With the constitutionality of minimum wage laws for women established, a chapter in American constitutional "law" has closed. The record of that chapter has brought abundant vindication to those who urge that the judge often translates "his tiny stock of scattered and uncoordinated philosophies . . . with all his weaknesses and unconscious prejudices," into "objective truth."

But since "philosophies" and "prejudices" stem not from written but from mental constitutions, many are the theories seeking to discover the true touchstone of the judicial process. Some flatly assert that the judge's function is to interpret the Constitution "as written." For these, the judicial process is mechanical and simple: Document is to be placed beside statute; if the latter matches the former, the constitutional mandate is met. Another school—more sophisticated—asserts that the judge finds in the due process clause his own brand of "higher law;" by a strange process of osmosis the Constitution absorbs the Natural Law, and the crucial but empty phrase, "due process of law," becomes meaningful. To the students of gastronomic jurisprudence, breakfast foods assume a controlling role: what the judge eats will determine what the Constitution says.

Such irreconcilable rationales leave the student slightly confused. He seeks solace in statistics. How do the biographical facts of the judges who cast their votes in favor of minimum wage legislation compare with those of the judges opposed? Are the inner springs of judicial preference to be found in the facts of life?  

**THE FACTS †**

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*Except where otherwise indicated, the table is arranged by judges rather than by votes.
† The material summarized in the table was compiled from Who's Who in America, Vols. VII-XIX (1912-1937); Dictionary of American Biography (1928-1936); and Martindale-Hubbell Law Directory (1931-1937).
POWER OF RECEIVER FOR CORPORATION TO ASSERT CAUSES OF ACTION VESTED SOLELY IN CREDITORS *

A receiver for an insolvent corporate broker, in the process of liquidation,\(^1\) sued on a surety bond taken out by the broker for the benefit of holders of interim certificates,\(^2\) who comprised a large proportion of the total number of creditors. Since the broker had no right of action upon the bond,\(^3\) the court, after dismissing the complaint for want of proper allegation, expressed an opinion that as a matter of substantive law the action would not lie because, first, the claim asserted did not arise out of a transaction in fraud of creditors, and, secondly, a receiver cannot sue on behalf of a limited number or class of creditors.\(^4\)

The power of a receiver for a corporation to sue is limited to causes of action which the corporation could have asserted but for his appointment, and any claim on his part is subject to defenses available against the cor-

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With the exception of the last cited case, and the Adkins case in the lower court, only decisions of supreme courts are included.

The following cases are not included because they were decided solely on the authority of the Adkins case without expression of opinion: People v. Successors of Laurinaga, 32 P. R. R. 766 (Porto Rico 1924); Folding Furniture Works v. Industrial Comm., 300 Fed. 991 (W. D. Wis. 1924); Murphy v. Sardell, 269 U. S. 530 (1925); Donham v. West-Nelson Mfg. Co., 273 U. S. 657 (1927).

Van Devanter and McReynolds, JJ., voted upon the question four times. Sutherland and Butler, JJ., cast three votes. Hughes, C. J., and McKenna, Holmes, Brandeis, Stone, Roberts and Cardozo, JJ., voted twice, as did two judges of the Washington Supreme Court. One of the judges cast a vote on both sides of the question and is counted throughout as two judges.

In allocating the justices in Stettler v. O'Hara, 243 U. S. 629 (1917), in which the Oregon decision was affirmed by an equally divided court, the following division has been made (after Powell): White, C. J., and McKenna, Van Devanter, and McReynolds, JJ., for reversal; Holmes, Day, Pitney, and Clarke, JJ., for affirmance. See Powell, The Judiciality of Minimum Wage Laws (1924) 37 Harv. L. Rev. 545, 549-550.

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\(^{\text{Kennedy v. Fidelity & Deposit Co. of Md., 153 Ore. 646, 58 P. (2d) 625 (1935).}}\)

1. The opinion does not indicate whether the receiver was an equity or a statutory receiver. Probably he was appointed under Section 32-702, Ore. Code Ann. (1930), providing for receivers for insolvent corporations.


3. If the bond had been one affording a right of action to the insolvent, there would have been no question of the receiver's power to sue upon it as an asset of the insolvent. American Surety Co. of N. Y. v. Moran, 75 F. (2d) 646 (App. D. C. 1935), cert. denied, 294 U. S. 720 (1935).

poration. But an exception to the general rule has been developed to allow a receiver to attack transactions in fraud of creditors. The usual rationalization of this exception has been that he may sue in the right of creditors only to recover something which was once an asset of the corporation, though presently beyond its reach by reason of its participation in the fraudulent transaction. While this concept has been stretched to include suits on un-


580, 582, 583. The usual rationalization of this exception has been that he may sue in the right of creditors only to recover something which was once an asset of the corporation, though presently beyond its reach by reason of its participation in the fraudulent transaction. While this concept has been stretched to include suits on un-

7. Cf. Runner v. Dwiggins, 147 Ind. 238, 243, 46 N. E. 580, 582 (1897); Glenn, Liquidation (1935) § 326; 2 Clark, Receivers (2d ed. 1929) § 829. See note 6, supra. The implication drawn from the express statutory authorization in a few states of
NOTES

1937]

paid stock subscriptions not maintainable by the corporation because of fraudulent representation in the inducement, and actions against holders of watered stock, as well as the more conventional suits to set aside fraudulent conveyances, unlawful preferences, 8 and actions against holders of watered stock, 9 as well as the more conventional suits to set aside fraudulent conveyances, unlawful preferences, unfilled chattel mortgages, and unrecorded conditional sales, and to recover unlawful dividend payments, receivers' suits to set aside transactions in fraud of creditors N. Y. REAL PROPERTY LAW § 268 and N. Y. PERSONAL PROPERTY LAW § 19; Md. ANN. CODE (Bagby, 1924) art. 23, § 94 that other types of creditors' claims are unenforceable by receivers reinforces this tendency. The same general restriction is also imposed upon trustees in bankruptcy. Sections 67(e) and 70(e) of the Bankruptcy Act authorize him to set aside transfers in fraud of creditors. Section 47(a) expressly confers upon him the rights of a judgment creditor with execution returned unsatisfied, but the purpose of that section is simply to allow him to sue in those states where only lien creditors can contest the transfers. Galbraith v. First National Bank of Alexandria, 221 Fed. 356 (C. C. A. 8th, 1915); Barnes v. Hirsch, 215 App. Div. 10, 212 N. Y. Supp. 536 (1st Dep't 1925), aff'd, 242 N. Y. 555, 152 N. E. 424 (1926); Betzer v. Olney, 57 P. (2d) 136 (Cal. App. 1936); 4 REMINGTON, BANKRUPTCY (4th ed. 1935) § 1404.

11. Industrial Mutual Deposit Co.'s Receiver v. Taylor, 118 Ky. 851, 82 S. W. 574 (1904); Ronald v. Schoenfeld, 94 Wash. 238, 162 Pac. 43 (1917); GLEN, LIQUIDATION (1935) § 312.
ers are almost universally denied authority to collect statutory double liability of stockholders. It might be argued that the action in the principal case fell within the already expanded sphere of exceptions, since it was brought for the purpose of replacing assets wrongfully diverted, but some difficulty would be presented by the analogous stockholders' statutory double liability cases, in which the stockholders have been considered "sureties" owing a collateral obligation solely to creditors.

On the second issue raised by the principal case, the power of a receiver to sue in the right of part of the creditors, the courts have divided. When such suits have been permitted, the proceeds have been distributed sometimes among all creditors and on other occasions only among the creditors possessing the cause of action. Denial of power to sue has been predicated

8th, 1933), (1934) 82 U. of Pa. L. Rev. 286. Although the right existed at common law, this has largely been supplanted by statutory liability. Even where the statutes express the liability as running to the corporation and its creditors, it cannot strictly be said that the receiver is suing in the right of the corporation for he can collect only so much of the wrongful dividend payments as are necessary to pay the debts. Gaunce v. Schoder, 145 Wash. 604, 261 Pac. 393 (1927).

15. Minneapolis Baseball Co. v. City Bank, 66 Minn. 441, 69 N. W. 331 (1896); Farnsworth v. Wood, 91 N. Y. 308 (1883); McLaughlin v. Kimball, 20 Utah 254 (1899). Contra: King v. Pomeroy, 121 Fed. 287 (C. C. A. 8th, 1903). An important factor in this trend has been the construction given to the common statutes codifying common law liabilities to creditors for wrongful dividend payments and watered stock and creating stockholders' double liability. For courts, apparently feeling that those statutes contemplated insolvency and liquidation proceedings, have often regarded as fatal their failure specifically to confer power upon the receiver to enforce the rights. Cf. Rockwood v. Foshay, 66 F. (2d) 625 (C. C. A. 8th, 1933). The question rarely arises with respect to suits by receivers of national banks to enforce double liability because of specific statutory authority.

16. The issue, of course, arises most frequently as to receivers in general winding up proceedings rather than in judgment creditors' suits or in proceedings supplementary to execution, where the receiver is acting solely for the petitioning creditor or creditors and those joining in, and not necessarily for all creditors. Nevertheless, because all creditors may join, the question is of significance even in the latter situation. In the following cases, receivers were allowed to sue in the right of a part of the creditors: Washington Mill Co. v. Sprague Lumber Co., 19 Wash. 165, 52 Pac. 1067 (1898) (conveyance in fraud only of existing creditors); Lex v. Selway Steel Corp., 203 Iowa 792, 206 N. W. 586 (1925) (unpaid stock subscriptions fraudulently obtained upon which only subsequent creditors acting in reliance had causes of action); Berry v. Rood, 168 Mo. 316, 67 S. W. 644 (1902) (watered stock upon which only creditors who had knowledge at time of extension of credit had rights). Contra: American Trust & Savings Bank v. McGettigan, 152 Ind. 582, 52 N. E. 793 (1899); Marion Trust Co. v. Blish, 170 Ind. 686, 84 N. E. 814, rehearing denied, 85 N. E. 344 (1908). Similarly trustees in bankruptcy have been permitted to set aside transfers in fraud of only part of the creditors. Glenn, Fraudulent Conveyances (1931) §324; Comment (1936) 45 Yale L. J. 504, 506-7.


