Comments

INTERSTATE ALLOCATION OF CORPORATE INCOME FOR TAXING PURPOSES

TAX Commissioner Long of Massachusetts was speaking before the National Tax Association in 1925. "We who believe strongly in income taxation as a fair measure for taxation purposes," he said, "find much to comfort and much to disturb us in the decisions of the courts. . . . . We find it, except in its application to interstate commerce, working well but the decisions of the courts leave us uncertain as to its success when applied to corporations engaged in this type of business." [1] If it is judicial disapproval of a tax measure which disturbs those who are interested in an efficient system of income taxation, their re-action to the last word of the United States Supreme Court on the subject will not be a happy one.

The case is *Hans Rees 'Sons v. North Carolina*,[2] involving the taxation of corporations whose activities spread across state boundaries, the very matter which Commissioner Long sees as the ogre of a smooth-working income tax. North Carolina had provided for an annual governmental toll upon the net income of every corporation, wherever chartered, doing business within its borders.[3] Fifteen other states had written similar taxes upon their statute books.[4] The proportion to be attributed to North Carolina of the income of a company doing business elsewhere was determined by a fraction whose numerator was the fair value of the company's tangible property in North Carolina and whose denominator was the fair value of all the company's tangible property.[5] Other states similarly used an allocation fraction to estimate the taxable portion of an interstate income.[6] The North Carolina taxing authorities, applying the statutory frac-

[1] Long, *Present Status of The State Income Tax as a Business Tax*, (1925) NATIONAL TAX ASSOCIATION PROCEEDINGS, 151, 158.

[2] U. S. DAILY, April 16, 1931, at 386.

[3] N. C. Laws, 1923, ch. 4, sec. 201; 1925, ch. 101, sec. 201; 1927, ch. 80, sec. 311.

[4] Ark., Cal., Conn., Ga., Mass., Miss., Mo., Mont., N. Y., N. D., Ore., S. C., Tenn., Va., Wis. The statutes are listed in (1929) NATIONAL TAX ASSOCIATION PROCEEDINGS, at 163.

[5] This provision applied to manufacturing companies and such, dealing in "tangible property," a different method of computation being used for those dealing in "intangible property." See statutes cited, *supra* note 3.

[6] All the states listed, *supra* note 4, use the allocation fraction except Ga., Mont., and Ore.

tion to the income of Hans Rees' Sons, a leather company whose only factory was situated within the state, figured the taxable portion of that income for the four years from 1923 to 1926 at fractions averaging about eighty per cent.[7] The leather company protested against the size of the fractions and complained that the statute was unreasonable when so applied.[8] The Supreme Court of North Carolina stood firm for the statute, the fractions, and the taxing authorities.[9] The company appealed to the United States Supreme Court, claiming the protection of the Fourteenth Amendment. Twice before, that Court had upheld the use of similar fractions under similar statutes, against similar protests.[10] But this time the Court was persuaded by the taxpayer's plea. Speaking unanimously through Mr. Chief Justice Hughes, it distinguished away the two earlier decisions and sent the tax back to the North Carolina authorities for readjustment.

The argument of the company's counsel was as ingenious as it was persuasive. Yet the earlier opinions on the subject had saved counsel from the difficulty of working blindly. In *Underwood Typewriter Co. v. Chamberlain*,[11] a Connecticut company had complained against the taxing of 47% of its income, a proportion calculated by the tangible property fraction. Conceding that all its manufacturing was done in Connecticut, it had maintained that the bulk of its profits came from sales made in other states. But the Supreme Court had ruled that such a showing "wholly failed to sustain the objection" of unreasonableness, inasmuch as the allocation fraction was a fair way of apportioning to a taxing state its share of the linked chain of processes that make up an interstate business. Again in *Bass, Ratcliff and Gretton, Ltd. v. State Tax Commission*,[12] where New York had taxed an allocated portion of the income [13] of a British brewery

[7] The computed fractions for the four years were: 1923, 83 per cent; 1924, 85 per cent; 1925, 66 per cent; 1926, 85 per cent.

[8] The taxes were figured at 4 per cent of the part of the annual income allocated to North Carolina. The company admitted that the Commissioner of Revenue had followed the statutory method and that the property valuations and the computation of net income had been correct. Its only protest was directed against the result of a proper application of the statute.

[9] Maxwell v. Hans Rees' Sons, 199 N. C. 42, 153 S. E. 850, (1930). The State Supreme Court sustained the trial court's ruling in striking out evidence offered by the company (see *infra*, p. 1276) as immaterial; and further held that even had the evidence been competent, it could not have changed the decision.

[10] Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113, 41 Sup Ct. 45 (1920); Bass, Ratcliff and Gretton, Ltd. v. State Tax Commission, 266 U. S. 271, 45 Sup. Ct. 82 (1924); *cf.* National Leather Co. v. Massachusetts, 277 U. S. 413, 48 Sup. Ct. 534 (1928).

[11] *Supra* note 10.

[12] *Supra* note 10.

[13] The New York tax is labelled a "franchise tax" (N. Y. Laws, 1918, chs. 271, 276, 417) but is computed exactly as are other state income taxes

with a sales office in New York, the Court had stressed the "unitary" nature of the business in upholding the tax against a cry of unfairness. The implication of both opinions had been that the fault of the cases against the taxes lay not in the pleadings but in the proof; and that had counsel presented evidence to show how manufacture and sales might clearly be separated for taxing purposes, the charges of unfairness might have been heeded.[14]

The attorneys for Hans Rees' Sons, furthermore, had direct precedent to guide them. In *Standard Oil Co. v. Thorensen*,[15] an allocation fraction had been used to measure the taxable income of a corporation whose only activity in North Dakota was the sale of oil products manufactured and refined outside the state. The company had offered in protest an alternative computation, based entirely on its own accounting, whereby the sales end of the business was treated as a separate unit and a part of the company's income allotted to North Dakota corresponding to the proportion of its total sales made in that state. The Circuit Court of Appeals of the 8th Circuit had accepted the company's figure, and nullified the use of the statutory fraction as an attempt to tax property outside the state.[16] The Thorenson case had then been followed by the Wisconsin Supreme Court in *Standard Oil Co. v. Wisconsin Tax Commission*.[17] Here the company had prepared an even more divergent method of computation as a substitute for the statutory fraction. Treating its Wisconsin sales office as an autonomous retailer it had figured Wisconsin income by subtracting from gross Wisconsin sales the overhead of the office plus the cost to the office of products

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and is universally regarded as an income tax. See Gerstenberg, *Report of Committee on Standardization and Simplification of the Business Taxes*, (1929) NATIONAL TAX ASSOCIATION PROCEEDINGS, 152.

[14] "The plaintiff's argument . . . carries the burden of showing that 47 per cent of its net income is not attributable, for purposes of taxation, to the manufacture of products from the sale of which 80 per cent of its gross earnings was derived. . . . The corporation has not even attempted to show this; . . . ." Underwood Typewriter Co. v. Chamberlain, *supra* note 10, at 121, 41 Sup. Ct. at 47. This passage is quoted in Bass, Ratcliff and Gretton, Ltd. v. State Tax Commission, *supra* note 10, at 281, 45 Sup. Ct. at 84.

[15] 29 F. (2d) 708 (C. C. A. 8th, 1928).

[16] Judge Pollock, in the Thorensen case, seemed to rely largely on dicta of Mr. Chief Justice Fuller in Sanford v. Poe, 165 U. S. 194, 17 Sup. Ct. 305 (1897), a case dealing with the application of the "unit rule" of property taxation (see *infra* p. 1279) to express companies. The only case cited as more or less direct precedent for the decision was Fisher v. Standard Oil Co., 12 F (2d) 774 (C. C. A. 8th, 1926), a case which overthrew a commission-set tax because the statutory fraction had not been properly applied, and which distinctly advocated the method of computation which the commissioner used and the court reversed in the Thorensen case.

[17] 197 Wis. 630, 223 N. W. 85 (1929).

"bought" from the company itself. The court, in accepting this figure and throwing out the commission assessment, had returned to the company almost seventy thousand dollars.[18]

So in the *Rees* case, counsel found their lead well-defined. To support their claim that the eighty per cent fraction was too high, they produced evidence to the effect that the company's total income accumulated from three separate sources. Buying profit, it was said, resulted from peculiar skill in dealing in the market for leather hides. Selling profit came from cutting finished leather in accordance with consumers' demands. Both these processes took place in New York. Manufacturing profit alone, described as the difference between the contract cost and the actual cost of tanning, could be assigned to North Carolina. And for the four assessment years the proportion of total income to be ascribed to manufacturing profit averaged only seventeen per cent.[19]

In agreeing with the company that the tax had been set too high, the Supreme Court was doubtless impressed by the tremendous difference between the commission's eighty per cent and the company's seventeen per cent. It was sufficiently impressed to declare that the company's analysis of its own business amounted to more than a "negligible criticism" of the practical impossibility of mathematical exactness in tax apportionment, and that it sufficed to break down the unitary conception of a single business on which the statutory estimate was based. The *Underwood* and *Bass* cases, said the Court, stood only for the principle that the unit idea and the dependent allocation fraction were valid on their face until contradicted by proof that a business might be split into segments for taxation purposes. But the Court seemed to forget having said in the Bass case that even if the taxpayer had received no net income in the taxing state, as the Bass Co. there alleged, still the theoretical income assigned it by the fraction might properly be taxed.[20] Certainly no scheme of splitting up the business, however elaborate, could have strengthened the argument that no income from any source was received in the state which was attempting to tax income there received.

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[18] Judge Rosenberry, writing the opinion, relied largely on the Thorensen decision, concerning the basis of which, see note 16, *supra*.

[19] All this evidence had been rejected by the trial court as immaterial. See note 9, *supra*.

[20] "Furthermore, the statutory method of apportionment not being shown to be arbitrary or unreasonable, we think that the Court of Appeals rightly held that the tax imposed for the carrying on of the business in New York is not invalid merely because in the preceding year the business conducted in New York may have yielded no net income." Bass, Ratcliff and Gretton, Ltd. v. State Tax Commissions, *supra* note 10, at 284, 45 Sup. Ct. at 85.

It is of more importance that the Court in the *Rees* case, considering the question before it with traditional judicial blinders, seemed to overlook the probable effect of the decision on the parties involved once the case itself was disposed of. For the substance of the leather company's argument was that the bulk of its income was assignable to New York activities and should be taxed by New York rather than by North Carolina. Yet New York, in estimating the taxable portion of an interstate income, uses a fraction very similar to that used in North Carolina.[21] According to such a fraction, New York would find itself taxing considerably less than the eighty-three percent which the company would have assigned it by reason of the "buying profit" and "selling profit" factors argued before the Supreme Court to escape the North Carolina tax.[22] And it can scarcely be supposed that the company would quarrel with the minuteness of the New York tax. Hence the *Rees* case allows an interstate income taxpayer to choose from two methods of computation the one which will subject him to the lesser assessment in each state, and thus to reduce materially below his total income the sum on which that income will be state taxed.[23]

Considered from the general angle of effective tax administration which prompted the comments of Commissioner Long, the result of the *Rees* case is even more bewildering. Almost all the states which had settled on corporate incomes as a source of revenue had resorted to the allocation fraction as the best means of splitting up an interstate income.[24] The method had been approved and sponsored by the National Tax Association.[25] In

[21] New York in its allocation fraction includes bills and accounts receivable, and shares of stock held in other companies, along with the tangible property factor used by North Carolina. That the inclusion of numerous items will have little effect on the resultant fraction, in that one item may be fractionally representative of several, see Gerstenberg, *supra* note 13, at 158.

[22] By assigning to other states where sales were made part of New York's "buying profit" and "selling profit," the company could attempt to reduce its New York fraction below eighty-three per cent. But no such suggestion was made in the Rees case, where the company's sole desire was to wrest as much of its income as possible from North Carolina.

[23] It is interesting to note that the committee of the National Tax Association which studied this problem warned against the converse of this possibility,—*i. e.*, taxation of more than a company's total income—which might also result from lack of uniformity in the state fractions. Gerstenberg, *supra* note 13, at 155.

[24] See note 16, *supra*. There is some variance in the items used by the different states in their fractions, but that this is likely to cause only a slight difference in the resultant computation, see note 21, *supra*.

[25] See (1928) NATIONAL TAX ASSOCIATION PROCEEDINGS, 429. The ideal allocation fraction there advocated is made up of two factors: tangible

general, it had the advantage of comparative simplicity. Inasmuch as the factors used by the various states in their fractions were or could easily be made identical, it offered the possibility of uniformity. The *Underwood* and *Bass* cases had seemed to endow it with constitutionality. In short, the allocation fraction seemed a thoroughly practical method of dealing with a difficult problem in taxation. Now comes the Supreme Court and says that any taxpayer who finds the difference in taxes worth the expense of the contest may force the taxing authorities to accede to a self-devised scheme of computation, no matter how complicated and incapable of uniform application it may be.

For a tax commission is ill-equipped to inspect and supervise every elaborate accounting scheme which may be proffered by corporation counsel as a fairer substitute for the allocation fraction.[26] Such supervision would mean, in effect, a unique computation of each assessment after a thorough investigation of the activities and finances of the corporation. It would entail a tremendous expense of time and energy. The cost of investigation might well consume a large part of the tax funds collected and thus defeat its own end.[27] The same administrative and technical difficulties would be encountered which have plagued utility rate regulation since the devices of the utilities have forced the commissions to act as financial policemen in order to make regulation effective. But in the absence of some such supervision, the corporations would be practically setting their own taxes, a practice of doubtful value as a revenue-producing scheme. Should interstate corporations, then, take too eager advantage of the *Rees* decision, the tax experts would be forced to abandon the allocation fraction method of taxing corporate income.

Nor is it the first time that the Supreme Court has allowed

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property and "business," the latter to be computed by a combination of sales, purchases, and wages paid. This fraction has been adopted by North Dakota and was the one involved in the Thorensen case, *supra* note 15.

