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## Comments

### POWER OF ADMINISTRATIVE AGENCIES TO COMPEL TESTIMONY AND PRODUCTION OF RECORDS

This subject deals with two basically conflicting concepts of democratic government which in this particular branch of the law clash sharply. On the one hand we have the time honored Anglo-American doctrines of individual freedom and constitutionally guaranteed rights, privileges, and immunities; while in direct opposition thereto is the increasing need for reliable information upon which to base sound legislation and public opinion. With the increasing tendency for the government to enter into regulation of industry, the need for

accurate information concerning industry and its relation to the public welfare becomes more pronounced.<sup>1</sup>

Many feigned advocates of laissez-faire and what is popularly termed "rugged individualism" feel that their constitutional guarantees have been violated when they are compelled to divulge information concerning business practices. Yet it is not to be forgotten that some of these same individuals through trade agreements, price fixing, inter-locking directorates, and stock manipulation destroy competition, impede commerce, and thereby make such investigations necessary.

Because of the breadth of the issues involved, this article will deal primarily with federal administrative bodies and federal courts.

At the outset of a discussion of the power of administrative tribunals to compel testimony, it is desirable to inquire into the power of Congress to compel testimony. If Congress has not such power it cannot vest its agents with that power. While there are theoretical limitations on the power of Congress in this respect,<sup>2</sup> yet in practice these limitations have proven no handicap to Congressional investigations and hearings.<sup>3</sup>

It must also be kept in mind that the federal administrative agencies cannot be placed in definite categories either as to functions or as to types. This statement is made because of the tendency of the courts to label a proceeding "quasi-judicial"<sup>4</sup> when they uphold the power of the agency to compel testimony,<sup>5</sup> and "fact finding" or a "fishing expedition"<sup>6</sup> when they deny the agency's power. A single administrative body may have both judicial and mere fact finding functions. The Interstate Commerce Commission and the Federal Trade Commission serve as good examples of this dual nature of the functions of many administrative agencies. The Interstate Commerce Commission, while it is usually termed a regulatory body performing quasi-judicial functions by the courts,<sup>7</sup>

1. Handler, *Constitutionality of Investigations by The Federal Trade Commission* (1928) 28 COL. L. REV. 708. See introductory note in HENDERSON, *THE FEDERAL TRADE COMMISSION* (1924): "The vast changes wrought in the social and economic aspects of society during the nineteenth century, due to the introduction of new mechanical forces, the penetrating influence of science, large scale industry and progressive urbanization have reflected themselves in a steady extension of legal control of social and economic interest. . . . More recently, legislative regulation of economic and social interests has resorted to administrative instruments in the enforcement of legislative policy."

2. Comment (1924) 38 HARV. L. REV. 234; (1925) 19 ILL. L. REV. 452.

3. *McGrain v. Daugherty*, 273 U. S. 135 (1927). While the court indicates that a "legislative" purpose must be served by such compulsory testimony, yet it is obviously difficult for a witness to show that no legislative purpose is being served. See Potts, *Power of Legislative Bodies to Punish for Contempt* (1926) 74 U. OF PA. L. REV. 780, *et seq.*

4. *In re Pacific Ry. Comm.*, 32 Fed. 241, 247 (C. C. N. D. Cal. 1887).

5. *Interstate Commerce Comm. v. Brimson*, 154 U. S. 447 (1894).

6. *Harriman v. Interstate Commerce Comm.*, 211 U. S. 407 (1908).

7. *Interstate Commerce Comm. v. Brimson*, 154 U. S. 447 (1894). By "judicial" functions, as distinguished from "fact finding," is usually meant enforcing a law of Congress and deciding upon the rights and obligations of parties, so as to constitute a case or controversy. See for meaning of "judicial

has often been declared by the court to be performing mere fact finding functions which were not sufficiently judicial in nature to warrant the exercise of power to compel testimony.<sup>8</sup> The Federal Trade Commission on the other hand, while it is more generally known for its fact finding and investigatory functions, does in many instances perform regulatory and what might be termed quasi-judicial functions. Thus it is preferable to take what might be termed a "functional" approach to the question of such bodies compelling testimony.

The term "quasi-judicial function" is usually used to denote a proceeding by a commission in connection with a specific breach of the law or the enforcement of such law. On the other hand a "fact finding" investigation may range anywhere from an authorization by Congress to investigate the high cost of living,<sup>9</sup> to an investigation by the commission into combinations of public carriers.<sup>10</sup>

It is not to be questioned that requiring a person to appear and testify or produce records is depriving him of his liberty and property, yet it is well settled that if the compulsion is designed to produce testimony before a court, that it is with due process of law.<sup>11</sup> When the compulsion has the effect of forcing the person to testify before an administrative tribunal the question of due process is not nearly so clear.

It is at the outset necessary to recognize that the decisions of the United States Supreme Court would seem to preclude the possibility of a federal administrative agency, of its own power, committing for contempt.<sup>12</sup> Historically, however, it is not quite so clear that the power to commit for contempt is exclusively judicial.<sup>13</sup> The power is said to be inherent in American legislatures.<sup>14</sup> The legislative power to commit for contempt has been consistently broadened<sup>15</sup> and reached its present status in *McGrain v. Daugherty*.<sup>16</sup> Here the Court, where no legislation was immediately contemplated, upheld the power of the

function," *United States v. Ferreira*, 54 U. S. 40 (1851); *United States v. Todd*, 54 U. S. 52 (1851); *Muskat v. United States*, 219 U. S. 346 (1911).

8. *Harriman v. Interstate Commerce Comm.*, 211 U. S. 407 (1908).

9. *Federal Trade Comm. v. Claire Furnace Co.*, 274 U. S. 160 (1927).

10. *Harriman v. Interstate Commerce Comm.*, 211 U. S. 407 (1908).

11. *Blair v. United States*, 250 U. S. 273 (1919).

