NOTES

LESSEE OPERATION OF REJECTED LINES UNDER THE RAILROAD REORGANIZATION ACT*

Section 77(c)(6) of the Railroad Reorganization Act of 1935¹ deals with the basic problems regarding physical operation of leased railroad lines during the bankruptcy of the lessee. By the terms of that Section bankruptcy trustees are permitted to adopt or reject existing leases, and the obligation of future operation in case of rejection is imposed upon the lessor, unless he can demonstrate to the bankruptcy court inability to undertake the duty assigned him. In that case the former lessee, through its trustees, is required to maintain operation "on or for the account of the lessor."³

The extent of the responsibilities of the lessee’s estate both before and after decision whether to adopt or reject the lease was, however, among the questions remaining unsettled³ prior to two recent Supreme Court decisions. These decisions have, in both situations, freed the lessee’s estate from all obligations over and beyond bare physical operation. In Palmer v. Webster & Atlas National Bank⁴ the Court, reversing the Second Circuit Court of Appeals⁵ held that obligations imposed by Massachusetts law upon the former lessor (Old Colony Railway) to pay the taxes and bonded indebtedness of requisite terminal facilities did not shift to the trustees of the lessee (New Haven Railroad) operating the rejected lines for the account of the lessor which was itself unable to perform. In Philadelphia Co. v. Dipple⁶ the bankrupt lessee’s estate was relieved of paying taxes owed by varying lessors

²At least until abandonment is authorized by the Interstate Commerce Commission under the terms of the Interstate Commerce Act, 24 STAT. 379 (1887), amended, 41 STAT. 477 (1920), 49 U. S. C. § 1(18) (1934). If continued operation at a loss reaches the point of confiscation, abandonment might be judicially authorized under the Fifth Amendment to the Constitution. Cf. New Haven Bankruptcy Proceedings, Memo of Decision on Order No. 398 (D. Conn. 1939) Court Record, Vol. X, p. 6159.
⁴61 Sup. Ct. 542 (U. S. 1941).
⁶61 Sup. Ct. 538 (U. S. 1941), aff'g sub. nom. In re Reorganization of Pittsburgh Railways, 111 F. (2d) 932 (C. C. A. 3d, 1940). This case, involving as it does street railways, was strictly speaking under Section 77B of the Bankruptcy Act, 48 STAT. 912 (1934), which contains no equivalent section to Section 77(c)(6). For the purposes of this note, however, the distinction is immaterial and will be ignored.
until after election to adopt or reject the leases, where no showing could
be made that the income from continued operation of the leased property
was greater than expenses incurred therein. In both cases the Court denied
the applicability of Sections 124- and 124(a) of Title 28 of the United
States Code, which require general adherence to state laws and payment of state
taxes by receivers and trustees in bankruptcy.

Section 77(c)(6) is the end product of a legislative effort to strike a
balance between the equitable right of trustees to reject unprofitable
leases and the necessity of insuring continued rail service in the absence of per-
mission by the ICC to cease operation. Until 1935 lessees were apparently
expected to secure the approval of the ICC before relinquishment
in favor of the lessor, as well as before any physical abandonment of
service.

Moreover, the duty of the lessor to assume management of lines
covered by a rejected lease was not firmly
established. The original draft
of the Section required Commission approval only if complete abandonment
of service were contemplated, but omitted to declare the status of the leased
line upon rejection. In committee the primary duty of running the line after
rejection was placed upon the lessor; but, as it was feared that the
lessor might not be able to assume the burden, the original lessee was required
to continue actual operation of the line in case the latter should default upon
its duty to assume operation. The obligation of the lessee to resume operation "for the account" of any lessor
unable to operate the line in accordance with its lease, was added as a committee amendment, "in the interest of the lessor who is depending on his contact with the
railroad."

The Act of 1933 failed to mention the problem of rejection and subsequent
operation of leases. 47 Stat. 174 (1933). The present section, as first suggested in
the Report of the Federal Coordinator of Railroad Leases and Reorganization, 1st
Sess. (1933) 23. The Bill introduced in Congress, however, eliminated the necessity

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Transportation Act of 1920, does not fall upon lesions which have not operated their
lines during the course of a lease. See Friendly, Determining of Railroad Reorganization Act (1939) 49 U.S.C.
§ 1(18) (1934). See Friendly, Amending of Railroad Leases and Reorganization Act (1936) 36 Col. L. Rev. 27, 70


3. Chicago & A.R. R. v. Toledo, P. & W. R., 146 I.C.C. 171 (1928). This was
only true subsequent to the Transportation Act of 1920, 41 Stat. 477 (1920), 49 U.S.C.
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operation of leases. 47 Stat. 174 (1933). The present section, as first suggested in
the Report of the Federal Coordinator of Railroad Leases and Reorganization, 1st
Sess. (1933) 23. The Bill introduced in Congress, however, eliminated the necessity
unprofitable lease obligations or in the interests of either the lessor or its creditors, but solely because of a public demand for uninterrupted utility service. Profits from post-rejection operation belong to the lessor, and operating deficits are charged against him. Because, however, the sole or major source of the lessor's income will frequently have been rent from the lease, the lessee's right to recover operating losses will often be unenforceable except by taking over the lessor's line through enforcement of its prior lien or possibly by way of "set-off" in a general reorganization compromise. It appears equitable, therefore, to charge no expenses against the lessee which are not required to maintain actual railway service. Indispensable costs of operation include neither guarantees of the lessor to pay bond obligations of subsidiary corporations, nor taxes assessed against the property of the former lessor. Satisfactory railroad operation can be maintained while holding such payments in abeyance.

The Circuit Court of Appeals in the *Webster & Atlas* case, however, derived authority to order payment of the tax obligations of the lessor not from the terms of Section 77(c)(6), but from Section 124(a) of Title 28 of the United States Code which provides that

"Any receiver, . . . trustee, or other officers or agents appointed by any United States Court who is authorized by said court to conduct any business, . . . shall . . . be subject to all State and local taxes applicable to such business the same as if such business were conducted by an individual or corporation . . . ."

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14. Set-off, in a technical sense, may be unavailable, since the cross claims between lessor and lessee differ in degree of security. See *Meck*, *supra* note 10, at 1401, n. 102.


16. 111 F. (2d) 215 (C. C. A. 2d, 1940). The Circuit Court specifically declined to pass on the issue of whether Section 77(c)(6), by its own terms, obligated payments as ordered. It (and the Supreme Court, *semble*) also declined to pass on whether the terms of the Massachusetts statutes, Mass. Acts 1896, c. 516 §§ 1–8; Mass. Acts 1921, c. 363, specifically obligated the New Haven to pay the taxes or bond interest. The District Court held that they did not. New Haven Bankruptcy Proceedings, Memo of Decision on Order No. 398 (D. Conn., 1939) Court Record, Vol. X, p. 6159. If the Massachusetts statute did obligate the New Haven, the Bankruptcy Court would have been bound to follow it. See *Warren v. Palmer*, 310 U. S. 132 (1940).

This section had been applied to trustees of bankrupt railroads, but prior to the decision of the Circuit Court this, as well as other statutes of a similar nature, had been limited to trustee management of the bankrupt's own property, and certain dicta have suggested that the obligations arising under this Section might be avoided by rejection of the bankrupt's lease upon the taxed property, or by other limitations of the bankrupt's interest in such property.

Moreover, examination of the legislative history of Section 124(a) attests to a possible different purpose for its enactment. The bill was the direct result of a lower federal court holding that the receiver of an oil distributing company was not subject to a state sales tax otherwise applicable to the business. Section 124(a) was thereupon rushed into law to reverse this decision, as no good reason was observed why "a receiver should be permitted to operate under such an advantage as against his competitors not in receivership, and the States and local governments deprived of this revenue." There is no indication that anything was contemplated beyond making trustees of bankrupt concerns liable for the taxes assessed against the property or business of the bankrupt. In the Webster & Atlas case, however, there are separate bankruptcy trustees charged with maintenance of the business of the lessor Old Colony, and the New Haven trustees are mere temporary operating agents. Non-payment of the taxes cannot possibly result in any unfair advantage to the New Haven over its competitors;


19. Section 104(a) of the Bankruptcy Act providing for priority of payment legally due and owing by the bankrupt to the United States, state, county, district, or municipality. 44 Stat. 666 (1926), 11 U.S.C. § 104(a) (1934).


23. H. R. Rep. No. 1138, 73d Cong., 2d Sess. (1934). "The purpose of this bill is to subject businesses conducted under receivership in Federal Courts to state and local taxation, the same as if such businesses were being conducted by private individuals or corporations." Ibid. (italics supplied).

24. In the case of the Old Colony they happen to be the same persons as the trustees of the New Haven but there are two separate trusteeships. The Boston & Providence R. R., a sub-lessor of the New Haven also in receivership, has a separate group of trustees.
nor does it necessarily deprive the state of revenue, as would be the case should the New Haven trustees be relieved of its own obligations, since the primary obligation of the Old Colony estate remains unimpaired.25

To impose liability on the New Haven trustees for the obligation of the Old Colony to pay interest on the bonds of Boston Terminal, the Circuit Court of Appeals in the Webster & Atlas case called upon the older Section 124 which purports to subject the management of federal reorganizations to the mandates of valid state laws.26 Unlike the narrower wording of Section 124(a) the phrase “receivers or managers in possession of any property” in Section 124 seems to describe the New Haven operation of the Old Colony trackage.27 It is undisputed that the provision requires lessee's trustees to abide by local safety laws and state police regulations relating to the physical operation of the line,28 and the Section has been cited as authority for disallowing partial abandonment of railway service without securing permission from the state authorities.29

These various mandates of Section 124, however, relate to how the trustees shall do what they are otherwise required to do by the provisions of Section 77(c)(6) of the Bankruptcy Act. If they affect or increase the expense of such activities they do so only incidentally.30 The Circuit Court decision in the Webster & Atlas case went beyond this, and used Section 124 to force payment by the lessee's estate of statutory debts of the lessor non-essential to the operation required by Section 77(c)(6), a positive application of Section 124 apparently not within the contemplation of Congress. Forcing the lessee's estate to assume such debts of the lessor, against only a doubtful claim for reimbursement, would render operation “for the account of the lessor” as provided by Section 77(c)(6) almost meaningless.31 Moreover, to give a state or its citizens an immediate claim against the lessee's estate for all statutory debts of a lessor would grant such claims unnecessary preferences over the claims of direct creditors of the lessee, and tend to make the rejection of unprofitable leases largely useless.

25. But see page 1260 infra.
27. It has been well established that a railroad's trustees under §77 are included within the class. Converse v. Massachusetts, 101 F. (2d) 48 (C. C. A. 2d, 1939), aff'd sub nom. Palmer v. Massachusetts, 308 U. S. 79 (1939).
30. This is recognized, in effect, by the Circuit Court in the Webster & Atlas case. It admits that "Section 124 may not require compliance with all state laws . . ." and that in the decisions in which it has been applied compliance "in no way interferes with the federal . . . bankruptcy powers upon which the reorganization of railroads is based." 111 F. (2d) 215, 220 (C. C. A. 2d, 1940).
31. The Supreme Court posed, as a horrible example, the question of "valid" state laws requiring a debtor to pay all his debts, which if §124 should be applied as suggested would clearly make operation "for the account of the lessor" completely fictional. Palmer v. Webster & Atlas Nat. Bank, 61 Sup. Ct. 542 (U. S. 1941).
The problems raised by Philadelphia Company v. Dippe differ from those presented by the New Haven bankruptcy case in that, in the former situation, the trustees of the bankrupt Pittsburgh Railways Company had not yet elected to adopt or reject the leases against which the challenged taxes were assessed. Since the entire railway system of the lessee was run as a unit with no attempt to allocate costs or income among the leases, it was, at the time of lessee's application to the bankruptcy court for instructions on payment of taxes, impossible to tell whether any or all of the leases were earning profits over and beyond their operating expenses, or whether they would be eventually adopted or rejected. Under these circumstances the court refused to order payment on the ground that such taxes might prove to be unrecoverable overpayments: should the leases be subsequently rejected, the "reasonable" sum charged for "use and occupation" during the period before rejection might be less than the amount already paid in taxes.

While the Bankruptcy Act contains no direct reference to operation by the lessee prior to rejection, it is now settled law that leases of the bankrupt are not automatically adopted upon the appointment of the trustee, but that the trustee is entitled to a reasonable period of time in which to decide whether to adopt or reject. If he elects to adopt a lease, the adoption relates back to the beginning of the bankruptcy, and operation previous to adoption will be considered to have been in the interest of the lessee and at the contract rental. If, on the other hand, he rejects the lease, operation during the trial period will have been for the interest of the lessor, and the bankrupt estate will be liable only for payment of a reasonable sum for the use of the leased property.