[26] See the excellent opinion of the Wisconsin Tax Commission, quoted in a footnote of Standard Oil Co. v. Wisconsin Tax Commission, *supra* note 17, which concludes: "Even though its (the appellant's) business activities in this state were ever so separate and distinct from its other business activities in other states, a faulty method of accounting for the income arising from those business activities within Wisconsin cannot be accepted simply because the business activities themselves might be capable of separation."

[27] *Cf.* Mr. Justice Pitney, dissenting in Union Tank Line Co. v. Wright, *infra* note 28, at 290, 39 Sup. Ct. at 281: "For if the state authorities were required to keep a check either upon the average use or the aggregate mileage covered by the movements of rolling stock within the State, and to supplement this with observations in other States in order to arrive at the due proportion, the cost of administration easily might consume the tax."

the intricate arguments of taxpayers to obstruct the smooth working of an established taxing scheme on which it had previously bestowed its general approval. The closest analogy to the allocation fraction scheme of apportioning taxes had been the so-called "unit rule," by which the states taxed property used in interstate business.[28] According to this rule, the entire property of a railroad, telegraph company or such was treated as a unit and divided between the states for taxation purposes according to a theoretically representative fraction, such as the railroad trackage within the state over the total trackage of the road. The unit rule was upheld by the Supreme Court in a long line of cases, until it seemed firmly and irreversibly established.[29] Then in *Union Tank Line v. Wright*,[30] protest was made against calculation by the trackage fraction of a Georgia property tax on tank cars used in and out of the state. The taxpayer produced statistics to show that the average numbers of its cars in the state per day was considerably lower than the theoretical average computed by the tax fraction. The Supreme Court, won over by the numerical disparity, reversed the tax in spite of a strong dissent, joined in by three of the justices, which spoke of the evils of leaving tax ascertainment "wholly within the breast of the taxpayer." [31]

Yet another analogy is to be found in the very field of corporate income taxation, where the development of the system had struck a Supreme Court snag before the *Rees* case. At first, the complaint that the taxing of interstate incomes amounted to an unconstitutional burdening of interstate commerce had failed to move the Court. It had held in several cases that a state might properly tax the income of a corporation doing business there, even though part of that income resulted from interstate activities,[32] provided only that the tax be laid on the net income

[28] For a full description of the unit rule and its history in the United States Supreme Court to that date, see the majority and dissenting opinions in Union Tank Line Co. v. Wright, 249 U. S. 275, 39 Sup. Ct. 276 (1919). See also Isaacs, *The Unit Rule* (1926) 35 YALE L. J. 838.

[29] Among the leading cases are Kentucky Railroad Tax Cases, 115 U. S. 321, 6 Sup. Ct. 57 (1885) (railroads); Western Union Telegraph Co. v. Massachusetts, 125 U. S. 530, 8 Sup. Ct. 961 (1888) (telegraph companies); Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 11 Sup. Ct. 876 (1891) (sleeping car companies); Adams Express Co. v. Ohio, 165 U. S. 194, 17 Sup. Ct. 305 (1897) (express companies); American Refrigerator Transit Co. v. Hall, 174 U. S. 70, 19 Sup. Ct. 599 (1899) (refrigerator car companies).

[30] *Supra* note 28.

[31] See note 27, *supra*. *Cf.* Wallace v. Hines, 253 U. S. 66, 40 Sup. Ct. 435 (1919) (unit rule held inapplicable in North Dakota because tracks and stations there represent lower proportional capital outlay than in other states).

[32] U. S. Glue Co. v. Oak Creek, 247 U. S. 321, 38 Sup. Ct. 499 (1918);

and not the gross.[33] Then came the *Alpha Portland Cement*[34] case. A New Jersey corporation with its main office in Pennsylvania and a central New England sales office in Massachusetts complained that Massachusetts' attempt to tax part of its net income was unconstitutional. The earlier cases were distinguished on the ground that there at least part of the taxed incomes had been intrastate, whereas here no part of the income could be so labelled inasmuch as all orders received at the Massachusetts office were relayed to the Pennsylvania office for confirmation. And the Supreme Court accordingly held that although an interstate income might be taxed when coupled with an intrastate income, nevertheless Massachusetts' attempt to tax a part of the cement company's net profits amounted to an unconstitutional burdening of interstate commerce.[35]

In the *Rees* case, as in the *Union Tank Line* and *Alpha Portland Cement* cases, it was the skillful argument of a recalcitrant taxpayer that induced the Supreme Court to sidetrack the development of a taxing scheme, at least to the extent of rendering it inoperative in the particular instance. But another method of partially evading the burden of a corporate income tax had previously been devised. The fact that only a smattering of states impose such taxes had encouraged several companies whose activities were split among taxing and non-taxing states to set up separate manufacturing and sales corporations, financially interdependent but legally autonomous, and so deprive a taxing state of the power to levy upon the profits thus isolated to one of the processes of a single business.[36] Reduction of taxable income by such use of holding and subsidiary corpora-

Shaffer v. Carter, 252 U. S. 37, 40 Sup. Ct. 221 (1920); Hump Hairpin Manufacturing Co. v. Emmerson, 258 U. S. 290, 42 Sup. Ct. 305 (1922); Atlantic Coast Line v. Daughton, 262 U. S. 413, 43 Sup. Ct. 620 (1923).

[33] Galveston, Harrisburg and San Antonio Ry. v. Texas, 210 U. S. 217, 28 Sup. Ct. 638 (1908); Crew Levick Co. v. Pennsylvania, 245 U. S. 292, 38 Sup. Ct. 126 (1917). In U. S. Glue Co. v. Oak Creek, *supra* note 32, Mr. Justice Pitney differentiates between a tax on gross income as a *direct* burden on interstate income, and a tax on net income as an *indirect* and hence permissible burden.

[34] Alpha Portland Cement Co. v. Massachusetts, 268 U. S. 203, 45 Sup. Ct. 477 (1925).

[35] For criticisms of the decision from the angles of tax administration and of constitutional law, see Long, *supra* note 1, and Powell, *Business Taxes and the Federal Constitution* (1925) NATIONAL TAX ASSOCIATION PROCEEDINGS, 164; and note the comments of the Association on those two papers, in the same volume at 196 *et seq.*

[36] For a thorough discussion of this practice and its possibilities, see Magill, *Allocation of Income by Corporate Contract* (1931) 44 HARV. L. REV. 935. *Cf.* Breckenridge, *Tax Escape by Manipulations of Holding Company* (1931) 9 N. C. L. REV. 189; (1931) 31 COL. L. REV. 719.

tions had withstood judicial inspection.[37] But a federal district court recently warned against too obvious tax evasion by this method when it allowed the Wisconsin commission to treat an affiliated group of corporations as a taxable unit where it appeared that the "contract" between the Wisconsin manufacturing company and its Delaware sales company operated to reduce the income of the former to a negligible fraction of the ultimate profits.[38] Thus the tax-reduction advantages of the separate corporation set-up are boiled down to a realistic division of income between the various processes of a manifold business. Yet the *Rees* case offers exactly the same opportunity without the further necessity of splitting the business into separate legal entities. A single corporation need only show that its manufacturing profits and its sales profits can be distinguished to force their distinction for taxing purposes. Moreover, as previously indicated, a single corporation can neglect to point out the distinction wherever the allocation fraction applied to the business as a unit is kinder to the taxpayer's treasury.

The popular notion of the tax-collector as a public enemy has been forced upon many lawyers because they are in the direct or indirect employ of heavily taxed corporations. To them the "practical" approach to the problem is always—How best can the tax be reduced or avoided. Legal commentators assume a similar attitude[39] or content themselves with the abstractions of legal theory, or perhaps avoid the latter tack by adopting an impartial and "functional" stand for fairness in taxation, unhindered by inclusive schemes or theories.[41] To any or all of these the *Rees* decision may appeal as just and proper. But to those who, like Commissioner Long, are interested from the governmental angle in a working system of taxation, the *Rees* decision can only appear as an added obstacle.

The problem outlined by the case is a miniature replica of the larger problem of state taxation. The most likely sources of revenue are the large industrial corporations which have sup-

[37] People ex. rel. Studebaker Corp. v. Gilchrist, 244 N. Y. 114, 155 N. E. 68 (1926).

[38] Palmolive Co. v. Conway, 43 F. (2d) 226 (W. D. Wis., 1930). To the same effect, see Buick Motor Co. v. Milwaukee, 43 F. (2d) 385 (E. D. Wis., 1930) (commission allowed to disregard separate corporation set-up where actual income shown to exceed "contract" income).

[39] *Cf.* articles cited, *supra* note 36.

[40] *Cf.* Rottschaefer, *State Jurisdiction of Income for Tax Purposes* (1931) 44 HARV. L. REV. 1075.

[41] *Cf.* Powell, *supra* note 35. Mr. Powell deplores the Alpha Portland Cement decision, *supra* note 34, as unwarranted and based on unsound logical deduction; but also deplores the Bass decision, *supra* note 10, as unfair to the taxpayer.

planted the landowners as the rich men of the time. But corporations today are no respecters of state boundaries. Their property and their activities are scattered throughout the states wherever population or natural resources may demand. Yet state boundaries are a part of our federal system and are written into our Constitution. And the federal government must also live on revenue garnered through a power of regulation which presupposes a group of separate states. Between this governmental inheritance and the contradictory nature of modern industry and commodity-distribution, the states must steer a difficult course. Schemes of taxation must be devised which will effectively reach the corporate wealth and yet will not offend the legal system which grants the taxing power.

To this dilemma the *Rees* case offers at best a haphazard solution. State taxation schemes are to be tested by a slow system of trial-and-error. First the legislature must work out and enact a tax law. It must be sufficiently detailed, sufficiently definite in its laying down of tax schedules, to escape the added constitutional hazard of "delegated legislation." [42] The tax commissioners must rigidly adhere to the schedule so laid down. They may apply the law and collect taxes for years, may even be upheld at times by the courts, before effective protest is made by a wounded taxpayer. Such protest will almost always take the form of a showing that a particular tax measure, though proper in itself, is unreasonable in its exceptional application to the complainant. But once the courts uphold such a protest, the door is opened for countless protests phrased in similar language. Taxes are sent back to the commission which then has no choice but to bow to the plea for reduction. The measure loses its omnipotence, and with it its effectiveness. And the legislature must start all over with a new revenue measure.

The delay and uncertainty of such a process, contrasted with the ever-immediate need of state revenue, demand for the situation a more workable solution. Voluntary agreements between the states, supported by the legal doctrine of comity, have been urged as a salutory step.[43] In this manner, uniformity would be guaranteed and the problem created by state borders would

[42] In Commonwealth v. P. Lorillard Co., 129 Va. 74 (1921), the tax assessors, working under a statute which laid a tax upon corporate income, devised an allocation scheme to measure the Virginia income of a foreign corporation doing business in the state. The statute itself provided no method of apportionment. The court, altho implying that the scheme would have been valid had it been written in the state, reversed the tax on the ground that the commission had exceeded its proper powers.

[43] Report of Model Income Tax Committee, (1922) NATIONAL TAX ASSOCIATION PROCEEDINGS, 491.

be insured a less piece-meal consideration. But while courts continue to tolerate the clever excuses of complaining taxpayers, even interstate agreements would run the same risk of belated judicial disapproval.[44] The only possible escape from this risk seems to lie in a scheme whereby the federal government would allot to each state its share of taxes levied on interstate enterprise. Whatever constitutional difficulties[45] would be encountered could doubtless be more easily and more quickly resolved than those inherent in the present hit-or-miss system. A problem nation-wide by nature would receive federal attention from the start instead of being relegated to splotchy federal supervision after tentative solutions are well under way. Finally, it might force judicial recognition of the administrative difficulties that beset any attempt to levy state taxes fairly and yet effectively.

STATUTORY CONSTRUCTION IN DEPORTATION CASES

THE drive announced by the Secretary of Labor to rid the country of "illegal invaders," as an aid to unemployment relief,[1] sharpens the significance of recent decisions of the federal courts in deportation cases. Even when directed with the most scrupulous intention to keep within statutory powers, it cannot be doubted that administrative zeal to produce large-scale results[2] is prone to breed, especially among the subordinate officials who handle most of the detail of the individual cases, administrative laxity

[44] Unless all the states were to pass corporate income taxes and all to join in the interstate agreements, the same protests supported by the same evidence, might be voiced against multi-state income apportionment as were made in the Rees case against the scheme of a single state.

[45] The greatest of these would probably lie in the attempt to work out the sphere of federal jurisdiction. Thus, although a strictly intrastate business would be constitutionally immune to federal regulation, the problem would remain of determining what, if any, businesses at no time reach across state boundaries.

[1] See New York Herald-Tribune, April 11, 1931, at 1.

[2] The following figures show the increase in the number of deportations per year:

1920—2,762	1926—10,904
1922—4,345	1928—12,908
1924—6,409	1930—16,631

ANNUAL REPORT OF THE COMMISSIONER GENERAL OF IMMIGRATION (1930) at 7. A record of 20,000 deportations has been predicted for the fiscal year ending June 30, 1931. For a recent report of the progress of the Labor Department's deportation program, and criticism of some features thereof, see New York Herald Tribune, April 11, 1931, at 1; April 17 at 16.

in the methods by which results are accomplished. And no fresh demonstration should be required to show that the danger of abuse of power is heightened at a time when popular apprehension is stirred by reports which, rightly or wrongly, tend to identify a general class, against certain members of which the power may be properly directed, with more or less imminent menace to public security.[3]

It is well settled that deportation proceedings are not in the technical sense penal in character.[4] They may therefore be entrusted to administrative officers for determination and are not required to follow the forms of judicial procedure.[5] Nevertheless, the nature of their consequences to the individual is such as to bring them clearly within the requirement of the Fifth Amendment as to due process of law.[6] Deportation proceedings begin with a deprivation of liberty, and it has not escaped judi-

[3] See POST, DEPORTATIONS DELIRIUM OF 1920 (1923); Reports made to Senate Judiciary Committee on activities of the Department of Justice in connection with the "red" raids of 1920, 64 CONG. REC. 3051-73 (1923); REPORT OF SPECIAL COMMITTEE TO INVESTIGATE COMMUNIST ACTIVITIES AND PROPAGANDA, U. S. DAILY, Jan. 19, 1931, Supplement.

