Notes

LIMITATIONS ON THE POWER OF THE FEDERAL TRADE COMMISSION TO PREVENT CORPORATE MERGERS

By Sections 7 and 11 of the Clayton Act\(^1\) the Federal Trade Commission is empowered to prevent corporations engaged in interstate commerce from acquiring the stock of other corporations similarly engaged when such acquisition would substantially lessen competition. The intention of the Act was first to close judge-made loopholes in the less precisely worded Sherman Act\(^2\) which had been enervated by the "rule of reason" and second, by the speedier administrative procedure of the Federal Trade Commission to prevent in their incipiency practices which the earlier statute could reach only after they had matured to the public harm. Neither purpose has been fully attained. Though the Federal Trade Commission has acted with success in specific instances to curtail the extent of some holding companies' multi-corporate domination,\(^3\) the powers vested in the Commission have been consistently restricted in breadth and usefulness to the letter rather than to the spirit of the Clayton Act.\(^4\)

The scope of these powers has recently come up for fresh review by the Supreme Court in *Arrow-Hart and Hegeman Company v. Federal Trade Commission*.\(^5\) The Commission had filed a complaint to compel a holding company, devised to control two important competing electrical manufacturing corporations, to divest itself of the stock of the two original companies, an admittedly legitimate exercise of authority. Before a decree could be issued by the Commission, the management of the holding company manipulated the return of the stock in a manner that ensured voting

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4. Cf. Western Meat Co. v. Federal Trade Commission, 272 U. S. 554 (1926); Federal Trade Commission v. Eastman Kodak Co., 274 U. S. 619 (1927); see cases cited in note 3, supra. The same inclination to restrict the powers and jurisdiction of the Commission has from the beginning marked the Court's decisions in cases involving prohibition of unfair methods of competition. Cf. Federal Trade Commission v. Gratz, 253 U. S. 421 (1920) (restricting the jurisdiction of the Commission to precedents established under the common law and judicial decisions); Federal Trade Commission v. Beech Nut Packing Co., 257 U. S. 441 (1922) (reasserting that it is duty of courts rather than Commission to determine meaning of "unfair methods of competition"); Federal Trade Commission v. Curtis Publishing Co., 260 U. S. 568 (1923) (The Court may examine the whole record to determine if there are material facts not reported by the Commission and may decide the controversy upon them); Federal Trade Commission v. Sinclair Refining Co., 261 U. S. 463 (1923) (with similar cases decided at same time cut heavily into substantive power of Commission to determine unfair trade practices). The most extreme stand was in Federal Trade Commission v. Klesner, 280 U. S. 19 (1929) and in Federal Trade Commission v. Raladam Co., 283 U. S. 643 (1931) (Public interest—a condition precedent to action by the Commission—is a jurisdictional requirement to be determined by the courts).
5. 54 Sup. Ct. 532 (1934).
strength to carry out a merger. The merger was effected and the Commission, claiming it to be "a subterfuge designed in an attempt to evade the Clayton Act," filed a supplemental complaint to require what was now one corporation again to become two as contemplated by the original action. Following the course laid out in Western Meat Company v. Federal Trade Commission\(^6\) and Federal Trade Commission v. Eastman Kodak Company\(^7\) the Supreme Court held that the whole matter was now beyond the Commission's statutory jurisdiction since the merger was effected before the issuance of a specific restraining order.

This decision confines the jurisdiction of the Commission within boundaries even narrower than those previously outlined by the Supreme Court. While there is no doubt that under the Clayton Act the Commission may compel divestment of acquisitions of a competing company's stock when such acquisitions tend substantially to lessen interstate competition,\(^8\) the Act has been construed not to grant power to compel the sale back of a competing corporation's assets which were purchased before the Commission took any action, even though the purchase was negotiated by means of illegal stock ownership.\(^9\) The Commission can, however, by an order requiring return of stock to persons not under the influence of the acquiring corporation preclude use of securities illegally obtained to secure control of competitors' property which has not actually been purchased prior to issuance of the decree.\(^10\) The opinion in the instant case enunciates the rule that the Commission cannot prevent the manipulation of wrongfully acquired stock to bring about a merger even where jurisdiction is taken prior to purchase of the competing company's property if the controlling group against whom the complaint was issued divests itself of the stock before the Commission can issue a decree; jurisdiction is lost, since the merger is not of itself illegal. But as Mr. Justice Stone points out in his dissent, the stock unlawfully acquired by the holding company in the present case was not released until the merger of the two operating companies was assured. The Commission might well retain jurisdiction for this purpose of dissolving a combination which could have been prevented had a decree been obtained more promptly. The Commission may now find that in the future hurried and perforce ill-considered action will be essential to preserve its powers.\(^11\) And further, although the Commission may in its decree

\(^6\) 272 U.S. 554 (1926). The court here said that where a corporation has unlawfully acquired all the stock of a competitor but not its plant or other property the order properly directs it to divest itself of its stock in such wise as will restore competition and not leave the corporation in control of the competitors as would happen if it first used the stock to secure such control and then divested by dissolving the other corporation. But where a corporation unlawfully buys its competitor's property before the Commission takes action, the Commission is not empowered by the statute to order the corporation to divest itself of the property; the remedy, if an unlawful status has resulted, is in the courts.

\(^7\) 274 U.S. 619 (1927). After quoting the Western Meat Case the Court continues: "So here the Commission has no authority to require that the company divest itself of the ownership of the laboratories which it had acquired prior to any action by the Commission. If the ownership or maintenance of those laboratories has produced any unlawful status, the remedy must be administered by the courts in appropriate proceedings therein instituted." 


\(^10\) Ibid.

\(^11\) See McFARLAND, JUDICIAL CONTROL OF THE FEDERAL TRADE COMMISSION (1933). Commenting on the earlier cases tending in the same direction it is said, at page 68:
make specific provision for the disposition of the illegally acquired stock, the instant decision indicates that if the decree fails expressly to prohibit all the possible evasions by which corporate union might be achieved the controlling interests may still be able to escape from the jurisdictional enclosure by evasive action.

It may be true that the Commission's jurisdiction even circumscribed by the holding of this case is generally sufficient for the enforcement of the Clayton Act. Mergers, especially of large corporations, are usually wrought through the medium of complex holding company schemes, since it is extremely difficult even for powerful groups to find the requisite capital for outright purchase of working stock-control. A group holding in the beginning a small percentage of the voting power can obtain the two-thirds vote generally required by law to effectuate a merger only by years' accumulation of effort, by unusual prestige, or—the more certain method—by careful construction of corporate pyramids. The Commission, if it acts with celerity, can prevent would-be offenders from obtaining by manipulation of stock-control the power to merge. Mergers accomplished either by the real consent of independent stockholders or by the simple purchase of physical assets, obviously of more exceptional occurrence, remain beyond the reach of the Federal Trade Commission because not contrary to the Clayton Act. If offensive to public policy in result they may be prosecuted by the Department of Justice under the Sherman Act. But to refer back, as the Court does here, to the provision of the latter statute as the only possible remedy against a combination built through stock acquisitions expressly prohibited by Section 7 of the Clayton Act, is either to follow too narrowly the trend of precedent, or to express indirectly a fundamental antagonism to a clear legislative policy.

Validity of Municipal Sales License Tax

The tremendous increase in recent years of both wholesale and retail distribution by truck, made possible by modern facilities for rapid and inexpensive highway transportation, has proved a serious threat to the small merchandiser in suburban communities. An effective method of meeting this competition from the large city concern, affording to the smaller town at the same time a not unwelcome means of securing additional revenue without increased burden on residents, has been found in municipal license taxes on selling, soliciting orders for, or delivering goods within the city limits. But many of these ordinances have failed to survive the test of.

"These decisions establish a race for priority—the Commission must discover impending business mergers and take action before there is an acquisition of the assets of competitors. Although the first comment by the Commission is non-committal, in later years these decisions are referred to as 'practically nullifying' the statute."


13. For statistics on mergers effected between 1922 and 1929, see Berle and Means, The Modern Corporation and Private Property (1932) appendix.

14. The possibility of this remedy has been urged by the court not only in the present case but also in the two preceding cases dealing with a similar problem. Cf. Western Meat Co. v. Federal Trade Commission, 272 U. S. 554 (1926); Federal Trade Commission v. Eastman Kodak Co., 274 U. S. 619 (1927). But see Aluminum Co. of America v. Federal Trade Commission, 284 Fed. 401 (C. C. A. 3d, 1922), cert. den. 261 U. S. 616 (1923). Mr. Justice Brandeis has very fully met this argument in his dissent to the Western Meat case.

1. French, Municipal Tariffs under the Guise of Occupation Taxes (1933) 18 Iowa L. Rev. 342.
litigation, being declared invalid if their effect is to erect a tariff barrier for the benefit of the local tradesmen or to discriminate against out-of-town merchants as such.\(^2\) The fate of the usual provision exempting those whose principal place of business is within the local subdivision has depended upon whether it operates as an arbitrary classification based on residence\(^5\) or makes a reasonable distinction between two essentially different methods of doing business.\(^4\)

The Supreme Court of Florida, however, introduced novel doctrine into the field by holding invalid an ordinance of the City of Cocoa which subjected non-residents making sales or deliveries within the city limits to the same license tax as local dealers.\(^6\) In the original opinion the measure was declared void on the absurd ground that a clause exempting interstate commerce from its provisions rendered it discriminatory against merchants within the state.\(^6\) On rehearing this reasoning was repudiated, and it was said that the fatal defect of the ordinance was that it was extraterritorial in its operation and that a municipality can no more impose a burden on interurban commerce than can a state on interstate commerce.

The defect of extraterritoriality is the defect of inherent lack of jurisdiction.\(^7\)

Although the legislature is competent to extend the police power of a city beyond its territorial limits,\(^8\) it may be conceded that the taxing power cannot be thus extended.

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2. In two interesting cases in California the ordinances were attacked on the ground that they discriminated in favor of non-residents who used another method of delivery. This contention was upheld in Town of St. Helena v. Butterworth, 198 Cal. 230, 244 Pac. 357 (1926); but overruled in E. A. Hoffman Candy Co., Inc. v. City of Newport Beach, 120 Cal. App. 525, 8 P. (2d) 235 (1932).


8. Chicago Packing & Provision Co. v. City of Chicago, 88 Ill. 221 (1878); 3 McQuillen, Municipal Corporations (2d ed. 1928) § 952; Anderson, The Extraterritorial Powers of
enlarged.\textsuperscript{9} An occupational tax, to be valid, must be levied only on those doing business within the area over which the taxing power extends. One engaged in interstate or interurban commerce, however, is doing business within the state or city.\textsuperscript{10} The Supreme Court of the United States has specifically recognized that the vice of taxing interstate commerce is not the vice of taxing what is beyond the jurisdiction;\textsuperscript{11} the immunity arises from a restriction on the power, not from the lack of it. The ordinances under consideration, then, do not fall within the prohibition against extraterritorial taxation.

Constitutional theory moreover does not compel an exemption of interurban commerce analogous to that accorded interstate commerce, for the relation of the city to the state is not identical with that of the state to the United States. The latter involves two sovereigns, the powers of one of which are restricted by, and those of the other derived from, the Constitution. The reason for the state’s disability to tax interstate commerce is that such a tax would conflict with the paramount implied will of Congress that that commerce should not be burdened.\textsuperscript{12} The municipality, on the other hand, acts as the instrumentality of the state, exercising only such power as has been delegated to it. If the legislature has authorized the tax, no question of conflict with the state’s supremacy can arise.\textsuperscript{13} Thus, objections like those sustained by the Florida court have not been frequently considered in the cases involving these taxes; but when urged they have been definitely rejected.\textsuperscript{14}

\textsuperscript{9} Wells v. City of Weston, 22 Mo. 384 (1856); Robinson v. City of Norfolk, 108 Va. 14, 60 S. E. 762 (1908); 3 McQuillin, op. cit. supra note 8, at § 1095. But cf. Langhorne and Scott v. Robinson, 20 Gratt. 661 (Va. 1871). See also Anderson, supra note 8, at 565 et seq., 61 Am. L. Rev. at 671 et seq.

