Notes and Comments

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NOTES AND COMMENTS

EMINENT DOMAIN: JUST COMPENSATION UNDER THE FIFTH AMENDMENT AS MEASURED BY JUST COMPENSATION UNDER THE FOURTEENTH: WHETHER REVOCABLE PRIVILEGE TO BE DISREGARDED*

The Tennessee Valley Authority brought proceedings to condemn about 12,000 acres of land in North Carolina in and along the Hiwassee River, in pursuance of a project for the development of the Tennessee River system for hydroelectric power production, navigation, and flood control. The lands involved in this suit were taken by the Government over a period of years, starting in 1936. At that time, the Southern States Power Company, a North Carolina corporation, and its wholly owned subsidiary, a Georgia corporation, owned a small hydroelectric generating plant on a tributary of the Hiwassee, known as the Murphy plant. This plant had a distribution system which supplied the surrounding territory. These companies also owned about 22,000 acres of land on both sides of the Hiwassee and its tributary, the Nottely. Their holdings included land at four dam sites: a large part of the land necessary for dam projects at two of the sites, and some of the land necessary for similar projects at the other two sites. The property condemned included the Murphy plant, but the award therefor was not appealed from.

Southern is successor to a corporation created by a special act of the North Carolina legislature in 1909. That corporation was granted broad powers and authorized to exercise eminent domain along nonnavigable streams of North Carolina. Nonnavigability of the Hiwassee along the lands involved was stipulated. Powelson, an experienced engineer, from 1913 to 1931 surveyed and acquired these lands and developed and promoted a plan for constructing an integrated four-dam hydroelectric power project on these rivers and at these sites. After extensive litigation, lasting until 1925, with another water-power company possessing eminent domain powers, Southern's prior right of eminent domain had been established. The actual cost of the lands involved in this case was $277,821.56. The total sum invested by Southern in the 22,000 acres through 1935 was $1,061,942.53.

All except 2000 acres of the 12,000 acres taken were rough and mountainous. They had little value except when joined with other lands for water-power purposes. The Government, contending that the lands had no water-power value, argued for a valuation of $95,000 to $165,000. The condemnee sought a water-power valuation of $7,500,000. A three-man commissioners' court found the lands had water-power value, and awarded

*The expressions of opinion herein contained are the personal opinions of the writer, and may not, therefore, be represented as official Department of Justice opinions.

1For purposes of this suit, this corporation had assigned its rights to Powelson.

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$1,437,000, plus $253,000 for severance damages to lands not taken. On review before a three-judge district court, water-power value was found but the award was reduced to $976,289.40, plus $211,791.23 as severance damages. On appeal the circuit court of appeals reduced the severance damages by $100,000, but affirmed the judgment otherwise.  

In the Supreme Court, the Government's primary arguments against consideration of water-power value were: that the United States had plenary power over the flow of nonnavigable portions of the Hiawassee because of the direct effect of the flow of the stream at such portions on the navigable part of the river; that there was no water-power value because the project was not commercially feasible, and because the corporation's power of eminent domain should be disregarded in determining whether there could be the necessary union of lands for the project.  

_Held, United States v. Powelson, — U. S. —, 63 Sup. Ct. 1047 (1943),_ Mr. Justice Douglas speaking for a majority of five Justices, reversed. The value of the land is to be determined without consideration of water-power value. “We do not see why the protection given to ‘private property’ under the Fifth Amendment imposes upon the United States a duty to provide a higher measure of compensation for these lands than would be imposed by the Fourteenth Amendment upon the state if it were the taker.”  

“We merely hold that the United States, in absence of a specified statutory requirement, need not make compensation for the loss of a business opportunity based on the unexercised privilege to use the power of eminent domain when the state need not do so were it the sponsor of the public project and the taker of the lands.”  

Mr. Justice Jackson, speaking for the minority, said that they understood “the Court to hold that property physically adaptable to power purposes, taken by the Federal Government for power purposes among others, is to be valued as worthless for power purposes as matter of law because its projected development might be defeated if the State should revoke the power of eminent domain admittedly possessed by the owner at the time of the taking. We think it denies proper effect to State law and policy in effect at the time of the taking.”  

The unusual manner in which the Court placed its decision upon a rationale not pressed by able counsel makes this case worthy of a place in courses of jurisprudence which purport to analyze how courts act.  

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2In each instance the decision was unanimous.  
3In all, the Government advanced seven legal propositions, some of them of considerable merit. _See Main Brief for the Government, pp. 2-4, United States v. Powelson, 319 U. S. —, 63 Sup. Ct. 1047 (1943)._  
4_id. at —, 63 Sup. Ct. at 1054.  
5_id. at —, 63 Sup. Ct. at 1058.  
6_id. at —, 63 Sup. Ct. at 1057.  
7Propositions of law were advanced in the Government’s petition for certiorari and in the opposing brief. After certiorari was granted, the Government filed a brief of 112 pages. In the brief for the first time the point of revocability of the power of eminent domain by the State of North Carolina is noted in a footnote (n. 41). Respondent’s brief of 118 pages does not mention this point. The Government filed a reply brief which did not discuss this point. Argument was had on March 12 and 13, 1942. With the leave of the Court, the Government, after the argument, filed a supplemental brief and the re-
Court, apparently, had serious qualms about deciding the issue of the Federal Government's powers in respect to nonnavigable waters. The majority intimates strongly that in determining market value of land as part of a combination with other lands, "the power of effecting the change by eminent domain must be left out," but shies away from placing its holding on that ground, possibly because the cases of McGovern v. New York and New York v. Sage, which contain language supporting this statement, are somewhat inconsistent with Olson v. United States, United States v. Chandler-Dunbar Water Co., and Ford Hydro-Electric Co. v. Neely.

In view of the Court's failure to direct counsel's attention to the rationale which appears in the Court's opinion, it comes with some surprise to find Mr. Justice Douglas saying: "No precedent has been advanced which suggests that a different measure of compensation should be required where the United States rather than the state is the taker of the property for a public project. Nor has any reason been suggested why as a matter of principle or policy there should be a different measure of compensation in such a case."

The Court's reliance upon the measure of damages under state law as a maximum for damages in a federal condemnation is not consistent with the oft held rule that in federal condemnations the question of damages is one of federal and not of state law. In Tilden v. United States, the court respondent filed a rejoinder brief and, at the request of the Court, a memorandum of testimony relating to the effect of respondent's proposed operation on navigation and flood control. These additional documents dealt with the question of the extent of the Federal Government's control over nonnavigable streams. An order of June 8, 1942, provided for a reargument before the Court limited to questions presented in points II to VII in the Government's main brief. Counsel were also requested to discuss the legislative history of a section of the T.V.A. Act. The case was reargued on March 1 and 2, 1943. The Government filed a brief and the respondent filed two briefs. Neither party discussed the ratio decidendi of the Court. In the circuit court of appeals, the Lands Division of the Department of Justice—the Government agency which handles all federal condemnations outside of those carried on by the T.V.A.—as amicus curiae filed a brief in support of a motion for reargument. This point was not raised. In the published opinions of the circuit court of appeals and of the district court this point is not discussed.

8 Apparently the Government did not raise this point until it petitioned for reargument before the circuit court of appeals. See Brief for Respondent on Reargument on Point I, p. 2, United States v. Powelson, 319 U. S. —, 63 Sup. Ct. 1047 (1943).
held a condemnee entitled to a higher award from the Federal Government than would have been necessary if the state were the taker.

Resort to what may be done under the Fourteenth Amendment to find out what may be done under the Fifth Amendment, when applied to the situation before the Court, seems neither sound in principle nor in accordance with the precedents. When a state takes property, undoubtedly any interest the state had in the property prior to the taking would be considered in determining the amount it must pay. It is hardly likely that both the Federal Government and the state would have identical interests in a piece of property; the contrary is much more likely to be true. A right, privilege or power given by a state in respect to property within a state may not only be dissimilar from that stemming from the Federal Government, but may even be beyond the power of the latter to give. And this is true of conditions which the different sovereigns may attach to their grants. To say that in such a situation a taking by the Federal Government involves the same considerations as a taking by the state ignores, if it does not deny, a difference in powers and rights between the two sovereigns in respect to lands within a state.\(^{17}\) The taking by the Federal Government of municipal property is compensable under the Fifth Amendment,\(^{18}\) even though the state could take the property without compensation.\(^{19}\) This decision may indeed be thought to derogate from the state's sovereignty. The state did not delegate to the Government its power of revocation or its power of eminent domain;\(^{20}\) yet the Government is treated as if it had received such delegation. The political importance of the state's grant of the power of eminent domain and the significance of its power of revocation are diminished if, without possessing either, the Federal Government may act as if it had both. The decision, furthermore, takes from the state much of the state's benefit from the water-power value of the lands. The lands are now the Government's; the water power in the hands of a Government agency certainly is less amenable to state regulation than it would be in the hands of a state corporation. There is not even a fund in the hands of the condemnee representing water-power value which the state could reach by taxation or otherwise.\(^{21}\)

20In early days, the Federal Government commonly took property under state law. See FEDERAL EMINENT DOMAIN (1940) 2, 111. Occasionally it still takes property under a delegation from the state. In re Certain Land in Lawrence, 119 Fed. 453 (D. Mass. 1902)). In many states, including North Carolina, statutes have been passed empowering the United States to condemn for certain purposes and prescribing the rules for ascertaining compensation.
21Cf. St. Louis v. Western Union Telegraph Co., 148 U. S. 92, 101, 13 Sup. Ct. 485, 489 (1893) : "... it is not within the competency of the national government to ... appropriate ... the benefit of any of its corporations or grantees, without suitable compensation to the State."
The Court's contention, that in a taking of these lands by North Carolina water power value would be ignored, has little basis. In North Carolina, in determining the value of lands, their value for water power purposes may be considered if the necessary union of lands for that purpose is reasonably probable and reasonably practicable by the exercise of the power of eminent domain or otherwise. It would seem unlikely, therefore, that such value would be held recoverable by an owner not possessing the power of union and denied to one having such power, since it is the land which is taken and not the power. In fact, it seems fairly clear that the North Carolina courts, in a case in which this condemnee's predecessor was the condemnor, approved the consideration of water power value. It does not follow from the fact that a power or even a franchise may be taken without compensation that property operated under such franchise may be taken and compensated for as if operated without a franchise.

Put somewhat differently, if just compensation would require payment of water power value because of the existence of available purchasers of lands for that purpose, it should follow that similar payment must be made to an owner holding the lands for that purpose and having a prior right over other available purchasers to unite these lands with other lands necessary for a water power development.

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22The Court cites Tacoma v. Nisqually Power Co., 57 Wash. 420, 107 Pac. 199 (1910) and Sears v. Akron, 246 U. S. 242, 38 Sup. Ct. 245 (1918) as indicating that a private power company's privilege to use the power of eminent domain need not be reflected in the valuation if the property be taken by the state. The first case held that the fact the property was employed for a public use by the company would not preclude its taking by the city; the court refused to allow profits from the power plant to be considered, and affirmed a value which included water power value. 36 SHEPARD'S PACIFIC REPORTER CITATIONS 84 (Supp., Aug. 1943), puzzled perhaps over the use of this case by the Supreme Court, ties it up to the first headnote in the case, which headnote states that property may not be taken for a private use. The doubtful applicability of the Sears case is brought out in the minority opinion. The Sears case was held inapplicable by the North Carolina Supreme Court, in a suit between Southern's predecessor and another power company over the former's prior right of eminent domain. Carolina-Tennessee Power Co. v. Hiawassee River P. Co., 175 N. C. 668, 682-683, 96 S. E. 98, 105 (1918). The North Carolina court went further and said that if the Sears case was applicable it would not be governed by it. The majority's use of this case to support its views of what the North Carolina law would be is, to say the least, odd.

