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THE RULE OF REASON, WORKABLE COMPETITION, AND THE LEGALITY OF TRADE ASSOCIATION ACTIVITIES*

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A DETERMINED MOVEMENT TO CHANGE THE ANTITRUST LAWS¹ is now under way.² Businessmen, lawyers, and students of public policy have joined in it. Such a movement is not unique to our time. Dissatisfaction with the administration and interpretation of the antitrust laws is about as old as the Sherman Act itself. Emotions aroused by this issue have ranged from discouragement to alarm. In the first antitrust

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¹ The four basic antitrust laws are the Sherman Act, 26 Stat. 209 (1890), as amended, 15 U.S.C.A. §§ 1-7 (1951); the Clayton Act, 38 Stat. 730 (1914), as amended, 15 U.S.C.A. §§ 12 et seq. (1951); the Robinson-Patman Act, 49 Stat. 1526 (1936), 15 U.S.C.A. §§ 13a et seq. (1951); and the Federal Trade Commission Act, 38 Stat. 717 (1914), as amended, 15 U.S.C.A. §§ 41 et seq. (1951). The Antitrust Division of the Department of Justice is also responsible for the enforcement of some fifty related laws, but this study will examine only the application of the basic antitrust statutes to trade association activities.

² The movement has official form in the Attorney General's Committee to Study the Antitrust Laws, which was organized in August 1953. Judge Stanley N. Barnes, Assistant Attorney General in charge of the Antitrust Division, and Professor S. Chesterfield Oppenheim of the University of Michigan Law School are co-chairmen. The committee consists of fifty-eight experts in antitrust problems, most of them lawyers or economists. 8 Trade Practice Bulletin 1, 6 (August 1953); 9 Trade Practice Bulletin 1, 6 (September 1953). Oppenheim's article, *Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy*, 50 Mich. L. Rev. 1139 (1952), is an important reflection of and contribution to the movement. "Effective Competition," A Report to the Secretary of Commerce by His Business Advisory Council, U.S. Department of Commerce, December 18, 1952, reflects the dissatisfaction of some businessmen with what they consider inconsistencies in the antitrust statutes as they are interpreted. Similar ideas are expressed by Smith, *Effective Competition: Hypothesis for Modernizing the Antitrust Laws*, 26 N.Y.U. L. Rev. 405 (1951). For varying points of view on this problem,

case to come before it, the Supreme Court, in holding that Congress lacked jurisdiction to ban monopolies in the manufacturing field, discouraged and disturbed those who feared the power of big business and regarded monopolies as a threat to the American way of life.³ And well it might have, for the decision served as a green light to the Great Combination Movement⁴ that was just gaining momentum. On the other hand, businessmen regarded the Court's rejection of the rule of reason in the freight association cases⁵ a couple of years later not only as a threat to their constitutional liberties—freedom of contract in their business pursuits—but as a threat to the free-enterprise system itself. As William D. Guthrie, a contemporary lawyer, put it: "It is . . . not surprising that the realization of the

see also Adelman, *Effective Competition and the Antitrust Laws*, 61 Harv. L. Rev. 1289 (1948); Burns, *The Decline of Competition* (1936); Cahill, *Some Recent Trends and Developments in the Anti-trust Laws*, 1 *The Record* (N.Y.C. Bar) 201 (1946); Clark, *Toward a Concept of Workable Competition*, 30 *Am. Econ. Rev.* 241 (1940); Clark, *The Orientation of Antitrust Policy*, 40 *Am. Econ. Rev.* 93 (1950) (*Papers and Proceedings of the American Economic Association*); Edwards, *An Appraisal of the Antitrust Laws*, 36 *Am. Econ. Rev.* (Part 2, Supp.) 172 (1946); Edwards, *Maintaining Competition* (1949); *The Effectiveness of the Federal Antitrust Laws: A Symposium*, 39 *Am. Econ. Rev.* 689 (1949); Griffin, *An Economic Approach to Antitrust Problems*, *American Enterprise Association* (1951); Handler, *A Study of the Construction and Enforcement of the Federal Antitrust Laws* (TNEC Monograph 38, 1941); *Anti-Trust—New Frontiers and New Perplexities*, 6 *The Record* (N.Y.C. Bar) 59 (1951); *Hearings before Subcommittee on Study of Monopoly Power of the House Committee on the Judiciary*, 81st Cong. 1st Sess. (1949); Levi, *The Antitrust Laws and Monopoly*, 14 *Univ. Chi. L. Rev.* 153 (1947); Lilienthal, *Our Anti-Trust Laws Are Crippling America*, 129 *Collier's* 15 (May 31, 1952); Loevinger, *The Law of Free Enterprise* (1949); Mason, *The Current Status of the Monopoly Problem in the United States*, 62 *Harv. L. Rev.* 1265 (1949); Oppenheim, *A New Look at Antitrust Enforcement Trends*, CCH *Antitrust Law Symposium* 69 (1950); Rostow, *The New Sherman Act: A Positive Instrument of Progress*, 14 *Univ. Chi. L. Rev.* 567 (1947); Schumpeter, *Capitalism, Socialism, and Democracy* (1942); Stocking and Watkins, *Monopoly and Free Enterprise* (1951); Sunderland, *Changing Legal Concepts in the Antitrust Field*, 3 *Syracuse L. Rev.* 60 (1951); *United States versus Economic Concentration and Monopoly in A Staff Report to the Monopoly Subcommittee*, H. Res. 64, 79th Cong. (1946); Wright, *Toward Coherent Anti-Trust*, 35 *Va. L. Rev.* 665 (1949).

³ *United States v. E. C. Knight Company*, 156 U.S. 1 (1895). Former President Taft writing in 1914 had the following to say about this decision: "The effect of the decision . . . upon the popular mind, and indeed upon Congress as well, was to discourage hope that the statute could be used to accomplish its manifest purpose and curb the great industrial trusts. . . . So strong was the impression . . . that both Mr. Olney and Mr. Cleveland concluded that the evil must be controlled through State legislation, and not through a national statute, and they said so in their communications to Congress." Taft, *The Anti-Trust Act and the Supreme Court* (1914).

⁴ The Great Combination Movement took place between 1897 and 1904, when many of the railroad and industrial consolidations which today dominate the national economy were formed. Among these were United States Steel Corp., Standard Oil Co. of New Jersey, American Tobacco Co., International Harvester Co., American Can Co., and United Shoe Machinery Corp. Purdy, Lindahl, and Carter, *Corporate Concentration and Public Policy* 25 (2d ed., 1950).

⁵ *United States v. Trans-Missouri Freight Association*, 166 U.S. 290 (1897); *United States v. Joint Traffic Association*, 171 U.S. 505 (1898).

intended scope and legal effect of this statute should have caused dismay in the commercial world, and have created profound misgiving as to the future."⁶ Guthrie was perhaps even more disturbed than the businessmen, for he predicted the flight of capital to Canada as a consequence of this "arbitrary and socialistic" measure. The private-enterprise economy survived and so did the clamor to change the law.

The 1914 Legislation

Twelve years later Congress rejected a bill that would have incorporated the rule of reason into the Sherman Act,⁷ but in 1911 the Supreme Court did by interpretation what Congress had refused to do by legislation.⁸ The 1911 decisions precipitated another move to amend the Sherman Act. They disturbed Congressmen, "unwilling to repose in . . . any . . . court, the vast and undefined power which it must exercise in the administration of the statute under the rule which it has promulgated."⁹

In reinterpreting the Sherman Act to include the rule of reason, while at the same time finding against the Standard Oil Company and the American Tobacco Company, the Supreme Court had placed great emphasis on the role which predatory practices had played in gaining for these companies monopolies in their respective fields. Students of the monopoly problem awoke to the fact that outlawing monopolies and contracts in restraint of trade was not enough to prevent their growth, and they urged that to preserve competition Congress must outlaw business

⁶ Guthrie, *Constitutionality of the Sherman Anti-Trust Act of 1890*, 11 Harv. L. Rev. 80 (1897).

⁷ In 1909, Sen. 6440, introduced in the 60th Congress, 2d Session, proposed to amend the Sherman Act to give all corporations except railroad companies (already subject to the Interstate Commerce Act) immunity from antitrust prosecution unless notified within thirty days by the Commissioner of Corporations, with the concurrence of the Secretary of Commerce and Labor, that any proposed contract or combination filed with the Commissioner of Corporations was in unreasonable restraint of trade. It would have limited the amount of recovery in a civil action for injury to business under Section 7 to single instead of threefold damages and, according to the Senate Judiciary Report on it, would have provided "that no prosecutions under the first six sections of the act shall be maintained for past offenses unless the contract, or combination, be in *unreasonable* restraint of trade. . . ." Sen. Rep. No. 848, 60th Cong. 2d Sess. 9 (1909). The Senate Judiciary Committee rejected the proposed amendment, saying that to make "civil and criminal prosecution hinge on the question of reasonableness or unreasonableness . . . destroys . . . the provisions of the act as to criminal prosecutions, and renders them nugatory, and opens the door wide to doubt and uncertainty as to civil prosecutions. . . . The defense of reasonable restraint would be made in every case and there would be as many different rules of reasonableness as cases, courts, and juries." *Ibid.*, at 9-11.

⁸ *Standard Oil Co. v. United States*, 221 U.S. 1 (1911); *United States v. American Tobacco Co.*, 221 U.S. 106 (1911).

⁹ This is the language of the Senate Committee on Interstate Commerce, Sen. Rep. No. 1326, 62d Cong. 3d Sess. xii (1913).

practices which threatened to destroy it. Brandeis was the chief spokesman for a group who took the position that large combinations of capital "are inherently uneconomic and wasteful"¹⁰ and that they gain their power through well-known exclusionary practices. Woodrow Wilson had written that anybody who read the newspapers knew what these practices were and that "any decently equipped lawyer" could suggest legislation "by which the whole business can be stopped."¹¹

Reformers were not alone in demanding change in the statutes. Businessmen, convinced that unrestrained competition was bad for industry, uncertain as to what they could lawfully do to check it, and fearful that bigness alone laid business open to attack, also wanted the statutes changed. Judge Elbert H. Gary, president of the United States Steel Corporation, testified before the Stanley Committee in 1911 that competition was ruinous, that it served the interests of neither industry nor the public, that it must give way to cooperation under government supervision, and that the Sherman Act was an archaic law inadequate to deal with the problems of competition and combinations.¹² George W. Perkins, a former member of J. P. Morgan & Company, testified before the Senate Committee on Interstate Commerce in 1912 that fear engendered by the prosecutions under the Sherman Act was retarding capital investments in the United States, that a businessman did not know "when he is right or when he is wrong . . . until he is prosecuted and his case reaches a court," and that business needed "immediate relief . . . from the uncertainty in which

¹⁰ Henderson, *The Federal Trade Commission* 18 (1924). Brandeis' testimony before the Senate Committee on Interstate Commerce in its investigation of proposed revisions of the antitrust laws reflected his intimate knowledge of the causes and effects of combination in the steel, shoe machinery, oil, and tobacco industries. Hearings before Senate Committee on Interstate Commerce Pursuant to Sen. Res. 98, 62d Cong. 1146-94, 1196-1291 (1911).

¹¹ Wilson, *The New Freedom* 172 (1913). Support for a commission of experts to adapt antitrust laws to the changing needs of a dynamic economy rested, according to Henderson, *op. cit. supra* note 10, at 18, on "a more vivid appreciation of the inherent difficulties of the situation. The forms of unfair and oppressive competition are myriad. By the time Congress has discovered and defined a dozen, a dozen more will be devised and put in operation."

¹² Hearings before House Committee on Investigation of United States Steel Corporation, 62d Cong. 2d Sess. 79, 99 (1911). On February 3, 1912, Judge Gary presented to the Senate Committee on Interstate Commerce his draft of a federal licensing bill requiring all corporations owning \$10,000,000 or more in capital stock or assets to apply to a federal corporation commission for a license before doing business in interstate or foreign commerce. The bill would make the issuance of a license depend on the commission's finding that no "unlawful restraint of trade" or "monopoly or attempt to monopolize" was involved in the organization and business of the applicant. A corporation that violated the Sherman Act would forfeit its license or be enjoined from continuing the violation. The federal corporation commission would be authorized to make advance orders on any proposed action and to fix the maximum prices of any product affected while the order was in effect if the commission considered this necessary to prevent monopoly or undue restraint of trade. Hearings before Senate Committee on Interstate Commerce Pursuant to Sen. Res. 98, 62d Cong. 2407 et seq. (1912).

every businessman who is doing anything that approaches a large business finds himself."¹³

In the presidential campaign of 1912 the political parties responded to pressure from the right and from the left, and the antitrust issue obtained a place on all three party platforms.¹⁴ The agitation culminated in the passage of the Clayton and the Federal Trade Commission Acts under a Democratic administration.¹⁵ These acts inaugurated a new policy, a

¹³ Hearings before Senate Committee on Interstate Commerce Pursuant to Sen. Res. 98, 62d Cong. 1092 (1911). Perkins proposed the creation in the Department of Commerce and Labor of "a business court or controlling commission, composed largely of experienced businessmen," authorized to license corporations engaged in interstate or foreign commerce on prescribed conditions and regulations, after which their legality could not be questioned. Violations of this commission's rules and regulations would be punishable by the imprisonment of the individuals responsible "rather than by the revocation of the license of the company." *Ibid.*, at 1091, 1092. Perkins favored giving his proposed commission "very broad power that in practical business questions would be analogous to the power, so to speak, of the Supreme Court. . . ." He felt businessmen wanted not "unnatural contraction of trade" but permission to bring about "a certain proper restraint of competition" that "might mean expanding trade." *Ibid.*, at 1102, 1103. He favored "proper government regulation" and felt that a regulatory commission for large-scale companies "would very soon come to recognize the enormous advantages" of large scale and "a large and scattered public ownership." *Ibid.*, at 1111. He believed "monopoly comes more from methods than it does from the percentage of business," and that instead of the dissolution of consolidations "complete publicity, required by governmental authority and submitted to the people, about these concerns would largely regulate or would be largely a corrective in itself." *Ibid.*, at 1113, 1114.

¹⁴ The Republicans stood for legislation to outlaw "those specific acts that uniformly mark attempts to restrain and monopolize trade, to the end that those who honestly intend to obey the law may have a guide to their action and that those who aim to violate the law may the more surely be punished"; and they favored a "federal trade commission" to assure promptness in the administration of the antitrust law and to "avoid delays and technicalities incidental to court procedure." Republican Campaign Text Book 272, 273 (1912), quoted by Henderson, *op. cit. supra* note 10, at 16 (1925). The Democratic platform enumerated the evils most in need of correcting as holding companies, interlocking directors, stock watering, price discrimination, and "the control by any one corporation of so large a proportion of any industry as to make it a menace to competitive conditions." Republican Campaign Text Book 279 (1912), quoted by Henderson, *op. cit. supra* note 10, at 17. The Progressives advocated establishment of a federal trade commission and the prohibition of "agreements to divide territory or limit output; refusing to sell to customers who buy from business rivals; to sell below cost in certain areas while maintaining higher prices in other places; using the power of transportation to aid or injure special business concerns; and other unfair trade practices." Roosevelt, *Progressive Principles*, Appendix 318, 319, quoted by Henderson, *op. cit. supra* note 10, at 17, 20.

¹⁵ Professor J. A. McLaughlin of the Harvard Law School in 1936 said of the Clayton Act that it "was passed in large part as the outgrowth of controversies started by the promulgation of the so-called 'rule of reason' in 1911. Business men, complaining that they should be told more definitely by congress what they might do, received congressional assistance to the extent that they might at least know certain particular kinds of things which they should not do. It was thought that any legislative policy which merely prohibited certain accurately defined acts and declared all else to be lawful, would simply be inviting evasion. Four sections of the Clayton Act may be regarded as specifications of the kind of practices violative of the policy of the Sherman Act. This does not mean that the Clayton Act was merely declaratory and rendered nothing unlawful which was not unlawful before. Although such an argument was forcefully made by the corporation bar, the second *Shoe Machinery* case established the contrary." *Legal Control of Competitive Methods*, 21 Iowa L. Rev. 274, 280-81 (1936).

policy designed to preserve competition by regulating it. Aside from the short-lived NRA aberration, which might appropriately be characterized as an attempt to preserve private enterprise by letting it regulate itself, this has remained national policy. But it has not brought businessmen the relief they sought. As the statutes have been interpreted they have not alleviated the feeling of insecurity expressed by big business nor made more certain what businessmen may do to restrain the excesses of competition. Moreover, they have reputedly given to small business protection against a hard competition that threatened its survival.¹⁶

THE RULE OF REASON

As the clamor to change the laws has intensified it has not lost its familiar ring. But public-spirited lawyers and economists have contributed a new note. They have developed a set of principles in accordance with which the amended laws are to be administered: the rule of reason and the principle of workable competition.

Basically, of course, the rule of reason is old. In the quarter-century after the *Standard Oil*¹⁷ and *American Tobacco*¹⁸ cases it developed into a settled principle of law in testing the legality of combinations that, however short of monopoly they may have fallen, changed greatly the structure of American industry and influenced directly the behavior of markets. Under this principle, combinations which restricted competition were held to be lawful as long as the restraint was not unreasonable. Since there is no precise economic standard by which the reasonableness of a restriction on competition can be measured, the courts examined the practices pursued by a corporate giant in achieving and maintaining its position in the

¹⁶ Simon, *Geographic Pricing Practices* 95 (1950); Stocking, *The Law on Basing Point Pricing: Confusion or Competition*, 2 *Journal of Public Law* 1, 14 n. 41 (1953); Stocking and Watkins, *Monopoly and Free Enterprise* 369 n. 70 (1951); Sunderland, *Save the Sherman Act from Its "Friends,"* 1950 *Institute on Antitrust Laws and Price Regulations* (Southwestern Legal Foundation) at 211, 214-16, 218.

¹⁷ *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

¹⁸ *United States v. American Tobacco Co.*, 221 U.S. 106 (1911). *United States v. E. I. du Pont de Nemours & Co.*, 188 Fed. 127 (C.C. Del., 1911), followed shortly in time and closely in principle. In this case the corporate combination under attack had grown out of thirty years' experience in trade association agreements. Seven years after the "rule of reason" opinions Justice Brandeis expounded the rule more concisely: "... the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. ... The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts." *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918).

market. Predatory practices were indicative of an intent to monopolize the market and a corporate combination which achieved dominance by indulging in them might be dissolved. Those which behaved in a more exemplary manner, even though their size gave them power over the market, did not transgress the law.¹⁹

But while the courts thus distinguished between the use and abuse of power achieved by combinations, they steadfastly refused to apply the principle of reasonableness to conspiracies to fix prices. These were per se unlawful.²⁰ Moreover, both the courts and administrative agencies have rejected the rule of reason in determining the legality of certain types of contracts or conspiracies and have sought to ban them without any specific finding as to their economic consequences.²¹ This has made the administration of the statutes simpler and more certain, but it has also restricted business operations. Some think it has hindered, not promoted, business enterprise.²²

¹⁹ The most notable examples of this treatment—"the law does not make mere size an offense"—of course are *United States v. United States Steel Corp.*, 251 U.S. 417 (1920), and *United States v. International Harvester Co.*, 274 U.S. 693, 708 (1927). More recent cases dealing with dominance of a market where no continuing predatory practices were proved reflect a different view: *United States v. Aluminum Co. of America*, 148 F. 2d 416, 432 (C.A. 2d, 1945)—"no monopolist monopolizes unconscious of what he is doing"—and *American Tobacco Co. v. United States*, 328 U.S. 781, 814 (1946).

²⁰ The classic expression of the principle appears in *United States v. Trenton Potteries*, 273 U.S. 392, 398 (1927), where the Supreme Court, referring to the *Trans-Missouri Freight Association* case, 166 U.S. 290 (1897), said: "... it has since often been decided and always assumed that uniform price-fixing by those controlling in any substantial manner a trade or business in interstate commerce is prohibited by the Sherman Law, despite the reasonableness of the particular prices agreed upon." It should not be overlooked that the *Standard Oil* opinion expressly recognized that certain combinations are *inherently* unreasonable and that it included the freight association rate-fixing cases in this category, saying that there the contracts, which were "fully referred to," created a "conclusive presumption which brought them within the statute." *Standard Oil Co. v. United States*, 221 U.S. 1, 64, 65 (1911). The per se illegality of price-fixing agreements is the rule of decision in *United States v. New Wrinkle, Inc.*, 342 U.S. 371 (1952); *Kiefer-Stewart Co. v. Seagram & Sons, Inc.*, 340 U.S. 211 (1951); *United States v. National Ass'n of Real Estate Boards*, 339 U.S. 485 (1950); *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948); *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944); *United States v. Masonite Corp.*, 316 U.S. 265 (1942); *United States v. Univis Lens Co.*, 316 U.S. 241 (1942); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *Ethyl Gasoline Corp. v. United States*, 309 U.S. 436 (1940).

²¹ Section 3 of the Clayton Act forbids the use of tying clauses and exclusive dealing arrangements in sales or leases where their effect "may be to substantially lessen competition or tend to create a monopoly in any line of commerce." 38 Stat. 731 (1914), 15 U.S.C.A. § 14 (1951). In two important cases to reach the Supreme Court under this section the Court has taken the position that to "foreclose competitors from any substantial market" or to eliminate competition "in a substantial share of the line of commerce affected" establishes a violation of the act. *International Salt Co. v. United States*, 332 U.S. 392, 396 (1947); *Standard Oil Co. of California v. United States*, 337 U.S. 293, 314 (1949).

²² Oppenheim, op. cit. supra note 2; Smith, op. cit. supra note 2; Sunderland, op. cit. supra note 16.

Businessmen, while seeking escape from the uncertainties of a law which for the most part has been applied on a case-by-case basis, are paradoxically demanding that the *per se* principle be renounced. They want every alleged violation of the antitrust statute to be examined in all of its economic implications and a determination made on a basis of its reasonableness as a restraint on competition. Lawyers sympathetic with the problems which antitrust enforcement creates for business and conscious of the vast changes in technology and industrial structure which have taken place since the rule of reason was laid down find hope in a broader application of the rule. They believe that a statutory requirement that courts and administrative agencies follow the rule of reason in every antitrust case would be better adapted to the needs of the contemporary economy than the varying methods of approach now employed. Oppenheim is one of the most vigorous expositors of this theory. As he puts it, "[t]he Rule of Reason would provide the central artery of a procedural device for considering all relevant legal and economic factors in any given factual situation."²³ Oppenheim proposes to supplement this extension of the judicial process with a statutory requirement that antitrust cases be judged by the principle of workable competition.²⁴ In this demand some economists have joined.

THE PRINCIPLE OF WORKABLE COMPETITION

Economists, schooled in classical theory, have long been disturbed by the discrepancies between the theoretical models they created and the actual structure of the contemporary economy. They have become increasingly aware of the futility of any public policy which aims at creating an industrial structure within which competition works with perfection. They realize not only that imperfect knowledge of markets interferes with the smooth functioning of competition but that mass production and distribution inevitably inject an element of monopoly into modern business. Competition is neither pure nor perfect. So remote from reality had become the neoclassical theory of price competition that Piero Sraffa writing in 1926 said of it:

It is essentially a pedagogic instrument, somewhat like the study of classics, and, unlike the study of the exact sciences and law, its purposes are exclusively those of

²³ Oppenheim, *op. cit. supra* note 2, at 1145.

²⁴ Oppenheim explains the manner in which the two concepts interact as follows: "This writer believes that the main bridge for connecting economic and legal concepts with realistic national antitrust policy should be built on the engineering foundation of the Rule of Reason applied through utilization of the concept of Workable Competition." Oppenheim, *op. cit. supra* note 2, at 1187.

training the mind, for which reason it is hardly apt to excite the passions of men, even academical men—a theory, in short, in respect to which it is not worthwhile departing from a tradition which is finally accepted.²⁵

Growing recognition of the inadequacy of price theory to explain price behavior eventually produced new doctrines more appropriate to the realities of business organization and operation. Specifically it brought forth in this country Chamberlin's *The Theory of Monopolistic Competition* in 1933 and in England Joan Robinson's *The Economics of Imperfect Competition* in 1934. While these doctrines differ in the details of their logic, they are alike in their recognition of the departure of the contemporary economy from the neoclassical models and in their implications for public policy.

Chamberlinian Theory

Chamberlin's theory, which is more relevant to domestic policy, was concerned with two major problems: How are prices determined in markets occupied by a few sellers selling a standardized product? How are prices determined in markets occupied by few or many sellers selling differentiated products? Both of these situations are typical of modern business and in both, according to the Chamberlinian theory, prices are apt to behave as they would in monopoly markets. Specifically, Chamberlin concluded, on the basis of his very rigorous assumptions—few sellers, a standardized product, identical demand and cost curves—that such sellers, if fully informed and rational (taking account of the indirect as well as the direct consequences of their decisions), would, acting independently, behave like monopolists.²⁶ They would maximize profits by restricting output and keeping prices at the monopoly level. The public would get less and would pay more for what it got, other things being equal, than it would in a market of many sellers. Chamberlin also concluded that many sellers selling a differentiated product would get more for it and produce less of it at a higher cost than would an equal number of sellers selling a standardized product. Chamberlin is primarily a theorist and as such has been only incidentally concerned with policy, but the policy implications of his theory of monopolistic competition are clear. Rational behavior in competitive markets of the neoclassical models promoted the public welfare by insuring that prices would in the long run cover the

²⁵ Sraffa, *The Law of Returns under Competitive Conditions*, 36 *Econ. J.* 535–36 (1926).

²⁶ As Chamberlin put it: "If each [of two or a few sellers] seeks his maximum profit rationally and intelligently, . . . the equilibrium result is the same as though there were a monopolistic agreement between them." Chamberlin, *The Theory of Monopolistic Competition* 48 (6th ed., 1950).

average cost of efficient producers and guide resources into economical channels. Rational behavior in markets of "monopolistic competition" results in output restriction, higher prices, and an uneconomical utilization of resources.

These unhappy implications, coupled with the contention of other economists that modern technology necessitates only a small number of large firms in many markets, created a dilemma.²⁷ To obtain the economies of mass production we need only a few firms in major sectors of our economy; but when only a few firms occupy a market, they behave like monopolists.

Clark's Concept of Workable Competition

But economists are a resourceful lot. Having created a dilemma, they resolved it. They did so by developing the concept of workable competition. Numerous economists have contributed to the concept but in its initial formulation John M. Clark pioneered.²⁸ Clark, recognizing the impossibility of achieving perfect competition in our economy, argued that (1) some unavoidable departures from the competitive norm might justify other departures;²⁹ (2) in the long run potential competition and the competition of substitutes may force sellers, even when they are few in number, to behave like competitors; and (3) unrestrained competition in periods of weak demand which forced prices down to marginal costs would prove disastrous in the long run, because prices in periods of strong demand would not rise enough above average cost to insure that average cost would be covered over both phases of the cycle.

In brief, Clark argued that in the long run rivalry among few sellers would approximate the competitive solution and that in the short run the power of oligopolists to influence prices performed a socially salutary function, by holding prices above marginal cost in times of weak demand. He also argued that quality competition among sellers of differentiated products might serve the public as well as or better than price competition. Clark recognized that no two markets are alike, that they vary in the degree and kind of competition, and that the social acceptability of any market situation must be judged by its performance. The workability of a particular industrial situation is to be judged by available alternatives. But he contended that even though in some markets sellers may have

²⁷ Burns, *The Decline of Competition* (1936), especially Chap. 1.

²⁸ Clark, *Toward a Concept of Workable Competition*, 30 *Am. Econ. Rev.* 241 (1940).

²⁹ For example, where two-way mobility of capital is lacking in a period of slack demand, the presence of many sellers in a market might result in ruinous competition and a sick industry. *Ibid.*, at 242.

some degree of monopoly power, no better alternative may be available and such power as they may have has a positive social value.³⁰

Since the concept of workable competition is applicable to quasi-monopolistic situations, a more precise term might be "workable monopoly," but this is not a concept around which public loyalty may readily be developed.

Modifications of Clark's Concept

Taking Clark's notions as a point of departure, other economists have tried to enumerate and define the conditions and describe the behavior which make quasi-monopolistic markets socially acceptable.³¹ On some characteristics they agree; on some they do not. Few theorists, if any, would dispute that the departures from competition are socially unacceptable if they are the product of collusion or conspiracy. In short, few economists would defend rigging the market, but no doubt they would disagree on what constitutes market-rigging. Most would insist that any market situation that is acceptable must provide two or more independent sources of supply for any particular product, or make available satisfactory substitutes on equally attractive terms. Outright monopoly is not workably competitive. Most economists would hold that for competition to be workable no artificial obstacles must block entry;³² most would hold that there must be a "considerable" or a "sufficient" number of firms, but according to Adelman competition is compatible with "many small firms . . . with a few large ones . . . and with large and small ones together."³³

³⁰ In another work Clark has qualified his position on this point. He recognizes that monopolists cannot always be relied on to promote the public welfare. As he puts it, "[a] monopolist does not typically price for the utmost possible immediate profit that curves of demand and cost permit, but seeks expanding business at a profit that seems to him reasonable. It is not exactly safe to let him be the sole judge of reasonableness in his own case; in fact, it is thoroughly unsound. . . . The trouble with monopoly is not that it always leads to the kind of pricing which theory assumes, but rather that it can do so, and is virtually sure to distort pricing in that direction, leaving the monopolist too wide a range of arbitrary discretion." Clark, *Alternative to Serfdom* 65, 66 (1948).

³¹ Adelman, *Effective Competition and the Antitrust Laws*, 61 *Harv. L. Rev.* 1289 (1948); Bain, *Workable Competition in Oligopoly*, 40 *Am. Econ. Rev.* (No. 2, Papers and Proceedings of the American Economic Association) 35 (1950); Edwards, *Maintaining Competition* 9-10 (1949); Markham, *An Alternative Approach to Workable Competition*, 40 *Am. Econ. Rev.* 349 (1950); Mason, *Methods of Developing a Proper Control of Big Business*, 18 *Acad. Pol. Sci. Proc.* (No. 2) 40 (1939); Mason, *The Current Status of the Monopoly Problem in the United States*, 62 *Harv. L. Rev.* 1265 (1949); Stigler, *The Extent and Bases of Monopoly*, 32 *Am. Econ. Rev.* (No. 2, Supplement, Pt. 2) 2, 3 (1942); Wilcox, *Competition and Monopoly in American Industry* (TNEC Monograph 21, 1940).

³² But Bain argues that complete freedom of entry in oligopolistic markets would contribute to inefficiency and an unstable market. Bain, *op. cit. supra* note 31, at 43.

³³ Adelman, *op. cit. supra* note 31, at 1303.

Other economists stress performance rather than structure in giving content to the term "workable competition." According to their approach the workability of imperfect competition depends on the flexibility of prices with changing costs, the presence of interindustry competition, the rate of product and process improvement, the level of profits, the role of selling expenditures, and cost-price and capacity-output relationships.

Certainly the concept is vague and the standard of performance by which it is to be determined is imprecise. Markham's somewhat abstruse definition illustrates the difficulty which economists experience in determining whether any particular industrial situation is workably competitive:

An industry may be judged to be workably competitive when, after the structural characteristics of its market and the dynamic factors that shaped them have been thoroughly examined, there is no clearly indicated change that can be effected through public policy measures that would result in greater social gains than social losses.³⁴

Just as economists find it hard to define accurately workable competition or to establish criteria by which it can be readily recognized, so they find it difficult to formulate policy about it which lends itself to easy administration. Mason stated the problem more than fifteen years ago when he said that the formulation of public policy requires "a distinction between situations and practices which are to be approved as in the public interest and those which are to be disapproved. . . ."³⁵ More recently he recognized how difficult this goal is when he said:

The relative importance to be assigned to the objective of establishing appropriate market limitations on the scope of action of firms as against the objective of encouraging efficient performance in the use of economic resources no doubt presents serious difficulties. It seems probable that individual judgments will always be influenced to some extent by ideological considerations.³⁶

In short, if economists are to appraise industrial arrangements, judgments on their competitive workability are apt to be greatly influenced by the preconceptions of the appraisers.³⁷

³⁴ Markham, *An Alternative Approach to the Concept of Workable Competition*, 40 *Am. Econ. Rev.* 349, 361 (1950).

³⁵ Mason, *Monopoly in Law and Economics*, 47 *Yale L. J.* 34 (1937).

³⁶ Mason, *The Current Status of the Monopoly Problem in the United States*, 62 *Harv. L. Rev.* 1265, 1283 (1949).

³⁷ Perhaps my preconceptions will be known to some readers, but I should like to restate them. I believe in a free-enterprise economy, and I view with suspicion arrangements designed to subject market forces to concerted control through either governmental or private action. I do not believe in *laissez faire*. I think the government has a responsibility to create an economic and political environment favorable to free enterprise and that society cannot rely solely on competition to achieve economic stability.

TRADE ASSOCIATION ACTIVITIES

I propose to examine the development of antitrust law in its application to one sector of the economy, the activities of trade associations, in the light of the rule of reason and the principle of workable competition. I have chosen this sector not because it is now the most important, but because it is likely to become more important as we move from a sellers' into a buyers' market. For about a decade and a half businessmen have found it easy to sell goods at continuously higher prices. An inflationary economy provided an environment friendly to competition. With nearly everybody making money, trade rivals need not act collectively to improve their individual lot. But when the going gets tough, if precedent can be relied on, they may seek mutual aid through cooperation. Adjusting to new demand-supply relationships frequently brings financial hardships. As competition becomes keener businessmen are apt to regard it as less trustworthy. While extolling the virtues of an individualistic economy businessmen may resent the ruthlessness of impersonal market forces. George Shea, writing in the *Wall Street Journal* recently, put it this way:

Like the fight against weeds in a country garden, the fight against monopoly in the business system is never ended. No one anywhere holds stronger antitrust opinions than the American business man. To the banner of free, merciless competition he owns an allegiance second only to his love for his country's flag. But when his sales prices are undercut, he often gives vent to an expression of moral indignation.³⁸

Sometimes he also takes positive steps to alleviate his lot. These may range from such extreme action as that recently taken by the rug merchants in Albany, New York, in organizing a "vigilante committee" which, according to a report in *Retailing Daily*, was "determined to try to put cut-rate floor coverings houses out of business in this area,"³⁹ to the more restrained activities of trade associations anxious to steer a safe course between the Scylla of antitrust and the Charybdis of insolvency. In tracing the development of the law on trade associations I shall be concerned with the specific question: Was the arrangement under governmental attack a workably competitive one, or did it transgress the principles of workability and hence become an appropriate object of condemnation?

³⁸ *Wall Street Journal*, p. 1, col. 5 (November 16, 1953).

³⁹ *Retailing Daily*, p. 16, col. 5 (October 16, 1953). The president of Capital District Floor Coverings Association in announcing the formation of the "vigilante committee" outlined the steps the committee would take. The committee would act as "moral guiders" to price cutters but, if this proved insufficient, would request the mill representative supplying the price cutters to stop selling to them; the next step would be to persuade members of the association to stop dealing with the manufacturer who supplied the price cutters. Since manufacturers as well as retailers were members of the association, action by its committee was expected to be effective.

To facilitate judgment on this issue, I shall first analyze in general terms the economics of trade association market-reporting activities and lay down a specific standard by which their competitive workability may be judged. The reader will thereby have an intelligent basis for agreeing or disagreeing with my conclusions.

THE FUNCTION OF PRICE IN A COMPETITIVE ECONOMY

To understand the significance of trade association activities in the operation of an effectively competitive economy, it is necessary to keep in mind the function of price in such an economy. Price is a mechanism by which to organize economic activity.⁴⁰ In a price economy cost-price relationships guide the use of a community's productive factors. They reflect the relative urgency of the demand for the myriad of commodities and services which a division of labor makes possible and for which consumers spend their incomes. When cost and price get out of balance, too little or too much of a commodity is being produced. The imbalance is repaired by the movement of economic resources away from or toward the point of instability. "High" prices serve as a magnet to pull resources into an industry whose goods are in relatively strong demand; "low" prices, as a repellent to push resources out of an industry that is producing in "overabundance." The adjustments are automatic. They are not made by a central planning agency whose directives are authoritative and which wants to promote the general welfare. On the contrary, they result from the voluntary decisions of rational businessmen who want to make money by selling goods.

To state these principles reflects no naïve and unsophisticated faith in an invisible hand guiding economic activities toward remote but beautiful goals. Competitive forces in a machine society work imperfectly. Serious obstacles and frictions impede the movement of resources. These obstacles cannot always be overcome without someone's being hurt. Getting into an industry may not be easy and getting out is likely to be harder. Where entry is blocked, those already in may reap abnormal rewards in the face of strong demand. Where egress is blocked, those in may suffer hardship or even disaster when demand falls off. The fortunate like price competition; the unfortunate despise their misfortune and seek to escape it. And who can blame them? But while some may suffer from competitive

⁴⁰ For discussions of this point see Boulding, *Economic Analysis* 117-20 (rev. ed., 1948); Knight, *The Economic Organization* (1933), chap. VIII, "The Price System and the Economic Process"; Stigler, *The Theory of Price* 8 (rev. ed., 1952); Stocking and Watkins, *Monopoly and Free Enterprise* 6-9, 100-102 (1951).

readjustments, society may benefit from a more economical use of limited resources.

A dynamic society is subject to frequent disturbances. Some of these are the inevitable consequences of changes in the tastes and habits of consumers or changes in the ways in which their tastes and habits are satisfied. When such changes take place, they affect cost and consumption "functions"—to use the jargon of my profession—and they necessitate corrective changes in the use of resources. The difficulty in making the indicated adjustments is a function of the state of business activity: when business is expanding the adjustments are relatively easy; when it is contracting they are more difficult. In truth, the forces making for change in the general level of economic activity may conceal the forces making for readjustments within a particular industry. And this may confuse the government in the exercise of its responsibility toward economic change. Businessmen, however wise they may be, are unlikely ever by independent action to eliminate the excessively rhythmical character of business activity. The government by sound monetary and fiscal policies may learn to ameliorate if not to eliminate it; and if democratic states are to survive, I suspect they must learn to do so.

But the state's obligation toward the specific maladjustments within particular industries occasioned by changes in methods of production, the discovery of new sources of raw materials, the development of new products, changes in consumers' tastes and wants, and the like, is of a different order. If society is to progress, the state should aim at facilitating, not at blocking, such readjustments. It should also try to create an environment within which businessmen can make informed decisions and thereby fewer mistakes.

This leads us to a more specific consideration of the competitive nature of markets and of the role that trade associations may play in them.

The Nature of Markets

A market is an area within which the forces of demand and supply converge to establish a price. In the perfectly competitive market as the economists have conceived it the buyers and sellers of a standardized commodity are so numerous and so well informed that none has any influence on the price for which the product sells. Sellers are free to sell or withhold their products from the market as best suits the interest of each. Buyers are free to buy or to refrain from buying according to their several judgments. But sellers who sell and buyers who buy do so at identical prices at any moment of time. The prevailing price is one at which the amount

offered equals the amount which buyers will take. It clears the market. It is the equilibrium price of the economic theorists.

But real markets differ from the economic models. Save in the produce market, sellers generally quote a price and sell what they can at that price. Their job is to insure a continuous flow of goods through sellers to consumers. They will not continue at it unless in the long run they can cover their costs. They must therefore look to the future as well as the present and they try so to order their business that they will survive. To do this they need to acquaint themselves with all available information which affects market behavior. Buyers similarly need access to market information if they are to buy wisely. Whether they buy as ultimate consumers or as intermediaries themselves engaged in the production of goods and services for sale, buyers want to get the best bargain they can, in one case to maximize satisfactions, in the other to minimize costs. Both buyers and sellers, therefore, have a legitimate interest in such market statistical data as current output, inventories, orders, shipments, prices, and the like. Rational entrepreneurs not only live in the present; they plan for the future. The market aids them in their planning, for it is not only a mechanism by which the forces of demand and supply are brought into equilibrium, it is a means of communication by which buyers and sellers learn significant facts essential for wise decisions. Businessmen continuously reshape their plans and modify their production programs on a basis of what they learn about market behavior. It is only by doing so that they can perform efficiently their function of coordinating the means of production and allocating economically society's limited productive factors.

Eddy's The New Competition

Society has an interest in removing obstacles to the dissemination of basic market data among both buyers and sellers and in facilitating their easy and continuous flow. Trade associations are appropriate mechanisms for spreading the necessary information, and they may make competition more workable. Arthur Jerome Eddy, a distinguished corporation lawyer, recognized this almost fifty years ago and not only became a professional organizer of "open-price associations" but developed a philosophy in justification of them. His *The New Competition*, published in 1912, became a sort of Bible to businessmen who recognized the need to cooperate in informing each other about the market. Eddy, however, apparently aimed at something more than mere dissemination of market information as a basis for independent, informed decision-making by trade rivals, for he denounced competition as war and war as hell. He condemned as "in-

human" the struggle which permits only the fittest to survive, and he advocated the thoroughgoing replacement of competition by cooperation. He encouraged a live-and-let-live policy under the umbrella of which business units, big and little, efficient and inefficient, would survive. About this he said:

So far from promoting progress, competition stays and hinders. . . . Rightfully viewed, there is not a single good result accomplished by man in . . . economics . . . that should not be attained by intelligent and far-sighted cooperation.⁴¹

But despite his comprehensive condemnation of competition, his advocacy of "open pricing" as a basis for rational behavior is, as Fetter pointed out many years ago, "in some respects in harmony both with the lessons of the history of markets and with contemporary needs for recreating effectual competitive conditions."⁴²

The economic standard for judging the propriety of the cooperative interchange of market data by trade rivals in a free-enterprise economy should be: Is it designed to promote informed but *independent* decisions by trade rivals and by their customers in order that they may adjust their operations more intelligently to the vagaries of the market, or is it designed to achieve a common judgment among business rivals about their business policies and a common pattern of behavior which will bring security to all of them? Setting up this standard means, of course, resort to reason in the administration and application of the antitrust statutes. It necessitates a review of all the relevant factors and a determination of whether the fact-spreading activities of a particular trade association are designed to promote the public welfare by making competition workable or to promote business welfare by making cooperation work. This should be the test.

I propose, then, to re-examine the leading open-price-association cases and to test the validity of the courts' disposition of them in the light of the principle I have set up. The specific question I shall try to answer is, were the activities designed to overcome market imperfections and insure rational, independent, and informed decisions by business rivals—who have assumed the risks of private enterprise—and thereby to make competition more effective; or were they designed to substitute for individual competitive effort cooperation on business policies and practices in an attempt to eliminate risks and bring greater security to businessmen who have associated themselves for those purposes? I shall deal briefly with the cases

⁴¹ Eddy, *The New Competition* 26 (1912).

⁴² Fetter, *The Masquerade of Monopoly* 209 (1931).

in which I think the courts' opinions are in harmony with this principle and in greater detail with the cases in which I think they conflict with it.

HARDWOOD LUMBER MANUFACTURERS ASSOCIATION

The Hardwood Lumber Manufacturers Association's "open competition plan" was a forthright experiment in Eddy's new competition. Members of the plan borrowed their slogan—"Cooperation, not Competition, is the Life of Trade"⁴³—from Eddy and patterned their statistical activities along the lines laid down by him. A manager of statistics collected from each member of the plan monthly data on stocks, current production, and estimates of future production. On the first of each month each member filed his price list with the manager of statistics and reported promptly all departures from list. Each member reported daily all sales, showing to whom the lumber was sold, at what price, and on what terms. To verify his report each member sent with it an exact copy of each invoice sent to a customer and subjected his books and records to a detailed audit by representatives of the association. The manager of statistics sent all members monthly reports showing each member's production, stocks on hand, and official price lists. He also furnished weekly reports covering sales and shipments, showing to whom each sale was made, by whom, and at what price. He reported to all members every departure from list prices made by any member.

The association's plan did not include supplying this information to buyers, and the information was in far greater detail than necessary for independent decision-making by lumber manufacturers who merely wanted to plan their own production programs wisely. What businessmen need for intelligent decisions in competitive markets is general information which reveals the strength of market forces and the direction of their movement. Detailed information mutually exchanged by rival sellers, identifying each seller, each buyer, the quality of lumber, and the price and terms of sale, is more essential for cooperative than for independent decision-making. Moreover, the plan did not permit each member independently to evaluate the significance to his own market policy of other business transactions. Rather, it provided machinery for translating specific market data into a common market policy. At periodic meetings the members discussed the statistical position of the industry and the price and production policies necessary to exploit it fully. The manager of

⁴³ *United States v. American Column & Lumber Co.*, 263 Fed. 147, 149 (1920). The description of the open-price plan which appears in the text is based on the district court's decision and the Supreme Court's opinion, *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921).

statistics sent members a monthly market letter in which he indicated the policy implications of the market information supplied members. As he put it on one occasion: "With this information before him it is difficult to see how any intelligent hardwood manufacturer can entertain any hesitation as to *the proper course for him to pursue* in selling his lumber."⁴⁴

Clearly the association's activities were not designed to insure an intelligent and informed business rivalry by which competitive cost-price relationships could be established and an economical allocation of resources and distribution of income could be effected. On the contrary, association members engaged in a cooperative interpretation of market data and a coordination of market policy designed to bring security and profits to them at the expense of those who bought their lumber. It is not surprising, therefore, that the Supreme Court said of the "plan":

Genuine competitors do not make daily, weekly and monthly reports of the minutest details of their business to their rivals, as the defendants did; they do not contract, as was done here, to submit their books to the discretionary audit and their stocks to the discretionary inspection of their rivals for the purpose of successfully competing with them; and they do not submit the details of their business to the analysis of an expert, jointly employed, and obtain from him a "harmonized" estimate of the market as it is and as, in his specially and confidentially informed judgment, it promises to be. This is not the conduct of competitors but is so clearly that of men united in an agreement, express or implied, to act together and pursue a common purpose under a common guide that, if it did not stand confessed a combination to restrict production and increase prices in interstate commerce and as, therefore, a direct restraint upon that commerce, as we have seen that it is, that conclusion must inevitably have been inferred from the facts which were proved. To pronounce such abnormal conduct on the

⁴⁴ American Column & Lumber Co. v. United States, 257 U.S. 377, 405 (1921). Each member of the plan subscribed to the principle that "[k]nowledge regarding prices actually made is all that is necessary to keep prices at reasonably stable and normal levels." Ibid., at 393. But members did not rely on independent interpretations of market data to insure this result. One of the chief duties of their manager of statistics was to make a "harmonized" interpretation of the confidential reports coming to him. On paper the plan provided for monthly meetings of district groups of members, but in practice the members met almost weekly during the period January 31, 1919, to February 19, 1920. Before each meeting the manager of statistics sent out a questionnaire in which he asked each member eleven questions, including the member's estimate of his production for the next two months and his view of market conditions for the next few months, with his reasons. On the basis of members' answers the manager of statistics distributed *his* estimate of prospective market conditions to members at the meeting and mailed it to those not present. The minutes of the meetings and the sales reports contained repeated warnings against overproduction, which would be "killing the goose that laid the golden egg," would "spell disaster," be "criminal folly," and "commercial suicide." Ibid., at 403. Constant exhortations at the meetings and in the sales reports and market letters worked to build up an expectation of higher prices and a common determination to demand them. For example, in the market letter of April 26, 1919, after pointing out that stocks were less than 75 per cent of normal, production was about 60 per cent of normal, and demand was far in excess of supply, the manager of statistics rejoiced: "The demand is with us, the supply inadequate, therefore, values must increase, as our competition in hardwoods is only among ourselves." Ibid., at 406.

part of 365 natural competitors, controlling one-third of the trade of the country in an article of prime necessity, a "new form of competition" and not an old form of combination in restraint of trade, as it so plainly is, would be for this court to confess itself blinded by words and forms to realities which men in general very plainly see and understand and condemn, as an old evil in a new dress and with a new name.⁴⁵

I do not see how an application of the rule of reason supplemented by the principle of workable competition as this study has formulated it could have led to any other conclusion.

LINSEED CRUSHERS COUNCIL

My judgment of the *Linseed Oil* case⁴⁶ is similar. Here the evidence is very clear that the purpose of the Linseed Crushers Council was to subordinate independent decision-making by which informed competitors might facilitate the operation of market forces and to promote group action serving private interests at the expense of the public welfare. The market data which the Armstrong Bureau of Related Industries collected and disseminated for the Linseed Crushers Council was for the *exclusive* use of the sellers of linseed products. Buyers did not get it. On their face the details of the information supplied by and disseminated to members of the council were designed to discourage, not to encourage, independent decision-making by trade rivals. They were the foundation on which group action could be built. By contracting to supply each other with price lists, to reveal all quotations or sales below list, and to forfeit Liberty bonds for failure to comply with any provision of the contract, council members revealed a purpose to cooperate in exploiting the market for linseed products. As the Supreme Court put it in condemning the association:

With intimate knowledge of the affairs of other producers and obligated as stated, but proclaiming themselves competitors, the subscribers went forth to deal with widely separated and unorganized customers necessarily ignorant of the true conditions. Obviously they were not *bona fide* competitors; their claim in that regard is at war with common experience and hardly compatible with fair dealing.⁴⁷

MAPLE FLOORING MANUFACTURERS ASSOCIATION

Lacking conspiratorial arrangements, maple-flooring manufacturers would find it difficult to restrict competition. Although not conforming precisely to the economists' model of perfect competition, this industry approximates it. Over the centuries God, not man, has created the potential supply of maple lumber and its kindred products beech and birch, and

⁴⁵ *Ibid.*, at 410.

⁴⁶ *United States v. American Linseed Oil Co.*, 275 Fed. 939 (N.D. Ill., 1921), rev'd 262 U.S. 371 (1923).

⁴⁷ *United States v. American Linseed Oil Co.*, 262 U.S. 371, 389-90 (1923).

long ago He made them abundantly. Monkeys used them before man. The learned brief of the defendants in the *Maple Flooring* case⁴⁸ tells us that all three woods date back to the Miocene era, "long before man's prehuman ancestors had abandoned their arboreal habits. . . . [These woods] preceded the Tool-maker and Dreamer by at least some 500,000 years."⁴⁹ And when the North American Dreamer began to fashion them to his imaginative needs, they were here in profusion. When he ran afoul of the law in 1923, the maple, beech, and birch stand in the continental United States totalled an estimated 86,000,000,000 board feet, distributed unevenly but widely among the New England, Middle Atlantic, South Atlantic, Lower Mississippi, Central, and Lake States.⁵⁰

Our domestic "Tool-makers and Dreamers" had not got around to using these woods extensively until the 1890's. Their very excellence delayed their use. They are very hard and therefore hard to fashion. Until cutting tools had been perfected, lumberers preferred to work on softer materials. But when the tools became available, the "Tool-makers and Dreamers" and even the less imaginative (but possibly more aggressive) tool users, the hard-boiled lumberjacks, tutored in the stern realities of the craft, found it relatively easy to get into the business. The required tools were relatively cheap and the know-how was simple.

Processes in Making Flooring

Making flooring involves three major operations.⁵¹ The first stage includes felling the trees, cutting the logs into suitable lengths, and skidding them to a loading point. The second step involves the making of rough lumber. From the loading point trucks or trains transport the logs to a mill where they are dumped in a pond of water (heated in the winter) to cleanse them of sand. Removed to the sawmill, the logs are machine-sawed into the desired thickness and width and the larger defects are removed. They are then graded, cross-piled, and air-dried for from nine to eighteen months. Seasoning is a meticulous business, and after air-drying the lumber is dried in kilns—generally concrete or brick structures but occasionally wood, customarily about a hundred feet long by eighteen feet wide—through which the lumber slowly moves on steel trucks. The trip through the kiln requires from six to seven days. As the logs journey

⁴⁸ *Maple Flooring Manufacturers Ass'n v. United States*, 268 U.S. 563 (1925).

⁴⁹ Brief and Argument for Appellants, at 25 n. 5. All references to "Record," briefs, and exhibits in this section apply to the *Maple Flooring* case.

⁵⁰ Defendants' Exhibit DD, Record, Vol. IV, at 838.

⁵¹ This description of the processes in making flooring is based on the record in the *Maple Flooring* case and may be out of date.

forward, the moisture content of the air in the kiln is gradually reduced. The lumber is eventually discharged into a cooling room where it remains until its temperature has been reduced to that of the finishing mill.

The third stage yields finished flooring. In the finishing mills the flooring is ripped to desired widths, double-surfaced, tongued and grooved, and polished. It is then graded and warehoused in steam-heated storage rooms ready for shipment to lumber dealers and building contractors.⁵²

An Industry Easy to Enter

Obviously, integrated firms conducting these several operations and owning their own lumber may have a relatively large investment, depending on the size of their live timber reserves and their scale of operations. But most mills specialize in either the making of rough lumber or the making of finished flooring. Although in 1923 fourteen of the twenty-two members of the Maple Flooring Manufacturers Association owned timber,⁵³ in 1920 in Michigan and Wisconsin alone 476 sawmill operators and in the entire country over four thousand operators produced rough maple lumber.⁵⁴ Precise data on the number of makers of finished flooring are not available, but the number must have been large. To say that the basic capital equipment consisted of a buzz saw and a place to put it is to oversimplify. But such oversimplification reflects the ease with which businessmen could get into the maple-flooring industry. An economist for the association testified that data obtained from various members indicated that \$30,000 would command the capital equipment for making maple, beech, and birch flooring and that the equipment could be bought on a free market.⁵⁵ His statement was neither challenged nor rejected. Every lumber dealer is a potential flooring manufacturer, and some dealers do in fact saw their own lumber. A representative of the Brown Lumber Company of Traverse City, Michigan, testified that in 1920 his company bought for \$5,000 the essential equipment for making maple flooring, exclusive of installation costs, and produced 1,200,000 feet of maple flooring in 1922.⁵⁶ Moreover, the makers of some other kinds of flooring, oak and fir, for example, use the same kind of equipment and can and do shift production from one product to another in response to market forces. When it pays to shift from one branch of production to another, some of them shift.⁵⁷

⁵² Record, Vol. I, at 199; Vol. II, at 512-16.

⁵³ Defendants' Exhibit DD-1, Record, Vol. IV, at 839.

⁵⁴ Defendants' Gordon Exhibit 5, Record, Vol. V, at 897.

⁵⁵ Record, Vol. II, at 632.

⁵⁶ Record, Vol. I, at 91-92.

⁵⁷ Record, Vol. I, at 84, 88, 137; Vol. II, at 526, 771.

Joint Costs

But not only do flooring makers find it easy to get into the business, once they get there they produce a variety of floorings under joint costs. This makes it difficult to determine average or marginal cost for any particular grade of flooring and hence complicates the pricing problem. One of the positive achievements of the Maple Flooring Manufacturers Association has been its standardization of grades. Under its standardization program rough maple, beech, and birch lumber fall into the following grades in order of excellence: firsts, seconds (or clear), selects, No. 1 common, No. 2 common, No. 3-A common, No. 3 common.⁵⁸ Firsts and seconds, selects, and better grades of common No. 1 are used primarily in automobiles and similar durable goods requiring the best of materials. The common grades account for most of the flooring. Just as the rough maple lumber has been graded to meet different requirements, so maple, beech, and birch flooring falls into three grades, clear, No. 1, and factory. Not only do floorings differ in quality, but they differ in width and thickness, and these have been similarly standardized. Unfortunately nature has circumscribed the discretion of the flooring manufacturer in determining what grades and sizes of flooring he will make. In truth, he must ordinarily make all three grades and a variety of widths if he is to avoid costly wastage.⁵⁹ This makes a flooring manufacturer peculiarly vulnerable to the shifts in consumer requirements. In meeting the demand for flooring of any particular grade and size, other grades and sizes must be produced. It is costly to warehouse them and, as one maker expressed it, it may be "necessary for us to sell . . . [certain] widths in the markets where they are used, regardless of price, when our surplus gets to a point where we feel that we must unload."⁶⁰

Floormaking Resembles Competitive Model

Finally, the buyers of flooring are for the most part informed and experienced. They are wholesale and retail lumber dealers who through trade journals and market representatives learn promptly at what prices lumber is available. The large buyers customarily send out inquiries by mail or wire to many rival sellers asking for prices on specified quantities and grades, and they buy where they can buy cheapest.⁶¹

⁵⁸ Record, Vol. I, at 197; Vol. II, at 511-12.

⁵⁹ Record, Vol. I, at 94. In the language of one witness, "The manufacturer has no choice as to the grades that he will produce. All three grades of flooring can be manufactured from cull lumber. We cannot, for instance, manufacture Clear flooring at one time, No. 1 at another, and Factory at another." Record, Vol. I, at 199.

⁶⁰ Ibid.

⁶¹ Record, Vol. I, at 291-92, 410-27, 429, 436-48; Vol. II, at 450-61, 466-69, 530-38, 560, 564, 571-77, 578, 581, 584, 588, 597, 605, 617-24.

In short, both the structure of the flooring industry and the structure of the market for flooring contribute to vigorous competition in its sale. When demand is strong and profits are high, supply is likely to respond promptly. A decline in demand is likely to bring about sharp competition and a decline in prices and ultimately to force a contraction in production facilities. Thus, as previously stated, while not conforming precisely to the theorists' model of perfect competition, the floormaking industry closely approximates it. Sellers are many, entrance is easy, the product has been standardized, buyers and sellers are well informed. In the absence of collusive arrangements that prevent it, prices are likely to be exceedingly flexible, responding promptly to changes in cost and changes in the intensity of demand.

Government Alleges Conspiracy

In a complaint filed on March 5, 1923, in the District Court for the Western District of Michigan the United States alleged such collusive arrangements. It charged the Maple Flooring Manufacturers Association and its several members with having conspired to fix the price of maple, beech, and birch flooring in violation of Section 1 of the Sherman Antitrust Act. The Government alleged that the defendants carried out the conspiracy through the association's activities, chief of which were its statistical program covering costs, freight rates, and market conditions, and through association meetings at which these matters were discussed and views about them exchanged. The district court found the defendants guilty and in doing so rejected their plea that relief be confined to an injunction against "the specific transactions which may be found to be objectionable."⁶² In rejecting the defendants' plea the court concluded that "the evidence . . . shows clearly that the fundamental and primary purposes and objects of this combination are unlawful and relief short of terminating its existence and restraining defendants from entering into other agreements or combinations of like character would be insufficient and inadequate."⁶³

Supreme Court Finds Arrangement Legal

Had this decision stood, contemporary proponents of the rule of reason and of the principle of workable competition as a guide to administrative agencies and the courts in enforcing antitrust statutes might have found a reasonable basis for demanding a change in the statutes. But the deci-

⁶² District court's opinion, *United States v. Maple Flooring Manufacturers Ass'n* (W. D. Mich., 1923) (unreported), Record, Vol. I, at 52, 60.

⁶³ *Ibid.*

sion did not stand. The Supreme Court in overruling it gave its unqualified approval to trade association activities of the sort which businessmen recognize as essential to sound decision-making in competitive markets. The Court said:

We decide only that trade associations or combinations of persons or corporations which openly and fairly gather and disseminate information as to the cost of their product, the volume of production, the actual price which the product has brought in past transactions, stocks of merchandise on hand, approximate cost of transportation from the principal point of shipment to the points of consumption, as did these defendants, and who, as they did, meet and discuss such information and statistics *without however reaching or attempting to reach any agreement or any concerted action with respect to prices or production or restraining competition, do not thereby engage in unlawful restraint of commerce.*⁶⁴

What more could businessmen who believe in competition want? Indeed it is possible that in the *Maple Flooring* case they got more than they were entitled to under antitrust statutes designed to keep competition workable and preserve free enterprise. About this economists like judges are apt to disagree. But to test the above statement requires a brief résumé of the history of trade associations in the maple-flooring industry. Such a history will reveal purpose and method. Effect is doubtless of greater significance in determining the acceptability of any control scheme that is to be judged by the standards of "workable" competition, but unfortunately on effects opinions may differ. "By their fruits ye shall know them" may be a good botanical guide, but the fruits of economic arrangements are not always so readily identifiable. It may help, therefore, to see what was planted.

Earlier Associations

Trade associations in the maple-flooring industry date back to about 1900⁶⁵ and with frequent modifications in their provisions have operated continuously or with brief interruptions from that date until this. Between 1905 and March 1923, when the Government's suit was filed, seven

⁶⁴ *Maple Flooring Manufacturers Ass'n v. United States*, 268 U.S. 563, 586 (1925) (emphasis supplied). The record indicates that the association's statistical activities went beyond the open gathering and dissemination approved by the Court. Only members who made a weekly sales report to the secretary received the association's composite report showing the details of each significant sale reported, and only a *summary* of the *average* prices, delivered and net, realized during the week were reported to the public. See testimony of George W. Keehn, the association's secretary, Record, Vol. I, at 125-26.

⁶⁵ Counsel for the maple-flooring manufacturers stated that association methods had followed "a more or less orderly evolution" since 1897. Appellants' Supplemental Reply Brief, at 22. The district court's opinion referred to 1895 as the first year of trade association activity. Record, Vol. I, at 55. The Government's Brief before the Supreme Court, at 11, stated: "So far as the record shows the first trade association was organized in 1905."

different associations had come and gone. But judged by their general spirit and purpose and to a lesser extent by their membership⁶⁶ and specific provisions, they were like the little babbling brook which the poet heard say,

For men may come and men may go,
But I go on forever.

Counsel for the defendants objected to including in the record evidence on the activities of the forerunners of the association against which the complaint ran. As counsel put it: "[T]he purpose of the petitioner in bringing into this case long-extinct associations and plans which had been abandoned years before the institution of this suit, was to prejudice the *present association* and confuse the issues."⁶⁷ This criticism may be appropriate in a lawsuit, but it does not apply here. I am not here interested in determining the legality of the arrangements engaged in by maple-flooring manufacturers but in assessing their economic significance.

Agreement Provides for Sales Quotas

The earlier associations may appropriately be characterized as cartels, that is, as arrangements "among, or on behalf of, producers engaged in the same line of business, with the design or effect of limiting competition among them."⁶⁸ Full details about the earlier associations are missing, but the 1913 agreement clearly indicates that its purpose was to curb competitive rivalry among association members in selling maple flooring. Its provisions if adhered to no doubt restrained the eagerness of rivals to get business. They did so by allotting each member of the association a percentage of total sales by association members and penalizing those who exceeded their quotas and rewarding those who fell short of them. Specifically, the agreement provided that members be assessed \$3.00 a thousand board feet for all lumber shipped in excess of their allotments, that assessments be placed in a special fund, and that they be returned at the rate of \$3.00 a thousand feet for the amount by which a member undersold his quota down to 75 per cent of his allotted share. For curtailing below that percentage, members received no reward. Members selling more than their

⁶⁶ Of the twenty-two members of the association against which the Government's suit ran, the articles of which were adopted in March 1922, sixteen were members of the association whose articles became effective January 1, 1913 (Record, Vol. I, at 73); seventeen were members of the association operating under these articles as extended with modifications from January 1, 1916, to January 1, 1919; fourteen signed the Minimum Price Plan of June 27, 1916 (Record, Vol. III, at 78-81, Vol. IV, at 798); twenty-one were members of the association operating under articles in effect from January 1 to July 1, 1919 (Record, Vol. I, at 76); and eighteen signed the Minimum Price Basis plan of January 6, 1921 (Record, Vol. III, at 92-94 et seq.).

⁶⁷ Brief and Argument for Appellants, at 7.

⁶⁸ Stocking and Watkins, *Cartels or Competition?* 3 (1948)

allotments received no return.⁶⁹ In effect they were fined on all their sales for exceeding their allotment by whatever amount.⁷⁰

Allotment Plan Abandoned

The allotment feature of the 1913 association was carried over into subsequent agreements and admittedly was not abandoned until the District Court for the Western District of Tennessee found the plan of the American Hardwood Lumber Association unlawful.⁷¹ But association members in abandoning the allotment plan did not abandon their effort to restrain competition. At its expiration on January 1, 1916, the 1913 plan was continued with few changes until January 1, 1919.⁷² The precise date on which the association abandoned its allotment plan is not clear. Keehn, the association's secretary, testified that on advice of counsel the association discontinued the allotment plan on March 31, 1920, but the minutes of neither the association nor the board of trustees disclosed the date of discontinuance. The tentative draft of new articles of association covering the period October 1, 1921, to July 1, 1922, which was never put into effect because of the failure of several manufacturers to sign, contained the allotment feature.⁷³

Minimum Price Plan and Minimum Price Basis

Before the association formally abandoned the allotment plan, it adopted, on July 1, 1916, a "Minimum Price Plan"⁷⁴ and on January 6,

⁶⁹ Record, Vol. III, at 6.

⁷⁰ Assessments were required to be paid within five days after members had been notified. The trustee of the special fund set up to guarantee performance of association agreements was authorized to draw on a member's undistributed share of the special fund to pay any delinquent assessment. Failure to restore such withdrawals brought forfeiture of membership and of all claims against the special and the general funds. *Ibid.*

⁷¹ *United States v. American Column and Lumber Co.*, 263 Fed. 147 (1920), discussed previously in the text; Appellants' Supplemental Reply Brief, at 22.

⁷² Record, Vol. I, at 74-75; Government Exhibit 2, Record, Vol. III, at 14-21.

⁷³ Government Exhibit 5, Record, Vol. III, at 49-56. Keehn testified that "upon the advice of our attorney we suspended all Association activities beginning in April, 1920, and running about four months thereafter on account of the Memphis case . . . then we resumed afterwards in August, 1920, our statistical work, but we never resumed any allotment contracts. . . ." Record, Vol. I, at 77. See also Record, Vol. I, at 143-44, 146; Vol. II, at 794. The Government offered in evidence a letter to association members dated September 16, 1921, which said in part: "It would seem that the allotments as agreed upon in our present Articles of Association, which allotments were to be in force from July 1, 1919 to July 1, 1922, should govern from October 1, 1921 to July 1, 1922, because each member has already agreed to his allotment to run to July 1, 1922, and if we begin changing allotments, there will be no end to it." Government Exhibit 6, Record, Vol. III, at 61. The Government contended that although suspended for business reasons from April 1, 1920, to October 1, 1921, the allotment plan was not formally abandoned until March, 1922, when association members adopted the plan against which the Government's complaint specifically ran. Government's Brief, at 17-19.

⁷⁴ Government Exhibit 11, Record, Vol. III, at 78-81; minimum price plan as revised January 1, 1919, Government Exhibit 12, Record, Vol. III, at 84-89.

1921, a "Minimum Price Basis,"⁷⁵ apparently designed to place a floor under maple-flooring prices. The two plans were similar in all important respects save for the provision of penalties. The minimum price plan provided that association members selling below the association's minimum prices were to pay penalties; the minimum price basis proclaimed a "scientific principle" for pricing maple flooring but provided no penalties for failure to observe it or procedure for enforcing conformance. Both apparently contemplated that association members should sell flooring above an average cost, the elements of which were both described and determined. These included:

- (a) The actual market value of the raw material;
- (b) The average cost and expense of manufacturing and selling flooring;
- (c) Interest on the capital actually invested in the flooring business at the rate of five (5) per cent per annum [six per cent under the minimum price basis];
- (d) Annual depreciation of plant; and
- (e) The usual overhead charges incurred in carrying on the flooring business.⁷⁶

The association's Market Conditions Committee averaged the surveys of manufacturing and marketing costs sent in by members and the results of "test runs" made by certain members and on the basis of these recommended changes from time to time in minimum prices.⁷⁷ Under the minimum price plan it was agreed that minimum prices should not yield more than 10 per cent profit over the average actual cost,⁷⁸ and under the minimum price basis agreement, not over 5 per cent.⁷⁹ Under both plans the association sent to members "Tables of Values Based Upon Average Cost"

⁷⁵ Government Exhibit 13, Record, Vol. III, at 92-94.

⁷⁶ Minimum price plan: Record, Vol. III, at 78-79, 84-85; minimum price basis: Record, Vol. III, at 92.

⁷⁷ Government Exhibits 18-U and 18-V, Record, Vol. III, at 246-51. Apparently at times association policy aimed at keeping prices down. For example, on August 21, 1919, the Market Conditions Committee reported to members that an advance in the price of rough flooring lumber justified an advance of \$10.50 in the minimum price plan but that it recommended advances of only \$6.00 on two grades of flooring and of \$5.00 on certain other grades. Record, Vol. III, at 250-51. Apparently the relative strength of demand for different grades of flooring, more than actual cost changes, may have influenced the cost figures which were distributed. For example, in estimates of average manufacturing and marketing costs covering the first half of 1921 spreads of as much as \$35.00 between various dimensions of the same grade of flooring were reported, although the cost of lumber must have been about the same for all dimensions. Government Exhibits 25-A, 26, and 27, Record, Vol. III, at 280, 284, 287. In one case a reported increase in the average cost of rough lumber was distributed among three dimensions of flooring and the cost of one dimension was *reduced*. Government Exhibits 25-A and 26, Record, Vol. III, at 280, 284. Keehn testified that the cost differential between two grades of beech was not a continuing one because "it depends upon the supply and demand of these different floorings, to what a man's stock conditions are, and the cost of it, too." Record, Vol. I, at 153-54.

⁷⁸ Record, Vol. III, at 79.

⁷⁹ Record, Vol. III, at 92-93.

and supplemented these from time to time with a list showing the "Application of Minimum Prices"⁸⁰ or "Concessions and Additions."⁸¹

As indicated, the minimum price basis carried no specific procedure for enforcement and provided no penalties. It left final discretion with each flooring manufacturer on the prices he would charge, but while it was in operation each member reported weekly to the association on actual prices charged and through the association to all the members.⁸² On advice from the Assistant Attorney General in charge of the Antitrust Division that the minimum price basis and the freight rate book used with it constituted a violation of the criminal provisions of the Sherman Act, the association on February 25, 1921, formally abandoned it.⁸³

Recession Calls for Cooperation

Meanwhile the 1920-21 business recession, accompanied as it was by a severe contraction in building, had created "deplorable conditions" in the flooring industry.⁸⁴ These apparently precipitated a demand for a renewal of cooperation among flooring manufacturers to stabilize conditions⁸⁵ and for adoption of new articles of association to implement cooperation. The minutes of the August 19, 1921, meeting state: "After a prolonged discussion of the demoralized conditions in the flooring industry, the Secretary was instructed to prepare a draft revising the Articles of Association with the view of securing greater cooperation in the industry. . . ."⁸⁶ Apparently the association looked to cooperation, not competition, to solve the industry's troubles.

The 1922 Agreement

The outcome was the adoption of new articles of association in March 1922, some three months before the old articles formally expired, but dating them back to January 1, 1922.⁸⁷ These articles were to govern associa-

⁸⁰ Government Exhibit 31-M, Record, Vol. III, at side folio p. 533.

⁸¹ Government Exhibit 34-M, Record, Vol. III, at 326.

⁸² Government Exhibits 14-B and 14-I, Record, Vol. III, at 98-99, 102.

⁸³ Defendants' Exhibit C, Record, Vol. IV, at 799-810, especially p. 804.

⁸⁴ The minutes of a special meeting of association members held April 27, 1921, used this term in describing the plight of the industry. Government Exhibit 15-Q, Record, Vol. III, at 134.

⁸⁵ A letter of August 11, 1921, calling a meeting of members August 19, 1921, said: "Our Weekly Sales Reports indicate considerable *demoralization* in the flooring situation and it seems absolutely necessary that every member should be represented at the meeting so that greater cooperation can be assured and conditions in the industry, which are now much disturbed, can be stabilized." Record, Vol. IV, at 566-67. Emphasis supplied.

⁸⁶ Record, Vol. III, at 138.

⁸⁷ Kechn's testimony, Record, Vol. I, at 78.

tion activities until January 1, 1925.⁸⁸ It was against the association's activities as conducted under these articles that the Government's complaint ran in the antitrust proceedings initiated March 5, 1923. These articles are strikingly similar in their more basic features to those which preceded them. They had four major features:

- (1) Provision for calculating an average cost of production;
- (2) Provision for a freight rate book showing freight rates from Cadillac, Michigan, to all the leading buying centers for maple flooring;
- (3) Provision for computation and distribution of trade statistics; and
- (4) Provision for meetings at which the statistics and market conditions were to be discussed.⁸⁹

Association Compiles Average Costs

The new articles recognized, as had earlier articles, that if makers of flooring are to conduct their business "scientifically," they must carefully consider their costs in making and selling it.⁹⁰ To aid them in doing this the association provided its members with a table of costs showing "average costs" for each grade and dimension of flooring. These replaced the "Scientific Price List" and "Table of Values" provided by earlier associations. They were calculated in much the same way. The average costs distributed by the association to its members were based on market prices of raw lumber, an average of the costs of making and selling flooring as reported by association members to the association, interest on capital at 6 per cent, annual depreciation of plant as "usually allowed" by the gov-

⁸⁸ Government Exhibit 8, Record, Vol. III, at 64-74.

⁸⁹ The January 22, 1913, annual meeting of the association had authorized the Market Conditions Committee to "figure out what the selling values of flooring would be if a logical and scientific method of determining values of flooring were used, that is: if the selling values of flooring were based upon the cost of raw material plus manufacturing and selling costs and plus a reasonable profit." Government Exhibit 15, Record, Vol. III, at 106, 108. The first "Scientific List" was made up in February, 1913 (Record, Vol. III, at 114, 230), and a "Table of Delivered Values" was printed May 21, 1913 (Record, Vol. III, at 213, 215, 222, 238). Keehn, the association's secretary, testified that throughout the period 1913-23 he distributed to association members from time to time lists of what in 1923 were called "average costs" and that these were based on changes in the market value of rough lumber and changes in manufacturing and marketing costs. Record, Vol. I, at 110.

The successive associations each had a committee to advise on costs; at first the Market Conditions Committee reported directly to members on both costs and selling prices, but under the 1922 articles of association the Cost Surveys Committee merely determined what cost information should be included in Keehn's reports to members. Record, Vol. I, at 104-5, 396.

Each of the five association agreements in effect between 1913 and 1922 provided for an annual meeting and from three to five regular meetings, for daily reports to the association secretary of all shipments and deliveries made except those made to other members, and for a monthly summary of the daily reports. Government Exhibits 1, 2, 3, 4, 8, Record, Vol. II, at 1-8, 14-21, 25-32, 37-44, 64-74.

⁹⁰ Art. XIV, § 1, of the January 1, 1922, Articles of Association, Record, Vol. III, at 69.

ernment, "usual" overhead charges, and an allowance for contingencies at 5 per cent of average total cost.⁹¹

By its costing program the association apparently provided a uniform system of cost accounting which could not have been otherwise achieved. But it did more than this. It provided standardized cost figures which afforded a basis for identical f.o.b. pricing if members chose so to use it.⁹²

The Freight Rate Book and the Weekly Reports

To make it easy to calculate a delivered price to any point to which maple flooring might be shipped, the association compiled and distributed a freight rate book. The "freight" book, which with occasional changes the successive associations had apparently used continuously since 1905,⁹³ contained freight rates on flooring from Cadillac, Michigan, to several thousand destinations throughout the nation. The last book issued before the Government filed its complaint was dated February 15, 1923, and contained freight rates from Cadillac to some 7,600 towns throughout the country.⁹⁴ The book contained an average cost chart showing f.o.b. average cost of maple flooring of specified grades and dimensions, a table of freight rates, and a delivered cost chart, formerly called a "Table of Values," showing a delivered cost or price made up of the average cost and the freight from Cadillac to destination.⁹⁵ It stated "differentials" from

⁹¹ Art. XIV, § 3, *ibid.* The Supreme Court's opinion noted that the allowance for contingencies was discontinued by the association on July 19, 1923 (four months after the Government filed its complaint). *Maple Flooring Manufacturers Ass'n v. United States*, 268 U.S. 563, 569 (1925).

⁹² The appellants denied this, contending that the members' diversity of output and position in the market made it impossible for them to take concerted action in production and sales policies and that the association could not undertake to furnish members with the cost of producing and selling flooring, but only to place before each member the average of the costs reported by members, leaving each member free to sell his flooring at any price he chose. Brief and Argument for Appellants, at 66-75, 244-45. The Government analyzed the estimates of average cost which were offered in evidence and argued that "the distribution of the increase or decrease of the so-called cost of production between the different grades and dimensions has no relationship whatever to the advance or decrease in cost; but is based entirely upon other influences, which unquestionably are the prevailing and prospective conditions of the market. In other words, the secretary of the association, aided to some extent by the [Cost Surveys] Committee, surveys the entire situation and makes up a price list which, so far as the relative price of grades and dimensions is concerned, is wholly arbitrary and not controlled in the least by any of the elements that appear in the cost of production." Government's Brief, at 78.

⁹³ Record, Vol. I, at 111.

⁹⁴ Government Exhibit 37, Record, Vol. III, at 329, side folio pp. 909-29.

⁹⁵ After the Government filed its complaint, the association quit publishing a delivered price but continued to present its average cost table and freight rates from Cadillac. This left to association members the problem of addition to arrive at identical delivered costs or prices. Keehn's testimony, Record, Vol. I, at 118.

which association members could calculate the average cost of beech and birch flooring of varying grades and dimensions, and it published standardized terms of discount. In brief, it gave association members all the data they needed to insure their quoting identical delivered prices for the varying grades of flooring if they wished to do so.⁹⁶ It did not guarantee that members would so use it.

Association Reports

The association collected and distributed statistical information reflecting conditions in the flooring market.⁹⁷ It collected monthly from each of its members data showing stocks on hand, unfilled orders, shipments, production, new orders booked, and "average price realized." From the individual reports the association's secretary compiled tables giving total figures for each of these items and showing the absolute and percentage changes from the previous month's report and the previous year's report for the same month.⁹⁸ The association's reports also presented similar data for each member individually. In short, the monthly reports enabled each member to see the market picture as a whole and the position of each member in it.

The weekly report covered all sales by each member, showing date of sale, exact quantity of each dimension and grade sold, the delivered price, the freight rate from Cadillac to destination, commissions allowed, if any, and the member making the sale. Several months after the Government challenged the legality of the association's activities, the association stopped identifying the particular mill reporting each sale⁹⁹ but thereafter presented the data by groups of mills so arranged that alert and informed members might readily identify the individual reports.

⁹⁶ A flooring salesman testified that he was not very familiar with the activities of the Maple Flooring Manufacturers Association "except that they issue a price book and rate book, which practically everybody uses, to determine delivered prices in various parts of the country." Record, Vol. II, at 575. The defendants offered testimony by a number of manufacturers that they used the freight rate book only to quote a delivered price promptly upon request and that the customer deducted the freight actually paid when remitting for his flooring. Record, Vol. I, at 228-35, 384.

⁹⁷ Perhaps the chief value of the statistics on price was to enable a seller to test the accuracy of buyers' claims that other sellers were offering for less. See various Market Conditions Committee Reports between 1913-15 and one dated October 28, 1921, and a letter dated December 3, 1921, from Keehn to three members who were not then making weekly sales reports. Record, Vol. III, at 203, 207-8, 331-32, 205, 219-20, 116, 233, 124, 254-55; Vol. IV, at 535-36.

⁹⁸ Government Exhibit 40-RRRRR, Vol. III, at 350, side folio pp. 2049-59. After July 1923 the association reported these data for groups of members. District court's opinion of December 19, 1923 (unreported), Record, Vol. I, at 52, 57.

⁹⁹ Record, Vol. I, at 127. The weekly sales report for July 21, 1923 (Government Exhibit 43-AAAAA, Vol. III, at 398-402), does not show the reporting members' identifying numbers.

The weekly reports, supplementing as they did the monthly reports, not only gave members more frequent pictures of the flooring market and the position of each member in it, but a more exact one. Specifically, a member could compare his own stock, shipments, orders, production, prices, and trends in each, with those of each other member and with the aggregate of all members.¹⁰⁰

Association Meetings

All of the articles of association back to 1913 provided for regular association meetings. In addition, the association's secretary called meetings from time to time. During the life of the articles under attack by the Government, meetings were held about once a month. What transpired at these meetings is not clear, but what is clear is that the meetings gave members an opportunity to discuss and analyze the statistical information compiled and distributed by the association and to relate this information to sound policy on production and prices. The report of the association's Market Conditions Committee issued shortly before the association's meeting in November 1921 recommended that to obtain greater cooperation among members the secretary's monthly report be mailed promptly so that members "will receive the October statistics in advance of the meeting and have an opportunity to analyze them and can come to the meeting fully informed respecting trade conditions as reflected by the statistical reports."¹⁰¹ The secretary in July 1922, in urging association members to send in their monthly reports promptly so that market data might be compiled before the next association meeting, advised members, "This will save time and give you a better opportunity to consider the relations of supply and demand as reflected by the data than if the matter is delayed by our not getting these reports until the members arrive in Chicago and then not getting them compiled until late in the afternoon."¹⁰² Writing again on August 10, 1922, Secretary Keehn urged members to bring the flooring data to the meeting "so that you will have as complete information as possible regarding statistical conditions on the day of the

¹⁰⁰ The Supreme Court described the association's exchange of trade information substantially as it has been described here, but it characterized the significance of the information altogether differently. It chose to emphasize that the association had *ceased* identifying individual members and did not exchange certain kinds of information, such as current prices, names of customers, names of members with surplus stock, etc. By looking at the even more revealing information that the association *might* have exchanged, the Court decided that the information actually exchanged did not show every member "the exact market condition generally" and "the exact condition of the business of each of his fellow members." *Maple Flooring Manufacturers Ass'n v. United States*, 268 U.S. 563, 573 (1925).

¹⁰¹ Record, Vol. III, at 255.

¹⁰² *Ibid.*, at 175.

meeting.”¹⁰³ And again, writing in October 1922, Secretary Keehn noted that two months had elapsed without a “gathering of the clan” and expressed the hope “that every member of the Association will be represented at the meeting so that trade conditions and the relations of supply and demand for flooring can be discussed and considered.”¹⁰⁴

No Signed Agreement to Fix Prices

The articles of association of January 1, 1922, contained no agreement not to sell below minimum prices fixed by the association, and apparently this was the decisive element in the Supreme Court’s decision of the case;¹⁰⁵ but as late as September 16, 1921, association members were furnished with three rough drafts of a “Declaration of Our Business Policy,” under Form 2 of which members would voluntarily agree to pay the association 10 per cent of any and all flooring sold below “the average cost of production, plus the average cost of freight to destination, as ascertained from time to time by the Maple Flooring Manufacturers Association’s Survey of Costs and Tables of Values Based Upon Average Cost”¹⁰⁶ (after allowing a commission to certain wholesalers and dealers not to exceed \$2.00 per thousand feet). The record does not show that any declaration of business policy was adopted.

The Supreme Court, far from finding any attempt to violate the spirit of the antitrust laws while seeking to appear to obey them, praised the association members for “steadily” indicating “a purpose to keep within the boundaries of legality as rapidly as those boundaries were marked out by the decisions of courts interpreting the Sherman Act.”¹⁰⁷

The Association’s Goal

The successive articles of association indicate clearly that the association aimed to restrain competition. It sought to substitute concerted action among the leading maple-flooring makers for the unrestrained forces of a free market. Its allotment plan, its minimum price plan, its minimum price basis could have had no other purpose. Clearly also the association tried to avoid carrying concerted action to the point of an unlawful restraint on trade. In an effort to stay within the law it from time to time revised its articles and modified its program. In response to the shifting winds of legal interpretation it tacked sail in an effort to steer clear of the

¹⁰³ *Ibid.*, at 181.

¹⁰⁴ *Ibid.*, at 185.

¹⁰⁵ *Maple Flooring Manufacturers Ass’n v. United States*, 268 U.S. 563, 572, 575, 586 (1925).

¹⁰⁶ *Record*, Vol. IV, at 568.

¹⁰⁷ *Maple Flooring Manufacturers Ass’n v. United States*, 268 U.S. 563, 577 (1925).

administrative shoals and legislative reefs which might otherwise have wrecked it. But it did not abandon its goal.

Effects of the Association's Activity

But did the association achieve it? The defendants introduced expert testimony to prove that it did not. In truth, they denied any intent to interfere with competitive forces, characterizing the association's activities not merely as innocent but as socially salutary. Counsel for defendants argued and witnesses testified that the association had standardized and graded the flooring made by its members and that, to insure that the grades would comply with the standards set, it provided an inspection service. By doing this it had made it possible for buyers to buy what they wanted and to get what they bought. Scores of witnesses testified to the dependability of association members' products and to their preference for them.¹⁰⁸ Counsel for defendants clinched their argument that the association's standardization program represented a public service by quoting from the Department of Commerce's Tenth Annual Report in which Secretary Hoover recognized the importance of standardization to the elimination of waste and urged that it be voluntarily established by private industry.¹⁰⁹ The association, according to its counsel, had conducted an extensive advertising campaign beneficial to the entire industry and beyond the ability of any single firm to finance. This had given some security to maple-flooring makers who otherwise would have lost business to rival products.¹¹⁰ Numerous witnesses testified that members' prices for maple, beech, and birch flooring had been "fair and reasonable" and lumber dealers testified that they found it cheaper to buy flooring than to make their own.¹¹¹

In defense of the association's calculations of the average cost of producing flooring, counsel for defendants with great erudition outlined the development of cost accounting and through the writings of renowned economists showed its significance to business stability and economic survival. They cited authorities on the theory and practice of accounting to justify the content of the association's cost figures;¹¹² the Federal Trade Com-

¹⁰⁸ Record, Vol. I, at 94, 140, 141, 293, 307, 427, 430-31; Vol. II, at 455, 459-60, 462, 466-67, 522-23, 538, 562, 565-66, 574, 579, 583, 584-86, 593, 604, 610, 618.

¹⁰⁹ Brief and Argument for Appellants, at 191.

¹¹⁰ *Ibid.*, at 165-66.

¹¹¹ Record, Vol. I, at 86-87, 93, 427-32, 435-36, 446; Vol. II, at 462, 466-67.

¹¹² Brief and Argument for Appellants, at 235-40, quoting from or citing Leon Carroll Marshall, *Readings in Industrial Society* 404-5, 408, 412 (1918); Hobson, *The Evolution of Modern Capitalism* 1 (new ed., 1898); Ashley, *The Economic Organization of England* 35-36 (1st ed., 1914); Fisher, *Elementary Principles of Economics* (1912).

mission, to show the importance of proper cost accounting and the inadequacy of customary cost-accounting procedures among small business firms;¹¹³ and the Department of Commerce, to justify association activities in sponsoring standard cost-accounting procedures.¹¹⁴

A score of witnesses testified that they used their own discretion in pricing flooring and that in doing so they took account of the general market for flooring and their position in it. When demand was weak and their stocks large, they cut prices to move their goods. When demand was strong and their stocks small, they raised prices.¹¹⁵ Defendants supplemented the testimony of distributors and manufacturers by expert testimony.

Long-run Price Movements

Two young Harvard-trained economists, Edward B. Gordon and Grant Keehn, supported the defendants' contention that market forces, not trade association activity, accounted for maple-flooring prices and movements therein.¹¹⁶ They made an analysis, too comprehensive and detailed to reproduce here, of relevant statistical data bearing on the demand for and supply of maple flooring. It was impressive. Much of their testimony centered around the relative movements over a ten-year period (1913-23) of indexes of maple-flooring prices, the wholesale prices of all commodities, the prices of building materials, and the prices of raw lumber. These data, presented on a logarithmic chart, showed that the several indexes had in general moved in the same direction at roughly the same time.¹¹⁷ The economists concluded that the price movements reflected market forces, not association manipulations. Using stocks on hand as a measurement of supply and unfilled orders as reflecting the intensity of demand, Grant Keehn concluded that the price of maple flooring moved with only natural lags "in accord with the factors of supply and demand."¹¹⁸ In short, the economists contended that markets, not men, made maple-

¹¹³ Brief and Argument for Appellants, at 240-42, quoting from Jones, Trade Association Activities and the Law 62 (1922), and an address by Edward N. Hurley, vice chairman of the Federal Trade Commission, before the Boston Commercial Club, March 28, 1916.

¹¹⁴ Brief and Argument for Appellants, at 243, quoting from Trade Association Activities (1923), a study by the U.S. Department of Commerce, p. 4, Defendants' Exhibit NN-1 (omitted in printing the record).

¹¹⁵ Record, Vol. I, at 84-86, 88-89, 92, 94, 198-201, 208-9, 210-16, 221-22, 227-29, 230-31, 236-38, 260-63, 268-85, 289-93, 322-27, 336-37, 385-91, 393-95, 410-12.

¹¹⁶ For Gordon's testimony see Record, Vol. II, at 624-76; for Grant Keehn's see pp. 677-722. Grant Keehn was the son of George W. Keehn, secretary of the successive associations.

¹¹⁷ Defendants' Gordon Exhibit 6, Record, Vol. V, at 899.

¹¹⁸ Record, Vol. II, at 712.

flooring prices. Gordon and Grant Keehn, fresh out of Harvard's graduate school of business administration, did a competent job; and their more mature professors, Homer B. Vanderblue and Albert J. Hettinger, Jr., backed them in it.¹¹⁹ I have no desire to quarrel with the long-run implications of their findings.

But clearly the association had aimed at market control. Clearly also the structure and ownership patterns of the industry (the association accounted for only 70 per cent of maple-flooring output and for a far smaller percentage of potential output) and the nature of the demand and long-run supply (particularly the ease of entry), made it difficult if not impossible for the association to block the operation of long-run market forces. Only a close-knit cartel of the European variety, operating in a friendly legal environment, could have hoped to do this. American NRA and European experiences indicate that even with the law behind them cohesive cartel members may be unable to stem for long a decline in the price of an easily produced commodity in the face of an abrupt and prolonged decrease in demand.

Short-run Price Behavior

In the short run they may do better. I note that the price index for maple flooring¹²⁰ moved upward during 1918, when unfilled orders, which were abnormally low, were moving downward, and that it responded with alacrity and great strength to the 1919 increase in unfilled orders.¹²¹ So fast and far did it move that it overtook and passed by a substantial margin the price indexes for all commodities, all building materials, and raw lumber. Moreover, it remained close to its peak throughout most of 1920 despite a sharp decline in unfilled orders. When the break came late in 1920, it fell further and faster than the other three indexes, which had moved down more promptly; but it never sank to its prewar position below the other three indexes. Whether the association's activities alone were responsible for its relatively better performance over the period 1918-23 is not clear, but its performance is consistent with that inference. Moreover, witnesses for both the Government and the defendants offered testimony which supports the proposition that association activities affected prices in the short run. Grant Keehn, for example, in commenting on the failure of maple-flooring prices to decline in 1918 and early in 1919 when "demand was decreasing and supply was increasing," noted that raw ma-

¹¹⁹ For Professor Vanderblue's testimony see Record, Vol. II, at 740-69; for Professor Hettinger's, see pp. 722-39.

¹²⁰ Defendants' Gordon Exhibit 6, Record, Vol. V, at 899

¹²¹ Defendants' Grant Keehn Exhibit 24, Record, Vol. V, at 959.

terials, manufacturing and marketing costs, and commodity prices were "on a higher relative level than the prices of the product [maple flooring] . . . and after the close of the War there was a condition of uncertainty."¹²² But uncertainty would contribute to price weakness, not strength. Grant Keehn recognized as more important than the above factor in raising maple-flooring prices when demand for maple flooring was declining "the fact that during the latter half of 1918, there were restrictions placed upon building. Because of these restrictions people could not build, even though they so desired. A cut in price of the product at that time, therefore, would not have stimulated demand."¹²³ Failure to cut prices in the face of a decline in demand would be a profitable policy for a monopolist or a cartel to follow, but it is not a very satisfactory explanation for competitive price behavior. On the contrary it suggests that the association as a price-control agency was doing very well indeed.

Realized Prices and "Average Cost"

The Government's evidence of the association's influence on maple-flooring prices was based largely on the weekly sales reports of association members. Its analysis of these materials covered the period November 19, 1921, to June 30, 1923. After analyzing the weekly reports the Government contended that the average cost figures compiled by the association and distributed to its members were in fact its suggested minimum prices below which association members should not sell. In accordance with this hypothesis, it calculated the percentage (by volume in board feet) of weekly sales of $\frac{13}{16}'' \times 2\frac{1}{4}''$ clear maple flooring made at, below, or above the association's average cost figures over a period of nineteen months. The average cost when combined with the rate book, as previously indicated, provided a convenient device for arriving at a minimum delivered price.

The Government summarized the results of its analysis in four periods: November 19, 1921—March 25, 1922; April 1, 1922—June 30, 1923; October 28, 1922—June 30, 1923; and November 19, 1921—June 30, 1923. During the period November 19, 1921—March 25, 1922, which the Government appropriately characterized as a period of confusion, it being a portion of the interim between the abandonment of the minimum price basis and the adoption of new articles, association members sold 57.5 per cent of their $\frac{13}{16}'' \times 2\frac{1}{4}''$ clear maple flooring below the association's average cost figures for that period. During the period from the date the new articles were adopted until the Government's suit was filed (April 1,

¹²² Record, Vol. II, at 707.

¹²³ Ibid.

