STARE DECISIS, QUO VADIS?
THE ORPHANED DOCTRINE IN THE SUPREME COURT

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The doctrine of *stare decisis* is a legal principle, tending to stabilize the law so that all may know what it is and act accordingly. It was once dependable but has become inconstant and unstable. Only recently it was referred to as a “social policy . . . rooted in the psychologic need to satisfy reasonable expectations.”¹ Sincere in their respective convictions, progress to one is regression to another. As long as men continue to think, there will be differences of opinion in law as well as in science and theology. Legal questions cannot be solved by mathematical formulae; however, neither should the law be made so uncertain by the varying opinions of judges, whereby sweeping and unpredictable changes are announced, overturning long-established principles, whether the diversities in viewpoint be legal or ideological or political, that a prospective litigant, with knowledge of the latest decisions, can do no better than guess as to what the law may be after his case has run the gantlet of the lower courts and has come to the scrutiny of last resort.

This is neither a criticism nor a polemic but a narration unadorned, except for occasional comments, of some of the mutations in the law, as it has been announced by the Supreme Court from time to time, that have resulted from changes in the personnel of the Court or from an inversion of concept of those who rendered the previous opinions.

To the fixed decisionists *stare decisis* is a revealed religion, a dogma as immutable as the tablets of stone that came down from Mt. Sinai. The credo of the contra-extremists, advocating the free decision, the current or transient interpretation, is that

“Rules, like Men, to Time must bow;
Then was Then, but Now is Now.”²

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²Gitterman, A POET’S PROVERBS (1924) 9.

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The Court has consistently emphasized its inclination to overrule former decisions and to steer an opposite course if the views of its members do not coincide with those of their predecessors. For example, it has said: 

"... we do not agree with the theory of the Haddock case..."; 8 

"... when convinced of former error, this Court has never felt constrained to follow precedent"; 4 whether the rule of stare decisis "shall be followed or departed from is a question entirely within the discretion of the court, which is again called upon to consider a question once decided." 5 This has been the attitude of the Court on questions arising under statutes as well as on constitutional questions. Justice Brandeis, in a dissenting opinion, said that "Stare decisis is usually the wise policy" but that "The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function." 86

In one instance, at least, members of the Court disagreed with a prior decision but declined to overrule it because it had been followed so long that they felt they should "adhere to an unsatisfactory rule to avoid unfortunate practical results from a change." 77 In another case the Court said: "It would violate the first principles of constitutional adjudication to strike down state legislation on the basis of our individual views or preferences as to policy, whether the state laws deal with taxes or other subjects of social or economic legislation." 88 That the Court has not always followed this precept will appear from its treatment of wage and hour laws, social and other legislation to which reference will be found later herein.

Associate Justice Jackson, speaking of the caution that should be exercised in the overruling of established precedents, had this to say in an address before the American Law Institute in May, 1944:

"... Unless the assumption is substantially true that cases will be disposed of by application of known principles and previously disclosed courses of reasoning, our common-law process would become the most intolerable kind of

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ex post facto judicial law-making. . . . To overrule an important precedent is serious business. It calls for sober appraisal of the disadvantages of the innovation as well as those of the questioned case, a weighing of practical effects of one against the other.  

Justice Jackson has dissented in several cases in which the Court has overruled its previous decisions, and he has joined with the majority in a few.

When a question that had been decided repeatedly by the Supreme Court of California was again before that court, an Associate Justice, recently appointed, stated that if he had been a member of the court when the former decisions were rendered he probably would have been inclined to a view opposite to that of the decided cases; but his regard for the doctrine of stare decisis impelled him to refuse to join with the minority of the court who thought that those precedents should be cast aside. He did not believe "that courts of last resort should lightly skip from side to side of a procedural fence on every change in their personnel", but was of the opinion "that certainty of the method may be of greater public importance than its technical soundness, where the asserted unsoundness lies not so much in its operation as in its historical or theoretical derivation." (Italics quoted.)

Manifestly the only disposition to be made of an error is to correct it. This may be done without embarrassment when error is confessed by those who joined in the former opinion, as in the recent Jehovah's Witness flag salute case. But what of the overruling of cases that have been relied upon, affirmed, and reaffirmed over a period of years? Who will sit in the Ivory Tower with a superior intellect to determine where the error lies, whether in the old or in the new decision; which one contains the correct exposition of the law; whose is the true and whose the sophistic reasoning?

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9Jackson, Decisional Law and Stare Decisis (1944) 30 A. B. A. J. 334.
"You’re sure that you are Right? How fine and strong! But were you never just as Sure—and Wrong?"\textsuperscript{14}

Right or wrong, we perforce have followed the prior ruling; and, right or wrong, we are bound by the new until a sufficient number of dissentients supply a contrary doctrine.

Casualties in judicial decisions have been numerous in the past decade. The most venerable of the authorities to decease was \textit{Swift v. Tyson},\textsuperscript{15} which stood for ninety-six years; and the shortest lived, less than one year, was \textit{Jones v. Opelika}.\textsuperscript{16} More concerning these cases later.

From the beginning of our national history the Court has occasionally overruled or qualified its former decisions, but recent years have brought forth an abnormal number of reversals,\textsuperscript{17} in some instances of cases of long standing, with numerous and respected progeny. Omar Khayyam did not purport to forecast the future courts when he wrote:

\begin{quote}
"The Moving Finger writes; and, having writ,
Moves on: nor all your Piety nor Wit
Shall lure it back to cancel half a Line,
Nor all your Tears wash out a Word of it."
\end{quote}\textsuperscript{18}

How frequently and completely have Words been washed out by the Court, sans Piety, sans Wit, sans Tears, will be found in the discussion following.

The overruling of \textit{Swift v. Tyson}\textsuperscript{19} by \textit{Erie Railroad Co. v. Tompkins}\textsuperscript{20} has been so thoroughly discussed in law reviews and other legal periodicals that nothing need be said here except that the writers are practically unanimous in approving the abandonment of the doctrine of \textit{Swift v. Tyson}, in which it was held that the expression "laws of the

\textsuperscript{14}GUTERMAN, A POET’S PROVERBS (1924) 38.
\textsuperscript{15}16 Pet. 1 (U. S. 1842).
\textsuperscript{17}The cases cited in this article overruling previous decisions were rendered as follows: From 1801 to 1910, 18 cases; 1911 to 1930, 9 cases; 1931 to 1936, 2 cases; 1937 to 1944 (end of 1943 term), 19 cases. The numerous decisions that have been qualified and limited by subsequent opinions are not referred to in this review.
\textsuperscript{18}KHAYYÁM, RUBÁIYÁT (Fitzgerald, 3d ed. 1872) Stanza LXXI.
\textsuperscript{19}16 Pet. 1 (U. S. 1842).
\textsuperscript{20}304 U. S. 64 (1938).
several states" in the Federal Judiciary Act of 1789, referred solely to the statutes and excluded the unwritten law as declared by the highest courts of the states. To be told that this case has been the vehicle by which the common law was returned to the state courts where it rightfully belonged was no anodyne to the aggrieved feelings of Tompkins nor compensation for his physical injuries. Relying on a rule that had been reiterated and followed by the Federal courts for ninety-six years, Tompkins lost his case by reason of the agreement of six justices (two dissenting and one taking no part in the decision) that the rule had always been wrong. Why should he have been made the victim of the failure of stare decisis to function when no constitutional question was involved? The Court might have announced that the doctrine was erroneous and would no longer be followed and at the same time have preserved to Tompkins the right that he was justified by lapse of time and by scores of decisions in believing was his.

Some state courts have taken this more reasonable view. In Montana the court concluded that it had judged wrongly in a previous case, overruled it, and declared that it was not to be followed in the future; but it sustained a recovery on a claim made by reason of the former decision. The court gave as a reason for so doing that a contract is made in consideration of the law in force at the time of its execution, whether statute law or decisions of the court, and that the construction given to a statute by the court, although erroneous, becomes and remains a part of it as much as though written into it, until reversed or modified. The change thus made by the court in the construction of the statute affected only those contracts that were made after the decision. The ruling had the same effect that would have been produced by a legislative amendment or repeal of a statute. The Montana court was sustained in so limiting its reversal of the former decision.

In Kentucky the court said that it is—

"... competent for a court, in overruling a prior adopted principle, to preserve in the overruling opinion all rights accrued under the prior declaration, the same as if they had been created or arose out of a former existing statute which was later repealed by the Legislature. ..."

And it did so. It overruled earlier cases, expressly preserved all rights

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22Montana Horse Prod. Co. v. Great Northern Ry., 91 Mont. 194, 7 P. (2d) 919 (1932); Sunburst Oil & Ref. Co. v. Great Northern Ry., 91 Mont. 216, 7 P. (2d) 927 (1932).
therefore created and accrued by reason of them, and declared that they should not be followed thereafter and that the current opinion should have a prospective effect only.

Insurance business for seventy-five years was not, but is now, if the judgment of a minority of the court makes it so, interstate commerce. From 1869 to 1944 the business of insurance was held to be subject to regulation and taxation by the states, the commerce clause of the Constitution being inapplicable thereto. In fact, the business was not considered to be commerce at all. Insurance policies were not subjects of trade and barter offered in the market. In *Paul v. Virginia*\(^{25}\) the Court stated:

> “... Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. ... Such contracts are not inter-state transactions, though the parties may be domiciled in different States. ...”

In a decision no less remarkable for the manner of its rendition than for the fact that it overturned a long established precedent repeatedly followed, the business of issuing insurance policies was held to be interstate commerce and subject to the restrictions of the Sherman Act.\(^{26}\) The decision was given by a minority of the court, four joining in the opinion, three dissenting, and two not participating. The result of the case, if the minority decision should be followed, is to vest in Congress the power to regulate the insurance business in all its phases; it may tax insurance companies, prescribe the terms on which they may write policies, and provide for the fixing of rates. Whether Congress determines to exercise that power remains to be seen; but the important consequence is the possibility that a business that has been held to be essentially a local state matter, conditions widely varying in the different states, the business having been established and the forms provided in accord with state requirements, may possibly be removed entirely from the control and regulation of state authorities.

The rule of *Paul v. Virginia* had been challenged in many cases, but prior to the *South-Eastern Underwriters case* it was always sustained.\(^{27}\)

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\(^{25}\) See the cases cited in the *South-Eastern Underwriters case*, 322 U. S. 533, 544, n. 18 (1944), and those cited in the dissenting opinions of Chief Justice Stone, *id.* at 562, and Justice Jackson, *id.* at 584.

\(^{26}\) Wall. 168, 183 (U. S. 1869). This decision was by a unanimous court.

In holding a foreign insurance company to be subject to a tax levied by state authority, the Court, in *New York Life Ins. Co. v. Deer Lodge County*, 28 said, citing a number of cases:

“If we consider these cases numerically, the deliberation of their reasoning, and the time they cover, they constitute a formidable body of authority and strongly invoke the sanction of the rule of *stare decisis*. . . . For over forty-five years they have been the legal justification for such legislation. To reverse the cases, therefore, would require us to promulgate a new rule of constitutional inhibition upon the States and which would compel a change of their policy and a readjustment of their laws. Such result necessarily urges against a change of decision. . . .”

This and like statements in former decisions of the Court did not deter the minority in the *South-Eastern Underwriters case*. No reason was given and no authority cited for the announcement of the judgment with less than a majority concurring. Such action was in direct conflict with what had repeatedly been declared to be the law. When the Court is called upon to decide whether what was done in the lower court shall be reversed or affirmed, “it is obvious that that which has been done must stand unless reversed by the affirmative action of a majority.” 29 When the Court is equally divided, the judgment must be affirmed; but the principles of law that have been argued cannot be settled. 30

Another landmark to fall was *Haddock v. Haddock*, 31 which for thirty-six years had been cited as a limitation on the application of the full faith and credit clause of the Constitution to a decree of divorce procured in a state other than that of the matrimonial domicile, if service of process on the defendant had been made by publication and the defendant had failed to submit to the jurisdiction of the forum. The Court, in its latest expression on the subject, overruling the *Haddock case*, said, “we do not agree with the theory of” that case; and, not agreeing, it decided otherwise. 32 Time and future litigation will tell whether the entire theory of that case has been repudiated or whether each case hereafter must be considered and decided on the particular facts estab-

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28 231 U. S. 495, 502 (1913).
29 30 Hertz v. Woodman, 218 U. S. 205, 212 (1910); see Washington Bridge Co. v. Stewart, 3 How. 413, 424 (U. S. 1845).
30 31 Etting v. United States Bank, 11 Wheat. 59, 78 (U. S. 1826); Durant v. Essex Co., 7 Wall. 107, 110 (U. S. 1869); Hartman v. Greenhow, 102 U. S. 672, 676 (1881). In practically every volume of the reports, memorandum orders are found affirming judgments by an equally divided court.
32 201 U. S. 562 (1906).
lished. Three justices dissented, Justice Jackson expressing the thought that "judicial responsibility is for the regularity of the law, not for the regularity of pedigrees."\textsuperscript{33}

In an admiralty case, \textit{Mahnich v. Southern Steamship Co.},\textsuperscript{34} sustaining a seaman's right to recover damages for injuries received while working on a ship, the Court disapproved a ruling to the contrary in a previous case.\textsuperscript{35} Justice Roberts, vigorously dissenting, said that the lower court felt bound to follow the law as announced by the Supreme Court in the prior decision and while he did not "advocate slavish adherence to authority where new conditions require new rules of conduct,"\textsuperscript{36} yet—

"... If litigants and lower federal courts are not to do so, the law becomes not a chart to govern conduct but a game of chance; instead of settling rights and liabilities it unsettles them... the more deplorable consequence will inevitably be that the administration of justice will fall into disrepute. ..."\textsuperscript{37}

He added that the disregard of precedents had been so strong as to "shake confidence in the consistency of decision and leave the courts below on an uncharted sea of doubt"\textsuperscript{38} as to whether what was said yesterday will hold good tomorrow.

Another precedent to be overruled was \textit{Toledo Newspaper Co. v. United States}.\textsuperscript{39} In the city of Toledo, where an application for an injunction was pending, a newspaper published cartoons and comment relating to the case which, because of their inflammatory character, tended to incite the public to resist and disobey the injunction, if it should issue, and amounted to an attempt to influence the judge. Such publications were held to be an obstruction of the administration of justice and to constitute contempt of court under the federal contempt statute.\textsuperscript{40}

The \textit{Toledo case} was decided in 1918 and stood for twenty-three years. But very recently the Supreme Court declared, in \textit{Nye v. United States},\textsuperscript{41} where persons not parties to an action induced a plaintiff by fraud, trickery, and dishonest means to dismiss the case, that their actions obstructed the administration of justice but nevertheless were not con-

\textsuperscript{33}Id. at 324 (dissenting opinion).
\textsuperscript{34}321 U. S. 96 (1944).
\textsuperscript{35}Plamals v. Pinar Del Rio, 277 U. S. 151 (1928).
\textsuperscript{36}Mahnich v. Southern Steamship Co., 321 U. S. 96, 113 (1944) (dissenting opinion).
\textsuperscript{37}Id. at 112.
\textsuperscript{38}Id. at 113.
\textsuperscript{39}247 U. S. 402 (1918).
\textsuperscript{40}36 Stat. 1163 (1911), 28 U. S. C. § 385 (1940).
\textsuperscript{41}313 U. S. 33 (1941).
tempt, punishable by the court, because they were not committed "so near" the presence of the court as to come within the provisions of the act defining such contempt. The earlier Toledo case was overruled. The term "so near thereto" in the statute was held in the recent Nye case to have a geographical meaning, so it would appear that the perpetrator of almost any act obstructing the administration of justice would be immune from summary punishment for contempt if he remained at a sufficient geographical distance from the presence of the court while committing the act. This is an example of the failure of stare decisis to function in a matter of statutory construction, no constitutional question having been involved. It may be assumed that Congress was not dissatisfied with the Toledo decision; otherwise the law would have been amended. But this fact did not obviate the reversal by the Court of its own construction of the statute.

In 1912, it was held, in Henry v. A. B. Dick Co., 42 three justices dissenting, that a patentee might, under the patent laws, sell his patented article with a license restriction that it be used only with supplies manufactured by the patentee, although the supplies were not patented. But the Court, upon reconsideration of the question in 1917, overruled the Henry case and held that a patentee is restricted to the use of his invention as described in the claims of his patent, and that he could not expand it by limitations as to materials to be used with it. 43

Several cases in the Supreme Court have involved the Texas election law. That law required that political parties should nominate candidates through primaries, provided the method of holding them, and gave to the state executive committee the power to prescribe the qualifications of members of the party for voting. The expenses of the election were not borne by the state but by members of the party seeking nomination, ballots were furnished by the party, and the votes were counted and the returns made by agencies of the party. The Democratic state convention limited membership in the party and the right to participate in its deliberations to white citizens. In Grovey v. Townsend 44 the Court held that a political party was a voluntary organization, that a state convention was not an agency of the state, and that the exclusion of Negroes from the party and from the privilege of voting at the primary was a mere refusal of party membership and was not state action in

42 224 U. S. 1 (1912).
44 295 U. S. 45 (1935).
violation of the Fourteenth and Fifteenth Amendments. Next, in *United States v. Classic*, the Court held the primary and general elections to be a single instrumentality for the choice of officers, in effect holding that the delegation, by the state to a party, of the power to fix the qualifications of voters at a primary election was a delegation of a state function. In the next case, *Smith v. Allwright*, a Negro was denied the right to vote at a primary election by reason of the same resolution of the Democratic state convention as that considered in *Grovey v. Townsend*. The Court re-examined the latter case in the light of the *Classic case* and held that the right to vote at a primary election for the nomination of candidates without discrimination by the state, like the right to vote at the general election, is a right secured by the Constitution and may not be abridged by a state on account of race. It also held that the statutory system for the selection of party nominees for inclusion on the general ballot makes the party an agency of the state in so far as it determines the participants in the primary election. The *Allwright* and other cases overruling prior decisions so irritated Justice Roberts that he was moved to dissent in language not customary in that Court. In the period between *Grovey v. Townsend* and *Smith v. Allwright*, seven justices died or retired and were replaced by others, and the Democratic party of Texas was transmuted from a voluntary organization in 1935 into a state agency in 1944.

**Cases on Fundamental Liberties**

In a series of cases growing out of the activities of Jehovah's Witnesses, contradictory and overruling opinions were the rule rather than the exception. By reason of the change of opinion of some of the justices and the coming of new appointees to the bench, some of the decisions were overruled before they had become cold. One group of cases had to do with the requirement that public school pupils salute the flag. In the other, the right of municipalities to require the payment of a license tax by persons who solicited the sale of books or subscriptions of money in behalf of their religious cause was the issue.

313 U. S. 299 (1941).

"He said that this tendency "indicates an intolerance for what those who have composed this court in the past have conscientiously and deliberately concluded, and involves an assumption that knowledge and wisdom reside in us which was denied to our predecessors. ... [It] tends to bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only." 321 U. S. 649, 666 (1944) (dissenting opinion)."
One of these ephemerae was the flag salute case, Minersville School District v. Gobitis, in which the Court, with one dissent, failed to see any violation of the guarantee of freedom of religion when Jehovah’s Witnesses were expelled from a public school because of their refusal to join other children in saluting and pledging allegiance to the national flag as required by the board of education. The Court said that—

"... The religious liberty which the Constitution protects has never excluded legislation of a general scope not directed against doctrinal loyalties of particular sects. ... The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities. ..."

Three years later, a change in the personnel of the Court having occurred, the Minersville case was overruled by West Virginia State Board of Education v. Barnette. Two of the justices who had joined in the former decision filed a separate opinion explaining their change of mind since that case was decided. Ignoring the political responsibilities of citizens and other considerations referred to in the former case, the Court here declared, three justices dissenting, that the order requiring the salute invaded the sphere of intellect and spirit which the Constitution reserved from official control, both as to persons whose religious belief caused them to refuse to participate in the flag ceremony and as to those who, without such religious views, considered that the compulsory ritual infringed their constitutional liberty.

The first of the other group of cases (relating to licenses) was Cantwell v. Connecticut. In that case the Court unanimously held that a statute forbidding the solicitation of subscriptions for any religious, charitable, or philanthropic cause, unless the same had been approved by the secretary of the public welfare council, was invalid as applied to the solicitation of the sale of religious books and pamphlets and a request for money when persons refused to purchase books. It, said the Court, deprived the solicitors of liberty without due process of law in that it inhibited the privilege of freedom of speech and freedom of religion.

Then came the decision in Jones v. Opelika, destined to perish in infancy. There the Court held, five to four, that ordinances imposing

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48 310 U. S. 586 (1940).
49 Id. at 594.
50 319 U. S. 624 (1943).
51 310 U. S. 296 (1940).
52 316 U. S. 584 (1942).
license taxes on the sale of printed matter by transient agents or peddlers were applicable to the sale of pamphlets and books advocating that sect’s theory of religion. It was declared by five of the justices that the license tax did not impair the right to freedom of religious thought, and that if proponents of religious or social theories pursued ordinary commercial methods of sales of articles to raise propaganda funds, the state, in the natural and proper exercise of its power, was justified in charging reasonable fees for the privilege of canvassing. Such enactments, said the Court, offered not a shadow of prohibition of the exercise of religion or of abridgment of freedom of speech or of the press.

Jehovah’s Witnesses, frustrated for a season, did not surrender. Justice Byrnes, who had been one of the majority, retired from the court. His successor joined with the former minority; and, before the decision was a year old, a petition for a rehearing was granted. By a five to four vote the former judgment was vacated, and the judgments of the state courts were reversed.\textsuperscript{55}

In two cases decided concurrently with Jones v. Opelika, both relating to violations of city ordinances, the Court ruled, also five to four, contrary to its first ruling in the Jones case, that the sale of religious books and pamphlets is in itself a religious practice and that a license tax for the privilege of canvassing or soliciting, if enforced against religious colporteurs who evangelize by soliciting the sale of literature from house to house, is a tax on the exercise of the freedom of religion and therefore unconstitutional,\textsuperscript{54} and that an ordinance prohibiting the ringing of doorbells or otherwise summoning the inmates of a residence for the purpose of receiving handbills is in violation of the constitutional guaranty of freedom of press and speech.\textsuperscript{55}

In a later case, Prince v. Massachusetts,\textsuperscript{56} again five to four, the welfare of children and the right of the state to safeguard them from dangers and abuses was placed above the guaranty of freedom of religion and above the right of a parent to direct the religious activities of her children when, in furtherance of their religious education, she accompanied them on the streets and aided them in the sale of literature of Jehovah’s Witnesses in violation of the child labor law that forbade children to sell newspapers and periodicals on a public street.

\textsuperscript{53} Jones v. Opelika, 319 U. S. 103 (1943).
\textsuperscript{54} Murdock v. Pennsylvania, 319 U. S. 105 (1943).
\textsuperscript{55} Martin v. City of Struthers, 319 U. S. 141 (1943).
\textsuperscript{56} 321 U. S. 158 (1944).
A review of the older decisions of the Supreme Court shows that they are far from being in accord concerning statutes covering analogous subjects relating to social welfare. In the decision rendered in 1887 in **Mugler v. Kansas**, sustining the Kansas prohibition law forbidding the manufacture and sale of intoxicating liquors, without providing compensation to manufacturers for the loss or depreciation in value of their properties, and restricting the right of people to drink as they chose, the Court said that if the state deemed the law—

"... to be necessary to the peace and security of society, the courts cannot, without usurping legislative functions, override the will of the people as thus expressed by their chosen representatives. They have nothing to do with the mere policy of legislation. . . ."\(^{58}\)

The opinion further said that the courts would not follow their own concept as to what was best and safest for the community in disregard of the legislative determination of the question, yet if—

"... a statute, purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, . . . it is the duty of the courts to so adjudge. . . ."\(^{59}\)

**Mugler v. Kansas** has never been overruled.

In a period that seems to many to be in the remote past, legislatures found and declared it to be necessary in the interest of the public health, welfare, safety, and morals to limit hours of labor for both men and women in certain occupations and for women in all types of work, and to fix minimum wages for women, with varying results.

A statute of Utah limiting the hours of work in smelters and underground mines was sustained in **Holden v. Hardy**,\(^{60}\) the Supreme Court saying that the protection not only of the lives but of the morals and health of citizens was within the police power of the legislature. But when the New York statute restricting the hours of labor in bakeries came up for consideration in 1905, in **Lochner v. New York**,\(^{61}\) the Court, by a five to four decision, held that **Holden v. Hardy** was inapplicable, and substituted its judgment for that of the legislature as to whether it was a health measure, declaring that the trade of a baker was not so

\(^{57}\)123 U. S. 623 (1887).
\(^{58}\)Id. at 662.
\(^{59}\)Id. at 661.
\(^{60}\)169 U. S. 366 (1898).
\(^{61}\)198 U. S. 45 (1905).
unhealthy as to authorize the legislature, for the prevention of his physical deterioration, to interfere with his right of free contract to labor and that there was no relation between the hours of employment of a baker and the wholesomeness of the bread he produced.

The *Lochner case* seems to have enjoyed the bliss of solitude, for the later attack, in *Bunting v. Oregon*, upon the Oregon statute limiting the hours of labor of both men and women, not only in one occupation, but in all mills, factories, and manufacturing establishments, was unsuccessful. The Court, five to three, one justice not participating, accepted the judgment of the legislature and the supreme court of the state that the law was necessary for the preservation of the health of persons employed in such establishments and sustained the statute. The disparate views expressed in the opinions in this case from those in the *Lochner case* amount to the overruling of the latter without mentioning it. Justice McKenna, who had joined in the *Lochner* decision, wrote the opinion in the *Bunting case*. Did the Court adjust itself to the climate of public opinion and progressive thought, or did it disagree with the decision in Lochner’s case and fail to say so?

Statutes limiting the hours of labor for women have always been sustained. The Oregon statute of 1903 providing maximum hours for women in factories and laundries was unanimously sustained in 1908. The contention that a New York statute limiting the hours of night work for women in restaurants interfered with the liberty of contract was also rejected by a unanimous Court in 1924. Reference was made to the “mass of information” before the legislature on which it acted in adopting the act, and the Court said that where the constitutionality of a statute depends on the existence of facts, courts must be cautious in reaching a conclusion different from that of the legislature.

The Supreme Court did not, however, at that time view the statutory establishment of minimum wages for women in the same manner as it did the limitation of hours. In 1923, in *Adkins v. Children’s Hospital*, a statute was declared void that empowered a commission, after investigations, hearings, and conferences with employers, employees, and the

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62 243 U. S. 426 (1917).
63 Muller v. Oregon, 208 U. S. 412 (1908). Other like statutes have been sustained: Riley v. Massachusetts, 232 U. S. 671 (1914) (hours in manufacturing and mechanical establishments); Miller v. Wilson, 236 U. S. 373 (1915) (in hotels); Bosley v. McLaughlin, 236 U. S. 385 (1915) (in hospitals).
65 261 U. S. 525 (1923).
public, to fix minimum wages for women in all occupations adequate to supply them with the cost of living in an amount necessary to maintain them in health and to protect their morals. Five members of the court (three dissenting, one not participating) saw no relation between wages on the one hand and health and morals on the other, and placed the right of contract for the sale and purchase of labor above the legislatively declared purpose of the statute to protect women “from conditions detrimental to their health and morals”, saying that women of mature age, *sui juris*, could not be subjected to restrictions upon their liberty of contract that could not be lawfully imposed on men in like circumstances. The Court paid no heed to the facts found by the investigating board and declared that Congress was without power to adopt the statute at all. Notwithstanding the virtual overruling of the *Lochner case* by the later *Muller* and *Bunting cases*, the Court cited that case, among others, as sustaining the constitutional guarantee of the right to contract about one’s affairs. 66 But Chief Justice Taft, in his dissenting opinion, could find no constitutional distinction between employment in a bakery and in any other kind of manufacturing establishment that would make limitation of hours invalid in one and permissible in another, stating that he had supposed that the *Lochner case* had been overruled *sub silentio*. 67

The decision in the *Adkins case* was reaffirmed in *Morehead v. New York*, 68 a comparatively recent case relating to the New York minimum wage law for women. Finally, in 1937, ten months after that decision, the Court, dividing again five to four, in *West Coast Hotel Co. v. Parrish*, 69 held that the minimum wage law for women of the State of Washington was not in violation of the due process clause and that power under the Constitution to restrict the freedom of contract may be exercised in the public interest with respect to contracts between employer and employee, the state having an interest in the welfare of its citizens and particularly in relation to the employment of women. The *Adkins case* was expressly overruled, and so, in effect, was the *Morehead* decision. Justice Roberts was one of the majority of five who, in the *Morehead case*, voided the New York statute as violating due process; yet he concurred in the opinion in the *Parrish case* declaring that a like Washington law did not infringe the due process clause!

