YALE LAW JOURNAL

VOLUME XLIV MARCH, 1935 NUMBER 5

Subscription price, $4.50 a year *Single copy, 80 cents*
Canadian subscription price, $5.00 a year; foreign, $5.25 a year.

YALE LAW JOURNAL COMPANY, INC., Box 401A, Yale Station, New Haven, Conn.

INVESTIGATORY POWERS OF THE SECURITIES AND EXCHANGE COMMISSION

THE Securities Act of 1933[1] and the Securities Exchange Act of 1934[2] seek to establish a protective control over the process of soliciting business capital from the public, and over the business of trading in securities. To this end, both statutes require full and accurate information of the financial structure of issuers of securities[3], so that adequate and truthful information may be available to investors to enable them to determine the investment risk of securities sold on the national securities exchanges or in interstate commerce.[4] In addition to compelling a disclosure of such information by issuers of securities, the dealing in securities is carefully regulated to prevent practices which are deemed subversive of fair dealing.[5] Finally, to develop and perfect the regulation, the Securities and Exchange Commission, which is charged with the administration of these Acts, is empowered to issue rules and regulations, and to recommend to Congress further legislation along designated lines.[6] To enable the Commission

1. 48 STAT. 74, 15 U. S. C. A. § 77 a, et seq. (1933), as amended by 48 STAT. 905, 15 U. S. C. A. § 776 et seq. (1934).

2. 48 STAT. 881, 15 U. S. C. A. § 78a et seq. (1934).

3. Securities Act § 7, Schedules A and B; Exchange Act §§ 12, 13.

4. 78 CONG. REC. 7704 (1934); Douglas and Bates, *The Federal Securities Act of 1933* (1933) 43 YALE L. J. 171, 172.

5. Securities Act § 17; Exchange Act §§ 7, 8, 9, 10, 11, 14, and 15; see Legis. (1934) 83 U. OF PA. L. REV. 255.

6. Securities Act §§ 19 (a), 211; Exchange Act §§ 11 (e), 12 (f), 19 (c), 23 (a).

properly to carry out the purposes of the Acts, it has been granted broad powers of investigation.[7] Thus, compulsory investigatory powers are given, first, for the purpose of ascertaining the correctness of information required to be set forth by issuers of securities in registration statements under the Securities Act, and in application statements and reports under the Securities Exchange Act; second, for the purpose of determining whether the numerous statutory regulations are being obeyed; and third, for the purpose of accumulating information upon the basis of which it may prescribe such rules and regulations as it is authorized to make under the two Acts, and also make recommendations to Congress for additional legislation. Opposed to these powers stand the Fourth and Fifth amendments of the Federal Constitution, guaranteeing freedom from unreasonable searches and seizures, and protecting an individual from compulsory self incrimination.[8]

I

The Securities Act requires that a registration statement containing detailed information concerning the issuer shall be in force as to any security sought to be sold in the channels of interstate commerce or through the mails.[8] As one means[9] of assuring that the information set forth in the registration statement shall be accurate, the Securities and Exchange Commission is empowered to suspend any registration statement when it appears that a material fact is falsely reported, or is omitted.[10] And by Section 8(e) of the Act, the Commission, in order to determine whether a registration shall be suspended, is empowered to examine the issuer, underwriter or any other person,[11] and to obtain access

7. Securities Act §§ 8 (e), 19 (b); Exchange Act § 21 (a), (b).

8. It is assumed that the other provisions of the statutes are constitutional, and therefore that the information demanded in the registration statement under the Securities Act, and the application and reports under the Securities Exchange Act, *supra* note 3, may constitutionally be required.

9. Section 24, Securities Act, and Section 32, Exchange Act provide criminal penalties for wilful misstatements in documents filed with the commission. See MacIntyre, *Criminal Provisions of the Securities Act and Analogies to Similar Criminal Statutes* (1933) 43 YALE L. J. 254. Section 11, Securities Act, and Section 18, Exchange Act, imposing civil liabilities for misstatements in informational documents which issuers and others must file with the Commission, provide another means of compelling accurate disclosure. See Shulman, *Civil Liability and the Securities Act* (1933) 43 YALE L. J. 227; Comment (1934) 44 YALE L. J. 456.

10. Securities Act § 8 (d). See Rodell, *Regulation of Securities by the Federal Trade Commission* (1933) 43 YALE L. J. 272.

11. The phrase "any other person" used in this section would seem to empower the Commission to obtain access to the books and papers of persons other than the issuer who is being investigated, if such were relevant to the matter under inquiry. In this respect the act confers broader powers of investigation upon the Commission than are possessed by the Federal Trade Commission, 38 STAT. 722 (1914), 15 U. S. C. A. § 49 (1926), or Interstate Commerce Commission, 41 STAT. 493 (1920), 49 U. S. C. A. § 20 (5) (1926). The latter may obtain access to the books and papers of only such corporations as are being directly investigated. However, the tax statutes apparently empower agents of the Bureau of Internal Revenue to gain access to the books and papers of third parties as well as the taxpayer. 45 STAT. 872, 26 U. S. C. A. § 1247 (1928).

to and demand the production of any relevant books and papers.[12] In the event of a refusal to comply with a request of the Commission for access to books and papers, the Commission may resort to the federal district courts to obtain a mandamus compelling compliance with the request. The power to obtain this mode of judicial coercion seems to be made available to the Commission by Section 20(c) of the Act, which endows federal district courts with jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of the Act. Since it is expressed in Section 8(e) that the Commission shall have access to, and may compel the production of books and papers of any person, it would appear that mandamus issued against any person, compelling him to permit the Commission to have access to his books and papers, would be proper under Section 20(c) as commanding compliance with the provisions of the Act. The appearance and testimony of witnesses, and the production of books and papers before the Commission, in an examination to determine whether a stop order should issue, may be obtained under Section 19(b), wherein it is provided that for the purpose of all investigations which the Commission may deem necessary for the enforcement of the Act, the Commission or any persons designated by it are empowered to subpoena witnesses and require the production of books and papers. Clearly, an investigation is such a necessary means of enforcing the stop order provisions of the Act as to be included within Section 19(b). In case of refusal to obey a subpoena issued under Section 19(b), the Commission may, by Section 22(b), apply to a federal district court to issue an order requiring obedience to the subpoena of the Commission. Failure to obey the order of the Court is made punishable as a contempt thereof.

The counterpart in the Securities Exchange Act of the registration statement required under the Securities Act is the "application." The Securities Exchange Act prohibits the sale of any security on a national securities exchange unless the security is registered.[13] A condition of procuring the requisite registration is the filing of an application with the Commission and with the exchange upon which the issuer contemplates selling the security, which application must contain certain stipulated information and documents relative to the financial structure and affairs of the issuer.[14] Under the Securities Act, as distinguished from the Securities Exchange Act, an issuer of securities is discharged from rendering further reports concerning its financial status after it has filed the registration statement. Provision was therefore not made in the former Act for providing investors with adequate up-to-date information concerning issuers of securities.[15] This was viewed as a definite defect, and to remedy it, the Securities Exchange Act requires every issuer of a security registered upon a national securities exchange to file such annual and quarterly reports as the Commission may pre-

12. Presumably such an examination may be made at any time the registration statement is in effect as to a particular security, since theoretically a stop order may issue at any such time. Conversely, once a registration statement has ceased to be effective, since a stop order could not issue against a nonexistent registration statement, the powers of examination conferred in connection therewith would likewise cease.

13. Exchange Act § 12 (a).

14. Exchange Act § 12 (b).

15. See Tracy and MacChesney, *The Securities Exchange Act of 1934* (1934) 32 MICH. L. REV. 1025, 1049.

scribe.[16] The power to conduct an investigation to determine if any information set forth in the application or reports is false or misleading is not expressly conferred upon the Commission under the Securities Exchange Act. Since the Commission under the latter Act is not empowered to issue a stop order suspending the effectiveness of any registration, it accordingly has been granted no special powers of examination exercisable therewith as it has under Section 8(e) of the Securities Act. However, under Section 21 of the Securities Exchange Act, the Commission is empowered to investigate any facts, conditions, practices, or matters which it may deem necessary or proper to aid it in the enforcement of the provisions of the act. Investigations to determine whether an application or a report contains a false or misleading statement of a material fact would appear to be included within that section. For, when the Act requires that issuers of securities divulge certain information in application statements and reports, it is logical to suppose that it is accurate information which is required. Therefore, should the Commission undertake an examination to determine whether or not the information set forth is accurate, it could validly be said that it was conducting an investigation of matters which it deems necessary to aid it in the enforcement of the Act. For the purpose of such an investigation, the Commission is given the power under Section 21(b) to subpoena witnesses, and to compel the production of any books, papers, correspondence, memoranda, or other records which the Commission deems relevant to the inquiry.

Whether, in such an investigation, the Commission might also send its own agents to inspect the books and papers of issuers and other persons is not apparent from the face of the Act. It is not expressly given that power in Section 21(b), and it may therefore be argued that the inference is that Congress intended to withhold it. On the other hand, since by Section 23 of the Securities Exchange Act the Commission is granted the power to make such rules and regulations as may be necessary for the execution of the functions vested in it by the Act, it may be argued that the Commission could issue a rule authorizing its agents to obtain access to the books and papers of the issuer and other persons, upon the ground that such was necessary to determine whether any information given in an application or report is false or misleading.[17] But it is not as yet judicially settled that such an executive rule would suffice to accomplish that result. The Supreme Court has not as yet passed upon the issue, and lower federal courts have divided upon it; two district court decisions holding that nothing short of an explicit statutory authorization could enable executive officials to gain access to the books and papers of a concern being investigated,[18] while a circuit court of appeals has held, in a case where no other power of investigation was available, that an executive order based upon a statutory authority to prescribe such rules and regulations as are necessary to carry out the pur-

16. Exchange Act § 13. See 78 CONG. REC. 7696, 7704, 8163, 8274, 8284 (1934).

17. The NIRA does not expressly empower the code authorities to inspect the books and papers of members of the code. Nevertheless, numerous codes contain a provision enabling the code authorities to inspect books and papers of members to determine the accuracy of information required in reports. See, e. g., Metal Etching Code, art. V, § 9; Fibre Can and Tube Code, art. VII, § 7; Copper Code, art. VI, § 5.

18. Overton Refining Co. v. Terrell, 4 F. Supp. 443 (E. D. Tex. 1933); Amazon Petroleum Corp. v. Rr. Commission of Texas, 5 F. Supp. 639 (E. D. Tex. 1934).

poses of an act would suffice legally to grant that power.[19] But even though it were conceded that the power of the Securities and Exchange Commission to prescribe such rules and regulations as are necessary to execute the functions of the Securities Exchange Act embraced the legal power to authorize its agents to obtain access to books and papers, it would still be incumbent upon the Commission to show that such was a necessary means of enabling it to check the accuracy of information in the application or reports. In view of the Commission's express powers to subpoena witnesses and compel the production of books and papers, it may seriously be questioned whether the power to gain direct access to those books and papers is necessary to enable the Commission to discharge that function.

No question can be raised that the provision of the Fifth Amendment, which provides that no person shall be compelled to bear witness against himself in a criminal proceeding, is violated by the granting of the power either to compel the production of books and papers by subpoena, or to send agents to inspect them directly. It is true that the privilege against self-incrimination has been extended by judicial construction to administrative as well as criminal proceedings.[20] Conceivably, questions asked a witness, or the examination of books and papers[21] required to be produced before the Commission may concern matters tending to indicate that the witness or possessor of the books and papers has violated provisions of the Acts for which criminal liability is attached. But as to corporations the Fifth Amendment has no application,[22] and as to individuals it is settled that a statutory immunity against prosecution or subjection to a penalty or forfeiture for or on account of any matters concerning which the person is compelled to testify or produce documentary evidence, renders the compulsion of incriminating testimony or documents unobjectionable to the self-incrimination clause.[23] Both statutes carry such immunity provisions,[24] and consequently forestall objection thereto on the ground of the Fifth Amendment. However, the immunity granted by those statutes does not extend to the situation where evidence of an incriminating nature is discovered in an examination of books and papers subsequent to gaining access thereto,[24] as the Commission

19. Ryan v. Amazon Petroleum Corp., 71 F. (2d) 1 (C. C. A. 5th, 1934).

20. See Counselman v. Hitchcock, 142 U. S. 547, 562 (1892); McCarthy v. Arndstein, 266 U. S. 34, 40 (1924); Internal Revenue Agent v. Sullivan, 287 Fed. 138 (W. D. N. Y. 1923); Grant, *Self Incrimination in the Modern American Law* (1931) 5 TEMPLE L. Q. 368, 371.

21. The privilege against self-incrimination extends to the production of incriminating books and papers as well as oral testimony. See 4 WIGMORE, EVIDENCE (2d ed. 1923) §2264, and cases cited therein.

22. Hale. v. Henkel, 201 U. S. 43 (1906); In re Bomn Hat Co., 184 Fed. 505 (S. D. N. Y. 1911), aff'd, 223 U. S. 713 (1912).

23. Brown v. Walker, 161 U. S. 591 (1896); see 4 WIGMORE, EVIDENCE § 2281.

24. Securities Act § 22 (c); Exchange Act § 21 (d). Both sections provide that "no individual shall be prosecuted or subject to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise. . . ." It is the general rule that to avail of the privilege against self-incrimination, it must be specifically claimed. Vajtauer v. Commissioner of Immigration, 273 U. S. 103 (1927); Pandolfo v. Biddle, 8 F. (2d) 142 (C. C. A. 8th, 1925).

may under the Securities Act.[25] This fact is nevertheless consistent with the requirements of the Fifth Amendment. The orthodox rule in regard to protection against disclosure of incriminating evidence is that only such disclosure as is sought by legal process against a person as a witness, is protected by the Fifth Amendment.[26] Since an inspection of the books and papers of a person at his office would not involve that person's acting as a witness in response to legal process, the Fifth Amendment offers no protection against the conduct of such an examination. Hence, an immunity need not be granted to make valid the power.

The tenability of objection to investigations by the Commission, whether by subpoena, or direct access, on the ground that they violate the Fourth Amendment can be considered only in the light of the historical background of that Amendment, and the rules which the courts have formulated in the process of adjudging what conduct comes within the prohibition against unreasonable searches and seizures. The concept of unreasonable searches and seizures in the United States had its inception in the deep resentment against the familiar general writs of assistance used by officials of the Crown to detect violations of the smuggling laws.[27] When there was no restriction upon the use of this legal process, governmental officials virtually had carte blanche for rummaging through a person's home or business in search of evidence of evasion of the smuggling laws. The power was greater than the popular conscience would tolerate. Accordingly, as an assurance against the future use of such writs, the Fourth Amendment was written into the federal constitution. That Amendment was drawn in two parts: the first prohibited all unreasonable searches and seizures, and the second prescribed that search warrants should not issue except upon probable cause particularly describing the place to be searched and the persons or things to be seized. Since the Amendment did not specify what searches and seizures were unreasonable, it has remained for the courts to determine that matter.

The courts of the United States were not without common law precedent to aid them in adjudging what constituted unreasonable searches and seizures. Antedating the use of writs of assistance in the colonies, was the use of general warrants by the Crown in England to ferret evidence of opposition to the government by political suspects.[28] Like their counterpart in the colonies, their

25. While the Commission has not the expressed power to obtain access to books and papers under the Securities Exchange Act, it may request that its officers be permitted to examine them upon the premises of the person investigated. Since it may subpoena such books and papers as are relevant to the matter under inquiry, it is probable that many persons, though legally not compelled to permit officers to obtain access to their books and papers, will accede to a request to do so, in order to avert the inconvenience of bringing them before the Commission, there to be examined. In such a case, however, the statutory immunity would not attach against any incriminating evidence, as it would where the books and papers were subpoenaed before the Commission. Cf. Sherwin v. United States, 268 U. S. 369 (1925); Cannan v. United States, 19 F. (2d) 823 (C. C. A. 5th, 1927).

26. See Adams v. New York, 192 U. S. 585, 597 (1904); People v. Defore, 242 N. Y. 13, 27, 150 N. E. 585, 590 (1926); 4 WIGMORE, EVIDENCE § 2264; Chafee, *Progress of the Law, 1919-1922* (1922) 35 HARV. L. REV. 673, 696.

27. See Fraenkel, *Concerning Searches and Seizures* (1921) 34 HARV. L. REV. 361, 364.

28. Id. at 362.

use was severely disliked. And in the famous case of *Entick v. Carrington*,[29] Lord Camden condemned such general warrants first because of their uncertainty, and second because their use was merely to obtain evidence against persons, which he declared to be in violation of the inherent right against self-incrimination.[30] He conceded, however, that the second ground of objection would not apply to cases involving search for and seizure of articles, the possession of which in itself was unlawful. These concepts were utilized by the American courts in the determination of what actions were unreasonable searches and seizures. Thus a search for and seizure of articles of contraband was reasonable if made under a search warrant based upon probable cause, and particularly describing the place to be searched and things to be seized.[31] However, in the absence of special circumstances not here relevant,[32] such a search and seizure without a search warrant,[33] or with a search warrant which was defective by reason of a failure to show probable cause[34] or because of the lack of particularity of the place to be searched and things to be seized,[35] was deemed to be unreasonable, and therefore in violation of the Fourth Amendment. And a search for, and seizure of, papers whose sole value to the government was their evidential worth as showing the criminality of the possessor was held to be unreasonable whether obtained without a search warrant, or even with one which otherwise met all of the requirements of the second clause of the Fourth Amendment.[36] Hence, the usual test applied by the courts resulted in making searches and seizures unreasonable unless the search was for articles of contraband, under a search warrant[32] which measured up to the requirements imposed by the second clause of the Fourth Amendment.

In *Boyd v. United States*,[37] the term unreasonable searches and seizures took on an extended meaning, and was held to embrace a subpoena duces tecum, where the object of its use was to compel a person to produce documentary evidence to be used against him in a criminal proceeding or forfeiture, documentary

29. 19 How. St. Tr. 1029 (1765).

30. Fraenkel, *supra* note 27, at 364; Handler, *The Constitutionality of Investigations by the Federal Trade Commission* (1928) 28 COL. L. REV. 905, 909.

31. Adams v. New York, 192 U. S. 585 (1904).

32. There are a relatively small number of situations in which a search and seizure is deemed to be reasonable even though made without a search warrant. See CORNELIUS, SEARCH AND SEIZURE (2d ed. 1930) §§ 60-71; Comment (1927) 27 COL. L. REV. 300, 302.

33. Weeks v. United States, 232 U. S. 383 (1914); Agnello v. United States, 269 U. S. 20 (1925).

34. The federal courts require that "probable cause" which must be shown previous to the issuance of a search warrant, be based upon definite facts within the knowledge of the person filing the affidavit upon which the search warrant is to be issued, and not alone upon information and belief. Nathanson v. United States, 290 U. S. 41 (1933); Giles v. United States, 284 Fed. 208 (C. C. A. 1st, 1922). See Ely, *"Probable Cause" in Connection with Applications for Search Warrants* (1928) 13 ST. LOUIS L. REV. 101.

35. See 1 COOLEY, CONSTITUTIONAL LIMITATIONS (8th ed. 1927) 621.

36. Gouled v. United States, 255 U. S. 298 (1921); Fraenkel, *supra* note 27, at 379; 1 COOLEY, op. cit. *supra* note 35, at 624.

37. 116 U. S. 616 (1886).

evidence which by virtue of its incriminating character was privileged under the Fifth Amendment. The rationale indulged to justify this extension was that the compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, accomplished the same purpose as an ordinary search and seizure, and therefore was similarly defective as contrary to the Fourth Amendment. That case may be interpreted either as holding that a subpoena duces tecum is a search, and as such is unreasonable when its purpose is to secure incriminating evidence in violation of the Fifth Amendment, or, as holding that while a subpoena duces tecum is not a search, yet when it is used for the purpose of securing incriminatory evidence in violation of the Fifth Amendment, it serves a purpose similar to that of an unreasonable search, and is therefore similarly defective. The language of the Court, and its interpretation in the opinions of the dissenting Justices, lead to an inference that the Court conceived of a subpoena as being a search. But the utter dissimilarity between a search and seizure, as commonly conceived, and a subpoena duces tecum issuing from a court in an orderly proceeding, renders the characterization of the latter as a search and seizure of questionable validity.[38] And, further, it may be noticed that if there is a parallel between a subpoena duces tecum and a search, it at least has not been sufficient to result in the courts' treating them as identical; for there has been no attempt to circumscribe the issuance of a subpoena with the same formalities which surround the issuance of a search warrant, in order to accord with a test of reasonableness. There is no necessity of abiding by the formal rules of showing probable cause in order validly to issue a subpoena, as there must be previous to the issuance of a search warrant.[33] Furthermore, unlike the search warrant, which must particularly describe the article of contraband to be seized, there is no necessity in a subpoena duces tecum of designating each particular paper which is demanded; such papers and books need only be "described with reasonable detail."[39] Nevertheless, for the present purpose it is sufficient to accept that the *Boyd* case has indicated that where the purpose of a subpoena duces tecum is to secure incriminating evidence, in contravention to the Fifth Amendment, it is invalid.

