UTAH LAW REVIEW

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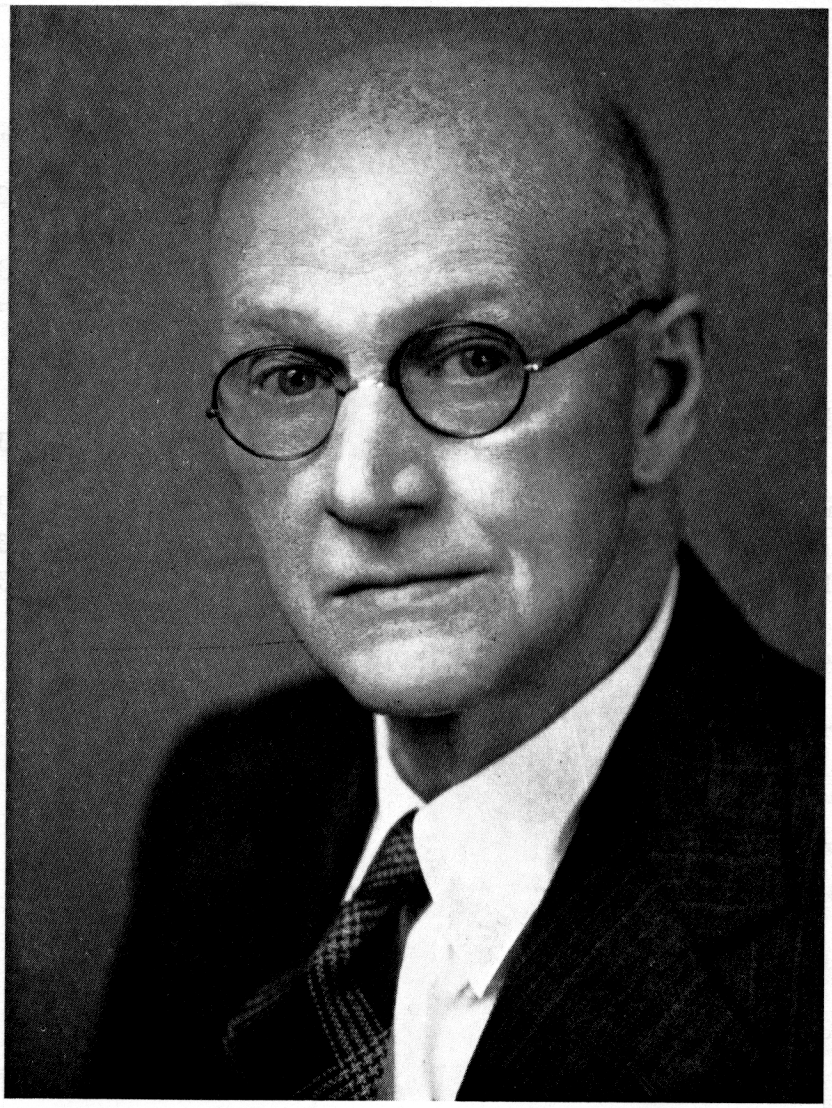


DEAN WILLIAM H. LEARY

In Memoriam

April 8, 1957

To the family of Dean William Henry Leary,

The Board of Regents of the University of Utah in its meeting assembled Monday, April 8, 1957, does hereby adopt the following resolution of sympathy and respect for the life, service to the University of Utah and its School and College of Law, his scholarly and rational influence in a revolutionary age, and in appreciation for the distinguished leadership of William H. Leary.

Dean Leary began his service as dean of the School of Law in 1915, serving in that capacity until his retirement on July 1, 1950. His teaching and administration was characterized by respect for the concept of man as a reasonable, prudent being. This ideal, and his stern attention to fact and legal detail, has made a lasting imprint on the legal profession. His work over the years of his deanship may be said truly to embody and represent the ideas of law, order, justice, reason, freedom, and moral respect in an age when these great principles were under attack. As he said in the Fifth Annual Reynolds' Lecture in January 15, 1941: "Virtue will emerge triumphant when reason writes on each erring heart these truths: freedom must be achieved by righteousness, peace must be secured by justice, unity must be bought by love. These are self-evident truths of the Natural Law. They are immutable."

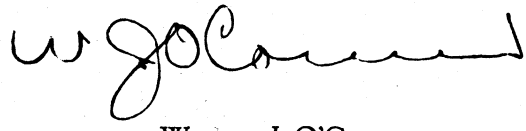
The University of Utah is proud to have had the benefit of his prestige these many years. As senior dean he often served as temporary leader of the University in the absence of the president. His influence was widespread throughout the campus beyond the halls of the law school. His sage advice and judgment in deliberations of the faculty and of the Deans' Council has been a balancing factor in the institution. His loyalty to the ideals of the University was never in question nor his devotion to the principles upon which a university rests. So valuable was his experience and counsel that after his ultimate retirement from the deanship, the Board of Regents felt required to retain his services as lecturer in the law school and as a trusted adviser.

It is impossible at this time to recognize, measure, or anticipate the influence of Dean William H. Leary. It is our feeling, however, that this influence, generated as dean of the College of Law and as trusted servant of the University of Utah over more than four decades, will mark him as one of the great men of this institution.

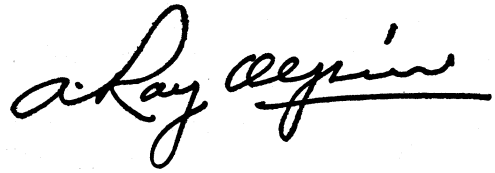
In his passing, we are proud to place our judgment on record, that his life and service will exert an enduring influence; and although he had many influences in many fields of life beyond these halls, all distinguished, we are

grateful and acknowledge the intimate relationship between his service and that of the University of Utah. It is our opinion that through such a life a university receives its ultimate justification, for in the lives of many students the work of a great teacher lives forever.

Adopted by Resolution of the Board of Regents of the University of Utah, Monday, April 8, 1957.



WILLIAM J. O'CONNOR
Chairman, Board of Regents



A. RAY OLPIN
President, University of Utah

DEAN WILLIAM H. LEARY

William H. Leary, affectionately called "The Dean" by the hundreds of his students now actively engaged in the practice or the administration of the law in Utah and elsewhere, has exerted a great influence upon the bench and bar of this State which will continue for many years to come.

During the thirty-four years he was Dean of the College of Law, from 1916 to 1950, he not only administered the affairs of the School, but he was also its greatest teacher. During that period a large number of lawyers, men of learning and ability, graced his teaching staff, but none were his equal.

He possessed an intense love of the law which he zealously endeavored to implant in his students. All first year students, with comparatively few exceptions, received a course from him in the law of torts. It was more than a course in torts. It was an introduction to the spirit and purposes of a great profession. Forcefully he impressed that "the Law is a jealous mistress" and that he who is too lazy to think or unwilling to study should quickly seek another occupation or profession. His class periods were not filled with a mere recitation of cases and legal principles. They were more often periods of intense mental quest for the fundamental bases of the rules of law. Never will be forgotten the verbal explosions of the Dean after an intense but fruitless effort to lead a student or the class collectively to the discovery of the reason underlying a legal principle. Who can forget such an outburst in high falsetto as: "If I had any hair on my head I'd pull it."

The students who came under his tutelage bear a respect and admiration bordering upon affection for the Dean with a unanimity that is unique. If one searches for the reason he will probably conclude that of his many admirable qualities it was his interest in and his fair dealings with all his students which won their warm feelings. His students had no fear that anything but their own inadequacies would cause them to be eliminated from the Law School. Although he might at times appear severe and demanding, they knew that he had a fatherly interest in every member of the School. They came to feel with full confidence that although other instructors might develop prejudices against them which might be reflected in the grades received, the grades given by the Dean would reflect with absolute honesty his unprejudiced appraisal of the quality of work done by them. Although he earnestly advised against his students participating in varsity athletics or working to maintain themselves unless absolutely necessary, those who did not heed his counsel knew that they would not be penalized by him for that reason.

His classes were frequently enlivened by his sallies of wit and humor. He possessed to an unusual degree that spontaneous wit often ascribed to the race of his forefathers. Meetings of the Law School Alumni came to be anticipated with pleasure because it was always expected that the Dean would speak — with his usual humor. At one such meeting an alumnus of the Law School entertained and amused those present with readings of and comments upon several autobiographies from a book in which, to quote the speaker, "one might write for a price his own obituary." The Dean had prepared a written speech for the occasion. Before undertaking to deliver the speech he digressed to talk about other alumni present, to the great amusement of all, including those talked about. After approximately thirty minutes of such fun the Dean closed by saying that at another time he would deliver the speech he had meant to give.

His attainments, attitudes and personality were well known and appreciated outside the Law School. He took a keen interest in Student Affairs and the affairs of the University generally. As Dean of the Law School he automatically became a member of the Deans' Council, and he served for many years as a member of the Athletic Council.

The memory of the Dean will remain enshrined in the hearts of his students so long as one remains.

J. GRANT IVERSON

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EXPERIENCE IN TEXAS WITH THE MODEL BUSINESS CORPORATION ACT

By PAUL CARRINGTON *

Prior to the enactment in 1955 of the Texas Business Corporation Act, Texas had the least adequate and most outmoded set of corporation statutes of any state. There had been no general change in the corporation laws of Texas theretofore since 1874. The ideas of 1874 as to the importance of corporations and as to the ways in which corporations may conduct business, of course, were far from the ideas prevailing many years prior to 1955. The need for the modernization of the Texas corporation laws had been painfully realized for many years by the lawyers and businessmen of Texas generally.

A large number of states had in recent years adopted modern corporation acts, including Ohio, Louisiana, Indiana, Idaho, Tennessee, Arkansas, California, Michigan, Pennsylvania, Illinois, Minnesota, Washington, Kansas, Nebraska, Missouri, Kentucky and Oklahoma. Since the enactment of the Illinois Act in 1933,[1] under sponsorship of a committee of the Chicago Bar Association, most of these modern corporation acts followed generally the pattern of the Illinois law. In 1943, a committee of a section of the American Bar Association was organized for the purpose of studying the possibilities of developing a Model Business Corporation Act for aid to the profession, not only lawyers in those states which had not enacted a Model Corporation Act, but also lawyers in states which had. One of the objectives of the work of the committee of the American Bar at its inception was not that uniformity be attained but that a growth and improvement in the corporation laws of the several states might be encouraged in directions generally parallel.

In 1950, this American Bar Committee and the American Law Institute jointly published the Model Business Corporation Act, which was patterned very largely upon the Illinois law. At the Annual Convention of the State Bar of Utah in 1956, my dear friend, Whitney Campbell, one of the draftsmen of the Illinois Act of 1933 and of amendments thereto sponsored by the Illinois Bar since that date, and a member of the American Bar Association Committee since its organization in 1943, discussed the Model Act. His discussion at that time has since been published in the *Utah Bar Bulletin*[2] and in *The Business Lawyer*, quarterly magazine of the Section of Corporation, Banking and Business Law of the American Bar Association.[3] This article is intended as a supplement to his and to emphasize the treatment given to the

* A.B., 1914, Missouri State University; LL.B., 1917, Harvard University; Member of the Texas Bar. Member and formerly Chairman, Section on Corporation, Banking and Business Law, American Bar Association; Chairman, Committee on Revision of Corporation Laws, Texas State Bar.

[1] ILL. REV. STAT. c. 32, § 157 (1953).

[2] Campbell, *Utah Corporation Law and the Model Business Corporation Act*, 26 UTAH B. BULL. 121 (1956).

[3] 11 BUS. LAW. 98 (1956).

Model Act in Texas during the five-year period in which the Texas Business Corporation Act of 1955 was being drafted and urged for enactment and since.

The State Bar of Texas organized in 1950 a committee for the purpose of studying and proposing a new code of corporation laws of Texas. The committee then organized was reappointed from year to year during the five-year period prior to the enactment of the Texas Business Corporation Act of 1955.[4] The committee consisted of the Assistant Secretary of State in charge of passing on and approving corporation documents for filing in that office (and when a resignation at that desk occurred, the successor became a member of the committee and the resigning official continued to serve), professors of corporation laws in the University of Texas, Southern Methodist University and Baylor University, and, as a majority of the committee, practitioners were added who had long corporate experience.

Promptly upon the appointment of this new State Bar Committee, it, following the pattern of the American Bar Committee, met on an average of once a month with all members present at practically every meeting and each paying his own traveling and other expenses. Between meetings, complete analyses were made of the statutes and court decisions relating to each section of the Model Act. As to the subject matter of each section, analyses of the statutes and decisions of Texas, Illinois, New York, Delaware, Ohio and Oklahoma were put in parallel columns; and this was supplemented as to any section by the law of any state found to have a rule worthy of study. As its first basic decision, the committee started with the premise from which it never varied that no reform should be undertaken of any statutory Texas public policy deemed important; and that, subject to this, generally the pattern of the Model Business Corporation Act of A.B.A. Committee would be followed. At the outset, Texas chose this model rather than the statutes of one of the states more liberal than the Model Act in freeing corporations from restraints. It was also concluded that Texas should not attempt, in competition with other states, to attract new corporations being organized for the purpose of conducting business in other states by businessmen in other states.

A first draft of the proposed Texas Business Corporation Act was completed in April 1951 after a very careful analysis of the statutes and decisions of the states mentioned and some other states. Copies of the draft were sent to every member of the American Bar Committee for constructive criticism, as well as to many lawyers and judges in Texas. Then, late in April 1951, the Texas Committee held a joint meeting with the American Bar Committee in Dallas and discussed every change contemplated for the Texas Act from the provisions of the Model Act as set forth in its first draft. A number of revisions in the initial Texas draft were decided upon at this joint meeting. As thus improved, the first public draft of the Texas Act was published in full in the Texas Bar Journal,[5] with the request that the Committee be given the benefit of any suggestion or criticism that any Texas lawyer might have. The Bar Journal having been sent to all members of the integrated Bar of Texas, this draft was placed on the desk of every Texas lawyer. A large

[4] 3A VERN. ANN. TEXAS STAT., Bus. Corp. Act, art. 1.01–11.01 (1956).

[5] 14 TEXAS B.J. 219 (1951).

number of suggestions were received and carefully studied. Every letter was answered. In July 1951, a day-long institute on changes so proposed was conducted on the day before the Annual Convention of the Texas State Bar.

Further study having been made of all suggestions received, another revision of the Act was printed under date of October 12, 1951, and was then approved by the Directors of the Texas State Bar. An interim committee of the Texas Legislature of 1951 meanwhile had been appointed to consider the proposed Act and to make any recommendation with reference to it, to the 1953 Legislature. This draft of October 1951 was submitted to this interim committee and approved.

During 1952, institutes on the subject of corporation law were conducted by the Texas State Bar all over the State and at the Annual Convention of the State Bar in July 1952, the proposed Act was unanimously approved by the Board of Directors and by unanimous action at the closing General Assembly of that Convention.

In 1953, the measure was subjected to very extensive hearings before legislative committees which urged all who desired to suggest any change in any provision to come to present their arguments. These hearings continued week after week; the measure finally was approved after amendments by the legislative committees, by the House of Representatives, but too late for enactment.

Prior to the 1955 session of the Legislature, many of the proposed changes which would have been effected by the amendments proposed by the Legislative Committee of 1953 had been polished into acceptable provisions agreeable both to the legislative committees and the State Bar Committee. There remained only three relatively unimportant changes from the Act as proposed by the Legislative Committee in 1953 on which solutions agreeable to all had not meanwhile been reached and after State Bar approval of the measure in that form, it was so introduced in the 1955 Legislature. The measure was enacted substantially as submitted, with only two legislative amendments deemed unfortunate (both of which have now been changed back to the form desired by 1957 amendments to the Act). Notwithstanding all legislative amendments, the measure passed was in substance about as introduced in 1953. As enacted, the Corporation Code contained a large number of changes from the Model Act. Most of such changes were intended to make the Texas Act yet more explicit than the Model Act and did not involve any changes in statutory policy. I agree with Whitney Campbell that the Texas Act of 1955 was, to the extent of approximately eighty-five per cent, the Model Act.

From the inception of the Texas Committee, it had repeated as among its objectives, that a Business Corporation Act, when enacted, would not be applicable to nonprofit corporations, banks, insurance companies or other corporations which were controlled by specific statutes; and proposed, as a second objective of the Committee, the enactment of a nonprofit corporation act. It was the third announced objective of the Texas Committee that all of the other Texas statutes applicable to particular types of corporations be consolidated into a single title of the Texas Revised Statutes, the first chapter of which would be the new Business Corporation Act, the second chapter

would be the Nonprofit Corporation Act, and the remaining corporation statutes applicable to particular types of corporations then following as succeeding chapters, with all chapters consistent with one another. Another objective of the Texas Committee was that the Committee would continue to function from year to year in order to consider suggestions for the improvement of any of such Texas statutes and also in order to oppose suggestions for their revision which seemed to be objectionable.

The Model Corporation Act sponsored by the American Bar Committee, from the completion of its first draft, has continued to be the subject of expected changes and improvements. Many have been made from the first draft by the time the 1950 draft of the Model Act was published. Others had been made by the time that a revision of that draft was republished in 1953. During those three intervening years, the American Bar Committee and the Texas Committee were in close contact with each other and the Texas Committee had the advantage of considering each of the possible improvements of the Model Act which were under consideration by the American Bar Committee. In joint meetings of the two committees, changes from the Model Act which the Texas Committee had under consideration were considered by the American Bar Committee. Several changes were thus made by 1953, both in the Model Act and in the draft of the proposed Texas Act.

The Model Act as published in 1953 has been the subject of a substantial number of additional changes proposed by the American Bar Committee since that date. That the American Bar Committee continues to propose such changes and is expecting to continue to do so from year to year hereafter, needs emphasis. For, as all of us who devote our careers to the law best know, the law in every field lives and grows. Since corporation law, as made by court decisions and textbooks, Law Review articles, Bar Committee Reports and other tools of our profession, is constantly changing, certainly the statutes which constitute the framework of the corporation laws of any state must be subject to change.

As the number of states which have adopted a Business Corporation Act based largely on the Model Act increases, the natural reluctance of the sponsoring committee of the A.B.A. to make changes in the Model Act will increase. And yet, it is not expected that the provisions of any section of the Model Act shall remain inviolate, even if the corporation statutes of practically all of the states were in accord with it. The Model Act has been intended to lead not to unformity, but to a sound, modern statute of highest practical use. Hence, considering prospective changes in the Model Act, it should be expected in the future, as heretofore, to promote a better rule than that established previously whenever improvements in corporation law may be so achieved.

In this spirit and with perhaps a Texanic enthusiasm for independence of thought, the Texas Committee from the commencement of its studies decided to follow the Model Act generally, accepting its terminology, adopting its definitions of the terms used, and following its pattern of the order in which the various problems of corporate law are dealt with, section after section, in the Model Act, all with the expectation that the provisions of

the Model Act would be adopted as set forth in each section, to the extent and only to the extent that the section rather than some revision thereof, seemed preferable to the Texas Committee. Attached as Appendix is a list of the changes made in the Texas Act as it became law in 1955 from the Model Act of 1953, section by section. This is presented in detail, not for the purpose of urging similar action in Utah, but solely to exemplify the independence of thought and action by the Texas Committee which those sponsoring the proposed Utah Act should feel free to evidence.

Of the 143 sections of the Model Act (1953 Edition), 74 were changed in some way before the Texas Act was put on the statute books.[6] But few of these changes were of substance. Some involved mere changes in language to accord with Texas statutory procedural law. Most of the changes in language were merely for the sake of making the Texas Act yet more explicit, though to the same effect as the Model Act. Some of the changes were necessary as, for example, the change in Section 18 of the Model Act, which was revised in order that language of the Texas Constitution might be inserted.[7] The Texas Antitrust Law having long been a landmark in the statutes of Texas, all changes in the Model Act thought by the Committee of the Texas Bar or the Texas Legislative Committee to be appropriate for proper consistency with the Antitrust Law were made. Several other of the changes were made because of Texas statutory policies of long standing.

Yet, after having discounted the large number of the sections of the Model Act which were changed in some way by the Texas Committee before they were incorporated in the Texas Business Corporation Act, it seems to me of importance that I refer to ten changes from the Model Act incorporated in the Texas Act which (among others) seem to us of the Texas Committee to be worthy of careful consideration by those who are considering the adoption of the Model Act or something like it in any other state. On each of these ten points of policy minds differ, a majority of the Texas Committee disagreeing with a majority of the American Bar Committee.

On these ten points I would like to urge careful consideration in Utah of the pros and cons of possible changes from the Model Act:

1. In the Model Act, Section 2, there is a definition of "earned surplus" which is subject to the construction that unrealized gains from the appreciation of the current values of assets of the corporation may be included in the "earned surplus" and may thus be used in increasing the sources from which

[6] For details of the Texas changes see Appendix, *infra* p. 305.

[7] MODEL BUS. CORP. ACT. § 18 (rev. ed. 1953):
The consideration for the issuance of shares may be paid, in whole or in part, in money, in other property, tangible or intangible, or in labor or services actually performed for the corporation. When payment of the consideration for which shares are to be issued shall have been received by the corporation, such shares shall be deemed to be fully paid and nonassessable.

3A VERN. ANN. TEXAS STAT., Bus. Corp. Act, art. 2.16A (1956):
The consideration paid for the issuance of shares shall consist of *money paid, labor done, or property actually received*. Shares may not be issued until the full amount of the consideration, fixed as provided by law, has been paid. When such consideration shall have been paid to the corporation, the shares shall be deemed to have been issued and the subscriber or shareholder entitled to receive such issue shall be a shareholder with respect to such shares, and the shares shall be considered fully paid and non-assessable.

The italicized words are found in TEXAS CONST. art. 12, § 6.

dividends may be paid. The Chairman of the American Bar Committee so construed the Model Act definition of "earned surplus." [8] In Texas, we have changed the definition of "earned surplus" so as to make it clear that before "gains" may be included in earned surplus, they being something other than income as the language of the definition makes clear, the gains must first be "realized." Either by the insertion of that single word or, perhaps yet better, by more explicit language, a revision of that definition should, in my opinion, be considered.

2. The proposed scope of the corporate enterprise is defined in the purpose clause or purpose clauses of the Articles of Incorporation. How much freedom should be extended to the officers and directors, supported by the requisite vote of shareholders, in changing that scope of the corporate enterprise? This question has been the subject of important and far-reaching litigation in the past and continues to be the subject of differences of opinion. Whitney Campbell has recently urged in his *Utah Bar Bulletin*[9] article that flexibility in changing the scope of the corporate enterprise should be encouraged and that changes of corporate direction, no matter how drastic, should be permitted like any routine amendment to the Articles of Incorporation. He is supported in this view by many others. Because the Texas Act takes a different view, Mr. Campbell predicted a future change in the Texas Act back to the provisions of the Model Act in this respect. This provision in the Texas Act, however, seems to the Texas Committee to be a part of a pattern throughout the Texas Act emphasizing the importance of the scope of the corporate enterprise as defined in the purpose clause or purpose clauses of the Articles of Incorporation. To explain our Texas view of this general theme which we have copied in some respects from the Model Act, and in other respects have not, and in order to explain the propriety as the Texas Committee sees it of our provision that a minority stockholder who has invested his funds in shares of a corporation to conduct specified type or types of business should be permitted to dissent and should be paid for his shares with his withdrawal from the venture, whenever there is a substantial change in the purpose clauses, I have prepared[10] an analysis of all provisions of the Texas Act emphasizing the importance of purpose clauses in Articles of Incorporation of Texas corporations and in Certificates of Authority to do business in Texas issued to other corporations. This footnote shows, as to each of these provisions, to what extent Texas has varied from the pattern of the Model Act. These Texas changes from the Model Act, I submit, are worthy of consideration.

[8] Seward, *Earned Surplus, Its Meaning and Use in the Model Business Corporation Act*, 38 VA. L. REV. 435 (1952).

[9] Campbell, *supra* note 2, at 129–130.

[10] Provisions of the Texas Business Corporation Act add emphasis to the purpose clauses in articles of incorporation of Texas corporations and in certificates of authority to do business in Texas issued to corporations domiciled in other states. The provisions of the Texas Business Corporation Act to such effect are:

1. According to Article 2.01 A, a corporation may be organized in the language of Section 3 of the Model Act "for any lawful purpose or purposes," this being the most important change from the prior Texas statutes which required corporations to select a purpose clause from many listed in the old Article 13.02. However, the new statute, Article 2.01 A, adds the requirement that the "purposes shall be fully stated in the articles of incorporation." Moreover, this Article 2.01 then proceeds to enumerate corporations that may not be organized under the

provisions of the Texas Business Corporation Act, including nonprofit corporations, banks, insurance companies and a number of other types of corporations controlled by separate Texas statutes. And in addition, Article 2.01 B, then, further dealing with the subject of purpose clauses, adds that no corporation may be organized under the Act or obtain a certificate of authority to transact business as a foreign corporation under the Act:

> (1) If any one or more of its purposes for the transaction of business in this state is expressly prohibited by any law of this state.
>
> (2) If any one or more of its purposes for the transaction of business in this state is to engage in an activity which cannot lawfully be engaged in without first obtaining a license under the authority of the laws of this state to engage in such activity and such license cannot lawfully be granted to a corporation.
>
> (3) If among its purposes for the transaction of business in this state there is included, however worded, a combination of two businesses . . .

there then being listed two sets of businesses which under statutory policy in Texas previously existing could not be combined in a single corporation: (i) raising cattle and owning land therefor as one business and the business of operating stockyards and slaughtering, refrigerating, canning and packing of meat as the other; and (ii) the petroleum oil-producing business as one business and engaging directly in the oil pipeline business as the other.

2. In Article 2.02 in which the general powers of the corporations are detailed in language following Section 4 of the Model Act, there is added:

> B. Nothing in this Article grants any authority to officers or directors of a corporation for the exercise of any of the foregoing powers, inconsistent with limitations on any of the same which may be expressly set forth in this Act or in the Articles of Incorporation or in any other laws of this state. Authority of officers and directors to act beyond the scope of the purpose or purposes of a corporation is not granted by any provision of this Article.

3. In Article 2.04, following generally the provisions of Section 6 of the Act, made yet more explicit than in such section of the Model Act, the reference to causes of action against officers and directors for causing the corporation to exceed the scope of its corporate purposes: ". . . that such act, conveyance or transfer is beyond the scope of the purpose or purposes of the corporation as expressed in its articles of incorporation . . . may be asserted in a proceeding by a shareholder" for injunction; or "in a proceeding by the corporation . . . or through shareholders in a representative suit against the incumbent or former officers or directors of the corporation for exceeding their authority"; or in a proceeding by the Attorney General for injunction or to dissolve the corporation.

4. In Article 2.41 with reference to the liability of directors the Texas Act follows generally the provisions of Section 43 in providing for the liability of directors in three specified situations as "in addition to other liabilities imposed by law upon directors." Thus as in the Model Act the liability of directors for causing the corporation to exceed the scope of its corporate purposes is set forth, though more explicitly by virtue of other provisions of the Act mentioned in this footnote.

5. If the purpose clauses of a corporation prove not as broad as desired and an amendment to the articles of incorporation substantially changing them becomes necessary, such an amendment may be made to the articles of incorporation by Article 4.01 B (3) following the provisions of Section 53 of the Model Act; this being by a two-thirds vote at a meeting of the shareholders pursuant to Article 4.02 A (3) following the provisions of Section 54 of the Model Act; but a shareholder may dissent from such action pursuant to Article 5.11 A (1) and become entitled to be paid the fair value of his shares, Article 5.12 A (3), the Texas Act in this respect differing from the Model Act which does not give a right of dissent because of a change in the scope of the purpose clauses of the corporation, no matter how emphatic.

6. A Texas corporation may be subjected to a suit for involuntary dissolution, brought by the Attorney General, if it continues "to transact business beyond the scope of the purpose or purposes of the corporation as expressed in the articles of incorporation." This provision of Article 7.01 A (4) is more explicit than the comparable provision in Section 87 of the Model Act which provides for involuntary dissolution by court decree when established that "the corporation has continued to exceed or abuse the authority conferred upon it by law."

7. A corporation domiciled in a state other than Texas which has obtained a certificate of authority to transact business in Texas, may be subjected to a suit for revocation of its certificate of authority, brought by the Attorney General if it continues to "transact business beyond the scope of the purpose or purposes expressed in its certificate of authority to transact business in this state." This provision in Article 8.16 A (4) of the Texas Act is not to be found in the corresponding section of the Model Act, Section 114, but was added by the Texas Committee, thinking that a provision to this effect should be applicable to foreign corporations doing business in Texas just as to Texas corporations obtaining their articles of incorporation in Texas.

8. In Article 8.02 of the Texas Act it is provided, as in Section 100 of the Model Act, that a foreign corporation having a certificate of authority shall enjoy the same but no greater rights and privileges as a domestic corporation organized for the purposes set forth in the

3. The Texas Committee made the effect of the Model Act in many respects yet more compelling on a Texas Bar and on Texas judges by being more explicit than the Model Act. As illustrative of many other such additions for the sake of being explicit, the Texas Act[11] added provisions expressly permitting a corporation to impose restrictions on the sale or other disposition of its shares and of the transfer thereof, and mentioned, among such other restrictions, those in connection with buy and sell agreements, stock option agreements, and others. No comparable effort has been made elsewhere to illustrate the extent to which corporations might reasonably impose restrictions on the transferability of its shares. Though such explicitness in these and other comparable Texas provisions may not seem beneficial in Utah, it has been and is the view of the Texas Committee that these additional and more explicit phrases are of value to our bar in Texas.

4. In what detail limitations on the rights of holders of shares should be set forth on the face and the back of certificates representing such shares, has been a problem which in Texas has seemed to be of difficulty. Section 21 of the Model Act requires that each certificate recite the designations, preferences, limitations and relative rights of the shares of each class authorized to be issued and where special class and series has been authorized, the variations in the relative rights and preferences of each series so fixed and determined and the power of the directors to fix and determine the relative rights and preferences of subsequent series; or in the alternative, that a summary thereof to be stated on the certificate; or, as a further alternative, that there be recited on the certificate that the corporation will furnish to any shareholder upon request and without charge, a full or summary statement thereof. As a change from this Section 21 of the Model Act, Article 2.19 of the Texas Act of 1955 requires the certificate to contain on the face or back such a full or summary statement. Moreover, in Article 2.22, it was required that restrictions on transfer of shares be set forth on the face or back of each certificate. These provisions, intended to aid the shareholder in making his certificate explicit, were found very difficult by Texas corporations having lengthy stipulations of this nature. So by a 1957 amendment to the Texas Act of 1955, it is now provided that the corporation with any such provisions which would other-

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application, pursuant to which the certificate of authority is issued, and that except as otherwise expressly provided in the Act, a foreign corporation should be subject to the same duties, restrictions, penalties and liabilities imposed upon a domestic corporation of like character. However, in Article 8.02 of the Texas Act the Texas Committee added in this last clause a provision that not only should the foreign corporation be so subjected to the same treatment as a domestic corporation of like character but that its officers and directors should also be subject to "the same duties, restrictions, penalties and liabilities now or hereafter imposed upon . . . officers and directors" of a domestic corporation of like character.

9. In Article 8.13 A of the Texas Act, following the provisions of the Model Act, Section 111, requires that a foreign corporation desiring to transact any business in Texas in pursuit of "purposes other than or in addition to those authorized by its existing certifiacte of authority," shall procure an amended certificate of authority therefor.

10. Similarly, following the language of the Model Act, Article 8.18 of the Texas Act, like Section 117 of the Model Act, prescribes penalties upon a foreign corporation for transacting business in this state not within the scope of its certificate of authority. In accordance with a prior Texas statute, a heavy daily penalty was inserted in this article of the Texas Act in addition to the provisions of the section of the Model Act.

[11] 3A VERN. ANN. TEXAS STAT., Bus. Corp. Act, art. 2.22 (1956).

wise be required to be copied or summarized on the face or back of any certificate, may file a document with the Secretary of State containing all such provisions and then incorporate the provisions of that document by reference thereto on its certificate of shares. The officials of some corporations may not furnish such a statement when requested in accordance with the requirements of the Model Act; and the statement when furnished may be incomplete or incorrect. Hence we in Texas have felt that this public filing and the incorporation by reference only to the contents of a document thus filed is far preferable to the incorporation by reference which is permitted by the provisions of Section 21 of the Model Act of the contents of a document to be prepared and furnished at some future date. We consider unfortunate a situation in which the shareholder must either go to court to compel furnishing the information or rely upon whatever officials of the corporation may assert to be those provisions which are of such controlling importance to the shareholders. We of the Texas Committee urge consideration of our errors in the 1955 Act requiring the stock certificate to be too explicit and our effort by the 1957 amendment to cure that error in the 1955 Act.

5. In the corporation statutes of some states there has been a recognition of what is known as "Wasting Assets Corporations," [12] which corporations are permitted to distribute as dividends, in addition to net earnings, amounts equal to depletion representing the reduction in value of the capital assets of the corporation resulting from their use. The typical "Wasting Assets Corporation" is a mine or oil well as to which dividends are permitted in sums equal to depletion reserves. I urged in the American Bar Association Committee the addition of such a provision; rather than a broader revision that I preferred, there was inserted paragraph (b) in Section 40 of the Model Act, which permits the declaration and payment of such dividends by a corporation engaged in the business of exploiting natural resources. That paragraph requires that such a dividend be identified as a distribution of a depletion reserve and the disclosure to the shareholders receiving the dividend. The Texas Act contains in Article 2.39 a broader provision than that contained in this paragraph of the Model Act. The Texas Committee concluded, though I had not been able so to persuade the American Bar Committee, that the same rule that may fairly be applied to corporations engaged solely in the business of exploiting natural resources should be applied also to a corporation, if it elects that the rule shall apply to it, which invests its capital in asset or assets which diminish in value with their use, such as,

> A corporation which invests its capital in a leasehold estate for years and hence must charge off that investment on an annual amortization of its cost during the period of the leasehold estate; or
>
> A corporation which invests its capital in a patent which has a definite term of years yet to run and which must charge off that investment on an annual amortization of its cost during the remaining period of the patent.

[12] See, *e.g.*, CAL. CORP. CODE ANN. § 1503 (Deering 1953). No direct regulation in either statute or case law can be found in Utah. That void has been characterized as a "legal no-man's land." Dykstra, *Gaps, Ambiguities and Pitfalls in the Utah Corporation Code*, 4 UTAH L. REV. 439, 444–45 (1955).

Feeling that the term "Wasting Assets Corporation" had been used almost wholly in the narrower sense of a corporation using its capital invested in natural resources and feeling that the term "wasting" sounded somehow reprehensible, the Texas Committee, in broadening this provision, defined as a "Consuming Assets Corporation" a corporation engaged in the business of exploiting assets "subject to depletion or amortization" and which elected to become a "Consuming Assets Corporation," adding those three words as a part of its official corporate name and giving them prominence equal to the rest of the corporate name in its financial statements and certificates representing shares. Such a corporation is required to add in each such certificate a statement, "This corporation is permitted by law to pay dividends out of reserves which may impair its stated capital." In Article 2.39, the terms and conditions in which dividends may be paid in amounts equal to reserves for depletion or amortization are set forth. These provisions may be, and, it is submitted, should be, available not merely to corporations engaged in oil or gas or other mineral exploitation.

6. During the earliest years of the American Bar Committee activity, the chief critic of its Model Act was Professor Ballantine of the University of California, whose ideas were largely responsible for the form of the California Corporations Code. One of the chief differences between the Model Act and the California Code is one as to which the Texas Committee concluded, after thorough study of these provisions of the California Code and their effect in operation in California, to adopt the California rule. This rule separates from all other items of surplus any surplus which may result from a diminution of the number of the outstanding shares as by purchase or redemption or may result from any other reduction of stated capital.[13] As in California, the Texas Act defines[14] "reduction surplus" as any surplus created by or arising out of a reduction of stated capital and the use of such surplus is restricted more than is the use of "earned surplus," which, as defined in the Model Act, includes in addition to other items any such surplus created by or arising out of a reduction of stated capital. The Texas Committee and now generally the Texas Bar, it is believed, recognize the propriety of this distinction. It prevents what otherwise might become a manipulation of stated capital in order to increase funds available for dividends under the terms of the Model Act.

7. In Section 43 of the Model Act, there are specific provisions defining circumstances in which directors of corporations will be liable for voting for or assenting to actions in violation of the Act, these liabilities imposed by the statute being stated as in addition to any other liabilities of directors imposed on them by law. Also in Section 43, there are specific provisions defining certain defenses of directors to any such causes of action. One of these defenses recited as a defense to each of the three statutory liabilities set forth in paragraphs (a), (b) and (c) of Section 43 of the Model Act, is available to a director who in good faith relied upon financial statements of the cor-

[13] CAL. CORP. CODE ANN. § 1711 (Deering 1953).

[14] 3A VERN. ANN. TEXAS STAT., Bus. Corp. Act, art. 4.13 (1956). See Ballantine and Hills, *Corporate Capital and Restrictions upon Dividends Under Modern Corporation Laws*, 23 CALIF. L. REV. 229 (1934).

poration represented to him to be correct by the president or the officer having charge of its books of account or a certified public accountant or an independent public accountant. The written statement of any such accountant as to the financial condition of the corporation is thus the basis for a defense. The Texas Committee, in following such provisions of the Model Act, added another defense applicable not merely to causes of action under the three paragraphs of Section 43 mentioned, but to any other cause of action asserted against a director (in this respect, making this defense as broad as that provided for in the paragraph of the Model Act immediately following paragraph (e)). This defense, which Texas lawyers generally now approve and as to which we have learned of no Texas opposition, reads:[15]

> A director shall not be liable for any claims or damages that may result from his acts in the discharge of any duty imposed or power conferred upon him by the corporation if, in the exercise of ordinary care, he acted in good faith and in reliance upon the written opinion of an attorney for the corporation.

If a director may rely upon a public accountant safely, should he not, when in good faith and in the exercise of ordinary care, be able to rely upon an attorney not of his choice but an attorney for the corporation?

8. In Sections 72 and 73 of the Model Act, it is provided that sales, mortgages and other distributions of all or substantially all of the property and assets of the corporation may be made pursuant to authorization of its Board of Directors if the transaction is "made in the usual and regular course of business of the corporation"; but that, if not in the usual and regular course of business, the corporation for any such transaction should obtain authorizing resolutions of the shareholders as well as the Board of Directors. These provisions were included in the Texas Act as presented to the Texas Legislature by the Texas Committee in the form that they appear in the Model Act and were changed by the Texas Legislature only as to the percentage of the vote required at any such meeting of shareholders called for authorizing such a transaction. Instead of a two-thirds vote, the Texas law as enacted [16] required four-fifths vote for this purpose, as well as for authorization of a merger, consolidation or dissolution of the corporation, the previous Texas law requiring such eighty per cent vote in the last mentioned situations. During the first two years of experience with this Texas statute, it was found that these provisions of the Model Act were unnecessarily burdensome with reference to corporate mortgages. The Texas Committee concluded that it could not reasonably hope to reverse the legislative decision to insist upon an eighty per cent vote and that as to mortgages the requirements of a two-thirds vote as contained in the Model Act are more burdensome than they should be. For creating indebtedness, the authority of the Board of Directors is sufficient. Any such indebtedness, though unsecured, may acquire the status of a secured indebtedness immediately upon being reduced to judgment, with the filing of an abstract of judgment, pursuant to which a statutory lien to secure the judg-

[15] 3A VERN. ANN. TEXAS STAT., Bus. Corp. Act, art. 2.41(D) (1956).

[16] 3A VERN. ANN. TEXAS STAT., Bus. Corp. Act, art. 5.10(3) (1956).

ment would arise.[17] Hence, without action of the shareholders, a judgment lien against all of the property and assets of the corporation could be created without any other limitations than those which equity would impose in preventing bad faith or imposition. For this reason, the Texas Committee in 1957 recommended and obtained, among other amendments to the Texas Act of 1955, the deletion of the word "mortgage" from the first line of the articles of the Texas Act incorporating provisions of Sections 72 and 73 of the Model Act and the insertion in the first of these two articles of a provision expressly permitting the Board of Directors by resolution to authorize the execution and delivery of any mortgage or other instrument of security.

9. In Sections 90 to 94 of the Model Act, there are provisions with reference to proceedings for liquidation of a corporation in court, the filing of claims in liquidation proceedings, the qualification of receivers, and the jurisdiction of courts as to such proceedings. Having in mind the inadequacies of the Texas statutes with reference to corporate receivers, the Texas Committee, in lieu of those five sections of the Model Act, set forth Texas Articles 7.04 to 7.08 creating explicit provisions for receiverships of three types: (i) receiverships for specific corporate assets, (ii) receiverships for rehabilitation of corporations, and (iii) receiverships for liquidation of the assets and business of corporations. These articles also define circumstances under which a receivership might be available as a remedy for all three situations, making it clear, however, that there can be no receivership for rehabilitation or for liquidation whenever a receivership for corporate assets would suffice. In addition, there may be no liquidation receivership if either of the other types would suffice. If a rehabilitation receivership has been commenced, a court might if special need were shown terminate it and order immediate liquidation, but absent such a showing a period of twelve months in which to develop a rehabilitation plan would be available. Though these statutory provisions were especially needed in Texas in view of the court decisions, and the provisions of the Texas Act in effect codified the sounder rules of these conflicting decisions, it is recognized that there may not be a need for such explicit provisions as to receiverships in other states. Whether some such receivership provisions should be inserted in the Business Corporation Act of any other state, it is submitted, depends upon the statutes and decisions as to receiverships of that state.

10. The Model Act contains provisions for voluntary dissolution of a domestic corporation only by court action, Section 87, and provides for revocation of a certificate of authority of a foreign corporation by act of the Secretary of State. The Texas Committee concluded that the involuntary termination from the state as to foreign, as well as domestic, corporations should be by court action only, and that the court procedure for any such relief sought by the Attorney General should be spelled out in more detail than in the Model Act. A corporation which is in default may obtain dismissal of the proceedings at any time before judgment by curing the default and paying the costs of the proceedings. And if the corporation in good faith contests the

[17] See 16 VERN. ANN. TEXAS STAT. § 5449 (1941); UTAH CODE ANN. § 78-22-1 (1953).

charge it may litigate the manner through both judgment and appeal before it elects to cure the alleged default; a brief period after judgment has been allowed in which the default may be cured, thus avoiding the "death penalty" at every stage of the proceedings.

These procedural provisions added to the provisions of the Model Act have been deemed by the Texas Committee and Texas lawyers generally to be most salutary.

The Texas Act of 1955 became effective ninety days after the adjournment of the legislature. By that time the Texas Committee had completed the preparation of drafts of forms for use under the Act and they were promulgated by the Secretary of State and distributed by the State Bar to lawyers over the state; and had completed comments as to the source of each article of the Act and as to the change in Texas law effected by each article of the Act as construed by the committee, and comments as to these forms, all of which were published in a separate volume of Vernon's Annotated Texas Statutes. Similar steps are in progress relating to the amendments effected by the 1957 statute.

As commented upon by Mr. Whitney Campbell in his article,[18] the Texas Committee suggested that the 1955 Act apply from its effective date to all corporations thereafter organizing in Texas or applying for authority to do business in Texas, excepting those types of corporations excluded from the provisions of the Act; but a period of five years was granted for each existing Texas corporation or each foreign corporation already authorized to do business in Texas, within which it might, at its election, "adopt" the Act. The Act becomes effective as to all of these corporations which have not voluntarily adopted it meanwhile upon the expiration of that five year period. The purpose of this was to assure that two regular sessions of the legislature, those in 1957 and in 1959, might be completed before any existing corporation would be involuntarily subjected to the provisions of the Act. The changes in the Texas law applicable to corporations already doing business in Texas, accomplished by the Act, were so many that it was assumed, and we still believe, that there would have been much opposition to our measure but for this device of permiting the Act to be available to those corporations which elected to adopt it during the interim five year period.

The Texas Act has been very popular among lawyers and businessmen of Texas. No changes in the Act were urged upon the Bar Committee during the first two year interval prior to the enactment of the 1957 legislature excepting proposals for amendment that would simplify or clarify and were consistent with the purposes and intent of the law. In accordance with the plan of the Bar Committee when first formed in 1950, the committee presented to the bar and with its approval, to the 1957 legislature, a series of amendments, all of which were adopted by the legislature. The important amendments have been mentioned in this article. No amendment of significance was added to this measure as it went through the legislature. These developments and the support given to the Texas Committee by the bar and businessmen of Texas quite generally, to the bill for the amendment of the

[18] Campbell, *supra* note 2, at 131.

1955 Act and the companion bill for a Nonprofit Corporation Act, attests to the general acceptance in Texas of the Model Act in the form we have it.

In keeping with the intent that this law shall be kept abreast of the developments of corporation law throughout the nation and shall be improved by amendments from time to time sponsored by the Bar Committee, and in keeping with the resolve that destructive proposals for amendment of the Act shall be aggressively opposed, the committee is expecting to continue through the years ahead as an aggressive and active committee of the State Bar. Only so is it possible that we may achieve in Texas our announced objectives.

APPENDIX

The Committee of the Texas State Bar, in proposing enactment of the Model Business Corporation Act in Texas, recommended many changes therein, and accordingly the Texas Business Corporation Act varies from the 1953 draft of the Model Act, as follows:

Section 1. A division of the Act into parts, articles, sections, subsections and paragraphs following the pattern of other Texas statutes; advantages of this include calling each section of the Model Act an article, arranging articles on the same subject in one part to which is assigned an arabic numeral with use of decimal points for each of the articles within that part; the greater facility in giving new numbers to added articles as and when decided upon later; a facility in amending portions of articles when amendments are desired from time to time; ease in identifying portions of articles in citing them; and clarity in breaking portions of each article up into sections and subdivisions of sectons, as illustrated by contrasting the form of Section 15 of the Model Act with the form of the same provisions in Article 2.13 of the Texas Act.

Section 2. The Texas committee modified the definition of earned surplus with the intent that it be expressly clear that "gains" such as from appreciation be unavailable for dividends, along with earned income, as a part of "earned surplus." Definitions were added for a "consuming asset corporation"; for "reduction surplus"; and in connection with changes in Sections 16 and 23, for "subscription" to stock.

Section 3. Under the long outmoded Texas statutory requirement that practically every corporation had to be organized for a single purpose and that it be one of those prescribed in an article of the Texas statutes, there developed problems perhaps unique in Texas as to this section which resulted in its entirely being rewritten. As adopted in Texas this section requires that the purposes of the corporation "be fully stated in the Articles of Incorporation"; that none of such purposes be expressly prohibited by any law; that certain purposes be not combined in the same corporation with other purposes; and that none of the purposes include the transaction of business of particular types of corporations controlled by specific separate statutes.

Section 4. After enumerating the general powers as in this section, the Texas statute Article 2.02B adds:

> B. Nothing in this Article grants any authority to officers or directors of a corporation for the exercise of any of the foregoing powers, inconsistent with limitations on any of the same which may be expressly set forth in this Act or in the Articles of Incorporation or in any other laws of this state. Authority of officers and directors to act beyond the scope of the purpose or purposes of a corporation is not granted by any provision of this Article.

A further provision was added by the legislature expressly subjecting all provisions of this article to the antitrust laws of the state and the chapter relating to the ownership of lands by corporations.

Section 5. The Texas committee, following the California pattern established a reduction surplus and added a restriction limiting the use of reduction surplus for the purchase of shares; it also added a special provision for open-end investment companies.

Section 6. Some changes in language were made by the Texas committee but in substance not changing the section substantially.

Section 7. The Texas committee, following the pattern of existing Texas law permitting the use of assumed names by corporations, as for example, identifying a separately conducted department, added a provision with reference thereto.

Section 9. Deeming such a change administratively preferable in the office of the Secretary of State of Texas, the registration period was made one full year so that applications for renewal would not be concentrated near the end of each calendar year.

Section 13. This was reworded so that there would be consolidated in this section all provisions as to service of process on the Texas corporations to which the Act applies.

Section 16. This section was reworded by the Texas committee in order to insert provisions which would clarify uncertainties under existing Texas decisions, as to when a subscription agreement is binding on the subscribers.

Section 18. The Texas committee inserted language of the Texas constitution in this section.

Section 19. The Texas committee deleted the last sentence of this section.

Section 20. The Texas committee added at the end of this section a qualifying statement: "only if the consideration still retained by the corporation after such disbursement is at least equal to the stated capital of the corporation represented by such shares." By 1957 amendment of the Texas Act, this revision of the Model Act was deleted at the request of the Texas committee.

