RECENT CASES

Constitutional Law—State Minimum Price Milk Control—Exclusive Jurisdiction Over Federal Area—Competitive Bidding Requirements—Pennsylvania and California have similar milk control minimum price legislation.[1] Indiantown Gap Military Reservation is *leased* from the Commonwealth of Pennsylvania, while Moffett Field, a California air base, is *owned* by the United States. A dairy company, in each state, negotiated a contract, with each post, to sell milk for less than the determined minimum milk price. The companies questioned the validity of penalty measures taken against them.[2] *Held,* the Pennsylvania minimum price law was binding on the sale since the *leased* reservation was not subject to exclusive federal jurisdiction; also the state regulation neither placed an unconstitutional burden on the United States nor interfered with its policy of competitive bidding. *Penn Dairies, Inc. v. Milk Control Commission of Pennsylvania,* 63 Sup. Ct. 617 (1943);[3] the California minimum price law was not binding on the sale since state laws are not applicable to a federal *owned* enclave, the federal government having exclusive jurisdiction by cession. *Pacific Coast Dairy, Inc. v. Department of Agriculture of California,* 63 Sup. Ct. 628 (1943).[4]

Exclusive jurisdiction of federal owned land[5] is a dwindling concept. At one time it was thought imperative as a prerequisite to the adequate performance of any federal function on the land.[6] Not until a vast quantity of land came under federal control[7] did the long accepted immunity begin to hamper the effectiveness of state social and economic legislation.[8] Subsequent recognition of the mutual benefits received from concurrent or partial federal jurisdiction[9] has resulted in more sensible jurisdictional requirements. Now, when a state cedes jurisdiction to the United States it may reserve to itself any jurisdictional power not inconsistent with the federal purpose for which the land was acquired.[10] Also, even though a state in giving its consent does not reserve concurrent jurisdiction, exclu-

1. AGRICULTURAL CODE OF CALIFORNIA (Deering, 1937) Div. 4, c. 10, §§ 735-738, as amended 1941 Supp. (Deering) pp. 462-467; Pennsylvania Milk Control Law, Pa. Laws, 1937 P. L. 417, PA. STAT. ANN. (Purdon, Supp. 1941) tit. 31, § 700j-101.

2. The California Commission instituted proceedings to revoke the license of the dairy, while the Pennsylvania Commission denied an application for the renewal of a license. The United States filed a brief as intervenor-appellant.

3. Justices Douglas, Black, and Jackson dissenting on the grounds that the federal competitive bidding statute overrode the state minimum price requirement. The appeal was from 148 Pa. Super. 261, 24 A. (2d) 717 (1942), affirmed without opinion in 344 Pa. 635, 26 A. (2d) 431.

4. Justice Frankfurter dissented as he failed to see any practical difference between the two cases; Justice Jackson's dissent upheld the state police power in the absence of any overriding Congressional legislation. The appeal was from 19 Cal. (2d) 818, 123 P. (2d) 442 (1942).

5. U. S. CONST. Art. I, § 8, cl. 17. Actually the California land was not purchased. For importance of method of acquisition see Note (1938) 38 COL. L. REV. 128.

6. *See* Laurent, *Federal Areas Within the Exterior Boundaries of the States* (1942) TENN. L. REV. 328, 329, 335-339; Note (1938) 38 COL. L. REV. 128.

7. *Ibid.*

8. If large areas and groups are exempt and the federal government does not supplement the state legislation, its effectiveness is bound to be limited—especial a minimum price statute. See Note (1938) 38 COL. L. REV. 128, 138, 139.

9. James v. Dravo Co., 302 U. S. 134, 147-149, 154 (1937).

10. Fort Leavenworth v. Lowe, 114 U. S. 525 (1885); Silas Mason Co. v. Tax Commissioner, 302 U. S. 186 (1937); Atkinson v. State Tax Commission, 303 U. S. 20, 23 (1938). Also any local law existing at the time the enclave is acquired, and which does not defeat the national purpose, remains in effect within the enclave until altered

sive jurisdiction does not vest automatically in the federal government because, it is now reasoned, the United States is under no *obligation* to accept jurisdiction.[11] Thus it remains in the state unless specifically accepted by the United States.[12] The above rules represent the government's present attitude toward jurisdiction. Therefore, it seems to be taking a backward step and encouraging the preservation of an outmoded legal refinement to decide the instant California case purely on the basis of a technical encroachment upon an established exclusive military jurisdiction.[13]

Furthermore, the policy of the federal government has been to encourage agricultural co-operation with the states.[14] It is inconsistent with that policy to allow an exclusive jurisdiction for military purposes to impair the effectiveness of state price regulation where that regulation does not interfere with, nor attempt to regulate, the federal activity on the land.[15] And the practical result is to make the status of each military post uncertain in its relations with contractors normally subject to state regulation.[16] It is submitted that the court should have considered the California case from the same realistic approach used in the Pennsylvania case to what seems to be the basic problem involved, *i. e.,* whether an unconstitutional burden is imposed upon a federal instrumentality. Then, the following considerations, which prevailed in the latter decision, would govern the former. There is no unconstitutional burden because immunity from state regulation does not extend to those who contract with the government,[17] and this is so even though the result might be higher cost to the United States.[18] Competitive bidding requirements protect the government's interest as a purchaser and at the same time present an obstacle to price regulation.[19] However, there must be express Congressional authority providing that price regulations should be subordinate to competitive bidding

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by Congress. Stewart & Co. v. Sadrakula, 309 U. S. 94, 99 (1940). *See* U. S. v. Unzeuta, 281 U. S. 138 (1929); James v. Dravo Co., 302 U. S. 134 (1937); 38 Op. Atty. Gen. 341 (1935).

