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TAXATION: POTENTIAL DESTROYER OF CRIME⁷

Russell Baker*

WHILE NOT ALL crime is committed with a view toward profit, there can be no question but what syndicated or commercialized criminal operations are carried on in this country because of the vast sums of money to be gained from such activities. One does not need to search reports issued by the Federal Bureau of Investigation or by police chiefs to learn that the cost of crime runs into billions each year. Hearings conducted by investigating committees have made the American public conscious of the fact that the cost of commercialized crime to the nation lies not solely in terms of dollars diverted from lawful affairs to syndicate treasuries. The public is now aware of the shocking consequences which arise from that degree of bribery, leading to public corruption and demoralization in high places, which organized criminal elements have perpetrated in an effort to remain able to garner huge illegal profits. If it could be shown, as the old saying goes, that the game is not worth the candle, if public officials could be taught that the acceptor of bribes is not to profit from his breach of public trust, the collapse of organized crime would soon follow. Deprived of all chance to profit, few criminals would be foolish enough to continue in activities that could lead to no gainful end.

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Society, for years, has acted on the proposition that efficient enforcement of criminal laws, the imposition of criminal sanctions, should be enough to suppress crime. But punishment has proved to be no deterrent to crime except in isolated instances. The imposition of fines, the assessment of short terms of imprisonment against its minions, have come to be regarded by syndicate heads as no more than another item of "overhead" in the syndicate budget. Even the moral influence of public disgrace has tended to disappear before the presence of accumulated wealth, despite the illegal nature of its origin. Besides, piecemeal attacks on the outwardly flagrant manifestations of crime¹ nibble only at the fringes and never reach the heart. The only telling blow that society will ever strike, at least against the hydra-headed menace of commercialized crime, will occur when the source of profit is shut off, when the life-sustaining blood of dollars is stopped from flowing in its veins.

It is at this point that one reaches the thought of taxing illegal enterprises out of existence. No greater truism was ever spoken than the one uttered by Chief Justice Marshall when he announced that "the power to tax involves the power to destroy."² Effectively used, lawful taxation could destroy most crime by drying up its well-spring, by eliminating its profit-motivating force. It is, therefore, proposed to examine whether proper tax laws could be devised capable of reaching that result. The subject could be put into understandable limits if one particular phase of organized crime be subjected to tax scrutiny. It is acknowledged, however, that all forms of syndicated crime would be open to the views herein expressed. The present center of interest in the

¹ The attempt to shut off the operation of slot machines by forbidding the transportation of such machines, or the parts thereof, in interstate commerce under S. B. 3357, Ch. 1194, Pub. Law 906, approved January 2, 1951, U. S. Cong. Serv. 1950, Vol. 1, pp. 1234-6, illustrates the "piecemeal" method of attack. While the statute reflects congressional awareness of a deplorable situation and a willingness to take measures against its continuance, it is likely to have little value in the suppression of intrastate crime involving such devices. If anything, it tends to encourage more crime by stimulating the gambling syndicates to "high-jack" existing machines located in private hands to recoup losses brought about by official seizure and destruction of those slot machines found operating in public places.

² *McCulloch v. Maryland*, 17 U. S. (4 Wheat.) 316 at 431, 4 L. Ed. 579 at 607 (1819).

national field being the commercialized business of gambling, thanks to the high-lighting it has received at the hands of the Kefauver Committee, it has been selected for examination from the tax standpoint.

Many have urged that law enforcement in relation to gambling has become something of a farce, as was the case with prohibition, because the public wants to gamble. The existence of an all too human impulse to want to take a chance, whether it be at the risk of life in an automobile hurtling over a highway or at the risk of financial loss in some speculative activity, is well enough known to call for no denial. Whether the urge is psychologically inherent in every human being or is inculcated by an earlier successful experience at chance-taking is something which need not here be inquired into. Threat of taxation will probably never serve to stop social card-playing and the like by those who wish to participate in a "friendly" game conducted at home. It is against those who operate commercial gambling activities, who provide the facilities through which others may gamble, who fix the odds to line their own pockets, that these remarks are addressed. Their profit has been shown to be enormous. It is that profit which, it is proposed, should be taxed out of existence, for there lies the evil and the danger to the national welfare.

One further limitation should be noted before turning to an investigation of controlling law. The frustrations which have accompanied local efforts to suppress commercialized gambling, the hampering restrictions which have surrounded even state-wide attacks on an enterprise shown to be national in scope, are too well-known to require comment. Their very existence dictates the obvious conclusion that any adequate tax law would have to be enacted at the national level. The experience of the past has shown that if the criminal element in the community has indicated any respect for the forces of law and order it has been because of a wholesome fear of the power and integrity of the national government, especially in connection with the taxation of income. The federal agent, therefore, may prove to be the nemesis of the

gambler, not because any power on the part of the national government to regulate gambling *per se* is involved, but because the nation's tax laws may become concerned.³

I. FEDERAL TAXATION OF ILLEGAL INCOME

A. CONSTITUTIONAL AND STATUTORY PROVISIONS

There is a general belief that the Sixteenth Amendment to the federal constitution constitutes the source of power in the federal government to impose an income tax. Such is far from the case for every government, including a federal one, has the inherent power to impose a tax for its support, quite without limit as to the nature of such tax so long as the same does not violate express constitutional restriction. An income tax is included within such power, hence the power to levy an income tax has been enjoyed by the federal government since its formation. Recognition of the necessity for the existence of such power on the part of the federal government was accorded by the framers of the Constitution when they wrote in Section 8 of Article 1, acknowledging that Congress should have

Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.

³ Save as to the District of Columbia, the territories, the insular possessions, the Indian lands, and its own establishments, the national government is generally without power to prohibit conduct otherwise criminal unless as an incident to the exercise of some one or more of the express powers delegated to it by the United States Constitution. In that regard, the recent history concerning successful prosecutions of violators of federal laws passed in aid of the taxing power is well known. In the Northern District of Illinois alone, federal convictions have been obtained against such notorious characters as Alphonse Capone, Case No. 19179; Ralph Capone, Cases No. 20566 to 20569 inclusive; Jake Guzik, Case No. 32227; Sam Guzik, Case No. 22081; Frank Nitti, No. 21239; Murry L. Humphries, Case No. 27428; Moe Annenberg, et al., Cases 31755, 31760 to 31762, and 31765 to 31767, inclusive; Louis Lipschultz, Case No. 17276; Hyman Levin, Cases No. 32202 and 27954; Rocco DeGrazzia, Cases No. 46-CR-229, 28252, and 27954; Nick DeGrazzia, Cases No. 28250 and 27955; Edward Jones, Cases No. 48-CR-205, 45-CR-30, 31562 and 33153; Stewart S. Brown, Case No. 32168, 32154 to 32156 inclusive; Jack Sommers, Cases No. 27087, 28023, 32168, and 32154; James Hartigan, Cases 32168 and 32155; William P. Kelly, Cases No. 32156, 32168, and 32766; and William Malosky, Case No. 31760. In addition thereto, see also *United States v. Johnson*, 319 U. S. 503, 63 S. Ct. 1233, 87 L. Ed. 1546 (1943); *United States v. Skidmore*, 123 F. (2d) 604 (1941), cert. den. 315 U. S. 800, 62 S. Ct. 626, 86 L. Ed. 1201 (1942); and *United States v. Potson*, 171 F. (2d) 495 (1948).

The breadth of the phrase "lay and collect Taxes, Duties, Imposts and Excises" is such that it covers every form of taxation which could conceivably be devised,⁴ necessarily including an income tax. In the case of the federal government, however, the purpose must be either (a) to pay the debts, (b) provide for the common defence, or (c) provide for the general welfare of the United States.⁵ Courts will not, generally, inquire into the congressional purpose evidenced by the enactment of a tax measure, hence if Congress should choose to enact a tax measure directed against illegal income it should withstand attack from that angle.⁶

One limitation was imposed originally on the federal power to tax and that was one which required that all duties, impost, and excises should be uniform throughout the United States and that direct taxes should be apportioned among the states in proportion to population as determined by a census.⁷ Income taxes imposed during the Civil War period⁸ may have been justified under the emergency conditions then existing, but other attempts to collect

⁴ Cooley, *Const. Lim.*, Carrington Ed., Vol. II, Ch. XIV, p. 986 et seq.

⁵ As to whether the power to tax was granted simply in order to make possible the payment of debts, etc., or is a power separate and distinct from the other substantial powers to pay debts, to provide for the common defence, and to provide for the general welfare, see Story, *Comm.*, Vol. 1, § 907-9, and Murphy, "Memorandum on the General Welfare Clause," Sen. Doc. No. 46, 79th Cong., 1st Sess., pp. 1-3. See also *United States v. Butler*, 297 U. S. 1, 56 S. Ct. 312, 80 L. Ed. 477, 102 A. L. R. 914 (1936).

⁶ In *Providence Bank v. Billings*, 29 U. S. (4 Pet.) 514 at 563, 7 L. Ed. 939 at 956 (1830), Chief Justice Marshall stated: "The power of legislation, and consequently of taxation, operates on all persons and property belonging to the body politic . . . This vital power may be abused; but the interest, wisdom and justice of the representative body, and its relations with its constituents, furnish the only security." The same judge, in *McCulloch v. Maryland*, 17 U. S. (4 Wheat.) 316 at 430, 4 L. Ed. 579 at 607 (1819), said that it was "unfit for the judicial department to inquire what degree of taxation is the legitimate use, and what degree may amount to the abuse, of the power." In *McCray v. United States*, 195 U. S. 27, 24 S. Ct. 769, 49 L. Ed. 78 (1904), a case concerning the validity of a heavy tax on oleomargarine, the Supreme Court held that since the statute was primarily a revenue measure the judicial department could not inquire into the ultimate effect of the statute or the motives of its enactors. But see Waite, "May Congress Levy Money Exactions, Designated 'Taxes,' Solely for the Purpose of Destruction," 6 *Mich. L. Rev.* 277 (1908).

⁷ U. S. Const., Art. I, § 9(4).

⁸ See Act of July 1, 1862, and historical note, 26 U. S. C. A. pp. 3-4, as well as discussion in Chief Justice Fuller's opinion in *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429 at 573, 15 S. Ct. 673, 39 L. Ed. 759 at 816 (1895). Note also Chief Justice Taney's letter, under date of March 10, 1863, to the Secretary of the Treasury, printed as an appendix in 157 U. S. 715, 39 L. Ed. 1155.

income taxes at the national level⁹ fell because of this requirement for apportionment. It was the office of the Sixteenth Amendment, therefore, to remove the apportionment requirement as it related to income taxation, so as to permit the collection of varying sums from the citizens of the different states based upon the location and size of the wealth being taxed rather than the relative size of the population. That amendment, as is well known, declares that Congress shall have "power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States and without regard to any census or enumeration." Under it, Congress has, from time to time, passed and amended income tax laws to the point where, in direct opposition to any principle of uniformity, there is now a wide variety of shading not only in terms of the rate of taxation but also between kinds of taxpayers.¹⁰

The power of Congress to enact laws taxing income having become acknowledged, only one point of inquiry from the constitutional standpoint might remain and that is whether or not Congress is limited to the taxation of lawful income only, so as to oppose constitutional objection to a tax law designed to reach illegal income. There should be no need to belabor the fact that the Sixteenth Amendment, by its very language, grants power to tax incomes "from whatever source derived." The taxing power being thereby made without limit, no court would sustain an objection that only lawful incomes come within reach of the tax collector if Congress should see fit to exercise the power conferred upon it. The constitutional foundation being secure, it is next necessary to turn to see to what extent Congress has already determined to utilize the power it possesses.

⁹ *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 15 S. Ct. 673, 39 L. Ed. 759 (1895).

¹⁰ The differentiation between individuals and artificial persons, such as corporations, is sound in law. The intense division of artificial persons into many subclasses for purpose of taxation or exemption is controlled more nearly by economic rather than legal reasons.

At the time Congress enacted the Income Tax Act of October 3, 1913, it chose to impose the tax on net incomes from

gains, profits, and income derived from salaries, wages, or compensation for personal services, of whatever kind, and in whatever form paid, or from professions, vocations, businesses, trade, commerce or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in real or personal property, or from the interest, rents, dividends, securities or the transaction of any lawful business carried on for gain or profit, or gains or profits and income derived from any source whatsoever.¹¹

There was room for argument, under that statute, that the final phrase was modified by the earlier reference to "lawful" business, so as not to subject illegal occupations to taxation.

When, however, Congress enacted the Revenue Act of September 8, 1916, it took the entire quoted provision into the new law with an only, but highly significant, change which consisted of omitting the word "lawful" before the word "business," so that the final clause read "interest, rents, dividends, securities or *the transaction of any business carried on for gains or profits*, and income derived from *any source whatever*."¹² The new law made evident the intention of Congress to include, as taxable gain, the profits and income from any unlawful as well as from any lawful source. As so amended, the provision has been carried forward into every subsequent revenue act including the one presently in force.¹³

Two noteworthy points must be made as to the scope of the existing tax law. While Congress has shown a disposition to tax even illegal income, it has placed the tax burden on "net income," as defined, and has seen fit to require that the business be carried on "for gains or profits." Each of these concepts will be exam-

¹¹ 38 Stat. 166, § 2(b); Mason's U. S. Code Anno., 1926, Vol. 2, pp. 1675-6.

¹² 40 Stat. 1057, § 213(a); Mason's U. S. Code Anno., 1926, Vol. 2, p. 1750. Italics added.

¹³ 26 U. S. C. § 22(a).

ined later, but before doing so it would be proper to see what action has been taken by the courts with regard to construing the statute as it applies to income or funds received from illegal sources.

B. JUDICIAL INTERPRETATION OF TAX STATUTES

There have been periods of substantial uncertainty in this country, even after the enactment of the section of the 1916 Act quoted above, as to whether gains from illegal transactions were to be classed as "income" within the statutory definition and were to be subjected to taxation. Lower federal courts, for example, were not in agreement, during the prohibition period, as to whether gains from transactions in violation of the Volstead Act were to be treated as taxable income. All such doubts were resolved in favor of taxation, however, in the opinion written by Mr. Justice Holmes in the case of *United States v. Sullivan*.¹⁴ The defendant there concerned, charged with a criminal failure to report and pay a tax on his income from illegal liquor activities, had questioned his conviction on the ground such income was non-taxable. The Circuit Court of Appeals had held in favor of taxation under the 1916 provision, but had reversed the conviction on the ground that to compel Sullivan to file a return would mean forcing him to disclose evidence of his commission of a federal crime, hence lead to a violation of his constitutional right against self-incrimination.¹⁵ More will be said about this point later, but on the question of the right to tax, Judge Soper had remarked, over an argument that Congress could not have intended to put legitimate and illegitimate transactions on the same footing, that

strong reasons of public policy require that the gains of commercial dealings, which are also criminal, should be regarded as beneath the contempt of the law for the purposes of taxation. The inconsistency of the government in prohibiting an

¹⁴ 274 U. S. 259, 47 S. Ct. 607, 71 L. Ed. 1037 (1927).

¹⁵ U. S. Const., Amend. V.

act, and at the same time subjecting it to taxation for purposes of revenue, is obvious.¹⁶

Mr. Justice Holmes, reversing the Circuit Court of Appeals and reinstating the conviction, saw no such inconsistency. Speaking for the entire court, he could see no reason to doubt the interpretation given to the statute nor "any reason why the fact that a business is unlawful should exempt it from paying the taxes that if lawful it would have to pay."¹⁷

Subsequent to that decision, and prior to a development about to be mentioned, many cases have supported the proposition that the statute, as it now stands, justifies the taxation of unlawful gains derived from such illegitimate activities as the illicit traffic in liquor,¹⁸ race track bookmaking,¹⁹ card playing,²⁰ unlawful insurance policies,²¹ illegal prize fight pictures,²² lotteries,²³ graft,²⁴ fraudulent misapplication of a client's funds by an attorney,²⁵ and the payment of protection money or ransom to racketeers and kidnapers.²⁶ On the basis thereof, one would be inclined to conclude that the receipts from illegal syndicated gambling would likewise be subjected to taxation, and the purported proprietor of certain gambling establishments was, in *United States v. Johnson*,²⁷ ordered to jail for wilful failure to report the income derived therefrom. The salutary lesson of the Capone conviction calls for no comment whatever.

Notwithstanding the line of decisions just mentioned, and

¹⁶ 15 F. (2d) 809 at 810 (1926).

¹⁷ 274 U. S. 259 at 263, 47 S. Ct. 607, 71 L. Ed. 1037 at 1039 (1927).

¹⁸ *Maddas v. Commissioner*, 40 B. T. A. 572 (1939), affirmed in 114 F. (2d) 548 (1940); *Poznak v. Commissioner*, 14 B. T. A. 727 (1928).

¹⁹ *McKenna's Appeal*, 1 B. T. A. 326 (1925).

²⁰ *Weiner v. Commissioner*, 10 B. T. A. 905 (1928).

²¹ *Patterson v. Anderson*, 20 F. Supp. 799 (1937).

²² *Richard v. Commissioner*, 15 B. T. A. 316 (1929).

²³ *Droge v. Commissioner*, 35 B. T. A. 829 (1937); *Huntington v. Commissioner*, 35 B. T. A. 835 (1937); *Voyer v. Commissioner*, 4 B. T. A. 1192 (1926).

²⁴ *Chadick v. United States*, 77 F. (2d) 961 (1935).

²⁵ *United States v. Wampler*, 5 F. Supp. 796 (1934).

²⁶ *Humphrey v. Commissioner*, 42 B. T. A. 857 (1940), affirmed in 125 F. (2d) 340 (1942).

²⁷ 319 U. S. 503, 63 S. Ct. 1233, 87 L. Ed. 1546 (1943), rehearing den. 320 U. S. 808, 64 S. Ct. 25, 88 L. Ed. 488 (1943).

the administrative interpretation which had been given to the statute in question,²⁸ the holding of the United States Supreme Court in *Commissioner v. Wilcox*²⁹ has tended to throw the question of taxing illegal receipts into a new stage of doubt. The sole question there was whether or not money obtained by embezzlement constituted taxable income to the embezzler. It was alleged that the money embezzled had been lost in the gambling houses in Reno. The embezzler had been convicted for his crime against the state and had been sentenced to the state penitentiary. The victim, however, had never condoned or forgiven the taking of the money, up to the date of the tax case, and still looked to the embezzler to restore the funds taken. The Supreme Court, recognizing a conflict between the Circuit Courts of Appeal on the matter of the taxability of embezzled money, took jurisdiction. A majority of the court held, under an opinion written by the late Mr. Justice Murphy, that the presence of a taxable gain was conditioned upon (1) the presence of a claim of right to the alleged gain, and (2) the absence of a definite, unconditional obligation to repay or return that which would otherwise constitute a gain.

Recognizing that there has never been, and probably never will be, a totally satisfactory definition of "income," Mr. Justice Murphy stated:

The very essence of taxable income, as that concept is used in Section 22(a), is the accrual of some gain, profit or benefit to the taxpayer. This requirement of gain, of course, must be read in its statutory context. Not every benefit received by a taxpayer from his labor or investment necessarily renders him taxable. Nor is mere dominion over money or property decisive in all cases. In fact, no single, conclusive criterion has yet been found to determine in all situations what is sufficient gain to support the imposition of an income tax. No more can be said in general than that

²⁸ G. C. M. 16572 XV-1, Cum. Bull. (1936), p. 82.

²⁹ 327 U. S. 404, 68 S. Ct. 546, 90 L. Ed. 752 (1946).

all relevant facts and circumstances must be considered . . . Moral turpitude is not a touchstone of taxability. The question, rather, is whether the taxpayer in fact received a statutory gain, profit or benefit. That the taxpayer's motive may be reprehensible or the mode of receipt illegal has no bearing on the applicability of Section 22(a).³⁰

Inasmuch as the particular taxpayer had not obtained the money under any semblance of a bona fide claim of right and was still regarded to be under a duty and obligation to repay, he was held not to have received any taxable income by reason of his embezzlement. Some clue may be provided, however, by the court's remark that the employer was entitled "to replevin the money as soon as it was appropriated or to have it summarily restored by the magistrate," together with the fact that the "debtor-creditor relationship was definite and unconditional."³¹

Accepting the premise that the mere fact that a business is unlawful provides no exemption from tax liability, the question then becomes one as to whether or not there is a difference between money lost to an embezzler and money lost at gaming, in order to make gambling receipts taxable to the gambler. The question may be a fine one made to turn on the title to the money used in the gambling transaction. It is, to say the least, doubtful that the bookmaker or slot-machine operator can be said to have a "claim of right" in the nature of a superior title to that of the loser of the money lost. True, in the absence of a statute permitting suit or proof that the gamble was fraudulent in character so that the patron could never win,³² the general doctrine of the law would permit the successful gambler to retain his winnings against any attempt to recover the same on a quasi-contractual theory because the parties would be treated as being *in pari delicto*.³³ But denial of a remedy to one does not necessarily

³⁰ 327 U. S. 404 at 407-8, 66 S. Ct. 546, 90 L. Ed. 752 at 755.

³¹ 327 U. S. 404 at 409, 66 S. Ct. 546, 90 L. Ed. 752 at 756.

³² *Watts v. Malatesta*, 262, N. Y. 80, 186 N. E. 210, 88 A. L. R. 1072 (1933); *Webb v. Fulchire*, 25 N. C. 485, 40 Am. Dec. 419 (1843).

³³ *Howson v. Hancock*, 8 T. R. 575, 101 Eng. Rep. 1555 (1800).

prove that the other has acquired title, for at least one slot-machine operator has been denied the right to bring proceedings to recover the machine, or its contents, despite an unlawful seizure thereof.³⁴ The machine not being property entitled to protection before the law, can there be doubt of the positive legal right of the patron who has deposited a sum of money in such a device to grab an ax or a crowbar and pry the "bandit" apart for the purpose of retrieving at least his own funds? Only if the loser is willing to let the matter at rest could it be said that the operator of the gambling device or gambling establishment has any claim of right to the money lost.

Even so, the Wilcox case adds the requirement that there shall be the absence of a definite, unconditional "obligation to repay or return" that which would otherwise constitute a gain. Under state statutes, with perhaps the exception in Nevada, the loser is given an uninhibited right to bring suit for the repayment of the money lost in gambling.³⁵ If the loser should fail to take action within a given period³⁶ most statutes permit any third person to bring a *qui tam* action, frequently with a view to compelling payment of a much larger sum as by way of treble damages, for the benefit of himself and the government. Until all such proceedings are barred by limitation of time,³⁷ it might be said that the gambler has not yet achieved a status with respect to the money won that it could be considered taxable income in his hands. What response a court might make to such arguments could not presently be predicted, for one is never certain what the United States Supreme Court will do until it

³⁴ *Germania Club v. City of Chicago*, 332 Ill. App. 112, 74 N. E. (2d) 29 (1947), noted in 26 CHICAGO-KENT LAW REVIEW 31.

³⁵ Ill. Rev. Stat. 1949, Vol. 1, Ch. 38, § 330, is typical.

³⁶ The Illinois period is six months. See *Holmes v. Brickey*, 335 Ill. App. 390, 82 N. E. (2d) 200 (1948), noted in 27 CHICAGO-KENT LAW REVIEW 181 for the manner of calculating the period of limitation.

³⁷ The stranger would appear to have up to five years in which to sue under Ill. Rev. Stat. 1949, Vol. 2, Ch. 83, § 16. By a process of reverse reasoning from the fact that a bad debt is not considered deductible, absent proof to the contrary, except in the tax year in which it becomes outlawed, it would seem the gambler might be able to argue that there is no truly taxable receipt by him until all opportunity to compel restoration has become barred by the lapse of time. But see *Estate of Joseph Nitto*, 13 T. C. 858 (1949), at p. 866, for the view that the illegally obtained money is taxable at the time of first receipt.

has acted.³⁸ As the Wilcox case, and its possible applications, may seem to be a weak spot in the attempt to tax illegal gambling and other illegal activities out of existence, there would seem to be some occasion to consider a modification of the tax laws in this respect to remove all thought that there must be a claim of right in the recipient before the illegal receipt should become taxable. Such amendment could also provide clarification regarding any technical problem growing out of the attempted passage of title to the money lost.

One thing is certain and that is the court has been perfectly willing, in clearly lawful transactions, to charge the burden of taxation to persons obviously not entitled to assert any claim of right to the fund under the state law.³⁹ The settlor of more than one valid trust, the transferor of more than one share in a partnership, has been compelled to bear the impact of taxation on funds which have never passed through his hands. There should, then, be no hesitancy of achieving the same result against the operator of an illegal business, especially since he at least handles the money involved. Such money should also be taxed at applicable income tax rates rather than, as would seem to be the Treasury position,⁴⁰ treated as some form of gift⁴¹ bearing a rate far lower than that applied to honest income.

An interesting consequence of the Wilcox decision would seem to be reflected in the effort made by certain taxpayers to establish themselves to be embezzlers in order to achieve tax immunity,⁴² and the argument has even been carried over in an

³⁸ Even the Supreme Court, as evidenced by the frequent divisions which have occurred therein at the time of the decision of many recent cases, would seem to be uncertain as to the state of the law.

³⁹ Bartlett, "The Impact of State Law on Federal Income Taxation," 25 CHICAGO-KENT LAW REVIEW 103 (1947), particularly pp. 113-121.

⁴⁰ G. C. M. 24945, Cum. Bull. 1946, p. 27, indicates that if the owner "condones the taking of the property and forgives the indebtedness, taxable income may result . . . depending upon the facts of the particular case."

⁴¹ As to whether a gratuitous cancellation of indebtedness results in a gift, hence is taxable under gift-tax rates rather than exposed to an income tax, see *Helvering v. American Dental Co.*, 318 U. S. 322 at 331, 63 S. Ct. 577, 87 L. Ed. 785 at 791 (1943).