\textsuperscript{10} Edgil v. City of Carbon Hill, 214 Ala. 532, 108 So. 355 (1926); California Fireproof Storage Co. v. City of Santa Monica, 206 Cal. 714, 275 Pac. 948 (1929); Young & Jones v. Town of Campbellsville, 199 Ky. 284, 250 S. W. 979 (1923); W. T. Sistrunk & Co. v. City of Paris, 205 Ky. 835, 266 S. W. 656 (1924); Croswell & Co. v. Town of Bishopville, supra note 4; Isaacs, An Analysis of Doing Business (1925) 25 Col. L. Rev. 1018, at 1021 et seq.

\textsuperscript{11} International Textbook Co. v. Pigg, 217 U. S. 91, 105 (1910).

\textsuperscript{12} Robbins v. Shelby County Taxing District, supra note 6. This follows the principles laid down in the leading cases of Cooley v. Board of Wardens, 12 How. 299, 319 (U. S. 1851), and Welton v. State of Missouri, 91 U. S. 275 (1875). A necessary logical result would seem to be that by expressing its will so to do Congress might validate state taxes on interstate commerce. It can thus make state prohibitions on interstate commerce operative. Clark Distilling Co. v. Western Maryland Ry. Co., 242 U. S. 311 (1917). And the case holding that it can permit levies on federal instrumentalities is based on Cooley v. Board of Wardens, an interstate commerce case. Van Allen v. The Assessors, 3 Wall. 573, 585 (U. S. 1855). If Congress can thus allow the states to tax interstate commerce, a fortiori the state can authorize municipal taxes on interurban commerce, since there is no constitutional restriction in the way nor would the vexing problem of delegation of power arise.

\textsuperscript{13} Two of the judges in the instant case wrote specially concurring opinions to the effect that the City of Cocoa had not been authorized to levy such a tax. But if they were correct, that defect has been remedied by Fla. Sp. Laws 1933, c. 16365, which validates all past taxes and gives enlarged power to the city.

\textsuperscript{14} City of Sedalia v. Standard Oil Co. of Indiana, 66 F. (2d) 757 (C. C. A. 8th, 1933); City of Sacramento v. The California Stage Co., 12 Cal. 134 (1859); City of Topeka v.
And it is implicit in the opinions upholding or avoiding similar ordinances on other grounds that these contentions are without merit. In view of the uncertainty of the rules regarding state taxation of interstate commerce and the opprobrium that has been cast upon them,\textsuperscript{15} the unwisdom of extending them to a new field is evident.

Perhaps this unique legal theory found favor with the court because it felt that the small town was attempting to extort tribute from the neighboring city. Of course, a great number of even relatively small exactions from an extensive business would prove burdensome.\textsuperscript{16} But preventing discrimination based on situs would seem to afford sufficient protection, since it would be to the interests of the resident merchants to keep the levies at a minimum. The obvious impolicy of compelling a discrimination against local business,\textsuperscript{17} the financial distress of municipalities throughout the country,\textsuperscript{18} and the general dictate of fairness that one should contribute to that which supports him ought in combination to outweigh any contention for a total immunity based on a fear of prohibitive taxes which are already amply guarded against. The test of discrimination seems fair, and the reported cases indicate no difficulty in determining the facts in each instance.\textsuperscript{19} Since the ordinance of the City of Cocoa provided for equality, the decision of the court seems as erroneous as the reasoning upon which it is grounded.

\textbf{PUBLIC CONTROL OF THE SELECTION OF GRAND JURORS}

\footnotesize{Since an early date the grand jury has been the only official body endowed with general powers of investigation and accusation.\textsuperscript{1} Authorities agree that it performs an independent and necessary function of government;\textsuperscript{2} and despite recent attacks on its efficiency, it is clear that society is at least partially dependent on its existence for the prosecution of crime in those states where it is the only body

Jones, 74 Kans. 164, 86 Pac. 162 (1906); Western Union Telegraph Co. v. City of Fremont, 39 Neb. 692, 58 N. W. 415 (1894).

15. See series of articles by Powell: \textit{Indirect Encroachment on Federal Authority by the Taxing Powers of the States} (1918) 31 Harv. L. Rev. 321, 572, 721, 932; (1919) 32 id. 234, 374, 634, 902; \textit{Contemporary Commerce Clause Controversies over State Taxation} (1928) 76 U. of P. L. Rev. 773, 958; \textit{State Production Taxes and The Commerce Clause} (1923) 12 Cal. L. Rev. 17; \textit{State Income Taxes and the Commerce Clause} (1922) 31 Yale L. J. 799; see also Note (1933) 42 Yale L. J. 1096; (1933) 43 Yale L. J. 337.

16. It was pointed out in Dugan Brothers, Inc. v. Zorn, Mayor, 145 Misc. Rep. 611, 261 N. Y. Supp. 592 (Sup. Ct. 1932), that if license fees equal to that in question were imposed upon plaintiff in every municipality in which it was then making deliveries the annual exaction from its business would accumulate to at least $38,000.

17. The same criticism holds here as is applicable to the interstate commerce cases. See note 15, supra.

18. See Note (1934) 43 Yale L. J. 924.

19. See cases cited in notes 2, 3, 4, and 10, supra.


with the power of indictment. That the citizen should have some control over its selection and function in order that its choice be made free from corruption seems axiomatic under a theory of government which receives its final sanction from the people. Especially today, when public positions, including the grand jury, have suffered the taint of fraud, it would seem that social policy requires judicial assistance in eliminating the usurpation of office, and the improper selection of grand juries, by the means the public has always used to test the authority of its formal representatives, namely, the writ of quo warranto or its modern equivalent under the codes. But in a recent decision, apparently the first of its kind, the court denied the application of a citizen to inquire into the right of a grand jury, alleged to have been fraudulently chosen, to hold office; it was held that a grand juror is not an officer, since his office lacks the element of duration and tenure, and therefore may not be subjected to quo warranto proceedings.

The legalistic argument on which the decision is based is unsupported either by precedent or by the general theory of public office. Courts and commentators assert that the essence of public office is the exercise of some part of the sovereign power of the state; when one performs a function prescribed by law he is considered a public officer. True, some courts have mentioned the idea of duration and tenure as one of the criteria by which to determine whether an office is public; but no court has held it a necessary condition. Duration moreover, has

3. See Dession and Cohen, supra note 1, at 687, et seq.
5. The previous grand jury had begun an investigation of the courts, and the new grand jury had as its foreman a relative of one who was being indicted. The selection procedure was allegedly highly irregular, and the foreman further technically ineligible, because he had recently served. McDuffie v. Perkerson, 173 S. E. 151 (Ga. 1933). Quo warranto cannot be brought against an employee as distinguished from a public officer. Attorney General v. Drohan, 169 Mass. 534, 48 N. E. 279 (1897); People ex rel. Throop v. Langdon, 40 Mich. 673 (1879); State v. Jennings, 57 Ohio St. 415, 49 N. E. 404 (1898). By deciding that a grand juror was not a public officer, it necessarily followed that the remedy sought was improper. MECHRE, op. cit. supra note 4, § 479; HIGH, EXTRAORDINARY LEGAL REMEDIES (1896) § 625.
7. Courts generally quote from the decision in United States v. Hartwell [73 U. S. 385 (1867)] to this effect. In that case, a clerk in the assistant-treasurer's office, appointed by the treasurer, was held a public officer.
8. See State v. Quinn, 35 N. M. 62, 65, 290 Pac. 786, 787 (1930); State v. Stanley, 66 N. C. 59, 63, 64 (1872); MECHRE, op. cit. supra note 4, § 8; THROOP, A TREATISE ON THE LAW RELATING TO PUBLIC OFFICERS (1892) § 8; Note (1928) 53 A. L. R. 595, 606.
always referred to the office itself and not to its incumbency; this criterion, assuming its necessity, does not preclude the designation of the grand jury as a public office. However, a definition of public office in the abstract seems futile and meaningless; an office may be public for the purpose of protecting its holder from civil liability, and not public for preventing him from occupying another position of public trust. The distinction between public office and employment is only to be drawn when considering a definite objective. In the principal case, the court apparently did not examine the functional nature of the grand jury in relation to the writ of quo warranto, and failed adequately to appreciate the urgent social problem behind the request for such a discretionary remedy. Hence it failed to recognize the importance of the grand jury in the social order as the sole criterion for determining whether it was a public office, and arrived at a manifestly unfortunate result.

If it is assumed, however, that a grand juror is not to be defined as a "public officer" against whom quo warranto may be brought, mandamus would be the only remedy available to test his authority. The selection of the grand jury is one of the ministerial duties of the court. Since mandamus is the formal method by which a citizen or the attorney general may request the superior court to force one who has assumed a governmental duty, to perform the requirements of his office, that device might be used to question the regularity of the lower court's action in the instant case. Because of the improper selection of the existing grand jury, the court might be ordered to discharge it, and select another in accord with the procedure prescribed by law. In view of the fact that no extraordinary writ other than quo warranto will lie when title to the public office is involved, mandamus may be used only when it is certain the court will refuse to consider the grand jury a public office. Although this writ is said to be discretionary, in the absence of quo warranto, the court would feel impelled to

11. The court in the instant case quotes from Mechem for the purpose of classifying grand jurors as quasi-judicial officers. But see cases cited supra note 1; Mechem, op. cit. supra note 4, § 480 (quasi-judicial officers may be challenged by quo warranto proceedings.)
13. See State v. Stanley, supra note 8, at 68.
15. Injunction will not lie. Greene v. Knox, supra note 4; Brower v. Kantner, 190 Pa. 182, 43 Atl. 7 (1899). Nor will certiorari lie. State ex rel. Crow v. Harrison, 141 Mo. 12, 41 S. W. 971 (1897); Randolph v. City of Rahway, 106 N. J. Law 296, 148 Atl. 793 (1930).
grant it, because it is then the only method by which society can control an important public function.\textsuperscript{17}

VALUATION OF LIFE TENANT'S INTEREST UNDER NEW YORK STATUTE LIMITING BEQUESTS TO CHARITY

A testator died in 1928, survived by a daughter, sister, niece, and a nephew. His will provided for certain small legacies and left the residuary estate to a trust company, directing payment of the income to the daughter until she reached the age of thirty-five years, at which time she was to receive the principal. In the event of her death before thirty-five, the principal was to go to her issue, and in default of issue the entire residue was left to a hospital. The sixth paragraph of the will provided that, "in the event that any of the contingencies shall occur upon the happening of which . . . a gift to St. Mark's Hospital shall take effect and if, notwithstanding the happening of such contingency, such gift to St. Mark's Hospital . . . for any reason shall not in whole or in part be effectual, then in so far as such gift shall not extend or be effectual, I give, devise, and bequeath the said rest, residue and remainder of the property and estate . . . to such person or persons as would be entitled to the same . . . if the same were personal property and I had died at the time of the happening of such contingency possessed thereof intestate without leaving a wife me surviving."\textsuperscript{1}\ The daughter died in 1932 without issue, before attaining the age of thirty-five, having received during her lifetime slightly over $3,000 from her father's estate, which, at his death, amounted to approximately $38,000 less some insignificant debts. Her husband, sole beneficiary under her will, contested the validity of his father-in-law's testamentary gift to the hospital as in violation of Section 17 of the New York Decedent Estate Law,\textsuperscript{2} providing that no person having a husband, wife, child, or descendant or parent, may devise or bequeath to charity more than one-half of his estate, after payment of debts, and that such devise or bequest is valid only to that extent. The court held that there was a violation in this case, because the sums actually received by the daughter and the other individual beneficiaries were considerably less than the remainder which was to go to the hospital, and that the gift of the residue to it, subject to the daughter's life estate, could be upheld only as to one-half of the total value of the estate as of the testator's death. The excess was held to have passed to the daughter by intestacy, and consequently, through her, to her husband. Since the hospital had been adjudicated a bankrupt in 1931 and ceased to function, it could not take testamentary gifts.\textsuperscript{3} Therefore, the one-half share permitted by Section 17 to be

\textsuperscript{17.} Cf. Kelley v. Kingsbury, 210 Cal. 37; 290 Pac. 885 (1930); State ex rel. Coen v. Industrial Commission of Ohio, 126 Ohio St. 550, 554, 186 N. E. 398, 399 (1933); Ferris, op. cit. supra note 12, § 192.

\textsuperscript{1.} Statement of the wording has been taken from a copy of the will. The "contingency," at the happening of which the intestate successors were to be determined, clearly was the death of the daughter under thirty-five without leaving issue, rather than the failure of the gift to the hospital.

