NOTES AND COMMENTS

ADOPTION

WITHDRAWAL OF CONSENT

In March, 1943, an unmarried girl, 17 years of age, knowing that she was about to become a mother signed an agreement and consent to the child's adoption. One day after the birth of her child, she signed an acknowledgment of the consent. The child was born on May 5, 1943. Four days later, on May 9, 1943, the child was given to the adoptive parents. On May 10, 1943, the adoptive parents filed a petition for adoption. On July 3, 1943, petition was filed by the next friend of the natural mother asking the court to pass an order withdrawing the consent to the adoption. The district court held that the natural mother, as a matter of law, has the right to withdraw her consent without cause, before the final order of adoption. Upon appeal, the circuit court of appeals reversed and remanded the order, holding that "the natural mother, as a matter of law, does not have the right to withdraw her consent without cause." In re Adoption of of a Minor, 144 F. (2d) 644. (1944).

Adoption was not recognized at common law; but certain rights and duties accompanying the parent-child relationship[1] were enforced by the courts even in view of agreements to the contrary.[2] Later statutes recognized the legal status of adoption. Thus, statutes alone determine when the relation of parent and child ceases and in what respects it shall do so.[3] Statutes relating to adoption[4] have been uniformly held to be constitutional except when the statutes interfere with vested rights of the parents.[5] Courts in determining adoption cases have said that the interests of parent and child are controlling. Under diverse statutes, an adoption based upon a consent that has been withdrawn has been held void,[6] that a parent's consent may be withdrawn at any time before final order of adoption[7], even though the consent was in writing[8], and accompanied by transfer of the child[9]. Courts have protected parental rights even when the natural parent has abandoned the child.[10] However, where the interests of the child would require

1. Madden, Domestic Relations (1931) §§ 120-142.
2. Madden, Domestic Relations (1931) § 106.
3. State ex rel Van Cleve v. Froter,—Wash.—, 150 P.(2d) 391 (1943); In re Ziegler, 82 Misc. 346 (Surr. Ct. 1913), 143 N.Y.S. 562 (1913); aff'd 161 App. Div. 589 (Surr. Ct. 1914), 146 N.Y.S. 881 (1914).
4. 4 Vernier, American Family Laws (1936) 254-64.
5. In re Frost's Will, 182 N.Y.S. 559 (1920); aff'd 192 App. Div. 206 (1st ep't 1920); In re Hoods Estate, 206 Wis. 227, 239 N.W. 488 (1931); Sewall v. Roberts, 115 Mass, 262 (1874).
6. In re Nelms, 153 Wash. 242, 279 Pac. 748 (1929).
7. In re Andrews, 189 Minn. 85, 284 N.W. 657 (1933); In re Sunada, 31 Hawaii 328 (1930).
8. State v. Berdsley, 149 Minn. 35, 183 N.W. 956 (1921).
9. Hebhardt v. Anderson, 7 Pa. D.&C. 139 (1926).
10. Andrew's Adoption, 14 Pa. D.&C. 343 (1930).

it[11], statutes have deprived parents, without the parents' consent, of a child under certain circumstances[12]. Hence, in the past, emphasis has been placed upon the individual interests of the parents and the interests of the child.

The circuit court of appeals found that the District of Columbia Code[13] adopted a new and different public policy toward adoption, i.e., a change in emphasis from the parental interests to the social interests involved[14]—weight being given to the interests of the child in both cases. Thus, "The individual interests of parents which used to be the thing chiefly regarded has come to be almost the last thing regarded as compared with the interest of society and of the child."[15]

CONSTITUTIONAL LAW

The Original Package Doctrine

A manufacturer contracted to purchase raw materials from foreign and Filipino suppliers through the latter's American agents. The merchandise was identified with and appropriated to the purchase contract from the moment of shipment.[1] The merchandise was consigned to brokers and bankers, part on order, part on straight bills of lading, with instructions to notify the manufacturer;[2] it was cleared through customs in the consignee's name and then reconsigned to the manufacturer. While stored in original packages in a warehouse at the purchaser's factory pending use in the manufacturing process,

11. James v. Williams, 169 Tenn. 41, 82 S.W. (2d) 541 (1935); In re Clough, 28 Ariz. 204, 236 Pac. 700 (1925).
12. Abandoument. Adoption of McGill, 49 Pa. D.&C. 374 (1943); Petition of Elkendahl, 321 Ill. App. 457, 53 N.E. (2d) 302 (1943); Purinton v. Jamrock, 195 Mass. 187, 80 N.E. 802 (1907). Drunkenness. Stearns v. Allen, 183 Mass. 404, 67 N.E. 349 (1903).
13. D.C. Code, (1940) tit. 16, c.II, §§16-201 to 16-207.
14. In its reasoning as to the legislative policy the court stated, " '***It goes without saying that such people (illegitimate) are more apt to become a burden upon organized society than cooperating members of it.' Mangold, "Children Born out of Wedlock" (1921) 131." p. 651 n. " 'The number of children who are housed in asylums or boarded out at the expense of the public is evidence enough of the problem and of the need.' Information supplied by the Board of Public Welfare of the District of Columbia." p. 650. "It was with all these considerations in mind that congress repealed the old statute and enacted a new one for the District of Columbia***." 6. 650.
15. Pound, "The Spirit of the Common Law" (1921) 189.

1. Ground given in distinguishing Waring v. City of Mobile, 8 Wall. 122 (U.S. 1868) (consignee held to be the importer). See principal case at 876 n. 4.
2. 46 Stat. 721 (1930), 19 U.S.C.A. § 1483 (1) (1934) provides that merchandise imported into the United States "shall be held to be the property of the person to whom the same is consigned." The court did "not deem this provision to be significant." Principal case, at 876 n. 3. " . . . the Constitution gives Congress authority . . . to lay down its own test for determining when the immunity ends." Id. at 878. The Board of Tax Appeals considered the provision. Hooven & Allison Co. v. Evatt, 26 Ohio O. 25 (1943).

the goods were assessed for a nondiscriminatory state ad valorem property tax. The levy was protested under U.S. Const. Art. 1, § 10, cl. 2. State Board of Tax Appeals denied review.[3] State Supreme Court affirmed.[4] Certiorari granted. Held: Imports[5] for manufacture are constitutionally immune from state taxation when "held by the importer[6] in the original packages and before they are subjected to the manufacture for which they were imported."[7] Dissent: Imports for use of the importer are not constitutionally exempt from state taxation "after they have reached the end of their import journey."[8] HOOVEN & ALLISON CO. v. EVATT, Tax Commr., 65 Sup. Ct. 870 (1945).