⁴² *United States v. Currier Lumber Co.*, 70 F. Supp. 219 (1947); *Wallace H. Petit*, 10 T. C. 1253 (1948).

effort to protect the proceeds of an extortion from taxation. Following the indictment and conviction of Browne, Bioff, Nitti and others for extorting money from the motion picture industry, an effort was made to assess additional income taxes against the estate of one of the deceased defendants. Opposition thereto based on the Wilcox case was answered by the Tax Court, in the proceeding entitled *Estate of Joseph Nitto*,⁴³ when it pointed to a possible distinction for use in matters of the kind under consideration. It said that, in the Wilcox case, the funds

were misappropriated without the knowledge or participation of the owner, and, also, the funds came to the party who was sought to be taxed not by the "conscious act" of the owner "in response to a claim for an agreed service by the party to whom they were paid." The Wilcox case does not stand for the proposition that all funds "fraudulently or illegally acquired" are non-taxable. . . . Even if we were to adopt petitioner's suggestion and denominate these various receipts as "extortion," the result would not be otherwise. Although the payors might have had the right to recover the funds so paid over, at least until such recovery, imposition of an income tax on the payees would not be improper.⁴⁴

The matter went no farther than the Tax Court, but it would be interesting to speculate on what the result would have been had it reached the Court of Appeals. If Nitti and his associates obtained the money through a legally defined extortion, they got no more title than did the embezzler in the Wilcox case. True the money was handed over by those who had "knowledge" and who "participated" in the physical transfer, but is not the same thing true of the victim of a holdup who acts at the point of a gun? May not much the same thing be said of the participant in a gambling transaction, although he may be separated from his money in a much more subtle fashion?

⁴³ 13 T. C. 858 (1949). The decedent was more familiarly known as Joseph Nitti in the Chicago area.

⁴⁴ 13 T. C. 858 at 866.

C. NECESSITY FOR UNIFORMITY IN TAXATION.

Supposing, for the moment, that it has been satisfactorily established that it would be proper for Congress to legislate for the imposition of an income tax on the proceeds received from illegal transactions such as gambling, it is next necessary to consider whether any such tax law must operate with geographic uniformity throughout the country upon all who engage in the illegal activity and whether or not it is necessary to impose the same rate on such persons as is imposed on honest taxpayers. If gambling were the subject of condemnation in every state in the union, as it is in most, there would be no problem as to geographic uniformity in the law. It is a fact, however, that some states, particularly Nevada, treat gambling as a legitimate enterprise, but such fact would not make Congressional action unconstitutional as a violation of due process requirements. It frequently happens that there is a difference in law between the state view on a subject and the attitude displayed in connection with federal taxing statutes.⁴⁵ The Supreme Court itself has noted, in the case of *Phillips v. Commissioner*,⁴⁶ that the "extent and incidence of federal taxes not infrequently are affected by differences in state laws; but such variations do not infringe the constitutional prohibition against delegation of the taxing power or the requirement of geographical uniformity."⁴⁷ If further evidence is needed of the right of Congress to enact tax laws which will have varying effect around the country, reference might be made to the decisions in *Florida v. Mellon*⁴⁸ and *Poe v. San-*

⁴⁵ See Bartlett, "The Impact of State Law on Federal Income Taxation," 25 CHICAGO-KENT LAW REVIEW 103 (1947).

⁴⁶ 283 U. S. 589, 51 S. Ct. 608, 75 L. Ed. 1289 (1931).

⁴⁷ 283 U. S. 589 at 602, 51 S. Ct. 608, 75 L. Ed. 1289 at 1300.

⁴⁸ 273 U. S. 12, 47 S. Ct. 265, 71 L. Ed. 511 (1927). The state there sought to enjoin the defendants from attempting to collect an estate tax under Section 301 of the Revenue Act of 1926 on the ground of discrimination in that, there being no state inheritance tax in Florida nor even the possibility of one in view of the state constitution, its citizens had to bear the full brunt of the federal estate tax since they could not have the benefit of the credit, running up to 80% of the normal estate tax, allowed for inheritance taxes paid to a state government. The statute was held constitutional, despite the seeming discrimination, because Congress did not have to "accommodate its legislation to the conflicting or dissimilar laws of the several states nor control the diverse conditions to be found in the various states

*born.*⁴⁹ If Congress should feel that recognition should be accorded to the fact that gambling may be a lawful activity in some areas, it could do so by discrimination in the matter of tax rate, assessing the lawful gambling income at the same rates as apply to other lawful income but subjecting the illegal income to an accelerated rate, or by making allowance for the deduction of lawful expenditures necessary for the production of such lawful income while disallowing such expenditures in other cases.

Obviously, if some form of taxation is to be designed to remove the profit factor from illegal activities, with intent thereby to destroy the same, the tax rate structure must be designed to impose confiscatory levies upon the receipt of illegal income while permitting legitimate enterprises to bear no more than a normal burden. To increase the income tax rate to the point where it would absorb 100% of the entire income of the country would be disastrous to a capitalistic economy. Is there, however, any constitutional objection to the utilization of a tax schedule which bears in unequal fashion upon different persons in the community? One need but refer to present income tax laws to see that no legal objection exists, for artificial persons are subjected to different rates than apply to humans, while higher rates apply, in accelerated fashion, to wealthier humans than is true of others.

At present, income from illegal activity is treated ratewise on the same basis as legitimate gains; in fact, even enjoys privileges not accorded to honest business men, as will be noted hereafter. It is an anomaly of strange hue that a legitimate business, if corporate in form, should be called upon to pay normal taxes,

which necessarily work unlike results from the enforcement of the same tax." All that was required was that the law should be uniform "in the sense that by its provisions, the rule of liability shall be the same in all parts of the United States." See 273 U. S. 12 at 17, 47 S. Ct. 265, 71 L. Ed. 511 at 515.

⁴⁹ 282 U. S. 101, 51 S. Ct. 58, 75 L. Ed. 239 (1930). The case turned on the right of a marital community, residing in a state where community property doctrines prevailed, to divide the income for tax purposes so as to enjoy a lower tax rate than would be applicable if the same amount of income had been earned by a husband alone in a common law state. The division, including the resultant tax saving, was held proper on the basis of controlling state law, thereby leading to a discrimination in favor of married taxpayers in community property states not enjoyed by married taxpayers in other parts of the country. The discrimination continued until Congress adopted the present equalizing provision, 26 U. S. C. § 301, one which disregards state law on the point for income tax purposes.

surtaxes, and excess profits taxes, while the commercialized gambling syndicate, financially more bloated than many a corporation, enjoys relief from an excess profits tax although the very conditions which justify or require such a program create the climate in which rackets can flourish on the excess of money in the hands of individuals. Other gross inequalities exist, but, concentrating on the question of the power of Congress to adopt varying tax classifications, even at the expense of inequality in taxation, it is clear that such a program would find no opposition in law.

In *Barclay & Company v. Edwards*,⁵⁰ for example, a domestic corporation claimed a refund on taxes which it had paid out of income derived from the manufacture of goods in the United States but which it had sold abroad. A foreign corporation, under similar circumstances, would have been immune from taxation on such operations. The Supreme Court answered the claim that the law was invalid, because arbitrary and capricious in character, by denying a right to refund. It said the "power of Congress in levying taxes is very wide, and where a classification is made of taxpayers that is reasonable, and not merely arbitrary and capricious, the Fifth Amendment cannot apply."⁵¹ In the earlier case of *Evans v. Gore*,⁵² the same court had noted that the taxing power of Congress could be applied to "every object within its range in such measure as Congress may determine" and enabled that body "to select one calling and omit another, to tax one class of property and to forbear to tax another," so that it might be applied "in different ways to different objects so long as there is geographical uniformity in duties, imposts and excises imposed."⁵³ There could, then, hardly be room for complaint of arbitrary or capricious action if Congress should decide to divide taxpayers into distinct categories on the basis of the legality or illegality of their activities, or to direct the application of one rate

⁵⁰ 267 U. S. 442, 45 S. Ct. 348, 69 L. Ed. 703 (1924).

⁵¹ 267 U. S. 442 at 450, 45 S. Ct. 348, 69 L. Ed. 703 at 706.

⁵² 253 U. S. 245, 40 S. Ct. 550, 64 L. Ed. 887 (1920).

⁵³ 253 U. S. 245 at 256, 40 S. Ct. 550, 64 L. Ed. 887 at 893.

to legitimate income and another, and still higher, rate to illegal gains.

On the question of how great a differential in rate could be drawn between the two classes of taxpayers, the answer again would seem to rest on the basis that the power resides in the hands of Congress and its determination would not be open to judicial scrutiny. To this point, of course, there has been no decision acknowledging the power of Congress to fix a tax rate from the standpoint of the legality or illegality of the occupation engaged in. Enough has been said, however, to indicate the probable response the courts would make to a claim of unconstitutionality. A state statute imposing a tax on margarine, not applicable to the sellers of butter, was upheld in *A. Magnano Company v. Hamilton*.⁵⁴ The United States Supreme Court there stated:

Except in rare and special instances, the due process of law clause contained in the Fifth Amendment is not a limitation upon the taxing power conferred upon Congress by the Constitution. . . . And no reason exists for applying a different rule against a state in the case of the Fourteenth Amendment. . . . Collateral purposes or motives of a legislature in levying a tax of a kind within the reach of its lawful power are matters beyond the scope of judicial inquiry. Nor may a tax within the lawful power of a state be judicially stricken down under the due process clause simply because its enforcement may or will result in restricting *or even destroying particular occupations or businesses*.⁵⁵

Again, in the case of *Alaska Fish Salting & By-products Company v. Smith*,⁵⁶ it said that even if the tax "should destroy a business, it would not be made invalid or require compensation on that ground alone. Those who enter upon a business take that risk." The court further stated it knew of "no objection to exacting a discouraging rate as the alternative to giving up a business, when the legislature has the full power of taxation."⁵⁷

⁵⁴ 292 U. S. 40, 54 S. Ct. 599, 78 L. Ed. 1109 (1934).

⁵⁵ 292 U. S. 40 at 44, 54 S. Ct. 599, 78 L. Ed. 1109 at 1114. Italics added.

⁵⁶ 255 U. S. 44, 41 S. Ct. 219, 65 L. Ed. 489 (1921).

⁵⁷ 255 U. S. 44 at 48-9, 41 S. Ct. 219, 65 L. Ed. 489 at 495.

Two other illustrations may shed light on the point. The validity of the Silver Purchase Act of June 19, 1934, one imposing a tax equal to fifty per cent. of the gains resulting from transactions in that metal, was sustained in the case of *United States v. Hudson*⁵⁸ despite the fact that the taxpayer had a net loss on his over-all operations for the year. Even more confiscatory, but equally valid, was the eighty per cent. excise tax imposed by the Unjust Enrichment Act,⁵⁹ a law enacted to meet the situation which had arisen because of the declared invalidity of the Agricultural Adjustment Act.⁶⁰ The government there appropriated practically all of the gains arising from a collection of the tax from the consumer without a corresponding payment thereof into the federal treasury, and its action was upheld.⁶¹ In one case involving the application of that statute, the court declared that if Congress

believes that a profit from a particular source, in the production of which the community has participated, was obtained under such circumstances as to amount to "unjust enrichment" by the standards of social or business conduct, as it conceives them, and taxes it heavily, courts have no right to say "nay." And this is true even if the taxing period were not limited, but the tax was continuous, aiming to tax a particular source, product or business out of existence.⁶²

One is forced to the conclusion, therefore, that Congress has unquestionable power to enact an income tax law containing stringent provisions directed against illegal gains derived from such things as gambling and to fix rates at a point where, from

⁵⁸ 299 U. S. 498, 57 S. Ct. 309, 81 L. Ed. 370 (1937).

⁵⁹ 49 Stat. 1648, Revenue Act of June 22, 1936, Tit. III, § 501, now 26 U. S. C. § 700.

⁶⁰ 7 U. S. C. A. § 601 set seq. The statute had been declared unconstitutional in *United States v. Butler*, 297 U. S. 1, 56 S. Ct. 312, 80 L. Ed. 477, 102 A. L. R. 914 (1936).

⁶¹ *Wilson Milling Co. v. Commissioner*, 138 F. (2d) 249 (1944), cert. den. 320 U. S. 800, 64 S. Ct. 430, 88 L. Ed. 483 (1944); *Union Packing Co. v. Rogan*, 17 F. Supp. 934 (1937).

⁶² *Union Packing Co. v. Rogan*, 17 F. Supp. 934 at 940 (1937).

a nullification of private profit, the illegal activity would soon cease. Being outside the pale of law, persons so taxed would find no protection within legal limitations designed to safeguard honest men and honest businesses. Such a program would, of course, require action by Congress to provide the necessary rate schedule. If it should be of the opinion that the step would be desirable, the machinery is already set up to accomplish the indicated purpose.

II. TAX ADMINISTRATION AND ENFORCEMENT

A. PRESENT VIEWS ON ADMINISTRATION.

The addition of still another law to the statute book, already crowded with measures intended to protect the community from crime, would be a meaningless gesture if no effort was made to compel obedience to its terms. Mention has already been made of the fearful respect accorded by the underworld toward the income tax law. The shadow of the federal agent has been enough to induce all but the hardiest of malefactors to pay at least a part of their ill-gotten wealth into the public treasury. If the tax rate should be set at a level where the entire profit is to be channeled into the public coffer, it is only to be expected that more will be encouraged to attempt to evade the law in order to save something for themselves. Only by stern enforcement, aided by the upper and nether millstones of tax collection and criminal punishment, would such a program become effective. Fortunately, the number who will be so tempted will come nowhere near the portion of the population which was led to flout the prohibition laws and bring law enforcement into disrespect. Adequately staffed with men of sufficient determination, the Treasury Department should be able to drive home the lesson that organized crime does not pay, either with freedom or dollars.

Is there anything in present tax administration or law which would militate against such a program? Policies currently followed by the Internal Revenue Department are, in some respects, weighted to favor the criminal class at the expense of honest men. Mention has been made of the fact that syndicate income

bears none of the burden of the excess profits tax. A disposition to put the receipts from crime in the category of gifts, taxed at a lower level than honest profits, has also been noted.⁶³ Gross inequalities in the matter of enforcement of the requirement for the keeping of records and reporting of gains and of other financial details⁶⁴ might also be mentioned. The gambling racket is possibly the largest industry, from the standpoint of volume of business, rapidity of turnover, and magnitude of profit, presently operating in the United States, yet it is permitted to exist without keeping financial records, or at best the most meager of records, except such as it may have been successful in keeping to itself. The Department has been content to accept returns, together with payment of the tax admitted to be due, totally lacking in data from which to permit verification of the accuracy thereof. Veiled reference to income from "speculation" or from "investments" is about as far as the record will bear. But the honest taxpayer, from fear he may omit some trumpery dividend payment, is required to detail not only the name of each corporation from which he received such a payment but also the address of its office and the amount so received.⁶⁵ The corporate taxpayer, or the individual engaged in operating a legitimate enterprise, well knows the cost and labor of keeping the complete financial records demanded of him, and the response of the Department if such records are not letter perfect!

B. ALLOWABILITY OF DEDUCTIONS

Even more flagrant is the disposition toward the credit for deductions taken in relation to the taxpayer's trade or business. Inasmuch as the tax, at present, attaches to the "net income" of the taxpayer, determination of that "net" requires that consideration be given to those items deducted from gross in ar-

⁶³ See notes 40 and 41, ante.

⁶⁴ Reg. 111, § 29.41-3. See also Henderson, *Introduction to Income Taxation* (The Lawyers Co-operative Pub. Co., Rochester, 1949), 2d Ed., p. 449 et seq.

⁶⁵ The Department yielded to the extent of permitting the taxpayer to omit the address of the corporation if its shares were listed on a regular exchange.

living at the tax base. The honest taxpayer is required, in case of doubt, to produce evidence that all such deductions are ordinary and necessary expenses having a direct relation to a trade or business entered into and carried on for profit. Except where otherwise specifically permitted,⁶⁶ no other deduction will be tolerated. A gain from the sale of the taxpayer's residence, for example, becomes taxable, but a loss cannot be deducted, except as an offset to other capital gains, since the property was not used in a trade or business nor acquired with a view toward making a profit. Cost of repair and depreciation on such a residence may not be taken into account. Other illogical results flow from still other ill-conceived provisions in the statute.

In contrast, the Department appears to allow to the operator of an illegal business a deduction for all those expenses which have been made "in the actual production of income."⁶⁷ The commercialized gambler could hardly argue that his occupation is not one entered into for the sake of "gains or profits." No court would accept the reasoning that each transaction should be classed as a separate investment undertaken for a capital gain, as might be the case of the occasional speculator in corporate stocks and bonds, hence no deduction should be permitted except on the basis that the expenditure was an ordinary and necessary expense having a direct relation to his trade or business. But even if the expenditure were of that character, it does not follow that any credit should be allowed for the making thereof, for public policy could well intervene and displace the logic applied to the honest business man.

The Tax Court case of *Stralla v. Commissioner*⁶⁸ is closely in point for the present purpose. The taxpayer there was found to be the real party in interest concerned with the operation of

⁶⁶ Special statutory authority is necessary to permit the taxpayer to deduct certain non-recurrent expenses such as losses from fire, storm, casualty, and similar items: 26 U. S. C. § 23.

⁶⁷ See *Stralla v. Commissioner*, 9 T. C. 801 at 821 (1947).

⁶⁸ 9 T. C. 801 (1947). See also *Lilly v. Commissioner of Internal Revenue*, 188 F. (2d) 269 (1951), denying an optical company the right to deduct, as "ordinary and necessary" business expenses, amounts paid to oculists by way of "kick-backs" on business forwarded because opposed to public policy.

a gambling boat stationed more than three miles from the California shore line but within the confines of Santa Monica Bay. After much litigation, it had been held that the boat was anchored within the jurisdiction of the state as it lay shoreward of a line connecting the headlands which formed the bay. For this reason, the gambling operations carried on aboard the ship were illegal because contrary to state law. Patrons of the gambling ship, one large enough to accommodate as many as 2,000 at a time, were ferried back and forth by water taxi. The taxpayer's returns disclosed his business to be that of operator of a gambling ship and the contest developed over his right to deduct certain outlays incurred in the conduct thereof. The expenses fell into three categories: (1) fees paid to lawyers to defend the enterprise against the charge the boat was anchored in state waters, including money paid to a lobbyist with a view to influencing legislation; (2) penalties paid the state for operating water taxis without a license; and (3) bad debt deductions based on a loan made to a pier company used as a landward terminus. Taxpayer contended these were ordinary and necessary expenses and the fact that the enterprise was determined to be illegal was a matter of no moment. The court, on the other hand, held that the allowance of these deductions would "frustrate sharply defined national or state policy proscribing particular types of conduct," and were not made "in the actual production of the income" but more nearly for the purpose of perpetuating a violation of state law.⁶⁹ There is a sound basis, therefore, for denying the operator of an illegal enterprise the right to claim any deduction from his gross income under the guise of expenses, whether ordinary and necessary or made in the actual production of income.

Calculation of the tax base also involves a problem with regard to the adjustment of losses on certain transactions entered into for profit against the profits made on others. The honest business man, quite properly, is permitted to take such losses into account in the preparation of his annual profit and loss state-

⁶⁹ 9 T. C. 801 at 820.

ment, for no one is so expert as to make a profit on every transaction. If the illegal gambling business were to be treated on the same basis, it would be logical to allow the gambler to deduct amounts paid on bets lost against the income received from bets won. The holding in the Stralla case just mentioned would appear to militate against that idea, but the law is not too clear on the subject. There was a time when losses on gambling were deductible only if the transaction took place in a state where gambling was legal.⁷⁰ Under that doctrine, the typical commercialized gambler would be required to report, as net income, all winnings without deduction for any losses. The Internal Revenue Act of 1934 made a change to the extent of permitting the deduction of gambling losses, but only to the extent that gains had been made from that source⁷¹ and then only if the losses were incurred in connection with the taxpayer's trade or business or bore a relation to transactions entered into for profit.⁷² It is quite likely that Congress had in mind the granting of relief to the patron of the gambling establishment rather than the proprietor thereof, but one decision does indicate that the measure of relief is open to both.

In *Humphrey v. Commissioner*,⁷³ the taxpayer had made wagers on card games, on football games, and on horse races. The wagering gains exceeded the amount of losses. The commissioner claimed a tax liability based on the gross gains without deduction of any losses incurred, but the court permitted deduction of the losses although the taxpayer offered no proof that the several wagers had been made with a view to profit. As the decision came subsequent to the 1934 act, it might be said to have nullified one of the two provisos incorporated therein, to-wit: the loss must have been incurred in connection with the taxpayer's trade or business or bear a relation to a transaction en-

⁷⁰ *Cronan v. Commissioner*, 33 B. T. A. 668 (1935) ; *Appeal of Heide*, 2 B. T. A. 451 (1925).

⁷¹ 26 U. S. C. § 23(h).

⁷² *Ibid.*, § 23(e) (1) and § 23(e) (2).

⁷³ 162 F. (2d) 853 (1947).

tered into for profit.⁷⁴ The holding did not pass without dissent, for Judge Holmes was of the opinion that Section 23(e) of the 1934 Act was not intended to liberalize the allowance of deductions for wagering losses. In his belief, it was "intended to constitute an additional restriction upon their allowance,"⁷⁵ hence required the concurrence of both factors before deduction would be proper.

Inasmuch as the gambler's conduct in paying off on bets lost is more nearly intended to perpetuate a violation of state law, it would seem that the frustration of "sharply defined national and state policy proscribing particular types of conduct," referred to in the Stralla case, ought to be sufficient reason for denying to the gambling racketeer the right to take any deduction, from the proceeds of the wagers he has won, on the basis of losses on other transactions, just as should be the case with respect to his other illegal expenditures. Put differently, taxation of the illegal enterprise on the basis of its gross gains without relief from any of the costs incident to its conduct would not only insure the collection of the highest possible rate of tax but, by financial attrition, would lead more rapidly to its collapse. If present law, as interpreted, is inadequate to produce that result, Congress should consider the need for amendment at the same time it ponders a change in the tax rates applicable to such criminal operations.

C. SUFFICIENCY OF PRESENT PENALTIES

Assuming, for the moment, that the tax plan, including the details of its administration, was such that the illegal enterprise was exposed to the obligation to pay the highest possible tax on its operations without relief from any of the expenses of doing business and that it was required to keep adequate records and file complete returns, what likelihood is there of compliance with such a law? No one would be so foolish as to suppose that any tax law will be obeyed, no matter how light the burden,

⁷⁴ 28 U. S. C. § 23(e).

⁷⁵ 162 F. (2d) 853 at 855.

except as it is backed up by stern enforcement with adequate penalty for its violation. Is the present income tax law satisfactory in that regard? Aside from provisions making it a crime to file a return which the taxpayer does not believe to be true and correct,⁷⁶ or to counsel another in the preparation and presentation of a false return,⁷⁷ the principal criminal sanctions of the law are directed against those who wilfully attempt to evade or defeat the tax⁷⁸ or who wilfully fail to file returns.⁷⁹ Successful prosecutions in the past of those who endeavored to evade the burden of the income tax, together with the visitation of heavy penalties as well as ultimate collection of the tax due,⁸⁰ appear to have taught underworld characters that it is the better part of wisdom to file at least a perfunctory return and to pay the tax admitted to be due. Five years in a federal penitentiary together with a stiff fine would seem to be adequate penalty for the felony of tax evasion. Only the section which makes it a misdemeanor punishable by a year in jail to wilfully fail to file a return might need Congressional attention, if the penalty for violation is to be severe enough to overcome the natural reticence of the illegal gambler to report the scope of his operations and to channel his ill-gotten gains into the public treasury.

D. PRIVILEGE AGAINST DISCLOSURE

Is there a possibility, at this point, that the taxpayer, concerned by the necessity for making disclosure of the nature of his operations, might be able to claim the privilege of the Fifth Amendment against self-incrimination? Mention has previously

⁷⁶ 26 U. S. C. § 3809(a).

⁷⁷ *Ibid.*, § 3793(b) (1).

⁷⁸ *Ibid.*, § 145 (b).

⁷⁹ *Ibid.*, § 145 (a).

⁸⁰ The statute calls for the addition of a penalty, in fraud cases, equal to 50% of the tax due, in addition to interest: 26 U. S. C. § 293(b). The Kefauver Committee is said to have adverted to the fact that certain settlements of tax liability connected with the extortion described in *Estate of Joseph Nitto*, 13 T. C. 858 (1949), illustrate but "another example of the efficiency of the underworld in releasing its leaders from the toils of the law." A claim against Campagna and Ricca for a total of \$470,000 in taxes and penalties was settled for \$190,000 as a preliminary to establishment of eligibility for parole.

been made of the holding in *United States v. Sullivan*⁸¹ on the point of the right of the government to assess and collect a tax against illegal income. That case is also important in relation to the question of self-incrimination. The Court of Appeals had ordered a reversal of the conviction of Sullivan on a charge of wilful failure to file returns on the ground that the compulsion of making a return would force him to disclose the commission of a crime without providing for a corresponding immunity from prosecution. The opinion of Mr. Justice Holmes, speaking for the Supreme Court, is most enlightening. He wrote:

As the defendant's income was taxed, the statute of course required a return . . . In the decision that this was contrary to the Constitution, we are of opinion that the protection of the Fifth Amendment was pressed too far. If the form of return provided called for answers that the defendant was privileged from making, he could have raised the objection in the return, but could not on that account refuse to make any return at all. We are not called on to decide what, if anything, he might have withheld. Most of the items warranted no complaint. It would be an extreme, if not an extravagant, application of the Fifth Amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in crime. But if the defendant desired to test that or any other point, he should have tested it in the return so that it could be passed upon. He could not draw a conjurer's circle around the whole matter by his own declaration that to write any word upon the government blank would bring him into danger of the law.⁸²

Applicable regulations, adopted pursuant to the statute, achieve much the same result,⁸³ but the tolerant attitude of the Department is not easy to understand for the mere statement in a re-

⁸¹ 274 U. S. 259, 47 S. Ct. 607, 71 L. Ed. 1037 (1927).

⁸² 274 U. S. 259 at 263-4, 47 S. Ct. 607, 71 L. Ed. 1037 at 1039-40.