\textsuperscript{2.} N. Y. Laws 1909, c. 18, § 17, reenacting N. Y. Laws 1860, c. 360, § 1.

\textsuperscript{3.} See In re Walter's Estate, 150 Misc. 512, 513, 269 N. Y. Supp. 400, 402 (Surr. Ct. 1933), where a testamentary gift to the same hospital was held to pass cy pres to the other charitable legatees mentioned in the will. In the instant case such a disposition would not further the intent of the testator, as he provided specifically for distribution in case the named hospital did not take the legacy.
queathed to it was ordered distributed to the surviving sister, niece, and nephew of the testator.  

Although the court did not discuss the issue, consideration of the husband's power to contest the gift to charity seems relevant. No suit to question the validity of the will under Section 17 was brought by the daughter during her lifetime, despite the fact that anyone who would derive benefit from a successful contest, as she would have done, might have done so under the form of the statute at the time of the testator's death. Since the testator had died prior to the adoption of the 1929 amendment, the present provision expressly limiting the power to contest to the persons specifically named in the statute has no application.

In view of the fact that the statute is aimed at preventing a private wrong to certain members of one's family, and is not an expression of public policy against gifts to charity, it would seem more logical if the right to contest, even under the old form of Section 17, were limited to those who, by virtue of being intestate successors, would derive added benefit if the gift were partially invalidated as of the time of the testator's death.


5. It has frequently been held in New York that anyone deriving benefit might contest as long as the testator was survived by a husband, wife, child, parent, or descendant. Robb v. Washington and Jefferson College, 185 N. Y. 485, 78 N. E. 359 (1906); Decker v. Vreeland, 220 N. Y. 326, 115 N. E. 989 (1917); Fisher v. Lister, 130 Misc. 1, 223 N. Y. Supp. 321 (Sup. Ct. 1927); Wernher, American Law of Administration (3d ed. 1923) 724; cf. In re Smallman's Estate, 141 Misc. 796, 253 N. Y. Supp. 628 (Surr. Ct. 1931) (a general legatee whose abated legacy would be increased if part of the charitable gift should be invalidated was permitted to contest), noted in (1932) 41 Yale L. J. 771; In re Howell's Estate, 146 Misc. 169, 261 N. Y. Supp. 859 (Surr. Ct. 1933) (identity of contestant considered immaterial and excessive legacy treated as void). Contra: Monahan v. O'Byrne, 147 Ga. 633, 95 S. E. 210 (1917) (grandniece not permitted to contest after death of testator's surviving children); see Trustees of Amherst College v. Ritch, 91 Hun 509, 532, 36 N. Y. Supp. 576, 588 (Sup. Ct. 1895) (the widow, sole intestate successor at death of testator, waived contest, and other relatives held not permitted to contest after her death); In re Beers' Estate, 85 App. Div. 132, 137, 83 N. Y. Supp. 67, 70 (3d Dep't 1903) (waiver by husband excludes contest by other relatives).


7. See Monahan v. O'Byrne, supra note 5, at 634, 95 S. E. at 210; Hollis v. Drew Theological Seminary, 95 N. Y. 166, 174 (1884); St. John v. Andrews Institute, 191 N. Y. 254, 272, 83 N. E. 981, 985 (1908); Matter of Brooklyn Trust Co., 179 App. Div. 262, 265, 166 N. Y. Supp. 513, 516 (2nd Dep't 1917); Matter of Apple, supra note 6, at 383, 252 N. Y. Supp. at 583.

8. The following cases have held to this effect: White v. Howard, 38 Conn. 342, 358 (1871) (based on the New York statute); Storrs v. St. Luke's Hospital, 180 Ill. 368, 54 N. E. 185 (1899); Karolusson v. Paonnessa, 207 Iowa 127, 222 N. W. 431 (1928); In re Thompson's Estate, 126 Misc. 99, 213 N. Y. Supp. 422 (Surr. Ct. 1925); Ligon v. HAwkes, 110 Tenn. 514, 75 S. W. 1072 (1903). Contra: Robb v. Washington and Jefferson College, supra note 5;
Indeed, charitable bequests are encouraged as long as they do not deprive those named in the statute of sufficient support from the testator's estate. If, however, the surviving spouse, parent, or descendant should die without contesting the legacy to charity, or if the contest should be started but not completed when such survivor died, then the reason for the statutory limitation ceases to exist. The right to contest a will seems to be a personal right which should die with the contestant rather than a property right which passes to the next of kin or personal representatives. It is analogous to the spouse's right to elect a statutory share under Section 18 of the Decedent Estate Law, which has been held not to pass to representatives. Therefore, since the daughter chose not to contest the validity of the remainder to charity, it would seem to be more in accord with the legislative policy not to permit her husband or other, more distant, relatives to do so. This conclusion seems substantiated by the provisions of the 1929 amendment to Section 17.

It is fundamental that the value of an estate and of legacies is to be fixed as of the testator's death. In order to determine whether in the present case more was left to the hospital than to individuals, it was necessary to ascertain the value of the daughter's life estate. At the time the will was offered for probate, it was

Fisher v. Lister, supra note 5; In re Sloat's Will, 141 Misc. 710, 253 N. Y. Supp. 215 (Surr. Ct. 1931); see Note (1932) 41 YALE L. J. 771.


to use life-expectancy tables in evaluating a life estate, as must be done if the question arises during the life of the life tenant, even if the remainder is contingent.\(^{16}\) It is more in accord with the oft expressed desire to fix the value as of the date of the testator's death. Their use in all cases would eliminate the uncertainty of two alternative methods of valuing the life estate, the choice depending upon the accidental factor of the time at which the issue arises. Possible contestants would no longer await hopefully an early death of the life tenant. Another advantage in their use would be found in the fact that testators would be enabled to estimate roughly the sums that could be left to charity without the possibility of having their wishes frustrated by the unexpectedly early demise of the life beneficiary and by a subsequent contest. The inaccuracies always connected with expectancy tables would result in no more hardships in these cases than in other matters in which they are used. It seems more desirable to use them in all situations.\(^{16}\)

Under this method, if the life tenant's expectancy is equal to or greater than the period of time necessary for a fund to double at the allowable interest rate, then the charitable remainderman can not be said to have been left more than the life tenant.\(^{17}\) In the instant case, the testator's daughter was under twenty-five when the testator


15. If the remainder is contingent, there seems to be no reason why the value of the life estate should not be determined as the least amount the life tenant may expect to receive according to mortality tables. Some times he is privileged to use part of the principal if he finds it necessary; surely then he is receiving at least as much as if he had a mere interest in the income, and if the latter be greater than one-half the estate there is no violation of the statute. Even when the termination of the life estate depends upon either the remarriage or death of the life tenant, the expectancy tables could be used, as it is possible to determine what he may expect to receive, and, unless by his own act he defeats that result, the expectation is the value of his interest. See Fisher v. Lister, supra note 14; cf. In re Shiman's Estate, 130 Misc. 716, 224 N. Y. Supp. 363 (Surr. Ct. 1927).

16. Life expectancy tables were used in the following cases in which the life tenant was living when the question arose: Jasme v. Mercer, 176 Ga. 256, 168 S. E. 16 (1932); Hollis v. Drew Theological Seminary, supra note 7; In re Arnolt's Estate, supra note 14; In re Shiman's Estate, supra note 15; In re Slattery's Estate, 132 Misc. 319, 230 N. Y. Supp. 267 (Surr. Ct. 1928); Matter of Loewenthal, 138 Misc. 871, 247 N. Y. Supp. 629 (Surr. Ct. 1931); Matter of Apple, supra note 6; In re Sloat's Will, supra note 8; In re Smallman's Estate, supra note 5; In re McArdle's Will, 147 Misc. 876, 264 N. Y. Supp. 764 (Surr. Ct. 1933). They were used in the following cases even where the actual duration of the tenant's life was known: Matter of Durand, supra note 12; In re Strang, 121 App. Div. 112, 105 N. Y. Supp. 566 (4th Dep't 1907); In re Bullard's Estate, 130 Misc. 337, 224 N. Y. Supp. 366 (Surr. Ct. 1927); Fisher v. Lister, supra note 14; see Rich v. Tiffany, supra note 13, at 28, 37 N. Y. Supp. at 332.

In a letter written on December 11, 1933, to Professor A. G. Gulliver of Yale Law School, Surrogate James A. Foley said: "I regard the New York rule for the computation of a life estate as being based upon expectancy only . . . My present policy is to disregard actual duration of life and adopt expectancy only."

17. If $A$ wills a life interest in $\$100,000$ to $B$, with remainder to charity, $B$ receives
died. Her expectancy was about thirty-nine years, but, had she lived ten years until aged thirty-five, the charity would have received nothing. Therefore, if the expectancy were used as the measure of the value of the life estate, the terms of the will would not conflict with Section 17, and only the hospital's bankruptcy would make paragraph six of the will applicable.

Since the court held that the actual amount received by the life tenant should be used as the value of her interest, clearly less than one-half of the total value of the estate, the further questions remain of the proper distribution of the excess which the statute barred the charity from taking, and of the one-half which bankruptcy disabled it from accepting. The excess would normally pass by intestacy to the successor as of the date of the decedent's death, that is, to the daughter and now to her estate. But in this case the testator had specifically provided in the sixth paragraph of his will that if any part of the gift to the hospital should be ineffective "for any reason" that part should go to his intestate successors determined as of the date of the happening of the contingency which vested the remainder in the hospital, namely, the death of the daughter under thirty-five without issue surviving. It seems probable that the testator was contemplating a possible contest under Section 17, and, desiring to keep his estate for his own blood relatives, inserted this provision in order to exclude the husband of the daughter. His intestate successors when the daughter died were the sister, niece, and nephew, and consequently they should have been allowed the excess over one-half of the total estate measured at the testator's death. The court, however, gave this half to the husband, who was the distributee of the daughter, the intestate successor at the time of the testator's death.

The effect of the bankruptcy of the hospital was to vest in the intestate successors in existence at the death of the daughter, the entire amount that the hospital would be permitted to receive under Section 17, in addition to the excess not permitted to be bequeathed to charity, which should have gone, as already indicated, to the sister, niece and nephew. If the son-in-law or the other relatives had not been permitted to contest the gift, or if it were found that Section 17 had not been violated, the whole will would stand, and the entire residuary estate would now pass, because of the bankruptcy, to the sister, niece, and nephew to the exclusion of the son-in-law. It appears, therefore, that under any interpretation of the law the husband was not entitled to share in the estate, since, as indicated, he was not entitled to the part of the gift to the hospital which Section 17 invalidated, nor to the valid part which became ineffective by virtue of the bankruptcy of the hospital.

(if the customary 5% be taken as the interest rate) $5,000 a year during his life. If his expectancy is 5 years, the present value of his interest is about $21,645, while the present value of the remainderman's $100,000 due in 5 years is about $78,355. In this case the statute would be violated. If B's expectancy is about 14½ years, the value of his expected annuity is just $50,000, or one-half the estate. In this case, or if B's expectancy is greater than 14½ years, the statute is not violated, and the terms of the will may be followed exactly.


19. In re De Lamar's Estate, 118 Misc. 127, 192 N. Y. Supp. 412 (Surr. Ct. 1922); In re Suydam's Estate, supra note 14; In re Mosley's Estate, 138 Misc. 847, 247 N. Y. Supp. 520 (Surr. Ct. 1931); In re Sloat's Will, supra note 8. But cf. Matter of Runk, supra note 14 (the excess goes into the residue to make up for deficiency); In re Smallman's Estate, supra note 5 (excess goes to compensate disappointed legatees for abated portions of their legacies).

20. That the testator did not desire his son-in-law to share is corroborated by the fact
POWER OF A FEDERAL COURT RECEIVER TO REMOVE UNDER SECTION 33 OF THE JUDICIAL CODE

At common law, a receiver could not be sued in his official capacity without the previous permission of the court appointing him. Pursuant to that rule, federal courts either drew to themselves suits against their appointed receivers, or designated the court in which they might be sued. In 1888, however, a federal statute provided that federal receivers could be sued without previous leave of the appointing court. Thereafter, persons suing federal receivers were free to procure an adjudication of their claims in a state court. But they might still bring suit before the federal courts not only on the regular grounds of diversity of citizenship and federal question but also on the theory that the suit was ancillary to the main suit in which the receiver had been appointed. Where the suit was instituted in a state court, a few

that by the express terms of the will the income payable to the daughter under the trust was declared to be "free from the debts, control or interference of any husband she may have."


