NOTES

GROUP PRACTICE VERSUS THE AMERICAN MEDICAL ASSOCIATION

The high cost of medical care has long been a common ailment in the American household. To it may be attributed in large measure the inadequacy of the medical treatment now received by a sizeable proportion of the population. As one method of alleviating this condition, the Committee on the Costs of Medical Care, with the experience of various private schemes before it, recommended in 1932 "that medical service . . . should be furnished largely by . . . groups of physicians . . ., organized, preferably around a hospital," and "that the costs of medical care be placed on a group payment basis through the use of . . . insurance, . . . taxation, or . . . both." This plan is founded on the principle that distribution of the price of medical care over a wider base, coupled with a reduction of overhead by group economies, will lower the cost per capita and perhaps insure more regularized medical attention. Under such a system, known to the medical profession as group or contract practice, physicians enter into contracts at stipulated rates with the non-profit association dispensing medical care.

Most of these plans for reducing the cost of medical care have been bitterly opposed by the present regime of the American Medical Association.

1. See generally, Falk, Rosem & Ring, Costs of Medical Care (Publications of Committee on Costs of Medical Care: No. 27, 1933).
2. Id. at 527.
3. Varied experiments along these lines have already been in existence for some time. Employers have insured, voluntarily or by compulsion of law, against employee sickness and injury. See Medical Care for the American People (Final Report of Committee on Costs of Medical Care, 1932) 80-81. Employees have formed mutual benefit associations on their own initiative. See id. at 81; Irwin v. Lorio, 169 La. 1090, 126 So. 669 (1930), cited infra note 24. Most significant, perhaps, have been the group practice clinics under the joint sponsorship of professional and consumer groups which supply medical services to groups of persons in exchange for fixed periodic payments. See Medical Care for the American People (1932) 94-95; Williams, Purchase of Medical Care Through Fixed Periodic Payment (Publications of Nat. Bureau of Economic Research, Inc., No. 20, 1932); Falk, Rosem & Ring, op. cit. supra note 1, 437-516.

Plans for non-profit hospital service financed by fixed periodic payments have recently enjoyed a mushroom-like growth. "The forty approved plans, scattered through nineteen States and the District of Columbia, have a combined membership of more than 1,600,000." N. Y. Times, April 19, 1938, p. 44, col. 1; see id., April 14, 1938, p. 24, cols. 6-8; id., April 29, 1938, p. 23, col. 8.

4. Medical Care for the American People (1932) 109.
5. Id. at 120.
6. It has been estimated that "a saving of over $78,000,000 might be effected through a more efficient use of the existing personnel and institutional apparatus." See 83 Cong. Rec., March 18, 1938, at 4939.

7. See notes 13 and 14, infra. Organized medicine deems contract practice "legitimate and ethical . . . [when it is] the only way in which competent medical service can be provided"; i.e., "when large numbers of workmen are employed remote from urban centers;" where employers "are compelled by law to provide medical service for their
That there may be valid objections to some forms of contract practice was recognized by the medical care Committee itself.8 Contract practice may offer an increased opportunity for the dispensing organizations to engage in price competition9 with its attendant objectionable advertising.10 There would also be a tendency to reduce the personal relationship between physician and patient, and to encroach upon cherished professional independence.11 But the objections of organized medicine seem to stem largely from the fear that continued growth of group practice will seriously impair the economic position of the ordinary practitioner.12

Skillful indeed has been the technique of organized medicine's attack. Under cover of a barrage of propaganda within the ranks of the profession,13 local medical societies throughout the country have frequently expelled, suspended or censured doctors who have engaged in any of the various forms of contract practice deemed "unethical" by the majority.14 Typical of these tactics has been the recent attack of the Medical Society of the District of Columbia upon Group Health Association, Incorporated, an organization founded recently to effectuate a plan for spreading and reducing the cost of medical care among Government employees in Washington.15 Organized as a non-stock corporation, the purpose of Group Health Association is employees"; and where a small community can secure a competent physician by no other means. Leland, Contract Practice (1932) 98 J. of Am. Medical Ass'n, 808, 813.

C. III, Art. VI, § 2, Principles of Medical Ethics, Am. Medical Ass'n, condemns contract practice when it results in "solicitation of patients, ... underbidding to secure the contract, ... inadequate ... compensation ... , interference with reasonable competition ... , [prevention of] free choice of a physician ... , conditions of employment [which] make it impossible to render adequate service to the patients, [and] when the contract ... is contrary to sound public policy." See Economics & Ethics of Medicine (pamph., 1936) 45-48.

8. See Medical Care for the American People (1932) 82, 94-95.
9. Id. at 94; cf. Porter v. King County Medical Soc., 186 Wash. 410, 414, 58 P. (2d) 367, 368-9 (1936).
10. See Leland, supra note 7, at 809-10.
11. See Medical Care for the American People (1932) 82. That the above disadvantages may be overstated, see id. at 95n.
13. The official organ of organized medicine is replete with this type of propaganda. For a typical example, see Group Health Ass'n, Inc., (1937) 109 J. of Am. Medical Ass'n, Oct. 2, 39B. See also 83 Cong. Rec., March 28, 1938, at 5566. The council of the N. Y. Medical Soc. has even gone so far as to propose a gag-law as an amendment to the Society's by-laws, which would forbid the component county medical societies to "initiate any policy, propose any legislation, or participate in any activities that are contrary to the policies of the State Society." See N. Y. Times, April 29, 1938, p. 23, col. 5.
14. Within the past eight years, local medical societies in Baton Rouge, Little Rock, Milwaukee, Dallas, Washington, D. C., Philadelphia, Los Angeles, Seattle, Chicago, et al., have taken this form of action. (Information through aid of Committee on Research in Medical Economics). See Irwin v. Lorio, 169 La. 1090, 126 So. 669 (1930); Porter v. King County Medical Soc., 186 Wash. 410, 58 P. (2d) 367 (1936).
15. For a summary of the plan of organization and operation of Group Health Ass'n, see D. C. Chap. of Nat. Lawyers Guild (Committee on Gov't Service), Report on
“to provide, without profit to the corporation, for the service of physicians and other medical attention . . . and hospital treatment . . . and the construction and operation of a clinic and . . . hospital . . . for the members hereof and their dependents . . . [The membership] shall be composed solely of civil employees of the executive branch of the United States government service . . .”16

Following the technique of other local medical societies, the District expelled a young doctor for undertaking to sign a contract with Group Health Association.17 His action, it was charged, violated the following pious by-law of the Society:

“Section 1. 'It is unprofessional for a physician to dispose of his services under conditions that make it impossible to render adequate service to his patient or which interfere with reasonable competition among the physicians of a community. To do this is detrimental to the public and to the individual physician, and lowers the dignity of the profession.' (Chap. III, Art. VI, Sec. 2, Principles of Medical Ethics, American Medical Association.) No member of the Society shall enter into a . . . contract . . . of employment with any . . . association . . . the terms of which . . . are in violation of the principles herein expressed. The customary professional relationship of a physician to his patients, upon the basis of individual fees for services rendered, shall not be regarded as a contract within the meaning of this section.”18

To estimate the effectiveness of expulsion as a method of deterring other members of a medical society from engaging in group practice, it is necessary to consider its effects upon the doctor actually expelled. This, in turn, involves the difficult problem of weighing the degree of the society's control over local hospitals against the doctor's economic independence of those hospitals. Thus, expulsion may be of but slight consequence to doctors who are able to use other hospitals, whether their own or the group's.10 But its effects may

GROUP HEALTH ASS'N, INC. (mimeog., 1938) 1-8; 83 CONG. REC., March 17, 1938, at 4778-9. Its initial impetus came from a grant of $40,000 from the Home Owners Loan Corp., the legality of which aroused a storm of controversy. REPORT ON GROUP HEALTH ASS'N, INC. (1938) at 29. The Legislative Counsel of the U. S. Senate, although disapproving the grant, held it to be within the statutory authority of the HOLC. See Washington Post, Jan. 7, 1938, p. 1; p. 5, col. 2. The legality of Group Health Ass'n itself has been attacked on the grounds, inter alia, that it has failed to comply with the insurance laws of the Dist. of Columbia and that it is practising medicine in violation of statute. See REPORT ON GROUP HEALTH Ass'n (1938) 17-28. A petition for a declaratory judgment to determine its legality is now pending before the U. S. Dist. Court for the Dist. of Columbia. See Group Health Ass'n v. Moor, In Equity, No. 66392.

16. Art. I, § 1, Certificate of Incorporation, Group Health Ass'n, Inc.
17. See 83 CONG. REC., March 22, 1938, at 5138. Another doctor felt compelled to resign from Group Health Ass'n as a result of pressure applied by the Dist. Medical Soc. See id., March 28, 1938, at 5566.
18. C. IX, Art. III, § 1, By-laws of Medical Soc. of Dist. of Columbia.
19. Since the general public, naturally enough, approves attempts to reduce the cost of medical care, expulsion hardly seems likely to result in serious injury to physicians' reputations from this source.
be little short of disastrous where, as in the District of Columbia, most or all hospitals have a rule that patients may not be treated by physicians who are not members of the medical societies.20

Regardless of the ultimate outcome of the various experiments to spread and reduce the costs of medical care, the public obviously has a vital interest in assuring a fair trial to organizations like Group Health Association. But as long as medical societies can brandish the bludgeon of expulsion, free experimentation—long extolled by the medical profession itself as the very lifeblood of scientific progress—will be throttled. It is important to consider, therefore, whether the expelled doctor can obtain redress in the courts against either the medical society or the hospital.

In weighing his chances against the medical society, the doctor must first decide whether he is interested primarily in money damages or in reinstatement. Should he desire the former, he might argue, following the lead of an English decision,21 that expulsion from the society and consequent exclusion from hospitals constitute an unlawful conspiracy and boycott.22 Although the punitive effect of a series of successful verdicts might influence organized medicine to alter its present policy, mere money damages probably would not adequately compensate the individual doctor. Furthermore, proof of malice, the basis of his cause of action, might be somewhat difficult.23

Should the doctor prefer the more complete remedy of reinstatement, before he can obtain relief from the courts he probably must first exhaust his remedies within the society.24 In the case of a doctor expelled by the District Society, this would involve an appeal to the Judicial Council of the American Medical Association; if the order of expulsion is given by a county medical society, an intermediate appeal must first be taken to the state medical


21. Pratt v. British Medical Ass'n [1919] 1 K. B. 244 (by means of threats and widely extended coercive action, members of the Ass'n pursued a system of professional and social ostracism against the plaintiff doctors who had engaged in contract practice); compare Thompson v. New South Wales Branch of British Medical Ass'n [1924] A. C. 764 (P. C.).