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66Id. at 545.
67Id. at 564 (dissenting opinion).
68298 U. S. 587 (1936).
69300 U. S. 379 (1937).
As a further illustration of the lack of accord in the decisions of the Court, when the first federal child labor law, an act to prevent the shipment of the products of child labor in interstate commerce, was before the Court in 1918, the welfare of children was not considered by five of the justices as a sufficient ground on which to sustain the statute as against the construction which they placed on the commerce clause.\(^70\) The goods shipped were said by a majority of the Court to be harmless. They said that the act was not to regulate commerce among the states but was aimed to standardize the ages at which children might be employed in manufacturing. At the present moment, however, the power of Congress under the commerce clause has been so extended by a unanimous court that the shipment of merchandise may be prohibited if produced by employees whose wages and hours of employment do not conform to the standards prescribed by law and *Hammer v. Dagenhart* has been expressly overruled.\(^71\) In both the *Hammer* and the *Darby* cases the Court quotes from *Gibbons v. Ogden*\(^72\) that the power of Congress is “to prescribe the rule by which commerce is to be governed.” The power to govern as construed in the earlier *Hammer* case—

“... is one to control the means by which commerce is carried on, which is directly the contrary of the assumed right to forbid commerce from moving and thus destroy it as to particular commodities. ...”\(^73\)

In the later *Darby* case the Court says that manufacture is not commerce but the shipment of manufactured goods is commerce, and, adopting Justice Holmes’ dissent in the *Hammer* case, says that the prohibition of shipment is regulation. The power over commerce—

“... extends not only to those regulations which aid, foster and protect the commerce, but embraces those which prohibit it. ...”\(^74\)

The latest expression of the Court on the subject of child labor is a five to four decision rendered on January 8, 1945, in *Western Union Telegraph Company v. Lenroot*,\(^75\) wherein it was determined that the Fair Labor Standards Act, which prohibits the shipment in commerce of goods in or about which children under sixteen years of age have been employed, is not applicable to the business of collecting, trans-


\(^{71}\) *United States v. Darby*, 312 U. S. 100 (1941).

\(^{72}\) *Wheat. 1*, 196 (U. S. 1824).


\(^{74}\) *United States v. Darby*, 312 U. S. 100, 113 (1941).

\(^{75}\) *65 Sup. Ct. 335* (1945).
mitting, and delivering telegraphic messages. In the same case the Court decided, as it had done previously, that telegraph lines are instruments of commerce; that messages passing over them are a part of commerce itself; that the messages, being the subjects of commerce, are "goods" within the meaning of said Act. But, says the majority of the Court, the transmission of messages [goods] over the telegraph lines [instruments of commerce] is not the shipping of goods in commerce, for the reason, apparently, that they are transmitted by means of electrical impulses instead of in crates and boxcars; and therefore the Act is inapplicable to children engaged in the transmission of "goods" over "instruments of commerce".

REGULATION OF BUSINESS AFFECTED WITH A PUBLIC INTEREST

In 1877 the Court declared that grain elevators, auxiliary to railroad transportation, were "clothed with a public interest" and sustained the statute of Illinois regulating the charges that could be made by their owners as being within the police power of the state. The Court said that the fact that the power may be abused is no argument against its existence. "For protection against abuses by legislatures the people must resort to the polls, not to the courts."\textsuperscript{76} Laissez faire, rudely jolted by the \textit{Munn} decision, did not reattain its former strength but was partially restored, almost regaining its full vigor, through later decisions. Only a few of the subsequent cases need be noticed. The Court did not change its views as to grain elevator rates, but as to other matters it turned away from the \textit{Munn} theory of price regulation, although the fire insurance business was held to be affected with a public interest and to be subject to state regulation. The fixing of fire insurance rates was sustained,\textsuperscript{77} as was the licensing of fire insurance brokers,\textsuperscript{78} and the limitation on the amount of their commissions.\textsuperscript{79} The operation of theatres was held to be insufficiently clothed with a public interest to warrant the fixing of the resale price of tickets;\textsuperscript{80} gasoline, though indispensable to commercial, farm, and social activities, was not affected with a public interest, and the state could not fix prices;\textsuperscript{81} likewise, the manufacture of ice, a common necessity, was held not to be so charged with

\textsuperscript{76}Munn v. Illinois, 94 U. S. 113, 134 (1877).
\textsuperscript{77}German Alliance Ins. Co. v. Lewis, 233 U. S. 389 (1914).
\textsuperscript{78}La Tourette v. McMaster, 248 U. S. 465 (1919).
\textsuperscript{80}Tyson & Bro. v. Banton, 273 U. S. 418 (1927).
\textsuperscript{81}Williams v. Standard Oil Co., 278 U. S. 235 (1929).
the public use as to be prohibited without a certificate of necessity and a permit. These and other decisions so shrank the doctrine of *Munn v. Illinois* and *Mugler v. Kansas* that, aside from the insurance business, it remained applicable to but little other than public utilities, and as to these the rates and regulations were subject to judicial examination.

Redemption of the narrowly restricted price fixing theory, as applied to business in the so-called private category, came in the *New York Milk (Nebbia) case*, where the Court said that neither property rights nor contract rights are absolute, that there is nothing so sacrosanct about the price one may charge for what he makes or sells that it may not be regulated by the state in the public interest. The *Nebbia case* was followed by a decision declaring tobacco warehouses to be affected with a public interest and sustaining a Georgia statute adopted in 1935 fixing the maximum charges for handling and selling leaf tobacco in warehouses. The Court, in 1940, declared it to be, within the power of Congress to authorize the fixing by a commission of maximum and minimum prices for bituminous coal in accordance with stated standards, and to proscribe unfair trade practices respecting the sale of coal in or affecting interstate commerce. In the same year it was held that a state statute was valid which set up a plan for fixing prices to be paid to producers of citrus fruits.

In *Ribnik v. McBride*, the business of an employment agent was said, in a six to three decision rendered in 1928, to be a private business, not differing substantially from the business of a real estate broker or an insurance broker, and not affected with a public interest to such an extent as to enable the state to regulate the amount of the fees that an agent might charge for his services. In 1929, less than one year after the decision in the *Ribnik case*, the legislature of Nebraska, ignoring that ruling, passed an act fixing the maximum fees and charges permitted to be collected by a private employment agency. In 1941, in

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85Sunshine Anthracite Coal Co. v. Adkins, 310 U. S. 381 (1940).
8777 U. S. 350 (1928).
Olsen v. Nebraska,\(^{88}\) this statute was sustained by a unanimous court, and the Ribnik case was expressly overruled.

While not overruling any previous decisions but illustrating the general trend in upholding legislation regulating business, in 1936 the Court sustained the validity of The Fair Trade Acts of Illinois\(^{89}\) and of California.\(^{90}\) These statutes sanction the fixing of prices by the producer or owner of commodities bearing his trade-mark, brand, or name, if they are in fair and open competition with commodities of the same general class produced by others, and validate contracts with buyers whereby they agree that they will not sell any such commodities except at the prices stipulated by the vendor.

**Taxation Cases**

In the tax field, also, the Supreme Court has often not followed precedent when constitutional principles were at stake. The state income tax law of Vermont exempting from taxable income interest received on account of money loaned within the state was held in 1935 to abridge the privileges and immunities of citizens of the United States and to deny equal protection of the law, in that persons lending money in the state were excused from payment of income tax on interest derived therefrom, while those lending money outside the state were taxed on the interest received.\(^{91}\) Four years later this decision was overruled in an opinion\(^{92}\) sustaining a statute of Kentucky taxing money owned by a resident of the state and deposited in a bank outside the state at a higher rate than on money deposited in a bank within the state, the court holding that the statute did not deny equal protection of the law, and did not violate the privileges and immunities clause of the Fourteenth Amendment.

Two decisions\(^{93}\) in 1935 relating to succession taxes on property conveyed in trust, but to revert to the settlor on certain conditions, in which it was held, five to four, that the principal of the trust should not be included in the gross estate of the settlor for the purposes of the

\(^{88}\)313 U. S. 236 (1941).

\(^{89}\)Old Dearborn Distributing Co. v. Seagram-Distillers Corp., 299 U. S. 183 (1936).


\(^{91}\)Colgate v. Harvey, 296 U. S. 404 (1935).

\(^{92}\)Madden v. Kentucky, 309 U. S. 83 (1940).

federal estate tax, were overruled five years later, with two justices dissenting.\textsuperscript{94}

The Court long ago, in 1871, in \textit{Collector v. Day},\textsuperscript{95} ruled that the salary of a state judge was not subject to federal income tax; and in a later case, \textit{New York v. Graves},\textsuperscript{96} decided in 1927, the Court held the converse—that an employee of an instrumentality of the Federal Government was exempt from state income tax. These cases were decided on the supposedly fundamental theory that inasmuch as one government was immune from taxation by another the salaries of employees of one were not taxable by the other. Upon re-examination of the theory on which those decisions were rendered, they were overruled in 1939, the Court holding that the taxation of an employee of a government or of one of its instrumentalities did not lay a burden on the government.\textsuperscript{97}

In 1939 the salaries of federal judges were held to be subject to federal income tax,\textsuperscript{98} overruling a previous decision,\textsuperscript{99} rendered in 1925, that such tax diminished the compensation of judges during their continuance in office in violation of the Constitution.

Two cases,\textsuperscript{100} decided in 1928 and in 1936, holding that a state tax measured by the quantity sold could not be imposed on the privilege of one of its citizens of selling merchandise to the Federal Government for use in the performance of governmental functions were overruled in 1941 in an opinion\textsuperscript{101} sustaining a similar state tax on a contractor that entered into the cost of materials supplied by him to the Government, notwithstanding that the economic burden of the tax was borne by the United States. Again, where state school lands were leased for the purpose of producing oil and gas, the state receiving a royalty therefrom, the lessee was held not to be a state instrumentality, its gain from operations under the contract with the state being its private profit and not immune from federal taxation on the income derived from operations under the lease.\textsuperscript{102} In reaching this conclusion in 1938,
the Court disaffirmed one case\textsuperscript{103} that had held such income to be un-
taxable in 1932, and another\textsuperscript{104} which had declared in 1922 that a state
was without power to tax net income derived by a lessee under a lease of
restricted Indian land.

The weird, kaleidoscopic history of the decisions dealing with death
taxes on tangible and intangible personal property is outlined in \textit{First
National Bank v. Maine}.\textsuperscript{105} An inheritance tax levied by the state of
Maine on the value of the capital stock of a Maine corporation forming
a part of the estate of a person domiciled in another state at the time
of his death was held to be in violation of the due process clause. Space
will be taken here only to refer to the various rulings and overrulings
on the question whether the taxable situs of such property was the state
in which the owner died or that in which the property was located, and
whether the property could be taxed in both states or in only one. That
case overruled conflicting prior decisions and in turn was overruled in
1942, in a decision\textsuperscript{106} that again reviewed previous decisions and sus-
tained a tax imposed by the state of Utah on the transfer by death of
shares of stock in a Utah corporation that was part of the estate of
a decedent who, at the time of his death, was domiciled in New York
where the certificates of stock were located.

Only a reminder need be made here of the ancient and historical
controversy over the direct tax clause,\textsuperscript{107} which led to the Income Tax
Amendment to the Constitution.\textsuperscript{108} An act of Congress "to lay duties
on carriages for the conveyance of persons" was sustained in 1796 as
not being a direct tax on property but an excise or indirect tax.\textsuperscript{109} The
theory of that case was disapproved in 1895 in the \textit{Pollock case},\textsuperscript{110} when
the Court held, four justices dissenting, that a tax on the income from
real or personal property was a direct tax and unconstitutional because
it was not apportioned according to population.

\textbf{INTERSTATE COMMERCE AND ADMIRALTY}

Acts of Congress for the regulation of interstate commerce have been

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\textsuperscript{103}Burnet v. Coronado Oil & Gas Co., 285 U. S. 393 (1932).
\textsuperscript{105}284 U. S. 312 (1932).
\textsuperscript{107}U. S. CONST. Art. I, § 9.
\textsuperscript{108}U. S. CONST. AMEND. XVI.
\textsuperscript{109}Hylton v. United States, 3 Dall. 171 (U. S. 1796).
\textsuperscript{110}Pollock v. Farmers’ Loan & Trust Co., 158 U. S. 601 (1895).
the subject of judicial controversy. There has been confusion as to whether employees of a railroad company performing services in railroad yards came within the provisions of the Federal Employers’ Liability Act[11] with reference to personal injuries received in the discharge of their duties, while the railroad was engaging in commerce between any of the states. In *Shanks v. Delaware, Lackawanna & Western R.R.*, an employee in a machine shop in which locomotives used in both interstate and intrastate commerce were repaired was held to be too distant from interstate commerce within the meaning of the statute to be engaged in it, the statute being interpreted as intended to cover an employee “engaged in interstate transportation or in work so closely related to it as to be practically a part of it.”[13] Likewise, it was held in another case[14] that a member of a switching crew engaged in transporting coal from storage tracks to bins or chutes to be used later in locomotives similarly engaged in interstate hauls was not covered by the statute. The same test was applied to one whose work was the repairing of an engine that had finished work in interstate business and was later used on, but had not commenced, another trip.[15] But a car inspector who was assisting in clearing a wreck in a railroad yard was held to be engaged in interstate commerce, within the meaning and scope of the statute, because he was aiding in opening the way for interstate transportation.[16] One who operated a gasoline engine used in pumping water for supplying locomotives employed in both interstate and intrastate commerce was held to be engaged in interstate commerce;[17] also one whose duty it was to prepare sand for use in locomotives employed in the same service.[18] These last cited *Collins* and *Szary cases* were overruled in 1932 in a decision[19] holding that an employee of a railroad company that was doing both interstate and intrastate commerce was not engaged in interstate transportation, within the terms of the Act of Congress, while operating an electric motor that furnished power for hoisting coal into a chute for use in locomotives.

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[13] Id. at 558.
tives that were employed principally in interstate commerce, the Court going back to the Shanks and Harrington cases to find what it conceived to be the correct test.

The transmission and sale of natural gas produced in one state, transported by means of pipe lines, and furnished directly to consumers in another state, without intervention of any kind between seller and buyer, was held in 1920, in Pennsylvania Gas Co. v. Public Service Commission,\(^\text{120}\) to be interstate commerce, yet subject to state regulation of the rates to be charged to consumers, because, the Court said, the service was local in character, and Congress had not exerted its superior authority. Here the Court did not consider, because they apparently were not presented, cases holding that interstate commerce ends and intrastate business begins when gas coming from outside the state passes into local distributing systems. In 1931 the opinion in the Pennsylvania Gas Company case was expressly disapproved in a case\(^\text{121}\) sustaining a state excise tax on the privilege of doing a local business, although in the later case the gas did not pass directly from the interstate pipe line into the local lines but was first placed in tanks from which it was distributed locally.

In the period following the Civil War the Supreme Court was much concerned with questions of state taxes and their effect upon interstate commerce. A tax levied by a state on tonnage of freight carried into or out of a state was, in 1873, held to be a tax on interstate commerce and therefore a restriction thereon, two justices dissenting.\(^\text{122}\) On the same day the Court held that a tax on gross receipts of a railway company was not a tax on freight transported by it in interstate commerce nor an impost or duty on imports and exports, three justices dissenting.\(^\text{123}\) In that same year, a city ordinance requiring a license fee to be paid by every express or railroad company doing business in the city and having a business extending outside the state was unanimously sustained as being within the power of the city to tax a business carried on within the city and the same was held not to be a tax on interstate commerce.\(^\text{124}\) In these three cases the Court drew a line between a tax on commerce itself and a tax on the proceeds of commerce or on the

\(^{120}\) 252 U. S. 23 (1920).
\(^{122}\) Reading R. R. v. Pennsylvania (State Freight Tax Case), 15 Wall. 232 (U. S. 1873).
\(^{123}\) Reading R. R. v. Pennsylvania (State Gross Receipts Tax Case), 15 Wall. 284 (U. S. 1873).
\(^{124}\) Osborne v. Mobile, 16 Wall. 479 (U. S. 1873).
right to carry on such business. The line was erased in 1888 when the Court voided an ordinance imposing a tax on telegraph companies doing business in the city and transmitting messages among different states, because such a tax affected its entire business, interstate as well as intrastate.\textsuperscript{125}

State legislation providing for the licensing of persons in the business of selling tickets for interstate and foreign travel has been annulled and later sustained. A Pennsylvania statute requiring others than railroad and steamship companies who engage in interstate sale of steamship tickets or of orders for transportation to and from foreign countries to procure a license and file a bond as security against fraud was before the Court in 1927 and was declared to be an infringement of the commerce clause of the Constitution.\textsuperscript{126} But upon reconsideration of the question in 1941, when a similar statute of California was under attack upon the conviction of an agent of having arranged interstate transportation of passengers by motor vehicle, the Court held that in the absence of pertinent congressional legislation the states had power to regulate interstate commerce by motor vehicle when it affected the safety of the public or the convenient use of the highways, provided that the regulation did not in any other respect obstruct or discriminate against interstate commerce.\textsuperscript{127}

In the admiralty field, also, there was difficulty in early days in determining jurisdiction. Courts of admiralty were once held to be without jurisdiction of actions involving boats employed exclusively in trade and navigation on the rivers of the United States, their jurisdiction being confined, so said the Court, to ships engaged in maritime service.\textsuperscript{128} When the question recurred in 1851, the Court pointed out, first, that definitions in admiralty matters had been adopted from England where there were no public rivers navigable above tidewater—consequently the early adoption here of the English method of measuring the boundary of admiralty jurisdiction by tidewater—and second, that the former Thomas Jefferson and Orleans cases were decided under the influence of those definitions at a time when commerce on our rivers and lakes was of little importance. These earlier cases were overruled and admiralty jurisdiction was extended to the navigable rivers of the

\textsuperscript{125}Leloup v. Port of Mobile, 127 U. S. 640 (1888).


\textsuperscript{127}California v. Thompson, 313 U. S. 109 (1941).

\textsuperscript{128}The Thomas Jefferson, 10 Wheat. 428 (U. S. 1825); The Orleans v. Phoebus, 11 Pet. 175 (U. S. 1837).
United States and to the waters of the Great Lakes.\textsuperscript{129} Some years later, a statement by the Court made in 1858\textsuperscript{130} that the restriction of admiralty jurisdiction of the federal courts, as set forth in the act prescribing such jurisdiction on the lakes, was suggested by the limitation of the power of Congress to regulate commerce, was disapproved, with the declaration that admiralty and maritime jurisdiction is conferred on the Federal Government by the Constitution, and Congress cannot enlarge it.\textsuperscript{131}

\textbf{Conclusion}

That the departure from the rule of \textit{stare decisis} is not a matter of recent origin is evidenced by the cases hereinbefore discussed and by numerous others that are too old and of too little current value to merit more than mere citation as a matter of historical interest.\textsuperscript{132} In scores

\textsuperscript{129}The Genesee Chief v. Fitzhugh, 12 How. 443 (U. S. 1851).

\textsuperscript{130}Allen v. Newberry, 21 How. 244, 245 (U. S. 1858).

\textsuperscript{131}The Belfast, 7 Wall. 624, 640 (U. S. 1869).


Whether a corporation sued in a state in which neither plaintiff nor defendant corporation is a resident may remove the action to the federal district court of that state: Lee v. Chesapeake & O. Ry., 260 U. S. 653 (1923), \textit{overruling} Ex parte Wisner, 203 U. S. 449 (1906), and \textit{qualifying} In re Moore, 209 U. S. 490 (1908).

A will should be construed by the federal court in the same manner as it had been construed by the state court and not as in a previous decision of the United States Supreme Court: Roberts v. Lewis, 153 U. S. 367 (1894), \textit{rejecting} the construction of the will in Giles v. Little, 104 U. S. 291 (1881).

The Supreme Court will follow the adjudication of the highest court of the state in the construction of the constitution and laws of the state and will reverse its own decision construing a state constitution, if no rights have accrued under it, when it appears that the state court had interpreted its own constitution differently: Fairfield v. County of Gallatin, 100 U. S. 47 (1879), \textit{overruling} Concord v. Portsmouth Savings Bank, 92 U. S. 625. (1876). (The state court decision had been rendered but not published before the decision in the Concord case and was not brought to the attention of the Court.)

The practice, pleadings, jurisdiction, and procedure in territorial courts were intended to be left to legislative action of territorial assemblies and the rules adopted by the courts: Hornbuckle v. Toombs, 18 Wall. 648 (U. S. 1874), \textit{overruling} Orchard v. Hughes, 1 Wall. 73 (U. S. 1864), and Dunphy v. Kleinsmith, 11 Wall. 610 (U. S. 1871).

Concerning the authority of a municipality to issue bonds in aid of a railroad: Brenham v. German American Bank, 144 U. S. 173, 187 (1892), in which the Court regarded Rogers
of cases the Court, not going so far as to overrule a previous decision,

v. Burlington, 3 Wall. 654 (U. S. 1866), and Mitchell v. Burlington, 4 Wall. 270 (U. S. 1867), as having been overruled.

What losses and costs should be secured by an appeal bond: Kountze v. Omaha Hotel Co., 107 U. S. 378 (1883), in which the Court regarded Stafford v. Union Bank of Louisiana, 16 How. 135 (U. S. 1853), as overruled.

When appraision of imported merchandise should be made in order to obtain an abatement of duties on damaged goods: United States v. Phelps, 107 U. S. 320 (1883), overruling Shelton v. The Collector (Shelton v. Austin), 5 Wall. 113 (U. S. 1867).

When a writ of error is sued out by defendant in the court below the jurisdiction of the Supreme Court is determined by the amount of the judgment and not by the amount claimed by plaintiff in his declaration: Gordon v. Ogden, 3 Pet. 33 (U. S. 1830), disapproving Wilson v. Daniel, 3 Dall. 401 (U. S. 1798).


Whether a judgment against one of several contracting parties on their joint contract bars an action against the others: Mason v. Eldred, 6 Wall. 231 (U. S. 1868), in effect overruling Sheehy v. Mandeville, 6 Cranch 253 (U. S. 1810).

Whether Indians became emancipated from federal control upon the receipt of the first patent or whether the national guardianship extended until the termination of the trust period: United States v. Nice, 241 U. S. 591 (1916), overruling Matter of Heff, 197 U. S. 488 (1905).


Competency of one defendant in a criminal case as a witness on behalf of or against his co-defendant: Rosen v. United States, 245 U. S. 467 (1918), disapproving United States v. Reid, 12 How. 361 (U. S. 1851).

Negotiability of bonds payable to bearer and negotiable on their face, after a state, while owner of the bonds, had imposed restrictions on their alienation: Morgan v. United States, 113 U. S. 476 (1885), overruling Texas v. White, 7 Wall. 700 (U. S. 1869).


A statute forbidding a foreign corporation to do business in the state unless it agreed that it would not remove any action against it to the federal court: Insurance Co. v. Morse, 20 Wall. 445 (U. S. 1874); Doyle v. Continental Ins. Co., 94 U. S. 535 (1877).
has distinguished it from the case under consideration or has limited its effect, in some instances the limitation being so confined as to amount to its practical disavowal as an authority.

The Court has always considered the doctrine of *stare decisis* as one to be disregarded whenever a majority (on at least one occasion a minority) of the justices have failed to agree with a former opinion. Changing economic and other conditions, ideologies of members of the Court differing from those of their predecessors, modification of views of individual members after more mature consideration, are among the reasons.

Chief Justice Marshall, after saying that our government is a government of the people, in form and substance emanating from them, and that its powers are to be exercised directly on them and for their benefit, counseled that “we must never forget that it is a *constitution* we are expounding.” In a concurring opinion in the *St. Joseph Stock Yards case* Justices Stone and Cardozo said: “The doctrine of *stare decisis*, however appropriate and even necessary at times, has only a limited application in the field of constitutional law.” Justice Brandeis, distinguishing between cases *applying* and those *interpreting* the Constitution, stated that the reasons why the Court should refuse to follow earlier decisions where the question is one of *applying* it are particularly strong.

It is patent that through the years the Court has heeded the advice of Chief Justice Marshall, but it has not sedulously observed the distinction suggested by Justice Brandeis. Decisions interpreting the Constitution have been as readily overruled as those applying its provisions. It will be observed that opinions dealing with statutory construction, in which the Constitution was not involved, have not been treated with too generous a degree of solemnity.

A decision on a constitutional question is not a Procrustean bed to which all things else must be made to conform. Our mode of living has changed, our contact with other parts of the world is closer, inven-

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134St. Joseph Stock Yards Co. v. United States, 298 U. S. 38, 94 (1936) (concurring opinion).

tions have given new methods of production, manufacture, transportation, and communication, and many other conditions are different from those existing when the earlier constitutional cases were decided. It is a normal result that our way of thinking should not have remained static, either in the interpretation or in the application of the Constitution. But the transition of both economic conditions and of our manner of thought is not swift. The overruling of a decision within a short time after it has been rendered must be ascribed to differing legal or economic theories of members of the Court rather than to the slow process of changing circumstances. We have seen interstate commerce, the general welfare, and even civil liberties constricted and presently enlarged with no observable change of conditions intervening.

The cases cited sum up to conflict, uncertainty, perplexity, and confusion, giving support to a quip attributed to Chief Justice Hughes: "We are under a Constitution, but the Constitution is what the Judges say it is." An expression frequently found in opinions is that the proposition under discussion is "well settled". Who would consider any principle to have been settled—fixed or established—by the last decision cited on any of the questions discussed? The Moving Finger will continue to write. Ideologies of the justices will, in the future as in the past, exert an influence on the decisions. Each future member of the Court will have the same privilege of expounding his views as the present and former members have had. Now will always be Now, distinguished from Then. Many of the decisions have been rendered by a bare majority of the Court, one by a minority. What appears to be certainty is generally an illusion. Neither the antiquity nor the lineage of an authority has been a bar to an assault upon its competency and validity as a precedent. In the face of the apparently insurmountable obstacle of an adverse decision, litigants have been successful. Other litigants will be encouraged to test the question again, entertaining the impression that there is no reasonable fixity, definiteness, nor predictability in the law because the Court may be divided in the next case as before, with the majority on the other side; and in that event the last decision on any subject may be overruled as readily and as summarily as it overruled the former.

But this must be so if the law is to breathe the air of verity and is to be the spirit of progress and not of immobility.
GOVERNMENT PRIORITY FOR REPAYMENT OF MONIES ADVANCED TO CONTRACTORS

JAMES CURRY BERNHARDT†

INTRODUCTION

IN ORDER to facilitate the prosecution of the war and to utilize productive capacity to the utmost, the Government has from time to time advanced monies to war contractors who were unable to finance themselves. In view of the weak financial condition of a number of contractors who have received advance payments, the possible effect of their collapse on subcontractors, and the bankruptcy or impending bankruptcy of certain contractors, primary emphasis has been given in this article to the position of the Government with respect to its right to reimbursement.

THE GOVERNMENT'S PRIORITY

The legal position of the Government as compared with that of general creditors depends in large measure upon the type of proceeding in which the Government's claim is asserted.

There are a number of different kinds of government priorities which may be classified into the following categories:

1. Plain insolvency under Section 3466 of the Revised Statutes.¹
2. Ordinary commercial bankruptcy under Section 64, Bankruptcy Act.²
3. Arrangements under Chapter XI, Bankruptcy Act.³
4. Priority upon liquidation of banks under the National Banking Act.⁴

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The opinions expressed in this article are the personal views of the author and are not to be taken as in any way representing the official views of the War Department or any of its constituent services, or of any Federal agency. I wish to here express my gratitude for the help and encouragement received from the suggestions of my friend, Major Joseph P. McNamara.


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5. Railroad reorganizations (Chapter 77).  
6. Corporate reorganizations under the Chandler Act (Chapter X).  

With 4 and 5 we are not directly concerned.

The Government's Priority Under Section 3466 of the Revised Statutes

The first statute giving priority to the United States was enacted in 1789, and in its original form gave, in case of the insolvency or the insufficiency of the estate in the hands of the personal representative to pay the deceased's debts, preference to debts due to the United States on bonds given to the United States for duties on goods imported.

This statute was followed by the Acts of Congress of 1792 and 1797 which extended the priority under like conditions to cases where any revenue officer or other person thereafter became indebted to the United States by bond or otherwise, and added that the priority of the United States should extend to cases in which a debtor, not having sufficient property to pay all his debts, should make a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor should be attached by process of law, as well as to cases in which an act of legal bankruptcy should have been committed.

A later Act of Congress passed in 1799 imposed personal liability upon the personal representatives or assignees or other privies of a debtor who distributed the assets of the debtor before payment of debts due to the United States and gave to sureties on the bond of a debtor, who paid the debt to the United States, a right of priority for payment out of the assets of the debtor.

The Revised Statutes re-enacted these provisions without change in their substance. As they stand at present they read as follows:

Section 3466.

"Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts

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7Section 21, Act of July 31, 1789, 1 Stat. 42. See also § 45, Act of August 4, 1790, 1 Stat. 169, to the same effect.
8Section 18, Act of May 2, 1792, 1 Stat. 263.
9Section 5, Act of March 3, 1797, 1 Stat. 515.
10Section 65, Act of March 2, 1799, 1 Stat. 676.
11Price v. United States, 269 U. S. 492 (1926), discusses the history of these statutes.
due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

Section 3467.\(^\text{13}\)

"Every executor, administrator, or assignee, or other person, who pays, in whole or in part, any debt due by the person or estate from whom or for which he acts before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate for the debts so due to the United States, or for so much thereof as may remain due and unpaid."

Section 3468.\(^\text{14}\)

"Whenever the principal in any bond given to the United States is insolvent, or whenever, such principal being deceased, his estate and effects which come to the hands of his executor, administrator, or assignee, are insufficient for the payment of his debts, and, in either of such cases, any surety on the bond, or the executor, administrator, or assignee, of such surety pays to the United States the money due upon such bond, such surety, his executor, administrator, or assignee, shall have the like priority for the recovery and receipt of the moneys out of the estate and effects of such insolvent or deceased principal as is secured to the United States; and may bring and maintain a suit upon the bond, in law or equity, in his own name, for the recovery of all moneys paid thereon."

