NOTES

Follow this and additional works at: https://digitalcommons.law.yale.edu/ylj

Recommended Citation
NOTES, 47 YALE L.J. (1937).
Available at: https://digitalcommons.law.yale.edu/ylj/vol47/iss1/16

This Article is brought to you for free and open access by Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Yale Law Journal by an authorized editor of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.
NOTES

Effect on the A.F. of L.-C.I.O. Controversy of the Determination of Appropriate Bargaining Units Under the National Labor Relations Act *

The National Labor Relations Act provides that the representatives selected by a majority of the employees within an appropriate unit shall be the exclusive representatives of all the employees in that unit for the purposes of collective bargaining. Authority is vested in the National Labor Relations Board to determine whether "...the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof," but no standards are provided to direct that determination. When, as in the great majority of cases before the Board, the scope of the unit has not been put in issue, the proposed unit has uniformly been sanctioned. Before bestowing its approval, however, the Board has attempted to justify its position in terms of such flexible criteria as the eligibility requirements of a union claiming to represent the employees, customary groupings, homogeneity and mutual interests, departmental organization of the employer's business, and employee preference.

Selection of the appropriate unit is not always mere routine, for disputes over the scope of the unit have occasionally cropped up, and the C.I.O.-A.F. rift foreshadows an increased number of such controversies. In the disputed cases the Board has talked in terms of the standards employed in the non-controversial cases, but other considerations seem to have been determinative. Whenever the dispute has arisen between a legitimate union

*In re General Steel Castings Corp., R-196, 3 NLRB No. 78 (Oct. 4, 1937).
4. In re Harbor Boat Building Co., 1 NLRB 349 (1936); In re M. H. Birge & Sons Co., 1 NLRB 731 (1936); In re Williams Dimond & Co., R-130, 177-D-137 (May 24, 1937).
5. In re United Press Associations, R-206, 3 NLRB No. 29 (Aug. 20, 1937) (white collar unit). Community of interest may be inferred from similarity in standards of pay and working conditions. Consequently production and maintenance workers have been held appropriate units. In re United States Stamping Co., 1 NLRB 123 (1936); In re Stone Knitting Mills Co., R-200, 3 NLRB No. 22 (Aug. 7, 1937).
6. In re The Associated Press, 1 NLRB 686 (1936); In re Somerville Manufacturing Co., 1 NLRB 864 (1936); In re Atlas Mills Inc., C-107, 3 NLRB No. 3 (July 14, 1937).
7. In re Mercantile Marine Co., 1 NLRB 384 (1936) (request to be excluded); In re American Tobacco Co., R-32, 112-D-99 (Sept. 1, 1936) (request of different locals to be bracketed together). These criteria are discussed in Legis. (1937) 12 Wis. L. Rev. 367. On the determination of bargaining units under the National Industrial Recovery Act, see Comment (1935) 48 Harv. L. Rev. 630, 634.
8. The background of the dispute is discussed in Fortune, Oct. 1936, p. 89.
and either an employer or an employee association with the earmarks of a company union, the unit submitted by the bona fide group has been chosen. In these decisions the Board has been guided by the prohibition against company unions expressed in the Act, but no such policy declaration is available when the controversy is between two bona fide labor unions, especially when one disputant is affiliated with the A. F. of L. and the other with the C.I.O., for the act expresses no opinion as to the propriety of the various forms of labor organization. In such circumstances the Board has been forced to proceed cautiously since any decision will be fraught with important consequence for the C.I.O.–A.F. of L. dispute.

In an early case the Board applied the doctrine that where competing unions are both affiliated with the same parent organization recourse must be had to the parent, even though one of the supposed affiliates of the A. F. of L. was a C.I.O. union. But since the Board has subsequently taken notice that the C.I.O. unions will no longer abide by the Federation rulings, the Board has been forced to choose between craft and industrial units. At first, the factor of traditional organization, which ordinarily must benefit the well established A. F. of L. craft unions, held sway in the determination of units. Of course this factor may inure to the benefit of the C.I.O. on those occasions when the A. F. of L. attempts to uproot an entrenched C.I.O. union. Several recent decisions have given even greater aid to the Federation. In the

9. Where the union sought a unit smaller than the employer unit desired by the employer, the Board has sanctioned the union's request. In re Delaware-New Jersey Ferry Co., 1 NLRB 85 (1935); In re R. C. A. Communications, Inc., R-152, 201-D-157 (June 30, 1937). The union's demands have likewise been granted where the positions of union and employer were reversed and the former sought an employer unit. In re Shell Oil Co. of California, R-123, 176-D-136 (May 24, 1937); In re Fleischer Studios, R-160, 3 NLRB No. 18 (Aug. 3, 1937).


13. In re Standard Oil Co. of Cal., 1 NLRB 614 (1936).


15. See especially the importance of the factor of tradition in the water transportation decisions. In re International Mercantile Marine Co., 1 NLRB 384 (1936); In re Lykes Bros. Steamship Co., R-36, 98-D-90 (July 8, 1936); In re Black Diamond Steamship Corp., R-107, 117-D-103 (Sept. 24, 1936); In re Grace Line, Inc., R-110, 127-D-109 (Nov. 13, 1936).


17. In re Globe Machine and Stamping Co., R-178, 3 NLRB No. 25 (Aug. 11, 1937); In re City Auto Stamping Co., R-203, 3 NLRB No. 24 (Aug. 11, 1937);
typical situation, the A. F. of L. unions claim that a plant should be divided into a series of craft units, while the C.I.O. union maintains that a plant unit is proper. The Board indicates that the factors are evenly balanced between craft and industrial units and that it will decline to settle the issue itself but instead will leave it to the desire of the employees. In determining the preference of the employees, however, the Board does not permit a majority of the employees in the plant to determine the unit; rather it allows each of the units proposed by the A. F. of L. to vote separately as to whether it will bargain as an entity or merge into an industrial unit. Implicit in such a decision—one which the A. F. of L. has sought to insert into the National Labor Relations Act by amendment18—is a determination in favor of the craft form of organization, since each proposed craft unit is deemed appropriate unless it votes to merge into a larger unit. On the other hand, a decision allowing a majority of employees in the entire plant to choose the unit would favor the C.I.O.

In these disputes the Board is in an unenviable position, for any decision it renders must necessarily aid either of the rival organizations in its struggle for superiority. Since the Board is doubtless aware of the implication of its holdings, the recent decisions would seem to indicate a determination to espouse the craft form of organization. Whether it has resolved to do so because of a belief in the intrinsic merit of craft unionism or because of repeated criticism that it is an adjunct of the C.I.O.19 is mere speculation. By making its choice in an easy, non-committal manner, the opposition of the C.I.O. to an arbitrary choice of craft units has been avoided,20 and the Board may await a settlement of grievances by the rival organizations or a statutory solution of the problem. The latter possibility seems remote, however, for Congress is probably as reluctant as the Board to take sides in this dispute.

JUDICIAL DECLARATION OF THE TERMINATION OF AN EMERGENCY*

It is an historic maxim of constitutional law that an emergency cannot create power.1 While this principle was used to dispose of the National


18. At the behest of the A. F. of L., Senator Walsh introduced a bill providing that "... in any case where a majority of the employees of a particular craft shall so decide, the board shall designate such craft as a unit appropriate for the purpose of collective bargaining." N.Y. Times, Apr. 8, 1937, p. 14, col. 4.


20. These decisions, however, have already been criticized by the C. I. O. See N.Y. Times, Oct. 14, 1937, p. 4, col. 2.


1. Ex parte Milligan, 4 Wall. 2, 121 (U.S. 1865).
Industrial Recovery Act, a qualification, originated by Chief Justice White— that an emergency “affords a reason for the exertion of a living power already enjoyed” has supplied a basis for sustaining such temporary measures as the pre-war Railway Labor Act and the emergency rent, mortgage moratorium and milk control laws. But even when recognized, this power is rigorously confined in its application. The legislative declaration that an emergency exists is entitled to great weight, but is not conclusive. The law must be limited by reasonable conditions appropriate to the emergency; it must be of temporary duration; and it must become immediately inoperative upon termination of the critical period, a question of fact always open to examination by the courts. While this reserved judicial power has never yet been exercised, continued renewals of the mortgage relief laws, originally sustained as emergency measures, have prompted mortgagees to raise the objection that steady improvement in economic conditions has ter-