18. Berry v. Rood, 168 Mo. 316, 67 S. W. 644 (1902). There has been a similar split of authority over the method of distribution of the proceeds when a trustee in bankruptcy recovers property fraudulently conveyed or its value. But the majority rule
on the theory that a contrary holding would result either in dipping into a common fund to defray the expenses of a suit for the benefit of only a portion of the creditor body,19 or in a windfall to creditors without rights at the expense of the others.20 These objections can be overcome, however, by limiting participation in the proceeds to those creditors vested with rights who agree within a specified period to indemnify the receiver for the expenses of the suit. Where a cause of action possessed by all creditors is considered too hazardous to warrant risking the fund, courts have employed a similar technique by restricting the distribution of possible recovery to those creditors who agree in advance to indemnify the receiver for the costs of litigation.21 Since the number and amount of claims in the instant case constituted a large proportion of the total, the court might well have allowed the suit by adopting the suggested procedure.

Whether the power of a receiver to sue in the right of creditors should be subjected to these restrictions is, in the final analysis, primarily an administrative problem. Frequently denial reflects a difficulty in visualizing an individual as representing both the corporation and its creditors, and an inclination to limit the receiver to the first capacity by likening him to the common-law assignee for the benefit of creditors.22 In reality, the receiver is neither an assignee nor a representative of any of the parties, but an officer of the court acting under its direction in the interest of all concerned.23 Refusal to permit suits by receivers forces a race among creditors for satisfaction and a multiplication of individual suits, annoying to the courts and unprofitable to the creditors and defendants.24 Although these difficulties might be avoided has been in favor of equal distribution of the proceeds among all creditors of the bankrupt. Comment (1936) 45 YALE L. J. 504, 506, n. 17. The argument supporting this rule, that if the assets had not been fraudulently conveyed, they might have been available to all creditors, does not apply to the principal case of a receiver's suit on a surety bond because the recovery sought was never an asset of the estate but a contract right belonging to a particular group of creditors.

22. The common-law assignee usually may not set aside fraudulent conveyances, but a statutory assignee has the power even in the absence of specific authorization by the statute. Comment (1936) 45 YALE L. J. 504, 509.
24. This situation is particularly vexatious in the case of suits to enforce the statutory liability of directors for unlawful dividends or the liability of stockholders for unpaid subscriptions, watered stock or statutory double liability, where the many defendants can be sued individually, thus giving rise to contribution suits among them.
by the institution of a representative action by one creditor in behalf of all,\textsuperscript{25} there is no assurance that a class suit will be brought before individual actions. Moreover, many significant defects inhere in that device. Representative suits will not lie if separate proof is necessary to support the claim of each creditor,\textsuperscript{26} but even when, as in the principal case, such proof is not requisite, difficulties remain because of the power of the plaintiff to dismiss,\textsuperscript{27} uncertainty as to the conclusiveness of the judgment,\textsuperscript{28} and the hesitancy of creditors to join until success of the suit seems assured.\textsuperscript{29} Since these weaknesses can be avoided by allowing a suit by the receiver,\textsuperscript{30} he should be permitted to collect in one orderly proceeding all that can be obtained to satisfy the claims of the creditors against the corporation, including those obligations of third parties to creditors which arose out of dealing with the corporation.\textsuperscript{31} There seems no administrative justification for denying a receiver power to assert claims similar to the one in the instant case.\textsuperscript{32} Nor


26. As, for example, if damages are sought. Cherry v. Howell, 4 F. Supp. 597 (E. D. N. Y. 1931); Comment (1934) 20 Va. L. Rev. 564, 571.

27. Since creditors described but not named in the bill are not regarded as parties, the plaintiff or plaintiffs of record are conceded absolute dominion to dismiss or settle until other parties have intervened or a decree has been rendered. Comment (1934) 34 Col. L. Rev. 118, 123; Clark, Code Pleading (1928) § 63.

28. Since decrees rendered upon a creditor's class bill are binding upon the class, some courts in their reluctance to sanction complete individual control over the fate of a class have conditioned the conclusiveness of the judgment on notice of the pendency of the class suit or upon actual participation. Comment (1934) 34 Col. L. Rev. 118, 135.

29. A realization that costs and attorney's fees will fall on the plaintiff if he loses will often impel other creditors to refrain from joining or to delay joining until the suit has progressed to a point of probable success. Clark, Code Pleading (1928) § 63, p. 279. And at any time up to the interlocutory decree, they may start separate suits of their own. Ibid.

30. Under the guidance and direction of the appointing court, the receiver brings actions only if they have a reasonably fair chance of success. Standart Bros. v. Ingham, 163 Mich. 106, 127 N. W. 922 (1910). And he dismisses or settles only if the court decides it to be in the best interests of the creditors. 1 Clark, Receivers (2d ed. 1929) § 583.

31. See Glenn, Liquidation (1935) § 324.

32. The recommended procedure is a radical departure from present practice, for even trustees in bankruptcy, who are generally conceded wider power to sue in the right of creditors than receivers, have not been permitted to sue upon a surety bond affording a contract right to creditors. Betzer v. Olney, 57 P. (2d) 1376 (Cal. App. 1936). And trustees cannot pursue claims of creditors which at no time constituted assets of the
should the accrual of a right of action to only a part of the creditor body stand in the way of such actions, provided that the number of creditors is substantial and an equitable arrangement is adopted for assessing the costs of the suit and for distributing its proceeds. Since the power of a receiver stems from the appointing court, there is no compulsion for the courts to await statutory authorization; equity is sufficiently flexible to permit extension of a receiver's presently restricted power to sue.

DETERMINATION OF DOMICIL FOR INHERITANCE TAX PURPOSES BY AN ORIGINAL ACTION IN THE UNITED STATES SUPREME COURT\textsuperscript{6}

The privilege of imposing an inheritance tax on a decedent's intangible estate, wherever located, attaches to the state of the decedent's domicil unless the intangibles have acquired a business situs elsewhere.\textsuperscript{1} But since each state may determine the location of domicil independently of another's findings, it is possible for more than one state to tax the intangible estate of a decedent who has maintained homes in many jurisdictions.\textsuperscript{2} If the due process of law objection to such multiple taxation is not seasonably raised, there will be no opportunity for a review of the issue by the federal courts;\textsuperscript{3} and even if such review is obtained, unless the appeals from the various state proceedings reach the United States Supreme Court at approximately the same time it may be impossible to obtain adequate relief.\textsuperscript{4} This problem of avoiding multiple inheritance taxation, so acute for wealthy multi-state debtors,\textsuperscript{5} is indicated by an instance where a special receiver was appointed to sue for creditors because the general receiver was deemed powerless to maintain the action. Hale v. Hardon, 95 Fed. 747, 770 (C. C. A. 1st, 1939).

\textsuperscript{6}Texas v. Florida, New York, Massachusetts et al. Motion for leave to file Bill of Complaint granted March 15, 1937 by the United States Supreme Court.


4. The cases from each state court would come up to the Supreme Court on different records and each record might demand a finding that the decedent was domiciled in that particular state. Unless the cases arrived simultaneously it might be impossible to reconcile this conflict. Chafee, \textit{The Federal Interpleader Act of 1935} (1935) 45 \textit{Yale L. J.} 1161, 1171.
dwellers, recently recurred when the taxing officials of New York, Texas, Massachusetts, and Florida asserted the right to tax the transfer of the intangible estate of a decedent who was claimed by each to have been locally domiciled. The situation is of particular concern to the State of Texas both because of the alleged inadequacy of the total estate to satisfy all the threatened taxes and because the decedent's assets within Texas' borders are insufficient to meet its tax—an important factor since Texas may be unable to obtain upon the representatives of the estate the personal service requisite to extra-territorial recognition and collection of tax claims.

Multiple inheritance taxation on the transfer of the same res may possibly be avoided in several ways. First, one claimant state may enter a voluntary appearance in the probate or inheritance tax proceedings before the courts of another state and agree to abide by the determination of domicil there made. Texas apparently is unwilling to follow this procedure both because of reluctance to submit to the adjudication of a possibly hostile forum and because there is no assurance that the other claimant states will also submit to the single determination which is essential to an effective disposition of the problem. Secondly, it has been suggested that the Federal Interpleader Act affords a means by which the executor can obtain a determination of domicil binding upon all the states. But serious doubt now exists as to its applicability in this situation. Therefore, in order to facilitate the collection of its tax, if that tax is found to be proper, Texas, resorting to a method hitherto untried, has brought an original action in the United States Federal District Court.

7. Under the opinion in Milwaukee County v. White Co., 296 U. S. 268 (1935), full faith and credit must be given to tax judgments supported by personal service. It was not decided that the clause would extend to a tax without a judgment. See Colorado v. Harbeck, 232 N. Y. 71, 133 N. E. 357 (1921); (1936) 49 Harv. L. Rev. 490; (1936) 35 Mich. L. Rev. 131.
8. Since Texas' Community property laws might force the legatee to share a portion of the estate with the deceased's wife who was cut off under the will, the legatee might prefer to waive collection of the Texas assets rather than submit to the operation of her laws.
11. The Act was held applicable in Worcester County Trust Co. v. Long, 14 F. Supp. 754 (D. Mass. 1936), which was reversed sub. nom. Riley v. Worcester County Trust Co. (C.C.A. 1st, 1937), 4 U. S. L. Week 950, on the ground that to implead a tax collector who is administering a valid law is to implead the State which he represents and is therefore forbidden by the Eleventh Amendment.
Supreme Court to determine which of the contesting states was in fact the domicil.\textsuperscript{12}

