Comments

RATE LITIGATION—FACT DETERMINATION BY JUDICIAL GUESSWORK

THE Supreme Court of the United States has decided that certain elements of value must be considered in fixing a base for public utility rates.[1] Legal writers have usually devoted much more attention to the relevancy of each particular element of value, and to the synthetic process by which such elements are combined to reach the ultimate fact of "fair value," than to the technique of determining the facts upon which the elements of value must be predicated.[2] And while it may be difficult to isolate completely this latter phase of the judicial process in rate cases, a careful examination of the court records in a number of these cases demonstrates that the courts in their present organization are ill equipped to deal with this primary fact-finding function.[3]

Such an examination indicates that one serious defect in the present machinery is to be found in the incompetency of courts

[1] Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418 (1898); Minnesota Rate Cases, 230 U. S. 352, 33 Sup. Ct. 729 (1913); Board of Public Utility Commissioners v. N. Y. Tel. Co., 271 U. S. 23, 46 Sup. Ct. 363 (1926); McCardle v. Indianapolis Water Co., 272 U. S. 400, 47 Sup. Ct. 144 (1926); St. Louis & O'Fallon Ry. v. United States, 279 U. S. 461, 49 Sup. Ct. 384 (1929); United Railways & Electric Co. of Baltimore v. West, 280 U. S. 234, 50 Sup. Ct. 123 (1930).

[2] *Cf.* Goddard, *Fair Value of Public Utilities* (1924) 22 MICH. L. REV. 652, 777; Bonbright, *The Economic Merits of Original Cost and Reproduction Cost* (1928) 41 HARV. L. REV. 593; Goddard, *The Evolution of Cost of Reproduction as the Rate Base* (1928) 41 HARV. L. REV. 564; Guernsey, *Value in Confiscation Cases* (1929) 77 U. PA. L. REV. 575; Wherry, *The O'Fallon Case* (1929) 7 N. Y. U. L. Q. REV. 39; Cohen, *Confiscatory Rates and Modern Finance* (1929) 39 YALE L. J. 151. See also WHITTEN, VALUATION OF PUBLIC SERVICE CORPORATIONS (2d ed. 1928); GRONINGER, PUBLIC UTILITY RATE MAKING (1928).

[3] The rate case, of course, is only one of the many types in which constitutional questions involve questions of fact. See Willcox, *Social Statistics as an Aid to the Courts* (1913) 47 AM. L. REV. 259; Frankfurter, *Hours of Labor and Realism in Constitutional Law* (1916) 29 HARV. L. REV. 353; Kales, *New Methods in Due-Process Cases* (1918) 12 AM. POL. SCI. REV. 241; Powell, *The Judiciality of Minimum-Wage Legislation* (1924) 37 HARV. L. REV. 545; Biklé, *Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action* (1924) 38 HARV. L. REV. 6; Barnett, *External Evidence of the Constitutionality of Statutes* (1924) 3 ORE. L. REV. 195; FRANKFURTER AND LANDIS, THE BUSINESS OF THE SUPREME COURT (1927) c. 8; Note (1930) 30 COL. L. REV. 360.

of general jurisdiction to deal with the highly technical factual issues involved in rate cases. This is nowhere better illustrated than when "present value" or "reproduction cost" is a subject of controversy. In *United Fuel Gas Co. v. Railroad Commission*,[4] the principal dispute was over the value of the company's natural gas leaseholds embracing 814,911 acres.[5] Two experts for the company valued the leaseholds at $36,449,176 and $32,000,000 respectively,[6] and the expert for the Commission thought they were worth about $11,000,000.[7] In order to decide what weight, if any, should be given to these different valuations, it was necessary for the court to examine the calculations and data upon which they were based. The calculation of the total volume of gas underlying the acreage involved the use of Boyle's Law of gases and complicated mining, engineering, and geological data.[8] The computation of value involved the application of the estimated price of gas during the next eighteen years to the calculated volume of gas recoverable.[9] Eighteen years was the estimated life of the field.[10] The price of gas during that period depended upon whether the use of gas would continue in the steel industry, and this in turn involved the future price of coal and the possibility that coal would displace gas.[11] There was expert testimony that coal would not displace gas and that the price of gas would not fall,[12] and there was expert testimony to the contrary.[13] A memorandum setting forth the conditions which obtained in the coal industry was presented to the court.[14] Probably no court of general jurisdiction possesses sufficient technical background to unravel such a mass of data.[15]

[4] 278 U. S. 300, 49 Sup. Ct. 150 (1929).

[5] Record, p. 1006.

[6] Uebelacker, Record, pp. 796, 803 *et seq.*; Wyer, Record, p. 762 *et seq.*

[7] Hagenah, Record, pp. 942, 943.

[8] See 278 U. S. at 314, 49 Sup. Ct. at 154; testimony of Davis, Record, p. 822 *et seq.*

[9] *Ibid.*

[10] Record, pp. 885, 908, 966, 967; oral argument (Mr. John W. Davis), Record, Vol. 3, pp. 17, 27.

[11] See 278 U. S. at 315, 317, 318, 49 Sup. Ct. at 154, 155; Record, pp. 914, 917.

[12] Record, pp. 788, 795, 796, 976 *et seq.*, 983 *et seq.*

[13] Record, pp. 914, 917.

[14] Hagenah Exhibit No. 3, Record, p. 1534.

[15] The lowest value assigned to the leaseholds by any witness for the company was $30,000,000. The Court, however, found that no value greater than $6,732,920 had been established by the company.

The Court rejected most of the company's evidence as "speculative" and unreliable. 278 U. S. at 318, 49 Sup. Ct. at 155. That this decision was not easy to make is further indicated by the fact that similar evidence had been considered and approved by at least two state courts. Erie City v. Public Service Commission, 278 Pa. 512, 123 Atl. 471 (1924); Penn. Gas

In fixing the value of artificial structures, the courts are also confronted with problems which require trained judgment —here of an expert construction engineer. Thus in *Ottinger v. Consolidated Gas Co.*[16] the reproduction cost of a large tunnel was in dispute. Two experts respectively estimated the cost at $8,750,676 and $5,903,884.[17] In *McCardle v. Indianapolis Water Co.*,[18] there were discrepancies between the valuations placed upon many parts of the utility's property by Elmes and Hagenah, the company's two expert engineers. Among these discrepancies were the following:

	Elmes	Hagenah
881 feet, 16 inch wrought iron pipe (in place) [19]	$3,673	$7,570
52 feet, 42 inch cast iron pipe (in place) [20]	$1,236	$1,940
Radial brick stack chimney [21]	$13,588	$21,597
Landscape gardening [22]	$13,673	$5,249

Mr. Elmes explained [23] that such discrepancies were usual, being due to difference in the engineer's judgment as to construction methods, and that there "can be an exercise of judgment as between two methods which will amount to a 100% difference in cost, the judgment being whether you will or not arrive at a result." [24] Mr. Elmes testified that his estimate of total reproduction cost "happened" to agree very closely with Mr. Hagenah's, and that the difference of only 5.6% between them constituted a "vindication of both." [25] The substantial agreement of the totals was due to the fact that the various discrepancies balanced one another.[26] Such totals, however, may not "happen" to agree, particularly if the utility is so

Co. v. Public Service Commission, 211 App. Div. 253, 207 N. Y. Supp. 599 (3d Dep't 1925). The Supreme Court's refusal to guess further than that the evidence was "speculative" and unreliable appears to be a recognition of its own technical shortcomings. See Comment (1929) 38 YALE L. J. 1116, 1117, 1123.

[16] 272 U. S. 576, 47 Sup. Ct. 198 (1926).

[17] Master's Opinion, 6 F. (2d) 243, 256 (S. D. N. Y. 1925) (*sub nomine* Consolidated Gas Co. v. Prendergast), Record 68, at 96, 97.

[18] *Supra* note 1.

[19] Record, p. 101.

[20] *Ibid.*

[21] Record, p. 104.

[22] *Ibid.*

[23] Record, pp. 100–110.

[24] Record, p. 106. Mr. Elmes also testified: "I would not be surprised at all that, in comparing 75 items on a sheet taken at random from my appraisal with a similar appraisal of Mr. Hagenah's, you would find a difference in the appraisals which might vary from 20% to 75%. I never saw two appraisals which did not do that. I would believe my appraisal to be correct." Record, p. 107.

[25] Record, p. 109.

[26] *Ibid.*

small that there is slight opportunity for "balancing." The court must then pass upon the technical feasibility of construction methods. A further perplexity arises when the various estimates are based on different price levels. This was the situation in *Patterson v. Mobile Gas Co.*,[27] where there were seven estimates, no two of which were based on the same price level.[28] Accurate comparison of such valuations is of course difficult. And the difficulty is increased if, as sometimes happens, the expert witnesses arrive at their figures by different methods.[29]

The determination of a utility's book cost raises many intricate questions of cost-accounting. The complexity of corporate books is almost proverbial. In *Patterson v. Mobile Gas Co.*,[30] two trained accountants spent sixteen days in examining the company's books.[31] They admitted that a thorough examination would have taken them from three to five months.[32] These accountants computed that the total book cost of the company's plant and property was $1,963,242.[33] The total as shown on the company's balance sheet was $2,580,393.[34] The difference of $617,151 was due to the elimination of certain items by the accountants. Another expert accountant and engineer spent six weeks in studying this report and all the other evidence and, after complicated computations and further deductions, found that the total book cost was really only $1,365,557.[35] The court was thus confronted with a problem in cost accounting which might well perplex a specially trained accountant and engineer.

The calculation of a public utility's operating expenses involves still other problems. In *Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission*,[36] an engineer

[27] 271 U. S. 131, 46 Sup. Ct. 446 (1926).

[28] Master's Report, Record, p. 110 *et. seq.*; Record, pp. 347, 348, 351-354.

[29] In McCardle v. Indianapolis Water Co., *supra* note 1, Hagenah allowed $235,000 for working capital (Record, pp. 72, 84); Elmes allowed $361,245 (Record, pp. 94, 194). The results appear to have been reached by different methods. Hagenah determined the depreciation of the property (Record, p. 77); Elmes made no depreciation study, but computed the "rehabilitation cost" (Record, pp. 94, 98). In Ottinger v. Consolidated Gas Co., *supra* note 16, the witnesses who estimated the reproduction cost of the tunnel used different methods. Master's Opinion, *supra* note 17, at 256, Record 68, at 97.

[30] *Supra* note 27.

[31] Record, p. 481 *et seq.*

[32] Record, pp. 484, 485.

[33] Plaintiff's Exhibit "P," Record, p. 325; Exhibit "A" to Plaintiff's Exhibit "D," Record, p. 328.

[34] *Ibid.*

[35] Record, p. 586 *et seq.*; Defendant's Exhibit 13, p. 8, Record, p. 618.

[36] 262 U. S. 276, 43 Sup. Ct. 544 (1923).

testifying as to the company's expenses presented an exhaustive study of the telephone industry, dealing especially with the developments in the art and the increased cost of furnishing service. This study, which was technical and detailed in the extreme, occupied 133 pages in the printed record.[37] In *Ottinger v. Consolidated Gas Co.*,[38] the plaintiff company controlled, directly or indirectly through stock ownership, eight other large corporations, each of which was engaged in furnishing gas to consumers in the city of New York. The operation of these companies was largely centralized, in order to effect economies, and the mains of six of them, including those of the plaintiff, were so interconnected that it was practically impossible to determine what part of the gas furnished to consumers by any one company was manufactured by that company. It was also difficult to determine what portion of the total property was used by the plaintiff individually.[39] Under these circumstances, judges could hardly reach an accurate decision as to the plaintiff's individual operating expenses, unless they possessed the professional qualifications of gas engineers and experienced accountants.[40]

The technical character of the factual questions which arise in rate cases has perhaps been sufficiently indicated. Certainly it seems that enough evidence has been adduced to demonstrate that unless a judge possessed the specialized knowledge of a scientist, an engineer, and an accountant, he would hardly be qualified to pass upon the complex technical questions of fact which arose in the foregoing rate cases. Even if a judge were eminently well qualified, however, the pressure of judicial business would often prevent him from giving rate cases adequate consideration. The record in any given case is seldom read by all the members of the court,[41] and in rate cases the enormous length of the records makes it a physical impossibility for each judge to read them. In seven rate cases recently decided by the United States Supreme Court, the average length of the record

[37] Record, pp. 354–487. The witness was Mr. F. L. Rhodes.

[38] *Supra* note 16.

[39] See Master's Opinion, *supra* note 17, at 246-252, Record 68, at 74-87.

[40] The determination of a utility's earning capacity involves similar technical problems. In the McCardle case, *supra* note 1, five or six trained accountants spent about two months in estimating the revenue which the company would receive in a given year. Record, p. 111. And in the Consolidated Gas case, *supra* note 16, this problem was of course very difficult. In each of these cases the results of the accountants' labors were presented to the court and it was necessary for the court to determine their reliability and accuracy.

[41] In response to a questionnaire, judges have stated that this is so. See (1925) 9 J. AM. JUD. SOC. 50 *et seq.*

was 1502 pages.[42] Combine lack of knowledge and training with lack of time to read the evidence, and the result is fact determination by judicial guesswork.[43]

Further examination of the records in utility rate cases discloses that the slowness of the judicial process is a peculiarly serious defect in the fact-finding machinery. The average time required for the determination of seven recent rate cases, from the time the bill was filed to the decision by the Supreme Court,

[42]

	Pages of Record	Pages of Briefs
United Fuel Gas Co. v. Railroad Commission, *supra* note 4	1602	209
United Fuel Gas Co. v. Public Service Commission, 278 U. S. 322, 49 Sup. Ct. 157 (1929)	1287	341
Ottinger v. Brooklyn Union Gas Co., 272 U. S. 579, 47 Sup. Ct. 199 (1926)	2251	303
Ottinger v. Kings County Lighting Co., 272 U. S. 579, 47 Sup. Ct. 199 (1926)	944	143
Ottinger v. Consolidated Gas Co., *supra* note 16	3075	602
Patterson v. Mobile Gas Co., *supra* note 27	990	609
McCardle v. Indianapolis Water Co., *supra* note 1	369	275
Average	1502	354

We may hazard a guess that the enormous length of the records and briefs accounts for the fact that opinions in rate cases are more often than not written by the younger members of the Supreme Court of the United States.

[43] The case of United States v. Shipp, 214 U. S. 386, 29 Sup. Ct. 637 (1909), contains an interesting example of the result which may be reached by a court sitting as a fact-finding body. That case was an original proceeding upon an information in contempt. The information charged that while holding custody of a prisoner under the jurisdiction of the Supreme Court, Shipp, a sheriff, had aided and abetted a mob which lynched the prisoner. A commissioner was appointed and he proceeded to the locus in quo, took all the testimony, and reported it to the Supreme Court without comment. Briefs were filed and the case was orally argued. Having reviewed parts of the evidence, Mr. Chief Justice Fuller said: "Only one conclusion can be drawn from these facts, all of which are clearly established by the evidence—Shipp not only made the work of the mob easy, but in effect aided and abetted it." 214 U. S. at 423, 29 Sup. Ct. at 645. Four Justices concurred with the Chief Justice. Mr. Justice Moody took no part. Three Justices dissented, in an opinion by Mr. Justice Peckham, who said: "A careful consideration of the case leaves me with the conviction that there is not one particle of evidence that any conspiracy had ever been entered into or existed on the part of the sheriff, as charged against him. It is not alone that the evidence preponderates in his favor, but it seems to me there is no material evidence against him, certainly none that rises higher than the merest possible suspicion, founded upon evidence of facts which are in themselves wholly inconclusive, and just as consistent with innocence as with guilt." 214 U. S. at 426, 29 Sup. Ct. at 646. Someone seems to have been mistaken.

was approximately three years and seven months.[44] By the time the cases were decided, additions to or subtractions from the utilities' property had probably rendered academic the particular questions involved. Thus, in the *McCardle* case,[45] the court in November, 1926 found that the fair value of the company's property, as of January 1, 1924, was not less than $19,000,000. There had then been substantial evidence that in 1924, 1925, and 1926, the company would expend, for additions and betterments, between two and three million dollars, and that only half this expenditure would produce new revenue.[46] Again, in the *United Fuel Gas Case,*[47] the estimated life of the company's gas field was eighteen years.[48] It took five years to decide the case—and during that time the field was being steadily exhausted. Furthermore, a rate of return which is proper at one time may not be so a year or two later under different economic conditions.[49] Hence a rate approved by the court, as of the date when suit was instituted, may often be an improper rate at the time the decision is rendered.