22. The doctor might also recover damages for libel and slander, as did the plaintiff in Pratt v. British Medical Ass'n [1919] 1 K. B. 244.

23. Cf. Thompson v. New South Wales Branch of British Medical Ass'n [1924] A. C. 764 (P. C.). That such proof is by no means impossible, see Pratt v. British Medical Ass'n [1919] 1 K. B. 244, cited supra note 21. There, however, the action of the defendant medical association may have been more drastic and extensive.

24. Irwin v. Lorio, 169 La. 1090, 126 So. 669 (1930) (expulsion of physician under contract with Stanacola Employees' Medical & Hospital Ass'n); Weyrens v. Scotts Bluff County Medical Soc., 277 N. W. 378 (Neb., 1938) (plaintiff expelled for violating resolution of society in effect declaring it "unethical" for any member to care for relief patients at greatly reduced rates); see Chafee, Internal Affairs of Associations Not for Profit (1930) 43 Harv. L. Rev. 993, 1019-20.
Nevertheless, there is some authority to the effect that appeal may be dispensed with where it would take too long,26 where there is obvious pre-judgment of the case in the appellate tribunal,27 or, possibly, where the grievance arises out of a provision contravening public policy.28 However, the likelihood of obtaining a similar decision is hardly certain enough to offset the risk of the delay that would result from an unsuccessful attempt.

If the appellate bodies affirm the decision of the local medical society after both notice and a fair trial in accordance with all the relevant by-laws,29 the doctor may then seek reinstatement in the courts by bringing an action for mandatory injunction or mandamus30 against the local medical society.31 At the outset, he will have the burden of surmounting judicial reluctance to interfere with the internal affairs of so-called non-profit associations.32 Con-


If the doctor seeks money damages, there is some authority to the effect that he need not exhaust his internal remedies. Thompson v. Grand Int. Bro. of Loc. Engineers, 41 Tex. Civ. App. 176, 91 S. W. 834 (1905) (union); see Chafee, supra note 24, at 1020.


The by-laws of at least some state medical societies provide that expulsion or suspension from the local society does not take effect until the state society has passed upon the appeal. See Irwin v. Lorio, 169 La. 1090, 1098; 126 So. 669, 671 (1930), cited supra note 24. Where such is the case, any delay pending appeal should not prove so harmful to the expelled doctor's interests.


The burden of proof is said to be on the medical society. Reid v. Medical Soc., supra.

30. Although generally mandamus may be employed only to enforce a public duty [see CLARK, CODE PLEADING (1928) 89; Note (1910) 16 Ann. Cas. 1246], it has occasionally been allowed against unincorporated associations. Otto v. Journeymen Tailors' Union, 75 Cal. 308, 17 Pac. 217 (1888); Stahl v. Romanian Young Men's Ass'n, 77 N. J. L. 380, 71 Atl. 1114 (1909); In re Miller v. Builders' League, 29 App. Div. 650, 53 N. Y. Supp. 1016 (1st Dep't 1898). But "at all events, the judicial attitude toward an expulsion does not appear to be affected by any difference between mandamus and injunction." See Chafee, supra note 24, at 1014.

Certiorari is no longer a proper remedy. Watson v. Medical Soc., 38 N. J. L. 377 (1876); People ex rel. Wilson v. Medical Soc., 84 Hun 448, 32 N. Y. Supp. 415 (2d Dep't 1895).


32. See State ex rel. Mayfield v. St. Louis Medical Soc., 91 Mo. App. 76, 84 (1901); Harris v. Thomas, 217 S. W. 1068, 1077 (Tex. Civ. App., 1920); Porter v. King County
sequently, the court should be impressed initially with the inapplicability of precedents involving other organizations, ranging all the way from social clubs and secret societies to the Roman Catholic Church. Although unjustified expulsion from social clubs may involve considerable unpleasantness and even injury to personality, seldom does it carry with it the severe economic consequences attendant upon expulsion from medical societies which control practice in hospitals. An expelled club member may seek solace in other social activities; the expelled doctor risks his means of livelihood.33 Furthermore, in the case of expulsion from a social club, justice to the individual club member is the maximum extent of the public interest. But when the dispute centers about this type of medical question, the state is vitally interested in safeguarding the fair trial of an experiment designed to lend the assistance of private resources to the solution of a problem which clearly involves the commonweal: national health. Equally inapplicable are the cases involving the internal affairs of secret societies and the Roman Catholic Church. Judicial non-interference with the former has justifiably been predicated upon the difficulties of mastering the ritual of the organizations.34 And experience has proved that the judicial needs of the Church may be adequately satisfied by the long-established system of canon law.35

On the other hand, expulsions from labor unions afford neater analogies. The greater readiness of the courts to mix into internal union affairs may be explained in part by the greater economic value of membership to the expelled laborer.36 When a trade union has a partial or complete monopoly of employment in the community, the economic consequences of expulsion upon a member are not unlike the effects of expulsion upon the physician. Hence the doctor should experience little difficulty in demonstrating that the medical society’s action has injured that elusive sine qua non of equity jurisdiction—a property right.37

Without challenging the validity of the by-law itself, the doctor might contend that he had not actually violated it; for example, that the contract of the Washington physician with Group Health Association does not “interfere with reasonable competition among physicians” of the District.38 Athwart this proposition, however, is the doctrine that the constituted authorities within the society have the final power of determining whether the by-law has been violated,39 provided their decision is made in good faith in accordance

Medical Ass’n, 186 Wash. 410, 418-19, 58 P. (2d) 367, 370; Stafford, supra note 26, at 1260.


34. See Chafee, supra note 24, at 1023.

35. Id. at 1025-26.

36. See Stafford, supra note 26, at 1262.


38. See c. IX, art. III, § 1, By-laws of Medical Soc. of Dist. of Columbia, quoted in full supra page 1195.

39. Bryant v. Dist. of Columbia Dental Society, 26 App. D. C. 461 (1906); see Chafee, supra note 24, at 1020 et seq.
with the by-laws, after notice and fair hearing. Yet there is authority to the effect that the reviewing court has power to determine whether there was any evidence whatsoever to support the expulsion.

Perhaps a more effective mode of proceeding would be to attack the validity of the by-law under which expulsion was ordered. Reinstatement of expelled trade unionists has often been bottomed upon the ground that the by-law upon which expulsion was based was void because unreasonable or contrary to public policy. Taking his cue from such cases, the expelled doctor might contend that the by-law of the District Medical Society as here applied is in restraint of trade and therefore contrary to public policy. Although the suggestion that medicine is a "trade" may be tinged with irreverence, its aptness can scarcely be doubted in view of the impact of modern business upon the profession. Primarily, the doctor would urge that his expulsion was part of a scheme by which the Society hoped to destroy Group Health Association and thereby remove the threat which its continued existence constitutes to the schedule of fees charged by the regular practitioner in the District. Although the Society has not directly attempted to regulate the fees charged by its members, it is seeking to preserve the price of medical care, within broad limits at least, by combining the weapon of expulsion with its virtual monopoly over the hospitals in the District. An informed court might find such conduct to be in restraint of trade, and invalidate the offending by-law.

Still another attack against the medical society, issuing from a different source, would also seek support from the proposition that the by-law is contrary to public policy. Where a doctor has signed a contract with some organization like Group Health Association, but has later breached it as a result of a medical society's threat of expulsion, the health organization might sue the society for inducing the breach. Such an action was recently brought in the state of Washington, but without success. There the court refused to consider the reasonableness of the by-law, and consequently held that the society

40. See note 29, supra.
41. Reid v. Medical Society, 156 N. Y. Supp. 780, 789 (Sup. Ct., 1915).
42. See Stafford, supra note 26, at 1267, and cases cited. American cases involving medical societies in which this contention was successful are: State * ex rel * Waring v. Georgia Medical Soc., 38 Ga. 608 (1869) (doctor expelled for becoming surety on criminal bonds of colored persons); People * ex rel * Gray v. Medical Soc., 24 Barb. 570 (N. Y. Sup. Ct., 1857) (doctor expelled for disregarding tariff of fees established by society); contra: Weyrens v. Scotts Bluff County Medical Soc., 277 N. W. 378 (Neb., 1938); Ewald v. Medical Soc., 144 App. Div. 82, 128 N. Y. Supp. 886 (1st Dep't 1911), rev'd, 70 Misc. 615, 130 N. Y. Supp. 1024 (1911); Porter v. King County Medical Soc., 186 Wash. 410, 58 P. (2d) 367 (1936); cf. Fawcett v. Charles, 13 Wend. 473 (N. Y. Sup. Ct. 1835).
44. See People * ex rel * Gray v. Medical Soc., 24 Barb. 570 (N. Y. Sup. Ct., 1857); compare Rohlf v. Kasemeier, 140 Iowa 182, 118 N. W. 276 (1908). The District Medical Society has a free schedule but it is probably not generally familiar to, nor is it observed by, many members of the Society.
45. Porter v. King County Medical Soc., 186 Wash. 410, 58 P. (2d) 367 (1936), (1936) 36 Col. L. Rev. 1371.
had the right to employ the threat of expulsion to compel its members to obey its by-laws. But a court persuaded to take an opposite view as to the reasonableness of the by-law might find it in restraint of trade, and thereby remove the justification for the society's threat of expulsion.

If the expelled doctor has been excluded from a public hospital, he might seek readmittance by mandamus or mandatory injunction on the ground that public hospitals cannot damn as "unethical" that which is not prohibited by statute or public policy. Although authority is sparse and conflicting, in at least one case a court reinstated a physician dismissed from the staff of a hospital. There the doctor had engaged in fee-splitting which, though contrary to the rules of the hospital, was not prohibited by the state statute regulating professional ethics. Distinguishing between public and private hospitals, the court held that however unethical the doctor's conduct might have been, according to other standards, it violated neither the statutes nor the public policy of the state and therefore could not lawfully be made grounds for exclusion from public hospitals. Whether this decision would be followed in the instant type of case is admittedly conjectural. At all events, most of the authorities supporting a contrary position involved the exclusion of osteopaths and homeopaths. These expulsions are easily distinguishable

46. Ibid.

47. See note 30, supra; Anon., Comb. 41 (K.B., 1686) ("mandamus to restore a surgeon to an hospital . . . denied; . . . not . . . a publick office"); State ex rel. Wolff v. La Crosse Lutheran Hospital Ass'n, 181 Wis. 33, 193 N. W. 994 (1923) (mandamus to compel reinstatement to hospital staff held improper remedy; specific performance suggested as proper).

The term public, as here used, is limited to hospitals operated by governmental units, whether federal, state or local.