12. *The court in Interstate Commerce Comm. v. Brimson*, 154 U. S. 447, 485, 489 (1894), emphatically states: "Such a body could not, under our system of government, and consistently with due process of law, be invested with authority to compel obedience to its orders by a judgment of fine or imprisonment. Except in the particular instances enumerated in the Constitution . . . the power to impose fine or imprisonment in order to compel the performance of a legal duty imposed by the United States, can only be exerted, under the law of the land, by a competent judicial tribunal having jurisdiction in the premises."

" . . . for, in a judicial sense, there is no such thing as contempt of a subordinate administrative body."

13. See FOX, *HISTORY OF CONTEMPT OF COURT* (1927) 49.

14. Potts, *Power of Legislative Bodies to Punish for Contempt* (1926) 74 U. OF PA. L. REV. 780.

15. *Ibid.* Compare cases of *Kilbourn v. Thompson*, 103 U. S. 168 (1880); *In re Chapman*, 166 U. S. 661 (1897); *McGrain v. Daugherty*, 273 U. S. 135 (1927).

16. 273 U. S. 135 (1927).

Senate to punish a recalcitrant witness for refusal to testify and produce books and records. Apparently the only limit placed upon the power by the decision was that it serve a "legislative purpose." What constitutes a legislative purpose is obviously a broad question with not too well defined limits. The cases culminating in the *Daugherty* case have increasingly recognized the growing need for complete information upon which to base legislation and the courts have not been prone to deny to the legislative bodies this power.

While it cannot be said that the position of the Court in the *Daugherty* case is in principle *contra* to that taken in respect to administrative agencies exercising this power, because of differences in the nature of the two bodies, yet surely the need for accurate and complete information is no greater in one case than the other.<sup>17</sup> The state decisions in some jurisdictions support the power of certain types of administrative bodies to commit for contempt.<sup>18</sup>

With what apparently amounts to a denial of power in the federal agencies to commit for contempt, two other remedies directed at compulsion remain. By act of Congress it can be made a crime against the United States to refuse to testify, thus resulting in a criminal prosecution in the federal courts.<sup>19</sup> This remedy, while concededly valid, is not sufficiently expeditious. The delay involved in a criminal prosecution seriously impairs the usefulness of this method. The other remedy is not a new one,<sup>20</sup> but the breadth of its application has not been fully explored. The method consists briefly of the following: the administrative tribunal is given power to issue subpoenas for the attendance of witnesses and production of papers; if such subpoena is disregarded, the tribunal is empowered to invoke the aid of the District Courts of the United States to require obedience to its demands; finally, the court appealed to is authorized to order the contumacious witness to comply, and if he fails to do so to punish for contempt of court.

The constitutional objections to this latter method fall generally into two categories. First, does a complaint by an administrative tribunal directed to a court of law, praying for an order to compel obedience to an administrative subpoena constitute a "case" or "controversy" to which the judicial power of the

17. See Note (1935) 35 COL. L. REV. 578, 587, for criticism of denying administrative bodies power of committing for contempt: "If the function of the contempt power is to remove impediments to the administration of justice, it is a narrow view which would distinguish between the administrative and judicial departments."

18. *In re Battelle*, 207 Cal. 227, 277 Pac. 725 (1929) (legislative committee held to have power to cite for contempt); *In re Sanford*, 236 Mo. 665, 139 S. W. 376 (1911) (county board of equalization held to have power to cite for contempt); *In re Hayes*, 200 N. C. 133, 156 S. E. 791 (1931) (Industrial Compensation Commission held to have power to cite for contempt upon refusal of witness to testify).

19. For an example of this method, see 27 STAT. 443 (1893), 49 U. S. C. § 46 (1926) (refusing to testify before the Interstate Commerce Commission made a crime). See also, *Brown v. Walker*, 161 U. S. 591 (1896).

20. Act of Feb. 4, 1887, § 12, 24 STAT. 379, 49 U. S. C. § 12 (1926) (Act to Regulate Commerce). This was enacted by the first Congress to consider the problem of administrative bodies forcing disclosures.

courts of the United States extends?<sup>21</sup> Second, does such compulsory testimony deprive the witness of due process of law contrary to the Fifth Amendment?

The use of the court process of contempt was early attacked in *In re Pacific Ry. Comm.*,<sup>22</sup> where Mr. Justice Field speaking for a lower federal court held such a legislative provision invalid. The basis of the declaration of invalidity was that such an application to a court of law did not constitute a "case or controversy" within the judicial cognizance.<sup>23</sup> Following this set back came the case of *Interstate Commerce Comm., v. Brinson*.<sup>24</sup> Here in a sharply cut five to three decision the United States Supreme Court upheld the power of Congress to authorize the Interstate Commerce Commission to use court process to compel testimony. The issue again was whether this method of compelling testimony violated the "separation of powers" doctrine by imposing non-judicial functions on a court of law. The Interstate Commerce Commission here was performing a "quasi-judicial" function in that it was acting upon a complaint made to it concerning an alleged violation of the Commerce Act by certain interstate carriers. However, the Court made no point of this fact in the decision. Neither did the Court squarely rule upon whether or not such compulsory testimony before an administrative tribunal is a violation of due process. Instead both the majority and the dissenting opinions take issue upon whether such a proceeding constitutes a "case or controversy" within the judicial cognizance of the courts.<sup>25</sup> The majority states that since Congress has authorized the commission to summon witnesses and to require the production of books that every citizen owes a duty to the government to so appear and testify. Whether the commission is entitled to the evidence it seeks and whether the refusal of the witness to testify is in violation of his duty as a citizen constitute issues within the judicial cognizance. The majority expressed a recognition of the need for adequate information if regulation of interstate commerce was to be successful and thus justified the "duty" imposed upon the individual.<sup>26</sup> The dissenting opinion by Mr. Justice Brewer voices a fear that such a scheme will make the courts "an adjunct to the legislative department."<sup>27</sup>

21. U. S. CONST. Art. III.

22. 32 Fed. 241 (C. C. N. D. Cal. 1887).

23. The court defines a "case or controversy" as follows: "By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs." *Id.* at 255. See also, *Den ex dem. Murray v. Hoboken Land & Imp. Co.*, 59 U. S. 272 (1855); *United States v. Ferreira*, 54 U. S. 40 (1851); *United States v. Todd*, 54 U. S. 52 (1851).