2. 25 Stat. 436 (1888), 28 U. S. C. § 125 (1926). ("Every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which the receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice.") In the process of interpretation, the federal courts have restricted the Act of 1888 to suits involving only some "act or transaction" of the receiver in carrying on the business which the court has put under his management. Thus suits for the recovery of property in the hands of a receiver are held not to concern any "act or transaction" of the receiver, and leave to sue in such cases must be obtained. In re Tyler, supra note 1; Coster v. Parkensburg Branch Rr. Co., 131 Fed. 115 (C. C. N. D. W. Va. 1904); Love v. Louisville and Eastern Rr. Co., 178 Fed. 507 (C. C. W. D. Ky. 1910); Dickinson v. Willis, 239 Fed. 171 (S. D. Iowa 1916); Field v. Kansas City Refining Co., 296 Fed. 800 (C. C. A. 8th, 1924); Chapman, Suits against Federal Equity Receivers (1927) 13 Va. L. Rev. 345, 349. For a similar reason, causes of action arising previous to the inauguration of a receivership are not maintainable without the previous permission of the court appointing the federal receiver. State of Oklahoma v. State of Texas, 265 U. S. 490, 492 (1924); Central Trust Co. v. East Tennessee, V. & G. Ry. Co., 59 Fed. 523 (C. C. S. D. Ky. 1894). But see Hall v. Wilson, 35 F. (2d) 189 (N. D. Tex. 1929). Suits against an incumbent receiver for causes of action arising under his predecessor in office are, however, maintainable without the previous leave of the appointing court. McNulta v. Lochridge, supra note 1. Finally, while the issues decided in a case properly tried in a state court cannot thereafter be reopened, the time and mode of payment of the judgment secured is designated solely by the federal court appointing the receiver. Texas and Pacific Ry. Co. v. Johnson, 151 U. S. 81 (1894); Wilcox v. Jones, 177 Fed. 870 (C. C. A. 4th, 1910); Dale v. Smith, 182 Fed. 360 (C. C. W. D. Mo. 1910).


courts therefore permitted removal by the federal receiver upon the ground that the suit was ancillary to the main proceeding. A more general method of removal, however, was that under the general removal statute upon the grounds of diversity of citizenship or federal question. For a time, the lower federal courts, apparently following a dictum in a Supreme Court decision, construed suits against federal receivers as involving a federal question, for the sole reason that the receiver had been appointed under a federal court order. Thus, a federal receiver could remove virtually at will under the general removal statute. The Supreme Court, however, reversed that trend of decision by holding that the mere fact that a federal receiver was a party to the suit did not raise a federal question; federal receivers were reduced to the status of ordinary persons sued in state courts insofar as the removal privilege was concerned. Later, a new possibility of removal was afforded federal receivers by the 1916 amendment to Section 33 of the Judicial Code which provided that an "officer of the courts of the United States" could remove a suit commenced against him in a state court "for or on account of any act done under color of his office or in the performance of his duties as such officer."


5. Carpenter v. Northern Pacific Rr. Co., 75 Fed. 850 (C. C. D. Wash. 1896); Sullivan v. Barnard, 81 Fed. 886 (C. C. W. D. Mo. 1897). But see Pitkin v. Cowen, 91 Fed. 599 (C. C. S. D. Ohio 1899); Gilmore v. Herrick, 93 Fed. 525 (C. C. N. D. Ohio 1899). It would seem that removal by a federal receiver upon the ground that the suit is ancillary to the suit in which he was appointed would be more properly denied. The removal privilege is a purely statutory one [DOE, FEDERAL JURISDICTION AND PROCEDURE (1928) at 347] and no provision in any removal statute justified removal of an ancillary suit. Removals under Section 2 of the general removal statute [25 STAT. 433 (1888), 28 U. S. C. § 71 (1926)], are expressly limited to cases in which the federal trial court has original, not ancillary, jurisdiction by Section 1 of the act.

6. Note 5, supra.

7. In determining whether diversity of citizenship exists in a suit against a federal receiver it is the receiver's personal domicile, rather than that of the corporation he is managing, that is determinative of the defendant's citizenship. See Farlow v. Lea, Fed. Cas. No. 4,649 at 1017 (N. D. Ohio 1877); Davies v. Lathrop, 12 Fed. 353 (C. C. S. D. N. Y. 1882); Brisenden v. Chamberlain, 53 Fed. 307 (C. C. D. S. C. 1892); Smith v. Rackliffe, 87 Fed. 964 (C. C. A. 9th, 1898).


12. The differences in the removal procedure between Section 33 and Section 28, which is the general removal section, are very marked. Under Section 28, it is necessary in order to sustain a removal that diversity of citizenship or a federal question be involved in a suit where the amount in controversy exceeds $3000. If removal is upon the ground of federal question, the facts revealing such must appear in the complaint. Walker v.
Lower federal courts unanimously agreed that a receiver was an officer of the court, and therefore within the purview of the act. They disagreed, however, as to when a suit against a federal receiver concerned an act done "in the performance of his duties." Upon the one hand it was contended that, either when engaged in activities in which he might incur personal liability, or when acting in a purely representative capacity, the receiver was performing duties imposed upon him by the court. It was therefore held that a suit relating to either situation was properly removable under Section 33. On the other hand, it was maintained that Congress intended to limit the removal privilege to those proceedings in which the attempt was made to subject the federal receiver to personal liability.

In a recent case, a suit was brought in a state court against the federal receiver of a railroad to recover damages for the death of plaintiff's son caused by the alleged negligence of an employee of the receiver in the operation of a train. Lacking the requisite diversity of citizenship or federal question to sustain a removal under the general removal section, the receiver invoked Section 33 to effect that result. The district court permitted the removal, but upon appeal from a judgment against the plaintiffs, the Circuit Court of Appeals reversed, and ordered a remand to the state court. The Supreme Court affirmed the decision of the Circuit Court of Appeals. It held that Section 33 does not extend federal receivers' right of removal to suits arising from the operation, through agents, of a business intrusted to their care. The express basis of the decision was that Congress did not intend to authorize that type of removal under Section 33.

That Congress did not intend the amendment to reach federal receivers sued in their representative capacity, is readily deducible from the dissimilarity between the functions of federal receivers and those of persons admittedly within the section, viz. federal revenue officers, officers of congress engaged in executing its orders, and marshals of the United States courts. The duties of these officers distinctly involve

Collins, 167 U. S. 57 (1897); Mayo v. Dockery, 108 Fed. 897 (C. C. E. D. N. C. 1901). Furthermore, under that section petition for removal together with a bond, must be filed in the state court before the time set for answer. But under Section 33, those conditions are eliminated. The petition for removal can be filed at any time before trial in a state court; the facts showing that the suit involves a federal question need not appear in the complaint; and no minimum jurisdictional amount is required.

13. It has long been held by the courts of the United States that a receiver is an officer of the court appointing him. See Booth v. Clark, 17 How. 322, 331 (U. S. 1854); Stuart v. Boulware, 133 U. S. 78, 81 (1890); Union Bank of Chicago v. Kansas City Bank, 136 U. S. 223 (1890); Porter v. Sabin, supra note 1, at 479; Atlantic Trust Co. v. Chapman, 208 U. S. 360, 370 (1908); Henn, op. cit. supra note 1, § 254.


the execution of recognized governmental functions. But, although the receiver is acting under the authority of the federal court which appointed him, his duties usually involve little more than the operation of a private business. In that respect his function approximates that of a business executive, rather than that of a governmental officer, and warrants no exemption from the ordinarily applicable state court jurisdiction. Furthermore, the clear motivation of Congress in allowing removal of criminal and civil suits against federal revenue officers or officers of congress who alone could remove prior to the amendment of 1916, would appear to be lacking in the case of suits against federal receivers. The purpose was to prevent an undue interference with the functions of those officers which had previously resulted from the prosecution of criminal and civil suits against federal officers in unfriendly state courts. And Congress deemed it necessary to provide against the repetition of that situation. No such danger, however, was or is apprehended from private suits against federal equity receivers. The absence of intention to include federal receivers within the amendment is further evidenced by the fact that an extension of the removal privilege under Section 33 to such receivers would virtually nullify Section 66 of the Judicial Code. The latter section authorizes suits to be brought against federal receivers without previous leave of the appointing court. Its obvious design was to permit suits to be tried in state courts which might otherwise be litigated in the federal courts. It is apparent that to enable receivers to remove on their own volition would tend completely to emasculate Section 66 and defeat its purpose. In view of the facts that Congress had never, previous to the amendment of 1916, expressed a desire to repeal Section 66, and that no particular necessity for so doing had been revealed, it is all the more reasonable to conclude that Congress did not intend to nullify Section 66 by extending the removal privilege to federal receivers through the amendment of 1916. The general tendency of Congress to restrict the jurisdiction of the federal courts fortifies this conclusion.

This line of reasoning would be equally applicable to deny the privilege of removal under Section 33 to federal receivers where it is sought to hold them responsible in

20. Only when the acts for which those officers stand accused are done in the line of their duties as such officers are they accorded the privilege of removal under § 33. Maryland v. Soper, 270 U. S. 9 (1926); Colorado v. Symes, 286 U. S. 510 (1932); State of Illinois v. Fletcher, 22 Fed. 776 (C. C. N. D. Ill. 1884); State of Florida v. Huston, 283 Fed. 687 (S. D. Fla. 1922).

21. Tennessee v. Davis, 100 U. S. 257 (1879); see Dorey, op. cit. supra note 6, at 395; Frankfurter, Distribution of Judicial Power Between United States and State Courts (1928) 13 CORN. L. Q. 499, 508; Strayhorn, Immunity of Federal Officers from State Prosecution (1928) 6 No. CAR. L. Rev. 123.

22. See Strayhorn, ibid.

23. Note 2, supra.


26. That restrictive policy is reflected in a steady stream of federal legislation from 1887 to 1925. See Frankfurter, supra note 21. It may be argued, of course, that while the general tendency of Congress may be to restrict the jurisdiction of the federal trial courts, an anomalous and undesirable situation may have prompted Congress slightly to broaden that jurisdiction as a means of eliminating that condition. This argument, however, cannot be availed of by federal receivers for the reason that no manifest evil necessitated elimination. But that such was the case insofar as United States Marshals were concerned, see Report of Judiciary Committee of the House, H. R. REP. No. 776, 64th Cong. 1st Sess. (1915) 53 Cong. Rec. 9442.
their own persons or property. In absence of a demonstrated need for removal privileges arising out of the special character or consequences of personal suits against them, the exclusion of federal receivers from the Congressional intent under Section 33 would be complete. The issue, however, was not before the court in the principal case and hence not settled. But since the vast majority of suits are directed against receivers in their official capacities rather than their personal capacities, the Supreme Court's confinement to the holding that federal receivers, sued in their official capacities, may not remove under Section 33 is hardly the less effective to restrict federal receivers to the state courts, and in so doing to foreclose a possible source of prolific federal litigation. And that result is, in itself, highly justifiable in view of the desirability of relieving the overcrowded dockets of the federal trial courts.

ADEQUACY OF SECURITY FOR JUST COMPENSATION IN MUNICIPAL EMINENT DOMAIN PROCEEDINGS

The capacity of the state to acquire private property for public use by the exercise of its power of eminent domain is said to be an inherent incident of governmental sovereignty; but the application of the power is subject to certain limitations imposed by both state and federal constitutions and by judicial construction. Perhaps the most significant qualification is the constitutional requirement that just compensation be paid to the individual whose property is taken. It is obvious that the determination of what constitutes a just compensation, and its method of payment, gives rise to problems not susceptible to a simple disposition, and must depend largely on the circumstances of the particular case; the resulting interpretations have been universally swayed in large measure by a desire to afford to the owner of private property the maximum of protection consistent with a recognition of the sovereign power to condemn.

A striking delimitation of the concept of just compensation appears in a recent New Hampshire case. A village district sought to condemn the property of an electric lighting company, acting under a statute which provided that both possession

27. The court intimated, however, that it would decline to permit a removal by federal receivers under § 33 even when sued personally.