7. Albert v. Milk Control Board, 200 N. E. 688 (Ind. 1936); State ex rel. State Board of Milk Control v. Newark Milk Co., 118 N. J. Eq. 504, 179 A. 116 (1935). The constitutionality of milk control statutes does not necessarily depend upon the recognition of the emergency power. The industry has been held to be affected with a public interest and may be regulated under the state police power. Nebbia v. New York, 291 U. S. 502 (1934).
8. Chastleton Corp. v. Sinclair, 264 U. S. 543 (1924); Wilson v. Colvard, 172 Miss. 804, 161 So. 123 (1935). In those states which provide for a referendum if petitioned by 6% of the registered voters before a legislative enactment becomes valid, an exception is usually made for “emergency” laws. In such cases the legislative declaration that an emergency exists has been held conclusive. State ex rel. Schorr v. Kennedy, 9 N. E. (2d) 278 (Ohio 1937).
9. The conditions were found to be reasonable in Home Building and Loan Association v. Blaisdell, 290 U. S. 398 (1934), and unreasonable in Worthen Co. v. Thomas, 292 U. S. 426 (1934).
12. The nearest the courts have come to declaring an emergency terminated was in Chastleton Corp. v. Sinclair, 264 U. S. 543 (1924), where the case was returned to the lower court for a finding of fact as to whether the emergency was at an end. Before any finding was made, however, the issue became moot. For a suggestion by the court that it would declare the emergency over, if the issue were properly presented, see Mutual Building and Loan Association v. Moore, 232 Ala. 488, 494, 169 So. 1, 7 (1936).
minated the emergency and invalidated further application of the statutes.13

Since mortgage relief laws usually specify a fixed date at which the statute is to expire,14 a court met with the above contention must decide whether it can declare the emergency at an end in advance of the day set by the legislature. At least two state tribunals, feeling that the law-making body has a closer view of the economic scene, have been unwilling to look behind the legislative finding that the crisis will continue to a fixed future date.15 But unless the legislature is to be permitted to lift itself by its own bootstraps, the date prescribed by the statute should not preclude judicial examination.

If, without regard to legislative fiat, a court decides to determine whether or not the emergency has ended, it may base its conclusion either upon judicial notice or upon evidence and findings. While judicial notice has been taken of obvious widespread depression in order to sustain emergency measures,16 it would be far more difficult for a court to have judicial knowledge of the debatable conclusion that the economic crisis has passed. The sufficiency of judicial notice in this situation has been intimated, but never declared.17 Since the determinative facts should be fully found prior to an expression of opinion upon an important constitutional question,18 and since the legislative finding of an emergency is entitled to great weight, reliance upon judicial notice would appear inadequate. If, on the other hand, the question is submitted to a referee for evidence and findings, as was done in a recent New York case,19 formidable objections are again presented. A court would probably be reluctant to permit the plaintiff to foreclose upon the referee's finding that the emergency had ceased in but a single locality, since the legislature has declared a moratorium throughout the jurisdiction, and rests its power upon a widespread emergency.20 Yet the accumulation and analysis


20. In upholding the new Frazier-Lemke Act, however, the Supreme Court sustained a provision permitting a judge to refuse the benefits of the statute to a mortgagor if he should find that the emergency had ceased in a particular locality. Wright v. Vinton Branch of Mountain Trust Bank of Roanoke, Va., 57 Sup. Ct. 556, 562 (1937). But there is no similar provision in any of the state mortgage relief acts, and it would
by a single referee of data based upon state-wide real estate sales and fore-
closures and available economic surveys would take many months. The delay
might well approximate the fixed moratorium period which the mortgagee
is seeking to avoid by resort to judicial proceedings. Moreover, the assembled
information would be susceptible of many conclusions. The future state of
any market must be a matter of conjecture. If any improvement were noted,
a referee would have to indulge in crystal-gazing to determine whether it
denoted a steady recovery or only a temporary spurt. Even if an exact
analysis were possible, there are no standards for determining what degree
of recovery terminates an emergency. Furthermore, since most of the mort-
gages affected have already matured, any abrupt ending of the moratorium
by the courts would present a problem of refinancing itself constituting a
new emergency that would require legislative measures postponing payment
during the period of readjustment.21 Forestalled creditors may consequently
discover that their right to challenge the continued existence of the emergency
has little substance.

A court inquiring into the extended existence of the critical period might
well come to the conclusion that the emergency has not yet terminated. While
mortgage moratoria can not be prolonged indefinitely, emergency deficiency
judgment acts, such as that renewed until 1938 in New York,22 may soon
be adopted as permanent measures for the protection of mortgagors. A less
drastic statute enacted for this purpose in North Carolina has recently been
upheld by the United States Supreme Court on the ground that the law
impaired only the mortgagee's remedy, and did not seriously affect his right.23
And although a permanent depression of all real estate values is difficult to
envisage, the situation in such regions as the "dust bowl" may become chronic
and require lasting moratory legislation. Rather than stretch the basic constitu-
tional power to the anomalous point of a quasi-permanent emergency, and
rather than seek refuge in the dubious distinction between right and remedy,
a more solid foundation should be sought upon which to rest these statutes,
both in their present form and as modified for continuous operation. Since
the police power may, under the emergency theory, be dilated to meet an evil
which exists temporarily, there seems to be no reason for denying the power
to deal with the evil when it has become permanent. A trend in this direction
is noticeable in the history of the milk control laws, which were originally

be difficult for a judge, without legislative sanction, to upset a state-wide law in a
single locality.

22. Sec. 1083a of the New York Civil Practice Act, extended to July 1, 1938 by
Chapter 83 of the Session Laws of 1937. New York has both a mortgage moratorium
(Sec. 1077a of the Civil Practice Act, which may soon be extended until 1941; N. Y.
Times, Sept. 26, 1937, § 13, p. 1, col. 1) and a deficiency judgment provision prohibiting
a deficiency judgment which does not deduct the "fair market value" of the property.
For a discussion of the constitutionality of the latter, see (1935) 3 U. of PRRTS. L.
Rev. 54.
23. Richmond Mortgage and Loan Corp. v. Wachovia Bank and Trust Co., 210
N. C. 29, 185 S. E. 482 (1936), aff'd, 57 Sup. Ct. 338 (1937).
devised to meet an emergency and upheld on that ground, but which are now held constitutional upon much broader grounds.

**Change of Beneficiary of Life Insurance Policy**

**as a Fraudulent Conveyance**

A real estate operator in deepening financial difficulties made his wife beneficiary of three policies of life insurance totalling $50,000 which had been payable to his estate and were listed as assets on financial statements he gave a bank, his principal creditor. Soon after, he refused the bank's request to assign the policies to it, but did not reveal the previous transfer. Two months later he committed suicide. In the bank's action to have its $15,000 claim paid out of the proceeds of the policy, the lower court found that the insured had not been insolvent when he changed the beneficiary and that no fraud was intended. The Supreme Court of Wisconsin affirmed this decision but held that these findings were unnecessary, because a change of beneficiary of a life policy was not such a transfer of property as could be a fraudulent conveyance, except as to the cash surrender value of the policy, which in this case had been almost entirely hypothecated to the insurer.

The decision represents the fruit of a long judicial struggle in which humane considerations have been increasingly mitigating the severities of a creditor economy, a trend also evidenced by statutes exempting the proceeds of life insurance policies to a limited amount from estate taxation and homesteads from the claims of creditors. Where the problem has involved the payment of premiums by an insolvent insured, legislatures and courts have long successfully complemented each other's efforts in allowing the insolvent to make reasonable provision for his family. But where, as in the principal case, the creditor protests that he was relying on a policy originally payable to the insured's estate, protection of dependents has been more difficult. A half century ago the problem was an easy one, for the maxim placing

---


1. Ibid.


3. ILL. ANN. STAT. (Smith-Hurd, 1934) c. 52, § 9; WIS. STAT. (1935) § 272.20; see Comment (1937) 46 YALE L. J. 1023.

"justice" before "generosity" was relentlessly invoked. An assignment or change of beneficiary depriving the insured's creditor of an asset, presently if not immediately forthcoming, was a fraudulent conveyance without more ado. But the courts gradually became dissatisfied with this result and sought to protect the insured's dependents. Many tried stretching the protective statutes to apply to transferred as well as original and continued policies, while others finally evolved, from occasional hint and back-handed reference, an apparently foolproof method of protecting the transfer. In the face of the Uniform Fraudulent Conveyance Act, which had extended the applicability of the general rule of the Statute of Elizabeth to any property "liable for any debts of the debtor," the change of beneficiary was said to be not a transfer of "property," hence not possibly a fraudulent conveyance.

5. Since the provision allowing a change of beneficiary is a comparatively recent development in life insurance policies, the early cases deal almost exclusively with assignments. The two are often distinguished, because a change of beneficiary may be accomplished only in the manner provided for, while an assignment may be effected in a number of ways. See Mutual Benefit Life Ins. Co. v. Swett, 222 Fed. 200, 205 (C. C. A. 6th, 1915); Opitz v. Karel, 118 Wis. 527, 532, 95 N. W. 948, 950 (1903). Since the assignor may, and often does, undertake to continue payment of premiums, there is nothing to be gained here by distinguishing the cases involving the different methods of transfer.


7. Early cases unfavorable to creditors are scarce. Cole v. Marple, 93 Ill. 58 (1881) (creditors entitled only to premiums paid while insolvent); Johnson v. Alexander, 125 Ind. 575, 25 N. E. 706 (1890) (assignment was to certain creditors); Succession of Hearing, 26 La. Ann. 326 (1874). Of the cases decided since 1920, nearly twice as many were favorable to the family as to creditors.


