NOTES

Criticized Uses of Federal Tax Exemption Privileges by Charitable Foundations and Educational Institutions

President Truman's special tax message to Congress on January 23, 1950 contained a stinging denunciation of present loopholes in the income tax statute,[1] and focused attention anew on schemes devised by individuals and organizations to reduce or completely avoid the payment of federal taxes on substantial incomes. Included in this excoriation were certain activities of charitable and educational organizations which have been accorded the exemption benefits of Sections 101(6) and 162(a) of the Internal Revenue Code.[2] The basic importance of these organizations in our daily life makes it desirable to examine in detail the nature of the activities criticized by the President and others; the probable impact of such undertakings on society, if they are allowed to continue in their present form; and remedies suggested to eliminate current and probable future abuses.

It is the purpose of this Note to discuss these problems, after first reviewing briefly, as background material, pertinent facts relating to charitable and educational institutions in this country, and the liberal interpretations by the courts of the relevant Code provisions. It should be stressed that no condemnation is intended of any of the organizations mentioned.

Background

Charitable Foundations.—"The man who dies rich . . . dies disgraced," wrote Andrew Carnegie,[3] continuing, "a millionaire will be but a trustee for the poor, intrusted for a season with a great part of the increased wealth of the community." As a practical application of his philosophy, Mr. Carnegie established eight foundations to which he donated more than $200,000,000,[4] and thus gave great impetus to the slowly developing movement in America for the establishment of philanthropic foundations.[5] Consonant with this idea of contributing private wealth

1. N.Y. Times, Jan. 24, 1950, p. 1, cols. 6, 8.

2. "Sec. 101. Exemptions from Tax on Corporation.

"The following organizations shall be exempt from taxation under this chapter. . . .

"(6) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for . . . charitable, scientific . . . or educational purposes . . . no part of the net earnings of which inures to the benefit of any private shareholder or individual. . . .

"Sec. 162. Net Income-Estates and Trusts.

"The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—

"(a) There shall be allowed a deduction . . . any part of the gross income, without limitation, which pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the purposes specified . . . or is to be used exclusively for . . . charitable . . . or educational purposes."

3. CARNEGIE, THE GOSPEL OF WEALTH 18, 19 (1900).

4. Andrews, *Foundations and Community Trusts,* SOCIAL WORK YEAR BOOK 218 (1949).

5. KEPPEL, THE FOUNDATION 17 (1930). No more than seven foundations of any importance carried over from the nineteenth century. COON, MONEY TO BURN 28 (1938).

for public purposes, innumerable foundations have been established in recent years;[6] the five largest and their estimated assets are:[7]

Ford Foundation	$205,000,000
Rockefeller Foundation	198,000,000
Carnegie Corporation of New York	171,000,000
Duke Endowment	135,000,000
Kresge Foundation	75,000,000

Additional stock assets will be distributed to the Ford Foundation upon settlement of the estate of Henry Ford. Further, the eventual yields of oil lands belonging to the new Cullen Foundation in Texas may place that organization in this category.[8]

To encourage the altruistic and benevolent motives ostensibly behind the establishment of this type of foundation, the income of such organizations has been consistently exempted from federal taxation.[9] It is not surprising, therefore, that a longing eye has been cast in the direction of this type of enterprise by individuals and corporations in upper tax brackets in an effort to evolve some plan whereby they could gain an advantage from this liberal tax provision. The astounding increase in the number of these organizations in recent years[10] has created a suspicion that "some taxpayers have strayed from the path of virtue in their search for new tax avoidance devises."[11] A disturbing number of these "foundations" appear to have no headquarters other than the office of a law firm, to be modest to the point of complete silence about any program for social or public welfare, and to be making no present contributions from their accumulated and accumulating wealth.[12]

Educational Institutions.—At the same time, colleges and universities, faced with the anomalous situation of rapidly increasing costs, decreasing income from endowments, and a decline in gifts by private donors, apparently due to the impact of heavy, progressive taxation, found refuge in the Supreme Court's ruling that the test of whether an organization qualifies under Section 101(6) is the destination, not the source of its income.[13] Consequently, they have embarked on ventures which have

6. HARRISON AND ANDREWS, AMERICAN FOUNDATIONS FOR SOCIAL WELFARE 22 (1946).

7. Andrews, *New Challenges for our Foundations,* The New York Times Magazine, April 3, 1949, p. 16, col. 4.

8. *Ibid.*

9. Finkelstein, *Freedom from Uncertainty in Income Tax Exemptions,* 48 MICH. L. REV. 449-50 (1950).

10. HOW TO HAVE YOUR OWN FOUNDATION, Fortune, Aug. 1947, p. 109, col. 1.

11. Jenks, *The Use and Misuse of Section 101(6),* NEW YORK UNIVERSITY SEVENTH ANNUAL INSTITUTE ON TAXATION 1051 (1949); Note, 34 VA. L. REV. 182 n.8 (1948). Out of 166 questionnaires dispatched to foundations, principally of the "family" variety, 103 made no replies and only 22 furnished extremely helpful information.

12. See ANDREWS, *op. cit. supra* note 4, at 219. Embree, *Timid Billions,* 198 HARPER'S 28, 33 (March 1949) states that "many of the newer funds do not recognize even a minimum of social responsibility. . . ."

13. Trinidad v. Sagrada Ordin de. Predicadores, 263 U.S. 578, 581 (1924) (rental income used to support legitimate activities of an exempt organization non-taxable). Subsequently, an orphanage which operated competitive enterprises was allowed to receive the benefits of Section 101(6). Sand Springs Home v. Commissioner, 6 B.T.A. 198, 217 (1927). It was recognized that for charities to be effective on a broad scale, they must have large *permanent* endowments to provide necessary revenue, and cannot depend on the philanthropic whims of individuals. More recently, this philosophy was reaffirmed by the Tax Court in a holding that a ceramic foundation was entitled to exemption, since its ultimate purpose was to promote the science

evoked a sharp cry of criticism from attackers and an equally vociferous defense by proponents. First, large investments have been made in rent-producing real estate,[14] and second, manufacturing and other business enterprises have been purchased and operated in competition with private businesses,[15] the income from both of these activities being channeled into the non-taxable coffers of the educational institutions.

It is the entrance into the field of these impecunious charities whose trading position rests solely on their tax exemption, and the alleged abuse of this privilege, which has prompted Congressional investigation, and unfavorable comment from powerful and respected quarters.[16]

Examples of Criticized Activities of Educational Institutions

Rent-Producing Real Estate.—An interesting example of an educational institution seeking shelter under the roof of tax exemption is the case of Washington University in St. Louis. At the end of 1946, approximately one-third of a total endowment of nearly $22,000,000 was invested in rent-producing real estate, including 51 business buildings in St. Louis, 2 buildings in Kansas City, and a railroad freight station and switching yard. The estimated income from these investments is $500,000 annually, no part of which is subject to Federal income taxation.[17]

There are numerous examples of recent sales of realty to educational foundations and lease-backs of the properties to the original owner.[18] Typical of this type of activity is the purchase by Yale University of an eight-story building and warehouse in Kansas City from Spiegel, Inc., a Chicago mail order house, for $1,000,000. The property was immediately leased back for a 100-year period.[19] Yale also has two properties under lease to F. W. Woolworth Co., one leased to 1990 at a rental of $450,000

---

or art of ceramics, although its income was derived from the manufacture and sale of standard cones in competition with other producers, and substantial payments to the widow of the donor were stipulated in the establishment of the foundation. Commissioner v. Orton, 173 F.2d 483 (6th Cir. 1949). The Bureau has filed a non-acquiescence to the decision, but has not applied for certiorari. Finkelstein, *supra* note 9, at 463 n.1. The entire rationale of the majority was attacked vigorously by the five-judge minority, who reasoned that the emphasis in the will on the continued operation of the business, the competitive nature of the operations, and the substantial payments to the widow precluded the foundation from qualifying as an exempt organization.

In Home Oil Mill v. Willingham, 68 F. Supp. 525 (N.D. Ala. 1945), it was held that the income of a competitive, commercial business, whose stock was held by a charitable trust, was not subject to federal taxation, in spite of the requirement that the testator's sister serve as chairman of the trust and receive an annual salary for life. Also see Debs Memorial Radio Fund v. Commissioner, 148 F.2d 948 (2d Cir. 1945), and Roche's Beach, Inc. v. Commissioner, 96 F.2d 776 (2d Cir. 1938). In the former case, the commercial enterprise was operated for an exempt purpose. In the latter case, a business corporation was operated as a subsidiary of a tax-exempt institution. A tax exemption was granted both of these organizations; although the Bureau non-acquiesced in both cases, it did not apply for certiorari.

14. 5 Research Institute of America, Taxation Reports, No. 5, 33-34 (1948).

15. Time, Nov. 14, 1949, p. 96, col. 3.

16. *Hearing before Committee on Ways and Means on Proposed Revisions of the Int. Rev. Code,* 80th Cong., 1st Sess., pt. V, pp. 3406-31, 3525-42 (1948); Fortune, *supra* note 10, at 143-44.

17. Wall Street Journal, April 12, 1947, p. 1, col. 6.

18. For a general discussion of sale and lease-back operations see Carey, *Corporate Financing Through Sale and Leaseback of Property; Business, Tax, and Policy Considerations,* 62 Harv. L. Rev. 1 (1948); Seale, *What is New Regarding Sales to Charities and Other Exempt Organizations,* New York University Eighth Annual Institute on Taxation 930 (1950).

19. See note 17 *supra.*

per annum net; the other to 1975 at a net annual return of $125,000. The properties were purchased for approximately $9,300,000, subject to financing of $8,700,000.[20] Recently, under the title "Moola for Boola," Time Magazine reported that Connecticut Boola, Inc., a wholly owned subsidiary of Yale University, purchased Macy's new nine-story building in San Francisco for $4,500,000, and promptly leased the store back to Macy's for 31 years and two months, at an average annual rental of $240,000. It thereby received a fairly sure tax-exempt income of 5.3% on its investment.[21] Other department store buildings owned by Yale are Frank and Sedar in Philadelphia, and, together with Cornell University, University of Rochester, Lawrenceville School and the Louis J. and Mary E. Horowitz Foundation, Inc., the Philadelphia Gimbel's.[22]

The University of Chicago receives on its Horder lease in Chicago a return of 4% for the first 10 years, 4½% for the second 10 years, and 4½% for the last 10 years.[23] Similarly, the University of Pennsylvania has purchased the department store building and lot owned by Lit Brothers in Philadelphia for $3,000,000, and leased back the properties for a 23-year period at an annual rental of $275,000 with an option to renew the lease at expiration.[24]

In 1948 Columbia University reported an investment in Rockefeller Center of over $28,000,000 and other real estate investments in excess of $16,000,000. Annual rentals of approximately $3,750,000 and $960,000, respectively, were received from these holdings.[25]

One of the most publicized transactions of this nature was the purchase in 1945 by Union College of Schenectady of essentially all of the real estate of Allied Stores Corporation for approximately $16,500,000, with a lease-back for 30 years and an option to renew for an additional 30-year period.[26]

In all of these instances, advantages accrue to both the business firms and the educational institutions.[27] The latter are provided with a greater return than could be received elsewhere, and because the income is tax-exempt, the property owner probably receives a higher sale price and a lower rental charge than could be obtained from a tax-paying owner.[28] Furthermore, rental payments may be deducted as business expenses,[29] a particularly advantageous procedure when the property sold has been greatly depreciated on the seller's books, or is a non-depreciable asset, *i.e.*, land. Favorable rental terms have an additional advantage over ownership in that they either result in a smaller debt structure or free capital. In either case, more funds are available for merchandising uses, and if indebtness is eliminated, the company's financial structure is simplified and refunding hazards are avoided.[30] It was also pointed out to

20. Levy, *The Trend of Corporations to Sell Their Real Estate to Institutional Investors*, THE MORTGAGE BANKER 2 (Dec. 1947).
21. Time, Nov. 14, 1949, p. 96, col. 3.
22. Wall Street Journal, Apr. 12, 1947, p. 2, col. 2.
23. Levy, *supra* note 20, at 2.
24. Wall Street Journal, Apr. 12, 1947, p. 2, col. 2.
25. N.Y. Times, Dec. 13, 1948, p. 29, col. 4.
26. Levy, *supra* note 20, at 3, col. 3.
27. *Hearings*, *supra* note 16, at 3411. Levy, *supra* note 20, at 11 (Nov. 1947) summarizes the reasons for these transactions given by corporate and institutional investors.
28. RESEARCH INSTITUTE OF AMERICA, WHAT'S YOUR BUSINESS REALLY WORTH 3 (March 7, 1949).
29. U.S. Treas. Reg. 111, § 29.23(a)-1; 6 RESEARCH INSTITUTE OF AMERICA, TAXATION REPORT, No. 23, 177 (1949).
30. Levy, *supra* note 20, at 3, col. 3. In the Allied Stores Transaction, $8,000,000 of the sales price was used to pay pre-existing debts, resulting in a substantial improvement of the debt ratio.

the stockholders of Allied Stores Corporation that in the sale of its property to Union College, the corporation would suffer a loss for tax purposes of approximately $340,000, deductible in determining federal income and excess profits taxes, without any reduction in the excess profits credit of the company or its subsidiaries.[31]

Commercial Enterprises.—A far greater area of controversy, with unlimited implications, has arisen where educational institutions have acquired both the property and business of a going concern.[32] The American Council of Education reports that 159 colleges and universities are buying commercial enterprises out of endowment funds or with the tax-exempt earnings of businesses they have taken over.[33]

Undoubtedly, the most striking example of this practice has been the activity by alumni and "friends" of New York University in forming foundations to take over and operate manufacturing establishments for the sole benefit of that institution. A separate foundation has been organized for each business, with different alumni participating; no compensation is paid the directors, and on dissolution, all assets, after payment to creditors, must be paid to the university.[34] Thus, in 1946 the Ramsey Accessorites Corporation's assets of approximately $3,000,000 were sold to the Ramsey Corporation, a tax-exempt corporation—the future profits to go to NYU's law and medical schools.[35] By means of a similar transaction in 1947, all earnings of the C. F. Mueller Company, one of the largest producers of spaghetti products, became ear-marked for the law school.[36] Further purchases by "friends" of the university of the $3,300,000 American Limoges China, Inc., and the $35,000,000 Howes Leather Co., will result in a diversion of the profits of those companies to the university.[37] It has been estimated that if these companies were privately held, they would pay an estimated $1,500,000 yearly in federal income taxes.[38]

EXAMPLES OF CRITICIZED ACTIVITIES OF CHARITABLE FOUNDATIONS

Concurrently with the extension of activities by educational institutions into controversial areas, private charitable foundations have been used to satisfy less altruistic and perhaps selfish motives of donors, while furthering social welfare.[39] Former Secretary of Treasury Mellon used this type of organization to eliminate all estate taxes on a multi-million dollar estate.[40] More recently, the Ford Foundation received upon the deaths of Edsel and Henry Ford substantially all of the non-voting stock of the Ford Motor Company, thereby becoming owner of over 90% of the equity in one of the largest automobile companies in the United States.[41] The remaining stock (voting) was left to the Ford family, who thus retained full and undisputed control of the Company by combining this

31. *Id.* at 4, col. 3.

32. *Hearings, supra* note 16, at 3535.

33. Time, Nov. 14, 1949, p. 96, col. 3.

34. *Hearings, supra* note 16, at 3537.

35. Wall Street Journal, March 21, 1946, p. 1, col. 5.

36. Business Week, Oct. 18, 1947, p. 89, col. 1.

37. Time, Nov. 14, 1949, p. 98, col. 2.

38. *Hearings, supra* note 16, at 3540.

39. LASSER, HOW TAX LAWS MAKE GIVING TO CHARITY EASY 56 (1948).

40. RESEARCH INSTITUTE OF AMERICA, FAMILY TRANSACTIONS UNDER THE 1948 REVENUE ACT 12 (1948).

41. *How to Have Your Own Foundation,* Fortune, Aug. 1947, p. 108, col. 2.

ownership with their control of the Foundation.[42] Furthermore, the resulting reduction in the taxable estates of Edsel and Henry Ford made it unnecessary to dispose of the stock publicly to meet huge estate taxes.[43]

Many less wealthy individuals have found it advantageous to use charitable foundations to retain family control of enterprises, to reduce taxable estates, to avoid forced liquidations,[44] and to serve as a buffer between a living donor and activities soliciting funds.[45] Contributions up to the maximum amount deductible for tax purposes may be made by the donor, but ultimate distributions may be delayed at the discretion of the trustees [46]—generally, the donor and members of his family. In the meantime, payments may be made to the trustees, their friends, or relatives, for services rendered.[47]

Donors may provide additional benefits to their families by leaving the principal of their estate to a charitable foundation with a proviso that the income be paid to their survivors for life. The present value of the estate will thus be considered exempt from federal estate taxes, resulting in a lower tax due, a correspondingly larger principal fund from which the survivors will receive income, and an ultimate benefit to the foundation.[48]

Corporations have found it advantageous to establish non-profit organizations which, while exempt from federal taxation, would cater to localized *corporate* interests. A typical example is the Altman Foundation which "promotes the social, physical or economic welfare and efficiency of the employees of B. Altman and Co." [49] The Richman Foundation loans money without interest to solvent employees of Richman Bros.,

---

42. N.Y. Times, April 19, 1947, p. 1, col. 4; N.Y. Times, June 4, 1943, p. 23, col. 6.

43. RESEARCH INSTITUTE OF AMERICA, *op. cit. supra* note 40.

44. *Ibid;* Eaton, *Charitable Trusts in Business,* TRUSTS AND ESTATES 615 (Oct. 1949).

A typical example of how a less wealthy individual may use a charitable foundation to advantage is as follows:

> "X, a married man, owns 1,000 shares of stock (controlling interest) of a corporation. The stock cost him $20,000 and is worth $200,000. X receives a salary of $25,000 a year and 50% of the corporate profit of $18,000 is usually paid out as a dividend. If each year X contributes 25 shares of stock worth $5,000 to the foundation he will—
>
> (1) Save $2,026 in income tax since the $5,000 is deductible as a charitable contribution. The dividend loss will only be $225 ($9 per share on 25 shares) and the appreciation in value of the stock is not subject to tax.
>
> (2) If X died after 10 years, his estate tax would be cut about $15,000 due to the contributions of $50,000; and control of the business would remain with X's family." 6 RESEARCH INSTITUTE OF AMERICA, TAXATION REPORT, No. 5 (1949).

For a method by which charitable foundations may be used to convert normal income into a capital gain, see 6 RESEARCH INSTITUTE OF AMERICA, TAXATION REPORT, No. 12, 93 (1949).

45. Fortune, *supra* note 41, at 143, col. 1.

46. William T. Bruckner v. Commissioner, 20 B.T.A. 419 (1930) (to build old people's home, income accumulated for sixteen years at time of hearing).

47. Jenks, *supra* note 11, at 1059-60. In Home Oil Mill v. Willingham, 68 F. Supp. 525 (N.D. Ala. 1945), the charitable foundation was required to pay the testator's sister an annual salary of $15,000 a year for life for acting as chairman of the trust, which was to be liquidated one year after *her* death.