3. Hooven & Allison Co. v. Evatt, Board of Tax Appeals 26 Ohio O. 25 (1943).
4. Hooven & Allison Co. v. Evatt, 142 Ohio St. 235, 51 N.E. (2d) 723 (1943) (decision on theory that sale occurred after imports arrived or, that at least goods were so incorporated with mass of property of state as to destroy immunity) relying on Waring v. City of Mobile, 8 Wall. 122 (U.S. 1868).
5. "Imports are articles brought into the United States from without the country," i.e. a place not "organized by and under the Constitution." Principal case at 879, 880, 881. The definition of "country" is an application of the doctrines of "incorporation" developed by Justice White in Downs v. Bidwell, 182 U.S. 244 (1900) to rationalize exceptions in the Insular Cases. See Burgess, "The Decisions in the Insular Cases" (1901) 16 Pol. Sci. Q. 486; Coudert, "The Evolution of the Doctrine of Territorial Incorporation" (1926) 40 Am. L. School Rev. 801; Swisher, "American Constitutional Development" (1943) 474-482. Under this definition, articles brought from the Philippines were held to be imports. But see Justice Reed, principal case at 886, defining an import as "an article brought from beyond the sovereignty or jurisdiction of the United States." Query: Is it logically defensible to say that there may be an import from a country to which there cannot be an export? Cf. Dooley v. United States, 182 U.S. 222, 234 (1901).
6. An importer is the person who "is the efficient cause of the importation." Principal case at 876. Under this definition, "the time when the title passes . . . is immaterial." Ibid. Similarly, immaterial in determining where interstate commerce ends. East Ohio Gas Co. v. Tax Commission, 283 U.S. 465 (1930); National Labor Relations Bd. v. Fainblatt, 306 U.S. 601 (1937).
7. Principal case at 877, 878. On the difficulties inherent in the conjunctive test see dissent by Justice Black, principal case at 889. Cf. termination of interstate commerce under a test of "the purpose for which it was imported." General R. Signal Co. v. Virginia, 246 U.S. 500 (1917).
8. Principal case at 888. Justices Black, Rutledge dissenting; Justices Douglas and Murphy joining in the dissent on this point. The suggested test would apply the rule in Brown v. Houston, 114 U.S. 622 (1885), to foreign imports.

   Both the majority and the dissenting opinions purport to be grounded on the rule in Brown v. Maryland, 12 Wheat. 419 (U.S. 1827). See principal case, Justice Stone at 878; Justice Black at 887-888. It is to be noted that further support for Justice Black's contention that his dissent is in accord with Brown v. Maryland supra found that case at 446; "Sale is the object of importation, and is an essential ingredient of that intercourse of which importation constitutes a part. It is as essential an ingredient, as indispensable

U.S. Const. Art. 1 § 10, cl. 2 provides that "No state shall, without consent of Congress,[9] lay any imposts or duties[10] on imports or exports,[11] except what may be absolutely necessary for executing its inspection laws."[12] So long as articles retain their "character as imports, a tax upon them, in any shape, is within the constitutional

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to the existence of the entire thing, then, as importation itself." See also id. at 448. It is suggested that the emphasis throughout Justice Marshall's opinion is not upon whether the goods were in the original package, nor yet whether they had lost their distinctive character as imports, but whether an act had occurred on the part of the importer by which "it has become incorporated and mixed up with the mass of the property in the country." Id. at 441. Importations were made for the sake of the sale, but the importer might instead keep the article for his own use. The immunity did not continue after the intent to use became manifest. Breaking the package was evidence of the intent to convert to his own use; use by the importer was an alternate evidence that the protected privilege of sale was not going to be exercised. The "character as an import" as the determining factor was apparently developed by Justice Field in Low. v. Austin, 13 Wall. 29, 34 (U.S. 1871) and Welton v. Missouri, 91 U.S. 275 (U.S. 1875). Cf. Kallenbach, "Federal Cooperation with the States Under the Commerce Clause" (1942) 52-60; Sharp, "Movement in Supreme Court Adjudication—A Study of Modified and Overruled Decisions" (1933) 46 Harv. L. Rev. 593, esp. 604-610.

9. Madison moved to make the prohibition absolute on the ground that if " . . . the States interested in this power by which they could tax imports of their neighbors passing thro' their markets, were a majority, could get consent," it "would revive all the mischiefs experienced from the want of a General government over commerce." Documents of the Formation of the Union of the American States, H.R.Doc. No. 398, 69th Cong., 1st Sess. (1927) 629-631. Also, Warren, "The Making of the Constitution" (1928) 557-559.

   Congressional consent never expressly given. See De Bary and Co. v. Louisiana, 227 U.S. 108 (1913) (consent to impose license tax on dealers selling imported wines implied from the Webb-Kenyon Act).

10. "In the Constitutional Convention, there was question of the meanings of 'duties,' 'imports'. and 'excises'." The question was not answered. Norton, "The Constitution of the United States: Its Sources and Its Application" (6th ed. 1943) 43-47.

    Duties, imposts, and excises have in the constitution been used in antithesis to direct taxes. U.S. Const. Art. 1, § 8, cl. 1 and § 9, cl. 4. All property taxes are at present held to be direct taxes. Pollock v. Farmers' L. & T. Co., 157 U.S. 601 (1895). See note 13 infra.

11. Justice Marshall "supposed the principles . . . to apply equally to importations from a sister State." Brown v. Maryland, 12 Wheat. 419, 441 (U.S. 1827). Overruled in Woodruff v. Parham, 8 Wall. 123 (U.S. 1868) inapplicable to imports from another state).

12. 28 Am. Jur. 850, "Inspection Laws" § 2. Invalid where fee imposed is excessive. D. E. Foote & Co. v. Stanley, 232 U.S. 494 (1914). Whether charge is excessive is a Congressional question. Neilson v. Garza, 17 Fed. Cas. 1302 No. 10,091 (E.D. Tex. 1876), approved Patopsio Guano Co. v. North Carolina Bd. of Agriculture, 171 U.S. 345 (1898).

prohibition."[13] Thus, the original package doctrine[14] was developed as a test of the "point of time when the prohibition ceases, and the power of the state to tax commences."[15] Early decisions restricted the doctrine to foreign commerce and the imports-and-exports clause,[16] after developing the relation of the commerce clause to state taxation,[17] the Court extended the doctrine to interstate commerce.[18]

The application of the original package rule under the imports-and-exports clause and the commerce clause is not uniform.[19] Substantially, two rules exist: both operate to render invalid state taxation of the privilege of selling imported goods while they are in the hands of the importer and in the original packages.[29] Under the

13. Low v. Austin, 13 Wall. 29, 34 (U.S. 1871); Willicuts v. Bunn, 282 U.S. 216 (1930), 71 A.L.R. 1260, 1268 (1931) E.g.: Property tax on article, Webber v. Virginia, 103 U.S. 344 (1880). License tax on importer, Anglo-Chilean Nitrate Sales Corp. v. Alabama, 288 U.S. 218 (1933); Brown v. Maryland, 12 Wheat. 419 (U.S. 1827). Occupation tax on auctioneer measured by commissions on sales of imports, Cook v. Pennsylvania, 97 U.S. 566 (1878). Stamp tax on bill of lading for goods, see Almy v. California, 24 How. 169, 174 (U.S. 1860). Fine for unlawful possession, People v. Buffalo Fish Co., Ltd., 62 N.Y.S. 543 (1899), 164 N.Y. 93, 58 N.E. 34 (1900).

