AN EXPERIMENT IN MUNICIPAL REFINANCING: FACTUAL BACKGROUND OF ASHTON v. CAMERON COUNTY WATER IMPROVEMENT DISTRICT NO. ONE

WALTER C. SAUER
Attorney, Reconstruction Finance Corporation

When the Federal Government, in the early days of 1932, undertook its program to bolster the financial structure of the nation through the instrumentality of the Reconstruction Finance Corporation, it was not as a result of an unintentional oversight that financially distressed municipalities and other political subdivisions of the several States were omitted from the comprehensive class of debtors to whom financial aid was made available. The omission was forcibly brought to the attention of the Congress by members of both branches, who made vigorous, although unsuccessful, attempts to broaden the scope of the original provisions of the Reconstruction Finance Corporation Act so as to empower the Corporation to lend its aid to cities, counties and even States which were encountering difficulty in floating securities to raise the money necessary to meet their

1 56 Sup. Ct. 892, 80 L. ed. 910 (U. S. 1936). By a five to four decision the Supreme Court held invalid Sections 78-80 of the Bankruptcy Act, which provided for the adjustment of indebtedness of municipalities and other political subdivisions of the several States in a manner similar to that contemplated under Sections 77 and 77B, on the ground that the extension of the bankruptcy power to the political subdivisions of the States impairs their sovereign powers. A rehearing was denied on October 12, 1936, after a stay of the Court's mandate had been granted by Justice Roberts on June 17, 1936.

current needs. From time to time since then, as the activities of the Corporation have been expanded to ever-increasing fields, frequent attempts have been made to authorize the Corporation to aid public debtors in a like manner as it has aided the banks, railroads and other private corporations of the country. The enactment of legislation of such nature has been urged not only in the Congress but in city councils, conventions of municipal officials, and in at least one State legislature. The proposals advocated have varied from those which would have empowered the Federal Government to make short-term loans to enable the political subdivisions of the several States to carry on their ordinary functions, to those which would have authorized loans for the purpose of enabling such entities to effect a complete refinancing of their outstanding indebtedness.

Except through its efforts to relieve unemployment, which brought forth both the public works program, originally undertaken by the Reconstruction Finance Corporation and later transferred to the Public Works Administration upon a broader basis, and the aid furnished through the Civil Works, Federal Emergency Relief and the Works Progress Administrations, the Federal Government has consistently refused to play the part

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8 75 CONG. REC. 1582, 1657 et seq., 1902, 2085 et seq., 2127-2150, 2313 (1932).
9 Id. at 13706 et seq., 13714, 13765 et seq.; 77 id. at 4143 (1933); 78 id. at 3446, 8763 et seq. (1934). See also Betters, Federal Aid for Municipalities (1935) 23 NAT. MUN. REV. 174.
10 City of Camden, N. J., 75 CONG. REC. 4147 (1932).
11 Id. at 143 (1933); 78 id. at 8764 (1934).
12 Legislature of Washington, 76 id. at 2028 (1933).
13 Attempted Senate Amendment to R.F.C. Act proposing that it “purchase the tax anticipation warrants, short-term notes . . . for the purpose of aiding such municipalities and governmental subdivisions in maintaining the necessary and essential governmental expenditures and service.” 78 id. at 8703 (1934).
14 S. 3741, 74th Cong., 2d Sess., proposed that R.F.C. make loans up to $75,000,000 to “municipalities and other political subdivisions of States” to refinance their outstanding indebtedness; H. R. 6227, 74th Cong., 1st Sess., proposed that R.F.C. make loans not exceeding $1,000,000,000 to “counties, parishes, road districts” for above purposes; H. R. 5694, 74th Cong., 1st Sess., proposed that R.F.C. make loans not exceeding $25,000,000 to “unincorporated tax or special improvement districts” for above purpose.
15 47 STAT. 709, 711 (1932); 15 U. S. C. § 605a, 605b (a) (1934).
of banker to the distressed public debtors of the country by opening its resources to enable such entities to borrow for the purpose of financing their operations or refinancing their already existing indebtedness.\footnote{12}

Nevertheless, anomalous as it may seem, by way of aiding the farmers of the country, the Federal Government did more or less unintentionally undertake a venture which was, in effect, one of municipal refinancing, and the administration of which may well serve as a precedent for any future legislation of such nature which may be enacted. Incorporated in Part IV of the Emergency Farm Mortgage Act of 1933, as amended, is Section 36, which empowers the Reconstruction Finance Corporation to make loans "... to or for the benefit of drainage districts, levee districts, levee and drainage districts, irrigation districts and similar districts ... duly organized under the laws of any State or Territory ... which ... have projects ... devoted chiefly to the improvement of land for agricultural purposes ... for the purpose of enabling any such district ... to reduce and refinance its outstanding indebtedness. ..."\footnote{12}

The purpose of the Section was to round out the ends of the Emergency Farm Mortgage Act;\footnote{14} which Act provided for an extensive program of financing and refinancing farm mortgages through the means of the Fed-
eral Land Banks. Throughout the South and West in particular, there had been created hundreds of special improvement districts for the purpose of constructing irrigation, drainage, levee and similar reclamation systems to render lands suitable for agricultural purposes. It was estimated, prior to the passage of Section 36, that the outstanding bonded indebtedness of these districts, existing in some thirty-five States and including more than ninety million acres of land, was approximately $865,000,000, and that the farm mortgage against the lands and improvements within the districts amounted to approximately $1,105,000,000.

With the decline in agricultural prices in the twenties, the farm lands within many of these districts were unable to pay the debt charges on the indebtedness incurred to construct the reclamation systems. The obligations evidencing the indebtedness were payable from taxes or assessments which were prior in their lien upon the lands and improvements thereon to the lien of private mortgage indebtedness. Consequently, landowners had been encountering difficulty in obtaining either original or re-

17 C. H. Scott, President, National Drainage, Levee, and Irrigation Association, Washington, D. C.
18 This was the immediate cause of the default, see Hearings, supra note 14; infra note 69. However, the history of defaults, particularly of irrigation districts, goes back to the latter part of the nineteenth century. Further defaults occurred in the first decade of the twentieth century. Immediately following the war, however, favorable farm prices caused a boom period for agriculture during which many districts were created, only to be caught in the agricultural depression of the twenties before their worth had been proven. See Hutchins, Bulletin No. 254, supra note 16. He lists four fundamental causes of difficulty: (1) Engineering mistakes, (2) colonization difficulties, and (4) financial and economic changes. Id. at 4.
19 By statute. McQuillan, Mun. Corp. (2d ed. 1928) § 2258. Statutes uniformly make such taxes or assessments prior to private liens. See Baldwin v. Moroney, 173 Ind. 574, 91 N. E. 3 (1910) holding valid a statute which made drainage assessments prior to existing mortgages. In some jurisdictions they are on parity with general taxes, Ill. Rev. Stat. (Cahill 1929 ed.) c. 42, § 23; in others, subsequent—at least by judicial decision, infra note 92.
financing mortgage loans not only from private sources but from the original Federal and Joint Stock Land Banks, since, as security for such loans, they could only offer lands and improvements already or potentially burdened with a first lien too great to be carried. In the light of such a situation, Section 36 was enacted to aid in scaling down the principal of and interest on this outstanding special improvement indebtedness to a point where the Land Banks could, with reasonable safety, make the mortgage loans contemplated under the Emergency Farm Mortgage Act.

The exact legal status of such entities as irrigation, drainage, levee and similar special improvement districts is a question open to discussion. It appears reasonably clear that they are not, strictly speaking, "municipal corporations"; although they have frequently been so designated. For different purposes and by different courts, they have been variously referred to as "public corporations," “political subdivisions of the State,” “taxing districts,” “public quasi-corporations,” and “quasi-municipal corporations.” Irrespective, however, of the nomenclature which would be ascribed to such

20 77 Cong. Rec. 4639 et seq. (1933).
22 Sternberg v. Wakonda Dr. & Levee Dist., 33 F. (2d) 451 (C. C. A. 7th, 1929) (Dr. Dist. held a municipal corporation under statute which saved rights of action as against dissolved private corporations); Kansas City v. Fairfax D. D., 34 F. (2d) 357 (C. C. A. 10th, 1929) (Dr. Dist. held municipality within compact between States relative to exemption of lands from taxes of municipalities); Turlock Irr. Dist. v. White, 186 Cal. 183, 198 Pac. 1060 (1921) (Irr. Dist. held not a municipal corporation within constitutional provision rendering property of such entities lying outside their boundaries subject to tax by authority in which it was located).
23 Houck v. Little River D. D., 239 U. S. 254, 36 Sup. Ct. 58, 60 L. ed 266 (1915) (Dr. Dist. held a public corporation so as to render members liable for taxes for preliminary expenses).
24 Kinne v. Burgess, 24 Ariz. 463, 211 Pac. 573 (1922) (Irr. Dist. held a political subdivision of the State within statute requiring bond issue of such entities to be voted on by property owners).
25 Greene v. Uniacke, 46 F. (2d) 916 (C. C. A. 5th, 1931) (Dr. Dist. held a taxing district within statute permitting such bodies to validate bonds).
26 Elmore v. Drainage Commissioners, 135 Ill. 269, 25 N. E. 1010 (1890) (Dr. Dist. held a public-quasi corporation and therefore not liable for negligence of its employees).
27 State, ex rel., Spencer v. D. D. No. 1, 123 Kan. 191, 254 Pac. 372 (1927) (Dr. Dist. held a quasi-municipal corporation within provision of constitution forbidding legislature to delegate power to create such entities).
entities under any given state of facts, it appears that they are instrumentalities of the States rather than merely creatures thereof in so far as the question of their powers is concerned. It is agreed that they may exercise only the powers expressly granted by the State of their creation. Furthermore, they must exercise such powers in the specific manner provided for in the statutes. Accordingly, in such respects they are governed by the principles of law applicable to true "municipal corporations." Likewise, their obligations, being issued pursuant to the authority of the governing statutes and being payable from taxes or assessments, are akin to obligations, particularly those of a special assessment nature, of any public corporation.

Thus, although different "in its fundamental respects" from a true municipal refinancing undertaking, the program authorized by Section 36 has involved the Corporation in exactly such a venture. But, even more important than establishing a precedent for Federal aid to public corporations, it has furnished evidence of decidedly a practical attempt to deal with the still unsolved problem of municipal debt readjustment. The many

29 Ibid.
30 Ibid.
31 Ibid.
32 See infra p. 28 for various types of obligations encountered.
33 "In my conception of it, it is an entirely distinct problem in its fundamental aspects from the financing of obligations or operations of municipalities or other governmental subdivisions. This is essentially a farm relief measure touching some of the most productive lands in the United States." Robinson (Ark.) in Debates on Section 36, 77 Cong. Rec. 4641 (1933).
34 It is interesting to note that one of the early bills proposing aid to municipalities was redrafted to exclude drainage and other reclamation projects. "In my original amendment offered last week I did have the word 'municipalities.' Then it was pointed out that there are various drainage systems, reclamation and other projects which have been recognized as municipal activities. I did not care to go so far as to include in the bill every subdivision of government including counties, towns, etc." Copeland (N. Y.), 75 Cong. Rec. 2136 (1932).
35 "But the readjustment of municipal debt structures—in curious contrast to the financial reorganization of private corporations—remains almost an untouched, and certainly an unsolved, problem for legislative aid and inventiveness. Indeed, municipal attorneys, investment bankers, and public officials found themselves confronted with an unfamiliar problem when the municipal defaults of the late twenties began. For, as has been previously mentioned, these were the
questions that are attendant upon the general problem have been realistically encountered. Some have been successfully disposed of; others remain an enigma—as, for instance, the problem of the dissenting minority, which was recently thrown into bold relief by the decision in *Ashton v. Cameron County Water Improvement District Number One.*

In undertaking the administration of the Section, the Reconstruction Finance Corporation was without much precedent. In 1933, the country was only beginning to wake to the realization that the recent municipal debt defaults presented a problem of more than temporary significance and one which required more than casual attention to its solution. The current era of defaults had been so short-lived that the field of municipal debt readjustment was lacking in practical application of the many theories that had been advanced with respect to the

first municipal defaults to speak of in a quarter of a century. Few, if any practitioners, legal and financial, had had personal experience with such situations.

"Speaking to this point, Kenneth M. Keefe, of Halsey, Stuart and Company, Inc., serving as chairman, vice-chairman or member of a number of protective committees for holders of municipal obligations, testified before this commission: "A. 'We went into the situation as best we could, and in most cases, such as with West Palm Beach, which I described in some detail, we found that the best thing to do was to turn the whole situation over to a committee of some sort which would have the responsibility of working the thing out. We had no idea at the time we did that the job was going to take any particular amount of time, or require the expenditure of very much money. We thought that it would be a simple process of getting refunding bonds issued, perhaps with some reductions in interest, for a period of a few years, or something like that, and then it would be all over and done with.'" Report of Securities and Exchange Commission (1936) on the Study and Investigation of the Work, Activities, Personnel, and Functions of Protective and Reorganization Committees, Part IV, Committees for the Holders of Municipal and Quasi-Municipal Obligations.

36 See infra note 69 as to Corporation's position in the case.

37 Irrigation bond defaults in the early part of the century resulted in a number of debt readjustment programs. In the main, however, the plans that had been successfully effected had involved dissolution of the districts and the creation of private corporations as their successors. See Cir. No. 72, op. cit. supra note 16 at 34-45. Similarly defaults by cities like Memphis and Mobile in the latter part of the nineteenth century were dealt with by so-called "corporate suicide" treatment. A. M. HILLHOUSE (Director of Research, Municipal Finance Officers' Association), *Municipal Bonds—A Century of Experience* (Prentice-Hall 1936) 321-328.

38 Public Administration Service—No. 33, edited by C. H. Chatters, Executive Director of Municipal Finance Officers' Association, pub. in August, 1933, appears to be the first practical discussion of the problems involved in municipal defaults. See HILLHOUSE, op. cit. supra note 37, for a comprehensive discussion of the whole subject.
problems involved;* and in those few instances where plans of readjustment had been attempted, the results had been somewhat discouraging.** Moreover, the undertaking introduced two elements which, even today, are a novelty in municipal refinancing. It involved a scaling of principal of the outstanding indebtedness of the debtor* and introduced an independent third party, in

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* See Pub. Ad. Ser., supra note 38, Appendix B, and Hearings before a Subcommittee of the Committee on the Judiciary, Senate, 73d Cong., 2d Sess., on S. 1868 and H. R. 5930, particularly at 14, for indication of how unsuccessful cities had been in making any progress with debt readjustment plans.

** See history of Coral Gables default, Sec. Report, supra note 35 at 23, 77-83.

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It is undoubtedly true that many public corporations in the country, particularly so-called boom cities and special taxing districts, can never pay their present existing indebtedness in full. The damage has already been done. Even measures of strict economy and supervision from now on will, at the most, have the effect of enabling such entities to pay their necessary future indebtedness. In this connection see Linen, Effects of Deterioration in Municipal Credit (1934) 23 Nat. Mun. Rev. 87; C. W. Tooke, Relief of Municipalities, Address Nat. Conference Debtor Relief Laws, Dec. 7, 1935 (N. Y.); Stason, State Supervision of Municipal Indebtedness (1932) 30 Mich. Law Rev. 833; Legislation Comment (1934) 33 Col. Law Rev. 1050; Comment, Administration of Municipal Credit, 43 Yale Law J. 924; SEC Report, supra note 38 at 27; Hearings Bank Leg., supra note 39 at 16, 20, 21, 62.

Nevertheless, little or nothing has as yet been accomplished in this respect except for the program discussed herein. Debt readjustment plans which even propose a scaling of principal, not to mention those of such nature which have actually been effected, are almost negligible. MUNICIPAL DEBT REORGANIZATION STUDY, pub. by National Association of Mutual Savings Bank Committee on Municipalities and Governments (May, 1936) lists thirteen municipalities which have attempted plans of debt readjustment. Only two plans contemplated a scaling of principal and neither has made any headway. The towns of Edinburg and Cisco, Texas, appear to be two of the very few municipalities which actually have effected plans which provide for reduction in principal. MUNICIPAL BONDS—A CENTURY OF EXPERIENCE, supra at 371, 372. See details of Coral Gables plan of July 1, 1932, providing for issuance of corporate stock equal to reduction, but which was never consummated. Id. at 372-374. See also C. T. Parsons, The Debt Picture Up to Date (1935) Fla. Municipal Record.
the person of the Corporation, which was to furnish the money to enable the debtor to refinance its indebtedness and thereby, at least for all practical purposes, ultimately determine the refinancing value of such indebtedness.\(^42\)

It was apparent that the basis upon which loans were to be set up would be an all important factor in the undertaking. The provisions of Section 36 were rather indefinite with respect to the question. It was provided that "No loan shall be made under this Section until the Reconstruction Finance Corporation (A) has caused an appraisal to be made of the property securing and/or underlying the outstanding bonds of the applicant, (B) has determined that the project of the applicant is economically sound, and (C) ... has been satisfied that ... the applicant will be able to purchase or refund all or a major portion of such bonds or other obligations at a price determined by the Corporation to be reasonable after taking into consideration the average market price of such bonds over the six months' period ending March 1, 1933. . . ." The Section was likewise subject to the requirement of the Reconstruction Finance Corporation Act that all loans made by the Corporation would be "fully and adequately secured."\(^43\)

Obviously, what the Section contemplated was that the Corporation, in determining the amount of a particular loan, would approach the problem from the angle of establishing the loan value of the district. But the Corporation, as a governmental agency, was in no position

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\(^{42}\) See infra note 44.

\(^{43}\) 47 Stat. 6 (1932); 15 U. S. C. § 605 (1934).
to favor either the debtor or its creditors at the expense of the other, and it was apparent, therefore, that the amount of the loan should represent what the Corporation, in its honest opinion, determined to be the full loan value of the district. In other words, its job was to find the maximum amount which the holders could ultimately realize upon their securities; and, having done this, to make the district an offer of a loan in such amount, to enable it to place before its creditors for their acceptance or rejection a plan of debt readjustment.  

In doing its job, the Corporation might have followed the practice, long pursued by courts in private corporate reorganizations, of determining value in the light of the needs of the situation and then supporting the conclusion by adopting some such nominal criterion as the market value of the securities to be refinanced or the market value of the property underlying the securities.  

Section 36, however, provided that the market value of the securities was to be but one element in the determination. Furthermore, this factor was rendered practically insignificant by reason of the fact that it developed, in the great majority of instances, that the securities of applicant-districts had long ceased to have been quoted or traded in. Any criterion which has as its basis the market value of the property underlying the obligation is peculiarly unsuitable to tax obligations and manifestly without significance in arriving at a determination of value. To have attempted to support a determination as to the loan value of a district upon the market value of the lands and improvements therein would have been

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44 In practically every case, the plan initially proposed by the borrower, and, in the great majority of cases, the plan effected—was nothing more than the offer made by the Corporation. In some instances, however, where creditors rejected the proposal, borrowers supplemented the Corporation's loan with cash on hand or cash obtained by a delinquent tax drive or a special assessment for such purpose. This was permitted, however, only where the borrower did not incur any future liability in the transaction.

45 Frank, Some Realistic Reflections on Some Aspects of Corporate Reorganization (1933) 19 VA. L. REV. 541 at 553-556; Spring, Upset Prices in Corporate Reorganization (1919) 32 HARV. L. REV. 489 at 502-503.
admittedly nothing more than adopting a fiction to substantiate an arbitrary finding.

Instead, the Corporation determined to face the problem squarely and honestly and attempt to fix the loan value of a district and substantiate its conclusion upon what is generally admitted should be the ultimate basis of value in any municipal debt readjustment program—the capacity of the debtor to pay. The Corporation decided upon such a course not unaware of the fact that, although susceptible of definition, “capacity to pay” is difficult of ascertainment; and although it realized that the theory has little support in actual practice more because of the difficulties in giving effect to the theory than because of its unsoundness—with the result that value is, and has been, for the most part, a matter of “give and take” between the debtor and its creditor with no logical basis.

46 “Creditors have always known what they wanted to accomplish, that is, to get from the municipality the utmost that it can pay, but they have not yet found out how to accomplish this.” E. J. Dimock, Legal Problems of Financially Embarrassed Municipalities (1935) 22 Va. Law Rev. 39.

47 “A major difficulty in the formulation of any plan is implicit in the general relative character of capacity to pay. For capacity depends not alone on assessed valuation, on the private wealth and volume of business in a community, but on many other problematical future factors. Can the public debtor’s future operating expenses be kept within the bounds of a plan or will they increase? What further interest obligations will the debtor incur through the issue of bonds for capital improvements? What guarantee is there that sinking fund provisions will be observed or that tax assessment, levy, and collection methods will be as efficient as any given plan may contemplate? Will any overlapping special districts, with power to levy taxes and incur debts be created?” SEC Report, supra note 35 at 55. See Hillhouse, op. cit. supra note 37, App. B. for suggestions as to elements entering into a determination of capacity to pay.

48 “... it [Mun. Bank. Leg.] is predicated on the assumption that the settlement with the creditors will be based upon a finding of fact of the ability of the municipality to pay. The ability of the municipality to pay is a fiction because of (1) the lack of control over overlapping taxing districts, and (2) the lack of judicial control over administrative expenses. The real problem is, when a majority of creditors are tired of the struggle and have reached a settlement satisfactory to them, regardless of any theoretical ability to pay, how can the dissenting minority be brought into line so that an end may finally be brought to the controversy and the creditors at least may obtain something.” Address of Giles J. Patterson, Esq., at A. B. A. Meeting, Sec. of Mun. Law, July 16-17, 1935, Summary of Proceedings, at 28. See also SEC Report, supra note 35 at 46-56.

49 It might be profitable to consider how this question of determining capacity to pay should be dealt with in future municipal debt adjustment legislation—whether it be federal or state. It would appear that, in any such legislation which attempts to enforce a settlement against a minority group, the
In the abstract, the criterion adopted might be stated as—that amount of special improvement indebtedness which the landowners within a given district could be called upon to pay and which they would be willing to pay rather than lose their lands. Obviously, any such determination involved many factors, both tangible and

ultimate right to decide the question must rest with the courts. C. M. & St. P. R. R. v. Minnesota, 134 U. S. 418, 10 Sup. Ct. 462, 33 L. ed. 970 (1890). In this respect at least, the controversy as to whether the approach to municipal defaults should be through an administrative rather than a judicial agency, infra note 112, narrows down to one question. To what extent should the power to determine capacity to pay be vested with the courts?

It is a fair criticism to say that the courts have never honestly dealt with the question in mandamus and receivership proceedings despite the fact that they have often tempered their decisions in mandamus actions by exercising their discretion in issuing the writ. Thus, they have permitted a debtor to levy the delinquent tax over a period of years rather than requiring the tax to be levied at one time. East St. Louis v. Amy, 120 U. S. 600, 7 Sup. Ct. 739, 30 L. ed. 798 (1887); Asbury Park v. Christmas, 78 F. (2d) 1003 (C. C. A. 3d, 1935), cert. den., 296 U. S. 624 (1936). So, also, they have ordered payments to be made to bondholders on a pro rata basis rather than on the theory of “first come—first served.” Groner et al. v. U. S. ex rel. Snower, 73 F. (2d) 126 (C. C. A. 8th, 1934). See infra note 53; note (1935) 45 Yale L. J. 702; note (1933) 46 Harv. L. Rev. 1050. But generally speaking, “up to now the judicial process as applied to the settlement of claims of the creditors of insolvent municipalities has had very little more tendency to attain a correct result than the common law trial by battle.” Dimock, supra note 46 at 41.

To what extent this has been due to a feeling on the part of courts that such a function is outside the judicial power and to what extent it has been due to a realization of their practical limitations to deal with the question, is debatable. See testimony of Mr. Dimock at Proceedings Before the Securities and Exchange Commission in the Matter of Protective Committees for Holders of Securities of City of Asbury Park, N. J., and Other Municipalities and Public Instrumentalities, Washington, D. C. (1935), at 668-672 and his Article, op. cit. supra note 46 at 50, for excellent discussions of the question.

But Section 80 specifically provided that the court “shall require the taxing district . . . to file such schedules and submit such other information as may be necessary to disclose the conduct of the affairs of the taxing district and of any proposed plan.” And, under State statutes, such as those in N. J. (Laws 1933, c. 331, supra note 41) and Fla. (Laws 1935, c. 16965) the courts are likewise empowered to investigate the question. In the words of the N. J. Act, “The supreme court . . . may by order . . . approve such adjustment or composition if the court by its justice determines . . . that the adjustment or composition is substantially measured by the capacity of the municipality to pay.” It would appear that such statutes vest the courts with power to determine the question.

The experience under Section 80 was, and under the State statutes has been, too limited to throw much light upon the probable attitude of the courts and their disposition of the question. But the experience under Section 80 did at least show that the courts were aware of the obligation imposed. Cardozo, J., dissenting in the Ashton case, voiced the comment that “Even then the plan will count for nothing unless the judge upon inquiry shall hold it fair and good.” And the District Court, infra note 70, dismissed the petition for the reason, among other more important and sound, that the allegations with respect to capacity to pay were insufficient; i. e., “. . . petitioner does not claim . . . that the property upon which said taxes are a lien . . . has depreciated in value to the extent that a sale thereof will not produce funds sufficient to pay the tax.”
intangible. The nature of the districts, however, involved one element which contributed largely in enabling the Corporation to arrive at a logical and reasonably accurate finding. Not only were the obligations evidencing the indebtedness ultimately chargeable solely against the lands and improvements without personal liability on the part of the landowners,50 but more important, the lands

In the plans put into effect prior to the Ashton decision, infra p. 26, the courts recognized their obligation by referring the matter to special masters who heard evidence and made a finding on the fairness of the proposed plan from the standpoint of the capacity of the debtor to pay. It was the writer's experience, however, that these findings and the courts' decrees thereon were based largely on a composition theory; i.e., in lieu of their own determination the courts accepted the consent of a great majority of creditors as sufficient proof of capacity. To what extent the courts, in adopting such a theory, were influenced by the fact that the R.F.C., acting in this respect in a capacity similar to an independent commission, had made a finding based upon a thorough appraisal of the debtor and to the fact that in few cases was a vigorous dissent, backed by proof, entered with respect to the question, is debatable. See Records of D. C. So. Dist. Cal. Cent. Div., Judge Cosgrave, In re Palo Verde Irr. Dist. No. 25394-C (In Bankruptcy), where the question of capacity to pay was vigorously contested and the court held extensive hearings on the question. Among those testifying were Professor Adams, of the Giannani Foundation, and W. R. Wagner, who had acted as appraiser for the R.F.C. in appraising the petitioning district. The court further attempted to subpoena the appraisal report and other records of the R.F.C. but the order was quashed on argument.

Unless the courts are willing to accept the judgment of the majority as sufficient, it would appear that, in the event of future legislation—whether it be federal or state—the problem could best be handled by vesting the power to determine the question in an independent state commission, whose findings would be reviewable by the court enforcing the plan only in the event they were so arbitrary as to constitute a denial of due process. This would appear to be advisable in view of (1) the admitted shortcomings in this respect of courts in private corporate reorganizations; (2) their practical limitations to determine the question; (3) their failure to deal with the question in mandamus and receivership proceedings; (4) their disposition “to dodge the question every time they could” in the few instances presented under the State statutes now in effect; and (5) the excellent job that has been done in this respect by commissions now functioning. See in particular Proposed Plan for Refinancing Bonded Indebtedness of the Township of Chester and the School District of the Township of Chester, prepared by the N. J. Mun. Fin. Com. (Feb., 1936).

It would also appear that the vesting of such power in a commission would lend dignity and strength to the supervision exercised by the commission during the preliminary stages leading up to the formulation of the plan. See testimony of W. R. Darby, Chairman N. J. Commission, at SEC Proceedings, supra note 49 at 553, in which he states that “The Commission does not feel that it is the responsibility of the Commission to formulate refunding plans,” and that since its appropriation is limited, it has hesitated to formulate plans and sell them to creditors—with the result that no plan has as yet been put into effect under either of the N. J. Acts. See 43 Yale L. J. op. cit. note 41 at 989-991; infra note 107 (pointing out the necessity for supervision by a commission during preliminary stages).

50 By statute, MCGUILLAN, MUN. CORP. (2d ed. 1928) § 2284. Statutes uniformly provide that drainage, levee, and irrigation taxes or assessments are chargeable only against the lands and other property benefited (including improvements thereon); i.e., COMP. GEN. FLA. 1927, § 1505.
were the ultimate source of income available to the landowners for the payment of the obligations.\textsuperscript{51} In other words, the farmer earned his livelihood from the land, and, therefore, the problem of determining his ability to pay resolved itself into one of determining what the land could pay. Thus, the obligations, though payable from taxes or assessments, were in the final analysis nothing more than income obligations; and in such respect were comparable to a municipal security, such as a water-works bond, payable solely from the income of the property underlying the bond. But, in determining the value of the obligations, the Corporation looked to that which might be called the "productive value" rather than the "market value" of the properties underlying the obligations.\textsuperscript{52}

Accordingly, the appraisals provided for in Section 36 took the form of field appraisals in order to ascertain the "productive value" of the lands or their ability to pay. A group of appraisers experienced in and acquainted with farm values and conditions within the States involved, was sent out by the Corporation to appraise the applicant-districts. The information gathered included such facts as the number of acres within the district under cultivation, the type of crops raised, the yield per acre and marketing facilities for the crops. In addition, the appraisals covered such factors as the physical condition of the reclamation system, the type of farmers—whether tenant or resident landowners, their general condition, and similar pertinent factors which had a bearing upon their ability to pay. This information, together with certain financial data furnished by the applicant, such as the amount, type, and maturities of its outstanding obligations, the average amount of taxes and assessments imposed upon the lands by the applicant and by the State, county, and other overlapping taxing authorities, during

\textsuperscript{51} See Circ. No. 72, supra note 16 at 6, 7, for discussion of this factor.
\textsuperscript{52} Ibid.
the preceding ten-year period, the average collections and delinquencies in each type for such period, and the amount of acreage, title to which had vested in the State or the applicant, furnished the basis upon which the Corporation made its determination as to the amount of special improvement indebtedness that the applicant could pay.

In the light of such determination, and upon the basis of a thirty-three-year loan on the average, with substantially equal annual principal amortization payments after the first three years, and with interest at the rate of 4% per annum, the "loan value" of the applicant was fixed. This amount, together with a reasonably small sum added to enable the applicant to effect the refinancing program, constituted the amount of the loan made by the Corporation.

Applied to the principal amount of outstanding indebtedness, the loan value directly determined the price of the obligations evidencing the indebtedness. At this point, one of the more important provisions of Section 36 might be noted. The Section was enacted solely for the purpose of relieving distressed districts. It was not conceived as a program to furnish cash to creditors; such a result being incidental and justifiable only in the event by so doing relief would be afforded the debtor. To make certain that the fundamental purpose of the legislation was adhered to, Congress included in the Section a provision to the effect that "No loan shall be made . . . unless . . . a substantial reduction will be brought about in the amount of the outstanding indebtedness of the applicant." Accordingly, when the amount of the loan value of a particular district, as determined by the Corporation, was not substantially less than its outstanding indebtedness, a loan was declined. Loans declined for such reason were of the soundest that could have been made. Moreover, in most instances, the loans would have afforded very desirable relief to debtors by extending the
maturities of their obligations and reducing the interest charges thereon. Nevertheless, they were prohibited; the Congress evidently believing that such situations should and could be taken care of by the debtors and their creditors through an ordinary refunding operation whereby maturities would be extended and possibly interest rates reduced.

The statement made above, to the effect that the refinancing price was determined by applying the amount of the loan value to the “principal” amount of outstanding indebtedness, might well call for an explanation with respect to the fact that, in computing the price to be paid on the obligations, principal alone, and not accrued interest, was considered as outstanding indebtedness. It was recognized that differences would often exist in the amount of unpaid interest on the various obligations of a single issue, either because of the apathy of the holders in presenting their coupons or as a result of the familiar “first come—first served” doctrine. It was believed, however, that the inequalities which would result from such differences would be more than offset by the advantages to be gained from the ability to fix a definite and stable refinancing price at the time of the authorization of the loan. This would have been impossible if accrued interest, which was a variable factor, and more important, the amount of which applicants were unable to report with any degree of accuracy, was to be taken into consideration for such purpose. In the case of coupon obligations, this necessitated precaution against the practice of clipping unpaid coupons for the purpose of holding them out for full payment. To render such a transaction unprofitable, deductions from the amount due holders were made for the unpaid coupons which were missing from the obligations deposited.

53 Doctrine applied in State, ex rel., Bliss v. Grand River D. D., 330 Mo. 360, 49 S. W. (2d) 121 (1932); denied in State, ex rel., Sturdivant Bank v. Little River D. D., 334 Mo. 753, 68 S. W. (2d) 671 (1934). Court justifies its conclusions by holding that in first case, district was solvent; in the second, insolvent.
When it came to the question as to how the loans of the Corporation were to be evidenced, Section 36 was broad in its requirements. It provided that "... each such loan shall be secured by bonds, notes, or other obligations, which are a lien on the real property within the project or on the assessments, taxes or other charges imposed by the borrower pursuant to State law or by such other collateral as may be acceptable to the Corporation. ..." As a matter of policy, on undertaking the administration of the Section, the Corporation imposed the requirement that all loans were to be evidenced by new refunding bonds. For apparent reasons, the obligations refinanced would have been unsatisfactory in the hands of the Corporation; their maturities and interest rates being completely different from the maturity schedules and rate provided for under the loans. Likewise, such obligations, bearing the stigma of default, would have been less marketable than a new issue of refunding bonds. The comparatively long term of the loans, which on the average was thirty-three years, made it expedient that the Corporation obtain securities which it could sell. Accordingly, as a condition to the commitment, each borrower was required to agree to issue its 4% refunding bonds in a principal amount equal to the loan.

Actual disbursement of the loans, however, was made through the purchase of either the refunding bonds or

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84 Even new refunding bonds of defaulting municipalities are generally not legal investments for savings banks and other financial institutions; at least until the expiration of a definite period of years after the default. (N. Y. 25 yrs.) (Conn. 15 yrs.) SEC Report, supra note 39 at 9, 10.

The following excerpt, quoted from the testimony of L. A. Frye of Hawkins, Delafield and Longfellow of New York, testifying at the SEC Proceedings, supra note 49 at 429, with respect to the question as to the marketability of refunding bonds of defaulting municipalities is interesting in this connection:

"Q. In other words, the capacity of the City to pay rather than the mere fact that it has failed to meet a maturity date, possibly only temporarily, or because of some deadlock which has nothing to do with its intrinsic financial position."

See HILLHOUSE, op. cit. supra note 37, App. I, for status of municipal securities under legal investment laws of several states.
the obligations being refinanced. Administering what was essentially a relief measure, the Corporation attempted to afford districts the relief contemplated as expeditiously as possible. Moreover, bondholders impatiently demanded payment once their securities were deposited; even though, under the terms of the loan commitment, they were guaranteed 4% interest on the refinancing value of their securities from the date of deposit to the date of disbursement of the loan. The Corporation purchased either the new or old bonds, depending upon which method made for the promptest disbursement, in the absence of special circumstances in any particular case making it necessary to adopt one or the other method of procedure. When the outstanding obligations were purchased, they were held until such time as the refunding bonds were available for delivery, and then exchanged for refunding bonds in a principal amount equal to the amounts advanced by the Corporation for the purchase of the obligations, with proper interest adjustments.

Except where bondholders' committees were in existence it was the borrower's problem to acquaint holders with the offer and corral the assenting securities in a central place under deposit agreements which authorized their disposal under the terms of the Corporation's commitment. Obtaining the deposit of the outstanding obligations was not without its difficulties. All of the problems attendant upon any such task were encountered.

55 Have bondholders' committees justified their existence? The program furnishes an opportunity for a profitable study of the question. Under very similar circumstances, plans were effected by borrowers and their agents alone; by borrowers with the aid of a "steering committee"; and by borrowers where committees held the bonds under a formal protective agreement.

The committees and agreements had been in existence prior to the enactment of Section 36. Generally, it was not a case of the agreement being too narrow to permit the committee to dispose of the securities at the refinancing figure, but rather of the agreement being so broad as to make the question of consent of depositors a debatable one—both in fact and theory. Thus, the Corporation frequently required, often over the protest of the committee, that specific consent of the depositors be obtained. See criticism of protective agreements from this standpoint in SEC Report, supra note 35, at 61-64; Comment Binding the Dissenter Under States' Reorganization Laws (1935) 48 Harv. L. Rev. 1414 at 1427, 1428; Lowenthal, The Investor Pays, particularly at 368-370.
In some instances, the securities were held in large blocks; in others, they were scattered among small holders who were difficult to reach and who, when contacted, generally demanded more of an explanation as to the meaning and advantages of the offer than the larger holders. Where the securities were held in sufficiently large blocks to warrant such procedure, it was determined that holders need not actually deposit their securities until the loan was ready for disbursement. They were merely required to execute their consent to the offer and agree to deliver them at the proper Federal Reserve Bank when notified that disbursement was to be made. In the case of the great majority of holders, of course, this would have proved impractical; and it was necessary to have the consenting securities actually deposited as the consents were obtained.

In this connection, it might be mentioned that one of the obligations voluntarily assumed by the Corporation was to ascertain that the individual holders obtained an equitable proportion of the price paid on account of their securities. Loans were made subject to the condition that the Corporation be satisfied prior to disbursement that the compensation and expenses of committees or other representatives of the bondholders were reasonable; and every precaution was taken to prevent undue profiting at the expense of the bondholders—who were already suffering a loss.

The desire to afford bondholders a convenient and in-

56 "Of the 88 deposit agreements analyzed for this group [dr. and irr. districts] 87 provide for payment of expenses with no provision for limitation or review, 14 expressly forbid compensation, 32 expressly provide for the payment of compensation, and 42 make no reference thereto. These deposit agreement provisions open a possibility of great abuse. But since no independent review is provided of the amounts which committees vote themselves as fees and expenses, there is danger that this specified maximum will be the actual minimum." SEC Report, supra note 35 at 89.

57 In addition to limiting expenses and fees, the Corporation took every reasonable step (publicizing loans and having borrowers watch names of depositors) to prevent persons profiting from their inside knowledge by buying up bonds from uninformed holders. In this connection, see SEC REPORT, supra note 35 at 97, with respect to practice of trading in securities by protective committee members.
expensive method for depositing their securities led the Corporation to prepare and suggest, although not require, the use of a standard form of deposit agreement by those districts whose bondholders had not formed committees. This agreement contemplated that the borrower or its agent, employed by it upon a reasonable basis and which was often the house or representatives of the house which marketed the bonds,\(^{58}\) would undertake the job of corralling the outstanding securities. It designated a bank or trust company of the borrower’s choosing, which was also permitted a reasonable charge and which was often the paying agent of the bonds, to act as the depositary. The agreement clearly set forth the amount payable under the offer and the fees that were to be charged by the depositary or others for handling the transaction. Under its terms, the depositary was vested with a power of attorney authorizing it to sell or otherwise dispose of the securities at the refinancing price; collect and receipt for the money paid; and forward the net proceeds to the holder.

Although the use of these standard deposit agreements provided a simple and inexpensive method by which bondholders could take advantage of the offer, it did not solve the problem encountered in any refinancing undertaking—that of dealing with dissenters. Section 36 provided that “No loan shall be made by the Corporation . . .” unless “all or a major portion of such bonds or other obligations . . .” were made available for refinancing. Although this provision apparently vested the Corporation with fairly wide discretion as to the percentage of outstanding obligations which it would require to be de-

\(^{58}\) “In order to organize bondholders and get their support for a protective committee, it is necessary to communicate with them by mail or personally. The source almost universally resorted to for this purpose is the bondhouse or houses which originated the issue of securities in question. The originating house or syndicate will have the names of investors to whom it sold the securities directly. It will also have sold some in wholesale lots to other bondhouses and dealers who in turn distributed them to investors. . . Because of their ability to obtain these names the bondhouses hold the key to readjustment of municipal obligations.” SEC Report, supra note 35 at 67, 68.
posited for refinancing prior to disbursement in any given case, the further requirement "that all loans shall be fully and adequately secured" directly qualified the Corporation's exercise of its discretion. While the Corporation was seeking no profit in making the loans, other than that which might result from charging interest at the rate of 4% per annum, it was making loans—"fully and adequately secured"—and not grants, with every expectation of being repaid.

Accordingly, the percentage of securities which had to be required to participate in any given case, was directly related to the amount of the loan value of the particular district as determined by the Corporation. In other words, before the Corporation could disburse a loan, it had to be satisfied that the borrower had the ability to pay the debt charges on the loan of the Corporation as well as the obligations which were not made available for refinancing; the latter, of course, being enforceable at their full face value. To have disregarded this principle when it came to a question of disbursing a loan would have been just as fatal as having been unduly generous in fixing the amount of the loan in the first instance. In either event, not only would the Corporation have suffered a loss, but the borrower would not have been helped since its burden, although lightened, would still have been too great to carry.

Thus, it may be seen that the smaller loan value, when considered in relation to the amount of outstanding indebtedness, the greater the percentage of consenting obligations which was necessary. By way of illustration, let us assume the loan value of a given district was determined to be $50,000 and the amount of outstanding indebtedness was $100,000. If the loan value theory was to be strictly adhered to, it is apparent that approximately 99% of the securities was essential; whereas, in a case of a district having the same amount of outstanding

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59 Supra note 43.
ing indebtedness, but the loan value of which was determined to be $75,000, approximately 96% of the securities was necessary.

It was recognized, however, that the loan value was not and could not be fixed with mathematical certainty. Accordingly, in its commitment, the Corporation did not attempt to set an absolute percentage of obligations necessary to be deposited prior to disbursement. Instead, it imposed the rather flexible requirement that "all of the outstanding securities or such a large proportion thereof as might be required by the Corporation" must be deposited. No refinancing plan was permitted to fail where the percentage of obligations deposited was reasonably near to the amount deemed necessary in the light of the established loan value. Under such circumstances, any doubt as to the ability of the borrower to carry the burden was resolved in its favor. Especially was this true where it appeared that the maturities of the nondeposited securities were favorable; or that there was a possibility that certain of the nondeposited securities, which could not be traced and upon which interest had not been collected for some time, would never be presented for payment; or where the nondeposited securities were held by small holders who were unlikely to instigate legal proceedings to enforce immediate payment thereof.60

Nevertheless, many borrowers found their refinancing programs blocked by individuals and groups who con-

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60 For a similar test see testimony of D. M. Wood, Esq., of New York, testifying at SEC Proceedings on Coral Gables, supra note 49 at 864-866:

Q. "Was it your thought, Mr. Wood, that unless the city instituted proceedings under the Bankruptcy Act, that approximately 100% of the bonds would have to be deposited before the 1931 plan could be put into effect?"

