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Notes and Comments

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Administrative Law—Announcement of Policy as Constituting Order Subject to Judicial Review

Through its contracts with 115 affiliated radio stations, the Columbia Broadcasting System maintains the national network organization necessary to secure advertising revenues. Following a prolonged investigation the Federal Communications Commission concluded that certain provisions of these contracts were unduly restrictive of competition. Accordingly, an order was issued giving expression, in the form of "chain broadcasting regulations," to the general policy which the Commission would follow in future licensing of broadcasting stations. The regulations provided that no license should be granted to a station whose contract with a network system contained any of the prohibited arrangements. Immediately many of the local affiliates announced their intention to cancel, modify, or refuse to renew their existing contracts. CBS brought suit under the Communications Act of 1934 and the Urgent Deficiencies Act[1] to enjoin enforcement of the FCC's order as beyond the Commission's statutory and constitutional authority and contrary to public policy. The special three-judge district court dismissed for want of jurisdiction,[2] but upon direct appeal to the Supreme Court the lower court was reversed and the case remanded for trial on the merits.[3] By a five to three decision the Court held the order reviewable because it promulgated regulations controlling the contractual relationships of the stations and the networks, thereby immediately and adversely affecting the rights of the appellant, and subjecting the stations to a drastic penalty for non-compliance—denial or cancellation of broadcasting licenses.

Several aspects of the broad problem of judicial review of administrative orders are not under consideration here. Under the doctrine of "primary jurisdiction" courts refuse to deal with technical questions

* Footnotes which contain material other than a mere listing of sources and authorities are indicated throughout this REVIEW by an asterisk placed after the footnote number.

[1] §402(a) of the Communications Act of 1934, 48 STAT. 1093 (1934), 47 U. S. C. A. §402(a) (Supp. 1941), makes applicable to "suits to enforce, enjoin, set aside, annul, or suspend any order of the Commission" (with the exception of orders granting or denying construction permits and radio station licenses) the provisions of the Urgent Deficiencies Act outlining the procedure for review of ICC orders. 38 STAT. 219 (1913), 28 U. S. C. A. §46 (1934).

[2] National Broadcasting Co. v. United States, 44 F. Supp. 688 (S. D. N. Y. 1942).

[3] Columbia Broadcasting System, Inc. v. United States, — U. S. —, 62 S. Ct. 1194, 86 L. ed. (Adv. Ops.) 1066 (1942). National Broadcasting Company v. United States, — U. S. —, 62 S. Ct. 1214, 86 L. ed. (Adv. Ops.) 1088 (1942), is a companion case.

until they have been submitted to the specialized administrative body designed for expertness in handling such problems.[4] Administrative remedies must be exhausted before the case can be taken to the courts.[5] For example, judicial review has been denied where there was no application for a rehearing before the administrative tribunal,[6] and in some cases where appeal to a higher governmental agency has been provided, such appeal has been held a prerequisite to judicial consideration.[7] Suits to set aside or modify administrative orders may be maintained only by aggrieved or interested parties,[8] and these actions are often limited to definite statutory procedures.[9*] These problems, and the crucial issue of the conclusiveness of administrative determinations (the doctrine of administrative finality), may be differentiated from the first essential of appeal from administrative action, the requirement illustrated in the principal case, namely, that there be an "order" having a degree of finality and determining or affecting the legal rights, duties and responsibilities of the appellant.

"The word 'order' is used for an executive act, for a judicial act,

[4] Texas & P. Ry. v. Abilene Cotton Oil Co., 204 U. S. 426, 27 S. Ct. 350, 51 L. ed. 553 (1907); Miller, *The Necessity for Preliminary Resort to the Interstate Commerce Commission* (1932) 1 GEO. WASH. L. REV. 49; Tollefson, *Judicial Review of the Decisions of the Interstate Commerce Commission* (1937) 5 GEO. WASH. L. REV. 503, 531; Note (1938) 51 HARV. L. REV. 1251.

[5] Berger, *Exhaustion of Administrative Remedies* (1939) 48 YALE L. J. 981; Stason, *Judicial Review of Tax Errors—Effect of Failure to Resort to Administrative Remedies* (1930) 28 MICH. L. REV. 637; Notes (1935) 35 COL. L. REV. 230, (1927) 27 COL. L. REV. 450.

[6] Red River Broadcasting Co. v. FCC, 98 F. (2d) 282 (App. D. C. 1938), *cert. denied*, 305 U. S. 625, 59 S. Ct. 86, 83 L. ed. 400 (1938); Note (1939) 27 GEO. L. J. 783.

[7] Porter v. Investor's Syndicate, 286 U. S. 461, 52 S. Ct. 617, 76 L. ed. 1226 (1931); Prentis v. Atlantic Coast Line Co., 211 U. S. 210, 29 S. Ct. 67, 53 L. ed. 150 (1908); United States v. Sing Tuck, 194 U. S. 161, 24 S. Ct. 621, 48 L. ed. 917 (1904); §313(a) of the Federal Power Act, 49 STAT. 860 (1935), 16 U. S. C. A. §825*l*(a) (1941).

[8] FCC v. Sanders Bros. Radio Station, 309 U. S. 470, 60 S. Ct. 693, 84 L. ed. 869 (1940); Claiborne-Annapolis Ferry Co. v. United States, 285 U. S. 382, 52 S. Ct. 440, 76 L. ed. 808 (1932); Alexander Sprunt & Son v. United States, 281 U. S. 249, 50 S. Ct. 315, 74 L. ed. 832 (1930); Chicago Junction Case, 264 U. S. 258, 44 S. Ct. 317, 68 L. ed. 667 (1924); Edward Hines Yellow Pine Trustees v. United States, 263 U. S. 143, 44 S. Ct. 72, 68 L. ed. 216 (1923).

[9*] The two most common methods of review found in Congressional acts are (1) an equitable proceeding to enjoin or set aside the order, brought in a special district court of three judges, with direct appeal as of right to the Supreme Court, and precedence over other cases in both courts (the procedure provided by the Urgent Deficiencies Act); (2) an appeal to a circuit court of appeals by the commission to enforce, or by an interested party to set aside, a cease and desist order of the commission, with review by the Supreme Court on writ of certiorari. McAllister, *Statutory Roads to Review of Federal Administrative Orders* (1940) 28 CALIF. L. REV. 129, 130. For cases denying relief because the wrong procedure was followed, see Venner v. Michigan C. R. R., 271 U. S. 127, 46 St. Ct. 444, 70 L. ed. 868 (1926); Lambert Run Coal Co. v. Baltimore & O. R. R., 258 U. S. 377, 42 S. Ct. 349, 66 L. ed. 671 (1922); United States v. Merchants and Manufacturers' Traffic Ass'n, 242 U. S. 178, 37 S. Ct. 24, 61 L. ed. 233 (1916).

and for a legislative act. . . ."[10] There is nothing in the usage of the term which clarifies the problem of what acts are "orders" and therefore reviewable. Nor have the statutes creating administrative boards and establishing their relationship to the judiciary attempted any more accurate definition or classification.[11] Consequently, courts have been relatively free to block out the kind of determinations properly called "orders" and to place limitations on the appealability of these orders.[12]

An "order" in the form of an unequivocal command is often required as a condition precedent to judicial review. Although this condition has not been universally demanded,[13] it does explain why administrative determinations in the nature of findings of fact embodied in reports and orders are not subject to attack as such.[14*] This is true whether the findings are the last contemplated action in the proceedings or whether they are to be the basis for future administrative adjudication or regulation; standing alone they are not enforceable and seldom have any immediate legal effects. *United States v. Los Angeles & Salt Lake Railroad Company,*[15] relied on by Justice Frankfurter in his

[10] Committee on Ministers' Powers, *Report* (Cmd. 4060, London, 1932) 18.

[11] For a thorough classification, see Blachly and Oatman, *Federal Statutory Administrative Orders* (1940) 25 IOWA L. REV. 582.

[12] Note, *Appealability of Administrative Orders* (1938) 47 YALE L. J. 766, 768. This comment contains an excellent discussion of the general problem under consideration.

[13] Note (1940) 8 U. OF CHI. L. REV. 113, 114.

[14*] United States v. Atlanta, B. & C. R. R., 282 U. S. 522, 51 S. Ct. 237, 75 L. ed. 513 (1931) (in report on carrier's accounts, ICC concluded that investment figure should not exceed stated sum and "expected" company to adjust accounts accordingly; *held,* no "order"); Carolina Aluminum Co. v. Federal Power Comm., 97 F. (2d) 435 (C. C. A. 4th, 1938) (no review of finding that interstate or foreign commerce would be affected by proposed construction of hydro-electric power project, even though after such finding construction of the project would violate the Federal Power Act and could be enjoined at the suit of the Commission); Third Ave. Ry. v. SEC, 85 F. (2d) 914 (C. C. A. 2d, 1936) (carrier asked SEC to amend requirements as to filing financial statements, and was notified by letter that its petition was denied; the court dismissed the statutory appeal); Brady v. ICC, 43 F. (2d) 847 (N. D. W. Va. 1930), *aff'd,* 283 U. S. 804, 51 S. Ct. 559, 75 L. ed. 1424 (1931) (suit to set aside reparation order held not maintainable under Urgent Deficiencies Act because suit was actually one to correct alleged errors in ICC's findings on which the order was based); Brooklyn E. Distr. Terminal v. United States, 28 F. (2d) 634 (S. D. N. Y. 1927) (general order of ICC required common carriers to report excess income and pay half to the Commission; the Commission declared petitioner a common carrier and by letters "requested" payment; *held,* no appealable order); *cf.* Great N. Ry. v. United States, 277 U. S. 172, 48 S. Ct. 466, 72 L. ed. 838 (1928) (no appeal from certification by ICC of amount due carrier under government guaranty). See also Chicago, B. & Q. R. R. v. Merriam & Millard Co., 297 Fed. 1 (C. C. A. 8th, 1924) (ICC report that certain rates would be unreasonable for the future and that reductions by the railroads should be forthcoming was held ineffectual to change existing filed tariffs); American Sugar Refining Co. v. Delaware, L. & W. R. R., 207 Fed. 733 (C. C. A. 3rd, 1913) (without formal order the ICC declared that allowances given by carriers were unlawful rebates and announced that carriers were expected to revise tariffs in conformity with the declaration; *held* ICC's action does not constitute a legally significant order).

[15] 273 U. S. 299, 47 S. Ct. 413, 71 L. ed. 651 (1927). *Accord,* United States

dissenting opinion in the instant case, presents a typical application of this rule. Under the authority of the Valuation Act,[16] the Interstate Commerce Commission established a final value of the railroad's property. This valuation was for possible future use by the Commission in any of a number of regulatory activities, notably rate making. In a suit to set aside the ICC's order fixing the value it was held that the order was not reviewable under the Urgent Deficiencies Act. It did not command, nor did it determine any legal right; and since under the Act it was only prima facie evidence of the legal value, it could be re-examined in any later judicial proceedings involving the valuation.[17*]

Similar to these "non-orders" are jurisdictional findings of boards and commissions. Such agencies must necessarily make the initial determination of whether individuals and corporations are subject to the provisions of the statutes sought to be enforced or whether they fall within exemptions or exceptions. Efforts to attain immediate court review of these decisions have generally been unsuccessful, even though direct and serious injury threatens. This is one aspect of the "final order rule,"[18] the doctrine which denies appeals until the final stage of the administrative process has been reached.[19] A determination that a carrier is not an interurban electric railway within an exception to the Railway Labor Act,[20*] or the Interstate Commerce Act;[21*] that

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v. Kansas City S. Ry., 275 U. S. 500, 48 S. Ct. 140, 72 L. ed. 394 (1927). *Contra:* Potomac Edison Co. v. West, 165 Md. 462, 169 Atl. 480 (1933). In Delaware & Hudson Co. v. United States, 266 U. S. 438, 45 S. Ct. 153, 69 L. ed. 369 (1925), a suit to annul a tentative valuation of railroad property was dismissed because the administrative process had not been completed, the administrative remedy exhausted.

[16] 37 STAT. 701 (1913), 49 U. S. C. A. §19a (1934).

[17*] The following language of Justice Brandeis, distinguishing this order from quasi-judicial and legislative orders of administrative agencies, was quoted in the dissenting opinion of the principal case: "The so-called order . . . is one which does not command the carrier to do, or to refrain from doing anything; which does not grant or withhold any authority, privilege or license; . . . extend or abridge any power or facility; . . . subject the carrier to any liability, civil or criminal; . . . change the carrier's existing or future status or condition; . . . determine any right or obligation. . . . It is the exercise solely of the function of investigation . . . merely preparation for possible action in some proceeding which may be instituted in the future—. . . ." United States v. Los Angeles & S. L. R. R., 273 U. S. 299, 309, 47 S. Ct. 413, 414, 71 L. ed. 651, 655 (1927).

[18] Note (1940) 8 U. OF CHI. L. REV. 113.

[19] Of course, all intermediate determinations may be questioned when the final order is attacked. For example, United States v. Idaho, 298 U. S. 105, 56 S. Ct. 690, 80 L. ed. 1070 (1936). When the ICC, after deciding that a railroad line was not a spur track outside the Commission's statutory jurisdiction, authorized abandonment of the line, the State of Idaho sued under the Urgent Deficiencies Act, contending that the line was a spur and the ICC's authorization of abandonment ineffective. *Held,* the line is a spur track wholly within one state and Commission's order is annulled.

[20*] §1 of the Railway Labor Act, 48 STAT. 1185 (1934), 45 U. S. C. A. §151 (Supp. 1941), authorizes and directs the ICC, upon request of the National Mediation Board or any interested party, to determine whether an electric railway falls

the Public Utility Holding Company Act of 1935[22] applies to a corporation seeking exemption;[23] that a distributor is a "natural gas company" under the Natural Gas Act;[24] or that an employer is engaged in interstate commerce and is therefore within the jurisdiction of the National Labor Relations Board[25]—these are not appealable orders.