14. Original packages consist of the boxes, cases, or bales in which the goods are shipped and not the smaller packages therein contained. May v. New Orleans, 178 U.S. 496 (1900); Mexican Petroleum Corp. v. South Portland, 121 Me. 128, 115 Atl. 900 (1922), 26 A.L.R. 965, 971 (1923).

"According to the celebrated original package doctrine . . . importation is not over so long as the goods are in the original package. Hence, a state has no power to tax imports until the original package is broken or there has been one sale while the goods are still in the original package." Willis, "Constitutional Law of the United States" (1936) 268-269. See statement of the rule in Low v. Austin, 13 Wall. 29, at 34 (U.S. 1871). Or one sale, introduced in Watring v. The Mayor, 8 Wall. 110 (U.S. (1868).

15. Brown v. Maryland, 12 Wheat. 419, at 441 (U.S. 1827). Marshall insisted that the prohibitory clauses had reference to taxing power of states and not to their power to regulate commerce. Gibbons v. Ogden, 9 Wheat. 1, at 198 (U.S. 1824). Willis, "Gibbons v. Ogden, Then and Now" (1940) 28 Ky. L. J. 280. Both the commerce clause and the imports-and-exports clause determined the decision in Brown v. Maryland, supra at 448.

16. Woodruff v. Parham, & Wall. 123 (U.S. 1868). Note 11 supra.

17. License Cases, 5 How. 504 (U.S. 1847); Woodruff v. Parham, 8 Wall 123 (U.S. 1868); Hinson v. Lott, 8 Wall. 148 (U.S. 1868). It is suggested that the holding in Woodruff v. Parham, supra in so far as it overruled Marshall's definition of imports, began the divergence in the original-package rules between interstate and foreign commerce.

18. Austin v. Tenn., 179 U.S. 343 (1900); Leisy and Co. v. Hardin, 135 U.S. 100 (1890). For the relation of the extension to the development of the police power of the states see Grant, "State Power to Prohibit Interstate Commerce" (1937) 26 Calif. L. Rev. 34.

19. Dowling and Hubbard, "Divesting an Article of Its Interstate Character" (1921) 5 Minn. L. Rev. 100, 253. E.g. property, use,

commerce clause state property taxation of goods imported from another state is valid if the goods have reached their destination or are at rest, whether in the original package or not, unless the tax discriminates against the goods solely because of their origin or otherwise burdens interstate commerce.[21] Under the imports-and-exports clause not even a property tax can be levied on goods imported from outside the country so long as they remain in the original packages and are in the hands of the importer.[22] Even under the imports-and-exports clause, the original package doctrine obviously is inapplicable to certain kinds of property.[23] In such cases, the determining factor in deciding whether the property has lost its status as an import appears to be "whether it has become mingled with other property in the state."[24]

The difference has been rationalized as the resultant of an absolute tax prohibition as opposed to a prohibition against regulation effected through taxation.[25] The dissenting opinion, by implication, construes the imports-and-exports clause as another recurrence to the national prerogative to regulate foreign commerce contained in the commerce clause.[26] Accordingly, a substantive test for the termina-

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and sales taxes. Brown, "Federal and State Taxation" (1933) 81 U. of Pa. L. Rev. 247.

20. Louis K. Liggett Co. v. Lee, 288 U.S. 517 (1932), 85 A.L.R. 699, 735 (1933) (interstate); Anglo-Chilean Nitrate Sales Corp. v. Alabama, 288 U.S. 218 (1933) (foreign).

22. Brown v. Houston, 114 U.S. 622 (1885); Wiloil Corp. v. Pennsylvania, 294 U.S. 169 (1934); Edelman v. Boeing Air Transport, 289 U.S. 249 (1932). The fact that a state tax is nondiscriminatory and general in its operation does not save it from being declared invalid if it directly burdens interstate commerce. See J. D. Adams Mfg. Co. v. Storen, 304 U.S. 307, 117 A.L.R. 429, 444 (1938).

22. May v. New Orleans, 178 U.S. 496 (1900).

23. E.g. timber, cattle, oil, gas. Trickett, "The Original Package Ineptitude" (1917) 22 Dick L. Rev. 63; Foster, "What is Left of the Original Package Doctrine?" (1916) 1 So. L. Q. 303.

24. Cf. Marsball's test cited supra note 8. Tres Titos Ranch Co. v. Abbott, 44 N. M. 556, 105 P(2d) 1070 (1940), 130 A.L.R. 963, 969 (1941).

25. "The distinction is that the immunity attaches to the import itself before sale, while the immunity in case of an article, because of its relation to interstate commerce depends on the question whether the tax challenged regulates or burdens interstate commerce." Sonneborn Bros. v. Cureton, 262 U.S. 506, at 508 (1922); American Steel and Wire Co. v. Speed, 192 U.S. 500 (1903); Baldwin v. G. A. Seelig, 294 U.S. 511 (1935), 101 A.L.R. 55, 64 (1936). Cf. Marshall's position, supra note 15. The act of laying and collecting taxes, duties, imposts and excise is an exercise of the taxing power and not of the power to regulate commerce. Cox v. Lott (State Tonnage Tax Cases), 12 Wall. 204 (U.S. 1870). It is submitted that this identification with the taxing power is the result of the struggle to harmonize the commerce clause and the taxing power. See arguments of cases cited supra note 16.

26. Principal case at 888. Cf: "The power is buttressed by the express provision of the Constitution denying the States authority to lay imposts and duties on imports and exports." University

tion of the tax immunity would consider the effect of the tax upon foreign commerce[27] rather than an immunity intrinsic to an article because of its form as an original package. The reason for two original package rules ceases to exist.

A novel feature of the instant decision is the recognition of the immunity of an import for manufacture in the hands of the ultimate consumer.[28] The rule was laid down in relation to imports for sale,[29] justified on the theory that the person who paid the duties purchased a tax-immune privilege to sell.[30] It was not intended that the importer who brought in goods "for his own use" should thereby be enabled to "retain much valuable property exempt from taxation."[31] Since 1827, the purpose of importation has changed as a concomitant of the shift from an agricultural to an industrial society.[32] Present business practices leave the bulk of imports in the hands of importers

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of Illinois v. United States, 289 U.S. 48, at 56 (1932); " . . . the taxing power is a distinct power; that . . . is distinct from the power to regulate commerce." Id. at 58; " . . . the judicial department may not attempt in its own conception of policy to distribute the duties thus fixed by allocating some of them to the exercise of the admitted power to regulate commerce and others to an independent exercise of the taxing power." Id. at 58. See also, Abel, "The Commerce Clause in the Constitutional Convention and in Contemporary Comment" (1941) 25 Minn. L. Rev. 432; Gavit, "The Commerce Clause of the United States Constitution" (1932) Appendix A; Kallenbach, op. ct. supra note 8, 377; and supra note 9.