24. 154 U. S. 447 (1894).

25. *Supra* note 23.

26. "An adjudication that Congress could not establish an administrative body with authority to investigate the subject of interstate commerce and with power to call witnesses before it, and to require the production of books, documents, and papers relating to that subject, would go far towards defeating the object for which the people of the United States placed commerce among the States under national control." *Interstate Commerce Comm. v. Brinson*, 154 U. S. 447, 474 (1894).

27. 155 U. S. 3, 4 (1894).

After the *Brimson* case the constitutionality of this method of compulsion seemed firmly established, yet fourteen years later the doctrine of the *Brimson* case was considerably modified and limited. In *Harriman v. Interstate Commerce Comm.*,<sup>28</sup> the Interstate Commerce Commission, on its own motion, instituted an investigation of consolidations of carriers which it believed tended to defeat the purposes of the Interstate Commerce Act.<sup>29</sup> Witnesses which had been subpoenaed refused to answer certain questions. The commission proceeded under Section 12 of the Act and petitioned the circuit court for an order requiring the witnesses to answer the questions. The petition was granted in part and denied in part. On appeal to the United States Supreme Court the petition was dismissed, the precise holding being that the interstate Commerce Act did not authorize such investigations unless they concerned "specific breaches" of the law which the commission was set up to enforce. While this holding is narrow and on its surface does not hinder the administrative agency greatly, yet the language of Mr. Justice Holmes is significant. The issue of whether or not Congress could authorize compulsory testimony before a tribunal engaged in a purely fact finding function was not passed upon, yet passages like the following are not to be overlooked:

"... in other words the power to require testimony is limited, as it usually is in English-speaking countries at least, to the only cases where the sacrifice of privacy is necessary—those where the investigations concern a specific breach of the law."<sup>30</sup>

"If we did not think, as we do, that the act clearly showed that the power to compel the attendance of witnesses was to be exercised only in connection with the quasi-judicial duties of the commission, we still should be unable to suppose that such an unprecedented grant was to be drawn from the counsels of perfection that have been quoted from §§ 12 and 21. We could not believe on the strength of other than explicit and unmistakable words that such autocratic power was given for any less specific object of inquiry than a breach of existing law, in which, and in which alone, as we have said, there is any need that personal matters should be revealed."<sup>31</sup>

With these strong statements the majority opinion concedes the power of administrative tribunals to compel testimony through court process when acting in a "quasi-judicial" capacity, but strongly indicates that even had Congress expressly authorized the commission to invoke the aid of the courts while pursuing a fact finding investigation, that such would have violated due process. Mr. Justice Day, dissenting, pointed out that the construction placed upon the Act by the Court contravened one of the intended purposes of the Act, namely to carry on investigations of a fact finding nature.<sup>32</sup>

The vigorous protest voiced by Mr. Justice Holmes against invasion of privacy certainly should be weighed against the statement in the *Brimson* case:

28. 211 U. S. 407 (1908).

29. 24 STAT. 379 (1887), 49 U. S. C. § 12 (1926).

30. *Harriman v. Interstate Commerce Comm.*, 211 U. S. 407, 419 (1908).

31. *Id.* at 421.

32. *Id.* at 423.

"All must recognize the fact that the full information necessary as a basis of intelligent legislation by Congress from time to time upon the subject of interstate commerce cannot be obtained, nor can the rules established for the regulation of such commerce be efficiently enforced, otherwise than through the instrumentality of an administrative body . . . charged with the duty not only of obtaining the required information, but of compelling by all lawful methods obedience to such rules."<sup>33</sup>

Soon after the decision in the *Harriman* case Congress amended the Interstate Commerce Act<sup>34</sup> to authorize investigations by the commission which were not directed at a specific breach of the law. Subsequent cases have apparently limited the strong language of the *Harriman* case. In *Baltimore and Ohio R. R. v. Interstate Commerce Comm.*,<sup>35</sup> the order of the commission, requiring all carriers subject to the act to make monthly reports listing the instances in which their employees had been permitted to remain on duty for a longer period than that allowed by the Federal Hours of Service Act was sustained, notwithstanding that the carriers in effect were being required to file formal admissions of their violations of a federal statute, which imposed heavy penalties. In *Interstate Commerce Comm. v. Goodrich Transit Co.*,<sup>36</sup> the Court upheld orders prescribing uniform systems of accounts and requiring reports of corporate organization and financial conditions of carriers subject to the act. In *United States v. Louisville and Nashville R. R.*,<sup>37</sup> it was conceded that the agents of the commission might inspect and have access to accounts and records of carriers, yet it was held that they were not authorized by the Act to inspect general correspondence. In *Smith v. Interstate Commerce Comm.*,<sup>38</sup> proceeding under a Senate resolution, the commission attempted to ascertain the amounts which certain carriers had contributed to political campaign funds and lobbying. The witnesses refused to answer questions concerning such contributions and the Court held that such investigation was proper and that the witnesses must answer.

It is true that the above decisions modifying the *Harriman* case doctrine concern the Interstate Commerce Commission exercising an investigatory fact finding function and not one of the agencies which is more often looked upon as a fact finding agency. Nevertheless, they do show that in application the Court does not go as far in denying power to an administrative agency engaged in a fact finding function as the *Harriman* case would indicate.

The Federal Trade Commission has fared less well at the hands of the courts than has the Interstate Commerce Commission. While the Supreme

33. *Interstate Commerce Comm. v. Brimson*, 154 U. S. 447, 474 (1894).

34. Investigations may now be prosecuted "in any case and as to any matter or thing concerning which a complaint is authorized to be made . . . or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act." 36 STAT. 551 (1910), 49 U. S. C. § 15 (1926).

35. 221 U. S. 612 (1911).

36. 224 U. S. 194 (1912).

37. 236 U. S. 318 (1915).

38. 245 U. S. 33 (1917).