⁸³ Reg. 111, § 29.145-1, declares: "The privilege against incrimination in the Fifth Amendment to the Constitution is not a defense to a charge of failure to file a return, and does not authorize a refusal to state the amount of income, though the taxpayer's income was made through crime."

turn of the amount of taxpayer's income, with nothing more, hardly amounts to a legally enforceable claim of privilege. More nearly, it constitutes a waiver, for the privilege must be asserted in affirmative fashion and at the first opportunity, *i. e.* on the face of the return itself.

Suppose the taxpayer does, by appropriate means, assert the claim of privilege. Does it follow that he is entitled to have his claim respected? It is fundamental law that the protection afforded by the guarantee against self-incrimination is one designed to immunize the individual from prosecution at the hand of the government which has compelled the disclosure. When it is remembered that, generally, the ownership and operation of slot machines, handbooks, gambling establishments and the like do not involve any violation of federal law, where is the basis for the claim of privilege against self-incrimination on the part of such individuals?

The answer to that query is amply provided by language in the opinion in the case of *United States v. Murdock*.⁸⁴ The taxpayer there concerned had filed income tax returns but had annually deducted a sum of money which he claimed he had paid to others as a form of graft. He refused to answer the interrogation of federal agents, who sought particulars relating to the claimed deduction, on the ground his answers might incriminate and degrade him. Indicted for such refusal to answer, he filed a special plea based on the Fifth Amendment. The Supreme Court said:

The plea does not rest upon any claim that the inquiries were being made to discover evidence of crime against state law. Nothing of state concern was involved. The investigation was under federal law in respect to federal matters. The information sought was appropriate to enable the Bureau to ascertain whether appellee had in fact made deductible payments in each year as stated in his return, and also to determine the tax liability of the recipients. Investigations for

⁸⁴ 284 U. S. 141, 52 S. Ct. 63, 76 L. Ed. 211 (1931).

federal purposes may not be prevented by matters depending upon state law . . . The English rule of evidence against compulsory self-incrimination, on which historically that contained in the Fifth Amendment rests, does not protect witnesses against disclosing offenses in violation of the laws of another country . . . This court has held that immunity against state prosecution is not essential to the validity of federal statutes declaring that a witness shall not be excused from giving evidence on the ground that it will incriminate him, and also that the lack of state power to give witnesses protection against federal prosecution does not defeat a state immunity statute. The principle established is that full and complete immunity against prosecution by the government compelling the witness to answer is equivalent to the protection furnished by the rule against compulsory self-incrimination . . . As appellee at the hearing did not invoke protection against federal prosecution, his plea is without merit and the government's demurrer should have been sustained.⁸⁵

If discovery of violation of state law should be the accidental by-product of forcing compliance with regulations calling for detailed information relating to the income tax obligation, most persons would be inclined to say such result was all to the good. If Congress thinks otherwise, it could provide protection against state prosecution by ordering the suppression of information contained in tax returns. Some might incline in the direction of a reward in the form of a lower rate in favor of all who keep complete records and file full returns, but with imposition of the maximum rate on all who do not, in order to add the stimulus of economic advantage.

E. ESTABLISHING THE FACT OF VIOLATION

Faced with the potential impact of such a tax program, some will undoubtedly be tempted to conceal their operations, neglect

⁸⁵ 284 U. S. 141 at 149, 52 S. Ct. 63, 76 L. Ed. 211 at 213.

to maintain records, and omit the filing of returns in an effort to hang on to illegal profits. The past has disclosed that enforcement machinery may operate slowly against such persons but, on the federal scene at least, it has been thorough. Lacking direct proof of violation, the government has been forced to resort to circumstantial evidence taking a variety of forms. It has, for example, used an analysis of the taxpayer's bank deposits, particularly if of periodic or recurrent character;⁸⁶ stressed the excess of expenditures over admitted cash resources;⁸⁷ or relied on unexplained increases in net worth⁸⁸ to support the claim of receipt of taxable income. On the basis thereof, or some combination of such forms of indirect proof, convictions for tax evasion have been sustained against those who gleaned their wealth from gambling,⁸⁹ from "policy" or "numbers" games,⁹⁰ from the selling of "protection" to handbooks,⁹¹ or the operation of slot-machines.⁹² There is no occasion to believe that federal agents in the future would be less successful in their effort to uncover tax frauds than they have been in the past. Any increase in the number of violators which might be produced by the imposition of even more stringent tax laws directed against the criminal element in the community could readily be offset by an increase in the number of law enforcement officials.

An increase in tax rates is normally followed by an increase

⁸⁶ *Gleckman v. United States*, 80 F. (2d) 394 (1935), cert. den. 297 U. S. 709, 56 S. Ct. 501, 80 L. Ed. 996 (1936).

⁸⁷ *Schuermann v. United States*, 174 F. (2d) 397 (1949), cert. den. 338 U. S. 831, 70 S. Ct. 69, 94 L. Ed. 505 (1949). See also *United States v. Potson*, 171 F. (2d) 495 (1948).

⁸⁸ *United States v. Fenwick*, 177 F. (2d) 488 (1949); *Bryan v. United States*, 175 F. (2d) 223 (1949).

⁸⁹ *United States v. Johnson*, 319 U. S. 503, 63 S. Ct. 1233, 87 L. Ed. 1546 (1943), rehearing den. 320 U. S. 808, 64 S. Ct. 25, 88 L. Ed. 488 (1943); *United States v. Vassallo*, 181 F. (2d) 1006 (1950); *Lurding v. United States*, 179 F. (2d) 419 (1950); *Bryan v. United States*, 175 F. (2d) 223 (1949), affirmed in 338 U. S. 552, 70 S. Ct. 317, 94 L. Ed. 335 (1950); *United States v. Potson*, 171 F. (2d) 495 (1948).

⁹⁰ *Schuermann v. United States*, 174 F. (2d) 397 (1949), cert. den. 338 U. S. 831, 70 S. Ct. 69, 94 L. Ed. 505 (1949), rehearing den. 338 U. S. 881, 70 S. Ct. 156, 94 L. Ed. 541 (1949).

⁹¹ *United States v. Skidmore*, 123 F. (2d) 604 (1941), cert. den. 315 U. S. 800, 62 S. Ct. 626, 86 L. Ed. 1201 (1942).

⁹² *United States v. Fenwick*, 177 F. (2d) 488 (1949).

in the cost of products or services to the ultimate consumer, the tax increase being absorbed in the selling or charging price. Fear that heavy taxation on the criminal operator will be passed on to the patron of his gambling enterprise should prove groundless. If, to compensate for his increased cost of operation, the gambler should attempt to charge more for the illegal service he purveys, as by lowering the odds or tightening up on the payoff on his devices, he will run into increased consumer resistance as the element of chance becomes less and less attractive. Followed to its logical conclusion, such an impact of taxation could well induce patrons to cease to gamble and deprive the operator of any chance to profit. Conversely, if he endeavors to maintain his rates in order to keep up the flow of dollars, a maximum tax rate will still operate to drive him out of business for the profit will migrate toward the public, rather than his private, treasury.

Caught in a mesh of tax laws kept firm by rigid enforcement, the commercial gambler would soon learn that crime cannot be made to pay and would cease his nefarious operations. Until he does, the short-term by-product of increased revenue to the national government should redound to the benefit of legitimate business and honest taxpayers. Congress, at least, should consider the prospect as a chance to strike at the heart of commercialized crime.

CORPORATE MANAGEMENT AS A LOCUS OF POWER

BEARDSLEY RUMML*

THE WORLD CRISIS of the twentieth century, which has had its most recent violent manifestation in the Korean affair, springs as we all know from ideological conflicts of the most profound character. These conflicts pertain to the nature of the individual, the nature of truth, and the question as to the existence of good and evil. The fact of the crisis has caused the Western democracies to re-examine their political, social and economic institutions and in this re-examination many inconsistencies have been found which are being gradually but definitely reconciled. One of the areas of re-examination has been that of business enterprise as it affects the dignity and freedom of the individual. In this setting, this discussion is presented.

Business is one of the most pervasive facts of modern life. Practically everybody who lives in a city, town, or village does business with business several times a day, and practically everybody else has something to do with business many, many times in every year. We depend on business for the things we eat and wear, for the home we live in, for most of our amusements and recreation, for going places and knowing what is going on in the world. Most of us depend on business for the kind of jobs we have. Many of us own some part of a business or receive some income from lending business our savings. Business is so common that we take it for granted and use it without thinking much about it, just as we do any other familiar facility.

What is it that business *does* in our complicated modern world? First, and primarily, it is the job of business to get things ready for use. Second, in doing this work of production and distribution, business concurrently provides people with productive

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activity—something useful to do—and a social setting in which to do it. Third, and finally, business makes a place where the inevitable savings of the people can be put to work.

How does business do these things? A business does these things by making rules, enforcing its rules when possible, and compromising them when necessary.

It is in no sense a figure of speech to refer to a business company as a private government. A business is a *government* because within the law it is authorized and organized to make rules for the conduct of its affairs. It is a *private* government because the rules it makes within the law are final and not reviewable by any public body. Some might say that the reason a business is a private government is because it is owned by private individuals, but it seems to me that the existence of private authority is more significant than the element of ownership. It is important to note that this private government, the corporation, or business, existing through the authority of the public government, is in no sense an interloper. On the contrary, it is the method we have chosen by which to get done, for the welfare of all of us, the work it is for private business to do.

A business carries on its operations through a multitude of decisions under its own rules. The rules made by a business to govern its operations must not be inconsistent with the law of national, state, and local governments from which it derives its authority and from which it receives protection. However, within the law, a business has great latitude in the rules it makes and in their enforcement.

I. THE GOVERNED

If business is private government, who are the governed? We are the governed! We are governed by business in one or all of four possible capacities: (1) as stockholder, (2) as vendor or supplier, (3) as customer, or (4) as employee.

A. THE STOCKHOLDER

Let us take these four capacities in which any of us may stand in relation to business and examine them. In what sense is the stockholder subject to the rule-making powers of the business in which he has placed his savings? One might have thought that it would have been the other way around, that the stockholders, being the owners, would have the rule-making power instead of being subjected to it. The stockholders collectively elect a board of directors, and the board of directors elects a management. At the time of an election, the stockholders have the legal right to change the directors and hence to change the managers. They also have the right to vote on specific rules for the running of the business that may have been proposed in a proxy statement. But, except at the time and place of a stockholders' meeting, the stockholders ordinarily have no rule-making power. A large stockholder may have large influence on the rules that the managers adopt. This influence may come as a result of the power he may exercise at a later meeting of stockholders, or it may be deference by the managers to a holder of property in the business. A small stockholder also may have large influence if his suggestions are helpful to the management. Access to management for the expression of ideas and criticism is frequently available to the smallest stockholder.

The freedom of the company in taking actions affecting the interests of stockholders is subject to legal limitations that experience has shown to be desirable, and the stockholder may go to the courts to enforce his legal rights. But the enforcement of legal rights is not the same thing as the power to make rules. It is only the power of protection against illegal rules.

Under the private government of business, the stockholders are definitely among the governed, even though they may choose the boards of directors under whose authority the rules affecting them are made. Their position is something like that of the citizens of the State of Illinois, or any other, who vote for the senators and representatives who pass the laws which they in turn obey.

The laws regulating corporations are intended to give basic protection to the stockholders against business rule-makers, just as our constitutional rights are intended to protect us as citizens against the law-making and law-enforcing agencies of public bodies—federal, state, and local. In addition to the laws, the stockholder has a final safeguard against business rule-making that he may find uncongenial—he may sell his stock. True, he may not be able to sell his holdings for as much as he paid for them. And, if he wants an income on his savings, he may become a stockholder-citizen under another business government which may please him little better or no better at all. Nevertheless, he can free himself at a price if he wishes; he is not locked in. The company he keeps, he keeps by choice.

B. THE VENDORS

The second group among those governed under the rule-making of business are the vendors or suppliers of raw or semi-finished materials, manufactured articles for resale, or services of one kind or another, utilities, transportation, and the like. The vendors are usually, but not always, other businesses which are making rules of their own for the business which is to them a customer.

The rules applying to vendors cover all the specifications made by the purchaser on the things that are purchased, the price that will be paid, when it will be paid, the quantities, qualities, and nature of the things supplied, the date of delivery, provisions for return of damaged or unwanted goods, restrictions on the sale to others, and all the rest. The contract or understanding in which these terms are embodied is like a treaty between two sovereign states. In entering into such a business treaty, both parties give up in some measure their freedom of subsequent action. They give it up because it is advantageous as compared with the alternative of making no arrangement at all.

Under ideal conditions, each business that is a party to a contract accedes willingly to the rules imposed by the other. Such

conditions are met most fully when the vendor has some other independent company to whom he can sell his goods if he wishes, and when Company X has another independent source from which it can supply its needs. It is then possible to discuss terms in a spirit of give-and-take, and to reach a compromise which, at the moment of decision at any event, seemed the best choice among real alternative possibilities.

Such equal conditions are not uncommon in the relations of one business to another. Yet inequality of bargaining power will always exist; when it is too great, imposed terms may be the result. The use of force is just as ugly in establishing the rules of a business contract as it is anywhere else. The coerced contract is of course resented in business, but it is not considered a wrong business practice. Many businessmen, large and small, welcome situations in which they are on the upper side of a business squeeze, and their resentment when they are on the lower side is not taken too seriously by their colleagues who happen to be spectators for the moment.

As a matter of fact, one test of survival efficiency in business consists in not being subjected to coercion too frequently or too severely at any one time. The last coerced act on a business is the step just next to bankruptcy. The inefficient or unwanted business cannot be protected from rule by force, because its own nature determines that it shall be weak when another is strong.

C. THE CUSTOMERS

The third group of the governed are the customers. The businesses which are customers of other businesses we have dealt with in our consideration of vendors. Most customers, the tens of millions of them, are individuals buying things and services at retail. Superficially, the individual customer seems to be at a great disadvantage in being subjected to the decisions of business management as to what he shall be offered, where and when he can get it, and how much he will have to pay for it. The business management can make its rules and back them up with ad-

ministrative organization, physical plant and equipment, money in the bank, and propaganda.

But the inequality is not so great as it appears—in fact, the strength may be with David Consumer if he does not have to buy, or can postpone his buying, or can find something else that will do, or some other place to get it. Then the imposing property and organization and resources of the Goliath Corporation become clumsy handicaps before David's power of choice. The company and its rule-making managers find themselves faced with a debilitating condition called "idle plant expense." Idle plant expense will slowly but surely force the business rule-makers to modify their rules to meet the views of the governed.

Does this mean that the customers make the rules? Not at all. It only means that when the customers have the power of choice, the rules that are made will be acceptable to them. Business management will still decide what will be offered and when and where and for how much. Neither individually nor collectively do customers have the ability to make rules or to enforce them. But collectively the customers determine what rules shall in the end survive.

The customer requires the aid of public government in order to make his power of choice worth anything to him. This aid takes the form of giving him the information he needs as to what is available and at what price. Laws covering labeling, misbranding, and the like are all measures that strengthen the effectiveness of customer choice. When there is no choice to the customer, when a single company is the only source of supply, as is true of telephone service or electricity or sometimes transportation, the customer is helpless if the product or service is indispensable for health and comfort. In these cases of natural or artificial monopoly, the more important rules of the company affecting the customer are regulated by public government.

D. THE WORKERS

The fourth group of people governed by private business are the employees, all of them. The president of the company, the

vice-presidents, the deputies and assistants, the superintendents and managers, foremen, bosses, and workers—male and female, part-time and full-time, employed or unemployed—all are governed by the rule-making of private business. Some of these governed are themselves subordinate rule-makers, promulgating codes and issuing instructions with the authority of the business-state by which they are employed. For most people, the rules that most intimately affect their lives are made by their employers. Most of the employed and of those who wish to be employed, but are not, look to private business for employment. The rules affecting employment made by private business are therefore of paramount importance to the individual. These rules determine for the individual where he shall work, when he shall work, what he shall do, who will give him orders, who will take orders from him, his promotion and discipline, the amount he gets paid, and the time and duration of his holidays and vacations.

The employees, all of them, are weak as compared with the company that makes the rules and enforces them. To compensate for this weakness, we must look to three off-setting balances. The first is the labor laws of public government, the second is the trade union or other private organization of employees, and the third is the chance of getting a job working for some other company or of getting by without doing any work at all. But neither labor laws nor trade unions can do more than give the broad framework of conditions of employment and occasional protection to the individual in extreme cases of maladministration. Just as the true strength of the customer in the apparently unequal negotiation with the business company was found in the ability of the customer to go elsewhere to do his business, so too the strength of the employee lies in his ability, when he has it, to get another job from another employer or to get along without doing any work. The laws and the unions may help provide a basic setting for private business rule-making, but they can never do enough to give to the employee a real feeling that in conforming to the rules affecting him he has exercised responsible free choice. Even for the executive, the ability to get a job elsewhere and the

courage to do it are the only conditions under which subjection to business rule-making is supportable by free men. It is obvious that under the large-scale unemployment of the 1930's, the reality of freedom, guaranteed politically, under the Constitution, was actually lost under the economic exigencies of the period. It was lost, not because business set out to destroy it, but because where there is no choice of rule-makers, as under mass unemployment, no rule however beneficent can be accepted by the individual as a matter of responsible consent. The economic system as a whole coerces him even though the particular employing company does not intend to do so.

Thus we see the tolerable freedom of the governed under the private rule-making of business, of the stockholders, of the vendors, of the customers, and of the employees of all rank comes from the opportunity of all to say, "No! I will do my business with another business." When the governed man can say "No," he has powers as great as those of the strongest business.

II. THE GOVERNORS.

To find out realistically how things happen, let us, the governed, approach a business from the outside and work our way in. We can come at the business either as an employee, a vendor, a customer, or a stockholder. From whatever point we come, we run into an employee whose job it is to attend to us. If we are looking for work, we see an employee of the employment department; if we call to discuss the job we have now, we talk to the executive to whom we are responsible. If we are a vendor with something we want to sell to the company, our first contact is with a representative of the purchasing agent, or the buying office. If we are a customer and wish to buy something for ourselves, or if we wish to discuss something we have already bought, we meet a salesman or an adjuster. If we are a stockholder, we first talk to an assistant treasurer, or an assistant secretary, or an assistant to the president. In every case, we find that the company is represented by a subordinate someone who has authority

to make certain decisions. In every case, the someone who represents the company gets his authority from a superior source in the company's management, a source which combines legislative, administrative, and judicial powers. This superior executive may be overruled by an executive superior to him unless he himself happens to be the chief executive. From whatever angle we approach a business, as we rise higher and higher through the levels of authority, we finally come to a chief executive who is usually the president of the company.

A. MANAGERIAL OFFICERS

In most things in a business the president is the boss. Working through his subordinates, he gets done the things that have to be done. In many cases he also decides on the policies that will be followed in doing them. He can buy and sell, hire and fire, construct or tear down. Among the few things he cannot do by himself are to declare a dividend, open a bank account for the company, sell its securities to the public, or dissolve the business. Nor can he appoint himself to his own job.

Sometimes a company has an officer who is called chairman of the board. The powers and duties of a chairman do not follow a consistent pattern. In general, the powers over policy that are reserved from the president, and are not reserved to the board of directors, are exercised by the chairman. The chairman has particular supervisory responsibilities including observation of the work of the president. It is doubtful if the chairman would give instructions to the president as to how he should operate the company even if he had the power to do so. If he did give such instructions, he would himself be the chief administrative officer under another name, and the president would then be his assistant. What is important is to realize that there are two related, separable, top functions: (1) that of long-time policy-planning with broad consideration of the company's relations to trends within the industry, in other industries, in the government, and in international affairs, and (2) that of day-by-day central coordination of operating decisions covering every phase of doing

efficiently the things it is the business of the company to do. In many companies, these *two* functions are carried on by *one* person.

B. THE BOARD OF DIRECTORS

The powers that are withheld from the president and chairman, or chief executive officer under whatever title, are held by the board of directors.

Where does the board of directors get its powers? They come from the laws of the state in which the company gets its charter to do business. These laws specify what things the board of directors may do and what things are reserved even from them to the stockholders. But since stockholders ordinarily have no powers except at a stockholders' meeting—and such meetings are infrequent and special meetings are hard to call without the consent of the directors—for practically all purposes, the board of directors is supreme. This description of where the power in a company is located is reasonably realistic with one exception, and here the situation differs greatly from company to company. The president or chairman of a company generally recommends to the board of directors what he thinks the board should do even in the field of the board's own powers. In some companies, such a recommendation is tantamount to a decision, and although the recommendation may be discussed and the president may change his mind, the directors never reverse him. A reversal would be taken as a vote of no confidence, and his resignation would be on the table forthwith. In other companies, the executive officer encourages the board of directors to come to its own decision on the matters that are its proper concern, for example, on the declaration of a dividend. The officer may advise the board what he as an individual would do, but he has no feeling of chagrin or embarrassment if the board, after talking it over, feels differently.

The directors of a company are persons of considerable importance in rule-making powers of a business. Consequently, it is a matter of some interest how the members of a board of directors are chosen and how they are continued in office. At

this point, the form and the substance of the location of power in business are far apart.

The form of election of directors is a quasi-democratic procedure for the affirmation of the delegation of power to candidates for election and re-election. The procedure accepts on principle the assumption that the final power over business rule-making resides in the owners of the property, and that the larger the relative ownership the larger the right to express preference for the individuals to whom delegated powers should be assigned. Without raising questions as to these assumptions, it is fair to note that in substance the selection of directors does not conform to the intention that the election procedure implies. The fact is that the stockholders *elect* the directors but they do not *choose* them. They are *chosen* by the board of directors itself, which makes the nomination.

The reason for this lack of correspondence of form and substance rests on two practical considerations: (1) the stockholders cannot choose directors because they are not organized as a political body in a way to make their franchise elective; (2) real choice of directors by stockholders would be an extremely costly and disruptive procedure, damaging to efficient management, to business profits, and to the interests of the stockholders themselves. The stockholders have invested their savings in a business to make profits and income, not to assert rights in the delegation of power. They do not want to be organized politically as stockholders; they want to be let alone. In this, the management agrees with them. The occasional crisis situation can be ignored, since the political organization of stockholders to oust a management is generally so crude as a technique of obtaining stockholder consensus that it is little more than a caricature of the "democratic" procedure it purports to be.

III. THE LOCUS OF POWER.

We have not been able to put our finger on the exact point of final power in a company, but we have narrowed its location down to the board of directors and the two principal officers, the

chairman and the president. Within the circle of directors and principal officers, the locus of power differs in different companies and the same company from time to time. Sometimes it changes even in the same meeting on different issues. If the chairman or president is an extremely strong or self-willed individual, he holds the reins in a firm hand. He may use the members of his board of directors as a sounding board, as a source of advice, as a means of access to influence in quarters outside his own company. But the most dominating governor is likely to pause if three or more directors differ audibly with his decision. The next time it may be three other directors who differ, and the time after that another three. Minorities are helpless alone, but several minorities may mean a revolt. Whenever ownership and management are held by different people, it can never be said that the board of directors does not matter. The locus of power may, for a moment or on a particular issue, be held by a single director. Generally this occurs when a strong will holds a negative opinion. It is rare that a single individual on a board of directors can get positive action taken contrary to the wishes of the officers.

The decisions that must be made by a company require that a final source of authority be instantly available. Accordingly, an executive committee, with power to act for the board of directors between meetings, is set up; and in this committee, the details of questions of policy and operations are examined. Many decisions are made by the executive committee that need only be referred to the board for information and ratification. Included in the membership of the executive committee, there will be one or more of the executive officers of the company.

The power element in a company is more nearly an area than a point, a pattern within the executive committee. It shifts within the boundaries of the board of directors, the executive committee, and senior officers. Sometimes the focus is sharp, sometimes it is blurred. It may include one combination of personalities at one time, another at another. Power in a company within this area seems to go to him who wants it and is able to

exercise it. For the effectiveness of the company in doing the things that a company is supposed to do, this shifting character of the locus of power is desirable. It keeps an administration from becoming too brittle. It creates a narrow circle where there is a normal and healthy competition for internal status and recognition. Carried too far, such competition can be destructive to united efforts, but ordinarily the influence of the board as a whole moderates the intensity of personal ambitions and divisive tendencies. When the board itself divides, and continues a division over a period of time, again a pathological condition exists that is harmful to the business.

From this circle of the board of directors and the two principal officers come the rules, the instructions, and the delegation of specific responsibility, the provision of means and the outlines of ways. Here is found the coordination of the parts and of partial efforts. Within this circle the character of the company takes form; into it come experience, inspiration, and criticism from the organization as a whole; and from it flow judgments which give back to the organization direction and discipline.

A. IS A BOARD OF DIRECTORS GOOD ENOUGH?

Considering the central position of the board of directors as an institution, not only in the government of a single business but in the government of business generally, it is in its present form an inadequate instrument of power. It is a vestigial remain from a time when investors paid attention to their businesses and when offensive and defensive alliances in business were the order of the day. The most that can be said for the board of directors as it exists today is that it provides an arena in which the ablest, most powerful, and most persistent members of the board can generally have their way. Such men have the traits that make businesses successful, and their survival in the shifting locus of power in a company means that they survive not only for their own good, but for the good of the company too. The board of directors tends to screen the fit from the unfit, and to that extent to provide the rule of the fit for the conduct of the business.

Need anything be done? If the board of directors is a vestigial and obsolete institution, sooner or later it will disappear in its present form. This disappearance may come by transformation or it may come by collapse. Collapse is a clumsy and uncertain way of moving from yesterday into tomorrow. Transformation gives an opportunity to consider the question of what is wanted and to choose the preferred method of getting from here to there.

B. WHAT DO WE WANT?

What is it that we want in a board of directors? First, we want a rule-making body superior to the executive officers that will contribute to the efficiency of the business. Second, we want a rule-making body that is sensitive to the interests of all who are affected by the company as a private government.