48. If practising in Montana, the doctor's case would gain support from a statute [Mont. Rev. Codes Ann. (Anderson & McFarland, 1935) §11577] which prohibits charitable, tax-exempt hospitals from discriminating "between the patients of any regularly licensed physician by reason of the fact that said physician is not a member of the medical staff of said hospital, or for any other reason, and such hospitals are hereby compelled to admit and care for the patients of any regularly licensed physician . . . under the same terms . . . as . . . the patients of any other regularly licensed physician." But this law is said to be unique. See Lapp & Ketcham, Hospital Law (1926) at 398.

49. The cases are collected in Note (1929) 60 A. L. R. 656; see Lapp & Ketcham, Hospital Law (1926) § 361.

50. Henderson v. Knoxville, 157 Tenn. 477, 9 S. W. (2d) 697 (1928); see also Stevens v. Emergency Hospital, 142 Md. 526, 121 Atl. 475 (1923).


52. Id. at 483, 9 S. W. (2d) at 698. The court cited no authority supporting the relevance under the facts involved in the case of its distinction between public and private hospitals.

53. Ibid.

54. Hayman v. Galveston, 273 U. S. 414 (1927); Newton v. Board of County Commissioners, 86 Colo. 446, 282 Pac. 1068 (1929); Harris v. Thomas, 217 S. W. 1068 (Tex. Civ. App., 1920); cf. Lambing v. Board of County Commissioners, 45 Idaho 468, 263 Pac. 992 (1928). For cases involving expulsion from medical societies for similar reasons, see Barrows v. Massachusetts Medical Soc. 12 Cush. 402 (Mass., 1853); Gregg v. Massachusetts Medical Soc., 111 Mass. 185 (1872).
in that the action was not conditioned by the socio-economic predilections of the majority but was based, rather, upon a determination of professional competence—concededly a matter in which the decision of physicians should be final.55

Uncertain and untried though many of these devices may be, they may at least serve to arouse public opinion in favor of a fair trial of group practice. Clearly, however, the ultimate fate of experiments designed to reduce the cost of medical care will not be determined by the success or failure of some expelled doctors in securing from hesitant courts a few scattered reinstatement decrees. In the last analysis, the solution lies not in the decrees of judges but in overcoming the stubborn intolerance of organized medicine. The recent revolt of a group of influential dissenters within the ranks of the American Medical Association56 indicates that perhaps the change may be accomplished with a minimum of outside interference. Failing this, the most effective alternative is to press present plans for a Congressional investigation of organized medicine.57

CONSTITUTIONALITY OF STATUTE PROHIBITING SALES AT LESS THAN COST*

Attempts to secure some type of legislative control over predatory price cutting stem, in part, from the Supreme Court decision of 19111 voiding resale price provisions contained in the contract between manufacturer and distributor. Recent efforts have culminated in a series of statutes whose potential effectiveness, in sharp contrast to the impotence of those preceding,2

55. If the doctor is on the regular staff of the hospital, whether public or private, prior to exclusion for any cause, he is probably entitled to notice and a fair hearing in accordance with the by-laws. Stevens v. Emergency Hospital, 142 Md. 526, 121 Atl. 475 (1923); contra: Van Campen v. Olean General Hospital, 210 App. Div. 204, 203, 205 N. Y. Supp. 554, 557 (4th Dep't 1924), aff'd, 239 N. Y. 615, 147 N. E. 219 (1925) (no right to hearing in absence of by-law imposing such a requirement).


57. A resolution authorizing an investigation of organized medicine is now pending in the House of Representatives. See H. R. Res. No. 452, 75th Cong., 3d Sess. (1938).


1. Dr. Miles Medical Co. v. John D. Park and Sons Co., 220 U. S. 373 (1911).

reflects a widespread and genuine desire to eliminate unfair methods of competition from the price scarred field of business.³ Aimed primarily at cut price retailing and the ruinous use of loss leaders, and bottomed upon a provision legalizing resale price maintenance, these newer statutes⁴ seek their effectiveness in a single provision penalizing all who sell in disregard of the manufacturer's contract, even though not parties to it.⁵ In 1937, thirteen states,⁶ encouraged by strong if somewhat guarded approval from the Supreme Court,⁷ proceeded to implement the weapon in an endeavor to give

Congress in each session since 1914; none has been passed. See Seligman and Love, Price Cutting and Price Maintenance (1932) 479-484.

Similarly, state legislation against price discrimination has been plentiful. See Chamberlain, Legislative Prohibitions of Unfair Practices (1924) 10 A. B. A. J. 44. But attempts to encourage resale price maintenance have until recently been limited to amendments to state anti-trust acts providing that no agreement is to be deemed unlawful the object of which is to market at a reasonable profit those products which could not otherwise be so marketed. E.g., Cal. Gen. Laws (Deering, 1931) Act 8702, § 1. The vagueness of this provision gave no assurance to the manufacturer of the legality of his contemplated action. Scattered statutes of somewhat later origin unconditionally sanctioned vertical resale price maintenance agreements, but proved ineffectual since they bound only parties to the contract. See note 5, infra.

3. The most active sponsors of the legislation have been well organized retail organizations, especially in the drug trade. Extensive price cutting on the part of independents with low overhead costs and a rapid rate of turnover has to some degree swung chain store sentiment in favor of regulation. Reaction of manufacturers and wholesalers coincides with that of the retail organizations, though somewhat less emphatic. Consumer opinion is difficult to ascertain. Price surveys made in California since the passage of the Fair Trade Act tend to show, however, that the elimination of deep price cuts in a few articles, prevalent under the unrestrained use of loss leaders, has resulted in a slight general reduction of prices due to more shallow cuts among a greater variety of articles. See generally, Grether, Experience in California with Fair Trade Legislation Restricting Price Cutting (1936) 24 Calif. L. Rev. 640; Grether, Solidarity in the Distributive Trades in Relation to the Control of Price Competition (1937) 4 Law & Contemp. Prob. 375; Zorn and Feldman, Business Under the New Price Laws (1937) 21.

4. Such statutes are now in operation in 43 states. See Zorn and Feldman, op. cit. supra note 3, at 297.

5. This provision put teeth into resale price maintenance statutes. Previous legislation bound only parties to the manufacturer's contract and was unavailing against distributors and retailers acquiring their goods from other sources. See Zorn and Feldman, op. cit. supra note 3, at 289.


it wider reach and sharper thrust. The newest legislation is modelled after a California law which specifically prohibits sales below cost "for the purpose of injuring competitors and destroying competition," defines cost as "invoice or replacement cost . . . whichever is lower . . . plus the cost of doing business," and lists the items to be included in the latter. No limitation is set as to the type of business affected by the statute, but, among other exceptions, it is provided that the law shall not apply to selling "in an endeavor made in good faith to meet the legal prices of a competitor."

The constitutionality of these provisions was recently passed upon in California. In a private suit to enjoin acts in violation of the statute, the defendant retail grocer was found to have sold four well-known articles at less than invoice or replacement cost, but with no purpose of injuring competitors or destroying competition, and solely in order to meet the reduced prices of competitors and to advertise his business. The appellate court did not disturb these findings, and affirmed the denial of the injunction. But, unwilling to rest its decision upon the facts as found, it proceeded with appropriate reluctance to consider the unconstitutionality of the statute. Under penetrative scrutiny it was found to violate provisions of State and Federal Constitution alike.

The grounds of the decision are three-fold. It is asserted initially that the statute fails to conform to Article 1, Section 1 of the State Constitution which provides that all laws of a general nature shall have an uniform operation. The violation is said to consist in the fact that large chain and depart-

8. The Fair Trade Acts apply only to branded articles and involve vertical price fixing alone. They are enforceable only by the owners of the brand. Schenley Products Co. v. Franklin Stores Co., 122 N. J. Eq. 69, 192 Atl. 375 (Ch. 1937). They are dependent for their effectiveness upon the initiative of manufacturers and distributors at the apex of the distributive pyramid. In certain trades this initiative is not forthcoming. See ZORN AND FELDMAN, op. cit. supra note 3, at 317; McAllister, Price Control by Law in the United States, (1937) 4 LAW & CONTEMP. PROB. 273, 293. For an example of the hostility with which the New York statute has been met by courts and particular industries, see Kline v. Davega-City Radio Corp., N. Y. L. J., April 19, 1938, p. 1891, col. 3.

9. CAL. GEN. LAWS (Deering, Supp. 1935) Act 8781, §§ 3-6. "The 'cost of doing business' . . . must include without limitation the following items of expense: labor (including salaries of executives and officers), rent, interest on borrowed capital, depreciation, selling cost, maintenance of equipment, delivery costs, credit losses, all types of licenses, taxes, insurance and advertising." § 3, par. 3.

10. Enforcement of the act is governed by §§ 10, 11 and 8. Section 10 allows a suit by any person, firm, private corporation or municipal corporation or other public corporation or trade association to maintain an action to enjoin a continuance of any act or acts in violation of the statute, without alleging or proving actual damages. If actual damages are sustained recovery may be had therefor as well as injunctive relief. Section 11 makes a violation of the act a misdemeanor punishable by a fine not to exceed $1000, or imprisonment not exceeding 6 months, or both. Section 8 provides that upon the third violation of the Act by any corporation the Attorney General must institute suit for forfeiture of the corporation's charter rights and to permanently enjoin it from transacting business in the state.

ment stores whose wholesale cost is lower and whose facilities for allocation are greater may sell their goods at a lower price than that permitted the smaller merchant, without infringing the statutory prohibition. This, in turn, is claimed not only to constitute unlawful discrimination but to defeat the very purpose for which the statute was created. The premises are not entirely correct and the conclusion is tinged with absurdity. Uniformity of operation does not necessitate identity of result. If there is any "discrimination" in the instant case it is due to the very fact that the law is uniform in operation and does not classify. It is true that by defining the permissible price to be charged as cost the statute may enable one group to sell for less than another. The poison, if such it be, contains its own antidote by exempting from operation of the statute any endeavor made in good faith to meet the legal prices of competitors.

The second attack launched against the act found it void for uncertainty in its definition of cost. Undoubtedly statutes which embody criminal sanctions are peculiarly susceptible to such accusations and are frequently invalidated upon that ground alone by the highest courts. Upon such occasions the standard of conduct has almost invariably been phrased in words such as "undue" or "unreasonable," terms whose subjective basis permits definition only by circularity and synonym. The term "cost" is not subject to the same type of imprecision since the variation in its meaning is articulated in reasonably objective systems of cost accounting. The uncertainty which does exist arises from the difficulty of ascertaining the facts necessary to conform to the prescribed standard. Such considerations, however, are apposite to the question of the statute's reasonableness rather than to the question of the statute's certainty.