Under the circumstances, assuming the inapplicability of Section 124(a), it would seem that the opinion of the Supreme Court was sound. If the leases are ultimately adopted, the trustee for the Pittsburgh Company will be obligated to pay the taxes as part of the rent claims owed to the underlying lessors, and no party at interest will suffer except from slight delay in payment. If the leases are rejected the tax burden will fall squarely upon the lessors, and lessee's trustees will not have to sue the presumably insolvent

33. Ibid. At all times the lessee's trustee had sufficient funds on hand to pay the questioned taxes, whereas the underlying lessors were without liquid resources.
34. United States Trust Co. v. Wabash Ry., 150 U. S. 287 (1893); North Kansas City Bridge & R. Co. v. Leness, 82 F. (2d) 9 (C. C. A. 8th, 1936). See Meck and Masten, supra note 9, at 647.
35. Meck and Masten, supra note 9, at 651. Under §77(b), however, adoption by the trustee does not preclude a later rejection in the ultimate reorganization plan adopted. 49 Stat. 913 (1935), 11 U.S.C. §207(b) (Supp. 1938).
36. Kneeland v. American Loan & Trust Co., 136 U. S. 89 (1880); In re Connecticut Co., 95 F. (2d) 311 (C. C. A. 2d, 1938), cert. denied, 304 U. S. 571 (1938); Friendly, supra note 9, at 45. Contra: Sunflower Oil Co. v. Wilson, 142 U. S. 313 (1892). If a deficit has been incurred during the trial period before rejection, it is chargeable to the lessor. Palmer v. Palmer, 104 F. (2d) 161 (C. C. A. 2d, 1939), cert. denied, 308 U. S. 590 (1939).
lessors in an effort to recapture overpayments. Nor will the lessor's claims for breach of the lease agreements be granted unearned preferences over those of other creditors of the Pittsburgh Railways Company. Finally, stay of payments will insure against any possible holding that, the rent obligations of the lessee having been met throughout the trial period, the leases were not broken until rejection, and that operation prior to rejection was, therefore, for the account of the lessee at the full rental provided by the lease.\textsuperscript{37}

If, on the other hand, there was available evidence that operation of the underlying lines had resulted in earnings at least sufficient to cover the taxes, the court would be justified in ordering the lessee to pay the lessor's taxes, the sum to be credited towards the rent if the leases were later affirmed, or as payments for "use and occupation" if they were rejected. Payments should be postponed only if the income from the leased lines is determined to be insufficient to pay the assessed tax or, as in the present case, if there is no available evidence of the worth of the individual leases.

The Court's holding that lessees need not pay the taxes or bond interest of the lessors will delay payment of these claims and will make even their eventual settlement uncertain. Of course the primary obligation of the lessor remains and even if rejection of the lease throws the lessor into bankruptcy its trustees will, under the mandate of Section 124(a), be required, if they can, to pay all taxes assessed against the companies; but lack of cash may make tax claims uncollectible. The state will have a lien on the physical properties reverting to the lessors on rejection, as well as preferred claims against any sums recoverable for breach of the lease,\textsuperscript{38} but here again possible prior claims by the lessee for losses incurred during its enforced operation "on account" may largely nullify any recovery for the breach.\textsuperscript{39} Where the bankrupt lessor can file as an ancillary party in the lessee's bankruptcy, an equitable solution may ensue, but amendments to the Reorganization Act in 1935, have diminished such opportunities.\textsuperscript{40}

\textsuperscript{37} This anomalous result might stem from the "consent" theory that lessor in allowing lessee to operate, and thus carry out lessor's duty, agrees that the operation is on its behalf. See Meck, \textit{supra} note 10, at 1403, 1405-6; \textit{cf.} Second Avenue R. R. v. Robinson, 225 Fed. 734 (C.C.A. 2d, 1915). But \textit{cf.} Westinghouse Electric & Mfg. Co. v. Brooklyn Rapid Transit, 6 F. (2d) 547 (C.C.A. 2d, 1925).


\textsuperscript{39} In the \textit{Webster & Atlas} case losses from New Haven operation of the Old Colony line during the reorganization period ending Dec. 31, 1939 equalled $20,000,000. See New Haven Bankruptcy Proceeding, Memo of Decision on Order No. 398 (D. Conn. 1934) Court Record, Vol. X, p. 6159.

\textsuperscript{40} Under the 1935 Act only railroad corporations in which the bankrupt lessee owns a majority of the voting stock can file in the lessees proceedings. 49 STAT. 911
Although the inapplicability of Sections 124 and 124(a) may limit the chances for full recovery by state or bondholder, this fact alone does not stamp the decisions as necessarily incorrect. The aim of the Bankruptcy Act is to rehabilitate insolvent railway systems even at the risk of loss to the system's creditors, and the elimination of unprofitable lease obligations by the process of rejection is recognized as a legitimate and indeed necessary method of reorganization. The duties of the lessee under Section 77(c)(6) were imposed because of public interest in continued railway service, not as an aid to state tax collection, nor in the interests of any favored group of bondholders or stockholders. The states' tax losses insofar as they "subsidize" operation by the lessee, do so in the interest of their citizens, not the lessee. It is true that Section 124(a) was intended, in part, to assure tax payments during ordinary bankrupt operation of a business. It was not, however, intended to prevent or obstruct rejection of leases as a valid method of casting off such tax burdens. The fact that, for unrelated reasons of policy, a former lessee's estate must reassume some of the burdens incident to the rejected lease for certain limited purposes does not mean that it must reassume the tax burdens as well.

JOINER OF FOREIGN CORPORATIONS IN STOCKHOLDERS' DERIVATIVE SUITS*

In a stockholder's derivative suit, the corporation whose rights are involved and for whose benefit the action is brought is a necessary party and must be named and served as defendant. Most important of the objectives sought to be achieved by the joinder requirement are the assurance that the corporation's rights will not be litigated in its absence and the certainty that it will be bound by the judgment and prevented from suing again on the

(1935), 11 U.S.C. §205(a) (Supp. 1936). See the criticism of this limitation in Meck and Masten, supra note 9, at 653.

41. See page 1257 supra.

*Proposed amendment to New York Civil Practice Act, § 193, Sen. Int. 26, Pr. 26, Assem. Int. 47, Pr. 47 (maintenance of derivative actions by stockholders of foreign corporations without joinder of the corporation).

1. 13 Fletcher, Corporations (Perm. Ed.) §5997; see N. Y. Leg. Doc. (1941) No. 65 (1), 11. Under the federal terminology, the corporation is an indispensable party. 2 Moore, Federal Practice (1938) 2153.

2. The joinder requirement also preserves the fiction that the suit is of a dual nature, the stockholder proceeding against the corporation and the corporation against the wrongdoers. Ballantine, Manual of Corporation Law and Practice (1930) §186; Note (1934) 43 Yale L. J. 661, 662.

Another reason for requiring that the corporation be joined as defendant is that relief may run to it as a party to the action. 3 Pomeroy, Equity Jurisprudence (4th ed. 1918) §1095; 1 Morawetz, Corporations (2d ed. 1889) §257; Black v. Huggins, 2 Tenn. Ch. 780 (1877).
same cause of action. But when the corporation which refuses to bring the action cannot be found in the same jurisdiction as the individual defendants, the joinder rule constitutes an obstacle which may effectively bar a derivative suit in the state courts. To be subject to the jurisdiction of these state courts, a corporation must either do business or own property within the state, but jurisdiction based on property ownership is in rem or quasi-in rem. Thus when the individual defendants cannot be served in the state where the corporation has property or where it does business, the shareholder seeking to institute a derivative suit is unable to obtain jurisdiction over the necessary parties.

One suggestion commonly advanced to enable shareholders to avoid this dilemma is that they apply at the corporation’s domicile for the appointment of a receiver to preserve the corporate cause of action and prosecute the action abroad. It has also been suggested that the shareholder sue in the state of the corporation’s domicile for an injunction compelling it to appear in the action abroad. A third possibility is based upon the theory that constructive service on the corporation might be supported by the court’s jurisdiction over a res, the corporation’s cause of action against the wrongdoers. Still another solution to the problem is assimilation of the English practice in which the corporation is regarded as a real plaintiff in interest and may consequently be joined as an involuntary plaintiff without service of process. Yet none of these proposals is adequate to resolve the dilemma of share-
holders seeking to bring derivative suits where the corporation and individual defendants cannot be served in the same jurisdiction.

A bill recently introduced in the New York Legislature offers a novel solution to the jurisdictional impasse in derivative suits. It provides that the court may, in its discretion, permit the action to proceed without joining the corporation where it is impossible to serve both it and the individual defendants with process. In order to satisfy the objective of the necessary party rule and prevent further litigation the bill provides that the defendants may notify the corporation of the suit, and, on proof of such notice, obtain a stay for not longer than six months, during which time the corporation may either intervene or enter a general appearance. After six months from the time of notice, the corporation may no longer sue the defendants on the same cause of action.

A statute binding the corporation by a decree entered in its absence would be unconstitutional. Since the present bill is patently a procedural device to accomplish virtually the same result its validity is debatable. But in view of the notice provision, the limitation of six months does not seem unreasonable. Nor is there any constitutional precept against imposing different statutes of limitation upon non-residents. Moreover, there is convincing legislative precedent: a similar New York statute operates in interpleader cases when the non-resident claimant cannot be found.


11. "After the expiration of six months from the giving of notice to the corporation . . . no action shall be commenced by the corporation against the same defendant or defendants for the enforcement of such cause of action. The limitation . . . shall not be construed to enlarge the time within which the cause of action of the corporation would otherwise be barred." Sen. Int. 26, Pr. 26, Assem. Int. 47, Pr. 47, § 4.

12. A decree purporting to bind the corporation in personam, handed down in an action in which it had not been served or appeared of its own volition, would be unconstitutional. Conley v. Mathieson Alkali Works, 190 U. S. 406 (1903); Goldoy v. Morning News, 156 U. S. 518 (1895); St. Clair v. Cox, 106 U. S. 350 (1882); Pennoyer v. Neff, 95 U. S. 714 (1878). A binding decree would prevent the corporation from suing again in any court, since it could be pleaded as res judicata. The proposed bill also prevents the corporation from suing again in New York, at least, but accomplishes this by means of a statute of limitations instead of by attempting to give a binding effect to the resulting decree.

13. The legislature may regulate the limitation, even on existing causes of action, if a reasonable time is allowed and an adequate means of enforcing the right of action remains. Taylor, Due Process of Law (1917) 519-521. A six months' limitation has been held reasonable. Turner v. New York, 168 U. S. 90 (1897); Wheeler v. Jackson, 137 U. S. 245 (1890).


15. N. Y. Civ. Prac. Act § 51-a (Thompson, 1940 Supp.) 833-834. The non-resident claimant is given one year (after notice) in which to intervene, during which time the action may be stayed. The constitutionality of this statute has not yet been questioned. The sole adjudication involving its application is Anninger v. Hohenberg, 172 Misc. 1046, 18 N. Y. S. (2d) 499 (1939).
Although the bill would probably survive an attack upon its constitutionality, it is not entirely free from criticism. The danger of collusion in the form of friendly suits brought to be dismissed after the statute of limitations has run would seem to be heightened by the new six months provision. The present period of limitation in New York is three, six or ten years, depending upon the nature of the relief asked, and naturally offers greater opportunity for intervention in and institution of actions than a statute of limitations which allows a much shorter time. If such a suit should be brought immediately after the cause of action arises, the period of limitation would be reduced to a fraction of its former length, and the chances of intervention correspondingly diminished.

Another potential deficiency in the proposed legislation is the fact that the corporation might still sue in another state. The bill fails to achieve this primary objective of the joinder rule as far as suits outside of New York are concerned, because the New York statute of limitations would not be applied in other states unless the cause of action arose in New York and the state of the forum had a "borrowing" statute. Similar restrictions would impair enforcement of the proposed statute in federal courts sitting in other states and possibly even in the federal courts in New York. Since the directors could be served most easily in New York, actions would ordinarily

16. N. Y. Civ. Prac. Act (Thompson, 1939) § 49(6)(7) (tort; three years), § 48(1) (contract; six years), § 53 (equity; ten years); see Comments (1941) 54 Harv. L. Rev. 1040 and (1939) 39 Col. L. Rev. 842.

17. See note 11 supra. It is highly unlikely that a court would construe this definite provision in such manner as to permit the corporation to reopen the suit after it had been dismissed, and after the statute had run. But cf. Mfrs. Mut. Fire Ins. Co. v. Hopson, 25 N. Y. S. (2d) 502 (1940).

18. An exception to the rule of lex fori is the case of states which have enacted "borrowing" statutes providing that the applicable statute of limitations is that of the state where the cause arose. 3 Beale, Conflict of Laws (1935) 1620-1629; Stumberg, Conflict of Laws (1937) 141-5.