48. INT. REV. CODE §§ 812(d), 1004(a)(2)(B). The estate tax is computed on the actuarial value of the life estate. Rockefeller, *Formula and Table for Computing Estate Taxes With Charitable Residuary,* 86 JOUR. OF ACCT. 458 (1948). However, if the non-exempt payments are large in relation to the assets or income of the foundation, the exemption will be denied. Scholarship Endowment Fund v. Nicholas, 106 F.2d 552 (10th Cir. 1939).

49. Fortune, *supra* note 41, at 143, col. 1.

a men's clothing firm, and also finances sick and maternity leaves of company employees.[50] Free research service is also received from tax-exempt foundations endowed by corporations.[51]

All of the stock of the Calloway Mills Company is owned by the Calloway Mills Foundation, a charitable corporation.[52] The Company also leases certain cotton mills from the Foundation. Undoubtedly, the latter's expenditures tend to conform to interests of the corporation.

The Hershey Industrial School owns the majority stock in the Hershey Chocolate Corporation, and in turn, is controlled by that company. Over a period of years, the corporation invested $30,000,000 of the School's tax free funds in an attempt to establish a sugar empire in Cuba to supply the Chocolate Company's requirements for sweetening. Losses from the ventures were borne by the Industrial School, and thus did not affect the Company's profits. Conversely, any profits that might have been made would have been tax-free and available to the corporation to expand its activities.[53]

The Textron Trusts.—Perhaps the most striking example so far revealed of charitable organizations being used primarily for the advantage of a commercial enterprise is the close cooperation which has existed between Textron, Inc., and the various trusts created or inspired by Mr. Royal Little, its president. In the space of a few years, financial maneuverings between the trustees and Textron caused organizations with original contributions of $1,100 to increase to a net worth of over $6,000,000.[54] The Rhode Island Charities Trust, the Rayon Foundation, and the M. I. T. Trust were formed with contributions of $500, $100, and $500 respectively, and their security holdings were originally purchased from an investment company in which Mr. Little was interested, the sole consideration being unsecured promissory notes. Earnings of the Rhode Island Charities Trust, from its inception in 1937 to September 1945, totaled $500,000, and from the latter date to September 1948, $4,000,000. Disbursements to its sole beneficiary, the Providence, R. I. Community Chest aggregated $85,000 (none prior to 1945), while the trustees and bank handling the securities received in excess of $140,000. The Rayon Foundation, organized in 1944, made a profit of $750,000 in the four-and-a-quarter years ended October 1948. Payments of $75,000 were made to its beneficiary, the Rhode Island School of Design. The M. I. T. Trust was formed in 1937, and its net earnings to October 1948 was approximately $1,000,000. No payments were made to its beneficiary, the Massachusetts Institute of Technology. At October 1948, no income taxes had been paid by any of these trusts;[55] their books had not been audited, and no accounting had been rendered the beneficiaries.

---

50. *Ibid.*
51. *Ibid.*
52. *Hearings, supra* note 16, at 3560.
53. Business Week, Sep. 13, 1947, p. 22, col. 3.
54. Unless specifically noted to the contrary, all information hereafter listed relating to the operations of the Rhode Island Charities Trust, the Rayon Foundation and the M.I.T. Trust is taken from SEN. REP. No. 101, 81st Cong., 1st Sess. (1949), hereinafter cited as REPORT.
55. *Id.* at 20, 21. In September 1947, the Commissioner of Internal Revenue notified the trustees of these trusts that in view of the nature of their operations, they were not exempt under any provisions of the income tax law. Accordingly, they were requested to file income tax returns. The trusts claimed an exemption under Sec. 162(a); no returns were filed, and eighteen months after the Bureau's ruling, no action had been taken to enforce payment of the claims. The Treasury Department apparently has acknowledged that such trusts are exempt under the present law,

The indentures governing these trusts allow the trustees discretion far beyond that normally found in a trust agreement. For example, power was given the trustees to purchase unproductive property; to purchase securities on margin and to sell securities short; to promote the organization and expansion of business enterprises, to underwrite securities, and become a member of underwriting syndicates; to sell trust property to themselves or organizations in which they were interested; and to loan funds to themselves. Further, the trustees were allowed to hold the property of the trust in the name of any individual or corporation, without indicating that it was trust property; exceptionally broad powers were given them to endorse notes without personal liability; and they were to receive reasonable compensation, not to exceed 5% of the trust principal or 6% of the gross income of the trust for any year, *whichever is larger.* For the purpose of determining the principal, no deduction was to be made of trust indebtedness. Thus a premium was placed on accumulating trust assets, rather than distributing them to the beneficiaries. Trustees were relieved from personal liability for losses incurred, regardless of the speculative nature or lack of diversification of the investments; no bonds were required nor was there a requirement for an accounting to the beneficiaries or audit.

Since Mr. Little was the motivating force behind their formation, and because of the unhampered powers granted the trustees, it is not surprising that the trusts operated primarily for the benefit of Textron and its affiliates. The non-taxable nature of their income furnished the trusts with a substantial competitive advantage over banks and other lending agencies, of which full use was made. In 1944, the Rhode Island, Rayon, and M. I. T. Trusts purchased $3,000,000 worth of Textron Southern Class A stock, three-quarters of the entire issue. The dividend rate on this issue was 10 percent and the call price double the issue price of $10 per share. In 1947, one-half of this stock held by the trusts was exchanged for 5% preferred stock and common stock, representing one-half of the Class A stock redemption value. In the following year, an exchange of the remaining one-half was made for cash and 4½% debentures, representing three-quarters of the redemption value. It is axiomatic that Textron received a definite advantage in substituting preferred stock with a 5% rate and common stock without a fixed rate for 10% stock. It also goes without saying that additional benefits were received in that it would no longer have to redeem the stock at double its issuance price.

Further assistance was given Textron by the trusts in the purchase of certain assets of Textron and its subsidiaries. For example, the Rhode Island Trust purchased for $1,200,000 in 1945 a mill owned by one of Textron's subsidiaries, immediately leased back the property, and thus without interrupting operations supplied Textron with additional working capital. In 1943, the M. I. T. Trust purchased from Textron $200,000 worth of machinery and immediately leased it back to the company. Similar purchases and lease-backs of $147,000 worth of equipment were made in 1944. In summary, during most of 1946 approximately $4,000,000, or virtually two-thirds of the total assets of the three trusts, were invested in securities and assets of Textron. During this period of heavy expansion, Textron's credit was strained to the limit. It is problematical that such an extensive undertaking could have been successful

in view of recent recommendations by Secretary of Treasury Snyder that legislation be enacted to correct this type of abuse. See Treasury Department, *Statement by Secretary Snyder before the Committee on Ways and Means, House of Representatives,* Feb. 3, 1950, p. 16.

without this ever-present source of both credit and purchasers of securities and property.

In 1944, Textron desired to purchase the Lonsdale Company but was precluded from doing so because of its strained financial position. Therefore the Rhode Island Trust, of which Mr. Little was trustee, borrowed $4,500,000 and with this loan, together with notes to the stockholders of Lonsdale of $2,500,000, purchased all of the Lonsdale stock for $7,000,000. During the succeeding year, the trust had declared to itself a total of $5,774,000 in dividends; sold part of the property to the Rayon Trust; and then sold its stockholdings in Lonsdale to Textron for $1,654,000. Thus, a profit of approximately $500,000 was realized in less than a year. In the succeeding 2 years and 8 months, Lonsdale's earnings were almost three times the price that Textron paid for the stock. The trustees justified the sale on the basis of "considerable uncertainty regarding post-war earnings in the textile industry." Surrounding circumstances, however, apparently did not justify such a conclusion. The properties purchased by the Rayon Trust were leased to Lonsdale and in less than two years approximately two-thirds of the purchase price was recovered. The mills were then sold to the Sixty Trust, a trust for the benefit of Textron executives, and the lease providing for rental payments by Textron on the basis of sales was renegotiated to provide for a flat rental of $102,000 per year. This was one-third of the minimum rental originally provided for, and one-sixth of the amount that the Rayon Trust received during its first year of ownership.

A strikingly similar example of such cooperation occurred in regard to the purchase by Textron of the Manville-Jenckes Corporation, and the subsequent re-sale of a substantial part of the property to the Rhode Island Trust. The latter trust, in turn, sold to the Sixty Trust, which renegotiated Textron's leases downward, and then sold to an outside interest at a profit of $600,000.

By skillful use of federal tax laws, therefore, three trusts were able to expand from minute organizations into going concerns of substantial means. Their procedure was to obtain controlling interests in corporations; to cause the corporate assets to be converted into cash; and then to distribute the cash to themselves as non-taxable dividends. The funds received were automatically available for the purchase of Textron's securities or physical assets. In defense of their operations, Mr. Little stated that the basic philosophy was to accumulate additional assets for the beneficiaries.[56] He did not discuss the possibility, however, that the wide discretion accorded the trustees might result in a substantial depletion of the accumulated assets.[57] For example, the Treasury Department found that stock was sold to friends and associates of the trustees at less than either cost or real value.[58]

Abuses and Remedies

Educational Institutions.—Great stress has been placed by competent observers on the possible undue concentration of economic power in educational institutions, if their policy of purchasing income-producing property and commercial establishments continues.[59] Flowing from this undesirable result would be increased agitation for greater controls by governmental agencies, and a possible sacrifice of the independence of the colleges. Emphasis has also been placed on the loss of tax revenue from

56. Philadelphia Inquirer, Feb. 11, 1950, p. 6, col. 7.
57. Report, *supra* note 54, at 9.
58. Report, *supra* note 54, at 21.
59. *Hearings, supra* note 16, at 3528.

these sources, which will have to be shouldered by other groups,[60] and the competition with private business.[61] A further criticism has been that these institutions generally pay state and local taxes on their business profits and property, while claiming federal exemption.[62]

Proponents of the present policy of colleges and universities contend that such objections are more fictitious than real.[63] They argue that the possible dangers have not sufficiently crystallized to justify a reversal of judicial thinking or Congressional policy. From their viewpoint, the social responsibility now borne by the educational institutions justifies the present liberal exemptions which, they claim, involves only a comparatively small loss of revenue to the federal government. Tax payments to non-federal authorities are defended on grounds of the minor amounts involved, the restricted tax basis available to those authorities, and other local considerations.

Obviously, the alternatives which would be created by a decrease in the exemptions allowed are a reduction in the activities of the colleges, an increase in student fees, or a demand on public authorities for additional funds, accompanied by inherent dangers of greater control and regulation by the appropriating agencies. The final decision in such matters must necessarily depend upon the relative weight given each of these arguments. President Stassen of the University of Pennsylvania recently discussed these matters as a problem of ethics, and warned that the trend is dangerous.[64] He particularly opposed income tax exemption for commercial activities, unless the primary purpose is to serve students, faculty, and guests, and unless at least half of the business is conducted with them.[65] President Truman's current tax message, while generally approving a federal policy of encouraging educational institutions through tax exemptions, criticized the extension of this exemption to income from private business enterprises.[66]

Thus, both of these distinguished gentlemen approve the distinction between "investment activities" and "trade or business" as the test for applying the exemption privilege. Although it may be that such a line of demarcation is the easiest one to draw, it rests on extremely tenuous grounds. For example, Junto, a non-profit adult school in Philadelphia, recently acquired title to 4,000 homes in a real estate deal involving more than $30,000,000.[67] The immediate profits, estimated to be about $75,000 yearly, after payment of mortgage costs, interest fees and operational charges, will be used to expand the school's Philadelphia facilities and to branch out into other cities.[68] In a determination as to whether this is an "investment" or "trade or business," strong arguments can be ad-

60. *Id.* at 3529.
61. *Id.* at 3526, 3534; N.Y. Times, Jan. 24, 1950, p. 1, col. 6.
62. *Hearings, supra* note 16, at 3531. Not all educational institutions pay city taxes. It is estimated that the loss to the city of St. Louis due to the non-payment of property taxes by Washington University approximates $220,000 annually. As a result, that institution has agreed to greatly curtail future real estate investments within the city. Wall Street Journal, Apr. 12, 1947, p. 1, col. 6.
63. *Hearings, supra* note 16, at 3525-42 (statement by John Gerdes on behalf of New York University).
64. Philadelphia Evening Bulletin, Jan. 13, 1950, p. 20, col. 1.
65. Office of the President, University of Pennsylvania, *Memorandum Covering the Principal Extemporaneous Remarks of Harold E. Stassen . . . Chairman of the Committee on Taxation and Industry of the Association of American Colleges . . .* (1950).
66. N.Y. Times, Jan. 24, 1950, p. 1, col. 8.
67. Philadelphia Evening Bulletin, Feb. 24, 1950, p. 1, col. 5.
68. *Id.* at p. 3, col. 8.

vanced on both sides. Furthermore, activities in both of these categories are competitive with tax-paying activities; they deprive the federal government of revenue; and they tend to concentrate capital in the hands of tax-exempt entities. Logically, therefore, they should be treated alike.

A solution frequently offered is to require tax-exempt corporations to distribute to the educational institution a portion of its profits at least equal to the amount of tax it would have paid if it were not exempt.[69] This would equate the position of tax-paying and tax-exempt commercial activities as to their ability to accumulate income, except for the moral obligation of the former to make dividend distributions to stockholders and legal restrictions on the improper accumulation of surplus.[70] However, the unsolved problem would still remain as to the effect of and justification for the loss of governmental revenue.

A recent statement by the Treasury Department noted that exempt institutions are able to trade on their exemption by purchasing rent-producing property with borrowed funds.[71] The tax-free earnings may be used to repay the loans and to make additional investments in property. To meet this situation, it was recommended that the rents should be taxed in the proportion that the unpaid indebtedness on the property bears to the total purchase price. It is submitted that allowing an exemption to colleges which purchase property with funds in their treasury, while denying it to those which must borrow funds, gives the former an undue advantage. Traditionally, the income of educational institutions considered tax-exempt consisted of gifts, student fees, and receipts from the investment of their funds. From that viewpoint, the Treasury's position is understandable. Changing circumstances, however, in the nature of increasing costs and decreasing endowment income, have placed many colleges in a precarious financial condition,[72] so that an expansion of the present concept appears justified. Earnings from borrowed funds should be considered on a par with those of institutional funds for tax purposes.

Charitable Foundations.—The growth of charitable foundations has emphasized, in a novel manner, the economic concept of control of property without ownership. Recognized as early as a century and a half ago as a concomitant of corporate enterprise organized for private profit,[73] this control is today the primary motivating force in the establishment of many of these foundations.[74]

Courts and legislators early recognized that restraints on the alienation or use of property were adverse to the community interest,[75] and placed restrictions thereon which have operated within their limited sphere. But the law has failed to keep pace with the changing economic concept of property: there are neither restrictions on the amount of wealth that one may *control,* nor is there a time limit on such control. Consequently, in 1910 J. P. Morgan obtained the power to direct the investment of over $500,000,000 by purchasing 51% of a $100,000 par capital stock issue of the Equitable Life Assurance Company for $3,000,00.[76] Today, organiza-

69. *Hearings, supra* note 16, at 3527.
70. INT. REV. CODE § 102.
71. Supplementary Treasury Department Statement on Tax Exempt Organizations (1950 Revenue Bill) Before House Ways and Means Committee, Feb. 6, 1950, p. 2.
72. See note 65 *supra;* Philadelphia Inquirer, Feb. 20, 1950, p. 12, col. 2.
73. ADAM SMITH, WEALTH OF NATIONS, Bk V, c. 1, pt. II, art. 1 (1776).
74. LASSER, *op. cit. supra* note 39.
75. PA. STAT. ANN., tit. 20, § 3251 (Purdon 1930).
76. *Report of the Pujo Committee,* H.R. REP. No. 1593, 62d Cong., 3d Sess. 83-85, 135 (1913).

tions similar to the Ford Foundation enable a comparatively few individuals to control increasing wealth.[77] The exemption allowed for gifts to charitable institutions has made possible the circumvention of one of the basic philosophies behind the federal estate tax law, *i. e.*, the return to public use of accumulated fortunes for subsequent channeling into the economy unfettered by restrictions.[78] Foundations, by protecting capital from the corrosive effect of high taxation, appear to be the last method available for one to divert substantial sums to sources of his own choosing, in view of the present day income and estate taxes.[79]

In his last tax message President Truman recommended that tax exemption be denied when charitable foundations are "used as a cloak for business ventures." [80] Subsequently, the Treasury Department recommended that such organizations be required to pay out all net income within a specified period after the close of a taxable year, with a proviso that reasonable amounts might be retained to provide for contingencies. Further, accumulations for extraordinary purposes could be placed in escrow for a limited period. It was also recommended that severe restrictions be placed on transactions between a foundation and its donor, his family or corporations controlled by him.[81]

These suggestions are obviously directed at remedying the immediate abuses currently available to promoters of charitable institutions who seek a personal advantage. If enacted, their effect should be salutary. They fail, however, to meet the broader problem of the economic effect of bringing great amounts of wealth under the control of eleemosynary institutions,[82] and the related issue of indefinite control of that capital by a select few or their self-appointed successors.[83] Cognizance should also be given to the effect of trustees being bound by the directions and desires of a donor.[84] Large blocks of capital may thereby be rendered sterile,[85] and funds disbursed will tend to flow into avenues reflecting only the founder's wishes.[86]

77. N.Y. Times, April 19, 1947, p. 1, col. 4; N.Y. Times, June 4, 1943, p. 23, col. 6.
78. RESEARCH INSTITUTE OF AMERICA, *op. cit. supra* note 40.
79. See LASSER, *op. cit. supra* note 39.
80. N.Y. Times, Jan. 24, 1950, p. 1, col. 8.
81. See note 71 *supra*. For additional recommendations, see 6 RESEARCH INSTITUTE OF AMERICA, TAXATION REPORT, No. 5, 36 (1949).
82. To prevent the concentration of business in charitable organizations, the Canadian Government recently introduced a bill providing that no foundation could own more than 10% of the capital stock of any company. 6 RESEARCH INSTITUTE OF AMERICA, TAXATION REPORT, No. 12, 93 (1949).
83. For severe criticism of the powers exercised by the Duke Endowment, and replies, see Seeman, *Duke but not Doris*, 88 NEW REPUBLIC 220 (1936); Cavers, Fuller, and Maggs, *The Duke University Law School in Rebuttal*, 88 NEW REPUBLIC 311 (1936); Seeman, *In Rebuttal*, 89 NEW REPUBLIC 48 (1936); and Cavers, *More About Duke*, 89 NEW REPUBLIC 114 (1936).
84. Several years ago, 55 foundation board members were questioned. 30, including 10 who said so emphatically, believed in strict adherence to the founder's wishes in administration of the foundation; 11 were undecided; and 14 did not believe in such adherence, 7 of them strongly. COFFMAN, AMERICAN FOUNDATIONS 166, 167, 169 (1936).
85. Fortune, *supra* note 41, at 143, col. 2. Many foundations outlive their usefulness, *e.g.*, a fund was left a Boston hospital to provide wooden legs for Civil War Veterans; $2,000,000 was left to care for daughters of railroad workers killed on the Pennsylvania Railroad; and real estate in downtown Manhattan, left in 1801 to endow "Sailors Snug Harbor," a home for "aged, decrepit, and worn out sailors," is now assessed at over $8,700,000, with rental income running into seven figures annually. Relatively few seamen are benefited.
86. Apparently it was not a coincidence that a study of industrial conditions was begun by the Rockefeller Foundation at the time of the Ludlow Mining Strike, which involved a mine in which Rockefeller was himself financially interested. 9 SEN. Doc.

