Notes

The Adkins Case Reconsidered[1]

In 1918 Congress enacted a minimum wage law for women and minors for the District of Columbia,[2] requiring the payment of wages, to be established by a board after due investigation, at levels adequate "to supply them [women and minors in any occupation] with the necessary cost of living . . . to maintain them in good health and to protect their morals."[3] In 1923 a majority of five justices of the Supreme Court declared the law unconstitutional under the due process clause of the Fifth Amendment.[4] Although Mr. Justice Sutherland, for the Court, "conceded" that every worker has an "ethical right . . . to a living wage," he found as one vital objection to the law that it ignored "the moral requirement implicit in every contract of employment, viz, that the amount to be paid and the service to be rendered shall bear to each other some relation of just equivalence."[5] Mr. Justice Sutherland suggested that "a statute requiring an employer . . . to pay the value of the service rendered . . . would be understandable,"[6] apparently conceding the possibility that the mechanism of a freely competitive labor market might not require an employer to pay a fair wage; for he would hardly have suggested such an alternative had he considered it merely declaratory of labor conditions in the absence of statute.[7]

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1. Morehead v. Tipaldo, 56 Sup. Ct. 918 (June 1, 1936) (Opinion by Butler, J.; Hughes, C. J., and Brandeis, Stone, and Cardozo, JJ., dissenting) (A laundry operator, imprisoned for violating the minimum wage established under the New York Statute, sought a writ of habeas corpus on the ground that the Statute was unconstitutional; the laundry operator is Tipaldo, his jailer, Morehead).

New York State has filed a petition for rehearing; a ruling is not expected before next fall. N. Y. Times, June 24, 1936, at 1, col. 2.

2. 40 Stat. 960 (1918).

3. Section 9.

4. Adkins v. Children's Hospital, Adkins v. Lyons, 261 U. S. 525 (1923). The court did not pass upon the constitutionality of the provisions of the Statute which applied to minors [id. at 554], but the Board ceased to function immediately following the decision. Report of the Commissioners of the District of Columbia (1923) 40.

5. Id. at 558.

6. Id. at 559.

7. See Powell, *The Judiciality of Minimum-Wage Legislation* (1924) 37 Harv. L. Rev. 545, 561. Even Adam Smith, who was opposed to state interference with the wage contract, thought that it was "but equity . . . that they who feed, clothe, and lodge the whole body of the people, should have such a share of the produce of their own labour as to be themselves tolerably well fed, clothed, and lodged." Smith, The Wealth of Nations (Everyman's Ed. 1910) 128-130, 70. See Ricardo, The Principles of Political Economy & Taxation (2d ed. 1819) at 103: "Like all other contracts, wages should be left to the fair and free competition of the market, and should never be controlled by the interference of the legislature." And, more vigorously, Gordon, J., in Godcharles v. Wigeman, 113 Pa. 431, at 437 (1886): "The Act is . . . an insulting attempt to put the laborer under a legislative tutelage, which is not only degrading to his manhood, but subversive of his rights as a citizen of the United States. He may sell his labor for what he thinks best. . . . and any and every law that proposes to prevent him from so doing is an infringement of his constitutional privileges, and consequently vicious and void." See also Comment (1923) 11

Ten years later the New York Legislature adopted Mr. Justice Sutherland's suggestion by enacting a minimum wage law which provided that if, after investigation, it was found that "any substantial number of women or minors in any occupation . . . are receiving . . . a wage which is both less than the fair and reasonable value of the services rendered and less than sufficient to meet the minimum cost of living necessary for health," a wage board shall be appointed to report upon the establishment of a wage rate "fairly and reasonably commensurate with the value of the service . . . rendered."[8] The New York Court of Appeals held the Act unconstitutional under the *Adkins* case.[9] Mr. Justice Butler for the Supreme Court, four justices dissenting, affirmed the decision of the New York Court of Appeals, and then went further to declare that the *Adkins* decision "and the reasoning upon which it rests clearly show that the State is without power by any form of legislation to prohibit, change or nullify contracts between employers and adult women workers as to amount of the wage to be paid."[10]

Before arriving at that conclusion, sufficient in itself to invalidate all minimum wage legislation for women, Mr. Justice Butler entered into a discussion of standards of wage fixing. The New York Court of Appeals [three judges dissenting] had held, said Mr. Justice Butler, that the minimum wage under its Statute must be based both upon the "fair and reasonable value" of services and upon "living wage" elements.[11] Mr. Justice Butler held that the Supreme Court was bound by that interpretation of the New York Statute and that the *Adkins* decision, holding a statutory wage based upon cost of living "clearly the product of a naked, arbitrary exercise of power,"[12] was therefore applicable. As a matter of fact, it is impossible to discover precisely what the New York Court of Appeals said the New York Statute meant, for Mr. Chief Justice Hughes, dissenting on the ground that the *Adkins* case was distinguishable, was able to quote a statement from the opinion in the lower court, immediately following that quoted by Mr. Justice Butler, to the effect that the statute forces the "payment of wages at a reasonable value."[13] If this be the interpretation intended by the New York Court to be placed upon the Statute, then clearly, said the Chief Justice, the majority's interpretation of the State Court's construction of the Statute is incorrect. Mr. Justice Stone, in a separate dissenting opinion, in which Justices Brandeis and Cardozo concurred, said that "while I agree with all that the Chief Justice has said, I would not make the difference between the present statute and that involved in the *Adkins* case the sole basis of decision."[14]

CALIF. L. REV. 353, 357; BURNS, WAGES AND THE STATE (1926) 8-24; INTERNATIONAL LABOUR CONFERENCE, MINIMUM WAGE-FIXING MACHINERY (1927) 11-15; RYAN, A LIVING WAGE (1906); SEN. REP. No. 486, 65th Cong., 2d Sess. (1918) (Report on S. 4548).

8. N. Y. LABOR LAW, §§ 550, 551, 554 (1933); see Comment (1933) 42 YALE L. J. 1250.

9. Tipaldo v. Morehead, 270 N. Y. 233, 200 N. E. 799 (1936), reversing 156 Misc. 522, 282 N. Y. Supp. 576 (Sup. Ct. 1935).

10. 56 Sup. Ct. 918, at 923 (1936).

11. Id. at 922, quoting Crane, C. J. in the N. Y. Court of Appeals, 270 N. Y. 233, 238, 200 N. E. 799, 800-801 (1936). A careful reading of the Statute, however, indicates clearly that any minimum wage to be established must be based solely upon the fair value of the service rendered. The cost of living element is merely one of the criteria for determining whether the Board has jurisdiction to act. Lehman, J. dissenting in the N. Y. Court of Appeals, points out this correct interpretation of the Statute. See also Hale, *Minimum Wages and the Constitution* (1936) 36 COL. L. REV. 629, Comment (1933) 42 YALE L. J. 1250.

12. 261 U. S. 525, 559 (1923).

13. 56 Sup. Ct. 918, at 928 (1936), again quoting Crane, C. J., 270 N. Y. 233, 238, 200 N. E. 799, 801 (1936).

14. 56 Sup. Ct. 918 at 932 (1936).

"No one has yet attempted to say," he declared, "upon what basis of history, principles of government, law, or logic," it is possible to reconcile the conflicting cases which are supposed to mark the constitutional limits of a State's power to regulate industry; and in any event, he argued, the *Nebbia* case has overruled the *Adkins* case and should control the decision here. He remarked further that a decision which found arbitrary a type of statute which at one time or another had been adopted by Congress and the legislative bodies of 17 States and 21 foreign countries, including Great Britain and its four commonwealths, could be based only upon "personal economic predilections" of the court's majority.[15]

Despite the legalistic debate among the judges as to the standard actually adopted by the New York legislature, there appear to be no significant economic differences between the two statutes, as they were administered, which might justify the conclusion that one was more constitutional than the other, even though they contained different verbal standards. The paramount fact to be considered in examining the administrative process of fixing a minimum wage based on the "living wage" standard of the District of Columbia statute is that there is no recognized statistical method for determining either the specific items entering into a cost of living budget, or the relative weight to be given to such items.[16] Although the prices of food, clothing, and shelter can be determined with accuracy at any particular time, the quantitative and qualititative incorporation of such items into a cost of living index is a process of approximation based on opinion.[17] Furthermore, disagreement arose over the claims of employees that a proper living wage should include at least a small amount for savings, amusements, vacations, and other items not immediately necessary for healthful existence.[18] It should be noted as a matter of administrative technique that employer and employee alike submitted exaggerated budgets in order to secure greater bargaining power at the conferences.[19] Nor was there any assurance when the Board fixed a living wage, that it would order that wage enforced as a minimum,[20] either because the Board feared that too precipitous an attempt at change would render the wages unenforceable,[21] or because the wages as ordered represented what the average or perhaps the better employers were paying or were willing to pay if their wage-cutting competitors were compelled to do likewise.[22] At all events,

15. Id. at 933.

16. See THE DEVELOPMENT OF MINIMUM-WAGE LAWS IN THE UNITED STATES, 1912-1927 (1928), BULLETIN OF THE WOMEN'S BUREAU OF THE U. S. DEPT. OF LABOR, No. 61, at 75; BURNS, op. cit. *supra* note 7, at 277-280, 299-363.

17. See SECOND ANNUAL REPORT OF THE MINIMUM WAGE BOARD, DISTRICT OF COLUMBIA (1919) 15.

18. See id. at 18; THE DEVELOPMENT OF MINIMUM WAGE LAWS, op. cit. *supra* note 16, at 128-129.

19. CLARK, MINIMUM-WAGE LAWS OF THE UNITED STATES CONSTRUCTION AND OPERATION (1921), BULLETIN OF U. S. BUREAU OF LABOR STATISTICS, No. 285, at 95, 99. Thus, for example, the original estimates in the laundry industry made in 1920 were $12.04 for the employers, and $19.88 for the workers, per week. See THIRD ANNUAL REPORT OF THE MINIMUM WAGE BOARD, DISTRICT OF COLUMBIA (1920).

20. Only 50% of the wage rates imposed were the rates found to be minimum living wages. See THE DEVELOPMENT OF MINIMUM-WAGE LAWS IN THE UNITED STATES, op. cit. *supra* note 16, at 156.

21. Id. at 143.

22. The Merchants' and Manufacturers' Association of the Dictrict of Columbia supported the Minimum Wage Law while it was under consideration in the Senate. See REPORT ON S. 4548, SEN. REP. No. 486, 65th Cong., 2d Sess. (1918). In New York the Interborough Coat & Apron Supply Association and Towel & Napkin Launderers Association strongly fa-

the wage rates finally established in the District of Columbia rarely, if ever, represented a scientific determination of the amount adequate to supply the worker "with the necessary cost of living," but rather resulted from a compromise based upon an apparently irreconcilable clash between the interests of employer and employee.[23]

Although nominally different in principle from the District of Columbia "living wage," the New York "fair wage" for the laundry industry[24] was fixed after an identical administrative process, as a compromise between a wage rate which the Board vaguely thought to be ideal or ethically fair and one which a majority of the employers could pay.[25] The Board early in its work determined that the amount necessary for a proper living wage[11] exceeded the minimum paid even by the "fairer" employers.[26] Consequently, it agreed that in fixing the minimum fair wage any rates based upon such a living wage would represent a greater increase in labor costs than the industry could support and would thus render such a wage unenforceable.[27] Therefore it directed its attention to the "going" wage and to the wages being paid by the "better" employers in the industry.[28] Nevertheless, the Board conceded that the rates as fixed "are less than the general movement for wage increases might encourage one to anticipate."[29]

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vored the New York Law. See their Brief, amicus curiae, Tipaldo v. Morehead, 270 N. Y. 233, 200 N. E. 799 (1936).

Minimum wage legislation aids in eliminating what is said to be unfair competition between employers by wage cutting.

23. See SECOND ANNUAL REPORT OF THE MINIMUM WAGE BOARD, DISTRICT OF COLUMBIA (1919) 18. It should be understood that the wage rates established for the different industries and occupations varied. Thus the minimum wage for printing and publishing concerns was $15.50, for hotels and restaurants, $16.50, for mercantile concerns, $16.50, and for laundries, $15.00. See DEVELOPMENT OF MINIMUM WAGE LAWS, op. cit. *supra* note 16, at 134-136.

24. The directory order for the laundry industry went into effect on Oct. 2, 1933, becoming mandatory on Aug. 6, 1934. Pursuant to discretionary authority granted the wage board in § 555.5 of the Law [*supra* note 8] a different rate was set for the New York City area than for the rest of the State, $12.40 per week being the rate for the former, while $11 per week was the figure established for the remainder of the State. Rates for hotels and restaurants were recommended on Dec. 6, 1935, the rates varying by locality. See PIDGEON, SUMMARY OF STATE HOUR LAWS FOR WOMEN AND MINIMUM-WAGE RATES, BULLETIN OF THE WOMEN'S BUREAU, U. S. DEPT. OF LABOR, No. 137 (1936) 16-17, 34-35.

25. Statutory authorization for this method of fixing the wage rates may, perhaps, be found in § 551.8 of the New York Statute [*supra* note 8] which provides: "In establishing a minimum fair wage . . . the wage board . . . (1) may take into account all relevant circumstances affecting the value of the service . . . , and (2) may be guided by like considerations as would guide a court in a suit for the reasonable value of services rendered where services are rendered at the request of an employer without contract as to the amount to be paid, and (3) may consider the wages paid in the state for work of like or comparable character by employers who voluntarily maintain minimum fair wage standards." Obviously, however, all three of these considerations are but slightly less vague than the term, "fair wage", itself.

26. See Factual Brief for Respondent, Tipaldo v. Morehead, 270 N. Y. 233, 200 N. E. 799 (1933) 71, 37-41.

27. Id. at 72.

28. Communication from Frieda S. Miller, N. Y. State Dept. of Labor, to the YALE LAW JOURNAL, April 27, 1936.

29. REPORT OF THE LAUNDRY MINIMUM WAGE BOARD TO THE INDUSTRIAL COMMISSIONER of NEW YORK STATE (mimeographed) (1933). Nevertheless, there was a distinct increase in

It may be, however, despite the Court's declaration in the *Tipaldo* case, that the State completely lacks power to regulate the wages of adult women workers, that the States may undertake to regulate the wages of all workers. For Mr. Justice Butler said that prescribing "minimum wages for women alone would unreasonably restrain them in competition with men and tend arbitrarily to deprive them of employment," because "men in need of work are as likely as women to accept the low wages offered by unscrupulous employers,"[30] a statement in direct conflict with the petitioner's factual brief, which the Chief Justice in dissent thought the Court "must assume" to be accurate.[31] Mr. Justice Butler's remark may have been meant to imply that a law regulating the wages of both men and women would be constitutional.

Thus the nation's legislatures are given another opportunity to guess at the meaning of the Supreme Court's declarations, while the Court continues to perform its self-imposed duty of dictating to the national Congress and at least seventeen State legislatures its concept of freedom of contract—a concept which Mr. Justice Stone in dissent characterizes as a "grim irony,"[32] based on the legislative opinion of the majority judges.

Application of a Status Concept to Membership Disputes in Labor Unions[1]

When confronted with membership disputes within labor unions,[2] courts have generally discussed trade union membership wholly as a problem in contract.[3]

wages over the low rates obtaining prior to the wage orders both in the District of Columbia and in New York. See Fifth Annual Report of the Minimum Wage Board, District of Columbia (1922) 19; Factual Brief for Respondent, *supra* note 26, at 76.

30. 56 Sup. Ct. 918, at 925 (1936). This line of argument implies that the Statute violates the equal protection clause, although by established constitutional doctrine only a person against whom a statute discriminates may raise such an objection. But see Truax v. Corrigan, 257 U. S. 312 (1921). In holding the Act unreasonable in that it applied only to women, Mr. Justice Butler placed reliance upon the fact that an emergency minimum wage bill applying to both men and women passed simultaneously with the present Statute by the New York Legislature was rejected by the Governor. 56 Sup. Ct. 918, 925 (1936).

31. Id. at 930.

32. Id. at 932.

1. Cameron v. International Alliance, 183 Atl. 157 (N. J. 1936), cert. denied, U. S. L. Week, April 14, 1936, at 781, col. 3.

2. This problem has not appeared in the court room so often as might have been expected because of the obvious practical difficulties involved. First, it is often difficult for unionists to find money for legal fees. Secondly, the constitution of many unions makes the bringing of a law suit against the union a ground for expulsion. Lo Bianco v. Cushing, 115 N. J. Eq. 558, 171 Atl. 778 (1934). Another factor is that union leaders often use intimidation and strong-arm methods to prevent the bringing of suits. Collins v. International Alliance, Local 244, 119 N. J. Eq. 230, 247, 182 Atl. 37, 46 (Ch. 1935). A final factor is the antipathy with which labor views the civil courts because of the abuse of the labor injunction. Frankfurter & Greene, The Labor Injunction (1930), p. 131-132; Comment (1936) 45 Yale L. J. 1248.

3. Although lacking many of the requirements of a formal contract, and although the measure of damages is often tortious and not contractual, courts have generally called the membership arrangements a contract either between the members inter sese or between the members and the group. Lawson v. Hewell, 118 Cal. 613, 50 Pac. 763 (1897); Ryan v. New

Recently, however, a few courts have treated trade union membership as a kind of protected status which may arise although all the formal elements of contract are lacking.[4] The use of this concept makes it unnecessary that the terms of the membership relation be declared by the parties to it, for, when it is once said that membership has arisen, as the product either of an express or of an implied agreement, the consequences of membership are judicially implied from the practices of labor unions, their function in the community, and the relevant rules of law. In the absence of express stipulation, it is difficult to isolate the elements of fact decisive in creating the implication of membership;[5] yet a satisfactory rule would seem to be that a membership status recognized by the courts is created whenever laborers formally attempt to join in "united action for the common welfare."[6] Customarily the creation of membership in labor unions is expressly consensual; and if the contract provides for all the incidents of membership, the court's task is relatively easy.[7] If, on the other hand, the contract provides only for some incidents of the membership relation, the remainder must be implied in fact and in law by the courts.

