NOTES

JUDICIAL INTERVENTION IN REVOLTS AGAINST LABOR UNION LEADERS

Courts have been intervening with increasing frequency in situations where labor unionists seek to free themselves of allegedly oppressive leadership. In previous discussions this problem has been analyzed principally from the viewpoint of the doctrines which the courts employ; but the value of such analyses is limited, because traditional legal doctrines have little relevance to the problems of intra-union conflict. If judges remain ignorant of the facts, litigation will be inconclusive and wasteful; the source of conflict will continue, unresolved. A few of the difficulties are indicated by three case histories chosen from a pathological industry.

The industry which constructs New York's magnificent buildings is itself petty and chaotic. The persistence of handicraft methods has preserved high costs of materials and labor, whose suppliers have long conspired to maintain inefficiency. The unions have gained critical power over employers by controlling the supply of skilled workers, and thus have been able to threaten the time-costs to which builders are especially subservient. This power was used to fix wage rates at high levels, and these rates were protected by freezing construction techniques in their old patterns. But such a program involved long-range fallacies. Fixed costs aggravated the speculative trends of the industry; high wages were overbalanced by uncertain length of jobs; permanent relations with employers were made impossible. With builders and workers vitally interdependent but mutually undependable, union officers, standing between them, have been able to exploit both sides notoriously, without disturbing the equanimity of the A. F. of L.

Of those intra-union disputes which reach the courts, most arise as suits for injunction against proposed disciplinary measures, or for mandamus for reinstatement after expulsion; and occasionally requests for damages are joined. As a general policy, the courts refuse to intervene in intra-union disputes except under one of two broadly-defined conditions: (a) the union charter—a contract between member and member, or member and organization—has been breached; (b) a property right is threatened, such as the "right to work", the right to maintain union membership, or a claim to special-benefit or general funds. Moreover, resort to internal union processes for redress must have been exhausted or shown to be futile. In other cases, concepts of tort (i.e., malice and conspiracy), agency (to define the officers' duties), or due process of law (as a general test for the fairness of internal procedures) have also been relied on. Since a few of these ra-

1. See for example Comment (1936) 45 YALE L. J. 1248; Note (1941) 51 YALE L. J. 331; compare Comment (1933) 42 YALE L. J. 1244.

2. An extensive list of cases is collected in Comment (1936) 45 YALE L. J. 1248. See generally Chafee, The Internal Affairs of Associations Not for Profit (1930) 43 HARV. L. REV. 993. The conceptual difficulties in various rationales are reviewed in Note (1941) 51 YALE L. J. 331.
tionales were transplanted bodily from the field of labor-capital conflict, it is not surprising that they have served as occasions for generalized anti-union sermons by the courts. Whether these doctrines help in solving real problems should appear from the case histories.

CASE I

During the late 1920's and early 1930's racketeers controlled both contractors and unions in the building trades of northern New Jersey, until scandal, depression and the loss of Mayor Hague's support intervened. One of the first revolts against that control was the attack by the (structural) Ironworkers against the card-index system of allocating men to jobs. While the primary objective of the card-index is to ensure impartiality and the unhindered role of chance in job distribution, it can be easily manipulated by union officers. The index had been adopted by Newark Local 11 in 1927-28 in an unsuccessful effort to end the abuses of a former permit system. In May, 1929, Local 11 voted 309 to 4 to abolish the index, but its spokesmen were denied a hearing by the north-Jersey District Council, whose constitution required the system. Three locals besides the Newark one comprised the Council: one of these (Perth Amboy Local 373) favored abolition, but the second was unaffected by the system and therefore uninterested, while the third was wholly dominated by the racketeers. Relief being blocked by the split vote, friction mounted within Local 11. In the spring of 1930 a member was criminally assaulted for protesting against manipulation of the card-index; at about the same time a petition against the system went to International President Morrin, who ignored it. The explosion occurred in September and October of that year, when the Local voted out for 90-day periods both the permit and the index systems. The International replied to this action by ordering them both restored and by suspending local meetings for a period which lasted some thirty months. Thus matters stood when four of the dissentients in Local 11 invoked judicial aid.

In the resulting case, Walsche v. Sherlock, the astonished tone of Vice-Chancellor Berry's opinion reflects the court's inability to believe that such unseemly methods were actually being used, and also its distaste for the arrogance of the International's officers. The Vice-Chancellor, convinced of the futility of making the plaintiffs "exhaust internal remedies", resolved the principal question as a "purely legal" one. The card-index system was held to be illegal because it was an instrument through which Local 11 maintained its closed shop, which was held to be illegal per se. Consequently the local charter, so far as its index provisions were concerned, became unenforceable

3. See generally Seidman, Labor Czar's (1938) 149-156. All the facts are in the opinions cited, unless otherwise indicated.
5. 110 N. J. Eq. 223, 159 Atl. 661 (Ch. 1932).
6. When, in open court, plaintiffs' counsel offered to settle if the Local were permitted to decide the index question for itself, defendants' counsel on instructions dismissed the offer as absurd.
contract. The decree therefore restrained the union's officers from depriving the complainants of any membership rights whatever, as a penalty for refusing to work under the index.

In Local 11 v. McKee the dissentients went a step further and charged the officers with having violated the Local's constitution in two ways: by acquiescing in the suspension of meetings, and by spending large sums of money without membership approval. In his reports to the Union, International President Morrin claimed that his vigorous intervention in the Local's affairs had been made necessary by the dangers of radical-fomented dissenion. In view, however, of the charges of malfeasance and of the steady dwindling of the union's membership and money, the court appointed a receiver to preserve the Local's *status quo* until new officers should be elected. "It is not difficult to perceive," said the court, "that the recreant ones should be ousted from the positions of trust which they have violated, and others be appointed in their stead." But the membership of Local 11 disagreed, and in a thoroughly honest election the old officers were re-elected. Apparently the dissatisfaction of a small group of union men was not enough to overcome the rank and file's deeply-rooted distrust of courts and their loyalty for elected officers, even those suspected of having taken personal advantage of a position of trust.

The same International and a sister Local in Perth Amboy are involved in Local 373 v. International Association of Ironworkers. In 1930 one Kelly had been elected business agent of 373 for a ten-year period; and when at the election the following year the Local's members nominated one Buckley for the same office, Kelly objected and appealed to the International for aid. Though Kelly's appeal was sustained, the Local nevertheless renominated and elected Buckley. A week later International Vice-President Pope was directed to take supervision over 373 until its internal dissension should subside. But as soon as he tried to put these orders into effect, the Local's officers, without troubling to appeal to the General Executive Board, served him with an injunction which restrained all International interference in the Local's affairs and finances. While the International then ceased to interfere officially, in fact it continued to exercise a degree of control by recognizing as Secretary-Treasurer Reichardt, who had originally been elected but had later been divested of office by the Local. Since International dues-stamps could be procured from Reichardt alone, the Local's own man never actually came into power. In April, 1933, Reichardt revealed to the International that since July, 1931, he had embezzled about $21,000; but the International allowed him to remain in office until a receiver *pendente lite* was finally appointed by a court in July, 1933. The International not only refused to supply dues-stamps to the receiver, but in October, 1933, induced four of the

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7. 114 N. J. Eq. 555, 169 Atl. 351 (Ch. 1933).
8. Id. at 566, 169 Atl. at 356.
9. Personal interview with counsel for plaintiffs.
10. 120 N. J. Eq. 220, 184 Atl. 531 (1936).
11. See id., brief for appellants, 3-6.
12. See id., brief for respondents, 13.
13. Reichardt was convicted for this embezzlement. See id. at 226, 184 Atl. at 534.
Local's members to pay dues to itself directly and granted stamps to them only, in the hope that other members—unable otherwise to prove union standing—would follow. This policy was continued until trial time in 1936, in such a way as to confuse the books further and deprive the Local of its proper share of the dues-moneys paid. In his opinion Vice-Chancellor Buchanan, apparently influenced by the decisions in *Waische v. Sherlock* and *Local 11 v. McKee*, recognized readily the impossibility of successful internal appeal. Since he could find no constitutional authority for the International's acts, he restrained it from interfering in any way with the Local's affairs, forbade it to discriminate as to dues-stamp recipients, and burdened it with costs of receivership and litigation. But the court denied the two most drastic requests made by the Local. The International was not enjoined from chartering a new local in the Perth Amboy area, and the parent body was not held answerable for Reichardt's defalcation, though a money decree against Reichardt was granted. Inasmuch as an injunction had been restraining the International from interfering with the Local's affairs during the period of embezzlement, it was held that Reichardt could not then have been acting as its agent; and the evidence of unofficial control by the International was not thought sufficient to make the doctrine of "respondeat superior" apply. But the International was thus forced out of Local 373's affairs, and it seems not to have interfered since then.

**Case II**

A ten-year court history of attempts by New York's crane- and steam-shovel-operators to get rid of their corrupt leaders begins with hope but ends in futility. Early in 1930, the two Locals that represented the International Operating Engineers in New York were under the "supervision" of men directly responsible to the General President. In that year President Huddell decided that efficiency would be promoted by the suspension of local meetings and a full concentration of power into the supervisors' hands. Meetings stopped; summary expulsion greeted those members who dared to protest, including some of long standing in the Locals. When they brought their plea to the Supreme Court in *Rodier v. Huddell*, the failure to grant a trial before expelling these members was held to have violated the International constitution and to have deprived them, without due process, of their property interests in local death benefits and general funds. The court there-

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14. 110 N. J. Eq. 223, 159 Atl. 661 (Ch. 1932).
15. 114 N. J. Eq. 555, 169 Atl. 351 (Ch. 1933).
16. Compare Toner v. Int'l Ass'n of Ironworkers, 113 N. J. L. 29, 172 Atl. 359 (1934). There the Ironworkers' International had taken legitimate supervision of the Trenton local and had appointed Toner as its business agent. Although Toner received his salary from the local, and although the International had no right to appoint local officers, Toner's widow was permitted to recover against the International for her husband's accidental death, on the theory that the International's control over Toner created a master and servant relationship.
17. See generally *Seidman, Labor Czars* (1938) 156-165.
fore ordered that the expelled members be reinstated in Local 125. This new Local 125 had been created by Huddell in the interim, by amalgamating the two original Locals; and under Huddell’s new supervisor, Patrick Commerford, the policy of membership exploitation was continued more vigorously than ever, until Commerford was sent to Atlanta for income-tax evasion late in 1932.20 At the instance of a rank-and-file leader named Irwin, a group of members again sought judicial aid (in the first Irwin v. Possehl),21 and again succeeded. Relief within the parent organization was no more to be expected from Possehl, the new General President, than from Huddell, who had recently been murdered. In this situation Supreme Court Justice Hammer took jurisdiction to construe the International constitution. In his opinion supervisory powers were limited to investigating local officers and affairs and guiding them back into compliance with the charter when they had erred. Inasmuch as Commerford and his men had exceeded this authority, Judge Hammer removed them from power and ordered elections and an accounting to be held. This was June 2, 1932. On June 3 the General Executive Committee revoked 125’s charter and promptly set up a rival local, whose leaders asserted full jurisdiction for New York on the ground that 125 was now out of both the International and the A. F. of L. In the second Irwin v. Possehl22 the revocation of Local 125’s charter was nullified, thus putting a stop to the other Local’s claims. Yet a further suit by Local 125,23 requesting that the International’s “ad hoc” union be dissolved, failed. When this rival Local had already replaced itself by two more newer Locals, another Supreme Court Justice enjoined it from continuing in existence;24 yet he refused to act against its offspring, whose officers, appointees of Possehl, constituted the present danger to 125. When the officers of Local 125 began an appeal from this extraordinary decision, they received formal notice from Possehl,25 were heard by him, adjudged guilty of incompetence and negligence, and suspended from office (not from membership)—all in strict accord with the International constitution. They resisted the General President’s orders, but at this crucial point of their revolt the rebels permanently lost judicial support.

In Fay v. Robinson26 the insurgent officers, after attempting to show cause why they should be permitted to disobey Possehl, were enjoined from further resistance. Possehl then fortified his position by re-consolidating all the locals into a single unit.27 A new constitution, whose terms expanded the

27. A complaint against this move was dismissed for lack of jurisdiction. See memoranda for both sides in Rowan v. Possehl, 173 Misc. 898, 18 N. Y. S. (2d) 574 (Sup. Ct. 1940); and see Rodier v. Fay, 7 N. Y. S. (2d) 744 (Sup. Ct. 1938).
President's control over disfavored Locals, was approved by the International Convention later in 1938; and early in the next year these provisions were submitted (as required) to a nation-wide referendum. In *Rowan v. Passcht*\(^\text{28}\) members of the big new Local charged that response had been so wholeheartedly favorable as to warrant suspicion: in certain Locals *every* registered member had voted, and all, or practically all, had voted "aye"; in others there had been voting by mail, although the General Executive Committee had instructed that only ballots be used. Doubt was thus cast on the validity of at least one-third the total of votes. However, Justice Benvenega found nothing in the constitution to prevent Locals from voting in manners other than the one prescribed, and—despite a detailed recounting of the unions’ past—he discovered that their acts bore a *presumption of regularity*. The evidence therefore fell short of proving a conspiracy. Since this mishap occurred, the New York Local’s engineers have made no new effort to rebel; but one may predict with little temerity that the struggle will break into the open again before long.

**Case III**

The International Hodcarriers Union comprises skilled and unskilled workers in all branches of masonry construction, and a few experts in Realpolitik. Although the organization has been under control-by-violence since 1911, only two uprisings against it have occurred in the New York area, both recent and both successful in the courts.