A. "Not necessarily. It depends on who owns those bonds and when they mature. For instance, we have accomplished the refunding of all the bonds of the City of Detroit, probably $400,000,000 of bonds. There are probably $4,000,000 of those bonds that were not refunded. Nevertheless, we put the plan in operation and the refunded bonds were issued. The reason we were willing to do that . . . was that those bonds are not past due or maturing currently. . . . Furthermore, they were widely scattered and it would not pay a man with ten bonds to bring a suit against the City of Detroit in order to get a tax levy for his bonds."
trolled a sufficient percentage of the outstanding securities to prevent the Corporation from making the money available to refinance the assenting obligations. Unlike the case of the private corporation, no conceivable method existed to force the dissenters to accept anything but the face value of their holdings. Not only was there no relief comparable to that afforded by Section 77 and 77B of the Bankruptcy Act, but the ordinary judicial procedure of foreclosure and sale, whereby dissenters might be forced to accept the cash value of their holdings, was likewise unavailable. It was with hopeful expectation, then, that both borrowers and assenting bondholders witnessed the enactment of Section 80 of the Bankruptcy Act, which was approved on May 24, 1934, some one year after the enactment of Section 36, and which attempted to do for "any municipality or other political subdivision of any State, including . . . any drainage, irrigation, reclamation, levee . . . district" what Section 77B does for the ordinary private corporation and 77 does for the railroads.

Upon the enactment of the Section, it was proposed by those districts and their consenting creditors, which had available for refinancing at least 66\(\frac{2}{3}\)% necessary to put through a plan thereunder, that the Corporation discard its requirements with respect to the percentage of securities necessary to be made available prior to disbursement and immediately proceed to purchase the obligations already available regardless of whether the amount thereof was less than that determined by the Corporation to be necessary to insure the repayment of its

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61 See infra page 26, and note 105, as to number of borrowers which took advantage of Section 80 and as to number of loans not yet effected. It is the writer's opinion that at least 75% of the undisbursed loans have been held up because of a comparatively small dissenting minority.


65 Section 80, as amend., provided that the plan be accepted prior to filing by 30% and finally approved by 66\(\frac{2}{3}\)% of creditors in the case of drainage, irrigation, reclamation, and levee districts; whereas, in the case of other taxing districts, 51% and 75%, respectively, was necessary.
loan. It was argued that the Corporation would be protected since the district could proceed to file a bankruptcy petition and the dissenters could be forced to accept the reduction either by way of refunding bonds issued by the district or cash furnished by the Corporation. As the holder of at least 66⅔% of the outstanding obligations which it would have purchased, the Corporation would furnish the necessary consent to the plan.

Although not questioning the constitutionality of the Section, that is, neither affirming nor denying its validity, the Corporation found itself in this position. It derived its powers to make the loans in question by virtue of the authority contained in Section 36. That Section contemplated and indeed provided, in effect, that the Corporation, when it had furnished the money to refinance the obligations of a district, could collect no more than the amount of its loan plus interest. Thus, when the Corporation purchased deposited securities prior to the issuance of refunding bonds, had not the borrower been refinanced to the extent of the securities purchased? If a borrower was to allege in its bankruptcy petition that the Corporation had already purchased a certain percentage of its outstanding obligations, might it not have been within the province of the court entertaining the petition to have found, despite the finding of the Corporation to the contrary, that the borrower was capable of paying both the amount actually loaned by the Corporation as well as the securities which had not been purchased, and that therefore it was solvent and not en-

66 "... the borrower shall agree ... to reduce, in so far as it lawfully may, the annual taxes, assessments and other charges imposed by it ... by an amount proportionate to the reduction" in its debt by reason of "the operation of this Section."

To what extent is the R.F.C., as a government corporation, bound by the provision of the legislation pursuant to which it functions? For example, would the court sustain an attempt by the R.F.C. to enforce at their full face value the old bonds which it purchased? As against the debtor? As against a nonconsenting bondholder? For discussion of this question of powers of government corporations like the R.F.C., H.O.L.C., T.V.A., see J. A. McIntire, Government Corporations as Administrative Agencies: An Approach (1936) 4 Geo. Wash. L. Rev. 161, particularly at 165-167, 205-210. See also R.F.C. v. Central Republic Trust Company et al., 11 F. Supp. 976 (N. D. Ill. 1935).
An experiment in municipal refinancing

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titled to file a petition? At least such a possibility existed, and, accordingly, no disbursement was made in such instances until the entry of a decree subjecting the indebtedness of the borrower to the plan proposed.\(^67\)

Thus, in the Ashton case, the Corporation’s position was that of a third party who had agreed, subject to certain terms and conditions, the most important of which in this connection was the requirement that all or such a large proportion of the outstanding securities of the debtor as the Corporation might require be made available before disbursement,\(^68\) to lend the money which was necessary to enable the petitioning district to effect the plan of debt readjustment proposed.\(^69\) The plan, in essence, was simply an offer of the district to pay to its

\(^{67}\) In one case the Corporation, before Section 36 was amended to permit it to purchase the outstanding bonds outright, had disbursed the loan to a trustee for benefit of bondholders; the loan being evidenced by a collateral note backed by the bonds paid off. Then the district decided to file a petition to scale down the balance, but the Special Master, on an intervention petition in which the question was squarely raised, held that the district had already been refinanced and recommended that the remaining bonds be paid off in full and that R.F.C. be given refunding bonds in the amount of its loan. Before the court had acted on the Master’s report, the Ashton decision came down. See Report, Findings and Recommendations of Special Master, Frank McLaughlin, In the Matter of Bowen Drainage District, Rio Grande County, Colorado, No. 8674, Feb. 25, 1936, D. C. 1st Dist. Colo., J. Foster Symes, Judge.

\(^{68}\) See discussion of this condition at p. 22 supra.

\(^{69}\) “It [the amended petition] substantially alleges that petitioner is an irrigation district . . . and has been in operation for something like twenty years, aiding and encouraging agriculture and supplying water to farmers to irrigate their lands and produce their fruit and vegetables; that about two and a half years prior thereto the country entered into a general financial depression, causing great reduction in the price which the farmers received for their fruit and vegetables, the prices being so low they did not pay the cost of production, thereby making it impossible for the farmers of said district to pay their flat rates and bond tax; that petitioner is insolvent and unable to meet its debts as they mature and desires to effect a plan of readjustment of its debts as provided by Section 80; that petitioner has outstanding approximately $800,000 of bonds bearing 6% interest and maturing serially, which are annual obligations against the district; that petitioner realizing its inability to meet its debts began to work out some kind of a plan to adjust them that would be fair and equitable to both the district and the bondholders and applied to the Reconstruction Finance Corporation for a loan to liquidate said indebtedness; that on January 13, 1934, the Reconstruction Finance Corporation authorized a loan to the district of $400,000, for the purpose of refunding these bonds at 49.8 cents on the dollar, which would enable the petitioner to reduce its bond taxes at least two-thirds and would make the district financially sound; that the plan had been accepted in writing by the holders of more than 30% of the bonds; that petitioner will be able to secure the approval of more than 66 2/3% of all the bonds at a hearing, as provided for in 80(d). . . .” Cameron County Water Improvement District No. 1 v. Ashton, 81 F. (2d) 905 (C. C. A. 5th, 1936).
bondholders the sum of 49.8 cents, in cash, on each dollar of principal. A decree subjecting the outstanding bonds to the proposed plan was never entered in the case; the district court dismissing the petition on the ground that Section 80 was invalid.\(^7\)

It might be of interest to note, however, that up to the time the Supreme Court handed down its decision, some 70 districts, which had been granted loans by the Corporation under Section 36, had filed petitions for debt readjustment pursuant to the provisions of Section 80. Approximately 30 more such districts had submitted tentative drafts of petitions to the Corporation for its approval. Of the 70 cases actually instituted, 50 had proceeded to a hearing on the petition. In these 50 cases, 40 confirmation decrees had been entered by some 27 different United States District Court Judges.\(^7\)

In only one case, the *Ashton* case, was the constitutionality of the Section denied; the decision of the District Court for the Southern District of Texas to such effect\(^7\) being reversed by the C. C. A. for the 5th Circuit;\(^7\) which court, in turn, was reversed by the Supreme Court of the United States.\(^7\)

In view of the number of drainage, levee and irrigation districts to whom loans were granted by the Corporation, which filed petitions under Section 80,\(^7\) it might be inferred that the Corporation brought its influence to bear upon borrowers to take advantage of the Bankruptcy Act. It may be stated, however, that the

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\(^7\) In re Cameron County Water Imp. Dist. No. 1, 9 F. Supp. 103 (S. D. Texas 1934).

\(^7\) Among the lower court decisions sustaining the Section were: In re Imperial Irr. Dist., 10 F. Supp. 832 (S. D. Calif. 1935); In re East Contra Costa Irr. Dist., 10 F. Supp. 175 (N. D. Calif. 1935); In re City of Dunedin, C. C. H. Bankruptcy Dec. p. 1540 (S. D. Fla. 1935).

\(^7\) Supra note 70.

\(^7\) Supra note 69.

\(^7\) Supra note 1.

\(^7\) A. M. Hillhouse, *The Federal Municipal Debt Adjustment Act* (1936) 25 *Nat. Mun. Rev.* 328 at 329 states that out of approximately 3,000 eligible debtors in default less than 100 filed petitions under Section 80. He lists 23 incorporated cities, villages and towns as petitioners; the rest being borrowers under Section 36.
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Corporation was in no wise instrumental in causing these petitions to be filed; except that by loaning money, it did undoubtedly provide the reason why borrower-districts were able to present concrete plans of debt readjustment to their creditors—which plans in practically every instance were acceptable to the holders of much more than the 66⅔% necessary to consent to the plan.  

While the deposit of the outstanding securities was being obtained, borrowers proceeded to comply with the other conditions precedent to disbursement. Principal among these was the institution of the proceedings necessary for the issuance of the refunding bonds. This was done under the guidance of bond counsel; the requirement having been imposed by the Corporation, in order to insure their validity and add to their marketability, that the refunding bonds be accompanied by approving opinions of "nationally recognized municipal bond counsel." Refunding of the obligations of the various borrowers, however, was not without its difficulties—the obligations encountered including about every conceivable type of tax security.

88 Id. at 329, 330. The author advances the following reasons for comparatively few petitioners: (1) Great majority of municipal debt plans being attempted involved no scaling of principal and therefore, minority problem was not acute, (2) difficulty of obtaining consent of percentage of creditors necessary to file petition, (3) novelty of Act and uncertainty of how to proceed thereunder, (4) mere existence of Act was sufficient to induce minority to come in, and (5) fears of debtors that their credit would be impaired. While the reasons advanced undoubtedly contributed, it appears that there was the added reason that few municipalities in default have arrived at the stage where a concrete plan of debt readjustment has been worked out, a condition precedent to the filing of a petition under the Section. In this connection, see testimony of E. H. Barker, Chairman of Protective Committee for Bondholders of Asbury Park, at SEC PROCEEDINGS, supra note 49 at 264, where he stated that the city and creditors were in favor of instituting bankruptcy proceedings, but that:

"A. One of the qualifications of that Act, you will remember, is the necessity of having the petition endorsed in writing by holders of 51% of the indebtedness affected by the plan.

"Q. And that 51% has never been obtained.

"A. Well there has never been a plan yet."

87 As to necessity of having "nationally recognized municipal bond counsel" furnish an approving opinion in order to market municipal securities, see testimony of L. W. Dempsey of B. I. Van Ingen & Co., N. Y., at SEC PROCEEDINGS, supra note 49 at 34, in which he states, "Well, speaking from our viewpoint, in the New York territory, I would say no more than a dozen' firms are acceptable.
Comparable to the sometimes called "general obligation" of a municipality was the bond which was payable from taxes levied, to an unlimited extent, against the lands and improvements upon an ad valorem basis. A more or less hybrid type of bond, which might be called a "limited liability obligation," was encountered in other jurisdictions; the lands being ultimately liable in the aggregate for only the amount of the cost of construction, plus interest and a small margin of contingencies. A third type of bond encountered was that which is generally conceded to be the true "special assessment obligation"; the lands being ultimately liable for the amount of benefits found to have accrued from the construction of the improvement. Variations on these general types were also encountered. Strangely enough, determining the exact nature of the obligations was often difficult and hazardous; the various statutes being frequently ambiguous with respect to the question of the ultimate liability of the lands for the payment of the bonds. The insuf-

78 ... and the governing authorities of such subdivisions shall impose and collect annually, in excess of all other taxes, a tax sufficient to pay the interest annually or semianually and the principal falling due each year. ..." Art. XIV, Sec. 14(a) La Const. (Dart 1932).

79 "In making such assessment, the jury shall ... assess the ... benefits ... and in no case shall any tract of land be assessed for benefits in any greater amount than its proportionate share of the estimated cost of the work and expenses of the proceedings. ... When an assessment against any tract of land has been fully paid, it shall be the duty of the treasurer of such district to execute and deliver to the owner of such land, a release in full, which shall discharge such owner from all further liability to pay the same. ..." Rev. Stat Ill., c. 42, §§ 22 and 23 (Smith-Hurd 1935).

80 "After the lists of lands, with assessed benefits ... have been filed ... then the board ... shall ... levy a tax of such portion of said benefits ... as may be found necessary ... to pay the costs of the completion of the proposed works. ... The said tax shall be apportioned to and levied on each tract of land in said district in proportion to the benefits assessed and not in excess thereof." Comp. Gen. Laws Fla. 1927, § 1467.

81 Districts may be created which shall have authority to issue bonds and "to impose and collect an acreage tax, or forced contribution, not exceeding fifty cents (50c) per acre per year for a period not exceeding forty (40) years" for the payment thereof. (Art. XIV, Sec. 14(F) La Const. (Dart 1932).

82 See in this connection conflicting decisions relative to Montana Irrigation Act; Clark v. Demers, 78 Mont. 287, 254 Pac. 162 (1927) (irr. bonds held general obligations); State, ex rel., Malott v. Bd. of Comm. of Cascade County, 89 Mont. 37, 296 Pac. 1 (1931) (ct. expressly overruled its prior decision and held bonds limited liability obligations); Judith Basin Irr. Dist. v. Malott, 73 P. (2d) 142 (C. C. A. 9th, 1934) (bonds issued prior to Malott decision held gen. obl.); Rosebud Land and Imp. Co. v. Cartersville Irr. Dist. 58 P. (2d) 765 (Sup. Ct. Mont. June 15, 1936) (ct. refused to follow Judith deci-
ficiency or complete absence of refunding statutes and the existence of so-called emergency legislation for relief of taxpayers added to the problem—and, all in all, the process of issuing the refunding bonds was a task of considerable import, and one which has and will add to the rather limited law on this particular phase of municipal financing.

Recognizing that many financial reorganizations fail to bring about desired results either from the standpoint of the debtor or its creditors, the Corporation realized that it was essential to do more in administering the program authorized under Section 36 than to make loans. It is undoubtedly true that the fundamental cause of the difficulty of most of the borrow-districts was that it was a case of over-capitalization—that the projects were economically unsound when considered in the light of the cost of constructing the drainage, levee, or irrigation systems. Yet, merely scaling down the outstanding indebtedness to a point where borrowers were able to pay it was not the complete answer to the problem. For, even assuming that the loans have seen set upon a sound basis and are legitimately within the ability of the borrowers to repay, it is apparent that inefficient management and the natural antipathy of landowners to the payment of taxes may well result in default in payment of the refunding bonds. To do a complete job of “cleaning up this debris of unwise reclamation,” borrowers had

83 As to the flood of such legislation and difficulties it imposed upon refunding municipal securities, see testimony of D. M. Wood, Esq., at SEC Proceedings, supra note 49 at 99-103; excerpts from which are quoted and commented on in SEC Report, supra note 39 at 23, 51. See also Tooke, supra note 41.


85 Title of unpublished address of Hon. Emil Schram, Director, R.F.C., broadcast over N.B.C. network, Conservation Day program, July 26, 1935, in which he discussed program from Conservation standpoint and in the course of which he said, in a lighter vein, that “In most cases, the natural optimism and en-
to be established and maintained upon a going and sound economic basis.

In its attempt to aid borrowers to achieve this, however, the Corporation was constantly faced with the problem, inherent in any activity of the Federal Government which involves the political subdivisions of the several States, of avoiding what might be deemed too paternalistic an attitude toward the districts and their internal affairs. Moreover, one ever present factor, which would be absent in the private corporate reorganization, had to be contended with in effecting a complete reorganization of the affairs of the borrower-districts—the lack of authority of a borrower to act and contract except as specifically provided for by statute.

The troublesome question of delinquent taxes well illustrates the problem. The refinancing of the outstanding obligations was, of course, but the means to an end. Unless the benefits thereof were passed along to the individual landowners, no reason for the program existed. The heavily accumulated special improvement and State and county taxes were a serious obstacle in the attempt to give landowners the benefit of the reduction effected in the debt. Except in those limited instances, in which the maturities of delinquent special assessments are ex-

thusiasm of the human race were sufficient to visualize the desert blossoming as a rose and the swamps covered with corn and cotton, where the prairie dog, muskrat and alligator should have been left undisturbed.” See also HEARINGS, supra note 14; op. cit. supra note 16 for evidence of economic unsoundness of the projects.

86 See op. cit. supra notes 3-9, 12, for indication of fear on part of Congress and others that Federal aid to political subdivisions of the country would result in undue interference with local autonomy. Undoubtedly, this was a contributing factor to defeat of legislation, supra notes 3, 4, 8, 9, proposing such type of loans by R.F.C.

87 Supra notes 31-35. Recognizing that the Corporation was attempting to aid their subdivisions, some States voluntarily undertook the enactment of legislation which empowered borrowers to contract to meet the Corporation's requirements. See for example, Ariz. Laws 1934, c. 6, §3, which provides: "... that any district which is a party to such a contract or agreement [loan commitment with R.F.C. or other governmental agency of U. S.] shall have full power and authority to enter into and to comply with the terms and provisions thereof and the duty to do and perform all things on its part to be done or performed thereunder, including ...” See also Miss. Stat., infra note 202, enacted in anticipation of the program.
tended for payment of the refunding bonds, delinquencies remain as such, upon the issuance of the refunding bonds. Thus, even assuming landowners were able and willing to pay current installments of their special improvement tax upon the reduced basis, they were unable to do so unless they first paid delinquencies. From the standpoint of the Corporation, delinquent State and county taxes were a source of concern in view of the fact that, generally, the outcome of a tax sale is that the lands are struck off to the State, with the result that they go off the tax rolls until returned to private ownership. Moreover, in certain jurisdictions, a sale for State and county taxes has the effect of cutting off the lien of special improvement assessments in a like manner as that of any private mortgage. In imposing the requirement, therefore, that each borrower work out a satisfactory plan for cleaning up delinquent taxes, the Corporation was seeking to aid the individual landowner as well as protect its own interests.

From a security standpoint, special improvement delinquencies might have been cancelled outright. Not only was there no authority, however, to cancel delinquencies, especially as against the holders of the obligations which were not refinanced, but any such action would have been obviously unfair to those landowners.

88 "The court having jurisdiction of a particular drainage district . . . is hereby authorized to extend the time of payment of assessments or any installment thereof, in whole or in part, whether due or not due . . . ." Rev. Stat. Ill., c. 42, § 38a (Smith-Hurd 1935). See also Ohio Gen. Code § 2293-5q.
89 Great majority of statutes make no provision for extending delinquencies, whether they have been foreclosed or not; i.e., Fla. Laws 1929, c. 13627.
90 Statutes uniformly provide that official charged with collection of tax or assessment can only discharge his obligation by collecting amount due (subject to statutes permitting compromise or payment with bonds), or returning properties as delinquent; i.e., Comp. Tex. Stats., 1934 Supp., Art. 7684. Moreover, in some jurisdictions, special assessments and general taxes are payable together, with the result that landowner must pay both or neither; i.e., Comp. Gen. Laws Fla. 1927 § 1469; in others, they may be paid independently; i.e., Rev. Stat. Ill., c. 42, § 31 (Smith-Hurd 1935).
91 Statutes uniformly provide that State lands are exempt from district tax or assessment; i.e., Ariz. Code 1928 § 3430.
93 Supra note 90.
who had kept up their tax payments. Moreover, in some States there was no provision whereby delinquent taxes could be compromised or paid with obligations. Obviously, landowners were unable to pay their delinquent special assessments in full; any suggestion to such effect being promptly met by the answer: "If we could pay them there would be no need of our seeking a loan." By taking advantage, however, of the laws of those States which provide for the compromise of taxes or their payment with bonds and coupons, borrower-districts have

94 Illinois, Texas.
95 I. e., Fla. Laws 1933, c. 16256.

It may be argued, of course, that any compromise of delinquent taxes is unfair to the paying landowners. In fact, the question as to the advisability of permitting taxpayers to settle delinquent taxes on a compromised basis or to pay such taxes with past due bonds and coupons, has been the subject of much dispute.

"The growing percentage of tax delinquency which normally precedes and accompanies defaults naturally engenders a considerable pressure to ease the delinquent tax burden. Given a substantial fraction of the electorate in danger of having their property sold for taxes, and the reluctance of all concerned to see such properties simply go off the tax rolls—as must be the case if no active market for tax certificates and titles exists, and such often is the case—concessions such as the compromise of delinquent of taxes, extension of redemption periods, reduction of penalties, and the acceptance of defaulted bonds and notes of the municipality purchaseable at a discount in payment of taxes and assessments are a frequent resort. But if such practices bring in a certain amount of delinquent taxes, they also discourage the taxpayer who has not been delinquent. Why, he naturally asks himself, should I not also let my taxes run until they are delinquent for a year or two, and then profit by these concessions?" SEC REPORT, supra note 35 at 12.

See also Testimony of D. M. Wood, Esq., of N. Y., at SEC PROCEEDINGS, supra note 49 at 458-467; arguments pro and con in PUB. AD. Sen., supra note 38 at 31; 43 YALE L. J., note 41 at 932-937.

To the writer, however, this much at least, seems clear. It is the desire of all concerned to get delinquent properties back on the tax rolls. In those instances where the debtors are in hopeless default and a scaling of principal is essential, the delinquencies are generally so heavy that owners just cannot pay them. The only other possibility is to obtain a purchaser for the amount of the delinquencies, but obviously this cannot be done in such cases. It would appear, therefore, that the owner must be permitted to compromise his delinquencies or pay them with bonds and coupons; or, if he still is unable to do so, that prospective purchasers be offered the property under the same terms.

Based upon the experience with the loans discussed herein, the writer is of the opinion that too much emphasis has been placed upon the argument that the paying landowner will object to the compromise of taxes or their payment with bonds. In over 100 such cases, the writer is unaware of any such objections. It is certainly to the benefit of the paying owner to have delinquent properties back on the roll where they can help carry the burden; especially in the case of general obligations. And, if the delinquencies are not cancelled outright but are settled on a reasonable basis—say in the same proportion as the reduction in the debt or whatever figure for which bonds may be purchased—and further, discharge or, in the case of a purchaser, title is conditioned on payment of current installments for a period of—say five years, it would appear that the benefits to the paying owner outweigh the injustice.
succeeded to a large extent in solving their difficulties, although the program in this respect is far from finished.  

Another problem facing the Corporation, which was closely aligned to that of delinquent taxes, was to provide a safeguard against possible defaults in any particular year, which might result from crop failures or similar catastrophies. Bitter experience has shown that farmers, above all, have good and bad years. It has likewise shown that tax receipts in any year are directly related to the crop receipts for such year; and the situation is not altered by the fact that in the preceding year the farmer might have cleared sufficient to pay two years’ taxes. Accordingly, it was recognized that something in the nature of a reserve fund should be established, through compulsory payments in good years, to prevent default in those lean years in which the taxes collected were insufficient, because of unusual circumstances, to

In this connection, it is interesting to compare the cases of McNee v. Wall, (two cases) 4 F. Supp. 496 (S. D. Fla. 1933), 13 F. Supp. 326 (S. D. Fla. 1936) and the case of State v. Butts, 149 So. 746, 111 Fla. 630 (1933), all of which involved an attack on the Florida statutes permitting payment of taxes with bonds. In the McNee cases, the attack was made by bondholders and the court held the statute was unconstitutional on the ground that their contract called for payment in cash and, if taxes were paid with bonds the debtor’s source of revenue would be cut off. In the Butts case, paying landowners sought to enjoin the collector from accepting bonds and coupons in payment of taxes. The court denied the relief, presumably on the theory that complainants were liable for the payment of taxes regardless of whether other owners paid or not, and the fact that other owners paid with bonds was no more harmful than if they failed to pay at all. See also cases cited in 43 Yale L. J., supra at 932-939.

Cleaning up of delinquent special improvement taxes was largely accomplished by the use of excess obligations of debtors. In general, statutes permit the issuance of refunding bonds to retire a like or greater principal amount of outstanding indebtedness. Thus, if a district had outstanding $100,000 of Bonds which were refinanced at 50 cents on the dollar, the refunding issue would be in the amount of $50,000; and only $50,000 of old bonds would have to be retired to render the refunding bonds valid. On the exchange for the bonds which had been purchased by the Corporation, all matured coupons and matured bonds up to the $50,000, instead of being cancelled, were deposited with a trustee under an agreement whereby the bonds and coupons were sold to landowners upon the reduced basis agreed upon, and then used by landowners to pay their delinquent taxes. Proceeds of such sales were devoted to (1) the creation of a fund for the payment of the obligations held by non-consenting holders, (2) creation of the reserve fund, discussed above, and (3) any balance to payment on the loan of the Corporation. In many cases, the results were so satisfactory that substantial repayments were made on the loans.

Schedules of tax collections furnished by borrowers. supra p. 14, conclusively established this fact.
pay maturing installments of principal and interest on the refunding bonds.

But, generally speaking, the statutes authorize the issuance of serial bonds only, and, therefore do not contemplate any such thing as a reserve or sinking fund for the payment of the refunding bonds. In fact, certain statutes impliedly prohibit the levying of a tax which might be used for such purpose by providing, in effect, that an annual tax is to be levied at a rate no greater than that necessary to pay accruing bond charges. In other instances, however, while not expressly providing for reserves, the statutes do permit of their creation by providing that the annual tax is to be levied in an amount sufficient to pay accruing bond charges and to meet unspecified contingencies. By taking advantage of the latter provisions, it was possible to provide for the creation and maintenance of a reserve—although, as is apparent, it was constantly a question of being satisfied with the best that the statutes offered.

One of the difficulties in dealing with municipal debt defaults, particularly in case of serial bonds, is the inability of the bondholders to enforce collection of more than the amount of principal and interest actually in default. Believing that no reason existed why ordinary

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98 Art. XIV, § 14(a) La. Const., supra note 78. Under this provision it was held in Ozenne v. St. Landry and St. Martin D. D., supra note 84, that that district was without authority to covenant to levy an additional tax to create a reserve.

99 "The Board may also at the time of making the said annual levy, levy an amount not to exceed 25% of the whole levy for the said year for the purpose of creating a surplus fund. This fund may be used for any of the district purposes authorized by law." 8 Remington's Rev. Stat. Wash. § 7440. A levy under this provision to create a reserve was sustained in In Re Columbia Irr. Dist., supra note 84.

100 To give landowners the needed respite, reserves were required to be built up over the first five years of the loan in an amount sufficient to pay principal and interest maturing in the sixth year and so maintained.

101 "The probable necessity for bringing repeated suits referred to is occasioned by the fact that the claim of municipal bondholders is limited to such principal and interest amounts as may have been actually defaulted upon. For there is no acceleration clause in the ordinary municipal obligation. The average bondholder, therefore, unless his portfolio consists of a considerable block of early and identical maturities, will hardly have a claim commensurate with the expense of litigation unless he wait for a period of years." SEC Report, supra note 35 at 18, 19.
corporate acceleration provisions should not be included in the refunding bonds, except the very practical one of statutory limitation, the Corporation, where statutes were sufficiently broad to warrant it required that the bonds include provision for interest on defaulted interest as well as provision for the acceleration, at the option of the holder, of the maturity of principal of the entire issue in the event of a default, either in interest or principal, which continued for a definite period.

Other requirements imposed by the Corporation in its attempt to place borrowers upon a sound economic basis were more in the nature of precautions against improvident and inefficient management. Along these lines, the Corporation required, among other things, that borrowers, from date of consummation of the refinancing, operate upon a "pay as you go" basis; submit an annual budget which would include a statement as to the rate of tax or assessment which the borrower proposed to levy in the succeeding year; and an annual audit which would give the name of each landowner who failed to pay his taxes and what steps had been taken to enforce collection.

102 "In the event any act shall be passed by the Congress ... authorizing loans to such districts ... the commissioners of the district with the approval of the Chancellor may ... sell the refunding bonds of such district in such amount, in such form, bearing such interest rate and with such maturities as may be in conformity with the terms of the Act of Congress and shall have full power and authority to do any and all things necessary to comply therewith; provided, however, that the amount of the liability of the several tracts of land of the district shall not thereby be increased." Miss. Laws 1932 c. 278. Under this statute, acceleration provisions were sustained in numerous validation proceedings.

However, in Ozenne v. Bd. Comm. of St. Landry & St. Martin D. D., supra note 84, the court held invalid a provision in the resolution authorizing the issuance of refunding bonds which provided for interest on defaulted interest on the ground it was compound interest; and as such prohibited by the State Constitution. The court further held: "However, this objectionable feature of the resolution will not affect the validity of the proceedings or of the refunding bonds which the Board proposes to issue, because neither the bonds themselves nor the coupons provide for the payment of interest on the coupons." See also Bay County v. State, 157 So. 1, 116 Fla. 656 (1934), where an attempt to accelerate the principal of county courthouse and jail bonds was held unauthorized under Fla. Laws 1931 c. 15772. It was likewise held that the provisions, being in the resolution, should merely be disregarded in issuing the bonds.

103 See N. J. Laws (1935), c. 258, § 5, wherein it is provided that "Such notes or bonds may ... contain such provisions with respect to the acceleration of the obligation to pay the principal thereof upon any default on the payment of interest thereon, as the resolution authorizing their issuance may provide."
thereof. But here, again, it was questionable whether such covenants could be enforced. Accordingly, to avoid jeopardizing the refunding issue, the Corporation exacted the covenants in the loan agreement—with provision that such conditions were to be complied with only as long as the borrower remained indebted to the Corporation. 104

While the program must be admitted to have been a success, 105 it would appear that Federal aid, in and of

104 "Attempts by some municipalities and their creditors to compensate through contract for this prevailing absence of effective control over their local financial structures and fiscal management bear further witness to the importance of this factor. These are the provisions for continuance of committee existence or some form of trustee supervision over a taxing district's fiscal administration after the clearing up of its default; and covenants incorporated in new refunding bonds to control a readjusted municipality's fiscal and management policy throughout the life of the issue. Such covenants embrace major items of financial management such as outside limits on appropriations for operation handling and investment of sinking fund, and calculation of the tax rate necessary to meet budget appropriations in such a way as to insure recognition of noncollectibility.

"In such covenants we have an interesting response to the advocates of home rule. The desire for home rule has often blocked attempts to establish a continuing and effective administrative supervision of local fiscal affairs by the respective states. But covenants of the kind mentioned suggest that in these, as in other political details of local government, creditors must and will meddle if the states will not. The net result is that creditors are exacting contractual substitutes which, if observed, would appear to cramp home rule at least as stringently as would any state administrative control." SEC Report, supra note 35 at 60.

See also covenants incorporated in plan agreed upon but not consummated in Coral Gables, Fla., id. at 32; general discussion of question in Pub. Ad. Ser., supra note 38 at 32, 33.

105 As originally enacted, Section 36 made available the sum of $50,000,000 for the purposes of the refinancing program. This amount was later increased by Congress to $125,000,000. The Section was also broadened to include private irrigation companies and loans to such borrowers are included in the figures hereafter set forth, although the number of such loans is comparatively insignificant. Up to date, applications for refinancing loans have been received from 752 applicants, having approximately $330,000,000 of outstanding indebtedness. Loans, in the total aggregate amount of $116,982,000, have been authorized to 530 borrowers; 310 of these loans, representing $59,538,000, have actually been disbursed. The amount of principal indebtedness, exclusive of interest, that was taken up was approximately $128,204,500, which represented an average refinancing payment of about 46.5 cents for each dollar of principal amount of outstanding indebtedness. It is estimated that the annual requirements necessary to service this outstanding indebtedness of $128,204,500 was $12,750,000, whereas the annual requirements necessary to service the amount loaned thereon, that is, $59,538,000, will be $3,980,000; which represents an annual saving to the landowners involved of about 68%; although, of course, in most instances loans run over a longer period than bonds refunded.

It is interesting to note that a program similar to that carried out under Section 36 is now being attempted for tax supported public school districts. Under the provisions of Pub. No. 325, 74th Cong., 2d Sess., app'd August 24, 1935, the R.F.C. is empowered "to make loans . . . in an aggregate amount not exceeding $10,000,000 to or for the benefit of tax supported public school dis-
itself, is not the answer to the problem as to how the financially distressed political subdivisions of the country, which will never be able to pay their existing indebtedness in full, may reduce and refinance such indebtedness. For, if the funds are to be made available, not by way of a gift, but as a loan—"fully and adequately secured"—the many difficulties attendant upon the refinancing of municipal indebtedness will necessarily be encountered. To what extent do these difficulties prevent an adequate and satisfactory solution of the general problem of municipal debt readjustment?  

The evidence compiled as a result of the program must, of course, be considered in the light of the fact that it was undertaken under very favorable attending circumstances. The borrower-districts, by their very nature, lacked the complexities of the ordinary municipal corporation. The amount of their floating indebtedness was, in the majority of cases, practically negligible. The nature of their obligations was peculiarly adaptable to a determination of value based upon capacity to pay. The obligations, for the most part, were, and for a long time prior to the passage of Section 36, had been in hopeless default. Bondholders were offered cash rather than refunding bonds—and upon what was generally admitted to be a very favorable settlement basis. In very few instances were the districts harassed by litigation while the readjustment plans were being formulated.

In such a light, how does the evidence shape up? Generally speaking, it may be said to demonstrate that, given
the proper surrounding conditions, an intelligent and satisfactory plan of readjustment may be formulated—and consummated. But what are the necessary conditions? To what extent are they now existent? How far may legislation go in supplying those factors still lacking?

It would appear, after all, that the refinancing value of tax obligations may be established upon a logical basis—through a determination of the capacity of the debtor to pay. If the determination was to be made by an independent administrative authority equipped to do the job, it is probable that the results would prove much more satisfactory than those achieved by the courts in private corporate reorganizations. State municipal commissions like those now functioning in New Jersey and North Carolina, acting in conjunction with the courts, appear to have furnished the answer to the needed supervision over debtors until the readjustment has been effected. Given adequate personnel and sufficiently

107 It is generally agreed that any satisfactory treatment of municipal debt readjustment must involve three broad elements: (1) Negotiating a plan of adjustment upon an open and logical basis; (2) keeping creditors in status quo while a plan is being formulated; and (3) enforcing the plan against the dissenting minority. See Dimock, supra note 46; Address of William O. Douglass, Commissioner, Securities and Exchange Commission, Am. Bar Assoc., 59th Ann. Meet., Sec. Mun. Law, Aug. 25, 1936.

108 "I think that [determining capacity to pay] is the great problem, of course, in the whole situation. I think that we are more concerned with that economic problem than we are with any of the legal machinery for finally collecting that amount from the municipality. If we could find a satisfactory way of determining that problem, I think that the legal machinery would be almost automatic." Dimock testifying at SEC PROCEEDINGS, supra note 49 at 665. See also op. cit. supra note 48 for indication of belief that crux of whole problem is the determination of capacity to pay.

The minority in the Ashton case apparently entertained no doubt that it was feasible to fix a fair and reasonable refinancing valuation. See comment of Justice Cardozo, supra note 49.

109 Supra notes 45, 49.

110 Supra note 49.

111 P. L. 1931, c. 60, as amended. For work of N. C. Commission see A. T. Allen, Adjustment of Municipal Debt, REPORT NO. 13, N. C. LEAGUE OF MUNICIPALITIES.

112 There has been much controversy as to whether receiverships for defaulted municipalities should take the form of administrative or judicial. See Dimock, op. cit. supra note 46 for argument in favor of "trying the courts first." See also HILHOUSE, op. cit. supra note 37 at 297-320, 335-344, where the several State statutes are analyzed from this standpoint and advantages and disadvantages of both types are discussed.

113 See testimony of W. R. Darby, Chairman, N. J. Commission, at SEC PROCEEDINGS, supra note 49 at 541-564, where he states inadequate appropriation and personnel have necessarily limited activities of commission.
broad powers to regulate the affairs of the defaulted debtor and mold its future debt policies, their work would be more effective.\textsuperscript{114} Similarly, supervision over committees or other representations of creditors by a Federal commission would curtail many of the objectionable practices of such bodies which make for unnecessary impediments.\textsuperscript{115} If the decision in \textit{Christmas v. Asbury Park}\textsuperscript{116} may be relied upon as evidence of the fact that the courts, in their desire to promote "equality of treatment to all bondholders," will temper the use of mandamus to afford the necessary "period of peace," it may be that we have gone a long way in solving the problem of how creditors may be held at bay during the preliminary stages.\textsuperscript{117} To conclude the problem, it has been suggested that Federal and State legislation should be enacted whereby the courts would be deprived of their power to issue mandamus when a certain percentage of creditors have agreed upon a plan of readjustment.\textsuperscript{118}

The plan has been formulated. Is compulsory legis-

\textsuperscript{114} \textit{I. e.}, the N. J. Mun. Fin. Commission has the power to prepare and certify to governing authority of school districts under its control resolutions authorizing the issuance of notes or bonds which "may contain provisions which shall be a part of the contract with the holders of such notes or bonds" as to creation of reserves, limitation on further borrowing, acceleration provisions, and "any other or further course of conduct on the part of the school district which may tend to improve its credit standing." N. J. Laws 1935, c. 258.

\textsuperscript{115} Mr. Douglas has unofficially advocated that municipal protective committees be brought under the supervision of the Securities and Exchange Commission, at the least, by requiring registration under the Securities Act of 1933, but preferably, by legislation fixing minimum standards "with power in the commission to enforce compliance with them." \textit{Supra} note 107.


\textsuperscript{117} Dimock has called such an interim "a period of peace," \textit{supra} note 46 at 50; Douglas—"a breathing spell." \textit{Supra} note 107. Neither leaves any doubt, however, that some such period is necessary to enable those concerned to work out a plan.

\textsuperscript{118} "After a specified percentage of creditors—say 66\%—and the debtor have signified acceptance and approval of a debt readjustment plan and that plan has been found to be fair, the Federal courts should be deprived of their power or jurisdiction to issue writs of mandamus and mandatory injunctions for the benefit of any creditor of a class affected by such plan." Douglas, \textit{supra} note 107.

It would appear that an attempt might be made to carry the legislation one step further and prohibit issuance of the writ prior to actual formation of a plan in order to enable negotiations to be carried on free of interference. The legislation might provide that creditor would be denied a writ for a reasonable length of time upon a showing that a valid attempt was being made to work out a plan.
lation needed to give it effect? If so, what may be expected? With the decision in the Ashton case, it would appear that hope for Federal bankruptcy legislation is indeed dim.\textsuperscript{119} State insolvency legislation then remains as the only possibility.

Whether such legislation may be carried to lengths sufficient to make it worth while, is a mooted question.\textsuperscript{120}

\textsuperscript{119} H. R. 12963, 74th Cong. 2d Sess., introduced June 8, 1936, by Congressman Wilcox, is another attempt to obtain valid Federal legislation—at least for debts incurred prior to its enactment. Except for the latter limitation, the bill is practically identical with Sections 78-80. Whether this change is an answer to the majority’s argument that the prior Act interfered with State sovereignty appears doubtful. If the Act were to require affirmative consent on the part of a State to the filing of a petition, rather than being merely permissive in such respect, it might be that the objection would be more nearly met; but even this is only a “straw in the wind,” in view of the majority’s argument that sovereignty cannot be waived. Douglas, supra 107.

See also H. R. 12596, introduced by Rep. Joy, of Missouri, in March, 1902; S. 5699 and H. R. 14789 (72d Cong. 2d Sess.). The latter were identical bills introduced by Sen. Norris and Rep. McLeod. Both Senate and House Judiciary Committees reported bills favorably. They differed from Sections 78-80 in that they merely attempted to permit a moratorium on debts of municipalities having 50,000 or more inhabitants.

\textsuperscript{120} The Ashton case, especially the minority opinion, appears to have cleared the atmosphere at least to this extent. The argument long advanced that municipal bankruptcy or insolvency legislation must fail because a public corporation has no property which it can turn over to the court for disposition to its creditors, was apparently disposed of by Justice Cardozo when he agreed with the principle of such cases as Vulcan Sheet Metal Company v. No. Platte Valley Irr. Co., 220 Fed. 106 (C. C. A. 8th, 1915), which hold that a debtor need have no property to surrender. Furthermore, the minority had no difficulty with the arguments that such legislation would necessarily violate the due process clause because the refinancing value of the obligations could not possibly be determined and because the resources of public corporations are inexhaustible—that the depth of the taxing power, especially in the case of general obligations, can never be plumbed.