20. Two arguments could be employed by a federal court desirous of avoiding the proposed New York statute. First, it might assert that the new provision was a procedural device created to force the corporation to accept the judgment obtained in the first action, and that because of this additional procedural function, it could not be termed a "substantive" matter under the Rules of Decision Act. The court could then proceed to apply the old statutes. Second, it might seek to impose laches, rather than a statute of limitations. In New York, an equitable statute of ten years' limitation is applied to derivative suits in which equitable relief like that of accounting is necessary. Potter v. Walker, 276 N. Y. 15, 11 N. E. (2d) 335 (1937), (1939) 39 Col. L. Rev. 842, (1938) 47 Yale L. J. 1004. See Comments (1941) 41 Col. L. Rev. 686 and 54 Harv. L. Rev. 1040. There is a fair chance that the federal court might maintain that such a suit was under New York law an action of an equitable nature, for purposes of the statute of limitations, and that the court was therefore not bound by the New York statute, but could apply the doctrine of laches. Clearly, if the court regarded the six month statute as inequitable in a particular case, it might apply the ten year one by analogy, or else exercise a free judgment. 3 Beale, Conflict of Laws (1935) 1627; Johnson v. White, 39 F. (2d) 793 (C. C. A. 8th, 1930). But see Russell v. Todd, 309 U. S. 280 (1940).
be brought there so that failure of the federal courts sitting in that state to adopt the six months' limitation would devitalize the bill and destroy the safeguards sought to be erected against double vexation of the defendants.\textsuperscript{21} Stockholders who held shares at the time of the injury to the corporation\textsuperscript{22} might immediately commence another suit in the district court. The joinder of the corporation would, of course, present no problem, since federal process in such cases runs throughout the country.\textsuperscript{23}

There are several ways in which the inadequacies of the present New York bill might be overcome and a scheme of broader effectiveness formulated. When the cause of action arose in New York, the corporation might be prevented from suing in other states by the enactment of a statute extinguishing its right of action if it failed to intervene after notice. Any less drastic reform would merely affect the remedy, and would consequently not bind other state courts under the prevailing rules governing conflict of laws.\textsuperscript{24} But extinction of the corporate right of action would not of itself solve the jurisdictional problem in derivative suits. Even if the New York bill were so revised, it would be contradictory and ineffective. The basic theory upon which the plaintiffs now recover after the expiration of the six months period is that of derivative suit, based on the survival of the corporate cause. Hence other state courts could argue that the statute, while purporting to destroy the corporation's right of action, was really another way to effect a change of remedy, and therefore procedural in nature. Consequently the law of the

\textsuperscript{21} The policy underlying the decision in \textit{Erie Railroad v. Tompkins} [304 U. S. 64 (1938)] would, on the other hand, be best served by an adherence to the New York rule, and it is more probable that the court would apply the six months statute except in cases where collusion, although it could not be proved, was fairly apparent. Thus the two objections to the bill might cancel each other out, the danger of double vexation becoming a safeguard against the danger of collusion. As far as double vexation is concerned, it can be questioned whether directors who have prevented the appearance of the corporation within the six months after notice have any standing to complain of the situation they themselves created, for if they had directed it to appear, it would have been bound. Double vexation seems in many instances to be a lesser evil than a complete immunity for wrongdoer. Viewed in this light, the bill does not appear to be open to serious objection, but it is interesting to note that it has been withdrawn from the legislature for further study. (Communication from the New York Law Revision Commission to the \textit{Yale Law Journal}, February 27, 1941).

\textsuperscript{22} Fed. Rules Civ. Proc. 23 (b); 2 Moore, \textit{Federal Practice} § 23.05. The decision in \textit{Erie Railroad v. Tompkins} [304 U. S. 64 (1938)] does not seem to have affected the application of this rule, although writers have argued that it is really substantive. See Comment (1941) 41 \textit{Col. L. Rev.} 104; Summers v. Hearst, 23 F. Supp. 986 (S. D. N. Y. 1938); Cohen v. Young, 4 Fed. Rules Serv. 23 b. 1, Case 3 (C. C. A. 6th, 1941).


\textsuperscript{24} When the right is extinguished by statute at the state in which it arises, it cannot be enforced in another state, even though its own statutory period has expired. Courts are characteristically reluctant, however, to find that the right has been extinguished in the state of its origin. 3 Beale, \textit{Conflict of Laws} (1935) 1622; Stumberg, \textit{Conflict of Laws} (1937) 143; LeRoy v. Crowninshield, 15 Fed. Cas. No. 8,269, at 369 (C. C. D. Mass. 1820).
forum would be applied, the local statute of limitations would govern, and
the corporation would be allowed to bring a second suit.

In addition to destroying the corporate cause of action, satisfactory solu-
tion of the jurisdictional dilemma would seem to require a sweeping change
in the fundamental concept of the shareholder's action against those who
injure the corporation. Where the suit can be brought in only one forum,
and the corporation, refusing to intervene upon being notified of the pending
derivative action, cannot be served, the plaintiffs should be permitted to amend
their complaint and proceed upon an entirely different theory, e.g., that of the
representative suit for personal injury to a class, rather than of a derivative
suit for corporate injury. The new theory is logically sound, for the stock-
holders are unquestionably injured when the corporation is damaged. The
time-honored concept that the injury is to the corporation alone, and not to
the stockholders, is an assumption of the conclusion that only the corpora-
tion may sue, rather than a logical argument. Moreover, the idea that relief
cannot be decreed in favor of the corporation unless it is a party to the suit
is equally formalistic. The real reasons for the historical rejection of the
representative suit in favor of the derivative suit are entirely practical: pro-
tection of creditors and the corporate working capital and prevention of a
multiplicity of actions.

But these purposes would be equally attainable through representative
actions, if the court permitted all interested groups, such as creditors, to
intervene. In most instances the court in the exercise of its broad equitable
discretion would decree a recovery in favor of the corporation. Suits in


26. See McLaughlin, The Mystery of the Representative Suit (1938) 26 Geo. L. J. 878; Glenn, The Stockholder's Suit—Corporate and Individual Grievances (1924) 33 Yale L. J. 580. It has been urged that the representative suit is quite as logical an instrument for the protection of the minority stockholder as the derivative suit, although it has been rejected historically for legalistic reasons. Winer, supra note 5, at 155-158. In this connection, an analogy may be drawn from the law of trusts. Normally, of course, the trustee must sue on a cause of action running to him for the benefit of the cestuis; where the trustee (similar to the corporation in the derivative suit) cannot or will not sue, courts permit a suit by the cestuis, joining the trustee and the third party as defendants. 4 Bogert, Trusts and Trustees (1935) § 870; 2 Scott, Trusts (1939) § 282.1. In a New York case, the trustee was beyond the jurisdiction, whereupon the court permitted the cestui to sue without joining the trustee at all, saying that a court of equity would not permit a wrongdoer to escape liability as the result of the accidental circumstance that the trustee was not available. Frankly basing the doctrine on "sub-

27. In the type of situation in which courts now accord the shareholder, suing on a derivative basis, an individual remedy, the courts might continue the practice; but it is
unlikely that they would in general decree recovery to the class, rather than the corporation, because of the difficulties inherent in such a course—the determination of pos-
sible prejudice to creditors, and the objection that such a decree would amount to the
other states would be barred because all members of a class are bound by judgments in true class suits in which they are adequately represented.\textsuperscript{28} The corporation would not be able to sue because its cause of action has been destroyed by statute.\textsuperscript{29}

This deprivation of the corporation's cause of action raises a constitutional problem. It could be argued in defense of the statute that the real parties in interest are simply being given another remedy. But if such an argument were used other states would term the matter procedural and permit the corporation to recover under their own laws, thus defeating the whole purpose of the representative cause of action. The statute would accordingly have to be defended on the alternative ground that, although the corporation lost its right of action, such deprivation was reasonable and necessary, and that it did not injure any of the real parties in interest.\textsuperscript{30}

By substituting the representative for the derivative suit, the Legislature would avoid restrictions arising from the long line of authority regarding \textit{in personam} jurisdiction,\textsuperscript{31} and would at the same time prevent the double vexation at which old rule of joinder was directed. The jurisdictional problem in shareholders' actions against foreign corporations is of broad significance today and will remain so in the future. Most of the reforms directed toward the amelioration of the "strike suit" situation do not propose replacement of the present method of judicial determination, but rather suggest substitution of a quasi-public plaintiff for the present stockholder-plaintiff.\textsuperscript{32} The jurisdictional problem of joinder will consequently survive even these general reforms and its legal importance will be heavily underscored in an era of more public-spirited litigation.

\textsuperscript{29}. See note 24 \textit{supra}.
\textsuperscript{30}. See Cooley, \textit{Constitutional Law} (4th ed. 1931) 402-4. An argument would have to be made, pointing out that the rights of the stockholders through the corporation had been extinguished, but that they, as the real beneficiaries (together with creditors, and other classes permitted to intervene), had been given a right in return.

On this ground, a provision that the corporation be joined without service as an involuntary plaintiff, six months after notice, would probably prove equally defensible, since it can be argued that the stockholders, as real parties in interest, lose nothing by being concluded. As with the representative suit, the adequacy of the representation would probably be an important consideration. In many ways, the involuntary plaintiff solution would seem quite sound, were it not for the difficulties presented in the \textit{Pennager} v. \textit{Nc}ff cases. See note 12 \textit{supra}.

\textsuperscript{31}. See note 12 \textit{supra}.
Restrictions placed on statutory liens by the Bankruptcy Act of 1938 are breaking down under the impact of a rival security device, the statutory trust fund. Many varieties of organized creditor interests throughout the history of national bankruptcy have pressed state legislatures to accord them a preferred position in the liquidation of a debtor's estate in bankruptcy. Congress for forty years conceded to the states two devices by which this could be accomplished: the statutory lien and a provision in Section 64 of the Bankruptcy Act giving a deferred priority to debts entitled to any priority by a state law. By 1938 use had become abuse. Congress destroyed the deferred priority entirely and imposed severe limitations on the statutory lien. Under Section 67b these are excepted from the disability visited by Section 60 upon preferential transfers made within four months of bankruptcy, but under Section 70c they may, in many cases, be so far subordinated in the order of payment as to lose all practical effectiveness. If a statutory trust fund...
tory lien successfully runs the gauntlet of Section 70c it faces still the rigors of Section 67c. Here, if it is a lien on personal property, it will be postponed in payment to claims against the bankrupt estate enumerated in Section 64a(1) and (2)—a substantial group—and, if it is a lien for wages or rent, it will be cut down to a size specified in Section 64a(2) and (5).

In sharp contrast to its concern with liens, and with statutory liens in particular, Congress has imposed not a single explicit limitation in the Bankruptcy Act on the use of any trust formula. It was established under the Bankruptcy Act of 1867 that the immunity of funds in trust to the claims of the insolvent trustee's creditors is not to be disturbed so long as such funds can be traced. This judge-made rule has never been altered by statute.

Meanwhile the prolific trust theory has spawned anew. A group of statutory trust funds which has received only slight attention in the legal

52 Stat. 840 (1938), 11 U. S. C. § 107c (Supp. 1939). This apparently makes general creditors, in whose interest the trustee's lien attaches when the petition is filed, superior in distribution to statutory lienholders whose liens are perfected subsequent to bankruptcy under the permission given in § 67b, second sentence (see note 5 supra); the state law may, however, give such liens relation back and defeat the trustee's lien under § 70c. It is clear also that § 70c does not affect statutory liens perfected prior to bankruptcy.

7. "Where not enforced by sale before the filing of a petition in bankruptcy . . . though valid under subdivision b of this section, statutory liens . . . on personal property not accompanied by possession of such property, and liens whether statutory or not, of distress for rent shall be postponed in payment to the debts specified in clauses (1) and (2) of subdivision a of section 64 of this Act, and . . . such liens for wages or for rent shall be restricted in the amount of their payment to the same extent as provided for wages and rent respectively in subdivision a of section 64 of this Act." 52 Stat. 840 (1938), 11 U. S. C. § 107c (Supp. 1939).

8. "64 . . . a . . . (1) costs . . . of preserving the estate . . . ; 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 . . . of one or more creditors, the reasonable costs . . . of such recovery; the costs and expenses of administration . . . the fees and mileage payable to witnesses . . . , and one reasonable attorney's fee . . . (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 . . ." 52 Stat. 840 (1938), 11 U. S. C. § 104a(1) and (2) (Supp. 1939).

9. The limitation of § 64a(2) on wages is reproduced at note 8 supra. Section 64a(5) provides: "... 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." 52 Stat. 840 (1938), 11 U. S. C. § 104a(5) (Supp. 1939).


literature\textsuperscript{12} has arisen in state legislation to serve a multitude of ends.\textsuperscript{13} During the 1930's the statutory trust fund for the first time became a security device. Upon sums placed by entrepreneurs in the hands of a building contractor at least three state legislatures have impressed a trust for the benefit of laborers, materialmen, and subcontractors working for him on the job.\textsuperscript{14} Congress has created a similar trust to cover sums held for the United States by its tax collectors.\textsuperscript{15} The New York statute\textsuperscript{16} has already made an appearance in bankruptcy litigation.

When a contractor-trustee goes bankrupt in New York, statutory beneficiaries claim the fund. Four New York District Court decisions have turned it over to them without a qualm.\textsuperscript{17} The Second Circuit Court of Appeals has contributed its tacit approval in a fifth New York decision recently handed down.\textsuperscript{18} In two cases the remarkable similarity of the statutory trust fund and the statutory lien is casually observed,\textsuperscript{19} but the significance of that similarity for bankruptcy has not been suggested.

12. Restatement, Trusts (1935) §17, comment h notes only one type of statutory trust, one giving a right of action for death by wrongful act to an executor, administrator, or other person. But see 2 Bogert, Law of Trusts and Trustees (1935) §254.