27. E.g. "whether the tax challenged regulates or burdens (foreign) commerce." See again note 25 supra.
The majority opinion professes concern for "matters of substance not of form" and recognizes that the "extent of . . . immunity from state taxation turns on the essential nature of the transaction; considered in the light of the constitutional purpose, and not on . . . formalities . . . " Principal case at 876. See, however, the basis given for regarding the presence of original wrappings as substance rather than form. Id. 877.

27. See principal case, Stone at 875-876; Black at 887-888. It is obviously impossible to determine to what extent tax assessors have treated the two types of imports uniformly. The practice which has prevailed will determine the immediate effect of the instant decision.

29. Brown v. Maryland, 12 Wheat. 419, at 441 (U.S. 1827).

30. Id. at 443; Low v. Austin, 13 Wall. 29 (U.S. 1871); Coe v. Errol, 116 U.S. 517 (1885).

31. Brown v. Maryland, 12 Wheat. 419, at 422 (U.S. 1827). See note 7 supra.

32. In 1830, 72.4% of the imports were manufactured articles; In 1940, 72.9% of the total imports were crudes or semi-manufactures. Figures based on Table 588, "Statistical Abstract of U.S." H.R. Doc. No. 411, 77th Cong. 1st Sess. (1941) 533. For comparable changes in value of imports, see id. Tables 569, 589. It is of interest that imports for manufacture totalling $1,853,513,000, in 1939, constituted only 5% in value of the raw materials used in manufacturing. Figures based on Census reports of Chief American Manufactures, 1939, quoted in "The World Almanac, 1942" (1942) 285-287.

for manufacture.[33] The original justification for the rule was based on a consideration of the commercial nature of the transaction and the effect of the tax upon commerce.[34] The justification is, however, not logically applicable to imports for manufacture. The dissenting opinion repudiates the extension.[35] It is submitted that an extension in this case is to make the test of an original package "an ultimate principle[36] and that the balancing of the interest of the states in revenue[37] with the tax immunity granted under the imports-and-exports clause is best achieved by resort to a substantive rather than to a formal test for the duration of the immunity.

CONSTITUTIONAL LAW

STATE REGULATION AND ENCLAVED FEDERAL TERRITORY

Army officers on a military reservation within the boundaries of a dry state forwarded orders for liquor through a club secretary to an outstate dealer. While in transit by common carrier under a uniform bill of lading, the shipment was seized by state officers for confiscation and destruction under the Oklahoma Permit Law.[1] A state law made

33. E.g. less than 1/10 of 1% of the Hooven & Allison Co. purchases of imports were spot purchases. Hooven & Allison Co. v. Evatt, Tax Commr., 142 Ohio St. 235, 237 (1943).

34. See arguments developed in cases cited note 30 supra. Notice the preservation of protection for the privilege of selling as retained in the commerce clause under other tests. See citations note 10 supra.

35. Principal case at 888.

36. Cf. " . . . the test of the original package is not an ultimate principle. It is an illustration of a principle . . . What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation." Baldwin v. G.A.F. Seelig, 294 U.S. 511, at 526-527 (1935) (interstate commerce).

37. The total revenue from real and personal property taxes in 1941 was 4 billion, 5 million; the states' share being 250 million and the remainder going to political subdivisions. "Statistical Abstract for 1943" (1943) 282. Estimated at an average of state ad valorem tax rates of 6 mills to the dollar, $15,263,936 taxes would have accrued to the states in 1940 had the rule been enforced in accord with the minority opinion.

A possible solution of the definition of the termination of the immunity of an import lies in legislation along the line of the Wisconsin exemption of "merchandise placed in storage in original package in a commercial storage warehouse or public wharf." Wis. State (1943) tit. X, c. 70 § 11(37). See also C.C.H. "State Tax Guide Service" (1941) ¶ 52-000.

1. Okla. Stat. Ann. (1941) tit. 37§ 41-48.

Amendment XXI, § 2, gives a dry state the power to forbid all importation of intoxicating liquor into the state or to adopt a lesser degree of regulation than total prohibition. State Board of Equalization v. Young's Market Co., 299 U.S. 59 (1936); Mahoney v. Joseph Triner Corp., 304, U.S. 401 (1937). A state may also require a permit for the transportation of intoxicants in interstate commerce through the state as a means of establishing the identity of transporters, their routes and points of destination and of enabling local officers to take appropriate

possession of intoxicants for personal use received from a common carrier unlawful.[2] The Federal Assimilative Crimes Act adopts the penal laws of a state, in so far as such laws have not displaced by specific acts of Congress, as the governing federal law for enforcement in federal areas.[3] A Federal Court granted injunctive relief to compel the officials to return the liquor and to refrain from interfering with the delivery.[4] Certiorari granted. Held: that carrier acted in good faith and neither the United States, the War Department, nor army officers were represented in litigation, and relief will not be denied on theory that federal laws may in consequence be violated.[5] Dissent: a violation of a police regulation ought not to be furthered by a federal court.[6] Johnson v. Yellow Cab Transit Co., 64 Sup. Ct. 622 (1944).

The Assimilative Crimes Act[7] provides that "whoever, within the

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measures to insure transportation without diversion. Duckworth v. Arkansas, 314 U.S. 390, 396; 138 A.L.R. 1144 (1941).

The Oklahoma statute, enacted to secure the benefit of the Federal Liquor Enforcement Act of 1936 (49 Stat. 877 § 202(b), 27 U.S.C.A. 9 § 221), was identical in wording with the Arkansas statute. Cf. State of Arkansas v. Duckworth, 201 Ark. 1123, 148 S.W. (2d) 656 (1941). Compare principal case at 624.

30 Am. Jud. "Intoxicating Liquors," 383 §§ 232, 239 et seq.; 15 C.J.S. "Commerce," § 99, note 27 at 452.

2. Okla. Stat. Ann. (1941) tit. 37 39 (enacted 1917; actively enforced for more than twenty-five years; constitutionality unquestioned in state courts). The Federal Court held this statute unconstitutional. Johnson v. Yellow Cab Company, 137 F. (2d) 274, 277 (C.C.A. 10th, 1943). Compare principal case: majority opinion at 627, dissenting opinion at 629. Cf. Commission of Texas et al. v. Pullman Co. et al., 312 U.S. 496 (1941).