23At times the majority opinion reads as if the Court thinks the Federal Government took the condemnee's power of eminent domain rather than its lands. On the point of noncompensability for loss of ability to exercise that power, support is found in Adirondack Railway v. New York State, 176 U. S. 335, 20 Sup. Ct 460 (1900); Hood v. United States, 49 Ct. Cls. 669 (1913-14).

The power has not been taken or revoked by these proceedings. Cf. United States v. Big Bend Transit Co., 42 F. Supp. 459, 474-475 (E. D. Wash. 1941). If T.V.A. were to transfer these lands to private persons, Southern probably could retake the lands by condemnation.


In view of the contest of Southern with other companies desiring to exercise emi-
Southern probably had added to the value of the instant lands by having already united them with a substantial amount of other lands necessary for the project—and most of the lands had been acquired, apparently, by purchase. Southern is hardly to be penalized for having secured the power of eminent domain from the state. The obligations assumed by Southern toward the state in the exercise of the power would seem to warrant consideration of the grant of power as more than a gratuity. It may be noted that there is authority to the effect that where a special commercial value of land depends upon rights which do not pass to a purchaser by virtue of the purchase, the value is not to be disregarded when the lands are taken in eminent domain.

The water power value of lands held by a water power company has been considered in a taking by a political unit of a state. To look only at the fact that in order to realize the value of a particular piece of land for a certain purpose it is necessary to unite it with other lands, improperly ignores any reasonable possibility that because of the location of this piece of land there might be prospective (perhaps actual) buyers of that parcel, who would purchase it to use for that purpose. This possibility exists as long as there are prospective buyers of lands for that purpose, whether or not at a given point of time they have acquired or have the power to acquire the other lands. It has been realistically pointed out that the difficulties of land acquisition almost always inherent in any sizeable water power project have not deterred promoters of such projects, and customarily have not been found insurmountable. It would seem that the emphasis should be on the likelihood of a project for this purpose by entrepreneurs other than the condemnor rather than on the necessity of union with other property to effect this purpose. The attitude of prospective purchasers of the land toward the possibility and probability of the projects being effected should also be considered.

The minority points out that "never until now has it [the Court] held...
that the law requires present values to be determined as if legally possible, but factually improbable changes have already taken place.34 It is one thing to consider the possibility of Government changes affecting the value of property,35 but it is hard to see how the remoteness of such possibility can be deemed irrelevant.36 Thus, when the Government sought to deduct special benefits to the remaining land from the value of property taken, the Court thought the possibility of the Government's taking away such benefits too remote to prevent the deduction.37 It is submitted that the rule should work both ways. Thus, in State v. McKelvey,38 it was held proper to consider, in evaluating the property taken, that traffic went by the property and zoning ordinances restricted the use of surrounding property.

It may be that when, in eminent domain proceedings, a revocable privilege is taken or the value claimed to attach to the land taken depends upon a gratuitous revocable privilege, compensation should be denied, at least when a different result would be equivalent to rejection of the right of the holder of the power of revocation to revoke without paying therefor.39 But the objectivity of the market value is abandoned, if this rule is applied to a case where prospective purchasers would think the chance of change too slight to refrain from buying the property for the purpose for which it was used.40 Where a privilege is revoked, an owner is hardly in a position to insist upon a valuation in condemnation proceedings as though it had not been revoked.41 And where the tenuousness of the interest is such that an informed buyer would pay nothing therefor, no compensation should be forth-
coming in eminent domain proceedings. But there are many authorities which have followed the market practice and refused to consider property taken in eminent domain as of no value because of the possibility of a loss or diminution of value from revocation of a right, power or privilege, where the probability of such contingency was not likely to deter purchasers.

Pertinent to the instant case are the remarks of the commissioners in Gardner Water Co. v. Inhabitants of Town of Gardner: "In valuing the company's water sources as defined above, the control and rights of the state in or over the same as therein set forth are to be borne in mind, as also the probability or improbability that these powers will in fact be exercised." Whether the Supreme Court will take the extreme position that lands bordering streams have no water power value as against the United States remains to be seen, but the instant case goes a long way in that direction.

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**42**United States v. 10.245 Acres of Land, 50 F. Supp. 470 (E. D. Wash. 1943).


**44**185 Mass. 190, 192, 69 N. E. 1051, 1052 (1904).


**46**The Powelson case was relied upon by the Government in opposing a petition for certiorari in the Washington Water Power case, ibid.
STUDENT NOTES

Bankruptcy: Partnerships: Whether "entity" or "aggregate" theory should prevail in partnership bankruptcy proceedings.—In the recent case of *Mason v. Mitchell*, 135 F. (2d) 599 (C. C. A. 9th, 1943) the circuit court was asked to decide under which theory, "entity" or "aggregate," a partnership's solvency should be determined for the purposes of bankruptcy. Appellant had filed a petition under the Bankruptcy Act seeking a voluntary adjudication of an alleged partnership between herself and defendant. Defendant objected, asserting his own solvency. The court affirmed the district court's dismissal of plaintiff's petition and upheld the defendant on the ground that a partnership is not insolvent so long as any one of the members who compose it is solvent in the sense of being able to pay both his individual and the firm debts. The court thus concluded that personal solvency may be raised by a nonassenting partner as a good defense to a petition filed on behalf of the partnership by another partner.

The conclusion here reached can be supported only by acceptance of the "aggregate" theory, and is in accord with the position taken by the overwhelming weight of authority. But whether this is presently the view of the Supreme Court since its decision in *Liberty National Bank v. Bear* is open to doubt. Previously the strong dicta of Justice Holmes in the leading case of *Francis v. McNeil* clearly committed the high Court to support the "aggregate" theory. But the more recent *Liberty Bank* decision, although claiming itself to be "not in conflict with the decision in Francis v. McNeil," has been viewed by some commentators, among whom is the draftsman of the present partnership bankruptcy section, as an adoption of the "entity" view. A few writers have attempted to reconcile the two cases by limiting

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4228 U. S. 695, 33 Sup. Ct. 701 (1913).
5276 U. S. at 225, 48 Sup. Ct. 252, 255.
7COLIER, BANKRUPTCY (14th ed. 1940) § 5.03; Comment (1940) 49 YALE L. J. 908, 923.

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their application to the narrow issues of each case.\footnote{See Cook, op. cit. supra n. 2, at 213; Note (1928) 14 St. Louis L. Rev. 57. In the Francis case the narrow issue in point was whether the individual estate of a non-adjudicated partner could be drawn into the administration of a bankrupt firm; in the Liberty Bank case the issue was whether a court order adjudging a firm bankrupt has the automatic effect of adjudging non-adjudicated partners bankrupt.} But most writers are confused as to whether the Supreme Court in the Liberty Bank case intended to upset the great weight of authority favoring the “aggregate” view\footnote{Francis v. McNeil, 228 U. S. 695, 33 Sup. Ct. 701 (1913) ; cf. Lurie v. United States, 20 F. (2d) 589 (C. C. A. 6th, 1927). See Comment (1938) 87 U. of Pa. L. Rev. 105, 109; Notes (1928) 41 Harv. L. Rev. 1044; (1914) 12 Mich. L. Rev. 223, 224.} and adopt the “entity” view, or whether the highest Court felt, as do some writers,\footnote{Comment (1940) 49 Yale L. J. 908, 910, 911.} that an adequate system of bankruptcy involves adoption of both theories for different purposes.\footnote{Notes (1929) 14 St. Louis L. Rev. 179, 180; (1928) 14 St. Louis L. Rev. 57, 62.} If only to resolve this confusion, the Supreme Court should take certiorari in the principal case, and write a lucid decision on all issues involved in partnership bankruptcy proceedings.

As a matter of law, neither the “entity” nor the “aggregate” theory seems to have any more or less justification than the other. Starting by assuming either one of them correct, one can develop a perfectly logical argument which will run smoothly to its conclusion. If, as under the “aggregate” theory, you consider the partnership as being nothing more than the aggregate of the individual members thereof, it is ridiculous to talk about discharging the partnership in the bankruptcy proceedings of the partnership while not discharging the partners, and even more ridiculous to talk about the partnership being insolvent while any of the partners are solvent and able to pay the partnership debts out of their own personal assets.\footnote{For this argument, see Holmes, J. in the Francis case, supra.} If, on the other hand, you conceive of the partnership as a separate entity,\footnote{For a good discussion of the “entity” theory, see Warren, Corporate Advantages Without Incorporation (1929) 29 et seq.; Drake, Partnership, Entity and Tenancy in Partnership (1917) 15 Mich. L. Rev. 609. For strongest case support of “entity” theory, see In re Bertenshaw, 157 Fed. 363 (C. C. A. 8th, 1907), now overruled. See note 2 supra.} with its own distinct pile of assets and its own list of liabilities, it is perfectly logical to argue that the partnership may become insolvent in its own right, even though the partners themselves, or some of them are still personally solvent; and that payment of the firm’s debts by the partners out of their personal assets does not make the firm any more solvent, even as payment by a surety\footnote{The term “surety” is here used in the broad sense and includes guarantors. Cf. Restatement, Securities (1941) § 82, comment g; see Arant, Suretyship (1931) §§ 4, 5.} of his principal’s debt does not make the principal any more solvent, although relieving the principal of his obligation to the creditor.\footnote{For case where counsel argued, unsuccessfully, that partners were like sureties, see Nashville Saddlery Co. v. Green, 127 Miss. 98, 89 So. 816 (1921), noted in (1922) 22 Col. L. Rev. 348, 350.} This analogy that approximates the relation of the partner and his firm to that of a surety and his principal is an appealing one,\footnote{In several ways partners resemble sureties: like a surety, partners are personally}
Which theory, "entity" or "aggregate," is to prevail? Or if, as has been suggested *supra*¹⁸ neither is adequate to the absolute exclusion of the other, to what extent should each prevail? The answer unfortunately is not to be found in the statute books; for the policy behind the much criticized²⁰ statute²¹ is not clear.²¹ The draftsman of the present partnership bankruptcy section stated his intention to be not to depart, so far as possible,²² from the fundamental principles of the "entity" theory,²³ which theory is generally admitted to have been adopted originally by the Bankruptcy Act of 1898.²⁴ But Holmes opined,²⁵ and many legal writers agree with him,²⁶ that the partnership section of the Bankruptcy Act was not aimed at changing fundamental principles of the substantive law of partnerships based on the "aggregate" theory, and that the basic assumption of the Act of 1898 was that whenever the partnership was administered in bankruptcy,

liable for the debts of their principal (or firm); like a surety, the partner's liability is often considered as secondary; also like a surety, the partners are not discharged by the discharge of their firm in bankruptcy; and like a surety, the partner who pays his firm's debts is subrogated against or indemnified by his firm or co-sureties (*i.e.*, fellow-partners).

