RECENT CASES

Aliens—Citizens—Effect of Conscientious Objector's Willingness to Serve as Noncombatant on Eligibility to Take Citizenship Oath— A Canadian citizen, member of the Seventh Day Adventists, and a resident of Massachusetts, filed a petition for citizenship stating, in the preliminary form, that he understood the principles of the government of the United States and was willing to take the oath as prescribed.[1] To the question, "If necessary, are you willing to take up arms in defense of this country?" petitioner answered in the negative, explaining that to him this was a purely religious matter. After a hearing, in which he expressed a willingness to serve in the armed forces as a noncombatant, the District Court admitted him to citizenship on the ground that, since the Selective Training and Service Act[2] provides that a draftee may decline to serve, except as a noncombatant, petitioner was able, by exercising in advance the right given under this Act, to take an unqualified oath of allegiance to the United States. On appeal, *held* (one justice dissenting), order of the District Court reversed. The Selective Training and Service Act does not apply; the 1942 Amendment to the Nationality Act, intended to reward conscientious objectors having served in the armed forces by waiving certain citizenship requirements, did not expressly alter the Supreme Court's previously settled interpretation that a petitioner taking the oath prescribed declares himself willing to bear arms in defense of the United States. *United States v. Girourd*, 149 F. (2d) 760 (C. C. A. 1st, 1945).

There must be strict compliance with the statutory requirements before an alien may be admitted to citizenship.[3] On three occasions the Supreme Court of the United States has interpreted the oath taken by petitioners for citizenship to mean that they stand willing to bear arms in defense of this country and that unless petitioner is willing to take the oath so interpreted, the privilege must be denied.[4] In 1942 the Nationality Act was amended so as to permit aliens who had been lawfully admitted to this country and were performing military duties for the United States to be exempt from certain requirements for citizenship.[5] This provision specifically was not extended to conscientious objectors

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1. Nationality Act of 1940, 54 STAT. 1137 (1940), 8 U. S. C. § 735 (1940): "I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely without any mental reservation or purpose of evasion: So help me God."

2. Selective Training and Service Act of 1940, 54 STAT. 885, 889 (1940), 50 U. S. C. §§ 305, 305g (1941).

3. United States v. Ness, 245 U. S. 319 (1917); United States v. Ginsberg, 243 U. S. 472 (1917); Johannsen v. United States, 225 U. S. 227 (1912).

4. United States v. Bland, 283 U. S. 636 (1931); United States v. McIntosh, 283 U. S. 605 (1931). In United States v. Schwimmer, 279 U. S. 644 (1929) a forty-nine year old woman was denied citizenship. Justice Holmes, dissenting, observed that in view of the petitioner's age and sex it was not likely that she would ever be called upon to take up arms.

5. 56 STAT. 182 (1942), 8 U. S. C. § 1001 (Supp. III 1944).

who refused to wear the uniform or accept military duties.[6] Neither did it expressly change the oath required of all petitioners, nor its interpretation. What the statute has been interpreted to mean is that conscientious objectors who have served as noncombatants may be admitted to citizenship by taking the prescribed oath.[7] Here is an anomalous situation. The alien conscientious objector who has served as a noncombatant repeats the oath which is required of all petitioners for citizenship, and that oath is interpreted as not implying a willingness to bear arms. On the other hand, the alien conscientious objector who is a civilian and who has admitted a willingness to undertake noncombatant military duty, if called upon to do so, is not permitted to take the same oath on the ground that it does imply a willingness to bear arms. Hence, the oath has two different meanings even when taken by individuals with the same religious scruples. On top of this, there is an interesting and imposing question concerning the Selective Training and Service Act, namely, does an alien who takes the oath in time of peace waive his privilege to serve as a noncombatant if later drafted? The reasoning of the instant case might be interpreted as leading to that conclusion, resulting in the creation of different classes of United States citizenship.[8] In view of the fact that future warfare—assuming there is that possibility—will require, as it has in the past, hundreds of thousands of military personnel as noncombatants, the old argument that the country may be weakened by the admission to citizenship of persons unwilling to bear arms in time of war has lost its force. Therefore, the dual conflicting meanings now given the oath should be resolved either (1) by the Supreme Court's discarding the present interpretation, or (2) by the Court's broadening the interpretation to include all who are willing to undertake military service of any type, or (3) by specific legislation in Congress.

