NOTES

REJECTION OF LEASES IN REORGANIZATION OF LANDLORD*

IN THEIR efforts to eliminate financially burdensome obligations, trustees of corporations undergoing reorganization have found a most effective instrument in the power to reject leases. But the exercise of this power in both liquidation and reorganization proceedings has, in the past, been confined almost exclusively to rejection by trustees for insolvent tenants. Exorbitant rents fixed in more prosperous times made it necessary for the lessee to disaffirm leases out of harmony with depressed economic conditions.[1] Illustrative were the 77B proceedings that followed the epidemic of chain-store failures in 1932.[2] On the other hand, landlords have always been anxious to retain a profitable lease. As a result, few cases arose which dealt with termination of leases upon insolvency of the lessor.[3] With rising costs and increasing land values, landlords are finding that leases established or modified during the depression period of low rentals are burdensome rather than profitable. In the reorganization of landlords, the extent of the trustee's power to eliminate onerous affirmative covenants or to substitute new leases with more favorable rentals becomes correspondingly important.

A recent decision of the Second Circuit Court of Appeals[4] upheld a plan for the reorganization of a landlord, in which the lease was rejected as to an objecting tenant, and the tenant-objector evicted. All interests in the

In re Hotel Governor Clinton, Inc., 96 F. (2d) 50 (C. C. A. 2d, 1938), *cert. denied*, 59 Sup. Ct. 72 (U. S. 1938).

1. Smith, *Chain Stores and the Lease Plague* (1932) 58 FINANCIAL WORLD 367; Roeder, *Landlords, Bankruptcy, and 77B* (1938) 23 CORN. L. Q. 285; Douglas and Frank, *Landlords' Claims in Reorganization* (1933) 42 YALE L. J. 1003.

2. City Bank Farmers Trust Co. v. Irving Trust Co., 299 U. S. 433 (1937); Kuehner v. Irving Trust Co., 299 U. S. 445 (1937); Schwartz v. Irving Trust Co., 299 U. S. 456 (1937); Meadows v. Irving Trust Co., 299 U. S. 464 (1936). These cases are treated in Roeder, *loc. cit. supra* note 1; (1937) 3 U. OF PITT. L. REV. 213; (1937) 37 COL. L. REV. 489; (1937) 14 N. Y. U. L. Q. REV. 509.

3. The following are the only cases, so far as is known, that are directly concerned with the problem: American Brake Shoe and Foundry Co. v. N. Y. Rys., 278 Fed. 842 (S. D. N. Y. 1922); Coy v. Title Guarantee and Trust Co., 198 Fed. 275 (D. Ore 1912); W. T. Grant Co. v. Utitz, 102 S. W. (2d) 436 (Tex. Civ. App. 1937); *In re* Beacon and Midway Corp., C. C. H. Bankr. Serv. ¶ 4343 (S. D. N. Y. 1936); Report of Special Master Jacob I. Grossman in In the Matter of Moir Hotel Corp., Bankr. Docket #50297 (N. D. Ill. 1937). The issue has been touched upon, however, by other courts. See *In re* Hays, Foster and Ward Co., 117 Fed. 879, 884 (W. D. Ky. 1902); *In re* Bissinger, 5 F. (2d) 106, 112 (N. D. Ohio 1925); Vass v. Conron Bros. Co., 59 F. (2d) 969, 971 (C. C. A. 2d, 1932); *cf. In re* Civic Center Realty Co., 26 F. (2d) 825 (D. Md. 1928); *In re* 211 East Delaware Pl. Bldg. Corp., 76 F. (2d) 834 (C. C. A. 7th, 1935); *In re* A. H. L. Bldg. Corp., 79 F. (2d) 823 (C. C. A. 7th, 1935); *In re* Hotel Governor Clinton, Inc., 96 F. (2d) 50 (C. C. A. 2d, 1938).

4. *In re* Hotel Governor Clinton, Inc., 96 F. (2d) 50 (C. C. A. 2d, 1938), *cert. denied*, 59 Sup. Ct. 72 (U. S. 1938).

reorganized property were given to first mortgage bondholders, since the first mortgage exceeded the value of the debtor's assets. The lease was expressly subject to all mortgages, and that fact was the basis of the court's ruling. The claim of the plaintiff tenant for damages against the estate was determined to be of no value, and was eliminated along with the claims of second mortgagees, unsecured creditors, and stockholders.[5] Although the case directly involved the rejection of a lease by the trustee for a landlord in reorganization, the particular facts obviated the necessity of passing upon the power to reject *per se*. Such a problem does arise, however, in cases where there is no mortgage, where the lease is not subject to the mortgage, or where interests other than those secured by the mortgage are permitted to participate in the reorganization.

Prior to 1934, there were no applicable provisions in the Bankruptcy Act dealing with rejection of leases and provability of claims resulting therefrom.[6] A long line of cases[7] in bankruptcy had established the harsh rule that, although a lessee's trustee could reject the lease, the landlord's claim for unaccrued rents was not provable, and therefore that the tenant was not relieved of his obligations under the lease by the discharge.[8] Provisions of the 1934[9] and 1938[10] amendments were specifically designed to remedy this situation, and the present doctrine in both liquidation and reorganization permits the lessee's trustee to reject an onerous lease, allows the landlord

5. *In re* 620 Church St. Bldg., 299 U. S. 24 (1936); *In re* Witherbee Court Corp., 88 F. (2d) 251 (C. C. A. 2d, 1937).

6. In the 1933 amendment entitled "Compositions and Extensions" it was provided: "The term 'creditor' shall include for the purpose of an extension proposal under this section all holders of claims of whatever character against the debtor or his property including a claim for future rent, whether or not such claims would otherwise constitute provable claims under this Act. A claim for future rent shall constitute a provable debt and shall be liquidated under section 63(b) of this Act." 47 STAT. 1467 (1933), 11 U. S. C. § 202 (1934). This section was held to be inapplicable to proceedings in ordinary bankruptcy. Manhattan Properties, Inc. v. Irving Trust Co., 291 U. S. 320 (1934). A similar provision in § 77 applied, of course, only to railroad reorganization. For a discussion of claims of the lessor under § 77, see Comment (1937) 47 YALE L. J. 272.

7. For citation and exhaustive treatment of these cases and for excellent discussions of the general problem, see Schwabacher and Weinstein, *Rent Claims in Bankruptcy* (1933) 33 COL. L. REV. 213; Douglas and Frank, *Landlords' Claims in Reorganization* (1933) 42 YALE L. J. 1003; Clark, Foley and Shaw, *Adoption and Rejection of Contracts and Leases by Receivers* (1933) 46 HARV. L. REV. 1111; Radin, *Claims for Unaccrued Rents in Bankruptcy* (1933) 21 CALIF. L. REV. 561, 22 CALIF. L. REV. 1.

8. The rule worked hardships both ways. If the bankrupt were a corporation that was dissolved after discharge, the landlord's undischarged claim was useless to him. If the bankrupt were an individual, the lease was an obstruction in the way of his getting a fresh start. The rule was occasionally avoided by specific clauses in the lease, especially the *ipso facto* and "original consideration" clauses. Irving Trust Co. v. A. W. Perry, Inc., 293 U. S. 307 (1934); Wm. Filene's Sons Co. v. Weed, 245 U. S. 597 (1918). Claims for back rents due at the time of the filing of the petition were allowed.

9. 48 STAT. 924, 11 U. S. C. (1934) § 103(a)(7) (bankruptcy); 48 STAT. 914, 916, 11 U. S. C. (1934) § 207(b)(6), (b)(10), (c)(5) (reorganization).

10. 52 STAT. 873, 881, 11 U. S. C. A. (Supp. 1938) §§ 103(a)(9), 103(c), 110(b) (bankruptcy); 52 STAT. 885, 893, 896, 11 U. S. C. A. (Supp. 1938) §§ 516(1), 602, 616 (4) (reorganization).

a limited claim for future rents, and terminates the duties of the tenant.[11] In the few cases involving rejection of leases by an insolvent landlord, it was quite well established that the tenant could not be evicted from the premises before his term was up.[12] The trustee could, however, reject those affirmative covenants of the lease that were still executory.[13] Likewise, if he thought that the reversion itself, as well as the lease, was onerous, he could renounce all interest in the property.[14] These rules were laid down in straight bankruptcy and receivership suits, and in the absence of statutory guidance. But the question of whether the same doctrine of non-eviction of the tenant should apply to reorganization[15] under the specific provisions of the Chandler Act is left unsettled.[16]

11. See note 2, *supra.*

12. The rule was the same for both bankruptcy and receivership. American Brake Shoe & Foundry Co. v. New York Rys., 278 Fed. 842 (S. D. N. Y. 1922); (receivership); see *In re* Hays, Foster, and Ward Co., 117 Fed. 879, 884 (W. D. Ky. 1902) (bankruptcy); Vass v. Conron Bros. Co., 59 F. (2d) 969, 971 (C. C. A. 7th, 1932) (bankruptcy); FINLETTER, PRINCIPLES OF CORPORATE REORGANIZATION (1937) 240; Payne, *The General Administration of Equity Receiverships of Corporations* (1922) 31 YALE L. J. 685, 694.

13. American Brake Shoe and Foundry Co. v. N. Y. Rys., 278 Fed. 842 (S. D. N. Y. 1922); Coy v. Title Guarantee & Trust Co., 198 Fed. 275 (D. Ore. 1912); FINLETTER, *op. cit. supra* note 12; Payne, *loc. cit. supra* note 12. In *In re* Civic Center Realty Co., 26 F. (2d) 825 (D. Md. 1928), the landlord's trustee declared that he was willing and prepared to perform the executory covenants of the lease, which had not yet been entered upon, but the court allowed the lessee to revoke the contract because of the likelihood of failure of performance of the covenants. See Comment (1928) 38 YALE L. J. 235.

14. W. T. Grant Co. v. Utitz, 102 S. W. (2d) 436 (Tex. Civ. App. 1937); see Vass v. Conron Bros. Co., 59 F. (2d) 969, 971 (C. C. A. 2d, 1932). When the trustee rejects in this situation, the right to rents and obligations under covenants of the lease remain with the insolvent landlord; possession and enjoyment of the leasehold remain with the tenant. Presumably, the rationale is that the trustee can refuse to take property which will be a burden upon the estate. Brown v. O'Keefe, 300 U. S. 598 (1937); First Nat. Bank v. Lasater, 196 U. S. 115 (1905). This might lead to some fantastic results, as in Vass v. Conron Bros. Co., 59 F. (2d) 969 (C. C. A. 7th, 1932), where the bankrupt was apparently left the owner of a small space in a large plant.

15. In *In re* 211 East Delaware Pl. Bldg. Corp., 76 F. (2d) 834 (C. C. A. 7th, 1935) the court allowed the trustee to evict the tenant, but only on the basis of specific provisions in the lease. The author of *Developments in the Law—Reorganization under § 77B of the Bankruptcy Act* (1936) 49 HARV. L. REV. 1111, at 1154, conveys an unwarranted impression when he states: "The power to adopt or reject leases also applied where the debtor is the lessor. Thus, in *In re* 211 East Del. Pl. Bldg. Corp., *supra,* it was held that on appointment of the trustee the court was free to terminate existing leases . . . "

16. No cases bearing directly on the point have arisen under the 1938 amendments, so far as is known. Under 77B, only two cases have been found which attempt to deal with the problem. The Report of Special Master Jacob I. Grossman in In the Matter of Moir Hotel Corp., Bankr. Docket #56297 (N. D. Ill. 1937) specifically construes the statute to permit eviction of the tenant. In *In re* Beacon & Midway Corp., C. C. H. Bankr. Serv. ¶ 4343 (S. D. N. Y. 1936), Judge Knox refused to allow abrogation of the lease and reletting at a higher rental. He states in his memorandum: "The cost of adjusting rights under the present lease would practically offset the increased income . . . Furthermore, the considerations about which Judge Mayer spoke in American Brake

Chapter X permits the trustee to reject executory contracts,[17] which are defined to include "unexpired leases of real property."[18] Section 202[19] provides: "In case an executory contract shall be rejected . . . any person injured by such rejection shall . . . be deemed a creditor. The claim[20] of the landlord for injury . . . shall be provable, but shall be limited to an extent not to exceed the rent, without acceleration, reserved by such lease for the three years next succeeding . . ." It might be argued that, since the sentence restricting the landlord's recovery follows immediately upon the sentence dealing with rejection, Congress intended that rejection of leases should be confined only to trustees of lessees. In view of the unqualified definitions and grants of power in the other sections of the chapter,[21] however, it seems that rejection for both lessors and lessees is contemplated, whereas only landlords' claims are to be thus limited. This interpretation is strengthened by Section 70(b),[22] in the straight bankruptcy portion of the Statute, which provides that: "Unless a lease of real property shall expressly otherwise provide, a rejection of such lease or of any covenant therein by the trustee of the *lessor* shall not deprive the lessee of his estate."[23]

The word "estate"[24] in Section 70(b) must mean that the lessee cannot be deprived of his enjoyment and possession of the demised premises. It is clear that the trustee has power to reject executory covenants. It is not quite so clear just what "a rejection of such lease" signifies. It may restate the

Shoe & Foundry Co. v. N. Y. Rys. . . . are applicable to the situation presented by the present petition." Are the "considerations" principles of fair dealing or the doctrine of non-eviction of the tenant? See Schneider, *Can a Landlord-Debtor Move to Reject Disadvantageous Leases under § 77B of the Bankruptcy Act?* (1936) 3 CORP. REORG. 12, 64; Gerdes, *Rent Claims in Bankruptcy Proceedings under § 77B* (1936) 59 N. J. L. J. 444; FINLETTER, PRINCIPLES OF CORPORATE REORGANIZATION (1937) 240.

17. 52 STAT. 885, 11 U. S. C. A. (Supp. 1938) § 516(1). The word "trustee" is used to mean trustee acting with the permission of the judge. The Statute also provides for rejection of executory contracts in the plan. 52 STAT. 896, 11 U. S. C. A. (Supp. 1938) § 616(4).

18. 52 STAT. 883, 11 U. S. C. A. (Supp. 1938) § 506(7). The 1934 provisions were not completely clear on this point. *Cf. In re* Cheney Bros., 12 F. Supp. 605 (D. Conn. 1935).

19. 52 STAT. 893, 11 U. S. C. A. (Supp. 1938) § 602.

20. "'Claims' shall include all claims of whatever character, against a debtor or its property, except stock, whether or not such claims are provable under § 63 of this Act and whether secured or unsecured, liquidated or unliquidated, fixed or contingent." 52 STAT. 883, 11 U. S. C. (Supp. 1938) § 506(1). "'Creditor' shall mean the holder of any claim." 52 STAT. 883, 11 U. S. C. A. (Supp. 1938) § 506(4).

21. See note 17, *supra*.

22. 52 STAT. 881, 11 U. S. C. A. (Supp. 1938) § 110(b). This provision appears for the first time in the 1938 amendments and, so far as is known, has not been interpreted.

23. A lease is usually considered something more than a mere contract. It creates rights in rem in the land itself. *In re* Barnett, 12 F. (2d) 73, 76 (C. C. A. 2d, 1926). For historical reasons, a lease is considered personal, rather than real, property and bears the name of "chattel real." 1 TIFFANY, REAL PROPERTY (2d ed. 1920) 98.

24. "The word 'estate' as it is used in this restatement, means an interest in land which (a) is or may become possessory; and (b) is ownership measured in terms of duration." RESTATEMENT, PROPERTY (1936) § 9.

previous rule[25] that a lessor's trustee, while keeping the reversioner's title and right to rents, may reject "the" lease in the sense of all the affirmative covenants[26] that the landlord was formerly bound to perform.[27] However, inasmuch as the words "such lease" are seemingly placed in contradistinction to "or any covenant therein," support is lent to an interpretation that the trustee, while keeping the reversioner's title,[28] may reject all interest in the lease itself. Consequently, the landlord's title remains with the bankrupt himself for the duration of the term, during which time he obtains all the benefits, but has to undertake all the burdens, of the lease. Another interpretation might be that rejection of the "lease" includes disaffirmance of all interest in the property, including the reversion.[29] Since Section 63(c)[30] provides that such rejection shall constitute a *breach* of the lease as of the date of the filing of the petition, the tenant can, under any interpretation of 70(b), give up possession and enter a claim for complete breach. He also, seemingly, has the option of retaining possession and of entering a provable claim for rejection of executory covenants.[31]

As to the applicability of the bankruptcy sections in reorganization proceedings, Section 102[32] states: "The provisions of chapters I to VII . . . shall, insofar as they are not inconsistent or in conflict with the provisions of this chapter, apply in proceedings under this chapter . . ." Inasmuch as 70(b) is apparently declaratory of Congress' definition of the power of a landlord's trustee to reject leases, it may well be carried over into Chapter X as determinative of the power of a trustee in reorganization. The scaling-down demands of a reorganization plan can be satisfied by eliminating the

25. See note 13, *supra*.

26. The affirmative covenants here contemplated are those to supply heat and light, to erect a building, etc. It seems quite obvious that the trustee cannot disaffirm the implied covenant of quiet enjoyment, for that, in effect, would deprive the lessee of his estate. He, likewise, cannot reject the covenant calling for a stipulated rental, inasmuch as that too would be contrary to the purpose of 70(b). Could the trustee disaffirm such a covenant as one to supply refrigeration in a lease for cold storage space? See Vass v. Conron Bros. Co., 59 F. (2d) 969, 971 (C. C. A. 2d, 1932).