When we examine these interests, a curious fact appears. The interests of the four parties at interest are in part identical in that each of them benefits by an efficient, well-managed, growing business. For the stockholders this means the possibility of larger dividends and a higher market price for their stock. For the vendors it means a better outlet and prompt payment for the things they supply. For the customer it means better service, better quality, and a wider range of products from which to choose. For the employee it means steadier employment, higher pay, and better conditions of work. But at any given level of activity and efficiency of a business, the interests of the four groups of the governed are in conflict. At a given level of activity, higher dividends can come only from lower prices to vendors, higher prices to customers, or lower labor costs. Vendors can get better consideration only at the expense of stockholders, customers, or employees. Customers must pay higher prices if the desires of stockholders, vendors, and employees are to be met, and the employees can improve their earnings only at the expense of the other three parties at interest. A board of directors, therefore, has a double task, first, to provide the company with an efficient, aggressive management, and second, to make sure that

at any given level of activity and efficiency, the groups at interest, whose interests are necessarily in conflict, get a square deal.

C. TWO IMPRACTICAL SUGGESTIONS

There have been two suggestions as to how the several parties at interest in the operations of a company might be effectively heard. One suggestion is that each of these groups should be represented by directors of their own choosing. The other is that there should be a "public" director on the directing board, an appointee of the Securities and Exchange Commission or of some other public agency. Neither suggestion meets the requirements of the situation in more than a formal way, and both should be rejected as unrealistic and undesirable.

The idea of representation of parties at interest other than stockholders appeals to those who are attracted by the machinery of republican democracy, and who would extend it to all fields where discipline and order make it necessary to have rule-makers and rules. The fact is that no group can be represented by an elected agent unless it has been organized to express itself politically. It must have a sense of common interest and a willingness to take the trouble at an appointed time and place to assert the privileges of an electorate. There must be understanding, not only of issues, but of the capacity of the person who stands for election. Sound choice requires elaborate procedural arrangements, opportunities for discussion and information, candidates, nominations, and campaigns. The necessary conditions cannot be established in practice for stockholders; nor can they be established for employees if we include employees of every rank and skill; nor can they be made to function for customers or vendors. A scheme of representation of these interests would be a travesty on democratic procedures. It would result in business political gangsterism that would destroy the efficiency of business management. It would inject, into circles requiring the most intimate confidence, individuals whose reliability was uncertain and whose motives and ambitions would be in doubt. A board elected in such

a manner would be injurious to the true welfare of the four groups who have an interest in the success of the business.

The second idea, that of "public" directors, appointed by some designated public agency, appeals to some who distinguish only two parties at interest in a business: one, the owners; the other, the general public. But in reality there are four parties at interest, not two. In some matters these four interests are the same and in other matters they are in conflict. No "public" representation on a directing board could meet the essential requirements of this rule-making situation. The special and specific interests of a company's stockholders, its vendors, its customers, and its employees justify the creation of an opportunity for expression, but it is they, not an undifferentiated public, that should be heard by the company's rule-making authority.

D. ONE MODEST STEP

If we reject these two methods for broadening the composition of a corporate board of directors, what suggestion can be proposed? No drastic or universally applied scheme of altering the composition of boards of directors should be contemplated. The situations in different companies call for different measures, or perhaps in some companies for none at all. Further in modifying an agency like a board of directors, it is a good thing to take a step at a time, to let adjustment and habit build familiarity with the new, and then move forward with knowledge and conviction that the direction is the right one.

Accordingly, my suggestion is, as a first step, that one director be elected or re-elected and that he be asked to act as "trustee" for one of the three parties at interest, other than the stockholders. Such director-trustee might be assigned the interests of either the customers, or the vendors, or the employees, depending on the nature of the company's business. He would be the nominee of the management and of the existing board of directors and would be elected in the usual way by the owners of the company, the stockholders. During the experimental period of whatever

length, no public announcement would need to be made that such a policy had been adopted. In a formal sense little is changed, but an important difference would occur in the deliberations of the board. Let us suppose that this first director-trustee has been asked to act for the customers of the company. Although he owes his nomination to his fellow directors, and his election to the stockholders, nevertheless he has accepted a trusteeship—a trusteeship which has been created voluntarily by those choosing him so to act as trustee. Now as he sits on the board, the interests of the customers of the company are his single interest. It is his duty to know what these interests are and to see to it that they are considered when matters affecting them are decided upon. Such a director-trustee should be chosen for his ability to make another's case his own. The one limitation that should be observed is that there should be no conflict of interest in the individual director himself; for example, a large stockholder should not be chosen as trustee for the interests of customers. The director-trustee should have time to work on his job and to think about it. His duties would not require his full time, but they would involve more application of effort than does the conventional directorship. Such a director should be properly compensated for the service he performs.

If the first director-trustee works out usefully, the next step would be a director-trustee for each of the other interests—all depending on the nature of the company and whether the groups are important enough in the particular case to warrant specialized consideration. In this way, three of the four parties at interest will have someone designated to speak for them. Presumably the stockholders, the fourth party, will be the concern of the remaining directors. But to make sure that equally thoughtful attention will be given to all the stockholders, one director should be explicitly charged with responsibility for *all* ownership interests and be paid for taking the time required in doing so.

The board of directors would then consist of four paid director-trustees, the chairman and the president, and such other officers and directors as the needs and traditions of the company

dictated. Under such a directing board, the interests of the governed will be at least represented and the actions of the company's administrative officers will take place in a frame of reference where the interests of all will have been heard. The four director-trustees would sit, not as "representatives" of the interest for which they speak, but as designees of their fellow directors to give particular attention to their trustee assignments. Since in any case these four special directors would be interested, even from the standpoint of their special interest, in the growth and prosperity of the corporation, and would be individually and collectively only a minority of the board as a whole, it seems improbable that the divisive interest thus deliberately built into the board at a low level of power but at a high level of articulate responsibility would be harmful in any way to a clear-cut and effective corporate program.

E. NEED ANYTHING BE DONE?

The question will arise, need anything be done at all? Granted that the customers, the vendors, and the employees do have an *interest* in the kind of business rules to which they are asked to conform, they have no present *rights* in the matter. The stockholders have the rights; if they do not choose to exercise them, that is their right as well. Meanwhile, the business goes on meeting on every side the test of competition, and preserving its authority as long as the governed consent to the rules that are imposed. A policy of doing nothing usually seems to be the prudent policy at any particular time for any particular group of people. Yet, after something has gone wrong, in retrospect it is possible to see that adjustment to the times and circumstances would have preserved a continuity of experience and tradition which, though modified, would not have been dissipated.

In considering whether business should do anything to give a voice to interests other than those who have rights to express themselves, we must remember that each business derives its power and its form from public government in which all these "interests" do have "rights." If these interests some day want

new rights in the government of business, they can be acquired through orderly public legislative processes.

Today the obvious interests of the several parties subject to business government are not properly safeguarded under the present form of control of business power. Since they are not, someone will some day, perhaps at a most inconvenient time, make it his crusade to turn these interests into rights. If, before this happens, the interests of all parties are protected by business itself, it is unlikely that formal intervention would occur on grounds of abstract political theory.

The reasons for taking steps to modernize the boards of directors of companies are reasons of efficiency, prudence, and justice. Fortunately, there is no critical situation that presses for action, but unfortunately there is under such circumstances an understandable hesitancy about altering existing and known power relationships. However, the mere passing of time brings with it the necessity for specific changes in the personnel of a board of directors. These occasions, if used to a purpose, may lead to the transformation of the central agency of corporate power so that it represents more nearly the interests of those whom business governs.

IV. SAFEGUARDING THE LOCUS OF POWER.

Because business has become one of the most pervasive facts of life, the operations of business have acquired a political as well as an economic significance in the lives of ordinary citizens. The locus of this political and economic power is in corporate management. We have depended on enterprise and competition as our methods of placing business powers where they are presently found. These methods have proved on the whole successful as far as economic development is concerned, but they alone are inadequate to meet the newer responsibilities of business. Corporate management, being the locus of business rule-making, has the opportunity to initiate the transformations that will conserve the successes of private business government and that at the same time will safeguard the community from abuses in the exercise of private power.

NOTES AND COMMENTS.

OFFICE BUILDINGS AND THE NLRB

The question as to whether or not the conduct of operating an office building is such as to bring the employer of labor within the provisions of the National Labor Relations Act¹ is often a vexing and troublesome one. As far as the jurisdiction of the National Labor Relations Board is concerned, it should be noted that the Board is generally empowered "to prevent any person from engaging in any unfair labor practice . . . affecting commerce."² The significant phrase used in this provision, the only one providing any criterion for a determination respecting jurisdiction, is the term "affecting commerce." That term has been defined elsewhere in the National Labor Relations Act as referring to acts done "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."³

Re-definition, however, has been provided by the United States Supreme Court for, in *National Labor Relations Board v. Jones-Laughlin Steel Corporation*,⁴ that court said that although "activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control."⁵ Chief Justice Hughes there also pointed out that the scope of the power of Congress to remove obstructions from interstate commerce must be viewed in the light of the existing dual system of government, hence should not be extended to such a degree as to embrace within its purview effects upon interstate commerce which are so remote and indirect that to embrace them would actually obliterate any distinction between the local and the national government.

These observations bring into focus something of the difficulty which is to be encountered when endeavoring to determine whether the employees of any given office building are covered by the National Labor

¹ 29 U. S. C. § 151 et seq.

² *Ibid.*, § 160(a).

³ *Ibid.*, § 152(7).

⁴ 301 U. S. 1, 57 S. Ct. 615, 81 L. Ed. 893, 102 A. L. R. (2d) 1352 (1937).

⁵ 301 U. S. 1 at 37, 57 S. Ct. 615, 81 L. Ed. 893 at 911, 102 A. L. R. (2d) 1352 at 1365.

Relations Act. By their very nature, buildings affixed to and forming parts of real estate typify the idea of things local and immovable in character. They suggest the very opposite of commerce which, in turn, signifies movement, flow and action. At first glance, then, it would seem impossible that any relation should exist between these two opposites. But, as more thought is given to the problem, one begins to realize that the connection between office buildings and the stream of commerce is not so improbable nor so remote as might, at first, appear. If, for instance, a dispute should arise between the management and the janitors and elevator operators of an office building, which dispute, in turn, leads to a closing of the building and a shut-down of the operations carried on therein, the resulting serious interference with business transactions conducted from the various offices located within the building could have a marked and grave influence upon the flow of goods in commerce. If, on the other hand, the amount of business conducted from the building is comparatively small, the effect of the labor dispute upon interstate commerce would be negligible in character and might be so slight as to prevent the case from entering the realm of federal jurisdiction. The broad contours of demarcation between those office building disputes which are amenable to federal jurisdiction and those which are not thus become discernible.

The position which the National Labor Relations Board has taken with respect to office building disputes in general⁶ is clearly demonstrated in *Matter of Midland Building Company*.⁷ A Missouri corporation there operated an office building containing some 93,000 square feet of rentable space. About twenty-one per cent. of the space was occupied by fifteen different railroad companies. Other tenants included several construction and manufacturing firms. The Board refused to take jurisdiction over a representation petition filed by a union representing the building service employees, declaring that an employer's operation of a general office building was an activity essentially local in character. In arriving at that conclusion, the Board based its opinion to some extent upon the decision of the United States Supreme Court in the case of *10 East 40th Street Building, Inc. v. Callus*,⁸ a case arising under the provisions of the Fair Labor Standards Act.⁹ Although the jurisdictional requirements of

⁶ A decision by the Board to assert or to refuse to take jurisdiction will usually be of decisive importance, since the courts will, in general, refrain from disturbing a determination of the Board as to jurisdictional matters. See *National Labor Relations Board v. Townsend*, 185 F. (2d) 378 at 382 (1950), where the court said: "Providing the Board acts within its statutory and constitutional power it is not for the courts to say when that power should be exercised."

⁷ 78 NLRB 1243 (1948).

⁸ 325 U. S. 578, 65 S. Ct. 1227, 89 L. Ed. 1806 (1945).

⁹ 29 U. S. C. § 201 et seq.

that statute differ somewhat from those contained in the National Labor Relations Act, the Board stressed the characterization which the Supreme Court had placed on the office building there concerned as being an establishment of essentially local nature. It may be seen, then, that a decision of the Supreme Court on a related question may be of persuasive significance in settling the question of policy determination with respect to an assertion of jurisdiction.

The Board also pointed out that while, in the case at hand, many of the tenants of the building were enterprises engaged in interstate commerce, the activities carried on in the building were predominantly clerical in nature and constituted a relatively small and unimportant part of the interstate operations. The services rendered by the building maintenance employees, in turn, were even more remote from the interstate operations of the tenants, hence it seemed unlikely that a stoppage or curtailment of the building service operations would have other than a negligible effect on interstate commerce. One basic point, then, becomes apparent if this decision is carefully considered, for the refusal of the Board, barring special circumstances, to take jurisdiction in the average office building case will undoubtedly be based upon the idea that the operation is essentially of such local nature as to have only minor effects upon the flow of goods in interstate commerce.¹⁰

The next question which arises, by force of the basic attitude of the Board outlined in the preceding sentence, may be formulated as follows: What are the "special circumstances" which will prompt the Board to assert jurisdiction in a case involving the operation of an office building? It is necessary, in order to find an answer to that question, to consider those cases wherein the Board has taken jurisdiction over office building disputes despite its general policy not to do so in the average case.

The case designated *Matter of International Trade Mart*¹¹ furnishes a good illustration. A five-story trade mart building located at New Orleans was operated by a nonprofit corporation formed to develop, promote and maintain trade and commerce between the people of the United States and those of other countries, especially in the South American republics. The building was occupied by some 108 tenants, representing over four hundred firms, about three-fourths of whom had their principal places of business outside the State of Louisiana. Seven or eight of the tenants were foreign governments. All told, merchants of twenty-six foreign countries were represented. The Board expressly found that no manu-

¹⁰ See also *Matter of Corrigan Properties, Inc.*, 87 NLRB 252 (1949); *Matter of Central Tower, Inc.*, 84 NLRB 357 (1949).

¹¹ 87 NLRB 616 (1949).

facturing, shipping, or processing of goods was performed in the building, nor were stocks of merchandise maintained therein,¹² for the tenants confined their activities to the promotion of sales by displaying samples of their wares and the issuance of catalogs listing available merchandise, although a few tenants took orders for the shipment of goods from distribution outlets located elsewhere.

Contrary to the holding in the Midland Building case discussed above, the Board declared that the building corporation in the case at hand was not in the business simply of renting space in a general office building to a variety of tenants but rather maintained the building for the sole purpose of promoting international trade, a purpose accomplished by providing a trade mart or central exhibition space where tenants could display their products and where buyers and sellers could be brought together. The Board, therefore, drew certain conclusions which deserve to be quoted verbatim. It said: "The promotional and sales activities carried on in the mart plainly are a direct and important factor in the genesis of commercial transactions involving the shipment of goods in interstate or foreign commerce; otherwise the mart would cease to be dedicated to such use. A shutdown of the mart would have an immediate and direct adverse effect on the very interstate and foreign commerce which it was constructed to foster. It would be inaccurate and wholly unrealistic to characterize such an enterprise as 'essentially local.' We find, therefore, not simply because of the purpose for which the Employer is organized, but also because of the use to which the mart is dedicated, that the Employer's operations 'affect commerce' within the meaning of the Act and that it will effectuate the policies of the Act to assert jurisdiction."¹³ An analysis of this decision clearly reveals one exception to the general rule, an exception which might be formulated as indicating that the Board will assert jurisdiction in office building disputes if the use of the building is devoted, either in its entirety or to a considerable extent, to the furtherance of interstate or foreign trade.

¹² The specific finding poses a question as to whether or not, if some tenants engage in manufacturing processes or store goods in an office building, the Board will assert jurisdiction. No case has been found which contains a specific answer to that question.

¹³ 87 NLRB 616 at 617. In a footnote appended by the Board to this case, it pointed out that the decision in *Borella v. Borden*, 325 U. S. 679, 65 S. Ct. 1223, 89 L. Ed. 1865 (1945), also a case arising under the Fair Labor Standards Act, resembled the situation before it more closely than the parallel constructed between the case of 10 East 40th Street Building, Inc. v. Callus, 325 U. S. 578, 65 S. Ct. 1227, 89 L. Ed. 1806 (1945), and the Board holding in *Matter of Midland Building Company*, 78 NLRB 1243 (1948). The United States Supreme Court, in the *Borella* case, had held that maintenance employees in an office building owned by The Borden Company and predominantly dedicated to use as a headquarters for conducting its far-flung interstate business, were necessary to the production of goods for commerce, hence were covered by the Fair Labor Standards Act.

While the use to which a building has been put has served as a criterion, another line of cases adds the element of ownership as an item having bearing upon the use of the building. In *Matter of Texas Company*,¹⁴ for example, the corporation owning the office building there involved was engaged in producing, manufacturing and marketing crude oil and its products. It operated approximately eight thousand wells and 23 refineries situated in several states. It marketed its products through numerous dealers in all the states of the Union. There was no doubt that the company itself was engaged in interstate commerce. The office building in question, located in Houston, Texas, thirteen stories high and covering one-quarter of a city block, was occupied in its entirety by the company and its subsidiaries. The company strenuously objected to the taking of jurisdiction by the Board of a representation proceeding brought by the maintenance employees of the building, contending that the work of the maintenance employees was purely local in character, without substantial relation to trade, traffic and commerce among the states.

The Board rejected the contention, refusing to regard the building maintenance operations of the company as something entirely separate and distinct from its admitted interstate business. The office building was not operated as a separate enterprise but as one of the executive offices from which a substantial part of the vast interstate enterprise was directed. In that connection, the Board pointed out that its stand had been inferentially approved by several of the Courts of Appeal of the United States which had granted enforcement to several of its orders directing reinstatement of building maintenance employees, or the carrying on of collective bargaining with representatives of both production and building maintenance employees, in cases where the employer had carried on an interstate business or industry from its own building.¹⁵

In this and in other similar cases reaching the same result, the building was owned and operated, in its entirety, by the employer for the purpose of carrying on an interstate business. What of the situation where the corporate owner uses only part of the building for its own purposes and rents the balance of the space to various tenants? The

¹⁴ 21 NLRB 110 (1940).

¹⁵ In *Matter of American Potash & Chemical Corporation*, 3 NLRB 140 (1937), the Board had directed reinstatement with back pay of a "relief" janitor found to have been discriminated against. The order was subsequently enforced in *National Labor Relations Board v. American Potash & Chemical Corp.*, 98 F. (2d) 488 (1938), cert. den. 306 U. S. 643, 59 S. Ct. 582, 83 L. Ed. 1043 (1939). Board orders directing that collective bargaining be carried on with representatives of both production and maintenance employees have also been enforced by the U. S. Court of Appeals in *National Labor Relations Board v. Piqua Munising Wood Products Co.*, 109 F. (2d) 552 (1940), and in *National Labor Relations Board v. Louisville Refining Co.*, 102 F. (2d) 678 (1939).

answer to this question may be found in the case of *Butler Brothers v. National Labor Relations Board*¹⁶ as well as in certain Board decisions dealing with that problem.¹⁷ In the *Butler Brothers* case, the company, engaged in large scale interstate sales transactions, operated two 15-story buildings in Chicago known as Buildings A and B. The buildings were separated by a city street. While the company had its store and warehouse in building A, it occupied only a small portion of the other building and leased the remainder thereof to some forty tenants who were engaged generally in the manufacture, sale and distribution of goods throughout the country.

In an unfair labor practice case involving the company and its maintenance employees in both buildings, the Court of Appeals, enforcing an order of the Board, expressly recognized the Board's jurisdiction with respect to the office buildings in question. It declared that the maintenance employees performed a service directly connected with and for the benefit not only of the company but of the many tenants as well. Since the company and its various tenants were engaged in interstate commerce, the services of the maintenance employees, in hauling freight and passengers to and from the offices and in cleaning and maintaining the lobbies and stairways, were closely associated with the flow of interstate commerce so as to entitle these employees to the protection of the statute involved.

It is obvious that the court, in reaching this decision, not only took into consideration the interstate activities of the company which owned and partly occupied the building but also the character of the activities of the various tenants who occupied a considerable portion of the space in one of the buildings. In another case, that of *Matter of Southern California Edison Company, Ltd.*,¹⁸ however, one in which the company owned and operated a 13-story office building and occupied only forty per cent. of the rentable space to house its executive offices, the Board did not concern itself with the character of the rest of the tenants who had rented more than a majority of the space but asserted jurisdiction by pointing to the fact that the operations of the company affected interstate commerce, that a disturbance among the building maintenance employees would interfere with the operation of the office building, and that the work performed in the executive offices constituted an integral and necessary part of the enterprise.

The Board went one step farther in *Matter of First National Bank*

¹⁶ 134 F. (2d) 981 (1943), cert. den. 320 U. S. 789, 64 S. Ct. 203, 88 L. Ed. 475 (1943).

¹⁷ See, for example, *Matter of Tri-State Casualty Ins. Co.*, 83 NLRB 828 (1949).

¹⁸ 56 NLRB 1172 (1944).

*Building Corporation*¹⁹ for it there asserted jurisdiction not on the basis of legal ownership of the building but upon the ground of actual control, cutting across legal technicalities to achieve its decision. The corporation holding title to the building concerned had, as its only business, the operation of an office building. It, in turn, was owned by the two tenants, a bank and a railroad, both being engaged in interstate commerce. The bank owned fifty-one per cent. of the stock of the building corporation and occupied fifteen per cent. of the rentable space. The railroad owned the balance of the stock and occupied the remainder of the space. The Board held that the operation of the building affected interstate commerce. In order to reach that conclusion, it had to distinguish the case before it from the Midland Building situation. It did so by pointing to the fact that the operation did not involve a general office building but, rather, dealt with a combination of two employers, each engaged in interstate commerce, joining for the purpose of procuring necessary business and office space through the medium of a wholly-owned subsidiary. It saw no significant difference between the instant situation and one in which a single company, engaged in interstate commerce, directly provides its own office building from which to carry on business.

A logical sequel developed in the case of *Matter of Intertown Corporation*.²⁰ The Michigan corporation there concerned owned and had its office and principal place of business in a 34-story office building in Detroit, Michigan. The corporation was engaged in the business of owning and operating real estate, operating as a real estate broker, and making loans and investments. Among its tenants in the building were retail stores, insurance companies, bus companies, a radio station, sales agencies, advertising companies, doctors, and a miscellany of other tenants. The corporation was one of a large group of apparently closed corporations forming a pyramid dominated by one man who was the president of most of them. It owned controlling interests in two of the insurance companies maintaining their home offices in the building, as well as in a real estate corporation, a coach company, and other corporations operating outside the state. These factors prompted the Board to hold the building operation to be one which affected interstate commerce.

When these cases are considered as a group, it becomes apparent that the decisive element in the relation of the operation of an office building to interstate commerce will be the purpose for which the building is designated and the use to which it has been devoted. If the building is devoted to the furtherance of interstate and foreign trade either (a)

¹⁹ 87 NLRB 1109 (1949).

²⁰ 90 NLRB No. 151 (1950).

directly, as by providing exhibition and office space to out-of-state business enterprises,²¹ or (b) indirectly, as by being owned or controlled by some industry engaged in interstate commerce which uses the entire building or some part of it to house its executive or administrative offices, or those of its subsidiaries, then the Board will generally assume jurisdiction and declare that the operations of the building will affect commerce. The amount of yearly rentals paid by out-of-state tenants who use the building, however, will not be considered to be a determinative factor by the Board nor will it have bearing upon the decision to take or refuse to take jurisdiction, particularly since the operation of an office building housing a variety of tenants is, in general, a matter of local consequence not covered by the provisions of the National Labor Relations Act.

F. HERZOG

²¹ Local illustrations may be found in the Chicago Furniture Mart and, possibly, the Chicago Merchandise Mart.

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DISCUSSION OF RECENT DECISIONS

CONSTITUTIONAL LAW—PERSONAL CIVIL AND POLITICAL RIGHTS—
WHETHER COMPULSORY DISCLOSURE UNDER OATH OF POLITICAL BELIEFS
AND AFFILIATIONS IS A VALID PREREQUISITE FOR THE ACQUISITION OF PUB-
LIC BENEFITS OR THE SECURING OF PUBLIC EMPLOYMENT—Two recent cases
deal with the "cold war" problem of the validity of legislation requiring
a person, under oath, to disclose his political beliefs and affiliations as a
prerequisite to receipt of public benefits or to appointment to public em-
ployment. In one such case, that of *Dworken v. Collopy*,¹ an inferior

¹ 91 N. E. (2d) 564 (Ohio Com. Pleas, 1950).

Ohio tribunal declared that provision of the Ohio Unemployment Compensation Act to be valid which states that an individual who advocates, or who is a member of a party which advocates, overthrow of the government by force shall not be eligible for compensation.² The statute in question, among other things, required the claimant for unemployment compensation benefits to attach to his claim a written affidavit amounting to a test oath of eligibility. The plaintiff, in his character as taxpayer, unsuccessfully advanced a claim of unconstitutionality predicated on an alleged infringement on the right of free speech as well as because the statute possessed ex post facto effects. In the other case, that of *Garner v. Board of Public Works of the City of Los Angeles*,³ a California intermediate appellate court upheld the constitutionality of a municipal ordinance which required a loyalty oath of its employees and also required the inclusion, within such oath, of a statement that the employee had not, within five years, advocated or taught the overthrow of the government by force. The plaintiffs there, some seventeen city employees who had been discharged for refusal to comply with the ordinance, sought a writ of mandate directing their reinstatement. The petition was denied by the trial court and that holding was affirmed when the appellate court could find no violation of the right of freedom of speech.

The major constitutional question with which the courts have been confronted in determining the validity of loyalty-oath legislation has been whether such compulsory disclosures of political beliefs and affiliations serve to violate constitutional rights to free speech. The conception that the right of free speech necessarily includes the right to be silent finds support in the decision of the United States Supreme Court in *West Virginia State Board of Education v. Barnette*⁴ in which case it was held that a state statute requiring public school pupils to give a prescribed salute and to pledge allegiance to the American flag was an unconstitutional attempt to control national unity and political beliefs. The court there asserted that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein."⁵ Pointing out that "censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of the kind the State is empowered to prevent and punish," the court there reasoned that "it would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence."⁶

² Page's Ohio Gen. Code Ann., Cum. Supp. 1949, §§ 1345-6(d) (2) (a).