The final and most authoritative ground for the holding lies in the fact that the statute involves regulation by price fixing of businesses unaffected with a public interest. Dialectically it is possible to tight rope over this
traditional inferno since the individual's cost, and hence his price, can be varied at will. Pragmatically, however, the right of an owner to fix his price is seriously limited. Prior to the decision in *Nebbia v. New York* the result reached in the principal case would have been the only probable one; no extension, however liberal, of the doctrine of affectation with a public interest, could have upheld a statute which has universal application to all business. Insofar as the *Nebbia* case involved a particular business in drastic need of regulation it is not helpful as a direct precedent. Insofar as it performed a delicate surgical excision of the growth of Lord Hale's phrase from the tissue of regulation it may be taken to have in part alleviated the pressure exercised upon the Court's mind by that phrase, and with it the attendant complex against price fixing. If the case be interpreted as setting up as criteria merely the necessity for, and the reasonableness of the regulation, the statute herein might conceivably be upheld.

Of the existence of the need there can be little doubt. The courts have by now been persuaded of the destructiveness of price cutting tactics, and the ineffectiveness of even the most rigid resale price maintenance statutes to cope therewith is apparent. The reasonableness of the legislation raises somewhat more controversial questions. Even assuming a uniform and ascertainable standard, the facts necessary for an accurate calculation of cost are probably not available to the merchant during the course of any current year. If available, the time and diligence required for an adequate application thereof might well be considered a prohibitive strain upon the small merchant's capacity. In addition to these difficulties, the proviso which theoretically enables a man to meet the prices of competitors by placing the floor under prices at the level of the lowest cost producer or distributor imposes upon the seller the almost insuperable burden of determining whether his competitors' prices are legal; in the event that they are not it offers him the dubious and expensive remedy of litigation. Undoubtedly this suggests


22. It is possible to argue that no price fixing is involved, since the legislature merely places a level under prices below which the producer or distributor may not sell; and that therefore, in all other respects, price may be the product of untramelled discretion. Since, however, under strenuous competitive conditions an upper level is naturally delimited close to cost, such discretion is narrowly confined.


26. See note 8, supra.

27. For example, the estimated rate of turnover for the year is a factor which enters into the determination of the price to be charged. Overestimation of the rate may, at the close of any accounting period, reveal that the prices charged have been insufficient to meet the costs. See Canning, *Cost Accounting*, 4 *Encyclopedia of Social Sciences* (1930) 478; Church, *Manufacturing Costs and Accounts* (2d ed. 1929); Clark, *Studies in the Economies of Overhead Costs* (1923).
a sound criticism of the act from a practical viewpoint. On the legal level much of its force is absorbed by the insulating provision which requires that, in addition to sales below cost, wrongful intent must be found, before a violation of the statute may be said to have taken place. Unfortunately a literal interpretation of this provision may destroy as well as save, for unless price cutting tactics and the use of the loss leader are held to raise at least a presumption of wrongful intent, there will merely be another gelding in the legislative stable. Viewed in this light the intent requirement would seem of little aid to the practical difficulties confronting the merchant. The fact remains, however, that hypothetical hardship does not seem appropriate matter for judicial consideration where the case itself does not present the issue. When and if the issue is squarely presented against its proper factual background, with appropriate evidentiary material, it may well be that these apprehensions will vanish—a theory fortified by the probability that action will be taken under the act, as in the principal case, only in the event of sales below invoice or replacement cost, items which are readily ascertainable by all.

For the support of the act as a necessary and reasonable regulation, precedent is wholly lacking. The cases involving resale price maintenance are not significant save in creating a favorable atmosphere, since they involve private price fixing and are justified only as a protection of the property right in a branded article. Many of the N.R.A. codes contained provisions forbidding sales below cost, and a few lower federal courts approved them, but these decisions are thrown into obscurity by the Schechter case. Decisions subsequent to the Nebbia case have involved only the regulation of specific industries, and have somewhat limited the broad principles evolved in the case by requiring a strong showing of the need for such regulation and by emphasizing its emergency characteristic. The application of these later restrictions will not necessarily find the instant statute incompatible.

28. The difficulties may not be so great for the retailer, since his activities are far less complex. Nothing in the Unfair Competition Acts, however, excludes manufacturers or wholesalers from the operation of these provisions. See note 9, supra.


30. Unless the presumption is held to exist, the statute is merely a codification of the law prior to the legislative enactment. Tuttle v. Buck, 107 Minn. 145, 119 N. W. 946 (1909); Boggs v. Duncan Schell Furniture Co., 163 Iowa 106, 143 N. W. 482 (1913); cf. Remington-Rand, Inc. v. Master Craft Corp., 67 F. (2d) 218 (C. C. A. 6th, 1933). From the paucity of cases deciding in favor of the complainant, the burden of proving malicious purpose or intent may be inferred to be crushing.

31. See cases cited note 7, supra.


with constitutional requirements. That business as an entirety requires regulation in some of its aspects would not seem a wholly preposterous conclusion for the court to reach; that permanent legislation of this type can be sustained in view of the emphasis placed on the feature of emergency in prior cases is somewhat more dubious. It would seem, however, that the character of the situation rather than its abruptness should determine judicial action, since the factual situation giving rise to an "emergency" is not limited in duration by dictionary definition. Whatever the eventual decision may be, a clarification of the doctrine laid down in *Nebbia v. New York* may be expected when and if the present statute or one of its prototypes is brought before the Supreme Court. In the event that such statute be found unconstitutional solely because of the unreasonableness of the cost provisions, rectification of the flaw seems simple. The statute would lose little in force or effectiveness and yet the burden imposed by it would be considerably lightened if the prohibition were restricted to sales below invoice or replacement cost, with or without a flat mark-up provision. 

**MARTIN ERDMANN II†**

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**THE BROKERAGE PROVISION OF THE ROBINSON-PATMAN ACT**

Prior to 1936 the Great Atlantic and Pacific Tea Company maintained central buying offices in charge of agents, who exacted a brokerage fee from sellers equivalent to the amount such sellers would have paid a selling broker. The practice, prevalent among many large buying organizations, was the chief cause for the insertion in the Robinson-Patman "Anti-Price Discrimination" Act of Section 2(c), which forbids the payment of brokerage, or an allow-

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36. See Note (1937) 47 Yale L. J. 124.

37. Such a provision is contained in the Tennessee Unfair Sales Act. **Tenn. Code Ann.** (Williams, Supp. 1937) §§ 6770.7-6770.13. The Act, comparable in essential features to the California Unfair Competition Act, was recently held constitutional in a decision which is unsatisfactory in its failure to consider many of the problems involved. Rust v. Griggs, 113 S. W. (2d) 733 (Tenn. 1938). The provision as to cost was, however, specifically upheld. It is worthy of note that the mark-up provided for is to be less than the minimum cost of distribution by the most efficient retailer, which mark-up in the absence of proof to the contrary is to be six percent. This was held not to be open to the charge of discrimination since it was but a rule of evidence legitimately enacted by the legislature.

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ance in lieu thereof, by the seller to the buyer or his agent except for services rendered in connection with the sale.2 After the effective date of the Act the Company instructed its agents to accept no more brokerage as such, but to purchase on a net basis reflecting a reduction equal to the brokerage. Nonetheless the Company was haled before the Federal Trade Commission and ordered to cease and desist from accepting allowances representing brokerage in whole or in part.8

As originally drafted in the Patman bill the brokerage provision did not contain the exception for services rendered.4 The evil to be remedied was the levying of brokerage as a subterfuge to obtain price concessions.5 The exception was put in by the House Judiciary Committee6 after testimony that the unqualified prohibition might be unconstitutional7 and considerable objection that there were cases in which the buyer should obtain a reduction because he made no use of the seller’s selling facilities.8 But in spite of the exception the section was loosely reported to both the Senate and the House as permitting payment by buyer or seller to his own broker, but prohibiting payment by either to the other’s agent.9 Thus the meaning and scope of the exception were left uncertain. “For services rendered” might mean nothing insofar as the buyer was concerned; it might mean that any incidental “service” by the buyer or his agent to the seller was sufficient justification for the allowance of brokerage; or it might mean something between the two that would har-
monize the brokerage provision with the apparent philosophy of the Robinson-Patman Act as a whole.

As was to be expected, the Company in its defense sought the broad interpretation. The idea that the Company by going to the seller directly was rendering to the seller the same service as an independent broker met the answer that if a buyer reaches out to the seller there is no brokerage service at all and therefore no need to pay brokerage to anyone. But the Company claimed that it could accept reductions in price representing positive services rendered by it through its agents to the sellers, emphasizing that its agents advised sellers how to improve, pack and ship their goods, and were instrumental in aiding sellers to dispose of surplus stocks which threatened to unstabilize markets. If this contention were to prevail, it is clear that the exception would nullify the section, for such services are nearly always present, and the exception was obviously not intended to create a condition upon which the brokerage could be allowed as before. Accordingly, the Federal Trade Commission found that these services were rendered solely in the buyer's interest and that for the seller to reward the buyer for serving himself resulted in an unfair rebate. But the Commission went further and reached the apparently far-fetched interpretation of Congressional intent that the "for services rendered" exception was meant only to permit payment to an independent broker. The phrase was thus robbed of all significance for the buyer. The rationale used had been employed to explain the section since the early discussions in Congress—the agent of either buyer or seller is a fiduciary incapable of rendering services to the opposite party without breach of trust. The fiduciary notion seems a misconception of the law of agency, for with the knowledge of both parties the agent may legitimately accept compensation from each. And the issue here does not concern the agent or his compensation, but the fact that the buyer receives the brokerage. But the conception of the agent's function inherent in the rationale and adopted in the instant case is consistent with a fair construction of the facts—whatever services the agent rendered to the seller were really being performed for the buyer's benefit.

The Commission interpreted the exception in the same way in proceedings involving the Biddle Purchasing Company and its clients. The Biddle Company was a purchasing agency running a market information service for wholesale buyers. It also filled buyers' orders, taking a brokerage fee from the seller which it credited to the buyer's account and which in few cases exceeded the buyer's debt to Biddle. Although the sellers testified that selling through the Biddle Company was cheaper than through an agent, and that many of them could not otherwise stay in business, the Commission ruled no

10. The interpretation urged by the Commission, that the exception removes a doubt as to whether an independent broker could be paid at all because he is somewhat controlled by each party to the sale, seems based upon an impossible interpretation of the section without the exception.


12. Bell v. McConnell, 37 Ohio St. 396 (1881); 1 Mechex, Agency (2d ed. 1914) § 178.

services were rendered to the sellers by the buyers through the Biddle Company. But though it ordered the buyers to cease and desist from accepting brokerage, the Biddle Company was ordered only not to accept brokerage which it intended to pay or credit to buyers. The artificiality of the notion that a broker must be either the buyer's agent or the seller's is here apparent,"14 for to become the seller's agent the Biddle Company need only retain the brokerage charged to the seller, and donate its services to those buyers using its purchasing facilities in proportion to their purchases. But so long as the buyer receives the benefit of brokerage paid by the seller, there remains at least a conceptual argument that the seller is not paying for brokerage services rendered but is giving a rebate.