27. This is probably the correct interpretation. In MOORE'S BANKRUPTCY MANUAL (1939) 221, it is said that this sentence of § 70(b) is ". . . declaratory of existing law and . . . added for clarity."

28. This would entitle the trustee or the trustee's grantee to possession of the property upon the termination of the lease.

29. See note 14, *supra*.

30. 52 STAT. 873, 11 U. S. C. A. (Supp. 1938) § 103(c).

31. The claim for damages would probably come in as a general claim, even though rejected by the trustee in the course of his administering the estate. The doctrine for executory contracts, and by statute for unexpired leases, is that bankruptcy is an anticipatory breach, subject, however, to the right of the trustee to affirm. If he affirms, the other party is bound. If he rejects, the breach is considered as of the date of the filing of the petition. See § 63(c); Central Trust Co. of Ill. v. Chicago Auditorium Ass'n, 240 U. S. 581, 590 (1916). Likewise, the tenant would probably not be able to set off his damage claim against his future rents. But could he set them off against rents already owing?

32. 52 STAT. 883, 11 U. S. C. A. (Supp. 1938) § 502.

burdensome covenants,[33] even though the tenant cannot be deprived of his estate in the land.[34] Nevertheless, it can be strongly argued that the objective of reorganization proceedings is completely different from that of bankruptcy, and contemplates use of the premises in the business, *i.e.*, not only rejection of the lease, but eviction of the tenant. Inasmuch as Congress did not see fit to repeat the specific proviso of 70(b) in Chapter X, wherein it is stated flatly that provision may be made for the "rejection of executory contracts of the debtor,"[35] it is reasonable to maintain that this part of 70(b) is "inconsistent with" the provisions of Chapter X as being "in conflict with" the purpose of reorganization to facilitate the rehabilitation of embarrassed corporations by a scaling or rearrangement of their obligations.[36] To allow a realty company, for example, with property composed almost entirely of leases for terms, merely to disaffirm covenants but not to evict the tenants and cancel the leases, is to prevent a successful reorganization.[37]

Although it is a serious matter to deprive a lessee of the store in which he has invested thousands of dollars and built up good will through the years, effective reorganization may demand that the debtor be allowed to rid itself of a burdensome lease, and either use the premises for a more profitable purpose or relet them at a rental commensurate with existing land costs and values.[38] The solution offered by 70(b)—denying to the trustee power to deprive the tenant of his estate and reserving to the tenant an option to remain in possession — seems satisfactory for a bankruptcy proceeding, the

33. This seems to be the only one of the three suggested interpretations which can be carried over into Chapter X. In reorganization, if ownership of the lease or the reversion remained in the debtor after rejection by the trustee, it would have to be turned over to the new company formed. Thus nothing would be gained, and the benefits from rejecting the covenants would be lost.

34. It may be pointed out that even under an interpretation that permits the trustee to reject executory covenants, without which the lessee would never have taken, and will not keep, the lease, the trustee is enabled thereby to accomplish indirectly what the statute forbids him to do directly. Thus the tenant's option of retaining his possession may often be illusory.

35. 52 STAT. 885, 896, 11 U. S. C. A. (Supp. 1938) §§ 516(1), 616(4).

36. City Bank Farmers' Trust Co. v. Irving Trust Co., 299 U. S. 433, 438 (1937).

37. It may be argued that such a corporation should be liquidated rather than reorganized. If it can be shown that the business could be successfully operated at going rentals, thereby best protecting the interests of creditors as a whole, the argument is not valid.

38. An interesting problem arises when both landlord and tenant are in reorganization. Under an interpretation that the landlord cannot evict the tenant, if the tenant were to affirm the lease and the landlord to reject it, the tenant could remain in possession and have his claim for damages. Of course, if the tenant were to reject, the landlord could do nothing but enter a claim for damages subject to the three year limitation. Under an interpretation that a landlord's trustee can evict a tenant, the equities must be carefully weighed against each other. *In re* A. H. L. Bldg. Corp., 79 F. (2d) 823 (C. C. A. 7th, 1935); In the Matter of Moir Hotel Corp., Bankr. Docket #56297 (N. D. Ill. 1937); see *Developments in the Law—Reorganization under §77B of the Bankruptcy Act* (1936) 49 HARV. L. REV. 1111, 1154. The Moir case had the further complication of the two reorganizations being carried on in different courts.

purpose of which is simply to liquidate. A trustee in reorganization, however, requires more latitude for the exercise of his powers.

If it should be decided that 70(b) is inapplicable because inconsistent with the purposes of reorganization, is there any remaining difficulty in the notion of a tenant's *estate* which might prevent his eviction, on a trustee's rejection of the lease?[39] The reorganization chapter[40] provides for the changing of one type of property interest into another.[41] If a mortgagee, under some circumstances, can be deprived of his security and made a stockholder,[42] why shouldn't a lessee be deprived in like manner of his tenancy and made a stockholder or claimant against the estate?[43]

The more sensible solution would be to treat a lease like any other contract that may be terminated by a landlord's trustee.[44] As in the rejection of any other contract, the issue involves a power that will be defined in terms of discretion, and eviction should be permitted only where the lease is a bargain bad enough to be a burden on the corpus of the estate.

39. The power to evict was denied to a landlord's receiver (see note 12, *supra*), and since reorganization through equity receivership and through Chapter X are essentially the same, a strong argument will be made that such power should be denied in the latter proceedings as well as in the former. Since American Brake Shoe and Foundry Co. v. New York Rys., 278 Fed. 842 (S. D. N. Y. 1922) is the only case denying such power to a receiver, a court could distinguish on the equities or, if necessary, overrule it to permit the reorganization trustee to evict.

40. 52 STAT. 895, 11 U. S. C. A. (Supp. 1938) § 616(1).

41. It may be argued that depriving the tenant of his estate constitutes a taking of property without due process of law. But the courts have been loath to use the Fifth Amendment to defeat the Bankruptcy Act. See (1939) 48 YALE L. J. 879, 884 for an able discussion of the various ways in which the cutting down of property interests has been sanctioned by the court. But *cf.* Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555 (1935). See *infra* notes 42 and 43.

42. *In re* Georgian Hotel Corp., 82 F. (2d) 917 (C. C. A. 7th, 1930); *In re* Central Funding Corp., 75 F. (2d) 256 (C. C. A. 2d, 1935); *In re* Caffall Oil Corp., 22 F. Supp. 484 (W. D. La. 1937).

43. It has already been held that a trustee for a conditional vendee can include the property in the plan of reorganization, even though the title is still with the vendor. *In re* White Truck & Transfer Co., C. C. H. Bankr. Serv. ¶ 2326.07 (S. D. Cal. 1934); *cf. In re* Burgemeister Brewing Corp., 84 F. (2d) 388 (C. C. A. 7th, 1936). *Contra: In re* Lake's Laundry, Inc., 79 F. (2d) 326 (C. C. A. 2d, 1935) (L. Hand, J., dissenting), (1935) 49 HARV. L. REV. 328.

44. "To assimilate leases of modern office buildings to feudal tenure in seventeenth century England is to disregard the essential elements of the bargain made, the present money economy, and the great development in contract law which has taken place since Coke wrote . . ." Douglas and Frank, *Landlords' Claims in Reorganization* (1933) 42 YALE L. J. 1003, 1005, note 6.

EMPLOYEE REPUDIATION OF COLLECTIVE LABOR AGREEMENTS UNDER THE WAGNER ACT*

LABOR'S organizing and bargaining methods were not singularly successful until the National Labor Relations Act[1] placed a duty upon management to bargain in good faith.[2] This feature of the Act has had much to do with the subsequent spectacular growth of unionism and the increased incidence of collective labor agreements.[3] Two recent decisions of the Supreme Court indicate, however, that if labor wishes to retain the benefits and protection of the Act, it can do so only by discarding some of its own established weapons.

In the highly publicized *Fansteel* case,[4] the Court held that employees on strike to protest unfair labor practices were precluded from claiming their privilege of reinstatement,[5] because they seized and retained the company's buildings. The precise holding of this case is of limited significance,[6] for popular sentiment had already eliminated the sitdown strike as an important weapon for dissatisfied employees.[7] But the implications of the decision are far-reaching in their impact on other labor practices. Particularly is this true when the *Fansteel* case is considered in the light of the less dramatic but more pregnant Supreme Court opinion in the *Sands* case.[8]

In the *Sands* case, the Sands Manufacturing Company entered into a collective labor agreement with an independent union which constituted the bargaining agent for the employees. A controversy arose over the seniority

*N.L.R.B. v. Sands Mfg. Co., 59 Sup. Ct. 508 (U. S. 1939).

1. 49 STAT. 449 (1935), 29 U. S. C. § 151 (Supp. 1936).

2. "It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees . . ." Section 8(5), 49 STAT. 453 (1935), 29 U. S. C. § 158 (Supp. 1936).

3. Between 1,500,000 and 2,000,000 workers were probably covered by collective labor agreements in 1933; about 7,500,000 at the end of 1938. Estimate of Isador Lubin, United States Commissioner of Labor Statistics, cited by Rice, *The Legal Significance of Labor Contracts Under The National Labor Relations Act* (1939) 37 MICH. L. REV. 693, n. 11 at 695.

4. N.L.R.B. v. Fansteel Metallurgical Corp., 59 Sup. Ct. 490 (U. S. 1939).

5. The privilege of reinstatement after an employer's unfair labor practices is secured by virtue of § 10(c) of the NLRA. 49 STAT. 454 (1935), 29 U. S. C. § 160 (Supp. 1936). This is the so-called discretionary power which the Board has used freely, resulting in reinstatement, by Jan. 31, 1939, of 14,847 employees. See (1939) 4 L.R.R. 55.

In the *Fansteel* case the Court felt that the order of reinstatement exceeded the discretionary power of the Board. It should be carefully noticed, however, that the nature of the men's conduct and not the mere loss of "employee" status apparently precluded reinstatement. See the Court's opinion at 496–497. Mr. Justice Stone, concurring, at 499, however, construed the Statute to deprive the Board of any discretionary power to reinstate when the employment status had been terminated.

6. See Nathanson and Lyons, *Judicial Review of the National Labor Relations Board* (1939) 33 ILL. L. REV. 749.

7. See Ward, *Discrimination Under The National Labor Relations Act* (1939) 48 YALE L. J. 1152, at 1173, n. 94.

8. N.L.R.B. v. Sands Mfg. Co., 59 Sup. Ct. 508 (U. S. 1939).

provisions of the agreement.[9] The company maintained that under the terms of the contract a rule of departmental seniority was established; it proposed to close down all but a single department — this to be augmented by "new" men. The union insisted that "old" men be transferred from closed departments. After repeated conferences had revealed the diametrically opposite positions of the two bargaining parties, an ultimatum by the management to the shop committee to accede to the company plan or see the entire plant closed was countered by an invitation from the committee to shut down. Accordingly, the entire plant was closed down until further notice. Shortly thereafter the company negotiated a contract[10] with an American Federation of Labor affiliate and reopened its plant with a new set of employees. A request by the old union for a conference was refused and the union ultimately complained to the National Labor Relations Board.

The decision of the NLRB[11] turned upon the validity of the company's contention that the old employees had broken the contract and given cause for discharge by refusing to observe the departmental seniority rule embodied in the agreement.[12] If the old workers had lost their employee status, the management was not bound to bargain with their representatives, and a refusal to negotiate when the plant reopened did not constitute an unfair labor practice.[13] The Board held that the employees' interpretation of the contract was tenable[14] and that even if they were later found to be legally

9. The chief provisions in question were (See *In re* Sands Mfg. Co., 1 NLRB 546, 552 (1936)):

> "(5) That when employees are laid off, seniority rights shall rule and by departments.
>
> "(6) That when one department is shut down, men from this department will not be transferred or work in other departments until all old men only within that department, who were laid off, have been called back."

The clause upon which the Board based its contrary conclusion that the employees had a tenable position was:

> "(7) That all new employees be laid off before any old employees, in order to guarantee if possible at least one week's full time before the working week is reduced to three days."

10. This agreement was cancelled by mutual consent ten days after it was signed.

11. *In re* Sands Mfg. Co., 1 NLRB 546 (1936).

12. The Board found that the company had committed unfair labor practices under §§ 8(1), 8(3), and 8(5). The alleged violation of § 8(3), for discrimination in hiring occurred after the refusal to bargain collectively under § 8(5). When the finding of violation of the latter was reversed, the charge under § 8(3) also toppled. The alleged violation of § 8(1) was merely an excrescence of the other two charges.

13. An employer is bound to bargain only with representatives of his employees. N.L.R.B. v. Columbian Enameling & Stamp. Co., 59 Sup. Ct. 501 (U. S. 1939).

14. The Board said: "The operation of Article 7 is not limited to departments. Yet it deals with the same subject as Article 5. It is clear that the shop committee was not unreasonable in contending that the preference to old men over new men applied to the whole plant and not only to departments. . . . The confusion on the point is abundantly evident in the testimony of the old men, so much so, that counsel for the respondent, by resorting to a mixture of hypothetical and factual questions in his cross examination of them, confused rather than clarified the record." *In re* Sands Mfg. Co., 1 NLRB 546, 555 (1936).

wrong, they had not lost their employee status. This view was based upon Section 2(3) of the Act which provides that the term "employee" shall include one whose work had ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice. Furthermore, the Board felt that the company had not made a "forthright, candid effort" to reach a settlement and had not exhausted "every avenue and possibility of negotiation". The Board reasoned that since the employees had retained their status, this failure to negotiate constituted an unfair labor practice. But the Supreme Court, affirming the decision of the Circuit Court of Appeals,[15] held that the employer had bargained in good faith until an impasse had been reached and that the action by the employees constituted a repudiation of the agreement.[16] Since the employer had fulfilled his duties under the Act, and was not guilty of unfair labor practices, he was enabled to sever his relations with the workers through their violation of the agreement.

In the *Mackay* case, the Supreme Court had said that a peaceful strike, no matter how ill-advised, came within the term "current labor dispute" in the Act, and that therefore such a strike did not sever the employment status of the workers.[17] In the *Sands* case, the Court holds that where an employer, after sincere efforts to bargain, is forced either to accede to an interpretation of a contract which his employees know to be erroneous, or to insist upon the correct interpretation and choose between precipitating a strike and shutting down, he may choose to shut down and discharge the men, thus terminating their employment status.[18] The result should not be different if, under the same circumstances, the management refuses to shut down and a strike follows; in either case there has been a cessation of activity owing to a purposeful breach by the employees. Thus narrowly construed, the *Sands* case would seem to restrict the *Mackay* doctrine to strikes which are not accompanied by repudiation of agreements.[19]

Implications immediately arise. The area of contractual misconduct which will operate to deny an employee his status is left uncharted by the Court's opinion. Obviously, the meaning to be attached to the word "breach" will

15. N.L.R.B. v. Sands Mfg. Co., 96 F. (2d) 721 (C. C. A. 6th, 1938).

16. The Supreme Court made it clear that it thought the employees deliberately repudiated the contract, saying: "The contract provided for departmental seniority, in sections 5 and 6, and section 7 did not create any ambiguity on the subject. Moreover, the record makes it clear that the committee which negotiated the contract on behalf of the union fully understood its terms in the same sense as did the respondent." N.L.R.B. v. Sands Mfg. Co., 59 Sup. Ct. 508, 514 (U. S. 1939).

17. N.L.R.B. v. Mackay Radio & Telegraph Co., 304 U. S. 333 (1938). The preservation of the status of the employees presumably would last only so long as the labor dispute was current. Note also that although the employees retained their status, the employer was not bound to discharge those hired to fill the places of strikers, upon the election of the strikers to resume their employment.

18. Opinion of the Court, at 514.

19. The Circuit Court of Appeals, at 726, put it concisely: "The controversy over seniority rights was a current labor dispute within the definition. . . . But the statute does not provide that the relationship held in statu quo under (§2(9)) shall continue in absence of wrongful conduct on the part of the employers and of rightful conduct on the part of the employees."

not be co-extensive with its connotation in an ordinary action at law for damages.[20] Unless the infraction is an important one, the employer will probably be unable to establish that the real reason for the discharge was breach of contract and not anti-unionism.[21] A case might arise, however, similar in all respects to the *Sands* case, except that the employees' misinterpretation of the contract would be not wilful but made in good faith. The plight of the employer would then be precisely the same as it was in the principal case and a sympathetic court might extend the *Sands* doctrine to cover his predicament.[22] The fact that the Supreme Court in the instant case considered it pertinent to determine whether the employees were wilful or well-intentioned, malicious or malleable, lends some credence to a view that the tribunal was seeking something akin to wilful misconduct.[23] Yet the Court's emphasis upon the deliberate character of the employees' behavior may reflect merely a desire to depict the equities of the case; even if such behavior were absent, the Court might still be inclined to find for the guiltless employer. Adoption by the courts henceforth of a material and wilful breach as the *sine qua non* of the *Sands* case would, in many situations, lead to results contrary to those which would be achieved by the adoption of a rule requiring only a "mere" material breach. Further judicial interpretation alone will resolve this uncertainty. In the meantime, labor must guess what deviation from the terms of an existing contract will prove fatal.