11. 54 STAT. 1083, 1084 (1940), 40 U. S. C. A. § 255 (Supp. 1942); Silas Mason Co. v. Tax Commissioner, 302 U. S. 186, 207-208; Atkinson v. State Tax Commission, 303 U. S. 20 (1938).

12. *Ibid.*

13. Admittedly the California base is under exclusive jurisdiction, but see Note (1938) 38 COL. L. REV. 128, 132.

14. 49 STAT. 767, § 101 (1935), 7 U. S. C. A. § 610 (i) (1939), amending § 10 of the Agricultural Marketing Agreement Law, 48 STAT. 37 (1933), and providing for federal and state cooperation.

15. The milk laws are not directed against the United States Military Reservations. They will, however, share the benefits of the regulation if the purported objectives of the laws are reached.

16. (1943) 11 GEO. WASH. L. REV. 381, 383. The combined effect of the two decisions is to produce uncertainty. ". . . it will be presumably necessary for every Army contracting officer to determine in each instance whether the post he is supplying is within exclusive federal jurisdiction . . . it is surely not the policy of either Congress or the Army that the authority of contracting officers should vary from state to state and post to post."

17. United States v. Oklahoma Gas & Electric Co., 297 Fed. 575 (C. C. A. 8th, 1924); James v. Dravo Co., 302 U. S. 134, 159-160 (1937); Alabama v. King & Boozer, 314 U. S. 1 (1941). In the last case a contractor erected an army camp under cost-plus contract terms. The Court held valid a sales tax on materials which was ultimately paid by the United States as a cost item. There was no question that the increased cost was *passed* directly to the United States.

18. *Ibid.*

19. The practical effect of price regulations is that all bids are submitted at the minimum prices, and thus any benefits of competitive bidding are lost.

requirements [20] or the necessities of the war effort before the state police power (which justifies milk control [21]) gives way.[22] Therefore, since the court in the *Penn Dairies* case construed the applicable competitive bidding statutes and army regulations as not precluding the payment of Pennsylvania regulated prices,[23] and the same statutes and regulations apply in California, there is no pragmatic reason for the divergent decisions.

Constitutional Law—Taxation—Validity of Real Property Tax on Leased Government-Owned Machinery Assessed Against the Holder of a Cost-Plus and Fixed Fee Contract—For *ad valorem* property tax purposes,[1] Allegheny County increased the assessment of the plaintiff, a holder of a cost-plus and fixed fee contract, by adding the full valuation of leased machinery [2] owned by the United States used to manufacture heavy guns. The machinery had been affixed to the plaintiff's realty. The lease, which was for an indeterminate period, provided for the reimbursement of the plaintiff for any state or local taxes paid on the leased machinery. *Held*,[3] (two justices dissenting),[4] since the machinery is a permanent part of the mill owned by the plaintiff, it is taxable as his real

20. The competitive bidding statutes are found in 31 STAT. 905 (1901), 10 U. S. C. A. § 1201 (1928); 36 STAT. 861 (1910), 41 U. S. C. A. § 5 (1928); 37 STAT. 591 (1912), 10 U. S. C. A. § 1200 (1928). See instant case, *Penn Dairies*, pp. 622-625, for discussion of applicability of the statutes.

21. (1942) 90 U. OF PA. L. REV. 966. "Control of prices in the milk industry is clearly within the police power of the states since the public health is so directly affected. Fixing a minimum price level prevents dealers from selling at low prices at the expense of sanitary conditions." Also, Nebbia v. New York, 291 U. S. 502, 522-533 (1934); U. S. v. Rock Royal Co-Operative, Inc., 307 U. S. 533, 570 (1939); Rohrer v. Milk Control Board, 322 Pa. 257, 265-266, 186 Atl. 336 (1936). See also, Coho, *Milk Price Control—A Developing Field of Administrative Law* (1941) 45 DICK. L. REV. 254.

22. See Note (1940) 8 GEO. WASH. L. REV. 955, for an excellent discussion of the clash between competitive bidding requirements and minimum price regulation.

23. The provisions were construed as only attempting to avoid any action that could be interpreted as an assent to price regulation in circumstances where the regulation, without affirmative assent, would be inapplicable, *Penn Dairies*, p. 625.

1. The tax was levied pursuant to PA. STAT. ANN. (Purdon, Supp. 1942) tit. 72, § 5020-201. "The following subjects and property shall, as hereinafter provided, be valued and assessed, and subject to taxation for all county, city, borough, town, township, school and poor purposes at the annual rate:

(a) All real estate to wit: Houses, lands, lots of ground and ground rents, mills and manufactories of all kinds, furnaces, forges, bloomeries, distilleries, sugar houses, malt houses, breweries, tan yards, fisheries, and ferries, wharves, and all other real estate not exempt by law from taxation."

2. Some of the machines (eight gun-boring lathes) were always owned by the United States, but other machines and equipment were purchased or manufactured by the Mesta Machine Company and sold by it to the United States. The machinery was appraised at $618,000.