As there is no such thing as the common law of the United States, the prerogative rights of the sovereign at common law are not in operation in favor of the United States Government.\(^\text{15}\) The right of priority of the United States is not an attribute of sovereignty but depends on acts of Congress.\(^\text{16}\) And the right of the United States to priority cannot be impaired, curtailed, modified, or in any way affected by any state legislation.\(^\text{17}\)

It is the view of the courts that Section 3466 is to be construed liberally.\(^\text{18}\) Thus it was held that its purpose is not to be defeated by unnecessarily restricting the term "debts" used in the statute to a "nar-
row technical meaning” so as to exclude taxes from receiving governmental priority.19

Under Section 3466, if an insolvent debtor commits an act of bankruptcy, the United States is entitled to priority in the payment of its claims out of the debtor’s estate although he has not been subjected to the Bankruptcy law, for a debtor may commit an act of bankruptcy even though he is not subject to that law.20 The term “assignees” as used in Section 3466 means only such persons as become vested with or possess all the property of the debtor in one or other of the cases of insolvency specified in the statute and is not extended to embrace heirs or devisees.

The proper construction of Section 3466, which gives priority to debts “due” to the United States, is that it gives priority not only to debts actually due at the time of the assignment, but also to those to become due thereafter, if they were owing at the time of the assignment. The word “due” as used in the statute is synonymous with the word “owing.”21

The priority established by Section 3466 can never attach while the debtor continues as the owner of and in possession of the property though he may be unable to pay all his debts.22 The statute is applicable only to cases where the debtor’s estate, either by death, legal bankruptcy, or insolvency, has passed into the hands of an administrator or assignee for the benefit of creditors, or where the debtor himself has voluntarily made such a disposition of his property.23 No evidence of the debtor’s insolvency can be received until he has been divested of his property in one of the modes stated in the statute.24 The statute secures a faith-

23Beaston v. Farmers’ Bank, 12 Pet. 102, 133 (U. S. 1838). In that case the Court said: “From the language employed in this section, and the construction given to it from time to time by this court, these rules are clearly established: first, that no lien is created by the statute; secondly, the priority established can never attach while the debtor continues the owner, and in the possession of the property, although he may be unable to pay all his debts; thirdly, no evidence can be received of the insolvency of the debtor until he has been divested of his property in one of the modes stated in the section; and, fourthly, whenever he is thus divested of his property, the person who becomes invested with the title is thereby made a trustee for the United States, and is bound to pay their debt first out of the proceeds of the debtor’s property.”
24Ibid.
ful application of the funds which come to the hands of an executor, administrator, assignee or other representative of an insolvent's estate out of which the preference arises. Such person becomes a trustee for the United States and is bound first to pay its debts out of the debtor's property. 25

But the whole estate must be subject to administration. A partial conveyance does not entitle the United States to priority out of the part conveyed and, if made in good faith, may defeat the priority (which is merely a priority and not a lien 26). As was said in Thelusson v. Smith: 27

"... The United States are to be first satisfied; but then it must be out of the debtor's estate. If, therefore, before the right of preference has accrued to the United States, the debtor has made a bona fide conveyance of his estate to a third person, or has mortgaged the same to secure a debt, or if his property has been seized under a fi. fa., the property is divested out of the debtor and cannot be made liable to the United States. ..."

Of course, if a trivial portion of an estate should be left out for the purpose of evading the act, it would be considered as a fraud upon the law, and the parties would not be enabled to avail themselves of such a contrivance; it would nevertheless constitute an act of insolvency. 28 Neither would subsequent acquisition of property defeat the statute. But where a bona fide conveyance of part is made, not to avoid the law but to secure a fair creditor, the case is not within the letter or the intention of the act. 29

The onus probandi, however, is on the United States to prove that an assignment which, on its face, purports to be only a partial assignment

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26Speaking of the nature of the priority, Daniel Webster in his argument in the case of Conard v. Atlantic Insurance Co., 1 Pet. 386, 416 (U. S. 1828), said: "The priority does not affect the transfer of property at all. It never attaches on lands or goods, as lands or goods of this debtor. It arises only: 1st. In bankruptcy; 2d. In cases of conveyances to assignees; 3d. Against executors and administrators; and in all those three cases, it attaches on the fund, and not on the specific property. It does not operate to prevent the passing of the property either to assignees in bankruptcy; or to assignees under a conveyance; or to executors and administrators. It amounts only to a right to previous payment out of the fund then in the hands of others."
28United States v. Hooe, 3 Cranch 73, 91 (U. S. 1805).
29Ibid.
is in fact a full assignment. The fact that, through mistake or accident, some trifling article was omitted from the assignment does not prevent the assignment from being an act of insolvency entitling the United States to a preference on its claim if, at the time, the debtor was unable to meet his obligations.

It has been uniformly held that the mere inability of a debtor to meet his obligations does not constitute insolvency within the meaning of the statute. Insolvency as used therein means legal insolvency. It must be manifested by some overt and notorious act of the debtor.

The statute provides for four classes of cases: first, cases where the estate and effects of any deceased debtor in the hands of his executors or administrators is insufficient to pay his debts; secondly, cases where the debtor, not having property sufficient to pay all his debts, has made a voluntary assignment thereof for the benefit of his creditors; thirdly, cases where the estate and effects of an absconding, concealed, or absent debtor have been attached by process of law; and fourthly, cases where the debtor has committed an act of bankruptcy.

The advantages of proceeding by way of an equity receivership under Section 3466 of the Revised Statutes, rather than by other possible remedies, are several. In the first place, the priority of the United States is absolute, whereas in bankruptcy the expenses of administration, wages, taxes, etc., would come ahead of payment of debts owed the United States. Again, the stigma of bankruptcy would be avoided; the Government would not necessarily be putting someone out of busi-

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33 Thelusson v. Smith, 2 Wheat. 396 (U. S. 1817). Compare the definition of "insolvency" in § 1 (19) of the Bankruptcy Act, 30 Stat. 544 (1898), as amended, 52 Stat. 841 (1938), 11 U. S. C. § 1 (19) (1940): "A person shall be deemed insolvent within the provisions of this Act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors, shall not at a fair valuation be sufficient in amount to pay his debts".
34 Prince v. Bartlett, 8 Cranch 431 (U. S. 1814).
35 There are two classes of attachment in the United States: In the one, the effect is to vest the property in trustees for the benefit of all the debtor's creditors; in the other class, the attachment is for the exclusive benefit of the attaching creditor, and the provision of the United States statute giving priority in the case of the estate and effects of an absconding, concealed, or absent debtor applies only to the former class. United States v. Wilkinson, 28 Fed. Cas. 605, No. 16,695 (C. C. W. D. Mo. 1878).
ness; it would be easier to defeat subsequent proceedings under the Chandler Act (in which there is no priority); and the business could be continued for a while subject to priority instead of without priority or instead of being liquidated forthwith, as in bankruptcy.

In the case of *United States v. Emory*[^36] it was held that the claim of the Federal Housing Administrator against an insolvent corporation was entitled to priority over wage claims in an equity receivership. The Court was of the opinion that the appointment of a receiver upon the petition of a creditor of the insolvent corporation to liquidate its assets was an “act of bankruptcy” within the statutory provision[^37] giving priority to claims of the United States against the assets of an insolvent debtor in cases “in which an act of bankruptcy” is committed. The appointment of a receiver under such circumstances is among the most common examples of an act of bankruptcy.

The Court pointed out that the purpose of Section 3466 of the Revised Statutes is “‘to secure adequate public revenues to sustain the public burden’ . . . and it is to be construed liberally in order to effectuate that purpose’.”[^38]

That case also is authority for the proposition that the statutory priority of claims of the United States against the assets of an insolvent debtor is not impliedly modified as respects non-bankruptcy proceedings by the provisions of Section 64 of the Bankruptcy Act[^39] which establishes an order of distribution of the assets of a bankrupt’s estate whereby certain wage claims precede claims of the United States.[^40]

Whether or not the United States, or a surety bound to the United States, is entitled to assert the priority created by Section 3466 of the Revised Statutes turns upon a determination of the debtor’s insolvency, as defined in that section and interpreted by more than a hundred years of cases. The provisions of the section, as previously pointed out, create only a priority, never a lien.[^41] The section applies only

[^36]: 314 U. S. 423 (1941).
[^38]: United States v. Emory, 314 U. S. 423, 426 (1941).
[^40]: The Court said: “. . . both courts and commentators have assumed that the application of § 64 of the Act of 1898 was limited to federal bankruptcy proceedings, and that the priority of claims of the United States in non-bankruptcy proceedings remained unaffected.” United States v. Emory, 314 U. S. 423, 429 (1941).
[^41]: United States v. Oklahoma, 261 U. S., 253 (1923); Beaston v. Farmers’ Bank, 12 Pet. 102 (U. S. 1838); United States v. Fisher, 2 Cranch 358 (U. S. 1804); United States v. Western Union Telegraph Co., 50 F. (2d) 102 (C. C. A. 2d, 1931); Winston-
"whenever any person indebted to the United States is insolvent" or "whenever the estate of any deceased debtor . . . is insufficient to pay all the debts due from the deceased." As construed by the Supreme Court, this requires that the insolvency must be manifested in one of the modes pointed out in the latter part of the statute—i.e., (1) a voluntary assignment, (2) the attachment of the effects of an absconding, concealed, or absent debtor, or (3) the commission of an act of bankruptcy.

The first of these modes has been relatively loosely construed by the courts as to the volition requirement; and a mere admission of insolvency, coupled with consent to a decree appointing a receiver, has thus been held to constitute a voluntary assignment. The second—attachment—of course requires no definition; and the third is set forth in Section 3 of the Bankruptcy Act.

There have been two instances in which priority under Section 3466 of the Revised Statutes has been directly refused the Government because of the special circumstances. One was in the case of national banks, the other in the case of debts owed by railroads.

The United States was denied its priority in connection with a claim against a national bank for the amount of certain funds of the United States deposited with it. In deciding the case the Supreme Court based its decision on two grounds: First, the National Banking Act undertook to provide a complete system for the establishment and government of banks and included specific provisions concerning the distribution of assets of insolvent banks, which were plainly inconsistent with the granting of priority to general claims of the United States. Second, the National Banking Act expressly authorized the Secretary of the Treasury to require national banks accepting deposits of federal funds to give satisfactory security. Consequently, it was held to be fairly


inferable that Congress intended the United States to look to this provision rather than to Section 3466 of the Revised Statutes for protection.

The case of the railroads\(^{47}\) arose under Title II of the Transportation Act of 1920.\(^{48}\) That Act provided for the funding of debts to the United States which the railroads had contracted during the period of wartime control, and also provided for new loans to the railroads. In holding Section 3466 of the Revised Statutes inapplicable to the collection of these loans, the Court emphasized that the basic purpose of the act was to promote the general credit status of the railroads, and that the railroads were required to furnish adequate security for the payment of both old and new loans.

The Government's Priority under Section 64 of the Bankruptcy Act in Cases of Ordinary Bankruptcy

Priority in cases of ordinary bankruptcy is governed by Section 64 of the Bankruptcy Act,\(^{49}\) which provides:

"a. The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be (1) the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition; the filing fees paid by creditors in involuntary cases; where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the cost and expense of one or more creditors, the reasonable costs and expenses of such recovery; the costs and expenses of administration, including the trustee's expenses in opposing the bankrupt's discharge, the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases and to the bankrupt in voluntary and involuntary cases, as the court may allow; (2) wages, not to exceed $600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding, due to workmen, servants, clerks, or traveling or city salesmen on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt; (3) where the confirmation of an arrangement or wage-earner plan or the bankrupt's discharge has been refused, revoked, or set aside upon the objection and through the efforts and at the cost and expense of one or more creditors, or, where through the efforts and at the cost and expense of one or more creditors, evidence shall have been adduced resulting in the conviction of any person of an offense under this Act, the reasonable costs and expenses of such creditors in obtaining such refusal, revocation, or setting aside,


or in adducing such evidence; (4) taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof: Provided, That no order shall be made for the payment of a tax assessed against any property of the bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court: And provided further, That, in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the court; and (5) debts owing to any person, including the United States, who by the laws of the United States in entitled to priority, and rent owing to a landlord who is entitled to priority by applicable State law: Provided, however, that such priority for rent to a landlord shall be restricted to the rent which is legally due and owing for the actual use and occupancy of the premises affected, and which accrued within three months before the date of bankruptcy.

“b. Debts contracted while a discharge is in force or after the confirmation of an arrangement shall, in the event of a revocation of the discharge or setting aside of the confirmation, have priority and be paid in full in advance of the payment of the debts which were provable in the bankruptcy or arrangement proceeding, as the case may be.”

Where a prime contractor is in bankruptcy, an unsecured subcontractor may not be paid for materials ahead of the United States. It will be observed that in bankruptcy “debts due the United States”, instead of having first priority, come fifth, being subordinate to expenses of administration, wages, taxes, etc. However, treating an advance payment to the contractor as a loan, and hence a “debt due the United States”, the Government would still come ahead of all the general creditors.

It will be noted that Subsection 64a (5) does not, in itself, give debts owing to the United States priority in bankruptcy; it merely accords fifth priority to debts owing to any person, including the United States, who, “by the laws of the United States”, is entitled to priority. In only two instances at present do the laws of the United States entitle any person to priority; one instance is the provisions of Section 64 of the Bankruptcy Act itself, and the other is Sections 3466 to 3468 of the Revised Statutes. Section 64 of the Bankruptcy Act may be disregarded, however, since any person entitled to priority under the other provisions of that section will already have a superior claim to any which can be made under Subsection 64a (5).

Sections 3466 to 3468 of the Revised Statutes, as pointed out earlier in this article, are general priority provisions in favor of the United States and sureties bound to the United States. By virtue of these provisions, the United States and sureties bound to the United States at

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50So in original. Probably should read “is”.

present appear to be the only "persons" entitled to priority by the laws of the United States, upon whom Subsection 64a (5) confers a fifth priority in bankruptcy distribution. If Section 3466 stood alone, the Federal Government would be entitled thereunder to be "first satisfied" in such distribution; but it has been uniformly held that in bankruptcy, though that section is the foundation of the claim of the United States, the relative priority of the claim is governed by Section 64 of the Bankruptcy Act, which relegates it to the fifth priority rank.

It will be noted that the conditions upon which Sections 3466 to 3468 accord priority to a claim are complex and not coextensive with those set up by the Bankruptcy Act for determining priority. Hence it is possible that the United States or a surety may be unable to present a claim under Section 3466 even though a bankruptcy distribution is under way, as when, for example, a voluntary bankrupt is not insolvent within the meaning of that section. The presentation of a claim to fifth priority by the United States or a surety involves a close construction of the limitations set up by Sections 3466 to 3468.

For a long time there was considerable controversy whether the United States had any priority in bankruptcy over general creditors for the payment of ordinary debts, as distinguished from taxes. It was conceded that Section 3466 set up a Government priority, but it was felt that this statute was superseded in bankruptcy by the Bankruptcy Act, which did not confer any express priority. The present view is that the priority conferred by the Government priority statute, Section 3466, is recognized by the Bankruptcy Act; and, taking the two statutes as in pari materia, the priority conferred by Section 3466 ranks fifth for purposes of bankruptcy, although first in proceedings not under

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51In United States v. Marxen, 307 U. S. 200, 206, n. 12 (1939) as stated in the opinion of the Court, the Government summarized the legislative background of the priority statute as follows: "The Act of July 31, 1789, Sec. 21, c. 5, 1 Stat. 29, 42, first gave the United States priority but was limited to debts due on bonds for duties. The Act of May 2, 1792, Sec. 18, c. 27, 1 Stat. 259, 263, allowed sureties who paid their debts to the United States to exercise their priority. The Act of March 3, 1797, Sec. 5, c. 20, 1 Stat. 512, 515, extended the priority to all debts due from any person. The Act of March 2, 1799, Sec. 65, c. 22, 1 Stat. 627, 676, applied to bonds for duties. R. S., Sec. 3466 is derived from the Acts of 1797 and 1799."

52The history of the status of Government priority for ordinary debts as affected by the Bankruptcy Act and decisions is admirably summarized in United States v. Kaplan, 74 F. (2d) 664, 665 (C. C. A. 2d, 1935). There the court said: "Section 3466 of the Revised Statutes (31 USCA § 191) provides that, whenever a person indebted to the United States is insolvent, the debts due to the United States shall be first satisfied;
the Bankruptcy Act. In other words, Section 64 of the Bankruptcy Act, in providing for the payment of debts in accordance with the priorities recognized by the laws of the United States, is clearly an adoption of those laws at least in so far as they do not conflict with the Bankruptcy Act; and, therefore, those claims entitled to a priority under Section 3466 of the Revised Statutes are entitled to a fifth priority under Section 64 of the Bankruptcy Act.

In order to claim priority under Section 3466 of the Revised Statutes and Section 64 of the Bankruptcy Act, the United States must show that it was entitled to such priority as of the date when the petition in bankruptcy was filed. The Supreme Court has refused to allow priority

and section 3467 (31 USCA § 192) imposes personal liability upon a trustee who distributes the debtor's property to other creditors before satisfying the debts due the United States. These sections were held to be in pari materia with the provisions of the Bankruptcy Act of 1867 (14 Stat. 517) according priority to debts and taxes due the United States, and to render personally liable an assignee in bankruptcy who with knowledge of the debt disregarded its priority, even though the United States had not proved its claim in the bankruptcy proceedings. Lewis v. United States, 92 U. S. 618, 23 L. Ed. 513; United States v. Barnes, 31 F. 705 (C. C. S. D. N. Y.). The defendant contends, however, that the same result does not obtain under the Bankruptcy Act of 1898 (11 USCA § 1 et seq.). In that act claims of the United States were dealt with more extensively, and by section 64 (11 USCA § 104) the order of priority was rearranged with the result that several classes of debts came ahead of nontax debts owing to the United States. This was held in Guaranty Title & Trust Co. v. Title Guaranty & Surety Co., 224 U. S. 152, 32 S. Ct. 457, 56 L. Ed. 706, to show a change of purpose and to render section 3466 (31 USCA § 191) ineffective to alter the order of priority set forth in section 64 of the Bankruptcy Act (11 USCA § 104). In the case of In re Tide-water Coal Exchange, 280 F. 648 (C. C. A. 2), this court held that the section was still effective within limits because incorporated by section 64b (5) now (7), 11 USCA § 104 (b) (5) now (7), which gives priority in the order named to '5 debts owing to any person by whom the laws of the States or the United States is entitled to priority.' See, also, In re E. J. Hibner Oil Co., 264 F. 667, 14 A. L. R. 629 (C. C. A. 7); In re Anderson, 279 F. 525, 527 (C. C. A. 2); In re Stoever, 127 F. 394 (D. C. E. D. Pa.). But the Supreme Court ruled that the United States was not a 'person' within the meaning of this clause. Davis v. Pringle, 268 U. S. 315, 45 S. Ct. 549, 69 L. Ed. 974. The following year, however, Congress amended the section and provided that it was. Section 64b (7) of the act, 11 USCA § 104 (b) (7). Consequently, as the law now stands, Rev. St. § 3466 continues in force, except in so far as it has been modified by the Bankruptcy Act, and in conjunction with section 64b (7) gives a debt due the United States priority in payment over general creditors, since they come in subsequent to the seventh group. In re Brannon, 62 F. (2d) 959, 960 (C. C. A. 5); In re C. D. Hauger Co., 54 F. (2d) 117, 118 (D. C. N. D. Tex.); Gilbert's Collier on Bankruptcy (3d Ed.) § 1318."


Subsequently to the Kaplan case, supra, § 64 was amended to move the Government priority from seventh to fifth position. 52 STAT. 874 (1938), 11 U. S. C. § 104 (1940).
in bankruptcy distribution to a claim assigned to the United States by a private creditor after the date of filing the petition.\(^5\)

Several recent cases in the federal courts are of interest in connection with the relative priority of Government claims in bankruptcy proceedings. In one case it was held that a note assigned to the Federal Housing Administrator before bankruptcy of the maker was a debt due the United States and entitled to priority under the Bankruptcy Act.\(^5\) On the other hand, another court said that debts due the Federal Housing Administrator are entitled to priority under Section 64 of the Bankruptcy Act, but not if assigned after bankruptcy.\(^5\) Only those debts owned by the Government at the time insolvency or bankruptcy is determined are contemplated by the priority statutes.\(^5\) Were the rule otherwise, the United States might buy up claims of general creditors after bankruptcy and collect in full to the ruin of other creditors.\(^5\)

As a prior claim against a bankrupt under Section 3466, damages for breach of contract with the United States to buy timber were held allowable in *United States v. Harris*,\(^5\) where the decision turned largely upon the extent of the allowance under all the facts.

In *Delaware v. Irving Trust Co.*,\(^5\) it was stated *arguendo* that Section 3466 is applicable to trustees in bankruptcy, and it was observed that the priority of federal taxes and the liability of trustees who fail to discharge debts due to the United States are specifically covered in Sections 3466 and 3467. It was noted, however, that the trustee's duty had been repeatedly referred to as a qualified one, applicable only where he is on notice of the existence of taxes.

Another court, in *Winston-Salem v. Powell Paving Co.*,\(^6\) observed that "Insolvency within the meaning of Section 3466 must exist before this statute applies."


\(^5\)In re Well, 39 F. Supp. 618 (M. D. Pa. 1941).


\(^5\)100 F. (2d) 268 (C. C. A. 9th, 1938), rehearing denied, 103 F. (2d) 1020 (1939).


It was stated in one case\(^{61}\) that the fact that the debt assigned to
the United States was originally a private debt was immaterial, under
Section 3466, and that priority of payment did not depend upon how
the United States acquired title to the notes relied on, nor upon their
status prior to their transfer.

In In re Wilson\(^{62}\) the court said:

"... A debt may arise out of a business transaction, or, out of an act of
sovereignty. Priority comes out of the law, and not upon any assertion of the
powers of sovereignty. ... "

"It has been suggested that if the United States acts as a merchant, it ought
to be content with preserving a consistency of character; but consistency is a
lost jewel in government. ... A general provision which gives the United
States priority for debts which are due it must be so read as to include whatever
debts it owns as a Constitutional creditor."

In that case a loan made by the Farm Credit Administration to a bank-
rupt was held entitled to priority as a debt due to the United States.

To sum up, the priority which is normally available under Section
3466 of the Revised Statutes is incorporated into and becomes, in cases
of ordinary bankruptcy, a fifth priority under Section 64 of the Bank-
ruptcy Act. As under Section 3466, there are several exceptions. For
instance, the United States was unable to obtain priority for debts
accrued and owing to it by the railroads\(^{63}\) because of the construction
put upon the Transportation Act of 1920.\(^ {64}\) Furthermore, while it is
true that the priority accorded the United States must be allowed where
the claimant is what may be loosely termed an administrative agency,
e.g., the Federal Housing Administration, Farm Credit Administration,
etc.,\(^ {65}\) as distinguished from a corporation the stock of which is held
by the Government, it is still unsettled whether an agency clothed in
corporate form is so entitled. In cases after World War I, a priority
status in bankruptcy was twice refused the United States Emergency


Trust Co., 271 U. S. 236 (1926).


\(^{65}\)United States v. Summerlin, 310 U. S. 414 (1940) (F. H. A.); In re Wilson, 23 F.
Supp. 236 (N. D. Tex. 1938) (F. C. A.); In re Tidewater Exchange, 280 Fed. 648
(C. C. A. 2d, 1922), cert. denied sub nom. Davis v. Coyle, 260 U. S. 721 (1922) (Dir.
R. R.). But see United States v. Marxen, 307 U. S. 200 (1939) (F. H. A.); In re Miller,
Fleet Corporation, a Government-owned organization.\textsuperscript{66} And so, it is doubtful whether the Reconstruction Finance Corporation, for example, is entitled to priority.

The present Supreme Court attitude on the issue awaits clarification, although language employed by Mr. Justice Frankfurter in deciding \textit{Inland Waterways Corporation v. Young}\textsuperscript{67} indicates that less concern may be felt today over imparting privileges of sovereignty to corporately-organized agencies. However, in view of the Federal Housing cases,\textsuperscript{68} nothing would prevent acquisition of priority by the simple expedient of having such corporations formally assign the claims to the United States prior to the adjudication in bankruptcy. It is true that Mr. Justice Byrnes, one of the majority in the five to four F. H. A. decision,\textsuperscript{69} has since resigned; but the law so far is still technically in favor of the Government. It is again submitted that the direct advance of Government funds out of the public revenues for war purposes is a much stronger case than the use of Government funds as an incidental guaranty of a commercial loan on housing.

\textit{The Government's Priority under Chapters X and XI of the Bankruptcy Act}

The Federal Government has the same priority in arrangement proceedings under Chapter XI as it does under Section 64 in ordinary cases of commercial bankruptcy. Section 302 of the law provides:

"The provisions of chapters I to VII, inclusive, of this Act shall, insofar as they are not inconsistent with or in conflict with the provisions of this chapter, apply in proceedings under this chapter. For the purposes of such application, provisions relating to 'bankrupts' shall be deemed to relate also to 'debtors', and 'bankruptcy proceedings' or 'proceedings in bankruptcy' shall be deemed to include proceedings under this chapter. For the purposes of such application the date of the filing of the petition in bankruptcy shall be taken to be the date of the filing of an original petition under section 322 of this Act, and the date of the adjudication shall be taken to be the date of the filing of the petition under section 321 or 322 of this Act except where an adjudication had previously been entered."\textsuperscript{70}


\textsuperscript{67}309 U. S. 517 (1940). \textit{But see} Reconstruction Finance Corporation v. J. C. Menihan Corp., 111 F. (2d) 940 (C. C. A. 2d, 1940), \textit{aff'd}, 312 U. S. 81 (1940), in which the Governmental corporation was treated as a private corporation so far as solvency is concerned.

\textsuperscript{68}See notes 36, 53, 54, 55, 56, 57, and 65 \textit{supra}.

\textsuperscript{69}United States v. Emory, 314 U. S. 423 (1941).

Section 337 (2) of the Bankruptcy Act\textsuperscript{71} requires the debtor in an arrangement under Chapter XI to deposit the money necessary to pay all debts "which have priority", with certain exceptions; but no provision in Chapter XI prescribes what debts shall have priority. In ordinary bankruptcy proceedings under Chapters I to VII of the Act, the debts which have priority are prescribed by Section 64. By virtue of Section 302, therefore, Section 64 serves to define the debts for which deposit must be made under Section 337 (2).

The Act provides for notice to the Secretary of the Treasury of petitions, notices, etc., filed under Chapter XI.\textsuperscript{72}

Chapter XI is better adapted for adjustment of unsecured claims of corporations with simple debt structure, whereas Chapter X is designed for large corporations with varied capital structure and large numbers and kinds of security holders and creditors. Some of the differences between the two chapters are discussed in the United States Realty & Improvement Co. case.\textsuperscript{73}

There is no provision for priority to the Government as such under Chapter X (sometimes referred to as the Chandler Act), with the exception of certain provisions pertaining to taxes and customs duties. On the contrary, there is an express provision excluding such priority. Section 102 of the Bankruptcy Act\textsuperscript{74} provides:

"The provisions of chapters I to VII, inclusive, of this Act shall, insofar as they are not inconsistent or in conflict with the provisions of this chapter, apply in proceedings under this chapter: Provided, however, That section 23, subdivisions h and n of section 57, section 64, and subdivision f of section 70, shall not apply in such proceedings unless an order shall be entered directing that bankruptcy be proceeded with pursuant to the provisions of chapters I to VII, inclusive. For the purposes of such application, provisions relating to 'bankrupts' shall be deemed to relate also to 'debtors', and 'bankruptcy proceedings' or 'proceedings in bankruptcy' shall be deemed to include proceedings under this chapter. For the purposes of such application the date of the filing of the petition in bankruptcy shall be taken to be the date of the filing of an original petition under section 128 of this Act, and the date of adjudication shall be taken to be the date of approval of a petition filed under section 127 or 128 of this Act except where an adjudication had previously been entered."

The definition of insolvency under ordinary bankruptcy is stricter

\textsuperscript{73}Securities & Exchange Commission v. United States Realty & Improvement Co., 310 U. S. 434 (1940).
than it is under the Chandler Act. Under that Act a corporation need merely be unable to meet its debts as they mature, in order to qualify; whereas, in formal bankruptcy it is provided that a person shall be deemed insolvent "whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors, shall not at a fair valuation be sufficient in amount to pay his debts".\textsuperscript{75} Mere inability of a debtor to pay all his debts in the ordinary course of business as they fall due is not insolvency in ordinary bankruptcy. Regardless of how frozen a debtor’s assets may be, they must actually be worth at a fair valuation less than the amount of his debts.

To come under Chapter X a corporation must allege that it is either insolvent in the bankruptcy sense of assets at a fair valuation not sufficient to pay debts, or insolvent in the commercial sense of not being able to pay debts as they mature. Of course, if a corporation is already in bankruptcy, it will be able to meet these conditions. The United States may be confronted with an attempt on the part of a corporation to convert ordinary bankruptcy into Chapter X (Chandler Act) proceedings, thereby destroying the Government’s priority; or the corporation may file under the Chandler Act direct without first having gone into bankruptcy.

If this is done, the United States may, in some instances, defeat the Chandler Act proceedings. Thus, it is required that the petition set forth specific facts showing the need for relief under Chapter X and why adequate relief cannot be obtained under Chapter XI. In the case of a small corporation with a relatively simple unsecured debt structure it should be possible to defeat the petition by making a showing that Chapter XI is appropriate.\textsuperscript{76}

Under the Chandler Act one of the most important factors to be considered in approving and proceeding under a proposed plan of reorganization is its feasibility. If the United States should be so large a creditor that it would of necessity drain off the major portion of a corporation’s assets even though not reimbursed in cash, the plan would


\textsuperscript{76}"Every petition shall state—(1) that the corporation is insolvent or unable to pay its debts as they mature; . . . (7) the specific facts showing the need for relief under this chapter and why adequate relief cannot be obtained under chapter XI of this Act; . . . " 52 Stat. 886 (1938), 11 U. S. C. § 530 (1940).
not be feasible in the sense that the corporation would not be able to continue as a going concern.