2. The limitation upon the power of the federal government is expressed in the Fifth Amendment to the Constitution, providing that "... nor shall private property be taken for public use, without just compensation." Similar provisions are said to exist in every state constitution, except those of New Hampshire and North Carolina. MICHIGAN JUDICIAL COUNCIL, EMINENT DOMAIN (1931) 56. And in these states the same result has been reached through judicial construction of "due process" clauses. Staton v. Norfolk and Carolina Rr. Co., 111 N. C. 278, 16 S. E. 181 (1892); In re Opinion of the Justices, 66 N. H. 629, 33 Atl. 1076 (1891). It has been suggested that even without a constitutional stipulation the requirement of just compensation would be imposed by the dictates of natural justice. Grant, The "Higher Law" Background of the Law of Eminent Domain (1931) 6 Wis. L. Rev. 67.

3. 1 NICHOLS, EMINENT DOMAIN (2d ed. 1917) § 1.

and title should pass to the condemnor before payment of compensation when the value of the property was in dispute. The utility brought a bill to enjoin the condemnation proceedings on the ground that the financial condition of the condemnor was so unsound as to give no proper security for payment of the final award, and that the statute authorizing the condemnation was therefore confiscatory. It appeared that the municipal power to tax and to borrow might be insufficient to meet the award of compensation which would subsequently be made. The court accordingly granted the injunction, holding that the usual presumption of the sound credit of a municipality was non-existent in the present economic situation, and that the security for compensation to the utility was not sufficiently certain to permit a taking of the property.

Both the manner and time of making payment of a compensation award are usually determined by express constitutional provisions which, of course, are controlling. Some such provisions require in all cases a complete determination of the issue of value, and payment of the final award, prior to any taking of the property. Others draw a distinction between a taking by the state and a taking by a private corporation, empowered by statute to condemn, requiring prepayment only by the latter. In still other jurisdictions there is offered the alternative of prepayment or the giving of adequate security in all cases to the condemnee. When a private corporation is permitted to acquire property merely upon providing security, it would seem that such a taking is violative of the requirement of just compensation unless the security offered is sufficient beyond any doubt. For the condemnee should not be compelled to resort to an action at law to secure a judgment against a corporation, whose financial structure may prove inadequate. However, it has been held in the case of a private taking that a deposit in court, pending appeal, of double the amount awarded by commissioners is adequate security for compensation to the utility was not sufficiently certain to permit a taking of the property.

8. IND. CONST., Art. 1, § 21; KAN. CONST., Art. 12, § 4; OHIO CONST., Art. 13, § 5; WASH. CONST., Art. 1, § 16.
9. This provision is applicable both to the state and to private corporations. IOWA CONST., Art. 1, § 18; MICH. CONST., Art. 15, §§ 9, 15; MINN. CONST., Art. 1, § 13; PA. CONST., Art. 1, § 10; S. D. CONST., Art. 17, § 18. In a few states it is applicable only to private corporations. Ark. CONST., Art. 12, § 9; FLA. CONST., Art. 16, § 29; Ore. CONST., Art. 11, § 14; S. C. CONST., Art. 9, § 20; Tex. CONST., Art. 1, § 17; W. VA. CONST., Art. 3, § 9.
12. Ibid.
purpose\textsuperscript{14} or by means of a bond with sureties for a fixed amount\textsuperscript{15} does not satisfy the constitutional requirement, since the determination of the amount of compensation is not a legislative but a judicial function\textsuperscript{16} and the fixed amount may prove to be inadequate. Also a deposit of no more than the award, to remain in court until final judgment on appeal, has been held insufficient security on the ground that the award might subsequently be materially increased\textsuperscript{17}.

When private property is taken by the state or by any municipal corporation acting under authority from the state, in the absence of an express constitutional provision to the contrary, payment of the compensation, under the usual view, need not precede either the entry upon the land or the passing of title.\textsuperscript{18} But the concept of security to the condemnee still obtains.\textsuperscript{19} The result, however, must necessarily be distinguished from that reached where the taking is by a private corporation, since payment of the compensation is here ordinarily a public obligation, and it is assumed that the property of the state or municipality is a fund to which resort may be had without risk of loss. Accordingly, the credit of the public is by itself alone adequate security, and to require a condemnee to rely upon that security is not a confiscation.\textsuperscript{20} The presumption of soundness of the public credit has been held, however, to be rebutted by proof that the resources of the municipality were insufficient to enable it to make compensation within a reasonable time.\textsuperscript{21} Moreover, if the terms of the statute authorizing the condemnation are such as not to make the payment of the compensation a public charge, the soundness of the public credit becomes an irrelevant factor and security in some other form must be provided.\textsuperscript{22} This result has been reached in one instance where a condemnation statute directed the payment of compensation out of the earnings of a railroad owned by the state. Even though it was admitted that the earnings would be ample for payment, it was held that such a provision did not supply a sufficiently certain security to satisfy the constitutional requirement.\textsuperscript{23} Where compensation is to be made only out of a particular appropriation for that purpose, it is likewise not a public charge; and if there

\begin{itemize}
\item \textsuperscript{14} State v. McCook, 109 Conn. 621, 147 Atl. 126 (1929).
\item \textsuperscript{15} Brewster v. J. & J. Rogers Co., 169 N. Y. 73, 62 N. E. 164 (1901).
\item \textsuperscript{16} See Monongahela Navigation Co. v. United States, 148 U. S. 312, 327 (1892).
\item \textsuperscript{17} Harrisburg, Carlisle & Chambersburg Turnpike Road Co. v. Harrisburg & Mechanicsburg Electric Ry. Co., 177 Pa. 585, 35 Atl. 850 (1896).
\item \textsuperscript{18} Sweet v. Rechel, 159 U. S. 380 (1895); United States v. McIntosh, 2 F. Supp. 244 (E. D. Va. 1932).
\item \textsuperscript{20} An extreme result of this doctrine is presented in \textit{In re City of Cedar Rapids}, 85 Iowa 39, 51 N. W. 1142 (1892) where it was held no defence in condemnation proceedings by a city that the city had at the time no funds with which to pay for the land and that because of its obligation under the award it would incur an indebtedness in excess of the constitutional limit.
\item \textsuperscript{21} Keene v. Bristol, 26 Pa. 46 (1856).
\item \textsuperscript{22} But there seems to be a tendency to construe condemnation statutes as pledging the full faith and credit of the public even where mention of a specific fund is made. \textit{Cf.} Liberty Central Trust Co. v. Greenbrier College for Women, 50 F. (2d) 424 (S. D. W. Va. 1931), aff'd, 238 U. S. 800 (1931).
\item \textsuperscript{23} Connecticut River Rr. Co. v. County Commissioners of Franklin, 127 Mass. 50 (1879).
\end{itemize}
is a deficiency in the amount of the appropriation, the property may not be taken.\textsuperscript{24}

In the present case the statute authorizing the condemnation provided for no security other than the public credit. Traditionally, this would have been sufficient. But the court took judicial cognizance of the present prevailing condition of economic uncertainty and concluded that present circumstances required an additional measure of protection in order to sustain the concept of adequate security. This additional measure was recognized in holding that the presumption of the soundness of public credit could not constitutionally be one of law, but only the result of a factual situation, and that the situation now no longer warranted the existence of the presumption. Such a conclusion seems under the circumstances manifestly in accord with the purpose of the requirement of just compensation. But the result reached suggests a serious qualification on the power of municipal corporations to acquire property by condemnation, since many cities may, in the present state of affairs, be unable to provide the requisite degree of further security.

RESALE PRICE MAINTENANCE UNDER THE N.R.A. CODES

The practice of retail price cutting, which seems to have begun late in the nineteenth century, has increased continually with the development and expansion of department and chain stores, and mail order houses.\textsuperscript{1} During this period, well advertised trade names have replaced the retailer's personal assurance as criteria of quality,\textsuperscript{2} and the result has been economic warfare between the manufacturer, attempting to maintain high prices in the sale of his article, and the more ambitious retailers, who have found in quick turnovers and "loss leaders" the means to larger profits.\textsuperscript{3} Manufacturers and vendors of trade-marked products have tried the devices of licensing,\textsuperscript{4} consigning,\textsuperscript{5} contracts to sell at fixed prices,\textsuperscript{6} threats of refusal to deliver,\textsuperscript{7} and the assistance of trade associations\textsuperscript{8} in order to maintain the price level of their products.

\textsuperscript{24} Miller v. United States, 57 F. (2d) 424 (App. D. C. 1932).


2. Id. at 18.


and to make them profitable items in the retailer's stock. Legal interference, however, has contributed to the failure of these methods and the conflicting interests of the consumer, wholesaler, manufacturer, "cut-rater," and smaller retailer have remained in a state of economic anarchy.

The courts have consistently ignored the social problem and the economic interests at stake. Guided by precedent to the effect that no man may distrain the use of personalty after transferring title, and aided by the anti-trust laws, they have held all agreements to maintain price levels illegal. But they have also recognized as equally good common law that an owner may choose his customers. The product has been a play on words rather than a frank recognition of the difficulty. Courts have said the manufacturer may refuse to sell to price cutters and inform them of his intention. But he may not sign contracts for price fixing, inquire through agents or other dealers to discover those who use his product as a loss leader, keep a list of offenders, or employ any mark of identification to trace the

11. See note 3, supra.
12. "Whether a producer of goods should be permitted to fix by contract, express or implied, the price at which the purchaser may resell them, and if so, under what conditions, is an economic question. To decide it wisely, it is necessary to consider the relevant facts, industrial and commercial, rather than established legal principles." Brandeis, J., in Boston Store v. American Gramaphone Co., supra note 6, at 27, 28.
15. See note 6, supra; Miles Medical Co. v. Park and Sons Co., supra note 5, at 411, Holmes, J. dissenting ("There is no statute covering the case; there is no body of precedent that by ineluctable logic requires the conclusion to which the court has come.").
17. See Motion Picture Co. v. Universal Film Co., 243 U. S. 502, 520 (1917) (Holmes, J. dissenting); cf. United States v. General Electric Co., supra note 5.
19. See note 6, supra.
20. Oppenheim, Obendorf and Co., Inc. v. Federal Trade Commission, 5 F. (2d) 574 (C. C. A. 4th, 1925); and cases cited note 7, supra.
source by which the cut-rate dealer obtained his product. The distinction, however, between an agreement to maintain prices, a mere suggestion that the price be maintained, and virtual agreements cannot be clearly made in terms of the social facts; although the matter still occupies the Federal Trade Commission and the Federal Courts.

Although the Supreme Court has refused to pass on the subject of resale price maintenance, for a number of years the lower courts have continued to condemn the practice. Thus, in a recent case, the Sheaffer Pen Co. was enjoined by a federal district court from proceeding further in the state courts against a "cut-rate" drug store, selling Sheaffer pens from which the maker's serial number had been buffed out with consequent damage to the pens; the ground given to sustain the injunction was that the state court suit was intended to aid the pen company in unlawfully restraining trade and competition by maintaining price levels. In its anxiety to enforce a dubious policy, the court apparently ignored the fact that in selling seriously damaged merchandise, and misrepresenting to the public that it was a guaranteed pen, the petitioners entered a court of equity with unclean hands.

The advent of the N.R.A. and the retailer's codes pursuant to it, offer little constructive relief to the manufacturer or consumer, and their effect has been further curtailed by at least one court. Under the provisions of the Code of Fair Competition of the Retail Trade and the various retail codes, "loss leaders," and sales below cost are prohibited. But when a manufacturer brought an action to enjoin the petitioner in the above case from selling his electrical machines below cost, the court denied that the defendant had violated his code, since he was selling only below replacement cost.