Section 21. The Texas committee slightly reworded this section as its bill was enacted in 1955 and substantially revised it, by its amendments of 1957. The Texas Act now provides (i) that the requirements for matters to be set forth on certificates representing shares shall not apply to certificates outstanding when the requirement first becomes applicable to them as for example, when an existing Texas corporation adopts the Act, but shall apply to all certificates thereafter issued, in connection with transfer of shares or otherwise; and (ii) that any corporation may file a document in the office of the Secretary of State and thereafter refer to it or any provision in it, thus incorporating by reference provisions of such a filed document without copying or summarizing same on the face or back of any stock certificate. The length of some provisions otherwise required to be copied or summarized and the difficulty of summarizing such detailed provisions led to this new 1957 provision.

Section 23. Because of the Texas constitutional requirements as to consideration, the Texas committee added in the first paragraph, 4th line, a clause that the consideration referred to be "fixed as provided by law."

Section 24. The Texas committee expanded this section so that it would contain provisions relating to restrictions on the transfer of shares (which provisions were required by the 1955 Act to be copied at length on the face or back of each certificate, but which, after the 1957 amendments to the Texas Act, may be summarized or incorporated by reference); and in repeating the provisions of this section with reference to preemptive rights, changed the word in the first line "additional" to "unissued."

Section 25. This section was slightly reworded by the Texas committee.

Section 26. Following generally the pattern of the Delaware statute, the Texas committee added provisions to the second paragraph of this section relating to court proceedings for compelling the conduct of an annual meeting.

Section 29. The Texas committee added a sentence at the end of the last paragraph to the effect that the liability to the shareholders should be that of the corporation, rather than the officer or agent in charge of the stock transfer books, should he not receive notice of the meeting sufficiently in advance reasonably to comply with this section.

Section 31. The Texas committee added to the third paragraph of this section, provisions that a proxy shall not be valid after eleven months unless otherwise provided in the proxy and shall not be irrevocable for a period of more than eleven months. As to the fourth paragraph the Texas committee provided that it should be optional to each corporation whether there should be cumulative voting. By the 1957 amendment to the Texas Act, the legislature, on its own initiative, has reverted to the provision previously proposed to it by the Texas committee that there shall be no cumulative voting "unless provided for in the Articles of Incorporation"; excepting, however, that as to corporations coming under the Act prior to the 1957 amendment, the legislature's 1955 provision that there shall be cumulative voting "unless otherwise provided in the Articles of Incorporation" will continue to apply. The Texas committee also added more explicit provisions to the fifth and sixth paragraphs of this section.

Section 34. The Texas committee inserted a provision for removal of directors with or without cause if this is provided for in the bylaws.

Section 38. The Texas committee added an explicit provision implied in this section that the authority which may be granted by the board of directors to the executive committee shall not include authority to act "where action of the board of directors is specified by this Act or other applicable law."

Section 40. The Texas committee deleted paragraph (b) from this section and enacted it as Article 2.38 and a separate article (2.39) as to dividends by "Consuming Assets Corporations." The provisions of an existing Texas statute were also added to the provisions of Article 2.38.

Section 41. Changes in this section were made by the Texas committee because of its adoption of provisions for a "reduction surplus."

Section 42. This section was deleted by the Texas committee, being deemed undesirable in view of the provisions of Section 43(d) of the Model Act.

Section 43. This section was adopted by the Texas committee except for a change in paragraph (e), made necessary by the adoption in the Texas Act of the "reduction surplus";

and except for the addition in the Texas Act of another paragraph immediately preceding the last two paragraphs of this section, and which reads:

"d. A director shall not be liable for any claims or damages that may result from his acts in the discharge of any duty imposed or power conferred upon him by the corporation if, in the exercise of ordinary care, he acted in good faith and in reliance upon the written opinion of an attorney for the corporation."

Section 46. In the Texas Act the third paragraph of this section is deleted.

Section 48. To this section and to Section 51 the Texas legislature by floor amendment added a clause based in part upon a prior Texas statute to the effect that the amount paid in before commencement of business should be $1,000 or 10% of the total capitalization of the corporation, whichever is greater. On urging of the Texas committee these additions to the Model Act were deleted by the 1957 Amendments to the Texas Act.

Section 50. The Texas committee reworded the last three lines of this section because it consolidated the legal proceedings referred to in this section as two exceptions, into a single procedure. See note as to Section 88 below.

Section 51. See note as to Section 48, above.

Section 53. The Texas committee added a clause relating to another change by it, permitting the converting of a corporation into a "Consuming Assets Corporation."

Section 56. The Texas committee reworded (b), to make it more explicit.

Section 59. The Texas committee, following the pattern of a New York statute, worded this section differently.

Article 4.08 of the Texas Act, detailing Procedure for Redemption, was taken in substance from the California and Oklahoma statutes. No such provision was then in the Model Act, or has since been added.

Section 60. The Texas committee substantially expanded this section in its Article 4.09.

Section 61. The Texas committee reworded the caption and the first and fourth paragraphs of this section.

Section 62. The Texas committee reworded the caption and two paragraphs of this section.

Section 63. The Texas committee reworded the caption and two paragraphs of this section.

Section 64. The Texas committee reworded the caption and some of the provisions of this section; one specific change was made necessary by the adoption in Texas of provisions for a "reduction surplus."

Section 67. The Texas legislature, contrary to the recommendation of the Texas committee, modified this section so as to require an 80% vote as required by the earlier Texas statute.

Section 70. The Texas committee adopted only a part of this section, added provisions from the California Code and added some procedural provisions of its own.

Article 5.08 as to conveyances of corporations, was inserted by the Texas committee following section 70, incorporating provisions of an existing Texas law.

Section 71 and Section 74 were consolidated and reworded by the Texas committee as its Article 5.10, defining rights of shareholders to dissent; to this article there were added Article 5.11, detailing procedure for dissent, and Article 5.12, adding provisions affecting remedies of dissenting shareholders. These three article of the Texas statute contained completely new provisions, taken largely from provisions of the Delaware and Oklahoma statutes.

Sections 72 and 73 were followed in the Texas Act of 1955, with a change made by the Texas legislature in Section 73(c), so as to require an 80% vote. Both of these Texas articles following these two sections, Article 5.09 and Article 5.10, have been amended at the instance of the Texas committee in 1957, by making their provisions inapplicable to mortgages and providing that, unless otherwise provided in the Articles of Incorporation, the board of directors may authorize any mortgage.

Section 77. The Texas legislature inserted a change in paragraph (3), changing the required vote from two-thirds to four-fifths.

Section 82. The Texas committee expanded the provisions of paragraph (3) in order to make the provisions more explicit, and the Texas legislature changed the percentage of vote therein required from two-thirds to four-fifths. The Texas committee also added in subparagraph (f) a further requirement that the voting by classes, if shares of more than one class voted, be shown separately.

Section 85. The Texas committee expanded the provisions of paragraph (d) in order to make such provisions more explicit.

Section 87. The Texas committee added grounds for involuntary dissolution, as follows: The corporation or its incorporators have failed to comply with the conditions precedent to incorporation; or the corporation has continued to transact business beyond the scope

of the purpose or purposes of the corporation as expressed in its Articles of Incorporation; or a misrepresentation has been made of any material matter in any application, report, affidavit or other documents submitted by such corporation pursuant to this Act.

The Texas committee also consolidated paragraphs (d) and (e) into a single ground for involuntary dissolution relating to the maintenance of a registered agent as required by law.

Section 88. The Texas committee completely rewrote this section so that its Article 7.02 provides for notification to the Attorney General as in this section; provides for notice to the corporation more explicitly than in this section; and provides in detail as to an opportunity that shall be given to the corporation to cure any default specified in any such notice. The Texas Act requires that a court judgment shall be necessary to any involuntary dissolution of a domestic corporation or revocation of certificate of authority of a foreign corporation and for continuing opportunity to cure the default of which a corporation is adjudged guilty, if the court is reasonably satisfied of the intention in good faith so to do, during a sixty-day period of stay following the pronouncement of the court's findings. The Act further specifies that if an appeal be taken as to the existence of the default, then such sixty-day opportunity for curing shall be afforded to the corporation desiring to cure the default, within sixty days after the judgment of default on appeal shall become final.

Section 89. The Texas committee rewrote this article so that it would accord with existing Texas procedures.

In lieu of Sections 90, 91, 92, 93 and 94 relating to court liquidations, the qualification of receivers in such proceedings and the filing of claims therein, the Texas committee wrote five new articles, 7.04 to 7.08, inclusive, detailing when a receiver for a corporation to which the Act applies shall be granted, and classifying types of receivership as (i) receiverships for specific corporate assets, (ii) receiverships to rehabilitate corporations, and (iii) receiverships to liquidate assets and businesses of corporations. Only in the event that the first type is an inadequate remedy, are either of the other two types provided for, and only in the event that neither of the first two types is an adequate remedy, is the third type provided for. In the event of receiverships for rehabilitation and no plan for remedying the condition of the corporation which the court finds to be feasible has been presented within twelve months, a liquidation is provided for. These articles provide as to qualifications, powers and duties of the receivers, the filing of claims with the receivers, exclusive jurisdiction of receivership court over properties of the corporation in receivership (or the assets if the receivership is of specific assets) and for ancillary receiverships for foreign corporations. The provision of the Model Act that shareholders are not necessary parties defendant to receivership or liquidation proceedings is repeated.

Section 97. The Texas committee added a provision to the provisions of this section, providing for escheat of funds deposited and unclaimed for seven years, after specified notice.

Section 99. This section was followed generally by the Texas committee, with the addition, however, of the following enumerated activities specified as not of themselves constituting the transaction of business by a foreign corporation in the state, in addition to those enumerated in the Model Act:

Voting the stock of any corporation which it has lawfully acquired;

Exercising the powers of executor or administrator of the estate of a nonresident decedent under ancillary letters issued by a court of this State, or exercising the powers of a trustee under the will of a nonresident decedent, or under a trust created by one or more nonresidents of this State, or by one or more foreign corporations, if the exercise of such powers, in any such case, will not involve activities which would be deemed to constitute the transacting of business in this State in the case of a foreign corporation acting in its own right;

Acquiring in transactions outside Texas or in interstate commerce, of debts secured by mortgages or liens on real or personal property in Texas, collecting or adjusting of principal and interest payments thereon, enforcing or adjusting any rights and property securing such debts, taking any action necessary to preserve and protect the interest of the mortgagee in said security, or any combination of such transactions.

The Texas legislature deleted from the enumeration of such transactions listed in this section, the language of paragraph (f) of the Model Act, the omission leaving the law, it is believed, however, the same as if the paragraph had not been deleted. In the 1957 amendments to the Texas Act one of the three additions of 1955 was reworded slightly, in accordance with the language as above quoted in this footnote, and yet another paragraph was added, as follows:

Investing in or acquiring, in transactions outside of Texas, royalties and other non-operating mineral interests, and the execution of division orders, contracts of sale and other instruments incidental to the ownership of such non-operating mineral interests.

Section 100. The Texas committee rewrote the last clause in this section, following the semi-colon, so as to read:

and, as to all matters affecting the transaction of intra-state commerce in this state, it and its officers and directors shall be subject to the same duties, restrictions, penalties and liabilities now or hereafter imposed upon a domestic corporation of like character and its officers and directors.

Section 101. The Texas committee deleted paragraph (b) from this section.

Section 105. The Texas committee reworded this section so that it would be more explicit as to the effect and term of each certificate of authority or renewal thereof.

Section 107. The Texas committee followed this section generally but spelled out some procedure more explicitly.

Section 108. The Texas committee revised this section so as to be consistent with the prior Texas statute and the provisions of the article of the Texas Act relating to the service of process on domestic corporations, which as above noted was a revision of Section 13 of the Model Act.

Section 112. The Texas committee deleted as requirements for the application for withdrawal, the provisions of paragraphs (f), (g) and (h) of this section but added the requirement that the application contain "a statement that all known creditors or claimants have been paid or provided for and that the corporation is not involved in or threatened with a litigation in any court in this state." It also added a requirement of "a statement that all sums due, or accrued, to this state have been paid or that adequate provision has been made for the payment thereof."

Section 114. The Texas committee added to the provisions of this section additional grounds for revocation, that: "the corporation has failed to comply with the condition precedent to the issuance of its certificate of authority or a renewal or amendment thereof"; and "the corporation has continued to transact business beyond the scope of its purpose or purposes expressed in its certificate of authority to transact business in this state"; and "the certificate of authority to transact business in this state or any amendment thereof was procured through fraud."

Section 115. The Texas committee entirely rewrote this section so as to provide that the revocation shall be accomplished only by court decree.

Section 116. The Texas committee deleted this section from the Texas Act, inserting, as later noted, provisions during a first five-year period for voluntary adoption of the Act by corporations transacting business in Texas under an outstanding permit but requiring that those coming into the state after the effective date of the Act apply for and obtain a certificate of authority under the Act.

Section 117. As to the first paragraph of this section the Texas committee changed the first sentence, for the purpose of making it more explicit, and added a provision, largely if not wholly declaratory, at the end of the first paragraph:

> It is expressly provided, however, that the provisions of this article shall not affect the rights of any assignee of the foreign corporation as the holder in due course of a negotiable promissory note, check or bill of exchange or as the bona fide purchaser for value of a warehouse receipt, stock certificate or other instrument made negotiable by law.

In the third paragraph of this section the committee added a sentence specifying, as in the existing Texas statute, specific penalties for the transaction of business in Texas without obtaining authority so to do.

Sections 118, 119 and 120 were deleted from the Texas Act, being appropriate for a franchise tax law which was enacted separately in Texas.

Sections 121 and 122 were consolidated in a single article, 10.01 of the Texas Act, with appropriate changes as to the amounts of the charges and fees to be exacted.

Sections 123, 124, 125, 126 and 127 were deleted from the Texas Act, being appropriate to a franchise tax statute which was separately enacted. This was true also of the first two paragraphs of Section 128.

Section 128 (the last paragraph thereof) and Section 129 and Section 130 were consolidated in one article, Article 9.01 of the Texas Act.

Section 133, though reworded, was followed generally in Article 9.04 of the Texas Act.

Section 135, though reworded, was followed generally in Article 9.06 of the Texas Act. The Texas legislature added a new provision inserted at this point as Article 9.07, reading:

> Whenever any document is required to be filed in the office of the Secretary of State by any provision of this Act, the requirement of the statute shall be construed to involve the requirement that the same be so filed with reasonable promptness.

Section 139 was deleted from the Texas Act by the Texas committee.

Section 140 was deleted and in lieu of it and Section 116, the Texas committee added to the Texas Act, Article 9.14, defining to what corporations the Act should apply and specifying a procedure for the adoption of the Act by existing corporations to which the Act could apply; by detailed provisions, such domestic corporations with charters under the existing statutes and such foreign corporations holding permits issued under the existing statutes are permitted to adopt the new Act at any time during a period of five years from and after the effective date of the Act, and then at the end of the five-year period all corporations to which the Act may apply that have not already adopted it, automatically come under the Act. This five-year period was determined upon so that two regular sessions of the Texas legislature would have

been completed meanwhile, and operation of the Act in its application to numerous corporations could then be reconsidered by the legislature before the Act mandatorily would apply to such corporations. Two additional new articles (9.15 and 9.16) also defined the extent to which existing laws should remain applicable to the corporations to which the Act would apply, and related to the repeal of existing laws and the extent and effect thereof. Section 143 of the Model Act was accordingly deleted by the Texas committee, its subject matter being covered by the provisions of Article 9.16.

RULE 63(9)(a) OF UNIFORM RULES OF EVIDENCE — A VECTOR ANALYSIS

By RONALD N. BOYCE *

The common law formality of court procedure has many vestigial remnants in the present-day judicial system. One of the more objectionable of these is our present adherence to sometimes overly strict rules governing the presentation of evidence. The law of evidence is the most often applied of the adjectival areas, simply because no case can be tried without involving it. To the layman this aspect of the legal profession is the most familiar. It involves the use of spectacular objections and dramatic oratory. To the practicing attorney, however, its artistic effects are less appreciated. The law of evidence for the common trial attorney (and for the courts as well) must be a practical, expedient and easily applied tool. Being aware of this necessity, judges, attorneys and legal scholars have attempted to accomplish various changes in the present substantive standards by the formulation of the Uniform Rules of Evidence.

The Uniform Rules constitute an affirmative attempt to reduce a very complex thing into a more simple form. In 1939 an American Law Institute committee under Edmund M. Morgan formulated the well-known Model Code of Evidence. In 1948 the National Conference of Commissioners on Uniform State Laws, realizing the need for some correction in the field of evidence, started to study the question with the Model Code as its guide. In 1952 the Uniform Rules of Evidence were completed and approved. It is these Rules, and modifications thereof, that have been under study by the Utah State Bar.[1]

One of the more controversial rules in the Uniform Rules is Rule 63 (9)(a):

> RULE 63. . . . Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except:
>
> . . . .
>
> (9) *Vicarious Admissions:* As against a party, a statement which would be admissible if made by the declarant at the hearing if
>
> (a) the statement concerned a matter within the scope of an agency or employment of the declarant for the party and was made before the termination of such relationship. . . .[2]

As can be seen at a glance, the substantive effect of this rule on our present rule of evidence relating to agents' admissions would be considerable. The Utah committee considering the adoption of this rule has made one change. The change precedes and qualifies part 9(a) with these words: ". . . the judge finds the declarant is unavailable as a witness, and that . . ."

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[1] See *Preliminary Draft of the Rules of Evidence*, 27 UTAH B. BULL. 5–51 (1957). A parallel New Jersey study is described in Jacobs, *The Uniform Rules of Evidence*, 10 RUTGERS L. REV. 485–490 (1956).

[2] NAT'L CONF. OF COMM'RS ON UNIFORM STATE LAWS, UNIFORM RULES OF EVIDENCE. Citations hereinafter will be UNIFORM RULES; Utah variations will be cited UTAH RULES.

It is the purpose of this paper to consider the relative effect of rule 63(9)(a) on the present condition of our law and to attempt to appraise the validity of the change and the objections thereto.

THE GENERAL RULE

The present rule is said to be simple in the statement and complex in the application.[3] The general proposition is that out-of-court admissions of an agent are not evidence against the principal. The rationale is that each man speaks only for himself unless and until another is authorized to speak for him. So it is said that where the agent is without authority to speak for the principal his statements cannot bind the principal, but where there is an express, implied or ratified authorization the principal is subject to the adverse admissions of his agent.[4] This applies in civil and criminal actions alike.[5] Thus the effect of the rule is to receive some admissions as though the principal himself had spoken. It is clear, however, that a statement does not bind the principal unless it is made within the so-called "scope of authority," real or apparent, and that the statement must be made while the authority was in existence.[6] Competence to speak is not alone the measure of admissibility under the present law; the statement must be one of fact rather than of opinion[7] made in connection with the agent's authority. These broad statements make it apparent that a certain amount of sophistication is needed to construct any practical and definitive standard of admissibility. It is our task to deduce some meaning from the stated principles.

Professor Jones in his work comments that declarations of an agent are competent evidence when deemed those of the principal, and that whenever an agent makes a contract, whatever is said by the agent accompanying that transaction is admissible, limited of course to his *scope of authority* which he determines

> . . . is, treated as the direct act of the principal, constituting a part of the *res gestae,* really an integral part of the whole negotiation. . . .[8]

In this definition we encounter a new test — *res gestae* — for determining scope of authority. This is a common expression in dealing with the admission of agents. It has been said by courts that admissions of an agent are receivable against his principal only when they are part of the *res gestae.*[9] As Professor Wigmore explains in his treatise, the term *res gestae* as used is really synonymous with "business" of the employer, and with our noted ambiguity,

[3] 1 JONES, EVIDENCE § 255 (4th ed. 1938).

[4] See Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229 (1917). The Supreme Court was concerned with the problem of making permanent a temporary restraining order issued against defendant labor union. In so doing they considered whether declarations made by a union representative could be used against all the members of the union. The court found that statements made at a union meeting by a representative authorized to speak were within his delegated scope of authority and receivable against all.

[5] American Fur Co. v. United States, 27 U.S. (2 Pet.) 358, 364 (1829).

[6] Idaho Forwarding Co. v. Fireman's Fund Ins. Co., 8 Utah 41, 29 Pac. 826 (1892).

[7] S. W. Bridges & Co. v. Candland, 88 Utah 373, 54 P.2d 842 (1936).

[8] 2 JONES, EVIDENCE § 255 (1913).

[9] See, *e.g.,* Vicksburg & M.R.R. v. O'Brien, 119 U.S. 99 (1886).

"scope of authority." [10] Thus the use of this oft-quoted phrase does little to define circumstances under which admissions will be received or excluded. Returning to Professor Jones, he says:

> Hence has been deduced the general rule that parties are not chargeable with the declarations of their agents, unless such declarations or statements are made during the transaction of business by the agent for the principal, and in relation to such business and while within the scope of the agency; in other words, unless the representation may be deemed a part of the *res gestae*.[11]

This statement of the rule is couched in very narrow terms. Post-event statements are inadmissible because they are not contemporaneous with the acts themselves. Since the existence of agency itself must be independently proved, the task of presenting a valid admission to a court becomes an arduous one. To give any outline to the above stated rule we must look at the way courts have applied it in the cases. Before doing so, however, we should point out another rule of law which, like the one previously discussed, is also an exception to the hearsay rule. This is the spontaneous or excited utterance doctrine.[12]

This doctrine expresses the idea that a statement made by anyone, under such circumstances as would indicate that the declarant would not have time to deliberate and weigh his speech, or that he was subject to such pressure and anxiety that he would not be apt to speak falsely, and the thing about which he speaks is the factor or a cooperative factor inducing the anxiety, the statement is apt to be reliable and may be admitted in evidence over a hearsay objection.[13] Thus not infrequently an out-of-court statement of an agent or employee is received in evidence not because of his status as agent or employee but because the statement was made under the stress of circumstances which qualify it as an excited utterance, a quite independent exception to the hearsay rule.[14] But the independence of the two exceptions is minimized in actual practice by several factors, not the least of which is the confusing use of the meaningless phrase *res gestae* in connection with both of them. Other aspects of the commingling of the two exceptions are treated in the immediately following section.

Cases on the Rule

One of the earliest pronouncements of the rule governing vicarious admissions came from the Supreme Court of the United States. *Vicksburg & M.R.R. v. O'Brien*[15] raised the problem of whether a statement made by defendant's engineer after a train accident as to the speed of the train was admissible. The court held that it was not, indicating that the statement was not made at the time of the action in reference to the engineer's duty and hence could not be considered part of the "res gestae." The court said:

[10] 6 Wigmore, Evidence § 1769 (3d ed. 1940).
[11] 1 Jones, Evidence § 255 (1913).
[12] 6 Wigmore, Evidence § 1756a (3d ed. 1940).
[13] *Ibid.*
[14] See, *e.g.*, Navajo Freight Lines, Inc. v. Mahaffy, 174 F.2d 305 (10th Cir. 1949).
[15] 119 U.S. 99 (1886).

> We are of opinion that the declaration of the engineer Herbert to the witness Roach was not competent against the defendant for the purpose of proving the rate of speed at which the train was moving at the time of the accident. It is true that, in view of the engineer's experience and position, his statements under oath, as a witness, in respect to that matter, if credited, would have influence with the jury. Although the speed of the train was, in some degree, subject to his control, still his authority, in that respect, did not carry with it authority to make declarations or admissions at a subsequent time, as to the manner in which, . . . he had performed his duty.

In considering this statement it should be remembered that the engineer's statement was made only a few moments after the accident. This case has been cited to stand for the majority rule. The courts have given a very narrow interpretation of what is included in scope of authority. In fact, it has been said that the authority to bind the principal must be a "speaking" authorization.[16] With his restriction, the rule has really operated as a substantive rule of agency more than a rule of evidence.[17] The effect of the rule has been to exclude what would normally be relevant and persuasive testimony very beneficial to a plaintiff's case. Absurdity often results from strict application of this standard. One example is *Northern Central Coal Co. v. Hughes*[18] where plaintiff brought suit against his employer for unsafe working conditions and dangerous equipment. Three or four days after the accident in which plaintiff was injured the defendant's superintendent, who as plaintiff's immediate supervisor had ordered him to perform the work resulting in his injury, made a statement which constituted an admission against defendant's interest. The court excluded the hearsay declaration as beyond the scope of authority. The decision, though perfectly within the orthodox rule, seems harsh in light of the declarant's position and authority. This case implies that only a statement by a board of directors could admit against a corporation — obviously absurd.

In *Elcox v. Hill* [19] the court excluded statements of a hotel manager against the hotel in a conversion action where the manager admitted he stole plaintiff's jewelry. This case seems to be excessively restrictive in view of the fact that the manager would be required to speak in carrying out his duties for his principal. The case does evidence the early reluctance of the courts to abandon a strictly logical view of authority. A very recent case is illustrative of the same general rule and at the same time points up an incongruity inherent in most of these agency-tort cases. In *Davis v. Sedalia Yellow Cab Co.*[20] plaintiff sued a taxicab company and the driver of a cab in which plaintiff was riding when injured. The court excluded admission-type statements of the taxi driver on the grounds that there was no authority to speak for the

[16] See Falknor, *The Hearsay Rule and its Exceptions*, 2 U.C.L.A.L. REV. 43, 70 (1954).
[17] See RESTATEMENT, AGENCY §§ 286, 288 (1933).
[18] 224 Fed. 57 (8th Cir. 1915).
[19] 98 U.S. 218 (1878).
[20] 280 S.W.2d 869 (Mo. App. 1955).

principal even though they were admissible against himself.[21] The incongruity is obvious where a declaration would be admissible against the declarant, the person who would try to serve himself, and not admissible against his employer. Certainly as far as the veracity of the statement is concerned the two persons are in the same category.[22]

Although the rule is adamantly restrictive, *res gestae* expressions may allow admissibility. Illustrative of this is the situation in the recent case of *Andrews v. State*,[23] a criminal prosecution for drunken driving. The court allowed the "yes" answer of defendant's wife to be admitted where it was an out-of-court declaration to a question of whether defendant had been drinking by the arresting officer at the time of the citation. The court determined that although the wife was not her husband's agent, her declaration was spontaneous enough to be a part of the *res gestae* (excited utterance). The *Hitchman Coal & Coke* case[24] and *Slifka v. Johnson*[25] are representative of the instances in which admissions are accepted in evidence.[26] The latter case is especially interesting since it involved the admissions of deceased broker as to the purpose of certain transactions of deceased for estate tax purposes. The court here indicated that it did not desire to draw such a narrow scope as would make the rule useless.

Thus the cases on the whole have rather closely drawn the rule of vicarious admissions, concentrating more on a purely logical analysis of authority rather than a practical rule of evidence.[27]

UTAH CASES

Before approaching the question of whether we should undertake an expansion of the rule, it is essential that we know just what the Utah courts have done with it. One of the first cases on this subject decided in Utah was *Idaho Forwarding Co. v. Fireman's Fund Ins. Co.*[28] In this case admissions of an insurance agent were held not admissible against defendant company. The court said that although the agent might have the power to make a contract for the defendant, such power would not include the authority to make subsequent admissions not properly a part of the *res gestae*. Thus the Utah law begins with a very conservative pronouncement of the rule. In contrast to this is the case decided a year later of *Linderberg v. Crescent Min-*

[21] This is apparent in the *Davis* case, *supra* note 20, where plaintiff had dismissed against the driver at the close of the case; because of the reversal he was without remedy. Even more incongruous is the case in which a verdict is directed in favor of the employer because there is no evidence of negligence by the employee which is admissible as against the employer, although admissions by the employee prevent direction of a verdict for him. See, *e.g.*, Cooley v. Killingsworth, 209 Iowa 646, 228 N.W. 880 (1930); Note, 1 DRAKE L. REV. 60 (1952).

[22] *E.g.*, Elcox v. Hill, 98 U.S. 218 (1878).

[23] 161 Tex. Crim. 550, 279 S.W.2d 331 (1955).

[24] 245 U.S. 229 (1917); see note 4 *supra*.

[25] 161 F.2d 467 (2d Cir. 1947).

[26] While both of these cases are interesting from the standpoint of social and economic factors, they should not be distinguished on that ground alone; there are many cases receiving agent's admissions in which such considerations could not be determinative. See the cases collected in 20 AM. JUR., *Evidence* § 505 (1939).

[27] MCCORMICK, EVIDENCE § 244 (1954); 4 WIGMORE, EVIDENCE § 1078 (3d ed. 1940).

[28] 8 Utah 41, 29 Pac. 826 (1892).

ing Co.[29] Here plaintiff was injured while working in defendant's mine. Defendant's employees, including a foreman, made statements that would indicate negligent operation of the mine. One of the statements was made twenty-five minutes after the accident when plaintiff was removed to a hospital. The court allowed the evidence in over the objection of hearsay on the ground of excited utterance. The court indicated that the circumstances of the injury should determine the admissibility of the statements, and that it need not always be made contemporaneous with the action itself.[30] This case is interesting on the concept of excited utterance since the court adopts a very liberal view at an early date. Were the question of admissibility in this case to be determined upon the vicarious admission rule it would undoubtedly have resulted in an exclusion.[31] In the same category is *Wilson v. Southern Pac. Co.*[32] where the court allowed the hearsay statements of defendant's switchman made a short time after the accident. *Leach v. Oregon Short Line R.R.*[33] is an excellent example of one construction excluding while the other admits. In this case deceased was killed while working for defendant railway company on one of their trains. At the trial the hearsay statements of the defendant's engineer were allowed in evidence. On appeal the defendants contended they should have been excluded as being outside the engineer's authority. The court agreed with the defendant's argument on the principle of vicarious admissions, but it allowed the evidence to come in as a part of the *res gestae* on the concept of spontaneity. Thus the court's pattern was set towards the accepted view of allowing admissions commensurate with authority.[34]

Following these early decisions the court added substance to its first pronouncements in a series of decisions. In *Cromeenes v. San Pedro, L.A. & S.L.R.R.*[35] plaintiff's son was killed when run over by defendant's train. In commenting on the admission by silence of defendant's agent when accused of negligence immediately after the accident, the court said:

> To bring the declarations of a party within the doctrine of *res gestae*, they must be connected with, and grow out of, the act or transaction which is the subject-matter of the inquiry so as to form one continuous transaction, and must, in some way, elucidate, qualify, or characterize the act, and, in a legal sense, be a part of it. . . .

[29] 9 Utah 163, 33 Pac. 692 (1893).

[30] The court confuses, understandably enough, the *res gestae* of excited utterance with that of vicarious admissions.

[31] See Weshalek v. Weshalek, 379 Pa. 544, 109 A.2d 302 (1954). In this case a usually enlightened court takes a very narrow position on the excited utterance doctrine. The statements were made when declarant was in such pain as to be unable to bear the pressure of a blanket upon his body. The dissent of Justice Mussmanno is to be preferred, and is approved in Falknor, *Annual Survey of American Law (Evidence)*, 31 N.Y.U.L. REV. 785, 798–799 (1956).

[32] 13 Utah 352, 44 Pac. 1040 (1896).

[33] 29 Utah 285, 81 Pac. 90 (1905).

[34] Moyle v. Congregational Soc'y, 16 Utah 69, 50 Pac. 506 (1897), is very expressive of the court's position. A comparison of this case with *Hitchman Coal & Coke Co. v. Mitchell* is enlightening when we consider that early expressions of the Utah court cite with approval the United States Supreme Court decisions; see note 4 *supra*.

[35] 37 Utah 475, 109 Pac. 10 (1910).

The court actually confuses the doctrine of vicarious admission with that of spontaneous admission and really allows the testimony to come in under the latter doctrine.

Shortly prior to the above case, in one involving the same defendant, the court expressed what is now thought to be the Utah rule. The case was *Meyers v. San Pedro, L.A. & S.L.R.R.*[36] It was an action for damages for death occurring when a second section of defendant's train overtook and collided with the first section. Subsequent thereto the defendant's conductor of the second train was discharged. At that time the defendant's supervisor furnished him with a letter of reference usually given in such cases. The letter indicated that the cause of the conductor's dismissal was his negligent handling of his section, resulting in the collision. The court held the admission of the letter by the trial court was error. It first found that the evidence did not sustain the superintendent's authority to make such admissions without some showing of direct authority. A second ground was that the letter was given nine days after the accident, and had relation to a wholly different subject — that of employer-employee relationship. Thus the court said it was too remote to be in and of itself admissible, and that on its face it dealt with a transaction wholly irrelevant to the accident; it did not fall within the "res gestae." The court said:

> If the transaction with respect to which the statement or admission of the agent is a part, the transaction which the agent was conducting for the principal and in respect of which the statement or admission was made is itself immaterial and inadmissible, then the statement or admission of the agent is not in law the admission of the principal and admissible for such purpose, unless special authority for making the admission is shown. . . .[37]

The court does carefully weigh what it considers to be the scope of the agent's authority, and declares:

> The rules of evidence permitting the immediate and spontaneous declarations and acts of persons to be received in evidence as an exception to the hearsay rule, when they are a part of the *res gestae* of a transaction itself admissible in evidence, and permitting declarations and acts of the agent to be received in evidence as the declaration or acts of the principal himself, "involve two distinct and unrelated principles." Wigmore, Ev., § 1078. But in either case, to render the declaration or act admissible, it must be a part of the *res gestae* of a transaction itself admissible in evidence.[38]

The court's declaration of the law in this case is a general restatement of the accepted principle.[39] Whether its application in this case was proper would venture us into an analysis of the concept of relevancy, something beyond the scope of this paper.[40]

[36] 36 Utah 307, 104 Pac. 736 (1909). The admission in this case was a letter of dismisal by defendant railway's division superintendent. Surely an agent of that stature may be treated as the principal himself, especially when the true principal, the corporation, is a fictional entity.

[37] *Id.* at 320, 104 Pac. at 740.

[38] *Id.* at 321, 104 Pac. at 740.

[39] See 4 WIGMORE, EVIDENCE §§ 1078, 1080 (3d ed. 1940).

[40] In the writer's opinion the restricted concept of relevance here employed is wrong, especially in view of concepts developed within the past twenty-five years.

Subsequent Utah cases have adhered to this rule as a general principle. Thus in *White v. Utah Condensed Milk Co.*[41] the court properly denied a hearsay statement of defendant's agent (in charge of personnel) as to the extent of plaintiff's injury, where plaintiff re-applied for a job after explosion of a gauge injured his eye. In *Jackson v. Utah Rapid Transit Co.*[42] the court allowed a statement made shortly after the accident by defendant's streetcar motorman to the effect that he was not looking, but denied the admissibility of his statements made five minutes after the accident over the telephone.[43] *Surbaugh v. Butterfield*[44] is another case expressive of the Utah policy, and also typical of what may be the plaintiff's attorney's problem. It should be kept in mind when we consider the defendant's attorneys' objections to a rule change. In this case the action was one for damages suffered as a result of trespassing sheep. The Utah Supreme Court held that testimony admitted of hearsay statements of herders as to who owned the sheep was improper; "Nor was it shown to be any part of the declarant's agency to so talk and gossip about his principal's affairs." The court noted the general rule that would allow declarations of possessors of chattels as to who was the owner of the chattel. But the court felt that such could not be the rule where the chattel was itself the damaging instrument in a tort action.

Although we have to this point couched our analysis of the Utah cases in those dealing with exclusions, the Utah court has not been without challenging decisions on the other side.[45] Two cases will suffice to point out the other view of the rule. *Golden v. American Keene Cement & Plaster Co.*[46] was an action for foreclosure of a mortgage; declarations of the agent who made out the deed and negotiated the contract were admitted over the hearsay objection against his principal. In *Western Securities Co. v. Spiro*[47] it was held that where the plaintiff permitted an independent third person to operate under its name for several years, and in a varied course of transactions, plaintiff could be deemed to have assented to that person's declarations touching the immediate transaction on the grounds of ostensible authority.[48] The Utah court when it receives admissions seems to limit those cases to instances of speaking authority. But Utah is not alone in this.[49]

Perhaps one more case should be considered before we determine our pattern to be structurally established. In *S. W. Bridges & Co. v. Candland,*[50] plaintiff's agent, a wool buyer, made opinion statements that the trial court admitted as admissions against the principal in a suit on a wool contract. The

[41] 50 Utah 278, 167 Pac. 656 (1917).

[42] 77 Utah 21, 290 Pac. 970 (1930).

[43] The first statement appears to have been admitted as an excited utterance, but no suggestion seems to have been made that the statements were admissible because made by an employee speaking about matters within the scope of his employment.

[44] 44 Utah 446, 140 Pac. 757 (1914).

[45] See Vecchio v. Industrial Comm'n, 82 Utah 128, 22 P.2d 212 (1933).

[46] 98 Utah 23, 95 P.2d 755 (1939).

[47] 62 Utah 623, 221 Pac. 856 (1923).

[48] The court here indicated some distress at the strictness of the present rule.

[49] See Fish Lake Resort v. Industrial Comm'n of Utah, 73 Utah 479, 275 Pac. 580 (1929); McCormick, Evidence § 244 (1954).

[50] 88 Utah 373, 54 P.2d 842 (1936).

Utah Supreme Court noted that the nature of the agent's authority in this instance would quite probably, in the ordinary case, be such as would bind his principal. However, the court found two factors that it felt made the admittance error. First, that the statements were opinions,[51] and second that they were such that they constituted calling the principal a "scoundrel," and could not possibly be within the scope of his speaking authority.

Thus the Utah court seems to be in accord with the rest of the nation in expressing a rather conservative policy towards vicarious admissions. However, some courts and cases, both national and local, evidence the beginning of a transition which we shall now consider.

THE VECTOR

In recent years courts and legal scholars have been concerned over some of the more obviously reactionary principles that are found in the law of evidence.[52] Not least among those criticized has been the restrictive application of the vicarious admissions rule. The rule has been subject to comment in court decisions, and in general most authorities favor some changes and modifications. As early as 1914 Professor Jones expressed the attitude of legal minds to the rule:

> The trend of judicial decision is undoubtedly in the direction of relaxing the rule of absolute and identical contemporaneousness. . . . The *res gestae* are the declarations tending to show the reality of its existence, and its extent and character.[53]

In addition it is interesting to note that Mr. Justice Field, noted scholar of the United States Supreme Court, attacked the rule in the *O'Brien* case[54] in his dissenting opinion, feeling that the majority was not acting in the best interest of the rules of evidence. As Professor Wigmore states:

> The question therefore turns upon the scope of authority. This question, frequently enough a difficult one, depends upon the doctrine of agency applied to the circumstances of the case, and not upon any rule of evidence.[55]

This appears to be a major criticism of legal scholars. They charge that the rule was an offspring of agency law and developed into a hearsay rule as a matter of course. They charge in addition that if the rule were properly characterized as a rule of evidence, the veracity of the testimony would be the sole determination, and not the narrow "agents' authority" concept that is now the law. So our corollary principle of excited utterance is based upon

[51] The rigid rule against opinion which is applied when the witness is on the stand is somewhat relaxed when admissions are to be tested; the rule against opinion is one of preference only, and the witness on the stand can be compelled to rephrase his answers as fact rather than opinion, something quite impossible when hearsay declarations are offered. See MCCORMICK, EVIDENCE § 241 (1954). But some form of the rule applies nevertheless. See Jackson v. Colston, 116 Utah 295, 209 P.2d 566 (1949).

[52] The clamor was strong enough in England to force the passage of legislation liberalizing receipt of hearsay there. See COWAN AND CARTER, ESSAYS ON THE LAW OF EVIDENCE, c. 1 (Statutory Modification of the Law of Hearsay) (1956).

[53] 2 JONES, EVIDENCE § 346 (1914).

[54] See note 9 *supra*.

[55] 4 WIGMORE, EVIDENCE 119 (3d ed. 1940).

the veracity of the statement and not upon authority to make it.[56] This development has not been completely arbitrary, as we shall later see, but it should be mentioned to the extent that it impeaches the validity of the rule. Since veracity is susceptible to the same incalculations as "scope of authority," the rule, no matter how it is stated, will of necessity be very elastic.

McCormick states his objections to the present rule in very lucid and persuasive fashion:

> This is the logical application of these tests, but the assumption that the test for the master's responsibility for the agent's *acts* should be the test for using the agent's statements as *evidence* against the master is a shaky one. The evidence should be tested by its trustworthiness. The rejection of such post-accident statements coupled with the admission of the employee's testimony on the stand is to prefer the weaker to the stronger evidence.[57]

All the advocacy for something better in the rule does not lie with the text writers. Many of the courts are showing themselves to be in accord with McCormick's stated view.

In *Whitaker v. Keogh*,[58] the court was faced with the problem of whether statements made by the defendant's chauffeur subsequent to the accident (but not such as to be excited declarations) could be admitted against the principal. The court said that even though he lacked speaking authority, the declarant's duties were clearly involved and did not cease because the motion of the car had ceased, that the accident was connected with his duties of driving and that hence such statements were impliedly within his duties. This case indeed set a new force in motion.

The case of *Navajo Freight Line v. Mahaffy*[59] is also indicative of the new attitude. The court allowed a statement made by defendant's truck driver after the accident to come in evidence. It placed admission on the firm base of excited declaration, but did make the following dicta expression:

> It is a rule of general application that admissions made by an agent after the occurrence of an accident are not admissible in evidence against the principal for the reason that the making of admissions is not within the scope of the agent's authority [citing cases]. While the rule has been followed with substantial unanimity, *it has been criticised and there appears to be a logical basis for such criticism* [citing Wigmore].[60] (Emphasis added.)

One of the cases most expressive of the desire to change is *Martin v. Savage Truck Line*.[61] The defendant objected to the admission of a statement of its truck driver as to the speed of the defendant's truck made after the accident. In declaring the admission to be proper the court said:

[56] See 6 WIGMORE, EVIDENCE § 1747 (3d ed. 1940). It is interesting to note that COWAN AND CARTER, *op. cit. supra* note 52, at 4, feel that the basis given for the excited utterance doctrine is not psychologically valid and indicate that the English courts have been less generous in its application than the American.

[57] McCORMICK, EVIDENCE 518–519 (1954).

[58] 144 Neb. 790, 14 N.W.2d 596 (1944).

[59] 174 F.2d 305 (10th Cir. 1949).

[60] *Id.* at 307. Slefka v. Johnson, 161 F.2d 467 (2d Cir. 1947), makes an expansion of the existing rule without expressly calling for change.

[61] 121 F. Supp. 417 (D.D.C. 1954).

> Undoubtedly the decision of the United States Supreme Court would be binding upon this court and compel a decision that the proffered statement was not admissible, unless very real and drastic changes have occurred since that decision which compel a different holding now . . . to say . . . that such operator is no longer the agent of such owner when an accident occurs, . . . seems to me to erect an untenable fiction, neither contemplated by the parties nor sanctioned by public policy.

The decision merely reflects the attitude that present-day jurisprudence should be commensurate with present-day fact situations and that to continue to apply the present restrictive rule is to be blind to current reality.

The Utah high court has not been without similar expressions, although not so clear as those above. *Nuttall v. Holman*[62] was an action for specific performance of a sale of land contract. The court allowed the statement of an employee of the mortgagee-bank, under the contract, to come in, feeling that the plaintiff had made the agent his own.[63] Even if such was the case there appeared no evidence that the plaintiff had authorized the agent to speak for him, and in no event to such an extent. Thus this case seems to indicate that the Utah court might be in a mood receptive to some form of a change.[64]

The least we can say is that there is some transition towards a new rule. In Utah that has taken shape in a possible adoption of the Uniform Rules of Evidence. It now becomes essential to determine the effect the proposed rules would have on the present status of our law.

RULE 63(9)(a)

Rule 63(9)(a) heretofore set out, is for the most part a complete adoption of the rule set out by the American Law Institute in the Model Code of Evidence. The Utah Advisory Committee in turn has largely accepted the rule as set out in the Model Code and the Uniform Rules. However, one exception has been made. The Utah proposed draft adds to the Uniform Rule a phrase that is qualifying in nature. The phrase authorizes admission only if "the judge finds the declarant is unavailable as a witness." Thus the Utah rule creates a condition precedent to the reception of the evidence, namely that the declarant be unavailable for cross-examination under regular trial procedure. The first problem is determining what constitutes unavailability. Rule 62(7) defines this in some detail,[65] but a short statement of its

[62] 110 Utah 375, 173 P.2d 1015 (1946).

[63] The statement made was that plaintiff could not secure enough money to perform. While there was no express advance authority shown, the plaintiff admitted on the stand that any statement made by his agent had been made at his direction. Needless to say, this kind of cooperation in laying foundation is rare indeed.

[64] But see Jackson v. Colston, 116 Utah 295, 209 P.2d 566 (1949).

[65] "Unavailable as a witness" includes situations where the witness is (a) exempted on the ground of privilege from testifying concerning the matter to which his statement is relevant, or (b) disqualified from testifying to the matter, or (c) unable to be present or to testify at the hearing because of death or then existing physical or mental illness, or (d) absent beyond the jurisdiction of the court to compel appearance by its process, or (e) absent from the place of hearing because the proponent of his statement does not know and with diligence has been unable to ascertain his whereabouts.

But a witness is not unavailable (a) if the judge finds that his exemption, disqualification, inability or absence is due to procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying, or to the

substance is that the declarant is "unavailable" if a subpoena will not be effective to produce him in court as a witness — he may be dead, incapable, disqualified or merely absent. The standards employed by the Rule are not very different from those which qualify depositions for use as primary evidence under the Rules of Civil Procedure,[66] and while they enlarge upon they are not changes of the case law standards of unavailability which have evolved in this state.[67] In short, the Utah revision of the Uniform Rule on this score seems not to threaten any difficult problems of practical application.

Perhaps before we weigh the substantive effect of the Utah addition we should look at the motives which probably prompted the qualification. Doubtless it is most wise whenever possible for counsel for either side to have available to him the actual declarant in such cases. Having any witness under oath and subject to cross-examination would usually tend to make his statements out of court less damaging. However, the rule in this instance would prevent the use of the hearsay declaration at all if the witness were available, except for impeachment. To this extent the rule has a reactionary quality. Perhaps a hypothetical case would best illustrate my point. Suppose *A*, an agent clothed with speaking authority, and in the employ of *B*, is involved in an accident with C, and that immediately after, and within the scope of his authority, although not under excitement, *A* states that he was responsible for the accident because of his negligence. Under the present general rule the statement of *A* could be admitted in an action against *B*, while under the Utah proposition it would be admissible only if *A* were not available. Assuming *B* to be the normal employer with a certain amount of control over the economic welfare of his employee, *A* may be unwilling to restate his position on the stand. As a consequence, a valuable piece of evidence may be lost. Thus to that extent the rule with its qualification is directly reactionary and may be used by a defendant's attorney to exclude otherwise relevant testimony. The detrimental effect of the provision may be alleviated to some extent when we consider that under Rule 63(1)[68] prior inconsistent state-

culpable neglect of such party, or (b) if unavailability is claimed under clause (d) of the preceding paragraph and the judge finds that the deposition of the declarant could have been taken by the exercise of reasonable diligence and without undue hardship, and that the probable importance of the testimony is such as to justify the expense of taking such deposition.

[66] See UTAH R. CIV. P. 26(d).

[67] Case authority on most of the grounds of unavailability mentioned in Rule 62(7), note 65 *supra*, exists in this state. For absence from the jurisdiction, see State v. Vigil, 260 P.2d 539 (Utah 1953); State v. De Pretto, 48 Utah 249, 155 Pac. 336 (1916); for inability to locate, see State v. King, 24 Utah 482, 68 Pac. 418 (1902).

[68] UTAH RULE 63 reads as follows:

Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except:

(1) *Prior Statements of Witnesses.* A prior statement of a witness, if the judge finds that the witness had an adequate opportunity to perceive the event or condition which his statement narrates, describes or explains, provided that (a) it is inconsistent with his present testimony, or (b) it contains otherwise admissible facts which the witness denies having stated or has forgotten since making the statement, or (c) it will support testimony made by the witness in the present case when such testimony has been challenged. When admitted, such statements shall be received as substantive evidence.

This is a decided contraction of the comparable UNIFORM RULE 63(1) which reads as follows: A statement previously made by a person who is present at the hearing and available for cross examination with respect to the statement and its subject matter, provided the statement would be admissible if made by declarant while testifying as a witness.

ments may come in as primary testimony. The fact remains, however, that a witness may become very much immune from the inconsistent impeachment merely by admitting the prior statement. Under such circumstances usually reliable evidence might be excluded. It would be a better balanced situation to allow the evidence in even if declarant were available. The reason behind the changes worked by the Utah Advisory Committee seems to be a desire for immediate opportunity to cross examination. The Rule as now stated in no way precludes cross-examination or discovery, yet it may operate to close the door prematurely on an important bit of relevant testimony; the witness by admitting the prior statement prevents further inquiry about it. As presently worded, his acknowledgment of the statement is the end of emphasis on a matter which may cry for further exploration. Under the old rule the same result follows, but the only object under it is to show an inconsistency, not to resolve it.