[4] Fong Yue Ting v. U. S., 149 U. S. 698, 13 Sup. Ct. 1016 (1892); Zakonaite v. Wolf, 226 U. S. 272, 33 Sup. Ct. 31 (1912).

[5] Ekiu v. U. S., 142 U. S. 651, 12 Sup. Ct. 336 (1891); Fong Yue Ting v. U. S., *supra* note 4. But a question of jurisdiction is presented when the person against whom the proceedings are directed alleges himself to be a citizen. The decision of the Secretary of Labor, under the Chinese Exclusion Act, has been held to be final even in such a case. U. S. v. Ju Toy, 198 U. S. 253, 25 Sup. Ct. 644 (1905). The Ju Toy case represents an extreme of judicial non-interference with the finding of the administrative officer, especially in view of the fact that in that case the District Court had found the petitioner to be a citizen. A distinction is now established between a person seeking entry, in legal contemplation a person still outside the borders of the United States, and a resident who has been lawfully admitted and supports his allegation of citizenship with substantial evidence. In the latter case the jurisdiction of the Secretary may be tested judicially. Ng Fung Ho v. White, 259 U. S. 276, 42 Sup. Ct. 492 (1921); and the burden of proof of alienage is on the government. Bilokumsky v. Tod, 263 U. S. 149, 44 Sup. Ct. 54 (1923).

[6] Aliens as well as citizens have Constitutional rights. Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064 (1886). As to persons seeking admission Congress has authority to entrust the final determination of questions of fact to an executive officer, his order then representing due process of law. Ekiu v. U. S., *supra* note 5. Administrative officers, however, may not disregard the fundamental principles of due process of law which include the right to be heard. Yamataya v. Fisher, 189 U. S. 86, 23 Sup. Ct. 611 (1903). And the hearing must be fair. Chin Yow v. U. S., 208 U. S. 8, 28 Sup. Ct. 201 (1908); Kwock Jan Fat v. White, 253 U. S. 454, 40 Sup. Ct. 566 (1920). Only where the deportation proceedings are fairly conducted and the findings supported by substantial evidence is the finding of the administrative officer conclusive. Whitfield v. Hanges, 222 Fed. 745 (C. C. A. 8th, 1915); Lisotta v. U. S., 3 F. (2d) 108 (C.

cial notice that they may entail deprivation of property and even of life itself.[7] When the Supreme Court by its decisions in *Fong Yue Ting v. United States*[8] and *United States v. Ju Toy*[9] affirmed a doctrine of non-interference with administrative discretion in deportation cases, a recognition of the severity of deportation in terms of human fortunes and happiness impelled the forceful dissenting opinions of Mr. Justice Brewer and others of his colleagues. In certain recent opinions in the Circuit Courts of Appeals there is a revival of emphasis on this consideration as a reason for requiring a more exacting construction of the due process rights of an alien and a more restricted construction of the statutory grounds upon which deportation orders may be based. As a result there has developed on certain points a conflict of authority likely to require solution by the Supreme Court which, although it has not maintained the pristine rigor of its doctrine of non-interference, has been sparing in its pronouncements in deportation matters.[10]

C. A. 5th, 1924); Colyer v. Skeffington, 265 Fed. 17 (D. Mass. 1920). See BOUVÉ, EXCLUSION AND EXPULSION OF ALIENS IN THE UNITED STATES (1912). Chap. IV; DICKINSON, ADMINISTRATIVE JUSTICE (1927), 290-296.

In England the alien enjoys no similar legal safeguards. Thus when the Home Secretary, acting under statutory authority, orders the deportation of an alien as "conducive to the public good," he acts as an executive officer and not as a judicial tribunal and is not bound to grant a hearing. Ex parte Venicoff, 3 K. B. 72 (1920). But *cf.* Ex parte O'Brien, 2 K. B. 361 (1923) (rights of citizen affected by deportation order). In countries where executive discretion is absolute and final, the rights of aliens against unjustified acts of expulsion are nevertheless not without protection under international law, though their assertion in a given case is dependent on the bringing of a claim by the state of which the alien is a national. See note 44, *infra*.

[7] "It deprives of liberty. It may result also in loss of both property and life; or of all that makes life worth living." Ng Fung Ho v. White, *supra* note 5, at 284, 42 Sup. Ct. at 495. A forceful presentation of the consequences of deportation and of the views of Madison and other early American statesmen is contained in the dissenting opinion of Mr. Justice Brewer in Fong Yue Ting v. U. S., *supra* note 4, at 740, 13 Sup. Ct. at 1029. The heaviest consequences of deportation often fall not upon the individual deported but upon families left in this country. There are, however, no constitutional guarantees relating to the rights of the family as such. For some of the social effects of deportation see ABBOTT, IMMIGRATION, SELECT DOCUMENTS AND CASE RECORDS (1924) 298-460; SOCIAL CONSIDERATIONS IN DEPORTATION, FOREIGN LANGUAGE INFORMATION SERVICE, 7 INTERPRETER RELEASE 121 (1930).

[8] *Supra* note 4. Brewer, J., Field, J., and Fuller, C. J., dissented.

[9] *Supra* note 5. Brewer, J., with whom concurred Peckham, J., wrote a dissenting opinion and Day, J., dissented without opinion.

[10] Outside of cases otherwise cited in foot-notes, the following list is believed to comprise the Supreme Court opinions of general importance on deportation questions during the last twenty years: Low Wah Suey v. Backus, 225 U. S. 460, 32 Sup. Ct. 734 (1912); Bugajewitz v. Adams, 228 U. S. 585, 33 Sup. Ct. 607 (1913); U. S. v. Woo Jan, 245 U. S. 552, 38 Sup.

I. EFFECT OF CRIMES COMMITTED IN THE UNITED STATES

In the case of *Browne v. Zurbrick* [11] the Circuit Court of Appeals in the Sixth Circuit recently dealt with one of the vexed problems created by cases of re-entry. It proceeded on the express hypothesis that, unless the application of the statute to the case is clear, because of the gravity of the effects of deportation the order to deport cannot be allowed to stand.[12] In this case, the alien had resided lawfully in the United States for eight years when he committed a crime; he was convicted but placed on probation and continued in his regular employment. Although the statute [13] provides for the deportation of aliens sentenced to imprisonment "because of conviction in this country of a crime involving moral turpitude," [14] he was at the time safe from deportation because, to bring it under this section of the statute, the crime must have been committed within five years after entry. A year later, however, with the consent of his probation officer, he made a ten-days' visit to relatives in Canada. Following his return he was taken into custody by immigration officials and ordered deported on the ground that he had been convicted of a felony *prior* to entry. On petition for a writ of *habeas corpus*, the Court of Appeals directed his release.

It has been established by Supreme Court decisions, in deference to what was deemed the manifest intention of Congress in changes introduced in the Immigration Act of 1903, that any re-entry renders an alien subject to the strictures of the Act,

Ct. 207 (1918); Tisi v. Tod, 264 U. S. 131, 44 Sup. Ct. 260 (1924); White v. Chin Fong, 253 U. S. 90, 70 Sup. Ct. 449 (1919); Mahler v. Eby, 264 U. S. 32, 44 Sup. Ct. 283 (1923); Quon Quon Poy v. Johnson, 273 U. S. 352, 47 Sup. Ct. 346 (1927); Claussen v. Day, 279 U. S. 398, 49 Sup. Ct. 354 (1929); Wenglinsky v. Zurbrick, 51 Sup. Ct. 35 (U. S. 1930), reversing without opinion 38 F. (2d) 985 (C. C. A. 6th, 1930).

[11] 45 F. (2d) 931 (C. C. A. 6th, 1930).

[12] A recent statutory change is made the point of departure in adopting this view, the court stating: "Whether, in view of this change in the results of a deportation order, the courts will construe more liberally the due process rights of an alien, is a question that will eventually call for consideration; here it is enough to say that, in applying the supposed statutory grounds of deportation to this alien, long rightfully domiciled here, the application must be clear, and cannot rest on doubtful interpretation." *Ibid*, at 932.

[13] 39 STAT. 889 (1917), 8 U. S. C. A. § 155 (1926).

[14] Congress has made it a condition that the crime must be shamefully immoral, leaving no test other than accepted moral standards to be applied by the courts; under such a test not every violation of the National Prohibition Act can be regarded as involving moral turpitude. See Iorio v. Day, 34 F. (2d) 920, 921 (C. C. A. 2d, 1929). The allocation may depend upon the facts in the particular case. Browne v. Zurbrick, *supra*, note 11, at 933 (refraining from decision upon the character of the offense involved in this case which was the taking of indecent liberties with a girl of fifteen). See 28 COL. L. REV. 1100 (1928).

regardless of previously acquired domicile in this country,[15] And the admission, or conviction, of the commission of a crime prior to entry is ground for deportation.[16] The issue in *Browne v. Zurbrick* was the application of this provision to an alien who had committed a crime *in this country*. Looking narrowly at the one provision of the statute and at the authority of the Supreme Court decisions as to "entry", the conclusion might be readily drawn, as it was in *Bendel v. Nagle*[17] in 1927, that such an alien falls within the description. Only by considering the statute more comprehensively is an implication discoverable that the offense committed prior to an entry which will bar admission is limited to one committed outside the territory of the United States. The basis for this interpretation is that deportation as a consequence of a crime committed in this country is especially provided for and made subject to certain qualifications. Not only must the crime have been committed within five years after entry and been followed by conviction and sentence for one year or more, but even then deportation will not follow if the alien has been pardoned or if the judge in rendering sentence has recommended to the Secretary of Labor that the alien shall not be deported as a consequence.[18] In view of these specifications, necessarily limited to crimes committed in the United States, it is possible to conclude that Congress intended a distinction based upon the place of crime, a distinction not altered by reentry. This construction the Court in the Sixth Circuit adopts, and, in doing so, it carries to its logical conclusion a process of differentiation already worked out in the Ninth Circuit.[19]

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[15] The provisions of the Act of 1891 (26 STAT. 1084) and of the acts which preceded it had been construed as applying only to "alien immigrants" and as not including aliens previously resident in this country. In re Panzara, 51 Fed. 275 (E. D. N. Y. 1892); In re Martorelli, 63 Fed. 437 (S. D. N. Y. 1894); In re Maiola, 67 Fed. 114 (S. D. N. Y. 1895); In re Ota, 96 Fed. 487 (N. D. Cal. 1899). But the Supreme Court "upon a review of the whole matter," pronounced itself "satisfied that Congress in the Act of 1903, sufficiently expressed, and in the act of 1907 reiterated, the purpose of applying its prohibition against the admission of aliens, and its mandate for their deportation to all aliens whose history, condition or characteristics brought them within the descriptive clauses, irrespective of any qualification arising out of a previous residence or domicile in this country." Lapina v. Williams, 232 U. S. 78, 91, 34 Sup. Ct. 196, 200 (1914). *Accord:* Lewis v. Frick, 233 U. S. 291, 34 Sup. Ct. 488 (1914).

[16] 39 STAT. 889 (1917), 8 U. S. C. A. § 155 (1926). By the same section any alien who at the time of entry was one of the excluded classes is subject to deportation. Persons who have been convicted of, or admit the commission of a crime, are excluded. 39 STAT. 875 (1917), 8 U. S. C. A. § 136 (1926).

[17] 17 F. (2d) 719 (C. C. A. 9th, 1927).

[18] 39 STAT. 889 (1917), 8 U. S. C. A. § 155 (1926).

[19] When this question arose in the Ninth Circuit in 1925, the question of the place where the crime was committed was not considered. Weedin v.

II. CONSTRUCTION OF "LIKELY TO BECOME A PUBLIC CHARGE"

Aliens "likely to become a public charge" at the time of arrival are barred by the statute and even though they may gain admission are subject to deportation at any time within a five-year period after entry.[20] The limitations placed by judicial construction on the application of these provisions are few and not sharply defined. In *Gegiow v. Uhl* [21] the Supreme Court held that the immigration authorities exceeded their jurisdiction under the statute in detaining immigrants for deportation merely because an over-supply of labor existed at the point of destination. The grounds of exclusion enumerated in the section of the statute in which the "public charge" phrase then occurred [22] were construed to be "permanent personal objections irrespective of local conditions." Two years later in the Immigration Act of 1917 [23] the phrase was shifted so as to dissociate it from the

Yamada, 4 F. (2d) 455 (C. C. A. 9th, 1925). That case concerned a Japanese, twenty-two years in the United States, married, and with children born in this country, who, eleven years after a re-entry from a visit to Japan, was ordered deported for a crime committed in the United States seventeen years before the deportation proceedings were instituted. In Bendel v. Nagle, *supra*, note 17, the alien was a Canadian who had resided in the United States nineteen years but had re-visited Canada. The fact that the crime on which the deportation order was founded had been committed in the United States was held not material since it was a crime prior to the last entry. But in Shibata v. Carr, 35 F. (2d) 636 (C. C. A. 9th, 1929) which concerned an alien who had made false statements at the time of his entry and who eight years later, after his wife had joined him and two children had been born in this country, was ordered deported for the commission of perjury "prior to entry," the court held that since the crime was committed, if at all, in the United States, the alien was subject to deportation only for conviction and not for admission merely. In Wong Yow v. Weedin, 33 F. (2d) 377 (C. C. A. 9th, 1929) an alien, established in the United States for twenty-six years and having the status of a Chinese treaty merchant, had contracted a bigamous marriage in this country. Upon a re-entry he was ordered deported for admitting the crime of bigamy "prior to entry." The court, in ordering his release, based its decision not on the distinction between conviction and admission but on the ground that Congress intended a classification of crime with reference to the place of commission. "We are inclined to think Congress, probably having in mind only a single entry, used the phrase [prior to entry] as synonymous with 'out of this country.'" *Ibid* 379. Linklater v. Commissioner, 36 F. (2d) 239(S. D. N. Y. 1929), accepts the construction of Wong Yow v. Weedin, *supra*. *Contra*: Medich v. Burmaster, 24 F. (2d) 57 (C. C. A. 8th, 1928) (alien, fifteen years resident, drove taxicab across Canadian border, returning the same day; deportation order for crime committed in this country "prior to entry" sustained).

