NOTES

SECTION 301(A) OF THE TAFT-HARTLEY ACT: A CONSTITUTIONAL PROBLEM OF FEDERAL JURISDICTION

Article III of the Constitution delineates both the sources and the limitations of the jurisdiction which Congress may confer upon the lower United States courts. In the main, this jurisdiction is confined to cases involving diversity of citizenship and cases "arising under" the Constitution or laws of the United States. The most recent Congressional exercise within these narrow constitutional limits has yielded Section 301(a) of the Taft-Hartley Labor Management Relations Act, 1947, under which suits for violations of labor contracts covering "employees in an industry affecting [interstate] com-

1. Alexander Hamilton, after observing that the judicial power of federal courts comprehends only cases specified in Article III of the Constitution, stated that "[t]he expression of those cases marks the precise limits beyond which the federal courts cannot extend their jurisdiction; because, the objects of their cognizance being enumerated, the specification would be nugatory if it did not exclude all ideas of more extensive authority." The Federalist, No. 83 at 460. (Goldwin Smith ed. 1901).

The elasticity of Congressional power to bestow jurisdiction upon United States courts is contractile only. Thus, a federal statute may withhold jurisdiction of controversies enumerated in the Constitution or withdraw jurisdiction previously granted, but it may not increase extant jurisdiction to overflow the constitutional benchmark. See Kline v. Burke Construction Co., 260 U.S. 226, 234 (1922); The Assessors v. Osbornes, 9 Wall. 567, 575 (U.S. 1869); Behlert v. James Foundation of New York, 60 F. Supp. 706 (S.D.N.Y. 1945), 55 Yale L. J. 600 (1946), 46 Col. L. Rev. 125 (1946).

2. In every case coming before statutory federal courts, jurisdiction depends upon an act of Congress, as well as the Constitution. See Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 258 (1944); Case of the Sewing Machine Companies, 18 Wall. 553, 577 (U.S. 1873); McIntire v. Wood, 7 Cranch 504, 506 (U.S. 1813). For a compilation of cases illustrating the dependence of jurisdiction in the federal district courts upon the will of Congress, see Crowell v. Benson, 285 U.S. 22, 86, n.22 (1932).

3. For the specialized jurisdictional subject matter, such as admiralty and ambassadorial cases, see U. S. Const., Art. III, § 2.

4. "Sec. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." Pub. L. No. 101, 80th Cong., 1st Sess. (June 23, 1947).

5. Collective labor contracts constitute the predominant kind of labor agreement since widespread unionization throughout industry. For a tracing of the checkered career of enforceable rights in such collective contracts, see 1 Teller, Labor Disputes and Collective Bargaining § 154 et seq. (1940); Hamilton, Individual Rights Arising from Collective Labor Contracts, 3 Mo. L. Rev. 252 (1938); Lenhoff, The Present Status of Collective Contracts in the American Legal System, 39 Mich. L. Rev. 1109 (1941); Wallace, Jurisdiction of the Courts to Decide Questions Arising Out of Collective Bargaining Agreements, 11
merce" may now be brought in any United States district court by employers and labor organizations—and perhaps individual employees—regardless of the amount in controversy or the citizenship of the parties. Since the diversity requirement has been abandoned in this potentially expansive grant of jurisdiction, the constitutionality of Section 301(a) must be predicated on the presence of a federal question in suits over labor contract violations.

Still furnishing the constitutional touchstone for statutes conferring federal question jurisdiction is the early case of Osborn v. Bank of the United States. In this case Chief Justice Marshall upheld one of the first Congressional grants of special federal question jurisdiction—a clause in the in-

Mo. L. Rev. 62 (1946); Witmer, Collective Labor Agreements in the Courts, 48 YALE L.J 193 (1938).

6. Congressional analyses of Section 301(a) suggest on the one hand that suits can be properly instituted by employers and labor organizations only; on the other, that employees themselves can initiate action. 93 Cong. Rec. 3734 (April 17, 1947). See p. 637 infra.

7. For extensive consideration of the troublesome nature of a federal question and the leading Supreme Court cases on this point, see Chadburn and Levin, Original Jurisdiction of Federal Questions, 90 U. OF PA. L. Rev. 639 (1942); Forrester, Federal Question Jurisdiction and Section 5, 18 TULANE L. Rev. 263 (1943); Forrester, The Nature of a "Federal Question," 16 TULANE L. Rev. 362 (1942); Willard, When Does a Case "Arise" Under Federal Laws?, 45 AM. L. Rev. 373 (1911); Comment, 40 ILL. L. Rev. 387 (1945).


The meaning attributed to the statutory federal question prescription determines the validity of federal jurisdiction in cases where a plaintiff alleges a cause of action under the authority of a statutory "arising under" grant. To resolve this validity, courts have applied the "disputed construction or effect rule," under the terms of which, "... a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. ... The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another." Cardozo, J., in Gully v. First National Bank in Meridian, 299 U.S. 109, 112 (1936). This interpretation accorded the statutory "arising under" language seems irrelevant to a determination of the constitutionality within the "arising under" terms of Article III of a jurisdictional statute like Section 301(a) of the Taft-Hartley Act.

8. 9 Wheat. 738 (U.S. 1824).

9. Federal question grants of jurisdiction are divided into two categories: the "general"
The corporation statute of the Bank of the United States enabling it "to sue and be sued . . . in any circuit court of the United States." The significance of this decision in formulating a rule for testing future exercises of Congressional power to bestow jurisdiction was two-fold. First, Marshall confirmed the capacity of the Bank to sue by pointing out that the corporate charter, a law of the United States, gave the Bank "every faculty which it possessed[,]" including "[t]he power to acquire rights . . . to transact business . . . to make contracts . . . and to sue on those contracts. . . ." The jurisdictional grant of the charter derived its validity expressly from the federal color displayed in all of the Bank's activities by virtue of the federal charter. Having found federal rights underlying the grant, Marshall then turned his ear to the contention that some suits involving the Bank would not actually "arise under" federal law because they would not present the federal question of the Bank's right to sue. Scotching this argument with a comprehensiveness uncalled for by the case before him, Marshall postulated the sweeping doctrine that, after the fundamental federal character of any of the Bank's activities was once established, the bare existence of the jurisdictional clause invested federal courts with power to hear any suit concerning the Bank.

Therefore, upon Marshall's initial principle, the existence of a substantive foundation in federal law, seemingly hinges the constitutionality of a jurisdictional grant. Back of all such grants must lie a cause of action in federal law: to wit, a statute creating substantive rights which may be asserted in the federal court. Thus, in the Osborn case, the omnipresent bank charter imbued all of the Bank's transactions with a federal nature. Similarly, beneath the permission to sue found in the Federal Employers' Liability Act and the Fair Labor Standards Act rests the separately conferred statutory cause of action in the injured or the underpaid employee plaintiff.

grant (36 Stat. 1091 (1911), as amended, 28 U.S.C. § 41(1) (1940) ) and the numerous "special" grants in § 24 of the Judicial Code (36 Stat. 1091–4 (1911), as amended, 28 U.S.C. § 41 (1940) ) and various other federal statutes. Section 301(a) of the Taft-Hartley Act falls into the latter classification.

10. 3 Stat. 269 (1816).
11. 9 Wheat. 738, 823 (U.S. 1824).
16. 52 Stat. 1069 (1938), as amended, 29 U.S.C. § 216(b) (1940). Section 216(b) includes both the substantive cause of action and the jurisdictional grant, but each is set forth in a distinct and explicit sentence. "Obviously the appellant would not have been entitled to file this action if it were not for the enactment of the statute which creates the cause of action. Section 16(b), Fair Labor Standards Act of 1938, Title 29, § 216(b), U.S.C. . . . ." Robertson v.
It is the want of a clearly denominated federal right to the enforcement of labor contracts which arouses doubt concerning the constitutionality of Section 301(a) of the Taft-Hartley Act. On its surface, this section does no more than specify a forum for a designated category of litigation,17 and examination of the rest of the Taft-Hartley Act18 and other federal labor


17. Senator Taft, co-sponsor of the 1947 Labor Act, stated that "[t]he purpose of title III [including Section 301(a)] is to give the employer and the employee the right to go to the Federal courts to bring a suit to enforce the terms of a collective-bargaining agreement. . . ." 93 Cong. Rec. 4265 (April 28, 1947). The Senator's statement clearly indicates, as do the words of Section 301(a), an intent to allow federal courts to hear actions involving labor contracts. But it does little to answer the crucial question whether these actions are intended to have a substantive basis in federal law.

Perhaps some light is cast on this question by the statement of Senator Murray, outspoken foe of the Taft-Hartley legislation, that "[t]he Federal courts have always had jurisdiction to entertain suits for breach of collective-bargaining contracts, and have awarded money damages where the amount in controversy fulfills the present $3,000 requirement and diversity of citizenship exists.

"Every district court would still be required to look to State substantive law to determine the question of violation. This section does not, therefore, create a new cause of action, but merely makes the existing remedy available to more persons by removing the requirements of amount in controversy and of diversity of citizenship where interstate commerce is affected." 93 Cong. Rec. 4153 (April 25, 1947). Senator Murray's substitute proposal for the Taft bill permitted suits in federal courts only if diversity of citizenship and jurisdictional amount were shown. 93 Cong. Rec. 5118 (May 12, 1947).