Where rigid contractual status, with detailed legal implications, is familiarly implied in fact, parties frequently condition and modify by express stipulation the position which would conventionally be theirs; occasionally, however, the courts have disregarded the express agreement, and enforced the conventional status, different from the one bargained for by the parties.[8] Recently a New Jersey court similarly granted to petitioners a more inclusive status of membership in a labor union than had been expressly provided for in a document described by the parties to it as a "contract of membership." Plaintiffs were members of a trade union Junior Department[9] and

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York Central Ry., 267 Mich. 202, 255 N. W. 365 (1934); Harris v. Geier, 112 N. J. Eq. 99, 164 Atl. 50 (Ch. 1932); Krause v. Sanders, 66 Misc. 601, 122 N. Y. Supp. 54 (Sup. Ct. 1910). But see Chafee, *The Internal Affairs of Associations not for Profit* (1930) 43 HARV. L. REV. 993, 1001; Laski, *The Personality of Associations* (1916) 29 HARV. L. REV. 404, 420; Pound, *Equitable Relief against Defamation and Injuries to Personality* (1916) 29 HARV. L. REV. 640, 680.

4. Howard v. Weissmann, 31 F. (2d) 689 (C. C. A. 7th, 1929); Collins v. International Alliance, Local 244, 119 N. J. Eq. 230, 182 Atl. 37 (Ch. 1935); Cameron v. International Alliance, 183 Atl. 157 (N. J. 1936). See Chafee, *The Internal Affairs of Associations not for Profit* (1930) 43 HARV. L. REV. 993, 1007; Comment (1936) 45 YALE L. J. 1248, 1266.

5. Neither mere desire and ability to work at the trade which the union controls [Mayer v. Journeymen Stone-Cutter's Ass'n, 47 N. J. Eq. 519, 20 Atl. 492 (Ch. 1890)], nor four years' service as an apprentice [Muller v. International Union, 140 Atl. 424 (N. J. Sup. Ct. 1928)], nor authorization to work as permit men, [Alterman v. Elliott, N. Y. L. J., July 13, 1933, at 145, col. 5 (Sup. Ct. 1933)] gives rise to membership status.

6. Cameron v. International Alliance, 183 Atl. 157, 163 (N. J. 1936).

7. If any of the incidents of the membership status are in conflict with public policy, they are judicially declared to be void. Spayd v. Ringing Rock Lodge, 270 Pa. 67, 113 Atl. 70 (1921); Walsche v. Sherlock, 110 N. J. Eq. 223, 159 Atl. 661 (Ch. 1932); Gilmore v. Palmer, 109 Misc. 552, 179 N. Y. Supp. 1 (Sup. Ct. 1919); Bricklayers', Plasterers' & Stonemasons' Union v. Bowen, 183 N. Y. Supp. 855 (Sup. Ct. 1920).

8. Cf. Lord v. Goldberg, 81 Cal. 596, 22 Pac. 1126 (1889); Johnston v. Fargo, 184 N. Y. 379, 77 N. E. 388 (1906); Pittsburgh Ry. v. Kinney, 95 Ohio St. 64, 115 N. E. 505 (1916).

9. The creation of the Junior Local was the consequence of a technical accident. When sound films were introduced, motion picture projector staffs were doubled. Fearing that sound films would not be permanent, the union gave the necessary new men employment under permit but did not admit them to the union. Two years later, however, when the

lacked the privilege either to vote, or to meet without seniors being present as officers, or to participate in collective bargaining. Furthermore, as juniors, plaintiffs were subject to severe fee discriminations and forced to yield to seniors priority privileges in procuring employment. Dissatisfied with their limited standing, certain juniors appealed to the courts to have annulled the discriminatory features of the local union's by-laws which had been subscribed to by them as though they formed a contract of membership. The New Jersey Court of Errors and Appeals granted the juniors' request on the ground that the discriminations were an "embezzlement" of fundamental rights and an attempt to monopolize the labor market in violation of public policy.[10] Over the objections of the seniors who contended that, since the "contract of membership" had been declared void, the juniors should revert to the status of permit men which they had held prior to the creation of the Junior Department, the Court of Chancery, upon the filing of the remittitur, declared the juniors to be full members of the Local on a parity with the seniors.[11] On a second appeal the highest New Jersey court affirmed this decree,[1] holding that the juniors acquired in the international organization a membership independent of and unlimited by the unreasonable conditions imposed by the so-called "contract of membership." As an alternative basis of decision the court suggested that even if no rights and privileges were conferred on the juniors save by the "membership contract," yet the condemned provisions were essentially subsidiary and severable so that the contract might be enforced to the extent of its legality, with the result that the juniors acquired full union status.

The central problem in the principal case lies in determining the effect of the written "membership contract" upon the status acquired in the union by the plaintiffs. Several closely related theories sustain the court's position. It is arguable, as the instant court suggests, that the juniors became members of the international organization on terms unlimited by the arbitrary conditions imposed by the local union's "contract of membership." This theory necessarily rests upon the premise that individual membership in the International Alliance is possible. But the Constitution of the Alliance expressly provides that the membership shall comprise local unions[12] and does not mention individual membership. Since the International

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permit men were no longer learning the trade and when it was known sound films would be permanent, they were organized into a Junior Local with the seniors reserving absolute power to prevent the juniors from ever becoming full senior members.

10. Cameron v. International Alliance, 118 N. J. Eq. 11, 176 Atl. 692 (1935). The implications of this decision were discussed in (1935) 44 YALE L. J. 1446. A further point in that case is that the court seems to have annulled seniority rights worked out by the union. In large industries seniority rights have usually been arranged by contract between the union and each employer, and the validity of these agreements has been recognized by the court. Piercy v. Louisville & Nashville Ry., 198 Ky. 477, 248 S. W. 1042 (1923); Ryan v. New York Central, 267 Mich. 202, 255 N. W. 365 (1934); Robinson v. Dahm, 94 Misc. 729, 159 N. Y. Supp. 1053 (Sup. Ct. 1916). But cf. Comment (1936) 45 YALE L. J. 1248, 1262, n. 74. In the moving picture industry, where, because of the large number of employers and the few men hired by each, such agreements would be of little use, the union's attempt to regulate seniority rights without the aid of the employers was rendered null and void as an unreasonable and arbitrary regulation. Cameron v. International Alliance, 118 N. J. Eq. 11, 28, 176 Atl. 692, 700 (1935).

11. The unreported opinion of the Court of Chancery was filed August 16, 1935.

12. "The membership of this Alliance shall comprise such local unions as shall hold charter; . . ." Constitution of the International Alliance of Theatrical Stage Employees and

Secretary must approve each individual application for membership, however, and since in two instances the International issues working cards which are distinct and separate from those issued by the locals,[13] the inference is tenable that individuals were given membership in the International itself, especially since membership in an International is commonly considered to accompany membership in local affiliates. But the fact of their putative membership in the International does not of itself justify the instant court in granting the plaintiffs full membership in the Local. The Local may be unwilling to accept the plaintiffs as members, and neither the Constitution nor the By-laws of the International compel a local union to admit members of the International whom it may otherwise wish to exclude,[14] nor have courts heretofore attempted to force members upon a union.[15] Yet, in view of the peculiar circumstances of the present case, the disfavor in which labor monopolies are held by the New Jersey courts,[16] and the public desire to punish unwarranted assertions of power by entrenched union leadership,[17] perhaps it can be said the juniors

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Moving Picture Machine Operators of the United States and Canada (hereinafter referred to as the Constitution), Art. 1, § 2.

13. a. "No member of this Alliance shall be permitted to accept position with a traveling theatrical attraction . . . unless he be in possession of official road card issued by this Alliance . . . together with local working card . . ." By-Laws of the International Alliance (hereinafter referred to as By-Laws), Art. 1, § 1.

b. "Any member of a local which, through insolvency or lack of membership has had its charter revoked, shall have the right . . . to retain his membership in the International Alliance . . ." By-Laws, Art 3, § 11.

It is of considerable significance that the By-laws refer constantly to "members of this Alliance" as individuals, not locals.

14. Except in one peculiar situation:—"Members carrying a card out of the I. A. Office from towns that have lost their charter, shall at any time that the town is reorganized and a charter granted from the I. A., automatically become members of the new local at once." By-Laws, Art 3, § 11.

To compel a local to accept persons as members would be contrary to the privilege of "home rule" conferred on the locals by the International Alliance. By-Laws, Art. 2, § 1. Furthermore, the international body does not compel a local to accept as members those members of a sister local who might wish to transfer. By-Laws, Art. 3, § 3.

15. Although in closed shop industries membership in a trade union is a prerequisite to securing employment, courts have not seized on this factor as a reason for departing from the rule that union membership is a privilege to be conferred or withheld at the union's option. Greenwood v. Building Trades Council, 71 Cal. App. 159, 233 Pac. 823 (1925); Mayer v. Journeymen Stone Cutter's Ass'n, 47 N. J. Eq. 519, 20 Atl. 492 (Ch. 1890); Simons v. Berry, 210 App. Div. 90 (1st Dep't, 1924); Alterman v. Elliott, N. Y. L. J., July 13, 1933, at 145, col. 5 (Sup. Ct. 1933); see Cameron v. International Alliance, 118 N. J. Eq. 11, 21, 176 Atl. 692, 697 (1935). See Mintz, *Trade Union Abuses* (1932) 6 St. John's L. Rev. 272, 274; Steever, *The Control of Labor Through Union Discipline* (1931) 16 Corn. L. Q. 212, 217.

16. Upholsterers' International Union v. Essex Reed & Fibre Co., 174 Atl. 207 (N. J. Ch. 1934); Baldwin Lumber Co. v. International Brotherhood, 91 N. J. Eq. 240, 109 Atl. 147 (Ch. 1920); Lehigh Structural Steel Co. v. Atlantic Smelting and Refining Co., 92 N. J. Eq. 131, 111 Atl. 376 (Ch. 1920); O'Brien v. Musical Mutual Union, 64 N. J. Eq. 525, 54 Atl. 150 (Ch. 1903); see Brennan v. United Hatters, 73 N. J. L. 729, 738, 65 Atl. 165, 169 (1906). But see Harris v. Geier, 112 N. J. Eq. 99, 108, 164 Atl. 50, 53 (Ch. 1932).

17. Harris v. Geier, 112 N. J. Eq. 99, 164 Atl. 50 (Ch. 1932); Chalighian v. International

acquired and exercised rights in the union as a whole sufficiently clear to justify a judicial declaration of full membership in the Local as an exception to the rule.

The conclusion of the court in the instant case may be explained, however, without sanctioning judicial interference with the autonomy of local unions. It may be argued that the plaintiffs obtained full membership in the Local and that the provisions of the "contract of membership" subsequently voided were wholly unconnected with the acquisition of that status. This position might be sustained if membership in the Local were deemed to attach immediately upon satisfaction of the membership requirements prescribed by the International,[18] since the International's last requirement had been fulfilled two weeks before the creation of the Junior Department.[19] But to grant full membership on these facts is to ignore the requirements, some of which were never satisfied, imposed by the Local as conditions precedent to admission.[20] The principal court seems to have selected the least vulnerable doctrinal approach, in holding that in conjunction with admission to the Junior Department, an implied agreement, to which the written document was subsidiary, conferred full membership in the Local upon the juniors inasmuch as (a) they did the same work and received the same wages as the seniors; (b) they received membership cards identical with those of the seniors (except for the words "Junior Department" stamped on their face); (c) they were reported to the International not as apprentices but as union members of the Junior Department, and (d) the so-called "contract of membership" was not in reality a contract and therefore it can be dismissed as a group of rules defining certain collateral rights and duties of those members who were henceforth to be classed as juniors. But since the "contract" was so inclusive in providing for all the fundamental aspects of union life[21] and limiting the juniors' privileges in each one of these aspects, and since the rules were signed exactly as though they constituted the entire contract, it seems hard to escape the conclusion that no status other than the limited one, provided for in the contract, was

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Brotherhood, 114 N. J. Eq. 497, 169 Atl. 327 (Ch. 1933); Local No. 11 v. McKee, 114 N. J. Eq. 555, 169 Atl. 351 (Ch. 1933); Collins v. International Alliance, Local 244, 119 N. J. Eq. 230, 182 Atl. 37 (Ch. 1935).

18. The By-Laws, Art. 2, §§ 21, 23, lay down as prerequisites to membership: (1) 18 months' residence within the jurisdiction of the local to which the applicant desires membership, unless he be a transfer from another local; (2) a demonstration through examination of the applicant's qualifications; and (3) approval of the International's General Secretary-Treasurer.

19. The approval of the International Alliance was secured on February 18, 1930, while the "contract" creating the Junior Department was not executed until March 4, 1930.

20. Besides fulfilling the International's requirements, this Local required the applicant (1) to pay an initiation fee of $3,000; (2) to receive a majority vote of the members of the local; (3) to take an oath of allegiance to the union. The juniors have only paid an initiation fee of $500, the prerequisite to admission to the junior local; have never been voted on; and have only taken an oath of allegiance to the junior local.

21. It provided that the seniors were to select representatives for collective bargaining, to fix wages and conditions of employment, to control the allotment of jobs, and to have the privilege of displacing any employed junior. Juniors were to have no vote at senior meetings, but were to have meetings of their own under the control of seniors. Furthermore, juniors were to pay as dues 10% of their salaries while employed, which in one case might have amounted to $912 a year had that junior been employed all year. Seniors, on the other hand, paid flat yearly dues of $80.

conferred on the juniors,[22] and that since this contract has been completely voided the juniors lost all position in the union.[23]

Failure to Allege a Cause of Action in a State Court as Grounds for Collateral Attack in a Federal Court[1]

The plaintiff, as administrator, brought an action in an Arizona superior court to recover damages for injuries causing the death of plaintiff's decedent. Judgment for $7,500 was recovered against the estate of the tortfeasor, whose negligent operation of a motor vehicle had caused the injury and death to plaintiff's intestate. Unable to satisfy this judgment, the plaintiff brought an action against the defendant insurance companies, claiming to be subrogated to the rights of the tortfeasor under certain insurance policies wherein the insurers agreed to pay to a limited extent for injuries resulting in death if occasioned by the negligent operation of the tortfeasor's automobile. On petition of the insurers the action was removed from the Arizona superior court to the federal district court, where a demurrer to the complaint was sustained. Upon appeal to the Circuit Court of Appeals for the ninth circuit the judgment of the district court was affirmed, one judge dissenting and one judge concurring in a separate opinion. It was the conclusion of the court that, since, under its construction of the Arizona statutes an action for wrongful death must be commenced during the lifetime of the tortfeasor,[2] the complaint filed against the

22. It seems unusual to treat a written "contract of membership" as subsidiary to membership created by an implied-in-fact agreement. So few matters of importance in trade union life were left without express specification in the "membership contract" that, even if there were an implied agreement contributing to the position of the juniors, the express "contract" seems the essential element of membership, implying that the whole should fall with the invalid "contract." The present situation is to be distinguished from that in which the court has annulled only one of the members' obligations. Under those circumstances the court has no difficulty in seeing that the essential membership status remains. Schneider v. Local 60, 116 La. 270, 40 So. 700 (1905) (obligation to vote as union directs); Walsche v. Sherlock, 110 N. J. Eq. 223, 159 Atl. 661 (Ch. 1932) (contract requiring members to work under card index system of job rotation); Spayd v. Ringing Rock Lodge, 270 Pa. 67, 113 Atl. 70 (1921) (requirement that members refuse to exercise their right to petition the legislature).

23. If in the principal case the "contract" had not been signed by the juniors, it would have been easier to discount its importance. Cf. Collins v. International Alliance, Local 244, 119 N. J. Eq. 230, 182 Atl. 37 (Ch. 1935).

1. McLellan v. Automobile Ins. Co. of Hartford, Conn., 80 F. (2d) 344 (C. C. A. 9th, 1935).

2. The Arizona statutes provide both that an action for damages can be maintained for wrongful death, Ariz. Rev. Code (1928) § 944, and that such an action shall not abate by reason of the death of the defendant (the personal representative being substituted as defendant) Ariz. Rev. Code (1928) §§ 3772, 3774. Since the state superior court must have construed these statutes as providing that an action for wrongful death survived the death of the tortfeasor, it would seem that the federal courts should be bound by this construction. Had the state supreme court adopted such a construction, it would clearly be binding on the federal courts under the Rules of Decision Act, 1 Stat. 92 (1789), 28 U. S. C. A. § 725 (1928). See cases collected at note 8, 28 U. S. C. A. § 725 (1928); Comment (1927) 5 Tex. L. Rev. 191; Dobie, Federal Procedure (1928) §§ 139, 140. Although it has been said that the decisions of lower state courts, while entitled to respect,

estate of the tortfeasor failed to state a cause of action; and that this failure was a jurisdictional defect, because the subject matter of the plaintiff's action was statutory, so that the prior judgment, upon which the present suit was based, was void and subject to collateral attack.[1]

It is generally said that, in the absence of fraud, a judgment may be collaterally attacked only when it is rendered by a court which has no jurisdiction over the parties, no jurisdiction over the subject matter, or no jurisdiction to render the particular judgment.[3] Although failure to state a cause of action is not generally considered to be a jurisdictional defect,[4] and although the rule is said to be that when a court has jurisdiction over the parties and the subject matter, the non-existence or invalidity of the cause of action pleaded does not defeat the judgment founded thereon, some courts have excepted from the operation of the rule judgments based on a cause of action dependent upon a statute for its existence.[5] In order to rationalize this exception, "subject matter" over which jurisdiction is requisite must be interpreted as being virtually synonymous with "cause of action." But such a limited construction of "subject matter" seems artificial. The usual rule is that "subject matter" is a more inclusive term, for it is generally said that, if the alleged cause of action falls within the general class of litigation over which the court may rightly exercise jurisdiction, the court has jurisdiction of the subject matter and the court's decision on the sufficiency of the complaint, however erroneous, is conclusive unless corrected by direct proceedings.[6] It is not clear that the customary rule should be

do not control the federal courts [Beals v. Hale, 4 How. 37, 54 (1846) (state court's construction followed); Anglo-American Land, M. & A. Co. v. Lombard, 132 Fed. 721, 724 (C. C. A. 8th, 1904), cert. denied, 196 U. S. 638 (1904); Westerland v. Black Bear Mining Co., 203 Fed. 599, 609 (C. C. A. 8th, 1913) (lower state court decisions distinguished); In re F. & D. Co., 256 Fed. 73, 76 (C. C. A. 2d, 1919) (state court's construction followed); Knight v. Atlantic Coast Line Rr. Co., 73 F. (2d) 76, 77 (C. C. A. 5th, 1934) (lower state court's construction found opposed to other state decisions)], the federal courts, contrary to the principal case, generally adopt the construction of a lower state court where at the time of decision it is the highest court that has construed the statute. Erie Rr. Co. v. Hilt, 247 U. S. 97 (1918); Ex parte Zwillman, 48 F. (2d) 76 (C. C. A. 3d, 1931).