The *Sands* case rule forces labor to choose between adherence to its contracts and running the risk of nullifying the employer's statutory duty to bargain.[24] That choice is not simplified by the uncertainty which apparently

20. The impact of the Act upon orthodox contractual relations is manifest in a dictum by the Supreme Court: "But we assume that the Act imposes upon the employer the further obligation to meet and bargain with his employees' representatives respecting proposed changes of an existing contract and also to discuss with them its true interpretation, if there is any doubt as to its meaning." Opinion of the Court, at 514.

21. The Act does not interfere with the normal right of an employer to select his employees or to discharge them. See N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U. S. 1, 45 (1937); Associated Press v. N.L.R.B., 301 U. S. 103, 132 (1937); *cf.* Texas & N.O.R. Co. v. Railway Clerks, 281 U. S. 548, 571 (1930); Virginian Ry. v. System Federation No. 40, 300 U. S. 515, 559 (1937). The employer may not, however, under cover of that right, intimidate or coerce his employees with respect to their self-organization and representation. See N.L.R.B. v. Jones & Laughlin Steel Corp., *supra* at 45–46. Because of the omnipresent tang of anti-unionism present in these cases, the employer should be able to point to an "independent and adequate" basis for discharge.

22. If a "real reason" only is required for an effective discharge, then, to carry this logic to its extreme, a mistaken but honest belief by an employer that his employees were acting in bad faith and were breaching the contract might suffice. In that case, since the employer had breached the contract, the employees would have a remedy of damages in an action at law.

23. See note 16, *supra*. Compare also the words of Mr. Justice Roberts at 514 of the *Sands* opinion: "The Act does not prohibit an effective discharge for repudiation by the employe of his agreement, any more than it prohibits such discharge for a tort committed against the employer."

24. This choice must be made whatever interpretation is placed upon the character of the breach that will call the *Sands* doctrine into play. Labor, however, has a notably

surrounds the character of the breach that will divorce employees from the protective wing of the Act. And the choice is further shrouded in doubt when the potential breach is preceded in point of time by an employer's unfair labor practices. In view of the *Fansteel* decision, holding that prior unfair labor practices do not prevent an employer from effectively discharging men who have participated in a sitdown strike,[25] labor may well pause to consider whether the privilege of reinstatement after an employer's unfair labor practices will be retained when followed by a wilful and material breach of contract.[26] However, in the mores of the time, breach of contract is not so shocking as force, violence and illegal occupation of property. An interpretation of the *Sands* doctrine consonant with public opinion would require an employer desirous of availing himself of the protection afforded by that case to establish that his own hands are clean. Consequently, it might be urged that the *Fansteel* case should be limited to sitdown strikes and the *Sands* case should be deemed inapplicable when unfair labor practices by the employer precede the breach,[27] unless, of course, the breach takes the form of a sitdown strike.

The rule of law which will evolve from the *Sands* doctrine, therefore, may well be narrowed to wilful and material breaches when not preceded by unfair labor practices. Under the curb rein which even this mild construction imposes upon it, labor will find its freedom somewhat curtailed. Alternative to the loss of the cherished protection of the Act is the self-restraint which labor must exercise in the use of its other weapons, especially the strike and the threat to strike. For although it is expressly stated that "nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike",[28] it seems likely that a strike in violation of an agreement not to strike or a strike or threat to strike to gain a modification of a term of an existing agreement would constitute, under

good record in living up to its agreements. *Cf.* Comment (1939) 52 HARV. L. REV. 970, at 974.

25. "As respondent's unfair labor practices afforded no excuse for the seizure and holding of its buildings, respondent had its normal rights of redress. Those rights, in their most obvious scope, include the right to discharge the wrongdoers from its employ." N.L.R.B. v. Fansteel Metallurgical Corp., 59 Sup. Ct. 490, 495 (U. S. 1939).

26. There are some suggestions that the Court intended the doctrine of the *Fansteel* case to carry over to the breach of contract situation. In the *Fansteel* case, at 496, the Court referred to "unlawful conduct" as the evil which prevented § 2(3) from operating. This interpretation of the majority opinion seems to be shared by the dissenters, who infer from it that an employer may henceforth discharge any employee so long as the discharge is not used to interfere with self-organization or collective bargaining. In the *Sands* opinion, the *Fansteel* decision was cited to support the already famous words quoted at note 23, *supra*.

27. This conclusion might be reached on orthodox contract concepts. It might well be assumed that the non-existence of unfair labor practices by the employer is an implied condition precedent to the worker's duty to perform under a collective labor agreement. If that assumption were held to represent the law—and it is supported by the fact that mutual good faith is a vital element of the collective contract—the employee will not have breached. *Cf.* RESTATEMENT, CONTRACTS, §§ 274, 275.

28. 49 STAT. 457 (1935), 29 U. S. C. § 163 (Supp. 1936).

proper circumstances, a breach of contract with its now attendant results.[20] If this deduction is warranted, then it would seem to follow that labor's crucially important right to strike is not so all-inclusive as the unions had hoped. Hereafter, a union contemplating a strike must weigh the grave possibility that in exercising the very right guaranteed to it by the Wagner Act, it may, in so doing, disable itself from invoking the protection of that Statute.

INQUISITORIAL POWERS OF FEDERAL ADMINISTRATIVE AGENCIES*

FROM AN early stage in the development of the American administrative system, judicial attention has been focused upon the power of an administrative agency to compel testimony and the production of documents.[1] But the scope of this now recognized investigatory prerogative, as it is expanded into new fields formerly immune, is still in the process of delineation.[2] Judicial determination of the question is complicated by the emergence of the related problem of the availability of information assembled by one agency for inspection and use by another. Both of these issues were dramatically raised in a recent case wherein the Securities and Exchange Commission undertook to exercise its investigatory powers upon a national bank.[3]

A corporation filed with the Commission an application for the listing and registration of its stock on national security exchanges. Since the principal assets of the corporation, until just prior to the filing of the application, consisted of all the stock of a national bank, the application was accompanied by balance sheets, profit and loss statements and financial information pertaining to this subsidiary. To facilitate the customary examination of the application, the Commission secured the authorization of the Secretary of the Treasury to inspect and use publically reports about this national bank made by bank examiners to the Comptroller of the Currency. The Commission concluded, principally from an inspection of these reports, that the registra-

29. One result of the *Sands* decision may be an increased tendency by management to seek to insert terms into the agreement that will prove onerous to labor. An increased tendency to bicker over clauses may slow down the bargaining process. Thus labor will be wise to avoid agreements not to strike and to keep the contract simple, its tenure short.

*Bank of America National Trust & Savings Ass'n. v. Securities and Exchange Commission, App. D. C., May 8, 1939.

1. See Handler, *The Constitutionality of Investigations by the Federal Trade Commission* (1928) 28 COL. L. REV. 708, 905; Langeluttig, *Constitutional Limitations on Administrative Power of Investigation* (1933) 28 ILL. L. REV. 508; Lilienthal, *The Power of Governmental Agencies to Compel Testimony* (1926) 39 HARV. L. REV. 694.

2. See Rush, *Expansion of Federal Supervision of Securities Through the Inquisitional and Census Powers of Congress—A Suggestion* (1938) 36 MICH. L. REV. 409; Comments (1935) 44 YALE L. J. 819, (1938) 47 YALE L. J. 790, (1938) 86 U. OF PA. L. REV. 420.

3. Bank of America National Trust & Savings Ass'n. v. Securities and Exchange Commission, App. D. C., May 8, 1939.

tion statements were in part false and misleading; it therefore issued, pursuant to the Securities Exchange Act of 1934, an order, accompanied by a detailed statement of the facts ascertained from the reports, directing a public hearing to determine whether the corporation's registration should be suspended. Though the bank was not joined as a party, subpoenas duces tecum were issued upon two of its officers, requiring production of data relating to the financial condition of the bank. Thereupon the latter, in the District Court for the District of Columbia, sought a declaratory judgment or an injunction to restrain the Commission from enforcing the subpoenas or revealing to the public information obtained by the inspection of the bank examiner's reports. From a dismissal of its complaint, the bank appealed to the Court of Appeals for the District of Columbia. The court held that the Commission had power to investigate a national bank for a purpose authorized by the Act; and that the Secretary of the Treasury could disclose bank examiners' reports; but that such data should not have been made public prior to hearing.

The case evidences an apparent clash between Congressional purposes. The Securities and Exchange Commission was established primarily for the protection of investors.[4] It was given broad inquisitorial powers to determine, in the exercise of its own discretion, whether a registrant has violated any provisions of the Act or rules of the Commission.[5] On the other hand, because of the vital significance of banking upon general business conditions and of the necessity of maintaining public confidence in banking institutions, power to examine the intricate internal activities of national banks has been restricted by Congress. The national banking laws provide that the Comptroller of the Currency shall have plenary authority to conduct examinations and supervise the operations of national banks,[6] but that no other visitorial powers are to be exercised over national banks unless duly authorized by law.[7] This apparent conflict in Congressional purposes the petitioning bank in the instant case attempted to employ in order to avert investigation. Petitioner contended that Congress in the past had provided express authorization, where duties of federal agencies have involved an examination of the affairs of national banks;[8] and that since the Securities Exchange Act did not expressly grant the Commission visitorial power over national banks, there was clear indication that Congress did not contemplate the exercise of such power by that body.[9] This position overlooks the fact that, according to judicial definition, the term "visitorial powers" refers only to the authority to regulate and supervise banking practices, and that disclosure of information relating to

4. 48 STAT. 881, 15 U. S. C. § 78(b) (1934).

5. 48 STAT. 899, 15 U. S. C. § 78(u) (1934).

6. REV. STAT. § 5211 (1877), 12 U. S. C. § 161 (1934).

7. 38 STAT. 271 (1913), 12 U. S. C. § 484 (1934).

8. 42 STAT. 1458 (1923), 12 U. S. C. § 1091 (1934) (Federal Intermediate Credit Bank); 47 STAT. 714 (1932), 15 U. S. C. § 608 (1934) (Reconstruction Finance Corporation); 47 STAT. 739 (1932), 12 U. S. C. § 1442(a) (1934) (Home Loan Bank Board); 48 STAT. 172 (1933), 12 U. S. C. § 264(k) (1934) (Federal Deposit Insurance Corporation).

9. Brief for Appellants, pp. 25–32, Bank of America National Trust & Savings Ass'n. v. Securities and Exchange Commission, App. D. C., May 8, 1939.

national banks, for purposes other than regulation, has not been deemed precluded by the statutory prohibition.[10] The Commission, in seeking data, not with the purpose of regulating banking practices, but only with that of determining whether requirements of truthful disclosure in registration statements have been met, can hardly be charged with attempting to exercise visitorial powers. The primary consideration, however, is not whether this investigatory power is visitorial, but whether it is "authorized by law."[11] Although Congress in the past has expressly provided for examination by federal agencies of information regarding national banks,[12] such provision cannot be deemed a conclusive indication, as contended by the bank, that express authorization is always necessary. The purpose of the Securities Exchange Act appears to warrant the exercise of this power; for a bank could register its stock for sale on national exchanges and dispose of it without the safeguards of Commission scrutiny contemplated by the Statute, unless such investigation were permitted.[13] Further evidence of Congressional intent to extend inquisitorial powers over banks to the S.E.C. is afforded by the legislative history of the Act. Since Congress specially considered the question of national banks[14] and exempted them from some provisions of the Act,[15] the absence of express immunity from the inquisitorial powers would seem to indicate that the extension of these powers to cover national banks was intended. Nor would it appear, as the bank argued,[16] that Congress created an immunity from investigation when a national bank is a subsidiary of the registrant, since investigation of a registrant's subsidiaries was authorized without qualification.[17] Therefore, although the actual subpoenas issued were deemed to be too broad,[18] the instant decision, in recognizing the authority of the S.E.C. to investigate the affairs of national banks to the extent necessary to effectuate the provisions of the Act, reaches a result clearly within the contemplation of Congress.

10. First National Bank of Youngstown v. Hughes, 6 Fed. 737 (C. C. N. D. Ohio 1881) (county auditor could compel production of national bank's books for tax purposes); Territory of Alaska v. First National Bank of Fairbanks, 22 F. (2d) 377 (C. C. A. 9th, 1927) (compulsory production of national bank's books permitted to aid Attorney General in administering escheat statutes).

11. 38 STAT. 271 (1913), 12 U. S. C. § 484 (1934).

12. See note 8, *supra*.

13. 48 STAT. 892, 15 U. S. C. § 78(l) (1934).

14. During discussion of the bill in the Senate an amendment was proposed to exclude banks from the definition of "member". The subsequent debate indicated that banks were subject to the terms of the bill unless expressly exempted. 78 CONG. REC. 8589 (1934).

15. Banks are excepted from the terms "broker" and "dealer". 48 STAT. 883, 15 U. S. C. § 78(c) (1934).

16. Brief for Appellants, pp. 33–38, Bank of America National Trust & Savings Ass'n. v. Securities and Exchange Commission, App. D. C. May 8, 1939.

17. 48 STAT. 895, 15 U. S. C. § 78(m) (1934).

18. The court deemed it unreasonable to require a transfer of the data from San Francisco, the location of the bank, to Washington, which would necessitate closing the bank. But the information could be used if the investigation were held at San Francisco. The court was not required to decree injunctive relief, since the actual subpoenas had expired.

The second problem faced by the court in the principal case was whether the Secretary of the Treasury acted properly in disclosing to the Commission the information contained in the bank examiners' reports. An administrative agency's authority to disclose information, like its authority to collect it, is derived from Congress.[19] Some Congressional authorizations for acquiring data have been accompanied by guaranties of confidential treatment;[20] some by provisions for inspection and use by other governmental agencies for specific purposes;[21] some by clauses specifically allowing disclosure at the discretion of the administrative board,[22] or the head of the executive department, which possesses the data.[23] The great mass of information in the possession of governmental agencies, however, is subject only to the rules concerning the custody of records which the executive departments are authorized, by general statutory provision, to make.[24] These rules usually provide expressly either for disclosure or confidential treatment, or else leave ultimate discretion with the head of the department.[25] The courts have given such

19. Where Congress has the constitutional power to provide for the collection of data, it has the power to authorize public disclosure. Flint v. Stone Tracy Co., 220 U. S. 107, 175 (1911); United States v. Dickey, 268 U. S. 378 (1925); Hubbard v. Mellon, 5 F. (2d) 764 (App. D. C. 1925); Rush, *supra* note 2, at 431.

20. Certain reports which the Secretary of Agriculture is authorized to demand under the census power cannot be published in a manner which identifies any individual document. 39 STAT. 437 (1916), 13 U. S. C. § 82 (1934) (cottonseed data); 45 STAT. 1080 (1929), 7 U. S. C. § 507 (1934) (tobacco reports); 50 STAT. 205 (1937), 13 U. S. C. § 96 (Supp. 1938) (red-cedar shingles reports). The usual statute authorizing collection of data contains a provision imposing a criminal penalty for disclosure of any information by any agent of the administrative body without express authorization. *E.g.*, 44 STAT. 117 (1926), 18 U. S. C. § 216 (1934); 40 STAT. 970 (1918), 12 U. S. C. § 594 (1934).

21. 39 STAT. 1081 (1917), 5 U. S. C. § 650 (1934). Revenue Acts provide for inspection of information in the possession of the Treasury Department upon executive order of the President. *E.g.*, 44 STAT. 51 (1926); 49 STAT. 1648 (1936). Pursuant to this provision special congressional committees have been empowered to inspect tax returns. 1 FED. REG. 1757 (1936) (special Senate committee to investigate production, transporting and marketing of wool); 2 FED. REG. 2088 (1937); 3 FED. REG. 783 (1938).

22. 38 STAT. 721 (1914), 15 U. S. C. § 46 (1934) (Federal Trade Commission); 43 STAT. 615 (1924), 38 U. S. C. § 456 (1934) (Veteran's Bureau); 48 STAT. 901, 15 U. S. C. § 78(x) (1934) (Securities and Exchange Commission).

23. 49 STAT. 293 (1935), 5 U. S. C. § 601(b) (Supp. 1938). The Secretary of Commerce and the Court of Claims are expressly authorized to request data possessed by other departments, which is to be submitted if the head of the department upon which request is made deems it proper. 32 STAT. 826 (1903), 5 U. S. C. § 601 (1934); 36 STAT. 1140 (1911), 28 U. S. C. § 272 (1934).

24. "The head of each department is authorized to prescribe regulations, not inconsistent with law, for . . . the custody, use, and preservation of the records, papers and property appertaining to it." REV. STAT. § 161 (1875), 5 U. S. C. § 22 (1934).