1922, to June 30, 1923) association members sold only 12.4 per cent of this grade of flooring below the association's average cost. Over the whole period studied by the Government (November 19, 1921, to June 23, 1923, which included the period of "confusion") they sold only 18.4 per cent of it below the association's average cost. During the period when the plan had passed its trial stage (October 28, 1922, to June 30, 1923), members sold only 8.8 per cent of their clear-grade maple flooring below the association's average cost figures or—as the Government charged—suggested minimum prices.¹²⁴

When it is recalled that the association's average cost included cost of raw lumber, cost of processing, depreciation, insurance and taxes, marketing costs, usual overhead, 5 per cent for contingencies, and interest on capital at 6 per cent (or what economists would regard as a normal profit), these findings support the Government's contention that the association's average cost was designed to place a floor under maple-flooring prices.¹²⁵

Weekly and monthly data drawn from members' weekly sales reports also support the Government's position. In November 1921, before the new articles were adopted, association members sold 86.6 per cent of their $1\frac{3}{8}'' \times 2\frac{1}{4}''$ clear maple flooring below the association's average cost figure. In October 1922, six months after the adoption of the new articles and immediately preceding an increase in the association's average cost figure, they sold only 2.4 per cent below it. During November 1922, following the increase, they sold 14 per cent of this grade of flooring below the association's average cost figure. The percentage declined to 7.3 per cent in February 1923, and a new advance was announced on February 15. In the following week members sold 14.3 per cent of their $1\frac{3}{8}'' \times 2\frac{1}{4}''$ clear maple flooring below the new average cost figure; by the week ending March 24, 1923, they sold only 7.9 per cent of it below. The association announced another advance on March 24, 1923, and in the week following members sold 56.9 per cent of this flooring below it; but on May 26, 1923, they were selling only 2.5 per cent below the association's average cost figure.¹²⁶

¹²⁴ Government's Brief, at 198.

¹²⁵ The association's contingency allowance was calculated by adding the cost of raw lumber (adjusted for waste) to the average manufacturing and marketing costs per thousand feet of flooring and taking 5 per cent of this amount. Its per unit allowance for interest, insurance and taxes, and depreciation was calculated on a basis of actual production over some specified period. The association's "Survey of Costs" questionnaire instructed members to divide one-fourth of the annual amounts of these items by the quantity of flooring produced during the previous quarter. George W. Keehn's testimony, Record, Vol. I, at 108; Government Exhibit 25, Record, Vol. III, at 279.

¹²⁶ The Government derived these comparisons from members' individual weekly sales reports appearing in the Record, Vol. IV, at 583-796. For a detailed discussion of the Govern-

Conclusion

These figures do not prove but they certainly support the Government's contention that the 1922 plan was in reality but a thinly disguised replica of its predecessors. The record is barren of any evidence that its objective had changed from that of lessening the rigors of competition for the benefit of its members. The association was faithful in its effort to avoid the appearance of evil, but apparently it sought the fruits of conspiracy while trying to escape its legal consequences. And apparently it succeeded in part; not so well as might have been desired but well enough to justify members' adherence.

Analysis of the record indicates that the association influenced the short-run price of maple flooring to the disadvantage of buyers. I believe that such arrangements are contrary to the interests of the buying public and that a government which protects and nurtures them is contributing to the death, not the survival, of a free private-enterprise economy. In saying this I do not want to seek refuge in semantics.

ment's procedure, see Government's Brief, at 170-210. The Government tabulated from the weekly sales reports of association members the following data: (1) date of order, (2) number of mills making sales, (3) quantity, (4) delivered price per thousand feet, (5) freight rate, (6) the average freight charge (freight from Cadillac), and (7) commissions. By deducting the freight charge from the delivered price the Government calculated an f.o.b. mill price. By comparing the price thus determined with the average cost furnished to association members (which the Government contended was a recommended minimum selling price), the Government calculated the percentage of sales made at, below, or above the average cost. The defendants challenged this procedure, alleging that variations in commissions charged by different members reflected price competition and contending that to calculate a proper net factory price with which to compare the association's average cost the Government should have deducted commissions as well as freight from the delivered price. Brief and Argument for Appellants, at 342. The defendants' proposed procedure would have increased substantially the percentage of sales below the association's average cost (Appellants' Brief, Appendix T, at 24) and would have weakened accordingly the Government's hypothesis.

The Government justified its inclusion of commissions in its calculated f.o.b. mill price on the following grounds: (1) The questionnaire on which members reported their costs to the association and from which the association calculated its average cost figure asked for both marketing costs in general and commissions specifically. Government Exhibit 25, Record, Vol. III, at 279. Hence to deduct commissions from the delivered prices would be to double-count. (2) The testimony showed no evidence that commissions were used for competitive purposes. They were merely a marketing cost, generally paid to wholesalers, commission men, or traveling salesmen. Retail dealers, so far as the record shows, never received them. Record, Vol. II, at 449-72. (3) The association's secretary in sending instructions to members on the meaning of the "Delivered Cost Charts" explained that "the Average Cost of Freight is added to the Average Cost of the flooring F.O.B. cars at flooring mills to illustrate what the Delivered Cost would be at destination." Government Exhibit 28-Q, Record, Vol. III, at 319. (4) The minimum price plan of January 1919 had made clear that payments of commissions to registered special representatives, wholesalers, and commission men were appropriately to be regarded as costs, not as evidence of deviations from the plan's minimum price subject to penalties. Government Exhibit 13, Record, Vol. III, at 94. These facts and arguments are convincing.

The Government's analysis covered only reported sales of $1\frac{1}{8}" \times 2\frac{1}{4}"$ clear-grade maple flooring, which represented only 35 per cent of all grades sold.

Economists who would defend such collective efforts to interfere with market forces probably fall into two groups: those who, like the defendants' consultants, Gordon and Grant Keehn, believe that the program failed; and those who believe that unrestrained competition in an industry like the manufacture of maple flooring prejudices the general welfare.

On the first issue I can say only that failure is poor justification for trade association activity designed to restrain competition. On the second, I shall say more below.

CEMENT MANUFACTURERS PROTECTIVE ASSOCIATION AND THE CEMENT INSTITUTE

The Cement Manufacturers Protective Association, organized in 1916 after a price war, by nineteen leading cement manufacturers in the Northeast,¹²⁷ performed four major services for its members: (1) it collected from each and distributed to all of its members information on specific job contracts; (2) it acted as a credit clearinghouse, collecting and distributing information on accounts owed its members; (3) it compiled and distributed a freight rate book showing the freight rate from the nearest basing point to each of the numerous delivery points in the northeastern area; and (4) it collected, compiled, and distributed monthly statistics relating to the supply and demand for cement.

On July 30, 1921, the Department of Justice filed a complaint in the District Court for the Southern District of New York alleging that the association constituted a combination in restraint of trade within the meaning of Section 1 of the Sherman Act and petitioning that it be dissolved. On October 23, 1923, Judge John C. Knox sustained the Government's charges and ordered the association to dissolve.¹²⁸ Defendants appealed and on June 1, 1925, the Supreme Court in a 6-3 decision reversed the lower court.¹²⁹

Specific Job-Contract Information

The association's activities relating to specific job contracts and customer credit were ostensibly designed merely to protect association members against exploitation by unreliable or financially irresponsible custom-

¹²⁷ The chairman of the organizational meeting expressed its purpose as follows: "Of course you understand that the idea of this thing is cooperation, and I think it is not necessary to say anything more on that point. We all agree that the necessity of cooperation is acknowledged by everybody in the industry. The only question now we have to determine is how best we can make use of cooperation." Record, at 401, *Cement Manufacturers Protective Ass'n v. United States*, 268 U.S. 588 (1925). References in this section to "Record," exhibits, and briefs are to this case unless otherwise specified.

¹²⁸ *United States v. Cement Manufacturers Protective Ass'n*, 294 Fed. 390 (S.D. N.Y., 1923).

¹²⁹ *Cement Manufacturers Protective Ass'n v. United States*, 268 U.S. 588 (1925).

ers, and the Supreme Court so found. The reports on specific job contracts aimed at correcting what the industry regarded as a serious abuse of a necessary business practice. Construction contractors wanted to be assured of an adequate supply of cement at a fixed price. They customarily contracted with a cement producer, frequently through a dealer, to purchase at a fixed price a designated amount of cement for future delivery for a specific construction job. Frequently dealers or contractors entered into several such contracts with different cement makers. If cement prices went down, they cancelled all their contracts except that needed for the specific job. If the price of cement advanced, they accepted delivery under all the contracts. This supplied them with cheap cement which competed with the dearer cement otherwise generally available from cement makers and gave them an advantage over less fortunately situated rivals. It also tended to check the price rise. As cement for specific job contracts constituted about 35 to 40 per cent of all cement sold, these practices tended to intensify competition in the sale of cement. To prevent this abuse, association members obligated themselves to report promptly to the association the details of all their specific job contracts and the association undertook to mail a compilation of this information to all members on the day received.¹³⁰ Members' reports on specific job contracts were detailed. They designated the purchaser and his address, described the construction job and its location, and specified the contractor, the amount of cement contracted for, and the *contract price*.¹³¹

In addition to the daily reports on specific job contracts, the association sent each member a daily, a monthly, and a quarterly cumulative report.¹³² From these reports members could readily identify each specific job and

¹³⁰ There was no specific deadline for filing these reports. Mary Belle Phalen, the association's secretary, testified, "It was usual for them to be sent in within a very few days" after a contract was closed. Record, at 155. From this information the association made up a report "sometime during the day and mailed it out that night every day except Sundays and holidays." Record, at 156.

¹³¹ This information on new contracts was reported on Form 20. Subsequent changes in these contracts were reported on Form 21. Form 21 provided a place for reporting cancellation of a contract, a decrease or an increase in the amount of cement called for, and the balance still due if the contract was increased. Government Exhibits 14 and 15, Record, at 360.

¹³² The data reported to the association by each member on Forms 20 and 21 were sent to all members daily on Form 7. Record, at 156-58. Form 8, also sent to members daily, reported for each company the number of new contracts reported that day and since the first of the month, the number of contracts reported cancelled that day and since the first of the month, the amount of cement involved, and contractual requirements reported reinstated, increased, or decreased that day and since the first of the month. Government Exhibit 17, Record, at 360, side folio p. 655. Form 9, sent monthly to all members, presented this same information as reported since the first of the year. Government Exhibit 405, Record, at 706, side folio p. 1463. Form 10 was a complete recapitulation for the quarter of the detailed information reported daily by the members. Government Exhibit 26, Record, at 364, side folio p. 64.

refuse delivery on a contract which duplicated a rival's or called for more cement than the job required. But, as indicated, the reports served a broader purpose. They constituted a price-reporting system, a function quite irrelevant to preventing duplication of specific job contracts. Since contractors customarily got cement at 10 cents a barrel above the dealer price, the specific job contract reports informed each member of the prices which other members were charging on sales to dealers as well.¹³³ In this way the specific job contract reports, supplemented by the association's freight rate books, enabled members to quote identical delivered prices on all sales of cement at any destination.

Other Association Activities

The association's other statistical activities supplied members with market information essential for wise production planning. The association collected, compiled, and distributed monthly statistics on cement and clinker production, stocks, and cement shipments.¹³⁴ It supplied quarterly statistics on returned bags.¹³⁵

The record indicates that association members made a concerted effort to conduct their operations in accordance with the law. The association's by-laws provided for monthly meetings and for special meetings at the call of the president on request of five members.¹³⁶ The association kept a stenographic report of all discussions and actions taken, and counsel exercised constant surveillance at meetings to guard against transgression of the law. The minutes disclose no agreement on or even discussion of prices, but they do reflect a concern by members about lack of uniformity

¹³³ Apparently cement company salesmen, eager for business, connived in the duplication and padding of dealer contracts. To stamp out this practice the association supplemented its reporting system by employing checkers or "auditors" to investigate the amount of cement delivered under the specific job contracts about which members were suspicious. Government Exhibits 82, 85, and 86, Record, at 376-78, 380, 381. The Government irreverently characterized this as a spy system. Brief and Argument on Behalf of the Government, at 96-110.

¹³⁴ Form 12 reported statistics on these items for the current month and for the same month in the preceding year, together with statistics for the year to date and for the same period in the preceding year. In both cases the percentage increase or decrease in activity was given. Government Exhibit 34, Record, at 366, side folio p. 679.

¹³⁵ These were reported on Form 19. Record, at 161. About its four major activities, policing specific job contracts, clearing on credit risks, supplying market statistics, and publishing freight rate books for members, the association's secretary testified: "The business of the Association is carried out by getting certain information as to those four subjects, putting that information on printed or mimeographed reports and sending these reports to the members. The Association simply repeats or tabulates this information without drawing any conclusions from the information or making any suggestions in connection with those subjects. The Association is in substance simply a mechanical multiplying and tabulating machine." Record, at 162.

¹³⁶ By-Laws § 7, Record, at 358.

in certain price-affecting practices—allowances for returned bags, terms of discount, use of trade acceptances, bin charges, and the like.¹³⁷

The Freight Rate Books

The association's activity that most clearly affected the industry's pricing was its compilation and distribution of freight rate books. The association's by-laws provided that the secretary prepare and distribute among its members a complete schedule of freight rates on cement and advise all members of changes in freight rates.¹³⁸ Members used these books for pricing cement, customarily quoting a delivered price equal to the governing base price plus cost of sacks and the freight rate from the governing base to the destination.¹³⁹ The record indicates that members understood these books were to be used in pricing cement rather than in determining freight rates. Under this pricing system each seller quoted identical prices to all destinations. A memorandum by an official of the Atlas Company under date of March 1, 1916, had this to say about the freight rate books: "These books, as I understand it, are to be used in making prices, whether the rates are correct or not."¹⁴⁰

At an association meeting for sales managers a cement maker, in discussing the importance of keeping the freight books out of the hands of dealers, stated:

[A]bout a year ago I was requested by a dealer in Baltimore for a freight rate book, and before I gave it any thought, I sent him one, and it was but a short time before I learned that he was making prices at different points down on the eastern shore there, and he had those freight rate books which he was using to upset the business

¹³⁷ Members discussed at length their differences in policy on giving credit for returned bags; some were accepting bags which others rejected as unusable, and some were granting credit for returned bags as of the date of shipment by customers, while others insisted on prior receipt before crediting. Government Exhibits 129, 162, and 166, Record, at 493-94, 575, 596-97. At least one member felt the variations occurred because "with some companies the sales department has too much to say regarding bag credits." Record, at 597. All agreed to allow five cents a barrel discount for cash payment within ten days, but members continued to be disturbed by variations in some companies' methods of computing the ten-day period, in granting the discount for payment by note, and in granting the discount to customers with past-due accounts. Government Exhibits 123, 124, 127, and 136, Record, at 447-52, 457, 482-84, 510-12. Attempts were made to adopt a standard trade acceptance, but these failed. Government Exhibit 129, Record, at 488-93. After rejecting a proposal to adopt a uniform bin charge, members agreed to report to the association when a price included such a charge. Government Exhibit 124, Record, at 456-59.

¹³⁸ By-Laws § 8(4), Record, at 359.

¹³⁹ Record, at 146-47, 152, 675; Government Exhibit 337, Record, at 684. Defendants in their answer to the Government's complaint acknowledged this method of pricing but justified it as a means of meeting competition. Answer, Record, at 101-8.

¹⁴⁰ Government Exhibit 687, Record, at 969.

that we had with the different dealers, and it all started from letting him have one of those freight rate books.¹⁴¹

Members agreed that the books should be kept from dealers and the president of the association summed up the matter with these remarks: "I think this information should be kept for the members of the Association, and not for its customers."¹⁴² Members, although aware of errors in the freight book, advised salesmen to use them in quoting prices.¹⁴³

Economists' Views Differ

A distinguished economist, Professor Thomas S. Adams of Yale University, testified that the identical delivered prices at which rivals sold cement under this system were a reflection of the effectiveness of competition, and he cited a score or more of economists from Jevons to Fetter in support of his position.¹⁴⁴ His reference to Fetter is particularly striking since it came at about the same time that Fetter himself was testifying on behalf of the Government in the Pittsburgh Plus proceedings before the Federal Trade Commission¹⁴⁵ that Pittsburgh Plus pricing was monopolistic and discriminatory.¹⁴⁶ In his subsequent writings Fetter became one of the country's most vigorous critics of systematic basing-point pricing, contending that it could be maintained only through conspiracy and advocating compulsory f.o.b. pricing as the appropriate remedy.

Commission v. Cement Institute

While Fetter's view has not wholly prevailed, it influenced greatly the work of the Federal Trade Commission, which on July 2, 1937, issued a complaint against the Cement Institute and seventy-four producers of cement,¹⁴⁷ charging them with having conspired to use a basing-point

¹⁴¹ Government Exhibit 124, Record, at 461.

¹⁴² *Ibid.*

¹⁴³ Government Exhibit 687, Record, at 969.

¹⁴⁴ Record, at 294-308. Jevons' *Theory of Political Economy* (1871), Fetter's *Economic Principles* (1915), and the other works referred to by Adams undoubtedly support his contention that in any market under conditions of perfect competition a single price will prevail. Fetter defines a competitive market as "a group of closely communicating traders whose valuations, however diverse before they meet, unite for a moment into a single price." Fetter, *Economic Principles* 59 (1915). When, however, sellers possess market knowledge withheld from the buyers, a market becomes imperfect and "different prices may exist at the same moment. . . ." *Ibid.*, at 60. Recent developments in economic thought make Adams' testimony sound quaint. When he testified, economists had not yet developed the theory of oligopolistic pricing or the concept of workable competition. See note 152 *infra*.

¹⁴⁵ *United States Steel Corporation*, 8 F.T.C. 1 (1924).

¹⁴⁶ *N.Y. Times*, p. 33, col. 3 (December 12, 1923).

¹⁴⁷ *Cement Institute*, 37 F.T.C. 87 (1943).

pricing system in violation of Section 5 of the Federal Trade Commission Act and with having discriminated in pricing in violation of Section 2 of the Clayton Act as modified by the Robinson-Patman Act. The Commission found respondents guilty and ordered them to cease and desist.¹⁴⁸ Respondents appealed and the United States Court of Appeals for the Seventh Circuit reversed the Commission.¹⁴⁹ The Commission carried the case to the Supreme Court, which found for the Commission.¹⁵⁰ The Commission's proceedings in the case were prolonged and the record was profligate. It revealed a long history of concerted action in the cement industry to lessen the rigor of competition.¹⁵¹

Basing-Point Pricing, Not Open Price-Reporting, the Real Issue

The cement cases do not throw much light on either the economic or the legal significance of open price-reporting activities conducted by trade associations. The dissemination of market information by the Cement Manufacturers Protective Association—statistics on production, stocks, and shipments—is the sort of information which sellers need for wise decisions in planning production. Even the information on prices, disseminated as a part of the association's program on specific job contracts, cov-

¹⁴⁸ Specifically, the Commission ordered respondents to cease and desist from entering into, continuing, cooperating in, or carrying out "any planned common course of action, understanding, agreement, combination, or conspiracy" to quote or sell cement "at prices calculated or determined pursuant to or in accordance with the multiple basing-point delivered-price system. . . ." *Ibid.*, at 260. The Commission prohibited some sixteen kinds of concerted action in aid or support of a basing-point delivered-pricing system, such as refusing to sell or quote f.o.b. mill and permit customers to provide transportation; quoting f.o.b. mill prices which when added to freight charges will systematically produce identical delivered prices by all sellers at any given destination; quoting or selling at delivered prices systematically equivalent to a price at and freight from some point other than the actual shipping point; quoting or selling at delivered prices which systematically include an artificial freight factor; quoting or selling at destination-cost prices but making specified deductions in invoicing; circulating freight rate information to be used as a factor in the price of cement; agreeing on a classification of customers; agreeing on certain uses for which or purchasers to whom cement will not be sold; exchanging statistical data which reveal an individual respondent's production, stocks, sales, or shipments; maintaining a spy system to police the use of imported cement; or agreeing on terms and conditions of sale. The Commission also ordered respondents to cease cooperating in price discrimination among their customers by charging and accepting mill net prices which vary by the amount necessary to produce delivered prices identical with their rivals' prices to such customers. *Ibid.*, at 261.

¹⁴⁹ *Aetna Portland Cement Co. v. Federal Trade Commission*, 157 F. 2d 533 (C.A. 7th, 1946).

¹⁵⁰ *Federal Trade Commission v. Cement Institute*, 333 U.S. 683 (1948).

¹⁵¹ This history cannot be summarized adequately here. It has produced a considerable body of literature. See Latham, *Giantism and Basing Points: A Political Analysis*, 58 *Yale L. J.* 383 (1949); Machlup, *The Basing-Point System* 40-41, 78-83, 92 (1949); Mund, *Government and Business* 386-90 (1950); Stocking and Watkins, *Monopoly and Free Enterprise* 193-216 (1951).

ered prices on closed transactions and is the sort of information essential to wise decision-making by business rivals. An objection to the association's activities in collecting and disseminating market information is, of course, that it went only to sellers and that the price information was specific rather than general in character.

Basing-point pricing, on the other hand, as *practiced by the cement industry* was an effective device for weakening competition; and when the Federal Trade Commission challenged, on the ground of conspiracy, the industry's use of systematic basing-point pricing, it won its case.

To discuss this issue would carry this study beyond an appropriate scope.¹⁵² It may be relevant, however, to reproduce a forthright and oft-quoted statement about the competitive significance of systematic basing-point pricing which apparently reflects its real character. An industry spokesman put it this way:

Do you think any of the arguments for the basing point system, which we have thus far advanced, will arouse anything but derision in and out of the government? I have read them all recently. Some of them are very clever and ingenious. They amount to this however: that we price this way in order to discourage monopolistic practices

¹⁵² The literature on the economic and legal significance of basing-point pricing is voluminous. The more important discussions include: Burns, *op. cit. supra* note 2, at 280-90, 329-71; Clark, Basing Point Methods of Price Quoting, 4 Canadian Journal of Econ. and Pol. Sci. 477 (1938); Clark, Imperfect Competition Theory and Basing-Point Problems, 33 Am. Econ. Rev. 283 (1943); Clark, The Law and Economics of Basing Points: Appraisal and Proposals, 39 Am. Econ. Rev. 430 (1949); Clark, Machlup on the Basing-Point System, 63 Q. J. Econ. 315 (1949); Daugherty, de Chazeau, and Stratton, The Economics of the Iron and Steel Industry 533-732 (1937); Delivered Pricing: A Symposium, 15 Law & Contemp. Prob. 123-310 (1950); Edwards, The Effect of Recent Basing Point Decisions upon Business Practices, 38 Am. Econ. Rev. 328 (1948); Edwards, Geographic Price Formulas and the Concentration of Economic Power, 37 Geo. L. J. 135 (1949); Fetter, The Masquerade of Monopoly (1931), *passim*; Fetter, The New Plea for Basing-Point Monopoly, 45 J. Pol. Econ. 577 (1937); Fetter, Exit Basing Point Pricing, 38 Am. Econ. Rev. 815 (1948); George, The Law and Economics of Basing Points, 56 Dun's Review 14 (September, 1948); *ibid.*, at 11 (October, 1948); *ibid.*, at 22 (November, 1948); Johnson, The Restrictive Incidence of Basing-Point Pricing on Regional Development, 37 Geo. L. J. 149 (1949); Kaysen, Basing Point Pricing and Public Policy, 63 Q. J. Econ. 289 (1949); Latham, *op. cit. supra* note 151; Machlup, The Basing-point System (1949); Mund, Open Markets 165 et seq. (1948); Mund, Monopolistic Competition and Public Price Policy, 32 Am. Econ. Rev. 727 (1942); Mund, Application of Economic Analysis to Antitrust Law Policy, Proceedings of Twentieth Annual Conference of the Pacific Coast Economic Association 75 (1941); Mund, The "Freight Allowed" Method of Price Quotation, 54 Q. J. Econ. 232 (1940); Nicols, The Economic Consequences of Some Recent Antitrust Decisions: The Cement Case, 39 Am. Econ. Rev. 297, 311-21 (Papers and Proceedings of American Economic Association) (1949); Sage, Basing-Point Pricing Systems Under the Federal Antitrust Laws (1951); Simon, Geographic Pricing Practices (Basing-Point Selling) (1950); Smithies, Aspects of the Basing-Point System, 32 Am. Econ. Rev. 705 (1942); Stocking, Basing Point Pricing and Regional Development: A Case Study of the Iron and Steel Industry (1954); United States Steel Corp., TNEC Papers III, "The Basing Point Method" (1940); Wooden and White, An Analysis of the Basing-Point System of Delivered Prices as Presented by United States Steel Corporation in "Exhibits Nos. 1410 and 1418," p. 91 (TNEC Monograph 42, 1941).

and to preserve free competition, etc. This is sheer bunk and hypocrisy. The truth is of course—and there can be no serious, respectable discussion of our case unless this is acknowledged—that ours is an industry above all others that cannot stand free competition, that must systematically restrain competition or be ruined.¹⁵³

Cement Cases Reflect Difficulty of Determining When Competition Is Workable

The usefulness of the cement cases is not in drawing a line between economically desirable and undesirable price-reporting activities, but in showing how treacherous is the principle of workable competition as a guide to public policy when set up as a standard by which to judge an industry's performance. In the *Cement Institute* proceedings both the Commission and the industry utilized economic experts in developing their case. Economists called by the industry¹⁵⁴ testified that the identical delivered prices charged under the industry's pricing system were a reflection of normal, healthy, competitive business rivalry. Economists called by the Commission testified that basing-point pricing was discriminatory and incompatible with a free market. About its significance to the general welfare Jacob Viner, then professor of economics at the University of Chicago, testified: "[I]n thinking about the structure, I have not been able to see how you could design any worse one, from the point of view of national economy, assuming we have free choice."¹⁵⁵

The *Cement* cases lend convincing support to Mason's observation that on the issue of the workability of any competitive arrangement judgment is apt to reflect the preconceptions of the judges.¹⁵⁶ The standard here proposed for judging the economic significance of open price-reporting systems has the advantage of relative simplicity, and it should appeal to those who are willing to rely primarily on market forces to guide the economy. Determining whether an arrangement reflects or interferes with competition is not always easy, but it is easier than determining whether an arrangement that interferes with competition promotes the general welfare.¹⁵⁷

¹⁵³ Letter of May 17, 1934, from John Treanor to B. H. Rader, Chairman of the Code Authority for the Cement Industry, Brief for Respondent, at 127, *Aetna Portland Cement Co. v. Federal Trade Commission*, 157 F. 2d 533 (C.A. 7th, 1946).

¹⁵⁴ These included Fairchild, Grether, Griffen, Vaile, and Westerfield. Brief of Respondents-Petitioners, A Topical Digest of the Evidence, Appendix A, at 3005-82, *Aetna Portland Cement Co. v. Federal Trade Commission*, 157 F. 2d 533 (C.A. 7th, 1946).

¹⁵⁵ Brief for Respondent, at 89, citing Record 5225, *Aetna Portland Cement Co. v. Federal Trade Commission*, 157 F. 2d 533 (C.A. 7th, 1946). Other economists expressed similar points of view: Duddy, Fetter, Hibbard, Nourse. *Ibid.*, at 87-107.

¹⁵⁶ See text at note 36 supra.

¹⁵⁷ In 1938 Clark expounded a theory to explain the origins of basing-point pricing which I have characterized as a theory of spontaneous evolution. See Clark, *Basing Point Meth-*

THE SUGAR INSTITUTE

When the American Sugar Refining Company acquired the stock of four Philadelphia sugar companies in the early nineties,¹⁵⁸ it boosted its control of domestic sugar output to 98 per cent of the country's total. Few monopolies have been more complete. Despite the Court's blessing in the *E. C. Knight* case, the sugar monopoly was short-lived. Competition sprang up all around the place¹⁵⁹ and a quarter-century later had become, from the industry's point of view, intolerably severe. By 1927 the American Sugar Refining Company produced only one-fourth of the domestically refined cane sugar. It was still the country's largest refiner but only by a small margin, National Sugar Refining Company refining 22 per cent. Thirteen other refineries, only one of which refined as much as 10 per cent of the total, accounted for the balance.¹⁶⁰ Moreover, domestically refined cane sugar met the competition of beet sugar and of "off-shore" refined cane sugar.¹⁶¹ The rise of competition promptly brought a decrease in refiners' margins, but World War I reversed the trend and brought great but tem-

ods of Quoting Prices, 4 Canadian Journal of Econ. and Pol. Sci. 477 (1938); Stocking, The Economics of Basing Point Pricing, 15 Law & Contemp. Prob. 159, 162-64 (1950). In writing on this subject at a later date Clark implied, without specifically saying so, that conspiracy may exert a considerable influence in *establishing* a basing-point pricing system. Clark, The Law and Economics of Basing Points: Appraisal and Proposals, 39 Am. Econ. Rev. 430, especially 439 (1949). But he implied also that in *setting* base prices rivals act independently, taking account of the indirect as well as the direct consequences of their decisions. This leads to identical pricing. If this view is correct, it means that by conspiring to use a basing-point pricing system, oligopolists place themselves in a position better to reap the fruits of oligopolistic pricing in accordance with the Chamberlinian principle.

¹⁵⁸ The Antitrust Division instituted proceedings to enjoin these purchases but, as indicated in the text at the beginning of this article, the Supreme Court ruled that the Sherman Act did not apply to monopolies in manufacture. *United States v. E. C. Knight Co.*, 156 U.S. 1 (1895). See note 3 *supra*.

¹⁵⁹ As rivals appeared in the market, American continued for a decade or more its practice of trying to block or control competition. In 1903, when the Pennsylvania Sugar Refining Company was about to open a new refinery, representatives of American by a series of legal and financial moves against its principals succeeded in blocking it. By 1911 American had bought an average of 41 per cent stock interest in eleven companies refining about one-half the country's beet sugar output. It had also acquired substantial stock interests in the National, the Great Western, and the Michigan Sugar companies. A government suit resulted in a consent decree in 1922 limiting its stock interest in these three companies to 25, 31, and 34 per cent, respectively. *United States v. American Sugar Refining Co.*, U.S.D.C., Dkt. No. 7-8 (S.D. N.Y., May 9, 1922). See Pearce, Trade Association Survey 111 (TNEC Monograph 18, 1941).

¹⁶⁰ *Ibid.*, at 112.

¹⁶¹ Defendants' Exhibit D-15, reproduced in the district court's opinion in *United States v. Sugar Institute*, 15 F. Supp. 817, 823 (S.D. N.Y., 1934), showed that in 1927, 82.5 per cent of the country's sugar supply was domestically refined cane, 14.4 per cent consisted of domestic beet sugar, and 2.8 per cent represented foreign and insular refined cane sugar. Institute members refined between 70 and 80 per cent of the domestically refined sugar. *Ibid.*, at 822.

porary prosperity.¹⁶² The depression reversed a long upward trend in the per capita consumption of sugar. The "slimness campaign" of 1927 accentuated the reversals. Hard times precipitated what the district court described as "highly unfair and otherwise uneconomic competitive conditions."¹⁶³ As the court put it,

arbitrary, secret rebates and concessions were the rule, and the widespread knowledge of market conditions which the courts and economists have recognized as necessary for intelligent fair competition were lacking. . . . [T]he refiners . . . were disturbed economically and morally over the then prevailing conditions. . . . [A]t least American was concerned at the possibility of liability under the Clayton Act because of the discriminations resulting from the various concessions.¹⁶⁴

Refiners Organize Sugar Institute

To remedy this situation the domestic cane-sugar refiners in December 1927 organized the Sugar Institute, drew up a "Code of Ethics," and inaugurated a program ostensibly designed primarily to eliminate secret concessions and rebates.¹⁶⁵ The core of the institute's program was the basic agreement that "[a]ll discriminations between customers should be abolished. To that end, sugar should be sold only upon open prices and terms publicly announced."¹⁶⁶

On March 30, 1931, in the District Court for the Southern District of New York, the Government filed a petition for the dissolution of the institute and an injunction against its members on the grounds of conspiracy to restrain interstate commerce in sugar. The district court on March 7, 1934, and the Supreme Court on March 30, 1936, handed down opinions holding that the arrangement complained against constituted an unlawful combination and conspiracy in restraint of trade and enjoining forty-odd specific collusive practices which represented essential elements in the broader conspiracy.¹⁶⁷

The Supreme Court found nothing new or objectionable in the indus-

¹⁶² Pearce, *op. cit.* supra note 159, at 113.

¹⁶³ *United States v. Sugar Institute*, 15 F. Supp. 817, 826 (S.D. N.Y., 1934).

¹⁶⁴ *Ibid.*, at 826-27. The Supreme Court approved this finding and reproduced it in substantially this form in its opinion. *Sugar Institute v. United States*, 297 U.S. 553, 575 (1936).

¹⁶⁵ A few months later the beet-sugar manufacturers organized a similar trade association, the Domestic Sugar Bureau, with a substantially identical "Code of Ethics." The two organizations enjoyed a high degree of cooperation and sometimes held joint meetings and took joint action. The district court found that although domestic refined sugar's price differential of 20 cents per hundred pounds over beet sugar prevailed more consistently after the organization of the two trade associations than before, the evidence did not establish an agreement between them. *United States v. Sugar Institute*, 15 F. Supp. 817, 824 (S.D. N.Y., 1934).

¹⁶⁶ *Ibid.*, at 828.

¹⁶⁷ *United States v. Sugar Institute*, 15 F. Supp. 817 (S.D. N.Y., 1934), *aff'd* *Sugar Institute v. United States*, 297 U.S. 553 (1936).

try's method of announcing prices. What it did object to was the refiners' agreement to adhere to their prices and terms as publicly announced and to the ancillary arrangements designed to convert an innocent price-reporting program into a device for eliminating competition among the sugar refiners. Both the facts and the logic of this case are well known and can be dealt with briefly. The Court's decision in this case conforms to a sound application of the rule of reason and the principle of workable competition, although the logic by which it reaches its decision does not always do so.

Court Approves the Principle of Cooperation To End Abuses

The Supreme Court recognized the propriety of cooperation among businessmen to bring health to a sick industry by eliminating unsavory business practices. Citing its opinion in the *Appalachian Coals* case,¹⁶⁸ the Court put it this way:

Voluntary action to end abuses and to foster fair competitive opportunities in the public interest may be more effective than legal processes. And cooperative endeavor may appropriately have wider objectives than merely the removal of evils which are infractions of positive law. Nor does the fact that the correction of abuses may tend to stabilize a business, or to produce fairer price levels, require that abuses should go uncorrected or that an effort to correct them should for that reason alone be stamped as an unreasonable restraint of trade. Accordingly we have held that a cooperative enterprise otherwise free from objection, which carries with it no monopolistic menace, is not to be condemned as an undue restraint merely because it may effect a change in market conditions where the change would be in mitigation of recognized evils and would not impair, but rather foster, fair competitive opportunities.¹⁶⁹

This is a principle which reasonable men are apt to approve. In truth, their approving it is likely to be regarded as evidence of their reasonableness. But it fails to recognize the nature of the sugar industry's sickness. It confuses the disease with its symptoms. The sugar industry had come upon hard times. World War I had brought an artificial prosperity and had expanded capacity. The postwar slump was followed by a change in the eating habits of millions of people. People demanded less sugar and this called for a readjustment in the use of resources. The price system's method of effecting such readjustments is a cruel one. Unprofitable cost-price relationships cause bankruptcies. A readjustment in profits was taking place in the sugar industry in the years immediately preceding the organization of the institute.¹⁷⁰ That businessmen should want to collabo-

¹⁶⁸ *Appalachian Coals v. United States*, 288 U.S. 344, 373, 374 (1933).

¹⁶⁹ *Sugar Institute v. United States*, 297 U.S. 553, 598 (1936).

¹⁷⁰ It was the "unethical" (price-cutting) refiners who took the lead in organizing the Sugar Institute, but they implied that in doing so they were trying to save their more "ethical"

rate to make prices more stable in the face of a declining demand is understandable, but it is not a very promising method of forcing economic readjustments.¹⁷¹

Price Discrimination Performs an Economic Function

In an effort to survive, refiners had made concessions to get business. They made them secretly because, with sugar a standardized product, to have made them openly would have forced all prices down to the level of the concessions. Price discrimination is difficult to justify on ethical grounds and the refiners who regularly discriminated were dubbed "unethical." To the layman it may seem hard to justify on economic grounds; and where the discrimination may tend to lessen competition substantially, there is a law against it.¹⁷² The Supreme Court's opinion lends approval to cooperative action to ensure compliance with legal obligations so long as the cooperation itself does not become illegal, and this, too, is apt to strike reasonable men as reasonable. But economists have come to realize that price discrimination may serve an economic function in an economy of imperfect competition. In markets of few sellers it may contribute to that degree of price flexibility essential to efficient economic re-

ivals. The district court's opinion quoted from the defendants' brief: "[T]he refiners who did not indulge in concessions were well on their way to becoming martyrs . . . their problem was how long they could survive." *United States v. Sugar Institute*, 15 F. Supp. 817, 826 (S.D. N.Y., 1934). The court took a different view of the matter, observing: "While the 'ethical' refiners may have been inconvenienced through the sales methods of some of their competitors and probably believed its effect on them to be harmful, they had no part in the first steps taken to form the Institute and were in no danger of being eliminated from the industry. . . . Moreover, despite the 'fair competition' inaugurated by the Institute, two of the 'ethical' companies showed substantially less profits for the post-Institute period, 1928 to 1931, than for the pre-Institute years of 1925 to 1927, while the profits of several of the 'unethical' companies increased substantially in the post-Institute period." *Ibid*.

¹⁷¹ For a contrary view see Clark, *Guideposts in Time of Change* 119-21 (1949). Clark denies that price changes are necessary to allocate resources economically and believes that changes in the volume of sales are sufficient. For a discussion of this point see Stocking and Watkins, *Monopoly and Free Enterprise* 100 n. 42 (1951).

¹⁷² The sugar refiners who organized the Sugar Institute in 1927 to abolish price discriminations among customers had little to fear from the courts' interpretation of the Clayton Act. Although Section 2 outlawed price discrimination which might substantially lessen competition in *any* line of commerce, at least two decisions had ruled that the act did not apply to competition at the secondary level. *National Biscuit Co. v. Federal Trade Commission*, 299 Fed. 733 (C.A. 2d, 1924), cert. denied, 266 U.S. 613; *Mennen Co. v. Federal Trade Commission*, 288 Fed. 774 (C.A. 2d, 1923), cert. denied, 262 U.S. 759. The Clayton Act was not applied to injury to competition among purchasers until 1929, in a triple-damages action between private litigants. *Van Camp & Sons v. American Can Co.*, 278 U.S. 245 (1929). The Sugar Institute's encounter with the law arose from another cause—conspiracy under the Sherman Act—five years before the Robinson-Patman amendment to the Clayton Act made it unmistakably clear that Section 2 applies to injuries to competition among the buyers from a price-discriminating seller.

adjustments. The secret concessions may reflect economic pressures that eventually will undermine a price level not justified by supply-demand relationships. In short, they may convert quasi-monopoly prices into competitive prices.¹⁷³

To permit businessmen to conspire to eliminate price discrimination because it may violate the Clayton Act is to invite them to violate the Sherman Act. The sugar refiners did not wait for either the permission or the invitation. The Court rejected for lack of supporting evidence the refiners' contention that price discrimination was in fact tending to lessen competition or to create a monopoly.

Courts Find Conspiracy

Students of this case may differ in their judgments on the economic and legal significance of price discrimination and on the significance to workable competition of the refiners' price-reporting program, but they are unlikely to challenge the district court's finding and the Supreme Court's confirmation that the sugar refiners had conspired to adhere to publicly announced future prices, terms, and conditions of sale, to eliminate certain consignment points and ports of entry for sugar, to maintain and police a delivered-pricing system, to determine transportation charges to be collected from customers, to eliminate quantity discounts and long-term contracts, to boycott distributors performing both brokerage and wholesaling functions, and to withhold from buyers the statistical information exchanged among themselves, and that the dominant aim of the institute was to preserve uniform, high prices. Activities such as these could not have been designed to insure open and free competition among business rivals, but rather to protect sugar refiners from the harassing and disturbing consequences of price competition in an industry suffering from surplus capacity and shrinking markets. Few economists are likely to regard the Sugar Institute's program in its entirety as consistent with the principle of workable competition; at least, none of the expositors of the concept have suggested that conspiracy to restrain competition is an attribute of workability.

Even the institute's open price-reporting plan considered separately has serious defects. The agreement among members to adhere to their publicly announced prices, terms, and conditions of sale until they announced a change inevitably tended to check general price reductions. By eliminat-

¹⁷³ Monopoly prices are not necessarily profitable prices. Monopolists and oligopolists in the face of declining demand cannot always so restrain output as to insure profitable operations. Whether or not they can do so will depend on the nature of costs and of demand. Similarly, conspiratorial prices may not guarantee profits and their aim may be merely to cut losses.

ing all concessions the plan deprived individual buyers of an opportunity to negotiate on prices, a useful practice in markets of imperfect competition. By withholding from buyers market information which it supplied to sellers, the institute also made it difficult for buyers to plan their buying programs as soundly as sellers could plan their production programs. On the whole the system tended to prevent effective competition, not to make competition more workable, and both the lower court and the Supreme Court found most of the institute's activities to be unreasonable restraints of trade.¹⁷⁴

FEDERAL TRADE COMMISSION CASES

The Antitrust Division of the Department of Justice has not been alone in challenging the legality of trade association activities. The Federal Trade Commission has conducted many proceedings against trade associations under Section 5 of the Federal Trade Commission Act.¹⁷⁵ The more important of these include the *Salt Producers Association*,¹⁷⁶ the *United States Maltsters Association*,¹⁷⁷ the *Milk and Ice Cream Can Institute*,¹⁷⁸ the *National Crepe Paper Association of America*,¹⁷⁹ and the *Tag Manufacturers Institute*¹⁸⁰ cases.

The *Salt Producers* and the *Maltsters* cases have a great deal in common. In each of the industries involved, a relatively small number of sellers accounted for most of the business, each of the associations had eighteen members, each was managed by industrial consultants specializing in

¹⁷⁴ The district court refused to order the dissolution of the institute but enjoined so many of its activities that shortly after the Supreme Court's opinion the sugar refiners disbanded it. *Pearce*, op. cit. supra note 159, at 142.

¹⁷⁵ Section 5 prohibits "unfair methods of competition in commerce." 38 Stat. 719 (1914), as amended, 15 U.S.C.A. § 45(a) (1951). The Supreme Court has held that a combination to eliminate competition, unlawful under the Sherman Act, may be prosecuted as an unfair method of competition. *Federal Trade Commission v. Cement Institute*, 333 U.S. 683 (1948), rehearing denied, 334 U.S. 839 (1948). In fact, "it was the object of the Federal Trade Commission Act to reach not merely in their fruition but also in their incipency combinations which could lead to these [price-fixing arrangements] and other trade restraints and practices. . . ." *Fashion Originators' Guild v. Federal Trade Commission*, 312 U.S. 457, 466 (1941). Between the end of NRA and December 1, 1939, the Commission issued cease and desist orders in thirty-five price conspiracy proceedings, most of them against trade associations. Guthrie, *Federal Trade Commission Price Conspiracy Cases, 1935-1939*, 8 Geo. Wash. L. Rev. 620 (1940).

¹⁷⁶ 34 F.T.C. 38 (1941), modified and aff'd 134 F. 2d 354 (C.A. 7th, 1943).

¹⁷⁷ 35 F.T.C. 797 (1942), order modified, 37 F.T.C. 342 (1943), aff'd 152 F. 2d 161 (C.A. 7th, 1945).

¹⁷⁸ 37 F.T.C. 419 (1943), aff'd 152 F. 2d 478 (C.A. 7th, 1946).

¹⁷⁹ 38 F.T.C. 282 (1944), aff'd sub nom. *Fort Howard Paper Co. v. Federal Trade Commission*, 156 F. 2d 899 (C.A. 7th, 1946).

¹⁸⁰ 43 F.T.C. 499 (1947), rev'd 174 F. 2d 452 (C.A. 1st, 1949).

trade association activities, and each association carried on a program which apparently was designed to promote the individual welfare of trade rivals by promoting their welfare as a group. In more technical terms, each program apparently was designed so to inform oligopolists about market conditions that they would be persuaded, without agreeing to do so, to behave as oligopolists of the theoretical model are supposed to behave—i.e., like monopolists.

These cases can be disposed of briefly. They lend little support to those who contend that the principle of workable competition has been violated in applying the antitrust statutes to trade association activities. Both the salt producers' and the maltsters' associations were organized and operated under the guidance of Stevenson, Jordan & Harrison, trade association consultants, who had earlier expressed unequivocally their belief that competition and free enterprise were "idols of brass and stone into whose fiery maws are being thrown the peace, security, and happiness of all our people."¹⁸¹ They had boldly advocated a change in federal statutes to provide for a system of industrial self-government, to be applicable to the whole of an industry on a decision by representatives of two-thirds of the industry's capital, which would include the regulation and allocation of output among plants and territories and a determination of the price at which an industry would offer its product to the public.¹⁸²

Salt Producers Association

In the Salt Producers Association, Stevenson, Jordan & Harrison apparently tried to put its notions into operation on a voluntary basis without benefit of legislation. At any rate, six months after the Supreme Court had invalidated the National Industrial Recovery Act¹⁸³ this firm conducted a survey covering the production, sales, plant capacity, marketing expense, average yield f.o.b. plant in delivered price zones, etc., of the leading salt producers during the previous four years and ten months. The firm calculated composite figures on these data for the industry and supplied each association member with the several composites and with similar figures calculated for each firm separately. At a meeting of the association members in Chicago in April 1936 representatives of Stevenson, Jordan & Harrison pointed out that salt producers had a large excess of

¹⁸¹ See Clair Wilcox, *Competition and Monopoly in American Industry* 253 (TNEC Monograph 21, 1941).

¹⁸² *Ibid.*, at 253-54.

¹⁸³ Act of June 16, 1933, c. 90, 48 Stat. 195, invalidated May 27, 1935, in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

capacity, that their sales expense was inordinately high, and their rate of earnings distressingly low. These unhappy conditions resulted from the unremitting efforts of the several producers to get a larger share of the salt business without proper regard to the cost of getting it. For thirty days after the Chicago meeting Stevenson, Jordan & Harrison conducted a personal educational campaign among the several salt producers, explaining to each the "fundamental economic truths" developed by the survey, namely, that unrestrained trade rivalry in selling salt predestined salt producers to high costs and low returns. The association consultants then held a second meeting with the salt producers, at which the producers commissioned them to collect monthly statistics on production, sales, and marketing expense and to calculate a composite figure for each producer. To insure the accuracy of these figures the salt producers agreed that Stevenson, Jordan & Harrison should audit their books from time to time.

The Salt Producers Association held monthly meetings at which its consultants explained and interpreted the monthly statistics on current production and yield, at times giving their opinion on the trend in demand. From time to time when conducting audits of members' books, representatives of Stevenson, Jordan & Harrison emphasized to company managers the probable consequences of an overzealous effort to get business at the expense of fellow members. Apparently familiar with the theories of oligopolistic pricing, they pointed out that in selling a homogeneous product any seller could get business at the expense of his rival only by lowering his price; that other sellers would promptly meet a price cut; and that each seller would continue to sell approximately the same amount at the lower price.¹⁸⁴ When their educational campaign proved inadequate to restrain the competitive practices of salt producers, representatives of Stevenson, Jordan & Harrison urged them to consider the unhappy consequences to themselves of trying to get more than their customary share of the market.

The Federal Trade Commission found that the salt producers' program as formulated under the guidance of Stevenson, Jordan & Harrison was "carried out in every particular" and it concluded that the "normal conflict of contending competitive forces engendered by an honest desire for gain was thereby restrained and suppressed."¹⁸⁵ In the proceedings before

¹⁸⁴ This argument apparently rests on what might be termed the ideal oligopolistic solution as expounded by Chamberlin in his *Theory of Monopolistic Competition*. See text above note 26 *supra*. Chamberlin's theory was based on carefully stated assumptions, and he recognized that uncertainties might lead to prices ranging between monopoly prices and those established by pure competition. *Ibid.*, at 51-53.

¹⁸⁵ Salt Producers Association, 34 F.T.C. 38, 53 (1941).

the Commission the respondents admitted the facts as alleged,¹⁸⁶ and on appeal they challenged only certain provisions of the Commission's cease and desist order.¹⁸⁷

Obviously, here was no trade association designed to enable buyers and sellers of salt independently to make informed decisions and thereby facilitate the operation of market forces. Here was no program to free markets from imperfections imposed by ignorance, but a program to subject it to rigidities created by one-sided knowledge. It was a collective endeavor to circumvent competition and to enhance the security of salt producers at the expense of salt buyers. It was an interesting attempt to persuade real oligopolists in business markets to behave like the ideal oligopolists of the theorists' models—a conscious effort to pluck the fruits of conspiracy without paying its legal penalties. It is not surprising that it failed.

United States Maltsters Association

Stevenson, Jordan & Harrison also managed the United States Maltsters Association, for which they devised a simpler program. This was on its face a price-reporting plan designed to inform maltsters of the state of the market. Under the plan each member furnished the association and the association compiled and sent all members daily reports on all malt sales, showing the name of the seller, the date of sale, quantity, grade, and price received. Each member reported weekly and monthly his total malt shipped, clean barley steeped, unfilled malt orders, unfilled commitments, malt stocks on hand, total barley on hand, in process and to arrive, barley purchases for the week, orders and commitments booked and cancelled, and malt shipped to or for another maltster.¹⁸⁸ This information is obvi-

¹⁸⁶ The court of appeals noted that initially the respondents filed individual answers to the Commission's complaint, denying the Commission's allegations, then withdrew their original answers and substituted answers wherein "they admit(ted) all of the material allegations of fact set forth in said complaint and waive[d] all intervening procedure and further hearing as to the said facts." *Salt Producers Association v. Federal Trade Commission*, 134 F. 2d 354, 356 (C.A. 7th, 1943).

¹⁸⁷ The salt producers objected to the Commission's use of the phrase "any common course of action" to supplement its prohibition of conspiracy to fix or maintain the prices of salt or regulate its production, arguing that competition or even coincidence might produce a common course of action. The court of appeals substituted the phrase "any planned common course of action," "so that only illegal *contractual* arrangements will be subject to contempt proceedings." *Ibid.*, at 357. The court also limited the Commission's prohibition of delivered-price zones to those established by agreements, and its prohibition of the exchange of price information to situations in which such exchange is part of a scheme to restrict competition. *Ibid.*, at 358, 359.

¹⁸⁸ *United States Maltsters Association v. Federal Trade Commission*, 152 F. 2d 161, 162-63 (C.A. 7th, 1945).

ously of the sort essential for wise decisions by trade rivals. The association was not content, however, merely to supply its members with aggregate figures. Each member got precise data on all other members. The buyers got none of the information.

Other features make the plan look less like a plan for removing market imperfections by banning ignorance than a plan for insuring uniform pricing by educating trade rivals. Each member supplied all other members with his price list. Each reported by wire any deviation from list price and the association manager immediately relayed the information by wire to all members. All members promptly conformed their prices. All members reported prices f.o.b. Chicago, although only three had their principal place of business there.¹⁸⁹ All members sold only on a delivered-price basis, quoting a delivered price equal to the Chicago price plus a standard freight rate from Chicago to the point of delivery. Each member quoted identical terms of sale. The Commission found that association members had agreed on several price-affecting practices which they followed. They had agreed to adopt grading standards, to quote only delivered prices f.o.b. final destination, and to adopt the grading specifications recommended by the association's executive committee in all instances where a guaranty of specifications was required. They had agreed on a standard form of contract, not to sell malt for resale, not to permit sales agents handling domestic malt to sell imported malt, to adopt a uniform discount of one-half cent a bushel, and that the association managers should audit their books to insure the accuracy of their reporting.¹⁹⁰

The Commission found this arrangement a price-fixing conspiracy, although it found no evidence of a specific agreement to fix prices. The record revealed, however, that for two years and four months all maltsters in the association had sold at identical prices. While revealing 100 per cent uniformity in the members' price for malt, the record revealed great diversity in their cost of producing malt. The most important element in the cost of producing malt is the cost of barley, representing as it does from 80 to 85 per cent of the total cost. Maltsters bought their barley by sample at terminal markets. No doubt maltsters paid about the same price for barley at any particular time, but barley prices fluctuated greatly. Transportation costs from terminal markets or country elevators to malting plants and from malting plants to customers' breweries varied greatly among different producers. The Commission found that manufacturing

¹⁸⁹ United States Maltsters Association, 35 F.T.C. 797, 799-800, 809 (1942). Most of the plants were located in Wisconsin.

¹⁹⁰ *Ibid.*, at 807, 808, 810.

costs among the association members varied by as much as 30 per cent. With such diversified and fluctuating costs the fact that the maltsters sold at identical prices over a period of two years and four months would seem to justify the Commission's conclusion that the maltsters' program represented a conspiracy to restrain competition. The court of appeals agreed.

By the standard which this study sets up the maltsters' price-reporting program had not contributed to workable competition in their industry.¹⁹¹ It did not provide both buyers and sellers with basic information essential for intelligent decisions. On the contrary, it apparently provided sellers with a mechanism whereby they could be assured that price competition among themselves would be eliminated.

Milk and Ice Cream Can Institute

Eight firms making about 95 per cent of the metal milk and ice-cream cans sold in the United States organized the Milk and Ice Cream Can Institute in 1930.¹⁹² In doing this they had the advice of D. S. Hunter, a professional promoter and manager of trade associations, doing business as D. S. Hunter & Associates. Hunter, serving the institute as "commissioner," its sole officer, supervised its meetings, recommended its activities, and collected and disseminated certain market information on milk and ice-cream cans. Under the institute's program each member reported daily on forms approved by the institute all orders received and all contracts entered into or fulfilled. The daily reports showed the date of the order, the name, address and business of the purchaser, quantity, capacity, and description of the cans, unit price with extras or deductions, discounts and terms, and freight rate added or "allowed to equalize" with a given basing point. Hunter mailed to each member a consolidated daily report giving similar information on all sales or contracts but omitting the name of the reporting member and the name and address of the customer. Each

¹⁹¹ Not all economists would agree. One economist testified for the maltsters that the price uniformity which prevailed under the association's program was "consistent with and a necessary consequence of the normal functioning of competition in such an industry." *United States Maltsters Association v. Federal Trade Commission*, 152 F. 2d 162, 165 (C.A. 7th, 1945). The court conceded that this line of testimony furnished "the basis for a good argument" but insisted that it could not stand up against the Commission's findings. As for the maltsters' complaint that the Commission ignored the economic forces in their industry which made for price uniformity, the court said: "It is true that the Commission made no findings upon petitioners' theory in this respect. It does not follow, however, that such factors were ignored. It merely indicates, so we think, that the Commission, after considering all the evidence, came to the conclusion, and we think correctly, that it was more reasonable to believe that petitioners' price structure resulted from an agreement rather than economic factors." *Ibid.*

¹⁹² The description of the industry is taken from the Federal Trade Commission proceedings, *Milk and Ice Cream Can Institute*, 37 F.T.C. 419 (1943).

member reported monthly on forms approved by the institute the quantity, capacity, and description of cans shipped into each state and for export, unfilled orders, volume of business for the month, average daily productive capacity, and percentage of capacity utilized during the month.

Institute members when quoting prices had followed the practice of equalizing freight with the nearest competitor's point of shipment before they organized the institute. By agreement they continued the practice and through the institute contracted for a freight rate reporting service which, although showing rates between members' shipping points and various destinations specified by Hunter, gave no information as to routing and was useful primarily in quoting delivered prices and invoicing customers. Upon evidence or suspicion from the daily reports that members quoted or sold at nonidentical delivered prices Hunter would "call such deviation or possible deviation to the attention of the members as a whole, and from time to time requested . . . members to review their data to determine if the discrepancies were due to errors in compilation."¹⁹³

Hunter's task of checking errors was facilitated by a classification of cans of different types (which were sold under various trade names) and by the use of symbols to identify a can's classification. The Commission found that the institute had carried its standardization program beyond government requirements or the requirements of customers and that it had done so the more easily to standardize prices.¹⁹⁴ It found that the in-

¹⁹³ *Ibid.*, at 433.

¹⁹⁴ A commentator has criticized the Commission's complaint in this proceeding as attacking the institute's efforts to standardize milk and ice-cream cans, even though trade association standardization programs have been generally recognized as beneficial and the Department of Commerce since 1921 has sponsored the standardization of products through its program for Simplified Practice Recommendations. He says: "[A] reading of this complaint and order cannot help but lead to the conclusion that the Federal Trade Commission is looking askance at standardization programs even when not connected with price fixing, *if it feels that the purpose or effect is to eliminate competition* among the products of the members engaging in the standardization program." Timberlake, *Standardization and Simplification Under the Anti-Trust Laws*, 29 Cornell L. Q. 301, 314 (1944) (emphasis supplied). The logic of Timberlake's position is obscured by the fact, which he himself points out before quoting the paragraphs in the complaint to which he objects, that the Milk and Ice Cream Can Institute complaint is directed against agreements on product standardization as *one of the means and methods* used by institute members to carry out an unlawful combination to suppress competition. This would seem to be a far cry from attacking standardization in and of itself.

The complaint also charges that the institute's standardization program was used to discourage quality competition, in a list of specific means and methods adopted "pursuant to and in furtherance of the aforesaid combination." Timberlake suggests that the Commission *may* have only intended to charge that standardization was used as a means of effectuating a price-fixing conspiracy. At first blush it would seem either that Timberlake is unwilling to accept the possibility that a trade association's standardization program may be used to eliminate quality competition or that he believes the elimination of such competition inevitably accompanies standardization but is offset by the savings effected through standardization. He fails to clarify the ambiguity of his interpretation of the Milk and Ice Cream Can Institute case,

stitute for similar purposes had defined and classified customers and for a short period before 1932 had agreed on discounts to be allowed so-called "five-car or more" buyers. On a basis of these and other findings the Commission concluded that the institute's program had a dangerous tendency to and had actually restrained competition in the sale of milk and ice-cream cans.

On petition by institute members for review of the Commission's order, the court of appeals saw as the essential question before it "whether the members of the Institute acted in combination or by agreement for the purpose of fixing prices, or their activities contributed to such result. . . ." ¹⁹⁵ The court rejected the petitioners' argument that there must be direct proof of an agreement and declared that circumstantial evidence was enough and that the Commission, like "any other fact finding body, is entitled to draw any reasonable inference from the circumstances of the situation." ¹⁹⁶ The court was impressed by the record evidence that (1) for more than four years before the Commission issued its complaint, the prices charged by the milk and ice-cream can makers had been identical for buyers at any point regardless of the location of the seller; (2) uniform delivered prices were made possible by the can makers' freight-equalization plan; (3) the purpose of the freight-equalization plan as revealed in the minutes of institute meetings and other evidence was to fix the delivered price of milk and ice-cream cans and its effect was seriously to impair price competition; (4) the institute's system of receiving daily reports from members permitted Hunter to supervise their price activities, and its purpose was to enable a member to determine whether his competitors were adhering to the price list; (5) the institute established a classification of buyers and determined the discount allowable to each class; (6) the manufacturers exerted such a meticulous effort to standardize their products as to indicate an agreement; and (7) the institute took steps revealed in its minutes to place restrictions on the sale of "seconds" and to widen the price difference between them and "firsts." ¹⁹⁷ The court of appeals concluded from its study of the record:

No good purpose would be served in a [more] detailed discussion of the various activities of the Institute and its members, relied upon by the Commission in support of its

but the conclusion of his study seems to be that a trade association may safely set up product standards (definitions) and formulate standard product lines (classifications) as long as members do not agree to make only standard products or to eliminate nonstandard items.

¹⁹⁵ *Milk and Ice Cream Can Institute v. Federal Trade Commission*, 152 F. 2d 478, 480 (C.A. 7th, 1946).

¹⁹⁶ *Ibid.*

¹⁹⁷ *Ibid.*, at 481-83.

finding that they acted in concert and by agreement. A study of the record is convincing not only that the finding is substantially supported but that it would be difficult to reach any other conclusion.¹⁹⁸

The court's treatment of the case appears to rest on a fair appraisal of all the significant elements in the factual situation before it. Its conclusion meets the standard of workable competition set up in this study. Nothing in the plan followed by the Milk and Ice Cream Can Institute suggests that it was designed to facilitate the operation of a free market by giving buyers and sellers alike information essential to informed but independent decisions. It looks more like a scheme to insure identical pricing by closely knit oligopolists selling to isolated consumers over a wide market.

National Crepe Paper Association of America

On October 7, 1941, the Federal Trade Commission issued a complaint against the National Crepe Paper Association of America and the eight companies accounting for all the crepe paper made in the United States.¹⁹⁹ The complaint charged the respondents with having conspired to restrain competition in the sale of crepe paper. This case grew out of association activities inaugurated during the NRA, when the association was first organized. The Commission found that association members had entered into numerous agreements during the NRA period which restrained competition among themselves. These included agreements to standardize trade practices and products, file current and future prices with the association, classify customers for pricing purposes, fix prices and terms of sale, and establish a zone pricing system with standard price differentials between the several zones. The Commission found that association members had continued these agreements after the expiration of the NRA, except that some of them ceased to file their price lists and invoices with the association. In making this finding the Commission relied largely on evidence contained in numerous minutes of association meetings extending from June 11, 1935, through May 3, 1939.

The Commission ordered respondents to "cease and desist from entering into, continuing, cooperating in, or carrying out any planned common course of action, agreement, understanding, combination, or conspiracy"²⁰⁰ to do any of the several specific acts which it enumerated and which constituted the elements of the alleged conspiracy.

Three of the crepe-paper makers appealed, including two who had with-

¹⁹⁸ *Ibid.*, at 481.

¹⁹⁹ *National Crepe Paper Ass'n of America*, 38 F.T.C. 282 (1944).

²⁰⁰ *Ibid.*, at 293.

drawn from the association almost two years before the Commission issued its complaint.²⁰¹ The Court of Appeals for the Seventh Circuit sustained the Commission.²⁰² With only three appellants before it, two of whom were no longer members of the association, the court attached less weight than did the Commission to the documentary evidence of a conspiracy. In upholding the Commission the court said:

It is the agreement to fix prices in concert that renders the conspiracy illegal. No formal agreement, however, is necessary to constitute an unlawful conspiracy. The essential combination or conspiracy may be found in a course of dealings or other circumstances as well as in any exchange of words.²⁰³

The principal course of dealings about which the court spoke at some length was the industry's zone pricing system, which resulted in identical delivered prices by trade rivals to all points within a particular zone and in arbitrarily standardized price differentials between zones.²⁰⁴ The court concluded that "[t]he existence of substantial similarity in delivered prices to zoned territories having identical zone price differentials, by six manufacturers located at different places, was not a happenstance."²⁰⁵ The reference to six manufacturers seems to be a mistake, since the court found that the two nonmembers continued to adhere to the zone system of pricing.²⁰⁶

This is one of the decisions cited by Oppenheim in support of his statement, "A series of civil cases instituted by both the Department of Justice and the Federal Trade Commission produced judicial opinions that countenanced in decision or dicta a deep thrust of the implied conspiracy doctrine."²⁰⁷ The court's failure to deal explicitly with the specific differences in price policies and practices which the three appellant crepe-paper makers claimed to exist among themselves and in contrast with practices recommended by the trade association may be disturbing, but the court's reliance on circumstantial evidence of conspiracy in this case should not

²⁰¹ Dennison Manufacturing Co. and The Reyburn Manufacturing Co. withdrew from membership in November 1939.

²⁰² *Fort Howard Paper Co. v. Federal Trade Commission*, 156 F. 2d 899 (C.A. 7th, 1946).

²⁰³ *Ibid.*, at 905.

²⁰⁴ The United States was divided into three zones for pricing bulk crepe paper and into two zones for pricing packaged crepe paper. Six manufacturers were located in the north-eastern section of the country and the other two in Wisconsin, but Zone 1 included nineteen states and all eight manufacturers. The system did away with the use of freight rate books but permitted identical prices to all customers within a zone regardless of the location of either buyer or seller.

²⁰⁵ *Fort Howard Paper Co. v. Federal Trade Commission*, 156 F. 2d 899, 906 (C.A. 7th, 1946).

²⁰⁶ *Ibid.*, at 908.

²⁰⁷ Oppenheim; *op. cit. supra* note 2, at 1167.

be. To discuss the implied conspiracy doctrine in any thoroughgoing way would lead beyond the scope of this study.²⁰⁸ But it may be of interest to point out again that eight firms made all the crepe paper produced in this country, they all had belonged to the association, they had standardized their practices under the NRA, and they maintained their zone pricing system—the “artificiality and arbitrariness” of which the court of appeals found “so apparent [that] it can not withstand the inference of agreement.”²⁰⁹

Concerted action among few sellers may well lead to common pricing policies without any overt agreement.²¹⁰ The fewer the sellers and the more nearly identical the conditions under which they operate, the greater the likelihood it will do this. In an old industry like the manufacture of crepe paper, selling a standardized product under well-established trade practices with only eight producing companies, the tendency to uniformity of pricing policies would be strong. The experience in collective discipline acquired under the NRA would accentuate this and would seem likely to carry over into the manufacturers’ attitude toward their trade association. Continuing concerted action under these circumstances constitutes a heavy threat to effective competition. The evidence of concerted action in the crepe-paper industry seems convincing and the propriety of striking it down scarcely debatable. Economists who emphasize the importance of industrial structure to price behavior may find a mere prohibition of conspiracy an inadequate remedy, but they are unlikely to challenge it as interfering with workable competition.²¹¹

TAG MANUFACTURERS INSTITUTE

Under the National Industrial Recovery Administration the manufacturers of tags operated under a code of fair competition, a major feature

²⁰⁸ For discussions of the implied conspiracy doctrine from several points of view see Kittelle and Lamb, *The Implied Conspiracy Doctrine and Delivered Pricing*, 15 *Law & Contemp. Prob.* 227 (1950); Stocking, *The Economics of Basing Point Pricing*, 15 *Law & Contemp. Prob.* 159 (1950); Stocking, *The Law on Basing Point Pricing: Confusion or Competition*, 2 *J. Pub. Law* 1 (1953); Wright, *Collusion and Parallel Action in Delivered Price Systems*, 37 *Geo. L. J.* 201 (1949).

²⁰⁹ *Fort Howard Paper Co. v. Federal Trade Commission*, 156 F. 2d 899, 907 (C.A. 7th, 1946).

²¹⁰ See discussion of Chamberlinian theory, text at note 26 supra. A corollary of this theory is that the mutual dissemination of market data among oligopolists may afford the basis for a common interpretation of the market and common pricing policies without conspiracy. See Stocking and Watkins, *Monopoly and Free Enterprise* 252-55 (1951).

²¹¹ Those who believe that market forces can be trusted as the best regulators of economic behavior may find some comfort in the fact that despite concerted action among crepe-paper manufacturers, price competition was not entirely eliminated. See Stocking and Watkins, *Monopoly and Free Enterprise* 247-49 (1951).

of which was an open price-filing system. Under this system tag makers filed tag prices with the code authority and sold their tags at such prices until seven days after they had filed a new price list.²¹² For a tag maker to sell for less than his list prices as filed with the code authority was to violate the law. After the Supreme Court had invalidated the National Industrial Recovery Act in the *Schechter* decision of May 27, 1935,²¹³ the tag makers entered into a contract with Frank H. Baxter Associates entitled "Voluntary Code Agreement Between Tag Manufacturers and Frank H. Baxter," dated June 5, 1935, effective August 14, 1935.²¹⁴

New agreements were substituted for the old from time to time—on September 22, 1936,²¹⁵ on January 15, 1938,²¹⁶ and on November 25, 1940.²¹⁷ Thirty-one manufacturers accounting for 95 per cent of the industry's output—four of them for 55 per cent—subscribed to the last two agreements. These agreements differed in important details, some of which will be noted later, but their basic characteristics remained unchanged.

The 1935 agreement declared one of its basic purposes to be to promote "a free and open market among both buyers and sellers" of tags and to "reduce the uneconomic results which flow from the spread of misinformation and unfair and unfounded rumor."²¹⁸ Apparently the tag makers never abandoned this agreement's professed objective. Baxter in a circular letter to the subscribers said of the 1940 agreement: "[O]ur aim has in fact been to make the entire new Agreement shorter and simpler without taking away any of the rights and obligations of subscribers which are necessary to the successful accomplishment of the endeavor which is now well understood by all."²¹⁹

Willard Thorp, now a professor of economics at Amherst College, testi-

²¹² Code of Fair Competition for the Tag Industry as approved on February 1, 1934, Commission's Exhibit 194B, Tag Manufacturers Institute, 43 F.T.C. 499 (1947).

²¹³ *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

²¹⁴ Commission's Exhibit 74, Tag Manufacturers Institute, 43 F.T.C. 499 (1947). Before the parties signed this agreement Baxter wrote a general letter to the tag makers under date of June 13, 1935, which read in part as follows: "Please understand the Tag Code Open Price Policy is not in force as such. Individual price reporting is still permissible however and we expect it will take organized form very shortly under the Liquidated Damages Agreement." Commission's Exhibit 825, *ibid*.

²¹⁵ Commission's Exhibit 75, *ibid*.

²¹⁶ Commission's Exhibit 1, *ibid*.

²¹⁷ Commission's Exhibit 76, *ibid*.

²¹⁸ Commission's Exhibit 74, p. 1, *ibid*.

²¹⁹ Letter dated May 14, 1940, Commission's Exhibit 4-Z-260, *ibid*. The 1940 agreement was not adopted until November 25 of that year.

lying on behalf of the tag makers, expressed the opinion that such a plan "will improve the open, competitive character of the industry."²²⁰ In short, the tag makers professed to be interested in making the tag industry more workably competitive by supplying interested parties with market information essential for rational decision-making.

How the Plan Operated

How did this work out? Under the 1940 agreement the tag makers sent Baxter, on the day they became effective, comprehensive price lists and detailed statements covering all terms and conditions of sale for every classification of tag or tag component that they sold. They also filed complete specifications of their products. From these individual reports Baxter prepared and distributed to his subscribers a loose-leaf compilation of list prices, arranged alphabetically in schedules according to various types of tags and showing each manufacturer's list prices for the myriad of tags which the industry produced. The schedules were set up in such a way that each seller could determine at a glance how his list price for any particular stock tag or component of a made-to-order tag compared with the last list price reported by Baxter for any rival seller.²²¹ Made-to-order tags comprised about 80 per cent of all tag sales by value.²²² Price compilations on these tags covered prices for the several standard components that might go into a custom-made tag.²²³ The possible combinations of components are almost infinite in making the thousands of different kinds of tags that enter into everyday use.²²⁴

Compilations of every manufacturer's terms and conditions of sale,

²²⁰ Report of Proceeding before the Commission, April 1, 1943, p. 2140, *ibid*.

²²¹ Tags were grouped under such schedules as A, Stock Shipping Tags; B, Made-to-Order Shipping Tags; C, Large Tags, etc. Within a schedule, prices for tags of a particular specification or the components thereof were set up as a table showing prices for varying quantities and sizes. Such a table, which might contain as many as a hundred prices, was identified as an "item." Price information not in tabular form might also appear on the compilation sheets as an item. A page might contain as many as eight items. On the opposite page tag manufacturers were listed in a vertical column with eight adjoining columns, each headed with an item number. In the appropriate item column an "x" was noted opposite each manufacturer using a particular list price. A quick perusal of a page would indicate the extent of uniformity among the several price lists. Commission's Exhibit 2-Z-34, *ibid*.

²²² Brief for Petitioners, at 21, *Tag Manufacturers Institute v. Federal Trade Commission*, 174 F. 2d 452 (C.A. 1st, 1949).

²²³ The standard components were (1) the paper board or cloth stock; (2) strings, wires, and fasteners; (3) punches, patches, slots, and eyelets; (4) inspection and ganging; (5) stapling, gumming, paraffining, pasting, lacquering, or other special treatment; (6) printing composition and changes; (7) numbering; and (8) original plates and art work. Brief for Petitioners, at 11, *ibid*.

²²⁴ There are eight standard sizes of shipping tags alone, sixty-four grades, weights, or qualities of tag stock, and thirty-six different kinds of printing. *Ibid*.

showing which tag makers followed certain policies or practices and in what respects other tag makers followed different ones, plus detailed definitions and specifications for each quality of tag product sold, supplemented the schedules of list prices.

Whenever a tag maker revised his price list or issued a new one to the trade, under the agreement he filed the revision or the new list with Baxter within twenty-four hours. Baxter thereafter made the necessary changes in his compilation and forwarded the new list prices on loose-leaf "blue sheets" to all subscribers. Tag makers making any sales at off-list prices were obligated to report them to Baxter within twenty-four hours and Baxter was obligated to report them daily to all his subscribers, which he did on "pink sheets." Any variation in price, however small, or in terms of sale, however trivial, was to be promptly reported.²²⁵ To make certain that their reports were reliable and complete, tag makers were obligated to send Baxter duplicates of all invoices by the close of the next business day after mailing them to customers.

For failure to make prompt and accurate reports tag makers were subject to a penalty, characterized in the agreement as "liquidated damages."²²⁶ To insure compliance with this obligation each subscriber con-

²²⁵ The thoroughness of the report is indicated by its description in the 1935 agreement. It called for a "complete statement of prices, terms, and conditions of sale affecting each and every executed contract for sale of, . . . order for, and invoice or other memorandum of shipment or delivery of both printed and unprinted tags, both stock and special, and all others for the sale thereof." The statement was to be prepared in accordance with a form specified by Baxter and "shall show the quantity, grade or quality, price, and terms and conditions of sale of such tags, or component elements thereof and shall be accompanied by a full statement of all pertinent information covering quantity tolerances, free goods, replacements and samples, and concessions of every nature." Commission's Exhibit 74, §§ 1a-f, Tag Manufacturers Institute, 43 F.T.C. 499 (1947).

²²⁶ Counsel for the tag makers objected strenuously to the Commission's use of the word "penalty" to describe the forfeitures specified in their Liquidated Damages Agreement. Brief for Petitioners, at 76-77, Tag Manufacturers Institute v. Federal Trade Commission, 174 F. 2d 452 (C.A. 1st, 1949). As one interested in preciseness in the use of language, I see no grounds for their objection. Webster's New International Dictionary (2d ed., unabridged) defines "penalty" as "the sum to be forfeited to which a person subjects himself by covenant or agreement in case of nonfulfillment of stipulations; forfeiture; fine." Counsel for the tag makers described the agreement as providing for "stipulated liquidated damages applicable in cases of failure to comply with the undertakings set forth" in it and said, "*This was done because actual damage is impossible accurately to be determined.*" Brief for Petitioners, at 27, supra (emphasis supplied). This candid admission suggests that the purpose of the assessments was to enforce compliance, not to compensate for noncompliance.

Before publication I submitted my discussion of the Tag case to counsel for the Tag Institute and counsel for the Federal Trade Commission for criticism. Counsel for the Tag Institute characterized my analysis as prejudiced. Among other passages, he specifically objected to the sentence in the text above in which I refer to liquidated damages as penalties. He suggested that a more accurate and judicious statement would be, "For failure to make prompt and accurate reports tag makers were subjected to liquidated damages for failure to comply with their contractual agreements, characterized by the Commission as penalties." Counsel

tributed from \$200 to \$500 annually, depending on sales volume, to a "revolving fund" against which "liquidated damages" were charged. Baxter investigated complaints of noncompliance and two or three times a year made unannounced audits of the books of subscribers to determine whether or not they were fully complying with their obligations under the contract. Where an investigation revealed noncompliance Baxter assessed "liquidated damages" in conformity with a schedule provided in the agreement.²²⁷ From Baxter's decision an offender could appeal to a Board of Arbitration consisting of three members outside the industry.

The theoretical basis for assessing "liquidated damages" was that tag makers were paying Baxter for accurate information on market factors essential to intelligent and informed business decisions and that all were hurt by inaccurate or incomplete market information.²²⁸ Liquidated damages were distributed among all subscribers on a basis of their relative sales volume. Information supplied by Baxter included data on the total sales of tags, from which any subscriber could determine his relative position in the market.

Baxter and the tag makers regarded this arrangement as an innocent

also objected to my use of the foregoing definition of "penalty." About this he stated: "You do not indicate . . . what is the fact—that the definition you quote is a secondary definition, not the usual and specific meaning of the word given first by Webster. I also am interested in preciseness of the use of language, and because I am it was the primary meaning of the word as defined by Webster that I was talking about in my brief."

Webster gives four groups of definitions of "penalty," each group marked by a heavy black numeral, 1 to 4. On page xciv, paragraphs 44 and 47, the publishers make the following comments on the significance of number groupings:

"44. Heavy-faced Arabic numerals (1., 2., 3., etc.) are used to number definitions when the meanings are numerous or are quite divergent from one another."

"47. Arrangement of definitions in the *historical order of development* should not be taken to imply that each sense has developed from the immediately preceding sense. Sometimes sense 1 gives rise to sense 2, sense 2 to sense 3, and sense 3 is the source of sense 4. Sometimes, however, each of the several senses derived in independent lines from sense 1 has served as the source of a number of other meanings" (emphasis supplied).

The sense 1 of "penalty" which I presume is "primary," is given as "pain," a meaning designated as rare. Sense 2 refers to "punishment for crime" and is obviously not relevant to the "liquidated damages" of the tag makers' contract: I chose sense 3, which seems to me relevant and appropriate.

²²⁷ Article IV of the 1940 agreement specified liquidated damages for noncompliance as follows: \$5 per day for delay in filing any report on prices, terms or conditions of sale, up to 10 per cent of the value of the transaction; 10 per cent of the aggregate value of all of the subscriber's transactions on which he failed to file copies of invoices within ten days after mailing the invoices to customers, up to \$100 per day; and \$25 per day for delay or refusal in answering inquiries by Baxter or in submitting books and records for audit. Commission's Exhibit 76, pp. 9-10, Tag Manufacturers Institute, 43 F.T.C. 499 (1947).

²²⁸ The 1940 agreement expressed it this way: ". . . inaccurate, incomplete or tardy dissemination of market information which is the essential aim hereof will, it is agreed, cause pecuniary damage to every other Subscriber in proportion to the extent of his interest in the marketing of the products." Commission's Exhibit 76, p. 10, *ibid.*

effort to make a market of imperfect competition more workably competitive. The Federal Trade Commission looked at it differently.

Commission Challenges Plan

On May 2, 1941, the Commission issued a complaint against the Tag Manufacturers Institute, Frank H. Baxter individually and as secretary-treasurer and executive director of the institute, and thirty-one tag manufacturers, charging them with having conspired to restrain and eliminate price competition in the sale and distribution of tags by fixing and maintaining their price.²²⁹ After a hearing covering 2,500 pages of testimony and including the presentation of approximately 1,500 exhibits, the Commission's trial examiner issued his report on the evidence. He found that the respondents had "combined, agreed, and conspired . . . to adopt and . . . carry out" a program "reasonably supposed and intended by them to lessen competition and restrain trade, and which through their mutual understandings and cooperation did lessen, injure, and restrain price competition in the tag industry."²³⁰ The Commissioners examined the record and heard arguments of counsel and on May 19, 1947, found the respondents guilty of an unfair method of competition within the meaning of Section 5 of the Federal Trade Commission Act.²³¹ The respondents appealed and on May 12, 1949, Chief Judge Magruder of the United States Court of Appeals for the First Circuit handed down a decision reversing the Commission.²³² The Commission did not seek review by the Supreme Court.

These several proceedings engendered a stark heat but a hazy light. In a bold, brash brief, counsel for the tag makers challenged the integrity and competence of the Commission, heaped ridicule on its counsel, and charged them with deliberately making "utterly false and grossly unfair" claims "without supporting evidence and in the face of clear and convincing" contrary proof.²³³

²²⁹ Tag Manufacturers Institute, 43 F.T.C. 499 (1947).

²³⁰ Trial Examiner's Report on the Evidence, filed December 2, 1943, p. 44, *ibid.*

²³¹ Tag Manufacturers Institute, 43 F.T.C. 499 (1947).

²³² Tag Manufacturers Institute v. Federal Trade Commission, 174 F. 2d 452 (C.A. 1st, 1949).

²³³ This language appeared in the tag makers' brief as respondents before the Commission and was quoted in their brief as petitioners before the court of appeals. Brief for Petitioners, at 58, Tag Manufacturers Institute v. Federal Trade Commission, 174 F. 2d 452 (C.A. 1st, 1949). Similar language was indulged in throughout this brief: the Commission was accused of a "lack of desire . . . accurately to find the facts" (*ibid.*, at 25); of demonstrating that the court "may not rely upon the accuracy of its findings" (*ibid.*, at 40); of showing "total" or "utter disregard for the truth" (*ibid.*, at 40, 41); of "deliberate misrepresentation or . . . complete lack of interest in factual accuracy" (*ibid.*, at 72); of slipping into "a fallacy of fan-

Cooperation Originates Under NRA

This is an important case—not merely because it involves a reversal of the Commission, but because it liberalizes the doctrines laid down by the courts in earlier cases covering the use of price statistics²³⁴ and because it gives approval to a scheme which, whatever its consequences, apparently has as its objective the discouragement of competition among business rivals.²³⁵ The several tag makers' agreements were an outgrowth of their cooperative activities under NRA. The National Industrial Recovery Act, despite its statutory rejection of codes designed to promote monopoly,

tastic magnitude" (ibid., at 99); and of having "peculiar ideas of proof" (ibid., at 107). The validity of the Commission's study of uniformity in price lists was denounced with "Anyone who has progressed beyond the one plus one stage of mathematics knows that figures produced on the basis outlined above are utterly meaningless" (ibid., at 46). The Commission's finding that competition had been eliminated and prevented was characterized as "sheer nonsense" and its finding that competition had been lessened, as "equally nonsensical" (ibid., at 47). The Commission's cease and desist order was interpreted to say "perfectly ridiculous" things (ibid., at 104).

²³⁴ To recapitulate, the earlier cases seem to stand for the following doctrines: genuine competitors do not contract to submit their books and records to audit by their rivals; where price reports go only to sellers, they cannot be justified as comparable to published reports available to all [*American Column & Lumber Co. v. United States*, 257 U.S. 377, 410, 411 (1921)]; where competitors enter an agreement which requires them to reveal to each other the intimate details of their business, under penalty for failure to report any deviation from their published price lists, the situation is wholly unlike an exchange where dealers assemble and buy and sell openly [*United States v. American Linseed Oil Co.*, 262 U.S. 371, 390 (1923)]; a trade association whose members take no concerted action with respect to prices or production or restraining competition and in which the names of *sellers* and buyers in *individual transactions are not revealed* may "openly and fairly" gather and disseminate information on prices received in past transactions [*Maple Flooring Manufacturers Association v. United States*, 268 U.S. 563, 586 (1925)]; competitors may take concerted action to exchange information for the purpose of correcting fraudulent practices in their industry [*Cement Manufacturers Protective Association v. United States*, 268 U.S. 588 (1925)]; but corrective measures which in themselves become restraints on competition will not be allowed [*Sugar Institute v. United States*, 297 U.S. 553 (1936)]. A recent comment sums up the "rules" for a trade association statistical program as follows: "(1) the information must be fully available to all interested parties; (2) the identity of particular contributors must not be disclosed; (3) supervisory powers of the association must not be excessive; and (4) the data must be released without comment, analysis, or subsequent discussion at association meetings." *Trade Association Statistics and the Anti-Trust Laws*, 18 *Univ. Chi. L. Rev.* 380, 384-85 (1951). This valiant attempt at certainty is quite properly qualified: "Nevertheless, complete compliance does not guarantee a plan's legality any more than does occasional departure from the rules assure the government's success." *Ibid.* The record indicates that the Tag Manufacturers Institute violated the first two of these rules and in my judgment supports the inference that it violated the third.

²³⁵ Counsel for trade associations may persuade a court that attempts to create conditions which encourage uniformity of pricing are not unlawful when they fall short of complete success, and many economists would discount such attempts as not a serious handicap on the economy. But what useful purpose do they serve? Do they suggest a principle for public policy—to substitute controlled decision-making by groups of sellers for the operation of the free market so long as this does not show measurably harmful effects? What effect does this policy have on buyers' and sellers' spirit of enterprise?

represented a sharp departure from traditional antitrust policy.²³⁶ It was enacted during an economic crisis when man's faith in a free-enterprise economy had almost vanished. As businessmen witnessed a sharp decline in the aggregate demand for their goods and services, as their plants idled and their earnings shrank, they found the customary restraints on price-cutting wholly inadequate. Faced with an intensity of competition that threatened their solvency, businessmen sought security in collective action. The NRA provided the mechanism by which competition was tempered and cooperation stimulated. The tag code made it unlawful for tag makers to price tags below cost or depart from the prices which they filed with the code authority.²³⁷ By providing for a waiting period during which an announced price revision was made inoperative it discouraged price-cutting. By calling attention to price discrepancies among rival sellers it encouraged identical pricing. When the code expired, the industry sought security in industrial self-government. The president of the largest corporate producer of tags was a few years later to set forth his philosophy of business cooperation in a book entitled *Modern Competition and Business Policy*, jointly authored with a well-known economist.²³⁸ In this book the authors question the self-regulatory character of modern business rivalry,²³⁹ lament industry experiences with cut-throat competition,²⁴⁰ reject the notion that modern corporate enterprise rewards socially desirable and penalizes socially undesirable behavior,²⁴¹ encourage publicizing trade statistics so that businessmen may know more about the affairs of each other,²⁴² and advocate the inauguration of a program of industrial self-government, voluntarily if industry will respond but otherwise at the initiative of the government and in any event under its supervision.²⁴³

²³⁶ Title I, § 3(a) of the act authorized "trade or industrial associations or groups" to submit to the President of the United States codes of fair competition for their respective industries, to be approved if the President found, among other things, that the codes were not "designed to promote monopolies" and did not permit monopolistic practices. But § 1 of the same title announced the public policy of promoting the organization of industry for the purpose of cooperative action among trade groups, and § 5 provided that any code approved under title I and any action complying with its provisions while it was in effect should be exempt from the provisions of the federal antitrust laws. 48 Stat. 195, 196, 198 (1933).

²³⁷ Code of Fair Competition for the Tag Industry as approved on February 1, 1934, op. cit. supra note 212.

²³⁸ H. S. Dennison and J. K. Galbraith, *Modern Competition and Business Policy* (1938).

²³⁹ Ibid., at 33.

²⁴⁰ Ibid., at 35 et seq.

²⁴¹ Ibid., at 77.

²⁴² Ibid., at 96.

²⁴³ Ibid., at 106 et seq.

The NRA tag code provided an experiment in business cooperation in an industry whose security had been undermined by the Great Depression and whose organization was such that competition inevitably worked imperfectly. The cooperative experiment was carried on in the successive tag agreements, with important modifications from time to time.²⁴⁴ All provided for open price-filing, but without a waiting period. None prohibited below-cost selling. All made clear a seller's right to depart at will from his prices as filed with Baxter and all disavowed any desire to restrict competition. The plan was ostensibly designed to make competition open and informed, but free.

Filed Prices: Future or Past

A study of the several tag agreements suggests, despite their nominal disavowal of it, that their objective was to discourage price competition. Counsel for the tag makers argued vigorously that prices as filed with Baxter were neither current nor future but merely a record of past transactions;²⁴⁵ but the 1936 agreement provided that "a general offer to the trade to sell tags and tag products at specified prices, terms, and conditions of sale shall constitute a past or effective price when said general offer has in fact been circulated through the customary channels of the

²⁴⁴ The Commission found that "[t]he purpose of these agreements was to keep in force and effect the open price-reporting plan originally adopted under the National Industrial Recovery Act." Tag Manufacturers Institute, 43 F.T.C. 499, 515 (1947). The court of appeals characterized "this crucial finding" as "a pure assumption, not a rational inference from the evidence." Tag Manufacturers Institute v. Federal Trade Commission, 174 F. 2d 452, 458 (C.A. 1st, 1949). But the Supreme Court has held that it is an "established judicial rule of evidence that testimony of prior or subsequent transactions, which for some reason are barred from forming the basis for a suit, may nevertheless be introduced if it tends reasonably to show the purpose and character of the particular transactions under scrutiny." Federal Trade Commission v. Cement Institute, 333 U.S. 683, 705 (1948).

²⁴⁵ The argument was as follows: each manufacturer issued to the trade a list of the prices at which he was selling his products and then furnished Baxter with a copy of it. Baxter's compilation could in the nature of things be no more than a book of reference with respect to past market conditions since it merely gave wider circulation to facts already published. At any given moment a subscriber might have one or more different list prices in effect than those shown in the compilation, since his obligation was only to report changes after they had gone into effect. The court of appeals described this state of facts and then observed: "[I]t is obvious that the Compilation in the hands of the Subscribers is more than an object of academic historical interest and is designed for a practical business purpose. Manufacturers do not change their price lists every day. A price list may remain in effect for weeks, often for months, without change. While at any given moment it is possible that the most recently revised price list of one or two manufacturers might not yet have been reflected in the Compilation, there is every assurance that for the most part the Compilation discloses current price list information. Examination of the Compilation, together with the more recent 'pink sheets' showing off-list sales, will give a quite accurate picture of the current price structure in the industry. Also, the 'pink sheets' for several weeks past and recent revisions of price lists noted in the Compilation may disclose trends indicative of future market conditions." Tag Manufacturers Institute v. Federal Trade Commission, 174 F. 2d 452, 458 (C.A. 1st, 1949).

trade, and is available to all buyers for immediate acceptance, and not before."²⁴⁶ This seems to transform a current or future price into a past price by so defining it. Although the record makes it clear that tag makers retained their right to depart at their discretion from their prices as filed with Baxter, the record also contains specific evidence that some tag makers regarded their filed prices as representing current and, until a new filing was made, future prices. For example, C. H. Barber, president of the Keystone Tag Company, in a letter dated May 19, 1938, expressed annoyance with Baxter's having reminded him in a letter dated May 18, 1938,²⁴⁷ that Baxter had not received Keystone's new general offer as required under the agreement. Barber wrote:

What you inform my competitors is up to you, but I am not going to sacrifice my health nor put on additional office force in order to get these out any quicker than we are doing. . . . *We are, however, cooperating 100% with our competitors by using prices to the trade as reflected in our price book which you now have.*²⁴⁸

Again, this colloquy appears in the record on the cross-examination of Arthur H. Swett, Jr., vice-president of the American Tag Company, by counsel for the tag makers:

Q. In referring to your operations under the price reporting agreement, you stated that you attempted to observe something which was not entirely clear in my mind just what it was which you attempted to observe, with reference to the contract.

A. Attempted to observe.

Q. You observed the prices?

A. We observe our prices.

Q. Do I understand your answer to be that you observe prices?

A. We observe our file prices. I don't know just what you mean.

Q. You don't understand my question?

A. No.

Q. Let me repeat it. You stated that you observed the contract. By that you mean what?

A. Our file prices.

This answer was apparently not satisfactory to counsel for respondent; and so he continued:

Q. Do you mean to say that the contract calls upon you to observe file prices?

A. No, it does not. It definitely does not.

Q. What does the contract call upon you to observe?

A. That we must file restricted offers, if we quote other than our file prices.²⁴⁹

²⁴⁶ Commission's Exhibit 75, § 1-(A), pp. 1-2, Tag Manufacturers Institute, 43 F.T.C. 499 (1947).

²⁴⁷ Commission's Exhibit 1011, *ibid.*

²⁴⁸ Commission's Exhibit 1010-A, B, *ibid.* (emphasis supplied).

²⁴⁹ Report of Proceedings before the Commission, November 28, 1941, p. 811, *ibid.*

Off-list Prices Discriminatory

The 1936 agreement characterized any departure from a firm's general-offer price list as a "discriminatory price."²⁵⁰ It also characterized as discriminatory a general-offer price decrease if followed within twelve days by a price increase.²⁵¹ It was such departures from their list prices, together with all revisions in their list prices or terms and conditions of sale, that tag makers were required under penalty of "liquidated damages" to report to Baxter in detail within twenty-four hours and to verify by filing duplicates of invoices with Baxter within five days after mailing them to customers.

Characterizing such price-cutting as discriminatory would, I should think, in and of itself tend to discourage price competition. But the agreement went further. It implied that such off-list pricing might be unlawful as well as "discriminatory." A firm's report of a "discriminatory" price was to be followed by an affidavit "setting forth all facts essential to the establishment of said transaction as a lawful exception to the statutory prohibitions against price discrimination . . . not later than noon of the succeeding business day."²⁵² Presumably reference is intended to Section 2 (a) of the Clayton Act as modified by the Robinson-Patman Act, which outlaws price discrimination whose effect may be substantially to lessen competition.²⁵³ I think it farfetched indeed to assume that if a tag maker cuts prices to get any particular order he may thereby be lessening competition. Certainly he is not diminishing the vigor of his competition with his rivals. And since the buyers of tags for the most part are ultimate consumers engaged in different lines of business activity, such price cuts can have little or no effect at the secondary level. Eventually the tag makers seemed to have reached this conclusion. At any rate, the 1937 agreement abandoned the term "discriminatory," but it did not abandon the practice of setting apart as special those prices to isolated buyers which were more favorable than those quoted in the tag makers' filed price lists. These

²⁵⁰ "Sec. 1-(B) A price, term or condition of sale made to a specific customer, or restricted to a specific locality, and not made available to all customers or localities under like circumstances, shall constitute a discriminatory price." Commission's Exhibit 75, p. 2, *ibid*.

