

NOTES

JUDICIAL ENFORCEMENT OF ADMINISTRATIVE DUTY: W. R. GRACE & CO. v. CAB*

WITH the end of the war and the release of pent-up private energies into the struggle for world airways, the Civil Aeronautics Board is increasingly pressed to define the pattern for American participation in international air transport. Having fostered an economy of controlled competition among domestic airlines under the mandate of the Civil Aeronautics Act,¹ the Board has clearly announced its intention to apply similar economic principles in the international field.² Thus, despite the predominance already attained by Pan American World Airways among international air carriers, competing operations have commenced on European and Atlantic routes. But in Latin

* W. R. Grace & Co. v. CAB, Pan American Airways Corp., Pan American Airways, Inc., Eastern Air Lines Inc., C. C. A. 2d, Jan. 28, 1946, p. 699, *rehearing denied*, Feb. 21, 1946, p. 933, *remanding* Panagra Terminal Investigation, 4 C.A.B. 670 (1944).

1. 52 STAT. 973 (1938), 49 U. S. C. § 401 (1940) (hereinafter cited by section number only); RHYNE, CIVIL AERONAUTICS ACT ANN. (1939) c. 11; Legis. (1938) 52 HARV. L. REV. 137. For the background of the industry and the Act, see RHYNE, *supra*, cc. 1-10; PUFFER, AIR TRANSPORTATION (1941) cc. I-IV. Among the factors in the public interest, the Act specifically adopts § 2(d): "Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense." See United Air Lines Trans. Corp.—Acquisition of Western Air Express Corp., 1 C.A.A. Rep. 739, 741-50 (1939); United Air Lines Trans. Corp., Western Air Express Corp.,—Interchange of Equipment, *id.* at 723, 725-33; Colonial Airlines, Inc.—Atlantic Seaboard Operation, 4 C.A.B. 552, 554-5. The numerous considerations governing the Board in its selection of a particular airline from among the applicants for a new route are discussed in Frederick and Lewis, *Air Routes and Public Policy* (1941) 19 HARV. BUS. REV. 482; Melone, *Controlled Competition: Three Years of the Civil Aeronautics Act* (1941) 12 J. AIR. L. 318; PUFFER, *supra*, c. V. See also Healy, *Workable Competition in Air Transportation* (1945) 35 AM. ECON. REV. SUPP. 229; David, *Discussion*, *id.* at 249.

2. In American Export Airlines, Transatlantic Service, 2 C.A.B. 16, 29-35 (1940), the Board first discussed and specifically adopted a policy of competition for international air routes. In Northeast Airlines, Inc.,—North Atlantic Route Case, CAB Docket No. 855, decided June 1, 1945, at 5-10, the question was reexamined in the light of post-war conditions and the increase in foreign competition and the policy was reaffirmed. *Cf.* Lee, Member, dissenting in I.A.T.A. Traffic Conference Resolution, Agreement CAB No. 493, approved Feb. 19, 1946. Under §§ 404 and 1002 (d) and (f) of the Act, the Board's control over rates and services of international routes is less than over those of domestic airlines. This has been construed as an additional argument in favor of the automatic regulatory effect of competition for international routes. See American Export Airlines, *supra*, at 32, 34. The great importance of international air transport as an instrument of national policy is clear. The United States is the only nation which has not adopted a large measure of direct government participation. See LISSITZYN, INTERNATIONAL AIR TRANSPORT AND NATIONAL POLICY (1942); REP. ATT'Y GEN., International Air Transport Policy, H. R. Doc. No. 142, 79th Cong., 1st Sess. (1945).

America all presently profitable routes are still controlled by Pan American, which there has the crucial additional advantage of long-standing operational and political entrenchment.³ Though immediate and substantial increase in the volume of air travel between the United States and Latin America is officially predicted,⁴ no competition has yet been authorized.⁵ In the further light of the special concern of national foreign policy with Latin American economic, political and military relations, the need for affirmative action in this region is distinctly apparent. *W. R. Grace & Company v. Civil Aeronautics Board*⁶ represents the efforts of the Second Circuit Court of Appeals to force an unwilling Board⁷ to take action on the first challenge to Pan American's hegemony in the Latin American air.

Pan American-Grace Airways, Inc., the subject of this controversy, was established in 1929 by agreement between Pan American and Grace for operation from the Canal Zone south along the west coast of South America to Buenos Aires.⁸ Owned equally by the two parents, Panagra was to be managed by a divided Board of Directors, on which half of the members represented Grace and half Pan American. Thus the capital and cooperation of Grace, parent of Grace Lines steamship company and dominant west-coast shipping and financial influence, were originally obtained for the entrance of a competing form of transportation into that region. But in operation Panagra has been merely a link in the Pan American system. The greater part of its traffic, though originating in or destined for the United States, has been dependent on Pan American feeder lines for access to the Canal Zone. And direct service from the United States to Buenos Aires via the east coast has been wholly controlled by Pan American.⁹

In 1938, Panagra's routes and schemes of operation were impliedly sanctioned when "public convenience and necessity" certificates were issued to

3. See BURDEN, *THE STRUGGLE FOR AIRWAYS IN LATIN AMERICA* (1943) *passim*; LISSITZYN, *op. cit. supra* note 2, c. XIII. That the political influence of Pan American was not confined to Latin American countries, see BURDEN, *supra*, at 23-6; PUFFER, *op. cit. supra* note 1, at 193-222; REP. ATT'Y GEN., *supra* note 2, at 1-3.

4. REP. ATT'Y GEN., *supra* note 2, at 10.

5. In the interests of national defense, a temporary certificate was granted authorizing service to Mexico City by American Airlines. American Airlines, Inc.—Mexico City Service, 4 C.A.B. 647 (1944).

6. *W. R. Grace & Co. v. CAB*, C.C.A. 2d, Jan. 28, 1946, p. 699, *rehearing denied*, Feb. 21, 1946, p. 933.

7. Panagra Terminal Investigation, 4 C.A.B. 670 (1944).

8. The agreement between the two companies is set out in the court's statement of facts. C.C.A. 2d, Jan. 28, 1946, pp. 700-2.

9. For the purposes of this Note, no distinction is made between Pan American Airways Corporation, the holding company, and any of its subsidiaries. Pan American airlines operate to Balboa from Miami, New Orleans, Brownsville and Los Angeles, and to Buenos Aires from Miami. 4 C.A.B. 671 (1944). Although the distance from Miami to Buenos Aires is shorter via Panagra's west coast route, the necessity for a change of planes at the Canal Zone largely counteracts that competitive advantage.

existing airlines as required by the Act.¹⁰ The potential conflict implicit in Panagra's structure, however, had already materialized in disagreements between the parents on questions of route, flight equipment and ground facilities.¹¹ And in 1939, ten years after its birth, Panagra was finally split by an irreconcilable controversy: Grace demanding, Pan American resisting, an extension of its line to a terminal in the United States. When informal attempts by the parties, and by the CAB, to arbitrate a settlement proved unavailing,¹² Grace took the problem to the Board in two formal petitions. The first was a request in Grace's own name that the Board amend Panagra's certificate to authorize the extension.¹³ The second was a specific complaint of unfair trade practice on the part of Pan American in using its 50 percent vote to prevent an application for the extension by Panagra itself; this complaint included a request that Pan American's stock ownership be divested to prevent such negative control.¹⁴ To the latter Pan American later countered with similar charges and a request for divestment of Grace.¹⁵

This conflict raised peculiar problems in which factual determination was difficult, legal precedent lacking, and the power and duty of the CAB unclear. Tactic of the Board was ultimately to evade decision on these issues. Electing not to undertake tentative and doubtful action on Grace's two petitions, the Board disposed of them without decision by a careful procedure which left it free to deal with the situation by other methods. Thus, the Board instituted a proceeding on its own motion to inquire whether the public convenience and necessity required the extension of Panagra's line.¹⁶ But this inquiry also was eventually dismissed without decision, on the jurisdictional ground that the Board had no power to order this extension on an

10. Sec. 401 (e); RHYNE, *op. cit. supra* note 1, at 103-4, n. 362. See Pan American-Grace Airways, Inc.—Certificate of Public Convenience and Necessity, 2 C.A.B. 104 (1940). Further history of Panagra's operations is found in Pan-American-Grace Airways, Inc.—Mail Rates, 3 C.A.B. 550, 553-7, 578-80 (1942).

11. Transcript of Testimony, CAB Docket No. 779, *passim*; C.C.A. 2d, Jan. 28, 1946, p. 715 and n. 1c.

12. C.C.A. 2d, pp. 703-6, 708, n. 1.

13. CAB Docket No. 707, filed Dec. 16, 1941, under § 401(h) of the Act, which authorizes the Board ". . . upon petition or complaint or upon its own initiative, . . . (to) alter, amend, modify or suspend any such certificate, in whole or in part, if the public convenience and necessity so require." C.C.A. 2d, pp. 706-7, 721.

14. CAB Docket No. 744, filed April 29, 1942, under § 411 of the Act; this complaint included a renewal of Grace's request in Docket No. 707. Sec. 411 authorizes the Board to investigate and correct alleged unfair trade practices. C.C.A. 2d, p. 707, 719. See also § 1107 (g), which amends the Clayton Act [38 STAT. 730 (1914), 15 U. S. C. § 21 (1940)] to charge the CAB with enforcement of that statute.

15. Answer of Pan American, CAB Docket No. 744, filed Jan. 27, 1943. See C.C.A. 2d, p. 711-2.

16. CAB Docket No. 779, instituted by Board Order of Sept. 10, 1942, decided May 24, 1944; Panagra Terminal Investigation, 4 C.A.B. 670 (1944). This proceeding was under § 401 (h), *supra* note 13. The Board Order recited Grace's two previous petitions and noted that the public interest might require an additional airline to provide competition for Pan American; the order is set out in the court's statement of facts, C.C.A. 2d, pp. 708-11.

"unwilling" carrier. On Grace's appeal from the jurisdictional dismissal, the Second Circuit through Judge Frank, noting the public interest in competition and sensing an evasion by the Board, remanded the case to the Board with a clear directive to face the issue. The court found that the underlying control fight had inevitably become the central element in the inquiry, and that the Board had power in this proceeding to determine whether Pan American's recalcitrance was fraudulent or illegal. Failure to exercise that power and bring the matter to a close was held to be "beyond even that generous latitude which must be accorded to the Board's discretion."¹⁷

The involved procedural history of this case testifies to the care with which Board and court each guided the action along the desired course. From among the welter of issues presented, no single question was clearly framed and disposed of during the entire course of the proceeding. By undertaking action on its own motion, the Board sidestepped consideration of the problems of Grace's independent standing to apply for Panagra's extension, and of Pan American's alleged unfair trade practices, raised by Grace's two petitions. In the Board hearing, Pan American early moved to dismiss on jurisdictional grounds, but the Board deferred ruling until full hearing on the merits. The lengthy evidence then taken covered in detail each parent's charges of the other's self-interest in Panagra's management; but no opinion was rendered on this question.¹⁸ And in eventually sustaining the jurisdictional motion to dismiss the Board rejected Pan American's legal argument in support of the motion. On appeal, the court denied without opinion sincere contentions of Pan American and the Board that the Board order was not reviewable and that Grace lacked standing to maintain the appeal. Grace's primary claim, that it had been denied fair hearing on the jurisdictional facts, was not mentioned in the opinion.¹⁹ Nor did the court examine the merits of the Board's jurisdictional and factual holdings. The court itself, during argument, raised the possibility that Grace's specific unfair trade practice complaint against Pan American had in effect been incorporated in the proceeding which the Board had instituted.²⁰ But this suggestion was dropped after additional briefing, and Pan American's alleged unfair trade

17. C.C.A. 2d, pp. 726-7.

18. C.C.A. 2d, p. 715 and n. 1c. The hearings in this case occupied six weeks, and four thousand pages of testimony were taken; but there was no briefing or argument of the merits, and no Examiner's Report was filed.

19. C.C.A. 2d, p. 718.

20. Argument in this case was heard by the court on Nov. 12, 1945. In a letter of Nov. 29, 1945, the court requested additional briefs of the parties on the following proposition, not previously suggested by either party: That the Board Order instituting CAB Docket No. 779 had direct reference to Grace's complaint in Docket No. 744, and that therefore the Board had power in this proceeding to take action under § 411. See notes 14 and 16 *supra*. Supplemental briefs were filed but no further oral argument was heard. Although its decision is based on another ground, the court adds an appendix to its opinion, in which the intricate arguments pro and con this proposition are set out, apparently as alternative support for the decision in anticipation of appeal. C.C.A. 2d, pp. 721, 728-33.

practices were held relevant to a possible derivative right of Grace to argue that Panagra should be considered as applying for the extension,—a rationale neither suggested by Grace nor argued before the court.

Having thus deviously selected their points of attack, both Board and Court resorted to intricate legal maneuvers to muster support for their conclusions. It is apparent at the outset that the structure of the corporation with which the proceeding was ostensibly concerned is unique. Equal participation in its ownership and control by the two overwhelmingly powerful and basically opposed interests makes a palpable fiction of any attempt to deal with Panagra as an independent entity. The Board, however, chose to treat Panagra, actually an uncertain carrier, as an unwilling carrier. Finding no aid in legislative history or statutory construction, the Board then sought guidance from the experience of the ICC. But the leading judicial expression on the situation, wherein the carrier itself had not applied for the extension, announced a technical rule that the agency could order no extension beyond the territory the carrier originally undertook to serve.²¹ This strict limitation the Board explicitly denied, adopting instead a factual rule of reasonableness and asserting power to order any extension which would not "transform the character" of the reluctant carrier. While the practical applicability to airlines of rules evolved for surface carriers may be doubtful, nevertheless the modification chosen by the Board permits a salutary flexibility in future determinations under this standard. But in its application to this case, the Board's factual conclusion that the proposed extension, urged by one half of Panagra, would so transform this carrier, seems open to question.²²

The court, however, accepted this conclusion, and instead raised the issue of Panagra's willingness. By an elusive process of reasoning it established that Grace might be entitled in a derivative capacity to speak for Panagra, in which case the Board could proceed as though Panagra were a willing carrier voluntarily applying for the extension. In this process the court placed reliance solely on an extension of the brief Supreme Court opinion in *SEC v. Okin*.²³ There it was held that Okin, a stockholder claiming fraud

21. 4 C.A.B. 676-7. In *ICC v. Oregon-Washington R. Co.*, 288 U. S. 14, 39-42 (1933), the Supreme Court indicated that no order would be constitutional which attempted to compel a carrier to extend its service into a field beyond its "profession of service." The Board quoted and adopted the language of the dissenting opinion in that case.

22. The Board found that the proposed extension would increase Panagra's route mileage by 14%, and would require an additional capital investment of \$800,000 as compared with gross assets of \$10,700,000 and a net worth of over \$3,000,000. These factors, however, were not controlling in its decision; more important was the fact that Panagra would be changed from a connecting to a direct carrier and one operating "in competition with an affiliated company." 4 C.A.B. 678.

23. *SEC v. Okin*, decided with *American Power & Light Co. v. SEC*, 325 U. S. 385 (1945). Okin was a minority stockholder of Electric Bond & Share Company. In a proceeding before the SEC, the directors of Electric Bond & Share took a position favoring approval of a plan to refinance a loan to a subsidiary at reduced interest. Okin claimed that this position was motivated by fraud, and that the resultant approval of the plan ". . . would

on the part of the controlling interest in stating his corporation's position before the SEC, had sufficient interest to maintain appeal from the SEC order. The court reasoned that, since Grace's position was analogous to that of Okin, and since the interest necessary to maintain court review is at least as great as that necessary to participate in an administrative proceeding, Grace might therefore establish before the Board a right to speak for Panagra in this proceeding.²⁴ But in holding that the derivative ground only incidental to the *Okin* case sustained Grace's position, the court treated that case as in effect overruling an earlier clear holding of the Supreme Court.²⁵

The underlying question of Grace's standing to maintain review, however, was never explicitly disposed of by the court. The appeal was apparently allowed to Grace in a right derived from Panagra on the *Okin* rationale. But standard doctrine would require prior showing that the Board order was a reviewable one,²⁶ and that some economic injury would result to the appealing party.²⁷ While both elements could be shown to exist under the peculiar

reduce the value of his stock by reducing the interest income of Electric Bond and Share." 325 U. S. at 387. Since Okin's action was in the nature of a derivative suit and recourse to his Board of Directors would obviously be futile, the Court granted him standing to appeal. See Note (1945) 45 COL. L. REV. 771.

24. But Grace had never made this claim in this proceeding; it had in fact objected to the introduction of its complaint against Pan American, and to the Board's consideration of the controversy between the co-owners. C.C.A. 2d, pp. 713-15, 718. The court, however, held that, the issue of Panagra's willingness being in the case, the Board had power to determine it. The Board's choice not to introduce that issue in this proceeding was held to be beyond its discretion. C.C.A. 2d, p. 726, citing *Ashbacker Radio Corp. v. FCC*, 66 Sup. Ct. 148 (U. S. 1945); cf. *FCC v. Pottsville Broadcasting Co.*, 309 U. S. 134 (1940).

25. In *Pittsburgh & W. Va. Ry. v. United States*, 281 U. S. 479 (1930), a minority stockholder sought to set aside an ICC order approving his company's abandonment of one terminal and use of another; the minority stockholder there claimed that the position of the controlling interest in favoring approval of the plan was actuated by fraud. But the Court held that the issue of the majority's abuse of power could not properly be raised in this case, and that the stockholder could not show such injury as a result of the order as would justify a suit to set it aside. 281 U. S. at 486-7. In discussing this case the Second Circuit stated: "In spite of some differences which we will point out, we might feel that decision conclusive here, were it not for the decision in (the *Okin* case)." C.C.A. 2d, p. 723. The distinction, however, was not pointed out. In the *per curiam* opinion denying rehearing, the court continued: "(The *Pittsburgh* case) involved nothing like the public interest patently here involved; moreover, that case was decided before the recent doctrinal development above noted." C.C.A. 2d, p. 937. See note 27 *infra*. But cf. *Schenley Distillers Corp. v. United States*, 66 Sup. Ct. 247, 248 (U. S. 1946).

26. The Act provides [§ 1006(a)] that "Any order, affirmative or negative" of the Board shall be subject to review. But the terms of the Board order in this case neither required nor prohibited any action of either Panagra or Grace. Technically an unchallenged ruling of law, it merely dismissed a proceeding initiated by the Board in its discretion.

27. Like other comparable statutes, the Act provides that a certificate of public convenience and necessity, grant of which is governed only by considerations of public interest, conveys no proprietary right [§ 401 (j)], and that appeal may be maintained "by any person disclosing a substantial interest" in a Board order [§ 1006(a)]. The Supreme Court has broadened traditional requirements of "standing to sue" to allow appeal from such administrative orders by persons showing only economic injury; but the party on appeal may argue

facts of this case, neither is immediately apparent, and some discussion of these points might have been expected.

Doctrinal and procedural devices aside, however, the variant decisions in this case may be evaluated in terms of their practical results. The Board, impliedly confessing impotence to remedy Panagra's "inherently bad" internal condition,²⁸ effectively eliminated any question of extension of Panagra in this or another proceeding. The court on the other hand forced reopening of that question. While the original opinion of the court speaks only of private rights of Panagra and Grace, under the goad of petitions for rehearing the court set out the policy considerations which governed its decision. There the court indicated a fear that denial of competition by Panagra meant denial of the competitive principle; it therefore demanded explicit examination of the question in terms of the public interest. Noting the broader aspect of the case, the opinion stated that the Board might "exercise its statutory powers to rectify the situation in any way it deems wise,"²⁹ and later pointed to "numerous provisions" of the Act authorizing the Board to ". . . do the needful, with respect to the management and control of air carriers."³⁰

But the practical possibility or desirability of the solution thus broadly suggested by the court may be questioned. While the statute favors competition among airlines, it also anticipates the obvious monopolistic potentialities inherent in surface carrier control of air transport. Recognized in

only questions relating to the public interest. See opinion denying rehearing, C.C.A. 2d, pp. 934-8. The definitive study of this development is contained in the opinion of Judge Frank in *Associated Industries v. Ickes*, 134 F. (2d) 694, 699-704 (C.C.A. 2d, 1943), *dismissed as moot*, 320 U. S. 707 (1943). See also Note (1940) 26 WASH. U. L. Q. 121. But in each of the cases in this development, the decision to grant appeal has been predicated on a finding of some direct economic injury to the existing operations or business of the appealing party. See *FCC v. National Broadcasting Co.*, 319 U. S. 239 (1943), opinion of Mr. Justice Douglas, dissenting, *id.* at 265, 266 (1944); *Ashbacker Radio Corp. v. FCC*, 66 Sup. Ct. 148, 150-1 (U. S. 1945). And compare the cases discussed notes 23 and 25 *supra*. In the instant case the only injury to Panagra (or its stockholder Grace) was the Board's denial of power to order it to expand its present operations.

28. In the last two paragraphs of its opinion, the Board pointed out that "regardless of which of the co-owners of Panagra is at fault" a decision by the Board on the merits would not solve the basic difficulty, and continued: "We have sought remedy under the Civil Aeronautics Act, but after having the facts presented in extensive public hearings we must conclude that the Act does not give the Board the power to take the action contemplated by this proceeding." 4 C.A.B. at 678, quoted, C.C.A. 2d, p. 718. See *Pan American-Matson Inter-Island Contract*, 3 C.A.B. 540 (1942). In that case the Board refused to approve a contract between Pan American and two steamship companies, proposed subsequent to the passage of Act, providing for a substantially identical 50% co-ownership arrangement for air operation between the west coast of the United States and Hawaii. Noting the possibility of deadlock, the Board also indicated disapproval of the surface-carrier influence and of the restrictions on competition embodied in the contract. *Id.* at 547-8. See note 31 *infra*.