25. The rules promulgated by the Treasury Department provide that requests for information must be made in writing to the Secretary. 3 FED. REG. 641-649 (1938); 391 C. C. H. 1939 Fed. Tax Serv. ¶¶ 481-520. No other department has such extensive regulations. The difficulty in ascertaining what regulations, if any, exist for each department may ultimately be overcome by virtue of compilations of administrative rules in the Federal Register. See Griswold, *Government in Ignorance of the Law* (1934) 48 HARV. L. REV. 198; Legis. (1936) 49 HARV. L. REV. 1209.

regulations, so long as consistent with existing legislation, the weight of statutory law.[26] Therefore, even subpoenas directing production of assembled information would be ineffective, if pursuant to these rules the head of a department should refuse to produce.[27] The data involved in the instant case, being in the possession of the Comptroller of the Currency, was subject to Treasury Department rules,[28] which rest discretion concerning inspection or disclosure with the Secretary of the Treasury.[29] Hence even though bank examiners' reports, by long-standing departmental custom, have been considered confidential and available to other governmental agencies only in rare cases and then with the assent of the bank in question,[30] the Secretary's decision—that under the circumstances of the case disclosure was proper—was sustained by the court.[31] The desirability of thus resting final discretion with the agency possessing the data, rather than with an impartial judiciary, may be questioned: a decision by an administrative board may be swayed by interdepartmental jealousies.[32] On the other hand, were the judiciary alone to decide the issue, the information might well be disclosed to the public before any protection could be afforded the bank.[33] The administrative agency, acquainted with all the circumstances of the case, is better equipped to consider the question of whether injury to the informant is imminent and to balance the two conflicting administrative policies involved: administrative efficiency fostered by free availability of information between administrative agencies, as opposed to the benefits consequent to maintaining a cooperative attitude with private persons who, even though under a legal duty to submit information, will give it more readily if confident its circulation will be guarded. Thus, it seems sound to continue the present policy of leaving complete discretion in disclosure to the administrative body possessing the information, either under a specific statute or administrative rules.

26. Boske v. Comingore, 177 U. S. 459 (1900); *Ex parte* Sackett, 74 F. (2d) 922 (C. C. A. 9th, 1935).

27. *Subpoena directed to head of the department:* 25 OPS. ATT'Y GEN. 326 (1905); 35 OPS. ATT'Y GEN. 5 (1925); *cf.* Robinson v. United States, 50 Ct. Cl. 159 (1915). *Subpoena directed to an agent of a department:* Boske v. Comingore, 177 U. S. 459 (1900); *Ex parte* Sackett, 74 F. (2d) 922 (C. C. A. 9th, 1935). Similar rules by state or municipal administrative bodies have defeated attempts at compulsory production of data possessed by these boards. McGowan v. Metropolitan Life Insurance Co., 141 Misc. 834, 253 N. Y. Supp. 551 (1st Dep't 1931); Gilbertson v. State, 205 Wis. 168, 236 N. W. 539 (1931). See (1936) 5 GEO. WASH. L. REV. 126; (1936) 10 TEMP. L. Q. 331.

28. REV. STAT. § 324 (1864), 12 U. S. C. § 1 (1934).

29. See note 25, *supra.*

30. This confidential treatment is a matter of custom and not of law. 29 OPS. ATT'Y GEN. 555 *et seq.* (1912); *Hearings before House Committee on Banking and Currency H.R. 429,* 62d Cong., 2d Sess. (1913) 1391.

31. Bank of America National Trust & Savings Ass'n. v. Securities and Exchange Commission, App. D. C., May 8, 1939.

32. See (1934) 7 AUSTRALIAN L. J. 387, 430; (1931) 75 SOL. J. 450.

33. An analogous situation is presented by cases wherein the possessor of a governmental secret is privileged from disclosure if, in his opinion, publication would be detrimental to the government. Pollen v. United States, 85 Ct. Cl. 673 (1937); United States v. Doheny and Fall (Sup. Ct. D. C. 1926), MORGAN AND MAGUIRE, CASES ON EVIDENCE (1934) 208.

Where, however, as in the instant case, data is revealed pursuant to administrative discretion, further problems arise as to the proper use of the information. There is a sharp distinction between availability of information for confidential use by another agency and availability for purposes of public disclosure. Injury in these situations lies in making the information public; not in permitting inspection by another governmental unit. In the instant case the Commission might have inspected the examiners' reports solely for the purpose of determining the advisability of initiating an investigation and charting its course of action, without ever disclosing the information or using it at public hearing. Therefore, where information is of such a nature that confidential treatment should be maintained, the proper course for the courts seems to be that of sanctioning its availability for limited inspection, but not for public disclosure. The proper extent of this restricted availability was one of the questions raised in the principal case. The fact that in the past bank examiners' reports have usually been regarded as confidential appeared to be an important factor in the court's determination that pre-hearing publication of the evidence acquired from the bank reports was improper.[34] The court, however, indicated by way of dictum that the information secured from the bank examiners' reports could be introduced at public hearing.[35] Hence the correct procedure, as the court indicates, is to allow as much use of the acquired data as efficient administration of the Commission's statutory duties requires, and yet maintain as far as possible confidential treatment of the data.[36] This balance the court achieved in the instant case by permitting use at public hearing but not before; and the distinction drawn between confidential inspection and public disclosure establishes a useful standard for the determinations of such questions in the future.

Thus, where information is in the possession of a governmental agency, restrictions on both the availability and the use of the data afford the informant a measure of protection. It is important to determine, however, by what procedure this potential protection can be actually achieved. A comparable situation that has come before the courts arises where a federal agency has subpoenaed documents, not from another governmental agency, but from a private person, who had secured them in the course of business from the original informant. The person furnishing the data is generally unable to overcome the natural reluctance of the person in possession of the informa-

34. The court did not restrict its decision to the particular information involved, but held that the Commission lacked statutory authority to disclose evidence prior to the public hearing provided in the Act. Bank of America National Trust & Savings Ass'n. v. Securities and Exchange Commission, App. D. C., May 8, 1939.

35. Since the Commission agreed not to introduce in evidence at the public hearing the information acquired from the bank examiner's reports, the court was not required to determine the point. Bank of America National Trust & Savings Ass'n. v. Securities and Exchange Commission, App. D. C., May 8, 1939.

36. Former Chairman Douglas of the S.E.C. testified at a Senate hearing: "I do not think the information from examiners of banks should be made public. Nevertheless, there is, on the other side of the question, the matter of not crippling the Commission and making it impossible for the Commission to enforce the statute." *Hearings before Senate Subcommittee on Banking and Currency, S. 2344,* 75th Cong., 1st Sess. (1937) 74.

tion to disobey legal process,[37] and reliance cannot be placed upon the constitutional immunity from unreasonable searches and seizures, for that immunity is available only to the person subpoenaed[38] or to one possessing a property interest in the document.[39] The informant, however, may have a valid objection in the possibility of irreparable injury,[40] in a statutory privilege,[41] or, occasionally, in a common law privilege resulting from his relationship with the possessor of the information.[42] By recognizing the possibility of injunctive protection, the courts have afforded the informant a means of raising such claims prior to production of the information.[43]

Where the person originally furnishing the information is seeking to prevent production of data by one administrative agency for use by another, the available bases of objection are somewhat different. There is no common law privilege shrouding information submitted to the government.[44] But in view of the fact that much information submitted to a governmental agency is surrendered with the tacit understanding that it will be treated as confidential, Congress has provided, in some instances, a statutory privilege of limited disclosure.[45] The instant case illustrates a further possible basis for injunction in the right in certain cases to limited use after disclosure. Finally, as in the case where the possessor of the data is a private person, a showing that disclosure would cause the informant irreparable injury would be a

37. The informant might enjoin the possessor from disclosing the data on the grounds of common law or statutory privilege. See Strawn v. Western Union Telegraph Co. (Sup. Ct. D. C. 1936), (1936) 36 COL. L. REV. 841. But this judgment would not preclude further action by the administrative agency to compel production. As to the possibility of a declaratory judgment, see Comment (1937) 51 HARV. L. REV. 312.

38. Dier v. Banton, 262 U. S. 147 (1923); Fuller v. United States, 31 F. (2d) 747 (C. C. A. 2d, 1929), *cert. denied*, 280 U. S. 556 (1929); Newfield v. Ryan, 91 F. (2d) 700 (C. C. A. 5th, 1937), *cert. denied*, 302 U. S. 729 (1937).

39. Pielow v. United States, 8 F. (2d) 492 (C. C. A. 9th, 1925); see McMann v. Securities and Exchange Commission, 87 F. (2d) 377, 379 (C. C. A. 2d, 1937). See (1937) 50 HARV. L. REV. 698. Regardless of who possesses the data or whose property it is, a corporation does not fall within the protection of the Fourth or Fifth Amendments. Hale v. Henkel, 201 U. S. 43 (1906); *In re* Bomn Hat Co., 184 Fed. 506 (C. C. S. D. N. Y. 1911), *aff'd*, 223 U. S. 713 (1911).

40. See McMann v. Securities and Exchange Commission, 87 F. (2d) 377, 378 (C. C. A. 2d, 1937); Comment (1936) 46 YALE L. J. 255.

41. The most frequent claim is that telegrams are subject to protection afforded the sender by the Federal Communications Act. 48 STAT. 1103, 47 U. S. C. § 605 (1934). See Newfield v. Ryan, 91 F. (2d) 700 (C. C. A. 5th, 1937); Hearst v. Black, 87 F. (2d) 68 (App. D. C. 1936).

42. McMann v. Securities and Exchange Commission, 87 F. (2d) 377 (C. C. A. 2d, 1937) (alleged broker-customer privilege), *cert. denied*, 301 U. S. 684 (1937).

43. Zimmerman v. Wilson, 81 F. (2d) 847 (C. C. A. 3d, 1936); McMann v. Securities and Exchange Commission, 87 F. (2d) 377, 379 (C. C. A. 2d, 1937); Newfield v. Ryan, 91 F. (2d) 700, 703 (C. C. A. 5th, 1937), *cert. denied*, 302 U. S. 729 (1937). In the McMann and Newfield cases, although injunctive relief was not granted, the courts, in determining whether or not a common law or statutory privilege did exist, recognized the possibility of equitable protection.

44. Rush, *supra* note 2, at 431.

45. See note 20, *supra*.

valid objection.[46] Despite the differences in the available objections, the desirability of maintaining a mechanism whereby the informant may raise these objections remains the same whether the possessor of the information is a private person or a government agency. To recognize the possibility of injunction, as the court in the instant case did over the objection of the Commission that the court was without jurisdiction,[47] may indeed somewhat impair administrative efficiency,[48] but it sets up a necessary safeguard of individual rights. This recognition of the remedy does not require granting the relief, but provides the means for making effective the potential protection afforded by restrictions of the department on disclosure of information in its possession, and by the court on use of the information after disclosure. In the principal case, the court provided the necessary counterpoise to the broadening inquisitorial powers of federal administrative agencies by granting the informant as much protection from unwanted publicity as appeared reasonably consonant with a proper exercise by the Commission of its statutory functions.

CORRECTION OF ELECTION FRAUDS*

THE great majority of American elections today are doubtless honestly conducted;[1] yet it is clear nevertheless that the element of fraud still plays a considerable part in the current political scheme.[2] Moreover, the question may be asked whether the courts do not condone the continuance of election fraud by their reluctance to permit a free investigation of suspicious electoral results, and by placing heavy burdens of pleading and proof on those who would avail themselves of statutory procedures for contesting an election. Recent litigation,[3] growing out of the disputed New Jersey gubernatorial

46. A registrant may request the Commission to consider submitted information confidential, whereupon the Commission may only make such information public if it deems it necessary for the public interest. 48 STAT. 901, 15 U. S. C. 78(x) (1934). A ruling by the Commission to disclose might possibly afford judicial review by the statutory procedure. See (1939) 48 YALE L. J. 1257. But even this possibility was unavailable to the petitioning bank since it was not the registrant. Equitable relief was the only possibility. *Cf.* Utah Fuel Co. v. National Bituminous Coal Commission, 59 Sup. Ct. 409 (1939).

47. Bank of America National Trust & Savings Ass'n. v. Securities and Exchange Commission, App. D. C., May 8, 1939.

48. See (1937) 50 HARV. L. REV. 698.

**In re* Kelly, 123 N. J. Eq. 489, 198 Atl. 203 (Ch. 1938), *aff'd*, McRell v. Martin, 124 N. J. Eq. 350, 1 A. (2d) 926 (1938); Petition of Clee, 119 N. J. Law 310, 196 Atl. 476 (Sup. Ct. 1938).

1. See 5 ENCYC. SOC. SCIENCES 451, 454.

2. See HARRIS, ELECTION ADMINISTRATION IN THE UNITED STATES (1934) 315-382.

3. *In re* Kelly, 123 N. J. Eq. 489, 198 Atl. 203 (Ch. 1938), *aff'd*, McRell v. Martin, 124 N. J. Eq. 350, 1 A. (2d) 926 (1938); Petition of Clee, 119 N. J. Law 310, 196 Atl. 476 (Sup. Ct. 1938).

contest of 1937, once again indicates the inadequacy of present governmental machinery for prevention and correction of election fraud.

In the New Jersey contest, the Democratic candidate, A. Harry Moore, was elected by some 45,000 votes; but his majority was produced by an unusually large plurality of 129,000 rung up for him by Mayor Frank Hague's Jersey City machine. His Republican opponent, Lester H. Clee, discovered in one precinct wide discrepancies between the registration books and the poll records which led him to believe illegal voting had been extensively practiced. Inspection of records in other precincts was prevented by local officials.[4] An election contest was duly commenced by Clee under the appropriate New Jersey statute,[5] and a motion made for the production of the records; but the motion was denied by the court on the ground that the statutory remedy was exclusive, and made no provision for such action.[6] Shortly thereafter the contest was dismissed,[7] Chief Justice Brogan declaring that the allegations of fraud were not sufficiently definite, and that the failure of election officials to compare the signatures on register and poll list, as prescribed by law, was a mere irregularity.

Clee then went to the state legislature, and induced the Republican majority in the lower house to appoint a committee to investigate and "to report its findings as a general basis for such legislative action as the General Assembly may deem necessary and proper."[8] Despite a hostile Governor and upper house, sufficient funds were found to enable the committee to function; but the committee's attempts to obtain access to election records failed when police forcibly barred its members from the depository.[9] The committee then attempted to take testimony from election officials. The latter refused to talk, were committed for contempt, and were promptly released on habeas corpus. On appeal, the Court of Errors and Appeals sustained the release and held the committee had no jurisdiction to ask a court to commit for contempt, since the proposed investigation was an attempt by the legislature to usurp the judicial function of investigating crime.[10]

These decisions illustrate the obstacles confronting an unsuccessful candidate who seeks a review of the returns, obstacles which have the effect of making a stolen election more or less a *fait accompli*. Although the judicial hamstringing of the legislative investigation in the principal case represents an unusually strict attitude, the original action of the lower court in dismissing the election contest proper is quite in line with the rigid pattern of authority.

4. See Petition of Clee, 119 N. J. Law 310, 317; 196 Atl. 476, 481 (Sup. Ct. 1938).

5. N. J. REV. STAT. (1937) tit. 19, c. 29.

6. Clee v. Moore, 119 N. J. Law 215, 195 Atl. 530 (Sup. Ct. 1937).

7. Petition of Clee, 119 N. J. Law 310, 196 Atl. 476 (Sup. Ct. 1938).

8. See *In re* Kelly, 123 N. J. Eq. 489, 491, 128 Atl. 203, 204 (Ch. 1938), *aff'd*, McRell v. Martin, 124 N. J. Eq. 350, 1 A. (2d) 926 (1938). Similar action has recently been proposed by the New York legislature in respect to the O'Connell machine in Albany. N. Y. Times, Mar. 7, 1939, p. 1, col. 5.

9. N. Y. Times, Jan. 30, 1938, p. 1, col. 4.

10. McRell v. Martin, 124 N. J. Eq. 350, 1 A. (2d) 926 (1938). The court adopted as its own the reasoning of Vice-Chancellor Kays in the lower court, but three judges joined in a strong dissent.

The courts apparently fear that a relaxation of the stiff requirements which they place upon the contestant in such cases would result in the habitual transfer of political battles from the polls to a judicial arena. This same fear is reflected in statutes governing election contests. The New Jersey statute, decidedly unfavorable to the contestant, is typical.[11] In some states an informal recount procedure is provided to serve as a check upon the canvassers, and is fairly easy to obtain;[12] but in others the recount is part of the contest and is subject to the difficult requirements of the contest procedure.[13]

The most rigid statutory requirement is that of a high degree of certainty in the allegations of the complaint.[14] It was this obstacle which Clee failed to surmount. He had been unable to obtain specific evidence of fraud and illegal voting except in one election district, for the reason that his agents were prevented by the election officials from examining records elsewhere. The court held that therefore his allegation that votes sufficient to change the result had been illegally cast[15] in the other 518 districts was a mere conclusion of law.[16] Where illegal voting is charged, some states require that the names of illegal voters be given,[17] though this is not true in New Jersey.[18] It is also quite generally required that the illegal votes be shown to have been cast for the elected candidate.[19] Although this requirement may cause

11. N. J. REV. STAT. (1937) tit. 19, c. 29. Under the statute, the defeated candidate, or a number of qualified electors, may commence a contest by filing a petition alleging that the supposedly successful candidate is not entitled to his office. The petition must be filed, ordinarily, within thirty days after an election, notice must be given to the contestee, and the specific grounds of contest must be alleged. These grounds include ineligibility of the candidate, bribery committed by him to further his own election, campaign expenditures in excess of the statutory limit, an error in canvassing sufficient to change the result, a defect or bad faith in the petition by which the candidate was originally nominated, illegal voting or exclusion of voters "sufficient to change" the result, fraud, "sufficient to challenge" the result, or any other cause showing that another person was legally elected. A bond of $500 must be filed by the contestants. The contest is to be tried like a civil action, and may be appealed like a civil action.

12. *E.g.*, N. J. REV. STAT. (1937) tit. 19, c. 28; Snowden v. Flanery, 159 Ky. 568, 167 S. W. 893 (1914); but *cf.* Wright v. Crase, 274 Ky. 628, 119 S. W. (2d) 858 (1938).