13. 2 Bogert, loc. cit. supra note 12, lists acts of Congress making the United States trustee of land for Indians, state laws making city officials trustees of a pension fund, a town government trustee of school or highway funds; statutory provisions regulating duties and liabilities of public officials and setting up protection for creditors of banks are also found.


15. "Wherever any person is required to collect or withhold any internal-revenue tax, . . . the amount of tax so collected or withheld shall be held to be a special fund in trust for the United States . . ." Int. Rev. Code §3661 (1940).

16. "Contractor who diverts funds guilty of larceny. The funds received by a contractor from an owner for the improvement of real property are hereby declared to constitute trust funds in the hands of such contractor to be applied first to the payment of claims of subcontractors, architects, engineers, surveyors, laborers and materialmen arising out of the improvement, and to the payment of premiums on surety bond or bonds filed . . ." N. Y. Lien Law (1940) §36-a. Section 36-b imposes an identical duty on subcontractors. Sections 25-a and 25-b apply the provision to contractors and subcontractors on public improvements. See cases in notes 17 and 18 infra.


18. Wickes Boiler Co., Inc. v. Godfrey-Keeler Co., Inc., 116 F. (2d) 842 (C. C. A. 2d, 1940). The case involved an arrangement under Chapter XI of the Bankruptcy Act, not ordinary bankruptcy; debtor was continued in possession. A subcontractor on the job for which debtor was contractor petitioned the court to impress the trust declared in N. Y. Lien Law §36-a on funds due the debtor from the owner of property under construction. The decision went off on an issue involving proper recordation, still disputed in New York courts. The court raised no question, however, concerning the effectiveness of §36-a once state law issues were disposed of.

19. The Second Circuit remarked, "It may be added in support of the sub-contractor's position that it has an inchoate interest in its claim, existing prior to the time of its collection, which resembles a mechanic's lien . . . [italics added]." Wickes Boiler Co.,
The distinction between a lien and a fund in trust, rooted in divergent lines of historical development, is for most legal purposes, marked. But when the trust is created by statute to make secure, in the hands of a debtor, a fund for the benefit of particular creditors, its functional resemblance to well-known statutory mechanics' and materialmen's liens is striking. The New York lien law and its construction by the New York courts emphasize this resemblance. Like the statutory mechanics' lien the statutory trust fund is created by legislative fiat, attaches to property without consent of any interested party, arises in the absence of fraud. Like the mechanics' lien it depends upon recordation to be effective against transferees or creditors and in form is an inseparable subdivision of a mechanics' lien statute.

The application of a national bankruptcy statute to legal interests diversely defined in more than fifty independent systems of jurisprudence has often required the classification of legal interests by bankruptcy courts on the basis of function rather than nomenclature. Whether, for example, a charge imposed by the state on its citizens is a debt, tax, or penalty is a question which cannot be foreclosed from decision in the court of bankruptcy where these distinctions entail variant consequences. This principle is unaffected.

Inc. v. Godfrey-Keeler Co., Inc., 116 F. (2d) 842, 843. "As liens, assuming these claims amount to such, they are not affected by the Bankruptcy Act. . . [italics added]." In re Heintzelman Constr. Co., Inc., 34 F. Supp. 109, 111 (W. D. N. Y. 1940).

20. The dominant distinction is undoubtedly the fiduciary relationship between trustee and beneficiary, no analogy to which exists in the case of a lien. Most others which suggest themselves either relate to this fundamental divergence or are only of historical or minor procedural importance. The Restatement of the Law of Trusts which distinguishes mortgage and trust at great length, merely asserts that trust and lien are different, without elaboration. RESTATEMENT, TRUSTS (1935) § 9, comment f. See, generally, Liens in 9 ENCYC. SOC. SCI. (1933) 456; Trusts and Trustees in 15 ENCYC. SOC. SCI. (1935) 122; BOGERT, LAW OF TRUSTS AND TRUSTEES (1935) §§ 11-38.

21. The New York statute says simply, "The funds . . . are hereby declared to constitute trust funds . . ." N. Y. LIEN LAW (1940) §§ 26-a, 26-b, 36-a, 36-b.

22. This is not true of most trust funds although the origin of constructive and resulting trusts is non-consensual. BOGERT, LAW OF TRUSTS AND TRUSTEES (1935) §§ 451-510.

23. This feature emphasizes its similarity to the lien rather than to the fund under a constructive trust.


25. N. Y. LIEN LAW, Art. 2, of which the statutory trust fund divisions are a part is titled "Mechanics' Liens."

by the trend initiated in *Erie R. R. v. Tompkins*\(^\text{27}\) and, indeed, must so remain if a nationally applicable statute is to retain coherence. The bankruptcy court is free; therefore, to apply to the New York statutory trust fund, or to those set up by other states or by Congress, the provisions of Sections 67 and 70 of the Bankruptcy Act. It should do so by defining the category outlined in those sections of the Bankruptcy Act with an eye to functional content, as courts do with sections of the Act which govern the statutory charge called debt, tax, or penalty. The court will then say that the statutory trust fund is in substance a statutory lien and must be so regarded in bankruptcy. Although it is clear that the New York statute was not purposefully framed to compass an evasion of the Bankruptcy Act,\(^\text{28}\) the trust fund device lends itself admirably to such a use. Unless it is properly restricted now, the carefully designed scheme enacted in 1938 to regulate the incidence of statutory liens on the bankrupt estate is useless in what promises to be an expanding category of claims.

**NEW LIMITATIONS ON POWER OF FEDERAL COURTS TO DECIDE NON-FEDERAL QUESTIONS**

Although the highest courts of each state are the final authority upon the construction of state statutes and state constitutions,\(^\text{1}\) federal courts have long been held competent to decide every issue, whether federal or not, in cases where their original jurisdiction is invoked by reason of a substantial federal question,\(^\text{2}\) even though the federal question should be decided against


\(^{28}\) Congressional restrictions on statutory liens were not even in the Bankruptcy Act when the New York provision made its appearance in 1930. It was enacted to avoid a loss of remedy which had been possible under prior mechanics’ lien laws:

> “These amendments are recommended by your committee for the reason that under the present section an owner who diverts funds can only be punished providing liens are filed *prior* to the diversion of the funds and does not offer any protection to laborers or materialmen who performed work or furnished materials before or after the diversion, who have not filed liens prior to such diversion . . . .” Legislative investigating committee report, quoted in Griffin, *New York Law of Mechanics’ Liens* (Supp. 1930) 29.


the plaintiff[3] or not decided at all.[4] This theory, assumed without question as early as 1824,[5] was given its first extensive application in the leading case of Siler v. Louisville & Nashville R. R.[6] There the Supreme Court, without considering alleged violations of the Federal Constitution, invalidated a state administrative order upon the sole ground that it was unauthorized by state statute. While the decision in Glenn v. Field Packing Co.[7] pursued the same course in enjoining a state tax statute which violated the state constitution, it introduced a limitation on the jurisdictional doctrine of the Siler case by denying the possibility of permanent relief in a federal court. The injunction was conditioned so that the tax commissioner might apply to the federal district court to dissolve its decree should the highest court of the state subsequently hold the statute valid under the state constitution.[8]

A new discretionary qualification has been attached to this procedure. The Supreme Court recently declared that, although a proper federal constitutional issue is presented, the federal judiciary will not enjoin the enforcement of state administrative orders where state procedure furnishes adequate opportunity for the review of non-federal aspects of such orders and for interim protection of the interests of litigants.[9] This judicial policy, enunciated on the Court's own motion, is an extension of that expressed in the statutory restraints of the Johnson Acts which prohibit federal court interference with the action of state rate-making bodies and the collection


7. 290 U.S. 177 (1933).


of state taxes, where the remedies in state courts are "plain, speedy and efficient." 10

The case arose when the Texas Railroad Commission, under cloak of a state statute giving the Commission authority to prevent "unjust discrimination" and "all other abuses" in the conduct of railroads, 11 issued an order requiring that all sleeping cars operated in the state be in charge of an employee having the rank of Pullman conductor. 12 Proceeding before a three-judge federal district court, 13 the railroads and the Pullman Company sought to enjoin the order as unauthorized by Texas law and in violation of the equal protection, due process and commerce clauses of the Federal Constitution. Colored Pullman porters were permitted to intervene as complainants and the Pullman conductors entered the litigation in support of the order. In the absence of state decisions interpreting the statute, 14 the federal court made an independent determination that the Commission had exceeded its statutory authority, and granted the injunction without any consideration of the constitutional claims. 15

On direct appeal to the Supreme Court, 16 this judgment was reversed and the cause remanded to the district court with directions to retain the bill pending an authoritative interpretation of the statute in proceedings to be brought "with reasonable promptness" in a state court. 17 Although the Court, speaking through Mr. Justice Frankfurter, deferred to the lower Court's interpretation of the Texas law, 18 it expressly refused to pass upon any of the issues raised, saying its decision would be no more than a tentative opinion upon state law presently subject to reversal by a contrary state adjudication. To make such a decision, it felt, would be inconsistent with the traditionally liberal exercise of federal equity discretion to avoid interference with state action in analogous situations. 19 By such voluntary restric-

12. In parts of Texas, where the passenger traffic is light, trains carry a single sleeping car. Unlike trains having two or more such cars, these trains had no Pullman conductors. The sleeper was in charge of a colored porter who was subject to the train conductor's control.
14. Certain Texas decisions have held that the Commission derives no authority by implication or from the common law and that the abuse must be one defined by the statute. However, holdings directly upon the particular "abuse" or "discrimination" involved in the instant case are lacking. See cases cited in Pullman Co. v. Railroad Comm. of Texas, 33 F. Supp. 675, 676-677 (W. D. Tex. 1940).
15. Id. at 678.
18. "Had we or they no choice in the matter but to decide what is the law of the state, we should hesitate long before rejecting their forecast of Texas law." Id. at 644-645.
19. Id. at 645. Cf. Wald Transfer & Storage Co. v. Smith, 4 F. Supp. 61 (S.D. Tex. 1933), aff'd per curiam, 290 U.S. 596 (1933). A denial by the Texas Railroad Commission of a permit to engage in interstate commerce as a contract carrier was
tion upon their discretionary powers the federal courts have, in certain instances, endeavored to avoid needless conflict with state policies in the field of state criminal law enforcement,\textsuperscript{20} in the administration of a specialized scheme to liquidate insolvent business ventures\textsuperscript{21} and in the final determination of complex questions of state law.\textsuperscript{22}

Born of a reluctance to adjudicate constitutional issues unnecessarily\textsuperscript{23} and guided by a sensitive regard for the independence of state governments,\textsuperscript{24} the instant decision has far-reaching implications. Despite the fact that the particular litigants inevitably suffer that inconvenience which accompanies any judge-made departure from previous rules, the result seems desirable. It has the effect of forcing complainants in the future to institute their attacks upon state statutes or administrative orders originally in the state courts whenever the state remedial procedure is "adequate."\textsuperscript{25} The Supreme Court, however, will remain the ultimate arbiter of cases involving disputed claims challenged as beyond the statutory authority of the Commission, unfounded upon the evidence, arbitrary and an interference with interstate commerce. A three-judge federal district court held that a case had not been made out for an injunction, basing its decision in part upon an independent construction of the state statute in the absence of state rulings upon the matter.


22. See Gilchrist v. Interborough Rapid Transit Co., 279 U. S. 159 (1929). This was a suit to enjoin the enforcement of rates, fixed by contract, as violative of the Fourteenth Amendment, the defendant Transit Commission having filed suit later in the same day to enforce the contract. The Commission had not at that time officially denied plaintiff's application for increased rates, although the indications were that it would do so. In the absence of a Supreme Court or a New York decision authoritatively deciding the issues, the Court reversed a lower court decree granting an injunction on the ground that the state court could readily decide the controversy without injury to the plaintiffs and that the complicated statutory and contractual disputes could best be disposed of by a state body more familiar with the situation. Cf. Thompson v. Magnolia Co., 309 U. S. 478 (1940), (1940) 7 U. OF CHI. L. REV. 727, as supporting the doctrine that a state should be allowed to determine its own law.

23. See cases cited \textit{infra} note 4.


25. See note 27 \textit{infra}. 

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of federal right, for many of the suits thus diverted into state channels will not be capable of solution solely upon state grounds.\textsuperscript{26}

In considering the adequacy of state remedies, the availability of speedy judicial review and the elements of procedural due process undoubtedly will be given great weight.\textsuperscript{27} Further, if the theory of this case is to serve as precedent in coming suits, it is essential that the parties be afforded protection in the state tribunal similar to that given suitors in federal courts by Section 266 of the Judicial Code, providing for a three-judge court where an interlocutory injunction is sought to restrain the enforcement of a state statute, or the execution of an administrative order made pursuant to state statutes.\textsuperscript{28} Where "irreparable loss or damage" is shown, a temporary restraining order may be secured in the federal court under Section 266, to continue in force only until such time as a decision is reached upon the application for an interlocutory order.

