

Notes

THE FULL FAITH AND CREDIT CLAUSE AND CONFLICTS OF SOCIAL POLICY

THE full faith and credit clause¹ has been interpreted to require that a valid judgment secured in one state must be enforced by the courts of every other state,² and that a legal status existing in one state may be protected in the courts of any other state upon introduction of the judgment³ or statute⁴ creating the status. Even though the judgment⁵ or statute⁶ is in conflict with the laws of the state where recognition is sought, the full faith and credit clause must ordinarily be applied. But this rule is subject to the broad limitation that a state court may refuse such recognition if compliance with the rule would result in an infringement of the state's own public policy. Thus full faith and credit need not be accorded criminal or penal statutes⁷ nor judgments⁸ rendered thereunder, judgments or statutes purporting to exercise control over real estate,⁹ nor, in some instances, judgments¹⁰ or statutes¹¹ purporting to affect a marital relationship.

1. "Full Faith and Credit shall be given in each state to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U. S. Const., Art. 4, § 1. Under this authority Congress has declared that ". . . the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken." 1 STAT. 122 (1790) [revised by 2 STAT. 299 (1804) and REV. STAT. § 905 (1875)], 28 U. S. C. § 687 (1926).

2. See Corwin, *The "Full Faith and Credit" Clause* (1933) 81 U. OF PA. L. REV. 371, 375.

3. *Thompson v. Thompson*, 226 U. S. 551 (1913); *Bates v. Bodie*, 245 U. S. 520 (1918).

4. *Supreme Council of the Royal Arcanum v. Green*, 237 U. S. 531 (1915); *Converse, Receiver v. Hamilton*, 224 U. S. 243 (1912). Cf. *Finney v. Guy*, 189 U. S. 335 (1903).

5. *Fauntleroy v. Lum*, 210 U. S. 230 (1908); *Westwater v. Murray*, 245 Fed. 427 (C. C. A. 6th, 1917); *Hope v. First National Bank of Walsenburg*, 142 Ga. 310, 82 S. E. 929 (1914).

6. Cf. cases cited in note 4, *supra*. A greater effect is sometimes given to a judgment rendered upon a statutory right than would be given to a claim based upon the statute but not reduced to judgment. Cf. *People of State of New York v. Coe Manufacturing Co.*, 162 Atl. 872 (N. J. 1932), noted in (1933) 42 YALE L. J. 1131.

7. 1 WHARTON, *CONFLICT OF LAWS* (3d ed. 1905) § 4; MENOR, *CONFLICT OF LAWS* (1901) § 10; Berge, *Criminal Jurisdiction and the Territorial Principle* (1931) 30 MICH. L. REV. 238.

8. GOODRICH, *CONFLICT OF LAWS* (1927) § 204; *State of Wisconsin v. Pelican Insurance Co.*, 127 U. S. 265, 293 (1888). But cf. *Huntington v. Attrill*, 146 U. S. 657 (1892); *People of State of New York v. Coe Manufacturing Co.*, *supra* note 6.

9. *Clarke v. Clarke*, 178 U. S. 186 (1900); *Fall v. Eastin*, 215 U. S. 1 (1909); *Olmsted v. Olmsted*, 216 U. S. 386 (1910); *Hood v. McGehee*, 237 U. S. 611 (1915).

10. *Andrews v. Andrews*, 188 U. S. 14 (1903); *Haddock v. Haddock*, 201 U. S. 562 (1906); *Kaiser v. Kaiser*, 192 App. Div. 400, 182 N. Y. Supp. 709 (1st Dep't 1920); Beale, *Haddock Revisited* (1926) 39 HARV. L. REV. 417.

11. *Dudley v. Dudley*, 151 Iowa 142, 130 N. W. 785 (1911); *In re Estate of Ommang*, 183 Minn. 92, 235 N. W. 529 (1931).

The Supreme Court, however, has indicated in recent decisions a desire to curtail the power of a state to pursue its local policy to a point where it would unduly impair a legal status existing under the laws of another state.¹² To this end the Court has even extended the application of the full faith and credit clause to situations not heretofore deemed to fall within its scope. *Bradford Electric Light Co. v. Clapper*¹³ is an instance. An employer-employee relationship was created in Vermont; both parties were residents of Vermont and the normal course of employment was conducted there. Suit was brought in a federal court in New Hampshire for the death of the employee from an accident which occurred while he was engaged in emergency work in New Hampshire. The Court held that the Vermont Employers' Liability Statute, which differed from that of New Hampshire, must be applied, since New Hampshire did not have a "sufficient interest" in the litigation to warrant the impairment of the legal status existing between the parties by reason of the Vermont statute. As pointed out by Mr. Justice Stone's concurring opinion, this was clearly an unnecessary extension of the application of the full faith and credit clause to decide a case properly before the Court as a common-law problem of conflicts. And since the Court has indicated that it will decline to interfere with ordinary questions of common-law conflicts,¹⁴ the inference is that it was the statutory relationship which was deemed to justify the decision in the *Clapper* case.¹⁵ But how far such constitutional protection will be extended and in what manner conflicting interests are to be weighed is not yet clear.

This problem was again before the Court at the present term.¹⁶ A husband, his wife and minor child had been domiciled in Georgia. Subsequently the wife and child moved to North Carolina, and the husband sued his wife in a Georgia court for a divorce. The wife appeared to file an answer and to defend the suit, the child being present during part of the proceedings but not represented therein. A decree of divorce resulted whereby custody of the child was awarded to the wife; a lump sum payment, agreed upon by the parties, was ordered as a final provision for

12. "The act of becoming a member is something more than a contract, it is entering into a complex and abiding relation . . . governed by the law of the State granting the incorporation." Holmes, J., in *Modern Woodmen of America v. Mixer*, 267 U. S. 544, 551 (1925). Cf. *New York Life Insurance Co. v. Head*, 234 U. S. 149 (1914); *Aetna Life Insurance Co. v. Dunken*, 266 U. S. 389 (1924); *Home Insurance Co. v. Dick*, 281 U. S. 397 (1930); *Bradford Electric Light Co., Inc. v. Clapper*, 286 U. S. 145 (1932), noted in (1932) 32 COL. L. REV. 131; (1932) 46 HARV. L. REV. 291; (1932) 42 YALE L. J. 115; see Brandeis, J., dissenting in *New York Life Insurance Co. v. Dodge*, 246 U. S. 357, 377 (1918).

13. *Supra* note 12.

14. *Kryger v. Wilson*, 242 U. S. 171 (1916).

15. It must be recognized that this case could be confined to narrower limits by reasoning that its subject-matter, workmen's compensation, requires special treatment. In view of the trend exemplified by the cases in note 12, *supra*, this limitation is questionable. Cf. Note (1933) 33 COL. L. REV. 503, n. 1. However, to require the application of the full faith and credit clause to such a statutory relationship, but to deny supervision of any kind in cases of common-law conflicts, is to draw a distinction which can be understood only if it may be attributed to the necessity the Court may feel of limiting the business which it must supervise. See Dodd, *The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws* (1926) 39 HARV. L. REV. 533; Comment (1930) 40 YALE L. J. 291.

16. *Yarborough v. Yarborough*, 54 Sup. Ct. 181 (1933).

the needs of the child during its minority. Payment was made and the child went with her mother to South Carolina to live. Two years later the child, still a minor, brought her father before a South Carolina court by attaching his property there located and by subsequent personal service. She alleged that she had no money and asked that her father be required to provide for her support and education. The father introduced the satisfied Georgia decree, which in Georgia would have precluded any subsequent action for support,¹⁷ and contended that under the full faith and credit clause the decree must be accorded the same effect in these proceedings. The trial court's judgment in favor of the child was affirmed by the South Carolina Supreme Court.¹⁸ The United States Supreme Court, speaking through Mr. Justice Brandeis, reversed, holding that the Georgia court had jurisdiction according to its own laws to decide the rights of the child; that the proceedings were valid in conformance with Georgia law;¹⁹ and that, consequently, under the full faith and credit clause, the father had a right to rely upon the determination of his obligation rendered according to the laws of his domicile. The Court admitted that the fact of the child's residence in South Carolina gave that state jurisdiction to determine her status and its incidents upon its own residents, but denied that the state had power to impose such a duty upon the father under the circumstances. Mr. Justice Stone, dissenting, assumed that the Georgia decree was valid to bind the parties in Georgia, but contended that conditions had now materially changed; that the policy of South Carolina gave that state a peculiar interest and concern in the support of children domiciled within its borders; and that the full faith and credit clause was not properly applicable, since to restrict the power of South Carolina to provide for the child's support out of her father's property located there would be to sanction undue control by one state of the internal affairs of another.

In view of the subsequent justified change in the child's domicile, the passage of two years of time, the child's lack of money, the location of property of the father in South Carolina where the child now lives, and the justifiable interest each state feels in effecting its policy where the welfare of minor children is concerned, it may well be questioned whether the full faith and credit clause is here applicable. Had the Georgia decree declared that no one thereafter could be required to provide further support for the child, it would obviously have gone too far.²⁰ Nor could that decree have relieved the father of such duty even if he were subsequently to move to South Carolina.²¹ Yet from the point of view of the child the practical effect of the decision in the instant case is not dissimilar, for it permits a Georgia decree

17. GA. CODE ANN. (Michie, 1926) § 2981; *Coffee v. Coffee*, 101 Ga. 787, 28 S. E. 977 (1897).

18. *Yarborough v. Yarborough*, 168 S. C. 46, 166 S. E. 877 (1932).

19. At each point Mr. Justice Brandeis reversed the South Carolina court's interpretation of Georgia law, in spite of a general doctrine that mistaken construction is not reversible error. See cases cited in Comment, *supra* note 15, at 294, n. 15. Perhaps the Court felt that the South Carolina interpretation of Georgia law had not been fairly made, and that to allow it to stand would permit re-litigation of a settled point while ostensibly giving credit to a previous adjudication. More probably the Court felt that in reviewing cases under the provision of this clause it must make such interpretation for itself if the review is to be more than a formality of doubtful value.

20. Cf. CONFLICT OF LAWS RESTATEMENT (Am. L. Inst. 1931) § 498A.

21. This is apparently granted by Mr. Justice Brandeis in his opinion. *Supra* note 16, at 185. By becoming a citizen of South Carolina the father would come under a new liability not connected with his former status as a citizen of Georgia.

to protect the father's property in South Carolina contrary to the laws and policy of that state. However, from the point of view of the father, to impose a burden on his property in South Carolina would in effect be to inflict a duty upon the owner in Georgia contrary to the laws and policy of that state.²² Clearly the economic result would be the same. And if this conclusion is valid, Mr. Justice Stone's own reasoning would argue against his position.

Implicit in the views adopted by the opposite sides of the Court is a conflict between the values attached to maintaining inviolate the status of an individual whose rights have been declared by the law of his domicile, and the values attached to the power of a government which acquires an interest in the matter to alter such rights in accordance with its social policy. Depending entirely upon which premise is given the greater weight, a convincing argument can be made in the instant case to either conclusion. But the respective merits of the premises can hardly be settled as a matter of logical analysis; the decision can be understood only as an expression of the present policy of the Court. And in restricting itself to the exact facts, the Court does not preclude the possibility that under different circumstances a new duty could arise upon the part of the father which South Carolina could then enforce.²³

ADMISSIBILITY IN EVIDENCE OF RESULTS OF LANDSTEINER BLOOD GROUPING TESTS

ONE of the most recent scientific discoveries to be presented to American courts for judicial recognition is the Landsteiner blood grouping test,¹ predicated on the discovery that the red corpuscles in human blood contain two affirmative agglutinating substances called agglutinogens. There are four types of blood: one containing both substances, *AB*; one containing *A*; another *B*; and the fourth containing neither, *O*. Scientists have determined that every individual's blood falls into one of these classes and remains the same throughout life. Furthermore, this blood individuality is an hereditary characteristic handed down from parent to offspring according to the Mendelian Law of inheritance. According to this law, no agglutinating substance can appear in a child which was not present in one of its parents;

22. It must be remembered, however, that a state may base jurisdiction upon property found within its borders and may subject it to taxation as well.

23. From the record in the case it appears that the father had remarried and was earning approximately \$1600 a year. The child asked for \$1500 a year to complete her education. This her grandfather, with whom she was living, was willing to furnish if the father did not or could not. Record, at 57, 3, 14. Had it appeared that the plight of the child was more serious, the scrutiny directed by the Court to the South Carolina court's interpretation of Georgia law might not have been so keen (See note 19, *supra*), or certiorari might have been denied. It is improbable that an identical case will arise. Only in Georgia can a father be relieved of all duty to support his child. 2 VERNIER, FAMILY LAWS (1932) 196 *et seq.* Elsewhere such an attempt has been held inoperative. *Walder v. Walder*, 159 La. 231, 105 So. 300 (1925).