[20] 39 STAT. 875 (1917), 8 U. S. C. A. § 136 (1926); 39 STAT. 889 (1917), 8 U. S. C. A. § 155 (1926).

[21] 239 U. S. 3, 36 Sup. Ct. 2 (1915).

[22] 36 STAT. 263, § 1 (1910), COMP. STAT. (1913) § 4244.

[23] 39 STAT. 875, § 3 (1917), 8 U. S. C. A. § 136 (i) (1926).

provisions relating to paupers, beggers and those having physical defects likely to affect their ability to earn a living. This change of position has done nothing to make the meaning of the phrase more clear, but its effect is undoubtedly to weaken the present authority of *Gegiow v. Uhl*[24] and to give greater latitude to administrative discretion.[25] In general the courts interfere only when the determination of the administrator on this ground is obviously grotesque.[26]

The acceptance of relief or care publicly provided is not alone sufficient to render the alien subject to deportation.[27] On the other hand the burden of showing affirmatively that the causes of need arose after entry may be severe.[28] Aliens when they are establishing themselves in a new society must therefore demonstrate during the first five years an independence of social aids of which the citizen in time of distress may avail himself with-

[24] The term "is certainly now intended to cover cases like Gegiow v. Uhl where the occasion leads to the conclusion that the alien will become destitute though generally capable of standing on his own feet." Iorio v. Day, *supra*, note 14, at 922. See Ex parte Horn, 292 Fed. 455, 457 (W. D. Wash. 1923), a case involving criminal misconduct, to the effect that by the change in the statute the term is differentiated from the application in Gegiow v. Uhl. But see Ex parte Mitchell, 256 Fed. 229, 230 (N. D. N. Y. 1919), for the view that the meaning of the words is not changed by a change in their position in the statute.

[25] The discretion lodged in administrative officials under this term has recently been used as a most effective means for regulating immigration. The Immigration Act of 1924 provides that immigrant's visas shall not be issued by consular officers abroad if these officials have reason to believe that the immigrant is inadmissible. On September 8, 1930, in view of unemployment in the United States, consular officers were ordered to take particular care to determine whether applicants were likely to become public charges. Under these instructions the number of visas issued has been sharply reduced. U. S. DAILY, Dec. 6, 1930, at 235.

[26] As where a woman, in good health, self-supporting and owning property, was ordered deported on the ground that she was likely to become a public charge merely because of the possibility of a civil suit being brought against her for alienation of affections. Ex parte Mitchell, *supra* note 24.

[27] Assurance on this point has recently been given in a letter of the Commissioner General of Immigration stating that "where lack of employment is the only factor which has placed aliens in needy circumstances, they incur no danger of deportation if they accept charitable aid." FOREIGN LANGUAGE INFORMATION SERVICE, 8 INTERPRETER RELEASE 16 (1931).

[28] FOREIGN LANGUAGE INFORMATION SERVICE, 7 INTERPRETER RELEASE 261 (1930). *Cf.* Ex parte Turner, 10 F. (2d) 816 (S. D. Cal. 1926). A man who prior to entry had suffered from throat trouble and had had an operation for hernia became a charity patient for throat treatment after entry, his family receiving financial assistance from a public agency. He and his family were then ordered deported as having been at the time of entry "likely to become a public charge." The court held that the facts constituted satisfactory evidence that the man at the time of his entry was not physically sound or strong.

out peril.[29] The case of *Canfora v. Williams*[30] illustrates the insecurity of the alien's position. A skilled workman at the time of the proceedings had lived in the United States for fifteen years and had raised a family of six children, who had become wage-earners able and willing to support him and prepared to give bond to that effect.[31] Seven years earlier, however, at a time when his children were not self-supporting and he had already paid out large sums for private treatment, he had had a leg amputated at Bellevue Hospital, which performed the operation without charge. Upon his return from a visit to Italy to see his aged mother, proceedings were instituted on advice from an apparently malicious informant[32] and he was ordered deported on the ground that he was likely to become a public charge. Though the court characterized his deportation as an act of "cruel injustice", it held that since the law confers exclusive power on the immigration officials to determine such questions the court had no alternative but to refuse *habeas*

[29] Any alien is subject to deportation who within five years after entry becomes a public charge from causes not affirmatively shown to have arisen subsequent to entry. 39 STAT. 889 (1917), 8 U. S. C. A. § 155 (1926).

[30] 186 Fed. 354 (S. D. N. Y. 1911).

[31] The effect of an offer to give a bond appears not to have been thoroughly tested in the courts. It is provided by statute that the admission of an alien on bond when otherwise subject to exclusion as likely to become a public charge may be permitted by the Secretary of Labor at his discretion. 39 Stat. 891 (1917), 8 U. S. C. A. § 158 (1926). In the case of a person seeking admission whose brothers in this country offered to give bond, it was held that the alien is either ineligible to enter or eligible to enter without bond. Wallis v. Mannara, 273 Fed. 509 (C. C. A. 2d, 1921). The court stressed the fact that the brothers were not legally liable for the alien's support. In the case of a person committed to an insane asylum after entry, it has been directed that the order to depart should not be executed if his family or others should execute a bond to assure the government that the alien would not become a public burden. Donatello v. Commissioner, 4 F. (2d) 808 (E. D. N. Y. 1925). Such assurance would seem to satisfy the statutory requirement as well as prevent human tragedy in many cases.

[32] It is an unfortunate aspect of the statute that it lends itself to the purposes of persons, sometimes private individuals and sometimes officials, acting from improper motives and that it may therefore, if abused, become an instrument of persecution. See Linklater v. Commissioner, *supra* note 19, at 241 (proceedings inspired by personal enemies). "The attitude of the examiner, the introduction of confused and voluminous testimony, the strong indications that the appellant was vaguely regarded as undesirable and that deportation was thought the easiest way to get rid of him—all these warn us of the dangers of a system where prosecutor and judge are one and the ordinary rules which protect the accused are in abeyance. It is apparent how easy is the descent by short cuts to the disposition of cases without clear legal grounds or evidence which rationally proves them." Learned Hand, J. in Iorio v. Day, *supra* note 14, at 922.

corpus.[33] If the same case should arise today is seems probable that the court might examine more closely the applicability of the statute to the facts as found. An illustration of the result of such examination is a construction adopted in the First Circuit, the effect of which is to give security to the alien who has lawfully entered and who has relatives in this country legally responsible for his support. Thus in the case of a boy committed to a state school for defectives, whose parents were financially responsible, it was held that the failure of the parents to pay, whether inadvertent or intentional, was not enough to make the child a public charge within the meaning of the statute. The duty upon the governmental authorities was not to deport the child but to enforce the legal obligation of the parents.[34]

The tendency to restrict the application of the "public charge" category, since the shift in its position in the statute which followed *Gegiow v. Uhl*,[35] is conspicuous in cases where the commission of a criminal offense is among the factors involved. That criminal misconduct sufficiently establishes a likelihood of becoming a public charge through prison confinement has been repeatedly urged by the government and accepted in some jurisdictions.[36] In others, though the direct issue has not been settled, orders resting on this ground have in some cases met judicial disapproval because the facts did not support the charge. In *Lisotta v. United States*,[37] for example, an Italian ordered deported had been at all times healthy, vigorous and engaged in "good paying hard work." Outside of a four-months jail sentence for making three gallons of whiskey for his own use he had no record of arrest. The court held that the finding that he was "likely to become a public charge at the time of his entry" was unsupported. In *Ex parte Rodriguez*[38] two aliens

[33] The opinion concludes: "But I desire to express the hope that the immigration officials will reconsider this case. I cannot believe that on a candid reconsideration of this record, this man, who is charged with no offense, will be sent away because he has suffered a grievous calamity and has been denounced by a malicious enemy, to pass his last years and to die in a distant land far from his wife and children, and from the home in this country in which he has lived a blameless life for so many years." Canfora v. Williams, *supra* note 30, at 356.

[34] Nocchi v. Johnson, 6 F. (2d) 1 (C. C. A. 1st, 1925).

[35] See note 24, *supra*.

[36] Ex parte Machida, 277 Fed. 239 (W. D. Wash. 1921); Guimond v. Howes, 9 F. (2d) 412 (D. Me. 1925); see Medich v. Burmaster, *supra* note 19, at 59. In the case of Ex parte Horn, *supra* note 24, the record was conclusive that the alien, who owned $10,000, was not likely to become a public charge for want of means of support. The fact that he might be prosecuted for a bootlegging conspiracy was held to bring him within the term "likely to become a public charge."

[37] 3 F. (2d) 108 (C. C. A. 5th, 1924).

[38] 15 F. (2d) 878 (S. D. Texas 1926).

had lived in this country for twenty-five years, and as man and wife, though adulterously, for a period of fifteen years; they conducted a profitable business and had never been in court. By the act of crossing the bridge in the Texas border town where they lived they exposed themselves to the hazards of exclusion under the immigration law. The administrative finding that, although they had been unmolested for fifteen years, they might be convicted of adultery and thus become a public charge was rejected by the court as doing violence to reason and common sense.[39] More recent opinions, would eliminate criminal misconduct from the "public charge" category entirely,[40] except possibly when a persistent propensity inconsistent with the pursuit of honest means of support is shown.[41] The basis for this view as stated by Judge Learned in *Iorio v. Day* is that the phrase "public charge" suggests "rather dependency than delinquincy" and that "Congress has specifically dealt with crime as a ground, and has defined what kinds are to be considered." [42] This conclusion was reached with full recognition of the existing conflict of authority and of the possibility "that the Supreme Court may take the broader view," but, like the result in *Browne v. Zurbrick*,[43] it followed from seeking the intention of Congress

[39] The warrant, however, was found "technically and legally sufficient" on another ground: namely that the man did import the woman in order to continue to live with her in adultery, thus constituting importing a person for an immoral purpose. "I cannot refrain from saying, however, that such a literal, drastic and harsh application of the law as this case furnishes was not, in my opinion, intended by the framers of it, since under the undisputed facts these persons have been in every respect as man and wife and would be under the laws of Texas united in a common law marriage but for the legal impediment of their prior marriages. Certainly it is a far-fetched conclusion to arrive at that these persons who have been in the United States for 25 years . . . have suddenly become, without any change of status whatever, inimical to the welfare of this country and persons who ought to be removed from it." Ex parte Rodriguez, *supra* note 38, at 879. It is submitted that the application of the statute in this case when a mere continuance in a long established relationship is involved, might be found not only drastic but improper.

[40] Lisotta v. U. S., *supra* note 6; Coykendall v. Skrmetta, 22 F. (2d) 120 (C. C. A. 5th, 1927); Iorio v. Day, *supra* note 14; see Browne v. Zurbrick, *supra* note 11, at 933.

[41] In a case decided before the act of 1917 the category was deemed to include "not only those persons who through misfortune cannot be self-supporting but also those who will not undertake honest pursuits, and who are likely to become periodically the inmates of prisons." U. S. v. Williams 175 Fed. 274, 275 (S. D. N. Y. 1910); *cf.* Lam Fung Yen v. Frick, 233 Fed. 393 (C. C. A. 6th, 1916) (professional gambler) distinguished in Browne v. Zurbrick, *supra* note 11, at 933, where the offense was a "single crime, not of the continuing type, and involving no prospect of the prison habit." See also Iorio v. Day, *supra* note 14, at 922.

[42] *Ibid.* 922.

[43] *Supra* note 11.

where it appears to be expressed most deliberately and from excluding doubtful interpretations.

III. LIMITS OF DISCRETION IN THE EXECUTION OF DEPORTATION ORDERS

While a deportation statute can have no legitimate object except to secure the removal of undesired aliens,[44] the consequences of deportation under the present statutes may be far more serious than mere compulsory departure. Under legislation enacted in 1929 the alien ordered deported is forever barred from re-entry and may be convicted of a felony for attempt to return.[45] Thus a deportation order becomes a decree of perpetual banishment and exile regardless of the alien's ties in this country. But the consequences to the individual may be most acute because of the circumstances confronting him in the country to which he is ordered returned. In this connection the following questions arise: (1) is it mandatory for the Secretary of Labor in all cases to order compulsory deportation? (2) to what country or countries does the statute require deportation to be made; and (3), if return to the designated port is shown to expose the alien to severe consequences, and even death, may the order be disturbed by the courts? While the wording of the statute is mandatory, as a matter of administrative practice voluntary de-

[44] The right of states to exclude or expel aliens, or to admit them on such terms as they may choose to prescribe, is generally admitted in international law and rests on the principles of sovereignty and self-preservation. Ekiu v. U. S., *supra* note 5. Even the most recent efforts to promote international economic co-operation by improving the position of aliens are confined to proposals respecting the position of the alien after establishment. INTERNATIONAL CONFERENCE ON THE TREATMENT OF FOREIGNERS, DRAFT CONVENTION (1929), Preamble and Article 6. Nevertheless "the act of expulsion ought to conform to its direct, essential object which is to relieve the soil of an obnoxious guest. The right of national sovereignty does not require or permit more." Rolin-Jacquemyns, 20 REVUE DE DROIT INTERNATIONAL (1898) 498 *et seq.* That an abitrary or unnecessarily injurious exercise of the right to deport is repugnant to international law has been maintained by the United States in the conduct of its relations with other countries, and such an exercise of power has frequently given rise to claims and to awards by international tribunals. BORCHARD, DIPLOMATIC PROTECTION OF CITIZENS ABROAD (1916) §§ 27-31; MOORE, 4 DIGEST OF INTERNATIONAL LAW (1906) §§ 550-551; BOUVÉ, *op. cit. supra* note 6, 3-14.