9. Life policies were said to have a definite, pecuniary value upon the approaching death of the insured, implying that this might not be true if the insured had a normal life expectancy. Cf. Barbour v. Connecticut Mutual Life Ins. Co., 61 Conn. 240, 247-8, 23 Atl. 154, 155 (1891); Navassa Guano Co. v. Cockfield, 253 Fed. 883, 885-6 (C. C. A. 4th, 1918); LaBorde v. Farmers' State Bank of Millard, 116 Neb. 33, 44, 215 N. W. 559, 564 (1927).

10. At common law a voluntary conveyance by an insolvent debtor was conclusively presumed to be in fraud of creditors, but only as to "lands and tenements, goods and chattels," i.e., tangible property. 13 Eliz. c. 5 (1571).


In the principal case, this conclusion was reached in spite of a statute which protects the proceeds of life insurance from creditors “except in cases of transfer with intent to defraud creditors . . . .”,13 the court refusing to admit that the exception contemplated the possibility that a change of beneficiary might be fraudulent. Chiefly on the authority of a recent Michigan case,14 such a change was held not to be within the broad statutory definition of conveyance: “every transfer . . . of tangible or intangible property . . . .”15 But there is ample case authority conferring on insurance policies many of the attributes of property. Thus a policy represents an interest which will be protected if the insurer commits anticipatory breach;16 it is transferable;17 and it may constitute the res of a trust.18 Although the policy had these attributes, and although it may be classified as property for some purposes, it does not follow that this classification is necessary for the purposes of the instant case. The property concept is sufficiently flexible to permit a great amount of purposive manipulation. This the court realized, for it held that “in a limited sense” the policy was property, but that it was not property for the purpose of the fraudulent conveyance rule. The malleability of the concept thus made it possible for the court to protect the insured’s dependents and yet at the same time satisfy the “justice” of a creditor economy.19 To reach the same result the court might conceivably have relied upon an analogy to the old doctrine that a power appendant in a debtor may be exercised to destroy his estate and defeat the rights of his creditors therein,20 although this doctrine has often been repudiated in the United States.21 The creditor bank might then be held to a constructive knowledge that it was relying on an interest subject to divestment by the exercise of the power to change the beneficiary.

15. Wis. Stat. (1935) § 242.01 (2). The Wisconsin rule, unique among the states, maintaining that the right of the beneficiary of an old line life insurance policy is not vested, is of no consequence with respect to a policy allowing change of beneficiary as in the principal case. See Vance, Insurance (2d ed. 1930) 542-43, 563.
17. This characteristic is set up as the fundamental test of an asset which is within the creditor’s reach. See Glenn, Fraudulent Conveyances (1931) 190.
19. “It is incorrect to say that the judiciary protected property; rather they called that property to which they accorded protection.” Hamilton and Till, Property, 12 Encyc. of Soc. Sciences (1934) 528, 536.
More logical is the argument suggested by the Wisconsin court that since only the cash surrender value of the policy was available to creditors at the time of the change, they can claim no more thereafter.22 The validity of this reasoning eventually depends on the premise, that beyond the surrender value the policy represents no property "liable for any debts of the debtor." But it is nowhere declared that a contingent right does not come within this provisions of the Uniform Act.23 Furthermore, no reason appears why the creditor could not have subjected the proceeds of the policy to eventual liability for his claim, either before the change of beneficiary by an equitable proceeding to declare his interest in the policy, allowing him to pay the premiums in order to safeguard that interest,24 or after the insured's death by an action impressing the proceeds with a constructive trust.25 Under the latter doctrine the original res and its fruits can be followed and reached in any form if properly identifiable, regardless of how small a value it may have had immediately after the transfer when the trust was erected.26

But from a broader point of view the result reached in the principal case may be desirable. The social function performed by securing the proceeds to presumably otherwise destitute dependents is of at least equal importance to that served by using them to meet creditors' demands. Further, one who extends credit in reliance on the security of life policies payable to the borrower's estate but with the reserved power to change the beneficiary may protect himself by requiring an assignment and delivery of the policies. And if he is a commercial lender, he is no doubt in a better position to spread the

22. This argument seems to have appeared originally in Davis v. Cramer, 133 Ark. 224, 202 S. W. 239 (1918).

23. "Contracts for the future payment of money depending upon conditions to be performed are not, for any reason growing out of their uncertain character, exempt from the claims of creditors." Stokes v. Amerman, 121 N. Y. 337, 343, 24 N. E. 819, 821 (1890). The assignment of future earnings has been commonly held void as to creditors. Gragg v. Martin, 12 Allen 498 (Mass. 1866); Costello v. Great Falls Iron Works, 59 Mont. 417, 196 Pac. 982 (1921); Lennon v. Parker, 22 R. I. 43, 46 Atl. 44 (1900).

24. Stokes v. Amerman, 121 N. Y. 337, 24 N. E. 819 (1890); cf. Spiro State Bank v. Bankers' National Life Ins. Co., 69 F. (2d) 185, 188 (C. C. A. 8th, 1934) (possibility of creditor's taking over unmatured life insurance and paying premiums suggested). The scarcity of cases directly supporting the availability to the creditor of anything more than the surrender value may reasonably be explained by the desire of creditors to liquidate claims as quickly as possible and their consequent unwillingness to await the complete maturity of an insurance policy.

25. Fidelity Trust Co. v. Union National Bank of Pittsburgh, 313 Pa. 467, 169 Atl. 209 (1933); see Lehman v. Gunn, 124 Ala. 213, 221, 27 So. 475, 477 (1900); Cornwell v. Surety Fund Life Co., 44 S. D. 391, 402, 184 N. W. 211, 214 (1921). In this field the doctrine has been more often applied in cases where embezzled or misappropriated funds were used to pay premiums. See Comment, (1925) 35 Yale L. J. 220.

26. Hill v. Flemming, 128 Ky. 201, 107 S. W. 764 (1908); see 4 BOGERT, TRUSTS AND TRUSTEES (1935) 2657. There should be no difficulty as to identifying the funds, the wife's insurable interest not being such property as to cause confusion as to the source of the proceeds. Holmes v. Gilman, 138 N. Y. 369, 34 N. E. 205 (1893).
risk and distribute the loss than are the insured's dependents. But in the petition for a rehearing it was argued that undesirable consequences would follow from the court's opinion since its inevitable effect would be a serious curtailment of the usefulness of life insurance policies as a basis for the extension of credit. Although this proposition lacks cogency since it overlooks the availability to the creditor of the pledge device, the court might have avoided the argument by relying entirely on the state statute protecting the proceeds of a policy made payable or assigned to a married woman, thus leaving creditors the possibility of recovery upon proof of actual intent to defraud. This statute was probably passed to aid the insured in effecting protection of his wife and children after his death, and hence would not be put to an unintended use. The court would have had ample precedent in thus frankly declaring that this effort of the insured is as worthy of sanction as an attempt to satisfy his creditors.

**Applicability of a State Statute of Limitations to the Claim of a Foreign Sovereign**

In 1916, the Imperial Russian government deposited $5,000,000 with the Guaranty Trust Company of New York. In 1917, the Soviet government, upon displacing the Kerensky government, issued decrees of confiscation pursuant to which about $9,000,000 held by Russian banks to the credit of the Guaranty Trust Company was seized. The United States subsequently refused to recognize the Soviet government but continued to deal with the representatives of the Kerensky government. Thereafter, the Guaranty Trust Company unequivocally repudiated its liability by charging against the Russian account the sums due the bank that were confiscated by the Soviet decree and sending notice thereof to the representatives of

27. For the argument in favor of such a consideration as a basis for legal decision, see Douglas, *Vicarious Liability and Administration of Risk* (1929) 38 *Yale L. J.* 584, 720.


30. See *Vance, Insurance* (2d ed. 1930) 546.

31. For a similar application of like statutes see cases cited in note 8, *supra*.

32. In *Central Bank of Washington v. Hume*, 128 U. S. 195 (1888), the United States Supreme Court laid down the startling doctrine that an insolvent may apply a moderate part of his income to the procuring and maintaining of life insurance for his family's benefit, even in the absence of a statute. Apparently no case involving this problem has reached the Wisconsin Supreme Court, hence the doctrine has never been adopted there.

the Kerensky government.¹ Under the Roosevelt-Litvinoff agreements of 1933, recognizing the Soviet government, Russia assigned its claim to the United States, which brought suit in a federal district court.² The complaint was dismissed on the ground that the action was barred by the New York Statute of Limitations.³ On appeal, the Circuit Court of Appeals for the Second Circuit reversed, holding the state Statute of Limitations inapplicable to the claim of a foreign sovereign because of deference to sovereign rights and principles of international comity.⁴

The issue of the principle case is one which has never before been squarely decided.⁵ In reaching its decision, the court relied heavily upon the fact that the United States, when suing in its governmental capacity, has been held immune from the limitations statutes of the forty-eight states.⁶ In private litigation, Statutes of Limitations have been regarded as essential to judicial security, for loss of testimony, death of important witnesses and destruction of evidence require prompt administration of justice.⁷ Why these important policy considerations behind the Statute of Limitations should not

¹. Appellant asserted that since the recognition of the Soviet government was retroactive in its operation [see U. S. v. Belmont, 301 U. S. 324 (1937)], the Soviet government became the owner of the bank deposit in issue in 1917 when it assumed control of the Russian state, and consequently that notice of repudiation to the Kerensky government was not binding on the Soviet government. Appellant's Reply Brief, p. 11. An answer to this question was rendered unnecessary in the principal case, since the decision that the statute of limitations was inapplicable to the claim of a foreign sovereign was predicated upon the assumed validity of the repudiation.