For the most part (9)(a) would work some rather substantial changes. The rule provides that the admission could be received if it "concerned a matter within the scope of an agency or employment." Thus the breadth of the rule is noted in the word "concerned" instead of the usual wording "made" in the "scope of authority." It appears that the person who acts as agent need not have a specific authorization to speak, requiring merely that he speak about something within the scope of his authority. The rule in addition requires that at the time he speaks he still be in the employ of the principal. This is the same as the present rule.[69] As is said in the Model Code:

> Clause (a) goes beyond the common law because the agent or servant in speaking about the transaction which it was within his authority to perform is likely to be telling the truth in most instances — much more likely than when later summoned to give testimony against his principal or master.[70]

Thus no authority is needed to speak, only a knowledge based upon his usual scope of authority. Hence the Uniform Rules change the basis of the rule from one of substantive agency law to one of evidence based upon the likelihood of truth in the statement. The rule would allow a chauffeur's or truck driver's statements concerning an accident in which he was involved to be received in evidence (assuming under the Utah qualification that the employee is unavailable), or from a superintendent or manager of a defendant's business wherein the "something" is an activity within the manager's control.[71] Thus the rule would become one of evidence, a thing the scholars have long called for.[72]

The Analysis

Although there has been Utah sentiment for the adoption of the rule as stated, there has also been opposition, emanating primarily from defendants' attorneys. It would be well to concern ourselves with the pros and cons.

[69] Hansen v. Oregon-Washington & N. W. Co., 97 Ore. 190, 188 Pac. 963 (1920).

[70] American Law Institute, Model Code of Evidence 251 (1942).

[71] Thus the superintendent's letter in Meyers v. San Pedro L.A. & S.L.R.R., 36 Utah 307, 104 Pac. 736 (1909), would be admitted. See note 36 *supra*.

[72] See Thayer, *Bedingfield's Case—Declarations as a Part of the Res Gestae*, 15 Am. L. Rev. I, 80 (1881); McCormick, Evidence § 244 (1954).

Pro

The affirmative side has much theoretical material upon which to base their argument for acceptance. The main argument is that you should consider the rule from the standpoint of the likelihood of the declarant's statement being true, and not with an eye to more formal principles of agency authority. This argument has much merit; the purpose of the law of evidence is to present as much of a true and accurate picture of the contested incident as is possible. Anything that interferes with that objective is at least suspect. Both sides of the controversy should accept this. The next argument posed is that if a statement made under the lenient application of the excited utterance doctrine can be admitted, the fact of a longer lapse of time should not exclude it; both have almost identical circumstantial gravities of trustworthiness.[73] The proponents of the change argue (1) that the agent has the principal's interests at heart, and is not likely to make careless statements against his employer, and (2) that the principal has economic control over the agent or servant, and as a consequence the servant would be unlikely to make false statements that would impair his continued employment. On the whole these reasons appear valid. Especially is this true in tort cases where the speaking agent himself is usually also liable. Each person is almost instantaneously appraised of his own wrongdoing and is less likely to speak against his own interests.

Con

Defendants' attorneys object to this extension by a direct attack upon the premise of the proponents. They deny that under modern conditions of unionized employee groups the employer has a real and effective economic control through his right to discharge, and they further deny that the unity of interest between employer and employee is sufficient to insure respect for the employer's interests. A case can be put which shows those objections in context — a Federal Employers Liability Act suit by an injured railway worker against his employer. To the extent that the plaintiff's case consists of out-of-court statements by fellow employees, it is argued, they are inherently unreliable — the unity of interest is between the plaintiff and the employees rather than between the defendant and the employees, and attempts to discharge the speaking employees will surely result in union reprisal. The Utah Advisory Committee recognized the force of this argument by inserting the qualification that the prior statement could be introduced only if (1) the employee were placed on the stand and contradicted it, or (2) he were unavailable as a witness. But the majority of the Committee evidently thought such evidence of at least enough value to authorize its receipt as such when the only alternative was its total loss.

Doubtless there was also a recognition that the strongest case which can be put against the Rule is not by any means the typical one. Because of Workmen's Compensation Laws in force almost everywhere, it is virtually only[74]

[73] See McCORMICK, EVIDENCE c. 26 (1954).

[74] An example in non-F.E.L.A. context is Robinson v. Macco Corp., Civ. No. 27500, 2d Dist., Weber Co., Utah. Here defendant's agents made admissions about (1) the scope of authority and (2) liability. They were transient laborers and had left the jurisdiction. While

in Federal Employers Liability Act cases that an employee sues his employer and attempts to utilize admissions of his fellow employees. Much more common is the case in which the unity of interest between employer and speaking employee is very real, when the threat of discharge for irresponsible talk is unfettered and when the speaking employee exposes not only his employer but himself to liability by his statements.

CONCLUSION

Whatever judgment might be made about the policy considerations involved, it is a decided advance to treat the problem as one of evidence on the veracity of the statements rather than one of agency on artificial notions of knowledge and authority. Although defendants' attorneys are apprehensive about giving up a protective device they have long enjoyed, the interests of truthful disclosure seem to demand that the shield fall. Change seems to be a valid practical as well as theoretical recommendation.

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the first would be excluded under any rule, the latter would be received under the proposed Utah version of Rule 63(9) if the scope of authority were established by other evidence. Under such circumstances defendants' attorneys must be forgiven some measure of alarm.

THE UTAH CORRECTIONAL SYSTEMS

By NORVAL MORRIS*

Seven days in a distant country and one is equipped to use it as the scene for a novel. Seven months reduces one to silence under the weight of perception of the extraordinary complexities of human cultures. But seven weeks is just the right length of time to equip one with a heady mixture of scraps of knowledge and chips of prejudice with which to write an article. In the summer of 1956 I spent seven weeks in Utah devoting most of my time, working and conversational, to an effort to learn something of the Utah correctional systems. In this I was aided by the daily presence of a skeptical class of law students and by the most generous co-operation of several of the state's correctional and child welfare officers, psychiatrists and police officers. My only justification for allowing this experience to seduce me into print is a high and sincere regard for the correctional and welfare work of many people in the State of Utah and a profound desire that their efforts should not be inhibited by any lack of community support, any legislative inadequacies, or any shortage of funds.

The State of Utah is fortunate in the organization of its correctional systems. For adult offenders, the Board of Corrections integrates and rationalizes the several types of correctional service which the state provides — probation, prison, parole and allied welfare, medical and industrial services.[1] For children, the Department of Public Welfare and, in particular, the Bureau of Services for Children, are excellently devised to provide for effective collaboration between the juvenile courts, the child welfare services generally, and the particular facilities for the treatment of young offenders. Likewise, the state is fortunate in having attracted to this type of work many people of competence and dedication.

But it is not by recording these qualities that an overseas visitor can contribute to the development of the Utah correctional systems; curmudgeonly though it may seem, he has more chance of being of some use if he dwells more upon what he regards as gaps, defects or inadequacies. If he is correct in his view of these deficiencies, his opinions will be likely to be shared by some of those working in the correctional field who may be precluded, owing to their position, from a free and forceful expression of their criticisms. If he is wrong, they will correct him.

By way of further *apologia*, I must affirm that this article was drafted prior to the riot at the Draper (Point-of-the-Mountain) Prison in February of this year, and has not been modified to include any stresses in the prison revealed by that disturbance.

ADULT OFFENDERS

The County Jail

In the Salt Lake City area, prisoners awaiting trial who are not allowed bail are held in either the county or city jails, under the control of the sheriff

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[1] See BEELEY, THE CENTRAL AUTHORITY FOR CO-ORDINATING THE FACILITIES FOR THE PROBATION, IMPRISONMENT, AND PAROLE OF CONVICTED FELONS IN UTAH (Graduate School of Social Work and the Department of Sociology, University of Utah, 1952).

and of the chief of police respectively. I inspected the former only and found it hopelessly inadequate.

On August 30, 1955, the first United Nations Congress on the Prevention of Crime and Treatment of Offenders agreed to certain "standard minimum rules for the treatment of prisoners." The United States representatives voted for these rules. Concerning prisoners awaiting trial, the following resolutions, among others, were accepted:

> Untried prisoners shall be segregated from convicted prisoners.
> Young untried prisoners shall be segregated from adults and shall in principal be detained in separate institutions.
> Within the limits compatible with the good order of the institution, untried prisoners may, if they so desire, have their food procured at their own expense from the outside, either through the administration or through their family or friends.
> An untried prisoner shall be allowed to wear his own clothing if it is clean and suitable. If he wears prison dress, it shall be different to that supplied to convicted prisoners.
> An untried prisoner shall always be offered opportunity to work, but shall not be required to work. If he chooses to work, he shall be paid for it.[2]

There were other resolutions. I have selected these because the county jail in Salt Lake City fails to meet the minimum requirements of every one of them. These minimum rules were drafted with a view to assisting socially backward countries to attain standards already reached and accepted elsewhere. The argument from here on is too obvious, and too offensive, to be stated.

Prisoners awaiting trial and those serving sentences up to a year (though six months is the normal maximum sentence) are held in the county jail. Those who are serving sentences of only a few days — in particular the drunks — are huddled together with some quite young offenders[3] in a basement dormitory, which is not particularly clean and which provides absolutely no activity for its inmates. Those serving a longer sentence and most of those who are awaiting trial are held in banks of tiered cells of an antiquated construction, with poor sanitation and inadequate lighting. The hopelessness of this institution springs mainly from the entire lack of any constructive activity for the prisoners. Some privileged prisoners are allowed to wash government cars in the yard outside the jail. There may well be doubts both as to the legality and wisdom of this type of activity. Apart from this, there is no industry, no garden, nothing whatsoever to occupy the prisoners, except those few who are engaged in domestic activities. This lack is underlined and made almost poignant by the fact that the top floor of the jail is a large open dis-

[2] U.N. Doc. No. A/CONF.6/L.17, at 20–21 (1955).

[3] UTAH COMM. TO THE MIDCENTURY WHITE HOUSE CONFERENCE ON CHILDREN AND YOUTH, REPORT at 7, 8 (1951), is forceful and persuasive on the detention of young offenders in jails such as the county jail in Salt Lake City: "Too many of our children in the toils of the law are yet being detained in common jails. The present unworkable statute makes detention the responsibility of cities and counties. The wide range of standards of detention makes a more acceptable standard imperative. We have a most enlightened and progressive juvenile court system, but our detention homes reflect the need of thought and action including legislation to correct some very undesirable practices." The UTAH STATE DEP'T OF PUB. WELFARE, BUREAU OF SERVICES FOR CHILDREN, BIENNIAL REPORT 9 (1956), wisely recommends: ". . . the enactment of legislation making it clearly the responsibility of counties to provide detention care according to minimum standards as determined by the Public Welfare Commission . . . such legislation should permit counties to join together in establishing detention districts."

used barn-like room, which would be quite suitable for use as a workshop for one or two of the more common prison industries. It is not, I assume, my task to speculate about the reasons for the failure to provide industrial activity, particularly for those prisoners who are serving sentences, as distinct from the untried prisoners. But I can, with confidence, affirm the proposition that there is no problem of space or technique to prevent the early introduction of industrial activity in this institution. I assume, further, that there is no need to defend the wisdom of such a course, not only on humanitarian grounds but in order the better to protect the community. Finally, some industrial activity would be inexpensive to introduce and would diminish the cost of running the jail.

The Draper Prison

The state prison at Draper is a modern, well-designed institution. Here too, however, the main deficiency is a failure to develop adequate industrial activities, and this despite the fact that at the prison there is a cannery, a carpenter's shop, a laundry, a license plate factory, a mattress factory, a printing shop, a shoe repair department, a tailor's shop, and a sign shop, as well as a farm outside the walls. In these activities it should be possible to employ more of the prisoners for longer periods than are at present employed. The biennial reports of the Utah State Prison for the periods 1952-1954 and 1954-1956 give information on the extent of production from the various prison industries, and the lists are impressive; but no information appears on the number of prisoners employed in the industries nor on the hours they work per week. Such information as I have is impressionistic and hearsay, and therefore unreliable; but I would estimate that the average working week for prisoners was less than twenty-three hours and that this applied only to a third of the prisoners. The remaining two-thirds are employed, if at all, for shorter working weeks in the maintenance of the prison and in activities of a domestic character. Idleness is, of course, one of the chronic problems of prison life. An ideal industrial program would require of inmates the diligent performance of something like forty hours' work a week, at trades which would demand some skill and understanding from them. This ideal is not at all easy to achieve. Certain California institutions and several of the Federal institutions seem to approach such a working week; but it demands a larger staff, a more lavish plant, and less opposition from groups on the outside, than are at present offering to the prison authorities at Draper. Nevertheless the time of the inmates could fairly easily be much more fully occupied than it is at present.[4]

The state prison is gradually developing its professional services. Not very long ago, it went through a difficult period when narcotics were being used by some of the inmates. This has been solved, I believe, by the appointment of a full-time physician. There has, too, recently been added a psychiatric and mental health services clinic under the excellent direction of Dr. Frank Rafferty, which will help to fill an obvious gap in the treatment facilities at

[4] It may not be inappropriate to quote one of the forty-three "suggestions" submitted on February 7, 1957, to the Governor by the rioting prisoners at the Draper prison. "Suggestion" 14 reads: "Provide work for all idle." Salt Lake Tribune, Feb. 8, 1957, p. A6, col. 4.

the prison. The prison officer training program is also in its early and rudimentary stages of development. As these new services grow and blend with the functions of the Division of Classification and Treatment, there should be real progress at the state prison. But all these developments will be of little effect if there are not sufficient industrial activities available to keep the prisoners occupied.

Early in 1955, after much public discussion, a new method of dealing with insane criminals in the State of Utah was devised. Previously, when a prisoner had been found to be certifiable while in prison, he had been transferred to the state hospital at Provo. Several of these insane criminals had escaped from the Provo hospital, and there had been much public unease about the suitability of that hospital for detention purposes. It seemed improper to hold the insane in a prison. It seemed unwise to hold a criminal in conditions incapable of providing sufficient custody and from which, in practice, many escaped. This whole problem was exacerbated by the freedom with which drugs were circulating in the prison. In the upshot the Board of Corrections and the Public Welfare Commission arrived at an agreement which was reduced to writing on January 7, 1955, and submitted as a memorandum to the Legislative Council and members of the legislature. It recommended an appropriation of $45,000 "to provide for a psychiatric team that will devote their services to assisting psychotic and other mentally disturbed persons incarcerated at the state prison." Upon the establishment of this psychiatric and mental health clinic in the prison, all mentally ill prisoners who had been sent from the prison to the Utah state hospital would be returned to the prison. It was planned that only under extreme circumstances, in which treatment could not possibly be provided by the psychiatric clinic at the state prison, should a prisoner be transferred to the state hospital at Provo. This plan was put into effect following the action of the 1955 Legislature in making the requested appropriation and continues to be the method of handling psychotic prisoners. This too offends one of the minimum standards agreed to at the United Nations Congress where it was resolved that "persons who are found to be insane shall not be detained in prison and arrangements should be made to remove them to a mental institution as soon as possible." [5] It might further be suggested that the imprisonment of one who is by agreed medical standards certifiably insane at a prison, is contrary to section 77-48-1 of the Utah Code, which provides that "no person while insane shall be tried, adjudged to punishment or punished for his public offense." It would seem that the distinctive character of "punishment" is the incarceration of the offender in prison, whether or not he comes under the control of the psychiatric and mental health services in that prison, and therefore the agreement of January 7, 1955, is contrary to the statutory requirement.

But these are legalistic difficulties and, though they merit the urgent attention of the legislative authorities in Utah, they are of less significance to the individual offender than the wise policy of developing psychiatric services within the prison. In practice it should be possible for the mental health

[5] U.N. Doc. No. A/CONF.6/L.17, at 20 (1955).

clinic at the prison at Draper to provide at least as good psychiatric treatment for the individual prisoner as he would receive were he to be held at the state hospital at Provo. It is to be hoped, however, that there will be a gradual development by which the psychiatric clinic will take over its own quarters, its own routine, and generally its own administration apart from that of the prison at large. What is really needed here, or what is likely to be developed over the years, is an institution somewhere between a prison and a mental hospital which can provide for this specific problem of the insane criminal as well as for a large but ill-defined group of prisoners who, though not being certifiably insane, are in need of specialized psychiatric assistance. In its biennial report for the period 1954-1956 the Board of Pardons made a specific recommendation for the consideration of the Legislative Council, that a complete study should be undertaken of this problem of the incarceration of the criminally insane in Utah. Wise planning as well as an adherence to strict legality in the disposition of offenders require such a study to be made.

The Board of Pardons

During the biennium on which it was reporting, the Board of Pardons heard and dealt with 721 cases: 49 of these concerned parole violations; the remainder concerned termination of sentences or hearings concerning the granting of parole. Until 1951 the granting of parole in Utah was under the control of a Board of Pardons made up of judicial and political representatives nominated by the Governor. Since that year it has been under the control of a State Board of Pardons composed of men standing outside the normal administrative processes of the state. The Board's immunity from political interference has been regarded as a considerable step forward in the organization of parole, and there is no doubt that this is an advantage. However, there would seem to be more positive qualities required of the three members of such a Board of Pardons than merely immunity from this evil. Certainly, a comprehension of the problems of penal administration and of the rehabilitation of convicted offenders is essential to enable them adequately to fulfill the onerous function of membership on this Board. Further, it is helpful both to the administration of a prison and the potentialities of reform in the prisoner that he should come away from a hearing before the Board with the sense that his case has received their responsible and thoughtful consideration. From my limited observations this has not always been the case.[6]

The work of the Board over the years has revealed a change in the balance of its preference between mere termination of a sentence and the use of parole supervision. The Board has power to discharge a prisoner either under supervision and on conditions or to discharge him absolutely: the former I refer to as "parole," the latter as "termination." Here are the figures

[6] Again, two of the rioting prisoners' "suggestions" might be mentioned:
" 5. A parole board that will be fair and consistent.
22. A new parole board. This board to be made up of trained qualified men headed by the governor."
Salt Lake Tribune, Feb. 8, 1957, p. A6, col. 4.

of the Board's choice between these two methods of release over the period 1951-1956:[7]

Year	*Termination*	*Parole*
1951-52	28	128
1952-53	19	129
1953-54	62	112
1954-55	82	92
1955-56	74	84

This represents a movement from granting parole to 82 per cent or more to less than 60 per cent of prisoners, and a consequent increase in the proportion of sentences terminated. The reports of the Board in no way make clear the criteria which the Board applies to distinguish cases suitable for parole from those which are merely terminated. There is no significant difference in the type of offense in relation to these two methods of release. It may be that the Board is decreasing the number of prisoners put on parole in order not to overburden an already heavily laden parole service; but if this were so one would anticipate in the reports of the Board an expression of the need for more parole facilities in the state, and this is absent. The weight of penological opinion strongly supports the value, to the discharged prisoner and to the community in which he is discharged, of a period of parole supervision. As a general proposition, only the most self-reliant, securely employed and safely housed ex-prisoner will have nothing to gain from informed and helpful parole supervision. Likewise, the community will be better protected if such supervision is imposed on all but the most clearly likely-to-conform ex-prisoners. On these assumptions the movement away from parole in Utah must be seen as a retrograde step.

By offering these criticisms of the Board of Pardons, one is not seeking a sentimental coddling of prisoners or the early granting of parole. All that is sought is that the work of the Board of Pardons should not be undertaken by men without training or experience in social or correctional work. Experience and skill as a politician or as a banker are not sufficient; nor does the lawyer's training or usual professional practice form a suitable background. More is needed either by way of training or experience, and preferably both. The politician, the banker, the lawyer may be excellent appointees to the Board provided, but only provided, that in their lives they have by other activities or other training fitted themselves for this difficult work. Minimally required as immediate steps forward are a statement by the Board of the criteria which lead it to prefer termination of parole for an increasing proportion of cases, a statement by the Board of the principles it applies and the facts it takes into account in determining the date for discharge and, quite certainly, the manifestation by the Board at its hearings of a more humane understanding of the gravity and significance of these hearings for the individual prisoner.[8]

[7] UTAH STATE BD. OF CORRECTIONS, ADULT PROBATION AND PAROLE DEP'T, BIENNIAL REPORT 22 (1956).

[8] On this whole problem of parole, the work of the American Law Institute in its *Model Penal Code* merits close attention. See ALI MODEL PENAL CODE 18–135 (Tent. Draft No. 5, 1956).

Pre-Parole Camp

An excellent plan is being developed in Utah for the establishment of a pre-parole camp where, under conditions of relative freedom, intensive training may be given to men shortly before they are released on parole. This provision of a bridge between the unreal environment of prison and the more challenging environment of the outside community is farsighted and deserves commendation.

Parole Case-loads

The organization of the adult probation and parole services in Utah is full of wisdom. But organization and planning are not enough. Sufficient members of staff to do the work are required, and these are lacking. When I was in Utah, the average case-load in Ogden of parole and probation cases per officer was 60, and this took no account of the extensive pre-sentence work which the officer was required to do for the courts. Elsewhere in Utah, the probation and parole officers were laboring under impossible case-loads exceeding 90 — again not including their quite extensive pre-sentence work for the courts. One such officer in Salt Lake City, a man of undoubted competence, was purporting to carrying a case-load well in excess of 100. It requires no reflection to appreciate that, under burdens such as these, effective counseling and effective community protection cannot be achieved.[9] With such a case-load the probation and parole officer can do little more than keep a record of names and devote his supervisory and supporting services to a few on his list who, for one reason or another, seem to require his particular attention.

Case-loads of 40 would be a considerable burden for a busy and efficient officer. There is no responsible opinion which would advocate more than this number. Even the immediate doubling of the number of caseworkers employed by the Adult Probation and Parole Department would not achieve this; but it would go a long way towards it. Certainly, if this important work is to be well done, there is no way of avoiding a substantial increase in the staff of this Department.[10]

So much for jeremiads concerning the treatment of adult offenders in the State of Utah. Let me repeat that many individuals working in this field are doing excellent work. In many ways the organization of these services in the state is excellent; yet they urgently require expansion and support if they are to fulfill their important role in the community. Utah's prison population of 79.1 per 100,000 people is well below the national average and is

[9] The same problem, though in a less acute form, is to be seen in the probation services provided at the juvenile court level. UTAH STATE DEP'T OF PUB. WELFARE, BUREAU OF SERVICES FOR CHILDREN, BIENNIAL REPORT 10 (1956): "Some of our Courts, however, have been handicapped because an adequate number of persons, qualified by education and experience, have not been available to maintain the probation staff at the required strength. Well qualified persons cannot always be obtained. Vacancies caused by officers leaving to take more lucrative positions have been difficult to fill at present salaries. The resulting lack of personnel has imposed a very heavy work load on the Courts in some districts. We feel that it would be false economy to lower standards. . . . In 1955, we expended in staff and facilities approximately $16.22 per case, which is only a very small fraction of the cost of institutional care."

[10] UTAH STATE BD. OF CORRECTIONS, ADULT PROBATION AND PAROLE DEP'T, BIENNIAL REPORT 10 (1956): "Whenever caseloads exceed 50 or 60 society loses both financially and socially. Successful probation and parole requires adequate investigation and close supervision."

lower than any other western state except Nevada.[11] It is within the state's resources to meet the needs of modern and efficient correctional services for adult offenders.

JUVENILE OFFENDERS

In 1944 Utah became the first state to institute a state-wide juvenile court system. Rhode Island and Connecticut have since followed Utah's example and there is widespread theoretical support for this development. It gives opportunity for the Public Welfare Commission to make the most effective use of the state's resources to treat this challenging problem. In many ways, particularly at the court, counseling and probation levels, excellent work is done. Nevertheless, it again seems more appropriate to seek to underline any deficiencies in these services than to praise the excellencies of the system.

State Industrial School

Utah provides only two institutions for delinquent and neglected children — the State Industrial School at Ogden and the American Fork Training School, the latter for mentally defective and borderline defective children. The point of my criticism is already made. One omnibus institution for boys and girls, holding a daily average of over 180 children, is grossly inadequate to deal with the varied age ranges and the various personality deficiencies of the children who, being delinquent or neglected, yet not defective, require placement in an institution. There is little in common between a young delinquent or neglected child, his conduct or situation perhaps the product of family failure and social disruption, and an older, aggressive, experienced young thug; yet both are placed in the State Industrial School at Ogden. There is a wide diversity of personality type and social background among delinquent offenders and neglected children, embracing every variety of sin, suffering, neglect, cruelty and aggression. For such a heterogeneous group of boys, the state requires at the very least two institutions; one for the less hardened more socially deprived group, the other for the more profound personality disorders and for children whose behavior is the product of intractable and deep-seated patterns of delinquency. It would be better if such institutions were far apart from one another, but it would be possible to make a rough division of personality types of children within the one large institution at Ogden, provided that within that institution a division of treatment programs and conditions of custody between the two sub-institutions was clearly drawn. Particularly for the younger, more malleable group a series of small cottage units is desperately needed. With such cottages an institution can provide something like the normal home life that this type of child requires for his full development. It is understood that there is a plan before the Governor for the development of a series of cottages at Ogden.[12] It is earnestly hoped that the state will find the funds to fulfill this urgent need. The perpetuation of one large, amorphous institution for this macrocosm of delinquent children would be poor economy and would be lacking in humanity.

[11] UTAH FOUNDATION, RESEARCH REPORT ON PROBATION AND PAROLE ADMINISTRATION IN UTAH, No. 113 (1954).

[12] UTAH STATE INDUSTRIAL SCHOOL, BIENNIAL REPORT 7–8 (1956).

The reception and detention facilities at the school are grossly inadequate; the provision for psychiatric treatment is insufficient; there is no adequate in-service staff training program; and, finally, the period that children spend in the institution seems too short for adequate training. On the average, boys spend eight months in the school and girls a little over nine months.

Those who run this institution are well aware of the defects I have suggested and would, I believe, agree with most of what I have written. There is nothing original in my suggestions: only the funds and political support necessary to do what is by any standards essential work are lacking. It is predicted [13] that by 1960, owing to a sharp increase in the birth rate and to the anticipated migration of families into Utah, the institution must be prepared to handle 400 to 500 admissions a year, that is, a daily average population of from 275 to 300. Its present daily average is about 180. The need to extend and diversify this type of institutional service is therefore pressing, particularly if children are to be held (as some should) for longer periods of training than they are at present.

On the next point those administering the State Industrial School at Ogden may disagree with me; but it may nevertheless merit attention. The institution is not coeducational in any real sense of the term, yet the section for girls is placed in close physical proximity to the sections for boys, and there is constant movement of the boys past the windows and doors of the girls' section. There are also the occasional dances and meetings on the lawn arranged by the administration of the institution. The organized encounters seem to me to be not undesirable, but there would appear to be little advantage in the chance proximity of the two sections of the institution. To my mind this does not create, as has been suggested, the natural heterosexual environment of the outside community.[14] The contacts are distant and strained; a constant accent on sexuality is present. If funds were available, it would be much wiser to remove the girls' section of the institution to a distant locality; the present girls' section could then be used to help to break up the heterogeneous groups of boys in the school into smaller more homogeneous groups.

Probation Hostels

Many children in the State Industrial School at Ogden need not have been sent there if probation hostels were available. In such hostels, children could be allowed to continue at school or work and yet be temporarily removed from their homes. The idea of the probation hostel is relatively new in the United States, though tested and established in the United Kingdom and the Scandinavian countries. It undoubtedly provides better and cheaper treatment for certain types of delinquent children. Some small suburban houses capable of holding twelve to twenty children might be obtained, placed under the supervision of a housemother and possibly a housefather, assisted by such staff as is necessary. The aims of a hostel are to supervise the leisure and recreational activities of the children, while the children go

[13] *Id.* at 6.

[14] For example, I am informed that at the dances, when not actually dancing, a boy and girl are not allowed to stand facing one another when talking. They must stand side by side!

out to work or school as they would if they were living at home. It is a halfway house between the probation treatment of children living at home and placement in a traditional institution. Careful selection by the juvenile courts of children suitable for this type of treatment would lessen the intolerable burden on the Ogden institution. It would be both effective therapy and wise economy to develop probation hostels.

Foster Homes

I cannot ascertain, from the reports of the Bureau of Services for Children, the number of children who have been placed in foster homes in the State of Utah. One can deduce from them, however, that considerable use is made of this technique of removing the child from his own home and placing him in the care of foster parents until his home can be rehabilitated, or until some other arrangement can be made for the child. There is much to commend this arrangement, provided it is not used as a cheap means of avoiding the real problem the child poses for the community. Only exceptionally should the child be placed in a foster home as a means of giving relief to his natural home while it is being reorganized for the re-establishment of the family unit, with the intention of returning the child to his home. Normally the foster home placement is more appropriate when the natural family of the child has broken down completely and the child has to be removed from that family, or his family have disappeared from around him and there is no hope, owing possibly to the age of the child, for a placement with a view to adoption. In these circumstances the foster home placement becomes a relatively permanent placement where the child can grow up and away from a family setting — though perhaps earlier than if he were growing up and away from his own home. For a merely temporary placement of a few weeks, holding a child in a reception center or in something like a probation hostel would be a very much wiser plan than using foster home placements. Too free a use of foster homes — particularly the shuttling of a child from one foster home to another — can cause disturbance and unease in the child, and consequently greater risks from him to the community. Probation hostels would seem to be suitable both to lessen the pressures on the limited institutional facilities in the state and to provide greater flexibility of treatment and less disturbance for the child than is involved in either placement in the State Industrial School at Ogden or in a sequence of foster homes.

As the Report of the Utah Committee to the Midcentury White House Conference on Children and Youth suggested,[15] there are indications of an unusual "stability and morality in family and community life" in Utah, in particular a "higher than average literacy, greater home ownership, second highest birth rate, and low infant mortality." In the light of these qualities, it would be deeply regrettable if an unseemly parsimony, a lack of support of those who do this difficult social work, should delay the development of sufficient and adequate facilities for the treatment of juvenile delinquency in Utah.

[15] UTAH COMM. TO THE MIDCENTURY WHITE HOUSE CONFERENCE ON CHILDREN AND YOUTH, REPORT at 5 (1951).

COMMENT

SOME LIGHT IN THE TWILIGHT ZONE

A *Note on* Guss v. Utah Labor Relations Board

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On March 25, 1957, the Supreme Court of the United States reversed the Utah Supreme Court in *Guss v. Utah Labor Relations Board.*[1] In so doing the Supreme Court resolved a long undecided and much mooted issue with regard to the power of states to govern labor disputes within an area subject to the jurisdiction of the National Labor Relations Act [2] but in which the National Labor Relations Board declines to act.

Guss was engaged in manufacturing photographic equipment for the Air Force. In fulfilling his government contract he purchased materials from outside Utah in an amount somewhat less than $50,000. The United Steelworkers succeeded in organizing his employees and obtained a certification as the bargaining representative from the National Board following a consent election wherein it was recited that Guss was engaged in commerce within the meaning of the federal act. Subsequently the union filed unfair labor practice charges against Guss with the National Board. In the interim, however, the Board promulgated its revised jurisdictional standards substantially increasing the quantity of interstate business required before the Board would assume jurisdiction. On the basis of these new standards, the Board declined to issue a complaint. Thereupon, the union filed substantially the same charges with the Utah Labor Relations Board. It overruled an objection that it was without jurisdiction, found that Guss had committed unfair labor practices as defined in the Utah Act,[3] and issued a remedial order. The Utah Supreme Court agreed with the position of the State Board and affirmed.[4] The United States Supreme Court disagreed. In reversing, the Court held (6-2) that the provisions of section 10(a) of the federal act in authorizing the National Board to cede jurisdiction to a state agency where state law is consistent with the federal law afforded the "exclusive means whereby states may be enabled to act concerning the matters which Congress has entrusted to the National Labor Relations Board." [5] Hence the refusal of the National Board to assert the jurisdiction it has, for whatever reason, budgetary or policy, does not authorize the state to furnish a remedy parallel to that which the National Board would furnish had it assumed jurisdiction. In two other cases consoli-

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[1] 77 Sup. Ct. 598 (1957).

[2] 49 STAT. 449 (1935), 29 U.S.C. §§ 151–156 (1946), as amended, 61 STAT. 136 (1947), 29 U.S.C. §§ 151–197 (1952).

[3] UTAH CODE ANN. §§ 34-1-1 to 15 (1953).

[4] Guss v. Utah Labor Relations Board, 5 Utah 2d 68, 296 P.2d 733 (1956).

[5] 77 Sup. Ct. at 602.

dated for argument with the *Guss* case and decided the same day,[6] the *Guss* principle was applied to vacate injunctions issued by state courts enjoining practices made unlawful by the federal act. Section 10(a), therefore, likewise operates to preclude state judicial action even though it furnishes no means of ceding jurisdiction to state courts.

The *Guss* case is the latest in a long line of decisions reaching back to 1942[7] dealing with the delicate problem of adjustment of jurisdiction over labor matters as between the National Labor Relations Board, state labor agencies and state courts. The magnitude of this problem, which, since the subsidence of the free-speech picketing issue, has become the most significant constitutional issue in the area of labor law, is a direct consequence of two legal developments, one legislative and one constitutional. The former was the decision of Congress in 1935 to enact a comprehensive scheme of labor relations legislation, the National Labor Relations Act, and to apply it to the furthest limits of its jurisdiction over commerce — to all matters "affecting commerce."[8] The latter was the series of holdings of the United States Supreme Court in the 1930's substantially enlarging the scope of Congressional power to regulate commerce.[9]

The constitutional framework within which decisions are made allocating power between the federal government and the states can be simply stated, although not as easily applied. The fact that the Constitution authorizes Congress to regulate commerce does not of itself preclude state action. Where Congress has not legislated (has not "occupied the field") states are free to act provided only that state action does not impose an undue burden on or discriminate against interstate commerce, or undermine a need for uniformity therein.[10] Where, on the other hand, Congress has legislated, the effect of the Supremacy Clause (Article VI of the Constitution), is to preclude state action, but only if Congress intends its regulation to be exclusive. Sometimes Congress expressly authorizes state action.[11] Sometimes it expressly negates concurrent state power.[12] In the great majority of cases, however, Congress is silent, and the Supreme Court is left to piece out the appropriate intention as best it can, even when none exists. With certain exceptions[13] this has been the situation in the cases determining whether state action in the area of labor relations is preempted by the National Labor Relations Act. The proliferation of cases in this area, and the subsistence of mooted and unresolved questions withal, underlines the *ad hoc* character of the determinations which have to be made — general constitutional principles are subordinate to case

[6] Amalgamated Meat Cutters v. Fairlawn Meats, Inc., 77 Sup. Ct. 604 (1957); San Diego Building Trades Council v. Garmon, 77 Sup. Ct. 607 (1957).

[7] Allen-Bradley Local 1111 v. WERB, 315 U.S. 740 (1942).

[8] Sections 2(6) and (7). See NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

[9] See Stern, *The Commerce Clause and the National Economy, 1933–1946*, 59 HARV. L. REV. 645, 883 (1946).

[10] See, *e.g.*, Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945); Morgan v. Virginia, 328 U.S. 373 (1946); H. P. Hood & Sons v. DuMond, 336 U.S. 525 (1949); Dean Milk Company v. City of Madison, 340 U.S. 349 (1951).

[11] See, *e.g.*, 59 STAT. 34 (1945), 15 U.S.C. § 1012(a) and (b) (1952), authorizing state regulation of insurance in defined circumstances.

[12] See, *e.g.*, Section 14(a) of the National Labor Relations Act, discussed *infra* at p. 339.

[13] See discussion *infra* at p. 338.

by case determinations of the appropriate intention in varying circumstances. And in ascertaining intention general principles have likewise not been forthcoming, except perhaps that an intention to exclude state action will be presumed where the state law or remedy is in actual or potential conflict with the federal law — a formulation which restates rather than answers the question.

One category of cases in which the Supreme Court has invalidated the assertion of state authority is that in which the state law was found to invade or qualify a right expressly protected by the federal act. Thus a state law which imposed conditions upon the right to act as union business agents was found to qualify the right of free choice of collective bargaining representatives guaranteed by section 7 of the federal act.[14] And state laws which qualified [15] or prohibited [16] the right to strike in circumstances where section 7 guaranteed that right likewise have fallen. Another such category comprises those cases where the state law dealt with labor practices in a not altogether similar manner as the federal act. Thus the action of a state labor board in permitting unionization of foremen was found in conflict with the then policy of the National Board disapproving organization units of foremen.[17] Likewise, a state board determination of the appropriate collective bargaining unit was invalidated where under the federal law the National Board might have made a different determination.[18] Finally, state laws have fallen which have subjected to regulation and afforded a remedy for labor practices which the federal act regulated and remedied similarly. In this category is the state injunction of a labor practice clearly made unlawful and subject to injunctive relief under the federal act,[19] as well as state prohibition of practices which might be similarly treated by the federal act.[20]

On the other hand, at least two categories of cases are identifiable in which state control of labor practices "affecting commerce" have been upheld. One includes cases in which the labor practice regulated by state law is outside the scope of the terms of the federal act, which neither prohibits the practice nor protects it. This has been held to be true of mass picketing, threats of bodily injury and property damage to employees, obstruction of streets and public roads, the blocking of entrance to and egress from a factory, and the picketing of employees' homes;[21] harassing intermittent and unan-

[14] Hill v. Florida, 325 U.S. 538 (1945).

[15] International Union, UAW v. O'Brien, 339 U.S. 454 (1950).

[16] Amalgamated Association v. WERB, 340 U.S. 383 (1951).

[17] Bethlehem Steel Co. v. New York SLRB, 330 U.S. 767 (1947).

[18] La Crosse Telephone Corp. v. WERB, 336 U.S. 18 (1949). See also Utah v. Montgomery Ward, 233 P.2d 685 (1951) where a state check-off law was found superceded by Section 302 of the Labor Management Relations Act.

[19] Garner v. Teamsters, Chauffeurs and Helpers, etc., 346 U.S. 485 (1953).

[20] Weber v. Anheuser-Busch, 348 U.S. 468 (1955).

[21] Allen-Bradley Local 1111 v. WERB, 315 U.S. 740 (1942). This case was decided under the National Labor Relations Act of 1935. Section 8(b)(4)(1) of the amended act, however, makes those activities union unfair labor practices. If the rationale of *Allen-Bradley* is that those practices were then ungoverned by the federal act, a contrary result would be reached under the amended federal act. Justice Frankfurter so puts it: "The Court held that such conduct was not subject to regulation by the federal Board, either by prohibition or by protection." Weber v. Anheuser-Busch, 348 U.S. 468, 477 (1955). Justice Jackson, however, has found another rationalization as fully applicable to the amended as to the unamended act:

nounced work stoppages;[22] and (under the Wagner Act) maintenance of membership clauses in collective bargaining agreements.[23] The other kind of case in which state power has been upheld is where state law subjects a labor practice to the same substantive regulation as the federal act, but affords a wholly different remedy. Thus it has been held that a state may validly award damages in tort for a labor practice made unlawful but subject only to prohibition by the federal act.[24]

In the above cases the Court was obliged to adjust federal and state power over labor matters by piecing out an unexpressed intent from a federal act. In portions of the act, however, Congress has expressly directed itself to the problem of state power, although with varying degrees of clarity. One such instance concerns union security agreements. Section 8(a)(3) exempts defined union shop clauses from the general prohibition against discrimination on the basis of membership or non-membership in a labor union. Section 14(b), however, expressly validates the application of any state or territorial law which prohibits union security provisions not prohibited by 8(a)(3). The significance of this provision is apparent from the upholding of state right-to-work legislation[25] as contrasted with its invalidation when applied to railway labor governed by the Railway Labor Act, which contains no such provision.[26] Another instance of explicit Congressional attention to state power is contained in section 14(a). In section 2(3) Congress excluded supervisors from the definition of the term "employee" and hence from the protection of the act. In section 14(a) it expressly vetoed the application of state law by providing that no employer be compelled to deem individuals defined as supervisors by the federal law as employees "for the purposes of any law, either national or local, relating to collective bargaining." The remaining provision of the federal act which addresses itself to the problem of concurrent state power, although with considerably greater ambiguity, is section 10(a), the provision finally given definition in the *Guss* case.

The gist of section 10(a), as interpreted, is that only the labor policy expressed in the federal act may be applied to labor relations which "affect commerce." Much of that application is to be achieved, of course, by the first-hand operation of the National Board. In given circumstances, however, it might be achieved through the machinery of a state agency administering a substantially parallel state labor policy — when the National Board is satis-

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"Nor is this a case of mass picketing, threatening of employees, obstructing streets and highways, or picketing homes. We have held that the state still may exercise 'its historic powers over such traditionally local matters as public safety and order and the use of streets and highways.' [Allen-Bradley] Nothing suggests that the activity enjoined threatened a probable breach of the state's peace or would call for extraordinary police measures by state or city authority." Garner v. Teamsters, Chauffeurs and Helpers, etc., 346 U.S. 485, 488 (1953).

[22] International Union, UAW v. WERB, 336 U.S. 245 (1949).

[23] Algoma Plywood & Veneer Co. v. WERB, 336 U.S. 301 (1949). The same result would follow under the amended act by virtue of the express authorization contained in Section 14(b).

[24] United Construction Workers v. Laburnum Construction Corp., 347 U.S. 656 (1954).

[25] Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949).

[26] Railway Employees' Department, A.F.L. v. Hanson, 351 U.S. 225, 232 (1956): "A union agreement made pursuant to the Railway Labor Act has . . . the imprimatur of the federal law upon it and by force of the Supremacy Clause of Article VI of the Constitution would not be made illegal nor vitiated by any provision of the laws of a state."

fied that state policy sufficiently resembles its own, it may cede to the state agency some of the Board's jurisdiction. Absent such a cession agreement, it is no justification for state action, judicial or administrative, that it does in fact coincide with results which would be reached if the National Board had elected to act. So interpreted, the object of section 10(a) would appear to be to induce the creation of state policy along federally approved lines, and thereby accomplish a measure of return to state control of labor relations thought to be peculiarly local in character. The fact is that no cession agreements have been negotiated, and there has been no discernible state trend toward conformity with federal policy. The result of *Guss*, therefore, is a paradox; the intent to return to the states matters thought appropriate for their control has been frustrated, and matters thought appropriate for control by either government are now in fact governed by neither.

The decision in *Guss* and its companion cases presents difficult choices to all of the law-making bodies concerned with labor relations — state legislatures, state courts and labor agencies, the National Board and the Congress.

The implied plea of section 10(a), both on its face and as interpreted in *Guss*, is that the states bring their labor policies into line with the federal labor law. Even if state legislatures were inclined to do so, the earliest possible time at which it could be accomplished is several years hence. But quite clearly there is no such general inclination. The industrial and highly unionized states of the North and East which have achieved through "little Wagner acts" [27] and "little Norris-LaGuardia acts" [28] a general state policy favorable to union organization will be hesitant to move toward the more restrictive provisions of the Taft-Hartley Act. So also the developing industrial states of the South and West will be reluctant to surrender their greatest lure to industry seeking new location — a docile and unorganized labor market — by bringing their restrictive organizational legislation into conformity with the more protective provisions of the federal act.[29] In view of the broadened sweep of the preemption doctrine announced in *Guss*, which displaces all state law "affecting commerce," federal policy will now receive a more respectful hearing in state legislative halls. But progress in this quarter must be expected to be slow and halting.

State court judges will view the *Guss* doctrine with a helplessness greater in degree, but not different in kind, from that which has confronted them since enactment of the original federal act. Were it clear that this case wholly precluded state action, they would have at least the solace that since they could do nothing at all, they could do nothing wrong. But a wholly new line-drawing process must be faced. In one area of what has been deemed before now to be permissible state action there is clear change. If the particular industry in question is one over which the Board has at some time or other exercised jurisdiction, state action is now prohibited. This is the central

[27] See, *e.g.*, MASS. ANN. LAWS c. 150A, §§ 1–12, as amended (Supp. 1956); N.Y. LAB. REL. ACT §§ 700–716; UTAH CODE ANN. § 34–1–1 through 34 (1953) as amended; Smith and DeLancey, *The State Legislatures and Unionism*, 38 MICH. L. REV. 987 (1940).

[28] See, *e.g.*, UTAH CODE ANN. § 34–1–25 (1953).

[29] *Compare* 15 VERNON'S TEX. CIV. STAT. § 5154(f)(3) (Supp. 1956) *with* section 9 of the Labor Management Relations Act, 29 U.S.C. § 159 (1952).

and crucial holding of both *Guss* and *Fairlawn Meats*. Yet clearly there is a remaining area of state jurisdiction — commercial activity which does not "affect commerce" and therefore is not preempted by the federal act.[30] Theoretically, this area is also beyond the reach of Congressional exercise of the commerce power. But it remains almost wholly undefined. After some preliminary skirmishing on its borders when the Wagner Act was first adopted, the ground of controversy shifted elsewhere. It now must go back, and it will assume quite different proportions. During the thirties, the question was "Is this *kind* of activity (mining, manufacturing, etc.) commerce?" [31] Now it must be "Is this *quantum* of activity commerce?"

When the question before the state court was "Will the National Board act in this particular dispute?" the conclusion of the Board was final; the state judge might feel strongly that it should not, but under the prevailing view a Board decision (in the form of a complaint issued by the Regional Counsel) put the issue at rest.[32] Occasionally a court was faced with a more doubtful question when it had to conclude from prior Board decisions whether action was likely, but this problem was simplified by the announcement of "yardsticks" expressing in dollar standards when the Board would assume jurisdiction.[33] The question henceforth seems to involve no such deference to agency judgment. The state judge is at least as qualified as Board officials to determine what "affects commerce" and is thus beyond state reach, and what does not and is thus within state control. He can ignore Board determinations, and he can decline to follow any precedent the Board may establish. He may be less cavalier in his treatment of federal judicial determinations of those same questions, but he ordinarily will be no more obligated by a federal Court of Appeals determination than that Court of Appeals is by his. Final correction of his mistaken judgment must come from the Supreme Court itself, and because of the essentially factual character of such determinations the precedent value of the decisions will be relatively slight. It is an axiom of labor law that temporary injunctions seldom need to be made permanent because their object is accomplished before the time arises, and the full futility of the long process of certiorari is apt here to be realized.

One of the almost certain results of the *Guss* decision is a new spurt of activity in a field that seemingly had been laid to rest. This is the device of short-cutting the ordinary appellate process by going directly to a lower federal court seeking an injunction against exercise of the state judicial power. In *Amalgamated Clothing Workers v. Richman Brothers*[34] the Supreme Court held flatly that a federal district court had no jurisdiction to issue an injunction against state court intervention in a labor dispute within the preempted

[30] In addition to this, of course, state court activity is still permissible without regard to whether or not the National Board has jurisdiction when (1) the remedy given is not one which conflicts with or attempts to supplement a federal remedy for federally prohibited activity, and (2) when the activity in question is neither protected nor prohibited by the federal act. See text at pp. 337–38 *supra*.

[31] See, *e.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

[32] In the *Guss* case itself the Regional Director had declined to issue a complaint because the volume transacted fell below the current jurisdictional minimums.

[33] See text at pp. 343–44 *infra*.

[34] 348 U.S. 511 (1955).

area when the request for such an injunction issued from a private party; the Judicial Code prohibits the enjoining of state court proceedings ". . . except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." [35] Perhaps a slightly different case is presented when the request for injunction in the federal court emanates from Labor Board officials, since in *Capitol Service v. NLRB* [36] such an injunction did issue to vacate a California state court injunction. Two grounds, one legal and one practical, indicate that little aid to either union or employer can be found in this procedure. The legal point is that in *Capitol Service* the injunctive power of the federal district court had been invoked by the Regional Director under section 10(l)[37] of the national act, so that it could truly be said that the injunction was "in aid of its jurisdiction"; no exception exists for federal injunctions to protect the jurisdiction of the National Board itself. The practical ground is even more compelling. *Capitol Service* involved an attempt by the Regional Counsel of the Board to protect a jurisdiction which he wished to exercise and in fact was exercising; it is highly improbable that he will be as alert to avoid state encroachment upon a dispute which is preempted by *Guss* but which nevertheless is one the National Board is unwilling to take.

Still another problem faces state courts in those areas where the National Board has consistently declined to exercise jurisdiction. Not all such refusals have been based upon the "budgetary and personnel" grounds assigned for the yardsticks. From its inception, the Board has declined to accept cases involving admittedly high dollar volumes on the ground that the activity or industry was "local" in character despite its effect upon interstate commerce. Notable are the hotel[38] and local transportation[39] industries. The principal reason asigned — "local character" — might be thought to involve a Board determination that the industry is not within the commerce power, and a state court might be excused if it accepted this view.[40] Yet courts may well conclude otherwise, with the effect that industries never before involved in the machinery of the national act would be withdrawn from the only form of regulation they have ever known.[41]

Prior to *Guss*, state supreme courts had evolved in a groping way a reasonably satisfactory and workable test of their jurisdiction — if the federal government had not occupied the field, the states could. This test has largely been

[35] 28 U.S.C. § 2283 (1952).