3. Reversing Appeal of Mesta Machine Company, 91 Pitts. L. J. 33 (1943).

4. A strong dissenting opinion was written by Justice Horace Stern and concurred in by Justice Allen M. Stearne. It points out that the authorities prohibit the taxation of government property even where the tax is assessed against private individuals or corporations. Also, it argues that the recent decisions in the field of federal tax immunity do not stand for the proposition adopted by the majority that immunity does not exist where the tax is assessed against an independent contractor rather than against the government; rather they hold "that a state has the right to impose a tax on an independent contractor on property owned, *not by the United States, but by the contractor;* in other words, the right of a state to tax the property of a citizen is not impaired merely because of the existence of a contract between that citizen and the United States as the result of which the tax indirectly imposes an economic burden on the government." Instant case at 242.

estate.[5] The legal obligation to pay the tax was on the company, not the government, and therefore the government's voluntary agreement to pay the tax is immaterial. *Mesta Machine Company Case,* 347 Pa. 191, 32 A. (2d) 236 (1943). After an unprecedented expansion of federal activities, the present trend, though it has belatedly appeared,[6] is to restrict stringently the scope of the implied *constitutional* doctrine of federal immunity from state taxation, especially when it is invoked for the benefit of private interests.[7] Correspondingly, there is a trend to broaden the scope of legislative power to immunize federal instrumentalities.[8] Previously, only those state taxes which were based on the speculative or conjectural nature of the tax burden on the government were upheld.[9] Indicative of this is the *King* case[10] which held that even though the economic burden of a sales tax is passed directly and exclusively on to the government, a federal instrumentality is not immune from state taxation where the legal incidence of the tax falls on an independent contractor.[11] On the other hand, Congress has always had the power to immunize from state taxation where it is "necessary and proper" to protect the federal instrumentality.[12] Evidencing this power is the *Bismark* case[13] in which the Court impliedly recognized the existence of Congressional power to provide immunity even beyond that implied in the Constitution. From these two recent decisions two observations can be made. First, where Congress is silent, the bearing by the

5. This particular part of the holding is only indirectly discussed in the text as it is the well-established rule in Pennsylvania that affixed machinery is taxable as real estate of the owner of the land on which the mill or manufactory is located. Patterson v. Delaware County, 70 Pa. 381 (1872). The rule is the same even though an agreement between the owner of the machinery and the owner of the land and mill treats it as personal property removable at the termination of the lease. Bemis v. Shipe, 26 Pa. Super. 42 (1904); Guthrie v. Pittsburgh Dry Goods Co., 47 Pa. Super. 384 (1911); *cf.* Pennsylvania Stave Co.'s Appeal, 236 Pa. 97, 84 Atl. 761 (1912). Nor can the owner of the land and buildings escape liability where permanent machinery is owned by a tenant who could remove it at the end of the lease. Guthrie v. Pittsburgh Dry Goods Co., *supra.* For the purposes of assessment and taxation, the registered titleholder is regarded as owner and is personally liable for taxes levied on the property on the theory that he represents himself as owner through public records. Pennsylvania Co. v. Bergson, 307 Pa. 44, 159 Atl. 32 (1932); *see* Germantown Trust Co. v. Stanley Co., 338 Pa. 533, 539, 13 A. (2d) 406, 409 (1940); Starling v. W. Erie Ave. B. & L. Ass'n, 333 Pa. 124, 127, 3 A. (2d) 387, 389 (1939); North Philadelphia Tr. Co. v. Heinel Bros., Inc., 315 Pa. 385, 386, 172 Atl. 692, 693 (1934). There is no violation of federal due process when the above principle is applied. Fidelity-Philadelphia Tr. Co. v. Bergson (No. 1), 328 Pa. 545, 196 Atl. 28 (1938).

6. See Lowndes, *Taxation and the Supreme Court* (1938) 87 U. OF PA. L. REV. 1, 2: "Reform with respect to the doctrine of inter-governmental immunities is long overdue. With the rise in the tax burden magnifying existing inequalities in the tax system, any type of exemption becomes less tolerable. Inter-governmental exemptions, moreover, in an era of increasing governmental activity threaten a suicidal circle, by which the expansion of government constantly narrows sources on which it depends for sustenance."

7. Notes (1942) 51 YALE L. J. 482, 490, 17 TULANE L. REV. 100, 120.

8. *Ibid.*

9. Graves v. New York *ex rel.* O'Keefe, 306 U. S. 466 (1939); Helvering v. Gerhardt, 304 U. S. 405 (1938); James v. Dravo Contracting Co., 302 U. S. 134 (1937); Trinityfarm Construction Co. v. Grosjean, 291 U. S. 466 (1934); Metcalf v. Mitchell, 269 U. S. 514 (1926).

10. Alabama v. King & Boozer, 314 U. S. 1 (1941), 140 A. L. R. 615, 621 (1942), (1942) 40 MICH. L. REV. 457.

11. *Cf.* Penn Dairies, Inc. v. Milk Control Commission, 63 Sup. Ct. 617 (1943); Curry v. United States, 314 U. S. 14 (1943).

12. Federal Land Bank of St. Paul v. Bismark Lumber Co., 314 U. S. 95 (1941); Graves v. New York *ex rel.* O'Keefe, 306 U. S. 466 (1938).

