Administrative Law—Adoption of Proposed Decision of Hearing Officer Without Review of the Record by Final Authority Is Not Denial of Due Process—Appellant, an insurance salesman, was charged with making misrepresentations to policy-holders in violation of the California Insurance Code. As provided in the Administrative Procedure Act, the case was tried before a hearing officer who prepared for the Insurance Commissioner a proposed decision setting forth his findings and recommending that appellant's license be revoked. The commissioner, without reading the record, adopted in toto the proposed decision of the hearing officer and revoked the license. The superior court gave trial de novo and affirmed the ruling. On appeal to the District Court of Appeals, affirmed. The adoption of the hearing officer's proposed decision by the commissioner without reviewing the record was not a denial of due process. Hohreiter v. Garrison, 81 A. C. A. 456 (1947).

It has long been well established that due process requires that a fair or "full" hearing be accorded by administrative tribunals, but the courts have not found it easy to reduce fair or "full" hearing to a fixed definition. The United States Supreme Court has said that "the one who decides must hear." However, this does not preclude the "one who decides" from delegating to subordinates the functions of holding hearings, preparing reports, and making recommendations, provided the administrator who makes the final decision does so only after consideration of the record. As a practical matter; of course, the degree of thoroughness with which the administrator reviews the record often varies with its size and the burden of his other responsibilities. The administrative procedures of most federal agencies have followed these principles. Thus, the California Administrative Procedure Act, as interpreted by the court in upholding its constitutionality, is unusual in permitting an agency to adopt the findings of a hearing officer without reviewing the record.

1. CALIFORNIA INSURANCE CODE § 1731 (Deering, 1937).
2. CALIFORNIA Gov. CODE, tit. 2, c. 5, § 11512 (1945). “The agency itself shall determine whether the hearing officer is to hear the case alone or whether the agency itself is to hear the case with the hearing officer.”
6. Id. at 481.
8. See A. H. Feller, Prospectus for the Further Study of Federal Administrative Law, 47 YALE L. REV. 647, 654 (1939). The author argues, with reference to the Morgan cases: “No lawyer is naive enough to believe that judges actually read through the records in the cases before them. Why must the Secretary of Agriculture be more diligent than the judges?”
9. FEDERAL TRADE COMMISSION, RULES POLICIES AND ACTS, Rule XIV (1943); 1 PIKE & FISCHER Ad. LAW (Statutes and Rules) NLRB RULES AND REGULATIONS 8, § 203.35; REP. ATT’Y. GEN. COMM. AD. PROC. 44 (1941).
This is not made clear by the language of §11517. However, in the light of earlier California decisions and the legislative history of the act, there can be little doubt that such was the intention of the legislature.

This case represents another step in the modern trend to expedite administrative procedure. Two problems arise, however, neither of which is answered satisfactorily by the court. §1731 of the Insurance Code places the responsibility for revoking or suspending licenses squarely upon the Insurance Commissioner. If the hearing officer’s decision is to be adopted without question, should he not carry the responsibility for the final decision rather than the commissioner? Secondly, if the commissioner need not examine the record except when making a different finding and award, what is to determine which cases, if any, he will review? Can it be that he is to pick and choose at random? Clearly, there was no denial of due process in the principal case since appellant received a full trial on all the facts before the superior court. However, had this not been the case, the court, by a strict application of the rule laid down in the first Morgan case, might well have found that “the one who decides” did not “hear” and thus have held that due process was denied. Unquestionably, the efficient discharge of administrative responsibility is a desirable goal. Yet it must not be accomplished at the expense of fair procedure.

Administrative Law—Judicial Review of Constitutional Issues in Rate Regulation—Plaintiff, a public utility furnishing electric service, sought to enjoin the enforcement of temporary and permanent rate orders fixed by the Public Service Commission of New York, alleging that the rates fixed were confiscatory. Plaintiff contended that review of rate orders of the Public Service Commission as provided by a certiorari order and its limitations under the New York Civil Procedure Act was inadequate.

10. CALIFORNIA GOV. CODE, tit. 2, c. 5, §11517(b) (1945): “If a contested case is heard by a hearing officer alone, he shall prepare a proposed decision in such form that it may be adopted as the decision in the case. A copy of the proposed decision shall be filed by the agency as a public record. The agency itself may adopt the proposed decision in its entirety, or may reduce the proposed penalty and adopt the balance of the proposed decision.”

11. Helmick v. Industrial Accident Commission, 46 Cal. App. 2d 651, 116 P. 2d 658 (1941); Bethlehem Steel Co. v. Industrial Accident Commission, 42 Cal. App. 2d 192, 108 P. 2d 698 (1940); Taylor v. Industrial Accident Commission, 38 Cal. App. 2d 75, 100 P. 2d 511 (1940). These cases all held that the commissioner need not examine the record unless making a different award from that proposed by the hearing officer.

12. Report of the Judicial Council of California to the Governor and the Legislature, Tenth Report (December 31, 1944) 24. The report states: “In fact, it is not realistic to require that the head of an agency or the agency members be thoroughly familiar with all of the cases which come before the agency.” And after recommending the procedure eventually adopted in §11517: “This procedure is in line with California case law which indicates that when an agency adopts the facts found and the award recommended by a referee who hears the evidence, the agency need not review the record, but if different findings and award are made the record must be reviewed.”

13. CALIFORNIA INSURANCE CODE §1731 (Deering, 1937).


1. Art. 78, §1296 (Clevenger, 1947): “Questions for determination; when hearing before appellate division. In a proceeding under this article, the questions involving the merits to be determined upon the hearing are the following only: . . . 6. Whether there was any competent proof of all facts necessary to be proved in order to authorize the making of the determination. 7. If there was such proof, whether,
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to determine the constitutional issue raised by the claim of confiscation. The Court of Appeals of New York decided\(^2\) (three judges dissenting) that plaintiff was entitled to bring a plenary action in equity so that he might receive an independent judgment on both law and fact which was not available under certiorari. \textit{Staten Island Edison Corporation v. Maltbie, et al.}, 296 N. Y. 374, 73 N. E. 2d 705 (1947).

The particular issues of whether, in rate regulation proceedings, after confiscation has been alleged, the Appellate Division of the Supreme Court of New York has the power under certiorari to make the required constitutional determination and whether a public utility is to be denied access to an equity action have heretofore been the subject of some speculation\(^3\) but no direct decision. The Court of Appeals of New York has restricted petitioners to certiorari even where rate orders were alleged to be confiscatory, but the court was dealing with certiorari proceedings already completed.\(^4\) The fact that petitioners had committed themselves to that mode of review undoubtedly influenced that decision. Moreover, in affirming such a decision the United States Supreme Court indicated a belief that under New York procedure an equity action would have been available had the petitioners so elected before submitting to certiorari.\(^5\) That certiorari is the exclusive remedy for reviewing rate orders of the Public Service Commission contested on constitutional grounds is denied by other New York cases.\(^6\)

Twenty-seven years ago in a situation similar on its facts to the instant case, the United States Supreme Court announced the controversial rule in the \textit{Ben Avon} case that an independent determination of both law and fact was required in judicial review of constitutional questions.\(^7\) If this rule is applied so that the reviewing court simply weighs the evidence on the record made before the administrative agency and then reaches an independent conclusion, delay and duplication are limited; but if the rule is extended so that the reviewing court initiates a \textit{trial de novo} and may

\(^2\) On appeal from a judgment for the plaintiff, 270 App. Div. 55, 58 N. Y. S. 2d 818 (1945), which reversed an order dismissing the complaint, 57 N. Y. S. 2d 515 (1945).

\(^3\) \textit{New York State Constitutional Convention Committee} (1938), \textit{Problems Relating to Judicial Administration and Organization} at 805.


\(^7\) \textit{Ohio Valley Water Company v. Ben Avon Borough}, 253 U. S. 287 (1920). This case held that where under state procedure judicial review of rate orders fixed by the Pennsylvania Public Service Commission was by appeal to a court upon the record made before the Commission, it was denial of due process for the legislature to provide that the court should be limited to determining whether the conclusions of fact rested on reasonably sufficient evidence, where those conclusions were as to facts upon which a question of constitutionality depended. For discussion and criticism see Curtis, \textit{Judicial Review of Commission Rate Regulation—The Ohio Valley Case}, 34 Harv. L. Rev. 863 (1921); Hardman, \textit{Judicial Review as a Requirement of Due Process in Rate Regulation}, 30 Yale L. J. 681 (1921). Cases that follow this rule: \textit{St. Joseph Stock Yards Co. v. United States}, 298 U. S. 38 (1936); \textit{Crovell v. Benson}, 285 U. S. 22 (1932). \textit{But cf.} \textit{Railroad Commission v. Rowan & Nichols Oil Co.}, 310 U. S. 573, opinion amended, 311 U. S. 614; 311 U. S. 570 (1941).
base its determination on entirely new or additional evidence,8 the powers of administrative tribunals are greatly reduced.9 Although the two possible applications were not to be decided in the instant case,10 New York has not in the past construed the rule as necessitating a trial de novo. Yet even when restricted to a reweighing of the evidence on the administrative record, the Ben Avon rule, although never specifically overruled, may have been further narrowed so as to comprehend only this situation where confiscation is alleged against a rate order fixed for a public utility.11 However, it now seems likely that the rule will continue to be applied at least within these circumscribed limits, particularly since there is some indication that the Administrative Procedure Act12 will broaden the general scope of judicial review of administrative findings.13 If such a trend is established, without opening the door to the trial de novo possibility, the New York legislature may well find it advisable explicitly to broaden the scope of review under certiorari to satisfy the constitutional requirements raised by the instant case.14

Administrative Law—Judicial Review of Deportation Orders Under the Administrative Procedure Act—The petitioner, an alien under order of deportation,1 was not yet in custody and was therefore without access to a writ of habeas corpus. He filed a petition with the federal district court praying for review of the deportation proceedings. § 10 of

8. This doctrine was promulgated by Crowell v. Benson, supra, which was not a rate case and which arose from the constitutional provision vesting the judicial power in the judiciary rather than from the due process relied on in the instant case. The Ben Avon and St. Joseph Stock Yards Co. cases, supra, followed the first alternative of independent conclusions from the record.