In accord with the domineering policy he has pursued since 1926, when he inherited the International, in April of 1939 President Moreschi instructed his appointee, Vice-President Bove, to take over the tunnel-workers’ (Sandhogs\(^\text{2}^\)) Local 147 of New York, without benefit of charges or hearing. When the Local proved recalcitrant, Moreschi renewed his orders and instructed 147's deposit banks to honor no signature but Bove's. In *Gallagher v. Moreschi*\(^\text{29}\) the Local secured an injunction against these summary proceedings; but the parent body was granted the right to investigate and try Local 147 on charges. At this point Moreschi began a campaign to dissuade contractors from dealing with the refractory Local, in an attempt to drive its members into two new Locals sponsored by the International. Yet Local 147 remained strong enough to lead the clamor which resulted in the holding of the first International Convention in thirty years. The insurgents carried the fight to the floor of the convention, but the organization's forces proved too well rooted. President Green of the A. F. of L. appeared and praised the International officials for cooperating with him. Moreschi won out by (literally) a stampede, and, after his victory, said of his critics: “Christ said, ‘Forgive them, for they know not what they do.’ So do I.”\(^\text{30}\)

\(^{28}\) 173 Misc. 898, 18 N. Y. S. (2d) 574 (Sup. Ct. 1940).

\(^{29}\) Unreported decisions, N. Y. Sup. Ct. Temporary injunction granted June 23, 1939; permanent injunction, July 12, 1941.

\(^{30}\) See PM, Sept. 18, 1941, p. 20, col. 1. On Green's speech, see N. Y. Times, Sept. 17, 1941, p. 14, col. 3. For the convention, see also: N. Y. Times, Sept. 15, 1941, p. 11, col. 1; Sept. 16, 1941, p. 30, col. 4; Sept. 19, 1941, p. 48, col. 3; Sept. 20, 1941, p. 8, col. 8; and see also PM, Sept. 15, 1941, p. 20, col. 1; Sept. 16, 1941, p. 21, col. 1; Sept. 21, 1941, p. 15, col. 2.
It was now quite safe to prefer formal charges against 147. After six weeks' hearing and deliberation by the International Executive Board (of which Bove was a member), in January, 1942, the Local's officers were declared guilty of having violated the constitution. As a penalty the Board revoked 147's charter, banned several of its leaders from office for periods up to five years, and directed it to transfer all its possessions to a new local. If 147 disobeyed these orders, they were to be enforced by strikes against its employers.

In the trial of Moore v. Moreschi, these facts were practically uncontested. In order to justify intervention in the case, Justice McCook first noted that internal remedies were unavailable; then, substantively, he found a conspiracy by the International and its two chief officers to deprive local members of the right to work and the hope of a livelihood. The formal hearing at Washington, which was supposed to have afforded the due process of law, was held to be in fact marked by prejudice, malice, excessive punishment, and tangible injury to the accused. And since the Board had based its decision on the theory that Local 147's officers had appealed to a court sooner than was permissible, the action taken at this hearing had specifically contravened a finding on this point in Gallagher v. Moreschi. While recognizing the unsavory history of the Local, the court declined to apply the "clean hands" doctrine. But under a sweeping permanent injunction Moreschi and Bove have been restrained from all interference with the Local or its jurisdiction. The next move is up to the still entrenched International administration.

A second revolt against Bove's interference, this time by a local in Kingston, New York, appears in the cases called Dusing v. Nuzzo. Local 17, organized in 1936 among New Yorkers transferred to the Kingston area in order to work on the New York City aqueduct, held its last election in 1937, after which meetings ceased by order of Bove. Within the next four years the Local's secretary, Nuzzo, henchman to Bove, mislaid $160,000 of the Local's money, and became the prosperous owner of a night-club. On these grounds one Dusing, acting in behalf of all who had lost their jobs by criticizing Nuzzo, moved for a temporary injunction and for discovery of the Local's records. Justice Murray granted both requests, and advised that the night-club was suitable for "jazz . . . and boogie woogie" but not for serious union meetings. An examination of the records confirmed Dusing's charges; and, since both the Local and the International constitutions called for quarterly accountings and annual elections, the Supreme Court ordered compliance with these requirements. The court's theory, riding off boldly in all directions, was that "if a member has a 'property right' in his position on the roster, I think he has an equally enforceable property right in the election of men who will represent him in dealing with his economic security and col-

lective bargaining, where that right exists by virtue of express contract in the language of a union constitution." The ensuing order decreed that Bove stop annoying Local 17, that Nuzzo (who had betrayed his fiduciary responsibilities) should make good the missing funds, and that no retaliation should be taken against the complainants.

At the ensuing elections the old regime seems to have been completely overthrown. But the story of Nuzzo's financial indiscretions is not yet complete; for in July of 1942 Governor Lehman ordered a grand jury to investigate Local 17's affairs at a special term of the Supreme Court at Newburgh in August. From this inquiry the state-wide activities of the International may be brought into the open.

These three case-histories are of course not typical of labor unions generally or even of intra-union disputes; but they do exemplify a class of cases which recurrently arise out of a very few industrial situations. The unions usually concerned, such as those in most branches of the building trades, and among the movie operators or the teamsters, comprise skilled workers in industries where the "perishability" of products is most pronounced; and corruption in these unions will follow fairly predictable patterns with regard to its origin, expansion, and defenses. The first factor in determining the success of judicial intervention is thus the industry's structure, and especially its employment relationships. A second factor is the character of the International and local constitutions. If time-consuming but futile court campaigns are to be avoided, the officers' powers and limitations in disciplining members, and the International's ability to make and unmake local charters at will, must be taken into account. A third, and probably the most important factor of all in any specific situation, is: do the members really want to be saved? Often the size and composition of the protesting group will help answer the question, but at least four variables must be ascertained before a satisfactory result is possible. (a) Resistance to intrusion by outsiders varies fairly directly with the age of the union and the extent to which it has become hardened in its "folkways." (b) Elected officers command greater personal loyalty than do officers thrust on a union from above. (c) The longer an officer has served, the more deeply rooted will be his hold on union affairs, though the degree will depend upon (d) his past and present ability to achieve high wages, good working conditions, and (perhaps) individual favors for his constituents. In all events, it is clear that vindictive language and extreme measures do not of themselves guarantee a desirable outcome.

The nature of these realistic criteria indicates why even intelligent and sympathetic courts fail so regularly in attempts to handle revolts within labor

35. Id. at 37, 29 N. Y. S. (2d) at 884.
36. See N. Y. Times, July 10, 1942, p. 18, col. 3.
37. See generally SEIDMAN, LABOR CZARS (1938); Note (1941) 51 YALE L. J. 331, 332. In food markets and with movie exhibitors, the value of the products will decrease or perish unless the services are performed immediately. Building contractors are in an analogous situation, since they can secure working capital only on short-term notes at a high interest rate. In these situations the union's threat to strike obviously offers increased opportunities for graft.
unions. The cultural backgrounds typical of our judiciary leave them rather ill-fitted at comprehending the personal relations between union men, particularly when those relations have reached a stage of high tension. If decisions are to be made which will take account of the real factors in the problem, probably union men can make them best. Since these disputes usually arise in metropolitan areas, it might be best to place them before a quasi-court composed of responsible and disinterested leaders of the important labor groups in the area concerned. Appeals to the regular judiciary could follow, but the insight of the experts would clarify future action. At any rate, continuance of the present judicial system of handling an intra-union revolt as a “purely legal question” is unlikely to solve any problems.

CONSTITUTIONALITY OF STATE LAWS PROVIDING STERILIZATION FOR HABITUAL CRIMINALS*

Since sterilization operations under compulsory state laws have been increasing rapidly, these statutes now present a more important problem than existed when the Supreme Court first approved sterilization in Buck v. Bell in 1927. This growth of compulsory sterilization in America has resulted from several different pressures. Eugenic aims have been combined with the more immediately practical objectives of reducing public welfare costs and punishing crime. And the statutory provisions reflecting these different aims have often been found to conflict with each other in judicial review.

For example, sterilization of the feeble-minded has been authorized in about thirty states and the courts have generally been willing to take judicial notice of the strong scientific evidence of the inheritability of feeble-mindedness. However, most of these statutes have applied only to persons in state insti-


1. Compulsory sterilization by American states began slowly after 1900. Before 1928 about 9,000 operations were performed, but by 1942 the number had risen to 38,000. Of these about 15,000 were in California and 4,000 in Virginia. Communication to the YALE LAW JOURNAL from the Human Betterment Foundation, Pasadena, California (an organization devoted to study of and publicity for eugenic sterilization), June 29, 1942. Probably almost all of the persons affected were feeble-minded or insane. Cf. note 18 infra.

2. 274 U. S. 200 (1927). This decision laid no emphasis on the civil rights involved.

3. The twenty-eight state laws usually apply to feeble-minded, insane, and epileptic persons. Former acts in New York, New Jersey, and Washington were declared unconstitutional (see notes 7 and 10 infra), but a revised statute will probably be enacted in Washington. A few state laws (notably in Vermont) have voluntary provisions, and in other states (for example, Iowa and Oregon) mandatory laws are enforced only when the inmate’s consent is secured. See note 18 infra.

tions—indicating the purpose to reduce the cost of public care—and this classification was held to violate the equal protection clause, until the Supreme Court upheld such a provision in *Buck v. Bell.* While since that time sterilization acts have been widely upheld, the courts have continued to insist that sterilization laws must provide a thorough hearing in each case, to allow each individual to dispute the question whether his children are likely to be feeble-minded. Cases involving mental deficiency have thus contributed to the pattern of judicial treatment of sterilization laws an emphasis upon equality of classification and the requirement of individual hearings.

On the other hand, the sterilization of criminals authorized in thirteen states raises different and more serious issues. A few of these statutes were

5. In twenty-one of the twenty-eight existing acts.

6. Sterilization often makes possible the release of feeble-minded inmates, and will clearly bring some reduction in the number of mentally deficient who will require care in the next generation. For the debate on how much reduction is likely, compare *Human Betterment Foundation, Human Sterilization Today* (1940) 2, 4, 5, with Price and Halperin, *Sterilization Laws—Bane or Banner of Eugenics and Public Welfare?* (1940) 45 *Amer. J. Mental Deficiency* 134. See also *Buck v. Bell,* 143 *Va.* 310, 130 *S. E.* 516 (1925); *N. H.* Laws 1929, c. 138.


8. 274 *U. S.* 210 (1927), *aff'd* 143 *Va.* 310, 130 *S. E.* 516 (1925).


11. Cf. note 40 infra.


Several other criminal sterilization laws have been declared unconstitutional, on various grounds. *Iowa Laws* 1913, c. 187, and *Nev. Rev. Laws* (1912) § 42-9 were held to provide cruel and unusual punishments. See note 13 infra. In cases involving sterilization of the feeble-minded, *N. J. Laws* 1911, c. 190, and *N. Y. Laws* 1912, c. 445, were
clearly intended to provide a more severe punishment for habitual and sex criminals, and in a few early cases such laws were invalidated on the ground that sterilization was a cruel and unusual punishment. But most of these acts also profess an eugenic purpose, although the scientific evidence tends to be unreliable.

13. Davis v. Berry, 216 Fed. 413 (S. D. Iowa 1914), rev'd on other grounds, 242 U. S. 468 (1917); Mickle v. Henrichs, 262 Fed. 687 (D. Nev. 1918). Contra: State v. Feilen, 70 Wash. 65, 126 Pac. 75 (1912). The existing Washington and California acts [CAL. PEN. CODE (Deering, 1941) § 645] and the former Nevada act provide the clearest examples of purely punitive laws; after a conviction for statutory rape, sterilization is authorized "in addition to such other punishment" as may be imposed. Moreover, Washington includes "habitual criminals" in the same provision. And compare ORE. COMP. LAWS ANN. (1940) § 127-802, 805: although the act is expressly declared to be non-punitive, the conviction of a sex criminal is to be followed by notice to the sterilization board, and the usual penal sentence is deferred until the board has decided whether he should be sterilized. Compare the two Oklahoma acts, infra note 14.

14. Two state acts are expressly limited to the criminally insane, whose sterilization may be justified because insanity is often hereditary. Thus in Delaware habitual criminals may be examined for mental abnormality or disease; and the Kansas act is limited to cases where defendant's children would be defective or feeble-minded with criminal tendencies. (An identical North Dakota provision, in N. D. COMP. LAWS ANN. (1913) §§ 11429 to 11438, was replaced by N. D. LAWS 1927, c. 263).

But all other acts are broader in scope. The most common type of statute—found in Idaho, Iowa, North Dakota, Oregon, and (until recently) Washington—covers the feeble-minded, insane, "habitual criminals", moral degenerates, and sexual perverts. An eugenic purpose is indicated in these acts by the requirement of an express finding, after an individual hearing, that the defendant's children would inherit their parent's antisocial tendency. In Nebraska the same provisions are applied only to inmates about to be released from state institutions, obviously for eugenic purposes; the Nebraska Act of 1933 contains the same limitation, but it is not clear whether the required eugenic finding is required for habitual criminals. The less elaborate Connecticut statute is less definite on its coverage, but requires the same eugenic finding; Wisconsin includes criminals, but the required finding is vaguely phrased, that procreation is "inadvisable". Similar but vaguer provisions appeared in the older invalidated acts in New Jersey, New York, and Indiana. In the few instances where "habitual criminal" is defined (in California, Delaware, both Oklahoma acts, and the invalidated Washington act), a standard of three convictions for felonies is adopted. While these laws have clearly eugenic features, and the most common type is even expressly non-punitive, they probably also embody a desire to prevent or punish crime; and they can be so used. Cf. p. 1384 infra. For example, another provision in the similar Utah act provides sterilization for "habitual degenerate criminal tendencies," and the usual eugenic finding is required. Nevertheless, in one of the few reported criminal sterilization cases (cf. note 13 supra), an apparently punitive order was made; and the court annulled it for insufficiency of evidence about the defendant's heredity. Davis v. Walton, 74 Utah 80, 276 Pac. 921 (1929).
to show that criminal traits are not inheritable. A many-sided maladjustment between an individual and his environment is now recognized as the typical background of criminality; and even the most ardent advocates of eugenic sterilization hesitate to say that an "hereditary criminal tendency" can be isolated from the complex factors that produce a criminal. These doubts may explain why the criminal sterilization statutes have evidently only been rarely applied.