Court of the United States has to date never squarely faced the problem of an administrative fact finding agency using court process to compel testimony, yet in cases involving the Federal Trade Commission the obstructions placed in the way of exercising such power have been even greater than in the case of the Interstate Commerce Commission. A study of the history of legislation culminating in the setting up of the Federal Trade Commission makes it apparent that the very intention of Congress was to empower the commission to make investigations of business practices as an aid to regulation through publicity of facts and sound legislation.<sup>39</sup> Apparently also from the plain language of the statute Congress intended that the commission should have power to compel testimony when holding fact finding investigations.<sup>40</sup> Nevertheless, the United States Supreme Court has consistently by statutory construction denied that Congress intended to authorize the commission to exercise power to proceed against contumacious witnesses in the courts of the United States, when the commission was involved in its investigatory function.<sup>41</sup> By this method the issue of constitutionality has been to date successfully avoided.

The other line of attack upon compulsory testimony and production of evidence by administrative bodies involves charges of unreasonable searches and seizures under the Fourth Amendment and violations of the Fifth Amendment in respect to self-incrimination. This being too broad a subject to adequately discuss in this article, it seems preferable to merely state the limitations upon the power which have been imposed under these Amendments. In the famous case of *Boyd v. United States*,<sup>42</sup> the Court held that a statute authorizing an order requiring a defendant to produce an invoice in a quasi-criminal proceeding was invalid because it compelled the defendant to furnish evidence against himself in a quasi-criminal proceeding. The Court found an intimate relation between the Fourth and Fifth Amendments and concluded that any proceeding in which a party is compelled to produce testimony privileged under the Fifth

39. See Handler, *The Constitutionality of Investigations by the Federal Trade Commission* (1928) 28 COL. L. REV. 708, 720.

40. § 10: "That any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce documentary evidence, if in his power to do so, in obedience to the subpoena or lawful requirement of the commission, shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than \$1,000 nor more than \$5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment." 38 STAT. 723 (1914), 15 U. S. C. 50 (1926). § 9: "Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other persons to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof." 38 STAT. 722 (1914), 15 U. S. C. § 49 (1926).

41. *Federal Trade Comm. v. American Tobacco Co.*, 264 U. S. 298 (1924); *Federal Trade Comm. v. Baltimore Grain Co.*, 267 U. S. 586 (1925); *Federal Trade Comm. v. Claire Furnace Co.*, 274 U. S. 160 (1927).

42. 116 U. S. 616 (1886).

Amendment, violates not only the Fifth Amendment but amounts to an unreasonable search and seizure. Whether or not this was a warranted extension of the search and seizure provision of the Fourth Amendment has been a subject of much controversy.<sup>43</sup> With the case of *Hale v. Henkel*,<sup>44</sup> a new qualification was added to orders requiring the production of evidence. The case held that a subpoena issued by a grand jury investigating charges of violation of anti-trust laws was invalid as violating the Fourth Amendment when it made a blanket demand for all papers, letters, and documents relating to the relations of six companies. The ground of objection to the subpoena was that it was so indefinite and all inclusive as to amount to an unreasonable search for evidence.

Assuming the soundness of the doctrine of the above two cases, it would seem that little opportunity is afforded under the Federal Trade Commission Act for the application of the doctrine of the *Boyd* case because of the immunity provisions of the act.<sup>45</sup> The provision which is typical of such acts affords natural persons immunity from prosecution for offenses revealed by compulsory testimony. As to corporations it is well settled that they are not privileged against self-incriminating evidence.<sup>46</sup> Thus it would seem that there is little ground for objection on this score to compulsory testimony.

The most recent expression of the United States Supreme Court on the subject of administrative bodies utilizing court process to compel testimony is found in *Jones v. Securities and Exchange Comm.*<sup>47</sup> Here, as in prior cases discussed, the Court avoids a square holding upon the issue but the sharp clash between the majority and the minority opinions indicates the vital nature of the issues involved. In this case the Securities and Exchange Commission challenged the truth of a registration statement and notified the registrant to appear at a hearing some weeks later and show cause why a stop order should not issue suspending its effectiveness. Thereafter the commission's subpoena was served on the registrant commanding him to appear and testify and bring books and papers pertaining to the filed statement. The registrant then gave formal notice that his statement was withdrawn and submitted motions to quash the subpoena, which he declined to obey, and to dismiss the proceeding. The commission, however, persisted in the investigation and obtained from the district court an order requiring the registrant to appear and answer questions. A regulation of the commission provided that no statements filed could be withdrawn without consent of the commission once they were submitted. By declaring the commission's proceeding analogous to an equity proceeding for an injunction, the majority concludes that the registrant could withdraw his statement thus terminating the

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43. Atkinson, *Admissibility of Evidence Obtained Through Unreasonable Searches and Seizures* (1925) 25 COL. L. REV. 11; Comment (1927) 36 YALE L. J. 536.

44. 201 U. S. 43 (1906).

45. 38 STAT. 722 (1914), 15 U. S. C. § 49 (1926).

46. *Essgee Co. v. United States*, 262 U. S. 151 (1923).

47. 298 U. S. 1 (1936).

proceeding. After hurdling this point the Court easily insists that no basis remains after withdrawal for the commission continuing its investigation and thus the subpoena could not be enforced under the commissions alleged general powers of investigation. The majority cites with approval the cases of *Harri-man v. Interstate Commerce Comm.*,<sup>48</sup> *In re Pacific Ry. Comm.*,<sup>49</sup> *Federal Trade Comm. v. American Tobacco Co.*,<sup>50</sup> and *Boyd v. United States*,<sup>51</sup> and indicated that an investigation by the commission after withdrawal of the statement would amount to no more than a "fishing expedition." The majority seems much impressed with the danger of infringement upon constitutional rights involved in allowing such investigations but apparently takes little notice of the fact that protection of the investing public was the end in view.