³ 98 Cal. App. (2d) 493, 220 P. (2d) 958 (1950).

⁴ 319 U. S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943).

⁵ 319 U. S. 624 at 642, 63 S. Ct. 1178, 87 L. Ed. 1628 at 1639.

⁶ 319 U. S. 624 at 633, 63 S. Ct. 1178, 87 L. Ed. 1628 at 1635.

Subsequent thereto, however, in the case of *American Communications Association v. Dowds*,⁷ the court upheld the provision of the Labor Management Relations Act of 1947 which conditioned the right of a labor union to present cases to the National Labor Relations Board upon the filing of affidavits by its officers, as well as by the officers of the parent organization, that they were not members or supporters of the Communist Party.⁸ The court there apparently recognized that one is entitled to believe and to advocate what he chooses, including the right to be silent about those matters, unless there is a clear and present danger that a substantial public evil will result therefrom. Unlike the situation in the *Barnette* case, the court seemed to recognize the possibility of a clear and present danger arising from permitting Communists to hold office in a labor union, hence found justification for the denial of the benefit of a government service to a union if its officers refused to take a loyalty oath. The holding was not based on the assumption that all those who refused to take the oath were subversive but rather that the requirement for such an oath was, in effect, a reasonable means of insuring against an evil which Congress had a right to prevent, *i. e.* subversive control of the labor forces of the nation.

The decision of the California court in the *Garner* case, following and quoting from the *Dowds* case,⁹ clearly subordinates the right to be silent concerning one's political affiliations and teachings to the superior public interest in a "loyal" public service,¹⁰ just as the right in regard to one's political beliefs was there subordinated to the public interest in a "loyal" labor movement. While the court did not say it saw a clear and present

⁷ 339 U. S. 382, 70 S. Ct. 674, 94 L. Ed. 925 (1950).

⁸ 29 U. S. C. A. § 159(h), sub. 9(h).

⁹ The court also relied on the decision of the California Appellate Court in *Steiner v. Darby*, 88 Cal. App. (2d) 481, 199 P. (2d) 429 (1948), which upheld a fact-finding program of the Board of Supervisors of Los Angeles County designed to require county civil service employees to swear allegiance to the federal and state constitutions as well as to compel answer, under oath, of advocacy of seditious concepts or membership in organizations formed to advocate the overthrow of government by force. No violation of a right to freedom of speech was there found to exist because it was said that the county employees had by accepting public employment, foregone privileges they might have had as private citizens. The oath there required was found to be a lawful safeguard against the dangers likely to arise from the hiring or retention of disloyal government employees.

¹⁰ The California court noted that the question whether the legislature could compel disclosure of mere beliefs or opinions in contrast to prior overt acts was not presented. The ordinance in question required an averment as to whether or not the public employee was then, or ever had been, a member of the Communist Party and advocated, or had advocated, within five years, the overthrow of the government by force. These provisions were interpreted as referring to overt acts rather than beliefs. The oath involved in the *Dowds* case specifically referred to a "belief" on the subject. It will be worth while to note whether future distinctions of this nature will be made.

danger of a substantive evil resulting from disloyal persons holding public posts, the fact that it regarded the oath requirement as a reasonable step in the loyalty program can have that meaning and only that meaning.¹¹

The decision in the Collopy case, on the other hand, represents a radical extension of the doctrine of the Dowds case, for the parties there required to declare their loyalty were not public employees nor even individuals holding strategic or influential positions in industry but were simply claimants for unemployment compensation benefits. Such being the case, it would appear that the Ohio court must have felt that all persons who advocate the overthrow of the government offer a clear and present danger to the community, regardless of their status. It would, seemingly, simplify the test of constitutionality to the point where no inquiry is necessary other than to determine whether a reasonable relation exists in conditioning the right to a public benefit on the taking of a loyalty oath. No other court has gone thus far to date.

In answer to the *ex post facto* argument, the Ohio court pointed out that: (1) the statute before it, unlike the California regulation involved in the Garner case, had no relation to past activities or allegiances but spoke only of the present; and (2) the statute was not penal in nature. It was "not intended," the court emphasized, "as a means to punish anyone for past conduct or affiliations."¹² The decision may be highly significant in this respect, for it may serve to indicate what could prove to be an important and highly necessary limitation on legislation of this type.¹³ The California case, decided some three months later, might have produced a different result if the court had considered the Ohio decision for the ordinance there upheld clearly required an inquiry into past as well as present conduct and beliefs.

An analogous problem may arise when a state attempts to impose a

¹¹ In the Ohio case of *Dworken v. Cleveland Board of Education*, 94 N. E. (2d) 18 (Ohio Com. Pleas, 1950), similar reasoning was utilized to uphold the validity of a non-Communist loyalty oath prescribed for public school teachers. After developing numerous reasons for declaring Communist teachers to be a threat to the nation and the state, the court said the regulations adopted represented "sincere and laudable efforts to protect our children from the susceptibility of such harm." See 94 N. E. (2d) 18 at 32.

¹² 91 N. E. (2d) 564 at 572. On that basis, the court distinguished the situation before it from the one involved in *Cummings v. State of Missouri*, 71 U. S. (4 Wall.) 277, 18 L. Ed. 356 (1867), which had declared a Missouri test oath statute to be invalid because directed against those who had seen service in the Confederate forces.

¹³ In *Dworken v. Cleveland Board of Education*, 94 N. E. (2d) 18 (Ohio Com. Pleas, 1950), the same plaintiff as in the principal Ohio case unsuccessfully challenged a program calling for oaths from teachers, which oaths pertained only to present beliefs and called for no penalty. A different court there concerned approved the reasoning used in the instant case on the *ex post facto* aspect of the problem.

nonsubversive pledge on an elected public official or a candidate for public office. A New Jersey statute, for example, required candidates for certain state offices to take an oath that they did not advocate the forceful overthrow of the government and were not members of any group dedicated to such a purpose.¹⁴ This provision was held invalid, in *Imbrie v. Marsh*,¹⁵ because in certain instances the language of the oath of office was set forth in the state constitution, while in the other instances at least the ground to be covered by the oath was so described. The New Jersey court indicated that the legislature had no power to require an oath different from or in addition to that prescribed by the constitution.¹⁶ The existence of such constitutional provisions, however, did not prevent the Maryland court, in *Shub v. Simpson*,¹⁷ from upholding a state statute which required a candidate for state public office to file an affidavit with his nomination certificate that he was not a subversive person.¹⁸ The statute was said to be justified under the rationale that it did not provide an additional oath of office but was merely a proper exercise of the "inherent power to safeguard elections" by preventing the submission to the electorate of the names of those who would be ineligible to hold office.¹⁹

One could only hazard a guess as to the probable validity of legislation requiring a loyalty oath as a condition to private employment, proposals for which have arisen during this "cold war" era. If the "clear and present" danger test is to be utilized by the courts in this regard, much of the reasoning used to justify the demand for oaths from public employees and labor leaders, persons whose positions clearly affect the public interest, will be inapplicable. In addition to a constitutional guarantee of free speech, the right to work for a living in a lawful occupation, well established under the Fifth and Fourteenth Amendments, should not

¹⁴ N. J. Stat. Ann., Cum. Supp. 1949, § 41:1-1 et seq., and § 19:13-18.

¹⁵ 3 N. J. Super. 578, 71 A. (2d) 352 (1950).

¹⁶ The New Jersey decision should be of special interest in Illinois for the state constitution provides for the form of the oath of office to be taken by members of the General Assembly as well as that required of other civil officers: Ill. Const. 1870, Art. IV, § 5, and Art. V, § 25. The last mentioned section provides that "no other oath, declaration or test shall be required as a qualification."

¹⁷ — Md. —, 76 A. (2d) 332 (1950).

¹⁸ Flack Ann. Code Md., Art. 85A, § 15, added by Laws 1949, Ch. 86. The provision was held not to be applicable to candidates for federal offices, such as congressmen, on the ground the state had no right to add to the qualifications laid down in the federal constitution.

¹⁹ In a brief per curiam opinion filed in the case of *Gerende v. Board of Supervisors of Elections of Baltimore City*, — U. S. —, 71 S. Ct. 565, 95 L. Ed. (adv.) 495 (1951), the United States Supreme Court affirmed the decision of the Court of Appeals of Maryland, — Md. —, 78 A. (2d) 660 (1951). The effect of which was "to deny the appellant a place on the ballot for a Municipal election . . . on the ground that she had refused to file an affidavit" as was required by the same statute which had been referred to in the *Shub* case. The court agreed that the statutes, as construed in the *Shub* case, involved no federal constitutional question.

be overlooked. But valid or not, the effectiveness of legislation calling for test oaths is questionable. Why, for example, should it be supposed that a subversive individual would hesitate to perjure himself when his scruples have not prevented him from being subversive? Furthermore, the type of conduct concerning which disclosure under oath is most frequently sought is often itself of criminal character,²⁰ which conduct should have been uncovered by proper and efficient police work. There is also more than a little of that which is un-American in the spirit which lies behind legislation of the kind here noted.²¹

H. L. BLOSTEIN

DESCENT AND DISTRIBUTION—PERSONS ENTITLED AND THEIR RESPECTIVE SHARES—WHETHER A SURVIVING JOINT TENANT WHO HAS SLAIN THE CO-TENANT OBTAINS CLEAR TITLE TO THE JOINTLY OWNED PROPERTY BY VIRTUE OF THE RIGHT OF SURVIVORSHIP—The Illinois Supreme Court, in the recent case of *Welsh v. James*,¹ had occasion to pass for the first time on a unique problem concerning the rights of a surviving joint tenant, who had slain his co-tenant, in the jointly owned property. The defendant there concerned and his wife held title to four tracts of land and three bank accounts in joint tenancy. While so holding such property, he unlawfully killed his wife but, having then been declared insane, he was not tried for the offense. When defendant was subsequently restored to sanity, the heirs at law of the deceased wife sued to establish a constructive trust for their benefit, claiming that defendant held an undivided one-half interest in the several properties for them with a reversion in their favor as to the other one-half interest subject only to a life estate in favor of defendant. A motion to dismiss the complaint for failure to state a cause of action was sustained and, a freehold being involved, plaintiffs appealed directly to the Supreme Court. The decree dismissing the complaint was there affirmed.

²⁰ Ill. Rev. Stat. 1949, Vol. 1, Ch. 38, § 558, for example, makes it a crime "for any person openly to advocate, by word of mouth or writing, the reformation or overthrow by violence or any other unlawful means, of the representative form of government now secured to the citizens of the United States and the several states by the Constitution of the United States and the constitutions of the several states."

²¹ Professor Henry Steele Commager, writing in Harper's Magazine for September, 1947, under the title "Who is Loyal to America?" states: ". . . loyalty is not conformity. It is not passive acquiescence in the status quo. It is not preference for everything American over everything foreign. It is not an ostrich-like ignorance of other countries and institutions. It is not the indulgence in ceremony—a flag salute, an oath of allegiance, a fervid verbal declaration. It is not a particular creed, a particular version of history, a particular body of economic practices, a particular philosophy . . . It is a realization that America was born of revolt, flourished on dissent, became great through experimentation . . . Every effort to confine Americanism to a single pattern, to constrain it to a single formula, is disloyal to everything that is valid in Americanism."

1 408 Ill. 18, 95 N. E. (2d) 872 (1951).

In reaching that solution, the court examined the nature of the interest created in the property as well as the mode adopted for its creating and, finding that the interest had been created by grant, concluded that the defendant was seized of the whole estate, as had been the case with his wife until her death, from the moment the interest was first acquired. To hold that the defendant was no more than a constructive trustee would be to divest him of an interest in the property in violation of that provision of the state constitution which declares that "no conviction shall work corruption of blood or forfeiture of estate."² In the light thereof, as well because of statutory penalties placed on unlawful homicide by the Criminal Code, the two constituting a declaration of public policy in the matter, the court felt compelled to affirm the decree.

Relatively few cases exist presenting the problem involved in the instant case and, of these, the majority reach an opposite result. Two cases cited by the court, one involving a joint bank account³ and the other involving realty held by tenants by entirety,⁴ have achieved the same result. In all other cases, the wrongdoer has been divested of the jointly owned property either upon the constructive trust theory, expressly disapproved in the present case, or upon a tenancy-in-common theory. Under the first of these, and relying on a principle that no man should be permitted to profit by his own wrongdoing, a constructive trust has been invoked for the benefit of the heirs of the deceased co-tenant,⁵ but certain differences may be noted. In *Sherman v. Weber*,⁶ for example, a trust was declared in favor of the wife's heirs to the extent of a one-half interest for the remainder of her normal life expectancy on the proposition that, as the wife was older than the husband, he in all probability would have outlived her. Where the age differential has been reversed, however, the result has been to declare a trust in the full property subject to the use and enjoyment of a one-half interest for the remainder of the surviving joint tenant's life.⁷ Other cases apply the doctrine to its fullest extent and declare a trust as to the entire property.⁸ While the result reached in

² Ill. Const. 1870, Art. II, § 11.

³ *Oleff v. Hodapp*, 129 Ohio St. 432, 195 N. E. 838 (1935). Williams, J., wrote a dissenting opinion.

⁴ *Beddingfield v. Estill & Newman*, 118 Tenn. 39, 100 S. W. 108 (1907). Another case directly in point is *Wenker v. Landon*, 161 Ore. 265, 88 P. (2d) 971 (1939).

⁵ The theory has been held inapplicable to a case where a wife killed her husband while she was afflicted with somnambulism on the ground that she was not a wrongdoer: *In re Eckhardt's Estate*, 184 Misc. 642, 54 N. Y. S. (2d) 484 (1945).

⁶ 113 N. J. Eq. 451, 167 A. 517 (1933).

⁷ *Bryant v. Bryant*, 193 N. C. 372, 137 S. E. 188 (1927).

⁸ *Bierbrauer v. Moran*, 224 App. Div. 87, 279 N. Y. S. 176 (1935); *In re Santourian's Estate*, 125 Misc. 668, 212 N. Y. S. 116 (1925); *Van Alstyne v. Tuffy*, 103 Misc. 455, 169 N. Y. S. 173 (1918).

these cases might seem desirable on the basis of the purely moral considerations involved, it cannot be denied that these courts have overlooked not only the true nature of the interest created under a joint tenancy but also the nature of the constitutional prohibition against a forfeiture of estate.

The tenancy in common theory finds expression in very few cases. It is predicated on the proposition that the rules relating to joint tenancies contemplate a normal death so that the question of the survival of one of the joint tenants over the other should be subject only to the natural vicissitudes of life. Where one of the joint tenants disrupts this normal process his act, in effect, severs the joint tenancy relationship, leading to a tenancy in common between the slayer and the heirs of the victim. The cases which endorse this rule purport to go behind the fiction of joint tenancy in order to avoid the stigma of violating the constitutional prohibition against forfeiture of estate,⁹ but while they avoid the high degree of uncertainty prevalent in the constructive trust cases and prevent the wrongdoer from taking advantage of his criminal acts they disregard the true nature of the estate in joint tenancy and violate the clear constitutional prohibition against forfeiture. The action of the court in the instant case, therefore, even if it represents a minority view, reaches the only, at present, legally justifiable result.

This does not mean that Illinois courts are necessarily and irrevocably committed to the law expressed in the case for the ethical problem involved could be resolved by proper action on the part of the legislature. Pennsylvania has adopted a so-called "slayer statute" which might well serve as a model for other states.¹⁰ While it covers all aspects of the wrongdoer's connection with realty, it particularly deals with the joint tenancy situation by giving the decedent victim's estate an immediate one-half interest to be increased by the other half upon the death of the slayer,¹¹ unless the slayer shall have obtained a severance of the property or a decree granting partition.¹² Any joint tenancy created under such a statute would be governed by its terms so as to make the right of survivorship

⁹ *Ashwood v. Paterson*, — Fla. —, 49 So. (2d) 848 (1951); *Grose v. Holland*, 357 Mo. 874, 211 S. W. (2d) 464 (1948); *Barnett v. Couey*, 224 Mo. App. 913, 27 S. W. (2d) 757 (1930).

¹⁰ *Purdon's Pa. Stat. Ann., Cum. Supp.* 1950, Tit. 20, Ch. 10, § 3441 et seq. The text thereof seems to have been drawn almost verbatim from Wade, "Acquisition of Property by Wilfully Killing Another—A Statutory Solution," 49 *Harv. L. Rev.* 715 (1936). Other law review notes appear in 44 *Harv. L. Rev.* 125 and 29 *Mich. L. Rev.* 745.

¹¹ *Ibid.*, § 3441.1.

¹² *Ibid.*, § 3446, also covers the situation likely to develop where the joint tenancy arrangement exists between more than two persons. It also recognizes the possibility of a trust by agreement or arising from the contribution of a greater proportion of the price by one of the parties.

depend upon a lack of wilful participation by the survivor in the cause of the deceased joint tenant's death, thereby obviating a violation of the constitutional provision against forfeiture. It would also serve to avoid any confusion inherent in an application of mortality tables for it establishes a conclusive presumption that the deceased victim would have outlived the slayer, regardless of the respective ages of the parties.

A secondary question appears to be raised by the opinion in the instant case, at least by way of inference, and that is one dealing with the right of a slayer to inherit, or to take by devise or bequest. One of the major cases cited by the court in support of its holding in the instant case was the earlier Illinois decision in *Wall v. Pfanschmidt*,¹³ handed down prior to the enactment of any statute on the general subject. It was there held that the constitutional prohibition against forfeiture of estate was a good defense to a suit designed to prevent a murderer from inheriting from his victim. Since that decision, certain statutory provisions have been enacted¹⁴ but no cases have, as yet, been decided thereunder. The approval given by the court to the holding in the *Wall* case might lead one to a belief that, upon such a suit being presented, the court could hold those sections of the statute to be unconstitutional.

Again, an examination of the decisions of other jurisdictions which have dealt with the problem, in the absence of statutory provision, discloses an apparent lack of uniformity. In those cases which have reached the same conclusion as that obtained in the *Wall* case¹⁵ primary consideration has been given to the constitutional prohibition involved and the unambiguous nature of the statutes relating to descent of property. In those cases which reach a contrary conclusion,¹⁶ the basic emphasis has been placed on the public policy argument that no man shall be allowed to profit

¹³ 265 Ill. 180, 106 N. E. 785 (1914).

¹⁴ Ill. Rev. Stat. 1949, Vol. 1, Ch. 3, § 167 and § 201.

¹⁵ *Crumley v. Hall*, 202 Ga. 588, 43 S. E. 646 (1947); *Hagen v. Cone*, 21 Ga. App. 416, 94 S. E. 602 (1917); *Hill v. Noland*, 149 S. W. 288 (Tex. Civ. App., 1912); *McAllister v. Fair*, 72 Kan. 533, 84 P. 112 (1906); *Eversole v. Eversole*, 169 Ky. 793, 185 S. W. 487 (1916); *Shellenberger v. Ransom*, 41 Neb. 631, 59 N. W. 935 (1894); *Owens v. Owens*, 10 N. C. 240, 6 S. E. 794 (1888); *Holloway v. McCormick*, 41 Okla. 1, 136 P. 1111 (1913); *DeGraffenreid v. Iowa Land & Trust Co.*, 20 Okla. 687, 95 P. 624 (1903); *Deem v. Millikin*, 6 Ohio Cir. R. 357 (1892); *In re Carpenter's Estate*, 170 Pa. St. 203, 32 A. 637 (1895); *In re Johnson's Estate*, 29 Pa. Super. 255 (1905).

¹⁶ *Weaver v. Hollis*, 247 Ala. 54, 22 So. (2d) 525 (1945); *Price v. Hittaffer*, 164 Md. 505, 165 A. 470 (1933); *Slocum v. Metropolitan Life Ins. Co.*, 245 Mass. 565, 139 N. E. 816 (1923); *Eisenhardt v. Siegel*, 343 Mo. 22, 119 S. W. (2d) 810 (1938); *Perry v. Strawbridge*, 209 Mo. 621, 108 S. W. 641 (1908); *Whitney v. Lott*, 134 N. J. Eq. 586, 32 A. (2d) 888 (1944); *Riggs v. Palmer*, 115 N. Y. 506, 22 N. E. 188 (1899); *In re Spark's Estate*, 172 Misc. 642, 15 N. Y. S. (2d) 926 (1939); *In re Wolf*, 88 Misc. 433, 150 N. Y. S. 738 (1914); *Johnston v. Metropolitan Life Ins. Co.*, 85 W. Va. 70, 100 S. E. 865 (1919).

from his own wrongdoing and on the theory that the constitutional prohibition is inapplicable as there is no deprivation of property but only the prevention of the acquisition of rights in property. Without attempting to analyze these theories but merely presenting them as being of historical importance, it is interesting to note that, at present, almost every jurisdiction has a statute designed to prevent a murderer from acquiring the property of the victim and the cases which have arisen thereunder have uniformly held these statutes to be constitutional,¹⁷ either by way of recognition of a change in public policy or because of a judicial belief that such statutes do not cause a forfeiture. The Illinois court could, and most likely would, side with that view.

It should be noted, however, that the holding on any particular set of facts falling within this general field cannot easily be determined in advance. Where statutory regulation exists some unusual results have been obtained because of varying statutory language. For example, a slayer convicted of manslaughter was allowed to inherit in one jurisdiction because the statute there required a conviction for murder in order to be operative.¹⁸ It has been said that a widow who has slain her husband is entitled to her widow's distributive share as the same is more nearly in the nature of a right of contract rather than one of inheritance.¹⁹ An heir who had committed suicide after murdering the ancestor has been declared to be a source of inheritance for lack of a conviction for murder,²⁰ while an out-of-state conviction has been said to be insufficient in another case.²¹ It was held, in *Ward v. Ward*,²² under a statute that required proof that the murderer had killed for the purpose of inheriting from the victim, that a conviction for murder without proof of the requisite purpose behind the act was not enough to disinherit. Of course, a subsequent

¹⁷ *Harrison v. Moncravie*, 264 F. 776 (1920); In re *Lysholm's Estate*, 79 Cal. App. (2d) 467, 179 P. (2d) 833 (1947); *Smith v. Greenburg*, 121 Colo. 417, 218 P. (2d) 514 (1950); In re *Kuhn's Estate*, 125 Iowa 449, 101 N. W. 151 (1904); *Hogg v. Whitham*, 120 Kan. 341, 242 P. 1021 (1926); *Hamblin v. Marchant*, 104 Kan. 689, 180 P. 811 (1919); *Wilson v. Bates*, 313 Ky. 333, 231 S. W. (2d) 39 (1950); *Parker v. Potter*, 200 N. C. 348, 157 S. E. 68 (1931); *Egelhoff v. Pressler*, 18 Ohio Supp. 195 (1945); *Winters Nat. Bank & Trust Co. v. Shields*, 3 Ohio Supp. 134 (1939); In re *Norton's Estate*, 175 Ore. 115, 151 P. (2d) 719, 156 A. L. R. 617 (1944); In re *Moore's Estate*, 50 Pa. D. & C. 183 (1943); In re *Hoffman's Estate*, 39 Pa. D. & C. 208 (1940); *Smith v. Todd*, 155 S. C. 323, 152 S. E. 506 (1930); *Ward v. Ward*, 174 Va. 331, 6 S. E. (2d) 664 (1940).

¹⁸ In re *Lysholm's Estate*, 79 Cal. App. (2d) 467, 179 P. (2d) 833 (1947). See also In re *Moore's Estate*, 50 Pa. D. & C. 183 (1943).

¹⁹ In re *Kuhn's Estate*, 125 Iowa 449, 101 N. W. 151 (1904).

²⁰ *Smith v. Greenburg*, 121 Colo. 417, 218 P. (2d) 514 (1950); *Hogg v. Whitham*, 120 Kan. 341, 242 P. 1021 (1926); *Parker v. Potter*, 200 N. C. 348, 157 S. E. 68 (1931); *Smith v. Todd*, 155 S. C. 323, 152 S. E. 506 (1930).

²¹ *Harrison v. Moncravie*, 264 F. 776 (1920).

²² 174 Va. 331, 6 S. E. (2d) 664 (1940).

declaration of insanity, which would operate to prevent a trial of the killer, would preserve the right of inheritance where conviction for the crime is an essential prerequisite to bring the statute into the case.²³

It would seem obvious, then, that the real problem is not so much whether a constitutional statute could be drafted but rather whether adequate language can be devised to meet the peculiar sets of facts likely to arise. The Pennsylvania statute mentioned above possesses merit in that no conviction is required, but it does insist that the killing be wilful and unlawful. If the insane slayer, for example, is to be penalized by being deprived of his rights as a joint tenant or as an heir, the proposed model would have to be suitably altered.

A. L. WYMAN, JR.

DESCENT AND DISTRIBUTION—RIGHTS AND LIABILITIES OF HEIRS AND DISTRIBUTEES—WHETHER OR NOT, WHERE INTESTACY HAS BEEN FOUND TO EXIST, A BONA FIDE PURCHASER OF PROPERTY FROM AN HEIR IS PROTECTED AGAINST CLAIMS BY DEVISEE NAMED IN A SUBSEQUENTLY PROBATED WILL—The Supreme Court of Illinois had occasion to decide a relatively rare question when it considered the direct appeal taken in the case of *Eckland v. Jankowski*.¹ The action was for partition of land. One Hegstad who was shown to be the last owner of the record title to the realty in question died supposedly intestate in January, 1945. Soon after his death, application for administration of his estate was made to and granted by the probate court of Cook County. The court found that he died intestate and declared his heirship. After the administration proceedings had been concluded and the administrator had been discharged, the premises were conveyed by the heirs-at-law to the defendants' predecessors in title. Approximately six months after the defendants had acquired title to the disputed property a will of the decedent was discovered and admitted to probate. Under the provisions of that will the plaintiff was devised a one-half interest in the realty. It was his contention that when the will was admitted to probate his title was perfected as of the date of the testator's death under the doctrine of relation back² and was not divested by the conveyance of the heirs-at-law. The defendants, however, contended that since they were innocent purchasers for value from the lawful heirs of the decedent owner, in reliance upon the public records which gave them no actual or constructive notice of the existence of a will or that anyone

²³ *Winters Nat. Bank & Trust Co. v. Shields*, 3 Ohio Supp. 134 (1939); *In re Hoffman's Estate*, 39 Pa. D. & C. 208 (1940).