29. C.C.A. 2d, pp. 934-5.

30. *Id.* at 937. The court continued: "In the light of those provisions, we reject Pan American's argument that the Board lacks 'all power to take the management of a corporation out of the hands of its directors.'" But see note 32 *infra*.

other opinions of the Board,³¹ the possibility of surface carrier self-preference is amply illustrated in the evidence taken on the cross-charges of Pan American against Grace. Thus the benefit to the public interest of an extension of Panagra's line seems doubtful. The practical operation of the line still subject to the vicissitudes of divided control, extension would provide at best only very limited competition for Pan American, and would at the same time extend the influence of both Pan American and the surface carrier. Further, apart from the practical difficulty of determining which of the two parents can be said to represent the "true" interest of Panagra, even complete divestiture of either parent would offer an unhappy choice between promoting an aviation monopoly or subjecting air transport to further control by a competing mode of transportation. Moreover, since the applicable provisions of the Act are wholly prospective, they confer no authority to disrupt control relationships antedating the statute.³²

Finally, the urgent necessity in the public interest to seize on the first offer of competition, however unsatisfactory, is not apparent. The fluid expansion of international air transport, and the eagerness of airlines to enter all areas, suggest limitless possibilities for collateral attack on the problem. In every proceeding on international air routes the Board has heard and specifically rejected Pan American's claim for single rights.³³ In specific recog-

31 Under § 408 (b), the Board may approve consolidations and other acquisitions of control of air carriers, provided that the consolidation will not create monopoly or jeopardize another air carrier, and provided further that if the applicant for control is not an air carrier, the Board shall *not* approve the consolidation *unless* ". . . it finds that the transaction proposed will promote the public interest by enabling such carrier other than an air carrier to use aircraft to public advantage in its operation and will not restrain competition." Sec. 413 provides that "control" means either direct or indirect control; and the Board has applied these provisions in cases of negative control. *Railroad Control of Northeast Airlines*, 4 C.A.B. 379 (1943). The Board interprets the second proviso of § 408 (b) as limiting strictly the participation of surface carriers to air operations which would be merely auxiliary and incidental to their other operations. *American Export Lines, Control—Amer. Export Air.*, 3 C.A.B. 619, 624-5, 626-30 (1942); *id.* 4 C.A.B. 104, 106 (1943); *Railroad Control of Northeast Airlines*, *supra* at 381, 385; *Local, Feeder, and Pick-up Air Service*, 6 C.A.B. 1, 7-8 (1944); *cf.* *Pan American Airway Co. v. CAB*, 121 F. (2d) 810 (C.C.A. 2d, 1941).

32. The court cited §§ 407-9, 411-3, 415. C.C.A. 2d, p. 937, n. 5. See also §§ 1002, 1007, 1106; *RHYNE, op. cit. supra* note 1, at 141, n. 488 and 139-49; *PUFFER, op. cit. supra* note 1, cc. VIII, IX. The Act, however, nowhere confers specific authority to order divestment; apart from investigations, specific cease and desist orders, prohibited interlocking directorates and pooling agreements, etc., its authority over control relationships is limited to the approval of acquisitions of control subsequent to the Act. See *Railroad Control of Northeast Airlines*, 4 C.A.B. 379, 386 (1943), and note 31 *supra*.

33. See note 2 *supra*; *American Export Airlines, Transatlantic Service*, 2 C.A.B. 16, 29-35 (1940); *Northeast Airlines, Inc.—North Atlantic Route Case*, CAB Docket No. 855, decided June 1, 1945, at 7-8. In the *American Export* case, *supra*, the Board held that a competing service should be authorized for transatlantic service in spite of proof that the cost to the public in air-mail payments would be considerably higher than if Pan American carried the traffic on additional flights. See also *Pan American Airways Co. (Del.)—Transatlantic Operations*, 1 C.A.B. 118, 129-33 (1939), in which the Board refused to allot all six weekly landing rights in Europe to Pan American, since to do so would prevent future com-

dition of the Latin American situation, the Board in 1943 instituted the important Latin American Proceeding in which numerous route applications were consolidated in order to determine an integrated pattern of air transport for the whole region.³⁴ While the Board decision in that case, though expected momentarily, has not yet been published, the detailed Examiners' Report offers tangible proposals addressed directly to the instant problem. Reaffirming the Board's interest in competition and its restriction on surface carrier control, and noting Panagra's need for independent connection to the United States,³⁵ the Examiners recommend that two new lines be authorized to operate to the Canal Zone. Specifically, extension of Eastern from Miami is suggested to supply direct service from New York to Panagra's northern terminal, and a route from Houston operated by Braniff to serve the middle west.³⁶ Although the present traffic potential is not considered sufficient to warrant additional service south of the north coast of South America,³⁷ the presence of Eastern and Braniff at the Canal Zone would enable the Board to extend them south whenever appropriate.

Thus, while this case will serve as an object lesson to the Board on its vulnerability to the expanding scope of judicial review, it also emphasizes with renewed clarity certain limitations surrounding judicial determination of the public interest at the instance of "private Attorney Generals."³⁸ For in this case the court's decision, that the public interest required examination of Grace's rights, was made without the benefit of argument directed to that point.³⁹ Moreover, the result of the court's action may be to delay realization of the very public interest it so fervently advocates; Grace may now ask postponement of other authorizations until its newly discovered rights have been ruled upon.⁴⁰

petition. Compare the Board's refusal to approve a contract between Pan American and American Export for division of landing rights, PUFFER, *op. cit. supra* note 1, at 510.

34. See Letter from the President to the CAB, Sept. 7, 1943, and CAB Release, Sept. 9, 1943, both quoted in Colonial Airlines, Inc.—Atlantic Seaboard Operations, 4 C.A.B. 392, 395, n. 9 (1943); REP. ATT'Y GEN., *supra* note 2, at 10. Applications for extensive routes in Latin America were filed in 1943 by 13 airlines and 4 steamship companies, including one by Grace Lines, Inc., subsidiary of W. R. Grace & Co. Examiners' Report, *infra* note 35, at 3.

35. Latin American Service, CAB Docket No. 525, Examiners' Report, served Mar. 5, 1945, at 123-32, 138.

36. *Id.* at 137-44, 162. Although Panagra will thus still be dependent on connections at the Canal Zone, the Examiners point out the ". . . probability that a close connecting service and perhaps an interchange equipment arrangement will be effected between Panagra and the new operator." *Id.* at 135.

37. *Id.* at 132-6.

38. C.C.A. 2d, p. 935, n. 2, citing Associated Industries v. Ickes, 134 F. (2d) 694, 704. See note 27 *supra*.

39. Thus the court, in remanding, could see "no conceivable reason" for the Board's failure to consider the question of Grace's unexpressed claim to speak for Panagra. C.C.A. 2d, p. 726.

40. On Feb. 5, 1946, Grace filed a motion with the Board requesting that any steps taken by the Board in the Latin American Proceeding, toward granting a route from Balboa to the United States to any other carrier than Panagra, be withheld pending further proceedings in the instant case as ordered by the court. CAB Docket No. 525.

INTERGOVERNMENTAL TAX IMMUNITIES: THE SARATOGA SPRINGS CASE*

UNDERLYING all theories of intergovernmental tax immunity is the premise that one sovereign government should not be subjected to the domination of another.¹ However, the search for new tax revenues by federal and state governments has periodically collided with this philosophy of sovereignty. The conflict has forced recurrent definition of the extent of governmental immunity from taxation in a federated nation.²

As a matter of political theory and in many earlier decisions, tax immunity between the states and the federal government was considered equal and reciprocal.³ But more recently, the federal government has enjoyed greater judicial protection from state taxation than the states have from federal taxation.⁴ Two rationalizations for this have been advanced.

First, by their representation in Congress, the states have a legislative safeguard against undesired federal taxation; whereas, the federal government, being unrepresented in state legislative processes, must rely upon judicial protection.⁵ Secondly, since the federal government has only delegated powers, any activity it undertakes in carrying these powers into effect is governmental in nature, hence immune from state taxation;⁶ whereas,

* State of New York v. United States, 66 Sup. Ct. 310 (U. S. 1946).

1. 2 COOLEY, CONSTITUTIONAL LIMITATIONS (8th ed. 1927) 989; WILLIS, CONSTITUTIONAL LAW (1936) c. 2; Cohen, *Federal Taxation of State Activities and State Taxation of Federal Activities* (1925) 34 YALE L. J. 807; Powell, *National Taxation of State Instrumentalities* (1936) 20 U. OF ILL. STUDIES IN THE SOCIAL SCIENCES No. 4.

2. The leading cases are: McCulloch v. Maryland, 4 Wheat. 316 (U. S. 1819); Collector v. Day, 11 Wall. 113 (U. S. 1870); Dobbins v. Commissioners, 16 Pet. 435 (U. S. 1842); South Carolina v. United States, 199 U. S. 437 (1905); Willcuts v. Bunn, 282 U. S. 216 (1931); James v. Dravo Contracting Co., 302 U. S. 134 (1937) 114 A. L. R. 318, 347 (1938); Helvering v. Gerhardt, 304 U. S. 405 (1938); Graves v. New York: *ex rel.* O'Keefe, 306 U. S. 466, 120 A. L. R. 1466, 1477 (1939); United States v. Allegheny County, 322 U. S. 174 (1944). For analysis of recent cases see, Powell, *The Waning of Intergovernmental Tax Immunities* (1945) 58 HARV. L. REV. 633; *The Remnant of Intergovernmental Tax Immunities* (1945) 58 HARV. L. REV. 757.

3. See note 1 *supra*; Collector v. Day, 11 Wall. 113 (U. S. 1870); See Ambrosini v. United States, 187 U. S. 1, 7 (1902); Trinityfarm Construction Co. v. Grosjean, 291 U. S. 466, 471 (1934).

4. See Helvering v. Gerhardt, 304 U. S. 405, 415-6 (1938); Graves v. New York: *ex rel.* O'Keefe, 306 U. S. 466, 478, 485 (1939). In terms of actual tax receipts, the states undoubtedly get more from the federal government than the latter gets from the states. This is explained by the greater volume of taxable activities of the federal government. But given similar undertakings, the judicial tests for taxability have placed the federal government in a better position than the states. Compare Allen v. Regents, 304 U. S. 439 (1938) with United States v. Allegheny County, 322 U. S. 174 (1944).

5. See McCulloch v. Maryland, 4 Wheat. 316, 435-6 (U. S. 1819); Weston v. Charleston, 2 Pet. 449, 465-6 (U. S. 1829); Helvering v. Gerhardt, 304 U. S. 405, 415-6 (1938).

6. No case squarely decides this, but see, Graves v. New York: *ex rel.* O'Keefe, 306 U. S. 466, 477 (1939). "As that government derives its authority wholly from powers dele-

the states, having all reserved powers, may engage in activities of a business or "proprietary" nature not intrinsically connected with their sovereign functions of government, which activities are taxable.⁷

The first reason for giving greater judicial protection to federal immunity than to state immunity appears considerably vitiated by cases holding that Congress may immunize a federal instrumentality if it so chooses.⁸ Thus, in fact, the federal government has Congressional protection and need rely neither upon state legislatures nor upon the federal courts. The logic of this argument and the present chaos of juridical doctrine⁹ suggest that inter-government tax immunity policy is more properly charted by legislative action than by judicial decision.

The second theory by which state immunity has been restricted, the governmental-proprietary test regarding the nature of the activity, is conclusively abandoned in *New York v. United States*.¹⁰ Suit was instituted by the United States against the State of New York and the Saratoga Springs authority to recover taxes assessed on the sale of bottled mineral waters taken from Saratoga Springs, New York. In permitting the federal government to tax New York on these receipts, six members of the court agreed that "the distinction between 'governmental' and 'proprietary' interests" of the states is untenable.¹¹ Elimination of this distinction, might seem logically to require equalizing state and federal tax immunity. On several occasions, however, including the instant case, the court has sustained a federal tax levied directly on a state enterprise,¹² but never a state tax levied directly upon a federal enterprise.¹³ Thus, although the court has abandoned the remaining

gated to it by the Constitution, its every action within its constitutional power is governmental action, and since Congress is made the sole judge of what powers within the constitutional grant are to be exercised, all activities of government constitutionally authorized by Congress must stand on a parity with respect to their constitutional immunity from taxation." For criticism of this view see Note, *State Taxation of Federal "Proprietary" Instrumentalities* (1937) 11 TEMP. L. Q. 383; Powell, *supra* note 2, at 653-4.

7. *South Carolina v. United States*, 199 U. S. 437 (1905); *Ohio v. Helvering*, 292 U. S. 360 (1934); Accord: *Helvering v. Powers*, 293 U. S. 214 (1934); cf. *Allen v. Regents*, 304 U. S. 439 (1938).

8. *Smith v. Kansas City Title and Trust Co.*, 255 U. S. 180 (1921); *Federal Land Bank v. Crosland*, 261 U. S. 374 (1923); *Pittman v. HOLC*, 308 U. S. 21 (1939); *Federal Land Bank v. Bismarck Lumber Co.*, 314 U. S. 95 (1941); *Maricopa County v. Valley National Bank of Phoenix*, 318 U. S. 357 (1943); *City of Cleveland v. United States*, 323 U. S. 329 (1945). The question of whether Congress has power to grant tax exemptions extending beyond the constitutional immunity of federal agencies which courts may imply has not been decided. See *Graves v. New York ex rel. O'Keefe*, 306 U. S. 466, 478 (1939).

9. "Looking backward it is easy to see that the line between the taxable and the immune has been drawn by an unsteady hand." *United States v. Allegheny County*, 322 U. S. 174, 176 (1944). See note 2 *supra*.

10. *State of New York v. United States*, 66 Sup. Ct. 310 (U. S. 1946).

11. *Id.* at 316.

12. See note 7 *supra*.

13. Direct taxes were invalidated in *Mayo v. United States*, 319 U. S. 441 (1943); *Van Brocklin v. Tennessee*, 117 U. S. 151 (1886); *New Brunswick v. United States*, 276 U. S. 547

reason for making a distinction between the extent of state immunity and that of the federal government, it has not, as a concomitant, placed the immunities on a par.

Seriatim opinions in the instant case create uncertainty in the fundamental rationale, but the precipitate of common agreement suggests certain bases for predicting future tax immunity decisions. First, Mr. Justice Frankfurter, who delivered the judgment of the court, purports to introduce a new criterion of validity—that the tax be non-discriminatory.¹⁴ In his view a tax is non-discriminatory if it applies to both state and private enterprises of a like nature; it becomes discriminatory when levied on any activity peculiar to the state.¹⁵ However, to ascertain such activities would seem to require resort to the old categories of governmental or proprietary, traditional or unusual functions of the state. In effect, this “non-discriminatory test” seems merely to place these old criteria “in a new container.”¹⁶ Since all but two members of the Court viewed Justice Frankfurter's test in this light,¹⁷ there is reason to doubt that the test will long survive.

Secondly, the “direct tax—indirect tax” test, which has been used to invalidate state taxes levied directly on a federal instrumentality,¹⁸ appears not to apply to the reverse situation of federal taxation of state instrumentalities. The instant case is one of a series involving direct federal taxation of a state enterprise where the test was not used.¹⁹ This lack of reciprocity subjects state enterprises to taxation which would not be allowed against similar federal ventures.

Thirdly, the “economic burden” test, which early became a part of the doctrine of intergovernmental tax immunity²⁰ and which was herein espoused by the late Chief Justice and the plurality of the court, seems still to

(1928); *United States v. Allegheny County*, 322 U. S. 174 (1944). Congress may by statute permit direct taxation of a federal instrumentality, but unless the tax is levied on a subject specifically taxable it will be invalid. *Federal Land Bank v. Bismarck Lumber Co.*, 314 U. S. 95 (1941).

14. *State of New York v. United States*, 66 Sup. Ct. 310, 314 (U. S. 1946).

15. “There are, of course, State activities and State-owned property that partake of uniqueness from the point of view of intergovernmental relations. . . . These could not be included for purposes of federal taxation in any abstract category of taxpayers without taxing the State as a State.” *Ibid.*

16. Justices Douglas and Black dissenting. *Id.* at 319.

17. *Id.* at 316, 319.

18. *James v. Dravo Contracting Co.*, 302 U. S. 134 (1937) (gross receipts tax on independent contractor working for federal government valid as only indirect tax on government); *State of Alabama v. King and Boozer*, 314 U. S. 10, 140 A. L. R. 615, 621 (1941) (sales tax on purchases of materials by a contractor for the federal government, held valid as indirect tax on the government); *United States v. County of Allegheny*, 322 U. S. 174 (1944) (state tax directly on government owned property, held invalid); *Mayo v. U. S.*, 319 U. S. 441 (1943) (inspection fees laid directly upon the United States held invalid).

19. See note 7 *supra*.

20. *Metcalf and Eddy v. Mitchell*, 269 U. S. 514 (1926); *Willcuts v. Bunn*, 282 U. S. 216 (1931); *Graves v. New York ex rel. O'Keefe*, 306 U. S. 466 (1939).

be in good standing as applied to federal taxation of state instrumentalities.²¹ By this test, as initially formulated, a showing of an economic burden "real, not imaginary; substantial, not negligible"²² passed on to the complaining government was required to invalidate the tax. Using this criterion, income taxes on government officials,²³ a capital gains tax on the sale of government bonds,²⁴ an excise tax on gasoline sold to a government contractor,²⁵ and a tax on the income of lessees of government oil lands²⁶ were upheld. In at least two cases indirect taxes were invalidated upon satisfactory proof of a burden.²⁷ In the instant case, the tax was a direct tax on the State of New York and pro tanto a clear burden. But the late Chief Justice indicated that proof of a burden will not suffice, unless the burden unduly interferes with the performance of governmental duties. Thus the plurality upheld the tax because "the activity taxed is such that its taxation does not unduly impair the State's functions of government."²⁸

Finally, the late Chief Justice warned that the line on tax immunity questions must be drawn with an eye to preserving the national taxing power. If the subject of taxation is one which has been traditionally within that taxing power, granting immunity because the subject is now owned or operated by the state will tend to limit the reach of the federal fisc.²⁹ With this criterion, the characteristics of the state enterprises are more important than the function it serves. If the enterprise is of a business nature, granting tax immunity would certainly withdraw a traditional subject from the field of federal taxation and hence impair the federal government's taxing power.³⁰

The net effect of the *Saratoga Springs* case is to limit severely state im-

21. The test has been specifically renounced as applied to state taxation of federal instrumentalities. *United States v. Allegheny County*, 322 U. S. 174, 189 (1944).

22. See *Willcuts v. Bunn*, 282 U. S. 216, 234 (1931).

23. *Metcalf and Eddy v. Mitchell*, 269 U. S. 514 (1926); *Helvering v. Gerhardt*, 304 U. S. 405 (1938); *Graves v. New York ex rel. O'Keefe*, 306 U. S. 466 (1939).

24. *Willcuts v. Bunn*, 282 U. S. 216 (1931).

25. *Trinityfarm Construction Co. v. Grosjean*, 291 U. S. 466 (1934).

26. *Helvering v. Mt. Producers Corp.*, 303 U. S. 376 (1938); *Accord: Helvering v. Bankline Oil Co.*, 303 U. S. 362 (1938).

27. *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U. S. 218, 56 A. L. R. 583, 587 (1928) (excise tax on gasoline collected from seller held bad as to gasoline sold to government); *Indian Motorcycle Co. v. United States*, 283 U. S. 570 (1931) (manufacturers excise on motorcycles sold to government held invalid). These two cases "have been distinguished and must be deemed to be limited to their particular facts." *James v. Dravo Contracting Co.*, 302 U. S. 134, 151 (1937).

28. *State of New York v. United States*, 66 Sup. Ct. 310, 317 (U. S. 1946).

29. *Ibid.*

30. This approach is a continuation of the rationale used in *Allen v. Regents*, 304 U. S. 439, 451 (1938), "In final analysis the question we must decide is whether, by electing to support a governmental activity through conduct of a business comparable in all essentials to those usually conducted by private owners, a State may withdraw the business from the field of federal taxation." The old governmental-proprietary test which looked to the nature of the function is thus supplanted by this new approach, which looks to the nature of the enterprise.

munity from federal taxation, because only by showing that a tax unduly interferes with the performance of its sovereign duties can a state avoid the impost. It is this limitation of immunity which Justices Douglas and Black attack in their dissent. They advocate a return to the doctrine of absolute intergovernmental tax immunity.³¹ On the legal level their argument relies upon the states' sovereignty as guaranteed by the Tenth Amendment and the anomaly of allowing one sovereign government to tax another.³² The force of the argument, however, is directed at the economic significance of the majority decision. No matter what test is adopted, any taxation of governmental activities is pro tanto a hindrance to that government in the execution of its functions, and with the tax immunity scales now weighed in favor of the federal government, "the economic ability of the federal government to expand its activities at the expense of the states, is at once apparent."³³ With many states contemplating programs in housing, soil and forest conservation, water resources control and the like,³⁴ the question of federal taxation is vital. Congress might not only decline to undertake such projects itself, but could conceivably hamper state projects by taxation.³⁵ The dissent appears to be aimed at restricting the federal government's power to restrain new economic ventures of state and local governments.

However, in view of other factors bearing on intergovernmental fiscal relations, there are limits to the extent to which the Supreme Court can act as an effective catalyst for expanding state functions if Congress balks at such expansion. By immunizing its own instrumentalities³⁶ and by cutting down payments to the states in lieu of taxes on government enclaves,³⁷ the federal government could limit the financial resources of the states³⁸ thereby indirectly restricting their activities.

31. *State of New York v. United States*, 66 Sup. Ct. 310, 318 (U. S. 1946).

32. *Id.* at 321.

33. *Id.* at 320.