Pryor v. Goza, 172 Miss. 46, 159 So. 99 (1935), and Sturges v. Crowninshield, 4 Wheat. 122, 4 L. ed. 529 (U. S. 1819), hold that it would be in violation of contracts to attempt to apply State legislation—at least if it permits a scaling of principal or interest, or otherwise affects the “substantive” rights of creditors—to debts incurred prior to its enactment. Indeed, both the majority and the minority in the Ashton case accept this theory. But the legislation passed upon in such cases was not based upon an emergency theory as are the Schackno Act in New York and the various bank reorganization statutes. Although it might not be amiss to prepare for future troubles, an attempt might also be made to deal with the existing difficulties by predicking the legislation on the emergency doctrine. For, it would appear that the prostration of one’s city is just as vital as of one’s banking institution; that emergency measures are as necessary in one instance as in the other. Of course, whether such legislation will be sustained by the Supreme Court, is still an open question. But there have been favorable decisions by State courts. People v. Title & Mtge. Co., 264 N. Y. 69, 190 N. E. 153 (1934). Moreover, whether even the emergency doctrine could be extended to a situation where creditors will not be restored to status quo thereafter, is questionable. Home Bldg. & Loan Ass’n v. Blaisdell, 290 U. S. 398, 54 Sup. Ct. 231, 78 L. ed. 413 (1934). See also Comment, Binding the Dissenters Under State Reorganization Laws (1935) 48 Harv. L. Rev. 1414.
Indeed, it has also been contended that there exists no necessity for any such type of legislation; but the experience with Section 36 would tend to show that—if it is true that the local public debt of the country is in many instances too burdensome to be borne—the solution lies in a direction other than an attempt to scale such indebtedness through a refinancing undertaking so

However, although the full import of Doty v. Love, 295 U. S. 64, 55 Sup. Ct. 558, 79 L. ed. 1303 (1934) is debatable, especially in this particular connection because of Worthen Co. v. Kavanaugh, 295 U. S. 56, 55 Sup. Ct. 555, 79 L. ed. 1298 (1934), it may be well that the case—where the question of emergency was not considered—strengthened by the emergency argument in the Blaisdell case, would permit the enactment of legislation which went no further than to provide that the minority could be forced to accept refunding securities with extended maturities and the enforcement of a plan embodying such a proposal. In other words, the legislation would be seeking merely to defer the enforcement of the dissenters' rights, with no substantial impairment thereof; something of which both the Love and Blaisdell cases apparently approved. See in this connection House Bill No. 675, Ohio Leg., app'd July 23, 1936.

More serious, perhaps, is the question of enforcing any such legislation against nonresident creditors. Cases like Ogden v. Saunders, 12 Wheat. 213, 6 L. ed. 606 (U. S. 1827), appear to conclude the question, unless the crux of Canada So. Ry. Co. v. Gebhardt, 109 U. S. 527, 3 Sup. Ct. 363, 27 L. ed. 1020 (1883), lay in the fact that the debtor in that case was a corporation "created for a public purpose," or unless the Congress might enact legislation to the effect that an insolvency or bankruptcy decree of a State court must be given "full faith and credit" by the courts of the several States. See Dimock, supra note 41 at 51, for discussion of the latter suggestion. It would appear, however, that the most that may be expected in this connection is legislation, such as Ore. Laws 1933 c. 433, which provides for the giving of notice of a proposed plan to creditors and requires registration of assent or dissent within a reasonable time to avoid being deemed to have consented to the plan. See Gilfillan v. Union Canal Co., 109 U. S. 401, 3 Sup. Ct. 304, 27 L. ed. 977 (1883), sustaining a Pa. Stat. to such effect.


121 See Hearings, supra note 39 at 84-140; Reports of U. S. Chamber of Commerce on Sections 78-80 published in March, May and November, 1933.

See also criticism of SEC Report by E. J. Dimock and Arnold Frye in (1936) 46 YALE L. J. 186. In their article reviewing the Report, the authors state: "However, the real difficulties in dealing with municipal debt adjustment are factual—not constitutional—for, where a substantial majority agree upon a fair refunding, a way is usually found to bring in the dissenters. While there is no way of telling how much the mere presence of the municipal provisions in the National Bankruptcy Act contributed to the substantially unanimous agreements of creditors by means of which many recent municipal refundings have been consummated, it is surely premature to assert that the only solution of the question of the irreconcilable minority lies in federal or state legislation. . . ."

122 Supra notes 26, 104.

123 Supra note 41.
long as there is no remedy available which is comparable to that sought to have been afforded by the late Section 80 of the Bankruptcy Act. 124

124 "If this [Ashton decision] is to remain the law of the land, it disposes of any possibility of effectively utilizing the bankruptcy power of the Federal Government in the field of quasi-municipal debt readjustment. And so long as this remains the law of the land it may be that no complete answer to the problems which they present can be found. To be sure, regulation of the means and methods of negotiable debt settlements can still be effected, protective committee personnel and procedure can be cleansed, purified, and made more effective on the level upon which negotiated, and compromise procedure can be raised, as I shall herein discuss. But the problem of minorities is one of great difficulty. So long as the majority’s opinion is a correct statement of the applicable law, it may indeed be true that ‘municipalities and creditors have been caught in a vice from which it is impossible to let them out,’ to use the words of Mr. Justice Cardozo.” DOUGLAS, op. cit. supra note 106.
THE NEED FOR A FEDERAL ADMINISTRATIVE COURT*

COL. O. R. McGUIRE

Chairman, Committee on Administrative Law, American Bar Association,
and Vice-Chairman, Committee on Administrative Law,
Federal Bar Association

On Friday, June 1, 1787, one hundred and forty-nine years ago, the Constitutional Convention, then in secret session in Philadelphia, adopted a resolution, as recorded by Robert Yates, a delegate from New York, that the Chief Executive should have “A general authority to execute the laws” while James Madison phrased the resolution as one “To carry into execution the national laws.” When the various resolutions adopted by the Convention were referred to the Committee on Style, this particular resolution emerged on Wednesday, September 12, 1787, as a part of Article 2, Section 3, in the language that the President “shall take care that the laws be faithfully executed.”

It will be remembered that Alexander Hamilton in his plan presented on June 18, 1787, to the Constitutional Convention had proposed that the President should be elected by electors chosen by the people in election districts to serve during good behavior and that among his duties should be “the execution of all laws passed.” The Virginia Plan, presented by Randolph on May 29, 1787, had proposed that the National Executive, or President, should be chosen by the National legislature to serve for a term of years and “that besides a general authority to execute the National laws, he ought to enjoy the executive rights vested in Congress by the Confederation.” The Pinkney Plan, likewise offered on May 29, 1787, to the Convention provided that the President should be elected annually by the Senate and House of Representa-
tives, by joint ballot, and that in the President should be vested "the executive authority of the United States." The New Jersey Plan, which was presented on June 15, 1787, by Patterson, contemplated that there should be elected by Congress a plural executive for a term of years who should have "general authority to execute the federal acts." Thus all of the plans offered to the Convention were in general agreement and it was assumed that the Chief Executive should have authority to superintend the execution of the laws which the Committee on Style and the Constitution phrased as a responsibility to "take care that the laws be faithfully executed."

When there was under discussion in the Convention on July 17, 1787, a proposal that the term of the President should be during good behavior, Colonel Mason objected thereto, saying that an executive during good behavior was only a softer name for an executive for life and that the next step would be a hereditary monarchy. Madison stated that "Experience had proved a tendency in our government to throw all power into the legislative vortex. The executives of the states are in general little more than cyphers; the legislatures omnipotent. If no effectual check be devised for restraining the instability and encroachments of the latter, a revolution of some kind or other would be inevitable." Madison again referred to this supposed danger of legislative usurpation of power by saying in the Federalist papers that "The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex" and that "it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions." In our appreciation of the fact that Madison has been proven wrong, we should not forget that he had no gift of prevision into our times.

There is no disguising the fact that the men who framed and adopted the Constitution of the United
States were apprehensive of the possible abuses of legislative authority but they were also apprehensive of excessive executive authority. They considered and adopted at different times resolutions for the election of the President by electors, and by the joint vote of the House and Senate, for terms of seven and then four years, and considered a Council of Revision to assist the President and to act as a check on his power.

These men of 1787 were not wedded to an authoritarian conception of society. They knew that before society as it then existed could develop, governments had to be subjected to a constitutional system. They knew of the long experience of mankind with the excesses and corruption of personal power. They remembered that the ascendancy of national kings and governments over local barons and the unification of national states from discordant tribes, were revulsions against vexatious, exclusive, and intimately despotic authority. They remembered that the emancipation of men from the elaborate restrictions of the guilds and the mercantilist policies of landed interests and of ecclesiastical and dynastic power had been necessary to enable men to reach their present stage of development. In a word, with them the laissez faire doctrine then recently stated by Adam Smith achieved the status of a theology and it was their intention to make the Federal government the instrument by which that theology could be applied to the practice of their daily lives. This necessitated the view that the least government consistent with protection within and without was the best government, and we have Jefferson declaring, in effect, that the best government was the one which governed least.

There is no intention discernible in the debates in the Constitutional Convention, in the ratifying conventions of the several States, or in the Federalist papers that the President should be a great administrative officer in personal charge of the administration of the laws. Aside
from the rather vague provisions in Article 2 of the Constitution that "The Executive Power shall be vested in a President" and that he shall "take care that the laws be faithfully executed" the intention seems to have been to make him some sort of a political chief, but, in the language of the poet, "Man proposes and God disposes." The gradual development of the executive power since the days of President Washington has operated to make the Chief Executive a great administrative officer, as I shall subsequently show, under express grants of authority from the Congress.

As we lawyers know, the Constitution was the result of a series of compromises. There were men in the Convention and in the State ratifying conventions who ardently desired that the Federal government should be a strong central government. Hamilton would have abolished the States and given all governmental power to the central government. There were others in these conventions who as ardently desired that there should be the absolute minimum of power in the Federal government; that the States should remain strong and the central government weak; and that nothing be done which would defeat these ends. You are doubtless familiar with the debates between the proponents and opponents of these ideas, a debate which has continued to this day. I merely pause to remind you that there was an attempt to balance the Federal power against the State power; the principal Federal executive power against the principal Federal legislative and judicial power; the principal Federal legislative power against the principal Federal executive and judicial power; and the principal Federal judicial power against the principal legislative and executive power as well as the reserved power in the people to amend the Constitution, and I need not go into detail.

Perhaps as a result of a conflict of ideas and the compromises necessary to reconcile them to any form of central government the Constitution made no express pro-
vision for the exercise of the administrative power. That
document is concerned with the separation of the prin-
cipal legislative, executive, and judicial powers in three
separate branches of the Federal government. I have
used the term "principal" legislative, executive and ju-
dicial powers advisedly for the reason that it was recog-
nized at the time that it was beyond the wit of man to
devise any system of government which would operate
in practice and which would make an absolute aggrega-
tion of those governmental powers into separate depart-
ments or branches of the government. Madison rightly
stated in the Federalist papers that:

"Experience has instructed us, that no skill in the science of
government has yet been able to discriminate and define, with
sufficient certainty, its three great provinces, the legislative, ex-
ecutive and judiciary; or even the privileges and powers of the
different legislative branches. Questions daily occur in the course
of practice, which proves the obscurity which reigns in these sub-
jects, and which puzzle the greatest adepts in political science."

There are but two indirect references in the Constitu-
tion to the possibility that the Congress might create any
administrative machinery for the execution of the laws.
One is that the Congress could vest the appointment of
subordinate officers in the President, or in the courts of
law, or in the heads of departments. The other refer-
ence is that the President might require the opinion in
writing of the principal officers in each of the executive
departments. The failure of the Constitution to provide
for the exercise of administrative authority has resulted
in a more or less continuous struggle between Congress
and the President as to the relative parts each should
play therein, with the Supreme Court of the United
States in the so-called Hot Oil cases last year declaring
a statute unconstitutional for the first time in the history
of our Government because the Congress and not the
President should have exercised the particular power of
legislation. There came along later the Schechter, or
Sick-Chicken case, and the point was raised in the Butler, or Processing Tax case.

During Washington’s administration there were adopted by the Congress the policy and procedure of conferring on the President the authority and responsibility of chief administrator of the laws enacted from time to time and to aid him therein there were created the Treasury Department, the War Department, which included the infant Navy, and the State Department. There was created the office of Attorney General, but he did not have a department until 1870, and there was continued the office of Postmaster General as created under the Articles of Confederation, but he was not a member of the cabinet until the days of President Jackson. Generally, the laws during the entire period from 1789 to 1860 were concerned with the maintenance of peace within and without the nation with the incidental raising of revenue from customs taxes to support such limited activities. There were a few exceptions, such as the building of roads and canals, but these exceptions were justified on the ground that they were necessary for the transportation of the mails and for the movement of troops.

Until the War between the States the powers of the Federal government remained comparatively simple. During this period there was a substantial amount of sub-legislative authority exercised by the several Presidents and their chief subordinates in the exercise of rules and regulations or orders designed to implement the statutes by filling in administrative details. Also, these administrative subordinates acted as judge and jury in the determination of such controversies as arose between them and the citizens in the administration of the laws—a power which they have necessarily continued to exercise to this day. With the exception of claims arising under the customs and excise laws no method was provided for the judicial review of such administrative decisions. As to customs and excise laws, the Federal courts worked
out on common law principles a procedure for suits against collectors of customs or collectors of internal revenue to recover the taxes paid to them, and in such suits all questions of law and fact could be decided. In 1853 a legislative court, known as the Court of Claims, was established to make investigation of cases and report them to the Congress, and some ten years later that court was given jurisdiction to enter judgment against the United States in a limited class of cases. In 1887, the district courts were given concurrent jurisdiction with the Court of Claims as to a further limited class of cases where the amount involved does not exceed $10,000—a jurisdiction now contained in section 24, paragraph 20, of the Judicial Code of March 3, 1911.

However, within the past seventy years—with the rise of the Granger and Populist movements—men appear to have assumed that the development of concentrated corporate capitalism is the natural and necessary outcome of the new technology resulting from the harnessing of steel and steam, the first instance of which in this country was witnessed by the members of the Constitutional Convention when they adjourned that day in 1787 to witness the novel invention of John Fitch—the movement of a vessel by means of steam. The collectivists, whether they were big business men, socialists, farmers, or laborers, have turned from the liberal to the authoritarian conception of society. During the intervening seventy or eighty years it has become more and more the primal premise of thought and action that human progress must come not through a larger emancipation of men but through a revival of the authoritarian state. I do not intend at this time to argue or suggest that the contrary movement during the Renaissance, Reformation, Declaration of Rights, Industrial Revolution, and during National Unification to disestablish governmental authority was so much antiquated nonsense and that our modern collectivists are correct.
It is sufficient for present purposes to invite attention to the fact, whether we like it or not, that within the past seventy years—and more particularly since the beginning of the World War—the intellectual leaders of the world seem to have abandoned the method of freedom prevailing since the Reformation and have sought to augment the powers of government. Notwithstanding the apparatus of all Western governments was never more elaborate, world economy has been disintegrating, and the United States has not escaped this world movement.

In our country, this revival of the theory of an authoritarian state has been going on, as I have stated, for a period of approximately seventy years, in an attempt to meet the problems engendered by the union of steam and steel, the rise of industrialism with its concentration of capital on the one side and labor on the other, with commerce and agriculture, and the various segments of social and economic groups arising therefrom. All of these groups are today represented at the National Capital by hired representatives, secretaries, managers, presidents or whatever their titles may be, who, like a modern general, have at their command the telephone, the telegraph, the radio and the airplane to organize and deploy their forces in the various States and congressional districts for or against men, measures and policies. Many of these men are highly trained in the art of both politics and propaganda. They bring to bear on Presidents, Senators and Congressmen all possible political pressure in behalf of measures favored by these organized minorities and with an activity as ceaseless as the waves they undertake to defeat men, measures and policies which are conceived to be antagonistic to the interests of the particular organized minority. There is some virtue in the fact that the cross current opposition and support of various organized minorities tend to equalize the efforts of each other, but the fact of the matter is that the volume of legislation is constantly growing which has for its object not
the ordinary governmental functions performed from 1789 to 1860 but the revival of authoritarian government in various aspects.

Please remember that I am not discussing whether this expansion of the authoritarian aspects of the Federal government is wise or unwise. I invite your attention to the matter for the purpose of showing that this growth is not a matter of the past three years or twelve years, and that, on the contrary, it commenced at least seventy years ago and has been moving with accelerating speed, particularly since the beginning of the World War. It is necessary that I do this in order to make my point that the problems confronting the nation and the President today that he take care the laws be faithfully executed are far more complex than they were when that phrase was written into our Constitution. They are more complex, in the first place, because the problems of government for the first seventy years of our national existence were comparatively simple—the maintenance of domestic order and the protection of the country against foreign foes. They are more complex, in the second place, because the volume of such laws and the personnel necessary to administer them today are greater for one of our larger departments of the government than they were of the entire government prior to 1860. Likewise, the cost of one of those larger departments of the government in 1930, for instance, was approximately the cost of the entire government seventy years before and in the meanwhile the per capita cost of that government had increased from approximately $2 in the early 1800's to more than $40 in 1930.

Now, what are the results? And I do not intend to speak at this time of the intangible results on the spirits of men of an abandonment, in large part, at least, of a theory of government by laws and not of men with return to an authoritarian state—constantly challenged since that long ago when first the Church and then kings and
emperors and guilds claimed and exercised the right to regulate the most intimate affairs of all men. I leave that question to the philosophers, the professors of the history of governments and peoples, and to men who make the science of government a part of the profession of politics. I prefer at this time to limit the question as to what have been the results of the growing concentration of government and in the increase in the power of that government to an examination of the effect on our constitutional system of government of the increased load which has been gradually thrown upon the President as a result of the mandate that he "take care the laws be faithfully executed."

Alike responsive to the growing complexity of our modern industrial conditions and the demands of organized minorities, the Federal government has legislated from time to time during the past seventy years in an attempt to meet the growing demands, and almost invariably the immediate responsibility for the administration of such legislation has been conferred on one of the existing departments of the government, or more often, since the World War, there have been created boards, commissions, authorities, and government-owned corporations to administer particular laws under the general supervision of the President. This process is ably discussed by Mr. Taft in "Our Chief Magistrate and His Powers," which was published in 1916, during the interim between his services as President and as Chief Justice, wherein he stated, even at that time, that the President "can exercise only a very general supervision," and that "there seems to be an impersonal entity in the permanent governmental structure, independent of him, which in some degree modifies his responsibility for its operation." He says further that:

"Presidents may come and go to the seashore or to the mountains, Cabinet officers may go about the country explaining how fortunate the country is in having such an administration, but the machinery at Washington continues to operate under this
army of faithful noncommissioned officers, and the great mass of governmental business is uninterrupted. The President notes little of this normal operation of the regular vast machine of government, which in many respects is automatic, unless its workings result in a break or there is palpable need of repair."

That is to say, we have piled departments, independent establishments, boards, commissions, authorities, and government-owned corporations on top of each other in an attempt to provide the necessary administrative machinery for the execution of the laws and we have turned loose in this rococo structure approximately a million men and women, if we include the military and naval services, as we must, to operate that machinery with nothing more than the most general supervision on the part of the President or on the part of his more responsible cabinet officers and heads of the other organizations. It is humanly impossible for the President to give more than the most general supervision to this vast administrative machinery with its far flung activities over the face of the entire globe even if he should be a master technician in the art of government. His cabinet officers are selected from civilian life with no particular knowledge of the work of the great organizations over which they preside and they generally remain in office no longer than the President, and even during such a short period they have little time to acquire any great amount of detailed knowledge of their particular departments, etc. In addition to all this, the more responsible subordinates, such as assistant secretaries, bureau chiefs, and similar officials with conspicuous exceptions which merely prove the rule, are political appointees and change with each change of administration or earlier. We have no administrative career civil service as in England, where a change in the party in power results in a change of about fifty officials only. Upon the theory that to the victor belong the spoils, we clean out the Department of Justice, for instance, of its responsible and able lawyers from the Attorney General right down through to the United
States Attorney for the United States Court for China, though some few lawyers are retained in the department in Washington during succeeding administrations. Our civil service is generally limited to minor clerks and stenographers, though the Army and Navy as well as the Coast Guard operate under a form of civil service in which automatic promotions, or promotions by selection have been provided for the commissioned personnel by which they may rise from the lower to the higher ranks and are able to make their services a life career.

But even if we could make the Federal civil service a career service for the men and women entering in the lower grades, we would be confronted by the situation in England that a trained civil service may not be trusted with absolute and unreviewable authority to make decisions in the issuance of rules and regulations and in the decision of concrete cases arising thereunder. Anyone who may have any doubts on this score has but to read Lord Chief Justice Hewart's book entitled, "The New Despotism," and the report made to Parliament by the Sankey Commission appointed to investigate the question of administrative justice at the hands of the English civil service. Shakespeare long ago declared that "Lawless are they that make their wills the law." Since the trained English administrative service under the supervision of permanent under-secretaries is asserted by Lord Chief Justice Hewart and the Sankey Commission to require an independent review of their decisions, it cannot be denied that our administrative service under the very general supervision of untrained supervisory officers appointed on the basis of political patronage for comparatively short periods of office requires such an independent review. President Taft transmitted to the Congress with approval a report of his Commission on Economy and Efficiency, wherein the statement was made that:

"One of the first dangers to which a representative government is exposed is usurpation of powers granted to the official
class. Wherever adequate provision has not been made for protecting the people against such danger, the result has been the overthrow of the principle of government as a trusteeship—the underlying principle of democracy. Recognizing the need for protection against the government official class, the American commonwealth adopted, as principles of charter organization, the devices which had been evolved after centuries of conflict—principles which had been successfully employed for the reduction of the self-assumed arbitrary powers of monarchs to a place of controlled responsibility."

Aside from this lack of control over the possible exercise of arbitrary power, the inevitable result and the practical consequences of our existing bureaucratic hodge-podge of numberless governmental agencies have been summarized in a recent publication of the Institute for Government Research, a privately endowed, non-partisan research organization, as follows:

"So great is the complexity, that merely the ordinary citizen seeking to protect his rights, but even a competent lawyer practising in federal administrative and constitutional law, can scarcely find his way through the jungle. Many agents of the government itself, sometimes the actual authorities who must make quasi judicial decisions are uncertain and bewildered concerning these matters."

There is no satisfactory administrative machinery by which the citizen and his lawyer may obtain a declaratory judgment as to the proper interpretation of a statute greatly affecting his rights, such as the Robinson-Patman Act, for instance. He is compelled for the most part to rely on the old common law method of trial and error, with the possibility of becoming involved in long and expensive litigation through all the courts to the Supreme Court of the United States to learn what his rights and duties may be under a particular statute. In addition, these administrative agencies are required to issue sub-legislation in the form of orders, rules and regulations, and to decide cases as they arise thereunder. At one and the same time a government administrative officer may find himself in one and all of the positions of a party interested in rigid enforcement or extension of an eco-
nomic or social policy; of complainant moving on the basis of a preliminary ex parte investigation; as legislator in the issuance of rules and regulations to fill in the details of the law canalizing such authority within certain banks; of prosecutor in the proceedings; and of judge in the determination of particular cases. Quite obviously this opens the door to great abuses and violates basic conceptions of impartiality and disinterestedness in the administration of justice. Also, quite obviously, such an administrator should not be the judge in his own cause. The Sankey Commission said with respect to the exercise of judicial power by administrative tribunals in England that:

"We think it is beyond doubt that there are certain canons of judicial conduct to which all tribunals and persons who have to give judicial or quasi judicial decisions ought to conform. The principles on which they rest are we think implicit in the rule of law. . . . (1) The first and most fundamental principle of natural justice is that a man may not be judge in his own cause."

And further, that:

"Indeed we think it clear that bias from strong and sincere convictions as to public policy may operate as a more serious disqualification than pecuniary interest. . . ." and that "It is unfair to impose on a practical administrator the duty of adjudicating in any matter in which it could be fairly argued that his impartiality would be in inverse ratio to his strength and ability as a minister."

We in America have adopted the device of conferring on the official who is to administer certain laws, which means in practice on subordinates acting in his name, authority not only to decide concrete cases arising in the administration of the laws and the rules and regulations issued by him thereunder but in a number of instances authority to make his decisions final and conclusive either on the facts and law or on the facts. It will be remembered that quite early in our history the courts adopted the English theory that the Government could not be sued without its consent, and Congress has not only failed to give consent for the Federal government to be sued in
many cases but it has gone further and in effect proh-ibited all suits under the particular statutes by the state-
ment therein that the decision of the appropriate admin-
istrative official shall be final and conclusive upon the
entire case or that his decision shall be final and conclu-
sive as to the facts. In other instances, the courts them-
selves have adopted a rule of decision that they will not
review the facts found by the administrative officers in
the decision of certain controversies if there were any
evidence from which such facts could be found. More-
over, in many instances the regular constitutional courts
do not have jurisdiction and could not be given jurisdict-
ion to review administrative decisions. Also, in some
instances, organized minorities have been instrumental in
having such provisions inserted in the statutes that the
decisions of the administrative official shall be final and
conclusive and they have succeeded in securing the ap-
pointment of one of their partisans as the administrative
official who is to make the decision. Well may they say
with the poet, Churchill:

"Who's in or out, who moves this grand machine,
Nor stirs my curiosity or spleen;
Secrets of state no more I wish to know
Than secret movements of a puppet-show;
Let but the puppets move, I've my desire,
Unseen the hand which guides the master wire."

Furthermore, the inability to test out administrative
decisions on both the law and the facts in a tribunal in-
dependent of the administrative branch of the govern-
ment results in the perpetuation of error, incompetence,
and injustice. If such decisions cannot be brought under
review in an independent tribunal, the defects in the de-
cision cannot be established, and as I have pointed out
in this address the President, cabinet officers, and prin-
cipal administrative officers are unable, in practice, to
give more than the most general supervision to the ad-
ministration of the details of the laws even if they had
the technical training and experience to do more. It is
not an uncommon phenomenon for men to acquire a Messiah complex in the exercise of power, and save for the Great Nazarene history has failed to show many men with Messiah complexes willing to be shorn of their power. On the contrary, the usual procedure is for them to strive for more power in the sincere belief that they know best how to exercise that power.

More than this, the overloading of the administrative branch of the government with administrative officials, employees and power can but result in overbalancing the power of the executive branch as compared with the legislative and judicial branches of our Federal government, thus destroying the equilibrium which the men of 1787 thought they had devised for the protection of our liberties. The executive not only has a vast power of patronage in appointment of men and women to office but he acquires greater power through the feverish efforts of such appointees to retain him in office, and this in turn is brought to bear on the legislative branch for a further augmentation of the personnel and power of the administrative branch. This is nothing new in our country. As I have elsewhere stated, the process has been going on more or less intermittently for a period of some seventy years, and the process was well known even at the dawn of history. The tragedy of human institutions is that men neglect to "new model" their government, as Hamilton or Madison phrased it in the Federalist papers, so as to restore the necessary equilibrium until it is usually too late to prevent the rise of the Man on Horseback—a fate which has overtaken great nations and peoples under our very eyes within the past twenty-five years.

The American Bar Association saw the danger from a book, which the late James M. Beck and I wrote in 1932, which we called "Our Wonderland of Bureaucracy," showing the more or less continuous growth of governmental organizations and powers since our form
of government was wound up and started to ticking in 1787. Shortly before 1932 Lord Chief Justice Hewart wrote “The New Despotism,” or the substitution of an uncontrolled discretion of an administrative service for the uncontrolled discretion of a King. Also, it was about this time that Lord Sankey’s Commission made its report to Parliament substantiating in many particulars the criticisms of Lord Chief Justice Hewart. Thereupon the American Bar Association established, in 1933, its Special Committee on Administrative Law under a mandate to study our existing governmental machinery for the enforcement of the laws and to devise some method which would bring it under the control of the law—since it appeared practically impossible for the Chief Executive to exercise anything more than the most general personal control.

Three rather exhaustive annual reports made by that Committee are now embalmed in the annual reports of the proceedings of the American Bar Association. As a result of the recommendations of the Committee there has been enacted into a law a requirement that there be published from time to time as issued the orders and regulations of a more general nature issued in the nature of sub-legislation to fill in the interstices of the law. We recognized that in practice the public business could not be conducted without considerable authority in the administrative branch of the government to legislate, but we did think that the American people should have as ready access to such sub-legislation as it had to the statutes enacted by the Congress. Another recommendation has been twice approved by the American Bar Association which has for its purpose the subjecting of the principal decisions of administrative officers to review on both the law and the facts in a tribunal absolutely independent of the administrative branch of the government, with the members thereof holding office for life or during good behavior.
The proposed tribunal for the review of administrative decisions has been termed an administrative court, but, in the language of Shakespeare, "A rose by any other name smells as sweet." The name of the court is immaterial and it is not absolutely essential that a new court be created for that purpose if we cannot readily do so—as the proposed jurisdiction can be conferred on one or more of the existing legislative courts with the addition of a few additional judges and possibly with some redistribution of jurisdiction now existing in such courts. I might add that France, which early recognized the need of subjecting administrative decisions to review on the law and the facts, has such a court named the Council d'Etat and in that country the existence of administrative law was recognized long before either England or this country with their common law traditions recognized the existence of such law. We have tried, with dismal failure, to fit the common law traditions and methods to a highly complex situation involved in many cases of disputes with administrative officers, and for lack of some workable machinery the Congress has generally ended up by making the decisions of administrative officers final and conclusive on both the law and the facts or at least on the law in practically all classes of disputes except money claims.

I may remind you at this point that, as pointed out in our report to the 1936 Boston meeting of the American Bar Association, there are a number of cases where it is impossible under the Constitution to invest the constitutional courts with jurisdiction to review on both the law and the facts administrative decisions. Moreover, these regular constitutional courts are generally unfamiliar with the technical governmental problems, and it is no easy task to attempt to educate 90-odd district courts, no matter how able the judges may be, in government cases which must, after all, form but a fraction of the regular work of such courts. Also, the diversities in conclusion
reached by such courts in similar cases is simply staggering, and there seems to be no possible hope of these 90-odd district courts reaching substantially similar conclusions without the slow, laborious and expensive procedure of dragging the cases through the several circuit courts of appeal and finally into the Supreme Court of the United States. I might add here that due to our antiquated procedure in tax cases, for instance, the latter court devoted approximately one-third of its time last year to the hearing and consideration of tax cases, many of which were brought to that court in an attempt to establish uniform rules in particular classes of cases.

We have established a specialized tribunal for the hearing and determination of administrative decisions reached by the custom officials and a further specialized tribunal exclusively to hear and determine appeals from the custom court of first instance. Both the importers, as represented by the President of the Customs Bar, and the Federal officials are satisfied with the celerity, inexpensiveness, and correctness of conclusions reached in these specialized courts and they are adverse to any change therein.

I could discuss more at length the details of the jurisdiction proposed to be conferred on the administrative court or on the existing legislative courts, but for present purposes I may summarize by saying that it is proposed to make reviewable in a tribunal absolutely independent of the administrative service and by judges possessing that independence which comes from long tenure of service, all decisions of administrative officers in the more important controversies between them and the citizen on both the law and the facts. This proposal has been made in this period of comparative tranquillity for the reason that the house is made fireproof while it is being built and not after it catches on fire. The time to "new model" our institutions of government, within the framework of the Constitution, is while matters are running more or
less smoothly and not after an undue burden is thrown upon the administrative machinery as the result of war or in days of depression when government itself is fighting for its life.

Above all, I would remind you that this is a task to which all lawyers should lend their assistance, not only to the American Bar Association and its Special Committee on Administrative Law, but to the elected representatives in both the White House and in the Halls of the Congress so that they may be able to beat back the tides of selfishness, indifference, and ignorance in attempting to improve the machinery of government so as to maintain that necessary equilibrium if our government is to endure. Concretely, this support can be given to these men in the form of discouraging opposition to them at home by other politicians snapping and snarling at their heels in an attempt to build up such opposition while they are engaged in these grave problems so that the opponents may succeed them in office with the glory and emoluments which go with the office. I admit that ambition for such an office is a laudable one, but we should select our public men and should support them on the same basis we select our employees in private business —on the basis of ability, honesty, and industry.

We cannot remain free through the use of governmental power at the dictates of minorities or bureaucrats or both to oppress the citizen who is entitled at the hands of his government to justice, nothing more and nothing less. Will you, in your mind's eye, view the conditions of great peoples across the seas where democratic institutions have crumbled under the heel of Men on Horseback. In the noble words of John Philpot Curran, that great Irish lawyer and patriot, "Slavery looks quietly at the despot on the very spot where Leonidas expired" because Sparta "lost that government which her liberty could not survive." Truly did he say, "The people are al-
ways strong; the public chains can only be riveted by the public hands."

In closing, may I remind you of the words of Benjamin Franklin as he signed the document which was to be submitted for ratification as the Constitution of the United States? Said he:

"I agree to this Constitution, with all its faults,—if there are such,—because I think a general government necessary for us, and there is no form of government but what may be a blessing to the people, if well administered; and I believe, further, that this is likely to be well administered for a course of years, and can only end in despotism, as other forms have done before it, when the people shall become so corrupted as to need despotic government, being incapable of any other."

Our form of government has been sealed and dedicated by the life blood of Americans, and upon the members of the Bar, beyond all others, rests the grave responsibility of seeing that their sacrifices of life, blood, and treasure were not made in vain; that the people shall not become so corrupted as to become incapable of any other government than a despotism; and that understanding, support, and encouragement are given to our leaders in their labors to redistribute the powers of government among the legislative, executive, and judicial branches so that no one of them will overbalance the others and destroy the equilibrium so necessary in a democratic form of government.

* Since delivering the above address there has come to my attention an address delivered by Mr. Justice Harlan F. Stone before the Conference on the Future of the Common Law, held at the Harvard Law School, August 19-21, 1936, 50 Harvard Law Review, pp. 16, 17, making reference to administrative law and administrative agencies, in pertinent part, as follows:

"Perhaps the most striking change in the common law of this country, certainly in recent times, has been the rise of a system of administrative law, dispensed in the first instance through authority delegated to boards and commissions composed of nonjudicial officers. The reception by the profession and the courts of these new administrative agencies has exhibited an interesting parallel to their attitude toward other forms of external change. These agencies soon became a matter of concern, not alone because of their novelty and statutory origin, but because they were brought into the law as a means of law enforcement and as the instruments for providing, to a limited extent, remedies for its violation, of which the courts had possessed a virtual monopoly.

"Under the civil law the rise of a system of administrative law, independently of the courts, came as a welcome formulation of principles for the guidance of official action, where no control had existed before. To the common law the
use of these administrative agencies came as an encroachment upon the established doctrine of the supremacy of the courts over official action. It was the substitution of new methods of control, often crude and imperfect in their beginnings, for the controls traditionally exercised by courts—a substitution made necessary, not by want of an applicable law, but because the ever expanding activities of government in dealing with the complexities of modern life had made indispensable the adoption of procedures more expeditious and better guided by specialized experience than any which the courts had provided.

"Looking back over the fifty years which have passed since the establishment of the Interstate Commerce Commission, no one can now seriously doubt the possibility of establishing an administrative system which can be made to satisfy and harmonize the requirements of due process and the common-law ideal of supremacy of law, on the one hand, and the demand, on the other, that government be afforded a needed means to function, freed from the necessity of strict conformity to the traditional procedure of the courts.

"Rarely in the history of the law has such an opportunity come to our profession to carry forward a creative work which would enable the law to satisfy the pressing needs of a changing order without the loss of essential values. The ultimate establishment of equity, after a period of resistance, as a coordinate branch of the law, ameliorating the rigors of the common-law system and translating in some measure moral into juristic obligations, is a comparable transition in the law. The profession of our day, like its predecessors who saw in the pretensions of the chancellor but a new danger to the common law, has given little evidence that it sees in this new method of administrative control any opportunity except for resistance to a strange and therefore unwelcome innovation.

"Addresses before bar associations twenty years ago, discussing the rise of new administrative agencies, are reminiscent of the distrust of equity displayed by the common-law judges led by Coke, and of their resistance to its expansion. We still get the reverberations of these early fulminations in renewed alarms at our growing administrative bureaucracy and the new despotism of boards and commissions. So far as these nostalgic yearnings for an era that has passed would encourage us to stay the tide of a needed reform, they are destined to share the fate of the obstacles which Coke and his colleagues sought to place in the way of the extension of the beneficent sway of equity. These warnings should be turned to account, not in futile resistance to the inevitable, or in efforts to restrict to needlessly narrow limits activities which administrative officers can perform better than the courts, but as inspiration to the performance of the creative service which the bar and courts are privileged to render in bringing into our law the undoubted advantages of the new agencies as efficient working implements of government, surrounded, at the same time, with every needful guarantee against abuse."
The George Washington Law Review

Published quarterly, November, January, March and May, by The George Washington University. Edited by the Faculty and Students of the Law School.

Subscription Price, $2.50 per year
Foreign Subscriptions, $3.00 per year
75 cents per number

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EDITORIAL NOTES

INDUSTRIAL REGULATION THROUGH GOVERNMENT CONTRACTS:
THE WALSH-HEALEY ACT

The Walsh-Healey Act of 1936¹ is the latest and most far-reaching, though not the first, example of an attempt by Congress to exercise control of industrial labor conditions through the medium of government contracts. Signed by the President on June 30, 1936, the Act has already made itself the subject of considerable controversy with respect to the meaning of some of its provisions.

The purpose of this note is to discuss the constitutionality of this law and to point out briefly some of the problems of interpretation and administration that have arisen.

Section 1 of the Act provides that in any contract made by any agency of the United States² for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding $10,000,³ there shall be included the following representations and stipulations:

“(a) That the contractor is a manufacturer of or a regular dealer in the materials, supplies, articles, or equipment to be manufactured or used in the performance of the contract;⁴

“(b) That all persons employed by the contractor⁵ in the manu-

¹ Public Act No. 846, 74th Cong. 2d Sess., June 30, 1936.
² Defined in Section 1 of the Act to include any executive department, independent establishment, or other agency or instrumentality of the United States, or the District of Columbia, or any corporation all the stock of which is beneficially owned by the United States.
³ Subsequent to the effective date of the Act, the government issued invitations for bids for twelve light trucks for the Resettlement Administration. When the bids were opened, only one firm, A. J. Corbitt Co., agreed to the Walsh-Healey stipulations. The other three, General Motors, International Harvester, and Reo, "ducked below the $10,000 limit under which the stipulations do not apply by the simple device of bidding for only seven, eight and eight units, respectively." Business Week, Oct. 24, 1936 at 11. The government rejected all four bids and readvertised for new bids on Oct. 23, 1936, stating: "... Bids to furnish less than the number called for will not be considered." N. Y. Journal of Commerce, Oct. 24, 1936 at 1.
⁴ The purpose of this provision is "to eliminate the evil of bid brokerage and bid peddling... Testimony was offered... showing that many persons who were not legitimate dealers nor manufacturers made a practice of bidding for government contracts by submitting estimates so low that none of the well-established concerns in the field could successfully compete against them. These brokers then sublet various portions of the contract to sweat shops and substandard factories..." H. R. Rep. No. 2946, 74th Cong. 2d Sess. at 4.
⁵ The original Senate bill, S. 3055, 74th Cong. 1st Sess., laid down labor regulations for subcontractors and persons furnishing materials to public contractors, as well as the contractors themselves. The Act as approved, with the possible exception of stipulation (e), infra, deals only with persons employed by the contractor proper. "It was the purpose of the committee [House..."
facture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract\(^a\) will be paid, without subsequent deduction or rebate on any account, not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under said contract;\(^7\)

"(c) That no person employed by the contractor\(^a\) in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract\(^a\) shall be permitted to work in excess of eight hours in any one day or in excess of forty hours in any one week;\(^10\)

"(d) That no male person under sixteen years of age and no female person under eighteen years of age\(^11\) and no convict labor will be employed by the contractor\(^12\) in the manufacture or production or furnishing of any of the materials, supplies, articles, or equipment included in such contract;\(^13\) and

Judiciary\(^1\) to deal only with government contracts, since the government has already had considerable experience with regulation in this field. . . ." "Ibid.

It has been suggested that the failure of the Act to go back further in the channels of supply may result in manufacturers avoiding its labor regulations by establishing independent "regular dealers" to contract with the government. Business Week, Sept. 26, 1936 at 20.

\(^6\) Regulations prescribed by the Secretary of Labor under this Act provide: "The stipulations shall be deemed applicable only to employees engaged in or connected with the manufacture, fabrication, assembling, handling, supervision, or shipment of materials, supplies, articles, or equipment required under the contract and shall not be deemed applicable to office or custodial employees." Infra note 26, Art. 102 at 4.

\(^7\) Section 11 of the Act contains a proviso "That the provisions requiring the inclusion of representations with respect to minimum wages shall apply only to purchases or contracts relating to such industries as have been the subject matter of a determination by the Secretary of Labor."

\(^8\) Supra note 5.

\(^9\) Supra note 6.

\(^10\) With respect to whether this would permit an employee who had already worked eight hours on government work to be worked additional time during that day on other work, the Secretary of Labor's regulations state: "If in any one week or part thereof an employee is engaged in work covered by the contractor's stipulations, his overtime shall be computed after eight hours in any one day or after 40 hours in any one week during which no single daily total of employment may be in excess of eight hours without payment of the overtime rate." Infra note 26, Art. 103 at 4.

\(^11\) "Having pointed out that the cotton cloth industry as now organized cannot readily comply with the rigid requirements of the act, the Cotton-Textile Institute asked if it could not reduce the 18-year female age limit to 16 years. . . . The board [a temporary one appointed by the Secretary of Labor] issued a temporary exemption for 90 days permitting the retention of 16-18 year-old girls now employed, but forbidding any further employment in this classification. . . ." Business Week, Oct. 24, 1936 at 11; see also 4 U. S. Law Week 194.

\(^12\) Supra note 5.

\(^13\) Supra note 6.
“(e) That no part of such contract will be performed nor will any of the materials, supplies, articles, or equipment to be manufactured or furnished under said contract be manufactured or fabricated in any plants, factories, buildings, or surroundings or under working conditions which are unsanitary or hazardous or dangerous to the health and safety of employees engaged in the performance of said contract. Compliance with the safety, sanitary, and factory inspection laws of the State in which the work or part thereof is to be performed shall be prima facie evidence of compliance with this subsection.”

Section 2 of the Act makes contractors who violate any of the above stipulations liable to the United States for liquidated damages of $10 per day for each employee engaged in violation of subsection (d), supra. In the case of employees paid in violation of subsection (d), the damages are the amount of the deduction, rebate, refund, or underpayment of wages. Such liquidated damages may be withheld from any amounts due the contractor or may be recovered in suits by the Attorney General. All such sums recovered or withheld must be kept in a special deposit account to be paid, on order of the Secretary of Labor, directly to the employees who have been paid less than the minimum rates of pay.