Subsequent to the passage of the Taft-Hartley Act, Senator Murray and Representative Hartley, co-author of the bill, expressed contrary views as to the existence of federal labor contract rights supporting Section 301(a). According to Senator Murray, "... the failure of Congress to have vested any substantive rights in collective labor agreements automatically precludes Congress from extending the judicial power of the United States to cases involving the breach of such agreements in the absence of diversity of citizenship. . . . If under the apparent theory of Section 301(a) Congress can authorize federal courts to hear and try cases between persons in the same state, simply because some aspects of the case may affect interstate commerce (even though Congress in the exercise of its commerce powers did not create a substantive right), then it would be possible for Congress virtually completely to deprive states of their sovereign, judicial powers." Communication to YALE LAW JOURNAL from Senator James E. Murray, Nov. 5, 1947. Representative Hartley, on the other hand, believes "... that Congress did obviate any constitutional doubts as to the liability for any loss, damage or injury caused by the violation of union agreements in the enactment of Section 1(b) of the Labor Management Relations Act, 1947." Communication to YALE LAW JOURNAL from Representative Fred A. Hartley, Jr., Nov. 5, 1947.

18. Possibly Section 8(d) of the Taft-Hartley Act, forbidding the termination or modification of a collective-bargaining contract unless certain procedural steps are pursued, might be urged as the source of a federal right in labor contract enforcement. "When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions. . . ." Sola Electric Co. v. Jefferson Electric Co., 317 U.S. 173, 176 (1942); Deitrick v. Greaney, 309 U.S. 190, 200-1 (1940).

However, Section 8(d) seems only to define an "unfair labor practice" enjoinable by the National Labor Relations Board rather than to create in parties to a labor contract any private rights in enforcing the bargain. Non-compliance with the procedure outlined in
legislation discloses no statutory language creating unequivocal substantive rights in the enforcement of labor contracts. But a constitutional appraisal of Section 301(a) cannot be concluded by discovering that there

Section 8(d) is a violation of "the duty to bargain collectively," which constitutes an "unfair labor practice." The National Labor Relations Board has jurisdiction "to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce." Section 10(a). Furthermore, it would seem that the Board, rather than the courts, is the exclusive remedial agency for hearing a complaint arising out of a contract termination or modification unlawful under Section 8(d), although, it is true, Section 10(a) of the Taft-Hartley Act does omit the "exclusive" characterization of the Board's jurisdiction found in the Wagner Act. 49 STAT. 453 (1935), as amended, 49 STAT. 1921 (1936), 29 U.S.C. § 160(a) (1940). Section 10(a) provides only that the "power [of the Board] shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise," implying that grievances which are termed unfair labor practices may be entertained as ordinary contract violations by state and/or federal tribunals other than the Board. This clause might well have been intended to resolve affirmatively a question which arose under the Wagner Act: namely, the existence of a private action for breach of contract under state law which at the same time would be considered an unfair labor practice within the jurisdiction of the Board. See National Labor Relations Board v. Newark Morning Ledger Co., 120 F.2d 262, 268 (C.C.A. 3d 1941), cert. denied, 314 U.S. 693 (1941) (decreasing enforcement of Board order that employer reinstate employee who had been discharged because of her union activities, declaring that the "existence of such a private right [to a possible action for wrongful discharge in a New Jersey court] . . . in no way affects the public right or the exclusive jurisdiction of the Board to enforce it.").


20. For discussion of the effect of Section 8(d) of the Taft-Hartley Act, setting forth the procedure for modification of collective-bargaining agreements, see note 18 supra.

Under the National Labor Relations Act, the only rights in a collective labor contract enforceable in the federal courts are those whose existence have been determined by the National Labor Relations Board; none springs from the contract itself. "... [W]e find no provision in the [National Labor Relations] act which can be construed as intending to create rights for employees which can be enforced in federal courts independently of action by the National Labor Relations Board." Blankenship v. Kurfman, 96 F.2d 450, 454 (C.C.A. 7th 1938) (suit by one union local to enjoin interference with subsisting collective contract by another local; dismissed for failure to state cause of action under Wagner Act and Norris-La Guardia Act). "There is no intimation in the [National Labor Relations] act that, merely because an employer has entered into a contract with a majority union, Congress assumed to vest jurisdiction in United States courts to protect or safeguard the integrity of such contract. ... [N]o proceedings between employer and employee under the Wagner Act are entitled to any protection by the court until some affirmative action has been taken by the Labor Board. ..." Lund v. Woodenware Workers Union, 19 F. Supp. 607, 609, 610 (D. Minn. 1937) (bill by employer to enjoin interference by striking minority of employees with labor agreement effected with bargaining representative of majority of employees; dismissed for absence of substantial federal question).

Similarly, suits claiming violation of employment contracts under the Railway Labor Act have been dismissed for want of a federal question on the theory that the right to sue arises, not from federal statutory provisions, but from the contract obligation dependent upon state law. Barnhart v. Western Maryland Ry. Co., 128 F.2d 709 (C.C.A. 4th 1942), cert. denied, 317 U.S. 671 (1942) (discharged employees asked for injunction, accounting, and
are no explicit labor contract rights in federal law, for it seems probable
that federal substantive rights may be distilled by implication from the
grant of jurisdiction. Read broadly, the language in Section 301(a) supports
the inference that parties to labor contracts shall be federally liable for any
loss, damage, or injury caused by violation of such contracts, so that a clause
remedial on its face might be pregnant with the federal right necessary to
non-diversity jurisdiction. That Congress, acting under the commerce
clause of the Constitution, could affix rights and liabilities in the parties to a
collective-bargaining agreement in industries “affecting commerce” cannot
be seriously doubted. Moreover, in the words of Section 1(b), the Taft-
Hartley Act purports “to prescribe the legitimate rights of both employees
and employers in their relations affecting commerce.” The absurd specta-
cle of a suitor in a federal court without any federal rights to vindicate
points up the strong likelihood that Congress intended Section 301(a) to
serve as a procedural method of creating those substantive rights.

determination of status under breached employment contract); Malone v. Gardner, 62 F.2d
15 (C.C.A. 4th 1932) (representative of one group of engineers requested injunction to re-
strain another group of engineers from influencing railroad employer to breach seniority
contracts with former group); Shipley v. Pittsburgh & L.E.R. Co., 70 F. Supp. 870 (W.D.
recover extra pay under contract authorizing such compensation for performance of special
duties); Delaware, L. & W. R. Co. v. Slocum, 56 F. Supp. 634 (W.D.N.Y. 1944) (employer
sought interpretation of contract in declaratory judgment action); McDermott v. New York:
Cent. R. Co., 32 F. Supp. 873 (S.D.N.Y. 1940) (employee sued for damages for breach of
employment contract).

The Railway Labor Act provides that “no carrier . . . shall change the rates of pay, rules, or working conditions of its employees . . . as embodied in agreements” except in
the manner permitted by the agreement or by written notice similar to that required in
Section 8(d) of the Taft-Hartley Act. 44 STAT. 577 (1926), as amended, 48 STAT. 1186
(1934), 45 U.S.C. § 152 (1940). No individual contract rights have been derived from this
mandate. In two recent companion cases before the Supreme Court, Negro railroad em-
ployees sued under the Railway Labor Act for a declaratory judgment, injunction and
damages arising out of discriminatory contracts effected between the bargaining repre-
sentative for their crafts and their employers. These contracts amended existing collective barg-
ing agreements, thereby depriving the plaintiffs of certain seniority rights. The Court
held that such cases did present a federal question entertainable by federal courts. How-
ever, the federal question was predicated not on the existence of federal contract rights stemming from the “no change” clause of the Act, but on the rights of the employees under the
provision of the Act dealing with the creation of exclusive bargaining representatives. Steele
v. Louisville & Nashville R. Co., 323 U. S. 192 (1944); Tunstall v. Brotherhood of Loco-
motive Firemen & Enginemen, 323 U.S. 210 (1944). For judgment on the merits in the Tun-
stall case, enjoining the enforcement of the discriminatory seniority contracts and
awarding damages, see 69 F. Supp. 826 (E.D. Va. 1946), aff’d, 163 F.2d 259 (C.C.A. 4th

21. Sections 1(b), 8(d), 301(a), 301(b), and 303(a) of the Taft-Hartley Act make men-
tion of the “interstate commerce” features of the Act. For other jurisdictional grants
springing from the regulatory power of Congress over commerce, see 52 STAT. 1069 (1938),
29 U.S.C. § 216(b) (1940) (suits under Fair Labor Standards Act); 35 STAT. 66 (1908), as

22. See Representative Hartley’s remarks, note 17 supra.
Tempering the deduction from Section 301(a) of implied federal rights in the enforcement of collective-bargaining agreements is the fact that a Congress so minded could easily have made explicit statement that there shall henceforth be federal liability for violation of a labor contract. Had Congress merely declared this indispensable liability, it could, with constitutional impunity, have passed the burden of expatriation along to the courts. Indeed, the elaboration of a federal law of labor contracts would probably be a job of too prodigious magnitude for the legislature, for it would entail, at the least, anticipation and description of "violations," defenses to suits for breach, and "contract" itself—in short, a superimposition of federal on top of state doctrines as to labor contracts. If the failure of Congress to elaborate a federal policy toward labor agreements can be excused, it

23. Congress may have intended in Section 301(a) to secure for the future the application of a uniform substantive law of labor contracts. However, even presupposing that federal rights in such contracts could be extracted from the Taft-Hartley Act, it is dubious how much uniformity would follow from the jurisdictional grant in Section 301(a). In cases basing federal jurisdiction upon a federal question, federal courts have not been bound to apply state substantive law under the doctrine of Erie R. Co. v. Tompkins, 304 U.S. 64 (1938). See Clearfield Trust Co. v. United States, 318 U.S. 363 (1943); D'Oench, Duhme & Co. v. F.D.I.C., 315 U.S. 447 (1942). Assuming the trial of Section 301(a) actions is conducted without reference to state law, two questions arise. Did Congress through the medium of Section 301(a) mean to preempt the field of substantive law dealing with labor contract rights? If it did, can state courts still hear suits involving labor agreements affecting interstate commerce, or is jurisdiction exclusive in the federal courts? For a discussion of the indices of whether federal law has preempted state law in a given field, see R.F.C. v. Central Republic Trust Co., 17 F. Supp. 263, 294 (N.D. Ill. 1936), aff'd sub nom. R.F.C. v. McCormick, 102 F.2d 305 (C.C.A. 7th 1939), cert. denied, 308 U.S. 558 (1939).