²⁵¹ Sec. 1-(E), *ibid.*, at 7.

²⁵² Sec. 1-(D), *ibid.*, at 7.

²⁵³ The words of the statute are: "That it shall be unlawful for any person engaged in commerce, . . . either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, . . . [in interstate commerce] where the effect of such discrimination may be substantially to lessen competition or . . . to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." 38 Stat. 730 (1914), as amended, 49 Stat. 1526 (1936), 15 U.S.C.A. § 13(a) (1951).

were called "restricted offers" and, as in previous agreements, required to be reported within twenty-four hours to Baxter under penalty of "liquidated damages."²⁵⁴ The 1940 agreement discontinued the term "restricted offer," but not the practice of reporting off-list sales nor the penalty for failing to report them.

Price Filing or Price Maintenance?

Counsel for the Commission argued that this practice tended to discourage making such off-list prices and thereby to restrain competition. They characterized the whole agreement as designed for this end. The Commission so found. I believe the Commission was correct. Not only does the logic of the arrangement warrant this conclusion, but tag makers themselves have expressed attitudes consistent with this interpretation. In reporting to Baxter two orders at off-list prices, A. H. Swett, Jr., vice-president of the American Tag Company, reviewed all orders which his company had executed during the life of the several agreements from 1935 to March 1938 to determine how many had been made at price concessions. He found his company's record was good. Under date of March 15, 1938, he wrote in part:

I simply want to point out to you that we have been able to maintain our regular schedule in the face of competition. We are sorry indeed that it was necessary to make a special concession for the two recent orders, but we felt that it was necessary in order to retain the account.²⁵⁵

E. L. McCusker, of the Reyburn Manufacturing Company, implied in a letter written to Baxter on July 12, 1940, that as he saw it the harm to the industry was not merely in failing to report price cuts but in making them as well. Reyburn had apparently accepted a \$1,980 order for three million No. 6 tags at 66 cents a thousand, a price below its list price and so reported to Baxter. Thereafter the buyer notified Reyburn that one of Reyburn's competitors had made him an even better offer—60 cents a thousand. To keep the business Reyburn met its rival's cut. Neither Reyburn nor its rival reported the lower quotation. After Reyburn had closed the order, its rival complained to Baxter of Reyburn's failure to file its

²⁵⁴ Commission's Exhibit 1, § II-B, pp. 11-12, Tag Manufacturers Institute, 43 F.T.C. 499 (1947). Tag makers were obligated to report to Baxter within twenty-four hours all prices and terms on all sales that differed in any respect from their terms and prices already on file. This was true of general offers as well as restricted offers. But the requirement that restricted offers be reported promptly meant much more than the requirement that general offers be reported promptly. Firms customarily sent their general offers direct to the trade and frequently to their competitors. Special offers in the absence of an agreement to report them would ordinarily have been regarded as the private business of the firms making and receiving them and no one else's, and if they were not filed with Baxter their rivals could not easily obtain them.

²⁵⁵ Commission's Exhibit 834, *ibid.*

60-cent quotation. Baxter investigated, established the failure, and assessed Reyburn 10 per cent liquidated damages. Reyburn protested Baxter's not assessing similar damages against its rival. About this McCusker wrote:

It seems to us that in the first case where we have to be liable for damages that we may do to the members of the Institute for failure to file a lower quotation, that the same thing should apply where a competitor makes a lower quotation than what we have received for the order and where he has damaged us to the extent of \$180.00, therefore should be assessed 10% of the total amount of the order.

A proposition of this character is a very serious one and should be given very serious consideration by your office. After this letter has answered your purpose, which is strictly confidential, kindly return for our files.²⁵⁶

Baxter in replying to McCusker stated that with no formal complaint against Reyburn's rival Baxter's office could do nothing about the matter.²⁵⁷ In writing McCusker, Baxter undertook to straighten out McCusker's thinking about the tag industry agreement. About this he wrote:

In the last three paragraphs of your letter you have reflected a brand of thinking that I am sure is not truly indicative of your understanding of what the Tag Industry Agreement proposes to accomplish. I do not want to make an issue of the situation, but I do feel that we must be so careful in this office to keep the thinking of our subscribers straight that we cannot afford to "pass one single red flag."²⁵⁸

Apparently Baxter frequently found it necessary to straighten out the tag makers' conception of the agreement. When G. M. Huey of the Denney Tag Company tried to justify failure to report a price cut by citing a rival that had cut prices, Baxter pointed out that the rival had filed his off-list prices as the agreement required and he advised Huey: "At the risk of seeming tedious we must point out that our concern must not be with what prices are quoted by subscribers, but only with whether the prices are reported as the agreement requires."²⁵⁹

Tag Agreements Did Not Eliminate Price Concessions

Both the agreements and the way subscribers looked at them indicate to me that the object of the several agreements was to discourage competition. Waiving or granting this, did the agreements in fact lessen compe-

²⁵⁶ Commission's Exhibit 776-A, B, *ibid.* The 1937 agreement, which continued in force until November 25, 1940, required subscribers to report restricted offers to Baxter. Commission's Exhibit 1, pp. 11-12, *ibid.*

²⁵⁷ McCusker's letter had not identified the offending rival. Baxter's letter stated: "Of course, you haven't made a complaint in the matter and you haven't afforded me an opportunity to make one, for there is no name on the letter. . . ." Letter of July 23, 1940, Commission's Exhibit 775, *ibid.*

²⁵⁸ *Ibid.*

²⁵⁹ Letter dated February 29, 1940, Commission's Exhibit 87-D, *ibid.*

tition or, as counsel for the tag makers contended, did they merely permit rival sellers to obtain market data which enabled them to interpret market forces correctly and to adjust their individual operations to them? One conclusion is clear: the 1940 tag agreement did not eliminate all price concessions. Several tag manufacturers testified they were free under the contract to use their own discretion in off-list pricing²⁶⁰ and equally free, of course, in announcing new general offers, and that they exercised their freedom.²⁶¹ The Commission cited 468 instances in which list prices of the several tag makers were identical but in which two or more tag makers quoted prices to a single customer. Counsel for the tag makers calculated that in 443 of these cases, representing 95 per cent of the total, customers were quoted two or more different prices. In 289 of the cases two tag makers bid and in 267 of these the prices offered were not identical. In 112 cases three tag makers bid and in 109 of these the customers had a choice of two or more prices. In 67 of these cases the customers had a choice of three prices.²⁶² Moreover, there was no consistency among rival sellers in their off-list pricing. Percentage of total business done off list ranged from 2.1 per cent to 63.9 per cent.²⁶³ Nor was off-list pricing confined to any one section of the country. It was both substantial and nationwide.

Most Business Done at List Prices

Nevertheless, three-fourths of the total business was done at list prices and apparently these for the most part were identical for all tag makers. At intervals over a two-year period a government accountant made a study of price lists as filed with Baxter. This study covered fourteen varieties of tags in varying sizes with varying prices for different quantity lots. According to the Commission the study was "representative of the tags sold in any appreciable volume."²⁶⁴ It showed virtually 100 per cent uniformity of list prices for eleven varieties of tags on May 12, 1939, and a similar uniformity in the list prices for the same tags on August 27,

²⁶⁰ See, for example, testimony of Walter C. Bailey, Jr., of The Reyburn Manufacturing Company, Report of Proceedings before the Commission, November 26, 1941, pp. 585-87, *ibid.*

²⁶¹ Approximately 25 per cent of all sales were made at off-list prices. This fact was not disputed and both the Commission and the court of appeals accepted it.

²⁶² Brief for Petitioners, at 34, citing Commission's Exhibit 1022, Tag Manufacturers Institute v. Federal Trade Commission, 174 F. 2d 452 (C.A. 1st, 1949).

²⁶³ Brief for Petitioners, at 33, *ibid.*

²⁶⁴ Brief for Respondent, at 76-77, *ibid.*

1940.²⁶⁵ For three varieties of tags the uniformity of list prices ranged from 70 per cent to 86 per cent at the beginning of the test period and from 70.7 per cent to 93.7 per cent at the close of the test period.

Counsel for the tag makers appropriately criticized the Commission's trial examiner for having calculated a simple arithmetical average for all fourteen varieties of tags of 96.8 per cent as a measure of list-price identity at the beginning of the test period and 97.5 per cent at its end. With equal propriety counsel criticized the Commission's broader generalization that at the beginning of the test period "the *compilation* reflected 96.8 per cent uniformity and at the end of the period . . . 97.5 per cent uniformity of general-offer filed prices among the respondent members."²⁶⁶

In addition to challenging the Commission's use of a simple arithmetical average as a measure of price identity in the sample of tag prices, counsel for the tag makers challenged the adequacy of the sample itself, asserting that it consisted largely of stock tags, among which greater price uniformity was to be expected than among made-to-order tags. This criticism has merit on its face, but the tag makers' brief before the court of appeals indicates that made-to-order shipping tags alone accounted for just under 40 per cent of the total tag business²⁶⁷ and the Commission included this kind of tag (Schedule B) in its sample, finding that 86 per cent of the filed prices for tags of this class were identical at the beginning of the test period and that 93.7 per cent of them were identical at the end of the test period.²⁶⁸

Commission Ignores Terms and Conditions of Sale

Counsel appropriately criticized the Commission's calculations because they ignored terms and conditions of sale. The Commission's accountant had undertaken the relatively simple task of calculating the percentage which identical list prices represented of total filed prices by the sampling method. As far as it goes this is an appropriate procedure. Price differences lend themselves to mathematical measurement. Concessions in terms and

²⁶⁵ *Ibid.* Just how many prices are represented in these schedules is not clear, but presumably they ran into the thousands. I sampled at random the price lists on page B 210 of the compilation, Commission's Exhibit 2-Z-100. It showed the price schedule or "item" for each of three different qualities of stock factor (the basic component for tags) for eight sizes of made-to-order shipping tags (not over 19.53 sq. in. in size) for sale in thirteen different quantity lots. The three items contained a total of 312 prices. All thirty tag makers filed identical prices for these items.

²⁶⁶ Tag Manufacturers Institute, 43 F.T.C. 499, 525 (1947).

²⁶⁷ Brief for Petitioners, at 21, Tag Manufacturers Institute v. Federal Trade Commission, 174 F. 2d 452 (C.A. 1st, 1949).

²⁶⁸ Brief for Respondent, at 77, *ibid.*

conditions of sale, like concessions in prices, are useful in attracting business but they do not lend themselves so readily to mathematical treatment. To have combined variations in both prices and terms of sale in a mathematical measure of price identity would indeed have been a colossal and fruitless task. Terms and conditions of sale alone as filed with Baxter and compiled and distributed by him to each tag maker covered about fifty pages. The price schedules covered many more pages, on some of which hundreds of prices were listed. Each company made thousands of different kinds of tags representing all sorts of combinations of the separately priced components. To establish 100 per cent uniformity in both price lists and conditions of sale for all tags even between two companies would require a comparison of thousands of items. If perfect uniformity were established, change in a single item would destroy it. With the potential variation among the price lists of some thirty tag makers almost infinite, any substantial degree of uniformity would indeed be surprising in the absence of some mechanism for establishing it. And yet a high degree of uniformity is a striking fact about the schedules appearing in the compilation.

But the difficulty of determining the price significance of variations in terms and conditions of sale does not justify the Commission's ignoring them. Certainly buyers would not ignore them. The variations in terms to some classes of buyers seem very significant indeed. In sales to the federal government listed discounts granted by the different tag makers ranged from 10 to 40 per cent,²⁶⁹ and this is substantial. The time over which deliveries on an order might be spread varied from four to twelve months.²⁷⁰

In dealings with private buyers apparently such discrepancies as appeared tended to balance out, for petitioners contended that no price variation was too small to be commercially significant. As they put it: "The minimum difference between items in price lists is one cent per 1,000 tags and this is enough to control the placement of orders."²⁷¹

Price Reporting Contributed to Identical Pricing

By providing the machinery for a ready comparison of rival prices for any particular tag or tag component the price-reporting system contributed to identical pricing. It is fairly clear that it was intended to do so. The

²⁶⁹ See, for example, Commission's Exhibit 2-Z-12, Tag Manufacturers Institute, 43 F.T.C. 499 (1947).

²⁷⁰ Commissions' Exhibit 2-Z-18, *ibid.* For other illustrations of departures, see Brief for Petitioners, at 32, Tag Manufacturers Institute v. Federal Trade Commission, 174 F. 2d 452 (C.A. 1st, 1949).

²⁷¹ Respondents' Brief, at 26, Tag Manufacturers Institute, 43 F.T.C. 499 (1947).

record indicates that at times both Baxter and the tag makers concerned themselves with even trivial variations in prices or terms of sale²⁷² and sought to avoid them. For example, on November 16, 1938, George E. Phelps, vice-president of Allen-Bailey Tag Company, notified Baxter that he had reduced by 5 per cent the price of tag stock and the charge for making and printing and composition changes on tags of a certain size.²⁷³ After discussing the proposed changes with Baxter's office, he agreed that Baxter should withhold publication of the filing "for a couple of days" while Baxter could "ascertain exactly the condition of the market with reference to the practice of other manufacturers in applying 5% discount to large tags involving various additional specifications."²⁷⁴ About this matter C. A. Adams of Baxter's office testified that Phelps wanted to ascertain whether when "you applied the 5 per cent, . . . you took 5 per cent of the total, or if they multiplied their total price by the factor of .95, which would give you a net result of a penny's difference. I told him we would ask the other subscribers to let us know how they applied this 5 per cent, and when we did we would publish it and that is published as a G letter."²⁷⁵ Adams' investigation revealed no standard practice. Allen-Bailey Tag Company, forced to make a choice on this penny issue, chose to follow the industry's biggest tag maker. It noted on a revised filing, dated April 4, 1938: "This filing is to make our terms the same as those published by the Dennison Manufacturing Company in General Letter No. G 18."²⁷⁶

On November 22, 1938, S. B. Seaton of the Acme Tag Company wrote Baxter as follows:

We enclose a tag printed on the front in one color reverse plate, and on the reverse side a Benday cut of a bunch of bananas.

It is reported that quotations have been made to this company on which Form 7 Printing was used in figuring the price, while we believe the price should be based on Form 8 Printing. Both of these printing rates come under schedule B.

What is the opinion of the Institute office as to which of the two forms of printing is the correct one to use according to the lowest filed price?²⁷⁷

²⁷² The 1936 agreement required each tag maker to declare a definite rule regarding fractions of a cent in the computation of prices from his price book. Commission's Exhibit 75, p. 6, *ibid.* The same requirement appeared in the 1937 agreement but was omitted from the less detailed 1940 agreement.

²⁷³ Commission's Exhibit 1017, *ibid.*

²⁷⁴ Commission's Exhibit 1016, *ibid.*

²⁷⁵ Report of Proceedings before the Commission, p. 2002, *ibid.*

²⁷⁶ Commission's Exhibit 1019, *ibid.* Apparently the date on this letter is incorrect. The year should be 1939.

²⁷⁷ Commission's Exhibit 187-Z-4, *ibid.*

To this inquiry C. A. Adams of Baxter's office replied on November 26:

In answering your letter of November 22, relative to the printing schedule to be used in connection with the attached tag, *we must, of course, make it clear that this office has no authority to establish any rule for printing merchandise.* The most that we can do is refer to the filings of various subscribers and state their practices as so reported.

On page B 262 of the Compilation, Item 1 represents the filing of *all* subscribers to the Industry Agreement with the exception of A. Kimball Company and states that all reverse plate printing, or Benday copy, aggregating 2 sq. in. or more per side is considered as reverse plate. The tag in question has more than 2 sq. in. of reverse plate or Benday copy of both sides and, hence, according to these filings, would come under the rule stated.

That being the case, Form 8 reverse plate printing as shown on page B 262-1 would seem to apply in the case of this job.²⁷⁸

Off-list Pricing Discouraged

Not only did the agreement provide machinery for facilitating identical price filing, as previously pointed out, but it provided machinery for discouraging departure from filed prices. The record indicates that this machinery did not work perfectly. Only 75 per cent of sales conformed to list. But that is a lot.²⁷⁹

Under the arrangement which the tag makers had imposed on themselves they sacrificed the privacy by which business decisions are ordinarily protected and by which buyers, in a market like the market for tags, may exercise most effectively such bargaining power as they may possess. Tag buyers are myriad, unorganized, and scattered. They do not buy tags in an organized, competitive market where all the forces behind demand and supply operate in an impersonal way to determine an identical price for all buyers and all sellers, and the nature of tag purchases is such that they cannot. They buy tags at list prices compiled by tag makers under customary terms of sale, or they bargain for better prices and terms. Their bargaining power is one of the market forces with which tag makers must contend. They can contend with it more effectively by presenting a united front. But by doing this they weaken a market force making for lower prices. Under the tag makers' arrangement, sellers anxious to get

²⁷⁸ Commission's Exhibit 187-Z-3, *ibid.* (emphasis supplied). Adams, after having rebuked Seaton for asking "which form of printing" is the correct one, proceeded to advise him that Form 8 "would seem to apply."

²⁷⁹ Antitrust prohibitions are not confined to activities which completely eliminate competition but make unlawful "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce" and every attempt "to monopolize any part of the trade or commerce among the several States. . . ." Sherman Antitrust Act, §§ 1 and 2, 26 Stat. 209 (1890), as amended, 50 Stat. 693 (1937), 15 U.S.C.A. §§ 1 and 2 (1951) (emphasis supplied).

business even at off-list prices must report promptly all such sales as they may make. It is not a characteristic of an imperfectly but effectively competitive market that sellers, anxious to get business by cutting prices, report their success to their rivals. That they agree to do so suggests that their primary concern is not with supplying full market information to their rivals that they all may make intelligent decisions about the market but with curbing their own normal impulse to sacrifice prices rather than business. And to the extent that they succeed they are blocking, not facilitating, the operation of market forces.

The Logic of "Liquidated Damages"

To evaluate the tag makers' arrangement properly, one must be more interested in logic than in language. It is no doubt proper for the tag makers, anxious to stay within the law, to characterize the penalty which they agreed to impose on themselves for failure to report an off-list sale as "liquidated damages" for preventing their rivals from getting full and accurate information about the market. But it is indeed difficult to see just how any one seller's failure to report one off-list sale hurts all other sellers on the theory advanced by the tag makers, and it is even more difficult to recognize an equivalence between such damage as a seller might conceivably suffer and his share of the "liquidated damages."²⁸⁰ Tag makers are scattered all over the map—from Massachusetts in the East to San Francisco in the West, from Minnesota in the North to Texas in the South, with a tendency to concentrate in the Mid-West. How a San Francisco tag maker is hurt in any specific or measurable way by a Massachusetts tag maker's failure to report an off-list sale to a Maine tag buyer I fail to see. On another, and I believe a more plausible, theory I can see a causal relationship between the phenomena in question. Price-cutting tends to undermine the tag price structure and if generally indulged in may bring lower prices all around. Cutting without reporting encourages cutting. Failure to report therefore hurts all tag makers. This theory makes sense. That the deterrent to price-cutting was not adequate to prevent it does not undermine the theory. And it is a reasonable conclusion from the theory and consistent with the facts that the arrangement contributed to more stable and higher tag prices than would have prevailed

²⁸⁰ Baxter had some discretion in determining liquidated damages. As the Commission's trial examiner put it when describing the provisions of the 1940 agreement: "Liquidated damages are not authorized whenever counsel advises against it as possibly constituting 'an unlawful penalty or forfeiture' or where 'probable actual damages' are not found." Trial Examiner's Report on the Evidence, p. 17, Tag Manufacturers Institute, 43 F.T.C. 499 (1947). Moreover, a tag maker could appeal from Baxter's decision to the Board of Arbitration.

without it. Most sales were at list prices and list prices remained unchanged over long periods.²⁸¹

Price-Reporting System Had Serious Defects

If in fact the object of the arrangement was to insure more intelligent decisions in market transactions, it had a serious defect. Buyers did not in fact have equal access to information which the sellers regularly received. It may serve at law to say that sellers did not try to bar them from it; but those interested in the economic, not the legal, aspect of the arrangement may appropriately point out that as a practical matter buyers' access to the details of the market facts which Baxter assembled, compiled, and distributed to tag makers was nominal, not real. For a while Baxter made his compilations available in Dun & Bradstreet's twelve regional offices. After this practice was discontinued, the tag makers on the advice of institute counsel followed Dennison's and Reyburn's practice of stamping each invoice with the following notation: "In common with most tag manufacturers, we file up-to-date records of tag prices with Frank H. Baxter Associates, 370 Lexington Avenue, New York City, where they are open for inspection."²⁸²

Tag buyers also had the privilege of subscribing to the service at cost and one tag jobber did in fact subscribe. Buyers generally did not; buying in small quantities as they did, they could not afford either to subscribe

²⁸¹ The court of appeals found that price lists might remain unchanged for weeks and even months. The Commission's trial examiner found that list prices "on numerous classes of products" indicated that "filings on a preponderant number of items remained unchanged with scattering variations from six months to one year between August 24, 1939, to August 27, 1940," and gave examples. Trial Examiner's Report on the Evidence, p. 36, *ibid*.

I am not convinced that the institute's program affected the stability of list prices, even though they apparently remained unchanged for long periods; but if it tended to reduce price-cutting, it thereby tended to make realized prices more stable. On the question of stability, counsel for the tag makers introduced in evidence the price lists of the largest producer of tags for a twelve-year period before the signing of the first tag agreement (Respondents' Exhibits 373-79) and contended: "These lists show that changes in price lists before the alleged conspiracy were actually less frequent than during the period of the alleged conspiracy." Brief for Petitioners, p. 48, *Tag Manufacturers Institute v. Federal Trade Commission*, 174 F. 2d 452 (C.A. 1st, 1949). The significant factor is not the stability of the price lists but the stability of realized prices. Moreover, as compared with the depressed 1930's, the prosperous 1920's are likely to have contributed to stable prices.

²⁸² Quite obviously the court of appeals felt that buyers, who did not contribute to the compilation of the data, should be content with whatever terms and conditions the buyers might lay down for their accessibility. "We are clearly of the opinion that if the reporting agreement is otherwise unobjectionable, it cannot be said to have become illegal for failure of the Subscribers to make the information generally available. Customers are notified on each invoice that 'up-to-date records of tag prices' are open for inspection at Baxter's New York office. If a customer living outside New York City has any curiosity in the matter, he can use the mails. . . ." *Tag Manufacturers Institute v. Federal Trade Commission*, 174 F. 452, 462-63 (C.A. 1st, 1949).

or to consult the compilations in Baxter's office. To protect their interests they did not need all the information required by the sellers. All they needed to know was the price at which tags were sold both at list and off-list. For intelligent decision-making on both sides of the market buyers needed this information as much as sellers did and if they got it in the same detail that sellers did, I am confident that tags would generally have sold for less. I realize that tag makers are unlikely to view favorably a suggestion that each of them report to all customers every off-list sale (i.e., price cut) that they make. If the courts were to require dissemination to buyers of information on all off-list sales, identifying the price cut—in short, supplying the identical information to all tag buyers that tag sellers got—as a condition for continuing their price-reporting activities, I suspect they would abandon them. And without the courts' requiring it, I suspect that they would regard a suggestion that they do so as a whimsical idea of an ivory-towered academician.

But the concept of workable competition is a product of the theorist just as is the concept of pure competition. And it is a part of the theory that, lacking all of the characteristics of perfect competition, a market may be more workably competitive if some imperfections which might be removed are retained.²⁸³ Applying this doctrine to the tag market, a reasonable conclusion may be that if it is not practicable to provide buyers as well as sellers with all available information on past prices, it will restrain, not promote, competition to furnish such information to sellers. Compulsory reporting to tag makers, under penalty of "liquidated damages," of all deviations from a filed price list without reporting such information to tag buyers, may push an imperfectly competitive market toward the cartel model and away from the competitive model. I believe that it does.

The court of appeals looked at it differently, resting its approval of the institute's program on the fact that the Federal Trade Commission had not proved a price-fixing agreement, on the judicial precedents upholding the exchange of trade statistics where not a part of such an agreement, and on its characterization of the tag makers' price lists as "pretty much public property" and of their obligation to report off-list sales as "no more than the reporting of past transactions."²⁸⁴ The court's reliance on precedent and its failure to consider the economic implications, pointed out above, of reporting individual seller's off-list sales, would seem to disqualify this decision as a "rule of reason" case.²⁸⁵

²⁸³ Clark, *Toward a Concept of Workable Competition*, 30 *Am. Econ. Rev.* 241, 242 (1940).

²⁸⁴ *Tag Manufacturers Institute v. Federal Trade Commission*, 174 F. 2d 452, 463 (C.A. 1st, 1949).

²⁸⁵ But Oppenheim so classifies it. Oppenheim, *op. cit. supra* note 2, at 1151 n. 21.

HAVE THE COURTS AND THE COMMISSION UNDERMINED
FAITH IN THE TRADE ASSOCIATION?

One must look to other than these leading cases to justify Oppenheim's gloomy observation that "trade association executives and their legal counsel have ample ground for contending that the subtleties and refinements of the rules of evidence and burden of proof, manifested in the broadening of the implied conspiracy doctrine through per se violation rules, have shaken the foundation of trade associations to an alarming degree."²⁸⁶ Fortunately Oppenheim has suggested a place to look. It is in the cases involving basing-point pricing systems²⁸⁷ that the doctrine of implied conspiracy, or as the Federal Trade Commission has dubbed it, "conscious parallelism of action," has had its fullest development. What the Federal Trade Commission has found in these cases and what it has said about them may justify the inference that the Commission believes that, lacking conspiracy, basing-point pricing will not be systematically followed by an industry, and that if followed systematically it lessens competition. And some students believe that the Commission was endeavoring to develop principles and precedents under which it would eventually strike down delivered pricing per se.²⁸⁸

²⁸⁶ *Ibid.*, at 1173.

²⁸⁷ *Ibid.*, at 1166.

²⁸⁸ In the Rigid Steel Conduit Association proceeding the Commission went further than in any previous case in trying to ban individual participation in industry-wide systematic basing-point pricing, charging that each respondent, by individual use of a basing-point system, which the Commission had found to restrain competition, while knowing that every other conduit maker was also using it, engaged in an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act. *Rigid Steel Conduit Association*, 38 F.T.C. 534 (1944). The Court of Appeals affirmed, stressing the existence in the record of "direct proof of conspiracy" but, on the strength of the Supreme Court's opinion in *Federal Trade Commission v. Cement Institute*, 333 U.S. 683 (1948), refusing to set aside the Commission's order directed at individual use of the basing-point pricing method as followed in the rigid steel conduit industry. *Triangle Conduit & Cable Co. v. Federal Trade Commission*, 168 F. 2d 175, 180 (C.A. 7th, 1948). The Supreme Court affirmed by a 4 to 4 vote. *Clayton Mark & Co. v. Federal Trade Commission*, 336 U.S. 956 (1949). Other cases involving actual conspiracy but containing dicta which lend support to the implied conspiracy doctrine are *United States Maltsters Ass'n v. Federal Trade Commission*, 152 F. 2d 161 (C.A. 7th, 1945); *Milk and Ice Cream Can Institute v. Federal Trade Commission*, 152 F. 2d 478 (C.A. 7th, 1946); *Fort Howard Paper Co. v. Federal Trade Commission*, 156 F. 2d 899 (C.A. 7th, 1946); and *Allied Paper Mills v. Federal Trade Commission*, 168 F. 2d 600 (C.A. 7th, 1948), cert. denied, 336 U.S. 918 (1949). Circumstantial evidence of conspiracy was abundant but less direct and specific in *Bond Crown & Cork Co. v. Federal Trade Commission*, 176 F. 2d 974 (C.A. 4th, 1949). See Herbert, *Delivered Pricing as Conspiracy and as Discrimination: The Legal Status*, 15 *Law & Contemp. Prob.* 181 (1950); Kittelle and Lamb, *The Implied Conspiracy Doctrine and Delivered Pricing*, 15 *Law & Contemp. Prob.* 227 (1950); Stocking, *The Economics of Basing Point Pricing*, 15 *Law & Contemp. Prob.* 158 (1950); Stocking, *The Law on Basing Point Pricing: Confusion or Competition*, 2 *J. Pub. Law* 1 (1953); Wright, *Collusion and Parallel Action in Delivered Price Systems*, 37 *Geo. L. J.* 201 (1949).

But it never did so and recent developments suggest that it is unlikely to do so within the foreseeable future. In its statement of policy toward geographic pricing issued for staff guidance on October 12, 1948, the Commission laid down the per se rule that *conspiracy* to use any delivered-pricing system is unlawful. While recognizing that identical pricing is not alone sufficient to establish conspiracy, it expressed the conviction that the sustained use of rigid, complex, basing-point pricing systems affords substantial but not necessarily conclusive evidence of conspiracy. However, in the *Cement Institute* hearing it received 40,000 pages of evidence and 50,000 exhibits in an effort to determine whether or not cement makers had in fact conspired to use a basing-point pricing system. It found that they had,²⁸⁹ but the record does not indicate that defendants were inhibited or restricted in their effort to prove their innocence.

In settling by consent its case against the steel producers, the Commission specifically sanctioned delivered pricing even where it involved freight absorption "when innocently and independently pursued, *regularly* or otherwise, with the result of promoting competition."²⁹⁰ And steel producers once more are absorbing freight to get into remote markets.²⁹¹ The Commission rejected "uniformity of prices or any element thereof of two or more sellers at any destination or destinations alone and without more as showing a violation of law."²⁹² This appears to be a retreat from the per se principle.²⁹³

²⁸⁹ *Cement Institute*, 37 F.T.C. 87 (1943). See note 148 *supra*. On appeal counsel for the institute argued that the Commission had not established conspiracy and the court of appeals set aside the Commission's order. *Aetna Portland Cement Co. v. Federal Trade Commission*, 147 F. 2d 533 (1946). The Supreme Court sustained the Commission. *Federal Trade Commission v. Cement Institute*, 333 U.S. 683 (1948).

²⁹⁰ *American Iron and Steel Institute*, 48 F.T.C. 123, 154 (1951) (emphasis supplied).

²⁹¹ Last fall United States Steel Corporation announced it would absorb freight to meet competition but would continue to quote f.o.b. prices or, when customers requested them, delivered prices that included full transportation charges. Benjamin Fairless, chairman of the corporation's board of directors, emphasized that the "revised sales policy . . . does not constitute a return to the multiple basing point" pricing system. *Wall Street Journal*, p. 1, col. 2 (October 1, 1953). The following day Jones & Laughlin, National Steel, and several smaller companies announced a similar policy. *Wall Street Journal*, p. 1, col. 2 (October 2, 1953). On November 30, 1953, Republic Steel announced a "simplified pricing system under which it will quote nothing but delivered prices" for hot rolled carbon bars. It hoped to bring its other products under this system in the future. *Wall Street Journal*, p. 1, col. 2 (November 30, 1953).

²⁹² *American Iron and Steel Institute*, 48 F.T.C., 123, 154 (1951).

²⁹³ The Commission of 1951, before the 1952 elections brought a change in national administration, was speaking. Statements by the new heads of the Antitrust Division and the Federal Trade Commission express their intention to take a "common sense" approach to the problems of competition and monopoly. On June 25, 1953, Edward F. Howrey, Chairman of the Commission, stated that under his administration the Commission would concentrate on "the prevention, rather than the cure, of diseased business conditions," and that its stress would be on "compliance, not punishment." *N.Y. Times*, § 1, p. 26, cols. 3, 4 (June 25,

Courts Apply Both Per Se Principle and Rule of Reason

The courts have applied both the rule of reason and the per se principle in the trade association cases, but the per se principle has been applied only to the legality of conspiracies to fix prices, while the rule of reason has permitted broad latitude in the presentation and analysis of evidence. Defendants not only have had great freedom in marshalling facts and opinions, designed to show the beneficial nature of their statistical activities, but they have had the help of economists who have passed expert judgment on them. In short, they have had their day in court.²⁹⁴

It is important to note that the delivered-pricing cases were not primarily trade association cases.²⁹⁵ Apparently the Commission was trying in these cases to strike down an instrument which it believed businessmen were using to make competition less effective. True, businessmen had resorted to their trade associations for help in wielding the instrument, but the legitimacy of open price-reporting was not a major issue in any of these cases and in some it was no issue at all. Nothing in the basing-point pricing cases warrants pessimism by businessmen about their right to compile and distribute trade statistics to sellers and buyers alike as an aid to informed decision-making—a prerequisite to effective competition.

Trade Association Membership Has Increased

Available statistics on the trade association movement do not justify Oppenheim's observation that "[t]rade association membership . . . has not only been discouraged, but the existing membership is so constantly confronted with the threat of antitrust that membership has become a

1953). Judge Stanley N. Barnes, Assistant Attorney General in charge of the Antitrust Division, has declared that his bureau will not be used as "an agency for the promulgation of political or sociological doctrines or belief." N.Y. Times, § 2, p. 25, col. 4 (August 28, 1953).

²⁹⁴ The courts have persistently refrained from applying to trade association activities the rigid doctrine laid down in the Socony-Vacuum price-fixing case, where the Supreme Court said: "Any combination which *tampers* with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or *stabilized* prices they would be directly interfering with the free play of market forces. The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940) (emphasis supplied).

²⁹⁵ In the Glucose cases the Commission proceeded against eight respondents separately, charging among other things that the practice of selling glucose at delivered prices based on Chicago resulted in price discrimination among the respondent's customers which injured competition and violated Section 2 of the Clayton Act as amended by the Robinson-Patman Act. *A. E. Staley Mfg. Co.*, 34 F.T.C. 1362 (1942); *Clinton Co.*, 34 F.T.C. 879 (1942); *Corn Products Refining Co.*, 34 F.T.C. 850 (1942); *The Hubinger Co.*, 32 F.T.C. 1116 (1941); *Union Starch & Refining Co.*, 32 F.T.C. 60 (1940); *Penick & Ford*, 31 F.T.C. 1494 (1940); *Anheuser-Busch, Inc.*, 31 F.T.C. 986 (1940); *Piel Bros. Starch Co.*, 30 F.T.C. 1384 (1939).

ticket to decrees of antitrust violation."²⁹⁶ The latest directory on trade associations issued by the Department of Commerce indicates that as of 1949 there were 1,500 national trade associations in the United States with a paid staff of approximately 16,000 persons and with a gross membership of over 1,000,000 firms, plus 300 other national trade associations in which businessmen constituted most of the membership. Including local associations and branch chapters, there were 12,000 trade associations.²⁹⁷ The rate of growth in trade association membership can be gauged by the fact that the preceding directory published by the Department of Commerce stated that as of 1941 there were 1,900 national trade associations in the country, with a gross membership of over 600,000 firms, plus 300 other national trade associations to which businessmen belonged for special purposes, and that local, interstate, and national trade associations totalled 8,000.²⁹⁸ Apparently trade associations grew stronger between 1942 and 1948—the period in which most of the “implied conspiracy” cases were decided. Approximately 120 trade associations with 15 or more paid employees added a total of 1,500 employees to their staffs in those years, an increase of 27 per cent; and membership in those trade associations increased by 30 per cent to a total of over 450,000 firms. In 1949, of the 1,510 national trade associations which were active, 210 had a staff of 15 and over.²⁹⁹

Some Activities “Concededly Laudable”

The trade association cases, far from indicating that membership in trade associations is a ticket for an antitrust proceeding, should give businessmen increasing confidence in the legitimacy of the cooperative collection, compilation, and dissemination of trade statistics which contribute to enlightened competition by acquainting both buyers and sellers with the basic facts that shape market forces. The principles laid down in the *Maple Flooring* case still govern.³⁰⁰ Nor should the cases arouse uneasiness about the legality of the many other socially salutary activities in which trade associations engage. None of the practices listed as “concededly laudable” by Oppenheim—“[c]ooperative research on product innovation, production, and distribution efficiency, market and merchandising sur-

²⁹⁶ Oppenheim, op. cit. supra note 2, at 1173.

²⁹⁷ National Associations of the United States viii (U.S. Dept. of Commerce, 1949).

²⁹⁸ Trade and Professional Associations of the United States 1, 3 (U.S. Dept. of Commerce, 1942).

²⁹⁹ National Associations of the United States ix (U.S. Dept. of Commerce, 1949).

³⁰⁰ See page 551 supra.

veys, cooperative advertising, recommended product and quality standards, publication of trade journals, circulation of information concerning government activities and conduct of relations with government, representation of the industry or trade in dealing with labor and consumer groups"—seem in danger.³⁰¹

What Businessmen Say about Trade Associations

Little evidence in what businessmen have said about trade association activities or in what they have done about them warrants Oppenheim's dismal observation about trade association membership. Earl Constantine, president of the National Association of Hosiery Manufacturers, speaking before the Trade and Industry Law Institute in New York on October 11, 1949, was more cheerful about this matter. He observed that "[d]uring the last 25 years the establishment and maintenance of industry-wide trade associations has spread with great rapidity, and there is hardly an industry or business in the United States today which does not maintain a trade association."³⁰²

He recognized, of course, that trade associations run the risk of court condemnation if they indulge in price-stabilization activities and about this he said:

Most trade associations abstain from conducting any statistical surveys which deal with price, or which can affect or tend to standardize the price structure of the industry. I happen to be of those who believe in such abstention and who have found by experience that *without such activities* a trade association can still prove to be a highly useful instrument to the industry, to the market it serves and to the public.³⁰³

A competent lawyer with great experience in these matters has pointed out that the statistical activities of trade associations, even though designed to affect the market, have never been condemned in isolation. He observed:

Statistical data of different kinds are collected and distributed by trade associations for some purpose and their use may produce some effect on trade. We start with that proposition because we must never suppose that the collection and dissemination of data is an idle exercise. Members of a particular industry pay for a statistical service because it serves some useful commercial purpose in that industry. . . . [T]he legality of this trade association activity has never been judged in court as an activity standing

³⁰¹ Oppenheim, *op. cit.* supra note 2, at 1171-72. In truth, Oppenheim cites a public address by a former Assistant Attorney General in charge of the Antitrust Division in support of his characterization of these activities. Berge, *Trade Associations and the Antitrust Laws*, address before the Washington Trade Association Executives, May 16, 1945.

³⁰² Constantine, "The Purpose and Nature of Trade Association Statistics," No. 4, *Current Business Studies*, Trade and Industry Law Institute 3 (1949).

³⁰³ *Ibid.*, at 8 (emphasis supplied).

apart. . . . What might appear to be squarely within the borders of legality under a Supreme Court decision may fall because it is but a part—and, standing alone, a lawful part—of an illegal whole. It is all too familiar law today that a lawful act becomes unlawful when done in furtherance of an unlawful end.³⁰⁴

Price-fixing is still per se unlawful.

Charles T. Lawson, vice-president in charge of sales of the Nash-Kelvinator Corporation, speaking before the same group, gave a forthright and illuminating account—apparently with no fear of governmental intervention—of the role which the statistical services of the National Electrical Manufacturers Association had played in his company's business planning. He averred that the statistical services of the association had developed and expanded over a twenty-year period "with increasing confidence and cooperation."³⁰⁵

The growth of trade association membership would seem to justify broadening this generalization.

Courts Have Approved Cooperative Dissemination of Market Information

The courts have indeed recognized that business judgments on production and consumption policies, on selling and buying, to be intelligent must be informed, and they have therefore placed their approval on the cooperative dissemination of market information designed to educate buyers and sellers alike. Unfortunately they have not always stopped here, but have at times approved arrangements clearly designed to promote the interests of producers at the expense of consumers. If the standards of workable competition laid down in this study are appropriate guides for judicial policy, the courts have already gone too far in approving control schemes. What is needed in passing judgment on the legality of open price-reporting systems is not a more liberal interpretation of the rule of reason and a less rigid application of the principle of workable competition than this study sets up, but a clearer recognition of the role which price plays in a free-enterprise economy. If the aim of policy is to make competition more effective by supplying decision-makers with market information essential to an enlightened interpretation of market forces, buyers and sellers must be treated alike, and open price-reporting programs must not be used as elements in a more complex arrangement designed to restrict competition. Open price-reporting systems defective in these respects transgress the principles of effective or workable competition.

³⁰⁴ McAllister, "Legal Aspects of Trade Association Statistics," *ibid.*, at 19.

³⁰⁵ Lawson, "Benefits Kelvinator Receives from Trade Association Statistics," *ibid.*, at 13.

Other Notions of Workable Competition

Some of the advocates of antitrust revision have a different conception of workable competition than that expounded in this study. They are not always precise in their statement of it, but it is pretty clear from what some of them have said that they lack faith in competition as a rationer of goods, an allocator of resources, and a distributor of income. They do not propose to discard competition as a symbol, but they would let businessmen collectively control market behavior in order to make it better serve the public interest. According to this view, the workability of arrangements that involve tampering with the market should be judged not by their effect on competition, but by their effect on public welfare. As Oppenheim has expressed it, "[i]n particular factual situations, evidence of legal, economic, and social justifications" should be "weighed under close judicial scrutiny to arrive at a determination of whether the restrictions are reasonable or unreasonable when measured against the effects upon competition."³⁰⁶

Other advocates of change in the antitrust statutes have been equally vague about the standards by which the effectiveness of competition is to be judged. Blackwell Smith has this to say about the application of the principle to trade association activities: "Public policy should be in favor of such joint or group activities in so far as they advance tendencies toward more and better goods and services for more people in proportion to human efforts, and tend to provide better tools for Effective Competition, including information."³⁰⁷ No one can object to this in principle, but who is to say what it means in practice?

Conclusions

If the good in trade association activity lies in its restriction on competition, how much good should associations be encouraged to do? That is to say, how much restriction on competition is socially desirable? How much restriction on competition leaves it workable? I don't know. Nor do other economists. But if businessmen are told that concerted action *may* by restricting competition promote the general welfare, they are entitled to know the appropriate limits of such restrictions. If they are told that concerted action to restrict competition is unlawful, they proceed collectively at their own risk. Outlawing concerted action to restrict competition is a far more certain guide to business behavior than setting up the vague and debatable principle of workable competition.

³⁰⁶ Oppenheim, *op. cit.* supra note 2, at 1160.

³⁰⁷ Smith, *op. cit.* supra note 2, at 419.

The chief objection to a proposal to liberalize the law on open price-reporting activities is its ultimate, not its immediate, consequences. It is unlikely that the market-control activities of either the Maple Flooring Manufacturers Association or the Tag Manufacturers Institute, judged separately, had any serious effect on the economy as a whole. The maple-flooring association probably contributed to high prices in the short run but apparently exerted little influence on long-run prices. The tag institute's program has probably resulted in higher prices for tags than would have prevailed without it. Both arrangements probably contributed to a redistribution of income in favor of sellers as against buyers. But tag purchases, at any rate, constitute a trivial part of ultimate consumer expenditures, and the benefits of lower tag prices to consumers would have been too diffuse for measurement.

General resort throughout the whole of industry to trade association activities like those of the maple-flooring association and the tag institute would be likely to exert a significant, though not precisely measurable, influence on the economy. This influence would, I believe, be undesirable in two ways. In normal times it would retard economic readjustments necessitated by an uneconomic distribution of productive resources. In bad times, it might well retard recovery directly by adversely affecting income distribution³⁰⁸ and indirectly by reducing the effectiveness of federally administered fiscal and monetary policies.

Moreover, if the nation is to rely on "free private enterprise" to guide economic processes, "workable competition" applied to concerted action is a dangerous principle. In a democracy, with authority should go responsibility. If associated activity among businessmen is to be substituted for the forces of the market in guiding economic processes, decisions on how far the principle should be carried before it clashes with the public interest should be made by commissions of experts responsible to all the people rather than by business groups answerable to the people only when they transgress the law by carrying their associated activities *too far*.³⁰⁹ This

³⁰⁸ This is a complex and debatable issue. For an exposition of my point of view on it, see Stocking and Watkins, *Cartels or Competition?* c. 7 (1948). For a contrary view see Boulding, *In Defense of Monopoly*, 59 Q. J. Econ. 524 (1945); Schumpeter, *op. cit. supra* note 2, c. VIII, especially at 93-94. See also Bergson, *Price Flexibility and the Level of Income*, 25 Rev. Econ. Stat. 2 (1943); Neal, *Industrial Concentration and Price Inflexibility*, American Council on Public Affairs, c. 9 (1942).

³⁰⁹ The British have avoided the legal dilemmas which arise when the standard of "public interest" is substituted for the standard of free competition by creating just such a commission of experts and not requiring judicial review of its findings. The Monopolies and Restrictive Practices (Inquiry and Control) Act, adopted July 30, 1948, provides that the Board of Trade may refer restrictive trade practices to a permanent commission for investigation to determine "whether any such things as are specified in the reference . . . operate or may be ex-

might well lead to a type of control ultimately destructive of private enterprise. In short, if the aim of public policy is to perpetuate a free-enterprise economy, it should outlaw associated activity designed to restrict competition. Where this is its object, failure to achieve it is not a very good reason for permitting business rivals to work together.

This does not mean that trade associations are or ought to be per se unlawful. They may and do perform many useful activities, not the least of which is the dissemination of basic market information. The courts have done fairly well in telling them what they can lawfully do. From the decided cases and existing law, it is clear that they will not be molested so long as they do not deliberately and collectively tamper with market forces to restrict competition. If we should adopt a policy whereby concerted action among business rivals is to be judged not by its effect upon competition but by its effect on the public welfare, we will have indeed launched on a sea of doubt; and, while our ultimate destination may now be obscure, it is a good guess that we will be drifting toward the haven of a collective society where security is bought at the expense of freedom and economy.

pected to operate against the public interest." 11 & 12 Geo. VI, c. 66, § 6(2) (1948). The criteria set up for the commission's guidance are extremely vague and not unlike some of those suggested for determining the existence of workable competition: (a) the most efficient production and distribution of goods of the type and quality, in the volume, and at a price that will best serve home and overseas markets; (b) an organization of industry that will encourage efficiency and new enterprise; (c) full employment and economical distribution of men, materials, and industrial capacity; and (d) development of technology, expansion of existing markets, and the opening up of new markets. *Ibid.* at § 14. But the British, unlike Americans, are not committed to a free-enterprise economy.

FULL FAITH AND CREDIT TO FOREIGN LAND DECREES*

BRAINERD CURRIE†

I

IT IS NOT EASY TO JUSTIFY the appearance, at this late date, of another paper on the effect to be given foreign land decrees. Legal analysis has made substantial progress since Langdell wrote, in 1883, that "a decree in chancery has not in itself (*i.e.*, independently of what may be done under it) any legal operation whatever. . . ."¹ Nearly thirty-five years ago, Professor Willard Barbour, of the University of Michigan, published a classic article on this precise subject,² in which he concluded that [i]f the defendant is personally before a court of equity, the court has power to order him to convey foreign land. Such a decree is an effective judgment and determines conclusively his obligation to convey and this obligation remains binding upon the person of the defendant wherever found. Such a decree ought to be entitled to full faith and credit at the situs of the land. . . .³

Four years earlier, Professor Walter Wheeler Cook, of the University of Chicago, had prepared the way for such a conclusion by his critical analysis of the maxim that equity acts in personam.⁴ Shortly after the appearance of Professor Barbour's article, the subject was fully reconsidered by Professor (now Judge) Herbert F. Goodrich,⁵ and by Professor Ernest G. Lorenzen,⁶ with results which confirmed and fortified Professor Barbour's thesis. Given so much intensive study of the subject by competent scholars, and such a degree of unanimity among them, one may justly inquire what purpose is to be served by further discussion.

* This paper was prepared as the basis for a shorter oral presentation of the subject before the Round Table on Equity at the Annual Meeting of the Association of American Law Schools, held at Chicago, December 28-30, 1953.

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¹ Langdell, *A Summary of Equity Pleading* 35 n. 4 (at p. 37) (2d ed., 1883).

² Barbour, *The Extra-Territorial Effect of the Equitable Decree*, 17 Mich. L. Rev. 527 (1919).

³ *Ibid.*, at 532-33.

⁴ Cook, *The Powers of Courts of Equity*, 15 Col. L. Rev. 37, 106, 228 (1915).

⁵ Goodrich, *Enforcement of a Foreign Equitable Decree*, 5 Iowa L. Bull. 230 (1920).

⁶ Lorenzen, *Application of Full Faith and Credit Clause to Equitable Decrees for the Conveyance of Foreign Land*, 34 Yale L. J. 591 (1925). The foundation of this article was an address delivered before the Round Table on Public Law at the 1924 meeting of the Association of American Law Schools.

The answer lies in the fact that, a generation after it was advanced, Professor Barbour's thesis stands neither accepted nor convincingly refuted. It was not received without criticism when it first appeared,⁷ and since that time divers reasons have been advanced by various authorities for rejecting it in whole or in part. The decision in *Fall v. Eastin*⁸ still stands as the presumptively definitive negation of the thesis so far as full faith and credit is concerned. State courts still, from time to time, reject with varying emotions the plea that a degree of finality should be accorded foreign decrees relating to local land.⁹ The courts have, in fact, generally ignored Professor Barbour and the other commentators. Nor is this simply another instance of the futility which was once a notorious attribute of academic attempts to influence the course of legal development;¹⁰ the most recent law review article on this subject cites not one of the basic studies referred to in the preceding paragraph.¹¹

These circumstances suggest not only a justification for one more inquiry into the subject, but also the limits of such an inquiry. Surely it should not be necessary to reiterate the details of the case which was made a generation ago. But one may be concerned with the efficacy of legal scholarship as well as with that of judgments. It is disconcerting to realize that one of the better products of our system of legal criticism can fall on deaf ears, or be turned aside by scattered and diverse reservations. It seems worth while, therefore, to recall briefly the essentials of Professor Barbour's argument; to ask whether there was any weakness in that argument which would account for the generally cool reception which it has been accorded; to see whether anything can be added to the force of the argument; to re-examine the specific objections which have been urged against it; and to observe the tendencies which are discoverable in decisions of the state courts. If this can be done without adding to the existing confusion, some lawyer may some day be assisted in the preparation of a petition for certiorari which will lead to a really definitive disposition of the question.

⁷ See Pound, *The Progress of the Law, 1918-1919: Equity*, 33 Harv. L. Rev. 420, 423-25 (1920).

⁸ 215 U.S. 1 (1909).

⁹ E.g., *McRary v. McRary*, 228 N.C. 714, 47 S.E. 27 (1948), and *Clouse v. Clouse*, 185 Tenn. 666, 207 S.W. 2d 576 (1948).

¹⁰ Cf. Cardozo, *Introduction to Selected Readings on the Law of Contracts* (Association of American Law Schools, 1931).

¹¹ Schwartz, *Fall v. Eastin Revisited: Extraterritorial Effect of Foreign Land Decrees*, 54 Dick. L. Rev. 293 (1950).

II

Barbour begins, somewhat in the tradition of Cook, by paying his respects to the circumscribing effect of the maxim that equity acts in personam. "When a judge sitting in equity today declares that a foreign decree ordering the conveyance of land creates no obligation but merely a duty owed by the defendant to the court, he is assuming that equity has made no progress since the time of Coke."¹² Then, having in mind the fact that the full faith and credit clause does not foreclose an inquiry into the jurisdiction of the issuing court, he turns his attention to the meaning of "jurisdiction" as applied to courts of equity. Given a court which has been invested with general jurisdiction by its sovereign, the question of jurisdiction in a particular instance becomes one of the effectiveness of the judgment. Effectiveness means *de facto* power to produce the desired result—not merely in terms of power to compel the defendant to perform an act, but also in terms of the consequences which the appropriate foreign sovereign will attach to the act when performed.¹³

This is a strangely modest conception, seemingly ill-suited to the breadth of the thesis.¹⁴ It may be doubted that the author would have accepted the proposition, if squarely confronted with it, that a state can escape the compulsion of the full faith and credit clause with respect to the decree of a sister state by the simple expedient of altering its rule on the validity of a deed executed pursuant to the order of a foreign court. Just as the jurisdiction to render the decree cannot be destroyed by the defendant's contumacy or by his evasion of process of enforcement,¹⁵ so it cannot be destroyed, under a constitutional system of full faith and credit, by another state's simple determination not to recognize it.¹⁶ The jurisdiction rests on the fact that the defendant has been duly summoned and given a fair opportunity to make his defense; the conclusiveness of the decree flows, as Professor Barbour argues, from the fact that it is a final determination of his obligation—an obligation which can scarcely be ex-

¹² Barbour, *op. cit.* *supra* note 2, at 528.

¹³ *Ibid.*, at 530-32.

¹⁴ "If the law of the country where the land is situate will not permit nor enable the defendant to perform the order of the court, no decree should be rendered; indeed it is doubtful if jurisdiction exists. But if the law of the situs of the land recognizes a deed made under compulsion of a decree as a valid conveyance, the decree is an effective judgment and jurisdiction unquestionably exists." *Ibid.*, at 532.

¹⁵ *Ibid.*

¹⁶ The American Law Institute affirms the jurisdiction of a court to require a conveyance of foreign land without any reservations based on the attitude of the state of situs. *Rest., Conflict of Laws* § 97, comment a (1934).

tinguished by nonperformance.¹⁷ This is the core of the argument. The author perhaps felt that his modest conception of jurisdiction was safe enough in view of the universal recognition of deeds executed under the compulsion of foreign courts.

Again he makes a substantial concession to critics of his thesis when he says that a decree relating to foreign land "may perhaps be attacked upon the ground that its enforcement would violate some fundamental policy of the state where the land is situate."¹⁸ The cases both before and since 1919 cast doubt on the necessity of this concession where the full faith and credit clause is applicable. It seems sufficient to say at this point that, under that clause, the substantiality of a state's policy objections to the recognition of a sister state's judgment is a matter to be finally determined by the United States Supreme Court. At any rate, as Professor Barbour notes, such a policy should not be confused with jurisdiction.¹⁹ He might have made the same point precisely with respect to a hypothetical rule denying the validity of deeds executed under the compulsion of a foreign decree.

After analyzing five of the leading cases on the question—three of them tending to support his thesis²⁰ and two against him²¹—Professor Barbour turns to a consideration of the principal objections to treating the foreign decree as the basis for a new decree at the situs. The first, founded on the "notion" that an equity decree for the doing of an act cannot create a binding obligation, he characterizes as "the last survival of an old dogma which is today shorn of most of its force."²² Not only have the principles of *res judicata* been applied to domestic equity decrees; it is well established that a decree for money will support an action at law in another state; and the cases on foreign decrees for alimony show that this result is required by the full faith and credit clause.²³ Thus *some* equity decrees, at any rate, create obligations. The attempt to distinguish other decrees on the ground that they purport only to order the doing of an act must fail; it is based on mere form, and applies equally to decrees for the payment of money. Moreover, courts have no difficulty in recognizing the obligation

¹⁷ Barbour, *op. cit.* supra note 2, at 532.

¹⁸ *Ibid.*, at 533.

¹⁹ *Ibid.*

²⁰ *Burnley v. Stevenson*, 24 Ohio St. 474 (1873); *Dunlap v. Byers*, 110 Mich. 109, 67 N.E. 1067 (1896); *Mallette v. Scheerer*, 164 Wis. 415, 160 N.W. 182 (1916).

²¹ *Fall v. Eastin*, 215 U.S. 1 (1909); *Bullock v. Bullock*, 52 N.J. Eq. 561, 30 Atl. 676 (1894).

²² Barbour, *op. cit.* supra note 2, at 539.

²³ *Ibid.*, at 542.

of a decree other than one for the payment of money when domestic land is not involved. They freely order defendants to convey foreign land, with expressions of confidence that the court at the situs will or must treat the decree as conclusive; they respect foreign decrees enjoining the enforcement of domestic judgments; they enforce foreign decrees for the conveyance of land when the land is located elsewhere.²⁴ The inference is strong that the reason for withholding recognition lies not in the nature of the decree but in some conception of policy relating to local land.

A writer in the *Harvard Law Review*²⁵ who sounds remarkably like Professor Beale had performed the ingenious feat of reconciling *Burnley v. Stevenson* and *Dunlap v. Byers*, on the one hand, with *Bullock v. Bullock* and the Nebraska Supreme Court's decision in the *Fall* case²⁶ on the other. This was on the basis that the first two cases arose out of contract and partnership, while the other two were divorce cases, involving the division of property and security for alimony; and "if the decree is strictly *in personam* upon an antecedent obligation which is in issue, it is well settled that a decree is conclusive as to land lying in another state."²⁷ Professor Barbour's disposition of this interpretation is brief. He observes that it does violence to the decisions in *Burnley v. Stevenson* and *Dunlap v. Byers*²⁸ to explain them as proceeding on the original cause of action, since in each case the court believed it was enforcing the new obligation created by the decree. He adds that the distinction reduces to a mere play on words, since "[a] rule of evidence which makes a decree conclusive is in truth a rule of substantive law."²⁹ In view of the fact that the "antecedent obligation" requirement has caused a good deal of confusion in the discussions, it seems necessary at this point to interpolate a somewhat fuller consideration of its merits.

The most succinct formulation of the suggested distinction is that the foreign court in the contract and partnership cases "has attempted to create no new interest in the land, but rather . . . the decree is *in personam*

²⁴ *Ibid.*, at 543-44, citing among other cases *Dobson v. Pearce*, 12 N.Y. 156 (1854), and *Roblin v. Long*, 60 How. Pr. (N.Y.) 200 (1880).

²⁵ *Equitable Decree as a Cause of Action in Another State*, 21 Harv. L. Rev. 210 (1908).

²⁶ *Fall v. Fall*, 75 Neb. 120, 113 N.W. 175 (1907).

²⁷ 21 Harv. L. Rev. 210 (1908).

²⁸ Cited in note 20 *supra*.

²⁹ 17 Mich. L. Rev. 527, 545 (1919). This, perhaps, does not do full justice to the argument in support of the "antecedent obligation" requirement, since, according to that argument, the rule of evidence does not come into operation unless there is first a cause of action in which it can be applied. Cf. Cook, *The Powers of Courts of Equity*, 15 Col. L. Rev. 228, 245 n. 47 (1915).

to effectuate rights already existing by the law of the situs."³⁰ It is hard to know what emphasis is intended. All the decrees in question were "in personam," if any of them were. If the reference to the law of the situs means that the court which is asked to enforce the decree is free to inquire whether the foreign court correctly applied the law which was rightly applicable under the principles of conflict of laws, the position is obviously untenable as applied to money decrees, and no reason is apparent for treating other decrees differently. No principle of *res judicata* is more fundamental than that the conclusiveness of a judgment is not vitiated by errors committed by the rendering court.³¹ Just why a court with the defendant before it should have jurisdiction to *establish* (or "effectuate") an interest in foreign land based on an existing claim to the land as such, and not have jurisdiction to "create" an interest in the land in order to effectuate a personal right, it is not easy to understand. There is probably no instance in which jurisdiction has been conditioned by such a distinction.

In the final analysis, the suggested requirement of an "antecedent obligation" reduces to nothing more than the simple necessity that there be a remedy available in the state of the situs such that the plaintiff can invoke and rely on his foreign decree. The author of the suggestion laid stress on the necessity of a remedy as a reason for the requirement, and the matured view of Professor Beale confirms this interpretation.³² The thought was that since there is no procedure for suing on a judgment other than one for the payment of money, the plaintiff's only recourse is to sue on the original cause of action. If he can do that, the foreign decree will be treated as conclusive as to the issues; if there is no cause of action which the court at the situs will recognize, the decree is useless to him. "It is evidence, and evidence is useless without a cause of action."³³ Since the comment was written, there has come into general use a remedy which may well dispose of the objection—the declaratory judgment. But apart from this, it seems clear that a remedy has long been available, in the form of a bill to execute the decree, at least with respect to some decrees;³⁴ and if this is true, it

³⁰ 21 Harv. L. Rev. 210 (1908).

³¹ *Milliken v. Meyer*, 311 U.S. 457 (1940); *Fauntleroy v. Lum*, 210 U.S. 230 (1908).

³² 2 Beale, *Conflict of Laws* § 449.1 (1935). Cf. 1 *ibid.* § 97.10.

³³ 21 Harv. L. Rev. 210 (1908).

³⁴ An early dictum from the New Jersey court itself seems to concede the existence of a remedy: "The only effect of a foreign judgment is, that it entitles the plaintiff to a new decree, not to the process of the court of another state." *Davis v. Headley*, 22 N.J. Eq. 115, 121 (1871). And see *Cook*, *The Powers of Courts of Equity*, 15 Col. L. Rev. 228, 244 (1915): "[T]he truth seems to [be that] . . . such equitable actions in other jurisdictions may be brought on some

must follow that the objection that no *procedure*—no form of action—exists for enforcement must fail. It will not do, at this point, to go back to the conception that an antecedent obligation is a condition of jurisdiction in the foreign court, and use that conception as a test of the availability of a remedy on the decree. Professor Cook does us a disservice if he suggests such a course.³⁵ To say that an antecedent obligation is required because there is no remedy on the decree, and then to say that there is a remedy on the decree only where there is an antecedent obligation, because such an obligation is required, is to reason in a hopeless circle. There is no reason for such a limitation on the remedy. As Professor Cook maintains, there is nothing inherent in the nature of an equity decree for the doing of an act to prevent a court from treating it as giving rise to an equitable cause of action for specific performance.³⁶ The reason Professor Beale assigns for the nonexistence of a cause of action on the decree which orders the doing of an act is this: "If there were any action it seems to be in the court of equity; and a court of equity never opens its doors freely to foreign rights. . . . It cannot therefore blindly enforce the decree of another state. . . ."³⁷ A number of observations might be made on this reasoning.

though not on all decrees. . . . Wherever such relief seems necessary . . . it seems to be the law, as far as authorities can be found, that if the decree for the conveyance of land is based upon a contract, express trust, or other consensual relationship of the parties which gives rise, independently of the decree, to equitable interests for the enforcement of which the decree is entered, a bill in equity will lie in other jurisdictions upon the decree itself, if it has not been obeyed, as a substantive cause of action." The authorities cited in support of the proposition are not as satisfactory as might be wished. The strongest is *Roblin v. Long*, 60 How. Pr. (N.Y.) 200 (1880). Two of them are the very cases which the commentator in 21 Harv. L. Rev. 210 (1908) is attempting to explain as proceeding on the original cause of action [*Dunlap v. Byers*, 110 Mich. 109, 67 N.W. 1067 (1896), and *Burnley v. Stevenson*, 24 Ohio St. 474 (1873)]. *Vaught v. Meador*, 99 Va. 569, 39 S.E. 225 (1901), is an instance of optimistic prediction by the court rendering the judgment as to the reception which will be given it by the courts at the situs. But by the same token, these authorities do not establish that the proposition is limited to decrees based on consensual relations giving rise, independently of the decree, to equitable interests. At a later point in this paper I shall offer additional evidence of the availability of the bill to execute the decree.

³⁵ Cook, *op. cit.* supra note 34.

³⁶ Cook, *op. cit.* supra note 34, at 244. The limitation was perhaps suggested to Professor Cook by judicial enumerations of the situations in which it is appropriate for a court of equity to decree conveyance of foreign land, such as Chief Justice Marshall's well-known reference to cases "of fraud, of trust, or of contract." *Massie v. Watts*, 6 Cranch (U.S.) 148, 160 (1810). Such expressions, however, mean no more than that the court will not act unless the case is properly one for equitable cognizance. 1 Wharton, *Conflict of Laws* § 289a (3d ed., 1905); Goodrich, *Enforcement of a Foreign Equitable Decree*, 5 Iowa L. Bull. 230, 236 (1920); Goodrich, *Conflict of Laws* 217-18 (3d ed., 1949). They do not express a limitation on the jurisdiction of the court in the conflict of laws sense, and there is no reason why they should be taken as a limitation on the availability of a remedy on the decree.

³⁷ 2 Beale, *Conflict of Laws* § 449.1 (1935).

For one thing, the argument would apply equally to decrees ordering the doing of an act and to decrees for the payment of money; yet it is firmly established that a remedy is available on money decrees. For another, a constitutional command of full faith and credit gives a different connotation to the recognition of decrees of sister states from that suggested by such words as "blindly," however the situation may have appeared to an English chancellor. But apart from such observations, the point is that the suggested reason for the nonexistence of a remedy on the decree has nothing to do with whether the decree is founded on an antecedent consensual relation or not; the force of the reason applies equally to decrees founded on "fraud, or trust, or contract" and to decrees dividing the property of divorced spouses. The necessary conclusion seems to be that, if there was a procedure known to the law whereby a bill could be brought for the execution of a foreign decree, it must have been generally available; and some reason must be found for refusing to give relief on the foreign decree other than the lack of a suitable form of action.

If it is difficult to find justification in legal history or theory for the position that the existence of an antecedent obligation is determinative of the question of recognition, it is impossible to find it in pragmatic considerations. The chief practical effect of such a requirement would be to withhold recognition from decrees entered in divorce proceedings; but those are among the very proceedings in which recognition is most imperative. In the ordinary case of fraud, trust, or contract the plaintiff can bring his action at the situs of the land, though he is not required to undergo the possible inconvenience of doing so. But since an action for divorce must be brought at the domicile of one of the parties, the rights of the spouses in land located elsewhere must be adjudicated away from the situs if multiplicity of litigation is to be avoided. Thus the effect of the suggested requirement would be to give recognition where it is needed least and to withhold it where it is needed most.³⁸

Professor Barbour's final argument with respect to this entire line of objection to the recognition of foreign decrees is that the same considera-

³⁸ Assuming for the moment the soundness of the suggestion that an "antecedent obligation" is required, it is interesting to consider how large a measure of support is thus given to the Barbour thesis. If the decree is to be conclusive when it is based on such an obligation, and if it is conceded, as it must be, that the decree cannot be collaterally attacked on the ground that the obligation did not exist by the law of the situs, the problem is largely solved, and solved in favor of finality and conclusiveness. If so much is conceded, there can be little left in the objection that for policy reasons or "in the nature of things" the courts of the situs must retain exclusive control of rights in land. A foreign court decreeing specific performance of an alleged oral contract for the sale of local land, against all manner of defenses on the merits, has at least as much opportunity of interfering with local policy as has a foreign court dividing the property of husband and wife in a divorce decree.

tions of policy which underlie the doctrines of *res judicata* as applied to judgments at law apply with undiminished force to decrees in equity, and should produce the same results. Concluding that the foreign decree does create an obligation, that there is a remedy on the decree, and that the underlying cause of action cannot be inquired into collaterally, he concludes that "[i]t is the anxious fear that the State may be deprived of control over its own land which leads to the denial of power in the foreign court. If this fear is not justifiable the last objection will be removed."³⁹ The discussion turns, therefore, to the second of the two principal objections.

Professor Barbour's treatment here is swift and powerful. He has no quarrel with the formulas, perennially reiterated in the cases, to the effect that real estate is exclusively subject to the laws and jurisdiction of the state in which it is located. They are truisms, expressing rules for the choice of governing law, or the fact of physical control, or the power to prescribe regulations, or the power to bind absent defendants. Such matters are not involved in the problem at hand. But the "mechanical iteration" of such statements, and "[n]ervous emphasis on the word 'title,'"⁴⁰ have led to the unwarranted deduction that no foreign court can apply the law of the situs to a state of facts and thereby determine a personal obligation. It is not contended that the foreign decree operates *ex proprio vigore* to affect title to domestic land, nor that the courts at the situs should issue process on the foreign decree; "all that is contended is that the courts of the situs should recognize such a decree as a final determination of a personal obligation to convey, an obligation analogous to that arising from a valid contract. It should be accepted as a valid cause of action in the jurisdiction of the situs, and if suit be brought upon it and personal jurisdiction obtained of the person bound, a new decree should be rendered. . . ."⁴¹ The question, then, is whether any sound policy of the situs state will be violated by acceptance of the foreign decree. Here Barbour delivers his coup de grâce, making the most of an idea which Cook had advanced with the tentativeness of footnote and question mark.⁴² Without

³⁹ Barbour, *op. cit. supra* note 2, at 547.

⁴⁰ *Ibid.*, at 548.

⁴¹ *Ibid.* In the qualifying clause, "if . . . personal jurisdiction [be] obtained of the person bound . . .," there appears to be another unnecessary concession. With *Hart v. Sansom*, 110 U.S. 151 (1884), out of the way (see Barbour, *op. cit. supra* note 2, at 537), it should be clear that the decree is enforceable at the situs on proper notice whether the court there has jurisdiction of the defendant or not. Cf. Goodrich, *Enforcement of a Foreign Equitable Decree*, 5 Iowa L. Bull. 230, 246 (1920).

⁴² Cook, *op. cit. supra* note 34, at 128-29, notes 56 and 57.

exception, the courts recognize the validity of a deed executed under the compulsion of a foreign decree. But if the decree did not deal rightfully and constitutionally with the title to the land it would be voidable for duress. Recognition of the deed necessarily involves acceptance of the decree. Whatever intrusion on the state's exclusive control is implied in the recognition of the decree is accomplished through the recognition of the deed. A policy so easily evaded, so dependent on the success of the defendant in eluding the enforcement process of the foreign court, is a formal, lifeless thing, and the truth must be that foreign judicial proceedings of this type pose no real threat to the legitimate interest of the situs state.

This argument stands unanswered. Before Professor Barbour's article appeared, a few courts had taken note of similar attempts to show the inconsistency of persistent refusal to recognize foreign decrees while recognizing the validity of deeds executed under their compulsion, and had weakly explained that when such a deed is recognized "it is the conveyance, not the decree, which affects the title to domestic land."⁴³ Nothing remained to be said along that line, however, after Professor Barbour's comment: "This artless explanation must excite eternal wonder."⁴⁴ So long as the argument remains unanswered, no objection to the recognition of foreign equity decrees, founded on the proposition that such recognition would violate the interest of the situs state in control of its land, can rest on a secure rational basis. This will remain true though commentators ignore Professor Barbour, and repeat uncritically the "artless explanation"; neither can we escape the fundamental inconsistency of the position, having failed to explain it away, by taking refuge in the attitude that further inquiry is foreclosed by authority.⁴⁵

I am inclined to believe that the full significance of this telling argument was not appreciated by Professor Barbour himself. Although his thesis is that full faith and credit ought to be given to the foreign decree, and although he indicates elsewhere that the doctrine of *Fauntleroy v. Lum*⁴⁶ should apply to decrees in equity,⁴⁷ he seems to address this particular argument to the state courts, in an effort to persuade them that recognition of foreign decrees would expose them to no new or additional

⁴³ See Barbour, *op. cit.* supra note 2, cases cited on 549 n. 100.

⁴⁴ *Ibid.*

⁴⁵ See Schwartz, *Fall v. Eastin Revisited: Extraterritorial Effect of Foreign Land Decrees*, 54 Dick. L. Rev. 293, 294-95 (1950).

⁴⁶ 210 U.S. 230 (1908).

⁴⁷ Barbour, *op. cit.* supra note 2, at 545.

threat to their control. Perhaps in this he is influenced by his assumption, already discussed, that the binding force of the decree is rooted in the voluntary act of the situs state in acknowledging the validity of the deed. On that premise, the state might find a way out of the dilemma, if it chose to overturn established precedents, by refusing to recognize deeds executed under the compulsion of a foreign court. But the argument cuts deeper than this. The practice of recognizing the deed not only exposes the logical inconsistency of refusing recognition to the decree, demonstrating that the states may safely recognize decrees as well; it also establishes that the state of the situs has no legitimate and substantial basis for refusing, on grounds of its own interests and policy, to recognize such foreign decrees. This is of major importance with respect to the application of the full faith and credit clause. The Supreme Court has served clear notice that, when the command of that clause is resisted, it will brush aside mere protestations of policy and will make its own judgment as to the seriousness of the supposed intrusion.⁴⁸ A state might change its law, and thereafter refuse to acknowledge the validity of deeds executed under the compulsion of foreign decrees, and the whole history of its judicial practice would still stand to establish that it has no just ground, under the Constitution, for apprehension that its interests will be subverted by such deeds or decrees.

In the preceding paragraph it was assumed that a state is free to change its rule on the validity of deeds executed under the compulsion of a foreign decree. (It should be noted that the assumption was made only for convenience of statement, by way of relating the conclusion to Professor Barbour's discussion, and that it was by no means essential to the conclusion, which was that the practice of recognizing the validity of such deeds demonstrates the insubstantiality of the policy claims of the state of situs.) But the very statement of such an assumption should be nearly enough to establish its unsoundness. Freedom for the courts of the situs state to disregard a deed executed (in compliance with the formal requirements of that state) in obedience to the decree of a foreign court having jurisdiction of the defendant would make a complete mockery of a jurisdiction which was solemnly affirmed by Chief Justice Marshall nearly a century and a half ago,⁴⁹ and which has hardly been doubted since. To be

⁴⁸ "[The] purpose [of the full faith and credit clause] ought not lightly to be set aside out of deference to a local policy which, if it exists, would seem to be too trivial to merit serious consideration when weighed against the policy of the constitutional provision and the interest of the state whose judgment is challenged." Stone, J., in *Milwaukee County v. M. E. White Co.*, 296 U.S. 268, 277 (1935). See also *Hughes v. Fetter*, 341 U.S. 609 (1951).

⁴⁹ *Massie v. Watts*, 6 Cranch (U.S.) 148 (1810).

sure, the Constitution does not say that full faith and credit shall be given to conveyances; but the only way to discredit the deed is to plead duress, and when the compulsion is identified as that of the decree of a court of competent jurisdiction, having power over the defendant, the plea can be sustained only if credit is refused to the decree. In this context the terms "in rem" and "in personam" have been bandied about with discouraging results, but it can hardly be maintained that the decree in this instance (when it does no more than address a command to the defendant, which the defendant obeys) operates otherwise than in personam.⁵⁰ It follows that full faith and credit requires recognition of the validity of the deed, and that there is no way of escape from the dilemma except by recognizing the decree where there is no deed.

III

I suspect that an argument like this one of Professor Barbour tends, by its very brilliance and simplicity, to defeat its own acceptance. People do not respond agreeably when they are told that they have long complacently followed inconsistent courses of action, nor are they readily separated from their faith in sonorous and seemingly self-evident formulas. Perhaps the argument is suspected of being a tour de force, which silences a less articulate opponent without really disproving his case. It is possible that a hypothetical judge might reason thus: Maybe it is logically inconsistent to recognize the deed and not the decree without a deed. But there must be wisdom in the books when they say that a state must retain the final voice in matters relating to its land. Perhaps the truth is that in the vast majority of cases it is a matter of indifference to our basic policy what the decision is—whether the vendor keeps the land or the

⁵⁰ I make this statement well knowing that a position very much like the one that "can hardly be maintained" was taken by Professor Walsh, *Treatise on Equity* 76 (1930); Professor Cook also characterized such decrees as "in rem," but without concluding that they are rendered without jurisdiction. Cook, *op. cit. supra* note 34, at 119-29. These two positions are considered in more detail below.

Perhaps the early view of Professor Schofield should be mentioned in this connection. According to that view, the English common-law rule of jurisdiction, that a court of one state has no jurisdiction to determine title to land in another, "derive[s] all [its] force and strength as between the states from [the federal constitution] . . . defining and limiting the reserved sovereignty of each state." While this rule is qualified by "the established but highly artificial, anomalous and purely historical English-chancery exception" formulated by Marshall in *Massie v. Watts*, the exception "admits of little, if any, judicial expansion and of no legislative expansion as between the states." Schofield, *Full Faith and Credit vs. Comity and Local Rules of Jurisdiction and Decision*, 10 *Ill. L. Rev.* 11, 18-19, 21, 29 (1915). This attitude is unfriendly toward the exercise of the jurisdiction in any case, and would proscribe it in all except the categories of "fraud, or trust, or contract." But I suspect few adherents would be found today for the proposition that the ancient injustice of *Livingston v. Jefferson*, 18 *Fed. Cas.* 660, No. 8,411 (C.C. Va., 1814), is enshrined in the Constitution.

purchaser gets it, whether it goes to the wife or is kept by the husband when there is a divorce; and because of this we tolerate the conveyance though it was not voluntary. But there may come a time when the decision will be a fateful one for our policy. Against such a possibility, it is prudent for us to avoid committing ourselves to the recognition of any virtue in a foreign decree, and thus to preserve our freedom of action. Besides, we have the orderliness of the system established by our recording statutes to think about.

The main thesis of this hypothetical reasoning proceeds on the fallacy that a state is free under the full faith and credit clause to disregard a conveyance ordered by the court of another state; nevertheless it is worth while to consider the attitude for a moment. Experience indicates that the fears of those who are concerned about the integrity of a state's control of its land are not to be overcome by the force of Professor Barbour's argument alone, however compelling its logic. The question then becomes: What can we say to quiet the "anxious fear" that the state may be deprived of control over its own land if it recognizes foreign decrees of the kind in question, beyond pointing out that the state has already surrendered the same degree of control by recognizing the validity of deeds made pursuant to such decrees?

It would be helpful to the consideration of this question if we could know more particularly the nature of the fears which are entertained. Unfortunately, the decisions seldom go into particulars. It is reasonable to suppose, however, that the unspecified fears reflect, to some extent, the passions which have moved governments, in both ancient and modern times, to place restrictions on the capacity of persons to own, or use, real property.⁵¹ The control of American states over their own land with respect to such restrictions is subject to important limitations under provisions of the Constitution other than the full faith and credit clause.⁵² Some such restrictions, however, are consistent with the Constitution, such as those upon the land-holding capacity of corporations.⁵³ Would the extension of full faith and credit to foreign decrees ordering conveyances of local land expose the policies expressed in such restrictions to erosion? The

⁵¹ Cf. 1 Powell, *Real Property* § 101 (1949), citing 1 Pollock & Maitland, *History of English Law* 460-66 (2d ed., 1905).

⁵² *Hauenstein v. Lynham*, 100 U.S. 483 (1879) (the treaty power); *Buchanan v. Warley*, 245 U.S. 60 (1917) (the due process clause); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (the equal protection clause). Cf. *Oyama v. California*, 332 U.S. 633, 647, 650 (1948) (equal protection, supremacy of federal law); *Paul v. Virginia*, 8 Wall. (U.S.) 168, 180 (1869), and *Corfield v. Coryell*, 4 Wash. C.C. 371, 6 Fed. Cas. 546, 551, No. 3,230 (E.D. Pa., 1823) (privileges and immunities of state citizenship).

⁵³ *Asbury Hospital v. Cass County*, 326 U.S. 207 (1945).

policies and the statutes take a wide variety of forms,⁵⁴ and perhaps it is dangerous to generalize about them. It would seem, however, that the problem involved is one of administration of the policy; statutes of this type involve their own problems of drafting, interpretation, and machinery. What happens when a voluntary conveyance is made to a corporation incapable of taking? A conveyance made in obedience to a foreign decree presents no different question. A foreign decree which has not been obeyed merely establishes, as between the parties, that the plaintiff is entitled to a conveyance. The freedom of the state of the situs to enforce its restrictive policy against the plaintiff after he has successfully demanded recognition of his right to a conveyance under the foreign decree remains unimpaired. For example, the administration of the North Dakota policy involved in the *Asbury Hospital* case⁵⁵ would in no way be jeopardized by the recognition of foreign decrees. The statute in North Dakota merely required corporations to dispose of land within its coverage within ten years from the enactment of the statute, or, in the case of after-acquired land, from the date of acquisition. Where the corporation is disabled to take title the problem is no greater. There is eminent authority to the effect that only the state may challenge the unauthorized acquisition.⁵⁶ Thus the disabling statute becomes irrelevant in private litigation, domestic or foreign. Its policy comes into play only when the state invokes it in escheat or other appropriate proceedings. Even if there are exceptions to this rule,⁵⁷ the essential operation of the state's policy is unimpaired. Suppose, for example, a state should hold that, as a corollary of its statute denying to foreign corporations the right to acquire domestic land, such a corporation as purchaser is not entitled to specific performance of a contract to convey. A foreign court having personal jurisdiction of the vendor, misapplying or failing to apply this law of the situs, orders a conveyance. In an action at the situs based on the decree the vendor would be precluded from reopening the question of the corporation's capacity, under Professor Barbour's thesis and mine. Thus a result would be brought about which would normally not have been possible in an original action at the situs.⁵⁸

⁵⁴ 1 Powell, op. cit. supra note 51, at § 148.

⁵⁵ 326 U.S. 207 (1945).

⁵⁶ 1 Powell, op. cit. supra note 51, § 148, and cases cited in note 46 supra.

⁵⁷ Cf. *Lord v. Shultz*, 115 Neb. 33, 211 N.W. 210 (1926).

⁵⁸ If this in itself is thought to be an intrusion on the integrity of the state's policy, it should be recalled that a foreign judgment against the vendor for damages for breach of his contract to convey would unquestionably be entitled to full faith and credit at the situs. So would a decree of specific performance against a corporate purchaser. The degree of intrusion on the policy of the situs state would be about the same in all three cases.

But the corporation would be ill-advised to seek such a Pyrrhic victory. Whether or not it is unqualifiedly true that only the state may invoke the disabling statute, it is true that the state may always invoke it. Not having been a party to either the foreign action or the domestic action based on the foreign decree, the state is not affected by the principles of *res judicata*. Whenever it is so disposed it may institute escheat proceedings, just as if the conveyance to the corporation had come about in some other way. It seems a reasonably safe conclusion that the full application of the principles of *res judicata* to foreign decrees directing the conveyance of local land poses no real threat to a valid policy of the situs state respecting the capacity of persons to acquire, hold, or use land.

As a practical matter, policy questions of this order have not been a problem in the cases which have dealt with the recognition to be accorded foreign decrees relating to local land.⁵⁹ When the specific content of the concern for local policy and local control can be discerned at all, it turns out to be (1) an understandable reaction against a particularly irksome error of law on the part of the foreign court; or (2) mere pride of local law, manifested in unwillingness to bring about a result which could not regularly have been achieved by an action in the local courts in the first instance; or (3) a not very clearly articulated apprehension that recognition would inject uncertainties or anomalies into the local system of recording land transactions.

The New Mexico case of *Fire Association v. Patton*⁶⁰ is an instructive illustration of the first type of concern. There the New Mexico court's rejection of a Texas decree purporting to reinstate a lien on New Mexico land was plainly motivated by a sense of outrage at the Texas court's highly dubious application of the principle of subrogation. The owner of the property had procured insurance, loss payable to the holder of a mechanic's lien. After the loss the owner assigned the policy to the lienor in return for a release of the lien and other consideration. In a Texas

⁵⁹ In the preparation of this paper I have encountered only one case involving personal incapacity. The question was of corporate incapacity under the law of the state of incorporation rather than the law of the situs, so that the case is not directly relevant to the policy question under discussion. It lends significant support, however, to the general principle of recognition for foreign land decrees. A Kentucky testator devised a share of his residuary estate, including land in Texas, to a New York charitable corporation, limited by New York law in the value of real property which it could own. The corporation intervened in a Kentucky proceeding brought by the heirs against the executors for a determination of their rights, which resulted in a holding that the corporation was incapable of taking. In a subsequent action of trespass to try title, brought by the corporation in Texas, the United States circuit court directed a verdict for the corporation. The Circuit Court of Appeals reversed, holding the Kentucky decree conclusive. *Norton v. House of Mercy*, 101 Fed. 382 (C.A. 5th, 1900).

⁶⁰ 15 N.M. 304, 107 Pac. 679 (1910).

action on the policy brought by the lienor, the owner being personally served as a defendant, the plaintiff had judgment; but the insurance company, on a cross-bill to which the owner was made a party, obtained a decree purporting to declare void the release of the lien, and declaring that the insurance company was subrogated to the rights of the lienor. When the insurance company relied on that decree as *res judicata* in its action to enforce the lien in New Mexico, the court, perceiving that to sustain the contention would be to hold that the owner got no protection whatever in return for his premiums, avoided that unpalatable result by invoking the convenient doctrine of *Fall v. Eastin*⁶¹ and kindred cases.⁶² Much as one may sympathize with the court in this avoidance, it must be clear that the hardship of such a result is part of the price which we must occasionally pay for the higher values of interstate application of the principles of *res judicata* in a federal system. The attitude of the New Mexico court in this case has nothing to do with the nature of equity decrees as such; still less has it anything to do with land policy. It is simply a strong conviction concerning a detail in the law of insurance. It has no more to do with the sovereignty of New Mexico than have any of the myriad differences in, or errors of, law which the courts of New Mexico must accept with good grace under the full faith and credit clause.⁶³ That clause is an imperfect instrument indeed if its incidence can be deflected by the essentially fortuitous presence in the case of a lien on real estate.

For such further light as is available on the second and third types of solicitude for local control and policy there is no better source than the opinions of the justices of the Supreme Court of Nebraska in the *Fall* case itself. The circumstances in which the state court reached its final decision brought about not only a thorough consideration of the problem but a special need for the justices holding opposing views to join issue. The result was, in places, a down-to-earth approach that is rare in a line of cases marked by the repetition of purportedly self-evident propositions. In the original decision⁶⁴ the court, composed of Chief Justice Holcomb

⁶¹ 215 U.S. 1 (1909).

⁶² For future reference, it should be noted that the court's escape was superficially facilitated by the form of the Texas decree, which purported to settle the rights of the parties without addressing any command to the owner, or taking any steps against him to effectuate the declaration. Inferentially, if the Texas court had gone to the pains of obtaining the signature of the owner to appropriate documents by committing him to jail until he signed, the New Mexico court would have accepted the result with resignation if not equanimity—in perfect accord with the authorities.

⁶³ *Fauntleroy v. Lum*, 210 U.S. 230 (1908); *Milliken v. Meyer*, 311 U.S. 457 (1940). Cf. *Goodrich, Two States and Real Estate*, 89 U. of Pa. L. Rev. 417, 425-29 (1941).

⁶⁴ *Fall v. Eastin*, 75 Neb. 104, 106 N.W. 412 (1905). The facts are too well known to be restated.

and Associate Justices Sedgwick and Barnes, held that the decree of the Washington court was entitled to full faith and credit, Sedgwick, J., writing the opinion of the court and Barnes, J., dissenting in a short opinion. Shortly thereafter Chief Justice Holcomb's term expired. He was succeeded by Sedgwick; and Charles B. Letton, a former commissioner of appeals, filled the vacancy as associate justice. On rehearing, the court reversed its former decision,⁶⁵ Letton, J., writing the opinion and Sedgwick, now Chief Justice, dissenting at length. The fact that the reversal coincided with a change in the court's personnel was doubtless regarded by the justices, especially Justice Letton, as a reason for setting forth the fullest and most effective justification of their positions which was possible.

Justice Letton, like Justice Barnes, was deeply impressed by the fact that the Nebraska law permitted no such division of the separate property of the spouses upon divorce as was authorized by Washington law and ordered by the Washington decree. This difference on a point in the law of husband and wife had, as it happened, been expressed in Nebraska in terms of the jurisdiction of courts. In fact, the court had previously taken the unusual course of holding that a decree of a Nebraska court purporting to award domestic land standing in the husband's name to the wife upon divorce was void and subject to collateral attack.⁶⁶ Mrs. Fall, said Justice Letton, was "asking the court to give effect to a decree of the Washington court which it would not enforce if it had been rendered in a court of this state. . . . A judgment or decree of the nature of the Washington decree, so far as affects the real estate, if rendered by the courts of this state, would be void. . . . We know of no rule which compels us to give to a decree of the courts of Washington a force and effect we would deny to a decree of our own courts upon the same cause of action. . . ." ⁶⁷ Observe that this is not an argument that the Washington court did not have jurisdiction to divide the property of the spouses on divorce; nor is it a holding that the Nebraska court lacked jurisdiction to enforce the Washington

⁶⁵ 75 Neb. 120, 113 N.W. 175 (1907).

⁶⁶ *Cizek v. Cizek*, 69 Neb. 797, 800, 96 N.W. 657, 658 (1903), rev'd on rehearing 69 Neb. 800, 811, 99 N.W. 28, 31 (1904). In so doing, the court, assisted by Commissioner (later Justice) Letton, reversed a sensible decision by Commissioner (later Dean) Roscoe Pound, who had held that though the court might have dealt with the question irregularly or erroneously, it had jurisdiction of the parties and the subject matter, and its decree was not open to collateral attack. Commissioner Duffie concurred. Letton succeeded Pound as commissioner. On rehearing, the former judgment was vacated, Commissioner Kirkpatrick writing the opinion and Commissioners Duffie and Letton concurring. Apparently Charles B. Letton was not the man to neglect an opportunity to rectify the errors of his predecessors.

⁶⁷ 75 Neb. 120, 132, 134, 113 N.W. 175, 180, 181 (1907).

decree.⁶⁸ It is simply a declaration that Nebraska will have nothing to do with the Washington decree because it grows out of a law which is different from the law of Nebraska. Nothing is really added to the force of this declaration by the circumstance that Nebraska has spoken of its substantive law of divorce in terms of jurisdiction and has been betrayed into an anomalous position by its terminology. With regard to the final sentence in the quoted portion of the opinion, we may note, first, that while *Fauntleroy v. Lum*⁶⁹ had not then been decided, it was a fresh memory when the *Fall* case reached the Supreme Court, and has now been on the books for forty-five years; and, second, that while the full faith and credit clause does not require a state to apply the doctrines of *res judicata* to the judgments of its own courts, it does require their application to judgments of the courts of sister states.

When Justice Letton seeks to bolster his argument by the epithetic assertion that "the act directed by the Washington court [the conveyance] is in opposition to the public policy of this state, in relation to the enforcement of the duty of marital support,"⁷⁰ it is hard to take him seriously. Bear in mind that he has just finished saying that "[i]n the instant case, if Fall had obeyed the order of the Washington court and made a deed of conveyance to his wife of the Nebraska land, even under the threat of contempt proceedings, or after duress by imprisonment, the title thereby conveyed to Mrs. Fall would have been of equal weight and dignity with that which he himself possessed at the time of the execution of the deed."⁷¹ But apart from this remarkable inconsistency, are we to believe that a statute defining the jurisdiction of Nebraska courts in divorce cases expresses Nebraska's policy of matrimonial support pertaining to *couples domiciled in Washington*? Of one thing we may be sure: the Nebraska policy in question is not a land policy. It is a policy "in relation to the enforcement of the duty of marital support." If Nebraska has a legitimate interest in such a policy as applied to couples domiciled in another state, and if it has such a policy, what is it? Nebraska laws allow alimony on principles which, as pointed out by Chief Justice Sedgwick, do not differ materially from those on which Washington divides the marital property.⁷² If the Washington court had awarded a money decree for alimony,

⁶⁸ The lack of jurisdiction of the Nebraska court in *Cizek v. Cizek*, 69 Neb. 797, 96 N.W. 657 (1903), stemmed from the provisions of the statute authorizing suits for divorce; the action on the decree is not a suit for divorce.

⁶⁹ 210 U.S. 230 (1908).

⁷⁰ 75 Neb. 120, 134-35, 113 N.W. 175, 181 (1907).

⁷¹ *Ibid.*, at 128 and 178.

⁷² *Ibid.*, at 136 and 182.

the Nebraska court would have enforced it and would have sold Mr. Fall's land on execution—perhaps to Mrs. Fall—to satisfy the obligation. The conclusion is inescapable that this second species of concern for local policy and dominion over local land has nothing to do with the nature of equity decrees, nor with land policy; it is nothing more than a refusal to apply the principles of *res judicata* merely because the foreign law differs—and that in a minor particular concerning the method of attaining a commonly desired result—from the law of the forum.

A recent commentator, yielding without a shot much of the ground won by his predecessors, assumes it to be established law that decrees of this sort are not within the operation of the full faith and credit clause, and contents himself with the assurance that the states will, as a matter of comity, enforce such decrees “where the law is substantially the same in both states.”⁷³ I should have thought that the last word on dissimilarity of law as a criterion in the choice of law, and a fortiori in the recognition of judgments of sister states, was spoken in 1918 by Judge Cardozo:

Our own scheme of legislation may be different. We may even have no legislation on the subject. That is not enough to show that public policy forbids us to enforce the foreign right. . . . We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home. Similarity of legislation has indeed this importance: its presence shows beyond question that the foreign statute does not offend the local policy. But its absence does not prove the contrary. It is not to be exalted into an indispensable condition. . . .⁷⁴

Such a criterion can exist only as an egregious anachronism in the context of an expanding full faith and credit clause.

The third type of specific concern for preserving the dominion of a state over its land against the intrusion of foreign decrees has to do with the integrity of the recording system. On this score Justice Letton said:

[I]f the courts of other states can so adjudicate the rights of parties to land in this state that a title apparently clear upon the official records could be made null and void by its action “upon the conscience” of the holder of the legal title, the recording acts of this state would cease to afford protection to purchasers of land, and thus the title in fact be affected, and the power of the state over the transfer and devolution of lands interfered with.