¹ 407 Ill. 263, 95 N. E. (2d) 342 (1950). Another aspect of the case is discussed in 39 Ill. Bar J. 412.

² Ill. Rev. Stat. 1949, Vol. 1, Ch. 3, § 205 recognizes this doctrine.

other than those persons designated by the statute of descent had any interest in the premises, the statutory effect of the admission of the will to probate was not applicable so as to divest them of their title. The circuit court, after a hearing on the merits, dismissed the complaint for want of equity. The Supreme Court squarely deciding the issue for the first time in Illinois³ affirmed the decree of the lower court on the ground that the purchasers had the right to rely on the devolution of title shown by the record.

The courts have considered this problem in relation to two fact situations: (1) those where the purchase was from a putative heir of a supposed intestate which purchase was followed by the probate of a will; and (2) those wherein the purchase was from an heir of a supposed intestate after the ancestor's estate had been administered followed by the subsequent discovery and probate of a will.

As to the first fact situation, there is no apparent reason why the vendee who has purchased from a person allegedly entitled as heir should be protected in his title and prejudice the rights of innocent third parties when his reliance upon the representations of his vendor was misplaced. However, the reported cases have been divided on the question of protecting the purchaser's title in such a situation. Those jurisdictions which have refused protection to the purchaser have in the main done so on the basis of the doctrine that probate of the will relates back to the death of the testator and avoids all dispositions and conveyances by the heirs contrary to the provisions of the will in the absence of any statutory limitation as to the time when a will may be probated.⁴ The doctrine that real property descends to the heirs-at-law of the deceased, unless a devise thereof is affirmatively shown, coupled with an extended lapse of time prior to the conveyance by the heirs, was made the foundation for protecting the purchaser in other jurisdictions.⁵ In none of these cases was there any evidence that the estate of the decedent had gone through administration.

³ See *Cassem v. Prindle*, 258 Ill. 11, 101 N. E. 241 (1913), for a case in which the bona fide remote grantee was not a party to the action but whose title was held valid in spite of the fact that his vendor's title was taken with knowledge of the decedent's will and in fraud of the rights of the devisees.

⁴ *Cole v. Shelton*, 169 Ark. 695, 276 S. W. 993, 43 A. L. R. 1008 (1925); *Reid's Adm'r. v. Benge*, 112 Ky. 810, 66 S. W. 997, 57 L. R. A. 253, 99 Am. St. Rep. 334 (1902); *Van Syckel v. Beam*, 110 Mo. 589, 19 S. W. 946 (1892); *Cooley v. Lee*, 170 N. C. 18, 86 S. E. 720 (1915).

⁵ *Barnes v. Gunter*, 111 Minn. 383, 127 N. W. 398 (1910); *Wright v. Eakin*, 151 Tenn. 681, 270 S. W. 992 (1925), noted in 10 Minn. L. R. 168 and 7 Tenn. L. Rev. 142; *Slayton v. Singleton*, 72 Tex. 209, 9 S. W. 876 (1888). See also *Stelges v. Simmons*, 170 N. C. 42, 86 S. E. 801 (1915) (estoppel); *Hadden v. Stevens*, 181 Ga. 165, 181 S. E. 767 (1935) (estoppel); *Hayes v. Simmons*, 136 Okla. 206, 277 P. 213 (1929) (laches).

The importance of a prior administration is made apparent by the case of *Simpson v. Cornish*.⁶ Following an express adjudication of intestacy and a final decree of distribution specifically allotting realty, the heirs in that case conveyed to good faith purchasers. The court said, in protecting the vendees from the effect of a subsequent probate of decedent's will, "We believe it is the law that a bona fide purchaser who relies upon official acts of a court having jurisdiction of the subject-matter will be protected in his title and in his purchase, for if it were not so, the courts, representing the judicial system, would be instrumental in committing a fraud, to the great detriment of one who relies upon its order or decree . . . the distinction [between a purchaser from a devisee after probate of a will and a purchase made from an heir after an adjudication of intestacy] is not based upon a difference in principle. While, in case of testacy, reliance is placed by the purchaser on the order or decree of probate admitting the will, in the case of intestacy reliance is placed, as in the instant case, upon the adjudication of intestacy. In either case, the purchaser is protected, because he relied upon a judicial determination of a court of competent jurisdiction."⁷

Protection is given to the title of the vendee acquired subsequent to intestacy administration proceedings because of the fear that the opposite conclusion would result in clouds on title derived from an heir, impairment of marketability and sale value, and, in effect, would create restraints on alienation. These fears were voiced by the Wisconsin court concerned with the *Simpson* case⁸ for it said: "To hold that a bona fide purchaser . . . cannot rely upon an adjudication of intestacy or upon a final decree, would have a tendency . . . to suspend the power of alienation . . . If the rule contended for . . . be adopted by the court . . . then the title to all property passing under the intestate laws of this state may be involved under a cloud which will effectually restrict its alienation and which will vitally effect the value of the real estate."⁹ This argument bears considerable weight, for the free transfer of inherited realty might well be impeded if a possible revocation of probate were to hang, like the sword of Damocles, over the purchaser's title.

⁶ *Simpson v. Cornish*, 196 Wis. 125, 218 N. W. 193 (1928), *Rosenberry, J.*, dissented, noted in 14 Iowa L. Rev. 111, 27 Mich. L. Rev. 118, 12 Minn. L. Rev. 768 and 7 Tenn. L. Rev. 142—See also *Dodd v. Holden*, 205 Ark. 817, 171 S. W. (2d) 948 (1943), *Robbins, J.*, wrote a dissenting opinion; *First National Bank of Portland v. Connolly*, 172 Ore. 434, 138 P. (2d) 613 (1943), rehearing denied 172 Ore. 434, 143 P. (2d) 243 (1943) (dictum).

⁷ 196 Wis. 125 at 151-2, 218 N. W. 193 at 203. The action was one brought by devisees after probate to remove a cloud from title.

⁸ *Simpson v. Cornish*, 196 Wis. 125, 218 N. E. 193 (1928).

⁹ 196 Wis. 125 at 154, 218 N. W. 193 at 204.

It cannot be denied that the result reached may work hardship on the isolated devisee normally entitled to the property, but this is lessened by the fact that he may pursue the purchase price into the vendor's hands.¹⁰ Also, the normal administration proceedings take long enough to give him a fair opportunity to make a search into the fact situation before the administration of the estate is closed.

In many jurisdictions this problem can be solved by resort to statutes. A few of these enactments have direct application while others bear only indirectly on the issue. In some states there are express statutes granting specific protection to the purchaser from an heir subsequent to the death of his ancestor.¹¹ These have application either with or without prior intestacy administration proceedings. In substance, these statutes provide that the title of a bona fide purchaser of realty from the heirs of a person who died seized thereof is not affected by a devise of the property made by the latter unless, within a certain period of time after his death, the will devising the property is admitted to probate or duly established by the judgment of a court of competent jurisdiction. Then if the will is not probated within the statutory period, the rights of the devisees, under the subsequently probated will, are limited to the proceeds of the sale in the hands of the adverse heirs. There is an implication which arises from the mere fact of the existence of these express statutory protective devices and that is that there has been a legislative attempt to grant advantages to and balance the equities between the unhappy devisees and bona fide purchasers who find themselves in the unfortunate situation discussed herein.¹²

¹⁰ *In re Walker's Estate*, 160 Cal. 547, 117 P. 510, 36 L. R. A. (N. S.) 89 (1911); *Thompson v. Sampson*, 64 Cal. 330, 30 P. 980 (1883), *McKinstry, Sharpstein, and McKee, JJ.*, dissented.

¹¹ See, for example, *McKinney's Cons. Laws N. Y., Decedent Estate Law*, § 46: "The title of a purchaser in good faith and for a valuable consideration, from the heir of a person who died seized of real property, shall not be affected by a devise of the property made by the latter, unless within two years after the testator's death, the will devising the same is either admitted to probate and recorded as a will of real property in the office of the surrogate having jurisdiction, or established by the final judgment of a court of competent jurisdiction of the state, in an action brought for that purpose." The statute, like most statutes of limitation, contains certain saving clauses favoring minors, non-residents and the like. It was derived from original § 2628, Code of Civil Procedure, which had a four year limitation. Cases illustrating the application of this section are: *Gilkinson v. Miller*, 74 F. 131 (1896); *Fox v. Fee*, 167 N. Y. 44, 60 N. E. 281 (1901) affirming 33 App. Div. 627, 53 N. Y. S. 1103 (1898) in turn affirming 24 App. Div. 314, 49 N. Y. S. 292 (1897); *Cole v. Gourlay*, 79 N. Y. 527 (1880); *Cipperly v. Link*, 135 Misc. 134, 237 N. Y. S. 106 (1929) (bar limited to title acquired from heir); *Werner v. Wheeler*, 142 App. Div. 358, 127 N. Y. S. 153 (1911).

¹² Cases illustrating the application of similar statutes found in other jurisdictions may be observed in *Biggs v. McCarthy*, 86 Ind. 352, 44 Am. Rep. 320 (1882); *Markley v. Kramer*, 66 Kan. 664, 72 P. 221 (1903); *Barnhardt v. Morrison*, 178 N. C. 563, 101 S. E. 218 (1919); *Cooley v. Lee*, 170 N. C. 18, 86 S. E. 720 (1915) (question of retrospective application); *Crickenberger v. Jasper*, 105 W. Va. 638, 144 S. E. 576 (1928). See also 57 Am. Jur., *Wills*, § 786; 26 C. J. S., *Descent and Distribution*, § 78.

Among the enactments which indirectly protect the purchaser are those which have either placed an absolute limitation on the time within which a will may be probated or that the probate of a will is of no effect unless filed for probate within a given period. Therefore, if the will is not probated within the time allotted the purchaser would automatically become protected.¹³

Recordation statutes have also played their part in sustaining or denying the claim of the devisee. For instance, where there has been an intentional and fraudulent or negligent omission to record the prior probate of a foreign will in the county in which the land is located, or an improper recordation of a valid domestic or foreign will prior to a conveyance by the heirs either with or without intestacy administration proceedings,¹⁴ the grantee has been protected.

In the light of these judicial determinations from other jurisdictions, the legal basis for the decision rendered upon the facts and circumstances in the principal case appears to be the most reasonable and logical conclusion that could be reached. It establishes stability of title to realty, creates a guide post for the attorney, and sounds a warning to testators that if the persons whom they desire to be the beneficiaries of their generosity are to receive the property intended instead of litigation such testators should overcome their inherent dislike to notify the world that they have made a will and should provide for a safe-keeping deposit thereof in a location known to all within their immediate circle. When the innocent vendee has examined the public records and purchased in reliance on the devolution of title as shown therein, the Illinois court, in the absence of express legislation, has given the unqualified answer to the unspoken question of "what more can he do?" by answering "nothing, no more is needed."

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¹³ *Goodman v. Russ*, 14 Conn. 210 (1841); *Ryan v. Texas & Pacific R. Co.*, 64 Tex. 239 (1885); *Ochoa v. Miller*, 59 Tex. 460 (1883). Local statutes contain innumerable differences, hence should be individually examined. Kentucky has construed its ten year statute of limitation for relief not otherwise limited as applicable on the right to offer a will for probate; *Foster v. Jordan*, 130 Ky. 445, 113 S. W. 490 (1908); *Reid's Adm'r v. Bengel*, 112 Ky. 810, 66 S. W. 997, 57 L. R. A. 253, 99 Am. St. Rep. 334 (1902) (in an action brought by devisees to probate an after-discovered will against purchaser from an heir without prior intestacy administration) following *Allan v. Froman*, 96 Ky. 313, 28 S. W. 497 (1894) (on right to probate a foreign will).

¹⁴ *Catholic University of America v. Boyd*, 227 Ill. 281, 81 N. E. 363 (1907); *Bliss v. Seeley*, 191 Ill. 461, 61 N. E. 524 (1901); *Harrison v. Weatherby*, 180 Ill. 418, 54 N. E. 237 (1899); *Barnes v. Gunter*, 111 Minn. 383, 127 N. W. 398 (1910); *Mizell v. Osmon*, 354 Mo. 321, 189 S. W. (2d) 306 (1945); *McCulloch's Lessee v. Eudaly*, 3 Yerg. (11 Tenn.) 346 (1832); *Slayton v. Singleton*, 72 Tex. 209, 9 S. W. 876 (1888); *Chadwick v. Turner*, L. R. 1 Ch. App. 310, 35 L. J. Ch. N. S. 349, 12 Jur. N. S. 239, 14 L. T. N. S. 86, 14 Week. Rep. 491 (1866).

EXECUTORS AND ADMINISTRATORS—ALLOWANCES TO SURVIVING WIFE, HUSBAND, OR CHILD—WHETHER OR NOT A WIDOW IS ENTITLED TO A FULL AWARD WHEN SHE DIES PRIOR TO THE EXPIRATION OF THE STATUTORY SUPPORT PERIOD AND BEFORE THE AWARD HAS BEEN GRANTED—Among recent decisions dealing with the administration of decedents' estates, the opinion rendered by the Court of Appeals of Ohio in *Croke's Estate v. Clancy*¹ is of importance. The case offered the court its first opportunity to consider the extent of a widow's entitlement, under the local widow's allowance statute,² when she died three months after her husband and before any allowance had been set aside for her benefit by the appraisers. The allowance, when subsequently made, was objected to by the widow's executrix since it was apparently limited to that period during which the widow had survived her husband.³ The executrix claimed that the amount so set aside was, and would have been, insufficient to support her decedent for the entire statutory period. She therefore moved for an increase to an amount equivalent to that payable for a full year. The Probate Court so held, but the Court of Appeals, looking to the purpose of the statute, reversed and reinstated the sum originally granted. In arriving at that conclusion, the court pointed out that the statute was not intended to provide a gratuity or a distributive share in the husband's estate, but that its sole province was to extend the husband's duty of support for one year beyond the date of his death. By adopting this position, the court refused to be persuaded by the argument that support for the entire year indefeasably vested in the surviving widow on the death of the husband.⁴

Statutes directing some form of allowance to the widow to alleviate the economic distress likely to prevail upon the death of the husband and during the period of administration are purely American in origin.⁵ Such

1—Ohio App. —, 93 N. E. (2d) 799 (1950). Hurd, J., wrote a dissenting opinion.

2 Page's Ohio Gen. Code Ann. 1946, § 10509-74, provides: "The appraisers shall set off and allow to the widow . . . sufficient provisions or other property to support [her] for twelve months from the decedent's death . . . The probate judge shall have authority to fix the year's allowance if the appraisers fail to do so, or if for any other reason there is no appraisal."

3 The action was brought pursuant to Page's Ohio Gen. Code 1946, § 10509-77, which permits the widow or other interested person to petition for a review of the allowance and authorizes the probate judge to take discretionary action in the matter.

4 The court, by way of dictum, indicated that if the appraisers had set aside an allowance for a full year the same result would have been reached upon proper motion by the husband's personal representative to reduce the allowance.

5 See Woerner, *The Law of American Administration* (Little, Brown & Co., New York, 1899), 2d Ed., § 77. These statutes would stem from an early date according to Atchison, "Massachusetts Probate System," 42 Mich. L. Rev. 425 (1943), particularly pp. 427-8.

statutes undoubtedly owe their existence to a benevolent and humane legislative spirit as well as to a recognition by the State of its duty to protect the family in time of need.⁶ But the legislation now to be found in all of the American states would appear to have well defined local characteristics for each state seems to have preferred to treat the problem in its own fashion. According to one writer,⁷ this provincial attitude has given rise to a hodge-podge of legislation which is often ambiguous and difficult to apply. One of the more apparent difficulties concerns that which faced the court in the instant case for the contingency of the widow's death before the receipt of the award does not appear to have been contemplated nor covered by express language in any of these statutes.

It might be emphasized, at the outset, that the prior cases which have dealt with the particular problem defy any comprehensive classification because of the facility with which the several statutes may be distinguished.⁸ Notwithstanding this circumstance, certain standards of construction seem to have been formulated which might serve to give some aid to the interpretation to be given to any particular statute whenever the problem here presented should arise.

When heretofore confronted with the question, the fundamental inquiry of the courts has been to determine whether or not the allowance could be said to have vested at or prior to the time of the widow's death. On this basis, some courts have concluded that the entire allowance is defeated where the statute requires a judicial determination of the amount to be received by the widow and judicial action has not been taken during the widow's lifetime.⁹ That result appears dictated whenever there are discretionary features to the statute which render it impossible to confer definite property rights on the widow until determination has been made. It has also been held that the allowance cannot be declared vested where the statute requires the widow to perform some affirmative act as a

⁶ *Ibid.*

⁷ Vernier, *American Family Laws* (Stanford University Press, Stanford, California, 1935), Vol. 3, § 228. The author has compiled the various statutes on the subject at the place cited.

⁸ This thought is expressed in an annotation, to be found in 144 A. L. R. 270, to the case of *Re Sampson*, 142 Neb. 556, 7 N. W. (2d) 60 (1942).

⁹ *Zunkel v. Colson*, 109 Iowa 695, 81 N. W. 175 (1899); *Drew v. Gordon*, 95 Mass. (13 Allen) 120 (1866); *Adams v. Adams*, 51 Mass. (10 Metc.) 170 (1845); *Tarbox v. Fisher*, 50 Me. 236 (1836); *Easton v. Fessenden*, 65 R. I. 259, 14 A. (2d) 508 (1940); *State ex rel. Case v. Superior Court*, 23 Wash. (2d) 250, 160 P. (2d) 606 (1945). See also 24 C. J. *Executors and Administrators*, § 824, p. 258, and 34 C. J. S., *Executors and Administrators*, § 348, p. 55. In *Ex Parte Dunn*, 63 N. C. 137 (1868), a judicial confirmation of the proposed set off by the appraisers was said to be a necessary pre-requisite to vesting.

prerequisite to obtaining the allowance.¹⁰ In that category fall those statutes which require the widow to select the property which is to constitute the allowance¹¹ or to make application for it.¹² The rationale for this view rests on the proposition that the act so required is one personal to the widow and must be made choate by her while still living, otherwise the right to the allowance will be deemed to be waived.¹³

Conversely, a number of decisions have concluded that, as the statute in question vested the allowance in the widow immediately on the death of her husband, the claim to the award was capable of surviving, in its entirety, to the widow's personal representative upon the widow's death.¹⁴ The vesting feature of such statutes has been said to be demonstrated by the presence of a granting clause which "entitles"¹⁵ or "allows"¹⁶ the widow to have a fixed amount of property upon her husband's death. Other instances of vestiture occur where the allowance

¹⁰ *Henderson, Adm'r v. Tucker*, 70 Ala. 381 (1881); *Barnes v. Cooper*, 204 Ark. 118, 161 S. W. (2d) 8 (1942); *Zunkel v. Colson*, 109 Iowa 695, 81 N. W. 175 (1899); *In re Bayer's Estate*, 95 Neb. 488, 145 N. W. 1030 (1914); *Carey v. Monroe*, 54 N. J. Eq. 632, 35 A. 456 (1896); *Kimball v. Deming*, 27 N. C. (5 Ired.) 418 (1845); *Cox v. Brown*, 27 N. C. (5 Ired.) 194 (1844); *Kearn's Appeal*, 120 Pa. 523, 14 A. 435 (1888); *In re Hemphill's Estate*, 157 Wis. 331, 147 N. W. 1089 (1914).

¹¹ *Henderson, Adm'r v. Tucker*, 70 Ala. 381 (1881); *Carey v. Monroe*, 54 N. J. Eq. 632, 35 A. 456 (1896); *In re Hemphill's Estate*, 157 Wis. 331, 147 N. W. 1089 (1914).

¹² *Barnes v. Cooper*, 204 Ark. 118, 161 S. W. (2d) 8 (1942); *Zunkel v. Colson*, 109 Iowa 695, 81 N. W. 175 (1899); *In re Bayer's Estate*, 95 Neb. 488, 145 N. W. 1030 (1914); *Kimball v. Deming*, 27 N. C. (5 Ired.) 418 (1845); *Cox v. Brown*, 27 N. C. (5 Ired.) 194 (1844); *Kearn's Appeal*, 120 Pa. 523, 14 A. 435 (1888).

¹³ See *In re Bayer's Estate*, 95 Neb. 488, 145 N. W. 1030 (1914); *Kearn's Appeal*, 120 Pa. 523, 14 A. 435 (1888). Another segment of this rationale is exemplified in *Re Sampson*, 142 Neb. 556, 7 N. W. (2d) 60, 144 A. L. R. 264 (1942). It was there held that the action to compel an award was personal to the widow, hence was not capable of surviving according to the common law, and there was no statutory sanction for its enforcement after the widow's death.

¹⁴ *In re Hearn's Estate*, 22 Del. Ch. 447, 195 A. 367 (1937); *Brown v. Joiner*, 77 Ga. 232, 3 S. E. 157 (1887); *York v. York*, 38 Ill. 522 (1865); *Bratney v. Curry*, 33 Ind. 399 (1870); *Mallory v. Mallory*, 92 Ky. 316, 17 S. W. 737 (1891); *Pyles v. Bowie*, 123 Md. 13, 90 A. 772 (1914); *In re Poupore's Estate*, 132 Minn. 409, 157 N. W. 648 (1916); *Sammons v. Higbie*, 103 Minn. 448, 115 N. W. 265 (1908); *Hastings v. Myer*, 21 Mo. 519 (1855); *Monahan v. Monahan's Estate*, 232 Mo. App. 91, 89 S. W. (2d) 153 (1936); *Crawford v. Nassoy*, 173 N. Y. 163, 65 N. E. 962 (1903); *In re Warner's Estate*, 53 App. Div. 565, 65 N. Y. S. 1022 (1900); *In re Ackler's Estate*, 168 Misc. 623, 6 N. Y. S. (2d) 128 (1938); *In re Hulse*, 41 Misc. 307, 84 N. Y. S. 220 (1903); *In re Estate of Phillips*, 27 Ohio N. P. (N. S.) 142 (1928); *In re James' Estate*, 38 S. D. 107, 160 N. W. 525 (1916); *Estate of Johnson*, 41 Vt. 467 (1868). Where the widow, not having received her allowance, does not die until after the expiration of the statutory support period, there seems to be no question but what the award is a vested one: *In re Rice's Estate*, 146 Iowa 48, 124 N. W. 792 (1910); *Bane v. Wick*, 14 Ohio St. 631 (1863).

¹⁵ *In re Hearn's Estate*, 22 Del. Ch. 447, 195 A. 367 (1937); *Pyles v. Bowie*, 123 Md. 13, 90 A. 772 (1914); *Monahan v. Monahan's Estate*, 232 Mo. App. 91, 89 S. W. (2d) 153 (1936).

¹⁶ *York v. York*, 38 Ill. 522 (1865); *Sammons v. Higbie*, 103 Minn. 448, 115 N. W. 265 (1908); *In re James' Estate*, 38 S. D. 107, 160 N. W. 525 (1916).

may be said to "belong" to the widow,¹⁷ or where the property which comprises the award is to be excluded from the assets of the husband's estate.¹⁸

In the cases reviewed to this point, the allowance was either granted or denied in its entirety regardless of the length of time within which the widow survived her husband. The principal case must be regarded as novel in that it took a middle ground by directing a proration of the allowance measured according to the length of time the widow survived in relation to the one-year statutory support period.¹⁹ The divergence between this result and that reached by other courts, in cases where a similar discretionary sum has been involved, seems to rest upon the fact that the support feature of the Ohio statute was emphasized, making it unnecessary for the court to enter upon an investigation of the vesting question. In the cases which turn on the point of whether the award was vested or not, it may be noted there has been an inclination to treat the allowance as a gratuity rather than a provision for support.²⁰ An added reason for proration of the allowance in the instant case might be said to exist in the fact that the Ohio statute fixed a statutory period for support which made it possible accurately to measure the sum to which the widow would be entitled for those months during which she did survive. No such possibility of measurement appears under other statutes where the amount of the allowance is made to depend upon a judicial determination.

What the particular outcome of the instant problem would be in Illinois, if it should arise, is not clear, since the prevailing statute²¹ does not indicate the course to be followed and no Illinois case to date has provided any construction thereof. The statute presently provides that the widow is to be allowed, as her own property,²² certain chattels²³ and, in addition, a sum of money which the appraisers shall deem to be reasonable²⁴ to support her for the nine-month period following her husband's

¹⁷ *Crawford v. Nassoy*, 173 N. Y. 163, 65 N. E. 962 (1903).

¹⁸ *In re Ackler's Estate*, 168 Misc. 623, 6 N. Y. S. (2d) 128 (1938); *In re Estate of Phillips*, 27 Ohio N. P. (N. S.) 142 (1928). The statute concerned in the case of *In Estate of Johnson*, 41 Vt. 467 (1868), provided that the widow should "have" the award.

¹⁹ But see *In re Rice's Estate*, 146 Iowa 48, 124 N. W. 792 (1910).

²⁰ An exception to this view may be seen in *Adams v. Adams*, 51 Mass. (10 Metc.) 170 (1845), where the court gave credence to the "support" theory but denied recovery because the award had not "vested."

²¹ Ill. Rev. Stat. 1949, Vol. 1, Ch. 3, § 330 et seq.

²² This thought has been expressed in various forms. The phrase "sole and separate" was used in Laws 1845, p. 38, § 1. It was amended to read "sole and exclusive" by Laws 1847, p. 168, § 1. The latter phrase was retained until the present term "own" appeared in Laws 1939, p. 4, § 178.

²³ These chattels consist of the family pictures and the wearing apparel, jewels and ornaments of the widow.

²⁴ The reasonableness of the sum is to be determined by a consideration of the

death, but which sum of money shall not be less than \$1,000. It may be seen that this statute contains, in combination, many factors which have been deemed to be singularly controlling in prior cases considered elsewhere. The Illinois statute, therefore, being much more complex, may be productive of a mixed result.

