

NOTES

JUDICIAL REVIEW OF AWARDS BY THE RAILROAD ADJUSTMENT BOARD*

THE railroad industry has been the laboratory for several attempts by Congress¹ to provide an expedient system for the adjustment of labor disputes arising out of the interpretation of collective bargaining contracts. The strong, highly developed trade unions and the national railroad systems provide the framework for a machinery of self-regulation whereby these contract grievances can be solved by the industry independently of the judicial process. The present National Railroad Adjustment Board² has operated to remove such disputes so completely from the surveillance of the courts that railroad interests now demand that additional techniques of judicial review be superimposed upon the procedure of the Adjustment Board.³

The statutory procedure encompassing the Railroad Adjustment Board sets up a hierarchy of negotiation between the unions and the carriers to facilitate the settlement of controversies. The Railway Labor Act requires that both parties attempt at the outset to compromise all grievances by direct negotiation.⁴ If this private negotiation proves unsuccessful, the controversies

* *Washington Terminal Co. v. Boswell*, 124 F. (2d) 235 (App. D. C. 1941).

1. The singular success of the bi-partisan adjustment boards in operation during the period of federal control of the railroads, 1918-1920, inspired the subsequent adjustment machinery of the Transportation Act of 1920, 41 STAT. 470 (1920), and the Railway Labor Act of 1926, 44 STAT. 578 (1926), 45 U. S. C. § 153 (1940). The Railway Labor Act as amended in 1934, 48 STAT. 1185, 45 U. S. C. § 151 (1940) (hereafter cited by section number only) is an example of legislative eclecticism, for it interweaves techniques of adjustment, arbitration and mediation into a workable system of labor relations. Labor relations during the war are detailed in HINES, *WAR HISTORY OF AMERICAN RAILROADS* (1928) 152-91; WOLF, *THE RAILROAD LABOR BOARD* (1927) 47-57. The weaknesses of post-war legislation are summarized in Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency* (1937) 46 *YALE L. J.* 567-76; SPENCER, *THE NATIONAL RAILROAD ADJUSTMENT BOARD* (1938) 2-16; Comment (1935) 29 *ILL. L. REV.* 789.

2. The National Railroad Adjustment Board was created by the 1934 amendments to the Railway Labor Act of 1926. No attempt will be made here to examine the provisions of the Act dealing with the National Mediation Board, the arbitration scheme or the emergency boards. It must be emphasized, however, that jurisdiction of the Adjustment Board is limited to controversies over the application and interpretation of collective labor agreements, while the National Mediation Board handles disputes involving wages or changes in agreements. There is, of course, a twilight zone between the interpretation of existing rules of an agreement and the formulation of additional rules. See SPENCER, *op. cit. supra* note 1, at 30.

3. The position of the carriers was presented to the Attorney General's Committee on Administrative Procedure by Mr. John Dickinson, General Solicitor, Pennsylvania Railroad. See Transcript of Proceedings, June 26, 1940, pp. 3-81.

4. Disputes cannot be submitted to the Adjustment Board until they have been "handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes." RAILWAY LABOR ACT, § 3, First (i).

may be submitted by either or both disputants to the proper division of the Board.⁵ The three major divisions of the bi-partisan Adjustment Board consist of five representatives of the railroads and five representatives of the brotherhoods. In the event of an even vote an impartial referee may be appointed to resolve the deadlock.⁶ The Adjustment Board is given no power to enforce an award and, if losing carriers refuse to comply voluntarily with its terms, a special judicial procedure permits employees to bring enforcement suits within a two year period. Since the statute specifies that the findings of the Board shall be merely *prima facie* evidence,⁷ the enforcement suit amounts to a trial *de novo*.

But an employees' enforcement suit is the only method of obtaining judicial review of awards by the Board. Evidently Congress recognized that the ability to enforce an award is inherent in the power of management, for the statute provides no method by which winning carriers can judicially enforce awards against employees. Furthermore, the statute affords no opportunity for either losing carriers or losing employees to institute a judicial suit to review the awards of the Adjustment Board. As a result, Board awards are seldom subject to court scrutiny.⁸ For, rather than pursuing judicial remedies to enforce awards, the railway brotherhoods almost always prefer to secure carrier compliance by resorting to economic strength—the threat to strike. If a strike should occur, public opinion ordinarily would support the decision of the Adjustment Board. Losing carriers have there-

5. The Adjustment Board is composed of four divisions, each of which is bi-partisan and operates independently of the others. The jurisdiction of a division is limited to a special class of employees; Division I: train engineers, firemen, conductors and yard employees; Division II: skilled craft and shop workers; Division III: clerical and maintenance employees; Division IV: employees of water carriers. During the period 1934-1937, 5,364 claims were submitted to Division I, 216 to Division II, 671 to Division III and 14 to Division IV. SPENCER, *op. cit. supra* note 1, at 49. In 1940, Division I was three years behind in its calendar. See FINAL REPORT OF ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE (1941) 188.

6. The Act specifies that upon a deadlock, the division shall select a neutral person as referee. If a referee is not selected within ten days, either party or any member of the division may certify that fact to the Mediation Board, which must then select a referee. § 3, First (1).

7. In addition the statute attempts to minimize the practical burdens of litigation by granting employees a choice of venue, exemption from payment of costs, and the recovery of attorneys' fees if the action is successful. § 3, First (p).

8. Diligent inquiry of reported cases has discovered only six statutory enforcement suits. *Estes v. Union Terminal Co.*, 89 F. (2d) 768 (C. C. A. 5th, 1937) (award enforced since affected employees had actual notice of submission); *System Federation No. 59 v. Louisiana & A. Ry. Co.*, 119 F. (2d) 509 (C. C. A. 5th, 1941), *cert. denied*, 62 Sup. Ct. 108 (U. S. 1941) (dismissal of suit for lack of Board's jurisdiction because dispute not pending when Act passed); *Cook v. Des Moines Union Ry. Co.*, 16 F. Supp. 810 (S. D. Iowa 1936) (award enforced); *Smith v. Texas & New Orleans R. R. Co.*, 32 F. Supp. 1013 (W. D. La. 1940) (suit dismissed because claim compromised between union and carrier after Board award but before Board order of compliance); *Thomas v. Texas & New Orleans R. R. Co.*, 118 F. (2d) 75 (C. C. A. 5th, 1941) (suit dismissed on same ground); *Atlantic Coast Line v. Pope*, 119 F. (2d) 39 (C. C. A. 4th, 1941) (award set aside as claim had lapsed under a system board appeal limitation).

fore been forced to accept the awards as final. The railroads have made strategic attempts to escape this impasse by seeking independent judicial determination of the validity of the awards of the Board.

Recently, in *Washington Terminal Company v. Boswell*,⁹ a carrier attempted to secure a declaratory judgment of its rights under a labor contract after an unfavorable award by the Railroad Adjustment Board. Claiming the right to perform special terminal switchwork, previously handled by train crews of tenant lines, certain employees and the labor unions,¹⁰ after unsuccessful private conference, submitted the controversy to the Adjustment Board. After a preliminary deadlock of the Board, the appointment of a referee resulted in an award for the employees. Before the statutory two year enforcement period had lapsed,¹¹ the losing carrier brought an independent declaratory judgment suit in the District Court for the District of Columbia.¹² The Court of Appeals, with one judge dissenting,¹³ sustained the dismissal of the complaint by the District Court. The nature of the case presented the necessary elements for declaratory relief;¹⁴ but since the granting of a declaratory judgment is a matter of judicial discretion, the court held that to allow such a suit would cripple the operation of the special statutory adjustment system.¹⁵

The relation of judicial remedies and judicial review to the statutory procedure of the Railroad Adjustment Board depends in large part upon the determination of whether a claimant in a contract dispute has an initial option to pursue his claim, either through the adjustment machinery or by direct suit on the contract. If the jurisdiction of the Board is wholly voluntary, then it may be said that by submitting the dispute to the Adjustment

9. *Washington Terminal Co. v. Boswell*, 124 F. (2d) 235 (App. D. C. 1941).

10. Because the Adjustment Board refuses to accept jurisdiction over submissions of individuals, claims of employees must be carried to the Board by the railway brotherhoods. For example, in *McDermott v. New York Central R. R.*, 32 F. Supp. 873 (S. D. N. Y. 1940), an employee brought a direct judicial action only after the Order of Railroad Telegraphers had refused to back his claim and after the Adjustment Board had rejected his individual submission.

11. The court in the principal case posed but did not decide the question of whether a losing carrier could bring a suit for declaratory judgment after the expiration of the two year enforcement period. It seems clear that after two years the employees' right of action under an Adjustment Board award vanishes, and that such a suit by a carrier should be dismissed as an academic controversy.

12. The Washington Terminal Company sought both an adjudication of rights under the original labor contract and a declaration that the Board award was void. Since the effect of either theory of the suit would be to nullify the award, the court treated the declaratory judgment action as essentially a suit to review the award of the Adjustment Board. 124 F. (2d) 235, 239 (App. D. C. 1941).

13. Stressing the informality of the Board's procedure, dissenting Judge Stephens stated that since the adjustment system was not an exclusive remedy allowance of the declaratory judgment suit would not interfere with a "special statutory method" of enforcement.

14. See BORCHARD, *DECLARATORY JUDGMENTS* (2d ed. 1941) 25-56.

15. A declaratory judgment should not be granted if it would interfere with a special statutory remedy intended by the legislature to be exclusive. See BORCHARD, *DECLARATORY JUDGMENTS* (2d ed. 1941) 342.

Board the claimant had waived his right to judicial remedies.¹⁶ But if it were compulsory to exhaust the statutory adjustment remedy before resorting to litigation, the traditional concepts of administrative law would probably require that the losing party before the Board be assured judicial review to satisfy the mandate of due process.¹⁷ After the principal case had been argued, the Supreme Court held in *Moore v. Illinois Central Railroad*¹⁸ that the jurisdiction of the Railroad Adjustment Board was merely a voluntary alternative to direct suit on the labor contract. Thus, when a dispute arises each party has the choice between the judicial process and the adjustment system.¹⁹ The unique procedure of the Board and the contractual nature of the dispute suggest that Congress intended the Board's jurisdiction to be alternative.²⁰ Such an interpretation does not hamper the operation of the Act, for the delay and expense of litigation will preclude formal trial of a large percentage of the thousands of disputes now handled by adjustment.

When one party, exercising the original option of jurisdiction, submits a controversy to the Adjustment Board, it is not settled whether the other party is bound by the choice, or whether courts will allow the non-submitting party to circumvent the jurisdiction of the Board by instituting a judicial action. Since the statute provides that either or both disputants may submit a dispute to the Board,²¹ it would seem that single submissions are

16. See *Baltimore & Ohio R. R. v. Brady*, 288 U. S. 448 (1933); *Brady v. ICC*, 43 F. (2d) 847 (N. D. W. Va. 1930), *aff'd*, 283 U. S. 804 (1931) (election of remedy under Interstate Commerce Act).

17. See *Anniston Manufacturing Co. v. Davis*, 301 U. S. 337, 345 (1937). Courts recognize the advisability of leaving the determination and regulation of intricate economic problems to administrative agencies specified by the legislatures. Depending upon the nature of the statutory provision, courts treat the jurisdiction of administrative bodies as "exclusive," thus making the administrative remedy compulsory, or as one of "prior resort," requiring an exhaustion of the administrative remedy before resort to the courts. The third category, "alternative" jurisdiction, does not require the petitioner to undertake administrative proceedings as a condition precedent to direct court action. For a valuable discussion of the jurisdictional relation of courts and administrative bodies, see Comment (1938) 51 HARV. L. REV. 1251.

18. 312 U. S. 630 (1941). The same result was reached earlier in *Evans v. Louisville & Nashville R. R.*, 191 Ga. 395, 12 S. E. (2d) 611 (1940), (1941) 39 MICH. L. REV. 1408. In *Adams v. New York, Chicago & St. Louis R. R.*, 121 F. (2d) 803 (C. C. A. 7th, 1941), the original opinion holding the jurisdiction of the Adjustment Board to be exclusive was withdrawn and revised after the decision in *Moore v. Illinois Central Railroad*.

19. If the adjustment proceeding were held to be exclusive, some judicial review would seem necessary to safeguard the interests of non-union employees. At present it is the practice of the Adjustment Board to deadlock and thus deny its jurisdiction to claims not sponsored by the railway brotherhoods.

20. Traditionally claims based on contract rights may be presented in court despite an administrative remedy. *Barone v. Aetna Life Insurance Co.*, 260 N. Y. 410, 183 N. E. 900 (1933); *Chicago City Ry. v. Chicago & W. I. R. R.*, 331 Ill. 151, 162 N. E. 852 (1928). For further discussion see Comment (1938) 51 HARV. L. REV. 1251, 1257.

21. Section 3, First (i). Although either party may submit the dispute to the Board, there has been only one instance of carrier submission. *Monograph of Attorney General's Committee on Administrative Procedure*, Pt. 4, SEN. DOC. NO. 10, 77th Cong., 1st Sess. (1941) 11.

sufficient to invoke the Board's jurisdiction. The grant of judicial relief to a non-submitting party who objects to the adjustment proceeding would thus produce the confusion and expense which result from concurrent litigation of the same issues in separate tribunals.²² It is clear, however, that if both parties join the submission of a contract dispute to the Board, or if the non-submitting party appears and participates in the proceeding, neither party should be allowed to resort to the courts during the course of negotiations. Under this theory, the employer in the *Washington Terminal* case was committed to the statutory process at least until the Board made its award. But the central issue of the *Washington Terminal* case was the right of the party who appeared before the Adjustment Board and lost the award to secure judicial review independently of the statutory enforcement suit.

Undoubtedly the draftsmen of the Act intended by means of the enforcement suit to assure judicial review of those controversial awards with which the carriers did not voluntarily comply. But the refusal of labor to utilize the enforcement procedure,²³ however unfortunate, does not necessarily justify the creation of additional opportunities for judicial review. Since losing parties are granted no means of instituting judicial review, the employee enforcement suits²⁴ could be regarded as the equivalent of management's power to enforce without judicial aid. If awards are enforced by employees through strike threats, employers are merely required, as employees always have been under the Railway Labor Act, to accept unfavorable awards of the Adjustment Board as final. But if added protection by judicial review were necessary, comprehensive statutory amendment, rather than judicial initiative, should supply the relief. Allowance of an independent suit for a declaratory judgment would induce a race to the courts after an award had been made—employees seeking the advantages of enforcement suits, and the employer seeking the procedure of an independent action. Furthermore, parties would be less inclined to compromise and adjust their differences

22. On the other hand, if the Adjustment Board decided not to exercise jurisdiction over a dispute unless both parties agreed to the submission, the adjustment machinery would be kept wholly voluntary. Such a holding would not materially limit the Board's jurisdiction, for at present if either party is anxious to avoid the Adjustment Board, they can take the jurisdictional initiative and choose the desired forum.

23. See *supra* note 8. For an analysis of labor's distrust of the courts, see Rice, *Collective Labor Agreements in American Law* (1931) 44 HARV. L. REV. 572.