34. For articles discussing the variant activities which are being contemplated by the various states as part of their post-war programs, consult the monthly issues of (1943-5) *STATE GOVERNMENT*; (1942-3) *PLANNING & CIVIC COMMENT*.

35. "Many state activities are in marginal enterprises where private capital refuses to venture. Add to the cost of these projects a federal tax and the social program may be destroyed before it can be launched." Justice Douglas dissenting in *State of New York v. United States*, 66 Sup. Ct. 310, 319 (U. S. 1946); *Veazie Bank v. Fenno*, 8 Wall. 533 (U. S. 1869) (10% federal tax on state bank notes drove them out of existence).

36. See note 8 *supra*.

37. For data on these payments see *Report on Federal Contributions to States and Local Government Units With Respect Federally Owned Real Estate*, H. R. Doc. No. 216, 78th Cong., 1st Sess. (1943). As of June 30, 1937, it was estimated that total Federal real estate holdings (including public domain) were 375,000,000 acres or 20.7% of the total area of the country. Estimated assessed value was \$3,283,000,000. *Federal State and Local Government Fiscal Relations*. SEN. DOC. 69, 78th Cong., 1st Sess. (1943) 279. No reliable figures are available on all payments made to the States and localities under the various laws, but payments in 1941 were estimated at \$8,500,000. *Id.* at 283.

38. For an exhaustive study of the chaotic tax structure now operative in the United

However, the dissent does focus attention on the crux of the matter—how much encouragement is to be given to governmental undertakings. Certain state or federal enterprises may be so affected with the public interest that they warrant the subsidy of tax immunity. If this is the central issue, the tax should be considered primarily in terms of the social and economic questions involved rather than in terms of a conflict of sovereignty. Under existing statutes, state or municipally owned public utilities are immune from the federal income tax.³⁹ If other state activities similarly connected with the public interest or uniquely adapted to operation by a governmental unit seek immunity from taxation, the answer should depend on a reasoned analysis of their nature and relation to the public. Where intergovernmental taxation is allowed, the rules should be equal and reciprocal between the states and the federal government.⁴⁰ Then, with taxes borne equally by state, federal and private enterprises of like nature, some measure of the efficiency of each might be obtained. Fortright recognition of these economic factors which are at the base of all tax immunity problems would do much to clear the air of the logic-chopping which has been characteristic of decisions to date.

SCOPE OF SUMMARY JUDGMENT UNDER FEDERAL RULES OF CIVIL PROCEDURE*

ALTHOUGH provisions for summary judgment exist in many jurisdictions, the present Federal Rules are the first to make the procedure available to both parties in all civil actions.¹ Under Rule 56 a district court, on the motion of either party, may be called upon to render judgment before trial if there is no genuine issue of material fact remaining in dispute between the parties. In arriving at its decision it may look beyond the pleadings and

States, see *Federal State & Local Government Fiscal Relations*. SEN. DOC. 69, 78th Cong., 1st Sess. (1943). For data on the archaic forms of taxation now left to the local governing units see *id.* at 8-12.

39. INT. REV. CODE § 116(d) (1939).

40. See Powell, *supra* note 2 at 804.

* *Arnstein v. Porter*, 154 F. (2d) 464 (C. C. A. 2d, 1946).

1. Advisory Committee's note to Rule 56, FED. RULES CIV. PROC., 28 U. S. C. following § 723c (1940). The Rules were made applicable to copyright actions in 1939 by amendment to copyright rule 1, 17 U. S. C. following § 25 (1940). See 3 MOORE, *FEDERAL PRACTICE* (1st ed. 1938) 3174-7 (hereinafter cited as 3 MOORE). For discussion of the earliest judicial interpretations see Wheaton, *Federal Rules of Civil Procedure, Interpreted* (1939) 25 CORN. L. Q. 28, 29. For an excellent brief historical survey and general discussion, with selected bibliography, see Clark, *Summary Judgments* (1941) JUD. ADMIN. MONOGRAPHS, Ser. A, No. 5, reprinted (1943) 2 F. R. D. 364.

consider evidence introduced by way of depositions, admissions, and affidavits.²

The courts, in applying Rule 56, must make a policy determination between the desirable aim of concluding litigation swiftly and without undue expense, and that of according each party a full and fair hearing.³ Moreover in each case the difficult problem is presented as to whether a "genuine issue of material fact" exists within the meaning of the Rule.⁴ In reaching this determination courts must decide whether pleading a fact, without showing the existence of supporting evidence, raises that fact in issue.⁵ In addition the extent to which the resisting party must disclose his case⁶ and the weight to be accorded presumptions or inferences in his favor⁷ must be considered.

The conflict between two fundamentally opposed theories of the scope of the summary judgment is represented by the opinions of a divided Second Circuit Court of Appeals in the recent case of *Arnstein v. Porter*.⁸ In a suit between two songwriters⁹ for infringement of copyrights to musical com-

2. ". . . The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), FED. RULES CIV. PROC. The right to introduce evidence advances the procedure beyond the motion to dismiss the complaint, and permits a party to discredit his opponent's pleadings, although on their face satisfactory. See 3 MOORE § 56.03.

3. Rule 1, FED. RULES CIV. PROC., reads in part: "[The Rules] shall be construed to secure the just, speedy, and inexpensive determination of every action." Therefore, Rule 56 should be considered in its setting as a part of the general scheme of the new procedure. For discussion see 3 MOORE § 56.01; HOLTZOFF, *NEW FEDERAL PROCEDURE AND THE COURTS* (1940) 143; Ford, *More Expeditious Determination of Actions Under the New Federal Rules of Civil Procedure* (1939) 1 F. R. D. 223; Clark, *Simplified Pleading* (1942) *JUD. ADMIN. MONOGRAPHS*, Ser. A, No. 18.

4. Courts have varied somewhat in their interpretation of the "fact" phrase. See 3 MOORE (1st ed. 1938 and Supp. 1945) § 56.04. Commentary, "Genuineness" of Issues on Summary Judgment (1941) 4 Fed. Rules Serv. 940.

5. See *Lindsey v. Leavy*, 149 F. (2d) 899 (C. C. A. 9th, 1945); *Williams v. Kolb*, 145 F. (2d) 344 (App. D. C. 1944); *Pen-Ken Gas & Oil Corp. v. Warfield Natural Gas Co.*, 137 F. (2d) 871 (C. C. A. 6th, 1943); *Piantadosi v. Loew's, Inc.*, 137 F. (2d) 534 (C. C. A. 9th, 1943); *Whitaker v. Coleman*, 115 F. (2d) 305 (C. C. A. 5th, 1940); *Port of Palm Beach Dist. v. Goethals*, 104 F. (2d) 706 (C. C. A. 5th, 1939).

6. See *Madeirese do Brasil S/A v. Stulman-Emrick Lumber Co.*, 147 F. (2d) 399 (C. C. A. 2d, 1945) (compare majority opinion with dissent); *Nahtel Corp. v. West Virginia Pulp & Paper Co.*, 141 F. (2d) 1 (C. C. A. 2d, 1944); *Engl v. Aetna Life Ins. Co.*, 139 F. (2d) 469 (C. C. A. 2d, 1943); *U. S. ex rel. Ryan v. Broderick*, 59 F. Supp. 189 (D. Kan. 1945).

7. See *Wittlin v. Giacalone*, 154 F. (2d) 20 (App. D. C. 1946); *Firemen's Mutual Insurance Co. v. Aponaug Mfg. Co.*, 149 F. (2d) 359 (C. C. A. 5th, 1945); *York v. Guaranty Trust Co. of N. Y.*, 143 F. (2d) 503 (C. C. A. 2d, 1944); *Clair v. Sears Roebuck & Co.*, 34 F. Supp. 559 (W. D. Mo. 1940).

8. *Arnstein v. Porter*, 154 F. (2d) 464 (C. C. A. 2d, 1946).

9. This is the sixth suit for plagiarism brought by composer Arnstein, each against a different defendant. The other five cases, the first of which was decided in 1933, went to trial and were determined to be without merit. *Arnstein v. Broadcast Music Inc.*, 137 F. (2d) 410 (C. C. A. 2d, 1943); *Arnstein v. Marks Music Corp.*, 82 F. (2d) 275 (C. C. A. 2d,

positions¹⁰ plaintiff, Arnstein, alleged that there were specific similarities between Cole Porter's songs and his own, that Porter or his agents had stolen manuscripts from Arnstein's rooms, and that Arnstein's works had been widely distributed and played over the radio. Recordings of the pertinent pieces were presented in evidence. But in a deposition Arnstein revealed that he had no direct evidence either to connect Porter with the alleged robbery, or to prove that he had seen or heard any of Arnstein's works; and Cole Porter in a deposition categorically denied any access or copying. On these facts the district court granted defendant's motion for summary judgment,¹¹ but this decision was reversed by the Circuit Court of Appeals, Judge Clark dissenting.¹²

Under the substantive law of plagiarism, copying can be inferred either from striking similarities between the works, or from lesser similarities plus proof of defendant's access to them.¹³ In the instant case both opinions agreed that the similarities between the songs were not striking, but the majority held them sufficient to support a finding of copying if access were proved; and they maintained that plaintiff had raised a genuine issue on that point, although he had shown only a possibility of having evidence to support it. Defendant's denial was held inconclusive, his credibility being a question of fact for determination by a jury.

The gravamen of this theory of summary judgment is that to resist the motion a party need not produce his evidence, but need only indicate that it is possible that such evidence may be available.¹⁴ The effect in plagiarism actions is virtually to eliminate the possibility of avoiding trial.¹⁵ For slight

1936); *Arnstein v. Twentieth Century Fox Film Corp.*, 52 F. Supp. 114 (S. D. N. Y. 1943); *Arnstein v. American Society of Composers, Authors and Publishers*, 29 F. Supp. 388 (S. D. N. Y. 1939); *Arnstein v. Nathaniel Shilkret*, U. S. Dist. Ct., S. D. N. Y., Opinion No. 8152, Dec. 20, 1933.

10. The suit also charged infringement of plaintiff's rights to uncopyrighted musical compositions, and wrongful use of the titles of others. The court held that these charges should be dismissed for lack of jurisdiction, being non-federal causes of action.

11. *Arnstein v. Porter*, U. S. Dist. Ct., S. D. N. Y., Opinion No. 16036, July 26, 1945.

12. *Arnstein v. Porter*, 154 F. (2d) 464 (C. C. A. 2d, 1946), with the majority opinion by Judge Frank.

13. See discussion in both opinions in the instant case and cases cited therein. 154 F. (2d) 464, 468, 475 (C. C. A. 2d, 1946).

14. For previous statements of this thesis, see Judge Frank's opinion in *Doehler Metal Furniture Co. v. United States*, 149 F. (2d) 130 (C. C. A. 2d, 1945), and his dissent in *Madeiraense do Brasil S/A v. Stulman-Emrick Lumber Co.*, 147 F. (2d) 399, 405 (C. C. A. 2d, 1945) where he said: "My colleagues' basic reason for their decision appears to be this: The seller should have disclosed in his affidavits any evidence it had which bore on the question of market price; its silence should therefore be penalized. . . . I see no reason for springing on the seller here an indirect method, no excuse for employing a threat of summary judgment as a sort of rack or thumb-screw to bring about disclosure of evidence." *Id.* at 407. Compare *Whitaker v. Coleman*, 115 F. (2d) 305 (C. C. A. 5th, 1940).

15. Judge Frank recognized this when he said in the instant case: "Until the Supreme Court tells us that we err, we shall therefore adhere . . . to our belief . . . that generally there should be trials in plagiarism suits." 154 F. (2d) 464, 474 (C. C. A. 2d, 1946). As an

similarities are easily shown, and, if a mere allegation of access is then sufficient to raise the fact of copying in issue, the motion for summary judgment is reduced in effectiveness to a motion to dismiss the complaint,¹⁶ which the Second Circuit has generally overruled in these suits.¹⁷ This result seems to deny that the summary judgment procedure instituted by the Federal Rules added anything to existing practice.

In his dissent, however, Judge Clark would give vitality to the summary judgment by requiring proof of the existence of evidence to resist the motion. Thus, in the present situation, the mere allegation of access, without evidence to contest defendant's denial, would not raise an issue of fact to be tried.¹⁸ Although admitting that the court is not to weigh material evidence

example of a case in which summary judgment might be proper, Judge Frank supported a suit wherein Ravel's "Bolero" was alleged to infringe "When Irish Eyes Are Smiling"; but such an action is without the realm of probability. There is no precedent for summary judgment in a suit turning on the infringement of a musical copyright. Compare *Piantadosi v. Loew's, Inc.*, 137 F. (2d) 534 (C. C. A. 9th, 1943), where the court affirmed a summary judgment for defendant on the grounds that plaintiff had failed to establish clear title to the copyright of the song involved. But summary judgment has been granted in a suit for plagiarism of a literary copyright. See *Rose v. Connelly*, 38 F. Supp. 54 (S. D. N. Y. 1941); cf. *Houghton Mifflin Co. v. Stackpole Sons, Inc.*, 113 F. (2d) 627 (C. C. A. 2d, 1940). In suits for the infringement of patents the motion has frequently been granted, although there is dicta adverse to the practice. See *Brown v. Ford Motor Co.*, 57 F. Supp. 825 (E. D. Mich. 1944); *Allen v. Radio Corp. of America*, 47 F. Supp. 244 (D. Del. 1942); *Millburn Mills, Inc. v. Meister*, 4 Fed. Rules Serv. 741 (S. D. N. Y. 1940). *Contra*: *E. W. Bliss Co. v. Cold Metal Process Co.*, 47 F. Supp. 897 (N. D. Ohio 1942); *Lip Lure, Inc. v. Bloomingdale Bros., Inc.*, 30 F. Supp. 388 (S. D. N. Y. 1939) (trade mark); *Refractolite Corp. v. Prismo Holding Corp.*, 25 F. Supp. 965 (S. D. N. Y. 1938). See 3 MOORE (Supp. 1945) 180-1.

16. It is conceivable that instead of merely denying access, the defendant could show conclusively that access by him was impossible, but it is difficult to imagine the circumstances of such a case.

17. *McDonald v. Du Maurier*, 144 F. (2d) 696 (C. C. A. 2d, 1944); *Dellar v. Samuel Goldwyn, Inc.*, 104 F. (2d) 661 (C. C. A. 2d, 1939). In earlier practice the motion was occasionally granted, but the appellate court indicated that it did not favor the procedure. *Shipman v. R. K. O. Radio Pictures Inc.*, 100 F. (2d) 533 (C. C. A. 2d, 1938). But see *Nichols v. Universal Pictures Corp.*, 45 F. (2d) 119, 123 (C. C. A. 2d, 1930).

18. A second reason for Judge Clark's dissent was his disagreement on the issue of unlawful use. He thought the alleged similarities too petty to constitute plagiarism, thus rendering moot the question of access. A large part of both opinions is devoted to consideration of the law of plagiarism. 154 F. (2d) 464 (C. C. A. 2d, 1946). For a further disagreement between Judge Clark and Judge Frank in this matter, compare their opinions in the subsequent case of *Emery Hein v. Universal Pictures Co.*, C. C. A. 2d, Opinion No. 20067, Feb. 16, 1946. There, surprisingly, Judge Frank, writing for the court, affirmed a motion to dismiss after trial on the ground that while plaintiff's copyright might have been valid, he had shown no unlawful use. Judge Clark concurred in the result, saying that while the copying would clearly have been illegal, the plaintiff had failed to establish a good copyright in this country. And he added: "That results at once so divergent and so musically astonishing as the decisions in these two cases can occur simultaneously I can attribute only to the novel conception of legal plagiarism first announced in the *Arnstein* case and now repeated here."

or pass on the credibility of witnesses,¹⁹ Judge Clark would hold insufficient the raising of a mere suspicion,²⁰ or a showing that it is possible that evidence might be produced.²¹

Although the Supreme Court has only twice considered Rule 56 in detail,²² the trend appears to be towards broadening the scope of the summary judgment. In 1944 in the leading case of *Sartor v. Arkansas Natural Gas Corporation*²³ the majority opinion seemingly approved a strict construction of the Rule.²⁴ However in *Griffin v. Griffin*,²⁵ decided subsequently to the *Arnstein* case, while refusing a summary judgment for reasons of substantive law,²⁶ the Court apparently indicated a willingness to require that a party show evidence to sustain his allegations. The Court therein rejected a pleaded

19. *Weisser v. Mursam Shoe Corp.*, 127 F. (2d) 344 (C. C. A. 2d, 1942); *McElwain v. Wickwire Spencer Steel Co.*, 126 F. (2d) 210 (C. C. A. 2d, 1942).

20. See *Banco de Espana v. Federal Reserve Bank of N. Y.*, 114 F. (2d) 438, 446 (C. C. A. 2d, 1940): "Plaintiff relies on three circumstances. . . . The first two are relied upon as circumstances of suspicion. . . . However much these might be matters affording clues for investigation by the secret police of an interested nation, of themselves they do not rise to the dignity of competent proof of any sort. . . ."

21. See *Madeirense do Brasil S/A v. Stulman-Emrick Lumber Co.*, 147 F. (2d) 399, 405 (C. C. A. 2d, 1945) ("the ruling is to be made on the record the parties have actually presented, not on one potentially possible"); *Engl v. Aetna Life Ins. Co.*, 139 F. (2d) 469, 473 (C. C. A. 2d, 1943) ("If one may thus reserve one's evidence when faced with a motion for summary judgment there would be little opportunity 'to pierce the allegations of fact in the pleadings' or to determine that the issues formally raised were in fact sham or otherwise unsubstantial. . . . So easy a method of rendering useless the very valuable remedy of summary judgment is not suggested in any part of its history or in any one of the applicable decisions."); *Bushwick-Decatur Motors, Inc. v. Ford Motor Co.*, 116 F. (2d) 675 (C. C. A. 2d, 1940). Compare note 14 *supra*. For a more complete expression of his views, see Clark, *Summary Judgments* (1941) and *Simplified Pleading* (1942) JUD. ADMIN. MONOGRAPHS, Ser. A, Nos. 5 and 18.

22. For cases applying Rule 56 with little discussion, see *Elgin, J. & E. Ry. v. Burley*, 325 U. S. 711 (1945); *Arenas v. United States*, 322 U. S. 419 (1944) (both reversing the judgment); *Associated Press v. United States*, 326 U. S. 1 (1945); *Milcor Steel Co. v. George A. Fuller Co.*, 316 U. S. 143 (1942); *Morton Salt Co. v. Suppliger Co.*, 314 U. S. 488 (1941) (all affirming the judgment). In analyzing appellate court decisions it should be kept in mind that generally only the granting of a summary judgment is reviewable by them. Hence the Supreme Court can probably never reverse a circuit court for denying a motion for summary judgment.

23. 321 U. S. 620 (1944).

24. *Id.* at 623, 627-9. For comment on this decision see 3 MOORE (Supp. 1945) 186, n. 1; ILSÉN, *FEDERAL RULES OF CIVIL PROCEDURE* (rev. ed. 1944) 248; Commentary, *Summary Judgment as to Damages* (1944) 7 Fed. Rules Serv. 974. See also Amendment to Rule 56(c) proposed by the Advisory Committee, Second Preliminary Draft of Proposed Amendments to Rules of Civil Procedure, May, 1945, pp. 64-5.

25. 14 U. S. L. WEEK 4217 (U. S. 1946).

26. The case hinged on the question of the faith and credit due in the District Court for the District of Columbia to a judgment previously obtained in New York. The majority held the New York judgment void for want of due process, and reversed on that ground. Three members of the Court, holding the New York judgment valid in view of lack of any evidence that it should be modified, were of the opinion that the summary judgment should be affirmed. 14 U. S. L. WEEK 4217, 4220-4 (U. S. 1946).

claim which was based solely upon "petitioner's unsupported suspicions." ²⁷

In view of the liberalizing intent of the Rules, with their great emphasis on pre-trial discovery and the elimination of unnecessary litigation, it is to be hoped that the implications found in the majority opinion in the *Griffin* case will be interpreted as sanctioning the more flexible interpretation of Rule 56. Otherwise, if the limited theory of the majority in the *Arnstein* case is extended beyond plagiarism actions, the procedure will be reduced in stature to little more than the old demurrer.

THE TWENTY-FIRST AMENDMENT VERSUS THE INTERSTATE COMMERCE CLAUSE*

AGAIN the Supreme Court has considered the effect of the Twenty-first Amendment ¹ upon the distribution between federal and state governments of the power to regulate intoxicating liquors, and once again, in *United States v. Frankfort Distilleries*,² the court has uttered an opinion which fails to delimit with clarity their respective spheres of authority. The judicial controversy involves the construction of Section Two of the Amendment which provides that "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

The instant case was a Sherman Act anti-trust prosecution, in which defendant wholesalers, producers and retailers argued, by way of defense, that Section Two destroyed Congress' prior power to control interstate commerce in intoxicating liquors and that, consequently, the Sherman Act could not affect them. Rejecting this defense, Mr. Justice Black asserted that the states had not been endowed with exclusive power over the interstate commerce in liquors, and that a federal anti-trust prosecution might therefore be maintained. By way of a *caveat*, he emphasized that this case did not present a conflict between state and federal power inasmuch as the state government concerned had not sanctioned the particular price-maintenance agreements. So the question of which authority over liquor traffic was supreme was specifically left open.

27. An alternative ground advanced by petitioner for reversal was that the New York judgment had been obtained by fraud. 14 U. S. L. WEEK 4217, 4220 (U. S. 1946). The author of the majority opinion was the late Mr. Chief Justice Stone, who wrote a strong dissent to the majority's interpretation of Rule 56 in *Sartor v. Arkansas Natural Gas Corp.*, 321 U. S. 620, 629 (1944).