Mr. Justice Cardozo speaking for the minority refuses to admit that the registrant can withdraw and thus avoid an investigation concerning a statement which he filed. Allowing such withdrawal would defeat the very purpose of the act and allow wrongdoers to excuse their own deceit, according to the minority composed of Justices Cardozo, Brandeis and Stone. Mr. Justice Cardozo in answering the dire warnings of the majority in regard to allowing the commission to carry on the investigation after the attempted withdrawal said,

"The opinion of the court reminds us of the dangers that wait upon the abuse of power by officialdom unchained. The warning is so fraught with truth that it can never be untimely. But timely too is the reminder, as a host of impoverished investors will be ready to attest, that there are dangers in untruths and half truths when certificates masquerading as securities pass current in the market. There are dangers in spreading a belief that untruths and half truths, designed to be passed on for the guidance of confiding buyers, are to be ranked as peccadillos, or even perhaps as part of the amenities of business. When wrongs such as these have been committed or attempted, they must be dragged to light and pilloried. To permit an offending registrant to stifle an inquiry by precipitate retreat on the eve of his exposure is to give immunity to guilt; to encourage falsehood and evasion; to invite the cunning and unscrupulous to gamble with detection. If withdrawal without leave may check investigation before securities have been issued, it may do as much thereafter, unless indeed consistency be thrown to the winds, for by teaching of the decision withdrawal without leave is equivalent to a stop order, with the result that forthwith there is nothing to investigate. The statute and its sanctions become the sport of clever knaves.

"Appeal is vaguely made to some constitutional immunity, whether express or implied is not stated with distinctness. It cannot be an immunity from the unreasonable search or seizure of papers or effects: the books and documents of the witness are unaffected by the challenged order. It cannot be an immunity from impertinent intrusion into matters of strictly personal concern: the intimacies of private business lose their self-regarding quality after they have been spread upon official records to induce official action. . . . If the immunity rests upon some express provision of the Constitution, the opinion of the court does not point us to the article or section. If its source is to be found in some impalpable essence, the spirit of the Constitution or the philosophy of government favored by the Fathers, one may take leave to deny that

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48. 211 U. S. 407 (1908).

49. 32 Fed. 241 (C. C. N. D. Cal. 1887).

50. 264 U. S. 298 (1924).

51. 116 U. S. 616 (1885).

there is anything in that philosophy or spirit whereby the signer of a statement filed with a regulatory body to induce official action is protected against inquiry into his own purpose to deceive. The argument for immunity lays hold of strange analogies. A Commission which is without coercive powers, which cannot arrest or amerce or imprison though a crime has been uncovered, or even punish for contempt, but can only inquire and report, the propriety of every question in the course of the inquiry being subject to the supervision of the ordinary courts of justice, is likened with denunciatory fervor to the Star Chamber of the Stuarts. Historians may find hyperbole in the sanguinary simile.

"The Rule now assailed was wisely conceived and lawfully adopted to foil the plans of knaves intent upon obscuring or suppressing the knowledge of their knavery."<sup>52</sup>

The above quotation clearly sets forth the two elements involved in this problem, namely, the need for information upon which to base sound administration of laws and enactment of legislation, weighed against the fear of invasion of constitutional rights. It is also notable to observe that Mr. Justice Cardozo has difficulty in seeing exactly what constitutional right the majority thinks would be invaded by such an investigation. This tendency is found in all cases on this subject, in that while most writers have assumed that from the indications of the court a "fishing expedition" "infringes upon the due process clause of the Fifth Amendment, yet the court has never squarely so held.

As to what the future trend will be in this field on the basis of cases like *Jones v. Securities and Exchange Comm.*, it is difficult to predict, but if government is to continue its present trend in regulation of business it is inconceivable that agencies can effectively function if they are to be dealt with in such an unsympathetic fashion by the courts.

H. L. LISLE, LL.B. '38.

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PROBATE PROCEEDINGS IN SEVERAL JURISDICTIONS AND THEIR EFFECT ON THE  
 VALIDITY OF THE WILL

Most courts hold as a matter of conflict of laws that the laws of the deceased's last domicile govern the descent of his personalty under a testamentary disposition.<sup>1</sup> As to realty, it is well settled that the law of the jurisdiction in which it is situated governs.<sup>2</sup> But the question still remains as to how this law is applied.

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52. *Jones v. Securities and Exchange Comm.*, 298 U. S. 1, 32, 33 (1935).

1. ATKINSON, *WILLS* (1937) § 177; Willett's Appeal, 50 Conn. 330 (1882); *In re Barney's Will*, 94 N. J. Eq. 392, 120 Atl. 513 (1923); *Kirkland v. Calhoun*, 147 Tenn. 388, 248 S. W. 302 (1922); *Jacobs v. Willis' Heirs*, 147 Tenn. 539, 249 S. W. 815 (1922).

2. Note (1921) 13 A. L. R. 498, 502; Carey, *A Suggested Fundamental Basis of Jurisdiction With Special Emphasis on Judicial Proceedings Affecting Decedents' Estates* (1929) 24 ILL. L. REV. 41; *Woodville v. Pizzati*, 119 Miss. 442, 81 So. 127 (1919); *In re Brandow's Estate*, 59 S. D. 364, 240 N. W. 323 (1932); *Kirkland v. Calhoun*, 147 Tenn. 388, 248 S. W. 302 (1922).

It is generally recognized that persons parties to prior adjudications in foreign jurisdictions are bound by them as a matter of *res adjudicata*.<sup>3</sup> In the case of *In re Barney*,<sup>4</sup> the court went so far as to hold the beneficiaries under a will in such privity with the executor that they were bound by prior foreign proceedings to which the executor was a party. This decision has been criticized and it has been pointed out that such a principle would require the legatees to prevent the will from being rejected in any state where the testator owned property.<sup>5</sup>

The federal courts do not interpret the full faith and credit clause of the Federal Constitution<sup>6</sup> as requiring the courts of one state to give conclusive effect to the prior decree of probate in another jurisdiction.<sup>7</sup> This is especially true where jurisdictional matters as the decision of domicile of the testator are involved.<sup>8</sup> It is interesting to notice that the Illinois Supreme Court has held<sup>9</sup> that legislation such as the Uniform Wills Act, Foreign Probated,<sup>10</sup> requiring recognition of foreign proceedings does not deprive any citizen of any right, privilege, or property without due process of law or abridge the privileges or immunities of citizens of various states.