It should also be recognized that, in recent years, our charitable organizations have failed to reflect the imagination and resourcefulness that so vividly characterized their early existence.[87] Rockefeller's millions played an imposing role in transforming our medical and public health facilities from mediocrity to world leadership. Funds from that source were also largely responsible for the control and elimination of hookworm, malaria and yellow fever. Credit must also be given it for the development of the University of Chicago and the resulting stimulating effect on progressive education throughout the country. The Carnegie Foundation took the initiative in providing public libraries in hundreds of towns and cities. The Julius Rosenwald Fund made substantial contributions toward equalizing educational opportunities for all the people in America. The Russell Sage Foundation was instrumental in replacing cumbersome trial and error approaches with scientific methods in social work. The passage of time, however, aided by the depression of the thirties, has allowed conservatism to make serious inroads. It is asserted that there is no longer a trend for them to make daring investments; now many trustees appear preoccupied with perpetuating and enlarging their roles.[88] Consequently, many investments are spread too thinly to produce lasting results; security is frequently the chief criterion in determining investments; and reserves are often created to protect capital.

To combat these disturbing trends and possibilities, consideration should be given to the advisability of denying tax exemption benefits to such organizations unless their duration is limited; [89] a proper accounting is made to the public; the public is represented on the board of trustees; and the trustees have power to vary the original directions of the donor, if warranted by changing circumstances.[90] The imposition of such conditions would negative criticism that the "dead hand" of wealth dominates our economy, and a higher degree of social vision might be mirrored in future expenditures. It should be recognized, however, that if the lives of such foundations are restricted, we must face the problem of their eventual disappearance. The effect of present tax laws on the accumulation of capital makes it improbable that the establishment of new foundations will keep pace with the forced termination of existing ones. Mr. Julius Rosenwald's belief that endowments should be completely expended within a short period of time, because future generations could

---

No. 415, 64th Cong., 1st Sess. 8383 (1916). Large foundations generally vote their stock in the interest of the founder's family. BERLE AND MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 82-3 (1932).

87. Embree, *Timid Billions,* 198 HARPER'S 28-32 (March 1949) describes the work of famous older philanthropists.

88. *Ibid.*

89. A provision of the Julius Rosenwald Fund required its liquidation within twenty-five years after the death of the donor. EMBREE, JULIUS ROSENWALD FUND—REVIEW OF TWO DECADES 3 (1936). Contrast this with a provision of the Duke Endowment directing that one-fifth of the annual income be set aside and allowed to accumulate until it equaled the original principal. Fortune, *supra* note 41, at 109, col. 2.

90. Community trusts, which are generally organized to consolidate the operations of numerous smaller trusts into an efficient operating medium for public benefit, are controlled by trustees who are representative of the community as a whole. If a donor's directions become "unnecessary, impracticable, or impossible," the trustees may alter them. Apparently the results of such operations have proven very satisfactory and would justify the imposition of these conditions on large, private foundations. LASSER, *op. cit. supra* note 39, at 60-61; Andrews, *Foundations and Community Trusts,* SOCIAL WORK YEAR BOOK 218, 221 (1949).

provide for their own needs,[91] must be viewed in the light of recent tax developments.

Conclusion

We have a large stake in the existence of strong, independent educational and charitable institutions. On the whole, their records are good and they are serving well.[92] Educational institutions have assumed the tremendous responsibility of training citizens to meet the harsh requirements of daily living. Charitable organizations stand alone in making giving a science. If unhampered by political controls, they are still capable of spear-heading experiment and new movements and of stepping aside when success is assured so as to concentrate their accumulated skills and resources on new ventures.

Many new frontiers are waiting to be tapped. The appalling lag in the social sciences, and the apparent inability of men throughout the world to locate a common basis of agreement, provide fields of exploration with unlimited possibilities. Some progress has already been made in that direction by charitable foundations.[93] The frightening potentialities of the atom bomb and the "H-bomb," increase the urgency for more aggressive efforts on a wider front. For foundations precluded from undertaking such ambitious programs, local and regional problems present sufficient challenges to stir the imagination. Racial and religious prejudices must be eliminated; management-labor relations should be clarified; properly timed transfusions of new capital into social, recreational, and health programs will produce effective results.

Delimitation of the present tax exemptions should be preceded by a full consideration of the broad social and economic problems involved. Tax laws should not be considered as mere vehicles for the collection of revenue. Prejudices should not be held against foundations simply because they are family or industrially controlled. The criterion for determining whether an organization qualifies for tax exemption privileges should be the public service rendered by it. This is not a matter for the courts; corrective measures should be preceded by a definitive legislative investigation. The current and past hearings of various committees of the House of Representatives,[94] studies by the Treasury Department,[95] and other published data on the subject [96] provide a broad base of information which should be used to formulate positive Congressional action.

D. K.

---

91. Embree, *op. cit. supra* note 89.

92. Andrews, *New Challenges for Our Foundations,* The New York Times Magazine, April 3, 1949, p. 53, col. 2.

93. N.Y. Times, Feb. 18, 1950, p. 17, col. 8. The Rockefeller Foundation granted $100,000 to begin an investigation to define the ethical side of economic actions in modern society. Harvard University was recently granted $740,000 toward support of a Russian Research Center to study all phases of Russian life. See Andrews, *supra* note 92 at 54, col. 5.

94. See *Hearings, supra* note 16. Additional hearings are being conducted at the present time relative to the problem of tax exemptions.

95. See note 71 *supra.* In 1942 the Treasury Department recommended to Congress that all income derived by charities from a trade or business not necessarily incident to their exempt activities be taxed. Blodgett, *Taxation of Business Conducted by Charitable Organizations,* New York University Fourth Annual Institute on Federal Taxation 418, 419 n.2 (1946).

96. For a summary of writings on the general subject of charitable foundations, not referred to in this note, see Andrews, *Foundations and Community Trusts,* Social Work Year Book 218, 222-23 (1949).

Restrictions on Admission to the Bar: By-Product of Federalism

Andrew Jackson envisaged a freely democratic legal profession in which every individual had an inherent right to be admitted to the bar. Historically, however, admission has been considered a privilege to be conferred only upon the competent,[1] and not a constitutionally protected right.[2] The lawyer, as an officer of the court, serves the public as well as his client, and public interest in the high calibre of legal service is paramount to any assumed right of the individual.[3] In England exclusion of the unfit was declared by statute in 1402 [4] to be an inherent power of the judiciary, necessary to its protection.[5] In the United States, courts' plenary powers [6] are derived from the constitution since the purpose in separating governmental functions would be defeated if the officers of one branch were allowed control over another.[7] Consequently the legislature may not establish standards which would make admission mandatory,[8] although some jurisdictions permit legislative prescription of minimum standards as a valid exercise of the police power.[9] Furthermore, the judiciary effectively controls admission to the bar since it adjudicates the constitutionality of all rules, whether promulgated by the courts or by the legislature.[10] While high standards can only be achieved through exacting academic and moral requirements, the reason for barriers does not extend to rules predicated on special privilege and designed to reduce competition as an end in itself.[11] Democratic principles dictate that any barrier imposed should pertain solely to an individual's ability to render adequate service.[12] While the bar, in the exercise of its inherent power, is responsible for improving standards in the legal profession, it is also in a position to exclude applicants discriminatorily. An examination of the requirements for admission reveals many rules which are unrelated

1. State v. Dudley, 340 Mo. 852, 102 S.W.2d 895 (1937), *cert. denied,* 302 U.S. 693 (1937). McCracken, *Character Examination in Pennsylvania,* 25 A.B.A.J. 873 (1939).

2. *See In re* Cate, 273 Pac. 617, 619 (Cal. 1928); *In re* Cloud, 217 Iowa 3, 10, 250 N.W. 160, 163 (1933).

3. *See* Booth v. Fletcher, 101 F.2d 676 (D.C. Cir. 1938). Paper by Karl McCormick, 61 REP. N. Y. STATE BAR ASS'N 82, 84 (1938).

4. 1402, 4 HENRY IV, c. 18.

5. *See In re* Opinion of the Justices, 279 Mass. 607, 609, 180 N.E. 725, 727 (1932), for a similar rationale of the rule in the United States.

6. For the view that the judiciary has power to impose any pre-requisite which it sees fit to incorporate into the local rules of court, see Smyth's Application, 40 D. & C. 98 (Pa. C.P., Monroe Co. 1940).

7. Myers v. U.S., 272 U.S. 52 (1926). The judicial power extends to the selection of the courts' janitor. *In re* Janitor Sup. Ct., 35 Wis. 410 (1874).

8. *Ex parte* Wall, 107 U.S. 265 (1882); *In re* Day, 181 Ill. 73, 54 N.E. 646 (1899); *In re* Opinion of the Justices, 279 Mass. 607, 180 N.E. 725 (1932). *Contra: In re Cooper,* 22 N.Y. 67 (1860).

9. *Ex parte* Galusha, 184 Cal. 697, 195 Pac. 406 (1921); *Ex parte* Yale, 24 Cal. 241 (1864); Cohen v. Wright, 22 Cal. 293 (1863); *In re* Application for License, 143 N.C. 1, 55 S.E. 635 (1906).

10. Carver v. Clephane, 137 F.2d 685 (D.C. Cir. 1943); Laughlin v. Clephane, 77 F. Supp. 103 (D. C. 1947).

11. The rules are for the protection of the public interest, not for the advancement of the individual. *See In re* Opinion of the Justices, 289 Mass. 607, 612, 194 N.E. 313, 317 (1935); People v. Alfani, 227 N.Y. 334, 339, 125 N.E. 671, 673 (1919).

12. *See* United States v. American Medical Association, 130 F.2d 233, 246 (D.C. Cir. 1942). The place where a physician has resided and practiced cannot furnish a basis for classification; it is arbitrary and void. State v. Pennoyer, 65 N.H. 113, 18 Atl. 878 (1889).

to educational or moral qualifications.[13] Such restraints in practical effect serve to protect local interests and are not justified from a public and professional standpoint. These restraints affect law students seeking admission to the profession and attorneys who wish to move to another jurisdiction.

STUDENT APPLICANTS

Residence and Registration.—The main hurdles which face students are registration[14] and residence[15] requirements. Both of these prerequisites ostensibly are directed toward the elimination of the morally unfit applicant. It is argued, in defense of residence requirements, that the public and the state bar association are given an opportunity to become familiar with the applicant's moral character.[16] The thesis would appear to be valid only in a state of small communities in which neighbors are in close contact with the individual and, consequently, able to make an intelligent, unbiased evaluation of his character. This is seldom the case. In the metropolitan districts it is extremely difficult to obtain information unless it is volunteered or obtainable from law enforcement agencies.[17] Actually, residence is predominantly a question of intent,[18] and may be satisfied by a declaration of intent to become a resident, a mailing address, and intermittent visits to the state. In such a case, the element of personal contact evaporates and a premium is placed on being far-sighted rather than on having good moral character. This barrier would be subject to less criticism if admissions committees made a real effort to secure information from the applicant's associates;[19] most committees, however, content themselves with affidavits of good character,[20] and since the references are selected by the applicant, the writers are likely to feel a greater responsibility to him than to the legal profession.[21] Mere residence, then, does not provide real knowledge of the candidate. Indeed, the applicant's former residence is a more fertile source of information, and references from that area would be predicated on a fuller knowledge of the candidate.

13. "In several states the barriers against outlanders have been so raised as to make one wonder whether the motive was purely one of protecting the public against unfitness." Garrison, *The Problem of Overcrowding,* 16 TENN. L. REV. 658, 675 (1941).

14. Detailed information concerning each state may be found in RULES FOR ADMISSION TO THE BAR (West Publ. Co., 31st ed. 1949). Alabama, California, Connecticut, Kentucky, Maryland, North Carolina, Ohio, Oklahoma, Pennsylvania, South Dakota, Texas and Vermont. Delaware requires that the student register six months before he commences his clerkship; however, as the Board meets once a year, the effective date of registration may be earlier.

15. Delaware—18 months. Georgia, North Carolina, Ohio, Texas, West Virginia —one year. Arizona, New Jersey—9 months. Arkansas, Maine, Nevada, New Mexico, New York, Pennsylvania, Rhode Island, South Carolina, Virginia—6 months. California, Florida, Idaho, Mississippi, Utah, Washington—3 months. In Maryland the student must be a resident at the time he registers; however, an application for registration may be filed *nunc pro tunc* in the discretion of the Board.

16. Horack, *Trade Barriers to Bar Admissions,* 28 J. AM. JUD. SOC'Y 102, 104 (1944).

17. James, *Today's Selective Process for Admission to the Bar,* PROC. ILL. STATE BAR ASS'N 51, 58 (1937).

18. *See* Lewis v. Lewis, 238 Mo. App. 173, 175, 176 S.W.2d 556, 560 (1943); Thompson v. Mandhein, 180 Misc. 1002, 1003, 43 N.Y.S.2d 632, 633 (Sup. Ct. 1943), *aff'd,* 266 App. Div. 1001, 45 N.Y.S. 2d 412 (1st Dep't 1943).

19. See Horack, *supra* note 16 at 104. But see McCracken, *Character Examination in Pennsylvania,* 25 A.B.A.J. 873 (1939).

20. See Horack, *supra* note 16 at 104.

21. McCormick, *What Can Be Done to Improve Methods of Character Investigation,* 16 TENN. L. REV. 232, 233 (1940).

Preliminary registration provisions are designed to eliminate the morally unfit applicant before he acquires the equities of a law school education.[22] Investigation at this stage eliminates waste and allows the committee to exercise its judgment unhampered by these equities;[23] furthermore, it provides a period during which the profession can closely observe the neophyte and inculcate in him a sense of his public responsibility.[24] The proponents of early registration also stress the *in terrorem* effect of the requirement, which discourages unfit applicants from enrolling at a law school.[25] Moral character, however, is an elusive concept, and in practice it is virtually impossible to predict which applicants will resort to unethical practice after admission.[26] Character studies indicate that generalized character traits on which to make valid prognostications are non-existent,[27] and that presently developed techniques for securing general impressions are still so imperfect as to be unreliable.[28] Likewise, lawyers have expressed opinions that professional moral weakness is only revealed under economic pressure.[29] Consequently, the applicants eliminated in the initial examination have been few, and only those of obviously unsavory pasts.[30] In the ensuing years, surveillance of the applicants by the bar association has usually been abandoned as an excessive burden, or turned over to the law schools.[31] The practical effect, then, of registration is only to eliminate those who are obviously unqualified, a result which could be accomplished by a commercial investigation conducted shortly before the bar examination.[32] Additionally, an inquiry into the applicant's past by a trained investigator would be more revealing than the limitations of a character committee make possible,[33] and would, therefore, exercise a greater *in terrorem* effect. This leads to

22. Address by Lowell Wadmond, 65 REP. N.Y. STATE BAR ASS'N 300, 310 (1942).

23. Clark, *Bar Admissions and the Law Schools,* 33 ILL. L. REV. 898, 901 (1939); Paper by Karl McCormick, 61 REP. N.Y. STATE BAR ASS'N 82, 86 (1938).

24. Cook, *Trends in Bar Admission Requirements,* 1 ALA. LAWYER 68 (1940); Paper by Karl McCormick, 61 REP. N.Y. STATE BAR ASS'N 82, 89 (1938); Clark, *Bar Admissions and the Law Schools,* 33 ILL. L. REV. 898, 901 (1939).

25. Clark, *Today's Selective Process for Admission to the Bar,* PROC. ILL. STATE BAR ASS'N 38, 43 (1938); Paper by Will Shafroth, 62 REP. N.Y. STATE BAR ASS'N 81, 102 (1939).

26. Kirkwood, *Some Problems in Admission to the Bar that Affect the Law Schools,* 9 AM. L. SCHOOL REV. 554 (1939); Discussion by Rowland Davis, 61 REP. N.Y. STATE BAR ASS'N 107 (1938).

27. STUDIES IN THE NATURE OF CHARACTER, Character Education Inquiry, Teachers College, Columbia University, Vol. I at 15, 243, 411.

28. *Id.* at 215, 217.

29. Kirkwood, *Some Problems in Admission to the Bar that Affect the Law Schools,* 9 AM. L. SCHOOL REV. 554 (1939); Discussion by David Stein, 61 REP. N.Y. STATE BAR ASS'N 110, 114 (1938); Report of the Committee on Legal Education and Admission to the Bar, 17 MICH. STATE BAR J. 47, 50 (1937).

30. McCormick, *What Can be Done to Improve Methods of Character Investigation,* 16 TENN. L. REV. 232, 234 (1940); Paper by Will Shafroth, 62 REP. N.Y. STATE BAR ASS'N 80, 97 (1939).

31. Andrews, *The Problem of Admission to the Bar,* 24 A.B.A.J. 365 (1938).

32. Kentucky employs the services of the National Conference of Bar Examiners to investigate non-resident applicants. James, *Today's Selective Process for Admission to the Bar,* PROC. ILL. STATE BAR ASS'N 54, 60 (1937).

33. Character committees do not have the facilities to make a thorough investigation. Paper by Paul Andrews, 61 REP. N.Y. STATE BAR ASS'N 82, 93 (1938). Many have little more than a power of recommendation. Paper by Will Shafroth, 62 REP. N.Y. STATE BAR ASS'N 80, 97 (1939).

the conclusion that since alternate methods are available to accomplish similar results, registration should be made freely waivable.[34] This would allow prompt admission of the student with a clean record, who has graduated from a law school of high standing, and would also remove the premium now placed on far-sighted selection of a jurisdiction in which to register.

Minimum Educational Requirements.—Educational requirements are also the subject of exclusionary and discriminatory practices. Nine jurisdictions admit graduates of local schools without examination, while requiring graduates of out-of-state law schools to pass bar examinations, regardless of equal or superior educational qualifications.[35] Montana requires that non-resident applicants meet, in addition to local rules, any prerequisite imposed on a Montana resident who applies for admission in the state from which the candidate has removed.[36] This type of rule certainly does not serve to secure professional competence. Three states bar the student who has not received credit for certain specified pre-legal courses.[37] Although college courses probably increase the applicant's intellectuality, the relevance of a given college course to the candidate's legal ability is doubtful. The rule serves chiefly to pose a barrier to the applicant who failed to select the restricting jurisdiction as his future home five to seven years in advance of the time for admission.