Again, from the point of view of the public interest, the case of advanced payments made by the Government to war contractors should be distinguished from and is much stronger than the case of mere guarantees under the Federal Housing Act. 77 In the latter case the money has been originally advanced by a bank or commercial institution, and the Government merely guarantees the loan. In the case of an advance payment, far from being an ordinary commercial transaction, the facts usually are that the Government has pumped money into a company in a highly risky non-bankable transaction in order to facilitate the continuance of necessary war production. And, notwithstanding this, should the company fail, it is vitally necessary in the interest of the war program to recoup this money in cash as soon as possible so that it may be used to finance war production elsewhere. If, therefore, other creditors of the corporation are not too numerous or their claims too long outstanding, it should also be possible to establish that the overall interest of creditors (i.e., overall "public interest") would best be served in proceedings other than under Chapter X. While the government does not want to be in the position of throwing corporations deliberately into bankruptcy, and while it is preferable from a policy viewpoint to use priority as a bargaining point in negotiation rather than to litigate it in court, it would be possible to proceed directly under Section 3466 of the Revised Statutes, by requesting an equity receivership and then attacking the "good faith" of any subsequent Chapter X proceeding as being merely a means of evading priority proceedings.

The comments which have just been made should also be considered in the light of the requirement of the Chandler Act that any petition for relief under Chapter X must be filed in good faith. It may be possible for the Government to show that a petition has not been filed in "good faith". 78 In this connection the pertinent provisions 79 read:

"Without limiting the generality of the meaning of the term 'good faith', a petition shall be deemed not to be filed in good faith if—

(1) the petitioning creditors have acquired their claims for the purpose of filing the petition; or


78 Thus Congress did not intend resort to corporate reorganization proceedings under Chapter X to be had for the mere purpose of liquidation. Fidelity Assurance Ass'n v. Sims, 318 U. S. 608, 621 (1943).

(2) adequate relief would be obtainable by a debtor's petition under the provisions of chapter XI of this Act; or
(3) it is unreasonable to expect that a plan of reorganization can be effected; or
(4) a prior proceeding is pending in any court and it appears that the interests of creditors and stockholders would be best subserved in such prior proceeding."

Let us assume, however, that an attempt to defeat Chapter X proceedings is unsuccessful and it is necessary to proceed further under the Chandler Act. In such a case, even though the United States does not have a strict priority, it is still possible to obtain substantial reimbursement under special provisions in the Act relating to the rights of creditors and more specifically to the rights of the United States.

Special provision is made in Chapter X for the transmission to the Secretary of the Treasury of copies of petitions, answers, orders, opinions, etc., filed or rendered in corporate reorganization proceedings and for notice to the Secretary of the Treasury of a hearing to consider a plan for reorganization.80

With respect to the status of the United States as a creditor in Chapter X proceedings, the Act contains the following provisions:

"If the United States is a secured or unsecured creditor or stockholder of a debtor, the claims or stock thereof shall be deemed to be affected by a plan under this chapter, and the Secretary of the Treasury is hereby authorized to accept or reject a plan in respect of the claims or stock of the United States. If, in any proceeding under this chapter, the United States is a secured or unsecured creditor on claims for taxes or customs duties (whether or not the United States has any other interest in, or claim against the debtor, as secured or unsecured creditor or stockholder), no plan which does not provide for the payment thereof shall be confirmed by the judge except upon the acceptance of a lesser amount by the Secretary of the Treasury certified in the court: Provided, That if the Secretary of the Treasury shall fail to accept or reject a plan for more than ninety days after receipt of written notice so to do from the court to which the plan has been proposed, accompanied by a certified copy of the plan, his consent shall be conclusively presumed."81

Notice from the foregoing that while without the consent of the Secretary of the Treasury a plan cannot be approved which does not provide for the payment of taxes and customs duties in full, no such protection is afforded ordinary debts owed the United States. Of course, if the Secretary of the Treasury fails to accept or reject a plan containing provisions with respect to such debts within the required period of time,

the consent of the United States to the scaling down of such debts will be conclusively presumed. If, however, the Secretary of the Treasury objects to the treatment of ordinary debts owing the United States, it does not necessarily follow that the United States will be paid in full; nor is there any priority with respect to such debts.

The acceptance of a reorganization plan in writing, filed in court, by or on behalf of creditors holding two-thirds in amount of the claims filed and allowed of each class, exclusive of creditors or of any class thereof who are not affected by the plan or whose claims are disqualified, or for whom payment or protection has been provided by the plan, is a prerequisite to a hearing upon a plan for the purpose of confirming it. Each class is regarded as a unit, whose acceptance of the plan is governed by a two-thirds majority of the creditors constituting the class. Provision must be made in a plan of reorganization for any class of creditors which does not accept the plan, but no provision need be made for a dissenting creditor who is a member of an accepting class; he is bound by an acceptance.

The judge has power to divide creditors and stockholders into classes for the purposes of a plan of reorganization and the acceptance thereof.

It may be argued, although the point has not been formally decided by the courts, that claims of the United States are sufficiently distinct in nature to warrant consideration of the United States as being a separate creditor class.

The requirement of acceptance of a plan by each class of creditors and stockholders who are affected by the plan is an exacting one, notwithstanding it may be essential to the preservation of the rights of persons concerned in the reorganization. It would appear that there is a possibility that one creditor may be in a position to block reorganization by refusing to accept a plan. This possibility might occur when the creditor is the only one in a certain class (for example, the United States). Even in this situation, however, the opposition of the creditor may be sidetracked by disqualification of his claim for bad faith or by making provision in the plan for his payment or protection.

It will be observed that the majority of each class of creditors whose

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82 The general rule is that creditors or stockholders for whom payment or protection has been provided as prescribed in §§ 216 (7) and (8), Bankruptcy Act, 52 Stat. 896 (1938), 11 U. S. C. §§ 616 (7), (8) (1940), are not "affected by the plan"; but if the United States is a creditor or stockholder, its interest shall be deemed affected by the plan. Section 199, Bankruptcy Act, 52 Stat. 893 (1938), 11 U. S. C. § 599 (1940).

acceptance is requisite is not the simple majority of the former bankruptcy composition—a majority in number and amount of the unsecured claims filed and allowed—but is a much more exacting majority—"two-thirds in amount of the claims filed and allowed of each class" which would be affected by the plan.

Let us assume that the United States, although it is not entitled to priority, has insisted upon treatment of its claims for advance payments as a separate class, demands reimbursement in full, and, through the Secretary of the Treasury, refuses to assent to the treatment of such claims suggested in a proposed reorganization plan. While the plan as such would then not be binding upon the United States as a separate creditor class, and reimbursement for its claims would have to be provided before proceeding with the reorganization plan, nevertheless, it would be discretionary with the court as to how such reimbursement should be made. For instance, the court could decide that payment in full could be made to the United States ahead of all the other creditors, or it might treat the United States as being on a parity and make a pro rata division of the assets, or it might even decide that the United States would be reimbursed by the issuance of securities in whole or in part. The point to be remembered is that the United States is not entitled to priority as such; and while the judge is bound to make reimbursement, the form of reimbursement is discretionary with the court.

In this connection, Section 216(7) of the Bankruptcy Act\(^\text{84}\) provides, with respect to a class of creditors not accepting a plan, that the reorganization plan—

\begin{quote}
"shall provide for any class of creditors which is affected by and does not accept the plan by the two-thirds majority in amount required under this chapter, adequate protection for the realization by them of the value of their claims against the property dealt with by the plan and affected by such claims, either as provided in the plan or in the order confirming the plan, (a) by the transfer or sale, or by the retention by the debtor, of such property to such claims; or (b) by a sale of such property free of such claims, at not less than a fair upset price, and the transfer of such claims to the proceeds of such sale; or (c) by appraisal and payment in cash of the value of such claims; or (d) by such method as will, under and consistent with the circumstances of the particular case, equitably and fairly provide such protection".
\end{quote}

Note that there is no requirement in the above section that the adjustment be made in cash. The Chandler Act is in pari materia with and prevails over Section 3466 of the Revised Statutes because it is a sub-

sequent enactment containing an express provision that Section 64 of the Bankruptcy Act (which incorporates Section 3466) is inapplicable. Whereas Congress revoked the rule in *Davis v. Pringle* by amending the old Bankruptcy Act, there is no corresponding provision in the Chandler Act, but rather an express provision that in the absence of formal bankruptcy Section 64 does not apply. Suppose the United States would not assent to the reorganization plan under Section 216(7) just quoted above. The court would decide what sort of adjustment would be made and whether such adjustment was entirely agreeable to the United States or not. Note also that while bankruptcy looks to liquidation and realization of assets, reorganization looks to the continuance of the debtor in business. While the priority of creditors over stockholders, etc., is preserved, there is no relative priority of claims comparable to Section 3466 of the Revised Statutes. In a reorganization plan all are scaled down, some getting more than others but most getting some. On the other hand, in the case of a strict priority one or two get all and the rest none. The United States, therefore, would not fare so well under the Chandler Act as under some of the other types of proceedings.

*Priority Summarized*

The priority of the Government to receive payment for an unsecured debt other than taxes ahead of general creditors varies under different statutes, and such cases may be classified as follows:

A. Insolvency, etc., under Section 3466 of the Revised Statutes
   *First Priority*

B. Ordinary bankruptcy under Section 64, Bankruptcy Act
   *Fifth Priority* (subordinate to expenses of administration, wages, taxes, etc., but ahead of general creditors)

C. Arrangements under Chapter XI
   *Fifth Priority* (Section 64 applies)

D. Corporate Reorganizations
   *No Priority* (similar provisions in both Chandler Act and Railroad Reorganizations)

**Interest as Affecting Government Priority**

It would seem that whether or not interest was charged would be immaterial. If interest were charged, the same would be a provable debt in bankruptcy; and it would be regarded as a part of the claim proper.

*268 U. S. 315* (1925).
In this connection, however, a distinction must be made between interest which has actually accrued as of the date of adjudication and interest which accrues thereafter.

While it is true that the courts have interpreted "a debt due to the United States" under Section 3466 of the Revised Statutes (the fifth priority under Section 64 of the Bankruptcy Act) as being an amount owing rather than an amount legally due, interest is not owed until it is accrued; and the practical difficulties of paying varying rates of interest on claims where an estate is insufficient to take care of even the principal amounts have led the courts to deny payment of interest after adjudication. This, however, has no effect on interest accrued prior thereto which is fixed and certain in amount, nor does the charging of interest have any effect on the validity of the claim.

The Bankruptcy Act provides that debts owing to the United States, etc., as a penalty or forfeiture shall not be allowed except for the amount of the pecuniary loss sustained. Excessive interest would therefore be disallowed in bankruptcy proceedings as a penalty rather than as reimbursement for use of money.

Under Section 63 of the Bankruptcy Act, interest on a debt is a provable claim, and by the express terms of the Act a creditor is entitled to include in his claim interest owing at the time of filing the petition. Since accrued interest constitutes part of a debt provable

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83 30 Stat. 561 (1898), as amended, 52 Stat. 867 (1938), 11 U. S. C. § 93 (1940). On this subject, American Jurisprudence says: "Debts owing to the United States, a state, a county, a district, or a municipality as a penalty or forfeiture are not allowable except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with interest and costs thereon. A distinction is to be noted in this connection between penalty and interest, the former being a means of punishment, while the latter is a means of compensation. Thus, it is settled that the amount due from a bankrupt as a penalty for nonpayment of taxes is within the provision. The fact that the amount imposed for nonpayment of taxes is called 'interest' in the taxing statute is not conclusive of its character in bankruptcy proceedings, but the fact that it is so denominated may be entitled to consideration." 6 Am. Jur., Bankruptcy (1937) § 128.

84 30 Stat. 562 (1898), as amended, 52 Stat. 873 (1938), 11 U. S. C. § 103 (1940). The section reads as follows: "Debts of the bankrupt may be proved and allowed against his estate which are founded upon (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition by or against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; ... ."


86 J. & S. Ferguson v. Lyle, 267 Fed. 817 (C. C. A. 5th, 1920); cf. Everett v. Mansfield,
against the estate of a bankrupt, it may be used to uphold involuntary proceedings.  90

Ordinarily, interest on unsecured claims against the bankrupt’s estate stops at the time the petition was filed.  91 The same is true of secured claims, except as to interest stipulated in the security held, accruing after bankruptcy. But where a bankrupt estate turns out to be solvent by reason of recovery of property fraudulently deeded to another, creditors are entitled to recover interest on claims subsequent to the date of filing the petition.  92

A secured creditor has a right to interest out of his security even after insolvency.  93 In this connection the Supreme Court said:

"... Secured creditors have two sources of payment for their claims—the liability of the debtor and the liability of the pledged or mortgaged assets. One is personal, the other in rem. ... With respect to the former the secured creditors have merely the same rights as any general creditor, and insofar as dividends are paid to secured creditors from free assets, they share ratably with the unsecured creditors, and their claims bear interest to the same date, that of insolvency. ... But to the extent that one debt is secured and another is not there is manifestly an inequality of rights between the secured and unsecured creditors, which cannot be affected by the principle of equality of distribution ... and interest accruing after insolvency may not be withheld on account of that principle.

"The rule as to the date to which interest is to be allowed on secured claims sharing pro rata with unsecured claims, cannot apply to the disposition of pledged or mortgaged assets subject to the lien of individual creditors, unless we are to disregard the rights in these assets prior to insolvency. But 'liens,

148 Fed. 374 (C. C. A. 1st, 1906). American Jurisprudence states: "In general, the courts, while stating or recognizing that interest on claims of equal rank against a bankrupt will not be computed where the assets of the estate are not sufficient to pay the principal of the debts, hold that if the estate does in fact turn out to be sufficient to meet all demands and leave a surplus, interest on all claims, whether they are interest bearing or not, will be allowed the creditors during the administration of the estate in bankruptcy. This principle is applied although the claim may have been allowed and paid without a demand for interest having been made. It has been held further that interest should be computed according to the ordinary rule for the computation of interest where partial payments have been made on an interest-bearing debt,—that is, a payment is first to be applied to discharge the interest then due on the principal obligation, and the remainder in reduction of the principal indebtedness. The trustee is entitled to retain possession of the assets until he has accumulated funds enough to satisfy such interest." 6 Am. Jur., Bankruptcy (1937) § 402.

90Sloan v. Lewis, 22 Wall. 150 (U. S. 1875).


92Brown v. Leo, 34 F. (2d) 127 (C. C. A. 2d, 1929).

equities or rights arising . . . prior to insolvency and not in contemplation thereof, are not invalidated."

A secured creditor "may enforce his lien against security, where it is sufficient to cover both principal and interest, until his claim for both is satisfied."94

Accrued interest on bonds is entitled to the same absolute priority over stockholders as the principal of the bonds in determining the fairness to bondholders of a plan of reorganization in bankruptcy.95

LIEN FOR DEPOSIT OF ADVANCES IN PRESCRIBED SPECIAL ACCOUNTS

Pursuant to the First War Powers Act, 1941,96 Executive Order No. 9112, under date of March 26, 1942,97 was issued, authorizing the making of advance payments. It reads in part as follows:

"(1) The War Department, Navy Department and the Maritime Commission are hereby respectively authorized, without regard to the provisions of law relating to the making, performance, amendment or modification of contracts, (a) to enter into contracts with any Federal Reserve Bank, the Reconstruction Finance Corporation, or with any other financing institution guaranteeing such Reserve Bank, Reconstruction Finance Corporation or other financing institution against loss of principal or interest on loans, discounts or advances, or on commitments in connection therewith, which may be made by such Reserve Bank, Reconstruction Finance Corporation, or other financing institution for the purpose of financing any contractor, subcontractor or others engaged in any business or operation which is deemed by the War Department, Navy Department or Maritime Commission to be necessary, appropriate or convenient for the prosecution of the war, and to pay out funds in accordance with the terms of any such contract so entered into; and (b) to enter into contracts to make, or to participate with any Federal Reserve Bank, the Reconstruction Finance Corporation, or other financing institution in making loans, discounts or advances, or commitments in connection therewith, for the purpose of financing any contractor, sub-contractor or others engaged in any business or operation which is deemed by the War Department, Navy Department or Maritime Commission to be necessary, appropriate or convenient for the prosecution of the war, and to pay out funds in accordance with the terms of any such contract so entered into."

In conformity with this, advance payments have been authorized.98

94Id. at 413.
The provisions for such advances are established in a number of contract clauses as set out in Procurement Regulations.\(^{99}\) Under these clauses special provisions have been made with respect to the deposit of advance payment funds in a special bank account to give the United States a lien on such funds.\(^{100}\) The following legal authorities support

\(^{99}\) C. C. H. War Law Serv. §§ 22,724-22,726 (1942); P. R. 347-349. Procurement Regulations, cited P. R., are the official War Department directives setting forth the instructions promulgated by the War Department for all its procurement services. The basic statutes and delegations of procurement authority are set forth in P. R. 107 et seq., 2 C. C. H. War Law Serv. §§ 22,621 et seq. (1942). Ordnance Procurement Instructions, commonly referred to as O. P. I., are published by the Legal Division of the Office, Chief of Ordnance, to supplement the Procurement Regulations pursuant to the authority contained in P. R. 107.9 and 107.10.

\(^{100}\) While the wording of individual clauses varies, they provide substantially as follows:

- **a.** That all funds received as advance payments shall be deposited in a special bank account or accounts at a member bank or banks of the Federal Reserve System, or any "insured" bank within the meaning of the Act creating the Federal Deposit Insurance Corporation.

- **b.** That the monies shall be kept separate from the contractor's general or other funds.

- **c.** That such special bank account or accounts shall be so designated as to indicate clearly to the bank their special character and purpose.

- **d.** That the balances in such account or accounts shall be used by the contractor exclusively as a revolving fund for carrying out the purposes of this contract.

- **e.** That when required by the Chief of Supply Service or his duly authorized representative, or any other person to whom authority to make advance payments has been delegated, withdrawals from such special account or accounts shall be made subject to the prior written approval of the contracting officer or his duly authorized representative. [Omitted from cost-plus-a-fixed-fee contracts.]

- **f.** That any balances from time to time in such special account or accounts shall secure the repayment of the advances in connection with which the special account or accounts are opened.

- **g.** That the Government shall have a lien upon such balances to secure the repayment of such advances, which lien shall be superior to any lien of the bank or any other person upon such account or accounts by virtue of assignments to it of such contract or otherwise.

- **h.** That, if, upon the completion of the contract, or upon its termination for other than the fault of the contractor, the advance payments made to the contractor have not been fully liquidated in the manner herein provided, the unliquidated balance of such advance payments shall be deducted from any payments otherwise due the contractor, and if the sum or sums due the contractor be insufficient to cover such balance, the deficiency shall be paid by the contractor in cash forthwith after demand and final audit by the Government of all accounts hereunder; provided, however, that in the event of such termination of the contract for other than the fault of the contractor, such deduction shall not be made prior to final audit unless, and only to the extent that, the contracting officer or his duly authorized representative shall determine that such action is reasonably required in order to secure the eventual repayment in full to the Government.
the view that these provisions establish a lien in favor of the Government. In insolvency proceedings, a trust fund is a prior claim if identified, and it may be followed through any change in form or species.\textsuperscript{101}

The Circuit Court of Appeals for the Fifth Circuit, in the \textit{City of Dallas case},\textsuperscript{102} said with respect to Section 67 of the Bankruptcy Act:

"... Section 67 deals with liens. Subsection (d) expressly preserves 'liens given or accepted in good faith and not in contemplation of or fraud upon the provisions of this title, and for a present consideration, which have been recorded according to law, if record thereof was necessary, * * * to the extent of such present consideration only.' ... The view generally taken is that true liens, however arising, which are not expressly invalidated by the Bankruptcy Act, remain good, and the trustee takes his title under section 70 (11 USCA § 110) subject to them. ..."

Specific liens and other security possessed by creditors are adverse to the bankrupt’s title, and the trustee succeeds to the bankrupt’s property subject to the same infirmities. A secured creditor has three alternatives: he may participate in the general fund of the bankrupt’s estate by first exhausting his security and crediting the proceeds on his claim; he may, without exhausting the security, credit its value upon his claim and share in the general estate for the balance; or he may surrender the security and share as to his full claim. The fact that the security consists of exempt property is immaterial. Of course, if a secured creditor so chooses, he may stay out of the bankruptcy proceedings entirely and look to the security alone for the payment of his debt. When the creditor lawfully converts the collateral into money, the

\textsuperscript{101}In re Franklin Savings & Loan Co., 34 F. Supp. 661 (E. D. Tenn. 1940).

\textsuperscript{102}City of Dallas v. Ryan, 62 F. (2d) 959, 960 (C. C. A. 5th, 1933).
amount realized determines the amount to be charged against the face of his claim.\textsuperscript{103}

Since, in the case of advance payments by the United States to contractors, the monies advanced are, by the terms of the contract, placed in a special fund impressed with a trust to be paid out only for the purposes expressed, and since the contract expressly subjects the fund to a prior Government lien for such purpose, it would seem that the interest of the Government in such fund is superior to that of the trustee in bankruptcy\textsuperscript{104} and to the rights of general creditors.\textsuperscript{105} Liens acquired by legal proceedings more than four months before the filing of a petition in bankruptcy will, if valid under state law, be accorded priority by the bankruptcy court in distribution of the estate in accordance with applicable local law.\textsuperscript{106}

In the \textit{Butterworth-Judson case}\textsuperscript{107} the United States had made an agreement with the contractor on May 9, 1918, to build a plant to produce picric acid at the expense of the United States, payment to be made by reimbursement and also by advance payment. A supplemental agreement dated May 22, 1918, provided for an advance in the amount of $1,500,000 to the contractor.\textsuperscript{108} The advance payment was

\textsuperscript{103}See Ivanhoe Bldg. & Loan Ass'n v. Orr, 295 U. S. 243 (1935).

\textsuperscript{104}In support of this view, one authority states: “Property of the bankrupt subject to a valid lien vests in the trustee under the general provisions of the Bankruptcy Act, to the effect that the trustee shall be vested by operation of law with the title of the bankrupt as to all property which the bankrupt prior to the filing of the petition could by any means have transferred or which might have been levied upon and sold under judicial process against him. The trustee, however, acquires the title to such property subject to the lien. The holder of the lien may assert it against the property to the same extent as if the bankruptcy had not intervened.” 6 AM. JUR., Bankruptcy (1937) § 201.

\textsuperscript{105}Where a fund has been set apart for the payment of an obligation or class of obligations, or a fund in the hands of a third person has been so designated as to require the latter to make payment out of it to a creditor, the general rule is that the person for whose benefit the fund was so set apart or designated acquires a right to have it applied as directed, which right will be given a preference over the rights of other creditors in case of the debtor's insolvency, provided, of course, that no element of fraud or other superior equity enters into the transaction. In giving effect to this rule, courts have in many cases regarded the transaction as in the nature of an equitable assignment or appropriation of the fund, by virtue of which the creditor in whose favor it is made acquires a right to the fund which is superior to the rights of the general creditors of the debtor.” 6 AM. JUR., Bankruptcy (1937) § 397.

\textsuperscript{106}Straton v. New, 283 U. S. 318 (1931).


\textsuperscript{108}In this connection the advance payment agreement contained the following provision: “The contractor shall deposit the money advanced hereunder in special accounts in banks,
made under the authority of the Act of October 6, 1917, which provided:

"That the Secretary of War and the Secretary of the Navy are authorized, during the period of the existing emergency, from appropriations available therefor, to advance payments to contractors for supplies for their respective departments in amounts not exceeding 30 per centum of the contract price of such supplies. Provided, That such advances shall be made upon such terms as the Secretary of War and the Secretary of the Navy, respectively, shall prescribe and they shall require adequate security for the protection of the Government for the payments so made."

Before the plant was completed, the United States, because of the Armistice, exercised its reserved right to terminate the contract and attempted to recover a portion of the advance payment from funds deposited by the contractor in advance payment accounts. The banks, also creditors of the contractors, claimed a prior right of set-off, which would have exhausted these funds and left the United States with nothing. The Supreme Court stated that the act authorizing advance payments was intended to relax, during the period of the war, the strict rule against advances of public money; and it held that since the banks had notice of the special purpose of the fund, when set up, their lien was subordinate thereto.

separate from its other funds, and shall draw on said accounts only in payment of expenditures made and obligations incurred in designing, constructing and equipping the plant specified in the Principal Agreement, and for other equipment and for material, labor and overhead expense, required in the direct performance of the Principal Agreement, unless otherwise authorized in writing by the War Credits Board.” 267 U. S. at 390.


110 For a discussion of the principles of war contract termination generally, see landmark article of Malman, Policies and Procedures for the Termination of War Contracts (1944) 10 Law & Contemp. Prob. 449.

111 In this connection the Court said: "The act plainly authorized advance payments, such as that covered by the supplementary agreement. It left the terms to the discretion of the Secretary of War, subject to the duty to require adequate security, but the act did not specify or limit the amount or kinds of security to be taken. A lien upon and right over the balances in the special accounts required to be kept is clearly within the meaning of the word 'security,' as used in the act. The power of the Secretary to exact such a lien or right in addition to the collateral note and surety bond cannot be doubted." United States v. Butterworth-Judson Corp., 267 U. S. 387, 392 (1925).


113 But a bank having notice that a deposit is held by one for the use of or as security for another has only such right of set-off as is not inconsistent with the rights of the latter. Here, the banks had knowledge of the agreements, under which these balances constituted security for the advance made by the United States. By acceptance of
To sum up, the Government has an equitable lien on advance payment monies deposited in special bank accounts in conformity with the standard contract clauses providing for such deposit. This lien comes ahead of the rights of any equity receiver, trustee in bankruptcy, etc., and even ahead of the bank’s right of set-off.

As a practical matter, however, the Government’s security will not cover the entire amount of the advance payment, since some of the funds may have been dissipated by payments for the purchase of materials now processed and transferred to subcontractors or otherwise unidentifiable. For that portion of the claim which is unsecured, the priorities previously considered in this article must be relied upon as the means of receiving payment ahead of general creditors.

RECAPITULATION

Priority for repayment of monies advanced to contractors is governed by the basic Government priority statute, Revised Statutes, Section 3466, subject to such modifications as have been made by Section 64 of the Bankruptcy Act. Section 3466 provides for first priority in payment to the United States of its debts out of funds held by persons administering the estate of an insolvent in four classes of cases:

First, cases where the estate and effects of any deceased debtor in the hands of his executors or administrators is insufficient to pay his debts;

Second, cases where the debtor not having property sufficient to pay all his debts has made a voluntary assignment thereof for the benefit of his creditors;

Third, cases where the estate and effects of an absconding, concealed, or absent debtor have been attached by process of law;

Fourth, cases where the debtor has committed a legal act of bankruptcy.

In cases of equity receiverships and other insolvency but non-bankruptcy proceedings, the Government is entitled to first priority; but in cases of ordinary bankruptcy the priority conferred by Section 3466 of the Revised Statutes is reduced to fifth position by Section 64 of the

the moneys furnished in accordance with the agreement, their right of set-off was made subject to the rights of the United States and the obligations of the contractor. . . . The appropriation of these balances by the banks cannot be sustained.” United States v. Butterworth-Judson Corp., 267 U. S. 387, 395 (1925).

Subsequently, priority was also allowed the Government under § 3466 of the Revised Statutes with respect to those assets not in the special fund. United States v. Butterworth-Judson Corp., 269 U. S. 504 (1926).
Bankruptcy Act, coming behind expenses of administration, wages, taxes, etc., but ahead of general creditors. The status of priority for arrangements under Chapter XI is the same, but there is no priority in Chapter X (Chandler Act) proceedings.

Unless the Secretary of the Treasury assents to a reorganization plan under Chapter X, some provision must be made for reimbursement before proceeding with the plan. The Government may also object to the plan on the grounds that it is not feasible, that Chapter XI proceedings would be more appropriate, or that the petition was not filed in good faith.

Whether or not interest is charged would have no effect on the right of the Government to enforce its claim for the repayment of monies advanced, interest being a provable debt.

The Government has an equitable lien on advance payment monies deposited in special bank accounts in conformity with the standard contract clauses providing for such deposit. This lien comes ahead of the rights of any equity receiver, trustee in bankruptcy, etc., and even ahead of the bank’s right of set-off. For that portion of the claim which is unsecured, the priorities previously considered in this article must be relied upon as the means of receiving payment ahead of general creditors.
ADMINISTRATIVE LAW

SHOULD PREJUDGMENT BEFORE HEARING IN A QUASI-JUDICIAL PROCEEDING DISQUALIFY AN ADMINISTRATIVE AGENCY?

Does a petitioner in a quasi-judicial proceeding have the right to recuse, i.e., to disqualify, an administrative agency if the latter, prior to the hearing, has prejudged the issue? At first blush, it would seem that the determination of the issue in question before the hearing—before the submission of any evidence on the side of the petitioner—would run counter to the fundamentals of a fair trial and due process. Without doubt, prejudgment is a type of bias and prejudice. But, the question is whether it is a fit ground for effecting the recusation of an administrative agency.