Conflict often occurs between decisions of the courts of several states where two or more have admitted the will to domiciliary probate. There are three views as to the effect of a prior foreign decision of the testator's domicile upon probate in another state. The majority view is that a foreign decision of domicile does not preclude or affect the local court's decision as to property within the latter's jurisdiction.<sup>11</sup> The case of *Loewenthal v. Mandell*<sup>12</sup> illustrates this view. There the decedent lived in New York first, moving to Florida a number of years before his death. He possessed personal property in both states. His will was admitted to domiciliary probate in New York and then to ancillary probate in Florida. Then a contestant, who had appeared and consented to both previous proceedings, filed a petition in Florida, to set aside the ancillary probate there because the testator was a resident of Florida. It was held that the contestant was barred from protest because he was personally bound by previous proceedings. However, the court announced that other interested parties

3. Willett's Appeal, 50 Conn. 330 (1882); *Loewenthal v. Mandell*, 125 Fla. 685, 170 So. 169 (1936); *In re Crane's Estate*, 205 Mich. 673, 172 N. W. 584 (1919); *In re Fischer's Estate*, 118 N. J. Eq. 599, 180 Atl. 633 (1935).

4. 94 N. J. Eq. 392, 120 Atl. 513 (1923).

5. Note (1923) 33 YALE L. J. 103.

6. U. S. CONST. Art. 4, § 1.

7. *Blount v. Walker*, 134 U. S. 607 (1890); *Thormann v. Frame*, 176 U. S. 350 (1900).

8. *Tilt v. Kelsey*, 207 U. S. 43 (1907); *Burbank v. Ernst*, 232 U. S. 162 (1914); *Baker v. Baker, Eccles & Co.*, 242 U. S. 394 (1917).

9. *Pratt v. Hawley*, 297 Ill. 244, 130 N. E. 793 (1921).

10. 9 U. L. A. 423.

11. *Baker v. Baker, Eccles & Co.*, 242 U. S. 394 (1917); *Willett's Appeal*, 50 Conn. 330 (1882); *Colvin v. Jones*, 194 Mich. 670, 161 N. W. 847 (1917); *Richards v. Huff*, 146 Okla. 108, 293 Pac. 1028 (1930); *Holland v. Jackson*, 121 Tex. 1, 37 S. W. (2d) 726 (1931).

12. 125 Fla. 685, 170 So. 169 (1936).

not bound by prior proceedings could have the ancillary probate set aside because domiciliary proceedings must be had within the state if the testator was domiciled there. The court stated that the fact that it was decided in New York that the testator was domiciled there does not bar the Florida court from deciding he was domiciled within its jurisdiction.

The second view is found in a long line of Maryland decisions.<sup>13</sup> This state will recognize a foreign adjudication regarding the matter of domicile as binding and final. For example, in *Kurtz v. Kurtz' Estate*,<sup>14</sup> a Pennsylvania court admitted the testator's will to probate deciding he was domiciled within that state. A certified copy of the Pennsylvania proceedings was filed in Maryland as provided for by the Maryland statute<sup>15</sup> for filing foreign court proceedings. Upon this certified copy, ancillary probate was allowed. Then the testator's son petitioned to contest the will, alleging that the testator's residence was in Maryland and that therefore the former proceedings were void. The Maryland Court of Appeals held that it was without jurisdiction to determine domicile when the question had been decided by another state. The court based its decision on the full faith and credit clause of the Federal Constitution.

North Dakota adopts a position somewhat between the majority view and the Maryland view. In this state, a foreign court's decision that a testator was domiciled in its jurisdiction creates a rebuttable presumption that this is true. If the fact of domicile as decided by the foreign court is not questioned, its decision prevails. A leading case is *McEwen v. McEwen*,<sup>16</sup> wherein it was stated that although the place where the testator was domiciled at the time of death has exclusive original jurisdiction over the testator's will, yet, if the question of domicile is raised the foreign court's decision will only create a presumption which may be rebutted.

The effect of decisions in foreign states as to the validity of wills in relation to form and mode of execution, fraud, undue influence, testamentary character, and mental competency of the testator varies in different jurisdictions. *Shimshak v. Cox*<sup>17</sup> distinguishes between the effect of foreign probate on the validity of the will as to undue influence, fraud, testamentary character, and mental competency on the one hand and the validity of form and mode of execution on the other. In that case the testator died in Arkansas possessing realty in Louisiana. The will, which was made in Arkansas, was probated there. Then it was admitted to ancillary probate in Louisiana over the objections of heirs there although it was not executed in the form required by the Louisiana code.

13. *Stanley v. Safe Deposit and Trust Co.*, 87 Md. 450, 451, 40 Atl. 53 (1898); *Harding v. Schapiro*, 120 Md. 541, 87 Atl. 951 (1913); *Whiting v. Shipley*, 127 Md. 113, 118, 96 Atl. 285 (1915); Johns Hopkins University v. Uhrig, 145 Md. 114, 125 Atl. 606 (1924); *Pattison v. Firor*, 146 Md. 243, 126 Atl. 109 (1924).

14. 182 Atl. 456 (Md. 1936).

15. MARYLAND CODE (1924) art. 93, § 364.

16. 50 N. D. 662, 197 N. W. 862 (1924).

17. 166 La. 102, 116 So. 714 (1928).