But in a recent case the Supreme Court held reviewable an FCC ruling that a telephone company was a common carrier within the Communications Act of 1934,[26] and therefore subject to past orders of the Commission relating to telephone companies.[27] The distinction between this case and others which involve jurisdictional determina-

within the exception. Pursuant to this provision and at the request of the Mediation Board the Commission found that a carrier was not an interurban electric railway. *Held,* the finding is not an order reviewable under the Urgent Deficiencies Act because it is not in the form of an order, it does not command or direct any action but is simply preparation for possible future intervention in case of a labor dispute. Shannahan v. United States, 303 U. S. 596, 58 S. Ct. 732, 82 L. ed. 1039 (1938). The Court expressly declined to consider whether the ICC's determination was reviewable by some procedure other than that of the Urgent Deficiencies Act. In Shields v. Utah Idaho C. R. R., 305 U. S. 177, 59 S. Ct. 160, 83 L. ed. 111 (1938) one method of appeal was approved. After the ICC found the railroad within the scope of the Act and the National Mediation Board ordered the posting of a notice, the carrier brought suit against the federal district attorney to restrain any prosecution for failure to publish the notice or for any other violation of the Act. The Supreme Court upheld the district court's assumption of jurisdiction. Other examples of review by this method: Texas Electric Ry. v. Eastus, 25 F. Supp. 825 (N. D. Tex. 1938), *aff'd,* 308 U. S. 512, 60 S. Ct. 134, 84 L. ed. 437 (1939), and Hudson & Manhattan R. R. v. Hardy, 22 F. Supp. 105 (S. D. N. Y. 1938), *rev'd on merits,* 103 F. (2d) 327 (C. C. A. 2d, 1939).

[21*] Piedmont & N. Ry. v. United States, 280 U. S. 469, 50 S. Ct. 192, 74 L. ed. 551 (1930). The ICC decided that the carrier was not exempt from the Act and that public convenience and necessity did not permit a proposed extension of the railway's lines. The carrier sued to set aside the order denying exemption; the Supreme Court affirmed the lower court's dismissal for want of jurisdiction, saying that the ICC's negative order was not *res judicata* of the company's claim of immunity, and that the risk of loss to the carrier if it constructed the line without a certificate arose from the statute, not from the order. The validity of the ICC's determination of the railway's status was later tested and sustained by a suit to enjoin the construction of the new line until a certificate should be obtained. Piedmont & N. Ry. v. ICC, 286 U. S. 299, 52 S. Ct. 541, 76 L. ed. 1115 (1932). United States v. Chicago, N. S. & M. R. R., 288 U. S. 1, 53 S. Ct. 245, 77 L. ed. 583 (1933) was a proceeding to enjoin the carrier from issuing securities without ICC approval. The district court and the Supreme Court declared the railroad within the exemption to the Act, pointing out that the Commission had for over a decade treated the carrier as an interurban electric railway outside its jurisdiction.

[22] 49 STAT. 838 (1935), 15 U. S. C. A. §79 *et seq.* (Supp. 1941).

[23] Houston Natural Gas Corp. v. SEC, 100 F. (2d) 5 (C. C. A. 4th, 1938).

[24] East Ohio Gas Co. v. Federal Power Comm., 115 F. (2d) 385 (C. C. A. 6th, 1940); Canadian River Gas Co. v. Federal Power Comm., 110 F. (2d) 350 (C. C. A. 10th, 1940).

[25] See Newport News S. & D. D. Co. v. Schauffler, 303 U. S. 54, 57, 58 S. Ct. 466, 467, 82 L. ed. 646, 648, 649 (1938).

[26] §2(b) (2) of the Act, 48 STAT. 1064 (1934), 47 U. S. C. A. 152(b) (2) (Supp. 1941); §3(h), 48 STAT. 1065 (1934), 47 U. S. C. A. §153(h) (Supp. 1941).

[27] Rochester Telephone Corp. v. United States, 307 U. S. 125, 59 S. Ct. 754, 83 L. ed. 1147 (1939).

tions is found in the opinion by Justice Frankfurter: "The order . . . was not a mere abstract declaration regarding the status of the Rochester. . . . [It] necessarily and immediately carried direction of obedience to previously formulated mandatory orders addressed generally to all carriers amenable to the Commission's authority."[28*]

There is a stronger reason, however, for the importance of the *Rochester Telephone Corp.* case in the field of administrative law. In it the Supreme Court repudiated the "negative order doctrine." A long line of decisions in suits under the Urgent Deficiencies Act to set aside ICC orders had established the questionable proposition that the federal courts had no jurisdiction to review orders denying the affirmative relief sought.[29] When re-examined by the Court the cases failed to sustain the utility and wisdom of the doctrine and they were over-

[28*] *Id.* at 143, 144, 59 S. Ct. at 764, 83 L. ed. at 1160. A case somewhat resembling the *Rochester Telephone Corp.* case is Charles Noeding Trucking Co. v. United States, 29 F. Supp. 537 (D. N. J. 1939). §203(b) (8) of the Motor Carrier Act, 49 STAT. 544 (1935), 49 U. S. C. A. §303(b) (8) (Supp. 1941), grants to carriers within municipalities, between contiguous municipalities, or within commercial zones adjacent to municipalities a partial exemption from the provisions of the Act, but the ICC may withdraw the exemption and apply the full Act when necessary to carry out the national transportation policy. The Commission defined the New York City commercial zone, excluding and withdrawing from the zone certain contiguous municipalities, thus subjecting carriers in those areas to the regulatory weight of the Act, backed up by penal provisions. On attack by the carriers the ICC's determination was held a "final order" reviewable under the terms of the Act; the order ended the proceeding before the ICC and imposed duties on the plaintiffs which carried sanctions for non-compliance.

[29] Proctor & Gamble Co. v. United States, 225 U. S. 282, 32 S. Ct. 761, 56 L. ed. 1091 (1912) (refusal of relief against demurrage regulations); Hooker v. Knapp, 225 U. S. 302, 32 S. Ct. 769, 56 L. ed. 1099 (1912) (refusal to reduce maximum rates); Lehigh Valley R. R. v. United States, 243 U. S. 412, 37 S. Ct. 397, 61 L. ed. 819 (1917) (denial of relief from Panama Canal Act); Manufacturers Ry. v. United States, 246 U. S. 457, 38 S. Ct. 383, 62 L. ed. 831 (1918) (failure to fix divisions of joint rates); Piedmont & N. Ry. v. United States, 280 U. S. 469, 50 S. Ct. 192, 74 L. ed. 551 (1930) (assumption of jurisdiction and denial of certificate of convenience and necessity); Standard Oil Co. v. United States, 283 U. S. 235, 51 S. Ct. 429, 75 L. ed. 999 (1931) (denial of relief against alleged overcharges); ICC v. United States *ex rel.* Campbell, 289 U. S. 385, 53 S. Ct. 607, 77 L. ed. 1273 (1933) (refusal to award damages in reparations case); United States v. Corrick, 298 U. S. 435, 56 S. Ct. 829, 80 L. ed. 1263 (1936) (refusal to file tariff schedule); United States v. Griffin, 303 U. S. 226, 58 S. Ct. 601, 82 L. ed. 764 (1938) (refusal upon re-examination to increase railroad's compensation for carrying the mail). *But cf.* holding order reviewable: Intermountain Rate Cases, 234 U. S. 476, 34 S. Ct. 986, 58 L. ed. 1408 (1914) (partial denial of permission to depart from the short and long haul clause of the Interstate Commerce Act); United States v. New River Co., 265 U. S. 533, 44 S. Ct. 610, 68 L. ed. 1165 (1924) (dismissal of complaints against rule of coal car distribution); Alton R. R. v. United States, 287 U. S. 229, 53 S. Ct. 124, 77 L. ed. 275 (1932) (refusal to change divisions of joint reshipping rates); Powell v. United States, 300 U. S. 276, 57 S. Ct. 470, 81 L. ed. 643 (1937) (order striking tariff from files). On the negative order doctrine and its abolition in the *Rochester Telephone Corp.* case, see Notes (1934) 34 COL. L. REV. 908, (1939) 15 IND. L. J. 151, (1940) 24 MINN. L. REV. 379, (1939) 6 U. OF CHI. L. REV. 277, (1939) 24 WASH. U. L. Q. 591; (1933) 1 GEO. WASH. L. REV. 276.

ruled. The combined doctrines of "primary jurisdiction" and "administrative finality" were left to effectuate the considerations of policy behind the abandoned negative order rule.[30]

In contrast to administrative determinations which are not enforceable and which do not give rise to a clash of interest between a complainant and a governmental agency are regulations which are the end results of a commission's investigation and which formulate definite rules of conduct, enforceable by the imposition of statutory penalties. Thus a person aggrieved by a rate order,[31] a rule of car distribution in times of shortage,[32] an order promulgating rules governing car-hire settlements,[33] a mandate compelling the adoption of a safety device,[34] or an order prescribing the form and classification of accounts[35] may bring an action to enjoin, set aside, annul or suspend the order. These regulations may adversely affect rights as clearly as the acts of a legislature. Since suits to enjoin the enforcement of statutes have been

[30] Completing the repudiation of the negative order doctrine are two cases decided at the same term. In United States v. Maher, 307 U. S. 148, 59 S. Ct. 768, 83 L. ed. 1162 (1939), the Supreme Court reviewed an order of the ICC denying an application for a certificate of convenience and necessity under the "grandfather clause" of the Motor Carrier Act, 49 STAT. 543 (1935), 49 U. S. C. A. §306(a) (Supp. 1941). In Federal Power Comm. v. Pacific Power & Light Co., 307 U. S. 156, 59 S. Ct. 766, 83 L. ed. 1180 (1939), denial of an application for transfer of a utility's assets was appealed by the procedure outlined in §313(b) of the Federal Power Act, 49 STAT. 860 (1935), 16 U. S. C. A. §825*l*(b) (1941), and the Court sustained the lower court's assumption of jurisdiction. This decision in effect overrules Newport Electric Corp. v. Federal Power Comm., 97 F. (2d) 580 (C. C. A. 2d, 1938).

[31] Acker v. United States, 298 U. S. 426, 56 S. Ct. 824, 80 L. ed. 1257 (1936); Tagg Bros. & Moorhead v. United States, 280 U. S. 420, 50 S. Ct. 220, 74 L. ed. 524 (1930); United States v. Illinois C. R. R., 263 U. S. 515, 44 S. Ct. 189, 68 L. ed. 417 (1924); Intermountain Rate Cases, 234 U. S. 476, 34 S. Ct. 986, 58 L. ed. 1408 (1914); Atchison, T. & S. F. Ry. v. United States, 232 U. S. 199, 34 S. Ct. 291, 58 L. ed. 568 (1914); ICC v. Union Pacific R. R., 222 U. S. 541, 32 S. Ct. 108, 56 L. ed. 308 (1912); McLean Lumber Co., v. United States, 237 Fed. 460 (E. D. Tenn. 1916). *But cf.* Algoma Coal & Coke Co. v. United States, 11 F. Supp. 487 (E. D. Va. 1935).

[32] Assigned Car Cases, 274 U. S. 564, 47 S. Ct. 727, 71 L. ed. 1204 (1927); ICC v. Illinois C. R. R., 215 U. S. 452, 30 S. Ct. 155, 54 L. ed. 280 (1910); *cf.* United States v. New River Co., 265 U. S. 533, 44 S. Ct. 610, 68 L. ed. 1165 (1924).

[33] Chicago, R. I. & P. Ry. v. United States, 284 U. S. 80, 52 S. Ct. 87, 76 L. ed. 177 (1931).

[34] United States v. Baltimore & O. R. R., 293 U. S. 454, 55 S. Ct. 268, 79 L. ed. 587 (1935).

[35] General order: American Telephone & Telegraph Co. v. United States, 299 U. S. 232, 57 S. Ct. 170, 81 L. ed. 142 (1936); Kansas City S. Ry. v. United States, 231 U. S. 423, 34 S. Ct. 125, 58 L. ed. 296 (1913); New York Edison Co. v. Maltbie, 271 N. Y. 103, 2 N. E. (2d) 277 (1936). Order applicable to particular company: Atlanta, B. & C. R. R. v. United States, 296 U. S. 33, 56 S. Ct. 12, 80 L. ed. 25 (1935); Norfolk & W. Ry. v. United States, 287 U. S. 134, 53 S. Ct. 52, 76 L. ed. 218 (1932), *aff'g* 52 F. (2d) 967 (W. D. Va. 1931); Chesapeake & O. Ry. v. United States, 5 F. Supp. 7 (D. Va. 1933); Atlanta, B. & C. R. R. v. United States, 28 F. (2d) 885 (N. D. Ga. 1928).

allowed[36] it is reasonable that a commission's quasi-legislation should be subject to the same attack in the courts.

There are many orders issued by administrative agencies which, though unequivocal and imperative, are nevertheless non-appealable. Recognizing the integrity, responsibility and necessities of the "fourth branch of Government," courts have been reluctant to interfere with the administrative process by reviewing procedural, interlocutory orders. Thus when a federal commission orders the institution of an investigation,[37] the holding of a hearing,[38] or the production of information and evidence[39] the "final order rule" precludes attack until a later stage in the proceedings has been reached. Similarly, there is no review when the Securities and Exchange Commission refuses permission to withdraw registration statements,[40] nor when the NLRB directs an election to determine labor representation.[41] Apparently, however, an administrative agency's disclosure of confidential information in the initial stages of the price-fixing process may be enjoined in a proper case.[42*]

The final order doctrine has been specifically incorporated into the

[36] Pierce v. Society of Sisters, 268 U. S. 510, 45 S. Ct. 571, 69 L. ed. 1070 (1925); Truax v. Raich, 239 U. S. 33, 36 S. Ct. 7, 60 L. ed. 131 (1915).

[37] East Ohio Gas Co. v. Federal Power Comm., 115 F. (2d) 385 (C. C. A. 6th, 1940); Canadian River Gas Co. v. Federal Power Comm., 110 F. (2d) 350 (C. C. A. 10th, 1940); SEC v. Andrews, 88 F. (2d) 441 (C. C. A. 2d, 1937); Chamber of Commerce v. Federal Trade Comm., 280 Fed. 45 (C. C. A. 8th, 1922).

[38] Newport News S. & D. D. Co. v. Schauffler, 303 U. S. 54, 58 S. Ct. 466, 82 L. ed. 646 (1938); Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41, 58 S. Ct. 459, 82 L. ed. 638 (1938); New York, O. & W. Ry. v. United States, 273 U. S. 652, 47 S. Ct. 334, 71 L. ed. 823 (1927), *aff'g* 14 F. (2d) 850 (S. D. N. Y. 1926); United States v. Illinois C. R. R., 244 U. S. 82, 37 S. Ct. 584, 61 L. ed. 1007 (1917); United States *ex rel.* Delaware & Hudson R. R. v. ICC, 51 F. (2d) 429 (App. D. C. 1931); Pittsburgh & W. Va. Ry. v. ICC, 280 Fed. 1014 (App. D. C. 1922); Philadelphia City Passenger Ry. v. Public Service Comm., 271 Pa. 39, 114 Atl. 642 (1921).

[39] Federal Power Comm. v. Metropolitan Edison Co., 304 U. S. 375, 58 S. Ct. 963, 82 L. ed. 1408 (1938); Federal Trade Comm. v. Claire Furnace Co., 274 U. S. 160, 47 S. Ct. 553, 71 L. ed. 978 (1927); Federal Trade Comm. v. Maynard Coal Co., 22 F. (2d) 873 (App. D. C. 1927).