10. See instant case at 383. But see Brief for Plaintiff, p. 75.

11. E. g., Railroad Commission v. Rowan & Nichols Oil Co., supra (no independent determination necessary for review of administrative proration order on oil production even though confiscation alleged). Neither the majority nor dissenting opinion cited the Ben Avon or St. Joseph Stock Yards Co. cases, supra.

12. 60 STAT. 243, 5 U. S. C. A. §§ 1001-1011 (Supp. 1946). § 1009(e) states: “So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of agency action. It shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . contrary to constitutional right, power, privilege, or immunity. . . . In making the foregoing determinations the Court shall review the whole record or such portions thereof as may be cited by any party and due account shall be taken of the rule of prejudicial error.”


14. The suggestion that the court in the instant case take on this function was advanced (Brief for Defendants, p. 76) but rejected (instant case at 384). It was also previously advanced for New York legislative consideration, but postponed because of doubt as to whether the United States Supreme Court would continue to apply the Ben Avon rule, supra, Benjamin, Administrative Adjudication in N. Y., 343-344 (1942).

1. Petitioner, in this country as a treaty merchant, pleaded guilty to an indictment charging conspiracy against the federal government. He served a sentence and paid a fine. A warrant was issued for his arrest by the Commissioner of Immigration and
the Administrative Procedure Act was alleged as the basis of the court's jurisdiction. The court denied the review requested, holding, that § 10 is inapplicable to the extent that judicial review is limited by statutes, and that, since the immigration statutes deny the right to judicial review except for the writ of habeas corpus, no other character of remedy is available under this section. United States ex rel. Trinler v. Carusi, 72 F. Supp. 193 (D. C. Pa., 1947).

The legislative background of the Administrative Procedure Act indicates that the court's construction of § 10 is less than consistent with Congressional intent. Such a construction, however, is desirable from the standpoint of efficient prosecution of the administrative functions. The court in applying its view of § 10 to the instant case, determined that in addition to the conclusive bar which the immigration statutes interpose, to allow judicial review of a character other than habeas corpus would unduly hamper the deportation process. These conclusions are open to question. There is serious doubt that the Immigration Act of 1917 restricts review to the extent that this court supposed. The cases cited to support its interpretation of that act say nothing about the extent to which the act limits review, and were decided on other grounds. In addition, the Senate Report on the Immigration Act of 1917 indicates quite clearly that Congress had no intent, specific or general, as to the manner in which judicial review of deportation proceedings could be obtained. In that report and in

Naturalization, charging that he had violated his status as a treaty merchant. Hearings were held and on review an order of deportation was entered.

2. 60 STAT. — 5 U. S. C. A. § 1009 (Supp. 1946). § 10 provides: "Except so far as statutes preclude review . . . (a) . . . Any person suffering legal wrong because of any agency action . . . shall be entitled to judicial review thereof. (b) . . . The form of proceedings shall be any special statutory review proceeding . . . or in the absence . . . thereof any applicable form of legal action. . . ."


7. Sen. Rep. No. 352, 64th Cong., 1st Sess., Vol. 2, Misc. ii, p. 16 (1916). In discussing the provision for administrative finality the committee said, "... while new in this particular location, is not new in the law, the courts having repeatedly held that . . . the decision of the administrative officers is final . . . Japanese Immigrant Case, 189 U. S. 86 (1903)." In the case referred to it was held that in habeas corpus proceedings a court could inquire into the deportation process to the extent of determining whether or not there was a fair hearing, notwithstanding that there was no provision for a hearing in the statute. This Senate report put Congressional approval on that view. However, it had been previously held that deportation matters were exclusively the province of Congress. Turner v. Williams, 194 U. S. 279 (1903); Fong Yue Ting v. United States, 149 U. S. 698 (1892), and cases cited therein. Thus, patents, long regarded as allowed judicial participation in an area in which it could have excluded it. For a brief discussion of this point see Freund, Administrative Powers Over Persons and Property 240-1 (1928).
subsequent decisions under the immigration statutes it is indicated that the scope of judicial inquiry into deportation proceedings was to be narrowly circumscribed, but there is nothing in the report or the decisions to indicate an intent to restrict the character of judicial remedy in which that limited scope of inquiry could be exercised. That habeas corpus has been the sole means of review is thus the result of a procedural technicality and is not attributable to legislative mandate.

But would granting of this review interfere with the administrative process unjustifiably? The court’s fears on this score were groundless. Under its construction of § 10, as being inapplicable to the extent that statutes limit review, no impairment of the deportation process would result from allowing judicial review of a character other than habeas corpus, since the scope of judicial inquiry could not be enlarged beyond the limitations imposed by the immigration act. In a proper case the alien will ultimately have his judicial remedy for wrongful administrative action. It would be more consonant with our philosophy of personal liberty as a natural right to make the remedy available to the injured party without first depriving him of his liberty.

Bankruptcy—Interest on Tax Claims Does Not Accrue in Bankruptcy—An involuntary petition in bankruptcy was filed in 1939. The United States and the State of New York filed tax claims. Turnover litigation ensued, resulting in a settlement in 1946. The tax claims with interest thereon to the date of payment plus administration expenses would have exceeded the estate prior to the increase in assets resulting from the turnover settlement. The referee ordered payment of the tax claims with interest to the date of the filing of the petition. In re Union Fabrics, Inc., 72 F. Supp.—(S. D. N. Y. 1947).

This decision overrules an anomalous rule of law announced by the court in In re Kallak. In that case § 64 (a) of the Bankruptcy Act of 1898 influenced the court to hold that tax claims could not be

9. GELLHORN, ADMINISTRATIVE LAW CASES AND COMMENTS, 790 (1940).
10. For an indication that Congress knew the formula to preclude judicial review where it so desired, see the language of the Economy Act of 1933, 48 STAT. 9 (1933), 38 U. S. C. § 705 (1940), as interpreted in Mroch v. United States, 88 F. 2d 888 (1937).
11. Note 9 supra. In three of the cases cited the court disposed of the case by merely citing the principle of equity that no resort may be had to equity where there exists an adequate remedy at law, such as habeas corpus. In the other cases the relief asked for was denied on similar technical grounds.
12. In order to have access to a writ of habeas corpus the petitioner must at the time of his petition be restrained of his liberty. See, e. g., In re Esselborn, 8 Fed. 904 (C. C. N. Y. 1881); Rosenbaum v. Board of Sup’rs., 28 Fed. 223, 225 (C. C. A. Cal. 1886), affirmed, 120 U. S. 450 (1886).
treated as ordinary unsecured claims, and that interest thereon accrued to the date of payment. The general rule is that the accrual of interest on unsecured claims is suspended as of the date of bankruptcy, but as to tax claims the rule of the Kallak case has been followed either without discussion, or with recognition that it is both unjust and unsound. As a result, tax claims benefited at the expense of other unsecured claims by the delay incident to liquidation. The ever-accruing interest operated as a deterrent to the presentation of possibly meritorious defenses to tax claims and minified the results of successful litigation waged by the trustee to enhance the estate. With increasing taxes and the high interest rates allowed thereon, the assets for distribution in many small estates were entirely exhausted upon the payment of tax claims, leaving nothing for general unsecured creditors who had often furnished the wherewithal for the payment of tax claims.

Amendments to the original Bankruptcy Act afford justification for treating tax claims on the same basis as other unsecured claims. In 1926 tax claims were relegated from first to sixth priority. The Chandler Act not only eliminated the reason for the Kallak decision, but also required that tax claims be filed and proved in the same manner as all other claims. It might be argued that Congress, in reenacting § 57 (j) without substantial change, adopted prior judicial construction of that section.