⁷³ Schwartz, *Fall v. Eastin* Revisited: Extraterritorial Effect of Foreign Land Decrees, 54 Dick. L. Rev. 293, 300, 297, 298, 299, 302, 303 (1950).

⁷⁴ *Loucks v. Standard Oil Co. of New York*, 224 N.Y. 99, 111, 120 N.E. 198, 201 (1918). A word of caution may be in order: Since Cardozo was speaking of local policy as a reason for refusing to enforce a foreign statutory cause of action, he should not be understood as implying that the state has similar freedom to decline to recognize a foreign judgment. Indeed, recent cases have significantly limited the freedom of a state to refuse enforcement on grounds of policy to a cause of action of the sort with which Cardozo was concerned in this case. *Hughes v. Fetter*, 341 U.S. 609 (1951); *First National Bank of Chicago v. United Air Lines*, 342 U.S. 396 (1952).

If the Washington decree bound the conscience of E. W. Fall, so that when he left the jurisdiction of that state any deed that he might make would be absolutely void, and had he sold the land to an innocent purchaser, who had inspected the records and found that he was the owner in fee . . . such purchaser, though relying on the laws of this state for his protection, would receive no title. This is the contention of the appellee [Mrs. Fall], carried to its ultimate conclusion, and, if this is correct, the action of the court of another state directly interferes with the operation of the laws of this state over lands within its sovereignty.⁷⁵

Chief Justice Sedgwick remarked, with restraint, "I do not understand the application of [this] language."⁷⁶ I do not understand it either, and for half a century no one has explained it. The language seems almost perverse in its refusal to confront the issue. No one has ever contended that a conveyance by Fall to a bona fide purchaser would be void; nor is that result a logical consequence of the position that the foreign decree should be treated as *res judicata*. Of course Fall could have conveyed a good title to a bona fide purchaser.⁷⁷ Although Holmes himself, somewhat perversely, speculated that the Nebraska court's decision might be interpreted as treating Mrs. Eastin as an innocent purchaser,⁷⁸ no member of the Nebraska court so much as intimated that she had such a status. The "bona fides" of the conveyance to her was in issue at the trial, and the issue was resolved against her.⁷⁹ It could hardly have been resolved otherwise on the facts. Not even Justice Letton questioned the finding. He argued only that Mrs. Fall's contention, *carried to its ultimate conclusion*, would mean that the beneficiary of the foreign decree would prevail not only over a transferee in Mrs. Eastin's position, but also over a hypothetical innocent purchaser.

I have *tried* to understand this argument, because of its obvious importance to the question whether the thesis I am supporting poses any real threat to the interests of the situs state. The best I can do is to understand how Justice Letton might have been misled, in good faith, into his confusion. The attorneys for Mrs. Fall—as lawyers still do—prejudiced their case by grasping for straws when they had solid ground beneath their feet. They counted not only on the Washington decree but also on the commissioner's deed which had been executed pursuant to it. Now, if a deed

⁷⁵ 75 Neb. 120, 133, 113 N.W. 175, 180 (1907). Cf. *Cooley v. Scarlett*, 38 Ill. 317, 319 (1865).

⁷⁶ *Ibid.*, at 148 and 186.

⁷⁷ Similarly, if he had executed a deed to Mrs. Fall in obedience to the Washington court's decree, he could have conveyed title to a purchaser without notice if the second deed was recorded first.

⁷⁸ *Fall v. Eastin*, 215 U.S. 1, 15 (1909).

⁷⁹ 75 Neb. 120, 123–24, 113 N.W. 175, 177 (1907).

executed by a commissioner pursuant to the decree of a foreign court actually passes title, a judge has cause for concern over the possible consequences to his state's recording system. This probably remains true even though the case is not as strong as Justice Letton put it—that is, it remains true even though the commissioner's deed is not good, until recorded, as against an innocent purchaser. The plight of a Nebraska lawyer examining a title, when he encounters on the record a conveyance by a commissioner appointed by a foreign court, is one which readily arouses sympathetic understanding. His problem, in such a suppositious case, would be to inquire fully into the unfamiliar powers of the foreign court; to examine the record of the proceedings leading to the decree; and perhaps to disentangle nice distinctions under the full faith and credit clause. It may well be said that a state could hardly tolerate such complexities. But, while thoughtless lawyers still count on foreign decrees and commissioners' deeds as muniments of title,⁸⁰ no judge and no commentator who has considered the question carefully has ever urged the recognition of the foreign decree in such terms. The thesis is simply that the foreign decree establishes an obligation to convey, or, if you please, an equitable interest in the land such as is created by a contract to convey. A judicial proceeding at the situs is essential to the enforcement of the obligation and the perfection of the interest. Innocent purchasers will be fully protected. The decree of the court at the situs, when it is rendered, will be the source of title. If a commissioner's deed is executed and recorded pursuant to the *local* decree, its appearance in the records will cause the title examiner no more difficulty than the many similar deeds he encounters, resulting from local judicial proceedings not preceded by an action abroad. The local decree insulates him against all questions as to the jurisdiction of the foreign court, the regularity of its proceedings, and the operation of the full faith and credit clause. All those questions, and in addition the question of the rights of the parties on the merits, are *res judicata* under the local decree. I am persuaded that Mrs. Fall's attorneys so frightened Justice Letton by the abstracter's nightmare conjured up by their supererogatory effort to work the foreign commissioner's deed into the chain of title that it was their own fault that he was diverted from the sound basis of their case.

Similarly, Justice Letton may have been disturbed by the form of the remedy sought in the Nebraska case. The suit was one to remove a cloud from the title, and thus assumed that Mrs. Fall had title of some kind. Under Nebraska law an equitable title was sufficient basis for such an

⁸⁰ Cf. *McRary v. McRary*, 228 N.C. 714, 47 S. E. 2d 27 (1948).

action, and Justice Sedgwick was satisfied that the obligation of the foreign decree created an interest which was such a "title." But for reasons that have already been indicated, a judge has some reason to shy away from any suggestion that the foreign decree, of its own force, transfers any "title" whatever. For this reason, if for no other, lawyers today who seek to realize upon the victory represented by a foreign decree would be well advised to cast their prayer in other terms, as by an action for declaratory and supplemental relief or a bill to execute the decree.⁸¹

It is possible that the cause of the confusion lies deeper than the tactical errors of Mrs. Fall's counsel. Langdell, in a metaphysical mood, inquiring why it is that equity submits to the limitation that it can act only in personam, had said: "Another reason is that if equitable rights were rights *in rem*, they would follow the *res* into the hands of a purchaser for value and without notice; a result which . . . would be especially abhorrent to equity itself."⁸² There is no direct evidence that Justice Letton had this conception in mind, and it is not easy to relate it to his position. Conceivably, however, he might have reasoned that to give conclusive effect to the Washington decree would be to give it, indirectly, an "in rem" effect; if it is "in rem" it is binding on all the world; hence to give effect to it at all necessarily involves giving it effect as against innocent purchasers. Such reasoning involves such a patent shift in the meaning attached to the phrase "in rem" that it should mislead no one who has read Professor Cook on the dangers of just such shifts.⁸³ Langdell may have contributed to Letton's unwitting distortion of the issue; but there is certainly no reason why a foreign personal decree cannot be treated as conclusive upon the parties and those in privity with them, and still as not affecting the rights of bona fide purchasers for value. If there is an apparent contradiction in this statement, it is adequately explained by the terms and the policies of the very recording statutes we are concerned about.⁸⁴

I have tried conscientiously to find some substance in the reiterated apprehension that the application of principles of *res judicata* to foreign personal decrees relating to land will be inimical to the legitimate interest

⁸¹ It has been suggested that the explanation of the Fall case may lie in the fact that Fall himself was not personally served in the Nebraska proceeding. Pound, *The Progress of the Law, 1918-1919: Equity*, 33 Harv. L. Rev. 420, 424 n. 30 (1920). Under modern conceptions, at least, that circumstance could have made no difference, in view of the Nebraska court's in rem jurisdiction. See note 46, *supra*. But it may have had an influence on Justice Letton. See 75 Neb. 120, 130, 134, 113 N.W. 175, 181 (1907).

⁸² Langdell, *A Brief Survey of Equity Jurisdiction* 6 (2d ed., 1908).

⁸³ Cook, *The Powers of Courts of Equity*, 15 Col. L. Rev. 37, 106, 228 (1915).

⁸⁴ The principle that a judgment has the effect of a transfer of title has no application to foreign decrees. Rest., *Judgments* § 110; cf. *ibid.*, at § 89 (1942).

of the state of the situs. I have been unable to do so, either in the concrete expressions of the courts or in the flights of my own imagination. This was to be expected, in view of the powerful evidence offered by the universal recognition of deeds executed pursuant to foreign decrees. It is also to be expected, however, that additional specific policy arguments will be advanced from time to time. When they are advanced they should be examined with care. They may have nothing to do with land policy at all; and certainly the principle of sovereignty over land cannot be allowed to function as an umbrella, sheltering the rejection by a state of unfamiliar or erroneous doctrine where such rejection would be precluded but for the presence in the case of a controversy relating to real estate. Even if land law is involved, such objections may be founded on mere differences in treatment which will not bear the name of policy. Even if the differences seem substantial, they may relate to "minor morals of expediency and debatable questions of internal policy."⁸⁵ In such cases opinions will differ. But there is no reason to fear that the application of full faith and credit to foreign decrees will place the land policy of the state at the mercy of venal and hostile tribunals. Our systems of conflict-of-laws rules are sufficiently homogeneous to insure that the law of the situs will be given due consideration.⁸⁶ Every state has an equal interest in the sound development and application of choice-of-law rules where land is concerned. In the event that a foreign state ignores, or refuses to apply, or misapplies the applicable law of the situs, there is a substantial possibility that the error may be rectified by the Supreme Court on direct review. This is not the place to undertake a consideration of the literature on the question of the extent to which the Constitution makes the choice of law a federal question; but certain recent cases are suggestive,⁸⁷ and certain others strongly

⁸⁵ Crouch, J., dissenting in *Mertz v. Mertz*, 271 N.Y. 466, 475, 3 N.E. 2d 597, 600 (1936).

⁸⁶ The attitude of the Supreme Court of Canada, assuming that a foreign decree must be based on foreign law and that the law of the situs has been ignored, is both unrealistic and offensive, and would be doubly so in an American court considering the judgment of a sister state. *Duke v. Andler*, [1932] 4 D.L.R. 529, 539. It is instructive to note that the only thought offered by the court by way of rationalizing the refusal to give effect to the foreign decree was an appeal to conceptualism: "[I]f the Courts of British Columbia were obliged to enforce it between the same parties, without question, there would be no practical difference, in effect, between such a judgment and a judgment for a debt, and the distinction so much insisted on in the authorities . . . would be of no real consequence." *Ibid.*, at 541. We are at the bottom of the barrel when the distinction is defended for its own sake.

⁸⁷ *Hughes v. Fetter*, 341 U.S. 609 (1951); *First National Bank of Chicago v. United Air Lines*, 342 U.S. 396 (1952). On the general problem, see 1 Crosskey, *Politics and the Constitution in the History of the United States* 541-57 (1953); Cheatham, *A Federal Nation and Conflict of Laws*, 22 *Rocky Mount. L. Rev.* 109 (1950); Moore & Oglebay, *The Supreme Court and Full Faith and Credit*, 29 *Va. L. Rev.* 557, 605 (1943); Overton, *State Decisions in Conflict of Laws and Review by the United States Supreme Court under the Due-Process Clause*, 22 *Ore. L. Rev.* 109 (1943); Dodd, *The Power of the Supreme Court to Review State*

invite the litigant to avail himself of the opportunity to find out.⁸⁸ Finally, the compulsion to accept the foreign decree exists only as the Supreme Court determines that the full faith and credit clause applies. The Court has said that the clause does not state an inexorable command, that that Court is the final arbiter, and that there may be exceptions from its operation.⁸⁹ Thus, in the remote event that a court of a sister state were to repudiate the law of the situs in a matter importantly affecting a substantial land policy of the situs; and the Supreme Court were to refuse review on the ground that no federal question is involved; and the courts at the situs were to refuse effect to the foreign decree; only the Supreme Court could require that it be given effect, and it would still be open to the Court to hold that, in the particular case, the policy of the situs state should prevail. I do not mean to hold out false hopes of exceptions. When the Supreme Court comes to hold that the full faith and credit clause applies to decrees relating to foreign land it will doubtless state the proposition generally, holding exceptions to a minimum and in time eliminating them one by one, as it has done with money judgments. My point is rather that it is the Supreme Court which determines, in the showdown case, whether the foreign decree shall be operative or not. Thus the land policy of the situs state is not subordinated to the authority of another state. It is subordinated to the same supreme authority which, under the Constitution, can nullify the most fervently held land policy if it conflicts with the equal protection clause⁹⁰ or the treaty power.⁹¹ It is subordinated to the same judicial authority which, one hundred and sixty-four years ago, was invested with jurisdiction to determine questions of title to land within the states in important classes of litigation, including controversies between citizens of different states.⁹² It is subordinated only to the Constitution.

Decisions in the Field of Conflict of Laws, 39 Harv. L. Rev. 533 (1926); Hilpert & Cooley, The Federal Constitution and the Choice of Law, 25 Wash. U. L. Q. 27 (1939); Ross, Has the Conflict of Laws Become a Branch of Constitutional Law?, 15 Minn. L. Rev. 161 (1931); Langmaid, The Full Faith and Credit Required for Public Acts, 24 Ill. L. Rev. 383 (1929); Smith, The Constitution and the Conflict of Laws, 27 Geo. L. J. 536 (1939); Cheatham, Sources of Rules for Conflict of Laws, 89 U. of Pa. L. Rev. 430 (1941); Corwin, The "Full Faith and Credit" Clause, 81 U. of Pa. L. Rev. 371 (1933); Reese, Full Faith and Credit to Statutes: The Defense of Public Policy, 19 Univ. Chi. L. Rev. 339 (1952).

⁸⁸ *Angel v. Bullington*, 330 U.S. 183, 189 (1947); *Morris v. Jones*, 329 U.S. 545, 552 (1947).

⁸⁹ Cf. *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430 (1943); *Industrial Commission of Wisconsin v. McCartin*, 330 U.S. 622 (1947).

⁹⁰ *Oyama v. California*, 332 U.S. 633 (1948).

⁹¹ *Hauenstein v. Lynham*, 100 U.S. 483 (1879).

⁹² No citation of authority is needed to sustain the elementary proposition that the United States courts in the exercise of their constitutionally conferred jurisdiction have full power to

In closing this phase of the discussion, I should like to turn from the attempt to discover, on the merits, whether there is substance in the fear of encroachment on local control and policy, and consider for a moment a phenomenon which, like the practice of conceding validity to deeds executed pursuant to foreign decrees, strongly tends to show that there is no substance in such fear. The leading cases, such as *Fall v. Eastin*, are of the type in which the claimant prevails in the foreign court and obtains a decree requiring the doing of an act which will change the status quo. What happens when the claimant who resorts to a foreign court for relief is rebuffed, the court holding that he is not entitled to a decree ordering a conveyance? One court, unaware that such cases have been generally assigned to a special category requiring distinctive treatment, responded to such a situation by invoking the standard authorities in derogation of the foreign court's power, and with repeated expressions of reluctance denied effect to the decree.⁹³ The husband had filed suit for divorce in Oregon. The wife, answering, asserted that certain land in Oklahoma, having been bought with their joint earnings, in equity belonged to her. The Oregon court disagreed, ruling that the husband was the owner, "absolutely and free from any claim, interest or estate of" the wife. Thereafter the husband brought an action of ejectment in Oklahoma, in which the wife again sought to show an interest in the money invested in the land. The husband, relying on the Oregon decree, argued that it did not attempt to vest any title to Oklahoma land; that, inasmuch as the legal title was already in him, it was not varied by the decree; and that the decree therefore settled personal rights alone. The Oregon court might have settled the matter conclusively if it had required the wife to execute some document of title; but since it found the wife had no interest, it perceived no reason for requiring her to execute a deed or a release. While the trial court was impressed with this argument, the Oklahoma Supreme Court felt constrained to follow, with reluctance, the authority of *Fall v.*

determine title to land within the states. But since the proposition is not often mentioned in discussions of the present question, it seems appropriate to recall that the famous case of *Pennoyer v. Neff*, 95 U.S. 714 (1878), was one in which the federal courts upset a title to Oregon land regularly acquired under the law of Oregon. The power of a district court over title to the property of a bankrupt is a striking illustration, involving practical problems with respect to title investigation which are not presented by the recognition of foreign decrees as *res judicata*. 44 Stat. 664 (1938), 11 U.S.C.A. § 44(g) (1953); 3 American Law of Property § 13.6a (1952); 6 Am. Jur. (Rev.) Bankruptcy §§ 847, 865 (1950); 2 Collier, Bankruptcy § 21.30 (1940); *Robertson v. Howard*, 229 U.S. 254 (1913); *Isaacs v. Hobbs Tie & Timber Co.*, 282 U.S. 734 (1931); *Gross v. Irving Trust Co.*, 289 U.S. 342 (1933).

⁹³ *Sharp v. Sharp*, 65 Okla. 76, 166 Pac. 175 (1916). See also *O'Connell v. Sewell*, 191 Ark. 707, 87 S.W. 2d 985 (1935).

Eastin, and remanded the case with instructions that the wife be given a second chance to prove the claim that the land was bought with her money. Other courts have not been so helpless in the face of such palpable attempts to flout elementary principles of *res judicata*—where there is such a convenient semantic way of escape from the dogma of exclusive control of land. There is a solid line of cases declaring what may be loosely referred to as the estoppel principle: that where one claiming an interest in local land invokes the aid of a foreign court, in a suitable proceeding in which the court has jurisdiction of the defendant, *and loses*, he is precluded, or estopped, from thereafter asserting his claim in the courts of the situs. Thus in a Texas case, the Court of Civil Appeals held:

Plaintiff . . . himself selected the Oklahoma forum for the adjudication of the question of the validity of the deed upon which he afterwards relied in this suit. He presented that instrument to the Oklahoma court as evidence of his title to the land in dispute and of his right to the rents and revenues derived from said land. He affirmatively invoked the judgment of that court upon the sufficiency of that deed to show title to the property, and that court, in the exercise of the jurisdiction thus invoked, held the deed void. Under the authorities cited plaintiff . . . is bound by that decree, and is estopped to dispute its effect in any other court.⁹⁴

What becomes of the vaunted exclusiveness of the state's control over questions of title to land if the sovereign policy can be set at naught by the election of a private litigant to pursue his claim in the courts of another state, coupled with the unsuccessful event of the action? Surely it is apparent that a negative decree can be as significant in its effect on asserted interests as one giving affirmative relief. Perhaps when no conveyance is ordered the apprehended threat to the orderliness of the recording system seems less imminent; but one gets the impression that the concern for the integrity of local control comprehends more than this. These "estoppel"

⁹⁴ *Hall v. Jones*, 54 S.W. 2d 835, 837 (Tex. Civ. App., 1932). See also *MacDonald v. Dexter*, 234 Ill. 517, 85 N.E. 209 (1908); *Norton v. House of Mercy*, 101 Fed. 382 (C.A. 5th, 1900); *Idaho Gold Min. Co. v. Winchell*, 6 Idaho, 729, 59 Pac. 533, (1899); *Niles v. Lee*, 169 Mich. 474, 135 N.W. 274 (1912); *Roller v. Murray*, 71 W.Va. 161, 76 S.E. 172 (1912).

The two elements of these "estoppel" cases are: (1) the unsuccessful claimant himself invoked the jurisdiction of the foreign court; (2) the foreign judgment is asserted defensively against the unsuccessful claimant. *Fall v. Eastin* itself has the first, but not the second of these two elements. Mr. Fall, as plaintiff in the divorce action, invoked the jurisdiction of the Washington court by claiming the Nebraska land as his own and asking that his ownership be confirmed. But the title stood in his name, and affirmative relief was awarded to the wife. Therefore the case is not inconsistent with the authority of the "estoppel" cases, however inconsistent those cases themselves are with the essential doctrine of *Fall v. Eastin*.

On the other hand, the early case of *Brown v. Lexington & Danville R.R.*, 13 N.J. Eq. 191 (1860), presenting the second but not the first of the elements, treats the foreign decree as conclusive. Thus New Jersey, one of the principal strongholds of the doctrine of exclusive local control, seems committed to the proposition, broader than that of the "estoppel" cases, that the foreign decree may be used defensively.

cases are no mere aberration. They reflect a deep-rooted conviction that one who has chosen his own forum should not be permitted to complain against its authority, though the situation may be otherwise if he is summoned to that forum against his will. Thus the United States Supreme Court, while refusing conclusive effect to a French judgment against American citizens, indicated that if an American citizen should invoke the jurisdiction of the French court the judgment would be conclusive.⁹⁵

These cases demonstrate that once again the states have willingly, and without unwelcome consequences, yielded a substantial degree of jurisdiction to foreign courts to determine conclusively controversies relating to interests in local land—this time on principles of *res judicata*. But their significance is greater than this. What a court does when it holds that a foreign decree is conclusive in the “estoppel” situation is to apply that phase of the general principle of *res judicata* known as the barring effect.⁹⁶ What a court does when it holds that an affirmative foreign decree in favor of the plaintiff is not conclusive is to refuse to apply that phase of the general principle known as merger.⁹⁷ But, at least in the constitutional context of full faith and credit, these two aspects of the general principle are of equal dignity and utility; they express the same considerations of fairness to litigants and the same interest of the nation in an end of litigation. If the operation of the foreign judgment as a bar is accepted, how can its operation as a conclusive determination that the plaintiff is entitled to relief be denied? The point is not just that there should be the usual “mutuality of estoppel,” but that the rejection of the merger effect rests on wholly inadequate reasons.

Finally, the existence of these estoppel cases is a circumstance which by itself is sufficient, in my judgment, to make nonsense of the proposition that a court cannot by its decree *create* an equitable interest in land in

⁹⁵ *Hilton v. Guyot*, 159 U.S. 113 (1895). The rule as stated by the Supreme Court is broader than the “estoppel” cases concerning land, since it does not require that the foreign proceeding terminate adversely to the one invoking the jurisdiction. “The extraterritorial effect of judgments *in personam*, at law or in equity, may differ, according to the parties to the cause. . . . So, if a foreigner invokes the jurisdiction by bringing an action against a citizen, both may be held bound by a judgment in favor of either.” *Ibid.*, at 170. Under the full faith and credit clause, of course, a state has no such freedom to refuse conclusiveness to the judgment of a sister state, where, though the defendant was summoned against his will, the foreign court had jurisdiction of his person. It should also be noted that the soundness or unsoundness of the much-criticized “reciprocity” theory of the *Hilton* case is irrelevant to the subject here under discussion.

⁹⁶ Rest., Judgments §§ 45(b), 48 (1942).

⁹⁷ *Ibid.*, at §§ 45(a), 47. In this position a court may get some support from the Restatement, § 46. But the Restatement makes no allowance for the “estoppel” doctrine in cases relating to foreign land. See § 71, comment b.

another state.⁹⁸ Suppose that a plaintiff, claiming an interest in local land by reason of a contract, or by reason of marital rights, institutes an action in a foreign court, with jurisdiction of the defendant, and wins a decree ordering a conveyance. In the absence of compliance, under traditional doctrines, the decree is entitled to no weight whatever at the situs, except—under a modern view—as a determination of *facts* in issue (not issues of law). But suppose the same plaintiff *loses* his case in the foreign court. Under the doctrine that the foreign decree operates as a bar—and that doctrine is apparently adopted by the *Restatement of Judgments*⁹⁹—the plaintiff is forever precluded, in the courts of the situs or elsewhere, from relitigating his claim. Yet he may, in truth, have had a contract which was perfectly valid under the law of the situs, and that contract may, under the law of the situs, have given him an equitable interest in the land.¹⁰⁰ Indeed, in precisely such a case the Supreme Court has held that the foreign decree is entitled to full faith and credit. The plaintiff, a lawyer, sued in West Virginia to enforce an alleged trust in West Virginia land, arising out of a fee arrangement embracing land in Virginia as well. The defendant pleaded in bar a Virginia decree, rendered in a similar action brought by the plaintiff in Virginia, holding that the plaintiff was not entitled to recover because the contract was champertous. The West Virginia court sustained the plea on the explicit ground that it was required by the Constitution to give full faith and credit to the Virginia decree, although the fee arrangement was assumed to be valid under the law of West Virginia.¹⁰¹ Dismissing the plaintiff's writ of error, the Court held:

It is not contended that the West Virginia court, in holding the Virginia judgment to be conclusive upon the present controversy, violated the "full faith and credit" clause of the Federal Constitution. By that clause, and by the act of Congress . . . passed to carry it into effect, it was incumbent upon the West Virginia court to give to the judgment the same faith and credit that it had by law or usage in the courts of Virginia. The effect of this was that, provided the Virginia court had jurisdiction of the subject-matter and of the parties (which was not questioned), the merits of the controversy there concluded were not open to reinvestigation in the courts of West Vir-

⁹⁸ Rest., Conflict of Laws § 240 (1934). Cf. *ibid.*, at § 239, and the view of Professor Beale, discussed above, that the foreign decree operates conclusively where a second suit can be brought on the original cause of action, but not otherwise, because there is no remedy on the decree. 2 Beale, Conflict of Laws § 449.1 (1935); and cf. 21 Harv. L. Rev. 210 (1908).

⁹⁹ Rest., Judgments § 46. Cf. *ibid.*, at § 71, comment b.

¹⁰⁰ Of course he may have had such a contract. It is not true, as some appear to think, that claimants who assert rights to local land in foreign courts regularly win when they should not, and lose only when their claims are palpably unfounded.

¹⁰¹ *Roller v. Murray*, 71 W.Va. 161, 76 S.E. 172 (1912).

ginia. It is not here questioned that the West Virginia courts gave such credit to the Virginia judgment as was thus required.¹⁰²

Under the traditional view, therefore, we are confronted with the remarkable proposition that, while a foreign court has no power to create (or confirm) equitable interests in local land, it has complete and lawful jurisdiction to destroy such interests.

IV

*Fall v. Eastin*¹⁰³ is a most unhappy decision. The case for Mrs. Fall was poorly presented.¹⁰⁴ The Supreme Court found it difficult to state wherein the appellant disagreed with the very vulnerable opinion of Justice Letton. Her lawyers were still arguing that the commissioner's deed was entitled to full faith and credit.¹⁰⁵ They offered a vague theory to the effect that, while the Washington court could not "create" an equity in Nebraska land, it could "divide" and "apportion" existing equities.¹⁰⁶ There was no brief and no appearance for Mrs. Eastin, Mr. Fall's transferee. Mr. Justice McKenna's opinion is indiscriminating, confused, unworthy, reluctant, and ambiguous. He thought that the Court "need not inquire" whether the doctrine that "a decree of a court rendered in consummation of equities, or the deed of a master under it, will not convey title, and that the deed of a party coerced by the decree will have such effect is illogical or inconsequent."¹⁰⁷ This is indiscriminating because, as we have seen, there is a substantial difference between treating the foreign decree, or the foreign master's deed, as a muniment of title, and treating the decree as a conclusive adjudication of the rights of the parties. It is confused because, when Justice McKenna comes to explain that inquiry is foreclosed by authority, he mixes up the question before the Court with the quite different situation in the discredited case of *Hart v. Sansom*.¹⁰⁸ He thought, also,

¹⁰² *Roller v. Murray*, 234 U.S. 738, 745 (1914). The holding is not as solid as one might wish on the constitutional question. The case was decided six months before the Supreme Court was given jurisdiction to review state court decisions *in favor* of rights asserted under the Constitution. Act of December 23, 1914, c. 2, 38 Stat. 790 (1914), 28 U.S.C.A. § 1257 (1949). But, since the language quoted was used in answer to the plaintiff's contention that the West Virginia court had deprived him of due process of law in giving conclusive effect to the Virginia judgment, it can hardly be dismissed as *obiter*.

¹⁰³ 215 U.S. 1 (1909).

¹⁰⁴ See *ibid.*, at 7; Lorenzen, Application of Full Faith and Credit Clause to Equitable Decrees for the Conveyance of Foreign Land, 34 Yale L. J. 591, 605 (1925).

¹⁰⁵ *Ibid.*, at 4.

¹⁰⁶ *Ibid.*, at 7-8.

¹⁰⁷ *Ibid.*, at 10.

¹⁰⁸ 110 U.S. 151 (1884). See *Fall v. Eastin*, 215 U.S. 1, 10-11 (1909); Barbour, The Extra-Territorial Effect of the Equitable Decree, 17 Mich. L. Rev. 527, 537 (1919).

that the Court need not "consider whether the other view [giving effect to the Washington proceedings] would not more completely fulfill the Constitution of the United States."¹⁰⁹ This, like the disinclination to inquire into the "illogical or inconsequent" character of refusal to credit the foreign decree when a deed made by the defendant under its coercion is recognized, is unworthy, because it is always the duty of the Supreme Court to inquire whether the requirements of the Constitution are fulfilled. He said without qualification that "[t]he policy of a [situs] state would not be violated"¹¹⁰ if the same effect were given to the foreign decree as to the defendant's deed under it. Undiscriminating again, because to recognize the foreign decree as passing title *would* create problems in the examination of titles at the situs. He cited, but did not apply, *Fauntleroy v. Lum*. He quoted the statement in *Dull v. Blackman*¹¹¹ that "if all the parties interested in the land were brought personally before a court of another state, its decree would be conclusive upon them, and thus, in effect, determine the title." He said that the case for Mrs. Fall might be "plausibly . . . sustained," but that the contrary view was "firmly established."¹¹² He discussed *Burnley v. Stevenson*¹¹³ at some length, quoting from it the following language: "[W]hen [the foreign decree is] pleaded in our courts as a cause of action, or as a ground of defense, it must be regarded as conclusive of all the rights and equities which were adjudicated and settled therein. . . ."¹¹⁴ He added:

There is . . . much temptation in the facts of this case to follow the ruling of the Supreme Court of Ohio [in *Burnley v. Stevenson*]. As we have seen, the husband of the plaintiff brought suit against her in Washington for divorce, and, attempting to avail himself of the laws of Washington, prayed also that the land now in controversy be awarded to him. She appeared in the action, and, submitting to the jurisdiction which he had invoked, made counter-charges and prayers for relief. She established her charges, she was granted a divorce, and the land decreed to her. He, then, to defeat the decree and in fraud of her rights, conveyed the land to the defendant in this suit. This is the finding of the trial court. It is not questioned by the Supreme Court [of Nebraska]. . . .¹¹⁵

The reluctance is apparent. Indeed, this statement of Mrs. Fall's case is so strong that the uninitiated reader may well wonder how the Court ruled

¹⁰⁹ 215 U.S. 1, 10 (1909).

¹¹⁰ *Ibid.*

¹¹¹ 169 U.S. 243, 246-47 (1898); 215 U.S. 1, 11 (1909).

¹¹² 215 U.S. 1, 11 (1909).

¹¹³ 24 Ohio St. 474, 16 Am. Rep. 621 (1873).

¹¹⁴ 215 U.S. 1, 13 (1909).

¹¹⁵ *Ibid.*, at 14.

against her. It did so by completing the statement quoted above with a masterpiece of ambiguity:

... but as the ruling of the [Nebraska Supreme] court, that the decree in Washington gave no such equities as could be recognized in Nebraska as justifying an action to quiet title does not offend the Constitution of the United States, we are constrained to affirm its judgment.¹¹⁶

That is all. Did the Nebraska decision rest on an adequate and independent state ground, or not? Justice Holmes did not think that the majority thought it did—hence his concurring opinion. If it did, was that ground, as Holmes thought, that Mrs. Eastin was an innocent purchaser, or that Nebraska had done away with the equitable doctrine as to purchasers with notice, or that an action to quiet title was the wrong remedy? Mr. Justice McKenna did not say. Justices Harlan and Brewer dissented, as well they might.

The most rational and charitable interpretation which can be put upon this unfortunate opinion is that it held, reluctantly, that the inapplicability of the full faith and credit clause to such decrees was too firmly established by authority to be open to question. What, then, was the paramount and overriding authority which enforced this unwanted result? The first case cited by Justice McKenna was *Watts v. Waddle*,¹¹⁷ which, he said, "has features like the case at bar."¹¹⁸ He cited subsequent cases, too; but a brief analysis will show that none of them required the decision.¹¹⁹ What

¹¹⁶ *Ibid.*

¹¹⁷ 6 Pet. (U.S.) 389 (1832).

¹¹⁸ 215 U.S. 1, 8 (1909).

¹¹⁹ *Watkins v. Holman*, 16 Pet. (U.S.) 25 (1842); *Corbett v. Nutt*, 10 Wall. (U.S.) 464 (1870); *Carpenter v. Strange*, 141 U.S. 87 (1891). Not one of these cases requires the result which the Court reached in *Fall v. Eastin*.

Watkins v. Holman: Holman, owning land in Alabama, contracted to sell it to Brown, but died before making the conveyance. His widow, residing in Boston, was there appointed administratrix. She conveyed the land to Brown on the authority of (1) an order of the Massachusetts court, assented to by Holman's heirs, purporting to authorize the conveyance on Brown's petition; (2) an act of the Alabama legislature authorizing her to sell lands of the estate for the payment of debts. Holman's heirs sued in ejectment to recover the land from Brown's transferees. The Supreme Court held that the order of the Massachusetts court did not enable the administratrix to convey the legal title, since that court was powerless to invest her with title. The effect of the Massachusetts decree as an adjudication of the equitable interests of the parties was not directly presented to the Court. If it had been, the response would have been clear, as is shown by the Court's treatment of the argument that the defendants, by virtue of the contract to sell, were the equitable owners: in fervent terms, the Court asserted that no equitable defense could be interposed in an ejectment action. "Equitable and legal jurisdictions have been wisely separated; and the soundest maxims of jurisprudence require each to be exercised in its appropriate sphere." 16 Pet. 25, 59 (1832). When it is noted that this opinion was written by Justice McLean, who also wrote the opinion in *Watts v. Waddle*, it will be appreciated that he was not denying that advantage might be taken of a foreign decree in an appropriate proceeding in equity. The case can stand for no more than that a foreign decree does not create interests which can defeat an ejectment action in a system of strict separation of law and equity. Even that was not necessary to the decision; the

is this keystone case that binds the court to an "illogical or inconsequent" position which does not completely fulfill the Constitution?

Watts v. Waddle was a sequel to the famous *Massie v. Watts*.¹²⁰ It grew out of the same act of disloyalty by a surveyor which led to Chief Justice Marshall's classic affirmation of the jurisdiction of a court of equity, in a proper case and with the defendant before it, to order a conveyance of foreign land. The facts of *Massie v. Watts* are well known, but, as an introduction to the events which led to *Watts v. Waddle*, they may be restated briefly.

Court directed judgment for the defendants on the ground that the act of the Alabama legislature validly authorized the conveyance by the administratrix.

Corbett v. Nutt: A District of Columbia court purported to appoint a new trustee for Virginia lands. The lands were sold for nonpayment of taxes, and the trustee so appointed redeemed pursuant to an act of Congress providing for redemption, in the case of land owned by a person under legal disability, by the trustee or other person having charge of the person or estate of such owner. While holding that the District of Columbia court could not vest title in its appointee, the Court held that since the new trustee had apparent authority he was a person "having charge" of the estate, and the redemption was proper. Clearly there is no support for *Fall v. Eastin* here: there would not be the slightest inconsistency between requiring conclusive effect for the Washington decree and holding that a court cannot vest its appointee with legal title to foreign land. Moreover, what was said as to the power of the District of Columbia court, though obviously sound, was just as obviously pure dictum.

Carpenter v. Strange: This is the strongest of the four cases cited, but it falls far short of compelling the result reached in *Fall v. Eastin*. One Merrill, trustee for Mrs. Carpenter, misappropriated the trust property. Certain land of his own, located in Tennessee, he conveyed to Mrs. Strange without consideration. Then he died. Mrs. Strange qualified as his executrix in New York, and there Mrs. Carpenter brought an equitable action against her, in her representative capacity, to recover the misappropriated funds, alleging that the conveyance of the Tennessee land to Mrs. Strange was in fraud of her rights as a creditor. The New York court entered a substantial money decree for the plaintiff, and purported to adjudge the conveyance of the Tennessee land to Mrs. Strange to be "absolutely null and void from the beginning" as a fraud on the plaintiff as creditor. Mrs. Strange having qualified as executrix in Tennessee, the plaintiff brought an equitable proceeding there to enforce her rights under the New York decree, attaching the land which had been conveyed to Mrs. Strange. The Supreme Court held that Tennessee must give full faith and credit to the New York decree for money, but that it was not bound to respect the adjudication that the conveyance was void. The latter holding was based, first, on the fact that Mrs. Strange had been sued in New York only as executrix, whereas she claimed the land in her individual capacity; and, second, on the fact that the New York court had purported to affect the title to the land directly, instead of exercising its power to order Mrs. Strange to make a conveyance. But for space limitations, it would be desirable to quote here a full page from the opinion (pp. 105-6) to demonstrate the careful phraseology with which the court emphasized the impropriety of this procedure, as distinguished from the correct exercise of jurisdiction in personam. The result might well have been different if, in the New York case, Mrs. Strange had been sued in her individual capacity as well, and if the New York court had couched its decree in terms of an order to her to convey the Tennessee land for the benefit of the defrauded creditor rather than in terms of an adjudication that the conveyance to her was void. The Supreme Court's insistence on the importance of such a distinction in wording is sheer formalism, of course; the Court might well have treated the decree, as it stood, as a final adjudication of the rights of the parties. But this is not the first time that an unfortunate choice of words or legal concepts has proved fatal in court.

¹²⁰ 6 Cranch (U.S.) 148 (1810).

Ferdinand Oneal [sic] was the holder of a military warrant for public land in Ohio. An entry was made under this warrant which apparently entitled Oneal to one thousand acres on the bank of the Scioto River, in what became the town of Chillicothe, the description resting upon two other entries, one by Thomas Massie and one by Robert Powell. Massie was employed to survey the Oneal entry. Watts, by assignment, succeeded to the rights of Oneal. Unexpected bends in the river injected an ambiguity into the calls of the entry. At the time the entries were made it was believed that they were such that each of the three entrants could have the acreage claimed within the allotted frontage on the river. But Massie, the surveyor, placed such an interpretation on the entries that those of Powell and Massie covered almost the entire space allotted on the river for the three claims, so that the land which should have gone to Watts was included in the surveys filed for Massie and Powell. Massie also bought Powell's rights, so that he became the sole beneficiary of his misconstruction of the calls; and he procured patents settling the title in himself—or so everyone assumed in the early stages of the protracted litigation. He promptly proceeded to sell the land thus acquired to other people.

Watts brought his action against Massie in the United States circuit court for Kentucky, which acquired personal jurisdiction of the defendant. Judge Innis entered a decree ordering Massie to convey to Watts a properly surveyed tract fronting on the river. Massie appealed to the Supreme Court, which affirmed with Marshall's classic opinion, holding that an agent indulging in such practices holds the land acquired as trustee for his principal, and can be required to convey by a court having personal jurisdiction. So much can be gathered from the report of *Massie v. Watts* in the Supreme Court, and is quite familiar.

What happened next is not so generally known. Like Mr. E. W. Fall and many another defendant, Massie treated the decree with contempt; he disregarded it, and made no conveyance. Watts then filed an action in the circuit court of the United States for Ohio, "to compel Nathaniel Massie and others, to make a conveyance to the complainant, of the legal title to the said [land], the elder equitable title thereto being in the complainant."¹²¹ Mr. Justice McLean, after reciting the award of the decree to Watts by the circuit court in Kentucky and the affirmance by the Supreme Court in *Massie v. Watts*, describes the subsequent action thus: "To carry this decree into effect, in the state of Ohio, suit was instituted by

¹²¹ *Watts v. Waddle*, 6 Pet. (U.S.) 389, 390 (1832).

Watts in the circuit court. . . ."¹²² Thereupon, we may gather, Watts called on certain luckless people in Chillicothe, including one William Lamb, who had bought from Massie parts of the land acquired by his perfidy. I feel sure that he called with a copy of John Marshall's instructive essay on applied ethics in his breast pocket. At all events, he was able to convince Mr. Lamb that, if he wished to continue in possession of the land he had bought from Massie, he would have to treat with the rightful owner, Watts. As an amicable settlement of the matter, Watts and Lamb entered into an agreement whereby Lamb agreed to pay a substantial price for the land, and Watts agreed to give him a good and sufficient warranty conveyance—as soon as a final decree should be entered in the action which Watts had brought against Massie in the Ohio circuit court.

This contract was made in November 1815, some five years after Watts's victory in the Supreme Court. It contemplated that the final decree in the Ohio case would be forthcoming by February 1, 1816. Actually, Watts won a final decree in that case in January 1818.¹²³ Unfortunately, the decision of the circuit court appears not to be reported. But there was an appeal to the Supreme Court: not by Massie, and not by Lamb, but by certain other of Massie's grantees who had been made defendants.¹²⁴ In Brightly's edition of the reports, following Justice McLean's statement that the final decree in the Supreme Court was entered in September 1822, there is a reference to 7 Wheat. 158. This is an error, since that reference is to *Watts v. Lindsey's Heirs*, a case involving different land, which Watts lost. Clearly the correct reference should be to *Kerr v. Watts*,¹²⁵ which was decided in March 1821. In the report of the case on appeal, the history of the litigation is recounted, and the Ohio proceeding is described: "The object of the present suit was, *to carry into execution against the defendants, who had acquired Massie's title, the decree against him in Kentucky, affirmed in this court.*"¹²⁶ Justice Johnson said: "Since that decision [in *Massie v. Watts*], it has been ascertained, that the present defendants are in possession of the land, or the greater part of it; and Massie having changed his residence to Ohio, this suit has become necessary, both *to enforce the former decree against him*, and to obtain relief against the actual possessors of the land."¹²⁷

¹²² *Ibid.*, at 392. (Italics supplied.)

¹²⁴ *Ibid.*

¹²³ 6 Pet. (U.S.) 389, 392, 395 (1832).

¹²⁵ 6 Wheat. (U.S.) 550 (1821).

¹²⁶ *Ibid.*, at 554. (Italics supplied.) The record in the Kentucky case was made part of the bill. *Ibid.*, at 552, 561.

¹²⁷ *Ibid.*, at 558. (Italics supplied.) A question of crucial interest, of course, is whether the Kentucky decree (affirmed by the Supreme Court) was given conclusive effect by the circuit

At this point, since neither Massie nor Lamb appealed from the Ohio judgment in Watts's favor, Watts seemed to have won his long battle, and to be in position to complete his contract with Lamb. But a dismaying discovery was made: although everyone had apparently assumed the contrary, Massie had never procured a patent on the land which he had appropriated to himself by his survey—or at least that part of it which he had conveyed to Lamb. The legal title was in the heirs of Powell, whose rights Massie had purchased. Watts had to begin all over again. He brought a suit, again in the circuit court in Kentucky, against Powell's heirs, and in 1826 obtained a decree against them ordering a conveyance of that part of the land covered by their patent which was rightfully his.¹²⁸ Again the decree was disregarded by contumacious defendants. Watts obtained a patent in his own name, and on the basis of that and the Kentucky decree tendered a deed to Waddle, to whom Lamb had assigned the contract. The tender was refused. Thereafter, a commissioner appointed by the court in Kentucky, pursuant to a Kentucky statute, executed a deed. Again a tender was made and refused. Waddle finally despaired of the contract's ever being performed, and sued Watts for a return of the purchase money, recovering judgment for nearly \$8,000. Then Watts filed the action that produced the precedent known as *Watts v. Waddle*, an action in equity in the circuit court for Ohio, to enjoin enforcement of the judgment for the purchase money, and to enforce specific performance of the contract. He did not live to see the outcome; the circuit court dismissed his suit, and the appeal was continued by his heirs.

There is no ground for wonder that the appeal was lost. Everything was wrong with Watts's suit for specific performance:

(1) A suit was pending against Watts and the heirs of Oneal in Kentucky, brought by one Banks, who claimed the Oneal warrant as a senior assignee, with rights superior to those of Watts, who had been personally served. Although the suit had been allowed to languish, Watts had not procured a dismissal.

(2) In his Kentucky action against Powell's heirs, Watts had failed to

court in Ohio (and the Supreme Court reviewing its decision). A full exposition is not feasible here; but careful analysis will show that, despite superficial indications to the contrary, the Court treated the decree as conclusive. See *ibid.*, at 558, 554, 561, 560.

Analysis of the decision will also reveal that Watts' title was upheld even as against bona fide purchasers for value. However, it is clear that this was the result of a peculiar rule applicable to Virginia land warrants. *Ibid.*, at 560. In passing, one wonders whether the decision, based on this unique rule, might possibly have been a source of Justice Letton's fear that recognition of foreign decrees would defeat the rights of innocent purchasers.

¹²⁸ *Watts v. Waddle*, 6 Pet. (U.S.) 389, 393 (1832).

join the husbands of Powell's married daughters. Where issue had been born, the husbands were entitled to a life estate in the property of their wives. Their possible interests were not foreclosed by a decree to which they were not parties.

(3) Similarly, Watts had failed to join Powell's widow. She had a possible dower interest which was not foreclosed, notwithstanding the argument that Powell held only as trustee for Watts.

(4) Disregarding all these objections, Watts did not get legal title by virtue of the Kentucky decree, or the commissioner's deed under it.

It was in connection with the last point that Justice McLean, who had also written the opinion in the circuit court,¹²⁹ used the language which has been so much quoted: "A decree cannot operate beyond the state in which the jurisdiction is exercised. It is not in the power of one state to prescribe the mode by which real property shall be conveyed in another. This principle is too clear to admit of doubt. . . ."¹³⁰ Read in its context, the statement is entirely unobjectionable; indeed, the care with which it was phrased, and the reason for the phrasing, become apparent. In the circuit court Justice McLean expressed the same idea in these words: "No decree of a court in a foreign jurisdiction, can operate as a conveyance of land in Ohio. The mode by which real estate must be transferred, either by act of the parties or by operation of law, is fixed by the laws of the respective states."¹³¹ The argument to the contrary was not based on any hypothesis of power in the Kentucky court to transfer title to Ohio land, but rather on an Ohio statute validating conveyances made in conformity with the law of the place of execution. The court quite properly construed the statute as applying to deeds executed by individuals, and not to the decrees of foreign courts, nor the deeds of commissioners appointed by foreign courts. The entire matter is summed up in a brief passage:

[A]t most, Watts derived only an equitable estate under the decree against Powell's heirs. . . . Under the deed tendered to Waddle, he could not defend himself against an action of ejectment commenced by Powell's heirs, or by any other persons claiming under a legal conveyance from them. A decree of a court in Ohio, having jurisdiction of the subject-matter, is necessary to give a legal effect to the decree in Kentucky. And even if this had been done, there would still exist serious objections to the title.¹³²

This, then—this cornerstone of the preclusive line of authority which prevented the Supreme Court from following its better judgment in *Fall v.*

¹²⁹ 1 McLean 200, 29 Fed. Cas. 446, No. 17,295 (D. Ohio, 1833).

¹³⁰ 6 Pet. (U.S.) 389, 400 (1832).

¹³¹ 1 McLean 200, 204, 29 Fed. Cas. 446, 447 (D. Ohio, 1833).

¹³² 6 Pet. (U.S.) 389, 401-2 (D. Ohio, 1832).

Eastin—was a marketable title case: an application of the principle that (in the words of Justice McLean) “No court of chancery will force a doubtful title on the vendee.”¹³³ This is the case that was read by the Court in *Fall v. Eastin* as having “features like the case at bar.”¹³⁴ The process of distinguishing cases can, on occasion, become somewhat refined. This is not such an occasion. The difference between a suit for specific performance, in which a party who has procured the decree of a foreign court ordering a conveyance attempts to force the rights thus acquired upon a third person who has contracted to buy, and a suit brought by such a party against the original defendant and his transferees to perfect his rights under the decree, is so wide as to be unmistakable. There is not a word in *Watts v. Waddle* inconsistent with the proposition that one who wins such a foreign decree acquires rights under it which he can enforce at the situs. On the contrary, to rely on the case as establishing the contradictory of that proposition is to deny the precise reason for the decision. Watts’s title was unmarketable because he had not taken the proper course, which was to proceed in equity in Ohio to enforce the Kentucky decree.¹³⁵ To decree specific performance against the purchaser would have been to cast on him the burden of that proceeding.

This review of *Watts v. Waddle* establishes two things clearly:

First, the decision in *Fall v. Eastin* was not dictated by authority.

Second, the successful plaintiff in the foreign forum was not without a remedy, or form of procedure, for the enforcement of his victory. A remedy existed in the form of an equitable proceeding at the situs “to carry [the decree] into effect.”¹³⁶ Watts brought such a proceeding against Massie and prevailed. The foreign decree was treated as conclusive. He failed to bring such a proceeding against Powell’s heirs, and his failure to do so was

¹³³ *Ibid.*, at 402.

¹³⁴ 215 U.S. 1, 8 (1909).

¹³⁵ It is not hard to guess why he relied on desperate alternatives to the proper course, which he had followed when Massie flouted the first decree. Although Ohio at that time had a statute giving its equity courts power to transfer land titles directly by decree [see Huston, *The Enforcement of Decrees in Equity* 17 (1915), and Millar, *Civil Procedure of the Trial Court in Historical Perspective* 476 (1952)], the notion which was later given temporary credit in *Hart v. Sansom*, that the court could not act without personal jurisdiction of the defendant, was generally entertained. Thus Henry Clay, representing Watts in the original case in the Supreme Court, argued: “If Watts could not sue Massie in Kentucky, he would be without remedy. He could not sue in Ohio, because the defendant could not be found there.” *Massie v. Watts*, 6 Cranch (U.S.) 148, 157 (1810). It was a relatively simple matter, after Massie moved his residence to Ohio, to serve him there, together with those to whom he had sold the land; but the problem of Ohio service on the numerous Kentucky heirs of Powell must have seemed insuperable.

¹³⁶ 1 McLean 200, 201, 29 Fed. Cas. 446 (D. Ohio, 1833).

the decisive reason for his failure to enforce specific performance against his purchaser.

It is ironical that the instrument which has been employed to frustrate the jurisdiction which Marshall affirmed in *Massie v. Watts* is a bit of language lifted out of its context in a later stage of the same litigation.

V

Professor Barbour's thesis stands up well. Critical re-examination of the supporting arguments leaves them intact, and even tends to reinforce them as other considerations come into view. We have examined to some extent the reaction of courts to arguments of a similar kind. The time has come to consider the objections which have been raised by legal scholars against the thesis.

We must begin with Professor Cook, although, as a predecessor of Barbour in this field, he is not formally to be classed among the critics. His major concern, and his great contribution, was to show that "[it is] time for judges and writers to stop talking language suitable to the time of Coke in discussing the power of equity, and to recognize that a court of equity is a legal tribunal with power to adjudicate and settle controversies as finally as a court of law."¹³⁷ He effectually disposed of any objection to the recognition of land decrees based merely on the nature of equity decrees as such, or of the obligation created by them. But the land decree was a special and troublesome case in the general topic with which he was concerned, and his treatment of it must be described as gingerly.¹³⁸ He used strange language: "From the nature of things the law of the jurisdic-

¹³⁷ Cook, *The Powers of the Courts of Equity*, 15 Col. L. Rev. 37, 233-34 (1915).

¹³⁸ At the outset, we are confronted by a difficulty of terminology which cannot be avoided; but because, in the end, we come back to the position that a court having jurisdiction of the parties has jurisdiction to order a conveyance of foreign land, we may relegate the discussion to a footnote to avoid confusion. The difficulty is that Cook, after some travail, classifies actions for specific performance of contracts to convey land as, at least predominantly, in rem. This does not lead him, as might be supposed, to the conclusion that a court without jurisdiction of the land has no jurisdiction in such actions; on the contrary, he argues in the end for giving an effect to the decree, and the commissioner's deed under it, which goes beyond what is contended for in this paper. He contrives to do this by means of a special and esoteric analysis which would not be serviceable in forensic argument, and which seems, besides, to be imperfect in its logic. The argument proceeds thus [*ibid.*, at 119-29]: An action for specific performance of a contract to convey is in rem because its ultimate object is to deprive the defendant of a specific res which he has. Irrespective of what the defendant may do, it will have such an effect; for although, for historical reasons, the court proceeds as if it were acting only in personam—in form doing nothing more than directing the defendant to convey—it not only may attach the defendant for contempt, but may and will sequester his personal property, issue a writ of injunction for possession, and then issue a writ of assistance commanding the sheriff to put the plaintiff in possession. Thus the court of equity brought about a state of facts to which the common law attached the consequence that the defendant lost his title, though retaining a common-law power to regain it; and the plaintiff acquired a defeasible

tion where the land is must in the final analysis determine who is entitled to the possession and enjoyment of it, since its tribunals and officers are the only ones that can deal with the physical *res*.¹³⁹ If this means only that no sheriff but a local sheriff can put the plaintiff in possession, and then only under process issuing from a local court, it is of course true. If the reference to the law of the situs makes it mean more—if it means that such process will issue only when the relationship between the parties gives rise, under that law, and independently of the decree, to an equitable interest—it ignores the possibility, entirely consistent with “the nature of things,” that the state of the situs may, voluntarily or under the compulsion of the full faith and credit clause, treat the foreign decree as *res judicata*, thus precluding any new inquiry into the incidence of the law of the situs. Yet he goes on to argue, noting the practice of recognizing deeds executed under duress applied by the foreign court, that a deed by a foreign commissioner should be recognized as passing title of its own force.¹⁴⁰ Once again, let me make it clear that, like Professor Barbour, I dissociate myself from such overstatements of the case. The foreign court does not have the power over the land that the court at the situs has; and a foreign commissioner’s deed appearing on the records at the situs would create substantial practical problems for the title examiner, thus impairing the utility of the recording system.

legal title. Today, the court can pass the title by its decree, or by the device of a commissioner’s deed pursuant to statute.

It is reasonable enough to describe such an action as *in rem* when this is the available machinery. But, in what I am afraid is a clear non sequitur, Cook carries over the *in rem* label to the action for specific performance which is brought in a jurisdiction other than that in which the land is located. Here his reasons for the characterization fail. The court can enforce its decree only by attachment for contempt or sequestration. It cannot issue a writ of assistance and put the plaintiff in possession. It cannot vest the title by its decree, or by a commissioner’s deed. On Cook’s own principle of looking to the actual consequences, therefore, such an action is procedurally (and, it may be added, constitutionally, for purposes of due process of law) one *in personam*, even though its object is to obtain a specific *res* from the defendant.

Having got himself into this position, Cook could defend the jurisdiction of the court away from the situs only by an extraordinary feat of analysis; but defend it he did. After all, “from the legal point of view the *res* of which the plaintiff seeks to deprive the defendant in an action *in rem*, is not only the physical object but also the congeries of legal rights, privileges and other jural relations which go to make up title or ownership. This congeries of jural relations, not being a physical object, can not of course have any physical situs.” There is no inherent reason why it cannot be transferred by acts done without the jurisdiction, whether those acts be those of the owner or of a foreign court.

This analytical game of in-and-out-the-window would be too much for most lawyers. Chief Justice Marshall firmly established, on simple grounds, the jurisdiction of a court of equity, having the defendant before it, to order a conveyance of foreign land. Let’s leave it that Cook affirmed that jurisdiction, and go on from there.

¹³⁹ *Ibid.*, at 128.

¹⁴⁰ *Ibid.*, at 128–29, notes 56, 57.

On the other hand, Professor Cook took a restricted view of the class of cases in which the decree of the foreign court should be recognized. This led him to accept the decision in *Bullock v. Bullock*,¹⁴¹ the New York court had undertaken to *create*, and not merely to enforce, an equitable interest in New Jersey land, no such interest having been in existence prior to the decree. This position stems from his unsupported statement, already discussed, that a remedy on the decree was available only in cases in which a consensual relation between the parties had given rise, independently of the decree, to an equitable interest. It is unnecessary to repeat what has been said on that score. I shall add only that I should like to know how Professor Cook would have responded to the suggestion that a foreign court may "create" rather than merely "enforce" an equitable interest in local land, simply by finding an enforceable contract between the parties to an action for specific performance where, according to the law of the situs, no such enforceable contract exists.¹⁴²

The first response to Professor Barbour's article was made by Dean Pound.¹⁴³ He regarded Professor Barbour, and the cases supporting him, as relying chiefly on arguments drawn from the enforceability of foreign decrees for money. These were not in point, he thought, because this status for money decrees had come about by reason of statutes allowing execution on them, and thus putting them on the same basis as money judgments. Where other types of equity decrees were concerned, the object was still, as always, to compel the defendant to do his duty, and that duty was "not necessarily" merged in the decree. There was never any necessity for a proceeding to enforce the decree as distinguished from the original claim. Nor was it necessary in cases like *Bullock v. Bullock* to sue on a right created by the decree; the right to alimony exists independently of and anterior to the decree, and can be enforced at the situs—even as against transferees in fraud of the wife's rights. Finally, if foreign courts are allowed to create duties to convey land, when such duties are gen-

¹⁴¹ 52 N.J. Eq. 561 (1894).

¹⁴² There is little more in Professor Cook's article bearing directly on the problem under discussion. He approved *Burnley v. Stevenson* [15 Col. L. Rev. 37, 245 (1915)], that being a specific performance case, although he thought it a bit extreme—oddly, for the reason that it seemed to treat the foreign decree as passing title. It is not clear why one who would treat a foreign commissioner's deed as passing title would balk at treating the decree in the same way. But such procedural merit as the objection has is probably met by the fact that under the Ohio code of civil procedure equitable defenses could be pleaded at law, coupled with the fact of the Ohio court's jurisdiction in rem as the court of the situs. Finally, as emphasizing the limited nature of Professor Cook's consideration of the problem, it should be noted that he disclaimed any inquiry into the application of the full faith and credit clause. *Ibid.*, at 245 n. 47.

¹⁴³ *The Progress of the Law, 1918-19: Equity*, 33 Harv. L. Rev. 420, 423-25 (1920).

erally recognized as giving rise to equitable ownership as against everyone except purchasers for value without notice, "the result is to allow one state through its courts to create real rights in land in another state—and if it may do so by its courts, why not through its legislature?"

The argument that a decision, sound in itself, will Open the Door to intolerable abuses has a tendency to induce irresolution; so immediate attention may be given to Dean Pound's last point. A complete answer is fortunately at hand, in a form which, of course, was not available when Dean Pound wrote:

[T]he full faith and credit clause does not ordinarily require [a state] to substitute for its own law the conflicting law of another state. . . . It was for this reason that we held that the state of the employer and employee is free to apply its own compensation law to the injury of the employee rather than the law of another state where the injury occurred. *Alaska Packers Assn. v. Industrial Accident Comm'n*, [294 U.S. 532], 544-550 [1935]. And for like reasons we held also that the state of the place of injury is free to apply its own law to the exclusion of the law of the state of the employer and employee. *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, [306 U.S. 493], 502-505 [1939].

. . . Where a court must make choice of one of two conflicting statutes of different states and apply it to a cause of action which has not been previously litigated, there can be no plea of res judicata. But when the employee who has recovered compensation for his injury in one state seeks a second recovery in another he may be met by the plea that full faith and credit requires that his demand, which has become res judicata in one state, must be recognized as such in every other.

The full faith and credit clause and the Act of Congress implementing it have, for most purposes, placed a judgment on a different footing from a statute of one state, judicial recognition of which is sought in another. . . .

From the beginning this Court has held that these provisions have made that which has been adjudicated in one state res judicata to the same extent in every other. . . .

The constitutional command requires a state to enforce a judgment of a sister state . . . even though the statute on which the judgment was founded need not be applied in the state of the forum because in conflict with the laws and policy of that state.¹⁴⁴

The argument that suit on the foreign decree in a case like *Bullock v. Bullock* is unnecessary, since suit for alimony may be brought at the situs, is not a reassuring one. It is not clear precisely what the suggested alternative is. The case cited¹⁴⁵ held that a wife may recover alimony after the husband has established a separate domicile and obtained an ex parte divorce on service by publication alone. Thus the apparent suggestion is that the alimony proceeding at the situs may be brought after the divorce.

¹⁴⁴ *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 436, 437, 438, 439 (1943).

¹⁴⁵ *Cochran v. Cochran*, 42 Neb. 612, 60 N.W. 942 (1894). See Goodrich's comment on this case, *Enforcement of a Foreign Equitable Decree*, 5 Iowa L. Bull. 230, 242 n. 56 (1920), and cf. *Estin v. Estin*, 334 U.S. 541 (1948).

But the cases which raise the problem under discussion are not cases of *ex parte* divorce. *Bullock v. Bullock*, for example, was a normal, contested action; it was brought by the wife at the common domicile; the husband was personally served and appeared. There is, to say the least, grave doubt that a right to alimony will survive a decree entered by a court having personal jurisdiction of the wife.¹⁴⁶ The case cited also indicates that (in Nebraska) a wife may sue for alimony without divorce; but if the suggestion is that the wife could have sued first in New Jersey for alimony, and then for divorce at the domicile, surely the alternative is unacceptable. The divorce action must, of course, be brought at the domicile of one of the parties, and that, by definition, is different from the situs. Under either of the alternatives intimated here, the result would be to split a normal divorce proceeding into two separate actions on the merits, and to remove the question of alimony from the court which must consider the grounds for dissolving the marriage. (This is to say nothing of questions of timing which might be important; nor of the expense of litigation; nor of the multiplication of the problem where the husband owns land in more than one state.) The argument that suit to enforce the decree is unnecessary proceeds on pragmatic grounds; but on precisely such grounds one may doubt the desirability of compelling such a result.

Perhaps the argument is only this: that after obtaining the decree for divorce and alimony at the domicile, the wife may bring an independent action for alimony at the situs; at least if the law of the situs has similar laws as to alimony, she may have a decree there, to be satisfied out of the land; and if fraudulent transfer is a problem, she may resort to the usual equitable remedy.

If the constructive view adopted by some courts were followed, it would not be necessary to proceed on the theory of an independent and anterior right existing by the law of the situs, and it might not be permissible to do so: the action could be brought on the decree, to establish even the obligation to pay future installments.¹⁴⁷ If it is brought on the theory suggested by Dean Pound, we encounter not only the previously stated objections to splitting the question of alimony from the main proceeding, but the additional fact of pointless relitigation. Whether it is brought on that theory or on the decree, the availability of an equitable remedy against a fraudulent conveyance is not particularly comforting. The court which had the

¹⁴⁶ Alimony after Foreign Decrees of Divorce, 53 Harv. L. Rev. 1180 (1940). Cf. Goodrich, *op. cit. supra* note 145, at 241; *Estin v. Estin*, 334 U.S. 541, 554 (1948).

¹⁴⁷ *Fanchier v. Gammell*, 148 Miss. 723, 114 So. 813 (1927); *Cummings v. Cummings*, 97 Cal. App. 144, 275 Pac. 245 (1929).

best opportunity to consider the relationship between the parties and their conduct toward each other decided that the wife should have security, in the form of a mortgage on the husband's land, for the payment of the small monthly installments. The general right of a creditor to have a fraudulent conveyance set aside is a poor substitute for such an arrangement. In practical effect it may mean only that, though her resources and the object to be attained are small indeed, she may institute another difficult and expensive suit in equity.¹⁴⁸ The New York court had provided meaningful assurance that her small monthly allotment would be paid. It is difficult to understand how depriving her of that assurance fostered the sovereignty of New Jersey, or served any other purpose except to impair the force and value of the money decree.¹⁴⁹

The next commentator, Goodrich, was,¹⁵⁰ and still is,¹⁵¹ an enthusiastic supporter of the Barbour thesis. In his early article, commenting on a new decision in support of the thesis,¹⁵² he took the position that the result was a desirable one if it did not do violence to settled legal principles, and proceeded to inquire whether it was in conflict with such principles. He rejected the arguments advanced to sustain the *Bullock* case: that the order for the mortgage was not part of the judgment, but "ancillary to the execution"; that the decree did not create a binding obligation, but only a "duty to the court" ("[i]t seems to the writer that this argument is deprived of all its force by the great mass of authority allowing, without question, an action on a foreign decree for the payment of money");¹⁵³ that enforcement of the foreign decree involves interference with the prerogatives of the situs state. On the last point he rested, like Barbour, on the incongruity of the argument with the practice of recognizing the deed executed under foreign compulsion.¹⁵⁴ He rejected the distinction between

¹⁴⁸ Mrs. Bullock's own experience is instructive. Having gained nothing by her first equity suit in New Jersey, she sued at law on the New York decree to recover accrued installments (at the rate of \$100 per month). For this purpose, the New Jersey court treated the New York decree as conclusive. *Bullock v. Bullock*, 57 N.J.L. 508, 31 Atl. 1024 (1895). But if, at this stage, Mr. Bullock had made a fraudulent conveyance, her only recourse would have been, after exhausting her legal remedies, to file a new suit in equity to set the conveyance aside.

¹⁴⁹ These seem to me to be Dean Pound's two principal points. As to his reasons relating to the nature of equity decrees, and the application of the principle of merger, I can only say that it is regrettable that he did not notice Professor Cook's persuasive arguments.

¹⁵⁰ Goodrich, *op. cit.* supra note 145.

¹⁵¹ Goodrich, *Conflict of Laws* § 218 (3d ed., 1949).

¹⁵² *Matson v. Matson*, 186 Iowa 607, 173 N.W. 127 (1919).

¹⁵³ Goodrich, *op. cit.* supra note 145, at 234.

¹⁵⁴ Perhaps he overstates the case a bit when he suggests that "the decree of the court at the situs is what affects the title to the land, and there is no foreign interference at all." *Ibid.*, at 237. Barbour made a similar suggestion. 17 Mich. L. Rev. 527, 550 (1919). It would be more

decrees resting on "antecedent obligation" and other decrees. The objection that no remedy existed on the decree was not basic; it could be cured, if necessary, by statute; but, agreeing with Cook that a remedy does exist, in a bill to enforce the decree, he effectively showed the lack of basis for Cook's limitation of the remedy to cases of antecedent obligation. He rejected Dean Pound's arguments, that suit on the foreign decree is unnecessary in the divorce cases, and that the cause of action is not merged in the decree, contending for a full application of the principles of *res judicata*.

In 1925 Professor Lorenzen joined forces with Barbour and Goodrich, supporting the thesis fully—with one important exception.¹⁵⁵ Building on Cook as well as on Barbour, he leveled a devastating barrage against all objections based on the character of equity decrees as not giving rise to enforceable obligations. In answer to Dean Pound, he showed that the courts have not attributed the enforceability of money decrees to statutes allowing execution on them. He rejected the distinction between decrees based on antecedent obligation and others: in the cases supporting the thesis, where the decree was based on antecedent obligation, the merits of the original cause of action were treated as conclusively settled. Hence the action was on the decree. The objection that there is no form of procedure for the enforcement of the foreign decree he dismissed as "no argument at all." Objections based on the resistance to allowing foreign states to create property interests in local land he dealt with primarily on the basis of the incongruity of recognizing the deed executed under compulsion, adding what should have been a helpful clarification: "The title will not be changed except as the result of a decree of the court of the situs, that is, only after there is record evidence of such change at the situs and this is the only real interest that the state of the situs has in the matter."¹⁵⁶

Then came the exception. Quoting almost in full the concurring opinion of Justice Holmes in *Fall v. Eastin*,¹⁵⁷ he submitted that ". . . Mr. Justice Holmes has given us the key to the final solution of our problem. . . ."¹⁵⁸ This solution, offered as a reconciliation of the interests of society in the principles of *res judicata* and the interest of a state in controlling the title

accurate and more candid to concede that the foreign decree, since it is conclusive, is the origin of the change in title; the effect on the title is brought about, however, not by the force of the foreign decree as such, but by the force which the Constitution of the United States gives to the principle of *res judicata*.

¹⁵⁵ Lorenzen, Application of Full Faith and Credit Clause to Equitable Decrees for the Conveyance of Foreign Land, 34 Yale L. J. 591 (1925).

¹⁵⁶ *Ibid.*, at 609-10.

¹⁵⁷ 215 U.S. 1, 14 (1909).

¹⁵⁸ Lorenzen, *op. cit. supra*, at 611.

of domestic land, was: "[T]he foreign decree is entitled to be enforced under the full faith and credit clause as between the immediate parties, but . . . the state in which the property is situated may decline to give effect to it as against third parties, including purchasers with notice of the foreign decree."¹⁵⁹

Few people have taken Mr. Justice Holmes's cryptic opinion so seriously. The Nebraska court did not consider Mrs. Eastin an innocent purchaser. Neither has Nebraska, so far as I know, seen fit "to do away with equity or with the equitable doctrine as to purchasers with notice. . . ."¹⁶⁰ It is difficult to understand why Professor Lorenzen should have developed this sudden concern for the interest of the state in controlling title to domestic land, after he had been at considerable pains to show that no interest of the situs state is jeopardized by recognition of the foreign decree. It is equally difficult to imagine that those who insist on the red meat of inviolable sovereignty for the law of the situs will be satisfied with the cake crumb Lorenzen offers them. If there were any threat to the substantial interests of the situs state, the real damage would be done in the compulsory recognition of foreign-created interests enforceable against the holder of the record title—unless, indeed, one is to accept Holmes's somewhat incredible intimation that the interest of a state in abolishing universally accepted principles of equity is more sacrosanct than its interest in controlling the transfer of title. Are we really to believe that the full faith and credit problem is to be resolved by subordination of the interest in finality of judgments to the interest of the situs state in protecting purchasers with notice?

We have seen that the jurisdiction of a court having the parties before it to order a conveyance of foreign land is not, and must not be, frustrated by the situs state's refusal to recognize a deed made by the defendant under compulsion of the decree. We have seen that it should not be frustrated, either, by the ingenuity of the defendant in evading the foreign court's enforcement process. After all the labor, including that of Lorenzen, which has been expended in arriving at this stage, are we to announce to the defendant that he may, nevertheless, frustrate that jurisdiction utterly, having evaded the foreign court's attachment process, by the ridiculously simple expedient of conveying the land to his friend? This is bringing forth a mouse with a vengeance.¹⁶¹

¹⁵⁹ *Ibid.*

¹⁶⁰ Holmes, J., concurring in *Fall v. Eastin*, 215 U.S. 1, 15 (1909).

¹⁶¹ The greatest difficulty I find with my own thesis is that it may be subject to similar criticism: it would allow the defendant to frustrate the foreign decree by conveying to an

Such superficial plausibility as there may be in the Holmes-Lorenzen suggestion, that a change in the law as to innocent purchasers raises no federal question, rests upon the unspoken assumption that such a change would be of general applicability. It disappears entirely when we articulate the obvious fact that it would be nothing of the sort. The situs state would go on enforcing equitable interests against purchasers with notice in all other cases, including those in which the interest arose from acts of the parties outside the state; it would refuse to do so only in the case of the unperformed foreign decree, thereby denying effect to that decree as an adjudication, discriminating against it, and treating it as having less dignity than a private contract. Before Lorenzen wrote his article, Justice Holmes himself had shown that a state cannot stultify the Constitution by refusing credit to judgments it dislikes under a convenient *ad hoc* rule.¹⁶²

Professor Walsh,¹⁶³ after noting the settled doctrine that a decree for the payment of money will support an action of debt, concludes that other decrees "may be enforced by action in equity in any other state in which personal jurisdiction over the defendant is secured provided the decree does not dispose of property in the state in which the later action is brought on principles differing from the law of that state." He thus disposes of any objection founded on the nature of the decree or the obliga-

innocent purchaser. The only apparent remedy for that defect is some provision for constructive notice. I cannot argue, however, that the pendency of the foreign action should constitute such notice under the doctrine of *lis pendens*. While some recording statutes might allow the foreign decree to be recorded, giving the record an effect similar to that of a contract to convey, I can find no basis for maintaining that the full faith and credit clause requires the situs state to provide such a medium of constructive notice. It seems to me that there is merit in the position that the intrusion of foreign decrees or commissioners' deeds into the records leads to undesirable complexities—whether the purpose is to record an actual transfer of title or simply to constitute notice of an asserted interest. This last statement must be made with some hesitation in view of the practice under the Bankruptcy Act, 44 Stat. 664 (1938), 11 U.S.C.A. § 44(g) (1953), (see discussion and citations in note 92 *supra*); but that practice itself suggests that the clean-cut way to deal with the problem of constructive notice, if it should become acute, would be to invoke the federal legislative power—this time under the full faith and credit clause. It seems reasonably clear that under its power to implement that clause Congress could provide for the recordation at the situs of notice that an interest in the land is claimed by virtue of the foreign proceeding or decree. In the meantime, the successful plaintiff must protect himself against a transfer to an innocent purchaser by commencing his action to enforce the foreign decree at the situs and securing the benefits of *lis pendens* before such a transfer can be made. This ought not to be excessively difficult, since legitimate land transactions ordinarily take some time.

¹⁶² "[I]t is plain that a State cannot escape its constitutional obligations by the simple device of denying jurisdiction in such cases to courts otherwise competent." *Kenney v. Supreme Lodge*, 252 U.S. 411, 415 (1920).

¹⁶³ Walsh, *Equity* § 17 (1930).

tion it creates, and of the objection that there is no remedy on the decree. His reservation is based solely on the argument that to treat the foreign decree as *res judicata* is to make that decree "the real operating power" which transfers title. To do that, he says—falling into one of those non sequiturs which lie in wait for those who like these Latin labels—is to give it an operation "in rem," which of course it cannot have. This, according to Walsh, "demonstrates that the constitutional provision [for full faith and credit] does not apply." The cases are all reconciled by the principle of comity: a state need not respect the foreign decree, but will do so, whether it is based on antecedent consensual obligation or not, when, and only when, "the law involved is the same in both states."

Here the argument becomes somewhat confused. Professor Barbour's article is "brilliant" (though it proceeds on the "sophistry" that to enforce the foreign decree is to enforce a personal obligation of the defendant), but it makes the "mistake of taking mere form for the substance." Walsh's conclusion is: "The matter will be settled finally when it is recognized that these actions in equity having for their object the transfer or settlement of title to land are actually *in rem* . . . that they are personal only as a matter of mere form."¹⁶⁴ It is not easy to evaluate this conclusion. Walsh seems to be building upon Cook's terminology, but he misses the subtlety of Cook's analysis, coming to an untenable conclusion from which Cook had the agility to extricate himself—the conclusion that a court without jurisdiction of the physical *res* has no jurisdiction. Probably Walsh does not mean to say that Marshall was wrong in *Massie v. Watts*, but only that there is such a defect of jurisdiction that full faith and credit does not apply; foreign courts may continue, as Marshall said they could, ordering conveyances of local land; but courts at the situs may trifle with their solemn judgments, and nullify them if they wish; or they may condescend to pay them lip service—provided they have retried the merits of the case and come to the conclusion that they would have decided the same way in the absence of the prior proceeding—on the basis of "comity."

This suggests an important question which cannot be fully explored here: How much room is there, in the American constitutional system, for the application of principles of "comity" to the judgments of sister states? Speaking very generally, there is ground for a preliminary inference that under our Constitution there exists a dichotomy: either a judgment is rendered without jurisdiction, in which case due process of law would be denied by holding it conclusive; or it is rendered with jurisdiction, in which case it is entitled to full faith and credit. In the days of *Haddock v. Had-*

¹⁶⁴ *Ibid.*, at 76.

*dock*¹⁶⁵ there was an exception, allowing room for the operation of "comity"; the anomalous results to which it led are a matter of history. The most recent development in the law of divorce jurisdiction raises this problem all over again on a slightly different level, and the majority of the Court of Appeals for the Third Circuit gives explicit support to the conception of a dichotomy.¹⁶⁶ There may remain an exception in the case of judgments based on penal causes of action; but, if so, it seems marked for imminent subjection to the same fate that overtook the exception of judgments for taxes.¹⁶⁷ It would be difficult, in arguing for the existence of the dichotomy, to account for the custody decrees which are valid where rendered but which do not unduly confine the courts of other states. Perhaps they could be explained on the ground of their lack of finality.¹⁶⁸ Paradoxically, the Supreme Court's most recent encounter with the problem of custody decrees yields substantial support for the view that due process and full faith and credit are correlative.¹⁶⁹ Whatever may be the ultimate answer to the broad question, at least one state court has interpreted the Supreme Court's refusal to apply the full faith and credit clause to foreign decrees ordering the conveyance of local land as precluding recognition on the basis of comity. In *Sharp v. Sharp* the Oklahoma Supreme Court, having reluctantly followed *Fall v. Eastin*, said:

¹⁶⁵ 201 U.S. 562 (1906). See Schofield, Full Faith and Credit vs. Comity and Local Rules of Jurisdiction and Decision, 10 Ill. L. Rev. 11 (1915).

¹⁶⁶ "With regard to this type of case one can generalize and say that due process at home and full faith and credit in another state are correlative." Goodrich, J., in *Alton v. Alton*, 207 F. 2d 667, 676 (C.A. 3d, 1953). If the soundness of this position were dependent on the soundness of the majority opinion as a whole one might hesitate to rely on it, since the opinion seems vulnerable in its insistence that due process is denied by a court which decrees a divorce with both parties before it. But the dissent, vigorous as it is, does not dispute the existence of the dichotomy; on the contrary, one may find in it at least oblique recognition of the possible existence of such a principle. ("Perhaps full faith should be given to every American divorce decree which satisfies due process." Hastie, J., dissenting, *ibid.*, at 684.) If the Supreme Court should recognize the validity in the Virgin Islands of divorces granted pursuant to the second part of the Island law, history indicates that it will be extremely difficult to escape the command that such divorces shall be treated as valid elsewhere. I do not for a moment believe that Judge Hastie is advocating a return to the chaotic conditions that followed the Haddock case. Anyone who does so must face the probability that within the ensuing thirty-six years there will appear a counterpart of the first Williams case, *Williams v. North Carolina*, 317 U.S. 287 (1942).

¹⁶⁷ *Milwaukee County v. M. E. White Co.*, 296 U.S. 268 (1935).

¹⁶⁸ *Cf. New York ex rel. Halvey v. Halvey*, 330 U.S. 610 (1947).

¹⁶⁹ *May v. Anderson*, 345 U.S. 528 (1953). Mr. Justice Burton's significant reliance on such cases as *Estin v. Estin*, 334 U.S. 541 (1948), is highlighted by Mr. Justice Frankfurter's concurring opinion, written solely to disclaim the dichotomy theory. Justices Jackson and Reed, dissenting, expressly embrace the theory.

As also bearing on the general question, see *Sutton v. Leib*, 342 U.S. 402, 409 (1952); *Fauntleroy v. Lum*, 210 U.S. 230, 238 (1908); *Haddock v. Haddock*, 201 U.S. 562, 628, 632 (1906); *Yarborough v. Yarborough*, 290 U.S. 202 (1933).

So, we have concluded, also reluctantly, that, being not compelled by the force of the constitutional provisions to give full faith and credit to the Oregon decree, we are concluded from affording it that effect through comity. In this state judgments void for lack of jurisdiction may be attacked or set aside in proper proceedings, by any party in interest at any time. The defendant had this right under our statutes. To concede, through comity, full faith and credit to the Oregon decree would be to deny defendant's rights and to confer upon that court, by judicial fiat, a jurisdiction which it does not have.¹⁷⁰

The opinion is not a sophisticated one; admittedly, the reasoning involves some shifting of the meaning of "jurisdiction"; it denies jurisdiction where jurisdiction, both of the person and the subject matter, was conceded by the Supreme Court;¹⁷¹ the result is unfortunate, since the Supreme Court did not so much as intimate that the situs state is precluded from giving conclusive effect to the foreign decree;¹⁷² but the sense of correlativeness expressed here ought to be a warning to anyone who is tempted by the Walsh position.¹⁷³

Professor Stumberg¹⁷⁴ dismisses as "beside the point" all objections to enforcement based on old hypotheses as to the nature of the equitable decree and the application of the principle of merger. Concluding that the question, whether foreign decrees other than those for the payment of

¹⁷⁰ 65 Okla. 76, 79, 166 Pac. 175, 178 (1916).

¹⁷¹ *Fall v. Eastin*, 215 U.S. 1, 5 (1909).

¹⁷² In *Roller v. Murray*, 234 U.S. 738 (1914), the Court, finding no substantial federal question in a contention that West Virginia had denied the plaintiff due process of law by treating a former Virginia decree as a bar to his claim to West Virginia land, said: "Supposing the courts of West Virginia erred in giving conclusive effect to the Virginia decision, this was no more than an error of law, committed in the exercise of jurisdiction over the subject-matter and the parties; and such an error—not involving a federal question—affords no opportunity for a review in this court." *Ibid.*, at 744. Cf. *May v. Anderson*, 345 U.S. 528 (1953).

¹⁷³ Professor Walsh also asks: "But why should a foreign decree disposing of local real property have a greater force or effect than a foreign judgment at law in ejectment, which would be admittedly void?" Walsh, *Equity* 76 (1930). Two brief answers may be given, one formal, the other practical: (1) Ejectment being one of the few actions which are essentially local, because of the nature of the relief sought, the law remains to the effect that no court except that at the situs has "jurisdiction." But it has long been established that a court of equity with the defendant before it has "jurisdiction" to order a conveyance. So one judgment is not entitled to recognition; the other should be. (2) Since few sane lawyers would apply to a court for an order directing the sheriff to put the plaintiff in possession of land when the sheriff could not obey without being guilty of trespass or worse, the question of the res judicata effect of foreign judgments in ejectment seldom, if ever, arises. The case is different where lawyers are invited by a long line of unimpeachable authority to bring suits in equity before a convenient tribunal, and do so regularly in good faith.

Moreover, the limitations on jurisdiction of "local" actions generally [cf. *Rest.*, Judgments § 71, comment b (1942)] are undergoing a salutary process of erosion. See *Little v. Chicago*, St. P., M. & O. Ry., 65 Minn. 48, 67 N.W. 846 (1896); *Jacobus v. Colgate*, 217 N.Y. 235, 111 N.E. 837 (1916); and cf. *Stoll v. Gottlieb*, 305 U.S. 165 (1938).

¹⁷⁴ Stumberg, *Conflict of Laws* 123-30 (2d ed., 1951).

money should be enforced elsewhere, "depends ultimately upon considerations of convenience," he gives some aid and comfort to the Holmes-Lorenzen view that the Constitution does not require a state to do equity. He rejects the antecedent-obligation distinction. "The most serious objection to a doctrine of compulsory full faith and credit to foreign equitable decrees," he believes, is that "a court might thus be compelled to order an act through the use of chancery process in a manner contrary to its local policy." This unusually worded statement is designed to encompass two propositions: first, a state should not be compelled "to make dispositions of realty which might conflict with the policy of its local law"; second, equitable process is an extraordinary remedy, granted only under exceptional circumstances. When a court is asked to enforce a foreign decree, "[i]t is being asked to employ its extraordinary process to bring about a result with regard to local land of which it may disapprove. Whether it should be compelled to do so is a matter of opinion which should be governed . . . by considerations of the possible results of compulsory enforcement."

The suggestion that equity powers are "extraordinary" or "discretionary" in such a sense that courts of equity are above the command of the full faith and credit clause will surely not bear analysis. I do not wish to misinterpret Professor Stumberg, but he seems clearly to be saying that a court of equity need not bestir itself to award its unusual remedies unless it is moved to do so by the facts of the original cause of action. This places equity—that separate system of higher, discretionary law—serenely out of reach of the full faith and credit clause. Equity may not be asked to bring about a result—at least with respect to local land—of which it may disapprove. The argument immediately encounters a snag in the fact that it is plainly untenable with respect to money decrees; and since it is based on the extraordinary and discretionary character of equitable relief as such, it ought to be as true of money decrees as of any other. Equity decrees the payment of money only in "exceptional cases," where the remedy at law is "inadequate." Professor Stumberg does not directly notice this difficulty. Speaking of judgments at law, however, he says: "But judgments only give rise to a duty to pay money and this enforcement does not materially affect conditions at the forum." Whether that proposition is directed to judgments at law or equity decrees for money, it cannot be demonstrated. Bitter fights have been waged in the name of state policy against the compulsory recognition of foreign money judgments; an equity decree of specific performance against a purchaser is different from a judgment against him at law for damages; and no one has yet

shown that transferring a land title in pursuance of a foreign decree affects conditions at the situs more significantly than does the recognition of a money judgment based on a difference in law.

Surely it is too late to object to the enforcement of foreign decrees affecting land on such a ground. Specific performance is not only the natural remedy for breach of contract; it is available as a matter of routine in land cases, and, like other equitable relief, is becoming increasingly available wherever legal remedies are less efficient to the ends of justice.¹⁷⁵ After more than a century of "fusion," an objection cannot be very persuasive insofar as it rests on a "tendency to regard the legal judgment as the norm and the equitable decree as anomalous. . . ."¹⁷⁶

Professor Stumberg's closing remark is that whether a court should be compelled to enforce foreign decrees affecting local land when it disapproves of the result is "a matter of opinion which should be governed . . . by considerations of the possible results of compulsory enforcement."¹⁷⁷ Such scope as the Constitution allows for balancing competing considerations regarding the faith and credit to be given to the judgments of sister states is, it should be observed, reserved for the Supreme Court. And patient consideration of the possible results of enforcement has failed to bring to light any results detrimental to any legitimate interest of the situs state in a federal system.

This has not been an exhaustive review of the scholarly reactions to the Barbour thesis.¹⁷⁸ Doubtless every writer on equity, conflict of laws, or judgments has paid his respects to the problem. The views noticed have, however, been those of some of the most frequently consulted modern authorities. As the various objections are considered one by one, none of them seems substantial. Is their cumulative effect more compelling?

¹⁷⁵ Cf. Rest., Torts §§ 938, Comment b, 933, Special Note (1939).

¹⁷⁶ Barbour, *The Extra-territorial Effect of the Equitable Decree*, 17 Mich. L. Rev. 527, 551 (1919). Professor Stumberg's apparent acceptance of the rule that the foreign decree establishes the facts conclusively, Rest., Conflict of Laws § 450(2) (1934), seems inconsistent with his position. So does his comment on *Burnley v. Stevenson*, 24 Ohio St. 474 (1873): "Where the foreign equity decree is used as a defense as in *Burnley v. Stevenson* . . . there is no particular difficulty as in such cases [the foreign court's findings of fact are] made effective by a recognized and proper process at the forum." But, as Professor Cook suggested, *Burnley v. Stevenson* is procedurally comprehensible only on the basis that the court at the situs awarded affirmative equitable relief against the plaintiff, in effect requiring—and effectuating—a transfer of title to the defendant. Otherwise, what is the defendant's position (with respect to the marketability of his title, for example) after he has won the case? In the *Burnley* case the Ohio court did employ its "extraordinary" process to bring about a result with regard to local land which it might have disapproved had it considered the case on the merits.

¹⁷⁷ Stumberg, op. cit. supra note 174, at § 176, p. 76.

¹⁷⁸ Further support for the thesis can be found, for example, in Moore & Oglebay, *The Supreme Court and Full Faith and Credit*, 29 Va. L. Rev. 557, 580-84 (1943).

The most striking feature of the state of opinion among these writers is that each objection can be identified with its particular champion, and that a majority would reject any specific objection:

Cook stands alone in the view that there is no remedy on the decree except in cases of antecedent obligation arising from consensual relationship, although he reaches a result similar to that of

Beale (whose views were considered earlier), who alone holds that there is no remedy on the decree in any case, but that the foreign decree is conclusive when suit can be brought on the original cause of action;

Pound alone clings to objections based on the nature of the obligation of an equity decree, and he alone feels that action to enforce the decree is unnecessary;

Goodrich repudiates all objections;

Lorenzen has no support, except from *Stumberg*, and that not very explicit, in his view that the decree is conclusive against the defendant but not his transferees with notice;

Walsh has no support, even from *Cook*, in the view that the foreign court lacks jurisdiction because of the *in rem* character of the action, nor in the requirement that the law of the two states must be the same if there is to be recognition even on the basis of comity;

Stumberg gets no comfort from any of the other writers in his solicitude for local land policy, except from *Pound's* concern about possible foreign legislation; and in his reliance on the extraordinary and discretionary character of equitable relief he has partial support from *Beale* only.

There is, then, no consensus opposed to the thesis. One of the seven critics supports it entirely; two are its vigorous proponents, each with a different reservation. No single objection could win the adherence of a majority of the seven. In such circumstances, the cumulation of negative attitudes is without persuasive significance. Professor *Barbour* has not been answered; he has been fobbed off.

VI

Since the ultimate question of the effect to be given foreign land decrees is one to be decided by the United States Supreme Court, no definitive solution can be found by reference to the state court decisions. From some of those decisions, however, we can derive useful guidance on the practical problem of how to get the maximum benefit from the foreign decree at the earliest possible stage of litigation, and at the same time to prepare the ultimate federal question for submission to the Supreme

Court, if that should become necessary. The conclusions which emerge are that, provided the foreign decree is framed in restrained and appropriate terms, and provided the type of relief sought at the situs is chosen with discrimination, there is a fair chance that the decree will be given a measure of conclusiveness which will be decisive in some cases; there is a growing probability that it will be given full effect as *res judicata*; and, if neither of these results follows, the record will present the federal question in the best form for submission to the Supreme Court, as free as possible from the embarrassment of nonfederal grounds on which the adverse decision might be rested.

We have already noted the harmful consequences of carelessness or overreaching in framing the foreign decree. The theory on which recognition is claimed for that decree is that the foreign court had jurisdiction of the person of the defendant, and jurisdiction to order him to make a conveyance; it is not contended that that court could, by the force of its decree or by a commissioner's deed, directly transfer the title. The decree should be framed in strict accord with that theory; it should purport to do no more than exercise the jurisdiction which is acknowledged; it should, upon appropriate findings of fact and of law, order the defendant to make a conveyance, and no more. Nothing whatever is to be gained by framing it in terms which purport to affect the title directly, or which call for the appointment of a commissioner to convey. Such terms are not consistent with the line of reasoning on the basis of which conclusive effect is claimed; they are an invitation to the court at the situs, and to the Supreme Court, to invoke hornbook principles in support of a holding that the foreign court had no jurisdiction to do what it did, and they are sure to arouse fears as to the effect of recognition on the recording system at the situs. It was just such a decree—requiring no act of the defendant, but purporting of its own force to divest the defendant's title—which lost the case for the plaintiff in *Carpenter v. Strange*.¹⁷⁹

It is not safe, either, to regard such terms as harmless surplusage in a decree which, in the first instance, orders a conveyance. The danger here is rather pointedly illustrated by a recent Tennessee case. A Michigan decree directed the defendant to execute a quit-claim deed to certain land in Sumner County, Tennessee. Instead of stopping there, it went to the unusual length of adding:

¹⁷⁹ 141 U.S. 87 (1891). See also *Davis v. Headley*, 22 N.J. Eq. 115 (1871); *Tolley v. Tolley*, 210 Ark. 144, 194 S.W. 2d 687 (1946); *Cooley v. Scarlett*, 38 Ill. 316 (1865); *Higgins v. Higgins*, 60 S.D. 576, 245 N.W. 397 (1932); *Bailey v. Tully*, 242 Wis. 226, 7 N.W. 2d 837 (1943). But cf. *Hanna v. Read*, 102 Ill. 596 (1882); *Greer v. Greer*, 189 S.W. 2d 104 (Tex. Civ. App., 1945).

[I]n the event the said Defendant fails forthwith to execute said Quit-Claim Deed that this Decree may be filed in the Offices of the Register of Deeds, or an equivalent office in the aforesaid Sumner County, State of Tennessee in lieu of said Quit-Claim Deed.¹⁸⁰

To provide that the decree shall operate of its own force as a conveyance is bad enough; to provide for actual registration at the situs is waving a red flag. The Tennessee court said:

We are not unmindful of the fact that a court of a foreign State, having jurisdiction of the parties, may, in a proper case, compel the execution of a deed to lands in this State by proceedings in the nature of attachment for contempt. But the Michigan court did not elect to pursue this course. . . .

We are asked to give full faith and credit to the Michigan . . . decree upon the theory "that it is conclusive as to all parties *media concludendi*; that the full faith and credit clause of the Federal Constitution requires that the judgment of the State court which had jurisdiction of the parties, and the subject matter in the suit, should be given in the courts of every other State the same credit, validity and effect which it has in the State where it was rendered."

Counsel cite many cases in support of the foregoing proposition. We are not in disagreement with this principle. . . . But we cannot give full faith and credit to a foreign decree which shows on its face that the court had no jurisdiction of the subject matter, to wit, to vest and divest title to lands located in a foreign State. . . . In other words, the trial court directed in his decree that it should become a valid *muniment of title* to lands in this State. This was clearly in excess of the court's jurisdiction.¹⁸¹

There are other features in the case which prevent one from asserting with confidence that the result would have been otherwise if the Michigan decree had been drafted with suitable restraint; but the adverse reaction to overreaching is clear. If the decree is to be accepted as conclusive for any purpose at the situs, the foreign court must mind its manners; a plaintiff's lawyer drafting the decree must not put into the mouth of that court language which serves no purpose except to arouse the elemental instincts of the court at the situs in defense of its legitimate prerogatives. It may, indeed, be rank formalism to maintain that a decree which is valid and entitled to conclusive effect down to its last paragraph is stripped of all validity by the inadvertent inclusion, at the end, of language from a local form book; but a lawyer interested in winning his case will not court the opportunity to combat such formalism.