¹⁷The approximation of a surety to a partner is only an analogy, not an identity: whereas a partner has an actual interest in the partnership, which, in the case of a profitable business, is a personal asset which could have been attached at common law [see CRANE, *PARTNERSHIPS* (1938) 156] to satisfy personal judgments [but see UNIFORM *PARTNERSHIP ACT* §§ 25(2), 28, under which "charging orders" are now issued against the partner's interest in the business instead of writs of attachment and execution], the surety has no such interest in his principal's capital; whereas the assets of the partnership and those of the partners are so merged that the assets of the firm are in reality the aggregate of the undivided shares of the partners, the assets of the principal and his surety are exclusive of one another; whereas the right of the partnership creditor to go against the individual partners personally to obtain satisfaction exists because of the very relation of the partners to the business which gives rise to a relational obligation, the right of the creditors to sue the surety arises because of the surety's contractual obligation; unlike a surety, a partner is not released from his obligations by an extension of time granted to his firm in the payment of its debts [for case on release of surety, see Zastrow v. Knight, 56 S. D. 554, 229 N. W. 925 (1930); accord: Murray v. Marshall, 94 N. Y. 611 (1884)] or by a change of obligee [see ARANT, *SURETYSHIP* (1931) 268]; whereas the principal element of suretyship is liability for the obligations of another, such liability is a mere incident of the partnership relation, the principal element of which is the right to participate in the management and share in the profits.

¹⁸See note 10 and text *supra*.

¹⁹For criticism of partnership section of Chandler Act, see generally Comments (1940) 49 *YALE L. J.* 908, (1938) 87 *U. OF PA. L. REV.* 105.

²⁰See Note (1928) 41 *HARV. L. REV.* 1044, 1046.

²¹For recognition by McLaughlin that adoption of "entity" theory was not possible for all purposes, see *Analysis of H. R. 12889*, 74th Cong., 2d Sess. (1936) 21.


²⁴Note (1929) 29 *COL. L. REV.* 1134, 1137.
the partners would also be declared bankrupt, provided this was feasible.27 Holmes' contention seems borne out by the fact that one section of the Bankruptcy Act, although impliedly inapplicable to partnership bankruptcy proceedings,28 provides that in determining whether a partnership is insolvent, the separate assets of the partners are to be considered.29

A casual reading of the partnership bankruptcy section of the Act seems to indicate adoption by Congress of the "entity" theory.30 The effect of subsection a31 is to allow a partnership to be adjudged bankrupt even though its partners are not so adjudged. This provision, if interpreted literally, completely reverses the substantive law of partnerships as it had existed under the Bankruptcy Act of 1867,32 whereby a partnership could not be administered in bankruptcy without an adjudication of all the partners. Congress' reasons for effecting such a change in the law, if that was its purpose, are not clear.33 While many have assumed that subsection a was intended to effect a substantive change in the law,34 others have suggested that the Bankruptcy Act of 1898 intended "to preserve, not to upset, existing relations,"35 and that thus subsection a has mere procedural significance,36 being designed primarily to overcome the unusual situation where personal exemption to bankruptcy proceedings of some of the partners due to infancy,37 insanity,38 death,39 or their status as farmers or wage-earners,40 etc. might otherwise prevent the firm from ever being adjudged bankrupt involuntarily.

27For instances where this is not feasible, see text infra p. 247.
28The effectiveness of the provision is expressly limited in application to the section wherein it is found, dealing with fraudulent transfers.
30It is noteworthy that the Commissioners on the Uniform Partnership Act expressly directed the draftsman not to proceed on the basis that a partnership is a legal person. Lewis, The Uniform Partnership Act (1915) 29 HARV. L. REV. 158, 173.
34Congress' purpose may have been to spare partners the "stigma" of bankruptcy, wherever possible. But, for argument that bankruptcy should be considered a remedy, not a "stigma," see McLaughlin, Aspects of the Chandler Bill to Amend the Bankruptcy Act (1937) 4 U. of CHI. L. REV. 369, 373.
35It is more likely that Congress sought to make it more easy for creditors to throw a partnership into bankruptcy, without worrying about some partners as to whom jurisdiction could not be obtained. See text infra p. 250.
36Supra note 22.
38See Note (1928) 41 HARV. L. REV. 1044, 1046.
39In re Duguid, 100 Fed. 274 (E. D. N. C. 1900).
32In re Wells, 298 Fed. 109 (S. D. Ohio, 1924).
33Dickas v. Barnes, 140 Fed. 849 (C. C. A. 6th, 1905) (held, a partnership [not engaged in farming], some of whose members are farmers or wage-earners personally exempt by statute from adjudication as involuntary bankrupts, may nonetheless be adjudicated an involuntary bankrupt firm. Cf. H. D. Still's Sons v. American Nat'l Bank,
It is clear Justice Holmes thought, even in view of subsection a, that, wherever possible, as a matter of policy "the partners ought to be put into bankruptcy whenever the firm is." The language of the Act does not preclude this construction.

Subsection g, in denying to non-adjudicated partners a discharge from their partnership obligations as an automatic consequence of the adjudication of the firm, despite the fact that even the non-adjudicated partners' personal assets may be drawn into the administration of the bankrupt partnership, can not be read otherwise than as a restatement of the "entity" theory. This subsection has been universally criticized. It has been called an "incongruity" and a mere "futility" to leave the partners liable while discharging the imaginary partnership entity. Aside from the fact that the discharge of the partnership has no practical effect, it is inequitable to subject the non-adjudicated partners to the burdens of administration of their personal assets in bankruptcy, without granting them the benefits, principally a discharge, at least so far as their individual liability for partnership obligations is concerned.

The draftsman of the present partnership bankruptcy section, in justifying his inclusion of subsection g in the Act, claims that it is "merely declaratory of existing" and "settled law." But legal commentators have taken issue with this. It is claimed that prior to the Chandler Act the cases, far from being "settled," were in "irreconciliable conflict." Viewed in this light, it becomes questionable whether the Chandler Act may be taken as an intentional adoption of the "entity" theory for purposes of the discharge of partners, or rather as merely an erroneous codification of the cases.

et al. 209 Fed. 749 (C. C. A. 4th, 1913), criticized in Note (1914) 12 Mich. L. Rev. 483, 484, holding that a partnership chiefly engaged in a farming business could not be adjudicated a bankrupt.

It has been held that the estate of a partner chiefly engaged in an exempt occupation may nonetheless be administered in the bankruptcy proceedings of his firm, under the rule of the Francis case, supra. In re Duke & Son, 199 Fed. 199 (N. D. Ga. 1912), noted (1913) 11 Mich. L. Rev. 246.

Francis v. McNeil, supra, at 701, 33 Sup. Ct. at 703.

§ 23g (1940).

See generally, Comments (1940) 49 Yale L. J. 908, 924; (1938) 87 U. of Pa. L. Rev. 105, 112.

Francis v. McNeil, supra, at 701, 33 Sup. Ct. at 703.

Note (1927) 5 Tex. L. Rev. 400, 402.

Hough, op. cit. supra n. 24, at 603.

Supra note 43; see Cook, op. cit. supra n. 2, at 221; Notes (1926) 35 Yale L. J. 362; (1922) 22 Col. L. Rev. 348, 349.


See note 43 supra.

Cook, op. cit. supra n. 2, at 221.


The second sentence of subsection could conceivably, although erroneously, be read to support the “aggregate” theory. It provides, in effect, that where less than all of the general partners are adjudged bankrupt, the partnership shall not be administered in bankruptcy. If read literally, this clause, by precluding a firm from ever being adjudged bankrupt unless all its partners are personally bankrupt, would vitiate the effect of subsection a, which allows a partnership to be administered in bankruptcy irrespective of its partners. But courts, in adjudging firms bankrupt even though less than all their partners are personally bankrupt, have correctly construed this clause as if it had been worded that the partnership need not, rather than shall not, be adjudged bankrupt where less than all the partners are bankrupt, unless the firm is itself vulnerable to a bankruptcy petition.

The first sentence of subsection is unquestionably inconsistent with the “entity” doctrine, in holding that where all the partners are adjudged bankrupt, the partnership shall also be so adjudged. To be consistent with the “entity” theory the legislature would have to stipulate that regardless of what happens to the partners, the partnership, being a separate entity, need not be adjudged bankrupt unless it is itself insolvent. Wisely the legislature did not so hold. Irrespective of which theory one espouses, there can be no doubt that compelling practical considerations make it imperative that when all the partners are personally before a bankruptcy court, the firm should also be administered in bankruptcy.

It is submitted that it is just such practical considerations as this and others to be mentioned, rather than legal considerations, which indicate the superiority, as a matter of substantive law, of the “aggregate” over the “entity” theory for all phases of partnership bankruptcy.

The main purposes of the bankruptcy acts were originally to aid creditors, and later also to give relief to insolvent debtors. But bankruptcy was never intended as a device with which to dissolve businesses. If, pursuant to the “entity” view, a court allows a petition to be filed against a partnership among whose members some, at least, are solvent, the only material effect of the proceeding is the dissolution of the partnership, while its “soul keeps marching on”—that is, its debts linger on to haunt the solvent partners. But neither of the aforementioned purposes of bankruptcy is accomplished as a result of the granting of the petition.

Creditors probably would not even file a petition against a firm while any of its partners remains personally able to satisfy all its obligations. Presumably a creditor’s primary concern is the receipt of prompt payments. So long as any of the members of the partnership remains able to pay all of its debts,
a creditor, having the power to bring an action against such solvent partners for payment of partnership obligations, would have no reason to petition to have the partnership put into bankruptcy. Of course, if the creditor is more desirous of putting the firm into bankruptcy for some personal reason than he is desirous of collecting the debt owing to him, as where the creditor is also a competitor, he is more likely to want to file a petition against a firm which is insolvent only in the "entity" sense, without his having to worry about "dead, insane, absent, dormant, or secret partners" who may be solvent. But bankruptcy laws are not the instrument of such personal desires.

As to providing relief to debtors, the Bankruptcy Act as it stands affords no relief to the true debtors of the partnership. The true debtors of an insolvent firm are, of course, the non-adjudicated partners, not the fictional partnership entity. To discharge a debtor partnership from obligations which, as a matter of fact, it could not have paid anyhow, while leaving the vulnerable solvent partners fully liable for all partnership obligations, is a mere nullity.

With regard to the so-called quasi-involuntary petition which the Act allows to be filed provided the "partnership is insolvent," where less than all of the partners desire to put the firm into bankruptcy, there is no practical reason to entertain the "entity" interpretation of partnership insolvency. Solvent partners are unlikely to file such a petition as they stand only to lose by it: (1) Their business investment loses its "going-concern" value; (2) their personal assets are likely to be taken to pay partnership debts. Insolvent partners should not be allowed unnecessarily to jeopardize the solvent partners' interests by filing a quasi-involuntary petition, especially since insolvent partners, who can always obtain a discharge from their partnership obligations by going into individual bankruptcy, do not benefit thereby.

In requiring that the partnership be insolvent before allowing a quasi-involuntary petition to be filed, Congress presumably sought to protect the non-consenting partners, since insolvency is not a prerequisite where all the

57True, it is to the advantage of holders of contingent claims against the partnership to force the partnership into bankruptcy as soon as possible where there is a likelihood that the partners, though presently solvent, may not be able to personally satisfy these claims when they mature. But this in itself would not appear to justify the allowance of an involuntary petition to be filed against the partnership.

57Hough, op. cit. supra n. 24, at 604.

57*See Int'l Shoe Co. v. Smith-Cole, Inc., et al., 62 F. (2d) 972, 974 (C. C. A. 10th, 1933) (where a petition is filed for no other reason than in pursuance of petitioner's business policy to participate in no liquidation proceeding except bankruptcy, held, the action should be dismissed).