[40] Resources Corp. International v. SEC, 97 F. (2d) 788 (C. C. A. 7th, 1938); Jones v. SEC, 79 F. (2d) 617 (C. C. A. 2d, 1935), *cert. denied*, 297 U. S. 705, 56 S. Ct. 497, 80 L. ed. 993 (1936).

[41] NLRB v. Falk Corp., 308 U. S. 453, 60 S. Ct. 307, 84 L. ed. 396 (1940); NLRB v. International Brotherhood of Electrical Workers, 308 U. S. 413, 60 S. Ct. 306, 84 L. ed. 354 (1940); Ames Baldwin Wyoming Co. v. NLRB, 73 F. (2d) 489 (C. C. A. 4th, 1934).

[42*] Review of a general order directing the disclosure of confidential information was denied where the suit was brought under the statutory procedure. Mallory Coal Co. v. National Bituminous Coal Comm., 99 F. (2d) 399 (App. D. C. 1938). But in Utah Fuel Co. v. National Bituminous Coal Comm., 306 U. S. 56, 59 S. Ct. 409, 83 L. ed. 483 (1939), the Supreme Court permitted the order involved in the Mallory case to be tested in a suit to enjoin enforcement; and in American Sumatra Tobacco Corp. v. SEC, 93 F. (2d) 236 (App. D. C. 1937) denial of an application for confidential treatment was held reviewable by the statutory method because the denial was a final order entered in a particular case.

National Labor Relations Act by the provision for review of "final orders" only.[43] A certification by the NLRB determining an appropriate bargaining unit and designating a particular union as exclusive representative of the employees in such unit[44] was held not a final order and therefore not reviewable in *American Federation of Labor v. NLRB.*[45] The holding rests squarely on construction of the Act in the light of its wording and history. The clear Congressional intent to bar appeals at this interlocutory stage controlled the decision.[46]

Obviously, the NLRB's certification may have marked adverse effects upon the rights and duties of the employer and any labor minority. In recognizing this aspect of the Board's action the Court significantly remarked: ". . . we attribute little importance to the fact that the certification does not itself command action. Administrative determinations which are not commands may for all practical purposes determine rights as effectively as the judgment of a court, and may be re-examined by courts under particular statutes providing for the review of 'orders.' "[47*]

The primary requisites of judicial review are present in the principal case, *Columbia Broadcasting System, Inc. v. United States.*[48] The Supreme Court is not deterred by the FCC's characterization of its order as an announcement of policy.[49] The chain broadcasting regulations, while in form mere rules to guide the Commission in the exercise of its

[43] §10(f): "Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals. . . ." 49 STAT. 455 (1935), 29 U. S. C. A. §160(f) (1942).

[44] §9 of the National Labor Relations Act, 49 STAT. 453 (1935), 29 U. S. C. A. §159 (1942), provides for determination of the appropriate unit and selection of representatives.

[45] 308 U. S. 401, 60 S. Ct. 300, 84 L. ed. 347 (1940).

[46] Appeal from a similar certification of a state labor relations board has been denied. Wallach's, Inc. v. Boland, 277 N. Y. 345, 14 N. E. (2d) 381 (1938).

[47*] American Federation of Labor v. NLRB, 308 U. S. 401, 408, 60 S. Ct. 300, 303, 84 L. ed. 347, 352 (1940). The Court declined to decide whether a suit in equity in a district court to set aside the certification was maintainable. Of course, the employer can attack the validity of the Board's determination of the appropriate unit and its designation of the majority union by refusing to bargain; on appeal from the Board's order to bargain collectively the record of the investigation is filed and the certification may be questioned and reviewed. Pittsburgh Plate Glass Co. v. NLRB, 313 U. S. 146, 61 S. Ct. 908, 85 L. ed. 1251 (1941). But if the employer acquiesces in the Board's certification there seems to be no way in which a minority union can contest it. For comment on *American Federation of Labor v. N.L.R.B., supra,* see (1939) 52 HARV. L. REV. 1171, (1940) 24 MINN. L. REV. 856, (1939) 17 N. Y. U. L. Q. REV. 109.

[48] — U. S. —, 62 S. Ct. 1194, 86 L. ed. (Adv. Ops.) 1066 (1942).

[49] Jurisdiction to review orders of administrative tribunals is not dependent on their form. See American Federation of Labor v. NLRB, 308 U. S. 401, 408, 60 S. Ct. 300, 303, 84 L. ed. 347, 352 (1940); Powell v. United States, 300 U. S. 276, 285, 57 S. Ct. 470, 475, 81 L. ed. 643, 650 (1937); Alton R. R. v. United States, 287 U. S. 229, 237, 53 S. Ct. 124, 127, 77 L. ed. 275, 281 (1932); Diamond Tank Transport v. United States, 23 F. Supp. 497, 499 (W. D. Wash. 1938).

licensing power, are in effect and intent regulations of the contractual relations of the national networks and their affiliated stations.[50*] Realistically viewed, the order commands the local stations to abrogate certain provisions of their contracts or else suffer economic death through loss of station licenses. Of course, this severe penalty will not be imposed if the stations can prove that the FCC's expressed concept of the public convenience, interest and necessity in chain broadcasting is an erroneous one and the regulations therefore void. But any interested party would have the same opportunity to avoid the fines levied for disobedience of FCC accounting regulations, or other general orders which are clearly reviewable. There is no essential difference between the order in the principal case and other legislative orders reviewable under the Urgent Deficiencies Act.[51] In all these cases the alternatives are to conform to the regulation, to attack it before its direct application to the particular litigant, or to violate it and then defend in the proceedings brought to attach its sanctions. And there is no question but that the appellant here is an aggrieved party with standing to assail the order as an illegal exercise of the Commission's rule-making power.[52]

Accepting the allegations of the complaint as true, the order adversely affects the substantive rights of CBS, not contingently upon future administrative action as in *United States v. Los Angeles & Salt Lake Railroad Company*,[53] but immediately, as the threatened cancellations of contracts attest. The FCC has decided that the contract provisions are contrary to the public interest. It has issued an order which em-

[50*] This is shown in several ways. In the first place, the FCC's investigation was begun under §303(i) of the Communications Act, 48 STAT. 1082 (1934), 47 U. S. C. A. §303(i) (Supp. 1941), which gives the Commission authority "to make special regulations applicable to radio stations engaged in chain broadcasting." Columbia Broadcasting System, Inc. v. United States, — U. S. —, 62 S. Ct. 1194, 1200, 86 L. ed. (Adv. Ops.) 1066, 1072 (1942). Secondly, the Commission twice provided for postponement of the effective date of the order with respect to existing contracts and station licenses, and in regard to two of the regulations the extension or suspension was "in order to permit the orderly disposition of properties." Columbia Broadcasting System, Inc. v. United States, *supra*, 62 S. Ct. at 1070, 86 L. ed. (Adv. Ops.) at 1198. Is this consistent with a mere announcement of policy? Thirdly, the wording of the FCC's first draft of the proposed regulations is significant. In its notice of November 28, 1940, which ordered argument on the first draft, most of the regulations began, "No licensee of a standard broadcast station shall enter into any contractual relation, express or implied, wtih a network organization which. . . ." The final draft changed the language to, "No license shall be granted to a standard broadcast station having any contract . . . with a network organization which. . . ." Brief for Appellant, pp. 44, 45, Columbia Broadcasting System, Inc. v. United States, *supra*.

[51] See cases cited *supra* notes 30-34.

[52] Powell v. United States, 300 U. S. 276, 57 S. Ct. 470, 81 L. ed. 643 (1937); Claiborne-Annapolis Ferry Co. v. United States, 285 U. S. 382, 52 S. Ct. 440, 76 L. ed. 808 (1932); Western Pac. Cal. R. R. v. Southern Pacific Co., 284 U. S. 47, 52 S. Ct. 56, 76 L. ed. 160 (1931).

[53] 273 U. S. 299, 47 S. Ct. 413, 71 L. ed. 651 (1927).

bodies this decision and the means of enforcing it. The result is a clash of interest between the network and the Commission which, the principal case holds, may be resolved judicially through the procedure of §402(a) of the Communications Act.

Nor is review barred by the "final order rule" precluding appeals from interlocutory orders. The FCC's investigations, hearings and deliberations have borne fruit in a legislative order which prescribes a standard for future conduct. This integral part of the administrative process has been concluded. What remains to be done is of a different nature, i.e., the application of the standard to the individual cases as they arise. Nothing in the law or the logic of this situation forces CBS to await the second stage of the process before requesting judicial review. Indeed, it seems highly probable that any remedies available at that stage would be most inadequate.[54*]

The Supreme Court has no desire to extend the holding of the principal case to review all announcements of policy,[55] but seeks rather to limit it to cases where by the exercise of rule-making power an administrative agency determines legal rights, and where appeal from later administrative adjudication of those rights would not be efficacious in the prevention of serious injury. In the words of Chief Justice Stone: "The ultimate test of reviewability is not to be found in an overrefined technique, but in the need . . . to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other . . . adjudications that may follow, the results of which the regulations purport to control."[56]

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[54*] Appellant's affadavits state that it knows of no affiliated station which is prepared to contest the order; the stations have seemingly elected to comply with the FCC's regulations even if it means rescinding their contracts with CBS. Brief for Appellant, pp. 27-30, Columbia Broadcasting System, Inc. v. United States, — U. S. —, 62 S. Ct. 1194, 86 L. ed. (Adv. Ops.) 1060 (1942). Even if one or more stations did contest, the issues and effect of such proceedings would not be the same as those in review under §402(a) of the Communications Act, 48 STAT. 1093 (1934), 47 U. S. C. A. §402(a) (Supp. 1941), and the decision would probably come too late to save Columbia from serious injury. Columbia Broadcasting System, Inc. v. United States, *supra*, 62 S. Ct. at 1203, 86 L. ed. (Adv. Ops.) at 1075.

[55] For the various forms which such announcements may take, see Final Report of the Attorney General's Committee on Administrative Procedure (1941) 26, 27.

[56] Columbia Broadcasting System, Inc. v. United States, —U. S.—, 62 S. Ct. 1194, 1204, 86 L. ed. (Adv. Ops.) 1060, 1076 (1942).

Constitutional Law—Right to Waive Jury in Federal Court without Advice of Counsel

The Circuit Court of Appeals, Second Circuit, recently held, one judge dissenting, that a federal district court had no jurisdiction to try a defendant charged with a felony where it appeared that the defendant had been tried by the court without a jury after having requested, without the advice and consent of an attorney, that he be allowed to waive his constitutional right[1] to a jury trial. A writ of habeas corpus was issued directing the release of the defendant who had been convicted and sentenced to imprisonment after a trial by the court.[2]

The decision was made to turn on the fact that the defendant had not been assisted by counsel in making his decision to waive jury trial. A reading of the opinion reveals, however, that the court had grave doubts as to the constitutionality of any waiver of jury trial, either with or without the assistance of counsel.

The history of the right to waive jury trial in the federal courts may be briefly traced as follows: The constitutional provision for the trial of all crimes by a jury was first interpreted as being mandatory, and courts were held to have no jurisdiction to try, without a jury, defendants accused of crime.[3] Exceptions were that a jury could be waived by a plea of guilty[4] or by a failure to plead further after a demurrer to the indictment had been overruled.[5] Later, the rule was relaxed to permit waiver of jury trial in prosecutions for "petty offenses," which were said not to be "crimes" within the meaning of the constitutional provision.[6*] The Supreme Court of the United States

[1] U. S. CONST. Art. III, §2; U. S. CONST. AMEND. VI.

[2] United States *ex rel.* McCann v. Adams *et al.*, 126 F. (2d) 774 (C. C. A. 2d, 1942).

[3] United States v. Taylor, 11 F. 470 (C. C. Kan. 1882).

[4] West v. Gammon *et al.*, 98 F. 426 (C. C. A. 6th, 1899).

[5] Summers v. United States, 204 F. 976 (C. C. A. 9th, 1913).

[6*] Schick v. United States, 195 U. S. 65, 24 S. Ct. 826, 49 L. ed. 99 (1904); Frank *et al.* v. United States, 192 F. 864 (C. C. A. 6th, 1911); Low *et al.* v. United States, 169 F. 86 (C. C. A. 6th, 1909); United States v. Praeger, 149 F. 474 (W. D. Tex. 1907); *accord,* Coates v. United States, 290 F. 134 (C. C. A. 4th, 1923). The argument made by the courts in these cases was that the word "crimes," as used in the Constitution, referred only to criminal offenses of a somewhat serious nature. They maintained that not all acts contrary to law were triable by a jury at common law, and said that the makers of the Constitution, in the course of debate, had changed the wording from "criminal offenses" to "crimes" so as to exclude these petty offenses which required no jury at common law. The courts indicated that they would look to the nature of the punishment provided in order to determine whether the offense was sufficiently serious to require a jury trial. They stated specifically that it would not necessarily depend on whether or not the offense was a felony or a misdemeanor. Mr. Justice Harlan, dissenting in Schick v. United States, *supra,* said that neither the Constitution nor the Congress had set up a criterion for deciding whether or not a jury was required for a particular offense, and that the court had no authority to draw the line for itself.

then rendered a decision in *Patton et al. v. United States*[7] which has long been interpreted by courts[8] and legal periodicals[9] as standing for the proposition that an accused on trial in a federal court for any crime may waive his right to a jury trial if he does so intelligently, and if the prosecution consents to such waiver.[10] This case held that a defendant on trial for a felony could consent to be tried by eleven jurors, where it appeared that the twelfth juror had fallen ill after the beginning of the trial, and was unable to serve further. The court added, by way of dictum, that a decision that the presence of one juror could constitutionally be waived logically required the conclusion that the whole jury could be waived, since a constitutional jury was a common-law jury of twelve, and no less.[11]

The court in the principal case is obviously of the opinion that this conclusion does not follow. It evidently believes that the Supreme Court today would refuse to permit the total waiver of a jury. It casts discredit on the dictum of *Patton et al. v. United States* in the following language: "Since [the *Patton* case] the surrender of that right [the right to jury trial] has not been before the Supreme Court, but we are to assume that that decision is still law, at least as to the point actually decided, which was that the accused might lawfully consent to a jury of less than twelve—eleven as it chanced. . . . Hughes, C. J., took no part in the decision, and Holmes, Brandeis and Stone, JJ., concurred only in the result; perhaps because they did not think that consenting to go on before a jury of eleven, after one had fallen ill, involved the same constitutional question as consenting to a trial 'by the court without a jury.' Whether or not it does, practically there is much difference between being tried by a jury of eleven, or six, or for that matter even of three, and being tried by the judge."[12] The court then argues that a trial by even a very small jury preserves the fundamental characteristics which have endeared the jury to the American judicial system, whereas a trial by a judge does not.