². Since the opinion of the court proceeds on the assumption that the United States was necessarily limited in all respects to the rights previously possessed by the Russian government as its assignor, the case is discussed as though the Russian government were the plaintiff.

³. Transcript of Record on Appeal, United States v. Guaranty Trust Company of New York, p. 442.


justify its invocation against a sovereign can be explained historically better than rationally. The doctrine *nullum tempus occurrit regi* grew up in the common law as one of the royal prerogatives, based upon the notion that the king was always busied for the public good and did not have the leisure to assert his rights within the time limited.8 This same tenderness for the sovereign's dignity or his pocketbook has firmly established the English rule in the United States, supported by the public policy argument that the interests of the public should not suffer because of the negligence of government agents.9 This rationale seems highly unrealistic in view of the competent legal department maintained by the United States government which places it in a better position to assert its rights within the time limited than an ordinary citizen. Foreign governments are probably even better equipped by virtue of their diplomatic as well as legal staffs and the relatively smaller number of claims to handle. Furthermore, sovereign freedom from Statutes of Limitations may result in positive detriment to the public since it may tend to promote laxity on the part of government officials in pursuing claims. Because this rule in favor of the sovereign is patently arbitrary,10 a number of state governments have rejected it either by judicial decision11 or by statute.12 Moreover, the considerations of local public interests prompting the retention of the rule in favor of the United States and state governments have no bearing on the claims of a foreign sovereign.

Nor do principles of international comity afford any basis for granting immunity to a foreign government voluntarily suing in our courts. Although it would be an obvious encroachment on sovereign rights to compel a foreign state to submit to the jurisdiction of another sovereign's courts13 and a

9. See United States v. Thompson, 98 U. S. 486, 489 (1878); Buswell, The Statute of Limitations and Adverse Possession (1889) 148; cf. United States v. Lee, 106 U. S. 196, 206 et seq. (1882). When counties or municipalities seek immunity from their state Statutes of Limitations, the problem becomes even more metaphysical for such bodies merely derive authority from the ultimate sovereign. That limitations do operate against political subdivisions, see Metropolitan R. R. v. District of Columbia, 132 U. S. 1 (1889); Bryant v. Cedar Co., 122 Neb. 853, 241 N. W. 538 (1932). *Contra:* Board of Comm'rs of Douglas County v. City of Lawrence, 102 Kan. 656, 171 P. 610 (1918); Herndon v. Board of Comm'rs in and for Pontotoc County, 158 Okla. 14, 11 P. (2d) 939 (1932).
10. The theory of sovereign immunity has been accepted by the courts as "an existing fact to be recognized rather than explained." Watkins, The State As A Party Litigant (1927) 197. It could be just as persuasively argued, were it not for sovereignty concepts, that the Statute of Limitations ought not run against a large corporation because the stockholders should not suffer for the negligence of the directors.
12. The very state whose limitations law is involved in the principal case has rejected the majority rule and has made the statute operative against itself. New York C. P. A. § 54. Other states which have adopted statutes to the same effect are Georgia, Idaho, Massachusetts, Minnesota, Missouri, Montana, Nebraska, Nevada, North Carolina, South Carolina, Vermont, Virginia, and West Virginia. *Contra:* Arizona, Florida, Indiana, Maryland, Mississippi, Oregon, Tennessee, and Washington.
breach of international comity to refuse a friendly state the privilege of
suing in the tribunals of another country,\textsuperscript{14} nevertheless, when a foreign
government voluntarily plays the role of a litigant, it must comply with
the ordinary rules of the forum it has chosen.\textsuperscript{15} And one of the rules which
has consistently been regarded as part of the law of the forum is the Statute
of Limitations.\textsuperscript{16} The court might have decided, on the unique facts of the
principal case, that the running of the Statute of Limitations against the
Soviet government was tolled until its disability to sue was removed by
recognition in 1933.\textsuperscript{17} But there appears to be little basis for the court’s
broad proposition that refusal to grant a foreign country immunity from
state Statutes of Limitations accorded to the United States itself contravenes
principles of international comity. More precisely, the relevant question is
whether the United States, when suing in a foreign country, would be
exempt from its Statute of Limitations. It is at least doubtful whether such
an exemption would be granted. Clearly, application of the New York
Statute of Limitations to the Russian claim would not encroach upon the
national government’s exclusive control over international relations.
The recognition of the Russian government and the attendant executive agree-
ments assigning the Russian claims to the United States would not be dis-
turbed by according a foreign government, or its assignee, equal treatment
with other litigants before our courts in determining the validity of those
claims. The rule in the instant case extends sovereign immunities into a
field where they serve no useful purpose but defeat an underlying policy of
another sovereign government.

\textsuperscript{14} The Sapphire, 11 Wall. 164 (1870); see Russian Socialist Federated Soviet
Republic v. Cibrario, 235 N. Y. 255, 257, 139 N. E. 259, 260 (1923); 26 Am. J.

\textsuperscript{15} United States v. National City Bank of New York, 83 F. (2d) 236 (C. C. A.
2d, 1936) (sovereign must submit to counterclaim); Republic of Honduras v. Soto,
112 N. Y. 310, 19 N. E. 845 (1889) (security for costs); King of Spain v. Hullet
and Widder, 1 Cl. & Fin. 333 (Ch. 1883) (sovereign must sign and verify answer to
cross-bill); Rothschild v. Queen of Portugal, 3 Y. & C. 594 (Ex. 1839) (bill of
v. Crowningshield, 15 Fed. Cas. No. 8269, 362, 363 (1820): a nation “is not obliged
to depart from its own notions of judicial order from mere comity to a foreign nation.
As a rule, Statutes of Limitations are to be considered to fall within these remarks.”

\textsuperscript{16} LeRoy v. Crowningshield, 15 Fed. Cas. No. 8269, 362 (1830); Western Lunatic
U. S. 620, 626 (1885); \textit{Wood, op. cit. supra} note 7, at 32.

\textsuperscript{17} It was directly held that the Soviet government could not sue in this country
while it was unrecognized by the United States. Russian Socialist Federated Soviet
INJUNCTION TO RESTRAN UNLAWFUL POLICE INTERFERENCE WITH UNIONIZATION*

Labor’s attempts to organize have often been thwarted by wholesale arrests under conveniently vague statutes or ordinances. While labor has found it difficult to offer effective legal resistance to this practice, a recent Texas decision indicates a possible solution whenever it is clear that arrests are made maliciously and unjustifiably. Plaintiffs, members of various trade unions, alleged that Houston police disrupted their organizational activities by continually invading union headquarters and arresting members without warrants on charges of vagrancy. The unions further claimed that not only were those arrested always later acquitted, but that the police had been aware of the groundless character of the charges and had threatened to continue harassing the members by such methods until they left town. On the basis of these allegations, plaintiffs petitioned for an injunction to restrain the police officers from unlawfully arresting or molesting the members in their legitimate union and personal activities. A general demurrer to the petition, sustained in the trial court, was overruled on appeal on the ground that the right to earn a living is a property right which equity will protect from unlawful interference by police, even though this protection incidentally involves enjoining the prosecution of criminal proceedings.2

It is usually said that equity will not restrain law enforcement officials from initiating criminal prosecutions against defendants for activities which are alleged to be legal.3 But courts have freely made exceptions to this general rule. Injunctions have been issued where criminal proceedings were based upon unconstitutional legislation,4 where it was evident that officials had seriously abused their discretion or misused their authority,5 or where


1. Police technique varies from region to region. Vagrancy, breach of peace, and disorderly persons regulations are frequently used. Ex parte Cutler, 1 Cal. App. (2d) 273, 36 P. (2d) 441 (1934); New Orleans v. Postek, 180 La. 1048, 158 So. 553 (1934); see Union Activity of Tenant Farmers Suppressed, 3 I. J. A. BULL. 6 (Feb., 1935); New Jersey Disorderly Persons Act, (1936) 5 I. J. A. BULL. 2.


3. The leading case is In re Sawyer, 124 U. S. 200 (1888). The cases and notes on this point have been collected. See Comment (1935) 13 Neb. L. Bull. 406.


a number of vexatious criminal proceedings were threatened. In most cases, the question is not whether equity has power to stay criminal proceedings, but whether the character of plaintiff's interest is such as to warrant protection by a court of equity—a remedy at law and irreparable injury to a property right being prerequisites to equitable jurisdiction. But there has been no stereotyped demarcation of this category; the concept of property rights has been so broadly expanded that it remains but a name for those interests which equity in fact protects.