If jurisdiction of state courts continues, a further question would arise: would state courts be governed by a federal law of labor contracts? Uniformity of substantive law would obtain under preemptive circumstances, for the United States Supreme Court would be arbiter of the law applied in all courts. However, the absence of a detailed doctrine of federal labor contract obligations would relegate state forums from time to time to the predicament of not knowing what the controlling federal law is during the interim before federal courts have declared it—a dilemma similar to the one which frequently confronts federal courts searching for state law under the Erie R. Co. v. Tompkins doctrine.

But the lack of expression of Congressional intent to accomplish preemption and the provision in Section 14(b) of the Taft-Hartley Act that nothing in the Act shall supersede state laws on closed and union shops militate strongly against the possible interpretation of Section 301(a) as a device for replacing state substantive law. Assuming Congress did not intend to preempt the labor contract field, cases could be brought in the state courts under Section 301(a), or under common law breach of contract principles. In an action based on the substantive contract law of the state, a party might often get a ruling quite different from what he could expect in a federal court or in the same state court sitting in a case cast under the Taft-Hartley Act. Furthermore, common law breach of contract cases could not reach the United States Supreme Court on appeal through the state courts for want of a federal question. See Rev. Stat. §§ 690, 709 (1875), as amended, 28 U.S.C. § 344 (1940). Thus, in place of uniformity of substantive law, two separate bodies of labor contract law might develop simultaneously.

24. It is possible that Congress meant in Section 301(a) to achieve uniformity in the suability of labor unions as well as in the application of substantive law. Herman W.
seems that the absence of a concise statement of liability underlying Section 301(a) might equally well be overlooked as chargeable to the inarticulateness of the draftsmen rather than to the lack of Congressional intent to enact federal rights in labor agreements.

Finally, in choosing between the inferential or the "face value" approach to Section 301(a), forethought toward the consequences of upholding the statute upon the volume of business of both trial and appellate courts of the United States would not be amiss. For example, a construction of the statute which permitted suits by individual employees, as well as employers and labor organizations, might well weigh against judicial approval of Section 301(a) because of the possible surge of suits which would thereby be authorized. More generally, the reluctance of courts to increase their

Steinkraus, appearing on behalf of the United States Chamber of Commerce at preliminary committee hearings on the Taft-Hartley bill, contrasted the ready accountability of employers for breach of labor contracts with the immunity enjoyed by labor unions through state procedural quirks. *Hearings of the House Committee on Education and Labor, 80th Cong., 1st Sess.,* v. 4, p. 2532 (1947). Absent statutory authorization to sue, the common law prevails in the several states that labor unions are not amenable to suit as such because of their status as unincorporated voluntary associations which have no juristic being. 2 TELLER, *op. cit. supra* note 5, § 462.

In view of the express provision in Section 301(b) of the Taft-Hartley Act rendering labor unions suable in "courts of the United States," it is extremely doubtful that Congress purported to go so far as to make unions suable in all courts, state as well as federal.

25. The protest of overburdening an increasingly busy federal judiciary often follows on the heels of proposed extensions of federal jurisdiction. Dissenting from a recent judicial broadening of bankruptcy jurisdiction, Justice Frankfurter revealed some alarm over the undesirable prospect of swollen federal dockets: "It is a truism, but vital to keep in mind that increase in the quantity of the Court's business affects the quality of its work. . . . If the Court works under too much pressure, because of the excessive volume of its business, the process of study and reflection indispensable for wise judgment is bound to suffer." Williams v. Austrian, 67 Sup. Ct. 1443, 1462, n. 7 (1947).

Overtaxing the judiciary is a practical consideration which may militate against validation of Section 301(a). Senator Murray, visualizing that Section 301 will impose an unnecessary load on federal judges, remarked that "[t]he abandonment of the present amount in controversy and diversity of citizenship requirements is an unwise departure from existing law, which would impose a needlessly increased burden upon the Federal courts, already weighted down with litigation. . . . Although the Federal courts appear to be handling this increased [citing figures previously mentioned] load as efficiently as possible, it is obvious that there are human limitations upon the capacity of present staffs and that constant increase in litigation can only be met by an increase in the number of judges and court personnel, with corresponding increases in the cost of government. The alternative would be a break-down in our judicial system." 93 Cong. Rec. 4153 (April 25, 1947). Of course, in evaluating the merit of this forensic pragmatism, it is well to remember that the skill of the arbitrator of labor disputes has lessened somewhat the worry about flooding the federal judiciary with litigation concerning collective agreements.

26. The ambiguity of Congressional intent to permit or deny suits by individual employees has been indicated in note 6 *supra.* Assuming that federal courts should decide to uphold Section 301(a), and yet limit the section's potential expansion of federal jurisdiction by barring suits by individual employees, an intent to bar such individual suits could arguably be supported by the statutory language: thus, if in the phrase "[s]uits for violation of
dockets, except where Congress has clearly spoken, could contribute to a restrictive reading of the instant statute. However, a policy based on administrative efficiency should not in itself preclude the recognition of a newborn class of litigation if such litigation is a vehicle for discharging obligations fixed in federal law.

contracts between an employer and a labor organization... or between any such labor organizations," the "between" phrases are held to modify "suits," application of the expressio unius est exclusio alterius rule of statutory construction would limit potential litigants to "employers" and "labor organizations."

27. For judicial limitations upon the ambit of federal jurisdiction, see Indianapolis v. Chase National Bank, 314 U.S. 63 (1941) (doctrine of realignment of parties in testing diversity); Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) (practical discouragement of litigants from trying to obtain different results in a federal forum from remedies in state court); Gully v. First National Bank in Meridian, 299 U.S. 109 (1936) (limitation of "arising under" jurisdiction to cases which turn on a construction of the Constitution or a federal law); White v. Sparkill Realty Corp., 280 U.S. 500 (1930) (requirement of federal question in plaintiff's complaint well pleaded); Strawbridge v. Curtiss, 3 Cranch 267 (U.S. 1806) (requirement of complete diversity of citizenship in diversity jurisdiction); Georgia Power Co. v. Hudson, 49 F.2d 66 (C.C.A. 4th 1931) (prohibition of joinder of separate causes of action to meet jurisdictional amount). For a discussion of recent Supreme Court restrictions on federal jurisdiction, see Note, 53 Yale L. J. 788 (1944).

See also statutes aimed at narrowing federal jurisdiction on the trial level: 43 Stat. 941 (1925), 28 U.S.C. § 42 (1940) (exclusion of jurisdiction over suits by or against federal corporations unless more than 50% of capital therein owned by United States); 36 Stat. 1094 (1911), as amended, 28 U.S.C. § 71 (1940) (permission of removal from state to federal court in diversity cases to non-resident defendant only); 36 Stat. 1098 (1911), 28 U.S.C. § 80 (1940) (provision for dismissal or remand of collusive suits which do not really involve controversy within federal jurisdiction); 36 Stat. 1091 (1911), as amended, 28 U.S.C. § 41 (1940) (requirement for over $3,000 jurisdictional amount and prohibition of certain suits by assignees of choses in action). For judicial recognition of the statutory trend in the past half century to delimit federal jurisdiction, see Gay v. Ruff, 292 U.S. 25, 36 (1934).

28. Invalidation of Section 301(a) might issue in part from the many thorny problems of workability presented by this clause. Regarding the ambiguity of who has a standing to sue, see notes 6 and 26 supra. What remedy a litigant may seek by virtue of Section 301(a) is also open to surmise. The mention in Section 301(b) of enforceability of "any money judgment" against a union denotes that damages is one form of relief contemplated by Section 301(a). House debate reveals that declaratory judgment suits were also meant to come within its purview. See remarks of Representatives Barden and Hartley, 93 Cong. Rec. 3734 (April 17, 1947). But legislative materials are mute upon the propriety of including injunctions within the description "suits for violations of contracts." If "violations" include activities which are designated as labor disputes by the Norris-LaGuardia Act, the use of Section 301(a) to supply injunctive redress would amount to an amendment of the anti-injunction provisions of that Act. See 47 Stat. 70–3 (1932), 29 U.S.C. §§ 101–15 (1940). But it is at least questionable whether the Norris-LaGuardia Act need be considered as amended by Section 301(a) in order that an injunction issue for violation of a collective labor agreement, for the courts have divided on the question of the applicability of anti-injunction statutes to such suits. For a collection of the opposite lines of cases, see Note, 156 A.L.R. 652, 678 et seq. (1945). The looseness and vagueness which characterize Section 301(a) is puzzling in contrast with the concrete provision in Section 303 of the Taft-Hartley Act for damage suits arising out of secondary boycott practices, which are outlined with clarity in subdivisions (a)(1) through (a)(4).

29. Compare the remarks of Judge John J. Parker, decrying movements to limit federal
No thought process, breakdown of extant statutory grants of federal jurisdiction, nor legislative token, exhibits categorically the federal rights in labor contracts essential to sustain Section 301(a). Congress has plainly shirked the definitiveness which should distinguish a statute expanding the restricted field of federal jurisdiction. However, to impugn successfully the constitutionality of Section 301(a), criticism should be more searching than a mere allegation that Congress has been inept in the execution of a valid intent to widen the jurisdiction of federal courts. The inherent power of Congress to declare substantive rights in labor contracts affecting interstate commerce, combined with a statement of the jurisdictional consequences of such rights, probably encompasses the rights themselves. Therefore, whatever the wisdom of this new grant of federal jurisdiction, Section 301(a) of the Taft-Hartley Act will probably not be invalidated.