[36] 347 U.S. 521 (1954).

[37] 61 STAT. 146, 29 U.S.C. § 160(e) (1952). This section provides that the Board officials shall seek district court injunctions against some narrowly defined union unfair labor practices. And it is only at Board instance that such injunctions may issue. Amalgamated Ass'n v. Dixie Motor Coach Corp., 170 F.2d 902 (8th Cir. 1948).

[38] Hotel Association of St. Louis, 92 N.L.R.B. 1388 (1951).

[39] Yellow Cab Co. of California, 90 N.L.R.B. 1884 (1950); Duke Power Co., 77 N.L.R.B. 652 (1948). For a general discussion by the Board of its jurisdictional policies, see 16th ANN. REP. OF THE NLRB 15–39 (1951).

[40] The Supreme Court of Nevada did so react to the Board's rulings on the hotel industry in Building Trades Council v. Bonito, 71 Nev. 84, 280 P.2d 295 (1955): "Accepting as the intent of Congress the interpretation of the NLRB itself, the dispute with which we are here concerned falls within a field which the federal government has declined to occupy."

[41] *Cf.* Note, 65 YALE L.J. 86, 89 (1955).

destroyed, since now they must look to an obscure expression which was almost wholly without content when enacted and which since that time has acquired meaning only in directions irrelevant for present purposes. The suggestion that all is "commerce" which is not *de minimis*[42] is virtually the only guide presently available. There is one very practical reservation, however; the ultimate cost of pursuing the problem to the Supreme Court of the United States will prove far too heavy a burden for those smaller businesses which are in the borderland of "commerce," just as it will usually be of too little interest to the unions involved when the decision goes against them. The net result in actual operation is that the question of what is "commerce" is apt to begin and end in the state trial courts and labor boards, with the parties involved accepting the decisions made not because they are right but because they are not worth contesting.

Any discussion of action which may be taken by state courts or legislatures in response to *Guss* must be limited by the realization that the problem exists because of federal action and that true solutions rest in the hands of the federal government. *Guss* arose because of a long-standing policy of the National Board to decline the exercise of certain jurisdiction which admittedly was available to it. From the inception of the Act until 1950 this restraint was exercised on a more or less piece-meal basis.[43] In that year the Board announced that experience warranted the establishment of certain guides or "yardsticks" which would exclude a substantial volume of cases from its processes.[44] The change in composition of the Board during 1953 and 1954 resulting from the change from Democratic to Republican administration[45] presaged yet further withdrawal of the Board from its permissible range of operation.[46] The reasons assigned for adopting revised standards in 1954 related to budget and personnel, and the majority specifically repudiated any idea that judgments about the desirability of relegating such matters to the states entered into its determination.[47] But the dissent of Member Murdock and the public utterances of Chairman Farmer[48] seem to make clear that even if desirability of local control was not a factor, the majority proceeded upon the assumption that restraint upon their part would not create a jurisdictional void and that state courts and agencies would be free to absorb the disputes thus relinquished. That assumption has now been shattered and it seems unquestionable that the National Board will be obliged to reassess its standards in a new perspective.

It is not inconceivable that the National Board may be legally obliged to reassess its standards. It has long been assumed by the Board and by the

[42] NLRB v. Fainblatt, 306 U.S. 601, 607 (1939); see Cox, *Federalism in the Law of Labor Relations*, 67 HARV. L. REV. 1297 (1954).

[43] See 16th ANN. REP. OF THE NLRB 15–39 (1951).

[44] See Hollow Tree Lumber Co., 91 N.L.R.B. 635 (1950); 26 LAB. REL. REP. (Ref. Man.) 50 (1950).

[45] Note, *The "Eisenhower" Board: Taft-Hartley Under a Republican Administration*, 4 UTAH L. REV. 380 (1955).

[46] *Ibid.*; NLRB Press Release, June 30, 1954; NLRB Press Release No. R–449, July 15, 1954; see Note, 50 NW. U.L. REV. 190 (1955).

[47] Breeding Transfer Co., 110 N.L.R.B. 493, 497 (1954).

[48] Extracts from public addresses of the chairman were quoted in the dissent in the *Guss* case.

courts which review it that discretion to decline the exercise of its utmost power does exist. The first General Counsel, Robert Denham, took a contrary view and issued complaints in any case "affecting commerce." The Board just as promptly dismissed those it chose not to hear. This dispute reached a Court of Appeals in *Haleston Drug Stores v. NLRB*,[49] where the Board's dismissal was upheld. Certiorari was denied, possibly for the reason that Denham had resigned and the new General Counsel and the Board announced that they had reached an accord on jurisdictional policy. That accord has continued to this day, minimizing the circumstances[50] in which the issue of compulsory exercise of the Board's jurisdiction could properly be raised. The Supreme Court once inferentially approved the Board's restraint,[51] but in the *Guss* case apparently thought it worth noting that the question has not finally been resolved.[52]

Thus in considering a downward revision of jurisdictional standards the Board must consider the effect of two forces. One is the wisdom of shouldering some of the burden of proceedings now necessarily surrendered by the states; the other is the possibility that no choice exists at all and that it must consider and decide all disputes within its potential power.

Another possible avenue of approach open to the Board is a reconsideration of the possibility of cession agreements with those few states which now have labor relations boards. As *amicus*, the Board informed the Supreme Court in the *Guss* case that negotiation of such agreements had proved impossible because state policies in existence were not sufficiently in accord. Yet it seems probable that attempts to find accord were less earnest when the assumption was that mere relinquishment of jurisdiction constituted a practical cession to states in any event. Now that the assumption has proven false, more serious attempts to find accord may be made. Similarly, state boards may evidence an attitude of cooperation not found when the result of refusal to accede to federal policy was that they applied their own policy in any event. It also seems probable that the avenue of piece-meal cession has been inadequately explored; section 10(a) seems to contemplate not only total cession of jurisdiction over an industry but cession over "any cases in any industry . . . unless the provision of the State . . . statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act. . . ." Although the total of Utah labor law may not coincide with the federal, it seems clear that the concept of refusal to bargain collectively involved in the *Guss* case itself is sufficiently similar in both acts to warrant a cession on that narrow base.[53] Even larger areas of similarity might be found upon further examination; for instance, standards governing representation proceedings under the New York "little Wagner

[49] 187 F.2d 418 (9th Cir. 1951), *cert. denied*, 342 U.S. 815 (1951); see Note, 64 HARV. L. REV. 781 (1951).

[50] *Cf.* Joliet Contractors Ass'n v. NLRB, 193 F.2d 833 (7th Cir. 1952), in which the court admitted the existence of discretion but held that refusal to take jurisdiction was, under the peculiar facts presented, an abuse of that discretion.

[51] NLRB v. Denver Building Council, 341 U.S. 675, 684 (1951).

[52] 77 Sup. Ct. 598, 599 (1957).

[53] *Compare* UTAH CODE ANN. § 34-1-8(1)(d) (1953) *with* 29 U.S.C. § 158(5) (1952).

Act" [54] seem sufficiently parallel to the federal provisions so that nearly all problems of representation in the smaller industries of that state could be surrendered to the New York Board. So far as concerns differing interpretations of parallel state laws, which under section 10(a) would appear to preclude cession, it is not beyond possibility that the National Board might propose and the state board might accept a commitment by the state board to follow federal rather than state interpretation and policies in the ceded case. The legality of such cession agreements might be directly and more expeditiously tested in the federal district courts through actions by the parties affected for declaratory judgment and injunctive relief against alleged actions by the National Board in negotiating cession agreements beyond its power. The doctrines of the *Richman* and *Capitol Service* cases would not necessarily preclude preliminary relief in such cases.

Unfortunately, however, no real solution to the problem can be sought through such measures in the light of present state law. Total success from such negotiation could result in only twelve cession agreements, unless state legislatures join earnestly in the quest for accord along these lines.

The problem presented to the Congress by the *Guss* decision is one not new to it. The several attempts to anticipate the present problem have ended in failure,[55] none of the proposals to delete or modify section 10(a) having succeeded in getting to the floor of either house. Doubtless the pressure will now become more urgent. A prime difficulty is that there will be a countervailing increase of contrary pressure. Although the practical thrust of the current development is not in any specific direction nor uniformly upon any group, it seems likely that the unions in developed industrial areas, well organized and politically potent, will resist any attempt at Congressional solution just as they will resist any effort in state legislatures to create "little Taft-Hartley Acts." By and large they no longer need the assistance of labor boards, state or federal, in their organizing campaigns or in attaining their objectives. If the present state of affairs is that state courts and boards cannot act and that the National Board will not act, they will have little complaint.

At least one bill [56] has already been introduced which would restore state power without directly amending the Labor Act. This would be done by amending the Administrative Procedure Act [57] to allow state agencies or courts to exercise jurisdiction over any matter involving the regulation of commerce when a federal agency has declined to exercise jurisdiction. An even wider proposal introduced in the 84th Congress may become the subject of revived interest. Prompted by *Pennsylvania v. Nelson*,[58] which held that

[54] NEW YORK LAB. REL. ACT § 705.

[55] See S. 2650, 83rd Cong., 2d Sess. § 6(b)(1) (1954); S. 1264, 83rd Cong., 1st Sess. § 2 (1953).

[56] S. 1933, 85th Cong., 1st Sess. (Apr. 29, 1957). The bill has been committed to the Committee on the Judiciary. One may speculate that not the least of the reasons prompting the form of the bill will be strategy rather than desired scope of amendment; a bill amending the Administrative Procedure Act goes to the Committee on the Judiciary, whose members may be somewhat more sympathetic to its objects than would members of the Committee on Labor and Public Welfare.

[57] 60 STAT. 237 (1946), 5 U.S.C. § 1001 et seq. (1952).

[58] 350 U.S. 497 (1956).

the federal sedition laws preempted that field to the exclusion of parallel Pennsylvania laws, the bill proposed enactment of a standard of statutory interpretation which would reject federal preemption in any case in which the statute in question did not expressly declare for preemption.[59]

Perhaps an easier way out for the Congress, and one which would create less dogged resistence, would be to increase the budget of the National Board to the point where abstension on monetary grounds would no longer be defensible. An unpopular plea in a period when the federal budget is under heavy attack and when expansion of federal activity is highly suspect, this nevertheless may prove to be the course of least resistence.

[59] S. 373, 84th Cong., 2d Sess. (1955).

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NOTES

THE UTAH BOARD OF EXAMINERS

The Utah Board of Examiners is a constitutionally created body charged with the duty of examining all claims against the state before they can be acted upon by the legislature. Since its creation the Board has realized powers and duties which make it potentially the most powerful unit within the executive branch of state government. The Board is composed of the Governor, Secretary of State, and the Attorney General. Apparently, the motivating force which gave rise to this and similar constitutional boards[1] can be found in a major political trend of the nineteenth century, illustrated by the following:

> Growth of corporations made legislative sessions a battle between privilege and populace. Special interests which were fostered by the district method of election rose superior to the interests of the state as a whole. The spoils system thwarted expenditure of state funds by trained civil servants. Against these conditions the people struck with all the weapons at their command. Unable to create a better system, they tried to prevent future mistakes of the old. Constitutional prohibitions, which were spun like a spider's web around the legislators, included limitations on the substantive powers of legislatures, fixation of the time and duration of regular meetings, and detailed procedural requirements governing the course of bills from their introduction to their final passage.[2]

Many states have created similar *ex officio* boards by statute.[3] A substantial number of these boards are of relatively recent origin[4] and their creation seems to have been motivated primarily by a desire to relieve state legislatures from the time consuming task of acting upon each of a multitude of private claims during their characteristically short sessions.[5] This factor probably contributed to the later expansion of the administrative functions assigned to the constitutional boards. Such expansion has not, however, been uniform.[6] Further, while the wording of the provisions creating the constitutional boards is substantially identical,[7] the interpretation of the power granted varies from state to state. Due to judicial decision, legislative enactment, and assumption of power, the Utah Board emerges unique in operation. It is the purpose of this

[1] IDAHO CONST. art. IV, § 18; MICH. CONST. art. VI, § 20; MONT. CONST. art. VII, § 20; NEV. CONST. art. V, § 107. Michigan has restricted the power of its board by establishing a court of claims. Abbott v. Michigan State Industries, 303 Mich. 575, 6 N.W.2d 900, 901 (1942).

[2] BROMAGE, STATE GOVERNMENT AND ADMINISTRATION IN THE UNITED STATES 196 (1936).

[3] *E.g.*, S.C. CODE § 30-251 (1952). See Note, 68 HARV. L. REV. 506, 510 & n.34 (1955).

[4] *E.g.*, "Tennessee, since 1931, has had a Board of Claims, consisting of the Commissioner of Administration, Commissioner of Highways and Public Works, Secretary of State, State Treasurer, and Attorney General." Shumate, *Tort Claims Against State Governments*, 9 LAW & CONTEM. PROB. 242, 252 (1942).

[5] See THE COUNCIL OF STATE GOVERNMENTS, REPORT OF THE COMMITTEE ON LEGISLATIVE PROCESSES AND PROCEDURES 17 (1946).

[6] *Compare*, IDAHO CODE ANN. §§ 67-2001 to 67-2031 (1947), *with* MONT. REV. CODES ANN. §§ 82-1101 to 82-1157 (1947).

[7] Utah, Idaho, Montana, and Nevada titled their boards Boards of Examiners. The constitutional provisions, as originally adopted, creating these four boards were identical except for the "until otherwise provided by law" phrase of the Utah constitutional section. The Michigan body is styled a Board of State Auditors.

Note to examine the powers and functions of the Board, factors which have contributed to its development, and the relationship of the Board to total state government.

I. The Constitutional Power and Its Exercise

The constitutional grant of power to the Utah Board was made in the traditionally broad fashion. This provision, never amended, reads:

> *Until otherwise provided by law,* the Governor, Secretary of State and Attorney-General shall constitute a Board of State Prison Commissioners, which Board shall have such supervision of all matters connected with the State Prison as may be provided by law. They shall, also, constitute a Board of Examiners, with power to *examine all claims against the State except salaries or compensation of officers fixed by law,* and perform such other duties as may be prescribed by law; and no claim against the State, except for salaries and compensation of officers fixed by law, shall be passed upon by the Legislature without having been *considered and acted upon by the said Board of Examiners.* (Emphasis added.)[8]

This section was not the subject of major discussion during the constitutional convention,[9] and the intent of the framers cannot be ascertained; the wording itself suggests many questions. Answers to these questions are essential to a minimum definition of the constitutional powers of the Board.

A. *The Finance Commission*

One of the first questions encountered in attempting to define the powers and functions of the Board is that of its relationship to the State Finance Commission. Conflicts between the statutory duties assigned the Commission and the constitutional duties of the Board become apparent from reading part of the act which created the Commission.

> The commission shall examine and approve, or disapprove, all requisitions and proposed expenditures of the several departments, except salaries or compensation of officers fixed by law, and no requisition of any of the departments shall be allowed nor shall any obligation be created without the approval and certification of the commission. *The commission of finance shall pre-audit all claims against the state.* The commission of finance shall, with the approval of the state auditor as to the adequacy of such documents in facilitating the post-audit of public accounts, prescribe all forms or requisitions, receipts, vouchers, bills, or claims to be used by the several departments. . . . (Emphasis added.)[10]

Following the formation of the Commission, in 1941, the problem presented by the conflict in duties was submitted to the Attorney General for an opinion. He ruled that the duties of the Board could not constitutionally be subverted by legislative enactment.[11] However, the opinion suggested that the Commission could function as the agent of the Board. In a subsequent meeting of

[8] Utah Const. art. VII, § 13.

[9] There were few discussions touching on any of the sections which included the Board of Examiners provision. See 1 Proceedings, Utah Constitutional Convention 933 (1898); 2 Proceedings, Utah Constitutional Convention 1015, 1016 (1898).

[10] Utah Code Ann. § 63–2–21 (1953).

[11] Ops. Att'y Gen. 41–6 (1941), Utah Att'y Gen. Bienn. Rep. (1942).

the Board, the Commission of Finance was formally appointed its agent.[12] This arrangement has continued since that time.[13]

Presently, the Commission prepares semi-monthly payrolls for state officers and employees[14] and semi-weekly registers for the payments of vouchers issued by state agencies.[15] These are circulated to the individual Board members for signature before payment is authorized. Generally, approval is routine. However, any item questioned by a member is deferred for consideration at a regular meeting.[16]

B. *Claims Against the State*

Dicta in *Uintah State Bank v. Ajax*[17] imply that any demand for payment of funds from the state treasury is a "claim against the state." [18] However, there has been no such specific holding by the Utah court. It is necessary to examine various types of requests for payment from state funds in order to clarify the scope of the phrase.

1. Legal Claims

It seems clear that demands which would be reducible to judgment and enforceable against the state were it not for sovereign immunity, are claims against the state. In dismissing suits on such demands, the Utah court has often pointed out that the exclusive remedy available to the party is by petition to the Board of Examiners with the possibility of subsequent relief through private legislation.[19]

With the exception of a few statutory requirements,[20] the procedure for presenting legal claims has always been informal and has varied with the com-

[12] Resolution by the Board of Examiners on November 19, 1941. This information was taken from the Board's record of proceedings (hereinafter cited as BD. EX. RECORD) which it is required by statute to maintain. UTAH CODE ANN. § 63–6–3 (1953).

[13] Apparently, the Board can revoke this agency at any time.

[14] UTAH CODE ANN. § 63–2–13 (1953).

[15] The Commission of Finance must pre-audit such vouchers before payment is made. UTAH CODE ANN. § 63–2–21 (1953). However, the collegiate level state schools are excepted unless the Governor and Commission provide otherwise. UTAH CODE ANN. § 63–2–38 (1953). Apparently, such compliance has not been required of the University of Utah or the Utah State Agricultural College. Both universities make their own salary and expense payments from funds kept in private banks. Subsequently they submit requests for reimbursement to the Finance Commission. The Commission audits these requests before reimbursement from funds appropriated and available to the schools is authorized.

[16] Much of the information about the operation of the Board of Examiners was obtained in interviews with Attorney General E. R. Callister, former Attorney General C. D. Vernon, and Mr. K. J. Hansen, Chief Accountant for the State Finance Commission (hereinafter cited as INTERVIEWS).

[17] 77 Utah 455, 297 Pac. 434 (1931).

[18] *Id.* at 463, 297 Pac. at 437.

> That these are demands against the state seems clear because the fund from which bounty claims are paid is raised by taxation; the money is paid into the state treasury, is subject to appropriation by the Legislature, and is paid out by the state treasurer on warrant of the state auditor. . . . That they are "claims" is equally clear.

[19] Hjorth v. Whittenburg, 121 Utah 324, 241 P.2d 907 (1952); Wilkinson v. State, 42 Utah 483, 134 Pac. 626 (1913).

[20] Claimant must file his claim with the secretary of the Board and all claims must be considered in the order of presentation. UTAH CODE ANN. § 63–6–7 (1953). The claim must be presented to the Board, accompanied by a statement showing the facts constituting the claim, verified in the same manner as complaints in civil action. UTAH CODE ANN. § 63–6–11 (1953). The Board must publish an abstract of the claims submitted, accompanied by a general notice

position of the Board.[21] By statute, claims must be submitted with an attached statement showing the facts upon which the claim is based and verified in the same manner as complaints in civil actions.[22] In a majority of the cases, the claimant does not personally appear before the Board,[23] although this is permitted.[24] The hearing is informal and no set procedure or evidence rules are followed even though the Board seemingly has always had the statutory power to make and invoke such rules.[25]

Contract claims customarily arise because of noncompliance with some technical statutory or administrative requirement which precludes payment by the Finance Commission.[26] These claims rarely pose real problems; the Board transmits them to the legislature recommending compensation.[27]

Tort claims against the state are referred to the Attorney General's Office where they are investigated by one of the assistant attorneys general. They are subsequently returned without recommendation, accompanied by a statement of fact. The Board may then (1) disapprove the claim, in which case it may be presented to the legislature directly,[28] (2) approve the claim and forward it to the legislature,[29] or (3) forward the claim to the legislature without recommendation.[30] The latter practice has noticeably decreased in the past four years. Favorable recommendation by the Board usually results in legislative relief for the claimant. However, the legislature is not reluctant to overrule disapprovals.[31] Occasionally it receives and compensates claims which have never been presented to the Board.[32] While such action is of questionable validity, the constitutional issue has apparently never been raised.[33]

2. Salary and Compensation Claims

Salary and other compensation demands by state officers and employees are as clearly claims against the state as legal claims.[34] The exception relating

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of the order and time that each claim will be examined, in a newspaper at the seat of government. UTAH CODE ANN. § 63–6–12 (1953). The Board must, at the time designated, examine and adjust all claims. They may hear evidence in support or against any claim. UTAH CODE ANN. § 63–6–13 (1953). No member of the Board shall act on any claim in which he is interested. UTAH CODE ANN. § 63–6–15 (1953). Board members may use any official or personal knowledge they may have concerning any claim. UTAH CODE ANN. § 63–6–13 (1953).

[21] INTERVIEWS.

[22] UTAH CODE ANN. § 63–6–11 (1953).

[23] INTERVIEWS.

[24] While statute gives the claimant the right to appear before the Board, no instance could be found where the Board had refused to allow appearance.

[25] UTAH CODE ANN. § 63–6–4 (1953).

[26] INTERVIEWS.

[27] *Ibid.*

[28] UTAH CODE ANN. § 63–6–17 (1953).

[29] UTAH CODE ANN. § 63–6–8 (1953).

[30] Note, 5 UTAH L. REV. 233, 242 (1956).

[31] *Ibid.*

[32] *Ibid.*

[33] This issue was before the Idaho court and it held the legislative act void. State *ex rel.* Hansen v. Parsons, 57 Idaho 775, 69 P.2d 788 (1937).

[34] State *ex rel.* Davis v. Edwards, 33 Utah 243, 93 Pac. 720 (1908); Marioneaux v. Cutler, 32 Utah 475, 91 Pac. 355 (1907).

to "salaries and compensation fixed by law," however, must be explored in order to define fully the area.

In *State ex rel. Davis v. Edwards*,[35] a statute permitting judges to fix the compensation to be paid court stenographers, subject only to a maximum, was held not to be a compensation fixed by law. Thus, it was necessary to allege approval of the claim by the Board of Examiners before payment could be compelled.[36] The *Davis* case implies that a salary or compensation is not fixed by law unless it is a sum certain set by statute. However, the same question (i.e., whether a statute allowing a state agency to set the salary of its employees is a salary fixed by law) is an issue in the pending second *University of Utah v. Board of Examiners of State of Utah* case.[37]

The Commission of Finance fixes schedules regulating the salaries of all state officers, employees and clerical workers except those set by appropriation or statute.[38] It also fixes schedules governing the rate of compensation to be paid state officers and employees for intrastate travel,[39] and approves or disapproves request by state agencies for additional personnel or new positions.[40] The exercise of these powers is subject to prior approval by the Board. If the salaries set by schedule or for new personnel are below $425.00 per month, the approval is usually perfunctory. If above this amount, they must be approved by the Board at a regular meeting.[41] However, the Board may raise or reduce the salary of any state employee or preclude employment of an individual by totally disapproving the salary fixed by the Commission. This is a political power of great significance, since it enables the Board of Examiners effectively to control the hiring and firing of all state employees and nonexempt officers.[42] This power is especially significant since, with the exception of the Liquor Control Commissioners[43] and the Bank Commissioner,[44] the Governor can remove the officers he appoints only for "cause." Removal of an appointed officer for "cause" is extremely difficult in Utah.[45]

[35] 33 Utah 243, 93 Pac. 720 (1908).

[36] *Id.* at 250, 93 Pac. at 722.

[37] Brief of Appellee, 72, 73, University of Utah v. Board of Examiners of State of Utah, *appeal docketed*, No. 8457, Utah Sup. Ct., Nov. 18, 1955. University of Utah v. Board of Examiners of State of Utah was one case at the trial level with the State Board of Education intervening. On appeal, the University of Utah and State Board of Education portions of the case were separated and argued separately. The Utah Supreme Court rendered a decision on the University portion of the case and it is reported as first University of Utah v. Board of Examiners of State of Utah, 4 Utah 2d 408, 295 P.2d 348 (1956). The State Board of Education portion is still pending before the court and is cited second University of Utah v. Board of Examiners of State of Utah, *appeal docketed*, No. 8457, Utah Sup. Ct., Nov. 18, 1955.

[38] See note 14 *supra*.

[39] UTAH CODE ANN. § 63-2-15 (1953).

[40] UTAH CODE ANN. § 63-2-14 (1953).

[41] INTERVIEWS.

[42] *E.g.*, The Industrial Commission hired a former member of the Commission and the Finance Commission set his salary. The Board of Examiners totally rejected this salary precluding employment of the former commissioner. BD. EX. RECORD, March 11, 1957.

[43] UTAH CODE ANN. § 32-1-5 (1953).

[44] UTAH CODE ANN. § 7-1-1 (1953).

[45] Taylor v. Lee, 119 Utah 302, 316, 334, 226 P.2d 531, 538, 547 (1951).

> . . . [W]e hold that the minimum requirements [of removal for cause] are these: (1) A written notice of the nature of the charges couched in ordinary and understandable language; (2) a notice of the time and place of hearing; (3) an opportunity by the office-

3. Private Claims Against Appropriated Funds

A third type of demand clearly defined as one against the state arises where the legislature appropriates money to be paid to private persons meeting certain conditions precedent. Thus *Uintah State Bank v. Ajax*[46] held a demand for payment of a bounty fee from a fund appropriated for that purpose to be a claim against the state, subject to action by the Board.[47] Such claims are of little significance in examining the exercise of the Board's constitutional powers since they rarely arise today and would probably be handled by the Commission with the Board's automatic approval.[48] They do throw some light on the vast potential of the Board's influence in state administration, however.

4. State Agency Claims Against Appropriated Funds

A question of major importance, never judicially determined, is whether vouchers drawn by state agencies against funds appropriated to that agency, are claims against the state. In the first *University of Utah v. Board of Examiners of State of Utah* case,[49] the University contended that since it is a constitutional corporation its claims against appropriated funds are not claims against the state and are not subject to any review by the Board.[50] Objections were made generally to the Board's control over the University regarding appropriated funds and specifically to its control over out-of-state travel.[51] The court held:

> Since no complaint is made against the defendants named (Board of Examiners and others), except that *the duties being performed by them are in violation of respondent's constitutional rights because the Legislature could not legally invest said defendant with authority to infringe upon the rights secured* by the Constitution, it must follow that the objections of

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holder to be heard and answer the charges; (4) the right to be represented by counsel, with opportunity for cross-examination; and (5) the presence of a reporter to preserve the testimony so that, if necessary, the question of cause can be made the subject of judicial review.

. . . .

. . . We believe removal from a position of honor and trust for cause is a harsh remedy that should be limited to cases where the evidence reasonably establishes that the office-holder failed to meet the ordinary standards of competency and efficiency.

[46] 77 Utah 455, 297 Pac. 434 (1931).

[47] *Id.* at 469, 297 Pac. at 440. The Idaho, Montana and Nevada courts have held that this type of claim is liquidated and not subject to examination by their boards. Winters v. Ramsey, 4 Idaho 303, 39 Pac. 193 (1895); Fitzpatrick v. State Board of Examiners, 105 Mont. 234, 70 P.2d 285 (1937); State *ex rel.* Lyon County v. Hallock, 20 Nev. 326, 22 Pac. 123 (1889).

[48] In an early case, the Utah court determined that the Board of Examiners could exercise only a ministerial pre-audit function when acting upon such claims. Thoreson v. State Board of Examiners, 21 Utah 187, 60 Pac. 982 (1900). Presently the Finance Commission pre-audits these claims as agent of the Board. INTERVIEWS.

[49] 4 Utah 2d 408, 295 P.2d 348 (1956).

[50] For an analysis of this case, and the concept of constitutional corporations, see 55 MICH. L. REV. 728 (1957).

[51] Brief for Appellee, 35–40, 41–44, University of Utah v. Board of Examiners of State of Utah, 4 Utah 2d 408, 295 P.2d 348 (1956). It is interesting to note that the Idaho court determined that their Board of Examiners had no control over the finances of the University of Idaho. State *ex rel.* Black v. State Board of Education, 33 Idaho 415, 196 Pac. 201 (1921). This Idaho decision was not based on the University being a constitutional corporation, but on the ground that the Board of Regents (State Board of Education) was a co-ordinate constitutional body. The Idaho court decided that claims of a co-ordinate constitutional body are not of the type that require approval by their Board. This point is also alleged by the Utah State Board of Education in the pending second *University of Utah* case. See note 54 *infra*.

> respondent as to the acts complained of must fall by reason of the conclusion reached herein; that the University is a *public corporation* not above the power of the Legislature to control, and is *subject to the laws of this State from time to time enacted relating to its purposes and government.* (Emphasis added.)[52]

While the question whether claims of a state agency against appropriated funds are claims against the state was not directly in point in this case, the decision could be construed to hold that any power of the Board in this regard is only administrative, imposed by the legislature, and not exercised pursuant to its constitutional power. This question is now directly before the court in the pending second *University of Utah v. Board of Examiners of State of Utah* case.[53] The Board of Education contends that the Board of Examiners does not have any constitutional control over its expenditure of appropriated funds, or, in the alternative, that such control is merely ministerial.[54]

There are statutes which would seem to indicate that the Board has this power.[55] However, it is impossible, in most instances, to determine whether these statutory powers and duties represent administrative delegations or whether they are complementary to what the legislature believed to be the constitutional power of the Board. In every litigation in which the power of the Board has been in issue, both parties have contended that different statutes are legislative definitions of this constitutional power.[56] These arguments, without additional indication of legislative intent, can usually be discounted as makeweight. The Board of Examiners is composed of responsible elective officials. It is to be expected that the legislature would assign important administrative functions involving considerable discretion to the Board in preference to appointive administrative agencies. Therefore, it would be error to accept every such statute as a legislative definition of constitutional power. The only direct authority supporting the contention that state agency vouchers against appropriated funds are claims against the state is found in an opinion rendered by the Attorney General.[57] A judicial determination of this question would be of major importance because it would conclusively manifest whether the Board of Examiners has the constitutional power to control, in varying degrees, all state spending.

While asserting that they have discretionary power to control the spending of all state agencies by approving or disapproving their vouchers,[58] the Board practices extreme restraint in invoking this asserted power.[59] As a matter of practice, the Finance Commission exercises a ministerial pre-audit function

[52] University of Utah v. Board of Examiners of State of Utah, 4 Utah 2d 408, 440, 295 P.2d 348, 370 (1956).

[53] *Appeal docketed*, No. 8457, Utah Sup. Ct., Nov. 18, 1955.

[54] Brief for Appellee, 9–60, 98–116, Brief for Appellant, 5–14, University of Utah v. Board of Examiners of State of Utah, *appeal docketed*, No. 8457, Utah Sup. Ct., Nov. 18, 1955.

[55] *Compare* UTAH CODE ANN. § 63–6–8 (1953) *with* UTAH REV. STAT. § 946 (1898).

[56] Brief for Appellee, 38–42, Brief for Appellant, 27–28, University of Utah v. Board of Examiners of State of Utah, *appeal docketed*, No. 8457, Utah Sup. Ct., Nov. 18, 1955.

[57] Ops. Att'y Gen. 41–6 (1941), UTAH ATT'Y GEN. BIENN. REP. (1942).

[58] Brief for Appellant, 6–26, University of Utah v. Board of Examiners of State of Utah, *appeal docketed*, No. 8457, Utah Sup. Ct., Nov. 18, 1955.

[59] INTERVIEWS.

in processing such vouchers subject to perfunctory approval by the Board. However, the Commission refers questionable vouchers to the Board.[60] In dealing with these vouchers, the Board has always based its decision on the firmer ground of legality of the expenditure rather than advisability.[61] This restraint is probably due to political expediency. An application of this controversial control could very well jeopardize the residium of the Board's uncertain but relatively unquestioned powers.

5. Judgment Claims

In limited areas the legislature has waived sovereign immunity and allowed suits against the state.[62] Dictum in *Wilkinson v. State*[63] indicates that judgments resulting from such suits are claims against the state. The court also recognized but did not decide this question in *Campbell Bldg. Co. v. State Road Comm'n.*[64] Again we have a type of demand for payment from state funds which has not been unequivocally defined as a claim against the state. No information could be obtained which would indicate whether such judgments have ever been treated as claims against the state. Even if they are not considered claims, a problem involving the Board could arise. The legislature appropriates a specific amount for the payment of condemnation awards. When the fund is exhausted, payment is precluded until additional funds become available. In the past, the Board has made deficit appropriations under these circumstances.[65] By analogy, there would be no fund available from which satisfaction of a possible tort judgment against a state agency could be satisfied. Thus, the Board could temporarily delay satisfaction by refusing to make a deficit appropriation.

C. *Function of the Board: Ministerial or Discretionary?*

The degree of control exercisable by the Board in acting upon the various claims depends upon whether its function is regarded as ministerial or discretionary. In *Thoreson v. State Board of Examiners*[66] the function of the Board in dealing with private claims against appropriated funds was held to be ministerial. On rehearing, the court was careful to limit its holding to such claims.[67] The same type of claim was involved in *Uintah State Bank v. Ajax.*[68] A mandamus action was brought against the state auditor to compel payment. The writ was denied since approval of the Board was not alleged.[69]

[60] *Ibid.*

[61] *Ibid.*

[62] See Note, 5 UTAH L. REV. 233, 238, 239 (1956).

[63] 42 Utah 483, 134 Pac. 626 (1913).

[64] 95 Utah 242, 70 P.2d 357 (1937).

[65] INTERVIEWS.

[66] 19 Utah 18, 57 Pac. 175 (1899).

[67] 21 Utah 187, 189, 60 Pac. 982 (1900).

> We did not hold, as intimated in appellant's brief, that the board of examiners is a mere perfunctory body, not capable of exercising any judgment or discretion in matters of allowing or rejecting claims against the state, but held that in the particulars mentioned in this case, where the claim is admitted to be just, the board had not discretion, but their duties were mandatory.

[68] 77 Utah 455, 297 Pac. 434 (1931).

[69] *Id.* at 469, 297 Pac. at 440.

Under *Thoreson*, approval is required but mandamus will lie to compel action. Conceding that vouchers drawn by state agencies are claims against the state, a determination of the scope of the Board's discretion would indicate the degree of control that it could exercise over all state spending. As previously noted, this question is before the court in the second *University of Utah* case. But since the *Thoreson* case seems to indicate that the discretion of the Board must be determined for each type of claim,[70] another largely undefined factor of the Board's total constitutional power emerges.

D. *Considered and Acted Upon; Until Otherwise Provided By Law*

The first Utah Legislature provided that the Board could not delay action for more than one month on a claim for which an appropriation had been made.[71] Other claims, not supported by an appropriation and disapproved by the Board, were required to be reported to the legislature.[72] It was further provided that any interested person aggrieved by disapproval of a claim could appeal the Board's decision to the legislature.[73] These statutes persist to this time.[74] Thus by long usage it seems to be established that the Board cannot preclude legislative action on a claim by taking no action, or by disapproval. However, the Utah Legislature meets regularly for only sixty days each biennium.[75] In many instances, the practical effect of this inherent delay is that the Board's disapproval of a claim is final.

The phrase "until otherwise provided by law" seems grammatically to apply to only the first part of the section creating the Board and the State Prison Commission and to deal only with the latter. However, the composition of the Board of Examiners is established in the same part of the section. On this basis, it could be argued that the legislature could change the composition of the Board, but could not alter its duties. The concurring opinion in the *Thoreson*[76] case took the position that the phrase applied to the duties of the Board as well. In the pending second *University of Utah* case the State Board of Education argues, with conceivable support from the constitutional debates, that the framers intended this phrase to refer to the entire section and not merely to the first part.[77] If it be determined that the phrase applies to the entire section, enactments of the legislature would prevail over the constitutional grant of power to the Board. In effect the legislature could, at any time, "otherwise provide by law" and replace or eliminate the Board or

[70] See note 67 *supra.*

[71] UTAH REV. STAT. § 935 (1898).

[72] UTAH REV. STAT. § 939 (1898).

[73] UTAH REV. STAT. § 945 (1898).

[74] UTAH CODE ANN. § 63–6–7 (1953) (cannot delay action on a claim for more than one month); UTAH CODE ANN. § 63–6–9 (1953) (disapproved claims must be reported to the legislature); UTAH CODE ANN. § 63–6–17 (1953) (any person aggrieved may appeal to the legislature).

[75] UTAH CONST. art. VI, §§ 2, 16.

[76] Thoreson v. State Bd. of Examiners, 21 Utah 187, 190, 60 Pac. 982 (1900) (concurring opinion). "By Sec. 13 Art. 7 of the constitution, the board of examiners were authorized, until otherwise provided by law, to examine all claims against the State. . . ."

[77] Brief of Appellee, 18–23, University of Utah v. Board of Examiners of State of Utah, *appeal docketed*, No. 8457, Nov. 18, 1955.

any of its functions. It would follow from this conclusion that the Board was abolished by the creation of the Finance Commission to the extent of any conflict in duties.

It is evident from the factors noted in this section that the total constitutional powers of the Board of Examiners cannot be clearly defined.

II. The Administrative Powers and Their Exercise

From the commencement of statehood, the Utah Legislature has assigned many administrative functions to the Board. It existed as a body capable of receiving and exercising such powers long before administrative government, as we know it today, was developed and accepted. As a result, the Board has accumulated a plethora of, often unrelated, administrative powers. Two of these powers seem of sufficient moment to warrant separate consideration.

A. *Deficit Appropriations*

In 1907, the legislature granted the Board power to make deficit appropriations.[78] The Board's exercise of this power has always been conditioned upon a unanimous decision.[79]

> When deficits are allowed by the board of examiners pursuant to law, the amount or amounts so allowed shall be set up on the books of the state auditor and state treasurer to the credit of the department or departments so affected, and claims against a deficit shall be paid from the state general fund when allowed against the general fund, or from the fund for which the deficit is allowed, in the same manner as claims against any regular appropriation made by the legislature.[80]
>
> The legislature *shall* at its next regular session include in its regular appropriation the amounts necessary to cover all deficits allowed by the board of examiners. (Emphasis added.)[81]

In a court test of this power it is almost certain that the authorizing statutes would be held an unconstitutional delegation of legislative authority.[82] However, such a declaration would present an interesting practical problem. It is impossible for the legislature to foresee and provide for all exigencies in the financial operation of state agencies for an ensuing two-year period. If a method for obtaining additional funds between regular sessions of the legislature were not provided, unforeseen financial difficulties could force many state agencies to cease functioning.[83] Important state services could be tem-

[78] This power was first granted in appropriation acts. Utah Laws, c. 123, § 5 (1907). It was first compiled in 1933. Utah Rev. Stat. § 26–0–23 (1933).

[79] *Ibid.*

[80] Utah Code Ann. § 63–6–20 (1953).

[81] Utah Code Ann. § 63–6–21 (1953).

[82] The criteria established by the Utah court in determining the validity of legislative delegations of power would seem clearly violated by this delegation to the Board. *Cf.* Revne v. Trade Comm'n, 113 Utah 155, 192 P.2d 563 (1948); Rowell v. State Bd. of Agriculture, 98 Utah 353, 99 P.2d 1 (1940); State v. Goss, 79 Utah 559, 11 P.2d 340 (1932). For a list of cases dealing with legislative delegations of the power to make appropriations, see Annot., 91 A.L.R. 1511 (1934).

[83] Deficits allowed by the Board of Examiners during the biennium 1955–57 totaled $1,518,747.41. Among the deficits allowed were the following: (1) The Supreme Court of Utah, $7,400.00, (2) Civil Defense Council, $30,000.00, (3) Dixie College, $175,000.00, (4) Snow

porarily discontinued resulting in considerable confusion. On the other hand, it is obvious that the discretion given to the Board in the exercise of this power permits every opportunity for abuse. A recent deficit appropriation of $500,000 for construction of a building[84] at the University of Utah provoked a great deal of criticism from members of the legislature.[85] A bill was introduced in the 1957 legislature which would have limited the Board's exercise of this authority to an amount limited by the legislature.[86] While this act did not pass, it is very probable that this manifestation of legislative pique will remain as a restraint on the Board's exercise of this power.

B. *Review of Banking Charter Determinations*

No new bank or building and loan company can be created nor may any such existing institution establish a branch without the approval of the Bank Commissioner.[87] This power is discretionary with the Commissioner, subject only to a few general principles.[88] The legislative enactment granting this authority concludes:

> . . . Any person feeling aggrieved by the action, decision or ruling of the bank commissioner under this section may have the same reviewed by the state board of examiners, whose decision shall be final.[89]

This is another significant grant of power to the Board. In providing for this review, however, the legislature set absolutely no procedural guides, nor has the Board formulated any procedural rules governing the exercise of this administrative power.[90] This failure has created a myriad of confusing questions for the proponents and protestants in requesting review by the Board. Such questions concern: the scope of review, reliance on the Commissioner's findings of fact, rules of evidence, nature of the pleadings, and procedure. Apparently the only answer to such questions are those which can be gleaned from past practices. The problem of procedure is not confined to the exercise of this particular power. It is present, in varying degrees, in connection with most functions of the Board, as well as those of other administrative agencies in the state.[91] Many of these procedural problems could be eliminated by the adoption of a state administrative procedure act fashioned after the Model Act formulated by the Commissioners on Uniform State Laws.[92]

College, $28,200.00, (5) Utah Water and Power Board, $15,000.00, (6) Public Safety Commission, $46,650.00, and (7) University of Utah, $40,000.00. H.B. 242, 32d Utah Legislature, § 13 (1957).

[84] It is interesting to note that only two members of the Board were present when this action was taken. In view of the one condition imposed on an exercise of this power, that any affirmative action be unanimous, this exercise would seem questionable. BD. EX. RECORD, Dec. 26, 1956.

[85] See, *e.g.*, Salt Lake Tribune, Jan. 11, 1957, p. B1, col. 2.

[86] S.B. 131, 32d Utah Legislature (1957).

[87] UTAH CODE ANN. § 7-1-26 (1953); UTAH CODE ANN. §§ 7-3-6, 7-7-2 (Supp. 1955).

[88] *Ibid.*

[89] UTAH CODE ANN. § 7-1-26 (1953).

[90] INTERVIEWS.

[91] An example is the Bank Commissioner's administrative functions. See note 87 *supra.*

[92] HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 329 (1944).

C. *Other Administrative Powers*

With each appropriation act during recent years, the legislature has made an assignment of four specific duties to the Board. The first of these is control of interstate travel made by state officers and employees. Prior approval by the Board is prerequisite to compensation from state funds.[93] Secondly, it is given authority to make and enforce regulations governing the working hours, overtime, sick leave, and vacations of state employees.[94] It also has the power to prevent the establishment of a petty cash fund or revolving fund by any state agency or department.[95] Finally, it may refuse or permit any state agency or department the power to make interagency transfers of earmarked funds.[96] For instance, the Board may authorize the agency involved to transfer funds from its administrative account to its travel account; it may also refuse to allow transfer.

Other administrative duties assigned to the Board of Examiners include authority to: (1) control the state capitol grounds,[97] (2) apportion among the counties forest reserve funds received from the federal government,[98] (3) permit the Finance Commission to make specified investments of any surplus in the State Insurance Fund,[99] (4) order an independent audit of the books of the state treasurer when an irregularity is found,[100] (5) permit the State Board for Vocational Education (State School Board) to make disbursements of vocational rehabilitation funds received from the federal government,[101] (6) receive and approve quarterly reports of all expenditures made by the Conservation and Research Foundation,[102] (7) direct, at any time, that the interest from the investment of funds belonging to any state agency be used for the maintenance of that agency,[103] (8) approve, with the state auditor and the particular agency head, all rules and regulations governing the operation of the particular agency,[104] and (9) pass upon the proposed sale of state property.[105]

In the past, the Board was given and exercised the authority to purchase Kearns Air Force Base, Bushnell General Hospital and parts of the Fort Douglas Military Reservation from the federal government.[106] Until the reorganiza-

[93] *E.g.*, UTAH LAWS, c. 164 § 8 (1955).

[94] *E.g.*, UTAH LAWS, c. 164 § 12 (1955). This power had been given to the Board since 1949, but was specifically given to the State Personnel Officer subject to approval by the Governor in the 1957 Appropriation Act.

[95] *E.g.*, UTAH LAWS, c. 164 § 9(b) (1955).

[96] *E.g.*, UTAH LAWS, c. 164 § 2 (1955).

[97] UTAH CODE ANN. § 63-9-8 (1953).

[98] UTAH CODE ANN. § 63-12-3 (1953).

[99] UTAH CODE ANN. § 35-3-14 (1953).

[100] UTAH CODE ANN. § 67-4-11 (1953).

[101] UTAH CODE ANN. § 53-17-2 (1953) (*Repealed* S.B. 34, 32d Utah Legislature (1957)).

[102] UTAH CODE ANN. § 63-4-2(4)(5) (1953).

[103] UTAH CODE ANN. § 65-1-67 (1953).

[104] UTAH CODE ANN. § 67-3-1(19) (1953).

[105] UTAH CODE ANN. §§ 65-7-7, 65-7-9 (Supp. 1955).

[106] UTAH CODE ANN. § 63-6-26 (1953) (Kearns Air Force Base); UTAH CODE ANN. § 63-6-22 (1953) (Bushnell Hospital); UTAH LAWS, FIRST SPECIAL SESSION, c. 12 § 1 (1948) (Fort Douglas). The Board was given the authority to lease, sell or convey the acquired portions of Kearns Air Force Base, and Bushnell Hospital. UTAH CODE ANN. §§ 63-6-25, 63-6-28 (1953).

tion of the State Building Board by the 1957 legislature,[107] the Board was given a great deal of control over funds available for building purposes.[108]

III. The Board of Examiners; Its Position in State Government

It is generally held by political scientists that the office of governor in the state of Utah is unduly weak.[109] The major executive officers of the state are directly elected by the people. The Governor has little control over the operation of their respective departments.[110] In addition, the Governor's limited power in appointing and removing administrative officers makes it difficult for him to control the various state administrative agencies.[111] He achieves a degree of control over these departments and agencies by exercising his legislative veto[112] power, and by the exercise of significant budgetary functions.[113] It is undoubtedly true that a governor who heads his political party can exert considerable influence over state officers who are members of that party.[114] These controls, however, do not alter the general observation that Utah has a multiheaded executive department necessarily resulting in some inefficiency and the dispersal of executive responsibility. Indeed, the major criticism leveled at this political structure is that the Governor cannot be held directly responsible for the total operation of the executive branch of government.[115]

[107] S.B. 189, 32d Utah Legislature (1957).

[108] Utah Laws, c. 106 (1951).

[109] Schleicher & Durham, Utah The State And Its Government 37 (1943); Durham, Public Administration And State Government In Utah 6–8 (Utah State Agricultural College Studies In Public Affairs No. 1, 1940).

[110] Utah Const. art. VII, § 1.

[111] See notes 43, 44 *supra*.

[112] Utah Const. art. VII, § 8.

[113] Utah Code Ann. § 63–2–20 (1953).

> The commission of finance shall exercise budgetary control over all state departments and agencies. The commission shall require the head of each department to submit to it and to the governor not later than May 15th of each year, a work program for the ensuing fiscal year and may at any time require any department to submit a work program for any other period. . . . The budget officer shall review under the direction of the governor the requested allotments with respect to the work program of each department and shall, if the governor deems necessary, revise, alter, decrease or change such allotments before approving the same; or, may proceed to make independent allotments which shall be binding on the said department when a work program is not furnished by any said department as required by this section. The aggregate of such allotments shall not exceed the total appropriations or other funds from any source whatsoever made available to said department for the fiscal year in question. . . . The commission of finance shall thereupon permit all expenditures to be made from the apppropriations or other funds from any source whatsoever on the basis of such allotments and not otherwise, unless such allotments or any part thereof are subsequently revised or changed by the governor.

The constitutionality of this section is challenged in the second *University of Utah v. Board of Examiners of State of Utah*. Budgetary work orders are not considered claims. When the Governor approves the work order and the appropriated funds become available, subsequent demands on the funds are considered claims subject to action by the Board of Examiners. Interviews.

[114] Bromage, State Government and Administration in the United States 165 (1936). ". . . He [The Governor] is the leader of his party in the state. There are times when weak or complacent governors permit the control of the party to pass into other hands. There have been and always will be some whose acts are motivated by influential politicians. . . ."

[115] Dern, *Governors and Legislatures, State Government*, September, 1931, p. 7.