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6. Instant case at —. Litigation over a period of six years resulted in an increase of $30,000 to the estate. Interest on the tax claims, if allowed to date of payment, would have increased the tax claims by 48%.
10. 30 STAT. 563 (1898), as amended, 11 U. S. C. § 93(n) (1940). “Except as otherwise provided in this Act, all claims provable under this Act including all claims of the United States and of any state or subdivision thereof shall be proved and filed in the manner provided in this section. . . .”
11. 30 STAT. 560 (1898), as amended, 52 STAT. 867 (1938), 11 U. S. C. § 93(j) (1940). “Debts owing to the United States, or any state or subdivision thereof shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty of forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law.” In the 1898 Act this section read, “Debts owing to the United States, State, County, district or municipality. . . .”
12. For a statement and discussion of the re-enactment rule see Sutherland, Statutes and Statutory Constructions § 5109 (3rd ed. 1943).
of itself, constitute an impediment to a re-examination of the cases and the reaching of a contrary construction.\textsuperscript{14} The reenactment of § 57 (j) created, at most, an ambiguous situation\textsuperscript{15} which the court properly resolved so as to reach a just result and dispose of an admittedly unsound rule.

Constitutional Law—Comment Upon Accused’s Failure to Testify Does Not Violate 14th Amendment—Appellant was convicted of murder in the Superior Court of California. He admitted former convictions charged against him in the information and thus barred allusion to them during trial.\textsuperscript{4} Had he taken the stand in his own defense, these prior crimes could have been used to impeach his credibility.\textsuperscript{2} He did not testify. With express authority from the California Constitution\textsuperscript{3} and penal code,\textsuperscript{4} the district attorney and court commented to the jury upon the fact that the accused had failed to explain away adverse testimony. On appeal to the Supreme Court the conviction was affirmed (four justices dissenting); the Court ruling that these provisions of the California Constitution did not violate the 14th Amendment. \textit{Adamson v. California}, 67 Sup. Ct. 1672 (1947).

The majority opinion by Justice Reed and the concurring opinion by Justice Frankfurter rest on two propositions: (1) assuming the proceedings would violate the Fifth Amendment if practiced in a federal court,\textsuperscript{5} it does not necessarily follow that they violate the 14th; and (2) appellant was not denied due process of law. Both points are supported by authority\textsuperscript{6} and with \textit{Twining v. New Jersey} \textsuperscript{7} as almost direct precedent the result is hardly surprising. The case is significant chiefly because of the rather remarkable dissent of Justice Black.\textsuperscript{8} The factual distinction between

\textsuperscript{15} In Hammer v. Tuffy, 145 F. 2d 447, 449 (C. C. A. 2d 1944), L. Hand, J., in discussing the problem, concluded that since the passage of the Chandler Act the question must be regarded as an open one. Note that if an appeal is taken from the decision in the instant case, it would be placed before the same court.

1. \textsc{Penal Code of Cal.} (Deering, 1941) § 1025.
3. \textsc{Cal. Const.} Art. I, § 13. "No person shall . . . be compelled, in any criminal case, to be a witness against himself . . . but in any criminal case whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury."
4. \textsc{Penal Code of Cal.} (Deering, 1941) § 1323.
6. As to the first proposition see note 16 \textit{infra}. As to the second see \textit{Palko v. Connecticut}, 302 U. S. 319, 325, 326 (1937).
7. 211 U. S. 78 (1908). Except for the distinction noted in note 8 \textit{infra} the case is on all fours with the instant decision.
8. Instant case at 1684. Justice Douglas joined in Justice Black’s dissent. Justices Murphy and Rutledge in a separate dissenting opinion agreed that the 14th Amendment made the first eight applicable against state action, but would go even further.
9. It does not appear that Twining had suffered any previous convictions which might deter him from testifying. The inference of guilt was thus much stronger there than in the instant case. Justice Frankfurter dismissed the variance as of relatively little importance. Others have considered the accused’s possible fear of cross-
the instant case and Twining v. New Jersey might possibly have permitted a contrary result on the basis of denial of due process. Justice Black, however, chose to dissent on a broader ground. Adopting the assumption of the majority that the proceedings would infringe the Fifth Amendment, if applicable, he argues that they must then violate the 14th. In a vigorous attack on the Court’s time-honored natural law method of interpretation of the 14th Amendment he contends that it was the intent of Congress when passing that amendment to guarantee the privileges of the Bill of Rights against abridgment by state action and that the Court should by giving effect to that intent cease roaming “... at will in the limitless area of their own beliefs as to reasonableness ...”

The contention is not new, but it has been specifically rejected previously in a long line of cases. Despite the first-blush appeal of strict Court subservience to the Constitution, Justice Black’s argument will not stand up under practical examination. It leads to two possible conclusions: (1) strict application of the first eight amendments to the states, or (2) the necessity of construing those amendments to such an extent that they become almost meaningless. Adoption of the first alternative might very examination more vital. Reeder, Comment Upon Failure of the Accused to Testify, 31 Mich. L. Rev. 40, 57 (1932); 9 Proc. Am. Law Inst. 202-218 (1931); 56 A. B. A. Rep. 137-152 (1931).

10. Appellant was clearly faced with a dilemma at the trial. He could testify and thereby have his previous criminal record brought to the jury’s attention; or he could remain silent and have that silence commented upon by the district attorney as an inference of guilt. Either course of conduct would thus be highly prejudicial. Analogy to an extorted confession is perhaps not too tenuous. Chambers v. Florida, 309 U. S. 228 (1940) reversed a conviction on the ground that a coerced confession was a denial of due process even though no physical violence was used.

11. Justice Black reviews the development of this theory. Instant case, pp. 1690, 1691.

12. Justice Cardozo has referred to due process as including only “... the very essence of a scheme of ordered liberty.” Palko v. Connecticut, 302 U. S. 319, 325 (1937).

13. Horace E. Flack in his historical study The Adoption of the Fourteenth Amendment (1908) agrees with Justice Black in so far as the House (pp. 81, 82) and Senate (p. 94) are concerned. He finds the evidence less compelling in the case of the ratifying states (p. 208).


16. Walker v. Sauvinet, 92 U. S. 90, 92 (1875) (jury trial in civil cases—Seventh Amendment); Hurtado v. California, 110 U. S. 516, 538 (1884) (information instead of indictment in capital offenses—Fifth Amendment); Presser v. Illinois, 116 U. S. 252, 265 (1886) (right to bear arms—Second Amendment); In re Kemmler, 136 U. S. 436, 448 (1890), O’Neil v. Vermont, 144 U. S. 323, 332 (1892) (cruel and unusual punishment—Eighth Amendment); West v. Louisiana, 194 U. S. 258, 262 (1904) (deposition in criminal trial when witness not dead or insane—Sixth Amendment); Twining v. New Jersey, 211 U. S. 78, 93, 99 (1908) (self-incrimination—Fifth Amendment); Palko v. Connecticut, 309 U. S. 319, 323 (1937) (double jeopardy—Fifth Amendment).

17. For an interesting example of the unfortunate result developing from an early attempt to apply the Bill of Rights to newly acquired territories and at the same time preserve local methods in the administration of the criminal law see Hawaii v. Mankichi, 190 U. S. 197, 217 (1903). “We would go even further, and say that most, if not all, the privileges and immunities contained in the bill of rights of the Constitution were intended to apply from the moment of annexation; but we place our decision of this case upon the ground that the two rights alleged to be violated in this case [trial by jury and the use of the information] are not fundamental in their nature but concern merely a method of procedure ...” (italics supplied).

See Dorr v. United States, 195 U. S. 138, 155 (1904). Justice Harlan, dissenting from a decision following Hawaii v. Mankichi, said “It is, I submit, so obviously in-
well invalidate a large number of current state practices and would tend to stifle reform in the administration of the law. Adoption of the second method of application makes the standard once again the conscience of the Court. It would seem more expedient that in exercising their opinions on what is or is not due process the judges be left, as in the past, unfetter with the necessity of "interpreting" the Bill of Rights in their effort to reach a desirable result.

Constitutional Law—State Tax on Net Income of Foreign Corporation Engaged Solely in Interstate Commerce—A Missouri motor freight carrier engaged exclusively in interstate commerce, and neither commercially domiciled nor possessed of appreciable property in Connecticut, was assessed on that portion of its net income originating in Connecticut. The Superior Court of Connecticut recently declared the tax statute applicable to petitioning carrier; therefore unconstitutional as a violation of the Commerce Clause. Spector Motor Service v. Walsh, CCH Corp. Tax Serv. (Conn.) ¶ 10,006 (1947).

Interstate commerce once enjoyed complete immunity from state taxation, but the Supreme Court has in many subsequent decisions recognized the right of states to tax local activities of interstate enterprises for the purpose of exacting from this commerce its fair share of the increasing burden of local government whose protection and facilities it enjoys, while consistent with the Constitution that I cannot regard the judgment of the court otherwise than as an amendment of that instrument by judicial construction when a different mode of amendment is expressly provided for."


19. The Code of Criminal Procedure, ibid. advocates: (1) the use of the information, § 113; (2) depositions from witnesses, § 53; (3) state appeals, § 428.