**United States v. Frankfort Distilleries*, 324 U. S. 293 (1945).

1. U. S. CONST. AMEND. XXI.

2. 324 U. S. 293 (1945), hereafter referred to as the *Frankfort Distilleries* case. The late Chief Justice took no part in the decision.

As a basis for future prediction, Justice Black's *caveat* is conducive of at least a dual interpretation. Conceivably, it is a warning that the Court, still entangled in the "unpurposive verbalism"³ of its early decisions under the Twenty-first Amendment, will continue to uphold all state liquor legislation against all federal constitutional objections.⁴ More plausibly, the *caveat* may herald an intention to re-examine the entire problem of liquor regulation when it squarely arises in issue and to substitute an intelligible formula for the present legal chaos. This redefinition might be grounded on the conception that state liquor legislation escapes the interdict of the Commerce Clause and other constitutional limitations only when representing a valid exercise of state police power.⁵ Such a restriction of state authority seems clearly justified by the language of Section Two and by the specific intent of the Amendment as a whole as discernible from the Congressional Record and from the peculiar antecedent history of liquor regulation in the United States.

The language of Section Two does not purport to grant to the states a plenary power unrestricted by pre-existing constitutional limitations. True, it prohibits the transportation and importation of liquors into a state in violation of "the laws thereof," but it would not require boldness beyond the capacity of the Supreme Court to interpolate the word "proper" to modify "laws." This interpolation is supported by the canon that a construction which raises a conflict between parts of a constitution is inadmissible when, by reasonable interpretation, the parts may be made to harmonize.⁶ In other cases the Courts have freely implied similar limitations to seemingly all-embracing language in order to effectuate the purpose of an amendment.⁷

If the Twenty-first Amendment be examined in its historical matrix, no intent to vest an unlimited jurisdiction in the states is discernible. The sole

3. See note 19 *infra*.

4. Compare Mr. Justice Black concurring in *Carter v. Virginia*, 321 U. S. 131, 138 (1944). "Though the precise amount of power it [The Twenty-first Amendment] has left in Congress to regulate liquor under the Commerce Clause has not been marked out by decisions, this much is settled: local, not national, regulation of the liquor traffic is now the general Constitutional policy"; see the vigorous defense of "States' Rights" by Justices Douglas and Black dissenting in *State of New York v. United States*, 66 Sup. Ct. 310, 318 (U. S. 1946).

5. The New York Milk Control Act was invalidated on precisely this type of police power rationale. "Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents." *Baldwin v. G. A. F. Scellig*, 294 U. S. 511, 527 (1935).

6. *Eisner v. Macomber*, 252 U. S. 189 (1920); *Fiske v. State of Missouri*, 62 F. (2d) 150 (C. C. A. 8th, 1933).

7. In interpreting the Thirteenth Amendment, the Supreme Court has legalized various forms of involuntary servitude despite the all-inclusive nature of the language employed in the Amendment. *Selective Draft Law Cases*, 245 U. S. 366 (1918); *Butler v. Perry*, 240 U. S. 328 (1916); *Robertson v. Baldwin*, 165 U. S. 275 (1897).

function of Section Two was to render an iron-clad protection to the "dry states" against any possible influx of intoxicants from non-prohibition areas.⁸ This purpose was to be achieved by transplanting into the Constitution pre-existing legislation: the Webb-Kenyon Act.⁹ Prior to the enactment of the Webb-Kenyon Act, a Supreme Court decision had established the principle that liquor arriving in a state in its original package was still in interstate commerce and therefore immune from the control of state police power.¹⁰ Construing an explicit Congressional response to this ruling, which provided that state authority might commence upon the "arrival" of an original package within a state, the Court held that "arrival" meant "delivery to the consignee" and that the transaction was in interstate commerce up to the time of delivery.¹¹ A later case sustained the right of an individual in a dry state to receive liquor for his own personal use without state interference.¹² This judicial frustration of state prohibition produced the Webb-Kenyon Act which divested liquor of its interstate character and prohibited the traffic of intoxicants into states in violation of "any laws thereof."

The title of the Act divested liquor of its interstate character "in certain cases"; the courts proceeded to define the exceptions while at the same time emphasizing the continuing existence of federal power to regulate. It was successively reiterated that only uses specifically forbidden by state law were prohibited,¹³ that interference with interstate commerce was permissible only in the exercise of valid state police power,¹⁴ and that discriminatory state statutes did not represent proper exercises of such power.¹⁵

8. See HAMILTON, PRICE AND PRICE POLICIES (1938) 426; Byse, *Alcoholic Beverage Control Before Repeal* (1940) 7 LAW & CONTEMP. PROB. 544, 567; (1939) 7 GEO. WASH. L. REV. 402, 407; (1939) 37 MICH. L. REV. 957, 959; (1937) 25 CALIF. L. REV. 713, 725. This was likewise the sole intent observable in the individual state conventions. See BROWN, RATIFICATION OF THE TWENTY-FIRST AMENDMENT TO THE CONSTITUTION (1938) *passim*. Legal and non-legal climate of opinion at the time of the ratification of the Amendment concurred in this view. Brief for Appellants, App. B., *Finch and Co. v. McKittrick*, 305 U. S. 395 (1939).

9. 37 STAT. 699 (1913), 27 U. S. C. § 122 (1940).

10. *Leisy v. Hardin*, 135 U. S. 100 (1890).

11. *Rhodes v. Iowa*, 170 U. S. 412 (1898) interpreting the Wilson Act, 26 STAT. 313 (1890), 27 U. S. C. § 121 (1940).

12. *Adams Express Co. v. Kentucky*, 238 U. S. 190 (1915).

13. *Adams Express Co. v. Commonwealth*, 154 Ky. 462, 157 S. W. 903 (1913); *Van Winkle v. State*, 4 Boyce (Del.) 578, 91 Atl. 385 (1914); *Palmer v. So. Express Co.*, 129 Tenn. 116, 165 S. W. 236 (1914); *Ex parte Peede*, 75 Tex. Cr. 247, 170 S. W. 749 (1914); *Commonwealth v. White*, 166 Ky. 528, 179 S. W. 469 (1915); see Rogers, *State Legislation Under the Webb-Kenyon Act* (1915) 28 HARV. L. REV. 225, 235.

14. *Palmer v. So. Express Co.*, 129 Tenn. 116, 165 S. W. 236 (1914); see Rogers, *supra* note 13, at 231; Notes (1936) 21 CORN. L. Q. 504, 506; (1937) 23 VA. L. REV. 338, 339. For a compilation of decisions sustaining particular state statutes as valid exercises of police power, see Comment (1937) 25 CALIF. L. REV. 718, 721-22.

15. The Wilson Act specifically forbade discriminatory state legislation. *Scott v. Donald*, 165 U. S. 58, 101 (1897); *Vance v. W. A. Vandercook Co.*, 170 U. S. 438, 444 (1893). Although the Webb-Kenyon Act did not explicitly bar such statutes, the courts declared

With reference to interstate commerce, the rule was concisely set forth in these terms: "It (Congress) may exercise its authority, as in the Wilson and Webb-Kenyon Acts, having in view the laws of the State, but it has a power of its own, which in this instance it has exerted in accordance with its view of public policy."¹⁶

Section Two of the Amendment was drafted to base this equilibrium between state and federal authority unshakenly and enduringly on the Constitution. In Senator Bingham's words, it was but a "restatement of the Webb-Kenyon law, already on the law books, which would write into the Constitution the right of the dry states to have federal protection against the importation of liquor."¹⁷ But in the first case to interpret the Amendment, *State Board v. Young's Market Company*,¹⁸ the Court refused to construe Section Two in the light of this intent and historical background, and, contending that the language of the Amendment granted states plenary power, upheld an otherwise invalid state license tax upon importers of beer from another state.¹⁹

Repudiation, as a standard of interpretation, of the Webb-Kenyon Act with its judicially defined notion of a concurrent federal and state authority and its conception that only "proper" exercises of the state police power were constitutional was unwarranted and also unnecessary: the result might have been obtained more satisfactorily by considering the statute

that the phrase "any laws" meant merely "proper laws." *Brennen v. So. Express Co.*, 106 S. C. 102, 109, 90 S. E. 402, 404 (1916); *Monumental Brewing Co. v. Whitlock*, 111 S. C. 198, 97 S. E. 56 (1918); see *Dugan v. Bridges*, 16 F. Supp. 694, 707 (D. N. H. 1936); *McGovney, The Webb-Kenyon Law and Beyond* (1917) 3 IOWA L. BULL. 145, 155; Note (1936) 21 CORN. L. Q. 504, 509.

16. *United States v. Hill*, 248 U. S. 420, 427 (1919); *United States v. Simpson*, 252 U. S. 465 (1920); *People v. Keeley*, 213 Mich. 115, 181 N. W. 990 (1921).

17. 76 CONG. REC. 4228 (1933); Senator Blaine *id.* at 4140-41; Senator Borah *id.* at 4170-72; Senator Walsh *id.* at 4176, 4219; Mr. Gibson *id.* at 4526; Senator Fletcher *id.* at 4001; see Carr, *Liquor and the Constitution* (1940) 7 LAW & CONTEMP. PROB. 709, 710; De Ganahl, *The Scope of Federal Power Over Alcoholic Beverages Since The Twenty-First Amendment* (1940) 8 GEO. WASH. L. REV. 819, 822; Kallenbach, *Interstate Commerce in Intoxicating Liquors Under The Twenty-First Amendment* (1940) 14 TEMP. L. Q. 474, 476; Legis. (1938) 38 COL. L. REV. 644, 645.

18. 299 U. S. 59 (1936).

19. The Court conceded that prior to the enactment of the Amendment this tax would have been invalid as a burden on interstate commerce but commented "As we think the language of the Amendment is clear, we do not discuss these matters." *Id.* at 63-4. See caustic criticism in HAMILTON, PRICE AND PRICE POLICIES (1938) 425. ". . . the opinion overlooks intent, which alone can give meaning to language, reverts to an unpurposive verbalism, and with complete unawareness slides across the plain boundary from the protection of public morals into the promotion of local interest." *Id.* at 426. Shortly afterwards, the Court took the next step. "We are asked to limit the power conferred by the Amendment so that only those importations may be forbidden which, in the opinion of the Court, violate a reasonable regulation of the liquor traffic. To do so would . . . 'involve not a construction of the Amendment, but a rewriting of it.'" *Mahoney v. Joseph Triner Corp.*, 304 U. S. 401, 404 (1938).

under question a proper police regulation based on a reasonable classification.²⁰ Had the Court so held, it would have been free to strike down the avowedly retaliatory state legislation which later faced it.²¹ Perhaps the Court's refusal to examine intent in this case²² is traceable to the peculiar moral, social, and sociological aspects of liquor itself. It may well have been the moral attitude of certain justices which predisposed the Court to look askance at efforts of the resuscitant liquor industry to escape regulation by means of a liberal constitutional construction.

Among the legal difficulties occasioned by the rejection of the historical interpretation are those suggested by the separate concurring opinion of Mr. Justice Frankfurter in the *Frankfort Distilleries* case. Reaching ahead to the issue upon which Mr. Justice Black reserved decision, Mr. Justice Frankfurter maintained that Section Two completely subordinated all federal power under the Commerce Clause to the power of the states to control liquor within their borders, and that federal legislation was valid only where states failed to act. This proposition, that a state, by action or inaction, may respectively bar or permit federal control over interstate commerce, applies the much-criticized²³ "silence of Congress" doctrine²⁴ to state legislatures.²⁵ Should the Court read such a novel tenet into the Constitution, it must prepare itself to analyze minutely all liquor regulations of *all* states to determine in which areas federal legislation may take effect.

In practical result, the Court's failure, beginning with the *Young's Market* decision, to construe Section Two in its proper light further sanctions the Balkanization of American trade, commerce and industry.²⁶ Of the 1500 odd statutory trade barriers in effect today, more than 100 are tailored to

20. See Comment (1937) 25 CALIF. L. REV. 718, 727; Legis (1938) 38 COL. L. REV. 644, 667 n. 158.

21. *Finch and Co. v. McKittrick*, 305 U. S. 395 (1939); *Indianapolis Brewing Co. v. Liquor Comm.*, 305 U. S. 391 (1939).

22. Courts are clearly empowered to examine the intent of amendments and to construe them in the light of their desired effect: *Evans v. Gore*, 253 U. S. 245, 259-60 (1920); *Matter of Dowling*, 219 N. Y. 44, 56, 113 N. E. 545, 548 (1916).

23. "The 'psychoanalysis' of Congress is a perilous venture when that body speaks and a hopeless task when it is silent. It would seem that the only sensible course is to hold that when Congress says nothing it means what it says." Sholley, *The Negative Implications of the Commerce Clause* (1936) 3 U. OF CHI. L. REV. 556, 588; see Bickel, *The Silence of Congress* (1927) 41 HARV. L. REV. 200; Dowling, *Interstate Commerce and State Power* (1940) 27 VA. L. REV. 1, 19-28.

24. An exhaustive collation of cases dealing with Congressional Silence and its effect on state action may be found in GAVIT, *THE COMMERCE CLAUSE* (1932) App. D & E.

25. The adoption of such a reciprocal doctrine has been urged by several commentators. See Collier, *Judicial Bootstraps and the General Welfare Clause* (1936) 4 GEO. WASH. L. REV. 211, 239-42; De Ganahl, *supra* note 17 at 885-94.

26. Mr. Justice Jackson concurring in *Duckworth v. Arkansas*, 314 U. S. 390, 402 (1941). "I do not suppose the skies will fall if the Court does allow Arkansas to rig up this handy device for policing liquor on the ground that it is not forbidden by the commerce clause, but in so doing it adds another to the already too numerous and burdensome state restraints of national commerce and pursues a trend with which I would have no part."

protect domestic manufacturers and distillers of liquor against the vagaries of the competitive market.²⁷ Comprehending the inadequacy of remedial state action through reciprocal legislation and compacts,²⁸ text writers have suggested federal attacks on both private and statutory trade barriers by use of the national fiscal powers,²⁹ by application of the doctrine of "unconstitutional conditions,"³⁰ and by stringent enforcement of the federal anti-trust laws.³¹ Prior Supreme Court decisions have fomented interstate liquor rivalry by giving judicial blessing to state mercantilism;³² the Frankfurter rationale would remove a prime federal regulatory weapon in the fight against these barriers. And it would do so at the very time when state-sanctioned price-stabilization agreements bid fair to become common in the economic pattern of the liquor industry.³³

The Supreme Court has reversed a host of prior decisions which later investigation indicated had been founded on an erroneous interpretation of legislative intent.³⁴ The Court is surely not foreclosed from re-examining Section Two of the Twenty-first Amendment in the light of its antecedent history in order that a sound basis may be found for future decisions, concerning the liquor industry.

ENFORCEABILITY OF CONTRACTS WHICH VIOLATE THE ROBINSON-PATMAN ACT*

THE Robinson-Patman Act,¹ designed to discourage monopoly by protecting small independent enterprises,² makes it unlawful to discriminate in

27. See Green, *Liquor Trade Barriers* (1940) 70 PUB. ADM. SERV. 1; Kallenbach, *supra* note 17 at 482-3.

28. See Lindsay, *Reciprocal Legislation* (1910) 25 POL. SCI. Q. 435; Frankfurter and Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments* (1925) 34 YALE L. J. 685; but cf. Kallenbach, *supra* note 17 at 487; Skilton, *State Power under the Twenty-First Amendment* (1938) 7 BROOK. L. REV. 342, 359.

29. See Hobbs, *Federal Fiscal Powers and the Abatement of Trade Barriers* (1941) 9 GEO. WASH. L. REV. 811.

30. See Carr, *supra* note 17 at 716; (1939) 37 MICH. L. REV. 957, 960 n. 27.

31. See Schrimsher, *The Use of the Federal Anti-Trust Laws to Combat Trade Barriers* (1941) 9 GEO. WASH. L. REV. 825.

32. "A return to mercantilism—an escape from which was by way of the Constitution—is given the sanction of a document whose very purpose was 'to establish a more perfect union.'" HAMILTON, *op. cit. supra* note 8, at 426.

33. For a comprehensive picture of the industrial pattern and price structure of liquor, see HAMILTON, *op. cit. supra* note 8, at 416-20; 2 VERBATIM REPORTS TNEC (1939) 430-549; De Ganahl, *Trade Practice and Price Control in the Alcoholic Beverage Industry* (1940) 7 LAW & CONTEMP. PROB. 665, 680.

34. *Erie R. R. v. Tompkins*, 304 U. S. 64 (1938).

* *Bruce's Juices, Inc. v. American Can Co.*, 155 Fla. 877, 22 So. (2d) 461 (1945), *aff'd without opinion*, 66 Sup. Ct. 527 (U. S. 1946), *rehearing granted* (1946) 14 U. S. L. WEEK 3322.

1. 49 STAT. 1526 (1936), 15 U. S. C. § 13 (1940). The Robinson-Patman Act is regarded

price between purchasers of identical commodities,³ and provides that aggrieved parties may sue for treble damages⁴ or to enjoin further discrimination.⁵ The Act, however, leaves to judicial determination the legal effect of contracts founded upon prohibited conduct.⁶ The extent to which a promisor can plead illegality under the Act as a defense to an action on a discriminatory sales contract may be answered when the Supreme Court decides the case of *Bruce's Juices, Incorporated v. American Can Company*.⁷

Action was instituted by the American Can Company in a Florida court to collect four promissory notes executed for goods received by Bruce, one of its smaller customers. The answer alleged that the Can Company, by allowing customer discounts based upon volume of purchase,⁸ had violated the Robinson-Patman Act and that the notes were, therefore, predicated upon illegal consideration. After a pre-trial hearing, the court struck out the defense of illegality and rendered judgment for the plaintiff,⁹ holding that the notes represented a valid obligation, since the sales contract upon which they were given was not illegal on its face. This decision was eventually¹⁰

as an amendment to § 2 of the Clayton Act, which Act is considered a supplement to the Sherman Act. For a general discussion of the interrelation of the three laws see Burns, *The Anti-Trust Laws and the Regulation of Price Competition* (1937) 4 LAW & CONTEMP. PROB. 301.

2. The Act was drawn to curb the buying advantages of chain stores. Phillips, *The Robinson-Patman Anti-Price Discrimination Law and the Chain Store* (1936) 15 HARV. BUS. REV. 62; Legis. (1936) 36 COL. L. REV. 1285.

3. 49 STAT. 1526 (1936), 15 U. S. C. § 13(a)(1940). But vendors may justify price differences by showing they were given to meet competition, or were based on differences in cost of manufacture, sale, or delivery.

4. 38 STAT. 730, 731 (1914), 15 U. S. C. § 15 (1940).

5. Injunction proceedings may be initiated privately in a federal court, 38 STAT. 730, 737 (1914), 15 U. S. C. § 26 (1940); or by a federal district attorney in a federal court, 38 STAT. 730, 736-7 (1914), 15 U. S. C. § 25 (1940). The Federal Trade Commission has the power to issue cease and desist orders, enforceable by the Circuit Courts of Appeals. 38 STAT. 730, 734-5 (1914), 15 U. S. C. § 21 (1940).

6. In this respect the Robinson-Patman Act differs from the Sherman Act, which outlaws specifically all contracts which violate it. 26 STAT. 209 (1890), 15 U. S. C. § 1 (1940). This difference, however, was held not crucial in the first decision of the Florida Supreme Court in the principal case. *Bruce's Juices, Inc. v. American Can Co.*, 155 Fla. 377, 382, 22 So. (2d) 461, 463 (1944). See note 10 *infra*.

7. 66 Sup. Ct. 527 (U. S. 1946), *rehearing granted* (1946) 14 U. S. L. WEEK 3322.

8. These discounts ranged up to five percent. The instant appeal is not, however, concerned with the substantive legality of the discounts since judgment was given on the pleadings.

9. The defendant company objected to this summary procedure on the ground that the pre-trial conference was authorized merely to simplify and not to determine the issues. Brief for Appellant, pp. 30-1. See *In re* Petition of Jacksonville Bar Association for Rule Permitting the Establishment of Pre-Trial Procedure, 141 Fla. 327 (1940) (ordering pre-trial hearings, when approved by individual circuit courts, for the purpose of simplifying the issues). But *cf.* *Hillsborough County v. Sutton*, 150 Fla. 601, 8 So. (2d) 401 (1942) (the court may give judgment on the pleadings if the conference eliminates all questions of fact).

10. Upon appeal, the Florida Supreme Court at first voted five to two for reversal,

upheld by the United States Supreme Court without opinion in a four to four decision,¹¹ but the Court has approved Bruce's petition for reargument before the full bench.¹²

The proliferation of doctrine concerning contracts which are void or voidable,¹³ *malum prohibitum* or *malum in se*,¹⁴ "inherently" or "collaterally" illegal,¹⁵ furnishes "authority" for both sides of the litigation. Both briefs invoke these legalistic distinctions in their attempts to analogize from cases arising under the Sherman Act, to which the Robinson-Patman Act is an appendage.¹⁶ The Can Company relies on *Connolly v. Union Sewer Pipe Company*,¹⁷ which held the validity of promissory notes unimpaired by proof that the creditor-vendor was a combination in restraint of trade.¹⁸ A contrary result, however, was reached in *Continental Wallpaper Company v. Voight and Sons*,¹⁹ on the theory that the *Connolly* rule did not apply where the statutory violation bore a "direct" relation to the contract in issue.²⁰ Moreover, as the Court admitted extrinsic evidence to prove this relationship,²¹ the *Voight* case undermines the Can Company's position that the de-

citing cases in which the defense had been allowed under the Sherman Act. 155 Fla. 877, 22 So. (2d) 461 (1944). But after rehearing, the Court voted four to three for affirmance of the trial court, holding, without further elaboration, that the defense was unavailable "under the facts submitted in evidence." *Id.* at 885, 22 So. (2d) at 465 (1945).