JUDICIAL REVIEW OF RATE-MAKING: THE "CONSTITUTIONAL FACT" DOCTRINE REFURBISHED

The "constitutional fact" doctrine provides that administrative action affecting constitutional rights is subject to an independent judicial determination on both the law and the facts. Invoked, on occasion, to obtain review of findings of such agencies as licensing and compensation boards:

jurisdiction: "One of the first duties of government, however, is to provide tribunals for administering justice to its citizens; and, if I am correct in thinking that a citizen is entitled to have his disputes adjudicated in a tribunal of the sovereignty to which he owes allegiance, it is unthinkable that that sovereignty should shirk its responsibility and abdicate its proper functions because of a comparatively insignificant matter of expense." The Federal Jurisdiction and Recent Attacks Upon It, 18 A.B.A.J. 433, 438 (1932).

* Staten Island Edison Corp. v. Maltbie, 296 N. Y. 374, 73 N.E.2d 705 (1947).

2. Laisne v. California State Board of Optometry, 19 Cal.2d 831, 123 P.2d 457 (1942).
this doctrine has generally been applied in the field of public utility rate disputes.\(^4\) During the past decade, however, it has fallen into a virtual state of atrophy.\(^5\) Nevertheless, in the case of *Staten Island Edison Corp. v. Maltbie*,\(^6\) the New York Court of Appeals revitalized the doctrine in holding that when a utility alleges that rates set by the Public Service Commission are confiscatory, the utility is entitled to have the rate-determination examined by some form of independent judicial review.\(^7\) Unclarified were three major issues: (1) whether utility rates are the only "constitutional facts" whose administrative determination requires such review;\(^8\) (2) the character of the review required;\(^9\) (3) the precise constitutional bases of decision.\(^10\)

In the instant case, the utility sought to enjoin the enforcement of rates promulgated by the New York Public Service Commission after nine years of hearings and investigation,\(^11\) alleging that they were confiscatory and therefore a deprivation of property without due process of law. The court was thus confronted with the issue of whether to limit the utility to the usual statutory review in the nature of certiorari, which permits an examination of the administrative record only to determine whether the Commission’s find-

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5. Despite opportunities to apply the doctrine presented by many recent cases, the United States Supreme Court has avoided using it. See note 20 infra.


7. Although it is difficult to determine precisely the direct results of the court’s holding, three propositions seem clear: (1) an allegation of confiscation states a good cause of action; (2) the utility may maintain an action to enjoin enforcement of rates set by the Commission; (3) the record of the proceedings before the Commission must be considered by the reviewing court. The Court of Appeals did not make clear the nature of the reviewing court’s proceedings, i.e., whether the court is limited to the administrative record but can substitute its judgment for that of the Commission on the weight of the evidence, or whether the court must relitigate the issues *de novo*.

The Public Service Commission’s motion for clarification of the opinion in respect to the trial *de novo* question has been denied. Communication to *Yale Law Journal* from Public Service Commission, Oct. 15, 1947.

8. If the Court of Appeals meant that the doctrine is to be limited to rate cases, no explanation is given for the apparent discrimination in favor of public utilities. If, on the other hand, the court intended that the doctrine be applied generally, the administrative disruption suggested at p. 645 infra might well become widespread. Cf. Laisne v. California State Board of Optometry, 19 Cal.2d 831, 123 P.2d 457 (1942) (constitutional fact doctrine successfully invoked to gain judicial review of licensing board’s action).

9. See note 7 supra.

10. See discussion at p. 641 infra.

11. The New York Public Service Commission instituted an investigation of accounts and records of the Staten Island Edison Corporation in 1936. By order dated November 10, 1937, the proceeding was broadened to include an investigation of rates and charges. On May 27, 1943, the Commission promulgated a temporary rate order which the utility challenged by a suit in equity and a proceeding in the nature of certiorari under
ings are supported by substantial evidence,12 or to allow the utility to attack the rates in a new judicial proceeding.

The Special Term had dismissed the complaint on the ground that the statutory method of review was an exclusive remedy and satisfied constitutional requirements of due process.13 The Appellate Division reversed 14 and the Court of Appeals affirmed 15 the reversal, holding, without elaboration, that due process required an independent judicial determination of the facts since the instant case was controlled by the constitutional fact doctrine laid down by the United States Supreme Court in 1920 in Ohio Valley Water Co. v. Ben Avon Borough.16 The Court of Appeals did not indicate, however, whether it is the due process clause of the Federal 17 or of the New York

Article 78 of the New York Civil Practice Act. The complaint in the equity suit was dismissed on the ground that no question of confiscation could arise involving temporary rates because of the recoupment provisions in the temporary rate statute. The certiorari proceeding was discontinued by stipulation. Brief for Defendants-Appellants, p. 3, and Respondent's Points, p. 3, Staten Island Edison Corp. v. Maltbie, 296 N.Y. 374, 73 N.E.2d 705 (1947).

12. The New York Public Service Law establishing the Public Service Commission and outlining its jurisdiction and authority makes no provision for a review of its determinations. A proceeding in the nature of certiorari under Article 78 of the New York Civil Practice Act is the generally accepted method of review. 2 BENJAMIN, ADMINISTRATIVE ADJUDICATION (The Dep't of Public Service) 179 (1942); 9 NEW YORK STATE CONSTITUTIONAL CONVENTION COMMITTEE, PROBLEMS RELATING TO JUDICIAL ADMINISTRATION AND ORGANIZATION 830 et seq. (1938); see Matter of New York Edison Co. v. Maltbie, 271 N.Y. 103, 2 N.E.2d 277 (1936). Although Civil Practice Act, § 1295, Subsec. 7, which states the test to be applied by a reviewing court to determine whether administrative decisions are sufficiently supported by evidence, talks in terms of "preponderance of proof," judicial gloss has converted the necessary quantum of proof into "substantial evidence." 1 BENJAMIN, op. cit. supra at 328-40; and see Jaffe, Administrative Procedure Re-Examined: The Benjamin Report, 56 Harv. L. Rev. 704, 727 et seq. (1943). See also Matter of Newbrand v. City of Yonkers, 235 N.Y. 164, 177, 33 N.E.2d 75, 82 (1941); Matter of Dusinberre v. Noyes, 284 N.Y. 304, 308, 31 N.E.2d 34, 36 (1940); Matter of Murphy v. Valentine, 284 N.Y. 524, 526, 32 N.E.2d 537, 538 (1940).

The Staten Island Edison Corporation actually did institute a certiorari proceeding under Article 78 of the Civil Practice Act for a review of the rates here being attacked but did not take any steps to advance the proceeding for argument pending determination of the instant case. Brief for Defendants-Appellants, pp. 2-3, Staten Island Edison Corp. v. Maltbie, 296 N.Y. 374, 73 N.E.2d 705 (1947).

13. The unreported opinion may be found in Record on Appeal, p. 436, Staten Island Edison Corp. v. Maltbie, 296 N.Y. 374, 73 N.E.2d 705 (1947).


15. 296 N.Y. 374, 73 N.E.2d 705 (1947).


which required this result and subsequently denied a motion requesting a clarification of this question. The resulting confusion becomes even more extensive since there are numerous indicia that the *Ben Avon* holding is no longer regarded as "good law"; and in the instant case appeal to the Supreme Court seems out of the question so long as any possibility remains that the Court of Appeals was interpreting the New York Constitution. Meanwhile, the New York Legislature is precluded from providing for any other type of review than that held essential in the *Staten Island* case, since the statutory review by certiorari has been held constitutionally inadequate.

The court's summary discussion of guiding constitutional principles is

19. The Public Service Commission's motion for amendment of the remittitur on this question was denied by the Court of Appeals. Communication to *Yale Law Journal* from Public Service Commission, Oct. 15, 1947. The court's reliance on the *Ben Avon* decision and other federal cases would seem to indicate, however, that the Federal Constitution was the basis of decision.


The courts of some states, however, have continued to apply the *Ben Avon* doctrine. See *State ex rel. Pacific Telephone & Telegraph Co. v. Dept't of Public Service*, 19 Wash.2d 200, 217, 142 P.2d 498, 508 (1943); Laisne v. California State Board of Optometry, 19 Cal.2d 331, 845, 123 P.2d 457, 465 (1942).
21. The United States Supreme Court has refused to review decisions of state courts where it is not clear whether a federal question has been determined or whether the decision was based on the state constitution. See discussion in *Minnesota v. National Tea Co.*, 309 U.S. 551 (1940); and see also *National Tea Company v. State*, 208 Minn. 607, 294 N.W. 230 (1940).

Since the instant decision is an interlocutory and not a final judgment, there is no way for it, at its present stage, to reach the Supreme Court even if it determined the federal question. *Rev. Stat.* §§ 690, 705 (1875), 28 U.S.C. § 344(a) (1940) limits the appellate jurisdiction of the United States Supreme Court to a review of a "final judgment or decree in any suit in the highest court of a State." See *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 123 (1945).
couched wholly in words of conclusion and therefore does not illuminate its rationale. However, the emphasis placed on the need for a "judicial" determination suggests that the court did not consider the Public Service Commission's investigation to be sufficiently "judicial" in character to render unnecessary a wholly new consideration of the facts. In so concluding, the Court of Appeals would seem to have ignored the procedures followed by the Public Service Commission preliminary to prescribing rates and the statutory requirements that notice be served, hearings held, and records of Commission proceedings maintained. Alternatively, the Court of Appeals may have relied on the Ben Avon case for its theory as well as its result, but the much criticized Ben Avon doctrine (that rate-fixing is a legislative act and therefore like all legislative acts is subject to judicial review) would itself seem a shaky basis for the instant decision. Since courts review legislative acts only to determine whether "reasonable grounds" support them, but review an administrative record in search of "substantial evidence" (after the manner of New York's statutory certiorari proceedings),

22. "There would indeed be a very drastic limitation upon the constitutional powers of the Supreme Court of the State if it may not enjoin an unconstitutional deprivation of property... The remedy by certiorari... is inadequate in the protection of constitutional right and... is lacking in due process." 296 N.Y. 374, 382, 73 N.E.2d 705, 703 (1947).