Original jurisdiction over inter-state controversies was granted to the Supreme Court by the Constitution\textsuperscript{13} and made exclusive by the Judiciary Act.\textsuperscript{14} As with suits between individuals the Court has jurisdiction only if an actual case or controversy exists:\textsuperscript{15} the plaintiff, in short, must sue to protect or enforce rights, or to redress or prevent wrongs which invade a legally protected interest.\textsuperscript{16} Whether such an interest is here at stake is a question upon which there is no authority precisely in point. Although in determining its jurisdiction over the analogous disputes involving interstate boundaries, the Court has never clearly defined the interest at issue; it is possible to conclude from these cases that it is the plaintiff’s sovereign right to govern the disputed territory which is protected from invasion\textsuperscript{17} despite the objection that such rights are “political” and hence beyond the compass of the law.\textsuperscript{18} The “political question” objection to justiciability may be addressed to the consequences flowing from the adjudication of certain rights\textsuperscript{19} or to the nature of the rights themselves.\textsuperscript{20} Although boundary disputes might be attacked as non-justiciable on either plane, national harmony required their judicial settlement;\textsuperscript{21} and the court buttressed this practical reason for taking jurisdiction with the legal argument that the submission of interstate controversies by the states to the Supreme Court’s jurisdiction must have included controversies over sovereign rights.\textsuperscript{22}

\begin{itemize}
\item \textsuperscript{12} Texas v. Florida, New York, Massachusetts, \textit{et al.} Motion for leave to file bill of complaint granted March 15, 1937.
\item \textsuperscript{13} U. S. Const. Art. III §2.
\item \textsuperscript{14} 1 Stat. 80 (1789), 28 U.S.C. §341 (1934).
\item \textsuperscript{15} Louisiana v. Texas, 176 U.S. 1 (1899).
\item \textsuperscript{16} Cf. Muskrat v. United States, 219 U.S. 346, 356 (1911); Borchard, \textit{Justiciability} (1936) 4 U. of Chi. L. Rev. 1, 2.
\item \textsuperscript{17} See, \textit{e.g.}, Rhode Island v. Massachusetts, 12 Pet. 657 (U. S. 1838).
\item \textsuperscript{18} In the extended discussion of justiciability in Rhode Island v. Massachusetts, 12 Pet. 657 (U.S. 1838) an effort was made by the majority to analogize the suit to one between private individuals, but the dissent (p. 752) clearly indicates that the plaintiff state was not suing to protect property rights in the soil nor to quiet title, but to recover “sovereignty and jurisdiction.” Subsequently that position was tacitly recognized by the majority. Florida v. Georgia, 17 How. 478 (U.S. 1855).
\item \textsuperscript{19} See, in general, \textit{Post, The Supreme Court and Political Questions} (1935); Field, \textit{The Doctrine of Political Questions in the Federal Courts} (1924) 8 Minn. L. Rev. 485.
\item \textsuperscript{20} It was suggested in Cherokee Nation v. Georgia, 5 Pet. 1, 20 (U.S. 1831) that the bill might be doubtful since it contemplated the control of the exercise of force by the Georgia legislature. See also Kansas v. Colorado, 185 U.S. 125 (1902). But \textit{cf.} Worcester v. Georgia, 6 Pet. 515 (1832).
\item \textsuperscript{21} Rhode Island v. Massachusetts, 12 Pet. 657 (U.S. 1838); Louisiana v. Mississippi, 202 U.S. 1 (1906).
\item \textsuperscript{22} United States v. Texas, 143 U.S. 621, 630 (1892).
\end{itemize}
disputes are repeatedly declared to be justiciable. It has been suggested, however, that when the Court does employ the "political question" formula to deny jurisdiction, it does so, not because of any substantive defect in the suit itself, but primarily because it is a convenient device to avoid deciding questions which it does not wish to decide. If that is true it becomes impossible to predict with confidence when jurisdiction over litigation involving sovereign rights will be declined and when it will be entertained; yet the failure in the past to term any interstate dispute "political" suggests reluctance to apply the formula to actions like the present one.

If the proposition is correct that sovereign interests are proper objects of judicial scrutiny and if any invasion of them is wrongful because of the very nature of sovereignty, it would seem that the Court has jurisdiction of the present case. For the state of domicil's right to tax the transfer of intangibles may be considered sovereign and, accordingly, taxation by a non-domiciliary state would be an infraction of that sovereignty resulting in damage comparable to that in a boundary dispute when one state exercises police power over territory rightfully belonging to another. On one occasion, however, the Court refused to decide a similar interstate tax dispute although a showing of justiciability in these terms could have been made. Since no opinion was written in that case it is possible only to speculate as to what essentials of justiciability were absent. The decision may have been motivated by the fear of determining political questions; or perhaps the Court failed to discern in the dual exercise of taxing "jurisdiction" the affront to sovereignty which is present in boundary controversies; or, more probably, the element thought essential and found lacking in that case was


25. This reasoning follows the application of the mobilia sequuntur personam doctrine which the Supreme Court used in Farmers Loan and Trust Co. v. Minnesota, 280 U. S. 204 (1930) and Baldwin v. Missouri, 281 U. S. 586 (1930). It is false if, as has been suggested, the taxation of intangibles is not a jurisdictional matter. See Buchanan and Myers, The Administration of Intangibles (1935) 48 HARV. L. REV. 911; Lowndes, Spurious Conceptions of the Constitutional Law of Taxation (1934) 47 HARV. L. REV. 628.

26. Louisiana v. Mississippi, 202 U. S. 1 (1906) (conflict as to which state could control oyster fishing in the disputed territory).

27. New Jersey v. Pennsylvania, 287 U. S. 580 (1933). Massachusetts v. Mellon, 262 U. S. 447, 485 (1923) indicates that the Court will not adjudicate abstract questions of sovereignty when a state is the moving party, but only rights of persons, property, dominion over physical domain, or quasi-sovereign rights actually threatened or invaded.
physical damage, actual or threatened, as opposed to sovereign affront. In controversies other than boundary disputes the plaintiff state has sued to protect from damage the rights of its citizens or a proprietary interest of its own, and even in the boundary cases it is possible to spell out a physical injury. In the principal case, likewise, the physical injury requirement can be satisfied since the plaintiff may be unable to collect revenues properly belonging to it.

Something more than tangible injury to the plaintiff is necessary, however. Legal protection from injurious activities will not be granted unless the damage is wrongfully inflicted. And the wrongfulness which saves the justiciability of a boundary dispute may not be available in inheritance tax cases. In boundary disputes the wrong springs from the jurisdictional impropriety of the dominion exercised by one of the states; but in the taxation of intangibles, the impropriety of multiple action may be viewed not as jurisdictional in nature but merely as the result of an arbitrary rule of constitutional fairness. However, the elasticity of these concepts make them so susceptible of manipulation that if the desirability of a speedy final determination of this issue is sufficiently potent, the “one state tax rule” may be deemed to have erected around a decedent’s intangible estate jurisdictional boundaries, the invasion of which constitutes a justiciable wrong when coupled with damage. Except in these terms the damage resulting to a state from taxation by another state when the estate of the decedent sought to be taxed is insufficient, would not seem to be an injury against which the plaintiff state may receive judicial protection. The Fourteenth Amendment appears to be the only constitutional basis for prohibiting taxation by nondomiciliary states, but this amendment is invoked to protect taxpayers from an unfair levy, not to guarantee tax collection to the domiciliary state. The fact that the rights of the taxpayer may wrongfully be invaded by the con-


29. Cf. Oklahoma v. Texas, 258 U. S. 574 (1922) where the state’s proprietary interest in oil and gas and river beds within the disputed territory was recognized.


31. Buchanan and Myers, supra note 25.

current taxation does not make wrongful the injury which the plaintiff state will suffer. Yet no redressible wrong is suffered by Texas, if that state is assumed to be the domicil, because of the small portion of the decedent's assets within its borders, and its prospective inability to collect assets located elsewhere. Yet damage may be suffered if the courts of the defendant states adopt either of two courses. First, B's (the defendant's) courts, instead of recognizing that $A$ is the domicil and, in the interests of comity, refusing to probate the will until its validity had been determined by $A$'s courts—in which case the executor would be forced to proceed to $A$ to prove the will and $A$ would be able to collect its tax extra-territorially—might hold the decedent to have been domiciled in $B$. In that event, despite a conflicting holding by the courts of $A$, $A$ might be unable to collect its tax. Secondly, although such a course would be extremely improbable, $B$'s courts might recognize that $A$ was the domicil and yet determine the succession according to its own laws without forcing original probate in $A$. In that case the estate could successfully be taxed only to the limited extent of the assets in Texas. The mistaken holding under the first alternative, that the decedent's domicil is in $B$, is injurious but not wrongful as to $A$, despite its wrongfulness as to the successor. The denial of comity embraced in the other possible determination is likewise not a wrong to $A$ since, despite the fact that the situs of intangibles for tax purposes is considered to be the state of domicil, their situs for the purposes of administration is the state in which the evidences of them are found at the death of the decedent and that state has the power to control the succession to them.

Considerations of policy may be advanced both for and against the taking of jurisdiction over this suit. The Supreme Court seems an inappropriate forum in which to litigate such factual issues as domicil, yet under present

33. See note 30, supra.
34. See note 7, supra.
36. Since the ancillary courts under the majority rule of comity will order the surplus assets transmitted to the state of domicil for administration after local debts have been paid, Texas might be doubly assured of collecting its tax in this situation. Woerner, The American Law of Administration (1923) § 167; but cf. Matter of Martin, 255 N. Y. 359, 174 N. E. 753 (1930).
37. This eventuality would result from the insufficiency of assets in $A$ and the failure of the executor to submit to $A$'s process.
38. The right of a state in which are located intangible assets of a non-resident decedent to control the succession to those assets in accordance with its own laws has been expressly recognized. Watkins v. Madison County Trust and Deposit Co. 40 F. (2d) 91 (N. D. N. Y. 1930); but cf. In re Tallmadge, 109 Misc. 696, 181 N. Y. Supp. 336 (Surr. Ct. 1919); Woerner, loc. cit. supra note 37.
39. See note 30, supra.
41. The danger of many suits of this sort may not be very great because of the peculiar circumstances involved, but it is conceivable that in an original action such
law it apparently must be the final arbiter if two state courts reach conflicting decisions. On the other hand, since the courts in all the defendant states might possibly hold Texas to be the domicil, it might be considered impolitic to rule on the case in the absence of final state action. However, even though the present action were found to constitute a justiciable controversy and a declaration that the decedent's domicil was in Texas were entered by the Court, it is doubtful whether Texas can be assured of the successful tax levy which it desires. The cases prohibiting taxation of an intangible res by a state other than the domicil may imply that the United States Supreme Court is the tribunal in which the ultimate determination of domicil for tax purposes will be made. But there has been no clear intimation that any state in which the decedent's assets are located may not determine for itself the location of domicil for the purposes of succession to those assets. Consequently unless due process is extended to require uniform findings of domicil for all purposes, any of the defendant states might disregard the Supreme Court's ruling and find local domicil for succession purposes and thus enable the executor to obtain possession of the assets without first probating the will in Texas and submitting to Texas' process. Further, even if the defendants' courts follow the Supreme Court's determination, only a rule of comity requires that an ancillary court which is administering assets within its jurisdiction demand that a disputed will be proved at the domicil before admitting it to probate locally, and if that rule were ignored Texas again might be unable to procure the requisite personal service on a successor to the estate. It would not seem possible, under existing law, for the Supreme Court either to order payment of the tax to the domicil or to accomplish the same result indirectly by ordering the executor to submit to Texas' process, for that would contravene the rule against extra-territorial enforcement of a state's tax claims if not supported by an in

as this, a litigant successfully might insist on his constitutional right to a jury trial of the issue and delay the Court's other business.