13. *E.g.*, Gray v. Huntley, 7 Colo. 478, 238 Pac. 53 (1925); *In re* Election Contest for Office of Burgess of Borough of Ellwood City, 286 Pa. 257, 133 Atl. 379 (1926).

14. Benavides v. Orth, 120 S. W. (2d) 99 (Tex. Civ. App., 1938); MacGuidwin v. Commissioners, 333 Ill. 58, 164 N. E. 208 (1928); *In re* Contest of Election of Gollmar, 316 Pa. 560, 175 Atl. 510 (1934).

15. Clee's motion to produce the records had previously been denied on the ground the statute called for their production only at trial. Clee v. Moore, 119 N. J. Law 215, 195 Atl. 530 (Sup. Ct. 1937).

16. For an example of allegations sufficiently specific to pass muster with the New Jersey courts, see *In re* Stoebling, 196 Atl. 423 (Cir. Ct. 1938).

17. *E.g.*, WIS. STAT. (1937) § 294.06; N. M. STAT. ANN. (Courtright, 1929) § 41-604; *cf.* Green v. Owen, 38 S. W. (2d) 496 (Kansas City Ct. of App., Mo. 1931).

18. The statute (N. J. REV. STAT. (1937), tit. 19, § 29-2) implicitly dispenses with such a requirement.

19. *Cf. In re* Contest of Election of Gollmar, 316 Pa. 560, 175 Atl. 510 (1934); *In re* Incorporation of Town of Big Cabin, 132 Okla. 200, 270 Pac. 75 (1928).

little difficulty at the trial, for it is clear that the voter's privilege of secrecy does not extend to illegal voters,[20] it is an additional handicap to the pleader.

Where fraud or misconduct on the part of election officials, rather than mere illegal voting, is charged, a lesser showing by the pleader will be sufficient against a demurrer or motion.[21] But another barrier to the contestant is raised by the tendency of courts to regard statutory requirements as directory rather than mandatory.[22] It is said that the statutes must be liberally interpreted in favor of sustaining the election;[23] and therefore illegal presence of party workers in the polling booth,[24] failure to compare poll signatures with registration signatures,[25] defects in giving notice of the elections,[26] and similar breaches[27] have been held mere irregularities which do not void the election. Whether invalidation occurs is often a question of degree: to ignore several statutory requirements will invalidate where to ignore one alone would not. One court has said that no breach of the statute will be held fatal unless the words of the statute expressly make it so.[28] A further difficulty is presented by the refusal of many courts to entertain allegations upon information and belief, whether the charge is fraud or illegal voting.[29]

In most states, statutory remedies are held to be exclusive. But a few still permit the older remedies; chiefly, proceedings in the nature of *quo warranto.* Such proceedings lie where an office has been "usurped" under a claim of right, and often may be brought only by the claimant to the office.[30] They

20. Powers v. Harten, 183 Iowa 764, 167 N. W. 693 (1918); Gardner v. School Dist., 248 Mich. 134, 226 N. W. 895 (1929); Hodges v. Murray, 240 Ky. 127, 41 S. W. (2d) 923 (1931); 3 WIGMORE, EVIDENCE (2d ed. 1923) § 1713.

21. Taylor v. Nuetzel, 220 Ky. 510, 295 S. W. 873 (1927); note provisions of New Jersey statute set out *supra* note 11.

22. Bolton v. Whalen, 350 Ill. 50, 182 N. E. 780 (1932); Ramsay v. Wilhelm, 52 S. W. (2d) 757 (Tex. Civ. App. 1932); *In re* Election Contest for Office of Burgess of Ellwood City, 286 Pa. 257, 133 A. 379 (1926). Although the courts disclaim a desire to excuse breaches as irregularities where fraud is present, the requirement of proof of fraudulent intent allows too free a rein to election officials.

23. See Lumm v. Simpson, 207 Ind. 680, 683, 194 N. E. 341, 342 (1935).

24. See Petition of Clee, 119 N. J. Law 310, 329, 196 Atl. 476, 486; *cf.* Lehlbach v. Haynes, 54 N. J. Law 77, 23 Atl. 422 (Sup. Ct. 1891).

25. See Petition of Clee, 119 N. J. Law 310, 321, 196 Atl. 476, 483 (Sup. Ct. 1938); *cf.* Bolton v. Whalen, 350 Ill. 50, 182 N. E. 780 (1932) (election judges tampered with ballots).

26. Anselmi v. City of Rock Springs, 80 P. (2d) 419 (Wyo. 1938).

27. Kerby v. Griffin, 48 Ariz. 434, 462, 62 P. (2d) 1131, 1139 (1936) (statutory provisions as to time are mandatory before elections but directory thereafter); State v. Ice, 207 Ind. 65, 191 N. E. 155 (1934) (failure to file acknowledgment of signature with nominating petition not fatal).

28. Wadsworth v. Neher, 138 Okla. 4, 280 Pac. 263 (1929) (in syllabus by the court).

29. Smith v. Township High School District, 335 Ill. 346, 167 N. E. 76 (1929); *In re* Cryer, 247 Pac. 252 (Cal. 1926).

30. And as to him the statutory remedy is often held to be exclusive. State *ex rel.* Abercrombie v. District Court, 37 N. M. 407, 24 P. (2d) 265 (1933). Moreover, the

are generally subject to all the disadvantages of the statutory procedure, with few compensatory advantages,[31] except the opportunity to avoid the statutory tribunal and perhaps to gain a slightly longer period within which to commence suit. The ancient jurisdiction of equity to set aside elections has entirely disappeared,[32] though equity will still interfere on occasion to prevent election frauds.[33]

Legislative bodies are the final judges of their own membership, and have wide latitude in dealing with contests over seats.[34] Their authority to investigate other elections, however, is limited and uncertain. Their impeaching power is not sufficient to expel an office-holder for fraud in his election, unless he can be proved responsible for it;[35] and they may not investigate crime *ex parte,* for that is a judicial function.[36] But the New Jersey court seems to go rather far in restricting their powers of investigation. The precise issue raised by its decision, whether a legislature, by investigating election frauds where its own membership is not in question, infringes upon the judicial power, has apparently never before been expressly litigated. The general rule as to legislative powers of investigation has been stated often enough: "A legislature has power to obtain information concerning any subject on which it has power to legislate, with a view to its enlightenment and guidance, but it cannot violate the constitutional rights of any institution or individual by conducting a public and judicial investigation of any charges made against such person under the pretence or cloak of its

granting of the remedy is discretionary with the court. See CONSTANTINEAU, PUBLIC OFFICERS (1910) §§ 450–474.

31. In its origin, *quo warranto* was a proceeding by the state, and the respondent was held to bear the burden of proving his title to the office; but since the development of the proceedings into a private remedy, with the state's role merely nominal, the burden of proof has largely shifted to the plaintiff. This is especially true where the plaintiff is himself the claimant to the office. See CONSTANTINEAU, PUBLIC OFFICERS (1910) § 472.

32. *Cf.* 14 SELDEN SOCIETY 64 (Star Chamber, 1535), reprinted 2 CLARK, CASES ON PLEADING AND PROCEDURE (1934) 173; 4 POMEROY, EQUITABLE JURISPRUDENCE (4th ed. 1918) § 1753 ff.

33. People v. Tool, 35 Colo. 225, 86 Pac. 224 (1907); *cf.* dissent of Mr. Justice Brewer in Taylor and Marshall v. Beckham, 178 U. S. 548, 581 (1900) (arguing that the right to office is a property right, protected by the Fourteenth Amendment against wrongful deprivation by a state court); *cf.* Taylor v. Nealon, 120 S. W. (2d) 586 (Tex. 1938). If the question of title to public office is a mere incident to the principal question involved, equity will usually resolve it. Heyward v. Long, 178 S. C. 351, 183 S. E. 145, 114 A. L. R. 1130 (1935).

34. *Ex parte* Dalton, 44 Ohio St. 142, 5 N. E. 136 (1886); *In re* Gunn, 50 Kan. 155, 32 Pac. 470 (1893). The appropriate federal agencies can of course investigate state elections in which federal offices are at stake, under the rule of *Ex parte* Siebold, 100 U. S. 371 (1880).

35. Moreover, the impeachable "high crime or misdemeanor" must have been committed during the term of office; and only a few states will allow impeachment during a succeeding term. See notes to State v. Hasty, 184 Ala. 121, 63 So. 559, Ann. Cas. 1916 B 707, 50 L. R. A. (N.S.) 553 (1913); Ethridge, *The Law of Impeachment* (1936) 8 MISS. L. J. 283.

36. Kilbourn v. Thompson, 103 U. S. 168 (1880).

power to investigate for purposes of legislation."[37] But the rule appears to furnish a poor standard for determining whether, in a given case, the investigation will be regarded as legislative or judicial. Thus a legislature may investigate a cement trust,[38] the police department and "election system" of Kansas City,[39] the income of a United States Attorney General[40] or a Boston policeman;[41] but it may not investigate a real estate "pool,"[42] a dubious religious organization,[43] or the income of a Jersey City mayor.[44] Its declaration that its intent is legislative carries weight,[45] but is not conclusive. Its intent will more often be presumed to be legislative where public institutions under state control, or those deriving their existence from the legislature, are the objects of the investigation.[46] Indeed, the degree to which the public has a direct interest in the subject matter is perhaps the safest guide to whether it may be investigated. Since it is difficult to conceive a matter in which the public has greater interest than in honest elections, it is to be hoped that other jurisdictions will not follow New Jersey in restricting the legislature.[47]

Questions of legislative investigation are of course collateral to the problem of whether judicial attack upon election results has been made too difficult. The digests report thirty-four election contests between November, 1937 and November, 1938—a comparatively slack period for elections—and most of these are contests which went all the way to courts of last resort. So large a number lends some credence to the claim that a more liberal attitude toward contests would convert the courts into political arenas. But if the courts can not assume the responsibility of an aggressive war on election frauds, the legislatures must do so. Certain simple measures suggest themselves at once. For instance, a requirement of prompt duplication and publication of official returns would curb substantially the ancient device of "counting out," espe-

37. Note (1920) 9 A. L. R. 1341; *cf.* Landis, *Constitutional Limits on Congressional Power of Investigation,* 40 HARV. L. REV. 153 (1926); Notes (1930) 65 A. L. R. 1518; (1935) 79 L. Ed. 809.

38. *Ex parte* Battelle, 207 Cal. 227, 277 Pac. 725 (1929).

39. Lowe v. Summers, 69 Mo. App. 637 (1897).

40. McGrain v. Daugherty, 273 U. S. 135 (1937).

41. Att'y General v. Brissenden, 271 Mass. 172, 171 N. E. 82 (1930).

42. Kilbourn v. Thompson, 103 U. S. 168 (1880); *cf. In re* Pacific R. R. Commission, 32 Fed. 241 (1887) (affairs of Central Pacific R. R.).

43. Greenfield v. Russel, 292 Ill. 392, 127 N. E. 102 (1920). The organization was Wilbur Glenn Voliva's "Church of Zion" and its municipality of Zion City.

44. *Ex parte* Hague, 123 N. J. Eq. 475, 150 Atl. 322 (1930); (1930) 30 COL. L. REV. 1059.

45. See McGrain v. Daugherty, 273 U. S. 135, 178 (1927).

46. Burnham v. Morrissey, 14 Gray. 226 (Mass. 1859); People *ex rel.* McDonald v. Keeler, 99 N. Y. 463, 2 N. E. 615 (1885).

47. Moreover, in addition to questions of public policy, the authority on which the majority of the court in the instant case rested its decision does not appear persuasive. The majority regarded the decision in *Ex parte* Hague, 123 N. J. Eq. 475, 150 Atl. 322 (1930), as controlling. There a witness was sustained by the court in his refusal to disclose to a legislative investigation the source of his income. But, as the dissent pointed out, it was not clear whether it was the particular questions asked, rather than the investigation itself, which were held beyond the power of the legislature in that case.

cially in its most obnoxious form, wherein the returns from vital precincts are held back by the organization until it is seen how large a plurality is needed. Again, rendering poll lists and registration books more easily available, so that all who cared could inspect them, would make illegal voting a riskier process. It may be also that the courts themselves, by assessment of much higher costs on unsuccessful contestants, would be able to discourage those lacking meritorious claims, without requiring such rigorous proof of those with a real grievance. And probably prospective contestants could be given more ready access to election records, under proper supervision, without endangering either the elective or the judicial process. On the whole, it seems more profitable for election reformers to turn their attention to a stricter enforcement of criminal penalties for election violations, and to a better administration of elections. England appears to have had considerable success with the former method;[48] but American juries are apparently reluctant to convict political underlings when the punishment is too drastic. As a result, the most effective of all remedies appear to be those of improving election personnel, and of simplifying and safeguarding election machinery.[49]

LIABILITY OF ATTORNEY FOR ESCAPE OF CLIENT RELEASED TO HIS CUSTODY*

PLEADING that imprisonment for non-payment of a judgment debt was endangering his client's life, an attorney secured her release by agreeing to keep her in his custody. The attorney had failed to ascertain the true condition of his client's health, had relied entirely upon her representations to him, and after her release had neglected to take any precautions to prevent her escape. She fled the jurisdiction. When he failed to produce his client at the court's direction, the lawyer was ordered to show cause why he should not be cited for contempt. He was found not guilty, however, on the ground this his disobedience of the order was not wilful.[1]

The power of the courts to punish attorneys for contempt, direct or constructive, is fundamental; any refusal by an attorney to obey a court order is generally a punishable offense.[2] Inability to obey is no defense if it is

48. *Cf.* SEYMOUR, ELECTORAL REFORM IN ENGLAND AND WALES (1915) cc. 7, 13, 14.

49. *Cf.* the model election system and code set forth in Harris, *op. cit. supra* note 2, chapter 2.

*Matter of Cameo Combined Press, Inc., N. Y. L. J. Nov. 12, 1938, p. 1595, col. 5 (Sup. Ct. 1938).

1. *Ibid.*

2. West v. Field, 181 Ga. 152, 181 S. E. 661 (1935); *In re* McHugh, 152 Mich. 505, 116 N. W. 459 (1908); People *ex rel.* Chanler v. Newburger, 98 App. Div. 92, 90 N. Y. Supp. 740 (1st Dept. 1904); see *Ex parte* Robinson, 19 Wall. 505, 510 (U. S. 1873).

the result of voluntary action taken by the attorney himself;[3] and likewise it probably is no defense even if it results from negligence.[4] Moreover, where a layman might be excused by a court for a minor breach of conduct, an attorney bound by his profession to a more meticulous standard has frequently been subjected to official action.[5] It is immaterial conceptually whether the contempt be deemed civil or criminal, that is, whether the punishment be designed chiefly to aid the plaintiff or to preserve the dignity of the court. The operative fact is that an order of the court has been disobeyed by one of its officers with no exonerating defense on the offender's part. Without more, this would seem to constitute punishable contempt. In the absence of direct authority, analogous precedent for this power of the court is provided by decisions holding sheriffs guilty for negligently permitting the escape of prisoners, despite the lack of any wrongful intent on their part.[6] It is true that some error of judgment might be imputed to the court itself in failing to require bail directly of the debtor as a prerequisite to release, but this very failure may be said to indicate the court's reliance upon the attorney's implied promise to act as surety for his client's appearance. Seemingly, the breach of such a promise should not go unpunished.

A practical approach to the problem, however, may indicate a more appropriate solution than imprisonment of the attorney. The primary purpose of a civil arrest is not to punish the debtor, but to secure the payment of the debt.[7] Imprisonment is merely ancillary to the action for recovery and ends as soon as the debt is paid.[8] Accordingly, rather than suffer fruitless punishment, the lawyer, by assuming responsibility for the safekeeping of the prisoner, might well be deemed to have become an implied bail or surety for the debt and as such liable to the judgment creditor. Upon payment of the amount owed, he would become entitled to reimbursement from his elusive client, for presumably his responsibility was incurred at the debtor's request, to whom undoubtedly all benefit ran.[9] The burden of finding the debtor and collecting from him would thus quite properly be shifted.

Moreover, no substantial affront would be offered to the dignity of the court, if the creditor were paid by the lawyer, since the court's original action in imprisoning the debtor was merely in aid of the collection of the creditor's

3. Staples v. Staples, 87 Wis. 592, 58 N. W. 1036 (1894); see Notes (1923) 22 A. L. R. 1256, 1259; (1932) 76 A. L. R. 390, 391.

4. Reed v. Reed, 24 Ky. L. Rep. 2438, 2441, 74 S. W. 207, 208 (1903); Hembree v. Hembree, 208 Ky. 658, 660, 271 S. W. 1100, 1101 (1925).

5. *In re* Megill, 114 N. J. Eq. 604, 169 Atl. 501 (Ch. 1933) (while excusing laymen from a contempt charge, requiring only an apology, court suspended two attorneys from practice); see Melton v. Commonwealth, 160 Ky. 642, 654, 170 S. W. 37, 42 (1914).

6. Long v. Palmer, Smith & Co., 16 Pet. 65 (U. S. 1842); Swepston v. United States, 251 Fed. 205 (C. C. A. 6th, 1918); Fanning v. United States, 72 F. (2d) 929 (C. C. A. 4th, 1934); State v. Lewis, 113 N. C. 622, 18 S. E. 69 (1893).