1. This same test is called by various names, evidently depending upon the leading scientist in this field in the locality in which it is used. In England it is referred to as the Bernstein Test. 66 Ir. L. T. 111 (1932). Landsteiner, however, is acknowledged as the pioneer in the field. Ottenberg, *Medicolegal Application of Human Blood Grouping* (1921) 77 J. AM. MED. ASS'N 682. Two continental scientists, Descatello and Sturli, confirmed Landsteiner's findings in 1902, one year after he published his first work thereon. Among the others who have aided in proving the theory are Von Dungen, Hirschfeld, Moss, Hektoen, Ottenberg and Bernstein.

thus a given pair of parents can produce only children of certain well defined groups.²

Courts have apparently considered the competence of the Landsteiner test as evidence in only three reported cases. In a criminal bastardy action³ in Pennsylvania in 1931, expert testimony based upon blood tests was offered to show that the defendant could not have been the father of the prosecutrix's child. The jury, disregarding this evidence, found the defendant guilty, and this verdict was upheld by the trial court. Upon appeal, however, the county court reversed the decision and granted a new trial upon the ground that, in view of the contrary uncontroverted expert testimony based on scientific knowledge, the verdict was not supported by the evidence. In a recent action⁴ in New York involving a similar prosecution, the Supreme Court not only admitted evidence based upon the Landsteiner theory, writing a convincing opinion in which stress is placed upon the general medical recognition of the theory, but also held that the defendant was entitled to an order compelling the plaintiff and her illegitimate child to submit to the blood tests. On the other hand, the Supreme Court of South Dakota in a recently reported case⁵ has reached a contrary conclusion. In this case an illegitimate child was born to the defendant's stepdaughter, who alleged that the defendant had raped her. At the trial the defendant moved to have blood tests taken and the resulting evidence introduced. The motion was denied by the trial court. Upon appeal, the state supreme court refused to grant a new trial and expressed the opinion that "It did not sufficiently appear, as an unquestioned fact of science . . . that if the blood groups of the mother and child are known . . . the blood group of the father could not have been a certain specific characteristic group."

In view of the established legal doctrine applicable to the acceptance of expert testimony based on scientific discovery, that the discovery relied upon must be generally acknowledged by the scientific world,⁶ the South Dakota court appears

2. Only a brief statement of the results of the theory important from the legal point of view has been attempted. For the clearest statement see Ottenberg, *Hereditary Blood Qualities* (1921) 6 JOURNAL OF IMMUN. 363. The following table illustrates the inheritance function of this classification:

Parents		TYPES OF BLOOD	
		Offspring Can Have	Offspring Cannot Have
AB and AB		AB, A, B, or O	No group impossible
AB	" A	AB, A, B, or O	No group impossible
AB	" B	AB, A, B, or O	No group impossible
AB	" O	AB, A, B, or O	No group impossible
A	" A	A or O	AB or B
A	" B	AB, A, B, or O	No group impossible
A	" O	A or O	AB or B
B	" B	B or O	AB or A
B	" O	B or O	AB or A
O	" O	O	AB, A or B

Ottenberg and Beres, *The Heredity of the Blood Groups*, in JORDAN AND FALK, *THE NEWER KNOWLEDGE OF BACTERIOLOGY AND IMMUNOLOGY* (1928) 912.

3. *Commonwealth v. Zamorelli*, 17 Pa. D. & C. 229 (1931).

4. *Beuschel v. Manowitz*, U. S. Law Week, Jan. 16, 1934, at 8.

5. *State v. Damm*, 252 N. W. 7 (S. D. 1933).

6. *Frye v. United States*, 293 Fed. 1013 (App. D. C. 1923); 2 WIGMORE, *EVIDENCE* (2d ed. 1923) § 795.

unwarrantedly skeptical. Continental doctors have written widely on the Landsteiner test and have endorsed it without dissent.⁷ Scientists working separately in different countries have tried the theory on hundreds of subjects in known families and have reached the same conclusion as to its validity.⁸ The medical information bureau of the New York Academy of Medicine, in an official statement recently issued, announced as a scientific fact the possibility of conclusively excluding paternity under certain conditions by use of these tests.⁹ European courts have employed the Landsteiner test in countless cases in recent years.¹⁰ The South Dakota court's decision seems particularly unfortunate in that it may stand as a precedent which will cause the law to lag behind later developments of the science. Thus in declaring in 1923¹¹ that it was preposterous to believe that any one could tell that a given bullet had been fired from a specific gun, the Illinois court delayed use in that jurisdiction of the valuable evidence afforded by forensic ballistics beyond the time demanded by the legal rule.¹² Early cases regarding the availability as evidence of x-ray photographs were similar.¹³

It is true that in the majority of cases the blood grouping tests will provide only negative evidence that a defendant might be the father of a particular child; conclusive evidence against paternity would appear only about one-third of the time.¹⁴ But the possibility that the tests will not afford conclusive evidence in a given case hardly justifies a refusal to use them in bastardy actions; for in such proceedings any possibility of securing evidence more substantial than the resemblance of a recently born child to the defendant¹⁵ should be welcome. Moreover, the Landsteiner tests may also prove valuable in criminal cases. For example, a defendant charged with assault or murder might, by means of the blood tests, show that blood found on his clothes was not that of the victim. On the other hand, if the tests showed that the victim's blood was one of the more rare combinations of agglutinogens¹⁶ and that the blood found on the clothes of the accused was similar, the

7. For a list of the foreign works see Lee, *Blood Tests for Paternity* (1926) 12 A. B. A. J. 441, n. 2. Perhaps LARTES, *L'INDIVIDUALITE DEL SANGUE* is the best known. The latter work has been translated into German by Dr. Fritz Schiff (J. Springer, Berlin, 1925) with an appendix dealing with the use of blood grouping tests in legal proceedings and containing an elaborate bibliography of the subject.

8. Ottenberg, *supra* note 2, at 366.

9. N. Y. Herald Tribune, Jan. 21, 1934, II-4.

10. See decision of Mr. Justice Steinbrink in *Beuschel v. Manowitz*, *supra* note 4; 66 Ir. L. T. 64 (1932); Lee, *supra* note 7.

11. *People v. Berkman*, 307 Ill. 492, 500, 139 N. E. 91, 94 (1923).

12. Serhant, *The Admissibility of Ballistics in Evidence* (1931) 2 AM. J. OF POL. SC. 202.

13. Scott, *Röntgenograms and Their Chronological Legal Recognition* (1930) 24 ILL. L. REV. 674; Note (1925) 13 CAL. L. REV. 272; (1926) 24 MICH. L. REV. 418.

14. See statement of the information bureau of the New York Academy of Medicine, *supra* note 9.

15. E.g., *Adams v. State*, 93 Ark. 260, 124 S. W. 766 (1910) (child only a few months old); *Shailer v. Bullock*, 78 Conn. 65, 61 Atl. 65 (1905). For a collection of the cases and a discussion of the necessity of this evidence for want of better, see Note (1926) 11 CORN. L. Q. 380.

16. An English authority has ascertained that in the English race the percentage of the different groups runs about $AB=3$; $A=43.3$; $B=7.2$; $O=46.4$. Other scientists experimenting with other races have had slightly varying figures, lowering class *O* to about 42 per cent and raising class *AB* to about 5 per cent. See Ottenberg, *supra* note 2.

evidence, even if not conclusive, would be persuasive of the accused's guilt; or if the defendant attempted to explain the presence of blood as his own, and the tests showed the blood to be of a different type than his and the same as that of the victim, the evidence would be extremely incriminating.

The decision in the New York case that submission to the blood tests may be compelled as a means of securing evidence is of particular importance. While a refusal to undergo the test would probably warrant an inference against a person upon which opposing counsel might comment,¹⁷ this alone would hardly prove satisfactory.¹⁸ In the majority of American jurisdictions the trial courts have the power at their discretion to order a litigant to submit to a physical examination if the resulting evidence would be relevant to the issue involved.¹⁹ This power apparently did not exist at common law;²⁰ and while in many states it has been secured only by means of statutes,²¹ in other jurisdictions the courts without the aid of legislation have claimed an inherent power to compel examination.²² Apparently the same power to compel production of evidence exists in criminal cases. The defence that such procedure might subject the defendant to disgrace is no longer recognized, except, perhaps, in one or two states.²³ While it may still be necessary in some jurisdictions to meet the objection of the privilege against self-incrimination,²⁴ the better rule is that evidence obtained from a physical examination is fact or "real" evidence, similar to that gained by the jury from observing the face of the defendant or marks on his body, and that therefore the privilege doctrine is not applicable.²⁵ Since the taking of a drop of blood from an ear lobe is certainly no more of an invasion of a litigant's person than many physical examinations, the New York court's decision establishes a precedent that may well be followed in all jurisdictions.

17. *Union Pacific Ry. Co. v. Botsford*, 141 U. S. 250 (1891); *Chicago, Rock Island & Pacific Rr. Co. v. Hill*, 36 Okla. 540, 129 Pac. 13 (1912); 4 WIGMORE, *op. cit. supra* note 6, § 2220(d).

18. It would be insufficient, for example, to overcome the presumption of legitimacy that is raised when a husband seeks to prove the adultery of his wife. 5 WIGMORE, *op. cit. supra* note 6, § 2527.

19. *St. Louis-San Francisco Rr. Co. v. Murphy*, 168 Ark. 330, 270 S. W. 956 (1925); *Cooke v. Miller*, 103 Conn. 267, 130 Atl. 571 (1925); *Hayt v. Brewster Gordon and Co.*, 199 App. Div. 68, 191 N. Y. Supp. 176 (4th Dep't 1921). For collection of cases see Note (1927) 51 A. L. R. 183.

20. *Union Pacific Ry. Co. v. Botsford*, *supra* note 17.

21. E.g., ARIZ. CODE (Struckmeyer, 1928) § 4468; N. Y. CIV. PRAC. ACT (Gilbert-Bliss, 1926) § 306; WASH. COMP. STAT. (Remington, 1932) § 1230-1.

22. *City of Ottawa v. Gilliland*, 63 Kan. 165, 65 Pac. 252 (1901); *Graves v. City of Battle Creek*, 95 Mich. 266, 54 N. W. 757 (1893).

23. 2 WIGMORE, *op. cit. supra* note 6, § 987 (3).

24. *Stokes v. State*, 5 Baxt. 619 (Tenn. 1875); Jordan, *Finger Printing: Its Use and Limitation* (1926) 12 VA. L. REC. 470, 473.

25. *People v. Sallow*, 100 Misc. 447, 165 N. Y. Supp. 915 (Gen. Sess. 1917); *State v. Cerciello*, 87 N. J. L. 309, 90 Atl. 1112 (1914); *cf. United States v. Kelly*, 55 F. (2d) 67 (C. C. A. 2d, 1932), *rev'g* 51 F. (2d) 263 (E. D. N. Y. 1931).

ABATEMENT OF LEGACIES ON ELECTION OF STATUTORY SHARE BY SURVIVING SPOUSE

THE will of a childless testator provided general legacies of about \$40,000 for three charitable and educational institutions. The residue of approximately \$140,000 was left to the testator's wife in trust during widowhood, with remainder to the heirs of the testator's brother. The widow renounced her legacy under the will and elected to take her statutory share, which amounted in this case to one half the estate.¹ The recently amended New York Decedent Estate Law requires that "after the elective share . . . has been deducted . . . the terms of the will shall as far as possible remain effective."² Interpreting this as authorizing an equitable distribution to be determined according to the facts of each case, Surrogate Foley held that all the general legacies should abate fifty per cent so that the residuary legatees would be compensated for some of the loss occasioned by the widow's election. Since contingent remainders do not accelerate in New York,³ the residue was ordered to be held in trust for the remaindermen until the widow died or remarried.⁴

Under the established rules of abatement, debts and legacies for funeral and administration expenses must be paid before any other provisions of the will are given effect.⁵ Thereafter, preference is given to specific and demonstrative, general, and residuary legacies and intestate property, in that order.⁶ A legatee within any of these classes who might be called a purchaser of the legacy by virtue of a valuable consideration given for it, as for instance a widow who accepts a testamentary gift

1. "Where a testator . . . leaves a will . . . and leaves surviving a husband or wife, a personal right of election is given to the surviving spouse to take his or her share of the estate as in intestacy, subject to the limitations . . . contained in this section." N. Y. DECEDENT ESTATE LAW (1929) § 18 (1). "In exercising the right of election herein granted a surviving spouse shall in no event be entitled to take more than one-half the net estate of the decedent, after the deduction of debts, administration expenses and any estate tax." *Id.* § 18 (1) (a).

An estate during widowhood at common law was equivalent to a life estate, and a life estate in as large a proportion of the total estate as was bequeathed in this case would bar an election under § 18. But the New York Court of Appeals in *In re Byrnes Will*, 260 N. Y. 465, 184 N. E. 56 (1933), held that in this case the estate during widowhood, being a defeasible life estate, was not equivalent in value to the minimum which would bar an election, and granted the right to the widow.

2. N. Y. DECEDENT ESTATE LAW (1929) § 18 (2).

3. *In re Lawrence's Estate*, 37 Misc. 702, 76 N. Y. Supp. 653 (Surr. Ct. 1902); (1929) 62 A. L. R. 207.

4. *In re Byrnes' Estate*, 267 N. Y. Supp. 627 (Surr. Ct. 1933). The income was to go to the residuary legatees. *Cf.* note 11, *infra*.

5. *In re Meek's Estate*, 113 Misc. 301, 184 N. Y. Supp. 693 (Surr. Ct. 1920); *In re SchAAF's Will*, 120 Misc. 292, 199 N. Y. Supp. 284 (Surr. Ct. 1923); *In re Smallman's Will*, 138 Misc. 889, 247 N. Y. Supp. 593 (Surr. Ct. 1931); 3 WOERNER, AMERICAN LAW OF ADMINISTRATION (3d ed. 1923) § 451.