11. 66 Sup. Ct. 527 (U. S. 1946).

12. (1946) 14 U. S. L. WEEK 3322.

13. See ANSON, CONTRACTS (Corbin's ed. 1930) §§ 12-16, 263; RESTATEMENT, CONTRACTS (1932) § 475b; 5 WILLISTON, CONTRACTS (rev. ed. 1937) § 1630 *et seq.*

14. The utility of this distinction has often been questioned. See Gellhorn, *Contracts and Public Policy* (1935) 35 COL. L. REV. 679, 683; 6 WILLISTON, CONTRACTS (rev. ed. 1938), § 1764.

15. See cases cited *infra* notes 18 and 20. For a discussion of this distinction see Wilder Mfg. Co. v. Corn Products Ref. Co., 236 U. S. 165, 171-78 (1915).

16. See note 1 *supra*.

17. 184 U. S. 540 (1902).

18. *Accord*, Small Co. v. Lamborn & Co. 267 U. S. 248 (1925); Geddes v. Anaconda Copper Mining Co., 254 U. S. 590 (1921); Wilder Mfg. Co. v. Corn Products Ref. Co., 236 U. S. 165 (1915). Cases holding that a vendee cannot avoid a contract merely because the vendor is an unlawful trust are collected in 5 WILLISTON, CONTRACTS (rev. ed. 1938) § 1661, n. 4. See also ANSON, CONTRACTS (Corbin's ed. 1930) § 253; RESTATEMENT, CONTRACTS (1932) § 597.

19. 212 U. S. 227 (1909). Dissenting, Justice Holmes found this case indistinguishable from the *Connolly* case: "I think that this decision must mean that *Connolly v. Union Sewer Pipe Co.* ought to have been decided the other way. . . . There was just as much of a scheme and just the same scheme in that case as in this." *Id.* at 272.

20. *Accord*, Sola Elec. Co. v. Jefferson Elec. Co., 317 U. S. 173 (1942); Bement & Sons v. National Harrow Co., 186 U. S. 70 (1902); Pratt v. Paris Gas Light & Coke Co., 168 U. S. 255 (1897). See cases collected in 5 WILLISTON, CONTRACTS (rev. ed. 1938) § 1661, n. 5.

21. "The court will not be restricted to a partial statement of the facts but will consider all the circumstances connected with the transaction so as to ascertain its real nature." *Continental Wallpaper Co. v. Voight & Sons Co.*, 212 U. S. 227, 266 (1909). *Cf.* *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 245 (1899).

fense is unavailable unless the misconduct shows on the face of the contract. Thus, in the instant case, the vendor's discount policy and practice may be examined to support the claim that the contract is an integral part of a scheme condemned by the Act.

A somewhat more fruitful approach to the problem than that based solely upon the traditional, conceptual distinctions has been to examine the purposes of the antitrust acts²² and to determine whether these objectives would be furthered by an enlargement of the sanctions now provided. In this regard, the institution of a contract defense of illegality based on one of these acts would effectuate antitrust policy. Indeed, to reject such a defense in the instant case would seem to give judicial backing to a forbidden agreement, where the victim is of a class which the Robinson-Patman Act was specifically designed to protect.²³ Moreover, no reading of the Act or of the proceedings which led to its passage²⁴ supports an inference that the enumerated penalties were intended to be exclusive.²⁵

A strict construction²³ of statutory sanctions would seem particularly unjustified in this case where effective relief is impossible under existing jural remedies. Since Bruce now buys elsewhere, it would not benefit from an injunction against further discriminatory conduct. And a suit for treble damages, the only specified action permitting recovery for past injury, seems inadvisable unless evidence garnered by the government in a suit of its own

22. See Gellhorn, *supra* note 14, at 691-3; Landis, *Statutes and the Sources of Law*, in HARVARD LEGAL ESSAYS (1934) 213. Cf. *Harris v. Runnels*, 12 How. 79 (U. S. 1851).

23. Traditionally, courts have been inclined to construe statutes in favor of their intended beneficiaries where the legislative purpose has been to minimize discrepancies in bargaining power. "Where contracts or transactions are prohibited by positive statutes, for the sake of protecting one set of men from another set of men; the one, from their situation and condition, being liable to be oppressed or imposed upon by the other; there, the parties are not *in pari delicto*; and in furtherance of these statutes, the person injured, after the transaction is finished and completed, may bring his action and defeat the contract." *Browning v. Morris*, 2 Cowp. 790, 792, 98 Eng. Rep. 1364 (K. B. 1778) (per Lord Mansfield). See *United States v. Post*, 148 U. S. 124 (1893); *Turney v. Tillman Co.* 112 Ore. 122, 228 Pac. 933 (1924). But cf. *Hill v. Missouri Pacific Ry.*, 8 F. Supp. 80 (W. D. La. 1933), (1935) 35 COL. L. REV. 297.

24. See *Hearings before Committee on the Judiciary on H. R. 8442, H. R. 4995, H. R. 5062*, 74th Cong., 1st Sess. (1935); H. R. REP. No. 2951, 74th Cong., 2d Sess. (1936); SEN. REP. No. 1502, 74th Cong., 2d Sess. (1936).

25. Representative Wright Patman, co-author of the Act, has asked to enter the instant case as *amicus curiae* on behalf of the defendant. In a memorandum in support of his petition, Patman says, "Such a denial [of the defense] seems to me to be contrary to the intent of the Congress; to weaken the Act by taking away its most available remedy; to diminish the protection against monopoly which the Act throws about small business; and to impede the antitrust policy which the Act was meant to instrument."

26. In one of the few cases in which the point raised by the principal case has been litigated previously, the court held that the Act was to be construed strictly because of its penal character. *Progress Corp. v. Green*, 163 Misc. 828 (Sup. Ct. 1937). This result is criticized in (1938) 38 COL. L. REV. 192.

against the wrongdoer is available.²⁷ Thus, the most immediate practical method of relieving Bruce seems to be to vitiate the discriminatory contract when the vendor seeks its enforcement.

Assuming Bruce's substantive argument prevails, the form of recovery must be considered. The defendant's brief suggests theories both of complete avoidance and counterclaim for damages.²⁸ Avoidance of the notes, however, appears an illogical criterion of recovery, for their sum bears no demonstrable relation to the amount of injury sustained. Furthermore, it seems unreasonable to allow a vendee's counterclaim²⁹ which may be quantitatively penal beyond the intention of the Act. The most equitable adjustment appears to be to allow the Can Company to recover the contract price less the amount Bruce has paid in excess of its most favored competitor.³⁰ Thus, even though the contract is invalid, the vendor would be permitted

27. The Clayton Act makes such evidence available. 38 STAT. 731 (1914), 15 U. S. C. § 16 (1940). See ZORN AND FELDMAN, *BUSINESS UNDER THE NEW PRICE LAWS* (1937) 250; HAMILTON AND TILL, *ANTITRUST IN ACTION* (TNEC Monograph No. 16, 1940) 83.

28. "This question [of whether the defense is to be available] does not require the Court to decide that the entire transaction is so tainted with illegality that the seller cannot collect even the fair value of the goods, thus giving the buyer a windfall. The question can, of course, be answered on the broad ground that a transaction unlawful under the Robinson-Patman Act constitutes criminal conduct upon which no money judgment can be based.

"But if it be admitted that the buyer is entitled to the fair value of the goods, petitioner's defense can be sustained on a narrower ground. It is that narrow ground which is actually presented by the record. There is here, on the part of the respondent, no mere demand for the fair value of its merchandise. Instead the record of the unfinished pre-trial conference suggests the strong probability that petitioner has already paid the fair value based on prices at which American Can Company sells to its larger competitors." Brief for Appellant, p. 8. It is of interest that Bruce was represented by Thurman Arnold, ex-Assistant Attorney General, and Chief of the Anti-trust Division of the Department of Justice.

29. Jurisdictions which have adopted the English view that every contract involving statutory violation is wholly unenforceable and void might allow such a claim. See *Bartlett v. Vinor*, Carth. 251, 252, 90 Eng. Rep. 750 (K. B. 1692), *Sturm v. Truby*, 245 App. Div. 357, 282 N. Y. Supp. 433 (4th Dep't 1935). Cf. *Harriman v. Northern Securities Co.*, 197 U. S. 244, 295-6 (1905); Anderson, *Quasi-Contractual Recovery in the Law of Sales* (1937) 21 MINN. L. REV. 529, 565-66.

30. See 5 WILLISTON, *CONTRACTS* (rev. ed. 1937) § 1485 and cases collected therein. Use of surcharge as a measure of recovery, however, seems to have been discarded at one stage in the Act's development. In discussing this mode of relief, the Senate Committee said, "The measure of damages provided in section (d) is the amount of the forbidden discrimination or allowance found to have been granted, limited however to the volume of the plaintiff's business in the goods concerned, or to the amount which he would have received had the allowance been granted to all on the equal basis which the bill requires. The underlying principle of the bill is the suppression of unjust discriminations, and it seems both fair and just, and in harmony with that principle, to enable those victimized by its violation to restore themselves, through the recovery of damages, to the equal position which they would have occupied had the violation not been committed." SEN. REP. No. 1502, 74th Cong., 2d Sess. (1936) 8. The Senate alone enacted this provision and ultimately withdrew it in conference. H. R. REP. No. 2951, 74th Cong., 2d Sess. (1936) 8.

the value of its performance on a quasi-contractual basis.³¹ Then, if further injury appears, such as a lessening of Bruce's ability to compete,³² a separate suit for treble damages,³³ though repetitive, is necessary since the state courts cannot assess treble damages.

The argument of the Florida court that, as a matter of sound judicial administration, antitrust issues should not be raised in state courts, because those tribunals are unable to handle the complex economic issues involved,³⁴ is not persuasive. State courts have for many years policed state antitrust legislation³⁵ and many have tried the defense of illegality under the Sherman³⁶ and Clayton³⁷ Acts. While state administration of federal antitrust policy may not be the optimum, nevertheless the violator's choice of forum should not foreclose an aggrieved vendee from his most practical form of relief.

If precedent is needed to support the decision that illegality is a valid defense in the instant case, the Supreme Court may find a "direct" relationship between the price discrimination and the promissory notes. In any event, it is to be hoped that the Court will use the opportunity afforded to increase the effectiveness of the Robinson-Patman Act in the post-war resumption of antitrust enforcement.

31. 5 WILLISTON, CONTRACTS (Rev. ed. 1937) § 1631. For a graphic example of the operation of this doctrine under a regulatory act see *Rosasco Creameries, Inc. v. Cohen*, 276 N. Y. 274, 11 N. E. (2d) 908 (1937), (1938) 37 MICH. L. REV. 136, *rev'g* 249 App. Div. 228, 292 N. Y. Supp. 1 (1st Dept. 1936), (1937) 50 HARV. L. REV. 1320.

32. The Act provides that discrimination is actionable if its effect "may be substantially to lessen competition or tend to create a monopoly." 49 STAT. 1526, 15 U. S. C. § 13(a) (1940). "Subsection (a) does not require that a discrimination actually result in any of the various forms of competitive injury specified, but merely that discrimination have a necessary or probable effect of the kind prohibited." ZORN AND FELDMAN, *op. cit. supra* note 27, at 97.

33. Bruce has instituted such a suit. Brief for Appellee, p. 26.

34. The trial judge in the instant case voiced this objection several times. "This question is not one that ought to be before this Court as I have had occasion to remark but it ought to have been before the Federal Trade Commission on the question of whether or not this system that is set up here is legal under the Robinson-Patman Act. It hasn't got any business in this Court because we have not the facilities to investigate all those things and we are not the body authorized to investigate whether or not their system of doing business is legal under the Robinson-Patman Act." Record on Appeal, pp. 578-9.

35. Virtually all states have antitrust statutes. They are collected and compared in Legis. (1932) 32 COL. L. REV. 347.

36. *Allen v. Parks*, 196 Iowa 943, 195 N. W. 745 (1923), *Schill v. Remington-Putnam Book Co.*, 182 Md. 153, 31 A. (2d) 467 (1943), *Remington Rand, Inc. v. International Business Mach. Corp.*, 167 Misc. 108, 3 N. Y. Supp. (2d) 515 (Sup. Ct. 1937). *Cf. Parker v. Brown*, 317 U. S. 341, 351-2 (1943). Violation of the Sherman Act has also been pleaded successfully as an equitable defense in a state court. See Note (1941) 50 YALE L. J. 1114.

37. *Ainsworth v. Cooper Underwear Co.*, 227 App. Div. 837, 237 N. Y. Supp. 301 (4th Dep't 1929); *Remington Rand, Inc. v. International Business Mach. Corp.*, 167 Misc. 103, 3 N. Y. Supp. (2d) 515 (Sup. Ct. 1937).

LAW AND EQUITY IN NEW YORK—STILL UNMERGED*

LAW and equity were merged in New York State with the introduction of the Field Code¹ almost a century ago, yet insistence upon distinguishing between them still produces confusion, delay, and needless multiplicity of suits.² Lawyers and judges steeped in lore conceive that ancient conceptual institutions have an existence independent of the profession's recognition and immune from legislative will to destroy. The dichotomy between law and equity is regarded, not as an outmoded tool, but as an immutable condition to which men must adapt themselves. The New York Court of Appeals, in the much cited case of *Jackson v. Strong*,³ stated it thus: "The inherent and fundamental difference between actions at law and suits in equity cannot be ignored."

Later decisions of the Court of Appeals promised abandonment of this position, but the court has vacillated so consistently that the most recent decision can no longer be considered a safe basis for prediction.⁴ This indecisiveness, which may be partially accounted for as a disinclination on the part of the highest court of a state to concern itself seriously with "mere matters of procedure," has resulted in considerable confusion in the decisions of the lower courts of New York.

Basic to the code system of pleading simplification is the principle that the

* *International Photo Recording Machines, Inc. v. Microstat Corp.*, 269 App. Div. 485, 56 N. Y. S. (2d) 277 (1st Dep't 1945); *Atlantic Metal Products, Inc. v. Minskoff*, 295 N. Y. 566, 64 N. E. (2d) 277 (1945).

1. "The distinctions between actions at law and suits in equity, and the forms of all such actions and suits, heretofore existing, are abolished; and there shall be in this state, hereafter, but one form of action, for the enforcement or protection of private rights and the redress or prevention of private wrongs, which shall be denominated a civil action." N.Y. LAWS (1848) c. 379, § 62. See FIRST REPORT OF COMMISSIONERS ON PRACTICE AND PLEADING (N. Y. 1848) 145. The present New York statute reads: "There is only one form of civil action. The distinction between actions at law and suits in equity, and the forms of these actions and suits, have been abolished." N. Y. CIVIL PRACTICE ACT, § 8.

2. CLARK, CODE PLEADING (1928) 44-50; WALSH, A TREATISE ON EQUITY (1930) 111; James, *Trial by Jury and the New Federal Rules of Procedure* (1936) 45 YALE L. J. 1022; Rothschild, *New York Civil Practice Simplified: I* (1927) 27 COL. L. REV. 258.

3. 222 N. Y. 149, 118 N. E. 512 (1917). Clark, *The Union of Law and Equity* (1925) 25 COL. L. REV. 1, discusses the case at length as an ancient horrible, citing many cases holding *contra*. See Walsh, *Merger of Law and Equity Under Codes and Other Statutes* (1929) 6 N. Y. U. L. Q. REV. 157, 222 N. Y. at 154, 118 N. E. 513.

4. Discussing *Wainwright & Page v. Burr & McAuley*, 272 N. Y. 130, 5 N. E. (2d) 64 (1936), a decision which seemed to repudiate the doctrine of *Jackson v. Strong*, Judge Charles E. Clark, a learned commentator in the field, said, "But for the fact that no procedural matter seems to remain settled in New York, we might consider that this problem had been settled. . . ." CLARK, CASES ON PLEADING AND PROCEDURE (2d ed. 1940) 531. This pessimistic attitude was vindicated the same year by the court's decision in *Terner v. Glickstein & Terner, Inc.*, 283 N. Y. 299, 28 N. E. (2d) 846 (1940), which reaffirmed the "fundamental" nature of the distinction. See SHIENTAG, MOULDERS OF LEGAL THOUGHT (1943) 149.

facts, and not the demand for judgment, determine the remedy.⁵ Even in New York⁶ it is generally recognized that the complainant's demand for judgment is not part of his cause of action, and ought not to limit the award of remedies.⁷ To reinforce this principle Section 111 of the New York Civil Practice Act provides for amendment of the pleadings to conform to the proof at any stage of the proceedings, including appeal, "so that relief may be finally granted which is appropriate to the facts."⁸

Nevertheless residuary resistance to the unification of law and equity, expressing itself through the "theory of the pleadings" rule, which purports to require that every complaint be brought on a definite theory, and that on this theory complainant must try his case,⁹ frequently achieves a contrary result. In misapplication the rule often reintroduces the old forms of action and negates the principle that the demand for judgment should not limit the remedy.

The confusion thus caused becomes apparent through study of a sampling of two groups of decisions handed down since 1921. In both groups, complaints were brought "in equity" when they should have been brought "at law." There being no grounds for equitable relief, courts were faced with a choice: could the court grant legal relief; should the case be transferred to the trial calendar for jury trial; or must the plaintiff bring an entirely new action "at law?"

From the standpoint of speedy and effective administration of justice, the

5. See N. Y. CIVIL PRACTICE ACT, § 479; FED. RULES CIV. PROC. § 54 (c). See also CLARK, *op. cit. supra* note 2, at 184. For a contrary view see McCaskill, *Actions and Causes of Action* (1925) 34 YALE L. J. 614.

6. New York judges are notoriously hostile to the spirit of the code. See McArthur v. Moffet, 143 Wis. 564, 567, 128 N. W. 445, 446 (1910) for the much quoted paragraph in which Chief Justice Winslow characterizes the treatment afforded the "infant Code" as "cold, not to say inhuman."

7. For an exception to the rule, designed to protect defendants in default cases, who may have failed to appear in reliance upon the complaint's demand for judgment, see N. Y. CIVIL PRACTICE ACT § 479. Compare FED. RULES CIV. PROC. § 54 (c). See CLARK, *op. cit. supra* note 2, at 179-86, for a discussion of an illogical extension of the exception in New York, occasioned by unfortunate wording of the New York statute.

8. "That section, new in 1921, has made it the duty of any court at any time in this State to disregard a mistaken prayer for relief and all formal defects in a pleading before or after judgment, and to administer the proper relief if it has jurisdiction on any statement of facts properly pleaded and proved." *Small v. Kronstat*, 175 Misc. 626, 629, 24 N. Y. S. (2d) 535, 538 (Sup. Ct. 1940). See Rothschild, *From Law and Equity to—What?* (1927) 4 N. Y. U. L. REV. 114, 116; Alden, *The New Civil Practice Act and Rules* (1922) 4 BULL. ASSOC. BAR N. Y. 34-5.

9. *Barnes v. Quigley*, 59 N. Y. 265 (1874); *Jackson v. Strong*, *supra* note 3; and cases cited in notes 12 and 15 *infra*. Compare Albertsworth, *The Theory of the Pleadings in Code States* (1921) 10 CALIF. L. REV. 202, 224: "The courts following such a doctrine are still dominated by what Mr. Justice Holmes has so aptly termed 'The inability of the 17th century common law to understand or accept a pleading that did not exclude every misinterpretation capable of occurring to an intelligence fired with a desire to pervert.'" See James, *supra* note 2, at 1029.

most desirable result would seem to be a final judgment by the court in which the action was brought, although if there were issues of fact which could go to a jury, and no waiver of jury trial, the case should be transferred to the trial calendar.¹⁰ Dismissal of the complaint, besides occasioning delay, might seriously harm plaintiff's cause in cases where an attachment had been levied, or the applicable statute of limitations had run out after the original complaint. And even where the complaint is dismissed with leave to amend, delay inevitably results.¹¹

Where the court was faced with this choice before trial, on defendant's motion to dismiss for failure to state a cause of action in equity, four complaints were dismissed,¹² four were dismissed with leave to amend,¹³ and in six cases the motion was denied, and the cases proceeded to final judgment by the court, or, where a jury issue was presented, were transferred to the trial calendar.¹⁴

In the second group of decisions, it was brought out during trial that there were no grounds for the equitable relief sought. Five courts, adhering to the "theory of the pleadings" doctrine, dismissed the complaint.¹⁵ Of the nine

10. The New York Constitution, Art. 1, § 2, provides that the right of trial by jury "in all cases in which it has been heretofore used shall remain inviolate forever" unless waived. See *Smith v. Western Pac. Ry.*, 203 N. Y. 499, 96 N. E. 1106 (1911). Sections 425 and 426 of the Civil Practice Act enumerate the actions in which a jury trial must be had, and the methods of waiver, respectively. For a full treatment of the right to jury trial under the codes, see CLARK, *op. cit. supra* note 2, at 52-71.

11. In addition to the time required for preparing and filing an amended complaint, delays would probably be incurred on the jury calendar not normally encountered on the non-jury calendar. See JUDICIAL COUNCIL OF N. Y., 11TH ANNUAL REPORT (1945) pp. 26-31.

12. *Terner v. Glickstein & Terner, Inc.*, 283 N. Y. 299, 28 N. E. (2d) 846 (1940); *Standard Film Service Co. v. Alexander Film Corp.*, 214 App. Div. 701, 209 N. Y. Supp. 924 (1st Dep't 1925); *Page v. St. Lawrence Condensed Milk Corp.*, 213 App. Div. 336, 210 N. Y. Supp. 261 (3d Dep't 1925); *Chadbourn v. Ritz Carleton Restaurant & Hotel Co.*, 207 App. Div. 754, 202 N. Y. Supp. 805 (1st Dep't 1924).