The court held that a prior foreign probate was conclusive as to the validity of the form and mode of execution, but that it was not binding as concerns things other than execution unless the persons parties to the Louisiana proceedings were parties to the prior foreign suit. Thus third persons could show lack of testamentary character, mental capacity, fraud and undue influence. This distinction merely serves to complicate the problem. If the foreign proceeding deserves recognition as to validity of form and manner of execution, it should also be followed as to decisions on testamentary character and mental competency. The majority of courts in discussing the effect of foreign proceedings on the validity of the will do not make the distinction drawn by the Louisiana court.<sup>18</sup> However, the Uniform Wills Act, Foreign Executed,<sup>19</sup> provides that a will executed in the mode prescribed by laws either of the place where made or of the testator's domicile shall be deemed to be duly executed. This act does not provide specifically that the laws of the domicile or the place where made should govern as to testamentary character and mental competency or fraud and undue influence. It only states that those laws shall govern as to the mode of execution. The act was in force and involved in the *Shimshak* case and the court seemed to give weight to the act as one basis for drawing their distinction. But cases in other jurisdictions in which the act is in force do not follow this view.<sup>20</sup>

The Uniform Wills Act, Foreign Probated,<sup>21</sup> provides that a will duly allowed and admitted to probate outside of a state shall be allowed if upon a hearing by the proper court it appears that the will has been duly proved, allowed and admitted outside of the state. The effect of this is to let the foreign probate proceedings govern. The provision for a hearing by a local court to determine whether the will was duly admitted to probate under the laws of the foreign state gives the local court the only check upon the decisions of the foreign tribunals. This restraint has only been exercised to determine whether the will was duly admitted under the law of the foreign state and not to determine whether the law was such that a will probated under it should not be duly admitted.<sup>22</sup>

Where two states grant domiciliary probate, obviously the courts of one will not be bound by its sister state's decision as to the property within the court's own jurisdiction. Thus the second court may, as to property within its jurisdiction, differ from the first court's determination on the issues of execu-

18. *Robertson v. Pickrell*, 109 U. S. 608 (1883); *Morrison v. Hass*, 229 Mass. 514, 118 N. E. 893 (1918); *Garvey v. United States Fidelity and G. Co.*, 77 App. Div. 391, 79 N. Y. Supp. 337 (1st Dep't. 1902).

19. 9 U. L. A. 419. This act had been adopted by the following states at the end of 1929: Alaska, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Nevada, New York, Wisconsin, and the territory of Hawaii.

20. *Drohan v. Avellar*, 276 Mass. 441, 177 N. E. 583 (1931); *In re Marsland's Estate*, 142 Misc. 230, 254 N. Y. Supp. 293 (Surr. Ct. 1931); *In re Logasa's Estate*, 161 Misc. 774, 293 N. Y. Supp. 116 (Surr. Ct. 1937).

21. 9 U. L. A. 423. This act at the end of 1927 was adopted by Illinois, Louisiana, Nevada, Tennessee, and Wyoming.

22. *Sanders v. New Staunton Coal Co.*, 213 Ill. App. 493 (1919); *Terry v. Webb*, 159 Tenn. 642, 21 S. W. (2d) 622 (1929); *In re De Franceschi's Estate*, 17 Tenn. App. 673, 70 S. W. (2d) 513 (1933).

tion of the will, capacity of the testator, undue influence, and fraud.<sup>23</sup> As we have seen above, the situation where there are two domiciliary probates would be an impossibility in some jurisdictions because they would hold themselves bound by the earlier decision of the other state that the testator was domiciled therein.

A will may be admitted to ancillary probate in most jurisdictions even though it has not been probated at the domicile.<sup>24</sup> A minority have stated that they will not allow original probate unless the testator was domiciled within their jurisdiction.<sup>25</sup> New Jersey once took this position,<sup>26</sup> but by statute now allows ancillary probate even though there has been no domiciliary adjudication.<sup>27</sup> Some courts adopt the view that although ancillary proceedings can occur before domiciliary, they will await the establishment of the will in the testator's domicile unless a good reason for doing otherwise appears.<sup>28</sup> An example of the latter view is the case of *Payne v. Payne*.<sup>29</sup> There the court said that the general rule to be followed is that the validity of wills and the right of succession generally are to be determined by the courts of the state where the deceased had his last domicile, unless circumstances demand a different course of action to avoid loss, prevent justice, or subserve some substantial good. Just when circumstances are such as to require allowance of ancillary probate before domiciliary is apparently within the discretion of the court and the standard set is very indefinite. It is recognized by all courts whether they allow ancillary proceedings before domiciliary or not, that the primary place for probate of wills is at the domicile and that the normal order is domiciliary before ancillary.<sup>30</sup>

Where a testamentary document has been admitted to probate in one state before a decision as to its validity has been reached at the domicile, the ancillary proceeding as a general rule does not affect the decision as to the will's validity when it is presented for probate at the domicile.<sup>31</sup> However, there is a small

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23. *Baker v. Baker, Eccles & Co.*, 242 U. S. 394 (1917); *Loewenthal v. Mandell*, 125 Fla. 685, 170 So. 169 (1936); *Holland v. Jackson*, 121 Tex. 1, 37 S. W. (2d) 726 (1931).

24. *Higgins v. Eaton*, 202 Fed. 75 (C. C. A. 2d 1913); *State ex rel. Attorney General v. Wright*, 109 S. W. (2d) 123 (Ark. 1937); *Parnell v. Thompson*, 81 Kan. 119, 105 Pac. 502 (1909), 33 L. R. A. (N. S.) 658 (1911); *Knight v. Hollings*, 73 N. H. 495, 63 Atl. 38 (1906); *In re Clayson's Estate*, 26 Wash. 253, 66 Pac. 410 (1901).

25. *Davis v. Upson*, 230 Ill. 327, 82 N. E. 824 (1907), criticized in (1908) 2 ILL. L. REV. 605; *In re Corning's Estate*, 159 Mich. 474, 124 N. W. 514 (1910); *Read v. Baker*, 195 Wis. 128, 217 N. W. 709 (1928).

26. *In re Dodge's Will*, 104 Atl. 646 (N. J. 1918).

27. *New Jersey Public Laws* (1921) 831.

28. *In re Orrantia's Estate*, 36 Ariz. 311, 285 Pac. 266 (1930); *Davis v. Upson*, 230 Ill. 327, 82 N. E. 824 (1907); *Rackemann v. Taylor*, 204 Mass. 394, 90 N. E. 552 (1910).

29. 239 Ky. 99, 39 S. W. (2d) 205 (1931).