3. 1 BLACK, JUDGMENTS (1st ed. 1891) §§ 215, 218; 1 FREEMAN, JUDGMENTS (5th ed. 1925) §§ 321, 325, 333, 337, 338.

4. Foltz v. St. Louis & S. F. Ry. Co., 60 Fed. 316 (C. C. A. 8th, 1894); Kaill v. Board of Directors, 194 Fed. 73 (C. C. A. 5th, 1912); Tube City Min. & Mill. Co. v. Otterson, 16 Ariz. 305, 146 Pac. 203 (1914); Trans-Pacific Trading Co. v. Patsy Frock & Romper Co., 189 Cal. 509, 209 Pac. 357 (1922); Winningham v. Trueblood, 149 Mo. 572, 51 S. W. 399 (1899); Hunt v. Hunt, 72 N. Y. 217, 229 (1878); 1 BLACK, JUDGMENTS (1st ed. 1891) §§ 241, 269; 1 FREEMAN, JUDGMENTS (5th ed. 1925) §§ 338, 363, 365. But see Brecht v. Hammons, 35 Ariz. 383, 278 Pac. 381 (1929); Grannis v. Superior Court, 146 Cal. 245, 254, 79 Pac. 891, 895 (1905); Cole v. Parker-Washington Co., 276 Mo. 221, 207 S. W. 749, 763 (1918); State v. Armstrong, 158 Okla. 290, 292, 13 P. (2d) 198, 200 (1932).

5. Murray v. Am. Surety Co., 70 Fed. 341, 346 (C. C. A. 9th, 1895); Wright v. Atwood, 33 Idaho 455, 195 Pac. 625 (1921); Doey v. Howland Co., 224 N. Y. 30, 120 N. E. 53 (1918).

6. Board of Comm'rs v. Platt, 79 Fed. 567 (C. C. A. 8th, 1897); Varnes v. White, 40 Ariz. 427, 12 P. (2d) 870 (1932); Farmers & Merchants Bank v. Board of Equalization, 97 Cal. 318, 32 Pac. 312 (1893); Hunt v. Hunt, 72 N. Y. 217, 229 (1878). See 1 BLACK, JUDGMENTS (1st ed. 1891) §§ 215, 216, 240; 1 FREEMAN, JUDGMENTS (5th ed. 1925) §§ 333, 337, 338, 365.

modified even for statutory causes of action unless the powers conferred by the statute are of a special, extraordinary character, or the court in question is one of closely limited jurisdiction.[11]

But even if one accepts the rule permitting collateral attack on all erroneous judgments in actions whose subject matter is statutory, the thesis of the court in the instant case seems vulnerable, because the subject matter of the plaintiff's cause of action was not statutory. Since the survival statute was held not to prevent the common law abatement of the tort action, it would seem that the only cause of action which the plaintiff alleged in the state court was a defective one at common law, within the general tort jurisdiction of the superior court, since the Arizona Constitution confers upon the superior courts jurisdiction over all cases where the amount involved is in excess of $200 and over all cases and proceedings jurisdiction over which has not been vested exclusively in some other court. If, in the principal case, no statute had been involved, it is probable that the state superior court's judgment for the plaintiff on an erroneous view of the common law would have been valid against collateral attack, since jurisdiction to decide a question, it is said, does not depend on the correctness of the decision.[7] It is therefore difficult to perceive why the interposition of a statute (which was held to be inapplicable) should so materially change the operation of the rules of collateral attack. The rule adopted by the instant case appears to be contrary both to the weight of authority and to the trend of recent decisions allowing a court's determination of its jurisdiction over the parties and even over the subject matter to be conclusive except when challenged by direct attack.[8]

The principal court linked with its application of the minority rule a refusal to give effect to the customary presumptions in favor of the validity of judgments of courts of general jurisdiction.[9] The majority of the court, emphasizing its view that the plaintiff's cause of action in the state court was statutory if it existed at all, since it did not exist at common law, held that the judgment in question should be regarded as that of a court of special and limited jurisdiction, with the result that the usual presumptions of validity were held inapplicable and all necessary jurisdictional facts required affirmatively to appear.[10] But even if the cause of action were statutory it is generally held that only where a court of general jurisdiction renders a judgment in the exercise of special statutory powers of a summary nature must the jurisdictional facts appear on the face of the record; and, conversely, that jurisdiction

7. 1 BLACK, JUDGMENTS (1st ed. 1891) §§ 245, 246, 261, 262; 1 FREEMAN, JUDGMENTS (5th ed. 1925) §§ 333, 350, 357, 363.

8. Baldwin v. Iowa State Traveling Men's Ass'n, 283 U. S. 522 (1931) (jurisdiction over the parties); American Surety Co. v. Baldwin, 287 U. S. 156 (1932) (same); Catholic Society of Religious & Literary Education v. Madison County, 74 F. (2d) 848 (C. C. A. 4th, 1935) (jurisdiction over the subject matter); Windholz v. Everett, 74 F. (2d) 834 (C. C. A. 4th, 1935) (same); see Hamilton Gas Co. v. Watters, 79 F. (2d) 438, 440 (C. C. A. 4th, 1935); see Gavit, *Jurisdiction of the Subject Matter and Res Judicata* (1932) 80 U. OF PA. L. REV. 386; Comment (1936) 45 YALE L. J. 1235, 1245.

9. Thompson v. Tolmie, 2 Pet. 157, 164 (U. S. 1829); Berman v. Thomas, 41 Ariz. 457, 463, 19 P. (2d) 685, 687 (1933); Hahn v. Kelly, 34 Cal. 391 (1868); 1 FREEMAN, JUDGMENTS (5th ed. 1925) §§ 373, 374, 383.

10. East Tenn. Va. & Ga. Rr. Co. v. So. Tel. Co., 112 U. S. 306 (1884); Murray v. Am. Surety Co., 70 Fed. 341 (C. C. A. 9th, 1895); Wright v. Atwood, 33 Idaho 455, 461, 195 Pac. 625, 627 (1921); Doey v. Howland Co., 224 N. Y. 30, 38, 120 N. E. 53, 55 (1918); Pulaski County v. Stuart Buchanan & Co., 69 Va. 872 (1877); 1 FREEMAN, JUDGMENTS (5th ed. 1925) § 389.

will be presumed where the court is merely enforcing newly created statutory rights by the procedure applicable to rights existing at common law.[11] Thus in the instant case, since the alleged cause of action, if it existed, would be enforced by the procedure applicable to the ordinary common law tort action, it would seem that the judgment of the superior court should be presumed valid in the absence of an affirmative showing to the contrary.[12]

The rule employed in the main case was applied only because a majority of the court felt bound to follow a state court decision[13] which it nevertheless considered erroneous. In *Brecht v. Hammons* it was stated that although a court's determination of its own jurisdiction over the subject matter, when based on a question of fact, is conclusive against collateral attack, an erroneous decision on a question of law upon which jurisdiction is founded may be attacked in an independent proceeding. The binding effect of this decision could have been avoided in the instant case, however, by resort to the rule that the federal courts are not compelled to follow the decisions of state courts on non-statutory questions of general law.[14] Moreover, if a desire for comity between the state and federal courts precluded resort to that doctrine, the principal court could nevertheless have restricted the *Brecht* case to its own peculiar facts and refused to extend its application to the case at bar. The judgment attacked in the *Brecht* case was based on an unconstitutional provision in the state constitution[15] and there the court refused to allow a

11. Kempe's Lessee v. Kennedy, 5 Cranch 173 (U. S. 1809); Harvey v. Tyler, 2 Wall. 328 (U. S. 1864); Galpin v. Page, 18 Wall. 350 (U. S. 1873); Hahn v. Kelly, 34 Cal. 391 (1868); Burris v. Kennedy, 108 Cal. 331, 41 Pac. 458 (1895); 1 FREEMAN, JUDGMENTS (5th ed. 1925) § 389.

12. The argument that such presumptions cannot be used to contradict the record, the truth of which must be conclusively presumed [Voorhees v. Bank of U. S., 10 Pet. 449 (U. S. 1836); 1 BLACK, JUDGMENTS (1st ed. 1891) § 278; 1 FREEMAN, JUDGMENTS (5th ed. 1925) §§ 373, 375, 382, 383, 386], is inapplicable in the instant case, where the pleadings in the action before the Arizona superior court were not before the federal court. Furthermore, the principal decision was rested solely on the plaintiff's allegations which, as the dissenting judge indicated, it is possible to interpret as a declaration that the original action in the state court was brought against the tortfeasor himself and that his administrator was later substituted as a defendant. Since under the Arizona Statutes such an action would be proper, and since the plaintiff's allegation is not inconsistent with those facts, it is arguable that the federal court, on demurrer at least, should have adopted that interpretation of the complaint most favorable to the plaintiff.

13. Brecht v. Hammons, 35 Ariz. 383, 278 Pac. 381 (1929).

14. Swift v. Tyson, 16 Pet. 1 (U. S. 1842); see Comment (1929) 7 TEX. L. REV. 283; DOBIE, FEDERAL PROCEDURE (1928) §§ 142, 143. But cf. Burgess v. Seligman, 107 U. S. 20, 33 (1882); dissenting opinion of Holmes, J., in B. & W. Taxi Co. v. B. & Y. Taxi Co., 276 U. S. 518, 532 (1928); Frankfurter, *Judicial Power of Federal and State Courts* (1928) 13 CORN. L. Q. 499, 520. It has been held that the validity of a judgment when attacked collaterally is a matter of general law and that the decisions of state courts do not bind the federal courts. Amis v. Smith, 16 Pet. 303, 313 (U. S. 1842); Galpin v. Page, 9 Fed. Cas. No. 5206, at 1131 (C. C. Cal. 1874); Mohr v. Manierre, 17 Fed. Cas. No. 9695, at 568 (C. C. Wis. 1877), aff'd 101 U. S. 417 (1880); Ryan v. Staples, 76 Fed. 721, 727 (C. C. A. 8th, 1896).

15. Article XIV, section 11 of the Arizona Constitution imposes double liability on bank stockholders. It was held that to construe this provision as applying to banks organized prior to the establishment of the constitution would constitute an impairment of the

judgment to stand which was based on an alleged right which the state supreme court had held not only did not, but *could* not exist.[16] In the instant case, however, it cannot be said that the alleged cause of action *could* not exist, since the statute, if construed as providing for the survival of the cause of action after the death of the tortfeasor, would be constitutional.[17] Persuasive, too, should have been the fact that, although the *Brecht* case has occasionally been cited with approval,[18] a number of cases have distinguished it, and, as a result, the scope of the rule there announced appears to have been considerably narrowed.[19] And it is of added significance that prior to the *Brecht* case, the Arizona court had expressly held valid against collateral attack a judgment based on a complaint which failed to state a cause of action.[20] The federal court might have been justified therefore in limiting the doctrine of the *Brecht* case to judgments attempting to enforce rights derived from unconstitutional statutes or from provisions of the state constitution which violate the Federal Constitution.

THE POWER OF CONGRESSIONAL INVESTIGATING COMMITTEE TO ISSUE SUBPOENA DUCES TECUM[1]

THE most serious threat to the effectiveness of Congressional investigating committees[2] in their work[3] of preparing the foundation for legislation and of exposing

obligation of contracts. Hammons v. Watkins, 33 Ariz. 76, 262 Pac. 616 (1927); Herndon v. Hammons, 33 Ariz. 88, 262 Pac. 620 (1927).

16. It is interesting to note that in at least two other cases involving an alleged cause of action based on the same constitutional provision as the *Brecht* case, jurisdiction was exercised by both the superior and supreme courts. Hammons v. Watkins, 33 Ariz. 76, 262 Pac. 616 (1927) (sustaining of demurrer affirmed); Herndon v. Hammons, 33 Ariz. 88, 262 Pac. 620 (1927) (overruling of demurrer reversed).

17. See Winfield, *Death as Affecting Liability in Tort* (1929) 29 COL. L. REV. 239; Evans, *Survival of Claims for and against Administration* (1931) 19 KY. L. J. 195; Comment (1932) 9 N. Y. U. L. Q. REV. 344.

18. Latham v. McClenny, 36 Ariz. 337, 344, 285 Pac. 684, 686 (1930); Sawyer v. Ellis, 37 Ariz. 443, 447, 295 Pac. 322, 324 (1931); Varnes v. White, 40 Ariz. 427, 430, 12 P. (2d) 870, 871 (1932); Bell v. Bell, 39 P. (2d) 629, 636 (Ariz. 1934); Dockery v. Central Ariz. Light & Power Co., 45 P. (2d) 656, 662 (Ariz. 1935).

19. See Latham v. McClenny, 36 Ariz. 337, 344, 285 Pac. 684, 686 (1930), where the court distinguished between a complaint based on an alleged right which never existed and one based on a right which, although existing at one time, had become extinguished by subsequently arising facts; Varnes v. White, 40 Ariz. 427, 430, 12 P. (2d) 870, 872 (1932).

20. Tube City Min. & Mill Co. v. Otterson, 16 Ariz. 305, 146 Pac. 203 (1914).

1. Strawn v. Western Union Telegraph Co. (Sup. Ct. D. C. March 11, 1936). The oral opinion is reported in N. Y. Times, March 12, 1936, at 1, col. 4.

2. For a full discussion of the achievements of Congressional investigations, see DIMOCK, CONGRESSIONAL INVESTIGATING COMMITTEES (1929); EBERLING, CONGRESSIONAL INVESTIGATIONS (1928); Galloway, *The Investigative Function of Congress* (1927) 21 AM. POL. SCI. REV. 47; Landis, *Constitutional Limitations on the Congressional Power of Investigation* (1926) 40 HARV. L. REV. 153.

Fact-finding investigations by special administrative agencies seem to be replacing to a considerable extent investigations by congressional committees, although the courts in the past have been reluctant to recognize the existence of investigatory powers in such agencies. Federal Trade Comm. v. American Tobacco Co., 264 U. S. 298 (1924); Jones v.

corruption in public affairs, has in the past been the obstructionist tactics of powerful pressure groups.[4] Hitherto the power of Congressional committees to resist such tactics has been largely unrestricted by the courts.[5] A recent case, however, suggests the possibility that judicial restraints may be added to these already formidable practical obstacles. A firm of Chicago lawyers was able to enjoin a telegraph company from surrendering to the Senate Lobby Investigating Committee certain messages in its files.[6] The plaintiff contended not only that the resolutions authorizing the investigation exceeded the power of Congress, but that even if the resolutions were within the power the subpoena duces tecum issued by the committee was so broad as to amount to an unreasonable search and seizure in violation of the Fourth Amendment.[1] The injunctive relief was granted on the latter ground.[7]

It is generally said that Congress may investigate only for legislative purposes[8]—the power to investigate being implied as necessarily incident to a proper exercise of the legislative powers expressly delegated by the Constitution. The requirement,

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Securities & Exchange Comm., 56 Sup. Ct. 654 (1936); Handler, *The Constitutionality of Investigations by the Federal Trade Commission* (1928) 28 COL. L. REV. 708, 905; Comment (1935) 44 YALE L. J. 819.

3. Investigations actually conducted by Congress have four principal purposes, the first two of which are judicially recognized; membership (e. g. inquiries into qualifications and conduct of members), legislative (*infra* note 8), surveillance of the administration, and informing public opinion. DIMOCK op. cit. *supra* note 2, at 21, 44; Galloway, loc. cit. *supra* note 2. It would seem wise specifically to recognize investigations for the last two purposes. A possible constitutional peg for investigations of the third type is the impeachment power.

4. Black, *Inside a Senate Investigation* (Feb. 1936) 172 HARPER'S 275.

5. In the infrequent court tests of Congressional investigations the primary issue has been one of the purposes for which Congress may investigate rather than one of the extent of the power in effectuating concededly valid purposes.

6. The subpoena, a standard form, called for "all telegrams sent paid and/or received between the dates of February 1, and December 1, 1935, and charged to" Winston, Strawn and Shaw. [Brief for the plaintiffs, at 46.] The Strawn firm was counsel for large utility interests, the activities of some of which gave rise to the inquiry.

7. The plaintiffs also contended that production of the requested papers would violate the privileged character of communications between attorney and client. The privilege attaching to such communications, however, is but a rule of law and it is questionable whether the rules of a court of law apply to Congressional investigations. See Barry v. United States ex rel. Cunningham, 279 U. S. 597, 613 (1929); Frankfurter, *Hands Off The Investigations* (1924) 38 NEW REPUBLIC 329; EBERLING, op. cit. *supra* note 2, at 35. It might be argued in any event that the communications do not come within the privilege since the presence of third persons (telegraph dispatchers) indicates that the necessary "intention of confidentiality" was lacking. This contention is of dubious validity since the dispatchers might be termed agents of the parties and were, moreover, under a statutory duty not to disclose. 5 WIGMORE, EVIDENCE (2d ed. 1923) §§ 2285, 2287, 2291, 2292, 2301, 2311, 2317 2320, 2326; see, also, Olmstead v. United States, 7 F. (2d) 760, 763 (W. D. Wash, 1925), aff'd 277 U. S. 438 (1928). Despite arguments raised by the committee it would seem that plaintiffs have a property right protected by the Fourth Amendment. Zimmerman v. Wilson, 81 F. (2d) 847 (C. C. A. 3d, 1936), noted in (1936) YALE L. J. 1523.