24. The provisions for the enforcement of the Adjustment Board awards are not unique in administrative law. Compare enforcement suit provisions under the Interstate Commerce Act, 34 STAT. 590 (1906) as amended by 36 STAT. 554 (1910) and 41 STAT. 491 (1920), 49 U. S. C. § 16 (1), (2) (1940); the Federal Trade Commission Act, 38 STAT. 722 (1914), 15 U. S. C. §§ 49, 50 (1940); the Packers and Stockyards Act, 42 STAT. 168 (1921), 7 U. S. C. § 222 (1940). Courts have refused to set aside rulings of the Federal Trade Commission on the ground that such orders have no legal effect until enforcement proceedings are instituted by the Commission. *FTC v. Claire Furnace Co.*, 274 U. S. 160 (1927); *FTC v. Maynard Coal Co.*, 22 F. (2d) 873 (App. D. C. 1927). In *Cook v. Des Moines Union Ry. Co.*, 16 F. Supp. 810, 813 (S. D. Iowa 1936), the same reasoning was applied to awards of the Railroad Adjustment Board. The analogy of these cases as precedent for the Adjustment Board awards, however, is imperfect since the threat to strike provides an extra-legal technique of enforcement.

in early negotiation if a subsequent, full-dress judicial proceeding were available to the party who lost before the Board.

The voluntary nature of proceedings before the Adjustment Board provides a machinery comparable to a well-developed system of industrial arbitration.²⁵ The steady growth of commercial and industrial arbitration stems from a realization that technical contract disputes can best be handled by designated non-judicial tribunals familiar with practices and problems of the industry and able to act speedily at minimum expense. The same considerations are paramount in railway labor contract disputes. Arbitration awards are accorded the same legal effect as a court judgment if the hearing and decision of the arbitrators conform to provisions of the arbitration agreement.²⁶ Arbitral proceedings are subject to procedural and jurisdictional attack, but the decisions are enforceable by courts without review of the merits of the decision.²⁷ In this respect the courts have already indicated that awards of the Railroad Adjustment Board may be collaterally attacked for lack of jurisdiction²⁸ or for lack of proper notice to interested parties.²⁹ By analogy to arbitration law, it may be argued that parties voluntarily invoking the jurisdiction of the Adjustment Board waive their right to judicial review of the merits of awards.

Since the procedure of the Railroad Adjustment Board is more informal than that specified by arbitration laws, it would seem advisable to formalize the Board's internal procedure in order to safeguard awards from possible judicial attack.³⁰ The Adjustment Board has developed unique rules of procedure governing the nature of submissions, the conduct of hearings, and the methods of proof. Submission of disputes is not characterized by traditional responsive pleadings.³¹ Instead controversies are referred to the

25. See Kellor, *Coordinate Mediation and Arbitration in Labor Relations* (1941) 5 ARB. J. 239.

26. The United States Arbitration Act, 43 STAT. 885, 9 U. S. C. § 9 (1940), specifies that if the agreement provides for judicial enforcement courts must grant upon the petition of any party an order confirming the award unless the award is vacated, modified or corrected as prescribed in the Act.

27. *Everett v. Brown*, 120 Misc. 349, 193 N. Y. Supp. 462 (1923). For a discussion of the grounds upon which an arbitration award may be attacked, see KELLOR, *ARBITRATION IN ACTION* (1941) 167-77. The United States Arbitration Act, 43 STAT. 885, 9 U. S. C. §§ 10, 11 (1940), allows the vacation of awards chiefly upon grounds of fraud, mistake or misconduct of the arbitrators.

28. *Stephenson v. New Orleans & N. E. R. R. Co.*, 180 Miss. 147, 177 So. 509 (1937). *Contra*: *Railroad Yardmasters v. Pittsburgh & L. E. R. R. Co.*, 39 F. Supp. 876 (N. D. Ohio 1940).

29. *Nord v. Griffin*, 86 F. (2d) 481 (C. C. A. 7th, 1936), *cert. denied*, 300 U. S. 673 (1937); *Brand v. Pennsylvania R. R.*, 1 Prentice-Hall 1941 Labor Serv. ¶4033 (E. D. Pa. 1939); *Estes v. Union Terminal Co.*, 89 F. (2d) 768 (C. C. A. 5th, 1937).

30. Since the standards of administrative procedure required by due process have not been clearly defined by the courts, arbitration procedure provides a useful norm. As long as arbitration remains a voluntary remedy, probably any procedure specified in the arbitration agreement which insures a "fair" hearing will be upheld. See STURGES, *COMMERCIAL ARBITRATION* (1930) 422-519 *passim*.

31. *Monograph of Attorney General's Committee on Administrative Procedure*, Pt. 4, SEN. DOC. NO. 10, 77th Cong., 1st Sess. (1941) 12. In arbitration law the written

Board as joint submissions³² or as ex parte submissions, in which both parties present arguments and facts simultaneously without knowledge of the position of the other party. Such pleadings fail to narrow the issues, and in the Board's First Division, which limits the proof to allegations contained in the submissions, often result in unfairness.³³ At hearings before the Board both parties present oral arguments, which are followed by a cross examination of the parties by Board members. Hearings are conducted informally, the present theory being that adequate presentation of facts and issues is assured by the bi-partisan structure of the Board. The major difference between arbitration and Adjustment Board procedure lies in the presentation of evidence. Although courts have upheld arbitration awards based on hearsay evidence,³⁴ the use of witnesses and depositions characterizes the majority of arbitral proceedings.³⁵ Nearly all the awards of the Railway Adjustment Board are based on hearsay evidence presented by the parties without benefit of cross-examination of witnesses.³⁶ Actually, however, few disputes involve pivotal factual issues, and both labor and carrier representatives approve the present, simple method of eliciting the facts.³⁷

Substantial reform of the Board's procedure will probably have to await Congressional action, for its bi-partisan membership prevents the Adjustment Board from achieving effective rules of practice. On certain basic procedural issues the representatives of labor and the carriers are in sharp disagreement, the resulting deadlocks leaving these questions undecided. For example, the various divisions of the Board consistently deadlock over the issue of granting jurisdiction to claims asserted by individuals.³⁸ Since impartial referees are only appointed to resolve deadlocks over the merits of disputes,³⁹ claims not sponsored by the railway brotherhoods are uniformly rejected. In addition, deadlocks have prevented a determination of whether notice should be given to non-submitting employees affected by a seniority dispute. In three instances of collateral attack upon seniority awards, courts

agreement to arbitrate an existing controversy is termed a submission. The required content and form of the submission varies according to the controlling statute. Generally the submission includes statements of the various claims in issue and the remedy sought. See KELLOR, *ARBITRATION IN ACTION* (1941) 58-66.

32. Joint submissions include submissions in which the parties stipulate the facts and specific issues and those in which the parties state their differences in a single document.

33. See Transcript of Hearing before the Attorney General's Committee on Administrative Procedure, June 26, 1940, p. 30.

34. See *Dana v. Dana*, 260 Mass. 460, 157 N. E. 623 (1927); *Koepke v. Liethen Grain Co.*, 205 Wis. 75, 236 N. W. 544 (1931).

35. See KELLOR, *ARBITRATION IN ACTION* (1941) 101.

36. See *Monograph of Attorney General's Committee on Administrative Procedure*, Pt. 4, SEN. DOC. NO. 10, 77th Cong., 1st Sess. (1941) 13.

37. See *id.* at 14.

38. See *id.* at 7.

39. The National Mediation Board was recently advised by the Attorney General that it could appoint a referee to resolve jurisdictional deadlocks of the Adjustment Board, although the question did not concern the merits of a dispute. 39 ORS. ATT'Y. GEN., No. 113, Feb. 19, 1940.

have declared that such an award made without adequate notice to interested parties is unenforceable. An order was issued in two of the cases⁴⁰ enjoining enforcement while in the third case⁴¹ the court enforced the award on the ground that the objecting party had actual notice of the pending dispute. Although the Adjustment Board has ignored these judicial decisions, continued nullification of seniority awards may force the adoption of some reasonable method of notification. Substitution of a non-partisan tribunal for the present Adjustment Board would go far toward solving many of the current procedural problems. But, as the success of the adjustment system depends upon the willingness of the parties to invoke the jurisdiction of the Board and accept its decisions, a non-partisan board would be useless until actively supported by both the railroads and labor.

As other industries emerge from the transitional stage of union organization and recognition, the National Railroad Adjustment Board may provide an effective model upon which to base stable, mature systems of labor relations. Moreover, the exigencies of production in a wartime economy accentuate the importance of available techniques of labor negotiation and mediation⁴² as a useful means of avoiding the waste and delay of labor strikes. The present Railroad Adjustment Board, however imperfect in detail, has proved remarkably successful in preventing interruptions of railroad transportation due to labor disputes. Reforms in its structure and procedure should emanate from Congress and not from the courts.

40. *Nord v. Griffin*, 86 F. (2d) 481 (C. C. A. 7th, 1936), *cert. denied*, 300 U. S. 673 (1937); *Brand v. Pennsylvania R. R.*, 1 Prentice-Hall 1941 Labor Serv. ¶ 4033 (E. D. Pa. 1939).

41. *Estes v. Union Terminal Co.*, 89 F. (2d) 768 (C. C. A. 5th, 1937). In a concurring opinion Judge Hutcheson stated that notice to affected employees was not necessary since "neither the employee favored, nor those disfavored, by the carrier, have individual legal rights which they can press against the carrier as rights personal to themselves, apart from the collective agreement under which they work." *Id.* at 774.

42. The procedures for settling wartime labor disputes under the National War Labor Board, recently established by executive order, are similar to those of the Railway Labor Act. Parties are directed to utilize at the outset direct negotiation or existing systems of adjustment. If the dispute remains unsettled after negotiation and conciliation, the War Labor Board is empowered to determine finally the merits of the dispute. It should be noted that the War Labor Board does not supersede the Railroad Adjustment Board but merely operates as a body of last resort after the machinery set up by the Railway Labor Act has failed to settle the controversy. See *N. Y. Times*, Jan. 13, 1942, p. 14, col. 4.

ALLOCATION OF RISK BETWEEN MARINE AND WAR INSURER*

THE outbreak of war presents the troublesome problem of determining whether a particular marine loss should be borne by the marine or by the war insurer. Although originally both types of risks were covered by the same policy, it early became customary to except from the marine policy any liability for war risks by warranting the insurance policy "free of capture and seizure and all consequences of hostilities and warlike operations."¹ In time of war, the shipowner must protect himself against war risks either by having the immunity clause deleted, or by insuring against them in a separate policy. But when two separate policies, issued by different underwriters, are employed to cover the shipowner an issue often arises as to whether a marine loss is a "consequence of warlike operations" and therefore excluded from the marine coverage.²

In a recent English case, *Yorkshire Dale Steamship Company v. Minister of War Transport*,³ the steamship *Coxwald* was engaged in the admittedly "warlike operation" of carrying oil from one war base to another. No lights were being used for fear of attack, and visibility was limited. Although she had been following the course prescribed by the commodore of the convoy, an unexplained and undetected tidal set carried the ship several miles off her course, and she grounded on a reef. The English Court of Appeals, rejecting a lower court contention that a vessel engaged in a warlike operation and damaged by sea perils must necessarily be deemed to have been injured as a consequence of the warlike operation,⁴ held that the "proximate cause" of

**Yorkshire Dale S. S. Co. v. Minister of War Transport*, 3 All E. R. 214 (C. A. 1941).

1. Ancient forms of marine insurance policies in Britain enumerate among maritime risks many perils of war. See I MAGENS, AN ESSAY ON INSURANCES. The British have usually adhered to the old form of marine policy, introduced at an early date and adopted by statute, 35 GEO. III, c. 63 (1795). The Marine Insurance Act, 1906, 6 EDW. VII, c. 41, § 3, classified perils of war, together with perils of the sea, as maritime risks. But in 1898, Lloyd's policy was modified to exclude: "capture, seizure, and detention, and the consequences thereof or of any attempt thereat, piracy excepted, and also from the consequences of hostilities or warlike operations, whether before or after declaration of war." This is known as the F. C. & S. clause. For the legal effect of this clause see (1920) 65 SOL. J. 40, 41.

2. Loss by collision, fire, and stranding are prima facie marine perils. The shipowner, having proved a loss by one of these perils, is brought prima facie within the policy, and the burden of bringing himself within one of the exceptions to the policy lies on the marine underwriter. See *Attorney General v. Adelaide S. S. Co.*, [1923] A. C. 292, 305; *Britain S. S. Co. v. The King*, [1921] 1 A. C. 99, 119. A difficult problem arises when a ship leaves port and is never heard of again. Although in time of war, as in time of peace, there is a presumption of loss by a marine peril, and the burden of proof is on the marine underwriter to show that loss was due to a war risk excluded by the warranty, the presumption is not a very strong one, and individual losses have been decided on the merits of the particular case. The courts have been quick to impose the loss upon the war insurer in time of war. For cases, see 29 ENGLISH & EMPIRE DIGEST 227, Nos. 1841-1846.

3. 3 All E. R. 214 (C. A. 1941).

4. *Id.* at 220.

the loss was the tidal set. Since this upheaval of the sea was completely dis-associated from the war, the loss was placed upon the marine underwriter.

This decision virtually overrules the British holdings of the first World War. It had been repeatedly said that, to allow recovery on a war risk policy, the accident must have been "proximately caused" by a warlike operation.⁵ Despite such statements, however, the primary consideration of the courts in practice had been to determine merely whether any of the vessels involved was engaged in a warlike operation.⁶ The existence of a warlike operation having been established, it was assumed that the damage occurring in the course of that operation was proximately caused by it.⁷ In those cases where causation was more fully considered, the proximate cause of the injury was said to be the "impact" of the vessel moving in the course of its operation,⁸ whether commercial or warlike, or the operation itself,⁹ of which the impact constituted an integral part. Absence of lights owing to war, which prevented vessels from sighting each other in time to avert collision, was said to be merely one of the conditions under which the operation was carried out.¹⁰ Negligence on the part of those operating the ships, though not so directly traceable to any surrounding war conditions, was treated in the same man-

5. See concurring opinion of Lord Sumner in *Britain S. S. Co. v. The King, Green v. British India Steam Navigation Co., British India Steam Navigation Co. v. Liverpool & London War Risks Ins. Ass'n*, [1921] 1 A. C. 99, 127; see also dissent of Viscount Cave, *id.* at 107.

6. Compare *Commonwealth Shipping Representative v. Peninsular and Oriental Branch Service*, [1923] A. C. 191; *Charente S. S. Co. v. Director of Transports*, 33 T. L. R. 434 (C. A. 1922).

7. The result was sometimes stated in the form of a syllogism: "Patrolling for submarines is a warlike operation. The *Tartar* was engaged in patrolling. In the course of that operation, and while engaged in it, she ran into the *Ardgantock*. The collision is therefore the consequence of the warlike operation." *Attorney General v. Ard Coasters; Liverpool and London War Risks Ins. Ass'n v. Marine Underwriters of S. S. Richard de Larrinaga*, [1921] 2 A. C. 141, 152; *cf.* *Attorney General v. Adelaide S. S. Co.*, [1923] A. C. 292; *Commonwealth Shipping Representative v. Peninsular and Oriental Branch Service*, [1923] A. C. 191.