3. 54 Stat. 304 (1940), 18 U.S.C.A. § 451 and 54 Stat. 234 (1940,, 18. U.S.C.A. § 468; Cr. Code §§ 272 and 289; carried as § 857 of 1940 Supplement to the Military Laws of the United States.

4. Yellow Cab Company v. Johnson, 48 F. Supp. 594 (1943). Decision on the ground that a state has no power to forbid an interstate commerce shipment of intoxicants through its territory; assimilative crimes problem sidestepped. Equitable grounds for granting relief to carrier found under rule in Louisville & Nashville R.R. Co. v. Cook Brewing Co., 223 U.S. 70 (1911).

5. Justice Black: "Considering the difficulty and importance of a correct decision of the novel issues which an attempt to construe this federal statute would present . . . we are convinced that in the interests of the sound administration of justice we should refrain from a complete exploration of these issues in this proceeding, especially since these issues are only collateral," principal case at 626.

6. Justices Frankfurter and Roberts dissenting. The reasoning of the dissent proceeded: Oklahoma statutes make delivery and receipt of intoxicants for personal use as a beverage a crime if the delivery is made in Oklahoma; the Assimilative Crimes Act had made the same acts Federal crimes in the Fort Sill area; the liquor would be illegal and contraband at its point of destination; and an equity court should not aid the accomplishment of illegal acts. See also, dissenting opinion of Circuit Court Judge Murrah. Johnson v. Yellow Cab Co., 137 F. (2d) 274 (C.C.A. 10th, 1943).

7. Constitutionality upheld. Franklin v. United States, 516 U.S. 559 (1910).

territorial limits of a state, within or upon any lands reserved,[8] or acquired[9] for the use of the United States and under the exclusive[10] or concurrent[11] jurisdiction thereof, shall do any act or thing which is not made penal by any act of Congress,[12] but which if committed within the jurisdiction of the state, by the laws in force on" the date mentioned in the Act,[13] "would be penal, shall be deemed guilty of a like offense and subject to a like punishment."[14] By adoption, state penal laws become federal laws in force in the designated places[15] and are not enforceable by the state.[16]

From the history[17] of this act, which has been in effect for more than a century, it will be seen that its purpose was to satisfy a lack of a comprehensive Federal Criminal Code.[18] There are no common law offenses against the United States and the criminal jurisdiction of the United States is derived exclusively from specific statutes.[19]

8. United States v. Pelican, 232 U.S. 442 (1914).
9. Does not apply to purchase at tax sale without consent of state. United States v. Peun, 48 Fed. 669 (C.C.E.D.Va. 1880); after-acquired legislative consent sufficient. United States v. Tucker, 122 Fed. 518 (W.D. Ky. 1903).
10. Const. art. 1, § 8, cl. 17 gives Congress power to "exercise exclusive legislation in all cases whatsoever over . . . all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings." "Other needful buildings" construed to include: custom house, Sharon v. Hill, 24 Fed. 726 (C.C. Cal. 1885); post office, Battle v. United States, 209 U.S. 36 (1907). "Forts" to include: navy yard, United States v. Dolan, 25 Fed. Cas. 887, No. 14,978 (E.D. N.Y. 1865).
11. Whether the national government acquired exclusive jurisdiction depends upon terms of the state legislature's consent or cession. Bowen v. Johnston, 306 U.S. 19 (1939).
12. Query: Must the local law be consistent with Federal policy? The cases have not dealt with this question. Relative to local civil laws, it has been said, "local law not inconsistent with Federal Policy remains in force, until altered by national legislation." James Stewart & Co., Inc. v. Sadrakula, 309 U.S. 94 (1940).
13. United States v. Paul, 6 Pet. 141 (N.Y. 1832); United States v. Barney, 24 Fed. Cas. 1011, No. 14,524 (S.D. N.Y. 1866).
14. United States v. Coppersmith, 4 Fed. 198 (W.D. Tenn. 1880).
15. Sharon v. Hill, 24 Fed. 726 (C.C. Cal. 1885).
16. Washington P. & C. Ry. Co. v. Magruder, 198 Fed. 218 (D.C. Md. 1912); People of Puerto Rico v. Shell Company, 302 U.S. 253 (1937).
17. The forerunner of the instant statute was the act of March 3, 1825, Chap. 65, 4 Stats. 115. Justice Story was the author. 1 Warren, "The Supreme Court in United States History" 440-443; 1 Gales and Seaton, "Debates in Congress, 1824-1825" 154, 157, 165, 168, 335, 338.
18. "This is the most important section of the whole bill. The Criminal Code of the United States is singularly defective and inefficient. . . . Few, very few, of the practical crimes (if I may so say) are punishable by statutes, and if the courts have no general common-law jurisdiction (which is a vexed question), they are wholly dispunishable. . . . Rapes, arsons, batteries, and a host of other crimes may in these places be now committed with impunity." 1 Story, "Life of Justice Story" (1851) 293.
19. See United States v. Britton, 108 U.S. 199 (1882).

The coverage of the Federal Criminal Code is comparatively meager.[20] Congress could have enacted a comprehensive Federal Code to cover all Federal areas without reference to the state in which they were enclaved.[21] Congress chose rather to refer to the penal laws of the state in which the different Federal areas were enclaved as the source for the governing law. The choice was made with regard for state autonomy.[22]

There is a dearth of authority, both in the decisions[23] and in scholarly comment, upon the scope of the Assimilative Crimes Act. It has been held applicable to the "ordinary crimes."[24] It has, directly or by implication, been held inapplicable to "police regulations."[25]

By implication, the majority opinion limits the statute to crimes "involving moral turpitude." The effect of such an interpretation is to make wholly dispunishable certain acts contrary to the public policy of the state in which the federal area is enclaved. Nonenforcement of police regulations in the numerous federal areas[26] within a state would inevitably course backwards to play a part in undermining the policy declared essential by the state. The dissenting opinion supports the application of the statute to "police regulations." It is submitted