7. People *ex rel.* Wolfe v. Johnson, 230 N. Y. 256, 130 N. E. 286 (1921); Gelles v. Rosenbaum, 141 Misc. 588, 252 N. Y. Supp. 827 (Sup. Ct. 1931); Wessinger v. Duncan, 112 S. C. 205, 102 S. E. 6 (1920).

8. Nelson v. Blanchfield, 54 Barb. 630 (N. Y. Sup. Ct. 1869); Wessinger v. Duncan, 112 S. C. 205, 102 S. E. 6 (1920).

9. ARANT, LAW OF SURETYSHIP AND GUARANTY (1931) § 73.

judgment.[10] It is true that a different case might be presented where the attorney were unable to satisfy the judgment rendered and had negligently permitted the escape of his client; for here the court's efforts to effect payment of the judgment would have been totally evaded. A lawyer, aware of his own financial condition, who failed to secure the presence of his client under such circumstances might safely be termed lacking in respect for the court's processes, and deserving of citation for contempt. Nor is the court limited to this one method of discipline alone. It has others, ranging from permanent disbarment to official censure, the choice dependent upon the particular facts of the case and the background factors indicating the attorney's fitness to practice before the bar.[11] However, it seems reasonable that where the attorney is able to do so, his payment of the judgment creditor should exonerate him from any further liability, except, perhaps, reprimand by the court.

There remains one difficulty in implying a promise by the attorney to see the judgment debt paid. By a common law rule,[12] now regularly embodied in statutes[13] or rules of court,[14] an attorney may not be a surety or bail. The original reason for the rule — the protection of attorneys from the importunities of their clients[15] — still remains the principal one, although later opinions have expressed an added fear of adverse interests arising between attorney and client.[16] Today, as well as four hundred years ago, lawyers are subjected to requests to assume financial liability which, either from motives of friendship or business, they cannot well resist. The prohibition against becoming bail or surety provides them with a polite but certain means of remaining aloof from a financial liability never properly theirs;[17] and even

10. See note 8, *supra.*

11. Disbarment for the offense in the instant case would seem needlessly severe. However, where an attorney advised a client to jump *criminal* bail, inasmuch as the primary objective of the court was incarceration, the attorney was properly disbarred. Matter of Pascal, 146 App. Div. 836, 131 N. Y. Supp. 823 (1st Dep't 1911).

12. For history see Miles v. Clarke, 2 Bos. 709, 710, (N. Y. Super. Ct. 1859), *aff'd* 4 Bos. 632 (N. Y. Super. Ct. 1859). *Contra:* Murray v. Moynahan, 27 Wash. 379, 67 Pac. 810 (1902).

13. FLA. COMP. GEN. LAWS ANN. (Skillman, 1927) § 4169; Craig v. Wilder, 125 Fla. 384, 169 So. 847 (1936); KY. STAT. ANN. (Baldwin, 1936) §§ 2019, 3867; Johnson v. Commonwealth, 2 Duv. (Ky. 1866) 410; OKLA. STAT. (Harlow, 1931) § 4209, Goodwin v. State *ex rel.* Crandall, 168 Okla. 4, 31 P. (2d) 841 (1934); WYO. REV. STAT. ANN. (Courtright, 1931) §§ 9-113.

14. Collins v. Board of Supervisors, 158 Iowa 322, 138 N. W. 1095 (1913); Rule 50, promulgated by Supreme Court of Texas, 1877, 47 Tex. 626, 81 S. W. 549; see Foulks v. Falls, 91 Ind. 315, 322 (1883); United States Fidelity & Guaranty Co. v. Sabath, 286 Ill. App. 320, 333, 3 N.E. (2d) 330, 336 (1936).

15. See note 12, *supra;* Schuek v. Hagar, 24 Minn. 339, 341 (1877).

16. The reality of this fear is demonstrated by McWhirter v. Donaldson, 36 Utah 293, 104 Pac. 731 (1909), wherein an attorney delayed beyond the permissible period in filing an amended complaint because he desired to minimize his obligation as surety on an attachment bond. Compare one court's fear of too intense a partisanship upon the part of the attorney. Love v. Sheffelin, 7 Fla. 40 (1857).

17. The scope of the rule varies widely from the jurisdictions which absolutely prohibit an attorney from becoming a surety or bail [Rule 50, 47 Tex. 626, 81 S. W.

though this prohibition was made for their benefit,[18] they may be cited for contempt when they disregard it.[19] In the instant case, however, the attorney incurred his obligation apparently with the court's full knowledge and consent, and hence it would seem to be highly anomalous if he should be punished for contempt. On the other hand, he should clearly not be allowed to plead the rule and his own infringement of it at the same time in order to escape financial liability. Accordingly, the result suggested above — that payment of the judgment creditor by the attorney should effect the latter's exoneration from punishment for contempt — remains the most plausible one, and should not be affected by this rule of prohibition, which can conveniently be construed as directory rather than mandatory.[20] The instant problem, of course, would never have arisen, had the real nature of the attorney's agreement to keep his client in custody been recognized from the start. Even so, vouching for the appearance of clients should be abandoned by lawyers to those professionally devoted to the task.

SUCCESSION OF PERSONALTY AND THE CONFLICT OF LAWS*

ANGLO-AMERICAN courts declare, almost without exception, that testate and intestate succession of movables is governed by the law of the domicile at the time of death.[1] Although rationalization of this conflict of laws rule has taken various forms, the expediency of providing succession according

549 (1877)] to those restraining him only in cases in which he appears. Carr v. Wewoka, 103 Okla. 139, 229 Pac. 434 (1924). In the light of the policy of the rule, however, no sound reason for prohibiting an attorney from becoming a bail or surety for a person not his client appears. On the other hand, no great harm ensues from a general prohibition, and simplicity of application of the rule is assured.

18. In addition to reasons generally advanced, implicit economic motive may make punishment necessary. An attorney prepared to provide bail or bonds for his clients would undoubtedly enjoy a competitive advantage over fellow lawyers unable or unwilling to resort to such means. The prohibition interpreted against such a background becomes an effective weapon against unprofessional methods of competition, but only if its violators are punished.

19. See Ohio & M. R. R. v. Hardy, 64 Ind. 454, 455 (1878); State *ex rel.* Helena Adjustment Co. v. District Court of Lewis and Clark County, 92 Mont. 587, 588, 19 P. (2d) 226 (1932); McWhirter v. Donaldson, 36 Utah 293, 306, 104 Pac. 731, 736 (1909).

20. State *ex rel.* Helena Adjustment Co. v. District Court of Lewis & Clark County, 92 Mont. 587, 19 P. (2d) 226 (1932) (appeal bond on which attorney went surety held merely defective and not void); Carr v. Wewoka, 103 Okla. 139, 229 Pac. 434 (1924) (court circumvented strict statute declaring void bonds which attorney signs as surety for client by terming transaction a common law agreement to indemnify and not a statutory bond).

In re Gifford's Will, 279 N. Y. 470, 18 N. E. (2d) 663 (1939).

1. RESTATEMENT, CONFLICT OF LAWS (1934) §§ 301, 303, 306–308; 2 BEALE, CONFLICT OF LAWS (1935) §§ 301.1, 303.1–308.1; DICEY, CONFLICT OF LAWS (5th ed. 1932) 799–820. But see Schweitzer v. Bean, 154 Ark. 228, 230, 242 S. W. 63, 64 (1922). The personalty rule has been criticized. See Stimson, *Which Law Should Govern?* (1938) 24 VA. LAW REV. 863, 878.

to a single standard has always been the underlying consideration of all the different theories.[2] In the case of immovables, the law of the situs of the property governs because of the paramount interest of the state in the devolution of realty;[3] but with movables, it has been considered better not to require a man who has personalty in numerous jurisdictions to have to bequeath each part according to the law of the state where the property is situated.[4] A recent decision by the New York Court of Appeals illustrates difficulties which may arise when a court loses sight of this reason behind the personalty rule.[5]

An application for ancillary letters testamentary was made to the New York Surrogate, based on *ex parte* probate of a will in France. Relatives of the testatrix, who was an American formerly living in New York, objected on the ground that the will in question did not apply to personalty in New York. Ancillary letters were issued by the Surrogate, who ruled that the decree of the French probate court conclusively decided that the will was valid and covered all the property of the testatrix.[6] The Court of Appeals, after noting that both by statute[7] and the common law[8] the *lex domicilii* applied, reversed on three grounds: first, there had been no adjudication of domicile either in France or in the court below;[9] second, the effect of the French decree had not been satisfactorily proved in the Surrogate's Court; and third, even assuming that the testatrix was domiciled in France and that the French probate decree construed the will to dispose of all the testatrix's personalty, the courts of New York must determine for themselves whether the will disposes of personalty in their jurisdiction.

The first reason for reversal is orthodox; domicile is jurisdictional,[10] and a finding that the testatrix was domiciled in New York would mean that New York law was to be applied and that no recognition need be given to the French proceedings. The second reason for reversal is also orthodox; a foreign judgment must be proved.[11] The third reason given by the court, however, raises important questions, because it permits the local forum seriously to upset the operation of the *lex domicilii.*

2. See 2 BEALE, CONFLICT OF LAWS (1935) § 303.1; STUMBERG, CONFLICT OF LAWS (1937) 379, 380; STORY, CONFLICT OF LAWS (Bigelow's 8th ed. 1883) 537.

3. RESTATEMENT, CONFLICT OF LAWS (1934) §§ 245, 249–251; see 2 BEALE, CONFLICT OF LAWS (1935) §§ 245.1, 249.1–251.3.

4. STORY, CONFLICT OF LAWS (Bigelow's 8th ed. 1883) 537; see Story's opinion in Harvey v. Richards, 1 Mason 381, 412 (C. C. Mass. 1818).

5. *In re* Gifford's Will, 279 N. Y. 470, 18 N. E. (2d) 663 (1939).

6. Papers on Appeal 52, 53, *In re* Gifford's Will, 279 N. Y. 470, 18 N. E. (2d) 663 (1939).

7. N. Y. DEC. EST. LAW (1909) § 47.

8. Parsons v. Lyman, 20 N. Y. 103 (1859); White v. Howard, 46 N. Y. 144 (1871).

9. A French-American attorney testified before the Surrogate that French probate courts take jurisdiction if the decedent dies within the judicial district, regardless of residence. Papers on Appeal 39, *In re* Gifford's Will, 279 N. Y. 470, 18 N. E. (2d) 663 (1939).

10. Thormann v. Frame, 176 U. S. 350 (1900); *In re* Dorrance's Estate, 115 N. J. Eq. 268, 170 Atl. 601 (1934); see 2 BEALE, CONFLICT OF LAWS (1935) § 450.9.

11. 2 FREEMAN, JUDGMENTS (5th ed. 1925) c. 14.

If, in the new trial, the Surrogate should find that the testatrix was domiciled in France and that the French decree included the New York property, then, under this decision, he must independently construe the will. If he should decide that the will does not cover New York assets, a situation arises in which two courts make contradictory rulings on the issue of what property was bequeathed by the will.[12] Such an independent finding, inconsistent with the French decree, is more than a mere failure to keep in mind the rationale behind the personalty rule; it is patently a refusal to apply the *lex domicilii*. Were the Surrogate to conclude that the decedent died intestate as to New York property,[13] a further divergence in the application of the law of the domicile would occur. Undoubtedly, the Surrogate would distribute the New York assets according to the law of distribution of France, the decedent's domicile.[14] Yet if the French court were distributing the personalty of the decedent, the New York law of distribution would be applied, because, unless one is a French citizen, the French court applies the law of the domicile of origin.[15] Under these circumstances, it is evident that the estate does not pass according to one law: the French assets would descend according to New York law; New York assets would descend according to French law.[16]

It is difficult to see how such inconsistent results can be justified. That the will of the testatrix was written in English might, it is true, lead to an erroneous interpretation by the French court. But mistake is not a proper ground for ignoring a foreign judgment,[17] particularly one rendered by a court at decedent's domicile.[18] Nor is the fact that the French probate pro-

12. See Parsons v. Lyman, 20 N. Y. 103, 120–121 (1859).

13. The New York relatives said they thought there was another will in existence, not yet found, which covered the New York property. Papers on Appeal 42, *In re* Gifford's Will, 279 N. Y. 470, 18 N. E. (2d) 663 (1939).

14. N. Y. DEC. EST. LAW (1909) § 47; see *In re* Slade's Estate, 154 Misc. 275, 276 N. Y. Supp. 956 (Surr. Ct. 1935); *In re* Tallmadge, 109 Misc. 696, 181 N. Y. Supp. 336 (Surr. Ct. 1919).

15. See Lorenzen, *French Rules of the Conflict of Laws* (1928) 38 YALE L. J. 165, 182; Falconbridge, *Renvoi and Succession to Movables* (1930) 46 L. Q. REV. 465, 472–474. It should be noted, however, that if the New York law were properly proved, the French court would accept the provision of the Decedent Estate Law that personalty descends according to residence (domicile) and, therefore, apply the French law of distribution. See Lorenzen, *loc. cit.* 182. In the principal case, it appears that the expert on New York law testifying before the French court did not refer to this particular provision of the Decedent Estate Law. Papers on Appeal 26, *In re* Gifford's Will, 279 N. Y. 470, 18 N. E. (2d) 663 (1939).

16. Technically, the New York court is applying New York law; but New York incorporates the law of the domicile as its own. Thus, under any situation, separate parts of the estate are, strictly speaking, governed by different laws. See 2 BEALE CONFLICT OF LAWS (1935) § 303.2. But when the New York court incorporates the law of the domicile, it is not the same law that is applied by a French court.

17. Godard v. Gray, L. R. 6 Q. B. 139 (1870); RESTATEMENT, CONFLICT OF LAWS (1934) § 431. *Contra:* Tremblay v. Aetna Life Ins. Co., 97 Me. 547, 55 Atl. 509 (1903). See 3 FREEMAN, JUDGMENTS (5th ed. 1925) § 1493.

18. The fact that considerable legal importance is attached to a change of domicile should outweigh the chance that the domiciliary court may have to struggle with a

ceedings were *ex parte,* without notice to the New York relatives, a satisfactory justification, even though the Court of Appeals placed considerable emphasis on this element.[19] It is true that the *Restatement* requires, as one of the requisites of a valid foreign judgment, that a "reasonable notice and an opportunity to be heard . . . [be] given to all persons to be bound thereby; . . ."[20] But some courts have not been this exacting.[21] Objections on the ground that present litigants were not represented at domiciliary probate have been brushed aside with the comment that news of death is well circulated among relatives and interested persons, and that full opportunity existed to be heard.[22] Where probate is allowed without notice to interested parties and without a subsequent period during which proceedings can be reopened, a court may well refuse to recognize the conclusiveness of the foreign adjudication and try all issues independently. In other instances of probate without notice, if a court wishes to be sure that litigants are not denied their day in court, it can send the case back to the domiciliary forum.[23] The Court of Appeals might well have done so; undoubtedly the French court would have reopened the hearings.[24]

By referring all contested issues to the domiciliary forum, the law of the domicile could be applied in its most complete sense. No situation could arise in which the will had different meanings in different courts.[25] Nor could there be a case in which separate parts of an estate were distributed according to different laws of succession.[26] Moreover, the possibility of abuse through litigants attempting to choose the forum most likely to render a favorable decision would be greatly diminished.[27]

Although the difficulties created by the New York Court's exception to the *lex domicilii* are made greater because the domicile is in a foreign country which applies the law of the domicile of origin, a problem not present in this

foreign language. As to importance attached to domicile, see Texas v. Florida, 59 Sup. Ct. 563 (U. S. 1939).

19. *In re* Gifford's Will, 279 N. Y. 470, 477–478, 18 N. E. (2d) 663, 666 (1939).

20. RESTATEMENT, CONFLICT OF LAWS (1934) § 429(a).

21. *Cf.* Tilt v. Kelsey, 207 U. S. 43 (1907).

22. See Crippen v. Dexter, 13 Gray 330, 334 (Mass. 1859); *In re* Horton's Will, 217 N. Y. 363, 369, 111 N. E. 1066, 1067 (1916).

23. This has been done. McEwan v. Brown, 176 N. C. 249, 97 S. E. 20 (1918); White v. Howard, 46 N. Y. 144 (1871).

24. A French court did in fact reopen the case at the instance of attorneys representing the New York residents, who were not heard at the original probate proceeding. Communication to YALE LAW JOURNAL from counsel for appellants, *In re* Gifford's Will, 279 N. Y. 470, 18 N. E. (2d) 663 (1939).

25. See *In re* Tallmadge, 109 Misc. 696, 181 N. Y. Supp. 336 (1919).

26. If the French court were to decide that decedent's will did not cover New York property, it would have no reason for making an intestate distribution because all of the French assets would be covered by the will. *Cf.* Jauncy v. Sealey, 1 Vern. 397 (Ch. 1686), (domiciliary court would not entertain probate when no property existed within the country). Consistency in distribution of assets could be guaranteed in such a situation by the heirs' requesting a decree, in the nature of a declaratory judgment, of their rights under the domiciliary law. See Griswold, *Renvoi Revisited* (1938) 51 HARV. L. REV. 1165, 1189.