In the instant case, the plaintiffs appear to have an adequate state remedy, with proper protection for their interests. When the interlocutory injunction was granted, the temporary restraining order ceased to have effect, and the judgment granting the interlocutory order was later reversed with directions to the federal district court to hold the bill for a reasonable time until a state action could be instituted to obtain a determination of the non-federal issues. This suspension seems unwarranted in a case arising under Section 266, which authorizes such a stay only when a suit has been filed in a state court of proper jurisdiction, accompanied by a stay in such state court of proceedings under the order pending the final outcome of the state litigation. Since these requirements were not satisfied in this case, plaintiffs were left to whatever safeguards the state law might provide to procure a suspension of the execution of the Commission's order until its validity could be determined in the state court. The Texas statutes, however, permit the issuance of a temporary restraining order without notice to the opposing

\textsuperscript{26} 36 STAT. 1156 (1911), as amended; 28 U. S. C. § 344 (1934) (providing for review by the Supreme Court on appeal and by certiorari of suits from the highest state courts).

\textsuperscript{27} The situation may be compared to the problem of a "plain, speedy and efficient" remedy under the Johnson Acts. \textit{Cf.} Mountain State Power Co. v. Public Service Comm., 299 U.S. 167 (1936) (Johnson Act does not apply where state statute denies injunction staying enforcement of order during pendency of suit in state court; implicit that Fourteenth Amendment must be met in state remedies); Corporation Comm. of Okla. v. Cary, 296 U.S. 452 (1935) (effective judicial review of rate order uncertain because of conflicting state decisions; Johnson Acts inapplicable); Mississippi Power & Light Co. v. Jackson, 9 F. Supp. 564 (S. D. Miss. 1935) (where state court can enjoin enforcement of confiscatory ordinance, no federal jurisdiction exists.)

party, where the danger is irreparable or immediate, and give precedence on
the court dockets to suits attacking the validity of administrative orders.29

The doctrine of the present case may be applied to ameliorate some of
the more apparent injustices consequent upon an extension of *Erie R. R. v.
Tompkins*,30 such as the recent decision in *Fidelity Trust Co. v. Field*.31
There, the Supreme Court affirmed the binding effect on federal courts of
cases decided by an inferior New Jersey court of one judge, whose decisions
had not been reviewed by the highest court of the state, thus frustrating the
plain intent of the creator of a trust and rendering ineffective a state statute
that was clearly intended to apply. Once having chosen a federal forum, the
plaintiff had no opportunity to test the correctness of the opinions of the
lower New Jersey court rendered in cases to which she was not a party.32
To such victims of the judicial process, this self-imposed limitation upon
federal diversity jurisdiction might provide relief by directing the parties
to litigate the question of state law in the state courts. While this procedure
may result in greater justice, it will present the difficult problem of whether
or not this is a contravention of the statute conferring diversity jurisdiction
upon the federal courts.33 This problem will arise not only where a suit
is brought originally in federal courts, but also upon removal from state
courts.34

In a suit by the present plaintiffs in a state court to secure a ruling upon
the Commission's power to issue the order concerned,35 a procedural question
may arise should the defendants plead in bar the pending federal action. This
plea should not be allowed inasmuch as the federal action is dormant, being
delayed to give the state court an opportunity to act. Moreover, while the
state court could, if it so desired, recognize the plea of a prior action in the
federal court, "it usually will not, but confines the plea of abatement to
another action pending in its own courts."36

29. Precedence is also given such cases in the appellate court. The temporary
restraining order cannot exceed ten days in duration, unless extended for a like period
30. 304 U. S. 64 (1938). For a summary of discussions of this case by legal
periodicals, see Hart, *The Business of the Supreme Court* (1940) 53 Harv. L. Rev.
579, 606, note 51.
31. 61 Sup. Ct. 176 (U. S. 1940). The Supreme Court reversed the Circuit Court
of Appeals and affirmed the decision of the district court.
curtailment of federal diversity jurisdiction will find favor with at least two members
of the present Court. Mr. Justice Frankfurter has expressed his view that the avoidance
of assumed local prejudice is no longer a sufficient basis for the existence of general
diversity jurisdiction. Frankfurter, *supra* note 25, at 530-522. And see Mr. Justice
35. Suit has already been filed by the plaintiffs. Communication of Counsel to the
36. 1 Moore's Federal Practice (1938) 236 and cases cited note 32.
No substantive protections have been removed by the decision in the principal case. Should any federal right be denied by a final adjudication of the highest court of Texas, review may be had in the Supreme Court. Moreover, the plaintiffs are protected during the progress of the suit in state court from possible injury owing to enforcement of the order. The procedure is merely made more orderly so that federal courts may be relieved of the necessity of making tentative and premature decisions upon matters that are more properly the concern of the state judiciary. The Supreme Court has resorted once more to the concept of a "benign and prudent comity"\(^3\) in order to safeguard further the "rightful independence of state governments."\(^3\)

**OFFICIAL THREAT OF ENFORCEMENT AS A REQUISITE OF JUSTICIABILITY IN DECLARATORY JUDGMENT ACTIONS**

The injunction has commonly been the vehicle by which to obtain a speedy decision on the constitutionality of statutes.\(^1\) But since 1934, the declaratory judgment has proved even more efficient in testing constitutionality in the federal courts.\(^2\) By contrast with the restrictive "equity jurisdiction"\(^3\) requirements of an injunction, the declaratory judgment is a far less technical procedure. Fear that it would provide too much freedom to challenge the validity of statutes led to a suggestion that the new procedure be limited to private litigation;\(^4\) but the courts have refused to confine themselves in this fashion.\(^5\) In fact, except for the bar to settling the constitutionality of

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\(^3\) See Mutual Life Ins. Co. v. Johnson, 293 U. S. 335, 339 (1934).
\(^3\) See DiGiovanni v. Camden Ins. Ass'n, 296 U. S. 64, 73 (1935).

*Southern Pacific Co. v. Conway, 115 F. (2d) 746 (C. C. A. 9th, 1940).

1. Caught in an expanding web of legislation, owners and managers of property have been beset by serious doubts and paralyzing uncertainties concerning the constitutionality of various statutes. On the one hand, compliance with a new law might be critically injurious, yet after a year or two of expensive obedience the statute might be held unconstitutional. On the other hand, violation of the act may entail heavy penalties if the constitutionality is upheld.


tax statutes, the only important restraint on its use has been the requirement that the case in issue be an "actual controversy." But the utility of this expeditious remedy in the field of public law has been threatened by a novel and peculiar interpretation of these key words.

Recently, an interstate railroad sought a declaratory judgment in a federal court to test the constitutionality of an Arizona statute which limited freight trains to ninety cars and passenger trains to fourteen. Conformity with the statute cost the company at least $300,000 a year. If the act were disobeyed, however, the railroad would be liable to cumulative penalties varying from $1,600 to $37,000 per day, depending upon the density of traffic. Inasmuch as the statute explicitly designated the state attorney general as the enforcing officer and expressed his duty in mandatory language, he was made the defendant. The attorney general informed the court, however, that there had been no violation, and that he had made no threat of enforcement. He contended that his duty was dissolved if the statute was unconstitutional, and insisted moreover, that since he had not determined its constitutionality, he was under no duty to enforce it. But even assuming he was under a duty to enforce the law, he claimed no genuine controversy existed because he had made no threat. Accepting his arguments, the Circuit Court of Appeals, in affirming the lower court, found no "case or controversy." The court's reasoning in placing special emphasis on the threat of enforcement can be explained by its reliance on the case of Ex parte La Prade. In that case the Supreme Court was confronted with facts almost identical to the Southern Pacific case.


10. After the district court dismissed the action and prior to appeal the attorney general brought suit against the railroad for violations of the train limit law. In addition, he issued a public statement announcing his belief in the validity of the law and indicated that penalties might exceed $100,000. The Circuit Court of Appeals, however, refused to permit the filing of a supplemental complaint on the theory that the new evidence did not reveal the attitude of the attorney general at the time the suit was originally filed.

to those in the instant litigation except for two important differences. First, the mode of testing the constitutionality of the train limit law was by injunction. Secondly, in the course of litigation the original defendant was succeeded in office by a new attorney general, and the Court's opinion turns largely on the question of substituting the new officer for his predecessor. Finding the action personal to the first defendant with no privity between the two officers, the Court held it unnecessary to pass on the constitutional question. In reaching that conclusion, Mr. Justice Butler wrote a passage regarded as controlling by the court in the instant case. The opinion, referring to the second attorney general as the "petitioner", reads in part: 12 "Plaintiffs did not allege that petitioner threatened or intended to do anything for the enforcement of the statute. The mere declaration of the statute that suits for enforcement of penalties shall be brought by the attorney general is not sufficient. Petitioner might hold, as plaintiffs maintain, that the statute is unconstitutional and that, having regard to his official oath, he rightly may refrain from effort to enforce it."

Since the basic problem of the La Prade case was one of substitution, the Court's statement may be regarded as dictum. Yet, in this suggestion of necessity of threat and the right of an officer to pass on constitutionality, the Circuit Court found a double ground for denying the existence of an "actual controversy." It is submitted that this dictum is misleading and unsound, that it has not been followed by the Supreme Court and should be disregarded in the future. To make the existence of an official threat a prerequisite of a controversy would needlessly curtail the opportunity of adjudicating important issues, especially those involving constitutionality.

One source of the confusion in defining a "case or controversy" in which a public officer is defendant antedates Ex parte La Prade and stems from the attempt on the part of the judiciary to circumvent the Eleventh Amendment. 13 In Ex parte Young the Court resorted to the fiction that a suit to enjoin the enforcement of an unconstitutional statute was, in fact, an action against the attorney general as an individual, stripped of his attributes of office. 14 This specious reasoning 15 shifts the focus of judicial attention from

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13. The Eleventh Amendment reads as follows: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." For the origin of the doctrine of sovereign immunity see Borchard, Government Liability in Tort (1924) 34 Yale L. J. 1.
15. The fiction of the case is quite apparent. Factually, the action of the officer is exactly the same when he acts to enforce a statute which later proves unconstitutional as it is when he enforces a constitutional statute. Moreover, in addition to the internal inconsistencies of Ex parte Young the decision probably conflicts with the protection of individual rights from state action under the Fourteenth Amendment. See Corwin, The Twilight of the Supreme Court (1934) 83; Rapacz, Protection of Officers Who Act Under Unconstitutional Statutes (1927) 11 Minn. L. Rev. 585; Comment (1937) 50 Harv. L. Rev. 956.
the acts of the legislature to the action of the attorney general. By holding the state immune from suit, *Ex parte Young* laid the foundation, in part, for a subsequent over-emphasis on the affirmative acts of the enforcing officer as a test of justiciability. The court in the instant case, for example, by stressing the conduct and deliberations of the attorney general and yet ignoring the threat implicit in the statute itself allowed the fictitious concepts designed for avoiding sovereign immunity to cloud its determination of the quite separate issue of justiciability. A possible method of abating confusion and achieving a clear distinction between the problems of "sovereign immunity" and "justiciable controversy," might be found in a revision of the theory of state liability. But in view of the time-honored acceptance of *Ex parte Young* it is unlikely that the judiciary will expand the liability of the state through a reinterpretation of the Eleventh Amendment. Conceivably, however, the Court may revive the neglected precedents of Marshall, who was convinced that the Eleventh Amendment was never intended to preserve the general dignity of the state but was designed solely to prevent suits against the state for the collection of debts.

In uncritical reliance on the dictum of *Ex parte La Prade*, the court in the instant case held that the duty of the attorney general was non-existent, or at least suspended, because he had not decided whether the statute was constitutional, and thus concluded that the adversity of interests between the parties was insufficient for justiciability. Although the attorney general took an oath to defend the Constitution, it cannot logically be maintained that the Supreme Court intended him to supplant the judiciary in the vital function of passing on constitutionality. In the recent case of *Panitz v. District of Columbia*, it was emphatically declared that administrators who have a personal belief that a statute contravenes the Constitution cannot encroach upon power reserved to the judiciary. Moreover, both the United States

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16. To capitalize upon this emphasis on official action, the attorney general in the present case, while charged with a mandatory duty, pointed to the fact that he had taken no action whatsoever. He reasoned, therefore, that he was not a proper party to the suit because he was sued not as an officer but as an individual who, in this instance, was clearly not a private wrongdoer. To answer this line of argument, the Circuit Court relied on another facet of the *Ex parte Young* decision; for there the Supreme Court makes abundantly clear that the existence of a duty to enforce is the important and material fact which makes the attorney general a proper party in constitutional litigation. See *Ex parte Young*, 209 U. S. 123, 157-161 (1908). Thus, either the official or individual aspect of the attorney general is alternately stressed to fit a particular purpose. The problem of establishing a proper party, however, appears to be a distinct issue from determining the requisites of a justiciable controversy.

18. Note (1934) 43 Yale L. J. 500; Comment (1937) 50 Harv. L. Rev. 950.
19. Ibid.
22. Ibid. See also United States v. Butler, 297 U. S. 1, 62 (1936). Compare with a leading mandamus decision, State v. Board of Equalizers, 84 Fla. 592, 94 So. 1081 (1922). For other mandamus cases, see Note (1933) 33 Col. L. Rev. 1036.
Attorney General\(^2\) and federal administrative agencies\(^3\) have refused to express an opinion on the constitutionality of legislation once it is passed.