23. "[D]ue process requires independent judicial determination of the constitutional question..." Id. at 382, 73 N.E.2d at 707.


27. Among the articles criticizing the Ben Avon case are: Albertsworth, Judicial Review of Administrative Action by the Federal Supreme Court, 35 HARV. L. REV. 127, 139 (1921); Brown, The Functions of Courts and Commissions in Public Utility Rate Regulation, 35 HARV. L. REV. 141, 147 (1924); Freund, The Right to a Judicial Review in Rate Controversies, 27 W. VA. L. Q. 207 (1921). See prize winning essays To What Extent Should the Decisions of Administrative Bodies be Reviewable by the Courts? Davis, 25 A.B.A.J. 770, 772 (1939), and Clay, id. at 940. See also Note, 50 HARV. L. REV. 78, 82 (1936).


30. See note 12 supra. For tests New York courts have applied in determining the
it would seem that the latter form of review provides a stronger safeguard for constitutional rights.31

Although the decision does not purport to empower the courts to establish rates, it would seem to permit a substitution of judicial discretion for that of the Commission on the preliminary questions of fact which determine such technical questions as accrued depreciation, operating expenses, and rate of return. After these vexatious problems have been settled, the establishment of rates becomes little more than a mathematical operation.32 Judicial deter-

31. A similar argument has been suggested against the Ben Avon decision. DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW 198-9 (1927).

The necessary quantum of evidence to satisfy the "substantial evidence" requirement appears to be greater than the amount which the court demands as sufficient to make a legislative act "reasonable," Compare Matter of Stork Restaurant, Inc. v. Boland, 282 N.Y. 256, 273, 26 N.E.2d 247, 255 (1940), with cases cited in note 29 supra.

Various considerations operate in the field of "straight" constitutional questions which are not applied in reviewing administrative decisions, the most important being the presumption of constitutionality accorded acts of the legislature. See Matter of Fay, 291 N.Y. 198, 206, 52 N.E.2d 97, 98 (1943); People v. Nebbia, 262 N.Y. 269, 271, 186 N.E. 694, 699 (1933), aff'd sub nom. Nebbia v. New York, 291 U.S. 502 (1934). Subsidiary considerations are that an intent to enact an unconstitutional statute cannot be imputed to the legislature, see People v. Barber, 289 N.Y. 378, 385, 46 N.E.2d 329, 332 (1943); and that, where two meanings are reasonable, the one that sustains the statute is preferred. See People v. Mancuso, 255 N.Y. 463, 472, 175 N.E. 177, 180 (1931).

Since a legislative act is valid if there are reasonable grounds to support it, People v. Perretta, 253 N.Y. 305, 171 N.E. 72 (1930), and since a rebuttable presumption of a state of facts warranting legislative action arises where the constitutionality of a statute is challenged, Noyes v. Erie & Wyoming Farmers Co-op. Corp., 281 N.Y. 187, 195, 22 N.E.2d 334, 337 (1939), it would seem that the courts themselves have narrowed the constitutional safeguards in this field to a minimum. See Note, 36 Col. L. Rev. 283 (1936).

32. Litigation has been traditionally concerned with establishing the rate base. See Smyth v. Ames, 169 U.S. 466, 547 (1898); State of Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Comm'n, 262 U.S. 276, 291 (1923) (concurring opinion of Mr. Justice Brandeis); Federal Power Commission v. Natural Gas Pipeline Co., 315 U.S. 575, 586 (1942); and Frankfurter and Hart, supra note 1, at 109. But cf. Hamilton, Cost as a Standard for Price, 4 LAW AND CONTEMP. PROB. 321, 329 (1937): "Now and then a hardy soul, equipped with simple faith and a calculating machine, essays the adventure of rates based upon the true costs of particular services. This feat is, of course, technically impossible..."
mination of preliminary facts would, of course, be limited to those instances where rates fixed by the Commission are attacked as confiscatory, but the instant decision would seem to open all future New York rate-making to such attack. Hearings before the Commission may be transformed into preliminary proceedings, the statutory method of review may be ignored, and the Court of Appeals may emerge as the progenitor of rate-making policies. A recrudescence of the very conditions which originally prompted the establishment of the Public Service Commission might well result, and forty years experience in administrative rate regulation would go by the board.

Considerations of expediency also militate against the conclusion in the instant case. Although complicated fact questions which arise may not be beyond judicial comprehension, the trend has been pronouncedly one of increased judicial deference for the expertise of administrative agencies.

33. 296 N.Y. 374, 383, 73 N.E.2d 705, 708 (1947).

34. See the recent petition of the Consolidated Edison Co. to the Public Service Commission for increases in rates. Present rates are allegedly "confiscatory" of the company's property. N.Y. Times, November 30, 1947, § 1, p. 1, col. 6.


36. See Justice Elsworth's opinion dismissing the complaint at Special Term. Record on Appeal, p. 436, Staten Island Edison Corp. v. Maltbie, 296 N.Y. 374, 73 N.E.2d 705 (1947); and see dissenting opinion in Appellate Division, 270 App. Div. 55, 64, 58 N.Y.S.2d 818, 826 (3d Dep't 1945).

37. The corruption of New York's gas light era and the colorful campaigns waged by Seth Low and Charles Evans Hughes against the utilities were the more immediate reasons for establishing the Public Service Commission. See, e.g., Monroe, The Gas, Electric Light, Water and Street Railway Services in New York City, 27 ANNALES 111, 112 et seq. (1906); Moshier and Crawford, Public Utility Regulation 21 et seq. (1933); 2 BENJAMIN, op. cit. supra note 12, at 3.

38. For history of the Commission's development, see 2 BENJAMIN, op. cit. supra note 12, at 5 et seq. See also Moshier and Crawford, op. cit. supra note 37, c. II; Recommendations of Commissioners, 1 REPORT OF COMMISSION ON REVISION OF THE PUBLIC SERVICE COMMISSIONS 241 (1930).

39. "Neither should the court confess its inability to comprehend and intelligently decide the issues involved. ..." Staten Island Edison Corp. v. Maltbie, 270 App. Div. 55, 59, 58 N.Y.S.2d 818, 821 (3d Dep't 1945).

Since litigation of this nature is protracted, court calendars which are already congested may be further encumbered. Moreover, the conditions upon which rates are based do not remain constant during the period of litigation. As a result, such important considerations as cost of operation and depreciation, which are themselves subjects of the litigation, can vary to such an extent that the rates finally prescribed are no longer reasonably applicable. Further hearings before the Commission may therefore become necessary from which a series of new appeals could be prosecuted.

The administrative agency, well beyond its incubation stage, now occupies a position of importance and prestige and should be accorded recognition commensurate with the scope of its function. The instant case requires a balance to be drawn between efficient and effective rate regulation on the one hand and the safeguarding of private rights on the other. Since a review of the administrative record for substantial evidence appears adequately to protect the utility from arbitrary and capricious Commission action, it would seem that, in the instant case, the utility's allegations of confiscation could have been properly decided in the statutory judicial proceeding and the Public Service Commission's position as a rate-making body would not have been undermined.

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42. 1 BENJAMIN, supra note 12, at 338; address by Dean Shea, 62 Report of N.Y.S. Bar Ass'n 259, 261 (1939). See also note 41 supra.

AMENABILITY OF FOREIGN ADMINISTRATORS TO SUIT UNDER NON-RESIDENT MOTORIST STATUTES

FIRMLY imbedded in Anglo-American conflict of laws doctrine is the concept of an administrator as a territorially limited personality who can be sued in his representative capacity in the state of his appointment alone. The policy underlying this immunity is said to be the desirability of a central administration of the assets of a decedent's estate, concentrating litigation in the decedent's domiciliary forum. Never free from attack, the administrator's immunity from foreign suit is today threatened by six state statutes which provide for substituted service on the administrator of a non-resident motorist and which thus purport to widen the jurisdiction of six of the forty-eight non-resident motorist statutes. The purpose of the non-resident motorist statutes has been to provide a convenient forum in which persons injured by such motorists could sue to enforce their rights. But

1. The term "administrator" is used in this Note to connote the personal representative, whether administrator or executor. For purposes of the problem discussed herein, no distinction is made between them. See McMaster v. Gould, 240 N.Y. 379, 325, 148 N.E. 556, 558 (1924); Stumpf, PRINCIPLES OF CONFLICT OF LAWS 404 (1937); RESTATEMENT, CONFLICT OF LAWS, introductory note to topic 1, c. 11 (1934).
5. All the states now have non-resident motorist statutes which expand normal concepts of in personam jurisdiction by providing for substituted service of process upon non-resident motorists in suits growing out of accidents in which they are involved. The constitutional background of these statutes involved Supreme Court validation of a state's requirement of a driver's license, Hendrick v. State of Maryland, 235 U.S. 610 (1915), and of a state's conditioning use of its highways by a non-resident on the latter's appointing a state officer as agent to receive service of process in actions growing out of the operation of the motor vehicle within the state. Kane v. New Jersey, 242 U.S. 160 (1916). The modern form of the typical non-resident motorist statute was first enacted in Massachusetts in 1923. MASS. ANN. LAWS, c. 90, § 3A (1946). In addition to providing that use of the highways of that state by a non-resident should be deemed equivalent to appointment of a state official as his attorney for service of process, the statute also made sufficiency of service dependent upon the sending of notice and a copy of process to the non-resident by registered mail. This statute was declared constitutional in Hess v. Pavloski, 274 U.S. 352 (1927). For general treatments of such statutes see Culp, Process in Actions Against Non-Resident Motorists, 32 Mich. L. REV. 325 (1934); Scott, Jurisdiction Over Non-Resident Motorists, 39 HARV. L. REV. 563 (1926).
6. Nelson v. Richardson, 235 Ill. App. 504, 15 N.E.2d 17 (1938); Scott, supra note
since, in the absence of explicit statutory provision, courts have been unanimous in finding themselves without jurisdiction over the administrator of a foreign motorist,\(^7\) the failure of the original non-resident motorist statutes to provide for service on an administrator has tended to make suit impossible precisely where the plaintiff most gravely needs redress—in those accidents so serious as to cause the tort-feasor's death.\(^8\) The current amendments to six of the statutes resulted from dicta indicating that the immunity of a non-resident motorist's administrator could be cured by legislation;\(^9\) but the recent invalidation in \textit{Knoop v. Anderson} \(^10\) of one of these amend-

\(^5\) at 565; \textit{Legis., 20 IOWA L. REV. 654} (1935). Financial injury to the motor accident victim and his dependents is a serious problem. For a complete discourse on its incidents and effects, see the symposium in \textit{3 LAW \\& CONTEMP. PROBS.} 465-608 (1936); \textit{Report by the Committee to Study Compensation for Automobile Accidents to the Columbia University Council for Research in the Social Sciences} (1932); cf. James, \textit{Accident Liability Reconsidered: The Impact of Liability Insurance}, \textit{57 YALE L. J.} 549 (1948).