The Commission thus seems to have adopted the position that in no case can a buyer make use of the "for services rendered" exception. The major fault of this extreme interpretation is that it fails to recognize the distinction between the problem of whether the buyer can be paid a brokerage fee, measured as an actual brokerage service rendered by him to the seller, and the problem of whether he should be allowed a reduction for a saving in selling cost to the seller, measured by actual saving to the seller because of the buyer's non-use of the seller's selling facilities. For illustration, it may be assumed that one seller with his own sales force sells a commodity for $1.00, computing his selling cost at 10 cents, and that a second seller with no selling organization sells the same commodity for $1.00, paying 10 cents to a broker. A buyer dealing directly with the first and receiving a reduction of 10 cents as a brokerage, would be receiving a dummy brokerage since he would not be acting as a broker but as a buyer and because, due to the fixed cost of the selling organization, the seller does not save 10 cents on that sale but something less. But if the buyer received from the first seller not the 10 cents but the amount saved the seller, or if he received 10 cents from the second seller, he would not be taking a "brokerage" but a discount reflecting the lower cost to the seller.15 The former example is properly condemned as an unfair method of competition. Granted without regard to the saving to the seller, it amounts to a rebate effected by the buyer's power, and results in discrimination. But prohibition of the latter example seems contrary to the tenor of the rest of the Act.

Section 2(a) of the Act, which prohibits price discriminations, specifically permits differentials which make only due allowance for differences in the cost of sale or delivery resulting from the differing methods in which commodities are sold.16 In one of its defenses the Company claimed that the seller's reductions in prices to it could be justified on the same theory. But the Commission held that while Section 2(a) deals with discrimination only, Section 2(c), which refers to brokerage, strikes at both discrimination and an unfair method of competition; and that Section 2(c) is by statutory con-

14. For the confusion that results from an attempt to determine for whom services were rendered, compare Trunz Pork Stores v. Wallace, 70 F. (2d) 688 (C. C. A. 2d, 1934) with Wilmington Provision Co. v. Wallace, 72 F. (2d) 989 (C. C. A. 3d, 1934).
15. See statement by Teegarden, author of the Patman bill, Hearings, supra note 5, at 34.
struction separate and distinct, unmodified by Section 2(a). As reported from the Senate Committee, the cost proviso of Section 2(a) had the counter exception inserted that brokerage costs were not excepted by the saving clause. Senator Logan declared that the counter exception was put in to harmonize the cost proviso portion of Section 2(a) with the brokerage section, which at that time did not contain the “for services rendered” exemption. He further stated that the counter exception should be removed because legitimate brokerage should be allowed insofar as it represented a saving in selling cost to the seller. When the bill was passed, the brokerage section included the “for services rendered” exemption and the cost proviso did not except brokerage. The insertion of the one and the deletion of the other seem to show an intent that any actual saving to the seller effected by the buyer being his own broker could be properly reflected in the price, whether or not Section 2(c) is shown to be independent of Section 2(a) and hence unmodified by the cost proviso. Either the phrase “except for services rendered” was intended to incorporate the principle of the cost proviso; or Section 2(c) was intended to deal solely with dummy brokerage, and it was expected that a reduction in price representing a saving in selling costs to the seller would not fall under Section 2(c) but under Section 2(a).

But although the doctrine of the statute thus construed is comparatively clear, its application to particular facts would cause difficulty. It was doubtless largely for that reason that the Commission chose its interpretation, in order to avoid possibility of vitiating loopholes. Whether the buyer effects a saving in cost to the seller by buying direct will depend upon whether the price from which the supposed saving is to be deducted does or does not include a selling cost, which in turn will depend upon the custom of the particular trade. If it does, the saving may be deducted; if it does not, any deduction purporting to represent a saving will be dummy brokerage. The amount of the saving will of course vary greatly depending upon the selling organization used and its relation to the producing organization, and the computation of saving will likewise vary according to the cost accounting applied. Normally, no doubt, all price reductions depend rather upon the bargaining process than upon computation of cost, and the quest for selling cost may seem futile. But the Robinson-Patman Act, assuming a delusive certainty, requires every inequality of price to different buyers to be justified by cost, and the computation of saving is no more difficult in this instance than in any other. And since the burden of proof in justifying price differentials is on the respondent,

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<td>It is to be noted that in proving a price differential prohibited under § 2(a) to be justified by a saving in selling cost to the seller, the buyer would at the same time be proving that he was not receiving an allowance in lieu of dummy brokerage, prohibited under § 2(c).</td>
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the buyers would have to prove actual saving to the seller equal to the discount received. The possibility of evasion would thus be minimized, for dummy brokerage could not be so justified. Further, for the administration of Section 2(c) as well as 2(a), the Commission in exercising its judgment as to whether a price reduction reflects a saving to the seller or is the result of excessive buying power could take into consideration the prices quoted to others dealing on the same footing and the history of the practices of a particular buyer.

The purpose of the Act was to aid the Commission to police trade by making Section 2 of the Clayton Act more specific as well as more stringent. But the Commission's construction, which forbids the passing on of any brokerage savings as differentials in cost, sacrifices too much for the sake of certainty and efficiency. If adopted by the courts, it would put unjustifiable, if not unintended premium upon the economic function of brokers. It would, by making him pay the cost of brokerage in any event, fail to give the buyer the benefit of his buying organization. Addition of the cost of maintaining that organization to the cost of unused brokerage included in the seller's price would result in discrimination against the larger buyer. At the same time, if the buyer continued to buy direct, the seller would receive an unearned profit. To urge that the buyer could give up his buying organization and deal solely through brokers is only to urge the extinction of a more economical method of distribution. Although the Act is admittedly calculated to curb the economic power of large buying organizations, it purports to do so only by removing unfair advantages. The freedom of economic development and justifiable reductions in costs resulting from more efficient methods of distribution are supposedly not disturbed. To consider the problem in terms of the constitutional power upon which the Act is bottomed, it may be that the failure to distinguish between dummy brokerage and the allowance of reduction for saving in selling cost would result in the imposition of a restraint on interstate commerce as heavy as that sought to be removed.

23. Section 2(b) of the Act puts the burden of justifying a discrimination upon the respondent. For the various interpretations of the section see Zorn and Feldman, Federal Trade Commission Hearings and the Robinson-Patman Act (1936) 70 U. S. L. Rev. 620. The Commission has construed §2(c) as unmodified by §2(b), but even under §2(c) alone the respondent would seem to have the burden of justification or of proving that his case falls within the exception.

24. See F. T. C., op. cit. supra note 1, at 96.

25. Although the Tea Company advanced the argument that savings to the seller should be deducted, it did not attempt the probably impossible task of proving such savings. It is interesting to speculate as to the result if the Company in June, 1936, had adjusted its prices so as to reflect only the saving to particular sellers, instead of continuing its practices under different names, and had then insisted that only § 2(a) was relevant. According to the clear dicta of the principal decision, however, the result would have been no different.

26. See note 3, supra.

27. The food brokers had strongly urged the insertion of §2(c) to counteract the tendency of large buyers to absorb the brokers' function. Hearings, supra note 5, at 58 et seq. But see ibid. at 181 et seq., where the point is made that the broker will survive so long as he is efficient. Cf. F. T. C., op. cit. supra note 5, at 25, 50.

The Federal Gift Tax levies an excise exaction upon all "transfers" whether "in trust or otherwise," whether the gift is "direct or indirect," and whether the property is "real or personal, tangible or intangible." But no attempt is made to specify what constitutes a "transfer." By judicial interpretation the concept of a "transfer" evolved under estate tax law—namely that consideration of the shift of economic benefits resulting from a conveyance rather than of technicalities of title is determinative—has been employed in the assessment of the Gift Tax. Purporting to apply this rationale in a recent decision, the Board of Tax Appeals, two members dissenting, reached a seemingly variant result. Petitioner, the owner in fee of land situate in Pennsylvania, transferred the premises by deed to himself and his wife as tenants by the entirety. In accordance with the Treasury Regulations, the Commissioner of Internal Revenue determined that the transfer constituted a taxable gift with a value for tax purposes computed upon the basis of the present worth of the wife's present and future interest in the property. Upon appeal to the Board, the Commissioner's contention was rejected upon two grounds: first, that there had been merely a technical change in title which failed to confer upon the wife property rights sufficient to constitute the transaction a gift; and second, that Congress had evinced no intention to include within the term "transfer" the creation in this fashion of an estate by entireties.

The estate by entireties is an archaic device based upon an antiquated fiction of marital unity, but it still persists in nearly all states. Although this estate can always be created through a "straw man" transaction, it is not possible

NOTES


6. 1 TIFFANY, REAL PROPERTY (2d ed. 1920) §§194; Comment (1924) 37 Harv. L. Rev. 616; (1933) 19 Va. L. Rev. 422. Estates by entirety are not recognized in England. WILLIAMS, REAL PROPERTY (Eastwood's ed. 1933) 346. As to the utility of this estate compare Comments (1924) 37 Harv. L. Rev. 616; (1937) 46 Yale L. J. 1077, with Spencer, Rights of a Husband's or Wife's Individual Creditor Against an Estate by Entirety (1923) 8 St. Louis L. Rev. 105.

in all jurisdictions to create it directly by the conveyance of property from one spouse to himself and his spouse together. In the absence of statutory authority to convey to one's self and another jointly, a direct conveyance has been held to effect merely a tenancy in common. Even where such legislative authorization is present, the basic concept that the spouses are one has been employed to prevent the creation by such a conveyance of other than a joint tenancy. Pennsylvania, however, has ruled that an estate by entireties can be created in the manner here attempted, and state interpretations of the nature and incidents of real estates are controlling upon the federal courts.

Since the common law estate by entireties has undergone a variety of changes in many states, the benefits accruing to the wife upon its creation will vary with the jurisdiction. At common law, the wife as a tenant by the entirety could claim no more than a mere expectancy in the property. In sharp contrast, the wife in Pennsylvania not only shares in rents and profits arising from land held by entireties but also can prevent her spouse from depriving her of possession and preclude his creditors from attaching the property. Because of this difference the Board of Tax Appeals has provided that in those states in which the common law rule prevails income is returnable only by the husband; in the other jurisdictions where income from the property held by entireties accrues to both spouses, each spouse is entitled to report for income tax purposes one-half of the income from the property so held.