Since the high office of attorney general commonly implies a broad range of discretion, part of that freedom might be thought to include the right to pass on constitutional issues as a condition precedent to enforcement. But although an attorney general is a discretionary officer, he can not always ignore the express word of the statute.\(^4\) In theory, a declaratory judgment on the constitutionality of a statute does not limit the justifiable discretion of the enforcing officer; it only defines the legal boundaries of the area in which his discretion can operate.\(^5\) In terms of practical results, even if an attorney general thought he was acting within the ambit of his discretion in judging constitutionality, his conclusions would bind neither his successors nor the judiciary.\(^6\) Thus, for several reasons, the normal processes of government should not be disrupted by the guess of the attorney general as to what the Constitution permits, especially where there is clear duty to enforce the statute.

Assuming an officer's opinion of constitutionality does not alter his duty, the question becomes whether, in the absence of both an official threat and a violation, the statute itself plus the duty to enforce it creates a sufficient adversity of interest to fulfill the constitutional requisites of a "case or controversy." The strongest evidence for illustrating the minimum requirements for a controversy may be found in suits to enjoin, since in order to obtain this coercive remedy there is, in addition to the normal constitutional demands, the extra necessity of showing the threat of future irreparable injury.\(^7\) Nevertheless, the history of challenging statutes by means of injunction is replete with cases in which the Supreme Court has retained jurisdiction in spite of the absence of a violation or an official threat to enforce. For instance, in *Pierce v. Society of Sisters*\(^8\) the Court enjoined the state attorney general even though the statute in issue would not become effective for three years. In both that and the instant case, present injury to the plaintiffs arose out of the existence of the statute although no official threat appeared. That


\(^{25}\) *Levitt v. Attorney General*, 111 Conn. 634, 151 Atl. 171 (1930). Where the statute is for the benefit of the public, there is judicial authority to indicate that every enforcing officer is not free to do as he chooses even where the language is permissive. Compare *Supervisors v. United States*, *ex rel.*, 4 Wall. 435 (U. S. 1866); *Fidelity and Casualty Co. of N. Y. v. Brightman*, 53 F. (2d) 161 (C. C. A. 8th, 1931) with *Farmers Bank v. Federal Reserve Bank*, 262 U. S. 649, 663 (1923).

\(^{26}\) *Ex parte Young*, 209 U. S. 123 (1908).

\(^{27}\) *Austin v. Barrett*, 41 Ariz. 138, 16 P. (2d) 12 (1932); *Jones v. Williams*, 121 Tex. 94, 45 S. W. (2d) 130 (1931); People *ex rel.* *Brundage v. Peters*, 305 Ill. 223, 137 N. E. 118 (1922); *Leddy v. Cornell*, 52 Colo. 189, 120 Pac. 153 (1912).

\(^{28}\) See cases cited *supra* note 3. Also see *Stafford v. Wallace*, 258 U. S. 495 (1922); *Clive v. Frink Dairy Co.*, 274 U. S. 445 (1927).

\(^{29}\) 268 U. S. 510 (1925).
the statute might be repealed or that the attorney general might not enforce it did not deprive the court of jurisdiction. Similarly, in Pennsylvania v. West Virginia and in Carter v. Carter Coal Company bills to enjoin enforcement of regulatory statutes were entertained although no violation or official threat was shown. Recently in the injunction suit of Beal v. Missouri Pacific Railroad Corporation the Court did not complain of a lack of a controversy although it is stated in the opinion that the attorney general had not yet decided whether he was going to enforce the statute in issue.

Similar injunction cases reinforce the conclusion that the Court has found a sufficient adversity of interests for a "case or controversy" in the statute itself. The injunction precedents, moreover, demonstrate that Ex parte La Prade is authority neither for what constitutes equity jurisdiction nor for what is essential to a justiciable controversy. Yet, not only did the court in Southern Pacific v. Conway take the words of that case at face value, but also, unfortunately, the erroneous dictum has been incorporated in part into the new Federal Rules. Thus Rule 25(d) on substitution makes the lack of a threat to enforce by the successor a fatal deficiency.

The elastic use of the injunction in the past to test the constitutionality a fortiori furnishes those who employ the declaratory judgment with ample grounds for a liberal construction of the statutory words, "actual controversy." As the Supreme Court remarked in Aetna Life Insurance Company v. Haworth, "actual" is only a word of emphasis, and is not designed to add to the Constitution by restrictive definition. The Court has already exemplified its willingness to apply the liberal construction used in private litigation to public law. In Currin v. Wallace, for example, no threat of enforcing an allegedly unconstitutional statute was proved; nevertheless, an "actual controversy" was found to exist on the authority of the Haworth case. Further proof of the latitude of the "actual controversy" doctrine is illustrated in the recent case of Maryland Casualty Company v. Pacific Coal & Oil Company where only a potential claim of the injured person warranted joining him as a party defendant with the insured. In order, however, to avoid needless curbs on the availability of the declaratory judgment in the future, it is

30. 262 U. S. 553 (1923). The suit was brought only a few days after the act went into effect. The court, speaking through Mr. Justice Van Devanter, said the following: "One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough." In the instant case, the injury to the railroad was not "impending" but genuinely existed.
32. 9 U. S. L. WEEK 4140 (U. S. 1941).
34. The second sentence of Federal Rule 25(d) reads as follows: "Substitution pursuant to this rule may be made when it is shown by supplemental pleading that the successor of an officer adopts or continues or threatens to adopt or continue the action of his predecessor in enforcing a law averred to be in violation of the Constitution of the United States." See 2 Moore, FEDERAL PRACTICE (1938) 2432.
36. 306 U. S. 1 (1939). In this same case, see Brief for the United States, pp. 88-92.
37. 9 U. S. L. WEEK 4147 (U. S. 1941).
suggested that in testing the validity of a statute the existence of definite "adverse legal interests" be the primary touchstone of justiciability. Applying this test to the facts of the principal case, it becomes apparent that the railroad had a substantial interest plainly adverse to the duty of the attorney general. That the enforcing officer has an adequate legal interest solely by reason of his duty to enforce the statute is stated by the Supreme Court in Coleman v. Miller. Further proof of his legal interest may be found in the uniformity with which administrative officers are held to be indispensable parties where statutory uncertainties are raised.

Of course, not every statute by itself creates conflicts of interest sufficient to present a justiciable constitutional issue. The variety of statutes defy generalization. Those, for example, which invest the enforcing officer with complete discretion might be considered separately from those which state or imply a mandatory duty. Where there is doubt about the interpretation and resulting application of a statute, as well as uncertainty concerning its constitutionality, adversity of interest is made more indefinite. Statutes requiring regulations as an indispensable implementation will probably compel a delay in order to determine if and how possible litigants will be affected. Thus, the presence of mandatory enforcement, clear application, and operation without intervening rules or administrative initiative are factors which make for justiciability and speedy adjudication.

Any suggestion, however, that minimizes the importance of official threat and stresses the flexibility of the declaratory judgment arouses fear, in some quarters, of too great liberality and speed in obtaining a judicial review of the validity of legislation. First, in defending a restrictive policy, it has been argued that the court should be given the benefit of actual experience. Experience, however, only comes through lapse of time and is never conclusive. Statutes sustained today may be held unconstitutional in a decade or so. Moreover, the Judiciary Act of 1937 expresses a deliberate Congressional

40. Janes v. Lake Wales Citrus Growers Ass'n, 110 F. (2d) 653 (C. C. A. 5th, 1940); A. H. Belo Corp. v. Street, 35 F. Supp. 430 (N. D. Tex. 1940); Note (1941) 50 YALE L. J. 909. See also Comment (1937) 50 HARV. L. REV. 796.
43. FRANKFURTER, LAW AND POLITICS (1939) 23-33; Frankfurter and Landis, Business of the Supreme Court at October Term, 1931 (1932) 46 HARV. L. REV. 226; Frankfurter, A Note on Advisory Opinions (1924) 37 HARV. L. REV. 1002; Comment (1936) 46 YALE L. J. 255, 270.
policy to hasten the adjudication of allegedly unconstitutional statutes.\textsuperscript{45} Second, speed has also been charged with fostering consideration of vague and abstract situations. Although it is a wise precaution to restrict decision to concrete cases, the facts of the instant case are illustrative of a specific and definite complaint where there has been no violation of the act or threat of enforcement.\textsuperscript{46} In the third place, it may be said that the courts and the attorney general will be overburdened with litigation of private parties seeking to establish their constitutional rights. Conceivably, however, the more the courts interpret the Constitution by passing on legislation, the more they tend to narrow the sources of confusion and uncertainty. The use of joinder and bills of peace, moreover, reduces the multiplicity of actions.\textsuperscript{47} Furthermore, a stay may be obtained by the government in order to single out one suit as a "test case", thereby exercising control over the factual situation and over the number of suits to be defended.\textsuperscript{48}

In accord with the suggestion of the present Attorney General of the United States, it is believed that the Supreme Court may well pursue a middle course between advisory opinions on the one hand and a network of technical restrictions on the other hand.\textsuperscript{49} Clearly, one device for facilitating a more liberal adjudication is the declaratory judgment.\textsuperscript{50} Instead of a private party being exposed to the whim of the enforcing officer, declaratory relief should be available if a legal interest is substantially affected by the words and effect of the statute. Just as a bill to remove a cloud from title was found necessary when land tenure was at the center of the social scheme, so today the declaratory judgment is the mode of eliminating doubts and insecurity in an era when private and corporate property is affected by clouds in the form of innumerable statutes. The success of declaratory relief in removing statutory uncertainties depends on the maintenance of a liberal interpretation of the concept of justiciability.

\textsuperscript{45} Comment (1937) 51 Harv. L. Rev. 148.
\textsuperscript{46} See Transcript of Record in Southern Pacific Co. v. Conway, pp. 2-46.
\textsuperscript{47} 2 Moore, Federal Practice (1938) 2241; Chaffee, Bills of Peace with Multiple Parties (1932) 45 Harv. L. Rev. 1297.
\textsuperscript{50} See note 2 supra.
ENFORCEABILITY OF ANTENUPTIAL CONTRACTS IN MIXED MARRIAGES*

Marriage between persons of different religion may breed disputes between parents concerning the education of their children.1 Such domestic difficulties are ordinarily settled by informal compromises between the marital partners. But apparently endeavouring to prevent injury to their communicants' faith,2 many Roman Catholic Bishops in the United States have recently conditioned their consent to mixed marriages on conclusion of antenuptial contracts governing the religious education of the offspring.3 Since Catholics who marry "outside the Church" without consent of the ecclesiastical authorities are generally forbidden to partake of the Sacraments,4 the Church's own sanctions probably suffice to induce the initial exchange of promises between the spouses. The resort to formal contracts represents an attempt to supplement ecclesiastical with legal sanctions.

The insistence on formal contractual guaranties represents the current phase of the Church's answer to the problem of mixed marriages.5 When the growth of Protestantism6 and the decline in authoritarian religious con-

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*For sample forms of pre-nuptial marriage contracts see NAU, MANUAL ON THE MARRIAGE LAWS OF THE CODE (1934) 241–3; WHITE, THE LEGAL EFFECT OF ANTE-NUNPTIAL CONTRACTS IN MIXED MARRIAGES (1932) 61–62; Lehman, Mixed Marriages in the Catholic Church (1941) 2 CONVERTED CATHOLIC 36.

1. Mixed marriages seem to be characterized by an exceptionally high percentage of divorces. See MOWRER, FAMILY DISORGANIZATION (1926) 102–106; COLCORD, BROKEN HOMES (1919) 44–45. Church writers believe such marriages will rarely be happy. Lonergan, The Children of Mixed Marriages (1932) 47 AMERICA 135.

2. Surveys in some dioceses indicate that only half of the children born of marriages between Catholics and Protestants are reared as Catholics. See AYRINIAC, MARRIAGE LEGISLATION IN THE NEW CODE OF CANON LAW (2d ed. 1932) 101.

3. Other clauses in these contracts are discussed in notes 13 and 15 infra.


But if, subsequent to marriage, the non-Catholic spouse agrees to sign a nuptial agreement or allows the Catholic spouse to control the spiritual welfare of the children, original religious deficiencies may be eliminated by the issuance of a sanatio in radice, i.e., a nunc pro tune dispensation. C. J. C. Cans. 1138, 1141. See AYRINIAC, OP. CIT. supra note 2 at 347; Brown, The Canon Law of Marriage (1939) 26 VA. L. REV. 71, 85.

5. Early Fathers and Church councils unanimously condemned mixed marriages and many invoked biblical authority. SCHENCK, MIXED RELIGION (1929) 17, 82; 3 CAPPETTO, DE SACRAMENTIS (1927) § 306. Although some nineteenth century theologians argued that Catholics should be permitted to enter into mixed marriages with absolute freedom, higher ecclesiastical authorities have steadfastly opposed this view. 2 COLLECTANEA S. CONGREG. DE PROPAGANDA FIDE § 1434; McCaffrey, History of the Roman Catholic Church in the Nineteenth Century (1911) 95.