42. Since the Supreme Court could enjoin the states which were found not to be the domicil from collecting the tax despite conflicting findings by their own courts, no double taxation would be possible, but that in itself would not assure the plaintiff's collection.

43. Unless such a determination were made by the Supreme Court no method whereby double taxation could surely be avoided is apparent. Even though the Court has not yet resolved conflicting domicil findings by two states it has generally been assumed that it will do so if a proper case is presented. Chafee, loc. cit. supra note 4. Since there is no federal common law of domicil and it is possible for each state court's determination to be indubitably correct under its own laws or on the record before it, the Court may encounter difficulty in reaching a satisfactory conclusion. See Knapp, loc. cit. supra, note 5; but cf. Kansas v. Colorado, 155 U. S. 125 (1902) (the rights of two states, one of which followed the English common law of riparian rights, the other the western doctrine of public ownership of flowing waters, determined by creating new equitable principles).

44. But see suggestion in First Bank of Boston v. Maine, 284 U. S. 312, 327 (1932) that a transfer from the dead to the living may take place only under the laws of a particular state.

45. See note 36, supra.
personam judgment;⁴⁶ but a determination by the Supreme Court would almost certainly be persuasive on the state courts which would be disinclined to permit the avoidance of the spirit of that determination by disregarding established rules of comity. Thus, a declaration as to domicil would probably both assure the state of domicil of collection of its tax and prevent taxation of the transfer of the intangible estate by more than one state. But it seems clear that any disposition which the Court may make of this suit will be only a temporary solution of the dilemma which was created when the “one state tax rule” was superimposed on a Federal system of government and which will not be resolved finally until full faith and credit is given to tax claims as well as to tax judgments and a uniform law of domicil, at least for tax purposes, is created.

AVAILABILITY TO A SURETY OF COLLATERAL SECURITIES HELD BY THE CREDITOR*

The right of a surety to compel satisfaction of the principal debtor’s obligation out of liens or securities held by the creditor against the principal may be enforced in three types of actions. At law, the surety’s only remedy is by subrogation to the creditor’s cause of action against the principal after the debt has been paid.¹ Subrogation generally extends to all the rights and remedies of the creditor,² but when the creditor is the state or federal government, the courts have drawn a somewhat hazy distinction between substantive and procedural rights. Where the right is substantive in character, subrogation will be allowed,³ but where it is of a procedural nature, the enforcement of which would require affirmative governmental action or involve a peculiarly governmental prerogative, subrogation will generally be denied.⁴ For this reason, a surety can never compel the government to sue,⁵ bring suit in the government’s name,⁶ or avail himself of the govern-

⁴⁶. See note 7, supra.


1. See Kidd v. Hurley, 54 N. J. Eq. 177, 180, 33 Atl. 1057, 1058 (1896); Arant, Suretyship (1931) § 77; 4 Williston, Contracts (Rev. ed. 1936) § 1267.

2. See American Surety Co. v. State Trust & Savings Bank, 218 Iowa 1, 5, 254 N. W. 338, 340 (1934); 1 Brandt, Suretyship and Guaranty (3d ed. 1905) § 324.

3. 4 Williston, Contracts § 1267.


ment's privilege to sue in the federal courts when the requisites of federal jurisdiction are lacking. Unlike the rule at law, equity does not limit the surety's right of access to the liens and securities of the creditor until after the debt has been paid, so that a surety may maintain an action of exonerating against the principal to compel payment immediately after maturity of the debt, whether or not action has been commenced by the creditor. Usually the creditor will be joined in this action in order to receive payment, but the authorities are divided as to whether such joinder is necessary. If the principal is solvent, the surety merely obtains an order directing him to pay; if he is insolvent or fraudulent or has absconded, the surety is also entitled to the appointment of a receiver, and the tracing of property in the hands of third persons, and he may further obtain the benefit of all liens and securities held by the creditor. In the latter case he stands in the position of an equitable assignee of the creditor and thus achieves the same results by exonerating before payment as he would by subrogation afterwards. This equitable action of exonerating will not prevent the creditor from obtaining a judgment against the surety at law; it merely permits the surety to compel satisfaction of the debt out of the property of the principal before the creditor has levied execution against


8. Arant, Suretyship §72; Arnold, Suretyship and Guaranty (1927) §126.

9. See Arant, Suretyship, §72.


him. Where action has been commenced by the creditor, a third remedy is sometimes given the surety, since he may restrain execution against his property and thereby force the creditor to exhaust all the securities which he has received from the principal debtor before levying on the property of the surety. But the creditor is generally entitled to his choice of remedies against either obligor, and the surety's right of action against the creditor is, therefore, much more restricted than his right of exoneration against the principal, for relief will seldom be permitted in these cases unless the creditor has been secured against loss or delay by the surety, the principal is insolvent, and the securities are readily available to the creditor but would not be available to the surety by subrogation after payment.

Because of the diversification of remedies available to a surety, difficulty is sometimes encountered in selecting the type of action best adapted to the particular situation involved. This fact is illustrated by a recent case. The surety on two refinery bonds securing the United States in the payment of processing taxes due and to become due upon oil owned by the principal brought suit in a federal court against the principal and the federal tax collector alleging that the time for payment had accrued, that the principal refused to pay, and that the United States was threatening suit against the surety. Since the only known assets of the principal were the taxed oil, the surety prayed for the appointment of a receiver and an order directing the tax collector to enforce the lien on the oil and to deduct the amount of the tax from the proceeds of its sale. A receiver was appointed and pursuant to a state statute regulating the production and sale of oil, he applied to the Texas Railroad Commission for the necessary authorization of the sale of the oil. The application was refused because the oil was unlawful under the statute. On final hearing, a motion by the tax collector to dismiss the complaint was sustained on three grounds: if the suit was against the tax collector in his official capacity, jurisdiction failed because it was in reality a suit against the United States and no consent had been
given; if against the tax collector as an individual, there was failure of proper parties because this defendant had no authority to enforce a tax lien belonging to the United States; if against the principal alone, the court had no jurisdiction for there was no diversity of citizenship or federal question involved.

The decision is based upon clearly defined rules of federal jurisdiction and appears to preclude further action in the federal courts, but the surety might obtain a remedy by following any one of several courses of action in a state court. For instance, the surety might pay the tax in order to become subrogated to the government's lien. It is questionable, however, whether the right of the government to foreclose the lien and thus override state statutes prohibiting the sale of the oil, is of the substantive class to which subrogation is allowed. The validity of this classification is at least arguable, for the surety would merely require a judicial determination of his right to have the oil sold, coupled with execution of that right by the exercise of the state court's power to compel the Commission to authorize the sale of the oil; enforcement by the United States Tax Collector would be unnecessary. More likely to succeed would be an action of exoneration against the principal, with the tax collector being joined merely to receive payment. Since a surety may be entitled to the benefit of the creditor's lien by exoneration, and since the courts apparently do not make the substantive-procedural distinction in an action of this sort, it seems that the state court could enforce that lien by ordering a judicial sale of the oil. An alternative method of approach under the exoneration theory would be to seek a lien


23. In a direct proceeding to foreclose the lien the government would not be impeded by the state statute prohibiting the sale of the oil, for even in the exercise of its police power a state cannot burden the power of the federal government to levy and collect taxes. License Tax Cases, 72 U. S. 462 (1866); United States v. Snyder, 149 U. S. 210 (1893); Flaherty v. Hanson, 215 U. S. 515 (1910); In re Rosenberg, 269 N. Y. 247, 199 N. E. 206 (1935).

24. The Texas courts have power to compel authorization of the sale when the Commission's refusal is unreasonable or arbitrary. Davenport v. Railroad Commission, 85 S. W. (2d) 661 (Tex. Civ. App. 1935). Moreover, the fact that the oil is illegal in the hands of the owner does not mean it can never be sold. By the terms of the state statute, proceedings may be taken by the Texas Attorney General for the forfeiture of the oil, and the purchaser at the forfeiture sale receives a valid title. Tex. Ann. Rev. Civ. Stat. (Vernon, 1936) art. 6066a, § 10.