[45] 45 STAT. 1551 (1929), as amended by 46 STAT. 41 (1929), 8 U. S. C. A. § 180 (1930, Supp.). The rigidity, and consequent harshness of this provision, has been criticized by administrative authorities. REPORT OF THE COMMISSIONER OF IMMIGRATION (1930) at 48; Address of P. F. Snyder, Assistant to the Secretary, U. S. Dep't of Labor, 7 INTERPRETER RELEASE (1930) 132-133. This change in the law is particularly noted in Browne v. Zurbrick, *supra* note 11, at 932, as a reason for a strict construction of statutory grounds for deportation.

partures have been very generally permitted.[46] As to the second question, the Secretary is given the option of deporting the alien to the country whence he came or to the foreign port at which he embarked, with special provisions in case of entrance from foreign contiguous territory and with the condition that the country to which the alien is to be sent will consent to receive him.[47] There is nothing in the statute to indicate that Congress intended that its designation of countries to which the alien should be returned should be the means of inflicting additional hardship upon him; on the contrary an intent to provide humanely and even generously for the restoration of the alien to the place where he may most readily establish himself may be argued.[48]

The case of *Lewis v. Frick*[49] decided by the Supreme Court in 1914, while authority for the proposition that the terms of an order cannot be varied according to the wishes of the alien, expressly left undecided the question whether the statute allowed room for the exercise of discretion on the part of the Secretary in view of the facts of the case. No issue of special hardship likely to be encountered at the destination specified was presented. In *Karamian v. Curran*[50] in 1927 the Court of Appeals in the Second Circuit modified an order to return to Turkish territory an Armenian who had previously been cruelly tortured there. It was able to find on the facts of the case that France was the country "whence he came." The decision of the lower

[46] See REPORT OF THE COMMISSIONER OF IMMIGRATION (1930) at 22; (1929) at 20; (1928) at 17; SNYDER, ADDRESS, *supra* note 45, at 134.

[47] 39 STAT. 890 (1917), 8 U. S. C. A. § 156 (1926).

[48] In this connection may be noted Bureau of Immigration General Order No. 168, Feb. 16, 1931, announcing that the government is prepared to repatriate at government expense aliens who have been in this country less than three years and who, from causes arising subsequent to entry, have fallen into distress or are in need of public aid. The arrangement is authorized by the Immigration Act. 39 STAT. 892 (1917), 8 U. S. C. A. § 102 (1926).

[49] 233 U. S. 291, 34 Sup. Ct. 488 (1914). The case concerned a Russian, six years resident in the United States, who made a re-entry from Canada. The deportation order called for his return to Canada. The court, while remarking on the lack of clearness in the statute, held that the destination should not be controlled by the adventitious circumstance of the fact that he came from Canada at the time of the second entrance.

The case illustrates sharply the difference between criminal and deportation precedure, and the indisposition of the Supreme Court, as shown in the Ju Toy case, to disturb the conclusion of the administrative authorities. The deportation order was issued on the ground that the alien imported a woman for immoral purposes. In spite of the fact that he had been criminally tried and acquitted on the same charge, the court held that the Secretary was justified in concluding from the evidence that the alien's story as to his "wife" was pure fabrication.

[50] 16 F. (2d) 958 (C. C. A. 2d, 1927).

court,[51] however, directing that the alien be permitted to return voluntarily to France, was reversed as error. "Deportation means compulsory action . . . [He] should be sent, not politely permitted to go as he pleases." [52] But the Court of Appeals was careful to point out that, if it should prove impossible to send him to France, other destinations were possible and concluded: "We further feel it right very pointedly to call to the attention of the Secretary what weight of responsibility for human woe the statute places on his shoulders. . . We publicly hope for the exhaustion of every possibility, including Congressional action, before this man is doomed to the land of his birth." [53] The more recent case of *Giletti v. Commissioner* [54], though not favorable to the petition before the court, contains far more lenient implications. Approval is indicated, though guardedly, for the construction that "when deported *in invitum* the alien must go to one of the prescribed countries, but it (the statute) need not be executed when the same result is accomplished by his going elsewhere." [55] Moreover there is a clear intimation that the court might, under circumstances which are specified, review the action of the Secretary as to the manner of securing the departure of the alien, provided "abuse of discretion" be shown. The case presented was that of an Anti-Fascist resisting deportation to Italy who had, however, failed to show to what country he wished to go, that he could secure the means of transportation, that the other country if selected would admit him, or that it would be remote enough to insure against re-entry. Without these facts, the court stated, it was without the means of saying that the Secretary ought not to send him to Italy.

The opinion is of great interest because the facts indicated as pre-requisite to passing upon the order of the Secretary as to destination are present in the pending *Serio* case.[56] In this

[51] S. D. N. Y. Not reported.

[52] *Supra* note 50, at 961.

[53] *Ibid.* 961.

[54] 35 F. (2d) 687 (C. C. A. 2d, 1929).

[55] The argument presented for this construction rests on the provision in the Act of March 7, 1929, as amended June 24, 1929 (45 Stat. 1551 as amended by 46 STAT. 41, 8 U. S. A. § 180 (1930, Supp.) that an alien "ordered deported" shall be deemed to have been so deported, if he "has left the United States . . . irrespective of the source from which the expenses of his transportation were defrayed or of the place to which he departed," the contention being that this gave countenance to the practice, which has long existed, by which the Secretary in his discretion allows the order to remain unexecuted, if the alien voluntarily leaves for another country at his own expense. See note 46, *supra*. Of this interpretation, the opinion says: "This appears to us certainly a humane construction to put upon the statute, and we will not say that it is too much of a strain upon its language."

[56] District Court, Southern District, New York, per Bondy, J., Dec. 16,

case, which is being carried to the Court of Appeals in the Second Circuit, the Secretary of Labor is insistent on sending an alien to Italy in spite of the fact that there is said to be a decree of death against him in that country and in spite of the fact that funds are assured for sending him to Russia which is prepared to admit him. This is clearly a case in which judicial interference can be supported only by reason of the prospective consequences of the order. It may be contended that, so long as alternative methods of enforcing departures are open, the order is an arbitrary and unwarranted abuse of administrative discretion. Or it may be argued that such extreme treatment, wholly unnecessary to the object of the statute and at variance with developing principles of international law relating to the treatment of aliens,[57] cannot in the absence of the most specific stipulation be regarded as authorized by Congress.

The result in the *Serio* case may well turn on the recognition of the desirability of judicial protection of individual rights in the enforcement of statutes which, in pursuance of legitimate objectives, vest in administrative officers authority to alter the arrangements of human lives in great number. *Browne v. Zurbrick* and other recent cases indicate a disposition to afford increased protection in the case of aliens long resident in this country. The beneficial effect of such decisions is to give assurance to aliens that the hazards which must be overcome to assure their establishment in this country will not be increased by governmental agents acting arbitrarily or under dubious authority, and this assurance cannot fail to be important in determining their attitude toward existing legal and political institutions. The *Serio* case, on the other hand, promises a test of the presumptive rights of that individual, legally most naked, the alien whose own citizenship offers him no protection and who has acquired no foothold in the land where his fate is tried. A system which contemplates the exercise by administrative officials of wide powers such as are conferred on immigration officials [58] in deportation cases will be in the long run strengthened rather

1930. Not reported. For particulars of the case see AMERICAN CIVIL LIBERTIES UNION, BULLETINS (1930-31) 428, 436, 450. N. Y. Herald-Tribune, April 11, 1931.

[57] See BORCHARD, *op. cit. supra* note 41, at 51, 57.

[58] "It is a power to be administered, not arbitrarily and secretly, but fairly and openly, under the restraints of the tradition and principles of free government applicable where the fundamental rights of men are involved regardless of their origin or race. It is the province of the courts, in proceedings for review, within the limits amply defined in the cases cited, to prevent abuse of this extraordinary power." Kwock Jan Fat v. White, *supra* note 6, at 464, 40 Sup. Ct. at 570 (referring to the power of the Secretary of Labor over Chinese persons and persons of Chinese descent).

than hampered by a vigilant insistence on the part of the courts that these powers be not abused. Only so, under present governmental machinery, can the expedition considered essential to the manifold operations of the modern state be secured without the destruction of safeguards upon which in the last analysis both social and individual security depend.

PATENT POOLS AND THE SHERMAN ACT

IT not infrequently occurs in certain industries that many patents are rendered useless—"blocked"—by other patents adversely owned which cover vitally related features of the manufacturing process or finished process, a situation which may result in expensive infringement suits or in an enhancement of prices in order to insure manufacturers against the possibility of such litigation.[1] The patent pool is of great economic utility in relieving this so-called "congestion" of patents, the expenses of which are shifted to the consumer.[2] Moreover, in its most elementary aspect, the patent pool is a voluntary dissolution of many individual monopolies, and thus may create competition by bestowing upon many the full enjoyment of technological advances.[3] Though patent pools have on occasion been charged with destroying the incentive among manufacturers to produce or acquire innovations,[4] this inference is not generally supported by experience; for, in fact, the manufacturer who first acquires a patent almost always enjoys the substantial advantage of being the first to be able to embody it into his product or process.[5]

But it is not denied that the patent pool has often been employed to eliminate competition among owners of competing

[1] *Trade Associations, Their Economic Significance and Legal Status,* NATIONAL INDUSTRIAL CONFERENCE BOARD (1925) 127, 128; KIRSH, TRADE ASSOCIATIONS: THE LEGAL ASPECTS (1928); Lamb, *The Relation of the Patent Law to the Federal Anti-Trust Laws* (1927) 12 CORN. L. Q. 261.

[2] The patent-pool constitutes one of the major functions of many trade associations. KIRSH, *op. cit. supra* note 1, at 126. Important patent pools now exist in the automobile, radio, and aviation industry. See *Trade Association Activities,* U. S. DEP'T OF COMMERCE (1927) 176 (automobiles); REPORT OF THE FEDERAL TRADE COMMISSION ON THE RADIO INDUSTRY (1923) C. 2, Appendices; 31 OFFICIAL OPINIONS OF THE ATTORNEYS GENERAL (1917) 166 (aviation).

[3] See Blount Mfg. Co. v. Yale & Towne Mfg. Co., 166 Fed. 555, 557 (C. C. D. Mass. 1909); KIRSH, *op. cit. supra* note 1, at 144. See the remarks of Frank H. Russel, president of the Manufacturers Aircraft Association, Inc., N. Y. Times, April 15, 1931, at 24.

[4] VAUGHAN, ECONOMICS OF OUR PATENT SYSTEM (1925) 210.

[5] *Trade Associations, Their Economic Significance and Legal Status, supra* note 1, at 147.

patents, or to develop an even more extensive monopoly than that inherent in the individual patents,[6] thus materially affecting the cost at which the public receives their benefits.

Patent owners may license one another, either directly or through some trust arrangement, imposing on such mutual licenses conditions affecting the price, output, or sales of the patented product,[7] or simply exacting exorbitant royalties from one another.[8] As these factors must be reckoned with in computing the ultimate selling price, it will be enhanced to that extent. The participants in a pool may also be engaged in the business of marketing a process by licensing others to use it. By stipulating in the pooling agreements the royalties to be charged sublicensees, and by dividing such fees,[9] they may eliminate competition among themselves, or, retaining some measure of competition, will at least succeed in eliminating price competition.

The legality of these various types of patent pools is a matter of some complexity.[10] A patentee clearly enjoys a limited monopoly [11] which privileges him to impose many restrictions on the use, manufacture and sale of his patented article that might otherwise be illegal under the Sherman Act.[12] Nevertheless this

[6] Indeed one author defines a patent pool as "designed to restrain trade." VAUGHAN, *op. cit. supra* note 5, at 34.

[7] *Cf.* National Harrow Co. v. Hench, 83 Fed. 36 (C. C. A. 3d, 1897); Blount Mfg. Co. v. Yale & Towne Mfg. Co., *supra* note 3; Standard Sanitary Mfg. Co. v. United States, 226 U. S. 20, 33 Sup. Ct. 9 (1912).

[8] *Cf.* United States v. Discher, Federal Anti-Trust Laws and Decisions, Dep't of Justice (1928) 147. Later decision in same case, 255 Fed. 719 (S. D. N. Y. 1919) (application for amended decree denied). The patent pool of the Automobile Bumper Association involved in this case is described in *Trade Associations: Their Economic Significance and Legal Status, supra* note 1, at 140.

[9] *Cf.* Standard Oil Co. of Indiana v. United States, 51 Sup. Ct., 421 (U. S. 1931).

[10] The legality of patent consolidations is beyond the scope of this comment. See VAUGHAN, *op. cit. supra* note 4, c. 3. A vertical combination in one corporation of non-competing or supplementary patents is apparently legal. United States v. Winslow, 227 U. S. 202, 33 Sup. Ct. 253 (1913); United States v. United Shoe Machinery Co., 247 U. S. 32, 38 Sup. Ct. 473 (1918). But *cf.* United Shoe Machinery Co. v. La Chapelle, 212 Mass. 467, 99 N. E. 289 (1912). The acquisition by purchase of competing patents, however, so as to eliminate competition has apparently never been adjudicated. *Cf.* United States v. Eastman Kodak Co., 226 Fed. 62 (W. D. N. Y. 1915); Note (1924) 24 COL. L. REV. 654.

[11] See Heaton-Peninsular Button Fastener Co. v. Eureka Specialty Co., 77 Fed. 288, 290 (C. C. A. 6th 1896). For a discussion of the alleged conflict between the Sherman Act and the patent statutes, see Lamb, *op. cit. supra* note 1.