This problem arose in a singular recent case, *Marquette Cement Mfg. Co. v. Federal Trade Comm.*,¹ in which the Commission was asked by the petitioner to disqualify itself on the ground of prejudice and bias—specifically as the latter related to prejudgment. This prejudgment allegedly grew out of a previous investigation of the steel industry, wherein the Commission decided that a certain business practice (a certain base point pricing system) was illegal. The Commission in this prior investigation and in other reports had expressed its belief that the pricing system was illegal, not only in the steel industry, but in all of industry as well, the Commission specifying the cement industry (of which the petitioner was a member). In a subsequent investigation of the cement industry, the Commission formally decided that the pricing system was illegal. After the decision to that effect by the Commission, and the rendering of a cease and desist order, the petitioner moved for the recusation of the Commission on the ground that it had prejudged the issue involved. The Court overlooked the fact that delay in bringing the suit, in itself, was sufficient to bar the petitioner and considered the merits of the case—i.e., whether the facts alleged constituted bias and prejudice in the form of prejudgment, and whether the latter gave rise to a right in the petitioner to recuse the Commission.

Ideally, it cannot be doubted that the triers of facts should be unbiased and unprejudiced. "It is a fundamental rule of our common law, embodied in the Constitutions of our State and Nation, that no person may be adjudged guilty and punished upon a charge of wrongful con-

¹C. C. A. 7th, Jan. 29, 1945.
duct without a hearing. Decision must await the hearing of the defense. The cause may not be prejudged, and no man may be both accuser and judge. Otherwise a hearing becomes a fiction, and no fiction can destroy constitutional guaranties. In the opinion of the New York Court, at least so far as the rule relates to judges as distinguished from administrative agencies, prejudgment is generally frowned upon. As another court put it: "To compel a litigant to submit to a judge who has already confessedly prejudged him, and who is candid enough to announce his decision in advance, and insist that he will adhere to it, no matter what the evidence may be, would be so farcical and manifestly wrong that it seems to us that the idea must necessarily be excluded by the very expression 'administration of justice.'

In the consideration of the principal case and the issues it suggests, it is significant that the statute creating the Commission was silent on the matter of the possible disqualification of the agency, and significant also that disqualification, if allowed, would destroy the only tribunal authorized to handle the matter involved. Throughout this note, analogies will be drawn between an administrative agency on the one hand, and the related fields of judges and jurors on the other.

I. General Rule Regarding the Disqualification of an Administrative Agency on the Ground of Prejudgment and Its Rationale

The rule may be simply stated: in the absence of any statutory provision for the disqualification of an administrative agency, an agency having exclusive jurisdiction over a given type of quasi-judicial proceeding may not be disqualified on the ground of having prejudged the issue prior to the hearing.

Administrative agencies acting in quasi-judicial proceedings and judges resemble each other at least to the extent that their functions are similar. It has been held that the rules of disqualification applicable to judges apply as well to members of quasi-judicial tribunals. For instance, even though the statute creating the administrative body was silent on the matter of disqualification, a member of the administrative board was deemed to be disqualified on the ground of pecuniary inter-

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2State ex rel. Barnard v. Board of Education, 19 Wash. 8, 19, 52 Pac. 317, 321 (1898); see National Labor Relations Board v. Phelps, 136 F. (2d) 562, 563 (C. C. A. 5th, 1943); Williams v. Robinson, 6 Cush. 333, 335 (Mass. 1850).
An exact analogy, however, cannot be drawn in view of the materially greater difficulty of substitution in the case of an administrative agency.


A juror is held to be disqualified for prejudgment in the sense of having a fixed opinion as to the desirable outcome of a trial. Thus, a juror is disqualified for having expressed an opinion of the defendant's guilt prior to the juror's being sworn in. That the defendant would be at a distinct and unfair disadvantage because of the prejudgment of the juror is manifest. Similarly, a juror is disqualified if, prior to the trial, he sat on the grand jury returning the indictment. In these instances, the juror is assumed likely to maintain his preconceived notions obtained elsewhere than at the pending trial and therefore to be unable to consider the case impartially.

With respect to a judge, the general rule is that prejudgment of an issue does not disqualify. Because of the possibility of abuse effecting both needless delay, confusion and expense, statutes providing for the disqualification of judges are narrowly construed. Thus, the federal statute permits the recusation of a federal judge if such judge "has a personal bias or prejudice either against him [affiant] or in favor of any opposite party to the suit". The key word in this statute, for present purposes, is "personal". It is clear that the prejudgment of a case does not necessarily demonstrate the existence of any personal bias or prejudice either for or against any party to a suit. This sharp distinction is accentuated by a frequently-cited case which held that "the facts and reasons advanced in support of the charge of bias and prejudice do not tend to show the existence of a personal bias or prejudice on the part of the judge toward the petitioner but rather a prejudgment of the merits of the controversy and 'against deponent's right to recover.'"

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With regard to the situation of a judge presiding at the second trial of the same case, another court stated: "We hold that such bias and prejudice (if these be appropriate terms for a well-grounded state of mind . . .) is not personal; that it is judicial. 'Personal' is in contrast with judicial; it characterizes an attitude of extra-judicial origin, derived non coram judice. 'Personal' characterizes clearly the pre-judgment guarded against." Similarly, judicial opinion formed on evidence in a hearing against others is not ground for disqualifying a judge because of personal bias and prejudice. The prevailing view clearly is that pre-judgment of an issue, though obviously a form of prejudice and bias detrimental to the success of a litigant, is not a personal bias and prejudice entitling that litigant to the disqualification of the judge. Parenthetically, it may be added that the other requirements of the federal statute providing for the disqualification of judges are equally literally interpreted.

The celebrated case of Tumey v. Ohio held a direct, substantial, financial interest in the outcome of a case automatically disqualified a judge since the resulting proceeding would be contrary to due process of law. A dictum of that case bears on the immediate problem. "All questions of judicial qualification may not involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion." While prejudgment is not specifically spelled out by the Court on its illustrations of potentially fit subjects of legislative discretion, the Tumey case suggests that an act of prejudgment by a judge is not a breach of due process of law.

At common law, the bias and prejudice of a judge (exclusive of bias resulting from pecuniary interest) did not disqualify. Thus, an un-
necessary expression of opinion regarding the merits of a controversy would not be ground for disqualification. It has also been held, though not with uniformity, that a judicial decision made on the basis of personal knowledge regarding the facts of the case does not disqualify the judge.\textsuperscript{15} This stand is an odd one, since above everyone else the judge should be expected to confine his decision to the evidence presented at the trial.

That a judge should be disqualified only for pecuniary interest is not too logical. There are types of bias and prejudice arising from sources other than financial interest that are just as potent in effecting injustice. Prejudgment would certainly qualify as such a type of bias and prejudice. Legislative changes expanding the grounds of disqualification are necessary, however, in order to make prejudgment a ground for disqualification. It is true, of course, that a judge may voluntarily withdraw from a case before him should he consider himself unable, because of some bias and prejudice, to be impartial. However, this matter is discretionary with the judge;\textsuperscript{16} no right, in the absence of a statute, exists in the litigant to disqualify the judge for other than pecuniary bias.

It is pertinent to note that the rule of disqualification is inapplicable to non-judicial officers, although the cases considered by such officers may call for the exercise of judgment and discretion.\textsuperscript{17} For instance, prejudgment on the part of a member of the executive branch of the government in a proceeding that does not adjudicate the respective rights among parties is not covered at all by the rules of disqualification applicable to judges. It is probably felt that the checks on such non-judicial officers, \textit{e.g.}, the threat of removal for inadequate performance of duty, already are sufficient.

\section*{B. \textit{Reasons for the General Rule Applicable to Administrative Agencies.}}

The outstanding justification assigned for permitting an administrative agency to conduct a quasi-judicial proceeding despite its prejudg-

\textsuperscript{15}Ingles v. McMillan, 113 Pac. 998, 1002 (Okla. Crim. Ct. of App. 1911). \textit{Contra}: Rugenstein v. Ottenheimer, 78 Ore. 371, 152 Pac. 215 (1915); Massie v. Commonwealth, 93 Ky. 588, 20 S. W. 704 (1892); see Note (1928) 41 H\text{\textsc{av}}. L. REV. 78.

\textsuperscript{16}Saunders v. Piggly Wiggly Corp., 1 F. (2d) 582, 588 (W. D. Tenn. 1924); see Medlin v. Taylor, 101 Ala. 239, 242, 13 So. 310, 311 (1893).

\textsuperscript{17}State \textit{ex rel.} Mueller v. District Court, 87 Mont. 108, 114, 285 Pac. 928, 930 (1930); \textit{cf.} State \textit{ex rel.} Heimburger v. Wells, 210 Mo. 601, 109 S. W. 758 (1908).
ment is the rule of necessity. "The true rule unquestionably is that wherever it becomes necessary for a judge to sit, even where he has an interest, if no provision is made for calling another in, or where no one else can take his place, it is his duty to hear and decide, however disagreeable it may be."\(^{18}\) Again, as another court phrased it: "From the very necessity of the case has grown the rule that disqualification will not be permitted to destroy the only tribunal with power in the premises."\(^{19}\) It is felt that the protection of the interests of the public necessitates the continued participation by the administrative agency, notwithstanding the latter’s prejudget of the case. It would be unfortunate if the public had to suffer by the non-prosecution of a suit because of the prejudget of the administrative agency exclusively authorized to carry through with the case. A resulting injustice arises, however, because of the prejudiced rights of the litigant.

The doctrine of necessity should be applied only where imperative necessity demands it. Thus a disqualified member of a board should not sit where the remaining members have the power to act.\(^{20}\) National Labor Relations Board cases are occasionally sent back for a new trial because of a biased trial examiner, \textit{i.e.}, one peculiarly prejudiced in favor of the imagined interests of the Board.\(^{21}\) In the latter cases, no argument for the rule of necessity could be made because of the relative interchangeability of trial examiners. It has been held that the interpretation of the statute setting up the administrative agency should, wherever possible, lean towards the requirement of a hearing before an unprejudiced administrative official.\(^{22}\)

Another salient argument advanced for refusing to disqualify an ad-

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\(^{18}\) R. C. L. 541; \textit{accord}, Jeffersonian Pub. Co. v. Hilliard, 105 Ala. 576, 17 So. 112 (1895); Hill v. Wells, 6 Pick. 104 (Mass. 1828); see 33 C. J. 989; 39 A. L. R. 1476; and an excellent note on the problem of the disqualification of administrative officials, Note (1941) 41 Col. L. Rev. 1384.


\(^{20}\) Metsker v. Whitesell, 181 Ind. 126, 138, 103 N. E. 1078, 1083 (1914); \textit{accord}, State \textit{ex rel.} Barnard v. Board of Education, 19 Wash. 8, 52 Pac. 317 (1898); People \textit{ex rel.} Pond v. Board of Trustees, 39 N. Y. Supp. 607, 613 (Sup. Ct. 1896).

\(^{21}\) National Labor Relations Board v. Washington Dehydrated Food Co., 118 F. (2d) 980 (C. C. A. 9th, 1941); Inland Steel Co. v. National Labor Relations Board, 109 F. (2d) 9 (C. C. A. 7th, 1940); Montgomery Ward & Co. v. National Labor Relations Board, 103 F. (2d) 147 (C. C. A. 8th, 1939); see Note (1941) 30 Georgetown L. J. 54.

\(^{22}\) Sharkey v. Thurston, 268 N. Y. 123, 127, 196 N. E. 766, 768 (1935); \textit{cf.} People \textit{ex rel.} Hayes v. Waldo, 212 N. Y. 156, 173, 105 N. E. 961, 967 (1914).
ministrative agency on the ground of prejudice is the "legislative
discretion theory."

The latter hinges on the silence of the legislature
regarding the possible disqualification of an administrative agency on the
ground of prejudice and bias. This argument regarding the legislative
intent (i.e., to permit an agency to adjudicate cases despite bias) is
impressive in view of specific legislative provision for the disqualification
of judges.

The type of prejudgment that necessarily results from the combina-
tion of the powers of investigation and adjudication in an administra-
tive agency is almost uniformly held not to disqualify an agency. To
hold otherwise would cripple the administrative agency set-up, since the
latter is based on the combination of prosecutor-judge-juror. Some be-
lieve that this type of combination is potentially dangerous, but that
in actual practice it has not worked unfairly. The latter appears to be
a fair evaluation of the administrative agency device as it works at pres-
ent. It is perhaps true that some improvement along this line could be
affected by splitting, within the agency, the functions of prosecution
and adjudication—but this procedural change is not without its dis-
advantages. Regardless of the intra-organizational division of func-
tions employed, it is apparent that the investigation-adjudication func-
tions must be kept within the administrative agency for the latter system
to continue. It has been held, however, that although this combination
of functions is to be avoided wherever possible, the law or the prac-
tical considerations of the case may compel it.

Of course, a judge acting as a prosecuting attorney in prior proce-
dings in the same case is disqualified. The maxim that no man should
be a judge in his own case is applicable here. The bias resulting from
having been a prosecutor should bar an individual judge from adju-
dicating the same case. With the growth of administrative agencies and
with the accompanying increased division and specialization of work

Brinkley v. Hassig, 83 F. (2d) 351, 356, 357 (C. C. A. 10th, 1936); accord, Rawlings
v. City of Newport, 275 Ky. 183, 121 S. W. (2d) 10 (1938); Bergeron v. Jackson, 94 Vt.
Feller, Administrative Law Investigation Comes of Age (1941) 41 Col. L. Rev. 589, 602.
Report of the Attorney General's Committee on Administrative Procedure, SEN. DOC.
No. 8, 77th Cong., 1st Sess. (1941) 55-60, 203-209.
State v. Cottrell, 45 W. Va. 837, 32 S. E. 162 (1899); accord, Terry v. State, 24 S. W.
510 (Tex. Crim. App. 1893); cf. Kirby v. State, 78 Miss. 175, 28 So. 846 (1900); see Note
(1941) 51 YALE L. J. 169, 174.
within the agencies, no one individual is likely to be both prosecutor and judge. However, there is some danger that individuals performing different functions within an agency will view controversial issues in too much the same light—perhaps, in order to further the assumed end of the agency—and thereby tend to effect injustice. This danger, though, would be minimized by having the different functions of the agency performed by separate and distinct groups within the agency.

An undercurrent running through the cases on prejudgment is the feeling that despite the apparent existence of prejudgment, justice will be rendered. For instance, in one case where an administrative official intimated that his mind was made up and that there was no necessity for a hearing, the court decided that these words did "not indicate that his mind was not open to any proof, but only that when so full an examination had been made no matters affecting the result were likely to be developed." Especially with regard to statements made in an election campaign prior to membership on commissions, courts decline to hold this type of prejudgment disqualifying in a post-election action prosecuted by the newly elected commission members. The "presumption is that . . . the commission . . . would act without bias or prejudice, and would be guided in rendering a decision solely by the evidence submitted." It would indeed be contrary to public policy to maintain that such campaign promises amount to disqualifying prejudgment. The present stand is necessary in order to promote beneficial political change.

In connection with an unsuccessful charge that bias by the Secretary of Agriculture disqualified him from adjudicating further in a rate case, the Supreme Court said: "That he not merely held, but expressed, strong views on matters believed by him to have been in issue, did not unfit him for exercising his duty in subsequent proceedings ordered by this Court. . . . Cabinet officers charged by Congress with adjudicatory functions are not assumed to be flabby creatures any more than judges are. Both may have an underlying philosophy in approaching a specific case. But both are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly upon its own circumstances."
II. Remedy Available to One Aggrieved by Prejudgment by an Administrative Agency

A party aggrieved by the prejudgment of an administrative agency has no right to appeal the agency's adverse decision solely on the ground of prejudgment. Prejudgment, in other words, in and of itself, will not support reversal by the courts. Successful appeal to the courts will result only where the administrative decision is not based on substantial evidence. For instance, in one case it was charged that personal hostility was the sole reason for the dismissal of a county treasurer. In view of the silence of the statute on the matter of disqualifying the official removing the county treasurer from office, the court decided that the pivotal question was not the bias but the existence of a legally sufficient cause and substantial evidence to support the removal.

Despite the prejudgment of an administrative agency, there is no denial of due process if there is statutory provision for the judicial review of the administrative order in question. The fact that a complainant, by statute, is entitled to a stay of an allegedly invalid order until it is judicially reviewed, is ordinarily considered sufficient to meet the requirements of due process.

That this extremely limited scope of review is inadequate is clear. It would appear preferable to grant, by statute, the right to appeal an administrative order on the basis of prejudgment alone. Under the present set-up, the mere existence of substantial evidence supporting an administrative order does not necessarily render that order a just one. In most controversial cases, it would seem possible to find some substantial evidence on both sides of the proposition. Under these circumstances, the bias of the agency in the form of prejudgment could swing the decision one way or the other in accordance with the prejudgment. Thus, a biased administrator or member of a quasi-judicial board may prejudice a party's cause without the bias necessarily appearing on the record.

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32 Regarding the "substantial evidence" rule, see Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197, 229 (1938).


III. Conclusion

It would appear to be the better practice, by statute, to permit prejudgment before hearing to be a ground for disqualification. This expansion could well cover judicial and quasi-judicial actions. That prejudgment prejudicially affects the complainant and makes difficult a fair decision of the case is evident. Statutes setting up prejudgment as a ground for disqualification would, of course, have to provide for substitution of other individuals to carry the case through to completion. In the administrative agency field this could perhaps best be handled by providing for the disqualification of only the members of the agency individually, and not the agency itself. In this manner, the agency could be expected to complete a case despite the disqualification of several of its members.

At present it is perhaps felt that despite prejudgment, the administrative agency will render a just decision based on the evidence presented at the hearing. Such factors as the oath of office taken by the agency members, the possibility of removal from office should the decisions be manifestly unfair, the possibility of reversal by the courts because of the absence of substantial evidence, do tend to minimize the significance of prejudgment. However, it would seem best, nevertheless, to include prejudgment as a ground for disqualification. Because of the strict construction given disqualification statutes, and because of possibility of abuse, the disqualification provisions would have to be adroitly drawn. The present remedy for prejudgment—based not on the prejudgment itself, but on the lack of substantial evidence—is inadequate.

Progress in the form of the further splitting up of the prosecuting-adjudicative functions within the administrative agency itself would be salutary. Such a development would minimize the likelihood of prejudgment. The principle that a case should not be decided until the evidence is heard could logically be considered an element of due process of law. But until that conception receives affirmation, the legislature might well make prejudgment in a quasi-judicial proceeding a ground for disqualification.

EDWIN R. FISCHER
"WHETHER competition is a good thing for the insurance business is not for us to consider. Having power to enact the Sherman Act, Congress did so; if exceptions are to be written into the Act, they must come from Congress, not this Court." These words, spoken by the United States Supreme Court in the majority opinion of the now famous South-Eastern Underwriters case, placed squarely upon Congress the burden of determining the desirability of granting the insurance business a special exemption from the operation of the federal antitrust laws.

In brushing aside the fiction that insurance is not commerce, the Court adopted a realistic view of the nature and magnitude of the business and its effect on almost every phase of the Nation's commercial enterprises. From the recognition that insurance is commerce it followed that interstate insurance transactions were subject to federal legislation, such as the Sherman and Clayton Acts, pertaining to monopolistic practices and agreements in restraint of trade. While the precise question presented in the South-Eastern Underwriters case had never previously been considered by the Supreme Court, there had been several decisions involving the validity of state statutes, which held that the issuance of a policy of insurance was not commerce. These decisions had established a widely accepted precedent that insurance was neither intrastate nor interstate commerce so as to be included within the constitutional concept of the term commerce. It was not surprising, therefore, that considerable confusion and chaos resulted from this reversal by the Court.

A great many companies found themselves confronted with actual or potential criminal and civil prosecution for acts which, in respect to interstate transactions at least, had been considered perfectly legal when performed. Not only was there confusion among companies, but state

officials were also perplexed as to the validity of certain state-enacted regulatory and tax legislation pertaining to the insurance business. Furthermore, millions of policyholders pondered over possible effects on policy values.

It was therefore imperative that Congress act quickly. Being fully aware of the importance of the issue raised by the indictment in the South-Eastern Underwriters case and in anticipation of the decision finally handed down, members of both Houses of Congress had introduced bills designed to express congressional policy and offset any reversal of the Court’s past doctrine. These bills were to the effect:

"That nothing contained in the Act of July 2, 1890, as amended, known as the Sherman Act, or the Act of October 15, 1914, as amended, known as the Clayton Act, shall be construed to apply to the business of insurance or to acts in the conduct of that business or in any wise to impair the regulation of that business by the several States."5

An analysis of these bills has been dealt with at some length elsewhere and will not be explored further here. Extensive joint hearings before the subcommittees of the Committees on the Judiciary were held, the issues were debated in the respective chambers of Congress, and agreements were arrived at in the Conference Committee. These efforts finally culminated in the passage of the McCarran-Ferguson Bill, S. 340,8 which became law with the President’s signature March 9, 1945.

A careful study reveals that this Act, in substance, suspends full application of the antitrust laws for approximately three years, thereby granting ample opportunity to the several states to readjust legislation and to the insurance companies to revise their practices so as to conform to the new legal conception of insurance as commerce.

Section 1 of the Act states the policy of Congress and reads as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States."

Here Congress affirms the position that control and regulation of the

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6Note (1943) 32 Georgetown L. J. 66.
insurance business for various reasons should remain with the states. The clause providing that "silence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States" will tend to avoid conflict with decisions holding that silence or inaction on the part of Congress does not imply exemptions from the particular act in question.9

Support for the declaration of policy is found in Section 2 (a):

"The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business."

In Section 2 (b) Congress has sought to avoid a conflict between existing or future Acts of Congress and state-enacted legislation by providing a guide for the courts to follow in any future litigation. It reads as follows:

"No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That after January 1, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law."

The question naturally arises as to whether this clause will permit states to continue to impose fees, taxes, or license requirements on companies incorporated in other states which are more onerous than those placed on domestic companies. In the light of the cases it is extremely doubtful whether the Supreme Court would accept any such interpretation, for it has repeatedly held that states may not place an undue burden on interstate commerce.10

The Supreme Court recently upheld a Wisconsin statute requiring a foreign mutual automobile insurance company seeking a Wisconsin license to include, in computing its reserve, 50 per cent of the premiums and membership fees exacted in other states and not merely 50 per cent of the premiums paid by Wisconsin members.11

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not to be violative of the "due process" or "full faith and credit" provisions of the Federal Constitution, the Court did not decide whether the statute violated the Commerce Clause. On the contrary, inasmuch as the decision in the South-Eastern Underwriters case had been handed down too late for that issue to be raised in the Wisconsin court, the Supreme Court concluded that the insurance company was not foreclosed from obtaining a determination of the question in the Wisconsin courts.

The phrase "to the extent that such business is not regulated by State law" promises to be a prolific source of litigation. Debate on the Senate floor revealed differences of opinion as to the proper interpretation of the phrase, and there were indications that it might be interpreted as giving states the power to modify or practically eliminate the applicability of the Sherman, Clayton, and Federal Trade Commission Acts.

However, it would seem that the proper interpretation is that the states must take affirmative action in providing effective regulation as described by President Roosevelt in his letter of January 2, 1945, to Senator Radcliffe, in which he said: "The antitrust laws do not conflict with affirmative regulation of insurance by the States such as agreed insurance rates if they are affirmatively approved by State officials."

Fears that the states may give a free hand to the insurance companies disappear when one considers that such action would constitute a direct invitation to Congress to establish federal control. Furthermore, the Supreme Court has held that states may not grant outright immunity from federal antitrust laws.

Section 3 of the Act specifically exempts the insurance business from the application of the Sherman, Clayton, Federal Trade Commission, and Robinson-Patman Antidiscrimination Acts, with certain exceptions, until January 1, 1948. This section reads as follows:

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13 U. S. CONST. AMEND. XIV, § 1.
14 Id. Art. IV, § 1.
“(a) Until January 1, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, and the Act of June 19, 1936, known as the Robinson-Patman Antidiscrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

“(b) Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.”

The three-year period of grace is designed to provide ample opportunity for state legislatures to adopt effective regulatory legislation and should prevent the enactment of hurried and ill-advised measures.

The exceptions provided for in Section 3 (b) continue in force the application of the Sherman Act to agreements to boycott, coerce, or intimidate, or acts of that nature. It is to be noted that a mere agreement to boycott, coerce, or intimidate constitutes a violation. It was obvious that no business could claim to have established vested interests in conduct of this type which is repugnant to all forms of business enterprise in this country.

The extent to which the Robinson-Patman Antidiscrimination Act is affected by Sections 2 and 3 is not entirely clear, for Section 2 (b) makes no provision for the reapplication of that Act after January 1, 1948, in the manner provided for the Sherman, Clayton, and Federal Trade Commission Acts. However, Section 3 (a) implies exemption from that Act only until January 1, 1948. If Section 2 (b) is to be strictly construed, it would seem that the Robinson-Patman Act will be inapplicable to the insurance business even after January 1, 1948. On the other hand, if full weight is given to the implication in Section 3 (a) that the exception shall last only until the expiration of the period of grace, it may be argued that beyond such period that Act would be fully applicable to the insurance business regardless of the extent of state regulation. A further conflict rests in the fact that the Robinson-Patman Act is, in part, amendatory of the Clayton Act.20 To that extent, at least, it might well be contended that whatever is provided with respect to the Clayton Act is also applicable to the Robinson-Patman Act. While the latter Act was undoubtedly never intended to apply to the insurance business and makes no specific reference to it, the Act does prohibit, except under certain conditions, payment of commissions to brokers21—


a long-established practice in the insurance business—and could be construed as outlawing this time-honored custom.

Section 4 provides for the exception of the National Labor Relations Act, the Fair Labor Standards Act of 1938, and the Merchant Marine Act, 1920 from the effect of this Act and therefore allows continued application of these Acts to the insurance business.

From the foregoing analysis it is apparent that the instant McCarran-Ferguson Act places a direct obligation upon the several states to provide adequate and effective legislation if state regulation is not to be superseded by federal control. It is an open question whether or not the public interest can be fully protected by state control alone. The magnitude of the task faced by state legislatures is well demonstrated by the experience of the State of Missouri. Testimony before the congressional subcommittees by the Attorney General of that State revealed the difficulty a state may have in trying to control insurance transactions which are essentially interstate in scope. This statement is particularly significant:

"... The business of insurance has not been, and is not now, under the control of the several States, and no State, nor any group of States, nor all of the States, can control the business of fire insurance as it is now being conducted by the companies engaged in such business."

United States Attorney General Francis Biddle and United States Assistant Attorney General Wendell Berge presented further evidence disclosing the gross inadequacy of present state controls.

Sec. 4. Nothing contained in this Act shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act, or the Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938, or the Act of June 5, 1920, known as the Merchant Marine Act, 1920.

On the day the South-Eastern Underwriters opinion was handed down, the Supreme Court affirmed a decision of the Circuit Court of Appeals for the Seventh Circuit, holding that a fraternal benefit association carrying on the business of insurance by interstate communications is engaged in commerce, that such business affects interstate commerce, and that it is therefore subject to the National Labor Relations Act. Polish Nat'l Alliance v. N. L. R. B., 322 U. S. 643 (1944). The decision of the Court in that case is in no wise offset by the enactment of the Act under discussion.

Id. at 55, 142.
The results of a painstaking survey of state controls revealed that only the State of Texas establishes its own rates and imposes them upon insurance companies.28 It was found "that in three states there is no visible governmental control of rate-making, that in twelve other states the only possible controls are general anti-monopoly provisions, and that in the remaining thirty-three states there is some specific legislation directed at rate-making."29

The effectiveness of these statutes in preventing monopolistic practices, however, is seriously open to question in the light of evidence submitted to the congressional subcommittees, which was admirably summed up by Senator O'Mahoney when he said:

"My point, of course, Senator, is that at a time when the record now clearly shows that at the very best, from the point of view of insurance companies, the interstate management of insurance is complicated and confused, Congress should not deprive the public of the protection which it now has or may have in the antitrust laws. . . .

"The Interstate Underwriters Bureau was brought into existence for the express purpose of providing a Nation-wide system of handling Nation-wide risks. It is an organization of the insurance companies. It is a supergoverning board which operates in the field of interstate business. It operates to the disadvantage of the States and to the disadvantage of small business. It tends to reduce the revenues of the States and to increase the premiums paid by local business. Disproportionate discounts are allowed to the big risks and State control is evaded and nullified. A complicated and confusing system has been adopted which could scarcely be improved upon if its sole purpose were to deceive the State insurance officials." [Italics supplied.]30

It has been argued that in order for the insurance business to function properly without fear of insolvency, there must be certain agreements among the companies, uniform practices adopted, and interstate organizations set up.31 Assuming this to be true, it is unthinkable that these organizations should be self-governing without adequate protection afforded the public interest. That the public interest can best be served by forty-eight separate sets of regulations and controls remains to be proved.32

It is without doubt most desirable that control of economic power

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28Note (1944) 33 GEORGETOWN L. J. 70, 82.
29Id. at 88.
31Id. at 259 et seq., wherein this is fully developed by the testimony of Mr. Edward L. Williams, President of the Insurance Executives Association.
32Note (1943) 32 GEORGETOWN L. J. 66; Note (1944) 33 GEORGETOWN L. J. 70.
be kept as close as possible to the people. However, unless this can be done effectively by the states, Congress must step in to protect the public from private monopoly, as it has done in other industries. The necessity for such action can be determined only on the basis of a thorough analysis of the business rather than by the negative approach reflected in the McCarran-Ferguson Act. The tremendous influence of the insurance business requires that Congress proceed with such a study at once without waiting for the results of state legislative efforts, which, in the light of prior efforts,\textsuperscript{33} promise to be inadequate for a proper solution of the problem.