It is submitted that the court, believing that the judge would have no jurisdiction to try the defendant without a jury under any conditions, seized upon the fact that the accused did not have the advice and consent of counsel in regard to the waiver, in order to release him without

[7] 281 U. S. 276, 50 S. Ct. 253, 74 L. ed. 854, 70 A. L. R. 263, 279 (1930).

[8] Simons *et al.* v. United States, 119 F. (2d) 539 (C. C. A. 9th, 1941); Brown v. Zerbst, 99 F. (2d) 745 (C. C. A. 5th, 1938); Spann v. Zerbst, 99 F. (2d) 336 (C. C. A. 5th, 1938); Irvin v. Zerbst, 97 F. (2d) 257 (C. C. A. 5th, 1938).

[9] Naff, *Jury Trial, Waiver Thereof, and the Alternate Juror* (1933) 22 KY. L. J. 125; Notes (1930) 16 A. B. A. J. 372; (1932) 27 ILL. L. REV. 447.

[10] Rees *et al.* v. United States, 95 F. (2d) 784 (C. C. A. 4th, 1938).

[11] Patton *et al.* v. United States, 281 U. S. 276, 290, 50 S. Ct. 253, 255, 74 L. ed. 854, 859, 70 A. L. R. 263, 267 (1930), cited *supra* note 7.

[12] United States *ex rel.* McCann v. Adams *et al.*, 126 F. (2d) 774, 775 (C. C. A. 2d, 1942), cited *supra* note 2.

directly disaffirming the popular interpretation of the doctrine of *Patton et al. v. United States*. The court admits that the defendant had waived the jury with a full understanding of his constitutional rights, and that he was probably capable of appraising his chances as between judge and jury. The defendant, while not a member of any bar, had studied law, and, after having been advised to retain a lawyer, stated that he wished to act as his own counsel. He had been convicted before by a jury in a trial involving transactions similar to those for which he was being prosecuted, and concluded that he would have a better chance in a trial before a judge. The present court argued that trial by jury is such a fundamental right that the power to waive it without the assistance of counsel should not depend upon the outcome of a preliminary inquiry as to the competency of the particular accused. Rather, concludes the court, he must be presumed to be incompetent to waive his right to a jury trial, and must retain an attorney to advise him on such waiver, even though the advice of the attorney extends to no more than that particular choice.

There are both practical and legalistic objections to this conclusion. As a practical matter, many persons, not lawyers, would be capable of making a well-advised and intelligent choice between judge and jury. The ability to make such a decision does not necessarily depend upon whether or not one is an attorney. To force one who wishes to be tried by a judge and to conduct his own defense to call in a lawyer for the sole purpose of waiving a jury would be to put the defendant to unnecessary expense. If he is capable of defending himself, he is capable of waiving jury trial, and there would be no logic in forcing him to pay for a service which would be more form than substance.

The court has placed a limitation upon the right of an accused to act as his own attorney. The reason advanced is that the right to jury trial is a fundamental one which should be zealously protected by the courts. The court, however, overlooks the fact that other fundamental rights may be waived without the advice of an attorney. The right to counsel has itself been held to be a fundamental right.[13] This right may be waived.[14] It would, of course, be absurd to hold that the right to counsel can be waived only upon the advice of counsel. Yet the reasoning of the court would lead to this result.

A California court, dealing with the problem before the court in the principal case, reached a different result.[15] It reasoned that the right to waive counsel carried with it the implication that the defendant

[13] Powell v. Alabama, 287 U. S. 45, 53 S. Ct. 55, 77 L. ed. 158, 84 A. L. R. 527, 544 (1932).
[14] Johnson v. Zerbst, 304 U. S. 458, 58 S. Ct. 1019, 82 L. ed 1461 (1938).
[15] People v. Thompson, 41 Cal. App. 965, 108 P. (2d) 105 (1940).

might do for himself that which he and his counsel together might do. This, in the opinion of the writer, is a better line of reasoning than that pursued in the principal case. When a defendant without counsel comes before the court asking that he be tried without a jury, the court should decide whether the defendant understands the full nature and consequences of his request. If the court believes him competent to make such waiver, then he should be allowed to do so. A preliminary inquiry of this nature would not be unduly burdensome on the court.

These weaknesses in the court's argument as to the necessity of having advice of counsel concerning the waiver of jury trial strengthen the belief of the writer that the defendant's lack of counsel was not the real reason for the decision. The determining factor seems to have been the court's belief that the constitutional provision for the trial of all crimes by a jury is mandatory, and that no federal judge has jurisdiction to try, without a jury, a defendant accused of felony.

Certiorari has been granted,[16] and the principal case will soon come before the Supreme Court for final determination. It is to be hoped that the court will take this opportunity to clarify, once and for all, the status of the right of an accused to completely waive trial by jury. It is highly unlikely that the Supreme Court will subscribe to the denial of the Circuit Court of Appeals that the case of *Patton et al. v. United States* stands for the proposition that a jury trial may be waived. The term "jury" as used in the constitutional provision means a common-law jury of twelve.[17] If, as the *Patton* case undoubtedly held, the presence of one juror may be waived, it follows that the provision is not mandatory, since the nature of the Constitution is such that it will not allow even a partial waiver of any of its mandatory provisions.

The problem of the principal case would not arise in the North Carolina courts. The State Constitution decrees that the trial of all crimes, except petty misdeameanors, must be by a jury.[18] This provision has been held to be mandatory, and does not merely guarantee a right which may be waived.[19] It has been held that this jury must consist of twelve persons.[20] However, an act[21] providing that the court

[16] Adams v. United States *ex rel.* McCann, 62 S. Ct. 1048, 86 L. ed. 937 (1942).

[17] Patton *et al.* v. United States, 281 U. S. 276, 50 S. Ct. 253, 74 L. ed. 854, 70 A. L. R. 263, 279 (1930), cited *supra* notes 7 and 11.

[18] N. C. CONST. Art. I, §13.

[19] State v. Muse, 219 N. C. 226, 13 S. E. (2d) 219 (1941); State v. Hill, 209 N. C. 53, 182 S. E. 716 (1935); State v. Pulliam, 184 N. C. 681, 114 S. E. 394 (1922); State v. Camby, 209 N. C. 50, 182 S. E. 715 (1935) (holding unconstitutional c. 23, N. C. PUBLIC LAWS 1933, as amended by c. 469, N. C. CODE ANN. (Michie, 1939) §4636(a), providing for trial by the court as upon a plea of "Not Guilty," when a defendant enters a "conditional plea" under the act).

[20] State v. Rogers, 162 N. C. 656, 78 S. E. 293 (1913); State v. Scruggs, 115 N. C. 805, 20 S. E. 720 (1894).

[21] N. C. PUBLIC LAWS 1931, c. 103, N. C. CODE ANN. (Michie, 1939) §233(a).

may order the selection of an alternate juror to sit with the other twelve and serve as a juror in case one of the original twelve should die or be discharged has been held not to infringe upon the constitutional provisions.[22]

JOEL DENTON.

Federal Crimes—Interpretation of Statute for Protection of National Banks—Incorporation of State Definition of Felony into Federal Criminal Statute

Petitioner was indicted and convicted under the National Banking Law for entering a national bank in Nebraska with the intent to cash a no fund check for $42.50, which he in fact succeeded in cashing. The statute under which the indictment was drawn reads:

". . . or whosoever shall enter or attempt to enter any bank, or building used in whole or in part as a bank, with intent to commit in such bank or building or part thereof, so used, any felony or larceny, shall be . . . [fined or imprisoned]."[1]

The cashing of a bad check is not of itself an offense against the United States, but it is a felony under the laws of Nebraska.[2] Petitioner brought habeas corpus proceedings against the warden of the Federal Penitentiary at Leavenworth, Kansas, on the ground that he had committed no offense against the United States. The United States District Court of Kansas granted habeas corpus. The Circuit Court of Appeals, however, reversed the decision, holding that by using the words "any felony" Congress indicated an intent to include in the statute all felonies, under either federal or state law, having relation to the preservation of the efficiency of a national bank.[3]

The general rule is that penal statutes are to be construed strictly, but this rule is relaxed to the extent that they are not to be construed so strictly as to defeat the obvious intent of the legislature.[4] Congress had the power to adopt state felonies by this statute if it wished to do so,[5] but there seems to be no precedent for such adoption by the court under the guise of interpreting Congressional intent.

[22] State v. Dalton, 206 N. C. 507, 174 S. E. 422 (1934).

[1] 50 STAT. 749 (1937), 12 U. S. C. A. §588b(a) (Supp. 1942). This statute was passed in 1937 to amend the bank robbery statute so as to include burglary and larceny, or entry with intent to commit any felony or larceny.

[2] COMP. STAT. NEBR. (1929) Ch. 28, §1212; Ch. 29, §102.

[3] Hudspeth v. Melville, 127 F. (2d) 373 (C. C. A. 10th, 1941) (one judge dissenting). Same holding on the basis of this case in Hudspeth v. Tornello, 128 F. (2d) 173 (C. C. A. 10th, 1942) (same judge dissenting); United States v. Jerome, 130 F. (2d) 514 (C. C. A. 2nd, 1942) (one judge dissenting), *cert. granted*, Jerome v. United States, 11 U. S. L. WEEK 3106 (U. S. 1942).

[4] United States v. Wiltberger, 5 Wheat. (U. S.) 76, 5 L. ed. 37 (1820); MAXWELL, INTERPRETATION OF STATUTES (6th ed. 1920) 484.

[5] Westfall v. United States, 274 U. S. 256, 47 S. Ct. 629, 71 L. ed. 1036 (1927)

The United States courts do not recognize common-law offenses, the criminal jurisdiction of the courts being derived expressly from acts of Congress;[6] nor can the federal courts take cognizance of state statutes in criminal proceedings to make an act an offense which is not made so by Congress.[7] Neither can statutes creating and defining crimes be extended by intendment, and no act, however wrongful, can be punished unless clearly within the terms of the statute.[8] These familiar doctrines seem to lead to the conclusion that the courts are bound to consider only offenses defined by Acts of Congress, and cannot look to state statutes for definitions unless they are so authorized by an unmistakable Congressional intent.

In other intances where Congress has intended to incorporate state laws into the federal law there has been an express announcement of that intent. An example of this is the specific adoption of the state penal offenses as offenses against the federal government when they are committed on government-owned property.[9] This statute was upheld by the Supreme Court;[10] however, this would not necessarily lead to the conclusion that such adoption was intended in the present statute, for it contains no expression of that intent unless the word "any" is construed as indicating such a purpose.[11*]

It would seem that "felony" as used in a federal statute must logically be interpreted to mean a felony under the Federal Criminal Code as Congress has defined it.[12] It is generally held that a statutory definition of a word must prevail regardless of what other meaning may be attributable thereto.[13] The fact that the statute in question is

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(holding that Congress may protect state banks which are members of the Federal Reserve System by making acts committed within them criminal); Franklin v. United States, 216 U. S. 559, 30 S. Ct. 434, 54 L. ed. 615 (1910) (holding that Congress may incorporate state offenses as offenses against the federal government where it has jurisdiction).

[6] United States v. Hudson, 7 Cranch (U. S.) 32, 3 L. ed. 259 (1812); CLARK & MARSHALL, LAW OF CRIMES (2d ed. 1927) §12(b), p. 21.

[7] United States v. Coppersmith, 4 Fed. 198 (C. C. W. D. Tenn. 1880).

[8] Todd v. United States, 158 U. S. 278, 15 S. Ct. 889, 39 L. ed. 982 (1895).

[9] 35 STAT. 1145 (1909), 18 U. S. C. A. §468 (1927).

[10] Franklin v. United States, 216 U. S. 559, 30 S. Ct. 434, 54 L. ed. 615 (1910).

[11*] When the statute was first drawn by the Attorney General it read "any larceny or other depredation," but the House Judiciary Committee amended it to read "any felony or larceny," H. R. REP. No. 732, 75th Cong., 1st Sess. (1937), and the basis for the holding in the instant case was this substitution. It could easily be argued that "felony" was substituted for "other depredation" merely to make the statute clearer, and that "any" was left in because it was there when the statute was first written to show that the statute included all larcenies.

[12] 35 STAT. 1152 (1909), 18 U. S. C. A. §541 (1927).

[13] Fox v. Standard Oil Co. of N. J., 294 U. S. 87, 55 S. Ct. 333, 79 L. ed. 780 (1934); see Emery Byrd Thayer Dry Goods Co. v. Williams, 98 F. (2d) 166, 170 (C. C. A. 8th, 1938). These cases involve civil suits, but their use of a word in a statute would be analogous to the use of a word in a criminal statute when that word is defined by statute.

under the banking code rather than the criminal code would not seem to make any difference, for it is a penal offense, even though jurisdiction over it is had under the power of the government to regulate national banks and currency. It would hardly seem, in the light of this reasoning, that "felony" as used in the statute is ambiguous, but even if it were considered to be so, ambiguities are not to be solved so as to embrace offenses not clearly within the law,[14] and judicial enlargement of a criminal statute by interpretation is at war with a fundamental concept of common law that crimes must be defined with appropriate definiteness.[15]

Along with that portion of the statute considered in this case, Congress made the additional provision that when there was an actual taking or carrying away, with intent to steal or purloin any money or property belonging to or in the custody of the bank, it should be punished as therein specified, the punishment being such as to make the crime a felony when the amount was over $50, and a misdemeanor when it was $50 or less.[16] This could lead to the conclusion that Congress meant to make the same distinction when there is an entering with "intent to commit any felony or larceny." There would seem to be no logical basis for arguing that the entering with intent to obtain $42.50 by cashing a bad check should be a more serious offense than actually stealing $42.50; and had the indictment been for the latter, under the statute itself, petitioner could only have received a sentence of one year and a fine of $1,000 or both. However, it was possible, under the interpretation incorporating the state law to give him a sentence of twenty years, and a fine of $5,000. Under this construction the statute provides a greater penalty for entering with intent to commit the crime than it does if the crime is actually committed. Thus it would be better for purposes of punishment to indict him for an entry with intent, for which he could be given up to twenty years and a fine of $5,000, than for an actual commission of the larceny, for which he could only get ten years and a fine of $5,000. It would seem that there would be no need for the distinction between grand and petit larceny unless it was also intended to limit the entering with intent to commit any felony correspondingly. This observation may be strengthened by

[14] Krichman v. United States, 256 U. S. 363, 41 S. Ct. 514, 65 L. ed. 992 (1921) (holding that a porter was not to be considered an officer of the United States when the government was operating the railroads).