27. See note 24, supra.
on the oil, junior to that of the government, to protect the surety's right of indemnity against the principal.\textsuperscript{28} When the government later obtained judgment against the surety, he could offer his lien in satisfaction of the claim, and the court, by the doctrine of marshalling of assets, might order foreclosure of the lien, for a surety to whom the principal has pledged property is entitled to an equitable decree ordering its sale before execution may be levied by the creditor upon the surety's own property.\textsuperscript{29} Even though the surety neglected to obtain a junior lien on the oil, it is possible that in a subsequent action by the government he might restrain execution on the judgment until the government had foreclosed its own lien on the principal's oil, but this theory seems somewhat tenuous in view of the statutory prohibition against enjoining the levy and collection of taxes\textsuperscript{30} and the reluctance of the courts to confine a creditor solely to his remedy against the principal.\textsuperscript{31}

Regardless of the theory selected by the surety in the state court, it is doubtful whether recovery would be permitted on the facts of the instant case, for the court suggests that the action was the result of a collusive agreement between the principal and the surety to enforce the sale of illegal oil by invoking the taxing power of the United States. Since the remedies available to a surety are essentially equitable in their character and are applied as the facts of the particular case demand,\textsuperscript{32} a state court would be justified in concluding that the immunity granted the federal government from the provisions of state laws governing the sale of oil was for the sole purpose of collecting taxes, and that, since these taxes could be collected from the surety, the immunity should not be employed for the personal advantage of any of the parties involved.\textsuperscript{33}

\textsuperscript{28} In view of a surety's general right of indemnification, there would seem to be no objection to allowing him a junior lien on the property of the principal [cf. Pinckney v. Wylie, 86 F. (2d) 541 (C. C. A. 5th, 1936); Craighead v. Swartz, 219 Pa. 149, 67 Atl. 1003 (1907); Henry v. Compton, 39 Tenn. 549 (1859)], and such relief could reasonably be granted in an action of exoneration. See notes 11, 12, 13, \textit{supra}.

\textsuperscript{29} Hillams v. Abercrombie, 15 S. C. 110 (1879); 1 \textit{Brandt, Suretyship and Guaranty} § 246. By a Texas statute if the principal and surety are sued together, the property of the principal must be levied upon first. \textit{Tex. Ann. Rev. Civ. Stat. (Vernon, 1925) art. 6247}.


\textsuperscript{31} See note 19, \textit{supra}.

\textsuperscript{32} American Surety Co. v. Robinson, 53 F. (2d) 22 (C. C. A. 5th, 1931); American Surety Co. v. Lewis State Bank, 58 F. (2d) 559 (C. C. A. 5th, 1932); Stratton v. Thomas, 133 Mich. 281, 94 N. W. 1053 (1903); (1929) 15 Va. L. Rev. 495.

\textsuperscript{33} \textit{Cf. White v. Georgia}, 51 Ga. 252 (1873); Ramsay's Estate v. Whitbeck, 185 Ill. 550, 56 N. E. 322 (1900).
THE NEW HAVEN REORGANIZATION UNDER SECTION 77*

Section 77 of the Bankruptcy Act, enacted in 1933 and amended in 1935, is primarily designed to afford to large railroad systems the unified, efficient and inexpensive reorganization not available to them in an equity receivership with its many ancillary proceedings. An indication of the effects of the 1935 amendment, which among other things limited the jurisdiction of the court in any one proceeding to the principal debtor and its subsidiary “railroad corporation(s)” and required the Interstate Commerce Commission’s ratification of the court’s appointment of trustees, is afforded by the pending reorganization of the New York, New Haven & Hartford Railroad. When the trustees of X, the New Haven Railroad, disaffirmed the 99 year lease by which X operated all the properties and leaseholds of Y, the Old Colony Railroad, an integral part of the New Haven system, Y, having been deprived of its entire income, petitioned to be reorganized in the principal proceeding as a subsidiary “railroad corporation.” This petition was approved without objection although X had previously pledged its entire majority holding of Y voting stock to the Reconstruction Finance Corporation as security for loans now in default and retained its title thereto only by virtue of a court injunction. At a subsequent hearing the pledgees and others, perhaps more directly interested in Y, requested the appointment of an independent non-operating trustee to represent Y’s interests. The court, however, after considering the nature of a trustee under Section 77, appointed the X trustees as trustees of Y subject to ratification by the Inter-


5. Since this injunction was issued to prevent a dismemberment of the New Haven system during reorganization, it was justified. Continental Ill. Nat. Bank & Trust Co. v. Chicago, R. I. & P. Ry., 294 U. S. 643 (1935).
6. These included the minority stockholders’ protective committee and a trustee under various wills and other instruments for a small amount of Old C. l. ry. stock whose sole interest lay in the Old Colony. However, the primary interest of the pledgees who were direct creditors of the New Haven would seem to lie principally in that railroad system.
7. Since all the parties recognized the desirability of operation of the system as a unit, an operating trustee was not sought by them.
Aggrieved by this decision, the pledgees not only intervened before the Commission to urge that it refuse to ratify the appointment because of the inherent conflict of interest between X and Y arising from the disaffirmance of the lease, but also appealed the order of appointment to the Circuit Court of Appeals for the Second Circuit alleging for the first time that the lower court had no proper jurisdiction over Y. After a full hearing the Commission ratified the appointment order and thus sustained the court’s interpretation of the functions of a trustee under Section 77. The Circuit Court refused to hear the appeal.

The decision of the lower court appointing the same set of trustees to administer the interests of both the X and Y railroads rests upon the fundamental difference between a trustee under Section 77 and an orthodox trustee in bankruptcy. In the latter proceeding, which generally involves a complete liquidation of the debtor’s estate with no surplus remaining for the equity interests, the trustee is appointed by the creditors as their fiduciary representative, and since, conceptually, a fiduciary may not represent adverse interests, one set of trustees would appear incompetent to represent the creditors of two debtors with such conflicts of interest as those of X and Y. On the other hand, in a reorganization under Section 77, the Act provides elaborate safeguards for minority interests, clearly indicating a Congressional intent to constitute the trustee an impartial administrative agent of the court with powers and duties similar to those of an equity receiver. Thus, effective protection of any interest is not made dependent upon representation by a trustee possessing title but upon active participation in the reorganization by militant and independent representative committees and trustees under mortgage indentures who may align themselves according to their interests to press their views on the principal trustees or the court.

It is, therefore, implicit in Section 77 that only one set of trustees be appointed in any proceeding. This result, moreover, seems necessary in the light of certain practical considerations. If special representation by a trustee were granted one subsidiary, the court would logically be compelled to yield similar representation first to every other subsidiary and finally to each of countless groups of creditors, bondholders and stockholders with additional expense, complications and disintegration of the reorganization necessary

11. See 1 GRDES, CORPORATE REORGANIZATION (1936) §§387, 389. Of course, the orthodox trustee in bankruptcy is responsible to the equity interests for the proper administration of the property so as to obtain as large a fund as possible and to distribute to the equity interests all that remains after satisfaction of the creditor’s claims. However, since a surplus rarely remains after satisfaction of the creditor’s claims, the trustee is usually answerable only to the creditors.
13. Rodgers & Groom, Reorganization of Railroad Corporations under Section 77 of the Bankruptcy Act (1933) 33 COL. L. REV. 571, 606.
consequences. Yet this independent trustee, whose primary allegiance would have to be to the parent as majority stockholder, could afford no greater protection to those interested in the subsidiary; for, while one set of trustees as duly appointed non-partisan administrators would be prompted by human motives to be as fair as possible to all interested parties, the trustees of the parent, if opposed by a subsidiary trustee might be impelled to benefit the parent at the expense of the subsidiary, and would probably succeed because they would be more intimately in touch with the properties than the non-operating trustee of the subsidiary.

After the appointments in the instant reorganization had been approved by the court as legally, equitably and economically sound and in accordance with the intention of the Congress, the order of approval was subject to review in two separate forums. Not only is the appointment of trustees by the court under Section 77 reviewable by the appellate court for abuse of discretion, but the Act makes the appointments ineffective until ratified by the Interstate Commerce Commission. As originally enacted, Section 77 allowed the court to continue the debtor in possession or appoint trustees from a panel chosen by the Commission, but the 1935 amendment makes the appointment of trustees mandatory and, to avoid administrative difficulties present under the old scheme, substituted the requirement of ratification by the Commission. While Congress may have intended the Commission's ratification to be based solely on the personal qualifications of the appointed trustees, the instant reorganization indicates that the Commission has interpreted the statute as a grant of unlimited discretion to affirm or veto the court's appointment; for the Commission's opinion included a review of the court's interpretation of the Act as it affected the propriety of appointing the same trustees for two debtors with such conflicts of interests as X and Y.

Although the Commission sustained the court's interpretation, the validity of review by an administrative agency of a court's determination on such a traditionally legal issue as the interpretation of a statute is without precedent. If Section 77 does in fact authorize such a broad power of review by the Commission, the Act might possibly involve an unconstitutional delegation of judicial power to an administrative tribunal. Yet a power of review

15. See note 4, supra.
19. But see Friendly, supra note 2, at 40.
21. See Friendly, supra note 2, at 40; Recent Federal and Local Legislation; Amendments to Railroad Reorganization Act (1935) 3 U. OF CHI. L. REV. 61, 63.
such as asserted by the Commission in the principal case infringes judicial authority even less than many of the other judicial powers conferred upon the Commission by the original Section 77 which were sustained without qualification in the Rock Island case. Accordingly, doubts as to the legality of the Commission's unusual powers under the amended Act, including the power to review questions of law involved in court orders, may perhaps be minimized.