The theory on which relief is claimed at the situs is at least equally important. Consistently with the reasoning on which recognition is demanded, the plaintiff must scrupulously avoid any prayer for relief predicated on the assumption that he has acquired legal title by virtue of the

¹⁸⁰ Clouse v. Clouse, 185 Tenn. 666, 669, 207 S.W. 2d 576, 577 (1948). See also McRary v. McRary, 228 N.C. 714, 47 S.E. 2d 27 (1948).

¹⁸¹ Clouse v. Clouse, 185 Tenn. 666, 671-72 (1948). (Italics supplied.)

foreign decree. Thus, to bring an action of ejectment, or to rely on the foreign decree in defense to a possessory action in a state in which law and equity powers are kept separate, is the worst possible exercise of judgment.¹⁸² Even in a state which has gone far in the direction of abolishing forms of action and merging law and equity powers, it is important to avoid, in the complaint or in the argument, any theory of the case depending upon derivation of title through the foreign decree. Thus, in a recent North Carolina case, the plaintiff conceived her remedy appropriately enough: her action at the situs is described as one to reduce the foreign judgment to judgment in North Carolina. Her argument, however, must have ranged beyond this conception, for the court said:

The plaintiff seeks to establish the Ohio judgment as a *muniment of title* and to recover the *locus* on the strength thereof. That raises the question of the validity and efficacy of the Ohio decree as a judgment affecting the title and right of possession to land in North Carolina.¹⁸³

Again, one cannot say with confidence that the result would have been different if the argument had been more restrained; but it is clear that reliance on the foreign decree as a muniment of title prejudiced the plaintiff's case unnecessarily. It is noteworthy that in the cases which have given full effect to the foreign decree the procedure followed in the action at the situs has been scrupulously consistent with the argument that, while the foreign decree did not transfer title, it should be regarded as *res judicata*.¹⁸⁴

An action to remove the defendant's claim as a cloud on the plaintiff's title, if that remedy is otherwise available, is a tempting possibility, but is probably not advisable. In the first place, a holding that such a remedy is available only to one having a legal interest¹⁸⁵ would provide an adequate nonfederal ground for the refusal of relief, precluding review by the Supreme Court of the question under the full faith and credit clause. Moreover, even if the situs state gives the holder of an equitable title standing to invoke the remedy,¹⁸⁶ the unsuccessful resort to that mode of relief in

¹⁸² *Watkins v. Holman*, 16 Pet. (U.S.) 25 (1842); *Courtney v. Henry*, 114 Ill. App. 635 (1904); *Tolley v. Tolley*, 210 Ark. 144, 194 S.W. 2d 687 (1946); *City Ins. Co. v. Commercial Bank of Bristol*, 68 Ill. 348 (1873).

¹⁸³ *McRary v. McRary*, 228 N.C. 714, 717-18, 47 S.E. 2d 27, 29-30 (1948). (Italics supplied.) See also *Norris v. Loyd*, 183 Iowa 1056, 168 N.W. 557 (1918).

¹⁸⁴ See, e.g., *Dunlap v. Byers*, 110 Mich. 109, 67 N.W. 1067 (1896); and as to *Burnley v. Stevenson*, see note 176 *supra*.

¹⁸⁵ *Frost v. Spitley*, 121 U.S. 552 (1887).

¹⁸⁶ *Fall v. Fall*, 75 Neb. 104, 108, 106 N.W. 412, 413 (1905); *Casstevens v. Casstevens*, 227 Ill. 547, 81 N.E. 709 (1907); *McClintock*, Equity § 187 (1936).

the *Fall* case stands as a warning that courts may shy away from any position resting on the contention that the foreign decree is a source of "title" of any kind. In spite of the fact that such a reaction relegates the foreign decree to a status inferior to that of a mere contract, reliance on the foreign decree as giving rise to "equitable title" confuses the issue by importing possible nonfederal grounds of decision and by directing the discussion to the effect which the foreign decree may have *ex proprio vigore*.

A procedure which would be strictly in conformity with the theory on which conclusive effect is claimed for the foreign decree would be to bring, at the situs, an action to effectuate the foreign decree, or to carry it into effect. The history of the Watts-Massie-Waddle litigation, together with the other evidence which has been adduced, seems sufficient to destroy the notion that, historically, no such right of action existed. It is to be hoped that lawyers seeking to secure the benefit of foreign decrees will frame their complaints in part on this theory, so that the inaccuracy of the position that there is no such remedy can be authoritatively established. Nevertheless, enthusiasm for the correctness of the view that such a remedy has long been available should not blind one to the unwisdom of staking the whole case on that general proposition. The availability of such a remedy is, after all, a matter of state law; and a holding that, regardless of the evidence adduced, there is no such remedy under the law of the situs state might dispose of the matter on a ground not reviewable by the Supreme Court.

Therefore, the complaint should be framed in the alternative as claiming relief by virtue of a procedure which is both appropriate and unquestionably provided by the law of the situs. Fortunately, such a remedy is almost universally available in the declaratory judgment. The statutory origins of this procedure place it, of course, entirely out of range of the controversy as to whether history reveals the existence of a remedy on the decree. The Uniform Declaratory Judgments Act itself is in force in thirty-six jurisdictions,¹⁸⁷ and of course the federal act is available.¹⁸⁸ The Uniform Act authorizes declaratory judgments "whether or not further relief is or could be claimed."¹⁸⁹ The federal act contains similar provision for supplemental relief.¹⁹⁰ A form of procedure is thus provided which enables the plaintiff to proceed in complete consistency with the theory that the

¹⁸⁷ 9 U.L.A. 62 (Supp., 1953).

¹⁸⁸ 62 Stat. 964 (1948), 28 U.S.C.A. § 2201 (1950).

¹⁸⁹ 9 U.L.A. 234, § 1 (1951).

¹⁹⁰ 62 Stat. 694 (1948), 28 U.S.C.A. § 2202 (1950).

foreign decree, while not of its own force transferring title, should be regarded as conclusively establishing his claim to the land on principles of *res judicata*. Supplemental relief designed to conform the title of record to the interests declared may be obtained as well. The supposed absence of a remedy at the situs—the only obstacle that deterred Professor Beale from supporting the Barbour thesis—is completely circumvented.

As an anchor to windward, the plaintiff's lawyer might also count, in the alternative, on the original cause of action, in cases in which the defendant's obligation to convey exists independently of and antecedent to the foreign decree. Thus, if all else fails, he will be in position, under the view taken by Professor Beale, to invoke the foreign decree as conclusive on the issues both of law and of fact; and no more than this is required in cases of "antecedent obligation."

Thus the ideal action to secure the benefits of the decree at the situs would be framed as one to enforce, or execute, the decree; and, in the alternative, to secure a declaration of the rights of the parties pursuant to the decree, with supplemental relief; and, also in the alternative, to enforce the original cause of action—if there is one—with the decree operating as *res judicata*.

If the foreign decree is properly framed, and if the action at the situs is properly conceived, there is a fair chance that the court at the situs will treat the decree as conclusive, at least as to the findings of fact supporting it.¹⁹¹ In some cases—i.e., where the law applied in the respective states is the same—this effect for the foreign decree will be decisive. To be sure, such a result is anomalous. It would seem that, if the foreign court acted beyond its jurisdiction, its judgment should not be treated as conclusive for any purpose; and that, on the other hand, if it acted within its jurisdiction, its judgment should be conclusive both as to law and fact. There is no analogy for this piecemeal application of *res judicata*. We are not here dealing with the principle of collateral estoppel, which comes into operation when a second suit between the parties involves a different cause of action. The principle involved is that of merger, or of the conclusiveness of a claim which has been reduced to judgment in a competent court. The analogue is the action of debt on a record. In such cases, there is no room for selective application of *res judicata* principles. The rule of the *Restatement* seems no more than a formula, disguised in plausible terminology, for avoiding the more unwelcome aspect of the compulsion to accord full

¹⁹¹ *Bailey v. Tully*, 242 Wis. 226, 7 N.W. 2d 837 (1943); Annotation 145 A.L.R. 583 (1943); Rest., Conflict of Laws § 449(2) (1934). The rule in the *Restatement* is limited (perhaps as a compromise with the Reporter) to actions on the original claim.

faith and credit: that is, the compulsion to accept a result based upon a difference in, or an error of, law. Professor Beale rejected the rule: "... Section 450 of the Restatement was neither drawn by the Reporter nor acceptable to him."¹⁹² The *Restatement of Judgments* makes no comparable provision for the finality of findings of fact.¹⁹³ Counsel for the plaintiff, however, will doubtless be inclined to consider this strange half loaf better than none.

Finally (again assuming that the foreign decree has been drafted with due restraint and that the theory of the action at the situs has been properly conceived), there is a growing chance that the decree will be given full effect as *res judicata*. Professor Barbour referred to only three states supporting his thesis.¹⁹⁴ Professor Goodrich added a fourth to the list.¹⁹⁵ The investigations undertaken in the preparation of this paper have been directed to the objections which have been raised against the thesis, and no particular effort has been made to determine exhaustively the number of states in which the principle of recognition has been accepted. Even so, it appears that perhaps five additional states may be listed as accepting the principle.¹⁹⁶ But even more encouraging than the scattered cases which actually accord recognition to the foreign decree is the emergence of a new attitude of confidence in and respect for the courts of sister states, which may eventually replace the traditional attitude of suspicious and jealous provincialism. The California courts were recently confronted with this problem: The wife had filed suit in Texas for divorce and for a determination of property rights, praying among other things that certain real property located in California be adjudged to be her separate property, and that her husband had no interest therein. The husband thereafter filed an action in California, asking a declaration that he was the owner of a half interest in this property, with a decree accordingly. The Superior Court denied the wife's motion for a stay of proceedings pending determination of the Texas action. The District Court of Appeals termed this ruling a

¹⁹² 2 Beale, *Conflict of Laws* § 450.1 (1935).

¹⁹³ See *Rest., Judgments* §§ 68, 71, 45, 46; cf. *ibid.* § 45, comment d (1942).

¹⁹⁴ Ohio [*Burnley v. Stevenson*, 24 Ohio St. 474, (1873)]; Michigan [*Dunlap v. Byers*, 110 Mich. 109, 67 N.W. 1067 (1896)]; and Wisconsin [*Mallette v. Scheerer*, 164 Wis. 415, 160 N.W. 182 (1919)].

¹⁹⁵ Iowa [*Matson v. Matson*, 186 Iowa 607, 173 N.W. 127 (1919)].

¹⁹⁶ California [*Redwood Investment Co. v. Exley*, 64 Cal. App. 455, 221 Pac. 973 (1923)]. But cf. *Taylor v. Taylor*, 192 Cal. 71, 218 Pac. 756 (1923)]; West Virginia [*Piedmont Coal and Iron Co. v. Green*, 3 W.Va. 54 (1868); cf. *Wilson v. Braden*, 48 W.Va. 196, 36 S.E. 367 (1900)]; Texas [*Greer v. Greer*, 189 S.W. 2d 104 (Tex. Civ. App., 1945); cf. *Davis v. Roosevelt*, 53 Tex. 305 (1880)]; Missouri [*McCune v. Goodwillie*, 204 Mo. 306, 102 S.W. 997 (1907)]; Louisiana [*Putnam & Norman v. Conner*, 144 La. 231, 80 So. 265 (1918) (semble)].

"manifest" abuse of discretion.¹⁹⁷ This, of course, goes well beyond a holding that a Texas *judgment* would be entitled to full faith and credit at the situs.¹⁹⁸ The California court attributed its decision to principles of comity, but clearly indicated that it would accord full faith and credit to the Texas judgment when rendered.¹⁹⁹ After so much preoccupation with jealous affirmations of exclusive sovereignty, I consider it refreshing to find the California court saying:

It is the duty of the court to give preference to principles and methods of procedure by which the tribunals of the states may cooperate as harmonious members of the judicial system. California courts should interpose no action to interfere with rights of the wife to which she may be entitled as a resident of Texas in an action for divorce. A conflict of authority should not occur if it can be avoided. Courts should compose rather than irritate. "Our states do not stand in the same relation to each other that foreign countries do. They are members of the same family, and section 1, art. 4, of the Constitution of the United States requires each state to give full faith and credit to the judicial proceedings of every other state. Comity between states is daily growing and should be encouraged." . . . *The courts of Texas are as competent to administer justice as those of California.* . . .²⁰⁰

VII

"That the doctrinal basis of *res judicata* is living law and not archaic formula is shown in its authoritative extension in recent years."²⁰¹ In our law two persistent doctrines, each inimical to the finality and conclusiveness of judicial proceedings, have hampered the full development of principles of *res judicata*: the dogma that equity acts only in personam, and the doctrine that actions concerning rights in land are local. The case of the foreign land decree stands at the intersection of these two doctrines. If an appropriate case is developed along the lines indicated in the foregoing section, the plaintiff, assuming that he loses in the state court, will be in position to present to the Supreme Court for determination the clear-cut question whether the full faith and credit clause requires that the foreign decree be treated as *res judicata* when it is pleaded as a cause of action or as a ground of defense. The Court will thus be given an opportunity to

¹⁹⁷ *Simmons v. Superior Court*, 96 Cal. App. 2d 119, 214 P. 2d 844 (1950).

¹⁹⁸ Despite the reference in the full faith and credit clause to "judicial proceedings," the mere pendency of a suit on the same cause of action between the same parties in another state is not regarded as ground for abatement or stay of proceedings. *Chicago, R.I. & P. Ry. v. Schendel*, 270 U.S. 611 (1926).

¹⁹⁹ 96 Cal. App. 2d 119, 128, 214 P. 2d 844, 851 (1950).

²⁰⁰ *Ibid.*, at 130-31 and 852. (Italics supplied.)

²⁰¹ Goodrich, J., in *Caterpillar Tractor Co. v. International Harvester Co.*, 120 F. 2d 82, 84 (C.A. 3d, 1941).

review the unfortunate decision in *Fall v. Eastin* in the light of Professor Barbour's criticism and of the subsequent judicial and nonjudicial contributions to the discussion. If it finds that, contrary to its earlier decision, the state of the situs must treat the foreign decree as *res judicata*, it will remove an illogical and inconsequent gloss from the law governing the relationship between the states in our federal system; it will contribute materially to a more complete fulfillment of the Constitution; it will remove a source of hardship and unnecessary relitigation; and it will do this with no impairment of any substantial interest of the situs state in controlling the land located within its borders. In so doing, in this crucial situation, it may well open the way for eventual rectification of some of the undesirable results which flow from one or the other of the stubborn doctrines which combined to produce *Fall v. Eastin*.

ESTOPPEL AGAINST THE GOVERNMENT

RAOUL BERGER†

"Men naturally trust in their government, and ought to do so, and they ought not to suffer for it."*

WRONGS WHICH ORDINARILY "SHOCK THE CONSCIENCE and justify the intervention of a court of equity," it is said, can yet not found an estoppel against the government.¹ At first sight this is strange doctrine. For equitable estoppel is based upon principles of morality and justice,² and it is scarcely debatable that government action should exhibit even "more scrupulous regard to justice and a higher morality" than is required of individuals.³

Although the government itself has stamped repudiation of an earlier position as "unconscionable,"⁴ it yet claims total immunity from equitable estoppel⁵ and some courts have echoed that sweeping claim.⁶ Some courts

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* *Menges v. Dentler*, 33 Pa. 495, 500 (1859).

¹ *Schafer v. Helvering*, 83 F. 2d 317, 320 (App. D.C., 1936).

² The ultimate principle, said Mr. Justice Cardozo, is that "no one shall be permitted to found any claim upon his own inequity or take advantage of his own wrong." *R. H. Stearns Co. v. United States*, 291 U.S. 54, 62 (1934).

The Supreme Court earlier said: "The vital principle is, that he who . . . leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both." *Dickerson v. Colgrove*, 100 U.S. 578, 580 (1880). See also *Morgan v. Railroad Co.*, 96 U.S. 716, 720 (1878); *Van Rensselaer v. Kearney*, 11 How. (U.S.) 297, 325, 326 (1850).

Our discussion is confined to the situation in which one party acted to his detriment in reliance upon what the other party did or said. Cf. *Helvering v. Schine Chain Theatres*, 121 F. 2d 948, 950 (C.A. 2d, 1941). For present purposes, it suffices to note that election and estoppel are often used interchangeably. Cf. *Vestal v. Commissioner*, 152 F. 2d 132, 135 (App. D.C., 1945); *Wurtsbaugh v. Commissioner*, 187 F. 2d 975 (C.A. 5th, 1951).

³ *Woodruff v. Trapnall*, 10 How. (U.S.) 190, 207 (1850); *Pawlett v. Attorney General*, *Hardres* *465, 469 (1667) (Baron Atkyns): "[I]t would derogate from the King's honour to imagine, that what is equity against a common person, should not be equity against him." See also *Robinson v. South Australia*, [1931] A. C. 704, 716.

⁴ *Taylor v. Commissioner*, 89 F. 2d 465, 466 (C.A. 7th, 1937). The government's change of position was stamped as "unconscionable" in *Stockstrom v. Commissioner*, 190 F. 2d 283, 289 (App. D.C., 1951).

⁵ *United States v. Coast Wineries*, 131 F. 2d 643, 650 (C.A. 9th, 1942). Apparently English administrators make similar unjustifiable claims. *Farrer, A Prerogative Fallacy—"That the Crown Is Not Bound by Estoppel,"* 49 L.Q. Rev. 511 (1933).

⁶ "Estoppel may not be invoked against the government." *West Texas Utilities Co. v. National Labor Relations Board*, 184 F. 2d 233, 239 (App. D.C., 1950); *Spencer v. Railroad Retirement Board*, 166 F. 2d 342, 343 (C.A. 3d, 1948); *United States v. Ohio Oil Co.*, 163 F. 2d

have held, on the other hand, that the government is immune from estoppel only when it has acted in a "governmental" as distinguished from "proprietary" capacity.⁷ In its most recent estoppel decision, *Merrill v. Federal Crop Insurance Corporation*,⁸ the Supreme Court, splitting five to four, held that the form in which the government functioned was not controlling if the action on which the estoppel was based was *unauthorized*. One shares Mr. Justice Jackson's lively dissatisfaction with a result that requires an Idaho farmer to search the Federal Register to learn whether he may safely purchase crop insurance from an officer of the government who offers to sell it.⁹ The courts themselves have characterized the immunity from estoppel doctrine as "harsh" and "severe,"¹⁰ and have applied it with "great reluctance,"¹¹ at times accompanied by judicial groans.¹²

633, 641 (C.A. 10th, 1947); *Burnham Chemical Co. v. Krug*, 81 F. Supp. 911, 913 (D.D.C., 1949); *Wells v. Long*, 68 F. Supp. 671, 672 (S.D. Idaho, 1946); *Bowles v. Hansen Packing Co.*, 64 F. Supp. 131, 133 (D. Mont., 1946); *United States v. Lecony Smokeless Fuel Co.*, 64 F. Supp. 269, 270 (S.D. W.Va., 1946); *United States v. National Gypsum Co.*, 49 F. Supp. 206, 214 (W.D. N.Y., 1942); *United States v. Hess*, 41 F. Supp. 197, 217 (W.D. Pa., 1941); *O. D. Jennings & Co. v. Reinecke*, 19 F. Supp. 197, 200 (N.D. Ill., 1937); *Huron Portland Cement Co. v. Woodworth*, 19 F. 2d 530, 534 (E.D. Mich., 1921).

⁷ *United States v. City and County of San Francisco*, 112 F. Supp. 451, 454 (N.D. Cal., 1953); *The Falcon*, 19 F. 2d 1009, 1014 (D. Md., 1927); *Elrod Slug Casting Mach. Co. v. O'Malley*, 57 F. Supp. 915, 920 (D. Neb., 1944); *England National Bank v. United States*, 282 Fed. 121, 127 (C.A. 8th, 1922). For application of estoppel to government in "proprietary" capacity, see *Branch Banking and Trust Co. v. United States*, 98 F. Supp. 757, 766, 768 (Ct. Cl., 1951); *Ohio Oil Company v. United States*, 65 F. Supp. 991, 997 (D. Wyo., 1946), *rev'd*, *United States v. Ohio Oil Company*, 163 F. 2d 633, 641 (C.A. 10th, 1947) ("traditional inapplicability of the doctrine of estoppel against the United States").

⁸ 332 U.S. 380 (1947). See also *McIndoe v. United States*, 194 F. 2d 602, 603 (C.A. 9th, 1952).

⁹ Mr. Justice Jackson, in a dissent joined in by Mr. Justice Douglas (Black and Rutledge, JJ., also dissented), remarked (332 U.S. 380, 387) that: "[I]t is an absurdity to hold that every farmer who insures his crops knows what the Federal Register contains. . . . One should not be expected to have to employ a lawyer to see whether his own Government is issuing him a policy which in case of loss would turn out to be no policy at all."

¹⁰ *Burnham Chemical Co. v. Krug*, 81 F. Supp. 911, 913 (D.D.C., 1949).

¹¹ *United States v. Globe Indemnity Co.*, 17 F. Supp. 838, 846 (S.D. N.Y., 1936); *Sternfeld v. United States*, 32 F. 2d 789, 791 (N.D. N.Y., 1929).

¹² In *Walker Hill Co. v. United States*, 162 F. 2d 259, 263 (C.A. 7th, 1947), the court, denying estoppel, declared: "It never gives us a satisfactory, reassuring feeling, however, for the government to repudiate the acts of one of its agents performed in the course of his duties."

Dissenting from a holding of estoppel against the government, Circuit Judge Prettyman said: "I wish the law were as they [the majority] find it to be, because it is my belief that the Government ought to set a high standard in its dealings and relationships with citizens and that the word of a duly authorized Government agent, acting within the scope of his authority ought to be as good as a government bond." *Stockstrom v. Commissioner*, 190 F. 2d 283, 289 (App. D.C., 1951). The majority in that case declared that "[t]axpayers expect, and are entitled to receive, ordinary fair play from tax officials. We regard as unconscionable . . ." the Commissioner's change of position. *Ibid.*, at 298.

Mounting exasperation with a rule that permits repudiation of the legal advice which administrative officials are constantly giving¹³ and which government agencies often lead the public to believe such officials are authorized to give,¹⁴ led to the introduction in April 1953 of Senate bill S.1752, exempting persons who rely on written statements by responsible agencies from damages or penalties.¹⁵ But the bill does not go far enough; it fails to provide for losses incurred if claims are pressed by the government against, or denied to, persons who relied on such statements. Moreover, the legislative mills grind slowly.¹⁶

It needs to be emphasized that the courts are free to correct their own, judge-made rule without awaiting legislation,¹⁷ that there is no government immunity from estoppel if the official conduct was authorized, and that policy considerations require a realistic approach to the problem whether official conduct was "authorized." There is also need to re-examine the rule that the government may repudiate an official interpretation by reliance on the "mistake of law" doctrine, and to review the principles governing the right of an administrative officer to overrule the decision of a predecessor. Analysis of the government's "change of position" must likewise take into account the extent to which new tax rulings or regulations may be given retroactive effect in the face of a taxpayer's reliance upon the superseded regulation. It may be added that the problem of governmental immunity from estoppel is most acute in the tax field because of (1) the great volume of tax cases, (2) the unduly cautious application of estoppel to the government in such cases, and (3) statutory ambiguities which complicate the estoppel-immunity problem in the tax

¹³ See Newman, *Should Official Advice be Reliable?—Proposals as to Estoppel and Related Doctrines in Administrative Law*, 53 Col. L. Rev. 374 (1953). Blair-Smith, *Forms of Administrative Interpretation Under the Securities Laws*, 26 Iowa L. Rev. 241, 243, 246 (1941).

¹⁴ Compare the annual invitation to the public to avail itself of the services of agents of the Internal Revenue Bureau in making out tax returns.

¹⁵ Sen. 1752, 83d Cong. 1st Sess. (1953). A previously proposed bill is discussed in Newman, *op. cit. supra* note 13.

¹⁶ Compare Herman Oliphant's suggestion in 1938 of a tax code provision comparable to § 209(b) of the Securities and Exchange Act which exempts one who in good faith acts in reliance on a rule or regulation, though it later be rescinded or declared invalid. Oliphant, *Declaratory Rulings*, 24 A.B.A.J. 7, 9 (1938). Legislative inaction on such proposals is at best equivocal in light of the flood of new legislative proposals that submerges the Congress at each session.

¹⁷ "When . . . a rule is not statutory, but a rule of judiciary law, and . . . the modification will plainly serve the ends of justice, it would seem appropriate that . . . the courts themselves should do the needful." *Hammond-Knowlton v. United States*, 121 F. 2d 192, 201 (C.A. 2d, 1941).

field. Consequently special emphasis will be given to the tax aspect of the claimed immunity from estoppel.

BASIS OF THE IMMUNITY

Governmental immunity from estoppel, it has been held, is an offshoot of sovereign immunity.¹⁸ That claim may draw some comfort from early English dicta,¹⁹ but such dicta do not represent English law.²⁰ An English commentator has labelled the notion that the Crown is not bound by estoppel "a prerogative fallacy."²¹ In the United States the doctrine of sovereign immunity is in current disfavor²² and offers uneasy support to doctrines that work hardship and injustice.

A glance at the earliest and most recent Supreme Court cases will furnish a background against which to evaluate the rationalizations advanced for immunity. In *Lee v. Munroe*,²³ the Commissioners of the city of Washington, pursuant to an authorization to sell public lands, contracted with Morris and Nicholson for the sale. The latter made deposits of money with the Commissioners and from time to time advised them to convey to designated persons. Supposing that Morris and Nicholson had not received land to the value of the sum deposited by them, the Commissioners informed Lee that they would convey certain lots to him if he would obtain an order from Morris and Nicholson. Thereupon, Lee surrendered a note given by Morris and Nicholson to them in return for such an order. The Commissioners then discovered that Morris and Nicholson had received all the land to which they were entitled and refused to honor the order. The Supreme Court held that the Commissioners' promises were not binding upon the government because they were "altogether gratuitous and not being within the sphere of their official duties."²⁴ One may

¹⁸ *Trustees of Philip Exeter Academy v. Exeter*, 90 N.H. 472, 495, 27 A. 2d 569, 586 (1940). The state cases exhibit almost the same problems as the federal. See *Clark, Estoppel Against State, County and City*, 23 Wash. L. Rev. 51 (1948).

¹⁹ *Sir Edward Coke's Case*, Godbolt *289, 299 (1623); *Queen v. Delme*, 10 Mod. *198, 200 (1713). English concepts of the royal prerogative have entered into our own political state. *Dollar Savings Bank v. United States*, 19 Wall. (U.S.) 227, 239 (1874).

²⁰ *Attorney General v. Collom*, [1916] 2 K.B. 193, 204: "A further point was raised that no estoppel binds the crown. . . . I know of no authority for the proposition as applied to estoppel in pais." See also *Plimmer v. The Mayor*, [1884] 9 App. Cas. 699.

²¹ *Farrer*, op. cit. supra note 5.

²² *Keifer and Keifer v. Reconstruction Finance Corporation*, 306 U.S. 381, 391 (1939); *Wallace v. United States*, 142 F. 2d 240, 243 (C.A. 2d, 1944).

²³ 7 Cranch (U.S.) 366 (1813).

²⁴ *Ibid.*, at 369.

doubt the absence of authority under the circumstances,²⁵ but we are here concerned with the reasons advanced for this holding:

It is better that an individual should now and then suffer by such mistakes than to introduce a rule against an abuse of which, by improper collusions, it should be very difficult for the public to protect itself.²⁶

In 175 years of federal administration the amount of "improper collusion" by federal officers has been remarkably small. Even if such collusion were more significant, the cost of insuring the faithfulness of its employees ought to be borne by the government, not thrust upon the luckless victims of their faithlessness.²⁷ To the extent that a deterrent against public fraud is required, it is supplied by the severe criminal sanctions imposed for defrauding the government. A democratic government which rests on consent of the governed should take care in every part of the system, as Daniel Webster said, "not only to do right, but to satisfy the community that right is done."²⁸ To preserve confidence in popular government is of higher importance than to avert occasional frauds.²⁹

In later cases, the fear that the agent may "ruin the principal"³⁰ no longer finds expression. Instead, the Supreme Court has repeatedly emphasized that an estoppel does not lie where the officer does "what the law does not sanction or permit."³¹ In other words, *unauthorized* conduct will not work an estoppel.³²

²⁵ In the words of the plaintiff, "[t]he commissioners were acting within the scope of their authority. It was their business to keep the accounts with Morris and Nicholson, to know the balance; it was also their business to convey the lots." *Ibid.*, at 367.

The Commissioners had been conveying to purchasers at the order of Morris and Nicholson; it was their business to know whether Morris and Nicholson were entitled to further conveyances. See pages 692-93 *infra*.

²⁶ *Ibid.*, at 370. In *The Floyd Acceptances*, 7 Wall. (U.S.) 666, 681 (1869), the fear that the agent might "ruin the principal" led the government to repudiate the action of the Secretary of War himself. See also *Whiteside v. United States*, 93 U.S. 247, 257 (1876).

²⁷ Pound, *The Spirit of the Common Law*, 185-89 (1921), pointed out the "increasing tendency to hold that public funds should respond for injuries to individuals by public agencies."

²⁸ 5 Writings and Speeches of Daniel Webster 163, quoted by Mr. Justice Frankfurter, concurring, in *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 149, 172 n. 19 (1951).

²⁹ Cf. *United States v. Willamette V. & C. M. Wagon-Road Co.*, 54 Fed. 807, 811 (C.C. Ore., 1892).

³⁰ See note 26 *supra*.

³¹ *United States v. San Francisco*, 310 U.S. 16, 32 (1940); *Utah Power & Light Co. v. United States*, 243 U.S. 389, 408 (1917); *Wilber National Bank v. United States*, 294 U.S. 120, 124 (1935).

³² "An officer or agency of the United States to whom no administrative authority has been delegated cannot estop the United States even by an affirmative undertaking to waive or surrender a public right." *United States v. Stewart*, 311 U.S. 60, 70 (1940). See also *Filor v. United States*, 9 Wall. (U.S.) 45, 49 (1870).

A striking example is furnished by the previously mentioned case, *Merrill v. Federal Crop Insurance Corporation*,³³ where the government acted in what, in view of prior cases, might be regarded as a "proprietary" rather than a governmental capacity. An Idaho farmer purchased crop insurance from Federal Crop Insurance Corporation on the faith of assurances by its agent that the crop of reseeded winter wheat was insurable. After a drought destroyed his crop, the farmer learned that his reliance was misplaced. The lower courts held that the Corporation, like a private insurance company, was bound by the acts of its agent. But, Mr. Justice Frankfurter, speaking for the majority of the Supreme Court, rejected the idea that government is "partly public or partly private,"³⁴ and held that, "whatever the form in which the Government functions,"³⁵ one deals with it at the risk of accurately ascertaining that its agent "stays within the bounds of his authority,"³⁶ that such limitations may be expressed in proper regulations as well as statutes, that the regulation precluded such insurance, and that notice of the regulations was given by publication in the Federal Register.³⁷

There can be no dissent from Mr. Justice Jackson's insistence that a federal insurance agency should be held to "the same fundamental principles of fair dealing" that progressive states apply to private companies.³⁸

³³ 332 U.S. 380 (1947).

³⁴ *Ibid.*, at 383. But the distinction has respectable authority: "[A] government may suffer loss through the negligence of its officers. If it comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there." *Cooke v. United States*, 91 U.S. 389, 398 (1875).

In the eyes of Congress, the distinction continues to have vitality. See *Dalehite v. United States*, 346 U.S. 15, 27 (1953), where referring to a tort claims amendment, the Supreme Court said that "[w]hile Congress desired to waive the Government's immunity . . . it was not contemplated that the Government should be subject to liability arising from acts of a governmental nature or function."

³⁵ 332 U.S. 380, 384 (1947). It had earlier been stated that "[t]he officers of the Fleet Corporation may estop that corporation by their official conduct when the officers of the sovereign by their conduct might not estop the government of the United States." *Providence Engineering Corp. v. Downey Shipbuilding Corp.*, 294 Fed. 641, 660 (C.A. 2d, 1923).

³⁶ 332 U.S. 380, 384 (1947). Mr. Justice Frankfurter adverted to Mr. Justice Holmes's dictum that "men must turn square corners when they deal with the Government." *Ibid.*, at 385. But "the Government ought to turn square corners when dealing with its citizens." *Howbert v. Penrose*, 38 F. 2d 577, 581 (C.A. 10th, 1930); *Maguire and Zimet, Hobson's Choice and Similar Practices in Federal Taxation*, 48 Harv. L. Rev. 1281, 1299 (1935). As Mr. Justice Jackson put it: "[T]here is no reason why the square corners should constitute a one-way street." Dissenting in 332 U.S. 380, 388 (1947).

³⁷ For immunity from estoppel because of lack of authority to waive the requirements of a regulation, see *Nichols & Co. v. Secretary of Agriculture*, 131 F. 2d 651, 659 (C.A. 1st, 1942); *Sternfeld v. United States*, 32 F. 2d 789, 791 (N.D. N.Y., 1929); *Bowles v. Lentini*, 151 F. 2d 615, 618 (C.A. 7th, 1945).

³⁸ 332 U.S. 380, 388 (1947).

As Laski points out, the modern state is "in essence a public service corporation"; like any other body, "it acts through servants who take decisions in its name," and like any such body, it should "be responsible" for the "torts," and, it may be added, the acts, of its servants.³⁹ But no separation of powers doctrine complicates corporate delegations.

Though little explicit reliance on the separation of powers is to be found in the cases,⁴⁰ judicial stress upon authority as the test of estoppel stems from that doctrine. The analysis may be articulated as follows: Administrators are clothed with authority to act and make rules by the exercise of legislative power; and such legislative power is exercisable only by Congress.⁴¹ It cannot be exercised by an administrator; no administrator may do that which is forbidden,⁴² nor exercise a power that was withheld. The fact that a citizen was injured by his action does not clothe an administrator with legislative power, i.e., with the power to assume an authority that has been withheld or prohibited. If this analysis is valid, and if the touchstone of immunity from estoppel is the absence of authority, one must agree with Mr. Justice Frankfurter that "the form in which Government functions" is of no moment.⁴³

³⁹ Laski, *Liberty in the Modern State* 53-54 (1949). Section 161 of the Restatement of Agency (1935) states that: "A general agent for a disclosed or partially disclosed principal subjects his principal to liability for acts done on his account which usually accompany or are incidental to transactions which he is authorized to conduct if, although they are forbidden by the principal, the other party reasonably believes that the agent is authorized to do them and has no notice that the agent is not so authorized." See also Holmes, *Collected Legal Papers* 81 (1920).

⁴⁰ In *Langstaff v. Lucas*, 9 F. 2d 691, 692 (W.D. Ky., 1925), the court based the government's immunity from estoppel on the fact that the Treasury Department "[w]as not . . . authorized . . . to exempt from income taxation. That power is vested in Congress. . . ." In *Municipality of Rio Piedras v. Serra, Garabis & Co.*, 65 F. 2d 691, 694 (C.A. 1st, 1932), the court said that "[e]stoppel can never be invoked against the public to create power in an officer who purported to act on behalf of the public without authority to do so." See *Securities & Exchange Commission v. Torr*, 22 F. Supp. 602, 612 (S.D. N.Y., 1938).

⁴¹ Executive power is limited to the scope of the congressional grant. *Little v. Barreme*, 2 Cranch (U.S.) 170, 177-78 (1804). On this, all the Justices were united in the recent "steel seizure" case, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585, 602, 637-39, 660-61, 662 (1952). As Mr. Justice Douglas, paraphrasing Black and Frankfurter, JJ., said: "[T]he power to execute the laws starts and ends with the laws Congress has enacted." *Ibid.*, at 633.

Acts of administrative bodies, indeed of courts as well, which go beyond the powers delegated to them are void. *Valley v. Northern F. & M. Ins. Co.*, 254 U.S. 348, 353-54 (1920); *General Broadcasting System v. Bridgeport Broadcasting Station*, 53 F. 2d 664, 668 (D. Conn., 1931); *L. A. Tucker Truck Lines v. United States*, 100 F. Supp. 432, 434 (E.D. Mo., 1951).

⁴² One "may not invoke an estoppel to obtain a license which the statute forbids." *Middleboro Liquor & Wine Co. v. Berkshire*, 133 F. 2d 39, 41 (App. D.C., 1942). Compare Mr. Justice Frankfurter's statement in *Merrill v. Federal Crop Insurance Corp.*, 332 U.S. 380, 384 (1947), that an express statutory prohibition of insurance on reseeded wheat would make ignorance of the restriction immaterial.

⁴³ *Merrill v. Federal Crop Insurance Corp.*, 332 U.S. 380, 384 (1947). Notwithstanding the Supreme Court's rejection of the governmental-proprietary distinction as a test of estoppel, it

Such analysis may be logically satisfying, but the "pitiless conclusion" prompts the query whether the courts have marched "under the prod of a remorseless logic which is supposed to leave them no alternative."⁴⁴ For there has been a notable shift, in applying the separation of powers, from inflexible abstractions to the lessons of experience, witness the retreat from insistence on rigorous standards of delegation.⁴⁵ It is open to question whether the related restriction of administrators to the jurisdiction conferred inexorably requires the sacrifice of the citizen who relied on the official exercise of apparent authority.⁴⁶

However the case may be with respect to "unauthorized" conduct, estoppel clearly may be based upon "authorized" conduct. From the Supreme Court's oft-repeated formulation of the immunity from estoppel in terms of administrative action that "the law does not sanction or permit,"⁴⁷ it may be inferred that government is bound by actions within the scope of the agent's authority. A steadily growing number of federal courts have properly so held,⁴⁸ for the sole tenable argument for the im-

continues to be drawn in the lower courts. See *United States v. City and County of San Francisco*, 112 F. Supp. 451, 454 (N.D. Cal., 1953); *Chapman v. Santa Fe Pac. R. Co.*, 198 F. 2d 498, 502, 519 (App. D.C., 1952) (dissenting opinion); *Branch Banking & Trust Co. v. United States*, 98 F. Supp. 757, 766 (Ct. Cl., 1951).

⁴⁴ Cardozo, *Selected Writings* 215 (1947).

⁴⁵ Davis, *Administrative Law*, 27-31, 44-54 (1951); Willis, *Three Approaches to Administrative Law*, 4 *Selected Essays on Constitutional Law* 36, 54, 57 (1938); *American Power & Light Co. v. Securities & Exchange Commission*, 329 U.S. 90, 105 (1946).

⁴⁶ In considering the separation of powers it is well to remember that a "constitution was made for the safety and protection of the people and not to be used as an instrument for their destruction." *Kneeland v. Milwaukee*, 15 Wis. 454, 469-70 (1862) (Dixon, C.J.).

⁴⁷ See note 31 supra.

⁴⁸ "The acts or omissions of the officers of the government, if they be authorized to bind the United States in a particular transaction, will work estoppel against the government, if the officers have acted within the scope of their authority." *Ritter v. United States*, 28 F. 2d 265, 267 (C.A. 3d, 1928).

The following cases in accord are listed chronologically; a few have reference to state action. *Cahn v. Barnes*, 5 Fed. 327, 334 (C.C. Ore., 1881); *Indiana v. Milk*, 11 Fed. 389, 397 (C.C. Ind., 1882); *United States v. Willamette V. & C. M. Wagon-Road Co.*, 54 Fed. 807, 811 (C.C. Ore., 1892); *Michigan v. Jackson, L. & S. R. Co.*, 69 Fed. 116, 123 (C.A. 6th, 1895); *United States v. Stinson*, 125 Fed. 907, 910 (C.A. 7th, 1903); *Walker v. United States*, 139 Fed. 409, 413 (C.C. Ala., 1905); *Western Union Telegraph Co. v. Julian*, 169 Fed. 166, 175 (C.C. Ala., 1909); *Hemmer v. United States*, 204 Fed. 898, 902 (C.A. 8th, 1912); *J. Homer Fritch, Inc. v. United States*, 236 Fed. 133, 134 (C.A. 9th, 1916); *United States v. Denver & R.G.W.R. Co.*, 16 F. 2d 374, 376 (C.A. 8th, 1926); *Dayton Airplane Co. v. United States*, 21 F. 2d 673, 674 (C.A. 6th, 1927); *Joseph Eichelberger & Co. v. Commissioner of Internal Revenue*, 88 F. 2d 874, 875 (C.A. 5th, 1937); *United States v. Big Bend Transit Co.*, 42 F. Supp. 459, 474 (E.D. Wash., 1941); *Vestal v. Commissioner of Internal Revenue*, 152 F. 2d 132, 135 (App. D.C., 1945); *United States v. Property on Pinto Island*, 74 F. Supp. 92, 102 (S.D. Ala., 1947); *David J. Joseph Co. v. United States*, 82 F. Supp. 345, 351 (Ct. Cl., 1949); compare *Lindsey v. Hawes*, 2 Black (U.S.) 554, 560 (1862). For similar cases in the tax field, see notes 92 and 93 infra.

munity derives from separation of powers considerations which have no play where administrative action is *authorized* by Congress. In such case the government should be and is estopped.

This analysis is no less applicable to the tax functions than to the other functions of government. Nevertheless, in the tax field, the courts have said that estoppel must be applied to the government with "great caution,"⁴⁹ "in only the most extraordinary case."⁵⁰ The ground upon which this is put is the "necessity inherent in [the government's] sovereign power of taxation."⁵¹ The government must have money and, it has been suggested, "can be sure of that money only if its tax scheme is stringent to the point of potential injustice. . . ."⁵² The fact is, however, that tax collection is not accomplished with the aid of thumbscrews, but rests for the most part on mutual trust between the government and the taxpayers.⁵³ Repudiation of tax rulings and interpretations damages that trust and therefore impairs our voluntary tax payment system. Given administrative authority to act, there should be no more hesitancy in applying estoppel to the government's tax, than to its other, functions.

Similarly, the binding effect of an "election" of judicial remedies⁵⁴ may likewise be explained by the plenary *authority* conferred on the Attorney General and the United States Attorneys to prosecute and defend suits,⁵⁵ so that however mistaken the government's choice of a remedy, it is nonetheless binding.⁵⁶ It is this authorization which also explains why the

⁴⁹ *Barnet Inv. Co. v. Nee*, 72 F. Supp. 81, 82 (W.D. Mo., 1947); 10A Mertens, *The Law of Federal Income Taxation* 189 (1948); *Vestal v. Commissioner*, 152 F. 2d 132, 136 (App. D.C., 1945). In *Elrod Slug Casting Mach. Co. v. O'Malley*, 57 F. Supp. 915, 920 (D. Neb., 1944), it was held that the "collection of revenues is a governmental function" to which estoppel does not apply.

⁵⁰ *James Couzens v. Commissioner*, 11 B.T.A. 1040, 1151 (1928).

⁵¹ *Ibid.*

⁵² Maguire and Zimet, *op. cit. supra* note 36, at 1302.

⁵³ "[T]he voluntary system of tax collection rolls on successfully, year after year. The BIR is essentially a bookkeeping bureau. It cracks down occasionally, but its chief function is to accept tax payments that United States citizens—private and corporate—line up willingly to pay." What Hit Tax Collections, *Business Week*, No. 1245, July 11, 1953, pp. 25, 26.

⁵⁴ *United States v. Oregon Lumber Co.*, 260 U.S. 290 (1922).

⁵⁵ 62 Stat. 910 (1948), 28 U.S.C.A. § 507 (1949); cf. 45 Stat. 54 (1928), 5 U.S.C.A. § 309 (1949); 34 Stat. 816 (1906), 5 U.S.C.A. § 310 (1949). See *Halbach v. Markham*, 106 F. Supp. 475, 480 (D. N.J., 1952).

⁵⁶ To be sure, the judicial explanation has been made in different terms. In *United States v. Oregon Lumber Co.*, 260 U.S. 290 (1922), the Court explained that "it is not admissible to thus speculate upon the action of the court, and, having met with an adverse decision, to again vex the defendant with another and inconsistent action upon the same facts." *Ibid.*, at 296. But any government change of position after a citizen had acted on the prior position to his detriment is equally "vexing." Yet if the earlier position was unauthorized, estoppel will not lie. The rationalization of "election" must therefore be "authorized" conduct.

government is estopped by the representations made by its counsel in the course of judicial proceedings.⁵⁷ The several cases which appear to be contra rest on readily distinguishable grounds and do not affect the conclusion that representations by government counsel in the courts are binding on the government.⁵⁸

LEGAL INTERPRETATIONS, ADVICE AND RULINGS

Binding effect is often denied to administrative rulings on the ground that an interpretation of law cannot found an estoppel.⁵⁹ Whatever the merits of the rule that a "mistake of law" cannot ground equitable relief between private parties,⁶⁰ it is mechanical jurisprudence to apply this rule

⁵⁷ *United States v. Coast Wineries*, 131 F. 2d 643, 650 (C.A. 9th, 1942); *First National Bank v. United States*, 2 F. Supp. 107, 109 (E.D. Mo., 1932). In the *Wineries* case, the court placed its decision upon the ground that unless the court could rely upon statements and stipulations of government counsel, there would "be delay and confusion which would be seriously detrimental to the orderly administration of justice." 131 F. 2d 643, 650 (C.A. 9th, 1942). "Orderly administration" would inadequately explain how government counsel could be permitted by his action in court to forfeit federal land which, for example, the Secretary of the Interior was forbidden to transfer. The explanation must reside in the fact that counsel has plenary authority to conduct the suit.

⁵⁸ In *Carr v. United States*, 98 U.S. 433 (1879), government counsel appeared for federal officers sued in their "individual" capacity, and it was held that the United States was not estopped by their appearance. This is the doctrine of *United States v. Lee*, 106 U.S. 196, 222 (1882); cf. *Land v. Dollar*, 330 U.S. 731, 739 (1947), recently characterized as "a patent prostitution" of the government immunity from suit doctrine in *Land v. Dollar*, 190 F. 2d 366, 375 (App. D.C., 1951). In *United States v. Javier*, 22 F. 2d 879, 880 (App. D.C., 1927), it was held that "the United States is not estopped by an order of naturalization, although . . . it had entered its appearance in the naturalization proceeding and there unsuccessfully raised the same objection." Reliance was placed in part upon *United States v. Ness*, 245 U.S. 319 (1917). There it is explained that Section 11 of the Naturalization Act which authorizes the United States to appear in opposition in a naturalization proceeding, and Section 15 which authorizes it to bring suit to set aside a certificate of naturalization, are "cumulative," and that Congress intended by Section 11 "to aid the court of naturalization in arriving at a correct decision and so to minimize the necessity for independent suits under § 15." *Ibid.*, at 327. The naturalization cases therefore represent a statutory exemption from the rule that an appearance in court binds the government.

⁵⁹ *Ross v. Commissioner*, 169 F. 2d 483, 496 (C.A. 1st, 1948) (per Frankfurter, Cir. J.); *Sturm v. Boker*, 150 U.S. 312, 336 (1893); *Commissioner v. American Light and Traction Co.*, 125 F. 2d 365, 366 (C.A. 7th, 1942); 10A Mertens, *The Law of Federal Income Taxation* 156 (1948). In Holmes's phrase, the rule is "an instance of an early statement ossifying by repetition into an absolute principle. . . ." 1 Holmes-Laski Letters 335 (1953).

⁶⁰ Criticisms of the rule are collected in Maguire and Zimet, *op. cit. supra* note 36, at 1304; *Mistake of Law: A Suggested Rationale*, 45 Harv. L. Rev. 336 (1931). See also *Staten Island Hygeia Ice & Cold Storage Co. v. United States*, 85 F. 2d 68, 71 (C.A. 2d, 1936). Consult Chafee, *Cases on Equitable Remedies* 649 et seq. (1939), for a comprehensive collection of materials on "mistake of law." 3 Pomeroy, *Equity Jurisprudence* § 849 (5th ed., 1941), concluded that the "great majority of courts" give relief for mistakes as to a person's "own antecedent existing legal rights" and that such mistakes "may be properly regarded—as in great measure they really are, and may be dealt with, as mistakes of fact. Courts have constantly felt and acted upon this view, though not always avowedly." See also *Order of United Commercial Travelers v. McAdam*, 125 Fed. 358, 368 (C.A. 8th, 1903).

to a pronouncement of law by a public officer charged with administering and interpreting a statute.

Apparently the rule proceeded from the facile assumption that "every man must be taken to be cognizant of the law."⁶¹ But the maxim that ignorance of the law may not be pleaded in excuse of a crime had earlier been rejected in a civil case⁶² and the presumption that everyone knows the law is now discredited.⁶³

Noting that reasons for the rule have "never been adequately stated"⁶⁴ and searching for a rationalization, one commentator has suggested that the rule seeks to preclude possible fraud since for evidence of mistake of law we are usually left to the word of the complainant himself. Since, moreover, it is difficult for a jury to assay a man's past motives and the degree of certainty with which he previously regarded the legal significance of a specific set of facts, it was suggested that an arbitrary rule of thumb excluding mistake of law is justified.⁶⁵ But such considerations are irrelevant where, for example, the Commissioner of Internal Revenue has promulgated a ruling or rendered a written interpretation to a taxpayer; in such a case strong policy considerations dictate that the Commissioner be bound by his opinions.⁶⁶ A taxpayer is entitled to rely on the interpre-

⁶¹ *Bilbie v. Lumley*, 2 East. *469, 470, 472 (K.B., 1802); see *Mistake of Law: A Suggested Rationale*, 45 Harv. L. Rev. 336, 337 (1931).

⁶² *Lansdown v. Lansdown*, Mosely *364, 365 (1730). It is one thing to reject ignorance as an excuse by one who has committed a wrong; it is something else again to employ the rejection as an instrument of inflicting a loss or hurt.

⁶³ The very existence of courts of appeal, said Justice Maule, shows that even "judges may be ignorant of law." *Martindale v. Falkner*, 2 C.B. *706, 720 (C.P., 1846). And, he declared, "[t]here is no presumption in this country that every person knows the law. It would be contrary to common sense and reason." *Ibid.*, at 719. See also *Montriou v. Jefferys*, 2 C. & P. *113, 116 (N.P., 1825).

⁶⁴ *Mistake of Law: A Suggested Rationale*, 45 Harv. L. Rev. 336, 337 (1931). "[W]hat," asked Professor Keener, "is the public policy which demands that one who has done no injury, but simply seeks to avert a loss, shall, because of his ignorance of law, suffer a loss?" Keener, *Quasi-Contracts* 91 (1893). As a matter of analysis, "[t]he mind no more assents to the payment made under a mistake of the law, than if made under a mistake of the facts; the delusion is the same in both cases; in both alike, the mind is influenced by false motives." *Northrop v. Graves*, 19 Conn. 548, 554 (1849).

⁶⁵ *Mistake of Law: A Suggested Rationale*, 45 Harv. L. Rev. 336, 337-41 (1931).

⁶⁶ Policy arguments are advanced by Magill, *Finality of Determinations of the Commissioner of Internal Revenue*, 28 Col. L. Rev. 563, 575-76 (1928): "The unsettling effects of the repeated reopening of tax cases thought settled; the expense of repeated presentations of involved facts and legal arguments; the confusion and delays in the Treasury caused by the failure to dispose of old cases once for all cannot be too strongly deprecated. . . . The rapidly changing provisions of the revenue laws, grounded on little or no actual experience, call for a reasonable finality of interpretation if chaos is to be avoided. . . ." Indeed the Commissioner, recognizing the shock to public confidence, has himself halted the repudiation of prior legal rulings. See page 693 *infra*.

"[I]t must be considered an intolerable operation, after the State, through its duly consti-

tation of the officer to whom the task of interpretation is confided; he should not be at the peril of guessing whether courts will ultimately reject the interpretation.⁶⁷ Indeed, Congress itself has said that "sound administration . . . places upon the Government the responsibility and burden of interpreting the law. . . ."⁶⁸ Even in private law, equity will relieve from a "mistake of law," if it was reasonable for the plaintiff "to rely upon the presumably greater knowledge of the defendant."⁶⁹ So far as the "mistake of law" rule is concerned, it would seem that an interpretation of law by a duly authorized officer should estop the government.

The question next arises, whether the interpretations of a subordinate should be given as much effect as an authoritative agency interpretation. To my mind, the interpretation of statutes and regulations cannot be placed at the hazard of varying and conflicting interpretations by hundreds, perhaps thousands of subordinates, widely scattered over the nation. One who seeks an authoritative interpretation, common sense would suggest, should address himself to the head of the agency.⁷⁰ The recent proposal for legislative correction goes no further than to seek conclusiveness for authorized administrative interpretations.⁷¹

Legal advice, concerning the effect of a given transaction, for example, as distinguished from an interpretation of a statute or regulation, requires a different approach. The Technical Staff of the Bureau of Internal Revenue advises, for example, that for tax purposes no trust came into being.⁷² Or similar advice is rendered by a field agent. Unified administration, it is true, would be facilitated if all such legal questions were authoritatively answered by a designated, central voice. But administration would founder if every such question would be postponed for an answer from

tuted organs, has pronounced a rule of law upon which the citizen relies when, later, the State, through the same organs, takes away from that citizen the rights or liberties which he has fashioned in reliance on what has been officially declared." Kocourek and Koven, *Renovation of the Common Law Through Stare Decisis*, 29 Ill. L. Rev. 971, 972 (1935). See also note 108 *infra*.

⁶⁷ Maguire and Zimet, *op. cit. supra* note 36, at 1291-92.

⁶⁸ Quoted *infra*, page 700.

⁶⁹ *Staten Island Hygeia Ice & Cold Storage Co. v. United States*, 85 F. 2d 68, 71 (C.A. 2d, 1936); *Fidelity & Deposit Company of Maryland v. McQuade*, 123 F. 2d 337, 339 (App. D.C., 1941).

⁷⁰ Compare the procedure for obtaining official interpretations provided by the Office of Price Administration. *Bowles v. Indianapolis Glove Co.*, 150 F. 2d 597, 601 (C.A. 7th, 1945).

⁷¹ Newman, *op. cit. supra* note 13, at 382-83.

⁷² *Gilmer v. United States*, 91 F. Supp. 887 (S.D. Tex., 1950).

that voice. Taxation is "eminently practical."⁷³ It has to do with matters, "the great majority of which ought to be and usually are, disposed of informally. . . ."⁷⁴ Such dispositions should be encouraged, not vitiated.

In this area, the attitude of the courts has been too grudging. One need only recall one court's flippant dismissal of the Bureau Solicitor's advice—that on the facts the taxpayers were operating as a partnership and "would not be subject to the corporation tax"⁷⁵—as a "careless and unofficial expression of opinion"⁷⁶ Another striking illustration is furnished by *United States v. Globe Indemnity Co.*⁷⁷ There a surety had furnished a bond for a taxpayer. After a series of dealings with the taxpayer, the Collector of Internal Revenue, in response to the taxpayer's request, certified that "there are no unpaid income taxes appearing on the records of this office in your name. . . ."⁷⁸ On the faith of this letter the surety returned the collateral to the taxpayer. Thereafter, the government sued the surety for unpaid taxes. The court declared that "[t]here would seem to have been no authority on the part of the collector to furnish a tax search binding on the Commissioner."⁷⁹ What more natural than to turn to the Collector to whom taxes have been paid for advice whether any further

⁷³ *Tyler v. United States*, 281 U.S. 497, 503 (1930).

⁷⁴ *Hartwell Mills v. Rose*, 61 F. 2d 441, 444 (C.A. 5th, 1932).

⁷⁵ *F. E. McGlone v. Commissioner*, 22 B.T.A. 358, 362 (1932), reviewed in *Commissioner v. Duckwitz*, 68 F. 2d 629 (C.A. 7th, 1934).

⁷⁶ *Commissioner v. Duckwitz*, 68 F. 2d 629, 630 (C.A. 7th, 1934). Compare the Office of Price Administration regulation which authorizes official *interpretations* to be signed by the General Counsel, any Associate or Assistant General Counsel, or Regional Price Attorney. Quoted in Newman, *op. cit. supra* note 13, at 382.

⁷⁷ 94 F. 2d 576 (C.A. 2d, 1938). Compare *Burnham Chemical Co. v. Krug*, 81 F. Supp. 911 (D. D.C., 1949), where a "responsible official of the Department of Interior" "discouraged" the claimant from taking a departmental appeal to the Secretary of the Interior. Judicial relief was denied because claimant failed to exhaust his administrative remedies and because the government was not estopped by the subordinates' advice to plead exhaustion. Exhaustion is not a creature of statute, but of equity. Berger, *Exhaustion of Administrative Remedies*, 48 Yale L.J. 981, 985-86 (1939). In weighing the need for compliance with its own rule, a court of equity surely may weigh the equities. No statute forbade the "responsible official" to advise the claimant with respect to a matter of departmental procedure.

⁷⁸ 94 F. 2d 576, 577 (C.A. 2d, 1938). It may be noted that this case involves a repudiation of an earlier determination of *fact*, as did *Lee v. Munroe*, 7 Cranch (U.S.) 366 (1813). If there is "authority" to make such determinations, analysis of the immunity from estoppel is not advanced by distinguishing them from determinations of law. In the case of legal interpretations and regulations, the necessity of harmonizing with the "clear" language of a statute is a special aspect of the authority question. See page 699 *infra*.

⁷⁹ 94 F. 2d 576, 578 (C.A. 2d, 1938). Compare *Darling v. Commissioner*, 49 F. 2d 111, 113 (C.A. 4th, 1931), where a revenue agent's advice that a taxpayer should not take a loss in 1918 until the business of the company was a closed transaction, was held unauthorized. In *Searles Real Estate Trust*, 25 B.T.A. 1115, 1122 (1932), a revenue agent's advice that the filing of a belated return was unnecessary, was likewise held unauthorized.

taxes are owing? And on whom may a taxpayer more properly rely for legal advice than on the Solicitor, the chief legal officer of the Bureau? When, for example, the Bureau offers the assistance of its agents to the public in the preparation of income tax returns, it is unsound administration to repudiate such advice as unauthorized. It is submitted that unless such advice is expressly forbidden by statute or regulation, the courts should find the authority implied. The necessities of government render impracticable a statutory authorization for every act performed by an administrator, as was emphasized by Justice McLean more than 100 years ago:

A practical knowledge of the action of any one of the great departments of the government must convince every person that the head of a department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by the law; but it does not follow that he must show a statutory provision for everything he does. No government could be administered on such principles. To attempt to regulate by law the minute movements of every part of the complicated machinery of government would evince a most unpardonable ignorance on the subject. Whilst the great outlines of its movements may be marked out, and limitations imposed on the exercise of its powers, there are numberless things which must be done that can neither be anticipated nor defined, and which are essential to the proper action of the government.⁸⁰

Such considerations are no less applicable to the effective functioning of subordinates to whom power is of necessity delegated.

Let it not be concluded, however, that the rulings of agency heads have received much more respect as a basis of estoppel than have those issued by their subordinates. So, in *Washington Market Co. v. Commissioner*,⁸¹ the taxpayer "found a written ruling [by the Commissioner], rendered after full hearings to be only a scrap of paper."⁸² In *Boykin v. Commissioner*,⁸³ the Commissioner insisted upon treating a tenancy in common as an entire taxable interest for purposes of estate tax, but was permitted to change his position to the detriment of the surviving wife for purposes of income taxes. Perhaps the most noted change of position, sustained in *Couzens v. Commissioner*,⁸⁴ involved a change in the Commissioner's valuation of Ford Motor Co. minority stock after Couzens sold his shares. It is this case, we are told by a recent Chief Counsel of the Bureau, which "did little to instill public faith and confidence in the Bureau," that led

⁸⁰ *United States v. MacDaniel*, 7 Pet. (U.S.) 1, 14-15 (1833).

⁸¹ 25 B.T.A. 576 (1932).

⁸² Maguire and Zimet, op. cit. supra note 36, at 1308 n. 92. The Commissioner was permitted to reverse his ruling that no taxable gain or loss had been realized by reason of certain transactions. *Washington Market Co. v. Commissioner*, 25 B.T.A. 576, 581 (1932).

⁸³ 16 B.T.A. 477 (1929).

⁸⁴ 11 B.T.A. 1040 (1928).

to the Bureau's present policy of honoring its rulings.⁸⁵ This belated recognition of the "policy of fair play"⁸⁶ finds support in case law that has yet to be repudiated.

But the precedents denying the power of an officer to overrule the authorized determination or ruling of a predecessor, which may be said to constitute the common law on the subject, have been given scant consideration by the courts. A review of the early cases will furnish a background against which to construe the statutory provisions which have been deemed to empower the Commissioner to overrule his predecessors.

In 1841, the Supreme Court, considering the right of a Postmaster General to disallow an allowance made by his predecessor within the scope of his authority, held that the

right in an incumbent of reviewing a predecessor's decisions extends to mistakes in matters of fact arising from errors of calculation, and to cases of rejected claims in which material testimony is afterwards discovered and produced. But if a credit has been given, or an allowance made, as these were, by the head of a Department, and it is alleged to be an illegal allowance, the judicial tribunals of the country must be resorted to, to construe the law under which the allowance was made. . . . It is no longer a case between the correctness of one officer's judgment and that of his successor. A third party is interested, and he cannot be deprived of a payment or a credit so given, but by the intervention of a Court to pass upon his right.⁸⁷

The rule is reiterated in a series of Supreme Court cases,⁸⁸ among them *United States v. Kaufman*,⁸⁹ which held that the allowance of a tax refund by the Commissioner could only be impeached for fraud or mistake, and that, not administratively. Citing these decisions, a district court held that the Commissioner of Internal Revenue is without authority to reverse his predecessor's determination of a question of fact,⁹⁰ and another district judge declared that "[a]ny other conclusion would bring chaos in governmental administration and cause untold annoyance to our citizens."⁹¹

⁸⁵ Wenchel, *Taxpayer's Rulings*, 5 Tax. L. Rev. 105, 112, 113-14, 115 (1950). The policy has been in effect for more than a decade. *Ibid.*, at 113.

⁸⁶ *Ibid.*, at 115. It has "been the unvarying policy of the Bureau for a decade or more." *Ibid.*

⁸⁷ *United States v. Bank of the Metropolis*, 15 Pet. (U.S.) 377, 401 (1841).

⁸⁸ *Stone v. United States*, 2 Wall. (U.S.) 525, 535 (1864) (successor cannot annul patent issued by his predecessor); *United States v. Real Estate Savings Bank*, 104 U.S. 728, 733-34 (1882) (allowance of claim by Commissioner can only be impeached in court for fraud or mistake); cf. *United States v. Great Northern Ry. Co.*, 287 U.S. 144 (1932).

⁸⁹ 96 U.S. 567 (1878).

⁹⁰ *Penrose v. Skinner*, 278 Fed. 284, 286 (D. Colo., 1921).

⁹¹ *Penrose v. Skinner*, 298 Fed. 335, 337 (D. Colo., 1923). See also note 66 *supra*. Compare a consul's absence of implied power to revoke a visa once issued to an alien, *United States v. Reimer*, 101 F. 2d 267, 269 (C.A. 2d, 1939), on the ground that it would "involve the possession of an essentially arbitrary discretion."

In a number of subsequent tax cases, some courts have denied both the power of the Commissioner to change the position taken by a predecessor⁹² and his power to change his own position.⁹³ Other courts have taken a contrary view,⁹⁴ traceable ultimately to an article published in 1928 by Professor Magill.⁹⁵ The views there expressed have been so influential as to require detailed examination.

Magill sought to distinguish a number of opinions of Attorneys General as well as some lower court decisions "indicating that an administrative officer may not reverse the action of his predecessor, even for an erroneous construction of the law. . . ."⁹⁶ There is no occasion to dwell on these opinions and decisions,⁹⁷ for the Supreme Court cases here discussed contain no intimation that the distinguishing factors stressed by Magill played any role.

⁹² *H. S. D. Co. v. Kavanagh*, 191 F. 2d 831, 846 (C.A. 6th, 1951); *Stockstrom v. Commissioner*, 190 F. 2d 283, 288-89 (App. D.C., 1951); *Woodworth v. Kales*, 26 F. 2d 178, 181 (C.A. 6th, 1928); *Boyne City Lumber Co. v. Doyle*, 47 F. 2d 772, 774 (D. Mich., 1930).

⁹³ *Vestal v. Commissioner*, 152 F. 2d 132, 136-37 (App. D.C., 1945); *Norton Coe v. Commissioner*, 50 F. 2d 664, 669 (C.A. 1st, 1931); see *Wurtsbaugh v. Commissioner*, 187 F. 2d 975, 977 (C.A. 5th, 1951); *United States v. Brown*, 86 F. 2d 798 (C.A. 6th, 1936); *Joseph Eichelberger & Co. v. Commissioner*, 88 F. 2d 875 (C.A. 5th, 1937); *United States v. Borg-Warner Corporation*, 108 F. 2d 424, 428 (C.A. 7th, 1939); *Ford Motor Co. v. United States*, 9 F. Supp. 590, 601 (Ct. Cl., 1935); *Potter v. Fahs*, 71 F. Supp. 675, 678 (S.D. Fla., 1947). See also note 117 *infra*.

⁹⁴ We set to one side the cases holding that a prior interpretation of law is not binding on the Commissioner. See authorities cited note 59 *supra*.

McIlhenny v. Commissioner, 39 F. 2d 356 (C.A. 3d, 1930); *Burnet v. Porter*, 283 U.S. 230 (1931); *Page v. Lafayette Worsted Co.*, 66 F. 2d 339 (C.A. 1st, 1933); *L. Loewy & Son v. Commissioner*, 31 F. 2d 652 (C.A. 2d, 1929); *Knapp-Monarch Co. v. Commissioner*, 139 F. 2d 863 (C.A. 8th, 1944); *Tonnigsen v. Commissioner*, 61 F. 2d 199 (C.A. 9th, 1932); *Stanford University Book Store v. Helvering*, 83 F. 2d 710 (App. D.C., 1936); *Washington Market Co. v. Commissioner*, 25 B.T.A. 576 (1932).

⁹⁵ Magill, *op. cit.* *supra* note 66.

⁹⁶ *Ibid.*, at 568.

⁹⁷ Magill stated with respect to some of them that Congress had "conferred the power to determine a claim upon a particular individual; thereby inferentially at least precluding a review by his successor," and that the underlying policy was that there "was no statute of limitations to prevent an indefinite succession of reopenings. . . ." *Ibid.*, at 568. These factors played no role in the Supreme Court cases earlier cited. Other cases are distinguished by Magill on the ground that interests in patents or land "had been vested by the act of the former administrative officer." *Ibid.* In *Stone v. United States*, 2 Wall. (U.S.) 525, 535 (1860), the Court indicated that even a patent "void for want of authority" could not be annulled by a successor. Such void patent in legal contemplation never "vests" title. Compare note 41 *supra*. Finally, Magill urges that an administrative decision that an admiral was not in the naval service at a given time and a Commissioner's decision, setting the value of Ford Motor Co. stock at a given time, exhibit such "tremendous differences in the facts . . . and in the potential effect of the two decisions" as to counsel "that a legal analogy between the cases should not be lightly drawn." 28 Col. L. Rev. 563, 573 (1928). To the contrary, we submit, the fact that the Ford decision shook public confidence in the Commissioner (page 693 *supra*) and that such a tax decision adversely affected the rights of others similarly situated indicates that the reversal of a tax decision has less to commend it than that of a decision concerning an Admiral's standing.

A more weighty argument to support the view that the Commissioner may overrule a predecessor is based by Magill upon the fact that the Internal Revenue statute, in providing that a "closing agreement" shall be "final and conclusive," furnished the exclusive mechanism for finality.⁹⁸ This argument was adopted in *McIlhenny v. Commissioner*, expressed in terms of the rule that "when a statute limits a thing to be done in a particular way, it includes a negative of any other mode."⁹⁹

Mechanical reliance on rules of construction has given way to the view that they "are not rules of law but merely axioms of experience. . . . They do not solve the special difficulties in construing a particular statute."¹⁰⁰ Then, too, there is competition amongst such rules. In the presence of a long line of cases precluding the reversal of a predecessor's determination, the court, for example, might well have concluded, as did the Supreme Court, in *Transcontinental & Western Air v. Civil Aeronautics Board*,¹⁰¹ that Congress, in enacting the "closing agreement" provision, had not plainly exhibited any intention to "make a radical break with tradition," or that Congress had not "clearly" shown an intention to depart from the common law.¹⁰²

⁹⁸ 28 Col. L. Rev. 563, 567 n. 27 (1928). This provision is now found in 53 Stat. 462 (1939), 26 U.S.C.A. § 3760 (1940).

Still another argument by Magill is that the definition of a "deficiency" [now contained in 53 Stat. 82 (1939), 26 U.S.C.A. § 271 (1945)] "contemplates the possibility of previous determinations." 28 Col. L. Rev. 563, 567 (1928). The then provision that the deficiency shall "first be *increased* by the amounts previously assessed . . . as a deficiency, and *decreased* by the amounts previously abated . . .," quoted by Magill, *ibid.*, at 568, indicates, however, that past administrative action in this regard must be respected. Moreover, recognition of the mere "possibility of previous determinations" does not clearly disclose a purpose to depart from the common-law rule which precludes a successor from overruling the determination of a predecessor.

⁹⁹ 39 F. 2d 356, 358 (C.A. 3d, 1930); see also *L. Loewy & Sons v. Commissioner*, 31 F. 2d 652, 654 (C.A. 2d, 1929); *Knapp-Monarch Co. v. Commissioner*, 139 F. 2d 863, 864 (C.A. 8th, 1944). Cf. *Burnet v. Porter*, 283 U.S. 230, 231 (1931).

¹⁰⁰ *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221 (1953); *Springer v. Philippine Islands*, 277 U.S. 189, 206 (1928); *United States v. Gilliland*, 312 U.S. 86, 93 (1941). Compare the pioneer utterance of Chief Justice Doe: "Legal rules of construction, so called, suggest natural methods of finding and weighing the evidence and ascertaining the fact of intention, but do not determine the weight which the evidence has in the mind, and do not establish a conclusion at variance with that reached by a due consideration of all the competent proof." *Edes v. Boardman*, 58 N.H. 580, 592 (1879). Compare cases cited note 127 *infra*.

¹⁰¹ 336 U.S. 601 (1949). There retroactive effect was denied to a provision authorizing the Board "to make such rates effective from such date as it shall determine to be proper" on the ground that traditionally rate-making is prospective and because the Court found no "[c]ongressional purpose to make a radical break with tradition" and was therefore "most reluctant to give the 'make effective' clause the broad meaning [of retroactivity] which petitioner urges." *Ibid.*, at 605.

¹⁰² *Northern Securities Co. v. United States*, 193 U.S. 197, 361 (1904) (Brewer, J., concurring); *Shaw v. Railroad Co.*, 101 U.S. 557, 565 (1880); *Jones v. Jones*, 72 F. 2d 829 (App. D.C., 1934). That the "expressio unius" rule does not foreclose the matter may be gathered

That intention, it may be thought, can be found in an extract from the legislative history of the "closing agreement" provision, first noted by Magill:

Under the present method of procedure, a taxpayer never knows when he is through, as a tax case may be opened at any time because of a change in ruling by the Treasury Department.¹⁰³

This statement does not reflect the *law* as expressed in the Supreme Court cases earlier discussed, but rather the Treasury *procedure*, contrary to that law. At most, it therefore expresses a Congressional misapprehension of existing law to which little weight would attach.¹⁰⁴ More significant is the legislative statement accompanying the provisions in the same Act respecting retroactivity of regulations, which is in *pari materia*, whereby Congress unequivocally exhibited its intention to relieve taxpayers who relied upon existing practices of the inequities of retroactive charges and to make the government responsible for interpretations upon which taxpayers may rely.¹⁰⁵

RETROACTIVITY OF NEW REGULATIONS

Reliance upon a regulation promulgated by the head of an agency, one would think, should be free from the doubts that surround reliance on a subordinate's interpretation. Yet such confidence too may prove costly to the citizen. It is all too easy to explain retroactive displacement of an old regulation by a new one in terms of a "continuing rule-making" power,¹⁰⁶ or of the absence of power to commit the government to a mistaken inter-

from *Botany Worsted Mills v. United States*, 278 U.S. 282, 289 (1929), where, in a parallel situation, the Supreme Court was at pains to save the question whether an agreement by subordinates outside the statutory mechanism, "though not binding in itself, may when executed become, under some circumstances, binding on the parties by estoppel."

¹⁰³ Report of Committee on Finance on the Revenue Bill of 1921, Report No. 275, 67th Cong. 1st Sess. 31 (1921), quoted by Magill, *op. cit.* supra note 66, at 567 n. 26.

¹⁰⁴ In *Salomon Bros. & Hutzler v. Pedrick*, 105 F. Supp. 210, 213 (S.D. N.Y., 1952), the Congress had enacted a law adopting a view contrary to the prior Bureau interpretation, but stated in a Report that "under the present law," the law was as the Bureau interpreted it. The court held that "such reference to the 'present law' in the Committee Reports is not final nor dispositive. A mere reference to what the 'law' presently is, in a Committee Report, is not necessarily accurate nor always free from error."

¹⁰⁵ These legislative materials are discussed at page 700 *infra*.

"Instead of balancing the various generalized axioms of experience [i.e., rules of construction], in construing legislation, regard for the specific history of the legislative process that culminated in the Act now before us affords more solid ground for giving it appropriate meaning." *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 222 (1952).

See also Magill's citation to provisions indicating "a legislative desire to prevent repeated reopenings of tax cases," note 108 *infra*.

¹⁰⁶ *Helvering v. Wilshire Oil Co.*, 308 U.S. 90, 100 (1939).

pretation,¹⁰⁷ or, as Professor Magill suggested, of the Commissioner's duty to collect taxes due which compels him to reverse an erroneous interpretation.¹⁰⁸ But these are shaky conclusions. Was the Commissioner in contemplation of law necessarily "wrong the first time"?¹⁰⁹

Suppose that the displaced regulations represent a contemporaneous construction of the statute. Such interpretations carry "great weight."¹¹⁰ Given an ambiguous statute, a regulation that is substantially contemporaneous with the statute is regarded as evidence of the probable general understanding of the times and of the opinions of men "who probably were active in the drafting of the statute."¹¹¹ From Mr. Justice Story onwards, the Supreme Court has yielded its doubts in the face of a long-continued administrative construction;¹¹² it has considered that construction "binding on past transactions";¹¹³ it has viewed "with disfavor" a retroactive change which would work injury upon those who relied upon a former con-

¹⁰⁷ *Schafer v. Helvering*, 83 F. 2d 317, 320 (App. D.C., 1939). See also *Commissioner v. American Light & Traction Co.*, 125 F. 2d 365, 366 (C.A. 7th, 1942).

¹⁰⁸ Magill states that the "Commissioner's duty to collect taxes due would compel him to reverse a prior ruling of law in a particular case, if he concluded it was an erroneous interpretation." Magill, *op. cit. supra* note 66, at 568. (Emphasis added.) This was put upon the then provision that the "Commissioner . . . shall make . . . the determinations and assessments of all taxes. . . ." *Ibid.*, at 564 n. 7. Parenthetically, today the Commissioner merely has "general superintendence of the assessment and collection of all taxes. . . ." 53 Stat. 477 (1940), 26 U.S.C.A. § 3901 (1947). The word "shall" is as often permissive as mandatory, and given the huge volume of tax collections, a large area of discretion in the re-"determination" and re-"assessment" of taxes must necessarily reside in the Commissioner, a necessity which bars the notion of mandatory duty. More important, the administrators themselves recognize no such duty once they have given a ruling, for they adhere thereto "even where a Supreme Court decision changes the Bureau's previous interpretation of the law, and such change operates to the benefit of the Government. . . ." *Wenchel, op. cit. supra* note 85, at 115. Despite the "duty to collect taxes that are due," Magill himself states that "a reasonable finality of interpretation" is called for "if chaos is to be avoided," that "at the very least it would seem that there should be a considerable reluctance to reopen old cases, in the absence of fraud, a material mistake in fact, a controlling court decision, or perhaps a serious error in the interpretation of the law. The provisions for a formal declaration from which the taxpayer can appeal to the Board of Tax Appeals; the provision denying the Commissioner power to make a redetermination for a particular year where an appeal has been taken for that year; the provision authorizing final statement; all indicate a legislative desire to prevent repeated reopenings of tax cases. A decent respect may properly be paid to this desire. . . ." Magill, *op. cit. supra* note 66, at 575.

¹⁰⁹ *Stockstrom v. Commissioner*, 190 F. 2d 283, 289 (App. D.C., 1951) (Prettyman, J., dissenting).

¹¹⁰ *United States v. American Trucking Association, Inc.*, 310 U.S. 534, 549 (1940); *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933).

¹¹¹ *White v. Winchester Country Club*, 315 U.S. 32, 41 (1942); *Augustus v. Commissioner*, 118 F. 2d 38 (C.A. 6th, 1941); Griswold, *A Summary of the Regulations Problem*, 54 *Harv. L. Rev.* 398, 405 (1941).

¹¹² *United States v. State Bank of North Carolina*, 6 Pet. (U.S.) 29, 39-40 (1832).

¹¹³ *United States v. MacDaniel*, 7 Pet. (U.S.) 1, 15 (1833).

struction;¹¹⁴ and it has said that such a construction "ought not to be disturbed now unless it be plainly wrong."¹¹⁵ Indeed, a long-continued construction under a statute which Congress has left untouched is said to have the force of law.¹¹⁶ If the courts are thus under a duty to swallow their doubts when confronted by a contemporaneous construction of an ambiguous statute, all the less should the Commissioner or any other officer be permitted to turn interpretive somersaults.¹¹⁷ In such case, surely, the Court, in choosing between the earlier and later regulations, is no less free than it formerly was in determining what the state law was¹¹⁸ when it held that "where gross injustice would be otherwise done," the federal courts would follow "the earlier [state decisions] rather than the later decisions as to what it was."¹¹⁹

Against this, it has been argued that Section 3791(b) of the Internal Revenue Code authorizes retroactive regulations.¹²⁰ Section 3791(b) authorizes the Commissioner to "prescribe the extent, if any, to which any

¹¹⁴ *United States v. Alabama G.S.R. Co.*, 142 U.S. 615, 621 (1892).

¹¹⁵ *Universal Battery Co. v. United States*, 281 U.S. 580, 583 (1930). See also *Griswold*, op. cit. supra note 111, at 409. In the tax field, there is the additional rule that doubts in the construction of a tax statute are resolved in favor of the taxpayer. *Gould v. Gould*, 245 U.S. 151, 153 (1917); *Cloister Printing Corp. v. United States*, 100 F. 2d 355, 357 (C.A. 2d, 1938).

¹¹⁶ "Acquiescence by Congress in an administrative practice may be an inference from silence during a period of years." *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 313 (1933) (per Cardozo, J.). See also *Helvering v. Winmill*, 305 U.S. 79, 83 (1938); *Stout v. Hancock*, 146 F. 2d 741, 744 (C.A. 4th, 1944).

¹¹⁷ Courts are not bound to give retrospective effect to a regulation not retroactive in terms though the Commissioner announced he would give it retroactive effect. *Kay v. Commissioner*, 178 F. 2d 772 (C.A. 3d, 1950). Compare the rejection of an additional tax "based upon a theory at variance with established administrative interpretation." *United Fruit Co. v. Hassett*, 61 F. Supp. 1013, 1019 (D. Mass., 1945), and see requirement that published ruling be repealed by formal action and publication, and note rejection of departure from ruling prior thereto in *James v. Germania Iron Co.*, 107 Fed. 597, 609-10 (C.A. 8th, 1901).

In *Hirshon v. United States*, 113 F. Supp. 444, 445 (Ct. Cl., 1953), the Court said: "[T]he Bureau itself, for two years after its enactment, interpreted the statute as making these taxes deductible. . . . Then, without amendment of the statute, or the publication of any Treasury Regulation, we have the Bureau issuing an I.T. which says the opposite. As we understand it, an I.T. is an instruction issued to the staff of the Bureau, as to how the law should be administered by the staff. The Bureau has no power to make law by such an instruction, even to the extent that the Secretary of the Treasury may make law by regulation."

¹¹⁸ *Gelpcke v. Dubuque*, 1 Wall. (U.S.) 175 (1863).

¹¹⁹ *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 452 (1924). The Supreme Court has indicated that "it may reject an established administrative practice when it conflicts with an earlier one and is not supported by valid reasons. . . ." *Sanford's Estate v. Commissioner*, 308 U.S. 39, 53 (1939).

¹²⁰ 53 Stat. 467 (1939), 26 U.S.C.A. § 3791 (1940); consult *Magill*, op. cit. supra note 66, at 570-71 for predecessor section. See also *Manhattan General Equipment Co. v. Commissioner*, 76 F. 2d 892, 897 (C.A. 2d, 1935). It is worth noting that the predecessor statute to which *Magill* refers was expressly couched in terms of "the discretion of the Commissioner." *Magill*, op. cit. supra note 66, at 570. That phrase is absent from § 3791(b).

ruling, regulation . . . shall be applied without retroactive effect." Although the literal terms suggest recognition of the existence of retroactive regulations,¹²¹ the legislative history of this provision discloses an intention to curb retroactivity. The Conference Committee stated with respect to the predecessor of Section 3791(b) that:

It is hoped that this provision *will prevent* the constant *reopening* of cases on account of changes in regulations or Treasury decisions, and it is believed that sound administration properly *places upon the Government* the *responsibility* and burden of *interpreting* the law and of *prescribing regulations upon which the taxpayers may rely*.¹²²

The Supreme Court noted that the Committee Reports respecting the 1934 amendment of this provision stated that it "was intended to permit the Treasury to *avoid inequities* to persons who had closed transactions in reliance upon existing practice. . . ." ¹²³ Thus the Congress plainly manifested its intention to relieve taxpayers who relied upon "existing practice" of retroactive inequities and to compel the government to prescribe regulations upon which taxpayers may rely. In the words of the Supreme Court, Section 3791(b) and its predecessors were designed to relieve the Treasury from the view that "each change in administrative construction must be given retroactive effect," a view that "deprived both the Government and the taxpayer of any assurance that cases once settled would stay settled."¹²⁴

The Bureau, for upwards of ten years, has not retroactively applied changes in *rulings*, also a component of Section 3791(b), "even where a Supreme Court decision changes the Bureau's previous interpretation of the law. . . ." ¹²⁵ This course has been followed under the "policy of fair play,"¹²⁶ but, it is suggested, this is tantamount to a long-continued administrative construction of Section 3791(b), a construction that gives effect to the legislative history. If this falls short of a settled administrative construction, the courts ought nonetheless to give effect to the plainly dis-

¹²¹ For present purposes, it is unnecessary to determine whether this section authorizes the issuance of retroactive regulations as Magill suggests, *op. cit. supra* note 66, at 570-71, and as *Helvering v. R. J. Reynolds Tobacco Co.*, 306 U.S. 110, 116 (1939), would seem to indicate. It suffices that the literal terms imply recognition of the existence of such a power. *Surrey, The Scope and Effect of Treasury Regulations Under the Income, Estate and Gift Taxes*, 88 U. of Pa. L. Rev. 556, 567 (1940); and see *Helvering v. Griffiths*, 318 U.S. 371, 397 n. 49 (1943): "Thus it appears that this legislation was intended to permit escape from the retroactive effects of administrative action by the Treasury, rather than to increase its power to make retroactive rulings."

¹²² H.R. Rep. No. 1882, 70th Cong. 1st Sess. 22 (1928), quoted in *Helvering v. Griffiths*, 318 U.S. 371, 397 n. 49 (1943). (Emphasis added.)

¹²³ *Helvering v. Griffiths*, 318 U.S. 371, 397 n. 49 (1943). (Emphasis added.)

¹²⁴ *Ibid.*

¹²⁵ *Wenchel, op. cit. supra* note 85, at 115.

¹²⁶ *Ibid.*

closed intention of Congress, however imperfectly expressed in the literal terms of the Act.¹²⁷

Thus far we have considered regulations under an ambiguous statute. Suppose the superseded regulation is inconsistent with the literal terms of that statute. In such case, it has been said, the ability of an administrator to prescribe a retroactive rule "is measured by the ability of Congress itself to make the retroactive command."¹²⁸ But, had Congress itself enacted a successor statute which would alter pre-existing rights, a retrospective effect would be rejected unless required by the "unequivocal and inflexible import of the terms, and the manifest intention of the legislature."¹²⁹ In more recent terms, "[r]etroactivity, even where permissible, is not favored except upon the clearest mandate."¹³⁰ The mere grant of power to make regulations need not be read to authorize retroactive regulations when an amendatory act by Congress itself would be jealously read for the "clearest mandate" of retroactivity.¹³¹

But how, it may be asked, can estoppel be founded upon a regulation that is void and of no effect because inconsistent with the "plain" terms of the statute?¹³² This doctrine of absolute retroactive invalidity has been "eroded" in an analogous case with the aid of a "realistic approach."¹³³ In *Chicot County Drainage District v. Baxter State Bank*,¹³⁴ where a decree was

¹²⁷ "But the fair interpretation of a statute is often 'the art of proliferating a purpose,' . . . revealed more by the demonstrable forces that produced it than by its precise phrasing." *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 489 (1951). If, said Mr. Justice Holmes on circuit, a legislature "has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute . . . may not be set out in terms, but it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before." *Johnson v. United States*, 163 Fed. 30, 32 (C.A. 1st, 1908), quoted with approval in *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U.S. 381, 391 (1939).

¹²⁸ *Surrey*, op. cit. supra note 121, at 569. See also *Manhattan General Equipment Co. v. Commissioner*, 76 F. 2d 892, 896 (C.A. 2d, 1935).

¹²⁹ *United States v. Heth*, 3 Cranch (U.S.) 399, 413 (1806).

¹³⁰ *Claridge Apartments Co. v. Commissioner*, 323 U.S. 141, 164 (1944).

¹³¹ Compare note 101 supra. It is argued that if the old regulation is invalid, "the new regulation should be given full retroactive effect, as otherwise the statute would be incomplete and unworkable." *Surrey*, op. cit. supra note 121, at 569. The statute can become complete and workable from the time the new regulation takes effect. An amendatory statute which was not retroactive in express terms could accomplish no more.

¹³² *Manhattan General Equipment Co. v. Commissioner*, 297 U.S. 129, 134 (1936); *Miller v. United States*, 294 U.S. 435, 439 (1935).

¹³³ *Warring v. Colpoys*, 122 F. 2d 642, 646 (App. D.C., 1941) (per Vinson, J.).

¹³⁴ 308 U.S. 371 (1940). The reluctance with which courts overrule a prior decision on a constitutional question suggests that the overruled decision no less departs from the "plain" meaning of the Constitution than does a rejected regulation from the "plain" meaning of the statute. "Absolute invalidity" is no more required in the one case than the other.

attacked as lacking basis because the underlying statute was subsequently declared unconstitutional, Chief Justice Hughes declared:

The actual existence of a statute, prior to such a determination, is an operative fact and may have *consequences which cannot justly be ignored*. The past cannot always be erased by a new judicial declaration . . . it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified.¹³⁵

In the mentioned "decisions," the great majority of the state courts have refused to give retroactive effect to an overruling decision which construed a statute or constitution, when intermediate rights would be prejudiced thereby.¹³⁶ Such cases often cite *Gelpcke v. Dubuque*¹³⁷ and related federal cases. Because the reasoning of that decision is now suspect and because the anti-retrospective doctrine is frequently phrased in restrictive terms, it is essential to examine whether these cases furnish a safe analogy for refusal to give retroactive effect to a declaration that a regulation or authoritative administrative interpretation is invalid.

Gelpcke v. Dubuque was a suit in a federal court upon municipal bonds issued under state court decisions sustaining the power of issuance, which decisions were later overruled by the state court. The Supreme Court's intimation,¹³⁸ later made explicit,¹³⁹ that such a change of decision was an unconstitutional impairment of contract met with vigorous dissent from Mr. Justice Miller and has since been repudiated.¹⁴⁰ For purposes

¹³⁵ *Ibid.*, at 374.

¹³⁶ The cases are collected in Snyder, *Retrospective Operation of Overruling Decisions*, 35 Ill. L. Rev. 121, 130 n. 101 (1940). For recent cases, see *Florida Forest and Park Service v. Strickland*, 154 Fla. 472, 18 S. 2d 251 (1944); *Swank v. Tyndall*, 226 Ind. 204, 78 N.E. 2d 535 (1948); *German Gymnastic Association v. City of Louisville*, 306 Ky. 810, 209 S.W. 2d 75 (1948); *Gentzler v. Constantine Village Clerk*, 320 Mich. 394, 398, 31 N.W. 2d 668, 669 (1948); *Mississippi State Tax Comm. v. Brown*, 188 Miss. 483, 509, 195 So. 465, 470 (1940); *Oklahoma County v. Queen City Lodge*, 195 Okla. 131, 156 P. 2d 340 (1945).

¹³⁷ 1 Wall. (U.S.) 175 (1864). Consult Freeman, *The Protection Afforded Against the Retroactive Operation of an Overruling Decision*, 18 Col. L. Rev. 230, 243 (1918).

¹³⁸ 1 Wall. (U.S.) 175, 206 (1864): "[I]f the contract, when made, was valid . . . its validity and obligation cannot be impaired by any subsequent action of legislation, or decision of its courts altering the construction of the law." [Quoting Chief Justice Taney in *Ohio Life & Trust Co. v. Debolt*, 16 How. (U.S.) 416, 432 (1853).]

¹³⁹ *Douglass v. County of Pike*, 101 U.S. 677, 687 (1880), per Waite, C. J.: "[W]e cannot give them [new decisions] a retroactive effect without impairing the obligation of contracts long before entered into. This we feel ourselves prohibited by the Constitution . . . from doing."

¹⁴⁰ The impairment clause "is directed only against impairment by legislation, and not by judgments of courts." *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 451 (1923). Chief Justice Taft's rationalization of the *Gelpcke* case—that the federal courts under diversity jurisdiction "held themselves free to decide what the state law was" and to choose the earlier rather than later decision (*ibid.*, at 452)—is hopelessly irreconcilable, as Mr. Justice Miller saw from the outset [1 Wall. (U.S.) 175, 213 (1864)], with the established rule that in construing state

of determining whether federal courts may refuse to give retroactivity to *their own* decisions, it is of no moment that their constitutional power to *compel state courts* similarly to act is today doubtful.¹⁴¹ Still relevant, however, is Mr. Justice Miller's insistence that the *Gelpcke* decision scuttled the theory that courts merely declare and do not make law when they overrule a decision.¹⁴²

Despite the fact that this "declaratory" theory is manifestly a "childish fiction,"¹⁴³ that, as Sir Frederick Pollock said in 1906, "no intelligent lawyer would at this day pretend that the decisions of the Courts do not add to and alter the law,"¹⁴⁴ the "ancient dogma" that the law declared by the courts "had a Platonic or ideal existence before the act of declaration"¹⁴⁵ continues to be reiterated with unquestioning judicial fidelity.¹⁴⁶ But, the "dogma" is riddled by exceptions which are actually irrecon-

statutes or constitutions state courts have the last word. *Leffingwell v. Warren*, 2 Black (U.S.) 599, 603 (1862); *Watson v. Buck*, 313 U.S. 387, 401 (1941); cf. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78-80 (1938).

¹⁴¹ In *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364 (1932), Mr. Justice Cardozo said that a state "may say that decisions of its highest court, though later overruled, are law nonetheless for intermediate transactions. Indeed there are cases intimating, too broadly, that it *must* give them that effect. . . ."

¹⁴² 1 Wall. (U.S.) 175, 211 (1864). His view was adopted by Mr. Justice Holmes, dissenting in *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 371 (1910), and by Gray, *Nature and Sources of the Law*, 256-57 (2d ed., 1921).

¹⁴³ 2 Austin, *Jurisprudence*, 655 (4th ed., 1873); see also Kocourek and Koven, *op. cit.* supra note 66, at 986.

¹⁴⁴ Notes by Frederick Pollock to Maine, *Ancient Law* 48 (1930). Holmes "regarded those who doubted that the judges made law . . . as simply incompetent or else carried away by a hobby." 1 Holmes-Laski Letters 183 (1953). Holmes' early remark that "what the courts declare to have always been the law is in fact new," Holmes, *The Common Law* 35-36 (1881), had been anticipated: Bentham, *A Comment on the Commentaries* 190, 198 (Everett ed., 1928); Austin *op. cit.* supra note 143, at 655; Maine, *supra*, 37-38. See also Jeremiah Smith, *Sequel to Workmen's Compensation Acts*, 27 Harv. L. Rev. 344, 366 (1914).