8. *Attorney General v. Adelaide S. S. Co.*, [1923] A. C. 292; see Lord Sumner, concurring, *id.* at 301. "Whether the navigating officer keeps his course when he should have given way, or gives way when he should have kept his course, what proximately causes the damage is the forcible impact of the two vessels." *Cf.* *Attorney General v. Ard Coasters*, [1921] 2 A. C. 141, 147.

9. *Attorney General v. Ard Coasters*, [1921] 2 A. C. 141. See particularly Lord Finlay, concurring, *id.* at 147; *Britain S. S. Co. v. The King*, [1921] 1 A. C. 99.

10. See *Attorney General v. Ard Coasters*, [1921] 2 A. C. 141, 153; *Britain S. S. Co. v. The King*, [1921] 1 A. C. 99, 115; *cf.* *Le Quellec et Fils v. Thomson*, 86 L. J. K. B. 712 (1916). *Contra:* *British and Foreign S. S. Co. v. The King*, [1918] 2 K. B. 879 (C. A.). In *Ionides v. Universal Marine Insurance Co.*, 14 C. B. N. S. 259 (1863), the argument was advanced that the removal of lights merely reduced the perils of the sea to normal, and afforded no basis of recovery on a war risk policy. This line of reasoning is obviously fallacious in view of the fact that marine insurance rates were based on the continued presence of such lights as existed in 1860, and not upon pre-historic conditions.

ner.¹¹ Thus, if both vessels, or in the case of stranding, the grounded vessel,¹² was engaged in a technically commercial voyage, the extinguishment of lights was considered only a condition which increased the risk of loss by a marine peril, and it remained a marine risk.¹³ On the other hand, if the ship or ships were engaged in a warlike operation, the loss caused by the impact was held to be the consequence of that operation.¹⁴ On the basis of this reasoning, discovery of a warlike operation was equivalent to imposition of the risk upon the war insurer.¹⁵

Inasmuch as the definition of "warlike operations" largely controlled the result of the cases, the major conflict centered around determination of the reference of that term. It was said that acting as a convoy escort was a warlike operation,¹⁶ but travelling in convoy was not.¹⁷ A warship travelling to a station where it was to undertake a warlike operation was already so engaged while en route,¹⁸ but a cargo vessel sailing to its station to undertake a warlike operation was not.¹⁹ A vessel carrying war supplies between two war bases was engaged in a warlike operation,²⁰ but one carrying essen-

11. See Lord Shaw, concurring in *Attorney General v. Adelaide S. S. Co.*, [1923] A. C. 292, 300: "The conduct may have been faulty, but it was a warlike operation although faultily conducted. Faulty navigation on the part of one ship or the other, is, of course, the determining factor of responsibility as between the two ships, but, in my opinion, it is not a legitimate factor for the other purpose which is here attempted—namely, of converting a war risk into a sea risk." But see *Owners of S. S. Larchgrove v. The King*, 36 T. L. R. 108, 109 (K. B. 1919).

12. Apparently stranding and collision cases are to be treated alike. *Yorkshire Dale S. S. Co. v. Minister of War Transport*, 2 All E. R. 776, 781 (K. B. 1941), *rev'd on other grounds*, 3 All E. R. 214 (C. A. 1941).

13. *Attorney General v. Ard Coasters*, [1921] 2 A. C. 141; *Britain S. S. Co. v. The King*, [1921] 1 A. C. 99; *Atlantic Transport Co. v. Director of Transports*, 38 T. L. R. 160 (K. B. 1921). *Contra*: *British & Foreign S. S. Co. v. The King*, [1918] 2 K. B. 879 (C. A.).

14. *Attorney General v. Adelaide S. S. Co.*, [1923] A. C. 292; *Attorney General v. Ard Coasters*, [1921] 2 A. C. 141; *Charente S. S. Co. v. Director of Transports*, 38 T. L. R. 434 (C. A. 1922); *Atlantic Transport Co. v. Director of Transports*, 38 T. L. R. 160 (K. B. 1921).

15. The courts have talked of the possibility of the existence of an "intervening" cause which would break this chain, but this has apparently been restricted to wilful acts, or acts of God. See *Attorney General v. Adelaide S. S. Co.*, [1923] A. C. 292, 301; *cf. Moor Line v. King*, 36 T. L. R. 799 (K. B. 1920); *Henry and MacGregor v. Marten*, 34 T. L. R. 504 (K. B. 1918).

16. *Attorney General v. Ard Coasters*, [1921] 2 A. C. 141, 151.

17. *Britain S. S. Co. v. The King*, [1921] 1 A. C. 99; *Queen Ins. Co. v. Globe and Rutgers Fire Ins. Co.*, 263 U. S. 487 (1924).

18. *Attorney General v. Ard Coasters*, [1921] 2 A. C. 141.

19. *J. Wharton v. Mortleman*, 2 All E. R. 261 (C. A. 1941). But if a merchant ship sights what it believes to be an enemy submarine, and deliberately rams it, the act is a warlike operation, and any damage caused by the impact falls upon the war insurer. *Henry and MacGregor v. Marten*, 34 T. L. R. 504 (K. B. 1918).

20. *Commonwealth Shipping Representative v. Peninsular and Oriental Branch Service*, [1923] A. C. 191 (ambulance wagons and other government stores from Mudros to Alexandria); *Atlantic Transport Co. v. Director of Transports*, 38 T. L. R. 160 (K. B. 1921) (to Salonika with horses for the army). It is not quite clear whether

tial raw materials was not.²¹ Distinctions were also based upon the percentage of war materials in the cargo;²² and courts even considered as a determinative factor the question of whether identical supplies, consigned to the same port, were destined for the military or civil commissariat.²³ That these theoretical definitions were not necessarily within the contemplation of the parties in framing the various insurance policies apparently received only passing attention.

Relegation of the absence of lights and of travelling in convoy to the status of conditions under which the operation took place, together with arbitrary and unrealistic determinations of the reference of "warlike operations," has led to distinctions in the allocation of loss which cannot be justified. If a merchant ship in convoy collides with another vessel in the convoy, the loss falls either upon the marine or the war underwriter depending upon the entirely fortuitous circumstances of the cargoes of the ships, their destinations, or, perhaps, their ports of departure. When a merchant ship operating under Admiralty instructions runs aground because it is carrying no lights, if it is carrying a cargo of raw materials, however necessary for the war effort, the loss falls upon the marine underwriters;²⁴ but if the grounded vessel is a warship, or is carrying war supplies between war bases, the loss falls upon the war risk underwriters.²⁵ This result is reached though neither the character of the goods in the hold nor the port of destination affects in any way the navigation of the vessel or the immediate danger of collision to which it is exposed.

Despite these incongruities, if the cases afford a basis for prediction upon which underwriters have relied in setting their rates, it might be thought that any departure from these rationales would lead to a distortion of the contract of the parties. But those rules which have been laid down have so often been criticized in dicta,²⁶ followed only after expressions of doubt,²⁷

the journey must be between two war bases, or whether transportation to a war base for war purposes is sufficient. Compare *Owners of S. S. Larchgrove v. The King*, 36 T. L. R. 108 (K. B. 1919) (munitions to Marseilles destined for the American army, held not a warlike operation), with *Clan Line Steamers v. Board of Trade*, [1929] A. C. 514 (war supplies to a war base, held a warlike operation).

21. *Britain S. S. Co. v. The King*, [1921] 1 A. C. 99.

22. *Clan Line Steamers v. Board of Trade*, [1928] 2 K. B. 557, 571 (C. A.), *aff'd*, [1929] A. C. 514; see *Commonwealth Shipping Representative v. Peninsular and Oriental Branch Service*, [1923] A. C. 191, 210; *Queen Ins. Co. v. Globe & Rutgers Fire Ins. Co.*, 263 U. S. 487, 491 (1924).

23. See *Clan Line Steamers v. Board of Trade*, [1928] 2 K. B. 557, 571 (C. A.), *aff'd*, [1929] A. C. 514, 520.

24. See cases cited *supra* note 20.

25. *Attorney General v. Adelaide S. S. Co.*, [1923] A. C. 292; *Commonwealth Shipping Representative v. Peninsular and Oriental Branch Service*, [1923] A. C. 191; *Attorney General v. Ard Coasters*, [1921] 2 A. C. 141.

26. See opinion of Lord Wrenbury in *Britain S. S. Co. v. The King*, [1921] 1 A. C. 99, 134; *cf.* *Viscount Finlay in Commonwealth Shipping Representative v. Peninsular and Oriental Branch Service*, [1923] A. C. 191, 205.

27. See *Commonwealth Shipping Representative v. Peninsular and Oriental Branch Service*, [1923] A. C. 191, 208; *Clan Line Steamers v. Board of Trade*, [1928] 2 K. B. 557, 568 (C. A.), *aff'd*, [1929] A. C. 514; *Hain S. S. Co. v. Board of Trade*, [1923]

or evaded by artificial distinction,²⁸ that it has become extremely difficult for the contracting parties to predict, in any given fact situation, what the courts will decide.²⁹ It was early held, for instance, that although the navigation of a vessel engaged in a warlike operation had been negligent, a merchant vessel in a collision with it was damaged as a proximate consequence of the warlike operation.³⁰ The negligence was explained away as merely a condition of the conduct of the operation, and not the proximate cause of the loss. On the same theory, when both ships were negligent, the loss was held to be due to the warlike operation.³¹ This reasoning would logically lead to a similar result where only the operators of the merchant ship are at fault; the "proximate cause" of the damage would be the impact of a war vessel upon a merchantman, and the negligence of the merchant ship a mere operational condition. Nevertheless, it has been repeatedly suggested that in any such situation an opposite holding would be reached.³² Moreover, in some cases, perplexing distinctions have been made to depend upon whether the negligence of the vessel engaged in a warlike operation has consisted of acts of omission or of commission. In the former case the loss is attributed to the warlike operation, while in the latter the negligence has been held sometimes to constitute an intervening factor shifting the loss to the marine underwriter.³³ To add to the confusion, the courts have upon occasion rejected the rationale that the impact or operation was the proximate cause of the loss.³⁴ Furthermore, in addition to refusing to make a definitive interpretation of the term "warlike operation,"³⁵ courts have often differed among themselves as to whether a particular activity comes within its meaning.³⁶

2 K. B. 534, 554 (C. A.), *aff'd*, [1929] A. C. 534; *Atlantic Transport Co. v. Director of Transports*, 38 T. L. R. 160 (K. B. 1921).

28. Compare *Inui Gomei Kaisha v. Attalico*, Lloyd's List, July 20, 1918, Feb. 10, 1919, with *Attorney General v. Adelaide S. S. Co.*, [1923] A. C. 292. Compare *Charente S. S. Co. v. Director of Transports*, 38 T. L. R. 434 (C. A. 1922) with *Commonwealth Shipping Representative v. Peninsular and Oriental Branch Service*, [1923] A. C. 191.

29. See *Harrisons v. Shipping Controller*, [1921] 1 K. B. 122, 137; *cf. Yorkshire Dale S. S. Co. v. Minister of War Transport*, 2 All E. R. 776, 781 (K. B. 1941), *rev'd*, 3 All E. R. 214 (C. A. 1941).

30. *Attorney General v. Adelaide S. S. Co.*, [1923] A. C. 292.

31. *Board of Trade v. Hain S. S. Co.*, [1929] A. C. 534. The court maintained that inasmuch as the war insurer would have been liable had the sole cause of loss been the steaming of the war vessel into the merchant ship, he remains liable although the negligence of the merchantman contributed to the accident.

32. See *Attorney General v. Adelaide S. S. Co.*, [1923] A. C. 292, 304-05; *Charente S. S. Co. v. Director of Transports*, 38 T. L. R. 434, 435 (K. B. 1922); *Trinder, Anderson and Co. v. Thames and Mersey Marine Ins. Co.*, [1898] 2 Q. B. 114.

33. *Inui Gomei Kaisha v. Attalico*, Lloyd's List, July 20, 1918, Feb. 10, 1919. See *Attorney General v. Adelaide S. S. Co.*, [1923] A. C. 292, 302.

34. *Clan Line Steamers v. Board of Trade*, [1929] A. C. 514.

35. See *Commonwealth Shipping Representative v. Peninsular and Oriental Branch Service*, [1923] A. C. 191, 198-99. For the difficulty in defining the term, see MacCardie, J., in *Harrisons v. Shipping Controller*, [1921] 1 K. B. 122, 130.

36. Compare *Owners of S. S. Larchgrove v. The King*, 36 T. L. R. 108 (K. B. 1916) with *Clan Line Steamers v. Board of Trade*, [1929] A. C. 514. Compare *Attorney Gen-*

Confronted by these conflicting authorities and unsatisfactory standards, the court in the principal case refused to relegate the tidal set to the status of a condition under which the warlike operation was conducted. On the contrary, the Court of Appeal adopted the position that the tidal set was in fact the "real proximate cause" of the accident and the war service merely a *causa sine qua non*.³⁷ The tidal set, it was reasoned, would have carried the Coxwold on to the Damsel Rocks whatever her cargo or destination,³⁸ and therefore the risk was placed upon the marine insurer.

While the decision represents an advance in freeing the law of the unexpressed premise that the war risk insurer is liable *ipso facto* for all accidents to ships in what might, for any technical reason, be denominated war service, use of the "common sense" or "real" proximate cause to fix the locus of risk appears to be of very limited benefit. Such a doctrine might possibly serve to isolate negligence cases,³⁹ but will hardly determine the burden of loss where the accident results from the dousing of lights or the crowding of vessels in convoy because of fear of attack.⁴⁰ A solution to some of the more common problems, it is true, has been provided by the generally accepted rule that the marine underwriter is liable for losses resulting from collisions between, or the stranding of, merchant vessels caused by convoy conditions or absence of lights.⁴¹ The marine insurers have expressly recognized the imposition of such liability and have specifically provided against it in their rates.⁴² All possibilities, however, are not and cannot hope to be so fully covered.

eral v. Ard Coasters, [1921] 2 A. C. 141, 152, with *J. Wharton v. Mortleman*, 2 All E. R. 261 (C. A. 1941). Compare *Harrisons v. Shipping Controller*, [1921] 1 K. B. 122, with *Commonwealth Shipping Representative v. Peninsular and Oriental Branch Service*, [1923] A. C. 191.

37. *Yorkshire Dale S. S. Co. v. Minister of War Transport*, 3 All E. R. 214, 222 (C. A. 1941).

38. But would the accident have occurred had not the ship been running with dim lights, subject to convoy conditions, at an established speed and on a set course?

39. In such cases, at least, the doctrine of proximate cause has been developed to coincide with the reasonable foreseeableness of an act.

40. A nice problem may arise, for example, when a vessel is successively the victim of an enemy attack and of the fury of the seas. If it was shown that the hostile act so weakened the vessel that she was unable to withstand the subsequent storm, the war risk insurer alone has been held liable. See Comment (1919) 33 HARV. L. REV. 706, 707, n. 7.

41. Compare *Britain S. S. Co. v. The King*, [1921] 1 A. C. 99; *Harrisons v. Shipping Controller*, [1921] 1 K. B. 122; *Queen Ins. Co. v. Globe and Rutgers Fire Ins. Co.*, 263 U. S. 487 (1924).