13. *Moen v. Thompson*, N. Y. L. J., April 2, 1946, p. 1287 (N. Y. Sup. Ct.); *Vernon v. Kelton*, 48 N. Y. S. (2d) 659 (Sup. Ct. 1943); *Brown v. Werblin*, 138 Misc. 29, 244 N. Y. Supp. 209 (Sup. Ct. 1930); *Fidelity Trust Co. v. International Ry.*, 118 Misc. 227, 193 N. Y. Supp. 726 (Sup. Ct. 1922); *accord*, *Peck v. Philipson*, 265 App. Div. 110, 37 N. Y. S. (2d) 788 (1st Dep't 1942).

14. *Boissevain v. Boissevain*, 252 N. Y. 178, 169 N. E. 130 (1929); *Foley v. Realty Associates, Inc.*, 245 App. Div. 725, 280 N. Y. Supp. 73 (2nd Dep't 1935); *Bloom v. Gelb.*, 227 App. Div. 619, 235 N. Y. Supp. 730 (2nd Dep't 1929); *Westergren v. Everett*, 218 App. Div. 172, 218 N. Y. S. Supp. 68 (1st Dep't 1926); *Superior Brassiere Co. v. Zimetbaum*, 214 App. Div. 525, 212 N. Y. Supp. 473 (1st Dep't 1925); *Port v. Holzinger*, 212 App. Div. 124, 208 N. Y. Supp. 287 (2d Dep't 1925); *accord*, *Sasanow v. Williamsburg Sav. Bank*, 256 App. Div. 928, 9 N. Y. S. (2d) 782 (2d Dep't 1939).

15. *Dickinson v. Springer*, 246 N. Y. 203, 158 N. E. 74 (1927); *D'Aversa v. Guido*, 213 App. Div. 355, 210 N. Y. Supp. 621 (2d Dep't 1925), *aff'd per curiam* 244 N. Y. 590, 155 N. E. 909 (1927); *International Photo Recording Machines, Inc., v. Microstat Corp.* 269 App. Div. 485, 56 N. Y. S. (2d) 277 (1st Dep't 1945); *Poth v. Washington Sq. M. E. Church*, 207 App. Div. 219, 201 N. Y. Supp. 776 (1st Dep't 1923); *Stumpf v. Wells*, 197 N. Y. Supp. 389 (Sup. Ct. 1922).

courts which did not follow this rule, three awarded money damages,¹⁶ four transferred the action to the trial calendar for jury trial,¹⁷ and two, having considered whether there might be grounds for legal relief, dismissed for failure to establish an action either "at law" or "in equity."¹⁸

This bewildering diversity of result may be further illustrated by an examination of two recent decisions which reach diametrically opposite results on very similar facts; *International Photo Recording Machines v. Microstat Corporation*¹⁹ and *Atlantic Metal Products v. Minskoff*.²⁰ Both actions were brought to reform a contract, and for a money judgment on the contract as reformed.

Litigation in the *International* case opened in New York City Court, where plaintiff sued to recover unpaid installments on the contract. Defendant alleged a loophole in the contract as written, whereupon plaintiff discontinued his suit, and brought this action for reformation in Supreme Court. The court found that there was no loophole, and thus no grounds for reformation. Having determined that the contract on its face meant what plaintiff claimed it should mean, the court awarded him a money judgment.²¹ On appeal, the First Department of the Appellate Division reversed and dismissed the complaint, basing its decision on the strict "theory of the pleadings" rule and citing *Jackson v. Strong*.

In the *Atlantic* case, the trial court reformed the contract and awarded a money judgment. The Second Department, in a memorandum decision, held that there were no grounds for reformation, but affirmed the money judgment for breach of the contract as originally written, citing Section 111 of the Civil Practice Act.²² Defendant, in his brief before the Court of Appeals, relied heavily upon the decision in the *International* case, which had been handed down while his appeal was pending. Plaintiff, while attempting to distinguish the cases, based his argument on the fact that Section 111 had not been brought to the First Department's attention in the *International* case.²³ The Court of Appeals, *per curiam*, unanimously affirmed the judgment for plaintiff as modified by the Second Department.

16. *Atlantic Metal Products v. Minskoff*, 267 App. Div. 1002, 48 N. Y. S. (2d) 436 (2d Dep't 1944); *aff'd per curiam*, 295 N. Y. 566, 64 N. E. (2d) 277 (1945); *Dobschiner v. Levy*, 179 Misc. 416, 39 N. Y. S. (2d) 277 (Sup. Ct. 1942); *Small v. Kronstat*, 175 Misc. 626, 24 N. Y. S. (2d) 535 (Sup. Ct. 1940).

17. *Syracuse v. Hogan*, 234 N. Y. 457, 138 N. E. 406 (1923); *Hermes v. Compton*, 260 App. Div. 507, 23 N. Y. S. (2d) 126 (2d Dep't 1940); *Casey v. Nye Odorless Incinerator Corp.*, 238 App. Div. 242, 264 N. Y. Supp. 207 (1st Dep't 1933); *Fuegle v. Parlway Farm Stables*, N. Y. L. J., Oct. 14, 1941, p. 1034 (N. Y. Sup. Ct.).

18. *Claris v. Richards*, 260 N. Y. 419, 183 N. E. 904 (1933); *Ehrlich v. Jaek Mills, Inc.*, 215 App. Div. 116, 213 N. Y. Supp. 395 (1st Dep't 1926), *aff'd mem.*, 248 N. Y. 598, 162 N. E. 539 (1928); *accord*, *Saperstein v. Mechanics & Farmers Sav. Bank*, 228 N. Y. 257, 126 N. E. 708 (1920).

19. 269 App. Div. 485, 56 N. Y. S. (2d) 277 (1st Dep't 1945).

20. 295 N. Y. 566, 64 N. E. (2d) 277 (1945).

21. 183 Misc. 394, 48 N. Y. S. (2d) 196 (Sup. Ct. 1944).

22. 267 App. Div. 1002, 48 N. Y. S. (2d) 436 (2d Dep't 1944).

23. Reply Briefs for Appellant and Respondent, *Atlantic Metal Products, Inc., v. Minskoff*, 295 N. Y. 566, 64 N. E. (2d) 277 (1945).

Since the lower court opinion in the *Atlantic* case was not reported, the Second Department opinion was a one-page memorandum, and the Court of Appeals affirmed without opinion,²⁴ the significance of the *Atlantic* case may not be readily apparent to courts faced with a similar problem. It is important, therefore, to note that the decision further discredits the "theory of the pleadings" rule, and emphasizes the utility of Section 111 as a speedy and economical means of granting the relief appropriate to the facts stated in a complaint. However the precedential effect of a *per curiam* decision may be very insubstantial in a jurisdiction where lengthy opinions have not proved binding.

It has been suggested that further legislation, looking toward the establishment of "one means for commencement of an action, pleading, and docketing,"²⁵ might help to obviate the confusion which still exists in New York as to the blending of law and equity sought by the Commissioners in 1848.²⁶ However, failure of bench and bar alike to make more effective use of reinforcing provisions like Section 111,—only four of the twenty-eight decisions tabulated *supra* make reference to the section²⁷—indicates that the whole answer to the problem is not additional legislation.

A better understanding of the purposes which the framers of the code sought to effectuate, and a clearer working knowledge of the tools provided in the present Civil Practice Act for the accomplishment of those purposes, should hasten the demise of the "inherent" distinctions which, while decreasing in importance in other states²⁸ and in the federal courts,²⁹ continue to plague litigants in the birth state of the code.

24. It seems unfortunate that the court did not see fit to write a full opinion. The clash between the "theory of the pleadings" rule and Section 111 was brought out clearly in the briefs, Respondent's brief suggesting that Section 111 was inserted specifically to avoid a repetition of the results reached in *Jackson v. Strong*.

25. Comment (1942) 27 IOWA L. REV. 451, 463. For suggested reforms in Illinois, see Fisher, *Wedding Law and Equity* (1946) 40 ILL. L. REV. 326, 342.

26. FIRST REPORT OF COMMISSIONERS ON PRACTICE AND PLEADING (N. Y. 1848) 67-87, 137-47.

27. *Atlantic Metal Products, Inc., v. Minskoff*; *Boissevain v. Boissevain*, 252 N. Y. 178, 169 N. E. 130 (1929); *Moen v. Thompson*, N. Y. L. J., April 2, 1946, p. 1287 (N. Y. Sup. Ct.); *Small v. Kronstat*, 175 Misc. 626, 24 N. Y. S. (2d) 535 (Sup. Ct. 1940). For the use of Section 111 to avoid duplication of action in the converse situation, where a complaint was brought "at law" which should have been brought "in equity," see *Bruff v. Rochester Trust & Save Deposit Box Co.*, 118 Misc. 394, 193 N. Y. Supp. 321 (Sup. Ct. 1922).

28. "These decisions (referring to *Jackson v. Strong* and *Maguire v. Tyler*, 47 Mo. 115 [1870]) are not followed in the majority of code states or in England. Clearly, then, they are not necessary consequences of a united procedure." James, *supra* note 2, at 1029. See Walsh, *op. cit. supra* note 2, at 110; Clark, *supra* note 3, at 9.

29. "The distinction between law and equity has no procedural significance whatever except where the right to a jury trial has been affirmatively denied, after a timely demand, in an action which historically would be considered as arising at 'law.'" *Groome v. Steward*, 142 F. (2d) 756 (App. D. C. 1944).

DUE PROCESS REQUIREMENTS OF A STATE CLASS ACTION*

BOTH the true class suit and the spurious class suit¹ were developed by courts of equity because of the rigor of rules as to joinder of parties. Where joinder of all parties was required by substantive law and numbers alone made such a suit impractical, equity in the true class action permitted representation of all interested parties by a few and entered a decree binding on members of the group not personally served.² Equity also allowed joinder to avoid a multiplicity of action when there was an issue common to any group of litigants;³ but the judgment in this, the spurious suit, was not conclusive upon persons not served.⁴

With the advent of state code procedure these two actions were brought together in the same rule although they retained their separate definitions.⁵ This verbal distinction was removed by subsequent judicial interpretation and the true and spurious class actions became one⁶ in both state and federal practice.⁷ However, since the scope of judgment in the two actions differed, their judicial consolidation caused confusion in considering pleas of *res judicata*.⁸ Therefore, an attempt was made to distinguish linguistically between the two actions by requiring a "common or general interest" among the members in a true class suit, and a "common question of law or fact" in the spurious action.⁹ But this distinction proved too fugitive to be satisfactory.¹⁰

The Federal Rules partially¹¹ clarified the use of the class suit in federal

* Richardson v. Kelly, 15 Tex. Sup. Ct. Rep. 118 (1945).

1. The use of the words "true" and "spurious" in this context is not in their correct historical sequence. Street first used these words to denote two types of class actions; the true class suit he considered to be concerned with a fund or property and the spurious with personal liability. 1 STREET, FEDERAL EQUITY PRACTICE (1909) 342-5.

2. Smith v. Swormstedt, 16 How. 288 (U. S. 1853); 2 MOORE, FEDERAL PRACTICE (1938) 2235 (hereinafter cited as MOORE); CLARK, HANDBOOK OF THE LAW OF CODE PLEADING (1928) 277-82; Lesar, *Class Suits and the Federal Rules* (1937) 22 MICH. L. REV. 34.

3. 2 MOORE at 2241-5; Lesar, *supra* note 2, at 35.

4. Ayer v. Kemper, 48 F. (2d) 11 (C. C. A. 2d, 1931).

5. The typical code provision states, "Where the question is one of a common or general interest of many persons or where the persons who might be made parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all." Note (1934) 19 CORN. L. Q. 614, 615-6 (italics supplied).

6. This occurred when the disjunctive, italicized in note 5 *supra*, was changed to the conjunctive. 2 MOORE at 2227; Note (1942) 30 CALIF. L. REV. 350.

7. "When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole." For a summary of federal experience, see Lesar, *supra* note 2, at 34-7.

8. McLaughlin, *The Mystery of the Representative Suit* (1938) 26 GEO. L. J. 878, 903.

9. Skinner v. Mitchell, 108 Kan. 861, 866, 197 Pac. 569, 571 (1921).

10. 2 MOORE at 2230; Lesar, *supra* note 2, at 35; Wheaton, *Representative Suits Involving Numerous Litigants* (1934) 19 CORN. L. Q. 399, 407.

11. Gavit, *The New Federal Rules and State Procedure* (1939) 25 A. B. A. J. 367, 374. But see Sunderland, *The New Federal Rules* (1938) 45 W. VA. L. Q. 5, 16.

procedure and, by example, offered a solution for state practice. Although the original draft of Rule 23(a)¹² attempted a more precise identification of the scope of the judgment in each action, two sources of confusion were retained in the Rule as finally adopted:¹³ (1) the requirement of a "common question of law or fact" in the spurious suit which suggested the syntax of the "common or general interest" doctrine, and (2) the requirement of representation in the spurious action where it should have been immaterial. But the federal courts, adhering to the underlying theory of the Rule as expressed in the original draft, have limited the true class suit to actions where, traditionally, all parties had to be joined.¹⁴ And the spurious action has been employed merely as a jurisdictional device to allow members of the spurious class to intervene in a diversity suit, although complete diversity would not have existed had they been original parties.¹⁵

Injustice may result from the effect accorded class suit judgments in those states which have copied Rule 23(a) in its entirety, unless the interpretation of the federal courts (that joinder be required) is adopted in true class suits and the inapplicability of spurious suits to state practice is recognized. This is illustrated by *Richardson v. Kelly*¹⁶ wherein the Supreme

12. The original draft in subparagraph (b) described the "Effect of Judgment" in each type of class action, and in subparagraph (c) detailed the "Requisites of Jurisdiction." See Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft* (1937) 25 GEO. L. J. 551, 571.

13. "Rule 23. Class Actions.

(a) REPRESENTATION. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought." These three categories of class actions have been named true, hybrid and spurious respectively. 2 MOORE at 2230. It should be noted that Street's definition, set forth in note 1 *supra*, of the true suit is essentially that of the hybrid suit in this Rule, since the property test was considered to be too narrow for the true class action. Lesar, *supra* note 2, at 45. The hybrid suit as contained in subparagraph (2) will not be considered in the present discussion since it is not pertinent thereto.

14. *Pentland v. Dravo Corp.*, 152 F. (2d) 851 (C. C. A. 3d, 1945); *Oppenheimer v. F. J. Young Co.*, 144 F. (2d) 387 (C. C. A. 2d, 1944); *York v. Guaranty Trust Co. of N. Y.*, 143 F. (2d) 503 (C. C. A. 2d, 1944) *rev'd on other grounds*, 326 U. S. 99 (1945); *Farmers Co-op. v. Socony-Vacuum Oil Co.*, 133 F. (2d) 101 (C. C. A. 8th, 1942); *Boesenberg v. Chicago Title & Trust Co.*, 128 F. (2d) 245 (C. C. A. 7th, 1942).

15. See 2 MOORE at 2241-5; *Sperry Products, Inc. v. Ass'n of American Railroads*, 132 F. (2d) 408 (C. C. A. 2d, 1942); *Hunter v. Southern Indemnity Underwriters, Inc.*, 47 F. Supp. 242 (E. D. Ky. 1942).

16. 15 Tex. Sup. Ct. Rep. 118 (1945). Texas Rule 42 is identical with Federal Rule 23(a) with the single exception—probably not intended since it introduces an ambiguity—that the Texas Rules have omitted the comma after the word "common" as it appears in subparagraph (1) of the Federal Rules.

Court of Texas sustained a plea of *res judicata* based upon a prior class judgment and thereby deprived many defendants of their rights seemingly without their day in court.

Pursuant to a Texas statute,¹⁷ 3200 subscribers to National Indemnity Underwriters, an inter-insurance exchange, had executed powers of attorney to an agent authorizing him to exchange indemnity contracts and to act for them in all matters related to the business. Although not required by statute, these powers of attorney provided that the participants were to be bound severally, not jointly, and limited the liability of each to one additional yearly premium on any policy carried by him.¹⁸

In 1937 National was adjudged insolvent and a state receiver was appointed to liquidate the business. Subsequently, the receiver instituted a suit¹⁹ against 190 subscribers, seemingly to recover additional premiums and obtained a dismissal without prejudice when the defendants prepared to contest the action. A year later, pursuant to a court order in the receivership action, the receiver commenced a plenary action against 28 named defendants "and all other subscribers and policyholders" to assess each of the 3200 members one annual premium. The receiver chose as defendants subscribers with a small premium liability and avoided any policyholders who had been made parties to the first action.²⁰ Of the 28 named defendants the receiver dismissed as to two, six defaulted and seventeen settled before judgment.²¹ Judgment was obtained against the remaining three binding all subscribers as "a class whose rights . . . are fairly and truly represented herein by the named defendants appearing and answering." No appeal was taken since the receiver settled with two of the three defendants contesting the action and the liability of the third was too small to justify the expense of an appeal.

17. A statute permitting individuals, partnerships and corporations designated as subscribers, to exchange reciprocal or inter-insurance contracts with each other. *TEX. REV. CIV. STAT. ANN.* (Vernon, 1945) arts. 5024-33.

18. The Texas Court of Civil Appeals concerned itself largely with the problem of whether this liability was contained in all the powers of attorney and decided that it was. *Richardson v. Kelly*, 179 S. W. (2d) 991, 997 (Tex. Civ. App. 1944). The dissent in the Texas Supreme Court also accepted this interpretation. 15 Tex. Sup. Ct. Rep. 118, 126.

19. There is some doubt concerning the form of that action. The majority opinion referred to it as one against partners, 15 Tex. Sup. Ct. Rep. 118, 119 (1945), while the dissent stated that the receiver "had named 190 of the subscribers as representative of the class." 15 Tex. Sup. Ct. Rep. 118, 127 (1945).

20. The receiver, however, contended that 25 of the 28 defendants had been included in the original suit against 190 subscribers. See Respondents' Argument In Support Of His Motion For Rehearing, pp. 100-1. This disputed point and others of a similar nature can be resolved by a reference to the opinions. The majority tacitly admitted their existence when they disposed of the allegations "as to the manner in which the receiver selected defendants and proceeded with the litigation" by stating that the trial judge must have weighed them and that he still gave judgment against the class. 15 Tex. Sup. Ct. Rep. 118, 125 (1945).

21. Three other subscribers intervened in the suit but, in return for the receivers' agreement not to issue execution against them, they did not resist the action. One of the original 28 also settled in this manner. 15 Tex. Sup. Ct. Rep. 118, 128 (1945).

A month after judgment became final, the present suit was instituted by other subscribers in the nature of a bill of review to set aside the previous judgment alleging that lack of notice of the prior proceedings and inadequate representation therein constituted a denial of due process of law. But the lower court held that the prior judgment was *res judicata* and gave judgment for the receiver in a cross-action for an assessment from the petitioning subscribers. The Supreme Court of Texas affirmed²² the decision of the lower court, holding that the prior action was a true class suit²³ and that the common rights and interest of the class had been adequately represented. Two judges dissented, stating that either the prior litigation was a spurious class suit since the rights were not "joint" or "common" or, if it was a true class suit, the representation was inadequate.

The conclusion that the prior action was a true class suit might better have been reached by emphasizing "the substantive necessity of joining all parties defendant rather than by resort to the "common or general interest" theory.²⁴ Thus, in establishing the liability of the entire class, the receiver had two alternatives: the impractical one of joining all 3200 policyholders;²⁵ or the more feasible one of suing a representative number of the subscribers. Had the court adopted this approach, it would have been unnecessary to consider the stipulations in the powers of attorney providing for several liability and their bearing upon the question of a "common interest".²⁶

22. The court decided the case on a rehearing and withdrew the opinion handed down after the original hearing. Chief Justice Alexander wrote the withdrawn opinion in which he contended that the prior action was not a true class suit—in fact not even a spurious suit. 14 Tex. Sup. Ct. Rep. 383 (1945). In the intervening period the number of justices had been increased and the Chief Justice then wrote the dissent.

23. Whereas the first opinion was reasoned on an interpretation of Texas Rule 42 and Federal Rule 23(a), on rehearing neither opinion made a direct reference to these rules. This is probably the result of the receiver's contention that judgment in the class suit here involved was entered on March 8, 1941 while Rule 42 did not become effective until Sept. 1, 1941, thus making the Rule inapplicable. See Respondent's Argument In Support of His Motion for Rehearing, pp. 2-3. But that the court applied Rule 42 is evident in the use by both opinions of terminology found in that Rule. Perhaps, reference to the Rule was avoided in order to obviate any discussion as to its applicability.

24. This was originally the Pomeroy test. POMEROY, *CODE REMEDIES* (4th ed. 1904) 392. It is the test that has been applied under Rule 23(a). 2 MOORE at 2235; see also cases cited note 14 *supra*. The common or general interest test is not without support based mainly on the contention that the joinder rule is too narrow a test and that the courts should be given more discretion. Wheaton, *Representative Suits Involving Numerous Litigants* (1934) 19 CORN. L. Q. 399, 410, 435; Blume, *The "Common Questions" Principle in the Code Provision for Representative Suits* (1932) 30 MICH. L. REV. 878, 903; Note (1922) 36 HARV. L. REV. 89, 93. The difficulty with this approach is that it tends to "overlook factors, such as that various defenses (estoppel, set-off, contributory negligence, etc.) may exist against some complaints and not against others, which indicate that parties whose rights are separable should not be concluded from asserting those rights by a judgment rendered in an action to which they were not parties." Lesar, *supra* note 2, at 50.

25. TEXAS RULES CIV. PROC. (1941) Rule 39(a): "Except as otherwise provided in these rules, persons having a joint interest shall be made parties and be joined as plaintiffs or defendants."