The decision in the instant case, though comparatively novel in labor cases, fits well within the traditional framework. In the first place, there is abundant authority in favor of treating labor's right to earn a living, to organize for collective bargaining, and to exercise constitutional civil liberties as valuable property interests worthy of the protection of equity. In fact, this protection appears to be only the logical correlative of equity's traditional preservation of conventional property interests and the right of employers to conduct a lawful business. Secondly, it seems clear that police officers who deliberately misapply vagrancy statutes for the purpose of denying workers their legal rights are guilty of a serious misuse of authority. And finally, considered from a realistic viewpoint, it is evident that the threatened

---

6. The cases are collected in Note (1937) 6 Brooklyn L. Rev. 362.
7. Davis and Farnum Mfg. Co. v. Los Angeles, 189 U. S. 207 (1903). Equity may take jurisdiction if the legal remedy is not "as complete, practical and efficient as that which equity could afford." See Terrace v. Thompson, 263 U. S. 197, 214 (1923); Hall v. Dunn, 52 Ore. 475, 479, 97 Pac. 811, 813 (1908).
10. Truax v. Raich, 239 U. S. 33 (1915); see International News Service v. Associated Press, 248 U. S. 215, 236 (1918) ("the right to acquire property by honest labor . . . is as much entitled to protection as the right to guard property already acquired"); Mason, Organized Labor as Party Plaintiff in Injunction Cases (1930) 30 Col. L. Rev. 466, 485 especially n. 70.
injury is irreparable and the remedy at law inadequate. For the drive for unionization of a plant or an industry requires a combination of favorable circumstances which official lawlessness can do much to destroy. Subsequently brought false arrest and damage suits, though useful collaterally, would, even if won, hardly achieve the same results for workers as a strong and independent collective bargaining agent.

Several rationalizations have been advanced to support the denial of injunctions against police officers. A common argument has been that an injunction to restrain criminal proceedings is tantamount to a suit against the state without its consent. While this may be true when officials are acting conscientiously under a valid statute, it is well established that an officer who exceeds his authority remains no more than a private wrongdoer. A second argument has been that the effect of an injunction would be to appropriate to equity the functions of a criminal court, thereby depriving the accused of his traditional safeguards. This contention, however, is somewhat fanciful when it is considered that the accused himself seeks the aid of equity; and, if the bill is dismissed, he still has an opportunity to defend himself in the criminal courts. More persuasive is the contention that an injunction may unduly hamper law enforcement. Although injunctions will restrain prosecutions only where the police do not act with probable cause or in good faith, the threat of a contempt citation may deter authorities from instituting criminal proceedings made proper by a change in circumstances following the issuance of the injunction. While this consideration might justify the denial of an injunction in cases where officials are making an honest, though perchance mistaken, attempt to carry out the

14. Civil actions, promptly instituted, are not to be minimized. See Wood, Coleman, and Hays, Don't Tread On Me (1928) passim. The authors emphasize the deterrent effect of a multitude of such cases. The delay and uncertainty of recovery, however, make the injunction a more effective safeguard.


17. See In re Sawyer, 124 U. S. 200, 210 (1888); Economy Cleaners v. Green, 184 Atl. 225, 226 (Del. Ch. 1936).

18. The argument is really more applicable to the police officer who may be punished by contempt instead of by a civil action.


20. Injunctions will not lie where arrests are threatened or made in good faith. Harmon v. Commissioner of Police of Boston, 274 Mass. 56, 174 N. E. 198 (1931); Davis v. American Society for Prevention of Cruelty to Animals, 75 N. Y. 362 (1878). This is especially true where the police have reasonable grounds for suspecting that the law is being violated. Russo v. Miller, 221 Mo. App. 292, 3 S. W. (2d) 266 (1928); Delaney v. Flood, 183 N. Y. 323, 76 N. E. 209 (1906); see Matthews, Injunctions Against Police Activities (1926) 29 Law Notes 227; Comment (1937) 46 Yale L. J. 855, 858 et seq.
law, its relevance would seem to be slight in the instant case where officers deliberately interfered with legitimate activities.\textsuperscript{21} Furthermore, the sacrifice of vigorous enforcement of vagrancy and similar vague and easily abused statutes seems a doubtful loss when the alternative is to countenance the infringement of civil liberties.\textsuperscript{22}

**Income Taxation of Rights to Purchase Shares in Another Corporation**

Considerable confusion exists among four of the federal circuits on the question of whether rights, issued by a corporation to its shareholders, entitling them to buy from it stock in another and different corporation at a stated price below the prevailing market value, constitute a taxable property dividend upon receipt.\textsuperscript{3} In the Fourth Circuit, rights of this type are held to be mere options which, if exercised, merge with the contract of purchase, so that there is no realized income unless the rights, or the stock acquired through them, are sold or exchanged.\textsuperscript{2} The Second and Seventh Circuits have declared such rights to be a property dividend, taxable at their fair market value as of the time when the taxpayer first receives the certificates evidencing his rights.\textsuperscript{3} Recently the Circuit Court of Appeals for the First District was confronted with the same issue. The petitioning taxpayer received from his corporation rights to buy stock, which it owned in another and different corporation, at a price substantially below its market value. He exercised these rights and retained the stock thus obtained. The Board of Tax Appeals ruled that no taxable income would be realized until the stock in question was sold.\textsuperscript{4} The

\begin{itemize}
  \item \textsuperscript{21} Fox Film Corp. v. Chicago, 247 Fed. 231 (N. D. Ill. 1917); Mills Novelty Co. v. Farrell, 3 F. Supp. 555 (D. Conn. 1933), aff'd, 64 F. (2d) 476 (C. C. A. 2d, 1933); see Judge Gaynor's famous impassioned pleas in Hale v. Burns, 44 Misc. 1, 89 N. Y. Supp. 711 (Sup. Ct. 1904), and Hertz v. McDermott, 45 Misc. 28, 90 N. Y. Supp. 803 (Sup. Ct. 1904).
  \item \textsuperscript{22} While a declaratory judgment might unmistakably establish the legality of complainants' conduct without hampering police activity by threat of contempt proceedings, the reluctance of courts to extend this procedure to criminal cases, coupled with the delay involved in obtaining it, renders such a method of doubtful value for widespread general use in these situations. See Comment (1937) 46 Yale L. J. 855.
\end{itemize}
Circuit Court reversed, holding that while the taxpayer realized no income when he first received the rights, nevertheless, upon exercising them he obtained a taxable property dividend in the form of a purchase of corporate assets for less than their actual value.\(^5\)

It is unquestioned that a distribution by one corporation of stock in another and different corporation constitutes a dividend in property which is immediately taxable realized income in the shareholder's hands.\(^6\) Likewise, it is generally accepted that when the corporation, instead of distributing such stock outright, issues to its shareholders valuable rights to buy it at an advantageous price, those shareholders thereby gain a profit which at some point or another is subject to tax.\(^7\) The controversy centers upon the exact time of attachment of liability for the income tax, since there are, in all, five points of time any one of which might conceivably be selected for this purpose: first, when the corporation declares the rights; second, when the stockholder must be of record on the corporate books to be entitled to the rights; third, when the certificates evidencing the rights are first received; fourth, when the right is either sold or exercised; and fifth, when the stock acquired through exercise of the right is sold.

The value of the right at the time of declaration might be employed as the measure of the tax provided the issue is listed on an exchange and trading in the rights begins at the moment of declaration on a "when, as, and if issued" basis.\(^8\) Although this trading amounts in essence to short selling, it constitutes a means for realizing cash.\(^9\) However, the stockholder has no enforceable claim to ownership of the rights until the record date set by the


\(^8\) The value of the rights when actually issued is always a matter of speculation which attracts professional operators who are willing to buy or sell against future delivery at the date of issue. For a discussion of the speculator's interest in announced but as yet unissued stock rights, consult Dewing, CORPORATION FINANCE (rev. ed. 1931) 315.

\(^9\) To realize cash at this time, the taxpayer would have to put up security to assure the delivery of the certificate at the date set. NEW YORK STOCK EXCHANGE DIRECTORY AND GUIDE (1935) G-97.
resolution. At that time, the second possible point of taxation, the position of the stockholder entitled to the rights is comparable to the status of stockholder of record in a corporation which has declared a cash dividend payable at a time subsequent to the record date. Cash dividends are not taxable at this stage since they are not yet completely at the disposal of the taxpayer. But although a dividend in rights is at this stage more easily disposed of than a cash dividend since rights are traded in before received while cash dividends are not, nevertheless the rightholder cannot fully enjoy his property until he has received the certificate evidencing his right. Without it, he cannot sell the right unless he supplies a minimum ten point margin to assure delivery of the certificate; he cannot exercise the right without surrendering the certificate; nor can he pledge it as collateral for a loan unless the certificate is available. Consequently, taxation of the rights as income before the certificates are obtained would amount to an unwarranted extension of the doctrine of constructive receipt.