¹⁴⁵ *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364 (1932).

¹⁴⁶ A number of examples must suffice: *Sunray Oil Co. v. C.I.R.*, 147 F. 2d 962 (C.A. 10th, 1945); *Ruppert v. Ruppert*, 134 F. 2d 497 (App. D.C., 1943); *Peterson v. John Hancock Mutual Insurance Co.*, 116 F. 2d 148 (C.A. 8th, 1940); *Chelsea v. R. T. Green Co.*, 318 Mass. 85, 60 N.E. 2d 351 (1945).

A recent commentator, despairing "of succeeding where the mighty have failed, accepts the [declaratory] theory," Snyder *op. cit.* supra note 136, at 122, and attempts by involved reasoning to show that it squares with a denial of retrospective operation to overruling decisions. *Ibid.*, at 145-53. Anticipating criticism that his synthesis "is merely a subterfuge to avoid admitting that the judges 'make' law," he defends it because "it enlists habitual modes of thought." *Ibid.*, at 152. But "the refusal to admit the reality of judicial legislation does not improve the process." Frank, *Law and the Modern Mind* 215 (1930). See also *Blackstone v. Miller*, 188 U.S. 189, 204 (1903); *Hammond-Knowlton v. United States*, 121 F. 2d 192, 199 (C.A. 2d, 1941).

cilable with the "declaratory theory"¹⁴⁷ and represent a revolt from conceptualism at the call of justice.¹⁴⁸

The mistaken notion that retroactivity of overruling decisions collides with the constitutional restriction on laws impairing the obligation of contracts¹⁴⁹ frequently led the courts to phrase the "exception" in terms confined to contracts.¹⁵⁰ Nevertheless, the exception has lustily expanded beyond these narrow confines,¹⁵¹ the reason being that it was from the beginning rested "upon the plainest principles of justice."¹⁵² The "exceptions" merely called on the courts themselves to observe the ban on retroactivity which they had laid down for the legislatures.¹⁵³ Men have a right, in-

¹⁴⁷ Though "most of the courts express nominal allegiance" to the declaratory theory, "the hardship and mischief in its strict application has led many courts . . . to depart widely from it in so-called 'exceptions.'" Freeman, *op. cit. supra* note 137, at 233; Snyder, *op. cit. supra* note 136, at 130-33.

¹⁴⁸ "It is difficult to sustain the exception on principle. . . . It is plainly an exception made by the courts, at the call of justice." Falconer v. Simmons, 51 W.Va. 172, 178, 41 S.E. 193, 196 (1902). See also Laabs v. Tax Comm., 218 Wis. 414, 417, 261 N.W. 404, 405 (1935). Mr. Justice Cardozo has referred to the "spirit of realism" with which the courts have dealt with the problem, saying that the result "may be hard to square . . . with abstract dogmas," but that the line was drawn because "the injustice and oppression of a refusal to draw it would be so great as to be intolerable." Cardozo, *Selected Writings* 170 (1947).

¹⁴⁹ Freeman, *op. cit. supra* note 137, at 236; Snyder, *op. cit. supra* note 136, at 133-34; see, e.g., *Thomas v. State*, 76 Ohio St. 341, 81 N.E. 437 (1907); *Harmon v. Auditors of Public Accounts*, 123 Ill. 122, 135, 13 N.E. 161, 165 (1887).

¹⁵⁰ See *Lewis v. Symmes*, 61 Ohio St. 471, 485, 56 N.E. 194, 196 (1900); *Falconer v. Simmons*, 51 W.Va. 172, 178, 41 S.E. 193, 196 (1902); *Haskett v. Maxey*, 134 Ind. 182, 191, 33 N.E. 358, 360 (1892); Snyder, *op. cit. supra* note 136, at 131.

¹⁵¹ Snyder, *op. cit. supra* note 136, at 130-33. For non-contract applications, see *Copper v. Hawkins*, 234 Ala. 636, 176 So. 329 (1937) (de facto officer protected against salary suit); *German Gymnastic Association v. City of Louisville*, 306 Ky. 810, 209 S.W. 2d 75 (1948) (taxes); *Montana Horse Products Co. v. Great Northern Railway Co.*, 91 Mont. 194, 211, 7 P. 2d 919, 925 (1931) (remedy); *State v. Haid*, 327 Mo. 567, 586, 38 S.W. 2d 44, 53 (1931) (procedure); *Oklahoma County v. Queen City Lodge*, 195 Okla. 131, 156 P. 2d 340, 362 (1945); *Kelley v. Rhoads*, 7 Wyo. 237, 239, 51 P. 593 (1898) (remedy). For broad phrasing of the exception to retroactivity, see *Mississippi State Tax Comm. v. Brown*, 188 Miss. 483, 509, 195 So. 465, 470 (1940); *Florida Forest & Park Service v. Strickland*, 154 Fla. 472, 477, 18 S. 2d 251, 253 (1944); *Payne v. City of Covington*, 276 Ky. 380, 392, 123 S.W. 2d 1045, 1051 (1938). But some courts continue to read the "exception" narrowly: *Donohue v. Russell*, 264 Mich. 217, 219, 249 N.W. 830, 831 (1933); *Jackson v. Harris*, 43 F. 2d 513, 516-17 (C.A. 10th, 1930); *Linn County v. Rozelle*, 177 Ore. 245, 283, 162 P. 2d 150, 165 (1945).

¹⁵² *Gelpcke v. Dubuque*, 1 Wall. (U.S.) 175, 206 (1864). The cases are collected in Snyder, *op. cit. supra* note 136, at 140-42. The "singularly feeble" reasoning of the Gelpcke decision, Gray, *op. cit. supra* note 142, at 257, was but an obeisance to judicial conventions. The motivation nakedly appears in the statement that "[w]e shall never immolate truth, justice, and the law, because a state tribunal has erected the altar and decreed the sacrifice." *Gelpcke v. Dubuque*, *supra*, at 206. In the words of the then Supreme Court Reporter, Wallace, in his preface to the volume reporting *Gelpcke v. Dubuque*, the case was one "[w]here high moral duties were enforced upon a whole community, seeking apparently to violate them. . . ." 1 Wall. (U.S.) xiv (1864).

¹⁵³ *Geddes v. Brown*, 5 Phila. 180, 187 (1863).

deed, they are under a duty, to respect the decision of a supreme court,¹⁵⁴ and they ought not to suffer for it.¹⁵⁵

Absolute retroactive invalidity was thus rejected to avoid "injustice and oppression."¹⁵⁶ True, the rejection has thus far been applied only to overruled decisions by courts of last resort, the reason assigned by Mr. Justice Cardozo being that men know they cannot safely assume that lower courts have finally settled general propositions.¹⁵⁷ But an administrative regulation or an authoritative legal interpretation must be distinguished¹⁵⁸ if we are not to invite litigation as a preliminary to compliance. Such an invitation could hamstring administration. To encourage reliance on the highest administrative pronouncement is to advance good government.¹⁵⁹ Unless a man's trust in his government is protected, an early court wisely observed,

every man is bound to question every act of government that affects him, and to resist whatever he does not approve—a doctrine that would make government impossible.¹⁶⁰

In a word, retroactivity, whether of judicial decisions, of legislation, or of administrative regulations or interpretations, has little to commend it.¹⁶¹ The anti-retroactive "exception" fashioned by the courts with respect to their own decisions at the call of justice furnishes a sound analogy for protecting citizens who relied on regulations or authoritative interpretations

¹⁵⁴ *Harris v. Jex*, 55 N.Y. 421, 424 (1874); *Menges v. Dentler*, 33 Pa. 495, 500 (1859); *Warring v. Colpoys*, 122 F. 2d 642, 645 (App. D.C., 1941) (per Vinson, J.).

¹⁵⁵ *Farrior v. New England Mortgage Security Co.*, 92 Ala. 176, 180, 9 So. 532, 533 (1891); *Kelley v. Rhoads*, 7 Wyo. 237, 239 (1898); *Menges v. Dentler*, 33 Pa. 495, 500 (1859); *Hollinshead v. von Glahn*, 4 Minn. *190, *191 (1860); *Swank v. Tyndall*, 226 Ind. 204, 222, 78 N.E. 2d 535, 543 (1948).

¹⁵⁶ Authorities cited note 148 *supra*.

¹⁵⁷ Cardozo, *Selected Writings* 170 (1947).

¹⁵⁸ Judge Paine stated in *Kneeland v. Milwaukee*, 15 Wis. 454*, 694* (1862) that "there are many cases which would almost sustain the proposition, that the practical construction of mere administrative officers, which have been acquiesced in for a long time, without any judicial decision whatever, should in such cases be followed, though in conflict with the Constitution." But these cases have not come across this writer's ken.

¹⁵⁹ Maguire and Zimet, *op. cit.* *supra* note 36, at 1305.

¹⁶⁰ *Menges v. Dentler*, 33 Pa. 495, 500 (1859).

¹⁶¹ "Retroactivity is not favored in law. . . . There are few occasions when retroactivity does not work more unfairly than fairly. Congress, the state legislatures and the courts apply the principle sparingly, even where they may." *Addison v. Holly Hill Company*, 322 U.S. 607, 641 (1944) (dissenting opinion of Rutledge, Black, and Murphy, JJ.).

See 1 Kent's *Commentaries* 455 (14th ed., 1896); and authorities cited notes 129 and 130 *supra*. 1 Crosskey, *Politics and the Constitution*, 324-51 (1953), persuasively shows that the constitutional "ex post facto" clause was originally designed to prohibit retroactive civil as well as criminal laws.

from declarations of retroactive invalidity. The drawing of the line in this field, as Mr. Justice Cardozo pointed out, should

be governed, not by metaphysical conceptions of the nature of judge-made law, nor by the fetich of some implacable tenet, such as that of the division of governmental powers,¹⁶² but by considerations of convenience, of utility, and of the deepest sentiments of justice.¹⁶³

Whether application of these principles to the tax field is precluded by Section 3791(b)¹⁶⁴ remains to be decided.¹⁶⁵ Reliance on the literal terms of that section¹⁶⁶ is, I believe, mistaken. Be the initial regulation "legislative"

¹⁶² A refusal to give retroactive effect to a judicial decision raises no separation of powers problem. The separation of powers is to be viewed in terms of what judges were actually doing at the adoption of the Constitution, not in terms of descriptive labels that might be attached to their activity by doctrinaires. Then, as now, judges made new law when they announced a rule. Hence the courts are in no wise prevented by the separation of powers from limiting the effect of a decision to the future.

¹⁶³ Cardozo, *Selected Writings* 170 (1947). In *United States v. Alabama G. & S. R. Co.*, 142 U.S. 615, 621 (1892), a contemporaneous construction, "though inconsistent with the literalism of the act" was "considered as decisive in this suit" by the Supreme Court because it "consort[ed] with the equities" and avoided retroactivity which was "especially objectionable" because prejudicial to a citizen.

Dean Griswold, *op. cit. supra* note 111, at 411, states that "[a]s a matter of wise tax administration, the Treasury should be held to have no power to amend a legislative regulation retroactively," and that after "an interpretative regulation becomes seasoned it becomes something upon which people justifiably rely; and then the principle of retroactivity should be given controlling force." *Ibid.*, at 413.

¹⁶⁴ See page 699 *supra*.

¹⁶⁵ In *Helvering v. R. J. Reynolds Tobacco Co.*, 306 U.S. 110 (1939), and *Helvering v. Griffiths*, 318 U.S. 371 (1943), the Supreme Court held that reenactment of a statute in the face of an existing regulation deprives the Treasury of the right to give a superseding regulation retroactive effect. But the Court's elaborate analysis of the legislative history in the Griffiths case, *ibid.*, at 397 n. 49, which is the most recent case examining "3791," and its invocation of the "principle" that "a long period of accommodation to an older decision sometimes requires us to adhere to an unsatisfactory rule to avoid unfortunate practical results from a change," *ibid.*, at 403, suggests that the promulgation of retroactive regulations may not be sustained. See 10A Mertens, *op. cit. supra* note 49, at 109.

¹⁶⁶ In *Manhattan General Equipment Co. v. Commissioner*, 76 F. 2d 892 (C.A. 2d, 1935), a divided court rejected the contention that a retroactive "legislative" regulation was invalid under *Arizona Grocery Co. v. Atchison, T. & S.F. Ry. Co.*, 284 U.S. 370 (1932), on the ground that § 3791(b) reserved power to make retroactive regulations and disclosed that regulations were provisional and therefore subject to modification under *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 361-62 (1932). The Court of Appeals relied on the literal terms of § 3791(b), and cited *Titsworth v. Commissioner*, 73 F. 2d 385 (C.A. 3d, 1934). The reasoning of the latter is obscure, unsatisfactory and in part untenable in light of *Helvering v. R. J. Reynolds Tobacco Co.*, 306 U.S. 110 (1939), holding that reenactment of a statute deprives the Commissioner of power to supersede a regulation retroactively. In *Manhattan General Electric Co. v. Commissioner*, 297 U.S. 129 (1936), the Supreme Court held that the initial regulation was void because in conflict with the statute, that the superseding regulation therefore became the "primary" rule and was no more retroactive than a judicial decision applying the statute to a case in hand. For analysis of these considerations, see page 701 *supra*.

or "interpretive" in character, be the underlying statute ambiguous or clearly in conflict with the terms of the regulation, I believe that it should be conclusive with respect to those who relied upon it to their detriment.

CONCLUSION

Repudiation of representations is dirty business, no less at the hands of the government than of its citizens. Hence the claim of immunity for governmental repudiation is tolerable only to the extent that it rests on inescapable compulsions arising out of the needs of government. The sole arguable compulsion resides in the separation of powers, which is said to deny efficacy to administrative acts that are prohibited or beyond the authority conferred. Whether this compulsion is inescapable may be doubted in view of the judicial trend toward realism in applying the separation of powers.

Certainly the absence of authority marks the furthest boundary of the immunity from estoppel. Since government itself would bog down if statutory "authority" had to be spelled out for each of myriad administrative acts, judicial inquiry into the existence of "authority" must not be captious.

Nor is governmental irresponsibility for legal interpretations to be condoned by resort to the mistake of law doctrine. To demand that a taxpayer should prophetically foresee that courts will declare the administrator wrong is to forsake reality for Alice in Wonderland. Reliance by a taxpayer on published regulations or rulings stands on even higher ground. There is no clear-cut mandate to swallow retroactive repudiation in such case. To the contrary, the express legislative intention to relieve from retroactivity merely echoes the basic requirement of "fair-play" to which the Commissioner of Internal Revenue has himself adhered.

The claim of the government to an immunity from estoppel is in fact a claim to exemption from the requirements of morals and justice. As such, it needs to be jealously scrutinized at every step. Confidence in the fairness of the government cements our social institutions. No pinch-penny enrichment of the government can compensate for an impairment of that confidence, for the affront to morals and justice involved is the repudiation of a governmental representation.

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COMMENTS

THIRD-PARTY RECOVERY FOR INJURY TO ECONOMIC INTERESTS—A COMMON-LAW PROBLEM IN INTERPRETING THE ANTITRUST LAWS

*Harrison v. Paramount Pictures, Inc.*¹ is the most recent case raising the question of whether an injured third party may sue for treble damages under the Sherman and Clayton Acts. The third-party plaintiff, Mrs. Harrison, was the lessor of a motion picture theater; the tenant controlled the operation of the theater and, under the terms of the lease, paid as rental a fixed minimum amount plus a percentage of the receipts. The tenant had at all times paid the minimum rental, but his receipts, and thus the amounts paid by him under the percentage clause, had been kept down due to the trade practices of defendant motion picture companies, who had refused to permit exhibition of first-run pictures in the theater. The lessor claimed that defendants had violated the Clayton Act,² that she had been damaged in her "business or property" under the percentage rent arrangement, and that she was therefore entitled to treble damages. The court, however, denied recovery.³

I

The *Harrison* case is not one of first impression. Three other cases have decided the issue of whether a lessor may maintain a treble damages action when his tenant has been the direct victim of an antitrust violation. Two of these decisions upheld the lessor's capacity to sue, by denying motions to dismiss. In *East Orange Amusement Co. v. Vitagraph, Inc.*,⁴ the landlord claimed that antitrust violations had caused his tenant to default in payment of rent, and that this default led in turn to the landlord's loss of his real estate to a mortgagee. And in *Camrel Co., Inc. v. Paramount Film Distributing Corp.*,⁵ the lessor claimed

¹ 115 F. Supp. 312 (E.D. Pa., 1953).

² "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 38 Stat. 731 (1914), 15 U.S.C.A. § 15 (1951).

³ Upon trial the jury found no antitrust violation by the defendants. Plaintiff claimed that the trial judge erred in failing to direct a verdict, and that, therefore, a judgment notwithstanding the verdict should be entered for plaintiff. The defendant contended that the verdict was correct, and that, as a matter of law, the plaintiff had no standing to sue. The opinion was written on plaintiff's motion. Although the court refused to upset the verdict, it discussed the plaintiff's right of action as if a violation had been found; this note will deal with the problem upon the same assumption. Appeal in the *Harrison* case is now pending.

⁴ CCH Trade Cas. ¶ 52,965 (D.C. N.J., 1943).

⁵ CCH Trade Cas. ¶ 57,233 (S.D. N.Y., 1944).

injury to rental and market value and, in addition, injury under a percentage rent agreement like that in the *Harrison* case, as a result of the alleged antitrust violations by the defendant. Neither court gave substantial treatment to the problem. The *Camrel* court, after reciting the plaintiff's claims of injury, dismissed the motion, saying only, "I think plaintiff has alleged sufficient to withstand a mere formal motion."⁶ The third case, *Westmoreland Asbestos Co. v. Johns-Manville Corp.*,⁷ held, however, that the injuries to the landlord were too remote to entitle him to maintain the action. The court dismissed the complaints of one Kuenn, stockholder and creditor of Westmoreland Company, and of Kuenn, Inc., landlord of Westmoreland, without useful discussion. The result in the *Harrison* case, then, evened the split in the cases at two to two.

The *Harrison* opinion was the first to deal fully with the problems peculiar to a suit by a lessor. The court adopted two alternative lines of argument: first, that a lessor's interest was such that there could be no injury in "his business or property," as required by the Act; second, that even if there were injury to business or property within the meaning of the statute, it would be too remote to be compensable. As to the first contention, it should be observed that Mrs. Harrison accepted a lower minimum rental, as well as a share of the risks of the business, in return for expectations of a percentage of the receipts. But in accepting some part of the business risks, she would appear to be entitled to rely on statutory remedies whose purpose is to reduce such risks. Although, in the court's words, Mrs. Harrison's expectation of sharing in receipts may have been no more than a "hope,"⁸ it would seem to be a hope which should not be impaired, without remedy, by violations of the law. This point had been conceded by the defendants, who admitted, in their brief, that the plaintiff could have suffered injury.⁹ Moreover, the no "injury in his business or property" argument appears to be in conflict with the policy implicit in the Supreme Court's decision in *Bigelow v. RKO Radio Pictures, Inc.*¹⁰—that courts should not deny relief under the Acts where any injury can be proven. The primary issue, then, is whether the plaintiff's interests can properly be said to be too remote to be

⁶ *Ibid.*, at ¶ 57,326.

⁷ 30 F. Supp. 389 (S.D. N.Y., 1939).

⁸ 115 F. Supp. 312, 316 (E.D. Pa., 1953).

⁹ Defendants' Brief Contra Plaintiff's Motion for Judgment N. O. V., at 20. They say [speaking of *Conference of Studio Unions v. Loew's Inc.*, 193 F. 2d 51 (C.A. 9th, 1951)]: "The court granted judgment on the correct ground—not that there was no injury to plaintiffs, but that the injury was merely incidental, and therefore not within the purview of the anti-trust laws."

"This, we submit, is the proper basis on which to consider the matter and it must result in holding that the plaintiff in our case had no status."

¹⁰ 327 U.S. 251 (1946). The court stated that: "in the absence of more precise proof, the jury could conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs." *Ibid.*, at 264.

protected; if the remoteness question is decided in the plaintiff's favor, it seems highly unlikely that any court would then find that the interests injured do not constitute "business or property."

Lessors have not been the only third-party plaintiffs to bring actions for treble damages under the Sherman and Clayton Acts. Courts have been uniform in denying recovery to shareholders,¹¹ creditors,¹² and deposed officers of corporations¹³ damaged by antitrust violations. Sales agents, on the other hand, have been permitted to recover lost commissions from the violator.¹⁴ The cases, however, do not make clear why the interest of a sales agent is considered to be less remote than those of the other third-party plaintiffs; these courts stress the existence of an "injury to business," but do not deal with the remoteness problem. However, the divergence in result between the stockholder-creditor cases and the sales agent cases is not overly disturbing. To permit individual shareholder's suits would be to disregard one of the basic purposes of the corporate entity. Direct recovery to the individual creditor would give him a preference over other creditors of the insolvent business; such recovery would act to thwart the policies of the bankruptcy laws. Further, the number of shareholders and creditors makes the multiplicity of suit problem almost insurmountable. These elements are not present in the sales agent situation, and may justify the difference in result. But there is no corporate entity, nor is there a serious multiplicity of suit problem in the *Harrison* case; thus it would seem more logical that the *Harrison* result accord with that of the sales agent cases, rather than that of cases involving stockholders or creditors.

Thus, neither in terms of logic, dictum, nor uniformity of result have the cases under the Acts been of assistance in determining the standing to sue of third-party plaintiffs. Where the important criteria of decision are not disclosed, they may vary from one case to the next. Judge Kirkpatrick, in his *Harrison* opinion, seems to be resigned to this state of affairs, for he says:

It is not possible to formulate any general rule by which to determine what injuries are too remote to bring a plaintiff within the scope of the Act and I shall not attempt to do so. Each case must be dealt with on its own facts. All that is decided here is that this plaintiff's loss, if any, is beyond the limit of injuries cognizable under the anti-trust laws.¹⁵

¹¹ E.g., *Gerli v. Silk Ass'n of America*, 36 F. 2d 959 (S.D. N.Y., 1929); *Loeb v. Eastman Kodak Co.*, 183 Fed. 704 (C.A. 3d, 1910).

¹² E.g., *Loeb v. Eastman Kodak*, 183 Fed. 704 (C.A. 3d, 1910).

¹³ E.g., *Corey v. Boston Ice Co.*, 207 Fed. 465 (D.C. Mass., 1913).

¹⁴ *Roseland v. Phister Mfg. Co.*, 125 F. 2d 417 (C.A. 7th, 1942); in *McWhirter v. Monroe Calculating Mach. Co.*, 76 F. Supp. 456 (W.D. Mo., 1948), and *Klein v. Sales Builders, Inc.*, CCH Trade Cas. ¶ 62,600 (N.D. Ill., 1950), it was held that sales agents were proper parties plaintiff; however, judgment on the merits was rendered against the plaintiff when insufficient proof of injury was made. *Klein v. Sales Builders, Inc.*, CCH Trade Cas. ¶ 62,950 (N.D. Ill., 1951).

¹⁵ 115 F. Supp. 312, 317 (E.D. Pa., 1953).

Apart from the cases, it would seem that assistance in determining the scope of permissible plaintiffs might be derived from the policy underlying treble damages. There are, however, at least three ways of interpreting the treble damages provisions: first, that in view of the severity of the penalty, the scope of liability should be narrowed from what it would be at common law; alternatively, that if the policy of the act is so strong as to warrant such a penalty provision, full support of that policy requires the scope to be extended beyond the common-law limits; or, finally, that the allowance of the treble damage remedy should in no way change the effect of the common-law remoteness criteria.

All three viewpoints may be found expressed in decisions under the anti-trust laws. The court in *Corey v. Independent Ice Co.*,¹⁶ read the statute as narrowing the common-law remedies. In denying an equitable remedy under the Act to minority stockholders, the court decided that "neither [plaintiffs] nor their corporation could claim any right whatever to such damages except so far as the act has expressly given such a right, and the express provisions of the act are not of a character such as permits extending them by implication."¹⁷ On the other hand, the court sitting in *Bigelow v. Calumet & Hecla Mining Co.*,¹⁸ allowing an injunction to issue, stated: "I cannot overlook the fact that the federal anti-trust act is highly remedial. Its apparent object is not to restrict, but to extend, remedies. . . . The very penal provisions invoked by defendant's counsel as requiring a strict construction of the act are but evidence of the highly remedial nature of the statute. . . ."¹⁹ Finally, the court in *Loeb v. Eastman Kodak Co.*,²⁰ refusing to change the common-law rule denying actions by individual stockholders for wrongs to the corporation, stated: "The statute above referred to was passed, as we must assume, with full knowledge of the existing law in that respect. We have no reason to suppose, much less to assume, that it was intended thereby to run contrary to the settled policy of the law."²¹

Far from being an aid in properly interpreting the statute, the treble damages provisions pose problems of their own. Suppose, in the *Harrison* case, that the tenant had sued, and recovered treble damages from the defendants. How should the damages then be apportioned between landlord and tenant? The landlord might take only compensatory damages, to the extent of her percentage; the lease agreement refers to percentages of "receipts," and it involves some stretching to bring penalty damages within the meaning of that term. And it may be argued that the landlord did not bargain for the possibility of penalty damages and should not be allowed to share in them. On the other hand, the lease might be viewed as a risk-sharing arrangement; if the landlord, under

¹⁶ 207 Fed. 459 (D.C. Mass., 1913).

¹⁷ *Ibid.*, at 461.

¹⁸ 155 Fed. 869 (C.C. W.D. Mich., 1907).

¹⁹ *Ibid.*, at 878.

²⁰ 183 Fed. 704 (C.A. 3d, 1910).

²¹ *Ibid.*, at 709.

the percentage agreement, assumed some part of the risk of torts against the business, then she would seem entitled to share fully in any recovery. Moreover, to limit the lessor to compensatory damages would create a windfall for the tenant, who would receive three times his own loss plus twice the amount of the landlord's loss. From this view, it would seem that the landlord should share in the entire recovery.

In summary, neither the cases under the Acts nor discussions of the policy supporting treble damages are helpful in defining clearly the range of permissible plaintiffs. However, the *Harrison* case, and the other third-party suits under the Acts, are but particular instances of a general tort problem—the right of a third party to sue for *any* tort committed against one with whom he has a contract, when the result is to make that contract less profitable. If a conclusion can be reached on the more general level, as to whether such third-party plaintiffs have or should have a right of action, the criteria for decision in the antitrust sphere will almost certainly be clarified.

II

The *Harrison* situation presents a problem on which two great tort doctrines bear. The similarity with the *Lumley v. Gye*²² situation is apparent; in each, the plaintiff loses the benefit of a contract due to a wrongful act by the defendant. In the *Harrison* case, however, the defendants did not know of the plaintiff's contract, nor did they intend to cause its breach. To allow recovery under *Lumley-Gye* theory would involve an extension of that doctrine to cases where interference with the contractual relationship was not specifically intended; the courts have been loath to make such an extension.²³ Secondly, the *Harrison* situation can be viewed as raising a proximate cause question analogous to that in the *Palsgraf* case.²⁴ But there is no foreseeability problem in the *Harrison* scheme; the plaintiff is usually a foreseeable person, such as a lessor, and recovery would seem to be dictated. Unlike *Palsgraf*, however, the damage here is economic rather than physical.²⁵

The leading case in the *Harrison* area is *Robins Dry Dock & Repair Co. v. Flint*,²⁶ where the general rule was stated by Justice Holmes: "a tort to the person or property of one man does not make the tortfeasor liable to another

²² 2 El. & Bl. 216, 1 Eng. Rul. Cas. 706 (Q.B., 1853).

²³ Consult Foreseeability of Third-Party Economic Injuries—A Problem in Analysis, 20 Univ. Chi. L. Rev. 283 (1953); Harper, Interference with Contractual Relations, 47 Nw. U.L. Rev. 873 (1953); Carpenter, Interference with Contract Relations, 41 Harv. L. Rev. 728 (1928).

²⁴ *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 162 N.E. 99, 59 A.L.R. 1253 (1928).

²⁵ Compare the juxtaposition of *Newlin v. New England T. & T. Co.*, 316 Mass. 234, 54 N.E. 2d 929 (1944) (physical damage), and *Stevinson v. East Ohio Gas Co.*, 47 Ohio Law Abs. 586, 73 N.E. 2d 200 (1946) (damage to economic interests), in Seavey, Keeton, and Thurston, Cases on Torts 382, 383 (1950); and consult Foreseeability of Third-Party Economic Injuries A Problem in Analysis, 20 Univ. Chi. L. Rev. 283 (1953).

²⁶ 275 U.S. 303 (1927).

merely because the injured person was under contract with that other, unknown to the doer of the wrong. . . . The law does not spread its protection so far."²⁷ The rationale of the rule is the fear of the courts of extending too far liability for the negligent act. That this is a real problem is graphically illustrated by *Stevinson v. East Ohio Gas Co.*,²⁸ there, an explosion caused several factories to shut down, throwing hundreds out of work, each a potential third-party plaintiff. The court, denying recovery to one of the injured employees, said:

If one who by his negligence is legally responsible for an explosion or a conflagration should be required to respond in damages not only to those who have sustained personal injuries or physical property damage but also to every one who has suffered an economic loss, by reason of the explosion or conflagration, we might well be appalled by the results that would follow.²⁹

Granting that limitation of liability is a valid reason for denying recovery, it does not follow that this result is appropriate in every third-party action. In cases where there is no problem of extending defendants' liability, but only of apportionment of damages between injured parties, the *Stevinson* rationale is not applicable, and its rule should not be indiscriminately applied. For example, where a negligent party inflicts permanent damage upon leased property, the courts find no difficulty in awarding damages to both the interests involved, that is, to the tenant and to the holder of the reversion.³⁰ There is no limitation of liability question here, for the quantum of damages is fixed. The injury to the land is only so great, and defendant can be forced to pay only that amount; how the recovery is divided among those with interests in the land is of no consequence to the defendant. This analysis would have allowed recovery in the *Harrison* case, for the problem in a percentage-of-profits lease is not essentially different. The antitrust violation has decreased the receipts of the enterprise by an amount which, under the theory of the Act, must be ascertainable.³¹ The

²⁷ *Ibid.*, at 309. The rule is also stated in 1 Sutherland, *Damages* § 33 (4th ed., 1916): "Where the plaintiff is injured by the defendant's conduct to a third person it is too remote if he sustains no other than a contract relation to such third person, or is under contract obligation on his account, and the injury consists only in impairing the ability or inclination of such third person to perform his part, or in increasing the plaintiff's expense or labor of fulfilling such contract, unless the wrongful act is wilful for that purpose."

One exception to this rule denying third-party recovery is the master-servant cases, where masters have traditionally been able to recover for wrongful injuries to servants. This doctrine, however, has been narrowly applied. *United States v. Standard Oil Co.*, 332 U.S. 301 (1947); *United States v. Atlantic Coast Line R. Co.*, 64 F. Supp. 289 (E.D. N.C., 1946). *Contra: Attorney-General v. Valle-Jones* [1935] 2 K.B. 209.

²⁸ 47 Ohio Law Abs. 586, 73 N.E. 2d 200 (1946).

²⁹ *Ibid.*, at 592 and 203.

³⁰ "It is well settled that both the tenant and landlord may maintain actions for injuries done to the soil, or buildings upon it. They are both injured, but in different degrees; the tenant in the interruption to his estate and the diminution of his profits, and the landlord in the more permanent injury to his property. Both may have separate actions for their several damages, and a recovery is to be had according to their respective interests." *George v. Fiske*, 32 N.H. 32, 45 (1855).

³¹ Consult note 10 *supra*.

tenant may recover damages for these lost profits. Upon such recovery, Mrs. Harrison would be entitled to her percentage of the damages awarded in place of the lost receipts. And allowing Mrs. Harrison to recover directly would not increase the defendant's total liability beyond the amount recoverable by the lessee.

However, the rule of the *Robins Dry Dock* case has been of such pervasive influence that courts have seldom distinguished those third-party cases where recovery would extend the tortfeasor's liability from those where it would not. But there is at least one group of cases which have, to some degree, rejected the *Robins* rule. These cases concern fishing expeditions where it is the practice for the crew to be paid by sharing in the catch, along with the owners of the boats. The Ninth Circuit, in the recent case of *Carbone v. Ursich*,³² held that fishermen employed under such a contract could recover, in their own names, from one who had negligently fouled the boat's nets. This decision expressly overruled a prior decision of the Ninth Circuit denying recovery on the basis of the *Robins Dry Dock* case.³³ A Federal district court in *Lind v. United States*,³⁴ a case where the masters of both ships were found to be negligent, held the owner of each ship liable to the crew members of the fishing vessel for full damages. These courts, seeing no problem of extending the tortfeasor's liability, allowed a right of action to the crew although the "direct" tort was against the owner, thus making whole, directly, all parties injured.³⁵ But even in the confines of the "fishing-boat" cases, there are strong holdings following the traditional rule of no recovery.³⁶

Suits by insurers in their own name to recover money paid in satisfaction of tort claims constitute an important instance of denial of third-party recovery despite the absence, in many cases, of a limitation of liability problem. The analogy between this problem and that of the *Harrison* case is close. As has been noted, a percentage-of-profits lessor, much like an insurer, contracts to assume certain risks of the business, among which may be that of reduced profits resulting from tortious acts of others. The common-law rule would deny recovery to the insurer, as to the lessor. However, in some cases the doctrine of subrogation may be available to permit recovery by the insurer; no similar doctrine is present to assist the lessor.

*Rockingham Mutual Fire Ins. Co. v. Bosher*³⁷ is illustrative of the group of

³² 209 F. 2d 178 (C.A. 9th, 1953).

³³ *Borcich v. Ancich*, 191 F. 2d 392 (C.A. 9th, 1951).

³⁴ 61 F. Supp. 329 (E.D. N.Y., 1945).

³⁵ Cf. *The Mary Steele*, 2 Low. 37, 16 Fed. Cas. 1003, No. 9,226 (D. Mass., 1874); *The Columbia*, 9 Ben. 254, 6 Fed. Cas. 173, No. 3,035 (E.D. N.Y., 1877).

³⁶ *Baxter v. Rodman*, 3 Pick. (Mass.) 435 (1826); *Grozier v. Atwood*, 4 Pick. (Mass.) 234 (1826); *Taber v. Jenny*, 1 Spr. 315, 23 Fed. Cas. 605, No. 13,720 (D. Mass., 1856).

³⁷ 39 Me. 253 (1855).

cases in which the insurer is without subrogation.³⁸ The defendant wilfully burned the property of the insured. The plaintiff insurance company paid on the policy, but was denied a cause of action in its own name. Because the amount of damage caused by fire in cases of this nature can be readily computed, this is the clearest situation in which the courts' fear of unduly extending liability is groundless. In the usual case of property damage, subrogation is now allowed.

But subrogation is available in only a limited number of cases. It appears to be the law that there can be no subrogation in part.³⁹ Thus, if the amount of the policy is less than the amount of the loss, the insurer is entirely dependent upon the insured for his recovery from the tortfeasor. The reason for this rule is probably fear that the wrongdoer, as a result of a single negligent tort, might be subjected to a multiplicity of suits by insurance companies, as well, perhaps, as one by the insured for any loss not covered by the policies.⁴⁰

Neither is subrogation available in life or accident insurance cases.⁴¹ These policies are seen as compensating the injured party for something other than that for which he recovers from the tortfeasor, in that the policy may be for an amount greater than that recoverable as tort damages by the insured.⁴² There are some instances in which this argument is valid; thus, if a man has a large life insurance policy, it might be that this amount would be beyond the "actual" value of his life, and that it would be unfair to a defendant to make him pay this amount to an insurance company for being so unlucky as to have negligently killed an "overinsured" man. However, it seems clear that very often the amount of the policy will be no more than the tort damages recoverable by the insured. In such a case, recovery by the insurer would involve no extension of the defendant's liability.

Subrogation, then, is not allowed when the defendant's liability may be extended. But when the amount of the insurance cannot exceed the tort damages recoverable by the insured, courts have surmounted the remoteness problem, and permitted recovery by the third-party insurer.⁴³ However, it is highly un-

³⁸ *Mobile Life Ins. Co. v. Brame*, 95 U.S. 754 (1877); *Conn. Mutual Life Ins. Co. v. N.Y. & N.H. R. Co.*, 25 Conn. 265 (1856); *Anthony v. Slaid*, 11 Metc. (Mass.) 290 (1846); *Town of Milton v. Story*, 11 Vt. 101 (1839).

³⁹ *Norwich Union Fire Ins. Soc. v. Standard Oil Co.*, 59 Fed. 984 (C.A. 8th, 1894); *Fairgruve v. Marine Ins. Co. of London*, 94 Fed. 686 (C.A. 8th, 1899); *National Union Fire Ins. Co. v. Chesapeake & O. Ry. Co.*, 4 F. Supp. 25 (E.D. Ky., 1933); *Aetna Ins. Co. v. Hannibal & St. J. R. Co.*, 3 Dill. 1, 1 Fed. Cas. 207, No. 96 (C.C. E.D. Mo., 1874); Vance, *Insurance* § 134 (3d ed., 1951).

⁴⁰ But see the explanation offered in *Norwich Union Fire Ins. Soc. v. Standard Oil Co.*, 59 Fed. 984 (C.A. 8th, 1894).

⁴¹ *Mobile Life Ins. Co. v. Brame*, 95 U.S. 754 (1877); *Crab Orchard Imp. Co. v. Chesapeake & O. Ry. Co.*, 115 F. 2d 277 (C.A. 4th, 1940); *Suttles v. Railway Mail Ass'n*, 156 App. Div. 435, 141 N.Y. Supp. 1024 (4th Dep't, 1913). But cf. *Staples v. Central Surety & Ins. Corp.*, 62 F. 2d 650 (C.A. 10th, 1932); Vance, *Insurance* § 134 (3d ed., 1951).

⁴² Compare Vance, *Insurance* § 134 (3d ed., 1951).

⁴³ In the case of property insurance, the amount of the policy clearly can never exceed the value of the property. Apparently, the right of subrogation exists even in the absence of a contract providing for it. Consult Vance, *Insurance* § 134 (3d ed., 1951).

likely that any court would apply subrogation doctrine literally in the *Harrison* situation, although the central elements for its application are there present. First, there is, as has been noted, a single fixed amount of damages, beyond which the defendant's liability cannot be carried. Secondly, there has been a paying out by the lessor. Mrs. Harrison, in bargaining for the percentage arrangement, undoubtedly accepted a lower minimum rental than she would have otherwise. Thus, to that extent, the tenant has not been injured by the reduction of his receipts. If subrogation were here applicable, the lessor would have a cause of action, in her own name, for her share of the lost profits.⁴⁴

Although the *Robins Dry Dock* case established the general rule denying recovery, the case itself is one where the defendant's liability was clearly limited, and in which the only real problem was one of apportionment. Defendant had negligently damaged a ship, so that it was not available for the use of the plaintiff charterer at the time specified in his contract with the owner. The Court of Appeals for the Second Circuit, allowing recovery, pointed out that "the result reached involves no injustice to respondent. Its liability for its tortious act is for the actual damages done to the combined interests in the ship. The measure of total recovery is the market value of the loss [of the use] of the ship."⁴⁵ Under the theory of the Second Circuit, if the vessel were off hire when damaged, as in the case, the owner recovers for the lost charter hire, and the charterer receives the balance, that is, the difference between the charter hire and the market value of the use. In the usual case, where the ship is not off hire, the charterer would recover the entire amount. However, although the loss is at least in part the charterer's, Justice Holmes could find no protection in the law for such a plaintiff.

The previous discussion points towards the conclusion that there exists a distinguishable body of cases in which third-party recovery has in the past been denied on limitation of liability grounds, but to which the argument is not properly applicable. Where the amount of the tortfeasor's liability is fixed and ascertainable, and where more than one interest is injured, it appears unreasonable to make contingent the recovery of some of the parties, forcing them to rely upon the party directly injured for relief. This is not to deny that there are cases where the fear of extending too far the defendant's liability is valid; the *Stevinson* case, with its numerous prospective plaintiffs, is argument enough.⁴⁶ But the courts have failed to differentiate between those cases in which extension of liability would raise formidable questions and those in which it would not.

⁴⁴ One important consideration not present in the *Harrison* case, but present in the insurance situation, is the question of whether, due to the superior risk-sharing capabilities of an insurer, policy might not dictate a denial of his right of action against the tortfeasor. James, *Social Insurance and Tort Liability: The Problem of Alternative Remedies*, 27 N.Y.U.L. Rev. 537 (1952); Friedmann, *Social Insurance and the Principles of Tort Liability*, 63 Harv. L. Rev. 241 (1949).

⁴⁵ *Flint v. Robins Dry Dock & Repair Co.*, 13 F. 2d 3, 5 (C.A. 2d, 1926).

⁴⁶ See discussion at note 28 *supra*.

The line of distinction will not be a perfectly smooth one. There will often be a problem as to whether the particular case is one in which the defendant's liability is static, in which suit by one or several plaintiffs will not increase the amount of damages to be paid out. In *Cattle v. Stockton Water Works*,⁴⁷ for example, the third-party plaintiff, a contractor, lost the benefit of his bargain with the party directly injured, as a result of the defendant's negligence. Recovery was denied. It seems clear that had the tort caused the intermediate party to lose the benefit of his bargain with the third party, recovery would be available to him, although he could not recover for the third party's loss. To allow the third party to obtain recovery would extend the tortfeasor's liability.⁴⁸

Workmen's compensation insurance cases present another instance in which it may be difficult to determine whether third-party recovery would extend liability. For example, in *Northern States Contracting Co. v. Oakes*,⁴⁹ defendant negligently killed one of plaintiff's employees; as a result, plaintiff was forced to pay increased amounts for workmen's compensation insurance. Recovery for the amount of the increase was denied. It appears, at first sight, that the position of the employer is similar to that of an insurer, and that recovery would be desirable. This situation, however, involves four parties, the insurer being the other party injured by the tort. Recovery by the insurer up to the amount of tort damages recoverable would not extend liability, but if, in addition, the employer could recover for his increased premiums, the amount of the tortfeasor's liability would be increased.

Several questions remain unanswered. First, why is it not sufficient to let the party directly injured bring the suit, and let the third party get relief through him? Surely, in the usual case, it is in the interest of the directly injured party to bring action. And the courts have undoubtedly relied upon the intermediate party to seek relief on behalf of the injured third party, in denying the third party's capacity to sue. Nevertheless, there are cases where it is to the best interests of the intermediate party *not* to sue. The bringing of an action might jeopardize important business relationships. The intermediate party's share of the recovery might be very small, or the entire loss might be the third party's. Thus the interests of the two parties need not coincide; it seems clear that if her tenant had sought recovery, Mrs. Harrison's suit would have been unnecessary.⁵⁰

⁴⁷ [1875] 10 Q.B. 453. The facts are: the defendant negligently flooded some land at a time when plaintiff, a contractor, was doing work there for the owner; as a result, plaintiff was delayed in his work, and put to increased expense; he sued to recover his increased expense.

⁴⁸ It will be recalled that the lessor-plaintiffs in the antitrust cases claimed as injury the decrease in market value of their real estate as a result of the tenant's unsuccessful period of operation. In view of the fact that the tenant could not recover for this decrease in value, recovery by the lessor would result in extension of the defendant's liability.

⁴⁹ 191 Minn. 88, 253 N.W. 371, 92 A.L.R. 1201 (1934).

⁵⁰ The possibility of insolvency of the intermediate party raises additional difficulties. If the third party has no direct cause of action, he may never obtain the amounts recovered by the insolvent. On the other hand, to allow the third party to recover directly would in effect give him a preference over creditors. This result is not necessarily desirable.

Another major problem is that of control of settlements. If reliance is placed upon the action of the intermediate party, he may settle for an insufficient amount. In the *Robins Dry Dock* case, the owner settled for an amount which exceeded his own loss, but did not cover that of the charterer. If the third party is foreclosed by such an agreement, the door is open for collusive settlements. On the other hand, if the intermediate party may settle only as to his own claim, and third parties retain an independent claim, settlements will be made more difficult, for defendants will fear that there may be some hidden third party whose claim is not being settled.

A final objection is that a direct third-party cause of action might require the tortfeasor to defend against multiple actions. But in many cases the actions will be joined; moreover, the common situation is where there will be only two plaintiffs, as in the *Harrison* case. In any event, the third party is innocent; the defendant is not.

Although direct third-party recovery has been found to be desirable in certain cases, the weight of precedent is opposed to it. Most of the cases involving injury to the economic interests of third parties have been disposed of on grounds of remoteness, and discussion has ended there. But further analysis has disclosed that this class of third-party actions is not uniform—that although some recoveries would extend liability, others would not. The distinction proposed would achieve the advantageous result of permitting third-party recovery where this is possible without increasing the amount of damages payable by the tortfeasor. In the absence of a discernible supervening policy, this distinction seems as appropriate to antitrust actions as to others.

JUDICIAL EXERCISE OF EQUITABLE DISCRETION IN ENFORCEMENT OF ARBITRATION CONTRACTS

A quarter of a century of experience with federal and state arbitration statutes has suggested to some observers that arbitration, despite its great usefulness in many situations, does not always achieve better results than could the courts. Many judges, brought into contact with arbitration contracts by virtue of statutory provisions for enforcement and review, have demonstrated their agreement with this evaluation. This attitude is most apparent in their frequent refusal to enforce such contracts at the outset of the arbitration process in cases in which they have felt more equitable results would be achieved through judicial procedures.

Opportunities for judicial influence over the outcome of arbitrable disputes are presented not only in review of arbitrator's decisions but at the several points at which statutes provide for judicial action before arbitration commences. A court may be asked to issue an order directly compelling the parties to arbitrate, to stay judicial proceedings where under the terms of the contract

the issues are referable to arbitration, or to appoint arbitrators where a party has failed in his contractual obligation to do so.¹

On many occasions courts have refused these enforcement remedies on equitable grounds in spite of a clear legislative policy favoring settlement by arbitration. Since the statutes appear to give no clear authority for such discretionary refusal this result is achieved only by strained construction of the arbitration clause in question or by free interpretation of the statutory language.

For example, in a recent decision, *RFC v. Harrison & Crosfield*,² the Court of Appeals for the Second Circuit considered laches as a defense in a suit to compel arbitration under the United States Arbitration Act. Although the narrow holding of the case—that laches ran from the time of the refusal to arbitrate rather than from the time of the alleged breach of a substantive term in the contract³—may be of little practical significance, the premise of the decision, that a defense such as laches might be available, raises sharply the issue of whether the arbitration statutes permit courts to exercise equitable discretion in enforcement proceedings. The purpose of this comment will be to consider this question and the broader issue which it in turn suggests—whether, apart from statutory interpretations, courts can best assist in the efficient and just resolution of arbitrable disputes by such use of their equitable powers.

I

On its face the United States Arbitration Act⁴ gives no clear authority to the courts for the exercise of equitable discretion.⁵ Section 2 makes enforceable cer-

¹ While the arbitration acts differ substantially, all provide essentially the same methods of enforcement with the important exception of the order directly compelling arbitration. The New York Draft Act and those patterned after it (including the federal act) provide for the order while the Uniform and English Arbitration Acts do not. N.Y. Civ. Practice Act §§ 1448-69 (Thompson, 1939); Uniform Arbitration Act; The Arbitration Acts (Eng.) 52 & 53 Vict. c. 49 (1889), 24 & 25 Geo. V, c. 14 (1934). For a review of the remedies available under the common law, consult: 6 Williston, Contracts § 1927A (Williston & Thompson rev. ed., 1938), or Judge Frank's comprehensive opinion in *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F. 2d 978 (C.A. 2d, 1942).

² 204 F. 2d 366 (C.A. 2d, 1953), cert. denied 346 U.S. 854 (1953).

³ The breach of a substantive term in the contract, i.e., failure to procure insurance, occurred in 1942. The demand for arbitration was first submitted and refused in 1951. Judge Clark in a dissenting opinion suggested that the view which Judge Frank held would "surely . . . make of limitation a 'topsy-turvy land.'" *Ibid.*, at 371. Since a demand is ordinarily required before a court will entertain suit to compel arbitration, the New York statute, which the court found to be controlling, would seem to indicate that failure to make the demand should not prevent the limitation period from running: "Where a right exists, but a demand is necessary to entitle a person to maintain an action, the time within which the action must be commenced must be computed from the time when the right to make the demand is complete. . . ." N.Y. Civ. Practice Act § 15 (Thompson, 1939). The principal case has been noted in the following law reviews: 39 Cornell L.Q. 107 (1953); 67 Harv. L. Rev. 510 (1954); 38 Minn. L. Rev. 264 (1954).

⁴ 43 Stat. 883 (1925), repealed and re-enacted into positive law by 61 Stat. 669 (1947), 9 U.S.C.A. §§ 1-14 (1953).

⁵ The congressional committee reports reflect no real concern for equity but indicate an intention merely to place arbitration contracts on the same level with other contracts. House

tain contracts in interstate commerce and maritime transactions "save upon such grounds as exist at law or in equity for the revocation of any contract." Later sections provide appropriate remedies for enforcement but do not advert to equity. Section 3 provides for a stay of court proceedings where the issues in dispute are referable to arbitration under the contract, and Section 4 indicates that on finding the "making of the agreement" and "failure to comply therewith" a court "shall" order the parties to proceed to arbitration. Similar mandatory language appears also in Section 3.

Accepting the mandatory language at face value, the early commentaries and decisions under the Act assumed that no equitable discretion could be exercised, and on this basis the Act was criticized.⁶ As a result, courts in several of the early decisions engaged in strained and technical interpretations of the clauses before them to withhold the disputes from arbitration. In one case⁷ under the New York statute, the clause covered "all questions that may arise under this contract and in the performance of the work thereunder." The court, however, held that a controversy over delays and amounts due was not covered by the clause on the grounds that the dispute involved violation or nonperformance of the contract rather than performance under it. The court further decided that "by filing a mechanics' lien [the parties seeking relief] set out on a course so inconsistent with arbitration that they must be regarded as having decisively elected to waive and abandon their right to that course."⁸

In the 1930's, however, the federal courts began turning to principles of equity to achieve their results, and highly technical grounds for refusing enforcement were not so often relied upon. In effect the courts simply ignored the mandatory language of the Act and asserted that the order compelling arbitration was an equitable one. From this premise it followed that equitable doctrines

Committee on the Judiciary, Report No. 96 to accompany H.R. 646, 68th Cong. 1st Sess. (1923); Senate Committee on the Judiciary, Report No. 536 to accompany Sen. 1005, 68th Cong. 1st Sess. (1923).

⁶ "Is equity history to be taken so lightly and equitable principles to be so disregarded that specific performance, always a remedy in the discretion of the chancellor is now to be granted wholesale, without thought? . . . Equity saw good reason why Madame Wagner should not be compelled to sing, but business forgets that when it asks that contracts to arbitrate be specifically enforced, and without the chancellor having discretion to deny the enforcement." Phillips, *The Paradox in Arbitration Law*, 46 Harv. L. Rev. 1258, 1266 (1933). See also: Phillips, *A Lawyer's Approach to Commercial Arbitration*, 44 Yale L.J. 31 (1934); Simpson, *Specific Enforcement of Arbitration Contracts*, 83 U. of Pa. L. Rev. 160 (1934).

⁷ *Young v. Crescent Development Co.*, 240 N.Y. 244, 140 N.E. 510 (1925).

⁸ *Ibid.*, at 249 and 511. The device of narrowing the scope of a seemingly broad arbitration clause to exclude the particular dispute was used elsewhere. *Smith Fireproof Const. Co. v. Thompson-Starrett Co.*, 247 N.Y. 277, 160 N.E. 369 (1928); *Marchant v. Mead-Morrison Mfg. Co.*, 252 N.Y. 284, 169 N.E. 386 (1929). For examples of similar devices, see: *Lehigh Structural Steel Co. v. Rust Engineering Co.*, 59 F. 2d 1038 (App. D.C., 1932); *Colwell Worsted Mills v. Glass*, 228 App. Div. 150, 239 N.Y. Supp. 281 (1st Dep't, 1930).

could be used to justify not only a refusal to compel but also the issuance of special orders designed to meet peculiar situations.

For example, in *In re Utility Oil Corp.*⁹ a federal court refused to enforce an arbitration clause strictly according to its terms but rather applied a "fair and equitable interpretation in line with the dominant intent of the parties." The contract provided that upon the failure of one party to appoint an arbitrator the one chosen by the other party should consider the dispute and render an award. The court ignored this provision and allowed the defendant to appoint an arbitrator since his initial refusal was based on a good-faith contention that the dispute was not covered by the arbitration clause.

Courts also have spoken in terms of equity when dealing with an application for a stay order under the Act. In one case the court refused to grant the order on the legal grounds of waiver and delay, but went on to say that "[t]he trial judge is vested with discretion to refuse to stay the action if he is of the opinion that the party seeking arbitration is in default."¹⁰ While such a statement is not a bold assertion of equity power, it tends to suggest some degree of judicial discretion to meet the facts of each case.

Proceedings under arbitration statutes have also been designated as "equitable in nature" when the remedy granted would not have been available at law. The New York Court of Appeals held in *Matter of Feuer Transportation*¹¹ that relief not specifically asked for in the complaint might nonetheless issue—in this case, court appointment of arbitrators. The court relied on the principle that "[i]n equity, proper relief is ordinarily granted when the facts warrant regardless of what may have been asked for."¹² Too, the federal courts have granted interlocutory orders designed to preserve the status quo pending a decision by the arbitration board. In cases otherwise justiciable in admiralty the Act provides for libel and seizure,¹³ but where the action involves only interstate commerce equity must again be relied upon in granting interlocutory injunctions to preserve the subject matter of the dispute. Thus it has been held that a necessary concomitant of the power to compel arbitration is the right to issue whatever orders are appropriate to protect the rights of each party until a final decision is forthcoming.¹⁴

⁹ 10 F. Supp. 678 (S.D. N.Y., 1934).

¹⁰ *Radiator Specialty Co. v. Cannon Mills*, 97 F. 2d 318, 319 (C.A. 4th, 1938).

¹¹ 295 N.Y. 87, 65 N.E. 2d 178 (1946).

¹² *Ibid.*, at 92 and 180.

¹³ 61 Stat. 669 (1947), 9 U.S.C.A. § 8 (1953). Cf. *The Anaconda v. American Sugar Refining Co.*, 322 U.S. 42 (1944).

¹⁴ *Murray Oil Products Co. v. Mitsui & Co.*, 146 F. 2d 381 (C.A. 2d, 1944); *Albatross S.S. Co. v. Manning Bros.*, 95 F. Supp. 459 (S.D. N.Y., 1951). But cf. *Young v. Crescent Development Co.*, 240 N.Y. 244, 148 N.E. 510 (1925), discussed *supra* page 721. Guarded assertions of a freedom of discretion have been made in several other cases but the discretion was not necessary to the decision. *American Locomotive Co. v. Chemical Research Corp.*, 171 F. 2d 115 (C.A. 6th, 1948); *Almacenes Fernandez S.S. v. Golodetz*, 148 F. 2d 625 (C.A. 2d, 1945); *Postal S.S. Co. v. International Freighting Corp.*, 133 F. 2d 10 (C.A. 5th, 1943).

II

The rather hesitating nature of these forays into the realm of equity suggests that no satisfactory justification had yet been found for the exercise of equitable discretion under the statutes. However, Judge Frank's remarks in the *RFC* case¹⁵ and in *Kulukundis Shipping Co. v. Amtorg Trading Corp.*¹⁶ indicate at least two possible grounds for invoking equity.

A footnote to the opinion in the *RFC* case suggests that the court relied upon the language of Section 2—"valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract"—as the source of a general equity power.¹⁷ But the court did not explain how Section 2 could be used to overcome the mandatory language of Sections 3 and 4. And there are two further arguments indicating that equitable discretion is not properly derived from Section 2.

The first argument arises from the ambiguity of the word "revocation." The decisions under the statutes have not discussed the meaning of the term. In common-law arbitration, as Dean Sturges has pointed out, "revocation" was used to describe the "right" of a party to elect possible liability for breach rather than carry out his "obligation" to arbitrate.¹⁸ This history, however, does not clarify the meaning of the term as used in the statutes, for by making such contracts enforceable, if valid, the legislatures have taken away the right of election to which the term originally related. "Revocation" is usually employed in contract law with respect to the withdrawal of an offer,¹⁹ and it seems to have no other technical or clearly defined meaning. If the word is used as an equivalent to "rescission," a term more appropriate to an existing contract, technical questions are presented by the vagueness of the concepts of "void" and "voidable" and the uncertainty as to grounds for rescinding the arbitration clause as distinguished from the other, substantial, provisions. But if meaning is to be given to the term it seems nonetheless necessary to rely on the analogy; and such reasoning does not support the implication of the *RFC* case. For, in any case, it appears that grounds for cancellation of any contract by a party are much narrower than the range of legal or equitable bases for a court's denial of enforcement of it. For instance, the running of the statute of limitations, waiver, hardship or laches—as in the *RFC* case—do not make a contract invalid, but simply bar a particular remedy. On the other hand, nonage or other incapacity, or fraud in the making might be grounds for rescission by a party. Thus the latter, but not the former, are defenses which a court may entertain in determining whether to enforce arbitration. Only this interpretation of "revocation"

¹⁵ 204 F. 2d 366 (C.A. 2d, 1953).

¹⁶ 126 F. 2d 978 (C.A. 2d, 1942).

¹⁷ 204 F. 2d 366, 369 n. 10 (C.A. 2d, 1953).

¹⁸ Sturges, Commercial Arbitration and Awards §§ 15, 76 (1930).

¹⁹ 1 Williston, Contracts § 55 (Williston & Thompson rev. ed., 1938).

is consistent with the mandatory language of Section 4—that a compelling order should issue on a finding of valid “making of the agreement” alone.²⁰

Secondly, if Section 2 were the source of equitable discretion as the *RFC* case would indicate, it may be that only a particular class of contracts among many covered by the Act would be subject to such discretion. While Section 2 refers to contracts arising out of interstate commerce and enumerated maritime transactions, Sections 3 and 4 provide that the appropriate remedies may be invoked whenever a federal court would, save for the arbitration agreement, have jurisdiction over the dispute. At present, the circuits are in conflict as to whether Section 2 confines the entire Act to the enumerated transactions.²¹ The Second Circuit has had no real occasion to decide this question though in occasional dicta it has indicated that Section 3 and perhaps Section 4 are broader in scope than Section 2 and may not be limited to interstate commerce and maritime transactions.²² If this view is correct, Section 2 contracts will be treated differently from those falling only under Sections 3 and 4, for Section 2 appears to be a source of equitable discretion only as to transactions falling within its limits. In other words, contracts involving interstate and maritime transactions would be subject to equity, while other contracts over which the federal courts have jurisdiction would not. There is no reason to suppose that such different treatment was contemplated. Thus whether Section 2 can reasonably be considered a source of equitable discretion would appear to depend in part upon whether its coverage, and that of Sections 3 and 4, are in fact coextensive.

²⁰ The New York courts, without defining “revocation,” have occasionally suggested that all issues subsequent to the making of a valid agreement are reserved to arbitration. *Matter of Lipman* (Haeuser Shellac Co.), 289 N.Y. 76, 43 N.E. 2d 817 (1942). Consult: *Judicial Innovations in the New York Arbitration Law*, 21 Univ. Chi. L. Rev. 148 (1953). But cf. *In re Kramer & Uchitelle*, 288 N.Y. 467, 43 N.E. 2d 493 (1942). Occasional attempts to define the term have given it a meaning substantially the same as rescission or cancellation. *Zimmerman v. Cohen*, 236 N.Y. 15, 139 N.E. 164 (1923); *Manufacturers Chemical Co. v. Caswell Strauss & Co.*, 259 App. Div. 321, 19 N.Y. Supp. 2d 171 (1st Dep’t, 1940).

²¹ In the Third Circuit, substantial precedent was recently overruled and the entire Act was held to be confined to interstate commerce and maritime transactions as defined in Section 1. *Amalgamated Ass’n of Street Employees v. Pennsylvania Greyhound Lines*, 192 F. 2d 310 (C.A. 3d, 1951). See also, *Tejas Development Co. v. McGough Bros.*, 165 F. 2d 276 (C.A. 5th, 1947). The Fourth Circuit still holds that the Act is not so confined and other courts appear to take a similar view. *International Union United Furniture Workers v. Colonial Hardwood Flooring Co.*, 168 F. 2d 33 (C.A. 4th, 1948); *Agostini Bros. Bldg. Corp. v. United States*, 142 F. 2d 854 (C.A. 4th, 1944); *Wilson & Co. v. Fremont Cake & Meal Co.*, 77 F. Supp. 364 (D. Neb., 1948), aff’d 183 F. 2d 57 (C.A. 8th, 1950); *Pioneer Trust & Sav. Bank v. Screw Machine Products Co.*, 73 F. Supp. 578 (E.D. Wis. 1947). For a full discussion of this conflict, see *Sturges and Murphy, Arbitration under the United States Arbitration Act*, 17 Law & Contemp. Prob. 580 (1952).

²² Other circuits have relied upon language in *Shanferoke Coal and Supply Corp. v. Westchester Service Corp.*, 70 F. 2d 297 (C.A. 2d, 1934), and *Krauss Bros. Lumber Co. v. Bossert & Sons*, 62 F. 2d 1004 (C.A. 2d, 1933), to the effect that Section 3, at least, is broader in scope than Section 2. Cf. *In re Pahlberg Petition*, 131 F. 2d 968 (C.A. 2d, 1942); *San Carlo Opera Co. v. Conley*, 72 F. Supp. 825 (S.D. N.Y., 1946). But see *Lewittes & Sons v. United Furniture Workers, CIO*, 95 F. Supp. 851 (S.D. N.Y., 1951).

A second possible ground for the use of equity power can perhaps be derived from Judge Frank's remarks in *Kulukundis Shipping Co. v. Amtorg Trading Corp.*:²³

It may well be that in a proceeding under Section 4, there are open many of the usual defenses available in a suit for specific performance. . . . However that may be, the same equitable considerations should surely not be applicable when a defendant asks a stay pursuant to Section 3. For he is not then seeking specific performance (i.e., an order requiring that the parties proceed to arbitration) but merely a stay order of a kind long familiar in common law, equity and admiralty actions. . . . There is a well recognized distinction between such a stay and specific performance: The first merely arrests further action by the court itself . . . until something outside the suit has occurred. . . . The second, through the exercise of discretionary equity powers, affirmatively orders that someone do (or refrain from doing) some act outside the suit.²⁴

This reasoning seems inconsistent with the suggestion in the *RFC* case that the source of equity power is the language of Section 2, for if the latter were the case it would seem anomalous that the discretion could be exercised only with respect to the compelling order and not the stay. But in the *Kulukundis* case the emphasis is not on the particular language of Section 2 but on the inherent and traditional nature of the court orders as the source of equity powers. The court, seeming to assume that Congress did not intend to create any new form of remedy in the Act, indicates that the statutory remedies are to be invoked according to the principles which govern their common-law counterparts. Under this assumption, it is difficult to explain why Congress spelled out in detail the available remedies and methods of applying them. Moreover, it seems likely that the remedies would have been given their traditional labels—at least as to the order compelling arbitration. But aside from these objections, it will be shown that other difficulties confront any attempt to characterize Sections 3 and 4 in the manner suggested by the court.

The court asserts that the Section 3 remedy is "merely a stay order of a kind long familiar in common law, equity and admiralty actions." Nevertheless, it indicates that discretionary equity power should not be exercised in granting the stay. Since the order is familiar in both equity and law, it is difficult to see why the stay must be granted strictly according to law while the compelling order is subject to equitable discretion. Whichever remedy is invoked, the fundamental purpose of the Act is to force a recalcitrant party to proceed to arbitration. Making the exercise of discretion depend solely upon which remedy happens to be necessary in the particular case seems unreasonable. Moreover, for purposes of determining whether an appeal may be taken from the issuance or denial of a stay order, the courts have uniformly deemed the order an inter-

²³ 126 F. 2d 978 (C.A. 2d, 1942).

²⁴ *Ibid.*, at 987.

locutory injunction, "an equitable defense or crossbill interposed in an action at law."²⁵

The Section 4 order compelling arbitration has been almost universally characterized as a decree of specific performance, without adequate analysis of the difficulties presented. Thus, the court in the *Kulukundis* case apparently reasoned that because the order requires the defendant to act affirmatively, or at least to refrain from doing some act outside the suit, some flexibility and discretion to meet the peculiarities of each case must be allowed. Judge Frank cited the Supreme Court decision in *Hecht Co. v. Bowles*²⁶ to the effect that Congress could not intend, without the most explicit language, that the courts should grant specific performance stripped of the equitable considerations which traditionally control its application, and concluded that equitable discretion must be permitted under Section 4.

Professor Sydney P. Simpson has suggested that the compelling order could be classified as specific enforcement only if failure to comply could be punished by the usual equity sanctions, i.e., contempt proceedings, sequestration and imprisonment.²⁷ He reasoned that perhaps the legislators intended the courts to restrict themselves in case of such non-compliance to the measures provided in the statute—appointment of arbitrators with power to summon witnesses and entry of judgment upon the award. In this interpretation the Act's remedy in Section 4 would be characterized not as specific enforcement in the traditional equity sense but as a new statutory form of relief. As such, it would be subject to no controlling principle of common law or equity which could arguably override the mandatory statutory language. Thus the compelling order would issue automatically upon a finding of the making of an agreement and neglect or refusal to perform. To the objection that Simpson's analysis limits the effectiveness of the compelling order to the threat of judgment on an award by court-appointed arbitrators—the only statutory sanction for non-compliance—it may be noted that the order serves at least as a preliminary inducement for the parties to cooperate in proceeding to arbitration.

Another indication that a compelling order is improperly characterized as a specific enforcement decree is provided by one of the cardinal principles of equity—that equitable remedies are available only if the legal remedies would be inadequate. If a court could not settle the merits of the dispute before it as quickly and effectively as an arbitration board, it might be said that this is the case. But such a conjectural determination could hardly provide a sound basis for controlling the use of equitable discretion in issuing the compelling order. On the other hand, if a court sits in equity and grants equitable remedies when

²⁵ *Shanferoke Coal and Supply Co. v. Westchester Service Co.*, 293 U.S. 449, 452 (1935); *Gatliff Coal Co. v. Cox*, 142 F. 2d 876 (C.A. 6th, 1944).

²⁶ 321 U.S. 321 (1944).

²⁷ Simpson, *Specific Enforcement of Arbitration Contracts*, 83 U. of Pa. L. Rev. 160, 170-71 (1934).

applying the Arbitration Act, then the legal remedies are clearly inadequate since a court of law would have to apply the common law which gave only nominal damages for breach. Perhaps such confusion has induced the courts to avoid discussing the issue at all.²⁸

It is also significant in characterizing the compelling order that specific enforcement ordinarily requires an affirmative act on the part of the person to whom the order is directed. The order seems not to have such effect for the defendant is not required to appear and argue his side of the case. He can stand mute and suffer award and judgment by default. In this respect the order has the same effect as the basic legal requirement that all complaints be answered regardless of their merits and that judgment be rendered summarily in case of default. And of course the legal system allows the courts no discretion in this regard.

Finally, it is important to note that while specific enforcement involves either a temporary or final determination of substantive rights, the order compelling arbitration affects only the procedure by which those rights are determined. The order does not enforce the contract but rather shifts the trial of a dispute to another tribunal on the basis of prior consent to the arbitrator's jurisdiction.²⁹ For the courts to assume that such a shift will as a practical matter prejudice the substantive rights of the parties is an assertion of the very distrust in the arbitration process which Congress intended to eliminate. When a court is required to decide its own or another tribunal's jurisdiction, it may in some cases exercise a degree of discretion—witness the doctrine of *forum non conveniens*. But such discretion is not an inherent and necessary power of the court as in the case of specific enforcement; a statute may set the bounds of court jurisdiction and leave no room for discretion. This is what the Arbitration Act appears to do, requiring that upon certain conditions *all* disputes shall be referred to arbitration.

Only if the compelling order is properly characterized as specific performance is the rationale of *Hecht Co. v. Bowles*³⁰ relevant. There, an injunction had been issued under the Emergency Price Control Act to prevent violation of maximum

²⁸ Commentators have expressed only passing recognition of the problem and have not agreed in their conclusions. Consult Phillips, *The Paradox of Arbitration Law*, 46 Harv. L. Rev. 1258 (1933); Simpson, *op. cit. supra* note 27, at 161. Compare Pomeroy, *Specific Performance of Contracts* §§ 47-50 (1941).

²⁹ A rough comparison can be made between arbitration contracts and other contractual consents to jurisdiction. For example, where the maker of a cognovit note has contracted in advance for confession of judgment without personal service, the court, in assuming jurisdiction, is not specifically enforcing that obligation but rather is concerning itself with a simple prior consent to the jurisdiction.

It will be noted that this comment adopts the prevalent view that arbitration is merely a substituted mode of trial. No attempt will be made here to defend this view in opposition to the so-called agency-contract theory of arbitration. For the classic exposition of these two theories, consult Isaacs, *Two Views of Commercial Arbitration*, 40 Harv. L. Rev. 929 (1927).

³⁰ 321 U.S. 321 (1944).

price regulations. The Court announced the principle that a statute establishing remedies equitable in nature should not be construed to withdraw equitable discretion without explicit language to that effect. However, in that case, the use of discretion was perhaps justified because substantive rights were being finally determined. As to the compelling order, it has been shown, this is not the case. Thus neither the analysis of the *Kulukundis* case nor the authority of *Hecht Co. v. Bowles* seems persuasive that equitable discretion is properly available to courts under the arbitration acts.

III

Apart from the interpretation placed upon the acts by the courts in this regard, the question remains whether equitable discretion in its application is desirable.³¹ It is clear that by invoking equity powers the courts have significantly narrowed the area in which arbitration operates. And alighting upon the words "equity" and "revocation" in Section 2 the courts have in some cases exercised discretion to decide substantive issues in dispute. For example, assume that a contract is made and upon substantial breach one party cancels. The court, instead of summarily ordering arbitration, proceeds to determine whether the contract exists; this may depend upon the nature and justification for the breach and subsequent cancellation—the very issues the parties had agreed to arbitrate.

As a result of identifying the Section 4 order as specific enforcement the courts have exercised an even broader discretion, recognizing many defenses which go to the merits of a dispute under a contract whose validity is not in dispute. Discretion in compelling arbitration invites a judgment by the court as to whether the issue in dispute can best be handled by the arbitration process. And if some phase of the controversy involves complex legal matters, or if for any reason the court feels that arbitration is not appropriate, the entire dispute may be withheld from the arbitrators; again the court's jurisdiction is expanded and that of arbitration is contracted.

The practice of the courts in deciding issues which arbitration could competently handle is perhaps understandable in view of Section 10 of the federal act, and the equivalent provisions in others, which purport to eliminate judicial review of errors of law in the arbitrators' decision. This section of the Arbitration Act allows a court to make an order vacating the arbitrator's award upon certain enumerated grounds. These include (1) procurement of the award "by corruption, fraud or undue means," (2) "evident partiality or corruption in the

³¹ Judge Frank in *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F. 2d 978 (C.A. 2d, 1942), suggested that if equitable discretion were not available, litigation—which the arbitration acts are designed to reduce—would be augmented. But if either party to an arbitration contract may resort to the courts for relief from his obligation whenever it seems inequitable to perform, it is difficult to conceive how litigation will be reduced. Strict judicial enforcement would leave the parties with nothing to litigate except the merits and that would have to be done through arbitration.

arbitrators," and (3) "any other misbehavior by which the rights of any party have been prejudiced." No explicit mention is made of a power to vacate an award on the grounds that the arbitrator misinterpreted or misapplied the law. While a majority of the Supreme Court in *Wilko v. Swan*³² indicated that the statute precludes judicial review of errors of law, one Justice preferred to reserve decision on this matter and two asserted that such review was allowable. The critical feature of that decision is that all of the Justices felt that this question had some bearing on whether or not to send the particular dispute to arbitration. Since judges seem unwilling to allow such errors to go uncorrected or to relinquish their jurisdiction over the legal issues in dispute, this aspect of the decision may strengthen their inclination to exercise their influence when they can—in deciding whether a stay or compelling order will issue.

Congressional policy favors arbitration in both commercial and labor disputes.³³ Of course, in certain areas of dispute this policy may be overridden. For example, the Supreme Court in the *Wilko* case felt that the protection afforded to investors under the Securities Act³⁴ could not be effectively guaranteed by the arbitration process. But in the case of the ordinary commercial dispute the policy favoring arbitration ought to prevail.

If the courts, denied the power of review, may still prevent arbitration of the dispute, the dominant policy of the Act is frustrated. To withhold a dispute from arbitration means that even issues of fact are tried by the courts. To review an award means that the arbitrator's findings of fact are conclusive; only his application of the law is subject to scrutiny. If this power of review were available to the courts, as it is in England,³⁵ both the arbitrators and the courts might operate in the area where they are most effective.

The division of jurisdiction between the courts and arbitration need not, necessarily, be based solely on the distinction between issues of law and fact. Empirical investigations of arbitration now in progress may show that the process does not function well, from the viewpoint either of the parties or of a commercial society, in certain areas.³⁶ If this is true, Congress might well prescribe that certain disputes are to be settled with the aid of the judicial machinery. But it seems unwise to allow the courts discretion in deciding when the

³² 346 U.S. 427 (1953), rev'g 201 F. 2d 439 (C.A. 2d, 1953), rev'g 107 F. Supp. 75 (S.D. N.Y., 1952).

³³ "[I]t is the policy of the United States that . . . (b) the settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for conciliation, mediation and voluntary arbitration. . . ." Taft-Hartley Act § 201, 61 Stat. 152 (1947), 29 U.S.C.A. § 171 (Supp., 1953).

³⁴ Securities Act of 1933, 48 Stat. 74 (1933), 15 U.S.C.A. §§ 77a et seq. (1952).

³⁵ The Arbitration Acts (Eng.), 52 & 53 Vict. c. 49 (1889), 24 & 25 Geo. V, c. 14 (1934).

³⁶ For discussion of a research project on this and related problems now under way at the University of Chicago Law School, consult Mentschikoff, *The Significance of Arbitration—A Preliminary Inquiry*, 17 Law & Contemp. Prob. 698 (1952).

judicial process is to give this aid.³⁷ For the courts, in their case-by-case encounters with arbitration, are necessarily concerned with particular disputes, and not with the broader problem of nurturing arbitration in those fields where it is most competent.

CARRIER'S DUTY OF NOTIFICATION ON AN ORDER-NOTIFY BILL OF LADING

The problem of a carrier's liability for failure to inform the shipper of goods on an order-notify bill of lading¹ of a failure of the notify party to accept the goods has recently received renewed attention from the courts. The Massachusetts Supreme Court has considered the problem in *Lapp Insulator Co. v. Boston & M. R.R.*,² which was a suit by a shipper on an order-notify bill of lading against the carrier for loss by fire of the goods while stored in the carrier's warehouse. The goods had arrived at their destination and the notify party had been duly informed, but it had not accepted them at the time of their destruction. The notify party had repeatedly promised the carrier that it would accept the goods and pay storage charges, if the latter would hold them. The carrier failed to notify the shipper of the goods of the non-acceptance, however, and on this basis the court held the carrier liable to the shipper for the value of the goods.

The only other case which has arisen concerning this problem since 1934³ is *Tri-State Produce Co. v. Chicago, B. & Q. R. Co.*,⁴ decided in the Federal courts in 1952.⁵ There a duty of notification was imposed on the carrier under similar circumstances.⁶ While the *Lapp Insulator* result is in accord with that reached

³⁷ Law review discussions treating the cases in detail have analyzed the problem of jurisdiction of court and arbitrator from other viewpoints without specific consideration of the role of equity. *Judicial Innovations in the New York Arbitration Law*, 21 *Univ. Chi. L. Rev.* 148 (1953); *Judicial Control of Arbitrators' Jurisdiction in New York*, 38 *Cornell L.Q.* 391 (1953); *Arbitration: Its Snares and Delusions*, 19 *Brooklyn L. Rev.* 199 (1953).

¹ In this type of bill the shipper is both the consignor and the consignee of the goods. There is a direction to the carrier to notify a party at the destination point. Typically this party (the notify party) is the buyer of the goods, and upon presentation of the bill of lading to the carrier is entitled to possession. The practice is for the seller to tender the bill of lading together with a sight draft through banking channels; upon acceptance of the draft the bank releases the bill of lading to the buyer, who then obtains the goods from the carrier.

² — *Mass.* —, 112 N.E. 2d 359 (1953).

³ In that year the Third Circuit Court of Appeals passed on the problem in *Trinidad Bean & Elevator Co. v. Pennsylvania R. Co.*, 72 F. 2d 371 (C.A. 3d, 1934).

⁴ 104 F. Supp. 452 (N.D. Iowa, 1952), noted in 66 *Harv. L. Rev.* 351 (1952), and 37 *Minn. L. Rev.* 204 (1953).

⁵ Possibly the dearth of decisions during the period 1935-1952 is reflective of the general economic situation then prevailing. It will be noted that in a period of growing demand for goods it is less likely that buyers will fail to accept goods shipped to them; thus the situation requiring notice by the carrier to the shipper less frequently arises.

⁶ There was no actual recovery in the *Tri-State* case even though the court found liability for the failure of the carrier to notify, since no loss was proved by the evidence. (The goods involved were frozen turkeys, and damages were alleged to have accrued from a drop in the

in the *Tri-State* case, the Massachusetts court expressly states that it does not decide whether the duty of notification is absolute or dependent on the particular "circumstances."⁷ It is submitted that the particular "circumstances" of this case were such that the result represents a departure from what might have been expected from prior decisions governing the carrier's liability.

Although the few cases⁸ directly bearing on the problem cannot be reconciled, there are several major factors which the courts find important in varying degrees. Foremost among these seems to be the general custom of giving notice to the shipper of the non-acceptance of the notify party.⁹ In several cases emphasis is placed upon the custom in applying the common-law duty of care as a standard. Actually the custom has arisen, as is recognized by the court in *Porter v. Pennsylvania R. Co.*,¹⁰ out of the desire of the carrier to assess demurrage charges against the shipper,¹¹ and not primarily from the fear of liability resulting from non-notification.¹² Nevertheless, the custom exists as a strong support for the decisions finding liability.¹³

market rather than from destruction of the goods, as in the *Lapp* case.) The basis for liability was found in the facts of the particular case, no rule of absolute liability being adopted.

⁷ — Mass. —, —, 112 N.E. 2d 359, 363 (1953).

⁸ The following cases seem to be directly in point: *Missouri, K. & T. R. Co. v. Jenkins*, 35 Tex. Civ. App. 429, 80 S.W. 428 (1904) (no liability in absence of rejection by buyer; non-perishables involved); *Samuel Hardin Grain Co. v. Chicago & Alton Ry. Co.*, 134 Mo. App. 681, 114 S.W. 1117 (1908) (no liability where buyer took no action; perishable goods); *Nashville, Chattanooga & St. Louis Ry. v. Dreyfuss-Weil Co.*, 150 Ky. 333, 150 S.W. 321 (1912) (liability where buyer rejected; non-perishable goods); *Emerson v. Chicago, B. & Q. R. Co.*, 120 Minn. 84, 138 N.W. 1026 (1912) (liability where buyer rejected; perishable goods); *South Deerfield Onion Storage Co. v. N.Y., N.H., & H. R. Co.*, 222 Mass. 535, 111 N.E. 367 (1916) (liability for non-acceptance; perishable goods); *Stoddard Lumber Co. v. Oregon-Washington R.R. & Navigation Co.*, 84 Ore. 399, 165 Pac. 363, 4 A.L.R. 1275 (1917) (liability where buyer promised acceptance; non-perishable goods); *Porter v. Pennsylvania R. Co.*, 217 App. Div. 49, 215 N.Y.S. 727 (4th Dep't, 1926) (liability where buyer took no action; perishable goods); *Missouri Pacific R. Co. v. Myers*, 173 Ark. 747, 293 S.W. 15 (1927) (liability where buyer took no action; perishable goods); *Atlantic Coast Line R. Co. v. Ousley Co.*, 37 Ga. App. 215, 139 S.E. 586 (1927), 40 Ga. App. 555, 150 S.E. 564 (1929) (liability where buyer took no action; perishable goods); *Trinidad Bean & Elevator Co. v. Pennsylvania R. Co.*, 72 F. 2d 371 (C.A. 3d, 1934) (no liability where buyer took no action; perishable goods); *Tri-State Produce Co. v. Chicago, B. & Q. R. Co.*, 104 F. Supp. 452 (N.D. Iowa, 1952) (liability where buyer took no action; semi-perishables); *Lapp Insulator Co. v. Boston & M. R.R.*, — Mass. —, 112 N.E. 2d 359 (1953).

⁹ E.g., *Emerson v. Chicago, B. & Q. R. Co.*, 120 Minn. 84, 138 N.W. 1026 (1912); *Porter v. Pennsylvania R. Co.*, 217 App. Div. 49, 215 N.Y.S. 727 (4th Dep't, 1926); *Tri-State Produce Co. v. Chicago, B. & Q. R. Co.*, 104 F. Supp. 452 (N.D. Iowa, 1952).

¹⁰ 217 App. Div. 49, 215 N.Y.S. 727 (4th Dep't, 1926).

¹¹ *Tri-State Produce Co. v. Chicago, B. & Q. R. Co.*, 104 F. Supp. 452, 458-59 (N.D. Iowa, 1952).

¹² Notice was probably not given to the plaintiff in the principal case [*Lapp Insulator Co. v. Boston & M. R.R.*, — Mass. —, 112 N.E. 2d 359 (1953)] because the notify party promised to pay storage charges, thus lending support to the view that the custom arose as a foundation for assessing storage charges.

¹³ It should be noted that bills of lading do not have any explicit provision requiring notice to the shipper of non-acceptance. In fact, when the possibility of such a provision was con-

Another factor supporting liability is the knowledge which the railroad must have of the nature of the transaction involved, i.e., that an order-notify bill is typically used by a shipper as a collection device¹⁴ to keep control of the goods from the buyer until the latter has accepted the seller's draft and obtained the bill of lading. The carrier, therefore, realizing that the shipper is interested in the disposal of the goods, should notify him of non-acceptance so that he can take the necessary steps to protect his interest.¹⁵

Additional factors receiving consideration in the cases are the nature of the goods involved¹⁶ and the stability of the market at the time of their arrival.¹⁷ Where the goods are known to be perishable or the market is recognized to be fluctuating the court may find added justification for a finding of liability.

In spite of these factors, the courts in several cases have been firm in denying liability for failure to notify the shipper of non-acceptance.¹⁸ A legal basis for these decisions is found by treating the notify party as the agent of the shipper and then applying the agency doctrine that notice to the agent is notice to the principal. The court in the *Trinidad Bean* case summarizes this position, pointing out that if a duty of notification were imposed, "we would have the strange contradiction . . . where the consignor is itself the consignee of the goods, that the consignor should be advised that it, as consignee, had not accepted delivery."¹⁹ The court in the *Tri-State* case²⁰ rejects this theory, holding it inapplicable in a situation where the carrier knows that the notify party is the buyer. This view seems more in harmony with the current practice, since as previously noted, the principal use of the order-notify bill of lading is as a collection device between buyer and seller.

A seemingly very important factor, which has received practically no atten-

sidered, it was expressly rejected, with the view stated that practical hardship might result from a notice requirement in all cases. In the *Matter of Bills of Lading*, 52 I.C.C. 671, 717-21 (1919).

¹⁴ See Uniform Sales Act, §20(2).

¹⁵ There is, of course, the probability that the seller will also receive notice from his bank that the draft has not been accepted. The cases seem uniform, where the question is considered at all, in holding that the carrier is not liable for loss after the shipper has received actual notice from the bank, or any other source.

It is interesting to note that no mention at all is made in the principal case of possible notice to the plaintiff from his bank, although a draft was forwarded through banking channels, and over 2½ months elapsed between the time of the arrival of the goods at their destination and the fire destroying them.

¹⁶ *Tri-State Produce Co. v. Chicago, B. & Q. R. Co.*, 104 F. Supp. 452 (N.D. Iowa, 1952).

¹⁷ *Ibid.*, where the market for turkeys was allegedly fluctuating during the Christmas period.

¹⁸ *Trinidad Bean & Elevator Co. v. Pennsylvania R. Co.*, 72 F. 2d 371 (C.A. 3d, 1934); *Samuel Hardin Grain Co. v. Chicago & Alton Ry. Co.*, 134 Mo. App. 681, 114 S.W. 1117 (1908); *Missouri, K. & T. R. Co. v. Jenkins*, 80 S.W. 428 (Tex. Civ. App., 1904) (liability imposed if notify party rejected—new trial).

¹⁹ *Trinidad Bean & Elevator Co. v. Pennsylvania R. Co.*, 72 F. 2d 371, 372 (C.A. 3d, 1934).

²⁰ 104 F. Supp. 452 (N.D. Iowa, 1952).

tion from the courts in their determination of liability of the carrier, is the conduct of the notify party. In some cases he has absolutely rejected the goods; in others he has simply taken no action concerning them, and in still others, such as the principal case, he has promised the carrier that he will accept them. In all cases involving a rejection the courts have found a duty of notification to exist,²¹ but without placing emphasis upon such rejection. Likewise, in both cases in which the notify party has promised the carrier future acceptance, the courts have nevertheless found liability for failure to notify the shipper of the absence of an immediate acceptance.²² In view of these decisions it is surprising to find that in the remaining cases dealing with the simple non-acceptance situation—in the absence of either a rejection or an express promise to accept—the courts have differed upon the question of liability.²³ If the carrier is to be held to a duty of notification even where it is assured of future acceptance, it would seem that logically it should be required to give notice where it has no such assurances from the notify party. The courts, however, have given very little consideration to the factual circumstances involved in the various cases.

On the basis of the foregoing considerations, the *Lapp Insulator* case²⁴ may well be viewed as a departure from many of the earlier cases, including the recent *Tri-State* case.²⁵ The court, in finding liability, states that it does not decide whether the duty to notify is absolute or dependent on the circumstances of the particular situation,²⁶ thus purporting to follow the rule adopted in the *Tri-State* case. In spite of this language, however, it is difficult to visualize a set of facts which would give less cause for notification than those in the *Lapp Insulator* case. The goods involved were evidently not perishable, and there was no evidence of a fluctuating market. Moreover, the notify party had repeatedly promised the carrier that the goods would be accepted. In addition, a time lapse of over 2½ months occurred between the arrival of the goods and their destruction. The railroad could well have assumed that after such a long period of time the seller had exercised some care in inquiring either about the disposition of his goods or of the bill of lading, thus giving him actual notice of the situation. The decision of the court thus seems to lead to the conclusion that the liability imposed, if not "absolute," is not far short of it.²⁷

²¹ *Nashville, Chattanooga & St. Louis Ry. v. Dreyfuss-Weil Co.*, 150 Ky. 333, 150 S.W. 321 (1912); *Emerson v. Chicago, B. & Q. R. Co.*, 120 Minn. 84, 138 N.W. 1026 (1912).

²² *Stoddard Lumber Co. v. Oregon-Washington R.R. & Navigation Co.*, 84 Ore. 399, 165 Pac. 363, 4 A.L.R. 1275 (1917); *Lapp Insulator Co. v. Boston & M. R.R.*, — Mass. —, 112 N.E. 2d 359 (1953).

²³ Compare, e.g., *Porter v. Pennsylvania R. Co.*, 217 App. Div. 49, 215 N.Y.S. 727 (4th Dep't, 1926), with *Trinidad Bean & Elevator Co. v. Pennsylvania R. Co.*, 72 F. 2d 371 (C.A. 3d, 1934).

²⁴ — Mass. —, 112 N.E. 2d 359 (1953).

²⁵ 104 F. Supp. 452 (N.D. Iowa, 1952).

²⁶ — Mass. —, —, 112 N.E. 2d 359, 363 (1953).

²⁷ It is interesting to compare the solution of the problem of notice to the consignor of non-acceptance in the ordinary situation where the consignor and consignee are different persons. In that situation there would seem to be no reason to hold the carrier to knowledge of any

It should be noted that the seller in the instant case had an action against the buyer, had he elected to sue him. Under the Uniform Sales Act the risk of loss follows the property interest in goods in the absence of agreement to the contrary.²⁸ Thus under the ordinary shipment contract the risk of loss passes to the buyer at the time of delivery to the carrier, notwithstanding the retention of a security interest in the goods by the seller.²⁹ On the other hand, under a destination contract the risk of loss does not pass to the buyer until "delivery" to him pursuant to the terms of the contract.³⁰

The courts have generally held that the form of the bill of lading does not determine the time at which property in the goods, and thus risk of loss, passes from seller to buyer.³¹ It follows that use of an order-notify bill under a shipment contract does not mean that the risk of loss remains with the seller upon his delivery to the carrier.³² If a shipment contract were involved in the *Lapp Insulator* case, the seller then could have sued the buyer for the price of the goods.³³ If, on the other hand, a destination contract were involved, the buyer, by agreeing to take, has accepted the goods within the meaning of Section 48 of the Uniform Sales Act, and an action could be maintained by the seller for the price.³⁴

The availability of an action against the buyer does not militate against allowing an action against the carrier, however, since the seller still has a security interest in the goods,³⁵ as the carrier must know. Even though the risk of loss

shipper's interest in the goods, yet some cases have held the carrier liable nonetheless for failure to notify the consignee where the consignee fails to accept the goods. Other cases have spoken in more general terms, requiring reasonable care on the part of the carrier, while still others have found no liability in the absence of agreement. *Simon v. Universal Carloading & Distributing Co.*, 1 N.Y.S. 2d 249 (N.Y. Munic. Ct., 1938). In the situation where the consignee only delays acceptance, the general rule seems to require no notice to the consignor (contra to the order-notify bill cases). See *Missouri, K. & T. R. Co. v. Sealy Oil Mill & Mfg. Co.*, 123 S.W. 2d 948 (Tex. Civ. App., 1939). Contra: *American Merchants Union Express Co. v. Wolf*, 79 Ill. 430 (1875). See generally, 4 A.L.R. 1285, and cases there cited.

In some order-notify cases, e.g., *Atlantic Coast Line R. Co. v. Ousley Co.*, 37 Ga. App. 215, 139 S.E. 586 (1927), 40 Ga. App. 555, 150 S.E. 564 (1929), the court seems to say that "order notify party" equals "consignee." Strict application of such a rule would result in no liability of the carrier in situations such as the *Lapp Insulator* case where the notify party simply delays in accepting the goods, according to the position of most courts stated above.

²⁸ Uniform Sales Act §22; *Lott v. Delmar*, 2 N.J. 229, 66 A. 2d 25 (1949); *Gillingham v. Phelps*, 5 Wash. 2d 510, 105 P. 2d 825 (1940).

²⁹ Uniform Sales Act §§46(1), 22(a).

³⁰ Uniform Sales Act §19, Rule 5, §22; cf. Uniform Commercial Code §2-509.

³¹ *Maffei v. Ginocchio*, 299 Ill. 254, 132 N.E. 518 (1921); *Alderman Bros. Co. v. Westinghouse Air Brake Co.*, 92 Conn. 419, 103 Atl. 267 (1918). But cf. *Chapman v. Nitrate Agencies Co.*, 225 Ala. 650, 144 So. 810 (1932).

³² See *Inland Seed Co. v. Washington-Idaho Seed Co.*, 160 Wash. 244, 294 Pac. 991 (1931).

³³ Uniform Sales Act §63. The buyer would then presumably be forced to a negligence action against the carrier (now a warehouseman) if possible under the circumstances.

³⁴ Uniform Sales Act §63. The risk of loss has clearly shifted to the buyer under §22(b).

³⁵ Uniform Sales Act §20(2).

has passed to the buyer, the latter may be insolvent—one of the contingencies which retention of the security interest was designed to cover. Allowance of an action by the shipper against the carrier should thus remain.

Perhaps a desirable rule governing the carrier's liability would be: where a carrier of goods on an order-notify bill of lading fails to notify the consignor of any non-acceptance of the goods by the notify party, the carrier will be absolutely liable for subsequent loss or damage; provided, however, that the carrier may be relieved of his duty of notification, where the seller has or should have knowledge eliminating the necessity of notification. Such "knowledge" could be actual notice received by the consignor from his bank, or directly from the notify party. A long delay prior to loss (such as occurred in the principal case), during which time the consignor should be expected to exercise reasonable care in inquiring as to the disposition of his goods, should also constitute "knowledge."

Such a rule seems justified by several considerations. In the first place, no great additional burden is placed on the carrier, since custom already required that notice be given.³⁶ Moreover, the great difficulty involved in proving damages³⁷ should prevent a deluge of groundless suits. It may also be hoped that a rule of absolute liability would not only preserve the duty of care of the shipper, but would re-emphasize the responsibility of the carrier in this situation.