Appellate Jurisdiction of the Supreme Court—Application of Non-Federal Ground Rule—Causes Continued for Clarification by State Court—While petitioners' proceedings[1] under the Federal Employers' Liability Act[2] were pending in City Courts of Illinois, the Illinois Supreme Court held such courts to be without jurisdiction over any case where the cause of action arose outside of the city in which the action was brought.[3] Petitioners, being affected by this holding, moved to transfer

6. "The provisions of this subchapter shall not apply to (1) any person who during the present war is dishonorably discharged from the military or naval forces or is discharged therefrom on account of his alienage, or (2) any conscientious objector who performed no military duty whatever or refused to wear the uniform. . . ." 56 STAT. 183 (1942), 8 U. S. C. § 1004 (Supp. III 1944).

7. *In re* Kinloch, 53 F. Supp. 521, 523-4 (W. D. Wash. 1944): ". . . it cannot be held that alien applicants for citizenship who are performing military duty and wearing the uniform, must have read into the oath of allegiance administered to them their willingness to bear arms. . . ."

8. I. e. those who could choose noncombatant service when drafted and those who, by taking the citizenship oath, would have estopped themselves from choosing such service.

1. Herb brought his action in the City Court of Granite City, Madison County, in December of 1937. A verdict of $30,000 was returned, which the court set aside. After appeal to the Supreme Court of Illinois, the case was remanded to the City Court. Belcher brought his action in June, 1940, in the City Court of East St. Louis. A verdict of $20,000 was also set aside.

2. 35 STAT. 65 (1908), 45 U. S. C. § 51 (1941).

3. Werner v. Illinois Central R. R., 379 Ill. 559, 42 N. E. (2d) 82 (1942); Mitchell v. Louisville & N. R. R., 379 Ill. 522, 42 N. E. (2d) 86 (1942).

their actions to Illinois Circuit Courts,[4] but before the motions were granted the two-year period within which the action could be instituted under the Act[5] had expired. Dismissals of the actions were affirmed by the Illinois Supreme Court.[6] Upon certiorari, the United States Supreme Court continued the causes to permit petitioners to apply to the Illinois Supreme Court for clarification as to whether its decision was based upon a *federal* ground, i. e. construction of the federal Act in that actions must be "commenced within two years" from the date of injury, or upon a *non-federal* ground, i. e. no valid proceedings were pending in the state courts as a matter of Illinois law. After the Illinois Supreme Court had made it clear that its decision rested solely upon the federal ground and that no action had in its opinion been commenced within the two-year period, the Court *held* judgment reversed and the causes remanded.[7] *Herb v. Pitcairn,* 324 U. S. 117, 325 *id.* 77 (1945).

The appellate jurisdiction of the Supreme Court over decisions of the highest state court has been consistently limited to a consideration of questions arising under the Constitution, laws, or treaties of the United States.[8] As a corollary, the Court early developed the non-federal ground rule, i. e. the Supreme Court will not review a state decision, even though a federal question be involved, if the judgment rests upon a state ground, independent and adequate of itself to support the judgment.[9] The rule is one of necessity inasmuch as the state court could reaffirm its own judgment on the basis of the independent non-federal ground.[10] Review by the Supreme Court would thus amount to no more than the rendering of an advisory opinion.[11] A problem, however, arises when an ambiguous record presents reasonable cause for believing that the decision of the state court may actually have rested upon a federal ground. In many past cases of

4. Illinois Venue Act, ILL. ANN. STAT. (Smith-Hurd, 1936) c. 146, § 36, which provides for a change of venue, when a case is commenced in the wrong court, upon motion of either of the parties; also that ". . . such cause shall be proceeded in and determined in all things as well before as after judgment, as if it had originated in such court." *Id.* § 16.