8. This was not established until 1927. McGrain v. Daugherty, 273 U. S. 135 (1927). As thus used "legislative purpose" means any purpose within the jurisdiction of action by the legislature, and it is not confined to the enactment of legislation. Seymour v. United States, 77 F. (2d) 577 (C. C. A. 8th, 1935).

however, is loosely applied. Investigations have been upheld where only a remote possibility of permissible Congressional action has existed.[9] Frequently, moreover, where the existence of a valid objective was uncertain, the courts have indulged in a presumption favoring the legitimacy of the inquiry.[10] Likewise the mere assertion of a legitimate purpose in the authorizing resolution may be deferred to by the courts as conclusive,[11] especially if investigations similar in character have been conducted previously.[12] Accordingly the investigation of lobbying activities challenged in the instant case would seem to be unquestionably within the powers of the Senate. It can clearly be justified as an inquiry incident either to Congress' power to legislate or to supervise its membership.[13] And the frequency of comparable investigations should be persuasive evidence of validity.[14]

Even though the power of Congress to authorize the investigation in question is conceded, the objection remains that the limitations imposed upon the exercise of the power have been exceeded. As already indicated, however, the exercise of the power to investigate has been substantially unlimited in practice. The power of an investigating committee to compel testimony, a power not in issue in the principal case, has been restricted only by a requirement of relevancy, a restriction which serves to confine inquiries to the particular subject matter authorized and to protect rights of privacy from unwarranted invasion.[15] In contrast to the restrictions placed

9. McGrain v. Daugherty, 273 U. S. 135 (1927); Sinclair v. United States, 279 U. S. 263 (1929). Seymour v. United States, 77 F. (2d) 577 (C. C. A. 8th, 1935). So broadly has the power been construed that only one investigation, the first to be tested in the Supreme Court, has been declared beyond the power of Congress to conduct. Kilbourn v. Thompson, 103 U. S. 168 (1880). Yet similar investigations have since been upheld. McGrain v. Daugherty, Sinclair v. United States, both *supra*.

10. See In re Chapman, 166 U. S. 661, 670 (1897); Barry v. United States ex rel. Cunningham, 279 U. S. 597, 619 (1929).

11. See McGrain v. Daugherty, 273 U. S. 135, 178 (1927). But such a statement is not essential. See In re Chapman, 166 U. S. 661, 669 (1897). Nor is it necessarily conclusive. People ex rel. Sabold v. Webb, 5 N. Y. Supp. 855, 23 N. Y. St. Rep. 324 (Sup. Ct. S. T. 1889). And where the resolution states that the purpose of the investigation was as a basis for legislation and other action, the fact that no other action could constitutionally be taken does not invalidate the investigation. McGrain v. Daugherty, *supra* at 176.

A device that might be used to nullify any judicial limitations on legislative purpose is a statement in the authorizing resolution that the investigation is to be used as the basis for a Constitutional Amendment.

12. This would appear to follow from the weight accorded legislative precedents in determining whether Congress has the power to investigate. See McGrain v. Daugherty, 273 U. S. 135, 174 (1927), and cases there cited; Landis op. cit. *supra* note 2 at 169, n. 65.

13. Bills aiming at regulating lobbying activities have been introduced in both Houses. S. 2512, H. R. 11663 (1936). Each has been passed by one House. N. Y. Times, April 5, 1936, § 1, at 30, col. 1. Cf. In re Chapman, 166 U. S. 661 (1897), for an example of the membership supervisory function.

14. Examples of similar investigations are to be found in EBERLING, loc. cit. *supra* note 2.

15. Kilbourn v. Thompson, 103 U. S. 168 (1880); In re Chapman, 166 U. S. 661 (1897); McGrain v. Daugherty, 273 U. S. 135 (1927); Sinclair v. United States, 279 U. S. 263 (1929); cf. 11 STAT. 155 (1857) 2 U. S. C. A. § 192 (1926).

The cases do not discuss the basis for the limitation and the contrary inferences that it was designed only to limit the inquiry to the scope authorized, or that it is imposed solely to protect rights of privacy, are possible. See Barry v. United States ex rel. Cunningham,

upon the power of Congressional committees to compel testimony,[16] the power to demand the production of papers by means of the subpoena duces tecum has been unlimited in scope prior to the instant case. The imposition, however, of a requirement of relevancy analogous to the restriction on the Congressional power to compel testimony, seems inevitable if inquiries are to be confined to the scope of the investigatory power.[17] Likewise it is possible that the courts may adopt other restrictions comparable to the limitations imposed upon the subpoena power of parties to ordinary judicial proceedings. There the courts have employed "specificity" as well as "relevancy" as tests of the validity of subpoenas. These two criteria appear to satisfy both the constitutional prohibition against unreasonable searches and seizures and the rules of practice formulated independently by the courts[18] to achieve an equitable adjustment of the interests of parties litigant.[19] Although the requirement of specificity in judicial subpoenas is customarily employed interchangeably with that of relevancy, and although lack of specificity is usually considered objectionable only because under a broad subpoena there is no assurance that all the documents secured will be of the desired relevance,[20] occasionally the two limitations are viewed as distinct. In such cases the subpoena may be held invalid, even though the documents secured are relevant, because of the inconvenience attendant upon re-

279 U. S. 597, 613 (1929); In re Chapman, 166 U. S. 661, 668 (1897); Sinclair v. United States, 279 U. S. 263, 291 (1929).

16. Since the relevancy requirement apparently affords adequate protection to Congressional witnesses, it has been unnecessary for the courts to impose other safeguards.

The privilege against self-incrimination is made unavailable by statute, 12 STAT. 333 (1862), 2 U. S. C. A. § 193 (1926); but the supplementary immunity provision, 11 STAT. 156 (1857) 12 STAT. 333 (1862), 28 U. S. C. A. § 634 (1926), makes the withdrawal of the privilege constitutional. Brown v. Walker, 161 U. S. 591 (1896).

17. Language can be found, however, inferring that the limitation of relevancy is not applicable to the production of papers. See Jurney v. MacCracken, 294 U. S. 125, 144 (1935); Sinclair v. United States, 279 U. S. 263, 291 (1929). But see In re Chapman, 166 U. S. 661, 667 (1897). Yet the state court cases hold that the papers must be relevant. Herwitz and Mulligan, *The Legislative Investigating Committee* (1933) 33 COL. L. REV. 1. No other limitations have been applied to state legislative committees. Id. at 19. Cf. In re Conrades, 112 Mo. App. 21, 85 S. W. 150 (1904), rev'd 185 Mo. 411, 85 S. W. 160 (1904). But see Gray, J. in Matter of Barnes, 204 N. Y. 108, 115, 97 N. E. 598, 510 (1912).

18. 4 WIGMORE, EVIDENCE § 2200. See Federal Trade Comm. v. American Tobacco Co., 264 U. S. 298, 306 (1924).

19. This appears to be the reason for the requirement of specificity when papers are demanded from a party-opponent. At common law, a party to litigation was privileged to refuse to produce papers demanded by his opponent. This rule has been gradually undermined, but those restrictions which do remain are probably a vestige of the early attitude. This survival does not adequately explain the restriction as applied to the demanding of papers from a witness. In that situation the basis of the rule seems to be a desire that the witness be adequately informed as to what papers are sought. 3 and 4 WIGMORE, EVIDENCE §§ 1845, 1857, 1858, 1859 d, 2200, 2219.

20. The connection between specificity and relevancy is illustrated by the fact that subpoenas ostensibly rejected on the former ground have really offended in the latter respect. See McKenna J., concurring in Hale v. Henkel, 201 U. S. 43, 81 (1906). And where courts are satisfied of the relevance of the documents subpoenaed, a failure to specify is not likely to prove fatal. See Liebenow v. Phillippine Vegetable Oil Co., 39 Philippine 61, 68 (1918). The converse, however, is not necessarily true.

questing a search for papers without any specification of what is desired.[21] Whether or not these restrictions are regarded as co-extensive, however, their application in private litigation has been so indiscriminate that it has become impossible to predict when a subpoena will be held valid. It is usually said that the degree of particularity required is only that which is practicable under all the circumstances.[22] So flexible a formula provides the courts with an almost unlimited discretion[23] and as a result there is considerable authority supporting the validity of judicial subpoenas almost identical with the Congressional one rejected in the instant case, demanding from telegraph companies all the telegrams sent by certain persons between certain dates.[24] Thus even if the limitations upon the use of subpoenas in judicial proceedings are to be imposed upon the subpoenas issued by Congressional bodies, the doctrines are so elastic and direct precedent so available that the subpoena questioned in the principal case might easily have been approved.[25] The court's objection to the breadth of the subpoena in the *Strawn* case is seemingly rooted in the fact that irrelevant matters will be exposed to hostile scrutiny along with the relevant;[26] yet, in private litigation, subpoenas are normally upheld against this objection[27] especially if the

21. 4 WIGMORE, EVIDENCE § 2200 and cases there cited; see, also, Brown v. United States, 276 U. S. 134, 143 (1928).

22. 4 WIGMORE, EVIDENCE § 2200; United States v. Babcock, 24 Fed. Cas. No. 14,484, p. 908 (C. C. E. D. Mo. 1876); In re Storror, 63 Fed. 564 (N. D. Cal. 1894); Norwich Fire Ins. Soc. v. Gomez, 1 Porto Rico Fed. 498 (1904).

23. Thus courts generally allow broad subpoenas where they regard the public interest as strong. United States v. Terminal Rr. Ass'n of St. Louis, 148 Fed. 486 (C. C. E. D. Mo. 1906) United States v. Watson, 266 Fed. 736 (N. D. Fla. 1920) and cases cited *infra*, note 24. Cf. Ex Parte Gould, 60 Tex. Crim. Rep. 442, 132 S. W. 364 (1910). See, particularly, Hale v. Henkel, 201 U. S. 43, 70 (1906); Consolidated Rendering Co. v. Vermont, 207 U. S. 541, 554 (1908).

24. United States v. Babcock, 24 Fed. Cas. No. 14,484, p. 908 (C. C. E. D. Mo. 1876); In re Storror, 63 Fed. 564 (N. D. Cal. 1894); cf. Wilson v. United States, 221 U. S. 361 (1911). Comparable subpoenas, calling for virtually all the books and papers of corporations have been upheld, although the doctrine of Hale v. Henkel, 201 U. S. 43 (1906) outlawing broad subpoenas, is still nominally adhered to. Consolidated Rendering Co. v. Vermont, 207 U. S. 541 (1908); Hammond Packing Co. v. Arkansas, 212 U. S. 541 (1909); Wheeler v. United States, 226 U. S. 478 (1912); United States v. Invader Oil Corp., 5 F. (2d) 715, (S. D. Cal. 1925); see, particularly, Standard Home Co. v. Davis, 217 Fed. 904, 916 (E. D. Ark. 1914).

25. Thus most of the closest precedents which hold broad subpoenas invalid are distinguishable. Hale v. Henkel, 201 U. S. 43 (1906); United States v. Hunter, 15 Fed. 712 (N. D. Miss. 1882); Ex Parte Jaynes, 70 Cal. 639, 12 Pac. 117 (1886); Ex Parte Brown, 72 Mo. 83 (1880), rev'g Mo. App. 484 (1878) (last two cases squarely *contra* to federal cases in same jurisdiction, note 24, *supra*); Ex Parte Gould, 60 Tex. Crim. Rep. 132 S. W. 364 (1910) (senders not named; based on relevancy); State v. Bragg, 59 Mo. App. 334 (1892); State v. Davis, 117 Mo. 614, 23 S. W. 759 (1893) (called for *all* prescriptions, not particular doctor's).

26. Yet the Black Committee had pledged that it would make no public revelation of irrelevant documents. N. Y. Times, March 8, 1936, § IV at 3, col. 1. If, however, the court's objection was founded on a "distinct" requirement of specificity it should have been refuted by the fact that the documents were specified with the particularity practicable under the circumstances, that there was no uncertainty as to the papers desired.

27. In re International Corp. Co., 5 F. Supp. 608 (S. D. N. Y. 1934) (contrary rule would mean that an examination could always be prevented by including non-pertinent matters);

unrelated portions may be removed under the supervision of a court,[28] as was possible in the instant case.

Although the Congressional subpoena in the principal case seems to be well within the limits of validity imposed upon subpoenas used in private controversies, questions of whether the restrictions governing judicial subpoenas should be extended to the subpoenas issued in Congressional investigations, and whether the breadth of the Congressional subpoena should be curtailed, and, if so, to what degree, are questions which cannot be disposed of on the doctrinal level alone. In private proceedings where the public interest is least discernible, there is little justification for allowing documents not clearly necessary to the litigation to be scrutinized. But Congressional Committees must be accorded wide latitude if their investigations, often directed to large or ambiguous ends, are to be effective.[29] The addition of judicial restrictions to the persistent practical difficulties and emotional hysteria attending investigations will strengthen the position of recalcitrant witnesses[30] who are thereby enabled effectively to check a Congressional inquiry by forcing protracted appeals to the courts.[31] Notwithstanding its possible dilatory effect, the restriction of relevancy, reasonably applied, appears to be desirable and perhaps necessary to confine committees to the legitimate objectives of the inquiry authorized.[32] But the wisdom of a limitation of specificity is questionable, for it seems unnecessary, the policy upon which it is founded being largely the same as that for the restriction of relevancy. Even if specificity is considered as a separate requisite of subpoenas, the bases for its application in ordinary litigation are not persuasive in the sphere of Congressional investigation.

Cooley v. Bergin, 27 F. (2d) 930 (D. Mass. 1928); see State v. Superior Ct., 109 Wash. 634, 642, 187 Pac. 258, 261 (1920).

28. Cf. Wilson v. United States, 221 U. S. 361 (1911).

29. That necessity is testified to by the long-continued use of "dragnet" subpoenas by Congress. See, EBERLING, loc. cit. *supra* note 2. And in the case of United States v. American Tobacco Co., 146 Fed. 557 (C. C. S. D. 1906), the necessity of a "fishing excursion" was recognized to justify the subpoena. Cf., also, Harlan J. concurring in Hale v. Henkel, 201 U. S. 43, 78 (1906).

30. The institution of the instant suit has precipitated a wave of attacks on Congressional investigations: e. g. by William Randolph Hearst [Hearst v. Black (Sup. Ct. D. C. April 8, 1936), oral opinion reported in N. Y. Times, April 9, 1936, at 18, col. 3], Kurt Grunwald [N. Y. Times, April 7, 1936, at 1, col. 4], Dr. Francis Townsend and two of his aides, [N. Y. Times, May 29, 1936, at 2, col. 1].

31. Congress may compel obedience to its mandates by recourse to its contempt powers or by instigating a criminal prosecution pursuant to statute. 11 STAT. 155, 156 (1857), 2 U. S. C. A. §§ 192, 194 (1926). In the former case, the question may be raised by habeas corpus either when the recalcitrant witness has been taken into custody to be tried for contempt or after he has been committed for contempt. See, in general, Potts, *Power of Legislative Bodies to Punish for Contempt* (1926) 74 U. of Pa. L. REV. 691, 780. Whatever procedure is adopted, a final disposition of the matter involves long delay, and the investigation is effectively thwarted, e. g. *Daugherty* case (3 years); *Sinclair* case (5 years).

32. It would seem preferable to allow the committee itself, rather than the courts, to judge the pertinence of the papers demanded and if the committee is allowed this power the customary procedure followed in the instant case of examining the subpoenaed telegrams and copying only those relevant to the inquiry would seem to be sufficient. Cf. Consolidated Rendering Co. v. Vermont, 207 U. S. 541 (1908); 4 WIGMORE, EVIDENCE § 2200 and cases cited; PA. STAT. ANN. (1930) tit. 15, § 2442.

The Fourth Amendment, already expanded so far beyond its original objectives[33] as to make a further extension unwarranted, would seem to be adequately satisfied by the relevancy restriction; and the objection to the inconvenience which accompanies a search without the guidance of a specific subpoena must yield[34] to the paramount public interest in having Congress unembarrassed in its efforts to legislate. If it is objected that a requirement of specificity is essential to the protection of radical organizations from persecution, it can be said in reply that restrictions upon the permissible breadth of subpoenas will be of small protection if persecution is intended.

Successive Deeds to the Same Property between the Same Parties[1]

In 1854 *A* secured from the Commissioner of the New York Land Office letters patent to the underwater land appurtenant to his littoral property, conditioned upon his filling in the lands and building a dock within five years.[2] There had been no compliance with these terms in 1887 when *X*, who had through mesne conveyances succeeded to *A*'s title to the littoral property, obtained from the state for an undetermined reason a new grant similarly conditioned. None of the deeds in *X*'s chain of title specifically included the underwater land, and it was not until twelve years after the issuance of *X*'s letters patent that the New York Court of Appeals decided that the title to land under water was appurtenant to title in the adjacent uplands and passed by a conveyance of the littoral property without specific description.[3] In 1932, one day before the expiration of the forty-year Statute of Limitations on the state's cause of action based upon the breach of the second patent,[4] the state brought an action against the defendant, successor in title to *X*, to foreclose the interests conveyed by both grants. The lower courts dismissed the cause of action based upon the earlier grant, holding, first, that the grant conveyed a fee subject to defeasance for breach of condition subsequent and, secondly, that the power to fore-

33. The Amendment was originally designed to guard against writs of assistance and general warrants used in seditious libel cases [Boyd v. United States, 116 U. S. 616 (1886); Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause* (1930) 29 Mich. L. Rev. 1, 191; Fraenkel, *Concerning Searches and Seizures* (1921) 34 Harv. L. Rev. 361], and seemingly limited in its application to the use of such devices for purposes of crimination. Boyd v. United States, *supra*. This limitation has long since been abandoned. Handler, *supra* note 2, at 915; Comment (1936) 10 U. of Cin. L. Rev. 308; Hale v. Henkel, 201 U. S. 43 (1906). The *Boyd* case further extended the Fourth Amendment to a subpoena duces tecum demanding the production of incriminating evidence, and in Hale v. Henkel, *supra*, the Amendment was again extended to cover a subpoena duces tecum issued in any judicial proceeding. In Olmstead v. United States, 277 U. S. 438 (1928), the court refused to extend the Amendment to cover the tapping of telephone wires, which would seem to come more nearly within the spirit of the Amendment than the issuing of a subpoena duces tecum.