A similar distinction might well have been drawn in the instant case. Where, as under the common law rule, the wife's enjoyment of the property hinges upon her survivorship, the transfer by her spouse would not seem to occasion an immediate gift. On the other hand, a transfer which affords the wife security of possession, a joint right to rents and profits, and an estate in all other respects equal to that of her spouse would seem a present taxable acquisition in no way affected by the fact that the fortuitous circumstance of her survivorship would result in a further expansion of this present inter-

11. United States v. Robbins, 269 U. S. 315 (1926); Blum v. Wardell, 270 Fed. 309 (N. D. Cal. 1920), aff'd, 276 Fed. 226 (C. A. 9th, 1921), aff'd, 258 U. S. 617 (1922);
Dowie, Federal Procedure (1928) § 143.
12. See note 6, supra.
13. 1 Tiffany, loc. cit. supra note 6 and cases cited.
est. In reasoning that there had not been a taxable transfer, however, the Board did not attempt to extend the formula employed in income taxation. Relying upon the amiable fiction that each spouse holds title to the whole estate, the Board found *a fortiori* that petitioner had retained title to the property and had merely created in his wife certain "negative rights." This result seemingly permits a fictional unity to override the actualities of the situation. If petitioner and wife jointly had purchased the property as tenants by the entirety, a subsequent conveyance by one of them of his interest to the other would clearly seem a taxable transfer. It is difficult to accept the reasoning by which the converse of the proposition produces a contrary result.

Notwithstanding the Board's contention that Congress did not intend the Gift Tax to cover the creation of a tenancy by entireties, the language of the statute is clearly broad enough to include the conveyance. Hence the decision seems to rest upon the unspoken premise that it would be inconsistent to levy a gift tax upon the transfer when the entire property would later be taxable upon the devolution of petitioner's estate. This argument was rejected in upholding the assessment of both gift and estate taxes upon a gift made in contemplation of death, and seems equally inapplicable in the present instance. While the Supreme Court ruled in *Tyler v. United States* that the decease of a tenant by entireties occasions a transfer which can be subjected to an estate tax, that decision made no attempt to change the legal relations between the parties to an estate by entireties. Accordingly, it can scarcely be said to preclude the assessment of a gift tax upon the transfer in the principal case. The logical difficulty of the corpus of a gift remaining in the donor's estate is more apparent than real, for the mere fact that upon the death of the donor substantial economic benefits would shift to his spouse does not preclude the possibility of an immediate transfer of other benefits taxable as a gift. To except the conveyance from the provisions of the Gift

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21. See note 1, *supra*. In *Burnet v. Guggenheim*, 288 U. S. 230 (1933), the statute was broadly construed to embrace any transaction with the "quality of a gift."

22. Several commentators have taken this position. See Montgomery and Magill, *op. cit. supra* note 1, at 351; Brewster, *The Federal Gift Tax* (1933) § 19.


25. See Lang v. Comm'r of Int. Rev., 289 U. S. 109, 112 (1933) (gain from sale of property held by entireties cannot be determined upon basis that survivor takes by "inheritance"); gain must be measured on basis of what spouses paid for property when acquired), (1934) 32 MICH. L. REV. 422. But cf. Comm'r of Int. Rev. v. Fletcher Savings & T. Co., 59 F. (2d) 508 (C. C. A. 7th, 1932) (surviving tenant held to take by "inheritance" so as to profit by the estate tax deduction for property acquired within five years by "inheritance."), (1932) 18 CORN. L. Q. 121.

Tax merely because the property would also be computed as part of the petitioner’s estate is an unnecessarily narrow construction of a tax intended to reach gratuitous transfers of “every species of right or interest protected by law and having an exchangeable value.” The allowance of a gift tax credit in the estate tax, indicative that Congress contemplated that certain transfers would be subject to both taxes, would seem to reinforce this conclusion.

ANTI-LAPSE STATUTES AND THE CONFLICT OF LAWS*

A testatrix domiciled in Ontario, Canada, died in 1927. Her will, admitted to probate in that province, included a legacy to a brother, William, who had died the year before while domiciled in New York. By his will, admitted to probate in New York, his son James was bequeathed three-quarters of his residuary estate. According to Ontario law the bequest to William did not lapse by his predecease, but took “effect as if the death of such person had happened immediately after the death of the testator.” James died prior to the time the Canadian executor sent William’s share to the administrator c. t. a. for further distribution. It was distributed to William’s heirs under New York’s laws of intestacy, as if William had died intestate. James’ heirs protested that William’s share should have been distributed according to the terms of his will. The Erie County Surrogate’s Court upheld the action of the administrator on the grounds that the Ontario statute did not control the distribution of the legacy, and that the legacy, being a mere expectancy at the time of William’s death, could not be bequeathed by William’s will.

The great majority of anti-lapse statutes in the United States differ in language from the century-old English model copied by the Ontario legis-

28. 47 Stat. 278 (1932), 26 U. S. C. § 413 (2) (1934). Credit is also allowed against the additional estate tax of the Act of 1932. 47 Stat. 245 (1932), 26 U. S. C. § 536 (1934). An assessment of the gift tax in the instant case would make petitioner’s tax burden somewhat heavier for, although he would have a credit against the estate tax, he would lose interest on the gift tax paid. Moreover, he could not, as under the 1932 law [47 Stat. 180 (1932)], deduct the amount of the gift tax from his gross income in computing taxable net income. 48 Stat. 688, 26 U. S. C. § 23(c) (1934).
29. This argument has recently been accepted by the Circuit Court of Appeals for the Seventh Circuit. Lilly v. Smith, 384 C. C. H. 1938 Fed. Tax Serv. ¶ 9129 (C. C. A. 7th, 1938), cited supra note 5; see Legis. (1932) 32 Col. L. Rev. 1205, 1211.

2. For simplicity the word heirs is employed in its common, though non-technical, sense as including devisees, legatees and distributees. See Words and Phrases (1904) pp. 3252, 3253.
3. 20 Halsbury’s Statutes of England (1930) § 1104 (Wills Act 1837, § 33).
lature. It is universally held in this country that those named as beneficiaries in the statute, regardless of whether they are designated as a specified class of descendants or as the legal heirs, are substituted for the predeceasing legatee, and the testamentary gift passes directly from the original testator to them. Although the established principle that an expectancy cannot be disposed of by will was applied to an early American anti-lapse statute similar to the Canadian law, generally, the concept of fictitious survivorship of the predeceasing legatee in the English type statute has been interpreted to prevent the introduction of that principle. The words "as if the death of such person had happened immediately after the death of the testator" are read literally, and are held to create a fictitious survivorship which carries with it all the incidents of an actual survivorship. The gift is pictured as vesting


6. Iowa Code (1935) c. 505, § 11861; Md. Ann. Code (Bagby, 1924) art. 93, § 335. The issue of whether the heirs are to be selected under the law of the domicile of the original testator or the law of the domicile of the predeceasing legatee appears not to have been litigated, and is not discussed in the treatises. Judicial interpretation might go either way, for some jurisdictions state that the legacy goes to those who would be entitled by law to the distribution of the legatee's estate had he died intestate, [Halsey v. Convention of Prot. Episcopal Church, 75 Md. 275, 283, 23 Atl. 781, 783 (1892)], while others hold that the legatee's heirs take by force of the statute under the will and not through the estate of the legatee [In re Estate of Mikkelsen, 202 Iowa 842, 844, 211 N. W. 254 (1926)]. The issue arises under the administration of the estate of the original testator, and the same reasons to be advanced infra for allowing the law of his domicile to govern in the principal case would dictate the selection of the same law as governing this question.


8. 1 PAGE, WILLS (2d ed. 1926) § 211.

9. Glenn v. Belt, 7 G. & J. 362 (Md. 1835). The broad statutes of Iowa and Maryland are the two acts in this country most susceptible to the English interpretation. But the courts in both states have consistently followed this early decision. In re Estate of Mikkelsen, 202 Iowa 842, 211 N. W. 254 (1926); McLaughlin v. McGee, 131 Md. 156, 101 Atl. 682 (1917).

10. (1934) 177 L. T. 149. But there are limits to the fiction, and the court will not recognize the survivorship of a predeceasing daughter as causing an extension of coverture to the time of the testator's death in order to render the legacy subject to a marriage covenant executed by the daughter's husband. Pearce v. Graham, 1 New Rep. 507 (Ch. 1863).
in the legatee, and is disposable by his will.\textsuperscript{11} And if the legatee dies intestate, his heirs take not by substitution but by descent from the legatee,\textsuperscript{12} and are determined as of the date of the legatee's notional death, immediately after that of the testator.\textsuperscript{13} Similarly, the fictional momentary vesting of the gift in a predeceasing daughter gives her husband the right to curtesy.\textsuperscript{14} The interest of the predeceasing legatee's heirs or legatees is subject to estate duties,\textsuperscript{15} and to claims outstanding against the predeceasing legatee at the time of his death.\textsuperscript{16} The Ontario law is a counterpart of the English,\textsuperscript{17} and the rule that property passes by the will of the predeceasing legatee and not by intestacy has been held too settled by the terms of the statute to warrant submission to the Canadian court.\textsuperscript{18}

The court's holding in the instant case appears to be the product of a confused application of both Canadian and New York substantive law to an issue which should be resolved by reference to the laws of succession of a single jurisdiction. The Canadian doctrine of fictitious survivorship was recognized to prevent a lapse, but was ignored in relation to its accompanying incident, the conferring of the privilege of testamentary disposal upon the predeceasing legatee. Once fictional existence was recognized to prevent a lapse, it would seem that consistency demanded continued recognition of this Canadian doctrine throughout the decision. In rejecting the devisability of the legatee's interest as being a mere expectancy, the court was applying the substantive law of New York which, in its denial of the existence of fictitious survivorship, directly opposes the Canadian rule. This commingling of legal propositions appears to have involved the court in logical difficulties.