Of the three remaining alternatives, the last is not deserving of consideration, since it is inconsistent with the accepted principle that a dividend, to be recognized for taxation, need not be in cash, but may be in the form of property exchangeable for cash. Moreover, failure to tax the rights, or stock purchased through their surrender, until sold or otherwise disposed of, would unduly delay the collection of Federal revenue, cause loss in revenue in those
instances where rightholders allow their privilege to lapse, and force the government to surrender to the taxpayer the choice of when, if ever, the tax is to attach. In the principal case, the court's decision that delivery of the certificates representing the rights did not amount to a dividend prior to sale or exercise, apparently overlooked the common attributes of the rights and the stock acquired through them. Both are dealt in upon the Stock Exchange in the same manner. They cannot be distinguished either as to marketability or ease of valuation. The court sought to make a distinction, however, on the theory that the rights could not be a dividend because their issue did not effect any depletion in the corporate assets. Yet the moment the shareholder receives his irrevocable privilege of buying the stock offered, the corporate assets are reduced by the difference between the market value of that stock and the price at which the corporation has agreed to sell it.

Fairness to the taxpayer requires that the rights in question should not be taxed before they come into the taxpayer's complete control, that is, at the moment when the certificates are first delivered to him. And over a period of time, taxation at this point should produce greater and more certain revenue than if the authorities wait until the sale of the rights, their exercise, or the subsequent disposal of the stock acquired. The possibility of loss through lapse of rights would thus be avoided. Moreover, the loss of revenue that would seemingly accompany a rapid rise in the value of the rights after receipt would in fact be minimized by capital gains taxes upon the profit-taking sales of the rights or the stock. If the value of the rights decline, the government will have obtained the maximum tax upon the dividend, and at the same time, any subsequent loss suffered upon sale of the rights or the stock would be deductible only to a limited degree against ordinary income.

20. Cf. Bull v. United States, 296 U. S. 247, 259 (1935). An example of lost revenue may be found in Helvering v. Bartlett, 71 F. (2d) 598 (C. C. A. 4th, 1934), holding that no tax could be levied until either rights or the stock acquired were disposed of. The taxpayer received valuable rights, exercised them, and retained the stock acquired until its value had shrunk to less than the option price.


24. (1936) 31 Ill. L. Rev. 537, 540, n. 11.


26. Losses from sales or exchanges of capital assets will be allowed only to the extent of $2,000 plus the gains from such sales or exchanges. 49 Stat. 1692, 26 U. S. C. A. § 101d (Supp. 1936); 372 C. C. H. 1937 Fed. Tax Serv. §§862, 867.
A corporation had distributed its assets among its stockholders and dissolved, the Commissioner of Internal Revenue determined a deficiency in its tax returns. Pursuant to Section 280 of the Revenue Act of 1926, he instituted summary proceedings directly against one of the stockholders, collecting the entire amount of the deficiency from him. This stockholder then filed a bill in equity in a federal district court to compel contribution from the other distributees, but the court dismissed his complaint. The Circuit Court of Appeals for the Third Circuit affirmed the dismissal decree on two grounds: first, that there must be some prior determination of the defendants' liability for the tax before the plaintiff can maintain his contribution suit, and second, that the plaintiff is really attempting to impose a tax assessment in a manner not authorized by Congress.

The initial difficulty encountered by the plaintiff in effecting an apportionment of his burden was the impossibility of joining the other stockholders in the original proceeding for the collection of the tax. Section 280 was drafted by Congress to promote an efficient system of tax collection, and it has been held that, while the government may proceed against any one of several transferees of a defaulting transferor, the transferee singled out by the Commissioner is not entitled to delay the proceedings by impeding the others. Nor does it seem that the plaintiff would have fared better in his independent suit if he had argued in terms of subrogation to the government's right. One who has paid more than his pro rata share of a common obligation will ordinarily be subrogated to the rights which the creditor formerly held against the other obligors. But this remedy might be denied the plaintiff in the instant case on the ground that if the right to collect a

*Phillips-Jones Corporation v. Parmley, 88 F. (2d) 958 (C. C. A. 3d, 1937).*


2. This was less than the value of the assets that he had received in the distribution. The Supreme Court upheld this assessment in Phillips v. Comm'r of Int. Rev., 233 U. S. 589 (1931), 6 St. John's L. Rev. 176.


5. The government was formerly limited to an action at law or a bill in equity against the transferees in order to collect the tax debts of the individual or corporation that had distributed all its assets. Section 280 provided a summary procedure for achieving the same result. See Phillips v. Comm'r of Int. Rev., 233 U. S. 589, 592 (1931); 5 PAUL AND MERTENS, FEDERAL INCOME TAXATION (1934) §46.03.

6. Phillips v. Comm'r of Int. Rev., 233 U. S. 589, 603-604 (1931); see 5 PAUL AND MERTENS, FEDERAL INCOME TAXATION (1934) 315, n. 32. The devices available to the transferee for equalizing the burden when the proceedings against him are in equity are indicated in Hatch v. Dana, 101 U. S. 205 at 214 (1879). See also Grand Rapids National Bank, 15 B. T. A. 1166, 1182 (1929).

7. In this situation, the paying obligor is regarded as being primarily liable for his proportionate share of the obligation and secondarily liable for the others' shares. 5 Pomeroy's EQUITY JURISPRUDENCE (2d ed. 1918) 5183, 5189.
tax is dependent upon an assessment or a judgment in a suit brought by
the Commissioner, as the court indicates, these prerequisites might well be
considered procedural governmental prerogatives of the type to which subro-
gation does not apply. 8

The only other alternative is the one which the plaintiff actually used—an
action for contribution. This remedy seems particularly well suited to the
facts of the instant case. The elements necessary for the maintenance of such
an action are a class of parties subject to a common burden or obligation and
a compulsory—or, at least, a non-officious—discharge by one of the group of
more than his proportionate share.9 This latter requirement is clearly satis-
fied in the instant case by the proceeding under Section 280; and the neces-
sary common burden is supplied by the liability which springs from the well
settled rule that creditors may pursue the assets of a dissolved corporation
into the hands of any of its stockholder distributees,10 and by the threat of an
action based upon that liability to which all of the stockholders were equally
subject.11 No determination of the defendant’s liability by assessment or
judgment had been obtained by the government, but it is hard to understand
the court’s requirement of such a determination. A common judgment is
seldom required in cases of contribution between joint tort-feasors12 and is
never considered essential when liability is imposed upon stockholders by
statute13 or because of unpaid stock subscriptions.14 The second ground for
the court’s decision is even less persuasive. The right to contribution arises
from the relationship between the members of a class and is based upon the
broad doctrine that “equality is equity between persons standing in the same
situation”;15 it is a direct right of the co-obligor who has been forced to pay
the debt and is not derived from any cause of action possessed by the cred-

8. (1937) 46 YALE L. J. 1242. There is authority available, however, to the effect
that there is nothing sacred about a tax assessment as such, that it is merely the deter-
mination of the amount of the tax required of each individual, and that this determination
need not be made by designated government officials but may be made by the tax
statute itself. See Dollar Savings Bank v. United States, 19 Wall. 227, 240 (U. S. 1873);


10. 16 FLETCHER, CYCLOPEDIA CORPORATIONS (1931) § 8161; HOLMES, FEDERAL TAXES
(6th ed. 1925) 309.

11. See notes 1 and 5, supra. 5 PAUL AND MERTENS, FEDERAL INCOME TAXATION
(1934) §46.08.

v. McCarthy, 183 Minn. 414, 236 N. W. 766 (1931); Gregory, Tort Contribution Prac-

13. Richter v. Henningsan, 110 Cal. 530, 42 P. 1077 (1895); Wolters v. Henning-
Foster v. Posson, 105 Wis. 99, 81 N. W. 123 (1899).

14. Siegel v. Fish, 129 Ill. App. 319 (1906); Lex v. Selway Steel Corp., 203 Iowa
792, 206 N. W. 586 (1925); Putnam v. Miscohi, 189 Mass. 421, 75 N. E. 956 (1905);
(N. Y.) 318 (1817).

Thus, in terms of the instant case, the plaintiff is not seeking to enforce the government's right to assess and collect a tax but rather to enforce a duty owed directly to him by the defendant stockholders.