[15] Pierce v. United States, 314 U. S. 306, 62 S. Ct. 237, 86 L. ed. 238 (1941) (holding that the interpretation of a statute making it a crime to impersonate a federal officer did not extend to an officer under the T. V. A.).

[16] 50 STAT. 749 (1937), 12 U. S. C. A. §588b(a) (Supp. 1942). When the robbery statute was amended in 1937 entering with intent to commit any felony or larceny was made the same grade offense as robbery itself as far as the penalties are concerned, but a distinction was made when there was a completed larceny, between grand and petit.

the fact that when the bill was first on the floor of Congress it did not differentiate between a felony and a misdemeanor,[17] but later it was suggested in debate that such a distinction was necessary so that all grades of completed larceny would not be penalized in the same manner,[18] and an amendment was added providing for this division.[19] In a case decided in the same circuit as the instant case the statute was interpreted as creating four separate and distinct offenses, in that the force and violence required in the first part of the statute to create robbery was not essential to the offenses of entering with intent to commit any felony or larceny or the actual completion of the larceny.[20] This could be interpreted as a holding that Congress did not intend for the division of larceny in the completed offense to limit in any way the clause relating to entering with intent to commit any felony or larceny.

An analogous situation to the instant case might arise under a provision of the espionage act authorizing the issuance of a search warrant where the property to be seized was used as a means of committing "a felony."[21] In interpreting the act the court held that "felony" covers any felony arising under any federal statutes.[22*] The present question might well arise, however, where the goods seized were used in the commission of an offense against the state, but not against the federal government.

Passing on from the logic of the construction of the statute it might be well to look at some of the practical effects of such a construction. This interpretation of the statute can make an act committed in one state an offense against the federal government, whereas if it were committed in another state it would be no offense against the federal government. For instance, if petitioner had presented his check in North Carolina he could not have been indicted under the statute, for the North Carolina law makes cashing a bad check only a misdemeanor;[23] but had he written it in West Virginia he would be guilty of a felony under the West Virginia Code[24*] and thus would be guilty of an offense against the United States.

[17] H. R. REP. No. 732, 75th Cong., 1st Sess. (1937).
[18] 81 CONG. REC. 4656 (1937). [19] 81 CONG. REC. 5376 (1937).
[20] Alford v. United States, 113 F. (2d) 885 (C. C. A. 10th, 1940).
[21] 40 STAT. 228 (1917), 18 U. S. C. A. §612(2) (1927).
[22*] Conyer v. United States, 80 F. (2d) 292 (C. C. A. 6th, 1935). There is a distinction here in that "a felony" is used rather than "any felony." One could be interpreted to go as far as the other, however.
[23] N. C. CODE ANN. (Michie, 1939) §4283.
[24*] WEST VA. CODE ANN. (Michie, 1937) §5980. If the check were for less than $20.00 under this statute it would be a misdemeanor. In the Fourth Circuit of the Circuit Court of Appeals, of the five states therein, North Carolina, South Carolina, and Maryland make the offense of writing a bad check a misdemeanor. N. C. CODE ANN. (Michie, 1939) §4283; CODE OF LAWS OF S. C. (Michie, 1932)

It is stated in a federal case in Indiana involving the same statute that Congress did not intend to include the offense of obtaining money under false pretenses in the statute, for it did not expressly provide for that offense.[25] This holding is an example of the same statute being given a strict interpretation. If the indictment had been as in the present case the defendant could have been convicted, for the writing of a bad check is a felony under the Indiana law.[26] A like result was reached in a Pennsylvania case where the defendant was released because his act of giving a forged check did not constitute either larceny or a federal felony;[27] but had he merely been indicted for intending to give a forged check he would have been within the present interpretation of the statute, for forgery is a felony under the Pennsylvania Code.[28] These decisions would tend to show that other judges and prosecuting officers are not completely in accord with the interpretation given in the present case, and the possibility of having non-uniform offenses against the federal government might make it wise either to rewrite the law, indicating freely the intention of Congress, or to interpret the statute so that it covers only felonies under the federal law.

Certiorari has recently been granted[29] in a case concerning the same issue involved in the instant decision, and an authoritative ruling may soon be forthcoming.

C. D. HOGUE, JR.

Marine Insurance—Return of Excess Premiums—Innocent Overvaluation—Risk Bearing in Transoceanic Shipments

A pearl necklace, left in Germany upon the death of the owner, was adjudged by a German "official protocol" to be worth $60,000, and was sought to be obtained from Germany by the executors of the estate

§1167; ANN. CODE OF MD. (Flack, 1939), Art. 27, §§152 and 150. Virginia and West Virginia both have distinctions as to when the offense is a felony or a misdemeanor; Virginia turning the offense into larceny and making distinction between grand and petit larceny at $5.00; VA. CODE ANN. (Michie, 1936) §4149(44), grand larceny being a felony, *id.* §4758. It is thus possible to commit the same crime within the same circuit and be guilty of an offense against the United States if it is committed in one part, and not guilty if committed in another part. There would not seem to be any apparent reason why the cashing of a check in a national bank would impair its efficiency more in one state so as to make it an offense against the United States than in another where it would be no offense against the United States.

[25] United States v. Mangus, 33 F. Supp. 596 (N. D. Ind. 1940). Here the indictment was for larceny by trick, and the court held that the defendant could not be convicted because there was consent to the taking of the title and the possession of the money.

[26] IND. STAT. ANN. (Burns, 1933) §§10-2105, and 9-101.

[27] United States v. Patton, 120 F. (2d) 73 (C. C. A. 3rd, 1941) (indictment was for larceny, but the court held that the bank relinquished title and possession when it cashed the forged check and thus it could not be larceny).

[28] 18 PENNA. STAT. ANN. (Purdon, 1930) §3611.

[29] Jerome v. United States, 11 U. S. L. WEEK 3106 (U. S. 1942).

and the heir. A war-risk insurance policy was taken out against loss in transit of the pearls, "valued at . . . [$60,000]." Premiums of over $2,000 were paid. Upon its arrival the necklace was found to be worth only a little more than $60.00, the German "official protocol" allegedly being incorrect in stating its value. Executors therefore sue to recover the excessive premiums paid the insurance company, basing their suit on a count for "money had and received," and also requesting reformation of the insurance policy. *Held:* Recovery denied. Equity will reform a contract when it does not state what the parties intended, but will not create a new and entirely different contract. Here there is no indication of intent to obtain a lesser amount of insurance than $60,000 worth. Also, the insurance company has rendered consideration worth all the premium paid, for if the necklace had been lost at sea the true value of it would never have been known, and the insurer would have had to pay the $60,000 loss.[1]

Practically all of the decisions (certainly the important ones) concerning overvaluation of the protected property by the insured have dealt with a situation in which a loss of the property has occurred, and the insurer is seeking to resist payment because of an alleged overvaluation. The present case differs in that the risk has terminated without a loss of the protected property so that insured is seeking to recover excess premiums paid because of mistaken overvaluation rather than to obtain indemnification. However, despite the factual peculiarity of the present case, a knowledge of the law as set down in the ordinary overvaluation decision is important background for the understanding of this case.

The effect of overstating the value of insured property has undergone a rather obvious change in the past century. The earlier cases abided by the rule that even an absolutely innocent and unintentional overstatement by the insured, if it were a material and substantial overstatement, would avoid[2*] the policy.[3] This rule put the duty squarely

[1] Orient Insurance Co. v. Dunlap, 193 Ga. 241, 17 S. E. (2d) 703 (1941).

[2*] See VANCE, INSURANCE (2nd ed. 1930) 360 n. 72.

When used with reference to insurance policies, the words "void," "vitiate," and similar language are generally used in decisions and texts not to mean void *ab initio,* but rather "voidable at the option of the injured party." Since most insurance cases arise from an attempt by the insurer to resist performance, so that the insurer will always exercise any option he may have to avoid the policy, the distinction between "void" and "voidable" is usually immaterial. In the present case, though, the distinction might be of prime importance. If this policy were void *ab initio* the insured here would have a much easier case for the return of his premiums than if the policy were merely voidable at the option of the insurer, since obviously the insurer does not elect to avoid. See *infra,* pp. 94 f., to the effect that insured might recover in the present case, notwithstanding the fact that the insurer has not exercised his option to avoid.

[3] Carpenter v. Providence Insurance Co., 16 Peters (U. S.) 495, 10 L. ed. 1044 (1842); Smith v. Royal Insurance Co., 37 F. Supp. 841 (N. D. Cal. 1941); Carrolton Furniture Co. v. American Indemnity Co., 115 Fed. 77 (C. C. A. 2nd,

upon the insured in all cases to find out the value of the goods he wished to have insured, and to state same to the insurer accurately, upon pain of being unable to recover for injury to or loss of the property even to the extent of the smaller true value of it.

The modern cases have looked the other way—so that today the majority rule may be said to be that an innocent mistake, even to a substantial amount, will not cause a policy to be void.[4] It would seem that under the modern rule neither insured nor insurer would be greatly interested in whether or not the protected property were overvalued. However, the insurer may be anxious to avoid overstatement so as to cut down the "moral hazard." And the insured is of course anxious to avoid paying too high a premium.

1902); Carpenter v. American Insurance Co., 1 Story 57, Fed. Cas. No. 2428 (C. C. D. R. I. 1839); National Insurance Co. v. Duncan, 44 Colo. 472, 98 Pac. 634, 20 L. R. A. (N. S.) 340 (1908); Continental Insurance Co. v. Farlan, 219 Ky. 462, 293 S. W. 952 (1927); Niagara Insurance Co. v. Layne, 162 Ky. 665, 172 S. W. 1090 (1915); Protection Insurance Co. v. Hall, 15 B. Mon. (Ky.) 411 (1854); Dennison v. Thomaston Insurance Co., 20 Me. 125 (1841); Wood v. Fireman's Insurance Co., 126 Mass. 316 (1879); Wilbur v. Bowditch Insurance Co., 10 Cush. (Mass.) 446 (1852); Davenport v. New England Insurance Co., 6 Cush. (Mass.) 340 (1849); Houghton v. Insurance Co., 8 Metc. (Mass.) 114 (1844); Bryant v. Ocean Insurance Co., 22 Pick (Mass.) 200 (1838); Stetson v. Massachusetts Insurance Co., 4 Mass. 330 (1808); Shelden v. Michigan Insurance Co., 124 Mich. 303, 82 N. W. 1068 (1900); Briggs v. Fireman's Insurance Co., 65 Mich. 55, 31 N. W. 616 (1887); Smith v. Automobile Insurance Co., 188 Mo. App. 297, 175 S. W. 113 (1915); Leach v. Insurance Co., 58 N. H. 245 (1883); Hersey v. Merrimack Insurance Co., 7 Fost. (N. H.) 149 (1855); Armour v. Transatlantic Insurance Co., 90 N. Y. 450 (1882); Evans v. Columbia Insurance Co., 40 Misc. 316, 81 N. Y. Supp. 933 (1903); Bobbit v. Liverpool Insurance Co., 66 N. C. 70 (1871); Lexington Insurance Co. v. Paver, 16 Ohio 324 (1847); Nassauer v. Susquehanna Insurance Co., 109 Pa. St. 507 (1885); Catron v. Tennessee Insurance Co., 6 Humph. (Tenn.) 176 (1845); Home Insurance Co. v. Eakin, 2 Tex. Civ. Cas. §665 (1885); Boutelle v. Westchester Fire Insurance Co., 51 Vt. 431 (1878); Ionides v. Pender, L. R. 9 Q. B. 531 (Eng. 1882); Newton v. Gore Insurance Co., 33 U. C. (C. P.) 92 (Eng. 1875); Riach v. Niagara Insurance Co., 21 U. P. (C. P.) 464 (Eng. 1861); Dickson v. Equitable Fire Insurance Co., 18 U. C. (Q. B.) 246 (Eng. 1859); Shaw v. St. Lawrence Insurance Co., 11 U. C. (Q. B.) 73 (Eng. 1851); Continental Insurance Co. v. Ware, 9 Ins. L. J. 519 (1876).

[4] First National Bank v. Hartford Insurance Co., 95 U. S. 673, 24 L. ed. 563 (1877); Franklin Insurance Co. v. Vaughan, 92 U. S. 516, 23 L. ed. 740 (1876); Hartford Live Stock Insurance Co. v. McMillen, 9 F. (2d) 961 (C. C. A. 6th, 1925); Columbian Insurance Co. v. Modern Laundry, 277 Fed. 355 (C. C. A. 8th, 1921); Miller v. Alliance Insurance Co., 7 Fed. 649 (C. C. D. N. Y. 1881); Atlas Insurance Co. v. Robison, 94 Ark. 390, 127 S. W. 456 (1910); Cottam v. National Church Insurance Co., 209 Ill. App. 404 (1918); Home Insurance Co. v. Overturf, 35 Ind. App. 361, 74 N. E. 47 (1905); Dwelling House Insurance Co. v. Freeman, 12 Ky. Law Rep. 894, 15 S. W. 856 (1891); Garnier v. Aetna Insurance Co., 181 La. 426, 159 So. 705 (1935); German Fire Insurance Co. v. Cohen, 114 Md. 130, 78 A. 911 (1910); Bernadich v. Lincoln Mutual Insurance Co., 287 Mich. 137, 283 N. W. 5 (1938); Mississippi Fire Insurance Co. v. Dixon, 133 Miss. 570, 98 So. 101 (1923); Delaware Insurance Co. v. Hill, 127 S. W. 283 (Tex. Civ. App. 1910); Morotock Insurance Co. v. Fostoria Glass Co., 94 Va. 361, 26 S. E. 850 (1897); see especially Lynchburg Insurance Co. v. West, 76 Va. 575 (1882). See comment (1941) 19 LEHIGH LAW JOURN. 139.

A few of even the very early cases did follow the "modern" rule, and these gradually became more and more numerous. It appears that the very first reported American case to offer a faint suggestion of what ultimately became the modern rule was *Wolcott v. Eagle Insurance Company,*[5*] in 1827. Plaintiff operated a brig and was away from the home port for many months at a time, making many stops in distant lands. The value of the cargo was great at times and small at times. Plaintiff had stated that the average value was around $2,500, and defendant insurer issued him a policy in that amount. At the time of the loss sued on, the insured part of the cargo was worth considerably less than $2,500. The case turned on other questions than the one of valuation, but the counsel for plaintiff interposed the argument that "Where the assured in a valued policy has anything at risk under the policy, *there being no fraud,* the valuation is conclusive." The *Wolcott* case was then cited by counsel in *Borden v. Hingham Fire Insurance Company,*[6] which stated, on the subject of overvaluation, "The plaintiffs made and the defendants accepted the estimate; and the contract was made on that basis. No fraud, concealment, or gaming is suggested. We are all of the opinion that the plaintiffs are entitled to recover." The *Hingham Insurance Company* case was then cited in *Fuller v. Boston Fire Insurance Company,*[7] and in Wood on *Fire Insurance.*[8] Thus the modern rule was born.