26. These facts appear from a complaint filed by the Federal Trade Commission against the W. A. Sheaffer Pen Co. (Docket No. 2158, 1934, p. 3) and the answer of the Pen Co. filed March 22, 1934 (supra, at p. 4).
28. CODE OF FAIR COMPETITION FOR THE RETAIL TRADE, (1933) art. VIII; CODE OF FAIR COMPETITION FOR THE RETAIL DRUG TRADE (1933) art. VII.
29. CODE OF FAIR COMPETITION FOR THE RETAIL TRADE, (1933) art. IX, § 1 c.
30. The provisions of the drug code seem to have been inadequate, being ineffective to prevent selling below cost by the small dealer. It was modified on March 29, 1934 by art. VIII, § 6 which prohibits sales below the manufacturer's wholesale list price per dozen items.
31. Chicago Flexible Shaft Co. v. Katz Drug Co., supra note 27. The complainant, manufacturer of the article, waged a price war with the defendant who sold his "Mixmasters" at a reduced price, by ordering other dealers to undersell at his expense. After driving the defendant to reduce his price below the original wholesale price, complainant brought this suit. The defendant showed that the plaintiff's activities made it possible for him to buy the machines below the price at which he was selling it. It is difficult to understand why the "loss leader" clause of the codes did not apply since it
the plaintiff's request that the defendant be forced to sell at the retail list price, the court apparently accorded practices of cut throat competition the sanction of public policy; it noted that the attempt of the plaintiff to maintain such a price would constitute restraint of trade.\(^3\)

It is unfortunate that during a period of unusual social change through governmental enactment no more desirable solution has been found.\(^3\) The consumer's reliance on trade names in the hope of purchasing trustworthy products,\(^3\) has raised the price of these articles far beyond their value without labels;\(^3\) but the manufacturer must keep the prices high to maintain their prestige, and to encourage their sale by the retailer.\(^3\) On the other hand, the consumer cannot be expected to buy at a price higher than he need pay; and it is certain that some enterprising middleman will be found ready to profit by the situation. Thus the conflicting interests of various economic groups jeopardize money invested in advertisements, the interests of the small retailer who requires a larger percent profit, the wholesaler, and the consumer. The attitude of the law has in the past, been "laissez-faire;" and the present codes are inadequate, since they merely prohibit the relatively rare incident of cutting prices below cost,\(^3\) and that, only in particular industries. Recent judicial treatment, moreover, threatens to make the codes completely abortive in this respect by the narrow interpretation of provisions, and the insistence that only the government may prosecute under the N.R.A.\(^3\) If the situation would be remedied, a more thorough governmental policy, extending beyond mere price maintenance would seem necessary to decrease the waste of advertisement which is finally charged to the consumer,\(^9\) to give the retailer a fair profit or eliminate the "inefficient" small shop, and to guaranty to the public that it is purchasing honest and unmisrepresented values at a fair price.\(^4\)

includes in the cost of the item an allowance for store wages. Furthermore, it does not seem that a "loss leader" need constitute a sale below cost or that it refers to replacement cost. The court might also have found a violation of the advertisement clause of the code, supra note 29, since the defendant had advertised its cut-rate policy.

The court cited Purvis v. Bazemore, S F. Supp. 230, 232, which decided, inter alia, that an individual member of an industry could not maintain action against another under the code; that the enforcement of the N.R.A. was solely a governmental privilege. The court's interpretation of the N.R.A., 15 U. S. C. Supp. VII § 703c (1933), seems doubtful since it does not explicitly or implicitly reserve the right of prosecution to the government.

32. 15 U. S. C. Supp. VII § 705 (1933) exempts codes, agreements and licenses from the operation of anti-trust laws. It does not however, appear here that the plaintiff was under the N.R.A.

33. With the exception of the Code of Fair Competition for the Petroleum Industry (1933) art. 5 rule 26, it seems no code provides for resale price maintenance, although a number of proposed codes contained such provisions. MAYERs, A HANDBOOK OF N.R.A. (2d ed. 1934) § 364.

34. Such reliance has generally proved unjustified. See note 2, supra; CHASE AND SCHLINK, Your Money's Worth (1928); KALLET AND SCHLINK, 100,000,000 Guinea Pigs (1933).

35. UNITED STATES FEDERAL TRADE COMMISSION, op. cit. supra note 3, at 159; CHASE, The Economy of Abundance (1934) 159-165.

36. See note 9, supra.

37. UNITED STATES FEDERAL TRADE COMMISSION, op. cit. supra note 3, at 4.

38. See note 31, supra.


40. See note 34, supra; Schlink, Safeguarding the Consumer's Interest (1934) 172 ANN. AM. ACAD. 113; see also generally, the whole of volume 173 of the same publication.
PAYMENT OF DIVIDENDS FROM WASTING ASSET CORPORATION TO INCOME OF TRUST RATHER THAN CORPUS

By the terms of a living trust in a recent New Jersey case, the settlor directed payment to his daughter during her lifetime of the income arising from the corpus of the trust, which consisted of stock in a copper mining company; at her death the income was to be paid to a subsequent life tenant, with the remainder over to other specified persons. Subsequent to the settlor's death, dividends were declared on the stock out of a depletion reserve, representing the value of ore extracted from the mine. The daughter thereupon brought suit against the trustees to compel payment to her of the dividends as "income," which claim the second life tenant and remaindermen contested on the ground that, since the dividends arose from the sale of ore, which was the company's sole asset, they should be retained as part of the corpus. It was found that the depletion reserve was a mere book entry established to decrease income tax payments, that both the settlor and company understood "income" to include payments out of this reserve, and that the trustees had, during the settlor's lifetime, paid similar dividends with his approval to the daughter. The court held, therefore, that the dividends should be paid to the daughter as income, since such a disposition would effectuate the settlor's apparent intention.

Dividends from mining and similar wasting asset corporations result from the sale of capital assets. Logically, the distribution of the entire sale proceeds by this device returns to stockholders the proportionate share of their capital investment represented by the assets sold in addition to any profit arising from the sale. But the payment of wasting asset dividends to a trust fund, however, is not usually treated as a return of capital; and consequently mining, oil, lumber, and speculative land company dividends have all been held to be legitimate income which must be allocated to the life beneficiary rather than to the trust corpus. These results may be explained in part by the influence of the analogous treatment accorded to the earnings of the wasting asset corporation itself. Thus the capital of such corporations has been held not to be dissipated in violation of statutes by the declaration of dividends where no depletion reserve had been created, on the ground that the capital element of the

2. Dividends arising from corporate exploitation of patents are also termed wasting asset dividends, but are not considered here as they do not physically represent sold assets. Treatment of dividends of this nature may be found in Union County Trust Co. v. Gray, 110 N. J. Eq. 270, 159 Atl. 625 (1932); cf. Mellon v. Mississippi Wire Glass Co., 77 N. J. Eq. 498, 78 Atl. 710 (1910); 2 COOK, CORPORATIONS (8th ed. 1923) § 546.
5. Washington County Hospital Association v. Hagerstown Trust Co., 124 Md. 1, 91 Atl. 787 (1914).
7. Excelsior Water and Mining Co. v. Pierce, 90 Cal. 131, 27 Pac. 44 (1891); Lee v. Neuchatel Asphalt Co., 41 Ch. D. 1 (1889); 2 CLARK AND MARSHALL, PRIVATE CORPORATIONS (1901) 1593, 1594; 6 FLETCHER, PRIVATE CORPORATIONS (1917) § 3670; 7 THOMSON, CORPORATIONS (3d ed. 1927) § 5302; see Van Vleet v. Evangeline Oil Co., 129 La. 406, 410, 411, 56 So. 343, 344 (1911); cf. Young v. Haviland, 215 Mass. 120, 102 N. E. 338 (1913);
payment was part of the usual income or profits of exploitation. Likewise taxation of gross receipts as income, with inadequate allowance for capital depreciation, and of the total amount of dividends paid to stockholders has been sustained. A further explanation for the customary distribution of these dividends as trust income is the simplicity of such a disposition, since a determination of what portion of such distributed profits represents depleted capital, and what represents actual profits of the process of exploitation, would require cumbersome calculation. Still another basis for reaching this conclusion is found in the apparent belief that such a distribution was intended by the settlor. If specific evidence of his intent is available, whether from indicative statements in the will or deed of trust or from extrinsic circumstances as in the instant case, that intent is considered paramount over any other rule of construction. In the absence of any evidence pointing to a specific intent, the fact that the average individual generally looks upon dividends from any source as being income leads reasonably to the conclusion that the settlor of a particular trust intended such a treatment.

Nevertheless if actual depletion of capital assets in the corporation has occurred as a consequence of excessive dividend payment, and to such an extent as to impair seriously the remainder interest in the stock held in trust, it would seem that the dividends paid to the trustee should be apportioned between corpus and income. It can scarcely be maintained that the settlor would intend that the entire corpus should be exhausted, as a result of a liberal dividend policy, when its effect would be to render worthless the interest of the remaindersmen. Had he so intended, the naming of the remaindersmen would have been superfluous. Consideration of this factor has influenced a Wisconsin court to hold that dividends declared by lumber companies, some of which were closing out and others greatly reducing their timber acreage, should be apportioned between corpus and income of a trust fund; and a similar allocation was directed in a California decision dealing with dividends resulting from funds accumulated by a gradual sale of certain land, the sole asset of the realty corporation paying the dividends. To recognize the existence of this qualification,

Dealers' Granite Corp. v. Faubion, 18 S. W. (2d) 737 (Tex. 1929); Boothe v. Summit Coal Mining Co., 55 Wash. 167, 104 Pac. 207 (1909).


9. Van Dyke v. Milwaukee, 159 Wis. 460, 146 N. W. 812 (1914).

10. Compare the rule permitting a life tenant to enjoy all profits realized from the exploitation of open mines, even to the exhaustion of the mineral deposits. Butler v. Butler, 176 Ark. 126, 2 S. W. (2d) 63 (1928); Crain v. West, 191 Ky. 1, 229 S. W. 51 (1921); 1 THORNTON, OIL AND GAS (3d ed. 1918) § 297; cf. Seager's Estate, 92 Mich. 166, 52 N. W. 299 (1892).

11. Oil dividends were held income partly on the basis that the depletion of an oil well could not be accurately calculated. City Bank Farmers' Trust Co. v. McCarter, supra note 4.


13. Matter of James, 146 N. Y. 78, 100, 101, 40 N. E. 876, 880 (2nd Dep't 1895).

14. Estate of Wells, 155 Wis. 294, 144 N. W. 174 (1914).

that an apportionment must be decreed where the remainder interest of the corpus
would otherwise be seriously impaired, in no way conflicts with the decisions which
establish that wasting asset dividends must go to the income of the trust. For these
decisions have resulted where the share value of the particular stock held in trust
was still high,\textsuperscript{16} where the corporations paying the dividends either owned extensive
properties,\textsuperscript{17} or, after paying dividends out of an appreciation of capital assets, still
retained assets equal in value to the capital originally invested,\textsuperscript{18} or where the
remaindermen despite the payment to income were reasonably certain of being
left a substantial sum.\textsuperscript{19} Consequently, these holdings do not preclude an allo-
cration between income and corpus in situations in which serious depletion in cor-
porate assets has resulted. In the instant case no real danger to the remainder
interest was shown, and therefore no necessity for apportionment existed. Had
it been established, however, that serious depletion had in fact resulted, it is
of the dividends as represented depleted capital.\textsuperscript{20}

\textbf{POWERS OF THE FEDERAL TRADE COMMISSION IN PROHIBITING UNFAIR METHODS OF
COMPETITION}

Respondent sold in interstate commerce in competition with others penny candy
which it manufactured. As a means of stimulating the sale of its products, particu-
larly to children, who were the major purchasers of such candy, it employed various
devices partaking of the nature of gambling. It arranged one assortment of candies
so that coins were concealed within the wrappers of a few packages; another so
that the price to be paid for the piece of candy was not disclosed until the wrapper
had been removed; and a third so that the chance recipients of the few pieces with
colored centers were given prizes. The scheme was effective to increase sales,
despite the fact that the candy thus sold was, as found by the Federal Trade Com-
mission, inferior to that sold by competitors at similar prices. Upon investigation,
the Federal Trade Commission, acting under Section 5 of the Federal Trade Com-
mission Act, issued an order to cease and desist the practice on the ground that it
constituted an unfair method of competition. This order was then reversed by the
Circuit Court of Appeals,\textsuperscript{1} but upon appeal to the Supreme Court, was reinstated.\textsuperscript{2}

\begin{itemize}
\item 16. Old Colony Trust Co. v. Shaw; Waterman's Estate, both \textit{supra} note 3.
\item 17. Washington County Hospital v. Hagerstown Trust Co., \textit{supra} note 5.
\item 18. Oliver's Estate and Thompson's Estate, both \textit{supra} note 6.
\item 19. Reed v. Head, \textit{supra} note 6, at 178.
\item 20. \textit{Cf.} Lannin v. Buckley, 256 Mass. 78, 152 N. E. 71 (1926); Matter of Enz., 204
    App. Div. 634, 198 N. Y. Supp. 802 (3d Dep't 1923); \textit{Loring, A TRuster's HANDBOOk
    (4th ed. 1928)} 164, 165. The rule that wasting asset corporations do not dissipate capital
    in dividends by failure to provide for a depletion reserve has also been questioned where
    the depletion will injure preferred stockholders and creditors. Lee v. Neuchatel Asphalte Co.,
    \textit{supra} note 7, the much cited authority for this rule, has been weakened by later English
dicta. Bond v. Barrow Haematite Steel Co., [1902] 1 Ch. 353; \textit{PALMER'S COMPANY LAW
    (England, 13th ed. 1929)} 227, 228. A Delaware decision, departing from the rule, has
    received favorable comment. Wittenberg v. Federal Mining and Smelting Co., 15 Del. Ch.
    147, 133 Atl. 48 (1926); noted in (1926) 40 \textit{Harv. L. Rev.} 318 and (1926) 75 \textit{U. of Pa. L.
    Rev.} 89. But \textit{cf.} \textit{Note (1926) 12} \textit{Corn. L. Q. 79}. The decision was affirmed in 15 Del. Ch.
    (1927).
\end{itemize}