Another defect as revealed by the records is the great cost of rate litigation. The Indianapolis Water Company spent over $174,000 on rate litigation in 1923 and 1924.[50] This included only two proceedings before the Public Service Commission and part of the proceedings in the Federal District Court. The expense of the subsequent proceedings in the District Court, and of the appeal, must have been large. During the five years preceding 1925, rate cases cost the Consolidated Gas Company $730,114. There was evidence that this expense would continue for at least another year or two.[51] All these expenses, of

	Bill Filed	Decided	Time
[44] United Fuel Gas Co. v. Railroad Commission	Dec. 1923	Jan. 1929	5 years
United Fuel Gas. Co. v. Public Service Commission	April 1925	Jan. 1929	3 yrs. 8 mos.
Ottinger v. Brooklyn Union Gas Co..	June 1923	Nov. 1926	3 yrs. 5 mos.
Ottinger v. Kings County Lighting Co.	June 1923	Nov. 1926	3 yrs. 5 mos.
Ottinger v. Consolidated Gas Co.....	June 1923	Nov. 1926	3 yrs. 5 mos.
Patterson v. Mobile Gas Co.	Aug. 1922	April 1926	3 yrs. 8 mos.
McCardle v. Indianapolis Water Co..	Dec. 1923	Nov. 1926	2 yrs. 11 mos.
Average			3 yrs. 7 mos.

[45] *Supra* note 1.

[46] Record, pp. 115, 116; Complainant's Exhibit 19, Record, p. 246.

[47] *Supra* note 4.

[48] *Supra* note 10.

[49] *Cf.* Newton v. Consolidated Gas Co., 258 U. S. 165, 42 Sup. Ct. 264 (1922); United Railways & Electric Co. of Baltimore v. West, *supra* note 1, at 249, 50 Sup. Ct. at 125.

[50] McCardle v. Indianapolis Water Co., *supra* note 1, Record, pp. 118, 140.

[51] Ottinger v. Consolidated Gas Co., *supra* note 16, Master's Opinion, *supra* note 17, at 267, 268, Record, 68 at 124. See Goddard, *Fair Value of Public Utilities, supra* note 2, at 778, 779.

course, must be borne by the consumers.[52]

Delay increases the expense of rate litigation. An interlocutory injunction restraining the enforcement of a rate-fixing order or statute is commonly accompanied by a provision that if the injunction is later dissolved, the complainant shall refund the excess charges to its consumers. Thus the complainant must bear the expense of keeping special accounts and of giving a bond to secure repayment.[53] At times, the court orders the "excess" charges to be impounded to abide the event of the suit,[54] and may require that the consumers be given receipts for such charges, with the understanding that if the company is unsuccessful in the litigation the receipts will be cashed.[55] Such orders are usually continued in force pending an appeal from an injunction, either interlocutory or permanent.[56] Manifestly, the longer the litigation is prolonged, the greater the expense of keeping the separate account and furnishing bond; and if the excess charges have been impounded, the money so accumulated may be lost, by the failure of the bank of deposit or otherwise. In any event, the company is deprived of the use of the money, and compelled to accept a low rate of interest thereon.[57] As for the consumers, if receipts have been given it is likely that most of them will have been lost or destroyed before the final decision is rendered.

Obviously, the situation which has been described would be alleviated by the appointment of additional judges, which would relieve the pressure of judicial business and allow courts time to become familiar with the evidence and the technical and

[52] These expenses may be included and allowed in the operating expenses of the year in which they were incurred. Alpha Portland Cement Co. v. Lehigh Nav. El. Co., P. U. R. 1924E, 737; *cf.* Re Consolidated Gas, Electric Light, & Power Co. of Baltimore, P. U. R. 1924D, 177. Or they may be pro-rated over a short period. Consolidated Gas Co. v. Newton, 267 Fed. 231 (S. D. N. Y. 1920), *aff'd*, 258 U. S. 165, 42 Sup. Ct. 264 (1922); New York & Richmond Gas Co. v. Prendergast, 10 F. (2d) 167, P. U. R. 1925E, 19 (E. D. N. Y. 1925).

[53] Prendergast v. New York Tel. Co., 262 U. S. 43, 43 Sup. Ct. 466 (1923); Pacific Gas & Electric Co. v. City of San Francisco, 211 Fed. 202 (N. D. Cal. 1913). See 38 STAT. 738 (1914), 28 U.S.C.A. § 382 (1928).

[54] As in Hunter v. Wood, 209 U. S. 205, 28 Sup. Ct. 472 (1908). *Cf.* Newton v. Consolidated Gas Co., *supra* note 49.

[55] See Hunter v. Wood, *supra* note 54, at 207, 28 Sup. Ct. at 473.

[56] Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission, *supra* note 36, Record, pp. 111, 112; Lincoln Gas Co. v. Lincoln, 223 U. S. 349, 32 Sup. Ct. 271 (1912); Ottinger v. Consolidated Gas Co., *supra* note 16, Record, p. 325 (Final decree, §§ X, XI, XII); United Fuel Gas Co. v. Railroad Commission, *supra* note 4, Record, pp. 1595, 1596, 1597; See Newton v. Consolidated Gas Co., *supra* note 49, at 177, 42 Sup. Ct. at 267; Federal Equity Rule 74, 198 Fed. xxxix (1912).

[57] See Pacific Gas & Electric Co. v. City of San Francisco, *supra* note 53, at 203, 204.

scientific principles involved. The appointment of judges conversant with public utility matters would be expedient.

Again, the labors of appellate courts would be lightened if complete and careful findings of fact were made and reported by the courts below. The procedure whereby this might be accomplished was indicated in *Chicago, Milwaukee, & St. Paul Ry. v. Tompkins*,[58] where the Supreme Court held the findings of the lower court insufficient and remanded the case with instructions that it be referred to "some competent master to report fully the facts." Mr. Justice Brewer said:

"Ought we to examine the testimony, find the facts, and from those facts, deduce the proper conclusions? . . . We think this is one of those cases in which it is especially important that there should be a full and clear finding of the facts by the trial court. The questions are difficult, the interests are vast, and therefore the aid of the trial court should be had. . . . we think we are entitled to have the benefit of the services of a competent master and an approval of his findings by the trial court." [59]

In the *Consolidated Gas* case [60] such a special master was appointed. He took the testimony and prepared an exhaustive report,[61] which contained "a valuable analysis of the relevant evidence and clear statements concerning values," and set out distinctly the "evidence . . . as to cost of production, expenses of the business, etc." [62] This report proved very helpful to the court. In the *McCardle* case,[63] on the other hand, the finding by the lower court was inadequate.[64] There was no analysis or summary of the evidence.

The courts must depend upon counsel for helpful presentation of evidence both at the trial and on appeal. The Supreme Court, however, has complained that counsel are not sufficiently helpful. In *Newton v. Consolidated Gas Co.*,[65] the Court said, through Mr. Justice McReynolds:

---

[58] 176 U. S. 167, 20 Sup. Ct. 336 (1900).

[59] *Ibid.* 179, 20 Sup. Ct. at 340. Mr. Justice Brewer added: "The writer of this opinion appreciates the difficulties which attend a trial court in a case like this. In Smyth v. Ames [*supra* note 1], he, as Circuit Judge . . . undertook the work of examining the testimony, making computations, and finding the facts. It was very laborious, and took several weeks. It was a work which really ought to have been done by a master. . . . We are all of opinion that a better practice is to refer the testimony to some competent master, to make all needed computations and find fully the facts." 176 U. S. at 179, 20 Sup. Ct. at 341.

[60] *Supra* note 16.

[61] *Supra* note 17.

[62] Per Mr. Justice McReynolds, *supra* note 16, at 578, Sup. Ct. at 199.

[63] *Supra* note 1.

[64] Record, p. 56.

[65] *Supra* note 49.

"Equity Rules 75 and 76 direct that records on appeal shall not set forth the evidence fully but in simple condensed form and require omission of non-essentials and mere formal parts of documents. Without apparent attempt to comply with these rules and with assent of appellee's counsel, appellants have filed a record of 21 volumes—twenty thousand printed pages—made up largely of stenographic reports of proceedings before the Master with hundreds of useless exhibits and many thousand pages of matter without present value. This is indefensible practice . . ." [66]

In the subsequent case of *Patterson v. Mobile Gas Co.*,[67] Mr. Justice McReynolds again protested:

"The record in this cause has been made up with such disregard of the rules that we cannot undertake to examine the evidence or to discuss seriatim the thirty-four jumbled assignments of error. It would be permissible to dismiss the appeal . . . but, considering the public interest and with purpose to prevent any serious miscarriage of justice, we have examined the pleadings, the master's report, the opinions and the decrees." [68]

The foregoing examination of the records indicates the opportunity of a partial solution. The appellate courts might insist upon better workmanship in the trial courts or the appointment of technically qualified masters to ascertain the facts. Furthermore, counsel might be compelled to improve their presentation by judicious exercise of the trial court's discretion and strict enforcement of the rules of court upon appeal.

Legal writers have also suggested that the adoption of a new theory of value would eliminate many of the difficulties which arise at present.[69] Yet even if agreement could be had upon a new and glittering theory, before the courts could finally fix a rate they would still be confronted with the necessity of determining a utility's revenues, operating expenses and other essen-

[66] *Ibid.* 173, 42 Sup. Ct. at 266.

[67] *Supra* note 27.

[68] *Ibid.* at 132, 46 Sup. Ct. at 445. The rules of the Supreme Court provide that the appellant's brief shall contain "a concise statement of the case containing all that is material to the consideration of the questions presented," which shall be followed by the argument. Revised Rules, 1928, Rule 27, 275 U. S. 614. In the Patterson case, *supra* note 27, appellant's statement of the case and summary of the evidence was unnecessarily long and detailed, and often confusing. See appellant's brief, pp. 1-167. The recent Interborough Rapid Transit rate case, 279 U. S. 159, 49 Sup. Ct. 282 (1929), was so poorly presented to the Supreme Court, on the first argument, that the Court ordered the case to be reargued, and more compact and helpful briefs to be filed. N. Y. Times, Nov. 20, 1928, at p. 1.

[69] See, *e.g.*, Mr. Justice Brandeis, dissenting in Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission, *supra* note 36, at 289, 43 Sup. Ct. at 547; Goddard, *Fair Value of Public Utilities*, *supra* note 2, at 782 *et seq.*

tial facts. Since complex questions of fact cannot, therefore, be avoided, the question arises whether the present methodology is not so inadequate as to demand fundamental reform.[70]

[70] The creation of special appellate courts for handling rate litigation is one possibility.

In recent years much new legal machinery has been evolved to handle various types of complex and technical litigation. The rate-fixing boards and commissions may be mentioned as examples as well as the Federal Radio Commission, 44 STAT. 1162 (1927), 47 U. S. C. A. § 81 *et seq.* (1928), the Court of Customs and Patent Appeals, 45 STAT. 1475 (1929), 28 U. S. C. A. § 301a *et seq.* (1929), and the Federal Board of Tax Appeals, 44 STAT. 105 (1924), 26 U. S. C. A. § 1211 *et seq.* (1928). The tendency has been towards specialized tribunals, with appeals from these bodies to courts of general jurisdiction. In the process of evolution, special appellate courts for handling rate litigation may be devised. The precise character such tribunals might take, and the question of whether their creation would be in all respects expedient and practicable, are subjects too extensive for this paper.

The findings of state commissions are sometimes treated as prima facie conclusive by the state courts. See Northern Indiana Telephone & Cable Co. v. Peoples Mutual Telephone Co., 187 Ind. 486, 491, 119 N. E. 212, 213 (1918); ILL. REV. STAT. (Smith-Hurd, 1929) c. 111 2/3, § 72. And the Supreme Court of the United States accords similar weight to the findings of the Interstate Commerce Commission. See Virginian Ry. v. United States, 272 U. S. 658, 47 Sup. Ct. 222 (1926); Western Chemical Co. v. United States, 271 U. S. 268, 46 Sup. Ct. 500, (1914); 43 STAT. 939 (1925), 15 U. S. C. A. § 21 (1928); (1926) 38 STAT. 734 (1914). *Cf.* New York & Queens Gas Co. v. McCall, 245 U. S. 345, 38 Sup. Ct. 122 (1917). But in other cases the Supreme Court reserves the right to exercise its independent judgment, unfettered by any artificial rules as to the weight of the findings below. *Cf.* City of Knoxville v. Knoxville Water Co., 212 U. S. 1, 29 Sup. Ct. 148 (1909); Denver v. Denver Union Water Co., 246 U. S. 178, 38 Sup. Ct. 278 (1918); Bluefield Waterworks & Improvement Co. v. Public Service Commission, 262 U. S. 679, 43 Sup. Ct. 675 (1923). But see Van Dyke v. Geary, 244 U. S. 39, 49, 37 Sup. Ct. 483, 487 (1917); Galveston Electric Co. v. Galveston, 258 U. S. 388, 401, 402, 42 Sup. Ct. 351, 356, 357 (1922).

The state must provide a fair opportunity for submitting the issue of confiscation "to a judicial tribunal for determination upon its own independent judgment as to both law and facts." Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287, 40 Sup. Ct. 527 (1920). Hence even though they may treat the findings below as prima facie conclusive, the courts must still decide questions of fact in rate cases.

But see Beutel, *Valuation as a Requirement in Rate Cases*, (1930) 43 HARV. L. REV. 1249.

FEDERAL PROTECTION OF COLLECTIVE BARGAINING UNDER THE RAILWAY LABOR ACT OF 1926

"LEGISLATION forbidding employers from interfering with the membership of their employees in labor unions is invalid. All courts have reached this conclusion." [1] Thus Dean Pound, writing in 1909, summed up the cases. Laws making it criminal for an employer to discharge an employee because of membership in a labor union had been declared unconstitutional by many courts.[2] The same fate had overtaken legislation forbidding the "yellow dog" contract, in which the employee agrees not to join a labor union.[3] In *Adair v. United States* [4] the Supreme Court of the United States adopted the first position, and in *Coppage v. Kansas* [5] the second, upholding in both cases the constitutional rights of an employer to hire and fire at will. Advocates of collective bargaining accused the courts of discriminating between capital and labor, arguing that the efforts of the employer to preserve the non-union shop were thus protected while the right of labor to strike for the closed shop was often limited.[6] For many years these arguments seemed to make little impression on the judiciary. The right of labor to organize was gradually accorded more cordial recognition,[7] but the right of the employer to discharge remained absolute.[8] Not until the recent case of *Texas & N. O. R. R. v. Brotherhood of Railway & Steamship Clerks* [9] did anything occur to suggest

[1] Pound, *Liberty of Contract* (1909) 18 YALE L. J. 454, 481.

[2] State v. Julow, 129 Mo. 163, 31 S. W. 781 (1895); Gillespie v. People, 188 Ill. 176, 58 N. E. 1007 (1900); Ohio v. Bateman, 7 Ohio N. P. 487 (1900); State v. Kreutzberg, 114 Wis. 530, 90 N. W. 1098 (1902); Coffeyville Vitrified Brick & Tile Co. v. Perry, 69 Kan. 297, 76 Pac. 848 (1904).

[3] People v. Marcus, 185 N. Y. 257, 77 N. E. 1073 (1906).

[4] 208 U. S. 161, 28 Sup. Ct. 277 (1908).

[5] 236 U. S. 1, 35 Sup. Ct. 240 (1914).

[6] COMMONS AND ANDREWS, PRINCIPLES OF LABOR LEGISLATION (1927) 123 and cases cited at 114.