The constitutional problems involved in such statutes have recently been raised in a test case brought under the Oklahoma Habitual Criminal Sterilization Act of 1935. This act defines an habitual criminal as anyone convicted three times of felonies involving moral turpitude, except for crimes against the revenue and liquor laws, embezzlement, and political offences. After an investigation by the state Attorney General, proceedings against the

15. "There is more unanimity today than ever before that criminality, per se, is not inherited, and that criminals, as criminals, should not be subjected to compulsory sterilization." FINE, CAUSES OF CRIME (1938) 209-210. See also LANDMAN, HUMAN STERILIZATION (1932) 178-182, and COMMITTEE OF THE AMERICAN NEUROLOGICAL ASSOCIATION, EUGENIC STERILIZATION (1936) c. VIII.

16. See SUTHERLAND, PRINCIPLES OF CRIMINOLOGY (1939); HEALY, THE INDIVIDUAL DELINQUENT (1915).

17. The attitude of the Human Betterment Foundation, a leading organization devoted to promoting eugenic sterilization, is significant. In a letter accompanying their legislative suggestions, President Gosney said in 1930: "We feel strongly that no attempt should be made at the present time to apply sterilization to criminals as such. . . . The criminal may and often should be sterilized on eugenic grounds without reference to his crime." Quoted in 3 GENETICS 110 (1930). Cf. A. B. A. Rep. (1928) 575-577. In a communication to the YALE LAW JOURNAL, July 15, 1942, the Foundation reaffirmed its position that it does not actively advocate sterilization of criminals as such.

18. No complete figures are available on the number of criminals sterilized under the thirteen state acts (see note 12 supra). Communications have been received by the YALE LAW JOURNAL from Idaho (July 13, 1942), Iowa (July 24), Oklahoma (June 30), Oregon (July 23 and August 3), Utah (July 28), Washington (July 10 and 28), and Wisconsin (July 22). Apparently these acts have not often been invoked against criminals. No habitual criminals have been sterilized in Iowa, Idaho (where the whole law is now a dead letter), or Utah [but see Davis v. Walton, 74 Utah 80, 276 Pac. 921 (1929), cited supra note 14]. In other states, along with a large number of the feeble-minded, a few criminals have been sterilized, under various circumstances. In Wisconsin twenty-five criminally insane have been sterilized, but no criminals as such. Under the Oregon law (as in Iowa), in practice the inmate's consent is required for operations; and under this arrangement thirty-one criminals have been voluntarily sterilized. In Washington, the act of 1921 has not been used on criminals. As for the act of 1909, the records show no indication that the sterilization order upheld in State v. Feilen, 70 Wash. 65, 126 Pac. 75 (1912), was ever carried out; but one other "habitual criminal" was sterilized under this act in 1925. The present Washington Dep't of Public Institutions has indicated the view that sterilization of criminals is eugenically unsound. Finally, in Oklahoma the first proceedings brought under the separate act of 1935 resulted in the Supreme Court test in the principal case.


20. OKLA. STAT. ANN. (1936) tit. 57, §§ 171 to 195. For the previous Oklahoma act of 1933 [OKLA. STAT. ANN. (1936) tit. 35, §§ 141 to 146], see note 14 supra.
criminal are begun under civil procedure in the state district courts, with a jury trial if desired by either party. The scope of the hearing is limited to applying the statutory definition and to finding whether the operation would be detrimental to the defendant's health; there is no determination whether the individual is likely to have children with criminal tendencies.\footnote{21}

In the test case, \textit{Skinner v. Oklahoma ex rel. Williamson},\footnote{22} the defendant's three convictions, all prior to the passage of the sterilization act, were for stealing chickens and robbery with fire-arms. In the Oklahoma Supreme Court the statute and the sterilization order were upheld by a five to four decision. The majority felt that the act was wholly eugenic and not penal, and that eugenic sterilization of criminals was a proper exercise of legislative discretion under the police power. The United States Supreme Court, unanimously reversing, indicated a new recognition of the important human rights involved in sterilization, but narrowed the decision by grounding it upon the traditional doctrines used in connection with sterilization of the feeble-minded. Mr. Justice Douglas, speaking for the majority group of seven, found a denial of equal protection in the exception made for embezzlers, while Chief Justice Stone, concurring, put his chief emphasis on the limited individual hearing as a violation of procedural due process. Mr. Justice Jackson agreed with both objections, and hinted at the broader question of substantive due process as a constitutional limit on the legislature's power to sterilize.\footnote{23}

Several important issues concerning criminal sterilization depend upon construction of the Oklahoma statute. Although the Oklahoma court majority declared that the law was not penal but eugenic,\footnote{24} their reasoning that the legislature's intent was wholly eugenic is not convincing. It is true that the act provides for civil procedure, and the sterilization order is not formally part of a criminal judgment. And an eugenic purpose may be argued from the fact that all habitual criminals are included, those at large as well as those in institutions. Yet, since several courts have invalidated sterilization acts which applied only to institutionalized persons on the ground that this limitation was a denial of equal protection, the act's applicability to all criminals may have been intended to avoid this constitutional objection. A more definite indication of the act's punitive intent is the testimony in the legislature, by one of its authors, that it would have a deterrent effect on crime.\footnote{25} Moreover, in this act the legislature omitted several important limitations which had emphasized the eugenic character of the previous Oklahoma act.\footnote{26} The blanket provisions of the present act include no upper age limit. It applies to all institutionalized persons, even lifers, and not simply to those about to be released. And finally, all habitual criminals are included, without the usual finding that the defendant's children are likely to have criminal tendencies.\footnote{27} While the legislature's intent may have been in part eugenic, the act unmistakably had punitive features.

\footnote{21}{For the more usual requirement of an eugenic finding in each case, see note 14 \textit{supra}.}
\footnote{22}{189 Okla. 235, 115 P. (2d) 123 (1941), \textit{revd}, 62 Sup. Ct. 1110 (U. S. 1942).}
\footnote{23}{See p. 1387 and note 48 \textit{infra}.}
\footnote{24}{See 189 Okla. 235, 237-238, 115 P. (2d) 123, 126 (1941).}
\footnote{25}{See Note (1941) 9 U. of Chi. L. Rev. 145, 147, n. 18.}
\footnote{26}{See \textit{OKLA. STAT. ANN.} (1941) tit. 35, § 141. See notes 12 and 14 \textit{supra}.}
\footnote{27}{See note 14 \textit{supra}.}
If, then, the act has a punitive character, it raises two constitutional problems. Admittedly it would be ex post fact\textsuperscript{28} when applied to situations where, as in the \textit{Skinner} case, all the defendant's criminal convictions took place before the Act was passed. In the second place, the Oklahoma court expressly refused to pass on whether sterilization is a cruel and unusual punishment,\textsuperscript{29} and as such forbidden by the state constitution.\textsuperscript{30} Two of the three early cases held that it was cruel and unusual.\textsuperscript{31} While sterilization may not be physically painful, mental suffering has been recognized as an element of cruel and unusual punishments. After a person has been sterilized, "the humiliation, the degradation, the mental suffering are always present and known by all the public, and will follow him wheresoever he may go."\textsuperscript{32} By enlightened modern standards, sterilization should be recognized as exceeding the limits of humane punishments for crime.

Even if the act is considered to have no punitive features, serious questions as to its validity as an eugenic measure are raised under the equal protection and due process clauses. While all members of the Federal Supreme Court recognized that the importance of the personal rights involved required strict judicial scrutiny of the act,\textsuperscript{33} their opinions were based on rather narrow issues. While expressly reserving judgment on the other constitutional issues involved, Mr. Justice Douglas seized upon the exemption for embezzlement to invalidate the Act under the equal protection clause.\textsuperscript{34} It is true that the act would permit unequal treatment of two crimes that are intrin-
cally the same. Larceny (which is covered) is only technically different from embezzlement (which is exempted), and it would not be seriously argued that different hereditary tendencies could be expected from these legally different classes of criminals. Yet the situation of a thrice-convicted larcenist who is sterilized, and a thrice-convicted embezzler who is left free, is unlikely to occur. Since the Skinner case presented several more serious constitutional questions, the remote possibility indicated seems rather a minor issue on which to base a major decision. Moreover, no other such arbitrary classifications appear in other sterilization acts. Consequently, the Supreme Court's emphasis on equality of classification does not seem to be the most appropriate judicial approach to criminal sterilization laws.

The traditional insistence on individual hearing may have been responsible for the judicial proceedings established in the Oklahoma act. But the hearing provided does not include a determination that the defendant's children are likely to have criminal tendencies, and on this ground Chief Justice Stone and Mr. Justice Jackson thought the act violated procedural due process. While a hearing to examine the defendant's family history may give indications of the presence of hereditary feeble-mindedness, it is difficult to understand what enlightening evidence could be presented to show that a person's unborn children would, or would not, have hereditary criminal tendencies. As the Oklahoma court majority pointed out, the evidence about a person at such a hearing would only be speculative. But the logical conclusion from this is, not that the legislature may therefore sterilize all habitual criminals without hearing, but that a legislative "finding" dealing indiscriminately with all habitual criminals is so speculative as to be of very dubious value. Thus an evaluation of procedural due process for sterilization of criminals leads directly into the question of substantive due process.

35. See 62 Sup. Ct. at 1112-1114.
36. Apparently the only other exception contained in a criminal sterilization law is the provision in one California act to exempt voluntary patients in state hospitals. CAL. PEN. CODE (Deering, 1941) §2670. Apart from the now accepted limitation to persons in public institutions, the laws for sterilizing the feeble-minded do not contain any arbitrary exceptions that would justify judicial emphasis on equality of classification.
37. See note 10 supra.
38. OKLA. STAT. ANN. tit. 57, § 172. This judicial hearing is almost unique. But see MICH. STAT. ANN. (Henderson, 1936) §14.383 (on the feeble-minded).
39. See Chief Justice Stone, 62 Sup. Ct. at 1115; Mr. Justice Jackson, id. at 1115-1116.
40. See for example the statement of facts in State v. Troutman, 50 Id. 673, 679, 299 Pac. 668, 670 (1931). In a proceeding to sterilize a feeble-minded inmate of a state institution, the evidence revealed that defendant's father, mother, five brothers, and six sisters were also feeble-minded and in state institutions. Moreover, his aunt had seven children, three of whom were feeble-minded and institutionalized; and one of these had ten children, all defective and institutionalized.
41. See 189 Okla. 235, 239, 115 P. (2d) 123, 128 (1941).
42. The present Supreme Court's reluctance to invoke substantive due process has been particularly evident in the 1941-1942 term. While anxious to protect civil liberties against state action, the court has resorted to other verbal formulas which have had a less dubious recent history. Thus in Bridges v. California, 314 U. S. 252 (1942), the Fourteenth
The Oklahoma court in upholding the act under the due process clause gave great weight to the legislature’s findings of a substantial relation to the general welfare, by a vote of five to four. This presumption of the constitutionality of legislation has received increasing respect from the courts in the last few years; but, as the four dissenting Oklahoma judges pointed out, the presumption usually “does not apply in all its force” when personal liberties are involved. In the *Skinner* case three separate opinions in the United States Supreme Court have unanimously reaffirmed a belief that the right to have children is among the most important civil liberties, both to society and to the individual. A reckless use of sterilization will deprive the community of valuable citizens, and if available the device might even be turned against minorities deemed subversive. The damage, done, cannot be undone. As Mr. Justice Jackson put it, “there are limits to the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority.” And Chief Justice Stone’s opinion has strong indications of a similar attitude. On the analogy of the “clear and present danger” test in the free speech cases, no strong likelihood of preventing future crime appears to justify sterilization of habitual criminals. The requirements of a non-arbitrary basis of classification and of an individual hearing may be relevant to protecting the feeble-minded against abuse of the power to sterilize. But criminal traits are not known to be inheritable, and the right to have children has now been recognized as one of the higher civil liberties. In this situation the courts should be willing to face the eugenic issue squarely by declaring criminal sterilization laws invalid on their face.

Amendment was invoked without reference to any particular clause. Presumably the court fears that preservation of the due process clause will allow its revived use by a possible future conservative court against economic regulation. But the battle over *Lochner v. New York*, 198 U. S. 45 (1905), has now been won; and if its philosophy should again come to dominate the court, it may be doubted whether its fulfillment would be forestalled by the distinction between “due process” and “fourteenth amendment” or “equal protection”.

43. See 189 Okla. 235, 239-240, 115 P. (2d) 123, 127-128 (1941). But apparently very little evidence was presented to the legislature before the law was enacted. Communication to the *Yale Law Journal* from the office of the Attorney General of Oklahoma, June 30, 1942.