Some cases pretended to abide by the settled rule that any material overvaluation, whether fraudulent or innocent, would avoid the policy, yet circumvented the rule in cases where it would work an injustice by simply calling any overvaluation, even one of twofold the actual value,[9] or of a third again actual value,[10] an immaterial and unsubstantial overvaluation.

A clear and typical clash of the two doctrines, the old and the new, can be seen in the three *Eakin* cases, quite noted in their day. The intermediate court of appeals, citing the Massachusetts cases, *supra,* and Wood on *Fire Insurance,* held that only an overvaluation so gross that fraud must of necessity be presumed would vitiate the policy.[11] The

[5*] 4 Pick (Mass.) 445, 21 Mass. 429 (1827). 2 MAY, INSURANCE (3d ed., 1890), §373A, p. 827, n. 3, states that the modern rule was born in Texas. The most diligent search by the author, however, would clearly give Massachusetts this honor.

[6] 18 Pick (Mass.) 523, 35 Mass. 523 (1836). In the Borden case the question was whether the value of the insured's *interest* in the protected property was worth the full value of the face of the policy. There was no question as to the value of the property itself. The court held that in the absence of fraud, insured could recover the full face of the policy.

[7] 4 Metc. (Mass.) 206, 45 Mass. 206 (1842).

[8] WOOD, FIRE INSURANCE (1878) 431, §220, n. 6.

[9] Conn v. Imperial Fire Insurance Co., 1 R. & C. (Nova Scotia) 240.

[10] Franklin Insurance Co. v. Vaughan, 92 U. S. 516, 23 L. ed. 740 (1876).

[11] R. E. Eakin v. Home Insurance Co., 1 Tex. Civ. Cas. 155 (1883).

highest appelate court reversed this holding, stating that any material overvaluation, whether by mistake or fraud, would bar recovery on the policy.[12]

The old rule has still been followed in some comparatively recent decisions.[13]

As to the case where there is a *fraudulent* overvaluation, the law appears the same in nearly all cases, old and modern: If the misvaluation was material or substantial the policy is void; otherwise not.[14*]

The change that has occurred in the law is clearly reflected by the text writers, the early ones stating the "old" (now minority) rule, the transition ones being rather confused, and the recent writers stating the modern majority rule.

The third edition of May on *Insurance,* published in 1891, follows the earlier editions in stating that where the policy provides that overvaluation will avoid it, then any substantial overvaluation, innocent or fraudulent, will avoid the policy; and where the policy does not state that overvaluation will avoid it, the same is true. However, May recognizes that in the latter case there is a tendency to hold that only *gross* innocent overvaluation will avoid the policy.[15*]

As late as 1921, Corpus Juris stated the law in accordance with May above. A few pages later, however, it states that the "old" rule applies only to warranties, and not to representations. A general confusion of the cases on the matter is said to exist.[16]

The fourth edition of Richards, in 1932, emphasized still another way of dividing and distinguishing between the cases using the "old" and the "new" rules: viz., that the "old" rule that an innocent overvaluation would avoid the policy is still today the majority rule in *marine* insurance cases, while the "new" rule is the majority in other types of property insurance cases. The reason, as indicated by Richards, is that a marine insurer is entitled to practically a guaranty of

[12] Home Insurance Co. v. R. E. Eakin, 2 Tex. Civ. App. Reps. 587 (1885).

[13] Smith v. Royal Insurance Co., 37 F. Supp. 841 (N. D. Cal. 1941).

[14*] 2 MAY, INSURANCE (3rd ed. 1891), §373; 4 RICHARDS, INSURANCE (4th ed. 1932), 363, §233; 26 CORPUS JURIS, FIRE INSURANCE (1921), §189(b); VANCE, INSURANCE (2d. ed. 1930), §190; 29 AMERICAN JURISPRUDENCE, INSURANCE (1940), §1132. But see Lycoming Insurance Co. v. Ruben, 79 Ill. 402 (1876), and 4 APPLEMAN, INSURANCE (1942), §2601, to the effect that *any* fraudulent overvaluation may avoid the policy, whether material or not.

[15*] 2 MAY, INSURANCE (3rd ed. 1891), §§373-4. The case of Citizens Fire and Marine Insurance Company v. Short, 62 Ind. 316 (1878), in discussing an identical section from an earlier edition of May, criticized May's adherence to the "old" rule: "It states the law on the subject of overvaluation more strongly in favor of the insurer than we think the cases will warrant. In our opinion, the overvaluation must be knowingly false and fraudulent, or it will not have the effect of vitiating or avoiding the policy."

[16] 26 CORPUS JURIS, FIRE INSURANCE (1921) §§188-191, 205-6.

the truthfulness of the insured's description of the protected property, because in many cases the property may be overseas so that the insurer has no opportunity to inspect it. This circumstance is said not to be true of other forms of property insurance. Richards' conclusions seem to be backed up by good case authority.[17]

Vance, in 1930, seems to have committed the error of stating quite bluntly in one place that the "old" rule is the law (except as to mere statements of opinion and belief),[18] while several chapters later he clearly states that the modern rule is in the majority.[19] However, Vance's point seems to be that *all* statements as to the value of property must be treated as mere opinion, except valuations of items which have a definite stipulated value (such as the value of a mortgage on the insured property). Thus the inconsistency is largely explained away.

Patterson concurs with Vance's conclusion that statements of valuation are largely opinion, citing *First National Bank of Kansas City v. Hartford Fire Insurance Company.*[20] Hence the insurer can avoid the policy only if there is a fraudulent misvaluation, which would involve the considerable difficulty of proving that the insured did not actually "think what he said he thought." Such a statement of opinion is therefore "worthless," says Patterson, insofar as aiding the insurer in litigation upon the policy.[21]

Appleman on *Insurance,* 1941, presents a very discerning analysis of the cases on this point.[22] He begins by giving a general statement of the "new" majority rule that a fraudulent and substantial overvaluation will usually avoid the policy whereas an innocent one usually will not. Appleman points out the confusion on the point of innocent overvaluation, but states that the better modern courts realize that statements of value are largely mere opinion and that nearly everyone is inclined quite innocently to place an exaggerated value on his own goods. These considerations, plus the fact that a court may always fall back on the device of presuming fraud in case there is a very grossly exaggerated value, have been the principal reasons for the switch to the "new" rule. Appleman indicates, and with a substantial backing of decisions, that innocent overvaluation is more apt to be excused where the policy is of the "open" form than where it is "valued." Nearly all policies today are "open" ones (another reason for the switch to the new rule). Under such a policy the original statement of value is not of importance in determining the amount that an

[17] RICHARDS, INSURANCE (4th ed. 1932) §§79-80.
[18] VANCE, INSURANCE (2d ed. 1930) §107, at p. 368.
[19] VANCE, INSURANCE (2d ed. 1930) §190, at p. 724.
[20] 95 U. S. 673, 24 L. ed. 563 (1877).
[21] PATTERSON, INSURANCE (1935) §67, at p. 278.
[22] 4 APPLEMAN, INSURANCE (1941) §§2601-2.

insurer must pay in the event of loss, for the insured is indemnified in accordance with the value of the property at the time of the loss. The original statement of value is therefore important only in determining the amount of the premium, and because the moral hazard is thought to be increased if property is insured for more than actual value. If it is a valued policy, on the other hand, then the amount the insurer must pay after a loss is calculated in accordance with the original statement of value in the application for insurance. Courts are therefore much less willing to excuse an overvaluation in such a policy, and much more willing to consider the overvaluation as fraudulent.[23*] The very fact that the policy is of the valued type is calculated to put the insured on notice that he must be especially careful and accurate in his statement of value.

The sketch treatment of this subject in the American Jurisprudence volume on *Insurance* seems well taken in so far as it goes.[24] It is clearly stated that the majority rule today is that an innocent overvaluation will not avoid a policy of insurance. Also, it is well shown that generally it makes no difference, in cases concerning overvaluation of property, whether the misstatement occurred in the proofs of loss, or in the original application for the policy. The law is the same in both cases.[25]

Such, then, is the law as stated by the cases and the authorities who have attempted to analyze them.

As to the present case, it should be noted at the outset that if the insured is to be allowed any relief it cannot be by reformation of the policy as sought by the plaintiff here. Some other basis for relief must be found, such as that the mistake was of such nature that it will avoid the policy; or that the authorities have generally allowed a return of premiums when they "reopen" the valuation of a valued policy. For the court in the principal case decided, and rightly so, that the insured could not have had reformation here. "There was no agreement or intention as to insurance of a necklace made of 'Japanese' or cultured pearls; and if the contract should now be so reformed as to cover a necklace of the latter character, it would be converted into something which the parties never intended." While in a proper case equity may

[23*] See, *infra*, pp. 95 f., as to the right of the insurer to "reopen" the stipulated valuation after a loss, if he feels there has been an overvaluation; and as to the right of the insured, upon such "reopening," to recover excess premiums paid because of an innocent overvaluation.

[24] 29 AMERICAN JURISPRUDENCE, INSURANCE (1940) §§1132-4.

[25] Orenstein v. Star Insurance Co., 10 F. (2d) 754 (C. C. A. 4th, 1926); Columbian Insurance Co. v. Modern Laundry, 277 Fed. 355, 20 A. L. R. 1159 (C. C. A. 8th, 1921); Erb v. German-American Insurance Co., 98 Iowa 606, 67 N. W. 583 (1896); Stone v. Hawkeye Insurance Co., 68 Iowa 737, 28 N. W. 47 (1886).

reform a written contract which, because of a mistake or inadvertence in drawing up the instrument—as a stenographical error, etc.—does not express what the parties intended, it can do so only to the extent of making it speak the actual agreement, and cannot make a new and different contract for the parties.

The present case is an attempt by the insured to recover excess premiums, rather than an attempt by the insurer to escape liability because of misvaluation. However, whether or not these premiums can be recovered depends upon whether or not the policy was valid, for it is the well-established rule in marine insurance that, with regard to return of premiums for overinsurance, if the insurer could have at any time and under any circumstances been called upon to pay the whole sum on which he had received premiums, then the entire premium is earned, and there can be no recovery of any part of it by the insured. But if the insurer could never have been called upon to pay the whole, then he must return an amount of the premium commensurate with that percentage of the whole value of the insured property which he could not have been forced to make good in case of a loss.[26] In short, the insurer can usually keep the premiums only if he bore the risk. The rule therefore is based upon failure of consideration.[27]

It would seem that the insurer did not bear a risk in the present case because if he had been sued on the policy there are several defenses which he might have interposed so as to escape any payment. First, this was a marine insurance policy. As stated,[28] the so-called "old" rule is controlling in such a case. An innocent overvaluation, if substantial, will avoid the policy. Second, in many cases where the valuation is very greatly inaccurate (as in the present case, where a $60.00 necklace was stated to be worth $60,000) the courts have adopted the device, in order to prevent obvious injustice, of presuming fraud, so that the policy is void under the universally accepted rule that a fraudulent substantial misstatement will avoid the policy.[29] And third, the policy in the present case was a valued one. As stated,[30] proper valuation is of such importance in such a policy that the courts have generally expected an applicant for insurance to be positive of the value of the protected property. A substantial overvaluation, even an innocent one, will usually avoid a valued policy.

The insurer may claim, however, and upon good authority, that

[26] VANCE, INSURANCE (2d ed. 1930) §92, at p. 322; 2 ARNOULD, MARINE INSURANCE (11th ed. 1924) §1259.

[27] Tyrie v. Fletcher, 2 Cowp. 666, 98 Reprint 1297 (Eng. 1777); VANCE, INSURANCE (2d ed. 1930) §93, at p. 321.

[28] See, *supra,* pp. 91 f., the summary of Richards' discussion.

[29] See, *supra,* pp. 92 f., the summary of Appleman's discussion.

[30] *Ibid.*

these defenses do not render the policy absolutely void, but merely *voidable* at his option so that until the insurer has exercised his option (which naturally he did not do here) the policy must be treated as valid and he must be regarded as having carried the risk.[31]

This contention of the insurer may be discounted in several possible ways. First, the language in many cases and texts seems to indicate that a material misvaluation of the protected property in a marine policy will cause the policy to be *ab initio* void (so that the risk never attaches), and not merely voidable at the will of the insurer.[32*]

And second, there is authority that the risk does attach, but that nevertheless there may be a recovery of premiums commensurate with the amount of overinsurance, by a "reopening" or reconsideration of the value even in a valued policy. In *Forbes v. Aspinwall,*[33] and *Rickman v. Carstairs,*[34] it was established that notwithstanding the fact that

[31] See, *supra,* n. 2.

[32*] For example, 4 APPLEMAN, INSURANCE (1941) §2601, states, "A gross exaggeration of the value or substantial misstatement *will relieve the insurer of all liability thereunder.*" And 2 MAY, INSURANCE (3rd ed. 1891) §373, says, "It is not necessary that the overvaluation be intentional and fraudulent to have the effect of *vitiating* the policy." Further, "For no overvaluation but a gross and clear one . . . will in either case be held to *vitiate* the policy; and such a one will avoid the policy, whether provided against or not." And RICHARDS, INSURANCE (4th ed. 1932) §79, states, "In marine insurance, a concealment of a material circumstance . . . whether intentional or unintentional, innocent or fraudulent, *avoids* the contract." Further, "The *validity* of the marine policy impliedly is conditioned upon the completeness and accuracy of the description of the character of the risk as put forth by the applicant."

And Merchants Insurance Co. v. St. Paul Insurance Co., 219 App. Div. 636, 220 N. Y. S. 514 (1927), says, "The relationship between insurer and insured on marine insurance is one which calls for *uberrima fides.*" Further, Delaware Insurance Co. v. Hill, 127 S. W. 283 (Tex. 1910) is to the effect that a valued policy will be absolutely void if there is misrepresentation of value, provided there is actual fraud, or such a gross misstatement of value that fraud may be presumed. Also, see Tyrie v. Fletcher, 2 Comp. 666, 98 Reprint 1297 (Eng. 1777); Stevenson v. Snow, 3 Burr. 1240, 97 Reprint 809 (Eng. 1761); Martin v. Sitwell, 1 Shower 156, 89 Reprint 509 (Eng. 1700); Colby v. Hunter, 3 C. & P. 7, 172 Reprint 298 (Eng. 1827).