The scope of the Fourth Amendment was further increased by *Hale v. Henkel*.[40] In an investigation by a federal grand jury of violations of the anti-trust laws by certain tobacco companies, a subpoena duces tecum was issued to one of the corporations being investigated, demanding the production of all the papers, books, and correspondence of the company since its inception. The avowed purpose of the subpoena was to gain evidence which would prove a violation of the anti-trust laws and thereby lead to a criminal liability therefor. The fact, however, that the evidence produced would be of an incriminating nature against the corporation did not render the subpoena invalid under the rule of the *Boyd* case, as it would have if the books and papers had been those of a private person; for it was held that a corporation did not possess the privi-

38. For criticism of the view that a subpoena duces tecum is a search and seizure, see 4 WIGMORE, EVIDENCE § 2264; Handler, *supra* note 30, at 913.

39. See Consolidated Rendering Co. v. Vermont, 207 U. S. 541, 554 (1908).

40. 201 U. S. 43 (1906).

lege against self-incrimination under the Fifth Amendment. However, the language of the Court indicated that it believed a subpoena duces tecum to be a search, and as such, subject to the rule of reasonableness under the Fourth Amendment regardless of whether a corporation or an individual was concerned. Whether the case must be interpreted as holding that a subpoena is actually a search, or only that it is subject to the same rules when it serves the same function as an unreasonable search, raises the questions already discussed in connection with the *Boyd* case. At any rate, the Court clearly held that the Fourth Amendment required that only a reasonable inquiry by the means of a subpoena duces tecum could be made, and that a demand for all the books and papers of a corporation was unreasonable because far too sweeping in its terms. It inferred, however, that a subpoena duces tecum for such books and papers, described in suitable detail, as were material to the matter under inquiry would be consistent with the requirements of the Fourth Amendment; and subsequent cases, accepting this inference, have upheld subpoenas which were very broad in their requirements, upon the ground that what was demanded was suitably specified, and was material to the matter under inquiry.[41]

It is apparent that since the test of reasonableness is determinative of the constitutionality of an investigation, there is, and can be, no iron-clad rule applicable to all searches and seizures and to all subpoenas. What is reasonable in one situation may be unreasonable in another; indeed what is unreasonable at one period of time may very well, by reason of changed factors, become reasonable in another. The formal requirements surrounding the search warrant in searches and seizures in aid of criminal law enforcement have had the virtue of protecting innocent persons from abuse, but also the demerit of hindering such enforcement. Yet, the balance has weighed in favor of the former factor, and the formal requirements must be respected. Should the problem of crime become so acute however, as to necessitate a more adequate method of detection, it is not too unrealistic to expect that the formal requirements surrounding the obtaining of a search warrant may be relaxed, and searches and seizures which are now condemned as unreasonable will become reasonable.[42] In the realm of government regulation of business, administrative commissions have been armed with powers of investigation, enabling them to subpoena witnesses, and compel the production of books and papers, as well as to obtain access to books and papers.[43] The analogies of the law indicate that those powers must be

41. Consolidated Rendering Co. v. Vermont, 207 U. S. 541 (1903); Hammond Packing Co. v. Arkansas, 212 U. S. 322 (1909); Wheeler v. United States, 226 U. S. 478 (1913); Grant and Burlingame v. United States, 227 U. S. 74 (1913); Brown v. United States, 276 U. S. 134 (1928); In re Bornn Hat Co., 184 Fed. 506 (S. D. N. Y. 1911), aff'd, 223 U. S. 713 (1912); United States v. Watson, 266 Fed. 736 (N. D. Fla. 1920).

42. Concession to efficient law enforcement may be noted in the refusal of the Supreme Court to hold that "wire tapping" constitutes an unreasonable search and seizure, Olmstead v. United States, 277 U. S. 438 (1928), and in its condoning a search for and seizure of liquor in an automobile, when the possession therof was illegal, without a search warrant, and solely upon probable cause. Carroll v. United States, 267 U. S. 132 (1925).

43. For exhaustive surveys of the instances in which administrative tribunals have been granted powers of investigation see Lilienthal, *The Power of Governmental Agencies to Compel Testimony* (1926) 39 HARV. L. REV. 694; Handler, *supra* note 30.

exercised in a manner which is reasonable within the meaning of the Fourth Amendment. The question of their reasonableness must depend not only upon how that issue has been decided in analogous situations in the past, but also upon a balancing of the public necessity of the investigations, under modern conditions as against the inconvenience and hardship caused those who are investigated.

Considered in the light of a rule of reason, it is difficult to see that the powers of investigation granted to the Securities and Exchange Commission to determine the accuracy of information voluntarily submitted as true, are violative of the Fourth Amendment. The purpose, namely to check the accuracy of filed information, is essential to the regulation proposed. And the scope of such an investigation is limited to that purpose, thereby presenting ascertainable limits to the investigation.[44] A subpoena duces tecum for the production of such books and papers as are relevant to the matter of checking the accuracy of the information would be sufficiently definite to accord with the requirements of the *Hale* case.[45] Both Acts require, of themselves, that the subpoena be so limited. Unlike the subpoena duces tecum condemned in the *Boyd* case, the purpose of its use by the Securities Exchange Commission is not to compel a person to produce documentary evidence to be used against him in a criminal proceeding in violation of his rights under the Fifth Amendment; its sole purpose is to check the accuracy of information voluntarily submitted by an issuer of securities, to the end of correcting misstatements. Indeed, not only is the purpose not to compel a person to produce documentary evidence against himself in a criminal proceeding, but even the effect of compelling any person to produce evidence which may be used against him in a subsequent criminal proceeding is removed by the grant of immunity to individuals against prosecution for or on account of facts disclosed in documentary evidence produced in response to

44. There are dicta in some decisions involving investigations by the Federal Trade Commission, to the effect that a complaint must have been filed with the Commission, or drawn up by it charging a definite violation of the Federal Trade Commission Act, previous to conducting an investigation. The purpose of the complaint is said to be to draw the bounds of the investigation so that it will be restricted in character. See Federal Trade Commission v. Lorillard Co., 283 Fed. 999, 1005 (S. D. N. Y. 1922); Federal Trade Commission v. Baltimore Grain Co., 284 Fed. 886, 889 (D. Md. 1922); Federal Trade Commission v. Claire Furnace Co., 285 Fed. 936, 941 (App. D. C. 1923). Where, however, investigations are restricted by statute, as in investigations by the Securities Exchange Commission to check the accuracy of information submitted by issuers of securities, there is no need to restrict the investigation further by requiring a complaint.

45. The closest analogy to the Securities Exchange Commission's power to conduct an investigation to check the accuracy of information submitted by issuers of securities is the power granted to agents of the Bureau of Internal Revenue to examine books and papers, subpoena witnesses, and the production of books and records, in order to ascertain the correctness of any tax return. 45 STAT. 1142 (1919), 26 U. S. C. A. § 1247 (1928). The power of the latter to subpoena witnesses and compel the production of any relevant books and papers of the taxpayer and third parties has uniformly been upheld. Internal Revenue Agent v. Sullivan, 287 Fed. 138 (W. D. N. Y. 1923); United States v. First Nat. Bank of Mobile, 295 Fed. 142 (S. D. Ala. 1924), aff'd, 267 U. S. 576 (1925); In re International Corp. Co., 5 F. Supp. 608 (S. D. N. Y. 1934). Cf. 2 PATON'S DIGEST (1926) § 4611a.

a subpoena duces tecum. Under such circumstances, there is no room for invoking the rule of the *Boyd* case to condemn the subpoena duces tecum of the Commission as unreasonable.

The direct access to the books and papers of issuers, underwriters, and other persons may be obtained under the Securities Act does not render the provision unconstitutional. The Act does not authorize a "fishing expedition" through any and all of the books and papers of the person or corporation investigated, but permits access only to such papers and books as are relevant to the determination of the accuracy of information submitted. Since a subpoena duces tecum, which may be analogized to a search and seizure, is not unreasonable if only such books and papers as are relevant to the matter under inquiry are demanded in a subpoena suitably specifying such books and papers, it should follow that access to such books and papers as are relevant to the matter under inquiry likewise would not constitute an unreasonable search and seizure. Objection, therefore, cannot successfully be directed against the constitutionality of the statutory power, but only against the manner in which the power is exercised. If the Commission attempts to exceed its powers by a search that is broader than the statute permits, it obviously must fail, if challenged.

II

Both the Securities Act and the Securities Exchange Act provide that the Commission may make investigations to determine whether any person has violated or is about to violate the provisions of those Acts, or any rules and regulations issued thereunder.[46] Investigations for the purpose of discovering violations of the Acts may be distinguished from the investigations that have been discussed above, in that inaccuracy of statement is not alone a violation of the Act, but is such only when it is wilful.[9] While the Commission may proceed to such an investigation after a complaint has been lodged with it definitely charging someone with a violation of those Acts, or of rules and regulations issued thereunder, the express terms of both Acts negative any possible inference that the Commission is authorized to conduct such an investigation only after a complaint has been filed with it. The question raised by construction of the terms of the Acts is, rather, whether or not the Commission is even restricted to the extent that it must have a reason to believe that there has been or is about to be a violation before it may conduct an examination. Under Section 21(a) of the Exchange Act, the Commission is given power to make such investigations as it may, "in its discretion", deem necessary to determine the existence or possibility of a violation. These words clearly indicate that the Commission is to be the sole judge of whether an investigation should or should not be made. But, under Section 20(a) of the Securities Act, the Commission is empowered to investigate "whenever it shall appear to the Commission, either on complaint or otherwise" that there has been or is about to be a violation. Here it is not clear whether the Commission is to be the sole judge of appearances, or whether the statute is intended to grant such power only upon a showing to the satisfaction of a court that the Commission has sufficient

46. Securities Act § 20 (a); Exchange Act § 21 (a).

facts in its possession to warrant reasonable belief that the Act is being violated. If the former interpretation is accepted, the question raised by both Acts is the same, although as will be seen, the answers might well be different for each Act. On the other hand, should the more narrow interpretation control, the situation may be reversed. For the purpose of any such investigation, the Commission is empowered under both Acts to subpoena witnesses, and compel the production of any books and papers which are relevant to the matter under inquiry.[47]

Objection to these investigations on the ground of self-incrimination is foreclosed by the grant of immunity to all persons who are compelled to testify or produce documentary evidence in any proceeding instituted by the Commission.[24] While the grant of immunity does not extend to corporations, it will be recalled that such is not necessary, since they are not accorded the privilege against self-incrimination.[22] The necessary effect of these facts is that an individual who is called upon to testify or produce his personal books and papers in a proceeding to determine whether he has violated either Act, cannot thereafter be criminally prosecuted thereunder for or on account of any matter concerning which he is compelled to testify or produce evidence, if he asserts his privilege against self-incrimination at the proceeding. However, any violations which are uncovered may be enjoined in a suit instituted by the Commission, on the basis of the information obtained at the hearing.[48] Moreover, these illicit activities possibly may be suppressed by casting the light of unfavorable publicity upon them. Corporations, of course, upon the basis of the evidence gained at the Commission's proceeding may be subject to fine for violations of the Act, or may be enjoined from continuing the illegal practices. Moreover, officers of such corporations may likewise be criminally prosecuted upon the basis of evidence derived from the corporate books and papers.[49]

Assuming that under both Acts the Commission is given full discretion as to when an investigation is needed, then since the subpoena duces tecum provides

47. Securities Act § 19 (b); Exchange Act § 21 (b). Both Acts further provide that the Commission may either require or permit any person to file with it a statement in writing, under oath or otherwise, as the Commission shall determine, as to all facts and circumstances concerning the matter to be investigated. Securities Act § 20 (a); Exchange Act § 21 (a).

48. The immunity granted by both Acts is only against a criminal penalty or forfeiture, for or on account of any evidence produced under compulsion at a proceeding instituted by the Commission; it does not extend to civil suits. Securities Act § 22 (c); Exchange Act § 21 (d). A suit to enjoin a violation of either Act would be a civil proceeding. Hence evidence gained by the Commission at one of its investigations might be used in a suit by it to enjoin any violation of either Act. Securities Act § 20 (b); Exchange Act § 21 (e). That the facts which are protected from disclosure by the Fifth Amendment are only those which involve a criminal liability or forfeiture, and not a civil liability, see 4 WIGMORE, EVIDENCE § 2254. Cf. Camden County Beverage Co. v. Blair, 46 F. (2d) 648 (D. N. J. 1930).

49. An officer of a corporation may not refuse to produce the corporate books and papers in a proceeding to determine whether there have been statutory violation by either the corporation or its officers on the ground that such would tend to incriminate him. Wilson v. United States, 221 U. S. 361 (1911); Dreier v. United States, 221 U. S. 394 (1911); Wheeler v. United States, 226 U. S. 478 (1913).

the sole means available to the Commission under these investigations for examining books and papers, objection on the ground of the Fourth Amendment, prohibiting unreasonable searches and seizures, must take the form of objection to broad and indefinite subpoenas.[50] Where a complaint has been lodged with the Commission charging a definite violation of either Act, and the investigation ensuing thereon is focused upon a particular matter, a subpoena for the production of such books and papers as are relevant to that matter would clearly not be so broad and indefinite as to constitute an unreasonable search and seizure.[51] But an investigation undertaken to determine whether either Act has been violated, or is about to be violated, without a complaint having been filed with the Commission, and without its definitely charging a violation of either Act, may take on a wider range. The exact limits of an investigation in such a case are not so readily determinable.

Nevertheless, such investigations do not necessarily violate the Fourth Amendment. The question again is one of reasonableness. Under the Interstate Commerce Act, the Interstate Commerce Commission is authorized to conduct an investigation upon its own motion and without a complaint charging a violation of the Act, in any matter relating to the enforcement of the Act.[52] And the question of reasonableness has been resolved in favor of the constitutionality of such investigation.[53] The justification is that the business of common carriers is "affected with a public interest." That reason may also be used to hold similar investigations by the Securities and Exchange Commission to be reasonable, certainly as to investigations under the authority of the Exchange Act, for Congress has found that the transactions regulated by that Act are "affected with a public interest,"[54] and the finding can hardly be said to be unreasonable. And, as to investigations under the Securities Act, while Congress has not found the matters thereunder similarly to be affected with a public interest, the fact that

50. The rule of the *Boyd Case, supra* note 37, making a subpoena duces tecum an unreasonable search and seizure if the purpose of such is to compel a person to give evidence against himself in a criminal proceeding is inapplicable, for the reason that the statutory immunity granted against prosecution for or on account of any evidence produced at a proceeding of the Commission negates any such purpose, and renders impossible any prosecution on account of the evidence produced.

51. The federal courts have never interfered with investigations pending before the Federal Trade Commission to determine whether any person or corporation is engaging in unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, where such investigations have been made upon complaint lodged with it, or drawn by it, charging violation of the act. Federal Trade Commission v. Nulomoline Co., 254 Fed. 988 (C. C. A. 2d, 1918); T. C. Hurst and Son v. Federal Trade Commission, 268 Fed. 874 (E. D. Va. 1920); Chamber of Commerce of Minneapolis v. Federal Trade Commission, 280 Fed. 45 (C. C. A. 8th, 1922); Royal Baking Powder Co. v. Federal Trade Commission, 32 F. (2d) 966 (App. D. C. 1929). See MCFARLAND, JUDICIAL CONTROL OF THE FEDERAL TRADE COMMISSION AND INTERSTATE COMMERCE COMMISSION, 1920-1930 (1933) 47, 92; Mechem, *Fishing Expeditions by Commissions* (1924) 22 MICH. L. REV. 765, 775.

52. 41 STAT. 484 (1920), 49 U. S. C. A. § 13 (1929).

53. Smith v. Interstate Commerce Comm., 245 U. S. 33 (1917); United States v. New York Central Rr. Co., 272 U. S. 457, 462 (1926).

54. Exchange Act § 2.

it has imposed the regulation can be said to indicate that it believes that the sale of securities through the channels of interstate commerce is so affected.

Furthermore, the question of reasonableness may be resolved in favor of upholding the statutory authorization to the Securities and Exchange Commission to conduct such investigations, by presuming that the statute authorized the Commission to make investigations in "good faith",[55] and of only such matters as are related to both Acts. Since the Commission is legally powerless to compel obedience to a subpoena duces tecum without the aid of a court of law, any person investigated who might deem the demands of the Commission to be unreasonable, may have the question of their validity raised in court before his compliance is compelled. In such a case the court would determine whether or not the Commission has acted in "good faith", which would in turn involve a determination of the subordinate isssues of whether the subpoena duces tecum is for only such books and papers as are relevant to matters which might constitute a violation of the Acts,[56] and suitably specifies the books and papers demanded. Hence, arbitrary and unwarranted investigations are safeguarded against. This line of reasoning was adopted in a New York case[57] to uphold the constitutionality of the state blue sky law which empowered the attorney general to conduct an investigation in any case to determine whether the Act had been violated, without a complaint having been filed with him, or drawn by him, definitely charging a violation.[58] No reason is apparent why the same reasoning might not also be used to sustain the constitutionality of the Sections of the Securities and Securities Exchange Acts under consideration.[59] Should the Courts choose, however, to permit full powers of investigation only in respect to a business "affected with a public interest", and confine its finding on the latter issue to the findings expressed by Congress,[54] it would follow that the power granted under Section 20(a) of the Securities Act was too broad to be upheld.

Yet, even in the face of such a course by the courts, there is the alternative of

55. Cf. Culver v. Smith, 74 S. W. (2d) 754, 758 (Tex. 1934).

56. Cf. Carlisle v. Bennett, 275 N. Y. Supp. 152 (Sup. Ct. 1934).

57. Dunham v. Ottinger, 243 N. Y. 423, 154 N. E. 298 (1926), appeal to United States Supreme Court dismissed for want of a substantial federal question, 276 U. S. 592 (1928). Cf. Northwest Bancorporation v. Benson, 6 F. Supp. 704 (D. Minn. 1934).

58. N. Y. GEN. BUS. LAW (Cahill, 1921) art. 23A, § 352. Numerous state blue sky laws authorize security commissions to conduct examinations to determine whether the state law has been violated, or is about to be violated, whenever they deem it necessary to do so. See, e. g., ALA. CODE ANN. (Michie, 1928) § 9892; CAL. GEN. LAWS (Deering, 1931) Act. 3814, § 23; CONN. GEN. STAT. (Supp. 1933) § 1066 b; GA. CODE ANN. (Michie, 1926) § 2928 (71).

59. Actually, the instances in which the Commission may institute an investigation without a complaint having been filed with it, or drawn by it on the basis of facts in its possession may be few. The Commission has the power to examine the books, records, papers, and memoranda of national securities exchanges, members thereof, brokers, and dealers at any time (see *infra* page 833), and since virtually every transaction consummated upon or in connection with any national securities exchange would be revealed thereby, violations of the Securities Exchange Act, at least, would be shown. The information gained thereby would suffice to draw up a complaint making a definite charge of violation of the Act.

construing the Securities Act as giving the Commission power to investigate only when it could show that it had reason to believe, upon the basis of facts in its possession, that the Act was being violated. Under such a limitation, the power seems clearly valid, by analogy to the cases wherein a complaint has been filed with the Commission.[51]

A further means of determining whether the provisions of the Securities Exchange Act have been, or are about to be, violated is provided in Section 17 of that Act. The latter Section prescribes that every national securities exchange, every member thereof, and every broker or dealer transacting business in securities through such member, or creating an over-the-counter market, "make, keep, and preserve for such periods, such accounts, correspondence, memoranda, papers, books, and other records, and make such reports as the Commission by rules and regulations may prescribe," and that such papers and records be subject at any time to "reasonable periodic, special, or other examinations" by examiners of the Commission. It is clear by the terms of the Act that this latter section is applicable only to national securities exchanges, members thereof, brokers, and dealers, and apparently only such books, accounts, correspondence, memoranda and other papers as the Commission shall require to be made and kept are subject to examination under this section. However, such books and papers would appear to be subject to examination at any time, and even though the Commission had not charged, or even suspected that there had been, a violation of any provision of the Act. Likewise, reports may be required at any time the Commission may deem it necessary to call for such.