THE FOREIGN INJUNCTION AS A REMEDY FOR PROTECTION OF THE PRIVILEGE OF REMOVAL TO THE FEDERAL COURTS *

A Missouri beneficiary desired to enforce liability on an insurance policy written by a company organized in Connecticut and doing business in Missouri. In order to prevent the insurer from removing the action to a federal court because of diversity of citizenship, the beneficiary assigned the claim to a resident of Connecticut. The assignee, unable to sue in the Connecticut courts because of a Connecticut statute forbidding suit by an assignee not the bona fide owner of the chose in action,1 instituted suit in his own name in a Missouri state court. When the insurer petitioned for removal under the diversity clause, the federal district court, refusing to inquire into the motive behind the assignment, denied the petition because both parties to the action were Connecticut residents.2 The company then brought action in Connecticut to enjoin the assignee from further prosecution of the Missouri suit, but was denied relief on the ground that extraterritorial effect would not be given to the Connecticut statute and there was nothing unconscionable in the device employed to evade the jurisdiction of the federal court.3

To prevent the manufacture of federal jurisdiction, a Congressional enactment prohibits suits by an assignee in a federal court unless the assignor could have maintained suit there in the first instance.4 The courts have also been astute to prevent the creation of federal jurisdiction where the assignment is found colorable.5 However, the decision in the principal case illus-

---

1. See Camp v. Bostwick, 20 Ohio St. 337, 346-347 (1870). Contribution may be obtained from co-obligors even though they would have a valid defense to an action by the creditor. 5 POWELL'S EQUITY JURISPRUDENCE 5177, n. 47. Thus, contribution is, in effect, pro tanto reimbursement. But cf. (1937) 50 HARV. L. REV. 1317.


4. 24 STAT. 552 (1887), 28 U. S. C. § 41 (1) (c) (1934). However, there are two exceptions to this rule; namely, suits on foreign bills of exchange, and corporate paper payable to bearer.

5. This question has arisen in the above noted exceptions and decisions have been rendered pursuant to section 37 of the Judicial Code. 18 STAT. 470 (1875), 28 U. S. C. § 80; cf. Bullard v. City of Cisco, 290 U. S. 179 (1933). In like manner, federal courts have refused jurisdiction when the complainant has fictitiously increased the ad damnum clause to meet the $3000 requisite. LeRoy v. Hartwick, 229 Fed. 857 (E. D. Ark. 1916).
trates the contrary treatment accorded a similar maneuver to avoid removal on the basis of diversity of citizenship. Because the diversity clause in the Constitution is not self-executing, and consequently the right of removal is not absolute but dependent upon statutory direction, the federal courts have relied upon the absence of statutory authorization in refusing jurisdiction of a claim assigned to avoid diversity of citizenship. As a result, the insurer's only apparent resort was to set up the defense of collusive assignment in the Missouri action. However, this defense would almost certainly fail, since Missouri is not among those few states which have a statutory prohibition against suits by an assignee not the bona fide owner of the cause of action. In this situation, the insurance company sought the possibility of a foreign injunction suit. But the Connecticut court's refusal of this remedy seems proper for there was no question of added inconvenience or expense to the insurer by reason of the choice of Missouri as the forum. And it is usually said that in the interest of comity among the states, the foreign injunction is to be employed sparingly. Moreover, the insurer, in the instant case, was not complaining of an avoidance of Connecticut jurisdiction; it was simply objecting to its inability to remove the case to a federal court subsequent to the assignment. Even if the injunction were granted, the Connecticut court would be unable to compel the insurance company to submit to its jurisdiction since the assignee, not being the bona fide owner of the chose in action within the Connecticut statute, would fail in any attempted suit there. A Connecticut suit could be brought only in the name of the Missouri assignor, and the defendant would then be in a position to remove on the ground of diversity of citizenship. Thus a foreign injunction would inevitably force the beneficiary into the federal courts and by indirection deny him an escape sanc-

6. In an analogous situation, federal courts have refused jurisdiction where a foreign administrator was appointed solely to obviate diversity of citizenship. Mecom v. Fitzimmons Drilling Co., 284 U. S. 183 (1931), (1932) 41 YALE L. J. 639.


10. Recent decisions indicate the unavailability of this defense in Missouri and elsewhere. Schepman v. Mutual Benefit Health and Accident Ass'n, 104 S. W. (2d) 777 (Mo. 1937); Hayday v. Hammermill Paper Co., 176 Minn. 315, 223 N. W. 614 (1929).

11. CONN. GEN. STAT. (1930) § 5531; ILL. ANN. STAT. (Smith-Hurd, 1936) c. 110, § 146. Two other states have statutes which, though worded differently, lend themselves to a similar interpretation. See MD. ANN. CODE (Bagby, 1924) art. 8, § 1; TENN. CODE ANN. (Williams, 1934) § 8619.

12. Carson v. Dunham, 149 Mass. 52, 20 N. E. 312 (1889) (refusal of a foreign injunction; complainants contended that the equity defendant was suing abroad by virtue of a colorable assignment). For a general discussion of the scope of the foreign injunction, see Comment (1930) 39 YALE L. J. 719.


14. One purpose of the foreign injunction is to protect the jurisdiction of the court of issuance. American Express Co. v. Fox, 135 Tenn. 489, 187 S. W. 1117 (1916).

tioned both by a previous federal court decision\textsuperscript{16} and by absence of federal statutory provision for removal where there has been a collusive assignment.

The insurance company might possibly have escaped the jurisdiction of the Missouri court by another device. Immediately upon ascertaining a dispute with the beneficiary, it could have gone into the federal district court in Missouri and asked for a declaratory judgment of its liability on the policy which would have been res judicata in any subsequent suit by the beneficiary.\textsuperscript{17} However, such a request would, in all probability, have been refused. Although availability of another remedy will not alone preclude a declaration, the imminence of suit on the policy by the beneficiary, and the adequate opportunity for the company to present its case as a defense to that suit wherein the parties would be in their normal position would properly defeat the remedy.\textsuperscript{18} The Federal Declaratory Judgment Act was not intended to allow foreign corporations to anticipate an adjudication of the validity of a defense, to prevent the real plaintiff from choosing his forum, or to provide a facile means of defeating the jurisdiction of the state courts.\textsuperscript{19}

The utility of the assignment as a device for circumventing federal jurisdiction can be destroyed, however, by either a federal statute to complement the existing legislation which prevents creation of jurisdiction by such assignments,\textsuperscript{20} or by state statutes barring suit by an assignee who is not the bona fide owner of the chose in action.\textsuperscript{21} And if there is any justification for diversity of citizenship as a basis for federal jurisdiction, it would seem to follow that a device which defeats the diversity rule as easily as the collusive assignment in the instant case should not be accorded its intended subversive effect. On the other hand, the decision in the instant case may be supported on the ground that it sanctions a device which, if widely employed, may alleviate the chronic over-crowded condition of the dockets in the federal courts.\textsuperscript{22}

\begin{itemize}
\item \textsuperscript{16} Bernblum v. Travelers' Ins. Co., 9 F. Supp. 34 (W. D. Mo. 1934).
\item \textsuperscript{17} Washington-Detroit Theater Co. v. Moore, 249 Mich. 673, 229 N. W. 618 (1930); Borchard, \textit{Declaratory Judgments} (1934) 172.
\item \textsuperscript{19} Cf. Associated Indemnity Corp. v. Manning, 16 F. Supp. 430 (W. D. Wash. 1936); Western Casualty and Surety Co. v. Beverforden, 17 F. Supp. 928 (W. D. Mo. 1936); Beatty v. Chicago, B. & Q. R. R., 49 Wyo. 22, 52 Pac. (2d) 404 (1935); Borchard, \textit{Declaratory Judgments} 110, 178.
\item \textsuperscript{20} In contrast to their policy of regarding as immaterial the colorable nature of an assignment made to defeat diversity jurisdiction, the federal courts have taken jurisdiction where parties defendant have been fraudulently joined in a tort action for the same end. Wecker v. National Enameling and Stamping Co., 204 U. S. 176 (1907); cf. Morris v. E. I. Dupont de Nemours and Co., 68 F. (2d) 783 (C. C. A. 8th, 1934). However, this latter device is more objectionable than a collusive assignment for it subjects to litigation another party who otherwise would not have been introduced.
\item \textsuperscript{21} Only a very few states have such legislation at the present time; see note 11, \textit{supra}.
\item \textsuperscript{22} For statistical analyses of the relationship of the number of diversity cases occurring in the federal courts to the need for legislation abolishing this ground of removal, see Yntema, \textit{The Jurisdiction of the Federal Courts in Controversies Between}
But regardless whether this result is desirable, the tactical maneuvering in the instant case illustrates the objectionable practices encouraged by an anomalous judicial system composed of two sets of courts rendering opposite decisions on identical substantive issues—an anomaly created by the federal courts' assertion of power to declare the state law independently of the decisions of the state courts.23

Ratification of Child Labor Amendment by a State Legislature After Previous Rejection *

The Child Labor Amendment was proposed by Congress on June 2, 1924, and by the end of 1932 had been ratified by six states and rejected by thirty-six. The total of ratifying states has now increased to twenty-eight, twenty of which had at one time rejected it. Spurred on by these recent legislative victories, the foes of the amendment have twice sought to block it in the courts. Thus immediately after the Kentucky and Kansas Legislatures purported to ratify the proposal early in 1937, several members of each legislature filed suit for a declaration as to the validity of the ratification.1 The Court of Appeals of Kentucky declared the resolution of ratification void, holding that rejection of the amendment by the Kentucky legislature in 1926 precluded a subsequent ratification by that state unless the proposal was resubmitted by Congress.2 The court further stated that, even if Kentucky had not previously rejected the amendment, that state would have been barred from ratifying since affirmative rejection of the amendment by more than one-fourth of the states made subsequent adoption impossible. The court thought finally that the amendment had been pending for too long a period to be still subject to ratification. The Kansas Supreme Court came to an exactly contrary conclusion.3