THE LIMITS OF CONSTITUTIONAL INQUIRY ON HABEAS CORPUS IN INTERSTATE RENDITION

The writ of habeas corpus, historically the guardian of human liberty in the Anglo-American world,¹ is an important procedural device in interstate rendition² proceedings. The traditional conception of the function of the writ in such

³⁶ See note 11 *supra*. Interviews with freight agents reveal that the railroad is acutely aware of the necessity of giving notice in all cases where an order-notify bill is involved. It is only where an agent "slips up" that notice is not given, and in the case of perishables it is customarily given by phone or telegraph.

³⁷ *E.g.*, *Tri-State Produce Co. v. Chicago, B. & Q. R. Co.*, 104 F. Supp. 452 (N.D. Iowa, 1952).

¹ See *Ex parte Yerger*, 8 Wall. (U.S.) 85 (1868). "The Great Writ (*habeas corpus ad sub-iiciendum*) always serves the function of precipitating a judicial inquiry into a claim of illegality in the petitioner's detention for the purpose of commanding his release, or other appropriate disposition, if he is found to be illegally detained. The underlying premise is, of course, that only law can justify detention, the specific contribution of the English struggle with royal prerogative in which the writ played an historic part." Hart & Wechsler, *The Federal Courts and the Federal System*, 1238 (1953).

² Rendition is normally defined as the surrender by one state of persons found within its jurisdiction to another state in whose territory they are alleged to have committed, or to have been convicted of, crime, so that they might be dealt with according to the penal laws of the latter state. Kopelman, *Extradition and Rendition*, 14 B. U. L. Rev. 591, 624 (1934). In strict correctness the word "extradition" applies only to the international process of surrendering fugitives, and "interstate rendition" to the comparable process between the states of the

proceedings has been exceedingly narrow; the expanded scope of the writ in other contexts³ has led to strong pressure to extend the permissible area of inquiry when a person detained under an extradition warrant invokes the writ in protection of his constitutional rights. This pressure has evoked judicial response in several characteristic types of cases: a fugitive claims that his extradition to the demanding state will subject him to possible or probable lynching or that prejudice on account of race or other reasons makes a fair and impartial trial in the demanding state impossible; an escaped prisoner detained for extradition claims that the demanding state has subjected him in the past to cruel and inhuman punishment in violation of his constitutional rights, or that his indictment or his conviction in the demanding state is itself void because of constitutional defects; a fugitive detained for extradition claims that he is not charged with crime because the crime alleged is itself unconstitutional. Broadly put, the question presented by these cases is whether the courts of the asylum state have jurisdiction on habeas corpus to inquire into the fugitive's constitutional claim.

The law, abstractly conceived, requires that the fugitive from justice, charged with a crime by the demanding state, be delivered up by the authorities of the asylum state, and that the constitutional questions raised by the person involved be considered in a forum located in the demanding state. The almost automatic operation of the rendition process is essential to the control of crime and the furtherance of criminal justice; yet the rights of the individual must be carefully preserved: the individual is entitled to security of residence in the state of his choosing, he should be protected from unwarranted prosecution, and his life and liberty must not be taken from him without due process of law. Faced in the extreme case with an appealing constitutional claim asserted on behalf of the often-beleaguered fugitive, some courts have strained against, and occasionally even ignored, the traditional bounds of the habeas corpus hearing in extradition cases.

United States. Moore, *Extradition and Interstate Rendition* (1891); Scott, *Interstate Rendition* (1917); Kopelman, *supra*. However, there is no consistent adherence to this usage in the cases, and the use of "extradition" for either process has been furthered by the Uniform Criminal Extradition Act, 9 U.L.A. 169 (1951), hereafter to be cited as U.C.E.A. Herein the words "rendition" and "extradition" are used interchangeably.

³ Traditionally, hearings on the writ of habeas corpus inquired into the jurisdiction of the detaining authority. The theory that jurisdiction may be lost during the trial expanded the scope of inquiry: "A court's jurisdiction at the beginning of trial may be lost 'in the course of the proceedings' due to failure to complete the court . . . by providing counsel. . . . The judgement of conviction pronounced by a court without jurisdiction is void. . . ." *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938). It now appears that the writ is an appropriate remedy in "those exceptional cases where the conviction [in a state court] has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights." *Waley v. Johnston*, 316 U.S. 101, 105 (1942). The use of habeas corpus to correct errors of due process during trial is illustrated by *House v. Mayo*, 324 U.S. 42 (1945), and *Johnson v. Zerbst*, *supra*. Consult *The Freedom Writ—The Expanding Use of Federal Habeas Corpus*, 61 *Harv. L. Rev.* 657 (1948).

I

Criminal rendition is based on the Constitution,⁴ implemented by federal statute,⁵ and supplemented by state law.⁶ The mechanics of the rendition procedure are simple: a fugitive from justice found in another state (the asylum state) must be turned over to the governor of the demanding state upon presentation of an indictment or affidavit charging such fugitive with the commission of a crime.⁷ "Such is the command of the supreme law of the land, which may not be disregarded by any State."⁸ Although the governor of the asylum state is under a duty to return the fugitive, there is no way to compel him to do so.⁹

A habeas corpus hearing cannot arise until the governor of the asylum state issues his warrant and the fugitive is apprehended. At that time, however, the fugitive may test the legality of his arrest and detention by seeking release through the writ of habeas corpus.¹⁰ The accused should be released, according to the traditional conception of habeas corpus in rendition cases, if he can prove either: (1) that the papers under which he is held are not in proper form;¹¹ or (2) that he is not the person who is charged in the requisition;¹² or (3) that he was not present in the demanding state when the alleged crime was committed;¹³

⁴ U.S. Const. Art. 4, § 2, cl. 2: "A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime."

⁵ 62 Stat. 822 (1948), 18 U.S.C.A. § 3182 (1951). The wording remains fundamentally the same as the statute originally enacted in 1793 to implement the constitutional provision, which was not believed to be self-executing. 1 Stat. 302 (1793).

⁶ E.g., the Illinois Fugitives from Justice Act § 2, Ill. Rev. Stat. (1953) c. 60, § 2j. The Uniform Criminal Extradition Act, prepared in 1926 and revised in 1936, has been adopted by forty states. See 9 U.L.A. 40 (Supp., 1953). The federal statute enunciates the method by which the constitutional provision is to be carried out; since it is not all-inclusive, the various states have enacted alternative procedures, chief among them being the U.C.E.A.

⁷ *Commonwealth of Kentucky v. Dennison*, 24 How. (U.S.) 66 (1860).

⁸ *Appleyard v. Massachusetts*, 203 U.S. 222, 227 (1906).

⁹ *Commonwealth of Kentucky v. Dennison*, 24 How. (U.S.) 66 (1860).

¹⁰ Neither the Constitution nor the federal statute provides for habeas corpus when a person is detained for extradition, but the writ has been available in extradition cases from a very early date. *Robb v. Connolly*, 111 U.S. 624 (1884). The U.C.E.A. § 10 explicitly provides that the accused is entitled to a habeas corpus hearing in the asylum state.

¹¹ *Ex parte Hart*, 63 Fed. 249 (C.A. 4th, 1894); *Ex parte Spears*, 88 Cal. 640, 26 Pac. 608 (1891); *In re Waterman*, 29 Nev. 288, 89 Pac. 291 (1907). This inquiry into the correctness of the form of the requisition papers and warrant does not extend to the indictment—the technical sufficiency of the indictment as a criminal pleading will not be inquired into. *Pierce v. Creecy*, 210 U.S. 387 (1908); *Nevada v. Stacher*, 346 U.S. 906 (1953).

¹² *Barnes v. Nelson*, 23 S.D. 181, 121 N.W. 89 (1909).

¹³ This is the question whether the person is a "fugitive from justice." If the accused can show that he was not present in the demanding state at the time the alleged crime was committed, he should be discharged. *People ex rel. Sherman v. Barr*, 131 N.Y. Misc. 915, 229 N.Y. Supp. 268 (S. Ct., 1928). The accused need not have consciously fled to avoid prosecution in

or (4) that he is not substantially charged with a crime under the laws of the demanding state.¹⁴ Of these four specific questions three are questions of fact and the fourth a question of law.¹⁵ It is under the guise of substantial charge of crime that constitutional claims have been most often asserted.

Attempts by the accused to introduce evidence involving his innocence or guilt or to assert a defense to the crime charged have been given short shrift by the courts. "[T]he constitutionally required surrender is not to be interfered with by the summary process of *habeas corpus* upon speculations as to what ought to be the result of a trial in the place where the Constitution provides for its taking place."¹⁶ A person is charged with a crime when a state makes a formal accusation against him,¹⁷ and the technical sufficiency of the indictment or affidavit may not be inquired into on *habeas corpus*.¹⁸ The accused is not permitted to raise as a defense the fact that he was illegally abducted from the asylum state and brought into the demanding state.¹⁹ The accused must be extradited even though he is insane, and therefore cannot be convicted of any crime.²⁰ And even a showing that the statute of limitations of the demanding state bars a prosecution for the crime charged will not prevent his rendition.²¹

The motives of the demanding state in requesting extradition have been investigated by some courts,²² constituting the one occasional exception to the

order to be a fugitive from justice. *Appleyard v. Massachusetts*, 203 U.S. 222 (1906). Actual presence in the demanding state is required, *Hyatt v. Corkran*, 188 U.S. 691 (1903), except under Section 6 of the U.C.E.A., a change which is of particular importance in abandonment and non-support cases.

¹⁴ *Ex parte Hart*, 59 Fed. 894 (C.C. Md., 1894); *Ex parte Reggel*, 114 U.S. 642 (1885); *Commonwealth v. Hare*, 36 Pa. Super. 125 (1908).

¹⁵ See *Roberts v. Reilly*, 116 U.S. 80, 95 (1885).

¹⁶ *Drew v. Thaw*, 235 U.S. 432, 440 (1914).

¹⁷ "[T]he word 'charged' was used [in the Constitution] in its broad signification to cover any proceeding which a State might see fit to adopt by which a formal accusation was made against an alleged criminal." In the *Matter of Strauss*, 197 U.S. 324, 331 (1905).

¹⁸ "These are matters for the trial court of the demanding state, and are not to be inquired of on this writ." *Munsey v. Clough*, 196 U.S. 364, 373 (1905); *Pierce v. Creedy*, 210 U.S. 387, 405 (1908). See cases cited note 11 *supra*.

¹⁹ *Pettibone v. Nichols*, 203 U.S. 192 (1906) (jurisdiction of demanding state attaches when the accused is brought into the state, however illegal the abduction may have been).

²⁰ *Drew v. Thaw*, 235 U.S. 432 (1914) (defense of insanity will not be inquired into in asylum state).

²¹ *Biddinger v. Commissioner of Police*, 245 U.S. 128 (1917) (defense of statute of limitations cannot be inquired into in asylum state).

²² *Ex parte Slauson*, 73 Fed. 666 (C.C. Va., 1896); *Ex parte Maddox*, 55 Okla. Cr. 114, 25 P. 2d 1111 (1933); *Ex parte Cassel*, 85 Okla. Cr. 4, 184 P. 2d 467 (1947); *Ex parte Patrick*, 86 Okla. Cr. 61, 189 P. 2d 420 (1948). The governor of the asylum state may, at his discretion, refuse to grant a warrant for extradition if he decides the motive for extradition is improper. When it is suspected that extradition is sought to aid the service of civil process (e.g., the collection of a debt) an extradition warrant may be denied. See *Barranger v. Baum*, 103 Ga. 465, 30 S.E. 524 (1898); *Work v. Corrington*, 34 Ohio St. 64 (1877); *State ex rel. Nisbett v. Toole*, 69 Minn. 104, 72 N.W. 53 (1897).

rule that the courts of the asylum state could not inquire into anything involving the innocence or guilt of the accused. However, the vast majority of the courts have held that the motives of the prosecutor or of either of the governors are not open to judicial investigation,²³ and at least one state formerly allowing this inquiry has reached the contrary result under the Uniform Criminal Extradition Act.²⁴

II

Cases in which a constitutional claim is asserted by the fugitive detained for extradition fall into three broad classes: (1) where the fugitive claims a prospective deprivation of constitutional rights, (2) where he claims a past deprivation of constitutional rights,²⁵ and (3) where he claims that the crime alleged is itself unconstitutional.

A number of cases have explicitly dealt with a claim asserted by a detained fugitive that he will in the future be denied the protection of constitutional due process if returned to the demanding state,²⁶ but in only one of them, *Commonwealth ex rel. Mattox v. Superintendent of Prison*,²⁷ was the fugitive released. In the earliest, *Marbles v. Creedy*,²⁸ a Negro fugitive alleged that he would be in danger of being lynched if returned. The Supreme Court held that such an allegation by a fugitive could not prevent his extradition. The Third Circuit later held in *United States ex rel. Brown v. Cooke*²⁹ that a federal court in the asylum state could not consider whether or not the fugitive would receive a fair trial in the demanding state, since the matters open to judicial inquiry in the habeas

²³ *Pettibone v. Nichols*, 203 U.S. 192 (1906); *Worth v. Wheatley*, 183 Ind. 598, 108 N.E. 958 (1915); *Commonwealth ex rel. Flower v. Superintendent of Prison*, 220 Pa. 401, 69 Atl. 916 (1908). A statute providing that habeas corpus be issued where "the requisition is not made in good faith but is for some ulterior purpose other than the punishment of crime" has been held unconstitutional. *People ex rel. Carr v. Murray*, 357 Ill. 326, 192 N.E. 198 (1934).

²⁴ *Ex parte Scott*, 91 Okla. Cr. 345, 219 P. 2d 249 (1950). U.C.E.A. § 20 explicitly provides that there be no inquiry in the asylum state into the guilt or innocence of the accused. This has been uniformly interpreted as forbidding any judicial investigation of motives. *Moreaux v. Ferrin*, 98 Utah 450, 100 P. 2d 560 (1940).

²⁵ The problem is often complicated by the fact that in a number of the cases the fugitive involved has claimed both a past and a prospective deprivation of constitutional rights. In these situations the courts have rarely dealt with both of the claims, but have decided the case on the basis of one or blended the two together without distinguishing between them.

²⁶ *Marbles v. Creedy*, 215 U.S. 63 (1909); *United States ex rel. Brown v. Cooke*, 209 Fed. 607 (C.A. 3d, 1913), appeal dismissed for lack of jurisdiction, 238 U.S. 613 (1914); *Ople v. Weinbrenner*, 285 Mo. 365, 226 S.W. 256 (1920), cert. denied, 256 U.S. 695 (1921); *Ex parte Ray*, 215 Mich. 156, 183 N.W. 774 (1921); *In re Paramore*, 95 N.J. Eq. 386, 123 Atl. 246 (Ch., 1924), aff'd, 96 N.J. Eq. 397, 125 Atl. 926 (Err. & App., 1924); *Commonwealth ex rel. Mattox v. Superintendent of Prison*, 152 Pa. Super. 167, 31 A. 2d 576 (1943); and *Commonwealth ex rel. Mills v. Baldi*, 166 Pa. Super. 321, 70 A. 2d 439 (1950), cert. denied, 339 U.S. 986 (1950).

²⁷ 152 Pa. Super. 167, 31 A. 2d 576 (1943).

²⁸ 215 U.S. 63 (1909).

²⁹ 209 Fed. 607 (C.A. 3d, 1913).

corpus proceeding are strictly limited to the legality of the detention by the asylum state. But in the *Mattox* case the Pennsylvania court concluded that "where there is sufficient competent evidence to sustain a charge that the accused relator will be unable to have a fair trial and will be in grave danger of being lynched if returned . . . the judge hearing the writ of habeas corpus may refuse to give him over into the custody of [the demanding state's] representatives."³⁰ The facts of the *Mattox* case were extreme: the accused was a youth of sixteen at the time of the alleged crime and there was plentiful evidence of mob feeling running so high that lynching was not improbable.³¹ The case does not fit into the customary categories of questions inquired into in rendition cases. Certainly the prospective denial of constitutional rights has nothing to do with the legality of the accused's detention by the asylum state. The rationale of the *Mattox* case rests on a different ground entirely: if *Mattox* were lynched upon his return to the demanding state the damage would be irreparable—no other remedy would then be available to him.

A much larger number of cases, more recent in point of time, have been concerned with an alleged past deprivation of the fugitive's constitutional rights.³² In *Hale v. Crawford*³³ an agreed set of facts showed that the indictment against the accused was returned by a grand jury selected without Negroes, depriving the accused of the equal protection of the laws. The First Circuit held that this

³⁰ Commonwealth ex rel. *Mattox v. Superintendent of Prison*, 152 Pa. Super. 167, 173, 31 A. 2d 576, 578 (1943).

³¹ The Pennsylvania court, understandably impressed by the tenor of the evidence introduced by the petitioner, felt that "an ounce of prevention . . . is worth a pound of cure." Ibid., at 177 and 580. The decision relied heavily on a phrase in the U.C.E.A. § 10, in force in Pennsylvania, that a judge "may inquire into the facts of the case," and on negative inferences drawn from statements in *Marbles v. Creecy*, 215 U.S. 63, 69-70 (1909), and Commonwealth ex rel. *Flower v. Superintendent of Prison*, 220 Pa. 401, 411, 69 Atl. 916, 919 (1908). For a discussion of the *Mattox* case, see 53 Yale L. J. 359 (1944); 47 Col. L. Rev. 470 (1947); 17 Temp. L. Q. 469 (1943); Alexander, *The Thomas Mattox Extradition Case*, 2 Nat. Bar J. 1 (1944).

³² The cases can be broken down into two categories:

(1) Petitioner, a person who has fled prior to his trial, claims that the indictment returned against him in the demanding state is void since the grand jury was selected solely of whites, in violation of the Fourteenth Amendment. *People ex rel. Whitfield v. Enright*, 117 N.Y. Misc. 448, 191 N.Y. Supp. 491 (S. Ct., 1921); *Hale v. Crawford*, 65 F. 2d 739 (C.A. 1st, 1933); *Wilson v. Turner*, 168 Kan. 1, 208 P. 2d 846 (1949).

(2) Petitioner, an escaped prisoner, claims that his conviction was obtained without due process and/or that he has been subject to cruel and unusual punishment while confined in the demanding state. *Powell v. Meyer*, 134 N.J.L. 169, 46 A. 2d 671 (S. Ct., 1946); *In re Cotton*, 24 N.J. Misc. 267, 47 A. 2d 830 (S. Ct., 1946); *In re Colier*, 140 N.J. Eq. 469, 55 A. 2d 29 (Err. & App., 1947); *Johnson v. Dye*, 175 F. 2d 250 (C.A. 3d, 1949); *Harper v. Wall*, 85 F. Supp. 783 (D. N.J., 1949); *Ex parte Marshall*, 85 F. Supp. 771 (D. N.J., 1949); *Ex parte Quilliam*, 89 N.E. 2d 493 (Court of Appeals Ohio, 1949), appeal dismissed, 152 Ohio St. 368, 89 N.E. 2d 494 (1949); *United States ex rel. Jackson v. Ruthazer*, 181 F. 2d 588 (C.A. 2d, 1950); *Johnson v. Matthews*, 182 F. 2d 677 (App. D.C., 1950); *Davis v. O'Connell*, 185 F. 2d 513 (C.A. 8th, 1950); *Ross v. Middlebrooks*, 188 F. 2d 308 (C.A. 9th, 1951); *Sweeney v. Woodall*, 344 U.S. 86 (1952).

³³ 65 F. 2d 739 (C.A. 1st, 1933).

evidence could not be considered by a federal court in the asylum state, but presented a question solely for the courts of the demanding state.³⁴ The rationale underlying the petitioner's claim was that there was no substantial charge of crime, since the indictment by which the demanding state alleged a crime against him and by reason of which he was held was void as unconstitutionally obtained.³⁵

Some sixteen years later the first of the "chain-gang cases," *Johnson v. Dye*,³⁶ came before the Third Circuit. Assuming that the power existed to make the inquiry, and without discussing prior authority in extradition cases, the court concluded that the petitioner "must be set at liberty for the State of Georgia has failed signally in its duty as one of the sovereign States of the United States to treat a convict with decency and humanity."³⁷ The petitioner had escaped to Pennsylvania from a Georgia prison where he was serving a long sentence for murder. Arrested and held for extradition, he sought by petition for habeas corpus, first in the Pennsylvania state courts and then in the federal district court, to prevent his return. He had not, however, appealed the denial of his petition beyond the intermediate appellate state court before going into the federal courts. The petitioner attacked his extradition on three grounds: (1) the unconstitutionality of the trial in which he was convicted in Georgia, (2) the subjection during imprisonment in Georgia to cruel and unusual punishment in violation of the Fourteenth Amendment, and (3) the likelihood of further subjection to cruel and unusual punishment should he be returned. The Third Circuit reversed the district court's denial of the petition, relying on the second ground: past deprivation of constitutional rights. To reach this conclusion it was necessary to decide: (1) that the extraditee need not exhaust his state remedies in the asylum state before entering the federal courts,³⁸ (2) that the constitutional question raised by the petitioner was within the jurisdiction of

³⁴ There was almost no prior authority, the only case on the point being *People ex rel. Whitfield v. Enright*, 117 N.Y. Misc. 448, 191 N.Y. Supp. 491 (S. Ct., 1921) (court of asylum state could not consider upon habeas corpus the alleged unconstitutionality of grand jury selection). Consult *Race Discrimination and Interstate Rendition—The Crawford Case*, 43 Yale L. J. 444 (1934).

³⁵ Meanwhile the New Jersey courts passed on the question in a series of cases dealing with escaped prisoners, holding that the courts of the asylum state are without jurisdiction to consider alleged deprivation of the constitutional rights of the extraditee by the demanding state. *Powell v. Meyer*, 134 N.J.L. 169, 46 A. 2d 671 (S. Ct., 1946); *In re Cotton*, 24 N.J. Misc. 267, 47 A. 2d 830 (S. Ct., 1946); *In re Colier*, 140 N.J. Eq. 469, 55 A. 2d 29 (Err. & App., 1947). Accord: *Huff v. Ayers*, 6 N.J. Super. 380, 71 A. 2d 392 (Super. Ct., 1950).

³⁶ 175 F. 2d 250 (C.A. 3d, 1949).

³⁷ *Ibid.*, at 256.

³⁸ Since the petitioner had not exhausted his state remedies in either Pennsylvania (the asylum state) or Georgia (the demanding state), this was necessary to the decision. There was authority to support this position, but a conflict existed. Compare *United States ex rel. McCline v. Meyering*, 75 F. 2d 716, 718 (C.A. 7th, 1934) with *Powell v. Meyer*, 147 F. 2d 606, 607 (C.A. 3d, 1945).

the court on habeas corpus, and (3) that the petitioner had established that he had been denied his constitutional rights by the demanding state.

Only with difficulty can the decision be rationalized into the traditional scheme of habeas corpus. The argument is that the detention by the asylum state is illegal since it effectuates an unconstitutional act of the demanding state—a conviction or confinement in violation of the Fourteenth Amendment.³⁹ This argument is tenuous at best, for cruel and unusual punishment in the demanding state would seem to have little or no relation to the legality of the detention by the asylum state. Yet the Third Circuit, undoubtedly moved by the appealing claim presented by the fugitive, and not wishing to return him to the scene of abuses he had proven, relied on this past deprivation of constitutional rights in releasing him.

The Supreme Court reversed *Johnson v. Dye* in an unedifying per curiam decision on the ground, apparently, that state remedies had not been exhausted, but gave no hint as to which state they were referring to—the asylum state or the demanding state.⁴⁰ A number of courts, assuming that the decision of the Third Circuit was good law except on the point that remedies of the asylum state need not be exhausted before entry into the federal courts, allowed escaped prisoners to introduce evidence concerning the constitutionality of their conviction and incarceration in the demanding state.⁴¹

A forceful reassertion of the limited scope of inquiry on habeas corpus in extradition cases was the next development. In *Johnson v. Matthews*⁴² an escaped convict held for rendition charged that he had been subjected to cruel and inhuman treatment in the demanding state. The Court of Appeals for the District of Columbia held that the established scope of habeas corpus in extradition cases did not permit inquiry into the constitutional question by courts located in the asylum state. The decision explicitly turned on the lack of jurisdiction in the federal court to hear the question on habeas corpus.⁴³

The decision in *Johnson v. Matthews* created a sharp conflict between circuits. Two years later, after the Eighth and Ninth Circuits had followed the *Matthews* case,⁴⁴ the Supreme Court was called upon to resolve the conflict in *Sweeney v. Woodall*.⁴⁵ An escaped convict held for extradition charged both past and pros-

³⁹ See Horowitz & Steinberg, *The Fourteenth Amendment—Its Newly Recognized Impact on the "Scope" of Habeas Corpus in Extradition*, 23 So. Cal. L. Rev. 441, 446 et seq. (1950).

⁴⁰ *Dye v. Johnson*, 338 U.S. 864 (1949). The cryptic opinion cited *Ex parte Hawk*, 321 U.S. 114 (1944) (state remedies must be exhausted before a conviction in a state court could be tested on habeas corpus in the federal courts).

⁴¹ *Ex parte Marshall*, 85 F. Supp. 771 (D. N.J., 1949); *Harper v. Wall*, 85 F. Supp. 783 (D. N.J., 1949); *United States ex rel. Jackson v. Ruthazer*, 181 F. 2d 588 (C.A. 2d, 1950); *Application of Middlebrooks*, 88 F. Supp. 943 (S.D. Cal., 1950).

⁴² 182 F. 2d 677 (App. D.C., 1950).

⁴³ *Ibid.*, at 679.

⁴⁴ *Davis v. O'Connell*, 185 F. 2d 513 (C.A. 8th, 1950); *Ross v. Middlebrooks*, 188 F. 2d 308 (C.A. 9th, 1951).

⁴⁵ 344 U.S. 86 (1952).

pective subjection to cruel and inhuman treatment by the demanding state. The Supreme Court held that the prisoner could not raise these questions in a federal court in the asylum state, at least without showing that remedies were unavailable in the demanding state. The language of the per curiam opinion places the decision on narrow grounds, keyed to the particular facts before the Court. The Court stated that the fugitive "has asked the federal court in his asylum to pass upon the constitutionality of his incarceration in the demanding state, although the demanding state is not a party before the federal court"⁴⁶ and although he has made no attempt to raise such a question in the demanding state. The question is whether, under these circumstances, the district court should entertain the fugitive's application on its merits."⁴⁷ The Court's negative decision resolved the conflict, but the holding, if confined to the facts presented, leaves many questions unanswered.

A recent Illinois case, *People ex rel. Gilbert v. Babb*,⁴⁸ raised what is perhaps a third type of question involving a constitutional claim on behalf of an extraditee. The question presented was whether the courts located in the asylum state could ever inquire into the constitutionality of the crime for which extradition is sought. Margaret Gilbert, the relator, had associated in Massachusetts during the period from 1947 to 1951 with persons of suspected Communist affiliation. Massachusetts authorities wanted her to testify concerning these associations, but Mrs. Gilbert had left Massachusetts to take up residence in Illinois. Efforts failing to obtain her voluntary attendance as a witness, Mrs. Gilbert was indicted by a Massachusetts grand jury for the common-law crime, in Massachusetts, of conspiracy to overthrow the government,⁴⁹ and her extradition was demanded. Detained under an extradition warrant issued by the governor of Illinois, Mrs. Gilbert contended, in a habeas corpus proceeding, that she was not substantially charged with a crime under the laws of the demanding state, first, because such crime could not exist in violation of the protection accorded free speech under the First Amendment, and second, because the Massachusetts indictment was unconstitutionally vague and indefinite. The Illinois Supreme Court denied her appeal as to the first argument on the ground that the constitutionality of the crime alleged was not within the permissible scope of inquiry in habeas corpus proceedings in the asylum state, and as to the second on the

⁴⁶ Cf. *Johnson v. Dye*, 175 F. 2d 250, 253, 257-58 (C.A. 3d, 1949). There a concurring judge felt that the failure of the State of Georgia to appear was an indication of a lack of interest in Johnson which lent some substance to Johnson's arguments.

⁴⁷ *Sweeney v. Woodall*, 344 U.S. 86, 88-89 (1952).

⁴⁸ 415 Ill. 349, 114 N.E. 2d 358 (1953).

⁴⁹ The indictment charged that the relator "did conspire . . . to advocate, advise, counsel and cite the overthrow by force and violence of the government of the Commonwealth of Massachusetts by speech, exhibition, distribution and promulgation of certain written and printed documents, papers and pictorial representations, against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided." *Ibid.*, at 359 and 364. The reference to statute was admittedly surplusage: Mrs. Gilbert was charged with a common-law crime retained by Massachusetts.

ground that the technical sufficiency of the indictment could not be questioned. The court felt that, although there was no case determining the exact point, prior authority recommended, if it did not require, the result reached.⁵⁰

In *Pearce v. Texas*,⁵¹ a venerable Supreme Court case, a similar question was presented. Pearce had been indicted under an Alabama statute authorizing an indictment without allegations as to the time or place of the commission of the crime. He argued in rendition proceedings in the courts of the asylum state that this statute of the demanding state was unconstitutional, but they declined to consider the question and were upheld by the Supreme Court. The crucial question was not the technical sufficiency of the indictment as a criminal pleading but rather the substantive sufficiency of the charge of crime. In allowing the demanding state by statute to withdraw habeas corpus jurisdiction from the asylum state the case went much further, for it denied the fugitive any possibility of showing that he was not present in the demanding state at the time the crime was committed or that he is not substantially charged with a crime. The habeas corpus proceeding was reduced to an inquiry as to whether the fugitive was the person named and the papers were in proper order. The refusal to examine the constitutionality of the demanding state's law in the *Gilbert* cases is less startling.

The constitutional argument advanced by the fugitive in the *Gilbert* case bears a marked similarity to claims of past deprivation of constitutional rights such as were advanced in *Hale v. Crawford*,⁵² where it was claimed that the indictment was void since it had been returned by an improperly constituted grand jury. Mrs. Gilbert's theory was much the same: since the crime alleged against her was unconstitutional, the indictment returned under it and the requisition papers were void and there was no substantial charge of crime. This reasoning, however, would seem to be more tenuous than in the *Crawford* situation, since the indictment, though based on an unconstitutional crime or statute, meets the formal requirements and can hardly be said not to have existed.

The pressure to expand the scope of inquiry of habeas corpus in extradition cases, as manifested in the three types of cases discussed above, has on the whole produced meager results. Only in one case involving the prospective deprivation of constitutional rights has the inquiry been allowed and the extraditee released.⁵³ Although the inquiry has been allowed in many cases dealing with past deprivation of constitutional rights,⁵⁴ the decision of the Supreme Court in *Sweeney v. Woodall*⁵⁵ forecloses that result in the future. No reported cases have

⁵⁰ *Ibid.*, at 356 and 362.

⁵¹ 155 U.S. 311, 313-14 (1894), *aff'd* 23 S.W. 15 (Tex. Cr., 1893).

⁵² 65 F. 2d 739 (C.A. 1st, 1933). See pages 740-741 *supra*.

⁵³ *Commonwealth ex rel. Mattox v. Superintendent of Prison*, 152 Pa. Super. 167, 31 A. 2d 576 (1943).

⁵⁴ See cases cited notes 36 and 41 *supra*.

⁵⁵ 344 U.S. 86 (1952).

allowed an inquiry by courts located in the asylum state into the constitutionality of the crime for which rendition is sought. Direct constitutional attack by the extraditee has undoubtedly been less fruitful than a number of other circuitous modes of attack.⁵⁶

III

The writ of habeas corpus, in interstate rendition as well as in other areas, obviously "cannot be made the instrument for re-determining the merits of all cases in the legal system that have ended in detention."⁵⁷ Limitations on the scope of inquiry on habeas corpus are therefore a necessity. In interstate rendition the limitations have been formulated in terms both of the exhaustion of state remedies and the jurisdictional power of the courts. It may be suggested that these formulations, often merged and confused by the courts, are conclusions expressing the result rather than determinative tests of the scope of the writ.

The "exhaustion of state remedies" formulation is the less helpful, for, strictly speaking, it is not directly relevant to the rendition situation. The concept of the exhaustion of state remedies arose out of the concurrent jurisdiction of state and federal courts to issue writs of habeas corpus to persons held under color of any law of the United States or in violation of the Constitution or laws or treaties of the United States.⁵⁸ The doctrine of comity⁵⁹ between federal and state courts gradually resolved the problem. Federal courts, acting under this principle, deferred action on petitions for habeas corpus until state courts with concurrent jurisdiction had passed on the matter, denying jurisdiction as a matter of judicial discretion.⁶⁰ Discretion hardened into a mandatory rule that

⁵⁶ As a matter of common practice, the governor of the asylum state exercises discretionary power whether or not to grant extradition warrants. Among the reasons for which extradition has been refused are the danger of lynching in the demanding state, a suspicion that the prosecution is motivated by bad faith or is spurious, and, perhaps, the denial—past or prospective—of constitutional due process in the demanding state. Consult Note, 32 Col. L. Rev. 1411, 1419 n. 48 (1932). Moreover, the courts of the asylum state have occasionally released an extraditee on habeas corpus, disguising their action under any one of a number of technical holdings. Consult *Habeas Corpus in Interstate Rendition*, 47 Col. L. Rev. 470, 475 n. 51 (1947).

⁵⁷ Hart & Wechsler, *op. cit.* supra note 1, at 1239.

⁵⁸ Broad authority to grant writs of habeas corpus "where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States" was conferred upon the federal courts by 14 Stat. 385 (1867). Today, the jurisdiction of the federal courts to grant writs of habeas corpus can be found in 62 Stat. 964 (1948), 28 U.S.C.A. § 2241 (1949).

⁵⁹ Comity arises from the mere fact that we have a dual system of government comprised of many state sovereignties and an overarching federal government. There are two types of comity: (1) between a state government and the federal government, and (2) between state governments. Exhaustion of state remedies properly applies only to the former. Inasmuch as interstate rendition involves the cooperation of states in the enforcement of their criminal law it is concerned with comity of the second type; but since it is a federal process supervised by the federal courts it encompasses both aspects of comity.

⁶⁰ *Ex parte Royall*, 117 U.S. 241 (1886); cf. *Whitten v. Tomlinson*, 160 U.S. 231 (1895).

state remedies must be exhausted before resort to the federal courts.⁶¹ In 1948 this rule was codified.⁶²

Exhaustion of state remedies has been most often involved where a person contests the constitutionality of his conviction by a state court. He may not do so in a federal court until all state remedies have been exhausted. In extradition cases, where two states are involved, this rule should properly be applied only to the *asylum* state where the extraditee challenges the legality of his detention. But the courts have often phrased their decisions declining to hear the constitutional question in the asylum state in terms of the necessity of exhausting the remedies of the *demanding* state before they could take jurisdiction. Although this is a way of deciding the permissible scope of inquiry on habeas corpus, it is confusing because of its inappropriate application to state courts (the rule properly refers only to a federal court deferring a habeas corpus proceeding until the remedies of the state in which the federal court sits have been exhausted) and to courts located in the demanding state (the rule contemplates only one state, whose remedies must be exhausted before the federal courts within that state may act). The courts, however, have persisted in the use of the "exhaustion of state remedies" terminology for perhaps two reasons: as a convenient though indelicate method of incorporating comity ideas,⁶³ and as a method of reserving the possibility, in exceptional cases which might arise, of hearing the constitutional claim in the asylum state.

The jurisdictional power of courts located in the asylum state to consider constitutional questions raised by the fugitive would appear to be a sounder and more basic approach to the problem here involved. Yet, even though it states the problem in its ultimate terms, it provides no certain answer, because the concept of "jurisdiction" is shifting in meaning, abstract in character, and difficult of application. An illustration may suffice: it can be argued, on the one hand, that the asylum state's detention of the fugitive is based on Article IV of the Constitution and that when the requirements of that article are once met, there can be no further inquiry in the sense that a court would not have the power to proceed further. But, on the other hand, a fugitive challenging his detention and prospective extradition by way of a constitutional assertion of rights is not generally contradicting that he is held in accordance with Article IV. His assertion is rather that the action of the asylum state in holding him in custody is illegal since it effectuates an unconstitutional act of the demanding

⁶¹ *Ex parte Hawk*, 321 U.S. 114 (1944). For a discussion of this gradual development into a mandatory rule, see Hart & Wechsler, *op. cit.* supra note 1, 1268-99 (1953).

⁶² 62 Stat. 967 (1948), 28 U.S.C.A. § 2254 (1950): "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner." Exhaustion of state remedies has been held to include certiorari to the Supreme Court. *Darr v. Burford*, 339 U.S. 200 (1950).

⁶³ See page 751 *infra*.

state: a void indictment or trial, an inhuman confinement, the irreparable danger of future inhuman confinement or loss of life, or an unconstitutional crime.⁶⁴ Here at once, one constitutional provision is brought face to face with another—their interaction and conflict is itself the source of the problem. “Jurisdiction,” insofar as it is something other than precedent, is no guide.

Concepts such as “jurisdiction,” “power,” or “authority,” distinctions between actions that are “void” and merely “voidable,” while traditional and relevant in marking boundaries . . . , serve less often to explain than to express conclusions as to whether relief on the writ shall lie. Other factors may have a more generative influence upon results, such as the nature and importance of the legal right asserted to establish illegality, the need for speed in the determination and the availability of other remedies, the extent to which the inquiry upon the writ will further or will thwart the ordinary processes of law administration, the impact of the inquiry on tender areas of power distribution like the relation between federal and state or civilian and military courts.⁶⁵

The problem, easily and oversimply stated in terms of “jurisdiction” or “power,” cannot be resolved without a discussion of fundamental policies.

The reasons usually advanced for hearing the constitutional claim of the extraditee in the courts of the asylum state stem from a desire to protect the rights of the individual. It is argued that comity—both interstate and state-federal—is a rule of convenience and not of necessity, and that the interstate rendition mechanism will not be crippled by allowing the fugitive to present his constitutional argument before his rendition rather than after.⁶⁶ This reasoning is based, although usually not explicitly, on three closely related and far-reaching ideas. First, that as a practical matter remedies are unavailable to the fugitive in the demanding state, or, at the very least, are accessible only after much travail. It is true that the remedies of the demanding state may be beset with difficulties,⁶⁷ but it is generally not the case that remedies are entirely unavailable.⁶⁸ Difficulties of proof, the burden of persuading a jury, and other such factors are necessary concomitants of litigation itself and can hardly be abandoned by any tribunal.

A second idea is more basic. This is the belief that the fugitive will not re-

⁶⁴ Consult Horowitz & Steinberg, *op. cit. supra* note 39 (*passim*).

⁶⁵ Hart & Wechsler, *op. cit. supra* note 1, at 1239. Consult *The Writ of Habeas Corpus in the Federal Courts*, 35 Col. L. Rev. 404 (1935); *The Freedom Writ—The Expanding Use of Federal Habeas Corpus*, 61 Harv. L. Rev. 657 (1948).

⁶⁶ Consult Horowitz & Steinberg, *op. cit. supra* note 39; *Habeas Corpus in Extradition Proceedings*, 1 Duke Bar J. 188 (1951); *The Scope of Habeas Corpus Inquiry in Extradition Cases*, 48 Nw. U. L. Rev. 634 (1953). Judicial expressions are to be found in *Johnson v. Dye*, 175 F. 2d 250 (C.A. 3d, 1949) (Judge Biggs); *Johnson v. Matthews*, 182 F. 2d 677, 684 (App. D.C., 1950) (Judge Bazelon, dissenting); *Application of Middlebrooks*, 88 F. Supp. 943 (S.D. Cal., 1950) (Judge Carter); and *Sweeney v. Woodall*, 344 U.S. 86, 91 (1952) (Justice Douglas, dissenting).

⁶⁷ Consult *Prisoners' Remedies for Mistreatment*, 59 Yale L. J. 800 (1950).

⁶⁸ In Georgia, the state involved in most of the “chain-gang cases,” the state constitution provides that the writ of habeas corpus may not be suspended. Ga. Const. Art. 1, § 1, cl. 11. It is supplemented by state statute. Ga. Code Ann. (1937) § 50-101 et seq.

ceive substantial justice in the demanding state. Remedies, it is argued, may be available in the sense that they appear on the statute-books; yet, as a matter of actual fact the existence of race or other prejudice rebuts the presumption that the political authorities and judicial system of the demanding state can be relied upon to give the fugitive a fair trial, correct constitutional abuses and secure him from violence. The abstract legal right is negated by the prejudice or discrimination, the existence of which, it is thought, is capable of proof in the courts of the asylum state. Judge O'Connell, dissenting in part in *Johnson v. Dye*, gave explicit recognition to this: "In the absence . . . of effective steps toward reform in Georgia . . . it would be ingenuous to expect . . . Georgia authorities [whom the victim has accused of misconduct] to accord to Johnson's constitutional rights greater respect than this court finds was conceded to Johnson during his Georgia imprisonment."⁶⁹ Although this belief is the very foundation for the view that the asylum state should concern itself with the constitutional questions raised by the fugitive, it has been explicitly recognized by only a few courts and commentators.⁷⁰ Yet it is necessary to that view. If complete justice would be given the fugitive in the demanding state, the preservation of the fugitive's constitutional rights would not demand that courts located in the asylum state consider them.

Third, the idea that the best way to improve the protection accorded to constitutional rights is to have each state, as well as the federal court system, police the laws, procedures and institutions of other states. This is analogous to the reasoning supporting the exclusion by the federal courts of evidence obtained by means of an illegal search and seizure, the argument being that the only effective way to enforce proper police conduct is to take away the fruits of the illegally acquired evidence, even if this means the release of a guilty person.⁷¹ In the extradition situation a person charged with or convicted of crime would be released because of past or prospective denial of constitutional due process by the demanding state; in order to enforce its criminal law the demanding state would be required to give protection to the individual's constitutional rights. This is not without some effect: following the criticism of its penal system in the first chain-gang cases and attendant nation-wide publicity, Georgia abolished chain gangs by statute.⁷² But this argument does not have the same force in the

⁶⁹ *Johnson v. Dye*, 175 F. 2d 250, 258 (C.A. 3d, 1950).

⁷⁰ Consult Sutherland, *Due Process and Cruel Punishment*, 64 Harv. L. Rev. 271 (1950), and see the dissent of Judge O'Connell in *Johnson v. Dye*, 175 F. 2d 250, 257-59 (C.A. 3d, 1949).

⁷¹ See *Weeks v. United States*, 232 U.S. 383 (1914) (in federal prosecution in federal court evidence obtained by means of an illegal search and seizure by federal officers not admissible against the accused). But cf. *Wolf v. Colorado*, 338 U.S. 25 (1949), and *Irvine v. California*, 347 U.S. 128 (1954). See the dissent of Justice Douglas in *Irvine v. California*, *ibid.*, at 149-52, for an expression of the policy involved when exclusion of evidence is used as a sanction in order to enforce lawful police conduct.

⁷² Georgia abolished chain gangs by statute in 1946. Whipping, shackles and stripes were explicitly forbidden. Ga. Code Ann. (Supp., 1951) § 77-370.

extradition area as it does in the illegal-evidence situation, mainly because it is the citizens of the asylum state who bear the burden of the demanding state's constitutional lapses. The fugitive, usually accused or convicted of a serious crime, will be released in their midst,⁷³ and the grapevine will quickly carry back to the demanding state an invitation to those similarly situated.⁷⁴

Although never attaining a determinative position, and usually going unvoiced, there is a substratum of emotional reaction which should be mentioned. A basic fact is that the fugitive often presents a very appealing claim. Moreover, the ancient idea of a place of refuge⁷⁵ is a lurking symbol: there must be a sanctuary to which an individual can retreat, where there can be a fresh start in life with the past forgotten. A parallel can be drawn here to the strange but strong emotional appeal of the condemned man who resists on constitutional grounds a second subjection to the executioner, after the first attempt at execution has failed.⁷⁶ This idea has no legal expression, but its emotive impact may help a court to a decision justified in legal terms.

The view that courts, state or federal, located in the asylum state should not inquire into the constitutional claim asserted by the fugitive has been triumphant in the courts. The underlying policies originate in the constitutional provision respecting extradition and appeal to the power of precedent (the traditionally narrow scope of habeas corpus in extradition cases), but rest ultimately on the paramount importance to our federalism of federal-state and interstate comity.

The constitutional provision for interstate rendition creates by its phrasing a duty on a state to deliver up to the demanding state a person who has (1) been "charged" with a crime and (2) "fled" from justice.⁷⁷ From this wording, sub-

⁷³ The only remedy available to the courts of the asylum state, apparently, is to release the fugitive on habeas corpus. In *re* Paramore, 95 N.J. Eq. 386, 387, 123 Atl. 246, 247 (Ch., 1924). It is doubtful whether a federal prisoner can be remanded to a federal prison with instructions for the protection of his constitutional rights. Cf. *Coffin v. Reichard*, 143 F. 2d 443 (C.A. 6th, 1944), and *Williams v. Steele*, 194 F. 2d 32, 34 (C.A. 8th, 1952). No injunctive relief would seem possible when a state prisoner is involved. Consult *Prisoner's Remedies for Mistreatment*, 59 Yale L. J. 800 (1950). The release of the fugitive on habeas corpus is an inconclusive remedy, for if the fugitive leaves the asylum state rendition proceedings may begin anew in the second state refuge. Consult *Powell v. Meyer*, 134 N.J.L. 169, 46 A. 2d 671 (S. Ct., 1946) and *Habeas Corpus in Interstate Rendition*, 47 Col. L. Rev. 470, 477 (1947).

⁷⁴ While it is true, as pointed out by Horowitz & Steinberg, *op. cit. supra* note 39, at 457, and in *Scope of Habeas Corpus Inquiry*, 48 Nw. U. L. Rev. 634, 638 (1953), that prisoners do not escape in order to resist their extradition from the state to which they escape, there are yet some grounds to fear such an occurrence in the future. And the Supreme Court's suggestion that an escaped prisoner should have no more rights because of his escape than he would have had had he remained in the demanding state has force. *Sweeney v. Woodall*, 344 U.S. 86, 79 (1952).

⁷⁵ See Num. 35:9-15, 26-29 [Old Testament, AV].

⁷⁶ See *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947) (subjection to a second electrocution, after first attempt had failed, not cruel and unusual punishment).

⁷⁷ See notes 4 and 5 *supra*.

stantially repeated in the federal statute enforcing the constitutional provision, have arisen the four discrete questions which courts in the asylum state, whether they be state or federal, have traditionally considered on habeas corpus. Consequently, rendition has been viewed as a step toward the prosecution of accused persons, which is largely procedural in nature. It is often said that no substantive rights are involved in the habeas corpus hearing,⁷⁸ and that it is a summary process designed to correct obvious mistakes, and testing only the legality of detention by the asylum state.⁷⁹

A cluster of ideas grouped around the word "comity" is the primary foundation for the view that courts located in the asylum state should refuse to inquire into the constitutional question raised by the fugitive. Comity, both between the states themselves and between the state and federal governments, is a crucial consideration.⁸⁰ A court located in one state should defer action on causes properly within its jurisdiction "until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass on the matter."⁸¹ "[I]t would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation. . . ."⁸²

A number of factors are involved here: the idea that courts in one state should not pass on the laws or institutions of another state;⁸³ the general reluctance of courts to consider at an early stage a constitutional question that might well become academic (if, for example, the person extradited should be discharged or acquitted in the demanding state);⁸⁴ the fact that courts in the asylum state are far removed from the scene of the alleged constitutional violation, with consequent difficulty in determining any factual or even legal questions involved and forcing the demanding state to defend the constitutionality of its laws or institutions in a distant forum;⁸⁵ and the dangers, if courts in the asylum state were permitted as a matter of course to hear the constitutional

⁷⁸ See *Illinois ex rel. McNichols v. Pease*, 207 U.S. 100, 112 (1907); *Johnson v. Matthews*, 182 F. 2d 677, 682 (App. D.C., 1950).

⁷⁹ See *Drew v. Thaw*, 235 U.S. 432, 439-40 (1914).

⁸⁰ See *Appleyard v. Massachusetts*, 203 U.S. 222, 227-28 (1906); *Pierce v. Creedy*, 210 U.S. 387, 404 (1908); *Johnson v. Matthews*, 182 F. 2d 677, 679-82 (App. D.C., 1950).

⁸¹ *Darr v. Burford*, 339 U.S. 200, 204 (1950). See *Ross v. Middlebrooks*, 188 F. 2d 308, 311 (C.A. 9th, 1951).

⁸² *Darr v. Burford*, 339 U.S. 200, 204 (1950).

⁸³ All state courts are equally bound to observe the Constitution as the supreme law of the land. *Robb v. Connolly*, 111 U.S. 624 (1884). Yet the propriety of one state court's doing so under the assumption that the courts of another state will not do so, when such an assumption means passing judgment on the laws or institutions of a sister state, is open to serious question.

⁸⁴ See *Albertson v. Millard*, 345 U.S. 242 (1953), for a recent Supreme Court expression of this policy.

⁸⁵ In *Sweeney v. Woodall*, 344 U.S. 86, 90 (1952), the Supreme Court stated that the demanding state should not be put under the obligation of defending its laws or institutions in a distant forum in order to enforce its criminal law. But see note 46 *supra*.

questions, both to the efficient operation of the rendition process and to interstate harmony. Criticism of the institutions of one state by federal or state courts located in another state creates strong resentment,⁸⁶ and the ability on the part of a fugitive to resist extradition through successive applications for habeas corpus in both the state and federal courts of the asylum state, by raising constitutional questions, could delay extradition and consequent prosecution for a long period.⁸⁷ At any rate, no matter how these conflicting policies are balanced, there is no doubt that the Supreme Court takes comity very seriously: "Considerations fundamental to our federal system require that the prisoner test the claimed unconstitutionality of his treatment by Alabama in the courts of that state."⁸⁸

Although the rule seems clearly established that the constitutional question of the fugitive's mistreatment by the demanding state should be left to the courts of that state, a possible exception remains. The Supreme Court in *Sweeney v. Woodall* used the language of the "exhaustion of state remedies" cases.⁸⁹ Applied to the extradition situation, the idea that remedies must be exhausted in the demanding state before courts of the asylum state can hear the question precludes all inquiry into the constitutional question in the asylum state, except in the situation where it is shown that no remedies are available in the demanding state.⁹⁰ This possible exception, not yet passed upon by the courts, would not include cases of past deprivation of constitutional due process.

The least deserving situation for relief in the asylum state would appear to be where it is claimed, as in the *Gilbert* case, that the alleged crime is itself unconstitutional, for there there is no threat of physical violence and a remedy would always be available in the demanding state for such a claim. The personal inconvenience to the fugitive should not be allowed to defeat the efficient operation of the rendition process. But in the rare situation in which the fugitive is able to establish a grave danger of lynching or mob violence, it can still be argued that a court in the asylum state should make the inquiry, putting the fugitive to his

⁸⁶ For an example of the type of indignation aroused by the release of a fugitive on the grounds that justice would not be accorded him in the demanding state, see *Race Discrimination and Interstate Rendition—The Crawford Case*, 43 *Yale L. J.* 444, 445 (1934).

⁸⁷ As much as three or four years may be consumed by dilatory tactics. See *Successive Applications for Habeas Corpus in State and Federal Courts in Interstate Rendition*, 45 *Yale L. J.* 543 (1936).

⁸⁸ *Sweeney v. Woodall*, 344 U.S. 86, 90 (1952).

⁸⁹ *Ibid.*, at 89-90.

⁹⁰ "Respondent makes no showing that relief is unavailable to him in the courts of Alabama. Had he never eluded the custody of his former jailers he certainly would be entitled to no privilege permitting him to attack Alabama's penal process by an action brought outside the territorial confines of Alabama in a forum where there would be no one to appear and answer for that State. Indeed, as a prisoner of Alabama, under the provisions of . . . 28 U.S.C.A. § 2254, and under the doctrine of *Ex parte Hawk* . . . he would have been required to exhaust all available remedies in the state courts before making any application to the federal courts sitting in Alabama." *Ibid.*, at 89.

proof.⁹¹ For in this rare situation the petitioner has no other remedy—if he is lynched or subjected to cruelty there can be no repair. In such a case, proof of past deprivation of constitutional due process by the demanding state, though not sufficient by itself, may be relevant to show the possibility of prospective deprivation of constitutional rights for which no remedy is available.

In the vast majority of cases, however, such an argument should not be possible. State boundaries present no obstacle to a fleeing criminal. The extradition process, essential even in the earliest days of our nation, plays an even more vital role today in the interstate control of crime and the furtherance of criminal justice. The fugitive should not be allowed to delay and disrupt this process as a matter of course by raising constitutional questions involving past or prospective treatment by the demanding state. Assuming that a remedy is available in the federal courts of the demanding state and, as must be assumed, that federal courts throughout the breadth of the land will be vigilant in protecting the liberties of the fugitive, the inconvenience he suffers in being returned is overbalanced by the necessities of law enforcement and the requirements of an integrated federal system. These demand interstate rendition machinery of efficiency and speed. The review upon habeas corpus of the detention of the fugitive by the asylum state must remain as a safeguard to the innocent, primarily for the correction of obvious mistakes; but the fundamental rights of the fugitive, except when remedies are entirely unavailable there, should be left to courts located in the demanding state.

AGENTS' REPORTS AND THE ATTORNEY-CLIENT PRIVILEGE

A problem which has led to divergent and confusing decisions arises from the assertion of the attorney-client privilege to prevent disclosure of reports prepared by corporate agents and eventually transmitted to counsel. In applying the privilege in these situations the courts have usually relied upon tests poorly adapted to correct analysis in terms of the basic rationale of the privilege.

This rationale assumes that full disclosure by the client¹ to the attor-

⁹¹ Perhaps a distinction could be drawn between federal and state courts, allowing the federal court to inquire into the constitutional question only in the exceptional situation noted and the state court not at all. This would prevent the unwholesome situation of one state's criticizing and declaring invalid the laws or institutions of a sister state. This practical differentiation between federal and state courts is contradicted by the fact that both have concurrent jurisdiction over habeas corpus in extradition cases. State courts, however, should be more reluctant, even in the most extreme situations, to inquire into the constitutional question. Federal courts, on the other hand, have as one of their primary tasks the reviewing of the constitutionality of state laws and even state institutions, when they are called into question. Federal supervision of state schools, *Sweatt v. Painter*, 339 U.S. 629 (1950), and state elections, *Smith v. Allwright*, 321 U.S. 649 (1944), is an established and relevant fact.

¹ The problems inherent in applying the attorney-client rationale to statements from the attorney to the client are beyond the scope of this comment. The basis for such protection is

ney² is necessary for the effective operation of the legal system,³ and that such disclosure⁴ can be achieved only by a guarantee that the client's confidences will be protected. This policy is felt to outweigh the countervailing interest in full and unrestricted testimony at trial.⁵ But because of this countervailing interest, the courts have said that the scope of the privilege must be strictly limited.⁶

The privilege, however, is not restricted to direct communication by an individual client, but has generally been extended to agents' reports prepared for and transmitted to the principal's attorney. This protection has been granted in proper cases because the use of agents to aid in the communication between client and attorney is often necessary, and to deny the privilege to this class of documents would, to that extent, unnecessarily frustrate the purpose of the privilege.⁷ The requirements for invoking the privilege as to agents' reports, un-

probably to prevent disclosure of the information contained in the client's communication. *Magida v. Continental Can Co.*, 12 F.R.D. 74 (S.D. N.Y., 1951) (semble).

² The communication to an "attorney" acting in another capacity may be non-privileged. *Lifschitz v. O'Brien*, 143 App. Div. 180, 127 N.Y. Supp. 1091 (2d Dep't, 1911) (attorney employed as agent to procure a loan); *Peyton v. Werhame*, 126 Conn. 382, 11 A. 2d 800 (1940) (attorney acting as executor); *Kent Jewelry Corp. v. Kiefer*, 202 N.Y. Misc. 778, 783, 113 N.Y.S. 2d 12, 18 (S. Ct., 1952) (any actions falling outside of strictly legal capacities); *McKnew v. Superior Court*, 23 Cal. 2d 58, 142 P. 2d 1 (1943) (lawyer acting as witness to an examination of accounts); *Gallagher v. Akoff Realty Corp.*, 197 N.Y. Misc. 460, 95 N.Y.S. 2d 796 (S. Ct., 1950) (attorney acting as negotiator in business transaction). The decisions in the cited cases seem to be based upon an assumption by the courts that the rationale of the privilege is applicable only in those cases where the attorney's legal "capacities" are involved. This accords with the policy of construing the privilege within the narrowest possible limits consistent with its rationale. *Foster v. Hall*, 29 Mass. 89, 97 (1831). It is not at all certain to what extent the privilege should be broadened to take into account the expanding scope of the lawyer's advisory function. The determination of this issue must be made after a decision as to how much of the total attorney-client relationship should be "sedulously fostered" by a veil of secrecy. But see *Palatini v. Sarian*, 15 N.J. Super. 34, 83 A. 2d 24 (1951). The expanding function is described in *Curtis, The General Practitioner and the Specialist*, University of Chicago Law School Conference Series, No. 11, p. 3 (1952).

³ See, e.g., *Kilgo v. Continental Casualty Co.*, 140 Ark. 336, 215 S.W. 689 (1919); *Connecticut Mutual Life Insurance v. Scheafer*, 94 U.S. 457, 458 (1876); *Blackburn v. Crawfords*, 70 U.S. 175, 192 (1865).

⁴ These matters are thought to be those damaging to the client's cause. See 1 Thornton, *Attorneys at Law* § 94 (1914).

⁵ See *Magida v. Continental Can Co.*, 12 F.R.D. 74, 76 (S.D. N.Y., 1951). The requirements for any rule of privileged communication are set forth in 8 Wigmore, *Evidence* § 2285 (3d ed., 1940): "(1) The communications must originate in a *confidence* that they will not be disclosed; (2) This element of *confidentiality* must be *essential* to the full and satisfactory maintenance of the relation between the parties; (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*; (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation."

⁶ E.g., *McKnew v. Superior Court*, 23 Cal. 2d 58, 142 P. 2d 1 (1943); *State v. Ingels*, 4 Wash. 2d 676, 104 P. 2d 944 (1940) (semble).

⁷ *Schmitt v. Emery*, 211 Minn. 547, 2 N.W. 2d 413 (1942); consult *Privileged Communications—Extension of the Privilege to Communications Involving Agents*, 50 Mich. L. Rev. 308, 313 (1951). In the *Schmitt* case the court held that "[w]here a document is prepared by

like those for direct attorney-client communications,⁸ have not been clearly defined; the demands of both, however, find their basis in the rationale of the privilege. In determining the proper requirements, it appears important to distinguish between two broad categories of agents' reports: (a) those which originate for purposes other than or in addition to client-attorney communication; and (b) those which come into being for the sole purpose of conveying information to an attorney.

As to the former, it is well settled that if a report originates independently of an attorney-client relationship, it is not privileged,⁹ and a later entrusting of such report to an attorney makes no difference.¹⁰ If the privilege's promise of secrecy could have played no part in producing the disclosure, there exists no reason for protection, and the countervailing interest in full testimony at trial will prevail. It has been suggested, however, that the privilege entails no requirement that the document has originated for the exclusive purpose of client-attorney communication.¹¹ This appears to be faulty reasoning;¹² if a report is made for reasons in addition to that of later use by an attorney, the disclosure usually would have been made regardless of the privilege and, again, no reason would exist for its application. Thus, in the typical business situation the absence of the privilege's protection would not change the decision to require a report useful for the general purposes of the company. And it follows, as well, that where only a part of the document is found to have come into existence for

an agent or employee by the direction of the employer for the purpose of obtaining the advice of the attorney . . . such document is in effect a communication between attorney and client. The client is entitled to the same privilege with respect to such a communication as one prepared by himself." *Schmitt v. Emery*, supra, at 552 and 416. *State v. Laponio*, 85 N.J.L. 357, 88 Atl. 1045 (Ct. Err. & App., 1913); compare *Cully v. Northern Pacific Ry. Co.*, 35 Wash. 241, 77 Pac. 202 (1904).

⁸ Wigmore suggests an eightfold test for the privilege to be validly granted: "(1) *Where legal advice of any kind is sought* (2) *from a professional legal advisor in his capacity as such*, (3) *the communications relating to that purpose*, (4) *made in confidence* (5) *by the client*, (6) *are at his instance permanently protected* (7) *from disclosure by himself or by the legal advisor*, (8) *except the protection be waived*." 8 Wigmore, *Evidence* § 2292 (3d ed., 1940).

⁹ *Schwartz v. Public Service Co-ordinated Transport*, 64 A. 2d 477, 480 (N.J. County Ct., 1949); *Grant and Burlingham v. United States*, 227 U.S. 74 (1913); *Pearson v. Yoder*, 39 Okla. 105, 134 Pac. 421 (1913). Contra: *Davis v. New York, O. & W. Ry. Co.*, 70 Minn. 37, 72 N.W. 823 (1897). But see *Stokoe v. St. Paul, M. & M. Ry. Co.*, 40 Minn. 545, 42 N.W. 482 (1889) (dictum, release obtained by defendant for personal injuries of employee in possession of attorney is privileged).

¹⁰ *Grant and Burlingham v. United States*, 227 U.S. 74 (1913); *Parkhurst v. City of Cleveland*, 77 N.E. 2d 735 (Ohio C.P., 1947).

¹¹ *Clapperton*, *Privilege on Discovery of Documents*, 4 Can. B. Rev. 683 (1926).

¹² In *Davies v. Columbia Gas & Electric Co.*, 68 N.E. 2d 571 (Ohio C.P., 1938), the court instructed the notary to allow discovery because there was nothing to indicate that the documents were prepared exclusively for counsel and had remained in his possession continuously after their preparation.

the sole purpose of client-attorney communication, that part alone should be protected.¹³ No doubt it is desirable that there be a full and accurate disclosure to the principal and other agents, but the lawyer-client privilege is not properly used to further this objective.¹⁴

As to the second group of reports—those which originate solely as attorney-client communications—the privilege should apply unless the document is later revealed to personnel who have no function in securing the legal advice.¹⁵ These communications, although meeting the “sole-purpose” test on analysis, are subjected to an additional requirement, an analogue of the “confidentiality” test¹⁶ applied to communications to attorneys by individual clients. Wigmore states the requirement that such communications be “made in confidence,” its purpose being to insure that only those disclosures be protected which were prompted by reliance on the secrecy which the privilege guarantees. If the disclosure was made in the presence of outsiders, or, in the case of a written communication, was shown to an outsider before transmission to the attorney, it may be inferred that there was no reliance on secrecy, and the document is non-privileged *ab initio*. If the secrecy is violated by the client after communication to the attorney the privilege is waived.¹⁷

It may appear inappropriate to apply such a requirement to an agent's report, which is typically seen only by other agents standing in a fiduciary relationship to the principal. The alternative, however, is to allow the privilege despite the fact that every employee of an organization may have seen a supposedly confidential communication. Some limitation appears essential. Thus, when the outside party is an agent the rule has been stated that “the privilege is limited to the necessities of the situation.”¹⁸ This “necessity” requirement, in the case of the corporate client, which can act only through its agents, is ex-

¹³ The courts have not been consistent in their approach to documents where only a part is clearly within the requirements of the privilege. It has been stated that where part of the communication contains legal advice from the attorney, or requests for legal advice by the client, the whole is privileged. 1 Thornton, *Attorneys at Law* § 98 (1914). This seems to go beyond the necessity of the rule. In *Terrel v. Standard Oil Co.*, 5 F.R.D. 146 (E.D. Pa., 1945), it was held that where a communication is only partially privileged on its face, the whole will be denied the privilege if the claimant does not indicate which segments of the communication fall within the rule. This seems consistent with the doctrine that the party asserting privilege must allege facts sufficient to bring himself within the doctrine.

¹⁴ If the report deserves protection on this ground it is properly done by means of statute. See, e.g., 54 Stat. 926 (1940), 49 U.S.C.A. 320 (f) (1951).

¹⁵ See cases cited in notes 19 and 20 *infra*.

¹⁶ This requirement is usually insisted on by the courts. E.g., *Anderson v. Thomas*, 108 Utah 252, 159 P. 2d 142 (1945); *Matter of Yachnin v. Bedford Home Builders Inc.*, 228 App. Div. 795 (N.Y. 2d Dep't, 1930); *In re Arnolt's Estate*, 127 N.Y. Misc. 579, 217 N.Y. Supp. 323 (Surr. Ct., 1926); *Goddard v. Gardner*, 28 Conn. 172 (1859).

¹⁷ Consult 8 Wigmore, *Evidence* § 2327 (3d ed., 1940); cf. Model Code of Evidence, Rule 231.

¹⁸ *Schmitt v. Emery*, 211 Minn. 547, 552, 2 N.W. 2d 413, 416 (1942).

pressed in the rule that a report is non-privileged unless it is transmitted only through those agents necessary for communication to the attorney.¹⁹

It may be suggested that the "necessity" doctrine is simply an adjunct of the "sole-purpose" test, rather than an independent requirement. But a report may be circulated to other than "necessary" personnel before transmission to the attorney not only where this was the original intention, but also in cases where subsequent developments have made it convenient that a report originally intended solely for an attorney be given wider distribution. Such distribution may be evidence that client-attorney communication was not the original "sole purpose"; it does not follow, however, that this is necessarily the case. Thus, the "necessity" requirement supplements the "sole-purpose" criterion, although in many cases its importance may be only administrative—in evidencing absence of singularity of purpose of a report.

Although these two criteria—the "sole-purpose" and "necessity" tests—appear to be the proper tools for determining the application of the privilege to agents' reports, they are not commonly used by the courts. Judicial treatment of the problem has been influenced by the leading case of *Davenport v. Pennsylvania Railroad*.²⁰ In that case the reports held privileged had been submitted to the defendant by his agent prior to the establishment of an attorney-client relationship but after notification by the plaintiff that a claim would be pressed. At trial plaintiff asked for reports taken "in the ordinary course of business," and defendant refused production on the grounds that the reports in question were made for the special reason of resisting litigation and were in the hands of counsel. The court, required by the form of the pleadings to assume that the reports were taken for the purpose defendant alleged, denied discovery. The fact that the documents pre-existed any attorney-client relationship was not deemed decisive.²¹ This seems consistent with the rationale of the privilege. If the report is prepared solely for eventual transmission to counsel, the fact that no attorney-client relationship yet exists will not militate against its containing those disclosures which the privilege prompts. When the production of the report is sought, however, it must be in possession of counsel, that is, be a communication to him, to be a proper subject for the privilege.²²

Application of the privilege to the reports in the *Davenport* case cannot be criticized, for they seem to have been made for the sole purpose of serving as

¹⁹ *Hawes v. State*, 88 Ala. 37, 7 So. 302 (1890); *Davenport Co. v. Pennsylvania R. Co.*, 166 Pa. 480, 31 Atl. 245 (1895).

²⁰ 166 Pa. 480, 31 Atl. 245 (1895).

²¹ No cases have been found in conflict with this aspect of the *Davenport* doctrine, although it has been suggested that the rule is or should be otherwise. 28 R.C.L. § 161 (1921). The suggestion is unduly formal, although it gains some support from the assertion that the privilege is to be strictly construed. See *Cote v. Knickerbocker Ice Co.*, 160 N.Y. Misc. 658, 290 N.Y. Supp. 483 (N.Y. Munic. Ct., 1936); consult *Attorney-Client Privilege as Applied to Documentary Evidence Originating With Client's Agent*, 88 U. of Pa. L. Rev. 467 (1940).

²² *Atchison, T. & S. F. R. Co. v. Burks*, 78 Kan. 515, 96 Pac. 950 (1908); *People v. Rittenhouse*, 56 Cal. App. 541, 206 Pac. 86 (1922).

client-attorney communications. However, some courts have improperly applied the "anticipation-of-litigation" test suggested by defendant's response to the interrogatory, extending the privilege to documents multi-purpose in nature. In *Ex parte Schoepf*²³ a claim agent brought a habeas corpus proceeding to secure release from confinement imposed by the lower court because of his failure to produce certain documents. The documents consisted of accident reports made on blank forms in compliance with the standing order of defendant's employer that every motorman and conductor report all accidents. It was the practice that such reports be eventually transmitted to counsel. In the instant case, they had been filed with the claim agent and were not forwarded to counsel until two or three days after suit was begun. The purpose of the reports was to help prepare the company for possible suit and to advise the company on the extent of its liability *and on the cause of the trouble*. In releasing the petitioner, the court indicated, among its reasons, that the documents were privileged,²⁴ although they were clearly multi-purpose.²⁵

From the *Schoepf* and *Davenport* cases emerges a pattern which the courts have generally followed in dealing with agents' reports. They attempt to fit such documents into a "regular-course-of-business"—"anticipation-of-litigation" dichotomy. A distinction is made by some of these courts between reports which are a matter of general record with the company, these being in the regular course of business, and those which originate as a result of an accident,²⁶ these being in anticipation of litigation. The former are non-privileged even though eventually transmitted to counsel,²⁷ and the latter privileged if "[they], accord-

²³ 74 Ohio 1, 77 N.E. 276 (1906).

²⁴ The Schoepf doctrine has been criticized in recent decisions. See *In re Story*, 159 Ohio 144, 111 N.E. 2d 385 (1953); *Brookshire v. Pennsylvania R. Co.*, 14 F.R.D. 154 (N.D. Ohio, 1953). The federal court in Ohio has refused to be bound by the state law of privilege. *Pannella v. Baltimore & O. R. Co.*, 14 F.R.D. 196 (N.D. Ohio, 1951); cf. *Reeves v. Pennsylvania R. Co.*, 8 F.R.D. 616 (D. Del., 1949). See also dissent in *In re Tichy*, — Ohio —, 118 N.E. 2d 128 (1954) (criticizing application of the privilege to accident reports when made in the regular course of duty).

²⁵ Such reports are typically made on printed forms, and copies may be sent to various departments. See *Viront v. Wheeling & Lake Erie Ry. Co.*, 10 F.R.D. 45 (N.D. Ohio, 1950). Reports such as these "[are], of course, not necessarily taken for the purpose of being sent to counsel for advice or to be used by him in connection with pending or threatened litigation. [They] may be taken in connection with various reports required by law, or in connection with accident prevention studies of the transportation company. . . ." *Robertson v. Commonwealth* 181 Va. 520, 540, 25 S.E. 2d 352, 360 (1943).

²⁶ See *In re Keough*, 151 Ohio 307, 85 N.E. 2d 550 (1949).

²⁷ *In re Story*, 159 Ohio 144, 111 N.E. 2d 385 (1953). The police chief of Cleveland had refused to produce reports made by two police officers to the Department after they had mistakenly killed a person. The officers were now defendants in a wrongful-death action, and the Department had claimed the privilege. The court found the documents to be reports and records of the city and not privileged merely because they may have been turned over to the attorneys for the city. The dissent is interesting because it perhaps gives a clue as to the reason for the loose application of the privilege in cases involving accident reports. The minority maintained that ordering production of the reports would mean that police report at their peril and therefore, the dissent concluded, allowing disclosure might impair the usefulness of the reports, i.e., their accuracy.

ing to custom, are turned over to and remain in the possession of the company's [attorney]."²⁸

The "anticipation-of-litigation" terminology²⁹ has a superficial plausibility in relation to accident reports for at least two reasons: (1) it is doubtless true that litigation arises from the occurrences described in such reports more often than from the subject matter of other business reports; and (2) the terminology itself implies a situation in which the privilege is often properly applicable.

But accident reports as a class do not necessarily meet either the "sole-purpose" or the "necessity" tests, which have been suggested as critical to the rationale of the privilege. The reports in the *Schoepf* case, for example, were clearly taken for purposes in addition to client-attorney communication. And, typically, such reports, or duplicates thereof, are circulated among the accident-prevention, maintenance, personnel, claims, and other departments, besides going to the attorney or legal department for use in the event that legal problems arise; that they may have uses other than for litigation or may be viewed by personnel unnecessary to communication to the attorney seems plain. Any generalization that all accident reports are made in "anticipation of litigation" precludes examination of the specific communications by the tests pertinent to the claim of privilege and is therefore undesirable.

Neither is the "regular-course-of-business" formula for denying the privilege to agents' reports analytically helpful. The test of regularity may wrongly deny privilege to a document which would meet the proper tests, e.g., where the report was regularly taken when an accident occurred for the sole purpose of communication to an attorney and was not circulated to personnel unnecessary for that purpose. And although the test may sometimes properly deny the privilege³⁰ when the report is multi-purpose, it may, because the other side of the coin is "anticipation of litigation," lead to improper results for the reasons already suggested. Like the "anticipation-of-litigation" test, it precludes scrutiny of the individual communication in light of the tests more pertinent to the rationale of the privilege.

Generally, if it cannot be said that the document originated solely for the

²⁸ In re Keough, 151 Ohio 307, 314, 85 N.E. 2d 550, 553 (1949); In re Hyde, 149 Ohio 407, 79 N.E. 2d 224 (1948); Ex parte Shoup, 154 Ohio 221, 94 N.E. 2d 625 (1950); In re Tichy, — Ohio —, 118 N.E. 2d 128 (1954) (seems to privilege information and facts contained in an accident report as well as the communication but may be explainable by the fact that the party being questioned and asserting the privilege was the attorney).

²⁹ What constitutes "anticipation of litigation" or "preparation for trial" is not clear. Perhaps the action must have been commenced [see *Rediker v. Warfield*, 11 F.R.D. 125 (S.D. N.Y., 1951)], although that litigation is more than probable may be sufficient. *Shields v. Soberman*, 64 F. Supp. 619 (E.D. Pa., 1946).

³⁰ E.g., *Panella v. Baltimore & O. R. Co.*, 14 F.R.D. 196 (N.D. Ohio, 1951); *Curtis v. Indemnity Co. of America*, 327 Mo. 350, 37 S.W. 2d 616 (1931); *Virginia-Carolina Chemical Co. v. Knight*, 106 Va. 674, 56 S.E. 725 (1907); *Viront v. Wheeling and Lake Erie Ry. Co.*, 10 F.R.D. 45 (N.D. Ohio, 1950) (semble); *Eiseman v. Pennsylvania R. Co.*, 3 F.R.D. 338 (E.D. Pa., 1944) (semble).

purpose of client-attorney communication³¹ and that it was circulated only to agents concerned with direct forwarding to the attorney, the importance of full disclosure at trial would seem to dictate denial of the privilege. Categorization of agents' reports as either "in anticipation of litigation" or in the "regular course of business"³² finds no analytical basis in the rationale of the privilege.

The confusion in the cases cannot be entirely attributed to the impropriety of the tests used. It is evident that the courts have not been given an adequate picture of the circumstances surrounding the reports sought to be protected.³³ Since the burden of proof is on the proponent of the privilege, opposing counsel and the court should be diligent in requiring a clear showing that the claim of privilege is well founded.³⁴

DISCLOSURE OF INVESTIGATIVE REPORTS UNDER SECTION 6(j)
OF THE SELECTIVE SERVICE ACT—A POSTSCRIPT
TO *UNITED STATES v. NUGENT*

In the conscription of men for military service under the Selective Service Act, Congress has provided for the exemption of several classes of registrants. Among those exempted are conscientious objectors, persons whose religious beliefs do not permit them to serve in the armed forces. The task of separating valid from fraudulent claims for exemption has been committed to the selective service boards, local and appellate, as part of their general classificatory function under the Act. Normally, there is no resort to agencies outside the selective

³¹ See, e.g., *Atlantic Coast Line R. Co. v. Williams*, 21 Ga. App. 453, 94 S.E. 584 (1917); *Thomson v. Maryland Casualty Co.*, 11 Ont. L. Rep. 44, 45 (1906).

³² Although an accident report required by a corporation may not meet the regular-course-of-business standard for business-entry statutes, this should not imply that they cannot be in the "regular course of business" if that test is used in applying the privilege. It is clearly of general concern and in the best interests of a corporation to discover the nature and cause of accidents. Although in *Carlton v. Western & A. R. Co.*, 81 Ga. 531, 7 S.E. 623 (1888), the request for production was denied on other grounds, the court said: "We do not understand such a report to be a privileged communication. It seems that it was a report which the company, by its rules, required the conductor to make where a party was injured . . . a very good rule for the protection of the company and the employee." *Ibid.*, at 534 and 625. Compare *Palmer v. Hoffman*, 318 U.S. 109 (1943), with *Pekelis v. Transcontinental & Western Air, Inc.*, 187 F. 2d 122 (C.A. 2d, 1951).

³³ Judge Freed described this problem: "One of the chief difficulties which the courts face in deciding questions involving privileged communications . . . arises from the fact that they are seldom fully apprised of the circumstances under which those communications came into existence. When was the communication made? To whom and by whom was it made? . . . What was the relation of the party giving or the party taking the statement to the defendant? How and when did the statement come into the hands of defendant's counsel? Is counsel a salaried employee of the party opposing discovery or is he an independent attorney merely retained by defendant? In any given case each of these questions may be of vital importance in determining whether or not the matters sought are actually privileged." *Humphries v. Pennsylvania R. Co.*, 14 F.R.D. 177, 178 (N.D. Ohio, 1953).

³⁴ See *Robertson v. Commonwealth*, 181 Va. 520, 25 S.E. 2d 352 (1943). A voir dire is a form of proceeding well designed to reach such results.

service system, but in conscientious-objector cases Congress has provided for a hearing before the Department of Justice as a guide to decision. The procedure for determining the "character and good faith" of registrants is set forth in Section 6(j) of the Selective Service Act.¹ Upon the filing of an appeal from the decision of a local draft board, the appeal board refers the claim to the Department of Justice for inquiry and hearing; the Department of Justice then makes a recommendation which the appeal board is to consider, but need not follow. It has been the practice of the Department of Justice to employ the F.B.I. to make an investigation into the background of each claimant as a preliminary to the hearing. Although the investigative report is placed before the Department of Justice hearing officer, it is not made available for examination by the registrant. The registrant is permitted to introduce evidence in his own behalf, but is unable to counter specific charges contained in the F.B.I. report. Upon request, however, the hearing officer will "advise the registrant as to the general nature and character of any evidence in his possession which is unfavorable to, and tends to defeat, the claim of the registrant. . . ."²

In *United States v. Nugent*,³ a conscientious objector, under prosecution for failure to submit to induction, challenged the unfavorable classification of his appeal board. He argued that the decision of the appeal board was necessarily arbitrary⁴ because the failure to produce the F.B.I. report made it impossible for him to meet adverse evidence, and contended that this procedure violated his constitutional right to due process. The Supreme Court held that the Fifth Amendment does not require Congress, in the exercise of its war power, to provide hearings for registrants who wish to challenge their classification under the Selective Service Act. The Court further held, in interpreting Section 6(j), that

¹ "Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. . . . Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the persons concerned. . . . The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board." 65 Stat. 83 (1951), 50 U.S.C.A. App. § 456(j) (Supp., 1953).

² Instructions to Registrants Whose Claims for Exemption as Conscientious Objectors Have Been Appealed (a letter sent to appealing registrants from the office of the Attorney General).

³ 346 U.S. 1 (1953).

⁴ The Supreme Court held, in *Falbo v. United States*, 320 U.S. 549 (1944), that the determinations of selective service boards were not open to judicial review. This position was qualified in *Estep v. United States*, 327 U.S. 114 (1946), where it was held that the courts could intervene where the draft board had acted without jurisdiction. "The question of jurisdiction of the local board," the Court said, "is reached only if there is no basis *in fact* for the classification which it gave the registrant." (Emphasis supplied.) In *Dickinson v. United States*, 346 U.S. 389 (1953), the Court declared invalid a classification denying exemption where no evidence to support the classification had been introduced.

Congress in establishing an advisory "inquiry and hearing" did not intend the formalities of a trial to be adhered to in these proceedings.⁵ "It has regularly been assumed," the majority declared, "that it is not the function of this auxiliary procedure to provide a full-scale trial for each appealing registrant."⁶ Three Justices dissented, however, protesting that "[t]he very purpose of a hearing is to give registrants an opportunity to meet adverse evidence. It makes a mockery of that purpose to suggest that such adverse evidence can be effectively met if its provenance be unknown."⁷ The dissenters relied heavily on language from decisions in the Second Circuit; the division within the Supreme Court reflected a sharp conflict among the lower courts.

In four cases, courts within the Second Circuit had upheld the right of registrants to examine F.B.I. reports. In *United States v. Oller*,⁸ the District Court for Connecticut held that the use of the reports by the hearing officer in making his recommendation without producing them for inspection was prejudicial to the registrants; the court entered a judgment of acquittal on charges of draft evasion. A similar result was reached by Chief Judge Hincks of that court in *United States v. Geyer*,⁹ in a passage cited at length by the *Nugent* dissenters he interpreted Section 6(j) as follows: "The natural import of the provision is, I think, that the investigative report resulting from the inquiry shall be made a part of the record for consideration by all directly concerned with the classification. . . . Only if the Act be [so] construed . . . is the 'system of selection . . . fair and just' within our Anglo-Saxon concepts of justice and due process."¹⁰ The *Nugent* case and its companion in the Supreme Court, *United States v. Packer*, also arose in the Second Circuit.¹¹ After the district courts had entered convictions in these cases the court of appeals reversed, holding that under the statute, as interpreted in *Geyer*, registrants were entitled to examine the reports at the Department of Justice hearing. In the *Packer* case the court extended this right to a situation in which the report contained no findings unfavorable to the registrant.

On the other hand, the Sixth Circuit in *Imboden v. United States*¹² held that where the registrant was given a letter outlining the adverse evidence, refusal to disclose the names of the informants did not deprive him of due process. Sub-

⁵ Defendants in the *Nugent* case had failed to request summaries of "the general nature and character" of unfavorable evidence, which the Department of Justice was willing to make available. The Court held that the right to such summaries was waived by the failure to request them.

⁶ *United States v. Nugent*, 346 U.S. 1, 9 (1953).

⁷ *Ibid.*, at 13.

⁸ 107 F. Supp. 54 (D. Conn., 1952).

⁹ 108 F. Supp. 70 (D. Conn., 1952).

¹⁰ *Ibid.*, at 71 and 72.

¹¹ *United States v. Nugent*, 200 F. 2d 46 (C.A. 2d, 1952); *United States v. Packer*, 200 F. 2d 540 (C.A. 2d, 1952).

¹² 194 F. 2d 508 (C.A. 6th, 1952).

sequently, the Ninth Circuit in *Elder v. United States*¹³ took express exception to the Second Circuit's construction of Section 6(j) in the *Nugent* case, requiring complete disclosure of the report. In the Ninth Circuit's view, disclosure would frustrate the purpose of the Act by closing off the F.B.I.'s sources of information.

The Supreme Court in *Nugent* and *Packer* reversed the Second Circuit, but did not deny entirely the right of a registrant to be appraised of adverse charges contained in the F.B.I. report:

We think the Department of Justice satisfies its duties under §6(j) when it accords a fair opportunity to the registrant to speak his piece before an impartial hearing officer; when it permits him to produce all relevant evidence in his own behalf and at the same time supplies him with a fair résumé of any adverse evidence in the investigator's report.¹⁴

The recommendations of the Department of Justice can never be attacked as being without basis in fact because of a refusal to produce the F.B.I. reports.¹⁵ But the department is bound by the *Nugent* opinion to make available upon claimant's request a fair résumé of testimony against him; adherence to this procedure was seen by the court to be "an important and delicate" responsibility. The *Nugent* case thus achieves a result halfway between full disclosure and complete denial of the opportunity to answer adverse information.

Generally, courts since the *Nugent* decision have followed it in dismissing summarily due process objections concerning the use of secret reports, the refusal to produce such reports and the failure to provide a "fair résumé" when not requested at the hearing.¹⁶ However, in a very recent decision, the Fourth Circuit Court of Appeals set aside a conviction where the complete F.B.I. report had mistakenly been submitted to the draft boards, but was not made available to the registrant.¹⁷

The major problem left open by the *Nugent* case arises when a registrant challenges the fairness of the résumé which he received. The District Court for New Jersey upon examination of a Department of Justice letter summarizing

¹³ 202 F. 2d 465 (C.A. 9th, 1953).

¹⁴ *United States v. Nugent*, 346 U.S. 1, 6 (1953).

¹⁵ The *Nugent* case thus seems to overrule *United States v. Bouziden*, 108 F. Supp. 395 (W.D. Okla., 1952). That court stated: "The hearing officer must not be permitted to withhold unfavorable information gained during the inquiry, and giving no opportunity to rebut at the hearing, then use this same unfavorable information as a basis for his adverse advisory recommendation." Compare *United States v. Annett*, 108 F. Supp. 400 (W.D. Okla., 1952) and *United States v. Everngam*, 102 F. Supp. 128 (S.D. W.Va., 1951).

¹⁶ *Bejels v. United States*, 206 F. 2d 354 (C.A. 6th, 1953); *United States v. Borisuk*, 206 F. 2d 338 (C.A. 3d, 1953); *United States v. Gray*, 207 F. 2d 237 (C.A. 9th, 1953); *United States v. Dal Santo*, 205 F. 2d 429 (C.A. 7th, 1953), cert. denied, 346 U.S. 858 (1953); *United States v. Gonzales*, 120 F. Supp. 730 (E.D. Mich., 1953).

¹⁷ *Brewer v. United States*, 211 F. 2d 864 (C.A. 4th, 1954). The Court declared that where "the Local and Appeal Boards have had ready access to the actual F.B.I. file, and where their final classification of registrant is assumedly based upon information contained therein, to deny the registrant equal access to the evidence upon which his case is determined is to reject our most basic concept of due process." While this case will probably prove to be unique on its facts, it is perhaps indicative of a reluctance to extend *Nugent* beyond its own facts.

the representations made against the registrant held that it was sufficient, although it did not disclose the names of witnesses.¹⁸ But in the Second Circuit the courts have regarded the determination of sufficiency as a means of providing registrants with the opportunity to examine at trial the investigative reports withheld at the hearing.

In *United States v. Evans*,¹⁹ Judge Hincks said:

It is my opinion that I cannot conscientiously determine that the résumé was fair without an opportunity to inspect the investigative report of which it is claimed to be a résumé. . . . Even if the résumé given be deemed presumptively fair, on trial the registrant must be allowed to combat the presumption by the only means possible,—comparison with the investigative report itself.²⁰

The prosecution contended that the *Nugent* opinion justified their withholding the reports. The court, however, held that the force of the *Nugent* decision was directed to the level of the departmental hearing only,²¹ and had no effect on the right of a court to subpoena relevant documents. Once the government chose to prosecute for draft evasion, they were bound under the doctrine of *United States v. Andolscheck*²² to produce all documents relating to the crime.

In the most recent case under Section 6(j), *United States v. Stasevic*,²³ the Southern District of New York in ruling on prosecution motions to quash subpoenas for the production of F.B.I. reports gave a similar interpretation to the *Nugent* case. One defendant, who had not waived his right to obtain the résumé of the investigative report had nevertheless been denied access to it.²⁴ Under *Nugent* this defendant was entitled to the résumé if it contained any adverse evidence; and the court declared that without production of the report the nature of its contents could not be determined. The court denied the motion

¹⁸ *United States ex rel. Berman v. Craig*, 115 F. Supp. 6 (D. N. J., 1953).

¹⁹ 115 F. Supp. 340 (D. Conn., 1953).

²⁰ *Ibid.*, at 343. Accord: *United States v. Edmiston*, 118 F. Supp. 238 (D. Neb., 1954); *United States v. Stull* (E.D. Va. Nov. 1953) (not reported).

²¹ The *Brewer* case, note 17 *supra*, in refusing to apply the *Nugent* holding to proceedings before the local and appellate draft boards, is in accord with this view.

²² 142 F. 2d 503 (C.A. 2d, 1944). The court said: "While we must accept it as lawful for a department of the government to suppress documents . . . [so] far as they directly touch the criminal dealings, the prosecution necessarily ends any confidential character the documents may possess. . . . The government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully." *Ibid.*, at 506.

The *Andolscheck* doctrine has been recognized in the Supreme Court by implication in denying discovery of confidential government documents in cases other than criminal prosecutions by the government. *United States v. Reynolds*, 345 U.S. 1, 12 (1953) (action against the government under the Federal Tort Claims Act); *United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 467 (1951) (habeas corpus proceeding by prisoner challenging constitutionality of state conviction).

²³ 117 F. Supp. 371 (S.D. N.Y., 1953).

²⁴ Motions were made against three separate defendants. All of the defendants had been denied résumés of unfavorable evidence. Two of the defendants, however, had failed to request such résumés, and, under the reasoning of the *Nugent* case, waived their rights to them. *Ibid.*, at 374. The third defendant, Prytyskacz, unlike the others, did not receive a letter informing him of his right to request a résumé.

to quash the subpoena for the report on this defendant, and ruled further that upon its production it would be open to inspection by his counsel as well as by the court.

The effect of the reading given the Supreme Court's *Nugent* opinion by Second Circuit courts is to bring the investigative report before the court in almost every prosecution of conscientious objectors for failure to submit to induction. If the refusal to produce the reports at the hearing stems from a desire to keep them confidential, these decisions obstruct this purpose. The need for secrecy has generally been considered to be the basis of the *Nugent* decision, and was the express rationale of the Ninth Circuit in arriving at the same result in *Elder*.²⁵ But the Supreme Court made no mention of the importance of secrecy; it appears unlikely that the Court intended to exclude the reports at the trial without reference to the inroads such exclusion would make on the *Andolschek* doctrine. The *Evans-Stasevic* interpretation limiting the application of *Nugent* to the hearing level thus seems sound.

The language of the *Nugent* opinion would suggest rather that its goal was to facilitate the operation of a self-contained administrative process, in classification of registrants claiming exemption as conscientious objectors. Under some subsequent decisions, however, any delays caused by examination of the F.B.I. reports would be shifted to the trial stage, rather than eliminated altogether. As the dissent in *Nugent* urges, it was the intent of Congress in Section 6(j) that all evidence be heard by the hearing officer. The provision for a hearing for conscientious objectors would seem to have been caused at least in part by a desire to avoid the harshness of a system which would require registrants to risk imprisonment if they wished effectively to challenge their classification. Paradoxically, then, the *Nugent* opinion, by leaving consideration of investigative reports to the courts, has nullified the major purpose of the decision, to maintain an independent and efficient selective service system; by extending the hope of reclassification to registrants, it may, contrary to the purpose of Section 6(j), cause many to risk imprisonment as draft evaders in order to obtain a conclusive determination of the elusive questions of fact which necessarily arise in the classification of conscientious objectors. The position of the *Nugent* dissenters has therefore been vindicated at least in some degree by later developments. But given the majority holding, the gloss placed on the case by the courts in the Second Circuit is preferable to the result which would obtain if the decision were followed to its logical extreme, the complete denial of access to the investigative reports.²⁶

²⁵ "If the agency inquiry . . . is to be productive of worthwhile results it seems essential that frankness on the part of persons interviewed be encouraged by assurance that their identity will not be divulged; and in the absence of clear intimation in the statute to the contrary the court will not assume that Congress intended these reports to be made public." *Elder v. United States*, 202 F. 2d 465, 469 (C.A. 9th, 1953).

²⁶ Since this comment went to press, the Seventh Circuit Court of Appeals in a considered opinion specifically repudiated the *Evans-Stasevic* interpretation of the *Nugent* case. In this Court's view, not even a "fair résumé" need be made available to the registrant. *United States*

THE PARTIAL STRIKE

The various forms of concerted refusal by employees to do only part of their assigned tasks have been designated "partial strikes."¹ Such activities create a conflict between the employer's interest in directing his work force and the employees' "right" under Section 7 of the National Labor Relations Act to engage in "concerted activities for . . . mutual aid or protection."² This comment will review the doctrines developed by the National Labor Relations Board and the courts in dealing with the problems raised by the partial strike with a view to determining whether they represent an appropriate accommodation of the conflicting interests involved.

I

The first partial-strike cases involved employees seeking changes in the conditions of their own employment. The Board's decision, in 1936, in *Harnischfeger Corporation*,³ and that of the Court of Appeals for the Seventh Circuit, in 1939, in *C. G. Conn, Ltd. v. National Labor Relations Board*,⁴ represent conflicting resolutions which have had considerable influence in subsequent cases. In *Harnischfeger*, the employer discharged stewards of the union who ordered its members to refuse to work overtime as a protest against the management's refusal to bargain. The Board held that the work-stoppage was protected under Section 7 and, therefore, that the discharges violated Sections 8(1) and 8(3) of the Wagner Act.⁵ The management's unfair labor practice in refusing to bargain might in itself have justified protection, but the Board rested its decision on the finding that the employees' activity caused less harm to the employer than a full strike. The Board did indicate, however, that there was a limit to the protection afforded by Section 7 by stating that the question was whether the conduct, although concerted in part, was "so indefensible" under all the circumstances as to justify discharge.

In the *Conn* case, the Seventh Circuit, overruling a Board reinstatement order, held that employees who refused to work overtime until the employer accepted their wage and hour demands could be discharged. The court, speaking through

v. Simmons, — F. 2d — (C.A. 7th, No. 11,011, decided June 15, 1954). It is to be hoped that the Supreme Court will soon resolve the disagreements stemming from its Nugent opinion.