3. Cooley v. Board of Wardens, 12 How. 298 (U. S. 1851); Case of State Freight Tax, 18 Wall. 232 (U. S. 1873); Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196 (1885).

eliminating its tax advantage over competing local industry. Accordingly, a state may tax property located within the state whether owned by a domestic or foreign corporation engaged in interstate business. Gross receipts apportioned to business transacted within the state by foreign corporations have long been subject to state tax, including those on sales and use of articles produced in other states. States exercise the power to levy on net income derived from business transactions of foreign corporations within the state, or on the entire net income of domestic corporations even if derived from interstate commerce. License, registration fees, and gasoline taxes are of universal application. However, certain necessary safeguards have been maintained. Wherever a state has sought to impose a discriminatory burden portending competitive advantage for local interests, or to reach property subject to the taxing jurisdiction of other states, the Court has consistently denied it the right. Unapportioned gross receipts taxation has been repeatedly condemned. Most important to the instant case, the Court has struck down levies imposed upon an exclusively interstate business. No tax upon the net income of a foreign corporation engaged solely in interstate commerce has ever been sustained.

Although the Court has couched its decisions in rules of law and abstract learning, the compelling reason for condemning such taxes is the


8. This tax must be apportioned to the business done within the state but may be measured by that part of the interstate business income which is justly attributable to that business. Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113 (1920). This seems reasonable only when applied to a situation where the business is primarily manufacturing products for sale outside the state. Cf. Bass, Ratcliff & Gretton v. State Tax Comm'n, 266 U. S. 271 (1924) (Tax on net income of local activity of foreign corporation as determined by ratio of local assets to total assets).

9. U. S. Glue Corp. v. Town of Oak Creek, 247 U. S. 321 (1918) (A domestic corporation was subject to a tax upon its entire net income even though part of that income arose from interstate commerce). In New York ex rel. Cohn v. Graves, 300 U. S. 308 (1937), that part of a resident's net income which was derived from activities wholly within another state was recognized as a valid subject of a tax by the state of residence. Cf. Peck v. Lowe, 247 U. S. 165 (1918). But see Hans Rees' Sons v. North Carolina, 283 U. S. 123, 126 (1931).


14. Alpha Portland Cement Co. v. Mass., 268 U. S. 203 (1925) (Foreign corporation with mills in several states but only a sales office in the state attempting to levy the tax). Where, as in the instant case, the corporation had obtained but had not exercised a state franchise, the Court held that an insufficient factor to subject it to the proposed tax. Ozark Pipe Line Corp. v. Monier, 266 U. S. 555 (1925); Anglo-Chilean Nitrate Sales Corp. v. Alabama, 288 U. S. 218 (1933).
potential impediment of multiple taxation to the free flow of national commerce. The instant case exemplifies this. The base of the proposed tax is, under the existing status of the law as to net income, subject to the levies of more than one state. Under the authority of United States Glue Co. v. Town of Oak Creek,15 and supporting decisions, the plaintiff's entire net income, which necessarily includes that portion taxed here, is subject to tax by the state of domicile.16 Thus even fairly apportioned net income taxes would appear to be comparable to unapportioned gross receipts taxes, and equally objectionable.17 The practical impossibility of judicial supervision over apportionment should prove a further deterrent. Also the net income from that business which originates in Connecticut is derived not from the fact of origin but from service performed in hauling goods from Connecticut shippers over highways of other states.18 The only real justification for this tax is the exaction from plaintiff of its fair share of the burden, since the absence of competition with local commerce precludes the existence of any competitive advantage.19 Resort to those taxes presently applicable to interstate transportation would appear to be a reasonably adequate method of achieving this result. As Mr. Justice Frankfurter pointed out recently, "Because the greater or more threatening burden of a direct tax on commerce is coupled with the lesser need to a state of a particular source of revenue, attempts at such taxation have always been more carefully scrutinized and more consistently resisted. . . ."20

Corporations—Minority Stockholders’ Remedy for Non-Disclosure in Redemption and Dissolution Proceedings—Three classes of stock, preferred, Class A common and Class B common had been issued by an operating subsidiary in which defendant corporation was majority shareholder holding 67% of the Class A stock outstanding and in 1943 about 80% of the Class B. Class A had an annual dividend twice as great as Class B.1 On dissolution, each share of Class A was entitled to twice as much as each share of Class B. Each share of Class A was convertible into one of Class B at the holder's option. The Class A was redeemable, at the option of the directors, upon 60 days notice at $60 per share plus accrued dividends. In order to obtain for itself the benefits of the increase in value of the subsidiary's main asset (tobacco), unknown

15. Supra, note 9.

16. The theory advanced to render such a tax valid is that the net income has no longer any connection with the interstate commerce from which it arose but instead has become a part of the general mass of property located within the state.

17. There is a distinction however in that net income can only be subject to double taxation while gross receipts are potentially subject to even more levies. Nevertheless both result in a heavier burden on interstate commerce than that borne by local commerce, which is the ultimate test of constitutionality.

18. Of the considerable mileage on plaintiff's entire route, only a small percentage lies in Connecticut. The portion of the entire interstate operation which is carried on in Connecticut contributes relatively little of the service which results in that net income which that state seeks to tax.

19. For an example of a situation where relative competitive advantage was the controlling factor in the decision, see Henneford v. Silas Mason Co., supra, note 7.


1. The Class A stock was entitled to an annual cumulative dividend of $3.20 per share as against $1.60 per share for the Class B. If further funds were made available for dividends by the board of directors, the Class A stock and the Class B stock were to share equally.
RECENT CASES

to most of the Class A holders, the defendant corporation caused the subsidiary's directors to redeem the Class A stock, meanwhile converting its own Class A to Class B. This was shortly followed by a liquidation of the subsidiary whereby most of the tobacco and the subsidiary's assets were sold. The defendant received what remained after the payment of the preferred stockholders and the other Class B holders. Plaintiff, for himself and the other Class A stockholders, sued the parent to recover the difference between the redemption and the dissolution prices of the Class A shares. The bill was dismissed, but on appeal, the court held that the bill stated a cause of action against the parent for breach of the duty owed by the defendant-controlled directorate to the stockholders. Zahn v. Transamerica Corp., 162 F. 2d 36 (C. C. A. 3d 1947).

Although the facts of this case are unique, in holding that a "fiduciary relationship" may exist between majority and minority stockholders, the court was supported by substantial authority. However, the breach of duty did not result merely from the exercise of the redemption and dissolution provisions, as the court indicated, but rather resulted from non-disclosure to the stockholders at the time of redemption of the great increase in value of the subsidiary's tobacco. Generally, in the absence of such special knowledge as the directors and the defendant possessed, a redemption provision may properly benefit one class of shareholders as against another as an exercise of a contractual power. The fact that such benefit occurred is not, in itself, sufficient to permit recovery. Thus the "fiduciary relationship" invoked by the Court is inapplicable here. Nor

2. Axton-Fisher (the subsidiary) possessed leaf tobacco which had cost it about $6,361,981. During the war, the value of this tobacco increased enormously, and by the spring of 1943, was worth about $20,000,000. Since the tobacco was carried on the books at the original cost, an inspection of the books would not have revealed the appreciation in value.

3. The redemption value of the Class A stock, including accrued dividends, was $80.80. On dissolution, had he continued to hold Class A stock instead of turning it in for redemption, each shareholder would have been entitled to $240 per share. Some of the tobacco was still in storage at the time of the suit, in which case the holders of such shares were seeking the full $240.


5. Other factual situations where the relationship has been applied may be found in: Southern Pacific Co. v. Bogert, 250 U. S. 483, 487 (1919); Jones v. Missouri-Edison Electric Co., 144 Fed. 765, 771 (C. C. A. 8th 1906); Lebold v. Inland Steel Co., 125 F. 2d 369, 372 (C. C. A. 7th 1941), cert. denied, 316 U. S. 675 (1942); Singer v. Carlisle, 26 N. Y. S. 2d 172 (1940), aff'd, 26 N. Y. S. 2d 320 (App. Div., 1st Dep't 1941).

6. See Taylor v. Axton-Fisher Tobacco Co., 295 Ky. 226, 231, 173 S. W. 2d 377, 379 (1943) (involving the same stock provisions) where the court said, "Manifestly, it was very much to the interest of the holders of Class B stock to have all these priorities, obligations and restrictions on and conditional joint control of the management eliminated. A substantial advantage was given to and acquired by the Class B shareholders by the resolution definitely and unqualifiedly calling Class A stock for redemption. That being true, it was vested and fixed, so the directors could not withdraw or cancel or modify their action to the prejudice or detriment of Class B stockholders." See also Dodd, Purchase and Redemption by a Corporation of Its Own Shares, 89 U. of Pa. L. Rev. 697, 725 (1941).

does it appear that the mere dissolution of the subsidiary was the important factor in determining whether there was a cause of action against the defendant. Even without the exercise of the dissolution provision, it is apparent that defendant, as practically the sole holder of Class B stock, would have benefited a great deal merely from increased dividends after calling in the Class A shares.\(^8\) Had disclosure been made, on the facts of this case, dissolution of the subsidiary could have properly been carried out.\(^9\)

Assuming that disclosure had been made at the time of the issuance of the redemption call, the holders of Class A stock would have been faced with two choices: (1) to accept the redemption call or (2) to convert to Class B stock share for share.\(^10\) Clearly, the better choice, in view of the appreciation in value of the tobacco, would have been to convert to Class B which, although paying smaller dividends than Class A, would nevertheless be worth more than the redemption price as an interest in a flourishing corporation. Having no knowledge of the true value of the tobacco, the Class A holders were unaware that conversion was the intelligent choice, and consequently took the redemption price at a loss. It is apparent that if the defendant had redeemed with full disclosure, the plaintiff would have been holding Class B stock at the time of dissolution. Thus the true loss caused by non-disclosure is the difference between the liquidation value of the Class B stock (had all of the Class A been converted to Class B) and the redemption value of the Class A stock. If the greater damages sought by the plaintiff (based on the liquidation preference of Class A) are awarded, the court is saying, in effect, that failure to disclose results in a loss of the redemption privilege. Although plaintiff is clearly entitled to a remedy, such a result is not to be desired, since the damages demanded exceed the extent of the harm caused by the non-disclosure.