58For this usage of the term "quasi-involuntary," see Analysis of H. R. 12889, 74th Cong., 2d Sess. (1935) 23. The petition is considered so far voluntary as to obviate the necessity of an act of bankruptcy as a prerequisite to filing a petition, but so far involuntary as to necessitate proof of insolvency. A petition filed by some partners and objected to by others could hardly be called voluntary.


59Note (1925) 4 Tex. L. Rev. 102, 105.
partners consent to the petition. If this protection is to be more than nominal, the non-consenting partners should be enabled to defeat the petition by showing their ability and willingness to pay all the firm’s debts.

As a matter of fact, solvent, non-consenting partners can always avoid insolvency if they so desire, even under the “entity” construction, by pouring more of their personal assets into the business. Thus, since the “entity” construction can be easily rendered ineffectual, here again practicability demands the prevalence of the “aggregate” theory.

In conclusion, it seems clear that neither the “aggregate” nor the “entity” theory can prevail to the absolute exclusion of the other. The firm must be treated as an entity for the purposes of the long-established rule of distribution under the doctrine of “marshalling of the assets,” entitling firm creditors to first claim on firm assets. The Supreme Court’s *Liberty Bank* decision, *supra*, makes it clear that a firm is also to be treated as an entity to the extent that a court decree adjudging the firm bankrupt shall not have, the automatic effect of adjudging any of the non-adjudicated partners bankrupt. But a firm can not be effectively dealt with as an entity for all purposes. In the *Francis* case, *supra*, the Supreme Court clearly held that the “aggregate” theory is to be applied so as to allow a non-adjudicated partner’s assets to be drawn into the administration of the bankrupt partnership.

Between these two great Supreme Court decisions lies a gap which must be closed by the Court in a third decision as yet unwritten. As a matter of policy, should the partners be adjudged bankrupt whenever possible in a decree concurrent with the one so adjudging their firm? Do the partners’ individual assets count in computing the solvency of the firm? And what effect is to be given to the much-discredited section of the Chandler Act which withholds from the non-adjudicated partners of a bankrupt firm a discharge from individual liability on partnership obligations? The answers to these questions form the substance which is to fill in the gap in the law. Upon one of these answers, at least, hinges the correctness of the circuit court’s decision in the principal case.

Alvin D. Lurie

Business Regulation: Federal anti-trust laws: Recent applications to coöperative organizations.—In recent years the necessities of a changing economy, especially in the field of production of food supplies, have paved the way for the growth and development of coöperative organizations. For this brief survey it will suffice to sketch the broad outlines of this evolution.  

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1 For a more comprehensive and detailed history see: EVANS AND STORDYK, THE LAW
The Sherman Anti-Trust Act of 1892 made no provision for the exemption or exclusion of such co-operatives. The judiciary's early applications of the Act were confined to business trusts and trade associations. Following the federal pattern, various states enacted anti-monopolistic legislation. In Connolly v. Union Sewer Pipe Company the United States Supreme Court held unconstitutional such a state statute, which excepted from its operation agricultural and live-stock producer co-operatives on the ground that it contravened the equal protection clause of the Fourteenth Amendment. Subsequently, the Court recognized the power of the states to authorize farmers to co-operate in marketing their own products, yet distinguished the Connolly case on the basis of the classification involved. That case was expressly overruled in Tigner v. Texas, where a similar statute was upheld as a proper exercise of legislative discretion based on the economic differences between farmer-producers and urban business organizations.

The courts have not been very helpful in defining the limits within which the activities of co-operatives are legal. Rather, they have indulged in oblique phraseology—"right to function only when it does so illegally"; "reasonableness and moderation." Congress has not been more enlightening with its "lawfully carrying out the legitimate objects thereof." Only from an examination and correlation of particular cases may an area be delineated; but case material is, as yet, insufficient to define all the functional aspects of co-operatives.


3See Note (1941) 25 Minn. L. Rev. 208.
6310 U. S. 141, 60 Sup. Ct. 879 (1940).
7In the recent case of Midland Co-operative Wholesale v. Ickes, 125 F. (2d) 618 (C. C. A. 8th, 1942) plaintiff, a consumers' wholesale co-operative sought the protection of the Bituminous Coal Act of 1937 [50 Stat. 77 (1937), 15 U. S. C. § 833 (i) (13) (1940)] which provides: "It shall not be an unfair method of competition or a violation of the code or any requirement of this Act (1) to sell to or through any bona-fide and legitimate farmers' co-operative organization. . . ." The circuit court stated that consumers' co-operatives, as plaintiff, did not fall within the above provision. "Congress had the right to discriminate between the types of co-operatives and it manifestly did so, and the failure to treat them alike is neither novel nor unreasonable. . . . Laws fostering co-operative marketing and purchasing by farmers have a common genealogy. They stem from a desire on the part of federal and state legislators to extend to farmers ways to enable them to counteract the effects of an increasingly urban economy." 125 F. (2d) at 631.
May a coöperative of independent consumers so control a market that an individual be deprived of free competition? This question was posed to the court in *Mid-West Theatres Co. v. Coöperative Theatres of Michigan.*\(^{11}\)

Plaintiff corporation, the owner of four theatres, brought a suit to enjoin defendant, a coöperative association of about one hundred motion picture exhibitors,\(^{12}\) alleging violations of the Sherman and Clayton\(^{13}\) Acts which denied plaintiff the benefits of free competition. In the field of motion pictures, priority in obtaining films is a distinct financial advantage. Plaintiff alleged that defendant, through its widespread control, threatened to boycott producers if they made films available to competing theatre owners before dealing with the coöperative. The court did not controvert the legality of defendant’s existence under Michigan law,\(^{14}\) nor the right to assemble a vast purchasing power with its concomitant control. It held that when a coöperative employs methods which obstruct the channels of free trade for a competitor, “then the line has been crossed between legality and illegality.”\(^{15}\)

Can a coalition of producers, in the form of a coöperative, controlling a substantial portion of the sources of a particular product, require a purchaser of its product to enter into an exclusive buying contract without running afoul of the federal anti-trust laws? Such a coöperative enterprise may provide varied benefits to the public, yet the power to suppress competition and fix prices is the natural outgrowth of this type of contractual relationship. A self-styled “labor union,” composed of 90% of the commercial troll fishermen in Washington and Oregon waters, exacted such “exclusive contracts” from the processors and packers of marine products in that area. A requirement was imposed that no purchases were to be made from fishermen not members of the “union.” The Columbia River Packers Association, one of the purchasers, was approached by “independent” fishermen who desired to sell their product. Unable to buy because of its contract with the union, and threatened with suits by the independents, the Association brought an action against the union (1) to enjoin it from interfering with purchases from non-union members, (2) for a judgment invalidating the “exclusive clauses”, and (3) for treble damages. The court, in *Columbia River Packers Association v. Hinton,*\(^{16}\) enjoined the so-called union, stating that a co-

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\(^{12}\)Theatres in Detroit were classified into first-run, second-run, key-run and succeeding-run houses. Defendant coöperative was comprised of 50% of the seating capacity, exclusive of first-run houses, and 76% of key and succeeding-run houses.


\(^{14}\)“Independent operators may organize for the reasonable promotion of their economic activity without violation of the Sherman Law. This principle was clearly enunciated by the Supreme Court of the United States in Appalachian Coals v. United States, 288 U. S. 344, 53 Sup. Ct. 471 and has been consistently adhered to.” 43 F. Supp. at 221.

\(^{15}\)Id. at 223. Though plaintiff showed no damages, yet an injunction was issued, the court stating, “In any event, a wrong in which the public is interested should not be permitted to continue and although the right of this court to grant any injunction without allowing damages may be questioned, we nevertheless decided to err, if at all, upon the side of what we believe to be fairness and common sense.” Id. at 225.

\(^{16}\)315 U. S. 143, 62 Sup. Ct. 520 (1942), rev’g 117 F. (2d) 310 (C. C. A. 9th, 1941),
operative cannot exert so monopolistic a control and deprive the consuming public of the benefits accruing from an unrestricted market. The public interest is of vital concern in matters affecting the production and distribution of the necessities of life. Reasonableness and moderation should be the guide.\textsuperscript{17} The anti-trust laws were held to be properly invoked, no labor controversy being involved, for it was a dispute as to the sale of a product rather than as to terms and conditions of employment.\textsuperscript{18}

\textit{Manaka v. Monterey Sardine Industries}\textsuperscript{19} in the Federal District Court, presented analogous issues. All the boat owners in the Port of Monterey, California, formed a co-operative association and entered into contracts with the canners in the Port, by the terms of which the canner was not to buy fish from anyone not a member of the association. A scheme was devised whereby a price was fixed, although there was no outright sale of the product. Rather, boats were “assigned” to the various canners; but there was no assurance that the canners’ yearly needs would be filled in this manner. Manaka was an independent fisherman who had contracted with one of the canners to supply the latter with fish.\textsuperscript{20} He brought a suit against the co-operative alleging a conspiracy to restrain him from fishing and marketing his own products, and seeking treble damages under the anti-trust laws. The district court found that these exclusive agreements vested a monopolistic control of the industry in defendant by restricting the market, and were, thus, a restraint of “foreign commerce”\textsuperscript{20} in violation of the Sherman Act.

It is fallacious to presume that a co-operative organization may dominate a field of production of life’s necessaries with the altruistic intent of conservation of a particular product. The restrictive provisions of the anti-trust laws still apply, as in the case of any business enterprise, to boycotts, restraints on competition; and the control of prices.\textsuperscript{21} It is to be observed that the court did not specifically consider the problem of price control in the \textit{Manaka} case, but intimated that it was a violation of the Sherman Act incidental to the main issue. This may be because that question had recently been settled in \textit{United States v. Borden Co.,}\textsuperscript{22} where, aside from other statutory considera-

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\textsuperscript{17}Predicated on the “rule of reason” developed in \textit{Standard Oil Co. v. United States}, 221 U. S. 1, 31 Sup. Ct. 502, Ann Cas. 1912D 734, n. 764 (1911), and \textit{United States v. American Tobacco Co.}, 221 U. S. 106, 31 Sup. Ct. 632 (1911).

\textsuperscript{18}See 315 U. S. 143, 62 Sup. Ct. 520 (1942).

\textsuperscript{20}“Foreign commerce” was involved, for the ships that left the Port of Monterey intermingled with vessels of other nations on the high seas where they caught the marine products which they brought into the State of California.

\textsuperscript{22}308 U. S. 188, 60 Sup. Ct. 182 (1939), rev’d in part 28 F. Supp. 177 (1939) (to be considered subsequently in detail).
tions, hereafter to be discussed, the Supreme Court of the United States had held it to be contrary to the limitations of the anti-trust laws to form a co-operative organization and then conspire to fix and maintain an artificial price upon a necessary commodity.

That Congress has approved the co-operative form of business organization is manifest in its various legislative declarations.\(^2\) What qualifications these statutes have imposed upon the provisions of the federal anti-trust laws can be observed only by an examination of their judicial construction. In 1914, the Clayton Act\(^2\)\(^4\) authorized the formation of agricultural and horticultural non-profit organizations, not having capital stock and operated for the mutual benefit of members. The Capper-Volstead Act of 1922\(^2\)\(^5\) extended such recognition to those co-operatives operating with “capital stock,” and further provided for the intervention by the Secretary of Agriculture if there is a monopolization or an undue enhancement of prices.\(^2\)\(^6\) The Agricultural Marketing Agreement Act of 1937 laid down an elaborate plan for marketing agreements\(^2\)\(^7\) and orders\(^2\)\(^8\) under the direction of the Secretary of Agriculture.