42. Marine insurers in the United States have added a special wartime surcharge because of increased navigation perils due to the war. Communication to the YALE LAW JOURNAL from H. W. Farnum, Ass't Sec'y, North American Companies, Oct. 10, 1941. In America, at least, premiums on marine insurance were not raised to compensate for additional risks during the last war. See *Queen Ins. Co. v. Globe & Rutgers Fire Ins. Co.*, 263 U. S. 487, 492 (1924). Marine Insurance rates in England did go up, but it is doubtful if this was in reflection of fear of imposition of this risk in view of increases in risk due to other factors. See FAYLE, *THE WAR AND THE SHIPPING INDUSTRY* (1927) 287.

Until the full risks to be borne by each insurer are spelled out and described in detail in the contracts, it will not be of much use to talk "proximate cause." The basic issue to be decided by judge or jury—what would the parties to the contract have intended if they had foreseen the particular eventuality—can be better settled by direct consideration of that problem than by the use of a tautological device of such ambiguity as the concept of the proximate cause of the accident. It is to be hoped that the American courts⁴³ will chart their course during the war without the aid of the shibboleths of "war service," or "condition" as contradistinguished from "cause," or even the notion that in any complex series of events there is any particular cause which can be singled out as the one upon which alone to predicate liability.

FEDERAL COURT REVIEW OF STATE REGULATION OF BUSINESS—THE ROWAN & NICHOLS CASES*

FUNDAMENTAL to the maintenance of the Union in our dual system of government is the check over state regulation of business exercised by the Supreme Court of the United States.¹ In restraining states in this use of their powers, the Court has relied primarily upon the commerce clause² and the due process clause of the Fourteenth Amendment to the Constitution.³

43. The American courts have dealt with few cases on the point, and are thus happily free of the arbitrary precedents of the older British cases. The leading United States case, *Queen Ins. Co. v. Globe & Rutgers Fire Ins. Co.*, 263 U. S. 487 (1924), followed the contemporary English rulings, partly in order to achieve conformity with them. Now that the English courts have reversed their position in the principal case, the *Queen Insurance Company* case may be overruled in this country.

* *Railroad Commission of Texas v. Rowan & Nichols Oil Co.*, 310 U. S. 573 (1940), amended, 311 U. S. 614 (1940); *id.*, 311 U. S. 570 (1941). See Comment, *Proration of Petroleum Production* (1942) 51 YALE L. J. 608.

1. "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several states." HOLMES, COLLECTED LEGAL PAPERS (1920) 295-96.

2. U. S. CONST. Art. 1, § 8(3). The commerce clause was first utilized to restrict state action in *Gibbons v. Ogden*, 9 Wheat. 1 (U. S. 1824).

3. U. S. CONST. AMEND. XIV, § 1. The concept seems to have originated in *Mugler v. Kansas*, 123 U. S. 623 (1887), even though the state statute there involved was sustained. See Brown, *Due Process of Law, Police Power, and the Supreme Court* (1927) 40 HARV. L. REV. 943, 946-47. Some commentators trace the idea to *Chicago, Milwaukee & St. Paul Ry. v. Minnesota*, 134 U. S. 418 (1890). See Hough, *Due Process of Law—Today* (1919) 32 HARV. L. REV. 218, 228. For an historical treatment of due process, see MOTT, *DUE PROCESS OF LAW* (1926). See also HAINES, *THE REVIVAL OF NATURAL LAW CONCEPTS* (1930) 143 *et seq.* For a discussion of the two clauses and other possible checks on the states, see Moses, *The Constitutional, Legislative, and Judicial Growth of Oil and Gas Conservation Statutes* (1941) 13 MISS. L. J. 353, 363.

While both clauses have been used to limit the legislative and administrative provinces of the states in the regulation of business, the boundaries thus established have varied according to which provision was applied, and which justices were speaking for the Court. In an inquiry based on the commerce clause, the Supreme Court has formulated the issue in terms of the effect of the state regulation upon the national interest in controlling commerce.⁴ Where the due process doctrine has been applied by the Court, emphasis has centered about protecting individual rights of liberty and property from state interference.⁵ While these doctrines are not in all cases available as alternative bases for decision and while they do show conspicuous differences of focus, they have been closely linked in the interplay of constitutional dogma.

Opposition to the application of the due process clause or the commerce clause in invalidating state legislation has been expressed on several grounds. Some jurists and legal commentators have opposed widespread use of due process on the ground that its precepts have been extended so far that the states have been denied sufficient leeway for experiment.⁶ Some urged that due process should embody only procedural safeguards and should not permit review of state declarations of business policy.⁷ And others, solicitous of states rights, have been reluctant to strike down state legislation because it interferes with national commerce—an interference which has grown more likely as a result of cases which vastly broadened the federal commerce power.⁸ While it is not yet clear how the present Supreme Court of the United States will utilize these two constitutional clauses to restrain state action, and though the future status of the due process doctrine is especially dubious, there are some foreshadowings of the line that the Court will ultimately take.⁹

Apparently the due process clause will be zealously employed to control procedure in criminal cases, and to protect basic civil liberties of individuals and, perhaps, corporations as well.¹⁰ And as regards the chief fighting

4. See *South Carolina State Highway Dep't v. Barnwell Bros.*, 303 U. S. 177, 185-86 (1938); *Baldwin v. Seelig*, 294 U. S. 511, 523 (1935).

5. See *Brown*, *supra* note 3, at 966; CORWIN, *THE TWILIGHT OF THE SUPREME COURT* (1934) 52 *et seq.*

6. Outstanding exponents were Justices Holmes and Brandeis. See Frankfurter, *Mr. Justice Brandeis and the Constitution* (1931) 45 HARV. L. REV. 33, 44; Frankfurter, *Mr. Justice Holmes and the Constitution* (1927) 41 HARV. L. REV. 121, 144-45. But their individual applications of the view did not always coincide. See *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393 (1922).

7. Mr. Justice Holmes approached this idea at times. See his dissents in *Tyson & Brother v. Banton*, 273 U. S. 418, 445 (1927), and *Lochner v. New York*, 198 U. S. 45, 74 (1905). For typical discussion see Maurer, *Due Process and the Supreme Court* (1934) 22 GEO. L. J. 710.

8. See Humes, *Trend of Decisions Respecting the Power of Congress to Regulate Interstate Commerce* (1940) 26 A. B. A. J. 846.

9. See JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* (1941) 48-57; FRANKFURTER AND LANDIS, *THE BUSINESS OF THE SUPREME COURT* (1928) 300.

10. Criminal procedure: *e.g.*, *Lisenba v. California*, 62 Sup. Ct. 280 (U. S. 1941); *Chambers v. Florida*, 309 U. S. 227 (1940). Civil liberties: see, *e.g.*, *Bridges v. California*; *Times-Mirror Co. v. Superior Court of California*, 62 Sup. Ct. 190 (U. S. 1941).

issue of the Supreme Court of preceding years, the due process clause as a ground for invalidating state regulation of business, some inferences may be drawn from the two recent cases of *Railroad Commission of Texas v. Rowan & Nichols Oil Company*.¹¹ In both these cases, the Commission appealed from lower federal court decrees enjoining its oil proration orders.¹² The lower courts had held that the regulations confiscated the company's property and deprived it of leasehold rights to oil in place without due process of law. The invalidation of both proration orders was, however, reversed by the Supreme Court of the United States. Since the record was actually reviewed and the action of the Railroad Commission found to be reasonable and fair,¹³ it could be argued that no real change in the due process technique has been effected by the *Rowan & Nichols* cases. Yet the language used by the Court in its opinion and the disposition made in this and other cases on remittitur¹⁴ suggest that a substantial mutation in the due process approach has appeared—a change extending far beyond the *Rowan & Nichols* cases themselves.

The immediate effect of the decisions is to broaden the scope of the state police power in the regulation of oil production. After weighing the desirability of state legislation against the nature and extent of private rights affected by it,¹⁵ federal courts have previously annulled statutes in a variety of fields.¹⁶ In former proration cases, for example, certain property rights of oil and gas lessees have been accorded judicial protection.¹⁷ The Supreme Court of the United States has asserted the invalidity of proration orders

But cf. *Edwards v. California*, 314 U. S. 160 (1941). See Hamilton and Braden, *The Special Competence of the Supreme Court* (1941) 50 YALE L. J. 1319, 1349 *et seq.*

11. *Railroad Commission of Texas v. Rowan & Nichols Oil Co.*, 310 U. S. 573 (1940), *amended*, 311 U. S. 614 (1940); *id.*, 311 U. S. 570 (1941) (hereafter cited by volume and page).

12. The first order, formulated in 1938, was enjoined by the District Court for the Western District of Texas. *Rowan & Nichols Oil Co. v. Railroad Commission of Texas*, 28 F. Supp. 131 (W. D. Tex. 1939). The Fifth Circuit Court of Appeals affirmed with modification. *Railroad Commission of Texas v. Rowan & Nichols Oil Co.*, 107 F. (2d) 70 (C. C. A. 5th, 1939). Because of that injunction, the Commission had to formulate a new order, which was in turn enjoined by a three-judge district court prior to the first Supreme Court opinion. *Rowan & Nichols Oil Co. v. Railroad Commission of Texas*, 35 F. Supp. 573 (W. D. Tex. 1940).

13. "A flat per well allowance to these producers was not an unnatural answer to the problem." 310 U. S. 573, 583.

14. See *Patterson v. Stanolind Oil & Gas Co.*, 305 U. S. 376 (1939).

15. See note 5 *supra*. Each case is said to be decided on its own facts [see *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U. S. 365, 387 (1926); *Noble State Bank v. Haskell*, 219 U. S. 104, 112 (1911)] and great weight is presumably attached to legislative judgment [see *Gitlow v. New York*, 268 U. S. 652, 668 (1925); *Williams v. Arkansas*, 217 U. S. 79, 88 (1910)].

16. *Louis K. Liggett Co. v. Baldridge*, 278 U. S. 105 (1928); *Meyer v. Nebraska*, 262 U. S. 390 (1923); *Coppage v. Kansas*, 236 U. S. 1 (1915).

17. *Thompson v. Consolidated Gas Utilities Corp.*, 300 U. S. 55 (1937); *People's Petroleum Producers, Inc. v. Sterling*, 60 F. (2d) 1041 (E. D. Tex. 1932); *People's Petroleum Producers, Inc. v. Smith*, 1 F. Supp. 361 (E. D. Tex. 1932). See *Sterling v. Constantin*, 287 U. S. 378, 396 (1932).

which bore no reasonable relation to prevention of waste or protection of the supposed correlative rights of owners in the common reservoir, or orders which were found to be arbitrary or unreasonable in any other respect.¹⁸ Under various guises this general doctrine has been followed in the federal courts.¹⁹ The reasoning has been that, in spite of the virtually universal common law "rule of capture" which permits ownership of only so much of the mineral as is reduced to possession, oil and gas lessees have a rather vaguely defined claim to the mineral in place under their leases even before reduction to possession. Yet in the *Rowan & Nichols* cases the state police power was allowed to override this previously-erected claim by a postulation that the Railroad Commission was acting for the welfare of the people as a whole and should be granted the power to subordinate private interests to that larger purpose.²⁰ The Court mentioned the "rule of capture" as a case law doctrine giving rise to the orders²¹ and noted that, in the view of the Commission's experts, complainants actually benefited from the challenged regulations.²² But the lack of emphasis placed on these arguments indicates judicial willingness to permit the broadest possible operation of the police power of the state — an attitude certainly consistent with other recent cases.²³

The *Rowan & Nichols* cases go further: the bold conception of due process they advance is applied directly to the freedom of administrative bodies to formulate policy. In dealing with confiscation claims such as those involved here, reviewing courts, under the constitutional facts doctrine, have not been bound to accept the administrative fact findings as conclusive.²⁴ While the Supreme Court of the United States said that it would attach great weight to administrative findings in cases of that type,²⁵ a trial de novo seemed the only certain way to satisfy the constitutional facts doctrine.²⁶ Despite the Court's designation of this technique for review of constitutional facts, lower federal courts have treated them in a variety of ways. Some have

18. *Thompson v. Consolidated Gas Utilities Corp.*, 300 U. S. 55 (1937).

19. *Canadian River Gas Co. v. Terrell*, 4 F. Supp. 222 (W. D. Tex. 1933); *People's Petroleum Producers, Inc. v. Sterling*, 60 F. (2d) 1041 (E. D. Tex. 1932); *People's Petroleum Producers, Inc. v. Smith*, 1 F. Supp. 361 (E. D. Tex. 1932). See Summers, *Does the Regulation of Oil Production Require the Denial of Due Process and the Equal Protection of the Laws?* (1940) 19 TEX. L. REV. 1, 19-20.

20. See 310 U. S. 573, 579; 311 U. S. 570, 577.

21. See 310 U. S. 573, 579.

22. See 310 U. S. 573, 581.

23. See *South Carolina State Highway Dep't v. Barnwell Bros.*, 303 U. S. 177, 190-91 (1938). For discussion of this tendency in relation to proration, see Moses, *The Constitutional, Legislative, and Judicial Growth of Oil and Gas Conservation Statutes* (1941) 13 MISS. L. J. 353.

24. *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38 (1936); *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U. S. 287 (1920). A related doctrine is that of jurisdictional facts. See *Crowell v. Benson*, 285 U. S. 22 (1932). But cf. *South Chicago Coal & Dock Co. v. Bassett*, 309 U. S. 251 (1940).

25. See *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 53 (1936).

26. See FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE (1941) 87.

simply studied the record to determine whether substantial evidence supports the statute.²⁷ Other tribunals, after stating that orders grounded upon substantial evidence should be upheld, have proceeded to decide many of the fact questions involved.²⁸ And the complete trial de novo rule set forth by the Supreme Court has, of course, also been followed.²⁹

Yet in the *Rowan & Nichols* cases the Court signified its reluctance to undertake any review of the judgment of the state administrative body in choosing the enforcement policy actually before the courts. This unwillingness may be explained by reference to the factors which generally account for dissimilar types of judicial review of administrative action.³⁰ Complex fact situations may delimit that review; the *Rowan & Nichols* cases involve the technical, scientific field of proration which is not readily comprehended by nonexperts.³¹ Moreover, the Texas Railroad Commission especially has been hampered by persistent judicial invalidation of its orders.³² And the Court evinced, by frequent references to the expertness of the Commission, a faith in the responsibility of that particular agency.³³ Although the Supreme Court did not expressly discard the constitutional facts doctrine, it did disregard it in the *Rowan & Nichols* cases.³⁴ When these cases are coupled with the steady criticism levelled at the doctrine of constitutional facts,³⁵ they would seem to indicate judicial dissatisfaction with it and probably

27. *Clymore Production Co. v. Thompson*, 11 F. Supp. 791 (W. D. Tex. 1935); *Danciger Oil & Refining Co. of Texas v. Smith*, 4 F. Supp. 236 (N. D. Tex. 1933). To add to the confusion, the Supreme Court itself has apparently followed this doctrine. See *Pacific States Box & Basket Co. v. White*, 296 U. S. 176 (1935).

28. *Amazon Petroleum Corp. v. Railroad Commission of Texas*, 5 F. Supp. 633 (E. D. Tex. 1934); *MacMillan v. Railroad Commission of Texas*, 51 F. (2d) 400 (W. D. Tex. 1931).