[12] United States v. General Electric Co., 272 U. S. 476, 47 Sup. Ct. 192 (1926) (stipulation at what price patent licensee must sell patented article); Bement v. National Harrow Co., 186 U. S. 70, 22 Sup. Ct. 747 (1902) (limitations on licensee's production).

individual legal monopoly may be abused so as to run afoul of the Sherman Act.[13] When several patent owners combine, restrictions which could be legally imposed by each individual patentee may be illegal when enforced through the combination because "the restraint of trade or monopoly arises from combination, and not from the exercise of rights granted by letters patent";[14] *a fortiori*, if a patent pool attempts to restraint trade to an even greater degree than that allowed an individual patentee, it is clearly within the prohibition of the anti-trust laws.[15] Because of the difficulty of determining the exact extent of the patent monopoly, the operative facts that will constitute an abuse of concentrated patent power through a pool are of necessity unusually vague.[16] The few cases in which this question has been raised in the past concerned only the more drastic practices by which combinations may restrain trade, such as out-right price fixing and limitation of production, and patent pools containing such agreements have been quite generally found illegal.[17] The status of pools that may accomplish the same result by the less obvious method of fixing royalties has until recently been a matter of mere speculation.

The Supreme Court, in the recent case of *Standard Oil Co. of*

[13] Bauer v. O'Donnell, 229 U. S. 1, 33 Sup. Ct. 616 (1913) (price fixing after patentee has sold the patented article); Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U. S. 502, 37 Sup. Ct. 416 (1917) (condition that licensee use patented article only in connection with a particular unpatented article); United Shoe Machinery Corporation v. United States, 258 U. S. 451, 42 Sup. Ct. 363 (1922) ("tying" clauses). *Cf.* 38 STAT. 731 (1914), 15 U. S. C. § 14 (1926) (Clayton Act); Lamb, *op cit. supra* note 1; Comment (1928) 38 YALE L. J. 246; Comment (1931) 40 YALE L. J. 954.

[14] See Blount Mfg. Co. v. Yale & Towne Mfg. Co., *supra* note 3, at 562; Standard Sanitary Mfg. Co. v. United States, *supra* note 7, at 48, 33 Sup. Ct. at 14; United States v. Motion Picture Patents Co., 225 Fed. 800, 806. (E. D. Pa. 1915). But see Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co., 154 Fed. 358, 363 (C. C. A. 7th, 1907). This is also true of combinations based on copyrights. Straus v. American Publishers' Association, 231 U. S. 222, 34 Sup. Ct. 84 (1913).

[15] See Standard Sanitary Mfg. Co. v. United States, *supra* note 7, at 48; 33 Sup. Ct. at 14.

[16] See United States v. Motion Picture Patents' Co., *supra* note 14, at 806.

[17] Standard Sanitary Mfg. Co. v. United States, *supra* note 7; National Harrow Co. v. Quick, 67 Fed. 130 (C. C. D. Ind. 1895); National Harrow Co. v. Hench, *supra* note 7; Blount Mfg. Co. v. Yale & Towne Mfg. Co., *supra* note 3; United States v. Motion Picture Patents Co., *supra* note 14; Vulcan Powder Co. v. Hercules Powder Co., 96 Cal. 510, 31 Pac. 581 (1892); State v. Creamery Package Mfg. Co., 110 Minn. 415, 126 N. W. 126 (1910); *cf.* United States v. New Departure Mfg. Co., 204 Fed. 107 (W. D. N. Y. 1913); But *cf.* Massie et al v. Asbestos Brake Co., 95 N. J. Eq. 298, 123 Atl. 155 (1922); Lamb, *op. cit. supra* note 1, at 279; Comment (1928) 38 YALE L. J. 246.

Indiana v. United States[18] has had occasion for the first time to consider the legality of an extensive system of patent-interchange embodying just such restrictions. Four principal owners of patented processes for producing "cracked" gasoline executed cross-license agreements covering their patents. Each of the patent owners thereby acquired the right to use the patents of the others in its process; each was empowered to sub-license manufacturers with the patents acquired; and the owners, as well as the sub-licensees, who were named as secondary defendants, were released from all liability for past and future infringements. The royalties to be charged both primary and secondary defendants were fixed by the contracts, and the fees received therefrom were to be divided among the owners at fixed, though unequal proportions. The District Court, accepting the Government's figures that the defendants produced eighty per cent of the "cracked" gasoline of the country, held that their control of the patents through the pool enabled them to control output and prices, and was hence illegal.[19] The Supreme Court concluded that as "cracked" gasoline represented only twenty-six per cent of the total gasoline output, with which it was in direct competition, the defendants could not effectively control the price and output of gasoline through the pool, even if the Government's questionable estimate were accepted. It accepted the findings of the master that the patents had been acquired in good faith, and not as a pretext for "lending color of legality" to the combination. Moreover, the court found that the evidence failed to establish a monopoly or restriction of competition in the business of licensing patented cracking processes.[20]

[18] *Supra* note 9. This decision is also the first by the Supreme Court concerning cross-licensing agreements.

[19] 33 Fed. (2d) 617 (N. D. Ill. 1929); Note (1929) 39 YALE L. J. 290. It is to be observed that certain provisions in the cross-licensing contracts on which the District Court based its decision had been formally cancelled by the defendants when the case reached the Supreme Court. These concerned territorial restrictions, options to purchase, and blanket acknowledgements of patent validity. The Supreme Court held regarding these cancelled agreements that "as the relief . . . sought is an injunction, and hence relates only to the future, the alleged validity of such provisions has become moot." Standard Oil Co. of Indiana v. United States, *supra* note 9, at 428. As a result of this decision sub-licensees of the primary defendants set up the illegality of the cross-licensing agreements as a defense to a suit for royalties. The defense was held to be unavailing as the contract sued on was independent of the alleged illegal agreements. Gasoline Products Co. v. Champlin Refining Co., 46 F. (2d) 511 (D. Me. 1931).

[20] This result was reached because the primary defendants owned or licensed only fifty-five per cent of total cracking capacity, the remainder being distributed among twenty-one independently owned cracking processes. If the defendants had controlled a larger fraction of the industry, it is conceivable that an illegal restraint of trade in the licensing business alone,

Because of these findings, it reversed the District Court on the ground that where there is no "definite factual showing of illegality" the Sherman Act is not violated.

This is substantially the same policy as that adopted by the Supreme Court towards open price associations and trade information exchanges, which have recently been given a clean bill of health.[21] The mere fact that price-fixing and other illegal restraints may be rendered easier by the agreements does not vitiate them;[22] it is only when such illegal activities are in fact pursued that the court will grant relief under the Sherman Act.[23] The assumption implicit in such an attitude is that the Government will be able to cope effectively with abuses of concentrated patent power when they arise.

Many obstacles, however, that may prove will nigh insurmountable, beset the prosecution of an illegal patent pool that comprises only royalty-fixing covenants. In the first place, it is necessary, as indicated above, to prove more than mere monopoly, or practices which in the absence of patents might be unreasonable restraints of trade; it must be shown that the pool has exceeded the legal monopolies and privileges conferred by its patents[24]—the exact extent of which is extremely tenuous. The unquestioned right of an individual patentee to charge as high a royalty as the traffic will bear will undoubtedly color such proceedings.[25] If it is urged that the royalties are onerous,[26] and have no relation to the true value of the patents,

which may have affected the ultimate selling price only slightly, might have resulted.

[21] Maple Flooring Manufacturers' Association v. United States, 268 U. S. 563, 45 Sup. Ct. 578 (1925); Cement Manufacturers' Protective Association v. United States, 268 U. S. 588, 45 Sup. Ct. 586 (1925). But *cf.* American Column & Lumber Co. v. United States, 257 U. S. 377, 42 Sup. Ct. 114 (1921); United States v. American Linseed Oil Co., 262 U. S. 371, 43 Sup. Ct. 607 (1923).

[22] But price fixing, even when the prices are reasonable, is illegal. United States v. Trenton Potteries Co., 273 U. S. 392, 47 Sup. Ct. 377 (1927).

[23] *Cf.* Board of Trade of Chicago v. United States, 246 U. S. 231, 38 Sup. Ct. 242 (1918).

[24] See cases cited *supra* note 14.

[25] Columbia Wire Co. v. Freeman Wire Co., 71 Fed. 302 (C. C. E. D. Mo. 1895). It is worthy of note, moreover, that the Government in the Standard Oil case conceded the validity of the royalties exacted by the primary defendants from one another, directing its attack solely against the fixing of royalties to be charged sub-licensees, and a division of the fees to be thus derived.

[26] This contention was made in the Standard Oil case, and the court indicates that it may be a vital factor in this type of case. It stated: "Unless the industry is dominated or interstate commerce directly restrained, the Sherman Act does not require cross-licensing patentees to license at reasonable rates others engaged in interstate commerc." Standard Oil Co. of Indiana v. United States, *supra* note 9, at 425.

but are merely a means of enhancing prices, the court is faced with the intensely difficult task of assessing the value of patents [27]—an evaluation that admits of wide diversity of opinion. The further question of the good faith of the patentees in entering the pool for the legitimate purpose of avoiding infringement suits—a question that was raised in the *Standard Oil* case and in almost every other case involving patent pools [28]—involves many of the baffling problems of ordinary patent litigation, such as whether the patents were actually infringed. Evasion of the Sherman Act may thus be quite possible through a patent pool based on more or less unimportant, or even invalid patents [29] for the alleged purpose of avoiding infringement suits. In addition to these hazards peculiar to patent pools, the fundamental necessity of showing that domination exists is often extremely difficult in certain industries. In the *Standard Oil* case, for instance, it was impossible even after several years of litigation to ascertain from the available statistics what proportion of "cracked" gasoline the defendants produced.[30] And it seems well established as the result of the case of *Cement Manufacturers' Association v. United States* that the mere showing of uniform prices is not conclusive of illegality.[31] Moreover, a single victory

[27] This difficulty, indeed, has been the chief stumbling-block in the successful maintenance of patent pools. See TRADE ASSOCIATIONS, THEIR ECONOMIC SIGNIFICANCE AND LEGAL STATUS, *supra* note 1, at 145. One method of obviating such difficulties that has been resorted to is the use of a compulsory arbitration board to assess the royalties. Its use by the Manufacturers' Aircraft Association has received the approval of the Department of Justice. 31 OFFICIAL OPINIONS OF THE ATTORNEY-GENERALS, *supra* note 2, at 170 (1917). At least one important patent interchange, that sponsored by the National Automobile Chamber of Commerce, is organized on a non-royalty basis. *Trade Association Activities*, U. S. DEP'T OF COMMERCE (1927) 176.

[28] See National Harrow Co. v. Hench, *supra* note 7 at 38; United States v. New Departure Mfg. Co., *supra* note 17 at 114; Standard Sanitary Mfg. Co. v. United States, *supra* note 7, at 41, 33 Sup. Ct. at 15.

[29] In this connection, it may be pointed out that contracts acknowledging patent validity are probably illegal. *Cf.* Pope v. Gormully, 144 U. S. 224, 12 Sup. Ct. 637 (1892). Yet almost every patent pool will undoubtedly tend to decrease suits against invalid patents that have been assigned to the pool. Moreover, a patent pool extends to a larger number of patents the protection from successful attack that a powerful owner of patents often enjoys over an impecunious owner of a competing patent. *Cf.* VAUGHAN, *op. cit. supra* note 4, at 81.

[30] The estimates of the proportion produced by the primary defendants during 1924 ranged from 66.1 per cent to 81.04 per cent, while the court intimates that both of these figures are probably inaccurate. Sufficient data for determining the production of the secondary defendants was lacking. Standard Oil Co. of Indiana v. United States, *supra* note 9, at 427, n. 17.

[31] See Cement Manufacturers' Association v. United States, *supra* note 21, at 605; 45 Sup. Ct. at 592.

gained by a potentially illegal combination, as in the instant case, is apt to deter prosecution at some later date when it does in fact grow in size so as to dominate the industry, or exercises its latent possibilities for illegal action.[32]

The patent pool, as well as other cooperative business activities, thus presents the double-headed aspect of legitimate constructive economies, and of dangerous potentialities for cleverly disguised restraints of trade. In distinguishing between their legal and illegal pursuits, on the basis of fact, the Supreme Court has undoubtedly aided what is generally considered a healthy trend in modern business. But it is believed that this has been at the expense of effective enforcement of the Sherman Act because of the manifold difficulties of piercing the veil of apparent innocuousness behind which illegal activities of this nature may be hidden.[33] This is especially true of the patent pool. The clear recognition by the Court that practices declared legal may under other circumstances be illegal, and its avowed intention to subject these activities to careful scrutiny[34] may serve, however, as a deterrent to abusive combinations, if for no other reason than to avoid the costly defense of prosecutions.

THE PETTY OFFENSE CATEGORY AND TRIAL BY JURY

THE United States Supreme Court has recently had occasion to express itself upon two issues of present-day importance to the administration of criminal justice—waiver of jury trial and the differentiation of petty and serious offenses as criteria of jury right. In *Patton v. United States*,[1] during a trial for conspiracy to bribe a federal prohibition agent, a penitentiary offense, one of the jurors fell ill. With the consent of both parties, the trial was continued with eleven jurors. The Supreme Court, identi-

[32] Thus, in the gasoline industry, it is probable that the proportion of gasoline refined by the cracking process will increase rapidly so that the cross-licensing agreement held legal in the Standard Oil case may become an effective means of restraining trade.

[33] For a strong criticism of this policy with regard to open price associations, etc., see Probst, *The Failure of the Sherman Anti-Trust Law*, (1926) 75 U. of PA. L. REV. 122; *cf.* Oliphant, *Trade Associations and The Law*. (1926) 26 COL. L. REV. 381.

[34] Moreover, the Supreme Court has emphatically stated that evasion of the anti-trust laws by resort to any disguise or subterfuge will not be sanctioned. See United States v. American Tobacco Co., 221 U. S. 106, 181, 31 Sup. Ct. 632, 649, (1911). A suit has been brought by the Government in the District Court of Delaware against the alleged monopoly created by the radio cross-licensing agreements. United States v. Radio Corporation of America, In Equity No. 793. See Comment (1931) 40 YALE L. J. 958.