In contrast to the Commission's significantly broad opinion, the Circuit Court refused to hear the petitioners' appeal, thereby leaving unanswered one of the most important problems raised by the instant reorganization; for the pledgees, although they again pressed the arguments considered above, placed special reliance on the contention, which had not been offered to the lower court or the Commission, that the lower court did not have proper jurisdiction over Y under the amended Section 77. The original act had provided that any corporation could be reorganized in the same proceeding with the principal debtor if the latter owned a majority of its voting stock or operated substantially all of its property, but the 1935 amendment, which may have been designed to exclude non-railroad subsidiaries and independent lessors from the principal proceeding, restricted this privilege to a subsidiary "railroad corporation." Since the Act defines a "railroad corporation" as "any common carrier by railroad engaged in the transportation of persons or property in interstate commerce," the pledgees maintained that subsidiary lessors, like the Old Colony Railroad, are not in fact engaged in such transportation and hence not "railroad corporations" within the meaning of the Act so that they may not file in the principal proceeding. The disaffirmance of the lease may be said, however, to make the lessor an operating company and therefore a "railroad corporation" eligible for reor-

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22. Rodgers & Groom, supra note 13, at 580; Hanna, supra note 2, at 459, n. 17.
24. See note 10, supra.
27. 49 STAT. 911, 11 U.S.C. §205(a) (Supp. 1935). Throughout the extensive hearings on the amendment held by the Judiciary Committee of the House, no mention as to any possible change in this clause has been found. Hearings Before Committee on the Judiciary on H. R. 6249, 74th Cong. 1st Sess. (1935). The present wording was adopted by the Committee in executive session and received no mention in the Congressional debates. A possible reason for the change is to be found in a brief filed with the Committee by Cassius Clay, Counsel of the Railroad Division, Reconstruction Finance Corporation, which suggested that subsidiaries not subject to the control of the Interstate Commerce Commission should be excluded from the benefits of the Act.
ganization under 77. Moreover, even if the lessor may not be designated an operating company, it could nevertheless be considered a "railroad corporation" within the meaning of 77 by analogy to the Commission's interpretation of an identical definition in the Transportation Act to include lessor railroads. This result would not only sustain the apparent purpose of 77 but is manifestly desirable upon broader grounds. If a lessor is not a "railroad corporation" within the meaning of 77, it cannot avail itself of this section of the bankruptcy act either as a principal or a subsidiary debtor but will be compelled to reorganize under 77B. This action would complicate the reorganization of both the lessor railroad and the railroad system of which it was an integral part; for 77B, which was not designed specifically for railroad reorganizations, neither gives the Commission authority to aid in the reorganization nor provides for a reconciliation of conflicting regulation of the debtor by the court under 77B and the Commission under the Transportation Act. Moreover, since lessor railroads are railroads within the meaning of the Interstate Commerce Act for the purposes of imposing certain public duties upon them, there appears to be no reason to exclude them from the benefits of a reorganization under 77. A different result requires in the reorganization of large railroad systems a principal proceeding under 77 and numerous ancillary reorganizations under 77B. The consequent expense, complexity and probable disintegration of the system are repugnant to the fundamental purpose of 77.

**CONSTITUTIONALITY OF STATE STATUTE IMPOSING COST OF REGULATION UPON PUBLIC UTILITIES**

Lack of funds has been one of the chief factors hampering state public service commissions in regulating public utilities. Because the state legisla-

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33. Many of the ancillary proceedings under 77B, as in the instant case, would have to be laid in a district court other than that in which the reorganization of the parent railroad is being held.

*Great Northern Ry. v. Washington, 57 Sup. Ct. 397 (Feb. 1, 1937).*

tures have hesitated to appropriate sufficient funds from the general treasury to support the commissions, an increasing number of states have attempted to solve the problem by apportioning the cost of supporting the commissions among the utilities regulated by the commissions. A common technique is to impose upon all utilities regulated, in addition to property, license and occupation taxes, a fee measured by gross operating revenues derived from intrastate business, and to segregate the proceeds for the support of the state's public service commission. This type of statute was early sustained against attacks based upon the Fourteenth Amendment, as a reasonable scheme for imposing the burden of supporting the services furnished by the commissions upon the utilities for "whom the service is rendered, and to whom it is useful." Where, however, the fee is also imposed upon utilities engaged in interstate commerce, it must not substantially exceed the reasonable cost of regulation and inspection; otherwise the statute imposes a "direct," and therefore unconstitutional, burden upon interstate commerce. But a modicum of


3. Charlotte, C. & A. R. R. v. Gibbes, 142 U. S. 386, 394 (1892); People ex rel. N. Y. Electric Lines Co. v. Squire, 145 U. S. 175 (1892). Modern proponents of the benefit theory of taxation point out that by assessing the cost of regulation against the utility, the expense will ultimately be borne by the consumer rather than by the public at large, many of whom have no direct interest in utility regulation. See Mosher & Crawford, op. cit. supra note 1, at 81; H. R. Rep. No. 2240, 69th Cong., 2d Sess. (1927).

4. Postal Tel.-Cable Co. v. Taylor, 192 U. S. 64 (1904); see Pure Oil Co. v. Minnesota, 248 U. S. 158, 162 (1918); cf. Robbins v. Shelby County Taxing Dist., 120 U. S. 489, 493 (1887). In order to sustain the fees, where not substantially in excess of the reasonable cost of inspection and regulation, as against the contention that they impose a "direct" burden upon interstate commerce, the Court has relied upon the exception granted in U. S. Const. Art. I, § 10, that "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws . . . ." Although that clause applies only to foreign commerce [Woodruff v. Parham, 8 Wall. 123 (U. S., 1869)], the Court has held that "... the same principle must apply to interstate commerce." Patapsco Guano Co. v. North Carolina Bd. of Agriculture, 171 U. S. 345, 361 (1898). The Court, accordingly, has cited cases, whether involving interstate or foreign commerce, interchangeably. The
flexibility is allowed: the amount of the fee need not be exactly equivalent to the cost of regulation; nor need it be imposed after the regulation has taken place, for if the sums collected before the regulation prove to be excessive, the Court presumes that the legislature will act in good faith and reduce the rate so as to approximate the cost of regulation. Finally, since the tax is presumed to be reasonable, the burden has been placed upon the complainant to demonstrate that the revenues collected are so "disproportionate to the services rendered as to attack the good faith of the law."

A recent decision of the Supreme Court, however, has seemingly reversed this presumption of constitutionality. The State of Washington imposed upon all utilities doing business in the state a fee of one-tenth of one percent of gross operating revenues derived from intrastate operations. The sums thus collected were commingled in a revolving fund to defray all the expenses of the Department of Public Works. No separate accounts were kept of the amounts expended upon the regulation of each type of utility or of the amounts spent for each activity of the department. The plaintiff railroad sought to recover fees paid under protest on the ground that the statute imposed an unconstitutional burden upon interstate commerce and violated the equal protection and due process clauses of the Fourteenth Amendment. It contended that this commingling of total revenues and the expenditure of a portion of them for such allegedly non-regulatory functions as the activities of the department in the interest of interstate shippers and in the trial of reparation cases placed upon the state the burden of demonstrating that the fees collected from railroads did not exceed the sums expended in their "legitimate" regulation. At the trial the department's auditor had testified from unofficial records that the disbursements chargeable to the railroads from 1929 to 1933 exceeded the receipts from them in the same period by $37,833.00.

result has been to confuse "a power [which] has been granted to be used in exceptional conditions" with a "field of general legislative power, with every presumption of validity back of it." Cardozo, J., dissenting in Great Northern Ry. v. Washington, 57 Sup. Ct. 397, 405.

6. See note 5, supra.
11. Wash. Rev. Stat. Ann. (Remington, 1932) §§ 10417, 10418. Auto transportation companies pay a tax of one percent (Id., § 6395), and steamboat companies one-fifth of one percent (Id. § 10361-2).
But his figures included, without segregating, the expenditures upon the allegedly non-regulatory activities. Mr. Justice Roberts, writing the majority opinion, held for the plaintiff on the ground that although the statute was valid on its face, nevertheless, because the state had commingled costs properly chargeable to the utilities with other costs not so chargeable, it had the burden of proving that the sums exacted from the railroads did not exceed the reasonable cost of the proper regulatory functions; and it had failed to sustain this burden. Mr. Justice Cardozo wrote a dissenting opinion in which three justices concurred.\textsuperscript{12}

Although the decision turned upon the allocation of the burden of proving the reasonableness of the fees, there is a broader significance in the implied assumption that if a state includes all types of public utilities in a single class for the purpose of computing these fees, they will be declared unconstitutional upon proof that the exactions from any group of utilities are in excess of the disbursements for that particular group. This segregation into groups seems to be an unwarranted innovation. It is not clear whether a disproportionate fee for a particular group of utilities is deemed a "direct" burden upon interstate commerce or a violation of the due process clause of the Fourteenth Amendment, or both. In view of the fact that Washington's "occupation" tax, imposed upon all persons, including utilities, doing business in the state, and measured, like the tax in the instant case, by gross operating revenue from intrastate business, had been recently upheld by the Court against attacks based upon the interstate commerce clause,\textsuperscript{13} that clause would seem to supply no independent ground of attack. The controlling factor appears to be that because the present tax was not paid into the general treasury, it came within the prohibition of the due process clause against taxing "one group for the benefit of another."\textsuperscript{14} But if it is constitutional to exact more from one railroad than is expended in regulating that road, there would seem to be equal justification for sanctioning the exaction of more from all railroads than is expended in their regulation, so long as the total amount collected from all utilities does not substantially exceed the total expenditures of the commission in regulating them. For, in practical effect, just as one railroad is materially benefited by expenditures for regulation of

\textsuperscript{12} The principal ground of dissent was that Foote & Co. v. Stanley, 232 U. S. 494 (1914), relied upon by the majority, was inapplicable to the present situation. That decision was based upon Art. I, §10 of the Constitution, which expressly limits the allowable fees for purposes of "inspection" (see note 4, supra), whereas there is concededly nothing in the Fourteenth Amendment or interstate commerce clause which prohibits the imposition of fees covering the cost of both inspection and regulation of the intrastate activities of public utilities. See Great Northern Ry. v. Washington, 57 Sup. Ct. 397, 402 (1937). Moreover, it was demonstrated in the Foote case that the inspection fees actually did exceed the reasonable cost of inspection. See (1937) 4 U. Mich. L. Rev. 505, 506.


competing railroads, all railroads derive substantial benefit from disbursements for regulation of competing methods of transportation.\textsuperscript{15}

In addition to the unpersuasive character of the premises of the Court’s opinion, there are certain practical objections to the result to which these assumptions lead. Just as the difficulty of making cost allocations may have supplied at least one reason for originally considering all railroads as a single class, a similar difficulty today would seem to supply a sufficient justification for permitting the modern enlarged public service commission to treat all utilities in a single class for the purpose of computing this type of tax. To insist that the commissions allocate portions of many of their cost-items to each type of utility, is to run afoul of the unmastered science of allocating joint costs—an expensive and necessarily arbitrary process furnishing a fertile source of litigation.\textsuperscript{16} A further objection is that, since the rates are set in advance, an accurate correspondence annually, or over a short span of years, between exactions from and expenditures upon each class would seem impossible. This difficulty may, however, be avoided if the decision in the principal case is construed as limited to situations where so-called non-regulatory functions are financed out of the proceeds of these tax levies. In that event, a prior line of Supreme Court decisions could be relied upon which established the presumption that the legislature will in good faith decrease the rates should they prove to be substantially in excess of the reasonable cost of regulation.\textsuperscript{17}

\textsuperscript{15} This is true of other types of utilities, as, for example, gas and electric companies. Cf. West Ohio Gas Co. v. Commission, 294 U. S. 63, 72 (1935). The various classes of utilities are not isolated monopolies, but rather competitors in a real sense. And the court in the \textit{Butler} case conceded that “the expropriation of money from one group for the benefit of another . . . is constitutional when imposed to effectuate regulation of a matter in which both groups are interested and in respect of which there is a power of legislative regulation.” U. S. v. Butler, 297 U. S. 1, 61 (1936), cited note \textsuperscript{14}, \textit{supra}.