[7] Perhaps the most sympathetic words concerning collective bargaining to be found in a majority opinion of the United States Supreme Court, prior to the principal case, are those of Chief Justice Taft: "Union was essential to give laborers an opportunity to deal on equality with their employers. They united to exert influence upon him and to leave him in a body in order by this inconvenience to induce him to make better terms with them. They were withholding their labor of economic value to make him pay what they thought it was worth. The right to combine for such a lawful purpose has in many years not been denied by any court." American Steel Foundries Co. v. Tri-City Central Trades Council, 257 U. S. 184, 209, 42 Sup. Ct. 72, 78 (1921).

[8] State v. Daniels, 118 Minn. 155, 136 N. W. 584 (1912).

[9] 50 Sup. Ct. 427 (1930). Decisions of the lower courts in the same case are reported as follows: 24 F. (2d) 426 (S. D. Tex. 1928) (contempt proceedings); 25 F. (2d) 873 (S. D. Tex. 1928) (permanent injunction);

that Dean Pound's generalization was no longer an accurate statement of the law.

This case involved the interpretation and application of a section of the Railway Labor Act of 1926, providing that representatives for the settlement of labor disputes should be chosen "without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other." [10] The brotherhood, already recognized by the railroad as the representative of its employees, applied for a wage increase, which was denied. These demands were then referred, by the brotherhood alone, to the United States Board of Mediation, charged by the Act of 1926 with the duty of attempting to induce the settlement or voluntary arbitration of labor disputes. The railroad, anticipating that resort to arbitration would result in substantial additions to its payroll, refused all offers of mediation and arbitration, withdrew its recognition of the brotherhood, and proceeded to establish a company union.[11] The brotherhood thereupon obtained an injunction ordering the railroad to abstain from interfering with its employee's representation and self-organization. Despite the injunction, the railroad officially recognized the company union and discharged several employees because of their activities in behalf of the brotherhood. In contempt proceeding these men were ordered reinstated and the company union disestablished. Counsel for the railroad, in an appeal to the Supreme Court of the United States, argued that these orders were based upon an unwarranted and unconstitutional interpretation of the statute, but the Supreme Court unanimously affirmed the decisions of the lower courts.[12]

To the contention of the appellants that the injunction and contempt orders constituted an extension of federal authority beyond the limits established in *Adair v. United States* and *Coppage v. Kansas*, Chief Justice Hughes answered shortly,

25 F. (2d) 876 (S. D. Tex. 1928) (motion to vacate contempt order); and 33 F. (2d) 13 (C. C. A. 5th, 1929) (appeal).

In its passage through the lower courts the case drew comment, upon aspects not treated in this note, from the following journals: Note (1928) 13 CORN. L. Q. 447, 451 (company unions); (1929) 29 COL. L. REV. 1020 (development of federal arbitration); (1930) 28 MICH. L. REV. 621 (injunctions). The decisions have been acclaimed as a great victory for labor in the following labor periodicals: (1927) THE TRAIN DISPATCHER 495; (1929) 18 LABOR AGE 19; (1927) 24 THE RAILWAY CLERK 351.

[10] 44 STAT. 577 (1926), 45 U. S. C. § 152 (1928).

[11] All of these facts do not clearly appear in the opinion of the Supreme Court, but are substantiated by letters and telegrams reproduced in 25 F. (2d) 874, n. 1, 24 F. (2d) 432, n. 13, and the transcript of the record (Supreme Court of the United States, October term, 1929, No. 469, p. 112).

[12] Mr. Justice McReynolds did not hear the argument and took no part in the decision of the case.

"These decisions are inapplicable." [13] Although the opinion thus briefly indicates that the *Adair* case and the principal case may be distinguished, the two seem worthy of comparison. The statutes involved were both passed as part of voluntary railroad arbitration systems; both recognized and sought to protect labor organizations as necessary instruments in arbitration.[14] But the Act of 1898 [15] was a criminal statute protecting only union men from discrimination, whereas the Act of 1926 is a civil statute affording equal protection to all forms of employer and employee organization. On paper the two statutes seem very different; in operative effect they are, as the result of the principal case indicates, essentially similar. In ordering the railroad to purge itself of contempt by reinstating men discharged for their connection with the brotherhood, the Supreme Court does today by judicial decree what it refused, in 1908, to allow Congress to do by legislation.[16]

Counsel for the railroad seem to have attacked this apparent inconsistency as another instance of the tyranny of government by injunction; [17] but support is not lacking for the contention that it is the natural culmination of recent developments in labor law. Between the *Adair* case and the principal case there is a history of slowly growing concepts which in this sharp contrast now bear their inevitable fruit.

The court in the *Adair* case concluded that the power to regulate interstate commerce did not extend to labor organizations

[13] The argument of the railroad is elaborated at p. 114 *et seq.* of the appellant's brief and answered in the principal case, 50 Sup. Ct. at 434.

[14] Justice McKenna in his dissenting opinion in the Adair case explains the relations between the provision then in question and the arbitration system established by the Erdman Act of 1898. Adair v. U. S., 208 U. S. at 180 *et seq.*, 28 Sup. Ct. at 283 *et seq.* District Judge Hutcheson performs a similar service for the Act of 1926. Brotherhood of Railway & Steamship Clerks v. Texas & N. O. R. R., 24 F. (2d) at 431.

[15] 30 Stat. 424 (1898).

[16] Counsel for the brotherhood contended that the contempt decree should be considered on a different basis from the injunction because, "courts of equity are almost unlimited in their power in contempt proceedings to enter remedial orders restoring the status quo ante." Respondent's Brief 133. But the injunction was itself very indefinite, merely repeating the words of the statute, whereas the contempt decree showed the court's interpretation of the words "interference, influence and coercion." Furthermore, Judge Hutcheson himself said that the court in ordering the discharged men reinstated, inferentially ordered that their discharge "should not again occur for the same or similar reasons." 25 F. (2d) at 877. Thus it seems that the contempt order was the real application of the statute to the facts of the case.

[17] The application of the injunction to the interests of capital here elicits a protest very similar to that often voiced by advocates of labor. That this attack was actually made is attested by Judge Hutcheson's opinion, 24 F. (2d) at 427.

of employees engaged in interstate commerce. Justice Harlan, speaking for the majority, could conceive of no "legal or logical connection . . . between an employee's membership in a labor organization and the carrying on of interstate commerce." [18] The dissenting justices, however, found such a connection in the possible effects of activities of organized labor upon the continuity of commerce and a system of arbitration intended to prevent its interruption.[19] The practical nature of that connection was emphasized by subsequent strikes and threats of strikes, which inspired new federal laws regulating commerce.[20] Its legal existence has been since foreshadowed by the gradual extension of federal regulation to other aspects of the labor problem.

In *The Employers' Liability Cases*,[21] decided at the same term as the *Adair* case, the court wrestled with the question of whether the power to regulate interstate commerce extended to relations of master and servant. A majority of six answered affirmatively, a minority of three negatively. But the line of division was indistinct and in both camps there seemed to be differences in degree. It remained for later cases and more specific issues to clarify the attitude of the court. Three years after the *Adair* decision an act of Congress governing the hours of labor of railway employees was sustained as a proper regulation of commerce because of the effect of hours of labor upon efficient service and safe transportation.[22] In the *Second Employers'*

[18] 208 U. S. at 174, 28 Sup. Ct. at 282.

[19] This connection is graphically described in Justice McKenna's dissenting opinion where he says, "A provision of law which will prevent or tend to prevent the stoppage of every wheel in every car of an entire railroad system has as direct an influence upon interstate commerce as the way in which one car may be coupled to another or the rule of liability for personal injuries to an employee." 208 U. S. at 189, 28 Sup. Ct. at 286. Justice Holmes seemed to find an even broader connection for he said, "These unions exercise a direct influence upon the employment of labor in that business, upon the terms of such employment, and upon the business itself." 208 U. S. at 190, 28 Sup. Ct. at 287.

[20] The Erdman Act of 1898 was itself preceded by a great strike, and the Newlands Act of 1913, 38 STAT. 103, U. S. C. §§ 101, 125 (1926), and the Adamson Act of 1916, 39 STAT. 721, 45 U. S. C. §§ 65, 66 (1926), were passed to prevent threatened strikes. Regarding the labor provisions of the Transportation Act of 1920, Willoughby says, "The experiences of the past few years and especially those attending the enactment of the Adamson Act made it evident that if possible some means more effective than those that had been previously employed should be provided for obtaining an equitable adjustment of the demands of railway employees without interruption to the running of the railroads." 2 WILLOUGHBY, CONSTITUTIONAL LAW OF THE UNITED STATES (2d ed. 1929) 789.

[21] 207 U. S. 463, 28 Sup. Ct. 141 (1908).

[22] Baltimore & Ohio R. R. v. Interstate Commerce Commission, 221 U. S. 612, 31 Sup. Ct. 621 (1910).

Liability Cases[23] the court unanimously upheld the power of Congress to change the common law rules of the liability of railroads to their employees. In 1917, in the famous case of *Wilson v. New*,[24] the court found even wage fixing justified when necessary to prevent the interruption of commerce. Though the court, in this case, was hopelessly divided over questions of "due process" and the legal connotations of a national emergency, the decision seems to establish that, when public policy requires it, the power to regulate commerce extends to wages—the heart of the labor contract and the primary object of collective bargaining.[25] Thus federal authority has gradually enveloped the relations of master and servant in interstate commerce.

Parallel to this development, was the extension by means of the anti-trust laws of federal regulation of commerce over the weapons of organized labor. Here again we may begin with a case decided at the same term as the *Adair* case, *Loewe v. Lawlor*,[26] in which a labor boycott was for the first time held illegal as a restraint of interstate commerce. Following the passage of the Clayton Act,[27] sympathetic strikes, secondary boycotts, unfair lists and the like, were still considered as "obstructions of commerce."[28] Thus local strikes in local industries became subject to federal prohibition when aimed at non-union shops in other states. In 1924 the destruction by strikers of mines, not in themselves part of interstate commerce, was held actionable under the anti-trust laws because there was evidence that the outbreak was partly incited by fear of the competition of non-union coal in national markets.[29] Thus in motives as well as effects, connections have been discovered between the battles of organized labor and the affairs of interstate commerce. In most of the great labor cases of the twentieth century may be found the germs of a "legal or logical connection . . . between an employee's membership in a labor organization and the carrying on of interstate commerce." In the light of this history, it is not surprising that Chief Justice Hughes should have found the *Adair* decision "in-

[23] 223 U. S. 1, 32 Sup. Ct. 169 (1911).

[24] 243 U. S. 332, 37 Sup. Ct. 298 (1917).

[25] Four justices dissented, but one of these, Justice Day, agreed that the law was within the power to regulate interstate commerce. His objection was to the lack of due deliberation, *i.e.* due process, in its enactment.

[26] 208 U. S. 274, 28 Sup. Ct. 301 (1908).

[27] 38 STAT. 730 (1914), 29 U. S. C. § 52 (1926).

[28] Lawlor v. Loewe, 235 U. S. 522, 35 Sup. Ct. 170 (1915); Duplex Printing Press Co. v. Deering, 254 U. S. 443, 41 Sup. Ct. 172 (1921); Bedford Cut Stone Co. v. Journeyman Stone Cutters Ass'n, 274 U. S. 37, 47 Sup. Ct. 522 (1927).

[29] Coronado Coal Co. v. United Mine Workers of America, 268 U. S. 295, 45 Sup. Ct. 551 (1925).

applicable." Having itself extended federal regulation to so many activities of organized labor in intrastate as well as interstate industries, the Supreme Court could hardly have again denied the power of Congress to regulate or protect the labor organizations of railway employees.

To affirm this power does not, however, answer the contention, upheld in the *Adair* case and unsuccessfully advanced in the principal case, that to prevent an employer from discharging an employee because of his connection with a union is a denial of "liberty of contract" and an infringement of the "due process" clause of the constitution.[30] Nor can a satisfactory answer be found in the statute itself or the particular facts of the case, for the Act of 1926, like the Act of 1898, provides for voluntary arbitration, to which the railroad in the principal case had refused to submit. A more plausible argument might be based upon the history of twentieth century railroad legislation and litigation wherein the rights of private property have been conspicuously subordinated to considerations of public welfare. In cases involving the regulation of rates and the redistribution of income, as well as in the labor cases already mentioned, the Court has accorded scant sympathy to the "due process" defense.[31] But though this history may lend some weight of analogy to the instant decision, it does not minimize the surprising significance of the Court's changed attitude toward two fundamental factors in collective bargaining. The right of the employer to discharge has been hitherto considered absolute; the right of the employee to organize has been recognized but denied protection. Now comes Chief Justice Hughes and says, so briefly as if to conceal the significance of his words, that the right to discharge may be limited in order that right to organize may be protected.[32] Thus the court, in giving

[30] The orthodox approach to a problem of this sort has been to apply two separate and distinct tests: (1) Is the law in question within the power of Congress to regulate interstate commerce? (2) If so, is it a proper exercise of that power, *i.e.* is it consonant with the "due process" clause of the 5th amendment, or is it an unconstitutional infringement of the rights of private property? *Cf.* United States v. Cress, 243 U. S. 316, 37 Sup. Ct. 380 (1917); Wilson v. New, *supra* note 24. However, when a law regulates matters somewhat indirectly connected with commerce, there is a tendency for the two questions to merge. The court, in showing the effects on interstate commerce, is likely to show at the same time the effects on the public welfare which may justify an infringement of private rights, and thus answer both questions at once. *Cf.* principal case, 50 Sup. Ct. at 433; Tagg Bros. & Morehead v. United States, 280 U. S. 420, 50 Sup. Ct. 220 (1929).

[31] New England Divisions Case, 261 U. S. 184, 435 Sup. Ct. 270 (1923); Dayton Goose Creek Ry. v. United States, 263 U. S. 456, 44 Sup. Ct. 169 (1924).

[32] The exact words of the opinion seem worthy of note: "It has long been recognized that employees are entitled to organize for the purpose of secur-

full force to the Act of 1926, recognizes collective bargaining, not merely as the subject of legal toleration, but also as the proper recipient of legislative protection.

It is natural that this recognition, for which labor has so long fought, should come first in the field of railroad regulation where such persuasive phrases as "liberty of contract" and "due process of law" have repeatedly yielded to exigencies of public welfare. But the law made here may well affect the law in other fields. The power to regulate interstate commerce may now, without violence to precedent, be extended to include labor relations in other industries. And what Congress can do through the commerce power, the states may sometimes accomplish through the medium of the police power.[33] Thus collective bargaining may yet find protection in state as well as federal legislation.[34]

That these implications would be unanimously accepted by the court which rendered the instant decision may well be doubted; that they will be vigorously urged by labor's advocates seems highly probable. At any rate, to Dean Pound's generalization, which endured intact for more than a score of years, there has at last been added a suggestive peradventure.

---

ing redress of grievances and to promote agreements with employers relating to rates of pay and conditions of work. . . . Congress was not required to ignore this right but could safeguard it and seek to make their appropriate collective action an instrument of peace rather than of strife. Such collective action would be a mockery if representation were made futile by interference with freedom of choice. Thus the prohibition by Congress of interference with selection of representatives for the purpose of negotiation and conference between employer and employees, instead of being an invasion of the constitutional rights of either, was based on recognition of the rights of both." 50 Sup. Ct. at 434.

[33] 3 WILLOUGHBY, *op. cit. supra* note 20, at c. XCV and cases cited therein.

[34] In recent years labor has carried on an intensive campaign to secure state legislation declaring the "yellow dog" contract illegal and void as against public policy. Cochrane, *"Yellow Dog" Abolished in Wisconsin* (1929) 19 AM. LAB. LEG. REV. 315. In Coppage v. Kansas the court argued that the decision in the Adair case was direct precedent for declaring legislation forbidding the "yellow dog" contract unconstitutional. 236 U. S. at 11, 35 Sup. Ct. at 242. Upon this authority, it may perhaps be argued that the decision in the principal case is some precedent for declaring legislation outlawing the "yellow dog" contract constitutional. But *cf.* Opinion of Justices, 171 N. E. 234 (Mass. 1930).