46. See note 33 supra.

47. It is suggested by Mr. Justice Douglas, 62 Sup. Ct. at 1113 (U. S. 1942), that reckless sterilization might even affect the future character of the race.


NEW ADMINISTRATIVE DEFINITIONS OF “ENEMY” TO SUPERSEDE THE TRADING WITH THE ENEMY ACT

Because of the more complex international economic relations and the great distance between the United States and its enemies in the present war, the prevention of trade beneficial to the enemy has required new techniques different from the common law doctrines. Since direct commerce with enemy territory, originally the most important problem, is now made impossible by the naval blockade and the shortage of shipping space, the traditional prohibitions on trade with persons of enemy domicil are of little importance. And for the same reasons the European neutrals—Portugal, Spain, France, Switzerland, Sweden, and Turkey—are as inaccessible as the Axis countries. But in neutral countries in South America, Axis-dominated firms, or neutral companies with established commercial relations with the enemy, have been profiting by trade with the United States. In many instances, firms with these hostile associations can be injured or destroyed by withholding necessary American supplies. However, the success of the “Good Neighbor” policy requires that interference with South American economic affairs be kept at a minimum. In response to these conflicting needs of war and diplomacy, the Treasury Department has recently issued new trading with the enemy regulations which mark an important step in the evolution of wartime commercial law.

As international economic relations have become more complex, the Anglo-American concepts of trading with the enemy have been gradually expanded in order to include certain persons in neutral territory. When the common law rules were developed in England, the international trade involved—consisting chiefly of shipments of bulky tangible goods between England and the continent, and between the American colonies and the various countries in Europe—was usually carried on in the European countries by resident citizens of those countries. The principal tests of enemy character for commercial purposes were thus enemy nationality and domicil in hostile territory. Since there were few enemy firms in neutral territory, these criteria were effective at that time in severing most communication with the enemy country and colonies.

1. Alien enemies in this country are not considered enemies for the purpose of trading with the enemy measures. See p. 1393 and note 45 infra.
3. For a history of trading with the enemy regulation see Hunter, Alien Rights in Wartime (1918) 17 Mich. L. Rev. 33; see also Napoleon’s Counter-Blockade (1940) 85 J. Royal United Serv. Inst. 655. Valuable historical material may also be found in Blum and Rosenbaum, Trading with the Enemy (1940); Parry, The Trading with the Enemy Act (1941) 4 Mod. L. Rev. 161.
4. Under mercantilist regulation, the colonies were of course required to trade primarily with the mother country; but some trade continued in peacetime between the colonies and other countries in Europe.
5. See Parry, The Trading with the Enemy Act (1941) 4 Mod. L. Rev. 161, 172; Porter v. Freudenberg, [1915] 1 K. B. 857, 872; Alcinous v. Nigreu, 4 El. & Bl. 217 (Q. B. 1854). These common law doctrines made possible a desirable uniformity, for an enemy for commercial purposes was an enemy for all other purposes.
By 1914 economic change had made these common law doctrines inadequate. Large corporations spread their business across national boundaries, or established subsidiaries in neutral states to hide the parent corporation's identity. Moreover, with the development of complex credit devices, commercial transactions were no longer always marked by easily detected bulk shipments of tangible goods. Since modern warfare was dependent upon certain strategic raw materials, it was now more important than ever to block all these new forms of foreign trade by an enemy country. Consequently, during the last war Great Britain and the United States both enacted statutes designed to broaden the common law definition of "enemy". The test of residence in enemy territory was inserted to preserve the common law doctrine; and all corporations organized under the laws of an enemy state were included. But restrictions on British and American trade were also extended in order to bring economic pressure on neutral firms who traded with the enemy, although under international law such firms had a right to trade with either belligerent. First, the statutes defined as enemies, and thus cut off from English (or American) trade, all neutral firms who did some business in enemy territory. As a sanction to reach the neutral companies who traded with the enemy on neutral soil, the executive was authorized to blacklist any such business cooperating with enemy commercial policy. Moreover, firms wherever incorporated which were "controlled" by enemies were later added to the proscribed group by judicial decision. Finally, all transactions "for the benefit of" enemies were broadly

8. See 2 Lauterpacht, Oppenheim's International Law (6th ed. 1940) §83(a).
9. See Tingley v. Muller, [1917] 2 Ch. 144, 172.
10. 4 & 5 Geo. V, c. 87 (1914); 5 & 6 Geo. V, c. 12 (1914); 8 & 9 Geo. V, c. 31 (1915). Upon the outbreak of the present war, a new statute was enacted. 2 & 3 Geo. VI, c. 89 (1939). Further references to British practice will be supported by citations to the 1939 Act, which is a synthesis of the World War legislation.
14. 2 Wheaton, International Law (Keith's ed. 1929) 925.
17. Daimler Co. v. Continental Tyre & Rubber Co. [1916] 2 A.C. 307. See note 63 and p. 1396 infra. There was no statutory authorization for this decision. The "control" doctrine was later inserted in the peace treaties. See Treaty of Versailles, Art. 297(b),
prohibited. The acts were enforced by criminal prosecutions, with severe penalties provided for any firm in America or Britain which traded with an enemy.

While these acts still remain technically in force, judicial administration of these general prohibitions has been abandoned in America because of its inevitable injustices and inflexibility. Under these vague statutory criteria businessmen could not readily predict whether a proposed transaction would be illegal; and the threat of criminal prosecution discouraged innocent commerce when the prospective customer's background was not thoroughly familiar. Moreover, the fixed statutory definitions of the 1917 Act are inadequate to cope with the present problem. The delicate South American situation requires a flexible supervision empowered to change regulations without waiting for Congressional authorization. As a result, the World War legislation has been superseded by sweeping administrative orders.

The trend towards administrative control over all international trade was begun, during the year before American entry into the war, by regulations freezing Axis and Axis-controlled funds in this country. When a European country was taken over by Germany, the funds in America belonging to the invaded country's nationals could be used to supply dollar exchange to the Axis for international trade. To prevent German use of these intangible assets for payment to neutrals or Americans, the Treasury used Section 5(b) of the 1917 Act to issue lists of "blocked nationals," and a Treasury license was required to transact any business in which "blocked nationals" had a direct or indirect interest.

The definition of which permitted the Allies to retain and liquidate the sequestered property of German nationals, or of companies "controlled" by them.

19. 40 Stat. 411 (1917), 50 U.S.C.App. § 16 (1940), provides a $10,000 fine, ten years imprisonment, or both. 2 & 3 Geo. VI, c. 89, §1(1) (1939), provides a prison term of seven years, or a fine, or both.
20. The Treasury Dep't itself has pointed out this disadvantage in the 1917 statutory plan. See Dep't of Treasury Release, March 19, 1942, 1 C. C. H. War Law Serv. 9051 (1942). An example of the confusion which may be caused by a similarly broad statutory term, "ally of the enemy" [see 40 Stat. 411 (1917), 50 U.S.C.App. §2 (1940)], is a recent case in which Finland was held to be an ally of the enemy. Sundell v. Lotmar Corp., 44 F. Supp. 816 (S. D. N. Y. 1942). This case was decided before the Treasury issued General Ruling No. 11 (see p. 1391 et seq., infra).
21. Licensing over all exports, and even blacklisting, were also instituted in this period. See 5 Bulletin of the Dep't of State 54-56, 57-58, 99, 419 (1941).
22. The Trading with the Enemy Act has remained in force ever since its enactment. The Joint Resolution of March 3, 1921, 41 Stat. 1359 (1921), declaring that certain Acts of Congress should henceforth be construed as if the war had ended, expressly excepted The Trading with the Enemy Act. Section 5(b) of the Act was amended by a joint resolution on May 7, 1940, to give the President or officer designated by him the complete freezing powers now in existence. 54 Stat. 179 (1940), 50 U. S. C. App. §5(b) (1940). Cf. First War Powers Act, approved Dec. 18, 1941, 55 Stat. 838 (1941), 1 Prentice-Hall Nat. Defense Serv. 36,627 (1941).
23. A typical freezing order is Executive Order No. 8389, §10(b), 5 Fed. Reg. 1400 (Pt. 2, 1940), covering Norwegian and Danish nationals.
such a national included any "person who has been, or there is reasonable cause to believe has been, domiciled in, or a subject, citizen or resident of" any nation whose funds had been frozen. 24 The freezing regulations thus forbade the use of credit accounts in America by anyone who was likely, by present or past citizenship or residence, to be now under enemy control. However, the different definition of prohibited trade in tangible goods in the Trading with the Enemy Act of 1917 25 was revived 26 by American entry into the war. Since the problems of defining an enemy were essentially the same in both types of trade, tangible and intangible, the definitions were unified by an extraordinary device. Under his licensing power, 27 the President issued a general license flatly authorizing any commercial transaction previously forbidden by the Trading with the Enemy Act; 28 but such transactions were required to conform to any Treasury Rulings under the freezing powers. 29 By executive act, the statutory prohibitions were thus suspended and replaced by similar administrative regulations. Apparently these can be amended and further changed at any time by administrative action, and the courts would be unlikely to interfere with such action. The basic policies for American commercial warfare are now formulated by the Board of Economic Warfare, 30 and the detailed administration of trading with the enemy is carried on by the Treasury Department.

This unified control over trading with the enemy was implemented by a Ruling from the Treasury 31 which abolished the terms "enemy" and "blocked national" and substituted the new term "enemy national". The funds of an "enemy national" are frozen, and, except under Treasury license, individuals or firms "subject to the jurisdiction of the United States" may not communicate with him in any way, or

"send . . . or attempt to send . . . import, export . . . property of any nature whatsoever, including checks, . . . powers of attorney,

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26. See note 22 supra.
27. 40 Stat. 411 (1917), 50 U. S. C. App. § 4 (1940). The executive licensing power has been used, particularly in England, for both individual and class licenses. For American examples, compare General License No. 60 on China, 6 Fed. Reg. 3727 (1941), with General License No. 53, 6 Fed. Reg. 3556, 3946 (1941), cited note 28 infra.
28. 1 C. C. H. War Law Serv. §§14,533 (1942). See 7 Fed. Reg. 2168 § 132.11(4) (1942). This general permission to trade was soon limited, by General License No. 53, 6 Fed. Reg. 3556, 3946 (1941), to eight approved trading areas: Central and South America, the British Empire, the USSR, the Dutch East Indies, the Dutch West Indies, Belgian Congo, Greenland, and Iceland.
29. This device added another restriction to outstanding freezing control licenses. Dept of Treasury Release, March 19, 1942, 1 C. C. H. War Law Serv. § 5051 (1942).
30. "Administration . . . of activities relating to economic defense shall remain with the . . . departments now charged with such duties but such administration shall conform to the policies formulated or approved by the Board." Executive Order No. 8389, July 30, 1941, 6 Fed. Reg. 3823 (1941). The Secretary of the Treasury is a member of the B. E. W.
evidences of ownership . . . of property or contracts directly or indirectly to or from an enemy national . . . ”

In defining an “enemy national”, the Treasury Ruling is largely limited to the historic common law or statutory tests of presence or the doing of business in enemy territory. Individuals “within” enemy territory are included; but a partnership, corporation, or association is an “enemy national” only “to the extent that it is actually situated within enemy territory.” Another clause specifically mentions the government of a nation against which the United States has declared war, and its agents wherever situated; and the government of any other blocked country having its seat in enemy territory is covered, but its agents are included only if in enemy territory. And, in order to bring pressure on neutrals trading with the enemy by withholding American trade from them, the Treasury issues a periodic “Proclaimed List of Certain Blocked Nationals” naming any other individuals and firms which are to be treated as “enemy nationals”. In interpreting this Treasury Ruling, most of the problems are raised in connection with the provision covering individuals, partnerships, and corporations.

The provisions of the Treasury Ruling covering individuals expressly retain the criterion of presence in enemy territory, although direct trade

33. The historic significance of these twin principles is well discussed in Porter v. Freudenberg, [1915] 1 K. B. 857. See also Blum and Rosenbaum, Trading with the Enemy (1940) 3-10; Parry, The Trading with the Enemy Act (1941) 4 Mod. L. Rev. 161, 172 et seq.
34. Enemy territory includes areas occupied by hostile forces. The Treasury Ruling defines these territories specifically. 7 Fed. Reg. 2168, § 2 (1942). In Great Britain, the Board of Trade is also empowered to expand the definition of “enemy territory” by administrative regulation. British Order-in-Council, amending Defence (Trading with the Enemy) Regulations, S. R. & O. 1940 No. 1214. Cf. Trading with the Enemy (Specified Areas) Order, S. R. & O. 1940 No. 1219, (adding all of France to the list of enemy territory). But the United States does not treat unoccupied France as enemy territory.
37. Treasury Ruling § (1)(ii), 7 Fed. Reg. 2168 (1942). This provision may have been designed to allow trade with agents of the European Governments-in-exile.
38. To supplement the blacklist and gain more control over neutral traders who are not under the jurisdiction of the United States, extra-legal pressures may be used. A good example is the publication by the government of the names of neutral firms who will not cooperate with American policy. But too extensive use of such techniques may cause shortages of materials in the neutral states and arouse resentment. For the present serious situation in Argentina, see N. Y. Times, July 25, 1942, p. 21, col. 1.

The Dep’t of Commerce will provide names of approved firms in South America. See N. Y. Times, Aug. 5, 1941, p. 11, col. 1.