In addition to the above sanctions against violators, the government may cancel the contract, obtain its supplies elsewhere, and charge the violating contractor with any additional cost thereby incurred. Also, section 3 of the Act directs the Comptroller General to distribute to all agencies of the United States a list of those found by the Secretary of Labor to have breached any of the stipulations. Unless the Secretary otherwise recommends, no government contracts can be awarded to anyone on the list for three years after the date of the breach.

Section 4 vests administration of the Act in the Secretary of Labor with authority to make, amend, and rescind necessary rules and regulations. Section 5 gives the Secretary of Labor power to hold hearings, order the attendance of witnesses, and to make findings of

14 Compare the language here with that of stipulations (b), (c), and (d) and see note 5, supra. This stipulation may go further back in the channels of distribution than the others, by making the immediate contractor agree not to purchase materials from unsanitary or unsafe plants.

15 A proviso is added to this section “That no claims by employees for such payments shall be entertained unless made within one year from the date of actual notice to the contractor of the withholding or recovery of such sums by the United States of America.”

16 The language used is: “Upon his own motion or on application of any person affected by any ruling of any agency of the United States in relation to any proposal or contract involving any of the provisions of this Act, and
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fact after notice and hearing, which findings are made conclusive upon all agencies of the United States, and if supported by the preponderance of the evidence, are to be conclusive in any court of the United States.

Section 6 of the Act provides that, upon a written finding by the head of a contracting agency that the inclusion in a contract of the stipulations required by the Act will “seriously impair the conduct of Government business,” the Secretary of Labor shall make exceptions when justice or public interest will be served thereby. This section gives the Secretary power, upon the joint recommendation of the contracting agency and the contractor, to modify the terms of an existing contract respecting wages and hours of employment. It also gives the Secretary broad power to make rules and regulations providing reasonable variations, tolerances, and exemptions with respect to provisions of the Act or the application of the Act to contractors. It concludes with the injunction that whenever the Secretary permits an increase in the maximum hours of labor “stipulated in the contract,” he shall set a rate of pay for overtime of not less than time and one-half.

Section 9 exempts from the operation of the Act “purchases of

on complaint of a breach or violation of any representation or stipulation as herein provided, the Secretary of Labor . . . shall have the power to hold hearings. . . .” (Italics supplied.) An administrative question arises as to whether the Secretary has power to hold hearings in the absence of a complaint of breach or violation. In other words, should the italicized “and” be construed literally or construed to mean “and/or”? On application of the Secretary of Labor, the District Courts are given jurisdiction to issue appropriate orders to disobedient witnesses. Violation of the court order, of course, is punishable as a contempt.

All of the powers of the Secretary of Labor under Section 5 of the Act may, under that section, be delegated to “an impartial representative.” (Italics supplied.) Quaere whether this makes the finding of the head of the contracting agency conclusive and leaves the Secretary power to pass only on the question whether “justice or the public interest” will be served.

such materials, supplies, articles, or equipment as may usually be bought in the open market; such perishables, including dairy, livestock and nursery products; agricultural products processed for first sale by the original producers; contracts of the Secretary of Agricultural for the purchase of agricultural commodities; transportation of freight or personnel over carriers having published tariff rates, and contracts with common carriers subject to the Communications Act of 1934.

Section 11 established the effective date of the Act as September 28, 1936, causing it to apply to the government's invitations for bids issued on and after that date.

On September 14, 1936, the Secretary of Labor issued regulations instructing government agencies how to proceed under the Act. These regulations added three new contract stipulations to those expressly required by the Act proper, and presented the

22 There seems to be a disagreement between industry and the Secretary of Labor over the meaning of the words "as may usually be bought in the open market." The Secretary has instructed government purchasing officers that they mean, "Where the contracting officer is authorized by statute or otherwise to purchase in the open market without advertising for proposals." Infra note 26, Art. 2 at 3. This regulation refers to the statutory power of contracting officers to buy certain limited needs in the open market. Industry points out that "As the normal limitation on such orders is from $50 to $500, and the Act applies only to contracts over $10,000, the exemption, according to the Secretary's interpretation, is so much waste language. . . . When the law is taken to the courts, it will probably be for an interpretation of this ruling." Business Week, Sept. 26, 1936 at 20. Industry argues that the "open market" phrase exempts from the Act's operation all articles which producers or dealers usually offer or supply "ready made" to the commercial trade generally. This view is based largely on the existence of a similar "open market" clause in the Eight-hour Act of 1912, 37 Stat. 137 (1912), 40 U. S. C. §§ 324, 325 (1934), and upon a number of opinions of the Attorney General and Judge Advocate General as to the meaning of that clause. A lengthy discourse on this problem, together with digests of these opinions will be found in the Law Dept. Bulletin, July, 17, 1936, Natl. Assn. of Manufacturers, Washington, D. C. See also the Washington Review, July 27, 1936, Ch. of Com. of U. S., p. 2.

23 A question has arisen whether the Act means to regard dairy, livestock and nursery products as perishable per se, or merely as examples of articles that may be perishable under certain conditions. The Secretary of Labor takes the second view, stating in regulations issued under the Act that "perishables" cover products subject to decay or spoilage and not products canned, salted, smoked, or otherwise preserved." Infra note 26, Art. 2 at 3.


25 Section 10, not discussed in the text, is a separability clause. Section 11, in addition to prescribing the effective date, contains a proviso discussed in note 7, supra.

26 Regulations prescribed by the Secretary of Labor under Public Act No. 846, 74th Cong. (1936), Labor Dept. No. 504; 4 U. S. Law Week 67.

27 The Procurement Division of the Treasury Department circulated these regulations to the heads of all departments and establishments of the government. Procurement Div. Circular Letter No. 178, Sept. 16, 1936.

28 Supra note 26, Art. 1(f), (g) and (h) at 2. One incorporates the liquidated damages clauses of the Act in all contracts. The second binds contractors to post a copy of the stipulation at the site of work and keep certain employ-
Secretary of Labor's interpretations of a number of disputed provisions of the law. They prescribed certain definitions of terms, and gave a blanket authorization for the working of employees longer than 8 hours per day or 40 hours per week provided they are paid time and one-half for such overtime. They also granted exemptions from the operation of the Act to three classes of contracts. The regulations stated that when determinations are made with respect to prevailing minimum wages they will be published in the Federal Register.

The use of government contracts to enforce labor regulations is far from a new field of Federal legislation. An early type of this technique is the Act of August 1, 1892, establishing eight hours as the maximum day's work for laborers and mechanics employed by the United States or the District of Columbia or any contractor or subcontractor upon a public work of the United States. This Act was amended by the Act of March 3, 1913 to include dredging or rock excavation in any river or harbor. Both of these enactments prescribed a fine or imprisonment for violators, and neither of them stated expressly that the eight-hour limitation should be incorporated in the contract proper. In these respects, as well as in the narrower scope of the work covered, they differed from the Walsh-Healey Act.

Another statute of interest is the Eight-hour Law of June 19, 1912 requiring that government contracts and subcontracts contain a stipulation for a maximum working day of eight hours for laborers and mechanics and a stipulation for liquidated damages of $5 per day for each employee worked in violation of the eight-hour law.
limit. This statute covered types of work which the government had previously performed for itself or might perform for itself, whenever the same were let out to contractors. It did not cover contracts for transportation, transmission of intelligence, purchase of supplies, or "such materials or articles as may usually be bought in the open market, except armor and armor plate, whether made to conform to particular specifications or not." Neither did it apply to the construction or repair of levees or revetments for flood control. On March 4, 1917, this Act was amended to permit the President to suspend its operation in case of a national emergency, but the amendment provided that in such an event, the employees affected should be paid time and one-half for work in excess of eight hours per day.

The next enactment in point of time was the Bacon-Davis Act of 1931 providing that every government contract in excess of $5,000 for work on public buildings should contain a stipulation that the rate of wage for laborers and mechanics should not be less than the prevailing wage in the locality for similar work. In the event of a dispute as to the prevailing wage, the matter was to be referred to the Secretary of Labor, whose decision would be final. Congress amended this Act in 1935 making it applicable to contracts in excess of $2,000 for work on public buildings or public works. The Secretary of Labor was given power to determine prevailing wages in advance, and the actual wages, so determined, were to be inserted in each contract. This amendment required the contractor to post the wage scale at the scene of the work, and to pay his employees at least weekly. Like the Walsh-Healey Act, this amendment permitted the government to withhold from payments due the contractor whatever amount might be necessary to reimburse under-paid employees.

It also permitted the government to terminate a contract because of a violation and charge the contractor with the cost of having the work done elsewhere. Peculiarly similar to the Walsh-Healey Act is the provision in this amendment which directs the Comptroller General to issue a list of violators and which refuses government contracts to those on the list for a period of three years.

The above-described statutes did not, it is seen, cover a wide field of industry. The first exercise of widespread labor regulation in government contracts came about during the life of the National Recovery Administration. Under the authority of Title I of the National Industrial Recovery Act, the President issued Executive
Order No. 6646, requiring every government contractor or supplier of materials to certify to his compliance with each code applicable to his operations and, in addition, to obtain certificates of compliance from his subcontractors and materialmen. Executive Order No. 6646 was, of course, rescinded after the decision of the Supreme Court in the Schechter case had invalidated the N.R.A.

After the Schechter decision, the Comptroller General ruled that all outstanding bids which had been made on the basis of code compliance had to be rejected. To remedy this situation, Congress, on August 29, 1935, enacted a joint resolution to the effect that no such bid should be rejected if the bidder would agree that the contract, in lieu of code provisions, should be subject to all acts of Congress subsequently passed with respect to hours of labor, wages, or child labor.

Meanwhile, Congress had passed the Bituminous Coal Conservation Act of 1935, and this statute contained provisions that the government should not buy any coal at mines which were not in compliance with the coal code set up by the Act. Furthermore, it required each government contractor on public works or services to agree not to buy any coal for use in carrying out the contract except from members of the coal code. This Act was declared unconstitutional by the Supreme Court in the Carter case on May 18, 1936. The decision did not involve the government contracts provisions directly, but they fell with the rest of the Act.

In addition to these major statutes prescribing labor regulations in Federal contracts, three other enactments should be described to make the history of this type of legislation complete. An Act of June 13, 1934, prescribes a fine and imprisonment for anyone who forces an employee engaged in the construction of a public building or public work to "kick back" any of his salary. Title II of N.I.R.A. contains two provisions, one requiring minimum wage provisions

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44 On March 14, 1934.
46 14 Comp. Gen. 905 (1935); id. at 911.
48 The joint resolution provided for decreasing the contractor's compensation by the amount of any saving realized through relief from code compliance, and for increasing it to cover any increased costs resulting from compliance with subsequently-enacted legislation.
50 Section 14(a) and (b), respectively, 49 Stat. 1006 (1935, 15 U. S. C. Supp. I § 818a, b (1935).
to be included in all contracts involving expenditures of Federal grants to states for highway construction, and the other requiring that contracts for construction projects shall contain provisions to insure, "so far as practicable and feasible," a 30-hour maximum work week, "just and reasonable" wages, and giving preference in hiring to certain prescribed classes of persons. The Tennessee Valley Authority Act requires all contracts to which the corporation established by that Act is a party, and which require the employment of laborers or mechanics in construction work, to contain a provision for payment of not less than the prevailing rate of wages for similar work in the vicinity.

It is apparent that the Walsh-Healey Act covers a wider range of trades and industries than any previous measure of a similar type except Executive Order No. 6646 under N.R.A. Unlike the government contracts aspects of N.R.A. and the Guffey Coal Act, the Walsh-Healey Act is not connected with any attempt to regulate labor conditions directly through codes. Thus the question of its constitutionality is unencumbered with any question of Federal power to prescribe labor regulations apart from contract stipulations. The Walsh-Healey Act should stand or fall on its own merits.

Three classes of previously decided cases have a bearing on the constitutionality of this Act. The first class deals with the validity of municipal, state, and previous Federal legislation incorporating labor provisions in public contracts. The second class deals with the broad question of the Federal power to regulate indirectly, through the exercise of admitted powers, matters which it cannot regulate directly. The third class of cases deals with the delegation of quasi-legislative power to an administrative official.

Cases determining the validity of municipal ordinances regulating labor conditions in public contracts, while not involving the identical constitutional point raised by the Walsh-Healey Act, are interesting as background material. Such municipal ordinances have been declared void by state courts on one or more of the following grounds:

First, that they deprive contractors and their employees of constitutional rights, principally the right to contract freely. Second, that the municipality lacks authority to fix a labor policy in public con-

55 For a general discussion see Mattison, Limitation of Hours of Labor and Fixing a Minimum Wage Scale on All Public Work by Statute, Ordinance or By Contract (1921) 5 MARQUETTE L. REV. 150.
56 Re Kuback, 85 Cal. 274, 24 Pac. 737 (1890); Glover v. People, 201 Ill. 545, 66 N. E. 820 (1903); Seattle v. Smyth, 22 Wash. 327, 60 Pac. 1120 (1900); Fiske v. People, 188 Ill. 206, 207, 58 N. E. 985, 986 (1900); McChesney v. People, 200 Ill. 146, 147, 65 N. E. 626, 627 (1902).
tracts, such power lying only in the state; and third, that the municipality cannot pass such ordinances in the face of a state statute requiring that awards go to the lowest bidder. It should be noted that the cases based on the first ground were decided prior to the Supreme Court’s decision in Atkin v. Kansas, discussed later. A few cases involving municipal ordinances prior to that decision, and a considerable number decided later, uphold such ordinances as valid. These cases involve relatively simple wage and hour provisions in public contracts. In a few instances, municipalities have tried to require public contractors to employ union labor exclusively, and such municipal action has been held invalid.

In the field of state legislation governing labor conditions in public contracts, the leading case is Atkin v. Kansas, decided by the Supreme Court in 1903. In this case, the legislature of Kansas had established for employees of public contractors a maximum of eight hours work per day and a minimum wage equal to the current rate of per diem wages in the locality where the work is performed. A contractor was convicted for working an employee ten hours per day. The Supreme Court, in sustaining the conviction, said: "... No question arises here as to the power of a state, consistently with the Federal Constitution, to make it a criminal offense for an employer in purely private work in which the public has no concern, to permit or require his employees to perform daily labor in excess of a prescribed number of hours. ... It may be that the state, in enacting the statute, intended to give its sanction to the view held by many, that, all things considered, the general welfare of employees, me-

58 Frame v. Felix, 167 Pa. 47, 31 Atl. 375 (1895); Glover v. People, 201 Ill. 545, 66 N. E. 820 (1903); see McChesney v. People, 200 Ill. 146, 147, 65 N. E. 626, 627 (1902); McQuillin, Restricting Competition in Contracts for Public Works (1905) 61 Cent. L. J. 204.
60 City of St. Paul v. Fielding & Shepley, 155 Minn. 471, 194 N. W. 18 (1923); Re Broad, 36 Wash. 449, 78 Pac. 1004 (1904); Gies v. Broad, 41 Wash. 448, 83 Pac. 1025 (1906); Malette v. Spokane, 77 Wash. 205, 137 Pac. 496 (1913); Jahn v. Seattle, 120 Wash. 403, 207 Pac. 667 (1922); Milwaukee v. Raulf, 164 Wis. 172, 159 N. W. 819 (1916); State, ex rel., Miller v. Niven, 180 Wis. 583, 194 N. W. 30 (1923); Wagner v. Milwaukee, 266 U. S. 585, 45 Sup. Ct. 124, 69 L. ed. 454 (1924) (Writ of error dismissed for want of jurisdiction).
61 State, ex rel., United District Heating, Inc., v. State Office Building Commission, 124 Ohio St. 413, 178 N. E. 138 (1931); Holden v. City of Alton, 179 Ill. 318, 53 N. E. 536 (1899); Adams v. Brennan, 177 Ill. 194, 52 N. E. 314 (1898); City of Atlanta v. Stein, 111 Ga. 789, 36 S. E. 932 (1900); see Fiske v. People, 188 Ill. 206, 207, 58 N. E. 985, 986 (1900); McQuillin, supra, note 58 at 206.
mechanics and workmen, upon whom rest a portion of the burdens of
government, will be subserved if labor performed for eight continu-
ous hours was taken to be a full day's work. . . . We have no oc-
casion here to consider these questions, or to determine upon which
side is the sounder reason; for, whatever may have been the motives
controlling the enactment of the statute in question, we can imagine
no possible ground to dispute the power of a state to declare that
no one undertaking work for it or for one of its municipal agencies
should permit or require an employee on such work to labor in excess
of eight hours per day, and to inflict punishment upon those who are
embraced by such regulations and yet disregard them. . . . It cannot
be deemed a part of the liberty of any contractor that he may be allowed
to do public work in any mode he may choose to adopt, without re-
gard to the wishes of the state. On the contrary, it belongs to the
state, as the guardian and trustee for its people, and having control
of its affairs to prescribe the conditions upon which it will permit
public work to be done on its behalf, or on behalf of its municipalities.
No court has any authority to review its action in that respect. Regu-
lations on this subject suggest only considerations of public policy.
And with such considerations the courts have no concern. . . . No
employee is entitled, of absolute right and as a part of his liberty,
to perform labor for the state. . . ."

Prior to the Atkin decision, the few state cases on the subject, in-
volving state statutes, were divided, but afterwards, state regulation
of labor conditions in public contracts was uniformly held valid both
by the state courts and the Supreme Court. In one later case, the Supreme Court held a state statute invalid which prescribed that
public contractors should pay their help not less than the current rate

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63 All italics in this quotation are the Court's.
64 City of Cleveland v. Clements Constr. Co., 67 Ohio St. 197, 65 N. E. 885
(1902) (Statute held invalid); In re Dalton, 61 Kan. 257, 59 Pac. 336 (1899)
(Statute held valid). For a general discussion of the validity of State statutes
and municipal ordinances prior to the Atkin decision, see Myrick, Hours of
People, 37 Colo. 317, 87 Pac. 791 (1906); State v. Tibbetts, 21 Okt. Cr. 168,
205 Pac. 776 (1922); Turney v. Tillman Co., 112 Ore. 122, 228 Pac. 933
(1924); Campbell v. New York, 244 N. Y. 317, 155 N. E. 628 (1927); State
v. Livingston Concrete Bldg. & Mig. Co., 34 Mont. 570, 87 Pac. 980 (1906);
State v. Read Co., 33 Wyo. 387, 240 Pac. 208 (1925) (Law held valid except
criminal penalty section); Sweeten v. State, 122 Md. 634, 90 Atl. 180 (1914);
Elkan v. State, 239 U. S. 634, 36 Sup. Ct. 221, 60 L. ed. 478 (1915) (aff'd
without opinion); see Ruark v. Intl. Union of Operating Engineers, 157 Md.
576, 578, 146 Atl. 797, 799 (1929).
66 Heim v. McCall, 239 U. S. 175, 36 Sup. Ct. 78, 60 L. ed. 206 (1915);
Crane v. People of New York, 239 U. S. 195, 36 Sup. Ct. 85, 60 L. ed. 218
(1915) (both involving restrictions upon employment of aliens by city con-
COL. L. REV. 99.
of wages in the locality, but the ground of the decision was that the statute was criminal and that the terms used to define the minimum wage were too indefinite. The basic right of the state to prescribe a minimum wage for public contractors was not questioned. In passing, it should be noted that the Walsh-Healey Act contains a somewhat similar definition of the minimum wage, but makes it definite by giving the Secretary of Labor power to determine exactly what the wage shall be and suspending the operation of the wage provision until such a determination has been made.

In the field of regulation of labor provisions in public contracts by the Federal Government, the Supreme Court has tested the Act of August 1, 1892, and found it valid in the leading case of Ellis v. United States. Ellis, a contractor, was engaged in work upon a pier in a navy yard, and permitted employees to work more than eight hours a day. In the argument before the Supreme Court, the appellant, Ellis, did not stress the constitutionality of Congress' power to limit working hours in public contracts so much as the validity of making violations of such contracts criminal. The Court said: "We see no reason to deny to the United States the power . . . established for the states . . . It would be a strong thing to say that a legislature that had power to forbid or to authorize and enforce a contract had not also the power to make a breach of it criminal, but however that may be, Congress, as incident to its power to authorize and enforce contracts for public works, may require that they shall be carried out only in a way consistent with the views of public policy, and may punish a departure from that way."

There is a class of cases with which the Ellis case should be compared. These relate to the right of the Federal government to achieve regulation indirectly by the exercise of admitted powers when the same regulation could not be effected by direct measures. Among the most recent decisions on this subject are the important Carter case invalidating the Guffey Coal Act, and the Hoosac Mills case declaring the Agricultural Adjustment Act unconstitutional. Both of

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68 Section 1(b) quoted, supra.
69 Supra note 7.
70 Supra note 34.
71 206 U. S. 246, 27 Sup. Ct. 60, 57 L. ed. 1047 (1907). Note that Ellis was only one of three defendants in this case. The decision with respect to the other two went upon a different ground. See supra note 37.
72 Supra note 51.
73 Supra note 49.
these cases, as well as prior cases of the same tenor, involved an attempt by Congress to use the taxing power to regulate matters beyond its powers of direct regulation, but they indicate that the Court might frown upon the use of any other admitted power for the same ends. In the *Hoosac Mills* case, the Court states: "It is an established principle that the attainment of a prohibited end may not be accomplished under the pretext of the exertion of powers which are granted."

Compare this language with the following language in the case of *Ellis v. United States*, where the exercise of control over labor conditions was permitted when effected through the power to authorize and enforce contracts: "It is quite true that it [Congress] has not the general power of legislation possessed by the legislatures of the states, and it may be true that the object of this law is of a kind not subject to general control. But the power that it has over the mode in which contracts with the United States shall be performed cannot be limited by speculation as to motives. If the motive be conceded, however, the fact that Congress has not a general control over the conditions of labor does not make unconstitutional a law otherwise valid, because the purpose of the law is to secure to it certain advantages, so far as the law goes."

If the *Ellis* case is to be harmonized with cases of the *Hoosac Mills* class, several factors need consideration. The first is the amount of prohibited regulation that the statute in question will bring about. In the *Hoosac Mills* case there was a general regulation of agriculture, and in the *Carter* case a general regulation of the entire bituminous coal industry. In the *Ellis* case, however, the labor regulations covered only a small part of industry and, even within that part, only those firms which sought government business.

The second distinguishing feature is the relative importance of upholding the particular exercise of the admitted power when balanced against the dangers inherent in the prohibited regulation. The Supreme Court has evidently felt it more important, in the *Ellis* case, to uphold the right of Congress to put what it wants in government

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77 While the actual regulation in the *Hoosac Mills* case is achieved through expenditures and the granting of benefits, the court treated the tax or exaction as part of the same scheme, and the party before the court was one who had been requested to pay the exaction.

78 The Act of August 1, 1892, *supra* note 34.
contracts than to curb the resulting regulation of labor in private industry. In the other cases, however, it seems to have been less important that Congress be permitted to levy the special tax involved than to prevent Congress from exercising a widespread control of matters beyond its direct powers.

The third factor to be considered is the voluntary or involuntary nature of the regulations. Persons do not have to contract with the government and can avoid the regulation of their labor conditions by not doing so. This argument must be taken with some caution, however, for the acceptance of benefits by farmers under the Agricultural Adjustment Act was technically voluntary, yet the Court attached little weight to this and indicated that, for many practical purposes, it was to be regarded as compulsory. There are doubtless firms whose principal business is in government contracts and who could not readily find markets elsewhere. For these, the Walsh-Healey Act would appear as a compulsory regulatory measure.

Before concluding, a further question needs comment, namely, the validity of the delegation to the Secretary of Labor of numerous powers under the Walsh-Healey Act. Among those delegated are the power to determine “the prevailing minimum wages for . . . similar work . . . in the locality . . .”; the power to determine breaches of contract for the purpose of “black-listing” those who have breached; the power to make, amend, and rescind necessary rules and regulations; and the power to make exceptions and exemptions in certain instances.

The cases on the subject of delegation of legislative authority to administrative officials form a well-established body of precedent to the effect that, while Congress cannot abdicate or transfer its power and responsibilities to others, it can, if it makes its legislative purpose clear and lays down sufficient guiding standards, leave to an administrative official the purely ministerial task of finding certain facts to fill the legislative gaps. This principle of law would seem to apply to the Secretary of Labor’s power, under the Walsh-Healey Act, to find the prevailing minimum wage.

According to the cases, Congress can go somewhat further, if it wishes, than merely to entrust the finding of facts to an administrative official. It can lay down a legislative purpose, and give such

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79 Section 1(b) of the Act, quoted supra.
80 Section 3 of the Act, discussed supra.
81 Sections 4 and 5 of the Act, discussed supra.
an official power to make rules and regulations with respect thereto.\textsuperscript{83} The fact that such power may conceivably be abused by the official does not, in the view of the Supreme Court, make the statute invalid, but judicial relief may be had whenever such an abuse occurs.\textsuperscript{84} If, however, Congress goes too far in its delegation of power to an administrative official, as where it permits him too much discretion as to what the law shall be or lays down too few standards for his guidance, the statute may be held invalid.\textsuperscript{85} The question seems principally to be one of degree, and the Walsh-Healey Act appears to fall rather more on the side of validity than invalidity in this respect. During the Congressional hearings on the Healey bill, counsel for the Department of Labor argued that the courts will not interfere with grants of executive discretion, however broad, that bear upon such purely internal affairs of the government as the expenditure of appropriations.\textsuperscript{86}

In view of the Ellis case and other decisions here cited, it is submitted that the constitutionality of the Walsh-Healey Act is less in doubt and less likely to occupy the attention of the courts and of industry than the many questions of interpretation of its language.\textsuperscript{87}

\textbf{SUMMER S. KITTTELLE.}

\textbf{NEW FRAZIER-LEMKE ACT LITIGATION}

The purpose of this note is to supplement previous treatment of the Frazier-Lemke legislation in this Review.\textsuperscript{1} Following the failure of the first Frazier-Lemke Act\textsuperscript{2} in the Radford decision,\textsuperscript{3} the

\begin{itemize}
    \item Carter v. Carter Coal Co., supra note 51; Schechter Poultry Corp. v. United States, supra note 45.
    \item Hearings before a Subcommittee of the Committee on the Judiciary, House of Representatives, upon H. R. 11,554, Serial 12, Part 2, 74th Cong. 2d Sess. (1936), brief of Gerard D. Reilly, Acting Solicitor of Labor, 536, 539.
    \item Supra notes 3, 6, 10, 14, 16, 19, 20, 22 and 23.
\end{itemize}
second and present farm moratorium amendment became law August 28, 1935. The new act has thus far met with varying success in the lower Federal courts, but as yet there has been no determination of the question by the Supreme Court.

The main issue which will confront the Supreme Court may be said to be that of due process under the Fifth Amendment. Whether or not the present act has cured the defects pointed out in the Radford decision is the primary question. That the new legislation has sufficiently secured the mortgagee's rights to retain his lien, to realize upon the security at a judicial public sale, and his right to protect his interest by bidding at such sale seems generally


The Radford case, supra note 3, voided the first Frazier-Lemke Act as depriving the mortgagee of five substantive rights, namely, (1) The right to retain his lien until the debt secured thereby is paid.

(2) The right to realize upon the security at a judicial public sale.

(3) The right to determine the date of the sale subject only to the court's discretion.

(4) The right to protect his interest in the property by bidding at the sale.

(5) The right to control the property during the period of default subject only to the court's discretion and to have a receiver appointed to collect the rents and profits for the satisfaction of the debt.
conceded by the cases and the writers. However, as to the mortgagee’s right to determine when such sale shall take place, subject only to the discretion of the court there is great doubt. The dominant purpose of the act taken as a whole is to grant the benefits of a moratorium to the debtor who has complied with its provisions. The main dispute is as to a proviso of paragraph 3 of subsection (s). Although this proviso would, if taken alone and at its face value, seem to authorize the creditor to bring about a sale at any time before the expiration of the three-year moratorium period, many courts have construed it otherwise. In the *Lowmon* case the court said of this provision, “Presumably it was intended by this section to enable the secured creditor to bid in the property at the amount of his mortgage, thereby permitting him to obtain the property or the full amount of the debt, if the debtor chooses to redeem within 90 days thereafter also provided for by the statute. Thus at the end of three years and ninety days the mortgagee may receive exactly what he was entitled to under the completed adjudication according to the laws of the state at the beginning of that period.” Later in the *Pamp* case, the court quoting as above from the *Lowmon* decision went on to conclude, “It may reasonably be said that the stay is for a period of three years, subject to being shortened by the mortgagor at his uncontrolled discretion.” The above quotations are typical of the cases holding against the validity of the act. On the other side, some courts have upheld the statute on the theory that paragraph 3 of subsection (s) saved the mortgagee the right to determine the date of sale subject only to the court’s discretion. That this construction is a strained one is evidenced by the doubts apparently existing in the minds of the judges. In the

8 Supra note 5.
9 Supra note 4.
10 Supra note 4.
11 11 U. S. C. §203(s) (3). “... That upon request in writing by any secured creditor or creditors, the court shall order the property upon which such secured creditors have a lien to be sold at public auction.”
12 Wright v. Vinton Branch of the Mountain Trust Bank; U. S. National Bank of Omaha v. Pamp; Lafayette Life Insurance Co. v. Lowmon; In re Lindsay; In re Tschoepe; In re Diller; In re Schoenleber, In re Young; In re Davis; In re Maynard, all supra note 5.
13 Lafayette Life Insurance Co. v. Lowmon, supra note 5.
14 Supra note 5 at 890. In this case the debtor sought to enjoin the sheriff from issuing a deed pursuant to a certificate of sale executed Aug. 5, 1933 in a foreclosure proceeding in the state court. Under the law of Indiana the purchaser would have been entitled to the deed immediately upon the expiration of the period of redemption fixed by statute in favor of the mortgagor.
16 Supra note 5 at 499.
17 Supra not 5.
18 In re Slaughter; in re Reichert, both supra note 5.
Slaughter case, for example, after declaring that the legislation under consideration went “to the verge” of constitutionality, the court went on to say, “A study of the decision of the Supreme Court in Louisville Bank v. Radford, decided May 27, 1935, does leave some doubt as to the validity of the present act, but the doubt is not of sufficient dignity to give rise to that conviction which a trial court should have before declaring an act of the national Congress unconstitutional.”

It is submitted that although an act of Congress should always receive the benefit of serious doubts and should always be presumed valid until shown otherwise, yet the basic purpose of this legislation would seem to be thwarted if the mortgagee could at any time prior to the end of the stay procure a public sale of the debtor’s property. Therefore it would seem that the proviso of paragraph 3 of subsection (s) should not raise sufficient doubt to deter even a trial judge.

Also, most courts passing unfavorably upon the statute in question have found it invalid as depriving the secured creditor of the right to control the mortgagor’s property during the period of default subject only to the discretion of the court, and to have a receiver appointed to collect the rents and profits for the satisfaction of the debt. Under the new Frazier-Lemke Act the property remains in the debtor’s possession, and although he pays a reasonable rental fixed by the court, yet the profits are used in the first instance to cover taxes and upkeep expenses on the property and so benefit the debtor. The creditor is, of course, indirectly benefited, but fails to realize until after the expiration of the stay. Where state law gives the mortgagee this right to control the property during the period of default, it would seem beyond the power of Congress, even under the bankruptcy power, to deprive him without compensation, since such rights are regarded as rules of property binding upon and enforceable in the Federal courts.

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19 In re Slaughter, supra note 5.
20 13 F. Supp. 893, 894, 12 id. 206, 208. This same hesitancy is also shown by District Courts in In re Bennett and In re Cole, supra note 5.
22 Supra note 11.
23 Supra note 5.
ruptcy power the Federal courts take jurisdiction of the debtor's property as they find it, subject to rights of others already vested under state law.\textsuperscript{26}

The amended Frazier-Lemke Act was framed with regard being given to the decision of the Supreme Court in upholding the Minnesota farm mortgage moratorium legislation.\textsuperscript{27} The \textit{Lowmon} case,\textsuperscript{28} however, held that since Congress had no police power,\textsuperscript{29} bankruptcy jurisdiction is subject to state rules of property;\textsuperscript{30} that where property rights are regulated by state law, Congress has no right to alter them under the bankruptcy power; that whereas the Minnesota legislature could alter these rules within the state so long as it did not impair the obligation of contract, Congress cannot.\textsuperscript{31} On the other side is the argument advanced by the court in the \textit{Reichert} case,\textsuperscript{32} as follows. The Minnesota act may be said to have been sustained as a valid exercise of the police power of the state, justified by an emergency, and Congress has no such power. In answer to this, the Congress may exercise its \textit{constitutional} power for any purpose for which a state may exercise its reserved power.\textsuperscript{33} The \textit{Reichert} case, however, construed the present legislation as not applying where the debtor had previously been adjudicated bankrupt and foreclosure proceedings had been had in state courts, intimating that such an application would be unconstitutional as depriving of rights vested under state law.\textsuperscript{34} So construed, perhaps the above argument of the \textit{Lowmon} case would not apply, but other courts have not so limited the intended application of the act.\textsuperscript{35} Also the Frazier-Lemke Act differs from the Minnesota legislation\textsuperscript{36} in that it fails to protect lienors of the mortgagor, whereas under the state legislation lienors of the mortgagor are given a further period

\textsuperscript{26}Louisville Joint Stock Land Bank v. Radford, supra note 3.
\textsuperscript{28}Lafayette Life Insurance Co. v. Lowmon, supra note 5.
\textsuperscript{30}Board of Trade of Chicago v. Johnson, 264 U. S. 1, 44 Sup. Ct. 232, 68 L. ed. 533 (1924).
\textsuperscript{31}Congress is not under the same obligation of contract restriction as applies to the states.
\textsuperscript{32}In re Reichert, supra note 5.
\textsuperscript{33}id. at 6 and cases cited.
\textsuperscript{34}id. at 7
\textsuperscript{35}Wright v. Vinton Branch of the Mountain Trust Bank; Lafayette Life Insurance Co. v. Lowmon; U. S. National Bank v. Pamp; In re Young; In re Davis; In re Wogstad; In re Maynard, all supra note 5.
\textsuperscript{36}Supra note 27.
of redemption in which to redeem. If he does not, no such privilege is given under the Federal act.37

The conflicting arguments of the Lowmon and Reichert cases,38 set forth above, involve the question of the application of the due process requirement. That such a requirement is difficult of application is well known, nor has any definition of this nebulous concept yet been framed.39 It is not true, however, that every law depriving someone of substantive rights without compensation is necessarily unconstitutional.40 Every law does so to a certain degree otherwise it would not be an instrument of social control. The question always should be whether from a sociological point of view it is more desirable for the act or for the rights of the individual to be upheld.41 This determination should be based upon the facts, not only of the case before the court, but also upon the factual set-up which induced the legislature to enact the measure under consideration. The reports of fact-finding bodies,42 the scientific data prepared by experts and all kindred materials are invaluable, of course, and the court should only in the rarest instances draw conclusions from judicial notice of facts.43 It is the duty of counsel to present the proper factual background in their briefs, and failure to do this has often led to unfortunate results.44

37 In re Young, supra note 5, invalidated the present Federal act on this ground as well as for the reason that other objections pointed out in the Radford case had not been remedied. See supra note 7.
38 Lafayette Life Insurance v. Lowmon; In re Reichert, both supra note 5.
39 In the interest of flexibility it is hoped that no authoritative and binding definition ever will be framed.
40 Powell, The Judiciality of Minimum-Wage Legislation (1924) 37 Harv. L. Rev. 545. There the author in speaking of the minimum-wage legislation, says, at p. 545, "While the legislation, like substantially all legislation and all law, involves a deprivation of property, such deprivation is innocuous unless it is 'without due process of law.'"
42 The Report of the Wainwright Commission to the Legislature of the State of New York, March 1910. This commission was empowered by authority of the legislature, N. Y. Session Laws, 1909, c. 518, and this report was the basis of the New York Workmen's Compensation Law. N. Y. Laws 1910, c. 674.
44 Very few facts were presented to the court in the Lochner case, supra note 43, in which a New York labor law, N. Y. Laws 1897, c. 415 s. 110, was declared unconstitutional under the Fourteenth Amendment as being unreasonable. In comparison see Muller v. Oregon, 208 U. S. 412, 28 Sup. Ct. 324, 52 L. ed. 551 (1908) in which a very similar Oregon statute, Session Laws
The idea of "due process" does not depend entirely upon the facts, but also, and perhaps to a larger degree, upon the conclusions drawn by the various judges from whatever facts are presented. This depends greatly upon the previous legal environment and general philosophy of the judges. In the past the "due process" concept has been applied as a rule of natural justice, rigid and rather inflexible, without serious regard for changing conditions in society, science and civilization. This mechanical form of jurisprudence has been decried by more modern writers whose influence has made itself felt in the decisions. The sociological jurists would have "due process" interpreted as a standard, taking into regard the facts and relative benefits and detriments of the new legislation to society as it now exists. The result follows that the old concepts of stare decisis are seriously jolted to the extent that a modern dictum may

1903, p. 148, was upheld. Excerpts from the brief for the State of Oregon written by Louis D. Brandeis of counsel (now Mr. Justice Brandeis) illustrating a masterful presentation of facts are reproduced in Parkinson, Cases and Materials on Legislation, Vol. I, Part 2 at p. 213 et seq. That this brief was largely responsible for the "change of heart" on the part of the Court cannot be doubted. Contrast also two New York cases, People v. Williams, 189 N. Y. 131, 81 N. E. 778 (1907), and People v. Charles Schweinler Press, 214 N. Y. 395, 108 N. E. 639 (1915), where substantially similar statutes were construed first as invalid and shortly thereafter as valid under the Fourteenth Amendment by the same court. The explanation is to be found in the facts available in the second case as a result of the research of the New York State Factory Investigation Commission. For excerpts from the brief for the State in the Schweinler case see Parkinson, op. cit. supra, p. 234 et seq.

45 Powell, supra note 40.

46 See Pound, Scope and purposes of Sociological Jurisprudence (1912) 28 Harv. L. Rev. 489, 516, where the author writes, "Summarily stated, the sociological jurist pursues a comparative study of legal systems, legal doctrines and legal institutions as social phenomena, and criticises them with respect to their relation to social conditions and social progress. Comparing sociological jurists with jurists of other schools, we may say:

(1) They look more to the working of the law than to its abstract content.
(2) They regard law as a social institution which may be improved by intelligent human effort, and hold it their duty to discover the best means of furthering and directing such effort.
(3) They lay stress upon the social purposes which the law subserves rather than upon sanction.
(4) They urge that legal precepts are to be regarded more as guides to results which are socially just and less as inflexible molds.
(5) Their philosophical views are diverse. Beginning as positivists, they have recently adhered to some one of the groups of the social philosophical school, from which, indeed, the sociological school, on many essential points, is not easily distinguishable."

47 See Nebbia v. New York, 291 U. S. 502, 54 Sup. Ct. 505, 78 L. ed. 940 (1934); Blaisdell v. Home Building and Loan Association, supra note 27, where the rule of reasonableness in due process was applied as a standard rather than a rigid rule based upon the natural justice concepts of the analytical jurists of the nineteenth century.

48 See Pound, supra notes 41 and 46.
The approach to constitutional questions has changed. The new Frazier-Lemke Act as analyzed above would still seem to deprive the mortgagor of at least two substantive rights given him under state law. It is not the purpose of this note to consider the factual basis upon which Congress saw fit to enact this measure, nor to try to discuss its relative merits and disadvantages. It is submitted, nevertheless, that the Supreme Court, if it follows the theory laid down and applies the “due process” clause as a standard rather than as a rule it may reach a result contrary to the Radford case. Although the new legislation seems to deprive the secured creditor of certain of the rights which formed the basis for voiding the first act, it may be possible to convince the court that the measure is not unreasonable but is pragmatically sound and to the best interests of the country at the present time.

Analogy to railroad reorganization under Section 77 of the Bankruptcy Act and to corporate reorganization under Section 77B has been drawn to support Section 75(s). Whereas property of insolvent railroads and corporations is usually not capable of immediate liquidation for the benefit of creditors, yet farm mortgagees are generally not troubled in that respect. Sections 77 and 77B contemplate sale as soon as it is possible for the creditors reasonably to realize upon their security, but the stay of three years in Section 75(s) seems primarily for the debtor’s benefit. If, however, para-

49 That this is true seems certain in view of the fact that social conditions and civilization will never be the same over a long period of time.

50 See Collier, Gold Contracts and Legislative Power (1934) 2 Geo. Wash. L. Rev. 303, 311.

51 The right to set the date of sale subject only to the discretion of the court, and the right to control the property during the period of default and to have a received appointed to collect the rents and profits for application to the mortgage debt.

52 Powell, supra note 40, would seem to throw grave doubts upon this possibility in view of the fact that the same justices who voided the first act in the Radford decision will decide the fate of the present act after only a short space of time. See also, supra note 6 to the effect that the need for farm mortgage moratorium legislation is not so great now as it once was.


55 Mr. Justice Brandeis speaking for the Court in the Radford case, said that, “in ordinary bankruptcy proceedings and equity receiverships, the court may in its discretion order an immediate sale and closing of the estate, and it (the argument) ignores, also, the fundamental difference in purpose between the delay permitted in those proceedings and that prescribed by Congress (in the original
graph 3 of subsection (s) is to be construed as allowing the creditor
to demand a sale at any time during the stay, this difficulty might
be overcome.57

The emergency clause in the present act58 involves further ques-
tions. That this provision will aid the legislation is doubtful. Emer-
gency will not create new powers in Congress.59 The language of
the Supreme Court in the Radford case seems applicable: "For the
Fifth Amendment commands that however great the country's need,
private property shall not be taken even for a wholly public purpose
without just compensation. If the individual interest requires and
permits the taking of property of individual mortgagees in order to
relieve the necessities of individual mortgagors, resort must be had
to proceedings by eminent domain, so that, through taxation, the
burden of the relief afforded in the public interest may be borne by
the public."60 Also the emergency provision seems to violate the
uniformity requirement in bankruptcy legislation.61 The require-
ment of geographical uniformity does not prohibit recognition of the
laws of the several states,62 yet the uniformity demanded by the Con-
stitution is manifestly denied when the statute might be in effect in
one or more parts of the country and not in others.63 This difficulty
is encountered from the fact that the determination of the emer-
gency is made a local matter,64 and so not within the doctrine of
Chastleton Corporation v. Sinclair.65 Other cases have questioned
this section as leaving the status of the emergency too vague and un-

57 But this would nullify the apparent purpose of the Act.
§ 203(s)(6) (1935). "This act is hereby declared an emergency measure and
if in the judgment of the court the emergency ceases to exist in its locality,
then the court, in its discretion, may shorten the stay of proceedings herein
provided for and proceed to liquidate the estate."
79 L. ed. 1570 (1935).
60 Supra note 3 at 602.
61 Wright v. Vinton Branch of the Mountain Trust Bank; U. S. National
Bank of Omaha v. Pamp; In re Davis; In re Slaughter, all supra note 5.
63 Supra note 61.
64 Supra note 58.
L. Rev. 1, 5, n. 8, where the writer feels the territorial uniformity requirement
is as well here as in secton 6 of the Bankruptcy Act which allows bankrupt his
state exemption, citing Hanover National Bank v. Moyses, 180 U. S. 181, 22
defined. Still another case finds the whole act invalid as not being a uniform bankruptcy law in that it applies only to farm mortgagees and so only to a special class of debtors.