6. *Rexford v. Bacon*, 195 Ill. 70, 81, 62 N. E. 936, 940 (1902); *Conant v. Elgin City Banking Co.*, 232 Ill. App. 156 (1924); *Firth v. Denny*, 2 Allen 468 (Mass. 1861); *In re Meek's Estate*; *In re Smallman's Will*, both *supra* note 5. But *cf.* *Taylor's Estate*, 5 Phila. 218 (Pa. 1863) (where a deficiency was caused by widow's election, and all legacies were abated proportionately as "more consistent with testator's intent").

in lieu of dower,⁷ is preferred to others of the same class.⁸ These rules of abatement are premised on the natural assumption that a testator who leaves specific sums or items to designated individuals intends to give those exact sums or items despite possible diminution of residuary legacies through unexpected losses.⁹ Since there is technically no residue until all prior gifts are deducted from the estate,¹⁰ he cannot be said to have anticipated that any definite sum would go to the residuary legatee, who therefore comes last in order of precedence. However, a disappointed legatee, such as the beneficiary of a residuary estate which has been diminished by the satisfaction of legacies of a preferred class, may receive preferment through the sequestration for his benefit of the corpus of a life estate which has been renounced by the life tenant,¹¹ and the remainder will not be accelerated.¹²

A clear and unequivocal expression of an intention to prefer a particular beneficiary will alter the usual order of abatement in favor of that legatee.¹³ Likewise, an intention to prefer may be presumed from pertinent expressions in the will, natural human reactions, and circumstances surrounding the testator at the time the will was executed.¹⁴ Thus, where a testator specifically instructed his executor to

7. *Security Co. v. Bryant*, 52 Conn. 311 (1885) (legacy to wife preferred over daughter's, which in turn is preferred to all others); *Towle v. Swasey*, 106 Mass. 100 (1870); *Pope v. Pope*, 209 Mass. 432, 95 N. E. 864 (1911); *In re Rothman's Will*, 140 Misc. 597, 251 N. Y. Supp. 554 (Surr. Ct. 1931); *Moran v. Cornell*, 49 R. I. 308, 142 Atl. 605 (1928); *Ellis v. Aldrich*, 70 N. H. 219, 47 Atl. 95 (1899). There are dicta to the effect that a wife's legacy in lieu of dower will be preferred over all other legacies. See *Security Co. v. Bryant*, *supra*, at 321; *Moran v. Cornell*, *supra*, at 314, 142 Atl. at 608. *Contra*: *Mitchener v. Atkinson*, 62 N. C. 23 (1866) (wife's legacy abated with other general legatees). See (1925) 34 A. L. R. 1276; WOERNER, *op. cit. supra* note 5, § 452.

8. *In re Schaaf's Will*, *supra* note 5 (attorney's fee preferred); see *In re Smallman's Will*, *supra* note 5; WOERNER, *loc. cit. supra* note 7.

9. *McGoldrick v. Bodkin*, 140 App. Div. 196, 199, 125 N. Y. Supp. 101, 104 (2d Dep't 1910). A testator is presumed to have expected that his estate would be adequate to fulfill all legacies. *Wetmore v. St. Luke's Hospital*, 56 Hun 313, 317-319 (N. Y. 1890); (1925) 34 A. L. R. 1248 *et seq.*

10. *Wetmore v. St. Luke's Hospital*, *supra* note 9, at 318.

11. *Conant v. Elgin City Banking Co.*, *supra* note 6; *Hinckley v. House of Refuge*, 40 Md. 461 (1874); *Sellick v. Sellick*, 207 Mich. 194, 173 N. W. 609 (1919); *Lonergan's Estate*, 303 Pa. 142, 154 Atl. 387 (1931), overruling *Estate of Ferguson*, 138 Pa. 203, 20 Atl. 945 (1890) and *Estate of Vance*, 141 Pa. 201, 21 Atl. 643 (1891). See Simes, *The Acceleration of Future Interests* (1932) 41 YALE L. J. 659, 679-685.

12. Renunciation of a life estate generally accelerates the remainders as though there had been a natural termination of the life estate. *Cockey v. Cockey*, 141 Md. 373, 118 Atl. 850 (1922); *Mercantile Trust Co. of Baltimore v. Schloss*, 166 Atl. 599 (Md. 1933); *In re Devine's Estate*, 147 Misc. 273, 263 N. Y. Supp. 670 (Surr. Ct. 1933); *Klenke's Estate* (No. 2), 210 Pa. 575, 60 Atl. 167 (1905); *Disston's Estate*, 257 Pa. 537, 101 Atl. 804 (1917). *Contra*: *Windsor v. Barnett*, 201 Iowa 1226, 207 N. W. 362 (1926). See Simes, *supra* note 11.

13. *First National Bank v. Hessong*, 83 Ind. App. 531, 149 N. E. 190 (1925) (testatrix instructed that all legacies should abate pro rata in case of a deficiency); *Derby v. Derby*, 4 R. I. 414 (1856) (legacy to an infant son abated in favor of wife and daughter because of specific instructions to that effect); see *In re Bialostosky*, 27 Misc. 716, 59 N. Y. Supp. 606 (Surr. Ct. 1899).

14. *Wilson v. Tyson*, 61 Md. 575 (1883) (manner of disposition of the estate shows

prefer his wife's, his son's, and a friend's legacies in case of a deficiency, the established rules were subordinated to this plain intention.¹⁵ Legacies left for the support of a dependent friend or relative or a favorite member of one's family, or for the education of one's children, may be strong evidence of an intended exception to the customary rule, as it is a natural desire to provide first for such matters.¹⁶ However, though a testator may be presumed to have intended to prefer a legacy to a spouse or child who is otherwise unprovided for,¹⁷ mere relationship is not enough to set up a presumption of priority.¹⁸ Nor will the order of mention in the will¹⁹ or words of endearment²⁰ show sufficient preference to alter the order of abatement. The intention must be indubitable, and the burden is upon the legatee seeking preferment to establish the presumption in any particular case.²¹ These rules and the exceptions to them arise out of the oft expressed requirement that the will be interpreted so as to distribute the testator's property as he would have desired had he known of the contingency which produces the necessity for abatement. The difficulty of giving effect to an intent which was either non-existent or has been locked forever in the testator's mind is obvious.²²

preference of widow); *Towle v. Swasey*, *supra* note 7 (legacy for son's education preferred); *In re Hardenbergh's Will*, 144 Misc. 248, 258 N. Y. Supp. 651 (Surr. Ct. 1932) (legacy for wife's support presumed to be preferred); *McIntosh's Appeal*, 158 Pa. 528, 27 Atl. 1044 (1893) (intent of testator to give in certain proportions will be followed); see *Bliven v. Seymour*, 88 N. Y. 469, 476 (1882).

15. *Richardson v. Hall*, 124 Mass. 228 (1878).

16. *Scofield v. Adams*, 12 Hun 366 (N. Y. 1877) (legacy for husband's "comfort and benefit" preferred); *In re Gibson's Will*, 166 App. Div. 1, 151 N. Y. Supp. 459 (1st Dep't 1915) (legacy to a "favorite niece," who had been treated like a daughter, preferred); *Richardson v. Bowen*, 18 R. I. 138, 25 Atl. 908 (1893) (monthly payments to an aged brother preferred even over legacy to wife); (1925) 34 A. L. R. 1266; see also cases cited in note 14, *supra*.

17. *Scofield v. Adams*, *supra* note 16; *Stewart v. Chambers*, 2 Sandf. Ch. 422 [382] (N. Y. 1882) (legacy to wife and children otherwise unprovided for preferred); *In re Hardenbergh's Will*, *supra* note 14; *In re Neil's Estate*, 238 N. Y. 138, 144 N. E. 481 (1924) (legacies for the support and education of children preferred); *Lewin v. Lewin*, 2 Ves. Sen. 415 (1752) (legacy to dependent wife and children preferred); see *Duncan v. Alt*, 3 Penr. & W. 382, 384 (Pa. 1832); *Babbidge v. Vittum*, 156 Mass. 38, 30 N. E. 77 (1892) (children "otherwise provided for" and therefore not preferred); *cf. Blower v. Morret*, 2 Ves. Sen. 420 (1752) (legacy to wife not preferred).

18. *In re Parsons' Estate*, 150 Iowa 230, 129 N. W. 955 (1911) (daughter not preferred because of relationship alone); *In re Hinman's Will*, 32 Misc. 536, 67 N. Y. Supp. 459 (Surr. Ct. 1900) (legacy to a brother not preferred over other general legacies); *In re Schaaf's Will*, *supra* note 5 (grandchildren not preferred); *In re Rae's Will*, 140 Misc. 530, 250 N. Y. Supp. 617 (Surr. Ct. 1931) (nephew not preferred); *Duncan v. Alt*, *supra* note 17 (wife and child not preferred); *Bixenstein's Estate*, 6 Pa. Dist. R. 19 (1896) (daughter, now married, not preferred); *Blower v. Morret*, *supra* note 17.

19. *Sumner v. American Home Mission Society*, 64 N. H. 321 (1887); (1925) 34 A. L. R. 1254.

20. *In re Bialostosky*, *supra* note 13 ("beloved" grandchildren not preferred to other grandchildren not so described).

21. *Richardson v. Hall*, *supra* note 15; *In re Bialostosky*, *supra* note 13; *In re Lloyd*, 87 Misc. 503, 511, 149 N. Y. Supp. 922, 926 (Surr. Ct. 1914).

22. ". . . While it is idle to speculate upon what he personally would have done

Under present economic conditions a general deficiency of assets will be found to be the most common cause calling for an application of the rules of abatement. The past few years have brought about such a reduction in values and diminution of estates that wills drawn in more prosperous times are liable to be utterly ineffective in consummating the intent of testators. This is especially true when they have left the residuary property to those who were the natural objects of their bounty and to whom they really desired to give the bulk of the estate.²³ Abatement of legacies may be occasioned also by assignment of dower or, as in the instant case, through election by a surviving spouse of her statutory share, or the assertion of a right to participate in the estate by a pretermitted heir or spouse.²⁴ The same order of sacrifice applies in those cases as in other situations, in the absence of a statutory variation as in New York where it is provided that the shares of the pretermitted child or spouse shall be made up by proportionate contributions from the legacies of all other beneficiaries under the will.²⁵ Though there is no statutory requirement of equal contribution in case of election by a spouse of the legal share in lieu of a legacy,²⁶ the provisions relative to a pretermitted spouse or child were strongly influential in Surrogate Foley's decision in the instant case.

After the widow's share was withdrawn, the rest of the estate had to be distributed with a "minimum disturbance of the general plan" of the testator.²⁷ It is sometimes presumed that the testator contemplated the possibility of renunciation by the spouse and abatement according to the established order.²⁸ However, it is impossible to determine whether he knew of these rules, or whether he thought and would have desired that the legacies should abate proportionately in such a situation as the present one. If the established rules of abatement were applied in this case, it is probable that the named institutions would receive their legacies in full after the widow's share was deducted from the net estate, and that the contingent remaindermen would take the residue. Judged by the criteria established in previous cases, there appears to be neither express nor sufficient implied intent to prefer the residuary legatees and except their bequests from the operation of the cus-

had he been able to look ahead, courts have always permitted themselves, within limits, to impute to testators an intent which they could not foresee." L. Hand, J., in *Boal v. Metropolitan Museum of Art*, 292 Fed. 303, 304 (S. D. N. Y. 1923).

23. Courts might take into consideration the unexpected economic situation and find an intent to prefer where the precedents failed to provide a way out of an unfortunate situation. The Connecticut Bar Association sent to all its members a suggestion that all wills be reconsidered with the economic conditions in mind. See the resolution adopted July 20, 1932, (1932) 6 CONN. BAR J. 91.

24. *Kirchner v. Kirchner*, 71 Misc. 57, 127 N. Y. Supp. 399 (Sup. Ct. 1911) (abatement caused by assignment of dower); *Young's Appeal*, 39 Pa. 115 (1861) (abatement caused by birth of a pretermitted child).

25. N. Y. DECEDENT ESTATE LAW (1929) §§ 26, 35, as amended by Laws 1931, c. 562. See the recommendation for the amendment incorporated in § 35 in Third Supplemental Report of the Commission to Investigate Defects in the Laws of Estates, N. Y. LEG. DOC. (1931) No. 69, at 77. Also see Mathews, *Pretermitted Heirs* (1929) 29 COL. L. REV. 748, 774.

26. Cf. COLO. ANN. STAT. (Mills, 1930) §§ 7871, 8028; MASS. GEN. LAWS (1921) c. 191 § 30.

27. *Loneragan's Estate*, *supra* note 11, at 148, 154 Atl., at 389; *Mercantile Trust Co. of Baltimore v. Schloss*, *supra* note 12, at 603.

28. *Disston's Estate*, *supra* note 12, at 543; 101 Atl., at 806.

tomary rules. In the instant case, the first under the applicable section of the Decedent Estate Law, Surrogate Foley departed from these criteria and, in abating the legacies proportionately, declared that each case should be governed by the equities of the particular situation rather than by a fixed standard. This seems to be the more desirable procedure where the decision is to be in accordance with so nebulous an element as the intent of the testator.

VALIDITY OF INDICTMENT CHARGING LOAN SHARKS WITH COMMON LAW
CONSPIRACY TO EXTORT

A FOREIGN corporation engaged in the small loan business in Kentucky, where the only statute¹ dealing with usury declares a contract "void for the excesses over the legal interest" rate, had charged as much as 360% upon its loans to residents of the state. In securing authority to do business in Kentucky the corporation had given the Secretary of State² false information regarding ownership of its stock. A grand jury returned an indictment charging that the defendants, officers or agents of the corporation, were guilty of the common law crime of conspiring to extort money, and, in filing a false certificate with the Secretary of State, to obstruct public justice and administration of the law. The trial court dismissed the indictment on demurrer. Upon appeal the Kentucky Court of Appeals, declaring the common law of crimes to be in force in Kentucky and the charging of usurious rates of interest to constitute extortion, reversed and held the indictment sufficient.³

The inadequate protection afforded hard-pressed debtors by the familiar statutes declaring usurious contracts to be "void" or "voidable"⁴ has led to enactment of small loan statutes in a majority of the states.⁵ In the absence of such legislation, some courts have attempted to place restraints upon the invidious "loan sharks" by holding that equity has jurisdiction to enjoin their activities.⁶ Such a resort to

1. KY. STAT. (Carroll, 1930) §2219; *Commonwealth v. Mutual Loan & Trust Co.*, 156 Ky. 299, 160 S. W. 1042 (1913).

2. Under KY. STAT. (Carroll, 1930) §§199b.1-199b.5.

3. *Commonwealth v. Donoghue*, 63 S. W. (2d) 3 (Ky. 1933).