40. For the World War act, see note 12 supra; and see the discussion in Techt v. Hughes, 229 N. Y. 222, 128 N. E. 185 (1920) (a case invalidating a devise of real property to an American woman who married an enemy foreigner); Krachanake v. Acme
with the enemy is unlikely today because of the inaccessibility of enemy territory. Since the concept of “residence” in enemy countries confused and narrowed the application of the World War statutes, the definition in the Ruling has substituted the word “within.” Thus even transients in enemy territory apparently now would be considered enemy nationals. As in the last war, the definition includes Americans as well as neutrals or enemy subjects in enemy territory, on the ground that anyone in the enemy country is too closely associated with that national economy to deserve special consideration for reasons of nationality. Injustices can usually be corrected by a Treasury license to trade; and in cases of extreme hardship, the courts have been willing to intervene and declare special exemptions from the statutory definitions. Other types of individuals are not covered by the terms of the Ruling. Individuals in neutral territory may be important in helping the enemy to maintain his foreign trade, but now they are reached only through the blacklist.


43. The Trading with the Enemy Act authorized the sequestration of enemy property in this country by the Alien Property Custodian [see 40 Stat. 411 (1917), 50 U. S. C. App. § 6 (1940)]; and in suits to recover seized property, courts have made some exceptions to the statutory test of residence for enemy character. See Vowinckel v. First Federal Trust Co., 10 F. (2d) 19 (C. C. A. 9th, 1926) (Red Cross surgeon in Germany not an enemy); Stadtmuller v. Miller, 11 F. (2d) 732 (C. C. A. 2d, 1926) (Columbia professor unwillingly in Germany not an enemy). See also Van Dyke v. Adams, [1942] 1 Ch. 155 (prisoner of war not an enemy). And in Waldes v. Basch, 104 Misc. 306, 179 N. Y. Supp. 713 (Sup. Ct. 1919), aff’d mem., 191 App. Div. 904, 181 N. Y. Supp. 883 (1st Dept 1920), Czechs resident in Germany during the last war were declared not to be enemies, in order to allow them to recover on a pre-war debt, because they had participated in a successful uprising against Germany at the end of the war.


44. The Treasury has noted that Axis representatives often place orders through relatives and friends, whose enemy affiliations are not generally known. Dept of Treasury Release, March 30, 1942, 1 C. C. H. War Law Serv. ¶ 14,859 (1942).

45. The British Act, 2 & 3 Geo. VI, c. 89, § 2(1) (1939), provides expressly that no individual is to be considered an enemy simply because he is an enemy subject. The American Act reaches the same result by implication. The government supervises the commercial activities of alien enemies in America through the alien registration, freezing controls, and the blacklist. An interned alien enemy in this country is, however, considered an enemy under the Act. See 1 C. C. H. War Law Serv. ¶ 6030 (1942); Tortoriello v. Seghorn, 103 Atl. 393 (N. J. Ch. 1918).
If an individual or firm does only a part of its business in enemy territory, the provisions of the Treasury Ruling make it an enemy only to the extent of that business,\(^4\) in order to allow trade with firms cooperating with the European Governments-in-exile, and to retain the good will of the South American neutrals by maintaining their normal trade as much as possible. Under this doctrine of severability, neutral branches of an enemy concern, and neutral concerns which have established commercial relations with the enemy, are not enemies unless specifically blacklisted. This old doctrine originated in the English prize courts,\(^4\) and has been adopted by America from British experience in the last war. But these international businesses may be so closely knitted in control or finance as to be incapable of separate treatment.\(^4\) Since such firms may represent an important part of Axis commercial relations in South America, the American Government has used the blacklist to forbid all trading with many international businesses.

International business partnerships are similarly severable according to the location of their business.\(^4\) But partnerships are also affected by another doctrine, evolved by judicial initiative in the last war. Because of the intimate relations within a partnership, such organizations which include “enemy nationals” along with neutral or American partners have been regarded in American courts as dissolved on the outbreak of war.\(^4\) This judicial doctrine has of course not been affected by the executive suspension of the Trading with the Enemy Act. While the future relation between the two doctrines of severability and dissolution is not altogether clear, they can be applied separately or in combination. Under the severability doctrine, a partnership with an international business may be divided by the administrative Ruling into friendly and unfriendly parts, to define permissible American trade with them. Under the dissolution doctrine, a partnership with international membership is automatically dissolved by the outbreak of war, and the proprietary interest of enemy partners may be terminated.\(^5\) If the two doctrines are applied to a given firm, both trade volume and business management will be severed into friendly and unfriendly parts.

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47. The Portland, 3 C. Rob. 41 (Adm. 1800); see The Venus, 8 Cranch 253, 280 U. S. 1814. But see The Panariellos, 114 L. T. R. 670, 672 (P. C. 1916). This theory was based originally on the assumption that only in case of presence in enemy territory can an individual augment the resources of the enemy. As suggested, it has now been adopted as a measure of political expediency.
48. See BLUM AND ROSENBAUM, TRADING WITH THE ENEMY (1940), 5, 9 et seq.
51. The assets of such a firm may be seized by the Alien Property Custodian, but American citizens can recover their share. Mayer v. Garvan, 278 Fed. 27 (C. C. A. 1st, 1922).
Effective control of hostile corporations remains the most complicated problem in trading with the enemy regulations. In both the British and the superseded American Acts, enemy corporations are defined as those incorporated or doing business in an enemy state. But within neutral territory enemy trade could continue, unaffected by these regulations, with neutral corporations serving as cloaks for enemy firms or with genuine neutral corporations. In dealing with this problem in the last war, the British developed the "benefit" and "control" doctrines, and these doctrines indicate the factors to be taken into consideration in making out the present American blacklist of corporations in neutral territory.

A cover-all provision forbidding all transactions "for the benefit of" an enemy was included in both the British and American statutes. While the scope of this clause was severely limited in the British cases during the last war, the problems raised under it are important since the doctrine has been restated in a recent American ruling. Apparently the provision was primarily intended to forbid any indirect payments or transfers of goods to the enemy, and, similarly, a payment to a South American firm for repayment to Germany would probably be forbidden under the American blacklist. In the typical situation, this section has been invoked by debtors, on the ground that payment of their obligations would benefit the enemy; but the defense has usually been disallowed because the transaction would not result in an immediate financial benefit to the enemy during the war. For example, an English or neutral creditor can recover from an English surety on a German obligation, since this payment will not reduce the total debt owed by the German principal. But an exception has recently been made where the payment allows the German debtor to take advantage of favorable discount provisions during the war. And it can be persuasively argued that any fulfillment of suretyship obligations in favor of an enemy debtor will

52. See note 7 supra.
53. See notes 13 and 15 supra.
54. 40 Stat. 411, 50 U. S. C. App. §3(a) (1940); 2 & 3 Geo. VI, c. 89, §1(2)(a) (1939).
56. See Rex v. Kupfer, [1915] 2 K. B. 321, 335. There are no important American cases dealing with the "benefit" concept, since the United States was not at war long enough to develop its doctrines as fully as the British had done by 1918. But see Swiss Nat. Ins. Co. v. Miller, 267 U. S. 42 (1925), where an American company, which had sold its German holdings to Germans during the war, was held to be still an enemy—presumably because of the benefit to the enemy from the sale.
57. For example, in Schmitz v. Van der Veen & Co., 84 L. J. K. B. 861 (1915), the English agent of a German manufacturer was allowed to collect on pre-war debts, but the payments could not be forwarded to Germany till after the war. And see In re Kielmark's Will, 188 Iowa 1378, 177 N. W. 690 (1920), where an alien enemy was allowed to take by devise, but the conveyance was delayed till after the war. Cf. Weiner v. Central Fund, [1941] 2 All. Eng. R. 29 (K. B.).
59. Stockholms Enskilda Bank v. Schering, [1941] 1 K. B. 424. Since the court in this case endorsed a broad conception of the "benefit" doctrine, and expressly refused to draw a line for the future, this case may indicate a significant new extension in English law. This approach would weaken the force of the Kohnstamm precedent.
improve the credit standing of the enemy firm, and may also ensure a saving in interest during the war. Although these British cases represent a rather restricted view, an extension of the concept of benefit to the enemy can provide a logical basis for the American blacklist in the attempt to prevent American trade with South American corporations who are themselves trading with "enemies". While direct trade in tangible goods from South America to Europe is probably rare, intangible exchanges may still continue. Moreover, other neutral South American corporations maintain close trading relations with Axis firms there. In extreme cases these may be blacklisted, but the "Good Neighbor" policy prevents indiscriminate use of such economic pressure.

The problem of neutral corporations which really serve as cloaks for enemy firms has not been handled by any of the above techniques, except indirectly by pressure on neutral firms who help such corporations. To fill this gap during the last war, in Daimler Company v. Continental Tyre & Rubber Company an English court ventured without statutory authorization to include as enemies any corporations "controlled" by persons who are enemies under other sections of the Act. This "control" test is applied where the directors or stockholders are enemies residing or doing business in enemy territory, or persons who have been placed on the blacklist. By a Defence Regulation in 1940, the "control" doctrine was formally incorporated into British statutory scheme.

Although the Axis-dominated firms in neutral South America present a similar problem for America, proposals for the adoption of the "control" test

60. Air transport may possibly be used to carry valuable tangibles which occupy little shipping space. Tungsten and mercury, both produced in South America, are possible examples. See Spiegel, The Economics of Total War (1942) 293; N. Y. Times, July 27, 1942, p. 4, col. 2.

61. The South American countries have instituted wartime licensing systems to control foreign trade in intangibles, so that all such transactions would at least be known to the South American government involved.

62. The Treasury Ruling § (1)(iii), 7 Fed. Reg. 2168 (1942), applies the separability doctrine to corporations. There is a possibility that some friendly businesses situated in enemy territory will not be considered enemies, at least so far as their right to sue in British courts is concerned. A Dutch corporation doing business in occupied Netherlands is not an enemy for the purpose of prosecuting a suit in the British courts. Re An Arbitration, [1941] 3 All Eng. R. 419 (C.A.). On the other hand, an American court has held that a corporation does not lose its enemy character even if it ceases doing business in enemy territory by selling its establishment there. Swiss Nat. Ins. Co. v. Miller, 267 U. S. 42 (1925). This holding seems inconsistent with the separability rule, and where this rule is applied the Swiss Insurance case will probably be disregarded.

63. [1916] 2 A. C. 307. While the precise holding in this case was merely that the corporation's English secretary was not authorized under the by-laws to sue for a corporate debt, the "control" doctrine announced as dictum was widely accepted as the law, and on this ground this case has excited an extraordinary amount of comment. See Norem, Determination of Enemy Character of Corporations (1930) 24 Am. J. Int'l L. 310, and references cited therein. Much of the criticism is directed against the allegedly unwise device of "piercing the corporate veil" to discover the controlling interests.

64. Defence (Trading with the Enemy) Regulations, 1940, reg. 3.
have met with vigorous opposition in this country. American courts have been reluctant to “pierce the corporate veil”, perhaps chiefly to avoid complications in connection with the diversity of citizenship requirement for federal jurisdiction.\(^{65}\) But now that judicial control over enemy trading has been superseded in this country, administrative use of the “control” doctrine in examining Axis-dominated corporations in South America is not likely to complicate the law relating to federal jurisdiction. A more persuasive objection to promulgation of the “control” doctrine as a general regulation—statutory, judicial, or administrative—is that the facts on control of foreign corporations are so complex and so difficult to obtain that businessmen would find it impossible to predict what transactions will be illegal.\(^{65}\) Consequently, although the “control” doctrine made a brief appearance in the early freezing regulations,\(^{67}\) the wording of the Treasury Ruling defining enemy nationals omitted any reference to this doctrine.\(^{68}\) But the criterion of enemy control is appropriate to describe the Axis-dominated firms in South America. And since the Government has more access to the facts of foreign corporate organization than the ordinary businessman, suspected South American firms are now investigated, and blacklisted if enemy control is found. Thus, while the “benefit” and “control” doctrines have not been emphasized in American trading with the enemy regulations, in fact they have been retained as criteria to define enemy trade in neutral countries, for the purpose of making out the blacklist.

The inter-American conference on systems of economic and financial control which recently met at Washington has recommended to the American countries, “in order to eliminate from the commercial, agricultural, industrial and financial life of the American Republics, all influence” of persons and corporations “acting against the political and economic independence or security of such Republics . . . whatever their nationality”, that the countries proceed with “forced transfer or total liquidation” of their “business, properties and rights.” This far-reaching measure, to be carried out “in accordance with the constitutional procedure of each country”, makes no specific reference to compensation. It goes far beyond the restrictions imposed by trading prohibitions, freezing orders or blacklists. It is designed to put any

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\(^{65}\) For purposes of federal jurisdiction, there is a conclusive presumption that corporators are citizens of the same state as the corporation. St. Louis & San Francisco R. R. v. James, 161 U. S. 545 (1896); Fritz Schulz Co. v. Raimes & Co., 160 Misc. 697, 166 N. Y. Supp. 657 (Sup. Ct. App. Term 1917). Apparently to avoid complications in this field, the control doctrine was rejected in America in Hamburg-American Line v. United States, 277 U. S. 138 (1928). A contrary holding would seem possible, even on the basis of existing authority. If an equitable remedy is required, or a matter of public policy involved, the “veil” may be “pierced.” Amtorg Trading Corp. v. United States, 71 F. (2d) 524 (C. C. P. A. 1934); see, e.g., United States v. Lehigh Valley R. R., 220 U. S. 257 (1911) (scrutiny of stockholders to determine violation of Hepburn Act “commodities clause.”).