34. As it often does in judicial proceedings. Wertheim v. Continental Ry. & Trust Co., 15 Fed. 716 (C. C. S. D. N. Y. 1883); Johnson Steel Street-Rail Co. v. North Branch Steel Rail Co., 48 Fed. 19 (C. C. W. D. Pa. 1891); State v. Superior Ct., 109 Wash. 634, 187 Pac. 358 (1920).

1. People v. Tombkins-Kiel Marble Co., 269 N. Y. 77, 199 N. E. 10 (1935).

2. For a discussion of the procedure involved in the obtaining of these grants, see Getman, Title to Real Property (1921) 237 et seq.

3. Archibald v. N. Y. C. & H. R. Rr. Co., 157 N. Y. 574, 52 N. E. 567 (1899).

4. N. Y. Civil Practice Act (1932) § 31.

close based upon the breach of the condition in that grant became barred in 1899, with the result that the defendant's title was thereafter immune from the state's attack.[5] The New York Court of Appeals, however, while assuming that the defendant would have had an indefeasible fee since 1899 under the first grant alone, reversed the order of dismissal on the ground that acceptance by *X* of the 1887 grant evinced an intent to claim only under that patent, so that his grantees were estopped from asserting title under the earlier deed.[1] Three judges, concurring specially, agreed that the motion to dismiss should not have been granted, but proposed that a full disposition of the matter await ascertainment, by answer and trial, of the facts surrounding the grant of the second patent.

When *A* purchases from *C* an outstanding claim of title to land whose ownership *A* himself asserts under a prior grant from *B*, *A* is usually commended for "buying his peace" and thereby curtailing litigation, and he is not precluded from claiming under the original conveyance from *B*.[6] Similarly, the mere act of *A*, or his successors in title, in taking a second deed to the same land from the same grantor, *B*, is generally considered to be cumulative and not to estop him from relying on the first deed as well as the second. The attempt to restrict *A* to his second deed is usually made by a third party whose own claim of title is superior to *A*'s second grant from *B*, either because the latter is intrinsically defective,[7] or has conveyed a lesser estate than the first grant,[8] or because the third party's claim intervenes between the two deeds under which *A* holds.[9] But in at least one case like the instant one, where the grantor, *B*, himself sought to have *A* constrained to hold under the second of two deeds, it was likewise held that nothing in the relationship of *A* and *B* deterred *A* from claiming under both deeds.[10] The only exception to the policy of giving subsequent deeds a cumulative effect seems to be made when the second deed is intended to settle any question or dispute over the terms of its predecessor.[11] The distinguishing feature of these cases is the intent of the parties to abandon the first grant and to rely solely on the second—an intent, it seems, which must be

5. People v. Tombkins-Kiel Marble Co., 148 Misc. 559, 265 N. Y. Supp. 243 (Sup. Ct. 1932), aff'd without opinion, 241 App. Div. 695, 270 N. Y. Supp. 940 (2d Dep't 1934).

6. So. Pac. Rr. Co. v. Ambler Grain & Milling Co., 57 F. (2d) 536 (S. D. Cal. 1932); San Francisco v. Lawton, 18 Cal. 465 (1861); Yerby v. Gilham, 147 Ga. 432, 94 S. E. 246 (1917); Watkins v. Houck, 44 Kan. 502, 24 Pac. 361 (1890); Kenada v. Gardner, 3 Barb. 589 (N. Y. Sup. Ct. 1848); see Jackson v. Cary, 16 Johns. 302, 305 (N. Y. Sup. Ct. 1819); Coakley v. Perry, 3 Ohio St. 344, 346 (1854).

7. McConnel v. Crittenden County, 250 Ky. 359, 63 S. W. (2d) 329 (1933) (second ferry franchise invalid because of prior statute).

8. Town of Golconda v. Field, 108 Ill. 419 (1884) (second ferry franchise for term of years taken by possessor of perpetual franchise).

9. Tully v. Tully, 137 Cal. 60, 69 Pac. 700 (1902); Thompson v. Thompson, 19 Me. 235 (1841); cf. City of St. Joseph ex rel. Forcee v. Baker, 86 Mo. App. 310 (1900).

10. Sylvester v. State, 46 Wash. 585, 91 Pac. 15 (1907) (grantor seeking to enforce right of reentry for breach of condition subsequent in second deed where first deed was for unqualified fee simple).

11. Nichol v. Trustees of the Town of Huntington, 1 Johns. Ch. 166 (N. Y. Ch. 1814); Town of Babylon v. Darling, 207 N. Y. 651, 100 N. E. 727 (1912); Chloupek v. Perotka, 89 Wis. 551, 62 N. W. 537 (1895). A second exception has been suggested of subsequent deeds from successive sovereigns. People v. Foote, 242 App. Div. 162, 273 N. Y. Supp. 567 (2d Dep't 1934). The cases there relied on, however, are distinguishable. E. g., Jacob v. Smead, 1 D. Chip. 56 (Vt. 1791) (recital in second deed of surrender of first); Tameling v. U. S. Freehold & Emigration Co. 93 U. S. 644 (1876) (federal grant controlled by statute).

clearly inferable from the facts, since the courts more willingly presume that legal rights are being retained than that they are being voluntarily surrendered.[12]

To the extent, therefore, that the prevailing opinion of the instant case derives from the fact that *X* took a new grant a constructive intent to claim under the second patent alone and an estoppel to rely on the earlier deed, it appears to deviate from the general rule. While the intent of the parties in 1887 is conjectural, it can hardly be assumed that *X*, in taking the second patent, intended to divest himself of possible interests under the first grant which an examination in the appropriate recordation office would have shown him he already possessed.[13] And in any event it seems harsh to penalize *X* for his diligence in seeking to strengthen his claim, whereas complete inactivity would have given him an indefeasible title in 1899. The conclusion, however, is not without support. By the doctrine of election, generally assimilated into a broader concept of estoppel, one who claims under a deed may not assume inconsistent positions in relation to it.[14] After the breach of the condition of the first grant the state retained a power to terminate the fee which, by virtue of the Statute of Limitations, had to be exercised before 1899.[4] When *X* received the second grant in 1887, this power had twelve more years to run. The later grant, therefore, could operate only to release this power and to create in the grantee an immunity from divestiture for five of the twelve years. But at the same time, *X*'s application, like the admission of an outstanding paramount claim by an occupant of land whose adverse possession has not yet ripened into title,[15] amounted to a recognition of the state's power which tolled the Statute of Limitations on the state's action to terminate the *first* grant and subjected *X* to a liability of divestiture of his estate for a new period of forty years from the expiration of the second five year period in 1892. Having enjoyed the immunity, the grantee could not, under the doctrine of election, subsequently deny the concomitant liability. Since the state had nothing left to grant in 1887 but its twelve-year power to terminate, any title the defendant had in 1932 could be derived only from the first grant and not from the second. If docks had been built before 1932 the defendant's fee would have been indefeasible.[16] Since they were not, the state's action was properly for breach of the condition of the first grant and not of the second.

12. It is usually said that title to land cannot be abandoned. The cases might be distinguished, however, on the ground of the lack of any evidence of intent to abandon other than non-user. See Sullivan Construction Co. v. Twin Falls Amusement Co., 44 Idaho 520, 526, 258 Pac. 529, 530 (1927); Robie v. Sedgwick, 35 Barb. 319, 329 (N. Y. Sup. Ct. 1861); In the Matter of the City of New York, 256 N. Y. 217, 221, 176 N. E. 171, 172 (1931). See generally Simonton, *Abandonment of Interests in Land* (1930) 25 ILL. L. REV. 261.

13. New York statutes require that all land grants by the state be recorded in the office of the Secretary of State, N. Y. PUBLIC LANDS LAW (1917) § 5, and permit their recordation also in the proper county, N. Y. REAL PROP. LAW (1917) § 295. Recordation of land grants has been required by statute since 1664. See N. Y. C. & H. R. Rr. Co. v. Brockway, 158 N. Y. 420, 424, 53 N. E. 209 (1899).

14. 1 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1918) §§ 487, 488; Fox v. Windes, 127 Mo. 502, 30 S. W. 323 (1895); Jones v. Jones, 1 Call. *458 (Va. 1798).

15. Arcady Camps, Inc., v. Berry, 207 App. Div. 63, 202 N. Y. Supp. 398 (3d Dep't 1923); see Jackson v. Britten, 4 Wend. 507, 511 (N. Y. Sup. Ct. 1830). The rule elsewhere is unsettled. 2 TIFFANY, REAL PROPERTY (2d ed. 1920) § 507.

16. Although theoretically the building of docks after the expiration of the five year period would not have healed the breach of the condition subsequent of the first patent, the state would probably have been estopped from asserting its power to terminate after the docks had actually been completed. Cf. Palmer v. State, 174 App. Div. 933, 160 N. Y. Supp. 892 (3rd Dep't 1916).

FILING OF WAGE ASSIGNMENT AS INTERFERENCE WITH CONTRACTUAL RELATIONS[1]

A, A PURCHASER of uncollected claims, bought a judgment of $172 outstanding against *B*, an illiterate railroad laborer, and obtained from him a written agreement to pay $100 in $2 bi-weekly instalments in satisfaction of the judgment, together with an assignment of all his present or future wages as security. Upon *A's* filing the assignment with *B's* employer, *B* was discharged in accordance with a standing rule of the company. Although notified of *B's* dismissal and of the necessity of his obtaining a withdrawal of the assignment before he could be reinstated, *A* refused to act unless the arrearages of $6 were paid and *B's* lawyer "vouched" that future payments would be made as agreed. *B*, unable to obtain other employment and forced upon public relief, brought an action against *A* to recover damages for wrongful interference with his employment. The Appellate Division of the New York Supreme Court, without opinion and with two judges dissenting, affirmed the trial court's denial of the defendant's motion to dismiss the complaint, on the ground that the assignment was void as against public policy and that its filing and the defendant's deliberate refusal to withdraw it when advised of its effect had resulted in the loss of the plaintiff's job.

The doctrine of *Lumley v. Gye*,[2] that "malicious" inducement of breach of contract constitutes an actionable tort, has been expanded to comprehend increasingly broader fields.[3] While the New York courts at first limited recovery to cases where the inducement involved fraud, misrepresentation or other means in themselves tortious,[4] they have abandoned this position,[5] together with the restriction of the rule to contracts for personal services,[6] and have progressively broadened their interpretation of the "malicious" element of the tort to mean no more than an intentional inducement of breach without sufficient justification.[7] The doctrine has even been extended in some jurisdictions to include a purely negligent interference with contractual relations,[8] although there is no agreement on this point[9] and the New York law

1. Messina v. Continental Purchasing Co., 285 N. Y. Supp. 177 (App. Div. 3d Dep't 1936), noted (1936) 36 COL. L. REV. 849.

2. 2 El. & Bl. 216 (Q. B. 1853).

3. For the historical background of the doctrine, see Sayre, *Inducing Breach of Contract* (1923) 36 HARV. L. REV. 663.

4. Ashley v. Dixon, 48 N. Y. 430 (1872); Laskey Feature Play Co. v. Fox Vaudeville Co., 93 Misc. 364, 157 N. Y. Supp. 106 (Sup. Ct. 1916), aff'd without opinion, 174 App. Div. 872, 159 N. Y. Supp. 1120 (1st Dep't 1916); cf. Goodman Bros. v. Ashton, 211 App. Div. 769, 208 N. Y. Supp. 83 (1st Dep't 1925). The foundations of the tort in New York were laid as early as 1809, when an action was recognized for "enticement." See Hutcheson v. Peck, 5 Johns. 196, 203 (N. Y. 1809). Later cases directly anticipated the doctrine of *Lumley v. Gye*. Aldridge v. Stuyvesant, 1 Hall *210 (N. Y. 1828); Benton v. Pratt, 2 Wend. 385 (N. Y. 1829).

5. Gonzales v. Ky. Derby Co., 197 App. Div. 277, 189 N. Y. Supp. 783 (2d Dep't 1921), aff'd without opinion, Gonzales v. Reichenthaler, 233 N. Y. 607, 135 N. E. 938 (1922).

6. Ibid.; Campbell v. Gates, 236 N. Y. 457, 141 N. E. 914 (1923).

7. Hornstein v. Podwitz, 254 N. Y. 443, 173 N. E. 674 (1930).

8. Cf. Western Union Telegraph Co. v. Ramsey, 261 Ky. 657, 88 S. W. (2d) 675 (1935), noted (1936) 30 ILL. L. REV. 1062; see Carpenter, *Interference with Contract Relations* (1928) 41 HARV. L. REV. 728, 737-742; (1926) 40 HARV. L. REV. 302. The tort of interference with contractual relations is, of course, broader in scope than the action for intentional inducement of breach. See Carpenter, *supra*, at 728-732, 737-742; Note (1933) 84 A. L. R. 43, 52-55. Thus, any act which interferes with the performance of a contract may be actionable, although it does not induce actual breach. Woodward v. Washburn, 3 Den. 369

remains uncertain.[10] The Court of Appeals has held it immaterial that the contract is unenforceable by reason of the Statute of Frauds,[11] and other courts have ruled likewise with respect to contracts voidable at the option of the party induced,—because of a prior breach by the plaintiff[12] or a clause permitting cancellation,[13]—and with respect to contracts terminable at will,[14] as in the instant case, or unenforceable by reason of lack of mutuality[15] or uncertainty.[16] Finally, the courts have recognized a right of action for preventing the formation of a contract, although by the majority view such interference is not actionable unless it involves an independently tortious act.[17]

It may be questioned whether the assignment in the instant case was void under existing law,[18] but if it be assumed, in order to examine the case in the light more favorable to the plaintiff, that the court was correct in holding the assignment invalid,[19] its decision can conceivably be supported on two grounds—either wrongful interference with the plaintiff's existing employment or wrongful prevention of the creation of a new employment relation. Since there were no allegations of fraudulent[20]

(N. Y. 1846); Reiner v. North Amer. Newspaper Alliance, 259 N. Y. 250, 181 N. E. 561 (1932), noted (1932) 32 COL. L. REV. 1236, (1932) 46 HARV. L. REV. 158.

9. La Société Anonyme de Remorquage à Félice v. Bennetts, [1911] 1 K. B. 243; Robins Dry Dock & Repair Co. v. Flint, 275 U. S. 303 (1927); see Green, *Relational Interests* (1935) 29 ILL. L. REV. 1041, 1043; Sayre, *supra* note 3, at 680, n. 58.

10. Cf. Glanzer v. Shepard, 233 N. Y. 236, 135 N. E. 275 (1922); Doyle v. Chatham & Phenix Nat. Bank, 253 N. Y. 369, 171 N. E. 574 (1930); see Fitzpatrick v. Personal Finance Co. of N. Y., N. Y. L. J., April 23, 1936, at 2067, col. 1 (Sup. Ct.).

11. Rice v. Manley, 66 N. Y. 82 (1876). *Contra:* Little v. Childress, 12 S. W. (2d) 648 (Tex. Civ. App. 1928).

12. Angle v. Chicago, St. P., M. & O. Ry. Co., 151 U. S. 1 (1894).

13. General Outdoor Advertising Co. v. Hamilton, 154 Misc. 871, 278 N. Y. Supp. 226 (Sup. Ct. 1935).

14. Truax v. Raich, 239 U. S. 33 (1915); Chipley v. Atkinson, 23 Fla. 206, 1 So. 934 (1887); Berry v. Donovan, 188 Mass. 353, 74 N. E. 603 (1905); Warschauser v. Brooklyn Furniture Co., 159 App. Div. 81, 144 N. Y. Supp. 257 (2d Dep't 1913). *Contra:* Biber Bros. News Co. v. New York Evening Post, 144 Misc. 405, 258 N. Y. Supp. 31 (Sup. Ct. 1932); see Sayre, *supra* note 3, at 696-702.

15. Laskey Feature Play Co. v. Fox Vaudeville Co., 93 Misc. 364, 157 N. Y. Supp. 106 (Sup. Ct. 1916), aff'd without opinion, 174 App. Div. 872, 159 N. Y. Supp. 1120 (1st Dep't 1916). But cf. Exchange Bakery and Restaurant v. Rifkin, 245 N. Y. 260, 157 N. E. 130 (1927).

16. Aalfo Co. v. Kinney, 104 N. J. Eq. 207, 144 Atl. 715 (1929), noted (1929) 28 MICH. L. REV. 94.

17. See ANSON, CONTRACTS (Corbin ed. 1930) 351, n. 1; (1926) 25 MICH. L. REV. 206.

18. Sacks v. Neptune Meter Co., 144 Misc. 70, 258 N. Y. Supp. 254 (Sup. Ct. 1932), aff'd, 238 App. Div. 82, 263 N. Y. Supp. 462 (1st Dep't 1933), noted (1932) 10 N. Y. U. L. Q. REV. 235. N. Y. PERS. PROP. LAW (1934) § 46, which declares invalid all assignments of wages amounting to twelve dollars or less per week, and permits collection of not more than ten per cent of wages above that sum, was passed three weeks *after* the assignment in the instant case. For restrictive legislation in other states, see Strasburger, *The Wage Assignment Problem* (1935) 19 MINN. L. REV. 536; (1932) 45 HARV. L. REV. 1102.

19. When the assignment is valid, no recovery is permitted for the employee's discharge, on the theory that defendant was exercising a contract right equal or superior to the plaintiff's right. Cf. Haines v. Welker, 182 Iowa 431, 165 N. W. 1027 (1918); see Southern Finance Co. v. Foster, 19 Ala. App. 109, 111, 95 So. 338, 340 (1923).