Statutes compelling security for possible liability for injuries to person or property to be provided by bond or insurance as a condition precedent to using the highways are another facet of the controls passed to affix financial liability upon the negligent operators of automobiles. \textit{See, e.g., MASS. ANN. LAWS, c. 90, §§ 34A-J} (1946); \textit{Packard v. Banton}, 264 U.S. 140 (1924).

7. The courts have based their refusal on three separate grounds. The main ground relied upon is that the statute, being in derogation of the common law, must be strictly construed. \textit{Warner v. Maddox}, 68 F. Supp. 27 (W.D. Va. 1946); \textit{Riggs v. Schneider}, 279 Ky. 361, 130 S.W.2d 816 (1939); \textit{Young v. Potter Title and Trust Co.}, 114 N.J. Law 561, 178 Atl. 177 (Sup. Ct. 1935); \textit{Dowling v. Winters}, 208 N.C. 521, 181 S.E. 751 (1935); \textit{Donnelly v. Carpenter}, 55 Ohio App. 463, 9 N.E.2d 888 (1936); \textit{State ex rel Ledin v. Davison}, 216 Wis. 216, 256 N.W. 718 (1934). The second ground invokes the rule that an agency (that implied between the motorist and a state official) is terminated by the death of the principal. \textit{Warner v. Maddox}, supra; \textit{Brogan v. Macklin}, 126 Conn. 92, 9 A.2d 499 (1939); \textit{Riggs v. Schneider}, supra; \textit{Dowling v. Schwenck}, 138 Neb. 395, 293 N.W. 278 (1940); \textit{Harris v. Owens}, 142 Ohio St. 379, 52 N.E.2d 522 (1943). But see, for rule that police power is not limited by rules of agency or contract, \textit{Young v. Masci}, 289 U.S. 253 (1933); \textit{Hess v. Pawloski}, 274 U.S. 352 (1927); \textit{Oviatt v. Garretson}, 205 Ark. 792, 171 S.W.2d 287 (1943); \textit{Gesell v. Wells}, 254 N.Y. 604, 173 N.E. 885 (1930); \textit{RESTATEMENT, AGENCY § 118, Comment d} (1933); \textit{cf. Sligh v. Kirkwood}, 237 U.S. 52 (1915). Thirdly, due process grounds have been utilized on the theory that the real defendant is deceased and hence beyond the jurisdiction of the court. \textit{Boyd v. Lemmerman}, 11 N.J. Misc. 701, 168 Atl. 47 (Sup. Ct. 1933); \textit{Lepre v. Real Estate-Land Title Trust Co.}, 11 N.J. Misc. 887 (C.P. 1933); \textit{Dowling v. Winters, supra}.

8. \textit{See Culp, Recent Developments in Actions Against Non-Resident Motorists, 37 MICH. L. REV. 58} (1938); \textit{Legis., 20 IOWA L. REV. 654}, 663 (1935); cases cited noted 7 \textit{supra}.


10. \textit{71 F. Supp. 832} (N.D. IOWA 1947). The only previous decision under the amended statute is \textit{Oviatt v. Garretson}, 205 Ark. 792, 171 S.W. 2d 287 (1943), which accepted the amendment almost without comment.
ments—a statute far narrower in scope than the blanket subjection to suit of foreign administrators held unconstitutional by the New York Court of Appeals in 1925—compels reexamination of the premises underlying the foreign administrator's traditional immunity.

In *Knoop v. Anderson*, the defendant foreign administrator removed to a federal district court a tort action brought pursuant to the amended Iowa statute; thereupon the federal court of its own motion held the amendment invalid and dismissed the cause for lack of jurisdiction. The opinion of the court emphasized the *in rem* nature of the proceeding for the establishment of a claim against an administrator in his representative capacity. Personal jurisdiction over the administrator, it was said, does not give jurisdiction to determine the validity of a claim against the estate. Moreover, since an administrator has no status outside the state of his appointment, a foreign court cannot obtain jurisdiction over him in his representative capacity. Hence, the court held, a statutory provision for substituted service upon the administrator of the estate of a non-resident motorist is invalid.

On looking behind the judicial syllogism to the reason for the administrator's traditionally limited status, it becomes clear that suits brought by a foreign representative outside the jurisdiction of his appointment were originally prohibited in order to protect domestic creditors from withdrawal of a foreign estate's domestic assets which would entail pursuit of remedies in the foreign state, where the creditors might "meet with obstructions and inequalities in the enforcement of their own rights from the peculiarities of local law." As a concomitant, suits against a foreign administrator were also prohibited. But this fear of unequal rights in administration was laid to rest by the Supreme Court in the leading case of *Blake v. McClung* which


15. 172 U.S. 239 (1898); *cf.* Clark v. Williard, 292 U.S. 112 (1934). Although the *Blake* case dealt with the administration of a receivership, there is no reason why it should not apply equally to the administration of a decedent's estate. See Restatement, Conflict of Laws § 497 (1934).

Denial of the right of suit by or against foreign administrators was carried over from the English common law. *See* Goodwin v. Jones, 3 Mass. 514, 517 (1807); Vaughtan v.
required that the claims of foreign creditors be treated equally with those of local creditors. It would seem that with the practical basis for the rule disappearing, the rule itself might be expected to disappear. Many states, however, still refused to allow suit by a foreign administrator, and those permitting suit did so on grounds of comity rather than of right.

Although thirty-three states and the District of Columbia now have statutes permitting suit by foreign administrators, it has been more difficult to break through the technical conceptions obstructing suit against these representatives. Foreign administrators have, it true, frequently been

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16. Thus in the resolution of a somewhat analogous jurisdictional problem, it was not until the courts gave primary consideration to the practicalities involved that they were able to articulate a satisfactory body of law on the status of foreign corporations. The only real basis of the resulting rule that a corporation doing business in a state is subject to the process of that state is that it is socially desirable that it be so. Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165 (1939); Hinton, Substituted Service on Non-Residents, 20 Ill. L. Rev. 1, 5-6 (1925); Note, The Adoption of the Liberal Theory of Foreign Corporations, 79 U. Of Pa. L. Rev. 956, 1119 (1931).


sued in their *individual* capacity, and occasionally in their *representative* capacity, but in practically all of the latter cases there has been property in the forum to which *in rem* jurisdiction could attach. If there are no assets of the decedent in the foreign state, then the plaintiff's only remedy is to establish his claim in the jurisdiction where the estate is being administered. For, under orthodox dogma, an action against the administrator is in the nature of a proceeding *in rem*, the property of the estate within the jurisdiction of the court being considered the defendant and the administrator merely its representative.

It is generally stated that suits against a foreign administrator constitute an interference with the domiciliary court's administration of the assets of the estate. This position, however, seems untenable since, even if the foreign jurisdiction were to allow such suits, any judgments obtained could not be enforced directly against the assets of the estate, but would merely establish the validity of the asserted claims. These judgments would then have to be taken into the domiciliary state and enforced by the courts of that state *pro rata* with those of other creditors. Hence the distribution

20. *E.g.*, Clopton v. Booker, 27 Ark. 482 (1872) (suit asking for declaration that executrix was trustee of Arkansas land); Falke v. Terry, 32 Colo. 85, 75 Pac. 425 (1903) (wrongful removal of assets); Lake v. Hardee, 57 Ga. 459 (1877) (executor having assets in his possession repudiated the authority of his own state and took them out of its power), *but cf.* Hedenburgh v. Hedenburgh, 46 Conn. 30 (1878); Lewis v. McCabe, 6 Mo. App. 600 (1878) (recovery of assets fraudulently concealed); Holzer v. Thomas, 69 N.J. Eq. 515, 61 Atl. 154 (Ch. 1905) (assets brought into state and used to purchase real estate); Bergmann v. Lord, 194 N.Y. 70, 86 N.E. 828 (1909) (suit in equity against the executor to prevent a failure of justice); Johnson v. Wallis, 112 N.Y. 230, 19 N.E. 653 (1889) (executor sued upon contract made with him as executor).