It is unquestioned that the duty of keeping such books and records as the Commission shall prescribe, the making of periodic and special reports, and the submission to periodic and special examinations of such books and records as are required to be kept, are burdensome.[60] Nevertheless, these statutory requirements appear to be constitutionally unobjectionable. State statutes requiring the keeping of books and papers by certain businesses subject to state regulation, and authorizing the inspection thereof at any time by governmental officials, have uniformly been upheld.[61] Federal statutes imposing similar duties upon certain businesses have likewise been sustained. For example, a statutory authorization to the Interstate Commerce Commission to require periodic or special reports,[62] to prescribe what accounts and records shall be kept by common carriers,[63] and to examine such accounts and records whenever it deems

60. Cf. FREUND, ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY (1928) 182.

61. City of St. Joseph v. Levin, 128 Mo. 588, 31 S. W. 101 (1895); Park v. Cotton Mills, 75 S. C. 560, 56 S. E. 234 (1906); State v. Davis, 68 W. Va. 142, 69 S. E. 639 (1910); Hughes v. State, 67 Tex. Crim. Rep. 333, 149 S. W. 173 (1912); City of St. Louis v. Baskowitz, 273 Mo. 543, 201 S. W. 870 (1918); Reaves Warehouse Corp. v. Commonwealth, 141 Va. 194, 126 S. E. 87 (1925); State v. Legora, 162 Tenn. 122, 34 S. W. (2d) 1056 (1931); Karr v. Baldwin, 57 F. (2d) 252 (N. D. Tex. 1932). But see Sullivan v. Brawner, 237 Ky. 730, 36 S. W. (2d) 364 (1931).

62. Baltimore and Ohio Rr. Co. v. Interstate Commerce Commission, 221 U. S. 612 (1911).

63. Interstate Commerce Commission v. Goodrich Transit Co., 224 U. S. 194 (1912); see Norfolk and Western Ry. Co. v. United States, 287 U. S. 134, 138 (1932). Under the Perishable Agricultural Commodities Act, commission merchants, dealers, and brokers

it necessary to do so,[64] is settled to be valid. Recently, the duty imposed upon oil producers and refiners, by executive order under the N I R A,[65] to render reports, to keep adequate books and records of all transactions in the production and transportation of petroleum, and to permit examination thereof at any time by government officials was upheld despite the objection that the requirement of reports and inspection of books and records constituted unreasonable searches and seizures.[66] The basis of the court's holding was that the making of reports and the inspection of books and records were a necessary means of effectuating the purpose of the oil code.

More directly in point is a recent case[67] decided by a federal circuit court of appeals involving the requirement under the Grain Futures Act[68] that brokers of the Chicago Board of Trade submit reports and permit an inspection of their books and papers by agents of the Department of Agriculture. Objection was made that the requirement of reports and inspection of books and papers when the brokers had not been charged with, or even suspected of having violated the Act, constituted unreasonable searches and seizures. In overruling the objection, and thereby sustaining the statutory provision, the court held that the business of dealing in grain futures was one which was affected with the public interest, and in such a case, where reports and an inspection of books and papers were a reasonably necessary means of accomplishing the purpose of the Act, the Fourth Amendment had no application. This case provides direct precedent for the sustenance of the Section under consideration. In the Securities Exchange Act, Congress has declared that transactions in securities as conducted on securities exchanges and over-the-counter markets, are "affected with a public interest."[54] This finding should suffice to place the inspection provisions of this statute within the same category as those of the Grain Futures Act. Furthermore, as in the case of the latter statute, it may be shown that those provisions in the Securities Exchange Act are a necessary means of enabling the Commission properly to discharge its statutory duties. If the Commission is to prevent manipulations, it must have ready access to information which will disclose manipulations when fluctuations in securities indicate that they might be in

in perishable commodities are required to keep such books, records, and memoranda as fully disclose their business dealings. 46 STAT. 535 (1930), 7 U. S. C. A. § 559 (1934). Under the Federal Water Power Act, the Federal Power Commission may require licensed water power companies to keep designated books, papers, and accounts. 41 STAT. 1353 (1921), 16 U. S. C. A. § 797 (1926).

64. United States v. Clyde Steamship Co., 36 F. (2d) 691 (C. C. A. 2d, 1929), cert. denied 281 U. S. 744 (1930). Federal reserve banks and members thereof are subject to examination of their accounts, books, and affairs by government examiners at the discretion of the Federal Reserve Board. 38 STAT. 261 (1913), 12 U. S. C. A. § 248a (1926). National banks may be examined at least twice a year. 38 STAT. 271 (1913), 12 U. S. C. A. § 481 (1926). The Federal Power Commission may examine at any time the books, papers and records of licensees. 41 STAT. 1353 (1921), 16 U. S. C. A. § 797 (1926).

65. See MAYERS, A HANDBOOK OF N. R. A. (2d ed. 1934) 386.

66. Ryan v. Amazon Petroleum Corp., 71 F. (2d) 1 (C. C. A. 5th, 1934).

67. Bartlett Frazier Co. v. Hyde, 65 F. (2d) 350 (C. C. A. 7th, 1933), cert. denied 290 U. S. 654 (1933). See Langeluttig, *Constitutional Limitations on Administrative Power of Investigation* (1933) 28 ILL. L. REV. 508.

68. 42 STAT. 1003 (1922), 7 U. S. C. A. § 12 (1926).

progress. The books and papers of the exchanges, members thereof, dealers, and brokers would disclose such; and only if the Commission were able immediately to see them, could it prevent manipulations before they had run their destructive course. Access to such books and papers, moreover, would reveal infractions of the law by outside traders as well as members of exchanges, brokers, and dealers. That fact, of itself, would provide a powerful deterrent to violations of the Act.

The fact that infractions of the statute by national securities exchanges, members thereof, brokers, dealers, or even third parties may be revealed in the reports which are required, or in the inspection of books and papers under Section 17, and may thereby tend to subject them to criminal liability, does not make the Section defective as contrary to the self-incrimination provision of the Fifth Amendment. The fact that third parties may be incriminated by evidence disclosed in an inspection of books and papers, or in a report, provides no objection to such inspection or report; for the privilege against self-incrimination is personal and extends only to the person who is compelled to produce evidence against himself.[69] As to members of national securities exchanges, brokers and dealers, it may be held, following numerous state decisions, that a crime disclosed in books and papers required by law to be kept, does not privilege the person keeping such books and papers to withhold them from inspection on the ground that they would tend to incriminate him.[70] This rule has been enunciated in the interests of assuring an efficient administration of regulatory statutes, and that same reason would render it applicable to the Section under consideration. The rationale indulged to justify this holding is that the state requires the books and records to be kept but does not require the person to commit a crime, and if in the course of committing a crime he makes entries, the criminality of his entries exists by his own choice, and not by compulsion. Furthermore, the duty imposed by the law to make entries and keep books is anterior to and independent of the crime.[71] This line of reasoning would likewise be applicable to the making of reports where the information demanded is known to the person making the report previous to the occurrence of the illegal act, the disclosure of which would incriminate him.[72] But where special reports are demanded, in which information is sought that was not theretofore required to be kept on record, as they may be under Section 17 of the Securities Exchange Act, that reasoning would have no application. In that case, consistently with the Fifth Amendment, only such information as does not incriminate the person submitting it could be required in the special reports. Hence, under these circumstances, while a broker, dealer, or member of an exchange may be required to submit reports under this Section, when some of the information sought con-

69. See Corwin, *The Supreme Court Construction of the Self-incrimination Clause* (1930) 29 MICH. L. REV. 1, 16, and cases there cited.

70. City of St. Joseph v. Levin, 128 Mo. 588, 31 S. W. 101 (1895); State v. Davis, 68 W. Va. 142, 69 S. E. 639 (1910); Fougera and Co. v. City of New York, 224 N. Y. 269, 120 N. E. 642 (1918); State v. Legora, 162 Tenn. 122, 34 S. W. (2d) 1056 (1931).

71. See 4 WIGMORE, EVIDENCE § 2259c.

72. Launder v. Chicago, 111 Ill. 291 (1884); State v. Smith, 74 Iowa 580, 38 N. W. 492 (1888); People v. Henwood, 123 Mich. 317, 82 N. W. 70 (1900); Sanning v. City of Cincinnati, 81 Ohio St. 142, 90 N. E. 125 (1909); Aston v. State, 27 Tex. App. 574, 11 S. W. 637 (1889).

cerns a matter which might subject him to a criminal penalty or forfeiture, he may be privileged to withhold it by making due objection thereto in his report.[73]

III

Investigations whose end is the accumulation of information to serve as a basis for an exercise of the rule-making powers of the Commission, and for the making of recommendations for further legislation to Congress, provide the final occasion for the exercise of the powers of investigation conferred upon the Commission. Both the Securities Act and the Securities Exchange Act empower the Commission to make rules and regulations relative to particular matters stipulated in those Acts,[74] and such other rules and regulations as are necessary to carry out the provisions of those Acts.[75] The Securities Act directs the Commission to make a study of protective and reorganization committees,[76] while the Securities Exchange Act directs it to make studies of the feasibility of segregating the functions of dealers and brokers,[77] of trading in unlisted securities,[78] and of the rules by which national securities exchanges regulate the conduct of their members.[79] The results of these studies are to be reported to Congress with recommendations for further legislation.

By Section 21 of the Securities Exchange Act, the Commission is explicitly authorized to investigate any facts, conditions, practices, or matters which it may deem necessary or proper to aid it in prescribing rules and regulations under the Act, or in securing information to provide a basis for recommending further legislation concerning matters to which the Act relates. Immediately following the authorization to conduct investigations in those situations, the Act provides that "for the purpose of any such investigation the Commission or any officer designated by it may subpoena witnesses and require the production of any books, papers, correspondence, memoranda, and other records which the commission deems relevant to the inquiry." From these statutory provisions, the conclusion seems inescapable that Congress, at least under the Securities Exchange Act, intended to grant powers of examination to the Commission in connection with fact-finding expeditions in these situations.

There is no express statutory authorization for the exercise of the powers of examination in these situations under the Securities Act. If such exists, it

73. Under the federal income tax laws, a taxpayer must make a return of his net income, but if the form of the return provides for answers which the taxpayer is privileged from making by reason of the self-incrimination clause, he may object to answering the particular incriminating matters in his return; however, he cannot, on that ground, refuse to make any return at all. Cf. United States v. Sullivan, 274 U. S. 259 (1927); W. C. Peacock and Co. v. Pratt, 121 Fed. 772 (C. C. A. 9th, 1903).

74. Securities Act §§ 3 (b), 7, 10 (b) (2) (3) (4), 10 (d); Exchange Act §§ 3 (a) (12), 3 (b), 9 (a) (6), 9 (b), 10 (a), 10 (b), 11 (a), 11 (b), 12 (b) (1), 12 (d), 12 (e), 13 (a), 13 (b), 14 (a), 15, 17, 19 (b).

75. Securities Act § 19 (a); Exchange Act § 23 (a).

76. Securities Act § 211.

77. Exchange Act § 11 (e).

78. Exchange Act § 12 (f).

79. Exchange Act § 19 (c).

must be inferred from Section 19 of that Act, which empowers the Commission, or any officer designated by it, to subpoena witnesses and to compel the production of books and papers for the purposes of all investigations which "are necessary and proper for the enforcement of this title." A determination of whether these powers may be used in fact-finding investigations of the type under consideration hinges upon the construction which is given the word "enforcement." To the end of denying the Commission the powers of examination under the Securities Act in connection with its rule-making powers, or when it is investigating protective and reorganization committees as directed by the Act, it is arguable that the use of the word "enforcement" contemplates the exertion of a type of compulsion by the Commission over persons who are regulated by the Act, and does not apply to duties which are imposed upon the Commission, since it cannot compel itself to do something. Furthermore, if Congress had intended that the Commission should use the powers of examination in these cases, it would have expressly made provision for such, as it has done in the Securities Exchange Act. However, such a narrow interpretation of the Section is unwarranted in view of the expressed statutory direction to investigate protective committees for the purpose of making recommendations to Congress, and the statutory authorization to make such rules and regulations as are necessary to carry out the provisions of the Act. A comprehensive and accurate study of protective committees was undoubtedly within the contemplation of Congress when it directed the study. Such would be virtually impossible without the power to subpoena witnesses and compel the production of books and papers. And an intelligent exercise of the rule-making power of the Commission necessarily presupposes a knowledge of all matters concerning which rules are to be prescribed, which the Commission could hardly gain were it dependent upon voluntary information. Furthermore, it is unreasonable to attach to the word "enforcement" a meaning which would lead to the supposition that Congress conferred examining powers upon the commission in respect to its rule-making powers and study of stipulated subjects in the Securities Exchange Act, and withheld those powers from the same Commission in regard to similar matters under the Securities Act.

Again, because of the immunity granted to individuals, and because of the inapplicability of the Fifth Amendment to corporations, constitutional objection to these powers on the ground of self-incrimination is obviated, and the only question is the reasonableness of these provisions in the light of the Fourth Amendment.

It may be seen that in this field of general fact-finding investigations the courts have drawn a distinction, as to their permissibility, between so-called private business, and business which is affected with the public interest.[80] Thus, the federal courts have uniformly denied the Federal Trade Commission the power to compel private corporations to submit to an examination of their books and papers in a general fact-finding investigation.[81] While the reason advanced for this denial has been that the statute did not authorize the exertion

80. See Watkins, *An Appraisal of the Work of the Federal Trade Commission* (1932) 32 COL. L. REV. 272, 280.

81. Federal Trade Comm. v. American Tobacco Co., 264 U. S. 298 (1924); United

of legal process to compel obedience to the demands of the Commission in such a situation, there are unmistakable dicta in the cases to the effect that the Fourth Amendment would present a barrier to such investigations of private corporations, even though made under explicit authorization of Congress.[82] Apparently, therefore, the inconvenience and hardship to private business is deemed to be such as to outweigh any advantages derived by the public from such investigations, and hence such investigations are unreasonable within the meaning of the Fourth Amendment. On the other hand, reasonableness apparently draws no bounds to investigations by the Interstate Commerce Commission of the common carriers, which are said to be affected with the public interest, and the Commission may generally investigate anything in that industry.[83]

One test of reasonableness of such investigations apparently being whether the business investigated is affected with the public interest, there is strong reason for upholding fact-finding investigations by the Securities Exchange Commission. It has previously been pointed out that the regulations which Congress has imposed upon the sale of securities in interstate commerce, and upon the national securities exchanges, are indicative of the fact that the business of selling and purchasing securities to the public is one which is affected with the public interest. The abuses which surrounded the business of dealing in securities, which necessitated the corrective legislation, bear ample testimony to that fact.

But there are other and more cogent reasons for holding that such investigations are not unreasonable within the meaning of the Fourth Amendment. When the Commission is engaged in gathering information for the purpose of recommending legislation to Congress relative to the purchase and sale of securities, there is a strong analogy between such investigations and investigations by a subcommittee of Congress.[84] Since the same function is served

States v. Basic Products Co., 260 Fed. 472 (W. D. Pa. 1919); Federal Trade Comm. v. Lorillard Co., 283 Fed. 999 (S. D. N. Y. 1922); Federal Trade Comm. v. Baltimore Grain Co., 284 Fed. 886 (D. Md. 1922), aff'd 267 U. S. 586 (1924); Federal Trade Comm. v. Smith, 34 F. (2d) 323 (S. D. N. Y. 1929). However, the Federal Trade Commission may not be enjoined in an investigation, in view of the fact that the legal remedy of the complainant is adequate. Federal Trade Comm. v. Claire Furnace Co., 274 U. S. 160 (1927); Federal Trade Comm. v. Maynard Coal Co., 22 F. (2d) 873 (App. D. C. 1927); Federal Trade Comm. v. Miller's National Federation, 47 F. (2d) 428 (App. D. C. 1931). See Handler, *supra* note 30; Lilienthal, *supra* note 43. The Secretary of Agriculture has been denied the power to inspect all of the books and records of the packers under the Packers and Stockyards Act, 42 STAT. 168 (1921), 7 U. S. C. A. § 222 (1926), in order to determine whether the records and books are being kept properly. Cudahy Packing Co. v. United States, 15 F. (2d) 133 (C. C. A. 7th, 1926).

82. Federal Trade Comm. v. American Tobacco Co., 264 U. S. 298, 307 (1924); United States v. Basic Products Co., 260 Fed. 472, 482 (W. D. Pa. 1919); Federal Trade Comm. v. Baltimore Grain Co., 284 Fed. 886, 890 (D. Md. 1922).

83. Smith v. Interstate Commerce Comm., 245 U. S. 33 (1917). This case appears, in effect, to have overruled Harriman v. Interstate Commerce Comm., 211 U. S. 407 (1908). Cf. Handler, *supra* note 30, at 932.

84. Cf. Federal Trade Comm. v. Miller's National Federation, 47 F. (2d) 428 (App. D. C. 1931).

by the Commission and a subcommittee of Congress in such a case, no reason appears why they should not have the same powers. It is now settled that a witness may be compelled to testify and produce books and papers in his possession before a subcommittee of Congress which is investigating a matter upon which Congress may legislate.[85] It would not seem unreasonable to grant those same powers to the Commission. Since a subcommittee of Congress can demand only such information as is relative to a matter upon which Congress can legislate, the bounds of reasonableness to investigations by the Commission would be that the information demanded be relative to a matter relating to the purchase and sale of securities in interstate commerce, or upon the national securities exchanges, upon which Congress may legislate.[86]

Investigations by the Commission to gather data upon the basis of which the Commission may itself prescribe rules and regulations present a situation analogous to investigations by Congress to obtain information which will enable it intelligently to exercise its legislative duties. In such a case the Commission is not acting as a type of congressional committee gathering information for the purpose of recommending legislation to Congress, but is acting precisely as Congress would, pursuant to the passage of legislation. The analogy between Congress and the Commission in such a case is a close one, for there is little doubt that the Commission, when making rules and regulations, is engaged in a legislative function. That that function may be denominated "quasi-legislative" in no way detracts from the inherent legislative character of that function. By way of comparison, it may be pointed out as well settled that an administrative body, when engaged in quasi-judicial duties, may subpoena witnesses and compel the production of books and papers relative to the inquiry.[87] Apparently this concession has been made by the courts because of the appreciation of the similarity between the administrative function in such a case and the purely judicial function. Since courts have always been able to subpoena witnesses and compel the production of documentary evidence, it seemed reasonable to accord the same powers to a commission when acting quasi-judicially. Carrying that same line of reasoning over to the situation where a Commission acts in a quasi-legislative capacity, it would seem that since Congress may subpoena witnesses and compel the production of books and records in aid of its legislative powers,[85] a commission acting in a manner similar to the legislature should likewise be able to exercise those powers.

85. Jurney v. MacCracken, 55 Sup. Ct. 375, 376 (1935). Other decisions have settled that a person could be compelled to appear as a witness to give oral testimony before a subcommittee of Congress, or Congress itself. In re Chapman, 166 U. S. 661 (1897); McGrain v. Daugherty, 273 U. S. 135 (1927); Sinclair v. United States, 279 U. S. 263 (1929). See generally, Landis, *Constitutional Limitations on the Congressional Power of Investigation* (1926) 40 HARV. L. REV. 153; Herwitz and Mulligan, *The Legislative Investigating Committee* (1933) 33 COL. L. REV. 4.

86. Attack may therefore be made upon an investigation of the Securities Exchange Commission for the purpose of recommending legislation to Congress, upon the ground that the subject matter sought to be investigated was not within the power of Congress to legislate upon. Cf. Kilbourn v. Thompson, 103 U. S. 168 (1880); see Herwitz and Mulligan, *supra* note 85, at 8.

87. Interstate Commerce Comm. v. Brimson, 154 U. S. 447 (1894); Interstate Commerce Comm. v. Baird, 194 U. S. 25 (1904); see Lilienthal, *supra* note 43, at 712.

But such investigations by the Commission may not take on an unlimited scope. The investigatory powers of Congress have been circumscribed by the rule of reasonableness under the Fourth Amendment, and the Commission, when making rules and regulations, must similarly be limited. Neither House of Congress is invested with a "general" power to inquire into private affairs and compel disclosures; they may conduct inquiries only into such matters as are relative to a subject upon which Congress may legislate.[88] Applying that rule to the Commission, it could conduct investigations, pursuant to its rule-making powers, of only matters upon which it has the power to prescribe rules and regulations.[89] Those matters are definitely specified in both Acts.[74] When the information demanded is relevant to such a matter, there is hardly any room for objection that the investigation is unreasonable.