Clerkship Requirements.—In five jurisdictions[38] applicants must serve six to eight months as the clerk of an experienced practitioner after graduation from law school. In this way, it is hoped that the theoretical education of the academic institution will be supplemented by realistic training in legal practice, and that the neophyte will be inculcated with a consciousness of the ethical obligation he owes to the public and the profession.[39]

The proponents of this system analogize it to the compulsory medical internship plan; certain differences, however, not only make the analogy unsound, but also may nullify any advantage to be gained from the clerkship system. In the medical profession an entire hospital staff is available to instruct and supervise the interne, and the financial burden of the plan is absorbed by the hospital. In the clerkship system the preceptor is the sole advisor to the clerk, so that the value of this indoctrination period depends entirely on his ability and interest.[40] Difficulty in obtaining the services of qualified preceptors has led to the rejection of the plan in at least three jurisdictions.[41] Furthermore, unlike law school education, the clerkship involves discrimination in the quality of the instruction received, since the influential student will be in a position to secure the supervision of the most experienced practitioner while less fortunate students must seek committee assistance in obtaining a pre-

34. Some of the states allow students to file applications *nunc pro tunc* in "exceptional and meritorious cases" (North Carolina).

35. Alabama, Arkansas, Florida, Iowa, Mississippi, South Carolina, South Dakota, West Virginia, Wisconsin.

36. RULES FOR ADMISSION TO THE BAR 192 (West Publ. Co., 31st ed. 1949).

37. Delaware, Maryland, North Dakota.

38. Delaware, New Jersey, Pennsylvania, Rhode Island, Vermont. There was also a clerkship in New York prior to 1933.

39. Smith, *Readers Defend and Oppose Legal Internship,* 30 J. AM. JUD. SOC'Y 61 (1946); Rose, *Apprenticeship and Probationary Plans for Admission to the Bar,* 5 ALA. LAWYER 85 (1944).

40. *Kansas City Lawyers' Committee Investigates and Disapproves Internship Proposals,* 30 J. AM. JUD. SOC'Y 192, 193 (1947); Paper by Mark Lefever, *id.* at 61.

41. Kansas, Michigan, Texas.

ceptor.[42] The Board of Bar Examiners has usually found the burden of supervision insufferable;[43] consequently, with many clerks serving apathetic attorneys, there is little possibility of minimum requirements or uniform standards.[44] In addition, there is no uniform practice in regard to remuneration in any of the states, the matter being left to private arrangement between the parties. Since the service is compulsory, opportunity is afforded the practitioner to avail himself of continued clerk service at a minimum expense.[45] This imposes a heavy burden on the student whose finances already are overladen with law school and, often, family expenditures.[46]

A poll was made for the purposes of this Note of members of the bars of Pennsylvania and New Jersey, who had served clerkships within the last three years, to determine their reaction to the present system in their respective states. Of the two hundred replies received,[47] the two most prevalent objections stemmed from lack of supervision and remuneration. More than one-third of the writers from both states desired more supervision.[48] One-half of the Pennsylvania clerks reported that they received no pay. The New Jersey clerks fared better, only twenty-two percent receiving less than expenses.[49] Significantly, one-half of the Pennsylvania and thirty-five percent of the New Jersey replies expressed the opinion that the system should not be continued in its present form. The large majority of this group were dissatisfied primarily because of either one or the other of the above mentioned complaints.

Whether the clerkship system justifies its existence will ultimately depend on the size of the town and other conditions peculiar to the locality.[50] However, the deficiencies of the law school curriculum which the clerkship system is designed to meet may in part be remedied by alternate means. Moot court arguments, instruction in drafting legal instruments, and courses in legal ethics are a certain amount of aid, although they lack the quality of *actual* experience.[51] Duke University, at least, has introduced this element by requiring third-year students to handle cases in the local legal aid clinic.[52] This practical contact enables the student to temper his analysis of the theoretical problems presented in school with

---

42. *Kansas City Lawyers' Committee Investigates and Disapproves Internship Proposals,* 30 J. AM. JUD. SOC'Y 192, 193 (1947).

43. *Report of the Committee on Legal Education and Admission to the Bar,* 17 MICH. STATE BAR J. 47, 48 (1937).

44. Black, *Readers Defend and Oppose Legal Internship,* 30 J. AM. JUD. SOC'Y 61 (1946).

45. *Kansas City Lawyers' Committee Investigates and Disapproves Internship Proposals,* 30 J. AM. JUD. SOC'Y 192, 193 (1947); Handy, *Today's Selective Process for Admission to the Bar,* PROC. ILL. STATE BAR ASS'N 44, 52 (1937); Address by Elliott Cheatham, 66 REP. N.Y. STATE BAR ASS'N 256, 269 (1943).

46. Discussion by Robert Noonan, 61 REP. N.Y. STATE BAR ASS'N 115, 117 (1938).

47. This represents approximately 60% of the questionnaires which were mailed.

48. Pennsylvania, 39%; New Jersey, 36%.

49.

	PA.	N.J.
$150/month and over	14%	14%
$150/month and under	24%	40%
Expenses	14%	24%
Nothing	48%	22%

50. See article cited, note 42 *supra,* at 196.

51. Silver, *Law Students and the Law: "Experience—Employment" in Legal Education,* 35 A.B.A.J. 991 (1949).

52. At least fourteen other law schools had similar projects prior to the war. Winters, *Legal Aid and Legal Internship Should Go Together,* 30 J. AM. JUD. SOC'Y 35 (1946).

an awareness of the way in which such problems are likely actually to be presented to him. If it is felt that this aspect of legal education should be controlled by the bar, an amalgamation of legal aid clinics and the clerkship system could be effected, somewhat along the lines of medical internship.[53] The cases presented admittedly would be of a restricted nature; however, the system would provide the embryo lawyer with actual experience in writing briefs and dealing with clients under the continued surveillance of experienced practitioners. The financial burden of the student, in addition, could in part be absorbed as a cost of the clinic.

Evaluation.—The current law school graduate tends to be older than his predecessors, and, due to the war's disrupting influence, is not so likely to return home. Consequently, restrictions which delay his entrance into active practice or limit the area from which he may select a job are increasingly important, especially in this age of specialization. Residence requirements should be reexamined: it does not raise the standards of the bar to require that the applicant wait a year or longer before he is admitted.[54]

Where an attorney resorts to unethical practice because his intellectual incompetency makes it impossible for him to get legitimate business, the obvious remedy is a higher educational standard.[55] In this the law school is the moving factor.[56] Since it is at most doubtful whether the best training will develop the lesser student into a competent lawyer, the initial step should be to limit enrollment to those in a stated percentile of their college class or ranking favorably on carefully planned objective tests.[57] There are a number of objective tests which show a high degree of correlation between predicted and actual academic achievement.[58] Such examinations have the further advantage of forming an impartial criterion for admission which cannot be assailed as undemocratic. Probably the quickest method to improve educational standards would be to make the law school responsible for its graduates as is done in California. There the law school loses its accreditation if a stated minimum percentage of its graduates do not pass the bar examination. The inevitable opposition of the law schools to such a penalty creates a possible objection to the implementation of the plan, but California's apparent success with this system warrants that it be considered by other states.[59]

Where the lawyer engages in unethical practice because it is more profitable or through sheer indolence, the problem is more difficult.

---

53. *Id.* at 36.

54. Horack, *Trade Barriers to Bar Admissions,* 28 AM. JUD. SOC'Y 102, 105 (1944).

55. California requires that all students pass a state examination at the end of their first year. Applicants enrolled in accredited schools are exempt.

56. Law schools seem to have been largely responsible for improved quality of the bar in the past. 95% of all applicants in N.Y. during the years 1922 to 1927 eventually passed the bar examinations; they do not pose a barrier to the persistent applicant. It has been suggested that this situation should be remedied by limiting the number of times one may take the examination. Paper by Will Shafroth, 62 REP. N.Y. STATE BAR ASS'N 81, 83 (1939); Phillips, *Building a Better Bar,* 8 AM. L. SCHOOL REV. 4, 5 (1934).

57. Shea, *Overcrowded—The Price of Certain Remedies,* 39 COL. L. REV. 191, 214 (1939); Clarke, *Today's Selective Process for Admission to the Bar,* PROC. ILL. STATE BAR ASS'N 38, 39 (1937).

58. Gulliver, *The Use of a Legal Aptitude Test in the Selection of Law School Students,* 9 AM. L. SCHOOL REV. 560 (1939); Wagner, *Generalizations Regarding Prediction,* 9 U. OF BUFFALO STUDIES 184, 185 (1934).

59. Clark, *Some Random Comments by a Former Member of the Committee of Bar Examiners,* 18 CALIF. STATE BAR J. 5, 13 (1943); Handy, *Today's Selective Process for Admission to the Bar,* PROC. ILL. STATE BAR ASS'N 44, 48 (1937).

Although intellect and honor are not synonymous, there is evidence that cultural training tends to develop the personality ethically.[60] Thus pre-legal education[61] contributes a certain moral background of stamina, by tending to eliminate the weaker men preliminarily. The law schools may attack the problem by incorporating in their curriculum comprehensive, practical, and effectively taught courses in legal ethics.[62] The bar committee will ultimately have to pass on all candidates if there is to be any measure of uniformity and centralized control, but if the student can sustain the burden of showing good moral character through an independent investigation,[63] registration and residence requirements should be made freely waivable. In Texas, the committee automatically dispenses with the registration provision if the applicant has graduated from an accredited law school and was not a resident of Texas at the time he enrolled.

Attorney Applicants

As an attorney becomes farther removed from the systematized knowledge of his law school days, his chances of success on the bar examination will decrease, in spite of the fact that his general ability may have increased through active practice.[64] Rather than compel these men to take a prolonged and wasteful cram course, the vast majority of states grant admission on motion,[65] or give special attorneys' examinations.[66] The requirements prerequisite to such admission vary greatly; generally, however, they provide for residence, admission to practice before the highest court of another state, and active practice of law for a period of years.

Standards of Proficiency.—Those states which require previous practice usually limit the period to three or five years, but two states require at least eight years.[67] This period of seasoning forms a basis on which to evaluate the attorney's merit and moral qualifications. It also deters the student who cannot gain admission directly from circumventing high standards by seeking admission on motion from a jurisdiction of low requirements. Although this rule serves to protect the quality of the bar, it is usually mandatory and therefore bars the applicant who has compensatory personal qualifications. A number of states, consequently, have alternate provisions which permit admission without practice if the applicant's educational background meets the requirements of the admitting state.[68] Frequently, however, the practice and equivalent education rules

60. Paper by Will Shafroth, 62 Rep. N.Y. State Bar Ass'n 81, 96 (1939).

61. The rejections and withdrawals of the college men on the character test were only one-fourth as many as for other classes of candidates in Pennsylvania. *Ibid.*

62. "A course in legal ethics should be part of the curriculum of every law school. It should be taught by the case method and presented in such a way as to tie up with all courses and should include a discussion as to fees, methods of dealing with and charging clients, and something of law office management." Allan Wright, 61 Rep. N.Y. State Bar Ass'n 118, 122 (1938).

63. See note 32 *supra.*

64. *Problems of the Migratory Lawyer,* 13 J. Am. Jud. Soc'y 4 (1929).

65. The minority of jurisdictions which apparently require the foreign attorney to pass the same examination given students includes Arizona, Colorado, Florida, Idaho, Louisiana, Nevada, New Jersey, and West Virginia.

66. California, Delaware, Kansas, and Washington.

67. Pennsylvania (8), Rhode Island (10). In addition, Florida requires ten years' practice for all attorney applicants before they may be admitted to examination.

68. Montana, Nebraska. Several states recognize this principle but limit admission on motion by a comity requirement. District of Columbia (District Court), Tennessee. In addition, Illinois and Texas reduce their requirement of previous practice if the applicant presents equal educational qualifications.

are made mandatory and conjunctive requirements.[69] Such restrictions assume that the necessary preparation may not be obtained by other means, and in addition, absolutely bar many attorneys who have practiced extensively but were admitted when educational requirements were minimum. While four of these states [70] admit the candidate if his education meets their requirements, three [71] grant admission only if the state from which the applicant removed has substantially equivalent rules, making admission turn on the standards of the state in which the applicant has practiced, rather than on the qualifications of the applicant himself. The education and previous practice rules are both designed to maintain the quality of the bar, and as such are justifiable, but their purpose is complementary. It is submitted that they should be applied only in the alternative.

Another frequently found provision limits admission on motion to attorneys who seek to transfer from a state which grants similar privileges.[72] While these states waive bar examinations, all retain rules governing previous practice and the majority require that specified educational requirements be met.[73] Two states,[74] in addition, require that the applicant meet any rules of the former jurisdiction which exceed those of the admitting state. Comity provisions do not serve to improve the quality of the bar, but merely exclude attorneys applying from states which refuse to accept the standards of the admitting state. They may have some long-term effect, however, in persuading the more restrictive states to extend reciprocal benefits.

Residence Requirements.—A minority of jurisdictions [75] require a migrant attorney to reside within the admitting state from three months to a year prior to admission. These requirements are even less justifiable here than in the case of a student, since the attorney has a past record of practice which is freely available to scrutiny. Furthermore, the National Conference of Bar Examiners has established an investigating procedure which makes a thorough inquiry into the attorney-applicant's educational and professional record, leaving little of the lawyer's moral character which is not revealed. Residence for one year does little to establish character since the unfit attorney will purposely live an irreproachable life; therefore, requirement of residence operates only to exclude the able lawyer who will not abandon his established office. The unsuccessful or disbarred attorney will be ready to wait the required time.[76]

Another group of states require that the applicant reside [77] or intend to reside [78] within the state prior to admission, although no stated period

69. Arkansas, Connecticut, Indiana, Missouri, Ohio, Oregon, and Vermont. Mississippi also applies the two rules conjunctively, and in addition imposes a comity requirement.

70. Connecticut, Indiana, Ohio, and Vermont.

71. Arkansas, Missouri, and Oregon. In addition, the rules of equal education applied in Kentucky and Illinois are based on the rules imposed in the other jurisdiction; however, such rules are not mandatory and the applicant may be admitted on motion under alternate provisions.

72. District of Columbia (District Court), Georgia, Mississippi, Montana (if applicant is not a resident of Montana), North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Utah, and Virginia.

73. District of Columbia (District Court), Mississippi, Montana, Tennessee, Texas.

74. Oklahoma, Utah.

75. *E.g.*, North Carolina (1 year), Texas (3 months).

76. See Horack, *supra* note 16, at 103.

77. *E.g.*, Iowa, Maryland.

78. *E.g.*, Missouri, Ohio.

of residence is necessary.[79] All such rules effectively preclude an attorney from being admitted without changing his domicile,[80] although it would obviously be a business advantage to allow a certain amount of mobility.[81]

The requirement is predicated on the danger which would supposedly inure to the administration of justice if a person who resided beyond the jurisdiction of the court exercised intra-territorial functions.[82] But residence does not give the courts any increased control over the attorney. It does not imply ownership of assets which would permit an *in rem* proceeding;[83] furthermore, personal jurisdiction over the non-resident attorney for purposes of suits arising out of his business within the state might be obtained by requiring him to appoint a local official as his agent for service as a condition of his admission to the bar.[84] Since the threat of disbarment, as a method of preserving professional decorum, does not discriminate between the non-resident and the resident lawyer, the state is adequately protected.[85] As the client is aware of the attorney's non-residence at the time of employment, no injustice results to him, even if he is forced to sue the lawyer in the state of residence; and this, in fact, may be the most convenient procedure, since the client will most frequently be a resident of the same state as the attorney. Service of pleadings and notices extra-territorially does not seem to be a serious problem, although it may result in some inconvenience to opposing lawyers. Most statutes contemplate service by mail after the attorney has appeared, but if this is doubtful, consent thereto might be required as a condition of appearing.[86]

Evaluation.—Many lawyers desire to cross state lines in mid-career to accept better posts or to represent inter-state business interests. In addition, the young attorney's natural impulse may be to move early in his career in an effort to find a suitable job. A majority of jurisdictions give very limited recognition to these interests by allowing an attorney to argue a case *pro hac vice,* although even this privilege may be further limited by a comity restriction.[87] Oklahoma, furthermore, grants a temporary permit, without examination, to an attorney who removes to that

79. In absence of statute, the Wisconsin court has held that residence is required. *In re* Mosnes, 39 Wis. 509 (1876).

80. However, when a lawyer migrates from one state to another he does not necessarily lose his right to practice in the first state. Statutes and rules are usually not explicit on this point, but some case authority indicates that one loses his right to practice by change of residence, although membership in the bar is not thereby lost. *In re* Pierce, 789 Wis. 441, 307 N.W. 966 (1926). Nevada expressly provides that attorneys lose their right to practice alone in Nevada courts when they cease to be residents.

81. Biever, *Admission of Attorneys from Other States,* 2 BAR EXAMINER 73, 81 (1932).

82. Atkinson and Penney, *Practice in Kansas by Nonresident lawyers,* 2 J. BAR ASS'N, STATE OF KANS., 110, 122 (1933).

83. Furthermore, a committee of the American Bar Association recommended a resolution condemning the bonding of attorneys, since it detracts from the guarantee of character accompanying bar membership. 68 A.B.A. REP. 285, 292 (1923).

84. Morris v. Douglass, 237 App. Div. 747, 262 N.Y.S. 712 (1st Dep't 1933); Copin v. Adamson, L.R. 9, Ex. 345 (1875).

85. It is unnecessary to obtain personal service within the jurisdiction for disbarment. *In re* Craven, 169 La. 555, 125 So. 591 (1929).

86. See Atkinson and Penney, *supra* note 82, at 123.

87. Florida and Louisiana. Oklahoma allows an attorney to argue single cases alone if his state grants similar privileges; otherwise, he must associate with a resident attorney.

state to do business for his former employer. Such rules reduce the inconvenience and expense implicit in state barriers, although the lawyer's position is still relatively immobile.

Many of the restrictive provisions existing today were originally intended to protect the bar from migrant attorneys shifting from one jurisdiction to another. Today, however, the work of the American Bar Association in the investigation of comity applicants has reduced this threat to a minimum, and consequently, better quality at the bar could be attained if residence requirements with attendant idleness were abolished and the applicant required only to file notice of his desire to be admitted.[88] Furthermore, the experience requirement could safely be eliminated if the educational qualifications of the candidate satisfied the admitting state's rules with respect to student applicants.[89] Finally, the Boards should be given greater discretion. The greatest objection to many of the existing restrictions is that they apply uniformly to all applicants from a particular jurisdiction. This works an obvious injustice to the applicant who is personally qualified but applies from a jurisdiction of low requirements.

M. S. M.

Some Aspects of Competency and Privileged Communications in the Federal Criminal Courts

In federal criminal prosecutions, admissibility of evidence is governed by Rule 26 of the Federal Rules of Criminal Procedure,[1] which provides that "admissibility of evidence and competency of witnesses shall be governed, except when Act of Congress or these rules otherwise provide, by principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Only four years have elapsed since the adoption of the rule, so that judgment may yet be premature, but it may be remarked at the outset that no substantial changes have been wrought by it, nor by the courts working under it, in that part of the criminal law of evidence which deals with privilege against third persons' testimony or disclosure of communications by the defendant, or with the competency of spouses. If any changes are desirable, it may be necessary, therefore, to turn to legislative relief or rules of court, either piecemeal or in the form of a complete federal code of evidence. This Note attempts to summarize the present state of the law in these areas, to criticize shortcomings, particularly by comparison with the most advanced state rules, and to present the background story of the sources of the federal criminal law of evidence. Those aspects of competency, such as mental and moral incapacity, and personal interest, which have been thoroughly settled for many years, are not treated independently.