It is a serious error to assume that by these statutes Congress intended to wrest from the judicial field the control of the enforcement of the federal anti-trust laws as to the production and marketing of agricultural and other commodities, and vest an administrative officer with exclusive quasi-judicial powers of such wide scope. The authority of the Secretary of Agriculture under the Agricultural Marketing Agreement Act is restricted by express provisions, for his is a limited, not an exclusive, jurisdiction. He is empowered to deal with certain commodities only.\(^2\)\(^9\)

In *United States v. Borden Co.*,\(^3\)\(^0\) an indictment charged producers, distributors, a labor union, city officials and certain individuals with a conspiracy to fix and maintain arbitrary prices and restrain trade in the production, transportation and distribution of fluid milk in the Chicago area in violation of Section 1 of the Sherman Act. The producers of milk had formed a co-operative organization through which they marketed their product. The


\(^{2,4}\)See note 13 supra.


\(^{2,6}\)Id. at § 292.


\(^{2,8}\)Id. at § 608c.

\(^{2,9}\)Id. at 608c (2).

\(^{3,0}\)308 U. S. 188, 60 Sup. Ct. 182, rev’d in part 28 F. (2d) 177 (1939); see Notes (1939) 34 Ill. L. Rev. 345, (1941) 27 Va. L. Rev. 674, 680. Cf. Barnes v. Dairymen’s
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district court dismissed the indictment stating that the Capper-Volstead Act gave authority to producers to organize and fix and control prices in marketing and that intervention was solely at the instigation of the Secretary of Agriculture, and then only when such practices unduly enhanced the price of a particular commodity; that the producers were also protected by the Agricultural Marketing Agreement Act because it removed cooperative organizations entirely from the purview of the Sherman Act. The United States Supreme Court reversed on the ground that these statutes have not superseded the restrictions of the Sherman Act. Under the Agricultural Marketing Agreement Act, the Secretary of Agriculture must follow a dictated procedure, and in the absence of his action, the marketing of agricultural commodities is not removed from the policing powers of the Sherman Act. The latter is a broad statute controlling monopolies and attempts to monopolize, as well as restraints which burden interstate commerce. Where, however, the Secretary of Agriculture has undertaken to act, and has entered into agreements or issued an order in respect to a particular commodity, the Sherman Act is not violated though the effect of such action is to give a cooperative a monopoly of the market.31

The Supreme Court said that the Capper-Volstead Act did authorize cooperative organizations to market collectively and make necessary contracts. Yet, no justification is found in the Act to allow such cooperatives to conspire with others to fix prices, when such conspiracies are outlawed by the Sherman Act. Again the Court pointed out the limited procedure which obtains when the Secretary of Agriculture seeks to intervene. Similarly in the later Hinton case, discussed above,32 the union endeavored to invoke the protection of the Fishermen's Collective Marketing Act,33 which was patterned after the Capper-Volstead Act. The court there, relying on the Borden case, denied that protection, stating that the procedure by the Secretary of Commerce is not exclusive where a monopolistic practice has arisen. And in the Manaka case34 it was held that inaction by the Secretary of Commerce is no indication that a monopoly does not exist in violation of the anti-trust laws. It thus appears that what at first glance seemed unlimited legislative sanction of cooperative activity has been narrowly limited by judicial construction. The extra-judicial powers conferred upon administrative officers

League Cooperative Association, Inc., 220 App. Div. 624, 22 N. Y. Supp. 294 (1927). But see the recent case of United States v. Dairy Co-operative Association, 49 F. Supp. 475 (D. Ore. 1943). Defendant cooperative and others were indicted for violation of the federal anti-trust laws. Defendants' motion of not guilty was allowed, the district court stating that although the acts of the cooperative were monopolistic in character, Congress, in the Clayton Act, said such action was not punishable criminally.

31See United States v. Rock Royal Co-op, 307 U. S. 533, 560, 59 Sup. Ct. 993, 1006 (1939), where it was said, "If ulterior motives of corporate aggrandizement stimulated their activities, their efforts were not thereby rendered unlawful. If the Act and Order are otherwise valid, the fact that their effect would be to give cooperatives a monopoly of the market would not violate the Sherman Act. . . ."

32See note 15 supra.


34See note 18 supra.
must be exercised in the prescribed manner. In the absence of such official participation, coöperatives, in their marketing practices, are still subject to the anti-trust laws.

What relief is afforded coöperative organizations under the federal anti-trust laws? In *Farmers Coöperative Oil Co. v. Socony-Vacuum Oil Co., Inc.,* et al.\(^{35}\) plaintiff coöperative, a distributors' association existing and operating under Iowa law,\(^{36}\) brought an action for treble damages under the Clayton Act\(^{37}\) against eight corporations which had been convicted of a conspiracy under Section 1 of the Sherman Act.\(^{38}\) The court did not deny the coöperative the right to sue, but did deny it the right to prosecute the action as a class suit under the Federal Rules of Civil Procedure.\(^{39}\) It was held that the coöperative had erred in failing to set forth its individual cause of action and the separate causes of action of each of its members, and remanded the case for amendment of the complaint to that effect.\(^{40}\) *Louisiana Farmers' Protective Union v. Great A & P Tea Co.,*\(^{41}\) raised a similar procedural problem. There the plaintiff was a non-profit coöperative organization composed of all the strawberry growers in the State of Louisiana. The coöperative, to which all the members had assigned their individual causes of action, brought an action for treble damages, to an amount over eight million dollars, under the Sherman Act,\(^{42}\) and alleged a conspiracy by the defendants to stifle all competition and to monopolize the retail distribution of strawberries in interstate commerce. The district court dismissed the action, without leave to plaintiff to amend, and without deciding whether a conspiracy existed, on the ground that the necessary causal relation was not shown, and the damages were incapable of arithmetical calculation. The circuit court held this to be error and reversed, allowing plaintiff to amend by setting forth the damages of each member and the basis of computation. These two cases show the dire need for a new procedure in litigation by coöperative organizations, as no statute exists at present which allows a coöperative to sue in its coöperative character for the benefit of its members as a group.

We have seen that the functions of private coöperative associations are still subject to the federal anti-trust laws. But what of a state which adopts a stabilization program to restrict competition and control prices in connec-

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\(^{35}\)133 F. (2d) 101 (C. C. A. 8th, 1942).
\(^{36}\)IOWA CODE (1939) chaps. 389, 390.1.
\(^{39}\)Rule 23 (a) (3).
\(^{40}\)Amendment to conform to Rule 20 (a) of the Federal Rules of Civil Procedure providing for permissive joiners.
\(^{41}\)131 F. (2d) 419 (C. C. A. 8th, 1942).
tion with the distribution of agricultural commodities produced within the state, all of which is denied to private coöperative enterprise? Is it to be bound by the Sherman Act or the Agricultural Marketing Agreement Act? California adopted an Agricultural Prorate Act for the marketing of raisins, vesting in various state officials the authority to enforce the Act and program adopted pursuant thereto. In one case arising under the Act, Brown, a producer and packer of raisins in the state, brought a suit to enjoin the officers from enforcing the program as to him, and sued for treble damages. The district court awarded an injunction and held that the program was an undue burden upon interstate commerce. The Supreme Court of the United States, in Parker v. Brown, reversed, and in denying relief to the plaintiff declared that nothing in the Sherman Act or its history indicates that the Act was intended to restrain activity directed by a state, or state action itself. The Prorate Act, initiated by the California legislature, was never intended to operate through individual activity, in which instance, presumptively, it would be illegal. Rather, it was to be effected by the action of state officials, acting under authority delegated by the state. The Agricultural Marketing Agreement Act becomes effective only when the Secretary of Agriculture inaugurates a marketing program under it. Nothing in the Act, directly or by implication, indicates that a state program may not be enforced until the Secretary acts, if it be not at variance with the policy of the Act.

The federal anti-trust laws promulgated a policy for the protection of the freedom of economic intercourse by restraining monopolistic tendencies. In the absence of statutes, coöperatives are not a privileged form of organization and still must operate under those laws the same as any other form of business. In the field of the production and marketing of agricultural commodities, the ban has been lifted by statutory authority providing for the participation of government officers. Yet, that is a limited freedom, requiring strict adherence to the letter of the law, and then applicability of a particular statute lies within the discretion of the designated officials. Concededly, the long-established anti-monopolistic standards should be maintained, and although the courts should be liberal in giving effect to the peculiar advantages of coöperative economic enterprise, yet it is primarily a legislative function to extend the scope of this new commercialism.

Lillian J. Kaminsky

Executors and Administrators: Liability for priority of claim of United States: Methods of presentation.—In United States v. Pate, 47 F. Supp. 965 (D. C. W. D. Ark. 1942) the Federal Government sued the defendant as administrator of an estate for failure to prefer and pay a claim of the Federal Housing Administration based upon a promissory note of the defend-

ant's decedent. Upon the death of the decedent the United States, through its attorney, filed a verified claim with the clerk of the Probate Court of Howard County, Arkansas. The claim was presented to the defendant who approved it in full; upon advice of his attorney, he classified it as a third class claim. It was presented to the probate court and allowed as a third class claim. Although the defendant gave notice to the plaintiff, no appeal was taken from the judgment. Distribution was made of the assets. The plaintiff received its aliquot share of the insolvent estate on the basis of a third class claim. Twenty-one months later plaintiff filed objection in the probate court to the defendant's final account on the ground that the claim was improperly classified, but later withdrew it and commenced suit in the Federal district court under 31 U. S. C. § 1923 contending (1) it was not bound by the judgment of the probate court; or (2) that if it were bound, defendant had become a trustee for the Government and that it was his duty to appeal from the judgment of the probate court. The district court held that the defendant was trustee for all the creditors, that it was the duty of the Government to appeal from the

1ARK. DIG. STAT. (Pope, 1937) Ch. 1, § 97 provides that:
"All demands against the estate of any deceased person shall be divided into the following classes.
First. Funeral expenses.
Second. Judgments rendered against the deceased, in his life time and which are liens on lands of deceased, if he died possessed of any; otherwise to be regarded as debts due by contract.
Third. All demands, without regard to quality, which shall be exhibited to the executor, or administrator, properly authenticated, within six months after the first granting of letters on the estate.
Fourth. All such demands as may be exhibited as aforesaid after six months and within one year after the first letters granted on the estate, and all such demands not exhibited to the executor or administrator as required by this Act, before the end of one year from the granting of letters shall be barred."

2Under Act 164 of the Acts of the General Assembly of Arkansas (1939) an appeal to the probate proceedings must be taken within six months.

3REV. STAT. § 3467 (1875):
"Every executor, administrator, or assignee, or other person who pays any debt due by the person or estate from whom or for which he acts, before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate to the extent of such payments for the debts so due to the United States, or for so much thereof as may remain due and unpaid."

See also REV. STAT. § 3466 (1875), 31 U. S. C. § 191 (1940):
"Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor in the hands of an executor is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of Bankruptcy is committed."

This latter section is to be read in pari materia with the preceding section of the title. United States v. Giger, 26 F. Supp. 624 (D. C. Ark. 1939); United States v. Western Union Telegraph Co., 50 F. (2d) 102 (C. C. A. 2d, 1931), aff'g 19 F. (2d) 157 (S. D. N. Y. 1926).
judgment of the probate court, and having failed to take a timely appeal, its right was barred by the Arkansas Statute of Limitations. Since the Government had become a party to the proceedings in the probate court, it was subject to its jurisdiction and was bound by the decree. The district court suggested that had the Government remained aloof from the proceeding and had it given the administrator notice of the claim, the administrator would have been bound at his peril to see that the rights of the Government to priority were fully protected.