"DOUBLE" INHERITANCE TAXATION OF INTANGIBLES

DECISIONS of the last quarter-century portray a notable change in the judicial attitude with respect to the power to levy an inheritance tax upon intangibles [1] owned by non-resident decedents. *Blackstone v. Miller*,[2] decided in 1903, upheld New York in taxing the succession of a local bank account of a non-resident decedent even though the account was similarly taxed at the decedent's domicile. Early in the present year this decision was expressly overruled by the United States Supreme Court in *Farmers' Loan & Trust Co. v. Minnesota*.[3] This case decided that registered and bearer state and municipal bonds, issued in Minnesota, deposited in and subject to an inheritance tax in New York, the decedent's domicile, could not be taxed on the same succession by Minnesota. Several months later the scope of this decision was broadened by *Baldwin v. Missouri*.[4] Here Illinois taxed the transfer of a resident decedent's intangibles consisting of bank deposits, Liberty bonds, and promissory notes secured by mortgages on Missouri land. The Supreme Court denied to Missouri the power to tax the succession of the same intangibles a second time, even though the intangibles were physically present in Missouri and dependent for delivery on the laws of that state.

Both decisions were based upon the objection of the Supreme Court to so-called "double" taxation.[5] It should be noted at the outset, however, that "double" taxation is neither good nor

[1] The use of "tangible" and "intangible" as connoting distinctive property concepts has been criticized. Comment (1926) 35 YALE L. J. 357. While recognizing the validity of such criticism, the terms are adopted here for reasons of general convenience. The New York reciprocal inheritance statute defines intangibles as follows: "For the purposes of this section intangible personal property means incorporeal property, including money, deposits in banks, mortgages, debts, receivables, shares of stock, bonds, notes, credits, evidences of an interest in property, and evidences of debt. 59 N. Y. CONS. LAWS (McKinney, 1928) § 248p.

[2] 188 U. S. 189, 23 Sup. Ct. 277 (1903). Mr. Justice Holmes wrote the opinion. Mr. Justice White dissented without opinion.

[3] 280 U. S. 204, 50 Sup. Ct. 98 (1930). For comment on this case see Note (1930) 43 HARV. L. REV. 792; (1930) 30 COL. L. REV. 404; Note (1930) 5 WIS. L. REV. 441; Note (1930) 15 CORN. L. Q. 457; Note (1930) 7 N. Y. U. L. Q. REV. 728.

[4] 50 Sup. Ct. 436 (U. S. 1930).

[5] In the Minnesota case, 280 U. S. at 211, 50 Sup. Ct. at 100, Mr. Justice McReynolds says in part: "Primitive conditions have passed; business is now transacted on a national scale. A very large part of the country's wealth is invested in negotiable securities whose protection against discrimination, unjust and oppressive taxation, is matter of greatest moment. . . . Existing conditions no less imperatively demand protection of choses in action against multiplied taxation whether following misapplication of some legal fiction or conflicting theories concerning the sovereign's right to exact contributions."

bad in itself.[6] Wealth which has been subjected to a property tax may also form part of an estate upon which an inheritance tax is levied. And an individual accumulation of wealth may be taxed on succession by both state and Federal governments. In either of the foregoing cases, all estates, irrespective of the form which property comprising them may take, are subject to the same type of double assessment. Before any double assessment may properly be criticized as such, however, it must result in some arbitrary discrimination against a particular form of property. Arbitrary discrimination of this nature generally arises when the multiple character of a particular set of taxes results largely from adventitious causes.

Previous to the instant decisions, the purely adventitious character of multiple inheritance taxation resulting from a classification of property into "tangibles" and "intangibles," whereby under precisely the same circumstances[7] estates composed of "tangibles" were taxed but once while those composed of "intangibles" were taxed twice or more, was generally recognized, at least extra-judicially, as leading to arbitrary[8] dis-

[6] *Cf.* Cream of Wheat Co. v. Grand Forks, 253 U. S. 325, 40 Sup. Ct. 558 (1920).

[7] Previous to the Minnesota case intangibles were taxed on succession at the domicile of the decedent and frequently again at the debtor's domicile, *cf.* Blackstone v. Miller, *supra* note 2, at the physical situs of the securities, Wheeler v. Sohmer, 233 U. S. 434, 34 Sup. Ct. 607 (1914), and at the business situs of the credits, Bristol v. Washington County, 177 U. S. 133, 20 Sup. Ct. 585 (1900), whereas real property was taxed only by the state of its situs and tangible personal property at either the owner's domicile or at an acquired situs but never at both. *Cf.* Frick v. Pennsylvania, 268 U. S. 473, 45 Sup. Ct. 603 (1925) (holding an inheritance tax void insofar as it was levied on a resident decedent's tangible personal property with an actual extra-state situs). See in general Carpenter, *Jurisdiction Over Debts* (1918) 31 HARV. L. REV. 906, 918; Chambers, *State Inheritance Tax on Foreign Held Bonds or Notes Secured by a Mortgage on Land in the State* (1927) 12 CORN. L. Q. 172; Beale, *Jurisdiction to Tax* (1919) 32 HARV. L. REV. 587; Powell, *Extra-Territorial Inheritance Taxation* (1920) 20 COL. L. REV. 283; Lorenzen, *Extraterritorial Succession Taxes* (1927) 1 CONN. BAR J. 154.

[8] The language of the Supreme Court in both the Minnesota and Missouri decisions tends to support the contention that "double" taxation becomes objectionable when it presents elements of arbitrary discrimination arising from purely adventitious circumstances. The decision of the same court in Safe Deposit & Trust Co. v. Virginia, 280 U. S. 83, 53 Sup. Ct. 59 (1929), further justifies this conclusion. In that case, Virginia, domicile of the cestuis of a trust, was denied the right to assess a property tax against the trust estate composed of "intangibles" in the possession of a Maryland trustee and (apparently) subject to a property tax in Maryland. Implicit in the decision appears a recognition that the allowance of Virginia's claim would have resulted in discrimination against the cestuis purely by virtue of the accidental circumstance of the estate being administered in a jurisdiction other than that of their residence. For comment on this case see (1930) 39 YALE L. J. 589; Note (1930) 30 COL. L. REV. 539. *Cf.* Commonwealth v.

crimination.[9] Such taxation was declared inequitable,[10] uneconomic,[11] impractical and inconvenient,[12] and of doubtful financial

Pennsylvania R. R., 279 Pa. 308, 147 Atl. 242 (1929), in which the Pennsylvania Supreme Court indicated that "double" taxation becomes objectionable when "unintended" by the legislature.

Any conclusion as to the arbitrary character of a particular discriminatory double tax will be colored of course, not only by a consideration of the adventitious nature of a multiple levy but also by the particular theory of taxation adopted. A number of theories have been advanced by economists as a basis for testamentary taxation. Prominent among these are the Socialistic or diffusion-of-wealth theory which views the state as an instrument to check the aggregation of wealth in a few hands; the cost-of-service theory which is little recognized as it would justify only probate fees; the fortuitous income theory which sees this tax as supplementary to the income tax to reach the real ability of the beneficiary; the back-tax theory which views the estate as having evaded proper taxation sometime previous to the assessment of this tax. Most widely accepted by the courts is the special privilege of transfer theory. *Cf.* United States v. Perkins, 163 U. S. 625, 16 Sup. Ct. 1073 (1896). Obviously certain multiple succession taxes will appear to be reasonable discrimination under one theory and quite arbitrary under another. Similarly the "double" inheritance taxation of "intangibles" may appear reasonable under a system of economy in which wealth is represented for the most part by "tangibles" and quite arbitrary under a modern economy in which wealth is to a great extent represented by "intangibles."

[9] *Cf.* SELIGMAN, ESSAYS IN TAXATION (1928) c. IV, V; PROC. NAT. TAX. ASS'N (1925–1929) *Reciprocity in Inheritance Taxation;* Bradford, *Uncertainties and Diversities in Death Duty Legislations and Interpretations* (1924) 11 VA. L. REV. 585; Wickersham, *Double Taxation* (1925) 12 VA. L. REV. 185; Note (1930) 43 HARV. L. REV. 792. Progress in avoiding "double" taxation has also been made between nations. *Cf.* SELIGMAN, DOUBLE TAXATION AND INTERNATIONAL FISCAL COOPERATION (1928). The Canadian provinces of Ontario and Yukon have reciprocal agreements with a number of states in the United States.

[10] See Resolution of Chamber of Commerce of United States (May, 1928), (1928) PROC. NAT. TAX ASS'N 484, in which it was said: "Inheritance taxation from an interstate standpoint is in a confused and chaotic condition. In addition to excessive delays and annoyances there is multiple taxation which at times approaches confiscation."

[11] "Double" taxation tends to raise artificial economic barriers between states since investors choose securities with special regard to the taxes imposed. Recently, in a message to the General Assembly of Virginia, Governor Byrd asked for the repeal of a non-resident transfer inheritance tax of 2 per cent. on the stock of Virginia Corporations. He said: "This tax is a direct barrier to the investment of foreign capital in Virginia." (1928) PROC. NAT. TAX. ASS'N 483.

[12] "This is one of the taxes in which the heaviest burden is not the payment to the Government, but the expense of determining the amount of the payment." Simonds, *Progress in Reciprocity in State Inheritance Taxation* (1925) PROC. NAT. TAX. ASS'N 246, 251. *Cf.* Note (1928) 28 COL. L. REV. 806. Many states, in order to determine the amount of the tax, require the filing of ancillary wills and the retention of counsel. This procedure in settling the average estate is not only inconvenient and expensive but in cases of small, diversified foreign holdings may even cost more than it is worth to the estate. *Cf.* McNaughton, *Multiple Succession or Inheritance Taxes in United States* (1927) 164 L. T. 89, where it is suggested that

advantage to the state assessing it.[13] In many states the reaction against it has taken the form of reciprocal legislation[14] usually providing for the exemption of foreign owned intangibles in states which pass similar statutes or assess no inheritance tax against non-residents. In a few states the taxation of intangibles owned by non-resident decedents has been entirely abolished.[15] Yet about one fourth of the states, chiefly mid-western,[16] apparently fearing a disproportionate financial loss or simply because of legislative lethargy, have failed to pass such measures.[17]

In finding "double" inheritance taxation of intangibles unconstitutional, the majority of the Supreme Court in the *Missouri* case abandoned the traditional conception of "jurisdiction" as expressed in the dissent of Mr. Justice Stone. In this dissent it was argued that the necessity of invoking Missouri's laws to effect delivery of the securities composing the estate gave that state "jurisdiction."[18] Granting "jurisdiction" the sovereign power to tax readily follows. Although this argument may be legally acceptable, pragmatically it results in the same

smaller estates are hit harder than larger because of the proportionately larger cost of administration.

[13] According to statistics published in (1925) PROC. NAT. TAX. ASS'N 254, the income in fourteen states from non-resident estates averaged about 13.1% of the total inheritance tax revenue. According to the experience of New York only about two-thirds of this amount is derived from intangibles. Assuming an average revenue of about 9% the apparent monetary loss in relinquishing this income would not be great. The actual loss, of course, cannot readily be ascertained when factors such as incorporations and investments enter the computations.

[14] It is interesting to note the rapid spread of reciprocal legislation from four states in 1925 (Pa., N. Y., Conn., Mass.) to more than three-fourths of the states in 1930.

[15] For example, N. J. Laws 1926, c. 294; N. J. Laws 1927, c. 228; N. J. Laws 1929, c. 144; Mass. Laws 1927, c. 156.

[16] Among these are Ky., Minn., N. D., Okla., S. D., Utah.

[17] A further difficulty in solving the problem by reciprocal legislation was encountered in the lack of uniformity in the wording and interpretation of reciprocal statutes. Thus several states do not apply reciprocity to Florida, Nevada, or District of Columbia because they have no inheritance tax. For a discussion of the success of reciprocal legislation in this field see notes in (1928) 28 COL. L. REV. 806; (1930) 5 WIS. L. REV. 288.

[18] In the Minnesota case Mr. Justice Stone concurred in the result on the ground that the actual transfer of property was completed outside the state. Mr. Justice Holmes, dissenting in the same case, insists: "The right to tax exists because the party needs the help of Minnesota to acquire a right, and that state can demand a *quid pro quo* in return." 280 U. S. at 218, 50 Sup. Ct. at 102. On "jurisdictional" grounds this reasoning would seem as strong as that presented by Mr. Justice Stone in the Missouri decision but in neither case can it be said that these states granted the succession privilege. That had already been given by the state of decedent's domicile.

property being taxed several times over on the same succession.[19] In view of the present wide geographical distribution of wealth in the form of intangibles, and the ease with which the tangible indicia of such wealth may be separated both from the physical possession of their owner and from the jurisdiction in which the property value represented by them is situated, it is almost inevitable that more than one state will have sufficient "control" over the "intangibles" of an estate to warrant a claim of "jurisdiction" for taxing purposes.

Perhaps an even more formidable obstacle facing the Supreme Court in these decisions was voiced by Mr. Justice Holmes. While conceding that the taxation policy of the decisions might not be objectionable,[20] he suggested that the proper solution for "double" taxation is reciprocal state legislation and vigorously attacked the use of the Fourteenth Amendment to reach this result. He said in part:

"As the decisions now stand I see hardly any limit but the sky to the invalidating of those [state] rights if they happen to strike a majority of this court as for any reason undesirable. I cannot believe that the Amendment was intended to give us carte blanche to embody our economic or moral beliefs in its prohibitions." [21]

This argument is neither new,[22] nor lacking in validity, and the incidental loss of power by the states is perhaps subordinate to the seriousness of substituting the economic beliefs of the Supreme Court for the individual economic needs of the various states, as each state sees this need. The instant decisions, however, find considerable justification through being in accord with

[19] See Farmers' Loan & Trust Co. v. Minnesota, *supra* note 3, at 209, 50 Sup. Ct. at 99.

[20] In his dissenting opinion in Baldwin v. Missouri, *supra* note 4, at 439, Mr. Justice Holmes said: "Very probably it might be good policy to restrict taxation to a single place, and perhaps the technical conception of domicil may be the best determinate."

[21] Baldwin v. Missouri, *supra* note 4, at 439. Mr. Justice Brandeis concurred in the dissents voiced by Mr. Justice Holmes and Mr. Justice Stone.

[22] The Supreme Court has held that the Fourteenth Amendment forbids the double taxation of real estate and tangibles. *Cf.* Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 26 Sup. Ct. 36 (1905) (Mr. Justice Holmes dissenting); Frick v. Pennsylvania, *supra* note 7. The use of the Fourteenth Amendment in dealing with these problems has received the approbation of commentators. *Cf.* Dodd, *The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws* (1926) 39 HARV. L. REV. 533; Nossaman, *The Fourteenth Amendment in its Relation to State Taxation* (1930) 18 CALIF. L. REV. 345; Note (1930) 43 HARV. L. REV. 792. But *cf.* notes (1927) 36 YALE L. J. 694, and (1930) 30 COL. L. REV. 404, in which reciprocal legislation is suggested as the proper solution for "double" inheritance taxes.

the majority, and what seems the better, opinion of the states themselves.

Accepting the proposition that "double" inheritance taxation of intangibles is contrary to the Fourteenth Amendment, the question whether the term "intangibles" as used by the United States Supreme Court includes shares of stock looms as a problem of major importance. It has usually been held that shares of stock may be taxed by the decedent's domicillary as part of the intangible estate transferred [23] and again by the state which created the corporation,[24] authorized the issuance of the shares, and controls their transfer.[25] Under the *Minnesota* and *Missouri* decisions, however, corporate debentures are apparently to be classed as intangibles. Furthermore, in modern corporate financing distinctions based on the different relationship of a bondholder and a stockholder to the corporation are slowly disintegrating.[26] Bondholders are frequently accorded all the powers and privileges in management previously associated with common or preferred stock ownership.[27] And conversely the management privileges accompanying many recent so-called "stock" issues, amount to practically nothing.[28] Moreover, it is

[23] Blodgett v. Silberman, 277 U. S. 1, 48 Sup. Ct. 410 (1928) (shares of a foreign corporation assessed on devolution even though the certificates were never within the taxing jurisdiction). *Cf.* GOODRICH, CONFLICT OF LAWS (1927) 111.

[24] *Cf.* Hawley v. Madden, 231 U. S. 1, 34 Sup. Ct. 201 (1914); GOODRICH, *op. cit. supra* note 23, at 111. See also Frick v. Pennsylvania, *supra* note 7. This case limits the tax assessed by decedent's domicile on foreign issued shares, to their value after the tax paid to the state of incorporation has been deducted.