[1] 281 U. S. 276, 50 Sup. Ct. 253 (1930). See (1930) 30 COL. L. REV. 1063.

fying the consent to trial by the remaining jurors with a complete waiver of jury,[2] held that the right to a jury could be waived in the trial of serious as well as petty offenses. In *District of Columbia v. Colts*,[3] the accused, charged with having operated a motor vehicle recklessly and at a prohibited rate of speed, was tried before a police court without a jury, over his protest. Although the maximum punishment for the offense was a fine of $100 or 30 days in jail, the Supreme Court held that the accused was entitled to a jury on the ground that the offense charged was "an act of such obvious depravity that to characterize it was a petty offense and thus triable summarily would be to shock the general moral sense." [4]

The *Patton* case brings the support of the highest federal court to recent trends toward greater freedom in waiving the jury. That state courts have reached conflicting results on this question may be ascribed largely to peculiarities of the constitutional and legislative problems involved in each case.[5] Several states have express constitutional or legislative provision for waiver,[6] and the courts have generally given these full effect.[7] In rare cases courts have reached the same result even without statutory authority.[8] On the whole the experience of states which allow waiver goes far to justify the practice at least on the ground of administrative expedience.[9] Hitherto, however, the federal courts have consistently adhered to the anomalous practice of allowing waiver of the constitutional right to jury trial only where no such right exists—that is, in the trial of petty offenses.[10] The clear-cut recognition and approval in the

[2] It has been pointed out that the case could have been decided on the ground of procedural irregularity, without invoking questions of policy and constitutionality. See (1930) 44 HARV. L. REV. 124.

[3] 51 Sup. Ct. 52 (U. S. 1930). See (1931) 79 U. PA. L. REV. 641.

[4] 51 Sup. Ct. at 53. A suggestion that an analogous offense of driving a horse recklessly was indictable at common law is supported only by a *dictum* in the case cited. See (1931) 31 COL. L. REV. 325.

[5] See Oppenheim, *Waiver of Trial by Jury in Criminal Cases* (1927) 25 MICH. L. REV. 695, 699; Perkins, *Proposed Jury Changes in Criminal Cases* (1931) 16 IOWA L. BULL. 20, 40.

[6] See collection of statutes in AMERICAN LAW INSTITUTE CODE OF CRIMINAL PROCEDURE, TENTATIVE DRAFT No. 2, 250-252 (1929).

[7] People v. Fisher, 340 Ill. 250, 172 N. E. 722 (1930); People v. Henderson, 246 Mich. 481, 224 N. W. 628 (1929); Ex parte King, 274 Pac. 682 (Okla. Cr. App. 1929).

[8] State v. Teideman, 49 S. D. 356, 207 N. W. 153 (1926).

[9] See Bond, *The Maryland Practice of Trying Criminal Cases by Judges Alone Without Juries* (1925) 11 A. B. A. J. 699. For an interesting compilation of statistics on the operation of the waiver system, see Goldberg, *Waiver of Jury in Felony Trials* (1930) 28 MICH. L. REV. 163.

[10] Schick v. United States, 195 U. S. 65, 24 Sup. Ct. 826 (1904) (allowed in petty offense); Low v. United States, 169 Fed. 86 (C. C. A. 6th 1909) (disallowed in serious offense).

Patton case of the power to waive a jury in the trial of serious offenses makes even more striking the decision of the same court in the *Colts* case, which gives effect to a somewhat inconsistent policy by reducing the category of petty offenses, triable summarily.

The Federal Constitution provides that "the trial of all crimes . . . shall be by jury," [11] and that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury." [12] Corresponding provisions of state constitutions have for the most part adopted similar phraseology.[13] It has been well-settled, however, that this guaranty is to be interpreted in the light of the common law,[14] and such a construction excludes from the application of the provision that indefinite category of crimes known as petty offenses, triable without a jury before the adoption of the constitution.[15] The historical background invoked as a basis for this interpretation therefore provides the test for crimes known to the common law. The inadequacy of pre-constitutional records tends to obscure the contemporary practices, but it is clear that justices sitting without a jury had some sort of criminal jurisdiction, and the frequency of offenses such as drunkenness and vagrancy have at least assured the survival of the form of their trial.[16] Although in specific instances it might prove difficult as a matter of research to ascertain whether or not, prior to the constitution, a particular offense was customarily tried with or without a jury, nevertheless the test permits a categorical answer.[17] Conversely, determination of the mode of trial of statutory offenses unknown to the common law is discretionary with the legislature,[18] unless the offense is analogized by the court to a crime triable to the jury before the constitution.[19] Under the same theory of strangeness to the common law, violations of municipal ordi-

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[11] U. S. CONST., ART. III, § 2, cl. 3.

[12] U. S. CONST., AMENDMENT VI.

[13] See 1 HYATT, TRIALS (1924) 418.

[14] See Callan v. Wilson, 127 U. S. 540, 549, 8 Sup. Ct. 1301, 1303 (1888).

[15] Schick v. United States, *supra* note 10. See Frankfurter and Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury* (1926) 39 HARV. L. REV. 917.

[16] See Frankfurter and Corcoran, *op. cit. supra* note 15 at 937 *et seq.*

[17] *Cf.* City of Mt. Sterling v. Holly, 108 Ky. 621, 57 S. W. 491 (1900) (disorderly conduct); People v. Harding, 115 Misc. 298, 189 N. Y. Supp. 657 (Erie Co. Ct. 1921) (vagrancy). See Profatt, JURY TRIAL (1877) § 87; Barbour, MAGISTRATES' CRIMINAL LAW (1841) 509.

[18] Bell v. State, 104 Neb. 203, 176 N. W. 544 (1920) (liquor act); Caruso v. Porter, 102 N. J. L. 71, 130 Atl. 803 (1925) (driving while intoxicated); Commonwealth v. Andrews, 211 Pa. 110, 60 Atl. 554 (1905) (Food and Drug Act).

[19] Bowden v. Nugent, 26 Ariz. 485, 226 Pac. 549 (1924). See 1 COOLEY, CONSTITUTIONAL LIMITATIONS (8th ed. 1927) 673.

nances have been almost invariably tried summarily,[20] even though the offense be a separate and serious crime against state law.[21]

Upon this purely historical analysis a few states have superimposed a further distinction between petty and serious offenses, based arbitrarily on the type or magnitude of the penalty involved. Thus in some states a jury may be dispensed with only so long as a fine without imprisonment is fixed as the maximum punishment;[22] in others, summary trial is barred where the maximum fine exceeds a stated amount.[23]

The federal courts, however, while achieving results substantially similar to those reached by the state courts, have adopted a somewhat more flexible test to distinguish the categories, namely, the moral nature of the offense, determined only in part by the severity of the penalty.[24] When faced with a crime indictable at common law,[25] but embarrased by the theoretic lack of a common law, they evolved the moral nature concept, either as a too literal adaptation of the misleading *malum prohibitum-malum in se* classification, which had long before completed its period of usefulness,[26] or as an attempt to deduce an intrinsic meaning from the felony-misdemeanor nomenclature.[27] For the most part cases in which this test has been applied could have been disposed of on the basis of the penalty exacted, since, with few exceptions, the only offenses for which the federal courts have required a jury trial have carried with them penalties of twice the magnitude of those involved in the most severely punished offenses which have been held petty.[28]

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[20] Natal v. Louisiana, 139 U. S. 621, 11 Sup. Ct. 636 (1891); City of St. Paul v. Robinson, 129 Minn. 383, 152 N.W. 777 (1915); Ex parte Sloan, 47 Nev. 109, 217 Pac. 233 (1923). *Cf.* Ex parte State ex rel City of Birmingham, 164 Ala. 576, 51 So. 309 (1909). See 2 BISHOP, NEW CRIMINAL PROCEDURE (2d ed. 1913) 892.

[21] State v. Anderson, 165 Minn. 150, 206 N. W. 51 (1926); Ex parte Simmons, 5 Okla. Cr. 399, 115 Pac. 380 (1911). See HYATT, *op. cit. supra* note 13, at 482.

[22] State v. Kilshaw, 158 La. 203, 103 So. 740 (1925); Weimer v. State, 118 Ohio 129, 160 N. E. 623 (1928). This distinction has been criticized as too arbitrary. See Note (1929) 3 CIN. L. REV. 215.

[23] Ward v. City of Tulsa, 24 Okla. Cr. 77, 216 Pac. 173 (1923). The District of Columbia has such a limitation. D. C. CODE (1930) TIT. 18, c. 4, § 165.

[24] Schick v. United States, *supra* note 10; Coates v. United States, 290 Fed. 134 (C. C. A. 4th, 1923).

[25] Callan v. Wilson, *supra* note 14 (conspiracy).

[26] See Note (1930) 30 COL. L. REV. 74.

[27] The words "felony" and "misdemeanor" are defined merely by the penalty involved. See *A Uniform Classification of Major Offenses* (June, 1928) REPORT BY THE COMMITTEE ON UNIFORM CRIME RECORDS, INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE.

[28] *Cf.* Coates v. United States, *supra* note 24 ($1000 and 1 year—seri-

In so far as the formulation of this test represents an attempt by the courts to preserve a discretionary power, it is a commendable effort. The desirability of granting wide and unchecked authority to justices of the peace, particularly where they operate on the fee basis, may well be questioned.[29] For this reason, any endeavor to crystallize the distinction between serious and petty offenses on the sole basis of penalty, such as is proposed by the proponents of the "public tort" classification,[30] is not entirely free from objection. But the moral nature test is open to the same criticism, for instead of providing a means of lifting a particular case out of the petty offense category on the strength of its peculiar facts, it merely places the offense in a different category, to be kept there permanently by the force of precedent.[31] Its inherent possibilities of abuse have been revealed in the *Colts* case, the first decision which could not also have been justified on the ground either of the size of the penalty or of historical precedent. The vice of the test is that the constitutional right to a jury trial is made to depend upon the moral sense of the specific court, without limitation by legislative judgment expressed in the form of penalty or by historical classification of the offense. And in the wide range of federal jurisdiction, it is inconceivable that differences in environment and training should not produce coterminously varying concepts of morality. Petty larcency,[32] gambling[33] and driving while intoxicated[34]—to name but a few—have consistently been held petty offenses, to be tried summarily. Yet if the test of morality were to be the sole arbiter, it might prove difficult to justify distinguishing from these the offense of reckless driving.

The merits of trial by jury are necessarily beyond the scope of this comment. Critics of the practical operation of the system have indicated such objections as the deficiency in mental calibre of the average jury, prejudice created by wide newspaper publicity in certain types of crime, and the cost and delay of

ous); United States v. Praeger, 149 Fed. 474 (W. D. Tex. 1907) ($500 and 6 months—petty). The English figure for maximum punishment of a petty offense is £100 and 6 months. See STONE, JUSTICES' MANUAL (61st ed. 1929) 1764 *et seq.*

[29] See Willis, *Are Justices of the Peace Courts Impartial?* (1928) 3 IND. L. J. 654.

[30] See Note (1922) 35 HARV. L. REV. 462.

[31] There is also the persuasive influence exerted on other jurisdictions, where perhaps a totally different situation may exist. A very recent New York case has followed the ruling in the Colts case on a charge of reckless driving. Matter of Application of People ex rel Cooley, 139 Misc. 321, 248 N. Y. Supp. 328 (Sup. Ct. 1931).

[32] Lewis v. Robbins, 95 Mass. 552 (1866).

[33] State v. Capell, 154 La. 662, 98 So. 58 (1923).

[34] Latimer v. Wilson, 103 N. J. L. 159, 134 Atl. 750 (1926).

jury trials.[35] On the other hand, there is the invaluable safeguard provided the accused against the arbitrary judicial disposition.[36] But one limit of any system of justice is the extent to which it may be made effective, and thus the question of expedience, at the outset but one of many factors to be taken into consideration as a basis of appraisal, becomes at a later point a decisive factor in itself. Statistics are at best uncertain guides, but they are perhaps sufficient to indicate the importance of the petty offense category to criminal administration. In New Haven, where state laws allowing waiver[37] would minimize the administrative difficulties arising from limitation of this category, over five thousand offenses were investigated in the police court in 1927, of which number all but some two hundred were finally disposed of in that court. In the Superior and Common Pleas courts of New Haven County, less than six hundred criminal cases were considered in that year, and of these under thirty, or approximately 5%, were tried to the jury. If but the same percentage of motor-law violators, for example, were to demand and be granted a jury trial, the number of such trials would exceed four hundred. While the notorious congestion of jury dockets is, at least in waiver states, largely mythical,[38] nevertheless the large discrepancy between the present annual number of criminal jury trials in a single city, and a conservative estimate of the increase that would result from the removal of but one group of crimes from the petty to the serious offense category suggests that such a transfer would result either in inevitable overcrowding of the jury calendar, with its attendant evils of delay, expense and bargaining by the prosecutor,[39] or as an alternative, a practical nullification of the prohibition against the offense.[40]

The decision in the *Colts* case serves a valuable purpose in focussing attention upon the importance of the petty offense category. The historical classification was based to a considerable extent upon contemporary expedience though phrased in

[35] See CRIMINAL JUSTICE IN CLEVELAND (Cleveland Foundation 1922) 341 *et seq;* The MISSOURI CRIME SURVEY (1926) 178 *et seq.* THE ILLINOIS CRIME SURVEY (1929) 230 *et seq.*

[36] See 1 HOLDSWORTH, HISTORY OF ENGLISH LAW (3rd ed. 1922) 320; FRANKFURTER, THE PUBLIC AND ITS GOVERNMENT (1930) 60.

[37] CONN. PUBLIC ACTS (1927) c. 267 § 2.

[38] See Goldberg, *op.* cit. *supra* note 9, at 166.

[39] See Miller, *The Compromise of Criminal Cases* (1927) 1 So. CALIF. L. REV. 1.