This dictum would appear to introduce a new duty and an indefensibly stringent standard of care for the executor or administrator. In support of its position, the district court cited Field v. United States and United States v. Huntington National Bank.

In the Field case a Louisiana insolvent, whose debts to the Government had been reduced to judgment, made an assignment of assets to the defend-

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4 See note 2 supra.
547 F. Supp. at 968.
6 In Arkansas, it is the duty of the executor or administrator to approve or disallow the claims [Ark. Dig. Stat. (Pope, 1937) Ch. 1, § 107] and to keep a list of all demands legally exhibited against the estate, classify the same, and return such list every year at the term at which the administrator is required to make such settlement [Id. at § 108]. Should the executor or administrator refuse to allow a claim after exhibition to him, such claimant may then proceed to present his claim to the court after giving the administrator ten days' notice [Id. at § 110].

See 2 Woerner, American Law of Administration (3d ed. 1923) § 390:
"If the administrator does not deem the claim a just one, or if some person having a legal right to do so objects to its allowance, or if, for any reason, he is unwilling to allow the claim, he should reject it, and remit the claimant to his action at law, or other proceeding allowed by statute, to establish it, and the claimant must then bring his action upon the claim as it was when rejected by the administrator."

(italics ours.)

Under 31 U. S. C. §§ 191, 192, a condition to any liability of the administrator would appear to be notice to him of a "debt due the Government." It would not appear under these sections that the mere notice of a claim by the government against the estate would place the administrator at his peril until the claim was adjudged a "debt due the Government."


In United States v. Porter, 19 F. (2d) 541, 24 F. (2d) 139 (D. Idaho, 1927) it was held that priority was extended to deposits of postal and forestry funds in insolvent banks. But as there were still sufficient funds on hand to pay the Government claims, the question of the liability of the assignee did not arise.

In United States v. Barnes, 24 Blatchf. 466, 31 Fed. 705 (Circ. Ct., S. D. N. Y. 1887) the Government had a claim against the insolvent of $540,000 for evasion of the revenue laws. After distribution was made of the $32,000 of the insolvent's estate, the Government recovered a judgment of $99,000 on the claims. The distributor was held liable for $32,000. This is an example of a contingent claim neglected by the distributor.

79 Pet. 182, 9 L. ed. 94 (1885).
ant syndics. With knowledge of these judgments the defendants created a tableau of distribution which failed to mention the Government debts. The Government did not appear in the insolvency proceedings, the tableau was approved by the parish court, and distribution was made. Upon suit under the Duty of Collection Act of 1799, the forerunner of the present statute, the United States Supreme Court held the defendants liable for their perverse conduct. In the opinion, Chief Justice Marshall declared that, if the defendants had not had knowledge of the judgments, a different question would have arisen.

In the Huntington Bank case the executor filed a federal estate tax return upon which an estate tax was levied. Despite notice that there was a tax deficiency, the defendant executor distributed all of the assets of the estate to the widow and made a final statement of accounts in which he failed to include the proposed tax deficiency. The court held that a cause of action was stated under 31 U. S. C. § 192.

Neither case appears to be adequate authority for the statement that when the executor or administrator has notice of a Government claim that he must secure at his peril judicial approval of the priority due to it. In both cases the defendants not only failed to give the claim priority, they neglected to include the claim and/or to provide for it in their scheme of distribution. Clearly the administrator would be liable under the expressed intent of 31 U. S. C. §§ 191, 192.

In the instant case the administrator, under legal advice, allowed and classified the claim to the best of his ability and presented it to the probate court. Under existing authority the court held that the claim was not entitled to priority. It would seem that a mere change in procedure suggested by the district court whereby the Government would present the claim to the executor or administrator without becoming a party to the proceedings would not place an added burden upon the administrator. If such were true in the future the Government would so deal with all its estate claims. It would save the Government the burden of any litigation in the probate court. The Government would not only preserve all its existing rights but would saddle an absolute liability upon the executor or administrator to litigate its rights whenever judicially denied. Moreover, the Government would never run the risk of being barred by a local statute of limitations for its failure to appeal an adverse decision of the probate court.

The advantage is strikingly illustrated in the instant case. When presented, the claim of the Federal Housing Administration was not entitled to pri-
Six months later the right to appeal the decision of the probate court was barred.\(^1\) Twenty-one months later the United States Supreme Court in *United States v. Emory*\(^1\) held that such claim was entitled to priority, and suit was commenced against the administrator. It scarcely seems plausible under such circumstances that, had the Government merely given notice of the claim to the administrator, the administrator, after acting on legal advice, in good faith and under the direction of the probate court, could be held personally liable, as the dictum of the district court would seem to indicate.

Although the status of a Federal Housing Administration claim has been decided, there are many other situations where a similar question might arise. It has been held that claims presented by the Director General under the Federal Control Act at the end of the last war were not entitled to priority;\(^1\) that debts owing to, or contracted by, the United States Shipping Board Emergency Fleet Corporation, when acting as a principal, were not entitled to priority;\(^1\) that veterans' funds prior to distribution in an insolvent bank were not entitled to priority;\(^1\) and that a surety upon the bond of an insolvent bank which is the depository of bankruptcy funds is not entitled to priority.\(^1\) Nor is it clearly determined when the claims of the Government will have priority over other types of claims. The statute involved does not create a lien in favor of the Government.\(^1\)

It seems probable that there may be many claims...
NOTES AND COMMENTS

held by administrative boards and agencies at the end of the present war the right of priority of which will be doubtful. Since the Supreme Court has hesitated to declare claims entitled to priority, it would hardly seem that Congress intended to impose an absolute liability upon the executor or administrator which entailed the burden of securing the priority rights of the United States.

Hamilton S. White

Labor Law: Minimum standard for women and children: Part time wage.—Does Article 19 of the New York Labor Law which authorizes the Industrial Commissioner to issue a minimum wage order empower him to fix a so-called “guaranteed wage” for women and minors for part time employment? (A “guaranteed wage” is a required or ordered wage.) In Lincoln Candies, Inc., v. Department of Labor, 289 N. Y. 262, 45 N. E. (2d) 434 (1942), the Court of Appeals, reversing the special term and the appellate division, answered the question affirmatively by a vote of four to three. The vital social significance of the question is evidenced by the fact that the attorneys general of Minnesota, Illinois, Utah, New Hampshire, and North Dakota, as amicus curiae, filed a brief in support of the Commissioner’s power to fix a “guaranteed wage”: for part time employment. Under Directory

1943]
Order No. 3, the Commissioner had established a basic hourly rate of thirty-five cents for women and minors in the confectionery industry. The order further required a minimum wage of ten dollars for three days or less during the peak season, and seven dollars for two days or less during the slack season, irrespective of the number of hours actually worked.  

Section 555 of the Labor Law provides that the Commissioner and the Wage Board in establishing a minimum wage "(1) may take into account the amount sufficient to provide adequate maintenance and to protect health (2) may take into account the value of the service and class of service rendered, and (3) may consider the wages paid in the state for work of like or comparable nature." In a vigorous dissent, Judge Finch declared that Directory Order No. 3 was invalid since Section 555 required the Commissioner to take into account both "the value of service and the class of service rendered," while the order provided for a wage rate for part-time employment without regard to the value of service rendered.

The majority of the court agreed with the minority in construing the clause "may take into account" in Section 555 to mean "must take into account," but insisted that the Commissioner must "take into account not only the worth of labor but also the amount sufficient to provide adequate maintenance and to protect health." The very concept of minimum wage legislation necessarily involves the determination of the cost of living.

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4Directory Order No. 3 became effective on November 14, 1938. Five similar minimum wage orders are now in effect in various industries in New York.

Order No. 1 issued on March 7, 1938, for the laundry industry, set a minimum weekly wage of $14 for a forty hour week in New York City, Nassau and Westchester counties. The validity of the order has been upheld in Hutchins v. Department of Labor, 173 Misc. 924, 18 N. Y. S. (2d) 656 (Sup. Ct. 1940).

Directory Order No. 2, effective August 1, 1938, established a minimum wage of $16.50 for full time employees for a forty-five hour week in the beauty shop industry. The order also required that part time workers receive a minimum wage of $4 per day for eight hours or less. For more than three days in one week, the minimum weekly wage was to be the same as for full time employment.

Directory Order No. 4 was promulgated on May 8, 1939, for the cleaning and dyeing industry. Minimum hourly rates were set by the order varying from 36 cents in the metropolitan district to 33 cents in communities of under 10,000 population for a basic work week of forty hours.

On June 3, 1940, Directory Order No. 5 put into effect a minimum wage rate in the restaurants of New York. In New York City, the hourly minimum wage for waitresses was set at 18 cents for the nine calendar months from June 3, 19 cents for the following twelve months, and 20 cents thereafter. For women and minor employees other than waitresses in New York City restaurants, the hourly minimum rate was fixed at 29 cents for nine calendar months, and 30 cents thereafter.

Directory Order No. 6 covers all establishments, such as hotels, clubs, resident houses, and camps, which offer lodging accommodations to the public, to employees, or to members or guests of members. The minimum hourly rates for employees who do not receive meals or lodging are 26 cents an hour for service employees, 33 cents for chambermaids and bathmaids, and 36 cents for all other employees. For workers who receive one meal a day, the rates are 3 cents less per hour; for those who get two meals a day, the rates are 6 cents less.

5Lewis and Conway, JJ., concurred with Judge Finch.

6289 N. Y. 262, 266, 45 N. E. (2d) 434, 436 (1942).
and the fixing of a wage that will reasonably cover or approach that cost. The idea of a ‘living wage’ is the heart and core of all such legislation.17 A minimum wage computed solely on the basis of the market value of the part time employee’s hourly service multiplied by the number of hours actually made available to him affords little economic security for him. Any formula for wage determination which disregards the assurance of “adequate maintenance and health,” would nullify the purpose of the statute. Clearly a “living wage” need not be consistent with the market value of the work actually done in every period of employment, however short.

In 1923, the Supreme Court of the United States in Adkins v. Children’s Hospital8 declared that a minimum wage statute of the District of Columbia9 contravened the fifth amendment of the federal Constitution. Fourteen years later, the Supreme Court expressly overruled the Adkins case in West Coast Hotel Co. v. Parrish10 and approved a minimum wage law of the state of Washington11, which authorized a minimum wage “adequate in the occupation or industry in question to supply the necessary cost of living, and maintain the workers in health.”12 That the Washington statute did not require payment according to “the value of service” which Mr. Justice Sutherland thought a constitutional requisite in the Adkins case, was not deemed controlling. One point stressed in the Adkins case was that the standard fixed by the District of Columbia act failed to make adequate allowance for the value of services rendered. Although the Washington statute resembled the District of Columbia law which was invalidated, the Supreme Court was unable to find “that in its minimum wage requirement the state has passed beyond the boundary of its broad protective power.”13

The Supreme Court in the Parrish case approved the dissenting opinion of Mr. Justice Holmes in the Adkins case. “This statute does not compel anybody to pay anything. It simply forbids employment at rates below those fixed as the minimum wage requirement of health and right living.”14 The social interest in the economic conditions of women workers, and the dependence of their standard of living upon the wages they receive make a “living wage” an indispensable minimum. That the New York Legislature had this objective in mind when, in 1937, it passed Article 19 of the Labor Law cannot be doubted.