20. Recovery is uniformly allowed where an attempt has been made to enforce an

or intentional interference,[21] to support the decision on the first of these grounds would require an inference of constructive intent from the defendant's knowledge that the plaintiff's dismissal would be the probable consequence of his act.[22] While such knowledge may readily be ascribed to a company engaged in the business of liquidating small claims, where familiarity of creditor and debtor alike with the prohibition of many employers against assignments of wages makes the threat of "telling the boss" the most effective method of compelling payment,[23] the New York Court of Appeals may hesitate to rely solely on such an "intent." With respect to the second possible basis of the decision, although the defendant's refusal to withdraw the assignment may be more indicative of an actual intent to prevent the plaintiff's reemployment, the Court of Appeals has recently allied itself by way of dictum with the majority rule that interference with the formation of contracts is actionable only where "malicious, fraudulent and deceitful" means are employed.[24]

The problem of determining when an interference with a contractual relationship is privileged or justified ultimately resolves itself, however, into one of balancing the social importance of the interests invaded against the desirabilty of permitting the invader freedom of action.[25] The interest in freedom to enter into contractual relations is apparently less highly protected in the law than the interest in freedom from interference with existing contracts. Thus, where *A* enters into a contract with *C* the performance of which he knows or surmises will necessitate the breach of *C's* existing contract with *B*, the second contract is unenforceable,[26] and *A* has been held liable to *B* for an unprivileged interference with *B's* contractual interests.[27] The same

admittedly invalid assignment. Southern Finance Co. v. Foster, 19 Ala. App. 109, 95 So. 338 (1923); Bartlett v. Federal Outfitting Co., 133 Cal. App. 747, 24 P. (2d) 877 (1933); Kennedy v. Hub Mfg. Co., 221 Mass. 136, 108 N. E. 932 (1915); Scott v. Prudential Outfitting Co., 92 Misc. 195, 155 N. Y. Supp. 497 (Sup. Ct. 1915); Suarez v. McFall Bros., 87 S. W. 744 (Tex. Civ. App. 1905); Askins v. Sparks, 56 S. W. (2d) 279 (Tex. Civ. App. 1933). But cf. Pickens v. Copeland Grocery Co., 219 Ala. 697, 123 So. 223 (1929), noted (1929) 39 YALE L. J. 294. See Note (1924) 29 A. L. R. 532, 537. But where the defendant has acted in good faith, there is no cause of action, even though the assignment was in fact void. Hutchins v. Jones Piano Co., 209 Iowa 394, 228 N. W. 281 (1929).

21. Evans v. McKay, 212 S. W. 680 (Tex. Civ. App. 1919); Cotton v. Cooper, 209 S. W. 135 (Tex. Com. App. 1919).

22. Cf. Twitchell v. Nelson, 131 Minn. 375, 155 N. W. 621 (1915); see Holmes, *Privilege, Malice, and Intent* (1894) 8 HARV. L. REV. 1; (1926) 40 HARV. L. REV. 302.

23. See Fortas, *Wage Assignment in Chicago* (1933) 42 YALE L. J. 526, 531-532; Hamilton, *In re the Small Debtor* (1933) 42 id. 473, 483.

24. See Union Car Advertising Co. v. Collier, 263 N. Y. 386, 400, 189 N. E. 463, 469 (1934). *Contra*: Lewis v. Bloede, 202 Fed. 7 (C. C. A. 4th, 1912); NIMS, UNFAIR COMPETITION AND TRADEMARKS (3d ed. 1929) § 176; cf. Doucette v. Sellinger, 228 Mass. 444, 117 N. E. 897 (1917).

25. See Carpenter, *supra* note 8, at 745 et seq.; Sayre, *supra* note 3, at 686-696. Thus, advancing the interests of organized labor has been recognized as sufficient justification for a labor union's inducing the breach of a subsisting labor agreement. Stilwell Theater v. Kaplan, 259 N. Y. 405, 182 N. E. 63 (1932); see Comment (1932) 46 HARV. L. REV. 125.

26. Roberts v. Criss, 266 Fed. 296 (C. C. A. 2d, 1920); Attridge v. Pembroke, 235 App. Div. 101, 256 N. Y. Supp. 257 (4th Dep't 1932); see (1914) 27 HARV. L. REV. 273.

27. N. Y. Bank Note Co. v. Hamilton Bank Note Engraving & Printing Co., 83 Hun 593, 31 N. Y. Supp. 1060 (Sup. Ct. 1895); Standard Amer. Pub. Co. v. Methodist Book Concern, 33 App. Div. 409, 54 N. Y. Supp. 55 (1st Dep't 1898); see Carpenter, *supra* note 8, at 746-747.

principle might be applied in a case like the instant one, where *A*, the defendant, enters into a contract with *B*, the plaintiff himself, and the performance of the contract will in all probability involve the same termination by *C* of an existing contractual relationship with *B*.[28] When *A* is a professional collection agency or "loan shark" and *B* is a small wage-earner, there should be no doubt as to which social interest ought to prevail; for the vicious consequences attendant upon permitting the small debtor to pledge his future earnings are evidenced by the abuses of the practice[29]—abuses acknowledged in New York by the statutory restrictions which took effect shortly after the execution of the assignment in the instant case.[18]

PRIVATE TRUSTS FOR INDEFINITE BENEFICIARIES[1]

SEVERAL recent cases suggest a reconsideration of the doctrine announced by Sir William Grant and Lord Chancellor Eldon in the famous *Bishop of Durham* case that a private trust will fail unless there be a definite beneficiary capable of enforcing it.[2] Supporters of the doctrine have argued that recognition of a trust without a definite beneficiary would destroy the symmetry of the trust concept by rendering temporarily "homeless" the beneficial interest.[3] Commentators of this view justify the disregard of the testator's intent implicit in the *Bishop of Durham* rule by reminding prospective creators of testamentary trusts that other devices are available which will give full effect to such intent without confusion of the trust concept.[4] The California Supreme Court followed the traditional doctrine without question when it recently invalidated a bequest to the testator's executor "in trust" with "absolute authority to dispose of this my entire estate as he may see fit."[1] The only dissenting justice disagreed, not with the invalidation of the trust, but with the award of the estate to the testator's heirs and next of kin, asserting with the lower court that the testator's intent as ascertained from a reading of the entire will was not to create a trust at all, but to make an absolute gift.

A wary testator may find means outside of the trust device to avoid the hazard which defeated the testator's intent in the *Bishop of Durham* case. Perhaps the simplest technique is the bequest of a gift in the nature of a base fee or one limited upon a condition subsequent.[5] The testator may also enter into a contract which will

28. Cf. Harrington v. Victoria Graving Docks Co., 47 L. J. 594 (Q. B. 1878).

29. In one large industrial concern employing 5380 employees, 3390 wage assignments were filed in a single year; and a study of 432 wage assignments handled by the Legal Aid Bureau of Chicago revealed 42% to be legally unenforceable. These figures become significant when many of the larger firms consider one, two or three "wage tie-ups" grounds for dismissal and generally do not distinguish between valid and invalid assignments. Fortas, *supra* note 23, at 532-544.

1. In re Thompson, [1934] Ch. 342, noted (1934) 50 L. Q. REV. 324; In re Ralston's Estate, 1 Cal. (2d) 724, 37 P. (2d) 76 (1934), noted (1935) 35 COL. L. REV. 954; Allred v. Beggs, 125 Tex. 584, 84 S. W. (2d) 223 (1935), noted (1936) 34 MICH. L. REV. 582.

2. Morice v. Bishop of Durham, 9 Ves. 399 (Ch. 1804), aff'd, 10 Ves. 522 (Ch. 1805).

3. See Gray, *Gifts for a Non-Charitable Purpose* (1902) 15 HARV. L. REV. 509, 514; 1 BOGERT, TRUSTS AND TRUSTEES (1935) § 166.

4. See 1 BOGERT, op. cit. *supra* note 3, §§ 161, 166. Few of the cases involve *inter vivos* trusts.

5. The possibility has been recognized of the creation of such interests in chattels personal as well as in chattels real or in realty. See Simes, *Future Interests in Chattels Personal* (1930) 39 YALE L. J. 771, 784-786; Scott, *Control of Property by the Dead* (1917)

be enforceable by his executor, whereby the legatee undertakes for a consideration to accomplish the testator's wishes,[6] or he may form a corporation to carry on after his death if the project is important enough to warrant some expense.[7] Alternatively a legacy may be accompanied by precatory language so phrased that it is not likely to be construed as evidence of an intent to create a trust.[8] The courts themselves have apparently come to the aid of unsophisticated testators by construing doubtful language along one or another of these lines,[9] or, in difficult cases, by holding, as the dissenting justice did in the California case, that the bequest confers an "arbitrary power of disposition" uncontrollable by judicial action, so that the beneficial interest vests absolutely in the legatee.[10] In appropriate cases they find a substitute for a definite cestui capable of enforcing the trust in the person of the attorney general, by calling the trust charitable instead of private.[11] And in England, it seems, mixed trusts for both charitable and indefinite private purposes, whose usual fate is complete failure,[12] may be saved, either by application of the doctrine of *ejusdem generis* to assimilate the

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65 U. OF PA. L. REV. 527, 533. With respect to gifts of chattels personal on conditional limitation, see Gamble v. Gates, 92 Mich. 510, 52 N. W. 941 (1892); Boal v. Metropolitan Museum, 298 Fed. 894, 903 (C. C. A. 2d, 1924); In re Terry's Estate, 218 N. Y. 218, 224, 112 N. E. 931, 934 (1916). With respect to gifts of chattels personal on condition subsequent, see Green v. Old People's Home, 269 Ill. 134, 109 N. E. 701 (1915); In re Tyler, [1891] 3 Ch. 252.

6. Gilman v. McArdle, 99 N. Y. 451, 2 N. E. 464 (1885) semble.

7. Bible Readers' Aid Soc. of Trenton v. Katzenbach, 97 N. J. Eq. 416, 128 Atl. 628 (1925). And "a valid devise or bequest may be limited to a corporation to be created after the death of the testator, provided it is called into being within the time allowed for the vesting of future estates." See Tilden v. Green, 130 N. Y. 29, 47, 28 N. E. 880, 882 (1891); 2 BOGERT, op. cit. *supra* note 3, § 344.

8. Estill v. Ballew, 26 S. W. (2d) 778 (Mo. 1930), 70 A. L. R. 326 (1931) ("request"); In re King, 144 Wash. 281, 257 Pac. 848 (1927) ("my request and will"); see Note (1927) 49 A. L. R. 10. The tendency has been away from construing precatory words as evidence of intent to create a trust. 2 JARMAN, WILLS (7th ed. 1930) 842.

9. Gilman v. McArdle, 99 N. Y. 451, 2 N. E. 464 (1885), cited note 6, *supra*; Davenport v. Sandeman, 204 Iowa 927, 216 N. W. 55 (1927) (precatory words); Kidd's Estate, 293 Pa. 21, 141 Atl. 644 (1928) (same).

10. Some courts stress the arbitrariness of the power of disposition. Harvey v. Griggs, 12 Del. Ch. 232, 111 Atl. 437 (1920), noted (1920) 19 MICH. L. REV. 455; Norman v. Prince, 40 R. I. 402, 101 Atl. 126 (1917), noted (1918) 31 HARV. L. REV. 661. Others stress the testator's intent to vest the total beneficial interest in the legatee. Norris v. Larkin, [1902] 1 Ir. R. 103; Wells v. Doane, 69 Mass. 201 (1855); Beals v. Villard, 268 Mass. 129, 167 N. E. 264 (1929), noted (1930) 14 MINN. L. REV. 310. But cf. Davidson v. Wyman, 214 Mass. 192, 100 N. E. 1105 (1913).

11. See Dwan, *Charities for Definite Persons* (1933) 82 U. OF PA. L. REV. 12. See note 20, *infra*. The desirability may be questioned of burdening the state with the expense of enforcing trusts not clearly for a public purpose. There is some indication, however, that the attorney general is not always a necessary party. Cannon v. Stephens, 18 Del. Ch. 276, 159 Atl. 234 (1932); see cases discussed in ZOLLMAN, AMERICAN LAW OF CHARITIES (1924) § 615; (1928) 12 MINN. L. REV. 653.

12. Smith v. Pond, 107 Atl. 800 (N. J. Ch. 1919), noted (1919) 29 YALE L. J. 242; Morice v. Bishop of Durham, 9 Ves. 399 (Ch. 1804), aff'd, 10 Ves. 522 (Ch. 1805); 2 BOGERT, op. cit. *supra* note 3, § 372; cases collected in SCOTT, CASES ON TRUSTS (2d ed. 1931) 264, n. 1.

apparently non-charitable purposes to the charitable,[13] or in a limited class of mixed trusts—where the trustee may dispose of the funds either to named charitable objects or to indefinite private objects, but must award some part to the former—by requiring an equal division of the property between the two types of objects and establishing a resulting trust for the residuary interests of the share allotted to the non-charities.[14] Finally, the courts in this country have long sustained trusts for the saying of masses,[15] for the erection of monuments to both testators and other persons,[16] for the maintenance of animals[17] and cemetery lots,[18] and for the manumission of slaves,[19] which apparently flaunt the requirement of a definite beneficiary. Sometimes these "honorary" or "specific purpose" trusts are upheld as charitable,[20] sometimes the courts content themselves with saying merely that they are not perpetuities[21] without attempting to rationalize the exception; the opinions seldom contain a satisfactory discussion.[22]

13. In re Douglas, 35 Ch. D. 472 (1887). But cf. Hunter v. Attorney-General, [1899] A. C. 309.

14. Re Clark, 129 L. T. 310 (Ch. D. 1923), noted (1923) 37 HARV. L. REV. 277. This has long been the rule in England where the private objects are definitely ascertainable. Attorney-General v. Doyley, 4 Vin. Abr. 485 (Ch. 1735).

15. Wilmes v. Tierney, 187 Iowa 390, 174 N. W. 271 (1919), noted (1919) 6 VA. L. REV. 294; cf. In the Matter of the Estate of Khoo Cheng Teow, [1932] S. S. L. R. 226 (Sup. Ct.), discussed, *Developments in the Law—Trusts* (1935) 48 HARV. L. REV. 1162, 1170 (analogous Chinese ceremony of *Sin Chew*). But cf. Matter of Fleischfarb, 151 Misc. 399, 271 N. Y. Supp. 736 (Surr. Ct. 1934) (analogous Jewish ceremony of *Yahrzeit*). See Curran, *Trusts for Masses* (1931) 7 NOTRE DAME LAWY. 42; Comment (1933) 18 CORN. L. Q. 628; Comment (1920) 5 IOWA L. BULL. 253.

16. Mussett v. Bingle, [1876] W. N. 170 (Ch.) (monument to wife's first husband); Masters v. Masters, 1 P. Wms. 421 (Ch. 1718). Monuments to the testator or his family are usually held valid as funeral expenses. See cases collected in 1 BOGERT, op. cit. *supra* note 3, § 164, n. 67. But cf. Spaulding v. Lackey, 340 Ill. 572, 173 N. E. 110 (1930), noted (1931) 25 ILL. L. REV. 814.

17. Mitford v. Reynolds, 16 Sim. 105 (Ch. 1848); In re Dean, 41 Ch. D. 552 (1889); Cleary v. Dillon, [1932] 1 Ir. R. 255; Note (1924) 31 A. L. R. 430; (1923) 11 KY. L. J. 248.

18. Angus v. Noble, 73 Conn. 56, 46 Atl. 278 (1900). *Contra:* In re Fisher's Estate, 8 N. Y. Supp. 10 (Surr. Ct. 1889).

19. Ross v. Duncan, Freem. Ch. 587 (Miss. circ. 1840).

20. Trusts for masses are generally held charitable in the United States. Estate of Semenza, N. Y. L. J., May 16, 1936, at 2522, col. 3 (Surr. Ct.); cases collected in 2 BOGERT, op. cit. *supra* note 3, § 376, n. 29. Monuments to public characters have been upheld as valid charities. Gilmer v. Gilmer, 42 Ala. 9 (1868); see Keasbey, *Gifts for Public Monuments* (1920) 29 YALE L. J. 729. And so have gifts for an indefinite number of animals. Johnston v. Colo. State Bureau of Child and Animal Protection, 86 Colo. 221, 279 Pac. 721 (1929). But cf. Re Grove-Grady, [1929] 1 Ch. 557, 66 A. L. R. 465 (1930).

21. Reichenbach v. Quinn, L. R. 21 Ir. 138 (1888); cf. Gafney v. Kenison, 65 N. H. 354, 10 Atl. 706 (1887). On the other hand, trusts of this sort are frequently invalidated simply as perpetuities. In re Howell's Estate, 145 Misc. 557, 260 N. Y. Supp. 598 (Surr. Ct. 1932), noted (1933) 42 YALE L. J. 1290; Shippee v. Industrial Trust Co., 43 R. I. 115, 110 Atl. 410 (1920), 14 A. L. R. 115 (1921), noted (1920) 30 YALE L. J. 96; cases collected in 1 BOGERT, op. cit. *supra* note 3, § 164, n. 71. See generally GRAY, RULE AGAINST PERPETUITIES (3d ed. 1915) 627, 628; Clark, *Unenforceable Trusts and the Rule Against Perpetuities* (1911) 10 MICH. L. REV. 31; Smith, *Honorary Trusts and the Rule Against Perpetuities* (1930) 30 COL. L. REV. 60; Note (1919) 4 A. L. R. 1124.

22. There is a perception of the problem in Ross v. Duncan, Freem. Ch. 587, 603 (Miss. circ. 1840); In re Dean, 41 Ch. D. 552, 556 (1889). For additional examples of trusts which

A rule so easily evaded, both by testators and by the courts, can hardly claim strong grounds of policy for its persistence. At the same time, the trust device, if freely available, would be more efficient than the various substitute formulas, both in making more certain the accomplishment of the testator's intent and in insulating the trust property from the donee's creditors.[23] The rigid requirement of a definite cestui is traditionally justified on the ground that he is necessary to hold the trustee to the faithful performance of his obligations. But to argue from this premise that the trustee should not be permitted to perform even when he is perfectly willing is a *non sequitur* which results only in a useless reification of the trust concept at the expense of the testator's intent.[24] Nor is it true that without a definite beneficiary the trustee would be free to do what he liked with the trust corpus, for there almost always exists someone—heir, next of kin, or residuary legatee—who, if permitted, could be relied upon to police the trust as effectively as a definite beneficiary.[25] While it is true that the trustee would be under no duty to accept the administration of the trust, his position in this respect would be no different from that of a person named as trustee of a definite private trust; and having undertaken its performance, he would be equally bound, since the non-exercise of his privilege to perform would subject him to the liability of surrendering the trust property to those residually interested. And even if this were not so, the testator's intention is obviously more likely to be fulfilled if the trust is sustained at the risk of an occasional dishonest trustee than if it is completely invalidated and the property given to the residuary interests by way of a resulting trust. These arguments, advanced a generation ago by Dean Ames,[26] have recently been implicitly recognized by the English Court of Chancery. A testator bequeathed a legacy of £1000 to a friend "to be applied by him in such manner as he should in his absolute discretion think fit towards the promotion and furthering of fox-hunting." In a suit by the executors to determine its validity the legacy was sustained over the objection of the residuary legatee, Trinity Hall in the University of Cambridge, that there was no definite beneficiary as required by the *Bishop of Durham* case.[27]

have been sustained despite objections based upon the absence of a definite benficiary capable of enforcing them, see, with respect to trusts for persons not in being, Hayward-Williams Co. v. McCall, 140 Ga. 502, 79 S. E. 133 (1913); Folk v. Hughes, 100 S. C. 220, 84 S. E. 713 (1915); 1 BOGERT, op. cit. *supra* note 3, § 163; 1 PERRY, TRUSTS (7th ed. 1929) § 66; Comment (1929) 42 HARV. L. REV. 813; and, with respect to trusts for unincorporated associations, 1 BOGERT, op. cit. *supra* note 3, § 167, and authorities there collected; Sturges, *Unincorporated Associations as Parties to Actions* (1924) 33 YALE L. J. 383.