IV

The Securities and Exchange Commission, of course, may resort to the courts to compel a submission to proper investigations by it.[90] But this is not the sole means available to it. The Commission may virtually compel issuers of securities under the Securities Act to permit examinations of their books and papers in order to check the accuracy of information in the registration statement, by the power granted it to issue a stop order against the registration statement if the issuer or underwriter shall fail to cooperate, or shall obstruct the making of an examination.[91] Under the Securities Exchange Act, the Commission does not possess a power to issue a stop order suspending the effectiveness of a registration upon a national securities exchange. Nevertheless, every leading securities exchange at the present time retains, as a condition of extending the listing privilege to any corporation, the power summarily to strike its securities off the exchange.[92] And it is not inconceivable that many corporations will be induced to permit examination of their books and papers to check the accuracy of statements in the application statement or reports, by the fear that the Commission may exert pressure upon exchange officials to exercise that power. Moreover, the threat of unfavorable publicity for those who refuse to permit examination may prove a powerful incentive to many persons and corporations to permit them. This is very likely to be

88. McGrain v. Daugherty, 273 U. S. 135, 173 (1927).

89. Investigations undertaken by the Commission in order to gain information upon the basis of which it may issue rules and regulations, may not only be attacked on the ground that the Commission does not have the statutory power to prescribe the particular rules and regulations, but also on the grounds that such rules or regulations are beyond the power of the Commission to make because they violate an expressed provision of the Constitution, or because Congress could not confer upon an administrative tribunal the power to make those rules and regulations, in view of the prohibition against the delegation of legislative powers. Cf. Panama Refining Co. v. Ryan, 55 Sup. Ct. 241 (1935).

90. Securities Act §§ 20 (c), 22 (b); Exchange Act §§ 21 (c), 21 (f).

91. Securities Act § 9 (d).

92. See, e.g., 135 C C H Stock Exchange Regulation Service 8005 (Baltimore Stock Exchange), 8018 (Boston Stock Exchange), 8027 (Chicago Board of Trade), 8080 (Chicago Stock Exchange), 8232 (New York Stock Exchange), 8268 (Philadelphia Stock Exchange).

the case with active protective committees, which are now being investigated under the Securities Act for the purpose of recommending legislation to Congress, since they must acquire and keep the favor of security holders.

These latter powers may enable the Commission in many cases to secure what information is desired without the aid of any court. Its investigatory activity for a while may therefore proceed without incurring active protest. Ultimately, however, its powers will be questioned, and the legality thereof then put to test. The Commission is a new agency, administering a new type of federal regulatory legislation. The success or failure of that regulation is largely dependent upon an able discharge of the statutory duties imposed upon the Commission. An efficient execution of those duties necessitates the use of the investigatory powers which Congress has granted it. Appeciative of this fact, the courts are unlikely to hold that the grant of these powers is unconstitutional. Neverthless, they will hardly hesitate to interfere with what is deemed to be an abuse of those powers.[93] This suggests that the Commission should proceed carefully and moderately with its investigatory powers. That would not in any way impair its efficiency, and would assure it greater co-operation by the courts, which is essential to its ultimate prestige and success.

STATUTORY RIGHTS OF PRETERMITTED GRANDCHILDREN

FORMERLY, the unqualified privilege on the part of an ancestor to disinherit his heirs could be exercised by the simple expedient of making a testamentary gift of his estate to other persons. The only limitation which the common law imposed upon this privilege was found in the doctrine that a subsequent marriage and the birth of issue was a sufficient alteration of circumstances to presume an intent on testator's part to revoke the will. The subsequent birth of a child alone, however, was not considered sufficient.[1]

The legislatures of forty-six of the United States[2] and of a number of foreign jurisdictions have passed statutes qualifying in various ways either the privilege to disinherit or the manner in which disinheritance may be accomplished. In some foreign jurisdictions it has been provided that a child shall have a certain indefeasible share in his parent's estate,[3] and in others, that, if adequate provision for the maintenance of a child has not been made, the court in

93. Already one court has held that agents of the Commission exceeded their powers in conducting a disorderly investigation of a brokerage firm, to determine if it was violating the Securities Exchange Act. United States v. Knight, oral opinion, reported in 135 C. C. H. Stock Exchange Regulation Service, 6553.

1. 1 SCHOULER, WILLS, EXECUTORS AND ADMINISTRATORS (6th ed. 1923) §§ 642, 643. In the United States the common law is unsuperseded by statute only in Maryland, Wyoming and the District of Columbia.

2. All except Maryland and Wyoming.

3. See ENCYCLOPEDIA OF THE LAWS OF SCOTLAND, vol. 9, § 303. Compare the Civil Law jurisdictions. GERMAN CIVIL CODE, art. 2303; FRENCH CIVIL CODE, art. 913; LA. CIV. CODE ANN. (Dart, 1932) §§ 1493, 1495, 1705 and 1710.

its discretion shall make such provision out of the testator's estate.[4] These direct limitations on the testamentary power are based on the principle that a parent is under a social duty to provide for his immediate family in such a way that its members shall not become a burden to the state. In the United States, however, the legislatures have not gone so far as to limit the power of testamentary disposition. Instead they have attempted merely to make some provision for the cases in which a testator has unintentionally or accidentally failed to leave an heir some part of his estate. When a will disposes all of a testator's estate to other persons, it is, of course, possible to argue that the express gift of the estate to them is evidence of the testator's intention to disinherit his heirs. Yet in some instances it can as cogently be argued that since a parent would usually provide for his children, his failure to do so has been the result of fortuitous circumstances that defeated rather than carried out the intention of the testator. Thus, when a child is born to the testator after a will has been made, it would, in some cases, seem reasonable to assume that the testator would subsequently desire to change his will to provide for the child. Negligence or unexpected death may prevent the accomplishment of this change until it is too late, and the child may consequently be left without provision for the future. It is also barely possible that a testator may actually forget the existence of one of his children, or may intend to make an intervivos settlement, which is prevented by untimely death. Accordingly, the forty-six legislatures that have acted on the question—of which twenty-four confine themselves to children born after the execution of the will, while the others apply to all children[5]—have in general provided that in the event that a testator should fail to care for or to mention a child in his will, the child shall take the same share of the estate as he would have if his parent had died intestate.[6] The burden of a mistake is thus shifted from the child, whose unintentional disinheritance would be unfortunate, to the testator, whose scheme of disposition may be partially upset[7] by failure to meet the formal statutory requirements for disinheritance. The natural ties of love and affection and the general recognition of a moral, as well as a legal, duty of support on the part of a parent towards a child make such a change acceptable even though the probability that such omissions are generally unintentional seems slight.

4. See NEW SOUTH WALES STAT. (1916), act no. 41, TESTATOR'S FAMILY MAINTENANCE AND GUARDIANSHIP OF INFANTS ACT, § 1; DOM. N. Z. CONS. LAWS (1908) vol. 60, § 33, FAMILY PROBATION ACT; VICTORIA STAT. (1915) no. 2611, § 109, ADMINISTRATION AND PROBATE ACT.

5. For the twenty-four statutes of the first group see notes 8 and 9, *infra*; for the others see note 10, *infra*.

6. For a detailed analysis of the statutes with reference to their bearing upon pretermitted children see Mathews, *Pretermitted Heirs: An Analysis of Statutes* (1929) 29 COL. L. REV. 748. Florida since has adopted a statute, FLA. COMP. GEN. LAWS ANN. (Supp. 1934) § 5477(8). See also King, *The Statutory Status of Pretermitted Heirs* (1933) 13 B. U. L. REV. 672. See also notes 8, 9 and 10, *infra*.

7. The majority of the states provide that the will is only partially revoked and that the share of the pretermitted heir is to be made up by ratable contributions from the legatees. For a summary of the various statutory provisions see Mathews, *supra* note 6, at 753.

The majority of the statutes in this country are not confined to the protection of pretermitted children only, but give some consideration also to grandchildren who are heirs at the time of the testator's death. In eight of the twenty-four[8] states that make provision for only afterborn children, the same provisions apply also to the issue of such deceased children,[9] while in the twenty-two other states the provision for children, regardless of when born, are likewise extended to include the issue of deceased children.[10] A justification for shifting the risk of mistake from these grandchildren to the testator would be that in the normal course of events a grandparent would desire to make specific provision for all of his grandchildren who would inherit in case he died intestate. But actually it is questionable whether the ties are as strong between grandparents and grandchildren as they are between parent and child, and there can scarcely be said to be a moral or legal duty on the grandparent's part to support or to provide for a grandchild. There is, therefore, only a very slender factual basis for the legislative presumption that an omission of a grandchild is accidental. Regardless of the circumstance that the grandchild was born after the will, or that his parent died after the will, there is not the same reason for protecting him as for protecting a child. Only when the testator, in his scheme of disposition, either by means of intervivos or testamentary gifts specifically provided for most of his grandchildren but failed to mention or provide for one or several of them would there be any reasonable ground for the application of such a rule, and such cases can hardly arise very often. The validity of the presumption is also lessened by another common circumstance, that the testator often bequeathes his property to his wife and children, so that in the normal

8. The statutes in the following sixteen states provide for only afterborn children: ALA. CODE ANN. (Michie, 1928) § 10585; ARIZ. REV. CODE ANN. (Struckmeyer, 1928) § 3642; COLO. ANN. STAT. (Mills, 1930) § 7871; CONN. GEN. STAT. (1930) § 4880; DEL. REV. CODE (1915) § 3252; FLA. COMP. GEN. LAWS ANN. (Supp. 1934) § 5477(8); GA. CODE ANN. (Michie, 1926) § 3923; ILL. REV. STAT. ANN. (Smith-Hurd, 1933) c. 39, § 10; IOWA CODE (1931) §11858; KAN. REV. STAT. ANN. (1923) c. 22, § 240, 243; LA. CIV. CODE ANN. (Dart, 1932) art. 1705; N. Y. DEC. EST. LAW (1909) § 26; N. C. CODE ANN. (Michie, 1931) § 4169; PA. STAT. ANN. (Purdon, 1930) tit. 20, § 273; S. C. CODE (Michie, 1932) § 8925; TENN. CODE (Will. Shan. & Harlow, 1932) § 8131. The other eight statutes of the first group are cited in note 9, *infra*.

9. The following statutes provide for afterborn children and their issue: IND. STAT. ANN. (Burns, 1926) §§ 3457, 3458; KY. STAT. (Carroll, 1930) §§ 4847, 4848; MISS. CODE ANN. 1930) §§ 3551, 3552; N. J. COMP. STAT. (1911) p. 5865, §§ 20, 21; OHIO GEN. CODE (Page, Supp. 1935) § 10504-49; TEX. ANN. CIV. STAT. (Vernon, 1925) arts. 8292, 8293; VA. CODE (Michie, 1930) §§ 5242, 5243; W. VA. OFF. CODE (1931) c. 41, art. 4, §§ 1, 2.

10. ARK. DIG. STAT. (Crawford & Moses, 1921) § 10507; CAL. PROB. CODE (Deering, 1931) § 90; IDAHO CODE ANN. (1932) § 14-320; ME. REV. STAT. (1930) c. 88, § 9; MASS. GEN. LAWS (1932) c. 191, § 20; MICH. COMP. LAWS (1929) § 15550; MINN. STAT. (Mason, 1927) § 8745; MO. STAT. ANN. (Vernon, 1932) § 525; MONT. REV. CODE ANN. (Choate, 1921) § 7009; NEB. COMP. STAT. (1929) § 227; NEV. COMP. LAWS (Hillyer, 1930) § 9919; N. H. PUB. LAWS (1925) c. 297, § 10; N. M. STAT. ANN. (Courtright, 1929) § 154-112; N. D. COMP. LAWS ANN. (1913) § 5675; OKLA. STAT. ANN. (Harlow, 1931) § 1570; ORE. CODE ANN. (1930) § 10-508; R. I. GEN. LAWS (1923) c. 298, § 22; S. D. COMP. LAWS (1929) § 636; UTAH REV. STAT. ANN. (1933) § 101-1-32; VT. PUB. LAWS (1934) § 2977; WASH. REV. STAT. ANN. (Remington, 1932) § 1402; WIS. STAT. (1931) § 238.11.

course of events it will benefit the grandchildren and eventualaly be divided among them. In such a case an omission of a grandchild can hardly be presumed to be accidental.

Excluding from consideration the relatively infrequent occurrences of adoption, illegitimacy, and posthumous birth, there are four situations in which questions involving pretermittance of grandchildren may arise. First, both child and grandchild may be born after the execution of the will, the child predeceasing the testator. Secondly, the child may be born before and the grandchild after the execution of the will, the child dying after the making of the will but before the death of the testator. Thirdly, both child and grandchild may be born prior to the execution of the will, the child dying after the making of the will, but before the death of the testator. And finally, both child and grandchild may be born before the date of the will, with the child in this case dying before the execution of the will.

Except in so far as they can be included by judicial ingenuity, grandchildren receive no consideration under the statutes of sixteen of the states in the first group of twenty-four.[8] These sixteen states confine themselves merely to the provision that an afterborn child receives a share unless cared for by the will. It is reasonably evident that under such a statute "afterborn child" is not intended to include an afterborn grandchild.[11] At least one court has, however, advanced a line of reasoning whereby a grandchild may, under some circumstances, benefit by such a statute.[12] There the testator executed his last will in 1902, disposing of all his property to his wife. Subsequently he had three children, one of whom predeceased the testator leaving an infant daughter. Under the New York statute providing that if a testator shall die leaving an afterborn child uncared for by any settlement and unmentioned in the will, the child shall succeed to an intestate share of the estate,[13] the court held that the survivorship of the child was not a necessary requisite to the operation of the statute where the child should leave a descendant capable of taking its parent's share by representation, and that the granddaughter was therefore entitled to a portion of the estate equivalent to that which the deceased child

11. In re Alburger's Estate, 274 Pa. 10, 117 Atl. 450 (1922), in which the claiming grandchild was the posthumous child of the testator's only son, and the will had been executed after the son's death but before the grandchild's birth, held that "child" in this type of act does not refer also to a grandchild.

12. Matter of Horst, 264 N. Y. 236, 190 N. E. 475 (1934); cf. Matter of Schuster, 111 Misc. 534, 181 N. Y. Supp. 500 (1920).

13. "Whenever a testator shall have a child born after the making of a last will, either in the lifetime or after the death of such testator, and shall die leaving such child, so afterborn, unprovided for by any settlement, and neither provided for, nor in any way mentioned in such will, every such child shall succeed to the same portion of such parent's real and personal estate, as would have descended or been distributed to such child, if such parent had died intestate." N. Y. DEC. EST. LAW (1909) § 26. The Connecticut statute, (CONN. GEN. STAT. 1930) § 4880, provides: "If, after the making of a will, . . . a child shall be born to the testator . . . and no provision shall have been made in such will for such contingency," the birth of the child operates as a revocation of the will in toto. On the interpretation of what constitutes a provision for such contingency, see Blake v. Union and New Haven Trust Co., 95 Conn. 194, 110 Atl. 833 (1920).

would have received. This analysis would, of course, be inapplicable where the grandchild was the issue of a child born before the will was made, for the statute applies only to afterborn children; nor would it apply where no children of the testator survived him, for then a grandchild would not take by representation, but by his own right. Under the statutes of the other eight states in the first group,[9] which include also the issue of deceased afterborn children in the favored class, such grandchildren would be more fully protected since under any combination of circumstances they would, if their parent was not provided for, receive an intestate share. Possible ambiguities in the interpretation of these statutes with regard to the rights of grandchildren in certain contingencies are relatively unimportant,[14] for their application is confined to the rare situation in which the birth of two generations of descendants intervenes between the execution of the will and the death of the testator.

In contrast to the first group of statutes, which provide only for afterborn children or their issue, the second group, existing in twenty-four states, has found the omission of grandchildren the source of considerable litigation.[10] The terms of these statutes which attempt to define which heirs shall come within the favored class are not clear. A typical provision is that when a "testator omits to provide in his will for any of his children, or for the issue of any deceased child, . . . such child, or the issue of such child, . . . must receive an intestate share."[15] "Deceased child" in this context could be construed to mean either a child deceased at the time the will was executed, thus requiring a grandchild to be a presumptive heir at the time the will was made, or it could extend to a child deceased at the time of the testator's death, but who had been alive at the time that the will was made. The only court that has passed on this issue held that the child must be dead at the time of the will's execution, thus denying the application of the statute to grandchildren in all but the fourth factual situation.[16] Other courts have, by implication, taken the opposite view.[17] The language of these statutes is sufficiently broad, therefore, to cover a case arising in any one of the four situations in which the rights of pretermitted grandchildren can be litigated.

After it has been determined that a grandchild is within the favored class as defined in the local statute, the next question is whether he has been "omitted." The statutory provisions differ, a number requiring that he be "pro-

14. For example, if provision had been made for the child, would that exclude the grandchild? And must the child have predeceased the testator?

15. OKLA. STAT. ANN. (Harlow, 1931) § 1570.

16. In re Barter's Estate, 86 Cal. 441, 25 Pac. 15 (1890). The testator had expressly excluded his daughter, who was living at the time of the will, but had not mentioned his grandchildren. The court held that the grandchildren were not within the favored class, not being presumptive heirs at the execution of the will.

17. In Tucker v. City of Boston, 35 Mass. 162 (1836), arising under the third situation, the grandchild was held to be a pretermitted heir, indicating that the court construed the statute broadly. The issue, however, was apparently not raised. Wilder v. Thayer, 97 Mass. 439 (1867) and Miller v. Aven, 327 Mo. 20, 34 S. W. (2d) 116 (1930) arose in this fact situation, and although the decision was against the grandchild on other grounds, the courts seem to have taken it for granted that the claimant was within the terms of the statutes.

vided for," and others that he be "named or provided for," or "provided for or mentioned" in order that his claim to an intestate share may be avoided.[0] If the grandchild has not himself been named or mentioned, where that is necessary, and there has been no bequest directly to him, and if any other provisions of the local statute remain unsatisfied, then he is considered "omitted."[18] A further provision in many of the statutes declares that an "omitted" heir may take an intestate share unless it appears that he has been omitted intentionally.[19] Even in some of the states in which this provision does not occur, so that, as a result, the terms of the statute are mandatory as to omitted heirs,[20] the courts have construed their statute in the light of its purpose so as to permit testator's intention to have some weight. The question immediately arises, where estator's intention is relevant, whether extrinsic evidence is admissible to prove it; for otherwise the court must find it in the terms of the will and the surrounding circumstances.[21] Under the six statutes of the mandatory sort, the courts refuse to admit such evidence. On the other hand, under the others, extrinsic evidence is admissible in the states in which the question has been raised, with but one exception.[22] The determination of such issues does not, however, involve any problems peculiar to pretermitted grandchildren.

In many instances the testator provides for or excludes his child, but neglects to mention or provide for that child's issue. Upon the death of the child prior to the testator, the question then arises whether the grandchild's rights, which by the terms of the statutes are independent of his parent's, may be prejudiced by any provision for, or disinheritance of, that parent. It is this problem which has been the source of the greatest confusion in settling the claims of pretermitted grandchildren.

Where a grandparent has actually made a substantial provision for a child it would be normal for him to consider it as provision for that child's family and expect that his grandchildren would derive benefit therefrom. Recognizing this fact, but being restricted often by the terms of the statute, the courts could seize upon the fact that such a gift, in the event of the child's predeceasing the

18. Cf. Branton v. Branton, 23 Ark. 569 (1861); In re Van Wyck's Estate, 185 Cal. 49, 196 Pac. 50 (1928); In re Thomas' Estate, 92 Cal. App. 185, 267 Pac. 897 (1928); Tucker v. City of Boston, 35 Mass. 102 (1836); Roots v. Knox, 107 Ore. 96, 212 Pac. 469 (1923). But cf. Brown v. Brown, 71 Neb. 200, 98 N. W. 618 (1904); Merrill v. Sanborn, 2 N. H. 499 (1822).

19. Of the statutes cited in note 10, *supra,* the following are contingent upon the intention of the testator: California, Idaho, Maine, Massachusetts, Michigan, Minnesota, Montana, Nebraska, Nevada, North Dakota, Oklahoma, Rhode Island, South Dakota, Utah, Vermont and Wisconsin.