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\textsuperscript{33}Difficulties inherent in state control of the insurance business are clearly shown by the testimony of Mr. Roy C. McKittrick former Attorney General of Missouri. Joint Hearing before the Subcommittees of the Committees on the Judiciary on S. 1362, H. R. 3269, and H. R. 3270, 78th Cong., 1st Sess. (1943) 80, 168, 181.
NOTE

WARTIME SEIZURE OF PLANT FACILITIES: THE MONTGOMERY WARD CASE

On January 27, 1945, United States District Judge Sullivan ruled, in United States v. Montgomery Ward & Company,¹ that the President of the United States was without authority, under either Section 3 of the National War Labor Disputes Act² or the war powers conferred upon him by the Constitution as Commander-in-Chief of the Army and Navy, to take possession of the plants and facilities of Montgomery Ward & Company. The immediate effect of this decision was to cause consternation in many and various quarters; the far-reaching consequences remain to be appraised when the appellate courts have had their say in the matter.

Montgomery Ward & Company is one of the largest merchandising organizations in the world. It is principally engaged in retail mail order business, selling a wide variety of goods and merchandise through its nation-wide system of outlets. Its customers, who live mainly in rural areas, are dependent upon mail order houses, including Ward, for the purchase and receipt of many articles of equipment and supplies. In addition, many city war workers buy clothing and other essential goods by mail from Ward. This establishment also operates three factories, but its manufacturing activities are minor in comparison with its entire business. The magnitude of the company’s commercial activities can be measured best by noting that it sells approximately $600,000,000 worth of merchandise annually to approximately 30,000,000 customers.

For more than two years prior to the seizure of its facilities by the Government, Montgomery Ward & Company had refused to adjust labor disputes with its employees in accordance with directive orders issued by the War Labor Board. This Board was established by the President on January 12, 1942,³ to settle all wartime labor disputes which might interrupt work contributing to the effective prosecution of the war. These disputes in the Ward establishments have resulted in strikes, some in localities vitally concerned with war production. All told, 21 labor disputes, involving over 14,000 workers, between Ward and certain labor organizations designated as exclusive bargaining representatives of the

¹58 F. Supp. 408 (N. D. Ill. 1945).
employees, have been considered by the Board. During this whole period, Ward has, with one exception, refused to abide by the directives of the War Labor Board or to settle its labor disputes by other peaceful means. In fact, it has publicly taken the position that it is not bound by these directives.  

This persistent refusal by the company to settle its disputes led, on December 27, 1944, to the issuance by the President of Executive Order No. 9508, 5 which directed the Secretary of War to take possession of and operate the plants and facilities of Montgomery Ward & Company in Jamaica, New York; Detroit, Dearborn, and Royal Oak, Michigan; Chicago, Illinois; St. Paul, Minnesota; Denver, Colorado; San Rafael, California; and Portland, Oregon. On December 28, 1944, the Army took possession of these facilities, which were exclusively devoted to retail and mail order merchandising. On the same day, the Government filed a complaint 6 in the District Court of the United States for the Northern District of Illinois (Eastern Division) asking for a declaratory judgment adjudicating that the United States, through its designated officers, was lawfully in possession of the facilities described in the order. The complaint also asked that the court enjoin Montgomery Ward and sixteen of its officers, the defendants, from interfering with the plaintiff’s, the Government’s, possession of the plants and facilities.

The fundamental issue in the case was whether the United States was authorized to take possession of these facilities in order to operate them without interference from recurrent labor disputes similar to those which the company had previously refused to settle. The Government justified the seizure of the facilities on the basis of two contentions: (1) that the Connally-Smith War Labor Disputes Act 7 gave the President the power to seize the company’s facilities, and (2) that even if that law did not, the war powers of the executive branch of the Government inherent in the Constitution 8 were sufficient to make the seizure legal. Ward attacked the merits of these two contentions. In short, the company argued the case on the assumption that the President’s Execu-

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5 This attitude on the part of Ward toward the War Labor Board was based on the company’s refusal to agree to any form of closed shop, or compulsory union membership. It contended that to give to a union special privileges was not only unfair and uneconomic, but illegal as well. Washington Post, Dec. 21, 1944, p. 8, col. 5.
tive Order directing the seizure must necessarily be illegal, either as an attempted exercise of authority conferred by Section 3 of the War Labor Disputes Act, or as a purported exercise of the constitutional authority of the President of the United States. In handing down his opinion, Judge Sullivan found against the Government on both contentions. To evaluate properly the decision of the District Judge, it is imperative to examine the two contentions of the Government in the light of precedent.

I. LEGALITY OF SEIZURE UNDER THE WAR LABOR DISPUTES ACT

The significant provisions of Section 3 of the War Labor Disputes Act, under which the seizure of the Ward facilities was accomplished, are that the President may direct the seizure of—

"... any plant, mine, or facility equipped for the manufacture, production, or mining of any articles or materials which may be required for the war effort or which may be useful in connection therewith."9

The District Judge, drawing a definite distinction between plants equipped for production and those equipped for distribution, ruled that since Montgomery Ward & Company was an organization concerned with retail distribution and not production, Section 3 was inapplicable to permit seizure of its facilities. In other words, the seizure section of the War Labor Disputes Act was made applicable only to war plants and not to non-war industries. Whether this was a narrow construction of the statute can best be determined by reviewing, briefly, the attitude of the courts to the problems of statutory interpretation.

The courts have developed two broad approaches to this problem of judicial interpretation of statutory law. One method of approach adheres to the basic "rule of literalness," i.e., that if the meaning of a statute is clear from the words of the statute itself, then the language of the statute is conclusive evidence of legislative intent. If neither contradiction nor ambiguity is present, then the meaning of the statute apparent on its face must be considered as controlling upon the court. The prerequisites for the application of this rule are that the statute be free from ambiguity and obscurity, and that the results be neither unjust nor absurd.

The leading case of Caminetti v. United States10 was a notable example of the application of this rule by the Supreme Court of the United

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10242 U. S. 470 (1917).
States. The majority opinion of that Court held that the language of Section 2 of the White Slave Traffic Act,\(^{11}\) in its normal meaning, included interstate transportation of women for any immoral purpose and was not to be limited to commercial vice only, as contended by the petitioner. As recently as 1942, a Missouri court emphasized the rule laid down in the Caminetti case, stating that “A strict construction is one which limits the application of the statute by the words used.”\(^{12}\) Many other courts have held steadfastly to the rule that the language of the statute must be given its exact and technical meaning, with no extension on account of implications or equitable considerations.\(^{13}\) In effect, if the language of the statute is clear, it is conclusive of the legislative intent.\(^{14}\)

Opposed to the rule of literalness is the so-called “doctrine of equitable construction.” In plain words, this doctrine means that in the judicial interpretation of a statute the reason of the law should prevail over its letter.\(^{15}\) Judge Story announced this principal of interpretation as early as 1829.\(^{16}\) Thirty-eight years later, the case of United States v. Kirby\(^{17}\) gave the doctrine especial prominence. Although the courts originally espoused the principle of the “equity” of a statute in order to avoid producing absurd or unjust results from the application of the rule of literalness, equitable construction was later extended to include cases where the literal application would produce neither of these results.

The case of the Church of the Holy Trinity v. United States\(^ {18}\) gave impetus to this newer trend in statutory interpretation. The Supreme Court, in deciding that the immigration of a religious minister in fulfillment of a contract did not come within the provision of a federal statute which made it illegal for any person to assist or encourage the importation of any alien into the United States for the purpose of employment, stated that “It is a familiar rule that a thing may be within the letter of the statute, and yet not within the statute, because not within its spirit nor within the intention of its makers.”\(^ {19}\) Patently, a law designed

\(^{13}\)Barber Asphalt Paving Co. v. Watt, 51 La. Ann. 1345, 26 So. 70 (1899); St. John's Military Academy v. Edwards, 143 Wis. 551, 128 N. W. 113 (1910).
\(^{14}\)Osaka v. United States, 300 U. S. 98 (1937).
\(^{15}\)In re Di Toro, 8 F. (2d) 279 (N. D. Ill. 1925).
\(^{16}\)Wilkinson v. Leland, 2 Pet. 627 (U. S. 1829).
\(^{17}\)Wall. 482 (U. S. 1868).
\(^{18}\)143 U. S. 457 (1892).
\(^{19}\)Id. at 459.
to close immigration to the influx of cheap and unskilled labor was not to be construed to apply to a highly trained minister who had a pulpit waiting for him in the United States.

In 1944, the Supreme Court again reiterated the principle of the Church of the Holy Trinity case in deciding the case of Mortensen v. United States.20 There Mr. Justice Murphy, delivering the majority opinion, found that the transportation of a prostitute on an innocent vacation trip was not a violation of the White Slave Traffic Act21 because it was "consistent neither with the purpose nor the language of the Act."22

Historically, the rule by which the statutes in these cases were interpreted was termed to be the doctrine of equitable construction. Practically, the courts were construing the statutes by reference to the legislative intent in order to determine whether or not a specific set of facts constituted a violation of the statute. A long line of decisions, in various jurisdictions, attests to the desire of the courts to extend the scope of a statute to include cases not within the letter, but within the intention of the framers of the statute.23 In the main, however, the doctrine has been applied to restrict the scope of a statute to exclude cases within the letter, but not within the spirit—and, for the most part, to avoid absurd consequences.24

The doctrine of interpreting a statute according to its purpose or spirit—that is, the intent of its framers—probably provides the soundest judicial technique for the understanding of its meaning.25 It can be said, indeed, that the rule of literalness represents older law, while the doctrine of the equity of a statute represents the newer trend in legal reasoning relative to statutory interpretation. Whatever were the earlier views with regard to the latter doctrine, one may quite safely assert that it is now firmly established in this country.26

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20322 U. S. 369 (1944).
22322 U. S. 369, 377 (1944).
253 Sutherland, Statutory Construction (3d ed. 1943) § 6007.
26Id. § 6002.
Judge Sullivan's interpretation of Section 3 of the War Labor Disputes Act in the Montgomery Ward case took into account the entire legislative history of the Act. An examination of the Senate Committee report\(^27\) does not disclose any intent on the part of the legislators to include within Section 3, plants equipped for retail distribution. The terms used throughout the Senate hearings which served as a prelude to the enactment of the Act were production, mining, and manufacturing. These terms were used in their everyday, common meaning; and there is little doubt that they were intended to mean exactly what they mean in their usual context. If it could be said that the broad objectives of Congress were to authorize the President to seize all plants—not merely those concerned with production, mining, or manufacturing, but all others as well—Congress apparently did not find it expedient to translate such objectives into concrete law; and certainly there is nothing in the legislative history to indicate such broad objectives. Section 3 specifically provides for seizure of plants “equipped to manufacture, mine, or produce.”\(^28\) These, and these only, were the provisions that Congress expressed in the statute; and no contrary intent is to be found in the legislative record. And so, even in keeping with the modern trend of construing a statute in the light of legislative intent, Judge Sullivan properly concluded that the seizure was not within the authority conferred by the War Labor Disputes Act.

**II. LEGALITY OF SEIZURE UNDER THE WAR POWERS OF THE PRESIDENT**

The second question in the Montgomery Ward case was whether the President had the constitutional power to make a legal seizure of the Ward facilities, even if such seizure was not authorized by Section 3 of the War Labor Disputes Act. At the very outset in the consideration of this question, it is to be noted that the war powers of the President of the United States are extensive.\(^29\) These powers may be exercised not only over the armed forces, but over private persons and property as well.\(^30\) The test for the use of these powers in the latter cases is based on necessity in a wartime emergency. If a war emergency is so

\(^{27}\)*Hearing before a Subcommittee of the Committee on the Judiciary on S. 2054, 77th Cong., 1st Sess. (1941) passim.*

\(^{28}\)*57 Stat. 163, 50 U. S. C. App. § 1503 (Supp. 1943).*

\(^{29}\)*U. S. Const. Art. II, § 2.*

\(^{30}\)*United States v. Russell, 13 Wall. 623 (U. S. 1871); Mitchell v. Harmony, 13 How. 115 (U. S. 1851); see Roxford Knitting Co. v. Moore & Tierney, 265 Fed. 177, 179 (C. C. A. 2d, 1920).*
great that the national safety would be imperiled, then the President, as Commander-in-Chief, can order the seizure of private property and exercise extraordinary authority over private persons. The extent to which these presidential powers may be used is illustrated by the examination of several significant cases which were decided during prior periods of conflict in which our country participated.

In one of these cases, *Mitchell v. Harmony*, the plaintiff, a trader in the train of one of the military expeditions from the United States, entered Mexico during the war with that country, for purposes of trade. After entering that country, his wagons and teams were seized by the United States Army officers during the campaign against Chihuahua on suspicion that he designed to trade with the enemy. Although this seizure was declared illegal, the Supreme Court outlined the proper usage of the President's power under which the trader's goods were appropriated by the military. It said:

"But we are clearly of opinion, that in all of these cases the danger must be immediate and impending; or the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for. It is impossible to define the particular circumstances of danger or necessity in which this power may be lawfully exercised. Every case must depend on its own circumstances. It is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified."

And, commenting on the action of the officer who ordered the seizure, the Court added:

"... But it is not sufficient to show that he exercised an honest judgment, and took the property to promote the public service; he must show by proof the nature and character of the emergency, such as he had reasonable grounds to believe it to be, and it is then for a jury to say, whether it was so pressing as not to admit of delay; and the occasion such, according to the information upon which he acted, that private rights must for the time give way to the common and public good."

Another pertinent case was that of *United States v. Russell* where the Supreme Court, upholding the seizure, on orders by military officers, of three privately owned steamboats employed as transports on the Mississippi River during the Civil War, noted:

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13 How. 115 (U. S. 1851).
20 Id. at 134.
80 Id. at 135.
84 13 Wall. 623 (U. S. 1871).
"Such a taking of private property by the government, when the emergency of the public service in time of war or impending public danger is too urgent to admit of delay, is everywhere regarded as justified, if the necessity for the use of the property is imperative and immediate, and the danger, as heretofore described, is impending, and it is equally clear that the taking of such property under such circumstances creates an obligation on the part of the government to reimburse the owner to the full value of the service. Private rights, under such extreme and imperious circumstances, must give way for the time to the public good, but the government must make full restitution for the sacrifice."\textsuperscript{35}

The \textit{Prize Cases},\textsuperscript{36} while dealing with a situation quite different factually from the \textit{Harmony} and \textit{Russell cases}, enunciated the same view. These cases involved the seizure of four vessels under a blockade, of ports in possession of persons in armed rebellion against the Government, instituted by the President of the United States during the Civil War. In the majority opinion, the Supreme Court affirmed the President's constitutional right to institute the blockade and hence the right to authorize the seizure of vessels violating this blockade. And, in \textit{United States v. Pacific Railroad},\textsuperscript{37} it was held that the United States was not liable for the injury or destruction of several bridges of the railroad company, caused by the military operations of the Union forces during the Civil War.

Recently, in \textit{Alpirn v. Huffman},\textsuperscript{38} during the present war, the United States District Court for the District of Nebraska indicated that the President, independently of any statute, had a right to requisition scrap metal in a war emergency.

President Lincoln probably expressed the best view with regard to the authority of the President to seize property in time of war. He stated his viewpoint as follows:

"I think the Constitution invests its commander in chief with the law of war in time of war. . . . Is there—has there ever been—any question that by the law of war, property both of enemies and friends, may be taken when needed?"\textsuperscript{39}

It will be seen that the presidential power to seize private property in wartime has traditionally been determined by military exigency. In the several instances where private property was needed by the military

\textsuperscript{35}Id. at 629.
\textsuperscript{36}2 Black 635 (U. S. 1862).
\textsuperscript{37}120 U. S. 227, 239 (1887).
\textsuperscript{38}49 F. Supp. 337, 340 (D. Neb. 1943).
\textsuperscript{39}2 NICOLAY & HAY, LINCOLN'S WORKS (1905) 397.
during the Mexican, Civil, and World Wars, it was seized by these
officers deriving their powers from the Executive; and the courts gave
these seizures legal sanction.\textsuperscript{40} But, it must be carefully emphasized
that these appropriations of private property in the past were made in
the field of military operations. It was the pressing and immediate ne-
cessity in the \textit{theatre of war} that provided, historically, the essential test
for the use of the President's wartime seizure powers exercised through
the agency of the military. In deciding the \textit{Harmony} and \textit{Russell cases},
the Supreme Court, if nothing else, limited the presidential power within
the confines of this test. When Judge Sullivan ruled against the Govern-
ment's second contention and denied the President's constitutional au-
thority to seize the Ward facilities, irrespective of Section 3 of the
War Labor Disputes Act, he was only adhering to the precedents estab-
lished by the Supreme Court. He reasoned that Montgomery Ward &
Company was geographically far removed from the theatre of war, and
hence the necessity was neither so immediate nor pressing as to permit
of no delay. In effect, if there was any emergency situation occasioned
by the strikes in the company, it was something that would affect the
war effort only indirectly and at some future time.

Even though Judge Sullivan correctly followed the historical test and
limitations prescribed by the Court, there is, in the writer's opinion, a
very persuasive argument for expanding the application of the test of
necessity to permit the seizure of the Ward facilities by virtue of the
presidential war powers. The scope of Montgomery Ward & Company's
business activities is so vast, involving nearly one-fourth of the popula-
tion of the United States, that there is but little doubt that our national
wartime economy is closely intertwined with the activities of this or-
ganization. It supplies the farmers with farm implements and other
necessary articles and furnishes the city workers, especially war workers,
with essential clothing and other merchandise. Strikes in such a far-
flung business empire would \textit{ipso facto} partially dislocate the national
economy. The danger of this situation was further accentuated by a
well-founded belief that the strikes at Ward, if unchecked, would en-
courage sympathetic strikes in other industries adjacent to the company’s
properties and directly engaged in the war effort. There can be little
argument with the statement that stoppage of work in the Ward facilities,
together with the dangerous influence of such a situation on essential
industries, presents a case of emergency where the national well-being
in time of war is seriously imperiled.

\textsuperscript{40}See cases cited notes 30-38 \textit{supra}. 
If it appears too improbable that the strikes in the Ward plants represent a case of immediate danger to the war effort, it must be remembered that the present global struggle has changed the concept of war. Global war is total war, in which civilians as well as the military participate. Any dislocation of the economy on the home front is immediately felt on the fighting front. Geographic distances separating this country from the battlefields of Germany, and even the remote Pacific islands, have been greatly reduced by modern advances in transportation and communication. This was concretely illustrated by the blackouts and other precautions which were taken in the Middle West when the Eastern Seaboard, many miles removed, was anticipating some sort of enemy surprise action. The agricultural implements and clothing products of Montgomery Ward & Company provide very essential tools and necessaries to many millions of Americans who daily contribute to the prosecution of the war. Farmers raising food and war workers making the tools of war, supplied by the Ward facilities, can easily and quickly translate their efforts into essential commodities for the soldier on the battlefield. Were the company to stop furnishing these supplies, there would be a serious hampering of the war effort. Certainly, the products of this establishment are as important in the prosecution of this war as were the trader’s property in the Mexican War, and the steamboats in the Civil War. If, then, this argument is sound, the President in ordering the seizure of the Ward plants acted in the same fashion as other Chief Executives have acted in the other wars of our Republic when the war effort was in danger.

In the opinion of the writer, the circumstances in the present case could very plausibly indicate that the President’s action, as tested by the criterion of “necessity based on wartime emergency”, was within the special war powers granted to the Chief Executive by the Constitution. It again must be reiterated, however, that this conclusion is based on accepting the proposition that the facts in the Montgomery Ward case bring it within the “theatre of war” category; if not, then, in accordance with historical precedent laid down by the Supreme Court, the seizure was not justified.

Recapitulation

The wording of Section 3 of the War Labor Disputes Act left Judge Sullivan no alternative but to decide that the statute was limited only to plants equipped for production, manufacturing, or mining. Congress expressly narrowed the scope of the seizure section to include only
those three kinds of plants, and the legislative record did not enlarge
the scope of the section. Judge Sullivan could not impliedly include within
the provisions of this section a case wherein the plants in question were
equipped for distribution. He did what he was bound to do; he inter-
preted the seizure section in the light of the intent of its framers.

As already noted, the test for using the special war powers of the
President, regardless of Section 3 of the War Labor Disputes Act, is
predicated on necessity occasioned by a war emergency. The historical
precedents which have been adduced limit the application of this test
to cases within the theatre of military operations. Judge Sullivan, in
ruling against the exercise of the constitutional war powers of the Presi-
dent to seize the Ward facilities, considered himself bound by these
precedents. Montgomery Ward & Company was considered to be out-
side the theatre of war and, consequently, the test of necessity was in-
applicable. This decision, while judicially sound, altogether failed to
take into account the fact that modern war has broadened the extent
of military operations. It would not have been illogical for Judge Sulli-
van to conclude that the factual circumstances in the Ward case were
such that it was necessary to seize the facilities of the company in
order not to imperil the national war effort. The constitutional and judi-
cial safeguards of private property are still extant; but global war has,
of necessity, increased the situations wherein private property may be
appropriated for the benefit of a nation engaged in a struggle for exis-
tence.

LOUIS C. KAPLAN
RECENT DECISIONS

CIVIL PROCEDURE—An Unincorporated Labor Union Has the Capacity to Sue and Be Sued in its Common Name in an Ordinary Law Action in the District of Columbia.

The appellants, members of the Bar of the District of Columbia, brought an action for unpaid attorneys’ fees against the appellee, an unincorporated labor union, having its officers and principal office located in the District of Columbia. The defendant (appellee) moved to have the service of process quashed on the ground that the complaint showed it to be an unincorporated association and, accordingly, not such a legal entity as to be suable in the district court. The motion to quash was granted, and the complaint was dismissed. Appeal was taken to the United States Court of Appeals for the District of Columbia, which, pursuant to Judicial Code § 239, 36 Stat. 1159 (1911), 28 U. S. C. § 346 (1940), certified to the United States Supreme Court the question whether suit could be brought against an unincorporated labor union on an action of debt in the District of Columbia. The Supreme Court returned the question unanswered to the Court of Appeals, holding it to be one of local law that must first be decided by the local courts. 323 U. S. 72 (1944). The Court of Appeals proceeded to decide the case and held, that in the District of Columbia an unincorporated labor union has the capacity to sue and be sued in its own name in an ordinary law action. Bushy v. Electric Utilities Employees Union, 147 F. (2d) 865 (U. S. App. D. C. 1945).

Under the common law, partnerships and unincorporated associations had no legal recognition as entities; they assumed no rights and had no duties. The ancient Roman law frowned upon them as outlaw organizations. The State feared such associations; and, in order to protect itself against having an association become stronger than the sovereign, it became the policy to refuse to give recognition to any association unless it was first approved and sanctioned by the State. That general policy was carried over into the English Common Law system, and the attitude of the common law courts toward labor unions was that they were criminal conspiracies tending to disrupt the social order of the State. Prosser, Torts (1941) § 104; see Jaeger, Cases and Statutes on Labor Law (1939) 187 et seq.; Teller, Labor Disputes and Collective Bargaining (1940) § 462.

The law, however, has gradually recognized labor unions. They have been granted extensive privileges, such as the right to collective bargaining, the right to strike, and the right to have their common funds protected against embezzlement by fellow members. But, though they were achieving many of the benefits of corporations, they were still loath to assume the duties which are a necessary corollary of such privileges and benefits. Operative Plasterers’, Etc., Ass’n v. Case, 93 F. (2d) 56, 65 (App. D. C. 1937); accord, United
Mine Workers v. Coronado Coal Co., 259 U. S. 344 (1922). Several states have recognized that condition and have permitted suits against unincorporated associations in their common name; e.g., Mississippi, Varnado v. Whitney, 166 Miss. 663, 147 So. 479 (1933); Missouri, Syx v. Milk Wagon Drivers Union, 24 S. W. (2d) 1080 (Mo. App. 1930); Illinois, Dugan v. Int'l Ass'n of Bridge, Etc., Workers, 202 Ill. App. 308 (1916); Washington, St. Germain v. Bakery, Etc., Union, 97 Wash. 282, 166 Pac. 665 (1917); cf. Nevada, Branson v. Industrial Workers of the World, 30 Nev. 270, 95 Pac. 354 (1908).

The gradual change in the status of unincorporated associations, or labor unions, as regards their suability or non-suability, is very succinctly illustrated by an excerpt from the opinion of the court in the instant case, 147 F. (2d) at 865:

"It is hardly worth while to say that if the question were timed as of a period thirty or forty years ago, the answer would be that under the general rule of the common law a voluntary association, which is neither incorporated nor has otherwise acquired the status of a corporation, or quasi corporation, is not suable in its common name, and this for the reason that it has no legal entity distinguishable from that of its members. In such a case suit might only be brought in the names of all the individual members. But since the turn of the century the tremendous growth of labor unions, their internal set-up and organization, the extension of their rights and privileges, and the recognition and protection of these in state and federal statutes has resulted in a nearly universal change of viewpoint on the subject of their suability. . . ."

The rule in the federal courts is that labor unions may be sued as entities, that is, in their common names, for the purpose of enforcing for or against them rights accruing under the Constitution or statutes of the United States. United Mine Workers v. Coronado Coal Co., supra. In that case the Supreme Court ruled that a suit against a labor union was in essence and principle merely a procedural matter; that the substantive rights of the union members are unaffected, for they stand subject to the same liabilities and have the same rights as they had before. After citing the Coronado case, the Supreme Court of California pointed out in Jardine v. Superior Court, 213 Cal. 301, 307, 2 P. (2d) 756, 759 (1931), that to allow unincorporated associations to be sued as entities does not jeopardize the rights of the parties, but it eliminates procedural obstacles so that they can sue and be sued by a less cumbersome process.

This rule, however, has not been universally accepted by the state courts, many of which continue to hold that in the absence of statutes to the contrary, unincorporated associations are suable only in the names of the members, with liability enforced against each member. Colt v. Hicks, 97 Ind. App. 177, 179 N. E. 335 (1932); Baskins v. United Mine Workers, 150 Ark. 398, 234 S. W. 464 (1921); St. Paul Typothetae v. St. Paul Bookbinders' Union, 94 Minn. 351, 102 N. W. 725 (1905); see Pickett v. Walsh, 192 Mass. 572, 589,
78 N. E. 753, 760 (1906). In one instance it was held that upon a showing that a voluntary unincorporated association is involved, an action will not lie against it no matter what the merits of the case might otherwise be. Forest City Mfg. Co. v. Int'l Ladies' Garment Workers' Union, 233 Mo. App. 935, 111 S. W. (2d) 934 (1938). That case represents a complete recession from the position taken by the same Missouri court in the earlier Syz case, supra.

Equity courts have previously recognized that labor unions could be sued in their common names, or by joining a few members as parties defendant when service of process would be impossible against all the individual members. "In such a case it has been held 'that a number of members may be made parties defendant as representatives of the class.'" American Federation of Labor v. Buck's Stove & Range Co., 33 App. D. C. 83, 110 (1909). "Independently of statute, chancery has long assumed jurisdiction of suits instituted against labor unions by their common name." Newark Int'l Baseball Club, Inc. v. Theatrical Mgrs., 125 N. J. Eq. 575, 577, 7 A. (2d) 170, 172 (1939).

Suit against a labor union in its common name was allowed in the Operative Plasterers' case, supra, where the action was brought on a judgment obtained in North Carolina against the union. There the Court of Appeals for the District of Columbia said, 93 F. (2d) at 64:

"... Indeed, so far as due process is concerned there is no greater problem in allowing a suit which seeks to reach a common fund to lie against an unincorporated association as an entity than there is in allowing a suit to lie against a corporation as such. The corporate entity and the unincorporated association 'entity for purpose of suit' are both fictions of the law.

"... inasmuch as a fictional entity has been recognized by the law for the purpose of benefiting and protecting unincorporated associations in both the substantive and adjective senses... so also the fictional entity must in common fairness be recognized for the protection of those dealing with such associations and claiming that in such dealing their legal rights have been violated."

In Nat'l Ass'n of Industrial Ins. Agents v. C. I. O., 25 F. Supp. 540 (D. C. 1938), it was held, reasoning from the Coronado case, supra, that even though no right arising under the Constitution or the laws of the United States was involved, still the labor organization was subject to suit in its common name. See Christian v. Int'l Ass'n of Machinists, 7 F. (2d) 481 (E. D. Ky. 1925).

Since Congress, in numerous instances of legislative enactment pointed to by the Court of Appeals in the instant case, had recognized the legal existence of labor unions separate and apart from their individual members, the court concluded that "Accordingly, it is neither an extension nor a distortion of present law or practice to hold... that in the District of Columbia an unincorporated labor union has the capacity in its own name to sue and be sued in an ordinary law action, and may be served with process in accordance with the provisions of Rule 4(d) (3) of the Federal Rules of Civil Procedure."

The decision in the instant case, though incompatible with the idea en-
gendered in the common law that labor unions were not suable in their common names, is nevertheless fully in keeping with the current trend of legal progress. Labor unions are very potent instruments in the United States today. Their activities can be felt in the daily life of every American. Therefore, it is only fair and just that they should be held liable as entities for transgressions committed by them in their common names. It has been said that the law is never static; and when, in its evolution, it recognizes rights in an unincorporated association as an entity, it should also impose upon such an association the duties which are correlative to those rights.

WILLIAM A. KEHOE, JR.

CONSTITUTIONAL LAW—The Twenty-first Amendment Does Not Bar Federal Prosecution under the Sherman Act of a Combination Whose Objective Is Purely Intrastate where Such State Has Not Given its Legal Sanction to the Acts Complained of.