23. See 1 BOGERT, op. cit. *supra* note 3, § 146.

24. There would certainly be no objection to a gift to *A* for life with a general power of appointment or a power limited by certain exceptions. See Gray, *supra* note 3, at 512; generally Gray, *Release and Discharge of Powers* (1911) 24 HARV. L. REV. 511.

25. While there may be a statutory procedure for the enforcement of trusts which refers only to the beneficiary, it may not necessarily be exclusive. N. Y. REAL PROP. LAW (1917) § 112 (2) gives the Supreme Court power to remove trustees "on a petition presented, by any person interested in the trust."

26. See Ames, *Failure of the Tilden Trust* (1892) 5 HARV. L. REV. 389; Scott, *supra* note 5. But see Gray, *supra* note 3.

27. In re Thompson, [1934] Ch. 342, cited note 1, *supra;* see *Developments in the Law—Trusts* (1935) 48 HARV. L. REV. 1162, 1164. The trust might have been sustained as charitable in this country. 2 BOGERT, op. cit. *supra* note 3, § 380. But the tendency in England has been to hold trusts for the encouragement of sport non-charitable. In re Nottage, [1895] 2 Ch. 649; In re Clifford, 81 L. J. Ch. 220 (1912). No question of the rule against perpetuities (see note 21, *supra*) was involved in the *Thompson* case, *supra,* because the bequest could be spent immediately.

In a very brief opinion the court followed an earlier Chancery case which involved the validity of a bequest to an executor of £50 annually for the upkeep of a favorite mare,[28] and ordered that the legacy be paid to the trustee upon his "giving an undertaking (which I understand he is willing to give) to apply the legacy when received by him towards the object expressed in the testator's will . . . ; and that, in case the legacy should be applied by him otherwise than towards the promotion and furthering of fox-hunting, the residuary legatees are to be at liberty to apply."

Although this case involved a trust in which the purpose was clearly expressed, the simple solution adopted by the Chancellor could easily be extended to sustain a trust like that in the *Bishop of Durham* case,[29] in which the purpose is indefinite as well as the beneficiary. The two trusts would be hard to distinguish functionally. And the courts should experience no more difficulty in policing indefinite private trusts at the request of the residuary legatees or next of kin than they have encountered in enforcing charitable trusts, which at common law must always be indefinite,[30] at the suit of the attorney general. In a recent Texas case the court inferentially upheld the validity of a trust for "such charities and worthy objects" as the executor and the testator's sister should determine.[31] A bill by the attorney general to enjoin the executor from further administration of the estate for alleged misconduct was dismissed on the ground that the trust was not necessarily for public charity, so that the attorney general was not a proper party to enforce it, but the court added that a gift of part of the estate which had already been made by the executor to the Methodist Episcopal Bishop of Texas for the use of his church was a reasonable exercise of the trustee's discretion. While the testator's heirs and next of kin were not joined as parties to the suit and the court left unanswered the question whether or not they could enforce the trust in the event of the trustee's misconduct, the dictum indicates a possible wholesome trend in this country away from the *Bishop of Durham* doctrine.[32]

Validity of State Condemnation for Low-cost Housing[1]

The inadequacy of American housing, both in the amount and in the kind of shelter provided for persons of low income, is conspicuously dramatized in the urban slum.[2]

28. Pettingall v. Pettingall, 11 L. J. Ch. (N. S.) 176 (1842).

29. A trust as broad as that in In re Ralston's Estate, 1 Cal. (2d) 724, 37 P. (2d) 76 (1934), cited note 1, *supra*, could hardly be enforced even if the residuary interests were allowed to apply. But see note 10, *supra*.

30. See 2 Bogert, op. cit. *supra* note 3, § 362; 1 Jarman, op. cit. *supra* note 8, at 215-224.

31. See note 1, *supra*. In the comparable case of Re Gibbon, [1917] 1 Ir. R. 448, the court sustained a bequest by a Roman Catholic priest of the residue of his estate to his executors, also priests, to dispose of it "to my best spiritual advantage, as conscience and sense of duty may direct." The executors actually spent the funds for the saying of masses, and the opinion is not clear whether the trust would have been sustained otherwise.

32. In Sherman v. Baker, 20 R. I. 446, 40 Atl. 11 (1898), the court, in sustaining a trust for the saying of masses, recognized that the heir at law would be sufficiently interested to compel its performance.

1. New York City Housing Authority v. Muller, 270 N. Y. 333, 1 N. E. (2d) 153 (1936) (O'Brien, J., dissenting without opinion), noted (1936) 5 Brooklyn L. Rev. 327, (1936) 31 Ill. L. Rev. 113, (1936) 12 J. Land & Public Util. Econ. 193, (1936) U. of Pa. L. Rev. 902. See also Comment (1936) 10 St. John's L. Rev. 280, 287.

The case will not be appealed to the Supreme Court of the United States, according to communications to the Yale Law Journal from the attorneys.

2. Real Property Inventory (U. S. Dept. of Comm. 1934); Farm Housing Survey

Disease, moral degeneracy, and crime, products of the slum environment, jeopardize the health and welfare of entire communities and entail the expenditure of public funds far in excess of tax revenues from the blighted areas.[3] But adequate low-cost housing is inaccessible to a large majority of the population so long as the provision of housing is dependent upon private enterprise.[4] High wage rates, crystallized by unionization; the inapplicability of mass productive methods which have made other products widely available; heavy finance charges, high land values in urban centers, and an expectation of profits commensurate with the heavy risks assumed are some of the elements which retard building activity.[5]

Various forms of state subsidies to stimulate private building by closing the gap between costs and the rents that low income groups can afford to pay, although largely untested in the United States before the current depression, have long been successfully utilized abroad. Exemption of new low-rent houses from taxation for a limited term,[6] and government loans at low interest rates to individuals, public utility societies, and municipalties for housing purposes are common.[7] Many nations have given outright grants to non-profit building groups,[8] and some governments have themselves undertaken the construction of cheap housing facilities.[9]

In the United States, however, government efforts concerning housing have largely been restrictive. New York's restrictive legislation dates from 1867,[10] and its Tenement House Law of 1901[11] has been the model for similar legislation in many other states.[12] It prescribes minimum standards of sanitary facilities, space, light, air, and other essentials for the future erection of tenements, with lower standards for existing structures. This statute has been amended upon several occasions, its

(U. S. Dept. of Agric. 1935); WOOD, SLUMS AND BLIGHTED AREAS IN THE UNITED STATES, P. W. A. Housing Div., Bull. no 1 (1935) 80, 82, 97.

3. Britten, *The Relation Between Housing and Health* (1934) 49 U. S. PUBLIC HEALTH REPORTS, no. 84, at 1301, 1302, 1306; WOOD, op. cit. *supra* note 2, at 7, 9, 57, 58, 114; REPORT OF THE CRIME COMMISSION OF NEW YORK STATE (1930) 28, 112; PRESIDENT'S CONFERENCE ON HOME BUILDING AND HOME OWNERSHIP (1932) v. 3, p. 10.

4. REPORT OF THE COMMISSION OF HOUSING AND REGIONAL PLANNING, N. Y. LEGISLATIVE DOCUMENT no. 66 (1926) 25, 28-30; See Symposium on Housing (1934) 1 LAW AND CONTEMPORARY PROBLEMS 135, particularly Woodbury, *Land Assembly for Housing Developments,* id. at 213, 225.

5. For a graphic exposition of building costs in the United States and a comparison with other nations, see BAUER, MODERN HOUSING (1934) 232, 235. For wage rates in the building industry, see (1935) 40 MONTHLY LABOR REV. 1555. And see Conklin, *Building Costs in the Business Cycle* (1935) 43 J. POLIT. ECON. 365.

6. This subsidy has been applied in Denmark, Norway, Italy, France, Belgium, Austria, and Germany. I. L. O. HOUSING AND WELFARE, STUDIES AND REPORTS, series G, no. 3. (1930) 145, 163, 185, 224, 253, 311, 363.

7. Loans at cost have been made by England, Holland, Sweden, Denmark, Norway, Italy, and Austria. Loans at less than cost have been made by France, Belgium and Germany. I. L. O. op. cit. *supra,* note 6, at 83, 106, 126, 141, 161, 178, 305, 211, 240, 354. BAUER, op. cit. *supra* note 5, at 126, 127.

8. Grants have been made by England, Holland, Sweden, Denmark, Norway, Italy, France, Belgium, Austria, and Germany. I. L. O. op. cit. *supra* note 6, at 73, 106, 124, 141, 162, 183, 222, 247, 305, 358. BAUER, op. cit. *supra* note 5, at 126, 127.

9. Local authorities have constructed dwellings in England, Holland, Sweden, Denmark, Norway, Italy, Belgium, Finland, Austria, and Germany. I. L. O. op. cit. *supra,* note 6, at 91, 107, 130, 147, 161, 190, 255, 292, 314, 371.

10. Laws of 1867, c. 908. 11. Laws of 1901, c. 334.

12. See Pumphrey, *Housing Legislation in Kentucky* (1936) 24 KY. L. J. 306, 307.

development culminating in the rigorous Multiple Dwelling Law of 1929.[13] In practically all communities, building codes prescribe standards for fire protection and structural strength. In times of acute housing shortage, emergency rent laws have prevented profiteering by landlords.[14]

While such widely adopted restrictive legislation helps to eliminate bad housing and does remedy some flagrant abuses, it does not strike at the problem of underhousing. If anything, such legislation aggravates underhousing by raising building costs and thus widening the disparity between available rents and those costs. Affirmatively to supplement the restrictive housing statutes, the New York Housing Law of 1926[15] granted tax exemptions to privately owned limited-dividend corporations on the projects they construct. The State Board of Housing shares in the management of such corporations and regulates their rents and profits. Only a few projects have been built under this legislation, and even in these few the rents are above the means of poorer people. The failure of the 1926 Statute to effect substantial relief and the aggravation of the housing problem during the depression[16] led to the 1934 amendment to the Housing Law, enabling each city to set up a municipal housing authority, with power to sell its own bonds, buy land, construct projects and rent them to persons of low income.[17] A housing authority is exempted from the payment of certain taxes and is given the power of eminent domain to enlarge its discretion in the selection of tracts and to protect it against "holdouts."

The New York City Housing Authority sought to condemn land for a slum clearance and low-cost housing project. Defendant, owner of an old-law tenement in the midst of tracts already acquired, resisted the condemnation on the ground that the taking violated the State and Federal Constitutions, since housing did not constitute a "public use." Although the precise question had never been raised previously in a State court,[18] the New York Court of Appeals had no difficulty in upholding the condemnation on the ground that the use was a public one.[1]

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13. Laws of 1929, c. 713; N. Y. MULTIPLE DWELLING LAW (1929) 12. See Adamec v. Post (N. Y. Sup. Ct.) N. Y. L. J., April 11, 1936 at 1841, col. 3. (although the expense of alterations required by the law amounted to 60% of the value of the property, the law was held valid in its application).

14. See Block v. Hirsch, 256 U. S. 135 (1921); Levy Leasing Co. v. Siegel, 258 U. S. 242 (1922).

15. Laws of 1926, c. 823, N. Y. UNCONSOLIDATED LAWS (1926) 235.

16. During the depression, the drive to relieve unemployment and the desire to save homes from foreclosure as well as the need for more adequate housing have evoked unprecedented activity by the Federal Government in the field of housing. See Brabner-Smith, *The National Housing Program* (1936) 30 ILL. L. REV. 557; Fisher, *Federal Housing and Home Loan Legislation* (1934) 32 MICH. L. REV. 943.

Through the Housing Division of the Public Works Administration 49 low-cost housing projects are being created. Two others were abandoned when the federal government was denied the power of eminent domain for purposes of slum clearance. See *infra* note 18.

17. Laws of 1934, c. 4, N. Y. UNCONSOLIDATED LAWS (1934) 252.

18. Federal courts, however, have denied the power of eminent domain for slum clearance to the federal government, declining to adopt a broad construction of the federal spending power and holding that there was no constitutional authority for the undertaking of such work. United States v. Certain Lands in the City of Louisville, 9 F. Supp. 137 (W. D. Ky. 1935), aff'd, 78 F. (2d) 684 (C. C. A. 6th, 1935), cert. granted, 56 Sup. Ct. 154 (1935); cert. dismissed at the request of the government, U. S. L. Week, March 10, 1936, at 614, col. 1; United States v. Certain Lands in the City of Detroit, 12 F. Supp.

The Federal Constitution and the constitutions of practically all the States provide that private property may not be taken for public use without just compensation,[19] and the requirements of due process by implication have added the limitation that private property may not be taken, even with just compensation, *except for* public use. When an instrumentality of a State is condemning property, a decision of the State court on the issue of whether a use is public or private as a matter of due process has been accepted by the Supreme Court as satisfying the requirements of the Fourteenth Amendment.[20] The State courts have split, however, on the meaning of "public use." Some, notably the New York Court of Appeals in the instant case, have made it synonymous with a use contributing to the public welfare;[21] others have taken a narrow view, requiring use by the public or by public agencies.[22] In view of the urgent need for better low-cost housing and the detrimental social effects of slums, it seems hardly conceivable that the use of land for slum clearance could be characterized as "private," whatever doctrine of eminent domain a particular court may claim to apply. Under the "public welfare" theory, housing is concededly a public use. Although it has been assumed that where "use by the public" is the test adopted, condemnation for housing projects could not be justified,[23] that conclusion is not inevitable. In the first place, some jurisdictions which writers have placed in the "use by the public" category do not rightfully belong there; for the reasoning of many decisions is not clear on this issue and conflicting lines of cases may be discovered in the same jurisdiction.[24] Secondly,

345 (E. D. Mich. 1935). It should be noted that both these cases involved the spending power of the federal government and not the police power of the states.

Low-cost housing has been held to be a "public purpose," justifying expenditure by a state. Green v. Frazier, 44 N. D. 395, 176 N. W. 11 (1920), aff'd, 253 U. S. 233 (1920); Willmon v. Powell, 91 Cal. App. 1, 266 Pac. 1029 (1928). *Contra:* In re Opinion of the Justices, 211 Mass. 624, 98 N. E. 611 (1912).

19. U. S. Const. Amendment V; N. Y. Const. art. I, § 6.

20. See Clark v. Nash, 198 U. S. 361 (1905); Strickley v. Highland Boy Mining Co., 200 U. S. 527 (1906); Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co., 240 U. S. 30 (1915); Cf. Green v. Frazier, 253 U. S. 233 (1920).

21. Olmstead v. Camp, 33 Conn. 532 (1866); Hand Gold Mining Co. v. Parker, 59 Ga. 419 (1877); Highland Boy Gold Mining Co. v. Strickley, 28 Utah 215, 78 Pac. 296 (1904), aff'd, 200 U. S. 527 (1906). See also 1 NICHOLS, EMINENT DOMAIN (2d ed. 1917) 131; 1 LEWIS, EMINENT DOMAIN (3d ed. 1909) 504.

22. Sexauer v. Star Milling Co., 173 Ind. 342, 90 N. E. 474 (1910); Arnsperger v. Crawford, 101 Md. 247, 61 Atl. 413 (1905); Healy Lumber Co. v. Morris, 33 Wash. 490, 74 Pac. 681 (1903). See also cases listed in 1 NICHOLS, EMINENT DOMAIN (2d ed. 1917) 129; 1 LEWIS, EMINENT DOMAIN (3d ed. 1909) 505.

23. See (1936) 31 ILL. L. REV. 113, 116; (1936) 84 U. OF PA. L. REV. 902, 903.

24. With Pa. Mut. Life Ins. Co. v. Philadelphia, 242 Pa. 47, 88 Atl. 904 (1913), and Twelfth-Street Market Co. v. Philadelphia & R. T. Rr. Co., 142 Pa. 580, 21 Atl. 989 (1891) ("use by the public" test), compare Shoenberger v. Mulhollan, 8 Pa. 134 (1848), and Jacobs v. Clearview Water Supply Co., 220 Pa. 388, 69 Atl. 870 (1908) (public benefit emphasized).

With Cozard v. Kanawha Hardwood Co., 139 N. C. 283, 51 S. E. 932 (1905) (strict test), compare Norfleet v. Cromwell, 70 N. C. 634 (1874) ("great public utility").