20. See United States v. Press Publishing Company, 219 U.S. 1 (1911);
21. Express power given in Const. Art. 1 § 8, cl. 17.
22. 1 Gales and Seaton, "Debates in Congress, 1824-1825" 154 ff.; See United States v. Press Publishing Company, 219 U.S. 1 (1911); James Stewart & Co., Inc. v. Sadrakula, 309 U.S. 94 (1940).
23. See United States v. Press Publishing Company, 219 U.S. 1 (1911); principal case at 626.
24. Assault, State v. Morris, 76 N.J. 222, 68 Atl. 1103 (1908); assault with intent to kill, United States v. Dolan, 25 Fed. Cas. 887, No. 14,978 (E.D. N.Y. 1865); murder, United States v. Andem, 158 Fed. 996 (D.C. N.J. 1908); rape, United States v. Partello, 48 Fed. 670 (C.C. Mont. 1891); adultery, Southern Surety Co. v. State, 34 Okl. 781, 127 Pac. 409 (1912) aff. 241 U.S. 582 (1916); libel and slander, United States v. Press Publishing Co., 219 U.S. 1 (1911); larceny, United States v. Davis, 25 Fed. Cas. 781, No. 14,930 (C.C. Mass. 1829) false pretenses, Biddle v. United States, 156 Fed. 759 (C.C.A. 9th, 1907); embezzlement, United States v. Franklin, 154 Fed. 163 (C.C.S.D. N.Y. 1909), writ or error dis., Franklin v. United States, 216 U.S. 559 (1910).
25. Regulations for shipping vessels, Mitchell v. Tibbetts, 17 Pick 298 (Mass. 1835); regulations for delivery of telegram messages, Western Union Tel. Co. v. Chiles, 214 U.S. 274 (1909); standards for milk, Pacific Coast Dairy, Inc. v. Dept. of Agriculture of California, 318 U.S. 285 (1943) (by implication); prohibitory liquor statutes, Collins et al. v. Yosemite Park & Curry Co., 304 U.S. 518 (1938) (by implication), Crater Lake National Park Co. v. Oregon Liquor Control Commission, 26 F. Supp. 363 (D.C. Ore. 1939).
26. The significance of the problem is indicated by the fact that, according to the recent Byrd report, one-fifth of the area of the United States is now held as Federal land. E.g. National Parks, military reservations, national forests, unappropriated public lands, public buildings, dams, post offices, defense projects, etc. The Assimilative Crimes Act is, if literally applied, applicable to all such areas. It must be noted, however, that the principal case is not a decision construing this statute. See principal case at 626.

that "so long as there is no over-riding national purpose to be served, nothing is gained by making federal enclaves thorns in the sides of the States and barriers to the effective state-wide performance"[27] of the police policy of the state.[28]

Two solutions exist: (1) construe the Assimilative Crimes Act to include "police regulations," or (2) cede jurisdiction to the state. It is suggested that Congress might desirably cede jurisdiction to the State for enforcement of police regulations within Federal areas.[29]

CRIMINAL LAW

SELF INCRIMINATION

Defendant petitioner, Samuel Feldman, was convicted under a federal statute[1] of fraudulently "kiting" checks through the mails. Conviction affirmed.[2] Certiorari to determine whether the forced admission in a federal court, of testimony previously given by him in supplementary proceedings in a state court,[3] deprived him of the protection of the fifth Amendment.[4] Held: affirmed. The admission of testimony in the federal court, previously given by the accused in the

27. Judge Murphy in dissent, continued, "Indeed both the federal government and the nation as a whole suffer if the solution of legitimate matters of local concern is thus thwarted and local animosity is created for no purpose." Pacific Coast Dairy, Inc. v. Dept. of Agriculture of California, 318 U.S., 285, 305 (1943). In a concurring dissent, Judge Frankfurter said, "Enough has been said to show that the doctrine of 'exclusive jurisdiction' over federal enclaves is not imperative. The phrase is indeed a misnomer for the manifold legal phases of the diverse situations arising out of the existence of federally owned lands within a state." Ibid., 300.

28. The police power of the state is an indispensable prerogative to state sovereignty, and "at times the most insistent, and always one of the least limitable powers of government." Eubank v. Richmond, 226 U.S. 137, 142 (1912); Classon v. Indiana, 306 U.S. 439 (1938); Ziffrin Inc. v. Reeves, 308 U.S. 132 (1939).

29. "The possible importance of reserving to the state jurisdiction for local purposes which involve no interference with the performance of governmental functions is becoming more and more clear as the activities of the government expand and large areas within the states are acquired." James v. Dravo Const. Co., 302 U.S. 134, (1937).

Congress has expressly ceded jurisdiction to the state over federal enclaves for Workmen's Compensation Laws (Act of June 25, 1936, 49 Stat. 1938, 40 U.S.C.A. 290) and for enforcement of state income, sales and use tax acts (the Buck Act of Oct. 9, 1940, 54 Stat. 1059, 4 U.S.C.A. 13-18).

1. 35 Stat. 1130 (1909), 18 U.S.C.A. § 338 (1927).
2. 136 F. (2d) 394 (C.C.A. 2d, 1943).
3. Feldman was called on as a witness in supplementary proceedings designed to aid in the discovery of assets of a debtor. New York Civil Practice Act, art. 45, § 789. New York immunity statute protected him from further action in that state. New York Laws 1935, c. 630, § 789 as amended by New York Laws 1938, c. 108. § 17.
4. U.S. Const. Amend. V. "No person . . . shall be compelled in any criminal case to be a witness against himself."

state court, did not deprive accused of the protection of the fifth Amendment, even though such testimony could not have been used against him in a state prosecution. Feldman v. United States, 64 Sup. Ct. 1082 (1944).[5]

Although the privilege of not incriminating oneself applies only to the federal government,[6] every state constitution, with two exceptions,[7] contains a like provision. The provision protects a witness as well as a party defendant.[8] It had its origin in protestation against unjust inquisitorial methods of interrogating accused persons and the building of a barrier for the people's protection against the exercise of arbitrary power.[9] Strangely enough, the privilege does not protect against third-degree coercion,[10] although confessions of this kind are voidable in two ways.[11]

Whether there is a privilege not to testify in a state court because of fear of a federal criminal prosecution, is closely knit to the converse situation, whether there is a privilege not to testify in a federal court because of fear of a state criminal prosecution. Regarding the latter, in 1828 Chief Justice Marshall held, "The rule is, that a party is not bound to make any discovery which would expose him to penalties and this case falls within it."[12] In 1896 the Supreme Court held

5. A 4-3 decision. Justices Black, Douglas, and Rutledge dissent. Justices Murphy and Jackson took no part in the consideration of this case.

6. Barron v. Baltimore, 7 Pet. 243 (U.S. 1833). Nor is the privilege included in the 14th Amendment. Twinning v. New Jersey, 211 U.S. 78 (1908).

7. Iowa and New Jersey. Iowa recognizes the rule of evidence with reference to criminal procedure. State v. Knight, 117 Iowa 650, 91 N.W. 935 (1902). In New Jersey, it is recognized by the common law and by statute. State v. Zdanowicz, 69 New Jersey Law 619, 55 Atl. 743 (Ct. Errors and App., 1903).