5. "That no action shall be maintained under the Act unless commenced within two years from the day the cause of action accrued." 35 STAT. 66 (1908). An amendment adopted after the present causes of action accrued extended the limitation period to three years. 53 STAT. 1404 (1938), 45 U. S. C. § 56 (1941).

6. Herb v. Pitcairn, 384 Ill. 237, 51 N. E. (2d) 277 (1943); Belcher v. Louisville & N. R. R., 384 Ill. 281, 51 N. E. (2d) 282 (1943).

7. "An action is 'commenced' for these purposes as a matter of federal law when instituted by service of process issued out of a state court even if one which itself is unable to proceed to judgment, if the state law or practice directs or permits the transfer through change of venue or otherwise to a court which does not have jurisdiction to hear, try, and otherwise determine that cause." Instant case at 78.

8. See the Judiciary Act of 1789, 1 STAT. 85, § 25 (1789), and the Judiciary Act of 1925, 43 STAT. 936, § 237 (1925), 28 U. S. C. § 344 (1941).

9. For a discussion of the rules as to when the state court's judgment is said to be "based" on a non-federal ground, and whether that ground is "adequate" to support the state court's judgment, see ROBERTSON & KIRKHAM, JURISDICTION OF THE SUPREME COURT (1936) c. 15. At first the judgment of the state court was affirmed. Southern Pacific Co. v. Schuyler, 227 U. S. 601, 610 (1913). Later the appeal was dismissed. Live Oak Water Users Ass'n v. Railroad Commission of California, 269 U. S. 354, 359 (1926). Today under Supreme Court Rule 12, which requires a consideration by the Court of questions of jurisdiction prior to oral argument, the practice is to dismiss. A description of Rule 12 in action is contained in Frankfurter & Fisher, *The Business of the Supreme Court at the October Term, 1935 and 1936* (1938) 51 HARV. L. REV. 577, 587 *et seq.*, especially 588 n. 24.

10. Murdock v. Memphis, 20 Wall. 590, 635 (U. S. 1874).

11. "The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations on our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights.

such ambiguity the Court has refused to review,[12] but more recently it has made use of its general power to dispose of a case by remanding it to the state court for further consideration.[13] While state courts may adjudicate both state and federal questions without sharply defining each, the Supreme Court cannot assert jurisdiction, without subjecting itself to the danger of deciding state questions, unless the record is clear as to which controls the state court's judgment. Nor can it haphazardly renounce jurisdiction and perhaps fail to protect federally-created rights. In such circumstances, application to the state court to remove any ambiguity in the record[14] is a quick and efficient[15] means of solving the dilemma, and furthermore "it seems consistent with the respect due the highest courts of states of the Union that they be asked rather than told what they have intended."[16]

Federal Jurisdiction—Claims Against the United States—Original Jurisdiction of the District Court Where Aggregate of Several Claims is Greater Than $10,000—Suit against the United States under the Tucker Act[1] for the recovery of taxes alleged to have been overpaid in the years 1935, 1936, and 1937, each year's overpayment being less than $10,000, but the aggregate exceeding $10,000.[2] The District Court refused jurisdiction, accepting the Government's contention that although the District Court has original jurisdiction of all claims not exceeding $10,000 if the claims are sued upon separately, it loses that jurisdiction when separate claims are joined to total more than that amount. On appeal, *held*, judgment reversed. Under the Tucker Act the District Court has jurisdiction of all claims not exceeding $10,000, whether they are joined or sued upon separately. *Oliver v. United States*, 149 F. (2d) 727 (C. C. A. 9th, 1945).