Other grounds of attack have been suggested, namely, that it is not a law on the subject of bankruptcy and so conflicts with the reserved powers of the states or the people under the Tenth Amendment, and also that it violates the "full faith and credit" clause of the Constitution. These theories are not deemed sufficiently important to warrant discussion here at any length.

CHARLES R. REYNOLDS, JR.

CONSTITUTIONALITY OF ANTI-HEART BALM LEGISLATION: DUE PROCESS UNDER STATE AND FEDERAL CONSTITUTIONS

Becoming conscious of the great abuses and numerous opportunities for malpractice in the legal profession that existed in the entertainment by the courts of the so-called "Heart Balm" suits, a number of state legislatures have recently abolished by statute civil actions

66 In re Schoenleber; In re Tschoepe, both supra note 5; cf. Block v. Hirsh, supra note 65; Chastleton Corp. v. Sinclair, supra note 43; A. L. A. Schechter Corp. v. U. S., supra note 59.

67 In re Davis, supra note 5. Quaere result, however.

68 The Radford decision would seem to leave no room for doubt but that the present Frazier-Lemke Act is a law on the subject of bankruptcies.

69 Held in the Pamp case not to limit Congress in the exercise of the bankruptcy power.

1 "Declaration of public policy of state. Remedies heretofore provided by law for enforcement of actions based on alienation of affections, criminal conversation, seduction and breach of contract to marry, having been subjected to grave abuses, causing extreme annoyances, embarrassment, humiliation and pecuniary damages to many persons wholly innocent and free of any wrongdoing, who were merely the victims of circumstances, and such remedies having been exercised by unscrupulous persons for their unjust enrichment, and such remedies having furnished vehicles for the commission or attempted commission of crime and in many cases having resulted in the perpetration of frauds, it is hereby declared as the public policy of the state that the best interest of the people of the state will be served by the abolition of such remedies. Consequently, in the public interest, the necessity for the enactment of this article is hereby declared a matter of legislative determination." N. Y. Laws 1935, c. 263 § 61a.

2 Ind. Laws 1935, c. 208; New York Laws 1935, c. 263; Ill. Laws 1935, c. 38; Mich. Acts 1935, No. 127; N. J. Laws 1935, c. 279; Pa. Laws 1935, c. 189. Minnesota, Nebraska, Ohio, Oklahoma, Texas and Wisconsin, have bills pending at the present time. It is also reported that Arizona, California, Connecticut, Idaho, Maryland, North Carolina, Rhode Island and Washington are considering similar legislation. See the Milwaukee Sentinel, May 12, 1935, p. 11. For an interesting résumé of the introduction and passage of these bills see Feinsinger, Legislative Attack on "Heart Balm" (1935) 33 Mich. L. Rev. 978 at 997 n. 96, et seq.

3 The various statutes passed are not in accord as to the type of civil actions abolished. The Indiana Statute abolishes "all civil causes of action" (italics
for alienation of affections, breach of promise, criminal conversation, and seduction. It shall be the object of the present note to discuss the constitutionality of these legislative measures, accepting as a fact for purposes of the present discussion that the causes of action involved existed at common law for both parties to the marriage arrangement.

The Indiana, New York and Michigan Statutes include within their scope the actions for breach of promise, alienation of affections, criminal conversation and seduction. The Illinois Statute includes all but seduction. The Pennsylvania Act is limited to breach of promise and alienation of affection against a defendant who is not a parent, brother, or sister, or person in loco parentis of the plaintiff's spouse. Michigan makes the same exception in the action of alienation of affections.

The action for breach of promise existed as early as 1672 when the Court of Common Pleas allowed the action. Holcroft v. Dickenson, 124 Eng. Rep. 933 (1672). It was available, of course, to both parties to the agreement. The action of seduction was not allowed to be brought by the person seduced at common law because she was a party to the act. Hamilton v. Lomax, 26 Barb. 615 (N. Y. 1858). However, many states, by statutes, have allowed the action where the female is of a certain age. See for example Ind. Ann. Stat. (Burns 1933) §2-214.

The action of alienation of affections and criminal conversation were based on the rights of the spouse to "consortium," i.e., the right of the husband, his wife, her services in raising the family, exclusive intercourse with the other, companionship and affection. That was considered a property right, and hence could be protected from any interference by the proper action. Winsmore v. Greenbank, 125 Eng. Rep. 1336 (1745), recognized the husband's right to sue for alienation of affections. Gay v. Gee, 139 T. L. R. 429 (1923) recognizes the woman's right to sue in England. In the United States the courts are divided as to the woman's right to maintain the action after the passage of the Women's Acts. New York perhaps represents the majority view, allowing the woman to sue. The allowance of the action is predicated on the theory that the woman has as much right to "consortium" as the husband has and that right existed at common law but could not be enforced because of procedural difficulties, viz., necessity of joining the husband, but since the Women's Acts those difficulties are removed and the right remains available to all. Oppenheim v. Kridel, 236 N. Y. 156, 140 N. E. 227 (1923). See 13 R. C. L. 1459-1461. The minority view denying the action is represented by the case of Doe v. Roe, 82 Maine 503, 20 Atl. 83, 8 L. R. A. 833 (1890), 13 R. C. L. 1462. Louisiana denies the action to both the husband and wife on grounds of public policy in that it tends to lower the marital status in the minds of the public if such actions are encouraged. Moulin v. Menteleone, 165 La. 169, 115 So. 447 (1928).

It is well settled that the husband had the right to maintain an action of criminal conversation at common law on the ground of injury to the "consortium." Tinker v. Colwell, 193 U. S. 473, 24 Sup. Ct. 505, 48 L. ed. 754 (1904), 13 R. C. L. 1485; French v. Deane, 19 Colo. 504, 36 Pac. 609, 24 L. R. A. 387 (1894).

There is authority to the effect that the wife could not maintain the action at common law nor under modern statutes. See 13 R. C. L. 1487 and cases...
A treatment of the constitutional validity of this legislation entails a summary discussion of due process and its relationship to the problems in point. Though the term due process has been used in some form or other for the past seven hundred years, *vis.*, since the signing of Magna Charta,* the doctrine has never been definitely asserted so that it can be specifically applied.* The result is that the meaning of the term must be sought in the history of its specific application. In this discussion, however, it will suffice to state that by due process is meant that no one should be deprived of life, liberty or property, arbitrarily or capriciously, and without an opportunity of being heard in some proceeding appropriate to the case.* What is a capricious, unreasonable, or abusive deprivation of the fundamental rights constitutes the problems in the due process subject and will be reserved for later discussion. This fundamental concept guaranteeing to individuals, in effect, their very existence is embodied in the State as well as the Federal Constitutions.*

For the view that the woman has the right to sue today see Oppenheim v. Kridel, supra note 5. For a general discussion of the history and nature of these causes of action as related to the present problem, see Feinsinger, supra note 2; Brown, *The Action for Alienation of Affections* (1934) 82 Pa. L. Rev. 472; Note (1936) 30 ILL. L. REV. 764; Legis. Note (1936) 5 BROOKLYN L. REV. 196.

*For a general discussion of due process, its development and analysis, see WILLOUGHBY, *THE CONSTITUTIONS OF THE U. S.* (2d ed. 1929) c. xc; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616 (1871), 6 R. C. L. 436 and cases there cited. For the view that the woman has the right to sue today see Oppenheim v. Kridel, supra note 5.


"This court has never attempted to define with precision the words "due process of law," nor is it necessary in this case. It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government, which no member of the union may disregard, as that no man shall be condemned in his person or property without due notice and an opportunity of being heard in his defense." Holden v. Hardy, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. ed. 780 (1897). For similar statement see Ballard v. Hunter, supra note 20. See also Dent v. State, 129 U. S. 114, 9 Sup. Ct. 231, 32 L. ed. 623 (1889). "The clause in question means, therefore, that there can be no proceeding against life, liberty or property which may result in the deprivation of either, without the observance of those general rules established in our jurisprudence for the security of private rights." Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. ed. 569 (1884), the court citing the earlier case of Hurtado v. California, 110 U. S. 516, 4 Sup. Ct. 111, 28 L. ed. 232 (1884). Bank of Cal. v. Okely, 4 Wheaton 235, 4 L. ed. 236 (1819); Leeper v. Texas, 139 U. S. 462, 11 Sup. Ct. 577, 35 L. ed. 225 (1891). For the nature and character of the proceeding necessary see 6 R. C. L. 456 and cases there cited.

See 2 COOLEY'S *CONSTITUTIONAL LIMITATIONS* 733 n. 2 for due process clauses in various state constitutions.
The substantive meaning of due process in the Fifth Amendment as applicable to the Federal Government is the same as the term due process in the Fourteenth Amendment applicable to states. Any difference existing is one of substantive jurisdiction rather than content of the concept. What is an unreasonable deprivation of property, life or liberty is governed by the same principles in all cases. Jurisdictionally, however, a distinction occurs. The state legislative powers are much broader than those of Congress. Residuary powers, of course, lie with the states and that includes the extensive police power within which the various legislatures have a wide field of authority. It is here that the jurisdictional sphere of the states broadens greatly in contrast to the limited domain of the Federal Government. Whether, then, the problem at hand is considered from the due process clause as applied to the Federal Government or to the state government, the difficulty will be the same, viz., what is a reasonable deprivation of fundamental rights?

The question immediately presents itself as to what are the fundamental vested rights involved in the "Heart Balm" statutes which the due process clause is alleged to protect and whether they are of such a character to warrant protection in this situation. The statutes thus far passed by the various states abolish all or certain existing causes of action for injuries suffered and hence the damaged party is left remediless. Admitting this fact, does the due process clause insure a remedy for every wrong committed? Several of the state constitutions have as a substitute for, or supplement to, the typical due process clause, provisions expressly providing that "every man for an injury done him in his lands, goods, person, or reputation shall have a remedy by due process of law, and right and justice administered without sale, denial or delay." These special provisions providing for a remedy for every injury have been held by the Minnesota court to be but a declaration of general fundamental principles, founded in natural right and justice, which would be equally the law of the land if not incorporated in the Constitution. This constitutional concept found expression in the New York courts a few

10 For a statement by the Supreme Court to the effect that due process within the Fifth Amendment means substantially the same thing as due process within the Fourteenth Amendment, see Twining v. New Jersey, 211 U. S. 78, 29 Sup. Ct. 14, 53 L. ed. 97 (1900). An excellent interpretation of the Fifth and Fourteenth Amendments is given by Collier, infra note 43 at 340 et seq.
11 Supra note 2.
12 Supra note 3.
13 The criminal action for adultery and seduction, of course, still remains. See infra note 58.
14 Declaration of Rights § 17, NORTH DAKOTA CONST. See also MASS. CONST. Art. 11.
years later. This same court in another case interpreted the right to a remedy as a property right which would, therefore, come within the scope of the due process clause under the deprivation of property provision.

The maxim, *ubi jus ibi remedium*, "every right has a remedy," is purported to be as old as the law itself in the protection of personal liberty and property. Analytically, much may be said for the phrase, and as has been seen, the courts will adhere to it as closely as possible. Unfortunately, the maxim lacks historical authenticity. Street, in his treatise on legal liability, states the maxim and upholds its desirability, but is quick to note as historical fact the failure of the courts to adhere to it. An examination of comparatively recent decisions wherein the constitutionality of legislative enactments interfering with injured parties' remedies are treated, will disclose the fact that the courts, in handling the problem, do lip service to the maxim as an implied phrase in the due process clause. As early as *Marbury v. Madison*, the Supreme Court of the United States, speaking through Chief Justice Marshall, said "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives injuries. One of the first duties of government is to afford this protection . . . The Government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right." This same tribunal propounded the same doctrine in a modern case when it declared a statute of Arizona, which deprived

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17 "The plaintiff had a remedy against these defendants of which she could not be deprived. . . . We may say that the right of action was the plaintiff's property." Reid v. City of New York, 139 N. Y. 534, 34 N. E. 1162 (1893). See Gilbert v. Ackerman, 159 N. Y. 118, 53 N. E. 753 (1899); Gibbes v. Zimmermann, 290 U. S. 326 at 332, 54 Sup. Ct. 140 at 142, 78 L. ed. 342 at 347 (1933).
18 Street, THE FOUNDATIONS OF LEGAL LIABILITY (1906).
19 Examples of this are noted by the author with the remark that lack of remedy destroys in time the right. 3 id. c. 5.
20 Truax v. Corrigan, 257 U. S. 312, 42 Sup. Ct. 124, 66 L. ed. 254 (1921). The gist of the opinion was to the effect that while no one has a vested right in any particular rule of common law, it is also true that "the legislative power of a state can only be exerted in subordination to the fundamental principles of right and justice which the guaranty of due process in the Fourteenth Amendment is intended to preserve, and that a purely arbitrary or capricious exercise of that power whereby a wrongful and highly injurious invasion of property rights, as here, is practically sanctioned and the owner stripped of all real remedy, is wholly at variance with these principles."
21 Compare with this the statement by the same court in *Munn v. Illinois*, 94 U. S. 113 at 134, 24 L. ed. 77 at 87 (1876). "A person has no property, no vested interest, in any rule of the common law. That is only one of the forms
an employer of a remedy for damages caused through peaceful concerted picketing of strikes, unconstitutional as repugnant to the Fourteenth Amendment. Several state courts have reasoned along similar lines in dealing with the problem. In recent years, a few states, with the intent of protecting newspaper publishers who innocently print libelous matter but retract the same in due course, passed statutes denying the libelled party all but actual damages. A series of cases arose involving the validity of the legislation and the courts in several of these jurisdictions denied the defendants the right to use the statute as a bar to all but actual damages. The theory upon which the courts operated was that the due process clause, as used in the state constitutions, means the reparation for injury ordered by a tribunal having jurisdiction after a fair hearing and that this right to a remedy is not satisfied in libel actions by compensation for actual damage. That would be the same in all cases and would bear no relation to the injury suffered. Those courts that refused to declare the act unconstitutional, however, did admit that a remedy for a right cannot be abolished, but considered the remedy in this particular instance to exist. Statutes prohibiting the bringing of actions against municipalities for injuries caused by the latter's negligence have been promulgated by various states but these, too, have failed to pass the "fundamental rights" test. The New York court emphatically denied the power of the legislative branch to enact such

of municipal law, and is no more sacred than any other. Rights of property, which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct may be changed at the will or even at the whim of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances."

At first blush this seems to contradict the previous holdings of the court, but the New York judiciary in the case of Herkey v. Agar Mfg. Co., 153 N. Y. S. 369 at 372, 90 Misc. Rep. 457 (1915), in analyzing the statement, has this to say: "This certainly does not mean that any and every rule of the common law can be changed at the whim of the legislature, for it distinctly says that rights of property which have been created by common law cannot be taken away without due process. But rights to life and liberty are equally protected by the Constitution, and these rights are but a rule of the common law, or have found their expression in the common law as fundamental principles of government. The right to keep one's person free from unlawful assault or arrest is as sacred as the right to keep one's property from an unlawful taking." It may also be pointed out that the broad expression used in the Munn case is limited by the facts of that particular case.

24 Supra note 16. COOLEY, CONST. LIMITATIONS (5th ed. 1883) 445.
measures, condemning the argument advanced, that "the law of the land," in the term due process of law may mean the very act of legislation which deprives the citizen of his inherent rights, privileges, and property, as an absurdity.

The rapid growth of labor law in this country, with the corresponding growth of a sympathetic attitude toward organized labor, gave birth to statutes in some states depriving the employer of any action for injuries caused by picketers of his property. The Massachusetts court, in an advisory opinion, declared such a statute unconstitutional as repugnant to the Fourteenth Amendment of the Federal Constitution. A similar disposition was accorded the Arizona Act by the United States Supreme Court.

Automobile guest statutes which deny all rights to a guest to sue his host for injuries sustained through fault of the host, have, likewise, been held invalid. Statutes merely limiting liability are constitutional, however.

State Workmen's Compensation legislation has been upheld although such acts apparently abolish common law remedies. The reasoning of the court in upholding this type of statute is founded on the theory that a substitute is provided for the remedy abolished. This doctrine, that if a remedy is substituted it is valid, is sound and has the support of numerous authorities. While it is true that a cause of action is property and is protected from arbitrary interference, the plaintiff has no property, in the Constitutional sense, in any particular form of remedy. All that he is guaranteed by Amend-

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25 The Oregon Court in several cases has arrived at similar results. Mattson v. Astoria, 39 Or. 577, 65 Pac. 1066 (1901); Batdorff v. Oregon City, 53 Or. 402, 100 Pac. 937 (1909). But where the right is one created by statute, it may be repealed by statute. Templeton v. Linn County, 22 Or. 313, 29 Pac. 795 (1892). See Note (1925) 36 A. L. R. 1400, for discussion of whole problem.

26 "A true interpretation of the due process clause is that where rights have existed, the legislature cannot take them away. If it could it would make the legislature omnipotent. What would prevent it from passing laws taking away liberty or life, without a preexisting cause." Supra note 16.


28 supra note 21.

29 Coleman v. Rhodes, 35 Del. 120, 159 Atl. 649 (1932).

30 Hazzard v. Alexander, 173 Atl. 517 (Delaware, 1934); Silver v. Silver, 280 U. S. 117, 50 Sup. Ct. 57, 74 L. ed. 221 (1929); In re Opinion of The Justices, supra note 27.

31 New York Central Railroad Co. v. White, 243 U. S. 188, 37 Sup. Ct. 546, 61 L. ed. 667 (1917). The court in its dictum intimates that if no substitute was provided for the remedies abolished the legislation must fall.


ment Fourteen is the preservation of a substantial right to redress by some effective procedure. To hold that the state is without power to modify rules of procedure or to regulate the judiciary in its discretion is anomalous. Depriving the state of the right to alter its common law rules of pleading, evidence, procedure, or forms of action, to meet changing conditions, would create a static system of jurisprudence which eventually would hinder the ends of justice rather than aid it.

Recently an intermediate court of New York was confronted with an action testing the validity of the New York "Heart Balm" statute and by a 3-2 holding declared the act to be a violation of the fundamental rights of individuals under the due process clause as discussed heretofore. The majority opinion, devoid of the complete legal analysis that this legislation demands, is predicated on the earlier New York case of Williams v. Village of Port Chester which denied validity of a State statute abolishing the remedy for negligent injuries. The court failed to recognize, however, that the subject of the legislation involved was radically different from the nature of the statute used as a comparison. It might be well to add that the "Heart Balm" legislation can be distinguished in substance from all remedy-abolishing statutes discussed thus far. The husband-wife relationship is one of the foundation stones of human society and creates consequences of far more import than the simple business contract entered into daily. The advancement of the interests of mankind is dependent upon the maintenance of the marital status. The state is fundamentally interested in this phase of the relationship and hence under its police powers may so regulate it as will be best for the public morals and general welfare of its citizens. The argument then presents itself as to the authority of the state legislatures to abolish the entire remedy under their broad police powers. Is the due process clause so interpreted as to include radical abolishment of remedies if the states deem it necessary for the good of the people in general? When the fundamental rights of a certain class of people are abolished in favor of the supposed good for the whole, is the due process clause to expand to include these measures or is the police power deemed to have been expanded beyond its legitimate limits? The dissent

84 Gibbes v. Zimmerman et al., supra note 17.
86 Supra note 16.
in the New York case was of the opinion that it is for the state primarily to determine its public policy, limiting or abolishing property rights in the public interest and public welfare in its discretion. Justice Holmes, dissenting in the Truax Case, upheld the right of the legislature to create social experiments that an important part of the community desires. Justice Brandeis in a bitter dissent in the same case reasoned with persuasive force and logic that every regulatory law abridges the liberty or property of one of the parties and if such acts are made by the legislature, it is called police power. The statute will not be declared a violation of due process unless the court finds the interference with the private rights arbitrary or unreasonable or the measure has no real or substantial relation of cause to a permissible end. Whether a law is unreasonable within the police power, says Justice Brandeis, can be determined only by a consideration of the contemporary social, industrial and political conditions of the community to be affected thereby. All legislation involves a weighing of public needs as against private rights as well as weighing the relative social values. In Nebbia v. New York, the court, using language of broad import, upheld the right of a state, under the due process clause, "to adopt whatever economic policy may reasonably be deemed necessary to promote public welfare, and to enforce that policy by legislation adapted to its purpose."

38 Supra note 35.
39 Supra note 21.
40 "There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several states, even though the experiments may seem futile or even noxious to me and to those whose judgments I most respect." Id.
41 Id.
42 Thomas Reed Powell makes a similar statement in his article entitled The Judiciality of Minimum-Wage Legislation (1924) 37 Harv. L. Rev. 545.
43 "Private rights as between private parties represent an equilibrium in which the relative interests, claims and recognized analogous rights of both parties have to be brought into a satisfactory balance. It is always a matter of relative rights, not of absolute rights. The same statement is in reality true also as regards the relation of the individual to the government, or to society viewed collectively in its quasi-corporate aspect. Individual interests cannot claim an absolute immunity as against the public power, but in all cases there must be a mutual adjustment of the conflicting interests. The idea that the contract rights are protected by any rigid universal rule from the effects of governmental action is a misconception that owes its prevalence to its comfortableness." Collier, Gold Contracts and Legislative Power (1933) 2 Geo. Wash. L. Rev. 303 at 311.
45 The reasoning of Justice Roberts in the Nebbia case as contrasted with prior decisions, as well as the dissenting opinion, represents an enlightened and desirable view. The former decisions as well as the dissent in this case expound what had been termed by Dean Pound as "mechanical jurisprudence"—a system of law affected by metaphysical, natural law notions wherein the courts have treated the due process clause as a rule rather than as a standard. To
In the famous *Minnesota Mortgage Case* a statute of Minnesota impairing the obligation of contracts was sanctioned as being for the public welfare and enacted under the police power. The fact was stressed that the Constitution cannot be construed narrowly and must be adapted to the needs of the time. These last two decisions appear to be about as broad and revolutionary as any that have been decided by the Justices of the high bench in recent years. In light of these cases, one cannot deal with due process without injecting therein a view of the police power heretofore not generally accepted. The "Heart Balm" acts are clearly invalid in the light of precedent in relation to the pure abolition-of-remedies or natural law aspect. Viewed, however, in the light of the expanding concept of the police power, as interpreted by these recent cases, the statutes may have a substantial limb upon which to hang their validity. The dissenting deal with due process as a rule—a rule of natural law and justice which is omnipresent, relegates all the social interests pressing for recognition to an inconspicuous, unapproachable niche in the legally trained mind. To be governed by such an interpretation of the Fourteenth Amendment, which is the interpretation accorded it by the majority opinion in *Children's Hospital v. Adkins*, 261 U.S. 525, 43 Sup. Ct. 394, 67 L. ed. 785 (1923), will tend to stultify the common law and produce stagnation in jurisprudence while social, economic and political conditions change. The ruling in the Adkins case represented an instance of judicial radicalism on the part of the Supreme Court that it is hoped will not often be repeated. Collier, *supra* note 43 at 348.

Dean Pound states the proposition aptly when he writes, "The sociological movement in jurisprudence, the movement for pragmatism as a philosophy of law, the movement for the adjustment of principles and doctrines to the human conditions they are to govern rather than to assumed first principles, the movement for putting the human factor in the central place and relegating logic to its true position as an instrument, has scarcely shown itself as yet in America. Perhaps the dissenting opinion of Mr. Justice Holmes in *Lochner v. New York* (198 U.S. 45, 75) is the most eloquent exposition of it we have." It might be added that the Nebbia and Minnesota Mortgage Cases are shining examples of this philosophy. It is to be hoped that the Supreme Court will not reverse itself and relegate its thoughts to a legal reasoning which belongs to the eighteenth century practitioner imbued with the outworn and unworkable philosophical outlook. See Pound, *Liberty of Contract* (1908) 18 Yale L. J. 454; Powell, *supra* note 42.

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47 The court has accepted this view from the earliest period. "We must never forget that it is a constitution we are expounding . . . a constitution intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs," Chief Justice Marshall, in *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579 (U.S. 1819). "We must realize that they have called into life a being, the development of which could not have been foreseen completely by the most gifted of its begetters, . . . The case before us must be considered in the light of one whole experience and not merely what was said a hundred years ago." *Missouri v. Holland*, 252 U.S. 416 at 433, 40 Sup. Ct. 382 at 383, 64 L. ed. 641 at 647 (1920).

48 A reading of the dissent of Justice McReynolds in the Nebbia case will reveal the broad scope of the majority view.

49 Professor Collier, in discussing the validity of the Gold Clause legislation, *supra* note 43 at 317, considers present-day conditions as a necessity for a discussion of the subject, saying, " . . . The social and individual interests represented in legislative measures will generally be found to outweigh the
argument in Hanfgarn v. Mark deserves greater treatment and analysis than the court accorded it.

The effect of the enactment, if upheld, is supposed to eliminate from the clutches of the unscrupulous and unethical, a weapon which was slowly deteriorating the marital relationship and wrecking the pillars of its foundation. It is also expected to prevent the evils outlined in the New York statute. The latter evils doubtless will be eradicated but the other effect is dubious. It may be submitted that the statutes may cause more harm to the marriage status than good. Knowing that there is no civil liability, the practice of adultery, seduction and enticement may increase, resulting in the breakdown rather than the building up of the marriage institution. The criminal action, of course, still remains as a deterrent for adultery and seduction, but the difficulty of proof lessens its punitive value. This aspect is a mere matter of conjecture and as the legislature has acted, the courts cannot question their wisdom in so doing. If the measure promulgated are on their face reasonable and not capricious or arbitrary, the court cannot look into the motives. The presumption is that the legislature acted for the public good, and in order to remedy some existing evil. As these statutes appear reasonable on their face, the requirements of due process are satisfied, and “judicial determination to that effect renders a court functus officio.” If the interests represented in historically established rights, because the legislation represents the more modern and instructed view of the political or economic problem, whereas the familiar common law or statutory right represents a crystallization of the felt needs and the conscious thought of past times. I do not mean to say that whatever is new is right and constitutional. The point I wish to make is simply that the superior weight of social and individual interests represented in legislation typically, may be inferred from the modernity of legislation and its studied adaptation to contemporary needs in the light of contemporary knowledge and fresh current experience in a very rapidly changing and very complex economic and social order. Such changes may obviously involve the redefinition of rights, the recognition of new interests, and the formation of new crystallization of legal thought and social philosophy around new centers and principles.

50 Supra note 1.
51 For a discussion of the meaning of “consortium” after the Women’s Acts, see Holbrook, The Change in the Meaning of Consortium (1923) 22 Mich. L. Rev. 1.
52 Blaisdell Case, supra note 46.
53 Antoni v. Greenhow, 107 U. S. 769, 2 Sup. Ct. 91, 27 L. ed. 468 (1882); Calder v. Michigan, 218 U. S. 591, 31 Sup. Ct. 122, 54 L. ed. 1163 (1910). Conversely, the court held in Meyer v. Nebraska, 262 U. S. 390, 43 Sup. Ct. 625, 67 L. ed. 1042 (1923), that the liberty protected by the Fourteenth Amendment may not be disturbed under the guise of protecting the public interest, by legislation that is arbitrary or without reasonable relation to some purpose within the state’s power to effect.
55 State v. Moore, 104 N. C. 714, 10 S. E. 143 (1889).
56 Nebbia v. New York, supra note 44.
"Heart Balm" legislation appears to be neither arbitrary nor capricious, but a reasonable exercise of the police power, it should be upheld by the courts without further discussion.\textsuperscript{57} This, of course, is the point upon which the legislation will stand or fall.\textsuperscript{58}

BERNARD MARGOLIUS.

CONSTITUTIONALITY OF FEDERAL ACTS DIVESTING PRISON-MADE GOODS OF INTERSTATE CHARACTER

The increasing degree to which the Federal Government is seeking to subject private industry to regulation and control makes of primary importance the question of the constitutionality of enabling acts by which the Federal Government gives support to state legislation. The Supreme Court recently handed down a decision\textsuperscript{1} upholding an enabling act termed the Hawes-Cooper Act,\textsuperscript{2} by which act Congress divested prison-made goods of their interstate character and subjected them to the laws of the state of destination as soon as such goods arrived within such state. The Supreme Court has granted \textit{certiorari},\textsuperscript{3} bringing before it the case of Kentucky Whip and Collar Company v. Illinois Central Railway Company,\textsuperscript{4} which case presents the question of the constitutionality of the Ashurst-
Sumners Act, by which Congress prohibits the shipping in interstate commerce of prison-made goods where such goods are intended by any person interested therein to be used or sold contrary to the laws of the state of destination.

In *Whitfield v. State of Ohio* an Ohio Statute made it a crime to sell, on the open market in the state, merchandise manufactured wholly or in part in any other state by convicts or prisoners. Asa H. Whitfield was convicted in an Ohio Court for selling in an open market of Ohio, work shirts manufactured by prisoners in an Alabama prison and shipped into Ohio, in violation of the Ohio Statute above referred to, which is made applicable by the Hawes-Cooper Act to goods made in prisons of other states. The constitutionality of the Ohio Statute was assailed on the contention that it violates the privileges and immunities clause of the Fourteenth Amendment to the Constitution of the United States and constituted an unauthorized regulation of, and a burden upon, interstate commerce. The constitutionality of the Hawes-Cooper Act was attacked on the ground of an unlawful delegation of the power of Congress to the states. The Supreme Court of the United States held the Ohio Statutory provision enforces without discrimination the same rule as to the convict-made goods of other states when they are brought into Ohio, as Ohio enforces as to goods made by her own convicts; and the contention in respect of the privileges and immunities clause

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5 49 Stat. 494 (1935), 49 U. S. C. Supp. I §§ 61-64 (1935). “... It shall be unlawful for any person knowingly to transport or cause to be transported ... any goods ... manufactured ... wholly or in part by convicts ... into any state where said goods are intended by any person interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise in violation of any law of such state ... all packages containing any goods ... manufactured ... wholly or in part by convicts ... when shipped in interstate or foreign commerce shall be plainly and clearly marked, so that the name and location of the penal ... institution where produced ... may be readily ascertained. ...”

6 Supra note 1.

7 Ohio Gen Code (Page, Supp. 1935) §§ 2228-1. “After January 19, 1934, no goods, wares, or merchandise, manufactured or mined wholly or in part in any other state by convicts or prisoners, except convicts or prisoners on parole or probation, shall be sold on the open market in this state.”


9 Supra note 7.

10 Supra note 2.

11 Supra note 7.

12 Supra note 2.

13 Supra note 1.
must be rejected as without substance. The Ohio Statute does not infringe the commerce clause in so far as applicable to the sale in Ohio of Alabama prison-made goods in original packages after shipment in interstate commerce from Alabama into Ohio, as the Hawes-Cooper Act removes an impediment allowing the Ohio Statute to control prison-made goods in the original packages. The Federal Statute is valid for it merely permits the jurisdiction of the state to attach immediately upon delivery, whether the importation remains in the original package or not. It does not, therefore, delegate power over interstate commerce to the states.

In the case of Kentucky Whip and Collar Company v. Illinois Central Railway Company the plaintiff, the Kentucky Whip and Collar Company, which manufactures goods with convict labor obtained from the State of Kentucky by a contract with that state, presented goods to the defendant, the Illinois Central Railway Company, to be shipped from Kentucky to several states having statutes requiring branding of convict-made goods or excluding them altogether. One such state is the State of Ohio, whose statute was considered in the Whitfield case. Defendant refused to accept the goods on the ground that they were not labeled as required under the Ashurst-Sumners Act, and that the statute prohibited shipment of the con-

14 The Fourteenth Amendment does not prohibit legislation limited as to certain objects or territory, but merely insures that all persons subject to it, and under similar circumstances and conditions, shall be treated alike. Hayes v. Missouri, 120 U. S. 68, 7 Sup. Ct. 350, 30 L. ed. 578 (1887); Pembina Consol. Silver Min. and Mill Co. v. Pennsylvania, 125 U. S. 190, 8 Sup. Ct. 737, 31 L. ed. 650 (1888); Holden v. Hardy, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. ed. 788 (1898); Magoun v. Illinois Trust and Savings Bank, 170 U. S. 293, 18 Sup. Ct. 594, 42 L. ed. 1042 (1898). The equal protection of the laws is not denied when a certain law operates with equal force upon all persons situated in a similar position. Watson v. Newin, 128 U. S. 578, 9 Sup. Ct. 192, 32 L. ed. 544 (1889); Amer. Sugar Ref. Co. v. Louisiana, 179 U. S. 94, 21 Sup. Ct. 43, 45 L. ed. 104 (1900). "The Fourteenth Amendment does not prohibit legislation special in character. It does not prohibit the state from carrying out a policy that cannot be pronounced purely arbitrary, by taxation and penal laws." Mr. Justice Holmes, in Central Lumber Co. v. South Dakota, 226 U. S. 157, 160, 33 Sup. Ct. 66, 67, 57 L. ed. 164, 169 (1912). The constitutional guaranty of equal privileges and immunities to citizens forbids only such legislation affecting citizens of the states as will have the practical effect of putting a citizen of one state when he is in another, or when he is asserting his rights as a United State citizen in another state, in a condition of alienage. Blake v. McCung, 172 U. S. 239, 19 Sup. Ct. 165, 43 L. ed. 432 (1898).

15 Supra note 7.
16 Art. 1, sec. 8, clause 3.
17 Supra note 2.
18 Hawes-Cooper Act, supra note 2.
20 KY. STAT. (Carroll, 1930) §§ 524-26; OREGON CODE ANN. (1930) §§ 67-2010-14; WIS. STAT. (1929) § 1313.
21 CARRILL'S CONSOLIDATED LAWS OF N. Y. (1935-36 Supp.) Ch. 21, sec. 69 (passed in 1934).
22 Supra note 7.
23 Supra note 1.
24 Supra note 5.
vict-goods presented for consignment to the states in question. The plaintiff filed suit for a mandatory injunction\textsuperscript{20} to force the defendant to accept the goods on the grounds that the Ashurst-Sumners Act was invalid as exceeding the interstate power of Congress.\textsuperscript{26} It was contended that such power does not include power to prohibit shipment of goods harmless in themselves, that the act is an unconstitutional delegation to the states of power given to the Federal Government by the commerce clause of the Constitution of the United States, that the act is an attempt to control local business, a power reserved to the States under the Tenth Amendment. It was also contended that the act deprived plaintiff of his property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States by depriving the plaintiff of the right to do business in interstate commerce. The Federal District Court granted a temporary, but denied a perpetual injunction.\textsuperscript{27} This decision was based on the reason that the labeling provisions are valid under the interstate commerce clause. The Court said prohibitory provisions of the act are bad since such goods are legitimate articles of trade.\textsuperscript{28} These provisions, however, are separable as it can be presumed that Congress would pass the act regulating shipment of such goods without the inclusion of the unconstitutional provisions. The Court did not mention the objections relating to the delegation or invasion of local business. This decision was affirmed by the Circuit Court of Appeals\textsuperscript{29} in an opinion of more sweeping effect. The Court held the Ashurst-Sumners Act was constitutional in its entirety as there was no delegation of Federal power to the states to prohibit shipment of convict-made goods in interstate commerce as shown by the Whitfield case.\textsuperscript{30} The court declared Congress has power to prohibit the shipment in interstate commerce of prison-made goods. It can, therefore, as an incident to such power, require them to be labeled. Plaintiff's due process argument was not considered or at least was not answered by either the District or Circuit Court of Appeals.\textsuperscript{31}

These decisions are important as contributions in the expansion of the field of legislation which may by coöperative Federal and State action now be made to include subjects upon which neither could legislate alone.\textsuperscript{32}

\textsuperscript{25} Supra note 19. \\
\textsuperscript{26} Supra note 16. \\
\textsuperscript{27} Supra note 19. \\
\textsuperscript{28} 12 F. (2d) 37 at 39 (W. D. Ky. 1935). \\
\textsuperscript{29} Supra note 4. \\
\textsuperscript{30} Supra note 1. \\
\textsuperscript{31} Supra note 19. \\
\textsuperscript{32} Note (1936) 49 Harv. L. Rev. 466.
Perhaps the strongest objection to the Ashurst-Sumners Act is that the power to regulate interstate commerce does not include the power to prohibit the use of such commerce by goods not in themselves harmful. This question did not arise in the Whitfield case as there Congress did not prohibit the use of interstate commerce but merely divested convict-made goods of their interstate character. In considering this objection it will be helpful to make brief reference to statutes passed by Congress which prohibited the use of interstate commerce for the shipment of certain articles and for the transportation of human beings, under certain conditions. These statutes passed over a period of approximately forty-five years are: The Wilson Act of 1890, subjecting intoxicants upon their "arrival" in a state to the laws thereof; the Anti-Lottery Act of 1895, closing the channels of interstate transportation to lottery tickets, an earlier act having already banned lottery tickets from the mails; an act passed in 1900, as amended in 1909, excluding from interstate transportation game slaughtered in violation of state laws; the Pure Food and Drug Act of 1906, barring from interstate transportation foods and drugs not inspected and labeled in accordance with the act; the commodity clause of the Hepburn Act of the same year, forbidding interstate carriers to transport in interstate commerce commodities in which they had any interest "direct or indirect;" the Mann Act of 1910, forbidding the transportation of women from one state to another for immoral purposes; the

33 Supra note 5.
34 Supra note 1.
Webb Kenyon Act of 1913,\textsuperscript{44} prohibiting the shipment of intoxicants into a state there to be used in violation of its laws; the Child Labor Act of 1916,\textsuperscript{46} banning from interstate transportation articles in the production of which child labor of a described type had entered; the Federal Quarantine Act of 1917,\textsuperscript{46} forbidding the shipment from infected areas of diseased plants and shrubs; the Reed Bone-Dry Amendment of 1918,\textsuperscript{47} forbidding the transportation of intoxicants into any state which forbids the manufacture thereof; the Federal Motor Vehicle Act of 1919,\textsuperscript{48} prohibiting the transportation of stolen vehicles from one state to another and receiving, concealment, or sale of the same; the Hawes-Cooper Act of 1929,\textsuperscript{49} which went into effect in 1934, which had already been referred to above; the so-called Lindbergh Law of June, 1932, as amended in 1934,\textsuperscript{50} making kidnapping and carrying in interstate commerce of persons so held a Federal crime; the Ashurst-Sumners Act of 1935,\textsuperscript{51} the provisions of which were referred to above. As shown by the cases cited in the notes, all of these acts have been upheld by the Supreme Court of the United States against the objections set forth above as within the commerce power of the Constitution of the United States, except the Federal Game Act of 1900,\textsuperscript{52} which has never been before the Court, the Child-Labor Act,\textsuperscript{53} held unconstitutional in \textit{Hammer v. Dagenhart},\textsuperscript{54} and the Ashurst-Sumners Act,\textsuperscript{55} which is now pending in the Supreme Court of the United States.\textsuperscript{56} Therefore, \textit{Hammer v. Dagenhart}\textsuperscript{57} would seem to be the chief obstacle the Supreme Court of the United States must overcome if it is to uphold the Ashurst-Sumners Act.\textsuperscript{58} In \textit{Hammer v. Dagenhart} the Court held
\begin{footnotes}
\footnotetext{49}{Supra note 2.}
\footnotetext{51}{Supra note 5.}
\footnotetext{52}{Supra notes 39, 40.}
\footnotetext{53}{Supra note 45.}
\footnotetext{54}{Supra note 45.}
\footnotetext{55}{Supra note 5.}
\footnotetext{56}{Supra note 5.}
\footnotetext{57}{Supra note 45.}
\footnotetext{58}{Supra note 5.}
the Child-Labor Act\textsuperscript{59} unconstitutional as an attempt by Congress to impose its views of a desirable state public policy as to child-labor upon the states. The Court said that Congress could not thus interfere with the purely internal affairs of the states as to subjects reserved to the states by the Tenth Amendment. The Court distinguished the Lottery Act,\textsuperscript{60} the Pure Food and Drug Act,\textsuperscript{61} the Whiskey,\textsuperscript{62} and other similar acts.\textsuperscript{63} They pointed out that in the prior acts interstate commerce was “necessary to the accomplishment of the harmful results” prescribed, whereas in the Child-Labor Act the goods excluded, though made by child-labor, were “of themselves harmless.”