8. McCarthy v. Arndstein, 266 U.S. 34 (1924). Contra: State v. Douglass, 1 Mo. 527 (1825).

9. Brown v. Walker, 161 U.S. 591, 596 (1896). Dean Wigmore attributes its origin largely to the efforts of one John Lilburn from 1637 to 1645. Wigmore, "The Privilege Against Self-Crimination; Its History" (1902) 15 Harv. L. Rev. 610, 624. Pittman believes that Puritans in New England are primarily responsible for the establishment of the privilege in the United States, even before 1640. Pittman, "The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America" (1935) 23 Va. L. Rev. 763, 775.

10. A technical reason given is that the protection is available only in a criminal prosecution and at the time when the third-degree practice occurs there is as yet no criminal prosecution. Willis, "Constitutional Law" (1935) 521. It seems peculiar that a defendant may be subjected to physical violence and that the privilege does not protect the very injustice for which it was designed. For a good discussion of compulsory confessions, see Chafee, "The Inquiring Mind" (1928) 89.

11. Either on the grounds of duress or because of the privilege. Ziang Sung Wan v. United States, 266 U.S. 1 (1924); Note (1929) 43 Harv. L. Rev. 617.

12. United States v. Saline Bank of Virginia, 1 Pet. 100, 104 (U.S. 1828). State v. March, 46 N.C. 526, 527 (1854) held the same rule in a

the privilege not binding as the danger of a state prosecution was too remote to be considered.[13] Since 1906 the view is held favoring the famous "two sovereignities" rule. In granting immunity the only danger to be guarded against is one within the same jurisdiction and under the same sovereignty.[14]

Regarding the instant case and the privilege not to testify in a state court because of fear of a federal prosecution, the development appears similar to the other situation, but retarded. The original view favored the extension of the privilege.[15] In 1905 the Supreme Court used the question of whether or not prosecution in another jurisdiction appeared remote to decide the Jack case.[16] Suggested that the "two sovereignties" rule was beginning to invade the field[17] and this was fostered by way of dictum in 1922.[18] Again in 1931 "two sovereign-

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situation where courts of different states were involved. In Ballman v. Fagin, 200 U.S. 186, 195 (1906), Mr. Justice Holmes stated the prevailing view that a witness before a federal grand jury need not make "disclosures which would expose him to the penalties of the state law" which pnnished gambling. Numerous other courts adhered to the same rule in other criminal cases. In re Scott, 95 Fed. 815 (W.D. Penn. 1899); In re Feldstein, 103 Fed. 269 (S.D. N.Y. 1900).

13. Brown v. Walker, 161 U.S. 591 (1896). Other cases held likewise. People v. Butler Street Iron and Foundry Co., 201 Ill. 236, 66 N.E. 349 (1903); State v. Jack, 69 Kan. 387, 76 Pac. 911 (1905). Submitted that the court found an easy way to change the law by merely holding the danger of prosecution in another court "too remote."

14. Hale v. Henkel, 201 U.S. 43 (1906), McCalister v. Henkel, 201 U.S. 90 (1906). This was a "clear acceptance of the 'two sovereignties' doctrine rather than an application of the rule that the danger of prosecution must be real and substantial." Grant, "Immunity from Compulsory Self-Incrimination in a Federal System of Government" (1934) 9 Temp. L. Q. 194, 195. The "two sovereignties" rule has since been the yardstick. United States v. Murdock, 284 U.S. 140 (1931). It is interesting to note that Justice Brown wrote the opinion in the Henkel case, supra, only ten years later than his opinion in the Brown case, Brown v. Walker, 161 U.S. 591 (1896), cited supra notes 9, 13. It appears that he had changed his rationale during that time.

15. People v. Nussbaum, 55 App. Div. 245, 67 N.Y. Supp. 492 (1900).

16. Jack v. Kansas, 199 U.S. 372 (1905). The court relied heavily on the converse situation and decision in the Brown case, Brown v. Walker, 161 U.S. 591 (1896), cited supra notes 9, 13, 14. Justice Peckham said in the Jack case, supra, at p. 382, " . . . such possible prosecution did not operate as a reason for permitting the witness to refuse to answer; that it could not be presumed that under such circumstances any federal prosecution would ever take place, and that it was, within the reasoning of Brown v. Walker, supra, a danger so unsubstantial and remote that it was not necessary (or that it was impossible) for the statute to provide against it."

17. The court said in Jack v. Kansas, 199 U.S. 372 (1905), cited supra note 16, at page 382, "We think the legal immunity is in regard to a prosecution in the same jurisdiction, and when that is given, it is fully enough."

18. United States v. Lanza, 260 U.S. 377 (1922). This was a case involving double jeopardy which held that punishment by the Fed-

ties" was followed.[19] It is submitted that the principal case belatedly follows this rule to a point not heretofore reached in that accused was not contesting the validity of federal or state statutes granting him immunity from prosecution in another jurisdiction, but only whether federal courts could convict a defendant of a federal crime by use of self-incriminating testimony gained from him against his will in a state court.[20] It appears that this standard continues to strip the constitutional privilege of much force in now both state and federal jurisdictions, giving us a uniform rule, toward the end long advocated by many authorities.[21]

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eral Government, after prosecution and punishment by the state, was not double jeopardy under the 5th Amendment.

19. United States v. Smith, 51 F. (2d) 803 (S.D, Tex. 1931). The district judge stated that it was not even necessary to discuss authority to the effect that a state statue could no give immunity to a defendant charged in a federal court with violation of a federal criminal statute.

20. This holding would appear to be revolutionary to the other view of the constitutional guaranty. Grant, "Self Incrimination in the Modern American Law" (1931) 5 Temp. L. Q. 368 says at 402, Under the American federal system the abuses that the founding fathers dreaded have found themselves a home, protected by the magic phrase 'two soverignties'." Mr. Justice Bradley in Boyd v. United States, 116 U.S. 616, 631 (1886) said that compulsory self-incrimination is "contrary to the principles of free government. It is abhorrent to the instincts of an American. It may suit the purposes of despotic power, but it caunot abide the pure atmosphere of political liberty and personal freedom." Cooley said, "A peculiar excellence of the common law system of trial over that which has prevailed in other civilized countries is the fact that the accused is never compelled to give evidence against himself." Cooley, "Constitutional Limitations" (1868) 313. The English rule is different from our rule. King in the Two Sicilies v. Wilcox, 7 State Trials (N.S.) 1050 (1851), modified by United States of America v. McRae, L.R. 3 Ch. App. 79 (1867), probably established the English law that the witness is protected as to crime cognizable not only by English but by foreign law, provided the foreign law is clearly proved or admitted. Grant, "Immunity from Compulsory Self-Incrimination In a Federal System of Government" (1934) 9 Temp. L. Q. 57, 61.