And our power is to *correct wrong judgments, not to revise opinion. We are not permitted to render advisory opinions*, and if the same judgment would be rendered by the state court after we corrected its view of federal law, our review could amount to nothing more than advisory opinion." Instant case at 963. (Italics supplied.) "The rule is a salutary one in view of the different jurisdictions of the state courts and this court. It leaves in both the *full plenitude of their powers*. It permits no evasion by the state court of the responsibility of determining the federal question if necessary to be determined; it permits no assumption by this court of jurisdiction to review the decision of local questions." Adams v. Russel, 229 U. S. 353, 361 (1912). (Italics supplied.) See also Minnesota v. National Tea Co., 309 U. S. 551, 557 (1940).

12. Klinger v. Missouri, 13 Wall. 257 (U. S. 1871); De Saussure v. Gaillard, 127 U. S. 216 (1887); Johnson v. Risk, 137 U. S. 300 (1890); Wood Mowing & Reaping Machine Co. v. Skinner, 139 U. S. 293 (1890); Lynch v. New York *ex rel.* Pierson, 293 U. S. 52 (1934).

13. Minnesota v. National Tea Co., 309 U. S. 551 (1940).

14. The practice of some courts is to provide counsel with a certificate on motion that a stated federal question was presented and necessarily passed on, but this certificate is not conclusive.

15. "We think the simplest procedure . . . where the record is deficient, is to hold the case pending application to the state court for clarification or amendment. It need not be elaborate or formal if it is clear and decisive in stating whether a federal question, and if so, what federal question, was decided as a necessary ground for reaching the judgment under review. In proper cases we may grant counsel's request for continuance for the purpose. In proper cases we will impose the duty of applying for it upon petitioner or appellants upon our own motion." Instant case at 128.

16. *Ibid.*

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1. 36 STAT. 1091 (1911) as amended, 28 U. S. C. § 41 (1935), although changed in many ways from the Act of March 3, 1887, which was sponsored by Hon. John R. Tucker, of Virginia, is nevertheless generally referred to as the Tucker Act.

2. The claims were: $7351.59 for 1935, $6723.10 for 1936, and $6694.02 for 1937, totalling $20,768.71.

This situation, presented for the first time in the instant case,[3] requires an interpretation of that paragraph of the Tucker Act which gives to the District Courts original jurisdiction, "Concurrent with the Court of Claims, of all claims not exceeding $10,000 founded upon the Constitution of the United States or any law of Congress. . . ."[4] While the words of this paragraph, if taken alone, might admit of the construction for which the Government contended, a review of the history[5] and evident purpose[6] of the Act, as well as a consideration of the reason for the $10,000 limit,[7] clearly indicates that such a result was not intended by Congress. A study of the text of the Act shows twenty-eight paragraphs referring to actions against the Government, and, of these, only the twentieth uses the words "all claims." Since it is manifest that that term was specifically chosen, any real distinction between "claims" and "suits," "cases," "causes," or "proceedings," must have important effect.[8] One need only alter the phrase "of all claims not exceeding $10,000" to read "of all suits not exceeding $10,000" to realize that the total amount in controversy was not intended to be the factor which determined jurisdiction. Even aside from this, however, there is strong reason for the court's conclusion: affirming the District Court's judgment would be beneficial to no one, would result in a multiplicity of litigation, and would amount to a penalty for the claimants', attempt to join their claims.[9] This is not in accord with the present spirit of liberality in procedure in the federal courts.[10]

3. Previously some claimants had limited their claims to $10,000 by expressly waiving all right to recover a larger sum, thus gaining the jurisdiction of the District Court. Hill v. United States, 40 Fed. 441 (C. C. Mass. 1889).

4. 36 STAT. 1091 (1911) as amended, 28 U. S. C. § 41 (20) (1935).