**Criminal Law—Robber Guilty of Murder in First Degree When Shots Fired by Intended Victim Kill a Third Person—Defendants drove to a gasoline station. One of the defendants pointed a gun at the attendant, told him it was a “hold up”, and began marching the attendant toward the building on the premises. The owner of the station was hidden within the building’s doorway and was in possession of a gun. After the attendant moved off toward the left, a gun battle ensued between the owner and the defendants, during which the attendant was fatally shot. A portion of the trial judge’s charge was broad enough to mean that even if the owner fired the shot which killed the attendant,

8. Even if Transamerica had not received the increased dividends, the prospect of such an increase, after the appreciation in value of the tobacco became generally known, would favorably affect the value of the shares of Class B held by Transamerica.


10. By the charter, Class A could be converted to Class B at the holder’s option “at any time prior to the date upon which the same shall have been called for redemption.” [Brief for Appellee, p. 16a.] Plaintiff contended that the Class A stockholders, under this provision, could not exercise the conversion privilege after the redemption resolution was adopted. However, as defendant’s brief states, it would seem that the only time a Class A stockholder would desire to convert to Class B would be after the redemption resolution had been issued. If it could not then be exercised, there would be little point in having such a provision in the charter, for it would be more profitable to hold Class A stock in a going concern than Class B in view of the fact that both had voting privileges.
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defendants would be guilty under the Pennsylvania felony-murder statute. A conviction of murder in the first degree was affirmed by the Supreme Court, which held that the disputed portion of the charge, as construed above, was a correct statement of the law. Commonwealth v. Moyer, 357 Pa. 181, 53 A. 2d 736 (1947).

Elsewhere it has been held that where one uses another as a "human shield", or forces him to go to a place dangerous to his life, resulting in death from shots fired by a third person, the party who forces the victim into this position is criminally responsible for the death. But where the victim is an "innocent bystander", and is killed by one shooting in self-defense, or by an officer, the courts have not held the aggressor criminally responsible. Courts rationalize the different results by finding "causation" in one case and not in the other. Such a rationale is valueless in understanding the cases, since "cause in fact" exists in both situations. Nor does it help to call the third party who fires the fatal round an "independent intervening cause" in the second case and not in the first. The only factual ground of real distinction is that in the first situation, the defendant forces the victim into the place of danger; in the second, the dangerous situation is created around the victim by the defendant, after the victim arrives at this place, of his own volition. The factual situation in the instant case falls somewhere between the two. The court, by taking its analogy to the "human shield" cases allows Pennsylvania's felony-murder statute to embrace a new set of facts.

Should the two lines of cases be completely merged? While considerations of the present must guide any analysis of those homicides which courts ought to consider felony-murders, we should also look to the origin of the felony-murder doctrine. Previously, almost all felonies

1. "All the participants in an attempted robbery are guilty of murder in the first degree if someone is killed in the course of the perpetration of the first named crime." [Record, p. 455.] That the trial judge merely forgot to use the words "by the defendants" is shown by other portions of the charge. [Record, pp. 477, 481.]

2. PA. STAT. ANN., tit. 18, § 4701 (Purdon, 1945). "All murder which shall be committed in the perpetration of, or attempting to perpetrate any arson, rape, robbery, burglary, or kidnapping, shall be murder in the first degree." The word "murder" rather than "homicide" is used since one who killed in the perpetration of a felony was guilty of common law murder.


6. "The phraseology of causation, has never afforded a glimmer of light on any problem a court has had to decide, nor does it provide the slightest articulation for any judgments courts have passed. It has served but one useful function, and that has been to give the judges a dependable way out of difficult situations when they have made up their minds, but either do not know how, or else do not take the time, to articulate their conclusions on a rational basis." Green, Are There Dependable Rules of Causation? 77 U. of PA. L. Rev. 601, 626 (1929). However, Beale, The Proximate Consequences of an Act, 33 HARV. L. Rev. 633 (1920), states that a set of dependable rules of causation exist which will solve all tort and criminal problems.

7. "... no one is responsible for what others with whom he is not allied do or bring about." HALL, GENERAL PRINCIPLES OF CRIMINAL LAW, 261 (1947). While useful for determining who are parties to a crime, this principle is not helpful in determining whether causation exists.
were punishable by death.\(^8\) It was an easy step to call a homicide committed in the course of a felony, “murder”, as the punishment could be no greater.\(^9\) Distinctions should be maintained which prevent the further growth of this anachronism. For the same reason, the analogy should be taken to the “innocent bystander” cases where possible. Although the deterrent effect of this decision may prove to be very great, and although the decision might be justified on that ground, the court, by discussing many tort authorities,\(^10\) hints that a policy reason other than “deterrence” underlies its decision. The objectives of tort and criminal law are so divergent,\(^11\) however, that such precedents cannot be used interchangeably without causing confusion in both fields of law, with consequent illogical and undesirable results.

**Eminent Domain—Just Compensation for Government Seizure of Strike-Bound Public Utility Is Not Measured by Earnings—Virginia seized and operated a strike-bound ferry company, under an emergency statute providing for state seizure until the owner was able to operate again, and for payment to owners of “reasonable, proper, and lawful compensation.”\(^1\) Pursuant to statutory procedure, owners filed a petition for the court to determine just compensation. The lower court based its award on net profits for the period of seizure. On appeal, it was determined (two of five judges dissenting) that payment should be fair rental value based on circumstances at the time, including fact that ferry was not operating due to strike, and hence had no earning power. *Anderson v. Chesapeake Ferry Co.*, 43 S. E. 2d 10 (Va. 1947).

It is well settled that just compensation under eminent domain shall be determined by considering the best use to which the property is suited, and by avoiding any element of forced sale.\(^2\) The court’s consideration of the temporary lack of earning power resulting from the strike was a manifest departure from this rule, since when the test is applied the ferry’s value as a going concern would seem to be the proper measure of compensation. In determining just compensation for a temporary tak-

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8. “... this continued to be the law of the land as to treason and as to all felonies, except petty larceny and mayhem, down to the year 1826, subject to the singular and intricate exceptions introduced by the law relating to the benefit of clergy.” 1 Stephen, History of Criminal Law of England 458 (1883).


10. “There is no reason why the principle underlying the doctrine of proximate cause . . . in the three civil cases just cited should not apply to criminal cases also. Chief Justice De Grey, in the Squib case, . . . showed that he regarded the analogy between civil and criminal cases in which individuals are injured or killed as being so close that the principle of proximate cause applied to both classes of cases.” In-\nstant case at 198, 53 A. 2d at 745.

11. It is usually said that the function of tort law is compensation for loss, while the purpose of criminal law is mainly to discourage criminal activity. If compensation for loss were an objective of criminal law, the policy behind criminal law would be vengeance.

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2. Olson v. United States, 292 U. S. 246, 255 (1933) (“just consideration of all the uses for which it is suitable”); Waukesha Gas and Electric Co. v. R. R. Commiss-\nion, 181 Wis. 281, 194 N. W. 846 (1923), involving a public utility (“considering the property as a going business entity”). See also Steiner, Eminent Domain Damages, 6 Mo. L. Rev. 166, 170 and n. 30 (1941).
ing, as distinguished from the usual permanent seizure under eminent domain, the measure is generally held to be a "fair rental value." In the public utility field, however, there is no active renting market, and courts avoid discussing formulae for determination of rental value of a public utility. Furthermore, no just compensation cases were found involving a strike.