30. *Godwin v. Godwin*, 129 Ga. 67, 58 S. E. 652 (1907); *Shimshak v. Cox*, 166 La. 102, 116 So. 714 (1928); *Renwick v. Macomber*, 233 Mass. 530, 124 N. E. 670 (1919); *McEwen v. McEwen*, 50 N. D. 662, 197 N. W. 862 (1924); *Youngblood v. Rector*, 126 Okla. 210, 259 Pac. 579 (1927).

31. *Kerr v. Moon*, 22 U. S. 565 (1824); *In re Clark's Estate*, 148 Cal. 108, 82 Pac. 760 (1905); *Ives v. Salisbury's Heirs*, 56 Vt. 565 (1883); *Thrasher v. Ballard*, 33 W. Va. 285, 10 S. E. 411 (1889).



minority taking the opposite viewpoint. In the recent case of *State ex rel. Attorney-General v. Wright*,<sup>32</sup> prior ancillary probate in Texas was allowed to govern over domiciliary probate in Arkansas as to the validity which disposed of personalty of the will as to the question of fraud. This was put upon the basis of the full faith and credit clause of the Federal Constitution. In this case, the state of Arkansas which claimed the decedent's property through escheat was not a party to the prior proceedings and thus not personally bound by them. The fact that Arkansas had a statute<sup>33</sup> similar to that of Texas<sup>34</sup> providing for probate of a non-resident's will may have influenced the decision since this would make it appear that the policies of the two states in this respect were not antagonistic. Massachusetts has held a prior adjudication admitting a will to probate binding upon Massachusetts courts even though Massachusetts is the state of domicile.<sup>35</sup> Where a will is admitted to probate before there is a decision in the testator's domicile as to the will's validity, a subsequent refusal of probate at the domicile will not affect the ancillary proceeding.<sup>36</sup>

Where probate at the testator's domicile occurs first, most courts distinguish between the effect of the proceeding on the validity of the will as far as personalty is concerned and the effect on realty.<sup>37</sup> In so far as realty is involved, probate at the testator's domicile is not conclusive as to the validity of the will in other states.<sup>38</sup> This is based upon the theory that each state has as an incident to its common right of sovereignty the control over the land within its borders. As to personalty, most cases hold that the domiciliary decision is binding upon the subject of the validity of the will.<sup>39</sup> Although there are cases holding to the contrary they are in a distinct minority.<sup>40</sup>

Missouri courts hold that the law of the jurisdiction where realty is situated

32. 109 S. W. (2d) 123 (Ark. 1937).

33. CRAWFORD AND MOSES DIG. OF ARK. STAT. (1921) § 10511.

34. VERNON'S TEX. STAT. 1936, art. 3293, § 2.

35. Morrison v. Hass, 118 N. E. 893 (Mass. 1918).

36. Higgins v. Eaton, 202 Fed. 75 (C. C. A. 2d 1913); Milner v. Hoag, 182 App. Div. 524, 169 N. Y. Supp. 755 (2d Dep't 1918); Acklin v. Paschal, 48 Tex. 147 (1877).

37. Kirkland v. Calhoun, 147 Tenn. 388, 248 S. W. 302 (1922); Thrasher v. Ballard, 33 W. Va. 285, 10 S. E. 411 (1889); Wells, Fargo & Co. v. Walsh, 87 Wis. 67, 57 N. W. 969 (1894).

38. Note (1921) 13 A. L. R. 502; Robertson v. Pickrell, 109 U. S. 608 (1883); Dickey v. Vann, 81 Ala. 425, 8 So. 195 (1886); Lynch v. Miller, 54 Iowa 516, 6 N. W. 740 (1880); Shimshak v. Cox, 166 La. 102, 116 So. 714 (1928); Carpenter v. Bell, 96 Tenn. 294, 34 S. W. 209 (1896); Kirkland v. Calhoun, 147 Tenn. 388, 248 S. W. 302 (1922).

39. Evansville Ice and Cold Storage Co. v. Winsor, 148 Ind. 682, 48 N. E. 592 (1897); *In re Coppock's Estate*, 72 Mont. 431, 234 Pac. 258 (1925); Garvey v. United States Fidelity & G. Co., 77 App. Div. 391, 79 N. Y. Supp. 337 (1st Dep't 1902); Martin v. Stovall, 103 Tenn. 1, 52 S. W. 296 (1899); Kirkland v. Calhoun, 147 Tenn. 388, 248 S. W. 302 (1922); Ives v. Salisbury's Heirs, 56 Vt. 565 (1883); Thrasher v. Ballard, 33 W. Va. 285, 10 S. E. 411 (1889).

40. Jones v. Jones, 107 Ill. App. 464 (1903); Ewing v. Sneed, 5 J. J. Marsh. 459 (Ky. 1831); Crusoe v. Butler, 36 Miss. 150 (1858); Smith v. Neilson, 13 Lea 461 (Tenn. 1884).

governs the disposition of land by will.<sup>41</sup> Where personalty is involved, the law of the domicile is applied.<sup>42</sup> However, the probate of a will in a foreign state will not be held binding on Missouri courts as an adjudication of the validity of the will in so far as realty is involved on the basis that foreign courts do not have jurisdiction over land in Missouri.<sup>43</sup> This has been held not to contravene the full faith and credit clause of the Federal Constitution.<sup>44</sup>

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41. *Applegate v. Smith*, 31 Mo. 166 (1860); *Hines v. Hines*, 243 Mo. 480, 147 S. W. 774 (1912); *Fenderson v. Mo. Tie & Timber Co.*, 104 Mo. App. 290, 78 S. W. 819 (1904).

42. *White v. Greenway*, 303 Mo. 691, 263 S. W. 104 (1924).

43. *Keith v. Johnson*, 97 Mo. 223, 10 S. W. 597 (1888); *Emmons v. Gordon*, 140 Mo. 490, 41 S. W. 998 (1897); *Fenderson v. Missouri Tie and Timber Co.*, 104 Mo. App. 290, 78 S. W. 819 (1904).

44. *Hines v. Hines*, 243 Mo. 480, 147 S. W. 774 (1912).