21. Marcy v. Marcy, 32 Conn. 303 (1864) (assets collected in state); Holmes v. Camp, 219 N.Y. 359, 114 N.E. 841 (1916) (action to foreclose a lien); Stone v. Demarest, 67 App. Div. 549, 73 N.Y. Supp. 903 (1st Dep't 1902) (foreign executor of a deceased non-resident legatee joined as a necessary party in suit by legatee to obtain distribution of estate); Faulkner v. Reed, 229 S.W. 945 (Tex. Civ. App. 1921) (foreclosure of a judgment lien); Oney v. Ferguson, 41 W. Va. 568, 23 S.E. 710 (1895) (executor brought assets into the state); Dowdell's Case, 6 Co. 465, 77 Eng. Rep. 323 (K.B. 1695) (suitable to extent of assets collected abroad and not accounted for). *Cf.* Lawrence v. Nelson, 143 U.S. 215 (1892) (Supreme Court refrained upon a bill of review from upsetting a judgment upon a counterclaim against a foreign representative after he had brought suit under an enabling statute); Carpenter v. Strange, 141 U.S. 87 (1891) (where same person was domiciliary and ancillary executor, judgment against him at the domicile held conclusive against him in the ancillary jurisdiction); Noonan v. Bradley, 12 Wall. 121 (U.S. 1870) (foreign executor admitted as defendant-appellee upon motion).


23. *See* note 3 supra.

24. Yonley v. Lavender, 21 Wall. 276 (U.S. 1874); Wilson v. Beard, 26 F.2d 850 (C.C.A. 2d 1928); White v. Croker, 13 F.2d 321 (C.C.A. 5th 1926). Where an administrator brings suit in a foreign state under a statute permitting him to sue (see, e.g., note 19 supra), a judgment rendered against him on a counterclaim is conclusive everywhere
of the estate would still be entirely under the control of the domiciliary court.

However, it is usually said in support of the traditional immunity that a judgment obtained against an administrator in a foreign jurisdiction cannot be proved in the state of administration as a claim against the decedent's estate. Accordingly, the doctrine has it that, since other states may disregard any judgment which purports to bind the administrator, such a judgment must be without jurisdiction and hence a violation of due process.

This conclusion assumes that the foreign administrator is not subject to the jurisdiction of the court and seems to beg the real question—can jurisdiction be validly obtained? It must be remembered, moreover, that the rule denying existence to administrators beyond the territorial limits of the appointing state was not in its inception a rule of constitutional law, but merely a conflict of laws rule. This rule did not rest upon the absence of jurisdiction, but arose out of the unwillingness of the courts of one state to recognize an administrator appointed in another. The due process necessary to support the acquisition of jurisdiction would appear to be no more than compliance with reasonable procedural safeguards, and the Supreme Court, in

and would be provable as a claim in the domiciliary state, thus "depriving" the estate of possible assets. Lackner v. McKechney, 252 Fed. 403 (C.C.A. 7th 1918); Palm's Adm'r's v. Howard, 31 Ky. Law 316, 102 S.W. 267 (1907); Hamilton v. Taylor, 13 Ohio Dec. 975 (Cin. Super. Ct. 1873).

25. Even where an administrator has appeared as party defendant in a suit in a foreign state, the majority rule is that such appearance is not sufficient to confer jurisdiction upon the forum court, and any judgment rendered would not be provable in the domiciliary state. Burrowes v. Goodman, 50 F.2d 92 (C.C.A. 2d 1931); Hargrave v. Turner Lumber Co., 194 La. 285, 193 So. 648 (1940); In re Thompson's Estate, 339 Mo. 410, 97 S.W. 2d 93 (1936); Blodgett v. Orton, 14 Wash. 2d 270, 127 P.2d 671 (1942). But there is a substantial minority view. Babbitt v. Fidelity Trust Co., 70 N.J. Eq. 651, 63 Atl. 18 (Ch. 1906); Faulkner v. Reed, 229 S.W. 945 (Tex. Civ. App. 1921); see Chicago Life Insurance Co. v. Cherry, 244 U.S. 25, 29 (1916); Giampalo v. Taylor, 335 Pa. 121, 126, 6 A.2d 499, 502 (1939). As to an administrator's domiciliary liability for a judgment rendered on counterclaim against him when he sues in a foreign jurisdiction, see note 24 supra.

26. See note 10 supra. Recognition through comity of a decree not entitled to full faith and credit would not, however, appear a violation of due process. Gildersleeve v. Gildersleeve, 88 Conn. 689, 92 Atl. 684 (1914).

27. If jurisdiction is validly obtained, full faith and credit must be accorded the judgment of the court. Morris v. Jones, 329 U.S. 545 (1947); Milliken v. Meyer, 311 U.S. 457 (1940); Fauntleroy v. Lummis, 210 U.S. 230 (1908). 1 Beale, A TREATISE ON THE CONFLICT OF LAWS § 43.3 (1935); RESTATEMENT, CONFLICT OF LAWS § 430 (1934).


29. Blackmer v. United States, 284 U.S. 421 (1932) (service of process upon an American citizen outside the country); Wuchter v. Pizzuti, 276 U.S. 13 (1928) (recital of reasonable safeguards under a non-resident motorist statute); State ex rel Cochran v. Lewis, 118 Fla. 536, 159 So. 792 (1935) (same); Hinton, Substituted Service on Non-Residents, 20 ILL. L. REV. 1, 8 (1925); Tapley, Jurisdiction and the Non-Resident Motorist, 13 ST. JOHN'S L. REV. 278 (1939); Comment, 34 YALE L. J. 886 (1925). Requirements of due process are fulfilled in the case of the non-resident motorist statutes by provi-
evaluating the due process aspects of state protective devices analogous to the territorially limited administrator, has put main emphasis on practical social expediency.\textsuperscript{30}

Although the court in the instant case had doctrinal backing for its generalization that suits against an administrator are thought to be \textit{in rem}, it is equally clear that the action to establish a claim against the estate of the decedent would, if the latter were still alive, be \textit{in personam}. The proceeding is not for the purpose of establishing a lien against the \textit{res}—the estate—, but is essentially an action upon a delictual claim, which is the ordinary example of an \textit{in personam} proceeding. One of the major effects of categorizing an action as \textit{in rem} is to attain the flexible jurisdiction necessary to the maintenance of certain types of actions.\textsuperscript{31} However, \textit{in rem} classification of the instant suit serves only to defeat jurisdiction which would otherwise attach. Permitting such classification to destroy substantive rights would seem overly to exalt conceptual distinctions.

Restriction of an administrator to the jurisdiction of his appointment no

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longer appears necessary for the orderly and efficient administration of dece-
dents' estates. Particularly is this true in the narrow terms of the instant
case where the even-handed enforcement of non-resident motorist statutes
would seem of greater moment than the outworn protective policy which
underlies common law territorial limitations on the administrator.\textsuperscript{32}

SUPERVISORY REVIEW OF DECISIONS GRANTING HABEAS CORPUS: APPELLATE ENCROACHMENT ON THE WRIT\textsuperscript{32}

The common-law rule forbidding appellate review of habeas corpus pro-
ceedings\textsuperscript{1} has not been prejudicial to the prisoner whose petition for release
is denied, since the denial is generally given no res judicata effect and the
prisoner can therefore renew his petition before any judge or court of com-
petent jurisdiction.\textsuperscript{2} But where the petition is granted and the prisoner dis-
charged, the rule makes conclusive the decision of the court of first instance.
The unilateral effect of the rule is defended on the ground that whereas an
occasional ill-considered decision may result in the erroneous release of a crim-
nal, to permit review of the writ's issuance would bar that swift liberation of
the wrongfully imprisoned which the writ of habeas corpus was designed to
ensure.\textsuperscript{3} Where the common-law refusal to review habeas corpus decisions

\textsuperscript{32} Compare the interesting statement by Justice Jackson during the course of an ad-
dress, reported in 45 Col. L. Rev. 1, 33-4 (1945): "[T]he Constitution has come to be
construed to permit a state to obtain jurisdiction in some of those classes of cases which
are appropriately tried in the place of the transaction despite the defendant's absence and
nonresidence."

(1924).

\begin{enumerate}
\item State \textit{ex rel} Johnson v. Broderick, District Judge, 27 N.W.2d 849 (N.D. 1947).
\item Cox \textit{v.} Hakes, 15 App. Cas. 506 (1890); Sec'y of State for Home Affairs \textit{v.}
O'Brien, 1923 A.C. 603. And see cases cited note \textit{6 infra}. See also 1 \textit{BAILEY, HABEAS
CORPUS} § 60 (1913); \textit{CHURCH, HABEAS CORPUS} § 386 (2d ed. 1893); \textit{HURD, HABEAS
CORPUS} 568-76 (2d ed. 1876); Notes, 14 Col. L. Rev. 77 (1914), 25 Harv. L. Rev. 409
(1912).
284 (1845). Furthermore, the prisoner may obtain the equivalent of appellate review by
presenting his petition to one of the appellate courts, most of which have original jurisdic-
tion in the field of habeas corpus. \textit{See, e.g., CALIF. CONST. ART. VI, § 4; N. D. CONST.
ART. IV, § 87; PA. CONST. ART. V, § 3. See also 2 \textit{SPELLING, INJUNCTIONS} § 1186 (2d ed.
1901). As to decisions involving the custody of an infant, see note \textit{15 infra}.}
\item This is generally advanced as the true basis for the common-law rule. \textit{See, e.g.,}
State \textit{v.} Towery, 143 Ala. 48, 39 So. 309 (1905); State \textit{v.} Kirkpatrick, 54 Iowa 373, 6
N.W. 588 (1880); \textit{Ex Parte} Williams, 149 N.C. 436, 63 S.E. 108 (1908); McFarland \textit{v.}
Johnson, 27 Tex. 105 (1863).
\end{enumerate}
has not been abrogated by express statutory authorization of appeals,\(^4\) courts have, with few exceptions,\(^5\) interpreted legislative silence as an approval of the common-law doctrine and have held that the general appeal statutes do not permit the state to appeal a prisoner's release.\(^6\) Nevertheless, in a number of such states\(^7\) appellate courts have adopted the practice of reviewing the issuance of the writ by invoking their general power of supervisory control over inferior courts\(^8\)—thus accomplishing indirectly what their previous appraisal of legislative intent precludes them from doing directly.