Must the Court overrule \textit{Hammer v. Dagenhart} to uphold the Ashurst-Sumners Act? Can the Court distinguished that case? The Court might do as the District Court did and uphold the labeling section as a separable provision and declare that the Kentucky Whip Company had no right to the injunction without deciding the broader question as to whether Congress has the power to prohibit the shipment of the goods in question in interstate commerce. The Court might hold as the Circuit Court of Appeals did that \textit{Hammer v. Dagenhart} is distinguishable on the ground that here there is no attempt to foist a certain policy on the states but that the states themselves have the choice whether such a policy shall be adopted.\textsuperscript{64} The Court in the \textit{Whitfield} case did not mention \textit{Hammer v. Dagenhart}, as the provisions of the act there questioned were not prohibitory. The Court did declare in that case, however, that there is “ample support” for the view that the sale of convict-made goods in competition with the products of free labor is an evil.\textsuperscript{65} This seems to be then an economic evil. The Court may be ready to uphold attempts to put an end to such economic evils while it would differentiate child-labor as a social, not an economic evil. The Federal Trade Commission has declared it to be an unfair trade practice to sell prison-made goods as goods made by free labor.\textsuperscript{66} There is a statute forbidding the sale of goods made by convicts imprisoned

\textsuperscript{59} Supra note 45.
\textsuperscript{60} Supra notes 37, 38.
\textsuperscript{61} Supra note 41.
\textsuperscript{62} Supra notes 36, 44.
\textsuperscript{63} Supra notes 36-44.
\textsuperscript{64} 84 F. (2d) 168, 170 (C. C. A. 6th, 1936), “A sufficient answer to this contention it seems to us, is that the evils which legislation of this character seeks to remedy are not only those inherent in the nature of the article, but also those resulting from its employment and disposition.”
\textsuperscript{65} Supra note 1.
under Federal law in competition with private enterprise. Another statute denies the right of entry at the ports of the United States to products of convict labor. In view of this tendency the Court would have a basis for the suggested distinction. The Supreme Court has said, "There is no more important concern than to safeguard the freedom of labor, upon which alone can enduring prosperity be based." The Supreme Court could therefore consider this element of competition with free labor as a point in favor of the Ashurst-Sumners Act. One difficulty of enforcement of the child-labor law would have been the discovery of the age of every young person who worked on goods shipped in interstate commerce. Convict-made goods can be controlled more easily, as they are manufactured by a segregated class. Difficulties of enforcement and scope of a statute are no reasons for unconstitutionality. They are factors nevertheless to be considered for their possible influence on the Court. *Hammer v. Dagenhart* did not forbid cooperative action by Federal and State governments, for that question was not there involved. Attempts by states to legislate alone upon this subject failed before the Hawes-Cooper and Ashurst-Sumners Acts were passed by Congress, and the problem of the Ashurst-Sumners Act might be distinguished from *Hammer v. Dagenhart* because of the cooperative statutes involved. The view of Mr. Justice Holmes, who dissented in *Hammer v. Dagenhart*, that Congress had power to prohibit shipment in interstate commerce of things it is the policy of Congress to prohibit without regard to whether they are harmful per se, and that the indirect effects of such prohibition on states' rights is not a reason for unconstitutionality, is, of course, always available to the Court.

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68 46 Stat. 689 (1930), 19 U. S. C. §1307 (1934). In Prison Industries (Bureau of Foreign and Domestic Comm., U. S. Dept. Comm. 1929) at p. 86 it is suggested that such a ban would be ineffective as all goods look alike whether manufactured by convict or free labor.
70 New York State passed such a law in 1894 requiring all "Convict-made goods made in other states to be conspicuously branded 'Convict-made' when offered for sale in New York." (New York Laws 1894 C. 698 repealing earlier law of 1887, found in C. 323, New York Laws 1887, because the earlier law covered New York goods also.) The law of 1894 held it was invalid as a discrimination against interstate commerce. People v. Hawkins, 85 Hun. 43, 32 N. Y. Supp. 524 (1895).
71 Supra note 45.
The Court might give a square holding of unconstitutionality as did the Court in *Hammer v. Dagenhart*, quoting Chief Justice Marshall, who, when speaking for the Court in *Gibbons v. Ogdent*,73 in defining the extent and nature of the Commerce Power said, "It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed." Again, following *Hammer v. Dagenhart*, the Court may say the Ashurst-Sumners Act is unconstitutional as it does not regulate but prohibits the use of interstate commerce. By the two acts under consideration Congress attempted to prohibit the use of interstate commerce by prison-made goods. Congress used as patterns for these acts the Wilson74 and Webb-Kenyon Acts,75 by which it had succeeded in prohibiting the use of interstate commerce for shipment of whiskey. The Supreme Court in upholding the Webb-Kenyon Act76 pointed out that the nature of the evil there involved justified the extraordinary remedy used. The evil so far as prison-made goods is concerned is an economic evil, as has already been pointed out, as distinguished from an evil in the thing itself as was the case with whiskey. The difference in the nature of the things prohibited or the effect they cause might form a basis for distinction, but should not be fatal to the Ashurst-Sumners Act since it was not fatal to the Hawes-Cooper Act. In the latter act, however, it might be noted that outright prohibition was not involved.

Is the Ashurst-Sumners Act an unconstitutional delegation to the states of commerce powers granted to the Federal Government under the Constitution of the United States? The Court, in the *Whitfield* case,77 answered this objection by pointing out that the Hawes-Cooper Act was a copy of the form used in the Wilson Act78 except for the subject dealt with. The Court then pointed out that the Wilson Act was upheld in *In re Rahrer*79 as transferring no Federal power to the states but as divesting liquor of its interstate character whereby it was allowed to fall within the state’s jurisdiction at once upon arrival within the local jurisdiction. Similar reasoning may be

73 9 Wheat. 1, 6 L. ed. 23 (1824).
74 Supra note 36.
75 Supra note 44.
76 Supra note 44.
77 Supra note 1.
78 Cited supra note 36, "All fermented, distilled or other intoxicating liquors or liquids transported into any state or territory or remaining therein for use, consumption, sale or storage therein, shall upon ‘arrival’ in such state or territory be subject to the operation and effect of such state or territory enacted in the exercise of its police powers to the same extent and in the same manner as though such liquors or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in the original packages or otherwise."
79 Supra note 36.
applied to the Hawes-Cooper Act to answer the argument of delegation. The Ashurst-Sumners Act being to the Hawes-Cooper Act what the Webb-Kenyon Act was to the Wilson Act, the Court might easily uphold the Ashurst-Sumner Act under the decision of Clark Distilling Company v. Western Maryland Railway Company. In that case the Webb-Kenyon Act was held not to be a delegation to the states of interstate commerce power. The Ashurst-Summers Act was modeled upon the Webb-Kenyon Act and involves no more delegation of power.

Does the Ashurst-Sumners Act interfere with local business, the control of which is reserved to the states by the Tenth Amendment? Is this not merely the adoption of a police regulation in the exercise of a power conferred on the Federal Government, which type of legislation has been held to be within the scope of Congressional power? The principle of adopting state laws to carry out a Federal power is thoroughly settled in this country. By the statute in question Congress does not interfere with local business but tells the states that if they want to control and protect local business by keeping out prison-made goods, Congress has now passed a law removing Federal objections to state laws heretofore held bad as burdens on interstate commerce. The Hawes-Cooper Act was upheld against the above objection. The Court again used the Wilson Act and In re Rahrer to point out that the Hawes-Cooper Act does not interfere with local business but merely aids in the enforcement of state legislation. The Court has again supplied another detour to the "original package" doctrine of Brown v. Maryland. The same reasoning seems to apply with equal effect to the Ashurst-Sumners

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80 Citation supra note 44. "... That the shipment or transportation in any manner or by any means whatever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one state or territory or district of the United States ... into any other state, territory or district of the United States, ... which is spirituous, vinous, malted, fermented or other intoxicating liquor, if intended by any person interested therein, to be received, possessed, sold, or in any manner used, in violation of any law of such state, territory, or district of the United States is hereby prohibited."

81 Supra note 44.


84 Supra note 36.

85 Supra note 36.

86 12 Wheat. 419, 6 L. ed. 678 (1827).
Act; as it merely aids the states in enforcement of their laws, going one step further in such aid than the Hawes-Cooper Act.

As for the due process objection which did not receive any consideration in the Whitfield case as not raised there, and which objection (though raised by plaintiff’s briefs) the District Court and Circuit Court of Appeals did not deal with at all in Kentucky Whip and Collar Company v. Illinois Railway Co.,¹⁰⁷ there appears to be little authority directly in point. The Hawes-Cooper Act has been upheld under the commerce power,⁸⁸ and the Ashurst-Sumners Act does not seem to be unreasonable or arbitrary under all the circumstances.⁸⁹ The purpose of the act being to protect the state of destination from unfair competition, plaintiff is not “unjustly” deprived of his right to ship in interstate commerce. If the commerce power is broad enough to sustain the Ashurst-Sumners Act, the Court will not have to consider the due process of law objection, for if by any constitutional construction a law is a valid exercise of congressional power it is the duty of the Court to give the law that construction.⁹⁰

The objection that the Ashurst-Sumners Act does not apply uniformly throughout all the states can be dismissed by reference to the decision upholding the Webb-Kenyon Act⁹¹ and the fact that the former is patterned upon the latter act. In that decision the Supreme Court said the Webb-Kenyon Act does not fall before the

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¹⁰⁷ Supra note 19.
¹⁰⁸ Supra note 1.
¹⁰⁹ The Court might dispose of this objection by referring to the case of Clark Distilling Co. v. W. Md. Ry. Co., supra note 43, where it upheld the Webb-Kenyon Act as not violating due process of law under the Fifth Amendment, and point out that that Act was the pattern for the Ashurst-Sumners Act. In Nebbia v. New York, 291 U. S. 502, 54 Sup. Ct. 505, 78 L. ed. 940 (1934), Mr. Justice Roberts, speaking for the Court in upholding the New York Milk Control Law, stated what might be the views of the Supreme Court, as now composed, in regard to due process. He said: “The Fifth Amendment, in the field of Federal activity, and the Fourteenth Amendment, as respects state action, do not prohibit governmental regulation for the general welfare, they merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistant with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. It results that a regulation valid for one sort of business or in given circumstances might be invalid for another sort, or the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts.” See Champion v. Ames, supra note 37; Weber v. Freed, supra note 82; Hipo-lite Egg Co. v. United States, supra note 41; Hoke v. United States; Caminetti v. United States, both supra note 43.

¹⁰⁰ In United States v. Delaware & Hudson Co., 213 U. S. 366, 407, 29 Sup. Ct. 527, 535, 53 L. ed. 836, Mr. Justice White said for the Court: “It is elementary when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity.”

objection of nonuniformity because it applies uniformly to the conditions which call it into play. The Court pointed out that the provisions of the act thereunder consideration applied to all the states, and that the power of Congress to regulate interstate commerce is not subject to the restriction that the regulation shall be uniform throughout the United States.

By upholding the Ashurst-Sumners Act as the Court has already upheld the Hawes-Cooper Act, the Supreme Court can allow Federal legislation coöperating with state legislation to reach subjects heretofore held to be beyond the realm of the effective application of Federal or State constitutional power. Under the doctrine of such coöperative legislation a new child-labor law might avoid constitutional objections.

Charles S. Rhyne.
An officer of the United States Army was convicted in the district court of the United States for the District of Columbia for violating 18 U. S. C. § 203 (1934). Motions in arrest of judgment and for a new trial were overruled and the officer was sentenced to be imprisoned in the Washington Asylum and Jail for a period of six months and to pay a fine of $1,000; whereupon the defendant filed notice of appeal and upon furnishing a bond was admitted to bail. Judgment was entered accordingly. The Secretary of War requested the opinion of the Attorney General relative to the military status of the convicted officer pending appeal. Held, that upon the date of the entry of judgment of conviction and sentence the defendant became immediately incapable of holding any office of honor, trust, or profit under the Government of the United States. Op. Att’y Gen., May 21, 1936: Statutory Disability of Army Officer Convicted of Crime, Vol. 38, Op. No. 47.

That an appeal from conviction has not the effect of staying the disqualification provision of Section 203 has not yet been decided in any federal court. There is dictum of the United States Supreme Court to the effect that the disqualification is self-executing following a conviction under the statute. See Burton v. United States, 202 U. S. 344, 369, 26 Sup. Ct. 688, 50 L. ed. 1057 (1906). But a United States Senator is not ipso facto deprived of his senatorial office by reason of such conviction since the office of United States Senator is not an “office of honor, trust, or profit under the Government of the United States.” Burton v. United States, supra. The Attorney General finds support for his opinion in decisions of state courts interpretive of state statutes of similar nature. The trend of these decisions is to the effect that disqualification for office is not a punishment but is an incidental consequence, and becomes effective upon judgment of conviction notwithstanding appeal. McKannay v. Horton, 151 Cal. 711, 91 Pac. 598 (1907); In re Obergfell, 239 N. Y. 48, 145 N. E. 323 (1924); State ex rel Olsen v. Langer, 65

1 "Whoever, being elected or appointed a Senator, Member of or Delegate to Congress, or a Resident Commissioner, shall, after his election or appointment and either before or after he has qualified, and during his continuance in office, or being the head of a department, or other officer or clerk in the employ of the United States, shall, directly or indirectly, receive, or agree to receive, any compensation whatever for any services rendered or to be rendered to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter, or thing in which the United States is a party or directly or indirectly interested, before any department, court-martial, bureau, officer, or any civil, military, or naval commission whatever, shall be fined not more than $10,000 and imprisoned not more than two years; and shall moreover, thereafter be incapable of holding any office of honor, trust, or profit under the Government of the United States." 35 Stat. 1109 (1909), 18 U. S. C. § 203 (1934).

The Motor Carrier Act, 49 Stat. 543 (1935), 49 U. S. C. Supp. I § 301 (1935), was enacted as an amendment to the Interstate Commerce Act, amended, 24 Stat. 379 (1887), 41 Stat. 456 (1920), 49 U. S. C. § 1 (1934). Section 217 of the act relates to motor vehicles as common carriers and provides that such a carrier shall not charge a higher or a lower rate than that in its schedules on file with the Interstate Commerce Commission. Section 218 of the act relates to motor vehicles as contract carriers and provides that such a carrier shall file with the Interstate Commerce Commission schedules of its minimum charges for transportation and shall not accept a lesser compensation.

Section 217 contains a proviso whereby section 22(1) of the Interstate Commerce Act is made applicable to the common carriers by motor vehicles treated in section 217. Section 22(1) provides that the provisions of the Interstate Commerce Act governing rates which may be charged by carriers shall not prevent the carriage, storage, or handling of property free or at reduced rates for the United States. By operation of the proviso the Government is excepted from the provisions of section 217. Section 218 contains no such proviso, but there is nothing in that section, or elsewhere in the act, expressly binding the Government to the provisions of the section.

The Secretary of War requested the opinion of the Attorney General as to whether "under the provisions of section 218 of the Motor Carrier Act, 1935, contract carriers by motor vehicles may quote lower rates to the Government than those prescribed in tariffs required to be filed with the Interstate Commerce Commission." Held, that the provisions of section 218 do not apply to contracts with the Government and contract carriers by motor vehicles may quote to the Secretary of War rates not in excess of the tariffs filed with the Interstate Commerce Commission.

With respect to possible injustice to the officer so convicted, the Attorney General says, "Any hardship that may result to the individual as a result of such construction becomes real only in the event the reversal of his conviction is secured, but the injury and detriment to society and to the public service is a certain and immediate result of the retention in office of a person convicted of crime." But cf. 36 Op. Att'y Gen. 186, 196 (1930).

It is a well-established rule of common law that the sovereign authority is not bound by a statute which tends to restrain or diminish its powers, right, or interest unless it is named therein. United States v. Herron, 20 Wall. 251, 22 L. ed. 275 (U. S. 1873); Guarantee Title & Trust Co. v. Title Guaranty & Surety Co., 224 U. S. 152, 32 Sup. Ct. 457, 56 L. ed. 706 (1912); In re Riemer, 82 F. (2d) 162 (C. C. A. 2d, 1936). The sovereign is not bound, when not expressly named, unless it clearly appears that it intended to be bound. United States v. Hoar, 2 Mason 311, Fed. Cas. No. 15, 373 (C. C. D. Mass. 1821); United States v. California, 297 U. S. 175, 56 Sup. Ct. 421, 80 L. ed. 367 (1936); State v. City of Des Moines, 266 N. W. 41 (Iowa 1936). Since the right of the Government to contract freely would be impaired, the provisions of section 218 are not applicable to the Government unless made so expressly or impliedly by the provisions of the act.

Opposed to such an interpretation is the maxim expressio unius est exclusio alterius. While there is nothing in section 218 making its provisions applicable by necessary implication, sections 217 and 218 are very similar sections, treating of common carriers and contract carriers respectively, and the former contains a provision expressly excepting the Government from its operation while the latter does not. This raises the question whether under the maxim the provisions of section 218 are by necessary implication made applicable to the Government.

The maxim expresses a rule of construction, not of substantive law. United States v. Barnes, 222 U. S. 513, 32 Sup. Ct. 117, 56 L. ed. 291 (1912). It should be applied only when the contrast between that which is expressed and that which is omitted is so strong as to force the inference that that which is omitted was intended to have opposite treatment. Ford v. United States, 273 U. S. 593, 47 Sup. Ct. 531, 71 L. ed. 793 (1927). Great caution is requisite in dealing with it. Id at 612. It should not be applied when its application leads to inconsistency or injustice. Id. It should not be used when its use will defeat the manifest purpose of the act. City of New York v. Davis, 7 F. (2d) 566 (C. C. A. 2d, 1925). It has no application when that which is expressed is merely declaratory of existing law and not in derogation of it. Yardley & Co., Ltd., v. United States, 22 C. C. P. A. 390 (1934); see Straus v. Yeager, 48 Ind. App. 448, 93 N. E. 877, 881 (1911). It should not be invoked when to do so would contradict the public policy of the sovereign. Forsythe v. Paschal, 34 Ariz. 380, 271 Pac. 865 (1928).

As pointed out in the opinion, to hold that by reason of application of the maxim the Government is bound by the provisions of section 218 would contradict the established policy of the Government that contracts be awarded to the lowest responsible bidder. The exemption of the Government from the operation of section 217 is merely declaratory of existing law. To apply the maxim leads directly to
inconsistency for the reason that, while one of the recited aims of the act is to prevent unjust discrimination, the result would be a discrimination against contract carriers and in favor of common carriers in the procurement of Government business.

E. E. W.

Municipal Corporations — Statutory Construction — Federal Small Claims Act — Meaning of “Privately-Owned Property.” — A National Park Service truck operated by an enrollee of the Civilian Conservation Corps damaged a fire hydrant in the city of Cleveland, Ohio. The city filed a claim with the Secretary of the Interior for $69.41, under a small claims statute, 42 Stat. 1066 (1922), 31 U. S. C. § 215 (1934), which confers authority upon heads of departments to consider and settle all claims not in excess of $1,000 for damages to “privately-owned property.” The Secretary asked the Attorney-General if the statute were applicable to the claims of a municipality. Held, that the Secretary is authorized to consider the claim as one for damages to “privately-owned property.” Op. Att'y. Gen., Aug. 12, 1936: Claim of City of Cleveland Under Act of Dec. 28, 1922, Vol. 38, Op. No. 58.

Although the small claims statute has been in effect for almost 14 years, it has never been judicially construed. Even on the wider problem of the public or private status of municipal property, “authorities directly on the question are scarcely to be found.” Wayne County v. United States, 53 Ct. Cls. 417 (1917).

The general problem of when municipal property may be considered private property has usually arisen in connection with three types of cases: (1) eminent domain proceedings by state or federal government; (2) statutes exempting public property from taxation; and (3) attempted sales or rentals of municipal property.

A municipal corporation is said to have a dual character: it is a political subdivision of the state which created it, and it is a corporate body for the service of its inhabitants. Coyle v. Gray, 12 Del. 4, 30 Atl. 728 (1884); Mount Hope Cemetery v. City of Boston, 158 Mass. 519, 33 N. E. 695 (1893). Considered as a political subdivision of the state, a municipality is not entitled to protection under the XIV Amendment from the taking of its property by the state without due process of law. Trenton v. New Jersey, 262 U. S. 182, 43 Sup. Ct. 534, 67 L. ed. 937 (1923); Cranford County v. City of New York, 38 F. (2d) 152 (C. C. A. 2d, 1930); Williams v. Mayor, 289 U. S. 36, 53 Sup. Ct. 431, 77 L. ed. 1015 (1933). Contra decisions are found usually in jurisdictions adhering to a vestige of the doctrine of local self-government. Davison v. Hines, 151 Mich. 294, 115 N. W. 246 (1908); State Ex. Rel. Kern v. Arnold, 49 P. (2d) 976 (Mont. 1935). In such cases, however, emphasis has also been placed on the principle that a city may act in both a proprietary and a governmental capacity through the same instrumentality: Davison v. Hines, supra; Miller Grocery Co. v. Des Moines, 195 Iowa 1310, 192 N. W. 306 (1923); (1924) 33 A. L. R. 689; State Ex. Rel. Kern v. Arnold, supra. “Its rights of property once acquired, though designed and used to aid it in the discharge of its duties as a local government, are entirely distinct and separate from
its powers as a political body.” *Town of Milwaukee v. City of Mil-
waukee*, 12 Wis. 103 (1860). In relation to the Federal Government's right of eminent domain, the corporate nature of municipal ownership has been emphasized and municipal property has been held entitled to the protection of the Fifth Amendment prohibiting the taking of private property without due process of law. “Private as thus used [in the Fifth Amendment] includes property which is normally regarded as public.” *United States v. Wheeler Township*, 66 F. (2d) 977 (C. C. A. 8th, 1933); cf. *United States v. Town of Nahant*, 153 Fed. 520 (C. C. A. 1st, 1907).

In the second type of case, a municipal water system has been held entitled to tax exemption as public property. *Sachem's Head Prop-
erty Owner's Ass'n v. Town of Guilford*, 112 Conn. 515, 152 Atl. 877 (1931). For purposes of tax assessment water mains and fire hydrants have been held to be private property. *State of Kansas v. Shawnee County*, 83 Kan. 199, 110 Pac. 92 (1910). The weight of authority classes waterworks as private property where legislative control is involved; as public property when taxation statutes are applied. 1 McQuillin, *Municipal Corporations* (2d ed. 1928), § 239.

In the third class of cases, a statute permitting a municipality to sell its private property was held not to include fire department apparatus. *City of Southport v. Stanley*, 125 N. C. 464, 34 S. E. 641 (1899); cf. *Cline v. City of Hickory*, 207 N. C. 125, 176 S. E. 250 (1934) (rental of city hall). Fire engines are exempt from sale under execution in payment of a city's debts on the ground that they constitute public property. *Meriwether v. Garrett*, 102 U. S. 472, 26 L. ed. 197 (1880). Private property of a municipality is not exempt. *Shamrock Towing Co. v. City of New York*, 20 F. (2d) 444 (E. D. N. Y. 1927). City streets are not public property within the meaning of a Federal statute permitting telegraph companies to use the post roads without the necessity of paying rental. *St. Louis v. Western Union Telegraph Co.*, 148 U. S. 92, 13 Sup. Ct. 485, 37 L. ed. 381 (1893); cf. *City of Tulsa v. Southwestern Bell Telephone Co.*, 75 F. (2d) 343 (C. C. A. 10th, 1935) (Use of city streets by telephone company under franchise from territory).

It may be concluded that the term private property, as applied to municipal property, is ambiguous. In a specific case the status of municipal property would seem to depend more upon the purpose of the suit than upon any intrinsic distinction between public and private property. 1 Dillon, *Municipal Corporations* (5th ed. 1911), §§ 132; 1 McQuillin, *Municipal Corporations* (2d ed. 1928) §§ 245. In cases of ambiguity the “judicial department will lean in favor of a construction given to a statute by the department charged with its execution.” *Binns v. United States*, 194 U. S. 486, 24 Sup. Ct. 816, 48 L. ed. 1097 (1904) (and cited cases); *Gay, Receiver, v. Ruff*, 292 U. S. 25, 54 Sup. Ct. 608, 78 L. ed. 1099 (1934) (and cited cases). As pointed out in the opinion of the Attorney-General, the departmental practice has been to treat municipal property as private property. The legislative history of the act indicates a lumping together of all small claims, irrespective of legalistic distinctions.
“During the last Congress [66th] there were approximately 1,000 bills filed with the Committee on claims, and it is safe to say that as many bills, if not more, will be filed with the Committee during the present [67th] Congress. The cost of printing alone . . . amounted to nearly $15,000.” H.R. Rep. No. 342, 67th Cong. 1st Sess., Ser. No. 7912. In view of the extension of federal activities during the last few years, it may be expected that unless claims of municipalities are included in the class contemplated by the small claims statute the legislative situation described in the House Report will recur. The opinion of the Attorney General serves to assist administrative procedure by justifying the adoption of a workable interpretation of the statute.

W. W.
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ACTIONS—JURISDICTION—SUPERIOR OFFICER AS INDISPENSABLE PARTY DEFENDANT.—A taxpayer of Oklahoma brought an action in the Federal District Court to enjoin the construction of buildings under a Federal low-cost housing project on the ground that the Emergency Relief Appropriation Act of 1935 is unconstitutional. The local project manager, the chief architect (both residents of Oklahoma), and Harold S. Ickes, Secretary of the Interior, were made defendants. Secretary Ickes, a resident of the District of Columbia, appeared specially and on a motion to dismiss questioned the jurisdiction of the court inasmuch as he is a necessary party defendant and is not subject to suit in the District Court of Oklahoma because not an inhabitant under § 112 of Title 28 of the U. S. Code. Held, that "Secretary Ickes is not only a necessary party but he is the only party against whom an effective injunction can be granted. He . . . has not entered his appearance and therefore, the court has no jurisdiction over him." John Carr v. L. A. Desjardines, 4 U. S. Law Week 137 (1936).

42 STAT. 849 (1922), 28 U. S. C. § 112 (1934) provides: "(a) . . . No civil suit shall be brought in any district court against any person by an original process or proceeding in any other district than that whereof he is an inhabitant." The word "inhabitant" as used in this act is equivalent to residence. United States v. Gronich, 211 Fed. 548 (W. D. Wash. 1914). The question naturally arises as to the necessity of joining the superior officer in suits of this type where service can be had only on subordinate administrative assistants who are "inhabitants" of the district. Some confusion has arisen in the Federal Courts on this point. The leading case on the question involves a suit brought by an Osage Indian against the Secretary of the Interior, the Superintendent of the Osage Agency, and a special disbursing agent to secure funds alleged to be due him under an act of Congress. No service was had on the Secretary and he did not choose to appear. The court said: "But the suit was one which required the presence of the Secretary, and the bill should have been dismissed for want of a necessary party . . . Neither Wright nor Wise has any primary authority in the matter. They can act only under, and in virtue of, the Secretary's general or special direction." Webster v. Fall, 266 U. S. 507, 45 Sup. Ct. 148, 69 L. ed. 411 (1925).

In a suit brought by a State to restrain the Superintendent of a National Park from enforcing alleged unconstitutional regulations for the government of the park, the court said: "There is no question that a bill in equity is a proper remedy and that it may be pursued against the defendant without joining either his superior officers or the United States." Colorado v. Toll, 268 U. S. 228, 45 Sup. Ct. 505, 69 L. ed. 927 (1925). In this case, however, the defendant was the sole judge as to when the regulations were violated and the enforcement of their observance was left exclusively in his hands.

This distinction seems to have been ignored by the court in Yarnell v. Hillsborough Packing Co., 70 F. (2d) 435 (C. C. A. 5th, 1934).
which followed Colorado v. Toll, supra. In this case the court said: 
"... the Secretary, not being before the court, could not be en-joined from enforcing his regulations. But, if those regulations are indeed invalid, the control committee cannot shield themselves behind the Secretary, or compel compliance therewith in his name. It follows that the Secretary was not an indispensable party." Here an injunction was sought to restrain a local control committee from enforcing orders governing the citrus industry issued by the Secretary of Agriculture under the Agricultural Adjustment Act. The principal case is sound and in accord with the view of the United States Supreme Court as laid down in Webster v. Fall, supra. However, the Circuit Court in the Yarnell Case, supra, in following Colorado v. Toll, supra, evidently failed to observe the vital distinction between these two Supreme Court decisions.

It is essential, therefore, before instituting suit in a Federal Court against a governmental administrative assistant who may be directing a local project to determine whether he has been given discretionary power relative to its execution. If he is merely carrying out the specific instructions of his superior officer, the latter is a necessary party. But if he has been given a general assignment and the method of completing it has been left entirely to his judgment, his superior officer need not be joined. In fact, such officer should not be joined unless he too is a resident of that district. E. L. N.

Administrative Law—Due Process and Proceedings—Hearing.—Petitioners, market agencies at the Kansas City Stockyards, sought an injunction against the enforcement of a rate order, prescribing maximum fees chargeable for services in marketing live stock. The order was issued by the Secretary of Agriculture pursuant to The Packers and Stockyards Act, 42 Stat. 159 (1921), 7 U. S. C. § 181 (1934) which authorized the Secretary to prescribe rates after a full hearing and determination. A hearing of several months length was conducted by Assistant Secretaries of Agriculture. Petitioners alleged, among other things, that the Secretary signed the order without having personally read the records or briefs, or considered the oral arguments presented at the hearing, having derived his only information in regard to the hearing from consultation with other employees of the Department. Respondent's motion to strike the allegation was granted and upon appeal, the decree was reversed and remanded upon that point. Held, that a hearing within the meaning of the Act has not been had when the Secretary who signed the rate order has obtained his only information concerning the evidence presented at the hearing from consultation with employees of the Department. Morgan v. U. S., 56 Sup. Ct. 906, 80 L. ed. (Adv. op.) 901, (1936).

The Court, in deciding the instant case, has laid down a principle apparently new in American decisions. But see Tagg Brothers v. U. S., 280 U. S. 420, 444, 50 Sup. Ct. 220, 226, 74 L. ed. 524, 537 (1930). The decision considers the specification in the Act that the Secretary, after a full hearing, may determine and prescribe rates. Congress in similar statutes has frequently designated assistants to

It has been well established that a hearing to be within the due process requirement must not be arbitrary or capricious. Low Wah Suey v. Backus, 225 U. S. 460, 32 Sup. Ct. 734, 56 L. ed. 1165 (1912); see Pacific States Box and Basket Co. v. White, 296 U. S. 176, 182, 56 Sup. Ct. 159, 162, 80 L. ed. 133, 137 (1936). An administrative hearing must be fair and adequate. See Interstate Commerce Commission v. Louisville and N. R. Co., 227 U. S. 88, 91, 33 Sup. Ct. 185, 186, 57 L. ed. 431, 433 (1913). But in hearings of a quasi-legislative nature, procedure is not to be judged by judicial standards as to rules of evidence. Colyer v. Skeffington, 265 Fed. 17 (D. Mass. 1920), reversed on another point, 277 Fed. 129 (C. C. A. 1st, 1922). See Interstate Commerce Commission v. Louisville and N. R. Co., 227 U. S. 88, 93, 33 Sup. Ct. 185, 187, 57 L. ed. 431, 433 (1913); Tagg Brothers v. U. S., 280 U. S. 420, 442, 50 Sup. Ct. 220, 225, 74 L. ed. 524, 537 (1930). For a discussion on these points of due process in administrative hearings see F. R. Black, Is the Test of the Reasonableness of an Administrative Determination Subjective or Objective (1935) 12 N. Y. U. Law Q. Rev. 601. In the instant case the Court states that even though the power being exercised by the administrative agency is quasi-legislative in nature, the procedure to be followed, since a hearing and determination by the Secretary is prescribed by the Act as a condition precedent to the exercise of the power, is quasi-judicial and consideration in a substantial form by the administrative officer of the evidence presented is essential. But cf. Local Government Board v. Arlidge, A. C. 120 (1915), which was distinguished as concerned with a different type of administrative action.

It will be interesting to note how much the broad principles laid down in the decision of the instant case will be limited when the case appears again in court. Substantial consideration of the evidence is the only standard here laid down. The limitation upon the procedure of the administrative agencies is of particular interest in view of the modern tendency to extend the sphere of action of such bodies and agencies.

L. J. O'M.

CONFLICT OF LAWS—PUBLIC POLICY—INTERNATIONAL LAW—EFFECT OF CONFISCATORY DECREES OF RUSSIAN GOVERNMENT SINCE RECOGNITION.—Prior to 1918 money was deposited with August Belmont, then domiciled in New York, by a Russian corporation known as the "Petrograd Metal Works." By decree of June 28, 1918, the Russian government confiscated the property of the metal works, which according to plaintiff's theory, included the account of the metal works against Belmont. This account was thereafter assigned by the Russian government to the United States government. Held, that it is contrary to the public policy of the state of New York to enforce confiscatory decrees with respect to property located here
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at the date of the decree. Under state law as declared in New York Session Laws 1936, c. 917, adding Civil Practice Act, section 977-b, the title of the confiscating government is not to be recognized, at least until after the expiration of the period within which creditors or stockholders may claim it. The judgment dismissing the complaint is affirmed. United States v. Belmont, (C. C. A. 2d, August 10, 1936) (Not yet reported).

For a general discussion of the problem created by the confiscatory decrees of the Russian government prior to recognition of that government by the United States see Untermyer, Judicial Interpretation of Soviet Decrees (1933) 1 Geo. Wash. L. Rev. 471 and for a discussion of the case of Salimoff v. Standard Oil Co., 237 App. Div. 686, 262 N. Y. Supp. 693 (1933) see (1933) 1 Geo. Wash. L. Rev. 528. For a discussion of the problem subsequent to recognition see Note (1936) 4 Geo. Wash. L. Rev. 355 and for a discussion of the case of Vladikavkazsky Railway Co. v. New York Trust Co., 263 N. Y. 369, 189 N. E. 456 (1934) see (1935) 3 Geo. Wash. L. Rev. 245. The present case bears out the opinions of the authors of the above mentioned articles that recognition by the United States would not and has not changed the attitude of the courts toward the Russian confiscatory decrees as they effect property rights of Russian corporations within the state of New York.

"The principle which determines whether we shall give effect to foreign legislation is that of public policy, and when public policy conflicts with comity, our own sense of justice and equity as embodied in our public policy must prevail." Vladikavkazsky Railway Co. v. New York Trust Co., supra. Certain classes of acts are said to be "against public policy" when the law refuses to recognize them or to enforce them, on the ground that they have a mischievous tendency so as to be injurious to the interests of the state, apart from illegality or immorality. Tarbell v. Rutland R. Co., 73 Vt. 347, 51 Atl. 6 (1901); Ewell v. Daggs, 108 U. S. 143, 149, 2 Sup. Ct. 408, 27 L. ed. 642 (1883); Hartford Fire Ins. Co. v. Chicago etc. R. Co., 175 U. S. 91, 20 Sup. Ct. 33, 44 L. ed. 84 (1899); Beasley v. Texas etc. R. Co., 191 U. S. 492, 24 Sup. Ct. 164, 48 L. ed. 274 (1903). The question what is the public policy of a state and what is contrary to it, if inquired into beyond the limits of the constitution, laws and judicial decisions of the state, will be found to be one of great vagueness and uncertainty. It will involve discussions which scarcely come within the range of judicial duty and functions, and upon which men may and will complexionally differ. Vidal v. Girard, 2 How. 127, 197, 11 L. ed. 205 (U. S. 1844); St. Louis Mining etc. Co. v. Montana Mining Co., 171 U. S. 650, 655, 19 Sup. Ct. 61, 43 L. ed. 320 (1898).

While speaking of comity and public policy the court in the last analysis reaches its decision on the ground of lack of jurisdiction of the Russian decrees to affect property within the United States. No sovereignty can give effect to a law which will extend its force beyond the limits of the sovereignty from which its authority is derived. Hilton v. Guyot, 159 U. S. 113, 16 Sup. Ct. 139, 40 L. ed. 95 (1895). In other words, "a state cannot affect, nor authorize
its courts to affect, property within the control of another sovereign." Goodrich, Conflict of Laws (1927) p. 121.

The public policy doctrine is a doctrine of exception to ordinary Conflict of Laws principles. Title and other rights are acquired under laws that have jurisdiction over them. If public policy is as strong as the courts say it is they would have refused to recognize title to property acquired by confiscation, which they did not do in Salimoff v. Standard Oil Co., supra.

K. M. M.

Constitutional Law—Due Process—Minimum Wage for Women.—In accordance with the authority granted to him by the State law authorizing the fixing of minimum wages to be paid to women in any occupation in trade and industry, the State Industrial Commissioner of New York issued a mandatory order establishing minimum wages to be paid to women workers in the laundry industry. A laundry operator who failed to obey the order was indicted and convicted. He applied for a writ of habeas corpus on the ground that the statute, in so far as it authorized the Commissioner of Labor to fix women's wages, was repugnant to the due process clause, Art. I, sec. 6, of the Constitution of the State, and the due process clause of the Fourteenth Amendment to the Constitution of the United States. The New York Court of Appeals declared the statute unconstitutional. 270 N. Y. 233. A writ of certiorari was granted by the U. S. Supreme Court. Held, first, that the interpretation given a State statute by the highest court of a State must be accepted by the U. S. Supreme Court; second, that according to the interpretation placed upon the New York statute by the New York Court of Appeals, it was repugnant to the due process clause of the Fourteenth Amendment. People ex rel. Tipaldo v. Moorehead, 56 Sup. Ct. 918, 80 L. ed. (Adv. op.) 921 (U. S. 1936); rehearing denied, 80 L. ed. (adv. op.) 963 (U. S. 1936).

This decision and that of the New York Court of Appeals are both predicated on Adkins v. Children's Hospital, 261 U. S. 525, 43 Sup. Ct. 394, 67 L. ed. 785 (1923). Ironically enough the "fair wage" feature of the New York law, designed to meet the objection raised in the Adkins case that there was no relation between the wages to be paid and the service to be performed, was so confused by legal verbiage that it carried no weight in either court. See discussion of this provision in note (1933) 42 Yale L. J. 1250. According to the interpretation placed upon the statute by the New York Court of Appeals, there was "a difference in phraseology and not in principle" between the New York law and the law considered in the Adkins case; the U. S. Supreme Court held that it must accept the interpretation of the statute placed upon it by the highest State Court. The Supreme Court, however, did take notice of the provision for considering the fair value of the service to be rendered to the extent of saying: "If the State has power to single out for regulation the amount of wages to be paid to women, the value of their services would be a material consideration. But that fact has no relevancy upon the question whether the State has such power." People ex rel. Tipaldo v. Moorehead, supra.
Although the petition for a review of the decision was denied, the court on the same day granted a writ of certiorari in the case of Parish v. West Coast Hotel Company, 55 P. (2d) 1083 (Wash. 1936), which involves the constitutionality of the minimum wage law for women in the State of Washington. The standard for fixing wages set by that law is solely the cost of living and the adequacy of the wage to maintain the worker in health, and the “fair value of the services rendered” does not have to be taken into consideration.

Other cases involving the constitutionality of statutes fixing minimum wages for women or conferring on an administrative agency the authority to fix such wages, which have been before the U. S. Supreme Court are: Stettler v. O’Hara, and Simpson v. O’Hara, 243 U. S. 629, 37 Sup. Ct. 475, 61 L. ed. 937 (1917) (in which the Oregon law was upheld by an evenly divided court, Mr. Justice Brandeis taking no part in the consideration or decision of the case); Murphy v. Sardell, 269 U. S. 530, 46 Sup. Ct. 22, 70 L. ed. 396 (1925) (holding unconstitutional Arizona’s law establishing a minimum wage of $16 a week for women); Dunham v. West Nelson Mfg. Co., 273 U. S. 657, 47 Sup. Ct. 343, 71 L. ed. 826 (1927) (declaring invalid an Arkansas statute providing for payment of $1 and $1.25 a day to inexperienced and experienced female workers respectively, in any manufacturing, mechanical or mercantile establishment, laundry, or by any express or transportation company).

Fifteen states still have laws which either fix or empower a state agency to fix minimum wages for women in certain occupations: Calif., Colo., Conn., Ill., Mass., N. H., N. J., N. Dak., Ohio, Ore., R. I., S. Dak., Utah, Wash., and Wis. Two of these states, Colorado and Utah, have never been able to put the law into operation due to lack of appropriations. U. S. Department of Labor, Women’s Bureau, Bulletin 137. Two states, Nebraska and Texas, enacted minimum wage laws for women but later repealed them. The provisions of the laws vary to some extent, but in all states violation of the mandatory wage orders issued by the administering agency is punishable by fine or by imprisonment, or both.

Since the first minimum wage law was passed by Massachusetts in 1912, the constitutionality of the wage-fixing provision has been considered by courts of last resort in six states besides New York. In five states the provision has been upheld. State v. Crowe, 130 Ark. 272, 197 S. W. 4 (1917); Holcombe v. Creamer, 231 Mass. 99, 120 N. E. 354 (1918); Williams v. Evans, Ramer v. Evans, 139 Minn. 32, 165 N. W. 495 (1917); Stettler v. O’Hara, 69 Ore. 519, 139 Pac. 743 (1914); Larsen v. Rice, 100 Wash. 642, 171 Pac. 937 (1918). In a later case in Minnesota and in a case in Kansas the provision was held unconstitutional. Both decisions were based on the ground of the Adkins case. Stevenson v. St. Clair, 161 Minn. 444, 201 N. W. 629 (1925); Topeka Laundry Co. v. Court of Industrial Relations, 119 Kans. 12, 237 Pac. 1041 (1925).

In upholding or denying the validity of the wage-fixing provision of the statute, courts have considered several questions. State v. Crowe, supra; Williams v. Evans, supra; Stettler v. O’Hara, supra (police power); Adkins v. Children Hospital, supra; People ex
rel. Tipaldo v. Moorehead, supra; State v. Crowe, supra; Stettler v. O'Hara, supra; Holcombe v. Creamer, supra; Topeka Laundry Company v. Court of Industrial Relations, supra (due process of law and freedom of contract); Williams v. Evans, supra; Stettler v. O'Hara, supra (delegation of legislative power); Simpson v. O'Hara, 69 Ore. 519, 139 Pac. 743; Adkins v. Children's Hospital, supra (protection of the health and morals of women). The question whether it is within the power of a state to require employers to pay a wage commensurate with the value of the service rendered, however, has been injected in only one case. People ex rel. Tipaldo v. Moorehead, supra. In that case it was not answered. O. L. M.

CONSTITUTIONAL LAW—ELECTIONS—ABSENTEE REGISTRATION

ABSENT VOTERS LAWS—PERFORMANCE OF SOVEREIGN ACT BEYOND BORDERS OF SOVEREIGN STATE.—A Florida statute, Acts of 1935, Ch. 16978, provides that qualified electors may register from without the state in primary, general, and special elections by mailing a written application, accompanied by an affidavit as to eligibility and party affiliation, to the Supervisor of Registration of the county of the applicant's legal residence. Some thirty residents of Escambia county, temporarily residing outside the state, registered by mail, pursuant to the Act, and subsequently voted by mail in a primary election. A mandamus action was brought to compel the County Canvassing Board to reject these "absentee" ballots on the grounds that the voters were not legally registered. Held, that the Act is unconstitutional (1) for registration is a sovereign act in the acquisition of an official state status of "qualified elector" and must be performed within the territorial limits of the sovereign state, and (2) constitutional provisions for legislation to protect the purity of the ballot prohibit the registration of persons outside the state and beyond the reach of the enforcement of its laws. State ex rel Gandy v. Pace, Fla. Sup. Ct., Sept. 28, 1936, (not yet reported).