\textsuperscript{11} Johnson v. Johnson, 3 Hare 157 (Ch. 1843); Winter v. Winter, 5 Hare 306 (Ch. 1846); Re Mason's Will, 34 Beav. 494 (Rolls Ct. 1865); 28 HALSBURY, LAWS OF ENGLAND (1914) § 1196.
\textsuperscript{12} Mower v. Orr, 7 Hare 473 (Ch. 1849); Wisden v. Wisden, 2 Sm. & G. 396 (Ch. 1854); In the Goods of Jane Parker, 1 Swa. & Tr. 523 (Prob. 1860). Under the theory that the legacy goes as part of the predeceasing legatee's estate just as if he had survived the testator, it would seem to be clear that if the legatee died intestate, the heirs to this legacy should be determined in the same manner as those to any other property of the intestate, that is, by reference to the law of the legatee's domicile in the case of personalty and to the law of the situs in the case of realty. See 1 JARMAN, WILLS (7th ed. 1930) p. 2.
\textsuperscript{13} In re Allen's Trusts, [1909] W. N. 181 (Ch.).
\textsuperscript{14} Eager v. Furnivall, 17 Ch. D. 115 (1881).
\textsuperscript{15} Executors of Perry v. Queen, L. R. 4 Ex. 27 (1868); In re Scott, [1901] 1 K. B. 228 (A. C. 1900).
\textsuperscript{16} In re Pearson, [1920] 1 Ch. 247 (legacy held to vest in predeceasing legatee's trustee in bankruptcy and not in his four surviving children, where he died intestate after being adjudicated bankrupt, but before obtaining a discharge).
\textsuperscript{17} Re McCallum, 27 Ont. W. N. 169 (1924). The Ontario statute itself is broader than the English. It embraces gifts to brothers or sisters, which the English statute does not. It is specifically made to apply whether the predeceasing legatee died before or after the making of the will. The English courts have reached this same result by construction. Under a recent amendment [ONT. REV. STAT. (1927) c. 149, § 36(2)] the Ontario act applies to class gifts. For the American law as to class gifts, see Cooley, "Lapse Statutes and Their Effect on Gifts to Classes" (1936) 22 VA. L. REV. 373.
\textsuperscript{18} Re Mathe, 2 Ont. W. N. 327 (1910).
In selecting the controlling substantive law the court paid due homage to the Anglo-American rule that the validity and effect of a will of movables is determined by the law of the state in which the deceased died domiciled—a rule which is both well established and constantly growing. But the court went astray by relating this rule to the domicile of the predeceasing legatee rather than to the domicile of the original testatrix. An inducing factor in this error was a confusion in treating the case as involving two independent issues: lapse, and distribution. The problem would appear to be the broader one of determining who should receive a Canadian legacy when the New York legatee has predeceased the testatrix. To avoid the logical difficulties implicit in the court's opinion, this one problem of devolution under the will of the original testatrix cannot be split into questions referable to different patterns of law. The problem should be referred to one pattern of law throughout, and policy considerations of consistency, convenience, and the enforcing of intent require that the pattern of substantive law to be selected be that of the domicile of the original testatrix.

The simplicity of application of the rule of *jus domicilii* of the original testator in the instant type of situation would be welcomed by a testator wishing to co-ordinate testamentary desire with legal effect. The doctrine has been justified on the basis of a presumption that every testator knows the law and draws his will with it in mind. This presumption of legal knowledge is frequently ridiculed. But the doubters may themselves be doubted on two grounds: first, the common experience of testamentary succession may create a rudimentary word-of-mouth knowledge of considerable accuracy; second, the doctrine has been supported on a different basis: that of the presumed intent of the testator to have his will respected when he dies domiciled in a foreign country. Where the testator's domicile is in the United States, this presumption will often be sufficient to rule out the application of foreign law. Where the estate is subject to conflicting or incommensurate laws, the conflict may be solved by the application of the participating law which best serves the original testator's interest or by the designation of a forum by the testator, as by the appointment of a solicitor for foreign affairs or the direction of the solicitor in the will to look to a foreign court for the effects of the testator's will. The court in the instant case should therefore have referred to the testator's domicile, thereby avoiding the difficulties of the court's opinion.

The court's error in relating the rule of *jus domicilii* to the domicile of the predeceasing legatee is further illustrated by an analysis of the cases cited. The first citation is to Matter of Slade, 154 Misc. 275, 276 N.Y. Supp. 956 (Surr. Ct. 1935); *In re Cunningham, [1924] 1 Ch. 68*; *Restatement, Conflict of Laws* (1934) § 306; *2 Beale, Conflict of Laws* (1935) § 306A. The second citation is to Lowndes v. Cooch, 87 Md. 478, 39 Atl. 1045 (1898).

20. *Lowndes v. Cooch, 87 Md. 478, 39 Atl. 1045 (1898).*

second, and more important, testators, desiring to ordain with some certainty the disposition of their goods, may be led to acquire vicarious legal knowledge by applying to an attorney for the drawing of the instrument. When a testator desires to make bequests to persons in different states and countries, he can not, without the principle of jus domicilli, attach a reasonably certain consequence to the expression of his desire by conforming his will to one pattern of law, but he would have to look to two, or four, or forty-eight different patterns, and would still run the risk of having his wishes defeated by a subsequent change in domicile by one of his legatees.

That the controlling consideration in interpreting a will must be the testator's intention is frequently termed one of the most basic principles in the law of decedents' estates. Under the English and Canadian construction of the anti-lapse statutes it may be said that the testatrix in the principal case intended to pass the power of testamentary disposal along with her gift. It does not militate against this argument that in specific instances the actual presence of this intent may be too speculative to determine, for it is reasonable and desirable to presume this intent. The English judges remarked long ago that it was natural that a testator would wish his legatee to have the same power of testamentary disposal that he himself had over the same property. It is as desirable that the legatee should have that power as it is that he should be able to will any other property he may acquire. The likelihood of such intent is increased in the type of situation presented by the principal case, where the testator is at a distance from his legatee and may be unfamiliar with the circumstances of the individual members of the legatee's family. This likelihood is also heightened by the fact that the gift is to one in the same age-group as the testator, with correspondingly less chance for prolonged personal enjoyment. Finally, the English view finds support in the constantly reiterated principle that the law abhors an intestacy. By presuming an intent to confer the privilege of testamentary disposal, the English

25. The case is stronger for a finding of actual intent than most cases where intent must be found from an absence, rather than a presence, of words. The Canadian statute specifically is made to apply "unless a contrary intention appears by the will." Thus, the testatrix may be said to have done what the statute prescribed to express the affirmative intention.
26. "True, the search for intention is often a search after a phantom. . . . 'The question is one not of intention in the proper sense, but of the legal implications of one formula or another.'" Matter of Chalmers, 264 N. Y. 239, 245, 190 N. E. 476, 478 (1934).
27. See Mechem, supra note 4, at 1.
28. Johnson v. Johnson, 3 Hare 157, 161 (Ch. 1843).
29. While the legislature may attempt in the statute of distributions to set a general standard of fairness in sharing, it is important that a decedent, with his knowledge of the particular situation, be able to adjust by will the legislature's general standard to a more absolute one.
statute avoids intestacy in the maximum number of cases, whereas the American construction in effect causes intestacy even where, as in the principal case, there is little doubt of the predeceasing legatee’s desire to dispose of his estate in a method counter to the statutory manner of distribution.

**INTERSTATE COMMERCE JURISDICTION OF NLRB**

The failure of the *Wagner Act* cases to prescribe a definitive test of the extent of the NLRB's jurisdiction in interstate commerce left open to future adjudication the Board's power over employers not of the types there considered. Within the past year the applicability of the National Labor Relations Act to other types of employers has been contested repeatedly before the Board and the courts. Two recent decisions of importance suggest a re-examination of the Act’s jurisdictional boundaries.

According to the constitutional standards set by the *Wagner Act* cases, the statutory power of the Board to prevent labor practices which "affect commerce" extends to regulation of activities which "have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens or obstructions." In this category the court placed employers in nationally important industries whose plant operations were wholly within a state, but who nonetheless shipped, predominantly in interstate commerce, products fabricated from raw materials which were, to a large extent, imported from other states. In discussing the issue of jurisdiction, the court apparently considered also important the extent to which the industry was unionized and the employer organized, on a national scale. Guided by these vague criteria, which were developed only

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2. The *Jones & Laughlin* case concerned a local unit of a large steel corporation whose production was integrated on a national scale; the *Fruehauf* case, an important producer of trailers; the *Friedman-Harry Marks* case, a relatively small clothing manufacturer, part of an industry of national scope and importance. Each employer imported from other states and exported into other states a large volume of products.


with reference to the cases immediately before the Court, the Board has found potential obstructions to interstate commerce in many situations outside the immediate compass of the Wagner Act decisions. For example, the Board has assumed jurisdiction of companies which obtain a negligible quantity of raw materials or equipment from other states, but which ship out much of their finished products; of large wholesale agencies, which distribute wholly within a state products imported from other states; and of electric power corporations which neither import nor export any significant amount of raw materials, equipment, or power.

By now it is definitely established that the scope of the Act extends further than merely to employers who both import raw materials and export finished products across state lines. The Supreme Court has recently upheld the jurisdiction of the Board over an important fruit packer who shipped into interstate commerce 37% of its products, all of which were derived exclusively from domestic raw materials and equipment. Although the Carter case had denied Congress constitutional power to regulate collective bargaining in similar enterprises, here, as in the Jones-Laughlin case, the Court declined to overrule the Carter holding expressly. Emphasizing that the effect upon commerce requisite for federal jurisdiction is a question of degree, not of mathematical formula, the Court held that the activities of this type of employer bore a sufficiently close and substantial relation to interstate commerce to be subject to the Act. It is idle to speculate on ways of effecting a metaphysical reconciliation of the two cases. Realistically, the Carter case must be considered repudiated on its commerce points. The result of the Santa Cruz decision should be to privilege the Board to take jurisdiction over any employer who ships a substantial part of his goods across state lines.
therefore, as long as stoppage of the volume exported to other states would have an important effect upon the general volume of commerce, no limitation on federal power arises merely because the employer’s production is predominantly for the local market. Correlatively, the applicability of the Act to the wholesale distributor who is situated at the terminus of a flow of goods seems clearly to follow from this decision. In neither case is it likely that the Supreme Court will henceforth entertain petitions for review of Board decisions unless the Board’s judgment as to the question of degree appears to be a flagrant error.