4. Usury statutes which declare usurious agreements "void as to principal and interest," "void as to interest" or only "void as to excessive interest" have been interpreted by the courts merely as making the contracts voidable. For a discussion and collection of the present usury statutes see RYAN, *USURY AND USURY LAWS* (1924) 27-31, 205; *Legis.* (1932) 17 IOWA L. REV. 402. Criminal penalties provided by some of these statutes have been strictly construed in favor of the accused. *People v. Campbell*, 110 Cal. App. 783, 291 Pac. 161 (1930); *State v. O'Brien*, 93 Conn. 643, 107 Atl. 520 (1919); *Block v. State*, 14 Ind. 425 (1860); *People v. Quider*, 172 Mich. 280, 137 N. W. 546 (1912); *People v. Shakun*, 251 N. Y. 107, 167 N. E. 187 (1929). In addition to the legal rate of interest, a lender may lawfully charge for services and expenses incident to the loan. *Ashland National Bank v. Conley*, 231 Ky. 844, 22 S. W. (2d) 270 (1929), noted in (1929) 18 KY. L. J. 375, 401; Coffin, *Usury in California* (1928) 16 CALIF. L. REV. 281, 295.

5. The small loan legislation extant in thirty-six states and the cases dealing with the constitutionality of these statutes are classified and discussed in GALLERT, HILBORN AND MAX, *SMALL LOAN LEGISLATION* (1932) 114-130, 173-175.

6. *State v. Diamant*, 73 N. J. L. 131, 62 Atl. 286 (1905); *State v. Martin*, 77 N. J. L. 652, 73 Atl. 548 (1909); *State v. McMahan*, 128 Kan. 772, 280 Pac. 906 (1929), noted in (1929) 43 HARV. L. REV. 499. But cf. *Commonwealth v. Mutual Loan & Trust Co.*, *supra* note 1 (usurers could not be enjoined as a public nuisance).

equity encounters difficulty, however, in the lack of any property right requiring protection,⁷ and in the fact that a defendant charged with disobeying an injunction is not accorded a jury trial.⁸ These difficulties were avoided in the principal case by the resurrection of the common-law offense of criminal conspiracy. But the common law of crimes, while it remains in force in Kentucky, as well as in a majority of the other states,⁹ consists only of the common law existing in England in 1607¹⁰ as modified thereafter by statute and judicial decision in Kentucky. Prior to 1607, criminal conspiracy was a crime created and narrowly restricted by a series of statutes enacted to end the abuses growing out of combinations to procure false indictments, embracery and maintenance.¹¹ And the common-law crime of conspiracy as later developed in England and this country¹² was limited in its application to extortion to efforts to secure money under the color of public office; similarly, only combinations interfering with the performance of official duties or tampering with the courts' administration of justice were treated as conspiracies to obstruct or pervert public justice.¹³ It would seem, therefore, that the present common law in Kentucky¹⁴ affords but slight authority for the decision that the taking of usury is indictable as a common law conspiracy.

The decision in the instant case might be subject to the further criticism that in failing to enact a small loan law the Kentucky legislature could be said to have

7. *Wheeler v. Bedford*, 54 Conn. 244, 7 Atl. 22 (1886); *Cranford v. Tyrrell*, 128 N. Y. 341, 28 N. E. 514 (1891); *Crowder v. Tinkler*, 19 Ves. 617 (Ch. 1816); *Attorney General v. Sheffield Gas Consumers Co.*, 22 L. J. 811, 813 (Ch. 1853).

8. *People v. Seccombe*, 103 Cal. App. 306, 284 Pac. 725 (1930), noted in (1930) 13 CALIF. L. REV. 328; *Commonwealth v. Mutual Loan & Trust Co.*, *supra* note 1; *Hedden v. Hand*, 90 N. J. Eq. 583, 107 Atl. 285 (1919); *Commonwealth v. Hill*, 46 Pa. Sup. Ct. 505 (1911); *cf. People v. Vandewater*, 250 N. Y. 83, 164 N. E. 864 (1928) (mere commission of a series of crimes not a nuisance). The mere violation of a statute is not a ground for equitable intervention. *Caldwell, Injunction Against Crime* (1931) 26 ILL. L. REV. 259, 273; Note (1927) 75 U. OF PA. L. REV. 73; Note (1932) 38 W. VA. L. Q. 65.

9. *Lathrop v. Bank of Scioto*, 8 Dana 114, 121 (Ky. 1839); *Nider v. Commonwealth*, 140 Ky. 684, 131 S. W. 1024 (1910); *Coleman, Auditor v. Reamer's Executor*, 237 Ky. 603, 36 S. W. (2d) 22 (1931); CLARK AND MARSHALL, *CRIMES* (3d. ed. 1927) § 14.

10. KY. STAT. (Carroll, 1930) p. 120, §233.

11. First Ordinance of Conspirators, (1 Rot. Parl. 96a) 21 Edw. I (1293); Second Ordinance of Conspirators, 28 Edw. I, c. 10 (1300); Third Ordinance of Conspirators, 33 Edw. I, st. 2 (1304); 4 Edw. III, c. 11 (1330). "The earliest meaning of conspiracy was thus a combination to carry on legal proceedings in a vexatious or improper way . . . , the forerunner of the modern action for malicious prosecution." 2 STEPHEN, *HISTORY OF THE CRIMINAL LAW* (1883) 228.

12. Sayre, *Criminal Conspiracy* (1921) 35 HARV. L. REV. 393, 401, 404. For a more extensive treatment of the early historical development of criminal conspiracy see WRIGHT, *THE LAW OF CRIMINAL CONSPIRACIES* (1891); WINFIELD, *THE HISTORY OF CONSPIRACY AND ABUSE OF LEGAL PROCEDURE* (1921); HARRISON, *LAW OF CONSPIRACY* (1924).

13. CLARK AND MARSHALL, *op. cit. supra* note 9, §§ 140, 145.

14. *Cf. Rutland v. Commonwealth*, 160 Ky. 77, 169 S. W. 584 (1914) (common law conspiracy to extort money by threat to sue); *Commonwealth v. Barnett*, 196 Ky. 731, 245 S. W. 874 (1922) (common law conspiracy to elect official and to commit murder); *Baker v. Commonwealth*, 204 Ky. 420, 264 S. W. 1069 (1924) (common law conspiracy to abduct). But *cf. Aetna Insurance Co. v. Commonwealth*, 106 Ky. 864, 51 S. W. 624 (1899) (no common law conspiracy in combining to raise insurance rates).

indicated an intention to sanction a business such as that of the defendants', or at least to classify the taking of usury merely as a civil wrong. But the unconscionable terms of bargains driven by typical "loan sharks" sufficiently rebut such an inference.¹⁵ Nor do the usury laws, when not supplemented by other legislation, control these bargains; instead, such laws prohibit the honest broker from charging a rate of interest which, though in excess of the legal rate, is fair because of the risk and expense involved, and thereby drive necessitous debtors to lenders who will disregard the law.¹⁶ But while charging such lenders with the common-law crime of conspiracy was effective in putting a stop to the business of the present defendants, such indictments will be available as a weapon only where a group of individuals carry on a small loan business together.¹⁷ A single "loan shark" may still lend at exorbitant rates without being subject to punishment. The court's decision, therefore, offers only a partial solution to a problem which must eventually be solved by proper legislation.¹⁸

DEFENCE OF DIRECTORS BY CORPORATION AGAINST SUIT BROUGHT
IN ITS BEHALF

ON behalf of a corporation, a minority stockholder sued to recover money claimed to have been misappropriated by certain of its directors out of corporate funds. It was alleged that a demand on the corporation to bring suit would have been futile, since the defendant directors were likewise the chief executives of the organization and controlled a majority of its stock. On the defendants' objection to the nonjoinder of the corporation, it was joined as a necessary party defendant, and interposed an answer containing affirmative defenses to the charges against its officers. The apparent object of the defendants in urging the joinder of the corporation was to shift to it the burden of the defense. The court held that since the corporation was merely a "nominal" party with interests opposed to those of the real defendants, the affirmative defenses it offered in its answer should be stricken out.¹

In an action by a minority stockholder to compel officers of a corporation to return funds alleged to have been misappropriated, the corporation is generally regarded as an indispensable party.² This is partly to protect the defendant officers

15. The rates of interest alleged to have been charged in the principal case ranged from 240% to 360% per annum. But "loan sharks" have charged as much as 1300% per annum. *In re Home Discount Co.*, 147 Fed. 538 (N. D. Ala. 1906); *Tennessee Finance Co. v. Thompson*, 278 Fed. 597 (C. C. A. 6th, 1922); *State v. Hurlburt*, 82 Conn 232, 72 Atl. 1079 (1909); *Willson v. Fisher*, 75 Misc. 382, 135 N. Y. Supp. 532 (Co. Ct., 1912).

16. Note (1929) 42 HARV. L. REV. 689; Editorial (1932) 17 MARQUETTE L. REV. 60; Lisle, *A Widespread Form of Usury: The "Loan Shark"* (1912) 3 J. CRIM. L. 167. For a more complete discussion of this problem see RYAN, *op. cit. supra* note 4, at 127.

17. The crime of conspiracy must be effected by two or more legal persons. HARRISON, *op. cit. supra* note 12, at 63, 145.

18. The twelve states which have no small loan legislation are, with the exception of Kentucky, rural in nature. It has been suggested that wage earners supported by the land do not ordinarily have need for the small loan which is so essential to the urban employee. Cf. TUGWELL, MUNRO AND STRYKER, *AMERICAN ECONOMIC LIFE* (3d ed. 1930) 15, 67, 96.

1. *Meyers v. Smith*, 251 N. W. 20 (Minn. 1933).

2. *Davenport v. Dows*, 85 U. S. 626 (1873); *Porter v. Sabin*, 149 U. S. 473 (1893); *Bogart v. Southern Pacific Co.*, 228 U. S. 137 (1913); 4 COOK, *CORPORATIONS* (8th ed. 1923) § 738, at 3225.

from a second suit brought by the corporation on the same causes of action,³ and partly to preserve the fiction that the suit is essentially twofold: one by the minority stockholder against the corporation for failing in its duty to pursue guilty directors for acts injurious to the corporation,⁴ and a second by the stockholder as representative of the corporation on its cause of action against the directors themselves.⁵ The two suits are combined in equity and disposed of in one proceeding.⁶ It follows that the corporation is a real defendant as to the first cause of action, and a nominal party in the second. However, in each of these capacities the corporation retains affirmative defensive rights. It may unquestionably rebut the stockholder's cause of action against itself, by showing no breach of duty to bring suit.⁷ Likewise it may enter affirmative defenses when the cause of action against the directors raises issues which endanger rather than advance its interests.⁸ For a party joined in a suit for procedural purposes⁹ may yet plead in that action when his interests may be adversely affected. Thus while the assignor of a chose in action, as nominal plaintiff in a common-law suit brought in his name by the assignee, is said to have no control over the proceedings,¹⁰ he may reply to defenses of the obligor imposing "liabilities" on him.¹¹ Similarly, an executrix joined as nominal defendant in a suit by a residuary legatee to compel payment to her of certain moneys, is privileged to deny allegations of conversion by her of trust funds.¹² It results that when a suit by a minority stockholder against directors threatens an interest of the corporation, as by the cancellation of a contract believed beneficial to the corporation,¹³ or by the procurement of a receiver for the business,¹⁴ the corporation may join in the defense.

The corporation in the instant case was not attempting to defend a cause of

3. *Eldred v. American Palace-Car Co.*, 105 Fed. 457 (C. C. A. 3d, 1900); 4 *COOK*, *op. cit. supra* note 2, § 738, at 3226.

4. BALLANTINE, *MANUAL OF CORPORATION LAW AND PRACTICE* (1930) § 186.

5. See *Dickinson v. Consolidated Traction Co.*, 114 Fed. 232, 239 (C. C. D. N. J. 1902); *Dana v. Morgan*, 232 Fed. 85, 90 (C. C. A. 2d, 1916); 13 *FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* (1932) § 5939.

6. *Hawes v. Oakland*, 104 U. S. 450 (1881).

7. *Herrick v. Demster*, 73 N. J. Eq. 145, 75 Atl. 810 (1907) (a somewhat confusing opinion); *Grant v. Cobre Grande Copper Co.*, 126 App. Div. 750, 111 N. Y. Supp. 386 (1st Dep't 1908).

8. Opinion may differ as to the benefits resulting from acts of directors. The view of the minority stockholder should not preclude a defense by the corporation, if it believes the acts attacked were to its interest. See *Kanneberg v. Evangelical Creed Congregation*, 146 Wis. 610, 131 N. W. 353 (1911).

9. These cases generally arise under the code provision, found in most states, requiring necessary plaintiffs who refuse to join as such to be made defendants. See *PHILLIPS, CODE PLEADING* (2d ed. 1932) § 229.

10. See *Eckford v. Hogan*, 44 Miss. 398, 404 (1870); *Fetterman v. Plummer's Administrator*, 9 Serg. & R. 20, 22 (Pa. 1822); *cf. Welch v. Mandeville*, 1 Wheat. 233 (U. S. 1816).

11. *McCormick v. Fulton*, 19 Ill. 570 (1857).

12. *Rathbun v. Brownell*, 43 Misc. 307, 88 N. Y. Supp. 833 (Sup. Ct. 1904).