[25] It is settled that qualifying to do business in a foreign state or owning property there does not give that state jurisdiction to tax the succession of shares issued by the qualifying corporation when owned by a non-resident. Rhode Island Trust Co. v. Doughton, 270 U. S. 69, 46 Sup. Ct. 256 (1926).

[26] Such a distinction has been consistently observed in New York and other states. Matter of Bronson, 150 N. Y. 1, 44 N. E. 707 (1896). See cases collected in (1930) 64 U. S. L. REV. 158. But see Dale, *Inheritance Tax Questions Need Supreme Court Ruling*, New York Times, Feb. 9, 1930, at § 5, taking the view that stocks and bonds should be included in the same category for inheritance tax purposes. *Cf.* Attorney-General Ward of New York, *Reciprocity in Tax Laws*, New York Times, Feb. 2, 1930, at § 3, expressing the opinion that the Minnesota decision probably includes stock within its scope.

[27] "In legal theory the bondholder lends money to an enterprise in which he is not a participant. . . . At one time in the history of business such may have been the true situation of the bondholder, but it is not today. He is distinctly an investor." Isaacs, *Business Security and Legal Security* (1923) 37 HARV. L. REV. 201, 210. See to the same effect SELIGMAN, ESSAYS IN TAXATION (1928) 106. *Cf.* DEL. GEN. CORP. LAWS (1929) § 29; DEWING, FINANCIAL POLICY OF CORPORATIONS (1926) 104.

[28] To make a distinction on the functions performed would be impractical since the bondholder of today may be the manager of tomorrow.

to be noted that stock is included within the definition of intangibles set out in various reciprocal inheritance tax statutes.[29] Nor do those states which have abolished inheritance taxes on the intangibles of non-resident decedents make any provision for retaining such a levy on shares of stock.[30] It is thought that the foregoing considerations, together with the more general objections already advanced against "double" inheritance taxation, will lead the Supreme Court to include shares of stock within its category of "intangibles" subject to inheritance tax by only a single state.

The determination of the situs for this single taxation of intangibles in general and for stock in particular is a more difficult matter. The present system of assessing inheritance taxes does not provide for a proportionate distribution of the proceeds according to some scale of benefits contributed by the different possible taxing jurisdictions. Consequently if a single tax only is to be assessed, concession must be made by one or more of the interested states.

The state of the decedent's domicile has been selected as the situs for the inheritance taxation of certain intangibles by the United States Supreme Court[31] and by a number of the states which have adopted certain reciprocal legislation. This selection seems appropriate since this tax is based on the privilege of succession and, as the will is ordinarily probated in the state of the decedent's residence, this state appears logically to be the grantor of that privilege. Various considerations of expediency likewise recommend this choice of situs. A large part of the intangibles of the average estate are physically located there.[32] It appears to be the most convenient place to collect a single tax on the succession of foreign issued securities of the estate, thereby avoiding costly and inconvenient ancillary administration, the hiring of local counsel, and the obtaining of transfer waivers in as many states as have "jurisdiction."[33] And since these considerations apply to the succession of stock as well as to other intangibles, it is difficult to justify a different rule for stock which would require it to be taxed by the state of incorporation, especially if such rule is based on

[29] See New York statute, *supra* note 1.

[30] See the Massachusetts and New Jersey statutes, *supra* note 15.

[31] Farmers Loan & Trust Co. v. Minnesota, *supra* note 3, at 212, 50 Sup. Ct. at 100.

[32] The difficulty of collecting the tax at the decedent's domicile when insufficient property is present in that state does not appear as a problem of the average estate; nor is it more bothersome than the enforcement of any judgment in a foreign jurisdiction.

[33] See *supra* note 12. *Cf.* Clearwater, *Multiple Taxation* (1925) 11 VA. L. REG. (N. S.) 259, 260, where a client of the author's paid $100,000 tax to thirteen different states on the transfer of securities in an estate amounting to $354,000.

that state's claim of having authorized its issue.[34] Any "service charge" for such authorization appears satisfied by the charge for incorporation, the annual franchise tax and the stamp transfer tax. The privilege of ordinary transfer has already been granted by the corporate charter and the judicial machinery of the incorporating state is not required to effect a transfer since this can be enforced in any state having jurisdiction over the corporation. Moreover, as already indicated, the privilege of collecting an inheritance tax on domestically issued shares from foreign decedents has been willingly given up by several states[35] which have thereby attracted large numbers of incorporations.[36]

It has been suggested that the choice of situs made in the *Minnesota* case will work a sectional injustice to the so-called debtor state in that securities issued in Minnesota and owned by Eastern decedents will not be taxable in the state which gave the capital its increase.[37] But only rarely may it be said that capital is invested "within" a state when employed in financing modern large corporate enterprise. State borders are no longer industrial borders, and even where such is the case the net profit derived from subjecting non-resident decedents

[34] But see (1930) 64 U. S. L. REV. 161, where it is reported that the Minnesota and Oklahoma tax officials believe the Minnesota case does not prevent the taxation of domestic corporate shares owned by non-resident decedents. For a decision taking this view, see Guaranty Trust Co. v. Ohio, 8 Ohio Abs. 487 (1930). But see Equitable Trust Co. v. Kentucky State Tax Comm., U. S. Daily, Sept. 29, 1930, at 2325, expressly denying Kentucky the power to assess an inheritance tax on stock issued by a Kentucky corporation when owned by a non-resident decedent.

The inheritance tax problem should not be confused with the situation presented in Corry v. Baltimore, 196 U. S. 466, 25 Sup. Ct. 297 (1904), which grants to the state creating the stock the power to declare itself the taxable situs of the shares for purposes of ad valorem taxation. The effect, if any, which the Supreme Court's recent ruling on "double" inheritance taxation will have on this situation is not herein treated. *Cf. infra* note 36.

[35] For example, Delaware and New Jersey.

[36] The situation involving "business situs" of credits seems susceptible of the same solution. This question was not squarely before the court in the Missouri case although the Supreme Court of Missouri said the credits therein involved "may have established a business situs in this state in which case it would be subject to a general tax as well as an inheritance tax." Just why a "business situs" necessarily results in a situs for inheritance taxation is not clear unless resort be had to the "jurisdiction" theory. Despite the apparent fairness of assessing a business tax on foreign credits competing with local credits, it is believed those factors which favor the decedent's domicile as the sole situs for testamentary taxation in the "debtor" or "physical presence" situation are present here also. Taxation problems should not be decided on the basis of catch-phrases such as "situs," "jurisdiction," and *"mobilia sequuntur personam."* See generally Powell, *Business Situs of Credits* (1922) 28 W. VA. L. Q. 89.

[37] Note (1930) 43 HARV. L. REV. 792, 795.

to inheritance taxation appears doubtful. The average gross income is comparatively small [38] and is offset to some extent by a reciprocal tax on the state's own citizens.[39] Against this gross profit, there must also be charged the indirect loss arising from the discouragement of incorporation and the investment [40] of capital. Furthermore if the Supreme Court adopts the same rule for stock as for other intangibles by declaring stock taxable at the decedent's domicile only, the mid-western states will of necessity benefit from the fact that a comparatively large number of corporations, whose shares are nationally owned, are organized in the East. Moreover, since *Blackstone v. Miller* [41] is overruled, western owned bank accounts, kept in eastern banks in order to be near money markets, may no longer be taxed for the succession privilege by eastern states.[42]

As a final argument for a single inheritance taxation situs for all intangibles, it is suggested that since most states have graduated inheritance tax scales, by taxing the estate in one state only instead of dividing it among several the entire estate will be taxed at its full value, thereby increasing the total revenue from domestic decedents in all the states.[43] At the same time the beneficiaries in the ordinary sized estate will lose little since the cost of the actual machinery necessary to effectuate the transfer will be greatly reduced.

---

[38] See *supra* note 13.

[39] *Cf.* Bradford, *op. cit. supra* note 9, at 599.

[40] See *Supra* note 11. Delaware, a favorite state for incorporating, has a constitutional provision, not confined to inheritance, against taxing shares owned by non-residents. Art. IX, § 6.

[41] *Supra* note 2.

[42] This reasoning would not apply if bank accounts or other intangibles are declared to have a "business situs" in the eastern state and the Supreme Court rejects the domicillary rule for intangibles with a "business situs." *Cf. supra* note 36.

[43] This possibility is exemplified by the situation in Frick v. Pennsylvania, *supra* note 24, in which corporate shares could be assessed at their full value without deduction of the tax paid to the state of incorporation, and by those statutes, designed to take up the 80% allowed the state under the present Federal Estate Act, which permit the deduction of taxes paid to the foreign states. A state with this type of statute would directly benefit since it receives the tax which would otherwise be paid to the non-resident state.

THE PRESIDENT'S POWER TO EXCLUDE ARTICLES WHEN THE IMPORTER HAS PRACTICED UNFAIR COMPETITION*

THE controversies over tariff policy take a new turn in *Frischer & Co. v. Bakelite Corp.*,[1] recently before the Court of Customs Appeals. The Bakelite Corporation, a domestic manufacturer of articles made from synthetic phenolic resin, filed a complaint with the Tariff Commission asking relief under Section 316 of the Fordney-McCumber Tariff of 1922, which empowered the President to exclude articles imported under unfair conditions.[2]

* Since going to press a writ of *certiorari* in the case discussed in this comment has been denied by the United States Supreme Court on grounds which bear out the conclusions reached herein. N. Y. Times, Oct. 14, 1930.

[1] 39 F. (2d) 247 (C. C. A. 2d, 1930).

[2] "(a) That unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such industry, or to restrain or monopolize trade and commerce in the United States, are hereby declared unlawful, and when found by the President to exist shall be dealt with, in addition to any other provisions of law, as hereinafter provided.

(b) That to assist the President in making any decisions under this section the United States Tariff Commission is hereby authorized to investigate any alleged violation hereof on complaint under oath or upon its initiative.

(c) That the commission shall make such investigation under and in accordance with such rules as it may promulgate and give such notice and afford such hearing, and when deemed proper by the commission such rehearing with opportunity to offer evidence, oral or written, as it may deem sufficient for a full presentation of the facts involved in such investigation . . . [findings shall be reduced to writing, as the official record, and sent to importer or the consignee] . . . that such findings if supported by evidence shall be conclusive, except . . . rehearing may be granted by the commission . . . and except that within such time after said findings are made and in such manner as appeals may be taken from decisions of the United States Board of General Appraisers, an appeal may be taken . . . upon a question or questions of law only to the United States Court of Customs Appeals by importer or consignee of such articles . . . that the judgment of said court shall be final, except that the same shall be subject to review by the United States Supreme Court upon certiorari applied for within three months after such judgment of the United States Court of Customs Appeals.

(d) That the final findings of the commission shall be transmitted with the record to the President.

(e) That whenever the existence of any such unfair method or act shall be established to the satisfaction of the President . . . [he may levy additional offset duties within a maxima and minima] . . . or in what he shall be satisfied and find are extreme cases . . . he shall direct that such articles as he shall deem the interests of the United States shall require, imported by any person violating the provisions of this act, shall be excluded . . . and upon information of such action by the President, the

The alleged unfair methods consisted of patent infringements and trademark violations on the part of Frischer & Company, a domestic importer of synthetic phenolic resin products. The Tariff Commission found unfair competition to exist and on its recommendation the President ordered the exclusion of the competitive articles.[3] The Court of Customs Appeals upheld the pertinent provisions of the Act and the Commission's findings as to trademark violations, but denied the Commission's jurisdiction over patent infringement.[4]

In sustaining the section of the Tariff Act under review the Court of Customs Appeals held that the principles of *Hampton Jr. & Co. v. United States*,[5] controlled their decision.[6] The persuasiveness of the precedent may be doubted, although the earlier case upheld Section 315, a companion "flexible section" of the same Act. This Section authorized the President to revise existing duties only upon finding differences in cost of production between foreign and domestic industries[7] and made participation of the Tariff Commission mandatory.[8] Section 316, however, empowered the President to pass upon the propriety of importation practices,[9] "authorized but did not make expressly

---

Secretary of the Treasury shall through the proper officers . . . refuse such entry, and that the decision of the President shall be conclusive.

(f) . . . whenever the President has reason to believe that any article is offered . . . in violation of this section but has not information sufficient to satisfy him thereof, the Secretary of the Treasury shall, upon his request in writing, forbid entry thereof until such investigation as the President may deem necessary shall be completed. . . . The Secretary of the Treasury may permit entry under bond upon such conditions . . . as he may deem adequate.

(g) . . . any refusal of entry under this section shall continue in effect until the President shall find and instruct the Secretary of the Treasury that the conditions which led to the assessment of such . . . refusal of entry no longer exist." 42 STAT. 858, 943 (1922), 19 U. S. C. A. § 174 (1926).

[3] The Secretary of the Treasury issued the order on April 26, 1926. TREAS. DOC. 41512, 49 Treas. Dec. 715.

[4] The patent question prompted the dissenting opinion in the Court of Customs Appeals, as well as the delegation of legislative powers and other general objections to the section's validity. The majority of the court, however, placed their ruling squarely upon the trademark violations. Consequently the patent question, interesting as it is, has been purposely omitted.

[5] 276 U. S. 394, 48 Sup. Ct. 348 (1928).

[6] ". . . and, no different principle applies than that which was held to be applicable in the Hampton case." 39 F. (2d) at 253.

[7] Act of Sept. 21, 1922, § 315 (a), 42 STAT. 858, 942, 19 U. S. C. A. §§ 154–159.

[8] Par (c), *supra* note 7.

[9] Par. (a), *supra* note 2.

mandatory participation by the Tariff Commission,[10] entitled the President to act upon "such investigation as [he] may deem necessary," [11] and provided for court review only after action by the Commission.[12] Moreover, the President's decision was expressly made "conclusive." [13] These differences seem to compel a distinct ruling on the validity of Section 316.

If *certiorari* is granted the Supreme Court will be confronted with various considerations that militate against validity. First, one of the settled maxims of constitutional law forbids a delegation of legislative powers.[14] Second, the provision making the President's determination conclusive may be attacked as an outright attempt to secure administrative finality.[15] Third, the Section is open to the criticism of statutory uncertainty.[16] None of these objections, however, need be controlling.

The argument as to the delegation of powers is well refuted by an examination of tariff history, which will reveal that the President's authority over tariff and importation has been given a gradually widening scope. As early as 1795 Congress empowered the President to "lay and regulate" an embargo, "whenever in his opinion the public safety shall so require;" [17] in 1798, the President was entrusted with suspension of a non-intercourse act when France should refrain from depredations on United States vessels.[18] The first Act provided that the President should not exercise the authority while Congress was in session; the second conferred the power only until "the next session" of the legislature. That Congress so carefully reserved

---

[10] Par. (b), *supra* note 2.

[11] Par. (f), *supra* note 2.

[12] Par. (c), *supra* note 2.

[13] Par. (e), *supra* note 2.

[14] 1 COOLEY, CONSTITUTIONAL LIMITATIONS (8th ed. 1927) 224.

[15] Such attempts at administrative finality have normally failed. An instance of this is the Torrens land system which called, at first, for final determination of land titles by administrative officials. People v. Chase, 165 Ill. 527, 46 N. E. 454 (1896) (held invalid as conferring judicial power upon county recorder of deeds); People v. Simon, 176 Ill. 165, 52 N. E. 910 (1898). *Cf.* Knox v. Kearney, 37 Nev. 393, 142 Pac. 526 (1914) (Nevada statute giving administrative officers power finally to determine water rights declared invalid); Niblock, *Pivotal Points in the Torrens System* (1915) 24 YALE L. J. 274. For general objections to administrative finality, see Wiel, *Administrative Finality* (1925) 38 HARV. L. REV. 447; Pound, *Executive Justice* (1907) 55 AM. LAW REG. 137.

[16] For a comprehensive, general treatment, see, Freund, *The Use of Indefinite Terms in Statutes* (1921) 30 YALE L. J. 437; more specific objections to statutory indefiniteness and uncertainty are listed in Note (1925) 38 HARV. L. REV. 963.

[17] Act of June 4, 1795, c. 41, §§ 1, 2, 1 STAT. 372.