The eight respondents, six of which are producers of alcoholic beverages located outside Colorado, the seventh a wholesaler, and the eighth a retailer of such beverages, both the latter doing business within that state, were indicted in two counts for violation of § 1 of the Sherman Act, 26 STAT. 209 (1890), as amended, 50 STAT. 693 (1937), 15 U. S. C. § 1 (1940). The second count (the first was dismissed) charged the respondents with conspiring to raise, fix, and maintain the retail prices of alcoholic beverages shipped into the State of Colorado from producers located outside the state. The indictment was returned in the District Court for the District of Colorado, which overruled the respondents’ demurrers and motion to quash. Thereupon, a plea of nolo contendere was entered, resulting in the district court’s imposing judgments against the respondents. 47 F. Supp. 160 (1942). Appeals were taken to the Circuit Court of Appeals for the Tenth Circuit, which reversed the judgments on the ground that the indictment did not show that the combination and agreement was one directly or substantially to restrict or burden interstate commerce. 144 F. (2d) 824 (C. C. A. 10th, 1944). Certiorari was granted by the Supreme Court. Held, an indictment charging producers, wholesalers, and retailers of alcoholic beverages with conspiring to raise, fix, and maintain prices in violation of the Sherman Act is not demurrable on the ground that the object of such acts was local in character, or that the Twenty-first Amendment bars such prosecution, where the state which is the locus of such acts has not given its legal sanction to the acts complained of. United States v. Frankfort Distilleries, 65 Sup. Ct. 661 (1945).

As to the contention of the respondents in the instant case that the Sherman Act does not apply to acts relating exclusively to intrastate sales, the Supreme Court said that while the objective may be local in character, if the means of
carrying out this objective are interstate, then such conduct would be covered by the statute. Here the Court found a determined effort on the part of the combination to force price maintenance contracts relating to the sale of liquor within Colorado. Thus the Court reaffirmed its doctrine that intrastate activity affecting interstate commerce is subject to the Sherman Act. Local 167 v. United States, 291 U. S. 293, 297 (1934); see United States v. Darby, 312 U. S. 100, 120, 122 (1941).

The status of intoxicating beverages as an article of commerce has been the subject of a long series of cases before the Supreme Court. In Bowman v. Chicago & Northwestern Ry., 125 U. S. 465 (1888), and Leisy v. Hardin, 135 U. S. 100 (1890), the Court, in declaring intoxicating beverages to be a legitimate subject of commerce, made regulation of liquor traffic by individual states ineffective. See Mr. Justice Frankfurter, concurring in Carter v. Virginia, 321 U. S. 131, 139 (1944). To provide the states with the authority to regulate such interstate shipments, Congress passed the Wilson Act, 26 Stat. 313 (1890), 27 U. S. C. § 121 (1940); and the Supreme Court upheld its constitutionality in In re Rahrer, 140 U. S. 545 (1891). Twenty-three years later, Congress passed the more comprehensive Webb-Kenyon Act, 37 Stat. 699 (1913), 27 U. S. C. § 122 (1940), which was upheld in Clark Distilling Co. v. Western Maryland Ry., 242 U. S. 311 (1917). This was followed by the Twenty-first Amendment, U. S. Const. Amend. XXI, of which § 2 provides:

“The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.”

The Twenty-first Amendment to the Constitution has, by judicial interpretation, given broad and comprehensive powers to the states in controlling liquor traffic. The trend of these decisions was well expressed by Mr. Justice Reed when he said: “By interpretation of this Court the [Twenty-first] Amendment has been held to relieve the States of the limitations of the Commerce Clause on their powers over such transportation or importation.” Carter v. Virginia, supra at 137. Thus a state may, if it sees fit, arbitrarily make unlawful the manufacture, transportation, sale, or even possession of intoxicating beverages within its jurisdiction. Zifrin, Inc. v. Reeves, 308 U. S. 132, 138 (1939); Indianapolis Brewing Co. v. Liquor Control Commission, 305 U. S. 391, 394 (1939); State Board of Equalization v. Young's Market Co., 299 U. S. 59, 63 (1936).

Broad though this power is, it does not prevent the Federal Government from exercising some regulatory power over liquor traffic under the Commerce Clause. Mr. Justice Black, speaking for the majority in the instant case, stated that the powers of the states do not include control over the acts of persons engaged in an interstate business not in their jurisdiction. United States v. Frankfort Distilleries, supra at 664.
Another qualification to this power held by the states was expressed in *Jameson v. Morgenthau*, 307 U. S. 171 (1939), where the Court rejected an attack on the constitutionality of the Federal Alcohol Administration Act, 49 Stat. 977 (1935), 27 U. S. C. § 201 (1940), based upon the theory that the Twenty-first Amendment vests in the states exclusive authority over commerce in intoxicating beverages, and hence that Congress had no authority to control such commerce under the Commerce Clause. Additional cases holding such a limitation on the power of states over intoxicants are *Washington Brewers Institute v. United States*, 137 F. (2d) 964, 967 (C. C. A. 9th, 1943), *cert. denied*, 320 U. S. 776 (1943), and *Hayes v. United States*, 112 F. (2d) 417, 422 (C. C. A. 10th, 1940).

The issue before the Supreme Court in the instant case was whether § 2 of the Twenty-first Amendment to the Constitution accords intoxicating liquor a separate status from other commodities in the application of the Sherman Act. Mr. Justice Black in the majority opinion in this case held that it did not. But in giving this answer, he was explicit in pointing out that this decision applies only to the case under consideration, where the state gave no legal sanction to the acts complained of. "The Sherman Act is not being enforced in this case in such manner as to conflict with the law of Colorado. Those combinations which the Sherman Act makes illegal . . . have no legal sanction under state law either." *United States v. Frankfort Distilleries*, *supra* at 664.

This brings to mind the constitutional question of how far the Sherman Act may be applied if in conflict with the legislation of a state. Such a question of federal or state supremacy is one that might very well arise under the present broad powers granted states to regulate their liquor industry and market. As to the suggestion that a state must keep within the limits of reasonable necessity, Mr. Justice Frankfurter in a concurring opinion in *Carter v. Virginia*, *supra* at 142, said: "Such canons of adjudication open wide the door of conflict and confusion which have in the past characterized the liquor controversies in this Court. . . ." Contra: *Ziffrin, Inc. v. Reeves*, *supra* at 138.

Mr. Justice Frankfurter adopted a similar position in his concurring opinion in the instant case where he stated that if Colorado had sanctioned the acts complained of, then the Sherman Act would have to yield to the state power drawn from the Twenty-first Amendment. *United States v. Frankfort Distilleries*, *supra* at 666 (concurring opinion); see *Washington Brewers Institute v. United States*, *supra* at 968. A somewhat different view was taken by District Judge Symes, who, when the instant case was before him in the District Court for Colorado, said that § 2 of the Twenty-first Amendment "was a saving clause to avoid conflict with those states which at the time had their own state prohibition laws or might thereafter adopt prohibition as a matter of state policy", and that it "was never intended to deprive the Federal Government of any of its vast powers over interstate commerce". 47 F. Supp. 160, 162 (1942). The majority of the Supreme Court, following the long-established
rule of not anticipating a question of constitutional law in advance of the necessity of deciding it, deferred discussion of such a case until it is presented.

HENRY BISON, JR.

CORPORATIONS—The Doctrine of "Fair and Equitable" Liquidation Permits Disregarding Charter-Prescribed Preferences of Various Types of Stock in the Liquidation of a Solvent Corporation Decreed by a Regulatory Statute Aimed at Corporate Simplification.

The petitioner was a preferred shareholder of The United Light and Power Company, the apex of a public utility pyramid. This company was separated from the operating utilities by two intervening holding companies. The Securities and Exchange Commission ordered the liquidation and dissolution of this top holding company (which was a co-respondent with the Commission in the instant case) because it violated the "great-grandfather clause" of the Public Utility Holding Company Act of 1935, 49 STAT. 821 (1935), 15 U.S.C. § 79 k (b) (2) (1940). This clause outlawed a public utility system that had more than two tiers of holding companies beyond the operating company. The charter of the Power Company, effected in 1929, provided that upon the dissolution or liquidation of the corporation, whether voluntary or involuntary, the preferred shareholders would receive the par value of their stock plus accumulated dividends before the common shareholders would receive anything. The assets of the top holding company consisted mainly of the common stock of the subsidiary holding company in the next lower tier of the pyramid. The common stock of this subsidiary was to be distributed to the shareholders of the parent company upon dissolution of the latter. Although the company to be dissolved was unquestionably solvent (assets of eighty-one million dollars as against liabilities, exclusive of capital stock structure, of only six million), its net assets were conceded less than the liquidation value of the preferred as set by the charter—i.e., sixty million dollars for the par value of the preferred, plus about thirty nine million for the cumulative dividends thereon. The Commission estimated it would take fifteen years for the preferred dividend arrearages to be paid, at which time only could the common expect dividends. All parties admitted that should the charter liquidation provisions apply, the common stock would receive nothing. The Commission approved a liquidation plan submitted by the parent company (endorsed by the voting common stock, but not by the non-voting preferred) wherein the common was awarded a 5.48 per cent participation in the assets of the liquidated company; the preferred was to receive the balance. Holding Company Act Release No. 4215, April 5, 1943; see 8 FED. REG. 4676 (1943). The district court, 51 F. Supp. 217 (D. Del. 1943), and the appellate court, 142 F.
(2d) 411 (C.C.A. 3d, 1944), approved the plan. Held, a solvent corporation's liquidation plan, where dissolution is required by statute, may be "fair and equitable" despite the disregarding of the charter preferences of the various types of stock, provided the charter antedates the statute. Otis & Co. v. Securities and Exchange Commission, 65 Sup. Ct. 483 (1945).

The majority, speaking through Mr. Justice Reed, felt that the liquidation preferences of the preferred as set forth in the charter should not apply because the liquidation here involved was not one "envisioned by the charter provisions of Power [i.e., the company to be dissolved] for preferences to the senior stock." Otis & Co. v. Securities and Exchange Commission, supra at 487. The Public Utility Holding Company Act, which necessitated the dissolution of the respondent holding company, was passed some six years after the charter provision became effective. Hence, the stockholders could not have contemplated the type of dissolution brought about by the statute. The dissolution or liquidation contemplated by the charter would be one effected by a statute then in existence (e.g., Sherman Antitrust Act), a bankruptcy proceeding or equity reorganization, or a voluntary agreement by the stockholders to terminate the business. There was not a traditional dissolution in the instant case, since the holding company was definitely solvent and the dissolution was brought about solely by a regulatory statute aimed at corporate simplification. Were it not for that statute, without doubt the company would continue to function, with no right in the preferred to mature its charter liquidation preferences.

The Court, in approving the plan, stated, "The Commission recognizes and applies the doctrine of full priority by giving value to the rights of the preferred in a going concern rather than as if by sale and distribution." Otis & Co. v. Securities and Exchange Commission, supra at 489. The full priority rule, as ordinarily used, insists that in reorganization of insolvent companies the creditors be reimbursed in full before the junior security holders (e.g., stockholders) receive anything. Northern Pacific R. R. v. Boyd, 228 U. S. 482, 504 (1913); see In re Missouri Pacific R. R., 50 F. Supp. 936, 941 (E. D. Mo. 1943). This doctrine of full priority is relevant here because it is applicable as well to the reorganization of solvent companies. Consolidated Rock Products Co. v. du Bois, 312 U. S. 510, 527 (1941). The Court decided that this doctrine was sufficiently recognized by the Commission in awarding to the preferred so substantial a portion of the company's assets. It would be unfair to wipe out the interest of the common and bring about a "windfall" to the preferred. "It is sufficient that each security holder in the order of his priority receives from that which is available for the satisfaction of his claim the equitable equivalent of the rights surrendered." Group of Institutional Investors v. Chicago, Milwaukee, St. Paul & Pacific R. R., 318 U. S. 523, 565 (1943); Dodd, The Relative Rights of Preferred and Common Shareholders in Recapitalization Plans under the Holding Company Act (1944) 57 Harv. L. Rev.
295. In surrendering their preferred position in the parent company, the preferred shareholders would receive an equitable equivalent in the form of a substantial part of the subsidiary’s common stock. Since the common stock of the company to be dissolved also had a legitimate investment value, the common shareholders, too, should be allowed to participate in the liquidation of the company, despite the remoteness of their participating interests under the charter. See In re Utilities Power & Light Corp., 29 F. Supp. 763, 769 (N. D. Ill. 1939); In re National Food Products Corp., 23 F. Supp. 979, 984 (D. Md. 1938).

The Court accented the fact that the charter preferences of the preferred clearly would not arise had the Commission, in effecting corporate simplification, resorted to the devices of merger, consolidation, or recapitalization. Otis & Co. v. Securities and Exchange Commission, supra at 487. The mere selection by the Commission of one as against another procedural device to bring about the aim of the statute should not mature rights that would otherwise be dormant. If such consequences flowed from the use of a given procedural device, the Commission might be reluctant to use it and thereby be hampered in the administration of the statute. The Court also felt that the purpose of the statute was to simplify the capital structures of holding companies and to protect rather than destroy investment values. Sen. Rep. No. 651, 74th Cong., 1st Sess. (1935) 16; H. R. Rep. No. 1318, 74th Cong., 1st Sess. (1935) 49, 50. In view of the intent of the statute, private rights (such as the charter preferences in the principal case) should not be permitted to interfere. See Sola Electric Co. v. Jefferson Electric Co., 317 U. S. 173, 176 (1942); New York Trust Co. v. Securities and Exchange Commission, 131 F. (2d) 274, 276 (C.C.A. 2d, 1942).

The minority, speaking through Mr. Chief Justice Stone, thought that the priority of the preferred stipulated in the charter should control. The “fair and equitable” standard embraces the full priority rule of Northern Pacific R.R. v. Boyd, supra. Also, the full priority rule applies as between different classes of shareholders in addition to the creditor-stockholder relationship. See Case v. Los Angeles Lumber Products Co., 308 U. S. 106, 119 n. 14 (1939). In giving full, literal effect to the charter provisions, the minority felt that any “plan enforced without the consent of the parties affected by it, by which the subordinate rights and interests of stockholders are attempted to be secured at the expense of the prior rights of other security holders, is unfair and inequitable. . . .” Otis & Co. v. Securities and Exchange Commission, supra at 494 (dissenting opinion).

The reasoning of the minority, briefly, was this: The charter represents a contract among the various classes of stockholders entitled to protection against infringement. Treigle v. Acme Homestead Ass’n, 297 U. S. 189 (1936); Bedford v. Eastern Building & Loan Ass’n, 181 U. S. 227 (1901). In the instant case, the company was in fact in the process of being liquidated and dissolved.
It would be a fiction to consider it as a going concern. Similarly clear is the fact that the liquidation here is involuntary. That the charter antedated the statute should not be material since the precise cause of the involuntary dissolution need not have been contemplated by the shareholders. Under the circumstances, the priorities contracted for by the preferred should apply since "in the absence of some controlling direction of the statute there are no circumstances here which call for the exercise of any implied power of the Commission or court to readjust or restate the rights of the stockholders without regard to their contract." *Otis & Co. v. Securities and Exchange Commission*, supra at 493 (dissenting opinion). Furthermore, in the view of the minority, the aim of the statute would not be thwarted if the charter preferences were observed.

The stand of the majority appears to be the more convincing. The choice by the Commission of one procedural device rather than another to achieve the aim of the statute should not mature liquidation preferences—especially in the case of a solvent company whose charter antedated the regulatory statute. It is reasonable to hold that the liquidation here involved was not contemplated in the charter contract. The common stock of the company to be dissolved had a remote interest in the earnings, yet its value was appreciable. The "fair and equitable" standard and the absolute priorities doctrine would not seem to necessitate giving literal effect to the charter provisions. The rights of the stockholders *inter se* would be best preserved, under the circumstances of the principal case, by considering the corporate simplification more as a reorganization than as a dissolution. Under the fairer approach, each class of stock would receive the "equitable equivalent" of its interest in the distribution of assets. Also, where several procedural devices are available to the Commission, the choice of one should not be so pregnant with consequences originally unanticipated by the legislature.

EDWIN R. FISCHER

EVIDENCE—Hospital Records other than Those of a Readily Observable Condition of the Patient or His Treatment Not Admissible as Records Kept in Regular Course of Business under Federal Shop Book Statute.

Insured was found dead as a result of a fall under circumstances which indicated possible suicide. In an action brought in the District Court for the District of Columbia to recover double indemnity under the policy which provided for such payment in the event that the death of the insured resulted from bodily injury effected solely through external, violent and accidental causes, the insurer sought to introduce the records of Walter Reed General Hospital, Washington, D. C., where the death occurred, to prove contemplation of suicide in the mind of deceased. Included in the records offered were a
report of psychiatric examination and diagnosis and a record made by an attending physician from information advanced by a nurse that deceased took an overdose of medicine because he wanted to die. This evidence was excluded, and the jury gave a verdict for double indemnity under the policy. On appeal from the judgment, the United States Court of Appeals for the District of Columbia reversed the lower court on other grounds but sustained the court on its ruling excluding the hospital records. On a rehearing limited to the question of admissibility of the hospital records, held: hospital records which reflect opinion or conjecture, although systematically prepared and maintained, are not admissible as records kept in the usual course of business under the Federal Shop Book Rule. New York Life Insurance Co. v. Taylor, 147 F. (2d) 297 (U. S. App. D. C. 1945) (Original opinion dated May 8, 1944; on rehearing, decided Jan. 10, 1945).

The question of admissibility of records used in business transactions without the necessity of testimony by the entrant is one upon which the courts have widely disagreed. In the instant case the court, speaking through Mr. Justice Arnold, held that those hospital records containing a diagnosis of psychoneurosis, although admittedly maintained systematically for operations of the hospital, were not records made in the regular course of business as that term is used in the Federal Shop Book Statute, 49 Stat. 1561 (1936), 28 U. S. C. § 695 (1940). The statute provides:

“In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of said act, transaction, occurrence, or event, if it shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term ‘business’ shall include business, profession, occupation, and earning of every kind.”

The conflict of authority in the matter is evident within this jurisdiction. Even before the admission of business records was given legislative sanction by the passage of the act, the Court of Appeals of the District of Columbia, in an opinion by Mr. Justice Groner, who presided in the Taylor case, held, in a case on war-risk insurance wherein the Government sought to introduce an abstract of the records of government hospitals, that such a report was admissible so far as it contained the observations and opinions of the medical officers verified by their signatures since they were made in the performance of official duty and were presumably correct. United States v. Balance, 59 F. (2d) 1040 (App. D. C. 1932). In Prudential Insurance Co. v. Saxe, 134 F.
hospital records of diagnosis were admitted by the same court without objection.

The ruling of the court in the instant case is not in harmony with the interpretation of the statute by other circuit courts of appeals. The Court of Appeals of the Second Circuit, in *Ulm v. Moore-McCormack Lines, Inc.*, 115 F. (2d) 492 (C. C. A. 2d, 1940), *cert. denied*, 313 U. S. 567 (1940), held that hospital records should have been admitted to show the extent and cause of a brain injury from which the plaintiff contended various nervous disorders had resulted. The court in the *Taylor case* distinguished this decision as involving the admission of records of routine examinations and observations. In *Hunter v. Derby Foods, Inc.*, 110 F. (2d) 976, 973 (C. C. A. 2d, 1940), the conclusion of the coroner, following an autopsy, that the deceased had died as a result of eating canned meat was admitted as a record made in the usual course of business, although conjectural, the court saying that "The evidence tending to impeach the coroner's certificate, and there was plenty of such evidence, went to the weight to be given to the certificate, not to its admissibility". In *Becker v. United States*, 145 F. (2d) 171 (C. C. A. 7th, 1944), hospital records including the diagnosis of "Psychoneurosis, Hysteria" were admitted without objection. In the third circuit, in an action on life insurance policies in which the issue was whether the insured died as a result of an accident or from heart disease, the court held that hospital records relating to the posthumous examination of the deceased in the regular course of hospital business were admissible. *Norwood v. Great American Indemnity Co.*, 146 F. (2d) 797 (C. C. A. 3d, 1944). To sustain the defense that insured was intoxicated at the time of the accident causing his death, the defendant, in *Reed v. Order of United Commercial Travelers of America*, 123 F. (2d) 252, 253 (C. C. A. 2d, 1941), offered hospital records containing the statement of the physician on duty that the insured "Was reacting very well—still apparently well under influence of alcohol." The trial judge excluded this evidence. Upon appeal, the court reversed this decision, stating in part: "That a hospital record of the attending doctor's diagnosis of a patient's condition is competent evidence is no longer open to question in this court. . . . In our opinion the attempted distinction between a diagnosis and an 'observation' based on the patient's appearance is without substance".

It would appear that the reliance of the court on the decision of the Supreme Court in *Palmer v. Hoffman*, 318 U. S. 109 (1942), to sustain the holding in the present case is unwarranted. In that case, the Supreme Court said that the record sought to be introduced, the self-serving statement of a locomotive engineer made following an accident, was "not a record made for the systematic conduct of the business as a business". Since the primary utility of this type of document was in litigating, not in railroading, the Court stated, it could not be considered a record made in the regular course of business. The Court further observed that "'regular course' of business must find its meaning in
the inherent nature of the business in question and in the methods systematically employed for the conduct of the business as a business.”

That the reliance of the court on the Palmer case is questionable is further demonstrated in Buckminster’s Estate v. Commissioner of Internal Revenue, 147 F. (2d) 331 (C. C. A. 2d, 1944), wherein the court declined to follow the opinion rendered at the initial hearing in the instant case. The question in the case before the Court of Appeals of the Second Circuit was whether hospital records containing a diagnosis that the deceased was suffering from a cerebral hemorrhage were admissible to show contemplation of death as the reason for subsequent transfers of property. In holding that such records are admissible Judge Frank stated: “We do not agree with the way in which Hoffman v. Palmer was interpreted in the Taylor case . . . since as to them [hospital records] there is an absence of any such motive to misrepresent as was present in the Palmer case. . . . Since § 695 is a federal statute of general application, its construction by the Court of Appeals of the District of Columbia has no peculiar sanctity, and, as we think that Court’s construction was in error, we hold that it was not binding upon the Tax Court.”

The court, by its ruling in the present case, excludes all hospital records but those “of a readily observable condition of the patient or of his treatment.” The application of this principle would exclude from admission systematic records prepared by diagnosticians and specialists whose opinions are the bases for treatment affecting the lives of innumerable patients daily. The fact that these opinions are rendered by men whose entire lives have been devoted to the study of their chosen specialty is an indication of their trustworthiness. Their entry into the case history of the patient is as much a part of the regular course of business of a hospital as the records of date of the patient’s admission or the medicines administered. The maintenance of records of treatment and diagnosis is as much a part of the “inherent nature” of the business, demanded by the Supreme Court in the Palmer case, as are sales records or bills of lading in other businesses.

The establishment of a test such as a readily observable condition places determination of admissibility on whether the records contain opinion or conjecture, rather than whether, as the statute reads, they were made in the regular course of business. That hospital records were intended by the Congress to come within the language of the statute is evident from the citation of two cases involving hospital records in the committee reports on this legislation. Sen. Rep. No. 1965, 74th Cong., 2d Sess. (1936); H. R. Rep. No. 2357, 74th Cong., 2d Sess. (1936).

Dean Wigmore lends support to the admissibility of hospital records under the statute in stating that “the calling of all the individual attendant physicians and nurses who have cooperated to make the record even of a single patient would be a serious interference with convenience of hospital management. There is a Circumstantial Guarantee of Trustworthiness . . . ; for the records
are made and relied upon in affairs of life and death. Moreover, amidst the day-to-day details of scores of hospital cases, the physicians and nurses can ordinarily recall from actual memory few or none of the specific data entered; they themselves rely upon the record of their own action; hence, to call them to the stand would ordinarily add little or nothing to the information furnished by the record alone. The occasional errors and omissions, occurring in the routine work of a large staff, are no more an obstacle to the general trustworthiness of such records than are the errors of witnesses on the stand.” 6 Wigmore, Evidence (3d ed. 1940) § 1707.

Although the court by this decision does not exclude all hospital records, the criteria outlined would result in a much narrower application of the rule than has been established by opinions rendered by other federal courts. The language of the statute that “All other circumstances of the making of such writing or record [other than the requirement that it be made in the regular course of business within a reasonable time after the happening of the event], including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility” expresses an intention that the enactment should find broader interpretation than that handed down in the Taylor case. Considering the thousands of men each day who are being subjected to hitherto unknown nervous strains and treated on a necessarily impersonal basis by a great number of physicians and nurses in government hospitals throughout the world, a clarification of the rule is important. Following the war, the federal courts will be burdened with pension and insurance litigation in which the most complete history of the cases will be found in the records of the hospitals where the patients were treated. The majority of the Service physicians who attended an individual and diagnosed his condition will be unavailable. Because of the number of cases treated, the recollection by hospital personnel of a specific observation will add little to the record made at the time of treatment. Under these circumstances, the limiting character of the Taylor decision in regard to the admissibility of hospital records places an unwarranted burden on the parties and the Government.

STANLEY WALSH


Respondent filed a libel in rem in the District Court for the Southern District of California against the Baja California for damages resulting from a collision occurring in Mexican waters. The Mexican Ambassador filed a suggestion that the Baja California, at the time of the seizure, was owned by and in possession of the Republic of Mexico; libellant put in issue these allegations.
Meanwhile, two separate suggestions from the State Department had been filed in the district court by the United States Attorney for the district. Therein, the Department accepted as true the statement of the Mexican Ambassador that the *Baja California* was the property of the Mexican Government, but it took no position with respect to the asserted immunity of the vessel from suit.

The district court denied the claim of immunity, finding on the facts that the vessel was in the possession of a private Mexican company; and the judgment was affirmed by the circuit court of appeals. The United States Supreme Court granted certiorari and affirmed the lower courts. *Held:* that a vessel, the property of a foreign government, but not in possession of that government when seized by judicial process, is not immune from suit in the courts of the United States. *Republic of Mexico v. Hoffman,* 65 Sup. Ct. 530 (1945).

Chief Justice Marshall in *The Exchange v. McFaddon,* 7 Cranch 116 (U. S. 1812) laid down two basic principles concerning immunity of vessels of foreign governments from suit. In that case, a libel was brought against a French warship which libellants claimed had been taken wrongfully from them. The Attorney General presented a suggestion from the State Department that the vessel was owned and possessed by the French Government. The Court recognized the immunity of the vessel, stating that when a country allowed a foreign warship to enter its port, it consented to the vessel's exemption from its jurisdiction. This principle has been followed consistently by the courts of this country. *Ex parte Peru,* 318 U. S. 578, 588 (1942); *Ex parte State of New York,* 256 U. S. 503, 510 (1921); *Ex parte Muir,* 254 U. S. 522, 531 (1921); *United States v. Cornell Steamboat Co.,* 202 U. S. 184, 190 (1906); *The Divina Pastora,* 4 Wheat. 52, 64 (U. S. 1819); *L’Invincible,* 1 Wheat. 238, 252 (U. S. 1816). The *Exchange case,* in promulgating the substantive right of immunity, also established the procedural principle that upon recognition, allowance, and certification of the asserted immunity by the political branch of the government charged with the conduct of foreign affairs, the courts will surrender their jurisdiction *in rem* acquired by judicial seizure of the vessel. *Ex parte Peru,* supra at 588; *Ex parte Muir,* supra at 533; *United States v. Lee,* 106 U. S. 196, 209 (1882).

An important amendment to the principle of immunity was added by *Berizzi Bros. Co. v. The Pesaro,* 271 U. S. 562, 574 (1926). There the Court, relying basically on the authority of *The Exchange,* supra, extended the cloak of immunity to vessels other than warships. It said:

"We think the principles [of *The Exchange*] are applicable alike to all ships held and used by a government for a public purpose, and that when, for the purpose of advancing the trade of its people or providing revenue for its treasury, a government acquires, mans and operates ships in the carrying trade, they are public ships in the same sense that war ships are. . . ."

The procedure by which a foreign government may place its plea for im-
munity before the courts has also been amplified by judicial decision. The rule has been developed that in the absence of recognition of the claimed immunity by the State Department, the foreign government may now appear before the courts, through its accredited representative, and present its claim for immunity. The courts will then pass on the merits of the question as to whether the vessel is entitled to immunity in accordance with the principles established by the State Department. Ex parte Peru, supra at 588; Ex parte Muir, supra at 532; The Sapphire, 11 Wall. 164, 167 (U. S. 1870); The Santissima Trinidad, 7 Wheat. 283, 353 (U. S. 1822); The Anne, 3 Wheat. 435, 446 (U. S. 1818).

These principles, as extended, were reaffirmed by the Court in Compania Espanola de Navegacion Maritima, S. A. v. The Navemar, 303 U. S. 68 (1938). There the State Department refused to honor the request of the Spanish Ambassador that the Department recognize his government’s claim for immunity and present it to the court. The district court denied the application of the Spanish Ambassador to appear as claimant for the vessel. In that case the Supreme Court cited with approval the doctrine of The Pesaro, supra, as to immunity of vessels of friendly foreign governments. But in passing on the procedural presentation of such claim, the Court held that while the suggestion of an ambassador has never been treated as proof of the allegation of immunity nor as having the same status as a like suggestion coming from the State Department, the ambassador does have the right to intervene and litigate his government’s claim in the suit.

Chief Justice Stone, in delivering the majority opinion in the instant case, affirmed the doctrines of The Exchange, supra, and The Navemar, supra, and placed the decision squarely on these principles. He pointed out that the State Department had certified as to the ownership of the Baja California, but had refrained from certifying that it allowed immunity or recognized ownership without possession by the Mexican Government as a ground for immunity. “It does not appear that the Department has ever allowed a claim of immunity on that ground, and we are cited to no case in which a federal court has done so.” Republic of Mexico v. Hoffman, supra at 533.