5. The debate which preceded the enactment of the Tucker Act included an interesting discussion on the floor of the House of Representatives on January 13, 1887, which was occasioned by Mr. Tucker's submitting his bill to the House for approval. In the course of his explanation, Mr. Tucker stated that the district (then circuit) courts would have "concurrent jurisdiction with the Court of Claims in all *cases* up to the amount of $10,000." 18 CONG. REC. 622 (1887). By a study of the context, the court decided that it was the amount of the claim and not of the suit, to which Mr. Tucker referred. It was in further discussion on the same day, when Hon. William C. P. Breckinridge, of Kentucky, questioned the wisdom of the $10,000 limit on claims upon which suit might be brought outside the Court of Claims, that Mr. Tucker replied as in note 7 *infra*.

6. ". . . the evident purpose . . . of this law was to give to persons having claims against the United States for comparatively small amounts the right to bring suits in the courts of the United States . . . without subjecting them to the expense and annoyance of litigating in a court located at Washington." Coxe, Circuit Judge, in N. Y. & O. S. S. Co., Ltd. v. United States, 202 Fed. 311 (S. D. N. Y. 1912).

7. Mr. Tucker's explanation of the $10,000 limit is this: "Upon full consideration by the committee it was thought where a claim exceeded $10,000 it would be better and safer for the Government it should be where the head of the Department may be present to protect the Government." 18 CONG. REC. 624 (1887).

8. Since the federal income tax system is based on an annual accounting (Burnet v. Sanford & Brooks Co., 282 U. S. 359, 365 [1931]), this court held that the claimants had three separate and distinct claims against the government. 53 STAT. 465 (1939), 29 U. S. C. § 3772 (1941).

9. Since they concededly could have sued in the District Court in three separate suits. Instant case at 728.

10. At least one possible beneficial result of this decision will be the clarification of present misleading textbook treatment of the question in the instant case. A typical example is the following statement, found in HUGHES, HANDBOOK OF JURISDICTION AND PROCEDURE IN UNITED STATES COURTS (2d ed. 1913) § 73: "The . . . concurrent jurisdiction . . . of the district court . . . [is] limited to cases involving not over ten thousand dollars." This statement is now seen to be incorrect, since the total amount involved is clearly not the deciding factor. In the instant case, the total is more than double the statutory limit. Note 2 *supra*. There is nothing in the opinion to indicate that a much greater total would have caused a different result, nor should it, so long as there are separable claims, each for less than $10,000.

Labor Law—Fair Labor Standards Act—Application to Service Employees in Office Buildings—Two recent cases present questions similar to those in *Kirschbaum v. Walling*,[1] in which the Supreme Court of the United States held that service and maintenance employees who worked in a loft building where the tenants physically produced goods for interstate commerce were sufficiently integrated with such production as to be "necessary" to it[2] and hence within the coverage of the Fair Labor Standards Act.[3] In the first of the recent cases, the employees worked in an office building owned by a corporation engaged in the production of goods for interstate commerce. The corporate owner occupied fifty-eight percent of the rentable area for its executive and administrative offices.[4] While no manufacturing was done within the building, supervision of the manufacturing processes was exercised from these offices by means of direct telephone and teletype communication with the various productive units situated elsewhere.[5] Presented with the question of the application of the Fair Labor Standards Act, the Court *held* (two justices dissenting),[6] the service employees came within the scope of the Act on the ground that the executive and administrative employees in the office building were engaged in the "production of goods" for interstate commerce within the meaning of Section 3 (j) of the Act,[7] despite the fact that the physical handling and production of the goods took place elsewhere. *Borden v. Borella*, 325 U. S. 679 (1945). In the second case, elevator operators were employed in a building owned and operated by a local corporation not itself engaged in the production of goods for commerce. Forty-two percent of the rentable area, however, was occupied by tenants engaged in the production of such goods in outside plants.[8] Upon the same

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1. 316 U. S. 517 (1942).