There is thus no reason why the court could not have considered the strike element as the leading factor affecting rental value, instead of treating it secondarily. As a prerequisite to such treatment, the policy of the statute could be established by legislative history. This policy was to determine the compensation in such manner that neither disputant would reap advantage from government seizure and so that incentive would be given to both to settle the strike, minimizing government control. Such a test is difficult to apply since if, as in the instant case, the determination of rental value is on the basis of temporary inability to earn, a bargaining advantage is accorded to labor, which continues to receive wages while management's return is negligible. On the other hand, if net profits is the measure of remuneration, management receives an advantage, for under the Virginia statute it would achieve normal profits, since it continues managing subject only to nominal control by the Highway Commissioner, while labor may not strike and must work at pre-strike conditions. In the federal seizures, where net profits were remitted, recommendations of the War Labor Board on labor's demands were placed in effect during government control. But here again labor gets an advantage for granted demands are deducted from income before management receives profits. Perhaps the solution lies between these extremes in a rental value wherein management secures a percentage of net profits and labor's demands remain unsettled during seizure. No bargaining advantage is bestowed on

3. Egan v. Philadelphia, 108 Pa. Super. 271, 164 Atl. 813 (1933); Johnson v. United States, 2 Ct. Cl. 391 (1866). Some other definitions are: United States v. Certain Parcels of Land, 63 F. Supp. 175 (1945) (what the property is fairly worth for the time held); Monongahela Navigation Co. v. United States, 148 U. S. 312, 327 (1892) (a full and perfect equivalent for the property taken); Seaboard Air Line Ry. v. United States, 261 U. S. 299, 304 (1922) (the owner shall be put in as good position pecuniarily as if his property has not been taken); Olson v. United States, supra note 2 (he must be made whole but is not entitled to more); Louisville and N. R. R. v. De Montluzin Co., 166 La. 211, 116 So. 854 (1928) (fair value between one wanting to sell and one wanting to buy).

4. See Orgel, Valuation Under Eminent Domain 617-33 (1936) and cases cited therein.

5. Even in such federal seizures as the oil refineries, Exec. Order 9540, 9564, 9565, 9577A; meat packers, Exec. Order 9685; N. Y. tugboats, Exec. Order 9693; there was apparently no such litigation, probably because net profits were turned over to owners. Vietheer, The Government Seizure Stratagem in Labor Disputes, 6 Pub. Admin. Rev. 149, 154 (1946).

6. The governor's message asking for passage of the bill, and the arguments of the legislators all were accompanied by an express denial of any attempt to be partial in the labor dispute in any differences which might then or later exist. Parker, Current Trends in Labor Law in Virginia, 32 Va. L. Rev. 1050, 1060 (1946).

7. See dissenting opinion in instant case at p. 17.


9. If demands are not granted, the result is the same as merely giving owners net profits.

10. Virginia now has such a statute, providing that 15% of net profits, determined by a stated formula, shall go to the state as compensation for operation. Va. Acts 1947, c. 9, § 12. The amount or percentage may vary, and need not definitely be fixed by the legislature. Indeed fixing by the legislature may be unconstitutional. See Report of the Special Committee on Labor Legislation in the Public Utility Field, A. B. A. Section of Public Utility Law 1946-47, at p. 12.
either, and an incentive to settle is presented to both,\textsuperscript{11} tending to minimize government control.\textsuperscript{12} This may raise the question, however, whether loss of normal profits would equalize loss of the right to strike. The instant decision, in failing to adjudge the strike factor, thereby awards advantage to labor, and is a doubtful precedent for handling the problem.

Income Taxation—Donor of Income-Producing Property Subject to Tax on Accrued Income at Date of Gift—In 1940 the payee of a note gave it to her self-sufficient adult children. The maker's net worth assured payment of the principal ($71,000) and accrued interest ($43,000). $40,000 accrued interest was paid the donees in 1940, the remaining $3,000 in 1941. The donor paid a gift tax for 1940 based on $114,000. In addition, the Commissioner assessed the donor a $43,000 income tax deficiency for 1940, based on the unreported accrued interest on the note. The Tax Court held her liable for income tax in 1940 for the $40,000 accrued interest paid the donees that year, but not liable for the $3,000 paid in 1941. On appeal, this decision was affirmed. Income is taxable to the one who earns and controls its disposition regardless of whether he receives the actual payment himself or exercises his power to procure its payment to another. \textit{Austin v. Comm'r}, 161 F. 2d 666 (C. C. A. 6th, 1947).

This decision is an extension of the principle crystalized in \textit{Helvering v. Horst}: "The dominant purpose of the revenue laws is the taxation of income to those who earn or otherwise create the right to receive it and enjoy the benefit of it when paid."\textsuperscript{1} Heretofore, the application of this principle has been limited when the owner has irrevocably divested himself of all control over the income-producing property.\textsuperscript{2} But here the act of giving away this property was such an exercise of control over the accrued interest thereon as to amount to the enjoyment of it,\textsuperscript{3} thus making it taxable as income to the donor when paid to the donee.\textsuperscript{4} That enjoyment to a taxpayer on a cash basis is the nebulous mental satisfaction derived from a gift of such property represents a great diversion

\begin{enumerate}
\item \textit{11. Labor's incentive to settle is the fact they obtain no demands during government operation but must continue under objectional pre-strike conditions. But see \textit{Id.} at 14, in which it is contended labor has no incentive because they receive wages.}
\item \textit{12. If, instead of net profits to deduct from, there is a loss during government operation, although loss is unusual in public utilities, another problem is posed. The possibility of a charge for government operation presents itself, as analogous to a percentage of net profits, but may be unconstitutional as a penalty.}
\end{enumerate}

\textsuperscript{1} 311 U. S. 112 (1940). During the past two decades the Supreme Court has evolved and extended the application of this principle. Harrison v. Schaffner, 312 U. S. 579 (1941) (beneficiary of trust taxed although trust income was paid to short-term assignees); Helvering v. Eubank, 311 U. S. 122 (1940) (agent taxed for renewal commissions paid by insurance company to his assignee); Burnet v. Wells, 289 U. S. 670 (1933) (settlor of irrevocable trust taxed for his obligations); Corliss v. Bowers, 281 U. S. 376 (1930) (settlor taxed for income from a revocable trust); Lucas v. Earl, 281 U. S. 111 (1930) (assignor taxed for assigned earnings). \textit{MaciI, TAXABLE INCOME} § 12 (rev. ed. 1945); 39 MICH. L. REV. 495 (1941).


\textsuperscript{3} \textit{See Helvering v. Horst, 311 U. S. 112, 115, 118 (1940).}

\textsuperscript{4} \textit{See Harrison v. Schaffner, 312 U. S. 579, 583 (1940). But see Helvering v. Clifford, 309 U. S. 331, 343 (1940) (dissenting opinion).}
from the original concept of enjoyment and realization. Nevertheless, this concept is applied today, possibly because of Congressional acquiescence in the Supreme Court's rulings on the overall problem of taxing the owner of the tree on which the fruit grew. Attempts may be made to apply this concept of enjoyment and realization to numerous situations, causing difficulty in keeping it within rational limits. While it could allow great leeway to tax authorities to tax the donor for income on bona fide gifts, such a result is not likely for the limitation of rationality has not been exceeded in the related field of assignment of income or income-producing property. Mathematically the amount of current income accrued as of the date of a gift of income-producing property is easily determined and except in certain types of factual situations, would "... not broaden the definition of income to an indefinite extent to include purely intangible satisfactions," even when the donor is taxed for the accrued interest in whatever year it is paid the donee. This application of the concept is consistent with the inclusion of accrued interest in a taxpayer's earned income upon his death, and with the method of calculating income earned upon the transfer of installment obligations; further, the same amount of accrued interest is taxed as income as is taxed as a gift, as evidenced in the immediate case where the donor paid a gift tax based on $114,000. This concept is also in accord with the laymen's understanding that the present value of interest-bearing assets is the face amount plus interest accrued to date. By placing the holding of the principal case beside those of other cases in related

5. See Edwards v. Douglas, 269 U. S. 204, 211 (1925) (enjoyment and realization occurs when the income is received by the taxpayer). Magill, Taxable Income § 5 at 175 (rev. ed. 1945).

6. Cases cited note 1 supra; note 13 infra.


8. John H. Kellogg, 2 T. C. 1126 (1943) (voluntary, gratuitous relinquishment of salary credited to taxpayer's account is not realization of income); accord, Comm'r v. Giannini, 129 F. 2d 638 (C. C. A. 9th 1942).


11. Comm'r v. Timken, 141 F. 2d 625 (C. C. A. 6th 1944) (donor of note and accrued interest held not taxable for interest paid donee because at time of gift the financial condition of maker gave little likelihood of payment of either principal or interest); accord, First State Bank of Stratford, 8 T. C. —, No. 92, CCH Tax Court Serv. § 15,723 (1947).


13. Bertha May Holmes, 1 T. C. 508 (1943) (donor of building and loan shares taxed for dividends paid donee which had accrued prior to date of gift); Leonard Marx, 39 B. T. A. 537 (1939); I. T. 3011, XV-2 Cum. Bull. 132 (1936) (settlor taxed for accrued interest on bonds irrevocably transferred to trust fund in the year such interest is collectible by the trustee); accord, Potter v. Fahs, 71 F. Supp. 675 (S. D. Fla. 1947); cf. Annie A. Colby, 45 B. T. A. 536 (1941) (by implication).


fields, many loopholes which otherwise afford opportunity for tax avoidance of the revenue laws will be effectively closed.