[18] Act of June 13, 1798, c. 53, § 5, 1 STAT. 566.

these functions to itself at all times when it was in a position to exercise them, seems to indicate that it then considered them essentially legislative. But such reservation was not present in the Act of Feb. 9, 1799,[19] which suspended commercial intercourse between France and the United States, and empowered the President to "remit the restraints and then revoke his own order . . . whenever, in his opinion the interests of the U. S. shall require."

In 1813, *The Brig Aurora v. United States*[20] upheld the President's power to revive the operation of a non-intercourse act by a proclamation that the contingency named in the act had occurred.[21] Four subsequent acts[22] authorized the President to repeal established duties on foreign goods when "he shall be satisfied" that "foreign discriminating duties [in] so far as they operated to the disadvantage of the United States" had been abolished. 1892 saw the Supreme Court in *Field v. Clark*[23] sustaining the "reciprocal provisions" of the McKinley tariff after the first thorough review of the constitutional questions involved. These "reciprocal provisions" empowered the President to prohibit "for such time as he shall deem just," the free entry of sugars and other goods, when foreign duties seemed "reciprocally unjust and unreasonable."[24] The holding unfortunately was placed on the ground that while legislative powers could not be delegated, the powers conferred by the "reciprocal provisions" were not legislative.[25] The Revenue Act of 1916,[26] however, provided for an unprecedented investment of authority, actually if not concededly legislative in scope.

[19] C. 2, §§ 4, 5, 1 STAT. 615.

[20] 7 Cranch 382 (1813). Johnson, J., speaking for the court in a short opinion, did not discuss the constitutional questions involved but confined his remarks on the instant point to a paragraph.

[21] Act of May 1, 1810, c. 39, § 4, 2 STAT. 605–606. The contingency named in the act was the revocation by France or England of their edicts in violation of neutral commerce.

[22] Act of March 3, 1815, c. 77, 3 STAT. 224; Act of January 7, 1824, c. 4, § 4, 4 STAT. 3; Act of May 24, 1928, c. 111, § 1, 4 STAT. 308; Act of May 31, 1830, c. 219, § 2, 4 STAT. 425.

[23] 143 U. S. 649, 12 Sup. Ct. 495 (1892).

[24] Act of October 1, 1890, c. 1224, § 3, 26 STAT. 567, 612.

[25] The holding was unfortunate in the sense that a ruling that no legislative power may be delegated was not necessary to the case. Nevertheless, this case is often cited "as to what constitutes and what does not constitute a delegation of legislative powers." Hampton Jr. v. United States, 14 Cust. App. Rep. 350, 357 (1927). It has been questioned, however, whether a "legislative" could be distinguished clearly from a "non-legislative" power. Fairlie, *Administrative Legislation* (1920) 18 MICH. L. REV. 180. It is regrettable, therefore, that one of the influences of a "leading case" should be due to the judicial technique of creating a barrier which the court immediately proceeded to circumvent by more or less dialectical methods.

[26] §§ 805–806, 39 STAT. 799.

The President was empowered to prohibit the importation of foreign articles when the same or other domestic articles were refused entry into foreign countries, and to "change, modify, revoke or renew such proclamation in his discretion."

Whether or not this increasing authorization of executive action be considered a delegation of legislative duties, its validity has been consistently upheld in the interest of administrative efficiency.[27]

Nor does the Constitution of the United States expressly forbid a delegation of legislative powers.[28] It is merely a maxim of constitutional interpretation, and one which has been considerably weakened by permitted delegations when the powers are not "purely" or "strictly" legislative.[29] Clearly legislative powers have often been delegated and the delegation sustained on the ground that the powers were only "provisionally" effective [30] or that a "primary standard" had been established by the legislature.[31] Whatever rationalization it may resort to,

[27] The subject has been exhaustively treated in its legal phases. Cheadle, *The Delegation of Legislative Functions* (1918) 27 YALE L. J. 892; Green, *The Separation of Governmental Powers* (1920) 29 YALE L. J. 369; Pillsbury, *Administrative Tribunals* (1923) 36 HARV. L. REV. 405, 583; Note (1925) 25 COL. L. REV. 220; Note (1925) 25 COL. L. REV. 359.

[28] The implied prohibition is supposedly contained in Art. I, § 1, vesting "all legislative powers herein granted" in Congress. That there is no express prohibition, see Foster, *Delegation of Legislative Power to Administrative Officers* (1913) 7 ILL. L. REV. 397.

[29] Interstate Commerce Commission v. Goodrich Transit Co., 224 U. S. 194, 32 Sup. Ct. 436 (1911) (employing the term "purely" legislative); Dowling v. Lancashire Ins. Co., 92 Wis. 63, 65 N. W. 738 (1896) ("strictly" and "essentially" legislative); State v. Normand, 76 N. H. 541, 85 Atl. 899 ("strictly" legislative). These refinements of phrasing may have been induced by one or both of two considerations. The courts may have realized the necessity of permitting delegation of powers if the administration of law is not to be paralyzed, while assuming the necessity of maintaining a prohibition against general delegations. Or the courts may have reasoned that since Congress was vested with only legislative powers, any delegation must be of legislative authority. But some delegations of powers had always been permitted, therefore there must be degrees and varieties within the delegations themselves. *Cf.* McGuire, *Federal Administrative Law* (1926) 13 VA. L. REV. 461.

[30] In upholding the Federal Trade Commission Act the Courts pointed out that, in view of the necessity of court enforcement, judicial review was provided and the delegation of powers was not invalid. Sears Roebuck & Co. v. Federal Trade Commission, 258 Fed. 307 (C. C. A. 7th, 1919); National Harness Mfgrs. Ass'n v. Federal Trade Commission, 268 Fed. 705 (C. C. A. 6th, 1920). It is implicit in these decisions that the delegation of legislative powers is not void from the beginning, but may be valid under certain conditions.

[31] Idaho Power & Light Co. v. Blomquist, 26 Idaho 222, 141 Pac. 1083 (1914). While the requirement of "a primary standard" probably arose from the strict construction of criminal statutes, its application is not limited to criminal proceedings. Note (1925) 38 HARV. L. REV. 963.

the Supreme Court, in the light of history, can scarcely invalidate Section 316 of the 1922 Act as an unwarranted delegation.[32]

The second objection, that of administrative finality, is directed against the provision which makes the President's decision "conclusive." It has been argued that, even should the Court of Customs Appeals and the Supreme Court assume jurisdiction, the President under the provision could disregard their decisions.[33] Yet the indefinite phrasing of the Section does not compell this interpretation. Appeal is provided from the Tariff Commission, "whose findings, if supported by evidence shall be conclusive," to the court of Customs Appeals whose decision is also to be "final, except that the same shall be subject to review by the Supreme Court upon certiorari . . ." [34] The language is unfortunate but the probable intention of the legislature may be discerned. The courts are empowered to take appeals only on questions of law.[35] The Tariff Commission being a fact-finding body can determine only facts.[36] As the President may be assisted by the Tariff Commission, their respective functions would appear to be identical and the President's determination likewise limited to fact finding. Should issues of both law and fact be presented, however, the problem raised by the failure of the Act to distinguish between the two assumes a dual aspect. If the President utilizes the Tariff Com-

[32] Moreover, the prohibition against delegating legislative powers is probably effective only as a caution, Powell, *Constitutional Issues in 1921–1922* (1923) 21 MICH. L. REV. 542, 565, or to prevent the "whole power" of one department from being transferred to another. Pound, *The Judicial Power* (1922) 35 HARV. L. REV. 787, 789.

[33] "Either appeal to the courts is useless or it should in some way control the decision of the executive." Parkinson, *The New Tariff and the Delegation of Legislative Power* (1923) 9 A. B. A. J. 177, 178. "Our decision has not the force and effect of law; a conclusion expressed in terms of affirmation or reversal, using the nomenclature customary in court procedure, means nothing, so far as binding individuals in any legal sense is concerned, and, apparently, if the Supreme Court shall take the jurisdiction provided for it by the Statute in this or some similar case, and pronounce a judgment upon the merits as this court is doing, it will have no greater binding effect as a judgment at law than our own. By its own force such judgment can exercise no control over the actions of the executive under the section." Garrett, J., dissenting in Frischer & Co. v. Bakelite Corp., *supra* note 1.

[34] Par. (c), *supra* note 7.

[35] Par. (c), supra note 2. While the Section authorizes the courts to litigate only questions of law, and makes their decision final, it is within the power of the Court of Customs Appeals, as a "legislative" court, to give an advisory opinion. Katz, *Federal Legislative Courts* (1930) 43 HARV. L. REV. 894.

[36] United States ex rel. Norweigian Nitrogen Prod. Co., v. U. S. Tariff Commission, 55 App. D. C. 366, 6 F. (2d) 491 (1925), 34 OP. ATT'Y GEN. 77 (1924). The instant Section, moreover, provides for only fact finding. Par. (c) *supra* note 2.

mission for investigation and the Commissions' recommendations are appealed, may the President disregard the court ruling and make an independent decision? Or, if the President does not utilize the Tariff Commission "for such investigation as he may deem necessary" may his decision be contested in court even though it is expressly made "conclusive"?

A contestant could certainly seek court review on grounds of constitutionality or jurisdiction,[37] and the President would be bound by adjudication of either point.[38] The word "conclusive" was obviously not intended to vest in the President final determination of the validity of his powers, of the propriety of their exercise, nor of the limits of his jurisdiction. The President's decision on factual issues, however, would probably not be disturbed.[39] Although the question of "unfair competition" is susceptible of judicial determination, a complainant can demand court review only to protect a recognized right.[40] And analogy to the cases dealing with deportation of aliens and with use of the mails [41] suggests that the importation of articles may likewise be considered a privilege rather than a "vested right," particularly in view of the plenary power of Congress over tariff and importation.[42] Thus, the question of unfair competition in this field might well be committed to the final

[37] *Cf.* Levitt, *The Judicial Review of Executive Acts* (1925) 23 MICH. L. REV. 588; Albertsworth, *Judicial Review of Administrative Action by the Supreme Court* (1921) 35 HARV. L. REV. 127.

[38] Because the final determination of constitutional questions is vested in the Supreme Court. This doctrine originated in Marbury v. Madison, 1 Cranch 137. (U. S. 1803), and is now well settled. 1 WILLOUGHBY, CONSTITUTIONAL LAW OF THE UNITED STATES (2d ed. 1929) 7.

[39] "It is competent for the legislative to make the determination of an administrative officer conclusive with regard to questions of fact." BURDICK, THE LAW OF THE CONSTITUTION (1922) 415. The question of procedure, namely, that it is a question of law as to whether there is evidence for the finding of fact or not, is discussed *infra.*

[40] It has been held that appeals from the Court of Custom Appeals relate to matters which are susceptible of judicial determination but which may be committed to the final decision of executive officers. In re Bakelite Corp., 279 U. S. 438, 49 Sup. Ct. 411 (1929). If the person is not entitled to court review, as of right, on the subject matter, the review may still be predicted upon right to "due process," discussed *infra.*

[41] Ekiu v. U. S., 142 U. S. 651, 12 Sup. Ct. 336 (1892) (deportation of aliens); United States v. Ju Toy, 198 U. S. 253, 25 Sup. Ct. 644 (1905) (admission and exclusion of aliens); Public Clearing House v. Coyne, 194 U. S. 497, 24 Sup. Ct. 789 (1904) (excluding letters from the mail).

[42] One does not have a "vested right" to import since the Constitution vested plenary powers over importation in Congress. Buttfield v. Stranahan, 192 U. S. 470, 24 Sup. Ct. 349 (1903); Rogers, *The Exclusiveness of the Power of Congress over Interstate and Foreign Commerce* (1905) 53 U. OF PA. L. REV. 529. The "privilege" is, consequently, not so zealously safeguarded as in the case of recognized rights. *Cf.* Powell, *Separation of Powers* (1912) 27 POL. SCI. Q. 215.

determination of executive officers, and the procedural aspects of the problem would then assume greater importance.

An opportunity to offer evidence before some sort of tribunal is generally considered an essential of administrative "due process."[43] Yet the section under consideration does not ensure such a hearing should the President make a decision without employing the Tariff Commission. It is true that when summary action is required by the nature of the subject matter, the elimination of administrative hearings has been sustained.[44] In such cases, however, the parties usually have recourse to a court review by proceeding against the administrative officials.[45] While it is doubtful whether the President could be made a party to such an action,[46] a complainant would not be remediless under Section 316. A suit would probably be entertained against the Secretary of the Treasury, as the President's enforcing agent under the Section,[47] or against the customs officials who directly prohibited entry.[48]

The anomalous character of Section 316 was patent to Congress when the Smoot-Hawley Tariff of 1930 was drafted,[49] but the provisions against unfair practices in importation remain substantially the same in the later Act.[50] Consequently,

[43] United States ex rel. Norweigian Nitrogen Prod. Co. v. Tariff Commission, *supra* note 36. Albertsworth, *op. cit. supra* note 37.

[44] Den. ex. Dem Murray v. Hoboken Land & Improvement Co., 18 How. 272 (U. S. 1856); Lawton v. Steele, 152 U. S. 133, 14 Sup. Ct. 499 (1894); Hutchinson v. Valclosta, 227 U. S. 303, 33 Sup. Ct. 290 (1913). But see, Taylor, *Due Process—Persistent and Harmful Effects of Murray v. Hoboken Land Co.* (1915) 24 YALE L. J. 353.

[45] Albertsworth, *op. cit. supra* note 37.

[46] It has commonly been supposed that the President is responsible to the courts only for impeachment charges since there is no process by which to enforce a court order against the chief executive. *Cf.* Mississippi v. Johnson, 4 Wall 475 (U. S. 1866). But *cf.* Hampton Jr. & Co. v. United States, *supra* note 5, especially at 367; "It is next contended by the appellant that the President cannot be haled into court and sued by a citizen; that his acts under Section 315 are not reviewable by the courts . . . that the President may under this section practically rewrite a tariff law, in form and substance without accountability to anyone. If this be so it goes without saying that the section cannot be sustained. But we cannot agree with either the premise or the conclusion."

[47] *Cf.* Marbury v. Madison, *supra* note 38.

[48] *Cf.* Buttefield v. Bidwell, Collector of the Port of New York, 192 U. S. 498, 24 Sup. Ct. 356 (1903).

[49] 71 CONG. REC. pt. 4, 3698, 4229, 4638 (1929); REP. OF THE TARIFF COMM. TO THE HOUSE WAYS AND MEANS COM., U. S. Daily, April 22, 1929, at 421.

[50] Pub. Doc. No. 361, 71st Congress (H. R. 2667) §§ 337 "Unfair practices in Importation." The most important changes, perhaps, are in providing for exclusion only of competitive articles and appeal only to the Court of Customs Appeals. The President can no longer levy additional offset duties. The exclusion is to be of "articles concerned in such unfair methods or acts, imported by any person violating the provisions of this act. . ."

the same legal considerations militate against the validity of the more recent tariff section. Yet it is the nature of the problem itself which renders difficult the drafting of suitable legislation. The only adequate remedy for injury suffered by unfair methods in importation lies in the immediate exclusion of the competitive article.[51] Should the article be admitted and the injured party forced to proceed against numerous independent dealers, the damage—assuming it to exist at all—would be irreparable. The small recovery in individual cases, coupled with the expense and delay of prolonged litigation, reveals the inadequacy of ordinary remedies. Nor would prohibition of the article prove effective unless enough administrative flexibility exists to ensure prompt exclusion before sufficient importation should occur to nullify subsequent relief. The difficulty of providing administrative machinery that is adequate but not so arbitrary as to be open to abuse has been encountered before.[52] And difficulty of interpretation need not dictate a ruling that a badly needed law is invalid. Yet one is compelled to agree with Mr. Justice Van Devanter that the instant section "is long and not happily drafted." [53]

THE CONSTITUTIONALITY OF A STATUTE SETTING UP A BASIC MINIMUM OF QUALITY FOR LUBRICATING OILS

A RECENT case [1] decided by a federal three judge court in the District for Connecticut holds unconstitutional a statute [2] attempting to establish a basic minimum of quality for lubricating oils. The statute specified that "oils must be equal to or better in quality and specifications than that known as United States Government Specifications for Motor (Class D) Lubricants," and set up as the tests by which this quality was to be determined those contained in Technical Paper No. 323B issued by the United States Bureau of Mines. The court held specifically

§ 337 (e), *supra*, and not "such articles as he shall deem the interests of the U. S. shall require, imported by any person violating the provisions of this act. . . ." § 316 (e), *supra* note 2. Otherwise the provisions are similar to the unfair competition provisions of the Fordney-McCumber Tariff of 1922.