\textsuperscript{16} See Canning, \textit{Cost Accounting}, (1931) \textit{4 ENCYC. SOC. SCIENCES} 475, 477. The Washington commission has secured the passage of a new law which it hopes will circumvent the difficulties created by the decision in the principal case. The statute differentiates the seventeen types of utilities regulated into five classes. It empowers the commission to decrease the annual rates “for any . . . class of companies” “to the end that the fees . . . from the several classes . . . shall be approximately the same as the reasonable cost” of regulating each particular class. H. R. BILL No. 510, 25th Regular Sess. (Wash. Legislature, 1937) (Passed, March 15, 1937). Although the statute does not meet the apparent prohibition against treating more than one type of utility in a single class for the purpose of computing the tax, the department hopes to obviate even this difficulty by establishing a cost accounting system at an estimated annual expense of $4,000 which would disclose the cost of regulating each type of utility. Communication from the Washington Dept. of Pub. Service to the \textit{YALE LAW JOURNAL}, Feb. 19, 1937. Despite the necessarily arbitrary character of any such cost accounting system, if the allocations are accorded the presumption of correctness, they would probably survive attack. Certainly they would be accorded more probative effect than that accorded the testimony of the department’s auditor in the principal case. See Great Northern RY. v. Washington, 57 Sup. Ct. 397, 400, 404, 405 (1937).

The bill, however, offers no solution to the problem of financing those of the department’s functions held in the principal case to be non-regulatory.

\textsuperscript{17} See note 7 \textit{supra}. 
The most formidable obstacle to any scheme for financing public service commissions solely from fees collected from the utilities arises out of the Court's acceptance, without inquiry, of an unwarrantedly restricted definition of the regulatory process. Certainly the department's activities in decreeing refunds of overcharges and in appearing before the Interstate Commerce Commission in matters pertaining to interstate transportation affecting the citizens of Washington do not appear to be so unrelated to state supervision of railroads as to render it unreasonable, and therefore a violation of the Fourteenth Amendment, to charge the costs of these activities against the railroads rather than the general public. Furthermore, even should these functions be financed entirely out of legislative appropriations from the general treasury, the difficulties of allocating joint costs between the regulatory and non-regulatory activities would still be faced. Thus the Court has effectively hamstrung a widely accepted method of financing public service commissions by resorting to a highly tenuous interpretation of the Fourteenth Amendment and by apparently abandoning the rule of constitutional law—so often honored in the breach—which accords the operation of a state statute every presumption of constitutionality.

LIABILITY OF STOCK BROKERS EXECUTING GIVE-UP ORDERS*

The so-called give-up order has developed in order to permit a customer who has an account with one stock broker to give orders for that account through another broker. Thus, if a customer whose account is with broker A finds it more convenient to go to the office of broker B, he places his order with B and gives up A. Before executing the order, B, the transmitting broker, telephones A, the recipient broker, and says "We have a give-up order to buy 100 Steel for the account of Smith." If the customer's account is sufficiently margined, the recipient broker answers "He is o.k.",
and makes a note of the order on the customer's margin card. The transmit-
ning broker buys on the exchange from a third broker, X, and then sends
the recipient broker a confirmation notice of the purchase. The stamping
of this notice by the recipient broker constitutes, as between the transmit-
ting and recipient brokers, an acceptance by the latter of the give-up. When
X is given the name of the recipient broker, he sends a confirmation notice
to the latter. The acceptance of this confirmation completes the bargain
between X and the recipient broker, in fulfillment of which the recipient
broker takes delivery and makes payment. Finally, the recipient broker
charges the purchase to the customer's account, and pays half the com-
mission to the transmitting broker.¹

When a give-up order results in a loss, this is generally borne by the
customer. But if the customer is financially unable to pay, or if he can
prove that the order was unauthorized, the loss will fall upon either the
transmitting or the recipient broker, since X, in any event, is fully pro-
tected.² The incidence of this loss is determined largely by brokerage cus-
tom.³ Prior to the execution of the order, the only function of the recipient
broker is to state over the telephone the condition of the customer's account.
If this statement is treated as a representation of present fact, it would
impose upon the recipient broker no liability for subsequent changes in the
account. However, the recipient broker alone is in a position to watch and
control the customer's account, and the parties contemplate allocation to
him of complete responsibility for the customer's failure to complete the
transaction because of financial reasons. But since the transmitting broker
can determine much more easily whether the order has been authorized by
the customer, and since in actual practice the recipient broker relies on the
transmitting broker for this determination, the latter should bear any loss
resulting from an unauthorized order.

In a recent case,⁴ the transmitting broker executed a give-up order for
the purchase of stock rights, which had been placed by the husband of the

¹. For a further description of the give-up order, see Meyer, LAW OF STOCK-
BROKERS AND STOCK EXCHANGES (1931) §123. Give-up orders may be either to pur-
chase or to sell, but this discussion will be limited to purchase orders, as there are no
material differences for present purposes.

². Since brokers deal on the exchange as principals, the transmitting broker is
bound to X, despite the fact that the order is a give-up. According to the usual practice,
the name of the recipient broker is not given up to X until comparison tickets are
exchanged between X and the transmitting broker; and acceptance by the recipient
broker does not discharge the transmitting broker, since this kind of substitution of
principals is not permitted. Rules of the Governing Committee of the New York Stock
Exchange, Chap. II, Section 8. However, there is a substitution of principals in the
rarer case where the name of the recipient broker is given up on the floor of the
I, Section 14.

³. Statements made in this note regarding brokerage custom are based upon com-
munications from various brokers to the YALE LAW JOURNAL.

aff'd. 247 App. Div. 864, 288 N. Y. Supp. 744 (1st Dep't 1936), motion for leave to
appeal to Court of Appeals denied, 248 App. Div. 564, 288 N. Y. Supp. 1051 (1st Dep't
1936), leave to appeal denied by Court of Appeals, 271 N. Y. 664 (1936).
customer without due authorization from her. After the recipient broker accepted the confirmation notice from X and took delivery, his customer refused to pay the purchase price. Meanwhile the rights had expired. To recover his loss, the recipient broker asserted against the transmitting broker a claim framed in two counts. The first was for negligent misrepresentation of the validity of the order. The second, relying upon a prior case holding that the transmitting broker acts as an agent for the customer, was for breach of an agent’s implied warranty of authority. The court granted judgment for the full amount of the loss, without reference, however, to either of the claimant’s theories. Instead, it treated the relationship between the two brokers as one of implied contract in which the transmitting broker assumed absolute liability for unauthorized orders. This seems the better approach, for if the recipient broker were shown to have acquired knowledge of facts indicating lack of authority prior to the moment he bound himself to X by accepting his confirmation notice, his action for breach of warranty or misrepresentation might fail, since knowledge of the truth is a defense. But because of the rapidity with which the whole transaction occurs, the recipient broker would rarely acquire information giving rise to suspicion of improper authorization before accepting the confirmation notice from X. It would appear preferable, therefore, to avoid injecting

6. See Bohlen, Misrepresentation as Deceit, Negligence, or Warranty (1929) 42 Harv. L. Rev. 733.
7. In Sartorius v. Cohen, 249 N. Y. 31, 162 N. E. 575 (1928), the give-up order was to sell 10,000 bushels of December wheat, from the customer’s long account. The transmitting broker did not promptly report the give-up order to the recipient broker. The price rose, and the customer instructed the recipient broker, who was unaware of the previous give-up order, to sell the same 10,000 bushels. The customer then attempted to disclaim his order to the transmitting broker on the grounds the latter was negligent in failing to report the give-up. The transmitting broker was held to have acted as agent for the customer, and therefore entitled to recover his loss from his principal.
8. Moore v. Maddock, 251 N. Y. 420, 167 N. E. 572 (1929); 1 MECHEM ON AGENCY (2d ed. 1914) § 1362 et seq.
9. Since the stock rights became valueless by expiration almost simultaneously with the recipient broker’s receipt of knowledge of the lack of authority, the damages under either of the counts would probably be the full loss. However, if the rights had not expired, the recipient broker would be expected to sell the rights within a reasonable time after the customer refused absolutely to ratify the purchase. Had the recipient broker failed to sell promptly, his maximum recovery would probably have been only that part of his loss represented by the difference between the price at which the rights were purchased for the customer’s account and the market price either at the moment of the customer’s refusal to ratify or at the expiration of a reasonable interval of time thereafter.
10. Knowledge by the plaintiff is a defense to an action for breach of an agent’s implied warranty of authority, MECHEM ON AGENCY (2d ed. 1914) § 1369, and to an action for misrepresentation, Green, Deceit (1930) 16 Va. L. Rev. 749, 763. Under these theories, if the plaintiff expends money for the benefit of the defendant after acquiring knowledge that he is not bound to do so, he becomes an intermeddler and cannot recover his voluntary payments, even though they benefit the defendant.
the issue of knowledge into the trial as a path of escape for the transmitting broker. Moreover, since the transmitting broker is already irrevocably bound to \( X \) after execution of the give-up order, his position cannot be made worse if the recipient broker completes the transaction first and disputes liability afterwards. Consequently, it appears more reasonable to view the relationship of the brokers in terms of an implied contract — based upon the division of commissions as mutual consideration — which allocates to the transmitting broker liability for loss resulting from unauthorized orders, and to the recipient broker liability for loss caused by the insufficiency of the account.