27. See Griswold, *Renvoi Revisited* (1938) 51 HARV. L. REV. 1165, 1180, 1181.

country where states apply the law of the domicile of choice,[28] still the practice of referring contested issues to the domiciliary forum can be useful in cases of domestic probate. There are other instances in which the court of the forum may construe a will differently from the construction made by the court of the domicile. This could be caused by erroneous proof of the foreign law. Or it could arise because the domiciliary court made an error in law or fact.[29] Then again, it might result from strong familiarity with local law which would consciously or sub-consciously affect the judge of the forum in interpreting the domiciliary law.[30] Inconsistencies from any of these sources could be avoided by remanding legatees and intestate successors of personal property to courts of the decedent's domicile. It is to be regretted that the court in the instant case did not adopt this course instead of attempting, by emphasizing collateral issues, to justify the potential undermining of the personalty rule by holding an independent trial in its own courts.

APPLICATION OF CONSPIRACY STATUTE TO PROSECUTION FOR SALE OF COUNTERFEIT MONEY*

THE CIRCUITY of method by which a counterfeiting ring operates leads to untold difficulty in prosecuting its members. The usual structure of the organization is hierarchical; the manufacturer of the bills sells or gives them to a distributor who in turn conveys them to local agents by whom they are foisted upon the public.[1] The difficulty of endeavoring to suppress such a ring in all its ramifications by separately prosecuting each member of the enterprise for his own particular offense is patent. It is far preferable, from the standpoint of expense, convenience, and above all, effective prosecution, that the government be able simultaneously to hale all the accused into one court, integrate all the evidence into one body of proof, and permit one judge having the whole perspective to determine the proper punishment for each of those convicted.[2] Under existing legislation, the only practical means of accomplishing this end is offered by a prosecution for conspiracy.

The courts, however, have not looked with complete favor upon the conspiracy statutes.[3] A recent federal case illustrates one of the limitations which has been placed upon their use and serves as an example of the handicaps

28. RESTATEMENT, CONFLICT OF LAWS (1934) § 9; see 1 BEALE, CONFLICT OF LAWS (1935) § 14.1.

29. See note 15, *supra.*

30. See Dalrymple v. Gamble, 68 Md. 523, 13 Atl. 156 (1888).

*United States v. Peoni, 100 F. (2d) 401 (C. C. A. 2d, 1938).

1. For a description of the intricate system employed, see American Banker, Jan. 9, 1939, p. 1; United States v. Corso *et al.*, 100 F. (2d) 604 (C. C. A. 7th, 1938).

2. Ritchie, *The Crime of Conspiracy* (1938) 16 CAN. B. REV. 202; (1937) 27 J. AM. INST. CRIM. LAW & CRIMINOL. 128.

3. See Vannata v. United States, 289 Fed. 424, 428 (C. C. A. 2d, 1923); dissenting opinion, Fisher *et al.* v. United States, 2 F. (2d) 843, 847 (C. C. A. 4th, 1924).

facing a prosecuting attorney desirous of smashing an entire counterfeiting ring.[4] *A* sold some counterfeit bills to *B*, who in turn sold them to *C*, all of the parties being aware of the fraudulency of the notes. *C*, while attempting to dispose of the bills, was apprehended and pleaded guilty to the charge of possession with intent to utter counterfeit money.[5] He and *B* were promptly convicted. In the case of *A*, who had instituted the circulation of the notes, the government, however, had more difficulty. Not only was he acquitted on the charge of aiding and abetting *C*, but on that of conspiring to commit the substantive offense[6] of which *B* and *C* were found guilty. The decision on the conspiracy issue rested on the view that *A*, having made an actual sale and received cash therefor, had no further interest in the bills after he sold them to *B* and, hence, could not be deemed to have conspired for their subsequent use.

The validity of the court's assumption that *A*'s interest ceased with the sale of the bills to *B* presents the crux of the issue. Conspiracies may take either of two forms of organization: "chain" or "circle".[7] In a "circle" conspiracy the parties are considered to be members of an illegal combination by virtue of the fact that their activities center about one or more common individuals or a common enterprise. In this type of offense it has been established that all the members need not know each other. Thus if *A* and *C* individually engage in similar illegal activities with *B*, they may be convicted of conspiring together, though unaware of each other's existence.[8] In a "chain" conspiracy one party communicates with a second who in turn communicates with a third, this form being the one employed in the principal case. In this type of combination it has also been held there is no need that the members know each other, providing all act in furtherance of a common illegal objective. Thus if *A* combines with *B* for an unlawful purpose which by its nature requires that *B* enlist a third party, *A* may be convicted for conspiring with the new member though not knowing him.[9] Knowledge of each other and direct contact among the members are not essential elements of any conspiracy; the gist of the offense lies in a common interest in pursuing an illegal objective.[10]

4. United States v. Peoni, 100 F. (2d) 401 (C. C. A. 2d, 1938).

5. REV. STAT. § 5431 (1875), 18 U. S. C. § 265 (1934).

6. REV. STAT. §§ 5323, 5427, 5440 (1875), 18 U. S. C. §§ 550, 88 (1934).

7. See Rex v. Meyrick and Ribuffi, 21 Cr. App. R. 94, 101 (1929), (1932) 4 CAMB. L. J. 65.

8. Rudner v. United States, 281 Fed. 516 (C. C. A. 6th, 1922) (defendants, who did not know each other, both sold illicit liquor to one Rudner); Rex v. Meyrick and Ribuffi, 21 Cr. App. R. 94 (1929) (defendants, who had no contact or knowledge of each other, bribed the same police officer), (1932) 4 CAMB. L. J. 65.

9. *Cf.* Jezewski v. United States, 13 F. (2d) 599 (C. C. A. 6th, 1926) (manufacturer of illicit liquor sold to distributors, who in turn sold to retailers, whom the original vendor did not know). But *cf.* United States v. Russell, 41 F. (2d) 852 (S. D. Ala. 1930).

10. See Allen v. United States, 4 F. (2d) 688, 691 (C. C. A. 7th, 1924); Zottarelli v. United States, 20 F. (2d) 795, 798 (C. C. A. 6th, 1927); Laska v. United States, 82 F. (2d) 672, 674 (C. C. A. 10th, 1936); Marino v. United States, 91 F. (2d) 691, 694 (C. C. A. 9th, 1937).

As the value of counterfeit money arises from the ability of the holder to dispose of it, it seems elementary that the vendor may be charged with constructive knowledge of his vendee's intent ultimately to impose the money upon the public. This the latter may undertake to do personally or he may employ the service of intermediaries. In either case *A* and *B* are clearly guilty of conspiring together to utter the spurious bills.[11] Where the indirect method has been chosen it is, as previously pointed out, highly desirable for purposes of efficient prosecution, that the conspiracy be enlarged to include *C*, thus subjecting the original vendor to liability for *C*'s acts. Whether the third party is termed an agent of the vendee or an entrepreneur, participation in the circulation of the bills is clearly in furtherance of the original purpose of the conspiracy. It would seem unjust in the extreme to hold *A* immune from prosecution on the conspiracy charge because *B* chose to employ an intermediary to distribute the bills among the public rather than to do so personally. It is settled law that once an overt act has been perpetrated in pursuance of the unlawful objective, a party to a conspiracy may not thereafter, by attempt to withdraw, be excused from criminal liability for the consequence of acts he had conspired to commit.[12] Even though *A* lacked a pecuniary interest in the resale of the contraband goods, he had set in motion the means for their disposal and hence was legally unable to terminate his membership in the combination.[13] The rigid attitude of the court in the principal case can perhaps be explained through fear of the inherent abuse to which conspiracy statutes are susceptible.[14]

11. Where two people are logically necessary to commit the substantive offense, they may not be held as co-conspirators. 2 WHARTON, CRIMINAL LAW (12th ed. 1932) § 1604. Thus a mere sale of illicit liquor would not be sufficient to constitute a conspiracy between the vendor and vendee. See United States v. Katz, 271 U. S. 354, 355 (1926). But *cf.* Vannata v. United States, 289 Fed. 424 (C. C. A. 2d, 1923). However, if the vendor knows that his vendee intends to resell the liquor, he may be charged as a co-conspirator for its resale. United States v. Engelsberg, 51 F. (2d) 479 (C. C. A. 3d, 1931); *cf.* Anstess v. United States, 22 F. (2d) 594 (C. C. A. 7th, 1927); Pattis v. United States, 17 F. (2d) 562 (C. C. A. 9th, 1927), (1928) 12 MINN. L. REV. 77.

12. Eldredge v. United States, 62 F. (2d) 449 (C. C. A. 10th, 1932); see Marino v. United States, 91 F. (2d) 691, 695 (C. C. A. 9th, 1937).

13. Costal *et al.* v. United States, 13 F. (2d) 843 (C. C. A. 6th, 1926); Comeriato v. United States, 58 F. (2d) 557 (C. C. A. 4th, 1932).

14. For example, rules of evidence in conspiracy trials make them difficult to try without prejudice to an innocent defendant. Moreover, an act, merely unlawful when done by an individual, may be given criminal consequences when done by a group, by calling the joint action a conspiracy. REP. ATT'Y. GEN. (1925) 5; Sayre, *Criminal Conspiracy* (1922) 35 HARV. L. REV. 393; Saeta, *Prohibition and Hawkins' Doctrine* (1932) 66 U. S. L. REV. 75. The penalty which may be inflicted for conspiracy is often more severe than that for the crime itself, thus subjecting the accused to a harsher punishment than the law intended for the substantive offense. See Vannata v. United States, 289 Fed. 424, 428 (C. C. A. 2d, 1923); dissenting opinion, Fisher *et al.* v. United States, 2 F. (2d) 843, 847 (C. C. A. 4th, 1924). The trial for a conspiracy charge may be held in any jurisdiction wherein an overt act in pursuance thereof was committed. As an overt act frequently takes place at a great distance from the residence of an alleged conspirator, the accused may be subjected to much inconvenience and hardship in appearing to defend himself. Brown v. Elliot, 225 U. S. 392 (1912); Hyde and Schneider v. United States, 225 U. S. 347 (1912).

It is easy to see the injustice which could arise from allowing a conspiracy prosecution in the extreme case when *A* sells counterfeit money, and long afterwards, when the money has passed through countless hands, is convicted of conspiracy with *Z*, a distant counterfeiter, of whom *A* had never heard. But it would not be necessary to extend to that degree the rule of law for which this Note contends. In the actual case, only one intermediary separated *A* and *C*, they lived in the same city, and only a brief interval elapsed between the time when the bills left *A*'s possession and the time when they reached *C*. Under these circumstances it should not be necessary to prove *A*, *B* and *C* were members of an established ring, nor even that they had previously worked together. The essential facts are that *A* conspired with *B* to utter counterfeit money and that *C*'s connection with *B* was a foreseeable, immediate consequence. This is a type of situation for which the conspiracy statutes are ideally suited.[15] Courts wishing to safeguard against abuse could limit the rule there and refuse to extend it to include *D* when he enters upon the scene.

The ruling in the principal case promises to retard efforts to prosecute illegal organizations engaged in the distribution of such contraband goods as narcotics, obscene pictures, illicit liquor, and counterfeit money. The essential qualities of these groups are mass production and mass distribution, with each member knowing as few of the others as possible in order to avoid apprehension. It is the chief concern of the power behind the organization that no member except himself be familiar with the entire scope of the plan. Only by prosecuting all the members together and by culling the sum total of their knowledge is it possible to obtain a detailed mosaic of the whole undertaking. The principal case presented exactly such a situation. In refusing to permit the application of the conspiracy statute to circumstances appropriate for its use, the court's attitude seems both impractical and shortsighted.

RIGHTS OF DISSENTING STOCKHOLDERS ON EXTENSION OF CORPORATE FRANCHISE*

JURISDICTIONS in which corporations are not of perpetual duration provide with almost complete unanimity for a statutory extension of the corporate franchise.[1] The majority of such statutes leave dissenting shareholders who oppose extension to the practical remedy of selling their shares on the market,

15. Ritchie, *The Crime of Conspiracy* (1938) 16 CAN. B. REV. 202; (1937) 27 J. AM. INST. CRIM. LAW & CRIMINOL. 128; *cf.* People v. Luciano *et al.*, 277 N. Y. 348, 14 N. E. (2d) 433 (1938).

*Terrell *et al.* v. Ringgold County Mutual Telephone Co., 282 N. W. 702 (Iowa, 1938).

1. N. Y. GEN. CORP. LAW §§ 45, 48; DEL. REV. CODE (1935) § 2106; PA. BUS. CORP. LAW (1933) § 801; ILL. BUS. CORP. ACT (1933) § 52. For other provisions, see PARKER, CORPORATION MANUAL (1939) classification 10.

but a few make special provision and require that either the corporation or the majority stockholders shall buy up these shares.[2] Difficulties with the latter type of statute are indicated by a recent Iowa case.[3] Prior to the acquisition by petitioners of the stock interests there involved, the Iowa corporation law provided that dissenters' stock should be bought by the majority at its real value.[4] After petitioners had acquired their stock, a provision was added to the statute to the effect that the majority should have three years from the time when the vote to extend the charter was taken in which to make such purchase.[5] Three months after the extension at issue was voted,[6] petitioners filed a bill against the corporation, its officers and directors, and majority stockholders. They demanded, *inter alia*, that the real value of their shares be determined as of the date of the renewal action, that judgment be given against each of the majority stockholders for the real value of their shares, that such judgment be declared a lien on the assets of the corporation, and that a receiver be appointed. The trial court dismissed the action as premature. On appeal, plaintiffs attempted to attack the constitutionality of the time-of-purchase amendment. The Iowa Supreme Court refused to rule on this point since it had not been previously raised. The dismissal was affirmed.

Aside from the question of constitutionality, this decision, under the particular terms of the statute, was perhaps inevitable. The court, however, might well have determined the real value of petitioners' shares as of the date of renewal. There is no statutory provision in the Iowa Code to guide in the determination of the value, nor is there any provision for the valuation of stock in merger or consolidation proceedings which might provide a help-

2. IDAHO CODE (1932) §29-149; IOWA CODE (1935) §8365; LA. GEN. STAT. ANN. (Dart, 1939) §1132; MINN. BUS. CORP. ACT (1933) §39, amended by L. 1935 c. 212, §§1, 2; WASH. BUS. CORP. ACT (1933) §41. The Louisiana remedy is provided only in the event that the extension was voted by less than 80% of the outstanding shares. The Iowa statute is the only one giving a remedy against the majority stockholders. Prior to 1933, such relief was afforded in Minnesota. See note 17, *infra*. The three other purchase statutes have all been enacted since 1928. See Levin, *Blind Spots in the Present Wisconsin Corporation Statutes* (1939) WISC. L. REV. 173, 220 *et seq.*; SECURITIES AND EXCHANGE COMMISSION, REPORT ON PROTECTIVE AND REORGANIZATION COMMITTEES (1938) Part VII, pp. 590-610.

3. Terrell *et al.* v. Ringgold County Mutual Telephone Co., 282 N. W. 702 (Iowa, 1938).

4. IOWA CODE (1935) §8365. The substance of this provision had been included in the Iowa statutes since the Code of 1851. The Iowa statute inaccurately uses the term "renewal", which is the revival of a charter already expired, to describe extension proceedings taken before lapsing of the corporate charter. This process will hereinafter be referred to as extension.

5. IOWA CODE (1935) §8365. This provision was added in 1933.

6. Statutes specifying the mechanism by which corporations may be extended vary in terms. Some provide for action by the officers, others by the directors, others by the stockholders. See 8 FLETCHER CYC. CORP. (Perm. Ed.) §§4099-4107; note (1937) 108 A. L. R. 59. The Iowa statute, IOWA CODE (1935) §8365, requires a majority vote of the stockholders at any regular election, or special election called for that purpose within three months before or after the time for the termination of the corporate charter.

ful analogy.[7] In the absence of a mandate that determination of "real value" be made at any particular time or in any particular manner, no convincing reason appears why this value should remain unsettled during the three-year period.[8]

If the view be taken that value should be determined as of the termination of the three-year purchase period, practical objections become manifold. Courts, for example, have held that dissenting stockholders who persist in objecting to extension proceedings automatically cease to be stockholders if they register their objection in the manner prescribed by statute.[9] While these decisions arose under statutes which did not provide, as does that in the instant case, for a three year purchase period, and therefore may not be entirely controlling here, a decision that they were so controlling would place objecting stockholders in a most disadvantageous position, and would nullify to a considerable extent the protection which the statute was designed to afford. For the capital investment of the objecting shareholders would be held in practical suspension for three years; dissipation of corporate assets during this period would, in the absence of fraud,[10] leave them virtually helpless. Having ceased to be stockholders, they would no longer have any control over corporate affairs, yet they would share equally with voting stockholders in corporate losses.[11] On the other hand, if the rule of these decisions should be held not to apply to the instant situation, the objecting stockholders would at least retain some interest in the corporate management, and could sue, as stockholders, in equity to prevent unlawful dissipation of assets. Yet they would in effect be continued in a role which they had expressly indicated they wished to disaffirm.

7. The Iowa corporation laws make no provision for consolidation or merger, or for sale of the corporate assets, nor is any relief granted dissenting stockholders in the case of amendment changing the purposes of the corporation.

8. If the statute be interpreted, as petitioners suggested in their argument, to give three years to majority stockholders to pay for, rather than to purchase, the stock of dissenters, the act of purchase will have occurred at the time the extension was voted, and the value fixed as of that time. This interpretation would seem more in keeping with the purpose of the amendment to the original statute.