Sources of the Federal Criminal Law of Evidence

In 1853, the Supreme Court had presented to it, in *United States v. Reid*,[2] for the first time the question of whether the federal courts were required to adopt the state rules of evidence in a prosecution under a

88. See Horack, *supra* note 16, at 103.
89. Letter by Dalzell, 13 J.D.C. Bar Ass'n 242, 243 (1946).

1. Prescribed pursuant to 18 U.S.C. § 3771 (Supp. 1949).
2. 12 How. 361 (U.S. 1851).

federal statute. The "conformity" principle was embodied in the Rules of Decision Act of 1789,[3] which provided that "the laws of the several states, except where the Constitution, treaties, or statutes of the United States, otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply." Did "trials at common law" include criminal prosecutions? The Court answered, "No," and refused to apply a Virginia statute enacted in 1849 making a co-defendant a competent witness. The applicable rule, the Court concluded, after examining other sections of the Act of 1789, was the law of the state, as it was when the courts of the United States were established in 1789.[4] The result of the decision was to deny to the criminal courts the conformity principle and the new views on evidence being developed in the states.[5]

Subsequently the problem arose as to what evidence applied in the courts of the states that were admitted to the union after 1789. In *Logan v. United States,*[6] decided in 1891, the Court, after following the general principles of the *Reid* case, held that the law applicable to a trial sitting in Texas was that of the state as of the time of its admission to the Union. A statute recently enacted in Texas was ignored, but a statute of the Republic of Texas,[7] providing that the common law of England should govern, was held binding on the trial court.

That the Court recognized the unsatisfactory result to be had from adherence to antiquated rules of evidence is perhaps shown in retrospect by *Benson v. United States,*[8] decided only eight months after the *Logan* case. Here, in a case arising from the Kansas district court, the Court ignored both the *Logan* case and a territorial statute of Kansas similar to the Republic of Texas statute held controlling in that case,[9] and instead examined the common law authorities, without explaining the sudden shift in sources. It may be significant that the decision concluded that the better common law rule favored the *competency* of a co-indictee offered by the defense. The *Benson* case introduced a state of confusion in the lower federal courts, whose practical result was merely to continue the dominance of the straightforward, if undesirable, rules of the *Reid* and *Logan* cases.[10]

It was not until 1918, however, that the Supreme Court began to provide clear signals that it considered evolution of the federal criminal law of evidence desirable. In *Rosen v. United States,*[11] a government witness who had previously been convicted of forgery in a state court was held competent to testify in a federal district court of New York. To the objection that the *Reid* case required the application of the New York rule of 1789, the Court replied that the *Logan* and *Benson* cases had

3. 1 STAT. 92 (1789), 28 U.S.C. § 725 (1946), changed to reflect the *Reid* interpretation in 28 U.S.C. § 1652 (Supp. 1949), to read "civil actions" in place of "trials at common law."

4. 12 How. at 363, 365.

5. It will be noted that most of the leading Supreme Court cases have dealt with questions of competency and privileged communications in the criminal courts, but the issue of applicable rules applies to all the problems of evidence alike.

6. 144 U.S. 263 (1891).

7. 1 REPUBLIC OF TEXAS LAWS 156 (1838).

8. 146 U.S. 325 (1892).

9. KAN. TERR. STAT., c. 96, § 1 (1855).

10. *E.g.,* Maxey v. United States, 207 Fed. 327 (8th Cir. 1913); Brown v. United States, 233 Fed. 353 (6th Cir. 1916); Knoell v. United States, 239 Fed. 16 (3rd Cir. 1917); Ding v. United States, 247 Fed. 12 (9th Cir. 1918).

11. 245 U.S. 467 (1918).

"severely shaken" the older case's holding.[12] The dictum of the *Benson* case that questions of competency were to be examined "in the light of general authority and sound reason" was stressed to reach the conclusion that "the dead hand of the common law of 1789" was no longer to be controlling.[13]

Despite two apparent retreats from the liberating principle of the *Rosen* case,[14] the Court has progressively given effect to it. In *Funk v. United States*,[15] the doctrines of the *Reid* and *Logan* cases were expressly repudiated. Holding that the wife of a defendant in a criminal case is a competent witness in his behalf, the Court stressed the idea that ancient rules should not shackle the courts because of a failure of the Congress, but that the rules should be formulated "in accordance with present day standards of wisdom and justice rather than in accordance with some outworn and antiquated rule of the past." [16]

Shortly thereafter, and in the same term, the Court found an opportunity to enlarge its pronouncement in the *Funk* case. In *Wolfle v. United States*,[17] a case arising from the district court of Washington, the Court rejected the reasoning of the Circuit Court of Appeals, which applied a statute of the territory of Washington, and stated that the rules of competency for criminal trials "are not necessarily restricted to those local rules in force at the time of the admission into the union of the particular state where the trial took place, but are governed by common law principles as interpreted and applied by the Federal courts in the light of reason and experience." [18] It was also stated that the admission of evidence in general was to be governed by the same rule as applied to competency. In the absence of federal statutes, common law principles, as interpreted by the federal courts, were to prevail. The federal courts were now free to reduce uncertainty and conflict and to achieve a uniform law of evidence despite the lack of an extended codification of that law. The character of that uniformity remains to be discussed.

In 1940, when the Supreme Court had vested in it the power to regulate the pleading and procedure in the criminal courts,[19] it appointed an Advisory Committee to assist in the preparation of Rules of Criminal Procedure.[20] Much discussion among legal scholars was expended upon the form which the rules of evidence should take in criminal cases. The committee was subjected to views from all sides,[21] some suggesting a

12. 245 U.S. at 471.
13. 245 U.S. at 472.
14. In Olmstead v. United States, 277 U.S. 438 (1928), where the defendant had been convicted on evidence obtained through wire-tapping, the Court ruled that wire-tapping was not a constitutional question, because it did not constitute search and seizure; therefore admissibility was purely an evidence question, seemingly to be decided on the basis of *Reid* and *Logan* cases. In Jui Fuey Mow v. United States, 254 U.S. 189 (1920), the Court held a defendant's wife incompetent to contradict a government witness. Justice Sutherland, in *Funk v. United States*, 290 U.S. 371, 386 (1933), explained that the acceptance of the court of an improvident concession of counsel was the cause of the decision.
15. 290 U.S. 371 (1933), 82 U. OF PA. L. REV. 406 (1934); 47 HARV. L. REV. 853 (1934); 43 YALE L.J. 849 (1934).
16. 290 U.S. at 383.
17. 291 U.S. 7 (1934).
18. 291 U.S. at 12.
19. 54 STAT. 688 (1940), 18 U.S.C. § 3771 (Supp. 1949).
20. The work of the committee is discussed in Holtzoff, *Reform of Federal Criminal Procedure*, 12 GEO. WASH. L. REV. 119 (1944).
21. Vanderbilt, *New Rules of Federal Criminal Procedure*, 29 A.B.A.J. 377 (1943); Cummings, *The Third Great Experiment*, 29 A.B.A.J. 654 (1943); Medalie, *Federal Rules of Criminal Procedure*, 4 LAW GUILD REV., No. 3, p. 1 (1944).

complete federal code, in the nature of the Model Code of Evidence, a few desiring that the criminal courts should adopt the rule of conformity and liberality existing in the civil courts, and others advocating a limited codification through rules of court, leaving controversial matter for more extended consideration and study. The end-product of this mountain of labor was exceedingly cautious. In the Federal Rules of Criminal Procedure which became effective in March, 1946, Rule 26 was adopted. Its purpose was to codify the then-existing law, as stated in the *Funk* and *Wolfle* cases,[22] and it was contemplated that it should not depend on older decisions alone, but that federal courts would be free to take cognizance of altered conditions, and the weight of current judicial authority elsewhere.[23]

That the courts have been capable of such progressive development is well illustrated by the history of the general disqualification of persons as witnesses upon grounds of mental and moral incapacity. From a beginning in the early common law which disqualified persons adjudged *non compos mentis*,[24] children of tender years,[25] non-Christians,[26] and convicted felons,[27] capacity to be a witness has been steadily liberalized until most jurisdictions disqualify only for such basic defects as inability to observe, recollect, and narrate facts, or lack of moral responsibility.[28] In the federal criminal courts, especially, the entire process has been accomplished by judicial decision unaided by legislation,[29] except for a single statute creating the admissibility of a former perjurer's testimony.[30]

The balance of this Note is concerned with a detailed examination of spouses' competency and certain privileged communications, relatively

22. See NOTES OF ADVISORY COMMITTEE ON RULES, following FED. R. CRIM. P. 26.

23. For more extensive coverage of the history of the development of evidence in the federal criminal courts, see Leach, *State Law of Evidence in the Federal Courts*, 43 HARV. L. REV. 554 (1930); Howard, *Evidence in Federal Criminal Trials*, 51 YALE L.J. 763 (1942); Bronaugh, *Competency of Husband or Wife as Witness in Criminal Case in the Federal Court*, 4 LAW NOTES 112 (1927).

24. 58 AM. JUR. § 118 (1948).

25. 2 WIGMORE, EVIDENCE § 505 (3d ed. 1940).

26. Co. LITT. 6b (1628) (an infidel could not be a witness). *But see* Omichund v. Barker, Willes Rep. 538, 125 Eng. Rep. 1310 (Ch. 1744).

27. Brown v. United States, 233 Fed. 353 (6th Cir. 1916); Bise v. United States, 144 Fed. 374, 375 (8th Cir. 1906).

28. 2 WIGMORE, EVIDENCE § 492 (3d ed. 1940). See *id.* § 488 for statutory enactments in the various states.

29. *Insanity.*—The leading federal case on insanity, District of Columbia v. Armes, 107 U.S. 519 (1882), which dealt with a civil matter, adopted the rule of the English case of Regina v. Hill, 2 Denison 254, 169 Eng. Rep. 495 (Ct. C.C.R. 1851), which held that an insane person may testify if, at the time of his testimony, he understands the obligation of the oath required of him and is able to give a correct account of the matter he is reporting. *Accord*, United States *ex rel.* Lo Pizzo v. Mathers, 36 F.2d 565 (3rd Cir. 1929); Ross v. United States, 93 F.2d 950 (7th Cir. 1939).

Infancy.—The Supreme Court stated, in Wheeler v. United States, 159 U.S. 523 (1895), that the test for infants is that they should have sufficient intelligence to have a just appreciation of the difference between right and wrong and a proper consciousness of the punishment of false swearing.

Infamy.—Rosen v. United States, 245 U.S. 467 (1918) (eliminated the disqualification for infamy).

Moral Obligation.—It seems that there is no requirement of any particular religious belief, because of a lack of cases. *But cf.* United States v. Miller, 236 Fed. 798 (W.D. Wash. 1916); Louie Ding v. United States, 247 Fed. 12 (9th Cir. 1918).

30. The former perjury statute, REV. STAT. § 5392 (1875), provided expressly that convicted perjurers were incompetent. The present statute, 35 STAT. 1111 (1909), 18 U.S.C. § 231 (1946), has deleted the disqualification; this change has been held to indicate Congressional intent to remove the disability. Latigis v. United States, 97 F.2d 588 (4th Cir. 1938); Lucks v. United States, 100 F.2d 908 (5th Cir. 1939).

less well-known areas of the federal criminal law of evidence. At the outset, it should be noted that the District of Columbia Code contains certain sections regarding evidence, which provide specific provisions concerning competency.[31] These will be noted when pertinent.

COMPETENCY AND PRIVILEGED COMMUNICATIONS IN MARITAL RELATIONS

It is important at the outset of any discussion of the rules relating to the competency of husband and wife as witnesses to prevent confusion by noting the inter-relation of the rules. Two distinct rules govern the relation of husband and wife as witnesses.

The first is the broad rule originating in the old common law conception that the spouses are one in law. It states that either, being a party to an action or interested in the outcome, is incompetent for or against the other where the other is in fact a party or interested in the outcome. Further justification for the rule was adduced from the public policy of preventing domestic discord by forestalling quarrels between man and wife about what one might or had said on the witness stand for or against the other. Since the general rule of the common law that parties and persons interested are incompetent to testify is now usually abrogated, it might well be thought that its offspring, the rule making spouses incompetent as witnesses would likewise fall. But although large inroads have been made upon it, such is not universally the case. It has not been wholly abrogated because of the second reason adduced in its support, namely that it fosters domestic harmony and prevents discord. The after thought has now become the actual reason for the rule.

The second rule is that neither spouse shall be permitted to testify *against* the other with regard to marital communications. Of separate origin, it rests not upon technical reasons, but upon public policy stronger than that of the first rule. It seeks not alone to safeguard domestic harmony, but also to make the marriage relation desirable by encouraging and keeping inviolate those acts and confidences which strengthen the intimate and constant relation of man and wife. More narrow than the first rule as to subject matter, since it safeguards only those acts and communications done or made by virtue of, or in the course of the marital relation and in reliance on the privacy of such relation, it is a rule of privilege.

The federal courts early adopted the universal common law rule forbidding the spouse to testify because of the identity of interest and danger of perjury,[32] and the rule was maintained in its entirety even after interest no longer continued to be a valid policy for exclusion.[33] It was not until 1933, in *Funk v. United States*,[34] that the unbroken rule

31. D.C. CODE, § 14-301 ff. (1941).

32. Stein v. Bowman, 13 Pet. 209 (U.S. 1839); Lucas v. Brooks, 85 U.S. 436 (1873); Hendrix v. United States, 219 U.S. 79 (1911).

33. It was believed at common law that a person interested in the outcome of an action could not be relied on accurately and truly to testify in respect to material facts. The temptation to falsify, it was felt, was too great for the average witness to resist testifying in favor of the interest. 2 WIGMORE, EVIDENCE § 575 (3d ed. 1940). This "fallacy" was bitterly attacked by Jeremy Bentham in RATIONALE OF JUDICIAL EVIDENCE 327-345 (1827). In 1878 a federal statute permitted the defendant in criminal cases to testify at his own request, 20 STAT. 30 (1878), 28 U.S.C. § 632 (1946), *repealed*, 62 STAT. 862 (1948). As a result, it was held that a person jointly indicted with the defendant, but separately tried was not disqualified to be a witness for the government. United States v. Benson, 146 U.S. 325 (1892).

34. 290 U.S. 371 (1933).

of a wife being incompetent to testify *for* her husband was repudiated. The decision was overdue, since the bar of incompetency had been long removed from the most interested party, the accused himself,[35] so that there was little reason to continue to exclude a wife on the ground of interest. No Supreme Court decision, however, has considered the propriety of admitting the evidence of one spouse *against* the other, and at present the rule preventing the spouse from testifying for the prosecution remains dominant in the lower federal courts, with some rumblings of discord.

General Privilege Against Adverse Testimony of Spouse.—Adverse testimony of the spouse presents considerations different from those in the question of incompetency based on interest. Most of the federal courts treat it as a matter of competence,[36] often stating that a wife is incompetent to testify for or against her husband, no apparent distinction being made between exclusion as a matter of disability or incapacity and exclusion as a matter of privilege.[37] Some courts have expressly so held.[38] The preferable and more logical view is, however, that while the question of the favorable testimony of a spouse is one of competence, the question of adverse testimony is one of privilege.[39] In any event, the latter is quite distinct from the former. The accepted rule that a wife may not testify against her husband in a criminal trial rests on reasons which should be separately examined before determining the present desirability of the rule in the federal courts.

According to Wigmore, the real and sole reason behind this privilege is the natural repugnance against compelling one spouse to be the means of the other's condemnation.[40] This he criticizes as being not a reason but a sentiment, exemplifying a spirit of sportsmanship having no place in proceedings aimed at truth and justice. The most commonly advanced reason for the privilege, however, is that it will protect the basic social institution of marriage by preserving marital harmony. Wigmore points out that if this is the true reason, the privilege is not scientifically applied, since it is accorded even in those cases where marital harmony has already been hopelessly disrupted.[41]

Others have criticized it as largely ineffective because its existence is unknown to most laymen, who are unlikely to learn about it except in the unusual event of becoming defendants in a criminal case, and on the ground that the minute social benefit it accomplishes is far outweighed by its hindrance of the process of fact finding. It is also pointed out that it is not applied to any other family relationship than that of husband and wife.[42] Another objection has been that it is applied only when one of the spouses is a defendant, but not to prevent spouses from giving conflicting testimony as witnesses for different parties. The privilege has also been criticized as a "curious piece of policy," in that it consults the

35. 20 STAT. 30 (1878); 28 U.S.C. § 632 (1946), *repealed,* 62 STAT. 862 (1948).

36. 2 WIGMORE, EVIDENCE § 601 (3d ed. 1940); McCormick, *The Scope of Privilege in the Law of Evidence,* 16 TEX. L. REV. 447 (1938).

37. This rule may have been a result of Coke's rationalization of the privilege, namely, that a wife could not testify for or against her husband because they were in effect one person. Co. LITT. 6b (1628).

38. *Ex parte* Belville, 58 Fla. 170, 50 So. 685 (1909); Barber v. People, 203 Ill. 543, 68 N.E. 93 (1920).

39. WIGMORE, EVIDENCE §§ 600, 601, 2228 (3d ed. 1940); Note, 33 HARV. L. REV. 873 (1920).

40. 8 WIGMORE, EVIDENCE § 2228(3)b (3d ed. 1940).

41. *Id.* at § 2228(3)a.

42. Hutchins and Slesinger, *Some Observations on the Law of Evidence; Family Relations,* 13 MINN. L. REV. 675 (1929).

wrongdoers' own interests in "determining whether justice shall have its course against him." According to Bentham, it not only makes every man's home his castle, but aids in converting it into a "den of thieves." [43] Most modern writers condemn the privilege,[44] and so many exceptions have arisen that doubt may be cast on the correctness of the general rule.[45]

Despite this array of criticism, only the Tenth Circuit has declared the privilege obsolete. In *Yoder v. United States*,[46] a case where a divorced wife testified against her former husband, Judge McDermott preferred to affirm the admission of the evidence on the ground that the incompetence of a spouse to testify against the other had ceased, rather than to say that the divorce had removed the privilege.[47] The opinion, relying on the admonition of the *Funk* case to take the most enlightened view of questions of admissibility of evidence, pointed to the marked trend of state legislation to wipe out this form of privilege and to place as much evidence into the hands of the triers of fact as possible.[48] Although commented upon favorably by legal writers,[49] these views have not been adopted by other circuits subsequently faced with the problem.[50] In a recent case in the Second Circuit, the majority suggested abrogation of the prohibition, but said that it was for Congress to choose between the conflicting views.[51] Judge Clark, dissenting, pleaded for the adoption of the dictum of the *Yoder* case, and said that Rule 26 required the courts to apply a "rational rule" which would be more commensurate with modern life.[52]

Although the present rule should be abandoned, it is not likely it will happen unless Congress takes some action. The present trend of

43. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE b. IX, pt. IV, c. V (1827).