**Contempt of Court in Publications Appealing for Funds**

A long and bitter controversy within an independent local union led to a fight with knives between two of the members. After one of the combatants had been indicted for this assault, his friends, including two of the defendants, attempted to solicit funds to obtain counsel for his defense. To this end, defendant Piesco hired defendant Felicani, a commercial printer, to print a circular which was distributed among members of the brotherhood, and defendant Woodbury sent a mimeographed letter to locals of the union in other counties. Both publications charged, in appealing for funds, that the case was framed up by the “gangster leaders” of the brotherhood but made no mention of the court or its officers. All three defendants, in proceedings commenced by the District Attorney, were adjudged in contempt of court. This judgment was affirmed by the Massachusetts Supreme Judicial Court on the ground that the publications were likely to breed prejudice among prospective jurors and popular distrust of the court’s capacity to do justice.\(^1\)

The punishment of individuals for contemptuous publications involves two conflicting social policies.\(^2\) To safeguard against judicial tyranny, there exists the privilege of free speech permitting individuals to indulge in reasonable criticism and discussion of judicial action.\(^3\) On the other hand, to insure that the judicial system will be reasonably immune from popular prejudice and respected and obeyed by the public, the courts possess a power, usually said to be necessary and inherent, to punish abuses of the privilege as contempts of court.\(^4\) The courts, seldom explicitly weighing these two policies,\(^5\)

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5. See Thomas, Problems of Contempt of Court (1934) 21.
have generally sought to resolve the conflict by the application of either of
two formulae. On the one extreme, as in the instant case, the test is said to
be whether, irrespective of the truth of the publication or its actual or in-
tended effect, it has a "reasonable tendency" to interfere with a conceptually
ideal administration of justice. Thus, the contempt power has been used to
maintain a judicial system in which popular prejudices have no influence,
all good causes of action may be litigated without intimidation of the parties,
decisions are based solely on judicially admissible evidence,
unbiased and
uncorrupted juries are readily
impanelled,
the whole truth is obtained from
unfearing and uncorrupted
witnesses,
and to which the public accords
respect and obedience.

At the other extreme, a publication is not viewed
as contemptuous unless it actually obstructs the judicial
process, consideration being given in doubtful cases to the intent and motive of the publisher
as well as to the situation in which the publication appeared.
Under this more limited interpretation of the contempt power, the contemptuous charac-
ter of a publication has been denied on appeal where a judge's handling

6. It is generally presumed that the defendant intended the natural and probable
consequences of his acts. State v. Howell, 80 Conn. 668, 671, 69 Atl. 1057, 1058
(1908); Globe Newspaper Co. v. Commonwealth, 188 Mass. 449, 453, 74 N. E. 682,
684 (1905). Contra: King v. Editor of the Daily Mail, 44 T. L. R. 303 (K. B. 1928);

7. Toledo Newspaper Co. v. United States, 247 U. S. 402, 421 (1918); State
v. Lovell, 117 Neb. 710, 718, 222 N. W. 625, 628 (1929); Sturoc's Case, 48 N. H.
428 (1869).

8. United States v. Craig, 266 Fed. 230 (S. D. N. Y. 1920); In re Shuler, 210
Cal. 377, 292 Pac. 481 (1930); see King v. Almon, WILMOT, OPINIONS AND JUDG-
MENTS 243, 255 (K. B. 1765).

9. Respublica v. Passmore, 3 Yeates 441 (Pa. 1802); see Re Thomas Shipping
Co., 144 L. T. R. 104, 106 (Ch. 1930). This power might be used to prevent boycotts
of such parties as the Schechter Bros., since parties with good causes of action similar
to the Schechters' cause would be deterred by this boycotting, from bringing their
actions. See N. Y. Times, May 24, 1936, p. 35, col. 6; cf. Sturoc's Case, 48 N. H. 428
(1869).

Newspaper Co. v. Commonwealth, 172 Mass. 294, 52 N. E. 445 (1889); In re Simmons,

11. In re Lee, 183 Atl. 560 (Md. 1936); Globe Newspaper Co. v. Commonwealth,
188 Mass. 449, 74 N. E. 682 (1905); Bee Publishing Co. v. State, 107 Neb. 74, 185
N. W. 339 (1921).

12. In re Lindsley, 75 Cal. App. 122, 241 Pac. 934 (1925); Field v. Thornell,
106 Iowa 7, 75 N. W. 685 (1898); cf. Ex parte Robinson, 19 Wall. 505 (U. S. 1873).

court that reversed him); Dale v. State, 198 Ind. 110, 150 N. E. 781 (1926); State

1 Q. B. 577.

15. In re Cottingham, 66 Colo. 335, 182 Pac. 2 (1919); Herald-Republican Pub-
lishing Co. v. Lewis, 42 Utah 188, 129 Pac. 624 (1913). King v. Editor of the Daily
Mail, 44 T. L. R. 303 (K. B. 1928).
of his court was criticized,16 where a party to a pending case published the judge's political connections with the suitor's political opponents,17 where an attorney's handling of a pending case was ridiculed,18 where the allegations of a complaint suppressed by the court were published,19 where the court's appointment of a receiver was criticized,20 and where — after one of a long series of articles had been made the grounds of a libel suit — similar articles were published.21

In Massachusetts, the power to deal with contempts is exercised by the application of formulae based solely on the publication's tendency to obstruct justice, and not its actual obstruction, the purpose being to vindicate "public authority and the majesty of the law."22 But it has often been said that such a vindication is not justified if merely to protect the judge from personal criticism but is proper only if necessary for the protection of litigants and possible litigants.23 It is difficult, however, to restrict the exercise of this power to the latter function, since almost any comment on pending judicial proceedings may be said to have a tendency to impair public confidence in the courts. Consequently the protection of the privilege of free speech is dependent in the trial court almost entirely on the discretion of the judge. This protection, moreover, may often be of little significance, since the interested judge, who usually tries the contempt proceedings without a jury,24 may be influenced by the sting of criticism.25 Therefore, if the appellate courts are to protect the privilege of free speech while punishing

22. See Hurley v. Commonwealth, 188 Mass. 443, 445, 74 N. E. 677, 678 (1905). This concept, developed in cases where the act was clearly contemptuous, is applied in the instant case to a different type of situation without consideration of freedom of speech as a possible justification. Cartwright's Case, 114 Mass. 230 (1873) (receiver misapplied funds in the hands of the court); Hurley v. Commonwealth, supra (jury bribing); Blackenburg v. Commonwealth, 260 Mass. 369, 157 N. E. 693 (1927) (perjury).
24. In Massachusetts, as in many other states, jury trial of contempt cases is unconstitutional. Walton Lunch Co. v. Kearney, 236 Mass. 310, 128 N. E. 429 (1920).
25. It is often said to be the better practice for a judge to decline to sit on a contempt case in which he is interested. See Cooke v. United States, 267 U. S. 517, 539 (1925); Ex parte Pease, 123 Tex. Cr. R. 43, 47, 57 S. W. (2d) 575, 577 (1933).
abuses of it, a formula which fails to consider the intent of the publisher and the circumstances which underlay a publication tending to obstruct the judicial administration seems grossly inadequate. Thus, some courts have recognized that a particularly liberal privilege of free speech might be permitted in election campaigns for judicial offices, petitions for recall of judges, attorneys' arguments requesting a change of venue or judge because of prejudice, and even in situations of great stress or excitement.

In the instant case, the formulae of the Massachusetts precedents are uncritically applied to a new situation in which a realistic consideration of the probable motives of the publishers and the result of the publication seem particularly apposite. Since the publication, which dealt with a situation that had fomented a great deal of antagonistic feeling on both sides, was circulated only among members of the union who were already interested in the matter, and since the letter was distributed entirely outside the venue of the court, the effect on possible jurors was probably inconsequential. Furthermore, although the recipients' confidence in the court might have been impaired by a conviction of the combatant, the effect of these publications in intensifying the atmosphere out of which such a reaction would arise seems imperceptible. And finally, the epithets of the publication were directed not at the court but rather at opponents in labor disputes, and the defendants' only intended effect on the administration of justice was the procuring of adequate counsel for the accused which is particularly necessary in Massachusetts in view of the absence of a public defender statute.

26. It has been suggested that review by appellate courts would be preferable to jury trial. See Note (1927) 12 Corn. L. Q. 374. But cf. In re Cheeseman, 49 N. J. L. 115, 143 (1886).

27. In several cases it has been said that intent to act contemptuously is immaterial, since intent to do the contemptuous act is alone sufficient. But this doctrine was laid down in cases punishing the misapplication of funds in the hands of the court where the issue of free speech was not involved. Wartman v. Wartman, 29 Fed. Cas. No. 17,210 (C. C. D. Md. 1853) (trustee); Cartwright's Case, 114 Mass. 230 (1873) (receiver).


32. Little consideration, however, has been given to the mode or extent of publication. See Note (1936) 50 Harv. L. Rev. 355.


34. The defendants' intent may not have seemed so magnanimous to the court, since one was a leader in the activities of the Sacco-Vanzetti defense committee and another was a special investigator for that committee.

While public policy clearly forbids trial outside the courts, it also demands adequate provision for counsel for the accused and freedom of discussion of matters of public interest even if the question is before the courts. Consideration of the effects of this decision in hampering the activities of defense committees and in limiting permissible comment among parties interested in a particular controversy might well have persuaded the court that it was inappropriate to follow unquestioningly the formula adopted in cases involving newspaper publications stimulated by a desire to arouse public opinion, to grind a political ax, or to raise profits by increasing circulation.

RICHARD H. ERNST†

36. See Notes (1927) 12 CORN. L. Q. 374, (1932) 81 U. of PA. L. REV. 214. It is significant that relatively few newspapers that have published reports of pending judicial controversies have been cited for contempt. See TAFT, LAW REFORM (1926) 153. This may be due to the courts' unwillingness to antagonize influential leaders of public opinion by a decision that might easily be said to be actuated by personal motives. See In re Nelson, 60 P. (2d) 365, 377 (Mont. 1936).


39. The cases relied on in the opinion involved newspaper publications. The punishment of Felicani, seemingly the first punishment of a job printer to be approved by American appellate courts, can be supported only by precedents dealing with newspaper publishers who are, unlike the job printer, responsible for the words used in the publication.


†Second year class, Yale Law School.