21. Dean Wigmore said, "There is no reason why our profession should not begin now to move in this reform." Wigmore, "Neno Tenetur Seipsum Prodere" (1891) 5 Harv. L. Rev. 71, 88. Bentham called the privilege "pretence for exclusion." Bentham, "Rationale of Judicial Evidence," Pt. IV, e. III 7 Bowring's Ed. (1843) 451, 458. Taft, "Administration of Criminal Law" (1905) 15 Yale L. J. 1, also doubted the usefulness of the privilege as compared with other needs of society. Boiarsky, "The Right of the Accused in a Criminal Case Not to be a Witness against Himself" (1928) 35 W. Va., L. Q. 126, 143 says, "The privilege has ceased to be a protection for the innocent. For an innocent man, the sooner his defense is raised the better. The privilege has developed into a means of escape for the gnilty." Perhaps the best solution is raised by Irvine, "The Third-Degree and Privilege against Self-Incrimination" (1927) 13 Corn. L. Q. 211, who contends that the privilege is the cause of third-degree work and that if the courts would narrow the privilege there would be less of the third-degree.

COURTS

CORAM NOBIS, PROHIBITION, AND APPEAL

Continuing the long series of proceedings following his conviction for murder 20 years ago, D. C. Stephenson by petition for writ of error *coram nobis* asserted that he should have another trial. The State, through the Attorney General sought a writ of prohibition to restrain the circuit court from acting upon the writ. *Held*, writ denied and rule of court established permitting appeal by the State from an order granting or denying a petition for writ of error *coram nobis*. State v. Hamilton Circuit Court ——— Ind. ———, 61 N.E. (2d) 182 (1945).

The instant case decided under difficult circumstances goes far toward clarifying the law of prohibition in Indiana and bringing its rule in accord with the weight of authority.[1]

It is clear that the circuit court has jurisdiction.[2] It must be assumed that the circuit court will exercise that jurisdiction properly. Thus, the present action does not appear to fall within the statutory ground for prohibition to restrain and confine "such courts to their respective, lawful jurisdiction" or to compel "the performance of any duty enjoined by law."[3] Thus, unless the court was prepared to give undue significance to the single sentence of the section which reads "Writs of mandate and prohibition may issue out of the Supreme and Appellate Courts of this state in aid of the appellate powers and functions of said courts, respectively,"[4] the decision is obviously sound.[5] Having gone this far in returning prohibition to its proper limits,[6]

1. High, Extraordinary Legal limitations § 770; Comment 22 Calif. L. Rev. 537 (1934); Note 36 Harv. L. Rev. 863 (1923).
2. " . . . the object of the writ of prohibition is to prevent a court of peculiar, limited or inferior jurisdiction from assuming jurisdiction of a matter beyond its legal cognizance." Smith v. Whitney, 116 U.S. 167 (1886).
3. Ind. Ann. Stat. Burn's (1923) § 3-2201.
4. The practice in federal courts is consistent with the decision in the instant case. Thus the phrase in 262 of the Judicial Code—"necessary to the exercise of their respective jurisdiction"—has been interpreted as limiting the Supreme Court and Circuit Courts of Appeals to cases where they would be deprived of appellate jurisdiction. Keaton v. Kennamer, 42 Fed. 2d. 814 (1930). The phrase has not been used by the courts affirmatively as a reason for taking jurisdiction, see Note 43, Col. L. Rev. 899, 902 (1934) cf Note 42 Col. L. Rev. 295 (1942).
5. Cf. Irwin v. State, 220 Ind. 228, 41 N.E. (2d) 809 (1942) criticized in Note 22 BU L. Rev. 600 (1942). For a general history of the writ of error coram nobis see Freeman, the Writ of Error coram nobis, 3 Temple L. Q. 365 (1939); Comment 11 Wis. L. Rev. 248 (1936); Note 19 Neb. L.B. 150 (1940); Note 8 Ind. L.J. 247 (1933); 18 Chi. Kent L. Rev. 304 (1940); Note 6 J. Marshall's L. Q. 304 (1940).
   Newly discovered evidence has been sufficient for the issuance of the writ. Jones v. Commonwealth, 269 Ky. 799, 108 S.W. (2d) 816 (1937) Discussed in 31 Ky. L. J. 86 (1942); but see People v. Dabbs, 372 Ill. 160, 23 N.E. (2) 343 (1939).
6. "The use of two extraordinary limitations is thus sought to prevent the anticipated abuse of the other. Each has its proper

it is to be regretted that the court did not continue the clarifying processes to the point of overruling the now inconsistent decision of State *ex rel* Fry v. Superior Court.[7]

Of much greater importance to the development of dynamic judicial leadership is that portion of the opinion which recognized that the denial of the writ might, in turn, prejudice the interests of the state.[8]

To guard the State against such hazards the court adopted a rule providing for state appeal from orders granting or denying petitions for writ of error *coram nobis*.[9] This is exactly the type of action which the legislature must have intended when it withdrew from the field of procedural legislation.[10] It is the type of action which the bar most certainly commends for it permits the court to establish rules which will protect the interests of all parties concerned without perverting the normal application of established procedures in order to provide satisfactory results in particular cases.

In the principal case the Supreme Court points out that an order denying a writ of error coram nobis had been held to be a final judgment from which an appeal was allowed. The Court emphasizes the fact that the new rule changes the law on this point and that in such a case the appeal must now be perfected and briefed as an appeal from an interlocutory order.

The Supreme Court's action in extending the privilege of appeal to an interlocutory order granting a writ of error coram nobis suggests that consideration might well be given to a similar extension in other fields. The privilege of appeal from interlocutory orders in Indiana is a very restricted one and there are undoubtedly other instances where provision for appeal might well be made.

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function. Neither should be perverted." State v. Hamilton Circuit Court ——— Ind. ———, 61 N.E. (2d) 182 (1945).

7. 205 Ind. 355, 186 N.E. 310 (1933).

8. "Relators are aware of the difficulties of marshalling in 1945 evidence to prove facts that existed and were susceptible of proof in 1925. They fear the possibility of an erroneous ruling by respondent court resulting in the unwarranted release of a guilty convict" who has already brought 39 separate proceedings including six petitions for writs of error coram nobis and habeas corpus actions upon the same subject matter. State v. Hamilton Circuit Court. Supra n. 6.

9. "RULE 2-40. An appeal may be taken to the Supreme Court from an order granting or denying a petition for writ of error coram nobis. The sufficiency of the pleadings and of the evidence to entitle the petitioner to the writ will be considered upon an assignment of error that the order is contrary to law. The transcript of so much of the record as is necessary to present all questions raised by appellant's proposition shall be filed with the Clerk of the Supreme Court within thirty (30) days after the date of the order. The provisions of Rule 2-15 applicable to appeals from interlocutory orders shall govern as to the time of filing briefs. All proceedings in the lower court shall be stayed until the appeal is determined. This rule shall apply to any order made on or after May 29, 1945, granting or denying a petition for writ of error coram nobis."

10. Ind. Ann. Stat. (Burn's Supp., 1942) § 2-4718.