13. Federal Land Bank of St. Paul v. Bismark Lumber Co., 314 U. S. 95 (1941), (1942) 40 MICH. L. REV. 586; *cf.* Pittman v. Home Owners' Loan Corp., 308 U. S. 21 (1939).

government or its instrumentalities of any *pro tanto* tax is not unreasonable interference, providing the legal incidence falls on a private interest, although an expenditure of large additional amounts by the government will be required.[14] Second, the Court believes Congress is in a better position to judge whether a nondiscriminatory, nonregulatory tax unreasonably interferes with the functions of the federal government.[15] In the instant case the tax involved was a *pro tanto* tax whose legal incidence fell on a private interest and Congress had not expressly immunized the plaintiff. Therefore, following the well-established Pennsylvania law [16] and the aforementioned trends, but without overthrowing the doctrine of immunity entirely,[17] the instant court was justified in holding the tax valid and in extending the rule of the *King* case to apply to real estate taxes levied upon the lessee of government-owned property.[18] The decision, though another step toward narrowing federal immunity, will probably have few implications as at present not many taxing authorities, even within Pennsylvania, actually tax machinery as real estate although they constitutionally have the authority. The dissent, which pointed out, rather unconvincingly, that the assessment could not have been on any interest the company had in the machinery since it could not be used for any other purpose than the manufacture of guns for the United States, probably would have declared invalid also a tax on the plaintiff's leasehold interest based on an assessment at less than the full valuation.[19] However, it has been generally held that leasehold interests in land are taxable when the fee or reversion is tax-exempt,[20] and this is the rule even though neither the state constitution nor

14. Note (1941) 28 VA. L. REV. 251, 264.

15. (1942) 40 MICH. L. REV. 457, 459; Note (1942) 51 YALE L. J. 482, 484, note 15, and the cases cited therein.

16. See note 5 *supra*.

17. Abrogation of the doctrine has been advocated by Hervey, *Judicial Delimination of the Exemption of Federal Instrumentalities From State Taxation* (1938) 12 TEMP. L. Q. 291, 339: "The law as it now stands makes the states and the United States undergo sacrifices, each for the benefit of the other. Neither government would suffer appreciably if the burnt offerings were no longer required. They are no longer exacted in Australia although the High Court there paid homage to the *dictum* of Chief Justice Marshall until 1920. And under the present decisions, the Canadian Provinces may tax Dominion instrumentalities provided only that the tax be not discriminatory. The tax has not destroyed the governmental arrangement of these English-speaking federations and the departures therefrom will have no different effect in the United States, although it might burden, to a minute degree, the cost of distributing government securities."

18. *But cf.* People *ex rel.* Donner-Union Coke Corp. v. Burke, 204 App. Div. 557, 198 N. Y. S. 601 (1923), *aff'd without opinion* in 236 N. Y. 650, 142 N. E. 320 (1923); People *ex rel.* Donner-Union Coke Corp. v. Burke, 128 Misc. 195, 217 N. Y. S. 803 (1926), *aff'd without opinion* in 222 App. Div. 790, 226 N. Y. S. 882 (1927), and in 248 N. Y. 507, 162 N. E. 503 (1928). Note, however, that the above two decisions were decided before the trend toward narrowing federal tax immunity was noticeable.

19. It is conceivable, but not probable, that the plaintiff's leasehold interest is equal to the full valuation of the machinery as the machinery may completely wear out before the war is over. Also, it is interesting to note that in Graselli Chemical Co. v. Board of Assessors of the City of Boston, 281 Mass. 79, 183 N. E. 150 (1932), despite the fact that a lessee's interest in state-owned land expired one month after the tax day, the lessee was taxed on the full value of the fee. The general problem of valuing such interests is discussed in Metropolitan Building Co. v. King County, 72 Wash. 47, 129 Pac. 883 (1913) and Note (1933) 21 CALIF. L. REV. 596.

20. Trimble v. Seattle, 231 U. S. 683 (1914); *Ex parte* Gaines, 56 Ark. 227 (1892); San Pedro, Los Angeles & Salt Lake R. R. Co. v. City of Los Angeles, 180 Cal. 18, 179 Pac. 393 (1919); Philadelphia, W. & B. R. Co. v. Appeal Tax Court of Baltimore City, 50 Md. 397 (1879); State, Morris Canal & Bkg. Co. v. Haight, 36 N. J. L. 471 (1873); County of Franklin v. McClean, 93 Pa. Super. 165 (1927); Moeller v. Gormley, 44 Wash. 465, 87 Pac. 507 (1906); *cf.* Daugherty v. Thompson, 71 Tex. 192, 9 S. W. 99 (1888); State of Texas v. Taylor & Kelley, 72 Tex. 297, 12 S. W. 176 (1888). Other authorities are collected in Note (1923) 23 A. L. R. 248.

the taxing statute makes specific provision for the separate assessment of a leasehold interest. Therefore, since both [21] are silent in Pennsylvania and since the affixed machinery is treated as part of the realty, the instant court would have been justified in upholding the tax on this ground also. The tax would then be on the lessee's interest in the machinery and the dissent's argument that it is actually on government-owned property would be no longer tenable. Moreover, the fact that the tax burden is passed immediately and exclusively on to the government then becomes immaterial under the *King* case. True, the problem of valuation here would be more difficult than the average lease since no definite term appears, but it would be no more difficult than the determination of the value of a particular piece of property.