Of greater significance is the implied recession of the majority from, and the express repudiation by Mr. Justice Frankfurter in his concurring opinion of, the doctrine of The Pesaro, supra. Chief Justice Stone stressed the obligation of the courts, in exercising or relinquishing jurisdiction over the vessel of a foreign government, not to act so as to embarrass the executive arm of the government. Ex parte Peru, supra at 588; United States v. Lee, supra at 209. “It is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize.” Republic of Mexico v. Hoffman, supra at 533. The Court, in a note, added that this “salutary principle” was not followed in The Pesaro, where an immunity was allowed by the Court.
although the State Department had refused to recognize it. "The propriety of thus extending the immunity where the political branch of the government had refused to act was not considered." Republic of Mexico v. Hoffman, supra at 533 n. 1. But the Court refused to go further, adding that the instant case presented no occasion to consider the questions of The Pesaro.

Mr. Justice Frankfurter, joined by Mr. Justice Black in a concurring opinion, stated that he would "heartily welcome" any implied recension of the majority of the Court from the decision in The Pesaro. His chief objection was that the judicial test of "possession" is not a feasible method of determining where immunity shall lie; especially is it impractical when applied to the field of foreign affairs in which "international interests and susceptibilities" are involved. His solution was that the courts would retain jurisdiction over all cases of vessels owned by foreign governments, however operated, except when the State Department or Congress explicitly grants such immunity. "Thereby responsibility for the conduct of our foreign relations will be placed where power lies." Republic of Mexico v. Hoffman, supra at 536 (concurring opinion).

Despite the broad ruling of the Court in The Pesaro, the United States Government has never claimed such immunity for American vessels; 41 Stat. 525 (1920), 46 U. S. C. § 742 (1940); 43 Stat. 112 (1925), 46 U. S. C. § 781 (1940); and this position of the Government has been supported by numerous authorities on international law. See Cheshire, Private International Law (2d ed. 1938) 96; Fenwick, International Law (2d ed. 1934) 228; Hall, International Law (8th ed. 1924) 249 n.; 1 Oppenheim, International Law (5th ed. 1934) 668, 670; Westlake, Private International Law (7th ed. 1925) 269; Wheaton, International Law (6th Eng. ed. 1857) 240.

It is clear, then, that if the Court but awaits an opportunity to modify the decision of The Pesaro and make all commercially operated vessels subject to seizure, such a decision will find substantial support. But if the Court follows the lead of Mr. Justice Frankfurter, a more far-reaching conclusion will result. The Court would recognize the sole responsibility of Congress and the State Department to formulate foreign policy, and it would agree to be controlled by such policy. Procedurally, it would mean that diplomatic representatives would no longer appear before the courts to have the immunity claim adjudged on the merits. Immunity would be recognized by the courts of the United States solely upon the suggestion of the State Department.

ROBERT L. HEALD

REAL PROPERTY—Equity Will Enforce Mutual Covenants of Land Owners Excluding Negroes from Owning or Occupying Land, Unless Constant Penetration of Negroes into Restricted Area Has Frustrated Purpose of Covenant.

The plaintiffs and all other owners in fee simple of the lots composing
Square 3123 in the District of Columbia entered into a mutual covenant that no part of the land should for a period of twenty-one years be owned or occupied by members of the Negro race or blood. The defendant, Consolidated Properties Incorporated, as owner of Lot 31 within Square 3123, conveyed the lot in question to defendant Mays, a Negro, through a “straw party”, defendant Cook. Several of the covenantors joined in this action in equity, praying for injunctive relief to prevent defendant Mays from owning or occupying said lot, to prevent defendant, Consolidated Properties Incorporated, from selling, leasing, transferring, giving, or conveying said lot to any Negro or person of color, and further to set aside, as null and void, the deeds between Jane Cook and Consolidated Properties Incorporated, and between Jane Cook and Clara Mays. Held, restrictive covenants against Negro ownership or occupation of land are not against public policy and will be enforced by courts of equity in the District of Columbia, Mays v. Burgess, 147 F. (2d) 869 (U. S. App. D. C. 1945).

A companion case involved a restrictive covenant agreed to by the owners in fee simple of the lots known as Moore and Barbour Additions Nos. 1 and 2 in the District of Columbia. The covenant in that case restricted occupation, but not ownership, by Negroes. The Stone Construction Company Incorporated, co-defendant, conveyed Lot 1, Square 3116, included within the restricted territory, to the defendant, Gospel Spreading Association, Inc., a “colored” corporation. As in the first case, several of the property owners brought this action to enforce the covenant. Held, the character of the neighborhood has so changed as to render enforcement of the covenant futile; and where such is the case, equity will not interfere. Gospel Spreading Association, Inc. v. Bennett, 147 F. (2d) 878 (U. S. App. D. C. 1945).

The land involved in the subject cases is included in an area bound by Flagler Place, N. W., U Street, N. W., North Capitol Street, and Adams Street, N. W., in the District of Columbia. In the Mays case, supra, no Negroes other than the defendant, Mays, owned or occupied land in Square 3123. However, there were several instances of Negro ownership in adjoining squares where similar restrictive covenants had expired or were about to expire. In the Gospel Spreading Association case, supra, there had been constant penetration of Negroes in the territory covered by the covenant. Four houses in Square 3116 had been occupied by Negroes for some time, the owners of said properties having been voluntarily relieved of the restrictions of the covenant.

In both instances the relief prayed for was granted by the United States District Court for the District of Columbia. The appellants' arguments were almost identical. They argued that restrictive covenants were void as placing undue restraint on the alienation of land, that they were unconstitutional violations of the Fifth, Thirteenth, and Fourteenth Amendments to the Constitution of the United States and the statutes enacted thereunder. They further relied on the “change in the character of the neighborhood” doctrine set
forth in *Hundley v. Gorewitz*, 132 F. (2d) 23 (U. S. App. D. C. 1942). The appellees relied on the long line of decisions in this jurisdiction upholding the validity of restrictive covenants and cited *Corrigan v. Buckley*, 271 U. S. 323 (1924), as being determinative of the constitutional issues raised. In the *Mays case* the appellants endeavored to attack the economic justification of the covenant by alleging that the property in Square 3123 could be sold to Negroes for $10,000, whereas it would bring from white purchasers no more than $7,500. This was answered by one of the witnesses, who testified that she and her husband had purchased a lot in Square 3123 about two years before for $9,500, relying upon the restrictive agreement.

Covenants and conditions totally restraining alienation, whether perpetually or for a limited time, have been declared invalid almost universally. However, restrictive covenants have been held valid where the restriction is limited to the uses to which the land could be put, or the classes of persons to own or occupy the land, where the uses or classes of persons so excluded do not constitute so large a segment of the uses for which the land is suitable or of the total number of potential purchasers as to be considered an unreasonable restraint upon alienation. This was recognized by the Supreme Court in *Cowell v. Springs Co.*, 100 U. S. 55 (1879), and indirectly in *Potter v. Couch*, 141 U. S. 296, 315 (1891). These restraints are divided into two broad classes based on the type of penalty provided in the covenant or condition. One group, operating as a condition subsequent, provides that the person’s estate is forfeited upon an attempt to alienate the property in a manner prohibited by the condition. We are here concerned with the other class—the disabling restraint which does not involve the forfeiture of the grantor’s estate, but rather declares any attempted conveyance to be of no effect. It is usually in the form of a covenant and is effectively enforceable only in equity.

This latter classification is subdivided into two groups—the unilateral covenant and the bilateral covenant. The unilateral covenant is affixed to and made a part of the deed of conveyance, and is a part of the contract between the original grantor and the grantee. As will have been noted in the earlier paragraphs, we are here concerned with the bilateral, or mutual, covenant, which is not a part of the individual deed, but is rather a separate contract made by all property owners in a given area. To be binding, all essentials of a valid contract must be present, including at least nominal consideration. Persons purchasing property so restricted, taking with notice of such restriction, are bound by it.

From an examination of numerous cases, it appears that in this country the weight of authority is slightly in favor of upholding restrictive covenants, those restricting occupation alone being more favored than those restricting ownership. An agreement whereby the parties bound themselves not to permit their respective lots to be occupied by persons of certain races and to incorporate these restrictions into deeds has been held valid in California. *Littlejohns*
v. Henderson, 111 Cal. App. 115, 295 Pac. 95 (1931). However, an agreement securing property against occupancy by persons other than of the Caucasian race for an unlimited time was held void in the same jurisdiction. Foster v. Stewart, 134 Cal. App. 482, 25 P. (2d) 497 (1933). Restrictive covenants imposed by former owners on all subsequent owners was held not contrary to public policy in Oregon. Ludgate v. Somerville, 121 Ore. 643, 256 Pac. 1043 (1923). The Colorado courts upheld a deed restricting occupancy and ownership to white persons in Chandler v. Ziegler, 88 Colo. 1, 291 Pac. 822 (1930). Parties not in privity with the original covenantee have been held not entitled to enforce restrictive covenants against Negro ownership, since the covenant is solely for the benefit of the parties to it. Toothaker v. Pleasant, 315 Mo. 1239, 288 S. W. 38 (1926).

In the neighboring jurisdiction of Maryland, whence comes much of the Common Law of the District of Columbia, property owners may agree that any given territory shall be used or occupied by white persons only or by colored persons only. Meade v. Dennistone, 173 Md. 295, 196 Atl. 330 (1938). But such restrictive covenants on the use of land may not be construed as extending for a longer period of time than the nature of the circumstances and the purposes of the imposition of such restrictions would indicate as reasonable, without undue and inequitable prejudice to the property rights purchased by the original grantee and his successors in title. Whitmarsh v. Richmond, 179 Md. 523, 20 A. (2d) 161 (1941).

Only one case has been considered by the Supreme Court of the United States involving the constitutionality of restrictions against Negro ownership. Corrigan v. Buckley, supra. There the Court said that the appeal raised alleged constitutional questions "so unsubstantial as to be plainly without color of merit and frivolous". 271 U. S. at 329. The Court further pointed out that the Fifth and Fourteenth Amendments, being limitations only upon the powers of the federal and state governments respectively, were not concerned with individual invasions of individual rights, and that the Thirteenth Amendment prohibited only slavery and afforded no protection to the individual rights of Negroes in other respects. Nor, said the Court, are these covenants violations of the federal civil rights statutes, Rev. Stat. §§ 1977-1979 (1875), 8 U. S. C. §§ 41-43 (1940). The right to acquire property is not the right to compel property to be conveyed. In this regard, however, it is interesting to note the case of Gandolfo v. Hartman, 49 Fed. 181 (1892), where a covenant not to rent to Chinese was held void as an infraction of our treaty with China to give Chinese subjects all rights, privileges, and immunities accorded to subjects of the most favored nation.

To quote Chief Justice Groner in Hundley v. Gorewit, supra, "it must now be conceded that the settled law in this jurisdiction is that such covenants as this are valid and enforceable in equity by way of injunction." 132 F. (2d) at 24. The covenant in that case involved a perpetual restraint. Another case
involving a perpetual restraint was Torrey v. Wolfs, 6 F. (2d) 702 (App. D. C. 1925). The covenant under consideration there provided for a penalty of $2,000. The court held that the penalty provision did not preclude the equitable remedy of injunction.

The erection of a stone building was enjoined in Chevy Chase Land Co. v. Poole, 48 App. D. C. 400 (1919), where a group of land owners had entered into a mutual covenant restricting the uses to which the land might be put. The theory of the court's decision was that since the plaintiff had submitted to a burden on his land in reliance on, and in consideration of, the placing of similar burdens on the land of others in the restricted area, it was equitable that he should be protected. In Grady v. Garland, 89 F. (2d) 817 (App. D. C. 1937), the court found that existing local conditions, the growth and expansion of the District of Columbia, and its constant tendency to changes in use and occupancy of realty require holding that valid restrictive covenants are intended primarily to protect realty included in the restricted area and should not be set aside merely because of conditions affecting surrounding territory; that such covenants constitute valid contracts and should not be lightly set aside. Realizing the care, however, which must be taken not to impose unreasonable restraint upon alienation, the Court of Appeals has held that covenants restricting the use of land must be construed strictly against the covenantors. Moses v. Hazen, 69 F. (2d) 842 (App. D. C. 1934).

Chief Justice Groner's opinion in the Mays case, supra, reviews the precedents in this jurisdiction, and properly concludes that no new question has been raised in this appeal. He points out that the doctrine of Hundley v. Gorewitz, supra, is inapplicable here because there has been no intensive penetration by Negroes in the immediate neighborhood of Square 3123 and, in fact, no penetration whatsoever in the square itself. In this connection it might be well to point out that Negro occupancy of one house in an otherwise restricted block has been held not to be such a change in the neighborhood as to frustrate the purpose of a restrictive agreement. Meade v. Denniston, supra.

In a lengthy dissent in the Mays case, Mr. Justice Edgerton endeavors to point out that the trend in the neighborhood is toward colored ownership and occupancy, "that the neighborhood has lost the exclusively white character which the agreement sought to preserve, and that enforcement of the agreement during the short remainder of its life will not restore that character." 147 F. (2d) 874. He also attacks the majority opinion from the standpoint of his own personal views on the sociological problem involved, discussing at great length the unfortunate state of Negro housing.

The factual situation in the Gospel Spreading Association case, supra, is quite different, in that actual penetration had been made by Negroes to the extent of four houses in the block itself. This was deemed a sufficient change in the character of the neighborhood to destroy the effectiveness of the restrictive agreement; and therefore the court followed the rule set down in Hundley
v. Gorewitz, supra, and held that "a court of equity ought not to interfere." As was pointed out in Chief Justice Groner's opinion, however, the same result could have been reached on another ground, inasmuch as the restrictive agreement in this case prohibited only occupancy by Negroes; and therefore by the terms of the covenant itself it was permissible for the land to be sold to Negroes, and owned by Negroes, provided it was rented to, or occupied by, white persons. From this it would appear that the Court of Appeals chose this opportunity to make clear that the Mays case, decided earlier the same day, was not intended to weaken the beneficial rule set forth in Hundley v. Gorewitz, supra.

The result achieved by balancing the decisions in the subject cases would seem to set down a sound rule for determining the validity of restrictive covenants in neighborhoods which are in the transitional stage. The courts should not close their eyes to substantial changes or unmistakable trends, but one swallow does not make a Spring. Care must be taken in applying the rule not to create a "No Man's Land" where one class is forbidden to live, and the others unwilling.

JOHN F. REILLY
BOOK REVIEWS


"Right profitable are the ancient books of the Common Law," law students were told in the old books, which restated general principles, and law students were admonished, after diligent reading of the case, to observe how the case is "abridged" in the great Abridgments of the law, Fitzherbert's and Brooke's. Professor Seavey has borne this traditional advice in mind in the preparation of his new casebook on Agency, for he has given us the exposition of legal principles, in opinions of the courts printed in full, and also an abundance of "abridgments" or summaries of additional cases. While summaries of cases in casebooks is not new, yet that device is used in a striking way in this casebook. The modern law of Agency is definitely presented in this casebook, for the organization of material in the prior edition has been completely changed; approximately two-thirds of the cases printed were decided since 1925, the year in which the prior edition appeared, and even Hunt v. Rousmanier is merely summarized.

The opinions in 176 cases are reprinted, and 786 cases are summarized—a total of nearly 1000 cases presented for study. The plan of organizing material followed in the Second Edition of Mechem's Cases, edited by Professor Seavey in 1925, and referred to in this review as "the prior edition," has been abandoned. In the present edition, the "principal" cases are reprinted virtually in full; and, instead of the traditional casebook note consisting of citations or summaries of related cases intended to broaden the study of the principal case, we have, following the principal case, summaries of pertinent cases, consisting of a compact statement of the facts, the ruling of the court, and often a striking sentence or two quoted from the opinion. It is evident Professor Seavey believes that students do not generally read casebook citations.

Six hundred and sixty-two cases, or approximately 70 per cent of the total number in the book, principal and summarized, were decided since 1925, when the prior edition appeared. Of these 662 cases, 199, or nearly one-third, were decided since 1940, that is in the past five or six years; 78 cases, or approximately 8 per cent, were decided be-

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8 Wheat. 174 (U. S. 1823).
fore 1875; 74 cases, or approximately 8 per cent, were decided in the period from 1875 to 1900; 121 cases, or approximately 13 per cent, were decided in the period from 1900 to 1925.

Only 75 cases, reprinted as principal cases in the edition of 1925, appear in the new edition, and of these 75 cases only 32 are reprinted in full; the remaining 43 cases are summarized.

There are 666 pages of cases in the new book, and in the Preface, Professor Seavey tells us that his book has been planned for "a course of about 45 class room hours." The Table of Cases includes 19 pages, and there is a designation after each case in the table showing whether it is reprinted as a principal case or summarized. The Index consists of ten pages. Following are the chapter headings and the number of pages included in each: Master and Servant, 76 pages; Respondeat Superior, 92 pages; Nature of the Agency Relation, 83 pages; Authority, 49 pages; Parties, Disclosed and Partially Disclosed Principal, 56 pages; Parties, Undisclosed Principal, 40 pages; Unauthorized Transactions, 140 pages; Notice, 37 pages; Ratification and Restitution, 93 pages. Paper and type—not an unimportant feature by any means—are both excellent, as is the binding. Teachers of Agency who have had to send their students to the volumes of statutes or else mimeograph supplemental statutes, will be glad to find excerpts from the Factors' Acts, Fiduciary Acts, the Negotiable Instrument Act, Statute of Frauds, True Name Statutes and Unemployment Acts, reprinted in the new book. "Admissions of Agents" is happily omitted as a separate chapter; so are chapters on Workmen's Compensation and Labor Relations. The reviewer regrets the omission of a chapter on the fiduciary duties of the agent. There are many excellent, even striking, cases on "Loyalty in Agency." In fact, the reviewer is confident that the whole group of principles we know as Agency might be philosophically developed, as they have been expanded in the cases, out of the central theme of loyalty. It is refreshing to find, for example, that the New York Court of Appeals, in an opinion by its Chief Judge, formulated the duty of the agent in respect of loyalty to his principal as follows: "Agents are bound at all times to exercise the utmost good faith toward their principals. They must act in accordance with the highest and truest principles of morality."2 There is no attempt to present the cases in chronological order. The reviewer has in mind Professor Wambaugh's beautiful pageant of cases, depicting the development of the rules of


Of course, every teacher of Agency has his favorite cases, principally the older cases which establish a doctrine, not forgetting later cases which show its modern application. A good selection of cases, however, has been made by Professor Seavey; and no casebook editor could possibly find all the cases. Professor Seavey acknowledges in his Preface his indebtedness to Floyd R. Mechem and to Eugene Wambaugh, his masters in the subject of Agency. Each of these acknowledged masters has frankly admitted that there are omissions in his casebook “intentional and accidental”. Professor Mechem says: “To make a selection of cases from the great number upon the subject is a difficult task and one in reference to which opinions will necessarily differ.”

Professor Wambaugh says: “... the editor is reminded... often in this long task, of a consoling sentiment attributed to Plato: ‘As it is the commendation of a good huntsman to find game in a wide wood, so it is no imputation if he hath not caught all.’”

HUGH J. FEGAN*

CLAIMS TO TERRITORY IN INTERNATIONAL LAW AND RELATIONS—by Norman Hill, Oxford University Press, 1945; Pp. 230.

This book is a very interesting, condensed analysis of international territorial disputes. The author freely uses the term “disputes” in relation to a wealth of precedents which he cites. However, as the title of his book suggests, such precedents may perhaps conveniently be classified broadly into two groups for the purpose of indicating briefly the scope of the work. The author devotes considerable attention to occasions when it has fallen to the lot of diplomats to remodel, to a considerable extent, the map of a continent, as was done at the Peace Conference at Paris in 1919 and at the Congress of Vienna in 1815. And he succinctly makes use of numerous precedents of the settlement of territorial controversies by judicial, and by what might be termed quasi-judicial, methods. In relation to international litigation, attention is drawn to some questions of procedure under arbitral agreements.

In both categories of adjustments, use has frequently been made of

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+Wambaugh, A Selection of Cases on Insurance (1902) iv.

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contentions involving similar theories but diverse applications. That has often occurred with reference to pertinent historical facts and facts relating to ethnical classifications of inhabitants of territories to which claims have been pressed. When, on occasions such as the Conference at Paris in 1919, there had been no opportunity, for a relatively long period, for acquisitions of territory by nations strongly desirous of extending their dominions, arguments based on considerations of policy, as distinct from purely legal grounds, have frequently covered very wide fields. Their scope has varied according to the resourcefulness, and to use one of the author's expressions, the "frantic efforts", of representatives of claimant governments. Interesting varieties of arguments have been advanced with respect to considerations such as economic conditions in territories desired or in territories which it was sought to augment and to strengthen; so-called natural boundaries; and boundaries desirable from the standpoint of national security against military force of a possible enemy.

In connection with a discussion of procedural questions, the author refers to the arbitration between the United States and The Netherlands under the Special Agreement concluded January 25, 1925. The Island of Palmas (or Miangas) was in the situation of numerous other small islands in the Philippine group which had been allowed to administer themselves, no local governmental machinery having been prescribed for their administration by the sovereign power. The United States based its claim to sovereignty fundamentally on the contention that the island was, prior to 1898, under Spanish sovereignty, which was acquired originally by right of discovery, and that the island was therefore properly included within the limits prescribed by the Treaty of Peace concluded between the United States and Spain in that year.

The island apparently had very little economic and no strategic importance, but it was necessary to settle the vexatious controversy concerning sovereignty over it. And the arbitration gave rise to some interesting questions of arbitral procedure. The author mentions the practice of The Netherlands Government of referring repeatedly to documentary evidence without producing it. Equally interesting was the constant practice of making unsupported allegations, which was justified by the contention that such allegations should be accepted as "facts" and "are evidence in themselves". This argument was made in reply to an observation expressed in behalf of the United States that an arbitral tribunal would be in an invidious position, if called upon merely to record its judgment with respect to the correctness of unsupported as-
sertions advanced by either party, rather than to discharge the function of determining a controversy in the light of evidence and by the application of proper rules and principles of law.¹

As has been observed, the author covers a wide field within comparatively narrow limits. And only meagre references could be made to numerous important and extremely complicated adjustments cited, some effected through diplomatic methods, others through international litigation. Nevertheless, with clarity of presentation of pertinent illustrative facts, the author has admirably succeeded in carrying out the purposes explained in the Preface of his book. This, he says, is not to advance solutions to particular disputes, but “to analyze such disputes with a view to a better understanding of their nature and the procedures available for solutions.”

FRED K. NIELSEN*


In his instructive study entitled Crime and the Human Mind, Dr. David Abrahamsen of the Department of Psychiatry, Columbia University, affords the reader the opportunity of becoming acquainted with modern psychological views of criminology. This is accomplished by means of a review of developments in this field in various countries of the concepts of various schools; individual case histories are included as demonstrative of the theories presented.

Careful examination of this work should result in a better understanding of the criminal personality and should suggest more rational ways of dealing with the criminal. The intricacies of mind and personality are of primary concern to the author. Organized society is hardly confronted with a problem of greater importance than prevention of crime and the treatment of antisocial and maladjusted persons whom we call “criminals.”

Dr. Abrahamsen makes a notable contribution by his emphasis on the complexity of the factors which produce the criminal. Many of his theses may be debatable; and the authorities are far from being in agreement as to which motivating force, psychological drive, or impulse


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is the determinant. Continuous conflict, generally repressed but often open, with the regulatory and moral laws of society constitute the frequently encountered pattern of criminal behavior.

A felicitous union of the efforts of the products of research in medicine, sociology, economics, anthropology, and law may tend to achieve a more intelligent approach to what makes a criminal.

It is often asserted that the laws governing the trial and punishment of criminals are antiquated and even barbarous. Law-making bodies have been slow to modify criminal law and procedure in order to accommodate the proponents of this or that new school of thought. However, when, as the result of careful and painstaking research, basic facts are developed which indicate the necessity of legislative revision, public demand will be reflected in the penal codes yet to be written.

Dr. Abrahamsen has been active in the field of psychiatry for some fifteen years and during the latter half of this period has concentrated on the psychiatric aspects of criminology. He summarizes his approach to the problem in this statement: “It cannot be stressed too much that if we are to understand the offender, then we ought to know the forces that drive him into crime.”

The first chapter is devoted to a discussion of “Criminology as a Science”, and the author analyzes various of the historical schools dealing with the reasons for criminal behavior and the punishment to be administered. He traces the development of criminal law through the great religious codes and explores the writings of the 18th century humanitarians and the efforts to establish a genuinely scientific criminal psychopathology and suggests that “criminology is now developed into a science with many ramifications, all of which aim at finding causes of crime and thereby in a realistic way help to counteract it.”

In a chapter “The Mind in Relation to Crime”, Dr. Abrahamsen remarks that the accomplishment of a criminal act is inevitably identified with the perpetrator; however, the criminal may not consciously be in a position to shed much light on just why he committed the deed. Back of the doing is the thinking, and here the author dwells at some length on the mental distortion that precedes the commission of crime. He comments: “Criminal fantasies are present in all people, perhaps most frequently in those suffering from a neurosis.” However, he qualifies

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1Abrahamsen, Crime and the Human Mind (1944) xi.
2Id. at 17.
3Id. at 31.
the relation of this statement to the criminal act by saying: "It is therefore doubtful whether psychological mechanisms which produce criminal fantasies are the same as those which produce the criminal act. This might indicate that crime would not be the same as a neurosis."4 In concluding this chapter, the writer suggests that crime must be regarded as a symptom in a personality laboring under mental deviations or abnormalities: "This being so, the attitude of society in inflicting punishment on the culprit must decisively alter."5

In the third chapter, "Heredity and Environment as Causes of Crime", the author refers to various of the investigations of families having an unusual number of criminal elements and then cites a number of cases that have come under his personal observation. He believes that when these traits of heredity and environment are considered there is "a genuine instability of all elements involved."6 Statistically, he concludes that offenses against property are more frequently committed by the younger males of the population.7

The fourth chapter, "Functional View of the Offender", consists largely of a series of typical cases and emphasizes the point that the individual criminal must be studied in relation to his surroundings—productive of impressions which will be incorporated into his personality.

In his exposition of the "Psychiatric-psychologic Examination of the Offender" (Chapter V) Dr. Abrahamsen discusses the problem of normality and abnormality and quotes the distinguished authority Dr. Charcot: "Normal or abnormal—I dare not say where is the border!" He advocates a psychiatric examination of each offender as a prerequisite to a proper disposition of the case, and emphasizes that each crime involves an individual personality which must be carefully analyzed and psychiatrically diagnosed if adequate results are to be accomplished. The physician to be charged with this responsibility, suggests the author, should be appointed by the state; in that way, the elements of advocacies which exist when psychiatrists are retained by the prosecution or by the defense would be eliminated. In addition to this psychiatric examination, a careful physical and psychological examination is recommended.

Various types of classification of offenders are suggested by the author

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4Id. at 32.
5Id. at 34.
6Id. at 37.
7Id. at 42.
in his sixth chapter; and in Chapter VII, the very timely topic of "Juvenile and War Delinquency" is treated. Here the point is made that "the largest number of offenders start their criminal careers in childhood and early youth." As remedies for the evils that beset the immature offenders, the author suggests the use of community activities, educational measures, and correctional methods following adequate diagnosis of the individual case.

Chapter VIII is devoted to a discussion of "The Psychiatric-psychologic Background of Murder". A statistical comparison of the homicide rate in the United States and that of other leading countries demonstrates that the United States has many more cases of criminal homicide than other countries of comparable development. Here the author states that "criminal activities and mental pathologies are like two plants that derive their nutrition from the same soil. The frequency of gross mental abnormalities in criminals supports this analogy." The author suggests the following classifications: "The symptomatic murder (1) murder due to a distorted erotic drive, which can be divided into (a) jealousy murder, and (b) murder in the course of a sexual offense; and (2) murder due to the aggressive drive, which can be divided into (a) alcoholic murder, (b) surrogate (substitute) murder, (c) murder due to physical inferiority. The manifest (essential) murder can be classified as (a) profit murder and (b) murder from motives unknown."

In Chapter IX, "The Psychiatrist and The Criminal Law", the historical evolution of the tests of legal sanity is described. The "right and wrong test" and the "irresistible impulse" test are discussed and the conclusion reached that the jury, which must determine as a question of fact whether the accused is sane or insane, is thus "the expert" although the jurists may be entirely confused by the testimony of the psychiatrists or other physicians summoned as witnesses.

In his concluding chapter (X) the author describes "Treatment and Research". The gist of this chapter is contained in the statement: "There is no doubt that with the advance of knowledge in psychiatry and in penology, the soil is being prepared for a total change of the treatment of the offender." The author suggests that there are two types of criminals who do not react to any treatment or punishment: the habitual criminals and the neurotics. The author frankly admits that the tools

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8Id. at 127.
9Id. at 157.
10Id. at 161.
11Id. at 202.
available for determining the mental condition of the offender "are still crude". The final conclusion of the author is that "prevention of crime is then much of a problem of education."\textsuperscript{12} He states further: "Education should, then, be the instruction of the intellect and the adaptation of the personality to the laws of society."\textsuperscript{13}

The reaction of the reviewer to the contents of this contribution to literature on crime and the human mind is that mental exploration has hardly passed beyond the rudiments of scientific development, and that vast avenues and veritable horizons will have to be examined and traversed before our treatment of criminology can properly be described as rational and realistic.

WALTER HENRY EDWARD JAEGER*  

\textsuperscript{12}Id. at 220.  
\textsuperscript{13}Ibid.  

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