[51] *Cf.* REP. OF THE TARIFF COMM., *supra* note 49.

[52] The problem in connection with public utilities has recently been presented in an article dealing with the New York Public Utility Survey. Bauer, *New York Public Utility Regulation* (1930) 20 AM. ECON. REV. 381. The problem, however, is common to all fields of administrative law. *Cf.* DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW (1929).

[53] In re Bakelite Corp., *supra* note 40.

[1] Atlantic Refining Co. v. Trumbull, U. S. Daily, Sept. 8, 1930, at 6 (D. C. Conn. 1930). The plaintiffs sought an injunction to restrain the state from enforcing the provisions of the statute.

[2] Substitute for House Bill No. 651, c. 296, approved July 2, 1929.

that the statute was invalid because the test which it proposed was of no value and was so vague as to be impossible of practical application. Judge Thomas, however, in delivering the opinion, went on to say that ". . . the statute cannot be upheld if it prevents buyers and sellers from dealing in oils just mentioned [those not meeting the requirements of Technical Paper No. 323B] in cases where the buyer is getting exactly what he wants and there is no deception.[3] . . . Sections of the act proscribe useful oils which have a wide market and satisfy the public . . . and also any substitutes which are allowed are determined by an utterly vague test.[4] . . . The oils in question are useful and harmless[5] substances and as long as sales are made honestly there can be no reason to prevent purchasers from obtaining what they wish, even though the article may be cheaper or inferior to that specified in 323B."

The decision itself was almost inevitable. The plaintiffs, a group of the largest oil companies in the country,[6] adduced a vast amount of evidence to prove that the tests contained in Technical Paper No. 323B were intended primarily for identification purposes and were of little or no value as an estimate of the quality of the oils in question.[7] It was argued further that the tests prescribed were chemical tests and as such rela-

[3] This position may in part be explained by a survival of the doctrine of *caveat emptor*, which still persists in the background of judicial thinking. In view, however, of the extreme complexity of modern marketing systems, and the number of commodities on which the consumer relies, he has no opportunity to judge quality for himself before purchasing, and quality must of necessity be determined before the product is brought to market.

[4] Compare the case of Hygrade Provision Co. v. Sherman, 266 U. S. 497, 45 Sup. Ct. 141 (1925), where a New York statute required all kosher meat to be plainly labelled and made fraudulent sales of such meat a misdemeanor. It was objected that the test of kosher meat was derived from ancient rabbinical tradition and was so vague as to be impossible of accurate application. The court, however, held the statute valid, saying that all it required was an honest attempt to meet its standards.

[5] It may be pointed out that the words "useful" and "harmless" are as equivocal as the words "better" and "equal" contained in the statute. See *infra* note 11.

[6] The Atlantic Refining Company, The Beacon Oil Company, Inc., The Sinclair Refining Co., The Standard Oil Company of New York, The Sun Oil Company, The Tide Water Oil Sales Corporation, The Texas Company, The Mexican Petroleum Corporation, and The Vacuum Oil Company.

The reasons for their opposition to the statute were (1) that it would destroy the good-will which they had built up by extensive and costly advertising for their various trade-name brands, since the government guarantee would mean to the public that any oil bearing it was in effect as good as any other; (2) that it would exclude entirely from sale in Connecticut several of their most popular oils; and (3) that it would require the manufacture of new oils purely for Connecticut trade. Trial Record, pp. 71, 90, 109, 116–117.

[7] Trial Record, pp. 26–30, 89, 91–92, 96.

tively academic,[8] since all the large oil companies, and all the government departments except the Post Office,[9] select their oils on the basis of purely pragmatic tests made in engines on dynamometer blocks or in actual service.[10] Expert testimony was advanced to show that oils varied so much in their performance in different machines and under different conditions of service in the same machine that the statutory requirement of an oil "equal to or better than" a specified oil was meaningless.[11] The state called no witnesses to refute these contentions.[12] Nor did it introduce any evidence either in its briefs or at the trial to show that abuses existed which required

[8] Trial Record, pp. 47–49. The statement that chemical tests are purely academic is hardly convincing. There must be some qualities lacking in "poor" oil which are present in "good" oil, and which can be discovered, isolated, and identified by chemical tests.

[9] Trial Record, pp. 56–57. Because of its extensive operation of all types of motor vehicles, however, the needs of this department are most analogous to those of the ordinary consumer. It may be noted, further, that the oils used by the Navy Department, do satisfy the requirements of Technical Paper No. 323B. Trial Record, p. 65.

[10] Trial Record, pp. 47–49, 58–59.

[11] Trial Record, pp. 94, 98, 101, 115. It is, however, interesting to note that the plaintiff's witnesses, when asked by counsel for the state whether under a given set of normal conditions an oil satisfying the specifications contained in 323B would be better or worse than one which did not, invariably avoided the question by reiterating "better under some conditions and worse under others." Trial Record, pp. 123–137.

[12] This case presents the converse of the usual situation in litigation involving the constitutionality of statutes. The factual and economic brief first attempted in Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. 273 (1887), and made famous by Mr. Louis D. Brandeis in Muller v. Oregon, 208 U. S. 412, 28 Sup. Ct. 324 (1908), has practically always been used to support the validity of the legislation questioned. In spite of the fact that the courts continually reiterate that the presumption is in favor of constitutionality, it is apparent that in general the burden of proof is on those who are endeavoring to establish it. Where the statute has been held invalid the courts have usually based their decisions largely on legal theories, such as that involving affectation with the public interest. Courts upholding constitutionality, on the other hand, have in general laid emphasis on the existing factual situation and supported their decisions by varied social and economic as well as legal considerations. In the instant case the plaintiff oil companies have appreciated the value and effectiveness of this factual method of approach and have appropriated it for the purpose of defeating the statute in the face of weak legalistic arguments by the state. For interesting examples of this contrast in judicial technique, see Adams v. Tanner, 244 U. S. 590, 37 Sup. Ct. 662 (1917) (employment agency); Block v. Hirsch, 256 U. S. 135, 41 Sup. Ct. 458 (1921) (emergency rent laws); Truax v. Corrigan, 257 U. S. 312, 42 Sup. Ct. 124 (1921) (labor injunction); Adkins v. Children's Hospital, 261 U. S. 525, 43 Sup. Ct. 394 (1923) (minimum wage law); Jay Burns Baking Co. v. Bryan, 264 U. S. 504, 44 Sup. Ct. 412 (1924) (weight of bread); Lambert v. Yellowly, 272 U. S. 581, 47 Sup. Ct. 210 (1926) (liquor prescriptions).

correction by such a statute.[13] Nor did it reply or object to plaintiff's statement at the trial that the district attorney had doubted the constitutionality of the statute while it was still pending in the legislature.[14] The whole litigation was marked by a total lack of any real effort to support the constitutionality of the bill, both in the state's briefs and in its conduct of the trial.

That the decision was practically forced by the one-sided character of the evidence was unfortunate.[15] But the real danger, implicit in the dictum of Judge Thomas, lies in the possibility that a decision so prompted be used to defeat future attempts to establish basic minima of quality. The objection of Judge Thomas to constitutionality, on the ground of the exclusion of inferior but harmless products, has been squarely met by the United States Supreme Court in two cases not cited to the instant court or mentioned in its opinion. An Oklahoma statute prohibiting the sale of any illuminating oil with a specific gravity of over 46 degrees Baume was upheld, although it excluded certain provedly safe and useful oils with a higher Baume rating.[16] Iowa and Pennsylvania statutes prohibiting the sale as ice cream of any product which did not contain a specified percentage of butter fat were also upheld, although they excluded certain products which were both harmless and nutritious.[17] The rationale of these cases contains the two main justifications for the establishment of basic minima of quality, the first stressing protection of the public from dangerous or inefficient substances, and the second laying the emphasis not so much on the fear of harmful ingredients as on the fact that the public might rely on qualities in the product which were lacking in fact.

Nor can it be said that the establishment of such basic minima is in itself an unwarranted exercise of power by the legislature.[18]

---

[13] Trial Record, pp. 151–152. When the bill first came before the legislature in 1927 it was defeated by considerations similar to those adduced at the instant trial. In 1929 it reappeared, backed by the Motor Vehicle Department, and some evidence was introduced to show that "gyp" oils were being sold. It is interesting to note that the most influential supporter of the proposed legislation was himself one of the largest independent oil dealers in the East.

[14] Trial Record, p. 152.

[15] It has happened before that courts have committed themselves and important doctrines have become part of the law in cases where the presentation of the case for one side has been so inadequate that the court's decision really has not constituted a fair consideration of the problem involved. *E.g.*, Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 38 Sup. Ct. 65 (1917); Ribnik v. McBride, 277 U. S. 350, 48 Sup. Ct. 545 (1928).

[16] Waters-Pierce Oil Co. v. Deselms, 212 U. S. 159, 29 Sup. Ct. 270 (1909).

[17] Hutchinson Ice Cream Co. v. Iowa, 242 U. S. 153, 37 Sup. Ct. 28 (1916).

[18] See the strong dictum in the instant case: "But aside from this, the

The regulation of the quality of food has become a matter of course,[19] as has the setting of standards to which physicians and others must conform.[20] The states have been supported in requiring guarantees of bank deposits [21] and in ensuring safe working conditions.[22] Even the protection of the state from inferior citizens by compulsory sterilization of defectives has been held constitutional.[23] In the field of illuminating oils regulation has been permitted in that statutes [24] providing for careful inspection have been uniformly upheld.[25] It is true that the primary purpose of this sort of regulation has been to ensure safety to the public, rather than quality of performance, but it often accomplishes both ends. A North Carolina statute, for example, provides that "illuminating oils sold or offered for sale in this state shall be subject to inspection and test to determine their safety and value for illuminating purposes. . . . If such analysis or test shows that the oil is either unsafe or of inferior illuminating quality, its sale shall be forbidden." [26]

In many fields in which the legislatures have been unwilling to make regulations ensuring quality for the consumer, the courts have done it for them by means of the doctrine of "implied warranty." The instant legislation is hardly more than a crystallization of this respected doctrine in an attempt to set up definite tests and standards by which a breach of the "implied warranty" shall be determined. Thus the justification of the exclusion of certain lubricating oils which have limited and

---

only warrant for the suppression of a legitimate business in a useful commodity lies in the lawful exercise of the police power."

[19] Powell v. Pennsylvania, 127 U. S. 678, 8 Sup. Ct. 992 (1888) (oleomargerine); Price v. Illinois, 238 U. S. 446, 35 Sup. Ct. 892 (1915) (boric acid); United States v. Forty Barrels and Twenty Kegs of Coca-Cola, 241 U. S. 265, 36 Sup. Ct. 573 (1916); Jay Burns Baking Co. v. Bryan, *supra* note 12 (bread); Hygrade Provision Co. v. Sherman, *supra* note 4.

[20] Hawker v. New York, 170 U. S. 189, 18 Sup. Ct. 573 (1898) (physician); Crane v. Johnson, 242 U. S. 339, 37 Sup. Ct. 176 (1917) (faith healer); Graves v. Minnesota, 272 U. S. 425, 47 Sup. Ct. 122 (1926) (dentist); Roschen v. Ward, 279 U. S. 337, 49 Sup. Ct. 336 (1929) (optometrist).

[21] Noble State Bank v. Haskell, 219 U. S. 104, 31 Sup. Ct. 186 (1911).

[22] Bowersock v. Smith, 243 U. S. 29, 37 Sup. Ct. 371 (1917).

[23] Buck v. Bell, 274 U. S. 200, 47 Sup. Ct. 584 (1927).

[24] ALA. CODE (1907) § 7491; N. C. CODE ANN. (1927) §§ 4851, 4860; MD. ANN. CODE (Bagby, 1924) art. 48, §§ 1–5; OKLA. COMP. STAT. ANN. (1921) c. 68, art. VI, § 7981. 'The department shall . . . cause to be inspected any gasoline, benzine, or naphtha for the purpose of determining whether the same is up to the specifications adopted by the United States Department of the Interior." IOWA CODE (1927) c. 159, § 3193.

[25] Waters-Pierce Oil Co. v. Deselms, *supra* note 16; Red C. Oil Mfg. Co. v. Board of Agriculture, 172 Fed. 695 (C. C. E. D. N. C. 1909); Gulf Refining Co. of Louisiana v. Jinright, 10 F. (2d) 306 (C. C. A. 5th, 1925).

[26] N. C. CODE, (1927) art. 14, §§ 4851, 4860.

technical uses lies in securing a high general quality of lubricants. Furthermore the purposes met by the excluded oils would be adequately served by the permitted lubricants, though perhaps at a higher cost to a limited number of consumers.

But the legislature unfortunately defeated its own ends by attempting itself to define a precise standard as based on specific tests. Had those selected been more susceptible to flexible interpretation the statute would have been far less open to attack. It was because of their impracticability that the court was led to declare the act invalid. And although the specific holding may be justified from the administrative standpoint, nevertheless, in view of the essential function of lubricants in our modern transportation system, regulation of this sort is clearly a valid and desirable exercise of the state's "police power."

RESPONSIBILITY OF INSURER FOR DELAY IN ACTING ON APPLICATION

HALF a century ago the Supreme Court of the United States voiced the judicial opinion of the time when it declared:

"It was competent for the [insurance] company to pause as long as they might deem proper and finally to accept or reject the application as they might choose to do." [1]

Since then, however, the insecure fortune of an individual pitted against the security of an actuary table has caused courts to construct new and distort old legal concepts in an endeavor to protect that individual. In the recent case of *Behnke v. Standard Accident Ins. Co.*, a Federal Circuit Court of Appeals did not hesitate to state:

"It is . . . well settled that an insurance company may be liable for its delay in passing upon an application for insurance." [2]

---

[1] Giddings v. Insurance Co., 102 U. S. 108, 111 (1880). *Cf.* Misselhorn v. Mutual Reserve Fund Life Ass'n, 30 Fed. 545 (C. C. E. D. Mo. 1887); Steinle v. New York Life Ins. Co., 81 Fed. 489 (C. C. A. 5th, 1897); Alabama Gold Life Ins. Co. v. Mayes, 61 Ala. 163 (1878); Ross v. New York Life Ins. Co., 124 N. C. 395, 32 S. E. 733 (1899). See also *infra* notes 3, 4, and 11.

[2] 41 F. (2d) 696, 699 (C. C. A. 7th, 1930). In this case the petitioner sought to recover compensation insurance, either in contract under the policy or in tort for negligent delay. The insurance application had been in the hands of an insurance broker and a bank cashier for a month before it was forwarded to the defendant company which four days later rejected it with the statement that "we know absolutely no company who will take on this risk." Before the cashier had notified petitioner of the rejection an employee was killed. The court, while recognizing the tort liability of

Yet in two recent state decisions, *Savage v. Prudential Life Insurance Co.*[3] and *Metropolitan Life Insurance Co. v. Brady*,[4] the older and simpler rule appeared to the court an insurmountable obstacle to recovery from the insurer. Thus the *Brady* case declares in terms reminiscent of the Supreme Court case:

"This court as presently constituted cannot perceive how a tort liability can be predicated upon an insurance company until and unless some legal duty devolved upon the insurance company to either accept or reject an application for insurance within a reasonable time. This legal duty must arise by virtue of some express provision of the statute or from the contractual relation existing between the parties whereby a legal duty, not a moral duty, devolves upon the insurance company to act within a reasonable time upon an application submitted." [5]

This diversity of result seems to have been caused by the successive application to similar facts of varying legal theories. An analytical survey, reducing each of these theories to its basic concept, may indicate the character of the insurer's duty as enunciated in the *Behnke* case and explain why the Indiana court felt itself constrained to follow the minority view recently revived by the Mississippi court. It is, therefore, proposed to consider, in historical order, the contract and tort concepts of recovery, and to make an attempt to define and evaluate the duties [6] that may arise thereunder.