2. The phrase "necessary to production" has been construed as meaning "a relationship to production which is not tenuous, but has a close and immediate tie with production." *Id.* at 525. See also Walton v. Southern Packing Corp., 320 U. S. 540, 542 (1944) where it was held that a watchman who contributed to the maintenance of a safe and habitable building came under the Act as "necessary" since he made "a valuable contribution to the continuous production of the respondent's goods." Also Armour & Co. v. Wantock, 323 U. S. 126 (1944).

3. 52 STAT. 1060 (1938), 29 U. S. C. § 201 *et seq.* (1940).

4. The remaining space was occupied by various other tenants in purely local business.

5. Offices in the building in question also controlled purchases of raw materials and supplies, methods of production, amounts of goods to be produced, quantity and character of labor to be used, safety measures to be adopted, budgeting and financing of various departmental activities, legal matters, labor policies, and maintenance of plants and equipment.

6. Justices Stone and Roberts dissented on the ground that the *Kirschbaum* decision must be limited to its facts, and this case differs from the *Kirschbaum* case in that here the employees who were carried in the elevators were not themselves persons engaged in the manual handling of goods in the process of production.

7. Section 3 (j) of the Act states: "For the purpose of this Act an employee shall be deemed to have been engaged in the production of goods, if such employee was employed . . . in any process of occupation necessary to the production thereof in any State." 52 STAT. 1061 (1938), 29 U. S. C. § 203 (j) (1940). *Cf.* Armour & Co. v. Wantock, 323 U. S. 126 (1944) where it was held that the term production is not limited to the physical handling of the goods in process, but also includes economic activities such as management and supervision.

8. The point was raised in the respondents' brief, and not discussed by either the majority or dissenting opinions of the Court, that the tenants here were engaged in sales activities rather than in direct control and management of physical production in outside plants. The Court evidently chose to ignore this argument and decide the case on broader grounds.

issue, the Court *held* (two justices dissenting),[9] the service employees were not engaged in the "production of goods" for interstate commerce within the meaning of Section 3 (j). *10 East 40th Street Building v. Callus,* 325 U. S. 578 (1945).

It is apparent that these three cases differ in the following respects: in the *Kirschbaum* case, the service employees were integrated with the physical processes of production carried on in the building even though they were employed by a person other than the producer of goods; in the *Borella* case, the service employees were integrated with production outside the building in which they worked but were employed by the person producing the goods for interstate commerce; in the *Callus* case, the service employees were integrated with production outside the building in which they worked, but they were employed by a landlord who was not himself engaged in the production of goods for commerce. In analyzing the three decisions, it is evident that where the factual integration was physical, i. e. where the manufacturing was done in the building in question, the Court gave little consideration to the legal concept of the employer's relationship to the production, that is, whether he was an employer-producer or an employer-landlord. In such a situation, the Court has frequently pointed out that the test to be applied in determining the coverage of the Act as to the individual employee is the relation of the activities of the individual employee to interstate commerce or to the production of goods for interstate commerce rather than the nature of the employer's business and its relation to such production or commerce.[10] It is equally clear, however, where the factual integration was not physical, i. e. where no manufacturing was carried on in the building in question, that the Court stressed the importance of the legal relationship of the employer to the production. Justice Frankfurter, in expressing the opinion of the majority of the Court in the *Callus* case, pointed out: "Running an office building as an entirely different enterprise is too many steps removed from the physical process of the production of goods. . . . An office building exclusively devoted to the purpose of housing all the usual miscellany of offices has many differences in the practical affairs of life from a manufacturing building or office building of a manufacturer."[11] From the standpoint of connection with the production of goods for commerce, it is difficult to see why the accident of ownership of an office building by the producer or nonproducer can properly be said to have any real relationship to the problem of whether a service or maintenance employee's work is part of the production of goods for interstate commerce. On the other hand, it is equally clear that it was not the congressional intent nor within the constitutional powers of the Federal Government to bring inside the ambit of the Act service employees of office buildings as such.[12] A line must necessarily be drawn

9. Justices Murphy, Douglas, Black, and Rutledge dissented on the ground that there was no appreciable distinction in the facts of this case and the *Borden* case. Chief Justice Stone concurred with the majority, since, in his opinion, even if there were no distinctions between the two cases, he would be in accord with the dissent expressed by him in the *Borden* case.