Evidence—Corpus Delicti—Circumstantial Evidence Sufficient to Establish Corpus Delicti in Murder Case—Defendant was convicted of murder in the first degree of a week-old infant.[1] Neither the victim's body nor eye-witnesses to the crime were produced, the only evidence being of a circumstantial nature and corroborated by defendant's confession. Upon assignment of error that apart from confession evidence was insufficient to establish the *corpus delicti, held,* circumstantial evidence, including false and contradictory statements of defendant, and the fact that the infant had last been seen in defendant's custody, was sufficient to establish the *corpus delicti* and thus authorize consideration of defendant's confession. *Commonwealth v. Lettrich,* 346 Pa. 487, 31 A. (2d) 155 (1943). Contrary to the layman's conception of the term, *corpus delicti* does not necessarily mean the object with which or upon which the crime has been perpetrated,[2] but rather, the substance of the crime charged,[3] that is, the substantial fact that a crime has been committed by someone. It contains two essential elements, the act and the criminal agency of the act.[4] In homicide, *corpus delicti* consists of death as the result and the criminal agency of another person as the means; and although usually proved by direct evidence, circumstantial is sufficient if of the most cogent and unequivocal nature.[5] That unless the *corpus delicti* is established a confession of the accused cannot be admitted into evidence is fundamental in the procedural

21. PA. CONST. Art. IX, § 1: "All state taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws; . . . ." For taxing the statute see note 1 *supra.*

1. Victim was the illegitimate child of defendant's sister.

2. "The phrase *corpus delicti* sometimes means the dead body of the deceased, but the use of the phrase in thise sense is an abuse of the words." WHARTON, CRIMINAL LAW (12th ed. 1932) § 347.

3. 7 WIGMORE, EVIDENCE (3d ed. 1940) § 2072; WHARTON, CRIMINAL LAW (12th ed. 1932) § 348; Words and Phrases; Bouvier's Law Dictionary.

4. "Some cases . . . require that defendant's criminal agency in the production of the state of fact shall also be established . . . but the sounder view is that proof of the *corpus delicti* does not include proof of the identity of the accused as the perpetrator of the crime." WHARTON, CRIMINAL LAW (12th ed. 1932) § 348.

5. Slaughter v. State, 21 Ala. App. 211, 106 So. 891 (1926); Deiterle v. State, 101 Fla. 79, 134 So. 42 (1931) (In homicide cases, when proof of the *corpus delicti* rests upon circumstances, and not upon direct proof, it must be established by the most convincing, satisfactory and unequivocal proof compatible with the nature of the case, excluding all uncertainty or doubt.); State v. McLennon, 40 Idaho 101, 231 Pac. 718 (1925).

rules of the courts of this country.[6] The instant decision follows the rule allowing the *corpus delicti* to be established by circumstantial evidence which satisfies the jury beyond a reasonable doubt that the felonious act has been committed. The conclusion that the evidence here was of this nature is justifiable for two reasons: first, because false and contradictory statements such as the defendant when questioned made to divert suspicion are sufficient to cast doubt on her innocence and warrant submitting the evidence to the jury;[7] second, because in an infanticide case, due to the physical nature of the victim, the character of the circumstantial evidence offered need not conform with that which would be demanded in the ordinary homicide case. A newly-born infant, unlike an older child or adult, is unable to propel itself about or to obtain sustenance, and is entirely dependent upon others for its existence. Therefore, the fact that the infant was placed in the custody of and last seen in the possession of an adult, coupled with that person's failure to satisfactorily explain the baby's disappearance is indicative of a felonious act.[8] The instant decision, in permitting the *corpus delicti* to be established by circumstantial evidence, clearly is not a departure from the authoritatively settled law. It is noteworthy, however, as being the first American infanticide case in which, in the absence of both the corpse and eye-witnesses, the circumstantial evidence was considered strong enough to establish the *corpus delicti*.[9]

Labor Law—Injunction Against Picketing Where All the "Employees" Are Members of a Newly Formed Partnership—The plaintiff, owner of a restaurant and employing six persons, refused to negotiate with the defendant union which thereupon peacefully picketed the establishment. Subsequently, the plaintiff formed a partnership with the six employees and obtained a permanent injunction against the continued picketing. *Held,* affirmed (three justices dissenting), the formation of a partnership terminated the existence of an employer-employee relationship, without which there can be no "labor dispute" within the meaning of section 876-a of the New York Civil Practice Act. *Angelos v. Mesevich,* 289 N. Y. 498, 46 N. E. (2d) 903 (1943).

The New York Anti-Injunction Act, aimed at reducing the number of labor injunctions issued [1] has, in certain situations, suffered a disappoint-

6. People v. Eldridge, 3 Cal. App. 248, 86 Pac. 832 (1906) (Where infant's body found and post mortem revealed nothing to indicate a violent or unnatural death, held, that infanticide cannot be proved by the confession of the woman without independent evidence sufficient to establish beyond a reasonable doubt that the death of the infant was caused by criminal or unlawful means.); State v. Morgan, 157 La. 962, 103 So. 278 (1925); State v. Willoby, 34 S. W. (2d) 7 (Mo. 1930); Commonwealth v. Turza, 340 Pa. 128, 16 A. (2d) 401 (1940).

"The general rule in this country is that the corpus delicti cannot be established by the confession of the accused, unsupported by corroborative evidence or proof aliunde, and a conviction had upon such uncorroborated evidence cannot be sustained." WHARTON, CRIMINAL LAW (12th ed. 1932) § 357.

7. Cathcart v. Commonwealth, 37 Pa. 108 (1861); Commonwealth v. Spardute, 278 Pa. 37, 122 A. 161 (1923); 2 WIGMORE, EVIDENCE (3d ed. 1940) § 278.