29. *National Fertilizer Ass'n v. Bradley*, 18 F. Supp. 263 (W. D. S. C. 1936), *aff'd*, 301 U. S. 178 (1937); *Canadian River Gas Co. v. Terrell*, 4 F. Supp. 222 (W. D. Tex. 1933).

30. See FINAL REPORT OF ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE (1941) 75-76, 91; Landis, *Administrative Policies and the Courts* (1938) 47 YALE L. J. 519, 534-35.

31. "The accommodation of conflicting private interests in the East Texas oil field, with due regard to the public welfare, is beset with perplexities, both geological and economic." 311 U. S. 570, 574.

32. See 310 U. S. 573, 580; Davis, *Judicial Emasculation of Administrative Action and Oil Proration: Another View* (1940) 19 TEX. L. REV. 29, 39-44.

33. ". . . it is clear that the Due Process Clause does not require the feel of the expert to be supplanted by an independent view of judges on the conflicting testimony and prophesies and impressions of expert witnesses." 311 U. S. 570, 576. For criticism of this reliance of the Court on the agency's expertness, see Summers, *The Rowan & Nichols Cases* (1941) 13 MISS. L. J. 417, 422-23.

34. In both cases the lower courts tried facts and law de novo. See 310 U. S. 573, 584 (Roberts, J., dissenting); 311 U. S. 570, 576. But *cf.* Summers, *supra* note 19, at 9-10, 24-26.

35. See the opinions of Brandeis, J., concurring in *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 73 (1936), and dissenting in *Crowell v. Benson*, 285 U. S. 22, 65 (1932).

augur specific rejection in the near future.³⁶ Since the Court did no more than review the administrative record, thus following the ordinary procedure for examining administrative decisions,³⁷ the substantial evidence rule commonly used in such situations may be expected to supplant the constitutional facts precept.³⁸

It may well be that the Court's expressed disapproval of the lower courts' inquiries into reasonableness—the very core of any due process case—in the *Rowan & Nichols* cases³⁹ also foreshadows absolute renunciation of the due process clause in relation to state regulation of business. Although the Court might be said to have reviewed the record in order to determine the rationality of the challenged regulations, its examination was cursory at best.⁴⁰ Other parts of the opinions, particularly the amendment to the earlier one,⁴¹ reinforce the view that the majority intends to remove the question of the arbitrary character of substantive state action from the jurisdiction given to the federal courts by the Fourteenth Amendment.⁴² Further support for this position is derived from the emphasis placed upon the fact that all the procedural requirements were satisfied.⁴³ The view that the Supreme Court is limiting due process to procedure and the protection of civil liberties⁴⁴ confirms the indication in the *Rowan & Nichols* cases that the clause has been abandoned as a check on state regulation of business. The rejection of due process in the area of the jurisdiction of states to tax⁴⁵ and the reiteration of the maxim that the polls, not the courts, are the proper media for the preservation of substantive interests⁴⁶ further evince such a trend.

But the abdication of the position that the Fourteenth Amendment furnishes a basis for reviewing substantive state action does not mean that the balance is to be tipped entirely in the states' favor. The Holmesian fear of abandonment of federal control stemmed from apprehension of the resultant effects on national commerce rather than upon concern for protecting individual

36. The jurisdictional facts tenet, although not applicable to the *Rowan & Nichols* cases, is so related to the constitutional facts theorem that, seemingly, they must stand or fall together.

37. See FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE (1941) 87.

38. See *id.* at 88-90; Summers, *supra* note 19, at 8-9. For an evaluation of this procedure see Hardwicke, *Oil Conservation: Statutes, Administration, and Court Review* (1941) 13 MISS. L. J. 381, 409-14.

39. See 310 U. S. 573, 581-82; 311 U. S. 570, 575-76.

40. See Summers, *supra* note 33, at 419-20.

41. See *Sun Oil Co. v. Burford*, 124 F. (2d) 467 (C. C. A. 5th, 1941).

42. See comment on the Court's abdication of its duties in dissenting opinion of Roberts, J., 310 U. S. 573, 584.

43. See 310 U. S. 573, 584; 311 U. S. 570, 572.

44. See DODD, CASES ON CONSTITUTIONAL LAW, CUM. SUPP. (1940) 179; Hamilton and Braden, *loc. cit. supra* note 10.

45. *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435 (1940), (1941) 50 YALE L. J. 900.

46. See Black, J., dissenting in *McCart v. Indianapolis Water Co.*, 302 U. S. 419, 428 (1938). The best-known expression of the doctrine is embodied in *Munn v. Illinois*, 94 U. S. 113, 134 (1877).

rights.⁴⁷ But the commerce clause remains as a potentially significant judicial check on state action in the former sphere. And that clause must now play an even more important role than it has in the past if the proper balance between states and nation is to be achieved.⁴⁸

A substantial opposition to such a use of the commerce clause has already crystallized in the Supreme Court of the United States.⁴⁹ If it is to win acceptance, the commerce clause must prove its ability to effect practical adjustment between state and national interests.⁵⁰ Such factors as the desirability of uniform regulation, the local concern, the competitive disadvantage to interstate commerce, and the possibility that the national economy will be Balkanized by state tariffs and other trade barriers must all be weighed in determining the validity of each state enactment.⁵¹ In the *Rowan & Nichols* cases, for example, it would be vital to begin analysis with the fact that the Texas system of proration is part of a national scheme of production control, designed to limit production to "reasonable consumptive demand," and operated through state proration laws, interstate compacts and estimates of consumption made by the Federal Bureau of Mines.⁵² Thus interstate producers may be burdened by multiple regulation,⁵³ and out-of-state consumers may be affected by state price-fixing schemes without being able to complain about them.⁵⁴ Against these considerations would stand the state's alleged interest in conserving its natural resources and the supposed impracticability

47. "For one in my place sees how often a local policy prevails with those who are not trained to national views and how often action is taken that embodies what the Commerce Clause was meant to end." HOLMES, *loc. cit. supra* note 1.

48. See address by Mr. Justice Stone, *Fifty Years' Work of the United States Supreme Court* (1928) 14 A. B. A. J. 428, 430. For development of the commerce clause, see CORWIN, *THE COMMERCE POWER VERSUS STATES RIGHTS* (1936).

49. See Dowling, *Interstate Commerce and State Power* (1940) 27 VA. L. REV. 1, 15-16.

50. "... commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business." Holmes, J., in *Swift & Co. v. United States*, 196 U. S. 375, 398 (1905).

51. See Dowling, *supra* note 49, at 21-24.

52. See Comment, *Proration of Petroleum Production* (1942) 51 YALE L. J. 608 *passim*. Restriction of production to reasonable consumptive demand has been held to be a natural and proper method of preventing physical waste. *Champlin Refining Co. v. Corporation Commission of Oklahoma*, 286 U. S. 210 (1932); *Danciger Oil & Refining Co. v. Smith*, 4 F. Supp. 236 (N. D. Tex. 1933). *Contra*: *MacMillan v. Railroad Commission of Tex.*, 51 F. (2d) 400 (W. D. Tex. 1931). *Cf.* *West v. Kansas Natural Gas Co.*, 221 U. S. 229 (1911). See also *Brown v. Parker*, 39 F. Supp. 895 (S. D. Cal. 1941), 21 B. U. L. REV. 716.

53. Compare *McGoldrick v. Berwind-White Co.*, 309 U. S. 33, 45, n. 2 (1940); *South Carolina State Highway Dep't v. Barnwell Bros.*, 303 U. S. 177, 184, n. 2 (1938).

54. "... to the extent that the burden falls on economic interests without the state, it is not likely to be alleviated by those political restraints which are normally exerted on legislation where it affects adversely interests within the state." *McGoldrick v. Berwind-White Co.*, 309 U. S. 33, 46, n. 2 (1940). See also *South Carolina State Highway Dep't v. Barnwell Bros.*, 303 U. S. 177, 185, n. 2 (1938). But *cf.* *Champlin Refining Co. v. Corporation Commission of Oklahoma*, 286 U. S. 210 (1932).

of Congressional control of oil production.⁵⁵ Instead of weighing the desirability of state regulation against the deprivation of private rights, as has been customary under the due process clause, the court would balance local and general interests so as to perpetuate a federated system of government capable of dealing effectively with the problems of an expanding national economy.⁵⁶

SUBPOENAED DOCUMENTS IN FEDERAL CRIMINAL CASES*

IN criminal prosecutions by the Federal Government, as for antitrust activities,¹ unfair trade practices,² and security frauds,³ defendants⁴ are generally served with subpoenas duces tecum ordering them to produce their books and papers material to issues in litigation.⁵ The subpoenas are drawn

55. Compare *United States v. Darby*, 312 U. S. 100 (1941), amended, 312 U. S. 657 (1941). But see Comment, *Proration of Petroleum Production* (1942) 51 YALE L. J. 608 *passim*.

56. "The excessive use for insufficient reason of a judicially inflated due process clause to strike down states' laws regulating their own internal affairs, such as hours of labor in industry, minimum wage requirements, and standards for working conditions, is one thing. To invoke the interstate commerce clause to keep the many states from fastening their several concepts of local 'well being' onto the national commerce is a wholly different thing." Jackson, J., concurring in *Duckworth v. Arkansas*, 62 Sup. Ct. 311, 316 (U. S. 1941).

* Record, vol. 2, pp. 117-27, *United States v. American Tobacco Co.*, U. S. Dist. Ct., E. D. Ky., Crim. No. 6670, filed July 24, 1940.

1. See Sherman Antitrust Act, 26 STAT. 209 (1890), amended, 50 STAT. 693 (1937), 15 U. S. C. §§ 1, 2, 3 (1940).

Recently the United States Department of Justice has adopted the theory that criminal prosecutions for antitrust activities are more effective in achieving compliance with the federal laws than civil suits for injunctions. See Berge, *Remedies Available to the Government Under the Sherman Act* (1940) 7 LAW & CONTEMP. PROB. 104.

2. See Robinson-Patman Act, 49 STAT. 1526, 1528 (1936), 15 U. S. C. § 13a (1940).

3. See Securities Act of 1933, 48 STAT. 74, 87 (1933), 15 U. S. C. § 77x (1940).

4. If defendants are individuals, they can stand on the privilege against self-incrimination guaranteed by the Fifth Amendment to the Constitution and refuse to produce their own books. This privilege as well as the fact that most individuals have only a few documents to evidence their activities necessarily limits the problem of subpoenaed documents in criminal cases to corporate books. Neither a corporation nor any of its officers has a constitutional privilege to refuse to produce corporate books on the ground of self-incrimination. *Essgee Co. v. United States*, 262 U. S. 151 (1923); *Wilson v. United States*, 221 U. S. 361 (1911); *Hale v. Henkel*, 201 U. S. 43 (1906).

5. The use of subpoenas has been sanctioned by the statutes interdicting antitrust activities [26 STAT. 210 (1890), 15 U. S. C. § 5 (1940)]; unfair trade practices [38 STAT. 722 (1914), 15 U. S. C. § 49 (1940)]; and security frauds [48 STAT. 87 (1933), 15 U. S. C. § 77uuu (1940)]. For discussion of the essential role of subpoenas duces tecum in antitrust prosecutions, see Rice, *Trial Technique in Antitrust Cases* (1940) 7 LAW & CONTEMP. PROB. 138, 141.

in the broadest possible terms;⁶ in compliance, defendants usually appear at the courtroom trailed by several trucking vans laden with filing cabinets.⁷ The court is then confronted by the vexing problem of how it should deal with this potential documentary evidence.

In ordinary situations where only a few documents are subpoenaed, well-established practice requires that the demandant wait to see them until he reaches the point in his case where they become relevant as evidence.⁸ He can then call upon the possessor to produce the documents; if the producing party has an objection based on relevancy or privilege, the documents may be submitted to the court for inspection. If the court then overrules the objection, the demandant may examine the documents and determine whether to introduce them into evidence.⁹ This procedure occasions no great inconvenience or delay when a small number of documents is involved. But where the number of documents runs into thousands as it must necessarily do in many federal criminal cases, this same procedure would act effectively to clog the machinery of justice while court and jury wait for counsel to conduct detailed investigations into ponderous records.

The expedient procedure where there are many documents is to permit unqualified inspection¹⁰ by the demandant as soon as they are produced so that he can sort out the relevant ones and have them ready when necessary.¹¹ In the past some parties producing documents have acquiesced in inspection.¹² But often other litigants have taken a combative attitude and employed every device available to conceal information possibly useful to

6. See 8 WIGMORE, EVIDENCE (3d ed. 1940) § 2200.

7. Some two hundred and fifty files were produced in trucks by the American Tobacco Company in a recent prosecution under the Sherman Antitrust Act. Record, vol. 1, p. 37, United States v. American Tobacco Co., U. S. Dist. Ct., E. D. Ky., Crim. No. 6670, filed July 24, 1940. In the *Sugar Institute* case about 500,000 documents were subpoenaed. Record, Sugar Institute v. United States, 297 U. S. 553 (1936). In the *Aluminum Company* case, the Government roughly selected 16,000 documents from a group produced under compulsion by defendants. Record, United States v. Aluminum Co. of America, U. S. Dist. Ct., S. D. N. Y., Eq. No. 85-73, filed April 23, 1937.

8. Edison Electric Light Co. v. United States Electric Lighting Co., 45 Fed. 55 (C. C. S. D. N. Y. 1891). See 8 WIGMORE, EVIDENCE (3d ed. 1940) § 2200.

9. For simplified analysis, see GOLDSTEIN, TRIAL TECHNIQUE (1935) c. 7.

10. The phrase "unqualified inspection" imports not only that the demandant should be allowed to inspect the documents before they are needed in evidence but also that the court should attach no condition to the inspection by way of a prior judicial determination of the relevancy of the documents.

11. Preferably the production and inspection should take place before the jury has been sworn in and the trial has begun. See Rice, *supra* note 5, at 144. This will not ordinarily be possible for a subpoena is customarily returnable on the first day of trial. But the court may require its return before trial. See Blackmer v. United States, 284 U. S. 421, 443 (1932). Or one party may request a postponement of the trial on the first day, before the jury is selected, as was done in the *American Tobacco* case. Even if a pretrial inspection is impossible, the presentation of the case to the jury will be expedited by permitting an inspection during the course of the trial before the documents are required in evidence. See Rice, *supra* note 5, at 141.

12. For example, in the *American Tobacco* case only one company refused to allow inspection. Six other defendants raised no objection.

the opposition and to delay the presentation of its case.¹³ Criminal cases provide a fertile field for this sort of tactical battle over unqualified inspection of subpoenaed documents because the pertinent case law is meager and confused and no attempt to formulate a uniform rule has yet been made.¹⁴

In the recent criminal prosecution of the American Tobacco Company by the United States of America acting under the Sherman Antitrust Act¹⁵ defendants were effectively prevented from obstructing unqualified examination of their documents by the Government. In response to a subpoena duces tecum and prior to the opening of the trial defendants had produced a number of truckloads of documents. The Government made a general motion for a pretrial inspection, defendants objected, but the court granted the motion unconditionally. The decision in the *American Tobacco* case is significant both for its exercise of a non-statutory power of the court to grant a pretrial inspection of documents and for its failure to require an examination into the relevance of those documents prior to an inspection.