13. *Michaels v. Pacific Soft Water Laundry*, 104 Cal. App. 349, 286 Pac. 165 (1930); *cf. Thomson v. Mortgage Investment Co.*, 99 Cal. App. 205, 278 Pac. 468 (1929) (suit against another corporation). The joint defense was permitted, but was not expressly passed upon in these cases.

14. *Cf. Godley v. Crandall and Godley Co.*, 181 App. Div. 75, 168 N. Y. Supp. 251 (1st Dep't 1917).

action against itself, but rather was denying charges of misappropriation by its directors, apparently on the premise that mere corporate interest justified this pleading. However, the interest of an organization in its officials is insufficient, by itself, to warrant its assuming the defense, when a mere nominal party. Thus in a suit by a taxpayer in behalf of the city to recover a salary improperly paid to the mayor, a defense of that official by the city as nominal defendant was held frivolous since the interest of the city lay in a recovery.¹⁵ True, a few decisions have permitted a defense by a corporation of its officials when recovery of misappropriated funds was the only apparent issue.¹⁶ However, the more reasonable view is that when fraud is charged against directors, the corporation is interested in having the truth of the charges determined, and in recovering all funds of which it was deprived.¹⁷ The court in the principal case, in broadly stating that a corporation as nominal defendant could interpose no defenses, misconceived the right of a corporation to offer appropriate defenses against suits in its behalf. It correctly held, however, that in this particular instance the interest of the corporation was not in defending its officers, and properly struck out the affirmative defenses.

Basically, the issue in the instant case is not whether the corporation, as a "nominal" party, may defend, but who shall bear the cost of defense. It is well established that directors have no right to compel the corporation to pay their legal expenses in suits brought against them for alleged malfeasance in office.¹⁸ The attempt in the instant case, where the directors controlled the corporation, was to have the latter shoulder the defense and thus bear the cost as well. This attempt to divert corporate funds for the defense of its officers may have some justification where the defendant officers have been exonerated of any malfeasance, for the successful plaintiff is reimbursed for the cost of the suit,¹⁹ though, it is true, only from the funds he has recovered for the corporation.²⁰ Liability to suits, however, is considered a risk attendant on directorships, to be assumed together with the more compensatory features of that office.

15. *Kaiser v. Portage*, 198 Wis. 581, 225 N. W. 188 (1929).

16. *Brown v. De Young*, 167 Ill. 549, 47 N. E. 863 (1897) (the corporation joined with the directors in the answer); *McHarg v. Finance Corp.*, 44 S. D. 144, 182 N. W. 705 (1921).

17. See *Jesse v. Four Wheel Drive Auto Co.*, 177 Wis. 627, 189 N. W. 276 (1922).

18. See *Du Puy v. Crucible Steel Co.*, 288 Fed. 583 (W. D. Pa. 1923) (director had won suit); *Witherspoon v. Hornbein*, 70 Colo. 1, 196 Pac. 865 (1921) (director had lost suit); *McConnell v. Combination Mining and Milling Co.*, 31 Mont. 563, 79 Pac. 248 (1905); *Godley v. Crandall and Godley Co.*, 153 App. Div. 697, 139 N. Y. Supp. 236 (1st. Dep't 1912); *Griesse v. Lang*, 37 Ohio App. 553, 175 N. E. 222 (1931) (director had won suit).

19. *McCourt v. Singers-Bigger*, 145 Fed. 103 (C. C. A. 8th, 1906); *Fox v. Hale and Norcross Silver Mining Co.*, 108 Cal. 475, 41 Pac. 328 (1895); *Graham v. Machine Works*, 138 Iowa 456, 114 N. W. 619 (1908); *Sant v. Perronville Shingle Co.*, 179 Mich. 42, 146 N. W. 212 (1914); *Fitzgerald v. Bass*, 122 Okla. 140, 252 Pac. 54 (1927); *cf. Trustees v. Greenough*, 105 U. S. 527 (1881); *Central Rr. v. Pettus*, 113 U. S. 116 (1885).

20. 13 FLETCHER, *op. cit. supra* note 5, § 6045; 6 THOMPSON, CORPORATIONS (3d ed. 1927) § 4585.

VALIDITY OF TAX ON NON-TAXABLE INCOME OF LIFE INSURANCE COMPANIES
IMPOSED AS A CONDITION TO DEDUCTION

THE Revenue Act of 1921,¹ taxing insurance companies only on their investment income and treating the ordinary expenses of the insurance business as properly payable out of untaxed premiums, authorized any life insurance company to deduct from gross income all the taxes, depreciation and expenses incurred in connection with its home office building only if the rental value of the space occupied by the company itself were included in its return of gross income. Furthermore, a statutory minimum was placed upon such rental value by the requirement that it "shall not be less than a sum which in addition to any rents received from other tenants shall provide a net income (after deducting taxes, depreciation, and all other expenses) at a rate of four per centum per annum of the book value . . . of the real estate so owned or occupied."² In several recent cases the taxpayer, attacking as unconstitutional the condition on which the deduction was allowed, claimed the full deduction without including in its gross income the rental value of the space which it occupied in its own building. The Board of Tax Appeals in each instance upheld the taxpayer's position and declared the particular subsection unconstitutional.³ On appeal, one of the Board's decisions was upheld by the Court of Appeals for the Sixth Circuit.⁴ In two cases appealed in the Seventh Circuit the Board was reversed and the tax provision upheld.⁵

Presumably the drafters of the special tax provisions applicable to life insurance

1. 42 STAT. 262 (1921) § 245a (6, 7).

2. *Id.* § 245b; U. S. Treas. Reg. 62, Art. 686. The provision was repeated without change in the Acts which followed. Revenue Act of 1924, § 245b, 43 STAT. 290 (1924), 26 U. S. C. § 1004b (1926); U. S. Treas. Reg. 65, Art. 686; Revenue Act of 1926, § 245b, 44 STAT. 48 (1926); U. S. Treas. Reg. 69, Art. 686; Revenue Act of 1928, § 203b, 45 STAT. 843 (1928); U. S. Treas. Reg. 74, Art. 976.

3. The first case was *Independent Life Insurance Co. v. Commissioner of Internal Revenue*, 17 B. T. A. 757 (1929). Three members denied the power of the Board to declare an Act of Congress unconstitutional, and dissented on that ground. The Commissioner indicated his "nonacquiescence in assumption of authority of the Board to pass upon constitutionality." IX-1 Cum. Bull. 68. The Board has consistently followed this case. *Reserve Loan Life Insurance Co. v. Commissioner of Internal Revenue*, 18 B. T. A. 359 (1929); *Two-Republics Life Insurance Co. v. Commissioner of Internal Revenue*, 21 B. T. A. 1355 (1931); *Jefferson Standard Life Insurance Co. v. Commissioner of Internal Revenue*, 25 B. T. A. 1335 (1932); *LaFayette Life Insurance Company v. Commissioner of Internal Revenue*, 26 B. T. A. 946 (1932); *Volunteer State Life Insurance Co. v. Commissioner of Internal Revenue*, 27 B. T. A. 1149 (1933); *Missouri State Life Insurance Co. v. Commissioner of Internal Revenue*, 29 B. T. A. No. 74 (1933).

4. *Commissioner of Internal Revenue v. Independent Life Insurance Co.*, 67 F. (2d) 470 (C. C. A. 6th, 1933). The question of the Board's power was regarded as being moot and was therefore not considered. The court had previously certified the constitutional question to the United States Supreme Court [62 F. (2d) 1066 (C. C. A. 6th, 1932)] but because the questions were of objectionable generality, the certificate was dismissed. 288 U. S. 592 (1933).

5. *Commissioner of Internal Revenue v. LaFayette Life Insurance Co.*, 67 F. (2d) 209 (C. C. A. 7th, 1933), *rev'g* *LaFayette Life Insurance Co. v. Commissioner of Internal Revenue*, *supra* note 3; *Commissioner of Internal Revenue v. Rockford Life Insurance Co.*, 67 F. (2d) 213 (C. C. A. 7th, 1933).

companies intended to exclude from the deduction in controversy expenses incurred in earning untaxed income.⁶ They proceeded upon the assumption that the expenses connected with space which a life insurance company occupies in its home office building is not an expense that should properly be allocated to investment income.⁷ But to the Board of Tax Appeals the device adopted seemed open to two objections under the Constitution. The Board argued that to constitute income under the Sixteenth Amendment and hence to be free from the inhibition against direct taxes not apportioned according to population,⁸ the subject of the tax must meet the Supreme Court's requirement that taxable income be severed from capital.⁹ That the theoretical rent enjoyed by a taxpayer occupying his own property is never severed from that property seemed obvious to the Board. However, the Court of Appeals for the Sixth Circuit, by adopting the Board's second objection as the basis for its own decision, found it unnecessary to determine that question. This objection was aimed not at the mere inclusion of the rental value in gross income but rather at the method of computing such value. The statutory formula was condemned as arbitrary in that the amount purporting to represent the rental value of the space occupied would vary each year inversely as the rents from other tenants increased or decreased, so that only by the merest chance would a constant estimate be even approximated.

In all the cases involving the constitutionality of these sections the Commissioner sustained the tax upon the ground that the taxpayer returns the amount only because such return is a condition to claiming the benefit of a deduction granted by Congress. In effect the argument is that Congress has arbitrary and full powers over deductions and may, therefore, attach conditions to their allowance. This position found favor with the dissenting judge in the principal case and with the Court of Appeals for the Seventh Circuit. However, the conditioning of a deduction upon an additional return is rare, and when such additional return submits to taxation income which is not directly taxable, its constitutionality might well be questioned. The Supreme Court has already decided that the benefit of a statutory exemption may not be withheld to the extent that the taxpayer received income from tax-exempt securities.¹⁰ And mathematically it is immaterial to the result whether the tax-exempt amount is included in gross income before the deduction is made or whether the deduction itself is reduced by the amount in question.¹¹ Once it is

6. This is the principle of *Lewis v. Commissioner of Internal Revenue*, 47 F. (2d) 32 (C. C. A. 3d, 1931). But *cf.* G. C. M. 10123, X-2 Cum. Bull. 254.

7. See SEN. REP. 617, 65th Cong., 3d Sess., Ser. No. 7452, at 9; Brandeis, J., dissenting in *National Life Insurance Co. v. United States*, 277 U. S. 508, 523 (1928); Revenue Act of 1921, § 244a.

8. U. S. Const., Art. I, § 9, cl. 4. See Riddle, *The Supreme Court's Theory of a Direct Tax* (1917) 15 MICH. L. REV. 566.

9. *Eisner v. Macomber*, 252 U. S. 189, 207 (1920); *Bowers v. Kerbaugh-Empire Co.*, 271 U. S. 170, 174 (1926).

10. *National Life Insurance Co. v. United States*, *supra* note 7; *cf.* *Missouri v. Gehner*, 281 U. S. 313 (1930); *United States v. Ritchie*, Fed. Cas. No. 16,168 (D. Md. 1872).

11. For example, (1) Net Income=Gross Income-(Deduction-Non-taxable Amount). Removing the parentheses: (2) Net Income=Gross Income+Non-taxable Amount-Deduction. To the dissenting judge in the Sixth Circuit, equation (1) seemed free from vice, *supra* note 4, at 474. However, *National Life Insurance Co. v. United States*, *supra* note 7, is direct authority for holding it objectionable under the Constitution under the assumption to which note 12, *infra*, is appended.

granted that such nebulous restrictions against inclusion of direct taxes within the income tax as were left after the passage of the Sixteenth Amendment are as compelling in this connection as the statutory exemption accorded to government securities,¹² the position of the Board of Tax Appeals falls clearly within the rule of *stare decisis*.

As a practical matter the taxpayer's complaint found a favorable reception because the statute seemed to work illogically and unfairly.¹³ It is a truism that precise equality in any system of taxation is an impossibility;¹⁴ yet inequality should not, as here, be unnecessarily irrational. Since the entire net rent is in any event to be computed as at least four per cent of the book value, the rental value of the space occupied must always be such a figure as may be needed to make up the four per cent minimum. Hence, though a company's revenues from rents fall below the four per cent, its taxes remain constant. The inherent unfairness, particularly under present conditions, of setting up this statutory formula for the rental value of the space was recognized when the Revenue Act of 1932 was in committee.¹⁵ The original end in view, to limit deductions to the same basis on which receipts were taxed as income, was clear; but the means of reaching it as embodied in the statute were seen to have been unfortunately chosen. As revised by the 1932 Act the statute now allows the deduction only to the extent that the taxes, depreciation and expenses are allocable to that part of the building not occupied by the company.¹⁶ The new provision seems a practical and valid means of arriving at a justifiable result.

RIGHT OF SHIPPING COMPANY TO COMPENSATION FOR RETURN OF ITS OWN SHIPWRECKED SEAMEN

IN November, 1929, the crew of the wrecked S. S. Depere, owned by the Alaska Steamship Company, were transported from their vessel to Ketchikan, Alaska, by the United States Coast Guard. On certificate of the Deputy Collector of Customs at Ketchikan, who provided them with lodging and sustenance as destitute seamen, they were subsequently returned to the United States via the S. S. Yukon, owned by the same company that had operated the Depere. Proceeding under the Act of June 26, 1884, as amended,¹ the owners of the Yukon sought to recover from the United States the amount payable by the government for the transportation of destitute seamen from foreign ports to ports of this country. Payment was refused by the Comptroller General, who considered the company under an independent duty to return its own shipwrecked seamen to the United States and therefore not entitled to the statutory remuneration. His decision was affirmed by the District Court on

12. But *cf. In re Opinion of the Justices*, 270 Mass. 593, 602, 170 N. E. 800, 803 (1930).

13. Thus in *Independent Life Insurance Co. v. Commissioner of Internal Revenue*, *supra* note 3, the formula required a return of \$14,784.70 as the rental value for 1923 of the one floor which the company occupied in its twelve-story building. For 1924 changes in the other variables resulted in a valuation of \$34,400.08 for the same space. *Id.* at 759, 760.