The Utah Legislature has met regularly in sixty-day sessions since the state's origin. However, its work load has increased in direct proportion to the increasing complexity of state government. Today, each session is faced with a staggering number of important problems,[116] especially in regard to taxation and spending.[117] It seems obvious that the legislature must, if it is to cope effectively with these problems, either assemble more frequently or delegate more of its authority.

If the legislature follows the delegation alternative, the Board of Examiners will be the probable recipient of much of this power. A review of the variety and importance of the administrative duties assigned to the Board in the past would support the belief that this will be the future legislative practice. However, the capacity of the Board members to manage additional duties is subject to practical limitations. The Board is presently dependent upon the Finance Commission for the discharge of many of its duties. Without resorting to redelegation, the administrative work load of the Board will soon reach the saturation point.

More significant problems raised by our projection of the Board into the executive structure lie in the vagueness of its constitutional powers. Specifically, the equivocal power to control all departmental expenditures of appropriated funds (other than salary expenditures) presents a basic question. The answer cannot be found in the intent of the framers of the constitution, nor in purported legislative definitions. If we look to the way in which other states have resolved this question, we find that Nevada and Montana have judicially rejected the contention that such expenditures are claims against the state subject to action by their boards.[118] Idaho, however, holds that such expenditures are claims against the state and that its Board has discretionary power in dealing with them.[119] Adoption of the former position would have little practical effect on the present operation of government in Utah. While asserting that it has discretionary power to act on expenditures of appropriated funds, the Utah Board's exercise has been largely ministerial. The Finance Commission would retain and exercise its pre-audit function as an independ-

[116] The Utah Legislature was in session for sixty days during the regular 1957 session. During this period, 516 bills were introduced, and 220 bills were passed. UTAH LEGISLATIVE COUNCIL, REPORT OF LEGISLATION ENACTED BY THE 32ND LEGISLATURE (1957).

[117] For an excellent outline of Utah's financial problems, see SLY, TAX POLICIES IN UTAH — A REPORT TO THE GOVERNOR, STATE TAX COMMISSION AND THE LEGISLATIVE COUNCIL (Prepared by Princeton University, Princeton Surveys 1954).

[118] State *ex rel.* Ash v. Parkinson, 5 Nev. (Hawley) *15, *31 (1869).

> A claim is a demand by some one other than the state against it for money or property; but when the claim originates with the state, or in its behalf, and . . . means and manner of payment are provided, . . . it does not . . . constitute a claim proper against the state . . . .

State *ex rel.* Schneider v. Cunningham, 39 Mont. 165, 101 Pac. 962, 965 (1909).

> Both [constitutional and statutory authority to examine all claims against the state] apply to unliquidated claims, and not to those the amounts of which have been fixed specifically . . . by any department of the government having authority to fix them. In this case relator's claim was fixed by the Legislature by appropriation. . . . His claim is therefore not an unliquidated claim . . . which must be approved by the board of examiners.

[119] Idaho recognizes that demands by a state agency against funds appropriated to that agency are claims against the state. Gem Irr. Dist. v. Gallet, 43 Idaho 519, 253 Pac. 128 (1927). Idaho holds that their Board of Examiners has discretionary power to deal with claims against the state. Suppiger v. Enking, 60 Idaho 292, 91 P.2d 362 (1939).

ent agency. If these expenditures were determined to be under the ministerial control of the Board, the power would amount to little more than the pre-audit function now exercised by the Commission with the automatic approval of the Board. However, if the Board of Examiners has the asserted discretionary power to control such expenditures, it would radically alter the present governmental power structure of the state. The Board would have unquestioned potential to dominate completely the operation of every state agency by regulating the amount and type of expenditure that could be made. There would, of course, be some restrictions on this power. The courts would strike down capricious and arbitrary actions, and the legislature could always initiate a constitutional amendment if, in its judgment, the power were abused. The fact remains that if the Board be granted such a power, it would be a sort of super-executive exercising complete control over the executive branch of government.

Conclusion

A study of governmental organization is primarily an analysis of power, a determination of what powers a particular unit has, how they are exercised, and how its powers are interrelated with other components. Viewing the Board of Examiners in this manner, it is an innovation in state government, an operating unit largely at odds with the traditional. But this fact alone can hardly stand as the basis for criticism. This departure from traditional form often gives the Board advantageous flexibility. However, one objection to the nontraditional form is the resulting general lack of knowledge of its functions and powers. The mere name of a traditional form conveys to everyone some idea of its operation. For instance, the word governor communicates enough information that most individuals coud broadly define the duties of that office without more than lay knowledge. This is, of course, not true of a board of examiners, and probably accounts for a general public apathy toward actions of the Board. Further, people are prone to distrust and criticize those things which they contact and do not understand.

It has been contended that the Governor should be able to control and be responsible for the operation of the executive branch of government. Whether one man or three hold and exercise this control seems a question which can only be answered as an individual subjectively views the traditional form, governmental efficiency, and many other variables. The notion of responsibility to the people has an appealing ring, but what does it mean? If such responsibility be determined to be that the votes of the electorate can place individuals in power and remove them, then each member of the Board can meet the test. If it be further contended that the action of three men precludes the fixing of responsibility, the question is reduced to one of public apathy. While the manner in which a member of the Board acts in relation to a particular issue is not readily apparent, the availability of this information depends almost entirely on public demand. Further, it seems inaccurate, under our system of party politics, to maintain that any elected officer is primarily responsible to the public at large. If he is primarily responsible to any group, it is to the party upon which he depends for support and to which he is ideologically attuned.

It has also been contended that there are no positive controls over the Board's exercise of power. It is true that there are few statutory or constitutional checks. However, the legislature can control the administrative functions of the Board by repealing or amending any given statutory power. The legislature's reaction to the recent deficit allowed the University of Utah represents a condition on the Board's exercise of that power which is as compelling as if it were written into the statute. In the constitutional area, the uncertainty of the Board's power calls for restraint. The sudden exercise of one of the questionable and controversial powers of the Board would evoke an immediate adverse reaction while their traditional activities would not be questioned by the public or in the courts.

Many criticisms of the Board become, on analysis, criticisms of a member's personality. This is tantamount to suggesting that an office should be abolished because the person presently holding it is open to valid criticism.

Viewing the Board in relation to total government, it would seem that it is not demonstrably malefic. It is a unique unit which has developed and which seems well established within the government of the state of Utah.

James W. Rawlings

BANISHMENT — A MEDIEVAL TACTIC IN MODERN CRIMINAL LAW

Banishment is not generally regarded as a contemporary problem in this country. The term itself suggests the barbaric treatment of the past or present totalitarian abuses. In reality, a large proportion of prisoners are presently released by the states under terms of conditional termination and conditional pardon which may amount to banishment. Banishment is also employed by most of our city courts in dealing with vagrants. The existence of these practices and the problems they create are symptomatic of our generally inadequate correctional institutions and of public apathy in the field of correction. It is obviously impossible to survey the entire field of correctional practice in this Note, but the impact of the specific aspect here examined upon that whole cannot be ignored. This Note will explore the use and validity of practices amounting to banishment as criminological tools in our law today.[1]

I. Historical Background

Banishment has its roots in antiquity. It is listed as a punishment in the oldest recorded system of law, *The Code of Hammurabi*,[2] which was written about 1700 B.C. In ancient Greece, it served both as a punishment and as a means of ostracization by popular vote without trial or accusation.[3] Banishment was employed by the Romans both as a prohibition against entering the city and as an exile to a specific territory.[4]

In England, banishment developed from the Anglo-Saxon institutions of sanctuary and abjuration.[5] From the thirteenth to the sixteenth centuries anyone who committed a crime could flee for refuge to a sanctuary.[6] If within forty days after taking sanctuary, the felon confessed his guilt to the coroner and took an oath to leave the kingdom and not to return without the king's permission, he was allowed to proceed in safety to a port assigned to him.[7]

[1] The United States regularly deports many aliens for various reasons, but this practice will not be considered as banishment within the scope of this Note since aliens are not citizens and their homes supposedly are elsewhere. See Sutherland, Principles of Criminology 269 (5th ed. 1955). *But see* Chafee, Three Human Rights in the Constitution of 1787, 204 (1956).

[2] Harper, The Code of Hammurabi King of Babylon 55 (1904) (§ 154 of the Code).

[3] See 2 Vinogradoff, Outlines of Historical Jurisprudence 209 (1922); Chafee, *op. cit. supra* note 1, at 205.

[4] Hunter, Roman Law 1065 (4th ed. 1903); Sutherland, *op. cit. supra* note 1, at 268.

[5] 3 Holdsworth, A History of English Law 303 (3d ed. 1923).

[6] The principle of sanctuary was well known at the time of Moses (see Exodus 21:13; White, Legal Antiquities 244 (1913)), but Christianity firmly established the doctrine that certain sacred places would protect one from the punishment of man.

> . . . the Church made of it a universal institution; the converted barbarians accepted it along with their new faith; . . . and so at the beginning of the mediaeval period it had become part of the public law of the kingdoms which had been founded on the ruins of the Roman Empire.

Reville, *Abjuratio Regni*, 50 Revue Historique 10, 11 (1892).

[7] Abjuration of the realm probably developed from the institution of outlawry. However, outlawry was generally pronounced against a criminal at large, while a person who abjured did so after surrendering himself to the sanctuary. Once a felon had abjured from the realm, his fate upon return was that of an outlaw. See 2 Pollock and Maitland, History of English Law 590 (2d ed. 1909). It is interesting to note that abjuration is almost completely contradictory to its companion concept, sanctuary. The idea is that certain consecrated places offer protection to the criminal, but as a punishment for committing the crime the criminal is banished from the kingdom. This conflict is still present in our modern conditional pardons having banishment as a condition. The idea that the pardon wipes the stain of guilt from the criminal, but as a punishment he must leave the state and never return.

A large part of England's criminals voluntarily banished themselves in this manner rather than answer to the civil authorities for their crimes.[8]

At the beginning of the sixteenth century the system of abjuration began to lose its deterrent effect, and Henry VIII made basic changes which practically nullified it.[9] This modified system was unsuccessful and was repealed in 1604.[10] But the public opinion of the seventeenth century would not tolerate this return to the outmoded institution which the Pope himself had begun to subvert a century earlier,[11] and in 1623 James I abolished the whole procedure.[12]

Even before the abolition of sanctuary and abjuration, England had begun to transport criminals to penal colonies.[13] This practice was adopted on a large scale during the period in which America was colonized.[14] Although the system was subjected to severe criticism by the colonists, a large percentage of England's convicts were transported to this country.[15] When America gained her independence, England began transporting her criminals to Australia. In time, the Australians found it extremely difficult to rear their families and live normal lives in a population composed mainly of convicts.[16] Opposition from the Australians, the great expense of operating the system, and the poor deterrent value of such a practice eventually forced England to abandon transportation as a method of criminal treatment.[17]

There were at least two additional means by which the English utilized banishment. Bills of attainder which came into being during the fourteenth century were acts of Parliament punishing persons by exile or death.[18] The other method consisted of making banishment a condition to a pardon. This practice preceded transportation, and was first employed, it seems, during the reign of Charles II. However, the theory underlying a conditional pardon is similar to that of sanctuary and abjuration, and a complete conceptual separation cannot be made. The king's power to grant such pardons probably developed with unbroken continuity.[19]

[8] See WHITE, LEGAL ANTIQUITIES 250 (1913).

[9] 21 HEN. 8, c. 11 (1529) (required the person abjuring to be marked on his thumb with a hot iron); 22 HEN. 8, c. 14 (1530) (many "expert mariners and apt men for the wars, and defense of this realm" have abjured greatly diminishing the strength of the realm); 27 HEN. 8, c. 19 (1535) (shall wear badges; carry no weapons; not go abroad before sunrise nor after sunset; governor has complete power); 32 HEN. 8, c. 12 (1540) (abolished all but certain designated sanctuaries; no immunity for murder, rape, burglary, robbery, arson). See 3 HOLDSWORTH, *op. cit. supra* note 5, at 306.

[10] The common law of sanctuary and abjuration was restored by 1 JAC. 1, c. 25 § 34.

[11] See 3 HOLDSWORTH, *op. cit. supra* note 5, at 307.

[12] 21 JAC. 1, c. 28 § 7.

[13] Although pardons with the condition of transportation were granted during the reign of Charles II, the first statute providing for transportation appears to have been 4 GEO. 1, c. 11.

[14] See 4 HAWKINS, PLEAS OF THE CROWN 297 (7th ed., Leach 1795).

[15] *Ibid.* "After the establishment of English colonies in America, therefore, transportation became in this country, as in all others which have had colonies, the most common sentence of criminals."

[16] See SUTHERLAND, *op. cit. supra* note 1, at 269.

[17] Transportation was gradually abolished between 1853 and 1864. 16 & 17 VICT. c. 99 (1853); 20 & 21 VICT. c. 3 (1857); 27 & 28 VICT. c. 47 (1864); see 1 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 482 (1883).

[18] See Clarendon's Case, 6 How St. Tr. (Eng.) 291 (1667); 4 BLACKSTONE, COMMENTARIES *377; CHAFEE, *op. cit. supra* note 1, at 98.

[19] 6 HOLDSWORTH, *op. cit. supra* note 5, at 218.

II. Banishment in this Country

A. *As a Punishment*

Banishment as a direct punishment has never been utilized to any great extent in this country. This is probably due to a number of reasons: our late birth date as a country, the bitterness instilled in the colonists by the English system of transportation, and dislike for bills of attainder which we were careful to prohibit in our Constitution. At an early date, however, the Supreme Court proclaimed:

> The right to confiscate and banish, in the case of an offending citizen, must belong to every government. It is not within the judicial power, as created and regulated by the constitution of Georgia; and it naturally, as well as tacitly, belongs to the legislature.[20]

This remarkable statement is from the peculiar case of *Cooper v. Telfair*.[21] The Supreme Court of the United States, affirming a circuit court of Georgia, upheld a Georgia bill of attainder which banished Cooper and confiscated his property. Perhaps the key to understanding of this case is to note that it was decided in 1800. This was before John Marshall, before *Marbury v. Madison*,[22] before the Court was sure of its power or function in our government. The case was decided solely upon the Georgia Constitution, for the Court was not sure that the Constitution of the United States applied to acts passed before its adoption, and if so, they doubted that they were the proper body to declare such acts unconstitutional. This case seems poor authority for anything, much less the proposition that banishment is an inherent right of state governments.

No state has ever authorized banishment as a proper punishment to be administered by judicial sentence, and, of course,

> A legislative act which undertakes to inflict the punishment of banishment or exile from the United States on a citizen thereof, and thereby deprive him of the right to live in the country, for any cause or no cause, . . . is a bill of attainder, within the clause of the Constitution of the United States, prohibiting the passage of such bills, and is therefore void.[23]

The courts of this country have universally held banishment to be an improper punishment impliedly prohibited by public policy.[24] While some courts have qualified this by declaring it void in the absence of legislative authorization,[25] it is doubtful that the Supreme Court would uphold such legislation today, in view of the great change in conditions and thinking since the *Cooper* case.

[20] Cooper v. Telfair, 4 U.S. (4 Dall.) 14, 19 (1800).

[21] *Ibid.*

[22] 5 U.S. (1 Cranch) 137 (1803) (established the doctrine of judicial review).

[23] *In re* Yung Sing Hee, 36 Fed. 437, 439 (Ore. Cir. 1888).

[24] *Ex parte* Scarborough, 76 Cal. App. 2d 648, 173 P.2d 825 (1946); Burnstein *ex rel.* Burnstein v. Jennings, 231 Iowa 1280, 4 N.W.2d 428 (1942); People v. Baum, 251 Mich. 187, 231 N.W. 95 (1930); Hoggett v. State, 101 Miss. 269, 57 So. 811 (1911).

[25] Millsaps v. Strauss, 208 Ark. 265, 185 S.W.2d 933 (1945); *Ex parte* Sheehan, 100 Mont. 244, 49 P.2d 438 (1935); State v. Doughtie, 237 N.C. 368, 74 S.E.2d 922 (1953); People v. Wallace, 124 N.Y.S.2d 201 (Co. Ct. 1953).

B. *As a Means of Dealing with Vagrants*

While the judiciary generally is not free to invoke a sentence of banishment, either directly, as an alternative, or as a condition to the suspension of a valid sentence, there is at least one state in which this prohibition seems to be largely a matter of form. In North Carolina, depending on the wording of the decree, an alternative of leaving the state may be construed to be merely a note or memorandum appendant to the legitimate sentence, and therefore, neither a punishment nor an infliction of an undesirable on another state.[26] Such reasoning, though shallow, is an attempt to justify a procedure common to the city courts of most states, for although illegal, banishment as a sentence is still invoked with embarrassing frequency in the case of floaters.[27] This is the procedure by which the vagrant, petty thief, or "wino" is given a specified number of hours to get out of the city, county, or state. The term "floater" aptly describes the unfortunate consequence of such a system — the tramp is floated from town to town. For every floater ejected, a new one arrives from another city. Before long the cycle becomes routine; the social problem remains unsolved.[28] It is impossible to determine accurately the number of such banishments. Although infrequently appealed, when appealed they have been held invalid.[29] In the great majority of cases the vagrant apparently is only too grateful for his chance at freedom, or too hardened from his experience with the courts to assert his rights (assuming that he knows what they are). As a practical matter, an appeal would probably result in imprisonment when the case was remanded for a proper sentence. However, when vagrancy ordinances are construed loosely, their constitutionality becomes doubtful.[30] Vagrancy defines a status rather than a crime, and very often the person arrested under such an ordinance is guilty of no substantial offense whatsoever;[31] his existence rather than his activity is what affronts society.

Floating is an expediency used for want of a better way to solve a pressing social problem. In most cities, the law is unable to handle the problem of undesirables in a constructive manner. Realizing that it will do no good to put the individual in jail for ten days, or levy a fine he never can pay, the court floats him, hoping to rid the city of this undesirable.[32] Present legal sanctions have little merit. The answer lies not in punishment, but in rehabilitation. It is doubtful whether many of these individuals could be rehabilitated. The

[26] Eg., State v. McAfee, 189 N.C. 320, 127 S.E. 204 (1925); State v. Hatley, 110 N.C. 522, 14 S.E. 751 (1892).

[27] See SUTHERLAND, *op. cit. supra* note 1, at 270.

[28] See Deutscher, *The Petty Offender: Society's Orphan*, Fed. Prob., June 1955, p. 12.

[29] *Ex parte* Sheehan, 100 Mont. 244, 49 P.2d 438 (1935); People v. Wallace, 124 N.Y.S.2d 201 (1953).

[30] See People v. Forbes, 4 Park. Crim. Rep. (N.Y.) 611 (1860), "They are constitutional, but should be construed strictly and executed carefully in favor of the liberty of the citizen." See also Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603 (1956).

[31] The "crackdown" of the Salt Lake City Police in February of 1954 provides an interesting example of wholesale arrests under the vagrancy ordinance. Large numbers of undesirables were arrested, charged with vagrancy, and presented with the alternative of leaving town or going to jail. The propriety of these tactics became a source of controversy between the Bar and the police authorities. The cleanup activities created a great deal of public interest, as the City's two large newspapers took opposite sides in the argument. *Compare* Salt Lake Tribune, Feb. 17, 1954, p. 8, col. 1 *with* Deseret News, Feb. 18, 1954, p. 12A, col. 1.

[32] See Deutscher, *supra* note 28.

solution to the vagrancy problem, in the final analysis, must come from the sociologists or the medical profession. Until such time as the legislatures provide an effective means of treatment, courts doubtless will continue to comply with the request of the vagrant and float him out of town.

C. *Banishment as a Condition to Release*

The most extensive use of banishment in this country has been by the executive branches of our state governments. This is frequently accomplished by granting a pardon on the condition that the convict leave the state. The courts which have considered the question are just as unanimous in upholding this practice as they are in denouncing the use of banishment in the form of a sentence.[33] There has been but one case in which such a condition was held to be illegal and void, and it was subsequently disapproved.[34]

1. The Pardoning Power

The pardoning power is an inherent right of sovereignty, part of the royal prerogative which was always held to reside in the king.[35] After the Revolution, most of the colonies settled the pardoning power with the legislatures.[36] This was due to their fear of monarchy. However, early emphasis on separation of power between the branches of government caused the pardoning power to shift to the executive. Today it rests solely with the governor in twenty-seven states. In the remainder the power is shared with or relinquished to a board or council; in eight of these he is reduced to the same authority as any other member of the board.[37] In Utah the power rests in a three man board of which the governor is not a member.[38]

A pardon generally is held to wipe away guilt, as if the crime had never been committed.[39] In *Ex parte Garland*[40] the Supreme Court stated:

> A pardon reaches both the punishment prescribed for the offence and the guilt of the offender . . . it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence . . . it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity.[41]

[33] Kavalin v. White, 44 F.2d 49 (10 Cir. 1930); *Ex parte* Marks, 64 Cal. 29, 28 Pac. 109 (1883); Flavell's Case, 8 Watts & S. (Pa.) 197 (1844); People v. Potter, 1 Parker Crim. Rep. (N.Y.) 47, 1 Edm. Sel. Cas. 235 (1846). See DEPT. OF JUSTICE, ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES, III PARDON 199 (1939).

[34] Commonwealth v. Hatsfield, 1 Clark 177, 2 Pa. L.J. 36 (1842). Disapproved in Commonwealth v. Haggerty, 4 Brewst. (Pa.) 326 (1869).

[35] See note 13 *supra*.

[36] SUTHERLAND, *op. cit. supra* note 1, at 545.

[37] *Ibid.*

[38] UTAH CODE ANN. § 77–62–2 (1953). *But see* § 77–62–3(b) (1953).
Nothing contained herein shall be construed as a denial of or limitation on the governor's power to grant respites or reprieves in all cases of convictions for offenses against the state, except treason or conviction on impeachment; provided, such respites or reprieves shall not extend beyond the next session of the board of pardons; and such board, at such session, shall continue or determine such respite or reprieve, or they may commute the punishments, or pardon the offense as herein provided.

[39] *In re* Charles, 115 Kan. 323, 222 Pac. 606, 608 (1924).

[40] 71 U.S. (4 Wall.) 333 (1866).

[41] *Id.* at 380.

However, a pardon may be absolute or conditional. Any condition, precedent or subsequent, may be attached to the pardon. If the condition is precedent, it must be complied with before the pardon takes effect, and if it is subsequent, the pardonee violating it will be subject to reincarceration for the unexpired portion of his original sentence.[42] While most states limit slightly the choice of conditions in that they must not be illegal, impossible, or immoral,[43] the condition of banishment is generally held to be quite proper.[44]

2. Justifications

The reasoning that most courts have adopted to sustain banishment as a proper condition to a pardon falls into four general groups. One that has been advanced by almost every court is the historical approach.[45] The practice is traced back to sanctuary and abjuration, and it is shown how banishment as a condition to pardon developed from these institutions.[46] That such conditions are sanctioned by history cannot be doubted, but to apply this precedent to our modern society is like advocating a return to mercantilism.

A second justification to the use of banishment as a condition to a pardon embodies the reasoning that a pardon is an act of grace, wholly a matter of mercy to which the executive may impose any condition that he pleases.[47] This theory is being eroded at the present time, for conditional pardon has come to be regarded by many courts as one of a number of criminological devices which have as a common goal the rehabilitation of the convict.[48]

[42] State *ex rel.* Brown v. Mayo, 126 Fla. 811, 171 So. 822 (1937); Harrell v. Mount, 193 Ga. 818, 20 S.E.2d 69 (1942); *Ex parte* Snyder, 81 Okla. Crim. 34, 159 P.2d 752 (1945); State v. Barnes, 32 S.C. 14, 10 S.E. 611 (1890).

[43] Muckle v. Clarke, 191 Ga. 202, 12 S.E.2d 339 (1940); Guy v. Utecht, 216 Minn. 255, 12 N.W.2d 753 (1943); *Ex parte* Webbe, 322 Mo. 859, 30 S.W.2d 612 (1929). *Eg.*, Huff v. Aldredge, 192 Ga. 12, 14 S.E.2d 456 (1941) (on condition that he join the Civilian Conservation Corps); Moore v. Lawrence, 192 Ga. 441, 15 S.E.2d 519 (1941) (on condition that a specified fine is paid); Commonwealth *ex rel.* Meredith v. Hall, 277 Ky. 612, 126 S.W.2d 1056 (1939) (conduct himself as a useful, upright and law abiding citizen); Pope v. Wiggins, 220 Miss. 1, 69 So. 2d 913 (1954) (any substantial reason at governor's discretion); People *ex rel.* Seymour v. Branham, 255 App. Div. 747, 6 N.Y.S.2d 857 (1938) (should not commit a felony while on parole); *Ex parte* Brown, 243 S.W.2d 167 (Tex. Crim. App. 1951) (condition of joining the armed services).

[44] *In re* Cammarata's Petition, 341 Mich. 528, 67 N.W.2d 677 (1954) (on condition of leaving the United States not to return); *Ex parte* Hawkins, 61 Ark. 321, 33 S.W. 106 (1895) (pardoned on condition of leaving the state); Pippin v. Johnson, 192 Ga. 450, 15 S.E.2d 712 (1941) (pardon on condition of leaving the county); see also note 33 *supra.*

[45] "Banishment is neither [cruel or unusual]. . . . It is sanctioned by authority, and has been inflicted, in this form, from the foundation of our government." People v. Potter, 1 Parker Crim. Rep. (N.Y.) 47, 1 Edm. Sel. Cas. 235, 245 (1846); see United States v. Wilson, 32 U.S. (7 Pet.) 150, 160 (1833). "As this power has been exercised, from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it."

[46] See People v. Potter, *supra* note 45.

[47] Pippin v. Johnson, 192 Ga. 450, 15 S.E.2d 712 (1941); State *ex rel.* O'Connor v. Wolfer, 53 Minn. 135, 138, 54 N.W. 1065 (1893); *cf.*, United States v. Wilson, 32 U.S. (7 Pet.) 150 (1833); Fleenor v. Hammond, 116 F.2d 982 (6 Cir. 1941).

[48] See Biddle v. Perovich, 274 U.S. 480 (1927); *In re* Stewart, 24 Cal. 2d 344, 149 P.2d 689 (1944); State v. Brinkley, 354 Mo. 1051, 193 S.W.2d 49 (1946); Wilborn v. Saunders, 170 Va. 153, 195 S.E. 723 (1938); Nibert v. Carroll Trucking Co., 139 W. Va. 583, 82 S.E.2d 445 (1954); see also Comment, 28 So. CALIF. L. REV. 158 (1955); Note, 65 HARV. L. REV. 309 (1951); DEPT. OF JUSTICE, ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES, III PARDON 195 (1939).

It should not be regarded as an act of leniency on behalf of the executive, but rather a tool to be used for the benefit of society. Since a condition of banishment cannot reform the convict, nor effectively benefit society, its use is at odds with the stated goal.

The most popular mechanism is the contract theory, which apparently stems from the 1833 decision of Chief Justice Marshall in *United States v. Wilson*.[49] He adopted Attorney General Taney's argument that the prisoner must in some way claim the benefit of the pardon, thereby denoting his acceptance of the proffered grace in order for the court to acknowledge it. One of the earliest cases to apply this theory to a condition of banishment was *People v. Potter*[50] in which the New York court described the conditional pardon as a contract between the convict and the state. By this line of reasoning the convict is at liberty to accept or reject the pardon. If he accepts, he is subject to the terms. Since the convict entered into it of his own volition, the condition of banishment could not be termed punishment. Thus it has been held a valid condition even in the face of an express state constitutional interdiction against exile.[51]

In reality a conditional pardon is not a contract, but an imposition of the sovereign upon an unequal subject. The terms are not established by the parties between them, but are commands of the state. While the way in which the convict receives the offer should, no doubt, determine whether or not the pardon will be granted, it is absurd to imagine that the state could not grant it without his consent if it saw fit to do so.[52] The words of Justice Holmes in *Biddle v. Perovich*[53] seem to be a logical refutation of the contract theory.

> A pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed. . . . Just as the original punishment would be imposed without regard to the prisoner's consent and in the teeth of his will, whether he liked it or not, the public welfare, not his consent, determines what shall be done.[54]

[49] 32 U.S. (7 Pet.) 150 (1833).

[50] 1 Parker Crim. Rep. (N.Y.) 47, 1 Edm. Sel. Cas. 235 (1846); see also *Ex parte* Snyder, 81 Okla. Crim. 34, 159 P.2d 752 (1945); *Ex parte* Hawkins, 61 Ark. 321, 33 S.W. 106 (1895). In the following cases, the contract theory is applied to conditions other than banishment: Burdick v. United States, 236 U.S. 79 (1915); *Ex parte* Peterson, 14 Cal. 2d 82, 92 P.2d 890 (1939); State *ex rel.* Rowe v. Connors, 166 Tenn. 393, 61 S.W.2d 471 (1933); *Ex parte* Calloway, 238 S.W.2d 765 (Tex. Crim. App. 1951).

[51] *Ex parte* Hawkins, *supra* note 50.

[52] See DEPT. OF JUSTICE, ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES, III PARDON 177, 201 (1939); Weihofen, *Revoking Probation, Parole or Pardon Without A Hearing*, 32 J. CRIM. L. 531, 537 (1942).

[53] 274 U.S. 480 (1927).

[54] *Id.* at 512. See State *ex rel.* Davis v. Hunter, 124 Iowa 569, 100 N.W. 510, 512 (1904). "Indeed, it is only in a somewhat fictitious sense that a conditional pardon is spoken of as a contract. It is, as a matter of fact, simply the grant and acceptance of a privilege, with a condition attached. . . ."

Perhaps the most valid argument is one based upon the concept of separation of power.[55] Since the pardoning power resides in the executive branch of the government, it is argued that the court has no power to review the conditions which the governor may impose. The Supreme Court carried this line of reasoning to its ultimate in discussing the general power of the President in regard to pardon.

> To afford a remedy, it has always been thought essential in popular governments, as well as in monarchies, to vest in some other authority than the courts power to ameliorate or avoid particular criminal judgments. It is a check entrusted to the executive for special cases.
>
> . . . .
>
> If it be said that the President, by successive pardons of constantly recurring contempts in particular litigation, might deprive a court of power to enforce its orders in a recalcitrant neighborhood, it is enough to observe that such a course is so improbable as to furnish but little basis for argument. Exceptional cases like this, if to be imagined at all, would suggest a resort to impeachment rather than to a narrow and strained construction of the general powers of the President.[56]

It is difficult to apply this line of reasoning to a pardon having banishment as a condition. If a conditional pardon is to have functional meaning, it can be described only as a reformative device.[57] As such it does not serve as a check against the improvident exercise of judicial power but rather as a criminological tool for the rehabilitation of the convict. In addition, the conditional pardon has been a common method of release from prison rather than the improbable abuse imagined in the quoted language.[58]

The pardoning power is an extraordinary one, and within its normal sphere of operation admittedly should not be subject to control by the court, since its very purpose is to act as a check on the power of the judiciary. However, it is the duty of the court to define the proper area of operation for such a power by interpreting the applicable provisions of the constitution or statute which creates it.[59] To deny the right of review is to destroy the very system

[55] See *Ex parte* Marks, 64 Cal. 29, 28 Pac. 109 (1883); Flavell's Case, 8 Watts & S. (Pa.) 197 (1844); State *ex rel.* Rowe v. Connors, 166 Tenn. 393, 61 S.W.2d 471 (1933); see also *Ex parte* Grossman, 267 U.S. 87 (1925); People *ex rel.* Depew v. New York State Bd. of Parole, 189 Misc. 321, 70 N.Y.S.2d 446 (Sup. Ct. 1947); Vanilla v. Moran, 188 Misc. 325, 67 N.Y.S.2d 833 (Sup. Ct. 1947); *Ex parte* Paquette, 112 Vt. 441, 27 A.2d 129 (1942).

[56] *Ex parte* Grossman, *supra* note 55, at 121; see also Solesbee v. Balkcom, 339 U.S. 9 (1950).

[57] See note 48 *supra*.

[58] However, in recent years there have been no releases by pardon from federal prisons, and the frequency of pardon as a release from state institutions is constantly decreasing. This is probably due to a growing tendency to use the pardoning power only in extraordinary cases, and the development of parole systems to serve as regular releasing devices. In 1951, 55.9% of all releases from state institutions were paroles, but this statistic tends to deceive since the proportions ranged from 4.3% in South Carolina to 100.0% in the state of Washington. See FEDERAL BUREAU OF PRISONS, DEP'T OF JUSTICE, PRISONERS IN STATE AND FEDERAL INSTITUTIONS, 1951, No. 7, NATIONAL PRISONER STATISTICS 17 (1952); SUTHERLAND, *op. cit. supra* note 1, at 547. For arguments against using the pardoning power as a supplement to parole, see Weihofen, *Consolidation of Pardon and Parole: A Wrong Approach*, 30 J. CRIM. L. 534 (1940); Weihofen, *Pardon: An Extraordinary Remedy*, 12 ROCKY MT. L. REV. 112 (1939).

[59] *Cf.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 582 (1952), where the Court was ". . . asked to decide whether the President was acting within his constitutional power when he issued an order directing the Secretary of Commerce to take possession of and operate most of the Nation's steel mills."

of checks and balances that the argument under attack was dedicated to preserve, since, in most of these cases, the court is the only other cognizant body.

3. A Look at the Utah Situation

Conditional pardon seems to be the only procedure possessing a tendency to find its way into the case law, but the Utah "conditional termination" is an example of another method by which an undesirable may be expelled from a state. In Utah, pardon is regarded as an extraordinary remedy which is used very sparingly. The wording of the Code would seem to prohibit a conditional pardon by implication.[60] As a result banishment upon release from prison in Utah is accomplished through the use of a conditional termination. This is an unsupervised release, which does not pardon the crime, subject to one condition — that the convict leave the state and never return.[61] Information received from the Executive Secretary of the Board of Pardons disclosed that the conditional terminee may, after the expiration of two years, apply for a complete termination and thus remove the condition of banishment. This is accomplished by having the police authorities of the locale the released convict is living in certify as to his good behavior and standing in the community. Since the present Secretary has held that position, however, no conditional terminee has applied for a complete termination. This would seem to indicate either ignorance of the opportunity or inability to secure the requisite endorsement from the police. This procedure is not statutory but merely a matter of policy. The Board purports to derive authority to grant conditional terminations from the general provisions of the constitution and statute which create the Board.[62]

The conditional termination must be requested by the convict in writing. He must verify that he has a place to go when he leaves Utah, even though the condition sends him to no specific place. While it is generally granted only to nonresidents, there is at least one recent case in which a resident of Utah was granted such a release. The procedure has never been tested by the judiciary, but an opinion of the Attorney General held it to be a valid method of release.[63]

Although Utah was one of the first states to become a member of the Interstate Compact for the Supervision of Parolees and Probationers,[64] the

[60] UTAH CODE ANN. § 77–62–1 (1953): " 'Pardon' shall mean an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed. 'Parole' shall mean a conditional release. . . ."

[61] The standard form for orders granting conditional terminations in Utah reads as follows:

> IT IS FURTHER ORDERED that the said———— will thereafter immediately depart from the State of Utah and that if he should ever again enter the State of Utah for any purpose whatsoever, then this Order of Conditional Termination becomes null and void and the said———— will be subject to arrest and reimprisonment in the Utah State Prison to serve the remainder of his sentence.

It will be noted that the banishment is absolute both as to duration and effect should the state choose to arrest a terminee upon his return to Utah.

[62] UTAH CONST. art. VIII, § 12; UTAH CODE ANN. § 77–62–3(a) (1953).

[63] See OPS. UTAH ATT'Y GEN. 56–131 (1956).

[64] See COUNCIL OF STATE GOVERNMENTS, HANDBOOK ON INTERSTATE CRIME CONTROL 60 (rev. ed. 1955).

frequency of conditional terminations in proportion to out-of-state paroles is distressing. In recent years, twenty-two per cent of all releases granted by the Board, including paroles, have been conditional terminations. The number of terminations approximates the number of paroles, but while forty-six per cent of the terminations are on condition of banishment, only about ten per cent of the paroles are out-of-state paroles handled under the Compact.[65] The cognizant state officials contacted were all of the opinion that the conditional termination was an expedient resorted to because of lack of funds and the inadequate scope of the Interstate Compact in actual operation.

D. *Constitutional Questions*

If there was any doubt before its adoption, the fourteenth amendment confirmed the existence of national rights of citizenship and secured them against state abridgement.[66]

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are *citizens of the United States and of the State wherein they reside*. No State shall make or enforce any law which shall abridge the privileges or immunities of *citizens of the United States*; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[67] (Emphasis added.)

One of the most important privileges of national citizenship is the right to pass freely from state to state. Justice Grier spoke of the right of every citizen to free access to the departments of the government, wherever they may be located, while dissenting in *The Passenger Cases*.[68] This reasoning was affirmed by the majority of the judges in *Crandall v. Nevada*,[69] where the Supreme Court held unconstitutional a Nevada tax upon persons leaving the state. In *Edwards v. California*[70] the opposite situation existed. California was attempting by statute to keep indigent persons from entering the state. The majority of the Court struck the statute on the basis of the commerce clause. Justice Douglas in a concurring opinion clarified the *national* right of freedom of movement.

> . . . I am of the opinion that the right of persons to move freely from State to State occupies a more protected position in our constitutional system than does the movement of cattle, fruit, steel and coal across state lines. While the opinion of the Court expresses no view on that issue, the right

[65] From July 1, 1954 to January 31, 1957, the Utah Board of Pardons effected 415 releases. One hundred and ninety-six of these were terminations, of which 91 or 46% were conditional (banishment). The remaining 219 releases were paroles, of which only about 10% were out-of-state. Thus about 22% of all releases effected by the Board were conditional terminations. This information was furnished to the writer by the Executive Secretary of the Board of Pardons and is not available in published form. For a different breakdown see UTAH STATE BOARD OF PARDONS, BIENNIAL REPORT (1956).

[66] See Meyers, *Federal Privileges and Immunities: Application to Ingress and Egress*, 29 CORNELL L.Q. 489, 503 (1944).

[67] U.S. CONST. amend. XIV, § 1.

[68] 48 U.S. (7 How.) 283 (1849).

[69] 73 U.S. (6 Wall.) 35 (1868). See also Williams v. Fears, 179 U.S. 270, 274 (1900); CHAFEE, *op. cit. supra* note 1, at 188.

[70] 314 U.S. 160 (1941).

involved is so fundamental that I deem it appropriate to indicate the reach of the constitutional question which is present.

The right to move freely from State to State is an incident of *national* citizenship protected by the privileges and immunities clause of the fourteenth amendment against state interference. . . .

. . . .

To be sure, there are expressions in the cases that this right of free movement of persons is an incident of *state* citizenship protected against discriminatory state action by Art. 4, § 2 of the Constitution. . . . But the thrust of the Crandall Case is deeper. Mr. Justice Miller adverted to . . . [these cases] when he stated in the Slaughter-House Cases that the right protected by the Crandall Case was a right of *national* citizenship arising from the "implied guarantees" of the Constitution. . . . But his failure to classify that right as one of *state* citizenship protected solely by Art. 4, § 2, underscores his view that the free movement of persons throughout this nation was a right of *national* citizenship.[71]

Banishment is an interference with the privilege of free movement between the states. Therefore, a condition of banishment annexed to a release should be declared invalid and void as an illegal condition. Even if free movement were only regarded as a right derived from state citizenship, the constitutionality of banishment would be doubtful under article IV, section 2.[72] This would be especially so after the banished person had qualified as the citizen of another state. It is absurd to claim the person banished is free to return at any time — subject to reincarceration. Likewise it is incongruous to regard the pardonee as anything but a citizen, since the pardon purports to erase the stain of criminality and restore his civil rights.[73] While this argument might not apply with equal force to a conditional terminee, the constitutionality of banishment should not turn upon the technical effect of the release.

With the adoption of the fourteenth amendment in 1868 came a new phase of federalism and a new concept of civil rights. The great developments in the protection of these rights have all come since the 1920's.[74] The trend of the cases,[75] plus the policy considerations,[76] leave little doubt as to what the constitutional status of banishment should be if the Supreme Court were faced with the question today.

[71] *Id.* at 177, 178, 180. See CHAFEE, *op. cit. supra* note 1, at 189.

[72] U.S. CONST. art. IV, § 2. "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

[73] See note 39 *supra.*

[74] See EMERSON AND HABER, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES, viii (1952).

[75] See Shachtman v. Dulles, 225 F.2d 938, 941 (D.C. Cir. 1955) where the court states: "The right to travel, to go from place to place as the means of transportation permit, is a natural right subject to the rights of others and to reasonable regulation under law. . . ."

[76] "The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." Justice Cardozo in Baldwin v. G. A. F. Seelig, Inc., 294 U.S. 511, 523 (1935). See Wheeler v. United States, 254 U.S. 281 (1920); Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868).

III. Pragmatic Considerations

A. *Social Policy*

Perhaps the most persuasive arguments against the use of banishment are those involving social policy. On the state level, banishment is capable of creating a most deplorable situation. A condition which requires the convict to leave the state necessarily forces him upon another state. This can only lead to reciprocity.[77] The Supreme Court of Michigan recognized this when they condemned banishment as a sentence in *People v. Baum*.[78]

> To permit one state to dump its convict criminals into another would entitle the state believing itself injured thereby to exercise its police and military power, in the interest of its own peace, safety, and welfare, to repel such an invasion. It would tend to incite dissension, provoke retaliation, and disturb that fundamental equality of political rights among the several states which is the basis of the Union itself. Such a method of punishment is not authorized by statute, and is impliedly prohibited by public policy.[79]

Conceivably, the answer to this objection in the case of pardon is that the pardon wipes the stain of criminality from the convict; since he is no longer a criminal, they are not exposing another state to future danger from a fugitive. It is improbable that any state would release a dangerous criminal in this manner. Yet if the person released does not represent an undesirable element or a bad risk, why banish him? On the other hand, if the doubts of the pardoning authority are so great that they will not endanger their own community, they are certainly unwarranted in driving him elsewhere. If constitutional, it seems very unwise from a practical point of view for one state to dump its undesirables into another state.

When considered on the level of the banished individual, public policy is equally opposed. Reformation has as its goal the rehabilitation of the individual, so that he may eventually take his place in society as a useful member.[80] A condition of banishment often does just the opposite. The unexpired portion of the sentence remains forever as a stigma of criminality and delays or prevents his assimilation as an ordinary member of society. In a meaningful sense, he is not very different from the successful fugitive from justice, and it is unlikely that his associates will appreciate what distinction is possible. His debt to society might have been paid in fifteen or twenty years, but after banishment he is forever considered a criminal at large should he return to the state.[81] There is no reformative connection as to result or process, since the convict is not subjected to surveillance or guidance of any kind.[82]

[77] See *Ex parte* Scarborough, 76 Cal. App. 2d 648, 173 P.2d 825 (1946); People v. Baum, 251 Mich. 187, 231 N.W. 95 (1930); State v. Doughtie, 237 N.C. 368, 74 S.E.2d 922 (1953).

[78] 251 Mich. 187, 231 N.W. 95 (1930).

[79] *Id.*, 231 N.W. at 96.

[80] See note 48 *supra*.

[81] *In re* Cammarata's Petition, 341 Mich. 528, 67 N.W.2d 677 (1954) (state did not waive jurisdiction by procrastinating four years before reincarcerating the petitioner after his return); State v. Barnes, 32 S.C. 14, 10 S.E. 611 (1890) (pardonee was remanded to serve out the balance of his sentence even though the maximum amount of time he was to serve had expired); see also State *ex rel.* Brown v. Mayo, 126 Fla. 811, 171 So. 822 (1937); Harrell v. Mount, 193 Ga. 818, 20 S.E.2d 69 (1942); People *ex rel.* Baum v. Morhous, 267 App. Div. 849, 45 N.Y.S.2d 772 (3d Dep't 1944).

The person banished often finds himself in need of medical aid or economic assistance. He probably can't qualify for welfare in any state other than that from which he was banished. If he returns he will be reincarcerated. Or perhaps, as in *Pippin v. Johnson*,[83] the pardonee, in order to save his life, returns, because it is the only place he can secure medical treatment on credit. Sometimes welfare agencies are able to solve these problems on an interstate level, but very often the court will hold, as it did in the *Pippin* case, that if the condition becomes more intolerable than the confinement, the pardonee is at liberty to forego compliance — but he will have to serve out the remainder of his sentence.[84]

Most courts hold banishment to be contrary to public policy when employed as a punishment.[85] It is difficult to see why the policy should change merely because the individual is banished as a condition to his release from prison. Banishment succeeds only in creating second-class citizens[86] and unrest and resentment between the states.

B. *A Realistic Look at the Problem*

While most states employing banishment tactics would agree as to their undesirability, there are several justifications that would be advanced in defense of the system. When the convict is domiciled in another state, parole in the state of conviction would probably be unsatisfactory. Because their families and relatives are elsewhere, such persons have nothing to hold them within the state. If paroled they are likely to run away. When the convict is "banished" to his home state, the problems of social policy which banishment creates are certainly mitigated, but in order to protect the public and insure rehabilitation adequate supervision, advice and assistance should be provided the convict after he returns there.[87] In other words, interstate parole

[82] See Weihofen, *Consolidation of Pardon and Parol: A Wrong Approach*, 30 J. CRIM. L. 534 (1940); Weihofen, *Pardon: An Extraordinary Remedy*, 12 ROCKY MT. L. REV. 112 (1940).

[83] 192 Ga. 450, 15 S.E.2d 712 (1941).

[84] Often the method of revocation presents constitutional problems. In many states, when the pardon authorities feel that a prisoner has violated a condition of his release, the pardon is summarily revoked without notice or hearing. No right to notice or hearing on revocation: *Ex parte* Snyder, 81 Okla. Crim. 34, 159 P.2d 752 (1945) (condition of banishment); *Ex parte* Dearo, 96 Cal. App. 2d 141, 214 P.2d 585 (1950); Wright v. Herzog, 182 Md. 316, 34 A.2d 460 (1943); Guy v. Utecht, 216 Minn. 255, 12 N.W.2d 753 (1943); *Ex parte* Paquette, 112 Vt. 441, 27 A.2d 129 (1942). Summary revocation may be expressly reserved and embodied in the condition: Commonwealth *ex rel.* Meredith v. Hall, 277 Ky. 612, 126 S.W.2d 1056 (1939); Pope v. Wiggins, 220 Miss. 1, 69 So. 2d 913 (1954); *Ex parte* Webbe, 322 Mo. 859, 30 S.W.2d 612 (1929); *Ex parte* Ferdin, 147 Tex. Crim. 590, 183 S.W.2d 466 (1944); *Ex parte* Costello, 22 Wash. 2d 697, 157 P.2d 713 (1945). Hearing on writ of habeas corpus is sufficient for due process on revocation: State *ex rel.* Bedford v. McCorkle, 163 Tenn. 101, 40 S.W.2d 1015 (1931). Revocation without notice or hearing is a denial of due process under the Fourteenth Amendment: Fleenor v. Hammond, 116 F.2d 982 (6 Cir. 1941). Hearing is required by the common law: State *ex rel.* Murray v. Swenson, 196 Md. 222, 76 A.2d 150 (1950). See also Weihofen, *Revoking Probation, Parole or Pardon Without A Hearing*, 32 J. CRIM. L. 531 (1942); Comment, 28 So. CALIF. L. REV. 158 (1955); Note, 65 HARV. L. REV. 309 (1951).

[85] See note 24 *supra*.

[86] "But to allow such an exception to be engrafted on the rights of *national* citizenship would be to contravene every conception of national unity. It would also introduce a caste system utterly incompatible with the spirit of our system of government. It would permit those who were stigmatized by a State . . . to be relegated to an inferior class of citizenship." Justice Douglas concurring in Edwards v. California, 314 U.S. 160, 181 (1941).

[87] See Crihfield, *The Interstate Parole and Probation Compact*, Fed. Prob., June 1953, p. 3.

seems preferable in this situation, since it provides the surveillance and guidance which are lacking in a conditional pardon or other release on condition of banishment.

At the present time all of the states are members of the Interstate Compact for the Supervision of Parolees and Probationers[88] which provides a means whereby a state may permit a parolee or probationer to serve his parole in another state. In operation, a receiving state may accept or reject any convict. Unfortunately, many of those who most need supervision have the least chance of being accepted.