To be contrasted with this solution of the problem of examination of subpoenaed documents is the restrictive ruling in one phase of the case of the *United States v. Aluminum Company of America*.¹⁶ Although the suit was a civil action conducted under the Federal Rules of Civil Procedure,¹⁷ the decision indicates a judicial frame of mind which is overzealous to prevent invasion of individual or corporate rights of privacy¹⁸ and can be expected to block any attempted liberalization of criminal procedure. Some eighty-seven documents were produced by the defendant at the trial in answer to a subpoena duces tecum whereupon the plaintiff motioned for an inspection of the documents under Rule 34.¹⁹ It was held that the plaintiff had a right to inspect the documents but that the court must first determine whether or not they were relevant. Judge Caffey accordingly read through all the documents and decided that twenty-nine of them were relevant. These were then submitted to the defendant to re-examine and to assert further objections. Only after each objection had been overruled was the Government permitted to inspect the documents.

13. By bringing documents into court and refusing to allow an inspection, the possessor can cause the demandant great embarrassment since it becomes extremely awkward for him to attempt to prove the relevancy of the documents without a prior inspection. See Rice, *supra* note 5, at 143.

14. The Supreme Court of the United States has recently been authorized by Congress to promulgate uniform rules for criminal proceedings in federal district courts. 54 STAT. 688, 18 U. S. C. § 687 (1940).

15. Record, vol. 2, pp. 117-27, *United States v. American Tobacco Co.*, U. S. Dist. Ct., E. D. Ky., Crim. No. 6670, filed July 24, 1940.

16. 26 F. Supp. 711 (S. D. N. Y. 1939).

17. 28 U. S. C. following § 723c (1940).

18. This attitude hearkens back to the common law privilege of a party-opponent not to bear testimony. See 8 WIGMORE, EVIDENCE (3d ed. 1940) § 2219.

19. Rule 34 provides: "Upon motion of any party . . . the court in which an order is pending may order any party to produce and permit the inspection . . . of any designated documents, papers, books . . . which constitute or contain evidence material to any matter involved in the action and which are in his possession, custody, or control . . ."

This procedure represents the extreme in protection to litigants whose documents are subjected to inspection as provided by Rule 34. But insofar as achieving speedy trials in cases involving a multitude of documents, it is just as time-consuming and cumbersome as the process of judicial inspection of documents before they are offered in evidence. Moreover, the ruling of the *Aluminum Company* case has the added disadvantage that the judge does not have the benefit of the evidence previously given at the trial²⁰ to aid him in determining the materiality of the documents.

From a policy point of view the decision of Judge Ford in the *American Tobacco* case is the best solution to the problem of subpoenaed documents in federal criminal cases. Inspection of documents, pretrial or otherwise, subjects the producing party to no new disability. The demandant might have secured free access to them with a full examination by means of a grand jury investigation.²¹ It is inexcusable to penalize the short-circuiting of this expensive and time-consuming mechanism. Furthermore, the demandant has a right to know whether or not there has been substantial compliance with the subpoena duces tecum. Until all the documents called for have been produced, he is under no compulsion to proceed with his case.²² And only by a personal inspection can the demandant determine that the documents he requested will be available for future use.

Aside from the *American Tobacco* ruling, case law in support or in contravention of the power of the court to grant an inspection prior to or during the trial is non-existent. There are some supporting dicta.²³ Despite the lack of precedent, however, use of the power is adequately sanctioned by statutes and long established judicial custom, both of which authorize the court to issue all writs necessary to expedite the trial with justice to the parties.²⁴

20. See *Carpenter v. Winn*, 221 U. S. 533, 541 (1911); *Jasigi v. Brown*, 1 Curt. 401, 402 (C. C. D. Mass. 1853).

21. *Blair v. United States*, 250 U. S. 273 (1919). See also Lewin, *The Conduct of Grand Jury Proceedings in Antitrust Cases* (1940) 7 LAW & CONTEMP. PROB. 112, 130.

22. See 8 WIGMORE, EVIDENCE (3d ed. 1940) § 2199.

23. See *Capital v. Fox*, 85 F. (2d) 97, 100 (C. C. A. 2d, 1936) ("It must be remembered, however, that the subpoenas merely require the physical production of documents in court; the extent of their inspection will be for the judge, like the scope of oral examination."); *Banks v. Connecticut Ry. & Lighting Co.*, 79 Conn. 116, 119, 64 Atl. 14, 15 (1906) ("The future of documents after they have, pursuant to an order of production, passed into the control of the court is for its determination, and is a matter quite independent of the act of production which has been completed."). Rule 34 of the Federal Rules of Civil Procedure was required to abrogate the common law rule that the court is powerless to compel the production of documents for inspection. 8 WIGMORE, EVIDENCE (3d ed. 1940) § 2219. But this development contains no authority against a right to an inspection per se since it was concerned with the production of documents for inspection and not the inspection of documents already impounded in court.

24. Section 262 of the Judicial Code provides: ". . . The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." 36 STAT. 1162 (1911), 28 U. S. C. § 377 (1940). A United States Circuit Court of Appeals recently declared that this provision authorized the grant of the privilege of a pretrial inspection.

Once the power to grant an inspection of documents is established, there is no need for a court to determine their relevancy as a condition precedent to an exercise of the power. The decision in the *American Tobacco* case permitting an unconditional inspection exhibits a sound use of judicial discretion. Other courts have wasted valuable time because they confused three situations in which the question of relevancy may arise. The first is where documents are produced in answer to a subpoena duces tecum. In such a case the possessor may properly refuse to comply with the subpoena unless the court agrees that the documents sought might become relevant in the trial.²⁵ The second situation occurs when the demandant seeks to introduce into evidence documents already in court and the court must then determine which documents are relevant.²⁶ In both these situations the question of relevancy is properly placed in issue and its resolution serves a useful function. In the first case a determination of irrelevancy may forestall a useless production of documents; in the second it may avoid prejudicing the jury.

But in the third and intermediate situation where the documents are in court but are not required in evidence at the time demandant moves for inspection,²⁷ the court should not consider the question of relevancy. An unconditional right of inspection is an eminently sensible solution to the procedural problem presented by the production of massive business files in court in compliance with a subpoena duces tecum. The party claiming inspection best knows what documents are important to his case and, if he gains access to the material before it is required as evidence, he may organize his presentation of the facts to promote rapid conduct of the trial. The time of the court and the jury is thus conserved if an unqualified right of inspection is allowed to the demandant where records are in court before they are introduced in evidence. Nor is the producing party deprived of any substantial rights by this procedure. The producing party has no right

See *Bethlehem Shipbuilding Corp. v. NLRB*, 120 F. (2d) 126, 127 (C. C. A. 1st, 1941). See also *Banks v. Connecticut Ry. & Lighting Co.*, 79 Conn. 116, 121, 64 Atl. 14, 15 (1906).

25. The Supreme Court has aptly described relevancy in terms of "probable materiality." See *Brown v. United States*, 276 U. S. 134, 143 (1928). In another case a "prima facie" showing of competency was required. See *General Finance Corp. v. New York State Ry.*, 1 F. Supp. 381, 382 (W. D. N. Y. 1931). A third court has assented the subpoenaed documents on the basis of "such as might be offered in evidence." See *Miller v. Mutual Reserve Fund Life Ass'n*, 139 Fed. 864 (S. D. N. Y. 1905). For some refinements in the meaning of relevancy as applied in civil actions, see (1940) 50 *YALE L. J.* 708. See generally 8 *WIGMORE, EVIDENCE* (3d ed. 1940) §2200.

26. The determination is the same as that which must be made when an objection is raised to the introduction in evidence of any exhibit or testimony. See 8 *WIGMORE, EVIDENCE* (3d ed. 1940) §2193. The competency of the documents may be established to the satisfaction of the party in possession by argument on the production under the subpoena duces tecum. But for a case in which an objection was raised at both stages, see *Edison Electric Light Co. v. United States Electric Lighting Co.*, 44 Fed. 294 (C. C. S. D. N. Y. 1890); 45 Fed. 55 (C. C. S. D. N. Y. 1891).

27. See note 19 *supra*.

to absolute privacy;²⁸ his only right is to be protected against unreasonable searches and seizures.²⁹ If he does not object to the materiality of the documents at the time when their production is sought, he should be foreclosed from objecting until the documents are offered in evidence. And if the defendant is forced to submit documents to his opponent for inspection, in the interim between their production and their introduction in evidence, he loses nothing more than substantial justice requires if they are found to contain evidence. If the documents do not furnish relevant evidence, it may always be said that defendant had an opportunity to weed out the irrelevant material before returning the subpoena duces tecum.

In future criminal cases under the present confused status of the law some federal courts may be expected to permit inspection of subpoenaed documents without restriction; others may exercise personal supervision; and still others may find that no right of inspection exists. With increased governmental supervision of large scale business the problem will become more acute. The status of subpoenaed documents in federal criminal cases should now be resolved by the Supreme Court Rules Committee.³⁰ This Committee should adopt the ruling made by Judge Ford in the *American Tobacco* case that a motion for an inspection is to be granted without regard to the materiality of the evidence. A provision should also be made for production upon notice, leaving the demandant free, however, to choose between this method and the use of a subpoena duces tecum.³¹ In order to assist the court in determining the materiality of documents when the question is properly raised under a subpoena duces tecum or a motion to produce, the judge should be allowed to refer the case to a master who would hear both parties and then decide what documents should be produced.³²

Action on the part of the Rules Committee is also required to clarify Rule 34. Under the decision in the *American Tobacco* case, a procedure impossible under Judge Caffey's interpretation of Rule 34 can be secured by calling upon the general power of the court to expedite the trial. If that procedure be generally adopted,³³ Rule 34 would be effectively circumvented.

28. *Capital v. Fox*, 85 F. (2d) 97 (C. C. A. 2d, 1936).

29. U. S. CONST. AMEND. IV; *Boyd v. United States*, 116 U. S. 616 (1886); *Hale v. Henkel*, 201 U. S. 43 (1906).

30. Congress has indicated its willingness to give legislative sanction to any uniform rule which the Court might adopt. See note 14 *supra*.

31. Rules 34 and 45 of the Federal Rules of Civil Procedure would provide a model for drafting the desired provision.

32. If a procedure is prescribed for the inspection of documents which have been brought into court, probably more objections will be forthcoming at the time when production is first sought. A method to conserve the time of the judge against the burdensome examination of these documents is therefore imperative. Some of the states have adopted the practice of delegating the function to a court commissioner. See RAGLAND, *DISCOVERY BEFORE TRIAL* (1932) 104.

33. The fact that the *American Tobacco* case involved a criminal prosecution would seem to permit the ready extension of the benefit of Judge Ford's ruling to civil suits in which the courts have not been required by the Constitution to act so zealously to protect corporate or individual rights of privacy.

The Committee should accordingly amend Rule 34 to make it conform to the procedure followed by Judge Ford so that a motion to inspect documents already before the court, as distinguished from one to produce documents for inspection, would require no consideration of the materiality of those documents by the court in a civil action.

LIBEL ACTIONS BROUGHT BY PUBLIC OFFICIALS*

THE guarantee of a free press provided by the First Amendment, though preventing any previous restraint in times of peace,¹ has never immunized the publisher from subsequent liability for false and damaging statements. The optimum extent of this liability depends upon a balancing of the right of the individual to his good name against the social need for freedom of speech. This conflict between individual rights and the needs of a democratic society is accentuated when a public official claims to have been libeled. His position makes him a subject of constant discussion because of the special interest of the community in those who govern it.² Some limits must nevertheless be imposed, since wholly unrestricted publication of false charges would exact of the public servant too high a price for the privilege of service.³

The difficulty of resolving this problem is illustrated by the majority and dissenting opinions of *Sweeney v. Schenectady Union Publishing Company*,⁴ recently decided by the Court of Appeals for the Second Circuit. The plaintiff, a Congressman from Ohio, complained of statements appearing in a syndicated column which the defendant had published in its newspaper.⁵ The article reported that the Congressman was trying to prevent an appointment to a United States district court because the proposed appointee was "a Jew and one not born in the United States." The plaintiff, bringing suit throughout the country against publishers in whose newspapers the article appeared, had been for the most part unsuccessful.⁶ But a majority

* *Sweeney v. Schenectady Union Publishing Co.*, 122 F. (2d) 288 (C. C. A. 2d, 1941), *cert. granted*, 62 Sup. Ct. 413 (U. S. 1941).

1. See *Near v. Minnesota*, 283 U. S. 697, 713 (1931).

2. See *Coleman v. MacLennan*, 78 Kan. 711, 724, 98 Pac. 281, 286 (1908).

3. See *Post Publishing Co. v. Hallam*, 59 Fed. 530, 540 (C. C. A. 6th, 1893).

4. 122 F. (2d) 288 (C. C. A. 2d, 1941).

5. The alleged libel appeared in "The Washington Merry-Go-Round," written by Drew Pearson and Robert Allen, and distributed by United Feature Syndicate, Inc., on December 23, 1941.

6. Complaints in actions brought by the plaintiff were dismissed in *Sweeney v. Capital News Publishing Co.*, 37 F. Supp. 355 (D. Idaho 1941); *Sweeney v. Beacon Journal Publishing Co.*, 66 Ohio App. 475, 35 N. E. (2d) 471 (1941), *appeal dismissed*, 138 Ohio St. 330, 34 N. E. (2d) 764 (1941); *Sweeney v. Newspaper Printing Corp.*, 177 Tenn. 197, 147 S. W. (2d) 406 (1941); *Sweeney v. Caller-Times Publishing Co.*, 41 F. Supp. 163 (S. D. Tex. 1941) (subsequent to the decision of the Second Circuit). Motions to dismiss the complaint were denied, however, by United States district courts in Arizona, Illinois, Kansas, the Southern District of New York, West Virginia, and

in the Second Circuit, guided by a definition of libel laid down by the New York Court of Appeals, found the statements capable of conveying a defamatory meaning and reversed the district court's order dismissing the complaint.⁷

On their face the statements may reasonably be understood to charge that the plaintiff had engaged in discriminatory conduct motivated by anti-Semitic prejudice. The article was published at a time when reports of events in Europe had intensified this country's antipathy to persons practicing or advocating acts of intolerance. It was circulated in a territory where Jews constitute a sizable portion of the population. In view of the time and place of publication, the charge was held capable of gaining for the plaintiff "the scorn and contempt of the right-thinking in appreciable numbers."⁸

The majority decided that under the law of New York a publication which could have this effect was defamatory per se. The test they adopted was found in general statements made by the New York Court of Appeals in two cases which dealt with quite different situations.⁹ In dissenting, Judge Clark did not differ with the majority as to the effect of the publication on the minds of "right-thinking" readers. But he held that the New York courts had evolved a different test of what is defamatory per se where the alleged libel concerns a public official—the rule announced in *Tanser v. Crowley Publishing Corporation* that criticism of a public official "may be captious, ill-timed and without foundation in fact, but, outside of a clear charge of corruption or gross incompetence holding one up to disgrace and contumely, there is no libel."¹⁰

This "public official rule" of the *Tanser* case seems to correspond more nearly to the actual decisions in cases bearing the closest analogy to the present one. Public officials have recovered in New York without showing special damage in actions involving charges of misconduct, corruption, or

Wisconsin. None of these cases has been reported to date; they are listed in Brief for Plaintiff-Appellant, pp. 13-14, *Sweeney v. Schenectady Union Publishing Co.*, 122 F. (2d) 288 (C. C. A. 2d, 1941).