1. R. F. Keppel and Brothers v. Federal Trade Commission, 63 F. (2d) 81 (C. C. A.

A not infrequent judicial utterance concerning the Commission's powers under Section 5 of the Federal Trade Commission Act, previous to this decision, was that they extended only to those practices which had previously been condemned as unfair under the Act, or which were unfair at common law, or which tended toward the restraint of trade or the creation of monopoly. In the present case there was no question of restraint of trade or monopoly; nor had the use of chance devices previously been adjudged illegal either at common law or under the Act. For that reason the lower court refused to sustain the Commission's order. But the Supreme Court, expressing a less restricted view of the scope of the Commission's powers, declared that the prohibition of unfair methods of competition does not extend solely to the above enumerated practices. It held that the prohibition may also include other and new types of competition, provided they are found to be unfair, to result in an injury to those competitors who do not employ them, and to be of sufficient public importance to satisfy the statutory requirement that the proceeding be brought in the public interest. No question arose as to the existence of the latter two requisites in this instance, the argument devolving around the question of whether the practice was unfair. The Court held that it was, resting its conclusion upon the ground that it was analogous to the forbidden practice of mislabelling.

3. In Federal Trade Commission v. Gratz, 253 U. S. 421, 427 (1920), the court said that the words unfair methods of competition "are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud, or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly." Also, Denison, J., in L. B. Silver Co. v. Federal Trade Commission, 289 Fed. 985, 993 (C. C. A. 6th, 1923), said that "a study of the Congressional Record convinces me that the Federal Trade Commission was wholly collateral to the Sherman and other anti-trust acts, and that the 'unfair methods of competition' intended to be reached by Section 5 are only such methods as tend toward the monopoly or restraint of trade which the anti-trust laws prohibit." See Standard Oil Co. of New York v. Federal Trade Commission, 273 Fed. 478, 482 (C. C. A. 2d, 1921); Kinney-Rome Co. v. Federal Trade Commission, 275 Fed. 665, 667 (C. C. A. 7th, 1921); John Bene and Sons, Inc. v. Federal Trade Commission, 299 Fed. 468, 471 (C. C. A. 2d, 1924); Raladam Co. v. Federal Trade Commission, 42 F. (2d) 430, 435 (C. C. A. 6th, 1930), aff'd, 283 U. S. 643 (1931); Federal Trade Commission v. Paramount Lasky Corp., 57 F. (2d) 152, 154, 157 (C. C. A. 2d, 1932).


5. While this was the first time in which the use of chance schemes was passed upon by the Court, the Commission has from time to time issued a number of orders to cease and desist such practices. For a few representative cases see In the Matter of Reinhart and Newton Co., 10 Fed. Trade Com. Dec. 110 (1926); In the matter of A. L. Douglas and Co. and Lincoln Sales Co., 16 Fed. Trade Com. Dec. 353 (1932).

6. This represented the first case in which the Supreme Court has expressly stated that the Commission's jurisdiction is not confined to those practices theretofore held unfair, or which tended toward an undue restraint of trade or creation of monopoly. For a similar view see HENDERSON, THE FEDERAL TRADE COMMISSION (1924) 33-37; Seligson, Trade Regulation (1923) 9 A. B. A. J. 698; Handler, The Jurisdiction of the Federal Trade Commission over False Advertising (1931) 31 Col. L. Rev. 527, 530.


in that it compelled respondent’s competitors either to adopt practices which they were “under a strong moral compulsion not to adopt” or suffer a loss of business. There is, of course, ample reason for distinguishing between the “element of chance” employed in this case, and the “element of deception” involved in the usual misbranding case. In the latter instance the consumer is deceived into purchasing a different article than is represented to him. Here the plan was truthfully advertised and the consumer when making his purchase got exactly what he was told he would get, and what he evidently desired—a piece of candy and a chance.

Granting that those practices which business men “should not adopt” constitute unfair methods of competition, the question still remains as to why, in the face of a diversion of trade which might otherwise be retained, they should refuse to use the method involved in the principal case. The reason is found in the injury which its use will entail to the public. In the advertising cases, that injury consists of deception with the resultant purchase of a different and usually inferior article than is represented. In the case under consideration, while the deception element was lacking, still the consumers of the product were induced by the gaming device to purchase a product inferior to that which they might otherwise procure for the same price. But in the eyes of the Court the financial injury was subordinate to the moral one, which consisted of a tendency to encourage gambling, a form of conduct that it deemed subversive of general morality and so contrary to public policy as frequently to have been an object of statutory prohibition.

As significant as the Court’s declaration that the Commission’s powers under Section 5 are not as restricted as had previously been assumed, is its statement to the effect that in reviewing the orders of the Commission, its determination of what is an unfair method of competition is “of weight.” Although it is not made clear just what weight is to be accorded that determination, the enunciation is important as expressing an attitude not hitherto apparent. In the past, the Court, in the exercise of its self-imposed duty of deciding as a matter of law what practices are unfair, has paid the Commission’s orders little respect and has not hesitated to reject them. With the retention of the power to decide what practices are unfair, the Court may still substitute its own findings and conclusions for those of the Commission. But the language employed in this case, as well as the result, seems to indicate a willingness to abstain from the exercise of that prerogative. To do so, and consequently to accept as valid the conclusions of the Commission would be greatly to increase its effectiveness in the suppression of questionable competitive methods, a result in accord with the evident purpose of Congress in the establishment of that body.


12. See note 10, supra.

13. The fact that the practice involved in this case was a comparatively petty one, and one which the court believed to be contrary to the moral welfare of the public must be considered in setting up this case as indicative of a more liberal attitude towards the Com-
Validity of Voluntary Conveyance Attacked as Fraudulent—Admissibility of Parol Evidence to Vary Recital of Consideration in Deed

Plaintiff, an existing creditor of the grantor, filed a bill to set aside as fraudulent a conveyance made on a recited consideration of one dollar and love and affection. The trial court, over complainant's objection, admitted evidence of an indebtedness due from grantor to grantee as the true consideration for the deed, and dismissed the bill on the ground that actual fraud, necessary to set aside a conveyance based on valuable consideration, had not been proven. On appeal, the supreme court of Alabama declared the deed void on its face and the admission of parol evidence to be reversible error.

The rule prevalent in eighteenth and nineteenth century England and given powerful impetus in the United States by Chancellor Kent, that a voluntary conveyance is absolutely voidable at the instance of creditors existing at the time of the conveyance, regardless of the grantor's intent and financial position or the size of the gift, prevails yet in some American jurisdictions. This may take the form of statute, or, where local enactments, modelled after the Statute of 13 Elizabeth c. 5, make no specific provision as to the validity of voluntary conveyances, the form of judicial legislation. In support of this view, it is arguable that the subsequent in-mission's findings. The court may not be so favorably disposed towards the Commission's findings in a case concerning practices employed by a large corporation which really involve a substantial restraint of trade. Cf. Federal Trade Commission v. Eastman Kodak Co., 274 U.S. 619 (1927).

2. Taylor v. Jones, 2 Atk. 600 (1743); Townsend v. Windham, 2 Ves. Sr. 1 (1750); Spirett v. Willows, 3 DeG. & S. 293 (1865).
4. A voluntary conveyance "is a conveyance founded merely and exclusively on a good, as distinguished from a valuable consideration, on motives of generosity and affection rather than on a benefit received by the donor or detriment, trouble, or prejudice to the donee." Bibb v. Freeman, 59 Ala. 612, 615 (1877).
5. KY. STAT. (Carroll, 1930) § 1907; OKLA. STAT. (1931) § 9697; VA. CODE ANN. (Michie, 1930) § 5185; W. VA. CODE (1931) c. 40, art. 1, § 3.
6. For the text of this statute, the original fraudulent conveyance act, see Glenn, Fraudulent Conveyances (1931) Appendix, p. 587.
7. The Alabama statute is typical of those found in states where the Uniform Fraudulent Conveyance Act is not in force. ALA. CODE (Michie, 1928) § 8038: "All conveyances ... made with intent to hinder, delay, or defraud creditors, ... of their lawful suits, damages, forfeitures, debts or demands ... against the persons who are or may be so hindered, delayed, or defrauded, their heirs, personal representatives and assigns, are void."
8. Sexton v. Wheaton, 8 Wheat. 229 (U. S. 1823) (later overruled); Cato v. Easley, 2 Stew. 214 (Ala. 1829) (expressly following Reade v. Livingston, 3 Johns. Ch. 481 (N. Y. 1818)); Bibb v. Freeman, 59 Ala. 612 (1877); Wood v. Potts, 140 Ala. 425, 37 So. 253 (1903); Allen v. Overton, 208 Ala. 504, 94 So. 477 (1922); Ogletree v. Tate, 225 Ala. 608, 144 So. 573 (1932); Harris v. First National Bank, 227 Ala. 86, 149 So. 86 (1933); Crosby v. Ross' Administrator, 26 Ky. 290 (1830); Enders v. Williams, 58 Ky. 346 (1858); Hamilton v. Cunningham, 186 Ky. 570, 217 S. W. 924 (1920); Hatcher-Powers Shoe Co. v. Sparks, 237 Ky. 321, 35 S. W. (2d) 564 (1930); Haston v. Castner, 31 N. J. Eq. 697 (1879) (following Ch. Kent's decision); Hancock v. Elmer, 61 N. J. Eq. 558, 49 Atl. 140,
solvency of a debtor who makes such a transfer strongly indicates that his purpose was to remove assets from the grasp of creditors. The creation of a conclusive presumption of fraudulent intent from these facts possesses some degree of merit as an objective standard since many gratuitous transfers assailed as fraudulent are made between relatives by blood or marriage and therefore are inherently suspicious. Its value, however, decreases directly with the remoteness of insolvency from the date of conveyance. The rule, moreover, overlooks the major premise underlying the statute of Elizabeth, that only conveyances which result in injury to creditors should be invalidated. If the grantor, despite the gift, retained sufficient assets to meet his existing obligations, the creditor has no grievance and is unduly favored if allowed to set aside a conveyance in the event that subsequent unforeseen contingencies or other conveyances have rendered the debtor insolvent. In operation, the rule imposes severe disabilities on the good faith donee who, if insolvency occurs and suit is brought near the expiration of a long term statute of limitations, may be forced to surrender property years after the transfer; under such circumstances, the conclusive presumption of fraudulent intent arising from the mere fact of insolvency is unwarranted. Furthermore, transferees for value may be prejudiced; if the complainant alleges that the conveyance was voluntary, the burden of proving valuable consideration is placed on the grantee. The lapse of time between conveyance and trial, coupled with the probable reluctance of the insolvent grantor to testify that the conveyance was supported by a consideration may render difficult the production of unequivocal evidence of a consideration; the grantor would be moved to assist creditors in setting aside the conveyance since, if their suit is successful, his debts to them will be reduced accordingly.

In recognition of the undesirable consequences of this rule most states have repudiated it in favor of one, codified in the Uniform Fraudulent Conveyance Act, aff'd, 63 N. J. Eq. 802, 52 Atl. 1131 (1902) (since overruled—see note 18, infra); Harris v. Harmon, 134 Okla. 116, 272 Pac. 383 (1928); Jackson v. Lewis, 34 S. C. 1, 12 S. E. 560 (1891); Betts v. Richardson, 112 S. C. 279, 99 S. E. 815 (1919); Battle v. Beck, 144 Va. 1, 131 S. E. 344 (1926); McCaskey v. Potts, 65 W. Va. 641, 64 S. E. 908 (1909).