44. Hines, *Privileged Testimony of Husband and Wife in California*, 19 CALIF. L. REV. 390, 408 (1931).

45. See Note, 69 U. OF PA. L. REV. 164 (1921).

46. 80 F.2d 665 (10th Cir. 1935).

47. Since the witness was divorced from her husband at the time of the trial, the decision easily could have been rested upon the well-recognized ground that the privilege does not apply after dissolution of marriage. 8 WIGMORE, EVIDENCE § 2237 (3d ed. 1940). Furthermore, some decisions have held that adultery is to be deemed an offense against the person of the wife. *Id.* at § 2239; Basset v. U.S., 137 U.S. 496 (1890). It would have been no great judicial innovation to extend this doctrine to the Mann Act violation involved in the *Yoder* case.

48. 80 F.2d at 667.

49. 35 MICH. L. REV. 329 (1935); 20 MINN. L. REV. 693 (1935); 10 So. CALIF. L. REV. 94 (1935).

50. Paul v. United States, 79 F.2d 561 (3d Cir. 1935); Brunner v. United States, 168 F.2d 281 (6th Cir. 1948) (based on Graves v. United States, 150 U.S. 118, 121 (1893), holding a wife incompetent to testify against her husband).

51. United States v. Walker, 176 F.2d 564, 568 (2d Cir. 1949).

52. *Id.* at 569. In the *Walker* case, the defendant was on trial for acts which he had also committed against his wife. The majority refused to apply the common-law exception of necessity that when the wife is the victim of personal violence committed against her, she is qualified to testify against her husband in the trial for such acts. Notes, 4 A.L.R. 1069 (1919), 16 A.L.R. 490 (1922), 35 A.L.R. 1132 (1925), 35 A.L.R. 138 (1925), 82 A.L.R. 644 (1933), 173 A.L.R. 378 (1948). Since the federal courts had already extended this "exception of necessity" to the crime of transporting one's wife in interstate commerce for immoral purposes, United States v. Mitchell, 137 F.2d 1006 (2d Cir. 1943); Hoyes v. United States, 168 F.2d 996 (10th Cir. 1948); Shores v. United States, 174 F.2d 838 (8th Cir. 1949); United States v. Williams, 55 F. Supp. 375 (D. Minn. 1944); Judge Clark thought the exception should be carried to the situation in the instant case, by way of criticizing the exception itself.

state legislation has been to remove this disqualification,[53] and in this light Congress should provide for all the federal courts the same rule it provided for the District of Columbia, which makes the spouses competent for all purposes.[54] Short of such Congressional action, it is suggested that the prohibition should only be enforced by the courts where the policy behind the rule will in fact be accomplished. It should be left to the discretion of the trial judge to determine whether permitting the spouse to testify will tend to weaken the marriage, and if not the jury should have the benefit of her information.[55]

Privilege Against Disclosure of Marital Communications.—Along with the general privilege against a spouse's adverse testimony, another privilege, considered by the federal courts to be distinct and co-existent, forbids the revealing by one of the spouses of the marital disclosures of the other.[56] Its form is similar to that of the attorney-client privilege, in that it requires that the communications arise out of the confidential relationship of the spouses.[57] The first privilege is broader in that it excludes testimony to any adverse facts even though they have been learned completely apart from the marital relationship.[58] Unlike the general privilege of the spouse to prevent adverse testimony of the other, the privilege against disclosure of marital communications is not affected by the death, divorce, or separation of the parties, and the other spouse is never at liberty to reveal any information acquired during marriage.[59]

The federal decisions shed very little light on how far the definition of communication will be carried. By the great weight of state authority, communications include the observance of acts as well as the hearing or seeing of the spoken or written word.[60] A Second Circuit decision, however, tends to sustain Wigmore's view that only utterances and not acts, except in special circumstances, can constitute a communication.[61] Generally the privilege is lost when the conversation is overheard or the communication gets into the hands of a third party.[62] Although the purpose of the privilege is to encourage the spouses to take each other into their confidence and to reveal their secrets, in order to promote happiness in marriages, it is felt that allowing third persons to report an admission of the defendant would not defeat the policy of the rule. This qualification seems defensible as a matter of degree, even though it might make a spouse cautious, for fear of the possible presence of third persons, but it is carried even farther by the federal courts, so as to deny con-

53. For collection of the state rules, see 2 WIGMORE, EVIDENCE § 488 (3d ed. 1940). See 17 AUST. L.J. 3 (1943). for a full treatment of English and Dominion rules. MODEL CODE OF EVIDENCE §§ 214-218 (1942) provide no restriction on spouses' testimony against each other.

54. "In both civil and criminal proceedings, husband and wife shall be competent but not compellable to testify for or against each other." 31 STAT. 1358 (1901), D.C. CODE, § 14-306 (1940).

55. The present rule does not apply where the couple is divorced. Thouvenell v. Zirbst, 83 F.2d 1003 (10th Cir. 1936), or the husband is charged with bigamy, 24 STAT. 635 (1887), 28 U.S.C. § 633 (1946), *repealed,* 62 STAT. 862 (1948).

56. 8 WIGMORE, EVIDENCE § 2383 (3d ed. 1940).

57. Wolfle v. United States, 291 U.S. 7 (1934).

58. *Ibid.* The privilege does not apply to conversations between spouses before their marriage or after its dissolution.

59. United States v. Mitchell, 137 F.2d 1006 (2d Cir. 1943).

60. Note, 35 CORN. L.Q. 187 (1949), discusses observation of the spouse in the commission of a crime.

61. United States v. Mitchell, 137 F.2d 1006 (2d Cir. 1943); 8 WIGMORE, EVIDENCE § 2337 (3d ed. 1940).

62. Wolfle v. United States, 291 U.S. 7 (1934).

fidential effect to any communications transmitted by a third person, at least in the absence of necessity for intermediaries in the particular marital communication.[63]

While it is not clear whether marital communications were privileged at common law,[64] the question became prominent in England with the appearance of the Second Report of the Commissioners on Common Law Procedure in 1853, proposing the elimination of the general privilege against spouses testifying adversely, and the substitution of the privilege against revealing marital confidences.[65] In the federal courts, the marital confidences privilege was introduced as early as 1839 by a Supreme Court decision,[66] which apparently relied only on a statement in an English treatise,[67] to the effect that a spouse, whose husband is *not* a defendant, may not reveal any marital confidences when she is a witness in a trial. Despite the early beginning of the privilege, it has had very little use, due to the parallel existence of the general disqualification of the spouse, and under the present law, the only need for the privilege is to exclude evidence between spouses which cannot be excluded under the general disqualification.[68] No criminal case has been found in which the courts have denied the admission of testimony on this ground.

Attorney-Client Privilege [69]

The attorney-client relationship was the first to be accorded a privilege against disclosure of confidential communications,[70] and it is said to be the only one presently in existence that has its basis in the common law. At present it is the subject of legislation in almost all of the common law jurisdictions except the federal criminal courts.[71] Originally the privilege belonged to the lawyer on the theory that as a gentleman he ought to keep secrets told him in confidence,[72] but today it belongs to

63. *Ibid.* (defendant dictated to stenographer letter intended for wife); Dickerson v. United States, 65 F.2d 824 (D.C. Cir. 1933) (letter from husband found among wife's effects after her death).

64. *Compare* Shenton v. Tyler, [1939] 1 Ch. 620, 641 (no privilege at common law) *with* 8 Wigmore, Evidence § 2333 (3d ed. 1940).

65. Commissioners on Common Law Procedure, Second Report 14 (1853); see 17 Aust. L.J. 3, 5 (1943).

66. Stein v. Bowman, 13 Pet. 209 (U.S. 1839).

67. 2 Sharkie, Evidence § 709 (1824).

68. The following cases discuss the point: Wolfle v. United States, 291 U.S. 1 (1934); Yoder v. United States, 80 F.2d 665 (10th Cir. 1935); Frazer v. United States, 145 F.2d 139 (6th Cir. 1944); Dobbins v. United States, 157 F.2d 257 (D.C. Cir. 1946).

69. This should be differentiated from the qualification of an attorney engaged in the trial to testify to any relevant facts which have come to his attention through sources other than his confidential relationship with his client. The federal courts do not forbid such testimony, but the practice is not looked upon with favor by the courts. Steiner v. United States, 134 F.2d 931 (5th Cir. 1943); Christensen v. United States, 90 F.2d 152 (7th Cir. 1937). The suggested practice is that the lawyer withdraw his participation before he takes the stand. Canon 19 of Canons of Professional Ethics of American Bar Association: "When a lawyer is a witness for his client, except as to merely formal matters, such as attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in court in behalf of his client." For an excellent discussion of attorney's competency and its ethical problems, see Shirley, *Right of Attorney to Participate in Trial After Testifying for Client*, 13 Neb. Law Bull. 334 (1935).

70. 8 Wigmore, Evidence § 2290 (3d ed. 1940).

71. *Id.* at § 2292.

72. Radin, *Privilege of Confidential Communications Between Lawyer and Client*, 16 Calif. L. Rev. 487 (1928).

the client and may be waived only by him. It rests basically on a social policy of encouraging clients to obtain the advice of lawyers and to make full revelation of facts essential to sound legal advice.

All communications between client and attorney in the course of, and for the purpose of, professional business for which the latter is engaged are privileged.[73] Thus, a client himself cannot be compelled to disclose those communications which the attorney is precluded from revealing, and the privilege is accorded without regard for the medium of transmission between the attorney and his client.[74] While it is not necessary that the remarks have been preceded by a plea of confidence, it is necessary that it was so understood by the client.[75] Therefore, statements made in the known presence of third persons lose their privileged character,[76] the presumption being conclusive that the communication was never intended to be confidential. The federal courts go even farther and permit eavesdroppers to report the communication,[77] even though the privilege remains as against the lawyer and his client. The exception has been justified on the ground that since the privilege excludes evidence which might be valuable in finding the truth, it should be strictly construed to require the client to use great care when disclosing information to his counsel.[78]

When a request is made to exclude the testimony of an attorney as privileged, a question of fact arises as to the existence or prospective existence of the professional relationship.[79] A formal retainer is not necessary, nor is the promise of payment, actual payment, or the stipulation of a fee essential,[80] so long as the communication was made in good faith for the purpose of obtaining professional advice.[81] On the other hand, an attorney can be required to testify to statements or activities that are not of a professional nature, such as communications involving business transactions rather than legal advice.[82] The disclosure of identity of the client by the attorney, or the payment of a fee is not accorded the privilege, unless there is some exceptional circumstance, on the theory that these matters are seldom considered confidential.[83] As an extreme

73. Robinson v. United States, 144 F.2d 392 (6th Cir. 1944); York v. United States, 224 Fed. 88 (8th Cir. 1915).

74. Notes, 88 U. OF PA. L. REV. 467 (1939); [1943] WIS. L. REV. 424. The privilege will usually be accorded to written communications, as well as oral, if they comply with the other requirements.

75. Hartzell v. United States, 72 F.2d 569 (1934).

76. Livezey v. United States, 279 Fed. 496 (5th Cir. 1922); York v. United States, 224 Fed. 88 (8th Cir. 1915); Note, 53 A.L.R. 369 (1928) (on who may be present, without defeating the privilege).

77. United States v. Olmstead, 7 F.2d 760 (D.C. Cir. 1925).

78. 8 WIGMORE, EVIDENCE § 2326 (3d ed. 1940).

79. Questions of termination and commencement of the relationship are questions of fact for the court to determine, which appellate courts will hesitate to upset without a showing of abuse of discretion. Small v. United States, 3 F.2d 101 (7th Cir. 1924); See excellent Note, *Nature of Professional Relationship Required Under Privilege Rule*, 24 IOWA L. REV. 538 (1939).

80. Robinson v. United States, 144 F.2d 392 (6th Cir. 1944); York v. United States, 224 Fed. 88 (8th Cir. 1915).

81. Disclosures made in good faith during a preliminary interview for the purpose of obtaining professional advice are privileged, even though the employment is not consummated. Lew Moy v. United States, 237 Fed. 50, 52 (8th Cir. 1916).

82. United States v. Vehicular Parking Limited, 50 F. Supp. 751 (D. Del. 1943).

83. United States v. Lee, 107 Fed. 702 (C.C.E.D.N.Y. 1901); Tomlinson v. United States, 93 F.2d 652 (D.C. Cir. 1937); Kaufman v. United States, 212 Fed. 613 (2d Cir. 1914). *But cf.* United States v. Pope, 144 F.2d 778 (2d Cir. 1944). For an example of the exceptional situation, see Eliot v. United States, 23 App. D.C. 456 (1904).

example, in a White Slave Traffic Act prosecution, the trial court allowed the government to elicit from an attorney-witness that the accused had retained him previously to appear for a woman whom the accused was charged with having transported, in order to impeach the defendant's testimony that he had no connection with her. The Second Circuit affirmed the lower court,[84] the majority reasoning that the privilege should be narrowly construed, and that the witness' statement should be considered merely an identification of a client. The dissent by Judge Learned Hand contended that such a direction by the client should be as privileged as any other statements he might make to his attorney, particularly when it was a step in his own defense.

There is no privilege between attorney and client where the conferences concern the proposed commission of a crime and are had for the purpose of the attorney's guidance and assistance in such a venture, provided the defendant is on trial for the very crime concerning which the statements were made and not for some other offense.[85] The reason perhaps most frequently advanced for this policy is that in such cases there is no *professional* employment, properly speaking.[86] Wigmore suggests this exception in view of the fact that the policy of the privilege ceases when the advice sought concerns future wrongdoing, so that the attorney may in effect become part of the criminal design.[87] But the mere assertion by the prosecution of an intended crime or fraud on the part of the client will not bring the matter into issue. There must be something to give color to the charge; there must be prima facie evidence that it has some foundation in fact.[88]

Jurors' Privilege

In the federal courts a juror has a privilege which protects from exposure his discussion and other considerations which led up to the determination of the verdict.[89] The rule has two foundations. The first is the public policy which favors independence of thought and will not permit the stifling of debate in the jury room that might result from a fear of exposure.[90] Another is expressed in the doctrine of Lord Mansfield that "a witness shall not be heard to allege his own turpitude," [91] enunciated in a case where a juror tried to disclose his own misconduct during the jury's retirement so as to impeach the verdict rendered. Forbidding impeachment of the verdict is designed to preclude a disappointed litigant from harassing the jurors to learn of irregularities in order to overturn an adverse verdict.

84. United States v. Pope, 144 F.2d 778 (2d Cir. 1944).

85. Alexander v. United States, 138 U.S. 353 (1891); Fuston v. United States, 22 F.2d 66 (9th Cir. 1927).

86. This view was adopted by the English cases. Queen v. Cox and Railton, 14 Q.B.D. 153, 166-170 (1884) provides the logical exception to Lord Bougnam's statement of the rule of attorney-client privilege in Greenough v. Gaskell, 1 My. & K. 98, 39 Eng. Rep. 618 (Ch. 1833).

87. 8 Wigmore, Evidence § 2298 (3d ed. 1940).

88. SEC v. Harrison, 80 F. Supp. 226 (D.D.C. 1948).

89. MacDonald v. Pless, 238 U.S. 264 (1915); Fabris v. General Foods Corp., 152 F.2d 660 (1945); Yoong v. United States, 163 F.2d 187 (10th Cir. 1947). *But cf.* United States v. Pleva, 66 F.2d 529 (2d Cir. 1933) (verdict impeached by statements of juror in open court, before recording of verdict, showing verdict result of coercion).

90. This policy has its beginning in Bushnell's Case, Vaughn 135, 124 Eng. Rep. 1006 (1670), discussed in the *Clark* case, note 92 *infra*.

91. Vaise v. Delaval, 1 T.R. 11, 99 Eng. Rep. 944 (K.B. 1785) ("Nemo turpitudinem suam allegans audietur.").

The public policy advanced for the privilege conflicts with another important social consideration when there has been fraud in connection with the jury. In *Clark v. United States*,[92] the Supreme Court, balancing the two interests, decided that the integrity of the jury was of greater social importance than keeping the privilege intact. Justice Cardozo limited the scope of the privilege by holding it not applicable where the relation out of which it arose had been fraudulently begun or continued. The attorney-client relation was applied by the Court, by way of analogy, in the *Clark* case. Just as that privilege vanishes when the actors abuse the relation by planning a crime, so the juror's privilege disappears when he has become a juror in the case through fraud. Likewise, the privilege is not denied until a prima facie case has been made out by the party seeking to attack it,[93] and evidence may be sought by invasions of the jury room only to corroborate a case already made likely. In the *Clark* case, for example, the juror's crime did not depend upon his conduct in the jury room, but was completed by perjury on his voir dire with intent to obstruct justice. If the juror has honestly created his relationship to the case, he can claim the full extent of his privilege. The *Clark* situation may be compared to the rule that in order for the privilege against disclosure of marital communications to arise, there must have been a valid marriage between the parties. Where the marriage is void,[94] there is no privilege.

Governmental Privileges

Informers' Privilege.—Traditionally at common law communications made to the government by informers concerning the commission of crimes were protected by a privilege based on the importance of the detection of crime.[95] The rationale of the privilege is that informers will be deterred from aiding law enforcement authorities if their identity is disclosed, because of fear of retribution and because of impairment of their existing sources of information.[96] The most frequent situation in which the defendant's case requires disclosure of the basis of a government witness' testimony is that in which he is attempting to show that a government officer obtained incriminating evidence through an illegal search and seizure. Where the arrest has been made without a warrant, the testimony of the informer may be desirable to enable the defendant to prove the non-existence of a reasonable belief in the commission of the crime. Where a warrant has been sworn out, the testimony may establish the non-existence of probable cause for its issuance. Although the general rule has been that only the identity of the informer will be withheld,[97] it has been stated that the whole communication is privileged.[98] The privilege extends to the identity of informers aiding investigating officers as well as arresting officers.[99]

92. 289 U.S. 1 (1933), 81 U. of Pa. L. Rev. 1000 (1933).

93. Cases cited *id.* at 15.

94. Cole v. Cole, 153 Ill. 585, 38 N.E. 703 (1894).

95. 8 Wigmore, Evidence § 2374 (3d ed. 1940).

96. Wilson v. United States, 59 F.2d 390 (3d Cir. 1932); United States v. Li Fat Tong, 152 F.2d 650 (2d Cir. 1945); United States v. Nichols, 78 F. Supp. 483 (W.D. Ark. 1948).

97. Vogel v. Gruaz, 110 U.S. 311 (1884); *In re* Quarle and Butler, 158 U.S. 532 (1895).

98. *See* Arnstein v. United States, 296 Fed. 946, 950 (D.C. Cir. 1924).