14. See *Tappan v. Merchants National Bank*, 86 U. S. 490, 504 (1873); *LaBelle Iron Works v. United States*, 256 U. S. 377, 392 (1921).

15. See SEN. REP. No. 665, 72d Cong., 1st Sess., Ser. No. 9488, at 36.

16. Revenue Act of 1932, § 203b, 47 STAT. 225 (1932), 226 U. S. C. SUPP. VI § 203b: "The deduction . . . shall be limited to an amount which bears the same ratio to such deduction (computed without regard to this subsection) as the rental value of the space not so occupied bears to the rental value of the entire property." See U. S. Treas. Reg. 77, Art. 976.

1. 23 STAT. 55 (1884), as amended by 42 STAT. 24 (1921), 46 U. S. C. § 679 (1926).

the same grounds,² and by the Circuit Court of Appeals for the reason that the statute requires the certificate to be issued not by a customs official but by an American consular officer.³ The Supreme Court sustained the petitioner's claim, holding that the administrative practice with reference to destitute seamen sanctions the issuance of certificates by customs officials in Alaska, where, of course, there is no American consul; and that steamship companies are under no duty, statutory or otherwise, to repatriate their shipwrecked seamen.⁴

The statute in question provides that certificates for the transportation of destitute seamen from foreign ports to the United States shall be issued by consular officers, and that such certificates are assignable to the carrier for collection from the Comptroller General.⁵ No provision is made for their issuance by customs officials. But certificates signed by Alaskan collectors of customs have uniformly been recognized, and Congress, in making annual appropriations for the relief of destitute seamen, has specifically included Alaska within the territories from which American seamen are to be returned at the expense of the government.⁶ The reversal of a settled administrative practice, consistently followed at least since 1900⁷ and necessary to effectuate relief in the American-owned regions specified in annual appropriations for this purpose, should be based on something more convincing than mere absence of proper statutory wording where the intent of Congress is clear. Furthermore, under the Act of July 31, 1894, as amended,⁸ compensation is provided, without need of a certificate, for the return of distressed seamen from foreign ports having no American consular officer.

If, however, the Alaska Steamship Company was under an independent duty to return its shipwrecked crew, its suit against the United States must fail. For the statute providing compensation was designed not for the benefit of shipping concerns but for the welfare of distressed seamen, and should be applied only where the owners of the vessel which accomplishes the purpose in view would not apart from the statute have been responsible for bringing the crew home.⁹ By statute and by the general maritime law ship owners are in many instances bound to return their men from foreign ports. As a rule, seamen discharged through the fault or misconduct of the owners or master, or because of the sale of the vessel in a foreign port, are entitled to their transportation to the United States.¹⁰ So also are seamen discharged on account of injury or illness.¹¹ But as to those who have deserted, the owners are under no such liability and may be compensated for transporting them back to this country.¹² In the matter of shipwrecked seamen the duty of the owner appears to be governed partly by custom, partly by statute, and partly by the shipping articles signed by the crew. In the early history of maritime law if the vessel were wrecked both parties

2. *Alaska Steamship Co. v. United States*, 60 F. (2d) 135 (W. D. Wash. 1932).

3. *Alaska Steamship Co. v. United States*, 63 F. (2d) 398 (C. C. A. 9th, 1933).

4. *Alaska Steamship Co. v. United States*, 54 Sup. Ct. 159 (1933).

5. Note 1, *supra*.

6. See *Alaska Steamship Co. v. United States*, *supra* note 4, at 160, 161.

7. See *id.* at 161.

8. 28 STAT. 205 (1894), 46 U. S. C. § 681 (1926), recently incorporated into § 679 by 46 STAT. 261 (1930), 46 U. S. C. SUPP. VI § 679 (1932).

9. 4 DEC. COMP. GEN. 118 (1924); 4 *id.* 632 (1925).

10. See 23 STAT. 54 (1884), 46 U. S. C. §§ 658, 684, 685 (1926); *The Gazelle*, Fed. Cas. No. 5,289 (D. Mass. 1858); 6 DEC. COMP. TREAS. 603 (1900).

11. 4 DEC. COMP. GEN. 252 (1924).

12. 3 *id.* 936 (1924).

were relieved from any further contractual obligations; the sailors no longer owed their services and the owner had merely to pay them such wages as were already due, apparently being under no duty to provide for their return transportation.¹³ In case of *seminaufragium*, or partial destruction of the vessel from perils of the sea, the seamen had a lien for their past wages on the proceeds resulting from the sale of the salvaged remains.¹⁴ When first adopted in this country this lien was extended to cover their expenses home,¹⁵ in conformity with an early statute providing for the payment of extra wages should the vessel be sold abroad.¹⁶ Later, however, with the enactment of a statute terminating this duty of an owner to pay extra wages after the loss of his vessel through shipwreck,¹⁷ the right of seamen against the remains of the ship for their return transportation was revoked.¹⁸ They have since relied on provisions made for their return passage by American consular officials, as authorized by statutes such as that in the instant case.¹⁹

The ordinary shipping articles signed by seamen in anticipation of a voyage provide for their wages and for their return to the port from which they embarked. In some instances large steamship companies append additional provisions to the standard shipping articles, agreeing that in case of the loss or wreck of the vessel the seamen's pay shall continue until they are returned to the United States, and that they may be transferred to any other vessel of that line. The effect of such supplemental agreements has been to prevent shipwreck from terminating the contractual relations of the parties, as it otherwise would, and under these circumstances the return of shipwrecked seamen in vessels of the same company has not been compensable by the government.²⁰ In the present case the steamship company agreed in the shipping articles to provide transportation "to a final port of discharge in the United States,"²¹ but there was apparently no provision concerning shipwreck. The duties of the company, except for payment of wages due, terminated, therefore, both by statute²² and by the general maritime law immediately upon the loss of the vessel, and in transporting the destitute crew to this country it cannot be said that the company was undertaking a duty which it was already obligated to perform.

13. VALIN, *ORDONNANCE DE LA MARINE DU MOIS D'AOUT 1681*, liv. 3, tit. 4, arts. 8, 9; POTHIER, *TRAITÉ DES CONTRATS DE LOUAGE MARITIMES* (1765) part. 3, § 2, subsec. 1, n. 184.

14. VALIN, *op. cit. supra* note 13, art. 9.

15. *The Dawn*, Fed. Cas. No. 3,666 (D. Me. 1841).

16. 2 STAT. 203 (1803).

17. 11 STAT. 62 (1856). The present statute, 30 STAT. 755 (1898), 46 U. S. C. § 593 (1926), provides that "where the service of any seaman terminates before the period contemplated in the agreement, by reason of the loss or wreck of the vessel, such seaman shall be entitled to wages for the time of service prior to such termination, but not for any further period. Such seaman shall be considered as a destitute seaman and shall be treated and transported to port of shipment as provided in (code) sections 678, 679, and 681." The code sections referred to provide for the care and return of distressed seamen by American consular officers, and for the payment of compensation to ships providing them with transportation.

18. *Hoffman v. Yarrington*, Fed. Cas. No. 6,580 (D. Mass. 1867); *Kelly v. Otis*, 23 Fed. 903 (C. C. E. D. La. 1885).

19. Since the enactment of 1 STAT. 256 (1792), the government has provided for the return of destitute seamen, with the co-operation of consular authorities.

20. 1 DEC. COMP. GEN. 337 (1921); 4 *id.* 542 (1924).

21. *Alaska Steamship Co. v. United States*, *supra* note 3, at 400.

22. See note 17, *supra*.

DETERMINATION BY FEDERAL COURTS OF VALIDITY OF STATE STATUTE UNDER STATE CONSTITUTION

IN *Glenn v. Field Packing Company*,¹ a petition for an injunction was presented to a three judge federal court to restrain the enforcement of a Kentucky tax statute on the ground that it violated both the state constitution and the Constitution of the United States. Although the validity of the statute under the Kentucky constitution had not been determined by the state courts, the court granted a permanent injunction on the ground that the statute violated that constitution. The Supreme Court, upon direct appeal, held that the federal court had jurisdiction to rest its decision solely on the state question, but modified the injunction by providing that the tax commissioner could apply² for a dissolution of the decree if the statute were subsequently sustained by the Kentucky Court of Appeals as valid under the state constitution.³

Where a controversy involving both federal and state questions is originally brought in the state courts, those courts are entitled to pass upon all questions presented; but on writ of error or certiorari to the United States Supreme Court, that tribunal considers only the federal question, since the highest court of a state is said to be the final authority on state law.⁴ More difficulty is found when a similar controversy originates in or is removed to the lower federal courts when jurisdiction is derived solely from the existence of the federal question. If in such a case decision upon the federal question may be reached only after determination of the state question, the federal court may clearly consider both problems. Thus where there has been no state-court interpretation of a statute alleged to violate the federal Constitution, the federal courts must necessarily construe the statute before passing upon its constitutionality.⁵ But frequently the state and federal questions are not thus inseparable.

1. 54 Sup. Ct. 138 (1933).

2. The Court's instruction that the tax commissioner apply "to the court below" apparently means to the three judge court. *Ex parte Metropolitan Water Co.*, 220 U. S. 539 (1911); *Cumberland Telephone & Telegraph Co. v. Louisiana Public Service Commission*, 260 U. S. 212 (1922); *Ex parte Northern Pacific Ry. Co.*, 280 U. S. 142 (1929); *Stratton v. St. Louis Southwestern Ry. Co.*, 282 U. S. 10 (1930); *cf. Great Falls Gas Co. v. Public Service Commission*, 39 F. (2d) 176 (D. Mont. 1930); *Ex parte Poresky*, 54 Sup. Ct. 3 (1933).

3. The modification also provided for an application to dissolve the decree if a change in circumstances validated the tax. This is a usual practice. *Simpson v. Shepard*, 230 U. S. 352, 473 (1913); *Darnell v. Edwards*, 244 U. S. 564, 570 (1917). Even when not expressed it is implicit in a permanent injunction. *Ladner v. Siegel*, 298 Pa. 487, 148 Atl. 699 (1930); 1 FREEMAN, JUDGMENTS (5th ed. 1925) 511.

4. *Carstairs v. Cochran*, 193 U. S. 10, 16 (1904); *Quong Ham Wah Co. v. Industrial Commission*, 255 U. S. 445, 448 (1921). The Supreme Court has often remanded cases so that issues of local law on which it had not passed when the case was before it might be considered by the state court. *Sioux City Bridge Co. v. Dakota County*, 260 U. S. 441 (1923); *Chicago & Northwestern Ry. Co. v. Durham Co.*, 271 U. S. 231 (1926). A prior decision of a state supreme court upon a state question is followed by the lower federal courts. *Ortega v. Triay*, 260 U. S. 103, 109 (1922); *General American Tank Car Corp. v. Day*, 270 U. S. 367, 371 (1926).

5. *Van Dyke v. Geary*, 244 U. S. 39 (1917); *Utah Power and Light Co. v. Pfost*, 286 U. S. 165, 187 (1932); *cf. Ohio River and Western Ry. Co. v. Dittley*, 232 U. S. 576, 586 (1914).

arable, but instead are merely alternative grounds of decision. A decision on the federal question in such a case does not preclude a subsequent examination of the state question, since the federal court is allowed to decide the case on its merits and so to dispose of the entire action.⁶ The federal court may, however, rest its decision wholly on the state question. In *Siler v. Louisville and Nashville Railroad Company*,⁷ allegations of the federal unconstitutionality of a state statute were combined with a question as to the proper construction of that statute; the federal court placed its decision solely upon the state question without any consideration of the federal claim through which it had secured jurisdiction. In the *Siler* case the Supreme Court recognized the policy of declining to decide state questions until they have been passed upon by the state court, but argued that by taking jurisdiction over the state claim and giving relief on that ground alone it avoided a difficult federal constitutional question.⁸ The *Siler* case has frequently been followed.⁹

In modifying the decree in the principal case to provide for dissolution of the injunction if the state court should interpret the state constitution as authorizing the tax, the Supreme Court has effected an important restriction upon the lower federal court's power to use their jurisdiction to pass only upon a state question. In none of the cases following the *Siler* decision had the state courts previously determined the local validity of the state legislation, yet in none of the decisions was provision made for the contingency that the state court might subsequently hold the statute constitutional. The modification in the instant case implies on the one hand that the Supreme Court will not sanction a conflict of jurisdictions from conclusive¹⁰ interference with state tax administration¹¹ prior to state court interpretation, and

6. In many cases in which injunctions have been sought to restrain acts in violation of both the federal and state constitutions, decision on the merits has resulted in denial of relief under both allegations. *Coulter v. Louisville & Nashville Rr. Co.*, 196 U. S. 599, 609 (1905); *Pullman Co. v. Knott*, 235 U. S. 23, 27 (1914); *Southern Ry. Co. v. Watts*, 260 U. S. 519, 522 (1923); *cf. Michigan Central Rr. Co. v. Powers*, 201 U. S. 245, 291 (1906); *Louisville & Nashville Rr. Co. v. Garrett*, 231 U. S. 298 (1913); *Hurn v. Oursler*, 289 U. S. 238 (1933) (decision against the plaintiff on a cause of action under the federal copyright statute does not preclude examination into a state question of unfair competition); Note (1933) 46 HARV. L. REV. 1339. But *cf. Chicago Great Western Ry. Co. v. Kendall*, 266 U. S. 94, 97-8 (1924).