8. Rex v. McNicholl (1917) Ir. R. 557; Attorney General v. Edwards (1935) Ir. R. 500; Makin v. Atty. Gen'l for New South Wales, L. R. (1894) A. C. 57. *Contra:* People v. Kirby, 223 Mich. 440, 194 N. W. 142 (1923).

9. For foreign cases in accord see note 8 *supra.* American cases *contra:* People v. Kirby, 223 Mich. 440, 194 N. W. 142 (1923); People v. Eldridge, 3 Cal. App. 248, 86 Pac. 832 (1906). In both these cases evidence was held insufficient to indicate a violent and unnatural death.

1. N. Y. L. (1935), c. 477, § 1; see Note (1935) 22 VA. L. REV. 83.

ing history [2] as a result of the emasculation of the statute by the courts' unnecessarily narrow interpretation.[3] Section 876-a which defines "labor dispute" in very broad terms [4] has been the crux of many cases decided adversely to labor.[5] The instant decision, when analyzed with closely related problems, illustrates the tendency of the courts to circumvent the clearly expressed purpose of the statute.[6] No "labor dispute" has been held to exist (because of the absence of any employer-employee relationship) where an owner discharged an employee and operated his business alone.[7] Some courts have drawn distinctions based on whether the discharge of employees occurred before or after union activity was begun,[8] the owner's intention as to future rehiring,[9] the motivation behind the discharge,[10] and the family relationships involved.[11]

On the other hand, some courts, on much broader grounds, have held that where the policy pursued by the owner will be detrimental to organized labor, and eventually society, picketing will be permitted.[12] Where

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2. Note (1940) 49 YALE L. J. 537. The Virginia Law Review note cited in footnote 1 *supra*, when read together with this Yale note, presents a good picture of the "before" and "after" of the New York statute. For more recent developments see Galenson and Spector, *The New York Labor-Injunction Statute and the Courts* (1942) 42 COL. L. REV. 51.

3. Fraenkel, *Judicial Interpretation of Labor Laws* (1939) 6 U. OF CHI. L. REV. 577, "Courts have often struck down laws designed to aid labor, by conservative construction of the constitution, and have emasculated them by interpretation. The most useful weapon in their varied armory has been the doctrine that the legislature intended merely to enact the law as it had already been handed down by the courts. As if the labor pains of law making were readily undergone for any such futile purpose!" See Goldfinger v. Feintuch, 276 N. Y. 281, 11 N. E. (2d) 910 (1937), in which the so-called "declaratory" doctrine appears. *Cf.* May's Furs and Ready to Wear, Inc. v. Bauer, 282 N. Y. 331, 26 N. E. (2d) 279 (1940); Everett v. Penna., 6 N. Y. S. (2d) 630 (1938), in which the instant statute was interpreted as merely regulating the *procedure* in injunction actions.

4. "The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, or concerning employment relations, or any other controversy arising out of the respective interests of employer and employee, regardless of whether or not the disputants stand in the relation of employer and employee." N. Y. CIVIL PRACTICE ACT, § 876a (10) c.

5. See Electric Coal Co. v. Rice, 80 F. (2d) 1 (C. C. A. 7th, 1935) (which describes the definition of a labor dispute as the "danger point" in the anti-injunction statutes); (1936) 21 CORN. L. Q. 640; (1937) 50 HARV. L. REV. 1295.

6. The legislative intent is clearly expressed in the beginning of the statute. N. Y. L. 1935, c. 477, § 1.

7. Thompson v. Boeckhout, 273 N. Y. 390, 7 N. E. (2d) 674 (1937); Leach v. Himmelfarb, 18 N. Y. S. (2d) 642 (1940); Zweibon v. Goldberg, 20 N. Y. S. (2d) 272 (1940); Lyle v. Local No. 452, Amalgamated Meat Cutters, 174 Tenn. 222, 124 S. W. (2d) 701 (1939); Roraback v. Motion Picture Operators' Union, 140 Minn. 481, 168 N. W. 766, *rehearing denied*, 169 N. W. 529 (1918).

8. Bailis v. Fuchs, 283 N. Y. 133, 27 N. E. (2d) 812 (1940); 1 TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING (1940) § 121.

9. Gips v. Osman, 9 N. Y. S. (2d) 828 (1939).

10. Marvin v. Frisch, N. Y. L. J., September 5, 1939, p. 535, col. 3 (Sup. Ct. 1939).

11. For a more detailed analysis of this group and the situations involved in footnotes 7 to 11, see Galenson and Spector, *The New York Labor Injunction Statute and the Courts* (1942) 42 COL. L. REV. 51; 1 TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING (1940) § 121.

12. Finke v. Schwartz, 28 Oh. N. P. (N. S.) 407 (1938) in which Mack, J., in paraphrasing Justice Cardozo in Mann v. Rasmist, 255 N. Y. 307, uses the following sound reasoning: "The court is of the opinion that in the instant case its decision should be controlled by the following just and fundamental principle, viz., if a defendant believes in good faith that the policy pursued by the plaintiff is hostile to the interests of organized labor and is likely, if not suppressed, to lower the standard of living for workers in a trade, it is privileged by pressure of notoriety and persuasions to bring

the owner was a member of an employers' association involved in dispute with the union, a "labor dispute" was held to exist and picketing of the owner was not enjoined.[13] Picketing of a manufacturer who had no employees of his own was permitted where he controlled the labor conditions of an independent contractor who was involved in a dispute with his employees.[14] Where the sole stockholders of a corporation were also its sole employees the necessary relationship of employer-employee existed.[15] It seems clear in the light of the above decisions that the instant case is an extremely narrow interpretation of the New York Civil Practice Act, section 876-a.