99. Schier v. United States, 305 U.S. 251 (1938); Mitrovitch v. United States, 15 F.2d 163 (9th Cir. 1926); Goetz v. United States, 39 F.2d 903 (5th Cir. 1930).

A significant limitation upon the privilege is the power of the trial court to deny it where the identity of the informer or his testimony is important to vindicate the accused, or to lessen the risk of false testimony, or is otherwise essential to the proper disposition of the case.[100] It cannot be said that the privilege is one exclusively of the government or of the communicant, or even a privilege of both, for the informer waives it when he appears and the defendant may compel disclosure.[101]

Two cases, recently decided, raise a problem close to the informer's privilege. The issue generally in both is whether or not an accused has the right to inspect prior voluntary statements made by a witness to the prosecution, and in its hands, but of which the latter has made no use during the trial. This problem is not solved by Rule 16, providing for discovery and inspection of certain papers in the hands of the government, since the right given by the rule applies only to papers obtained from witnesses by seizure or process.[102]

In the first case, *United States v. Krulewitch*,[103] the defendant attempted to obtain the prior inconsistent statements of the witness which completely exculpated the accused, to add to the impeachment of her testimony for the government, even though the witness had sworn on the stand that the prior statement was false. The Second Circuit held that even if the statement constituted a privileged communication, the prosecution surrendered the privilege when it called the witness to the stand, so that denial of inspection constituted reversible error. Judge Clark dissented on the ground that requiring the prosecution to hand over its own witness' statement, of which it had made no use, was contrary to established precedent, and that the majority had gone too far in not leaving it to the discretion of the trial judge.[104] Shortly after this case, the same court decided *United States v. Eberling*[105] in which Judge Clark wrote the majority opinion. In that case the court found no error in the refusal of the trial judge to allow inspection of a report made to an FBI agent by a witness for the prosecution. Since the report was not shown to contradict the witness' testimony on the stand and was not made part of the record on appeal, the court held the *Krulewitch* case did not govern. Judge Frank dissented on the ground that the *Krulewitch* decision was controlling.[106] Although the conclusion to be drawn from these two cases does not appear to be very clear, it seems that the courts will merely determine whether prior voluntary statements of government witnesses are relevant to the case, and deny suppression if they are.[107] The question whether the statements are privileged on such other grounds as informer's confidential communications fails to arise because the communicant has

100. Wilson v. United States, 59 F.2d 390 (3d Cir. 1932); Segurola v. United States, 16 F.2d 563, 565 (1st Cir. 1926); Shore v. United States, 49 F.2d 519, 522 (D.C. Cir. 1931); McIwes v. United States, 62 F.2d 180 (9th Cir. 1932).

101. *See In re* Quarles and Butler, 158 U.S. 532, 536 (1894); Arnstein v. United States, 296 Fed. 946, 951 (D.C. Cir. 1924).

102. Rule 16, Federal Rules of Criminal Procedure, provides: "Upon motion of a defendant . . . the court may order the attorney for the government to permit the defendant to inspect and copy and photograph designated books, papers, documents, or tangible objects *obtained from or belonging to the defendant* or attained from others *by seizure or by process*. . . ." (Emphasis added.) *But cf.* Shores v. United States, 174 F.2d 838 (8th Cir. 1949).

103. 145 F.2d 76 (2d Cir. 1944).

104. *Id.* at 80.

105. 146 F.2d 254 (2d Cir. 1944).

106. *Id.* at 257.

107. United States v. Winters, 158 F.2d 674 (2d Cir. 1946).

waived any privilege by his appearance as a witness.[108] Since the duty of the prosecution is to acquit the innocent as well as to convict the guilty, it is submitted that as much of the facts as possible should be presented to the jury, and the prosecution should not be permitted to suppress facts which may aid the jury in its determination of the veracity of the witnesses before it.

Statutory Administrative Privileges.—Many federal statutes, and departmental regulations promulgated pursuant to a general delegation of authority therefor,[109] specifically forbid disclosure of information which has been acquired by officials or agents under some compulsory process.[110] These regulations have been held to have the force of law.[111] This form of privilege is particularly directed toward nondisclosure of governmental information in controversies between private litigants, according to one line of cases, and is not available to the United States in a criminal prosecution founded upon such information.[112] Unless some public policy such as a security need is present in a particular case, the United States or one of its agents, when either is a party to a case, cannot invoke the privilege. An opposite view has been taken in several cases decided prior to the promulgation of the Federal Rules of Criminal Procedure. These decisions, relying on the language of the statutes which created the privilege, hold that the status of the parties is immaterial to its application.[113] Rule 16 would appear to have strengthened the former line of authority, since it is an explicit and later rule of law which provides the right of discovery to the defendant in a criminal case.[114]

Conclusion

Examination of this limited field has shown little to be objectionable in the law that is now applied by the federal criminal courts. In most instances the courts have taken the most enlightened view. This appears to be borne out by the fact that very few problems have been raised in recent cases as to competency and privileged communications. As a result, the law in most of the field appears to be pellucid. For this reason it would be unadvisable for the federal courts to adopt an extensive codification of the evidence to be used in criminal cases. Rule 26 seems more suitable for retaining the certainty of the law that presently exists, since codification would require the courts to undertake interpretation, which might cause confusion, until a final meaning was given to the code. In addition, the flexibility of Rule 26 allows the courts to be progressive in their rulings and to reflect the most modern views on the subject.

---

108. United States v. Krulewitch, note 103 *supra* at 79.

109. Rev. Stat. § 161 (1875), 5 U.S.C. § 22 (1946), authorizes the heads of governmental departments to prescribe regulations not inconsistent with law for custody, use and preservation of documents and information relating to the department.

110. Note, 165 A.L.R. 1302 (1946).

111. United States v. Marino, 141 F.2d 771 (2d Cir. 1944).

112. Bowles v. Ackerman, 4 F.R.D. 260 (S.D.N.Y. 1945); United States v. General Motors Corp., 2 F.R.D. 528 (N.D Ill. 1942); Brewer v. Hassett, 2 F.R.D. 222 (D. Mass. 1942).

113. United States v. Potts, 57 F. Supp. 204 (M.D. Pa. 1944); Walling v. Comet Carriers, 3 F.R.D. 442 (S.D.N.Y. 1944).

114. See note 106 *supra* for text of the Rule. A restrictive interpretation of the Rule is announced in United States v. Black, 6 F.R.D. 270 (N.D. Ind. 1946), where defendants' motion to inspect statements made to government agents after the commission of the alleged crime was denied on the ground that the Rule "embraces only those documents and objects which were in existence and in the custody of a defendant or other person prior to the government's obtainment of them by process or seizure."

The only problem that appears to be in need of consideration is the one concerned with marital relations. The need for protection of marital harmony seems to be a little overdone in the federal courts, in view of the provision for two co-existent methods of excluding evidence for that purpose. A satisfactory result would be reached if only one were permitted.[115] Since the privilege protecting marital communications is predicated on a firmer basis and seems more consistent with the conditions of modern society, that should be adopted by the federal courts to the denial of the other. This task is one for the Supreme Court, and could rightly be accomplished by judicial decision within the framework of Rule 26. Such a step would certainly fulfill the intention of the draftsmen that the Rules in use should be "continuously creative in an exceptionally high degree." [116]

P. L. J.

Pennsylvania Certiorari and Review of Questions of Law

Although much can be said in favor of limited appellate review of administrative decisions, there is little to recommend the present confusion as to the scope of such review in Pennsylvania. This confusion is apparently a hangover from the great procedural diversity in Pennsylvania's administrative agencies prior to the passage of the Administrative Agency Law in 1945.[1] Approximately thirty different agencies affecting private rights had each possessed their own adjudicative procedures, which were subject to review to various extents by the Common Pleas or Quarter Sessions courts.[2] Review of the lower court decisions by appellate courts was sometimes expressly provided or denied, sometimes not mentioned. The Administrative Agency Law purports to standardize the review procedure of all the agencies within its scope by providing for an appeal from agency adjudications to the Court of Common Pleas of Dauphin County, and an appeal from that court "to the Superior or Supreme Court as in other cases." [3] This provision appears to allow the two appellate courts to review lower court decisions on an appeal in the nature of a writ of error, although the few cases decided under it are not clear on the question.[4] However, at the insistence of the agencies in-

115. COMMISSIONERS ON COMMON LAW PROCEDURE, SECOND REPORT 14 (1853); MODEL CODE OF EVIDENCE (1942) adopts this view.

116. Orfield, *Two Years of Federal Rules of Criminal Procedure,* 21 TEMP. L.Q. 299 n.179 (1948).

1. Act of June 4, 1945, P.L. 1388, PA. STAT. ANN., tit. 71, § 1710 (Purdon, Supp. 1949).

2. *Report of the Administrative Law Committee,* 40 PENNA. B.A.Q. 273 (1939); Faught, *The Multiplication of Administrative Agencies and Problems of Judicial Review in Pennsylvania,* 13 TEMP. L.Q. 30 (1938).

3. Act of June 4, 1945, P.L. 1388, §§ 41, 45, PA. STAT. ANN., tit. 71, §§ 1710.41, 1710.45 (Purdon, Supp. 1949).

4. The writ of error has always been the proper form of review of proceedings according to the common law. "Appeal . . . as in other cases" would thus seem to indicate this form of review. *Compare* Schuylkill Navigation Co. v. Thoburn, 7 S. & R. 411 (Pa. 1821) *with* Rand v. King, 134 Pa. 641 (1890). In Pennsylvania State Board of Medical Education v. Shireson, 360 Pa. 129 (1948), an appeal under the Administrative Agency Law, the court reviewed questions of law without mentioning the scope of the appeal. However, in State Civil Service Commission v. Swann, 362 Pa. 422 (1949), the court stated that § 44 of the Administrative Agency Law, which deals with the scope of review of the trial court, applied to the appellate court, so that the latter could only reverse the decision below for lack of substantial evidence or violation of constitutional rights.

volved,[5] the effectiveness of the act was greatly diminished by a provision exempting from it all agency adjudications from which appeal to a court had been expressly provided or denied by statute.[6] Appeal to a Common Pleas court is thus not always available. Confusion also exists as to the scope of an ensuing review by an appellate court. It has been held that such review can only take the form of an appeal in the nature of a certiorari.[7]

Such an appeal is the only proper method of review of habeas corpus decisions, and of election cases, in which lower courts exercise quasi-administrative functions. It is the purpose of this Note to analyze some of the conflicting decisions on the scope of certiorari in all these fields, for the uncertainty on the subject in appeals from administrative decisions also exists in other areas covered by the writ.

CERTIORARI IN THE PENNSYLVANIA APPELLATE SYSTEM

The place of certiorari in the Pennsylvania appellate review system is obscure as a result of the passage and interpretation of an act of 1889 which provided that thereafter all review proceedings would be taken "in a proceeding to be called an appeal." [8] This language was immediately interpreted by the Supreme Court as changing the writ of error, the appeal, and the writ of *certiorari* in name only, leaving them applicable in the same instances, and unchanged in nature and scope.[9] Thus, though any of the three procedures used for review of a lower tribunal's decision is called an appeal, the nature and extent of that appeal is determined by the common law rules governing the form which review of the decision is to take.[10] If these rules indicate that an appeal in the equity sense is available, the entire proceeding below will be considered and disposed of as justice requires.[11] If a writ of error is the proper form, all decisions of law excepted to below are reviewable, but decisions of fact are not.[12] And if only a certiorari lies, the appellant may find that his "appeal" amounts to no more than a determination that the lower court proceeded regularly, and had jurisdiction of the controversy.[13] The rules determining when the appeal will be in the nature of a certiorari, and what the scope of such an appeal will be have early common law origins. A brief history of the writ is thus necessary to an understanding of the appellate courts' treatment of it today.[14]

5. 52 PENNA. B.A. REP. 179, 181 (1946).

6. Act of June 4, 1945, P.L. 1388, § 51, PA. STAT. ANN., tit. 71, § 1710.51 (Purdon, Supp. 1949).

7. Commonwealth v. Nathans, 5 Barr. 124 (Pa. 1847); Commonwealth v. Beaumont, 4 Rawle 368 (Pa. 1834).

8. Act of May 9, 1889, P.L. 158, § 1, PA. STAT. ANN., tit. 12, § 1131 (Purdon, 1931).

9. Christner v. John, 171 Pa. 527, 529 (1895). See also Supreme Court Order, 131 Pa. xxi (1890) recommending its repeal.

10. Rand v. King, 134 Pa. 641 (1890).

11. Esakovich v. Groudine, 141 Pa. Super. 365 (1940).

12. Warsaw Township v. Know Township, 107 Pa. 301 (1884).

13. Grime v. Dep't of Public Instruction, 324 Pa. 371 (1936).

14. Certiorari had three distinct uses: (a) to remove causes before judgment when it appeared that a fair trial could not be had below, (b) to bring up from the lower court any omissions from the record (certiorari *sur diminution of the record*), and (c) to review a lower court determination after judgment. Goodnow, *The Writ of Certiorari*, 6 POL. SCI. Q. 493, 500 (1891). This paper will deal only with the writ as used to review a lower court determination in a civil case after judgment—in short, as a means of review in the usual sense.

Development of the Writ.—Certiorari was first used by the Norman kings of England as a means of strengthening their control over the previously autonomous Teutonic popular courts,[15] and although issued by all three main branches of the King's Courts,[16] it was apparently made most use of by the King's Bench as a means of supervising the actions of lower court officers.[17] Thus from the beginning it differed from appeal and the writ of error in that it was primarily used as a means of control of the actions of lower courts, rather than as a method of reviewing adverse decisions. This difference was emphasized by the fact that it was not a writ of right, but issued only at the pleasure of the higher courts.[18] It was also early decided that certiorari would not be issued where an equity appeal was possible, on the grounds that its use would block this right to a fuller review.[19] The same reason was apparently applied with respect to proceedings according to the common law in courts of record where the losing party was entitled to a writ of error. The result was that certiorari was used to review decisions only where no other method was possible, the great majority of such instances being administrative decisions of Justices of the Peace and of various governing bodies created by statute or royal command.[20]

The scope of the writ of *certiorari* was originally limited in most types of cases to review of questions of law,[21] and by the beginning of the eighteenth century it had been narrowed to the questions of the jurisdiction of the lower court and the regularity of its proceedings. This extreme restriction on its scope resulted from the argument that no review of any kind should be allowed from administrative proceedings, since they were not a part of the common law court system. In answer, the Kings Bench stated that, as administrator of the King's justice, it had supervisory control over all its officers, and could at least issue certiorari to make sure that they acted regularly and within the limits of the power conferred upon them.[22] This could be done from an examination of the record alone, without pleadings, evidence, or the opinion; hence the rule that certiorari brings up the record only.[23]

This extremely narrow form of review, issuing at the discretion of the appellate court, and only when other forms are not available, was adopted by Pennsylvania as part of the common law.[24] As a means of review in the administrative field and in other areas where neither the writ of error nor the appeal were available, it was inadequate in its original form, and in consequence is still undergoing modification. The change

15. *Id.* at 493.

16. 1 TIDD, PRACTICE 397 (3d Am. ed. 1840).

17. 1 HOLDSWORTH, HISTORY OF ENGLISH LAW 93 (2d ed. 1924) states that it issued only from the King's Bench and Chancery.

18. Appeal of Philadelphia College of Law, Inc., 54 D. & C. 287, 290 (Pa. C.P. 1945).

19. Regula Generalis, 1 Salkeld 147, 91 Eng. Rep. 136 (K.B. 1702); 2 BACON, ABRIDGMENT 165 (ann. Am. ed. 1860).

20. 2 BACON, ABRIDGMENT 167 (ann. Am. ed. 1860).

21. Goodnow, *supra* note 14, at 499.

22. Groenwalt v. Burwell, 1 Salkeld 144, 91 Eng. Rep. 134 (K.B. 1701).

23. *Ibid.*

24. The Supreme Court was invested with all the powers of the Kings Bench by an Act of 1722, and the first Pennsylvania Constitution reaffirmed this grant of power. Commonwealth v. Beaumont, 4 Rawle 368 (Pa. 1834). As to its character and scope in early Pennsylvania, see Gosline v. Place, 32 Pa. 520, 526 (1859); Commonwealth v. Nathans, 5 Barr 124 (Pa. 1847); Commonwealth v. McGinnis, 2 Wharton 113 (Pa. 1837).

is taking place piecemeal, with a resulting uncertainty of the law governing application of the writ.

Its prerogative nature was the first characteristic to disappear. Although one or two very early Pennsylvania decisions mention it as issuing only in the discretion of the appellate court, the vast majority of cases indicate that it issues as a matter of course.[25] As has been mentioned previously, it is now called an appeal in the nature of a certiorari.[26] An act of 1919 directs that all evidence taken in the court below should be made a part of the record on certiorari,[27] thus giving the appellate court more information on which to act. As will be shown later, court decisions had already added the lower tribunal's opinion to the record. The greatest change has been an expansion of the scope of this form of appeal by the Supreme and Superior Courts in their struggle to fashion from it an effective review of the merits of administrative decisions. Since this has been done in the face of the rule that the only questions open to the court are the jurisdiction of the lower tribunal and the regularity of its proceedings, conflicting decisions on the subject are common.[28]

An attempt to reconcile such decisions was first made in 1924 by the Supreme Court in *Twenty-First Senatorial District Nomination:*[29]

> "Where, in a statutory proceeding, the legislature fails to provide for an appeal, and because of that omission, the action of the tribunal involved is . . . considered final . . ., a certiorari to inspect the record in the broadest sense allowed by our cases, may nevertheless issue; but where the legislature . . . particularly states that no appeal shall be permitted, then review, beyond determining questions of jurisdiction, cannot be had."

The distinction was followed in later opinions,[30] and led to the general rule in force when the Administrative Agency Law was passed, that certiorari to review questions of law may only be had where the proceedings below were statutory, and the statute did not mention appeal.[31] Since all administrative adjudications under statutes silent on appeal are now subject to review by virtue of the new statute,[31a] this part of the court rule has in effect been adopted by the legislature.

The rule that, where the legislature forbids appeal, only the question of jurisdiction of the lower court may be considered on review is still adhered to but has proven inadequate in two respects. First, it does not explain recurring inconsistencies on the subject in recent decisions. As illustration, in *Bauman Election Case,*[32] under a statute forbidding appeal, the Supreme Court reversed the Common Pleas of Allegheny County on

25. See Note, 78 U. OF PA. L. REV. 232, 233 (1929). In the federal review system, as well as in other states where a principal function of the highest appellate court is the coordination of the law in decisions of the intermediate tribunals, the writ remains a prerogative one in order that the highest court may better limit itself to this function.

26. See note 8 *supra.*

27. Act of April 19, 1919, P.L. 72, PA. STAT. ANN., tit. 12, § 1165 (Purdon, 1931).

28. For collection of the cases, see Rimer's Contested Election, 316 Pa. 342 (1934).

29. 281 Pa. 273, 279 (1924).

30. White Township School Director's Appeal, 300 Pa. 422 (1930) (explanation of legislature's limited right to curtail appellate jurisdiction); Rimer's Contested Election, 316 Pa. 342 (1934).