Income Taxation—Disallowance of Deduction for Loss Determined by Indirect Intra-Family Sale—Husband managed the independent estate of his wife. On several occasions he ordered a broker to sell certain stocks for the account of either himself or his wife, and to purchase an equal number of shares for the other at as nearly the same price as possible, for the acknowledged purpose of establishing deductible losses. The transactions were executed through the stock exchange so that on each occasion the sale or purchase was to an unknown buyer or from an unidentified seller, and invariably the buying spouse received different stock certificates from those relinquished by the other. Husband and wife's estate filed separate returns claiming losses on the sales described. These deductions were disallowed by the commissioner on the ground that the transactions constituted indirect family sales under § 24 (b) of the Internal Revenue Code. The Tax Court held § 24 (b) inapplicable. When the Sixth Circuit Court reversed, thereby reaching a result contrary to that of the Second Circuit Court, the Supreme Court granted certiorari and held that § 24 (b) comprehends the transfer of different units of fungibles from one member of a family to another independently of the manner in which the transfer is accomplished, thus disallowing the deduction. McWilliams v. Commissioner, 67 Sup. Ct. 1477 (1947).

The difficulty of interpreting § 24 (b) is highlighted by the fact that the Second Circuit Court, citing the very same congressional expressions as did the Supreme Court, found no reason to suppose that Congress intended to cover the instant situation within the term "indirect sale." Yet the Supreme Court concluded that the purpose of the section was to disallow deductions for technical losses at times selected by the taxpayer when, practically speaking, the investment continued uninterrupted, rejecting the contention that the purpose of § 24 (b) and its forerunners was merely to do away with the evidentiary problem peculiar to the intra-family sale. Prior to 1934, the test of whether there was a deductible

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1. 53 Stat. 16 (1939), 26 U. S. C. § 24(b) (1) (1940). "In computing net income no deduction shall in any case be allowed in respect of losses from sales or exchanges of property, directly or indirectly ... Between members of a family. ... including " ... only his brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants," id. § (2) (D).
2. 5 T. C. 623 (1945). In so doing, the Tax Court followed its own decision, 45 B. T. A. 478 (1941), and that of the Second Circuit Court, 132 F. 2d 660 (C. C. A. 2d 1943), in Commissioner v. Ickelheimer.
6. Commissioner v. Ickelheimer, note 2 supra at 661. The problem of what constitutes an indirect sale under § 24(b) had not been raised before the courts prior to the Board of Tax Appeals' consideration of the question in the Ickelheimer case.
loss on a sale was one of bona fides,8 and the government was hampered by the fact that the evidence material to the question was, by the very nature of the relationship of the parties, frequently inaccessible to the government.9 But the Supreme Court in denying that the congressional intent was so limited as to exclude the present situation, was consistent with its reasoning in the Clifford10 and Gregory11 cases, where they had refused to permit tax reduction by devious, though not prohibited means. There, also, the sole reason for the transactions in question was the avoidance of tax with no resulting economic loss to the taxpayer. 

Here, however, the Court goes further than in the above mentioned decisions, and further than the facts of this case require, declaring that even if the purchase and sale by family members were at arms length or fortuitous, no tax avoidance motive being present, the loss would still not be deductible, since § 24 (b) states an absolute prohibition.12 The decision, thereby, introduces a new factor for the mutual consideration of independent family members who trade upon organized security and commodity markets; the possibility of causing disallowance of an otherwise deductible loss to another member of the family.13 The Court refers to, but leaves unanswered, the question as to what time interval between the sale and purchase by family members would serve to divorce the one from the other. Since by § 118,14 a taxpayer, who has sold property, is permitted to repurchase for himself after thirty days and deduct his loss on the sale, it would be incongruous to refuse the same deduction to the seller if a member of his family should purchase after a like period. But if the purchase is within thirty days, the loss will likely be held not deductible on analogy to § 118. Further, this decision invites the interesting question of whether there is an "indirect" family sale when one family member purchases before the other family member sells. In view of the conflicting decision of the Tax Court in this case, and because the Tax Court "is informed by experience and kept current with tax evolution and needs by the volume and variety of its work,"15 in the absence of compelling policy reasons,16 the interests of the government would appear to be best served by leaving to that forum the determination of equivocal tax problems.

10. "Technical considerations, niceties of the law of trust or conveyances, or the legal paraphernalia which inventive genius may construct as a refuge from surtaxes should not obstruct the basic issue." Helvering v. Clifford, 309 U. S. 331, 334 (1939).
12. Instant case at 1480.
13. Everyday transactions on securities exchanges indicates that business reasons might well dictate one person to sell and another to buy at a given price. Further, since many issues are heavily traded and securities are generally bought and sold in units of one hundred, the chance of occurrence of such fortuitous situations is more than remote.
16. The argument, frequently made, that broad construction of fiscal legislation will protect against the loss of revenue has no practical verity. See Paul, Studies in Federal Taxation 156 (1937). Nor does the argument that liberal construction will lend flexibility and obviate the necessity of legislative correction carry much weight for two reasons. First, the Revenue Code must, in any event, be constantly revised to meet political and economic necessity. There have been fourteen revenue acts since the first act in 1916. Secondly, flexibility is uncertainty, and therein is the consequent danger that more harm will be done to innocent taxpayers than the good of avoidance prevention. Id. 153-157.
Securities and Exchange Commission—Corporation By-Law May Not Circumvent Proxy Rules—Stockholder gave notice to the corporation that he intended to submit the following proposals for action at the stockholders' annual meeting: (1) to have independent auditors elected by the stockholders; (2) to amend corporate by-law 47 and eliminate the requirement that notice of the proposed alterations of by-laws be contained in the notice of meeting; . . . (4) to require a report of proceedings at stockholders' meetings sent to all stockholders. Stockholder requested that management set forth the proposals at length in management's proxy solicitation material pursuant to SEC Rule X-14A-7. Upon the corporation's refusal to accede to the request, the SEC sought to enjoin the corporation from using the proxies solicited. The corporation contended that management was privileged to refuse to give the requisite notice and thus exclude each proposal under by-law 47 from being "a proper subject for action by security holders" at the annual meeting. The district court decided that management under by-law 47 was not required to give notice of by-law proposals and hence proposals (2) and (4) could properly be declared out of order at the meeting. On appeal, it was held that all three proposals are proper subjects for stockholder action within purview of SEC Rule X-14A-7, and the intent of the Securities and Exchange Act of 1934 is not to be circumvented by procedural devices of management. Securities and Exchange Commission v. Transamerica Corporation et al., 16 U. S. L. WEEK 2129 (C. C. A. 3d, Sept. 15, 1947).

The Securities and Exchange Commission has found it necessary to resort to litigation in few instances to enforce its proxy rules; in those, the federal courts have shown a tendency to uphold the commission's interpretation of its own rules. The decision in the instant case is in line with prior proxy regulation trends and upholds the legislative intent by giving full effect to corporate suffrage. Prior to Rule X-14A-7 a minority stockholder could oppose the management in a proxy fight using Rule X-14A-6 to require management to mail out his private proxy solicitation.

1. Proposal (3) was to change the place of annual meeting and was not ruled on, the change having been adopted by management.

2. 17 CODE FED. REGS. § 240.14A-7 (Cum. Supp. 1943). Rule X-14A-7 provides that when a security holder has given management reasonable notice that he "... intends to present for action by the security holders ... a proposal which is a proper subject for action by the security holders, the management shall set forth the proposal and provide means by which security holders can ... vote on it.

3. 48 STAT. 881, 895 (1934), 15 U. S. C. § 78n., "(a) It shall be unlawful for any person ... to solicit ... any proxy ... in respect of any security ... in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."


6. For articles on regulation of proxy solicitation see Dean, Non-Compliance with Proxy Regulations, 24 CONN. L. Q. 483 (1939); Bernstein and Fischer, The Regulation of the Solicitation of Proxies: Some Reflections on Corporate Democracy, 7 U. OF CHI. L. REV. 226 (1940); Comment, 33 ILL. L. REV. 914 (1939).


8. For an interesting summary of the fight to gain control of Standard Oil of Indiana, see Berle and Means, The Modern Corporation and Private Property, 81-84 (1933).
material at the stockholder's own expense. The effect of the present decision is to enable stockholders to bring their proposals to the attention of fellow stockholders at the expense of the corporation, provided such proposals are not prohibited by state law.

Both court and commission acknowledged that the question of what constituted a proper subject for stockholder action is to be determined by state law. Although Delaware law recognized that selection of auditors and amendment of by-laws were powers to be exercised by management, it did not prohibit stockholders from exercising the same powers. In addition the Transamerica charter itself provided that stockholders might alter or repeal by-laws. Note that although a by-law requiring that notice of proposed amendments be contained in the notice of meeting is very common and ordinarily beneficial to the stockholders, management misused by-law 47 in an arbitrary effort to avoid a vote on proposals it was unwilling to sanction. The danger that the instant decision will open the door to a flood of crackpot proposals, ultimately causing the stockholders considerable expense, may be obviated by proper commission administration. Here the proposals were clearly proper subjects for stockholder action. Presumably the commission would not, in close cases, insist that management set forth a stockholder's proposals.