\(^{66}\) See Dept’ of Treasury Release, March 19, 1942, 1 C. C. H. War Law Serv. ¶ 9051 (1942).

\(^{67}\) Executive Order No. 8389, §11(b), 5 Fed. Reg. 1400 (Pt. 2, 1940).

\(^{68}\) But in Pub. Circular No. 18, § c, 7 Fed. Reg. 2504 (1942), the definition of persons subject to American jurisdiction is extended to include all persons and organizations controlled by persons subject to American jurisdiction.
persons or corporations meeting the vague disqualifications of the recommenda-
tion, out of business. 69

The new administrative control over enemy trade in neutral territory by
means of the general license and the blacklist is already developing more
definite and predictable rules for businessmen. 70 Now that South America
has been declared a generally licensed trade area, 71 trade may continue except
with firms specifically blacklisted. While trade would thus theoretically be
allowed even with an Italian firm which is not blacklisted, 72 this policy is
particularly designed to assist friendly firms organized under the laws of
countries now overrun by the Axis powers. And when a South American
firm is blacklisted, the Department of Commerce will now help the American
businessman to find another South American customer to continue the
purchases formerly made by the blacklisted concern. 73 These attempts to
preserve the normal South American economy are an important part of the
"Good Neighbor" policy. From a broader viewpoint, this attempt to combine
commercial warfare with long-term diplomatic policy is changing traditional
Anglo-American theories of wartime commercial law. 74 The former broad
prohibitions have been replaced by a general license to trade in defined areas
with any firm not specifically blacklisted. At the same time criteria have
been developed to define what types of enemy trade in neutral territory should
be blacklisted. The success of the present liberal South American policy will
determine whether it will be extended to other important neutral trading
areas in the future.

REMOVAL OF DUE PROCESS PROHIBITIONS AGAINST MULTIPLE
STATE INHERITANCE TAXATION OF INTANGIBLES *

ALTHOUGH the United States Supreme Court seemed reluctant to raise
constitutional prohibitions against multiple taxation prior to 1900, 4 later

69. This recommendation is found in Resolution VII of the Final Act of the Confer-
cence. See generally 6 BULLETIN OF DEPT OF STATE 580, 581 (1942).

70. See note 66 supra.

71. General License No. 53, issued July 17, 1941; amended August 5, 1941, and Oc-

72. Dept of Treasury Interpretation No. 2, January 23, 1942, 1 Prentice-Hall Nat.
Defense Serv. § 50,121 (1942).

73. See N. Y. Times, Aug. 5, 1941, p. 11, col. 1.

74. See LAUTERPACH, OPPENHEIM'S INTERNATIONAL LAW (6th ed. 1940) § 101.


1. Tax laws were invalidated on jurisdictional grounds in six cases only: Hays v.
Pacific Mail Steamship Co., 17 How. 596 (U. S. 1854); North Central R. R. v.
Jackson, 7 Wall. 262 (U. S. 1869); St. Louis v. Wiggins Ferry Co., 11 Wall. 423 (U. S.
1871); State Tax on Foreign-Held Bonds, 15 Wall. 300 (U. S. 1873); Morgan v. Par-
ham, 16 Wall. 471 (U. S. 1873); Dewey v. City of Des Moines, 173 U. S. 193 (1899).
See Bruton, Multi-State Taxation of Intangibles—A Panoramic Sketch (1940) 12 P A.
BAR ASS'N Q. 122. After the turn of the century, the notion that there were constitu-
decisions held it incompatible with the Fourteenth Amendment for more than one state to tax the same "economic interest" at the same time. Thus, in First National Bank of Boston v. Maine, the Court held the due process clause a constitutional barrier to multi-state taxation of the transfer at death of shares of stock. During the past five years, however, the Court's gradual withdrawal from this position has implied both a judicial retreat from the jurisdiction-to-tax field and a disinclination to impose upon the states even the outlines of a fiscal policy outlawing double taxation. The ultimate result of this change of attitude is State Tax Commission of Utah v. Aldrich, which holds that the Fourteenth Amendment does not prohibit multiple state intangible objections to double taxation of intangibles by states which had command over them or whose owners was specifically rejected in Blackstone v. Miller, 188 U. S. 189 (1903). Accord: Kidd v. Alabama, 188 U. S. 730, 732 (1903). But cf. Louisville & Jeffersonville Ferry Co. v. Kentucky, 188 U. S. 385 (1903), which held that real property could be taxed only at its situs. However, the Court repeated many times that the Fourteenth Amendment did not prohibit multiple state taxation of intangibles. HARDING, DOUBLE TAXATION OF PROPERTY AND INCOME (1933) 20-22, n. 55. For a general bibliography on this subject, see Merrill, Jurisdiction to Tax—Another Word (1935) 44 YALE L. J. 582, n. 2.


3. In Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194 (1905), the conflict-of-laws conception of jurisdiction to tax was read into the Fourteenth Amendment. Goodrich, Conflict of Laws (1938) 80-82. Here tangible personality permanently situated in State A was held not subject to property taxation in State B, the domicile of the owner. See note 64 infra. A quarter of a century later, in Farmers’ Loan & Trust Co. v. Minnesota, 280 U. S. 204 (1930), the Court extended this rationale to inheritance taxation of intangibles and expressly overruled Blackstone v. Miller, 188 U. S. 189 (1903). Cf. Beidler v. South Carolina Tax Comm., 282 U. S. 1 (1930); Baldwin v. Missouri, 281 U. S. 586 (1930); Safe Deposit & Trust Co. of Baltimore v. Virginia, 280 U. S. 83 (1929). See note 50 infra and accompanying text.


5. After the Court in Lawrence v. State Tax Comm., 286 U. S. 276 (1932), went back to the benefit-burden theory of taxation (See HARDING, op. cit. supra note 1 at 22-25 for development of the theory), “reasonableness” of the burden imposed upon the taxpayer became the subjective test of the tax’s constitutionality. Relying upon the Lawrence case, the Court in Guaranty Trust Co. v. Virginia, 305 U. S. 19 (1938), upheld a Virginia tax on income, although a tax on the same income had already been paid to New York. Cf. First Bank Stock Corp. v. Minnesota, 301 U. S. 234 (1937); New York ex rel. Cohn v. Graves, 300 U. S. 308 (1937). Accord: Curry v. McCunless, 307 U. S. 357, 367 (1939) : “when the taxpayer extends his activities with respect to his intangibles, so as to avail himself of the protection and benefit of the laws of another state, in such a way as to bring his person or property within the reach of the tax-gatherer there, the reason for a single place of taxation no longer obtains.” Cf. Graves v. Elliott, 307 U. S. 383 (1939). See Traynor, Tax Decisions of the Supreme Court (1940) Proc. of Nat. Tax Ass’n 27.


Inheritance taxation of stock shares.\(^8\) Apparently, then, the Court has completed a full cycle in its treatment of state jurisdiction to levy inheritance taxes on the transfer of intangibles\(^9\) owned by non-resident decedents.\(^10\)

In the \textit{Aldrich} case, Utah imposed a tax\(^11\) upon the transfer at death of shares of stock in a Utah corporation, the stock forming part of the estate of a decedent who, at the time of his death, was domiciled in the State of New York and held there the certificates representing those shares. For many years the Utah corporation's stock books, records, and transfer agents had been in New York. The certificates representing the shares were never within Utah; yet the shares were claimed by Utah to be within her taxing jurisdiction. The decedent's administrators successfully attacked the constitutionality of the tax in the Utah courts\(^12\) on the authority of \textit{First National Bank of Boston v. Maine}.\(^13\) Having granted certiorari\(^14\) "so that the constitutional basis of the \textit{Maine} case could be re-examined in the light of such recent decisions as \textit{Curry v. McCanless}\(^15\) and \textit{Graves v. Elliott}\(^16\) . . . ."

\(^8\) For possible extensions of the holding in the \textit{Aldrich} case, see note 62 infra together with accompanying text.


\(^10\) The instant case returns the Court to the position it maintained nearly forty years ago in Blackstone v. Miller, 188 U. S. 189 (1903).

\(^11\) \textit{UTAH REV. STAT. ANN.} (1933) §§ 80-12-2, -3 provide: "A tax equal to the sum of the following percentages of the market value of the net estate shall be imposed upon the transfer of the net estate of every decedent, whether a resident or non-resident of this state; . . . ."

"The value of the gross estate of a decedent shall be determined by including the value at the time of his death of all property, real or personal, within the jurisdiction of this state and any interest therein, whether tangible or intangible, which shall pass to any person, in trust or otherwise, by testamentary disposition or by law of inheritance or succession of this or any state or country, . . . ." (\textit{Cf.} provision of New York State Constitution in note 58\(^\text{infra}\)). The Utah State Tax Commission made no attempt to impose an inheritance tax under this statute from the time of the Supreme Court's decision in \textit{First National Bank of Boston v. Maine} (see note 13\(^\text{infra}\)) until \textit{Curry v. McCanless} and \textit{Graves v. Elliott} (see notes 15 and 16\(^\text{infra}\)). Communication to \textit{YALE LAW JOURNAL} from State Tax Commission of Utah, July 17, 1942.

\(^12\) 116 P. (2d) 923 (Utah 1941).

\(^13\) In that case, a decedent owning stock in a Maine corporation died domiciled in Massachusetts. Maine's attempt to levy an inheritance tax on the transfer, after similar taxes had already been paid in Massachusetts, was held illegal. " . . . the transmission from the dead to the living of a particular thing, whether corporeal or incorporeal, is an event which cannot take place in two or more states at one and the same time." 284 U. S. 312, 326 (1932). But see vigorous dissent of Stone, J., on the ground that the non-resident stockholder in the Maine corporation had benefited by Maine's laws and should therefore be liable for the Maine tax. \textit{Id.} at 331.

\(^14\) 62 Sup. Ct. 1008-1009.

\(^15\) 307 U. S. 357 (1939).

\(^16\) 307 U. S. 383 (1939). The \textit{Graves} and \textit{Curry} cases declared that securities held in trust might be subjected to death taxes by both the state where the decedent-settlor was domiciled and the state where the trustee resided and administered the trust property.
the United States Supreme Court reversed the Utah judgment and upheld the tax.\textsuperscript{17}

Underlying Mr. Justice Douglas' majority opinion is the Court's acceptance of the benefit-burden theory of taxation,\textsuperscript{18} which founds the right of a state to tax upon "the benefit and protection conferred by the taxing sovereignty."\textsuperscript{19} Although this hypothesis is a good philosophic basis upon which to support a state tax,\textsuperscript{20} it also increases the probability of multiple taxation. Fearing this likelihood, the Court, during the late twenties and early thirties, abandoned the benefit-burden theory and used instead the "one thing, one tax" rule.\textsuperscript{21} During that period, however, the quid pro quo rationale was urged by the debtor states, who claimed that the \textit{Maine} rule, outlawing multi-state taxation, unfairly discriminated against them in favor of the creditor states.\textsuperscript{22} Once the benefit-burden theory, clearly irreconcilable with the views expressed in the \textit{Maine} case,\textsuperscript{23} was re-adopted by the Court a decade ago,\textsuperscript{24} it became but a matter of time before the "one thing, one tax" rule would be completely abandoned. Thus, in the \textit{Aldrich} case, rather than draw any "neat legal distinctions" between the benefit-burden principles involved and those in recent cases repudiating the \textit{Maine} rule,\textsuperscript{25} Mr. Justice Douglas chose rather to overrule expressly the \textit{Maine} decision, disavowing, as it did, the benefit theory.\textsuperscript{26}

Albeit the \textit{factum} of this decision is of undeniable consequence,\textsuperscript{27} the un-

\begin{enumerate}
\item[17.] 62 Sup. Ct. 1008-1012.
\item[18.] See note 20 infra.
\item[20.] When the principal objective of the Court became the avoidance of multiple state taxation, the maxim \textit{mobilia sequuntur personam} was abandoned in favor of the "single situs" theory. Compare Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 205 (1905) with Safe Deposit & Trust Co. of Baltimore v. Virginia, 280 U. S. 83, 92 (1929). Exceptions to the "single situs" theory were first induced by the dissent of Stone, J., in First National Bank of Boston v. Maine, 284 U. S. 312, 332 (1932): "Situs of an intangible for taxing purposes . . . is not a dominating reality but a convenient fiction which may be judicially employed or discarded, according to the result desired." When the desired result was multiple taxation, the benefit-burden doctrine was adopted. See dissent of Holmes, J., in Baldwin v. Missouri, 281 U. S. 596, 595 (1930); New York ex rel. Cohn v. Graves, 300 U. S. 308, 313 (1937); \textit{Harding}, \textit{op. cit. supra} note 1, at 22-25.
\item[21.] See note 13 supra.
\item[23.] See note 13 supra.
\item[24.] See note 5 supra.
\item[26.] See note 13 supra.
\item[27.] Under the \textit{Blackstone} rule (see note 1 supra), to which the Court has now returned, transfer of the same intangibles is liable to death taxation at the creditor's domicile [Orr v. Gilman, 183 U. S. 278 (1902)]; at the debtor's domicile [Blackstone v. Miller, 188 U. S. 189 (1903)]; at the business situs [New Orleans v. Stempel, 175 U. S. 309 (1899)]; and at the physical situs of the paper [Wheeler v. Sehmer, 233 U. S. 434
expressed considerations that must have impelled the Court once again to sanction multiple taxation are of even greater importance. Impliedly, the decision could have gone the other way. Furthermore, perhaps in anticipation of the dissenting justices' objections, the majority acknowledges that multiple state taxation has a "bad" practical effect, but fears "that resort to the Fourteenth Amendment as the ill-adapted instrument of tax reform will . . . create more difficulties than it will remove." If constitutional limitations on state jurisdiction to tax—as imposed by the Maine case—were to be retained and strictly enforced, it would almost necessarily follow that the taxing systems of most states would be seriously impaired, that other and less desirable forms of taxation would be devised by these states, and that the delicate duty of determining which states should be accorded priority to levy different kinds of taxes would devolve upon the United States Supreme Court. It was these considerations that rendered thorough application of the Maine rule of doubtful expediency. Furthermore, since some courts will refuse to appoint an executor or administrator for the estate if there are no assets to be administered within the sovereignty, an improper solution by the Court to any one of the various double taxation problems would multiply the opportunities for tax avoidance. To forestall the possibility of such undesirable consequences, the Court has now returned the problem of multiple taxation to the states. If the resulting jurisdictional snarl is to be unraveled, positive reform in this field of tax law will be needed. "But," says the Court, continuing its trend toward judicial abdication in the tax-jurisdiction realm, "it is not our province to provide it."