20. Of the statutes cited in note 10, *supra,* the following are of the mandatory type: Arkansas, Missouri, New Hampshire, New Mexico, Oregon, and Washington.

21. Under the first group of statutes, when an omitted child's birth occurs after the execution of the will, evidence of extrinsic circumstances would generally be inadmissible to show the intention of the testator. See Bordwell, *The Statute Law of Wills* (1929) 14 IOWA L. REV. 172, 174-177.

22. See Mathews, *supra* note 6, at 773, n. 92. The California statute is peculiar in that it gives a statutory share to an omitted heir "unless it appears from the will that such omission was intentional." CAL. PROB. CODE (Deering 1931) § 90. See Bordwell, *supra* note 21.

testator, goes by operation of the antilapse statutes[23] to his heirs and hold either that the grandchild's receipt of the legacy was a "provision" for the grandchild, or that the testator knew of the effect of the statute, and hence intentionally made no other provision for the grandchild. The grandchild, although he is not a legatee specifically provided for in the will, actually receives a substantial part of the estate of his grandparent, and therefore there is no reason for allowing him an intestate share. Moreover, when the testator makes a substantial gift to a child who he knows is dead at the time, the only possible reason for such a gift would be an intention to provide for the child's family, which would indicate that the omission of the grandchild was intentional.

The testator may, on the other hand, disinherit one or more of his children. This may be effected by means of making a nominal bequest, or by mentioning the name of the child to be excluded, or, under some of the statutes, by an express proviso to that effect. An expression of the testator's intention in this respect, however, gives no very definite clue as to his intention toward that child's family, but it would tend to show that he intended to exclude them. In the states in which the testator's intention is the final test, it would seem reasonable that a court, recognizing that the testator in making a nominal bequest to his son in all probability had intended to exclude the grandchildren, should hold that a receipt by them of the nominal gift made to their parent satisfied the technical formula of the statute.[24] Where the child was dead at the date of the execution of the will and the testator had knowledge of the existence of the child's issue, a nominal gift to the child would seem to be intended to pass to the grandchildren and to exclude them, so that, therefore, they should not take an intestate share.[25] In a case in which, for some reason, the nominal gift to the parent failed to go to the grandchild, the court could reach the same result by holding realistically that the disinheritance of the child was intended as an exclusion of his family as well.[26] A proviso expressly disinheriting a child could be treated similarly; and since a mere mention of his name, although having less evidentiary value of an intent to disinherit the child, has that effect, it should not produce a different result.[27]

23. These statutes prevent a gift to a person who is dead from being void and transfer the gift to the heirs of the legatee. See Mechem, *Some Problems Arising Under Antilapse Statutes* (1933) 19 IOWA L. REV. 1, 13-15.

24. Cf. Lawnick v. Shultz, 325 Mo. 294, 28 S. W. (2d) 658 (1930); Miller v. Aven, 327 Mo. 20, 34 S. W. (2d) 116 (1930).

25. In re Newell's Estate, 78 Utah 463, 5 P. (2d) 230 (1931) (legacy of ten dollars to a son whom testator knew to be deceased was held to raise an inference that he intended to disinherit the omitted grandchild also); cf. Riley v. Collier, 111 Okla. 130, 238 Pac. 491 (1925) (gift of fifty dollars to a child legally deceased, held to raise no inference that testator had in mind grandchildren of whose existence he was conceivably unaware, and hence they were permitted to share.

26. Wilder v. Thayer, 97 Mass. 439 (1867), held that a life annuity for the predeceased child sufficiently indicated the testator's intention to provide for his grandchild, of whose existence he was aware. Two California cases refused to infer an intent to exclude the grandchild. In re Ross' Estate, 140 Cal. 282, 73 Pac. 976 (1930); In re Matthews' Estate, 176 Cal. 576, 169 Pac. 233 (1917) (gift to deceased person held void).

27. In In re Salmon's Estate, 107 Cal. 614, 40 Pac. 1030 (1895), and Myers v. Watson, 234 Mo. 286, 136 S. W. 236 (1911), a mention of the deceased child by a provision for his

In some of the states in which the statutes are mandatory with regard to grandchildren who are not mentioned or provided for in the will, the courts are not expressly permitted to consider the testator's intention unless expressed in the manner the statutes prescribe. It is to be expected, therefore, that they would decide differently from the courts in the former group. Where a nominal gift to a child goes to the grandchildren, however, they are able to uphold the will by adopting the reasoning that the grandchild is technically provided for, and therefore is not pretermitted.[28] Neither a gift to a deceased child, where no lapse statute gave it to the grandchild, nor a mention of the deceased child could be permitted under this type of statute to raise an inference of the testator's intention which would have any weight in the decision unless the court was willing to construe its statute in accordance with the underlying policy that it merely creates a presumption of mistaken omission.[29]

The general protection which these statutes afford to heirs of a testator does not work out equitably or with any reasonable relation to the social values to be derived from such a policy. Actually, it is largely a matter of chance whether an heir who is omitted may recover. If he does, his share has no relation whatsoever to the fact that he may be a minor or an invalid needing support, or that others in his family were cared for by the will. Moreover, as each of the legatees are required by the statutes to contribute ratably to his share, whenever a gift has been made to a person outside the immediate family, the omitted heir takes a disproportionate share, often much larger than that of an heir whom the testator had particular reason to remember in his will. When the omitted heir is a grandchild, such inequalities are intensified.

---

surviving spouse was held not to affect the rights of omitted grandchildren to take as pretermitted heirs. In Rhoton v. Blevin, 99 Cal. 645, 34 Pac. 513 (1893), the court, in order to avoid pretermission, construed a clause excluding all testator's "children" to include grandchildren as well.

28. Lawnick v. Schultz, 325 Mo. 294, 28 S. W. (2d) 658 (1930); Miller v. Aven, 327 Mo. 20, 34 S. W. (2d) 116 (1930) (great-grandchildren). In both cases the heir took a five dollar bequest to the deceased child by reason of the lapse statute.

29. See Guitar v. Gordon, 17 Mo. 408 (1853), in which the court intimated that knowledge of the existence of testator's grandchild and mention of her mother's name in the will indicated that she was in testator's mind and was not pretermitted. The court, however, gave the granddaughter a share in a residuary legacy for all testator's children, in spite of his knowledge of the death of his daughter. In Fugate v. Allen, 119 Mo. App. 183, 95 S. W. 980 (1906), in which the plaintiff bears the double relation of adopted son and grandson of testator and is seeking contribution from his mother and two aunts, who are all alive, it was held that though omitted, the mention of his mother indicated that the testator had not forgotten this plaintiff, following Guitar v. Gordon, *supra*. But cf. Gray v. Parks, 94 Ark. 39, 125 S. W. 1023 (1910), holding for the grandchild where his parent was mentioned and given a nominal gift, under a peculiar statute which requires heirs to be mentioned and is silent concerning the effect of a provision for them.

NATIONAL RECOVERY CODE ASSESSMENTS

THE wholesale governmental regulation of industry created by NIRA[1] necessarily involved a complex administrative organization with enormous attendant expenses which, exclusive of those incurred and assumed directly by the government in its supervisory capacity, have been estimated to aggregate over forty million dollars a year.[2] Yet, curiously enough, the Act itself did not establish the essential agencies and omitted any mention of a method for defraying their necessary expenses. Since the fundamental concept of NRA, formulated in self-imposed Codes of fair competition, was that of industrial democracy in partnership with and under the control of the government, the idea easily developed that details of enforcement and administration should be placed in the hands of bodies chosen by and representative of industry—the code authorities. It seemed only fair that the inevitable expenses of maintaining these code authorities in the performance of their various legitimate regulatory functions provided by the codes should be borne by each member of the industry represented by the authority in proportion to the benefits derived by the member from its activities. In this way there was developed the principle that the costs of code administration, which would necessarily vary with the regulatory needs of each industry, should be met by assessments levied by the code authorities against those falling under their jurisdiction. Thus the earlier codes made payment of such an assessment a condition precedent to the enjoyment of the benefits offered, such as use of the NRA insignia, participation in the election and activities of the code authority, and sharing the advantages of compulsory arbitration provisions.[3] Or under codes which in effect delegated the administrative work to a pre-existing trade association, a member of the industry became entitled to enjoy the benefits offered by the code either upon undertaking membership in the association, to which it was provided that no inequitable restrictions should be attached, or upon paying such proportion of dues, assessments, or other charges as was used to

1. National Industrial Recovery Act, 48 STAT. 195, 15 U. S. C. A. § 701 (1933).

2. NRA Release No. 9957, Feb. 5, 1935.

3. Code of Fair Competition for the Advertising Distributing Trade, art. IV, § 6; All-Metal Insect Screen, art. VI, § 7; Asphalt Shingle and Roofing Manufacturing, art. VI, § 2 (b); Barber Shop, art. VI, § 5; Blouse and Skirt Manufacturing, art. V, § 1 (e); Boiler Manufacturing, art. VIII, § 1; Smelting and Refining of Secondary Metals into Brass and Bronze Alloys in Ingot Form, art. VI, § 5; Can Manufacturers, art. VI, § 3; Carpet and Rug Manufacturing, art. VI, § 4; Chemical Manufacturing, art. VI; Cinders, Ashes and Scavengers, art. VI, § 7; Cotton Garment, art. IX, G; Fur Trapping Contractors, art. IV, § 4; Gas Appliances and Apparatus, art. VII, § 2; Gasoline Pump Manufacturing, art. XI; Infants' and Children's Wear, art. VII, § 5; Laundry and Dry Cleaning Machinery Manufacturing, art. VIII; Machinery and Allied Products, art. VI (d) par. 3; American Match, art VI, § 1 (d); Motor Vehicle Storage and Parking, div. C, § 2; Non-Ferrous Foundry, art. VII (c); Office Equipment Manufacturers, § 18, par. 4; Optical Manufacturing, art. VIII; American Petroleum Equipment, art. III, § 3; Plumbago Crucible, art. VII; Radio Broadcasting, art. VI, § 8; Rayon and Synthetic Yarn Producing, art. VIII, § 4; Shoe Rebuilding, art. VI, § § 4, 6 (j); Stock Exchange Firms, schedule B, § 8; Upholstery and Drapery Textile, art. VI, § § 7, 8; Vitrified Clay Sewer Pipe Manufacturing, art. VI, § 10; Wall Paper Manufacturing, art. XII.

defray the costs of code administration.[4] Under either of these two types of provisions each member of the industry, upon payment of his proportionate share of the expense, became entitled to the benefits offered. Other codes made payment an obligation of all those signing or in any other manner assenting to the particular code.[5] But soon it became evident that considerations of fairness dictated that, since all members of an industry were necessarily deriving benefits from the code regardless of participation, assessments should be made on a compulsory, rather than a voluntary, basis. And so the recent codes and those which have been amended in conformity with a model provision[6] approved by executive order of the President[7] contemplate compulsory

4. Advertising Specialty Manufacturing, art. VI; Cap and Closure, art. IV, § 3 (b); Cement, art. IV, B, § 8; Chemical Manufacturing, art. VI; Coated Abrasives, art. VII, § 3, par. 2; Compressed Air, art. X; Electrical Manufacturing, art. VII; Floor and Wall Clay Tile Manufacturing, art. VI, B, § 9; Glass Container, art. IV, § 2 (b); Heat Exchange, art. X; Knitting, Braiding, and Wire Covering Machine, art. III; Laundry, art. VI, § 4; Machine, Tool and Forging Machinery, art. VI (d); Metal Tank, art. VI (c); Paint, Varnish, and Lacquer Manufacturing, art. X, par. 7; Piano Manufacturing, art. VI, § 1 (d); Pump Manufacturing, art. X; Rubber Manufacturing, art. II, § 5; Rubber Tire Manufacturing, art. II, § 5; Salt Producing, art. 2; Silverware Manufacturing, art. VII, § 3; Toy and Playthings, art. VI, § 3 (b); Umbrella Manufacturing, art. VII, § 4; Valve and Fittings Manufacturing, art. VI, § 1 (2).

5. Asbestos, art. VI, § 1 (h); Cleaning & Dyeing, art. VI, § 3 (i); Fertilizer, art. XI; Fishery, art. VIII, tit. E; Gas Appliances and Apparatus, art. VIII, § 2; Household Goods Storage and Moving, art. VI, § 2 (g); Investment Bankers, art. X, § 13; Lime, art. V, § 2 (b), par. 2; Luggage and Fancy Leather Goods, art. VII, § 1; Malleable Iron, art. IV, § 2; Motion Picture, art. II, § 10 (b); Motor Bus, art. VI, § 2 (g); Newsprint, art. II, § 2; Non-Ferrous Foundry, art. VII (c); Paperboard Manufacturing, art. II, § 3; Paper Making Machine Builders', art. VI, § 5; Paper Stationery and Tablet Manufacturing, art. II, § 5; Refractories, art. III; Special Tool, Die, and Machine Shop, art. VI, § 1 (b); Steel Casting, art. IV, § 2; Stock Exchange Firms, schedule B, § 8; Velvet, art. VI, § 6.

6. "1. It being found necessary, in order to support the administration of this Code and to maintain the standards of fair competition established by this Code and to effectuate the policy of the Act, the Code Authority is authorized, subject to the approval of the Administrator:

"(a) To incur such reasonable obligations as are necessary and proper for the foregoing purposes and to meet such obligations out of funds which may be raised as hereinafter provided and which shall be held in trust for the purposes of the code;

"(b) To submit to the Administrator for his approval, subject to such notice and opportunity to be heard as he may deem necessary, (1) an itemized budget of its estimated expenses for the foregoing purposes, and (2) an equitable basis upon which the funds necessary to support such budget shall be contributed by members of the Industry;

"(c) After such budget and basis of contribution have been approved by the Administrator, to determine and secure equitable contributions as above set forth by all such members of the Industry, and to that end, if necessary, to institute legal proceedings therefor in its own name.

"2. Only members of the Industry complying with the Code and contributing to the expenses of its administration as provided in Section 1 hereof shall be entitled to participate in the selection of the members of the Code Authority or to receive the benefit of its voluntary activities or to make use of any emblem or insignia of the National Recovery Administration."

7. Executive order of April 14, 1934, 2 NRA Rep. 146.

assessments against all members of an industry without regard to assent or equivalent conduct.[8]

8. These code provisions are based on the model quoted in note 6, *supra:* Air Transport, art. VI, § 6 (f); Artificial Flower and Feather, art. VI, § 7 (f); Asphalt and Mastic Tile, art. VI, § 1 (g); Auction and Loose Leaf Tobacco Warehouse, art. VI, § 1 (e); Automatic Sprinkler, art. VIII; Automobile Parts and Equipment Manufacturing, art. VI, B; Baking, art. VI, § 4 (f); Boot and Shoe, art. VII; Bottled Soft Drink, art. VI, § 8 (h); Brewing, art. VIII, § 4 (c-e); Buff and Polishing Wheel, art. VI, § 1 (b); Buffing and Polishing Composition, art. VI, § 1 (b); Dealers in Builders Supplies Submitted by the National Federation of Builders Supply Associations, art. VII; Business Furniture, Storage Equipment, and Filing Supply, art. IV, par. 4; Can Manufacturers, art. VI, § 3; Candy Manufacturing, art. VI, § 9 (f); Canning, art. VI, § 5 (f); Canning and Packing Machinery and Equipment, art. VII, § 2 (f); Cast Iron Soil Pipe, § 8; Coat & Suit, art. VI, § 2, H; Cigar Manufacturing, art. VIII, § 7 (f); Commercial and Breeder Hatchery, art. VIII, § 1 (e-g); Commercial Refrigerator, art. VI, § 9 (i), § § 10, 11; Concrete Masonry, art. VI, § 14; Cotton Cloth Glove Manufacturing, art. VI, § § 4-6; Country Grain Elevators, art. VI, A, § 11; Crushed Stone, Sand and Gravel, and Slag, art. VI, § 5 (a) (11); Dry and Polishing Mop Manufacturing, art. VI, § 2 (d); Electric Storage and Wet Primary Battery, art. VI, § 3; Electrotyping and Stereotyping, art. VII, § 5; End Grain Strip Wood Block, art. VI, § 9 (f); Excelsior and Excelsior Products, art. VI, § 1 (f); Fabricated Metal Products, etc., art. IV, § 7; Feed Manufacturing, art. VI, § 5; Fire Extinguishing Appliance Manufacturing, art. VI, § 2 (h); Fishing Tackle, art. IV, § 6; Folding Paper Box, art. II, § 5; Funeral Supply, art. VII, § 6; Fur Dressing and Fur Dyeing, art. VI, § 8 (b); Furniture Manufacturing, art. VI, § § 5-7; Gas Cock, art. XVIII; Graphic Arts, art. I, § 3 (e) 1-3; Gray Iron Foundry, art. III, § 4; Grinding Wheel, art. VII, § 1 (f); Hair and Jute Felt, art. VI (c); Hair Cloth Manufacturing, art. VI, § 4; Handkerchief, art. VI, § 5 (1); Hardwood Distillation, art. VI, A, § 2; Ice, art. X, § 5; Imported Date Packing, art. VI, part B, § 1 (l); Industrial Supplies and Machinery Distributors' Trade, art. V, § § 2-4; Knitted Outerwear, art IX (f); American Lace Manufacturing, art. VIII; Ladder Manufacturing, art. VI, B; Leather and Woolen Knit Glove, art. VI, § § 5-7; Liquefied Gas, art. V, § 5; Luggage and Fancy Leather Goods, art. VII, § 2; Lumber and Timber Products, art. IV (b-d); Machine Tool and Equipment Distributing, art. V, § 5; Marking Devices, art. VI, § 5; Medium and Low Priced Jewelry Manufacturing, art. VII, § § 6-9; Metal Tank, art. VI, § § 3-5; Millinery, art. VI, § 13 (l); Millinery and Dress Trimming, Braid, and Textile, art. VI (a) (5); Mopstick, art. VI, § 2 (e); Motor Fire Apparatus Manufacturing, art. VI, § 4; Motion Picture, art. II, § 10 (b); Motor Vehicle Retailing, art. VI, B, § § 4-6; Needle Work in Puerto Rico, art. VII, § 8 (1); Oil Burner, art II; Oxy-acetylene, art. VI, § 6; Packaging Machinery, art. X, § 3; Paper Distributing, art. IV, § 4; Photo-Engraving, art. VII, § 7 (f); Photographic and Photo Finishing, art. VI, § 6, G; Pipe Nipple Manufacturing, art. VI, § 8; Plastering and Lathing Contracting, art. IV, § § 5-7; Precious Jewelry Producing art. VII, § § 5-8; Printer's Roller, art. II, § 6; Pulp and Paper, art. II, § 4; Pyrotechnic Manufacturing, art. VI, § 4 (b); Raw Peanut Milling art. X, § § 2-4; Reinforcing Materials Fabricating, art. V, § § 9-11; Retail, art. X, § 2 (f); Retail Farm Equipment, art. IV (c); Retail Food and Grocery, art. X, § 1 (f); Retail Jewelry, art. IX, § 2 (f); Retail Lumber, Lumber Products, Building Materials, and Building Specialties, art. VII, § 7, pars. 4, 5; Retail Rubber Tire and Battery, art. II, A, § 7 (m); Retail Solid Fuel, art. III, § § 23-26; Retail Tobacco, art. VIII, § 7 (f); Road Machinery Manufacturing, art. III, § 2; Rock Crusher Manufacturing, art. III; Rolling Steel Door, art. VI, § 9 (e); Saddlery Manufacturing, art. VI, § 3; Savings, Building and Loan Associations, art. VI, § § 4-6; Scientific Apparatus, art. VI, § 7; Set-up Paper Box Manufacturing, art. II, § 5; Shoe and Leather Finish, Polish and Cement Manufacturing, art. VI, § 7; Shovel, Dragline, and Crane, art. VI, § 1 (c); Silk Textile, art. VI, § 4; Silverware Manufacturing, art. VII, § 2 (g); Soap

Under existing administrative orders and practice a valid assessment can be made only after the code authority has secured from the Administrator[9]—now the NIRB[10]—approval of an itemized budget and a basis of contribution. The expenses presumably are to be only those necessary and proper to the legitimate administration of the code provisions, which define in each case the powers and the scope of activities of the code authorities. But the codes do not impose any definite limitation on amount of expenses, nor do they place any particular restrictions on budget items. The actual costs of their activities are left to the determination of the code authorities as matters of business discretion,[11] subject, of course, to the approval of the NIRB. Similarly, most codes provide no specific basis of assessment, requiring only that it be fair and equitable. Some, however, ordain that the levy shall be made on the basis of some particular item "and/or such other factors as may be deemed equitable to be taken into consideration."[12] Only a very few absolutely pre-

---

and Glycerine Manufacturing, art. VI, C-E; Steel Tubular and Firebox Boiler, art. VI, § 7; Stone Finishing Machinery and Equipment, art. VI, § § 8-10; Structural Clay Products, art. X (a-c); Textile Machinery Manufacturing, art. III; Trucking, art. III, B, § § 4-6; Warm Air Furnace Manufacturing, art. V, § 2 (c); Washing and Ironing Machinery Manufacturing, art. VI, B; Watch Case Manufacturing, art. VI, § 1 (e); Waterproofing, etc., art. VI, § 4; Waxed Paper, art. II, § 5; Wheat Flour Milling, art. VI, § 1 (f-g); Wholesale Automotive, art. VIII (H); Wholesale Food and Grocery, art. VIII, § 1 (f); Wholesale Fresh Fruit and Vegetable Distributive, art. VI, § 1 (5-8); Wholesaling or Distributing, art. VI, § 4; Women's Belt, art. VIII; Wood Plug, art. VI, § 2 (e); Wool Felt Manufacturing, art. VI, § § 8-10.