7. 213 U. S. 175 (1909). The Court decided that the statute in question did not confer the contested rate making power upon the state commission.

8. *Id.* at 193-194.

9. *Greene v. Louisville and Interurban Rr. Co.*, 244 U. S. 499 (1917); *Dawson v. Kentucky Distilleries and Warehouse Co.*, 255 U. S. 288 (1921); *Davis v. Wallace*, 257 U. S. 478 (1922); *cf. Sterling v. Constantin*, 287 U. S. 378, 393 (1932); *Brucher v. Fisher*, 49 F. (2d) 759, 761 (C. C. A. 6th, 1931).

10. The lower federal courts, though not bound by their own prior decisions in such a situation, *Southern Ry. Co. v. North Carolina Corporation Commission*, 99 Fed. 162, 167 (C. C. E. D. N. C. 1900), will, if that prior decision was appealed, show deference to the Supreme Court's opinion and hold the proceeding to be *res judicata*. *Missouri v. Angle*, 236 Fed. 644, 651 (C. C. A. 8th, 1916); *United States v. Cargill*, 263 Fed. 856, 861 (C. C. A. 8th, 1920); *Duval Cattle Co. v. Hempill*, 41 F. (2d) 433 (C. C. A. 5th, 1930); 3 FOSTER, FEDERAL PRACTICE (6th ed. 1921) 2466; DOBIE, FEDERAL PROCEDURE (1928) § 140.

11. Federal interference with state tax administration is particularly undesirable. See *Michigan Central Rr. Co. v. Powers*, *supra* note 6, at 291.

on the other hand that it is maintaining a restrictive attitude toward excessive activity of the federal trial courts.¹² Under this decision permanent relief upon the state question can be obtained only by applying through the state courts;¹³ consequently the case should have a strong influence in forcing complainants relying principally upon a state question to first exhaust their state remedies and then to appeal from the state supreme court should their federal rights need protection.¹⁴

POWER OF FEDERAL COURT TO FIX UTILITY RATE APPLICABLE ONLY TO PAST PERIOD

APPELLANT gas company's municipal franchise contract provided that if the company should charge a rate which the city considered unreasonably high, the city could apply to the state Railroad Commission for a valuation of the company's property and a determination of a fair rate. It was stipulated that, pending such proceedings before the commission and review by the courts, the company should charge its customers 50 cents per thousand cubic feet of gas, to be increased to 60 cents upon the addition to the company's properties of certain pipe line facilities; but of the income received at these rates, 10 cents per thousand cubic feet of gas was to be turned over to the commission for ultimate distribution to the company and its customers on the basis of the rate finally set. In February, 1927, the city protested a rate demanded by the company, and the dispute was referred to the commission. In accordance with the terms of its franchise, the company then charged a 50 cent rate. In December, 1927, the anticipated pipe line extensions were completed, and the company raised its rate to 60 cents. After lengthy hearings the commission in 1929 set a 45 cent rate, basing its decision on a valuation of the company's property as of December 31, 1926. The company thereupon sought an injunction in the federal District Court against enforcement of the order, alleging that it was in violation of the Fourteenth Amendment.¹ In 1932 the court, likewise making its

12. A federal statute has been recommended limiting federal courts to cases where there is no speedy and adequate equitable or legal remedy in the state courts, Lockwood, Maw, Rosenberry, *The Use of the Federal Injunction in Constitutional Litigation* (1930) 43 HARV. L. REV. 426. It has also been suggested that the jurisdiction of federal courts to grant injunctions restraining state activity be abolished, and that review be given by the Supreme Court only on certiorari to the state courts. Frankfurter, *Distribution of Judicial Power between United States and State Courts* (1928) 13 CORN. L. Q. 499.

13. In several recent cases the Supreme Court has denied federal injunctions against the enforcement of state taxes by expanding the "adequate legal remedy" concept, and has thereby forced litigants into the state courts. *Matthews v. Rodgers*, 284 U. S. 521 (1932); *Stratton v. St. Louis Southwestern Ry. Co.*, 284 U. S. 530 (1932). See Note (1932) 41 YALE L. J. 769. The lower federal courts have done likewise. *Henrietta Mills Co. v. Rutherford County*, 32 F. (2d) 570 (C. C. A. 4th, 1929). 'But cf. *Conn. v. Ringer*, 32 F. (2d) 639 (C. C. A. 6th, 1929); *City Bank Farmers' Trust Co. v. Schnader*, 54 Sup. Ct. 259 (1934).

14. As such, the case is a desirable extension of the policy of denying federal jurisdiction over litigation which can more satisfactorily be dealt with by the state tribunals. See *United States v. Mayor of Hoboken*, 29 F. (2d) 932 (D. N. J. 1928); Warren, *Federal and State Court Interference* (1930) 43 HARV. L. REV. 345; cf. *Prentiss v. Atlantic Coast Line Co.*, 211 U. S. 210, 232 (1908), followed in *Interborough Rapid Transit Co. v. Gilchrist*, 279 U. S. 159, 208 (1929); Taylor and Willis, *The Power of the Federal Courts to Enjoin Proceedings in State Courts* (1933) 42 YALE L. J. 1169, 1191.

1. *Central Kentucky Natural Gas Co. v. Railroad Commission*, 37 F. (2d) 938 (E. D. Ky. 1930).

computations as of December 31, 1926, found the rate confiscatory and granted the injunction, on the condition, however, that the company consent to distribution of all of the funds impounded since 1927 on the basis of a 50 cent rate, which the court found to be a reasonable charge.² The company rejected this conditional relief and appealed. The Supreme Court recently held that, since the valuation used was calculated as of December 31, 1926, and did not take into account the cost of the pipe line extensions completed toward the end of 1927, the scope of any decree should have been confined to 1927. But the Court further held that the condition upon which the injunction had been granted was an unwarranted intrusion on the legislative power of the commission to set rates. The District Court's decision was accordingly reversed, with directions to enjoin the 45 cent rate but otherwise wholly to relinquish control over the matter to the commission for further proceedings.³

The greater technical knowledge and more specialized training of administrative bodies engaged in public utility valuation and rate making perhaps would warrant the view that rates set by a commission should not be subject to judicial review, even on issues of confiscation and due process.⁴ But the courts, insisting that they may not thus be deprived of their function of protecting the individual and his property from tyrannical legislation, and that commission rates have the force of legislation, have reserved to themselves the power of determining independently whether a given rate is so low as to be "confiscatory."⁵ While maintaining this power, however, the courts have recognized that too much judicial interference would virtually nullify all commission work and would greatly increase the difficulties inherent in public utility regulation. It is generally said, therefore, that even upon rejecting a commission's rate the courts may not themselves declare what a proper rate would be;⁶ to do so

2. *Central Kentucky Natural Gas Co. v. Railroad Commission*, 60 F. (2d) 137 (E. D. Ky. 1932).

3. *Central Kentucky Natural Gas Co. v. Railroad Commission*, 54 Sup. Ct. 154 (1933), petition for rehearing denied.

4. DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW* (1927) 12-15, 49-55, 71-75, 333-4. See *Illinois Central Rr. Co. v. Interstate Commerce Commission*, 206 U. S. 441, 454 (1907), *Excess Income of St. Louis & O'Fallen Ry. Co.*, 124 I. C. C. 3, 51 (1927). See, for general discussions of administrative law and judicial review, C. W. Pound, *Constitutional Aspects of American Administrative Law* (1923) 9 A. B. A. J. 409; Guthrie, *Public Service Commissions* (1928) 14 A. B. A. J. 359; Brown, *The Functions of Courts and Commissions in Public Utility Rate Regulation* (1924) 38 HARV. L. REV. 141; Buchanan, *The Valuation of Railroads* (1927) 40 HARV. L. REV. 1033; Lilienthal, *The Federal Courts and State Regulation of Public Utilities* (1930) 43 HARV. L. REV. 379; Comment (1930) 40 YALE L. J. 81; Comment (1932) 41 YALE L. J. 1037; Dickinson, *Judicial Review of "Constitutional Fact"* (1932) 80 U. OF PA. L. REV. 1055; Barnes, *Federal Courts and State Regulation of Utility Rates* (1934) 43 YALE L. J. 417. For an illuminating description of typical commission problems and procedure, see Kurtz, *State Public Service Commissions* (1923) 8 ST. LOUIS L. REV. 214, 220.

5. *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 8 (1909); *Kansas City Southern Ry. Co. v. C. H. Albers Commission Co.*, 223 U. S. 573, 591 (1912); *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U. S. 287 (1920); *Bluefield Water Works & Improvement Co. v. Public Service Commission*, 262 U. S. 679 (1923); *Crowell v. Benson*, 285 U. S. 22, 56 (1932).

6. *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 397 (1894); *Prentiss v. Atlantic Coast Line Co.*, 211 U. S. 210, 226 (1908); *Honolulu Rapid Transit & Land Co. v. Hawaii*, 211 U. S. 282 (1908); *Louisville & Nashville Rr. Co. v. Garrett*, 231 U. S. 298, 313 (1913); *Newton v. Consolidated Gas Co.*, 258 U. S. 165, 177 (1922); *Los Angeles Gas & Electric Corp. v. Railroad Commission*, 289 U. S. 287, 304 (1933); *Louisville v. Louisville Home*

would be to usurp the legislative power to set standards controlling the future relations of individuals, and incidentally to strip the commissions of what functions remain to them. The courts' function is to reject, if necessary, but not to revise. The duplication and inefficiency which this judicial self-restraint imposes upon litigants⁷ is perhaps a necessary compromise between administrative finality and constitutional guaranties. Yet acceptance of this compromise should not obscure the need for an occasional exception to the general rule. The principal case, in which after seven years of litigation a dispute over past rights was remanded to the commission without final decision, might well have been considered such an exception. As the Supreme Court recognized, the rate here disputed can properly control only as to 1927. Prompt determination of the charges for that year was not only desirable from the viewpoint of the company and its customers, but was also important to the commission in proceeding to set the rate applicable in subsequent periods. Since all the data relating to 1927 were before the District Court when it reviewed the commission's order, and since the court in condemning that order as confiscatory had in any event to calculate, for purposes of comparison, the amount of revenue necessary to avoid confiscation of the company's property,⁸ no practical difficulties stood in the way of a determinative decree. If the court was competent to make a comparative finding, it was likewise competent itself to dispose of the whole matter as to 1927.

In practice federal district courts frequently expedite a final solution of rate problems in the course of condemning a commission's figures, by pointedly indicating the revisions they consider necessary.⁹ This procedure, however, entails further administrative action; in the instant case it was desirable that the charge for 1927 be immediately and finally determined. This might have been accomplished had the District Court confined its conditional decree to the 1927 period;¹⁰ the company appar-

Telephone Co., 279 Fed. 949, 960 (C. C. A. 6th, 1922); *Minneapolis v. Rand*, 285 Fed. 818 (C. C. A. 8th, 1923); *Northwestern Bell Telephone Co. v. Spillman*, 6 F. (2d) 663 (D. Neb. 1925); *cf. Denver & Salt Lake Rr. Co. v. Chicago, Burlington and Quincy Rr. Co.*, 64 Colo. 229, 171 Pac. 74 (1918); *Morrell v. Brooklyn Borough Gas Co.*, 231 N. Y. 398, 132 N. E. 129 (1921).

7. See Comment (1930) 40 *YALE L. J.* 81.

8. See *Toledo v. Toledo Rys. & Light Co.*, 259 Fed. 450, 458 (C. C. A. 6th, 1919); *cf. cases cited in note 9, infra.*

9. In *Citizens' Gas Co. v. Public Service Commission*, 8 F. (2d) 632 (W. D. Mo. 1925), the court found 7.6% to be a reasonable rate of return on property which it valued at \$523,433. The court then stated that "the injunction will stand until the Public Service Commission has allowed and promulgated a schedule of rates responsive to this opinion." Similar action was taken in *Chesapeake & Potomac Telephone Co. v. Whitman*, 3 F. (2d) 938 (D. Md. 1925), and *Vincennes Water Supply Co. v. Public Service Commission*, 34 F. (2d) 5 (C. C. A. 7th, 1929), *cert den.*, 280 U. S. 567 (1929).

Federal courts have set provisional rates pending further commission or court proceedings. *Toledo v. Toledo Rys. & Light Co.*, *supra* note 8; *Northwestern Bell Telephone Co. v. Hilton*, 274 Fed. 384 (D. Minn. 1921); *Augusta-Aiken Ry. & Electric Corp. v. Railroad Commission*, 281 Fed. 977 (C. C. A. 4th, 1922); *Columbus Gas & Fuel Co. v. Columbus*, 17 F. (2d) 630 (S. D. Ohio 1927). And in *Fort Worth Gas Co. v. Fort Worth*, 35 F. (2d) 743 (N. D. Tex. 1929), after the state commission had rejected a demand for a rate increase, the court enjoined the city from interfering with the company's charging a "reasonable rate."