The contract of insurance concept. It is axiomatic in the law of contracts that an offer creates no duty of acceptance in the offeree.[7] Under this concept, therefore, courts have found it necessary to complete a contract of insurance on which to base

an insurer for negligent delay, held that the defendant company was not so liable inasmuch as the two intermediaries were not its agents.

[3] 154 Miss. 89, 121 So. 487 (1929).

[4] 171 N. E. 14 (Ind. App. 1930). Here the deceased applied for a life insurance policy as a first class risk. Within three weeks a policy which ranked the applicant as a special risk was sent to the company's agent who mistakenly kept it for a week. Upon a subsequent tender of the first premium payment, the agent refused to deliver the policy because the applicant had been taken ill the previous day. On the applicant's death her father brought suit. The court held that the insurer was not liable for negligent delay in acting on an application for life insurance where the first premium had not been paid. It expressly disapproved of any imposition on an insurer of a tort duty to exercise due care in acting promptly upon an application for insurance.

[5] *Ibid.* 17.

[6] The terms "right" and "duty" are here used in the Hohfeldian sense. See Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1913) 23 YALE L. J. 16.

[7] It creates a power of acceptance, but no duty. See Corbin, *Offer and Acceptance and Some of the Resulting Legal Relations* (1916) 26 YALE L. J. 171.

a contractual duty, the violation of which might be actionable. This has been accomplished both through the doctrine of "constructive acceptance," [8] and that of "silence as acceptance." [9] Neither theory is desirable. No degree of consistency or regularity has appeared in the courts' use of the constructive acceptance concept. Nor does any mutual understanding exist between the parties to warrant the inference of a silent acceptance.[10] Moreover, when the courts here postulate an obligation, moral or otherwise, on the part of the insurer to accept or reject the application within reasonable time, its non-

[8] Delivery of the policy by the home office to a local agent has been held an "acceptance." Paine v. Pacific Mutual Life Ins. Co., 51 Fed. 689 (C. C. A. 8th, 1905); Rose v. Mutual Life Ins. Co., 240 Ill. 45, 88 N. E. 204 (1909); Bowman v. Northern Accident Ins. Co., 124 Mo. App. 477, 101 S. W. 691 (1907); Fried v. Royal Ins. Co., 47 Barb. 127 (N. Y. 1866), *aff'd*, 60 N. Y. 243 (1872); Gallagher v. Metropolitan Life Ins. Co., 67 Misc. 115, 121 N. Y. Supp. 638 (Sup. Ct. 1910); Williams v. Atlas Ass'n Co., 22 Ga. App. 661, 97 S. E. 91 (1918). *Contra:* Busher v. New York Life Ins. Co., 72 N. H. 551, 58 Atl. 41 (1909). Execution of the policy in the home office, Van Arsdale Osborne Brokerage Co. v. Robertson, 36 Okla. 123, 128 Pac. 107 (1912) (action by insurer on premium note given by applicant), and approval of the application in the home office, Kentucky Mutual Life Ins. Co. v. Jenks, 5 Ind. 96 (1854), likewise have been held an "acceptance."

[9] Preferred Accident Ins. Co. v. Stone, 61 Kan. 48, 58 Pac. 986 (1899); Great Southern Life Ins. Co. v. Dolan, 239 S. W. 236 (Tex. Civ. App. 1922), *rev'd* on rehearing, 262 S. W. 475 (Tex. Civ. App. 1924). *Cf.* Richmond v. Travelers' Ins. Co., 123 Tenn. 307, 130 S. W. 790 (applicant, having been led to believe application would be accepted, refrained from obtaining other insurance); Stearns v. Merchants' Life & Casualty Co., 38 N. D. 528, 165 N. W. 568 (1917). Professor Patterson in a comprehensive article, *The Delivery of a Life Insurance Policy* (1919) 33 HARV. L. REV. 198, 216, says: "... in one class of cases, at least, inaction is communicative, namely, in those cases where the offeror delivers something to the offeree when the offer is made, and the offeree consents to receive the thing, and agrees to return it if he does not accept the offer. In such cases, the offeree's omission to return the thing received is a sufficient communication of his acceptance, because he is under a duty either to return the thing or accept the offer. The life insurance transaction falls under this head, and it is not surprising, then, that a few cases, albeit a distinct minority, have held that undue delay in notifying the applicant of the rejection of his application will constitute an acceptance of the policy." It is suggested, however, that agreeing "to return it if he does not accept the offer" does not logically entail an acceptance of the offer through silence by failure to return "it," but rather merely entitles the petitioner to a recovery of the premium under the doctrine of unjust enrichment. *Cf.* Stillwell v. Covenant Mutual Life Ins. Co., 83 Mo. App. 215 (1900); VANCE, INSURANCE (2d ed. 1930) 189; Note (1920) 33 HARV. L. REV. 595.

[10] Only rarely is a power to accept by silence alone conferred by an offeror. There can only be an acceptance by silence if the applicant-offeror has either requested such a course of action by express invitation or suggested it by a custom of past dealing. *Cf.* Corbin, *op. cit. supra* note 7, at 200; Comment (1920) 29 YALE L. J. 673.

fulfilment would seem to be a breach of that obligation to accept or reject rather than an acceptance through silence.[11]

The contract of reply concept. It has been suggested [12] that the law could, if necessary, imply a preliminary contract under which the filling out of the application would bind the insurer to a duty of prompt reply. It would seem, however, that the very factors which might induce a court to adopt this fiction would be sufficient to raise a simple tort duty in the offeree,[13] irrespective of any implied contract.

The duty of agent to forward concept. In 1897 the executors of one Carter brought suit in tort against the Manhattan Life Insurance Company for undue delay on the part of the company's agent in forwarding an application for a life policy which, but for the delay, would have been accepted without hesitation.[14] The court held that the agent owed the applicant a non-contractual duty to forward promptly the request for insurance. The possible existence of a "contract of reply" was also set forth in the opinion but the artificiality of this contract, which is created solely by implied promises, was emphasized by the ease with which the tort concept enabled the applicant to recover without resort to legal fictions. The court recognized that an applicant for insurance almost invariably deals with the insurer's agent, but it refused to state whether the insurance company would have been subjected to a similar duty of prompt action had the agent forwarded the application at once and the delay been the fault of the home office.

The duty of insurer to act concept. Some years later, by regarding the insurance company as a unit and basing recovery on its negligent delay rather than on that of its agent alone, the court in *Duffy v. Banker's Ass'n*,[15] on facts similar to those

[11] The great weight of authority now opposes the contract of insurance concept as a basis for recovery. Misselhorn v. Mutual Reserve Fund Life Ass'n, *supra* note 1; Alabama Gold Life Ins. Co. v. Mayes, *supra* note 1; Stewart v. Helvetia Swiss Fire Ins. Co., 102 Cal. 218, 36 Pac. 410 (1894); Atkinson v. Hawkeye Ins. Co., 71 Iowa 340, 32 N. W. 371 (1887); Handlier v. Knights of Columbus, 106 Neb. 267, 183 N. W. 302 (1921); More v. New York Bowery Fire Ins. Co., 130 N. Y. 537, 29 N. E. 757 (1892); Ross v. New York Life Ins. Co., *supra* note 1; Dorman v. Connecticut Fire Ins. Co., 41 Okla. 509, 137 Pac. 262 (1914); Royal Ins. Co. v. Beatty, 119 Pa. 6, 12 Atl. 607 (1888); Northern Neck Mutual Fire Ass'n v. Turlington, 136 Va. 44, 116 S. E. 363 (1923). See also VANCE, *op. cit. supra* note 9, at 188; (1913) 11 MICH. L. REV. 606; (1913) 13 COL. L. REV. 647. For an able discussion see Funk, *The Duty of an Insurer to Act Promptly on Applications* (1927) 75 U. PA. L. REV. 207, 210. For a contrary view see Patterson, *op. cit. supra* note 9, and cases cited therein.

[12] Comment, *supra* note 10, at 676.

[13] The advantage of employing a tort duty in place of a contract duty as a basis for recovery is discussed *infra*.

[14] Carter v. Metropolitan Life Insurance Co., 11 Hawaii 69 (1897).

[15] 160 Iowa 19, 139 N. W. 1087 (1913). This decision, although grounded

of the *Carter* case, transcended the arbitrary limits of the earlier decision. Thereafter the *Duffy* case was, until the *Savage* case, followed in almost every state in which the question arose.[16] The limitation upon this broader tort duty expressed in the *Behnke* case, however, that "before there can be a recovery in such cases damages must be proved," [17] seems unfortunate. Although a practical view will disclose few, if any, suits for nominal damages, yet an analytical one will stress the advisability of allowing a judgment for nominal damages,[18] lest the concept of no duty on the part of the insurer without substantial damages encourage, as in the *Brady* case, the doctrine of no duty at all.

Into the new tort duty, first advanced at the time of the *Duffy* case, the courts have carried over many of the conclusions formerly evolved under the contract concepts. Thus, according to the older theory, if an applicant was not an acceptable risk there was no meeting of the minds and hence there could be no contract. Once a tort duty of prompt reply has been established, however, such a distinction seems to have no logical application. The point becomes especially significant where, as in *Gonsoulin v. Equitable Life Assurance Society*,[19] the company does not refuse to insure but merely demands a higher premium than has been anticipated. Here the difficulty of determining damages, arising from the uncertainty as to whether the applicant would have accepted the more expensive policy, scarcely warrants a condonation of the insurer's negligent delay.

upon a similar holding in Boyer v. State Farmers' Mutual Hail Ins. Ass'n, 86 Kan. 442, 121 Pac. 329 (1912), has received more attention owing to its elaborately reasoned opinion. See (1913) 27 HARV. L. REV. 92; (1913) 13 COL. L. REV. 647; (1913) 11 MICH. L. REV. 606.

[16] De Ford v. New York Life Ins. Co., 75 Colo. 146, 224 Pac. 1049 (1924), noted in (1924) 34 YALE L. J. 102; Royal Neighbors v. Fartenberry, 214 Ala. 387, 107 So. 846 (1926); Wallace v. Hartford Fire Ins. Co., 31 Idaho 481, 174 Pac. 1009 (1918); Wilkins v. Capital Fire Ins. Co., 99 Neb. 828, 157 N. W. 1021 (1916); Fox v. Ins. Co., 185 N. C. 121, 116 S. E. 266 (1923); Security Ins. Co. v. Cameron, 85 Okla. 171, 205 Pac. 151 (1922); Columbian National Life Ins. Co. v. Lemmons, 96 Okla. 228, 222 Pac. 255 (1924); Brown v. Missouri State Life Ins. Co., 124 Okla. 155, 254 Pac. 7 (1927); VANCE, *op. cit. supra* note 9, at 192. *Contra:* National Union Fire Ins. Co. v. School District, 122 Ark. 179, 182 S. W. 547 (1916); Interstate Business Men's Accident v. Nichols, 143 Ark. 369, 220 S. W. 477 (1920); Savage v. Prudential Life Ins. Co., *supra* note 3; Metropolitan Life Ins. Co. v. Brady, *supra* note 4. *Cf.* Bradley v. Federal Life Ins. Co., 295 Ill. 381, 129 N. E. 171 (1920), noted in (1921) 19 MICH. L. REV. 737.

[17] 41 F. (2d) at 700.

[18] 1 COOLEY, TORTS (3d ed. 1906) 2; BURDICK, TORTS (4th ed. 1926) 239; SEDGWICK, DAMAGES (9th ed. 1912) §§ 96–104. The desirability of holding the insurer to a norm of conduct, discussed *infra*, irrespective of pecuniary damages to the applicant, would seem to exclude this situation from those torts which are dependent upon appreciable damages before liability ensues.

[19] 152 La. 865, 94 So. 424 (1922).

Yet the holding in the *Gonsoulin* case is to this effect. On this point the attitude of the *Brady* case is to be preferred. There the court, in its discussion of a tort liability, did not base its denial of recovery upon the issuance of a different kind of policy; it used that fact merely to show a counter-offer which would preclude recovery under any contract theory.

A further confusion of contract with tort concepts is exemplified by the cases holding with the *Brady* case that an application unaccompanied by the first premium payment cannot be the basis of a successful suit even though recovery would be granted had the premium been paid. This, with a single exception,[20] is a distinction recognized throughout the country.[21] Under the contract concepts of recovery, to be sure, the payment of the first premium is of some significance since it forms part of the consideration for the "promise" of the company or its agent.[22] In the tort concepts, however, it can have no bearing whatever on a duty for prompt action by the insurer as long as the applicant has performed all the formal requirements of the application and payment of the first premium is not among them.

Enough has been set forth to demonstrate the reluctance of the courts to abandon completely those contract principles which were the first to be applied to the instant situation. It is, however, urged that the tort concept, when it is isolated in the form of a duty of the insurer to act, has sufficient strength to justify its existence independent of all collateral support. It is not necessary to revert to the age-old doctrine that one who undertakes to do an act must do it with care.[23] Nor is it necessary to introduce the insurance company into the field of public service industries[24] merely because state regulation of

[20] Eames v. Home Ins. Co., 94 U. S. 621 (1877).

[21] Giddings v. Ins. Co., *supra* note 1; Savage v. Prudential Life Ins. Co., *supra* note 3; cases cited *supra* notes 11 and 16.

[22] It was also argued that the application unaccompanied by a premium payment was merely an invitation for an offer, while the presence of the premium transformed the invitation into an offer. This emphasis placed upon the payment of the first premium was further justified by the consideration that the insurance company would be unduly favored were it permitted to benefit by the first premium without giving protection during that period. *Cf.* Funk, *op. cit. supra* note 11, at 209.

[23] *Cf.* Condon v. Exton Hall Brokerage and Vessel Agent, 80 Misc. 369, 142 N. Y. Supp. 548 (City Ct. 1913). See (1913) 27 HARV. L. REV. 92 and (1918) 2 MINN. L. REV. 53 on the distinction between misfeasance and non-feasance.

[24] See (1913) 11 MICH. L. REV. 607. Patterson, *op. cit. supra* note 9, at 216, suggests that every person who applies to a company for a kind of policy issued by the company should be insured from the date of application if it can be proved that he was, when he applied, an acceptable risk. Comment, *supra* note 10, disapproves of this view. The latter position seems sound since compulsory acceptance of every "acceptable" risk would, in a

rates [25] and a statute regulating the acceptance of applications [26] have been permitted. Nevertheless, the social desirability and increasing use of insurance [27] in all forms for ameliorating the situation of unfortunate individuals by the laws of probability is evident in many fields of pursuit. There is, therefore, a great need for the courts to recognize the position of guardianship occupied many fields of pursuit. There is, therefore, a great need for the courts to recognize the position of guardianship occupied by the insurer in society and to endow the insurer with a responsibility for efficient action far greater than is required of the corner grocer. This need can be met by adding to the applicant's privilege to apply for insurance a right to be treated according to the best principles of business, and by considering any deviation from this reasonable norm a violation of the applicant's right for which he is entitled to receive the penalty inflicted upon the insurer for the breach of the correlative duty. It is suggested that a recognition of this tort duty, stripped of the hampering vestiges of other concepts, would go far in terminating the conflict resulting from faulty analysis and legal fictions, and in halting the undesirable trend recently manifested in the Mississippi and Indiana decisions.

---

suit for non-acceptance, substitute a jury of laymen in the place of the insurance company's experts in passing on the question of acceptability.

[25] German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 34 Sup. Ct. 612 (1914).

[26] National Union Fire Ins. Co. v. Wanberg, 260 U. S. 71, 43 Sup. Ct. 32 (1922), noted in (1920) 19 MICH. L. REV. 340, held constitutional a statute compelling the insurer to reply to an application for insurance within twenty hours under penalty of acceptance through silence.

[27] Attention is called to the compulsory automobile insurance of Massachusetts, to the Workmen's Compensation Laws, and to other forms of liability without fault, established in order to turn individual mishaps into incidents of social intercourse. *Cf.* Arizona Employers' Liability Cases, 250 U. S. 400, 39 Sup. Ct. 553 (1919).