10. Overstreet v. North Shore Corp., 318 U. S. 125 (1943); Walling v. Jacksonville Paper Co., 317 U. S. 564 (1943); Warren-Bradshaw Drilling Co. v. Hall, 317 U. S. 88 (1942); Kirschbaum v. Walling, 316 U. S. 517 (1942); Rucker v. First Nat'l Bank of Miami, Oklahoma, 138 F. (2d) 699 (C. C. A. 10th, 1943).

11. 325 U. S. 578, 583-4 (1945).

12. In United States v. Darby, 312 U. S. 100 (1940) the constitutionality of the Act was upheld as a valid exercise of the commerce power of the Federal Government under Art. 1, § 8, cl. 3 of the United States Constitution. Since service employees as such could not, independent of all other factual considerations be said to have anything to do with interstate commerce, under the *Darby* case the Act could not constitutionally apply.

somewhere. The distinction made by these three decisions, while perhaps somewhat lacking in academic nicety, is undoubtedly sound in view of the practical aspects of the problems involved. Certainly the Court was disturbed by the possible results of holding that the Act applied to all office buildings where tenants were engaged elsewhere in the production of goods for commerce and the owner of the building was connected with production only through the nature of his tenant's business enterprises. To thus hold would, in effect, stretch the Act so as to bring within its scope a vast field of economic enterprise ordinarily not associated with "production" within the everyday connotations of that term. These decisions have left open the very interesting problem as to how the principles of the *Callus* and *Borella* cases will be applied where parent and subsidiary corporations are involved, the parent corporation being a manufacturing corporation producing goods for interstate commerce and its subsidiary a real estate holding corporation owning the office building in which the parent corporation maintains its administrative and executive offices. Should such a case arise, it would be interesting to see whether the Supreme Court pierces the corporate veil with respect to the subsidiary corporation's identity and, treating the two corporations as one, applies the principles of the *Borella* case, or, treating them as separate and distinct entities, applies the principles of the *Callus* case.

Wills—Presumptive Revival by Cancellation of Later Inconsistent Instrument—Rebuttal of Presumption of Contrary Intent by Parol Evidence—In 1906 decedent executed a document which purported to be a will. Subsequently he crossed out the names of some legatees, made other obliterations and interlineations, crossed out whole paragraphs, and wrote "N. G." and "Invalid" at the top and "Invalid" on the outside cover. This left only the signature and a single alternative residuary clause intact.[1] In 1939 decedent duly executed another instrument, which did not contain an express clause of revocation, but made a disposition of the estate totally inconsistent with the first testamentary effort.[2] This second instrument was found with part missing and pencil lines drawn through the signatures of decedent and witnesses. Parol evidence was presented to show that at the time of the signing of the 1939 instrument decedent intended to make a new will.[3] The 1906 document was admitted to probate.[4] On appeal, *held* (two justices dissenting), decedent died intestate. The first instru-

1. The contents of the document had been so obliterated as to cause Stearne, J., to refer to it as a "mere remnant," and gravely to doubt "whether such a jumble of words constitutes an effective testamentary disposition." Instant case at 672.

2. Both dissenting opinions take the view that "revocation by a will making inconsistent dispositions is effective only if the subsequent will is valid and subsisting at testator's death," while the majority are of the opinion that such an inconsistent instrument is valid as an "other writing" within the terms of the Wills Act of June 7, 1917, PA. STAT. ANN. (Purdon, 1930) tit. 20, § 271. Instant case at 681, 676.

3. The parol evidence consisted of a letter signed by the decedent and written a few days after he executed the 1939 instrument, stating that he was then engaged in preparing another will as the final expression of his wishes; also, testimony that at the time decedent signed the 1939 instrument he said he was going to rewrite it as it had been incorrectly witnessed and as he had already disposed of some of the personalty mentioned in the document.