Mr. Justice Frankfurter, concurring, "recalls us to first principles" concerning the separation of powers in a federal system. The power of a state to tax the effective acquisition of membership in a domestic corporation, "wherever the piece of paper representing such taxable interest may be physically located," is held never to have been abrogated by the Fourteenth Amendment. If the fact that modern corporate enterprise may receive the benefits of more than one state government, thereby giving to each jurisdiction to tax, results in difficult fiscal and political problems, these "are inherent in the nature of our federalism and are part of its price." The courts can invalidate laws, whose wisdom or expediency is deemed the business of the political branches of government, "only when compelling considerations leave

(1914). See Sachs, The Saga of Blackstone v. Miller in Essays in Political Science (1937) 231, 239. In the case of stock held by the decedent in consolidated corporations incorporated in several states, the likelihood of multiple taxation is increased.

29. Id. at 1013.
31. 62 Sup. Ct. 1008, 1012. [Quoted from dissenting justices' opinion in First National Bank of Boston v. Maine, 284 U. S. 334 (1932)].
32. Merrill, supra note 1, at 602, n. 128 and accompanying text.
33. See Stimson, Jurisdiction and Power of Taxation (1933) 84-86. For some of the problems, see note 27 supra.
34. 62 Sup. Ct. 1008, 1012. See Note (1941) 50 Yale L. J. 900, 903-904.
35. 62 Sup. Ct. 1008, 1012.
NOTES

1403

no other choice.”36 How “compelling” these considerations must be in any particular case before resort is had to invalidation most likely depends upon the Court’s estimate of its competence to deal with the problem as compared with that of the legislative branch.57

Whereas both the majority and concurring opinions clearly take a long-term view, i.e., that the “bad” effects of the instant case will hasten much-needed positive tax reform, the dissent38 concerns itself with the immediate economic impact on states and taxpayers of the Court’s unequivocal return to multiple inheritance taxation of the transfer at death of stock shares. Attacking the majority opinion on the doctrinal level first, Mr. Justice Jackson ascribes a “fictional basis” to the theory of benefits and protections.59 Admittedly, an inheritance tax is a tax upon the exercise of the privilege to succeed to property upon the owner’s death.40 Thus, in the instant case it was argued41 that a successful transmission to the legatees of the decedent’s corporate interests was contingent not upon any law of Utah but upon the laws of the decedent’s domicile, which conferred the privilege of succession. Accordingly, the dissenting justices claim that the benefits, if any, conferred upon the taxpayer by the State of Utah are negligible in proportion to the tax burden imposed.42 Concerning themselves next with an analysis of the ultimate incidence of the tax,43 Justices Jackson and Roberts concluded that the subjection of intangible property to more sources of taxation than other forms of wealth prejudices its relation to other investments, with consequent

36. Ibid. See also separate opinion of Frankfurter, J., in Newark Fire Ins. Co. v. State Board of Tax Appeals, 307 U. S. 313, 323-324 (1939): “Wise tax policy is one thing; constitutional prohibition quite another. The task of devising means for distributing the burden of taxation equitably . . . is peculiarly a phase of empirical legislation. It belongs to that range of the experimental activities of government which should not be constrained by rigid and artificial legal concepts.”

37. Hamilton and Braden, loc. cit. supra note 6.

38. 62 Sup. Ct. 1008, 1013.

39. Id. at 1015.


41. Ibid. See also Nash, supra note 22, at 300.

42. Since Utah in 1897 issued a charter to the Union Pacific Railroad, which had been created in 1862 by Congress, and since the Railroad issued stock to a non-resident, “which changed hands at his death, which required a transfer on the corporation’s books, which transfer was permitted by Utah law, . . . Utah is permitted to tax the full value of each share of Union Pacific stock passing by death . . .” And all this despite the fact that Union Pacific stock derives its value from the Railroad’s operation in interstate commerce, a “privilege which comes from the United States and one which Utah does not give or protect and could not deny.” 62 Sup. Ct. 1008, 1014-1016.

43. Because the State of New York has written into its Constitution provisions renouncing a tax such as is involved here (see note 58 infra), “the practical issue underlying this case is not whether the (decedent’s) estate shall pay or avoid a transfer tax. The issue is whether Utah or New York will collect the tax.” 62 Sup. Ct. 1008, 1016. If, however, New York had no such provisions in its Constitution or no reciprocity provisions in its statutes (see notes 57 and 58 infra), the decedent’s estate would be compelled to pay taxes twice—both in New York and Utah.
detriment to the nation's largely corporate economy; that the burdens imposed by multiple state taxation are "unequal and capricious and in inverse order to the ability of the estate to pay"; and that the instant decision may lead to federal invasion of the death tax field and to federal incorporation of large scale enterprises. But what the dissenters fear most, apparently, is that the Court's opinion will "intensify the already unwholesome conflict and friction between the states of the Union in competitive exploitation of intangible property." Instead of withdrawing from this jurisdictional snarl, the Court is urged to help out with "all that it has of wisdom and power."

Of course, one may question the reasonableness of the Court's announcing a decision with admittedly "bad" immediate effects so as, it is hoped, to precipitate positive tax reform. Concededly, a conflict is here created between chartering and domiciliary states, but this must not be viewed in isolation. When two or more states claim domicile of the decedent, further conflicts over jurisdiction to tax the transfer at death of intangibles can arise. It has been impliedly held by the Court that one man can be legally domiciled in more than one state. Thus, even if the Maine rule, allowing only the domiciliary state to tax, were to continue in effect, there would still remain the possibility of double taxation. A further opportunity for multiple inheritance taxation of intangibles exists, even under the Maine rule, when there is a difference between the state of domicile of the decedent and the state in which his shares of corporate stock have their business situs. It was to alleviate all these conflicts of tax jurisdictions and equitably to settle the tax claims of the chartering and domiciliary states that the Court in the instant case impliedly invited positive tax reform, which it itself cannot bring about.

44. 62 Sup. Ct. 1008, 1017. The cautious investor, however, can reduce the risk of multiple taxation by avoiding huge investment in stock of a corporation in a state which has no reciprocity statutes on its books. See notes 57 and 58 infra.
45. 62 Sup. Ct. 1008, 1018-1019. Jackson, J., argues that the wealthy will find evasion devices, while the many small stockholders will not—because of the expense of professional counsel. Id. at 1019. See Sachs, supra note 27, at 259-265.
47. 62 Sup. Ct. 1008, 1013-1014, 1016.
49. Attempts to remedy this double-domiciliary-tax situation have so far failed. See Worcester County Trust Co. v. Riley, 302 U. S. 292, 299 (1937).
51. "... even if it were possible to make the needed adjustments in the fiscal relations of the States to one another and to the federal government through the process of
If the problem of multiple taxation is not alleviated by the individual taxpayer's restriction of his multi-state activities, there are a number of positive remedies for the resulting tangle: (1) Instead of allowing conflicting tax jurisdictions to fight it out, the death tax could be assessed by a federal clearing house, whereupon a proper part of the national yield would be distributed among the states.52 (2) All the states could, despite their conflicting interests, adopt a uniform death tax law which would give intangibles a situs in that jurisdiction which had primary control over their transfer.53 (3) The states could agree through compact or legislation to levy only a flat, low rate tax on nonresident decedents.54 (4) The federal courts could, sacrificing equity for the sake of simplicity, arbitrarily delimit the spheres of action of the several states.55 (5) States could cooperatively permit estates within their respective taxing jurisdictions to credit against domiciliary taxes any amounts paid to non-domiciliary states.56 (6) A system of reciprocity legislation could be put into operation, whereby State A would agree not to tax the transfer of stock of a State A corporation owned by a decedent resident in State B at time of his death, if State B would agree to a similar promise in return.57 Such a plan, in deference to the domiciliary state, would entirely preclude non-domiciliary taxation of the transfer of intangibles, over which the non-domiciliary state admittedly has jurisdiction.

In the past, reciprocal legislation has been the most widely adopted solution to the multiple state taxation problem.58 Now that the Court has returned this problem to the states, it seems more than likely that they will resort once again to reciprocity legislation, at least until some positive federal action is taken in this field. If so, existing reciprocity statutes should be carefully episodic litigation—which to me seems most ill-adapted for devising fiscal policies—it is enough that our Constitutional system denies such a function to this Court." Frankfurter, J., concurring. 62 Sup. Ct. 1008, 1013.

52. Such a plan might stipulate "that payment of a share of the fund be made only to those states which abolished their own estate or inheritance taxes, their income taxes, and their property taxes on intangibles." Rodell, A Primer on Interstate Taxation (1935) 44 Yale L. J. 1165, 1181-1185. See Seligman, ESSAYS IN TAXATION (9th ed. 1921) 116; cf. Graves, Influence of Congressional Legislation on Legislation in the States (1938) 23 Iowa L. Rev. 519, 528. The three powers Congress could use to conciliate state revenue needs with those of an interstate economy are the interstate commerce, taxing, and spending powers. See Hellerstein and Hennefeld, State Taxation in a National Economy (1941) 54 Harv. L. Rev. 949, 963-976.


54. See (1921) Proc. of Nat. Tax Ass'n 505; Brady, Death Taxes—Flat Rates and Reciprocity (1928) 14 A. B. A. J. 309.


56. See Note (1941) 26 Iowa L. Rev. 694, 708.

57. Id. at 695-697.

58. "The zenith of the reciprocity movement was reached in 1930, when 37 states had reciprocal exemption statutes." Id. at 695. New York State even wrote into its Constitution in 1938 a provision that intangibles "... shall be deemed to be located at the domicile of the owner for purposes of taxation,..." N. Y. Const. Art. XVI, § 3.

59. See Schur, Facing the Tax Problem (Twentieth Century Fund, 1937) c. 24. But note that Massachusetts v. Missouri, 303 U. S. 1 (1939), detracts from the efficacy
overhauled in the direction of uniformity among the states, and non-reciprocity states should be urged to conform.

But even before positive tax reform is realized, the Court may find it necessary to reverse its tendency toward self-abnegation in the jurisdiction-to-tax field. State tax laws with no practical or economic justifications may be forthcoming, and judicial limitations on arbitrary multiple state taxation will doubtless have to be drawn. The instant case may be limited to corporate stock only, or, as is more likely, its rationale may be extended to other forms of intangible property. And since the Court has at times strongly declared the similarity between intangible and tangible property, the question is opened whether its decisions "as to taxation of tangible property are not due to be overhauled." It is in answering these questions that the tax law of tomorrow will develop. It is in anticipation of the answers that positive tax reform of today should be framed.

VACATION BY APPELLATE COURTS OF ORDERS CONCERNING NON-APPEALING PARTIES*

A vast and necessary body of procedure limits the resort to appellate courts, and, by a rule generally adhered to, review on the merits will be denied where the proper parties are not before the court. It has been held that no one can appeal who was not a party to the judgment below, or at least privy to it, as shown by the record. Review could not be had by a

of reciprocal legislation because the Court there held that one state is powerless to enforce the reciprocal exemption statute of another state.

60. See Note (1941) 26 Iowa L. Rev. 694, 708.
61. 62 Sup. Ct. 1008, 1020-1021.
62. Prediction of Jackson, J., id. at 1021. The taxing power of the chartering or issuing state can be extended: (1) to corporate bonds and bonds of states and municipalities [by overruling Farmers' Loan & Trust Co. v. Minnesota, 280 U. S. 204 (1930)]; (2) to bank credits for cash deposited [by overruling Baldwin v. Missouri, 281 U. S. 586 (1930)]; and (3) to choses in action [by overruling Beidler v. South Carolina Tax Comm., 282 U. S. 1 (1930)].
63. See, e.g., Blackstone v. Miller, 188 U. S. 189, 205 (1903): "The practical similarity [between a bank deposit and actual coin in the pocket] more or less has obliterated the legal difference."
64. 62 Sup. Ct. 1008, 1021. If the implication here is that tangible property may some day be subjected to multiple taxation, it is not clear by what rationale this result will be achieved. For more than a third of a century now [since Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194 (1905)], it has been settled law that tangible property permanently located outside the owner's state of domicile is subject to property taxation only by the state of situs. Inheritance taxation of tangible property situated outside the state of decedent's domicile is likewise forbidden. See Frick v. Pennsylvania, 268 U. S. 473 (1925).