6. WHITE, LEGAL EFFECT OF ANTE-NUPITAL PROMISES (1932) 2. An additional factor tending to liberalize the official Catholic view toward mixed marriages has been widespread missionary activity and the desire of many African and Oriental converts to marry former friends who have remained members of animistic sects.
trol over individual behavior necessitated relaxation of the earlier absolute ban, canon law was amended to permit issuance of dispensations for such marriages, provided the necessary promises could be obtained from the non-Catholic applicant. Since indefinite terminology, lack of explicit consideration, and assumed repugnance to the Statute of Frauds might render the early type of promise unenforceable, formal, written contracts are now generally used.

Since every Bishop is empowered by the Holy See to issue dispensations from the canonical impediment of "diversity of cult," the contracts vary in each diocese according to local convention. Ordinarily the prospective husband and wife exchange promises to baptize and wholly educate all children in the Catholic religion. Sometimes the contracts also contain


8. The first recorded dispensation in modern form was issued by Pope Clement VIII in 1604. SCHENCK, op. cit. supra note 5 at 86. But special indults were issued in the Middle Ages, when a particular mixed marriage seemed likely to result in the conversion of the pagan spouse. AYRINHA, op. cit. supra note 2 at 102.

9. See, for example, the contract involved in Brewer v. Cary, 148 Mo. App. 193, 127 S. W. 685 (1910).

10. Courts have often refused to consider marriages as part performance, consequently destroying a common by-pass around the Statute of Frauds. WILLISTON, CONTRACTS (Rev. Ed. 1937) §§ 486, 501.

11. See WHITE, op. cit. supra note 6 at 60-62. See also In re Mancini, 89 Misc. 83, 151 N. Y. Supp. 387 (Sup. Ct. 1915).

12. Power to issue dispensations is vested in Ordinaries, i.e., Bishops, Diocesan Vicars-General and Provincial heads of religious orders. C. J. C. Can. 1040. Such faculty only permits dispensations from the "impedient impediment" of "diversity of cult," existing when a Catholic marries a baptized member of another Christian body.

The proposed marriage of a Catholic with an unbaptized person raises the more serious "diriment impediment" of "disparity of worship," and special procedure is prescribed to govern the issuance of dispensations. C. J. C. Can. 1070. Thus if the prospective spouse is a practicing Jew, permission must be obtained directly from the Holy See. SCHENCK, op. cit. supra note 5 at 254. For the rule on marriage with Atheists, see 26 ACTA APOSTOLICAE SEDIS (1934) 494. (Hereinafter cited as A. Aps. S.)

13. The antenuptial contract is but one of a number of steps taken to protect the Catholic party. The individual parish priest must refuse to participate in the ceremony, unless he is morally certain that the agreement will be observed. Even then, canon law forbids issuance of a contract unless there are "urgent causes" to justify a marriage between the specific parties. The reasons vary from the possibility of conversion to the dangers of a civil wedding, in case the Church refuses to sanction the marriage. CODEX JURIS CANONICI (1918) Canons 1060-1065 [Hereinafter cited as C. J. C. Can., the CODEX JURIS CANONICI is the body of ecclesiastical law governing the moral behavior of all Catholics. See CICOGNANT, CANON LAW (Eng. trans. 1934) 432 ff. Because of Papal order, the C. J. C. has not been officially translated from Latin (id. at 435) but the provisions relating to marriage have been paraphrased in numerous books, approved by diocesan censors and available to the laity].

[Antenuptial contracts providing for education of children in Protestant Sects are not unknown. See In re Story, 2 Ir. Rep. K. B. D. 328 (1916); In re Maher, 28 Ont. L. Rep. 419 (1913)].
agreements not to participate in an additional marriage ceremony before a minister of another denomination and never to seek a divorce. The promises are occasionally embodied in an agreement between the Bishop and the non-Catholic spouse, in consideration of the Church's consent to perform the marriage ceremony. Under this form, the Catholic spouse, as third party beneficiary, acquires an irrevocable legal interest by acting in reliance on the contract through consenting to marriage.

Since the non-Catholic party has voluntarily acceded to the terms of the contract, with a full understanding of the consequences of breach to the spouse and after an exposition of Catholic marital theory, considerations of fair play between the parties might well induce judicial enforcement. Furthermore a court would probably be moved by the practical impossibility of a faithful Catholic's dissolving the marriage by divorce. Thus dicta

Ordinary Catholics are requested, but not required to send their children to parochial schools. Ayrinhac, op. cit. supra note 2 at 106. But in at least one diocese—that of Milwaukee—the antenuptial contract contains an agreement to send the children to parochial schools, as far as is economically and physically feasible. Lehman, Mixed Marriages in the Catholic Church (1941) 2 Converted Catholic 36.

14. But the mixed marriage is not usually performed in a church proper, and the service lacks many features of the marriage between regular communicants. C. J. C. Can. 1109.

Since marriage is a Sacrament, Catholics who participate in non-Catholic nuptial ceremonies, unless required to do so by civil legislation, are considered to have professed heresies. C. J. C. Can. 1163, 2314; Noldin-Schmitt, De Censuris (1920) § 87.

15. The non-Catholic party is invariably required to promise not to interfere with the free exercise of the spouse's religion. Nau, Manual on the Marriage Laws of the Code (2d Rev. ed. 1934) 242; Lehman, op. cit. supra note 13; Ayrinhac, op. cit. supra note 2 at 117. But the Catholic party is obligated by church law to "labor faithfully for the conversion of the consort." C. J. C. Can. 1062.


Attempts by the Bishop, who is the obligee under this form of contract, to enforce the agreement would raise a host of legal problems. They would be largely academic, however, since it is not likely that church officials would thus seek to control an individual's religious conduct through secular courts.

17. Priests must convey such information prior to performance of the marriage ceremony. See Nau, op. cit. supra note 15 at 76-7.


The elaborate body of rules developed since the middle ages on the subject of annulment provides for a declaration of ab initio nullity, when certain familial relations or mental reservations are found to have existed between the parties. Thus the refusal of one spouse to marry, except on condition that there be no children, is thought to destroy the very purpose of marriage and therefore to justify canonical annulment. See 7 A. Ar. S. 292 (1915) (De Castellane-Gould marriage); 19 A. Ar. S. 217 (1927) (Marconi-O'Brien marriage). Because of the "Pauline Privilege", Corinthians 1:VII, 12-15, and the "Privilege of the Faith", certain additional exceptions to the rule against divorce are
in several cases where antenuptial contracts would have been enforced but for procedural obstacles indicate willingness to enforce such agreements in a proper case.¹⁹

As a matter of practice, however, it is difficult to see how the agreement could be enforced in a direct action between the contracting parties, where the issues would be most squarely raised. Since neither diminution of church status nor mental anguish to the Catholic spouse is susceptible to pecuniary valuation, only nominal damages would be available in such an action.²⁰

And even granting a liberal interpretation of the rule that equity only intervenes to protect property rights,²¹ there would appear to be no basis for chancery jurisdiction here. In support of equity jurisdiction, one recent Catholic writer has argued that the right to have children brought up as Catholics is so intimately related to the parent's religious life and general peace of mind that, entirely apart from the contract, it constitutes an enforceable interest of personality.²² But this argument appears to be predicated on the untenable minor premise that non-Catholics are relatively indifferent toward the religious education of their children. American governmental aloofness from ecclesiastical disputes would seem to foreclose judicial consideration of this argument for preferential treatment.²³ But even if this jurisdictional objection were overlooked and the original equality of religious interest considered subject to destruction by estoppel relating back to the time the contract was signed,²⁴ a decree of specific performance would still be barred by the impossibility of enforcement. Recalcitrant obligors might conceivably be compelled to have children baptized or enrolled in Sunday school made in marriages of Catholics with unbaptized persons or marriages between unbaptized persons, in which one partner, after becoming a Catholic, desires to leave the old spouse and marry another Catholic. C. J. C. Can. 1120(1); Gasparrini, Tractatus de Matrimonio (1932) §§ 1162, 1169; Nau, op. cit. supra note 15 at 182, 186-8.

In any situation where grounds for a canonical annulment exist, a Catholic spouse may seek relief in the secular courts through civil annulment or divorce action, provided the consent of an Ordinary has first been obtained. The same rule governs attempts to secure civil separations a mensa et thoro. See Nau, op. cit. supra note 15 at 192, 196. ¹⁹ See In re Lamb's Estate, 139 N. Y. Supp. 685, 689 (Sur. Ct. 1912); In re Luck, 10 Ohio Dec. 1 (Cir. Ct. 1900); Commonwealth v. McClelland, 70 Pa. Super. Ct. 273 (1918).

²⁰ See 5 Williston, Contracts (Rev. ed. 1936) § 1340A. But see A. L. I. Restatement, Contracts (1932) § 341 (recovery for wanton infliction of mental injury).

²¹ This maxim has been frequently relaxed in recent years, especially in domestic relations cases. See Metzler v. Metzler, 18 N. J. Misc. 821, 151 Atl. 847 (1930); Pound, Interests of Personality (1915) 28 Harv. L. Rev. 343, 349; Pound, Individual Interests in the Domestic Relations (1916) 14 Mich. L. Rev. 177; Simpson, Fifty Years of American Equity (1936) 50 Harv. L. Rev. 171, 221-2. Theobald, Does Equity Protect Property Rights in the Domestic Relations (1930) 19 Ky L. J. 1, 55.

²² White, op. cit. supra note 6 at 46. See De Rerum Novarum in The Great Ecyclical Letters of Leo XIII (1898) 246.

²³ See Holy Trinity Church v. United States, 143 U. S. 457 (1892); Desribes v. Wilmer, 69 Ala. 25 (1881); Barnes, History and Social Intelligence (1926) 347-355; Meiklejohn, What Does America Mean? (1937) 90-94.

or parochial schools.\textsuperscript{25} But the non-Catholic parent could scarcely be prevented from expressing his personal views in family conversations or from nullifying formal church and school training by contrary private instruction.\textsuperscript{26}

A more common situation demanding construction of antenuptial agreements in actions directly involving the original contracting parties is litigation over custody of children which is ancillary to divorce or separation proceedings. Assertion in such an action that the marriage contract creates an implied consent to the award of custody to the Catholic spouse, in case domestic discord dissolves the household, is a misconstruction of the legal basis of family relations. The individual parent is under a legal obligation to use his or her untrammeled judgment on all occasions, to protect the best interests of the children.\textsuperscript{27} This assumption of a trustee relationship, as well as the notion in many jurisdictions that guilty spouses should be punished by deprivation of custody,\textsuperscript{28} has long served to justify judicial disregard even of explicit private custody agreements.\textsuperscript{29} Hence the implied award in the antenuptial contract would not prevent the court from making an independent decision between the parents on the custody issue, based on the usual congeries of financial, affectional and psychological factors.\textsuperscript{30}

Another custody issue might arise if the non-Catholic party breached the antenuptial agreement after the other spouse’s death. The Baptismal Godparents would then be obligated by canon law to intervene to insure a Catholic home for the children.\textsuperscript{31} But since, under Anglo-American common law doctrine, the surviving parent is the normal guardian \textit{ad litem} for minor children,\textsuperscript{32} neither Godparents nor collateral Catholic relatives would have standing to sue.\textsuperscript{33} An exception might exist if the antenuptial contract purported to create rights inuring to the benefit of executors and heirs.\textsuperscript{34} A Catholic administrator of the deceased spouse’s estate might then attempt

\textsuperscript{25} Thus non-parental guardians are frequently instructed by probate courts to educate their wards in a designated religion. See \textit{In re Mancini}, 89 Misc. 83, 151 N. Y. Supp. 387, 388 (Sup. Ct. 1915).

\textsuperscript{26} See Denton v. James, 107 Kan. 729, 193 Pac. 307 (1920); Brewer v. Cary, 148 Mo. App. 193, 127 S. W. 685, 692 (1910). None of the cases implying judicial willingness to enforce these contracts raise this problem.

\textsuperscript{27} See Friedman, \textit{The Parental Right to Control the Religious Education of a Child} (1916) 29 Harv. L. Rev. 485, 498.

\textsuperscript{28} Caldwell v. Caldwell, 141 Iowa 192, 119 N. W. 599 (1909); \textit{Madden, Persons and Domestic Relations} (1931) 377.

\textsuperscript{29} See \textit{Lindsey, Antenuptial and Separation Agreements} (1937) 156-160. But see Chamberlin v. Chamberlin, 193 App. Div. 784, 184 N. Y. Supp. 464 (1st Dep’t 1920) (court does not have power to set aside general separation agreement, without granting a judicial separation).

\textsuperscript{30} \textit{E.g.,} the rule that "children of tender age" usually are placed under the mother’s wardship. Abeles v. Abeles, 164 Misc. 418, 299 N. Y. Supp. 205 (1936).


\textsuperscript{32} See \textit{Madden, op. cit. supra} note 28 at 428-9, 464-7. At common law, infants of fourteen were privileged to choose their own guardians. 1 Bl. Com. 462. Many states have adopted this rule by statute. See \textit{Madden, op. cit. supra} at 466-7.