Although the ratio decidendi of the case may be limited to the constitutional construction of a Florida statute, the reasoning followed by the courts in construing the constitutionality of Absent Voters Laws, infra, indicates that the decision may carry weight in other jurisdictions. One court, by way of dictum, has previously declared such method of registration unconstitutional. Jenkins v. State Board of Elections, 180 N. C. 169, 104 S. E. 346 (1920); but see Clark v. Nash, 192 Ky. 594, 234 S. W. 1 (1921).

The problem of absentee registration is analogous to absentee voting. Two recent New Mexico decisions holding Absent Voters Laws unconstitutional have, in effect, disenfranchised thousands of voters. Thompson v. Scheier, 57 P. (2d) 293 (N. M. 1936); Baca v. Ortiz, No. 4244, N. M. Sup. Ct., Sept. 26, 1936, not yet reported.

In decisions rendered both before and after the principal case, the Florida court has declared the state's absent voters law constitutional, but in none of the decisions was an attempt made to compare or contrast the reasoning applied to absentee registration with that applied to absentee voting. Hutchins v. Tucker, 106 Fla. 905, 143 So. 754 (1932); State ex rel Gandy v. Pace, Fla. Sup. Ct., Oct. 14, 1936, not yet reported.
In *Thompson v. Scheier*, supra, it was held that a constitutional provision relating to the length of time an elector must be a resident of the precinct "where he offers to vote" required the physical presence of the voter and the manual delivery of the ballot and that a proposed constitutional amendment providing for absentee voting by persons in the military and naval service did not extend the right to vote by mail to other classes of citizens. *Lancaster City's Fifth Ward Election*, 281 Pa. 131, 126 Atl. 199 (1924), Note (1925) 73 U. Pa. L. R. 176.

Similar constitutional provisions have been invoked to invalidate absent voters laws in the following cases: *Bourland v. Hildreth*, 26 Cal. 161 (1864); *Clark v. Nash* (Ky. 1921), supra; *People v. Blodgett*, 13 Mich. 127 (1865); *Opinion of Justices*, 80 N. H. 595, 113 Atl. 293 (1921); *Thompson v. Scheier*, (N. M. 1936), supra; *Chase v. Miller*, 41 Pa. 403 (1862).

On the other hand, similar statutes under similar constitutional provisions, have been held valid in the following jurisdictions: *Jones v. Smith*, 165 Ark. 425, 264 S. W. 950 (1924); *Hutchins v. Tucker* (Fla. 1932), supra; *Morrison v. Springer*, 15 Iowa 304 (1863); *Straughan v. Meyers*, 268 Mo. 580, 187 S. W. 1159 (1916); *Goodell v. Judith Basin County*, 70 Mont. 222, 224 Pac. 1110 (1924); *Jenkins v. State Board* (N. C. 1920), supra; *Lehman v. McBride*, 15 Ohio St. 573 (1863); *Moore et al. v. Pullem et al.*, 150 Va. 174, 142 S. E. 415 (1928); *Chandler v. Main*, 16 Wis. 422 (1863).

Nearly every state has, at one time or another, passed some form of an absent voters law. Ray, *Absent Voting Legislation* (1926) 20 Amer. Pol. Sci. Rev. 347. Many of these laws were enacted during the Civil War and the World War. In more recent years such legislation has been sponsored by the Traveller’s Protective Association. These statutes have been examined critically by the courts because such method of voting was unknown to the Common Law; because the safeguards thrown about the right of franchise and the qualifications of electors in many state constitutions went into specific detail and were framed at a time when voting in absentia was not contemplated; and because such laws have been subject to abuse and fraud. *Opinion of Justices*, 44 N. H. 635 (1863); *Thompson v. Scheier*, supra.

In no case does it appear that the power to extend the right to vote to citizens outside of the state by appropriate constitutional amendment was doubted. *People v. Blodgett*, supra; *Clark v. Nash*, supra; *Jenkins v. State Board*, supra. And the holding in the principal case that a sovereign act may not be performed outside the territorial limits of the sovereign state appears novel on this point, especially in view of the fact that the same court has not objected to voting by mail from beyond the borders of the state. In *Jenkins v. State Board*, however, the North Carolina court said that the act of mailing the ballot was not the act of voting, but was merely an offer to vote in the same manner that an offer to buy or sell might be mailed.

The decision in the instant case appears consistent with the present American theory of the power of states to enforce their criminal

The same considerations might be applied to registering in a primary election as to voting in such an election. Voting in a primary election which has, by statute, become the first step in the general election of the state, is subject to the provisions of the state constitution. Grovey v. Townsend, 295 U. S. 45, 55 Sup. Ct. 622, 79 L. ed. 1292, (1935); (1935) 48 Harv. L. Rev. 1436; see also (1933) 1 Geo. Wash. L. Rev. 273, and (1932) 1 Geo. Wash. L. Rev. 131. In Grovey v. Townsend, it was held, however, that action of officials at a party primary election in discriminating against negroes did not amount to state action within the meaning of the Fourteenth Amendment where the state constitution guaranteed to each political party the right to determine the qualifications of its own members.

Consideration of all aspects of the principal case leads to the conclusion that the Florida court went much farther than necessary in invalidating the statute and the operative effect of the decision seems already limited by the fact that absentee voting is still permitted in the state.

The situation appears much worse in New Mexico where the court in Baca v. Ortiz, supra, ruled that the state may never have a constitutionally valid Absent Voters Law until an amendment so providing is ratified at a general election by “at least three-fourths of the electors voting in the whole state, and at least two-thirds of those voting in each county.”

R. F. A.

CONSTITUTIONAL LAW—SEPARATION OF POWERS—INVESTIGATIONS—COMMISSIONS—DELEGATION—POWER OF S. E. C.—A petitioner filed a registration statement with the Security Exchange Commission, which statement would be effective in 20 days, in accordance with the terms of the Security Exchange Act. By this Act no person could use the instrumentalities of the mails or interstate commerce to sell securities unless their registration was effective. The Act gave the Commission power to issue a stop-order against such registration statement at any time it believed the statement contained untruths or omitted material facts. The registrant must be given 14 days notice to show why the stop-order should not issue. The notice was given to petitioner, and he was commanded to bring to the hearing certain of his private books and records. On the day of the hearing petitioner filed a written notice of withdrawal of his registration. The Commission refused to consent to the withdrawal. Consent was necessary and was to be given with due regard to the public interest. The Commission obtained the aid of the District Court to issue a subpoena duces tecum to the petitioner. The order compelling him to appear was affirmed by the Court of Appeals and brought to the Supreme Court on a writ of certiorari. Held, that the Commission must accept the withdrawal of the registration. The petitioner did not need to comply with the subpoena duces tecum, since his withdrawal took away the need for a stop-order, which was
the basis of the authority to command the presence of the petitioner and his papers. *Jones v. Security Exchange Commission*, 298 U. S. 1, 56 Sup. Ct. 497, 80 L. ed. 423 (1936).

The right of a petitioner to withdraw his registration is similar to the right of a plaintiff to withdraw his complaint at law or his bill in equity. In the instant case the majority of the Court emphasized that there were no adverse parties and no investors to protect, so the withdrawal would not prejudice the rights of an opponent. Mr. Justice Cardozo, writing the opinion for the minority, contended that neither notice of the stop-order nor the attempted withdrawal by the registrant removed the authority of the Commission to order the witness to appear before that body and produce his private records for the purpose of this investigation.

In the case of *Dunham v. Ottinger*, 276 U. S. 618, 48 Sup. Ct. 212, 72 L. ed. 734 (1928) the Court allowed a preliminary inquiry by the Attorney General before the institution of a suit to enjoin the flotation of fluctuating stock issues. It was said by the Court in the trial of the case before the Court of Appeals of New York, 243 N. Y. 423, 154 N. E. 298 (1926), "The power to investigate and examine witnesses to the end of a better discharge of their duties has been conferred upon administrative boards and officials without successful challenge by so many statutes that it is undesirable to refer to them all." Cf. *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 14 Sup. Ct. 1125, 38 L. ed. 1047 (1894). But see *Harriman v. Interstate Commerce Commission*, 211 U. S. 407, 29 Sup. Ct. 115, 53 L. ed. 253 (1908).

The power to investigate may be considered as ancillary to the legislative function. The legislative branch is allowed to select the means for performing its functions. Therefore, it is not a violation of the provision of the Constitution against delegation of the legislative power to give an administrative officer or body the right to investigate a matter on which legislation may be desired. *Attorney General v. Brissenden*, 271 Mass. 172, 171 N. E. 82 (1930); Lilienthal, *Power of Governmental Agencies to Compel Testimony* (1926) 39 Harv. L. Rev. 694; Eberling, *Congressional Investigations* (1928); Dimock, *Congressional Investigating Committees* (1929).


If a statute protects the witness from incrimination on the facts of the evidence he was to reveal, or the documents he was to produce, he could not claim the immunity granted by the Fifth Amendment to the National Constitution against self-incrimination as a ground for refusing to testify and present his papers. *ibid*. The Security Exchange Act granted such immunity. This point carries out the view of Mr. Justice Cardozo in the dissent in the instant case. *Wilson v. United States*, 221 U. S. 361, 31 Sup. Ct. 538, 55 L. ed. 771
A witness for a legislative inquiry may now be compelled to appear before Congress and testify or present his private records. If he does not, he may be punished for contempt. Jurney v. MacCracken, 294 U. S. 125, 55 Sup. Ct. 375, 79 L. ed. 802 (1935); Anderson v. Dunn, 6 Wheat. 204, 5 L. ed. 242 (1821) (Power based on necessity); McGrain v. Daugherty, 273 U. S. 135, 47 Sup. Ct. 319, 71 L. ed. 580 (1926) (Investigation must be for legislative purpose); Potts, Power of Legislative Bodies to Punish for Contempt (1926) 74 U. of PENN. L. REV. 691.

With respect to distribution of governmental powers between the departments of the government, a limitation on the power to subpoena is suggested in the confidential nature of departmental information. Ex parte Sackett, 74 F. (2d) 922 (C. C. A. 9th, 1935). Boske v. Commingore, 177 U. S. 459, 20 Sup. Ct. 701, 44 L. ed. 846 (1900) held that a lower official need not comply with the subpoena if the head of his department has issued a ruling that such certain papers shall not be exhibited.

The interest of the public, however, must be taken into consideration. Robinson v. U. S., 50 Ct. Cl. 159 (1915). In that case the Court did not compel the Secretary of the Treasury to surrender papers that he considered privileged because of protection of public interest, but the Court repeated its call for the papers through the chief clerk of the department. The right to subpoena papers may be made to depend on whether the purpose of the investigation is a public one. Lilienthal, Power of Governmental Agencies to Compel Testimony (1926) 39 HARV. L. REV. 721 n. 101 (Note by Rosenbaum).

**Constitutional Law—Separation of Powers—Investigations—States—Immunity of Federal Agency.** Pursuant to authority vested in him by the Emergency Relief Appropriation Act of 1935, 49 Stat. 115 (1935), 15 U. S. C. Supp. I § 728 note (1935), the President of the United States, on May 6, 1935, established the Works Progress Administration by Executive Order No. 7304. Moneys, formally appropriated by the act, were allocated to administrative units of the Works Progress Administration in each state, including Pennsylvania. Each such unit created agencies for the disbursement of funds to effectuate the purposes of the act. At an Extraordinary Session in 1936, the Senate of Pennsylvania, by Resolution No. 1, empowered its President Pro Tempore to appoint a committee to investigate "the organization administration and functioning of the Works Progress Administration in Pennsylvania" to enable the General Assembly to determine the amount of revenue it should raise to provide for employables who would not be provided for under a proper administration of Works Progress Administration. Such a committee was appointed and subpoenaed certain employees of the Works Progress Administration to appear and bring with them certain official records of that agency. The employees refused to comply and the United States filed a bill to enjoin the com-
mitteemen from making the contemplated investigation. Held, that the respondents be restrained from conducting the investigation into the organization, administration and functioning of the Works Progress Administration in Pennsylvania since to do so would be an unauthorized invasion of the sovereign powers of the United States. United States v. Owlett, 15 F. Supp. 736 (M. D. Pa. 1936).

A legislative body has power to investigate, through a committee, any subject which may yield information to aid it in the performance of any of its proper functions. McGrain v. Daugherty, 273 U. S. 135, 47 Sup. Ct. 319, 71 L. ed. 580 (1927); Ex parte McCarthy, 29 Cal. 395 (1866); Burnham v. Morrissey, 14 Gray 226, 74 Am. Dec. 676 (Mass. 1859); People ex rel. McDonald, v. Keeler, 99 N. Y. 463, 2 N. E. 615 (1885); Ex parte Parker, 74 S. C. 466, 55 S. E. 122 (1906); cf., Kilbourn v. Thompson, 103 U. S. 168, 25 L. ed. 377 (1880); Jurney v. MacCracken, 294 U. S. 125, 55 Sup. Ct. 375, 79 L. ed. 802 (1935). The investigating body, however, may not exceed its expressly limited authority. Ex parte Wolters, 64 Tex. Cr. 238, 144 S. W. 531 (1911); or make a judicial inquiry under a legislative cloak, Greenfield v. Russel, 292 Ill. 392, 127 N. E. 102 (1920); or conduct a criminal investigation (although it is no matter that the detection of crime results as an incident, and not an end, of the investigation), Attorney General v. Brissenden, 271 Mass. 172, 171 N. E. 82 (1930); see People ex rel. Bender v. Mulliken, 185 N. Y. 35, 40, 77 N. E. 872, 873 (1906).


A survey of the cases reveals that there have been few attempts to delimit affirmatively the scope of the legislative power of inquisition. The boundaries so far established have arisen, in most instances, by virtue of denials of the power in specific cases. Greenfield v. Russel, supra; Ex parte Hague, 105 N. J. Eq. 134, 147 Atl. 220 (1929).

The instant case adds to this process of definition by negation, the new restriction that, even for an authorized purpose, a legislature may not inquire into the “organization, administration, and functioning” of a state unit of a federal agency.

The federal government enjoys a complete immunity from interference by a state government. Dobbins v. The Commissioners of Erie County, 16 Pet. 435, 10 L. ed. 1022 (U. S. 1842); Tarble's Case, 13 Wall. 397, 20 L. ed. 597 (U. S. 1872); Tennessee v. Davis, 100 U. S. 257, 25 L. ed. 648 (1880). Where there is a lawful regulation promulgated by a federal agency, having authority so to do, which prohibits its employees from producing records in answer to a subpoena duces tecum, such employees may, with immunity, refuse to respond. Boske v. Comingore, 177 U. S. 459, 20 Sup. Ct. 701, 44 L. ed. 846 (1900); Ex parte Sackett, 74 F. (2d) 922 (C. C. A. 9th,
The two foregoing cases were relied upon by the court, in the case under consideration, as establishing the proposition that this “immunity from state control or interference applies to official papers and records of the United States.” It would seem, however, that they are not directly in point, for, in each case, there had been issued by the federal agency, under valid statutory authorization, a regulation prohibiting the production of records. In 25 Op. Atty. Gen. 326 (1905), also cited by the court on the same point, a conclusion was reached that the records of an executive department are quasi-confidential and may be classed as privileged communications, the production of which cannot be compelled without express statutory authority of a law of the United States.

Upon the question of whether the state can interrupt the acts of the general government, Mr. Justice Holmes pointed out in Johnson v. Maryland, 254 U. S. 51, 41 Sup. Ct. 16, 65 L. d. 126 (1920), that the cases upon the regulation of interstate commerce cannot be relied upon to furnish criteria because of the fundamental difference in the two propositions.

A state is powerless to interfere, by way of taxation, with the action of the United States or any of its instrumentalities. This principle has become firmly ingrained in our constitutional law. McCulloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579 (U. S. 1819); Osborn v. United States Bank, 9 Wheat. 738, 6 L. ed. 204 (U. S. 1824). However, a state tax imposed upon the property of an agent of the federal government is prohibited by no constitutional implications and does not constitute an interference with the exercise of the powers of that government. Thomson v. Pacific Railroad, 9 Wall. 579, 19 L. ed. 792 (U. S. 1870); Railroad Company v. Peniston, 18 Wall. 5, 21 L. ed. 787 (U. S. 1873); cf. Van Brocklin v. State of Tennessee, 117 U. S. 151, 6 Sup. Ct. 670, 29 L. ed. 845 (1886).

A state cannot authorize the use of unoccupied federal public lands, located within that state, for the lines of an electric power company. Utah Power & Light Co. v. United States, 243 U. S. 389, 37 Sup. Ct. 387, 61 L. ed. 791 (1917). Similarly, a state cannot require an employee of a federal department, driving over state roads, to obtain a license by submitting to an examination as to his competence and paying three dollars, before performing his official duty in obedience to superior command. Johnson v. Maryland, supra. Although a federal officer is not subject to the jurisdiction of a state for a violation of a state statute done as a part of his duty under valid federal authority, Ohio v. Thomas, 173 U. S. 276. 19 Sup. Ct. 453, 43 L. ed. 699 (1899), an employee of the United States does not enjoy a complete immunity from state law while acting in the course of his employment. United States v. Hart, Fed. Cas. No. 15, 316 (C. C. D. Pa., 1817).

In National Bank v. Commonwealth, 9 Wall. 353, 362, 19 L. ed. 701, 703 (U. S. 1870), Mr. Justice Miller said that, “... the agencies of the Federal government are only exempted from State legislation, so far as that legislation may interfere with, or impair their efficiency in performing the functions by which they are designed to serve that government. ... The salary of a Federal officer may
not be taxed; he may be exempted from any personal service which interferes with the discharge of his official duties because those exemptions are necessary to enable him to perform those duties."

The instant case appears to present a situation located in the penumbra between state power and federal immunity, and, since a presumption of good faith will usually be indulged where the purpose of a proposed inquiry is judicially scrutinized, it would seem that the court might have given more consideration to the question of whether the investigation could be so conducted as not to constitute an interference with a proper governmental function of the United States. Analogously, it is violative of no constitutional prohibition for Congress to confer upon a nonjudicial body the power to secure information for legitimate governmental purposes and to make the failure of a person to testify punishable by the court as a contempt. *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 14 Sup. Ct. 1124, 38 L. ed. 1047 (1894). Protection is afforded the witness in that the testimony or documents sought must bear a relevancy to the inquiry. *Federal Trade Commission v. American Tobacco Co.*, 264 U. S. 298, 44 Sup. Ct. 336, 68 L. ed. 696 (1924). As to limitations on the legislative delegation of investigative powers, see note (1936) 5 Geo. Wash. L. Rev. 128.

In any event, the decree of the court appears too broad and, it would seem, should have been limited to restraining the respondents from subpoenaing any employees of the Works Progress Administration and demanding the production of records. It does not strain reason to conceive an inquiry under the authority of the resolution, without the aid of the employees or records of the federal agency, and the securing of the desired information from other sources in a way which would not so hamper, impede or directly affect the functioning of that agency as to constitute an interference.

**Constitutional Law—States—Municipal Housing Authorities—Eminent Domain for Slum Clearance Purposes.**—Under the authority of the New York Municipal Housing Law, N. Y. Laws 1934, C. 4, the New York City Housing Authority brought condemnation proceedings against the owners of private property deemed by the authorities suitable for slum clearance for a low-cost housing project. After an order and judgment for the petitioner, the defendant appealed maintaining that his property was not being taken for a public use. Held, that this exercise of the power of eminent domain was for the purpose of acquiring land which would be dedicated to a public use. *New York City Housing Authority v. Muller*, 270 N. Y. 33, 1 N. E. (2d) 153 (1936).

This is the first decision on the validity of the exercise of the power of eminent domain by a state-created authority for slum clearance purposes. But see *In re Opinion of the Justices*, 211 Mass. 624, 98 N. E. 611 (1912).

The primary constitutional limitation on the power of eminent domain is that it must be employed only when the property to be condemned is to be put to a public use. *Clark v. Nash*, 198 U. S. 361, 25 Sup. Ct. 676, 49 L. ed. 1085 (1904); (1935) 4 Geo. Wash. L.
The courts have had great difficulty in drawing the line between what is a public and what is a private use. "No question has ever been submitted to the courts upon which there is a greater variety and conflict of reasoning and result than that presented as to the meaning of the words 'public use.'" Dayton Gold and S. Min. Co. v. Searvell, 11 Nev. 394 (1876). One line of cases holds that public use means use by the public. Healy Lumber Co. v. Morris, 33 Wash. 490, 74 Pac. 681 (1903); Gaylor v. Sanitary District, 204 Ill. 576, 68 N. E. 522 (1903). In Lewis, Eminent Domain (3d ed. 1909) 505, the author expresses the opinion that public use means the same as use by the public. The arguments used by the author are quite persuasive and were expressly adopted by the court in Arnspenger v. Crawford, 101 Md. 247, 61 Atl. 413 (1905). Another line holds that public use means public advantage, that any use that contributes to the welfare of the public constitutes a public use. Olmstead v. Camp, 33 Conn. 532 (1866); Nash v. Clark, supra.; Twin City Building and Investment Co. v. Houghton, 144 Minn. 1, 176 N. W. 159 (1920). A third line of cases takes an intermediate ground somewhere between the above doctrines. Brown v. Gerald, 100 Me. 351, 61 Atl. 785 (1905); Lowell v. Boston, 111 Mass. 454 (1873).

The instant case seems to adopt the broader doctrine of "public advantage" rather than the narrower one of "public use." By predicating its public advantage theory on the ground of public health benefit the court stands on rather firm ground. The taking for the purpose of promoting the public health has consistently been held to be a taking for a public use. Dingley v. City of Boston, 100 Mass. 544 (1868) (swamp land filled in to facilitate drainage of sewage to deep water); Matter of Ryers, 72 N. Y. 1 (1878); 1 Lewis, Eminent Domain (3d ed. 1909) 569.

However, since the ultimate question of what constitutes a public use is one for the courts, rather than for the legislature, other courts may choose to place less emphasis than does the New York Court on the public health aspect of slum clearance and reach a result contrary to that of this case. Shoemaker v. United States, 147 U. S. 282, 13 Sup. Ct. 361, 37 L. ed. 170 (1892); Wulzen v. San Francisco, 101 Cal. 15, 35 Pac. 353 (1894). The language of many cases certainly would seem to preclude a use for slum clearance from the category of a public use. Hunch v. Pritt, 62 W. Va. 270, 57 S. E. 808 (1907); Pocantico Waterworks Co. v. Bird, 130 N. Y. 249, 29 N. E. 246 (1891). Recently a Federal District Court took the view that a taking for slum clearance was not a taking for a public use. United States v. Certain Lands in Louisville, 9 F. Supp. 137 (W. D. Ky. 1935); dismissed on motion of Solicitor General, 294 U. S. 735 (1936); see (1935) 35 Col. L. Rev. 284; (1935) 48 Harv. L. Rev. 1021; (1935) 33 Mich. L. Rev. 957; (1935) 19 Minn. L. Rev. 705; (1935) 83 U. Pa. L. Rev. 799; (1935) 21 Va. L. Q. 216. This case involved the right of the Federal Government to condemn land in the states, a problem different from that in the instant case, but it is significant that the court took the "use by the public" view and forbade the condemning of land for slum clearance.

More and more the courts are determining constitutional questions
in the light of underlying factual conditions. Nebbia v. New York, 291 U. S. 502, 54 Sup. Ct. 505, 78 L. ed. 940 (1934); Muller v. Oregon, 208 U. S. 412, 28 Sup. Ct. 324, 52 L. ed. 551 (1908) (the original “Brandeis brief” case). The legislative determination to the effect that slum clearance was a public purpose should be followed by the courts unless clearly in error. Strickley v. Highland Bay Gold Min. Co., 200 U. S. 527, 26 Sup. Ct. 301; 50 L. ed. 581 (1906). In the light of this legislative determination, and in view of the willingness of the court to accept the functional interpretation of the public health implications of slum clearance the decision in this case seems sound.

CONSTITUTIONAL LAW—TENNESSEE VALLEY AUTHORITY—PROPERTY CLAUSE—DISPOSAL OF SURPLUS GOVERNMENT PROPERTY—GOVERNMENT COMPETITION WITH PRIVATE BUSINESS.—A bill sought to enjoin the Tennessee Valley Authority from constructing electric transmission lines in Georgia to do business in competition with petitioner, and to enjoin other defendants from purchasing such power from TVA. The TVA has surplus current at Wilson Dam and an arrangement whereby its Georgia lines will be fed by current interchanged with Tennessee Electric Power Company. The North Georgia Membership Corporation has been chartered under Georgia laws to buy and operate the TVA lines and to distribute to rural customers at rates and under conditions to be named by TVA. The Authority also contemplates furnishing current to various municipalities when their contracts with petitioner expire. Rates hitherto fixed by TVA for resale to consumers have been materially lower than those fixed for petitioner by the Georgia Public Service Commission. Held, that electricity generated at Wilson Dam in excess of government needs may be sold under the authority of Congress as surplus government property and in order to market same, transmission lines may be bought or built therefor. Preliminary injunction refused. Georgia Power Co. v. Tennessee Valley Authority, 14 F. Supp. 673 (N. D. Ga. 1936).

The instant case is of peculiar moment in that it brings once again into the legal spotlight the activities of this much discussed government agency. However, like the opinion in Ashwander v. Tennessee Valley Authority, 297 U. S. 288, 56 Sup. Ct. 466, 80 L. ed. 427 (1936), the court limits its decision to the specific facts at hand and keeps clear of the constitutional questions that seem inherent both in the TVA Act and the announced program of that Authority. Note (1936) 4 Geo. Wash. L. Rev. 399; (1936) 31 Ill. Law Rev. 78; 3 U. S. Law Week 513, Feb. 18, 1936. See also Washington Star, Feb. 18, 1936, at A-2, A-10; Washington Post, Feb. 18, 1936, at 8; id., Feb. 19, 1936, at 2. The decision, therefore, seems to add little, if anything, to that in the Ashwander case, supra, but it does revive interesting issues incident to government disposal of federal property in competition with private business.

Where the government has constitutionally acquired full title to a dam site, the water power which is the inevitable incident of the dam constructed thereon, comes into the exclusive control of the govern-


The policy of segregating mineral lands from other public lands and providing for leases, points to the recognition both of the full power of disposal and of the necessity of suitably adapting the methods of disposal to different sorts of property. See Ashwander v. Tennessee Valley Authority, supra at 331. The grant in the Constitution is made in broad terms, and the power of regulation and disposition is not confined to territory but extends to other property belonging to the United States. Story, op. cit. supra. The government not only has full power of disposal over its lands, therefore, but over the minerals within its lands; and it may reserve from a territorial grant the land therein valuable for coal. United States v. Sweet, 245 U. S. 563, 38 Sup. Ct. 193, 62 L. ed. 473 (1918). At the same time the grant may include, in the discretion of Congress, lands valuable for salt. Montello Salt Co. v. Utah, 221 U. S. 452, 31 Sup. Ct. 706, 55 L. ed. 810 (1911). The power to lease its property also extends to oil and gas on federal lands. See Pan American Petroleum Co. v. United States, 273 U. S. 456, 487, 47 Sup. Ct. 416, 71 L. ed. 734 (1927). It seems that the government may lease surplus water power developed incident to government improvements in navigation. United States v. Chandler-Dunbar Power Co., supra. Cf. 2 Willoughby, The Constitutional Law of the United States (2d ed. 1929) 958. It follows that electric power generated at a government-owned dam is susceptible of disposition as property belonging to the United States. Ashwander v. Tennessee Valley Authority, supra. The sale of all surplus power so generated is a reasonable
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The fact that in disposing of its property the government competes with private enterprise does not in itself prohibit such disposal. Tennessee Valley Authority v. Ashwander, supra; 2 U. S. Law Week 1066, July 23, 1935. The right of the government to dispose of its property is vitally distinct from carrying on a proprietary business with the property. Johnston, Legal Aspects of Government Competition (1935), 16 Pub. Ut. Fort. 378. That the Government has been in frequent competition with private business is clear. Emergency Fleet Corporation; U. S. Grain Corporation; U. S. Sugar Equalization Board; War Finance Corporation; U. S. Housing Corporation; U. S. Spruce Corporation; Russian Bureau, Incorporated. Though these agencies began in good faith the effort to liquidate as soon as their war purpose was terminated, the birth of the later Reconstruction Finance Corporation and the Home Owners Loan Corporation, etc., marked a new era in government corporations. See Johnston, op. cit. supra, at 364. Cf. McCulloch v. Maryland, 4 Wheat. 315, 4 L. ed. 579 (U. S. 1819) (federal bank). It seems that a government agency, properly authorized, may engage in lawful competition with a private utility. City of Campbell v. Arkansas-Missouri Power Co., 55 F. (2d) 560 (C. C. A. 8th, 1932) (municipal power plant). See also (1936) 5 Geo. Wash. L. Rev. 147.

To what extent the federal government will be permitted to invade the field of private business in its disposal of surplus government property; and to what extent the States will be permitted to regulate these government agencies, such as the TVA, remain controversial issues. McIntire, Government Corporations as Administrative Agencies; An Approach (1936) 4 Geo. Wash. L. Rev. 1; State Regulation of T. V. A. (1934) 1 U. S. Law Week 1005. H. S. C.

EMINENT DOMAIN—DUE PROCESS—VALIDITY OF FEDERAL STATUTE VESTING TITLE IN UNITED STATES.—A federal statute, 46 Stat. 1421 (1931), 40 U. S. C. § 258a (1934) provides that in proceedings by the United States to condemn land, the title thereto and the right of possession shall vest in the United States on the filing of the "Declaration of Taking," and the deposit in the court of the amount of the estimated compensation stated in the Declaration. Having complied with the provisions of the statute, the Government entered into a contract for the erection of certain buildings on the land. The owner of the premises seeks to enjoin the contractor from proceeding under the contract on the ground that the statute is unconstitutional since it deprives him of the property prior to the determination of the just compensation to which he is entitled and the payment thereof. Held, that since the statute makes an adequate provision for the determination and payment of the amount of just compensation to which
the owner is entitled the statute is constitutional. *Hessel v. A. Smith & Co.*, 15 F. Supp. 953 (E. D. Ill. 1936).

The right of eminent domain has been declared to be an incident of sovereignty requiring no constitutional recognition. *Boom Co. v. Patterson*, 98 U. S. 403, 25 L. ed. 206 (1878). The constitutional provision for the payment of a just compensation for the property taken is merely a limitation upon the use of the power. *U. S. v. Jones*, 109 U. S. 513, 56 Sup. Ct. 738, 80 L. ed. 699 (1883). It is well settled that the United States may lawfully go into possession prior to judgment in the condemnation proceedings and payment of the award into court, if adequate provision is made for the payment of just compensation to the persons entitled thereto. *Cherokee Nation v. Southern Kansas Railway Co.*, 135 U. S. 641, 10 Sup. Ct. 965, 34 L. ed. 295 (1890); *Bauman v. Ross*, 167 U. S. 548, 17 Sup. Ct. 966, 42 L. ed. 270 (1896); *Seaboard Air Line Ry. v. U. S.*, 261 U. S. 299, 43 Sup. Ct. 354, 67 L. ed. 664 (1923). Although payment need not be made at the time of the taking of possession, compensation must be made for the use of the property during such advance possession. *U. S. v. Rogers*, 255 U. S. 163, 41 Sup. Ct. 281, 65 L. ed. 566 (1921); *Seaboard Air Line Ry. v. U. S.*, supra. Numerous cases have held that title does not pass until compensation has been ascertained and actually paid, but the courts were dealing there with specific statutes. *Cherokee Nation v. Southern Kansas Railway Co.*, supra; *Bauman v. Ross*, supra. Yet in a condemnation proceeding brought under a general statute, § 258 (1934) the court also held that title did not vest until compensation was actually paid. *Hanson Lumber Company v. U. S.*, 261 U. S. 581, 43 Sup. Ct. 442, 67 L. ed. 809 (1923). The necessity of taking private property for public use, the extent to which it shall be taken, and the procedure to be followed are legislative questions subject only to the constitutional limitation of just compensation. *Secombe v. Milwaukee & St. Paul R. Co.*, 23 Wall. 108, 23 L. ed. 67 (U. S. 1874); *Shoemaker v. U. S.*, 147 U. S. 282, 13 Sup. Ct. 361, 37 L. ed. 170 (1892); *Lewis, Eminent Domain* (3d ed. 1909) § 255. In the absence of specific legislation there does not appear any basis for allowing the right to immediate possession, yet denying the right to title until the compensation is paid.


A. R. DeF.
Motor Carrier Act—Constitutional Law—Interstate Commerce—Effect of State Statutes.—A Florida statute (Acts 1931, c. 14764) requires those desiring to operate a motor vehicle for hire over the highways of Florida to obtain a certificate of public convenience and necessity from the Florida Railroad Commission. The R. C. Motor Lines, engaging exclusively in interstate commerce on private contracts, was refused such a certificate and the State, on the relation of the R. C. Motor Lines, brought mandamus proceedings to require the Florida Railroad Commission to grant the relators the necessary certificate. Held, that in accordance with the decision in the case of Carl Lowe v. Stoutamire, Sheriff, 166 So. 310 (Fla. 1936), the requirement of a certificate was in legal effect nothing more than a requirement of registration for the purpose of identifying the operations and for applying state mileage charges, and the certificate for an exclusively interstate operation was grantable as a matter of course. Mandamus was accordingly allowed. State ex rel. R. C. Motor Lines v. Florida Railroad Commission, 166 So. 840 (Fla. 1936).

It is well established that while the Federal Government has supreme power over interstate commerce, yet until such time as it sees fit to legislate, the states may pass laws indirectly operating on the sphere of federal jurisdiction. Munn v. Illinois, 94 U. S. 135, 24 L. ed. 76 (1877); Peik v. Chicago & Northwestern Ry. Co., 94 U. S. 178, 24 L. ed. 97 (1877); Sproles v. Binford, 286 U. S. 374, 52 Sup. Ct. 581, 76 L. ed. 1167 (1932).

Prior to the adoption of the federal Motor Carrier Act, 1935, 49 Stat. 543 (1935), 48 U. S. C. Supp. I § 8 (1935), the Supreme Court of the United States had held that a State could not deny permission to an interstate motor carrier to use its highways for the purpose of regulating competition. Buck v. Kuykendall, 267 U. S. 307, 45 Sup. Ct. 324, 69 L. ed. 623 (1925); Bush & Sons Co. v. Maloy, 267 U. S. 317, 45 Sup. Ct. 326, 69 L. ed. 627 (1925). Later the Court in Bradley v. Public Utilities Commission, 289 U. S. 92, 53 Sup. Ct. 1053 (1933), held that permission to use particular highways could be denied interstate motor carriers when based on prevention of highway congestion; and in Morris v. Duby, 274 U. S. 135, 47 Sup. Ct. 548, 71 L. ed. 966 (1927), and Sproles v. Binford, supra, upheld the constitutionality of state statutes placing limitations on the size and weight of motor vehicles using public highways on the grounds of public safety. See cases cited in annotation of Contract Cartage Company v. Morris, 59 F. (2d) 437 (E. D. Ill. 1932), (1932) 1 Geo. Wash. L. Rev. 127. As to classes of persons and property validly exempted from provisions of state regulations governing common and contract carriers, see note (1932) 1 Geo. Wash. L. Rev. 394. See also Stephenson v. Binford, 287 U. S. 251, 53 Sup. Ct. 188, 77 L. ed. 203 (1932) where the United States Supreme Court again reaffirmed the principles of previous decisions that (1) a contract carrier cannot be converted against his will into a common carrier nor regulated as such by legislative enactment; (2) the State, however, may regulate and control the use of its highways under its general police power. (1932) 1 Geo. Wash. L. Rev. 284.

Since the enactment of the federal statute, the two Florida cases,
the owner is entitled the statute is constitutional. Hessel v. A. Smith & Co., 15 F. Supp. 953 (E. D. Ill. 1936).

The right of eminent domain has been declared to be an incident of sovereignty requiring no constitutional recognition. Boom Co. v. Patterson, 98 U. S. 403, 25 L. ed. 206 (1878). The constitutional provision for the payment of a just compensation for the property taken is merely a limitation upon the use of the power. U. S. v. Jones, 109 U. S. 513, 56 Sup. Ct. 738, 80 L. ed. 699 (1883). It is well settled that the United States may lawfully go into possession prior to judgment in the condemnation proceedings and payment of the award into court, if adequate provision is made for the payment of just compensation to the persons entitled thereto. Cherokee Nation v. Southern Kansas Railway Co., 135 U. S. 641, 10 Sup. Ct. 965, 34 L. ed. 295 (1890); Bauman v. Ross, 167 U. S. 548, 17 Sup. Ct. 966, 42 L. ed. 270 (1896); Seaboard Air Line Ry. v. U. S., 261 U. S. 299, 43 Sup. Ct. 354, 67 L. ed. 664 (1923). Although payment need not be made at the time of the taking of possession, compensation must be made for the use of the property during such advance possession. U. S. v. Rogers, 255 U. S. 163, 41 Sup. Ct. 281, 65 L. ed. 566 (1921); Seaboard Air Line Ry. v. U. S., supra. Numerous cases have held that title does not pass until compensation has been ascertained and actually paid, but the courts were dealing there with specific statutes. Cherokee Nation v. Southern Kansas Railway Co., supra; Bauman v. Ross, supra. Yet in a condemnation proceeding brought under a general statute, 25 Stat. 357 (1888), 40 U. S. C. § 258 (1934) the court also held that title did not vest until compensation was actually paid. Hanson Lumber Company v. U. S., 261 U. S. 581, 43 Sup. Ct. 442, 67 L. ed. 809 (1923). The necessity of taking private property for public use, the extent to which it shall be taken, and the procedure to be followed are legislative questions subject only to the constitutional limitation of just compensation. Secombe v. Milwaukee & St. Paul R. Co., 23 Wall. 108, 23 L. ed. 67 (U. S. 1874); Shoemaker v. U. S., 147 U. S. 282, 13 Sup. Ct. 361, 37 L. ed. 170 (1892); Lewis, Eminent Domain (3d ed. 1909) § 255. In the absence of specific legislation there does not appear any basis for allowing the right to immediate possession, yet denying the right to title until the compensation is paid.


A. R. DeF.
Motor Carrier Act—Constitutional Law—Interstate Commerce—Effect of State Statutes.—A Florida statute (Acts 1931, c. 14764) requires those desiring to operate a motor vehicle for hire over the highways of Florida to obtain a certificate of public convenience and necessity from the Florida Railroad Commission. The R. C. Motor Lines, engaging exclusively in interstate commerce on private contracts, was refused such a certificate and the State, on the relation of the R. C. Motor Lines, brought mandamus proceedings to require the Florida Railroad Commission to grant the relators the necessary certificate. Held, that in accordance with the decision in the case of Carl Lowe v. Stoutamire, Sheriff, 166 So. 310 (Fla. 1936), the requirement of a certificate was in legal effect nothing more than a requirement of registration for the purpose of identifying the operations and for applying state mileage charges, and the certificate for an exclusively interstate operation was grantable as a matter of course. Mandamus was accordingly allowed. State ex rel. R. C. Motor Lines v. Florida Railroad Commission, 166 So. 840 (Fla. 1936).

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Since the enactment of the federal statute, the two Florida cases,
Carl Lowe v. Stoutamire, Sheriff, supra, and State ex rel. R. C. Motor Lines v. Florida Railroad Commission, supra., seem to be the only reported decisions on the effect of the legislation on state powers over interstate commerce. The former case establishes the proposition that the mere enactment of the Motor Carrier Act, 1935, did not ipso facto suspend nor eo instanti supersede the laws of Florida applicable to interstate motor carriers, but left those laws to be cooperatively applied in so far as they can be so applied without overriding, hindering, burdening, or embarrassing the regulations of Congress applicable to the identical subject-matter. The latter case, decided on the same basic principle, indicates that while the interstate motor carrier must comply with state regulatory measures, the granting of the certificate of public convenience and necessity is not a matter left to the discretion of the State Railroad Commission, but is issuable to a motor carrier engaged exclusively in interstate commerce as a matter of right.

The two decisions appear to be well considered, upholding the state's power to control certain incidents of interstate commerce, as long as the regulation does not burden that commerce or conflict with federal legislation on the subject. The permissable field of state regulation is not well defined. Past decisions have been based entirely on the interpretation of the Constitution. (1934) 2 Geo. Wash. L. Rev. 262. Future controversies will have to be settled in the light of both the Constitution and the provisions of the Motor Carrier Act, 1935.


Municipal Corporations — Bankruptcy — Constitutional Law — State Sovereignty.—Petitioner, an irrigation district created by Texas Statute, alleging inability to meet its obligations, petitioned for readjustment of its outstanding bonds which it had issued payable from funds to be raised by taxation. After the dismissal of the proceeding in the District Court, but before the reversal of that decision by the Court of Appeals, Texas enacted a statute which became law April 27, 1935, Texas Laws 1935, c. 107, whereby all municipalities, political subdivisions and taxing districts in the state were empowered to proceed under the Summers Act. Held, that the Summers Act was unconstitutional in that it constituted an unwarranted interference with fiscal matters of the State, essential to her existence, and therefore was an impairment of state sovereignty. C. L. Ashton v. Cameron County Water Improvement District No. One, 56 Sup. Ct. 892, 80 L. ed. (adv. op.) 910 (U. S. 1936). Rehearing denied, October 12, 1936, 4 U. S. Law Week 146, October 13, 1936.

“Is there power in the Congress under the Constitution of the United States to permit local governmental units generally, and irri-
gation or water improvement districts in particular, to become voluntary bankrupts with the consent of their respective states?" So did Mr. Justice Cardozo, in the dissenting opinion concurred in by the Chief Justice, Mr. Justice Brendeis and Mr. Justice Stone, state the question involved when the petitioner sought relief under the Act of Congress approved May 24, 1934. 48 Stat. 798 c. 345 §§ 78, 79, 80 (1934), 11 U. S. C. §§ 301, 302, 303 (1934); Act extended to January 1, 1940, P. L. 507, approved April 10, 1936.