The following code provisions contemplate assessments against code dissenters, but are not based on the model: Anti-Hog-Cholera Serum and Hog-Cholera Virus, art. VI, § 2 (b); Beet Sugar, art IX (c); Bowling and Billard Operating, art. VI, § 7 (f); Labor Provisions for the Brewing Industry, art. VI, B, § 8; Cast Iron Pressure Pipe, art. VI, § 8; Bituminous Coal, art. VII, § 3 (h); Construction, art. IV, A, § 2 (d); Corset and Brassiere, art VIII (e); Grain Exchanges and Members Thereof, art. VI, § 1 (f); Hosiery, art. IX, § 4; Linseed Oil Manufacturing, art. X, § 4; Men's Clothing, art. XIII (e), par. 5; Motion-Picture Laboratory, art. III, § 4; Petroleum, art. VII, § 8; Rayon and Silk Dyeing and Printing, art. VIII, § 4; Underwear and Allied Products Manufacturing, Part IV, § 1 (h); Wool Textile, art. VI, par. 2.

9. Administrative Order No. X-36, May 26, 1934.

10. Executive Order No. 6859, Sept. 27, 1934.

11. See page 861, *infra*.

12. Advertising Distributing, art. IV, § 6; All-Metal Insect Screen, art. VI, § 7; Asphalt Shingle and Roofing Manufacturing, art. VI, § 2 (b); Barber Shop, art. VI, § 5; Blouse and Skirt Manufacturing, art. V, § 1 (e); Boiler Manufacturing, art. VIII, § 1; Smelting and Refining of Secondary Metals into Brass and Bronze Alloys in Ingot Form, art. VI, § 5; Can Manufacturers, art. VI, § 3; Cement, art. IV, B, § 8; Chemical Manufacturing, art. VI; Cleaning & Dyeing, art. VI, § 3 (i); Cotton Garment, art. IX, G; Floor and Wall Clay Tile Manufacturing, art. VI, B, § 9; Fur Trapping Contractors, art. IV, § 4; Gas Appliances and Apparatus, art. VII, § 2; Infants and Children's Wear, art. VII, § 5; Laundry, art. VI, § 4; Luggage and Fancy Leather Goods, art. VII, § 2; Lumber & Timber Products, art. IV (b); American Match, art. VI, § 1 (d); Non-Ferrous Foundry, art. VII (c); Paint, Varnish, and Lacquer Manufacturing, art. X, par. 7; American Petroleum Equipment, art. III, § 3; Plumbago Crucible, art. VII; Radio Broadcasting, art. VI, § 8; Rayon and Synthetic Yarn Producing, art. VIII, § 4; Special Tool, Die, and Machine Shop, art. VI, § 1

scribe the basis to be used.[13] Thus a rather wide range of discretion is vested in the code authority not only in determining the amount of expenditure but also in choosing a basis of assessment answering the peculiar needs of the industry subject to its jurisdiction. They may utilize such bases as: unit volume of sales, dollar volume of sales, volume of raw material consumed, units of productive machinery in use, dollar volume of pay-roll, number of productive employes, number of man-hours worked, base charge per plant operated, average number of all employes on the pay-rolls of industry members, or a fixed amount per employe per annum.[14] Which of these diverse methods meet the requirement of being "fair and equitable" will depend, of course, largely upon the individual characteristics of a given industry. The only restrictions on the exercise of discretion by the code authority in choosing a basis of contribution which have been imposed by the NIRB as conditions of its approval of the basis are that it must conform with the code, be equitable in operation, and properly related to the budget.

Clearly, those who have assented voluntarily to the codes are bound by their agreement to pay authorized code costs.[15] Only those members of an industry who have refused to sign the code and have avoided direct participation in code authority activities and possibly those who have signed under economic duress are in a position to contest the intrinsic validity of the power to impose and collect assessments. With respect to them, at least the assessment is the exercise of a general governmental function, such as must give assurance of due process and equal protection. But it is to the interest of all classes of enterprisers to eliminate unauthorized or excessive expenses and inequities and improprieties arising from the manner of assessment. The assessment of code costs, therefore, even if desirable and valid, should provide adequate safeguards against abuses such as racketeering and incompetence. Yet, on the other hand, consideration of these requirements must be tempered by the danger of sacrificing administrative efficiency.[16]

At the outset arises the objection that NIRA does not authorize assessments. They are not mentioned in the Act and even code authorities receive no specific recognition there. Of course this can readily be remedied on revision by express authorization to code authorities to impose and collect assessments. But until this is done the inference must be sought in the NIRA that some such administrative agencies must have been within the contemplation of Congress. This

(b); Upholstery and Drapery Textile, art. VI, § § 7, 8; Vitrified Clay Sewer Pipe Manufacturing, art. VI, § 10; Wall Paper Manufacturing, art. XII.

13. Cap and Closure, art. IV, § 3 (b) (net sales); Bituminous Coal, art. VII, § 3 (b) (tonnage); Concrete Pipe Manufacturing, art. IV, § 10, A (tonnage produced); Fishery, art. VIII, tit. E, § 1 (sales); Glass Container, art. IV, § 2 (b) (net sales); Malleable Iron, art. IV, § 2 (net tons shipped); Rayon and Silk Dyeing and Printing, art. VIII, § 4; (pay-roll); Silk Textile, art. VI, § 4; Valve and Fittings Manufacturing, art. VI, § 1 (2); Velvet, art. VI, § 6 (wages); Wool Felt Manufacturing, art. VI, § 3 (labor employed).

14. NRA Release No. 4754, May 1, 1934.

15. The fact of signing an assent to the code may not, however, amount to a true voluntary assent, in view of coercion, threat of boycott, etc. Other difficulties are also present. See Comment (1933) 33 COL. L. REV. 1394; Comment (1933) 47 HARV. L. REV. 85, 100.

16. Administrative Order No. X-36, May 26, 1934 .

inference may be drawn from the expressed Congressional intention that the President redelegate many of the powers delegated to him.[17] Congress could scarcely have failed to recognize that the agencies to whom the President must necessarily delegate power would inevitably incur expenses; yet it made no appropriation of public monies to defray them. The conclusion is warranted, therefore, that it was intended that the code authorities should themselves raise the necessary funds; and it is corroborated to some extent by the fact that similar assessments had been considered the best practice in financing the operations of trade associations,[18] whose activities clearly served as the Congressional model. Authority for code assessments may also be implied from Section 3 of the Act, which provides for definition in the codes of the standards of fair competition. It would appear that a member of the industry who receives the benefits of the activities of the code authority or other similar body at the expense of his competitors is deriving an unfair competitive advantage from his refusal to pay the assessment. And the code provisions empowering the code authorities to impose and collect assessments could therefore be said to be an exercise of the defining power delegated by Section 3. Although it is thus possible to imply authority from the Act,[19] the necessity of such resort which leaves the question open to the possible vagaries of judicial imagination emphasizes the need to remove the vulnerable uncertainty by including in the new legislation provisions expressly recognizing code authorities and calling for the mandatory levying of assessments by them.[20]

If the assessment provisions are expressly authorized by the new law or can be regarded as impliedly authorized by the present Act, it may still be urged that they are unconstitutional because not within the powers of Congress. But if the Act, and the codes formulated under it, constitute a valid regulation of interstate commerce,[21] this objection can readily be met, for the power to compel the payment of code assessments is necessary and proper to that

17. Sections 2(a), 2(b), and 3(a), 48 STAT. 195, 196, 15 U. S. C. A. § § 702 (a), 702 (b), 703 (a) (1933); Comment (1934) 2 GEO. WASH. L. REV. 436, 441.

18. DONALD, TRADE ASSOCIATIONS (1933) 126-133; FOTH, TRADE ASSOCIATIONS (1930) 70-74.

19. Schlesinger v. Kofsky-Moos, Inc., U. S. L. Week, Jan. 8, 1935, at 424, col. 1 (N. Y. Mun. Ct. 1934). But cf. Friedman v. John Lowry, Inc., N. Y. L. J., Jan. 5, 1935, at 83, col. 3 (N. Y. City Ct. 1935). These cases, reaching opposite results, arose under the New York Recovery Act rather than under the NIRA, but there is no distinction in principle between the powers to be implied from the State and Federal Acts.

20. It is noteworthy that the revisors are planning such a proposal. N. Y. Times, Feb. 24, 1935, at 5, col. 3.

21. The constitutionality of the Act and its purposes is assumed in this comment; only those constitutional problems involving the levy and collection of code assessments are considered. For discussions of the more general problem, consult Black, *The National Industrial Recovery Act and the Delegation of Legislative Power to the President* (1934) 19 CORN. L. Q. 389; Field, *Constitutional Theory of the National Industrial Recovery Act* (1934) 18 MINN. L. REV. 269; Carpenter, *Constitutionality of the National Industrial Recovery Act and the Agricultural Adjustment Act* (1934) 7 So. CALIF. L. REV. 125. In Cousens, *The Delegation of Federal Legislative Power to Executive Officials* (1935) 33 MICH. L. REV. 512, an attempt is made to appraise the significance of the recent case of Panama Refining Co. v. Ryan, 55 Sup. Ct. 241 (1935), *infra* note 34.

regulation.[22] The necessity of raising funds to pay the expenses of the regulation is patent. And the propriety of raising them chiefly from those concerned by the regulation is established by precedent as an appropriate means of accomplishing the legitimate legislative end. Thus collection of the costs of administering a law from those for or against whom it is administered has received judicial sanction in a variety of circumstances. License fees[23] and inspection fees[24] are the usual forms, but others have enjoyed equal favor in the courts.[25] The underlying principles dictating these decisions, and meeting the objection that they are violative of due process, are that it is only fair that those who receive the benefits of the law should bear its burdens,[26] that the levy is in the nature of a contribution for services rendered,[27] or that it responds to the dictates of justice to require those whose activities necessitate regulation in the public interest to pay the cost of that regulation.[28] Possibly, too, if it may be urged that Congress has what amounts to a police power over interstate commerce,[29] then the assessment of code costs, like similar state

22. Its constitutional authorization is, therefore, that of the so-called "elastic clause", U. S. CONST. Art. 1, § 8, par. 18.

23. Head Money Cases, 112 U. S. 580 (1884); United States v. Grimaud, 220 U. S. 506 (1911); Hendrick v. State of Maryland, 235 U. S. 610, 623 (1915); Kane v. State of New Jersey, 242 U. S. 160, 168 (1916); American Baseball Club of Philadelphia v. City of Philadelphia, 312 Pa. 311, 167 Atl. 891 (1933).

24. Packet Co. v. Keokuk, 95 U. S. 80 (1877); Packet Co. v. St. Louis, 100 U. S. 423 (1879); Morgan's Steamship Co. v. Louisiana Board of Health, 118 U. S. 455 (1886); Nashville, Chattanooga and St. Louis Ry. v. Alabama, 128 U. S. 96, 101 (1888); Patapsco Guano Co. v. North Carolina Board of Agriculture, 171 U. S. 345 (1898); St. Louis Consolidated Coal Co. v. Illinois, 185 U. S. 203, 207 (1902); McLean v. Denver & Rio Grande Rr. Co., 203 U. S. 38, 54 (1906); Red "C" Oil Manufacturing Co. v. North Carolina, 222 U. S. 380 (1912); Standard Stock Food Co. v. Wright, 225 U. S. 540 (1912); People v. Harper, 91 Ill. 357, 369 (1878); Chicago, Wilmington and Vermilion Coal Co. v. People, 181 Ill. 270, 54 N. E. 961 (1899); City of New Orleans v. Hop Lee, 104 La. 601, 29 So. 214 (1901); Merchants Exchange of St. Louis v. Knott, 212 Mo. 616, 635, 111 S. W. 565, 569 (1908); City Council of Charleston v. Rogers, 2 McCord 495, 499 (S. C. 1823).

25. Cooley v. Board of Wardens of the Port of Philadelphia, 12 How. 299, 314 (U. S. 1851) (pilot-fees); Charlotte, Columbia and Augusta Rr. Co. v. Gibbes, 142 U. S. 386, 394 (1892) ("contributions"); New York v. Squire, 145 U. S. 175, 191 (1892) (assessments); St. Mary's Franco-American Petroleum Co. v. West Virginia, 203 U. S. 183 (1906) (charges for services rendered); Noble State Bank v. Haskell, 219 U. S. 104 (1911) (assessments); Savage v. Jones, 225 U. S. 501, 528 (1912) (stamps); Carpenter v. State Bar of California 211 Cal. 358, 295 Pac. 23 (1931) (dues); State ex rel. Macey v. Johnson, 50 Idaho 363, 296 Pac. 588 (1931) (charges for services rendered); Harrison v. the Mayor and City Council of Baltimore, 1 Gill 264 (Md. 1843).

26. People v. Harper, 91 Ill. 357, 369 (1878); Merchants Exchange of St. Louis v. Knott, 212 Mo. 616, 635, 111 S. W. 565, 569 (1908).

27. Cooley v. Board of Wardens of the Port of Philadelphia, 12 How. 299, 314 (U. S. 1851); Chicago, Wilmington and Vermilion Coal Co. v. People, 181 Ill. 270, 275, 54 N. E. 961, 962 (1899); City Council of Charleston v. Rogers, 2 McCord 495, 499 (S. C. 1823).

28. Charlotte, Columbia and Augusta Rr. Co. v. Gibbes, 142 U. S. 386, 394 (1892); Wisconsin Telephone Co. v. Public Service Commission of Wisconsin, 206 Wis. 589, 240 N. W. 411 (1932).

29. See, especially, Nebbia v. New York, 291 U. S. 502, 524 (1934); cf. Cushman, *The*

exactions,[30] might be held referable to that power and to constitute a valid exercise of it. Cases involving special assessments for local improvements likewise afford a possible analogy. Such assessments are now almost uniformly held valid;[31] they are founded on the principle, which seems equally applicable to assessment of code costs, that although the improvement in question may be beneficial to the public, it has also given special value to certain property which may be assessed against the property so benefited.[32] Here the regulation has given that special value to those subject to the code.[33]

But the most serious threat to the validity of the code assessments lies in an attack based upon the claim that delegation of the power to the code authorities not only to make the assessments but also to prescribe the methods of making them is unwarranted. Always puzzling, the problem of delegation of powers has been only more confounded by doubts raised because of the opinion in *Panama Refining Co. v. Ryan*,[34] in which the Supreme Court, which in the past had contented itself with copious lip-service to the doctrine that legislative powers are non-delegable,[35] for the first time held an act of Con-

National Police Power under the Commerce Clause of the Constitution (1919) 3 MINN. L. REV. 289, 381, 452.

30. Morgan's Steamship Co. v. Louisiana Board of Health, 118 U. S. 455 (1886); Patapsco Guano Co. v. North Carolina Board of Agriculture, 171 U. S. 345 (1898); Red "C" Oil Manufacturing Co. v. North Carolina, 222 U. S. 380 (1912); Carpenter v. State Bar of California, 211 Cal. 358, 295 Pac. 23 (1931); City of New Orleans v. Hop Lee, 104 La. 601, 29 So. 214 (1901); American Baseball Club of Philadelphia v. City of Philadelphia, 312 Pa. 311, 167 Atl. 891 (1933).

31. Willard v. Presbury, 14 Wall. 676 (U. S. 1871); Houck v. Little River Drainage District, 239 U. S. 254, 262 (1915); Kansas City Southern Ry. Co. v. Road Improvement District No. 6, 256 U. S. 658, 660 (1921); Miller County Highway & Bridge District v. Standard Pipe Line Co., 19 F. (2d) 3, 5 (C. C. A. 8th, 1927); State ex rel. Atlantic-Gulf Special Road and Bridge District v. Bass, 96 Fla. 478, 483, 118 So. 212, 214 (1928). See 1 PAGE AND JONES, TAXATION BY ASSESSMENT (1909) c. V.

32. Hagar v. Reclamation District No. 108, 111 U. S. 701, 705 (1884); Duval Cattle Co. v. Hemphill, 41 F (2d) 433, 437 (C. C. A. 5th, 1930); Booth v. Groves, 43 Idaho 703, 255 Pac. 638 (1927); 1 PAGE AND JONES, op. cit. *supra* note 31, at § 11.

33. The fact that an assessment takes into account facts which have already occurred, such as the past year's production or sales history, will not render it invalid. Even the fact that an assessment was for expenses already incurred, and was therefore truly retroactive, would not avoid it. No successful objection may be made to such an assessment on the ground that it was imposed for a benefit already accrued, and was based on what might be termed an executed consideration. There is no constitutional provision or principle which prohibits retroactive legislation, although it is disfavored as a matter of statutory construction. See City of Seattle v. Kelleher, 195 U. S. 351, 359 (1904); Billings v. United States, 232 U. S. 261, 282 (1914); Wagner v. Baltimore, 239 U. S. 207, 216 (1915).

34. 55 Sup. Ct. 241 (1935).

35. Field v. Clark, 143 U. S. 649 (1892); People ex rel. Breckon v. Board of Election Commissioners of Chicago, 221 Ill. 9, 77 N. E. 321 (1906); Owensboro & Nashville Rr. Co. v. Todd, 91 Ky. 175, 15 S. W. 56 (1891); State v. Great Northern Ry. Co. 100 Minn. 445, 111 N. W. 289 (1907); Barto v. Himrod, 8 N. Y. 483, 488 (1853); O'Neil v. American Fire Insurance Co., 166 Pa. 72, 30 Atl. 943 (1895); Fogg v. Union Bank, 60 Tenn. 435 (1872); Dowling v. Lancashire Insurance Co., 92 Wis. 63, 65 N. W. 738 (1896); Cheadle, *The Delegation of Legislative Functions* (1918) 27 YALE L. J. 892.

gress void because of such delegation.[36] But throughout the problem of delegability, from that of the delegability of the power itself to that of the agencies to which and the manner in which such delegation can be made, recurs the ultimate criterion of reasonable necessity and expediency for the accomplishment of the legislative program set forth.[37] That final test has for its foundation the very reason upon which any delegation of power is allowed, namely, that "to deny this would be to stop the wheels of government."[38] And it is important to note that by its nature the determination of such necessity and expediency is largely a legislative matter and ought not to be overturned by a court unless clearly arbitrary.

The power to prescribe the basis of contribution, which is almost invariably vested, at least in part, in the code authority, apparently would not comply with any literal test of purely administrative functions.[39] But no sharp line can be

36. To the effect that it had not done so before, see United States v. Suburban Motor Service Corp., 5 F. Supp. 798, 802 (N. D. Ill. 1934); Carpenter, *supra* note 21, at 126; Cousens, *supra* note 21; Comment (1933) 31 MICH. L. REV. 786, 795, n. 37.