However, see, *supra,* n. 2. And also to the contrary is the one case most directly in point, Morrison v. The Universal Marine Insurance Co., 8 Exch. 197 (Eng. 1873). Plaintiff-insured's agent was instructed to secure marine insurance on freight on the *Cambria.* The agent had been informed that the *Cambria* might be grounded, there being some news to that effect. Upon careful investigation the agent determined that the ship had not grounded, whereupon he applied for the policy, not mentioning the supposedly false rumor. The insurer heard of the rumor from another source shortly after receiving the application, but issued the policy notwithstanding. Upon suit on the policy (the *Cambria* having in fact been grounded and lost) *held,* the failure of the agent to mention the rumor made the policy *voidable* at the option of the insurer. This option could be exercised within a reasonable time after the insurer learns that it has cause to avoid. *Held,* also, that the insurer's issuing the policy after hearing of the unconfirmed rumor did not amount to an election not to avoid.

Also, see 38 CORPUS JURIS, MARINE INSURANCE (1921) §139; and 4 RICHARDS, INSURANCE (4th ed 1932) §136.

[33] 13 East 323, 104 Reprint 394 (Eng. 1811).

[34] 5 B. & Ad. 651, 110 Reprint 931 (Eng. 1833).

the policies were "valued," the value would be "reopened," and the insurer could show that the amount stated in the policy was not the true amount on board ship at the time of the disaster at sea. In those cases the boat owner insured his freight charge (*Forbes* case) and cargo (*Rickman* case) before picking up the cargo, which then turned out to be considerably smaller than anticipated. A loss at sea occurred. It was held that the insurer had to pay, in the former case, freight charges equivalent only to the actual charge that would have been due on the smaller cargo, and, in the latter case, only the value of the actual cargo.[35*]

The case of *The Main*[36] extended this doctrine by allowing the insured a return of the extra premium that had been paid for the unnecessary overinsurance. In this case, a ship operator took out insurance to make sure that he received his freight charge (which he otherwise would not receive in case of a loss at sea). Before he set sail, however, the owner of the cargo unexpectedly paid the ship operator about one fourth of the freight charge, so that there ceased to be any risk at all that such part of the charge would not be received. A loss at sea occurred. The court held that the insurer was liable only for the remainder of the freight charge, and also that the insured could recover the excess premiums.[37*] Also, in *Fisk v. Masterman*[38] there was overinsurance because of a mistake in good faith as to the size and value of the cargo. Return of appropriate premium was allowed.[39*]

New York has adopted for all types of property insurance cases the

[35*] The *Forbes* and *Rickman* cases conform to the general rule that the valuation in a valued policy may be reopened where there is fraud or mistake; but beyond this it may not be reopened, not even where there is only a partial loss. Griswold v. Union Insurance Co., 11 Fed. Cas. 69, No. 5840 (C. C. N. Y. 1854); Brooke v. Louisiana Insurance Co., 4 Mant. N. S. (La.) 640 (1826); Stanton v. Natchez Insurance Co., 6 Miss. 340 (1844). See Hall v. Jefferson Insurance Co., 279 Fed. 892 (S. D. N. Y. 1921); Standard Marine Insurance Co. v. Nome Beach Lighterage, 133 Fed. 636 (C. C. A. 9th, 1904); Muirhead v. Forth Insurance Assoc., 1894 A. C. (Eng.) 72.

[36] (1894) Prob. (Eng.) 320.

[37*] Despite the liberality of this case in allowing a return of the premium for overinsurance caused by unexpected payment of freight, it strongly criticized the *Forbes* case, *supra,* for recognizing any overinsurance in the case where, in a valued policy, the parties had merely mistaken the size of the cargo. The *Main* case stated that a court was *not* at liberty to reopen the valuation agreed upon by the parties as an arbitrary and unchangeable figure. As to the merit of distinguishing between overvaluation caused by unexpected payment of the freight charge and that caused by mistake as to the value of the cargo, *query.* See discussion of Fisk v. Masterman, *supra.*

[38] 8 M. & W. 165, 151 Reprint 994 (Eng. 1841).

[39*] When the voyage began, there was no overinsurance. But while the ship was on the high seas additional insurance was secured with another company, on a mistaken belief that the cargo was of greater value than it actually was. *Held,* only the second insurance company must return excess premiums to the insured; for the first insurer bore the entire risk for at least a part of the voyage, so is not liable for returning a ratable share of the premium paid for overinsurance.

wise custom of refusing to consider a valued policy void when there is an innocent overvaluation; but instead, that state merely sets aside the stated value, and awards recovery on the policy to the insured on the basis of a smaller and more accurate valuation.[40] This in effect converts a valued policy into an open one, except that the valuation has to be calculated, in such a case, by reference back to the time the policy was taken out, rather than as of the time the loss occurred. Also, Ohio has adopted a statute requiring every fire insurer to have an agent appraise the value of the property at the time the policy is renewed;[41] and under such a statute of course a misstatement of value by the insured would not be held to avoid the policy.[42]

Finally, regardless of whether or not the *insurer* exercised his option to void the policy, it would appear that there was such a mistake here that the *insured* himself should be allowed to avoid it. As stated by the Restatement of Contracts,[43*] ". . . where parties on entering into a transaction that affects their contractual relations are both under a mistake regarding a fact assumed by them as the basis on which they entered into the transaction, it is voidable *by either party* if enforcement of it would be materially more onerous to him than it would have been had the fact been as the parties believed it to be . . ."[44*] (with

[40] Huth v. New York Insurance Co., 21 N. Y. Super. Ct. 538, 8 Bos. 538 (1861).

[41] 6 OHIO GEN. CODE (Page, 1937) §9583. The effect of this statute is to make all five policies, which are renewed, valued policies. Originally the statute applied to original issues as well as renewals.

[42] Queens Insurance Co. v. Leslie, 47 Ohio St. 409, 24 N. E. 1072 (1890).

[43*] RESTATEMENT, CONTRACTS (1932) §502. This section begins by stating that it shall be applicable notwithstanding the fact that there is no such mistake as would render the original offer void, or render the contract void as ambiguous, or render the contract void because of impossibility not foreseen or reasonably foreseeable by the promisor.

[44*] This section of the Restatement is in accord with the general case law. Relief for mistake (cancellation, rescission, reformation, etc.) is allowed where there is a mistake going "to the essence" of the subject matter of a contract. Fritzler v. Robinson, 70 Iowa 500, 31 N. W. 61 (1886); Hecht v. Batcheller, 147 Mass. 335, 17 N. E. 651 (1888); McKay v. Coleman, 85 Mich. 60, 48 N. W. 203 (1891); Sherwood v. Walker, 66 Mich. 568, 33 N. W. 919 (1887); Costello v. Sykes, 143 Minn. 109, 172 N. W. 907 (1919); Du Pont Chemical Co. v. Buckley, 96 N. J. Eq. 465, 126 Atl. 674 (1924); McCaull-Webster Co. v. Steele Brothers, 43 S. D. 485, 180 N. W. 782 (1921).

Relief is also generally allowed where there was a mistake in counting, or other mathematical computation. Miller v. First Savings Bank, 90 Cal. App. 387, 266 Pac. 294 (1928); Freeman v. Ralph Realty Corp., 198 App. Div. 788, 191 N. Y. S. 72 (1921); 5 WILLISTON, CONTRACTS (2nd ed. 1938) §1574, n. 1; Annotation: 59 A. L. R. at 825, 830.

Relief is frequently denied where it would result in placing the defendant in a worse position than he was in originally—as, for instance, where he has performed services or entered into contractual obligations which he otherwise would not have undertaken, on the assumption that he was rightfully entitled to the assets which the plaintiff seeks to recover from him. Grymes v. Saunders, 93 U. S. 55, 23 L. ed. 798 (1876); Olson v. Shephard, 165 Minn. 433, 206 N. W. 711 (1926); Harper v. Newburgh, 159 App. Div. 695, 145 N. Y. S. 59 (1913): Murray v. Saunderson, 62 Wash. 477, 114 Pac. 424 (1911).

three exceptions not applicable here).[45*] All of the requisites for the application of this section are present in the principal case: (1) The mistaken fact was the basis on which the parties bargained. It was a material mistake affecting the identity and attributes of the subject matter of the contract.[46] (2) The mistake was harmful to the insured to the extent of over $2,000.[47] (3) The insured is willing to pay premiums on the true ($61.50) value of the necklace. (This requirement is generally a condition precedent to relief for mistake.)[48]

However, the contention of the insurer in this case is that to judge the case on the established rules concerning return of premiums and void policies is to beg the entire question, for this case contains, says the Orient Insurance Company, a special equity which makes the established law inapplicable—namely, that regardless of legal theories, the insurance company did actually, as a practical matter, bear a risk here—for if the insured property were at the bottom of the ocean, then the insurance company could never prove, savé perhaps by sending divers to the bottom, that the pearls were worth only $60.00 instead of $60,000. Hence the Orient Company says it is entitled to a premium commensurate with the $60,000 risk borne.

It would seem that the present case is incorrect in allowing this contention of the insurer to control the decision. No reason is shown why the insurer could not have obtained the second protocol from Germany—the one subsequently obtained by the insurer, in which the German commissioner admitted his original mistake in stating the value of the pearls, and restated their true value at $61.50. And not even this would have been necessary if there had been a disaster in which the pearls were merely partially lost, or crushed, or otherwise damaged, but not sunk. In short, this present case is no different from any other in which owners take out marine insurance that their goods in distant parts of the world will be safely transported.[49*] Every insurer, and in fact every litigant, must run the risk of not being able to find evidence to prove his defenses.

Although this was a valued policy, the insurer could not very well

[45*] The second exception is where the party seeking to avoid the transaction can obtain satisfaction by reformation. See, *supra*, pp. 93 f., to the effect that this exception would not apply here.

[46] See RESTATEMENT, CONTRACTS (1932) §502, comment a.

[47] *Id.*, comment b.

[48] *Id.*, comment c.

[49*] For example, see the *Forbes, Rickman, Main,* and *Fisk* cases, *supra.* If the Orient Insurance Co. was seeking to change the existing law, would the following line of argument have been more effective? The owner of property generally has, even in cases such as the present, a better chance of obtaining, and more likelihood of knowing, the value of the protected property than the insurer, who in practically every case has never had any dealings with such property before—so that the policy of the courts should be to make the owner bear the loss caused by overvaluation, where the property is in a distant country, and not available for inspection.

contend, in the face of the *Forbes* and *Rickman* cases, that he could not "reopen" the value so as to offer his evidence that the pearls were of lesser value.

MILTON SHORT.

Taxation—Powers of Appointment—Will Contests—Taxation of Property Passing under Compromise of Attempted Testamentary Exercise of Power of Appointment

Decedent, Zachary Smith Reynolds, died at the age of twenty, being at that time the beneficiary of three trusts set up by the deed and wills of his parents. One trust directed that he receive the income until he reached 28 years of age, at which time he became outright owner; from the other trusts he was to receive income for life. All three trusts gave him a general testamentary power of appointment over the trust property whereby he could, in his sole discretion, appoint to anyone. In default of exercise of the power, the property was to go to his descendants, or if he had none, to his brother and sisters and their issue *per stirpes*. Decedent's attempt to exercise the power in favor of his brother and sisters by a New York will was contested by his two children who (1) denied the validity of the New York will and, (2) challenging the right of the brother and sisters to take in default, asserted their own right to do so. The brother and sisters claimed under decedent's will and in the alternative as takers in default, contending that one child was precluded because of a prior separation agreement and the other by reason of illegitimacy. These issues were never finally resolved by judicial decision, and eventually a compromise was entered into under which 37½% of the trust property went to the brother and sisters. In a 5 to 4 decision[1*] the Supreme Court de-

[1*] Helvering v. Safe Deposit and Trust Company of Baltimore, — U. S. —, 62 S. Ct. 925, 86 L. ed. (Adv. Ops.) 851 (1942). Both the majority and minority agreed that if the power of appointment were unexercised decedent did not have such an interest in the trust property as to require its inclusion in his gross estate under §302(a). This conclusion was based upon the legislative history of the statute and upon implications from *United States v. Field*, 255 U. S. 257, 41 S. Ct. 256, 65 L. ed. 617 (1921), rather than upon the economic equivalence of decedent's rights to complete ownership. Thus the court refused to expand the scope of §302(a) by the concept of "substantial ownership" which is developing under §22(a) for income tax purposes. 1 PAUL, FEDERAL ESTATE AND GIFT TAXATION (1942) §4.12, p. 223. Except for the unavailability of the corpus, the ordinary life estate coupled with a general power of appointment closely resembles a fee simple. For this reason, the inclusion of such property under §302(a), even though the power be unexercised, would perhaps have been not unreasonable, especially inasmuch as by so doing the court, at one stroke, could have escaped the complicated question of apportionment raised by their actual decision, and also laid at rest any possible doubt concerning the constitutionality of the taxation under the 1942 Revenue Act of property subject to an unexercised power of appointment. See *Reeves v. Fidelity & Columbia Trust Company* (1941-1943) C. C. H. Inheritance Tax Service—State, ¶90, 530 (Ky. 1942), where the court at the end of its opinion expresses doubts as to the ability of the legislature to tax property subject to an unexercised power as a part of the donee's estate.

cided that such part of this share as the brother and sisters received because of their claim as appointees under decedent's will should be included in decedent's gross estate for the purpose of computing the Federal Estate Tax under §302(f) providing for the inclusion of property passing by the exercise of a general power of appointment.[2*]

Prior to the passage of the 1942 Federal Revenue Act,[3] this decision represented perhaps as good a solution as was possible to an extremely complicated and troublesome problem. It had been settled that property subject to an unexercised power of appointment was not includible in decedent's gross estate under §302(f) before the 1942 Amendment.[4] Property subject to a *general* power of appointment was includible under §302(f) if the power was *exercised* and the property *passed* pursuant to this exercise.[5] Even where a general power was validly exercised appointees under it, who were also takers in default under the will of the donor of the power, could exempt the property from the tax by electing to take in default rather than as appointees, the property being considered as not having passed.[6] The question involved in the instant case is how much, if any, of property subject to a general power of appointment is to be considered as coming within the scope of §302(f) so as to be includible in decedent's estate for the purpose of the levy of the Federal Estate Tax, where an attempt has been made to exercise the power, and the validity of this attempt has never reached judicial decision but a compromise agreement gives the attempted appointees some part at least of what they would have taken as such.