Texas had given consent to the petition prior to its consideration by the Supreme Court. The primary basis, therefore, for previous doubts as to the constitutionality of the act in its application to the instant case was seemingly removed. (1934) 83 U. of Pa. L. Rev. 920, 921 ("this limitation is waived by the state when, without objecting, it permits its agent to take advantage of the relief offered"); (1935) 48 Harv. L. Rev. 1435, 1436 ("in the absence of such consent, however, it would seem that federal supervision of municipal debts is an interference with the instrumentalities employed by the state to carry on its governmental functions"); (1935) 84 U. of Pa. L. Rev. 102 ("legislature's ratification supplied the important factor of state consent"); (1936) 34 Mich. L. Rev. 731, 732 n. 13 ("since the consent of the state to the filing of the petition was not obtained the holding on the constitutionality seems doubtful"); cf. Legis. (1935) 35 Cor. L. Rev. 428, n. 7, 436 n. 59 ("Should state assent be viewed as constitutionally necessary as a waiver of sovereign immunity").

Consent, submission or surrender of sovereignty of the state essential to its proper functioning, cannot enlarge the power of Congress. United States v. Butler, 297 U. S. 1, 56 Sup. Ct. 312, 80 L. ed. (adv. op.) 287 (1936); Ashton v. Cameron County, etc., supra.; United States v. Constantine, 296 U. S. 287, 56 Sup. Ct. 223, 80 L. ed. (adv. op.) 195 (1935).

The interest aroused by the decision in the instant case has not ceased with the denial of the petition for rehearing submitted by ten states on briefs as amici curiae filed through their respective attorneys general. Those briefs emphasized the lack of coercion, the presence of consent, and question the analogy of the bankruptcy power to that of the federal taxation power. 4 U. S. Law Week 73, September 29, 1936. Implications involved by this decision are discussed in detail by Sauer, Factual Background of Ashton v. Cameron, etc., An Experiment in Municipal Refinancing (1936) 5 Geo. Wash. L. Rev. 1.

Brought into sharp relief is the supremacy of state sovereignty within its sphere of action. Texas v. White, 7 Wall. 700, 725, 19 L. ed. 227 (U. S. 1869); The Collector v. Day, 11 Wall. 113, 125, 126, 20 L. ed. 122 (U. S. 1870); United States v. Railroad Company, 17 Wall. 322, 329, 21 L. ed. 597 (U. S. 1872); Indian Motorcycle Company v. United States, 283 U. S. 570, 575, et seq., 51 Sup. Ct. 601, 75 L. ed. 1277 (1931). It is questioned by the minority, however, whether any more disturbance of the federal framework is caused by the Summers Act than has been done already with reference to the power of taxation. McCulloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579 (U. S. 1819). An implied exception to that effect
should be read into the Summers Act, which, together with the presumption of validity doctrine, should make the Summers Act constitutional. Ogden v. Saunders, 12 Wheat. 213, 270, 6 L. ed. 606 (U. S. 1827); The Sinking Fund Cases, 99 U. S. 700, 718, 25 L. ed. 496 (U. S. 1878); United States v. Butler, supra at 67. The minority further contend that consent will preserve a balance threatened with derangement and thus maintain the equilibrium between state and national power and challenge the conclusions of the prevailing opinion that the bankruptcy power and the taxing power are subject to like limitations when the interests of a state are affected by their action. “Let that test be applied, and the Act must be upheld, for jurisdiction is withdrawn if the state does not approve,” states Mr. Justice Cardozo, dissenting, Ashton v. Cameron County, etc., supra.

In the instant case the opinions of the majority and of the minority clash on the use of the tax analogy. It may be questioned whether the analogy itself is proper. In United States v. State of California, 297 U. S. 175, 184, 185, 56 Sup. Ct. 421, 80 L. ed. (adv. op.) 367 (1935), the constitutional immunity of state instrumentalities from federal taxation was “not illuminating” as an analogy to the plenary power to regulate commerce. Yet the prevailing opinion in the instant case states that the power over bankruptcy can have no higher rank or importance in the scheme of government than the taxation power. Why? “Both are granted by the same section of the constitution, and we find no reason for saying that one is impliedly limited by the necessity of preserving the independence of the States, while the other is not.” What then is the magic of Section VIII that makes the “same section” location of taxation and bankruptcy a qualification test for the fitness of an analogy, yet prohibits the use of analogy to the power to regulate commerce? Is it not, too, in Section VIII? SOhM, THE INSTITUTES (Ledlie's 3d ed. 1907) § 8, “The method of analogy does not mean (as the lay mind is apt to imagine) the application of a given rule of law to a legal relation of a somewhat similar kind. Such an analogy would be the very opposite of scientific jurisprudence. It is the application of a given rule, not to a merely similar relation, but to the identical relation, in so far as the identical element (to which the given rule had already assigned its proper place) is traceable in a legal relation which is apparently different.” Did not Mr. Justice Sutherland in Continental Illinois National Bank v. Chicago, Rock Island, and Pacific Railway Company, 294 U. S. 648, 669, 55 Sup. Ct. 595, 79 L. ed. 1110 (1934) in speaking for the court as to the power of Congress under the Bankruptcy Clause give a more satisfactory approach to the problem of interpretation here involved when he stated, “the nature of this power and the extent of it can best be fixed by the gradual process of historical and judicial 'inclusion and exclusion’”? But see the remark of Mr. Justice Brewer, dissenting, in Austin v. Tennessee, 179 U. S. 343, 383, 21 Sup. Ct. 132, 147, 45 L. ed. 224 (1900), “that no case involving a constitutional question should be turned off on the simple declaration that upon its peculiar facts it falls on one side or the other of some undisclosed line of demarcation.” On the other hand, does not the method adopted in the
instant case approach too nearly to that given by Mr. Justice Roberts in United States v. Butler, supra, at 62, "to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the later squares with the former," yet at the same time ignore what is said in the Butler case at 66, "While, therefore, the power to tax is not unlimited, its confines are set in the clause which confers it, and not in those of Section VIII which bestow and define the legislative powers of Congress."

Regardless, however, of the fitness of the analogy since both opinions tacitly accepted it, of more concern is the clash in the instant case between the opinions as to the concept of the bankruptcy power itself. Through their historical approach the minority trace the bankruptcy power as an expanding concept, fighting its way through the evolutionary process, never bound by cramping definition. Opposed is the prevailing opinion, refusing to allow this Act to make an unwarranted extension of the will of Congress so as to interfere with the freedom of the States to manage their own affairs. Nowhere is it contended that bankruptcy is a static concept; therein lies the hope for the future by more mature legislation which may silence the cry of woe voiced by the minority, "If voluntary bankruptcies are anathema for governmental units, municipalities and creditors have been caught in a vise from which it is impossible to let them out." The mushroom growth of separately incorporated improvement authorities because of constitutional debt limitations, McIntire, Government Corporations as Administrative Agencies; An Approach (1936) 4 Geo. Wash. L. Rev. 161, 179, together with the poor presentation of cases by counsel to the Supreme Court, Davison, Administration and Judicial Self-limitation (1936) 4 Geo. Wash. L. Rev. 291, 318, carry within themselves the germs of self-destruction. Post mortems in the guise of rehearings come too late to revive the dead Summers Act; though they may aid in indicating the cause of death. When next this suicidal combination is encountered, only statesmanship in legislation, not judicial decision, can or should cure its inherent weaknesses.

C. Q. M.

PATENTS — INFRINGEMENT—PROFITS—RULES FOR DETERMINING THE PROFITS PLAINTIFF MAY RECOVER AFTER A DECREE HOLDING HIS PATENT VALID AND INFRINGED.—In the accounting following a decree holding patent No. 1182739 valid and infringed, directly by one and contributorily by the other defendant, both having acted in good faith, the findings and rulings of the District Court were as follows:

A. As to defendants' profits:

1. Cost of labor and materials wasted without fault in the manufacturing process were allowed defendants.

2. Cost of labor and materials that entered into merchandise returned by vendees for defects discovered after the sales were allowed defendants. The evidence did not show that these sales were preliminary to other sales refilling the same orders.

3. Manufacturing cost of articles supplied by the contributory infringer were allowed defendants.
4. Savings effected in manufacturing articles supplied by the contributory infringer through the use of patented devices in the process were allowed defendants.

5. Specific costs of operation to be attributed to sales made at known prices being unascertainable, the business was treated as one continuous infringement. The comparison of average costs with average prices showed a net loss for the period of infringement.

B. As to plaintiff's damages:

1. The evidence was insufficient to show what sales plaintiff would have made and what would have been netted therefrom but for the infringement.

2. General damages based on reasonable royalty were decreed with interest from the date of the last infringement. 10 F. Supp. 420 (W. D. Pa. 1934).

On appeal by plaintiff the allowances of P 1, 2 and 4 were rejected, the method of P 5 recast by directing a comparison between average costs and specific prices and the cause was remanded for restatement of the account. 81 F. (2d) 352 (C. C. A. 3d, 1935). Because of the great public interest certiorari was granted despite the lack of conflicting decisions in separate circuits. Held, remanded for restatement of the account in accordance with the following principles:

A. As to profits:

1. Factory losses incurred as a necessary or normal incident to the completion of the sales effected at a gain are to be allowed defendants.

2. Articles returned by vendees because of defects, where the orders were not refilled, are to be disregarded in the accounting.

3. The manufacturing cost of articles supplied by the contributory infringer is the proper allowance.

4. Savings effected through the use of patented devices owned by the contributory infringer in the manufacture of articles supplied by it are not to be allowed.

5. The account shall be stated on the basis of average costs and specific prices.

B. As to damages:

1. If the award of damages based upon reasonable royalty becomes appropriate again, interest shall run from the date they are liquidated and not from the date of the last infringement. Duplate Corporation and Pittsburgh Plate Glass Co. v. Triplex Safety Glass Co. of North America, 56 Sup. Ct. 792, 27 U. S. P. Q. 306 (U. S. 1936).

The statutes recognize three methods of ascertaining the amount a successful plaintiff in a patent infringement suit is entitled to recover, viz., the damages plaintiff has suffered, the profits defendant had realized and if these are not susceptible of calculation and determination with reasonable certainty the court may adjudge and decree the
payment by defendant to plaintiff of a reasonable sum as profits or general damages for the infringement. R. S. 4919; R. S. 4921 (1878) 35 U. S. C. §§ 67, 70 (1934).

The infringer is treated as though he were a trustee for the plaintiff with respect to all profits realized from the infringement. See Tilghman v. Proctor, 125 U. S. 136, 148, 8 Sup. Ct. 894, 900, 31 L. ed. 664, 668 (1888). Where the device defendant made and sold comprised only the patented features, the profit is the difference between the price realized from the sale and the cost of making and selling it. Warren v. Keep, 155 U. S. 265, 15 Sup. Ct. 83, 39 L. ed. 144 (1894). The same rule is applied to improvement patents where the profit is derived solely because of the patented features, Manufacturing Co. v. Cowing, 105 U. S. 253, 26 L. ed. 987 (1881); Westinghouse Electric & Mfg. Co. v. Wagner Electric & Mfg. Co., 225 U. S. 604, 32 Sup. Ct. 691, 56 L. ed. 1222 (1911), and to combinations where the entire value thereof is due to a patented feature. Stromberg Motor Devices Co. v. Zenith-Detroit Corp., 73 F. (2d) 62 (C. C. A. 2d, 1934) (petition for writ of certiorari dismissed per stipulation, on motion of counsel for petitioner, 294 U. S. 735, 55 Sup. Ct. 509, 79 L. ed. 1293 (1934) ).

An account for profits is difficult to work out. In the simplest cases where defendant is engaged only in the manufacture of the infringing article, or where defendant, though engaged in the manufacture of other articles, keeps separate cost accounts, many troublesome problems arise as to what expenditures may be included as costs in the account. Much litigation has resulted and the decisions dealing with these questions are numerous. See Walker, Patents (6th ed. 1929) § 759, n. 43a. The situation is greatly complicated when the patent covers only a part of the completed article or when the defendant is engaged in manufacturing noninfringing as well as infringing articles and does not keep separate cost accounts. Cf. Westinghouse Electric & Mfg. Co. v. Wagner Electric & Mfg. Co., supra; Levin Bros. v. Davis Mfg. Co. et al., 72 F. (2d) 163 (C. C. A. 8th, 1934). See also Macomber, Damages and Profits in Patent Causes (1910) 10 Col. L. Rev. 639; Collier, Burden of Proof in a Suit for Profits in Infringement of a Patent (1913) 76 C. L. J. 39; Toulmin, Jr., Problems in Profits and Damages in Patent Accounting (1914-1915) 2 Va. L. Rev. 507 and (1915-1916) 3 Va. L. Rev. 34.

Factory losses incurred as a necessary or normal incident to the completion of articles sold at a profit are properly included as costs. MacBeth Evans Glass Co. v. L. E. Smith Glass Co., 27 F. (2d) 553 (W. D. Pa. 1927) (manufacture of lenses covering a long period viewed as continuous infringement and infringer allowed credit for defective lenses); Continuous Glass Press Co. v. Smertz Wire Glass Co., 219 Fed. 199 (C. C. A. 3d, 1915) (waste in glass making). It is important, however, for defendant to establish the nexus between the waste or loss and the articles sold at a profit. See Canda Bros. v. Michigan Malleable Iron Co., 152 Fed. 178, 180 (C. C. A. 6th, 1907). If this nexus is not established the waste or loss cannot be added to the cost. Crosby Valve Co. v. Safety Valve Co., 141 U. S. 441, 12 Sup. Ct. 49, 35 L. ed. 809 (1891) (experimental valves not
proved to have been necessary or normally incident to making the infringing article). But cf. \textit{Page Mach. Co. v. Dow, Jones & Co.}, 238 Fed. 369 (S. D. N. Y. 1916) (costs of devising the infringing device allowed, both infringer and the one employed to devise it being ignorant of the patents infringed); \textit{Union Electric Welding Co. v. Curry et al.}, 278 Fed. 465 (C. C. A. 6th, 1922) (losses of 1912 and 1916 offset against profits of 1913 to 1915).

Failure to establish the nexus between the defective articles returned by vendees and the articles sold at a profit prevented defendants in the principal case from including the cost of making them in the account. It should make no difference whether defects are discovered before or after sale; whether the sale is a mere nullity or the defective articles are replaced by satisfactory ones. If the returned articles are made along with the ones sold at a profit a defendant is just as much entitled to add the cost of making them as the cost of those defective ones discovered at the factory. No distinction was made in \textit{MacBeth Evans Glass Co. v. L. E. Smith Glass Co.}, supra., between defective lenses returned by vendees and those discovered on the premises.

The contributory infringer in the principal case supplied large amounts of glass for which there was a very limited market apart from the infringing article. In rejecting defendants' claims that the market value thereof should be used in computing manufacturing costs of the infringing articles the court was influenced by the fact that this would permit the contributory infringer to reap a profit on articles wrongfully sold for which there would otherwise have been no market. This seems obviously correct. But cf. \textit{Barber Asphalt Pug. Co. v. Standard Asphalt & Rubber Co.}, 30 F. (2d) 281 (C. C. A. 7th, 1928) \textit{cert. den.}, 278 U. S. 659, 49 Sup. Ct. 250, 73 L. ed. 567 (1928). Moreover the contributory infringer was not permitted to add to the cost of manufacture the savings effected by the use of patented devices owned by it in the manufacturing process. This is in line with \textit{Lawther v. Hamilton}, 64 Fed. 221 (E. D. Wis. 1892); \textit{Conroy et al. v. Penn Electric & Mfg. Co.}, 199 Fed. 427 (C. C. A. 3d, 1912).

It is well settled that the patentee is entitled to recover the profits from profitable sales and to reject the losses from unprofitable ones. \textit{Crosby Valve Co. v. Safety Valve Co.}, supra; \textit{McKee Glass Co. et al. v. H. C. Fry Glass Co.}, 248 Fed. 125 (C. C. A. 3d, 1918). But cf. \textit{Union Welding Co. v. Curry}, supra. Where the specific cost and the specific sale price of each article in question are known the matter presents no difficulty but where, as in the principal case, only the average cost is determinable it is impossible to grant plaintiff exactly the profits made by defendant. The court refused to let this technical difficulty take from plaintiff the right to elect the profitable sales and reject the others. Defendant was primarily to blame for this condition by failing to keep his books so that the specific costs could be determined. The courts indicate an unwillingness to favor the defendant in cases where his method of bookkeeping results in confusion of costs or profits. \textit{Westinghouse Electric & Mfg. Co. v. Wagner Electric & Mfg. Co.}, supra; \textit{Levin Bros. v. Davis Mfg. Co.}, supra;
cf. Cincinnati Car Co. v. N. Y. Rapid Transit Corp., 66 F. (2d) 592 (C. C. A. 2d, 1933). The basic reason for this result is that defendant as trustee of the profits for plaintiff is not allowed to profit by the confusion he has caused. The Supreme Court has put it in the following language, "... the court was called on to determine the liability of a trustee ex maleficio, who had confused his own gains with those belonging to the plaintiff. One party or the other must suffer. The inseparable profit must be given to the patentee or infringer. The loss had to fall on the innocent or the guilty. In such an alternative the law places the loss on the wrongdoer." Westinghouse Electric Mfg. Co. v. Wagner Electric Mfg. Co., 225 U. S. 604, 618, 32 Sup. Ct. 691, 696, 56 L. ed. 1222, 1227 (1912).

The court was of the opinion in the principal case that the account could be stated by following the directions given. The direction to assess damages based upon reasonable royalty in case this were impossible conforms to the statutes referred to supra. The allowance of interest on such damages from the date of the master's report instead of the date of the last infringement accords with the rule generally followed. Tilghman v. Proctor, supra.

G. H. M.

PUBLIC OFFICERS—MANDAMUS—CIVIL SERVICE—ECONOMY ACT—MARRIAGE CLAUSE.—Appellant had been employed in the Bureau of Internal Revenue for more than fourteen years as a duly qualified, classified civil service employee. A lack of salary appropriations necessitated a reduction of personnel so appellant was selected for termination in accordance with Section 213 of the "ECONOMY ACT" of June 30, 1932, 47 Stat. 406, 5 U. S. C. §§ 35a, 37a (1934) which reads: "In any reduction of personnel in any branch or service of the United States Government or the District of Columbia, married persons (living with husband or wife) employed in the class to be reduced shall be dismissed before any other persons employed in such class are dismissed, if such husband or wife is also in the service of the United States or the District of Columbia." Appellant was living with her husband who was also employed by the United States government. Her dismissal was recommended by the Commissioner of Internal Revenue on behalf of the Secretary of the Treasury. The Board of Review of the Bureau of Internal Revenue subsequently forwarded appellant's rating to the Civil Service Commission, where her dismissal from the service was duly approved. She contends that her termination was illegal because Executive Order No. 4240, dated June 4, 1925, which reads in part, "Demotions and separations from each class heretofore and hereafter established by the Personnel Classification Board will be made in order beginning with the employee having the lowest rating ...", was violated and likewise that Executive Order No. 6175, dated June 16, 1933, and Executive Order No. 6495, dated December 14, 1933, as well as Sec. 9(a) of 48 Stat. 306, 5 U. S. C. § 673 note (1934) were violated. Appellant alleges that other employees with husbands or wives in government service and with lower efficiency ratings were retained. Held, that there is no evidence of an abuse of official discretion or of a violation of a duty of fact finding in the case and as the joint action of the Commis-
sioner of Internal Revenue, the Board of Review, and the Secretary of the Treasury, concurred in by the Civil Service Commission, constituted an exercise of official discretion, the decision of the lower court, overruling the demurrer of appellant to the answer of appellee should not be disturbed. United States, ex rel., Rhodes v. Helvering, Commissioner of Internal Revenue, 84 F. (2d) 270 (App. D. C. 1936), cert. den. U. S. Sup. Ct., October 12, 1936, 4 L. W. 123.

For a note on governmental economy and the Civil Service, see (1934) 2 Geo. Wash. L. Rev. 528.

The point of the case is whether or not the action taken by the Commissioner of Internal Revenue was a "discretionary" act. As a general rule, the courts will not issue a writ of mandamus ordering an administrative officer to perform certain acts if that officer is empowered to exercise his discretion or judgment in determining his duty to take action, unless his acts are palpably unjust, capricious, or contra to a statute or a constitutional provision. Wilbur v. United States, ex rel. Kadrie, 281 U. S. 206, 50 Sup. Ct. 320, 74 L. ed. 809 (1930); United States, ex rel., Taylor v. Taft, 203 U. S. 461, 27 Sup. Ct. 148, 51 L. ed. 269 (1906); Simons v. McGuire, 204 N. Y. 253, 97, N. E. 526 (1912); see note (1934) 7 So. Car. L. Rev. 477; (1932) 32 Col. L. Rev. 1252. Contra: Wilbur v. United States, ex rel., Krushnic, 280 U. S. 306, 50 Sup. Ct. 103, 74 L. ed. 445 (1930); Roberts v. United States, 176 U. S. 221, 20 Sup. Ct. 376, 44 L. ed. 443 (1900); see note (1934) 17 Corn. L. Q. 103.

In holding that section 213 of the "Economy Act" empowered the Commissioner of Internal Revenue to exercise his personal judgment as to which of the persons in a designated class were to be separated from the service the court ignored an important body of law and administrative regulation. A definite priority order for dismissal of employees in the same class according to a point rating system was provided in Executive Order 4240. The system of point rating was modified in Executive Order 6175 but the principle was continued. Another limitation was provided in an Act of Congress, 48 Stat. 306, 5 U. S. C. § 673 note (1934), and in Executive Order 6495 which authorized a system of rotative furloughs for employees to distribute the work as far as possible. Mandamus was the proper action to compel observance of the mandatory regulations. Nisbet v. Frincke, 66 Colo. 1, 179 Pac. 867 (1919); see note (1932) 18 Minn. L. Rev. 837.

Two considerations seem to have influenced the court's decision. Supervisors and administrative officials would be divested to a considerable degree of control over subordinate personnel if they could exercise no discretion to recommend dismissal and the court would be burdened with the task of reviewing virtually every termination of employment. It is noteworthy that Executive Order No. 4240 on which appellant relied in her claim that dismissal should be solely according to rating, provides in par. 3 that "In making selections for demotion or separation on account of reductions of force the heads of departments and establishments shall consider dependency, official conduct, or other like factors, and may on the basis of these factors, allow an additional credit not exceeding three points." Some meas-
ure of flexibility and discretion seems essential to handle terminations practically.

This is the first case decided under the famous "marriage clause" of the 1932 "Economy Act." It seems to forecast a liberal attitude of the courts toward personnel dismissals and to indicate that efficiency ratings will not be insisted upon where a married person with husband or wife in the government is dismissed.  

F. E. M.

PWA — CONSTITUTIONAL LAW — MUNICIPAL CORPORATIONS — VALIDITY OF LOAN AND GRANT TO A COUNTY FOR ELECTRIC PLANT — RIGHT OF PUBLIC UTILITIES TO ENJOIN EXECUTION OF AGREEMENT.—In 1934, Greenwood County in South Carolina applied to the Federal Emergency Administration of Public Works (PWA), created by Section II of the National Industrial Recovery Act (NIRA) 48 STAT. 200 (1933), 40 U. S. C. § 402 (1934), for funds of the United States with which to build an electric plant to be operated by the county in producing electric energy for transmission and sale to consumers both within and outside the county. PWA agreed to loan the county a sum of money for this purpose and also to give to it a further sum not to exceed 30% of the cost of the labor and materials used in the work of construction, the total amount of the loan and grant being $2,852,000. In consideration of the grant, the county covenanted that certain conditions specified in the written contract, relative to the wages of laborers, hours of work, employment of convict labor, collective bargaining, etc., would be observed by the county and by contractors and subcontractors. Rules and regulations respecting these matters were inserted in the contract by PWA. Two utilities companies sought to enjoin the county and its officers from obtaining the loan and grant from PWA. Mr. Harold L. Ickes, Federal Administrator of Public Works, was permitted to intervene as a defendant. The District Court granted an injunction restraining the performance of the loan and grant agreement, and the defendants appealed. In their argument before the Circuit Court of Appeals, one of the contentions made by the power companies was that the Administrator had assumed control over a local matter reserved to the jurisdiction of the State, because of the provisions of the contract relating to wages, hours of work, etc. Held, that the loan and grant which the Administrator of Public Works proposes to make to Greenwood County cannot be condemned either on the ground that the act of Congress under which they will be made is unconstitutional or that the Administrator in making them will exceed his power under the act; that even if this were not true, no right of plaintiffs would be invaded either by the county in the building of the power project or by the Administrator in the making of the loan and grant. Decree of the District Court reversed, and the case remanded with directions to dismiss the bill of complaint for lack of equity. Greenwood County, S. C. v. Duke Power Co., 81 F. (2d) 986 (C. C. A. 4th, 1936). Cert. granted, United States Supreme Court, docket No. 934, filed April 17, 1936.

It has been held that the Federal Government has power to make grants of money to aid in the relief of nation-wide unemployment,

Grants by the Federal Government on condition that it be given partial or indirect control of state projects have heretofore been made to the states: *Morrill Lands Grant Act*, 12 Stat. 503 (1862); *The Maternity Act*, 42 Stat. 224 (1921). The constitutionality of these acts was never passed upon. In answer to the contention that the Maternity Act invaded the local activities of the state, the court said: "Probably it would be sufficient to point out that the powers of the state are not invaded since the statute imposes no obligation but simply extends an option which the state is free to accept or reject." *Massachusetts v. Mellon*, 262 U. S. 447, 480, 43 Sup. Ct. 597, 598, 67 L. ed. 1078, 1082 (1923); *Corwin, The Spending Power of Congress—Apropos The Maternity Act* (1923) 36 Harv. L. Rev. 548. In *United States v. Butler, Receiver of the Hoosac Mills*, 296 U. S. 1, 56 Sup. Ct. 312, 80 L. ed. 287 (1936), the broad general principle was established, that the court will, in cases properly coming before it, check the spending and contractual powers of the Federal Government, where it appears that any regulatory power to command, compel, coerce, control or restrain is sought to be exercised in connection with the expenditures and contracts. *Cf. Ashton v. Cameron County Water Improvement District No. 1*, 56 Sup. Ct. 892 (1936), reh’g denied, October 12, 1936, 4 U. S. Law Week 146. The AAA crop-reduction contracts which were condemned in the *Hoosac Mills Case* differ, it is true, from the PWA contracts here in question, in that, by the former, the Federal Government sought to secure directly, by purchase from the individual farmer, compliance with the Federal policy of general regulation which it could not otherwise make effective. In the PWA grants the agreements were with state agents who derived their authority to make these conditional contracts with the Federal Government, from the state itself. Whether or not these differences are material is problematic. For a discussion of the Constitutional problems of the AAA Case see, Collier, *Judicial Bootstraps and the General Welfare Clause—The AAA Opinion* (1936) 4 Geo. Wash. L. Rev. 211-242; Hartman, Shilling, Wise, *Constitutionality of AAA Processing and Floor Stocks Taxes* (1935) 4 Geo. Wash. L. Rev. 43-84.

An electric power company is without standing as a federal or state taxpayer to question the constitutionality or effect of Title II of the NIRA on the ground that a loan and grant by the PWA to a city or county to construct a power plant may be invalid. *City of Allegan, Mich. v. Consumers’ Power Co.*, 71 F. (2d) 477 (C. C. A. 6th, 1934); *Mass. v. Mellon*, 262 U. S. 477, 43 Sup. Ct. 597, 67 L. ed. 1074 (1923); *cf. United States v. Butler*, 296 U. S. 1, 56 Sup. Ct. 312, 80 L. ed. 287 (1936). Where a private corporation is not only a taxpayer but is the holder of a valuable franchise which is be-
ing infringed upon by the expenditure of this loan and grant its case would seem to come squarely under the decision in \textit{Frost v. Corporation Commission}, 278 U. S. 515, 49 Sup. Ct. 235, 73 L. ed. 483 (1929), where it was held that an owner of a cotton ginning business, operating under permit under state law, was not precluded from asserting invalidity of subsequent amendments authorizing the establishing of additional gins without showing public necessity. A city has a right to build and operate a municipal electric light plant, if it proceeds according to law, though such a plant will compete with, and may destroy the value of a private corporation's plant. \textit{Missouri Utilities Co. v. City of California, Mo., supra; Puget Sound Co. v. Seattle}, 291 U. S. 619, 54 Sup. Ct. 542, 78 L. ed. 1025 (1934); \textit{Madera Waterworks v. Madera}, 228 U. S. 454, 33 Sup. Ct. 571, 57 L. ed. 915 (1912); \textit{cf. Green v. Frazier}, 253 U. S. 233, 40 Sup. Ct. 499, 64 L. ed. 878 (1920).

\textbf{TAXATION — STATES — COMMERCE — DISCRIMINATION AGAINST GOODS FROM ANOTHER STATE.} — Pursuant to Wash. Laws 1935, c. 180, tit. 4, the defendant tax commission demanded that plaintiffs pay an excise tax for the use within the State of Washington of tangible personal property purchased outside that state and upon which purchase no sales tax had been paid. The act further provided that such excise tax should be reduced by the amount of sales taxes paid in the place of purchase up to and including the amount of the “use tax” of 2% imposed under the statute. The plaintiffs petitioned for an order perpetually restraining the defendants from collecting such excise tax on machinery and other tangible personal property purchased outside the state. \textit{Held}, that since the statute attempts to levy a tax on articles purchased outside the State of Washington the tax is discriminating in its incidents against such articles because of their origin in another state and is in violation of the commerce clause of the Federal Constitution. \textit{Silas Mason Company, Inc. v. Henneford}, U. S. D. C. E. D. Wash. No. E4473 (1936). Probable jurisdiction noted U. S. Sup. Ct. Dkt. No. 418. 4 U. S. Law Week 172.

In \textit{Vancouver Oil Company v. Henneford}, 49 P. (2d) 14, 183 Wash. 317 (1935) and in \textit{Powell v. Maxwell}, 186 S. E. 326 (N. C. 1936), the constitutionality of the use tax was upheld on the theory that the state may tax goods brought to final rest within the state even though they entered subject to the regulations of interstate commerce. (1936) 11 \textit{Wash. L. Rev.} 54; (1936) 11 \textit{Wis. L. Rev.} 449; (1936) 20 \textit{Minn. L. Rev.} 543.

The primary purpose of the compensating tax is to protect merchants in the taxing state from discrimination arising because of the inability of that state to tax sales made to its citizens in other states. \textit{Wash. State Tax Commission Regulation} 178.

There is no merit in the argument that such a use tax violates the provisions of the Federal Constitution which provides that no state shall levy a tax on imports and exports since that provision applies only to traffic in goods with a foreign country. \textit{Brown v. Maryland}, 12 Wheat. 419, 6 L. ed. 678 (U. S. 1827); \textit{Woodruff v. Parham}, 8 Wall. 123, 19 L. ed. 382 (U. S. 1868). A state may tax goods

The compensating tax is not a direct property tax but an excise or privilege tax. *Monamotor Oil Refining Co. v. Oklahoma*, *supra*; *Altitude Oil Co. v. People*, 202 Pac. 180, 70 Colo. 452 (1921); *Standard Oil Company v. Brodie*, 239 S. W. 753, 153 Ark. 114 (1922); *Bowman v. Continental Oil Co.*, 256 U. S. 642, 41 Sup. Ct. 606, 65 L. ed. 1139 (1932); *Vancouver Oil Company v. Henneford*, *supra*; *Powell v. Maxwell*, *supra*. "There have been numerous dicta asserting that a general sales tax is a property tax. . . . But on direct holdings the authorities are unanimous in declaring that a general sales tax is an excise tax." (1936) 11 Wash. L. Rev. 56. It has been suggested that the distinction between a property tax on the one hand and a sales or a use tax on the other is whether the tax is certain to be imposed on the property when the regular assessment is made or whether it is payable as a condition precedent to the right to use or keep the property, (1921) 35 Harv. L. Rev. 70, or if the tax is nonrecurring, (1936) 24 Cal. L. Rev. 175, and a tax levied on the business of selling goods before they can be sold amounts to a property tax. *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347 (1875).

If the use tax burdens interstate commerce in such a manner as to destroy it or impose restrictions on free trade, or if it discriminates against articles purchased outside of the state because of their place of origin, the tax must be declared invalid. *Baldwin v. Seelig*, 294 U. S. 511, 55 Sup. Ct. 497, 79 L. ed. 1032 (1935); *Sonnenborn Bros. v. Cureton*, *supra*. As to when a tax becomes discriminating in character there are divergent views. A tax levied on goods purchased outside of the state to protect local business is discriminating in its incidents. *Silas Mason Company, Inc. v. Henneford*, *supra*. Contra: *Vancouver Oil Co. v. Henneford*, *supra*; *Powell v. Maxwell*, *supra*. A tax on goods purchased in another state when no tax is levied on the same type of goods within the state is discriminating. *Baldwin v. Seelig*, *supra*; *see Webber v. Virginia*, 103 U. S. 344, 26 L. ed. 565. (1880). A tax on goods both within and without state but on different tax rates is discriminatory. *See Walling v. Michigan*, 116 U. S. 446, 6 Sup. Ct. 454, 29 L. ed. 691 (1886); *Bethlehem Motors Co. v. Flynt*, 256 U. S. 421, 41 Sup. Ct. 571, 65 L. ed. 1029 (1921). In determining the validity of a tax on goods brought into one state from another, the court will look to the final effect of the tax rather

The majority opinion in the Silas Mason Company case bases its reasoning solely on the ground that the use tax is discriminatory between goods purchased in the state of Washington and those purchased in other states, and not upon the theory that the goods had come to a final rest within the state. The dissenting opinion expresses the view that since the tax was not effective until the goods came to a final rest and was a tax for the privilege of using the property within the state, there was no discrimination.

This decision is apparently limited to cases where an attempt is made to avoid double taxation by making provision for the already existing sales tax and does not solve the cognate problems that arise under a statute similar to that of North Carolina which makes no provision for sales tax exemptions on purchases made in another state. For a comprehensive discussion of the problems involved under the use tax see Legis. (1936) 9 So. Cal. L. Rev. 259 and (1936) 45 Yale L. J. 708.

TRADE REGULATION—FEDERAL—COMMODITY EXCHANGE ACT—REGULATORY POWER OF CONGRESS UNDER THE COMMERCE CLAUSE—DUE PROCESS.—In a suit brought to enjoin the enforcement of the Commodity Exchange Act, Public-No. 675-74th Congress (1936), plaintiffs averred themselves to be engaged in buying and selling grain for immediate delivery, or for future delivery, on their own account or on commission. They were also engaged in deferred shipment transactions, in making hedging contracts and purchase and sale contracts. In general, they were carrying on such business as is usually transacted by members of boards of trade. Held, that the Act is within the commerce power of Congress and is not violative of the due process clause of the Fifth Amendment. Board of Trade of Kansas City v. Milligan (D. C., W. D. Mo., No. 2857, Sept. 11, 1936, not yet reported).


The court in the instant case pointed out that practically identical questions were presented as to the constitutionality of the Grain Futures Act, supra, in Chicago Board of Trade v. Olsen, 262 U. S. 1, 43 Sup. Ct. 470, 67 L. ed. 839 (1922) and that the principles laid down in that case were developed from Swift and Company v. United States, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. ed. 518 (1905). which upheld an injunction against appellant's commission of alleged violation of the Sherman Anti-Trust Act. 26 Stat. 209 (1890), 15 U. S. C. §§1-33 (1934). The same principles were more definitely established in a decision upholding the power of Congress to provide punishment for introducing false and fraudulent bills of

It should be noted that the court in the instant case distinguished Hill v. Wallace, 259 U. S. 44, 42 Sup. Ct. 453, 66 L. ed. 822 (1922), which invalidated the Future Trading Act, 42 Stat. 187 (1921) 7 U. S. C. § 1 (1934), on the ground that it was designed to regulate a similar business under the guise of a tax. The Grain Futures Act, supra, was drawn to circumscribe the objections of the court to the Future Trading Act, and was upheld in that form in Chicago Board of Trade v. Olsen, supra.

In holding that the regulations prescribed or provided for in the Commodity Exchange Act are not “so onerous as to fall under the condemnation of the due process provision of the Fifth Amendment,” the court in the instant case relied on the principle that when Congress properly enters the field of authorized activity, it may not only adopt means necessary, but means convenient to the exercise of its power. Hoke v. United States, 227 U. S. 308, 33 Sup. Ct. 281, 57 L. ed. 523 (1913). Much reliance was also placed upon Tagg Bros. v. United States, 280 U. S. 420, 50 Sup. Ct. 220, 74 L. ed. 524 (1930). In that case, the Packers and Stockyards Act of 1921, supra, had been attacked under the due process clause, the contention being that services rendered by commission men were practically personal services. But the court held that where the services sought to be regulated were affected with a public interest, such regulation was valid. The plaintiffs there were held to be performing an indispensable service in interstate commerce in livestock, and the purpose of the regulation to be to prevent their service from becoming an undue burden upon, and obstruction of, that commerce. Cf. Pacific Telephone & Telegraph Co. v. Seattle, 291 U. S. 300, 54 Sup. Ct. 383, 78 L. ed. 810 (1934). In the instant case, the court pointed out that if, and when, regulatory measures are applied which may be so onerous as to be unlawful, provision is made for the protection of the members of the board of trade, and that it will then be the time to complain, rather than in advance of the promulgation of such regulation.

R. C. L.
BOOK REVIEWS


A restatement of the law, in a given branch, may either seek to reflect the apparent development and trend thereof as shown by recent decisions, or by reliance on the later cases it may merely seek to reflect the current interpretation of the law. In patent law, little has been done in recent years toward restating the law as to the prerequisites for a valid patent, recent texts having rather been concerned with the presentation of rules for the guidance of inventors, with matters of procedure, or with analyses of the cases bearing on special questions. Charles W. Revise and A. D. Cesar, in their PATENTABILITY AND VALIDITY, have adopted the second of the above methods of treatment in restating the essentials of a valid patent. While leading cases have frequently been included and early precedents have been employed in the absence of more recent available decisions, emphasis for the most part has been laid on recent decisions in exemplifying the application of controlling principles. Hence this work is not a mere bringing down to date of earlier treatises on patent law, but it is a true attempt to restate the law in the light of the later enunciations of the courts.

The presentation of the rules deduced by the authors from the cases takes the form of summary statements of controlling principles with illustrations of how the courts have applied these principles in typical cases. The supporting citations are not given merely as footnotes, requiring references to the reports, but the facts of each case are briefly summarized in the text, the patent under consideration is identified, the claim itself is quoted in considering a particular claim, and the reasoning of the court in applying a given rule to the facts is often exemplified by quotations. Thus the text within itself facilitates the understanding of the points sought to be made. This work also differs from earlier treatises of comparable character by freely citing decisions of the Court of Customs and Patent Appeals and of the Patent Office, as well as of the Federal Courts, and hence the illustrations selected are well balanced in that they show the attitude of the Patent Office on what are the prerequisites to the granting of a valid patent as well as the attitude of the Federal Courts on what is essential before a patent can be enforced.

The authors have not attempted to trace the development of the law or to indicate its trend. Nor have they sought to consider the philosophy underlying the stated principles, for the most part argumentative discussion having been avoided. Members of the profession may not entirely agree with the authors as to what some of the cases actually stand for, but that should not be surprising in the face of the lack of such agreement common to bench and bar alike. The cases selected as illustrations have been fairly chosen and in general reflect the diversities arising when accepted principles are applied
to different states of fact. Some danger naturally inheres in attempting to summarize briefly the facts of cases which involve many issues and are influenced by many collateral questions, but the authors have gained much in lucidity by giving the reader an insight into the cases referred to, even though entire accuracy in the statement of facts has sometimes been sacrificed to brevity. The citations are at least helpful suggestions leading to a more careful study of the cases relied on.

The text has been confined to those phases of the patent law which are directly concerned with the prerequisites to a valid patent. Hence the treatment has been logically subdivided into a consideration of what is patentable subject matter, what are the essentials underlying the statutory requirements as to utility, novelty and invention, what is involved in the proper formulation and prosecution of patent applications, what causes a forfeiture of the right to secure or maintain a valid patent, and what is involved in a loss of right due to double patenting. The analysis of the several prerequisites as made by the authors shows careful and extensive investigation and study. The governing rules are stated with simplicity, perhaps too much generalized in some instances, but for the most part accurately and in a way to clearly reflect the principles involved.

Within the scope of the subject matter treated the discussion is reasonably full, interestingly presented and easily readable. As a guide to students and as a desk book for ready reference to illustrative cases, affording a lead to pertinent decisions which reflect the current application of the principles underlying the prerequisites to a valid patent, this work is one of the most serviceable published within recent years.

L. H. Sutton.


A scholarly compilation and synthesis of material relating to foreign patent systems and the International Convention for the protection of industrial property has been prepared by Emerson Stringham, D. J., in his PATENTS AND GEBRAUCHSMUSTER IN INTERNATIONAL LAW. While the major part of this work is composed of transcriptions and condensations from important treatises of recognized authority on the patent law of leading industrial nations, the editor has woven the material into an organized whole by his comments and notes.

After presenting a translation of Lainel’s article on the German patent system, by way of introduction, the Paris convention for the protection of industrial property, as subsequently revised in London in 1934, is set out in full, and this is followed by a carefully prepared history of the development of laws for the protection of inventions in foreign countries and of the efforts made to secure by international agreement more nearly uniform laws to this effect in the leading industrial nations. The conflicts and difficulties inherent in the attempts to reconcile the widely divergent theories of the systems of different countries are well brought out. Du Bois-Reymond’s mono-
graph comparing the patent laws and procedure in Germany, England and the United States and Dr. Albert Osterrieth's monograph discussing German patent law and patent procedure are then transcribed in full. The Gebrauchsmuster statute and the Gebrauchsmuster Rules of Practice are transcribed, and accompanied by a discussion of the application thereof and a translation of Dr. Herrmann Isay's annotations on the Gebrauchsmuster statute, thereby affording a highly useful compendium of information respecting both law and practice respecting this branch of German practice. The work concludes with selected and annotated excerpts from authorities familiar with the patent practice of Germany, France, Russia, Italy, England and Canada, particularly in so far as it concerns the working of the International Convention in these countries.

Mr. Stringham has thus collected in one volume much useful information to guide those interested in pursuing either the history of the movement to establish an International Convention for the protection of patent property or the practice as it has evolved in different countries, while an extensive bibliography incorporated in the work affords abundant opportunity for additional research. The work shows careful research on the part of the editor and it therefore constitutes an important contribution to patent law texts.

L. H. SUTTON.