The accepted theories of parole are related to this impasse. Except for the few states where virtually no parole exists, there are two general types of parole systems in America.[89] The older theory is that parole should be reserved to those persons who, it is believed, will never again violate the law. The newer trend prescribes parole as the method of release for nearly all of the more than ninety-five per cent eventually released from prison. The former system is based on the theory of the ability to predict which convicts can be rehabilitated. The theory is largely discredited, but its incidents remain in practical operation largely because of inadequate funds. Many states have good frameworks for modern parole systems, but lack of money renders these plans ineffective.[90]

Factors other than limited parole systems exert practical force upon the officials involved. The repeated offender offers little promise under any theory of parole, and supervision will be wasted at best. Yet it is a practical fact that a proportionate number of convicts must be released every year in order to make room for the new commitments.[91] If this were not done, we would need many times the number of prisons we now have, and this we could ill afford. The net result in most states is that the person who needs supervision the most is given an outright release. Thus banishment presents a sorry but sometimes sole recourse. Unable to retain the prisoner because of lack of facilities and unwilling to expose their own community to what is recognized to be a bad risk, the pardoning authorities recognize the futility of asking another state voluntarily to assume a burden they themselves will not bear. So they dispense with the request and exile him. In short, the interstate parole system can be only as good as the individual parole systems of the member states.

Since a large proportion of the prisoners in state institutions are transients,[92] it is natural that the state would feel a desire to have them leave. Many doubtless want to go home but would not be accepted under the Compact. Most of them, however, have no home to which to go. Our criminal population today is one on the move. Many criminals undoubtedly feel that if they keep moving they will have a greater chance of eluding the authorities.

[88] See COUNCIL OF STATE GOVERNMENTS, THE HANDBOOK ON INTERSTATE CRIME CONTROL 56 (rev. ed. 1955).

[89] See Finsley, *Who Gets Parole?*, Fed. Prob., Sept. 1953, p. 26.

[90] Morris, *The Utah Correctional Systems*, 5 UTAH L. REV. 326 (1957).

[91] See Warren, *Parole an Important Facet in the Administration of Justice*, Fed. Prob., June 1956, p. 3.

[92] Information received from Utah officials reveals that approximately 60% of all prisoners in the Utah penitentiary are not residents of the state.

They would be called transients in any state. There are many justifications which state authorities may advance in an attempt to defend this practice, but in the end the basic motivation amounts to these two reactions: (1) in view of his past record, he'll probably wind up in prison again, and (2) we've fed him long enough, let someone else support him for the next ten years. Thus disregarding the public interest in both protection and rehabilitation, they banish the individual.

Another justification with possible merit is that banishment separates the criminal from the environment which led him astray. It gives him a chance for a fresh start unfettered by his past and free from the influence of his associates. This seems to be a rather naive approach which would be valid only in the light of special facts.[93] When such facts exist the better answer would be parole, either locally or via a more effective Interstate Compact.

IV. Conclusion

There is no ready solution to this problem at the present time. The best answer probably lies in better parole systems, but most legislatures have trouble finding adequate money for new schools, roads, and the myriad of other services modern societies demand. When the budget is cut, correction is often the first to suffer. Through lack of understanding, and indifference, we are unwilling to provide the necessary funds for realistic parole systems. While this would require a large amount of money, it seems small indeed when compared to the billions crime costs us each year.[94] However, there is nothing to indicate that the most elaborate parole system would be successful in every instance. Indeed, experience leads us to an opposite conclusion. While parole in itself may not be the panacea for all our treatment problems, it seems that adequate parole systems would eliminate the necessity for banishment. When states can afford to parole the "nine time losers," and give them the type of supervision they require, the Interstate Compact will work.

Whether it is in the form of a conditional pardon or some other type of conditional release, or whether the convict is a resident of the state, some other state, or a transient, banishment is nothing more than floating on a state level. There is no rationalization which can justify such a procedure, for it is contrary to the legal rights of the convict and important interests of society, not the least of which is protection of the public. It is contrary to the prin-

[93] For example, banishment as a condition to a pardon might be justified in the case of a narcotics addict who has been committed to a hospital and "cured," since it is desirable to place him in a drug free environment. See Dudycha, Psychology for Law Enforcement Officers 339 (1955).

[94] Hoover, *The Challenges of Crime Control*, Fed. Prob., June 1956, p. 10, 14.

> We complain about high taxes, but last year crime cost every man, woman, and child in these United States $122, or a staggering estimated total of $20 billion. Perhaps this figure could become more meaningful if we realized that for every $1 spent on education, crime cost $1.46; and for every $1 which went to the churches of the Nation, $13 went to crime.
>
> If we could but divert the waste of crime to constructive use — recruit and train the people so sorely needed in every phase of the administration of criminal justice and quarantine the mentally ill criminal until he is cured — the Nation would soon reap a marvelous profit. And there would be the added profit from a decline in sorrow, mental anguish, and outright physical suffering resulting from crime.

ciples of social policy and constitutional vinculum which bind the states together as a union. In reality it solves none of our difficulties, but rather multiplies and complicates the over-all problem of criminal treatment in this country. It was anachronistic in 1787 when the Constitution was framed; it certainly has no place in our society today. Perhaps someday soon the Supreme Court will be presented with an opportunity to declare banishment unconstitutional. This would provide a legalistic solution, but the real problem can only be solved with money, cooperation, and the most elusive thing of all, knowledge of the proper treatment for rehabilitation.

Gerald R. Miller

POLYGAMY IN UTAH

Since Utah's entry into the Union, her law enforcement officers have been plagued with what to do about a small percentage of the state's population who practice plural marriage under a belief that it is a divine covenant which must be followed in this world in spite of legal sanctions against the practice. For nearly a century officials of the State of Utah and the United States have attempted to stamp out the practice of polygamy without success. Plural marriage, with its accompanying social and moral problems, is today practiced by a substantial number of persons in Utah and neighboring states.[1] It is the purpose of this Note to attempt a preliminary survey of the institution of plural marriage as it exists today and the effectiveness of legal measures utilized in combatting the practice.

While there are several groups which practice polygamy in Utah today, their ideologies insofar as plural marriage is concerned are basically similar and will be grouped together in this Note under the general heading of Fundamentalists. These people claim to adhere to the original doctrines of the Latter-day Saint (Mormon) Church and refuse to recognize the renunciation of the practice of plural marriage by the orthodox church. A brief summary of the development of this group is necessary to achieve a proper perspective of the existing problems.

According to the doctrines of the LDS Church, Joseph Smith, the founding prophet, had a revelation from God which reinstated the principle of celestial or plural marriage among the Christian peoples.[2] Members of the Church engaged in plural marriage principally during the period following their migration to Utah in 1847.[3] Only a small percentage of the Church membership were engaged in the practice as the Church restricted participation to those considered fit financially and morally. However, in the period immediately preceding 1890 it became obvious that Utah would be denied statehood unless the practice of plural marriage ceased. In 1890 polygamy was renounced by the Church.[4] It is generally believed that the contracting of new polygamous marriages in the main body of the Church largely ceased at this time. However, some Mormons refused to accept the official position of the Church and continued to engage in plural marriage, claiming that the renunciation was a mere man-made ruling designed to end conflict between people in the Utah area and the federal government.[5] These people, now called Fundamentalists, claim to be bound by the earlier revelation.[6] However, they do not renounce the LDS Church, but recognize its formal organization although they claim its official doctrine in regard to plural marriage is

[1] Probably the largest group is that known as the United Effort which is organized on a community property basis and is best known for its settlement in Short Creek, Arizona.

[2] DOCTRINE AND COVENANTS § 132.

[3] Actually only approximately 2% of the Church membership practiced polygamy during the approximately 50 years it was approved by the LDS Church.

[4] This decision was submitted to the membership of the Church in the Wilford Woodruff "Manifesto" of 1890 and adopted by a Church conference in that same year.

[5] For a discussion of the view that the "Manifesto" was not a divine revelation see the pamphlet IS THE MANIFESTO A REVELATION? (Wilson Bookstore, Salt Lake City, Utah, 1956).

[6] See note 2 *supra*.

in error.[7] The LDS Church, relying on the theory that the renunciation of polygamy was a divine mandate, has made the practice of plural marriage grounds for excommunication.[8] It is the Fundamentalists against whom the weight of recent polygamy prosecution has been brought.

The use of the criminal law to deal with the practice of polygamy in the Utah area began in Congress in 1862,[9] but it was not until 1878 that the constitutionality of this legislation was tested. In *Reynolds v. United States*,[10] a convicted polygamist urged that his conviction was invalid since his activity was part of his religious belief and "necessary to avoid damnation." The Supreme Court of the United States rejected the contention that this activity was protected by the first amendment. The opinion stressed the position taken by Thomas Jefferson during debates on freedom of religion in the Virginia House of Delegates and cited him as stating " . . . it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against Peace and good order." [11] Further the court pointed out that polygamy was considered odious among all nations of Northern and Western Europe and hence was contrary to Anglo-American principles of morality.[12]

In 1882, Congress adopted an amended version of the Anti-Polygamy Act which, among other things, precluded polygamists from voting in the territories.[13] The law was tested in *Davis v. Beason*.[14] The appellant was accused of signing a false affidavit in order to vote in a congressional election and he challenged the law on the ground that it interfered with his freedom of religion. Justice Field, speaking for the United States Supreme Court, denounced plural marriage as a crime against the family. In affirming the conviction he stated, "Bigamy and polygamy are crimes . . . by the laws of the United States, and they are crimes by the laws of Idaho. . . . If they are crimes, then to teach, advise and counsel their practice is to aid in their commission, and such teaching and counseling are themselves criminal and proper subjects of punishment, as aiding and abetting crimes are in all other cases." [15]

A third Supreme Court decision in 1890 rounded out the early decisions relating to the constitutionality of legal sanctions against the polygamists.[16]

[7] MUSSER, A BRIEF BIOGRAPHICAL SKETCH OF THE LIFE, LABOR, AND FAITH OF SAINT JOSEPH WHITE MUSSER, c. 6, p. 10 (unpublished biography 1946).

> From my observations it may be concluded that in my feelings I am discarding the Church. This is not true. The Church of Jesus Christ of Latter-Day Saints is the very and only Church of Jesus Christ on earth today; its members who are living the fulness being members of the Church of the First Born. This is the only Church through which salvation can come to a fallen world. While in many respects the Church is out of order, a condition in which the Church has always fallen through the weakness of men, it has not been rejected. . . .

[8] No statistics are available on the number of excommunications.

[9] Act of July 1, 1862, c. 126, 12 STAT. 501.

[10] 98 U.S. 145 (1878).

[11] *Id.* at 163 (citing 1 JEFF. WKS. 45).

[12] *Id.* at 164.

[13] 22 STAT. 31 (1882), 48 U.S.C. § 1461 (1952).

[14] 133 U.S. 333 (1890).

[15] *Id.* at 341, 342.

[16] Late Corporation of Latter-Day Saints v. United States, 136 U.S. 1 (1890).

The Congressional Act of February 19, 1887, annulling the territorial charter of the Corporation of Latter-Day Saints and confiscating all land except that held for bona fide church purposes,[17] was challenged. In a five to three decision, the Court upheld the act, commenting that, "The existence of such a propaganda is a blot on our civilization. . . ." [18]

The 1894 enabling act providing for the admission of Utah as a state required that the Utah Constitution contain a provision prohibiting the practice of plural marriage.[19] This requirement was met [20] and provision for the enforcement of the constitutional prohibition against plural marriage has consistently been included in the Utah statutes which now make polygamy and unlawful cohabitation felonies.[21]

Since the admission of Utah as a state in 1896, efforts have been made by both Church and state to stamp out the Fundamentalist groups. The LDS Church excommunicated members who continued to engage in plural marriage.[22] The State of Utah prosecuted a number of cultists in 1938 [23] and again in 1944.[24] Also in 1944, the FBI conducted an investigation which resulted in several prosecutions for violations of the Mann Act.[25] Again in 1955 and the years following, there has been a resurgence of unlawful cohabitation prosecutions resulting in five convictions.[26] Further, in 1955 the Utah State Legislature appropriated $20,000 for use by the Office of the Attorney General in an investigation of polygamy.

The extent to which polygamy is practiced today is difficult to determine.[27] The number of persons involved has been variously estimated as anywhere from 1,600 to 20,000, the majority residing in Salt Lake County.[28] It is also claimed that, at least prior to recent enforcement measures, the practice of plural marriage had been growing both in the remote areas and in the population centers and was finding a considerable number of young converts.[29]

[17] Act of Mar. 3, 1887, c. 397, §§ 13, 26, 24 STAT. 637, 641.

[18] Late Corporation of Latter-Day Saints v. United States, 136 U.S. 1, 49 (1890).

[19] Act of July 16, 1894, c. 138, § 3, 28 STAT. 108.

[20] UTAH CONST. art. III, § 1.

[21] UTAH CODE ANN. § 76–53–1 (1953) (polygamy); § 76–53–2 (unlawful cohabitation).

[22] See note 8 *supra*.

[23] *E.g.*, State v. Jesup, 98 Utah 482, 100 P.2d 969 (1940).

[24] *E.g.*, State v. Barlow, 107 Utah 292, 153 P.2d 647 (1944); State v. Musser, 110 Utah 534, 175 P.2d 724 (1946), *rev'd*, 333 U.S. 95 (1948) (conspiracy to commit acts injurious to public morals).

[25] See Cleveland v. United States, 329 U.S. 14 (1946).

[26] State v. Barlow, *appeal docketed*, No. 8533, Utah Sup. Ct., March 11, 1957; State v. Smith, Crim. No. 15017, 3d Dist. S.L. Co., Utah, Jan. 18, 1956; State v. Kelsch, Crim. No. 14968, 3d Dist., S.L. Co., Utah, Dec. 17, 1955; State v. Jentzsch, Crim. No. 483, 2d Dist., Davis Co., Utah, Dec. 6, 1955. In State v. Darger, Crim. No. 15172, 3d Dist., S.L. Co., Utah, March 6, 1957, the conviction was set aside on grounds of lack of evidence, and the case was dismissed.

[27] Information relating to the nature of the present practice of polygamy has been obtained through interviews with the staff of the Utah Attorney General's Office, the Special Investigator for the Attorney General's Office, State Welfare Department Officials and various individuals having close association with the Fundamentalist organizations.

[28] Compilations of figures submitted to the State Welfare Commission by the various county organizations as of March, 1956, suggest a total number of 2,000. The Special Investigator for the Attorney General believes the amount is close to 20,000, while persons associated with the Fundamentalists suggest the rather small figure of 1,600. All sources agree the majority of Fundamentalists reside in Salt Lake County.

[29] Mensel, *Children Suffer Most in Area's Polygamy Cults*, Deseret News and Telegram, Oct. 19, 1956, p. A13, col. 1.

The Supreme Courts of both the United States and the State of Utah have concluded that polygamy is a fundamental threat to the family order which is, in turn, basic to our society.[30] Certainly the practice of polygamy is contrary to the accepted mores. However, as to actual harm done from a social standpoint, the evidence is conflicting.

It is a common assumption that the Fundamentalists live in remote, out-of-the-way localities where they subsist on meager incomes which provide only a bare existence. Their children are reputed to be ill-clothed and ill-fed and to be denied necessary medical care and adequate schooling.[31] These assumptions do not appear to be wholly correct. As has been previously noted, the greatest single congregation of cultists is to be found in Salt Lake County,[32] while the population of Short Creek (the most widely known settlement) is about 350.[33] Further, only 45 known cultists are on the welfare roles of the state.[34] Many of the cultist youth have attended colleges in Utah and neighboring states. However, it must be pointed out that the minimal number of known Fundamentalists found on welfare roles can be explained by reasons other than lack of need. First, many cultists are not known by the various county welfare departments;[35] secondly, there may be a conscious effort on the part of the Fundamentalists to refrain from applying for welfare in the belief that to do so would be to draw the attention of state officials and would give foundation to the charge of impoverished conditions.[36]

The general consensus of opinion is that the greatest harm is done to the children in these families. This is contended not only because of the above-mentioned handicaps, but also because the children are taught disrespect of the law[37] and are denied a free choice in the matter of whether they wish to follow these beliefs. It is alleged that young girls are married into a plural relationship at an age when they are too young to realize the full import of their actions.[38]

[30] See notes 10 and 14 *supra*. See also State in Interest of Black, 3 Utah 2d 315, 283 P.2d 887 (1955), *cert. denied* 350 U.S. 923 (1955) (discussed on p. 386 *infra*).

[31] See note 29 *supra*. See also State in Interest of Black, *supra* note 30, at 897 (the court in referring to testimony in the lower court pointed out that none of the particular polygamist father's houses had inside plumbing and none of the children had a high school education).

[32] See note 28 *supra*.

[33] See note 29 *supra*.

[34] Figures compiled March, 1956, in the Office of the State Welfare Commission from reports of the County Welfare agencies. It was also pointed out in an interview with a State Welfare Official that some of those persons on the welfare roles could easily be children of those persons serving jail sentences for unlawful cohabitation.

[35] This would seem obvious since the estimates of the Welfare Department as to total number of polygamists is considerably lower than that of the Attorney General's Office. See note 28 *supra*.

[36] In an interview with Mr. J. Farr Larson of the State Welfare Department, he indicated that some suspected Fundamentalists dropped off the welfare roles after the Short Creek Raid of 1953. See note 49 *infra*.

[37] See State in Interest of Black, 3 Utah 2d 315, 283 P.2d 887 (1955).

[38] See Mensel, *supra* note 29.

> Girls in their teens frequently are pushed into polygamous marriages before they are old enough to realize what is happening. One resident [of Short Creek] recalled two girls, one thirteen and the other fourteen who were thrilled with the prospect of being allowed to go north to "spend the winter" only to find on arrival they were being given in marriage to older men whom they had never seen before.

The Fundamentalists themselves claim the taking of a plural wife is strictly controlled and that statements such as the above are total distortions.

But the acceptance of the assertion that the practice of polygamy creates serious social evils and should be combatted by law does not resolve the problem. The practical problems of investigation and prosecution present substantial barriers to the liquidation of the practice by the traditional means. The fact that no certainty appears in the estimates, or more correctly guesses, of the extent of the practice or the number of believers is proof of the difficulty of investigation. Once the supposed polygamist is located, obtaining a sufficient amount of evidence to justify taking a case to trial is extremely difficult. False names are used on birth certificates. A person having several wives will often locate them in two or more of the intermountain states and then obtain a traveling-type employment. Children of one wife may be placed with another. To further complicate matters, neighbors are often sympathetic and hesitate to give information. Thus while numerous persons are suspected of practicing polygamy, only four so-called Fundamentalists have been brought to trial in Salt Lake County in the last three years.[39]

While the cases which arose in the late nineteenth and early twentieth centuries were usually prosecuted on the charge of polygamy,[40] that method has been discarded due to the difficulty of proving the second marriage. The plural marriage usually takes place in virtual secrecy with only the immediate members of the family present and no marriage certificate is obtained. The service is performed by one of the sect. Frequently only the lawful wife will go by the husband's name while subsequent wives will retain their maiden names.[41]

At the present time, the usual charge brought against the Fundamentalist is that of unlawful cohabitation.[42] This offense is considerably easier to prove since it requires only a showing that the defendant lived with more than one woman as husband and wife. There is no need to show a second marriage or even to prove the act of intercourse.[43] However, many practical problems of proof exist. In a typical trial involving unlawful cohabitation, the defendant will admit that the children of two or more women are his and that he has visited the several families, often taking parcels of food or clothing. But, these facts would not seem to be sufficient to justify a conviction because they do not necessarily prove that the defendant lived with the mothers of his children at the same time. Further, his visitations would seem to be fully proper since society encourages the father of illegitimate children to provide for them. A second problem faced by the prosecution is that most of the testimony necessary to prove cohabitation must come from the neighbors who have observed the activities of the defendant. Often these people are reluctant to testify. They may be friends of the defendant or may sympathize with his religious beliefs.

In 1944 several members of the polygamist cult were prosecuted for violations of the Mann Act [44] which prohibits the transportation of persons across

[39] See note 26 *supra*.

[40] *E.g.*, Reynolds v. United States, 98 U.S. 145 (1878).

[41] A typical example is X who raised two families under totally different names and recorded birth certificates in that manner. INTERVIEWS.

[42] *E.g.*, State v. Barlow, 107 Utah 292, 153 P.2d 647 (1944).

[43] *Ibid.*

[44] 36 STAT. 825 (1910), 18 U.S.C. § 2421 (1952).

state lines for the purpose of immoral conduct. Others were charged with conspiracy to violate the laws of Utah. Several convictions were obtained in both state and federal courts.[45] The convictions under the Mann Act were upheld by the Supreme Court of the United States on the ground that to transport females for the purpose of plural marriage was to engage in immoral conduct within the meaning of the Mann Act.[46]

Apparently feeling that penal sanctions were not solving the problem, in 1954 the State of Utah attempted to remove children from the custody of their Fundamentalist parents on the ground that they were "neglected children" under the Utah statutes.[47] The test case,[48] appearing first in the Juvenile Court for the Sixth District in the State of Utah, involved the children of Vera Black, a polygamist wife. The children's father was a Fundamentalist who had been arrested by the State of Arizona in a raid against a Fundamentalist settlement in Short Creek, Arizona, in 1953,[49] and who had been placed on probation by the State of Arizona after promising to refrain from illegal conduct. Although living at times with Mrs. Black, he apparently had not had sexual relations with her since his parole. While testimony was offered indicating poor living conditions this reason was not used to justify the taking of the children. Rather, the children were held to be living in an immoral atmosphere due to their religious teachings; *viz.*, plural marriage was the law of God and the law of God was higher than the law of man. The mother's claim that the children had their "free agency" and were not compelled to follow the religious teachings was rejected by the trial court largely on the basis of evidence that the majority of her children had married into polygamist families. Mrs. Black was given the opportunity of keeping her children if she would sign an oath not to teach them to violate the law

[45] See notes 20 and 21 *supra*.

[46] Cleveland v. United States, 329 U.S. 14, 19 (1946). "The establishment or maintenance of polygamous households is a notorious example of promiscuity." But see Cleveland v. United States, *supra* at 24 (dissenting opinion by Murphy).

[47] UTAH CODE ANN. § 55–10–6 (1953) (definitions).

> . . . "Neglected child" . . .
>
> A child who is abandoned by his parent, guardian or custodian.
>
> A child who lacks proper parental care by reasons of the fault or habits of the parent, guardian or custodian.
>
> A child whose parent, guardian or custodian neglects or refuses to provide proper or necessary subsistence, education, medical or surgical care or other care necessary for his health, morals or well-being.
>
> A child who is found in a disreputable place or who associates with vagrant, vicious or immoral persons.

UTAH CODE ANN. § 55–10–30 (1953). In cases of delinquency, dependency or neglect, the state has the following alternatives:

> (1) That the child be placed on probation or under supervision in his own home, or in the custody of a relative or other fit person, upon such terms as the court shall determine;
>
> (2) That the child be committed to the state industrial school or to any suitable institution, children's aid society or other agency incorporated under the laws of this state and authorized to care for children or to place them in family homes, or to any such institution or agency provided by the state or a county.

[48] State in Interest of Black, 3 Utah 2d 315, 283 P.2d 887 (1955), *cert. denied*, 350 U.S. 923 (1955).

[49] Utah has never gone as far as the famed Short Creek Raid by Arizona officials in 1953 in which nearly the entire population of Short Creek, Arizona, a small town on the Utah-Arizona line, was arrested. The town was a well-known Fundamentalist colony with a population of around 350. See Colliers, Nov. 13, 1953, p. 27; Time, Aug. 3, 1953, p. 16.

and affirmatively teach them to obey particularly the laws relating to marriage and sexual offenses.[50] She refused to do so and the children were taken.[51]

The Supreme Court of Utah in affirming the Juvenile Court decision pointed out that the "free agency" argument had no validity since the children were obviously reared to polygamy.[52] They further stated in rejecting the constitutional argument that:

> The good name of this State and its people, committed to sustaining a high moral standard, must not be obliged to suffer because of the unsavory social life of appellants and others claiming the constitutional right under the guise of religious freedom to bring shame and embarrassment to the people of this state.
>
> . . . .
>
> There must be no compromise with evil.[53]

The irony of the *Black* case lies in the fact that in offering the mother the chance to retain the children on signing the oath, the court is attesting to its faith in the integrity and honesty of the parents, who are responsible for the so-called immoral atmosphere. Further, while the children were undoubtedly being taught disrespect of one state law, it is doubtful whether the atmosphere of a foster home would be more conducive to good morals than the care of parents who in most respects are extremely moral and who have excellent reputations for honesty. However, as a purely practical matter, it is doubtful if the state could, in many cases, obtain a sufficient amount of proof to justify the taking. Most of the testimony favoring the state was elicited from Black's children.[54] In subsequent cases a reluctance on the part of such witnesses to so accommodate the prosecution might well demand a different result.[55]

[50] The Juvenile Court decree provided:

(b) That the parents . . . shall at all times refrain from counseling, encouraging and advising the children to violate the laws of Utah relating to marriage and sexual offenses.

(c) That the parents . . . shall counsel and advise the children to obey the laws of Utah relating to marriage and sexual offenses. . . . the parents shall affirmatively encourage their children to abide by the laws of Utah, and that the children should do so in disregard of any *religious* doctrines to the contrary.

Subsection (f) required the parents to submit a sworn statement to the court of the willingness to comply with its requirements as a condition to retaining custody of the children. State in Interest of Black, 3 Utah 2d 315, 322, 283 P.2d 887, 892 (1955).

[51] Mrs. Black later signed an oath which included the following provisions, and the children were returned:

3. That she does believe in the principle of plural marriage, but that she does not now belong to any organized group which encourages its practice and that she does not intend to teach her children to practice it or to encourage them to do so.

4. That it is her intention to teach and encourage and that she will teach and encourage her said children to abide by the laws of the State of Utah and particularly by those laws of said State pertaining to polygamy and all other sexual offenses.

State in Interest of Black, No. 3752 — 3758A, Juvenile Court, 6th Dist., Wash Co., Utah, May 31, 1956.

[52] State in Interest of Black, 3 Utah 2d 315, 346, 283 P.2d 887, 908 (1956).

[53] *Id.* at 348, 352, 283 P.2d at 910, 913. But see concurring opinion 353, 283 P.2d at 914 (suggests polygamy is not inherently immoral).

[54] State in Interest of Black, 3 Utah 2d 315, 320–322, 283 P.2d 887, 896–899 (1955). A full report of the relevant records of the juvenile court proceedings can be found in 20 TRUTH 51–70, 101–112 (1954).

[55] In interviews with interested persons, it was suggested that perhaps the testimony was willingly offered in order that the case could test the power of the state to utilize the juvenile courts to supplement its anti-polygamy laws.

As nearly as can be determined, existing enforcement measures are keeping the Fundamentalists on the move and possibly are hindering the growth of the practice.[56] This is probably due as much to the constant surveillance of the special investigator as to the recent convictions. There is no indication that polygamy is in any danger of being extirpated. It would seem that the state has two alternatives to continuing the existing policy which largely amounts to one of containment; conduct a prolonged drive using all the legal weapons at their disposal and perhaps more stringent legal sanctions, or refrain from prosecution entirely.

The presently utilized enforcement measures are merely a hindrance to the Fundamentalists. However, it is doubtful whether the practice can be eliminated without the utilization of totalitarian methods of enforcement. The Fundamentalists are not criminals under the common connotation of the term, but rather a deeply religious group of people who follow their religious practice under what is generally conceded to be the sincere belief that to do so is to obey the commandments of God and to insure salvation. They can more accurately be termed religious fanatics, but as such it is doubtful that ordinary sanctions and criminal theories can be successfully applied. Judge Robert S. Tuller of the Superior Court of Pima County, Arizona, delivered a speech to the members of the Fundamentalist sect who had pleaded guilty to unlawful cohabitation subsequent to their arrest in Short Creek in 1953. His comments seem to express the criminological problems involved.

> Although fanaticism flourishes in ignorance I find among you gentlemen keen intelligence, extensive formal education, broad travel, sophisticated outlook, heroic service to your country, pleasant personality, industry, humor and optimism. Yet you and each one of you have pleaded guilty to a crime which, under the law, carries with it the stigma of moral turpitude and there are no mitigating circumstances.
>
> . . . .
>
> The purposes of punishment have been said to be: First: to give revenge for the offense that has been committed against it [the state] I disown this reason for punishment. . . .
>
> Second: to rehabilitate the criminal and deter him from committing the same crime again. I do not honestly believe that I can rehabilitate you gentlemen. You have an unshakeable belief that it is the rest of the world that is out of step . . . nothing short of life imprisonment would prevent you from committing the same crime in the future. . . .
>
> Third: The third reason for punishment is said to be to deter others. Unfortunately, imprisonment for you will not deter other fanatics from doing likewise. Religious fanaticism is fed by hardship. Imprisonment for you would make martyrs and heroes of you in the eyes of others who are inclined in the same direction, instead of leaving you as you are, a band of forlorn men soon to be forgotten.

In addition to the fact that more strenuous enforcement might be far from successful from a criminological view, it also might be a practical impos-

[56] Both Fundamentalists and state officials agree that the current pressure is forcing the cultists to scatter (the Attorney General's Office asserts that 3,000 have left Salt Lake County in the last few years) and is perhaps dissuading some young people from joining the movement. *But see* Mensel, *supra* note 29. The population of Short Creek is higher than ever and new colonies are being planned in other areas in Utah and in Idaho.

sibility. Many county officials are reluctant to prosecute the Fundamentalists either because they are too busy or because they fear the effect at the polls.[57] Further, the financial cost of a full-scale effort would be enormous.

It is possible that the polygamists could more successfully be dealt with if no effort were made to enforce the anti-polygamy laws. Such a proposal might well violate the Utah Constitution and would undoubtedly be unacceptable to elements in the state to whom polygamy is embarrassing. However, polygamy is supposedly an obnoxious practice, and one held in considerable disrepute by the majority of American citizens. According to the Supreme Courts of the United States and Utah it violates the family order which is basic to our society. In view of these factors, it seems unlikely that plural marriage would increase a great deal if no efforts to prosecute were made. On the other hand, if Fundamentalist families were allowed to relax their constant vigilance and to live freely in the community they would be more likely to absorb the culture of the community. Their children would associate with others and would tend to conform to the general pattern of thought and behavior. It is certainly open to argument, whether the polygamists are hindered or helped by prosecution.

No practical positive plan to eradicate polygamy seems at hand. Rather it is submitted that the present policy of the State of Utah is probably the only feasible method of combatting the practice. By prosecuting polygamists as sufficient evidence is found, the state is clearly indicating its disapproval and applying the weight of illegality to the social pressures against polygamy. It must be conceded, however, that there is little if any possibility that presently enacted legislation and policies of enforcement will eliminate the practice of plural marriage in the foreseeable future.

Jerry R. Andersen

[57] *But see* a reply to such a suggestion by the Salt Lake County Attorney, Frank E. Moss, Salt Lake Tribune, Jan. 27, 1956, p. B7, col. 5. For a discussion of the general problems of local enforcement of state laws see Note, 5 UTAH L. REV. 70 (1956).

CASES NOTED

UTAH SUPREME COURT EXTENDS DEFINITION OF PRIVATE UNDERGROUND WATER

Defendant owned land so located that spring runoff and overflow from the Weber River maintained a high water table, allowing him to grow crops without other means of irrigation. Defendant had never filed an application to appropriate the water nor had he made an artificial diversion. Plaintiff, the Weber Basin Water Conservancy District, initiated proceedings to condemn part of defendant's land for a canal as part of an over-all reclamation project. The trial court refused to permit the introduction of evidence to show that portions of defendant's land not taken by the District would be damaged. It appeared that any loss of subirrigation water would not be attributable to the canal but to the entire project. On appeal to the Utah Supreme Court, *held,* reversed. The case was remanded to the trial court with instructions to retain jurisdiction until the water was diverted in the completed canal, and to allow defendant to offer evidence which might show compensable damage to that part of his land not actually taken. *Weber Basin Water Conservancy District v. Gailey,* 303 P.2d 271 (Utah 1956) (Wade, J., concurring, Worthen and Crockett, JJ., dissenting) *rehearing granted,* No. 8478, April 9, 1957.

The common law riparian theory[1] of water law used in the Eastern states was not suited to the conditions of the arid West. The trend of Utah decisions and statutes has been toward public ownership of water and the doctrine of appropriation.[2] This trend resulted in 1935 in the enactment of a statute declaring all water in the state whether above or under the ground to be public water and subject to appropriation.[3] Such a declaration could not constitutionally change the status of water from private to public but was a statement of legislative policy favoring public ownership of water resources.[4] The

[1] Clark v. Pennsylvania R.R., 145 Pa. 438, 22 Atl. 989 (1891); Mason v. Hill, 5 Barn. & Adol. 1, 110 Eng. Rep. 692 (1833); see Kinyon, *What Can a Riparian Proprietor Do?* 21 MINN. L. REV. 512 (1937).

[2] In 1903, legislation was passed requiring an application to obtain a right to water "above or under the ground, flowing in defined channels." Utah Laws c. 100 § 34, 47 (1903). With respect to underground water not in defined channels, the doctrine of common law ownership was first adopted. Willow Creek Irrigation Co. v. Michaelson, 21 Utah 248, 60 Pac. 943 (1900). A requirement of reasonable use was then imposed on the owner, thus preventing waste. Garns v. Rollins, 41 Utah 260, 125 Pac. 867 (1912). Shortly thereafter the private ownership doctrine was abandoned, and the doctrine of correlative rights, allowing overlying landowners to share in the water for use on the overlying land, was adopted with respect to artesian basins. Horne v. Utah Oil Refining Co., 59 Utah 279, 202 Pac. 815 (1921). This position was qualified in Glover v. Utah Oil Refining Co., 62 Utah 174, 218 Pac. 955 (1923), to permit a landowner to transport his share out of the basin. In 1935 the court embraced the appropriation doctrine for water in artesian basins in the cases of Wrathall v. Johnson, 86 Utah 50, 40 P.2d 755 (1935), and Justesen v. Olsen, 86 Utah 158, 40 P.2d 802 (1935). For a comprehensive review of this development see Note, 5 UTAH L. REV. 181 (1956).

[3] UTAH CODE ANN. § 73-1-1 (1953).

[4] Riordan v. Westwood, 115 Utah 215, 224, 203 P.2d 922, 927 (1949).

> . . . [I]t is clear that the legislature intended, as far as it was legally possible, to declare all waters of the state whether under or above the surface of the ground and whether flowing or not, to be public property subject to the existing rights of the use thereof. Such has probably always been the law of this state regardless of this amendment. Of course the legislature cannot by such an enactment change from private to public ownership waters which by their nature were a part of the soil and as such belonged to the owner of the land on which they are found.

approach taken by the Utah court has been to differentiate private water by the use of the term "percolating." The term "percolating," therefore private, in the earlier cases meant all underground water not flowing in defined channels.[5] In *Wrathall v. Johnson*[6] the court held that water in an artesian basin was public and subject to appropriation, and in this sense not "percolating" or private. However, in *Riordan v. Westwood*[7] the court held that water "percolating" near the surface, supporting plant life, and not flowing in sufficient quantity to run off the land, was private water and not subject to appropriation. The case involved a small quantity of water seeping from higher ground above the zone of saturation toward the general water table. Under these decisions the term "percolating" has become a legal classification and not necessarily descriptive of the physical occurrence.

To the ground-water geologist, the term "percolating" is descriptive of free ground water which moves through granular materials below the zone of saturation or water table.[8] This is to be distinguished from gravity or vadose[9] water which occurs above the zone of saturation and may seep downward through the earth toward the water table. This distinction is important in a legal sense in terms of the possibility of diverting the water or interfering with its occurrence at a particular time and place. Gravity water is not subject to extraction in significant amounts and may in a sense be considered part of the soil through which it passes. Water below the zone of saturation may be thought of as being contained in a reservoir: it is subject to diversion and development; its occurrence may be affected by operations some distance away; its boundaries and quantity may be determined with reasonable certainty.[10] The water in the instant case is termed "percolating" but moves in the zone of saturation as distinguished from the occurrence in *Riordan*.[11] A high water table covering a large area is maintained by the surface stream system and large quantities of spring runoff.

The opinions in the instant case suggest several conflicting theories of law, each of which is closely connected with the problem of classification of the water in question. The majority stated that there was not sufficient evidence

[5] Willow Creek Irrigation Co. v. Michaelson, 21 Utah 248, 60 Pac. 943 (1900); Herriman Irrigation Co. v. Butterfield Mining & Milling Co., 19 Utah 453, 57 Pac. 537 (1899); Crescent Mining Co. v. Silver King Mining Co., 17 Utah 444, 54 Pac. 244 (1898); Sullivan v. Northern Spy Mining Co., 11 Utah 438, 40 Pac. 709 (1895).

[6] 86 Utah 50, 40 P.2d 755 (1935).

[7] 115 Utah 215, 229, 203 P.2d 922, 929 (1949).

> Where, as here, in its natural state water is diffused and percolates through the soil so near the surface that without artificial diversion or application it produces plant life and thereby beneficially affects the land, and where its course cannot be traced onto the lands of any person, other than the owner of the land where it is found, such water is percolating water, and the right to the use cannot be acquired by appropriation under our appropriation statute.

[8] TOLMAN, GROUND WATER 562 (1937).

[9] *Id.* at 564.

[10] Tolman and Stipp, *Analysis of Legal Concepts of Subflow and Percolating Waters*, 21 ORE. L. REV. 113, 129 (1942).

> . . . The true character of the movement of subsurface water should be emphasized. Whereas gravity water seeps downward through granular materials of the zone of aeration, percolation of the free ground-water body is always in the direction of the water-table slope and the entire percolating water body below the water table constitutes the subsurface reservoir.

[11] 115 Utah 215, 203 P.2d 922 (1949).

in the record to prove damages resulting from the operation of the canal alone, and that damages attributable to the entire project were not claimed in this appeal. The opinion assumes that the defendant had some right to subirrigation but did not point out the legal basis for that assumption.[12] The concurring opinion agreed with the dissent that the question as to damages attributable to the entire project was properly before the court; the position was taken that destruction of "natural benefits" resulting from subirrigation would damage property for a public use and would be compensable regardless of the requirements of the appropriation theory or the inapplicability of the riparian theory. It further relied on the authority of the *Riordan* case. Language in the concurrence suggests that the water was "part of the soil," which is an application of the common law theory of ground water — ownership by the owner of the land.[13] The dissenters reasoned that the result of the concurring opinion implied an application of the riparian rights theory to underground water.[14] They concluded that the defendant had no right to subirrigation, relying on the applicability of the doctrine of appropriation which in this state requires both artificial diversion[15] and statutory application.[16]

The contention that any *migratory* water is literally a part of the soil is obviously contrary to the physical facts.[17] The common law theory of private ownership employed the fiction that all water beneath the surface of the owner's land, regardless of the source, was a "part of the soil."[18] Although this theory gave to the landowner a proprietary interest in such water, the ownership theory did not protect the continued flow of water into the land nor did it prevent withdrawals by adjacent landowners. Under the facts of the instant case, since the alleged damages arise from operations off the land, the private ownership theory would deny defendant's right to the continued flow of the water.[19] This would defeat any basis for damages other than com-

[12] Instant case at 272. The court said, "We cannot here determine without evidence the nature of appellant's right, whether or not he will be damaged, or whether the damage he claims is remote and speculative."

[13] Acton v. Blundell, 12 Mees. & Wels. 324 (1843); see Huber v. Merkel, 117 Wis. 355, 94 N.W. 354 (1903).

[14] Instant case at 276.

[15] See, *e.g.*, Bountiful City v. De Luca, 77 Utah 107, 292 Pac. 194 (1930).

[16] UTAH CODE ANN. §§ 73-3-1, 2 (1953).

[17] Furthermore, if this fiction were adopted, the logical result would be that injury resulting from interference with the water would be in the nature of trespass to land and the measure of damages would be the difference in value of the land before and after completion of the reclamation project. Such damages may include not only the cost of replacing the water but also the cost of levelling the land, constructing facilities for surface irrigation, and possibly applying the water to the land in the future.

[18] Acton v. Blundell, 12 Mees. & Wels. 324 (1843); Gould v. Eaton, 111 Cal. 639, 44 Pac. 319, 320 (1896).

> . . . The water which is held by the soil is a portion of the soil itself, and belongs to the owner of the land. . . . This rule is not changed by the character of the material through which the water percolates. . . . So long as the water is in the condition of infiltration or percolation, it is part of the soil. . . .

[19] The majority of the court in Riordan v. Westwood, 115 Utah 215, 226, 203 P.2d 922, 928 (1949), recognized the fact that the ownership theory of underground water would not protect the landowner from the effect of operations off the land:

> In other words, under that doctrine, the owner of the land does not have any right to the waters percolating through the soil before they come into his land nor after they depart therefrom, but while they are in his land they are a part of the soil and belong to him, and he can do with them, during such time, as he sees fit.

pensation for the value of the land actually taken, and possibly, changes in the water supply directly attributable to the segment of the canal on the defendant's land.

To declare migratory water a part of the soil on the ground that its presence is beneficial to the land is to imply the application of the common law riparian theory which was traditionally applicable only to surface streams.[20] According to this theory, an owner of land adjacent to a stream or watercourse was entitled to the flow of the water substantially undiminished in quantity or quality. This approach would prevent the use or diversion of the water before it reached defendant's land solely on the basis of the position of his land in relation to the natural underground watercourse. Logically, the depth of the water table and the fact of condemnation of a right of way would be irrelevant and all owners of overlying land who receive such a natural advantage from this relationship would be entitled to compensation for destruction of such benefits. This conclusion would defeat the concept of public ownership and abrogate the doctrine of prior appropriation as applied to underground water.

The concurring opinion suggests an additional reaction under which the defendant could be compensated. This "natural benefits" concept apparently stems from the idea that a distinction must be made between condemnation for a public use and interference by an appropriator. However, to grant relief for a taking, a right in the thing taken must first be established. A paradox is created in that the same "natural benefits" are enjoyed by owners of land across which a right of way is not being condemned. Such a landowner would have to take the initiative and assert some affirmative water right as against the District or other junior appropriator. Traditional water law theories would not support such a right. Recognition by the court of a vested interest in some inherent natural benefit resulting from the proximity of a natural underground watercourse could not be distinguished from recognition of riparian rights to underground water. If such acceptance of riparian or common law approaches be deemed advisable by the court, it would be less confusing expressly to acknowledge such acceptance.

The appropriation theory provides a usufructuary right to the continuous flow of that quantity of water actually diverted and beneficially used.[21] For defendant's purposes in the instant case, an artificial diversion in the normal sense would have been impossible and unnecessary. The fact that crops other than the natural vegetation were being grown indicates a conscious attempt to beneficially employ some of the water, but this does not dispose of the statutory requirement of proper application with the state engineer.

From the above examination of the various possible theories under which a right to subirrigation may be alleged, it may be seen that an exception or modification of one or more would be required to support such a result. It may be felt that the law should recognize some procedure by which a right to subirrigation may be established. This should not be done by perpetuating

[20] See Note, 5 UTAH L. REV. 181 (1956).

[21] E.g., Adams v. Portage Irrigation, Reservoir & Power Co., 95 Utah 1, 72 P.2d 648 (1937).

an entirely unscientific concept of "percolating" water in an attempt to declare such water private.

The following language of one member of the court is illustrative of the inconclusive effect of such an approach:

> . . . It is well established in this state that *percolating* waters to the extent that they *confer a benefit upon the land* are a part of and belong to the owner of the soil and are not public waters of the state nor subject to appropriation.
>
> In Riordan v. Westwood, we noted that this court has always recognized that *percolating* waters are not public waters but are part of the ground through which they pass and belong to the owner thereof. . . .[22] (Emphasis added.)

In the light of the Utah development, we have observed that "percolating" is not descriptive of the physical occurrence of water but is a legal classification of that underground water which is private. Analyzing the above statement, we see that the classification as private is subject to the requirement that the water "confer a benefit upon the land." Since "percolating" provides no guide to the type of water, this "benefit" must be relied upon. But great practical benefit may result from the existence of artesian pressure or a high water table which does not support natural vegetation. *Wrathall v. Johnson* excludes artesian water from the private classification. It may be that this term is restricted to ground water naturally supporting crops or other vegetation. Although characterized as an occurrence of water which is inherently private, this condition is as accurately described as a usufructuary, beneficial use of water from a public source. In reality the statement obscures the application of common law ownership or riparian theories.

On the other hand, if attention is given to the natural occurrence of ground water exceptions to the rule of public ownership need not be made. The term "private" adds little to the description of gravity water which merely moistens the ground sufficiently to support some natural vegetation and has not yet reached the general water table. Such water is not a part of a general stream system, and is not physically subject to diversion without substantial damage to the land itself. Nature draws its own line between that which is subject to diversion and subsequent appropriation and that which is such a part of the soil that it cannot be extracted without altering the essential characteristics of the land.[23]

Application of the doctrine of appropriation to the instant case in an attempt to find a remedy entails the following, conceivably justifiable subversion. Under the conditions of natural subirrigation of crops, an artificial diversion is unnecessary, but the intent and beneficial use are clear. From this

[22] Instant case at 274.

[23] Concurring opinion of Straup, J., in Wrathall v. Johnson, 86 Utah 50, 130, 40 P.2d 755, 790 (1935), described "percolating waters" as:

> . . . diffused waters in lands privately owned, percolating or seeping through the ground, moving by *gravity* in any or every direction along a line of least resistance, not forming any part of a stream or other *body of water* either surface or *subterranean*. . . . (Emphasis added.)

This language is roughly descriptive of gravity water and may not be objectionable as a designation of private water if *subterranean body of water* is taken to mean underground water below the general water table. See Tolman and Stipp, *supra* note 10.

point, reference could be had to the position taken in *Wrathall v. Johnson*,[24] where the requirement of statutory application was waived on grounds of an established diligence right and on the fact that such an application theretofore had not been considered necessary. This theory would provide an appropriative right to that quantity of water beneficially used in raising the crops.[25]

However, anyone benefiting from the natural occurrence of a supply of underground water should be aware of the fact. It would not seem unreasonable under the circumstances to waive the requirement of artificial diversion but require, in the future, submission of the statutory application as is necessary to the acquisition of any other appropriative water right in this state. This approach would be consistent with Utah legislative policy favoring public ownership of water resources. It would avoid piecemeal and confusing retention of common law riparian and private ownership concepts which have been repudiated[26] as unfavorable to maximum beneficial use.

Staff

PROOF OF INTENT UNNECESSARY IN CRIMINAL PROSECUTION FOR CONSPIRACY TO INJURE CITIZENS IN EXERCISE OF VOTING PRIVILEGE

Defendants, while serving as election officials in a general election, admittedly cast and caused to be cast false and fictitious ballots. They were indicted under section 241 of the Civil Rights Act,[1] which prohibits conspiracy ". . . to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States. . . ." It was conceded that the acts of defendants caused a pollution of the ballot box, but it was contended that they could not be convicted of a crime under the statute without proof of an *intent* to injure or oppress citizens in the free exercise or enjoyment of a federally guaranteed right. Defendants were convicted in the United States District Court. On appeal to United States Court of Appeals, Seventh Circuit, *held*, affirmed. To sustain a conviction for violating the constitutional right to vote,[2] it need only be shown that the defendant acted voluntarily and not that he intended to violate a constitutional right. *United States v. Nathan*, 238 F.2d 401 (7th Cir. 1956), *cert. denied*, 1 L. Ed. 2d 663 (1957).

The constitutionality of section 241 was upheld in many early cases;[3] it was first applied to state election officials in *United States v. Mosley*.[4] In that

[24] 86 Utah 50, 40 P.2d 755 (1935).

[25] The District would, under this approach, be able either to compensate the defendant for the water right or invoke UTAH CODE ANN. § 73–3–23 (1953) which grants a right of replacement to a junior appropriator.

[26] Stowell v. Johnson, 7 Utah 215, 26 Pac. 290 (1891); *accord*, Whitmore v. Salt Lake City, 89 Utah 387, 57 P.2d 726 (1936).

[1] This statute is now 62 STAT. 696, c. 645 § 1, 18 U.S.C. § 241 (1948), but in prior sections of the code it was §§ 6; 5508; 19; and 51. For purposes of this discussion the current citation will be used.

[2] U.S. CONST. art. I, §§ 2, 4.

[3] See *e.g.*, *Ex parte* Yarbrough, 110 U.S. 651 (1884); Motes v. United States, 178 U.S. 458 (1900); United States v. Waddell, 112 U.S. 76 (1884).

[4] 238 U.S. 383 (1915).

case the court held that section 241 protected the specifically enumerated constitutional right of citizens to vote. The failure to count and return the vote as cast was as much an infringement of that right as it would be to exclude the voter from the polls. Such an infringement is a violation of the code and there is no necessity of showing any "intent" to violate specific constitutional rights. The *Mosley* decision has been followed up to the present time.[5] The law pertaining to section 241 would seem to be clear in light of cases following *Mosley*. However, a great deal of confusion has been injected by four fairly recent civil rights decisions[6] involving prosecutions under section 241 and the following section 242.