1. Louisiana v. Jack, 244 U. S. 397 (1917); Ex parte Leaf Tobacco Board of Trade, 222 U. S. 578 (1911); Bayard v. Lombard, 9 How. 530 (U. S. 1850).
litigant of a judgment or error wholly in his favor. Courts have not usually disturbed judgments in the interest of defendants in error not assigning cross errors or appellees not taking cross appeals. It has been held that review may not be made where the court below has "failed to make an essential finding and the record on review is insufficient to provide the basis for a final determination. . . ." Frequently stated, as well, is the rule that an objection not specified by the assignment of error need not be considered, nor will an objection not referred to by the court below or pursued in argument or brief of counsel.

One of the most firmly established of these limitations has been that an appellate court could not reverse or modify in favor of a non-appealing party. In In re Barnett the Court of Appeals for the Second Circuit refused to apply this rule, holding that, where it is necessary in the interests of expediency and justice, an appellate court may extend its order to include the rights of parties not formally named in the appeal but affected by the controversy.

The facts of the case must be stated at some length. In 1935, Cecelia Barnett's father willed her 15% of his residuary estate, and the following year, in consideration of $5,000 paid her by her father, she executed an assignment to her mother of all her present and future rights to her father's estate. The day before her father's death, in 1940, Cecelia Barnett was adjudicated a bankrupt, and there then arose the issue of whether the property should go to the mother under the assignment, or should pass to the trustee.


3. United States v. Blackfeather, 155 U. S. 189 (1894); First Methodist Episcopal Church of Pasco v. Barr, 123 Wash. 425, 212 P. 546 (1923). For an exposition of the undesirability of such a result, see Comment (1931) 20 CALIF. L. REV. 70, 75. An exception, however, has invariably been made where the judgment below is fatally defective for lack of jurisdiction. In such a case the respondent is not precluded from attacking the judgment on that ground. Mattingly v. Northwestern Virginia R. R., 158 U. S. 53 (1895).

4. General Utilities & Operating Co. v. Helvering, 296 U. S. 200, 206 (1935) (quoting from Helvering v. Rankin, 295 U. S. 123 (1935)). But in that case the court held that the proper procedure is to remand the case to the court below for further hearings. And where there has been an exceptional situation, plain error, although not assigned, will be noted by the court. Trapp v. Metropolitan Life Ins. Co., 70 F. (2d) 976, 981 (C. C. A. 8th, 1934), cert. denied, 293 U. S. 596 (1934); see State v. City of Albuquerque, 31 N. M. 576, 249 Pac. 242 (1926).


8. Quoting Manson, the Court said, "We should no longer look upon a lawsuit as if it were 'in the nature of a cock-fight,' so that 'the litigant who wishes to succeed must try and get an advocate who is a game bird with the best pluck and the sharpest spurs.'" 124 F. (2d) 1005, 1010. See 6 WIGMORE, EVIDENCE (3d ed. 1940) 374-376.
in bankruptcy. In pursuing his claim the latter did not limit himself to an action against the mother to have the 1936 assignment held invalid, but also petitioned for an order directing the bankrupt to assign all interest in her father's estate to the trustee, free of the claims of the mother. The referee held the 1936 assignment valid as against the trustee. The District Court reversed, granting the requested order. From this decision the bankrupt was the only appellant. Thus the Circuit Court was forced to consider the case in the absence of the real party in interest, i.e., the mother. The majority of the Court, however, in holding the assignment valid as against the trustee in bankruptcy, reversed the District Court as to both the bankrupt and the mother.9

It was to the majority's determination of an issue "on behalf of a party who has not appealed at all"10 that Judge Learned Hand directed his criticism. Error alone in the court below, he contended in his dissenting opinion, should not be the foundation for this action. The bar is not insensible to the function of the right of appeal, and "it is precisely to raise such questions that the right of appeal is provided."11

Although Judge Hand's criticism of this unusual determination appears to be well taken, a thoroughly anomalous situation would have resulted had the Circuit Court reached its conclusion as to the daughter without a determination of the mother's rights. Time for appeal had run with respect to the District Court's adjudication of the mother's interest in the 1936 assignment. If, then, the Circuit Court had merely reversed the District Court's order that the daughter assign her interest in her father's estate to the trustee, the


10. From the fact that the attorney for the bankrupt signed his appeal brief as attorney for both the bankrupt and her mother, Judge Frank concluded that those parties intended and believed that the rights of the mother were before the Circuit Court. See 124 F. (2d) 1005, 1007.

11. Not only was there no appeal, but the assignment issue, contested in the court below, was abandoned by counsel for the bankrupt who, on appeal, rested his case upon an entirely new issue—that by means of the consideration paid by the bankrupt to her father there had been an ademption. Since the appellee had contended that the ademption issue should be excluded, and that only the original theory was open for consideration, the majority felt justified in deciding the case solely upon the ground originally argued, though abandoned, by counsel for appellant. 124 F. (2d) 1005, 1007.

12. 124 F. (2d) 1005, 1014.
latter would still retain his right to the disputed property because the assignment requested of the daughter by the trustee was a mere formality, the adjudication of the mother's right in the assignment being decisive. Therefore two contradictory determinations of the substantive law involved in this case would be made, both controlling as to the respective parties, yet with the lower court's decision making effective disposition of the substantive matter.

If the Circuit Court's only concern were to avoid this embarrassing consequence, there would be little justification for the decision in the instant case. The Circuit Court, realizing the empty formalism of any determination they could make as to the daughter's rights, might have dismissed the bankrupt's appeal on the ground that she had no standing before the Court. Judge Hand had contended that the bankrupt no longer had any basis for her appeal since counsel for the trustee was willing to dismiss the action against the daughter upon realizing that this unnecessary action was the technical foundation for a consideration of the mother's rights. The appeal would therefore be moot as to the only party before the Court. But the majority held that Rule 41a(2) of the Federal Rules of Civil Procedure, giving the Court discretionary powers as to dismissal, was applicable — and retained the appeal to decide the case on its merits. Dismissal would have concluded the issue against the mother — a result which the Circuit Court found intolerable.

The Circuit Court cited in justification of its decision the Supreme Court's view that an appellate court has broad power "not only to correct errors of law in the judgment under review, but also to make such disposition of the case as justice requires." It maintained that as a court of equity it could conclude all of the aspects of a case once jurisdiction of it was obtained, so that an equitable result could be reached. In stating that procedural mistakes

14. Although the daughter had no interest in the property itself, she could properly appeal from an order directing her to do an unnecessary or illegal act. The traditional prescription has been that the injured or "aggrieved" must justify his appeal by showing some denial of a personal or property right by the order of the court below. Even the slightest is often enough. United States v. Armijo, 5 Wall. 444 (U. S. 1866).
15. "Except as provided in paragraph (1) of this subdivision of this rule [providing for voluntary dismissal by plaintiff at any time before service of the answer, or upon showing consent to dismiss by all parties], an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper."
17. The Court considered the possibilities of using a method alternative to the one chosen here, based upon the action taken in Simmons Co. v. Grier Bros. Co., 255 U. S. 82 (1922). There a rehearing was granted as to the validity of a patent after the Supreme Court, in reviewing a decree in another suit brought in another circuit, determined the same issue contrary to the decision taken by the district court. The Supreme Court, in sustaining the action taken by the district court, held that the procedure followed in that case was sufficient for the purpose, although the circuit court had held that "on the facts presented, a bill of review could not be maintained." The earlier decree of the
as to appellate proceedings should not defeat justice, the Court has broadened the application of the Federal Rules of Civil Procedure to the process of appeal—on the theory that "procedural rules are but . . . means to the enforcement of substantive justice." Support for this position is found in Rules 73a and 75d, which give federal courts license to search the record for all helpful arguments on the merits by eliminating the need for assignments of error and their attendant limitations upon the scope of appellate review.

It might be said that the rationale in this case runs against the policy which underlies res judicata. That doctrine has long forbidden the litigation of an issue which could have been but was not raised in former proceedings. This prohibition has been recently applied even where the issue in question involved jurisdiction over the subject matter—a field in which there had been doubt as to whether the rule would apply. But the policy to end disputes and ease the administrative burden of the courts, thus authoritatively district court holding the patent invalid was deemed to be not final for there was still another issue concerning that same patent still before the district court—a charge of unfair competition. In view of this situation, the Supreme Court held that "it was the duty of the District Court to grant rehearing and to vacate the earlier decree, in order to avoid, where possible, the anomaly of discrepant legal rulings as to different parties concerning an identical subject matter." However, the Court in the instant case, expressed its hesitancy concerning the applicability of this procedure to In re Barnett, since more than "six months had elapsed since the order was entered in the instant case; Rule 60(b) sets a limit of six months for reopening of orders except by bill of review; and the Grier Bros. case leaves some doubt whether a bill of review would lie here." 124 F. (2d) 1005, 1011-1012.


19. Although originally the Rules had no application to bankruptcy proceedings under Rule 81 of the Federal Rules of Civil Procedure, they now apply to such proceedings. General Orders in Bankruptcy 36 and 37, 305 U. S. 698 (1939). See Ilsen and Hone, Federal Appellate Practice as Affected by the New Rules of Civil Procedure (1939) 24 MINN. L. REV. 1. Starting from the premise that an appeal was an entirely new suit, former federal practice held all errors not assigned to be waived by the appellant. This is still the rule in the majority of the states, but at least three have abolished the requirement. Ark. Dig. Stat. (Pope, 1937) § 2773; Ill. Ann. Stat. (Smith-Hurd, 1934) c. 110, §§ 259-36, 259-39; Iowa Code (Reichmann, 1939) § 12869.

20. See Boskey and Braucher, Jurisdiction and Collateral Attack: October Term, 1939 (1940) 40 Col. L. Rev. 1006, for an excellent discussion of these trends.

21. See Cromwell v. County of Sac, 94 U. S. 351 (1876); Moschzisker, Res Judicata (1929) 38 YALE L. J. 299; CLARK, CASES ON PLEADING AND PROCEDURE (3d ed. 1940) c. 16; ARNOLD AND JAMES, CASES ON TRIALS, JUDGMENTS AND APPEALS (1936) 138-192.

22. Chicot County Drainage District v. Baxter State Bank, 308 U. S. 371 (1940), 49 YALE L. J. 959; see Boskey and Braucher, supra note 20, at 1008. "The obstacle of supposed unwaivability which had prevented the extension of res judicata to subject matter jurisdiction was first prominently spanned in American Surety Company v. Baldwin [287 U. S. 156 (1932)], followed by Stoll v. Gottlieb [305 U. S. 165 (1938)]—cases in which the original court had made a specific though incorrect finding of its own power to judge." (1940) 49 YALE L. J. 959, 960. See also Treinies v. Sunshine Mining Co., 308 U. S. 66 (1939); Davis v. Davis, 305 U. S. 32 (1938). But cf. Kalb v. Feuerstein, 308 U. S. 433 (1940) (statute creating an exception to the principle opposed to collateral attack); see Boskey and Braucher, supra note 20, at 1016-1030.
sanctioned, does not have the same force in the present case. To be sure, if the mother’s claim is not considered, the litigation is ended since the time for an appeal from the lower court’s determination of her rights has run. But arguments based upon the greater administrative burden involved in adopting the procedure taken by the court in the instant case are not justified. In the collateral attack an entirely new proceeding is involved for which there is a wide choice of forums and which may be brought over a relatively long period of time. Here, on the other hand, an appeal must have been duly taken by at least one party, and there is only one court to which it may properly be taken. And in cases such as the one involved here there almost invariably will be litigation upon the very issue which is the concern of the non-appealing party. Since limitations on appellate jurisdiction tend to sacrifice a full examination of the substantive merits to expediency and simplicity of administration, they should not be insisted on in cases where the sacrifice is great and the administrative gain is slight.

Implicit in any objection that might be made to the instant case is the fear, perhaps justified by the unnecessarily broad language of the majority opinion, that it will operate as an unfortunate precedent. Circumstances may arise where one of the appealing parties could legitimately claim that he was surprised and unprepared to meet a proposed order by an appellate court on behalf of a party not joined in the appeal, even though that could hardly be contended here. Where there is surprise, adequate protection can be afforded the appellant by means ordinarily used. It is probable, therefore, that the Barnett case will serve as a precedent only in those situations where an unusual combination of circumstances would produce an inequitable result and embarrassment to the court, and where a liberal treatment of the rules of appellate procedure would not prejudice the opposing party’s substantive rights.

23. Assuming that the time for appeal had not run as to the mother’s right in the 1936 assignment the course followed here would have notably curtailed litigation. A consideration of the law involved in the suit against the daughter would not have to be made again when the substantive question—as to the 1936 assignment—was brought up later on the mother’s appeal. But this would not be a typical situation, since time for appeal in the federal courts ordinarily is 3 months. See Rule 6(b) of the Federal Rules of Civil Procedure which “expressly provides that the court may not enlarge the period for taking an appeal...” from a district court to a circuit court of appeals. In bankruptcy proceedings the time for appeal is limited to only 30 days. See Luke v. First Nat. Bank, 224 Iowa 847, 850, 278 N. W. 230, 233 (1938). The trustee could not have claimed to be surprised by an adjudication in favor of the mother since he believed that the interests of all three parties were enmeshed in the single question of the validity of the assignment. Not until Hand, C. J., suggested in open court that the trustee voluntarily delete the only part of the order outstanding against the bankrupt did the attorney for the trustee realize that the bankrupt’s interests were even technically separable from those of her mother. His brief was directed towards an argument on the merits of the assignment, urging in main that the Circuit Court disregard the ademption issue, since it was being raised for the first time on appeal, and determine whether or not the bankrupt could validly assign an expectancy under the prevailing New York law.