37. St. Louis Consolidated Coal Co. v. Illinois, 185 U. S. 203, 211 (1902); Buttfield v. Stranahan, 192 U. S. 470, 496 (1904); Union Bridge Co. v. United States, 204 U. S. 364, 386 (1907); United States v. Grimaud, 220 U. S. 506, 516 (1911); Mutual Film Corporation v. Industrial Commission of Ohio, 236 U. S. 230, 245 (1915); Douglas v. Noble, 261 U. S. 165, 169 (1923); Mahler v. Eby, 264 U. S. 32, 40 (1924); Avent v. United States, 266 U. S. 127, 130 (1924); United States v. Chemical Foundation, Inc., 272 U. S. 1, 12 (1926); Hampton & Co. v. United States, 276 U. S. 394, 409 (1928); noted in (1928) 37 YALE L. J. 1151; Campbell v. Chase National Bank of City of New York, 5 F. Supp. 156, 172 (S. D. N. Y. 1933), appeal dismissed, 291 U. S. 648, 686 (1934); Edgewater Dairy Co. v. Wallace, 7 F. Supp. 121 (N. D. Ill. 1934); Ex parte Gerino, 143 Cal. 412, 419, 77 Pac. 166, 169 (1904); People v. Harper, 91 Ill. 357, 369 (1878); State v. Johnson, 75 Mont. 240, 256, 243 Pac. 1073, 1079 (1926); Trustees of Village of Saratoga Springs v. Saratoga Gas, Electric Light & Power Co., 191 N. Y. 123, 83 N. E. 693 (1908); State v. Whitman, 196 Wis. 472, 220 N. W. 929 (1928), noted in (1929) 5 WIS. L. REV. 111; BUCHLY AND OATMAN, ADMINISTRATIVE LEGISLATION AND ADJUDICATION (1934) 61; Frankham, *An Analysis of the Delegations of Power in Some of the Recent Congressional Enactments* (1933) 3 BROOKLYN L. REV. 38, 43 ff; Comment (1933) 31 MICH. L. REV. 786, 795 ff.

38. Locke's Appeal, 72 Pa. 491, 499 (1873).

39. It is something more than a "filling up the details", as in: Wayman v. Southard, 10 Wheat. 1, 43 (U. S. 1825); *In re* Kollock, 165 U. S. 526 (1897); Buttfield v. Stranahan, 192 U. S. 470, 496 (1904); United States v. Grimaud, 220 U. S. 506, 517 (1911); United States v. Ormsbee, 74 Fed. 207 (E. D. Wis. 1896); Richmond Hosiery Mills v. Camp, 7 F. Supp. 139, 141 (N. D. Ga. 1934); United States v. Canfield Lumber Co., 7 F. Supp. 694, 697 (D. Neb. 1934); Bloxton v. State Highway Commission, 225 Ky. 324, 329, 8 S. W. (2d) 392, 394 (1928); Gima v. Hudson Coal Co., 310 Pa. 480, 165 Atl. 850 (1933). And it is not the determination of the existence of a contingency upon which the legislature's act becomes operative, as in: Union Bridge Co. v. United States, 204 U. S. 364 (1907); Duval Cattle Co. v. Hemphill, 41 F. (2d) 433, 437 (C. C. A. 5th, 1930); Booth v. State, 179 Ind. 405, 100 N. E. 563 (1913), aff'd, 237 U. S. 391 (1915); Iowa Life Insurance Co. v. Eastern Mutual Life Insurance Co., 64 N. J. L. 340, 347, 45 Atl. 762, 765 (1900); American Baseball Club of Philadelphia v. City of Philadelphia, 312 Pa. 311, 167 Atl. 891 (1933), noted in (1933) 2 GEO. WASH. L. REV. 112 and (1934) 32 MICH. L. REV. 555; Dillon Catfish Drainage District v. Bank of Dillon, 143 S. C. 178, 141 S. E. 274 (1928); State v. Zimmerman, 183 Wis. 132, 197 N. W. 823, 826 (1924), noted with disapproval in (1925) 3 WIS. L. REV. 124 and (1925) 34 YALE L. J. 325. In general, see Cheadle, *supra* note 35.

drawn between legislative and administrative powers;[40] and the delegation of functions classified in other cases as legislative in character has been often upheld.[41] The only definitive requirement that can be formulated is that the delegation must be rendered necessary by the exigencies of the situation.[42] Thus if conditions are such that the legislature could not well lay down a general rule, and if effective regulation cannot otherwise be achieved, the power is delegable.[43] These principles seem adequate to justify the conclusion that the power to determine a basis of assessment is delegable, for it is apparent that the diversity of present-day industrial organization demands a basis designed to meet the peculiar needs of each individual industry. A self-executing legislative scheme could not possibly be satisfactory, for the flexibility and discretion of administrative action are essential.[44]

The limitation, revived in the *Panama* case,[34] that the power delegated by the legislature must be something less than complete legislative discretion, that Congress must retain some color of direction by establishing primary standards for the guidance of its delegates, is likely, however, to vitiate the delegation in the present NIRA because of the absence of such standards therein. The degree

40. Ibid.; United States v. Grimaud, 220 U. S. 506, 517 (1911); Mutual Film Corporation v. Industrial Commission of Ohio, 236 U. S. 230, 245 (1915); Chicago & North Western Ry. Co. v. Dey, 35 Fed. 866, 874 (C. C. S. D. Iowa, 1888).

41. The power to prescribe rates has been said to be legislative. Interstate Commerce Commission v. Cincinnati, New Orleans & Texas Pacific Ry. Co., 167 U. S. 479, 499 (1897); McChord v. Louisville and Nashville Rr. Co., 183 U. S. 483, 495 (1902); Home Telephone and Teleg. Co. v. City of Los Angeles 211 U. S. 265, 271 (1908); City of Knoxville v. Knoxville Water Co., 212 U. S. 1, 8 (1909); Minnesota Rate Cases, 230 U. S. 352, 433 (1913); Louisville & Nashville Rr. Co. v. Garrett, 231 U. S. 298, 305 (1913); Oklahoma Operating Co. v. Love, 252 U. S. 331, 335 (1920); Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry. Co., 284 U. S. 370, 386 (1932). But it is permissible to delegate that power. Reagan v. Farmers Loan and Trust Co., 154 U. S. 362, 393 (1894); Intermountain Rate Cases, 234 U. S. 476, 490 (1914). So also, the power to require public utilities to provide certain facilities is legislative. Express Cases, 117 U. S. 1, 29 (1886). Yet it is delegable. Honolulu Rapid Transit and Land Co. v. Hawaii, 211 U. S. 282, 290 (1908). The power to fix tariff rates is legislative. Norwegian Nitrogen Products Co. v. United States, 288 U. S 294, 305 (1933). Yet it is delegable. Id.; Hampton & Co. v. United States, 276 U. S. 394 (1928). In general, see Cousens, *supra* note 21, at 538. That legislative powers are delegable under certain circumstances has sometimes received express judicial recognition. St. Louis Consolidated Coal Co. v. Illinois, 185 U. S. 203, 210 (1902); Norwegian Nitrogen Products Co. v. United States, *supra*; Commonwealth v. Sisson, 189 Mass. 247, 252, 75 N. E. 619, 621 (1905). State v. Whitman, 196 Wis. 472, 220 N. W. 929 (1928), noted (1929) 5 WIS. L. REV. 111; Comment (1933) 1 GEO. WASH. L. REV. 231; Comment (1924) 37 HARV. L. REV. 1118; Comment (1929) 27 MICH. L. REV. 558.

42. Hampton & Co. v. United States, 276 U. S. 394, 409 (1928), noted in (1928) 37 YALE L. J. 1151; Edgewater Dairy Co. v. Wallace, 7 F. Supp. 121 (N. D. Ill. 1934); Comment (1924) 37 HARV. L. REV. 1118; Comment (1929) 27 MICH. L. REV. 558.

43. Union Bridge Co. v. United States, 204 U. S. 364, 386 (1907); Mahler v. Eby, 264 U. S. 32, 40 (1924); Ex parte Gerino, 143 Cal. 412, 419, 77 Pac. 166, 169 (1904); People v. Harper, 91 Ill. 357, 369 (1878); State v. Johnson, 75 Mont. 240, 256, 243 Pac. 1073, 1079 (1926); Frankham, loc. cit. *supra* note 37; Comment (1933) 31 MICH. L. REV. 786, 795 ff.

44. The great diversity developed in actual practice would seem to corroborate this. See the enumeration of the approved bases, *supra* page 853.

of definiteness which the Supreme Court may demand of such standards is highly uncertain,[45] but this determination, too, should be made to rest on considerations of what is possible and practical for the effective operation of the scheme.[46] The exigencies of the situation indicate that a specific provision granting to the chosen administrative agencies the power to assess equitably the reasonable and legitimate code costs should prove satisfactory.

At present the delegation of power is to the President, with power in him to redelegate by approval of codes and by executive orders under Sections 2(a) and 2(b). In practice this redelegation lodges the ultimate assessment functions in the code authorities. Two objections may be urged to this arrangement: first, against the validity of redelegation; and second, against the validity of delegation of governmental power to interested private parties. But these cannot stand up against the ever recurrent consideration of necessity and expedience to the legislative purpose. Certainly, legislatively authorized redelegation of a delegable power has never judicially been held objectionable; and the redelegation seems warranted here on the basis of expediency because of the necessity of a complex administrative and supervisory organization. And similarly, no objection to delegation to private parties or quasi-public bodies, such as the code authorities, has been sustained for that reason alone.[47] Judicial sanction has frequently been accorded delegations of many sorts of governmental functions involving the exercise of essentially legislative discretion to private organizations.[48] While the self-interest of the members of the code authorities might cause the courts to look more closely to the reasonableness of a legislative determination that a delegation of power to them was necessary and expedient to its legislative program, it is no ground in itself for nullifying the delegation. If it threatens to create abuses, specific remedies checking their manifestation are more appropriate, and indeed are provided in administrative

45. See Cousens, *supra* note 21, at 543, 544.

46. That has been the test in the past. Avent v. United States, 266 U. S. 127, 130 (1924); United States v. Chemical Foundation, Inc., 272 U. S. 1, 12 (1926).

47. The decisions invalidating delegations to private parties can be explained for the most part as based upon the nature of the power delegated rather than upon the character of the delegate. Sayre, J., dissenting in Whaley v. State, 168 Ala. 152, 156, 52 So. 941, 942 (1910); Collins v. Hollis, 212 Ala. 294, 102 So. 379 (1924); Dade County v. State, 95 Fla. 465, 480, 116 So. 72, 77 (1928); Rouse v. Thompson, 228 Ill. 522, 536, 81 N. E. 1109, 1113 (1907); Bullock v. Billheimer, 175 Ind. 428, 438, 94 N. E. 763, 767 (1911); State v. Crawford, 104 Kans. 141, 143, 177 Pac. 360, 361 (1919); Shumway v. Bennett, 29 Mich. 451, 463 (1874); State v. Holland, 37 Mont. 393, 404, 96 Pac. 719, 722 (1908); Rowe v. Ray, 120 Neb. 118, 123, 231 N. W. 689, 691 (1930); Winters v. Hughes, 3 Utah 443, 449, 24 Pac. 759, 761 (1881).

48. County of Mobile v. Kimball, 102 U. S. 691, 703 (1880); Butte City Water Co. v. Baker, 196 U. S. 119 (1905); St. Louis, Iron Mountain and Southern Ry. Co. v. Taylor, 210 U. S. 281, 287 (1908); Douglas v. Noble, 261 U. S. 165, 169 (1923); Ex parte Gerino, 143 Cal. 412, 419, 77 Pac. 166, 169 (1904); Ex parte McManus, 151 Cal. 331, 90 Pac. 702 (1907); Day v. City of St. Augustine, 104 Fla. 261, 273, 139 So. 880, 885 (1932); Wilkins v. State 113 Ind. 514, 16 N. E. 192 (1888); Overshiner v. State, 156 Ind. 187, 59 N. E. 468 (1901); Scholle v. State, 90 Md. 729, 742, 46 Atl. 326, 327 (1900); Gima v. Hudson Coal Co., 310 Pa. 480, 165 Atl. 850 (1933); Note (1932) 32 COL. L. REV. 80. In Nicchia v. People of the State of New York, 254 U. S. 228 (1920), and Storey v. City of Seattle, 124 Wash. 598, 215 Pac. 514 (1923), the powers delegated might be considered as purely administrative.

practice.[49] Furthermore, the fact that the method of assessment might be prescribed in the codes themselves, cannot detract from the validity of the delegation of a discretionary power in that respect, directly or indirectly, to the code authorities. It is true that since the validity of the delegation is dependent upon its necessity, that delegation must not extend beyond the exigencies which warrant it. But the decision as to what the exigencies warrant must be, in the absence of arbitrariness or capriciousness, primarily a legislative matter. And so the greater administrative efficacy and flexibility afforded to meet rapidly changing or diverse conditions in an industry by lodging the power in the code authorities would provide ample reason both to deny the arbitrariness of the delegation and positively to establish its expediency.[50]

Because all these matters of delegability are inextricably bound up in a determination of legislative necessity and expediency, with which there can be little cavil on the score of reasonableness, that determination ought properly to rest with Congress. But Congress has not unequivocally expressed its will. The present allocation of power must be spelled out of the authorization to the President to approve codes of fair competition and to issue executive orders. Much doubt would be avoided and the code assessments rendered less vulnerable to attack if the delegation were expressly and properly enacted into the new NIRA. Thus not only should there be provision that reasonable and legitimate code costs are to be assessed fairly and equitably among all those subject to the code, but that it is to be done on a basis prescribed by the code and/or the code authority, the distribution of the latter power between the code and the code authority to be determined by the code. Under such provision the framers of the code either could set up a complete schedule and basis of assessments, leaving only administrative functions in the code authority, or could give to the code authority full power to determine, impose and collect the costs, subject only to the restrictions present in the delegation by the NIRA, or subject to additional restrictions and specifications in the code.

One further basis for attack upon the validity of assessments is violation of due process of law in the procedural sense. The model code provision[0] requires in substance that the assessments be fair and equitable, that the expenses be reasonable in amount and limited to legitimate costs of code administration, that the money collected be actually used only to defray such expenses, and

49. See a discussion of the safeguards now in force, *infra* at page 861.

50. A further possible objection to the delegation of the power to levy assessments is that, in view of Section 3(f), it involves the power to define a crime. But it is now well settled, especially in the federal courts, that such an objection is untenable if the statute itself declares that violation of the administrative regulation constitutes a criminal offense and fixes the punishment therefor. In re Kollock, 165 U. S. 526 (1897); Union Bridge Co. v. United States, 204 U. S. 364 (1907); United States v. Grimaud, 220 U. S. 506 (1911); United States v. Smull, 236 U. S. 405 (1915); Avent v. United States, 266 U. S. 127 (1924); United States v. Ormsbee, 74 Fed. 207 (E. D. Wis. 1896); Campbell v. Chase Nat. Bank of City of New York, 5 F. Supp. 156, 173 (S. D. N. Y. 1933), appeal dismissed, 291 U. S. 648, 686 (1934); Ex parte McManus, 151 Cal. 331, 90 Pac. 702 (1907); City of New Orleans v. Hop Lee, 104 La. 601, 29 So. 214 (1901). But cf. Sayre, J., dissenting, in Whaley v. State, 168 Ala. 152, 156, 52 So. 941, 942 (1910); State v. Holland, 37 Mont. 393, 404, 96 Pac. 719, 722 (1908).

that each member be given notice of the assessment and an opportunity to protest against its invalidity before being considered in default. Nothing less would satisfy the requirements of due process. But these provisions are found only in the codes which have adopted the model provision,[6] and even in such codes the failure to guarantee these requisites by express statutory provision may militate against due process.[51] And once more the NIRA should resolve the doubt by expressly incorporating these limitations, at least, upon the power to levy assessments. Furthermore, proper provision should be made directing the consummation of the requirements of due process in actual administration. Thus a statutory basis might properly be laid for the administrative machinery which now provides reasonably adequate safeguards to assure not only due process but also an efficient and fair administration.

As the NRA is now organized, approval of the itemized budget and basis of assessment submitted by the code authority is given only after interested parties have been afforded a hearing or opportunity to be heard. The latter consists of the privilege to file with the proper Deputy Administrator written objections to the proposed budget and basis of contribution together with supporting facts. An office memorandum for the guidance of deputy administrators indicates that approval will be withheld unless the budget shows plainly the period of time embraced, includes only items authorized by provisions of the code and omits pre-code expenses. Also the basis of contribution must conform with the provisions of the code, must be reasonable in amount, equitable in operation and properly related to the budget; it must indicate the members from whom contributions are required, the amount payable or method of calculation, and the intervals at which payments are to be made. Further, assurance must be given that appropriate provisions for safeguarding the funds will be adopted; the person or persons to receive such funds must be designated and must give adequate security.[52] In granting approval the NIRB, acting through a Deputy Administrator, may assist the code authority in paring down the budget.[53] Upon approval, the assessment may be levied. But notice must be given to each member assessed, setting forth the basis of contribution and the fact of its approval. The notice must also state that a member may lodge a protest with the code authority or with the Compliance Division of NRA within fifteen days on the ground that the assessment is unjust as applied to him and finally, that nonpayment after thirty days is a code violation. The assessment does not, however, become collectible until certification by the code authority to the Compliance Division of NRA that such notice has been given, that the assessment remains unpaid after thirty days and that no protest was filed within fifteen days, or that such protest was filed and overruled, provided that the trade or industry embraces the member's prin-

51. Chicago, Milwaukee and St. Paul Ry. Co. v. Minnesota, 134 U. S. 418 (1890); Kuntz v. Sumption, 117 Ind. 1, 19 N. E. 474 (1889); Stuart v. Palmer, 74 N. Y. 183 (1878). See WILLOUGHBY, PRINCIPLES OF LEGISLATIVE ORGANIZATION AND ADMINISTRATION (1934) 152.

52. 2 NRA Rep. 263 (1934). And see Administrative Order No. X-119, Dec. 5, 1934.

53. Some suggestions have been made to the code authorities by NRA as to the items properly to be included in the budgets. NRA Release No. 4754, May 1, 1934. And detailed instructions to auditors necessarily exert a similar influence. 1 PRENTICE-HALL, TRADE AND INDUSTRY SERVICE, par. 8611.

cipal line of business and that the code authorizes the assessment.[54] Thus the practice now set up does appear to satisfy the enumerated requirements of the code provisions so as to meet the demands of due process; and what is more, it gives the protective assurance of governmental supervision of the assessment procedure before collection activities are allowed. The supervisional aspect is further extended by the NRA administrative requirement that accurate accounts be kept of the funds collected by the code authority, periodic reports submitted to the Compliance Division and an annual audit made by an independent outside agency. Additional protection is afforded by the provision that the funds collected shall be held in trust for code purposes.[6] Some reference ought to be had in NIRA to provision for these checks and for the installation of an amount of administrative supervision sufficient to forestall and remedy any abuses that may develop. But these ought not to be enacted in such detail as to take away the flexibility necessary to the maintenance of administrative efficiency.[51]

Together with the assurances of notice and administrative supervision of the code assessment, the parties subject to the code must be provided with reasonable opportunity to challenge both the validity of the assessment in general and its application to them in particular. Those dissenters who challenge the constitutionality of the code authority's power to impose assessments upon them may do so by direct resorts to the constitutional courts.[55] But for those who, admitting the general validity of the assessment power, wish only to challenge the validity of the particular assessment, there are available in addition to judicial remedies certain administrative remedies, developed in NRA practice, but not specifically provided for in NIRA. In the first place, appearance may be made or papers filed at the hearing or opportunity to be heard before a Deputy Administrator when the budget and basis of contribution are submitted for approval.[56] The objections apparently available at this time are those against the basis of contribution as constituting an inequitable general rule for the industry or against items in the budget because they are unreasonable or are unauthorized by the code. Complaints based upon individual injustices are to be taken by protest filed within fifteen days after receipt of the notice of assessment.[57] Matters pertinent here are reasons why the basis of contribution operates unfairly upon the particular protestant because of the unusual character of his business or an overlapping of assessments under several codes, the most dreaded assessment problem.[14] These, the only administrative remedies provided under the existing arrangements, are derived from NRA administration. Their validity might also be bolstered by specific authorizing reference in NIRA. It is probable that where the complaint is directed against one of the defects which these administrative remedies are designed to cure, these remedies must be pursued before any resort can be had to the courts for relief. The effect that findings

54. Administrative Order No. X-36, May 26, 1934.

55. Wadley Southern Ry. Co. v. Georgia, 235 U. S. 651, 661 (1915); Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287 (1920); Crowell v. Benson, 285 U. S. 22, 56 (1932); Freund, *The Right to a Judicial Review in Rate Controversies* (1921) 27 W. VA. L. Q. 207; Tollefson, *Administrative Finality* (1931) 29 MICH. L. REV. 839; Comment (1932) 41 YALE L. J. 1037.

56. 2 NRA Rep. 264 (1934).