4. The Orphans Court of Philadelphia County ruled (two justices dissenting) that the execution of the later inconsistent instrument did not constitute a revocation of the earlier, but merely stood as a bar to its efficacy, which bar was removed when the later instrument was cancelled. Burtt's Estate, 49 D. & C. 575 (1943).

ment was effectively revoked by the second, but the subsequent cancellation of the second presumptively revived the first. The presumption of revival was, however, rebutted by the parol evidence. *In re Burtt's Estate,* 44 A. (2d) 670 (Pa. 1945).

That the exact issue in the instant case is doubtful may be attributed in part at least to the general state of conflict concerning the revocation and revival of wills.[5] The majority of the court considered the issue to be the revival of the first writing as a testamentary instrument after it had been revoked by the later one, while both dissenting justices were of the opinion that the second never revoked the first. In Pennsylvania, the question of revival is free of a statutory measure, while revocation is covered by legislation that "No will in writing . . . shall be repealed, nor . . . altered, otherwise than by some other will or codicil in writing, or other writing declaring the same, executed and proved in the manner hereinbefore provided." [6] If the alleged revocation of the first instrument by the execution of the second was not a sufficient compliance with the terms of the statute, it is clear, in the absence of an independent cancellation of the first,[7] that it must stand as the legal expression of the testator's intent, since the cancellation of the second instrument is undisputed. There is precedent to justify the view of the dissenters that the first instrument was never revoked by the second.[8] But the majority opinion depends upon the apparently unsupported rationalization that there "is no difference *in principle* between a revocation by an *express clause* or by *inconsistent provisions.*" [9] The instant case points directly to the need for legislation providing that revival shall be effected only by re-execution or a codicil showing such intention.[10] Pennsylvania would do well to follow the majority of states in adopting such a provision.[11]

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5. The situation is referred to as one of "now hopeless confusion" in a much quoted article. Roberts, *The Revival of a Prior by the Revocation of a Later Will* (1900) 48 AM. L. REG. 505, 521.

6. The words "in the manner hereinbefore provided" were found by Linn, J., to refer to Section 2, "that in all cases the revocation shall be proved by the oaths or affirmations of two or more competent witnesses; otherwise . . . it shall be of no effect." PA. STAT. ANN. (Purdon, 1930) tit. 20, § 191.

7. It is submitted that the mutilation of the 1906 instrument was an independent cancellation. Evans' Appeal, 58 Pa. 238 (1868). In Williams' Estate, 336 Pa. 235, 9 A. (2d) 377 (1939) the court said that certain writings alleged to constitute an effective revocation could not be given effect, "the testamentary provisions of the will remaining untouched by their addition," thus implying that, had the testamentary provisions *not* been untouched, the writings could have been given effect as revocatory. In the instant case, the entire obliteration of three paragraphs, the crossing out of approximately two hundred and fifty words, leaving the rest in a jumbled mass, could certainly be held to be sufficient cancellation of the testamentary provisions to have constituted a revocation in and of itself.

8. *In re* Ford's Estate, 301 Pa. 183, 151 Atl. 789 (1930); *In re* Seiter's Estate, 265 Pa. 202, 108 Atl. 614 (1919); *In re* Holmes' Estate, 240 Pa. 537, 87 Atl. 778 (1913).

9. It was necessary to use this device to claim any support at all, since there is some authority that an express clause of revocation, not being a part of the testamentary disposition, takes effect immediately and is not affected by subsequent revocation of the later instrument. Compare the statement of the majority with the following: "A very different question is raised where the second will contains no clause of revocation, but simply devises the property in a different manner from the first." Roberts, *The Revival of a Prior by the Revocation of a Later Will* (1900) 48 AM. L. REG. 505, 520.

10. First adopted in England, 1 VICT., c. 27, § 22 (1837).

11. Instant case at 682.