Section 242 states: "whoever, under color of any law, statute, ordinance, regulation or custom, willfully subjects any inhabitant of any State . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . shall be fined. . . ." As can be seen by comparing these two sections, the wording is slightly different but there are "no differences in the basic rights guarded." [7] Section 241 is generally referred to as the conspiracy statute and 242 is referred to as the substantive statute and prohibits individual action under color of state law. Each protects in a different way the rights and privileges secured to individuals by the Constitution.[8] The confusion has arisen as a result of two factors: the failure of the Court to agree on the proper distinction between the two sections, and a sharp division of the Court as to the proper disposition in each case.

Indictments in *United States v. Classic*[9] were brought under both sections 241 and 242, charging that defendants "willfully altered and falsely counted and certified the ballots of voters cast in the primary election." [10] This indictment was held sufficient.[11] The court confined itself, however, to deciding whether the acts of the election officials were "state action" [12] under section 242 and whether the federal government had the power under the Constitution to regulate primary elections.[13] The importance of the *Classic* case is

[5] *In re* Roberts, 244 U.S. 650 (1917); United States v. Classic, 313 U.S. 299 (1941); United States v. Saylor, 322 U.S. 385 (1944); *cf.* United States v. Gradwell, 243 U.S. 476 (1917). The court recognized the authority of *United States v. Mosley* but held that § 241 of the Criminal Code does not apply to nominating primaries.

[6] United States v. Classic, 313 U.S. 299 (1941); Screws v. United States, 325 U.S. 91 (1945); Williams v. United States, 341 U.S. 97 (1951); United States v. Williams, 341 U.S. 70 (1951).

[7] Screws v. United States *supra* note 6 at 119, Justice Rutledge, concurring opinion.

[8] United States v. Williams, 341 U.S. 70, 88 (1951), Justices Douglas, Reed, Burton, and Clark, dissenting opinion:

> One would have to strain hard at words to find any difference of substance . . . When no major difference between §§ 19 and 20 is apparent from the words themselves, it is strange to hear it said that though § 20 extends to rights guaranteed against state action by the Fourteenth Amendment, § 19 is limited to rights which the Federal Government can secure against invasion by private persons.

[9] 313 U.S. 299 (1941).

[10] *Id.* at 307.

[11] See Screws v. United States, 325 U.S. 91, 106 (1945).

[12] For a discussion of this specific problem see Barnett, *What is "State" Action Under the Fourteenth, Fifteenth, and Nineteenth Amendments of the Constitution?* 24 ORE. L. REV. 227 (1945).

[13] The court held that the federal government did have power to regulate primaries thus in effect overruling United States v. Gradwell, 243 U.S. 476 (1917).

apparent in the appraisal given to it in the subsequent case of *Screws v. United States*.[14] In the latter case three Georgia law enforcement officers were originally indicted under sections 241 and 242 for beating a Negro to death.[15] A demurrer to the charge of violating section 241 was sustained in the trial court. The Supreme Court was faced with the objection that the remaining section, 242, was unconstitutionally vague. To overcome this objection Justice Douglas said it could be saved by construing "willful" as used in the statute to mean a "specific intent to deprive a person of a federal right made definite by decision or other rule of law." [16] This statement has had the effect of requiring an instruction by the courts that defendant must have intended to deprive the person of a constitutional right, but that knowledge of the constitutional right involved was not material.[17] The derivation of this anomaly can be traced to the same opinion of Justice Douglas wherein he says: "The fact that the defendants may not have been thinking in constitutional terms is not material where their aim was not to enforce local law but to deprive a citizen of a right and that right was protected by the Constitution." [18] Justice Rutledge in a concurring opinion[19] declared unequivocally that sections 241 and 242 are companion sections and "if one falls for vagueness . . . the other must also fall." [20] Because Justice Rutledge's opinion was not that of the court the decision as to what was required to sustain section 242 as being constitutional, and not void for vagueness, did not necessarily apply to section 241.

The confusion which now surrounds section 242 due to the Douglas reasoning in *Screws* might have been avoided, however, if the rule established in *Ellis v. United States*[21] had been applied. In that case the court held that the only intent necessary to violate a law which forbids an act is the general intent to do the *act* prohibited. Although the *Ellis* case was given passing reference by the majority in *Screws* it was not followed, apparently from the belief that a finding of specific intent was necessary in order to sustain the statute. The supposed requirement of finding such specific intent to violate a constitutional right is at the most, however, only remotely connected with the problem of vagueness with which Justice Douglas was concerned. The requirement that the right to be protected should be made definite "by decision or other rule of law" would seem sufficient, and more appropriate, to bring the violation under the rule of the *Ellis* case. This approach would have restricted the purview of section 242 to enumerated constitutional rights and those due process rights made definite at the time of the alleged violation. In a further effort to justify the holding in the *Screws* case and not to disturb

[14] 325 U.S. 91 (1945).

[15] The purpose of the act was, in part at least, to provide sanctions for violations of the Negroes' newly won rights and provide means to enforce the newly adopted fourteenth and fifteenth amendments. See FLACK, ADOPTION OF THE FOURTEENTH AMENDMENT 223 (1908); United States v. Williams, 341 U.S. 70, 89–90 (1951).

[16] See Screws v. United States, 325 U.S. 91, 103 (1945).

[17] Clark v. United States, 193 F.2d 294 (1951) (denied right to trial in that he was beaten to death by sheriff). See 18 FED. CODE ANN. § 242(5) (Supp. 1957).

[18] *Supra* note 11.

[19] Concurring in order to give the case disposition and not because he favored the result. See Brisco v. Commonwealth Bank, 33 U.S. (8 Peters) 118, 121 (1834).

[20] Screws v. United States, 325 U.S. 91, 119 (1945).

[21] 206 U.S. 246, 257 (1906).

the decision in *Classic*, the court said: "The [*Classic*] indictment was sufficient since it charged a willful failure and refusal of the defendant election officials to count the votes cast. . . ." Since the indictment in *Classic* was for the violation of sections 241 and 242 that case could have been interpreted as requiring a *willful* violation under either section. Although the Court has not specifically distinguished the sections on the basis of the language in 242 requiring willfulness, the requirement of specific intent has not been applied to section 241. The position of the dissent in *Screws*[22] was that the federal government should not have the power to prosecute criminal acts in violation of due process; this power should be reserved to the states. This apparent fixation in the minds of the dissenting Justices helps to explain the holdings in *Williams v. United States*[23] and *United States v. Williams*.[24]

In *Williams v. United States* the majority upheld a conviction under instructions which conformed to the holding in the *Screws* case.[25] The dissenting opinion was consistent with that presented in *Screws*.[26] In the companion case of *United States v. Williams*[27] Justice Vinson shifted position and agreed with the dissent in *Williams v. United States*. The erstwhile minority, now majority,[28] held that the sections 241 and 242 are not companion sections. The protection under section 241 was restricted to those rights specifically enumerated by the Constitution, excluding the due process rights of the fourteenth amendment.[29] This holding established in regard to section 241 what they, the previous minority, had contended in *Screws* and the prior *Williams* case should have been the result in respect to section 242.

The court in the instant case accepted the position of *United States v. Williams* and other prior cases dealing with section 241. The requirement of willful or intentional violation of an enumerated constitutional right was held unnecessary. The present status of the law seems to be that a violation of rights specifically guaranteed by the Constitution can be protected under either section 241 or 242 and no intent need be proven under either section. However, those rights guaranteed by the fourteenth amendment can be protected only under section 242 and if brought under this section the charge to the jury must contain the instruction that the defendant can be found guilty only if "he willfully committed the acts in question."

The different positions espoused by the individual justices and the confusion in the cases do not permit a clear and logical analysis. The dissenting opinion in the *Screws* case, apparently adopted by the majority in *United States v. Williams*, is difficult to justify. The present contention seems to be

[22] Justice Murphy did not dissent for the same reason as the other dissenting justices. He dissented because he desired to affirm the conviction.

[23] 341 U.S. 97 (1951).

[24] 341 U.S. 70 (1951).

[25] The indictment was for a violation of § 242 of the Criminal Code.

[26] Justice Black also dissented without stating a reason.

[27] The indictment was for a violation of § 241 of the Criminal Code.

[28] Justice Black concurred making a majority but on entirely different grounds; *i.e.*, because the indictment was dismissed in the lower court, this action constituted double jeopardy. He did not make any decision in regard to constitutionality of § 241 under which the indictment was brought.

[29] United States v. Williams, 341 U.S. 70, 77–78, 82 (1951).

that enforcement of criminal laws designed to protect due process rights should be left entirely to the states. It is questionable whether this deference to state courts is practical in the protection of civil rights.[30] It has been well established that federal prosecution for violation of federal statutes does not preclude state prosecution for the same offense if state statutes are also violated.[31]

Rather than limit federal protection of civil rights to those specifically enumerated, as the court did in *Williams v. United States,* it would seem far better policy to construe the statutes more broadly and attempt to protect all civil rights "made definite by decision or other rule of law." Justice Douglas apparently desired to establish this policy in the *Screws* case but it is difficult to see why he felt compelled to establish an entirely new concept of intent. The use of sections 241 and 242, or similar legislation, to protect citizens in their civil rights could be very valuable tools at the present time in aiding enforcement of the Supreme Court's anti-segregation decisions.

D.E.A.

EQUAL OPPORTUNITY DOCTRINE EXTENDED IN LABOR DISPUTE

Nutone, Inc., imposed a no-distribution rule upon its employees which prohibited them from distributing or posting literature on company property. In a subsequent campaign to organize the employees of the company the rule was enforced against union organizers. The employer, however, regularly posted and distributed noncoercive antiunion literature on its property, not deeming itself bound by the rule. The union lost a subsequent election and filed charges of unfair labor practices with the NLRB claiming that its right to engage in organizational activities under section 7 of the Labor Management Relations Act[1] was violated by the discriminatory enforcement of the no-distribution rule. The NLRB found no interference,[2] on appeal, *held,* reversed. An employer cannot prohibit employees from distributing literature on plant property if, by his own act of distribution, he has demonstrated the absence of a valid reason for such prohibition. *Steelworkers, CIO v. NLRB (Nutone, Inc.),* 39 L.R.R.M. 2103 (D.C. Cir. 1956).

Under sections 7 and 8(a)(1) of the Labor Management Relations Act employees have a broad right to organize, limited only by the rights of the employer to conduct his business without interference from organizational activities. The original National Labor Relations Act contained no reference to the expression of views on organizational activities by the employer.[3] Never-

[30] On rehearing, the *Screws* case was reversed and the sheriff apparently went free. See 55 YALE L.J. 583 n.60 (1945); 44 MICH. L. REV. 823 n.41 (1946).

[31] See Hebert v. Louisiana, 272 U.S. 312 (1926); United States v. Lanza, 260 U.S. 377, 382 (1922).

[1] 49 STAT. 449 (1935), 29 U.S.C. §§ 151–168 (1952).

[2] Nutone, Inc., 112 N.L.R.B. 1153 (1955).

[3] Early decisions did, however, prohibit restraint, coercion, or interference with union activity. *E.g.* Nebel Knitting Co., 6 N.L.R.B. 284, 293 (1938), *modified,* 103 F.2d 594 (4th Cir. 1939); Knoxville Glove Co., 5 N.L.R.B. 559, 561–564 (1938).

theless, the Supreme Court held that the guarantee of organizational rights under the Act did not prohibit employers from expressing their views on labor unions.[4] The Board attempted to limit the broad rights thus guaranteed by the Supreme Court by adopting the captive audience rule in relation to unfair labor practices, on the ground that this would tend to insure fairness in labor relations, which was the objective of the Act. This rule, established in *Clark Bros., Inc.*,[5] prohibited an employer from speaking to a compulsorily assembled group of workers during working hours. In the judgment of Congress, however, the captive audience doctrine unduly restricted the employers' freedom of speech.[6] This adverse congressional reaction culminated in the addition of section 8(c) to the Taft-Hartley Act providing:

> The expression of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit.

In subsequent cases the broad scope of section 8(c) was restricted by both the Board and the circuits. The Board purported to follow the injunction of Congress,[7] but limited its application to unfair labor practice complaints[8] and retained the totality test in relation to elections[9] where the Board's rulings are not subject to review.[10] Under this test, words of the employer must be viewed in their aggregate, taking their purport from the setting in which they are used, to determine if threats or coercion are present. Several circuits limited the section by holding that it was a mere re-enactment of the free speech provisions of the first amendment,[11] but the Board held that it was a clear rejection of the captive audience doctrine.[12]

[4] NLRB v. Virginia Electric & Power Co., 314 U.S. 469 (1941). Although the Board and the 7th Circuit no longer found unfair labor practices based on isolated speeches, they continued to apply the neutrality doctrine in relation to employer activities during organizational periods. See Sunbeam Elec. Mfg. Co., 41 N.L.R.B. 469, 485, *modified*, 133 F.2d 856, 860 (7th Cir. 1943); NLRB v. Stone, 125 F.2d 752, 756 (7th Cir. 1942), *cert. denied*, 317 U.S. 649 (1942); American Oil Co., 41 N.L.R.B. 1105, 1115 (1942).

[5] 70 N.L.R.B. 802 (1946), *aff'd*, 163 F.2d 373 (2d Cir. 1947) (without discussing the captive audience rule).

[6] See S. REP. No. 105, 80th Cong., 1st Sess. 23, 24 (1947); H.R. REP. No. 245, 80th Cong., 1st Sess. 33 (1947); H.R. REP. No. 510, 80th Cong., 1st Sess. 45 (1947); Note, 38 VA. L. REV. 1037, 1048 (1952). There was confusion as to whether § 8(c) intended that an employer's speech should be held unfair only if its words contained a threat or promise, or whether context could be referred to in order to find inherent coercion. In evolving a definition of coercion Congress was faced with the alternative of adopting the Senate version, which expressly recognized the materiality of factual context, or the House version, which required threats of force or reprisal in the speech's "own terms." Failing to reconcile these positions Congress rejected them both leaving its interpretation open to the courts. See note 3 *supra*.

[7] General Shoe Corp., 77 N.L.R.B. 124 (1948).

[8] See NLRB v. Federbush Co., Inc., 121 F.2d 954, 957 (2d Cir. 1941).

[9] General Shoe Corp., 77 N.L.R.B. 124 (1948), was a consolidated case combining a motion to set aside and an unfair labor practices charge. The mandate of § 8(c) was applied only to the latter.

[10] American Federation of Labor v. NLRB, 308 U.S. 401 (1940). But indirect judicial review might be obtained by an employer's refusal to bargain with the union subsequently elected. See Ackerman and Sullivan, *Determination of the Appropriate Unit for Collective Bargaining*, 54 W. VA. L. REV. 17 (1951).

[11] E.g., NLRB v. Bailey Co., 180 F.2d 278, 280 (6th Cir. 1950); NLRB v. La Salle Steel Co., 178 F.2d 829, 835 (7th Cir. 1949), *cert. denied*, 339 U.S. 963 (1950).

[12] See S. S. Corrugated Paper Machine Co., 89 N.L.R.B. 1363 (1950); Babcock & Wilcox Co., 77 N.L.R.B. 577 (1948), *aff'd*, 351 U.S. 105 (1956).

The advent of the equal opportunity doctrine represented a further restriction on the scope of section 8(c). This doctrine was given limited application in the *Bonwit Teller* case.[13] The Second Circuit, relying upon section 8(a)(1), held that an employer who abused a privileged no-solicitation rule[14] by addressing his employees on working time committed an unfair labor practice by denying equal opportunity to the union. Although section 8(c) was not considered in arriving at this conclusion the decision, in its practical effect, amounted to a limitation on that section. This fact was clearly recognized by Chief Judge Swan, who dissented,[15] arguing that the legislative history surrounding the enactment of section 8(c) revealed an intent which would preclude such a result. The contention that section 7, backed by section 8(a)(1), required an employer to guarantee equal opportunity to be heard in *all* situations was rejected by the Board;[16] its policy of requiring opportunity to hear both sides of an election dispute under *circumstances* reasonably approximating equality was continued.[17] In 1953 the Board extended its equal opportunity doctrine (which formerly applied only to election disputes) to unfair labor practices,[18] thus equating this doctrine in the two areas. In more recent decisions, however, the Board has retreated from this strict position, holding that failure to grant equal time and facilities would only be an unfair practice under a privileged no-solicitation rule[19] when solicitation was made within twenty-four hours of the election.[20]

NLRB v. Babcock & Wilcox Co.,[21] represents the most recent expression on the subject by the United States Supreme Court. In that case the Court

[13] Bonwit Teller Inc. v. NLRB, 197 F.2d 640 (2d Cir. 1952), *cert. denied*, 345 U.S. 905 (1953).

[14] Normally no-solicitation rules are limited to employees' working time. Employers have been "privileged" to extend the application of these rules to employees nonworking time where the nature of the business was such that solicitation even during these periods would impair the orderly conduct of the business. See Bonwit Teller Inc., *supra* note 13.

[15] *Id.*, at 646.

[16] *Bonwit Teller*, rejected the contention that § 7 required equal opportunity, but only required that when a privileged rule was in effect the employer must refrain from activity where the union was excluded. See also Marshall Field & Co. v. NLRB, 200 F.2d 375 (7th Cir. 1952). *Cf.* NLRB v. May Dep't Stores Co., 154 F.2d 533 (8th Cir. 1946). An employer can enforce rules prohibiting solicitation during working time (if not for a discriminatory purpose) as well as during nonworking time where it would impede production.

[17] Metropolitan Auto Parts, Inc., 102 N.L.R.B. 1634 (1953). But, NLRB v. American Tube Bending Co., 205 F.2d 45 (2d Cir. 1953) reversed the Board for a second time. Despite the apparent interdiction of § 8(c) against finding an unfair labor practice based on an employer's noncoercive words, a number of circuits have continued to rely upon the doctrine that coercion can be found in the "context" of situations surrounding an employer's speech. *E.g.*, NLRB v. Kropp Forge Co., 178 F.2d 822 (7th Cir. 1949), *cert. denied*, 340 U.S. 810 (1950); NLRB v. Fulton Bag & Cotton Mills Co., 175 F.2d 675 (5th Cir. 1949).

[18] Metropolitan Auto Parts, Inc., 102 N.L.R.B. 1634 (Feb. 25, 1953); Seamprufe, Inc., 103 N.L.R.B. 763 (March 4, 1953); Onondaga Pottery Co., 103 N.L.R.B. 770 (March 19, 1953); *cf.* Stow Mfg. Co., 103 N.L.R.B. 1280 (March 31, 1953).

[19] Livingston Shirt Corp., 107 N.L.R.B. 400 (Dec. 17, 1953). The Board felt that to hold otherwise would violate § 8(c), basing its decision on American Tube Bending, 205 F.2d 45 (2d Cir. 1953). *Cf.* NLRB v. F. W. Woolworth Co., 214 F.2d 78 (6th Cir. 1954) (where adequate facilities were otherwise available, employer could address employees on company time without giving the union equal opportunity).

[20] The 24-hour rule, established in Peerless Plywood Co., 107 N.L.R.B. 427 (Dec. 17, 1953), provided that a speech on company time to massed employee assemblies would be grounds for setting aside an election only if made within 24 hours of the election. Although this was an extension of *Bonwit Teller*, it was nevertheless a retreat from the broad application of the equal opportunity doctrine.

[21] 351 U.S. 105 (1956).

held that there was a clear distinction between employee and nonemployee organizers. As to the latter, failure of the employer to permit solicitation on the premises would only be unfair if employees were isolated from normal means of contact, in which case the right to exclude from the property must yield to the right to organize.[22] The Court further observed that where employee organizers are involved, no restriction may be imposed unless necessary to maintain production or discipline.[23]

In the instant case, the court noted that sections 7, 8(a)(1), and 8(c) present a clear conflict of rights. Citing *Babcock & Wilcox Co.*,[24] the court held that any employer restrictions upon the employees' rights to discuss organization among themselves must be justified by "cause." The interest of the employer in plant discipline provides an initial presumption of "cause," which is negated when the employer himself engages in distribution. It was held that section 8(c) repudiated any taint of discrimination from the expression of views by the employer, as well as any requirement of equal opportunity. This section did not, however, nullify the requirement of "cause" in enforcing a no-distribution rule against the employees.

It should be here noted, however, that while the *Babcock & Wilcox* decision does contain statements to the effect that the employer must meet this requirement, they appear to be mere dictum since the court had decided that conditions of employee isolation required the employers' right of exclusion to yield.[25]

Further, the statements of the court in the instant case indicating that 8(c) would preclude any requirement of equal opportunity seem inconsistent with the requirement of "cause." To hold that the presumption of "cause" is overcome to the extent that the employer himself indulges in solicitation is tantamount to declaring that he may not deny the union equal opportunity. Viewed in this manner, the present holding seems to be an extension of the *Bonwit Teller* equal opportunity doctrine. The *Bonwit Teller* decision was justified only by the presence of a privileged no-solicitation rule; the instant case is based on a discriminatory posting of literature within the plant.

Limitations on the employer's right to prohibit union activity on plant premises seem based upon a feeling that such discrimination would violate the obvious purpose of the Labor Management Relations Act in insuring basic fairness in labor relations. This fact is of added importance when it is observed that Congress had opportunity to consider the disadvantage placed upon the union when it enacted section 8(c), but nevertheless rejected the captive audience rule.[26] Litigation construing section 8(c), however, reveals a dissatisfaction with the practical effects of the section and a tendency to restrict the apparent intent of Congress. This trend appears to be the result

[22] *Id.*, at 112.

[23] *Id.*, at 113.

[24] 351 U.S. 105 (1956). The court further noted that its attention had not been called to any case in which rights of an employer to restrict distribution were found from the mere fact of ownership.

[25] NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1956).

[26] See note 6 *supra*.

of an attempt to avoid unnecessary interference with the employer's rights of free speech as balanced against the employees' right to organize.

Although it might be argued that the ruling of the instant case limits the employees' right to hear the management side of a dispute,[27] there appears to be no valid reason for denying the union the use of the plant forum where there is no showing that the efficiency of the plant would be impaired. Application of the free speech provisions of section 8(c) in such a manner as to frustrate fair play and result in a substantial suppression of harmless employee expression would not seem to further the ends of labor legislation. The holding of this case seems consistent with the purpose of the Labor Management Relations Act in insuring equality in labor activities,[28] and does not seriously offend the rights of the employer since those situations where the employer could show valid reason for his restrictions were expressly reserved by the court.[29]

P.M.N.

KANSAS SPEEDY TRIAL STATUTE LIBERALLY CONSTRUED

Defendant was convicted of grand larceny and embezzlement. In November 1954, his motion for a new trial was granted by the lower court, which at the same time overruled his motion for discharge based on alleged insufficiency of the state's evidence. The state appealed the order granting the new trial and eight days later defendant filed a cross-appeal from the order overruling his motion for discharge. In March 1956, after final disposition of the pending appeals,[1] the cause was called for retrial. Defendant entered a motion for discharge, alleging that the failure to grant him a retrial until that time amounted to a denial of the speedy trial guaranteed by the Kansas Constitution and statutes.[2] The lower court sustained the motion. On appeal to the Kansas Supreme Court, *held*, affirmed. Neither the appeal by the state nor defendant's cross-appeal constituted a valid cause for the state's delay in proceeding with the retrial. *State v. Hess*, 304 P.2d 474 (Kan. 1956).

[27] The requirement of granting equal opportunity to the union would directly add to the employer's expense in communicating with his employees, and the employer might decline to communicate with the employees altogether rather than assume the added burden of providing the union with a forum. See 37 MINN. L. REV. 293 (1953).

[28] See FORKOSCH, A TREATISE ON LABOR LAW § 217 (1953).

[29] Instant case at 2108.

[1] See State v. Hess, 178 Kan. 452, 289 P.2d 759 (1955). The trial court's action in granting a new trial was affirmed, and it was held that the order from which defendant appealed was not subject to appellate review.

[2] KAN. CONST. BILL OF RIGHTS, § 10: "In all prosecutions, the accused shall be allowed . . . a speedy and public trial. . . ." This provision is supplemented by two statutes constituting a legislative definition of the term "speedy trial." KAN. GEN. STAT. ANN. § 62–1432 (1949): "If any person under indictment or information for any offense, and held to answer on bail, shall not be brought to trial before the end of the third term of the court in which the cause is pending which shall be held after such indictment found or information filed, he shall be entitled to be discharged so far as relates to such offense, unless the delay happen on his own application or be occasioned by the want of time to try such cause at such third term." The other provision, § 62–1431, states that an accused not admitted to bail shall be tried within two terms.

In the instant case the remainder of the November 1954 term of court and all of the March, June, and November 1955 terms had elapsed since the order of the new trial. The defendant was out on bail during the above period.

"The right of a person formally accused of crime to a speedy and impartial trial has been a right guaranteed to Englishmen since Magna Charta, and to all peoples basing their system of jurisprudence upon the principles of common law." [3] The original reason for granting this right was to protect an accused from protracted periods of arbitrary incarceration prior to trial.[4] The Constitution of the United States gives formal recognition to this right by providing for its application in federal criminal prosecutions.[5] Forty states have deemed the right worthy of protection by similar constitutional provisions.[6] However, many of these states have statutory delimitations of the term "speedy trial" which differ to some degree.[7]

Despite general recognition of the right to a speedy trial, problems exist concerning its proper application to the practical business of the court. Circumstances not created by the defendant, but which justify delay, have been held largely a matter of judicial discretion in reconciling the rights of the accused and the interests of the public.[8] Courts have found valid cause for delay in a variety of situations,[9] and have expressed diversity of opinion concerning the validity of some of the reasons assigned.[10] A greater divergence of views exists where courts have attempted to determine what acts of an accused will be regarded as a waiver of the right to a speedy trial. It is generally accepted that a fugitive from justice can not assert denial of the right relying on a period during which he placed himself beyond the reach of the court.[11] Express consent to continuance as well as affirmative acts such as motions or appeals which necessarily result in delay are also looked upon as a waiver.[12] There is no accord, however, as to whether a demand for trial is a prerequisite to an assertion of denial of the right, although the federal

[3] State v. Webb, 155 N.C. 426, 70 S.E. 1064, 1065 (1911).

[4] Commonwealth v. Carter, 28 Mass. (11 Pick.) 277, 279 (1831). "The obvious purpose of this . . . is to secure personal liberty, and to prevent the abuse of the power of imprisoning before trial, on the part of the prosecuting officers."

[5] U.S. CONST. amend. VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . ."

[6] See, *e.g.*, UTAH CONST. art. 1, § 12. See Note, 5 STAN. L. REV. 95 (1952), for a listing of states not incorporating such a provision in their constitutions.

[7] See, *e.g.*, UTAH CODE ANN. § 77-1-8 (1953). See ALI CODE OF CR. PROC. § 292, commentary at 890 (1930), for an enumeration of states having a statutory definition of speedy trial.

[8] Application of Hayes, 301 P.2d 701 (Okla. 1956).

[9] People v. Burns, 128 Cal. App. 226, 16 P.2d 1015 (1932) (accused held in another county on a different charge); *Ex parte* Venable, 86 Cal. App. 585, 261 Pac. 731 (1927) (existence of an epidemic); State v. Barger, 148 Kan. 590, 83 P.2d 648 (1938) (want of time to try case within the required term); Hollingsworth v. State, 50 Okla. Crim. 164, 297 Pac. 301 (1931) (lack of sufficient funds to hold court).

[10] Sample v. State, 138 Ala. 259, 36 So. 367 (1903) (exhaustion of jury panel held valid cause for delay); *contra*, State v. Coover, 165 Kan. 179, 193 P.2d 209 (1948) (failure to provide for a jury is one of the things speedy trial was designed to eliminate). State v. Squier, 56 Nev. 386, 54 P.2d 227 (1936) (custom of court to adjourn in summer to avoid discomfort of holding court in hot weather held valid cause for delay); *contra*, Hernandez v. State, 40 Ariz. 200, 11 P.2d 356 (1932).

[11] State v. Aspinwall, 173 Kan. 699, 252 P.2d 841 (1953); State v. Swain, 147 Ore. 207, 31 P.2d 745 (1934); State v. Keefe, 17 Wyo. 227, 98 Pac. 122 (1908).

[12] Woodall v. State, 25 Ga. App. 8, 102 S.E. 913 (1920); Weer v. State, 219 Ind. 217, 36 N.E.2d 787 (1941); Glebe v. State, 106 Neb. 251, 183 N.W. 295 (1921); State v. Estes, 151 Wash. 51, 274 Pac. 1053 (1929).

courts[13] and a majority of state courts require such a demand.[14] Failure to object to delay has been held an implied consent thereto;[15] however, the view has been expressed that such an implication is at odds with the very right protected.[16] The different tests reflected in these decisions can be at least partially accounted for by existing differences in the governing statutes.

The principal problem facing the court in the instant case was the effect to be given defendant's cross-appeal.[17] The statute[18] excludes those periods of delay which ". . . happen upon his [defendant's] own application. . . ." Application in this context was construed to require an affirmative act necessarily and directly resulting in delay.[19] The court reasoned that even if defendant's cross-appeal were termed an appeal and thus an affirmative act, it need not have resulted in delay of the retrial, and therefore could not be looked upon as an application.[20] The court stressed the principle that the entire responsibility of seeing that an accused is given a speedy trial rests with the prosecution and not the accused.[21]

The Kansas court construes their statute to require no demand for trial prior to assertion of denial of the right, and does not regard silence as acquiescence in delay.[22] The court did not specifically deal with the possibility that the mere filing of the cross-appeal might be considered implied consent to delay. However, since the holding apparently negates such effect the point seems resolved by implication.[23] Thus Kansas demands nothing of an accused but a certain amount of patience plus restraint from affirmative acts necessarily resulting in delay.

Strict observance and liberal application of the right to a speedy trial have the value of insuring that evidence concerning material matters will be readily

[13] See, *e.g.*, Pietch v. United States, 110 F.2d 817 (10th Cir. 1940), *cert. denied*, 310 U.S. 648 (1940).

[14] Ellenwood v. Cramer, 75 Idaho 338, 272 P.2d 702 (1954); State v. Smith, 10 N.J. 84, 89 A.2d 404 (1952); State v. Bohn, 67 Utah 362, 248 Pac. 119 (1926); State v. Lydon, 40 Wash. 2d 88, 241 P.2d 202 (1952). *Contra*, State v. Carrillo, 41 Ariz. 170, 16 P.2d 965 (1932); Zehrlaut v. State, 230 Ind. 175, 102 N.E.2d 203 (1951); Flanary v. Commonwealth, 184 Va. 204, 35 S.E.2d 135 (1945).

[15] People v. Howe, 1 Cal. App. 2d 518, 36 P.2d 820 (1934); State v. Bohn, 67 Utah 362, 248 Pac. 119 (1926).

[16] State v. Dewey, 73 Kan. 735, 88 Pac. 881 (1907).

[17] Another problem considered by the court was whether an earlier Kansas case, State v. Campbell, 73 Kan. 688, 85 Pac. 784 (1906), supported the prosecution's contention that an appeal by the state excused delaying the retrial. That case was distinguished on its facts since it involved a state appeal from an order quashing the information. Thus, while the appeal was pending there was no valid information upon which to try the accused. The appeal in the instant case was from an order granting a new trial and during the pendency of the appeal there existed an information upon which the defendant could have been retried.

[18] See note 2 *supra*.

[19] Instant case at 479 citing State v. Lewis, 85 Kan. 586, 118 Pac. 59 (1911).

[20] *Id.* at 481. The prosecution need not have delayed initiating the retrial pending the result of defendant's cross-appeal, for it did not present any question which required determination before commencement of the retrial.

[21] This liberal application appears to be the general policy of the Kansas court with regard to the matter of speedy trial. See, *e.g.*, State v. Dewey, 73 Kan. 739, 88 Pac. 881 (1907).

[22] Instant case at 479.

[23] *But cf.* Thornton v. State, 7 Ga. 752, 67 S.E. 1055 (1910), which suggests that any act of a defendant which shows that he does not intend to insist on his right to speedy trial will be construed as implied consent to delay.

available when needed. Further, such dispatch will release the defendant who is free on bail from the harassment and anxiety naturally incident to the final adjudication of a pending case,[24] and guarantees that no accused has valid cause to complain of "the law's delay." This approach also furnishes a practical means to spur prosecutors to greater speed in discharging their responsibility of bringing an accused to trial, thus eliminating delay in at least one stage of the criminal prosecution.[25] Extreme liberality of application, such as that advanced by the Kansas court, expands the right to speedy trial far beyond the scope envisaged at its inception. This expansion may be justified by its unquestionably desirable result in securing expeditious handling of criminal prosecutions untainted by the laches of public officers.

C.B.F.

POSSIBLE EXCEPTIONS TO FULL FAITH AND CREDIT DENIED BY MICHIGAN COURT IN STRICT APPLICATION OF YORK V. TEXAS RULE

Defendants, domiciliaries of Michigan, mailed a "special appearance and motion to quash service" alleging lack of jurisdiction to a Texas court. The motion was denied and default judgment subsequently entered against defendants. In an action on the Texas judgment in a Michigan court, defendants again raised the jurisdictional question, but plaintiff was granted summary judgment. On appeal to the Michigan Supreme Court, *held*, affirmed. The "special appearance" mailed by defendants was considered a general appearance for purposes of jurisdiction under Texas statutes[1] and entitled the judgment to full faith and credit. *Johnson v. DiGiovanni*, 78 N.W.2d 560 (Mich. 1956).

The full faith and credit clause requires that each state recognize the public acts, records, and judicial proceedings of every other state. Although this clause is not construed as authorizing direct execution on a judgment in a foreign state,[2] such judgment is held conclusive as to all "*media concludendi*," [3] thus precluding the defense that the underlying cause of action is repugnant to the established policy of the forum.[4] The right of the forum state to inquire into the jurisdiction of the foreign court is preserved, however, and judgments of courts which lack in jurisdiction are not entitled to recognition[5] unless the defendant appears and litigates the jurisdictional question.[6]

[24] State v. Keefe, 17 Wyo. 227, 98 Pac. 122 (1908).

[25] The existing delay in such proceedings has been the cause of much recent concern. As stated by Justice Frankfurter in Ward v. United States, 76 Sup. Ct. 1063, 1066 (1956). "Such untoward delays seem to me inimical to the fair and effective administration of the criminal law."

[1] TEX. REV. CIV. STAT. art. 2047 (1948); TEX. REV. CIV. STAT. art. 2092 § 8 (Supp. 1956).

[2] See M'Elmoyle v. Cohen, 38 U.S. (13 Pet.) 312, 324–25 (1839).

[3] United States v. California & Oregon Land Co., 192 U.S. 355 (1904).

[4] Fauntleroy v. Lum, 210 U.S. 230 (1908).

[5] Thompson v. Whitman, 85 U.S. (18 Wall.) 457 (1873); Board of Pub. Works v. Columbia College, 84 U.S. (17 Wall.) 521, 528 (1873).

[6] Finklea Bros. v. Powell, 189 Miss. 454, 198 So. 293 (1940). *Cf.* Baldwin v. Iowa State Traveling Mens Ass'n, 283 U.S. 522 (1931) (the defendant must be fully heard on the question of jurisdiction).

The jurisdiction required must extend to the subject matter.[7] A state court's exercise of jurisdiction is limited only by the due process clause, which requires: (1) that the basis on which power is exercised must be prescribed as sufficient by the forum state, (2) there must be a substantial tie or relationship between the defendant and the state, (3) reasonable notice and opportunity to defend, and (4) facts sufficient to support the above findings.[8]

The court noted that the Texas statutes[9] relied upon to satisfy the minimal contact requirements for jurisdiction had been held constitutional under the due process clause in *York v. Texas*,[10] and that they applied to an out-of-state defendant who filed a special appearance and motion to quash.[11] Having thus found proper jurisdiction, the court held that the full faith and credit clause of the Constitution required recognition of the Texas judgment.

The instant case can and should be distinguished from the *York* case since the defendant here did not personally appear before the Texas court. To hold that this case is controlled by the rule of the much criticized[12] *York* case would be a disregard of the element of physical presence which obviously influenced that court, and would result in an unnecessary extension of the *York* decision.

Furthermore, in recent years there has been a shift from the "power" concept of jurisdiction, which was dominant at the time of the *York* decision, to one of "fair play." [13] Under this concept impossible or impractical obstacles to fair litigation have been held violative of due process.[14] Recent Supreme Court decisions seem irreconcilable with the *York* decision, and suggest that the Texas statutes might now be held to present such an impractical obstacle. Although a state court might justifiably be reluctant to repudiate the *York* decision, it should not hesitate to limit the decision to its precise facts.

If, despite the above objections, the *York* case was found controlling on the due process question, it could be argued that cases similar to the instant

[7] Fall v. Eastin, 215 U.S. 1 (1909).

[8] See Milliken v. Meyer, 311 U.S. 457 (1940); McDonald v. Mabee, 243 U.S. 90 (1917). Entry of judgment when any of these elements are absent constitutes a denial of due process. RESTATEMENT, CONFLICT OF LAWS § 43 (1934).

[9] See note 1 *supra*.

[10] 137 U.S. 15 (1890).

[11] See instant case at 564. *But cf.* Comment, 32 TEX. L. REV. 78 (1954); 31 TEX. L. REV. 336 (1953) suggesting that (1) removal to the federal courts, or (2) amicus curiae suggesting lack of jurisdiction might be used to question the court's jurisdiction. The sole defense argued on appeal, however, was that no duly licensed attorney of the state of Texas entered appearance for defendants. The court held that Texas statutes regulating the admission to practice did not amount to an interdiction against the *ex gratia* admission involved here. Even if such a construction had been adopted, the courts, as a matter of comity, were entitled to permit an attorney from a sister state to appear and present argument in a particular case.

[12] *E.g.* Comment, 32 TEX. L. REV. 78 (1954).

[13] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) (criterion in notice by publication is the just and reasonable character of the requirement in reference to the subject with which the statute deals); International Shoe Co. v. Washington, 326 U.S. 310 (1945) (corporation may be subjected to jurisdiction where doing business within the state if its activities relate to the fair and orderly administration of laws which it is the purpose of the due process clause to insure); Riverside and Dan River Cotton Mills v. Menefee, 237 U.S. 189 (1915) (mere rendition of void judgment violates due process). See Blair, *Constructive General Appearances and Due Process*, 23 ILL. L. REV. 119 (1928) where the author concludes that the Supreme Court in the *Riverside* case adopted a different position than that taken in the *York* case.

[14] Mullane v. Central Hanover Bank & Trust Co., *supra* note 13.

case would justify an exception to the literal application of the command of the full faith and credit clause. Constitutional mandates are never absolute, but subject to change in the face of superior interests of society.[15] Similarly, the full faith and credit clause, although broad in its scope, has never been interpreted to mean that judgments must be accorded precisely the same effect as they enjoy in the rendering state. Exceptions to the clause have been recognized in restricted areas.[16] In *Yarborough v. Yarborough*[17] the dissent of Chief Justice Stone suggests an exception which permits modification of the rule when the internal affairs of a sister state are violated. Although this exception has never been specifically accepted by the court, some writers[18] feel that it was recognized in the second appeal of *Williams v. North Carolina*.[19] In *Williams II* the court said that North Carolina was not compelled to ". . . yield her state policy because a Nevada court found that the petitioners were domiciled in Nevada when it granted them a decree of divorce." [20] The court further indicated that even though the Nevada court's claim of jurisdiction was warranted, North Carolina was not compelled to accept the Nevada conclusion.[21] Although the decision was in terms limited tó findings of jurisdiction, in this case based on bona fide domicile, it is significant to note that the right to so question jurisdiction was expressly limited to the state of domicile.[22] The rights of North Carolina referred to can be interpreted as not mere rights of inquiry into jurisdiction, as most writers assume,[23] for mere lack of jurisdiction could be raised by any state.[24]

A full explanation of the ruling of the court in *Williams II*, in view of the above, seems to embrace a partial recognition of the "Stone exception," limited, however, to the state of domicile. The possibility arises, then, that given a domiciliary state[25] with sufficient legitimate public interest and a summary ruling on jurisdiction[26] — as found in both *Williams II* and in the

[15] *Cf.* Dennis v. United States, 341 U.S. 494, 508 (1951).

[16] Disregard of foreign state judgments has been upheld against a claim of constitutional violation where the forum state has stripped its courts of jurisdiction over the cause of action, Anglo American Provision Co. v. Davis Provision Co., 191 U.S. 373 (1903); the situs of real estate subject of the action is within the forum state, Clarke v. Clarke, 178 U.S. 186 (1900); the judgment is penal in nature, Huntington v. Attrill, 146 U.S. 657 (1892); Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 291 (1887); fraud is involved, Christmas v. Russell, 72 U.S. (5 Wall.) 290 (1866); Levin v. Gladstein, 142 N.C. 482, 55 S.E. 371 (1906); or where the foreign court has issued a decree of sanity, Gasquet v. Fenner, 247 U.S. 16 (1917). See Reese and Johnson, *The Scope of Full Faith and Credit to Judgments*, 49 COL. L. REV. 153 (1949).

[17] 290 U.S. 202, 215 (1933). See also Justice Stone's majority opinion in Magnolia Petroleum Co. v. Hunt, 320 U.S. 430 (1943).

[18] *E.g.*, Reese and Johnson, *op. cit. supra* note 16.

[19] 325 U.S. 226 (1944).

[20] *Id.* at 239.

[21] *Id.* at 234.

[22] *Id.* at 230, 232. See Johnson v. Muelberger, 340 U.S. 581, 585 (1951) (*Williams II* interpreted as allowing only North Carolina to determine domicile).

[23] *E.g.*, Comment, 52 MARQ. L. REV. 146 (1948); Note, 34 KY. L.J. 139, 141 (1946).

[24] See note 5, *supra*.

[25] *Cf.* Riley v. New York Trust Co., 315 U.S. 343 (1941), where the court alluded to the interest of a domiciliary state, though in a different sense.

[26] See Sherrer v. Sherrer, 334 U.S. 343 (1948). The divorce was recognized since both parties had full opportunity to contest jurisdiction. However, the court took pains to point out that this distinction might not apply when a state's interests were directly involved.

instant case — an exception to full faith and credit is permissible.[27] However, in *Fauntleroy v. Lum*[28] the Supreme Court declined to make an exception to full faith and credit based on forum policy when the underlying cause of action in a foreign judgment was found objectionable. It might be concluded, then, that the doctrine of full faith and credit is more flexible when confronted with a jurisdictional obstacle than when the merits of a cause embodied in a judgment are questioned.

The Supreme Court has indicated a propensity to circumvent the literal application of the Constitution in the past when a substantial interest of the forum is involved.[29] An exception to full faith and credit, based on an in personam decree obtained under procedures repugnant to the forum and affecting its domiciliaries, is not too far removed from those already recognized[30] — if the interests of the domiciliary state are conceded to be of sufficient weight. The Texas procedure involved here amounts to a trap for the unwary — possibly not contemplated or intended by its authors — involving an unwarranted and unnecessary extension of the jurisdiction of Texas courts.

P.M.N.

FEDERAL DISTRICT COURT UPHOLDS CONTRACTUAL LIMITATION UPON DISCOVERY

Plaintiff entered into a contract with the defendant in which he waived some elements of the right of discovery provided by Rule 34 [1] of the Federal Rules of Civil Procedure. The terms of the contract provided limited inspection of records within one year from the date of their preparation.[2] In a subse-

[27] It is conceded, however, that even if this interpretation of *Williams II* is accepted the case might be limited in its future scope to divorce actions where domicile is crucial. See Davis v. Davis, 305 U.S. 32 (1938).

[28] See note 4 *supra.*

[29] *Williams II* is an illustration of this inclination in the area of divorce; other cases relating to workmen's compensation awards appear to fit the pattern. See Magnolia Petroleum Co. v. Hunt, 320 U.S. 430 (1943). The action of Louisiana in failing to recognize a Texas workmen's compensation award, which purported to be a final determination of rights to a domiciliary of Louisiana was held to violate full faith and credit. Later, in Industrial Comm'n of Wisconsin v. McCartin, 330 U.S. 622 (1947), on facts similar to *Magnolia*, the Supreme Court held that an Illinois workmen's compensation decree under a similar statute did not affect rights that the applicant may have under Wisconsin statutes. Although the Illinois decree expressly allowed for possible rights under Wisconsin law, the court did not rest its decision on that fact. *Id.* at 628. Carroll v. Lanza, 349 U.S. 408 (1955), held a Missouri award was not final even without an express reservation of rights. Since the Missouri award was not based upon a final adjudication of rights the case is considered to have been based on choice of law concepts. However, in light of the Missouri statutes making the award final this conclusion seems doubtful. See Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493, 502 (1939). Although a choice of law case, the court does point out the area of currently recognized exceptions to full faith and credit.

[30] See note 16 *supra.*

[1] FED. R. CIV. P. 34. "Upon motion of any party showing good cause . . . the court . . . may order any party to produce and permit the inspection and copying . . . by or on behalf of the moving party, of any designated documents . . . not privileged . . . which are in his possession. . . ."

[2] Instant case at 50. Para. 3, sec. X of the contract provides: "The producer shall have the right [within one year period], at its sole cost and expense, through any national firm of certified public accountants of standing comparable to Price, Waterhouse & Co. at all reasonable times during business hours, to inspect and audit and make extracts from said books and records and supporting documents and vouchers. . . ."

quent action for breach of contract, plaintiff moved for an order to compel inspection of records prepared more than one year prior thereto. The court, denying the motion, *held*, plaintiff had validly waived his right to discovery by prior contractual agreement.[3] *Elliott-McGowan Productions v. Republic Productions, Inc.*, 145 F. Supp. 48 (S.D.N.Y. 1956).

Prior to the adoption of the Federal Rules the only discovery device available in the federal courts was Equity Rule 58.[4] This rule provided for a bill of discovery but proved relatively ineffective in operation.[5] Rule 34 of the Federal Rules provides for the discovery and production of documents and things for inspection[6] and was primarily intended to be used for the purpose of pre-trial discovery.[7] Although relatively new, these rules have been judicially tested on many occasions.[8] This is particularly true of Rule 34. In *Durkin v. Pet Milk Co.*,[9] the court stated:

> The rules were intended to . . . facilitate the preparation and trial of cases and to insure the discovery of facts relevant to the subject matter . . . Justice requires that cases be decided according to the law and the facts, and each party is entitled to know and have access to the facts relevant. . . .

In *Olson Transp. Co. v. Socony Vacuum Oil Co.*,[10] it was said that the purpose of Rule 34 was to avoid surprise and to prevent decisions resulting from strategy. It should be noted that discovery is not a matter of right[11] but rather a matter of judicial discretion,[12] its purpose being to aid both the court and the litigants.[13]

The instant case, in denying plaintiff's motion for pre-trial discovery, held that legitimate objections to full discovery existed,[14] and that the contract between the parties provided a reasonably effective substitute.[15] The court reasoned that the contractual limitations on discovery were analogous to contractual limitations on causes of action; such limitations have been upheld

[3] Instant case at 50. Para. 3, sec. X of the contract provides: "The producer [shall not] have any right to audit or inspect any such books, records, documents or vouchers relating to transactions reported in any such statement, unless such audit or inspection be commenced within one year from the date that such statement is rendered."

[4] EQUITY RULE 58, 33 Sup. Ct. XXXIV.

[5] As an alternative holding, this would be sufficient to support the decision. 4 MOORE, FEDERAL PRACTICE, § 33.03(2) (2d ed. 1950); Carpenter v. Winn, 221 U.S. 533 (1911) (held Equity Rule 58 to apply only during trial); Zolla v. Grand Rapids Store Equipment Corp., 46 F.2d 319 (S.D.N.Y. 1931).

[6] See note 1 *supra*.

[7] 4 MOORE, *op. cit. supra* note 5, § 34.02(1); United States v. American Optical Co., 2 F.R.D. 534 (S.D.N.Y. 1942).

[8] Hickman v. Taylor, 329 U.S. 495 (1947); Sonken-Galamba Corp. v. Atchison, T. & S.F. Ry., 30 F. Supp. 936 (W.D. Mo. 1939).

[9] 14 F.R.D. 385, 398 (W.D. Ark. 1953).

[10] 7 F.R.D. 134, 136 (E.D. Wis. 1944).

[11] Hickman v. Taylor, 329 U.S. 495 (1947); Martin v. Capitol Transit Co., 170 F.2d 811, 812 (D.C. Cir. 1948); United States v. 5 Cases, 9 F.R.D. 81 (D. Conn. 1949); Sutherland Paper Box Co. v. Grant Paper Box Co., 8 F.R.D. 416, 417 (W.D. Pa. 1948).

[12] United States v. United Shoe Mach. Corp., 76 F. Supp. 315 (D. Mass. 1948).

[13] Balazs v. Anderson, 77 F. Supp. 612, 613 (N.D. Ohio 1948).