57. Administrative Order No. X-36, May 26, 1934.

made in such a proceeding would have in court is uncertain, but their weight is questionable because they are reached very informally and without a record.[58]

No provision is found in the Act or codes regarding possible judicial determination of a member's rights at his suit, but reasonable opportunity to obtain such determination cannot be denied him. Thus in absence of a separate set of tribunals to exercise exclusive original jurisdiction over all controversies arising out of NRA, judicial remedies are open to the complainant. If he seeks declaratory judgment[59] or injunction,[60] judicial doctrine would not require him to become liable for punishment for a code violation before he can seek relief. Only the possibility that he has not first exhausted his administrative remedies can be interposed.[61] But if payment under protest and suit for recovery of the money so paid on the ground that it was collected without constitutional authority are allowed,[62] the adequacy of the legal remedy thus provided might preclude the possibility of injunctive relief.[63] In any event, he may, if he chooses, do nothing until he is sued or prosecuted for failure to pay, and then he may interpose his defenses. His failure to have first taken the available administrative remedies would not constitute a waiver of those defenses.[64] Probably the most satisfactory method to avoid the difficulties arising from default would be to enact into the new NIRA a provision whereby payment under protest is made a condition of suit to contest the validity of an assessment.

Contrasted with this is the problem of effective enforcement of code assessments, if they should be held valid. A failure or refusal to pay an assessment may, of course, be deemed a violation of the code and an unfair trade practice.

---

58. See Comment (1934) 43 YALE L. J. 599.

59. The federal courts now have jurisdiction to grant such relief. 48 STAT. 955, 28 U. S. C. A. § 400 (1934). That it is peculiarly adapted to such a situation as that here presented, see BORCHARD, DECLARATORY JUDGMENTS (1934) c. XIII.

60. Injunction is, of course, subject to the usual equity rules. Other possible remedies against an administrative body, but either inapplicable or unavailable here, include mandamus, prohibition, certiorari and quo warranto. See BLACHLY AND OATMAN, op. cit. *supra* note 37, at 185 et seq.

61. Cf. Prentis v. Atlantic Coast Line Co., 211 U. S. 210 (1908); Mellon Co. v. McCafferty, 239 U. S. 134 (1915); Porter v. Investors Syndicate, 286 U. S. 461, (1932). But this objection apparently applies only to remedies directed at securing a proper legislative result. Bacon v. Rutland Rr. Co., 232 U. S. 134 (1914); Schlosser v. Welsh, 5 F. Supp. 993, 997 (D. S. D. 1934). Hence it would probably be applicable only to such defects as might be remedied by existing administrative procedure, e.g., the inequity of a basis of assessment. Cf. 4 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1918) § 1800 and the many cases there cited on the related problem of taxation.

62. In cases involving federal taxation recovery can be had even though the payment was voluntary, the filing of a claim for refund being a condition precedent to suit. 43 STAT. 343 (1924), 26 U. S. C. A. § 156 (1926). The statute prohibits injunctive relief against federal taxes. R. S. § 3224 (1878), 26 U. S. C. A. § 154 (1926).

63. To the effect that this result has been reached in tax cases in some of the states, see 4 POMEROY, op. cit. *supra* note 61, at § 1805.

64. Pursuit of administrative remedies has never been considered except in cases where suit was brought to assert the invalidity of legislation. But a similar result might be reached by according finality to the administrative determination as a finding of fact. But see Comment (1934) 43 YALE L. J. 599.

By specific legislative provisions the proper United States district attorney may sue to enjoin the violation of the NRA code or make it the basis of a criminal prosecution, or the Federal Trade Commission may issue a cease and desist order.[65] And so, too, under the code provisions and administrative orders, the privilege of displaying the NRA insignia may be withheld or withdrawn.[66] But these actions look toward inducing the recalcitrant enterprisers to pay by indirect means because of their in terrorem character; they do not purport to enforce payment directly. And they are also likely to prove ineffective because placed in the hands of busy officers to whom collection is unimportant.[67] Obviously the compulsory assessment power, necessarily and impliedly authorized by the NIRA, must include as a necessary incident the power of collection; that power can be made truly effective only by allowing the interested code authority to bring suit for unpaid assessments.

Unfortunately, the existing NRA structure does not make it clear whether such a suit may be brought. If the doctrine is applied that where a statute creates a new right and grants a remedy therefor, the remedy is exclusive,[68] the code authority could have no cause of action for compulsory code assessments. Whatever right may exist to compulsory payment of code costs is derived ultimately from NIRA, which contains only the express remedies mentioned above for the enforcement of rights under it. Moreover, the enumeration in NIRA of these remedies, by the exclusive remedy doctrine, necessarily rebuts any implication of authority to the code authorities to bring suit for unpaid assessments against non-assenters. But until the new NIRA obviates this difficulty by specific authorization to code authorities to sue for assessments, resort will have to be had to establishing the nonapplicability of the exclusive remedy doctrine in this class of cases. Thus it may be argued that since none of the remedies specified in the Act really enforces the obligation to pay, except by indirection, they are not remedies for the wrong here complained of. Or, from another angle, the right is vested in the code authority, whereas the statutory remedies are given only to the government.[69] This would permit an application of the general principle that when a statute imposes a duty for the special benefit of a

65. 48 STAT. 196, 15 U. S. C. A. § 703 (b), (e), (f) (1933); 38 STAT. 719 (1914), 15 U. S. C. A. § 45 (1926).

66. NRA Release No. 5379, May 28, 1934.

67. See Comment (1934) 28 ILL. L. REV. 673, 678 ff.

68. Pollard v. Bailey, 20 Wall. 520, 527 (U. S. 1874); Fourth Nat. Bank of the City of New York v. Francklyn, 120 U. S. 747 (1887); Globe Newspaper Co. v. Walker, 210 U. S. 356 (1908); Paine Lumber Co. v. Neal, 244 U. S. 459 (1917); Decorative Stone Co. v. Building Trades Council of Westchester County, 23 F. (2d) 426 (C. C. A. 2d, 1928). For discussions of the NRA cases considering this question, see Billig, Fridinger and Herrick, *The Worker's Day in Court: Employee's Right to Code Wages* (1934) 3 GEO. WASH. L. REV. 1; Rosenbaum, *Enforcement of the NIRA and Codes by Private Injunctive Proceedings* (1934) 8 U. OF CIN. L. REV. 155; Comment (1935) 20 CORN. L. Q. 240, at 245; Note (1934) 48 HARV. L. REV. 342; Comment (1934) 28 ILL. L. REV. 673, at 684; Comment (1934) 29 ILL. L. REV. 396; Comment (1934) 44 YALE L. J. 90, at 98; (1934) 43 YALE L. J. 480.

69. Note, however, that where the *code* gives the code authority a remedy, viz., deprivation of participation, for the right, it specifically provides that that remedy is not exclusive. Can Manufacturers, Schedule B, § 9; Gas Appliances and Apparatus, art. III, § 2; Non-Ferrous Foundry, art. VII (c).

certain class of persons any member of that class has a right of action for the injury suffered as a result of violation of that duty.[70] Added to this is the orthodox doctrine, applied in similar situations, that an obligation to pay a sum certain or readily ascertainable can always be enforced in an action of debt by the person to whom it is owing, here the code authority.[71] Further, the doctrine of exclusive remedies is purely a rule of statutory construction, which will yield to a contrary legislative intent.[72] Such a result ought to be reached in this situation because the same reasoning by which the power to levy the assessments is implied would indicate a legislative intent that their effective collection should be made possible. Upon such a rationale the validity of those code provisions which specifically empower the code authorities to sue for assessments[73] may be sustained as to collection from those who have refused to consent to the codes. Yet to avoid the possible application of a holding that the remedies in the Act are exclusive, provision ought to be made in the NIRA authorizing the code authorities to bring suit.

Although such authorization would apply to suits against any member of an industry, it is, of course, not essential to recovery against those who have voluntarily assented to the codes. Clearly, they are subject to suit. They may be said to have agreed to this liability by their assent to the code either because of the specific authorization therein to be sued or because of an implication to be drawn from the power of collection specified in the code.[74] Since the right of the code authority to sue for payment against them is not derived from NIRA, but is based on the code itself, the possible limitation of remedies under NIRA does not apply. Or the right of action in the code authorities can be worked out on a purely contractual basis, the promise of payment to the code authorities having for consideration either the benefits derived from the activities of the code authority or the similar promises made by other members of the industry.[75]

Granting that the power of code authorities to sue for unpaid assessments is

70. Texas & Pacific Ry. Co. v. Rigsby, 241 U. S. 33, 39 (1916); Fairport, Painesville & Eastern Rr. Co. v. Meredith, 292 U. S. 589 (1934); Beauchamp v. Sturges & Burn Co., 250 Ill. 303, 95 N. E. 204 (1911); Cheek v. The Prudential Insurance Co., 192 S. W. 387 (Mo. 1917).

71. Meredith v. United States, 13 Pet. 486, 493 (U. S. 1839); Stockwell v. United States, 13 Wall. 531, 541 (U. S. 1871); The Dollar Savings Bank v. United States, 19 Wall. 227, 238 (U. S. 1874); United States v. Stevenson, 215 U. S. 190, 197 (1909); United States v. Chamberlin, 219 U. S. 250, 258, 262 (1911).

72. See Globe Newspaper Co. v. Walker, 210 U. S. 356, 367 (1908).

73. Code provisions cited in note 8, *supra*, first par.; Anti-Hog-Cholera Serum and Hog-Cholera Virus, art. VI, § 2(b); Underwear and Allied Products Manufacturing, Part IV, § 1 (h).

74. Code provisions cited in note 8, *supra*, first par.; Anti-Hog-Cholera Serum and Hog-Cholera Virus, art. VI, § 2 (b); Bowling and Billard Operating, art VI, § 7 (f); Labor Provisions for the Brewing Industry, art. VI, B, § 8; Construction, art. IV, A, § 2 (h), B, § 2 (e); Daily Newspaper, art. VI, § 3 (e); Labor Provisions for the Distilled Spirits Industry, art. VI, B, § 7; Fishery, art. VIII, tit. E, § 1 (a); General Contractors' Division, art. II, A, § 2; Investment Bankers, art. III, § 6; Refractories, art. III; Underwear and Allied Products Manufacturing, Part IV, § 1 (h).

75. This, however, is subject to the weaknesses pointed out in note 15, *supra*.

made clear either by statutory authorization or by judicial interpretation, the efficacy of that power may yet depend upon clarification of capacities in which such suit may be brought. If the code authority is incorporated, as it may be under the provisions of some codes,[76] it may of course bring suit in its corporate name. If not, it is not a legal entity and ordinarily would lack capacity to bring suit in its own name.[77] But if code authorities may properly be regarded as unincorporated associations, as it seems they may, they would find statutory authority to sue in certain states in their own names as such organizations.[78] Under the Conformity Act[79] these statutes would probably apply also to suits brought in the federal courts within those states.[80] The express provisions in

76. Barber Shop, art. VI, § 6 (b); Construction, art. IV, C, § 3; Handkerchief, art. VI, § 5 (a); Men's Clothing, art. XIII (g); Millinery, art. VI, § 8; Restaurant, art. VIII, § 1 (g); Retail, art. X, § 2 (g); Shoe Rebuilding, art. VI, § 5 (b); Wholesale Food and Grocery, art. VIII, § 6.

77. Agricultural Extension Club of Nevada County v. M. Hirsch & Son, 39 Cal. App. 433, 179 Pac. 430 (1919); Presbyterian Church of Paralta, Linn County v. Johnson, 213 Iowa 49, 238 N. W. 456 (1931); Adams v. Richardson, 268 Mass. 78, 167 N. E. 254 (1929); Detroit Schuetzenbund v. Detroit Agitations Verein, 44 Mich. 313, 6 N. W. 675 (1880); St. Paul Typothetae v. St. Paul Bookbinders' Union No. 37, 94 Minn. 351, 102 N. W. 725 (1905); Danbury Cornet Band v. Bean, 54 N. H. 524 (1874); WRIGHTINGTON, THE LAW OF UNINCORPORATED ASSOCIATIONS (2d ed. 1923) § 70, and cases cited in n. 1 therein; Sturges, *Unincorporated Associations as Parties to Actions* (1924) 33 YALE L. J. 383.

It has been said that this is not the federal rule. Hansel v. Purnell, 1 F. (2d) 266, 269 (C. C. A. 6th, 1924); Johnston v. Albritton, 101 Fla. 1285, 1289, 134 So. 563, 565 (1931). But these cases misinterpret the decision in United Mine Workers of America v. Coronado Coal Co., 259 U. S. 344, 383 (1922), which was based on the peculiar nature of a labor union and on statutory recognition of it as a legal entity. See Moffatt Tunnel League v. United States, 289 U. S. 113, 118 (1933); United States and Cuban Allied Works Engineering Corporation v. Lloyds, 291 Fed. 889, 891 (S. D. N. Y. 1923); Brown v. Protestant Episcopal Church of the United States of America, 8 F. (2d) 149, 150 (E. D. La. 1925).

78. ALA. CODE ANN. (Michie, 1928) § 5723; CONN. GEN. STAT. (1930) § 5490; MD. ANN. CODE (Bagby, 1924) art. 23, § 104; MICH. COMP. LAWS (1929) § 14020; N. J. COMP. STAT. (Supp. 1930) § 163-40; VT. PUB. LAWS (1933) § 1526; VA. CODE (Michie, 1930) § 6058; WYO. REV. STAT. ANN. (Courtright, 1931) § 28-908. But where the statutory provision refers only to associations of persons "in a business," the Code Authority would probably not be allowed to bring suit. Warman Steel Casting Co. v. Redondo Beach Chamber of Commerce, 34 Cal. App. 37, 166 Pac. 856 (1917); St. Paul Typothetae v. St. Paul Bookbinders' Union, No. 37, 94 Minn. 351, 102 N. W. 725 (1905); Cleland v. Anderson, 66 Neb. 252, 92 N. W. 306 (1902), 96 N. W. 212 (1903), 98 N. W. 1075 (1904), 75 Neb. 273, 105 N. W. 1092 (1905). But cf. Herald v. Glendale Lodge, B. P. O. E. of United States, 46 Cal. App. 325, 189 Pac. 329 (1920). ME. REV. STAT. (1930) c. 96, § 30, and N. Y. CONSOL. LAWS (Cahill, Supp. 1932) c. 20, § 12, provide respectively for suit in the name of trustees and of president or treasurer.

79. R. S. § 914 (1878), 28 U. S. C. A. § 724 (1926).

80. To the effect that such statutes relate only to the remedy, see United States Heater Co. v. Iron Molders' Union of North America, 129 Mich. 354, 363, 88 N. W. 889, 893 (1902); Warner v. Beers, 23 Wend. 103, 119 (N. Y. 1840). And the Conformity Act applies to the question of capacity to sue in one's own name in general. Texas and Pacific Ry. Co. v. Humble, 181 U. S. 57, 60 (1901); N. & G. Taylor Co., Inc. v. Anderson, 275 U. S. 431, 437 (1928); New York Evening Post v. Chaloner, 265 Fed. 204, 211 (C. C. A. 2d, 1920). But cf. United Mine Workers of America v. Coronado Coal Co., 259 U. S. 344, 391 (1922).

some codes that the code authority may sue for unpaid assessments in its titular capacity,[81] if accepted as of equal dignity with an act of Congress, would be controlling in the state as well as federal courts, as part of the paramount federal law,[82] to give to each of those code authorities power to sue as an entity. Otherwise suit must be brought in the names of the individual members. Those code authorities not enabled by incorporation or statute or code provision to sue as an entity cannot achieve the same result by representative suits. The statutes permitting such suits are invariably limited to cases where the parties are so numerous that it would be impractical or excessively expensive to bring them all into court.[83] This is obviously not the case with code authorities. Definite provision in the NIRA is needed to assure all code authorities the convenient capacity to sue as such.

Admitting the capacity of the code authorities or their individual members to sue, further clarification of the jurisdiction of the various courts to entertain suits by code authorities would also be desirable. Since there is nothing in the NIRA or the codes to indicate an intention that the federal jurisdiction over such suits should be exclusive, the code authorities are entitled to invoke the concurrent jurisdictions[84] of either the federal or state courts as matters of right.[85] In invoking federal jurisdiction, however, if the right of action of the code authority is claimed to be derived solely from the assent of the member sued to the code contract, the requirements of diversity of citizenship and jurisdictional amount would have to be met. But if the basis of the right is derived from NIRA, as it would have to be in the case of a non-assenter, and as it would indubitably be in cases of both assenters and non-assenters were NIRA to grant code authorities express power to sue for code assessments, then a different case would be presented. Such an action might then be held to come within the terms of Section 24 of the Judicial Code, which vests jurisdiction in the United States district courts of all suits arising under any law regulating commerce;[86] the code assessment powers derived from NIRA, like the rest of the program, to be valid, must be related to the commerce power. In that event federal jurisdiction would exist regardless of the amount in controversy[87] or the citizenship of the parties.[88]

81. Code provisions cited in note 8, *supra*, first par., and also Underwear and Allied Products Manufacturing, Part. IV, § 1 (h).

82. U. S. CONST., Art. VI, par. 2. But it may be doubted that the provisions were intended to have this effect. Once more statutory clarification would be helpful.

83. See collection of statutes in Wheaton, *Representative Suits Involving Numerous Litigants* (1934) 19 CORN. L. Q. 399.

84. Claflin v. Houseman, 93 U. S. 130, 136 (1876); Robb v. Connolly, 111 U. S. 624, 635 (1884); Galveston, Harrisburg and San Antonio Ry. Co. v. Wallace, 223 U. S. 481, 439 (1912); General Investment Co. v. Lake Shore & Michigan Southern Ry. Co., 260 U. S. 261, 286 (1922); Engel v. Davenport, 271 U. S. 33, 37 (1926); Grubb v. Public Utilities Commission of Ohio, 281 U S. 470, 475 (1930); Guiterman v. Pennsylvania Rr. Co., 48 F. (2d) 851 (E. D. N. Y. 1931).

85. Second Employers' Liability Cases, 223 U. S. 1, 55 (1912).

86. 36 STAT. 1092 (1911), 38 STAT. 219 (1913), 28 U. S. C. A. § 41 (8) (1926).

87. Turner, Dennis & Lowry Lumber Co. v. Chicago, Milwaukee & St. Paul Ry. Co., 271 U. S. 259 (1926); Davis v. Age-Herald Publishing Co., 293 Fed. 591 (C. C. A. 5th, 1923); Katz v. United States Shipping Board Emergency Fleet Corporation, 32 F. (2d) 14 (E. D. N. Y. 1929).

88. Illinois Central Rr. Co. v. S. Segari & Co., 205 Fed. 998 (E. D. La. 1913). Diversity

If the present indications that NRA is to be continued substantially as it now stands are to be realized, some attention should be devoted in drafting the new Act to the problems raised by code assessments.[89] Existing uncertainties require clarification; legal weaknesses demand removal. More positive safeguards must be provided for individual rights, and more adequate machinery established for administrative efficiency. Furthermore, all this must be guaranteed in the new NIRA itself.

---

of citizenship would be immaterial, anyway, since the suit is certainly one arising under the laws of the United States.

89. There have been eight cases involving the validity of code assessments: Schlesinger v. Kofsky-Moos, Inc., U. S. L. Week, Jan. 8, 1935, at 424, col. 1 (N. Y. Mun. Ct. 1934) (upholding assessments under Schackno Act); Friedman v. John Lowry, Inc., N. Y. L. J., Jan. 5, 1935, at 83, col. 3 (N. Y. City Ct. 1935) (holding assessments not authorized by New York Recovery Act); In the Matter of the National Department Stores, Inc., 1 PRENTICE-HALL TRADE AND INDUSTRY SERVICE, par. 8130 (E. D. Pa. 1934) (ordering receivers of bankrupt to pay assessment); United States v. MacEntire, NRA Release No. 8694, Nov. 7, 1934 (E. D. S. C. 1934) (consent decree enjoining non-payment); United States v. L. Brinkley Co., NRA Release No. 9149, Dec. 7, 1934 (E. D. S. C. 1934) (same); United States v. Breece Lumber Co., NRA Release No. 8789, Nov. 13, 1934 (D. Ohio 1934) (continuing restraining order); Schlesinger v. Industrial Fur Dyers, U. S. L. Week, Jan. 29, 1935, at 484, col. 3 (N. Y. Mun. Ct. 1934) (default judgment); Vaughn v. Pat Brown, Inc., U. S. L. Week, Jan. 29, 1935, at 484, col. 3 (Mun. Ct. Greensboro, N. C. 1934) (overruling demurer to complaint for "money due and owing"). Newspaper reports seem to indicate an increasing tendency to contest the validity of assessments in the courts.