31. Kaufman Const. Co. v. Holcomb, 357 Pa. 514, 519 (1947); Commonwealth v. Cronin, 336 Pa. 469, 475 (1939); Elkland Leather Workers' Ass'n, Inc., 330 Pa. 78 (1938).

31a. For the scope of this review, see note 4 *supra.*

32. 351 Pa. 451 (1945).

the question of what constitutes an invalid election ballot as described by statute, though this was obviously a question of substantive law. Clearly the rule outlined above was not followed. When the *Bauman* case was cited a year later in *Blair Liquor License Case*[33] as indicating that decisions on questions of law are reviewable on certiorari even though the governing statute forbids appeal, the Superior Court answered:

> "The *Bauman* case is an example of the broad . . . type of certiorari. It is one of a long line of cases, some of which are cited in the opinion, in which the Supreme Court upon certiorari has considered more than the question of jurisdiction and the regularity of the proceeding, and has held: '. . . *in this class of cases* (Mostly election cases), in passing on the regularity of the record, findings of fact contained in the opinion of the court below may be considered so far as they concern fundamental questions . . .'"[34]

It is apparent that the Superior Court at least is not classifying its cases in accordance with the rule under discussion.

Secondly, the rule applies to certiorari only when it is used as an appeal from statutory proceedings. Although this is its most frequent use, certain other decisions, notably orders disposing of habeas corpus hearings, are reviewable only by appeal in the nature of certiorari. The extent of review available from such proceedings is thus indefinite, although the Supreme Court in discussing the question has not distinguished between adjudications governed by statute and those which are not, citing the former as authority in limiting the scope of review in the latter.[35]

The remainder of this Note will be devoted to an examination of the cases involving certiorari in an attempt to arrive at a picture of its scope. Such an analysis of frequently cited cases should prove useful to those contemplating appeal, and will serve to clarify the present confusion surrounding the rule enunciated by the courts. The expansion of certiorari to include questions of substantive law will first be traced as it took place in election cases. A series of liquor license cases under a statute forbidding appeal in part, and silent in part, will then be considered. Finally, certiorari to review habeas corpus hearings concerning extradition of fugitives will be discussed as an example of the use of this means of appeal in the absence of statute.

Broad Certiorari in Election Cases

As early as 1839 the legislature had empowered the Common Pleas Court of each county to investigate election disputes, and decide finally which of the contestants had been elected.[36] In *Carpenter's Case*,[37] decided in 1850 and still cited as authority, the Supreme Court stated simply that even its inherent supervisory power to correct jurisdictional mistakes by writ of *certiorari* was constitutionally taken away when the legislature provided that the Common Pleas decision in such cases be final. Another

33. 158 Pa. Super. 365, 369 (1946).

34. Italics supplied by the Superior Court. It should be noted for the sake of clarity that consideration of findings of fact is not the same as review of conclusions of law. Nor does the case from which this language is taken, Smith's Petition, 292 Pa. 140 (1928), contribute to an understanding of the problem of when questions of law are reviewable on certiorari.

35. Commonwealth *ex rel.* Mattox v. Supt. Co. Prison, 152 Pa. Super. 167 (1943); Fleming v. Prospect Park Board, 318 Pa. 582 (1935).

36. Act of July 2, 1839, § 5, since repealed.

37. 14 Pa. 486 (1850).

election decision of the same year under a statute silent on the question of appeal stated that, though no legislative restriction existed, certiorari was confined to the questions of jurisdiction and regularity whenever the lower court was acting on a matter specially delegated to it by statute.[38] Use of certiorari to review election disputes was thus originally no different from its use in other situations. However, the decision in *Carpenter's Case* was very soon misinterpreted to read that, regardless of the words of the statute, certiorari lay to review the jurisdiction of the lower court and the regularity of its proceedings.[39] The writ existed in this single form[40] until 1898 when the court, in *Nomination Certificate of John S. Robb,*[41] ruled that the opinion might be examined along with the record, but only for the purpose of deciding the two questions open to it on certiorari. This practice was justified in *Independence Party Nomination*[42] on the grounds that in equity the appellate court may always examine the reasons behind the decisions below, and that since election petitions, as summary proceedings, were partially equitable, the opinion might accompany the record. Thus certiorari in election cases was for the first time altered, although its scope remained the same. However, the step from mere examination of the opinion in order to ascertain the basis of the court's decision to reversal of the judgment because of a misapplication of legal principles, as disclosed by the opinion, is almost imperceptible. It was accomplished in *Krickbaum's Contested Election,*[43] in which the Supreme Court not only reversed the Quarter Sessions on the merits, but gave as its reason that the lower court had erred in deciding a question of fact!

Thus certiorari had been expanded to afford as complete a review as the equity appeal, since the appellate court might attack any lower court ruling, whether excepted to or not, and might reverse it on a question of fact. The broad form of Pennsylvania certiorari is an outgrowth of this group of election cases. Although all reviewed questions of fact and law only on the grounds that election proceedings were partially equitable in nature, they have nevertheless been cited in other cases involving non-equitable lower court proceedings as authority for review of the merits under certiorari.[44]

The Two Forms of Certiorari in Liquor License Cases

Appeals from decisions involving the issuance of liquor licenses have best illustrated the distinction on review between statutes expressly pro-

38. Wallington v. Kneass, 15 Pa. 313 (1850), *citing* Commonwealth v. Nathans, 5 Barr 124 (Pa. 1847).

39. Chase v. Miller, 41 Pa. 403 (1862), where it was held that the only obstacle to review of questions of law on certiorari was that the bare record alone was brought up, but that since in that particular case the evidence and opinion had been made part of the record, the lower court's conclusions of law could be reviewed.

40. Election Cases, 65 Pa. 20 (1870).

41. 188 Pa. 212 (1898).

42. 208 Pa. 108 (1904). See also Chester County Republican Nomination, 213 Pa. 64 (1905), and Foy's Election, 228 Pa. 14, 16 (1910) where, after stating that the evidence and the opinion might be reviewed, the court justifies its consideration of the questions of law with the comment, "Wherever the right to review exists, the power to correct follows as a necessary corollary."

43. 221 Pa. 521 (1908).

44. Twenty-first Senatorial District Nomination, 281 Pa. 273, 279 (1934); Rimer's Contested Election, 316 Pa. 342 (1934); *In re* Elkland Leather Workers' Ass'n, 330 Pa. 78 (1938); Commonwealth v. Cronin, 336 Pa. 469 (1939); Kaufman Construction Co. v. Holcomb, 357 Pa. 514, 519 (1947). A few election decisions have asserted the narrow certiorari rule; Twenty-eighth Congressional District Nomination, 268 Pa. 313, 321 (1920); Cramer's Election Case, 248 Pa. 208 (1915).

hibiting appeal and those silent on the subject. Laws governing the sale of liquor have traditionally given the Quarter Sessions Court, or an administrative board or officer, authority to license liquor vendors.[45] Review of the licensing decisions was usually had by a petition to the Supreme Court for a writ of mandamus to compel granting of the license[46] until the decision in *Johnson's Case,* in 1894, in which the Supreme Court held that mandamus was not a proper writ for review, and suggested use of certiorari to reach abuse of discretion by the licensing court.[47] Appeal in the nature of certiorari was used three years later in the *Donaghue* case, the Superior Court stating that, since the Quarter Sessions Court was exercising jurisdiction committed to it by statute, certiorari was the correct form of appeal, and its scope was limited to a determination that the lower court had kept within the limits of its powers, and had acted regularly, without abuse of its discretion.[48] But the court was met immediately by the difficulty that the record did not include either the evidence or the lower court's opinion, and that without these a decision on the questions open to it was impossible. Rather than have "a Quarter Sessions judge . . . sit as absolute a despot as the Emperor of China," [49] the court reviewed the evidence and the opinion as certified to it by the Quarter Sessions, and decided that the lower court had abused its discretion in granting a license for the previous year in exchange for the licensee's promise not to apply for one the following year. Thus strict common law certiorari was from the beginning modified to provide more adequate review.

The Act of 1933, instituted following repeal, vested power to revoke liquor licenses in the courts of Quarter Sessions, and provided that "The action of the court . . . shall be final." [50] The legislature thus for the first time limited appeal in this situation, and unless its members were entirely unfamiliar with the form taken by appeal from proceedings not according to the common law, they must have intended to prohibit the limited certiorari allowed by the *Donaghue* case.[51] In dealing with this restriction the Superior Court in *Revocation of Mark's License*[52] stated that although a common law appeal was prohibited,

> ". . . an appeal in the nature of a 'certiorari' will lie, notwithstanding the provision above quoted in order that this court under its general supervisory powers on certiorari, may . . . ascertain whether the court below exceeded its jurisdiction or its proper legal discretion . . ." [53]

It then added that by virtue of the act of 1919,[54] it could also examine the evidence to test the right of the court to make the order complained of. Since this was the extent of certiorari in the *Donaghue* case prior to

45. Schlaudecker v. Marshall, 72 Pa. 200 (1872).

46. Raudenbusch's Petition, 120 Pa. 328 (1888).

47. 165 Pa. 315, 325 (1894).

48. Donaghue's License, 5 Pa. Super. 1 (1897).

49. *Id.* at 12, quoting Chief Justice Paxson in Prospect Brewing Co.'s Petition, 127 Pa. 523 (1889), a similar situation.

50. Act of Dec. 20, 1933, P.L. 75, § 13, PA. STAT. ANN., tit. 47, § 744-410 (Purdon, 1941).

51. *See* Twenty-first Senatorial District Nomination. 281 Pa. 273, 277 (1924) (court's surmise as to the meaning of "appeal" in such statutes).

52. 115 Pa. Super. 256 (1934).

53. *Id.* at 263.

54. Act of April 19, 1919, P.L. 72, PA. STAT. ANN., tit. 12, § 1165 (Purdon, 1931).

the legislative restriction, the court had in effect ignored the restriction completely.

Amendments to the statute in 1935 and 1937[55] placed the power to issue, transfer, and revoke licenses in the Liquor Control Board. A method of appeal to the Quarter Sessions court on refusal to *issue* or *transfer* a license was provided, and "no further appeal" was allowed the applicant.[56] A subsequent section of the act reiterated that upon refusal of the Board to transfer a license, the aggrieved party might appeal "in the same manner" as from a refusal to issue a license,[57] and again it was provided that the Quarter Sessions decision should be final. A similar provision for appeal was made in the case of the revocation of a license, but there was no statement that the Quarter Sessions decision[58] should be final. Grasping at this omission, the Superior Court held in *Commonwealth v. Hildebrande* that in revocation cases review in the nature of a broad certiorari was allowable, and that it could therefore reverse the Quarter Sessions on an error of law.[59] Thus by virtue of the omission of a restriction on appeal, certiorari to review an administrative determination had reached the stature of a common law writ of error. The opinion points out, however, that more extensive property rights are disturbed by revocation of a license than by refusal to issue one, and that there is therefore good reason for allowing broad review of the former but not of the latter.

This progressive trend toward a broad review whenever possible has been interrupted by the 1949 amendment to the Liquor Control Act which provides for an appeal to the Superior Court from any licensing decision of a trial court.[60] The distinction on appeal between granting, transferring, and revoking licenses is thus apparently abolished. At this writing no cases involving the provision have been reported, and consequently the scope of this new appeal is uncertain. However, since the statute expressly gives the lower court a broad review, there is less likelihood that the Superior Court will make its review as narrow as has the Supreme Court in proceedings under the Administrative Agency Law.[61]

Review of Habeas Corpus Proceedings

Pennsylvania courts side with the majority of American jurisdictions in denying an appeal from habeas corpus proceedings, and allowing the relator to petition for another writ in a different court instead.[62] Consequently review of such proceedings is limited to that afforded by appeal in the nature of certiorari:[63] to a determination that the lower court had jurisdiction of the controversy and proceeded in a regular manner.

When the hearing involves extradition, consideration of questions on certiorari is at any rate limited by the narrow function of the lower court in such proceedings. Thus in *Commonwealth* ex rel. *Flower v. Supt. Co.*

55. Act of July 18, 1935, P.L. 1246, Act of June 16, 1937, P.L. 1762, Pa. Stat. Ann., tit. 47, §§ 744-201, -404, -408, -410 (Purdon, 1941).
56. § 744-404.
57. § 744-408.
58. § 744-410.
59. Commonwealth v. Hildebrande, 139 Pa. Super. 304 (1939).
60. Act of May 20, 1949, P.L. 1551, §§ 2-4, Pa. Stat. Ann., tit. 47, §§ 744-404, -408, -410 (Purdon, Supp. 1949).
61. See Pennsylvania Supreme Court cases cited note 4 *supra.*
62. Church, Writ of Habeas Corpus, § 389e (1893); Commonwealth *ex rel.* Mattox v. Supt. Co. Prison, 152 Pa. Super. 167, 170 (1943).
63. Commonwealth v. McDougall, 203 Pa. 291 (1902), *cited for this restriction by* Commonwealth v. Hare, 36 Pa. Super. 125, 129 (1908).

Prison[64] a United States Supreme Court decision is cited confining the lower court to identification of the person demanded, and decision from the record that a crime was substantially charged in the demanding state, and that the relator was a fugitive from justice.[65] Both the *Flower* decision and one by the Superior Court in the same year[66] limit the scope of appeal to a narrow certiorari, leaving the legality of the extradition proceedings as tested by the three considerations mentioned above solely in the discretion of the lower court.

Subsequent decisions, however, reflect the same ragged progress towards a broad review as is seen in other fields. The Superior Court in *Commonwealth v. Steele*[67] completely ignored the careful distinction made by the *Flower* decision between the questions before the lower court and those open to the appellate court on certiorari, and, while citing the earlier case as controlling, went on to affirm lower court rulings that certain evidence was admissible and that the relator's contention that his sentence in the demanding state had been suspended was not a proper reason for denying extradition. The effect of the decision was thus to allow the appellate court on certiorari to review any determinations of law made below.

In *Commonwealth* ex rel. *Mattox v. Supt. Co. Prison*[68] the Superior Court again stated that its review was limited to a narrow certiorari. With this flat ruling as preface, it then affirmed the lower court's decision on a question of pure substantive law: that the danger of mob violence in the demanding state is sufficient reason for releasing the relator on habeas corpus.[69] Three years later in *Commonwealth* ex rel. *Johnson v. Dye*[70] the *Mattox* case was cited for the proposition that the only question before the appellate court was whether there had been an abuse of discretion below in the disregard of substantial evidence. On this pretext it was decided that Johnson was properly convicted of murder in the demanding state, since a demurrer to the evidence in the murder trial would have been of no avail, and that the relator's stories of false testimony against him and of brutal treatment while imprisoned, were not credible. The *Mattox* case received yet another interpretation in 1949 in *Commonwealth* ex rel. *Ghezzi v. Jeffries.*[71] Counsel in that case contended that the *Mattox* decision allows review in the nature of a broad certiorari in extradition cases. The court denied any such interpretation and stated that ". . . the court on review may only determine whether or not the lower court proceeded in conformity with the law in deciding . . ." the legality of the proceedings.[72] It then proceeded by footnote to explain that an exception to this limitation of review exists where, as in the *Mattox* case, there was evidence that the relator would be subjected to mob violence if extradited.

There has thus been a return to the rule of the *Flower* case, but with the exception noted above. Unusual circumstances in the demanding

64. 220 Pa. 401 (1908).

65. Roberts v. Reilly, 116 U.S. 80 (1885).

66. Commonwealth v. Hare, 36 Pa. Super. 125 (1908).

67. 78 Pa. Super. 352 (1922).

68. 152 Pa. Super. 167 (1943).

69. For comment on this use of habeas corpus, see Notes, 17 TEMP. L.Q. 469 (1943); 53 YALE L.J. 359 (1944).

70. 159 Pa. Super. 542, 548 (1946).

71. 164 Pa. Super. 48 (1949).

72. *Id.* at 52.

state, such as were suspected in both the *Mattox* and *Johnson* decisions, may justify expansion of the scope of the hearing below.[73] At any rate, when such an important question as the liberty of the relator is at stake, review of the principles of law used in the exercise of this expanded scope is desirable in order that the new law as applied by the many lower tribunals may be uniform. Moreover, appellate review of questions of law involving extradition is reached more easily under narrow certiorari since the substantive questions involved in extradition principally concern whether the jurisdiction of the lower court extends to a consideration of events in the demanding state.

CONCLUSION

Although not originally used to review decisions of substantive law, appeal in the nature of certiorari has been expanded to fulfil this function in some instances because of the number and importance of the administrative decisions which the appellate courts could only reach in this manner. This expansion was accomplished in decisions reviewing election cases, and has resulted in the creation in such cases of a certiorari as broad as the equity appeal. In spite of the fact that this broad review was allowed only because of the quasi-equitable nature of election cases, the courts have used it to review at least questions of law in other fields. The result has been great uncertainty as to the scope of certiorari under various circumstances.

The liquor license cases illustrate an attempt by the courts to reconcile their conflicting decisions on the subject by applying narrow certiorari to decisions under statutes forbidding appeal, and broad certiorari to decisions under statutes silent on the subject. Although this distinction by reference to statutes does not explain the election cases, the legislature has apparently affirmed it in part by providing for an appeal from lower court decisions under the Administrative Agency Law, since that law covers only adjudications under statutes silent on the subject of appeal.

The crux of the problem, however, is the complete lack of cooperation between legislature and courts. Although it is common knowledge that the courts have disregarded the legislature's attempt by the Act of 1889 to standardize all review proceedings, the legislature in subsequent statutes continues to speak as if such proceedings had in fact been standardized, and consisted of the one form—appeal. Meantime the courts continue to distinguish between the various forms of appeal, and to set the scope of certiorari apparently in accordance with the demands of justice in the individual case. The treatment of the appeal provided by the Administrative Agency Law is further evidence of this. Prior to the law broad certiorari was allowed. In apparent affirmation of the practice, the law provides for "appeal . . . as in other cases." Thus left without specific description of the type and scope of the appellate proceeding allowed, the Supreme Court has so far rendered two inconsistent opinions on the question,[74] thus indicating that, contrary to the concern for legislative direction shown in the liquor cases, it will continue to tailor the scope of its review to fit the needs of the situation. The habeas corpus cases reveal this same tendency.

---

73. It is worth noting, however, that the Governor has an opportunity to refuse extradition, and that such policy decisions might well be left up to him. See also note 69 *supra*.

74. See note 4 *supra*.

Although there is no doubt that the appellate courts have done substantial justice to the litigants in each case in handling this question of the scope of certiorari, they have produced such confusion on the subject that sure predictability of the scope of future proceedings is not possible. The balance between justice to the parties in an individual case and certainty in the law has been tipped so far that certainty is out of sight. Such should not be the case since justice itself is defeated when the law is so uncertain that two different litigants in the same legal position before the court are accorded different rights. A comprehensive and specific legislative overhauling of appellate procedure in Pennsylvania is needed. In its absence, consistent and explicit statements by the courts as to the extent of review allowed by certiorari under various circumstances would be of great assistance to the practitioner.

F. K. T.