10. The Supreme Court in the principal case recognized the power of the lower court in its "sound discretion" to attach equitable conditions to the granting of an injunction. The power, however, should be "very cautiously exercised" and does not extend so far as to al-

ently rejected the court's 50 cent rate only because the decree applied that rate also to the subsequent years, when the pipe line extensions had rendered the valuation as of December 31, 1926, inaccurate as a rate base. It is probable that neither party would have felt sufficiently aggrieved to appeal from a decree setting the rate only for 1927, and the case would therefore have been effectually closed. And even if the conditional decree as thus restricted had been contested, its validity might have been upheld upon the ground that in setting a rate for 1927 the court was dealing with the accrued, existing rights and liabilities of the company and the city;¹¹ such a determination would not be a legislative declaration of future rights, but would instead lie within the proper scope of judicial action.¹²

GROUNDINGS FOR RECOGNITION OF IMPLIED CONTRACTS UNDER THE TUCKER ACT

IN the Tucker Act¹ the United States has consented in advance to be sued upon contracts "express or implied in fact." But the Supreme Court has not made clear what the considerations are which actually impel it to recognize an implied contract. Where, for example, a claimant seeks to found an implied obligation upon an alleged taking of private property under the terms of the Fifth Amendment, a statement by the Court that the facts do or do not constitute a "taking" is merely the expression of a conclusion. And it is of little value to know that if real property is damaged rather than appropriated for public use, the Court considers it a taking only if the injury is a "direct" and foreseeable result of an act of eminent domain.² Likewise, the explanation that a particular claim concerns a contract implied "in law"³ and therefore does not fall within the Tucker Act gives no clue to the reason

low judicial rate-setting. *Newton v. Consolidated Gas Co.*, *supra* note 6, at 177. The conditional decree is used in a variety of situations. *Harrisonville v. W. S. Dickey Clay Manufacturing Co.*, 289 U. S. 334 (1933) (injunction against pollution by city sewage denied, provided adequate monetary compensation should be made); *Lincoln Gas & Electric Light Co. v. Lincoln*, 223 U. S. 349 (1912) (bond required to account to customers for any overcharges discovered subsequently); *Cummings v. National Bank*, 101 U. S. 153 (1880) (tax collection enjoined, conditional on payment of part thereof known and conceded to be owing); *People's National Bank v. Marye*, 191 U. S. 272 (1903) *semble*; see *State Railroad Tax Cases*, 92 U. S. 575, 617 (1876) *semble*; *cf.* *Colorado Power Co. v. Halderman*, 295 Fed. 178 (D. Colo. 1924).

11. *Janvrin v. Revere Water Co.*, 174 Mass. 514, 55 N. E. 381 (1899); *cf.* *Central Park, North & East River Rr. Co. v. Willcox*, 194 N. Y. 383, 87 N. E. 517 (1909); *Louisville Tobacco Warehouse Co. v. Louisville Water Co.*, 162 Ky. 478, 172 S. W. 928 (1915); see *Nebraska Telephone Co. v. Yeiser*, 55 Neb. 627, 635, 76 N. W. 171, 173 (1898); *Borough of Washington v. Washington Water Co.*, 70 N. J. Eq. 254, 255, 62 Atl. 390, 391 (1905); *cf.* *Road District v. St. Louis Southwestern Ry. Co.*, 257 U. S. 547 (1922); *Brymer v. Butler Water Co.*, 179 Pa. 231, 36 Atl. 249 (1897).

12. *Prentis v. Atlantic Coast Line Co.*, *supra* note 6; *cf.* *Roslyn Gas Co. v. Fletcher*, 5 F. Supp. 25 (E. D. Va. 1933) (rule of *Prentis* case held to be limited by wording of Virginia constitution to transportation and transmission companies).

1. 24 STAT. 505 (1887), 28 U. S. C. § 41 (20) (1926). See Grismore, *Contracts with the United States* (1924) 22 MICH. L. REV. 749.

2. *Bedford v. United States*, 192 U. S. 217, 225 (1904); *Sanguinetti v. United States*, 264 U. S. 146 (1924); *cf.* *Manigault v. Springs*, 199 U. S. 473, 484 (1905).

3. See *Eastern Extension, Australasia & China Telegraph Co. v. United States*, 251 U. S. 355, 363 (1920); *Merritt v. United States*, 267 U. S. 338, 341 (1925).

for denial of relief. In many cases, moreover, the Court's assumption that the United States took property "under a claim of right" seems questionable,⁴ and at most a convenient device for refusing recovery to the claimant by informing him that his claim is in tort.

In a number of cases the conclusion reached by the Supreme Court seems to be founded upon a determination of whether the loss to the plaintiff constitutes an injury to a property right. Thus, where the United States, under the terms of a contract, took possession of equipment which a defaulting contractor had purchased on conditional sale,⁵ or on which there existed a chattel mortgage,⁶ the government was held obligated upon an implied contract with the creditor. The Court has also allowed compensation to a claimant whose property interest was impaired when shells were fired over his land by coast artillery.⁷ And where during the War the government requisitioned the entire output of an electric power company, a manufacturer who was entitled by conveyance and lease to draw a stipulated quantity of water from the utility's intake canal was awarded compensation, one ground being that the right of withdrawal was an "incorporeal hereditament."⁸ Similarly, in allowing recovery to a claimant whose lease was destroyed when the government requisitioned the premises,⁹ the Court distinguished a previous ruling denying relief for the destruction of a contract right,¹⁰ on the theory that possession under the lease was "part of the res."

Considerations of policy, however, apparently play an even more important part in determining the interpretations of the Tucker Act. For example, in claims arising from the ordinary business dealings of the United States with private individuals, the rules enunciated by the Supreme Court have the effect if not the purpose of restricting liability in order not to impede the performance of governmental functions. Claims are not allowed upon contracts made by representatives of the United States acting beyond the scope of their authority¹¹ for amounts in excess of legislative appropriations¹² or for materials or work supplied beyond the stipulated contract terms,¹³ even where the government has benefited from the loss of the private party.¹⁴ The same policy is apparent where an implied contract is sought to be based upon an exertion of the power of eminent domain; for the allowance of compensation to all those whose property interests are in any way injured by the exercise of such power would discourage public improvement.¹⁵ It may of course be that

4. *Tempel v. United States*, 248 U. S. 121 (1918); *Alabama v. United States*, 282 U. S. 502 (1931); *Livingston v. United States*, 60 Ct. Cl. 114 (1925), *aff'd*, 273 U. S. 648 (1926); *cf. Hijo v. United States*, 194 U. S. 315 (1904). But *cf. Pearson v. United States*, 267 U. S. 423 (1925).

5. *International Harvester Co. v. United States*, 72 Ct. Cl. 707 (1931).

6. *United States v. Buffalo Pitts Co.*, 234 U. S. 228 (1914). But *cf. Ball Engineering Co. v. White & Co.*, 250 U. S. 46 (1919).

7. *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U. S. 327 (1922).

8. *International Paper Co. v. United States*, 282 U. S. 399 (1931).

9. *Duckett & Co. v. United States*, 266 U. S. 149, 152 (1924).

10. *Omnia Commercial Co. v. United States*, 261 U. S. 502 (1923).

11. *Hooe v. United States*, 218 U. S. 322 (1910).

12. *Goodyear Tire & Rubber Co. v. United States*, 276 U. S. 287 (1928).

13. *Sutton v. United States*, 256 U. S. 575 (1921).

14. *Ibid.*; *cf. Nelson Co. v. United States*, 261 U. S. 17 (1923); *Early & Daniel Co. v. United States*, 271 U. S. 140 (1926).

15. See *Cormack, Legal Concepts in Cases of Eminent Domain* (1931) 41 *YALE L. J.* 221, 259.

this consideration does not operate consciously upon the Court, but the decisions, frequently of an arbitrary character, are quite consistent with it. Compensation was allowed for a flooding caused by the construction of a dam¹⁶ but denied when a claimant's soda lake was destroyed by percolating underground water from an irrigation project.¹⁷ An owner was granted relief for damage to a portion of his land caused by the taking of the remainder¹⁸ but not for damage resulting from the taking of adjoining land owned by others.¹⁹ And a claimant whose property was suddenly flooded was awarded compensation for damage to hay stored upon the land, but not for destruction of his business or financial losses caused by the forced sale of cattle as a consequence of the flooding.²⁰ Likewise, in claims arising out of governmental activities during the World War, the necessity of protecting the financial stability of the United States, coupled with a realization of the enormous profits made by persons dealing with the government during the War, must clearly have motivated the Supreme Court to accord a narrow definition to the implied contracts for which compensation was assured by the Dent Act.²¹ Payment was refused for expenses incurred in providing the government with special facilities such as railway spurs to military depots²² and barracks for troops²³ when no authoritative promise of payment could be found. Nor was compensation allowed to persons who provided special cold storage equipment²⁴ or oil tanks²⁵ in order to fill military requirements, even where the outlay was in response to a threat to requisition the claimant's property. Relief was also denied for market losses which would not have been incurred in the absence of governmental regulation of industry.²⁶ In fact, the Supreme Court granted compensation only for supplies actually furnished to the United States;²⁷ for leases on land which the government took over;²⁸ and for executory contracts the performance of which was actually requisitioned, thus

16. *United States v. Cress*, 243 U. S. 316 (1917); *Jacobs v. United States*, 45 F. (2d) 34 (C. C. A. 5th, 1930); *cf. Sanguinetti v. United States*, *supra* note 2 (compensation denied where land previously subject to overflow was subjected to increased flooding).

17. *Horstmann Co. v. United States*, 257 U. S. 138 (1921).

18. *Campbell v. United States*, 266 U. S. 368 (1924). See *Cormack*, *supra* note 15, at 255.

19. *Campbell v. United States*, *supra* note 18.

20. *Bothwell v. United States*, 254 U. S. 231 (1920). The Supreme Court refuses compensation for loss of business and good will, *Mitchell v. United States*, 267 U. S. 341 (1925), although state constitutions and statutes often grant relief for such items of damage. *Id.* at 345, 346. The chief reason for the Supreme Court's attitude probably is that the damages are too speculative, *Cormack*, *supra* note 15, at 257.

21. 40 STAT. 1272 (1919). The Act did not confer jurisdiction upon the courts to entertain suits against the United States, but simply directed the Secretary of State to compensate deserving claimants.

22. *Baltimore & Ohio Rr. Co. v. United States*, 261 U. S. 385 (1923).

23. *Baltimore & Ohio Rr. Co. v. United States*, 261 U. S. 592 (1923).

24. *Chicago Cold Storage Warehouse Co. v. United States*, 57 Ct. Cl. 220 (1922), *aff'd*, 263 U. S. 677 (1923).

25. *Interocean Oil Co. v. United States*, 270 U. S. 65 (1926).

26. *Atwater & Co. v. United States*, 275 U. S. 188 (1927). But *cf. Sultzbach Clothing Co. v. United States*, 10 F. (2d) 363 (W. D. N. Y. 1925) (recovery allowed for amount of fine levied under Lever Act, subsequently declared unconstitutional).

27. *Liggett & Myers Tobacco Co. v. United States*, 274 U. S. 215 (1927). But *cf. cases cited note 14, supra*.

28. *Duckett & Co. v. United States*, *supra* note 9.

giving the United States the benefit of lower than market costs.²⁹ The latter case was distinguished from one where the impairment of the claimant's contract right to a portion of a manufacturer's supply, resulting from the requisition of the manufacturer's entire output at market prices, did not redound to the benefit of the United States.³⁰

The problem was again presented to the Supreme Court at the present term. In 1916 a village in Idaho, acting in pursuance of statutory authority, created three "improvement districts," issued bonds for the estimated cost of improvements, and levied a special assessment upon property owners equivalent to the par value of the bonds. Over a course of seven years, beginning in 1920, the United States acquired by condemnation or purchase all the lands within the districts for the construction of a reservoir. As each parcel was secured the government paid or caused to be paid the assessment previously levied, but it had notice before the acquisition was completed that the proceeds of the assessment would be insufficient to redeem the principal and interest of the bonds. In 1928 the city reassessed for the amount of the deficiency all the property within the districts, then completely under the ownership of the United States. A bondholder instituted suit against the government for the amount in question, claiming that the government's immunity to local taxation deprived the bondholders of their only source of payment;³¹ but the Supreme Court denied the existence of an implied contract.³²

The result is in accord with previous rulings of the Supreme Court and with the considerations which have been sought as the determining factors in interpreting the Tucker Act. The property right impaired by the government's action was at most an "inchoate right" to a reassessment,³³ an interest which the Court may reasonably consider not a property right protected by the Fifth Amendment. Allowance of compensation for the impairment of such an interest is clearly undesirable upon grounds of policy, since it would defeat the very purpose of governmental immunity to state process and local taxation.³⁴ Moreover, in the instant case the United States had not deducted the amount of the future reassessment from the moneys paid to the former property owners, and consequently had received no benefit at the expense of the claimant.³⁵

29. *Brooks-Scanlon Corp. v. United States*, 265 U. S. 106 (1924); *cf.* *Russian Volunteer Fleet v. United States*, 282 U. S. 481, 489 (1931).

30. *Omnia Commercial Co. v. United States*, *supra* note 10, distinguished in *Duckett & Co. v. United States*, *supra* note 9, at 152. An attempt was also made to distinguish the *Omnia* case in *International Paper Co. v. United States*, *supra* note 8, at 408. *Cf.* *Hall v. Wisconsin*, 103 U. S. 5 (1880); *De Laval Steam Turbine Co. v. United States*, 284 U. S. 61 (1931) (recovery allowed for cancellation of contract requisitioned by the United States).

31. The statute exempted the municipality from liability for the amount of the bonds; the bondholders' lien attached to each lot within the improvement district only to the amount of the assessment levied thereon. *IDAHO COMP. STAT.* (1919) §§ 4025, 4026. See *New First National Bank v. City of Weiser*, 30 Idaho 15, 22, 166 Pac. 213, 216 (1917).

32. *Mullen Benevolent Corp. v. United States*, 54 Sup. Ct. 38 (1933).

33. See *United States v. Mullen Benevolent Corp.*, 63 F. (2d) 48, 55 (C. C. A. 9th, 1933).

34. *Cf.* *Alabama v. United States*, *supra* note 4; *United States v. City of Buffalo*, 54 F. (2d) 471 (C. C. A. 2d, 1931).

35. At the time the United States acquired the land, it withheld a portion of the purchase price pending determination of the government's liability to a future reassessment, but subsequently, on advice of counsel, the amounts withheld were paid over to the former owners.