Some assistance may be provided by the holding in the early Illinois case of *York's Administrator v. York's Administrator*,²⁵ interpreting a former statute, wherein it was decided that the specific articles which went to make up the award²⁶ vested absolutely in the widow immediately upon her husband's death, notwithstanding the fact that she died ten days later and prior to a set-off by the appraisers. The statute then in effect²⁷ provided that the widow was entitled to have certain specific articles and also other property of an unascertainable nature²⁸ as and for her sole exclusive property. In arriving at this decision the court said, "The language of the act is emphatic, and declares in the most express terms, that the specific articles . . . shall be the sole and exclusive property of the widow forever."²⁹ This case, and others previously noted,³⁰ should stand as good authority for the proposition that the fixed items designated in the present award statute, to-wit: the chattels and the minimum \$1,000 allowance, should be deemed to vest in the widow on the death of her spouse³¹ for "own," as presently used, does not differ in legal effect from the phrase "sole and exclusive" heretofore used.³² The case is not, however, completely satisfactory for present purposes because there is no clear indication therein concerning a disposition toward the discretionary features included in the award.³³ The question of choice

condition in life of the widow when taken in relation to the condition of the estate. The award may be payable in installments every three months for the nine-month period following the husband's death.

²⁵ 38 Ill. 522 (1865).

²⁶ Even then the award was provisional in nature, for the widow had an option to take the estimated worth of the articles in cash or in other property.

²⁷ Ill. Rev. Stat. 1845, § 48, p. 546, as amended by Laws 1845, p. 38, § 1, and Laws 1847, p. 168, § 1.

²⁸ The pioneer character of the times may have been reflected in the fact that this property was said to consist of the necessary beds, furniture, stove and stove pipe, yearly provisions, livestock feed for six months, and fuel for three months. Not only was the property unascertainable before set off but an element of time was interposed.

²⁹ 38 Ill. 522 at 525.

³⁰ Comparable cases from other jurisdictions are listed in note 14, ante.

³¹ There is dicta to that effect in *McCord v. McKinley*, 92 Ill. 11 (1879); *Allen v. Hempstead*, 154 Ill. App. 91 (1910); *Fick v. Armstrong*, 136 Ill. App. 28 (1907); *Ross v. Smith*, 47 Ill. App. 197 (1892); *In re Estate of Scoville*, 20 Ill. App. 426 (1886). See also *Horner, Probate Practice* (Callaghan & Co., Chicago, 1925), 3d Ed., § 83; *Simons, Probate Practice* (Callaghan & Co., Chicago, 1907), § 495.

³² See *Prete v. Finkelstein*, 193 Misc. 24, 83 N. Y. S. (2d) 353 (1948).

³³ A criticism of this deficiency, expressed by Levi North, author of *North's Probate Practice*, appears in a note appended to the report of the decision in *York v.*

among the three possible results, heretofore illustrated, that could be achieved with regard to that part of the monetary award which exceeds the minimum amount, still, therefore, remains undetermined.

Notice has already been taken of the fact that there is support for the general proposition that an unascertained portion of an award cannot be said to vest until a determination with regard thereto has been made.³⁴ The possibility is not remote that Illinois might adopt this attitude and deny all chance of recovery as to this part of the award for the theory followed in other jurisdictions could apply, with equal vigor, to the Illinois statute.³⁵ One important consideration may mitigate against such a result and that is the fact that the statute has received extremely liberal treatment at the hands of earlier Illinois courts.³⁶ If that same liberality prevails, it is unlikely that such a harsh course would be followed, especially since the other two possible approaches lead to less severe consequences.

One such approach concerns itself with the unique result of proration attained by the Ohio court in the instant case. A similar result is possible in Illinois for there is comparable language in the two statutes as well as machinery in the form of a fixed support period through which an accurate proration could be achieved.³⁷ The analogy tends to lose some of its persuasiveness when it is recognized that the Ohio statute lacks a granting clause as explicit as that to be found in the Illinois act,³⁸ but application of the analogy would put emphasis on the idea of support,

York, 38 Ill. 522, as the same appears in the Denslow reprint, made in 1877, of that volume of the Illinois Reports. See also *Boyer v. Boyer*, 21 Ill. App. 534 (1886), where it was held that the appraisers were not permitted to estimate the worth of certain of these discretionary articles.

³⁴ See cases cited in note 9, ante.

³⁵ Proponents of this view should not overlook the case of *Estate of Johnson*, 41 Vt. 467 (1868). The statute there concerned provided that the widow should have so much of the personal estate of her husband as the probate court might assign to her according to circumstances and degree, but in no case was the share to be less than one-third of the estate after debts. The court, in a case where the widow had died one month after her husband without receiving any part of such contemplated allowance, held that her personal representative was entitled to at least a one-third share since that sum had vested in her on the death of her husband.

³⁶ In particular, see *Gillett v. Gillett*, 207 Ill. 136, 69 N. E. 942 (1904), affirming 109 Ill. App. 126 (1903); *Strawn v. Strawn*, 53 Ill. 263 (1870); *Moss v. Moss*, 208 Ill. App. 589 (1917).

³⁷ Compare Ill. Rev. Stat. 1949, Vol. 1, Ch. 3, § 330, which provides for ". . . such sum of money as the appraisers deem reasonable for the proper support of the surviving spouse . . . for nine months after the death of the decedent." with Page's Ohio Gen. Code Ann. 1946, § 10509-74, which directs that the appraisers "shall set off and allow to the widow . . . sufficient provisions or other property to support [her] for twelve months from the decedent's death . . ."

³⁸ Ill. Rev. Stat. 1949, Vol. 1, Ch. 3, § 330, provides that the widow shall be allowed, "as her own property," that property which constituted the award. In contrast, the Ohio provision is contained in an entirely different section, to-wit: Page's Ohio Gen.

a necessary element to the Ohio decision, whereas a contrary view would give to the Illinois statute a sense of gratuity over-riding the phrase which reveals a purpose to provide for the "proper support" of the widow. Certainly, her need for "support" would be contemporaneous only with her lifetime and no longer.

The other possible construction of the Illinois act would automatically vest the entire allowance, minimum and discretionary, in the widow upon the death of her husband regardless of when she died. Such a construction would give the utmost liberality to the statute and would emphasize the idea that the granting clause is definitive as to the entire award. Stated differently, the word "own" as employed in the statute, would apply to all segments of the award, the unascertained as well as the ascertained. This view finds support in the Georgia case of *Brown, Administrator v. Joiner, Administrator*.³⁹ It reached the conclusion that the statute under consideration vested the unascertained portion of the allowance in the widow immediately on the death of her husband inasmuch as it imposed an absolute duty on the appraisers to set off this reasonable sum for her yearly support, even though the widow might, as in fact she did, die within the twelve month period without having received the allowance. It was pointed out that the appraisers were precluded from taking into consideration the time of the widow's death, for the statute made it their sole duty to determine the reasonableness of the sum intended for her support for one year. The Illinois statute is susceptible of much the same construction. Although the appraisers have other duties to perform, their service in relation to the widow's award is limited to a determination of the reasonableness of the amount to be granted and no more.

The foregoing discussion may have served to highlight the problem and furnish possible alternatives for its solution even if it has not attempted the impossible by way of providing a forecast of the precise action which an Illinois court will take when forced to achieve a decision. As certain recent revisions of the statute call for clarifying amendment,⁴⁰ it can only be suggested that the legislature should consider the whole situation and all of its possibilities, when it next considers the subject.

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Code Ann. 1946, § 10509-54, as amended, which excludes certain assets from the husband's estate for the benefit of the widow. Even if this section and Section 10509-74 were construed *in pari materia*, they would still lack the comprehensibility of the Illinois granting clause.

³⁹ 77 Ga. 232, 3 S. E. 157 (1887).

⁴⁰ An amendment adopted in 1949 was intended to put both spouses on an equal plane: Laws 1949, p. 1, § 1. It has, however, produced a need for clarification because certain parts of the statute still refer only to widows and might be said to be inapplicable to widowers.

RECENT ILLINOIS DECISIONS

COSTS—TAXATION—WHETHER COSTS INCURRED IN ORDER TO OVERCOME DEFENSES NOT MADE IN GOOD FAITH MAY BE TAXED AT AN EX-PARTE HEARING—Little use appears to have been made of Section 41 of the Illinois Civil Practice Act,¹ if absence of appellate records may be considered to be any indication of infrequent trial court practice, although a judge once offered the opinion that the imposition of penalties under the statute would soon cause untrue defenses to disappear.² The decision in *Adams v. Silfen*³ indicates that it would be improper to assess costs for an untruthful defense, if one should be offered, except at the time of the trial and then only after proper notice of an intention to make application for an award. The plaintiff there, on petition filed long after the hearing and at an *ex parte* hearing before another judge than the one who presided at the trial, secured an order taxing the defendant with certain costs and attorney's fees allegedly incurred in overcoming certain allegations and denials made by the defendant supposedly without reasonable cause, not in good faith, and found to be untrue.⁴ The Appellate Court for the First District reversed such order on the ground that the statute was penal in character and no recovery could be permitted under it except upon full compliance with its terms. Although the section calls for a "summary" taxation of costs, it was said not to warrant *ex parte* action but rather to require that an opportunity be provided to be heard on the question of whether costs should be taxed or not. It was also said that the power to tax costs was vested in the trial judge alone since only he would possess the knowledge necessary to permit of summary disposition of the matter. The utility of the provision would seem to be a matter of some doubt unless it could be said to possess some prophylactic value from its mere presence on the statute book.

¹ Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 165.

² Fisher, "The Persistence of Chitty," 6 U. of Chi. L. Rev. 359 (1939), particularly p. 372.

³ 342 Ill. App. 415, 96 N. E. (2d) 628 (1951).

⁴ Other cases interpreting the statute may be found in *Hausman Steel Co. v. N. P. Severin Co.*, 316 Ill. App. 585, 45 N. E. (2d) 552 (1942), and *Palmer v. Gillarde*, 312 Ill. App. 230, 38 N. E. (2d) 352 (1942), but to date there has been no recorded case in which a penalty under the statute has been successfully imposed. It should be noted that the permissible recovery is described as the "reasonable expenses" of the opposite party. Ill. Civ. Prac. Act Anno., 1933, pp. 87-8, suggests this phrase may include attorneys' fees. There has been no expression to date interpreting this aspect of the statute.

DECLARATORY JUDGMENT—PROCEEDINGS—WHETHER OR NOT TIME FOR APPEAL IN A DECLARATORY JUDGMENT PROCEEDING IS TO BE MEASURED BY APPLICABLE LEGAL OR EQUITABLE RULE—The Illinois Supreme Court granted leave to appeal in *Freeport Motor Casualty Company v. Tharp*¹ solely to settle a question as to the timeliness of an appeal from a declaratory judgment order entered pursuant to the recently enacted declaratory judgment statute.² The proceeding had been one to secure a declaration as to an insurance company's obligations under a public liability policy. The trial judge, being absent from the county, mailed a written judgment order, under date of June 15th, to the clerk of the court with direction to make the usual docket entry "the next day there is court in Louisville," that place being the county seat. The order was received by the clerk of June 16th but was not spread of record until June 24th, the next court day. Notice of appeal was filed on September 22nd, well within the ninety-day period³ measured from June 24th but more than the statutory time allowed if the order could be said to have been entered on June 16th. The Appellate Court had rejected a motion to dismiss the appeal and had disposed of the case on the merits. The Supreme Court agreed that such action had been proper.

It is clear that the commencement of the period for appeal varies depending on the nature of the action brought, for a law judgment becomes final the moment it is pronounced even though not recorded until later,⁴ whereas an equity decree attains the force of a binding decree for this purpose only after it has been signed and enrolled.⁵ Inasmuch as a declaratory judgment proceeding is *sui juris*,⁶ it became necessary for the court to determine the exact point when the period for appeal would begin to run in such a case. In that regard, and for this purpose, the court concluded that the declaratory judgment proceeding should take the same character as would a suit based on the same facts but seeking positive relief instead of a mere declaration of rights. As the instant case appeared to be, in essence, a law action based on a contract, the court

¹ 406 Ill. 295, 94 N. E. (2d) 139 (1950), affirming 338 Ill. App. 593, 88 N. E. (2d) 499 (1949). Fulton, J., dissented.

² Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 181.1.

³ *Ibid.*, Ch. 110, § 200, requires that no appeal, as a matter of right, shall be taken "after the expiration of ninety days" from the "entry" of the order, decree or judgment. It does not elaborate on the acts which constitute "entry."

⁴ *People v. Jarecki*, 352 Ill. 207, 185 N. E. 570 (1933).

⁵ *Snook v. Shaw*, 315 Ill. App. 594, 43 N. E. (2d) 417 (1942), noted in 21 CHICAGO-KENT LAW REVIEW 98. See also *Hughes v. Washington*, 65 Ill. 245 (1872), and *Jones v. City of Cartersville*, 340 Ill. App. 330, 91 N. E. (2d) 604 (1950).

⁶ *Progressive Party v. Flynn*, 400 Ill. 102, 79 N. E. (2d) 516 (1948); *Great Northern Life Ins. Co. v. Vince*, 118 F. (2d) 232 (1941), cert. den. 314 U. S. 637, 62 S. Ct. 71, 86 L. Ed. 511 (1941).

applied legal rather than equitable concepts to fix the time for appeal.⁷ The holding may be indicative of a line of thought to be applied with regard to other procedural problems which may arise in declaratory judgment matters.⁸

The court did, however, note that the statute fixes a period which commences with the "entry" of the judgment rather than with its rendition. If a law judge pronounces judgment while present in open court in the county in which the case is pending and at a time when the court is in full and proper session, the appeal period, following the law rule, would immediately begin to run as the ministerial act of "entering" the judgment would be presumed to have occurred contemporaneously with the rendition of the judgment. If, on the other hand, as in the instant case, the judge is elsewhere at the time he formulates his decision and sends the same in by mail, there is no judgment until he, or an appropriate substitute, returns and reconvenes the court into proper session at the proper place. On that basis, the court held the final judgment in the instant case had not been "entered" until June 24th, for which reason the motion to dismiss the appeal had, properly, been denied.

DIVORCE—ALIMONY, ALLOWANCES, AND DISPOSITION OF PROPERTY—WHETHER OR NOT RETROACTIVE EFFECT SHOULD BE GIVEN TO THE STATUTORY AMENDMENT DESIGNED TO PRESERVE LUMP-SUM SETTLEMENTS FROM THE CONSEQUENCE OF REMARRIAGE—In the recent case of *Walters v. Walters*,¹ the plaintiff, in 1946, had been awarded a divorce under a decree which contained a provision for the payment of a specified sum of money in installments. Later that year, the defendant filed a petition for modification of the decree in the form of cancellation of the obligation to make the payments because of the plaintiff's remarriage. The trial court granted the requested relief but the Appellate Court for the First District reversed on the ground that the provision was in the nature of a lump-

⁷ The case had seemingly turned on a question as to the construction to be given to the language contained in the policy. That aspect of the case is discussed in a note to the decision of the Appellate Court to be found in 29 CHICAGO-KENT LAW REVIEW 18-9. Presumably, if the declaratory judgment proceeding had sought a determination as to the company's freedom from liability because of fraud or mistake, the action would have possessed the character of a suit in equity for rescission or reformation.

⁸ The statute, Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 181.1, recognizes the possibility for differentiation among types of declaratory judgment proceedings for it calls for trial by jury of disputed issues of fact where such method of determination is customary. Pleading and other procedural questions may turn on the distinction made in the instant case.

¹ 341 Ill. App. 561, 94 N. E. (2d) 726 (1949). Niemeyer, P. J., wrote a concurring opinion. Feinberg, J., dissented.

sum settlement,² even though payable in installments, rather than one for alimony. The plaintiff was, therefore, held entitled to the continued receipt of the sums even though her marital status had been altered. The decision is in conformity with the spirit of the 1949 amendment to Section 18 of the Divorce Act,³ which provision now requires the continuation of payment, despite remarriage of the recipient, of any lump-sum settlement, including those payable in installments. That amendment was, in all probability, enacted to prevent the recurrence of decisions, such as had been reached by certain of the Appellate Courts, to the effect that such settlements, if payable in installments, were converted into and were to be treated as alimony.⁴ The majority of the court mentioned, but declined to apply, the amended section on the basis that it was unnecessary to do so. Taking this position, it found it unnecessary to consider whether the amendment possessed retroactive effect. Judge Niemeyer, in his concurring opinion, felt the court should have stressed the statute to bolster its decision.⁵

The significance of the position taken in the concurring opinion could the more readily be grasped if one would consider that it could conceivably affect innumerable divorce decrees entered before the passage of the 1949 amendment. Just such a situation existed in another recent case, that of *Coleman v. Coleman*.⁶ The facts therein paralleled those of the Walters case in that the decree and the petition for modification came before the passage of the 1949 amendment, and the decree provided for a settlement similar to the one described in that case. The Appellate Court for the Fourth District, however, interpreted the decretal provision as being one for alimony rather than a lump-sum settlement and ordered a termination of payments on evidence of the wife's remarriage. In arriving at that decision, the court refused to give retroactive effect to the 1949 amendment. If it had done so, the result reached might well have been different since it would then have been confronted with an express legislative mandate designed to fit the situation presented to the court.

² This conclusion was apparently based on two factors present in the decree, to-wit: (1) the settlement was for a specific total sum; (2) any unpaid balance, in event of the premature death of the ex-husband, was to be a charge against his estate.

³ Ill. Rev. Stat. 1949, Vol. 1, Ch. 40, § 19.

⁴ See, for example, *Hotzfield v. Hotzfield*, 336 Ill. App. 238, 83 N. E. (2d) 605 (1948); *Banck v. Banck*, 332 Ill. App. 369, 54 N. E. (2d) 577 (1944); *Adler v. Adler*, 373 Ill. 361, 26 N. E. (2d) 504 (1940).

⁵ Since no legislative intent allowing retroactive application was shown, the conclusion is difficult to justify. For the necessity of such a showing, see *Hathaway v. Merchants' Loan & T. Co.*, 218 Ill. 580, 75 N. E. 1060 (1905); *Gage v. Stewart*, 127 Ill. 207, 19 N. E. 702 (1889).

⁶ 341 Ill. App. 462, 94 N. E. (2d) 507 (1949).

MUNICIPAL CORPORATIONS—CREATION, ALTERATION, EXISTENCE AND DISSOLUTION—WHETHER THE FAILURE TO INCLUDE THE TERMS OF ANNEXATION IN THE INITIATING ORDINANCE VOIDS THE ARRANGEMENT EVEN THOUGH THE VOTERS APPROVE THE ACTION—The councils of both the plaintiff city and the defendant city, in the recent case of *City of Nameoki v. Granite City*,¹ passed ordinances authorizing special elections to determine whether the former should be annexed to the latter. A majority of those casting votes at each election approved the proposed action. The plaintiff city thereafter commenced suit requesting an injunction to restrain the defendant and its officers from assuming control over the former's government, property and affairs. The complaint alleged that neither ordinance specified the terms of the annexation, as is required by statute,² for which reason the whole arrangement was void. The "terms" referred to were those dealing with the disposition to be made of the annexed municipality's property, debts, public facilities and the like. The trial court dismissed the suit on motion and, upon direct appeal to the Supreme Court because a franchise was involved, that decision was affirmed.³

The higher court took the position that the mere failure to recite the terms of annexation in the ordinances did not void the action taken since other sections of the statute could be looked to in order to provide the missing information. It is true that the legislature, after outlining two methods for annexation, had included a statement of the manner in which the existing debts and facilities of the annexed municipality were to be handled.⁴ Due to the physical arrangement of this particular portion of the statute,⁵ however, it might appear that these provisions are applicable only where annexation occurs by the second method, the one not utilized in the instant case. There is further basis for differentiation in the fact that the second manner of procedure does not allow the municipalities any opportunity to agree as to the terms for the election thereunder is to be ordered by the county court upon petition by the requisite number of voters. It was held, however, that the sections referred to are

¹ 408 Ill. 33, 95 N. E. (2d) 920 (1951).

² Ill. Rev. Stat. 1949, Vol. 1, Ch. 24, § 7—12.

³ The trial court decision may have rested on the proposition that plaintiff chose the wrong remedy, having used a proceeding in equity rather than quo warranto, permitted by Ill. Rev. Stat. 1949, Vol. 2, Ch. 112, § 9(a). The Supreme Court, while noting that equity does not take jurisdiction merely to inquire into the legality of an election deemed the remedy appropriate as property rights were involved: *Village of Morgan Park v. City of Chicago*, 255 Ill. 190, 99 N. E. 388 (1912).

⁴ Ill. Rev. Stat. 1949, Vol. 1, Ch. 24, § 7—15 to § 7—20 inclusive and §§ 7—35, 7—38, 7—39.

⁵ These provisions follow immediately upon the sections outlining the second method of annexation.

not restricted in their application to situations where the annexation occurs through the intervention of the county court, but are equally applicable to either method of annexation.⁶

NAMES—ASSUMED NAMES—WHETHER OR NOT CONTRACT MADE BY ONE WHO HAS FAILED TO COMPLY WITH STATUTE REGULATING USE OF AN ASSUMED NAME IS VALID AND ENFORCIBLE—The plaintiff in *Grody v. Scalone*,¹ conducting his business under the designation of "Modern Furnace Company," sought to recover a balance allegedly due for the installation of a furnace in the defendant's residence. The answer admitted the existence of the contract, denied the other items in the complaint, and set up as an affirmative defense the fact that the plaintiff had failed to comply with the registration requirements of the Illinois Assumed Name Act.² It was contended that since the plaintiff had violated the statute he was not lawfully in business and therefore any agreement he had entered into was unenforceable as being contrary to public policy. The trial court sustained this argument and the case was taken directly to the Supreme Court on a claim that the statute was unconstitutional. The higher court circumvented the constitutional issue by holding that non-compliance with the statutory provisions regulating the use of assumed names did not affect the enforceability of contracts or obligations entered into by persons otherwise subject to the regulation of the statute. An identical result was reached, on similar facts, in the later Supreme Court case of *Cohen v. Lerhman*.³ The court, in reaching its decision in these two cases, found that no other result would be consistent with legislative intent. It reasoned that, since the only penalty set out in the statute is one designed to punish the violator by a fine or imprisonment,⁴ the legislature did not intend any other consequence to attach to a failure to comply with the law. A contrary result which had been attained in two prior Appellate Court decisions has thus been repudiated.⁵

⁶ It is to be noted that Section 7—15, having to do with the debts of the annexed municipality, restricts its applicability to annexation on petition. As the other sections are not so specifically restricted, the court reasonably concluded that they were not subject to restraint but could, and did, apply to both types of proceeding.

¹ 408 Ill. 61, 96 N. E. (2d) 97 (1950), noted in 39 Ill. B. J. 308.

² Ill. Rev. Stat. 1949, Vol. 2, Ch. 96, § 4 et seq.

³ 408 Ill. 155, 96 N. E. (2d) 528 (1951).

⁴ Ill. Rev. Stat. 1949, Vol. 2, Ch. 96, § 8.

⁵ *Mickelson v. Kolb*, 337 Ill. App. 493, 86 N. E. (2d) 152 (1949), noted in 27 CHICAGO-KENT LAW REVIEW 327. See also *Franks v. Coront*, 341 Ill. App. 137, 93 N. E. (2d) 157 (1950).

TAXATION—LEGACY, INHERITANCE, AND TRANSFER TAXES—WHETHER IT IS PROPER TO DEDUCT A PRO-RATA SHARE OF ALL DEBTS AND EXPENSES FROM THE VALUE OF LOCAL PROPERTY IN COMPUTING THE INHERITANCE TAX PAYABLE BY A NON-RESIDENT DECEDENT'S ESTATE—The case of *In Re Geatty's Estate*¹ presented a problem which arose out of an ancillary administration proceeding commenced in Illinois. The decedent, a resident of Maryland, died, leaving assets in both jurisdictions. The local administrator filed an inheritance tax return,² listing the property subject to the Illinois tax, and deducted from the gross value 42.55% of all the debts payable out of the estate together with the expense of administering it both in Illinois and Maryland. He proceeded on the theory that the Illinois assets were 42.55% of all the property left and therefore should bear that percentage of debts and expenses as far as the tax calculation was concerned. The Attorney General objected to this method of computation and subsequently the estate filed an amended return wherein only the Illinois debts and administration expenses were subtracted. However, in the latter was included the entire amount of the Federal Estate Tax,³ and once more the Attorney General took exception. The county judge assessed the tax on the basis of the original return, and upon appeal by the state to the county court⁴ the order was affirmed. A further appeal was perfected, this time directly to the Supreme Court as a question of revenue was involved, and again the percentage deductions were sustained.

In computing the inheritance tax in instances where the decedent is a non-resident, one of two methods is typically utilized in ascertaining the amount of the debts and expenses which are deductible. The first allows only the subtraction of local debts and administrative expenditures, while the second, the one adopted in the principal case, permits a pro-rata deduction of all such items without regard to their situs.⁵ In choosing the latter as the appropriate rule to be followed, the Supreme Court took into consideration the fact that the adoption of the former would allow the estate to reduce the tax basis by the full amount of the federal Estate Tax. This, it was reasoned, might result in duplicate deductions, the estate taking advantage of the federal tax twice: once in the

¹ 408 Ill. 383, 97 N. E. (2d) 307 (1951), noted in 39 Ill. B. J. 518.

² This was in compliance with the state inheritance tax act, Ill. Rev. Stat. 1949, Vol. 2, Ch. 120, § 375 et seq. The tax is calculated on the amount of property which has a tax situs in the state minus debts and administration expenditures.

³ The Illinois Supreme Court has held that the full amount of the federal Estate Tax is deductible even though the decedent had been possessed of property in sister states: *People v. McCormick*, 327 Ill. 547, 158 N. E. 861 (1927).

⁴ The Act provides for such procedure: Ill. Rev. Stat. 1949, Vol. 2, Ch. 120, § 385.