Taxation—Federal Gift Tax on Property Transfer Made Pursuant to Divorce Decree—Pursuant to a divorce decree incorporating a previously made separation agreement, divorced husband transferred $625,000 to his former wife. The Commissioner assessed a gift tax on the full amount. The Tax Court held the transfer non-taxable in a split decision. The Commissioner petitioned for review, but claimed as taxable only that part of the transfer in excess of wife's actual support needs. The Circuit Court affirmed, holding the transfer made in payment of a judgment, not a gift. Commissioner v. E. C. Converse, 163 F. 2d 131 (C. A. A. 2d, 1947).

Although any transfer made for less than adequate consideration in money or money's worth could be deemed a gift under the wording of

10. Del. Corp. Law Ann. § 9 says in part: "The business of every corporation organized under the provisions of this chapter shall be managed by a Board of Directors, except as hereinafter or in its Certificate of Incorporation otherwise provided." § 12 provides: "The original by-laws of a corporation may be adopted by the incorporators. Thereafter, the power to make, alter or repeal by-laws shall be in the stockholders, but any corporation may, in the certificate of incorporation, confer that power upon the directors."
11. S. E. C. v. Transamerica Corporation et al., supra note 4, at 330.
12. Courts have uniformly sustained the validity of by-law provisions making notice a prerequisite to amendment or alteration of by-laws. State v. Offutt, 121 Neb. 76, 236 N. W. 174 (1931); Klein v. Scranton Life Insurance Co., 139 Pa. Super. 369, 11 A. 2d 770 (1940); 5 Fletcher Cyclopedia Corporations (Perm. ed.) 49; 8 id. 685 et seq.
13. See discussion in S. E. C. v. Transamerica Corporation et al., cited supra note 4, at 332.
15. The Commission's brief at 42-43 indicates that such Delaware corporations as General Motors Corporation, Bethlehem Steel Corporation, Standard Brands, Inc., and Allied Stores Corporation have submitted to their stockholders the questions whether auditors should be elected by the stockholders and whether a report of proceedings at the annual meeting should be sent to the stockholders. See also instant case at —; district court's opinion, cited supra note 4, at 333.
the statute, Treasury Regulations have excluded business transactions from the gift category if they are bona fide, at arm's length, and free from donative intent. In a case involving ante-nuptial settlements, the Supreme Court has said that the test of adequate consideration has replaced the test of donative intent in determining whether a particular transaction is a gift or not. The Tax Court in the principal case in effect held that the agreement was a bona fide at-arm's-length transaction, and distinguished the Wemyss and Merrill cases because these involved ante-nuptial agreements. Obviously, a separation agreement is less likely to have a donative element than an ante-nuptial transaction. It might be argued, however, that the two Supreme Court cases could not be distinguished, since the opinions made adequacy of consideration the only test of a non-donative transfer between husband and wife. The present position of the Bureau of Internal Revenue concedes that the portion of the payment required for the support of the wife is made for adequate consideration. The estate tax sections of the Internal Revenue Code make a clear distinction between liabilities incurred through agreement and liabilities imposed by law. A line of cases holds that since the divorce court could have based its decree on all the evidence, rather than on the agreement alone, a claim based on a divorce decree incorporating previously made settlements is a liability imposed by law, and so deductible from decedent's gross estate.

If the transfer would not be taxable under the estate tax, it should not be taxed under the gift tax, because of the supplementary nature of

2. Ibid.
3. “Love and affection, promise of marriage, etc.,” are not adequate consideration. Ibid. Nor is relinquishment of marital rights in husband's property. Merrill v. Fahs, 324 U. S. 308 (1945); Comm'r. v. Bristol, 121 F. 2d 129 (C. C. A. 1st 1941).
5. Merrill v. Fahs, supra note 3; Comm'r. v. Wemyss, supra note 4.
6. Converse v. Comm'r., 5 T. C. 1014 (1945) (by implication since the court expressly followed Jones v. Comm'r., 1 T. C. 1207 (1943), in which this position was taken). The Tax Court has since followed Converse v. Comm'r. in Lahtii v. Comm'r., 6 T. C. 7 (1946); Mitchell v. Comm'r., 6 T. C. 159 (1946); Est. of J. H. Hill, 5 T. C. M.—(mem. op.) CCH Dec. 14,974(M); L. C. Ledyard, 5 T. C. M.—(mem. op.) CCH Dec. 15,087(M). (But note that in the Lahtii, Hill and Ledyard cases main emphasis is on wife's relinquishment of support rights as adequate consideration; see note 8, infra.)
7. See Converse v. Comm'r., id. at 1017-1019.
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the latter.1 The estate tax cases relied upon, however, turn on a distinction which seems purely formal, inasmuch as there was no evidence in any of them to show that the decree was based on anything other than the separation agreement. Nevertheless, if the transaction was actually bona fide at arm's length, the result does not seem improper, but it does leave open a small avenue of tax avoidance.12 Extension of the adequate consideration test to the separation situation would perhaps provide a contrary result. Nor is there a controlling policy precluding taxation of such settlements. At first glance, taxation of a property transfer made pursuant to a divorce decree might seem to be a strange transmutation of "gift tax," but it would be in accord with the actual expressed intent of Congress, which was to prevent estate tax avoidance by discouraging depletion of estates during the taxpayer's lifetime.13

Trusts—Effect of Subsequent Amendment to Internal Revenue Code on Tax-Free Gift—Testator provided by will that certain beneficiaries should receive specified sums at regular intervals from a trust, and that his estate should absorb "all inheritance and/or other taxes imposed upon . . . trust funds." By prior decree the annuities were construed to be a charge upon the trust corpus as well as income. The federal income tax on the entire trust income was duly paid by the trustees before payments were made to the beneficiaries.2 The Revenue Act of 1942 shifted to annuitants receiving trust income the liability to pay income taxes thereon.3 Thereafter the trustees in filing their income tax returns deducted 4 from gross income the amount of income distributed to the beneficiaries who, in turn paid the taxes thereon. The beneficiaries challenged this action of the trustees, and, on application for instructions, the court held that the annuities should have been made tax-free according to the will, and that the trustees must pay for or to beneficiaries the amounts by which the beneficiaries' income taxes were increased by including in their taxable income, the income received from the trustees. Commercial Trust Co. of New Jersey v. Kohl, 54 A. 2d 473 (N. J., 1947).

12. Since this view is in effect the Tax Court's holding, it might be controlling under the doctrine of Dobson v. Comm'r., 320 U. S. 489 (1943).

2. Before 1942 courts ruled that an annuity chargeable upon corpus as well as income, although paid out of income was not taxable to the annuitant as income. Burnet, Commissioner of Internal Revenue v. Whitehouse, 283 U. S. 148 (1931). The trustees, therefore, were taxed on such income. For a criticism of this rule and of the application of trust concepts in determining income tax liability, see respectively, Hess and Guterman, Annuity Trusts and the Federal Income Tax, 55 Harv. L. Rev. 329 (1942); Fenn, The Present Method of Taxing Trust Income: A Criticism and Proposed Revision, 51 Yale L. J. 1143 (1942).
4. 40 Stat. 1071 (1919), as amended, 26 U. S. C. § 162(b) (Supp. 1946). "There shall be allowed as an additional deduction in computing the net income of the . . . trust the amount of income of the . . . trust for its taxable year which is to be distributed currently . . . to the . . . beneficiaries. . . ."
The change in tax liability effected by the Act of 1942 presents new problems in the administration of trusts where the settlor provides for tax-free annuities. If trust income should prove to be greater than the disbursements provided for, then additional amounts distributed to pay off the income taxes on the annuities, may themselves be subject to taxation as additional income. There seems to follow an infinite succession of a tax upon a tax. This apparent difficulty, however, may be avoided by the original payment of an amount, which, when reduced by the payment of income taxes, equals the specified annuity. More serious questions arise in the construction of wills and irrevocable trusts executed prior to 1942. Would a testator or settlor intend that payments be tax-free by reason of the contemporary process of taxing “annuity trust” income to trustees, or, that they be tax-free notwithstanding unforeseen contingencies which might possibly cause an unanticipated drain on the corpus? It is less likely that he intended the present interpretation of his directions that payments be tax-free where such a construction results in unequal re-imbursements to different beneficiaries for taxes paid on the same amount of trust income because of their different tax brackets. The courts in many such cases will be faced with uncertainty, and may have to look beyond the will or trust instrument. Some courts undoubtedly will be constrained to deviate from the particular terms in order to secure equitable or practical settlements. It seems that in the instant case the testator’s purpose was so strongly attested to by the terms of the will and by prevalent circumstances that the court, notwithstanding changes in the tax law, properly refrained from digressing from the expressed intention in coming to its decision.

6. See Old Colony Trust Co. v. Commissioner of Internal Revenue, 279 U. S. 716, 731 (1929), where the court refrained from answering the problem of taxing a tax ad infinitum.
7. This principle has been applied in cases involving inheritance taxes. Bouse v. Hutzler, 180 Md. 682, 26 A. 2d 767 (1942); In re Levalley’s Estate, 191 Wis. 356, 210 N. W. 941 (1926); In re Irwin’s Estate, 196 Cal. 366, 237 P. 1074 (1925).
8. See note 2 supra.
9. The issue of inequality of benefit through tax payments was not present in the instant case, as the beneficiaries acted in common and were in no way hostile to each other.