The assertion in the Kentucky case that once a state has rejected an amendment it can no longer ratify it rests upon questionable ground, for, although the Supreme Court of the United States has never spoken on the subject, constitutional commentators unanimously maintain a contrary position.4 Their argument proceeds upon the basis that the power of ratification is one

---

NOTES

derived from the federal constitution and is a power to ratify, not a power to reject.\(^5\) Rejection is thus a negative step which is equivalent to complete inaction, and the power to ratify continues until it is affirmatively exercised.\(^6\) While such subtle constitutional interpretation is by no means conclusive, the argument gains support from practice, for states which had rejected the Thirteenth, Fourteenth, and Fifteenth Amendments but had subsequently reversed their position were included in the list of ratifying states and constituted a part of the requisite three-fourths majority.\(^7\) The doctrine that a uniform and long continued interpretation of a question by the executive and legislative departments will not be overthrown by the judiciary unless the construction is clearly contrary to the Constitution\(^8\) may thus be invoked. And if it is conceded that a previous rejection does not operate to deprive a state of the power of ratification, it is difficult to see how the rejection by thirteen states, possessed of similar power to ratify subsequently, can so operate.\(^9\)

There is somewhat more substance to the Kentucky court's holding that the ratification was void because more than a reasonable time has elapsed since the submission of the amendment by Congress. In deciding in *Dillon v. Gloss*\(^10\) that Congress had power to insert a clause in the Eighteenth Amendment limiting the period of ratification to seven years and that such a restriction was reasonable, the Supreme Court indicated that the length of the ratification process must be restricted even in the absence of limitation clauses. The court merely held, however, that seven years was a reasonable time; it did not hold that seven years was the only reasonable time or that more than seven years constituted an unreasonable time.\(^11\) And any general language employed by the court must be viewed in the light of the amendments which at that time remained unratified. There were four of these, two of which

---

5. Dodd, *Amending the Constitution* (1921) 30 *Yale L. J.* 321, 347. The same rules of construction should undoubtedly apply to the case of ratification by conventions as to that of ratification by state legislatures.

6. When the power of ratification is exercised, the commentators say that the act is irrevocable. Dodd, *supra* note 4, at 346, 340.

7. In the case of the Fifteenth Amendment the states involved were Ohio and New Jersey. The former was included in the list of ratifying states and constituted part of the majority necessary for adoption. Ames, *Proposed Amendments to the Constitution* (1897) (Ann. Rep. Am. Hist. Ass'n, 1896, vol. 2) 300. In the cases of the other amendments there were complicating factors which detract from the force of the argument. See Brief for Appellants, pp. 22-28, Wise *et al.* v. Chandler *et al.*, Ky. Court of Appeals, Oct. 1, 1937.


9. The Wadsworth-Garrett Joint Resolution [Sen. J. R. No. 8; House J. R. No. 15, 69th Cong. 1st Sess. (1926)] proposed an amendment to read as follows: “Provided . . . that until three fourths of the states have ratified or more than one fourth of the states have rejected or defeated a proposed amendment, any state may change its vote.” This proposal died in committee.

10. 256 U.S. 368 (1921).

11. Exclusive of the “Bill of Rights” the longest period required for the ratification of an amendment has been three years and six months, the shortest has been nine months, and the average time required has been one year and six months.
were submitted in 1789, one in 1810, and one in 1861; the Child Labor Amendment had not yet been proposed. Equally unconvincing is the contention advanced by the Kentucky court that the action of Congress in attaching a seven year limitation to several amendments indicated the opinion of that body that seven years was the maximum reasonable time. Since Congress used the limitation in the Eighteenth, Twentieth, and Twenty-first Amendments but not in the Nineteenth and Child Labor Amendments, a more cogent argument could be made, that in the latter cases it had no predilections on the matter at all. The dictum in *Dillon v. Gloss* that any alteration in the Constitution should be made while the sentiment for the amendment could be fairly supposed to exist furnishes no conclusive guide to the instant situation. The friends of the proposed amendment point to the recent revival of interest in the problem; its enemies point to the period of complete inaction between 1927 and 1933 and maintain that the interest and sentiment must be continuing—that a renaissance is of no avail.

The recent controversy over the Supreme Court would probably make that tribunal extremely reluctant to declare the ratifications in the principal cases invalid. It is probable, however, that the court will avoid embarrassment, for precedent enables it to declare that the petitioners have no standing to challenge the validity of the resolutions. While the Supreme Court has determined the validity of already adopted amendments in cases where the legality of acts already committed by the parties depended upon that determination, the court has refused to enjoin the Secretary of State from pro-

12. After the "salary grab" act of 1873, Ohio ratified one of these proposals, which deal with the compensation of members of Congress. The validity of the action was not litigated. *Jameson, Constitutional Conventions* (4th ed. 1887) § 586.

13. 256 U. S. 374. This view was originally espoused by *Jameson, Constitutional Conventions* (4th ed. 1887) § 585.

14. During these years only one state, Colorado, took any action at all on the proposed amendment.


In the Kentucky case any objection to the sufficiency of the plaintiff's interest was waived by failure to demur specially to the petition. *Board of Park Comm'rs v. Speed*, 215 Ky. 319, 285 S. W. 212 (1926). And in Kentucky the court may disregard the question of the sufficiency of the plaintiff's interest in suit "where the importance of the controversy to the State requires a decision upon the merits". *Miller v. Johnson*, 92 Ky. 589, 18 S. W. 522 (1892).

In the Kansas case the court held that since the State had been made a party to the proceedings, the right of the parties to maintain the action was beyond question. *State v. Public Service Comm.*, 135 Kan. 491, 11 P. (2d) 999 (1932).

claiming the adoption of an amendment on the ground that the plaintiff lacked sufficient interest to give him standing in court.\textsuperscript{18} And in a suit to enjoin a governor of a state from submitting a proposed amendment to a state legislature,\textsuperscript{19} a lower federal court denied relief on the ground that the plaintiff failed to show even impending injury since there was no assurance that the amendment would ever be adopted—reasoning which could be applied to the present situation with telling effect. If the court refuses to entertain a suit before adoption, any attempt to attack an adopted amendment on the ground that some of the resolutions of ratification were inoperative would seem to be precluded by the statement in Leser v. Garnett\textsuperscript{20} that duly authenticated notice is conclusive on the Secretary of State, and when certified to by his proclamation, is conclusive on the courts.\textsuperscript{21} The desirability of refusing to allow an attack on an amendment before its adoption depends ultimately on whether it is thought, on the one hand, that the procedural difficulties in framing constitutional questions should be minimized in the interests of efficiency and certainty,\textsuperscript{22} or, on the other, that constitutional decisions should be few in number, postponed as long as possible, and rendered only if they can not be avoided.\textsuperscript{23}

\begin{thebibliography}{9}
\bibitem{} U. S. 716 (1931). These cases overruled a dictum in Luther v. Borden, 7 How. 1 (U. S. 1849) that the issue of the validity of an amendment was political.
\bibitem{} \textsuperscript{18} Fairchild v. Hughes, 258 U. S. 126 (1922).
\bibitem{} \textsuperscript{19} State of Ohio v. Cox, 257 Fed. 334 (S. D. Ohio 1919).
\bibitem{} \textsuperscript{20} 258 U. S. 130 (1922); \textit{cf.} United States v. Colby, 265 Fed. 998 (App. D. C. 1920), writ of error dismissed, 257 U. S. 619 (once Secretary of State has performed ministerial duty of proclaiming adoption of amendment no basis for relief remains).
\bibitem{} \textsuperscript{21} The petitioners in the Kentucky case cited this statement as the reason for their attempt to enjoin the governor \textit{before} he could send in the notice of ratification. The restraining order was issued, but summons was not served until after the notice was in the mails. Brief for Appellants, pp. 2, 13, Wise \textit{et al.} v. Chandler \textit{et al.}, Ky. Court of Appeals, Oct. 1, 1937. The court held that this circumstance did not deprive the court of the jurisdiction already attached. McHugh v. Louisville Bridge Co., 23 Ky. Law Rep. 1546, 65 S. W. 456 (1901); Saint Lawrence and S. F. R. R. v. Cross, 171 Fed. 480 (1909).
\bibitem{} \textsuperscript{22} Fraenkel, Constitutional Issues in the Supreme Court (1936) 85 U. of Pa. L. Rev. 27, 78; Comment (1932) 41 Yale L. J. 1195.
\bibitem{} \textsuperscript{23} Frankfurter, A Note on Advisory Opinions (1924) 37 Harv. L. Rev. 1002; Comment (1935) 45 Yale L. J. 649, 670; Comment (1936) 46 Yale L. J. 255, 268 \textit{et seq.}