Wage orders very similar to the one in question are in operation in

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7 Ibid.
9 940 Stat. 960, c. 174 (1918).
10 300 U. S. 379, 57 Sup. Ct. 578 (1937).
12 289 N. Y. 262, 266, 45 N. E. (2d) 434, 436 (1942).
13 300 U. S. 379, 396, 57 Sup. Ct. 578, 584 (1937) (Hughes, C.J.).
Illinois,\textsuperscript{15} Massachusetts,\textsuperscript{16} New Hampshire,\textsuperscript{17} New Jersey,\textsuperscript{18} Ohio,\textsuperscript{19} Washington,\textsuperscript{20} and the District of Columbia.\textsuperscript{21} Judge Finch asserted, in his dissenting opinion, that the order, in effect, outlawed part time employment. The presence of casual labor always presents a serious problem because of the mode of life it imposes on the worker. This problem had its origin in the rise of capitalistic production, but modern developments tend toward the partial elimination of its demoralizing effects.\textsuperscript{22} The brief filed as \textit{amicus curiae} by the attorney generals of Minnesota, Illinois, New Hampshire, North Dakota, and Utah declared, “an order fixing a wage which covers the application of a given rate of pay to a defined period of time can eliminate sporadic, part time, and irregular employment and substitute instead regular employment and basic readjustment of the industry to provide living wages commensurate with the services rendered.”\textsuperscript{23}

A fundamental question in minimum wage cases is the reasonableness of the order. Since the Brandeis brief in \textit{Muller v. Oregon},\textsuperscript{24} the necessity for supporting statistically the reasonableness of this type of legislation has been generally recognized. To effectuate the public policy exemplified by the New York Minimum Wage Law, intensive studies were made of wages and working conditions in industries to which the law was to apply, and a statewide survey of the cost of “adequate living” for working women was instituted.\textsuperscript{25} The record on appeal in the principal case shows that before promulgating Directory Order No. 3 the Wage Board collected persuasive data for determining a fair and reasonable wage.\textsuperscript{26}

If the basis of all minimum wage legislation is a “living wage,” the fixation

\textsuperscript{15}MONTHELY LABOR REV. 196 (1938). The laundry and wash dress industries are covered by minimum wage orders.
\textsuperscript{16}Ibid. The state minimum wage orders cover the laundry, dry cleaning, electrical equipment and supplies, candy, men’s furnishing, women’s clothing, toys, games, and sportswear industries.
\textsuperscript{17}Id. at 197. Minimum wage orders are in effect in the clothing, hosiery, and knit goods industries.
\textsuperscript{18}Id. at 198. A wage order is in effect for the laundry industry.
\textsuperscript{19}Ibid. Minimum wage orders for hotels and restaurants.
\textsuperscript{20}Id. at 200. Wage orders cover the canning and beauty culture industries.
\textsuperscript{21}Id. at 196. Minimum wage order in the retail trade, laundry, and wash dress industries.
\textsuperscript{22}Brissenden, \textit{Casual Labor}, 3 ENCYC. SOC. SCIENCES 260 (1930).
\textsuperscript{23}Motion for Leave to File Statement, \textit{Amicus Curiae}, 3 Lincoln Candies, Inc., v. Department of Labor, 289 N. Y. 262, 45 N. E. (2d) 434 (1942).
\textsuperscript{24}208 U. S. 412, 28 Sup. Ct. 324 (1908).
\textsuperscript{25}1940 Ann. Rep’t of Industrial Commissioner (N. Y. State Dep’t of Labor, No. 21).
\textsuperscript{26}In determining the order, the Wage Board found the annual cost of living for an adequate maintenance to be: for a woman living alone in 1937, $1,182.46; for a woman living as a member of a family, $1,058.31. Of 61 women in this industry working under 16 hours per week, 83.6 per cent were making less than $5 and the rest, 16.4 per cent, were making between $5 and $10 per week. Of 158 women working from 16 to 24 hours per week, 18.4 per cent were making less than $5; 77.8 per cent were making from $5 to $10; and 3.8 per cent making from $10 to $15. Transcript of Record before the Board of Standards and Appeals, Record on Appeal, pp. 337, 335, 199. Lincoln Candies Inc., v. Department of Labor, 289 N.-Y. 262, 45 N. E. (2d) 434 (1942).
of a bare wage rate per hour or even per day with sole regard to the market value of the services performed will not accomplish the desired legislative purpose. The gradual elimination of sporadic, irregular, and casual employment can be accomplished only by guaranteeing a "living wage" reasonably commensurate with the services actually rendered.

Daniel Jay Loventhal

Nuisance: Defense plant producing critical material for armed forces justified in causing the public some discomfort: Order of War Department as affecting reasonableness of defendant's conduct.—In People v. Amecco Chemicals, Inc., ———, 43 N. Y. S. (2d) 330 (Rochester City Court, 1943), the court stated the facts as follows:

"The defendant is charged with maintaining a public nuisance in violation of Section 1530 subdivision 1 of the Penal Law defining the offense as 'unlawfully doing any act, or omitting to perform a duty, which act or omission . . . annoys, injures, or endangers the comfort, repose, health, or safety of any considerable number of persons.' * * *

"Persons living in the vicinity of the defendant's plant were affected by fumes escaping therefrom in the course of its manufacture of a product for the War Department, . . . highly essential for the protection of the armed forces in the field. * * *

"Early in 1941 the War Department made a survey to determine the number of makers of this product [chlorinated paraffin to be used for flame proofing and gas proofing tentage and the uniforms of soldiers, sailors, and marines]. * * *

"In this great emergency Colonel Clough of the Chemical Division of the War Department ordered the defendant not to shut down to accomplish the expansion but to 'cut in' new units as they were completed. This resulted in the escape of hydrochloric acid and some chlorine gas into the atmosphere. There were other escapes of gas not directly due to the 'cutting in' method, but they were all more or less due to conditions that might be expected to arise in the hurried performance of an exacting task in a great emergency. . . .

"It satisfactorily appears that the equipment installed was the best obtainable and adequate for the purposes; and that the defendant used every reasonable means to obtain competent help and to train it.

"The defendant's plant is in a heavy industrial zone and abuts on the south side of the main line of the New York Central Railroad. North of and a few hundred feet from the railroad there are houses, including the residences of a considerable number of people claiming to have been affected by the fumes. * * *

"Residents of the neighborhood testified that the fumes were so strong that they could not sit on their porches in the summer, that they had to close bedroom windows, that the fumes caused coughing, that they
were offensive... In no case was illness caused and no one called a physician."

Evidence of damage to communication wires and copper rail bonds of the railroad and to copper fuses and switches of the Rochester Gas and Electric Company was introduced to show the degree of concentration of HCl in the atmosphere.

The City Court of Rochester properly held the defendant not guilty.

The statute here applied has been interpreted by the courts to be declaratory of the common law. It is a definition of an offense against the public in the enjoyment of common rights, and not of an offense against a large number of persons in the enjoyment of private rights not shared by the members of the community. The words "any considerable number of persons" are used solely for the purpose of differentiating the crime of public nuisance from the tort of private nuisance. Since the statute confirms the common law, not every interference with the comfort and repose of the people will constitute the offense, but only such interferences as arise from unreasonable conduct.

It is well settled that the conduct of a lawful business in a proper location with a proper regard for the rights of the public is a reasonable use of property and does not constitute a public nuisance. But this rule is not determinative of the principal case, because the escape of the noxious fumes might have been prevented had the plant been closed down while the expansion was being effected.

In determining whether the defendant has used his property unreasonably, the benefits to the public resulting from defendant's conduct are weighed against the harm to public or private rights. If the benefits outweigh the disadvantages, a criminal action is inappropriate for its only purpose would be to deter or prohibit the beneficial conduct. In the principal case the interest of the public in equipping the armed forces obviously outweighs the public interest in protecting citizens from the consequences of breathing unwholesome air.

The defendant's conduct may be shown to be reasonable by reference to another well established principle. Where an activity is specially authorized

5In a prosecution for maintaining a public nuisance, the doctrine of public compensation applies, and it may be shown that the public inconveniences are absorbed in the greater public advantages directly resulting from the act complained of. People v. Transit Development Co., 131 App. Div. 174, 115 N. Y. Supp. 297 (2d Dep't 1909).
6"Just as the legislature, within its constitutional limitations, may declare particular conduct or a particular use of property to be a nuisance, it may authorize that which would otherwise be a nuisance." Prosser, Torts (1941) 594 and cases cited n. 15.
or commanded by law, it cannot, in the eyes of the law, be unreasonable. Thus, where the maintenance of a gas works was authorized by the New York legislature and the plant was equipped with proper appliances, it was not a nuisance, because the legislative consent made the defendant’s conduct reasonable. Assuming that the order of the War Department was valid, the defendant’s compliance could scarcely be held unreasonable. This case is not an example of the war power eating away the reserve powers of the states, although it may appear that the order was in direct conflict with the state statute. By reading into the statute the word “reasonable,” flexibility is imparted, and the order may be regarded as a fact establishing the reasonableness of the defendant’s conduct. “It will not be presumed that Congress intended to exclude the reserve powers of the state (from operation in a particular field) by virtue of paramount powers vested in Congress . . . unless an actual conflict exists between Federal and State legislation.”9 If the state statute and the order of the War Department could not be reconciled, it is probable that the order would prevail.9

The sufferings of private persons particularly injured by defendant’s conduct need not necessarily go without redress. An injunction should not be granted, to be sure, for as already pointed out, the defendant’s manufacture of a material vital to the war effort should not be disrupted. Injuries to private persons should be accounted one of the costs of the war effort, and their recovery against the defendant charged to the government through an adjustment in defendant’s war contracts. The difficulty with this proposition is that the War Department would probably refuse to recognize such expenses as a basis for renegotiating the defendant’s war contracts upward. While this objection has some weight, it ought not of itself prevent recovery, since, when the contracts were entered into, the probability of some litigation in connection with their performance should have been taken into account.

The fact that the defendant’s conduct has been adjudged reasonable in an action for maintaining a public nuisance will not prevent a recovery in private nuisance. In private nuisance “liability is imposed in those cases where the harm or risk to one is greater than he ought to be required to bear under the circumstances, at least without compensation.”10 The emphasis is on the unreasonableness of the plaintiff’s harm, not on the reasonableness of the defendant’s conduct in the light of the public interest.

9“The authority of State laws or their administration may not interfere with the carrying out of a national purpose. Where enforcement of the State law would handicap efforts to carry out the plans of the United States, the State enactment must, of course, give way.” United States v. Mayo, 47 F. Supp. 552, 557 (N. D. Fla. 1942). “When requisite to this end [preservation of the life of the nation] the liberty of the citizen—the protection of private property—the peace-time rights of the states must all yield to necessity.” Public Service Commission v. N. Y. C. R.R. Co., 230 N. Y. 149, 152, 129 N. E. 455, 456 (1920). Not only may the congressional power be exercised directly, but discretionary powers may be delegated to the executive or to state officials. Selective Draft Law Cases, 245 U. S. 366, 38 Sup. Ct. 159 (1917).
10RESTATEMENT, TORTS (1934) § 822, comment j.
Nevertheless, facts which tend to establish the reasonableness of the defendant's conduct may, to a lesser degree, go to show that the plaintiff's injury is not so unreasonable as to require compensation.

"The defendant's privilege of making a reasonable use of his own property for his own benefit and conducting his affairs in his own way is no less important than the plaintiff's right to use and enjoy his premises. The two are correlative and interdependent, and neither is entitled to prevail entirely, at the expense of the other... The plaintiff must be expected to endure some inconvenience rather than curtail the defendant's freedom of action, and the defendant must so use his own property that he causes no unreasonable harm to the plaintiff."