26. A class may conceivably have rights that are several as well as joint, but the true

However, since Texas had adopted the language of Rule 23(a) in toto, the court felt it necessary to distinguish a spurious action from the case at bar. But the court ignored the fact that in the federal courts the spurious suit has become a mere procedural device, wholly inapplicable to state practice.²⁷ As a result, the requirement of a common question of law or fact in the spurious action inferentially forced the use of the common or general interest theory in identifying the true class suit.²⁸

Thus, in considering the identification of the type of class action as the primary issue in the case, the court slighted the question of whether the character of representation satisfied the requirements of due process.²⁹ The representation seems inadequate both in quantity and quality. Although quantitatively the original group of 28 defendants fairly represented the class,³⁰ that number degenerated to a doubtful one before the judgment

class suit litigates only those which are joint. *Supreme Tribe of Ben-Hur v. Cauble* 255 U. S. 356 (1921). Personal defenses of each subscriber will be litigated in individual actions instituted by the receiver to collect the assessments. Essentially, the cross-action by the receiver to collect the assessment in the present case constituted such a suit. The fact that only joint issues were litigated in the class action and that personal defenses still exist was recognized in the majority opinion: "Since the class suit was valid and since the *only defenses* pleaded by petitioners, as cross defendants, were their several attacks on its validity, it only remained for the receiver, in order to recover on his cross action against petitioner, to show that they were subscribers during the involvency period and the amount of the annual premiums paid by them during that period." 15 Tex. Sup. Ct. Rep. 118, 125 (1945) (*Italics supplied*).

27. See note 15 *supra*. And, although some states have used the spurious suit as a permissive joinder device, it is unnecessary in states, like Texas, with liberal joinder rules. See Lesar, *supra* note 2, at 50. Texas Rule 40 is identical with Federal Rule 20 and allows joinder of parties "if any question of law or fact common to all of them will arise in the action."

28. And the real nature of both actions was clouded by the provision for representation in the spurious suit, although judgment in such a proceeding binds only those made parties defendant. The requirement of representation in the spurious suit is equally superfluous in federal practice. "As the suit comes within Rule 23(a)(3), so that a judgment will not be res judicata as to noteholders who do not intervene, there is no necessity for a searching inquiry concerning the adequacy of her representation of others in the class." *York v. Guaranty Trust Co. of N. Y.*, 143 F. (2d) 503, 528 n. 52 (C. C. A. 2d, 1944), *rev'd on other grounds*, 326 U. S. 99 (1945).

29. The majority placed its main emphasis on *Southern Ornamental Iron Works v. Morrow*, 101 S. W. (2d) 336 (Tex. Civ. App. 1937), wherein the Court of Civil Appeals overruled an objection to the adequacy of the representation of a class, and as in the instant case no appeal was taken. The majority also gave considerable weight to an *amicus curiae* brief submitted by the Texas Attorney General to the effect that the *Morrow* case should not be overruled because other receiverships of reciprocal insurance associations were collecting assessments on the basis of that decision. 15 Tex. Sup. Ct. Rep. 118, 121 (1945). See *Amicus Curiae Brief and Argument On Behalf of the State of Texas*, pp. 11-2. In view of the reliance on the *Morrow* case it is important to note that in the court's opinion in that case "neither the Texas cases nor the ones cited from other jurisdictions seem to have considered the question whether such class judgments are violative of the notice and jurisdiction requirements of due process of law." Note (1937) 16 TEXAS L. REV. 113, 114.

30. The actual number of representatives has always been treated with liberality since mere numbers is not the criterion. 2 MOORE at 2234.

became final. Some of the named defendants had interests adverse to the class,³¹ and all had small liabilities that may well have influenced the spirit of the defense and the ease of settlement. Since the underlying premise of a true class action is that the parties actually joined will fairly represent the interests of the class, judicial approval of so limited a sampling as that in the *Richardson* case seems unfair and suggests the need for stricter standards of representation.³²

RUSSELL P. DUNCAN†

JUDICIAL REVIEW OF ALIEN PROPERTY CONTROL*

UPON the 1917 Trading with the Enemy Act¹ a broad system of foreign property control was built by amendment² during World War II. Two principal tools were employed, "freezing"³ and "vesting."⁴ The latter is the transfer of title and possession of property in the United States of desig-

31. Apparently, some of the named defendants in the class suit had insurance claims against the receiver, thereby benefiting from the receiver's successful prosecution of the suit. 15 Tex. Sup. Ct. Rep. 118, 132 (1945).

32. Petitioner-subscribers are seeking a writ of certiorari from the Supreme Court of the United States. That Court has said that "Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires." *Hansberry v. Lee*, 311 U. S. 32, 45 (1940), (1941) 39 MICH. L. REV. 829, 89 U. OF PA. L. REV. 525. Although under the doctrine of the *Hansberry* case it might be expected that the Supreme Court will grant certiorari, it may be suggested that the writ will be denied since *Richardson v. Kelly* was heard at length on the merits in the lower court and certainly with adequate representation.

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*Josephberg v. Markham, Alien Property Custodian, 152 F. (2d) 644 (C. C. A. 2d, 1945).

1. 40 STAT. 411 (1917), 50 U. S. C. (App.) §§ 1-31 (1940), 55 STAT. 839, 50 U. S. C. (App.) § 5 (Supp. I, 1941), cited hereafter by section number only.

2. In 1933 Section 5(b) was amended to strengthen the President's foreign exchange controls. 48 STAT. 1 (1933), 12 U. S. C. § 95(a) (1940). In 1940 Section 5(b) was amended to confirm the authority of the first presidential freezing orders, which had been based on the section as amended in 1933. 54 STAT. 179, 50 U. S. C. (App.) § 5 (1940); Comment, *Foreign Funds Control Through Presidential Freezing Orders* (1941) 41 COL. L. REV. 1039, 1041. In 1941 the vesting power was added. See note 4 *infra*.

3. Inaugurated April 10, 1940, when Germany overran Denmark and Norway. EXEC. ORDER 8389, 3 CFR, CUM. SUPP. (1943) 645. Successive German conquests were met with extensions of the controls culminating on June 14, 1941, with their application to virtually all of Europe. EXEC. ORDER 8785, 3 CFR, CUM. SUPP. (1943) 948. See ADMINISTRATION OF THE WARTIME FINANCIAL AND PROPERTY CONTROLS OF THE UNITED STATES GOVERNMENT (U. S. Treasury Department 1942); Littauer, *The Unfreezing of Foreign Funds* (1945) 45 COL. L. REV. 132; Reeves, *The Control of Foreign Funds by the United States Treasury* (1945) 11 LAW & CONTEMP. PROB. 17.

4. The vesting power was written into § 5(b) by Title III of the First War Powers

nated foreign and enemy countries and their nationals⁵ to the Alien Property Custodian⁶ to be ". . . held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States. . . ." ⁷ Passed under the pressure of the need for executive action to wage economic warfare, the amendment containing the vesting authority restricted it only to ". . . any property or interest of any foreign country or national thereof . . ." ⁸ Leaving the definitions and details to be filled in by executive orders and administrative rulings⁹ has made the vesting power a controversial issue.

Act, 1941. 55 STAT. 839, 50 U. S. C. (App.) § 616 (Supp. I 1941). The Office of Alien Property Custodian was established and the vesting power delegated by EXEC. ORDER 9095, 3 CFR, CUM. SUPP. (1943), 1121, March 11, 1942, as amended by EXEC. ORDER 9193, 3 CFR, CUM. SUPP. (1943) 1174, July 6, 1942. The latter order allocated the foreign property controls between the Secretary of the Treasury and the Alien Property Custodian. See *Hearings before Subcommittee No. 1 of the Committee on the Judiciary on H. R. 4840*, 78th Cong., 2d Sess. (1944) 71-74; Lourie, *The Trading with the Enemy Act (1943)* 42 MICH. L. REV. 205; Comment, *The Powers and Duties of the Alien Property Custodian (1943)* 11 GEO. WASH. L. REV. 357.

5. For the definition of "national" see note 9 *infra*. The Custodian is empowered to vest six categories of property, three of which involve foreign countries and their nationals, three of which involve enemy countries and their nationals. EXEC. ORDER 9193, 3 CFR, CUM. SUPP. (1943), 1174, July 6, 1942; ANNUAL REPORT OFFICE OF ALIEN PROPERTY CUSTODIAN (1944) 3.

6. Property valued at about \$8,500,000,000 was subjected to foreign property control during the war. *Hearings before Subcommittee No. 1 of the Committee on the Judiciary on H. R. 4840*, 78th Cong., 2d Sess. (1944) 105. About \$200,000,000 of this was vested. ANNUAL REPORT OFFICE OF ALIEN PROPERTY CUSTODIAN (1944) 16.

7. Section 5(b). "It is the intention of the Custodian to reduce to cash as large a proportion as possible of the property vested in him." ANNUAL REPORT OFFICE OF ALIEN PROPERTY CUSTODIAN (1944) 19.

8. Section 5(b). A survey of the Congressional debates reveals little conception of the true scope and meaning of the measure being passed. Frequent references were made to the applicability of the vesting power to the property of "aliens" and "enemies" only, despite the fact that the authority being granted clearly extended to the property of citizens and non-enemies in some cases. See 87 CONG. REC. 9838, 9856, 9859, 9865 (1941). The impression seems to have been that the purpose of the addition of the vesting power was to make possible unrestricted use by the United States of property as to which the power of "seizure" already existed. 87 CONG. REC. 9845, 9856, 9865 (1941).

9. The term "national" was first used in EXEC. ORDER 8389, 3 CFR, CUM. SUPP. (1943) 645, April 10, 1940. The definition includes "Any person who has been domiciled in, or a subject, citizen or resident of a foreign country at any time on or since the effective date of this Order, . . . (iii) Any person to the extent that such person is, or has been, since such effective date, acting or purporting to act directly or indirectly for the benefit or on behalf of any national of such foreign country, and (iv) Any other person who there is a reasonable cause to believe is a 'national' as herein defined." EXEC. ORDER 8389, *supra*, as amended by EXEC. ORDER 8785, 3 CFR, CUM. SUPP. (1943) 948, 950, June 14, 1941. The term first appeared in the Act in the amendment of § 5(b) by the Joint Resolution of May 7, 1940, 54 STAT. 179, 50 U. S. C. (App.) § 5 (1940). The above definition was adopted for vesting purposes by EXEC. ORDER 9193, 3 CFR, CUM. SUPP. (1943) 1174, 1177, July 6, 1942. Certain additional findings must be made by the Custodian in determining that a person not within a designated enemy country is a national of that country.

In its haste Congress created two major judicial problems in the construction of the statute. First, the incomplete meshing of the new provisions with the old ones, some of which are inapplicable and others doubtfully applicable to World War II,¹⁰ has forced the courts to do the job of the draftsman in interpreting the Act. The courts have undertaken this task to a limited extent. For example, in *Markham v. Cabell*¹¹ the Supreme Court held that Section 9(e), barring debt claims acquired after October 6, 1917, could have no application to a current creditor's suit under Section 9(a).¹² Second, Congress failed to provide specifically for any judicial review of the exercise of the vesting authority¹³ and has failed to remedy this defect despite ample opportunity to do so. To avoid the consequent spectre of unconstitutionality, one district court has remedied the apparent lack of judicial review of vestings by holding¹⁴ that Section 9(a), which authorized a suit to recover property "seized" under Section 7(c) during World War I,¹⁵

10. H. R. REP. No. 1507, 77th Cong., 1st Sess. (1941) 2. A forceful argument has been made that § 5(b), as amended in 1941, was intended to stand alone as an autonomous, unitary system of foreign property control. See Lourie, *supra* note 4 at 218-219; McNulty, *Constitutionality of Alien Property Controls* (1945) 11 LAW & CONTEMP. PROB. 135, 146. But see Dulles, *The Vesting Powers of the Alien Property Custodian* (1943) 28 CORN. L. Q. 245. For a review of the permanent and temporary provisions of the Act see Mr. Justice Burton's concurring opinion in *Markham v. Cabell*, 66 Sup. Ct. 193, 198 (U. S. 1945).

11. 66 Sup. Ct. 193 (U. S. 1945).

12. The inconsistencies of the Act were pointed out by the Custodian when he urged that the suit should be barred because no creditors may recover against frozen property, unless licensed by the Secretary of the Treasury, and because § 9(a) is in terms of creditors of enemies or allied of enemies only, thus barring creditors of foreign nationals; he also pointed out the administrative inconvenience resulting from allowance of such suits. The court's answer was ". . . however meritorious these considerations are, they raise questions of policy for Congress." *Id.* at 196. The court expressly limited its decision to recognition of the right to sue on a debt; the questions of whether the amended § 5(b) nullifies the § 9(a) procedures for satisfaction of a judgment creditor's debt and for suit to reclaim property which has been taken were not decided. *Id.* at 197.

13. The 1941 amendment of § 5(b), adding the vesting power, included no provision for judicial review of vestings. 55 STAT. 839, 50 U. S. C. (App.) §§ 616-618 (Supp. I, 1941). Much controversy over the constitutionality of the vesting authority has focused on the question of judicial review. See DOMKE, *TRADING WITH THE ENEMY IN WORLD WAR II* (1943) c. 17; ANNUAL REPORT OFFICE OF ALIEN PROPERTY CUSTODIAN (1944) 144-7; Carlston, *Foreign Funds Control and the Alien Property Custodian* (1945) 31 CORN. L. Q. 1, 21; Dulles, *supra* note 10 at 255; McNulty, *supra* note 10 at 142; Wechsler, *Constitutionality of Alien Property Controls: A Comment on the Problem of Remedies* (1945) 11 LAW & CONTEMP. PROB. 149.

14. *Draeger Shipping Co. v. Crowley*, 49 F. Supp. 215 (S. D. N. Y. 1943).

15. It was held that the existence of the provision for judicial review of the taking satisfied the constitutional requirements of the due process clause of the Fifth Amendment. *Stoehr v. Wallace*, 255 U. S. 239 (1921); *Central Union Trust Co. of New York v. Garvan*, 254 U. S. 554 (1921). It was also recognized that the seizure conferred the immediate right to possession on the Custodian unfettered by judicial interference but in the subsequent § 9(a) suit for the return of the property the validity of the seizure would be fully tested *de novo*. *Stoehr v. Wallace*, *supra*; *Central Union Trust Co. of New York v. Garvan*, *supra*; *American Exchange National Bank v. Garvan*, 273 F. 43 (C. C. A. 2d, 1921).

applied to Section 5(b) "vestings"¹⁶ despite the verbal incompatibility of the two sections.¹⁷ However, the problem of how much was reviewable in such a suit remained.¹⁸

In the recent case, *Josephberg v. Markham*,¹⁹ the Second Circuit Court of Appeals extended its review beyond the question of whether the property owner was included within the literal terms of the statute and definitive executive orders to reexamine the initial propriety of the vesting action. In 1943 the Alien Property Custodian, "deeming it necessary in the national interest," vested²⁰ the property of Alfred Cerutti, a naturalized United States citizen living in Italy, whom he found to be a "national of a designated enemy country."²¹ Prior to the taking, the property had been in the hands of a committee appointed by the Supreme Court of New York²²

16. Various suggestions have been made for avoiding this result. See Carlston, *supra* note 13 at 21-2 (administrative claims procedure within the Office of Alien Property Custodian sufficient); Dulles, *supra* note 10 at 255 (common law right to bring an *in rem* proceeding in the nature of replevin, to recover property which has wrongfully been taken into the custody of an officer of the United States); McNulty, *supra* note 10 at 142 (allow "alien friends" to sue for compensation under the Tucker Act).

17. Section 9(a) provides for suits by "any person not an enemy or ally of enemy" to recover property which has been ". . . conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him. . . ." This plainly refers to § 7(c) which provides that the property of enemies or allies of enemies ". . . shall be conveyed, transferred, assigned, delivered or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian. . . ." The § 5(b) language is ". . . and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President. . . ." A literal reading and application of § 9(a) would have allowed the recovery of any property vested from foreign nationals not enemies or allies of enemies, thus nullifying much of the vesting program. The courts have, however, read § 9(a) as modified by § 5(b). *Draeger Shipping Co. v. Crowley*, 55 F. Supp. 906 (S. D. N. Y. 1944).

18. Other cases of suits under § 9(a) for the return of vested property have not fully clarified this. In the *Draeger* case the plaintiff had been found by the Custodian to be a national of Germany by reason of acting for the benefit or on behalf of German nationals. Thus the determination of the plaintiff's status required judicial examination of the evidence that he had been so acting, but not of the necessity of the vesting. *Draeger Shipping Co., Inc. v. Crowley*, 55 F. Supp. 906 (S. D. N. Y. 1944). In *Standard Oil Company (New Jersey) v. Markham*, 67 U. S. P. Q. 263 (S. D. N. Y. 1945) the property had been vested as owned by a German corporation and the judicial inquiry was into the true ownership, not the necessity for the vesting.

19. 152 F. (2d) 644 (C. C. A. 2d, 1945).

20. Vesting Order No. 1911, 8 Fed. Reg. 11187, Aug. 3, 1943.

21. "2. The Alien Property Custodian is authorized and empowered to take such action as he deems necessary in the national interest, including, . . . the power to . . . vest . . . (f) any property of any nature whatsoever which is in the process of administration by any person acting under judicial supervision . . . and which is payable or deliverable to, or claimed by, a designated enemy country or national thereof." EXEC. ORDER 9193, 3 CFR, COM. SUPP. (1943) 1174, 1175, July 6, 1942.

22. "The Custodian vests all enemy rights in property which is being administered by persons acting under judicial supervision. . . ." ANNUAL REPORT OFFICE OF ALIEN PROPERTY CUSTODIAN (1944) 10.

which had adjudged Cerutti an incompetent in 1939. After complying with the Custodian's order the committee sued under Section 9(a) to recover the property in the District Court for the Southern District of New York, challenging the finding that Cerutti was a national of Italy. The district court dismissed the complaint,²³ holding that Cerutti had established "actual residence" in Italy in the sense that he intended to reside there temporarily and was therefore an enemy²⁴ and a national²⁵ of Italy. The appellate court reversed,²⁶ rejecting the district court's definition of "residence," and held that because the property was in the hands of a judicially supervised committee and because the type of property (cash and securities) would not lend itself to war production purposes there was no need to hold Cerutti to be a "resident" of Italy. This policy determination was doctrinally supported by saying that Cerutti, due to his mental incapacity, lacked the requisite intent to establish even temporary "residence." Cerutti was thus found to be not subject to vesting control²⁷ and his representatives were allowed to sue and recover the property.²⁸

The facts of the existing judicial supervision of the property and the innocuous character of the property, which refute any finding that it was in danger of falling into enemy hands or that it need be put under government control for war purposes,²⁹ logically are relevant to determining whether the

23. *Josephberg v. Markham, Alien Property Custodian*, U. S. Dist. Co., S. D. N. Y., Civil 31-395, July 18, 1945.

24. "Any individual . . . of any nationality, resident within the territory . . . of any nation with which the United States is at war." § 2(a).

25. See note 9 *supra*.

26. *Josephberg v. Markham*, 152 F. (2d) 644 (C. C. A. 2d, 1945).

27. Because he was not a "resident of" Italy within the meaning of the definition of a "national." See note 9 *supra*. "We are bound to construe the term 'resident' in so far as reasonably possible in a way to avoid . . . raising a serious doubt as to . . . constitutionality. . . . If the term 'resident' is held to include a . . . citizen in the situation of Cerutti . . . the failure to provide any remedy . . . other than what § 9(a) affords would create such a doubt." *Id.* at 649. The court's doubts as to the constitutionality of this vesting arise from its belief that something more than sequestration is involved. *Ibid.* As to whether vesting amounts to confiscation see Carlston, *supra* note 13 at 5; Dulles, *supra* note 10 at 250; Sommerich, *Recent Innovations in Legal and Regulatory Concepts as to the Alien and His Property* (1943) 37 AM. J. INT. L. 58; Turlington, *Vesting Orders under the First War Powers Act* (1942) 36 AM. J. INT. L. 460. The Supreme Court has stated that power exists to confiscate enemy private property. See *Miller v. United States*, 11 Wall. 268, 305 (U. S. 1870); *United States v. Chemical Foundation, Inc.*, 272 U. S. 1, 11 (1926). For the opposition to the exercise of this power see GATHINGS, *INTERNATIONAL LAW AND AMERICAN TREATMENT OF ALIEN ENEMY PROPERTY* (1940); Borchard, *Nationalization of Enemy Patents* (1943) 37 AM. J. INT. L. 92; Sommerich, *A Brief Against Confiscation* (1945) 11 LAW & CONTEMP. PROB. 152.

28. Because Cerutti was not "resident within" Italy within the meaning of the definition of an "enemy." See note 24 *supra*. If Cerutti had been an "enemy," suit under § 9(a) would have been barred. See note 17 *supra*.

29. For the statement of these basic purposes of trading with the enemy legislation see *Miller v. United States*, 11 Wall. 268, 305 (U. S. 1870); *United States v. Chemical Foundation, Inc.*, 272 U. S. 1, 9 (1926). With respect to these purposes an interpretation of the

Custodian's action was "necessary in the national interest." Had Congress clearly established the requirement of a finding that each vesting be "necessary in the national interest"³⁰ and empowered the courts to review that finding, a strained construction of the term "residence" would not have been necessary in this case. But as Congress had not provided a standard, the Second Circuit was compelled to turn the case on "national," the only word of delimitation in the statute, to effectuate a review of the compliance of the Custodian's action with the purposes of alien property control.³¹

Although the courts have remedied some of the defects in the Act by forced interpretation, the judiciary seems unsuited for such a procedure. Continued congressional inattention toward the definition of the relation between the courts and the Custodian can no longer be justified on the ground of war-time emergency. Yet, the most recent amendment of the Act,³² providing for the return of vested property to a limited group of

war powers, U. S. Const. Art. I, § 8, not discussed in the Josephberg case, is important. If the Trading with the Enemy Act is classed as an exercise of the power to ". . . make rules concerning captures on land . . ." no court review of the necessity for such "captures" would be possible. If interpreted as an exercise of the power to ". . . make all laws which shall be necessary and proper for carrying into execution . . ." the power ". . . to declare war . . ." an inquiry into necessity becomes possible. See Littauer, *Confiscation of the Property of Technical Enemies* (1943) 52 YALE L. J. 739. In *Stoehr v. Wallace* the court classed "seizures" under § 7(c) as "captures on land." 255 U. S. 239, 242 (1940). But see Littauer, *supra*, at 754 (Trading with the Enemy Act construed as an exercise of the general war powers, not the power to regulate captures).