With Olmstead v. Morris Aqueduct, 47 N. J. L. 311 (1885) (strict "use by the public" test), compare Scudder v. Trenton Delaware Falls Co., 1 N. J. Eq. 694, 729 (1832), in which the Chancellor said: "The ever varying condition of society is constantly presenting new objects of public importance and utility; and what shall be considered a public

it is arguable that the circumstances of the present case satisfy even the strict requirement of "use by the public." The land is taken by a public agency,[25] and actual residence in the completed project is not vested in any particular individuals, but is open to all "persons of low income." Thirdly, the close relation between slum clearance and health, morals, and public welfare, all firm bases of the police power, might well justify an exception to a literal application of the stricter rule.[26] And finally, the increasing scope of conscious intervention by the state into social and economic affairs makes "use by the public" an impractical limit on the exercise of the state's power of eminent domain. The New York Court of Appeals seemed responsive to this trend in holding, contrary to some of its earlier opinions,[27] that "use of a proposed structure, facility or service by everybody and anybody is one of the abandoned universal tests of a public use."[28]

Statute of Limitations as a Bar to Investigation of Broker's Books to Determine Customer's Income Tax Liability[1]

The Commissioner of Internal Revenue is empowered to examine books and records containing relevant data in order to ascertain the correctness of any income tax return, to make a return where none has been made, and to obtain information respecting any income or objects liable to tax or the returns thereof.[2] It is well settled that under these powers, the Commissioner may examine not only the taxpayer's records,[3] but also the records of third parties containing entries relative to the taxpayer's possible taxable transactions, despite objections by the taxpayer[4] or the third party, the latter being held to occupy the position of a testifying witness.[5]

use or benefit, may depend somewhat on the situation and wants of the community for the time being . . . Looking at this case in all its bearings, and believing as I do that great benefit will result to the community from the contemplated improvement, I am not satisfied to declare the act . . . void and unconstitutional."

With In re Eureka Basin Warehouse & Mfg. Co., 96 N. Y. 42 (1884) and In re Split Rock Cable-Road Co., 128 N. Y. 408, 28 N. E. 506 (1891), compare New York City Housing Authority v. Muller, *supra* note 1.

25. It is to be noted, however that the project may thereafter be sold or leased to a limited-dividend corporation supervised by the State Board of Housing. Laws of 1934, c. 4, § 71, N. Y. Unconsolidated Laws (1934) 252, 259.

26. See Matter of Ryers, 72 N. Y. 1, 7 (1878): "to take for the maintenance and promotion of the public health, is a public purpose."

27. At one period the test in New York was "use by the public." In re Eureka Basin Warehouse & Mfg. Co., 96 N. Y. 42 (1884); In re Niagara Falls and Whirlpool Ry. Co., 108 N. Y. 375, 15 N. E. 429 (1888); In re Split Rock Cable-Road Co., 128 N. Y. 403, 28 N. E. 506 (1891); see Note (1928) 54 A. L. R. 7, 15.

28. 270 N. Y. 333, 342, 1 N. E. (2d) 153, 155 (1936).

1. Zimmermann v. Wilson, 81 F. (2d) 847 (C. C. A. 3d, 1936).

2. 45 Stat. 878 (1928), 26 U. S. C. A. § 1514 (1935); 44 Stat. 119 (1926), 26 U. S. C. A. § 1515 (1935).

3. Cf. Bolich v. Rubel, 67 F. (2d) 894 (C. C. A. 2d, 1933); In re International Corporation, 5 F. Supp. 608 (S. D. N. Y. 1934); Philip Mangone Co., Inc. v. United States, 54 F. (2d) 168 (Ct. Cl. 1931).

4. Cooley v. Bergin, 27 F. (2d) 1930 (D. Mass. 1928).

5. United States v. First National Bank of Mobile, 295 Fed. 142 (S. D. Ala. 1924), aff'd First National Bank of Mobile v. United States, 267 U. S. 576 (1925); Brownson v.

But the Revenue Act contains a statute of limitations which bars the "collection of taxes without assessment" after a designated term of years has elapsed, unless the Commissioner alleges either that the taxpayer has been guilty of fraud, has waived the statute, or has failed to file any return.[6] And although the chief purpose of this statute is to prohibit the assessment and collection of additional taxes for the years covered, it has been extended in some instances to prevent the Commissioner from seizing and investigating records of the taxpayer concerning transactions occurring during those years.[7] But when the Commissioner demanded access to a third party's records, seeking data concerning a taxpayer's tax liability for years barred by the statute, it was held that the third party, being in the position of a testifying witness, could not raise the defense of the statute of limitations.[8] The court intimated, however, that in a proper case such a defense might be raised by the taxpayer himself.

In a recent case, plaintiff taxpayers filed a bill to enjoin the Commissioner's revenue agents from seizing and examining, and the partners of a brokerage firm from producing for examination brokerage and banking accounts disclosing transactions taking place between the taxpayers and the firm during 1929 and 1930. The taxpayers claimed that the statute of limitations barred the examination since their tax returns for the years in question had been duly filed and checked and final determinations made in each case, since the statute of limitations had not been waived by the taxpayers, and since no allegation of fraud had been made by the Commissioner to toll the statute. The District Court denied the injunction on the ground that the taxpayers had no property interest in the third party's books which might be protected by an injunction.[9] The Circuit Court of Appeals reversed and granted an injunction, holding that the taxpayers had a property right in the information contained in the books of the brokerage firm, and that any attempt upon the part of the Commissioner to secure the information without the allegations necessary to toll the statute of limitations was beyond the Commissioner's power and therefore both an invasion of the taxpayers' right of privacy, and an unreasonable search under the Fourth Amendment.[1]

The court's conclusion that the Commissioner had no power under the Revenue Act to conduct the attempted investigation appears justifiable. Such power could not be derived from the provision authorizing the Commissioner to obtain informa-

United States, 32 F. (2d) 844 (C. C. A. 8th, 1929); Caplis v. Helvering, 4 F. Supp. 181 (E. D. N. Y. 1933); Miles v. United Founders Corp., 5 F. Supp. 413 (D. N. J. 1933). But "mere explanatory searches for information" will not be permitted. Mays v. Davis, 7 F. Supp. 596 (W. D. Pa. 1934). See also 4 PAUL AND MERTENS, LAW OF FEDERAL INCOME TAXATION (1934) § 39.47.

6. The discussion herein will concern the two year period of limitations provided for in the 1928 statute. 45 STAT. 856 (1928), 26 U. S. C. A. § 275 (1935). The exceptions to the statute are to be found in 45 STAT. 857 (1928), 26 U. S. C. A. § 276 (1935). For an historical survey of the various statutes, see 5 PAUL AND MERTENS, op. cit. *supra* note 5, §§ 50.04-50.11.

7. Farmers' and Mechanics' National Bank of Philadelphia v. United States, 11 F. (2d) 348 (C. C. A. 3d, 1926); In re Morris and Cummings Dredging Co., 9 Am. Fed. Tax Rep. 1665 (S. D. N. Y. 1930) (unreported officially); cf. In re Archer, 1 Fed. Cas. No. 506, at p. 1086 (S. D. N. Y. 1878); Moraine Hotel Co. v. Commissioner of Internal Revenue, 41 F. (2d) 725 (C. C. A. 7th, 1930) (statute of limitations not a bar to the examination of books for prior years to determine the current depreciation charge, depending upon data in those books).

8. Caplis v. Helvering, 4 F. Supp. 181 (E. D. N. Y. 1933).

9. Zimmerman v. Wilson (E. D. Pa. June 17, 1935), reported in 2 C. C. H. TAX SERVICE § 1831.071.

tion respecting any income liable to tax or the returns thereof,[2] because, in the absence of an allegation to toll the statute of limitations, there would be no income liable to tax. Nor could the power be found in the provision allowing the Commissioner to conduct investigations in order to make a return where none had been made,[2] since here, returns for the years in question had already been filed. The attempted search might possibly be considered authorized, however, by the clause empowering the Commissioner to investigate records to ascertain the correctness of any return.[2] But it appears doubtful that this provision was intended to authorize investigations at a time when no additional assessment could be made unless the statute of limitations had been tolled.[10] The only object of such investigations would be to ferret out possible fraud to be used subsequently as a basis for tolling the statute and levying an additional assessment. In view of the judicial antipathy often expressed toward "fishing expeditions,"[11] it seems doubtful that the legislature intended to authorize such an investigation, and even more doubtful that the statute will be so construed by the courts,[12] especially since they have refused to allow a similar examination of the taxpayer's own books without an allegation by the Commissioner to toll the statute.[7] Furthermore, there is some evidence that the Commissioner's investigatory powers were meant to be definitely circumscribed. He cannot conduct investigations to further the collection of taxes.[13] A proposed measure which would have given him powers wide enough to investigate records for any purpose was rejected by Congress.[14] And the Revenue Act itself assures taxpayers of freedom from unnecessary investigations,[15] a provision which ought to apply in the instant case, since, just as in the matter of additional assessments, it seems unnecessary to an efficient taxing system and undesirable from the standpoint of convenient business administration that the Commissioner be given unlimited time in which to take action.

If the Commissioner was therefore unauthorized to obtain the records from the third party, the taxpayers were properly allowed to object, whether the result be explained on the ground that the right of privacy bestowed upon them by "natural law" was invaded or that the Commissioner's action constituted an unreasonable search and seizure under the Fourth Amendment.[16] It is said that if the right of

10. See Bolich v. Rubel, 67 F. (2d) 894, 895 (C. C. A. 2d, 1933).

11. Federal Trade Commission v. American Tobacco Co., 264 U. S. 298 (1924); Mays v. Davis, 7 F. Supp. 596 (W. D. Pa. 1934); Brex v. Smith, 104 N. J. Eq. 386, 146 Atl. 34 (Ch. 1929).

12. See Federal Trade Commission v. American Tobacco Co., 264 U. S. 298, 307 (1924); Interstate Commerce Commission v. Brimson, 154 U. S. 447, 478-479 (1894); Boyd v. United States, 116 U. S. 616, 621-622 (1886).

13. Rasquin v. Muccini, 72 F. (2d) 688 (C. C. A. 2d, 1934).

14. See 26 U. S. C. A. § 1544 and note (1935); also Rasquin v. Muccini, 72 F. (2d) 688 (C. C. A. 2d, 1934).

15. 44 STAT. 113 (1926), 26 U. S. C. A. § 1521 (1935).

16. It is possible that if the Revenue Act were construed as authorizing such unrestricted searches despite the statute of limitations, it would be declared unconstitutional as repugnant to the Fourth Amendment. See cases cited *supra* note 12.

That the protection of the Fourth Amendment extends to civil as well as criminal actions, see United States v. Hoyt, 53 F. (2d) 881, 885 (S. D. N. Y. 1931); Wagner v. United States, 8 F. (2d) 581, 584, 585 (C. C. A. 8th, 1925); cf. United States v. Union Trust Company of Pittsburgh, 13 F. Supp. 286 (W. D. Pa. 1936). But cf. (1936) 84 U. OF PA. L. REV. 789, explained later in (1936) 84 U. OF PA. L. REV. 904, n. 5.

The Fourth Amendment is sometimes construed to protect the right of privacy. See United States v. Lefkowitz, 285 U. S. 452, 464 (1932).

privacy is relied upon, the complainant must show a "personal right" in the matter in question,[17] and if the searches and seizures clause is invoked, a "property right,"[18] or sometimes even a "tangible material effect" of the complainant must be involved.[19] These terms perhaps connote varying degrees of interest which are necessary to support a standing in court, but the boundaries which they purport to set out are so nebulous that their only value is to reiterate the idea that a complainant must have an interest which the courts will protect.[20] The taxpayers' interest in the principal case appears sufficiently analogous to interests which have received judicial protection to warrant the court's conclusion that there was a property right involved. If the information in question had been contained in the taxpayers' own books, the taxpayers would have had a sufficient interest to object to the inquiry.[7] The fact that the information was contained in the broker's books should not alter this result. Had the information been placed in the hands of a receiver, trustee in bankruptcy, or trustee for the benefit of creditors, or in books of public record, it could be said that the taxpayers had given up all rights in it, and hence had no standing to object.[21] But here the information had been disclosed only to a confidential agent[22] whose books were not matters of public record, a disclosure which was involuntary in the sense that dealings with brokers are necessary if market operations are to be transacted, and hence it seems unjustifiable to say that the taxpayers had given up any rights in the information. Furthermore, in cases not arising under the Revenue Act, it has been expressly held that where information concerning a depositor is contained in the books of a bank, the depositor has an interest in the information which is protectable by an injunction against a "fish-

17. See Warren and Brandeis, *The Right To Privacy* (1890) 4 HARV. L. REV. 193, 203-205; Long, *Equitable Jurisdiction To Protect Personal Rights* (1923) 33 YALE L. J. 115, 122 et seq. In some cases where "personal rights" were involved, "property rights" were also found. See Warren and Brandeis, *supra,* at 207 et seq.; Pound, *Equitable Relief Against Defamation and Injuries to Personalty* (1916) 29 HARV. L. REV. 640, 646.

18. See Cravens v. United States, 62 F. (2d) 261, 266 (C. C. A. 8th, 1932); United States v. Gass, 14 F. (2d) 229, 230 (M. D. Pa. 1926).

19. Olmstead v. United States, 277 U. S. 438, 464-466 (1928); compare the dissenting opinion of Mr. Justice Brandeis, id. at 471 et seq.

20. The vagueness of the distinction between so-called personal and property rights is well illustrated by two cases dealing with a bank depositor's interest in information contained in the bank's books. In Brex v. Smith, 104 N. J. Eq. 386, 146 Atl. 34 (1929), his interest was held to be a property right, while in Shelby v. Second National Bank of Uniontown, 19 D. & C. 202 (Pa. 1933), it was treated as the personal right of privacy. For examples of highly intangible "property rights" which have been protected, see International News Service v. Associated Press, 248 U. S. 215 (1918); Board of Trade of Chicago v. Christie Grain and Stock Co., 198 U. S. 236 (1905); see also (1936) 45 YALE L. J. 520, 522.

21. Matter of Harris, 221 U. S. 274, 279 (1911); Dier v. Banton, 262 U. S. 147 (1923) (receiver); Ex parte Fuller, 262 U. S. 91 (1923) (trustee in bankruptcy); Warner v. Gregory, 203 Wis. 65, 233 N. W. 631 (1930) (trustee for benefit of creditors); People v. Coombs, 158 N. Y. 532, 53 N. E. 527 (1899) (public records); State ex rel. McClory v. Donovan, 10 N. D. 203, 86 N. W. 709 (1901) (public records).

22. Rubin v. Salomon, 136 Misc. 527, 241 N. Y. Supp. 495 (Mun. Ct. 1930); Butcher v. Newburger, 318 Pa. 547, 179 Atl. 240 (1935); Vollmer v. Newburger, 277 Pa. 282, 121 Atl. 56 (1923); Johnson v. McCluney, 80 S. W. (2d) 898 (Mo. C. A. 1935); McShane v. Quillin, 47 Idaho 542, 277 Pac. 554 (1929); Tatsuno v. Kasai, 70 Utah 203, 259 Pac. 318 (1927).

ing expedition."[23] And finally, the principle that one may have a protectable interest in information contained in papers possessed by another is well illustrated by the cases protecting the author of letters or telegrams sent to another against their unauthorized publication.[24]

If the Commissioner exceeded his authority in attempting the investigation in question, and if the taxpayers were entitled to object, the remaining question is whether the taxpayers' remedy at law was so inadequate as to justify injunctive relief.[25] The brokerage firm might have refused to surrender its books in compliance with the Commissioner's summons, thus compelling the Commissioner to bring court action to enforce his demand.[26] In such an action, the taxpayers might conceivably be allowed to intervene and raise their objection. But it is quite possible that the brokers would have turned their books over to the Commissioner in obedience to his summons without waiting for court action, in order to avoid the risk of incurring the heavy penalties which are imposed for failure to comply with the Commissioner's rightful demands.[27] Furthermore, if by some means the Commissioner had once obtained the books, the taxpayers might have been remediless, for there is some authority to the effect that the government can use illegally obtained information in computing any deficiency which might be levied against the taxpayers.[28] The fact that the brokers might have made a motion to vacate the summons on the ground that the Commissioner exceeded his authority in procuring it[29] does not afford a remedy to the taxpayers. It therefore appears that the injunction was properly granted.

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23. Brex v. Smith, 104 N. J. Eq. 386, 146 Atl. 34 (1929); Shelby v. Second National Bank of Uniontown, 19 D. & C. 202 (Pa. 1933); see Kacedan, *The Right of Privacy* (1932) 12 B. U. L. REV. 353, 378; Comment (1929) 43 HARV. L. REV. 297, 301, 302.

24. As to letters, see Warren and Brandeis, op. cit. *supra* note 17, at 200, 204-206, 211 et seq.; Kacedan, op. cit. *supra* note 23, at 358 et seq. As to telegrams, see Strawn v. Western Union Telegraph Co., (Sup. Ct. D. C., March 11, 1936), oral opinion reported in N. Y. Times, March 12, 1936, at 1, col. 4, noted in (1936) 36 COL. L. REV. 841; (1936) 84 U. OF PA. L. REV. 904; (1936) 45 YALE L. J. 1503.

If the taxpayers are held to have no interest in the information contained in the broker's books, the paradoxical result is that information admittedly of a confidential nature belongs to no one who may object to its illegal seizure.

25. It should be noted that the taxpayer may not need an interest equal to a "property right" in order to obtain an injunction, since there is a tendency to grant such relief in order to protect "personal rights" such as the right to privacy. See Long, op. cit. *supra* note 17, at 122 et seq.; Chaffee, *The Progress of the Law, 1919-1920* (1921) 34 HARV. L. REV. 388, 407 et seq.; Ragland, *The Right of Privacy* (1929) 17 KY. L. REV. 85, 113 et seq.; Pound, op. cit. *supra* note 17, at 668 et seq.

26. See 45 STAT. 877 (1928), 26 U. S. C. A. § 1523 (a) (1935); cf. Farmers' and Mechanics' National Bank of Phila. v. United States, 11 F. (2d) 348 (C. C. A. 3d, 1926); In re Morris and Cummings Dredging Co., 9 Am. Fed. Tax Rep. 1665 (S. D. N. Y. 1930); Philip Mangone Co., Inc. v. United States, 54 F. (2d) 168 (Ct. Cl. 1931).

27. See 45 STAT. 835 (1928), 26 U. S. C. A. § 145 (a) (1935); 31 STAT. 956 (1901), 26 U. S. C. A. § 1515 (e) (1935); 13 STAT. 226 (1864), 26 U. S. C. A. § 1516 (b) (1935).

28. Philip Mangone Co., Inc. v. United States, 54 F. (2d) 168 (Ct. Cl. 1931) (the court held that the cases in which illegally obtained information had been denied admission as evidence were not analogous); J. S. McDonnell, 6 B. T. A. 685 (1927); Executors of Estate of George E. Barker, 13 B. T. A. 562 (1928).

29. Rasquin v. Muccini, 72 F. (2d) 688 (C. C. A. 2d, 1934).