In the recent case of State ex rel. Johnson v. Broderick, District Judge,\(^9\) an 18 year old boy who had been committed to the state training school after pleading guilty to the theft of an automobile wheel, a pair of chains and a tire, petitioned a North Dakota district judge for issuance of a writ of habeas corpus, alleging substantial defects in pre-commitment proceedings. The district judge filed an opinion indicating his intention of ordering the boy's release; but, before the order was issued, the North Dakota Supreme Court, on the petition of the Attorney General, undertook to review the lower court's conclusions of law. Finding error, it issued a supervisory writ directing the district judge to remand the prisoner to custody.

In affirming its right to review the district judge's decision under its general supervisory power, the court in the Broderick case placed its decision on

\(^{4}\) See, e.g., ALA. Code, tit. 15, § 369 (1940) (appellate court must hear the appeal without delay); CALIF. PENAL CODE § 1505 (Deering, 1941); cf. REV. STAT. § 763 (1875), as amended, 28 U.S.C. § 463 (1940) (decision of a district or circuit judge may be appealed to circuit court of appeals, subject to review by the Supreme Court on certiorari). As to the prisoner's right to release pending appeal by the state, see Note, 48 HAW. L. REV. 513 (1935).

\(^{5}\) State v. Buckham, 29 Minn. 462, 13 N.W. 902 (1882); Doyle v. Commonwealth, 107 Pa. 20 (1894); Garfinkle v. Sullivan, 37 Wash. 650, 80 Pac. 188 (1905).

\(^{6}\) See, e.g., Weddington v. Sloan, 15 B. Mon. 147 (Ky. 1854); Bell v. State, 4 Gill 301 (Md. 1846); State v. Simmons, 112 Mo. App. 535, 87 S.W. 35 (1905); State v. Kenne, 24 Mont. 45, 60 Pac. 589 (1900); State v. Miller, 97 N.C. 451, 1 S.E. 776 (1887); Wisener v. Burrell, 28 Okla. 546, 118 Pac. 999 (1911); Ex Parte Brugnaux, 51 Wyo. 103, 63 P.2d 800 (1937).

\(^{7}\) See, e.g., State v. Williams, 97 Ark. 243, 133 S.W. 1017 (1911); State v. Hughes, 157 La. 652, 102 So. 824 (1925); State v. Wurdeman, 254 Mo. 561, 163 S.W. 849 (1914); State v. District Court, 50 Mont. 428, 147 Pac. 612 (1915); State v. District Court, 64 N.D. 399, 253 N.W. 744 (1934).

\(^{8}\) "The Supreme Court . . . shall have a general superintending control over all inferior courts under such regulations and limitations as may be prescribed by law." N. D. CONST. ART. IV, § 86. Similar provisions are to be found in the Constitutions of Alabama, Arkansas, Colorado, Iowa, Kentucky, Louisiana, Michigan, Missouri, Montana, New Mexico, North Carolina, Oklahoma, South Dakota, Wisconsin and Wyoming. A similar power, more narrowly limited, is sometimes conferred upon intermediate appellate courts. See, e.g., ARK. CONST. ART. VII, §§ 14; MO. CONST. ART. VI, §§ 12, 23; WIS. CONST. ART. VII, § 8. In the absence of constitutional provision, the power has been conferred by statute upon both supreme and intermediate appellate courts. See, e.g., KAN. GEN. STAT. § 20–301 (1935); MASS. ANN. LAWS, c. 211, § 3 (1932); N. H. REV. LAWS, c. 369, § 2 (1942).

\(^{9}\) 27 N.W.2d 849 (N.D. 1947).
the ground that no other form of review was possible. This rationale would seem to be more a statement of the problem than a solution, if the legislature may validly impose limits upon an appellate court's power to review and modify the decisions of lower courts. No other form of review was possible precisely because the same court had earlier interpreted the legislature's silence upon the subject as an indorsement of the common-law rule. Since all forms of review are equally undesirable in the eyes of the common law, it is difficult to see how any court could prohibit appeals, in deference to a legislative intent to preserve the common-law doctrine, and yet conclude that some other form of review would be permissible. Such a conclusion, which effectually repeals the common-law rule sanctioned by the legislature, would appear to be a usurpation of legislative functions.

In the Broderick case it seems improbable that the court could have felt the issuance of a supervisory writ was necessary to prevent "glaring injustice and irremediable injury," for, although it may be conceded that erroneous disposition of one in custody could lead to substantial social injury if not corrected, the facts of the instant case present no such situation. In

10. Id. at 859.
11. "It is hornbook law that an appellate court has only such authority and jurisdiction as is conferred upon it by statute." Higgins v. Fields, 150 Ore. 528, 534, 47 P.2d 235, 237 (1935). Although there is remarkably little discussion of the proposition, similar statements may be found in Worthington v. Morris, 212 Ala. 334, 102 So. 620 (1925); South Atlantic S. S. Co. v. Tustin, 139 Fla. 405, 190 So. 675 (1939); Collection Corp. v. Anami, 33 Haw. 911 (1936); In re Peterson's Estate, 22 N.D. 480, 134 N.W. 751 (1912); Ringstaff v. Metropolitan Life Ins. Co., 164 Va. 196, 179 S.E. 66 (1935); First Wisconsin Nat. Bank v. Carpenter, 218 Wis. 30, 259 N.W. 836 (1935). The constitutional provision defining the court's appellate jurisdiction may expressly subject it to legislative limitation. See, e.g., U.S. Const. Art. III, § 2; Colo. Const. Art. VI, § 2; N. D. Const. Art. IV, § 86.
13. This seems to have been recognized in an earlier North Dakota case, in which the court stated: "... [T]his court cannot hold that it was ever intended by the legislature to make the law governing appeals applicable to a habeas corpus case; and, before we should hold that an order of discharge could be reviewed in any manner, some statute must be pointed out authorizing such a review in terms." Carruth v. Taylor, 8 N.D. 166, 172, 77 N.W. 617, 620 (1898).
14. It is frequently held that a court may exercise its supervisory powers to prevent "glaring injustice and irremediable injury" when review by appeal or writ of error is impossible. Litteral v. Woods, 223 Ky. 582, 4 S.W.2d 395 (1928) (loss of small money judgment not enough); State v. District Court, 50 Mont. 428, 147 Pac. 612 (1915) (erroneous release of incompetent from custody of guardian sufficient); Pickus v. Perry, 59 S.D. 350, 239 N.W. 839 (1931) (erroneous refusal to quash indictment not enough); State v. Helms, 136 Wis. 432, 118 N.W. 158 (1908) (erroneous dismissal of criminal complaint not enough "in view of the nature of the offense, and the facility with which future prosecution may be maintained"). Cf. State v. Wurdeman, 254 Mo. 561, 163 S.W. 849 (1914); State ex rel. Red River Brick Corp. v. District Court, 24 N.D. 28, 138 N.W. 988 (1912). Notably when the proceedings test the custody of an infant, rather than of a prisoner. Res judicata effect has been given to habeas corpus litigation over infants, thus precluding successive petitions by the disappointed parent. In re Sneden, 105 Mich. 61, 62 N.W. 1009
any event, possible danger to the community was clearly remediable, and in a manner apparently intended by the legislature, through the reinstitution of criminal proceedings against the released prisoner. On the other hand, if the court was primarily concerned with correcting the district judge’s erroneous interpretation of the law, this could have been accomplished in an opinion pointing out the district judge’s errors, but denying the supervisory writ on the ground that it was unavailable for review of habeas corpus proceedings.\footnote{17}

\footnote{17} (1895); State v. Bechdel, 37 Minn. 360, 34 N.W. 334 (1887); Knapp v. Tolan, 26 N.D. 23, 142 N.W. 915 (1913). And the distinction has been held material in deciding whether the decision of the lower court may be reviewed. McKercher v. Green, 13 Colo. App. 270, 58 Pac. 406 (1899); State v. Miller, 97 N.C. 451, 1 S.E. 776 (1887) (statute permitted appeal in habeas corpus only where the issue was custody of a child); Tate v. Tate, 163 La. 1047, 113 So. 370 (1927). See also \textit{Church, Habeas Corpus} § 387 (2nd ed. 1893); 2 \textit{Freeman, Judgments} § 827 (5th ed. 1925).

16. "No person who has been discharged by the order of the court upon habeas corpus can be imprisoned again or kept in custody for the same cause, except in the following cases:

1. If he has been discharged from custody on a criminal charge and is committed afterwards for the same offense, by legal order or process;

2. If, after a discharge for defect of proof, or for any defect of the process, warrant, or commitment in a criminal action, the accused is arrested again on sufficient proof and committed by legal process for the same offense.

\ldots"


17. This is precisely the course which the same court followed in an earlier case, State \textit{ex rel. Shafer} v. District Court, 49 N.D. 1127, 194 N.W. 745 (1923). Carefully pointing out that the trial court erred, as a matter of law, in dismissing a criminal indictment, the court nevertheless refused to issue a supervisory writ on the ground that the legislature clearly intended the institution of new proceedings to be the only remedy: "Whether or not, under a Constitution such as ours, this court must in all circumstances when applications are made appealing to its power of superintending control, exercise an independent judgment entirely apart from the judgment which has been expressed by the Legislature, may well be open to serious question." \textit{Id.} at 1136, 194 N.W. at 749.

The views expressed in the \textit{Shafer} case seem to have been repudiated, by implication, in the subsequent case of Goodman v. Christensen, 71 N.D. 306, 309 N.W. 460 (1941). The court there admitted that "[i]t was evidently the intention of the legislature to make the decision of the district judge final as to those matters which he was required to determine under the provisions of Chapter 269 [relating to appeals from decisions of county assessment boards] \ldots" but held that "this court is not deprived of superintending control." \textit{Id.} at 310, 309 N.W. at 462.