In private nuisance as in public nuisance, if the conduct of the defendant is specially authorized by law, the plaintiff's suffering will not ordinarily be considered so substantial and unreasonable as to require redress. "In general it may be said that there is power to authorize minor interferences with the convenience of property owners, but not major ones, unless the land is condemned and compensation given under the law of eminent domain." Thus, in one case, the plaintiff had procured an injunction against the ringing of a bell. The legislature subsequently authorized the ringing of bells under certain circumstances. The act was held constitutional although it deprived the plaintiff of her injunction and authorized an interference with the enjoyment of her property which before the enactment had been deemed unreasonable.

In the principal case, the order of the War Department might be offered to show that the interference with the rights of the plaintiff is not reasonably great under the circumstances. In rebuttal it may be argued that the exercise of the war power is bounded by the requirements of due process of law, and that therefore the order did not contemplate a substantial interference with the enjoyment of private rights; or, that if it did, it was invalid and, therefore, could not be relied upon by the defendant as a justification.

The court was correct in holding the defendant not guilty of maintaining a public nuisance because the defendant's activities were reasonable so far as the public was concerned for the reason that in the main they benefited the public and because they were in conformity with an order, which, by hypothesis, was valid and hence had the force of law. The fact that the defendant's conduct is reasonable in this sense should not of itself prevent persons particularly injured from recovering damages if they have suffered harm so substantial that due process of law and fairness require that they be compensated.

Edward M. Smallwood

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11Prosser, Torts (1941) 580.
12Id. at 594.
13Sawyer v. Davis, 136 Mass. 239 (1884).
Restraints of trade: Sherman Anti-Trust Act: Whether American Medical Association may be guilty of restraints: Exemptions of a labor dispute under the Norris-LaGuardia Act.—Several medical societies and physicians, including a corporation of Illinois, a corporation of the District of Columbia, two unincorporated associations in the District of Columbia, and twenty-one individuals, were charged with illegally obstructing Group Health, a non-profit corporation organized in the District of Columbia by government employees to hire doctors and provide medical care and hospitalization on a risk-sharing, pre-payment basis. The district court had sustained a demurrer to the indictment on the ground that neither Group Health nor the practice of medicine were "trades" within the meaning of the Sherman Act since the courts of the United States in interpreting the common law took a narrow view of "trade" as embracing only operations or pursuits of a mercantile character. The Court of Appeals for the District of Columbia reversed, holding that the practice of medicine and the business of Group Health were "trades." The Supreme Court granted certiorari limited to three questions: (1) Whether the practice of medicine and the rendering of medical services as described in the indictment are "trade" under Section 3 of the Sherman Act; (2) Whether the indictment charged or the evidence proved "restraints of trade" under Section 3 of the Sherman Act; (3) Whether a dispute concerning terms and conditions of employment under the Clayton and Norris-LaGuardia Acts was involved, and, if so, whether petitioners were interested therein, and therefore immune from prosecution under the Sherman Act. The Supreme Court held the defendants guilty of violating the Sherman Act without answering the first question. The second question was answered in the affirmative and the third question in the negative. American Medical Association v. United States, 317 U. S. 519, 63 Sup. Ct. 326 (1943).

The Supreme Court upheld the position of the court of appeals that Group Health, although a co-operative, was a business or trade within the meaning of the Sherman Act, but did not sustain the holding that the practice of medicine was a "trade," finding that such a determination was unnecessary since the defendants as individuals are "persons" prohibited from certain activities and might therefore be found guilty if, purpose and

1United States v. American Medical Association, 28 F. Supp. 752, 755, 756, 757 (D. C. Dist. Col. 1939). In Atlantic Cleaners & Dyers v. United States, 286 U. S. 427, 436, 52 Sup. Ct. 607, 610 (1932) trade was defined thus: "Whenever any occupation, employment, or business is carried on for the purpose of profit, or gain, or livelihood, not in the liberal arts or in the learned professions [italics added], it is constantly called a trade."

2United States v. American Medical Association, 110 F. (2d) 703, 710, 711 (App. D. C. 1940). The case then went to trial in the district court, where the defendants were held guilty of restraints of trade. Petitioners appealed to the court of appeals which reiterated its ruling on the applicability of § 3 of the Sherman Act. 130 F. (2d) 233 (App. D. C. 1943).

3American Medical Association v. United States, 317 U. S. 519, 528, 63 Sup. Ct. 326, adv. sheet No. 6 (1943). See Sherman Anti-Trust Act, 26 STAT. 209 (1890), 15 U. S. C. § 3 (1940): "Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce ... is declared illegal. Every person who shall make
The effect of their conspiracy was the restraint of the business of Group Health.\textsuperscript{4} The defendants urged that this doctrine had been announced before the Supreme Court decided \textit{Apex Hosiery Company v. Leader},\textsuperscript{5} but the Court held that nothing in that decision contradicts the proposition stated, and "whether the conspiracy was aimed at restraining or destroying competition, or had as its purpose a restraint of the free availability of medical and hospital services, the \textit{Apex Hosiery Company} case places it within the scope of the statute."\textsuperscript{6}

In considering the second question, the Court found that the issues were fairly presented to the jury and its findings that the defendants were guilty of acts of coercion and conspiracy against Group Health should not be disturbed. The judge's charge to the jury was upheld: "If it be true... that the District Society, acting only to protect its organization, regulate fair dealings among its members, and maintain and advance the standards of medical practice, adopted reasonable rules and measures to those ends, not calculated to restrain Group Health, there would be no guilt, though the indirect effect may have been to cause some restraint against Group Health.'"\textsuperscript{7}

The third question involved the applicability of the \textit{Clayton}\textsuperscript{8} and Norris-LaGuardia\textsuperscript{9} Acts and the possibility that the defendants would be immune from the operation of the Sherman Act. The Supreme Court held that this was not a labor dispute since conditions of employment were not involved.\textsuperscript{10} It would not have been a strained construction of the statute to have held that doctors are individuals in the same "occupation," who have a "direct or indirect interest" in the conditions of work of others similarly engaged. The Court, however, found that the defendants were not interested in condi-

\textsuperscript{4}American Medical Association v. United States, 317 U. S. 519, 528, 63 Sup. Ct. 326 (1943).
\textsuperscript{5}310 U. S. 469, 60 Sup. Ct. 982 (1939).
\textsuperscript{6}317 U. S. 519, 529, 63 Sup. Ct. 326 (1943).
\textsuperscript{7}Id. at 533, 63 Sup. Ct. at 330-331.
\textsuperscript{8}38 STAT. 730 (1914), 15 U. S. C. \S\S 17, 29 U. S. C. \S 52 (1940).
\textsuperscript{10}The Norris-LaGuardia Act broadly defines a case growing out of a labor dispute as one involving "persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein... or who are members of the same or an affiliated organization of employers or employees... or when the case involves any conflicting or competing interests in a labor dispute" (as defined in this section) of "persons participating or interested" therein (as defined)." A person or association is "participating or interested in a labor dispute if... engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation. 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, regardless of whether or not the disputants stand in the proximate relation of employer and employee." 29 U. S. C. \S 113 (1940).
tions of employment since they were not employees or prospective employees and there was no dispute between Group Health and its employees.

The Court could have applied here the reasoning of *New Negro Alliance v. Sanitary Co.* There, an association of negroes organized for the mutual improvement of its members and to promote civic, educational, benevolent, and charitable enterprises, requested a grocery company to employ negro clerks in the course of personnel changes in stores patronized by colored people. When their request was ignored, members of the association picketed the grocery company. The Court refused to grant the grocery company an injunction against the picketing, finding that a labor dispute existed within the definitions of Section 113 (a), (b) and (c) of the Norris-LaGuardia Act, and emphasizing the fact that controversies need not be between employees and employers, employers and labor unions, or persons seeking employment and employers to be within the purport of the act.

Instead of following the *New Negro* case, the Court stated that the decision in *Columbia River Packers Assn. v. Hinton* required a holding that the medical societies' activities were not exempted by the Clayton and Norris-LaGuardia Acts from the operation of the Sherman Act. In the *Hinton* case, the defendants were fishermen who combined in a union affiliated with the C.I.O. to bargain collectively with purchasers of their fish. The plaintiff, a cannery, refused to sign an exclusive purchasing contract with the defendants, who then boycotted it. The Court held that there was not a dispute within the Norris-LaGuardia Act since the controversy was over sales of commodities and not over labor conditions. Apparently the Court feels that the selling of fish and the selling of medical services are analogous situations and that both are outside the realm of labor disputes.

It is to be noted that the *American Medical* case was prosecuted under Section 3 of the Sherman Act, which is applicable only to the District of Columbia. *Atlantic Cleaners & Dyers v. United States* was also brought under Section 3 of the Sherman Act. There, the Court pointed out that Section 3 and Section 1 are identically worded, but Section 3 is subject to a broader interpretation. In Section 1 the words "trade or commerce" must be limited by the constitutional power to regulate commerce. Section 3, on the other hand, comes under the plenary power of Congress to legislate for the District of Columbia. Whether there would have been a similar holding in the *American Medical* case if it had been brought under Section 1, which applies to transactions in interstate commerce, is undecided. The fact that the federal and state anti-injunction statutes were not intended to

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12303 U. S. 552, 58 Sup. Ct. 703 (1937).
16Id. at 434, 52 Sup. Ct. at 609 (1932).
17NEW YORK GENERAL BUSINESS LAW § 340 is similar to the Sherman Act. NEW YORK GENERAL BUSINESS LAW § 340 (2) and C. F. A. § 876-a are similar to the Norris-LaGuardia Act. NEW YORK MEMBERSHIP CORPORATION LAW §§ 170-175 concerns the
immunize a dispute between professional persons is not a persuasive reason why the protection of these acts should not be extended to such disputes, since it is equally probable that the authors of the Sherman Act never intended to include professional groups within its monopoly and restraint of trade prohibitions.\textsuperscript{17}

It is difficult to say what the effect of this decision will be on the practice of medicine. While some of the state medical journals were resentful, others felt that the decision would prove beneficial in the long run in arousing the profession to a more realistic approach to group medicine plans, which could then be supervised by the American Medical Society.\textsuperscript{18} The obvious result is that the medical associations, while recognized to have contributed a great service, are restricted to enforcing their ethical standards by "the safer and more kindly weapons of legitimate persuasion and reasoned argument."\textsuperscript{19}

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regulation of medical societies. § 174 provides for the enforcement of discipline by the society.

\textsuperscript{17}The Sherman Act originally was intended to be a "trust-busting" act to protect the public against big business monopolies which, through superior numbers and capital and unscrupulous business practices, threatened to abolish competition. United States v. E. C. Knight Co., 156 U. S. 1, 15 Sup. Ct. 249 (1895). The act was interpreted by the courts to include labor unions [Loewe v. Lawlor, 208 U. S. 274, 28 Sup. Ct. 301 (1908)] until 1914 when the Clayton Act was passed expressly excluding labor. The court interpreted that act strictly. Duplex Printing Co. v. Deering, 254 U. S. 443, 41 Sup. Ct. 172 (1921). Resort was again had to legislation and the Norris-LaGuardia Act was passed in 1932.

\textsuperscript{18}(1943) 32 \textit{Survey Graphic} 117.

\textsuperscript{19}American Medical Society v. United States, 130 F. (2d) 233, 248 (App. D. C. 1943).