Three possibilities are conceivable here: (1) to include none of the property; (2) to include only part of the property; or (3) to include all of the property. The four dissenting judges in the instant case took

[2*] Revenue Act of 1926, c. 27, 44 STAT. 9; 26 U. S. C. A. §811 (1940): "§302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—(f) (as amended by §803, Revenue Act of 1932, c. 209, 47 STAT. 169) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of or intended to take effect in possession or enjoyment at or after death, or (3) by deed under which he has retained for his life or any period not ascertainable without reference to his death or for any period which does not in fact end before his death (A) the possession or enjoyment of, or the right to the income from, the property, or (B) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth."

[3] Federal Revenue Act of 1942, tit. IV, Part I, §403 a-f (1-2).

[4] Helvering v. Grinnell, 294 U. S. 153, 55 S. Ct. 354, 79 L. ed. 825 (1935); Griswold, *Powers of Appointment and the Federal Estates Tax* (1939) 52 HARV. L. REV. 929; 1 PAUL, FEDERAL ESTATE AND GIFT TAXATION (1942), c. 9.

[5] Helvering v. Grinnell, 294 U. S. 153, 55 S. Ct. 354, 79 L. ed. 825 (1935).

[6] Helvering v. Grinnell, 294 U. S. 153, 55 S. Ct. 354, 79 L. ed. 825 (1935).

the position that none of the property should be included, on the assumption that the attempted exercise of the power was invalid;[7] hence anything which the brother and sisters took came to them because of their claim as takers in default and was thus outside the scope of §302(f). These judges regarded *Helvering v. Grinnell*[8] as supporting this point of view, and indicated that the doctrine of *Lyeth v. Hoey*[9] had no application since in the instant case a state court had said that no property had passed by the exercise of the power. Furthermore, they felt that the task of calculating the relative weight of the conflicting claims so as to determine what part of the brother's and sisters' share came to them through the bargaining force of the attempted exercise of the power and what part did not was virtually impossible.

The majority decided that some part of the share going to the brother and sisters under the compromise was attributable to the attempted exercise of the power in decedent's will and should therefore be included in decedent's gross estate under §302(f). This result was reached by applying the reasoning of *Lyeth v. Hoey*[10] in which property received by an heir under a compromise settlement of his contest of his ancestor's will was held to be property taken "by inheritance" and hence not taxable as income, the rationale being that the taxation of property distributed in compliance with the terms of a compromise depends upon the factors which influenced the compromise. The court indicated that the invalidity of the attempted exercise of the power had never been carried to final judicial decision and that it was a substantial factor in the compromise which was eventually reached,[11] while the alternative claim of the brother and sisters as takers in default was extremely tenuous. Although this conclusion seems reasonable, it injects into every case of this character the tremendously complicated issue of the relative effect of conflicting claims upon a compromise. The majority felt, however, that the difficulty of evaluation should not prevent taxation in accordance with the realities of the compromise.[12]

Although rejected by both the majority and minority of the court, the conclusion of the Tax Commissioner that all of the property should be included seems about as sensible as saying that none of it should be. Assuming that the validity of neither claim has reached judicial decision, the argument is that the brother's and sisters' alternative claim as takers in default was so tenuous as to have played no part in determining their

[7] Reynolds v. Reynolds, 208 N. C. 578, 182 S. E. 341 (1935).
[8] 294 U. S. 153, 55 S. Ct. 354, 79 L. ed. 825 (1935).
[9] 305 U. S. 196, 59 S. Ct. 155, 83 L. ed. 125, 119 A. L. R. 410 (1934).
[10] 305 U. S. 196, 59 S. Ct. 155, 83 L. ed. 125, 119 A. L. R. 410 (1934).
[11] Reynolds v. Reynolds, 208 N. C. 578, 182 S. E. 341 (1935).
[12] *Cf.* United States v. Ludey, 274 U. S. 295, 47 S. Ct. 608, 71 L. ed. 1054 (1926).

share under the compromise, and that such share was entirely due to their claim as appointees under decedent's will.

The 1942 Federal Revenue Act[13*] amends §302(f) by providing for the inclusion in decedent's gross estate of any property with respect to which decedent has at the time of his death a general power of appointment. Thus the tax is made to fall in accordance with the shifting of economic benefit rather than according to strict property rules under which it is determined whether any property passed through the exercise of a general power. One effect of this amendment is the future elimination under the Federal Estate Tax of the type of problem in the instant case where a will purporting to exercise a power of appointment has been compromised. Since the requisite for inclusion under §302(f) is now the mere existence of the power in decedent at the time of his death, all the property subject to the power would be included. The question whether any part of a compromise share is attributable to the attempted exercise of a general power of appointment and the necessity for the calculation of the relative weight of conflicting claims are no longer present.

An analogous problem exists under state law. A provision expressly imposing the Inheritance Tax upon property in accordance with compromises reached in will contests[14*] was eliminated from the Revenue Act of North Carolina in 1941.[15] Evidently this change was prompted by fear of the difficulties inherent in the situation of the principal case, and a desire to have the tax levied in accordance with the state of the probate records,[16] a result which has been reached under similar statutes in a majority of states passing on the question.[17]

The particular problem of the taxability of property subject to a power of appointment where an attempt to exercise the power by will

[13*] Federal Revenue Act of 1942, tit. IV, Part I, §403 a-f (1-2): "§403. Powers of Appointment. (a) General rule—§811 (f) is amended to read as follows: (f) Powers of Appointment—(1) In general—To the extent of any property (A) with respect to which the decedent has at the time of his death a power of appointment. . . ." This statute also provides for the taxation of property subject to *special* powers of appointment.

[14*] N. C. Pub. L. 1937, c. 127, §1 First, N. C. Code Ann. (Michie, 1939) §7880(1), First. "§1: A tax shall be and is hereby imposed upon the transfer of any property, real or personal, or of any interest therein or income therefrom, in trust or otherwise, to persons or corporations, in the following cases: First. When the transfer is by will or by the intestate laws of this state from any person dying seized or possessed of the property while a resident of the state; or when the transfer is by settlement, contract or agreement, or by any court order or otherwise, to any person or persons, by reason of claim or claims arising by virtue of intestate laws, in controversies or contests as to the probate or construction of any will or wills, or any trust or other instrument executed or created by any person dying seized of the property while a resident of this state."

[15] Inheritance and Estate Tax Laws of North Carolina, Schedule A—Revenue Act of 1939 as amended by the General Assembly of 1941, Art. I, Schedule A, Inheritance Tax, §1 First and Second.

[16] 19 N. C. L. Rev. at p. 526 (1941). [17] See Note (1932) 78 A. L. R. 716.

has resulted in compromise, is not affected by this change since the North Carolina Inheritance Tax Law contains a provision[18*] similar to the 1942 Federal Law whereby property subject to an unexercised power of appointment is taxed as though the power had been exercised. Hence whether property is to be taxed according to the terms of the compromise or the state of the probate records, any part of it which was subject to a power of appointment, exercised or not, would be taxed.

Nevertheless, since the North Carolina law imposes an inheritance tax upon property subject to a power of appointment at a rate determined by the relationship of the recipient of the property to the donor of the power,[19] greater opportunities for obtaining lower rates are open to the well-advised individual or institution under the present rule of taxing according to the state of the probate records than under the rule that the inheritance tax is to be levied in accordance with compromises in will contests. For example, property passing to strangers is taxed at a higher rate than property passing to relatives.[20] A power of appointment is exercised by will in favor of a stranger to the donor of the power. A son of the donor who is a taker in default contests the will. The parties can then agree that the will shall not be probated with the result that the property goes by default to the son who then pays an agreed share to the proponent of the will. Under the rule of taxation according to the state of the probate records, all of the property will then be taxed at the rate imposed upon sons of donors, in spite of the fact that part of it actually went to a stranger who is taxed at a higher rate. However, under the rule of taxation according to the compromise, the property going to each party would be taxed at the correct rate.[21*]

[18*] N. C. CODE ANN. (Michie, 1939) §7880(1), Fifth. "Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this law, such appointment when made shall be deemed a transfer taxable under the provisions of this law in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will, and the rate shall be determined by the relationship between the beneficiary under the power and the donor; and whenever any person or corporation possessing such power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a transfer taxable under the provisions of this law shall be deemed to take place to the extent of such omission or failure in the same manner as though the persons or corporations thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure."

[19] See note 18 *supra*.

[20] N. C. CODE ANN. (Michie, 1939) §7880(3-5).

[21*] See Taylor v. State, 40 Ga. App. 295, 149 S. E. 321 (1929); Note (1929) COL. L. REV. 1164. However, the usual result under this rule would be to keep the property in lower brackets because the tax would then be levied after the property had been split up according to the compromise.

An examination of the Estate and Inheritance Tax Laws of other states indicates a considerable variety of provisions for the taxation of property subject to powers of appointment. These statutes fall into three principal categories: (1) those which, like North Carolina, impose a tax upon property subject to a power of appointment not only where the power is exercised but also where there has been an omission or failure to exercise it, (2) those which tax only property which is transferred through the exercise of a power, and (3) those in which no specific reference is made to powers of appointment.

Twenty states impose a tax upon both the exercise and non-exercise of a power of appointment. Nineteen of these states[22] have an identical statute. North Carolina and Florida, however, further provide that the rate of taxation shall be determined by the relationship of the beneficiary under the power to the donor, and the Kentucky statute contains a proviso that the transfer shall be deemed to take place at the time of the death of the donor and that the assessment shall be made at that time.[23] Rhode Island specifically taxes property subject to either a "general or limited" power. North Dakota,[24] in somewhat different language, taxes transfers of property subject to both exercised and unexercised powers, but as of the estate of the donor, not the donee, of the power.

The statutes of thirteen states[25] tax only property which is transferred through the exercise of a power of appointment, and no tax is specifically imposed in the event of non-exercise. The statutes of Del-

[22] Colorado, COLO. STAT. ANN. (Michie, 1935) c. 85, §12; District of Columbia, D. C. CODE (1940) §47-1601(j); Florida, FLA. COMP. GEN. LAWS ANN. (Skillman, Supp., 1936) §1342(10); Idaho, IDAHO CODE ANN. (1932) §14-402; Kansas, KAN. GEN. STAT. ANN. (Corrick, Supp., 1941) §79-1520; Kentucky, KY. STAT. ANN. (Carroll, 1936) §4281a-14; Massachusetts, MASS. ANN. LAWS (1933), c. 65, §2; Michigan, MICH. STAT. ANN. (Henderson, 1941) §7.561, Fourth; Minnesota, MINN. STAT. (Mason, 1927) §2292(5); Missouri, MO. STAT. ANN. (1932) §571; Montana, MONT. REV. CODES ANN. (Anderson and McFarland, 1935) §10400.1(5); New Mexico, N. M. STAT. ANN. (Courtwright, 1929) §141-1118; North Carolina, N. C. CODE ANN. (Michie, 1939) §7880(1), Fifth; Ohio, OHIO GEN. CODE ANN. (Page, 1939) §5332(4); Rhode Island, R. I. GEN. LAWS (1938) c. 43, §§1, 4(3) 17, Acts of R. I. (1939), c. 664, §§1, 4(3), 18, p. 161; South Carolina, S. C. CODE (1932) §2480(d); South Dakota, S. D. CODE (1939) §57.2104; West Virginia, W. VA. CODE ANN. (Michie, 1937) §842(e); Wisconsin, WIS. STAT. (1941) §72.01(5).

[23] See note 18 *supra*.

[24] Laws of N. D. (1933) c. 251, §2(5), p. 374.

[25] Arizona, ARIZ. CODE ANN. (1939) §40-105(5); Arkansas, ARK. DIG. STAT. (Pope, 1937) §14001(8); California, CAL. GEN. LAWS (Deering, 1937) Act 8495 §2(6); Delaware, DEL. REV. CODE (1935) §135; Illinois, ILL. ANN. STAT. (Smith-Hurd, 1934) c. 120, §375(4); Iowa, IOWA CODE (1939) §7307; Mississippi, MISS. CODE ANN. (Supp., 1938) §1678(d); New Jersey, N. J. STAT. ANN. (1940) 54:34-1, d. (2), 54:36-4; New York, McKinney's Consolidated Laws of New York, TAX LAW §220(4); Pennsylvania, PENN. STAT. ANN. (Purdon, Supp., 1942) tit. 72, §2301(d); Tennessee, TENN. CODE ANN. (Williams, 1934) §1260; Texas, TEX. ANN. REV. CIV. STAT. (Vernon, 1925) Art. 7117; Washington, WASH. REV. STAT. ANN. (Remington, 1932) §11201-c.

aware, Illinois, New York, and Washington are couched in identical language; New York and Washington, however, providing further that, if at the time an appointment takes effect the donor of the power was a resident and the donee was a non-resident, the appointed property shall be taxable as having been transferred in the estate of the donor. Pennsylvania and Tennessee tax all property passing by the exercise of powers of appointment as of the estate of the donor of the power rather than that of the donee. The language of the Arizona and Mississippi statutes is identical with that of the Federal law[26] under which the principal case was decided. California regards the gift of a power of appointment as a taxable transfer from donor to donee at the date of donor's death, and provides that where the donor died before the taking effect of the statute that the subsequent exercise of the power shall be a taxable transfer.

The Inheritance, Estate, Transfer, or Succession Tax Laws of fifteen states[27] do not specifically mention the taxation of property subject to powers of appointment. Connecticut, Maryland, Oklahoma, and Virginia refer, however, to certain powers reserved in one who disposes of his property. Nevada[28] has no Inheritance, Estate, Transfer, or Succession Tax.

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[26] See note 2 *supra.*

[27] Alabama, ALA. CODE ANN. (Michie, 1940) tit. 51, §432; Connecticut, CONN. GEN. STAT. (Supp., 1939) §395e; Georgia, GA. CODE (1933) §92-3401; Indiana, IND. STAT. ANN. (Burns, 1933) §6-2401; Louisiana, LA. GEN. STAT. ANN. (Dart, 1939) §§8556-8587; Maine, ME. REV. STAT. (1930) c. 77, §2; Maryland, MD. ANN. CODE (Flack, 1939) Art. 81, §111, Laws of Md. of 1941, c. 790, §1; Nebraska, NEB. COMP. STAT. (Supp., 1941) §77-2201; New Hampshire, N. H. PUB. L. (1926) c. 72; Oklahoma, OKLA. STAT. ANN. (1937) tit. 68, §989e; Oregon, ORE. COMP. LAWS ANN. (1940) §§20-101 to 20-156; Utah, UTAH REV. STAT. ANN. (1933) §80-12; Vermont, VT. PUB. LAWS (1933) §§1047-1122; Virginia, VA. CODE ANN. (Michie, 1936) Appx. Tax Code, §§98-120, TAX CODE (1942) §§98-120; Wyoming, WYO. REV. STAT. ANN. (Courtwright, 1931) §§115-1201 to 115-1232.

[28] NEV. COMP. LAWS (Hillyer, 1929).