10. See cases supra, note 6.

11. Feaster v. Rooks, 293 S. W. 136 (Mo. 1927); Ferrell v. Elling, 84 Mont. 384, 276 Pac. 432 (1929).

12. Glenn, op. cit supra note 7, § 270.

13. E.g. Hancock v. Chapman, 170 Ky. 99, 185 S. W. 813 (1916) (suit brought just before expiration of 15 year statute of limitations); Reade v. Livingston, 3 Johns Ch. 481 (N. Y. 1818) (debt incurred in 1800, reduced to judgment in 1807; conveyance in 1805, suit brought in 1816).


relating the validity of the gift to the debtor’s financial condition.16 Under this doctrine a voluntary conveyance raises only a presumption of fraud as to existing creditors, rebuttable by proof that the grantor was not left insolvent thereby.17 While depriving the creditor of the overwhelming advantages formerly enjoyed, this rule affords him ample protection by imposing upon the grantee the onus of showing the debtor’s continued solvency;18 if the presumption of fraud is not overcome, the conveyance will not be sustained.19 Where the Uniform Fraudulent Conveyance Act has not been adopted, two types of independent statutes are common. One provides that fraudulent intent shall be a question of fact not of law, and that no conveyance

16. U. F. C. A., § 4: “Every conveyance made and every obligation incurred by a person who is or will thereby be rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration.”


In some jurisdictions, a voluntary conveyance is not even presumptively fraudulent; the attacking creditor must prove insolvency or intent to defraud, to invalidate the conveyance. McMillan v. McMillan, 42 Idaho 270, 245 Pac. 98 (1926); Nevers v. Hack, 138 Ind. 260, 37 N. E. 791 (1894); Ferrell v. Elling, 84 Mont. 384, 276 Pac. 432 (1929); Conway v. Raphael, 102 N. J. Eq. 531, 141 Atl. 804 (1928), overruling Haston v. Castner, 31 N. J. Eq. 697 (1879); Camden Securities Co. v. Nurock, 112 N. J. Eq. 92, 163 Atl. 547 (1932); Smith v. Peppen, 57 S. D. 25, 230 N. W. 229 (1930); Smith v. Edwards, 17 P. (2d) 264 (Utah 1932) sensibly.


A voluntary conveyance will, of course, be set aside if the creditor can prove insolvency of the grantor at the time of conveyance [Garner v. State Banking Co., 150 Ga. 6, 102 S.
shall be adjudged void merely because of its voluntary character;\textsuperscript{20} the other type, more explicit, adds that voluntary transfers are void in the absence of proof that the grantor retained sufficient assets to pay his then existing debts.\textsuperscript{21} The former group of statutes might be interpreted as requiring proof of actual intent to defraud even where insolvency after the conveyance is shown. But this result may be avoided by the argument that regardless of the statutory provision, a gratuitous conveyance which renders the donor financially disabled raises a conclusive presumption of fraud since the grantor must have intended the natural consequences of his act, which hindered creditors and so was “fraudulent in fact.”\textsuperscript{22} This device, indicative of the traditional preference of creditors to mere volunteers, frees creditors, injured by the gift, from the difficult task of proving subjective fraudulent intent, which a literal construction of the statute might impose.\textsuperscript{23}

In a state following the precedent of \textit{Reade v. Livingston},\textsuperscript{24} the possibilities of prejudice to honest purchasers are greatly increased when, as in the instant case, exclusion of parol evidence prevents proof of a valuable consideration. Deeds reciting a nominal consideration,\textsuperscript{25} a consideration of love and affection,\textsuperscript{26} or both,\textsuperscript{27} are voluntary as against existing creditors; such recitals constitute “good” rather than valuable consideration.\textsuperscript{28} If the instrument acknowledges receipt of value, parol evidence is admissible to show that no consideration was paid.\textsuperscript{29}

E. 442 (1920); Ransom v. Lochmiller, 207 Iowa 1315, 224 N. W. 469 (1929), or the existence of an actual intent to defraud. Miller v. Nissen, 280 Mass. 267, 182 N. E. 366 (1933); Queen-Favorite Bldg. & Loan Ass’n v. Burnstein, 310 Pa. 219, 165 Atl. 13 (1933).


27. Houston v. Blackman, 66 Ala. 559 (1880); McKeown v. Allen, 37 Fla. 490, 20 So. 556 (1896); Ransom v. Lochmiller, 207 Iowa 1315, 224 N. W. 469 (1929).

28. § 3, \textit{U. F. C. A.} uses the term “fair consideration” to describe the nature and adequacy of valuable consideration.

29. See note 4, \textit{supra}.

that the true consideration was greater\textsuperscript{31} or less\textsuperscript{32} than that recited, or that a different variety of valuable consideration was given.\textsuperscript{33} In Alabama and a few other states, however, a recital precludes the showing of a different character of consideration. Thus if a “good” consideration is mentioned,—if, in other words, the conveyance was a gift—extrinsic evidence may not be introduced to prove that a valuable consideration was in fact paid, on the theory that such evidence would violate the rule against varying the legal effect of a deed.\textsuperscript{34} By application of this principle, evidence of an antecedent debt, always deemed valuable consideration, providing the debt is bona fide and fairly proportionate to the worth of the property,\textsuperscript{35} was excluded in the instant case. The rule prohibiting variance of the terms or legal effect of a written instrument is based on the current conception that a legal act when reduced to writing is constituted, not merely proved by the document.\textsuperscript{36} Hence, when the whole of a transaction is embodied in a single writing, evidence to dispute its terms is superfluous; but if the instrument was not intended to cover a certain subject of negotiation, extrinsic evidence of the parties’ conduct in regard to that subject may be established.\textsuperscript{37} The intention of the parties is the sole test of whether the specific element of negotiation is embodied in the document.\textsuperscript{38} In the principal case it is apparent from the defendant grantee’s attempt to prove the satisfaction of an antecedent debt as consideration that the deed as drawn did not and was not intended to include the agreement of grantor and grantee on the

Harmon, 134 Okla. 116, 272 Pac. 383 (1928). For collection of older cases, see Note (1910) 25 L. R. A. (N. S.) 1194, at 1197.


33. Pique v. Arendale, 71 Ala. 91 (1881) (recital, $800; evidence admitted to show real consideration was antecedent debt); Mobile Savings Bank v. McDonnell, 89 Ala. 434, 8 So. 137 (1890) (recital, money; evidence admitted to show extinguishment of grantor’s liability on two notes was actual consideration); Smith v. Hood, 212 Ala. 554, 103 So. 574 (1925) (recital, $105; evidence to show deed was in fact advancement held admissible). For collection of cases, see Note (1910) 25 L. R. A. (N. S.) 1194, at 1198-1207.

34. Murphy v. Mobile Branch Bank, 16 Ala. 90 (1849); Potter v. Gracle, 58 Ala. 303 (1877); Houston v. Blackman, 66 Ala. 559 (1880); Elgdon v. Leggett, 208 Ala. 352, 94 So. 359 (1922); Carmack v. Lovett, 44 Ark. 180 (1884); Lawson v. Mullinix, 104 Md. 156, 64 Atl. 938 (1906); Latimer v. Latimer, 53 S. C. 483, 31 S. E. 304 (1898). \textit{Cf.} Kern v. Gardner, 26 Ohio App. 48, 159 N. E. 840 (1925) (recited consideration $9000; evidence inadmissible to show true consideration was merely “good”).

35. Allen v. Overton, 208 Ala. 504, 94 So. 477 (1922); J. I. Case Threshing Machine Co. v. Packer, 81 Colo. 195, 254 Pac. 779 (1927); Drury v. State Capital Bank, 163 Md. 84, 161 Atl. 176 (1932); Bankers’ Trust Co. v. Humber, 263 Mich. 426, 248 N. W. 858 (1933); Feaster v. Rooks, 293 S. W. 136 (Mo. 1927); Stalwart Building & Loan Association v. Monahan, 104 Pa. Super. 498, 159 Atl. 189 (1932). This rule was adopted in \textsection 3, U. F. C. A.

36. 5 WIGMORE, EVIDENCE (1923) \textsection 2426.

37. \textit{Id.} \textsection 2425.

38. \textit{Id.} \textsection 2430.
subject of consideration; no situation could more clearly demand extrinsic evidence to effectuate the intent of the parties.

Failure to comprehend the policy of the parol evidence rule is further illustrated by the inconsistency with which the Alabama courts have applied it. In that jurisdiction, evidence has always been admissible to show that a recited valuable consideration was not paid; the effect of this is to vary the legal effect of the deed to at least as great a degree as would evidence of a valuable consideration where "good" consideration is recited. In the majority of states, however, the Alabama interpretation of the parol evidence rule has been expressly repudiated by decision or statute, or has not been observed. And two Alabama cases have indicated that in an action to set aside a conveyance voluntary on its face, the unfortunate consequences of the rule may be mitigated if the defendant files a cross bill for reformation, alleging that on account of mistake, the deed as written failed correctly to express the intent of the parties with respect to consideration.

39. "When between the grantee, and an existing creditor, a controversy arises as to the validity of the conveyance, it has long been the settled rule of this State, that the recital of a consideration, is the mere declaration or admission of the grantor, and is not evidence against the creditor." Hubbard v. Allen, 59 Ala. 283, 296 (1877). Accord: Myers v. Peek's Administrator, 2 Ala. 648 (1841); Saunders v. Hendrix, 5 Ala. 224 (1843); Ely v. Pace, 139 Ala. 293, 35 So. 877 (1903); Kuykendall v. Terry, 227 Ala. 227, 149 So. 687 (1933). To the same effect, see Wigmore, op. cit. supra note 36, § 2433.

40. In each of the following cases and in the cases cited infra note 42, evidence of a valuable consideration was admitted to contradict a recital of mere "good" consideration (usually love and affection or one dollar and love and affection), or vice versa. Carty v. Connolly, 91 Cal. 15, 27 Pac. 599 (1891); Nichols, Shepherd & Co. v. Burch, 128 Ind. 324, 27 N. E. 737 (1891); Gordon v. Gordon, 58 Ky. 285 (1858); Ecton v. Flynn, 229 Ky. 476, 17 S. W. (2d) 407 (1929); Harman v. Fisher, 90 Neb. 688, 134 N. W. 246 (1912); Voight v. Dowre, 74 N. J. Eq. 560, 70 Atl. 344 (1908); Dieckman v. Walser, 114 N. J. Eq. 382, 168 Atl. 582 (1933); Velton v. Carmack, 23 Ore 282, 31 Pac. 658 (1892); Jack v. Daugherty, 3 Watts 151 (Pa. 1834); Bradley v. Love, 60 Tex. 472 (1883).

41. ILL. REV. STAT. (Smith-Hurd, 1933) c. 59, § 3, is in general typical: "The consideration" (of any instrument required to be in writing by the statute of frauds) "need not be set forth or expressed in the writing, but may be proved or disproved by parol or other legal evidence." CAL. CODE CIV. PROCE. (Deering, 1931) §§ 1962 (2), 1963 (39); GA. CODE ANN. (Michie, 1926) § 4179; KY. STAT. (Carroll, 1930) § 472; MICH. COMP. LAWS (1929) § 13414; MONT. REV. CODES (1921) § 10605(2); NEB. COMP. STAT. (1929) § 36-403; ORE CODE ANN. (1930) § 9-806(3).


43. Berry, Demoville & Co. v. Sowell, 72 Ala. 14 (1882) (deed reciting love and affection reformed at instance of grantee to show valuable consideration paid); Orr v. Echols,
of reformation as a remedy may be impaired or negatived by the requirement of an unequivocal showing of mutuality of mistake and by the often-reiterated doctrine that an instrument will not be reformed "for a mere mistake of law." 45

119 Ala. 340, 24 So. 357 (1898) (deed recited love and affection; reformation granted to show antecedent debt as consideration).

44. "... courts of equity proceed with very great caution in reforming written instruments, and, if the mistake as alleged is not admitted, it must be proved by clear, exact, and satisfactory evidence..." Folmar v. Lehman-Durr Co., 147 Ala. 472, 477, 41 So. 750, 751 (1906) (reformation to show valuable consideration denied).

45. Kelly v. Turner, 74 Ala. 513 (1883) (reformation denied); See West End Savings Bank v. Goodwin, 223 Ala. 185, 188, 135 So. 161, 163 (1931).