The next problem to be determined by the Supreme Court involves the applicability of the Act to an important electric power corporation which neither imports basic raw materials nor exports finished products in any significant amount. The Circuit Court of Appeals for the Second Circuit has approved such jurisdiction in the Consolidated Edison case. The Board’s power was there premised on the likelihood that strikes in the respondents’ plants would result in serious derangement not only of interstate commerce facilities such as telephones, telegraphs and railroads, but also of businesses making interstate shipments. The potential effect of such a strike was depicted as equivalent to simultaneous strikes by the employees of all industries dependent for their continued operation upon power furnished by the utilities before the Board. Moreover, since commerce might seriously be burdened by labor disturbances in the employer’s plants, the absence of an interstate flow of goods with which the respondents were directly identified was not regarded as controlling. The activities of this type of employer clearly have a substantial effect upon commerce. But the Supreme Court has in the past required this effect to be direct as well as substantial. The distinction, if any there be, is hard to grasp and impossible to apply. Although in the Schechter case the regulated activities were more directly related to interstate commerce in the sense of proximity to its flow than are those of the respondent utility, their effect upon commerce was thought to be too indirect to warrant federal control. That case, however, hardly forecloses jurisdiction, for causal relations do not depend alone upon propinquity. In the Schechter case, the government urged the propriety of federal regulation chiefly on the ground that general business activity would be increased

18. Schechter Corp. v. United States, 295 U. S. 495 (1935); see Industrial Association v. United States, 268 U. S. 64 (1925) (effect upon interstate commerce of a conspiracy to prevent building contractors from obtaining supplies if they recognized unions held too indirect to support jurisdiction under the Sherman Act); but cf. The Shreveport case, 234 U. S. 342 (1914) (effect upon interstate rates held to give jurisdiction to the Interstate Commerce Commission to change rates set by state Railroad Commission).
by the NIRA codes, thereby swelling the volume of interstate commerce.\textsuperscript{10} But apparently it was thought that the regulations there in question were not directed principally at preservation of the continuity of the flow of commerce of which the plaintiff was the terminus. Here, the result of labor disturbances in the respondent's plants which the Act seeks to prevent may be an immediate and drastic curtailment of both the operation of the agencies of interstate commerce and its flow as well. Since the effect upon commerce, not the source of the injury, is the criterion,\textsuperscript{20} the Board's jurisdiction should attach whether the relation of the employer to interstate commerce be primary or secondary.

Liberal utilization of this "obstruction to commerce" doctrine as the test of jurisdiction has the advantage of making possible federal regulation more commensurate with national need than if direct identification with the flow of commerce were required as the sole basis for jurisdiction.\textsuperscript{21} Obviously the future scope of the National Board's interstate commerce jurisdiction cannot be predicted on the basis of meaningless, definitional standards. Although the Supreme Court has indicated that the jurisdictional line must be so drawn as to avoid completely centralized government,\textsuperscript{22} this interpretation is flexible enough to enable the Board to take jurisdiction over any employer whose activities, by any of the tests outlined above, appreciably affect interstate commerce.\textsuperscript{23}

\section{Indispensability of an Absent Co-Patentee in an Infringement Suit*}

The right of a patentee to exclude all others from making, using, and selling his invention is said to be indivisible. A patent may, nevertheless, be owned by any number of persons, either as joint patentees or as partial assignees; they acquire undivided interests, and the patent remains "one entire thing."\textsuperscript{1} The owner of such an undivided interest may exercise it as

\begin{enumerate}
\item\textsuperscript{19} 295 U. S. 495, at 546. Compare the reasoning of the Board in In re Idaho-Maryland Mines Corp. C-260, 4 NLRB No.97 (Jan. 10, 1938) holding a gold mine subject to the Act, partly on the ground that gold is so important as the national credit and monetary base that a reduction in its supply would have a harmful effect upon interstate commerce. This reasoning seems closely analogous to that which the Court refused to follow in the \textit{Schechter} case.
\item\textsuperscript{20} National Labor Relations Board v. Jones & Laughlin Steel Co., 301 U. S. 1, 32 (1937).
\item\textsuperscript{21} Persuasive arguments have been advanced for vitalizing the commerce clause to achieve this result. See Corwin, \textit{The Commerce Power vs. States' Rights} (1936); Hamilton, \textit{The Power to Govern} (1937).
\item\textsuperscript{22} National Labor Relations Board v. Jones & Laughlin Steel Co., 301 U. S. 1, 37 (1937).
\item\textsuperscript{23} See Shulman, Book Review, (1938) 51 Harv. L. Rev. 1121, 1125.
\end{enumerate}


freely as if he owned the whole patent; he is under no duty to account to his co-owners for his profits; and, in the absence of special agreement, he may grant licenses or further subdivide his interest. But, as illustrated by a recent case, when he attempts to protect it against infringement, the concept of the patent as an undivided whole, and of the interest as a joint one, may create difficulties. The plaintiff, owner of an undivided half of a patent, brought a bill against an alleged infringer in the district of the latter's residence, asking for an injunction and an accounting of profits and damages. The owner of the other half of the patent, a resident of another district and not subject to the court's process, was hostile and declined to join in the suit. The defendant's motion to dismiss for non-joinder of an indispensable party was granted.

Unless the plaintiff can induce his co-owner to join, he would appear to be remediless. In an action at law, the mere fact that his interest is joint would ordinarily forbid him to sue alone, and though no cases involving co-owners of patents raise the precise issue, hostility of an absent co-owner would probably be no excuse for non-joinder. Whether the same result is reached in equity depends upon the distinction made in federal practice between "necessary" and "indispensable" parties. The former may be dispensed with if the court's process will not reach them or if their joinder would oust jurisdiction, but if the latter cannot be joined on one side or the other, the


5. See Clark, CODE PLEADING (1928) 242-3.


court may not proceed in the case.\textsuperscript{8} Indispensability of parties plaintiff depends on two questions, each of which is to some extent the corollary of the other. These are first, whether the court can formulate a decree which will protect the defendant from a second suit at the hands of the absent plaintiff,\textsuperscript{8} and second, whether it can decide the issues between the parties before it without determining legal relations of the absent party, who has not been heard, and against whom the court could not enforce its decree.\textsuperscript{10}

As a criterion for indispensability, the desire to protect the defendant from a second suit is not inflexible, for there are cases in which the courts have either ignored the possibility of a second suit,\textsuperscript{11} or have excused it as necessary to prevent a supposed miscarriage of justice.\textsuperscript{12} However, these precedents would seem not to be controlling in patent infringement suits, for either as a consequence of, or as a reason for the indivisibility of the patent monopoly, the courts, drawing a gloomy picture of an "innocent infringer" harassed in twenty suits by as many co-patentees,\textsuperscript{13} have repeatedly proclaimed a privilege in the infringer to have all his liability determined in one action.\textsuperscript{14} In the instant case, it would be argued that a trial and dismissal of the suit on its merits would leave the absent co-owner free to relitigate the question of infringement; and while he could not complain of the issuance of an injunction protecting his interest, he would not be bound by the accompanying award of damages, and might seek to make his own proof if the present plaintiff's failed.\textsuperscript{15} Therefore it would be inequitable to the defendant to allow the instant plaintiff to maintain his action.

\textsuperscript{8} Indispensability is determined not by relatively fixed rules, as in actions at law, but by a loose formula to the effect that though equity seeks to conclude all the parties concerned in, and all the issues arising out of a controversy, a party is not indispensable if without him a decree can be made which will not affect his interest, and which will completely and equitably decide the case as between the parties. Elmdorf v. Taylor, 10 Wheat. 152 (U. S. 1825); Shields v. Barrow, 17 How. 130 (U. S. 1854); West v. Randall, 29 Fed. Cas. No. 17,424 (C. C. D. R. I. 1820).

\textsuperscript{9} Niles-Bement-Pond Co. v. Iron Moulders Union Local No. 68, 254 U. S. 77 (1920); MacAulay v. Moody, 185 Fed. 144 (C. C. D. Ore. 1911).


\textsuperscript{13} See Gayler v. Wilder, 10 How. 477, 494 (U. S. 1850).


The foregoing argument would appear to be conclusive, if it assumes correctly that the absent co-owner would not be bound by the decree and could relitigate the issues. Since he has not submitted to the jurisdiction of the court, it seems clear that he is not bound in the sense that he must obey the court’s orders. And it seems equally clear that he cannot be made a party without his consent. The patent right is not such a res as will support substituted service; nor can the nation-wide process of federal interpleader be employed. And although the Supreme Court has held that an exclusive licensee of a patent may join his hostile and unavailable licensor as plaintiff against an infringer, the rationale of that decision rested on an implied contract to join, and on a trust relationship between licensor and licensee. The co-owners here, who claim under a common assignor, have perhaps had no contractual relations whatever, and, in view of the almost complete independence with which each may exercise the patent right, can scarcely be said to stand in any fiduciary relationship. Consequently, since he cannot be made a party, a decree in the principal case would seem not to be res judicata as to the absent co-owner.

But despite the apparent conclusiveness of precedent, another solution, preventing the hostile co-owner from later relitigating the issues, is possible. When he attempted to sue, the earlier holding that his co-owner could sue alone would not automatically permit him to do likewise, for the question whether parties are indispensable or only conditionally necessary is addressed to the policy and discretion of the court. And unless the court believed the

21. The exceptions to the rule that a person is not concluded by a decree to which he is not a party seem inapplicable. Cf. Robbins v. Chicago, 4 Wall. 657 (U. S. 1866); American Bell Tel. Co. v. National Improved Tel. Co., 27 Fed. 663 (C. C. E. D. La. 1886) (defendant after undertaking defense in action against infringer withdrew; held estopped from later contesting validity of patent).
22. Elmendorf v. Taylor, 10 Wheat. 152 (U. S. 1825); Rules of Civil Procedure, supra note 7, Rule 19(b).
first suit to have been collusive, it would seem a not unwarranted exercise of discretion to deny to the previously indifferent or hostile co-owner the privilege of maintaining an action alone. Such a ruling would effectively exclude him, for even if the first plaintiff were willing to join in the second action, it is believed that he would be barred by the decision in his own case. It must be admitted, however, that such a procedure, though feasible, is supported by little authority; and it is not altogether clear that it would result in an equitable disposition of the case. For example, the instant opinion intimated that on the merits the defendant would plead a license from the absent co-owner, which, if proved, would completely protect him. And the decision whether a valid license existed, though determining rights of the absent co-owner, would not be binding on him, and a finding of no license, subjecting the defendant to liability in the instant case, would not prevent the co-owner from later relitigating the validity of the license; this would be another reason for holding him to be indispensable.

The result of the instant case may seem harsh on the plaintiff, but it is historically an incident of almost any kind of joint ownership that one co-owner cannot sue unless all are made parties. If a jurisdictional impasse like the present one is at all foreseeable, it would be prudent for joint owners to covenant to participate in suits against invaders of the joint interest. A more effective device to control co-patentees, who, it has been said, are at the mercy of each other, would be to put the patent in trust, with one co-owner as trustee. The latter could be controlled by ordinary chancery powers, and, as holder of the legal title, could prosecute infringers without raising baffling problems of joinder.

23. This would follow from conventional principles of res judicata. Cromwell v. County of Sac, 94 U. S. 351 (1876).
26. E.g., in an action for a declaratory judgment, or as a defense to an action by the instant defendant on the licensor's implied warranty of his power to license.
27. Cf. Standard Stoker Co., Inc. v. Lower, 46 F. (2d) 678 (D. Md. 1931). When the question of indispensability may turn on the nature of the defense, it would seem advisable to postpone the jurisdictional decision until the issues are fully clarified.
28. Slingby's Case, 5 Coke 34 (1588); Brooke v. Burt, 1 Beav. 106 (Ch. 1838).