30. Section 5(b) contains no requirement that the vesting be "necessary in the national interest." It is in the delegation of authority by the President to the Custodian that the phrase appears. See note 21 *supra*.

31. In view of the origin of the definition of the term "national" in the initial freezing orders when Germany was overrunning Europe there seems little doubt that the word "resident" in the definition was intended to mean mere physical presence in a designated country. This was necessary to forestall Axis control of property by control of the person of the owner. See Lourie, "Enemy" under the Trading with the Enemy Act and Some Problems of International Law (1943) 42 MICH. L. REV. 383, 89. With respect to freezing the court in the instant case recognizes this by stating that the property of Cerutti was subject to freezing control. *Josephberg v. Markham*, 152 F. (2d) 644, 648 (C. C. A. 2d, 1945). The result is a definition of "national" in the field of freezing controls inconsistent with its definition in the field of vesting. The court relied on three World War I precedents in determining that mere physical presence is not equivalent to residence for purposes of the definitions of "national" and "enemy." *Id.* at 649. Of these, *Miller v. Sinjen*, 289 Fed. 388 (C. C. A. 8th, 1923), was a suit for the return of property the seizure of which was admittedly valid. The issue was the plaintiff's citizenship, not his residence. In *Vowinkel v. First Federal Trust Co.*, 10 F. (2d) 19 (C. C. A. 9th, 1926), the court interpreted "residence" as equivalent to domicile "for trade or otherwise." *Stadtmuller v. Miller*, 11 F. (2d) 732 (C. C. A. 2d, 1926), the leading case, did hold that mere physical presence within is not equivalent to "residence within." But in each of these cases control of the property involved was open to Germany through control of the person of the owner—the exact situation the new concept of "foreign national" was designed to meet.

32. Pub. L. No. 322, 79th Cong., 2d Sess. (March 8, 1946); C. C. H. War Law Service ¶6232 (1946).

"non-hostiles,"³³ while clarifying some difficulties, still fails to deal with the problem of judicial review.³⁴ Earlier drafts of the legislation included a provision granting to claimants the right to sue for the return of vested property, or for compensation,³⁵ but this safeguard was omitted in the final bill, apparently the result of pressure for some immediate returns.³⁶ However, piece-meal amendment does not seem to be optimum in view of the present confusion regarding the statute, and this fact suggests a complete reappraisal of the Act by Congress, an elimination of obsolete sections, and an integration of the remainder, with the insertion of necessary provisions to effectuate adequate judicial supervision of such broad administrative powers of private property control.

THE DOCTRINE OF ESTOPPEL IN PATENT LITIGATION*

ALTHOUGH restricted in theory to original contributions to science and the useful arts,¹ patents have, in practice, often been granted by an under-

33. Persons to whom the return of property is planned include ". . . friendly citizens of the various countries that were overrun by the enemy, friendly neutrals, American citizens who were caught, by the outbreak of war, behind enemy lines . . . citizens of enemy nations who left their countries prior to 1941 and who, it is now clear, are and have been loyal to the United States." SEN. REP. No. 920, 79th Cong., 2d Sess. (1946) 1-2.

34. The new legislation makes returns discretionary with the president or his designated agent except for specified categories of claimants to whom no returns may be made. These barred groups include: enemy governments; corporations organized under the laws of enemy nations; individuals voluntarily resident at any time since December 7, 1941, in enemy territory, other than United States citizens and diplomatic and consular officers of non-enemy nations; citizens and subjects of enemy nations present in enemy or enemy-occupied territory or engaged in business in such territory at any time since December 7, 1941; certain foreign corporations or associations. In addition, property which was held under a "cloaking" arrangement when vested is not to be returned, and a positive finding must be made that the return is "in the interest of the United States." Pub. L. No. 322, 79th Cong., 2d Sess. (March 8, 1946); C. C. H. War Law Service 6232 (1946). See SEN. REP. No. 920, 79th Cong. 2d Sess. (1946) 1-2.

35. H. R. 4840 and H. R. 5031, 78th Cong., 2d Sess. (1944). Persons who were not "foreign nationals" were to be allowed to sue for the return of their property, or the proceeds if the property had been liquidated; "foreign nationals" were to be allowed to sue for compensation in the court of claims under 24 STAT. 505 (1887), as amended, 28 U. S. C. §§ 41(20) and 250 (1940). *Hearings before Subcommittee No. 1 of the Committee on the Judiciary on H. R. 4870*, 78th Cong., 2d Sess. (1944) 19, 22.

36. H. R. 4571, 79th Cong., 1st Sess. (1945), the bill which finally passed, was the result of strong pressure from the governments of the liberated countries of Europe for the release of the property of their nationals. See SEN. REP. No. 920, 79th Cong., 2d Sess. (1946) 2; H. R. REP. No. 1269, 79th Cong., 1st Sess. (1945) 8 (joint letter from the acting Secretary of State, the Attorney General, and the Alien Property Custodian).

* *Scott Paper Co. v. Marcalus Mfg. Co.*, 66 Sup. Ct. 101 (U. S. 1945).

1. U. S. CONST. Art. I, § 8; 16 STAT. 201 (1870), as amended, 35 U. S. C. § 31 (1940); 1 WALKER, PATENTS (Deller's ed. 1937) §§ 8, 9.

staffed and inefficient Patent Office for devices lacking in novelty.² And these oversights have frequently been perpetuated by courts in patent litigation by adherence to the principle of estoppel.³ Under this concept, the assignor of a patent when sued by his assignee for infringement is estopped to deny the novelty or validity of the patent in issue.⁴ The theory was fashioned in the lower federal courts⁵ and received the qualified approval of the Supreme Court in *Westinghouse Electric and Manufacturing Company v. Formica Insulation Company*.⁶ There, the assignor of a patent, in a suit for infringement by his assignee, was permitted to introduce evidence of the prior art to narrow the scope of the patent, while conceding its validity.⁷ But, by way of dictum, the Court warned that such evidence was inadmissible to destroy the patent because of the doctrine of estoppel.⁸

Under this rule, however, it was difficult to identify the point at which "narrowing" of scope shaded into invalidation of the patent itself.⁹ And in cases of complete anticipation of the assigned patent, lower federal courts reached conflicting results as to whether the assignor was trying to limit¹⁰ or destroy¹¹ the patent.

2. For a discussion of the "confusion which exists as to the very definition of invention" and the resultant issuance of invalid patents, see Posnack, *Invention, The Law and Society* (1945) 27 J. PAT. OFF. SOC. 361, 369-75.

3. See Note (1943) 11 GEO. WASH. L. REV. 521, 529.

4. 2 WALKER, *op. cit. supra* note 1, at § 349.

5. *Babcock v. Clarkson*, 63 Fed. 607 (C. C. A. 1st, 1894); *Woodward v. Boston Lasting Mach. Co.*, 60 Fed. 283, 284 (C. C. A. 1st, 1894) and cases cited therein; *Faults v. Kamp*, 3 Fed. 898 (C. C. S. D. N. Y. 1880); *Curran v. Burdsall*, 20 Fed. 835 (N. D. Ill. 1883).

6. 266 U. S. 342 (1924), (1925) 38 HARV. L. REV. 692, 13 CALIF. L. REV. 504.

7. 266 U. S. 342, 350 (1924). This had been the view of the lower federal courts with the exception of the Seventh Circuit. See *Martin & Hill Cash-Carrier Co. v. Martin*, 67 Fed. 786, 787 (C. C. A. 1st, 1895); *Standard Plunger Elevator Co. v. Stokes*, 212 Fed. 941, 943 (C. C. A. 2d, 1914); *Piano Motors Corp. v. Motor Player Corp.*, 282 Fed. 435, 437 (C. C. A. 3rd, 1922); *Leader Plow Co. v. Bridgewater Plow Co.*, 237 Fed. 376, 377 (C. C. A. 4th, 1916); *Schiebel Toy & Novelty Co. v. Clark*, 217 Fed. 760, 763 (C. C. A. 6th, 1914); *Moon-Hopkins Billing Mach. Co. v. Dalton Adding Mach. Co.*, 236 Fed. 936, 937 (C. C. A. 8th, 1916); *Leather Grille & Drapery Co. v. Christopherson*, 182 Fed. 817 (C. C. A. 9th, 1910). *Contra*: *Foltz Smokeless Furnace Co. v. Eureka Smokeless Furnace Co.*, 256 Fed. 847 (C. C. A. 7th, 1919); *Siemens-Halske Electric Co. v. Duncan Electric Mfg. Co.*, 142 Fed. 157 (C. C. A. 7th, 1905).

8. "The distinction may be a nice one but seems to be workable." 266 U. S. 342, 351 (1924).

9. "If no limitation at all, by reference to the specification, be imposed upon this claim we reach the point where the distinction which the Court spoke of in the *Formica* case—that is, using the prior art to construe and narrow a claim without letting it affect its validity—remains nice but becomes unworkable. The situation is that of a claim, completely anticipated by the prior art." *Timken-Detroit Axle Co. v. Alma Motor Co.*, 47 F. Supp. 582, 588 (D. Del. 1942).

10. Some courts held that the assignor could show complete anticipation although this narrowed the claims to nought. *Casco Products Corp. v. Sinko Tool & Mfg. Co.*, 116 F. (2d) 119 (C. C. A. 7th, 1940); *Timken-Detroit Axle Co. v. Alma Motor Co.*, 47 F. Supp. 582 (D. Del. 1942).

11. Some cases held that the assignor could not evade the doctrine by this indirect

In the recent case of *Scott Paper Company v. Marcalus Manufacturing Company*,¹² the Supreme Court rejected the estoppel principle as a bar to a defense of anticipation by an expired patent but without a complete repudiation of the use of the doctrine. In 1932 the Automatic Paper Company, Scott's assignor, purchased from Marcalus, one of their employees, his patent application for a "method and machine for mounting a cutting strip of hard non-metallic substance on the edge of a box blank." Later, Marcalus left Automatic and organized his own company using what the plaintiffs claimed was the same device. In the ensuing suit for infringement, Marcalus offered to prove that his machine was a copy of one patented in 1912 and, hence, was part of the prior art. But the District Court excluded the evidence and entered judgment for Automatic on the theory that Marcalus could limit the scope of the patent but could not challenge its validity.¹³ The Third Circuit Court of Appeals reversed, holding that infringement was impossible since there had been a complete anticipation of the patent.¹⁴

This decision was affirmed by the Supreme Court.¹⁵ A majority of the Court held that, since all expired patents reverted to the public domain,¹⁶ the assignor as a member of the public was free to use the device;¹⁷ and that the estoppel principle of the *Formica* decision was not controlling.¹⁸

This decision of the majority, with its emphasis upon the public interest,¹⁹ is in harmony with two recent decisions limiting estoppel in other situations. In *Sola Electric Company v. Jefferson Electric Company*,²⁰ the Supreme Court

method. *Buckingham Products Co. v. McAleer Mfg. Co.*, 108 F. (2d) 192 (C. C. A. 6th, 1939); *West v. Premier Register Table Co.*, 27 F. (2d) 653 (C. C. A. 1st, 1928); *Frank Associates, Inc. v. Columbia Narrow Fabric Co.*, 33 F. Supp. 279 (S. D. N. Y. 1940).

12. 66 Sup. Ct. 101 (U. S. 1945), *rehearing denied* 66 Sup. Ct. 263 (U. S. 1945), 59 HARV. L. REV. 299, 27 J. PAT. OFF. SOC. 860.

13. *Automatic Paper Mach. Co. v. Marcalus Mfg. Co.*, 54 F. Supp. 105 (D. N. J. 1944). For similar holdings see cases cited note 10 *supra*, and *Libbey Glass Mfg. Co. v. Albert Pick Co.*, 63 F. (2d) 469 (C. C. A. 7th, 1933); *Swan Carburetor Co. v. General Motors Corp.*, 42 F. (2d) 452 (N. D. Ohio 1927), *aff'd* 44 F. (2d) 24 (C. C. A. 6th, 1930); *Cross Paper Feeder Co. v. United Printing Mach. Co.*, 220 Fed. 313 (D. Mass. 1915), *modified*, 227 Fed. 600 (C. C. A. 1st, 1915); *Automatic Switch Co. v. Monitor Mfg. Co.*, 180 Fed. 983 (C. C. D. Md. 1910); *Hurwood Mfg. Co. v. Wood*, 138 Fed. 835 (C. C. D. Conn. 1905); *Alvin Mfg. Co. v. Scharling*, 100 Fed. 87 (C. C. D. N. J. 1900).

14. *Automatic Paper Mach. Co. v. Marcalus Mfg. Co.*, 147 F. (2d) 608 (C. C. A. 3rd, 1945). For similar decisions, see cases cited note 11 *supra*, and *Dixie-Vortex Co. v. Paper Container Mfg. Co.*, 130 F. (2d) 569 (C. C. A. 7th, 1942).

15. 66 Sup. Ct. 101 (U. S. 1945).

16. The grant of a patent to the inventor is conditional on its dedication to the public at its expiration. *Motion Picture Co. v. Universal Film Co.*, 243 U. S. 502, 510-1 (1917).

17. See *Special Equip. Co. v. Coe, Comm'r of Patents*, 324 U. S. 370, 378 (1945).

18. "To whatever extent that doctrine may be deemed to have survived the *Formica* decision or to be restricted by it . . ." 66 Sup. Ct. 101, 103 (U. S. 1945).

19. For illustrations of the impact of public interest upon estoppel principles, see *Chesapeake & Ohio Ry. v. Martin*, 283 U. S. 209, 220-2 (1931); *Pittsburgh, C. C. & St. L. Ry. v. Fink*, 250 U. S. 577, 582-3 (1919).

20. 317 U. S. 173 (1942), (1943) 56 HARV. L. REV. 814.

denied that the doctrine of estoppel prevented a licensee under a patent from attacking its validity when the license contained a price fixing covenant violative of the spirit of antitrust legislation, and permitted the licensee to demonstrate the invalidity of the patent.²¹ And in *Nachman Spring-Filled Corporation v. Kay Manufacturing Company*,²² the Second Circuit Court of Appeals, with an equal emphasis on the public interest,²³ permitted the defendant in an infringement suit to attack the novelty of a competitor's patent although he had expressly contracted not to do so.²⁴ Thus, the trend of decisions indicates that the doctrine of estoppel is being whittled away by a process of exceptions rather than by direct renunciation.

The assumption of the dissenters in the *Scott Paper* case²⁵ that the theory of estoppel has validity in the patent field seems doctrinally unwarranted. The doctrine rests upon an analogy to property law, wherein estoppel is invoked to prevent denial of his implied warranty as to title by the grantor of land.²⁶ But in patent cases the analogy has been expanded to prevent a denial of title and a denial of the validity of the patent as well.²⁷ Moreover, the property theory was developed in cases concerning private ownership of land, and was inapplicable when the property in question was part of the public domain. For example, if an individual grants to another land which subsequently is proven to be government property the doctrine of estoppel would not bar evidence of public ownership introduced by the grantor in a suit to quiet title.²⁸ Similarly, the assignor of an expired patent should not

21. See *U. S. v. Univis Lens Co.*, 316 U. S. 241, 250 (1942); *U. S. v. Masonite Corp.*, 316 U. S. 265, 275-7 (1942).

22. 139 F. (2d) 781 (C. C. A. 2d, 1943), (1944) 43 MICH. L. REV. 225.

23. This policy of concern for public interest has been axiomatic in recent Supreme Court decisions. See *Kellogg Co. v. National Biscuit Co.*, 305 U. S. 111, 117-20 (1933); *Norman v. Baltimore & O. R. R.*, 294 U. S. 240, 304-5, 309-10 (1935). For discussions of the trend towards restricting patent monopolies because of the public interest see *Poenack, loc. cit. supra* note 2; *Feuer, Patent Abuse Versus National Interest* (1942) 2 LAWYERS GUILD REV. 1; *Notes* (1938) 26 GEO. L. J. 1049, 36 MICH. L. REV. 1214.

24. Although the defendant did not argue below that the patent was invalid, the Circuit Court of Appeals considered the question because of the public policy underlying the patent laws and the Sherman Act. See further *American Cutting Alloys, Inc. v. General Elect. Co.*, 135 F. (2d) 502 (C. C. A. 2d, 1943).

25. Mr. Justice Reed dissented on the ground that the District Court was correct in its application of the *Formica* rule. Mr. Justice Frankfurter also dissented, asserting that the public interest was unaffected, and that estoppel and the correlative principle of "fair dealing," forbade Marcalus' unjust enrichment at the expense of Automatic. 66 Sup. Ct. 101, 105-8 (U. S. 1945).

26. See TIFFANY, REAL PROPERTY (1940) § 768; *Note* (1908) 22 HARV. L. REV. 136.

27. "The rule . . . is that an assignor of a patent right is estopped to attack the utility, novelty or validity of a patented invention which he has assigned . . ." *Westinghouse Elect. Co. v. Formica Insulation Co.*, 266 U. S. 342, 349 (1924). The principle is said to cover validity, although there is no warranty of validity implied in any assignment of a patent right according to established patent law. See 2 WALKER, *op. cit. supra* note 1 at § 348 and cases therein cited.

28. See *Automatic Paper Mach. Co. v. Marcalus Mfg. Co.*, 147 F. (2d) 603, 613 (C. C. A. 3rd, 1945).

be estopped from proving this fact since such a patent belongs to the public as a part of the prior art.

Functionally, the doctrine of estoppel as delimited by the *Formica* decision creates an anomaly in infringement suits. If the patent is only partially anticipated, the infringing assignor may introduce evidence of prior art to limit the claims of the patent;²⁹ but, if the patent is completely worthless, the assignor is forbidden to produce any such evidence.³⁰ Furthermore, under the *Formica* rule the assignee's claims can be so limited as to leave him with a mere technical right to a patent with little or no financial value. Thus, only if the pre-*Formica* rule of absolute estoppel were recreated would the assignee's monetary investment actually be protected.³¹

The fact that the estoppel doctrine only enters litigation involving wholly or partially invalid patents or expired patents suggests the inadequacy of our present system of patent administration. Judicially, patent dead-wood may be eliminated by urging the federal courts to raise the issue of validity on their own motions,³² by permitting the Patent Commissioner to intervene in patent suits at his discretion,³³ and by statutorily authorizing the Commissioner to institute declaratory actions to test patents of doubtful validity.³⁴

Yet such recommendations do not strike at the source of the trouble. A searching revision of the entire patent system is needed: including such

29. *Westinghouse Elect. Co. v. Formica Insulation Co.*, 266 U. S. 342 (1924). See 2 WALKER, *op. cit. supra* note 1 at § 349.

30. See *Frank Associates, Inc. v. Columbia Narrow Fabric Co.*, 33 F. Supp. 279, 282-3 (S. D. N. Y. 1940).

31. Even then such a rule prevailed only in the Seventh Circuit Court of Appeals. See note 7 *supra*.

32. See Jessup, *The Court as Guardian of the Public Interest in Patent Cases* (1943) 11 GEO. WASH. L. REV. 521, 529-30. Two federal courts in 1922 took judicial notice of the prior art and invalidated patents when the defendants were estopped to attack their validity. *Standard Water Systems Co. v. Griscom-Russell Co.*, 278 Fed. 703 (C. C. A. 3rd, 1922) and *National Cash Register Co. v. Remington Arms Co.*, 283 Fed. 196 (D. Del. 1922). In the *Standard Water* case, the court said: "This question, [of estoppel] however, seems to be immaterial in this case. The public is interested in every adjudication with respect to the validity of a patent, and it is the duty of courts having jurisdiction of patent causes to have regard, at all times, of the rights of the public, so that such rights may be rather enlarged than diminished by judicial determination As before said, regardless of the principle that an assignee of a patent cannot deny invention, it is the duty of the court to determine lack of invention, where apparent, in order that the public interests may be guarded." 278 Fed. at 705, 707.

33. See Posnack, *supra* note 2, at 373.

34. "At the present time it is entirely possible for a patent which is intrinsically invalid to be used by its owner as a threat to throttle competition. . . . And there is nothing the government can do about it. . . . While the courts are asserting, more emphatically than ever, that the public has a vital interest in patent grants, the government as the public's agent is powerless to protect this interest against intrinsically invalid patents." *Id.* at 372-3. For a discussion of a bill proposed by Thurman Arnold to allow the Attorney-General to intervene in infringement suits and to institute suits for the cancellation of patents used in unreasonable restraint of interstate commerce, see Feuer, *supra* note 23, at 10-1.

measures as the enlargement of the Patent Office staff; the securing of larger appropriations; the selection and employment of more investigators with better technical training; the establishment of a more efficient recordation system for patents;³⁵ and, finally, the creation of a national patent laboratory where in so far as feasible all claims can be analyzed, tested, and compared.

35. Although such exhaustive searches may entail more expense, is it not "worthwhile to spend more in order to assure the issuance of valid patents upon which industry could rely, than to spend less and risk the continued issuance of patents destined to be rendered worthless to the discredit of the entire patent system." Posnack, *supra* note 2, at 374.