9. Apsey v. Kimball, 221 U. S. 514 (1911), *aff'g*, 164 Fed. 830 (1908); Apsey v. Whittemore, 221 U. S. 514 (1911), *aff'g*, 199 Mass. 65, 85 N. E. 91 (1908). Most statutes provide that notice of the demand for purchase of dissenting stock be given to the corporation within 20 days after the meeting at which extension was voted. Dissenting stockholders may waive their right to be bought out by failing to give such notice.

10. Fraud or gross mismanagement will entitle a stockholder to a receivership. 16 FLETCHER CYC. CORP. (Perm. ed.) § 7688. And simple creditors have been granted receiverships upon such an allegation. See Bankers' Mortgage Co. of Topeka v. Rupp, 66 F. (2d) 992 (C. C. A. 10th, 1933). Technically, the dissenters in the instant case would fit neither category, but it would seem highly probable that a receivership would be granted, on the above authority, if fraud were present. While the other actions open to stockholders are not available to dissenters in this case, it seems likely that a personal action would lie against the directors for misappropriation of corporate property.

11. With no time set at which to ascertain the "real value" of the dissenters' stock, the majority stockholders may choose a low ebb in the corporate fortunes any time within the three year period for consummation of the requisite purchase. The dissenter may not be completely remediless, however, for there is a possibility of judicial review of the appraisal proceedings. See Matter of Bickerton, 232 N. Y. 1, 133 N. E. 41 (1921); Mat-

Doubts may be raised as to the constitutionality of the Iowa statute, should value be determined as of the end of the three-year period. It is questionable if the power to amend and alter corporate charters, reserved by statute to the Iowa legislature, embraces such an amendment as this.[12] Judicial opinion sharply divides on the issue whether such power justifies an interference with contract rights made between stockholders and the corporation and between the stockholders themselves. Moreover, it is even more doubtful if so direct an interference with the property of stockholders will be sustained.[13] There is serious risk, therefore, that the amended statute would be held unconstitutional as an impairment of contract or as a taking of property without due process of law. Yet the problem posed by constitutionality is relatively unimportant, for it is one which will arise infrequently: only those who purchased their stock prior to the amendment could question its validity, all others would take subject to its terms.[14]

Objections to the Iowa statute on constitutional grounds are not as well taken if valuation is to be determined as of the date of the charter extension. The difficulties discussed above do not then arise. Even so, a serious criticism may be levelled at a provision which puts the duty to purchase dissenters' interests on the majority stockholders, rather than on the corporation itself. Since the statute expressly provides that extension shall be conditioned on such purchase, a failure to consummate the latter will necessarily prevent extension. Hence if the majority stockholders find the purchase of what may, under the statute, amount to as much as 49% of the stock too heavy a burden, the extension will lapse at the end of the three year period.[15]

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ter of Erlanger, 237 N. Y. 159, 142 N. E. 571 (1923); Lattin, *Remedies of Dissenting Stockholders under Appraisal Statutes* (1931) 45 HARV. L. REV. 233, 252-3.

12. The legislature may, however, restrict the renewal rights and privileges of a corporation while that corporation is in existence. Smith v. Eastwood Wire Mfg. Co., 58 N. J. Eq. 331, 43 A. 567 (1899) (two-thirds vote required instead of majority); Wm. Warnock Co., Inc., *et al.* v. H. D. Hudson Mfg. Co., 200 Minn. 196, 273 N. W. 710 (1937) (Purchase of dissenting stock required instead of mere two-thirds vote), noted in (1937) 22 MINN. L. REV. 108.

13. See 7 FLETCHER CYC. CORP. (Perm. ed.) §§ 3668-3690; SECURITIES AND EXCHANGE COMMISSION, REPORT ON PROTECTIVE AND REORGANIZATION COMMITTEES (1938) Part VII, pp. 514-518; Dodd, *Dissenting Stockholders and Amendments to Corporate Charters* (1927) 75 U. OF PA. L. REV. 585, 723; (1930) 43 HARV. L. REV. 656; *cf.* Pratt v. South Pueblo Building and Loan Ass'n, 1 Colo. Nisi Prius 171 (1901); Ohlinger, *Some Comments on the Reserved Power to Alter and Repeal Corporate Charters* (1931) 29 MICH. L. REV. 432. A possible argument in favor of the constitutionality of the amendment is that the right of the majority to continue the corporate existence is more justifiable on economic principles than is the preservation of any right of the minority dissenting shareholders.

14. Stockholders, being charged with knowledge of the privilege of extension upon purchasing shares, are unable to demand relief in the absence of statute. McKenzie v. Eady-Baker Grocery Co., 146 Ga. 753, 92 S. E. 282 (1917); see Pratt v. South Pueblo Building and Loan Ass'n, 1 Colo. N. P. 171, 181 (1901); 8 FLETCHER CYC. CORP. (Perm. ed.) § 4099. In this event he may prefer to remain a stockholder rather than to sell his shares in the market.

15. Under the unamended statute, actual purchase of the dissenting stock was necessary before the charter could be extended by the secretary of state. See Report of Attorney General of Iowa (1930) p. 190.

In the four other states[16] where similar statutory protection is given dissenting stockholders, the obligation of purchase is placed not on the majority stockholders, but rather on the corporation itself.[17] This practice is followed by the Uniform Business Corporation Act,[18] and is analogous to the provisions for purchase of dissenting stock in merger and consolidation statutes.[19] Such statutory remedy gives the dissenter a more certain and more efficient relief than the Iowa statute does, whether payment be made with or without litigation.

It may be argued that there is little real necessity for affording statutory relief to the stockholder who dissents to an extension of the corporate franchise,[20] for his interests are already amply safeguarded. Even without such protection, he still may remain a stockholder, or sell his shares at the market price, or, if the majority decide to follow the not unusual procedure of dissolving and then reincorporating,[21] receive his pro-rata share on dissolution. The protection thus afforded, however, may be purely theoretical

16. The five states [note 2, *supra*] which provide dissenting stockholders with statutory relief on extension of the franchise are in the western half of the United States where emphasis is put on rights of the individual stockholder. Such provision is lacking in the corporation law of eastern states where the legal emphasis is generally on the powers of the directors and management. See Colman and Finn, *Comparison of Business Corporation Law of Minnesota and Delaware* (1938) 22 MINN. L. REV. 661.

17. A statute which resembled that of Iowa in placing the burden of purchase on the majority stockholders was the old Minnesota provision. MINN. STAT. (Mason, 1927) § 7455, amended by the Business Corporation Act of 1933 to put the burden of purchase on the corporation.

18. Section 42, at 9 U. L. A. 94. The Uniform Business Corporation Act has been adopted in substance in Idaho, Louisiana, and Washington, and to a lesser degree in Minnesota.

19. The procedure under the Uniform Business Corporation Act gives relief identical to that afforded the dissenter in the case of sale, lease or exchange of the corporate assets, or of an amendment changing the corporate purposes, or changing the rights of the holder of any outstanding shares.

Payment to dissenters need not be made from surplus alone, in the absence of provision to that effect. The Uniform Business Corporation Act provides only that the dissenter shall not be entitled to payment unless the value of the corporate assets which remain are at least equal to the aggregate amount of the debts and liabilities exclusive of capital stock. Section 42, at 9 U. L. A. 94. This proviso has been adopted by Idaho, Minnesota, and Washington. See Levy, *Rights of Dissenting Shareholders to Appraisal and Payment* (1930) 15 CORN. L. Q. 420, 430.

20. Statutory provisions that a stockholder voting against an amendment "changing the purposes" of a corporation may demand payment for the value of his shares do not apply, in the absence of specific mention thereof, to an amendment extending the term of the corporation; such an amendment does not alter the purposes of the corporation. See 13 FLETCHER CYC. CORP. (Perm. ed.) § 5776.

21. This practice is occasionally protected by statutes giving majority stockholders on dissolution the exclusive right to use the corporate name for a new company for a limited time thereafter, or by permitting incorporation under the same name before expiration of the old charter. Under the latter procedure, no property, rights or franchises other than use of the name passes from the old corporation to the new. IND. STAT. ANN. (Burns, 1933) §§ 25-203; MO. REV. STAT. (1929) § 4589.

if there is no market for the shares, or if market value is far below real value. In such cases, there appears to be real justification for purchase provisions. But a legislature, in recognizing the need for such provisions, should not burden the remedy with a protracted period for purchase, or saddle majority stockholders, instead of the corporation, with an added, and possibly heavy obligation.

SAWING A JUSTICE IN HALF*

OPINIONS of the Supreme Court delivered in the last weeks of this Term exhibit a capacity in that Court for division sufficient to confound prophets and critics of all schools — legalistic, metaphysical, psychological and economic.[1] But the division in *Coleman v. Miller*,[2] recorded June 5th, should astonish even a Yogi magician. In January, 1937, the Child Labor Amendment came up for consideration before the Kansas Senate. Twenty senators voted in favor of its adoption; twenty opposed. Deadlock existing, the Lieutenant Governor, the presiding officer of the Senate, then cast his vote in favor of the resolution of ratification, which was later adopted by the House. Whereupon an original proceeding was brought in the Kansas Supreme Court by certain members[3] of the legislature to secure an order directing the secretary of the Senate to erase from the resolution his endorsement that it had been adopted by the Senate, and to substitute instead words to the effect that the amendment had not been passed. Petitioners also sought to restrain the officers of the legislature from signing the resolution, and the Secretary of State from authenticating and delivering it to the Governor. They based their contentions on three grounds: (1) the Lieutenant Governor was without power to cast the deciding vote in the Senate; (2) previous rejection of the amendment by the legislature in 1925 disabled the Senate from reconsidering it; and (3) failure of ratification of the amendment by the required number of states within a reasonable time after its submission by Congress in 1924 had now vitiated it. The state court denied on the

*Coleman v. Miller, U. S. Sup. Ct., (1939) 6 U. S. L. WEEK 1487.

1. See, *e.g.*, Guaranty Trust Co. v. Henwood, U. S. Sup. Ct., (1939) 6 U. S. L. WEEK 1361 (opinion of the Court by Black, J. with Roberts, Reed, Frankfurter and Douglas, JJ. concurring; dissenting opinion by Stone, J. with the Chief Justice and McReynolds and Butler, JJ. concurring); Hague v. C.I.O., U. S. Sup. Ct., (1939) 6 U. S. L. WEEK 1475 (opinion by Roberts, J. in which Black, J. concurred; opinion by Stone, J. in which Reed, J. concurred; opinion by Hughes, C. J., concurring in part with Roberts, J. and in part with Stone, J.; opinion by McReynolds, J. and opinion by Butler, J.).

2. U. S. Sup. Ct., (1939) 6 U. S. L. WEEK 1487.

3. Petitioners were 21 members of the Kansas Senate, 20 of whom had voted against the resolution, and 3 members of the House.

merits the mandamus which they sought.[4] The Supreme Court granted *certiorari* and affirmed.[5]

Apparently all nine Justices participated in the decision. "Mr. Chief Justice Hughes delivered the opinion of the Court," which was divided into three parts: "First—the jurisdiction of this Court . . . Second—The participation of the Lieutenant Governor . . . Third—(1) The effect of the previous rejection of the amendment and (2) of the lapse of time since its submission." A separate "Opinion of Mr. Justice Frankfurter" stated the view of himself, Mr. Justice Roberts, Mr. Justice Black and Mr. Justice Douglas "that the petitioners have no standing in this Court . . . The writ of *certiorari* to the Kansas Supreme Court should therefore be dismissed." A "concurring opinion by Mr. Justice Black, in which Mr. Justice Roberts, Mr. Justice Frankfurter and Mr. Justice Douglas join" found that "under the compulsion" of "the ruling of the Court" that petitioners do have standing to sue, these Justices "have participated in the discussion of other questions considered by the Court and . . . concur in the result reached, but for somewhat different reasons." These were: that Congress possesses "exclusive power over the amending process", that neither "State nor Federal courts can review that power" and that "whether submission, intervening procedure or Congressional determination of ratification conforms to the commands of the Constitution, call for decisions by a 'political department' of questions of a type which this Court has frequently designated 'political'." An opinion by "Mr. Justice Butler, dissenting" in which "Mr. Justice McReynolds joins" held that the judgment of the Kansas Supreme court should be reversed because more than a reasonable time had elapsed between

4. The Kansas Supreme Court apparently regarded all the issues as justiciable. It decided that the Lieutenant Governor was authorized to cast a deciding vote, that the previous rejection did not disable the legislature from subsequently adopting the amendment and that the proposed amendment retained its original vitality despite the lapse of time. Coleman v. Miller, 146 Kan. 390, 71 P. (2d) 518 (1937). This raises an interesting problem as to the appropriate method of disposition by the Supreme Court. Mr. Justice Frankfurter's opinion is limited to a consideration of the petitioners' standing in *his* Court. It states: "To whom and for what causes the courts of Kansas are open are matters for Kansas to determine. But Kansas can not define the contours of the authority of . . . this Court." The holding that the issues in the case are non-justiciable means, however, that they are non-justiciable in state as well as in federal courts. Mr. Justice Black's opinion is quite explicit on this point. And since the issues are "exclusively federal questions and not state questions," as stated by the Chief Justice, the holding as to non-justiciability is binding on the state courts. Would not the proper procedure for the Supreme Court be, then, to reverse the judgment below and direct dismissal of the suit for want of jurisdiction, particularly in the light of Mr. Justice Black's opinion? This question may even be important, as well as interesting, in a case like Chandler v. Wise, U. S. Sup. Ct., (1939) 6 U. S. L. WEEK 1496, companion to *Coleman v. Miller*. There the writ of *certiorari* was dismissed upon the ground that the case had become moot so that "there was no longer a controversy susceptible of judicial determination." That left undisturbed the Kentucky court's holding that the resolution of the Kentucky legislature purporting to ratify the amendment was void because not in conformity with the Federal Constitution.

5. The case was argued twice before the Supreme Court.

the submission of the amendment and the challenged action of the Kansas legislature.

What then was "the Court" for which the Chief Justice spoke and which reached "the result" in which Mr. Justice Black and his three brethren concurred? Two Justices, Stone and Reed, are not mentioned by name in any of the four opinions. They were apparently in agreement with the Chief Justice on all points. They were joined, on the issue of jurisdiction, by Justices McReynolds and Butler. The Court was thus divided five to four in favor of jurisdiction. But the majority then divided three to two on the result to be reached, affirmance or reversal. Power to dictate this result therefore lay with the four Justices who concurred in Mr. Justice Black's opinion; theirs was the power, too, to determine the grounds upon which the decision should be rested. The opinion of the Chief Justice found that the questions of the previous rejection of the amendment and of the lapse of time after its submission were both "political" in character, to be answered ultimately by Congress "in the exercise of its control over the promulgation of the adoption of the amendment." Justices McReynolds and Butler dissented only on the issue of lapse of time; presumably they concurred as to the previous rejection. Mr. Justice Black saw in the opinion of the Chief Justice erroneous, inarticulate premises and implications, too much discussion and insufficient disapproval of a prior Court opinion, but he agreed that the specific questions raised were political and non-justiciable.

Only the issue of the Lieutenant Governor's participation in the vote of the Kansas Senate therefore remains. The petitioners urged "that, in the light of the powers and duties of the Lieutenant Governor and his relation to the Senate under the state constitution, . . . [he] was not a part of the 'legislature' so that under Article V of the Federal Constitution, he could be permitted to have a deciding vote on the ratification of the proposed amendment, when the Senate was equally divided." Decision of this issue could not be avoided on grounds of irrelevance. If the Court had jurisdiction in the case, decision of this issue in favor of petitioners would have required reversal of the judgment below, regardless of the disposal of the other issues. None of the opinions except that of the Chief Justice considered this issue specifically. He said: "Whether this contention presents a justiciable controversy, or a question which is political in its nature and hence not justiciable, is a question upon which the Court is equally divided and therefore the Court expresses no opinion upon that point."

Equally divided? If "under the compulsion" of the ruling of the majority on the issue of jurisdiction, Justices Roberts, Black, Frankfurter and Douglas participated in the discussion of the issue as to the Lieutenant Governor, then the "equally divided" Court must have been composed of *nine* Justices. Justices McReynolds and Butler may not have participated in this question, since they voted for reversal on other grounds; but in that event the "equally divided" court was composed of *seven*. If the latter two did participate and the former four did not, then the "equally divided" Court was composed of *five*. And if neither group participated, then *three* Justices divided equally.

The four Justices who concurred in Mr. Justice Black's opinion could of course have refrained from voting on the Lieutenant Governor's partici-

pation, since they believed that the Court was without jurisdiction. Having undertaken, however, to consider the merits, even though "under the compulsion" of the majority's ruling as to jurisdiction, they could hardly refrain from deciding whether that participation was fatal. Mr. Justice Black's opinion, indeed, strongly indicates that these four Justices believed the issue of participation non-justiciable. The whole tenor of the opinion is that all matters relating to submission and ratification of amendments should be decided by a "political department." Again, the Chief Justice and Justices Stone and Reed could not have refrained from deciding this point after a decision against the petitioners on the other issues. Only Justices McReynolds and Butler could properly refuse to consider the question; for they voted for the petitioners on other grounds and therefore could have found it unnecessary to pass upon additional reasons supporting the same conclusion. Yet, failing to carry a majority on those grounds, they were under some duty to see whether they could find a majority for their result on any of the other grounds urged.

What really did happen? Did a Justice refuse to vote on this issue? And if he did, was it because he could not make up his mind? Or is it possible to saw a Justice vertically in half during a conference and have him walk away whole?