There is a fundamental distinction between the situation in which the sole owner or *existing* partnership[16] discharges an employee and carries on its business alone and that in which the employer of several persons, upon dispute with the union, retains the same services of the same workers, adopting the *form* of a partnership to eliminate the employment status and hence escape the effects of the Statute.[17] In the instant case the majority of the court ignores this distinction, applying identical reasoning to both situations.[18] By so doing it prostitutes substance to form. Whether the instant "partnership" be termed a scheme,[19] subterfuge,[20] illusory

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its policy to triumph"; Steerman v. Krouse, 36 Pa. D. and C. 475 (Phila., 1939). See Somerset Shoe Company, 5 N. L. R. B. 70 (1936).

13. Schwartz v. Fish Workers Union, 11 N. Y. S. (2d) 252 (1939), in which it was stated, ". . . the entire labor relationships with which the New York Labor Act concerns itself *is not limited to direct employer-employee relationships.*"

14. Abeles v. Friedman, 14 N. Y. S. (2d) 252 (1939).

15. Boro Park Sanitary Live Poultry Market, Inc. v. Heller, 280 N. Y. 481, 21 N. E. (2d) 687 (1939).

16. Miller v. Fish Workers Union, 11 N. Y. S. (2d) 278 (1939); Bostnick v. Winokur, 7 N. Y. S. (2d) 6 (1938); Pubin v. Choina, 26 N. Y. S. (2d) 10 (1941). *But cf.* Greenberg v. Halpern, 23 N. Y. S. (2d) 903 (1940); Fromer v. Winokur, 27 N. Y. S. (2d) 10 (1941) (picketing of a partnership was permitted).

17. In Saito v. Waiter and Waitresses Union, 12 N. Y. S. (2d) 283 (1939), in which the form of partnership was sought to take the case out of the statute, Justice Cuff uses language which could be equally well applied to the instant case. "I think that the alleged arrangement is a scheme—simple to concoct, in effect seriously destructive—born of a desire . . . to win for this enterprise the labor law immunities which surround a 'one man business'."

18. Instant case at page 502, "Upon the facts as found in this case, the partnership comes within the reasoning of and is controlled by the decision in Thompson v. Boekhout", 273 N. Y. 390, 7 N. E. (2d) 674 (1939) (in which a sole owner discharged his one employee and continued to operate the business alone).

19. See note 17 *supra*.

20. People v. Curiale, 12 N. Y. S. (2d) 464 (1939), where the defendant attempted to evade a minimum wage statute by asserting the existence of a partnership. The court said, "The defendant by the preparation of these so-called partnership agreements, was in effect making a mockery of the minimum wage law, and it is the barest sort of subterfuge." See also (1939) 25 CORN. L. Q. 132, 135, in which the author presented a situation similar to that in the instant case and concluded, "Surely the courts will not permit an obvious subterfuge to defeat the manifest purpose of the statute." However, the court permitted just this in a quite extreme case, Walling v. Plymouth Mfg. Co., 46 F. Supp. 433 (N. D. Ind. 1942), where it was held that when a corporation required its staff of about 100 employees to form a partnership in order to avoid the Fair Labor Standards Act, the employer-employee relationship no longer existed, and the use of the partnership device did not violate the act. See also Kershnar v. Heller, 14 N. Y. S. (2d) 595 (1939), where a corporation which had been denied an injunction (in Boro Park Line Poultry Market, Inc. v. Heller, 280 N. Y. 481) was dissolved and its members formed a partnership, thereupon obtaining an injunction against subsequent picketing.

device,[21] or veil,[22] the fact remains that the plaintiffs' conduct was obviously detrimental to the interests of organized labor; and defendant's complaint could have been interpreted easily, as falling within the definition of a "labor dispute", irrespective of the change in the legal form of the plaintiff's business association.

Taxation—Taxability of Stock Dividends as Income—A corporation having only one class of stock outstanding paid its stockholders a dividend in its own stock. Taxpayer, a stockholder, failed to report this dividend on her federal income tax return. The Commissioner's deficiency determination was reversed by the Tax Court in a memorandum decision,[1] which was affirmed by the lower court, likewise without opinion.[2] *Held,* affirmed. The dividend was not subjected to tax by the statute. The applicable sections,[3] in effect, merely enacted into statutory form the rule of *Eisner v. Macomber.*[4] *Helvering v. Griffiths,* 63 Sup. Ct. 636 (1943).

About twenty-five years ago, the court was called upon to decide whether a stock dividend was taxable income under the 16th Amendment.[5] It was then decided that this question was not before the court, since the statute [6] did not subject the stock dividend to a tax. A few years later, the same question was again raised,[7] the act having been amended meanwhile.[8] The court decided in favor of the taxpayer on reasoning seldom, if ever, applied to any other form of receipt,[9] *i. e.,* that there had been no "realization",[10] therefore no "income derived".[11] Congress and the Treas-

21. (1943) 56 HARV. L. REV. 478, 479.
22. 1 TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING (1940) § 121.