[14] Instant case at 50. Defendant claimed that the records desired were extremely confidential and therefore insisted that there should be no general right of discovery, although defendant did not attempt to show that the material was in any way privileged or irrelevant to the cause of action.

[15] See note 2 *supra*.

when reasonable.[16] It was further observed that parties have been permitted to contract away local jurisdiction in favor of foreign jurisdiction.[17] The court concluded:

> . . . [there is] no objection to giving effect to a party's agreement to contract away his right to discovery where the circumstances make such an agreement reasonable.[18]

Few cases are sufficiently in point to provide valid comparisons to the instant case. However, in *Jordan v. Stephens*,[19] the court held that a no-action clause[20] in an insurance contract was in direct opposition to Rule 14(a)[21] of the Federal Rules and therefore invalid.

> It [the no-action clause] poses a question as to whether the court should permit litigants to circumvent rules of the court by contractual arrangements. Rule 14 was promulgated not only for the purpose of serving litigants but as a wise exposition of public policy.[22]

The *Jordan* case can be distinguished in that there was no reasonably effective substitute provided. This distinction, however, appears to be one of degree. An attempt to circumvent procedural rules by substitution is hardly less devastating than the same attempt by elimination. It would appear that in either event the avowed purposes of Rule 34 are subverted by allowing an individual to waive, by contractual agreement, his privilege and the court's prerogative.

The court's analogy between the instant case and those which limit causes of action seems misplaced. In *Riddlesbarger v. Hartford Insurance Co.*,[23] the court did uphold such a restriction. It was noted, however, that the policy objections to such agreements arise from a misconception of the objects of traditional statutes of limitation.

> The policy being to encourage promptitude in the prosecution of remedies and absolute bars to late comers — founded on the idea that a lapse of years is a presumption against the validity of the claim.[24]

By comparison, validation of the one-year limitation in the instant case would not result in a bar to any right of action but would operate as a veil, thus serving to secrete evidence from the scrutiny of adverse litigants and the court while the right of action still exists. Generally the courts have held statutes of limitation operating to bar a late-comer's right of action, not to bar the procedural right of discovery.[25] Accepting the reasoning of the *Riddlesbarger*

[16] Riddlesbarger v. Hartford Ins. Co., 74 U.S. (7 Wall.) 386 (1869).

[17] Wm. H. Muller & Co. v. Swedish American Lines Ltd., 224 F.2d 806 (2d Cir. 1955).

[18] Instant case at 50.

[19] 7 F.R.D. 140, 142 (W.D. Mo. 1945).

[20] *Id.* at 141. "Action shall (not) lie against the company upon any claim or for any loss under this policy, unless brought after the amount of such claim or loss shall have been fixed and rendered certain either by final judgment against the assured after trial of the issue or by agreement between the parties with the written consent of the company."

[21] FED. R. CIV. P. 14(a) (provides for third party impleader).

[22] See Jordan v. Stephens, 7 F.R.D. 140, 142 (W.D. Mo. 1945).

[23] 74 U.S. (7 Wall.) 386, 389 (1869).

[24] *Ibid.*

[25] Frasier v. Twentieth Century Fox Film Corp., 119 F. Supp. 495 (D. Neb. 1954). Although the proposed discovery dealt partly with transactions antedating the period within which a claim might have arisen to which the statute of limitations would not be a bar, still discovery may extend to such earlier events. United States v. United Shoe Mach. Corp., 76 F. Supp. 315 (D. Mass. 1948); United States v. Aluminum Co. of America, 44 F. Supp. 97 (S.D.N.Y. 1941), *Aff'd*, 148 F.2d 416 (2d Cir. 1945).

case in part or *in toto*, its application and relation to the limitation of discovery is at best remote. *Wm. H. Muller Co. v. Swedish American Lines Ltd.*,[26] was cited by the court to substantiate further the proposition that a party may agree to contract away his right of discovery. It was noted in that decision, however, that there is a considerable difference of opinion as to whether or not private agreements can dislodge a court of jurisdiction. The general rule and great weight of authority in this area hold that the court's jurisdiction cannot be ousted by private agreements.[27] Even the *Muller* case does not assert that such agreements are necessarily enforceable even if reasonable, but only that the court may decline jurisdiction and indirectly effect enforcement.[28] A contractual arrangement stipulating a particular jurisdiction seems to be basically less objectionable than an agreement to restrict the production of evidence. The latter proviso would require the court to decide a case blindfolded, as it were.

The cases noted do not, themselves, justify the conclusion that parties may limit discovery by private contract. However, the possibilities of harassment and oppression through the abusive use of the procedural device of discovery are evident,[29] and the instant case does present a possible remedy for the control of such abuses. Unfortunately this remedy is at best incomplete, being limited to those actions which arise out of pre-existing contracts. Further, it takes little imagination to determine that such contractual safeguards will be most extensively used where there is the least equality of bargaining power. Until now the problem of abusive use of discovery has been countered by reliance on judicial discretion, guided by the implicit requirements of Rule 34.[30] This solution to the problem, until more logically challenged, should stand as the most efficacious remedy yet advanced.

No court should allow its investigation of the truth of matters brought before it to be limited by contractual agreement, nor should the individual litigant be permitted to contract away, limit, or create substitutes for his own procedural privileges. This case seems to be pointing unwisely toward future abdication of judicial prerogative in deference to private contracts which would seek to circumvent rules of procedure.

L.M.E.

[26] 224 F.2d 806 (2d Cir. 1955).

[27] Doyle v. Continental Ins. Co., 94 U.S. 535 (1877); Wood and Selick v. Campagnie Generale Transatlantique, 43 F.2d 941 (2d Cir. 1930); Nashua River Paper Co. v. Hammermill Paper Co., 223 Mass. 8, 111 N.E. 678 (1916).

[28] *Accord*, Murillo Ltda. v. The Bio Bio, The Paraguay, The Argentina, 127 F. Supp. 13 (S.D.N.Y. 1955), *Aff'd*, 227 F.2d 519 (2d Cir. 1955); *But see* Sociedade Brasileira de Intercambio Comercial E. Industrial, Ltda. v. S. S. Punta Del Este, 135 F. Supp. 394, 396 (D.N.J. 1955). The court, ruling on a similar set of facts, held the contract unenforceable. Although enforceable if reasonable, such contracts cannot bind the court. 25 FORDHAM L. REV. 133 (1956); 31 N.Y.U.L. REV. 949 (1956); 2 WAYNE L. REV. 50 (1955).

[29] 4 MOORE, *op. cit. supra* note 5, § 26.02(3); Speck, *The Use of Discovery in United States District Courts*, 60 YALE L.J. 1132 (1951); Note, 36 MINN. L. REV. 364 (1952); Comment, 59 YALE L.J. 117 (1949).

[30] FED. R. CIV. P. 34. Requires showing of good cause, that material is not privileged, and is relevant.

ORDINANCE ALTERING AN EXISTING ZONING CLASSIFICATION HELD TO BE ADMINISTRATIVE ACTION AND NOT SUBJECT TO REFERENDUM

In 1952, a Nebraska city adopted a comprehensive zoning ordinance which designated a certain block as "residential." In 1955, the city council was petitioned to alter this particular designation. Following a public hearing, the council re-zoned the block "neighborhood business." Those opposed to the change, rather than seeking redress through the statutorily established method of administrative and judicial review,[1] circulated a petition calling for a referendum. The required signatures were obtained and the council scheduled the referendum. The trial court refused to enjoin the proposed referendum. On appeal to the Nebraska Supreme Court, *held,* reversed. The city ordinance changing the zoning classification of particular property from residential to business use was not a legislative but an administrative act and not subject to referendum. *Kelley v. John,* 162 Neb. 319, 75 N.W.2d 713 (1956).

Referendum is the power of the electorate to approve or reject at the polls any act of their legislative body. It has flourished in the United States since Revolutionary times as a method of retaining some degree of direct legislative control in the hands of the people. The power is one which requires a specific grant to call it into being.[2] Ordinarily the scope of referendum is limited to legislation, thus exempting from its purview the myriad administrative decisions.[3] Because of relative newness and sweeping potential, it is small wonder that conflicts arise between administrative zoning action and the power of referendum. The conflict heightens when these actions appear to invade the province of legislation. The courts have thus had to evolve criteria for determining whether an action is administrative in nature or is, on the other hand, legislative.

Nebraska's referendum statute provides that: "The referendum may be ordered upon any ordinance or measure. . . ."[4] This is judicially restricted by the accepted legislative-administrative distinction.[5] The court in the instant case advanced unity and efficiency as justifications for such a limitation and construction. They reasoned that if administrative actions calculated to exe-

[1] See NEB. REV. STAT. §§ 19-904, 19-912 (1943) (Supp. 1955), which provides for the proper method of amendment or supplementation of zoning regulations, and appeal to the district court from decisions of the board of adjustment established therein.

[2] See, *e.g.,* State *ex rel.* Payne v. Spokane, 17 Wash. 2d 22, 134 P.2d 950 (1943). This power can be granted by constitution, statute, or charter.

[3] *E.g.,* 7 MCQUILLIN, MUNICIPAL CORPORATIONS § 351c at 6621 (Supp. 1921):

> To allow [referendum] to be invoked to annul or delay executive [or administrative] conduct would . . . entirely prevent the exercise of the power necessary to carry out the acts determined upon by the legislative department. In the absence of a very clear decision to the contrary it must be presumed that the power of referendum was intended to apply solely to the legislative powers of the city.

[4] NEB. REV. STAT. § 19-640 (1943).

> The referendum may be ordered upon any ordinance or measure except ordinances making the annual tax levy, appropriating money to pay the salaries of officers and employees, or relating to local improvements and assessments therefor. . . .

[5] The Nebraska position is well stated in State *ex rel.* Ballantyne v. Leeman, 149 Neb. 847, 32 N.W.2d 918 (1948). For an enumeration of the jurisdictions adopting this distinction, see 5 MCQUILLIN, MUNICIPAL CORPORATIONS § 16.55 at 253 (3d ed. 1949), and Annot., 122 A.L.R. 769 (1939).

cute previously enacted laws are subjected to referendum there will be a significant time lag. The result would be loss of the efficiency necessary successfully to administer the affairs of the municipality. Further, such a practice would wholly defeat the unity of application necessary to carry into practice a comprehensive zoning ordinance.[6] The court recognized that the originally formulated general zoning policy would have been a proper subject for a referendum at the time of its adoption. However, when such a general policy has been determined, the changing of areas or the granting of exceptions become matters of administrative discretion in exercising continuing control over a previously established course of action.[7] The Nebraska court advanced the following criterion for distinguishing administrative from legislative action: "If an ordinance serves merely to put into execution a previously enacted law it is clearly administrative or executive in character." [8] Applying this test to the facts of the instant case, the court concluded that the council, in altering the zoning designation of a particular block under a previous comprehensive zoning ordinance, acted in its administrative capacity. Hence, the exclusive avenue for those opposed to this change was governed by the statute providing for review by the board of adjustment and, if need be, by appeal to the courts.

Most referendum statutes speak of "ordinances" in a general sense.[9] Thus the administrative-legislative test lacks statutory definition or delimitation. Three basic judicial tests have arisen to meet the need. The predominant basis for distinction is between ordinances which are essentially "law making" and those which are more generally considered "law effectuating." The former is legislative and the latter administrative. More specifically, the ordinance will be considered administrative if it carries into effect part of a comprehensive plan to which the community is committed by unchallenged past action.[10] The second criterion might be denominated the "durability test." Ordinances relating to subjects of permanent and general character will normally be regarded as legislative, while those having to do with details that are essentially fluctuating and temporary in nature will be regarded as administrative.[11] The third test is one of practicality, standing on policy considerations which the court chooses to adopt. Each case is decided on its own merits without regard to formalized tests or standards subsequently set up to explain the court's action. The primary consideration is the consequence of extending referendum to a particular ordinance or measure. If such an extension would tend to destroy the efficient administration of the municipality, the existing referendum provision would be interpreted as inapplicable.[12]

[6] Instant case at 716 citing Read v. City of Scottsbluff, 139 Neb. 418, 297 N.W. 669 (1941).

[7] Instant case at 716.

[8] *Id.* at 715 citing State *ex rel.* Nelson v. Butler, 145 Neb. 638, 17 N.W.2d 683 (1945).

[9] See, *e.g.*, note 4 *supra*, and UTAH CODE ANN. § 20–11–21 (1953).

[10] Tests based primarily on this distinguishing factor were employed in: McKevitt v. Sacramento, 55 Cal. App. 117, 203 Pac. 132 (1921); Seaton v. Lackey, 298 Ky. 188, 182 S.W.2d 336 (1944); Keigley v. Bench, 97 Utah 69, 89 P.2d 480 (1939); Denman v. Quin, 116 S.W.2d 783 (Tex. Civ. App. 1938).

[11] See, *e.g.*, the criterion advanced in Hawkins v. Birmingham, 248 Ala. 692, 29 So. 2d 281 (1947); People *ex rel.* Austin v. Graham, 70 Colo. 509, 203 Pac. 277 (1921).

[12] Monahan v. Funk, 137 Ore. 580, 3 P.2d 778 (1931) and Chase v. Kalber, 28 Cal. App. 561, 153 Pac. 397 (1915) applied this basis of decision, which is suggested in 2 SUTHERLAND STATUTORY CONSTRUCTION § 490 (2d ed., Lewis 1904).

There are, of course, cases which have rejected all these tests,[13] but such rejection can be distinguished on two grounds. The act or ordinance in dispute did not provide for "due process" — notice, hearing and some avenue of appeal [14] or the ordinance involved a comprehensive plan which would have been substantially changed by the proposed alteration.[15]

Referendum would prove at best an unwieldy device if applied to administrative zoning ordinances. The increasing penumbral area between the legislative and administrative functions of bodies such as city councils indicates the need for meaningful distinction between these functions. The existing tests are admittedly inconclusive and flexible. But perhaps in this area flexibility is more desirable and practical than rigid rules of application. In an expanding field, a practical consideration of consequences rather than certainty of rules will be more apt to lead to the desired uniformity of result and application.

R.H.W.

SUPREME COURT APPLIES STATE LAW IN DISPUTE BETWEEN TRANSFEREES OF UNITED STATES GOVERNMENT BONDS

Plaintiff brought an action in a federal district court alleging that defendant had converted certain negotiable government bonds. The trial judge instructed the jury in accordance with state law. On appeal, the circuit court reversed, holding the court had erred in applying state law. On certiorari to the Supreme Court, *held,* reversed. Litigation concerning United States government bonds when the government is not a party and when the decision would only remotely affect the government's interest, is governed by applicable state law. *Bank of America Nat'l Trust and Sav. Ass'n v. Parnell,* 77 Sup. Ct. 119 (1956).

In the early case of *Swift v. Tyson,*[1] the Supreme Court held that federal courts in deciding cases based on diversity need not apply the common law as declared by the state court, but were free to exercise an independent judgment as to what the common law is or should be.[2] This doctrine was subjected to considerable criticism until displaced by *Erie R.R. v. Tompkins,*[3] which held that the federal courts must apply, in diversity cases, the law of the state of the forum.[4] However, in *Clearfield Trust Co. v. United States*[5] the court recognized an exception in those cases involving checks, bonds and other commercial paper issued by the United States. This doctrine requires the application of federal law in cases affecting the rights and duties of the

[13] *E.g.,* W. B. Gibson Co. v. Warren Metropolitan Housing Authority, 65 Ohio App. 84, 29 N.E.2d 236 (1940).

[14] State *ex rel.* Hunzicker v. Pulliam, 168 Okla. 632, 37 P.2d 417 (1934).

[15] *E.g.,* Dwyer v. City Council of Berkeley, 200 Cal. 505, 253 Pac. 932 (1927) (by implication).

[1] 41 U.S. (16 Pet.) 1 (1842).

[2] *Id.* at 19.

[3] 304 U.S. 64 (1938).

[4] *Id.* at 78.

[5] 318 U.S. 363 (1943).

federal government;[6] when the government is a party to the action federal law should be applied.

In the instant case, the court recognized that while the United States is always interested in the issuance of its securities, private interests also arise in and are affected by circulation of such securities. The present litigation was solely between private parties and the financial interest of the government was remote; the rights and duties of intermediate holders should therefore be governed by local law.[7] The mere absence of the government as a party, however, would not necessarily preclude a federal interest direct enough to require application of federal law.

The dissent, following *Clearfield*, argued that all such transactions should be governed by federal law, regardless of the parties or the interest which might be involved. Particular concern was expressed over the practical difficulty of distinguishing transactions which directly affect from those "essentially of local concern." [8]

The instant case is, apparently, the first to come before the Supreme Court since the *Erie* decision in which the dispute was strictly between private parties. Aside from the plethora of *Erie* supporting arguments,[9] there are other basic considerations involved in the case. One of the objects of the law relating to federal paper is to promote its ready acceptance and flow with the least possible difficulty. As pointed out in *Clearfield*, this can be best accomplished by having a uniform set of rules applied throughout all the states. Those persons and organizations such as banks, investment houses, and insurance companies who handle the vast bulk of these transactions are involved in interstate business and would presumably welcome a single uniform set of laws. However, they are necessarily required to know the various laws of the states in which they deal. The *Clearfield* holding merely added an extra set of rules, increasing rather than mitigating their problem.

The court's determination in *Clearfield* effectively neutralized the mandate of *Erie* in this area by holding that the federal government was exercising a power granted to Congress in the Constitution when it issues and deals with its own commercial paper.[10] Since Congress had not acted, the court was free to determine whether federal or state law should be applied on the basis of policy.[11] Their determination of this point is illustrated by the following:

> The issuance of commercial paper by the United States is on a vast scale and transactions in that paper from issuance to payment will commonly occur in several states. The application of state law, even without the

[6] *Id.* at 366.

[7] Instant case at 121.

[8] *Id.* at 122.

[9] The legal writers that discussed the *Clearfield* case tended to revert to those arguments that were applied to the *Erie-Tyson* controversy. See, *e.g.*, 32 ILL. B.J. 211 (1944).

[10] Clearfield Trust Co. v. United States, 318 U.S. 363, 366 (1943).

> We agree with the Circuit Court of Appeals that the rule of *Erie R. Co. v. Tompkins* . . . does not apply to this action. The rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law. When the United States disburses its funds or pays its debts, it is exercising a constitutional function or power.

[11] *Id.* at 367. "In absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards."

> conflict of laws rules of the forum, would subject the rights and duties of the United States to exceptional uncertainty. It would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states. The desirability of a uniform rule is plain.[12]

The decision in the instant case is not inconsistent with the policy announced in *Clearfield*. From the standpoint of convenience to the federal government, nothing is altered. The court was free to adhere to policies similar to those which motivated the *Erie* decision[13] without violating their *Clearfield* policy determination. However, the remote-direct interest criteria as established by the majority is extremely vague and any clear demarcation will have to come from future judicial refinement.[14]

The instant case represents one of the inevitable clashes inherent in the dual existence of the *Erie* doctrine and the federal right of supremacy when federal actions in a governmental capacity are involved. Accepting *Erie* as the present law the only exceptions that should be made are those found necessary by the proper application of constitutional mandates in the area of federal supremacy. *Clearfield* is an exception to *Erie*; as such it should be limited to the extent compatible with the reason for the original exception. Under *Clearfield* and the instant case when a federal interest is manifest, federal law will apply in both federal and state courts. However, the basic premise of *Erie* should not be overlooked in alluding to possible federal interest. When "primary private rights" [15] are in issue, *Erie* adherence requires an equally strict application of state law. The instant decision is a logical product of a fair interpretation of *Erie*. Whether the result is desirable depends upon how the individual views the validity of the *Erie* concept of state supremacy in all law-making which primarily affects private interests.[16] A return to *Swift v. Tyson* is highly improbable. Thus it appears that we must adjust to this inherent disparity between federal and state (private) interests.

The uncertain test in the instant case undoubtedly places an additional burden on the party or institution dealing with federal commercial paper. It would seem, however, that *Clearfield* imposes a burden in initially requiring the use and knowledge of another set of rules (*i.e.*, federal).[17] The solution to this paradox could come from congressional enactment of legislation which would specifically indicate the law applicable to the various situations and types of government paper. Consideration by Congress could provide a more logical appraisal of those critical elements of commercial paper — for

[12] *Ibid.*

[13] In the instant case, the court did not dwell on the policy which motivated their decision. However, every argument supporting the *Erie* decision could, with consistency, be applied to the instant decision. See, *e.g.*, Schmidt, *Substantive Law Applied By The Federal Courts — Effect of Erie R. Co. v. Tompkins*, 16 TEXAS L. REV. 512, 516–523 (1938).

[14] Even with relatively clear tests, the determination of applicable law presents many difficult problems. *Cf.* Davis v. Department of Labor, 317 U.S. 249 (1942); Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917).

[15] HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 633–636 (1953).

[16] Instant case at 122. "If the rule of the Clearfield Trust case is to be abandoned as to some parties, it should be abandoned as to all and we should start afresh on this problem."

[17] The lay businessman is not always aware of the differences between federal and state law and this lack of distinct information causes him to run some risk in the handling of government paper which might be controlled by either state or federal law.

example the effect of any course upon negotiability. Although it might be pragmatically more convenient to have all government paper controlled by one set of rules, this convenience, in absence of legislation, cannot justify an exception to *Erie*.

Unformity must bow to the need for consistent adherence to the presently accepted solution to this vexatious problem. This intermediate course, apparently required by both *Erie* and *Clearfield*, will undoubtedly result in substantial confusion until the test as espoused has been refined by the courts. That such refinement will come seems certain since *Erie* is apparently here to stay.

V.K.C.

EVIDENCE AS TO THE RESULTS OF ANALYSIS OF BLOOD TAKEN FROM DECEASED HELD ADMISSIBLE IN CIVIL ACTION

Plaintiff, injured in a collision with deceased's overturned automobile, brings action for damages under the Utah survival statute.[1] A blood sample taken from the deceased's body was analyzed for alcoholic content and found to contain a percentage of alcohol sufficient to warrant a presumption of intoxication.[2] This evidence, obtained without permission of deceased's next-of-kin, was held admissible by the trial court. On appeal to the Utah Supreme Court, *held*, affirmed as to the admissibility of this evidence; remanded on other grounds.[3] The constitutional right of privacy dies with the person to whom it is of value and suppression of evidence obtained by violating this right cannot be asserted by the estate or next-of-kin. *Fretz v. Anderson*, 300 P.2d 642 (Utah 1956) (Henroid, Justice, concurs in the result, dissents as to the admissibility of the blood test).

At common law, evidence was never excluded in a lawsuit, civil or criminal, because of the method by which it was obtained.[4] *Weeks v. United States*[5] established a contrary rule for federal criminal prosecutions. Evidence which is obtained by violating constitutional rights is not admissible.[6] This

[1] UTAH CODE ANN. § 78–11–12 (1953).

[2] UTAH CODE ANN. § 41–6–44 (b) (3) (1953).

[3] The court held that if deceased were alive at the time of the collision the tort action would survive according to the statute, but if he was dead the plaintiff would have no cause of action. There is some question as to whether this conclusion should be as automatic as the court indicates. Under the rule at common law no cause of action *ex delicto*, survives the death of the wrongdoer, but this rule has been changed in a great many states by statute. United States Casualty Co. v. Rice, 18 S.W.2d 760 (Tex. Civ. App. 1929), held that when the cause of action arose four days after the death of the negligent wrongdoer the action did not survive, because the statute only provided for survival of the cause of action which "shall have accrued" prior to the wrongdoer's death. In Ford v. Maney, 251 Mich. 461, 232 N.W. 393 (1930), the court decided that the law does not require a splitting of hairs as to what would constitute instantaneous death. The court reserved the determination of whether or not the action would survive if it could in fact be shown that the deceased died at the instant of the injury. The Utah statute does not require that the cause of action accrue before it can survive but provides for survival of "Causes of action arising out of . . . injury . . . caused by the . . . negligence of another. . . ." UTAH CODE ANN. § 78–11–12 (Supp. 1955). A liberal interpretation of the Utah statute does not seem to require the holding of the instant case.

[4] 8 WIGMORE, EVIDENCE § 2263 (3d ed. 1940).

[5] 232 U.S. 383 (1914).

[6] *Ibid.*

exclusionary rule is not constitutionally guaranteed but is judicially created.[7] State courts have split on whether the same rules of exclusion apply to state prosecutions, with a slight majority declining to follow the federal lead.[8]

A somewhat uncertain extension of the federal rule to state prosecutions was created by the decision in *Rochin v. California*,[9] which held that the due process clause of the Fourteenth Amendment required the exclusion of evidence obtained by methods which "shock the conscience," offend "a sense of justice" or run counter to the "decencies of civilized conduct." But the general proposition of state law yet remains that evidence obtained from the taking of body fluids may be introduced in state court prosecutions.[10] The fluids may be obtained without the free consent of the person from whom they are taken; not until the methods employed in securing them reach a high degree of offensiveness is there danger of colliding with the command of *Rochin*. Those few state court decisions which find blood samples taken without the express or implied consent of the accused inadmissible must, since *Breithaupt v. Abram*,[11] do so in the exercise of a judicial restraint or in the restrictive interpretation of their own constitutions[12] rather than upon any assumed violation of due process rights having their origin in the fourteenth amendment.

The opinion in *Breithaupt v. Abram* acknowledges that the circumstances there presented constitute a variation from *Rochin* in degree only.[13] Although in the instant case there is no reason to exclude the evidence on federal constitutional grounds because of *Breithaupt*, the dissenting opinion suggests the bare possibility that receipt of evidence in a civil case as well as in a criminal case when obtained in a manner which "shocks" the conscience may collide with federal proscriptions. The mere use of such evidence by a party to a civil proceeding presumably would not of itself be violative of due process, both because the federal sanctions against the evidence have been against the method by which it is obtained rather than its use, and because the mere proffer of such evidence by a non-governmental party to a civil suit would not seem to constitute the requisite "state action." But theoretically, at least, the judicial reception of such evidence might be thought to come within the exceptional reasoning employed in *Shelley v. Kramer*[14] in which judicial enforcement of a private agreement which discriminated on the grounds of race was found to be a form of state action prohibited by the fourteenth amendment. The instances in which evidence unlawfully obtained by state officers has been provided to and used in federal courts by federal prosecutors[15] seem

[7] See Wolf v. Colorado, 338 U.S. 25 (1949); Stefanelli v. Minard, 342 U.S. 117 (1951).

[8] McCORMICK, EVIDENCE § 139 (1954); see 5 UTAH L. REV. 116 n.6 (1956).

[9] 342 U.S. 165 (1952).

[10] *E.g.*, Schutt v. Mac Duff, 205 Misc. 43, 127 N.Y.S.2d 116 (Sup. Ct. 1954); State v. Cram, 176 Ore. 577, 160 P.2d 283 (1945); Alexander v. State, 305 P.2d 572 (Okla. 1956). See 8 WIGMORE, EVIDENCE § 2183–84b (3d ed. 1940).

[11] 77 Sup. Ct. 408 (1957).

[12] *E.g.*, State v. Kroening, 274 Wis. 266, 79 N.W.2d 810 (1956); Trammell v. State, 287 S.W.2d 487 (Tex. Crim. 1956); State v. Weltha, 228 Iowa 519, 292 N.W. 148 (1940).

[13] Breithaupt v. Abram, 77 Sup. Ct. 408, 411–12. See dissenting opinion at 412.

[14] 334 U.S. 1 (1948).

[15] Lustig v. United States, 338 U.S. 74 (1949); Feldman v. United States, 322 U.S. 488 (1944); Andersen v. United States, 237 F.2d 118, 122 (1956). *Cf.* Burdeau v. McDowell, 256 U.S. 465 (1921) (evidence supplied by private corporation).

to give strong indication that such an extension is improbable. The clearly criminal-law tone of the fourth and fifth amendments, in which the federal exclusionary rules have their genesis, reinforces this view.

The primary objection of the dissenting justice in the instant case was based not upon the ground that the evidence was unlawfully obtained but upon the feeling that methods employed were too ghoulish to receive judicial encouragement. No instance has been found in which the shocking conduct of ordering an autopsy or disinterment for the purpose of obtaining civil evidence was used, although each of these circumstances would present even more extreme cases. Basically, however, it is hard to see why the law which permits and orders physical examinations of living persons,[16] including the taking of blood specimens,[17] should be any more reluctant to sanction the same practices in regard to the body of a deceased when "the mental or physical condition of a *party* is in controversy. . . ." [18] The deceased in the instant case escaped being a party only because of his death, and in a practical sense he is as truly the defendant as if he were alive.[19]

It is submitted that much the same analysis should govern any action by the next-of-kin of the deceased for the taking of body fluids (the possibility of such an action was suggested by the majority as the appropriate remedy, in preference to exclusion from evidence). Since the exigencies of the situation do not admit of the deliberate procedures contemplated — a court order upon good cause shown — by Rule 35 of the Rules of Civil Procedure, it would seem appropriate to measure the wrongfulness of the taking of such evidence by whether it could have been obtained from a living party under a Rule 35 order. If it could not have been, a tort remedy should exist.[20] Only extremely ghoulish or revolting methods should be punished by the remedy suggested by the dissenting justice, which is total exclusion from evidence.

D.E.A.

[16] FED. R. CIV. P. 35, 37; UTAH R. CIV. P. 35, 37.

[17] See UTAH CODE ANN. § 78–25–18 through 23 (1955 supp.); Beach v. Beach, 114 F.2d 479 (D.C. Cir. 1940).

[18] FED. R. CIV. P. 35; UTAH R. CIV. P. 35.

[19] See Beach v. Beach, 114 F.2d 479 (D.C. Cir. 1940), a paternity proceeding in which blood samples were taken from both mother and child although the latter was not technically a party to the proceeding.

[20] The precise measure of damages for such a tort offers interesting speculation. Presumably any such remedy would reside in the next-of-kin since it is the offense to their sensibilities which is the gist of the cause of action. See JACKSON, THE LAW OF CADAVERS 132–33, 137, 169–70 (1950). Whether the amount by which their inheritance or survivorship is decreased by the recovery based upon the wrongful act in taking the evidence would constitute "legal damage" is extremely doubtful although the causal connection seems clear enough. Were this an element of damages, the cause of action would more properly reside in the estate and be measured by the amount by which the estate is depleted by the resulting judgment. Indeed, the estate might assert a counterclaim under such a theory which would exactly equal any judgment obtained against it. In any event, it seems clear that if the damages were measured by the principal "harm" which flowed from the wrongful taking, the one most often injured would be the deceased's insurer.

BOOKS

LETTER FROM THE LAW LIBRARY

A listing of recent significant acquisitions by the Law Library of the University of Utah will inform those interested in the materials available for use in the Law Library of new holdings and, in addition, will acquaint the busy practitioner with many of the recent publications which might otherwise escape his notice.

Accordingly the following listing, arranged by subject matter, is offered. The comments are intended to provide a better description of the book than is furnished by author and title standing alone.

ROBERT L. SCHMID
Law Librarian
University of Utah College of Law

AIR LAW

Journal of Air Law and Commerce. Chicago, Northwestern University, 1930 to date with the exception of 1943-1946 when publication was suspended.

The only significant periodical in this field.

BANKRUPTCY

MACLACHLAN, J. A. Handbook of the law of bankruptcy. St. Paul, West, 1956. 500 p.

After discussion of the relationship between bankruptcy and the other possibilities which might ensue when a debtor is unable to pay his debts, the author treats the subject of bankruptcy not in the order of the statute but in the order in which the problems, procedures and persons involved will most likely be presented to the attorney handling a bankruptcy problem. Black type headnotes precede the textual discussion. Not designed to replace the larger treatises on the subject, this "hornbook" will serve admirably well as a point of departure for the novice or non-specialist.

CORPORATIONS

Prentice-Hall, Inc., Corporation Service. Englewood Cliffs, N.J. Prentice-Hall, Inc., 4 v.

This is a four volume loose-leaf service covering the general problems encountered in corporate practice and also the applicable statutes, with annotations, from all states. This state coverage includes all statutes of interest to the corporate attorney. For example, it contains the pertinent Utah Rules of Civil Procedure with case annotations, annotated excerpts from the penal code, and annotated sections from the title on Labor, as well as numerous other selected statutes.

ARANOW, EDWARD R., AND EINHORN, H. A. Proxy contests for corporate control. Columbia University Press, 1957. 577 p.

This work presents, probably for the first time, a thoroughly exhaustive study of the use of proxy voting in corporate management, covering the numerous phases of the subject from a practical as well as a legal point of view.

INSTRUCTIONS TO JURIES

California Jury Instructions, Civil. 4th ed. rev. St. Paul, West, 1956. 2 v.

Also known as Book of Approved Jury Instructions, cited B.A.J.I., this fourth edition in two volumes supplies the most frequently used jury instructions and many that are only infrequently needed. In addition to explanatory comments and citations to California authorities there are included appropriate American Digest Key Numbers for further search in any unit of the National Reporter System or its several digests.

MINES AND MINERALS

Rocky Mountain Mineral Law Institute. Proceedings of 2d institute. Albany, Matthew Bender & Co., 1957. 509 p.

As indicated in the introduction, "The Second Annual Rocky Mountain Mineral Law Institute, held at Boulder, Colorado, August 2–4, 1956, attracted mining, oil and gas attorneys and executivess from all parts of the nation. The problems selected were designed to pin point technical legal problems faced in the mineral law field — yet broad enough to cover day-to-day

problems." Articles presented include "The Mining Lease" by Harley W. Gustin of the Utah Bar, "Co-Ownership of Mining Properties and Mining Partnerships" by James K. Groves of the Colorado, and "Indian Lands — Selected Problems" by Alfred E. McLane of the Texas Bar.

NEGLIGENCE

Negligence and Compensation Cases. 3d ser. v. 1–7. Chicago, Callaghan.

The coverage of this set includes the law of automobiles, negligence generally, workmen's compensation and insurance problems. The annotations following the reported cases consist of abstracts and excerpts from cases, arranged by jurisdiction, under specific subject or legal problem headings. Although in no sense analytical, this annotated special subject series of reports will serve as a rapid case finder for the subjects covered. A cumulative index service provides a supplemental case table for finding later cases in point.

HARPER, FOWLER V., AND JAMES, FLEMING. Law of torts. Boston, Little, Brown & Co., 1956. 3 v.

The latest exhaustive work of a general nature on the law of torts.

Defense Law Journal. Vol. 1, Jan. 1, 1957. Indianapolis, Ind., Allen Smith Co., 1957.

The editor proposes publishing two bound volumes annually. The purpose is to provide a forum for the exchange of ideas and suggestions by those interested in the defense and adjustment of personal injury claims. The tenor of the first volume is set by the editor's comment: "The philosophy that a high verdict is always a just and proper verdict has been given wide circulation by those whose interest is served best by such a doctrine. . . . The need for cooperation among attorneys representing those who have been compelled to bear the brunt of this trend is long over due."

OIL AND GAS

KULP, VICTOR H. Oil and gas rights. Boston, Little, Brown & Co., 1954. 916 p.

This is part 10 of the American Law of Property reprinted separately for the convenience of those interested in the field of oil and gas law.

MCLANE, A. E. Oil and gas leasing on Indian lands. Albany, Matthew Bender & Co., and Denver, F. H. Gower, 1955. 407 p.

Southwestern Legal Foundation. Proceedings of the Seventh Annual Institute on Oil and Gas Law and Taxation as it affects the Oil and Gas Industry. Albany, Matthew Bender & Co., 1956. 787 p.

The articles published in this and the prior proceedings form the basis of the various lectures delivered. However the articles are in an expanded form and are liberally footnoted.

Louisiana State University Law School. Fourth Annual Institute on Mineral Law. Ed. by Harriet S. Daggett. Louisiana State University Press, 1956. 179 p.

Limited in scope to the legal aspects of the oil and gas industry in Louisiana generally, this publication consists of the papers presented at the Institute.

REAL PROPERTY

LIEBERMAN, MILTON N. Effective drafting of leases for real property; with check lists and suggested forms. N.J., Gann Law Books, 1956. 974 p.

This book covers both the broad and the fine considerations of lease drafting, serving as a comprehensive check list and providing suggested model forms. Comments discuss the various problems encountered but there are no citations to statutes or cases on the theory expressed by the author that the user either knows the law of his jurisdiction or knows how to find it.

LIEBERMAN, MILTON N. Effective drafting of contracts for the sale of real property; with check list and suggested forms. N.J., Gann Law Books, 1954. 365 p.

The format follows that of the same author's book next above.

PATTON, R. G. AND PATTON, C. G. Patton on titles. 2d ed. St. Paul, West, 1957. 3 v.

A revised and improved edition of an already proved work.

TAXATION

LOWNDES, CHARLES L. B., AND KRAMER, ROBERT. Federal estate and gift taxes. N.J., Prentice-Hall, Inc., 1956. 1028 p.

A new, comprehensive and authoritative coverage of the field of federal estate and gift taxation based on the 1954 code.

TRUSTS

SCOTT, AUSTIN WAKEMAN. Law of trusts. 2d ed. Boston, Little, Brown & Co., 1956. 5 v.

Incorporates that of value from the thousands of cases and the many statutes which have come into existence since the publication of the first edition in 1939.

BOOK REVIEWS

Vagaries and Varieties in Constitutional Interpretation, by THOMAS REED POWELL. New York: Columbia University Press, 1956. Pp. xi, 229. $3.50.

Two months before his death in 1955, Professor Powell, who for a quarter of a century had held the chair for Constitutional Law at the Harvard Law School, delivered the James S. Carpentier lectures at Columbia University. The manuscript of these lectures, which had never received its final editing, was prepared for publication after Professor Powell's death by his former colleagues Paul A. Freund and Ernest J. Brown. The resulting volume supplies us with a more systematic account of the author's views than can be obtained from his widely scattered periodical articles and gives us a great deal of insight into the modes of thinking of a man who for many decades had been known as a colorful, pungent, and sharp-witted critic of the United States Supreme Court.

In his stimulating foreword, Professor Freund points out that the present volume, like most good writing, can be studied under two aspects and on two levels. It may be read, first, as an analysis of the development of Supreme Court doctrine in certain areas of constitutional law, notably regulation of commerce and state taxation. On another level, the lectures may be viewed as "an exercise in legal philosophy." They give articulate expression to certain strongly-held convictions of the author as to how the judicial process functions or should function in constitutional cases and what the guiding criteria and guideposts of constitutional interpretation should be. This review will appraise Professor Powell's lectures almost exclusively from the vantage point of the second level; the discussion will be confined largely to the first three lectures in which most of the author's basic views concerning decision-making in constitutional cases are set out. The last three lectures, however, will be of special interest to lawyers, teachers, or law students who are looking for an incisive analysis of some of the major Supreme Court decisions in the domain of federal-state relationships. The fourth lecture is entitled "Intergovernmental Relations" and deals chiefly with the reciprocal immunities — above all tax immunities — which the Supreme Court has accorded to the federal and state governments, respectively. The fifth lecture takes up the problem of state police power, to the extent to which the exercise of this power affects commerce and the national economy, while the sixth analyzes the state taxing power against the background of an economic federalism. Professor Powell's dissection and comparison of significant Supreme Court opinions on these subjects will be appreciated by all who are seeking to penetrate the thicket of constitutional doctrine in these highly technical and complex areas of federal-state relationships.

Turning now to those chapters which elucidate Professor Powell's general approach to problems of constitutional adjudication, this reviewer must confess to a certain sense of disappointment experienced in reading the first lecture, entitled "Establishment of Judicial Review." Rejecting the extremes of viewing judicial control of legislation either as a tyrannical act of usurpation by a power-drunk judiciary or as a divinely ordained and inexorably neces-

sary imperative of constitutional government, the author chooses the road of a somewhat unconcerned and nonchalant acceptance of the system on the ground that the statute of limitations has run against the propriety of serious criticism. "There have been arguments aplenty," says Professor Powell, "that Marshall's assumption of the power was judicial usurpation, but they do not interest me. However initially indefensible that first seizure might have been, the power has now been duly sanctioned by a century and a half of sufficient national acquiescence" (p. 20). This view is reinforced later in the book when the author expresses his general belief that "prescription may need to be invoked in making acceptable the course of constitutional history and of constitutional law" (p. 215). Such statements are symptomatic of strong leanings toward a philosophy of historical positivism which questions the existence of a power because it was not specifically defined in a formalized legal document, but regards the defect as cured by the lapse of time accompanied by popular inaction to remedy the situation.

In the opinion of this reviewer, there is no genuine necessity for grounding an institution as fundamental and pervasive for the growth of American public law as the doctrine of judicial review on such unedifying and unsatisfactory premises. Judicial review may properly be regarded as a natural outgrowth and concomitant of certain political and philosophical ideas which were widely held by statesmen and lawyers at the time when the Constitution was adopted. Foremost among these ideas was the conviction that it was a cardinal objective of the constitutional charter to protect individual "natural rights" from infraction by temporary legislative majorities and that, for the purpose of accomplishing this objective, it was essential to construe the provisions of the document as "law" in the strict sense of the term rather than a mere cluster of moral exhortations addressed to legislative assemblies. This view will logically concede to the judges a firm and decisive place in the system because they are the chosen interpreters and guardians of the law. Furthermore, the makers of the Constitution realized that the operation of a federal system predicated upon a precarious and delicate balance of central and local powers required ministration by a judicial arbiter, in the absence of which force alone might be capable of solving conflicts arising with respect to the distribution of jurisdictional powers. Professor Powell himself recognizes these necessary implications of the American system of government and advances the "unprovable assumption that in due season the power would have been exercised even had not Marshall made his affirmation in 1803" (p. 21). The fact that in the presence of such compelling considerations in favor of judicial review the fathers of the Constitution refrained from giving a formal sanction to the power may find its chief explanation in an understandable hesitation to parade this immense prerogative of a national court before the eyes of state governments intent upon yielding not one inch of sovereignty in excess of what the exigencies of the situation absolutely required. It is submitted that this omission to formalize the power of judicial review does not deprive the institution of legitimacy or legal efficacy if we realize that a legal document is never self-contained and self-sufficient and must often rely for its interpretation on unexpressed, contemporaneous ideas

without which its true import, significance, and scope cannot be comprehended.

The second lecture bears the title "Professions and Practices in Judicial Review." The purpose of the lecture is to instill in the students of constitutional law the conviction that few of the decisions of the U.S. Supreme Court in this field are logically inevitable or dictated by the textual mandates of the Constitution itself. Professor Powell points out that in a large majority of constitutional cases the men on the highest bench of the land face the necessity of making policy choices at almost every step on the road, and that official remarks uttered by some 20th century Supreme Court justices to the effect that "it is not they that speak but the Constitution that speaketh in them" must be regarded as a species of utter self-deception. He refers, for example, to the famous decision in which Mr. Justice Roberts analyzed the judicial function in constitutional cases as involving only one simple duty, viz., "to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former." [1] He shows that this case in fact dealt with a situation in which the squaring process could yield no compelling conclusion one way or the other. He then pertinently asks the question how Justices Brandeis, Stone, and Cardozo, the dissenters in this case — which according to the majority involved only a more or less plain, mechanical operation — could have failed to see the light unless they were "without the right kind of precision instruments for measuring angles, areas, and corners" (p 43).

A disarming freshness and piercing sarcasm will be found in many of Professor Powell's comments on the "automation" theory of constitutional adjudication. Much food for thought can also be derived from a study of the third lecture, entitled "National Power," in which some of the author's general ideas regarding judicial behavior are brought to bear upon specific problems relating to the scope of the federal commerce power. In this chapter, certain divisions of the court during the critical New Deal period, including divisions within the personality of individual judges ("Mr. Justice Roberts might be said to have been divided against himself") are subjected to Professor Powell's discerning scrutiny. In spite of a strong emphasis on the personal factor, he expresses impatience with the view that judges are controlled chiefly by their social and economic background or class prejudices. This view, he says, does not explain the judicial performance of men like Holmes, Brandeis, Cardozo, and Stone. "The simplest explanation of their outlooks is that they had superlatively high-grade minds. This is always a help" (p. 45).

Professor Powell's book, although replete with sagacious observations and discriminating insights, is in some respects the product of an epoch which has in our days come to a close. There are few lawyers and law professors today who are in need of being taught that constitutional provisions, in the words of Professor Powell, do not "interpret themselves under their own steam" (p. 53). A century and a half of constitutional adjudication has clearly demonstrated the truth that constitutional texts are neither static nor self-explanatory, that the meaning of legal terms and concepts often undergoes a

[1] United States v. Butler, 297 U.S. 1, 62 (1936).

shift in time, and that judges are more than the mechanical mouthpieces of an impersonal constitutional lawgiver. Choices must be made in the interpretation of general and often ambiguous clauses, and in making these choices the realities of the social scene, and needs of the nation, and the prevalent (or, in some cases, emergent) value patterns have to be taken into consideration by the adjudicators.

At the time when Professor Powell launched his early attacks against decisions like *Lochner v. New York*,[2] in which a result clearly resting on certain unavowed economic theories was disguised in judicial argument as the effluence of an ineluctable command of "due process," interpretations of judicial action such as those propounded by Professor Powell were by no means common or widespread. Today, his mode of approach would appear to be taken for granted by most scholars, lawyers, and judges. The function of future analysis of constitutional technique and reasoning would seem to lie in a somewhat different direction. In the opinion of this reviewer, the task ahead is to distill, from the mass and welter of competing rationales for decision, those considerations that are entitled either to a primary or supplementary place in the adjudicatory process and to segregate them from those which must be considered illegitimate and extraneous. It is also desirable, in a clearer fashion than has hitherto been achieved, to bring to light the controlling guideposts that should be observed by the judges in the balancing of conflicting interests and reconciliation of antithetical constitutional values. Another endeavor worthy of constructive scholarship would seem to be a re-evaluation and — if possible — systematic analysis of the limits beyond which a legislative judgment may not be entitled to deference and respect under modern constitutional theory. Only modest beginnings have been made so far in coping with these challenging problems. There is no doubt, however, that a book like Professor Powell's has served to clear away much of the underbrush and deadwood lying in the path of a fresh synthetic approach.

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Federal Estate and Gift Taxes, by CHARLES L. B. LOWNDES AND ROBERT KRAMER. Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1956. Pp. xxii, 1028. $25.00.

The authors state that *Federal Estate and Gift Taxes* is directed to the general practitioner who is not a tax specialist, the experienced tax attorney and the student. Though limited by the size of the book, this broad objective has been accomplished.

The text may help the lawyer who does not have extensive tax experience to recognize some of the tax and planning problems that lurk beneath the surface of daily practice. For instance, chapter 4 of part III, "Tax Planning for Estates," discusses some of the dangers incident to creating a vested remainder in a child of the testator. The typical case is the will of a husband

[2] 198 U.S. 95 (1905). The decision invalidated a statute limiting the hours of employment in bakeries.

that leaves property in trust to his wife for life, with remainder to his son in fee. Many wills may have been prepared in this manner without its being recognized that the vested remainder will be included in the son's taxable estate in the event the son survives his father but predeceases his mother.

The experienced tax attorney will find an analysis of some of the more difficult estate and gift issues. As an illustration, chapter 8 of part I, "Transfers with Reservation of a Life Interest" considers whether the transferor's gross estate for death tax purposes would include an irrevocable gift of income-producing property to an independent corporate fiduciary as trustee, where the trustee is given discretion to distribute income to or for the benefit of the trustor for so long as he lives. A property owner may hesitate to reduce his gross estate by gifts for fear he may need the income. If a right to income were reserved, the transfer would be included for death tax purposes. The problem is whether the same result would obtain if no rights were retained, but the trustee were given discretion to apply the income for the transferor's benefit.

The student who has sufficient imagination or experience to appreciate the significance of what he reads should gain invaluable ideas respecting not only what the law is, but how to solve a variety of problems within the framework of existing tax and local laws.

For general practice, the Utah lawyer should find certain chapters very useful. Among others, the chapter on "Powers of Appointment" gives substantial assistance to a Utah attorney who has occasion to prepare a will for an estate having assets in excess of $60,000. The authors have attempted to remedy the much overlooked matter of state death tax burdens, and many of their suggestions are applicable to estates of Utah residents.

One of the best features of the book is the explanation of the statutes and litigation which form the background for the present law. By careful study of the text, a busy attorney, who may be under too much pressure to extricate the controlling statutes and leading cases, should be able to determine fairly rapidly what has been the law, and in this manner gain a clearer appraisal of why the law is in its present form and more reliable opinion of what the law is likely to be in the future.

Though not giving solutions for all estate and gift tax problems which occur in current practice, the book would be a very useful addition to the library. Unfortunately, the work is a bound volume. The substantive law respecting federal estate and gift taxes is apt to undergo substantial and rapid changes. Perhaps current pocket parts will prevent the book from becoming outdated prematurely.

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