⁵ 61 C. J., Taxation, § 2604.

main administrative proceeding in Maryland, and once in the ancillary proceeding in Illinois. The court felt that it was under a duty to attempt to prevent this possibility.⁶

The Supreme Court did, however, foresee one difficulty which might arise if the pro-rata method was used indiscriminately and without regard to the facts and circumstances of each case. Thus, if the local debts and expenses were larger than the allowable pro-rata deductions, the result would be what the court termed "indirect taxation." In effect, the state would be receiving more than its share since the entire amount of the debts and expenses which were proper incidents of this jurisdiction would not be subtracted from the value of the property located within its boundaries.⁷ As the record in this particular case did not indicate that indirect taxation would occur, it was decided that there was no necessity to design a solution for such a problem at this time.

WORKMEN'S COMPENSATION—EFFECT OF ACT ON OTHER STATUTORY OR COMMON LAW RIGHTS OF ACTION AND DEFENSES—WHETHER STATE RELINQUISHES RIGHT OF SUBROGATION BY OFFSETTING WORKMEN'S COMPENSATION PAYMENTS AGAINST STATE RETIREMENT SYSTEM BENEFITS—In the recent case of *Weaver v. Hodge*,¹ it appeared that after the death of her husband, a former employee of the State of Illinois who had been negligently killed in the course of his employment, the widow sought to collect her claim under the Workmen's Compensation Act² and also under the Illinois Retirement System Act.³ Following determination of her claim under each of these respective statutes, she received payment in full of the workmen's compensation claim and payment of her entitlement under the retirement system, but payment of the latter was reduced by a set-off

⁶ The extent to which this objective was attained depends upon the Maryland method of computation. Thus, if that state did not apply pro-rata apportionment, a degree of duplication in the deduction of the Federal Estate Tax would still occur. The possibility of duplicate deductions did not deter the court from allowing the subtraction of the entire federal tax in *People v. McCormick*, 327 Ill. 547, 158 N. E. 861 (1927). It is to be noted that the decedent in that case, unlike the one in the present, was a resident of Illinois and the main administration of the estate occurred here. Thus it is readily apparent that the entire tax expense had a direct point of incidence in this jurisdiction whereas the same is not true in situations involving non-resident decedents where only ancillary proceedings occur in this state. It would, therefore, appear reasonable to suggest that the instant decision will have no effect upon the established rule that the federal Estate Tax can be deducted in its entirety where a resident decedent's estate is involved. See 39 Ill. B. J. 518 at 519.

⁷ For a situation of this type involving a resident decedent, see *Connell v. Crosby*, 210 Ill. 380, 71 N. E. 350 (1904).

¹ 406 Ill. 537, 94 N. E. (2d) 297 (1950).

² Ill. Rev. Stat. 1949, Vol. 1, Ch. 48, § 138 et seq.

³ *Ibid.*, Vol. 2, Ch. 127, § 215 et seq.

of the amount paid under the workmen's compensation award.⁴ Thereafter, the administrator of the deceased employee secured a judgment in an action against the tort-feasors responsible for the death and the proceeds of that judgment were paid to the Clerk of the court. Upon petition to distribute these proceeds, the State of Illinois sought leave to intervene and to enforce a lien to reimburse it for the unsatisfied remainder of the award it had been forced to pay under the Workmen's Compensation Act.⁵ The lower court denied such request and the state appealed directly to the Supreme Court.⁶ That court decided that a proper interpretation of the two statutes involved would necessarily lead to the result that the governmental employer had made an election to utilize the payments it had made under the Workmen's Compensation Act in order to reduce the obligation created by the Retirement System Act. To permit the state to then enforce a lien upon the wrongful death judgment would, in effect, provide it with duplicate reimbursement. While the case dealt only with an issue involving a public employer, it poses a nice question as to whether or not the same result would follow if a private employer, operating a pension or benefit fund, should become involved in a similar situation.⁷

⁴ *Ibid.*, Vol. 2, Ch. 127, § 225, directs that any amounts provided for the benefit of a dependent of a system member, whether under the provisions of the state Workmen's Compensation Act or the state Occupational Disease Act, shall be applied as an off-set against the amount due for any accidental death benefit, the off-set to be made in such manner as the retirement board may direct.

⁵ Ill. Rev. Stat. 1949, Vol. 1, Ch. 48, § 166, provides for a lien in favor of an employer who has paid a workmen's compensation award.

⁶ *Ibid.*, Vol. 2, Ch. 110, § 199, authorizes a direct appeal where the state is a party.

⁷ See Campbell, "Subrogation Under Workmen's Compensation—Too Much or Too Little," 18 CHICAGO-KENT LAW REVIEW 225-47 (1940).

BOOK REVIEWS

LIFE INSURANCE AND ESTATE TAX PLANNING. William J. Bowe. Nashville, Tennessee: Vanderbilt University Press, 1950. Pp. 92.

There have been debates among the learned through the ages respecting the economic, sociological, and ethical impact of the "right" to inherit property. Bentham was probably among the first to suggest that, providing there will be no impairment of productivity, the maximum happiness of society would be realized by distributing wealth equally. Only the years can reveal the degree of wisdom in such a course, but apparently our present-day tax planners have chosen to ignore the proviso clause of the aforementioned concept and have concentrated on a simple method to achieve economic equality; namely, by taxing accumulated private wealth out of existence. However, for each mind devoted to the development of this end, there is a counterpart concerned with and devising methods of avoiding, or at least delaying, the inevitable consequence of such a program. Not the least of these is Professor Bowe, who has written powerfully respecting tax avoidance by proper estate planning.¹

In this slim volume, he tries again to help resolve some of the more intricate problems of estate tax planning, this time restricting his discussion entirely to aspects of the use, or failure to use, any of the various forms of insurance in an estate plan. Even so, it would appear that, in this book, the author fails to live up to the promise of previous writings. Obviously, in any short work, there is a tendency toward generality, but the material here found, although in many ways helpful, is much too general to afford any concrete help.

It is all too often assumed, in the text, that an ideal state of affairs will continue to exist in the estate being planned, so that the suggestions offered often fail to cope with the potentialities of reality. For example, there is quite a discussion of the use of insurance as a means of buying up a business interest in such a manner as to provide liquidity for the estate and continuity of management in the decedent's beneficiaries. In particular, the author outlines the device whereby a closely-held corporation, holding insurance on the decedent, may buy up his shares to the advantage of one and all. Nowhere is there a suggestion that it might be unlawful for the corporation to buy its shares because of statutory prohibition or an impairment of the capital structure at the time of the

¹ See, for example, Bowe, *Tax Planning for Estate* (Vanderbilt University Press, Nashville, Tennessee, 1949), reviewed in 28 CHICAGO-KENT LAW REVIEW 186.

decedent's death.² What then is the worth of the plan? There is no desire to intimate that the book will not prove of interest to the practitioner, the trust man, and the insurance underwriter. There is, however, occasion to feel that the true utility of the work has been sacrificed for the sake of brevity.

THE LAW OF LABOR RELATIONS. Benjamin Werne. New York: The Macmillan Company, 1951. Pp. xiv, 741.

Specialization has progressed, in some fields of law, to such an extent that the general practitioner of today is apt to be considered a dodo or else finds that he wears the emblem of his general practitionership with discomfort. Law schools must, of necessity, prepare the student for full legal life but, within the limits of crowded curricula, are unable to include more than a few particular legal subjects among the general-knowledge courses.¹ Modern society, however, treating law as a means of social control, finds it impossible to ignore the overlap, if any there be between generalized and particularized subjects, and expects lawyers to go afield² just as governments call on others beside political scientists for aid.³ This particularizing of law, with its tendency to make the subject introvertistic, leads to congeries of theories and rules pertaining solely to specific fields. Eventually, the point is reached where even the proverbial Philadelphia lawyer throws up his hands and concedes defeat.⁴ The specialist's specialist then takes over and the general practitioner finds

² Scovill, "Treasury Stock in its Relation to Earned Surplus," 21 CHICAGO-KENT LAW REVIEW 328-32. For a more pragmatic approach to stock purchase plans, see Davis, *Life Insurance and Business Purchase Agreements* (National Life Ins. Co., Montpelier, Vermont, 1948), 2d Ed.

¹ See Currie, "The Materials of Law Study," 3 J. Legal Ed. 331 (1951), for a discussion of the problems arising from the antagonisms inherent in the general and the particular approaches.

² The New York Times, under date of Dec. 20, 1950, reports that Federal District Judge Wyzanski appointed a Harvard assistant professor of economics as his law clerk to assist him in the anti-trust suit against the United Shoe Machinery Corporation.

³ The Full Employment Bill of 1946 makes economists part and parcel of top governmental policy formulation. Governor Dewey, creating the New York State Crime Commission, called together a practicing lawyer, a law school dean, a retired educator, a former police commissioner, and a one-time diplomat.

⁴ Mr. Chief Justice Hughes, in *Panama Refining Co. v. Ryan*, 293 U. S. 388 at 412, 55 S. Ct. 241, 79 L. Ed. 446 at 454 (1935), noted how all the parties and the lower court were unaware of the presence of certain amendments which had been made to the Petroleum Code because of the absence of a requirement for their publication in any particular place. As a probable consequence of his remarks, the Federal Register Act was passed.

he is ousted from another field of revenue.⁵ Under these circumstances, the average lawyer who has been retained in a matter falling within one of these narrow fields either associates himself with a specialist or attempts to work alone, endeavoring to combat a specialist on the other side. As their respective armories are not stocked alike, the odds are weighted heavily against the uninitiated. To prepare himself, the tyro seeks for new and specialized weapons or tools. The plethora of texts, guides, handbooks, digests and the like attest to the prevalence of these conditions and to the effort that has been made to find some way out of the difficulty.

Labor law is no different from other specialties in this regard. Except on such points as relate to social legislation generally,⁶ or to injunctions and picketing⁷ and other areas where the judicial process is involved, the field of collective bargaining has itself become specialized to a degree not dreamt of in pre-Wagner Act days. At first, when bargaining did not resemble a name-calling jamboree, the prime issues were union recognition and wages and hours. Following the Wagner Act, experience with fringe incursions began to develop. The activities of the War Labor Board and of similar emergency agencies added little that was new. But since 1945, and under modern conditions, bargaining has become of importance in areas relating to pensions, guaranteed work, grievance procedure and arbitration as well as over the point of disclosure of secret financial data to unions. Save in certain areas of the South, the principle expressed in Section 7 of the Taft-Hartley Act has been generally accepted and followed. But recognition does not, *ipso facto*, produce a trade agreement. It is here that labor and management today engage in their most heated controversies. Whether lawyers will be an aid or an obstruction in collective bargaining is presently unimportant⁸ for the fact is that the participants generally utilize their services.

Unfortunately, experience gained in general practice in the negotiation of ordinary contracts is not of great value in this particular area for collective bargaining has created a jargon and an approach that is peculiarly its own. The general practitioner needs must bring the specialist's

⁵ The resentment may lead to suits such as the case of *In re Bercu*, 299 N. Y. 728, 87 N. E. (2d) 451 (1949), wherein accountants were prohibited from giving legal advice on tax questions. The New York County Lawyers Association, through its Chairman of the Committee on Unlawful Practice, discloses that another front is being opened with an investigation against estate planners because there is a "fringe of so-called 'experts' who are neither insurance men nor lawyers" deluding the public. See 7 Bar Bull. 16 (1949).

⁶ See the author's article on "Planning and Teaching a Course in Labor Law," to appear in the Summer, 1951, issue of the *Journal of Legal Education*.

⁷ Forkosch, "Equity versus Taft-Hartley Injunctions," 24 *Temp. L. Q.* 277 (1951).

⁸ See Sherman, "The Law Student and Collective Bargaining," 3 *J. Legal Ed.* 445 (1951).

tools to bear, else he will not be called again. How, then, can Lawyer X obtain the essential "know-how"? He is experienced with the use of treatises, texts and form books developed in other areas of the law, but encyclopedic treatises on labor law will provide no help. It is for just this reason that lesser studies have been made by Dunlop,⁹ by Tucker,¹⁰ and by Shulman and Chamberlain,¹¹ to mention only three, in addition to material which has been compiled in loose-leaf services and legal magazines. That all such varied attempts have not been completely successful is attested to by the publication of the instant volume.¹²

There may be some degree of misnomer in the title of this book if the reader is led to believe that the work was intended to discuss all of labor's ramified efforts to better itself. It is primarily the fields of the Taft-Hartley Act, of collective bargaining, and of the trade agreement which Mr. Werne has entered, but even these would, ordinarily, be too wide to cover adequately in a single volume. The book is one, however, geared to practical use and develops four principal topics, *i. e.* representation, prevention of unfair labor practices, rights and duties of management and unions, and collective contracts. The space allotted to each, approximately one-third for the first two, and one-third each for the third and fourth, gives some indication of the author's opinion as to their relative importance.

The first three parts deal almost exclusively with decisions of the National Labor Relations Board. The discussion is pithy and presents the law both succinctly and well. While the layman might find himself lost in the midst of the plentiful documentation, the average lawyer should find much to aid him to reach a particularized understanding in this field. But the major questions he will be inclined to ask will be what is the present status of the law, how up-to-date is the material offered? Although the book is a 1951 publication, it stops short at about September, 1950. Later Board determinations have tended to make the work outmoded, but definitely not obsolete.

For example, in the discussion of secondary boycotts, there is no mention of the Sterling Beverage or the Schultz Refrigerated Service cases¹³ although the Board made a major policy modification in Senator

⁹ Dunlop, *Collective Bargaining Principles and Cases* (Chicago, Richard D. Irwin, 1949).

¹⁰ Tucker, *Guide to National Labor Relations Act* (Chicago, Commerce Clearing House, 1947). Miss Tucker's excellent compilation, unfortunately, is not up to date.

¹¹ Shulman and Chamberlain, *Cases on Labor Relations* (Brooklyn, The Foundation Press, Inc., 1949).

¹² The author is Adjunct Professor of Industrial Relations, Graduate School of Business Administration, New York University.

¹³ 90 N. L. R. B. 75 (1950) and 87 N. L. R. B. 82 (1950), respectively.

Taft's outright condemnation by accepting to some slight degree the New York "unity of interest" doctrine.¹⁴ Also missing, although the omission is understandable, is reference to the fact that the Board, in October, 1950, promulgated standards or requirements to be met before it would exercise jurisdiction over interstate enterprises too small in character to warrant the utilization of the Board's limited resources.¹⁵ There would also seem to be no mention of the holdings in the Hughes, Hanke and Gazzam cases which validate state limitations upon union picketing.¹⁶ The time factor would make some of these omissions understandable, but others are not open to that explanation. The presence of error may also be noted. The author states, at pages 237-8, in relation to the discussion of strikes and boycotts under Section 8(b)(4)(A-C), that it is the function of the Board's "regional director" to make application for a temporary injunction, pursuant to Section 10. In fact, the statute specifically provides for an independent General Counsel whose duty it is to make such decisions and whose refusal to issue a complaint is final and non-reviewable. It is more likely that the author meant the "regional attorney" under the General Counsel rather than the "regional director" of the Board.

Despite these criticisms and other time and error defects, the overall view of the volume is generally good. True, the first three parts offer nothing the practitioner cannot get elsewhere but the manner of presentation and organization is competent and commendable. It is in the fourth part, dealing with collective contracts, that the prime worth of the book is demonstrated. It contains a capable discussion of both the theories and actualities underlying collective bargaining, covering not only the preparation therefor and the drafting thereof but also the operation thereunder. Typical contractual clauses have been offered in support of both the drafting and the operating chapters.¹⁷ If a work could be said to concentrate on any one topic so as to place other topics in the shade, the

¹⁴ See Forkosch, "Secondary Boycotts Under the Taft-Hartley Law," 1 Labor L. J. 1009 (1951), for a discussion thereof.

¹⁵ National Labor Relations Board, Release No. R-357, digests these standards. The standards were applied to a limited degree in the secondary boycott case of Jamestown Builders Exchange, 93 N. L. R. B. 51 (1951). See the writer's forthcoming article entitled "National Labor Relations Board Jurisdictional Requirements in Secondary Boycott Cases," to appear in the April, 1951, issue of Labor Law Journal.

¹⁶ Hughes v. Superior Court, 339 U. S. 460, 70 S. Ct. 718, 94 L. Ed. 985 (1950); International Brotherhood of Teamsters v. Hanke, 339 U. S. 470, 70 S. Ct. 773, 94 L. Ed. 995 (1950); Building Service Employees Internat'l Un. v. Gazzam, 339 U. S. 532, 70 S. Ct. 784, 94 L. Ed. 1045 (1950). As no table of cases appears in the book, a reader would be obliged to examine almost one hundred pages of footnotes to verify this fact. The task would be an impossible one for the busy practicing attorney. The omission should be corrected in a future edition.

¹⁷ It might have been worthwhile to have presented a "typical" completed agreement as an appendix, so that the reader could see the independent clauses tied together into a masterly whole.

emphasis here is clearly on this part. For that reason, the book should recommend itself to Lawyer X, for it provides the essential "know how." While that recommendation is not made entirely without reservation, the book deserves the characterization of being a workmanlike job quite likely to aid the uninitiated. In numerous respects it contains a wealth of information conveniently gathered and ably presented.

MORRIS D. FORKOSCH*

THE CONFLICT OF LAWS: A Comparative Study, Vol. III. Ernst Rabel. Ann Arbor: University of Michigan Law School (Michigan Legal Studies series). Chicago: Callaghan & Company, 1950. Pp. xlvi, 611.

A person who has been privileged to examine the first two volumes of this monumental comparison of the principles relating to choice of law, in those fields where one of two or more systems of law may become applicable, is likely to approach the third volume with preconceived notions as to the excellence of the material which awaits him. He has already, on two occasions, been impressed with the wide learning and indefatigable industry of the author. He has, in like fashion, been led to see a vast panorama of law unfolding according to a highly articulate, well-organized plan. The experience received from reading the textual statement of existing rules, with the frequent illustrations which accompanied the same, and from savoring the author's pungent and incisive analyses thereof have sharpened his expectation to the point where he is eager for more. He is now, by the release of the third volume, assured that his expectations are not to be thwarted or his hopes disappointed in the slightest.

The second volume closed with an entry into the realm of conflict of law as applied to contractual situations in general. It recognized that two principles have come to receive the widest recognition; those of party autonomy, or the right to choose the applicable law, on the one hand, and the so-called "point of contact" doctrine, by which the contract is to be governed by the law most closely connected with its chief features, on the other. The third volume carries that thought forward into a discussion of specialized contract problems such as relate to contracts for the payment of money, the sale of movables and immovables, of agency and employment, including workmen's compensation, of carriage by land and sea, of insurance, and of suretyship, as well as to contractual-like rights and duties arising from unjust enrichment. The book closes with an extended treatment of modification and discharge of contracts by

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such matters as assignment, subrogation, novation, counterclaim and bar by limitation.

There is no sign from the author that he relents, in any way, concerning his attitude against the use of mechanical and ill-fitted rules or the bolstering of obsolete concepts with ridiculous presumptions. He can, and does, still take issue in not infrequent measure with the provincialisms of the Restatement. His mastery of both the processes and the needs of international trade, commerce and finance, his grasp of legal history and legal developments are made evident on every page. It is only fair to say, however, that as the work progresses it becomes more difficult for the reader to follow every thought as the subject matter becomes that much the more complex. Here is no simple black-letter text to while away the student's, or lawyer's, time; more nearly, it may prove to be a challenge he could not meet. He would, though, be the stronger for having made the attempt. If nothing else be gained, he might learn that the American view of the subject is not the only one and, frequently, not the best one either.

WATER RESOURCES LAW, Vol. III. Water Resources Policy Commission. Washington: United States Government Printing Office, 1950. Pp. xviii, 777, paper.

Pursuant to Executive Order, the Water Resources Policy Commission has been engaged in preparing a series of reports relating to the water resources and water needs of the nation. The third of such reports has now been released in the form of a complete review of all existing water-resources legislation. It provides a comprehensive view of the numerous laws, both state and federal, which, regardless of date of enactment or actual impact on the subject, in any way concern the nation's water supply. Prepared in impersonal style, the report assembles a vast body of material relating either to statutory regulation or to development of water use, water power, drainage, flood control, navigation, land use and soil conservation. It is supplemented by extensive tables, indices and summaries.

While many of the points discussed will have slight concern for the mid-western area of the continent, being more important in the west where control of the water supply may be vital to life itself, the summary is one which should receive attention in every part of the nation. The hodge-podge of legislation on the subject alone, as revealed by this study, should call for clarifying action. Waste arising from duplication of effort, if not from direct conflict in responsibility, stands stark on almost every page. Shifts in constitutional emphasis from the exercise of a clear power over interstate commerce to specious reliance on the nebulous general welfare clause bespeak of historical change in the approach to the subject

of development and regulation of water supply. A growth in bureaucratic power is also to be noted, even to the point where administrative discretion in such matters has become of virtually unlimited character.

The raw materials of this report, then, present a picture which discloses urgent need for a major revision in both scope and policy in order that integration might not only eliminate conflicts and duplications in authority but so that the gaps might be filled. The report itself draws the conclusion that the "interests of present and future generations demand it." The legal profession will, undoubtedly, await future recommendations as to the form such revision should take. In the meantime, it has, through this report, been furnished with materials from which it might assemble its own conclusions.

LEGAL DRAFTING. Robert N. Cook. Brooklyn: The Foundation Press, Inc., 1951. Pp. xxxvii, 867.

The "innocent" bystander who will project himself into a stream of flying brickbats at a Donnybrook Fair has no one to blame for the lumps he suffers than himself. Such a "fair" has been raging for over a year between practicing lawyers on the one hand, utilizing the columns of the American Bar Association Journal for their vantage point,¹ and members of the law teaching profession, speaking through the pages of the Journal of Legal Education,² on the other. The pretext, if one is ever needed for a good fight, turns on the capacity, or lack of capacity, on the part of the typical law school graduate to perform the tasks besetting the practitioner the moment he receives the coveted license and undertakes to represent clients. The criticism proceeds, aside from any alleged general lack of ability, from the standpoint that the tyro is ill-equipped to translate his theoretical knowledge of law into the actualities to be faced in the daily routine of the law office.³ The reply when not couched in terms of confession and avoidance, is that the subject matter is not one capable of development in the professional school but must await field training in the actual workshops of the law. This reviewer refuses to expose himself to the dangers adhering to a life in the no-man's

¹ See Roberts, "Performance Courses in the Study of Law," 36 A. B. A. J. 17 (1950); Connor, "Legal Education for What?" 37 A. B. A. J. 119 (1951); and Cutler, "Inadequate Law School Training," 37 A. B. A. J. 203 (1951).

² Compare the papers mentioned in note 1, ante, with Wilson, "A Practical Practice Court Course," 3 J. Legal Ed. 285 (1950); Shestock, "Legal Research and Writing," 3 J. Legal Ed. 126 (1950); MacDonald, "The Professional Aspects of Legal Education," 2 J. Legal Ed. 444 (1950); Miller, "Clinical Training of Law Students," 2 J. Legal Ed. 298 (1950); Cavers, "'Skills' and Understanding," 1 J. Legal Ed. 395 (1949); Kalven, "Law School Training in Research and Exposition," 1 J. Legal Ed. 107 (1948). MacDonald, 2 J. Legal Ed. 444 at 451, states: ". . . I do not believe that law schools can do very much of real value in this regard, because of their inability to simulate the conditions of actual practice."

land between these armed camps, nor wishes to suffer from the rapid exchange going on between these verbal charges and retorts. There is much to be said on either side.

It would seem as if Professor Cook,⁴ from a similar recognition of the fact that there is some merit to these charges, has worked conscientiously toward a solution. A year or so back, reporting on the development of a course in legal writing at Western Reserve University, he stated that his description thereof was "necessarily a still picture of a growing thing. Only the general directions of this growth have been indicated."⁵ It is now possible, with the publication of his book, to announce that the outlines of the picture and the record of that growth may now be seen more sharply defined.

Here is no form book replete with ill-fitting clauses of ancient vintage awaiting to be assembled by the draftsman into a crazy-quilt vestment for the client's affairs. Here is no style book in composition, stuffed with boresome and pedantic rules concerning syntax, punctuation and the like. But the essence of these things, the large and small principles which should govern legal writing, are presented in stimulating fashion not for the guidance of students alone but for the practicing lawyer too. The materials, as Professor Llewellyn has noted in his introduction, offer a full background, an exploration into the policies and the problems involved in the drafting of a wide variety of legal forms, an elaborate check list of what to look out for, and frequent suggestions for lines of wise action in type after type of transaction. Case law is not neglected, but the emphasis is not thereon. The material is all there; all that remains is to put it to use and the result should silence much of the furor to be found in the cannonading referred to above.

³ Says Roberts, 36 A. B. A. J. 17 at 20, the graduate "... 'passed' contracts, but he never wrote one . . . He may have led his class in wills, yet, he has never prepared one . . . His course in trusts has been similar, but his knowledge of how to prepare the necessary documents for their establishment and execution is even smaller than his knowledge of decedent's estates." Cutler, 37 A. B. A. J. 203 at 204, adds: "All the theory in the world ill equips the lawyer who has all the legal lore at his fingertips, but [who] doesn't know how to draw a summons, a will, a deed or a bill of sale. To know the *cy pres* doctrine . . . is a necessary part of a lawyer's legal background. It is also important that he know how to use the words required in a simple petition to appoint an administrator of an estate." He offers, as his solution, a period of apprenticeship dealing with actual matters in a law office under the supervision of a member of the bar prior to the granting of the license.

⁴ Yes, the author is one of the schoolmen, not of the practitioner class, being a member of the faculty of law at Western Reserve University. He is, but not to his shame, one of those whom Connor, 37 A. B. A. J. 119, would point to with a degree of scorn for having "only one year of practice" or for revealing "no experience in the practice of law at all!" The author's practical experience is somewhat broader, but not by much. See biographical details in Teachers' Directory, Association of American Law Schools, 1950-51, p. 83. The book in question should prove that the theorist can also get practical.

⁵ Cook, "Teaching Legal Writing Effectively in Separate Courses," 2 J. Legal Ed. 87 (1949), at 91.