1. 46 B. T. A. 1279, Docket No. 110,035.
2. 129 F. (2d) 321 (C. C. A. 2d, 1942).
3. Int. Rev. Code, § 22 (a) "Gross income includes . . . income derived from dividends", and § 115 (f) (1) "A distribution made by a corporation to its shareholders in its stock . . . shall not be treated as a dividend to the extent that it does not constitute income to the shareholder within the meaning of the Sixteenth Amendment to the Constitution."
4. 252 U. S. 189 (1920) (holding that a corporate dividend in stock identical with the stock upon which it was declared was not income within the meaning of the Sixteenth Amendment).
5. Towne v. Eisner, 245 U. S. 418 (1918).
6. Income Tax Act of 1913, c. 16, § II B.
7. Eisner v. Macomber, 252 U. S. 189 (1920).
8. Rev. Act of 1916, c. 463, § 2 (a): ". . . the term 'dividends' . . . shall be held to mean any distribution . . . whether in cash or in stock. . . ."
9. The court, in dealing with receipts from many other sources received by a taxpayer in forms other than cash, has laid down no requirement of realization, or has used a concept of realization far broader than that of the *Eisner v. Macomber* decision. See, for example, Heiner v. Mellon, 304 U. S. 271 (1938) (holding a partner taxable on his distributive share of the partnership income, even though state law prohibited its distribution). An example of the broader concept of realization may be found in Helvering v. Bruun, 309 U. S. 461 (1940) (dealing with the taxability of a lessor for leasehold improvements added to his property by a lessee). There are also several cases dealing with receipts in the form of cash, which from an economic standpoint, at least, are unquestionably repayments of capital, but which have been treated as income for tax purposes. In Frieder v. Comm., 27 B. T. A. 1239 (1933) a stockholder who acquired stock shortly before declaration of a dividend, which represented corporate earnings prior to his purchase of the stock, was held to have received income and not a return of part of his investment.
10. "The essential controlling fact is that the stockholder has received nothing out of the company's assets for his separate use and benefit, . . ." Eisner v. Macomber, 252 U. S. 189, 211 (1920).
11. The court appears to have considered such derivation to be required by the Sixteenth Amendment. *Id.* at 207.

ury interpreted this decision to mean that *no* stock dividends were constitutionally taxable and the statute was thereupon amended to specifically exempt *all* stock dividends.[12] However, by 1936, several decisions dealing with basis of stock which had been distributed as a dividend, or which had been the subject of a stock dividend, indicated that the court did not consider the rule in *Eisner v. Macomber* applicable to *all* stock dividends.[13] Accordingly, in 1936, the statute was amended. The language adopted by Congress was peculiarly adapted to the existing situation. No one could then say with any degree of certainty how far the constitutional exemption went.[14] The phrase "(a) . . . Stock Dividend shall not be treated as a dividend to the extent that it does not constitute income . . . within the meaning of the Sixteenth Amendment . . . "[15] could mean no more than that Congress intends to tax stock dividends to the extent that constitutional limits will permit. True, it was thought at that time there was some limit, but the phrase quoted above does not suggest that Congress intended to preserve the limit if the Constitution did not require it. Nevertheless, the court in the instant decision found that Congress intended[16] to incorporate into the statute the exemption laid down by the *Eisner* case, as interpreted by intermediate related decisions.[17] Thus, in a modern counterpart of its *Towne v. Eisner*[18] decision the court refused to accede to the request of the Treasury for a re-examination of the constitutional question involved. In view of the various court interpretations put upon *Eisner v. Macomber* from the time of its decision to the date of enacting the statute in its present form, it is difficult to find that Congress intended to say anything more definite than that stock dividends are taxable to the extent that the Supreme Court will permit them to be.[19] Moreover, since the Court is still uncertain as to what dividends are entitled to the exemption established by the *Eisner* case and guardedly indicates in the instant decision that the exemption, by the justices' present interpretation, has no *constitutional* basis,[20] this decision postponing the result which will inevitably be reached when Congress rewrites the statute seems time wasting. To defer the ultimate reversal of *Eisner v. Macomber* merely prolongs the administrative difficulties and the inequities resulting from sustaining a decision of a constitutional question, the doctrine of which has long since been repudiated.[21]

12. Rev. Act of 1921, § 201 (d).

13. See, *e. g.*, Koshland v. Helvering, 298 U. S. 441 (1936) and Helvering v. Gowran, 302 U. S. 238 (1937). The court, in these cases, indicates that the statutory exemption from tax is broader than the Sixteenth Amendment requires; that a dividend is income within the meaning of the Amendment and constitutionally taxable as such if as a result the stockholders' subsequent interest in the corporation is different from that represented by his holdings before such dividend was distributed. Thus the prime factors are the incidents of the stock previously held and those of the dividend stock.

14. Nor today, for that matter, in view of two decisions very recently handed down by the Supreme Court, limiting the effect of the broad language used in the *Koshland* case, *supra* note 14, to the actual facts of that case. Helvering v. Sprouse and Strassburger v. Comm., 63 Sup. Ct. 791 (1943).

15. Rev. Act of 1936, § 115 (f) (1).

16. The opinion is largely taken up with a discussion of congressional intent and quotes at length from committee reports and debates on the floor of both houses of Congress at the time the 1936 Act, *supra* note 16, was being drafted.

17. See note 14 *supra*.

18. 245 U. S. 418 (1918).

19. This was the interpretation put upon the language of the statute by Justice Douglas in his dissenting opinion in the instant case. He strongly disputes the interpretation put upon the committee reports cited in the majority opinion.

20. This is indicated again in *Helvering v. Sprouse*, note 15 *supra*.

21. See note 9 *supra*.