[40] In the two years prior to February 1930 when the District of Columbia Court of Appeals handed down its decision in the Colts case, affirmed by the Supreme Court in the instant decision, 3080 cases of reckless driving had been filed in the Police Court. Since that time, only some 900 cases have been filed. Letter from the Corporation Counsel, D. C., dated April 22nd 1931.

terms of the inherent moment of the particular offense.[41] Modern development in the classification of statutory offenses should take place by the adjustment of penalties according to what may be a changing criterion of expedience and rather than by ignoring past experience, and substituting in its stead individual opinions of morality. The moral sense of the community will be more adequately reflected in the general adaptation of a classification than in sporadic and isolated personal judgments on particular crimes.

THE ELEVATED RAILWAY CONDEMNATION CASE—ANOTHER ANAYSIS OF THE PROPERTY INTERESTS INVOLVED

IN two previous Comments in this volume,[1] there have been discussions of a recent New York case involving rights to compensation on the dismantling of a part of the elevated railway system in New York City. When this system was built, the courts held that the railway company must make compensation to abutting owners for interference with light, air, and access. Now, upon dismantling the elevated structure, that interference ceases; and the railway company claims a right to compensation for the retaking of the easements of light, air, and access, retransferred, so it contends, to the abutting owners. The trial court sustained the claim and made an allowance of $750,000.[2] The Appellate Division also sustained the claim, but allowed only $200,000.[3]

The writers of both the previous Comments criticize these decisions, being in disagreement, however, as to the character of the property interests and the amount to be allowed as compensation. Both make valuable contributions to an understanding of the problem. With many of the matters there discussed, the present Comment does not deal; but an additional and somewhat different analysis of the property interests that are involved will be attempted. If this analysis is sound, the railway company has no right to compensation for anything that is retransferred to the abutting owners.

Unquestionably the railway company has property that is now being taken for the public benefit. The question is to determine

[41] See PALEY, SUMMARY CONVICTIONS (9th Ed. 1926) 5; Frankfurter and Corcoran, *op. cit. supra* note 15, at 926.

[1] 40 YALE L. J. 779, 1074.

[2] In re Forty-Second St. Spur of Manhat. Ry. Co., 126 Misc. 879, 216 N. Y. Supp. 2 (Sup. Ct. 1926).

[3] In re Elevated Railroad Structures, 229 App. Div. 617, 243 N. Y. Supp. 665 (1st Dep't 1930).

just what is this property for which compensation is to be made. The theory of the railway company and of the court seems to be that, when the railway was first built, the railway company acquired certain easements of light, air, and access from the abutting owners, paying the assessed value thereof; that these easements are now being taken from the railway company and retransferred to the abutting owners; and that the railway company is entitled to compensation at their present reasonable valuation.

What are these easements of light, air, and access that were originally "taken" from the abutting owners? No concept in our law, as used in specific cases is in greater need of exact and detailed analysis than the concept of "property." Without such analysis, the policies that are involved and the requirements of the public welfare cannot be determined. Analysis does not determine what sound policy requires, but it is a necessary prerequisite to its determination. This is shown by the struggles and differences of the courts and commentators in the present case. Easements are only one sort of property; and they must yield to analysis.

Prior to the building of the elevated railway, the owners of the abutting lots had easements of light, air, and access. This means only that those owners had rights against all other persons (rights *in rem*) that they should not interfere unreasonably with the passage of light and air to the lots in question or with the opportunity of convenient access and approach. An "easement" is not a physical *res;* like all other property, it consists of human relations recognized by the courts. In the present instance, the easements of the abutting owners were manifold rights against innumerable people, putting upon those people the correlative duties of forbearance and correspondingly limiting their legal privileges—their freedom of action.

It seems to be the established law that these easements of light, air, and access—these manifold rights against others—are appurtenant to particular parcels of land. They are for the protection of the use and enjoyment of that land and of no other land whatever; they cannot be sold or transferred apart from that land; they cannot be held "in gross." Therefore, it appears that by the original condemnation proceedings, the railway company did not acquire and could not acquire these easements. This is because they did not acquire the particular lots for the sole benefit of which the easements existed.[4]

[4] The trial court recognized that these latter easements "cannot be owned separate and distinct from the ownership of the land to which they are appurtenant"; but it failed to recognize that herein lay the key to the problem of the railway company's right to compensation. Instead, it confused the problem by continuing to talk in terms of easements that did not exist.

By the condemnation process, however, the railway company did acquire, as against each abutting owner, the privilege of interfering with his light, air, and access, so far as the maintenance of the railway required; and as against the railway company, the abutting owner lost his right against such interference. Not only was this not a transfer of the easements to the railway company, it was not even their entire destruction. The lot owners still had their easements of light, air, and access, as against everybody except the railway company; and it was the continued existence of those easements that gave to the lots the greatest part of their continuing market value. Who would pay much for a lot if there is danger that all of the light and air will be shut off and all access, even that of the borrowing mole, will be denied? The easements of the lot owners remained their property exactly as before the condemnation, except that one important constituent element—namely, the right that the railway company should not interfere unnecessarily with light, air, and access—was extinguished.

There never was any "transfer" of property from the abutting owners to the elevated railway company when the railway was built; nor is there now any such "transfer" of property from the elevated railway company to the abutting owners when the railway is being dismantled. When the railway was built, the railway company acquired much new property and the abutters lost some of their property; but the property acquired was not that which was lost. The State was creating and the State was taking away. In the railway company it created a "franchise," including privileges of using the streets and of carrying for hire, and rights *in rem* against all persons that they should not interfere with the exercise of these privileges. From the abutting owners, it took away their previously existing rights against certain types of interference by the railway company with light, air, and access. The abutters never had the property (called the "franchise") or any part thereof, created by the State in the railway company; the railway company never acquired the property (called the "easements of light, air, and access"), one part of which was taken by the State from the abutters.

In the case of a "transfer" of property, the transferee is substituted for the transferor. The latter's rights, privileges, powers, and immunities *in rem* pass to the transferee. So also do some of the transferor's duties and liabilities—for example, the duty of keeping the premises in safe condition and the liability to taxation; the analysis of ownership (or property) shows that it is not in all respects advantageous to the owner. In the case of such a simple piece of property as a *chose in action*—for example, a contract right—its transfer by assignment extinguishes the right of the assignor against the debtor and

creates a similar right in the assignee against the debtor. In the case of the more complex property in a chattel or in land, its transfer extinguishes the transferor's privileges of user, his rights against interference by others, his powers of conveyance, his duties of keeping in safe condition, his liability to taxation, and the other constituent relations of which property is composed; and it creates exactly similar ones in the transferee.

When the railway was built, there was no such transfer as this; there was a taking by eminent domain from the abutting owners, destroying their previous right against interfence—by the railway company. There was a creation of valuable property in the railway company, justifying an assessment for the benefits conferred by the community. But the value of the property of the abutters taken and extinguished by the community was not the same as the value of the property newly created in the railway company by the community. The requirement that the railway company should pay the abutting owners for the destroyed part of their easements was merely a part of the method of assessing the railway company for the benefits that it received from the State; it was not a payment of the price of property transferred by the abutting owners to the railway company.

Now the public is again "taking" property, in the sense of destroying it, except that this time it is destroying the property of the railway company instead of the abutters. Again, new property is being created in the abutters (it is the formerly destroyed portion of the easement),[5] although there is no "transfer" from the railway company. In so far as the abutters are now the special beneficiaries of the destruction of the railway company's property, it is just to assess the benefits against them (just as we do the benefits from paving an adjacent street), and to use such assessment in compensating the railway company for its loss. This is exactly what was done originally when the railway was built.

It never was just to assess the railway company more than it was benefited, or to pay to the abutters more than they were injured. In fact, the railway company received property that may have been worth much more than the amount of the injury to the abutters. If the railway company is required to pay the

[5] It is probably safe to assume, as the trial court did, that upon dismantling the railway the privilege of the company to occupy the street is totally destroyed, and the right of the abutting owners that the company shall not interfere with light, air, and access is recreated. If this is true, the abutting owners' easements of light, air, and access are restored to their original perfection by the recreation of the one constituent right that had been destroyed. If this is not true, there is much less benefit to the abutting owners and much less reason for assessing them for benefits conferred.

full value of what it got, the amount by which it exceeds the injury to the abutters should go to the community that created that property, not to the abutters who transferred none of it.

So now, it is not just to assess the abutters more than they are benefited by the new creation of property in them, or to pay to the railway company more than it is injured by the destruction of its property. If the abutters are required to pay the full value of what they get, the amount, so far as it exceeds the railway company's injury, should go to the community that again creates the property, not to the railway company that transfers none of it.

Originally, it was proper to require the railway company to pay for the injury suffered by the abutters, because the injury was a necessary result of giving the railway company the rights and privileges that it asked (that is, its newly created property); also for the reason that the community had to pay for the injury to the abutters and it might well be distributed on the large numbers of users of the railway company who were especially benefited by the sacrifice.

Now, it may be proper to require the abutters to pay for the injury suffered by the railway company, but not for the same reasons. The abutters may or may not be "asking" for the dismantling of the railway; in either case they do not obtain, as did the railway company, new and effective means of distributing the cost upon the community or the benefited members thereof. The community is destroying the property of the railway company and the community should pay the full amount of the injury. To raise the money necessary for this, it is customary and reasonable for the community to assess those who are special beneficiaries of the process. Among these are unquestionably the abutters. They may properly be assessed by the community to the extent that their benefits are in excess of the benefits acquired by other members of the community. Part or all of this assessment may be appropriated in payment of what the community owes to the railway company; but the amount of that debt is determined solely by the value of the railway company's property that is destroyed and has no relation whatever to the value of the special benefit conferred upon the abutting owners. How much the State should charge against the abutting owners for their special benefit and what part thereof should go to the railway company is for the State to determine, not for the railway company to demand. As against the abutting owners themselves, the railway company has no claim whatever.[6]

[6] This Comment deals only with easements extinguished and with rights and privileges gained by the process of condemnation for public purposes. No doubt, the railway company could have obtained a greater property interest by private purchase and conveyance. Thus, it might buy an

The depreciation in value of the railway company's franchise, or of the privilege of interference with light, air, and access that formed a constituent part of its total property, is a matter for consideration in the condemnation proceeding. So also is the appreciation in value of the abutting owner's right against interference that is being restored to him, in the process of assessing his benefits. It is obvious that the value of the privilege may have depreciated while the value of the right has appreciated. The value of the privilege depends on the operation of the trains; the value of the right depends on the uses of the land. If the company's franchise, including the privilege of interference, had appreciated in value, while the land values of the abutting owners, including their easements, had depreciated, the city might have had to pay a large amount to the railway company, while collecting only a small assessment from the abutting owners. If in such case the city must bear the loss, in the converse case the city should reap the profit.

In cases of a taking by eminent domain, Mr. Justice Holmes says that the question is, "What has the owner lost, not, What has the taker gained?"[7] This is clearly demonstrated to be correct when it appears that what the owner loses is different both in kind and in value from that which the taker gains. When the State or one of its agencies destroys property for a public purpose, there may be circumstances under which no compensation at all will be made under our existing law; but in the cases where compensation is due, it is measured by the value of the property destroyed, not by the amount by which somebody else may profit from the destruction.

On the other hand, in cases where the State is assessing a property owner for special benefits conferred upon him, the statement of Mr. Justice Holmes does not apply. The question now is, What has the recipient gained, not, What has somebody else lost?

In many eminent domain proceedings, no doubt the two problems exist together and both questions ought to be answered. Very likely, confusion exists for failure to differentiate them, the

abutting lot outright, with its appurtenant easements of light, air, and access. On any subsequent condemnation of this abutting lot by the city, the value of the easements, as well as of the lot without them, would have to be paid. With some of the abutting owners, the railway company had dealt privately and had obtained from them voluntary deeds of conveyance. It is believed, however, that these deeds of conveyance by the abutting owners, not involving the physical land itself, should generally be construed as conveying and creating only that interest that was required for railway purposes. This would be identical with the interest that would be created by the condemnation proceedings.

[7] See Boston Chamber of Commerce v. Boston, 217 U. S. 189, 195, 30 Sup. Ct. 459, 460 (1910); *cf.* Comment (1931) 40 YALE L. J., at 783.

supposition being that the two questions are identical and that the loss of one party is the other's gain. In the case of dismantling the elevated railway, the two questions are not identical and the railway company's loss is not at all the same as the abutting owners' gain.

The result reached by this analysis is that although the railway company is entitled to compensation by the city for all of its property that is taken from it by the city, whether taken for destruction or for enjoyment by a transferee, this does not include any easements of light, air, and access to the lots of abutting owners. No part of any such easements ever formed any part of the railway company's property. It includes the property in the elevated structure as a physical *res*, including easements of light, air, and access to this elevated structure. It includes the "franchise" (a term as greatly in need of analysis as is the term easement, for it, too, is not a physical *res*, but consists of legal relations between men); forming a part of this are the legal privileges (*in rem*) of erection, maintenance, and user. One of these privileges is the privilege as against each abutting owner—a privilege that was obtained by condemnation process, and costing (with respect to all the abutting owners) some $200,000. Without these privileges the "franchise" would have been incomplete and ineffective; and there is no good reason for separating them from the other privileges and rights of which the franchise is composed.

After the court has valued the elevated structure and the franchise, there is no other property left to be valued. To value anything further is to give double compensation for the same thing or to give compensation for something that the company never owned.[8]

If the city so desires, no doubt it is possible to make abutting owners parties to the condemnation proceeding and to assess them for the benefits that they will derive from the new public improvement. This is a problem of assessment for benefits, not a problem of compensation for property taken for a public purpose.

A. L. C.

[8] The analysis here made is not identical in form with that made by the City of New York in the existing litigation; but it reaches the same result, so far as concerns the right of the railway company to compensation for the taking of its property. As against the railway company, the city did not need to deal with its power to assess the abutting owners for benefits received from the recreation of their former right.