7. For the unreported opinion of the District Court for the Northern District of New York, see Record on Appeal, p. 18, *Sweeney v. Schenectady Union Publishing Co.*, 122 F. (2d) 288 (C. C. A. 2d, 1941).

8. But cf. *Sweeney v. Capital News Publishing Co.*, 37 F. Supp. 355, 357 (D. Idaho 1941), where it was held that the article did not expose the plaintiff "to public hatred, contempt, or ridicule," since opposition to a single political appointment does not of itself indicate prejudice against all Jews as a race. In Ohio, the complaint was dismissed on the ground that to be actionable without an allegation of special damages the alleged libel must attack the character of the plaintiff, or impute to him immorality or a violation of the law of the land. *Sweeney v. Beacon Journal Publishing Co.*, 66 Ohio App. 475, 35 N. E. (2d) 471 (1941), *appeal dismissed*, 138 Ohio St. 330, 34 N. E. (2d) 764 (1941).

9. *Kimmerle v. New York Evening Journal, Inc.*, 262 N. Y. 99, 186 N. E. 217 (1933) (newspaper article, stating that woman was courted by murderer, held not libelous); *Sydney v. MacFadden Newspaper Publishing Corp.*, 242 N. Y. 208, 151 N. E. 209 (1926) (report that married woman was the "latest ladylove" of actor and about to marry him, held libelous).

10. 240 App. Div. 203, 205, 268 N. Y. Supp. 620, 622 (4th Dep't 1934).

incompetence in office.¹¹ They have not so succeeded where the charge is one of favoritism or of efforts to shield a client from investigation.¹² The effect of the rule is to permit a greater latitude of expression in the case of men in public office than in the case of private citizens.¹³

From a number of viewpoints, much can be said in favor of the result reached by the majority. In theory at least, the policy of protecting the individual's right to his good name does not conflict with freedom of speech defined as "freedom to tell the truth and comment fairly on facts and not a license to spread damaging falsehoods in the guise of news gathering and its dissemination."¹⁴ Actually, threat of liability may not prevent dissemination of false reports since the possibility of suit is a risk which newspaper publishers find it necessary to take. The risk, moreover, can be distributed among readers and advertisers.¹⁵ The short answer, therefore, to the question of liability for such reports might be that the public is better able to sustain the burden than is the individual injured by consequent loss of reputation.

Where the statements in question are of a serious nature and are clearly libelous without considering extrinsic circumstances, courts have allowed the

11. *De Hoyos v. Thornton*, 259 App. Div. 1, 18 N. Y. S. (2d) 121 (3d Dep't 1940) (village officials charged with being dictated to by gangsters); *Cohalan v. New York World-Telegram Corp.*, 172 Misc. 1061, 16 N. Y. S. (2d) 706 (Sup. Ct. 1940) (judge reported unfit for office); *Bennet v. Commercial Advertiser Ass'n*, 230 N. Y. 125, 129 N. E. 343 (1920) (congressman accused of acting against the public interest and on behalf of his former client); *Lunn v. Littauer*, 187 App. Div. 808, 175 N. Y. Supp. 657 (3d Dep't 1919) (congressman charged with being the tool of wartime profiteers); *Bingham v. Gaynor*, 141 App. Div. 301, 126 N. Y. Supp. 353 (1st Dep't 1910), *aff'd*, 203 N. Y. 27, 96 N. E. 84 (1911) (police commissioner accused of corruption, incompetence, scoundrelism and lawlessness); *Mattice v. Wilcox*, 147 N. Y. 624, 42 N. E. 270 (1895) (candidate for public office reported incompetent); *Hamilton v. Eno*, 81 N. Y. 116 (1880) (assistant sanitary inspector accused of accepting a bribe); *Lewis v. Few*, 5 Johns. 1 (N. Y. 1809) (governor accused of criminal and corrupt conduct in office). See also *Sumner v. Liberty Publishing Corp.*, 240 App. Div. 118, 269 N. Y. Supp. 203 (1st Dep't 1934); *Burnham v. Hornaday*, 130 Misc. 207, 223 N. Y. Supp. 750 (Sup. Ct. 1927), *mod'd & aff'd*, 223 App. Div. 218, 228 N. Y. Supp. 246 (3d Dep't 1923); *Hoey v. New York Times Co.*, 138 App. Div. 149, 122 N. Y. Supp. 978 (1st Dep't 1910). But *cf. Hall v. Binghampton Press Co.*, 29 N. Y. S. (2d) 760 (Sup. Ct. 1941), where an editorial questioning the attitude of a congressman on national defense was held libelous per se.

12. *Tanzer v. Crowley Publishing Corp.*, 240 App. Div. 203, 268 N. Y. Supp. 620 (4th Dep't 1934); *Hills v. Press Co.*, 122 Misc. 212, 202 N. Y. Supp. 678 (Sup. Ct. 1924), *aff'd*, 214 App. Div. 752, 209 N. Y. Supp. 848 (3d Dep't 1925). See also *Gardner v. Home Life Publications, Inc.*, 237 App. Div. 200, 260 N. Y. Supp. 872 (2d Dep't 1932); *Duffy v. New York Evening Post*, 109 App. Div. 471, 96 N. Y. Supp. 629 (1st Dep't 1905).

13. For dicta that matters of public interest and concern may be freely discussed without liability for defamation, see *Briarcliff Lodge Hotel, Inc. v. Citizen-Sentinel Publishers, Inc.*, 260 N. Y. 106, 118, 183 N. E. 193, 197 (1932); *Hoepfner v. Dunkirk Printing Co.*, 254 N. Y. 95, 99, 172 N. E. 139, 140 (1930).

14. *Sweeney v. Schenectady Union Publishing Co.*, 122 F. (2d) 288, 291 (C. C. A. 2d, 1941).

15. See (1933) 81 U. OF PA. L. REV. 779; (1933) 46 HARV. L. REV. 1032.

plaintiff to recover in the absence of proof of actual injury.¹⁶ Although in specific instances the award of damages is likely to be in the nature of a windfall,¹⁷ this fortuitous element does not diminish the need to compensate loss of reputation which may well be substantial although not readily susceptible of evidentiary proof. Loss of reputation is, moreover, no less injurious to public officials than to ordinary individuals. Particularly in the case of men seeking or holding elective office, it may have serious and far-reaching consequences. Not only the individuals maligned but the community as a whole will suffer if deprived of the services of able men through public distrust caused by dissemination of defamatory matter.

These factors appear to support a policy of strict accountability for the publication of damaging falsehoods. But truth is sometimes an elusive criterion. The content of daily newspapers is assembled at great speed from diverse and distant sources. Of necessity it consists in part of reports whose accuracy cannot readily be ascertained or proved.¹⁸ Freedom of expression is impeded to the extent that reports of this character cannot be published without threat of liability. This is especially true with respect to statements concerning public officials. Day by day persons engaged in political activity are praised by their adherents and attacked by their adversaries. Accustomed to read both good and bad reports of its officers, the public may reasonably be expected to know that both are likely to be biased and exaggerated, and to give no greater credence to one than to the other. Moreover, through ready access to the press and special immunity from liability for their own utterances,¹⁹ public officials have more opportunity than private individuals

16. *Ben-Oliel v. Press Publishing Co.*, 251 N. Y. 250, 167 N. E. 432 (1929).

17. See, e.g., *Fisher v. Myers*, 339 Mo. 1196, 100 S. W. (2d) 551 (1936) (\$125,000 damages); *Youssoupoff v. Metro-Goldwyn-Mayer Pictures, Ltd.*, 50 T. L. R. 581 (C. A. 1934) (£25,000); *Duncan v. Record Publishing Co.*, 145 S. C. 196, 143 S. E. 31 (1927) (\$50,000 damages). In two actions for closely similar publications the same plaintiff recovered \$45,000 and \$40,000 respectively in the federal courts. *Washington Times Co. v. Bonner*, 86 F. (2d) 836 (App. D. C. 1936); *New England Newspaper Publishing Co. v. Bonner*, 77 F. (2d) 915 (C. C. A. 1st, 1935), *cert. denied*, 296 U. S. 610 (1935). Evidence that the alleged libel appeared in another newspaper, for which the plaintiff has already recovered damages, is inadmissible. *Fay v. Brockway Co.*, 176 App. Div. 255, 162 N. Y. Supp. 1030 (1st Dep't 1917); *Palmer v. Matthews*, 162 N. Y. 100, 56 N. E. 501 (1900).

18. This is especially true with respect to apparently authentic news items received by local newspapers from reputable news agencies, as in the *Sweeney* case. In *Szalay v. New York American, Inc.*, 254 App. Div. 249, 4 N. Y. S. (2d) 620 (1st Dep't 1938), (1939) 37 MICH. L. REV. 495, it was held that the plaintiff was entitled to compensatory damages, despite the fact that the libelous article was published as a news item received from a reputable news service. This view is in accord with the weight of authority. *Oklahoma Publishing Co. v. Givens*, 67 F. (2d) 62 (C. C. A. 10th, 1933); see (1938) 15 N. Y. U. L. Q. REV. 589. *Contra*: *Layne v. Tribune Co.*, 108 Fla. 177, 146 So. 234 (1933).

19. Members of Congress enjoy absolute immunity for statements made in the performance of their legislative function. *Cochran v. Couzens*, 42 F. (2d) 783 (App. D. C. 1930). The same is true of executive officers of the Government. *Glass v. Ickes*, 117 F. (2d) 273 (App. D. C. 1940). Speeches made by Representative Sweeney in the House

to make effective denial of unfavorable reports and to counterattack with impunity. Since the net effect of charges against them can thus be diminished by methods not available to other persons, it seems fair and perhaps necessary to restrict the category of statements sufficient to support a presumption of damage in political libel actions.²⁰

For formulating this restriction, an alternative to the public official rule is available through judicious use of the privilege of fair comment. This is matter which must be pleaded by the defendant in his answer.²¹ In most jurisdictions, including New York, the defense is available only where the alleged libel is an honest expression of opinion concerning a matter of public interest, reasonably warranted by facts which must be truly stated.²² Because of these prerequisites it is usual for the defendant to use the "rolled-up plea"—that the statements of fact contained in the publication are true, and that all other statements therein are fair comments upon these facts.²³ Whether the publication was privileged thus depends upon the public interest in the subject discussed, the distinction between statements of fact and of opinion, the truth of the facts, and whether they warrant the comments which accompany them. In a minority of jurisdictions, however, the privilege of fair comment is extended to misstatements of fact concerning public officials which the defendant honestly believed to be true.²⁴ The rule stems from the concept of a duty to report to the public all reasonably reliable information materially affecting the government of the community.²⁵ The gravity of the charge does not of itself determine liability. The good faith of the publisher is the operative criterion.

concerning the present litigation [87 CONG. REC., Aug. 6, 1941, at A4039; 84 CONG. REC. 6164 (1939)] could be fully reported by New York newspapers without accountability for libel. N. Y. CIVIL PRACT. ACT § 337.

20. "In Texas, a publication concerning a public officer, in order to be libelous per se, must be of such a character as, if true, would subject him to removal from office." *Sweeney v. Caller-Times Publishing Co.*, 41 F. Supp. 163 (S. D. Tex. 1941); *Nunn v. Webster*, 260 S. W. 157 (Tex. Comm. App. 1924); but cf. *Jenkins v. Taylor*, 4 S. W. (2d) 656 (Tex. Civ. App. 1928). In Illinois, a charge of dishonesty or corruption is necessary. *McDonald v. Chicago Daily News Publishing Co.*, 252 Ill. App. 61 (1929); *Davis v. Ferguson*, 246 Ill. App. 318 (1927); cf. *City of Chicago v. Tribune Co.*, 307 Ill. 595, 139 N. E. 86 (1923).

21. *Corwin v. Berkwitz*, 190 App. Div. 952, 179 N. Y. Supp. 915 (2d Dep't 1920). But when the public nature of the occasion appears on the face of the complaint, the law of fair comment applies. In that event the defendant need not plead the privilege. *Kenna v. New York Daily Mirror, Inc.*, 250 App. Div. 625, 295 N. Y. Supp. 219 (1st Dep't 1937), 6 FORD. L. REV. 477.

22. *Washington Times Co. v. Bonner*, 86 F. (2d) 836 (App. D. C. 1936); *Briarcliff Lodge Hotel v. Citizen Sentinel Publishers, Inc.*, 260 N. Y. 105, 183 N. E. 193 (1932); *Foley v. Press Publishing Co.*, 226 App. Div. 535, 235 N. Y. Supp. 340 (1st Dep't 1929).

23. See GATLEY, LIBEL AND SLANDER (O'Sullivan's ed. 1933) 533.

24. *Clancy v. Daily News Corp.*, 202 Minn. 1, 277 N. W. 264 (1933); *Steenison v. Wallace*, 144 Kan. 730, 62 Pac. (2d) 907 (1936); *Lafferty v. Houlihan*, 81 N. H. 67, 121 Atl. 92 (1923); *Snively v. Record Publishing Co.*, 185 Cal. 565, 193 Pac. 1 (1921); *McLean v. Merriman*, 42 S. D. 394, 175 N. W. 878 (1920).

25. See *Coleman v. MacLennan*, 78 Kan. 711, 728, 98 Pac. 281, 287 (1903).

Of the three possible methods of limiting liability for statements about men in public life, the limited privilege of fair comment prevailing in a majority of jurisdictions is the most complicated. In many instances it forces the issues of the alleged libel to trial, bringing into immediate relevancy considerations of "privilege," "truth" and the like. On occasion the rolled-up plea may be necessary in order to justify an imputation of corrupt or dishonorable motives by showing that it is a reasonable inference from facts which have been truly stated.²⁶ But where no such imputation can be gathered from the publication, the plea is a needlessly circuitous method of establishing that the language used is not in itself defamatory of a public official. Those few jurisdictions, on the other hand, which extend the doctrine of fair comment to include the basic fact statements appear to be the most liberal. It can be argued that since the public is more immediately concerned with the criminal or corrupt practices of its officers than with their less venal offenses, reports of the former should be those free from liability if published in good faith.²⁷ The objection to this view, however, lies in the difficulty of proving good faith. If it is to be tested objectively by the presence or absence of probable grounds for the publisher's belief,²⁸ the sufficiency of the defense is likely to depend upon whether a reasonable man would have been satisfied that the statements published were true. Hence the evidentiary problem on trial is only slightly less complex than that involved in setting up the defense of fair comment under the majority rule. If, on the other hand, the minority rule takes the form of placing the burden upon the plaintiff to prove actual malice,²⁹ recovery is made virtually impossible.