¹ See Kelsey, Partial Strikes, New York University Sixth Annual Conference on Labor 281 (1953); 25 A.L.R. 2d 315 (1952); Partial Strikes under the NLRA, 47 Col. L. Rev. 689 (1947).

² National Labor Relations Act, § 7, as amended, 61 Stat. 140 (1947), 29 U.S.C.A. § 157 (Supp., 1953). Those cases of partial work-stoppages accompanied by a tort or resulting in a breach of a collective bargaining agreement will not be discussed in this comment. See *NLRB v. Sands Manufacturing Company*, 306 U.S. 332 (1939); and *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939).

³ 9 N.L.R.B. 676 (1938).

⁴ 108 F. 2d 390 (C.A. 7th, 1939).

⁵ Though *Harnischfeger* was decided under the Wagner Act, its relevance is not diminished. Section 7 of the Taft-Hartley Act continues to give the employee the right to "engage in . . . concerted activities for . . . mutual aid or protection" while Sections 8(a)(1) and 8(a)(3) continue to make it an unfair labor practice for the employer to interfere with this right. *Automobile Workers Union v. Wisconsin Employment Relations Board*, 336 U.S. 245 (1949).

Judge Major, in effect withdrew protection from all partial strikes, indicating that the employees had only two alternatives when the employer refused to comply with their request: they could continue work and negotiate further, or strike in protest. Like the sitdown and slowdown, this "strike on the installment plan" was not a "legitimate" work-stoppage because the employees attempted to continue working on their own terms.⁶

In *Pinaud, Incorporated*,⁷ the Board recognized the force of the contention that an employee could not be permitted to dictate the terms of his employment. But it did not abandon completely the position it had taken in *Harnischfeger*—that the employees' competing interest must be recognized. The Board ruled that the employer, prior to discharge, must give the employees an election either to work as instructed or go on a full strike.⁸

In 1949 the Supreme Court in the *Briggs-Stratton* case⁹ approved the approach taken in the *Conn* case. The employer had petitioned the state labor board to order the union to cease employing the unannounced and intermittent work-stoppages which it had called twenty-seven times during the five months which followed a collapse of collective bargaining negotiations. The Court held that since the union's activity was neither protected nor proscribed by the Act, Congress had not precluded the exercise of state power in this area. Accordingly, the state board could issue a cease and desist order. The Court concluded that not every form of concerted activity is protected by Section 7; that regardless of the

⁶ But cf. *NLRB v. Good Coal Co.*, 110 F. 2d 501 (C.A. 6th, 1940), where the Court of Appeals for the Sixth Circuit enforced the Board's reinstatement of employees who refused to work on Labor Day, indicating that their refusal to work was protected since it "involved a controversy concerning the terms, tenure or conditions of employment." *Ibid.*, at 503. And in *Armour & Co.*, 25 N.L.R.B. 989, 996 (1940), the Board, in dictum, cited with approval its position in *Harnischfeger Corporation*, 9 N.L.R.B. 676 (1938).

⁷ 51 N.L.R.B. 235 (1943). Cf. *Mt. Clemens Pottery Co.*, 46 N.L.R.B. 714 (1943), *enf'd* in part, *NLRB v. Mt. Clemens Pottery Co.*, 147 F. 2d 262 (C.A. 6th, 1945).

⁸ But cf. *Firth Carpet Co.*, 33 N.L.R.B. 191 (1941), *enf'd*, *Firth Carpet Co. v. NLRB*, 129 F. 2d 633 (C.A. 2d, 1942), where the Board held that employees could be discharged "for insubordination" for refusing to be temporarily assigned to another task because they feared that the transfer was a subterfuge for bringing in non-union men to replace them. The Board might have considered the activity personal in nature and, therefore, not "concerted activity for mutual aid or protection," though such a position was not articulated in its order. But consult *The New Personnel and Policies of the National Labor Relations Board*, 55 Harv. L. Rev. 269, 270 (1942), where the observation is made that there was a major change in Board membership at this time.

Cf. *Home Beneficial Life Insurance Co. v. NLRB*, 159 F. 2d 280 (C.A. 4th, 1947), in which the Fourth Circuit considered a partial strike under the Wagner Act. Insurance agents were discharged when they violated a company rule requiring them to report in at the home office every morning. The agents had decided to come only every other day, though the employer had previously turned down their request to change the rule. The court, holding that the partial strike was not protected, said, through Judge Soper: "The statute, (§ 7), expressly recognizes the right of employees 'To engage in concerted activities' but does not and could not confer upon them the right . . . to defy the authority of the employer to manage his business while remaining in his service." *Ibid.*, at 284.

⁹ *Automobile Workers Union v. Wisconsin Employment Relations Board*, 336 U.S. 245 (1949).

objectives of a tactic, in terms of federal law there is an area of misconduct which the states may control. The *Conn* case was cited for the limitation it placed upon the application of Section 7 in denying protection to a "comparable" work-stoppage, while reference was made to the "so-indefensible" test set forth in *Harnischfeger* to indicate that the Board, too, recognized qualifications on the protection afforded by the Act. *Harnischfeger* was distinguished, however, on a factor on which the Board did not rely in its opinion—that the work-stoppage was in a "context of anti-union animus" on the employer's part; that the drastic remedy of discharge outweighed any possible damage to the employer and was tainted by anti-union motives. Mr. Justice Jackson, building on the Seventh Circuit's identification of partial strikes with sitdowns and slowdowns, declared that to protect these "quickie strikes" would require the protection of sitdowns and slowdowns. Furthermore, the Court reasoned, if the activity were protected, the employer would be helpless to resist while the employees would not suffer the corresponding economic pressure engendered by a full strike.¹⁰

A year after this Supreme Court decision, the Board in *Kennametal, Inc.*,¹¹ held that an employer was guilty of an unfair labor practice in discharging employees when they stopped working for two hours in order to present their demand for higher wages. The Board did not explicitly consider the defensibility of the conduct, simply asserting that the activity was "concerted" and "for mutual aid and protection." But the Court of Appeals for the Third Circuit, speaking through Judge Goodrich, followed the *Harnischfeger* logic in enforcing the Board's reinstatement order:

[W]hat the workmen did was more reasonable and less productive of loss to all concerned than an outright strike [and t]he language of the Act does not require and its purposes would not be served by holding that dissatisfied workmen may receive its protection only if they exert the maximum economic pressure and call a strike.¹²

Shortly thereafter, in *Elk Lumber Co.*,¹³ the Board arrived at the same view concerning slowdowns as had the Supreme Court and Seventh Circuit, holding that such a response to the employer's refusal to agree to wage demands was unprotected. The Board did not specifically refer to their language that slowdowns are unprotected but, accepting Judge Major's reasoning that all partial

¹⁰ The Court further held that if the union was not protected under Section 7 it could not be protected under Section 13 of either the original or amended Act. That section reads: "Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." National Labor Relations Act § 13, as amended, 61 Stat. 151 (1947), 29 U.S.C.A. § 163 (Supp., 1953).

¹¹ 80 N.L.R.B. 1481 (1948), enf'd, *NLRB v. Kennametal, Inc.*, 182 F. 2d 817 (C.A. 3d, 1950), cited with approval in *Buzza-Cardozo*, 97 N.L.R.B. 1342 (1952), enf'd in part, *NLRB v. Buzza-Cardozo*, 205 F. 2d 889 (C.A. 9th, 1953), and in *NLRB v. Southern Silk Mills*, 33 L.R.R.M. 2628 (C.A. 6th, 1954).

¹² *NLRB v. Kennametal, Inc.*, 182 F. 2d 817, 819 (C.A. 3d, 1950).

¹³ 91 N.L.R.B. 333 (1950).

strikes are attempts by employees to work on their own terms, found that the activity was "indefensible."

Recently in *Pacific Telephone Co.*,¹⁴ the Board relied on the *Conn* and *Briggs-Stratton* cases, holding that it was not an unfair labor practice for an employer to discipline employees who refused to cross "hit-and-run" picket lines surrounding their own offices and established by another union at the same company. The picket lines were set up intermittently to support a series of short-term economic strikes called successively at each of the company's more than two hundred offices. Only the employees who refused to cross the picket lines petitioned the Board; their activity was held unprotected because they had knowledge of the "hit-and-run" tactic of the primary strikers which, in itself, was declared unprotected activity because of its similarity to the quickie strikes in the *Briggs-Stratton* situation. It is difficult to see how the Board could have evaluated the primary activity in any other way in light of the Supreme Court's resolution of the quickie-strike problem. There appears to be no significant difference between harassing the employer by a series of surprise short-term work-stoppages by all the employees in one plant and having groups of employees at different parts of the company stop work at irregular intervals.

In summary, *Kennametal* indicated that the Board would protect at least some partial stoppages. The Third Circuit's opinion in that case suggests that some circuit judges may still favor protecting those partial stoppages which they find result in less harm to the employer than a full strike. Yet *Elk Lumber* and *Pacific Telephone*, following the *Briggs-Stratton* decision, imply that the Board may have accepted the logic of the *Conn* case as the solution to partial strikes over conditions of employment. If this is true, the *Kennametal* case could be explained as an exception to a general rule of no protection; in light of the Supreme Court's justification of the result in *Harnischfeger*, it might be argued that although the employer had not committed an independent unfair labor practice, the drastic remedy of discharge so outweighed the harm to the employer as, in itself, to justify protecting the employees.¹⁵

II

Board Member Murdock, dissenting in *Pacific Telephone*, insisted that since the employees' refusals to cross the picket lines were "traditional" sympathetic

¹⁴ 33 L.R.R.M. 1433 (1954).

¹⁵ Cf. the Board's General Counsel's opinion in Administrative Decision No. 513 (1952), cited in Kelsey, op. cit. supra note 1, at 286 n. 7. *Aurora Wall Paper Mill Inc.*, 73 N.L.R.B. 188 (1947), and *Phelps Dodge Copper Products Corp.*, 101 N.L.R.B. 360 (1952) are cases of unprotected partial strikes over conditions of employment. The Board in these cases did not have to determine whether the concerted activity was "indefensible" since its purpose was not within the protection of Section 7. In *Aurora Wall Paper Mill*, supra, there had been a "wild-cat" strike by a minority group of employees over conditions already settled through collective bargaining by the recognized union. In *Phelps Dodge*, supra, the union called a slowdown while engaged in collective bargaining. The Board decided in both cases that the activity, though over conditions of employment, was in derogation of collective bargaining, and therefore, unprotected.

responses to the interests of other workers, the refusals deserved protection, regardless of whether the primary work-stoppages are protected activity. This criterion—the “traditional” nature of the activity—was used by the Board after 1949 to avoid the *Briggs-Stratton* result in the sympathy partial-strike context and confine the notion that partial strikes are indefensible to partial strikes over conditions of employment.

Before the *Briggs-Stratton* decision the Board had made no distinction between primary and sympathy partial strikes, protecting the activity in both situations on the principles developed in *Harnischfeger* and *Pinaud*. In 1941, for example, it held in *Niles Fire Brick Company*¹⁶ that an employer had no right to discharge employees who refused to take over an operation left vacant by the demotion of a union leader. The activity was classified as in the nature of a partial strike and permissible under the rule of *Harnischfeger*. The order also noted that the employer was guilty of an unfair labor practice in attempting to replace the union leader. Another consideration was introduced for the first time: the dilemma raised by the emergency with which the employees had been confronted—whether to support what they felt were the rights of another employee, or to do work which they thought had wrongfully been taken from him.¹⁷

In *Rapid Roller Co. v. National Labor Relations Board*¹⁸ the Seventh Circuit, speaking through Judge (now Justice) Minton, enforced a Board order denying an employer the right to discharge non-union employees in one department for refusing to act as “strikebreakers” in another. But four months later, in *United Biscuit Co. v. National Labor Relations Board*,¹⁹ the same circuit court, through Judge Major, followed the reasoning of the *Conn* case. He argued, in dictum, that the company’s salesmen who refused to ride with substitute deliverymen because of a strike of regular drivers “had the undoubted right to strike with their fellow employees, but they had no right to remain as employees unless they were willing to perform their duties wholeheartedly and efficiently.”²⁰

The Court of Appeals for the Eighth Circuit adopted the broad *Conn* approach to a sympathy partial strike in *National Labor Relations Board v. Montgomery Ward & Co.*²¹ The court upheld the discharge of clerical workers who refused to process orders from another Ward plant, in which their union had called a strike. The Board, evidently still reluctant to accept the doctrine of the *Conn* case, had protected the activity, accepting the trial examiner’s findings that the rule of *Pinaud* governed the case. However, the court preferred the unequivocal position that the purposes of the Act are not served by protecting employees

¹⁶ 30 N.L.R.B. 426 (1941).

¹⁷ By 1944 the Board had not changed its position when a similar controversy arose. *Gardner-Denver Company*, 58 N.L.R.B. 81 (1944). The Board ordered the reinstatement of an employee who had refused to take over an operation vacated by a dischargee.

¹⁸ 126 F. 2d 452 (C.A. 7th, 1942).

¹⁹ 128 F. 2d 771 (C.A. 7th, 1942).

²⁰ *Ibid.*, at 776.

²¹ 157 F. 2d 486 (C.A. 8th, 1946).

who have engaged in a partial strike. It also noted that the refusal to process orders was secretive and did not come to the supervisor's attention until two days after it occurred, but the significance of this fact was not explained.

After the *Montgomery Ward* case, all the sympathy partial-strike cases came before the Board after the *Briggs-Stratton* decision and, except for *Pacific Telephone*, arose out of a single employee's refusal to cross a picket line surrounding another employer's premises.²² In *Cyril de Cordova & Bro.*,²³ a stockbroker's messenger was discharged when he refused to cross a picket line set up by members of his union, employees of the stock exchange, engaged in an economic strike. The Board held that the employee's refusal to cross constituted "concerted activity for mutual aid and protection." It did not rely on its reasoning in earlier partial-strike cases, but distinguished both the *Conn* and *Briggs-Stratton* situations by elaborating on the factor of emergency alluded to in *Niles Fire Brick*; it stated that the employees' activity was a traditional response to the dilemma whether to help or hinder the interests of other workers. But in protecting the activity, the Board recognized, as it had in *Pinaud*, the employer's right to insist that the employee either go out on a full strike or do all his assigned tasks.

Relying on its reasoning in *de Cordova*, the Board in *Rockaway News Supply Company*²⁴ held that an employee's refusal to cross a picket line was protected although he was not a member of the picketing union. The Court of Appeals for the Second Circuit refused to enforce the Board's order.²⁵ Speaking through Judge Maris, the court conceded that an employee's refusal to cross a picket line is "concerted activity" within the meaning of Section 7, but accepted the rationale of the *Conn* case that the employer's right to direct his working force is paramount. Attempting to strengthen this position, the court argued that it is of no practical difference to the employee whether he is discharged or perma-

²² The proviso inserted at the end of the union unfair-labor-practice section specifically mentions the refusal to cross a picket line. National Labor Relations Act, 1947, at § 8(b)(4), 61 Stat. 140 (1947), as amended, 65 Stat. 601 (1951), 29 U.S.C.A. § 158(b)(4) (Supp., 1953). The proviso reads: "[N]othing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike. . . ." It is not clear what Congress meant to accomplish by adding this proviso, which focuses on the rights of individuals, at the end of a section concerned with union activities. Since the proviso speaks only of unlawfulness, it seems certain that it does not protect absolutely the employee who refuses to cross a picket line surrounding another employer. But see Judge Clark's dissent in *NLRB v. Rockaway News Supply Co., Inc.*, 197 F. 2d 111, 115 (C.A. 2d, 1952); consult Thatcher and Finely, Respect for Picket Lines, 32 Neb. L. Rev. 25 (1953), and Note, 62 Yale L. J. 92 (1952). For different views, consult Petro, Taft-Hartley and the "Secondary Boycott," 1 Lab. L. J. 835, 836 (1950); Petro, The Enlightening Proviso, 1 Lab. L. J. 1075, 1078 (1950); and Tower, The Puzzling Proviso, 1 Lab. L. J. 1019 (1950).

²³ 91 N.L.R.B. 1121 (1950).

²⁴ *Rockaway News Supply Co., Inc.*, 95 N.L.R.B. 336 (1951).

²⁵ *NLRB v. Rockaway News Supply Co., Inc.*, 197 F. 2d 111 (C.A. 2d, 1952), aff'd on different grounds, 345 U.S. 71 (1953).

nently replaced as an economic striker; especially since, according to the court, support of the partial strike by his union would constitute an unlawful secondary boycott. The Supreme Court affirmed the Second Circuit's decision on other grounds, avoiding the partial-strike problem; however, although it did not consider the question of union support, the Court appeared to agree with the Second Circuit that there was no difference between discharge and replacement.

The contrary result reached by the Board and the Second Circuit in the *Rockaway* case exemplifies the conflict of opinion which existed until recently between the Board and the circuit courts in relation to sympathy partial strikes. On one side was the general position that these work-stoppages, short of full strikes, cannot be protected. The Board, on the other hand, after the *Briggs-Stratton* case, developed the position that such partial strikes are protected because they are a traditional response to the dilemma whether to act in accord with or against the interests of other workers. Against the Board's position it might be argued that there is no basis for distinguishing partial strikes over working conditions from those created by the refusal to do the work of another, handle "hot goods," or cross a picket line—an emergency or dilemma may be presented to the employees in both cases. But there may be a significant difference between the two situations. In the sympathy situations the employees must refuse to do part of their assigned tasks if they are not to hinder the interests of others, whereas in the working-condition cases, the employees are faced at most with the problem of deciding which from among a whole arsenal of tactics is best calculated to achieve their ends.

However, in *Snow Auto Parts Company*,²⁶ the Board, under new leadership, recently reversed its former policy, apparently concluding that there is no significant difference between sympathy partial strikes and those over conditions of employment. In that case it upheld the employer's right to discharge a deliveryman for refusing to cross a picket line around a customer. And the Board made it clear that the sole basis of its decision was the employee's "refusal to do the job for which he had been hired and a direct disregard of his employer's instruction."²⁷

²⁶ 107 N.L.R.B. No. 78, at page 2 (1953).

²⁷ The trial examiner's findings in *Snow Auto Parts Co.*, 107 N.L.R.B. No. 78 (1953), indicate that certain forms of partial strikes might be unprotected because a full strike under the same circumstances would be unprotected. The Board explicitly stated that it avoided any such consideration in arriving at its decision. The trial examiner concluded that the employee could be discharged because his activity was neither concerted nor for mutual aid or protection. Impetus for this view came from Judge Major's opinion in *NLRB v. Illinois Bell Telephone Co.*, 189 F. 2d 124 (C.A. 7th, 1951). The Seventh Circuit declined to enforce a reinstatement order for employees who refused to cross a picket line, surrounding their plant, established by a union other than their own. The court held that the refusal was neither "concerted activity" because the employees acted on their individual initiative, nor for their mutual aid since all that they could gain from the collective bargaining process had been obtained by a contract between their union and the employer.

The notion that a refusal to cross a picket line is not "concerted activity" received support in *NLRB v. International Rice Milling Co., Inc.*, 341 U.S. 665 (1951), where the Supreme Court held that picketing primary strikers did not encourage employees of other employers to

III

The view first expounded by Judge Major, that a partial strike cannot be protected because it is an interference with the employer's right to govern his working force, has thus become the controlling principle in a variety of situations. The policy of the Act favoring protection of concerted activity is completely subordinated in this area to the interests of the employer.

Of course, Judge Major is correct in assuming that Section 7 of the Act was not meant to give labor *carte blanche* for all its activities. But because protection of concerted activity in Section 7 is phrased in absolute terms, it is difficult to draw the line between protected and unprotected activity. However, the strike is labor's primary bargaining weapon, a form of concerted activity protected by Section 7. To say that a partial strike, although "concerted activity for mutual aid or protection," is per se unprotected because it is something other than a full strike seems contrary to the policy of that section. Protected concerted activity is so often a device for achieving labor's ends, at the expense of what management conceives as its best interests, that it seems at best questionable to deny protection to all forms of partial strikes for no other reason than that they, in varying degrees, interfere with these interests.²⁸

engage in a "concerted refusal" to cross their picket line within the meaning of the secondary-boycott provision of the Act. § 8(b)(4)(A), 61 Stat. 141 (1947), as amended, 65 Stat. 601 (1951), 29 U.S.C.A. § 158(b)(4)(A) (Supp., 1951). Though the decision may protect primary strikers who encourage secondary employees not to cross their picket lines, it is a hollow victory for them if the secondary employees are not protected because they are not engaged in "concerted activity."

The idea that an individual's refusal to cross a picket line is not "concerted activity" seems to be at odds with the principle generally accepted by the circuit judges that an employee's activity is concerted if its purpose bears a reasonable relation to conditions of employment, i.e., if it affects the general interest of the employees. See *NLRB v. Phoenix Mutual Life Ins. Co.*, 167 F. 2d 983 (C.A. 6th, 1948), and *NLRB v. Austin Co.*, 165 F. 2d 592 (C.A. 7th, 1947). Both cases are noted in 19 A.L.R. 2d 566 (1951). If protected concerted activity is to depend upon the agreement of at least two parties it leads to the anomaly that a worker is penalized simply because he failed to get another to join his plans.

There should be little hesitation in concluding that an unfair discharge or demotion of another employee in the same plant directly concerns the sympathetic employee's own working conditions. The same conclusion might at first appear more tenuous if applied to the employee who refuses to handle "hot goods" or cross a picket line around another employer. Yet, his activity directly promotes his interest by protecting his bargaining power. Though between the sympathy striker and his employer there is no present dispute over a collective bargaining issue, the striker's bargaining power will be promoted because by his activity he helps preserve an effective economic weapon which might be employed in the future. Cf. *NLRB v. Peter Cailler Kohler Swiss Chocolates Co., Inc.*, 130 F. 2d 503 (C.A. 2d, 1942).

If future decisions by the Board and courts continue to limit employee activity by whether its purpose is of immediate economic importance to the workers, the protection afforded by Section 7 will be unwarrantedly limited. The Supreme Court has held that some forms of concerted activity, unlawful or unduly harmful to the operation of business, were not meant to be protected by Section 7. However, it does not follow that where the activity directly, though not immediately, promotes employee bargaining power the section can be so limited. It is the affair of Congress whether or not "mutual aid or protection" is to be qualified by the word "immediate."

²⁸ Consult Gregory, *Labor and the Law* 110 (1946).

But to reject the broad denial of protection illustrated by the *Conn* case does not require acceptance of the contrary doctrine announced by the Board in *Harnischfeger*. In *Pinaud* the Board suggested a resolution which protects the employer's interest in directing his working force while preserving the employee's right to concerted activity: that the partial strike be protected unless and until the employer exercises an option to require the employees to go out on a full strike or work as directed. But in order to insure that the employer have an adequate opportunity to exercise this right the rule requires a limitation which has never been formulated by the Board: that the partial work-stoppage be protected only if the employer recognizes its nature within substantially the same period of time in which he would have known of the existence of a full strike had one been called. Such requirement insures that no protection will be extended if the partial strike, any more than would a full strike, deprives the employer, for any substantial period, of the right to direct his working force.²⁹

The *Pinaud* test was applied by the Board in *Rockaway* and criticized by both the Second Circuit and the Supreme Court on the grounds that it can make no practical difference to the employee whether the employer gives him such an option because full economic strikers can be permanently replaced. But there is a practical difference between the status of a dischargee and an economic striker, even if the employee's union cannot give him support. As the Board pointed out, as long as he is not replaced, the striking employee, unlike the dischargee, can demand reinstatement under Section 2(3), and often replacement may not be available to the employer.³⁰

Using the *Pinaud* test, limited by the suggested standard of adequate employer opportunity, different results are obtained than have been reached in the cases of partial strikes over working conditions—the Board's order in the *Conn* case would have been enforced, the decision in *Harnischfeger* was correct although its rationale was inadequate, and the *Kennametal* case need not be justified on the grounds of "anti-union animus." Neither the refusals to work overtime in *Harnischfeger* and *Conn* nor the work-stoppage in the *Kennametal* case was a situation in which employees were able to work on their own terms by using the partial-strike tactic. The employer's rights would have been completely protected if the option suggested by *Pinaud* had been available to him. However, in those cases in which the work-stoppages take the form of "quickie" or "hit-and-run" strikes, or slowdowns, the employer's opportunity to protect him-

²⁹ If the employee's activity was a response to an unfair labor practice, the fact that the employer did not have adequate notice under this test might not be conclusive.

³⁰ See Brief for Petitioner at 42, *NLRB v. Rockaway News Supply Co., Inc.*, 345 U.S. 71 (1953). However, protection should extend no further than allowing the employee to become a full economic striker; if he were given only a temporary layoff, he would have the status of an unfair-labor-practice striker, although his employer has not violated the Act. Cf. *Warton & Turner Coal Company*, 105 N.L.R.B. No. 52 (1953). For a contrary view see 62 Yale L. J. 92 (1953).

self is inadequate.³¹ In the "quickie" and "hit-and-run" situations the employer cannot adequately guard against future refusals to work which, although planned and repetitious, are unannounced. Although he has knowledge of each work-stoppage as it occurs, he does not have information about the future work-stoppages which are part of the over-all scheme. In the case of the slowdown, it may be some time before the employer is aware that his rate of production has declined as a result of the concerted activity of his employees. In the *Montgomery Ward* case, under this test, the important consideration would be whether the employer had an adequate opportunity to exercise his option when the supervisor discovered the refusal of the clerks to process orders two days after the refusal occurred.

The adequacy of notice of the partial work-stoppage would be a question of fact for the Board in each case. Finding that an employer recognized the existence of a partial strike later than he would have discovered a full strike need not be conclusive. Certainly, the Board should not be bound by any rigid formula, and where the difference in time is not substantial, other factors should be considered: the nature of the business, whether the partial strike has resulted in greater economic harm to the employer than a full strike, and the existence of other reasons for discharging or taking other disciplinary action.

This analysis subjects quickie strikes and slowdowns to a more discriminating test than the vague standard of "indefensibility." These activities would usually be unprotected because they typically give the employer no notice, not on the basis of an assertion that all partial work-stoppages represent attempts by employees to work on their own terms. Whether the test of adequate opportunity will protect employees who threaten the employer with a slowdown depends upon whether the employer has timely information of what to expect. If the employer thinks the harm will be less than a full strike, he has the option of not demanding a full strike. One factor he may consider is that it may be impossible to reduce wage payments to adjust for the reduced output.³² The solution suggested, of course, may put the burden on the employer of risking a full strike by asking the employees for an assurance that they will not engage in a partial work-stoppage. However, the employer has the advantage of being able to require his employees to commit themselves to uninterrupted work or a full work-stoppage, on pain of loss of protection under the Act.³³

³¹ Professor Cox writes: "Collective bargaining can function as a mechanism for pricing labor only if there is some bargaining power on each side. Slow-downs and similar disobedience on the job cost the employees nothing and, if they were protected activities, management would be helpless to resist. Hence such weapons are too effective to permit them to be part of the employees' arsenal." Cox, *The Right to Engage in Concerted Activity*, 26 Ind. L. J. 319, 339 (1953).

³² The fact that a partial strike may represent an attempt to get full pay for less than a full job may not be material if the employer need not pay for the time lost during the stoppage. See *NLRB v. Southern Silk Mills*, 33 L.R.R.M. 2628 (CA. 6th, 1954).

³³ The adequate-notice test was recently applied by the trial examiner in *Honolulu Rapid Transit Co., Ltd.*, 33 L.R.R.M. 354 (1954). He found that a series of week-end economic

The test of employer opportunity is equally appropriate to sympathy partial strikes. Protecting union activity because it is "traditional" is subject to the same objections as not protecting union activity because it is "indefensible." Both standards beg the question of balancing the conflict of interests. As in the case of work-stoppages over conditions of employment, the important consideration is the employer's opportunity to demand a total work-stoppage or continuous, uninterrupted work.

strikes by transit employees was protected activity because, unlike the quickie strikes in the Briggs-Stratton case, *Automobile Workers Union v. Wisconsin Employment Relations Board*, 336 U.S. 245 (1949), the work-stoppages here, although recurrent, were announced and, therefore, anticipated by the employer. On the other hand, the examiner upheld the suspension of employees who either failed to assure the employer that they would continue working on week ends or breached such an assurance. But if the Board follows the logic of the Conn case it should not support the finding that the work-stoppages were protected.

BOOK REVIEWS

The Federal Courts and the Federal System. By Henry M. Hart, Jr., and Herbert Wechsler. Brooklyn: Foundation Press, 1953. Pp. lvii, 1445 (plus appendix 454 pp.). \$11.00.

The book which turns up real gold in its area of the law is rare enough; those which go further, explore new veins, and present new ways of refining the precious metal are even rarer. This book is one of those latter few. With an inexorable drive toward meticulous and thorough understanding of their subject, the authors have produced a masterful contribution to the literature of the law and of law teaching.

They have wrought substantial changes in the subject generally known as "Federal Jurisdiction"—though more in orientation and depth than in scope.¹ The title is indicative of that shift. Departing from the usual pattern which focuses almost exclusively on the rules for entering and proceeding in the United States courts, this book explores "[t]he jurisdiction of courts in a federal system [as] an aspect of the distribution of power between the states and the federal government."² Except as relevant to this theme, federal procedure is turned back to the procedure courses. Brought into the foreground are the intertwined roles of national and state law in our federal system. The object of this book's study is, then, the going structure of our federalism: the choice of which law, national or state, is to govern at particular points in legal relations, the criteria by which that choice is to be made, and where power to make and enforce these choices is to be placed.³ The lawyer has been aptly characterized an "expert in structure." Certainly there is no more proper grist for his university training than the operating institutions of federalism, with its often subtle, constantly shifting dispersion of power and discretion. For it is of such stuff that the buttresses of democracy are made.

The pattern of presentation has been changed, too, in a manner well signified by omission from the title of the usual prefatory "Cases and Concomitants on" In the pedagogic controversy over "text-problem" versus "case" methods, the authors have chosen what I would dub the "problem case-prob-

¹ This is particularly true if the limitations of a two- or three-hour course confine one to the "core" of the book: Chapters IV through VIII. (See p. xiii.) I have taught a two-semester-hour course almost entirely from that portion of this book and can testify to its essential self-sufficiency.

² P. xi.

³ This last aspect necessarily involves the distribution of function and authority within our governments as well as problems of judicial administration, and these are treated as subordinate themes.

lem" approach. The book's development is by progression from problem area to problem area. At the heart of each is a principal case (or at most two). Following—significantly, in the same size type—is a compendious Note⁴ (or occasionally two or even three) suggesting possible lines of analysis and marshaling the materials which may shed light on the problem. Though the collection of sources is quite comprehensive, the feeling of frustration engendered by a long list of naked citations is absent. The authors have been careful not to make a reference without at least some indication of what the source contains. As a result, the assemblage of material is of substantial aid to the analyst as well as the researcher.

The authors' proffered analyses are presented by series of thought-provoking questions. Consistently these queries raise the significant issues in the problem at hand. Since the field is a developing one, this is a very effective device for presenting it. But issues are not raised merely to be straddled. Most often the authors do have a specific position on the relevant issues and their questions suggest their approach. Indeed, it would seem impossible to achieve the incisiveness and depth here reached without pointed questions. Penetration requires momentum in a precise direction. A rifle is more piercing than a shotgun. It does call for better aim, but the authors' is on the whole excellent. One at times disagrees with them; in a book of this scope this is inevitable. But that in itself only adds to the stimulation and challenge.⁵ And the dissenter will generally find that the sources and authorities on which he relies have also been preserved and displayed for ready access.

In only one area do the authors present articulate answers to questions: the power of Congress to limit the jurisdiction of federal courts.⁶ The device employed here is essentially a full-blown Socratic dialogue (as distinguished from the incomplete ones in the other Notes)—though here the respondent is the wiser man! What emerges from the "conversation" is an incisive, yet extremely subtle, analysis of a difficult and significant area. Following behind the two speakers, the student is led along many an otherwise unblazed trail through what are too infrequently seen as contiguous fields, and returns with some penetrating insights into the structure and operation of our federal system and the role of the judiciary in it. Hopefully he acquires en route a wise distrust of the easy generalization from a particular decision.

In sum, then, this book comes a long way from the old conception of a course-book as a convenient substitute for the library's reports of selected cases. The

⁴ As used in the book and in this review, the term "Note" refers to a comparatively extended treatment of a problem area. In a sense, each consists of a collection of what might elsewhere be considered separate notes.

⁵ For a sample of the type of questions, and answers by one who takes a differing view from the authors, in the particular area considered, see the review of this book by Kurland, 67 *Harv. L. Rev.* 906 (1954).

⁶ Pp. 312-40. This Note was published separately as Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 *Harv. L. Rev.* 1362 (1953).

meat of this book is in its Notes. Together with the cases, they add up to a deep, thorough and comprehensive treatment of the field. The quantity and quality of scholarship invested here is huge; the analysis is of an order difficult to match anywhere. Yet the fact that all this has gone into a course-book of itself raises some questions.

To begin with, it may be argued that such thoroughness and depth make the book difficult for students. To this the authors demur, on the ground that "oversimplification is no service to advanced students."⁷ I agree, though with some qualifications. For one thing, the students themselves must be brought to believe this. They are used to material which is simplified in greater or lesser degree. Considering the infinite depth and complexity of just about every part of law some glossing over is unavoidable; I for one doubt that law schools could (if they would) treat all their courses—or even all advanced ones—in full depth and richness. Probably every course has within it some areas that should be examined intensively, but it seems questionable, to me at least, whether this kind of treatment could be in constant use throughout. On the other hand, I have no doubt that some third-year electives should impel students to extend themselves, to develop their techniques of analysis in depth throughout a whole field. I have particularly in mind courses that cut across usual subject breakdowns in pursuit of deeper understanding of the operating structures of our law. In such studies especially, consistently thorough treatment may reveal a new dimension in the interrelation of seemingly disparate problems. Such an approach provides opportunity to achieve the refinement of previously acquired techniques and the development of new ones—matters too often neglected after the first year. The going institutions of federalism are to my mind excellent objects of such a sustained penetrating study. This book is a magnificent—and well-nigh indispensable—vehicle for such a course.

If there is a weakness in its pedagogy, it lies in another direction. The questions posed as to any problem vary in difficulty and significance: some may be answered fairly easily; others are calculated to open up long lines of thought. The student requires some guidance to let him know before class when the obvious answer is really just that—and when it is not. At times, the signs are clear. The very explicit titles heading each Note are generally quite helpful. But some further indications from the authors might not have been amiss. Considering the lucidity and economy of their "straight text" in those few areas where such treatment was used, perhaps a freer interlarding of textual statements is indicated. In any event, this difficulty is not a particularly substantial one (and can be alleviated by some advance word from the individual instructor); indeed, to some extent it seems to add to students' satisfaction when, on review, they comprehend more fully the pattern they had not wholly appreciated before.

The other objection based on presentation of the fruits of so much effort, both

⁷ P. xv.

research and analytical, in course-book form has to me much more substance. That is, the format tends to hide the light under a bushel: since the comments and critique are not generally presented in a fully articulated form, they are less accessible to lawyers doing research on a problem. A partial answer to this, as far as this book is concerned, is simply that it just isn't quite so. Though the analysis is presented by way of question series, anyone who has sat through a "case-method" law class realizes how effectively ideas may be conveyed in that manner. Indeed, in a field like this one, where many of the basic questions are yet unresolved, that method has distinct virtues. I do know that when I referred several colleagues to this book as bearing on problems they had, their reactions were uniformly of a high degree of satisfaction.

What does remain of the objection to the form of publication is that the practicing bar is habituated to ignoring course-books. If that should happen to this book—if it found its way into wide professional use only as those who studied it in law school entered the practice—it would be a substantial loss both to the bar and to the development of the law in this area. The book was prepared with the practitioner in view, albeit somewhat secondarily.⁸ The index and table of contents are substantially more elaborate than generally found in course-books and, though perhaps somewhat less detailed than those of a good treatise, should certainly prove adequate. The exertion of whatever extra effort might thus be involved will yield the researcher in its pages perhaps the two most important things he could demand: an introduction to the significant questions and available analyses in his area, with that perspective which a practicing lawyer rarely has time or detachment (though he may often have occasion) to develop; and a comprehensive collection of valuable leads into decisions, statutes and secondary sources. In short this would make an excellent desk book for any lawyer who has a significant amount of practice in federal courts or involving federal matters. Throughout the field of its coverage it is one of the best reference tools I know, and in some areas about the only one with any real thoroughness.⁹

In any event, if the argument about accessibility to the practicing bar is to be heeded, it means either that the authors should have produced both a text and a course-book, or else the former in preference to the latter. That the authors have not seen their way to do both may well be regretted. But if the choice must be in the alternative, I for one cannot quarrel with their election. The primary job of both authors is with their students, and a treatise is still not as satisfactory as a book like this for a searching kind of course. And who is to say to a teacher that the long-range influence of his work via his students is to be spurned for more immediate effect on current cases?

But all this notwithstanding, when one sees a product of this caliber, one

⁸ P. xii, xv.

⁹ For example, litigation against the United States Government, Chapter IX.

nevertheless hopes for its widest possible influence. That this may not be immediately realized is hardly a reflection on the book. The longing is rather a recognition of unusual merit. As to this book, such longing is most highly justified.

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McCarthy and His Enemies. By William F. Buckley, Jr., and L. Brent Bozell. Chicago: Henry Regnery Company, 1954. Pp. 413. \$5.00.

This volume is the development of a theme expressed by Christopher Fry's mayor in *The Lady's Not for Burning*.¹

"That's enough!
Terrible frivolity, terrible blasphemy,
Awful unorthodoxy. I can't understand
Anything that's being said. Fetch a constable.
The woman's tongue clearly knows the flavour
Of *spiritu maligno*. The man must be
Drummed out of this town."

Buckley wrote another book which Regnery published.² This is more of the same.

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Law and Social Change in the U.S.S.R. By John N. Hazard. Published under the auspices of the London Institute of World Affairs. Toronto: The Carswell Company, Ltd., 1953. Pp. xxiv, 310. \$4.50.

Soviet Law in Action. By Boris A. Konstantinovsky. Cambridge: Harvard University Press, 1953. Pp. x, 77. Paper, \$1.50.

In all questions relating to the Soviet Union there are two preliminary questions: have you got information and how accurate is it? Direct information as to the policy of a law is always most difficult to come by in all autocratic governments, and of these not least in the Soviet Union. It has to be inferred from text-book statements of legal doctrine, from legislation and from the reports of decided cases. The peculiar difficulty with the Soviet Union lies in three circumstances: first, even such relatively innocuous information as that concerning law, even private law, is kept as far as possible from the outside world, and the interval before release seems to be increasing; secondly, some legislation is kept secret until it needs to be applied; and thirdly, the coverage of law reports is

¹ Page 26 (Oxford U. Press, 2d ed., rev., 1950).

² See Kurland, Book Review, 47 Nw. U. L. Rev. 408 (1952).

slight, very slight if compared to the United States, slight even if compared to England or other Western European countries. There is the further difficulty that there are always doubts whether the information is accurate.

On the whole one need have few qualms on this last score. In so far as cases are reported they must, to be of any use, represent to the Russian lawyer, if not what has actually occurred, at least what the authorities think should have occurred—which discloses the policy they favor. Moreover, the textbooks, which are at least semi-official, must be made to give to the Russian lawyer the law he is to apply. One could not over the length and breadth of a country like the U.S.S.R. administer justice substantially by means of secret instructions, not only to the judges but also to practising lawyers. All of this material is not written or published to deceive foreigners but to instruct Soviet lawyers, though apparently in books on International Law pains are taken to stake a claim with the outside world in favor of doctrines believed to be beneficial to the Soviet Union.

Thus the quality of the information—secret instructions to Communist party members apart—is probably not worse for foreign than for Soviet lawyers. It is of course less easily understood, but this is where Professor Hazard's special experience comes in, for he was the last foreigner to be admitted as a student to the Moscow Law School. On all relatively permanent but imponderable characteristics of Soviet law and justice he is a sure guide; and these imponderables do not change rapidly enough for his experience to be out of date.

The real question is whether we are getting information on enough points to prevent its being misunderstood; and here there is doubt. Certainly it is harder than formerly to get books out of Russia, and this probably applies more particularly to law reports, which give the best indication of what is actually going on. But there are many countries from which it is even harder to get information than from Russia, just because it is not to be had in fact by anyone. On the whole we seem to have enough, especially when interpreted by Professor Hazard, to give us a sound impression of Soviet law; and of this Professor Hazard gives us ample specimens for a general understanding.

I suppose the question relating to Soviet law that most interests western academic lawyers is its relation to western law. How far is it an original system? The question is complicated by the presence of an ideology which has not prevailed in the West, though it is not Russian but western in origin. However Russian the Soviet leaders may be they are in the Russian sense of the term westerners and not easterners of the Panslavic school drawing inspiration from the glorious Russian past. Yet some western observers are inclined to mark off Soviet law from western law precisely because of this prevailing Marxist ideology, which they say transforms the whole system. I doubt the accuracy of this diagnosis, and so I think does Professor Hazard.

The elements are the same but the blend is different, and there is exaggeration. Everything can be explained in terms of a war economy directed by a definite

social policy and seemingly permanent in character. For war, once you have got beyond the stage of private war, involves nationalization, at least of the armed forces, and it also involves planning, which becomes more totalitarian as war becomes more total.

Nor are Soviet nationalization or planning complete, for private property is allowed in consumer goods and there is little control over their use. It is left to the private citizen to decide whether he shall bring an action in tort. All economies are mixed economies and the Soviet economy is no exception. It is only the mixture that is different.

Is the scheme of management different? It is hard to say. We have learned in the present quarter century that it is natural for a concern to fall under the control of its management and the management will try to perpetuate its control. Americans know this better than Englishmen, but that is only because American phenomena come more into the limelight. Probably in Russia no more than in America or England can a governing clique afford to keep the best brains outside provided they are willing to conform. Willingness to go out of power for a time argues great political maturity and a belief in the good faith of the opposing party. Sometimes it seems to be an almost exclusively British characteristic. Even in Britain there have been many struggles to retain or regain power.

Certainly there is in the Soviet Union an altogether exaggerated belief in the use of power. But although we may not approve of the purposes for which it is used, we must admit that in a sense the harnessing of power to a purpose ennobles it. Sometimes, however, one wonders whether the Soviets are really interested now in much more than power.

In a curious way power seems to be the end of the Soviet system, for even though the managers themselves may think that they are exerting power not for its own sake but to achieve certain ends, the principal end is not the happiness or well-being of the proletariat but only the maintenance of power in the proletariat or in persons who regard themselves as its agents. This is as it were a perverse slant given to our pursuit of liberty, for liberty is Power vested in the individual instead of the government.

The form of communism the Soviets profess and practice is certainly not humanitarian, and it is a matter for serious doubt whether the dictatorship of the proletariat, or rather of its self-chosen representatives, is not now an end in itself. Cheerfulness will break in sometimes, because it is not in the Russian nature to keep it out, but masterfulness seems to be an end. The obsession with sovereignty is not transformed, as it is in Hobbes, by an instinctive skepticism, but it is like a Calvinism without the Calvinistic insistence on the sovereignty of God. It is a characteristic Aristotelian perversion.

The methods are startlingly ruthless and efficient because the physical development of power has gone much farther than before; but the elements are all old; the inquisition, the secret police, propaganda. They are what could have been expected of men infected with religious or parareligious fanaticism working in an extremely favorable environment of Caesaropapism in a land where the

theory and practice of toleration had hardly taken root and only a small portion of the people had political experience, but where it would be suicidal not to stimulate technical education.

Incidentally, of course, the Soviets do much for their peoples, but apart from the Marxist power slant, it is not very different from what is done in most peoples of advanced civilization; and they have not been to any extent pioneers. They have drawn on German and British experience and to some extent on the New Deal for most of their ideas, and where, as in family law, they tried to be original, they have eventually become more conservative than many western countries. They leave a much smaller field for the operation of private law, but where it does operate, it is mainly of the usual continental type.

In a sense the whole of Professor Hazard's book is a set of variations on the same theme, the securing of power to the proletariat's self-chosen managers. Thus he takes first property, which in Marxist but now unrealistic fashion is regarded as the prime source of power. He shows how, in so far as property means power, it is monopolized by the state, but that this still leaves the acquisition of consumer goods, and the means to acquire them, as an incentive. The state monopoly of property, considered as power, is of course one reason, though not the only reason, for socialist planning; and this Professor Hazard deals with next, together with the part played by contract within the plan. He then passes on to public law, of which he says, "[p]reservation of a monopoly of political leadership has become the major task of Soviet constitutional law." Criminal law has caused the Soviets much trouble. In one sense they should have foreseen, and probably did foresee, that criminal law would play a greater part in a socialist than in a capitalist economy, for it has always been regarded as implied in socialism that private law should yield place to public law. But on the other hand it seems that they sincerely believed that there would be a lessening of the desire for private gain and that this, together with all-around improvement in the standard of living, would render crime far less common than heretofore. Certainly the criminal law has had to be used far more as a sanction than even in the mixed economies of western Europe, but the Soviets have also found that the old inducements to crime still work as powerfully as before.

Professor Hazard deals successively with the reorganization of landholding, with labor problems, with patents and copyright, with the adjustment of losses through social security, state insurance and the law of tort, with the family, and with international law. All of these are particularly well known from his earlier articles, on which he has drawn heavily for this book. Perhaps the most interesting passages are to be found in his descriptions of the opportunities still left for the individual, by the protection of intellectual property and by the deliberate perpetuation of the law of tort, which has entirely shed its socialistic elements and has departed more and more from the notion of liability without fault, and in his account of the general tightening of the family by making divorce difficult, more difficult indeed than in most western countries.

Of all of this Professor Hazard gives a convincing picture supported by much

authority and illustration. It would wrong the law to say that it is uninteresting, but I come away with the impression that we have little to learn from Soviet law except perhaps that it is a mistake to suppose that the natural tendencies of mankind cannot be thwarted and twisted by a group of resolute men, provided they are willing to pay the price. That the price is heavy there is no doubt, and the general insecurity which is a large part of it affects the leaders perhaps even more than the led.

Soviet Law in Action must be taken for what it is said to be in its subtitle, "The Recollected Cases of a Soviet Lawyer." The author was during the greater part of his career a professor of law and legal advisor to the Odessa Bread Trust. He has set down what he remembers of fifty-three cases with most or all of which he came into contact professionally between 1931 and 1941. His book is therefore not at all like an American casebook and his accounts resemble ordinary reports in the popular press; for all he can give is a general description of the facts, the decisions and, in some cases, the subsequent fates of the parties. However Professor Berman has added valuable introductions to the whole book and its various sections, together with explanatory notes to each case.

The book is eminently worth having, but it is interesting not because it adds anything to our knowledge of Soviet law but because it affords a view of the legal and social atmosphere in which Soviet lawyers have to work. This, I have already suggested, is more novel and more important than anything in the law itself.

As a comparative lawyer who has made no special study of Soviet law but has read not only these but other books on it, I am bound to confess that although it is our duty to provide experts on Soviet law, I would rather not be one of them. It seems radically uninteresting and unlikely to shed new light on our legal problems. Nor do I think this should be a matter for surprise, for the initial doctrine of the Soviets was that law was only a makeshift which must wither away in the not very distant future, and when this was announced as a heresy, it was only because they recognized that law was a convenient, and indeed necessary, instrument of absolute power.

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The Growth of Scandinavian Law. By Lester Bernhardt Orfield. Philadelphia: Temple University Publications, University of Pennsylvania Press, 1953. Pp. xx, 363. \$8.50.

The western world's legal systems are usually divided into two groups, those of the civil and those of the common law. The former of these is not too well defined and contains within it legal systems which are so different from each other as those of France and Germany, or of the Union of South Africa and Mexico or Switzerland. But even if one defines the concept of civil law so broad-

ly as merely to indicate that all the legal systems within it have been strongly influenced, at one time or another, and in some of many different ways, by the law of ancient Rome as revived in the Middle Ages, it is difficult to find within that civil law group a place for the legal systems of the Scandinavian countries. Certainly, these countries have not totally escaped the influence of Roman-law thinking, just as such influences have not been absent in the common law. But those influences have not so strongly turned the legal thinking of Scandinavia toward that peculiar kind of conceptual thinking by which the civil law has come to be characterized. On the other hand, there has been totally absent that feature which is characteristic of the common-law systems, viz., that they are directly derived from the practices and traditions of the royal courts of England. Precedent has, of course, played a considerable role in the laws of Scandinavia, but to no greater extent than in the laws of, let us say, France or Germany. The Scandinavian laws should thus be regarded as forming a third group together with those of the civil law and the common law. What characterizes this group is the unbroken development from ancient Germanic customs to a modern body of law in which autochthonous traditions are happily blended with institutions of common European civilization and highly progressive ideas of twentieth-century welfare-state ideology, all held together by the vigorous democratic spirit of nations which have successfully preserved their independence from foreign domination.

A group of legal systems presenting such special and, in many respects, exemplary features, would seem to deserve careful attention, but nowhere outside of Germany do the Scandinavian laws seem to have constituted the subject-matter of intensive study. In this country, where we have never shown much interest in the ways in which the problems of modern civilization are being attacked abroad, the laws of the Scandinavian countries are to all practical effects unknown. In the present book Professor Orfield has undertaken to arouse our interest in the legal traditions and institutions of Scandinavia and to present to us some of their principal features. The aim is meritorious, but the achievement is not fully satisfactory. However, if there is any fault, it does not lie with Professor Orfield but with the general state of legal history in this country.

As the laws of Scandinavia are characterized by their long and unbroken development from the days of the Vikings on, the author has appropriately chosen to present these laws in their historical development. As its title indicates, the *growth* of Scandinavian law is the subject-matter of his book. Such an undertaking would seem to require at least some acquaintance with the methods and results of legal history, and quite particularly of that branch of it which has flourished for some one hundred and fifty years under the name of Germanic legal history. But where in the United States, outside of Professor Goebel's Institute at the Columbia Law School, could anyone obtain any training in, or even acquaintance with, that field of learning? As far as American law schools

are concerned, it does not exist, although our American law constitutes an offshoot of that body of traditions which are studied by the "Germanists." This state of affairs has not always prevailed. Melville Bigelow was a great scholar in Anglo-Saxon law and, consequently, in Germanic legal history. Langdell and Ames were at home in it, at least through their acquaintance with the work of Maitland. In every chapter of his *Common Law*, Holmes draws upon the general stock of learning of the Germanists, and so did, in their wide-flung works, John H. Wigmore and Max Radin. But where could a Scandinavia enthusiast like Professor Orfield have found this grounding today? Who, indeed, could have advised him as to the need of such grounding?

The existence of that need is based upon the fact that the Scandinavian laws, genuinely national though they may be, have not grown up in isolation. Together with the Angles, the Saxons, the Franks, the Visigoths, the Bavarians, etc., the Danes, Norwegians and Swedes belong to that large group of the Germanic peoples who entered the scene of history in late antiquity, who destroyed the Roman Empire, who built new kingdoms upon its ruins, and who, through the Middle Ages, either in amalgamation with Romans or Romanized Celts, Britons and others, or, in Northern Europe, without such admixtures, in constant contact with each other built up the common civilization of Europe. Within this common European civilization, including its law, the Scandinavian nations present a special variant, but what is peculiarly Scandinavian and what is commonly European cannot be understood unless one is familiar with the history of Europe in general and its legal history in particular. Only upon such a background can we appreciate, for instance, in what respects the Norwegian "thing," the Danish nobility, or the Swedish law books of the thirteenth century were peculiarly characteristic. Familiarity with the general panorama of history would also be necessary to transform the mass of historical data from the accumulation of the mere chronicle into that meaningful presentation of interconnections which is the peculiar art of the historian. This art cannot be developed without training, and again we ask, where in the United States can a law teacher find this training?

The writing of this book, one can feel, has been a work of love for its author, who, while born in this country, is of Scandinavian origin, has spoken Norwegian as his first language, has constantly kept in contact with Scandinavian affairs, and is well read in Scandinavian legal literature. But, or so it seems at least, he has never studied the Scandinavian laws on the spot. Had he done so, he might have told us more about the legal life of these countries, about the men (and women!) by whom this legal life is carried on, about the practice of the law, the traditions of the bench and bar, the methods of legal education, etc. As it stands, the book gives us much information about both historical data and modern legislation, but we do not get that connecting link which constitutes the very essence of the Scandinavian laws and which sets them apart from both the civil and the common law. We are briefly told that custom plays a greater role than elsewhere. What does that mean: ancient custom or more modern

habits, general custom or that of localities or groups? Observing in action that special kind of court, the *häraderet*, in which, in the country regions, sturdy farmers and small town burghers sit together with a magistrate of legal learning, can give insights which no book can provide. Age-old traditions are blended here with a kind of professional legal learning that has long exercised a profound influence on both legislation and the decisions of the higher courts. To some extent it seems, indeed, as if in Scandinavia legal development has in a peculiar way been determined by the blending of two influences. Lay people of both countryside and town, who, in that dignity which only the absence of any sort of serfdom could give, have maintained their traditions and combined them with courageous progressivism, have joined their outlook with the ideas of professorial scholars of great learning in both their peoples' own traditions and the experiences of the world outside. In England, the law has been decisively shaped by the judiciary; in this country, the attorneys and, in recent years, legal scholars, have added their special contribution; in Germany the decisive influences have been those of the scholars and the high civil service. In Scandinavia, the law seems to have received its peculiar features through a combination of popular and professorial influences. Of this unique spirit little can be gleaned from the present book, which also does not deal much with that branch of the law in which these inner characteristics present themselves most clearly, viz., ordinary private law. We do obtain much useful information, however, about modern legislation, especially of that kind which has made the Scandinavian countries appear as the very prototype of the welfare state. Enough is also said to indicate that this development has not blunted the Scandinavians' vigorous self-reliance and energies. Much information is also given about constitutional developments, about criminal law, and about procedure. As to the latter, the influential model has, incidentally, not so much been Germany as Austria, whose system of civil procedure is quite different from that of Germany. In passing it might also be observed that the first country besides Denmark to accept Lutheranism was the Duchy of Saxony rather than Switzerland, whose Protestant parts did not accept the teachings of Luther, but those of his rivals, Zwingli and Calvin.

In his bibliographies, Professor Orfield has given what seem to be complete lists of publications on Danish, Icelandic, Norwegian, and Swedish law in English, references to important writings in German, French, and Italian, and, finally, extensive lists of writings in the Scandinavian languages. Law librarians, let us hope, should feel stimulated by these bibliographies.

In our review of Professor Orfield's book we have been critical. Let it be repeated, however, that this criticism is directed mainly toward a defect in the present state of our learning and teaching in general. To Professor Orfield we must be thankful for a stimulating and informative book.

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French Administrative Law and the Common-Law World. By Bernard Schwartz. New York: New York University Press, 1954. Pp. xxii, 367. \$7.50.

This book is the last of a trilogy. The first book, which appeared in England, explains American administrative law to English readers; the second explains the same topic to French readers; while now the third explains French administrative law to American readers.

Dean Russell D. Niles, in his Preface, introduces the reader to the method used by Professor Schwartz. He says: "The work itself seeks to explain the fundamentals of the *droit administratif* to an English-speaking audience. The author does so by use of the comparative method, rather than by the more usual type of straight exposition. Approach through the comparative method takes as its point of departure knowledge already possessed by the reader in the American System of law and proceeds thence to point out similarities and differences. In so far as possible, the American lawyer is thus enabled to learn French administrative law in terms of his own law and not as a distinct but unrelated system" (p. vii).

I have no right to raise any question as to whether Schwartz bases his comparison on American problems which are really of outstanding significance. He made a name for himself by publishing a number of excellent law review articles on the subject of American administrative law. And Chief Justice Arthur Vanderbilt, one of America's leading lawyers in the field, in his Introduction (pp. xi-xvii), makes it almost *res judicata* that, from the point of view of American administrative law, the right questions are being raised and answered in an outstanding way. He says: "Professor Schwartz paints his picture with a broad brush, making it possible for us to see the woods and not merely the trees. There is no evasion of difficult problems, no fuzziness of thinking, no vagueness in language as he probes the vital problems of administrative law in our complicated modern industrial era in three different administrative establishments [U.S.A., France and England]."

Therefore, there remains for this reviewer only one way to assess this book—to discuss the principal topic of the book, as defined in the heading of Chapter I ("A Common Lawyer Looks at the *Droit Administratif*"), from the point of view of the receiving end of this "Look." But having decided that this is the proper approach, I feel constrained to add that this Review might have found a much more competent reviewer than a lawyer first educated in the State of Baden, which developed an administrative law parallel to that of France, or even copied from the French example.

At the beginning, let me say that I support Professor Schwartz in the method applied by him. Indeed, comparative law is intelligible only if we use our own law as the basis for the solution of the questions to be examined. In very many cases we will find that other countries, on the basis of other philosophies or techniques, found other devices to reach the same results which we have attained. In other cases, we find differences in the result or a disregard of certain

problems. We must first modestly register our findings of such considerations and then we might decide to learn, positively or negatively, from our comparison. Indeed, it requires a lot of self-discipline to be satisfied with this method. It is much more exciting to use a Tacitus-deTocqueville method to describe to Americans the law of other countries as superb, hoping that they might adopt some of the other system, or to use the opposite method of horrifying the Americans, by showing them the terrible results to which the use of some foreign method may lead them. Just recently I had the occasion to learn that there is no chance for someone who suggests that a little bit of water ought to be put in the Tacitus-deTocqueville wine. When I did just that, I was unanimously voted down, and I left the meeting full of despair, almost convinced that I should forget comparative law.

While Professor Schwartz is not entirely free from overconfidence in his own law (especially in his references to English law), his basic method is good and opens a new gateway for studies in this field. I cannot think of any more important service to be performed in this respect.

Professor Schwartz has made the following basic findings during his eighteen months' visit to France: (1) The entire relationship between the French government and the French individual is governed by the rule of law. (2) The rule of law is being protected by the administrative tribunals, primarily the "*Conseil d'État*" (Council of State) and the "*conseils de préfecture*" (Prefecture Councils), which may either annul almost any decrees of an administrative agency on the ground of incompetence, abuse of power, violation of law in substance or procedure (*contentieux de l'annulation*) or impose an obligation to pay damages on the Government for a "*faute de service*" (a wrongful act committed by an agent of a public service in the exercise of his administrative function). (3) The separation of powers is guaranteed to the last logical result. Whenever any decision of a court of law depends on the interpretation of administrative law or on the validity or invalidity of a decree of an administrative agency the problem has to be submitted to the administrative tribunal for the determination of the point in issue. Whenever a court of law deals with a question which, in the opinion of the Executive, belongs to the jurisdiction of the administrative tribunals, a special "Court of Conflicts" decides the question of jurisdiction (positive conflicts). The same court determines the type of court—law or administrative—to which the case belongs, provided both courts have refused to take the case (negative conflict).

These basic findings of the book—unfortunately nowhere stated together—are correct without doubt. But may the reviewer express his surprise that these elementary facts of French law were new to any American observer of European history and political structure? Professor Schwartz (p. 310) and Chief Justice Vanderbilt (esp. p. xii) assure us that before the research leading to the book reviewed here, "Anglo-Americans" were "convinced that control of administrative action by the ordinary courts of justice was the essential element of the rule

of law." "To an American the rule of law seems to demand that all justiciable controversies be determined by the judges who are our depositories of the law." How could "Anglo-American lawyers" without knowledge of these elementary facts negotiate with France on treaties dealing with the legal status of Americans in France or even more with institutions like the European Coal and Steel Union (Schuman Plan)? How can "Anglo-American" college professors explain Montesquieu and the principle of separation of powers under law, unless they understand that the executive side of the government of France acts subject to the rule of law? This question is justified, since it was in connection with this principle that the legislators of 1790 established the two systems of courts. Nonetheless, one must admit that, apart from the work of Dicey, legal considerations of the French system have only recently been published in the English language. See the masterly book of Marguerite A. Sieghart, *Government by Decree* (1950), especially Part II; C. T. Hamson, "Le Conseil d'État Statuant au Contentieux," 68 *Law Quarterly Review* 60, especially page 61 n. 4 (1952), where one finds a list of earlier English literature; T. W. Elven, "The Administration of Bordeaux," [1953] *International and Comparative Law Quarterly* 238. Under the circumstances, Professor Schwartz has helped indeed to further understanding and research.

Once we overcome prejudices, such as the belief that French (or European) executive side of government is not subject to the rule of law, we have to guard ourselves against oversimplifications and against too far-reaching findings to the effect that our systems are "basically" the same, another trap set for comparative lawyers. I am afraid Schwartz goes too far when he equates the difference between the Anglo-American double court system (law and equity) and the French and European double court system (administrative and law). Law and equity are the historical result of different approaches to the same factual problems developed within different periods, while administrative and private law deal with substantially different relationships. Law and equity resulted in bitter fights because of jurisdictional disputes and the claim of the common-law judges that "Law," whatever its source, has to be under their final control. The separation of the French courts has much deeper reasons. Fundamentally, there is the philosophy of an all-embracing state, beside which there are no other legally admitted bearers of social power. This power-house can only be administered successfully if acting in the three divisions. This is combined with the idea of an Executive free from negative influences of law judges but subject to the limitations set by the legislative power and the general (which, practically speaking, means "normal") principles of law. In the first line, law and general principles are interpreted by the highest authorities in the public hierarchy which can obtain jurisdiction in all cases by the usual complaint procedure (strongly neglected by this book). Only in the second line, judicial tribunals serving the idea of a strong and just Executive take over the task of interpretation.

Professor Schwartz, as understood by Chief Justice Vanderbilt in his Introduction, used his comparative method in opposition to the former American "analytical, historical and sociological approach." He excludes, apart from a few unimportant remarks, the historical basis of the French idea of the two-court system. He does not mention the sociological differences between the set-up of American and French society; nor even the entirely different meaning of "government" in the United States, pluralistic as it is, and "government" in France, centralistic as it is in governmental and even social forms. He mentions legal philosophy only once, in connection with natural law, and there his attitude is completely negative. Perhaps the overdose of sociology, in combination with an ahistorical education and the substitution of a doctrine of expediency for philosophy opens the way to a new American conceptualism. This reviewer, who experienced certain European promenades in jurisprudence, observes here, with great concern, a brilliant American administrative law expert, who looks at the most important problems of French administrative law only from the point of view of legal forms and techniques. While it is true that sociology or history or even legal philosophy alone are dangerous bases for legal research, not less dangerous is legal research without all three aids.

The failure to evaluate the legal differences, excellently observed, in terms of the structure of French society, history, and philosophy as contrasted to American society, history, and philosophy, has caused other deficiencies. We can only come to a proper definition of "administration" in its substantive meaning (executive side of government) if we contrast the function of administration with the functions of the judiciary and of the legislature, as these functions developed historically and logically. Only a clear description and definition of this concept gives us a clear basis for jurisdiction of the administrative tribunals.

In just this regard, Professor Schwartz, who apparently is not interested in problems of trade regulation—which certainly is not intended as a criticism—might have availed himself of an opportunity to show the greatness of the *Conseil d'État*. During World War II committees of merchants, industrialists, and the like were established in France for the purpose of aiding the Government in the distribution of commodities and raw materials. The question arose as to whether the activities of these committees constituted "administration" and were, therefore, subject to review by the *Conseil d'État*. The *Conseil* responded in the affirmative. In the middle of cartel-ridden France the *Conseil* also took under its review admission to such trades as accountancy, dentistry, and pharmacy, although decisive determinations are not made in such cases by administrative agencies but by "private" organizations. The *Conseil* has defined "administration" as including practically all regulatory functions from above which limit the individual.

While this broad definition of "administration" enlarged the field of judicial review in the economic sphere, another development narrowed the field of jurisdiction. The *Conseil* has shown the greatest possible reluctance in looking

at cases of price control [C.E. 8-12-1950, Confédération générale des petites et moyennes entreprises, Recueil Sirey 3, 30 f.; C.E. 27-2-1948, Syndicat de la Raffinerie de soufre française, Recueil Dalloz 661 (1951)].

A very able young German observer has suggested that the *Conseil* has worked out another requirement for judicial review: Is there a public interest in a review? Does the case call for special protection?

Schwartz might have covered another point in his book: the supervision of municipal councils and their right to call on administrative tribunals for review, a procedure designed to protect not only individuals but also municipalities. Can a municipality compel the supervising governmental agencies to permit the establishment of municipal enterprises (e.g., gas, electricity)?

A stricter definition or description of "administration," in contrast to the function of the legislature and judiciary, would have shown the exclusion of any consideration of the constitutionality of statutes or treaties. The entirely unsatisfactory solution to this problem contained in the 1946 Constitution, which provides for examination of such issues by a committee of the legislature, shows how deeply rooted is the refusal of examination of constitutionality of legislative acts by *administration* (including administrative tribunals) or the judiciary in France.

Judicial review, with the aim of annulling an administrative decree, can only be asked for in France, as is the case in the United States, by persons who have a personal interest in the case. Under French law any economic and social interest is enough to justify a "standing in court." This includes taxpayer suits against municipalities. Professor Schwartz has been most impressed by the recognition of the consumer interest as the basis for a petition for judicial review (p. 184 et seq.). He refers to the case *de Roche du Teillois*, Dec. 4, 1936, in which street-car riders of Nancy complained about an increase in the fare. The *Conseil d'État* considered the interest of these petitioners sufficient to give them "standing in court." But why does not the book refer to the case *Fédération des Sociétés d'Assurances* (1951 *Revue du droit public*, 488 et seq.), in which the *Conseil d'État* took the opposite view? It is difficult to state what the present trend is.

At this juncture a little deviation may be permitted the reviewer. Without taking any position at this time, I would like to raise some questions:

To what extent, if at all, are decisions of French administrative tribunals "precedents" as that term is understood in our case law? Is the book sufficiently developed as to this point?

On the problem of "standing in court," is France on the way to an *actio popularis*, which Professor Schwartz defines as an action "with no restrictions on the standing of those who seek to bring it"? (P. 190.) Schwartz believes that Roman law knew such an *actio*. There he seems to go a little bit too far. The *actio popularis* was nothing more than a civil action by virtue of which a person damaged as a result of a minor criminal act could bring a suit for a "fine," to be paid to

him, provided the praetor licensed the bringing of the action. All in all, I believe that Professor Schwartz is too optimistic in regard to the development of "standing" before French administrative tribunals.

It is fully understandable that Professor Schwartz was most surprised to find the French administrative tribunals having jurisdiction in suits for damages against the Government as well as against the responsible official (p. 250 et seq.). The official is liable for "faute personnelle" whenever he acts "willfully or maliciously, with gross negligence, or outside the scope of his official functions" (pp. 251, 283). The Government is liable for "service-connected fault" (p. 276) and for risks endangering an individual by public activities (p. 288 et seq.). It is not always possible to distinguish entirely between facts leading to personal liability of the officer and the liability of the Government. Both liabilities often exist side by side (p. 285). It is, as Professor Schwartz well realizes, an especially fine legal accomplishment of French jurisprudence to have developed the liability of the Government for imposing particular risks on certain individuals. Under German administrative law, a house-owner whose house suffered from an explosion which took place 10 miles away in connection with the construction of a canal could only bring a suit for damages before the civil courts if he could prove negligence. What of the case where the rock formation where the explosion occurred is part of the formation on which the house is built? In such event the damage would be the unavoidable result of the explosion. French law goes so far as to recognize that the house-owner has a claim for damages, while German law only relatively recently grants a very modest compensation for "sacrifice to the public good."

The principal problem of government liability arises in determining whether damage done to individuals is the result of "service-acts." What is "service"? The *Conseil d'État* has been very liberal in extending government liabilities. The two most impressive liabilities are the one for legislative acts (p. 298 et seq.) and the one for parliamentary acts.

Professor Schwartz in dealing with the first instance rightly refers to the decision in the famous *Flevretti* case, rendered in 1938. That case arose out of a newly enacted law that forbade the manufacture and sale of cream substitutes that looked and tasted like cream but were not made from milk. Such substitutes were in no way injurious to the public health. The sole purpose of the law was to protect the French dairy industry. The plaintiff company, which had made a cream substitute prohibited by this law, brought an action against the State for damages caused to it by the law. The *Conseil d'État* allowed recovery although there was no provision in the statute for the compensation of those injured by it. In its decision the *Conseil* stated that "it cannot be thought that the legislature intended to impose upon plaintiff a burden that does not normally fall upon him; and this burden, imposed in the general interest, must be borne by the community as a whole."

The reviewer cannot overlook certain technical deficiencies in this book.

French cases are only referred to by the name of the case and the date. How can the interested reader find them? The general reference on page 341 to the various collections of cases is not adequate. The reader who becomes most interested in the topic of this excellent book would also prefer to have a more detailed bibliography than offered.

These minor matters have to be mentioned by the reviewer. They do not affect in the least his admiration for the book and the author, as well as for the Institute of Comparative Law of New York University under whose guidance the book has been prepared.

Professor Schwartz and I approach comparative law with similar questions. Our different philosophies lead us to rather different answers. That is only to the good. It is my hope this spirit may help to protect American comparative law against the conformism fostered by many of our organizers of legal research and to bring out books of similar value.

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The Doctrine of the Separation of Powers and Its Present-Day Significance.

By Arthur T. Vanderbilt. Lincoln: University of Nebraska Press, 1953. Pp. 144. \$2.50.

This provocative book of lectures, delivered in the Roscoe Pound Lectureship Series at the University of Nebraska, by Arthur T. Vanderbilt, Chief Justice of the New Jersey Supreme Court, stirs up memories of a feud that has been ended, and at the same time points up defects in the treaty of peace. There will be some who will question his description of the causes of that conflict, and there will be some who will question his description of the vices that have survived the peace treaty. On both counts his book is significant and should be read with interest and care by lawyers, judges, and students of public affairs.

During the first two terms of the administration of Franklin D. Roosevelt there was a bitter feud over administrative procedure between Liberty League lawyers, the American Bar Association, and the Republican party, on one side, and the New Dealers, on the other. Dean Roscoe Pound and Arthur T. Vanderbilt (who was president of the American Bar Association in 1937-38) led the attack on the administrative agencies. Some of us who defended the administrative process felt that the lawyers who were attacking that process were really aiming at the New Deal, which created a multitude of alphabet agencies as the chief means of implementing its reform program. Dean Pound unjustly labeled us "administrative absolutists." It may be that one or two were "administrative absolutists," but I am sure that most were only typical American reformers, disciples of Emerson and William James and Louis Brandeis. Because we rejected the constitutional philosophy of Justice McReynolds, it did not

follow that we had fallen into the arms of Lenin and secretly intended to subvert the Constitution. Following the apathetic days of Harding, Coolidge, and Hoover, we were fighting for the spirit of American reform, and, being lawyers, we naturally made the sounds that lawmen make; and so the conflict was over the scope, significance, and future of the doctrine of separation of powers and its relation to administration.

With the passage of time it became apparent that the New Deal was here to stay. (In a way the Eisenhower Administration has symbolized the permanent contribution of the New Deal by elevating the Federal Security Administrator to membership in the Cabinet.) Roosevelt appointed a Committee on Administrative Management, which made its report in 1937. In transmitting the report to Congress, the President said: "The administrative management of the Government needs overhauling." He placed the emphasis on the elimination of confusion, ineffectiveness, waste, and inefficiency. In 1939 the Attorney General, at Roosevelt's suggestion, appointed the Committee on Administrative Procedure, of which Chief Justice Vanderbilt was a distinguished member, and which made majority and minority reports in 1941. Once the substantive program of the New Deal was separated from the procedural aspects of the administrative agencies, it became apparent that there was a common ground even among the extremists—all of us were interested in reducing the possibilities of individual injustice in the administrative process and in strengthening freedom by improving and regularizing procedure. In 1946 Congress enacted the Administrative Procedure Act, which vindicated the position taken by Chief Justice Vanderbilt and the other members of the dissenting minority of the Attorney General's Committee on Administrative Procedure. Now there were no protests from New Dealers or "administrative absolutists." Writing shortly after passage of the act, Chief Justice Vanderbilt said that the act was "designed to protect the individual citizen from the hazards of uncertain and slipshod administrative procedures resulting in unfair and arbitrary action, and yet seeks to preserve the flexibility, the resourcefulness and progressiveness of the administrative agency at its best." He repeats this judgment in his Nebraska lectures. In the debate over administrative procedure in the 1930's, those who attacked the procedure emphasized "the hazards of uncertain and slipshod administrative procedures" that resulted in "unfair and arbitrary action," while defenders emphasized the need "to preserve the flexibility, the resourcefulness and progressiveness of the administrative agency at its best." The meeting of these extremes in 1946 once more proved that, given time and circumstance, the human intelligence, as long as it is free, finds a way of asserting itself and of reconciling conflicting interests. Each party, as Montaigne would say, to make the crooked stick straight, bent it the contrary way; but in the end the stick was straightened out, and once more it was proved that Americans are conservative reformers.

But this book is not devoted exclusively to the doctrine of the separation of

powers in the administrative process. It is also a plea for continuous vigilance and effort to maintain and insure the independence of an honest and efficient judiciary. This aspect of the book reflects Chief Justice Vanderbilt's rich experience with judicial administration, first as a layman, and more recently as a judge. Readers ought to take seriously his discussion of failures of judicial independence. I would question, however, his effort to unmake the Norris-LaGuardia Act because the statute seriously cuts down the power of federal courts to issue injunctions in labor disputes. His discussion of this topic leaves out the amendments effected by the Taft-Hartley Act and a consideration of the vices which the 1932 act attempted to cure: namely, government by injunction. Had not the courts abused their equity powers, Congress (and this happened when Hoover was President) would not have found it necessary to enact the restrictive legislation. Judges can be guilty not only of too much self-restraint, or of what Chief Justice Vanderbilt calls "judicial deference," but also of arrogant self-assertion. It is a toss-up as to which is the greater evil. Judicial independence and the rule of law are certainly basic to a free society; but judicial absolutism and the rule of judges (one form of a government of men) may be as detrimental to freedom as is administrative absolutism. There is enough in this book to lead me to think that Chief Justice Vanderbilt would agree with this judgment. Some day, it is hoped, he will devote his extraordinary resources of experience and wisdom to a definition of this difference.

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The Secret Diary of Harold L. Ickes. Volume I: The First Thousand Days. New York: Simon and Schuster, 1953. Pp. xi, 738. \$6.00.

The American President. By Sidney Hyman. New York: Harper and Brothers, 1954. Pp. 342. \$4.00.

Harold L. Ickes became Secretary of the Interior in Mr. Roosevelt's first term in the fall of 1932 and remained in office until 1952—that is, for nineteen years. He kept a careful diary of his official and personal life in Washington. The full text will probably occupy six volumes, each the size of the present one. Even so, they are edited, since some of the material is considered too detailed to interest any but historians, and other parts must be withheld until the death of many living persons.

The present volume is of cardinal interest to all those to whom the working of the presidential system of government is of importance. Although there are pages that contain trivia, by far the largest proportion of the script is concerned with the significant processes of American government. It ought to be added that no startling new facts about the federal government are narrated, but the flesh, blood and soul of the constitutional structure of the presidency are caught alive.

Two clichés of the American Constitution are that "this is a government of laws and not of men," and that "the Constitution is what the Supreme Court says it is." But in Harold Ickes' diary we see that whatever degree of truth lies in these apothegms, the American Constitution is also the product of the force of character of the president in action upon the peculiar pressures of the social problems and forces that he encounters day by day.

What are the main conclusions that emerge from the Ickes diary of the first thousand days? We may consider the contribution under six heads: (1) The dependence of the government upon the political quality of the president; (2) the nature of the president's cabinet; (3) the pressures from outside on the presidency; (4) the dependence of the president on the Congress; (5) the intolerable burden of governmental work; and (6) some miscellaneous features of the presidential system.

1. *Dependence on the political quality of the president.* Perhaps the most remarkable impression made by the diary—it would seem without deliberate intention—is the political magnitude of Franklin Delano Roosevelt. We already know that an American president supplies two things in the government of the United States. Primarily, he is vested with sole responsibility for the executive function. Secondly, he is part of the network of mind and mind which makes up the political community of the American nation. If a president fails in this second function, he can be of only minor value in the first, and there occurs in the mobilization of the values and will of the whole nation a gap, which lets down the morale of the nation itself, disturbs its consensus, and distracts the public and the Congress. This latter function is probably far more important than the narrow constitutional role of the presidency, although, of course, it is only the constitutional role that gives a president a vehicle for nation-building and nation-sustaining.

In the light of this diary, the qualities of Mr. Roosevelt to fulfill both the functions above mentioned emerge with admirable force. He understood the items of policy by experience and thought, and the choice of counselors, well enough to give coherence to government policy as a whole. He therefore did not allow himself to be a heedless victim of the many pressures—economic, social, political, congressional, state, city, personal—which the American system so hospitably encourages.

It is often said that as contrasted with Congress, issuing from the many diverse areas of the United States, and therefore being a rather incoherent and variegated assembly, the presidency represents the unity of the whole nation. Yet suppose the unity that he represents happens to be a zero? Suppose that his experience and native capacity have endowed him with only the unity of a vacuum? Mr. Roosevelt was not a vacuum. He had a policy. He could, therefore, select counselors. He knew the direction in which to drive, and this gave him an ability to resist the special claimants.

He also knew people. Mr. Ickes was not an easy man to handle. He was a self-

righteous and a self-sacrificing one; such men do not see why other people should not make sacrifices or why others should not be corrected. He had a very tart tongue, and he gloried in his pungency. He, also, needed to be domesticated within the presidential roof of policy. There are exquisite pages in which are described two tactics of the President with Mr. Ickes. One concerns Mr. Ickes' desire—God knows why—to be secretary of a department of conservation rather than Secretary of the Interior. For this he needed a departmental law passed by Congress. He worried Mr. Roosevelt a good deal to get presidential backing on the Hill for this. Mr. Roosevelt supported him to his face, and let him roll down the Hill. Mr. Ickes could not understand this, and frequently became plaintive about it. The truth is, Mr. Roosevelt did not care a California fig for this bill compared with all the rival anxious claims on his spirit in the realms of major policy.

The other instance is much more important. In the conduct of the Public Works Administration (PWA) the issue arose, and should have been confronted from the beginning, regarding who was to be top planner—the Director of the Bureau of the Budget (Lewis Douglas, and later Mr. Bell); the Secretary of the Treasury, Henry Morgenthau, Mr. Roosevelt's white-haired boy; Harry Hopkins, who came in later than Ickes and whose hair was even whiter; or Mr. Ickes, who was the first administrator of PWA?

What principle of relief, doles or work? what instruments of relief, public utilities or work camps? and how much was to be spent?—these were the problems which the President took time in deciding. In the course of groping for the decision, each of the aforementioned protagonists had his place in the sun. The question was, who would stay there long enough to get a good tan? This was a much more serious issue, as we have said; and here Mr. Ickes was made the victim of Mr. Roosevelt's process of learning by experience and his strict subordination to what the President finally concluded was the proper policy. It caused Mr. Ickes to consider submitting his resignation three times; once doing so and then being persuaded to withdraw it, later to regret, and later still to admire the quality of the President.

What Mr. Roosevelt could do in winning the loyalty of his colleagues can be seen by this quotation from the diary:

The President was notified of his nomination [for a second term] by Senator Robinson, and he then proceeded to make what I think was the greatest political speech I have ever heard. It was really a strong and moving statement of the fundamental principles underlying our politics today, and he put the issues so clearly and so strongly that I do not see how anyone can fail to understand them. He visualized our present struggle as one in the long battle for liberty, but this time liberty against the royalty of economic power. The speech went over in a big way, and even the opposition papers have had to do him the credit of admitting its greatness. I came away from the meeting feeling that, as matters stand, I would have no option except to support the President, no matter what my personal differences might be with him over policies affecting my Department. I simply would have no other choice in view of what I have believed in and stood for all my life. [P. 626.]

There are displayed in the diary all of Mr. Roosevelt's remarkable qualities of character which enabled him to give the nation the sense that his view of its direction was one that it could freely adopt. It gives an insight into his other ingredients of character that brought him first-rate cooperators—his gaiety, his humor, his timing of occasions, his genuine personal interest in the fortunes of his colleagues, his wisdom and judgment.

The diary also reveals the tremendous victory that the President's spirit won over his physical handicap. When you learn that in order to make a public appearance the President would have to put on those heavy braces; and then, after the flash bulbs had popped and the reporters had departed, would have to change in order to get back to his routine of work, it is not difficult to understand how men of public spirit would be inspired to give their honest best to their nation when they appreciated a daily sacrifice of this magnitude. Furthermore, the heaviness of the burden—that weighs on any president in the American system—had to be supported with a physique needing constant attention and subject to great ravages, and yet it was all borne with a gaiety of spirit that seems to be not of this day.

2. *The cabinet.* In this system of government, Mr. Ickes' diary shows how the president, in another sense, stands alone. If it is true, as Ickes testifies and as we have concluded above, that a conscientious and politically minded president is an active initiator who then engages his colleagues, it also emerges that to a larger extent than in any other governmental system he is *solitary*. In the development of the Constitution since George Washington, the cabinet has become more than a number of heads of departments who communicate with the president in writing. It is an assembly. It could be a council. It ought to be a genuine sharer in the responsibility the Constitution has dumped upon the president's sole shoulders.

The diary supports what the works of Frances Perkins, Hull, Stimson, Sherwood, and others have suggested: As a collective body, as collectively responsible for the determination of policy on the initiative of the president, the cabinet does not exist. The men are not appointed for their experience in office. They are not chosen for any collaboration with each other before they arrive in Washington. They do not come from a political party that has the cohesion of principle and the loyalty of fellowship. Each department, as we see them in this diary, is like a feudal fief, with its vassals, its house-servants, its livery, its little dominium, and its jesters, while the president is the highest lord aloft and away in the white distance. Again and again, Ickes complains that the cabinet meeting was a waste of time. Perhaps on two or three occasions in these thousand days he is jubilant that the cabinet was the forum of a fundamental discussion of policy, but even then he cannot add that a majority or a consensus settled the issues introduced.

Almost all the differences—and they were very serious and publicized—between Ickes, Hopkins, Morgenthau, Henry Wallace, Lewis Douglas, Frances Perkins, and the President resulted from a want of clearance in common council.

The President, feeling that he, in the end, was responsible under the Constitution, preferred, or was forced by conscience, to treat severally with the different departments. Then, having made up his mind, he confronted those who were subordinated by a decision with a *fait accompli* and with the gay guile needed for the redemption of their affections.

The result was a loss of cohesion in the administration, frequent interdepartmental squabbles, sometimes almost infantile outbursts of rage by cabinet officials against each other, and a lowering of morale through discouragement. The President was also involved in a far greater number of appeals by those who wanted to get in ahead of others for more power or prestige, and by others who felt that some terrible squeeze was in the making to which they were about to be subjected.

3. *Pressure from outside.* In a democracy, and especially in the American one, based upon the principle of life, liberty, and the pursuit of happiness, we expect heavy pressure on the administration from outside. Mr. Ickes' diary constantly reports such pressures. Two are outstanding for their character. The first is his allegation that big business was trying every trick: libellous allegations, subornation of the loyalty of employees within the administration, threats "to quit," and constant, virulent hatred. It was as though the business leaders did not believe in their own Constitution and in the propriety of acquiescing in the electorate's decision.

The other pressure is that of the newspapers on the administration. It is remarkable how carefully the administration had to watch the Hearst newspapers. If they had been advised to organize a system of anti-Hearst radar on the assumption that his press was an alien enemy, they could not have been more anxious. Nor did the *Chicago Tribune* torture itself to show tremendous fairness to the administration. Both took advantage of leakages of information from the departments, and of wild exaggerations, both attempted to use the method of smearing the private character and transactions of the incumbents. The leakages, it may be added, were partly due to the want of party loyalty inside the departments of the administration.

4. *The dependence of the President on the Congress.* Two major presidential problems with Congress come out strongly in the diary, stressing and illustrating our previous knowledge of this relationship. Difficulties arose not so much from the very heavy dependence of the administration on a few congressmen and senators, as out of their local "bailiwick" point of view. Connected with this is the peculiar personality of certain individuals in Congress—as for example, Senator Tydings—and the trouble that such peculiarities, quite alien to the rectitude of policy, could make for the administration. No party doctrine or loyalty civilized them—they were as a law unto themselves.

5. *The intolerable burden of governmental work.* If the president does not work through a complete sharing of collective responsibility with his cabinet, he is forced, since he is but a human being, to alleviate the weight on his conscience

and his mind by an entourage of assistants known as the "Kitchen Cabinet" or the "Brain Trust." Ickes gives an extremely detailed close-up picture of the President's brain trust and secretariat. Miss Le Hand, Grace Tully, Colonel Louis Howe, Colonel McIntyre, and Steve Early are seen on almost every other one of these pages.

Perhaps the most important fact that emerges is the extent to which one or another of these could be the helpful or the evil intermediaries between men like Ickes, of the highest status as cabinet officers, and the President. For example, McIntyre on one occasion was actually caught by a controlled experiment in deliberate non-delivery of a letter from Ickes to the President. The ruse was organized by Mr. Roosevelt himself after complaints had been made that McIntyre had deliberately kept Mr. Ickes away from Mr. Roosevelt. It was often left to one or the other of these persons to be an ambassador of highest political matters between the President and his chief officials. This is a parlous situation.

6. *Miscellaneous.* In the first thousand days, that is, up to the time of Mr. Roosevelt's election in 1936 for a second term, the Supreme Court issue had not yet been brought out into the open in a complete offensive. It was in 1935 that the series of decisions hostile to the New Deal began to be delivered. In the Ickes diary one can see the first plannings of alternative ways to cope with the mortmain of the then Supreme Court on the New Deal's social policy. Once the first shock and disappointment of invalidation had been overcome, the administration was glad of the massive attack of the Court, because its lethal attitude gave the administration an excellent ground for appeal to the nation for reelection. It helped as an inspiration to the people in favor of the Roosevelt economic and social policy, and was the basis of support for proposals to reform the Court. That issue will, no doubt, be fully dealt with in the second volume of the Ickes diary—and from the inside.

Only two other short observations will be made. It is remarkable what an enormous pressure of business rested on the chief executive and his cabinet officers—at any rate, on Mr. Ickes. They are always working overtime; they are never finished; and they are always tired. This is evidence of bad organization of the administrative branch, as well as of the undertaking of enormous political tasks in a system of separation of powers attuned to the eighteenth century. I believe I can discern one link missing from the administrative structure which might offer cabinet officers, at any rate, some relief—an administrative assistant in the permanent career service at the top of each department, the cabinet official's permanent-career-other-self. But American partisanship could never permit this relief of individuals, even though the nation would benefit.

Yet, overburdened and congested as cabinet officers are, instances abound of sheer time-wasters having the liberty to enter the department and impose upon these men. Thus, to take one example, one Christian F. Reisner, a reverend gentleman, barged into Mr. Ickes' office, sat composedly at his desk, and en-

tered into a long discourse on the theme that: "[H]e told me that in God's eyes I was doing just as important work as he himself was doing." It is doubtful whether Mr. Ickes' heavy burden was relieved by this long pious rigmarole, even though he comments: "This really did cheer me a lot. It was pleasant to have such an authoritative message from the Most High, lacking which I never would have ventured to consider myself as useful a citizen as the reverend doctor."

Sidney Hyman's work on the presidency takes a macrocosmic view, while the Ickes diary looks at the same subject from the inside, microscopically, and, as it were, without theory.

There are various kinds of works on the American presidency. One type is Professor Corwin's: the more formal, steadily systematic, luminous treatise concerned with the constitutional provisions and their meaning as developed in the long course of action since 1788. Another type is the developed essay on the presidency as a current part of the working constitution—in this class fall such works as George Fort Milton's *The Use of Presidential Power*; or Pendleton Herring's *Presidential Leadership*; or Harold Laski's *The American Presidency*; or Binkley's *President and Congress*.

Sidney Hyman's is a top-notch example of the essay type. It builds on a deep and firm knowledge of the constitutional foundations, and then displays the political problems to which the presidency gives rise. These problems are considered and their gravity weighed. Wherever it is established that certain ills must be endured because, in the given environment, they are less painful than the proposed remedies, the grounds for the judgment are given. Where the field is full of rival proposals for the improvement of the functioning of the presidency the respective merits and demerits are assayed.

It is a most brilliant performance. The quality of luminosity and verve is not purely verbal—such a thing does not exist—it is the product of a truly remarkable insight into the political process of American democracy, considerable wisdom about it, and an especially acute comprehension of the subsoil beneath the presidency's status and role. No one can fail to find a refreshing draught in political form, and in the higher sense of political science and constitutional inventiveness, in this production.

The course of the book is the discussion of "The President as an Institution," political and social, dealing with the role he must play and the personal qualities this demands. It is followed by an investigation of the process by which men become presidents: the mode of election, and what Mr. Hyman calls the "laws of natural selection." This is Part II, and is entitled "Virtue and Talent." Part III is concerned with the tasks as manager of social justice and prosperity thrust by the expanding necessities of an acquisitive nation and the first world power on the president's shoulders. And the problem is whether the office is appropriately organized for its tasks.

It is impossible to traverse all the pages of this work, because it is highly compressed and epigrammatic in form. Every page is important.

We therefore merely single out a few things which are of special interest to the reviewer, in the hope that they may convey some of the quality of the whole work to the reader, and in addition, to indicate some matters on which another point of view is tenable.

Hyman unveils the president as an artist: he examines the artistry the man requires to piece together the support he needs, in a broken Congress and a vast chaotic public, to fulfill a role which has grown with the years. For he is legislative leader as well as chief executive. "He is never free of the nagging question of whether the real majority is not made up of the shy and silent citizens who can flare like a pillar of phosphorus when they are rubbed the wrong way." (P. 53.) Yet, in view of this, the cooperation of party is needed desperately, especially as the provenance of presidents is most chancy. But, *if* this is so, then the later discussion of the reorganization of political parties is not stated with sufficient force.

The characterization of the sixteen presidents who failed as artists (including Hoover) indicates what the positive qualities are:

This is not to say they were bad men or were lacking in executive ability and intellect. But they shared one or more of five traits. Most of them failed as party leaders. Most of them compounded this failure by their inability to form a party *pro tem* that could cut across party lines and win the loyalty of millions of Americans. Most of them viewed the presidency as an office which worked with the Congress and the Court in a closed legal circuit. They all failed to project an image of a presidency with an organic responsibility of its own to help create what the people wanted. And most of them failed to grasp the potential of the presidency as an institution. [P. 73.]

The discussion of the "Kitchen Cabinet" or "Palace Guard" shows great acuity. Yet, ought it not be added that, as we have seen from the Ickes diary, the attribution to the president of *sole* responsibility for the office of chief executive, his final responsibility for all that happens, forces him to pick on men for aid and comfort and confidence—"buddies," indeed—who can help relieve him of so intolerable a burden on his conscience? And this raises a basic constitutional problem: where does true responsibility for policy lie?

I rather doubt whether the British prime minister "can often arrange a sequence of debates at intervals most favorable to his own cause and least favorable to the opposition." The House of Commons and the Opposition are less complaisant than that. The prime minister's voice always comes out clearly, because he has come out clearly himself as leader of a coherent party. This latter point is the true difference between the status of prime minister and president, as Mr. Hyman fully recognizes. The president's voice does come out clearly from time to time, *but* it is not clear for long. He does not go at it all the time; and the system produces inarticulate cries from his own cabinet, and confused and contradictory ones from Congress. Where is his voice *then*? Is it not forgotten within a few hours after it has been raised?

I raise these matters because they are crucial to the discussion which ensues regarding the reform of American parties. It is one thing to conclude that in the

present situation there is nothing to be done about this. It is another matter to argue, as Mr. Hyman does, that the system had better almost be left alone by reforming liberals who would like to see their kind in one party and all the non-liberals truly where they belong. The discussion is not sufficiently imbued with the urgencies that emerge from this present analysis of the incoherence and chanciness of policy.

"Yet he has ample means to make himself heard above all other voices." (P. 177.) This, even, is dubious. But what of his *will*—can that be made to prevail? And if not his, then whose? The brilliant evocation of the laws of natural selection of presidents—the extent to which one may expect learning and genius, or the "real good and wise," or the high-above-average men who then become artists on the job—shows what perils the Republic may suffer from the emergence of the president from the bowels of the people, and the parties (such as they are), and the prevailing mores. Then what of the single, the solitary voice? Where are the coherence, the longevity, the shoulders that can bear responsibility, such as bodies of men joined together by principle and acting for the public good—that is, political parties—may give?

Admittedly the task of bringing articulation to the policies of a nation so vast and territorially far-flung as the U.S.A., and so recently set on its course, is a most anxious one. Hence, I should have, personally, stressed the note of anxiety more than Mr. Hyman has done. Anxiety is the mother of invention; and our contemporary fumbling is not good for our minds, our spirits, and, maybe, for our lives. However, Mr. Hyman has undoubtedly put the cards on the table, and deals the kind of hand that makes one think and calculate the chances with accuracy and, in the process, pleasure.

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