Unlike the defense of fair comment, the public official rule is directed solely and immediately to the sufficiency of the complaint. The court must here determine, not broadly whether the article published by the defendant is capable of a defamatory meaning, but more narrowly whether it defames the plaintiff. Liability will depend upon the gravity of the charge. At the initial stage of the proceedings, before truth or good faith becomes an issue, the rule eliminates libel actions brought by political office-holders where the language complained of is insufficient to support a presumption of damage as to them. Thus its operation reduces the need for complicated pleadings and proof on the part of the defendant. Moreover, it provides a clear and simple guide for the courts and for the public.

From this point of view, the opinion of the majority fails to meet the dissent. It ignores the public official rule and omits discussion of the authority and of the policy which support it. In the light of this rule and of statements concerning public officials considered in previous New York decisions, the charges published by the defendant were not sufficient to sustain a presump-

26. See GATLEY, *LIBEL AND SLANDER* (O'Sullivan's ed. 1938) 382.

27. See *Snively v. Record Publishing Co.*, 185 Cal. 565, 576, 198 Pac. 1, 5 (1921).

28. *Lafferty v. Houlihan*, 81 N. H. 67, 121 Atl. 92 (1923). In California, the defendant has the burden of proving the absence of actual malice. *Snively v. Record Publishing Co.*, 185 Cal. 565, 198 Pac. 1 (1921).

29. *Clancy v. Daily News Corp.*, 202 Minn. 1, 277 N. W. 264 (1938); *Stenson v. Wallace*, 144 Kan. 730, 62 Pac. (2d) 907 (1936).

tion of damage in favor of the plaintiff.³⁰ It may be that the decision of the majority was induced by a belief that charges of anti-Semitism tend to inflame and divide public opinion and should therefore be discouraged. There is, however, no unanimity of opinion on this score. On the contrary, the belief is widely held that the best way to deal with intolerance is to expose and denounce it. In any event, it is questionable whether courts should use actions for libel as a means of embarking upon censorship of the press.

EFFECT OF PARDONS FOR INNOCENCE UNDER "HABITUAL CRIMINAL" STATUTES*

As long as the administration of justice remains in the hands of imperfect humans, innocent men will occasionally be erroneously convicted of crime.¹ Upon discovery of such error the wronged individual is entitled to a judicial reversal of his conviction, in addition to restitution of any fine he may have paid and compensation for the indignities and suffering he has undergone.² In contrast to Continental jurisprudence, however, American law exhibits a peculiar apathy to the predicament of the wrongfully convicted.³ This indifference may be largely attributed to the prevailing theory that judgments should not be forever subject to review, but should be final after an ascertained interval—ordinarily term time.⁴ Consequently, courts cannot reopen most cases whenever an erroneous conviction becomes apparent. Instead, that task has been left to the executive in the exercise of his pardoning power.⁵

Pardons may also be granted by the executive for reasons other than innocence, but courts generally have failed to distinguish the two types with respect to their consequences.⁶ Many courts consider a pardon to "blot

30. Under the law of New York, a publication not defamatory on its face is not actionable without an allegation of special damages. *National Variety Artists, Inc. v. Mosconi*, 169 Misc. 982, 9 N. Y. S. (2d) 498 (Sup. Ct. 1939); *Kuhn v. Veloz*, 252 App. Div. 515, 299 N. Y. Supp. 924 (1st Dep't 1937); *O'Connell v. Press Publishing Co.*, 214 N. Y. 352, 108 N. E. 556 (1915).

* *People ex rel. Prisament v. Brophy*, 38 N. E. (2d) 468 (1941).

1. See BORCHARD, *CONVICTING THE INNOCENT* (1932).

2. See Barnett, *The Grounds of Pardon in the Courts* (1910) 20 YALE L. J. 131, 132.

3. See BORCHARD, *op. cit. supra* note 1, at 375 *et seq.*

4. See Weihofen, *Pardon: An Extraordinary Remedy* (1940) 12 ROCKY MT. L. REV. 112, 118-19. England has been deemed as indifferent as the United States to erroneous convictions, but the English criminal procedure is somewhat more liberal than that in this country. See Williston, *Does a Pardon Blot Out Guilt?* (1915) 28 HARV. L. REV. 647, 659. A few American courts, however, may grant a new trial, no matter how much time has passed. *State v. David*, 14 S. C. 428 (1881).

5. For history of pardon see 3 ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES (1939) 1 *et seq.*

6. See Weihofen, *The Effect of a Pardon* (1939) 88 U. OF PA. L. REV. 177, 192.

out" guilt and to make the recipient "as innocent as if he had never committed the offense."⁷ Other courts, however, have said that the acceptance of a pardon implies guilt.⁸ Tribunals favoring the "blotting-out" theory have emphasized the fact that pardons may be granted for innocence. The implication-of-guilt theory, on the other hand, is supported by the argument that most pardons are granted not for innocence but for reasons of clemency.⁹ But neither theory can properly be all-inclusive. A pardon for innocence is an executive finding of the absence of guilt and should render the pardoned person as legally innocent as if he had never been convicted.¹⁰ In the case of a pardon for other reasons, however, since the recipient was not innocent in the first place, the fact of the crime should not be obliterated; only the punishment and the legal consequences of conviction should be removed.¹¹

This distinction is useful, for example, in determining the effect to be given pardons under "habitual criminal" or "second offender" statutes.¹² These laws provide that repeating offenders should be subject to increased punishment, with the dual purpose of dissuading criminals from further wrongdoing and of removing the habituals from society for longer periods.¹³ A convict, pardoned for any reason other than innocence, would seem, upon committing a second crime, to fall within the category of habitual criminals and, therefore, to be subject to increased punishment. Yet, the courts are not agreed as to whether the pardoned offense should be counted. One line of authority holds that, since only the second offense is being punished, the pardon for the first has no effect on that punishment.¹⁴ Other juris-

7. The statement was first made in *Ex parte Garland*, 4 Wall. 333, 380 (U. S. 1866). For cases repeating it see 3 ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES (1939) 267, n. 3.

8. See *Burdick v. United States*, 236 U. S. 79, 91 (1915); *Roberts v. State*, 160 N. Y. 217, 221, 54 N. E. 678, 679 (1899).

9. See 3 ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES (1939) 293.

10. See Lattin, *The Pardoning Power in Massachusetts* (1931) 11 B. U. L. REV. 505, 520.

11. Williston has stated the generally accepted rule for the effect of such pardons as follows: "The pardon removes all legal punishment for the offence. Therefore if the mere conviction involves certain disqualifications which would not follow from the commission of the crime without conviction, the pardon removes such disqualifications. On the other hand, if character is a necessary qualification and the commission of a crime would disqualify even though there had been no criminal prosecution for the crime, the fact that the criminal has been convicted and pardoned does not make him any more eligible." Williston, *supra* note 4, at 653.

12. Such statutes are constitutional. *Graham v. West Virginia*, 224 U. S. 616 (1912); *McDonald v. Massachusetts*, 180 U. S. 311 (1901); see Note (1929) 58 A. L. R. 20.

13. See (1936) 5 FORDHAM L. REV. 166.

14. *People v. Biggs*, 9 Cal. (2d) 508, 71 P. (2d) 214 (1937); *People v. Dutton*, 9 Cal. (2d) 505, 71 P. (2d) 218 (1937); *Herndon v. Commonwealth*, 105 Ky. 197, 48 S. W. 989 (1899); *Mount v. Commonwealth*, 63 Ky. 93 (1865); *People ex rel. Malmstrom v. Kaiser*, 135 Misc. 67, 236 N. Y. Supp. 619 (Sup. Ct. 1929), (1930) 14 MINN. L. REV. 293; *People v. Carlesi*, 154 App. Div. 481, 139 N. Y. Supp. 309 (1st Dep't 1913), 13 COL. L. REV. 418, *aff'd*, 208 N. Y. 547, 101 N. E. 1114 (1913), *aff'd sub nom. Carlesi*

dictions, however, adhere to the rule that the pardon forbids taking into account the earlier offense,¹⁵ either because the pardon blots out the first crime,¹⁶ or because the increased punishment for the later offense is one of the legal consequences removed by a pardon.¹⁷ Since none of the past cases arising under habitual criminal statutes have involved a pardon granted for reasons of innocence,¹⁸ the cases which have given effect to pardoned convictions are more persuasive.¹⁹

The question of the effect to be given a pardon for innocence under an habitual criminal law arose for the first time in the recent case of *People ex rel. Prisament v. Brophy*.²⁰ The court held that the conviction, although pardoned, should increase the punishment. Relator was convicted in New York of attempted robbery. He was accused of having been convicted formerly in a United States District Court of bank robbery and so was sentenced as a second offender. By a writ of habeas corpus, however, the power of the court to sentence him to increased punishment was questioned on the ground that he had been given a full and unconditional pardon by the President of the United States, who found that he was innocent.²¹ The Appellate Division upheld his claim,²² but was reversed by the Court of Appeals.

The court, while admitting the injustice of its result, followed essentially the reasoning of cases in which pardons were granted for reasons other than innocence. The statute, according to the court, provided an inflexible rule by the terms of which the President's pardoning power could not be used to eradicate guilt, but only to remove the legal consequences of a judgment of guilt. Only a judicial finding of innocence made by a court of proper

v. New York, 233 U. S. 51 (1914); *Commonwealth ex rel. v. Smith*, 324 Pa. 73, 187 Atl. 387 (1936); *Commonwealth v. Vitale*, 35 Lack. 85 (Pa. 1933); *State v. Edelstein*, 146 Wash. 221, 262 Pac. 622 (1927); see *State v. Webb*, 36 N. D. 235, 243, 162 N. W. 358, 361 (1917); 19 OP. ATT'Y GEN. OF WIS. 139 (1930); 22 *id.* 1009 (1933).

15. *Kelley v. State*, 204 Ind. 612, 185 N. E. 453 (1933); *State v. Lee*, 171 La. 744, 132 So. 219 (1931); *State v. Martin*, 59 Ohio St. 212, 52 N. E. 188 (1898); *State v. Anderson*, 7 Ohio N. P. 562 (1896); *Freeman v. State*, 118 Tex. Cr. 67, 39 S. W. (2d) 895 (1931); *Scrivnor v. State*, 113 Tex. Cr. 194, 20 S. W. (2d) 416 (1929), (1930) 14 MINN. L. REV. 293; *Edwards v. Commonwealth*, 78 Va. 39 (1883); see *Tucker v. State*, 14 Okla. Cr. 54, 64, 167 Pac. 637, 640 (1917).

16. See, e.g., *Edwards v. Commonwealth*, 78 Va. 39, 41 (1883).

17. See, e.g., *Scrivnor v. State*, 113 Tex. Cr. 194, 197, 20 S. W. (2d) 416, 417 (1929); cf. *Sanders v. State*, 108 Tex. Cr. 467, 471, 1 S. W. (2d) 901, 903 (1923) (same reasoning where question was effect of pardoned conviction on suspended sentence).

18. See *Weihsfen*, *supra* note 6, at 186.

19. Texas courts have held, in other places, that the increased punishment is solely for the second offense. *Arnold v. State*, 127 Tex. Cr. 89, 74 S. W. (2d) 997 (1934); *Kinney v. State*, 45 Tex. Cr. 500, 78 S. W. 225 (1904).

20. 38 N. E. (2d) 468 (1941).

21. The finding was based upon indisputable proof that the crime had been committed by other persons.

22. *People ex rel. Prisament v. Brophy*, 261 App. Div. 495, 26 N. Y. S. (2d) 193 (4th Dep't 1941).

jurisdiction, the court held, would operate to wipe out conviction for the purposes of the habitual criminal statute. The court conceded that, ideally, a person should be able to prove his innocence before such a tribunal; but, in the absence of such procedure, or a statute providing that the executive finding should have the effect of a judicial acquittal, it deemed itself powerless to mitigate the punishment prescribed by the legislature. Redress must be sought from the executive, not the courts.²³

The manifest injustice of the result reached in the *Prisament* case indicates the need for machinery to correct the unfair consequences of erroneous convictions. As the court pointed out, the innocent man could, when justified by the facts, be given the benefit of liberalized criminal procedure in order to present proof of his innocence to a proper court.²⁴ An alternative solution is embodied in statutes adopted by the Federal Government and by several states to compensate one erroneously convicted.²⁵ Under such laws the decision of the body authorized to hear the innocent man's claim for indemnity constitutes the required judicial determination.²⁶ In the principal case, however, relator was prevented from obtaining statutory compensation by a technicality²⁷ requiring compliance with certain statutory conditions additional to presentation of an executive pardon for innocence. Other possible remedies include a statute, such as that of Iowa, expressly providing that convictions pardoned for innocence should not be considered under habitual criminal laws;²⁸ and, finally, the executive reduction of sentence proposed by the New York court.

But even without any of these devices courts should be able to reach a just result by recognizing the distinction between pardons for innocence and pardons for other reasons.²⁹ The executive finding of innocence has been criticized as a non-judicial determination.³⁰ But even the most devoted

23. Compare (1930) 14 MINN. L. REV. 293, 294.

24. See Williston, *supra* note 4, at 660.

25. 52 STAT. 438 (1938), 18 U. S. C. §§ 729-32 (1940); CALIF. PEN. CODE (1941) §§ 4900-06; LAWS OF N. D. (Supp. 1925) §§ 11269b1-b6; WIS. STATS. (1939) § 285.05, as amended by LAWS OF WIS., 1941, c. 301, § 1. See Borchard, *State Indemnity for Errors of Criminal Justice* (1941) 21 B. U. L. REV. 201 (with model bill based on Federal Act).

26. Under the federal law the hearing is before the Court of Claims. Administrative boards, variously constituted, hear the claims in the three states, with the findings and awards subject to review on appeal to a court in North Dakota and Wisconsin. Wisconsin further provides a final appeal to the supreme court of the state. See note 25 *supra*.

27. Relator, because of possession at the time of arrest of firearms, ammunition, money sacks of the type commonly used by bank robbers, and stolen automobile license plates, was unable to make the required recital that he did not "either intentionally, or by wilful misconduct, or negligence" contribute to his arrest. See 58 STAT. 438, § 2(c) (1938), 18 U. S. C. § 730(c) (1940).

28. IOWA CODE (Reichmann, 1939) § 13402.

29. Compare *People v. Dutton*, 9 Cal. (2d) 505, 507-08, 71 P. (2d) 218, 219-20 (1937).

30. See *ibid.*

adherence to the principle of the separation of powers³¹ should not preclude recognition that the executive is in a very good position to judge the guilt or innocence of a person seeking a pardon.³² Especially because the executive alone can grant a pardon, courts should give full force and effect to a pardon for innocence and should acknowledge that an erroneous conviction of that type has no legal consequences whatever.³³

31. See *People v. Carlesi*, 154 App. Div. 481, 487, 139 N. Y. Supp. 309, 313 (1st Dep't 1913), *aff'd*, 208 N. Y. 547, 101 N. E. 1114 (1913), *aff'd sub nom. Carlesi v. New York*, 233 U. S. 51 (1914).

32. See description of pardoning procedure in 3 ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES (1939) 155 *et seq.* See also Humbert, *The Federal Pardoning Process* (1941) 27 VA. L. REV. 481.

33. See comments of Chief Judge Cardozo in *Matter of Kaufmann*, 245 N. Y. 423, 428-31, 157 N. E. 730, 732-33 (1927).