\textsuperscript{34} Many antenuptial contracts contain such succession provisions.
to sue on the contract to gain control of the children. But the attempt to devolve a co-guardianship on specified persons by testamentary grants assumes an unwarranted analogy between a parent's interest in children and ordinary property rights. Unless the surviving spouse is otherwise incompetent to act as guardian, his or her claim to custody takes precedence over the petitions of more distant relations as a matter of law. Few courts would give another person authority to override the survivor's control over the children's education.

A third contingency in which the antenuptial contract might be urged as the determinant of custody would arise subsequent to the death of both parents. The Church's position is that all material factors must be subordinated in order to insure Catholic upbringing for the child. Secular officials are, of necessity, forced to consider religious belief under some circumstances, but the state cannot allow private settlements or personal ecclesiastical doctrines to interfere with its avowed policy of permitting the free exercise of judicial discretion in the selection of a guardian.

Aside from the predilection for close relatives, the formula for selecting a non-parental guardian is to choose the person best fitted to stand in loco parentis for the specific children. Except in Missouri and New York, dissimilarity of religious views between parents and possible guardians is not ordinarily the decisive factor. But respect for the wishes of the deceased and the desirability of avoiding unnecessary psychological disturbance of

35. For an analogous situation see In re Tank's Guardianship, 129 Wis. 629, 109 N. W. 565 (1907).
36. See Florida v. Cline, 91 Fla. 300 (1926); Purinton v. Jamrock, 195 Mass. 187, 80 N. E. 802 (1907). But this right must yield when the general welfare of the child necessitates an award of custody to a person other than the surviving parent. People ex rel. Pascale v. Lanza, 166 Misc. 370, 2 N. Y. S. (2d) 401 (Sup. Ct. 1938).
37. The Church argues that it possesses exclusive control over the marriage of its communicants, except for incidental civil effects, and that the state's sole function is to enforce the decisions of the proper ecclesiastical authorities. Pius IX, Syllabus of Errors (1864) No. 68.
38. See Watson v. Jones, 13 Wall. 679 (U. S. 1871); Wells v. Talham, 189 Wis. 654, 194 N. W. 36 (1923) (fraudulent assertion of status essential to Catholic party in marriage does not effect civil status of partners).
39. See note 29 supra.
40. See Minersville School District v. Gobitis, 310 U. S. 586 (1940); Late Corporation of the Church of Jesus Christ of Latter Day Saints v. United States, 136 U. S. 1 (1889); Davis v. Beason, 133 U. S. 333 (1888) (dissolution of Mormon Church, because of adherence to outlawed marital doctrine of polygamy).
41. Madden, op. cit. supra note 28 at 153-5.
43. Brewer v. Cary, 148 Mo. App. 193, 127 S. W. 685, 692 (1910); In re Doyle, 16 Mo. App. 189 (1894) (award denied to a Catholic sister, however, because of a reputation for irresponsibility).
the adolescent mind should induce a court to direct guardians to continue the religious training of their wards in previously initiated channels. Since the terms of the contract may not have been faithfully observed, the determinative factor should be the actual religious environment of the child's former home.

By invoking jurisdictional limitations, many American courts have raised the tacit presumption that antenuptial contracts possess an enforceable legal status. As a matter of general policy, however, it would seem preferable for courts unequivocally to refuse enforcement. For the American doctrine of religious freedom necessarily subsumes a corollary privilege to change religious affiliations at will. This principle, coupled with the individual parent's duty to preserve his independent judgment with reference to the child's religious training, would seem to negate the prior contract. Moreover, the courts' inclination to overlook policy objections and to enforce otherwise valid contracts in the absence of express or implied legislative declarations would seem to be overcome in many jurisdictions by the terms of the religious freedom clauses of their state constitutions. In addition to the

45. See Stourton v. Stourton, 8 De C. M. & G. 760 (1857). The question of how effective such judicial direction would be still remains.


47. This view is upheld by the Dean of the Catholic University of America Law School in two recent books urging enforcement of these antenuptial contracts. White, op. cit. supra note 6 at 15-47; White, Canonical Antenuptial Promises and the Civil Law (1934).


To some extent this English rule reflects an ancient antagonism toward the Catholic Church. See In re Nevin, 2 Law Rep. Ch. 299 (1891).

49. It might be argued in response, however, that the duty is upon the parents jointly, rather than severally, and that the responsibility for active control over this phase of the child's education might be irrevocably vested in one parent by the antenuptial agreement.


51. An exception is made where "traditional public antipathy" is found to exist. 5 Williston, Contracts (2d Rev. ed. 1937) §§1, 1634-6; see The Case of Monopolies, 11 Co. 84 (1602). Thus certain types of marital contracts, e.g., those destroying consorts duties, have long been held invalid. 6 Williston, supra §§1741, 1742.

52. See e.g., Colo. Const. Art. II, § 4; Ohio Const. Art. I, § 7. The religious freedom clauses in a minority of states are worded exclusively or primarily as limitations
denial of power to establish an official religion, contained also in the First Amendment to the Federal Constitution,53 many state Bills of Rights affirm the individual's right to worship according to his own untrammelled volition. This affirmative grant would seem to place the privilege freely to change religious affiliations—whether one's own or those of minor natural children54—among those inalienable liberties of speech and conscience which are not subject to restriction by private agreement.55

Admittedly the doctrine that antenuptial contracts are invalid would occasionally place the Catholic spouse at the mercy of the consort, by forcing the continuance of married life under repugnant conditions.55 When mutual love and respect are insufficient to maintain domestic tranquility, a wise respect for the limitations of the judicial process counsels abstinence from intervention.57 It seems likely that most American courts will refuse to enforce Catholic antenuptial contracts either by continuing to invoke procedural impediments or by adopting the suggested voidability doctrine.58 The privilege of the Roman Catholic Church to oppose the marriage of its com-

53. Because of wording closely analogous to that of the Fourteenth Amendment of the United States Constitution, these provisions would not seem to place restrictions around the freedom of contract of private citizens. See Civil Rights Cases, 109 U. S. 3 (1883); Corrigan v. Buckley, 271 U. S. 323, 330 (1926). Some historians, however, have argued that the Fourteenth Amendment was intended to safeguard civil liberties against non-official persons also. FLACK, ADOPTION OF THE FOURTEENTH AMENDMENT (1907); Boudin, Truth and Fiction of the Fourteenth Amendment (1938) 16 N. Y. U. L. Q. Rev. 19. If this interpretation were to win judicial acceptance, see Black, J., dissenting in Conn. Gen. Life Ins. Co. v. Johnson, 303 U. S. 77, 83 (1938), the substantive argument made in the text might eventually also be accepted in states, using analogous phrasing in their Bills of Rights. See Neville v. Dom. of Can. News Co., 3 K. B. 556 (1915) (limitation on right to destroy freedom of press by contract).

54. Of course, a parental agreement would not prevent a child from exercising his own choice as to religious affiliation. But in most states parents would probably be able to insist upon attendance at the school of their church until the child had passed the fourteenth birthday. See FRIEDMAN, supra note 27.

55. Thus the provisions of the Thirteenth Amendment to the Federal Constitution, prohibiting slavery, may not be by-passed by private contracts. See Bailey v. Alabama, 219 U. S. 219 (1911); In re Lennon, 166 U. S. 548 (1896); WILLOUGHBY, CONSTITUTIONAL LAW OF THE UNITED STATES (2d. ed. 1935) § 499.

56. On the other hand, enforcement of a contract against a Protestant obligor would make life equally intolerable from his point of view. If the question is considered as a matter of practical adjustment rather than the attainment of abstract justice the signing of the original contract would not seem to weaken the non-Catholic position.

57. McCLINTOCK, EQUITY (1936) § 157.

58. Utilization of the coercive power of the State to regulate disputes which the majority of the community consider reserved for personal settlement can only result in reviving latent religious antagonisms. See ZOLLMAN, AMERICAN CHURCH LAW (1933) 48, n. 47.
municants with members of other sects or to condition its consent to such marriages can hardly be questioned. But it would appear more consonant with American traditions to abandon the contractual procedure and return to the Church's older policy of asking the prospective spouses in mixed marriages merely for personal promises, admittedly enforceable only at the tribunal of conscience.

EFFECT OF INCREASED CONGRESSIONAL POWER UPON STATUTORY CONSTRUCTION OF EXISTING LAWS: THE BUNTE CASE*

During the last fifty years, and particularly in the present term of the Supreme Court, federal regulatory power over industry has been greatly expanded by judicial construction of the commerce clause. Whether statutes designed by Congress to utilize fully its constitutional powers, but passed prior to judicial expansion of those powers, should be similarly enlarged by judicial construction is a new and debatable problem.

Some of the available criteria for construing such statutes have been illustrated in a recent Supreme Court case involving the jurisdiction of the Federal Trade Commission. The Act creating the Commission, passed in 1914, prohibits "unfair methods of competition" in interstate commerce. In construing the phrase, "unfair methods of competition," the Supreme Court had, previous to the principal case, declared unlawful the selling across state lines of "break and take" candy, whereby the amount of candy or additional

59. See Lonergan, Legal Effect of the New Marriage Promises (1932) 47 America 59, 61.
60. The insistence of many American Bishops on formal contracts would appear to be based on an unnecessary interpretation of Church doctrine. In 1932, the Sacred Congregation of the Holy Office, in a Rescript approved by Pope Pius XI, warned Bishops to exercise greater care in the issuance of dispensations in mixed marriages. 24 A. Ap. S. (1932) 15. Some of the American hierarchy then began the search for methods of making the antenuptial agreements legally enforceable. But there is strong ecclesiastical authority for the position that the decree was only meant to take effect in countries where the civil (i.e., non-church) law was "affirmatively antagonistic" to the enforcement of antenuptial religious promises. Since the American law is considered by canon lawyers to be "neutral" on this question, continuance of the old simple promise procedure would seem doctrinally permissible. Boussacné, Canon Law Digest (1934) 506; Letter by Pope Pius XI in 40 Irish Eccles. Rev. (1932) 409.

token a purchaser receives is determined by chance.\textsuperscript{4} In the principal case a manufacturer of such candy sold it entirely within the State of Illinois to the great detriment of out of state candy producers.\textsuperscript{6} Though not denying the power of Congress to prohibit the defendant from selling this candy in intrastate commerce, the majority of the Court through Mr. Justice Frankfurter decided that Congress had not done so in the Federal Trade Commission Act. Construing the words of the statute narrowly, the Court held that the admitted “unfair methods of competition” were not “in interstate commerce.”\textsuperscript{6} Dissenting, and interpreting the statute more broadly, Mr. Justice Douglas thought “unfair methods of competition” contemplated both a victim and a wrongdoer; if either were within interstate commerce, then the “unfair methods of competition” operated within the interstate field.\textsuperscript{7}

In choosing between these two constructions of the statute, it is important to note that the problem is set, though not solved, by determining that Congress, when it passed the Federal Trade Commission Act in 1914, intended to utilize all the power it then possessed under the commerce clause. Such an intention should render inappropriate the usual investigation of Congressional intent to cover a specific case as manifested by apt statutory wording or extrinsic documents and hence necessitates a construction based on other considerations. Ordinarily Congress will have had no intention with respect to a case covered only by a broad general interpretation of a statute whose Constitutional base has expanded. Yet it might have been Congress’ desire to cover the case had its limited power not rendered consideration of the possibility moot.\textsuperscript{8}

Had the Federal Trade Commission Act been passed within the last decade, the existence of an intention to use full Congressional power would be doubtful; for in such recent acts as the National Labor Relations Act\textsuperscript{9} Congress has employed the terms “affecting interstate commerce” as words of art to indicate fullest utilization of Congressional authority. This use of “affecting interstate commerce” in legislation was, however, unknown before and for a decade subsequent to the passage of the Federal Trade Commission Act.\textsuperscript{10}

\begin{itemize}
\item \textsuperscript{5} Evidence showed that 127 interstate producers were prevented by cease and desist orders from selling break and take candy across state lines into Illinois [Federal Trade Commission v. Bunte Bros., 61 Sup. Ct. 580 (U. S. 1941), Record 8-9] and that these producers had lost up to 80% of their Illinois business during a four months' period after these orders and while break and take candy was still sold locally [Id. at 12].
\item \textsuperscript{7} Id. at 584.
\item \textsuperscript{8} It may be suggested that, even aside from a clear Congressional intention to use all its power, a statute of 25 years standing, framed without reference to modern conditions and difficult to amend in troubled legislative times, should be construed without regard to documentary evidence of Congressional intention or to the possible absence of the most apt words to cover a case in question.
\item \textsuperscript{10} The Employers Liability Act, 35 Stat. 65 (1908), for example, which originally applied only to those employees injured by a common carrier while “engaging in interstate commerce” was not amended until 1939 to cover any employee of a carrier whose
\end{itemize}
Congress during this latter period generally extended its regulations over "commerce" which was then variously defined as, for example, that between two states or between a state and a foreign country.\textsuperscript{11}

In addition to similarities in the wording of the Trade Commission and other broad regulatory acts of that period, there is positive evidence in the history of the Trade Commission Act itself indicating that Congress intended to exercise all its then Constitutional power under the commerce clause. The original Acts which passed both the House and the Senate defined the commerce in which "unfair methods of competition" were unlawful as "such commerce as Congress has the power to regulate under the Constitution."\textsuperscript{12} In the Conference Committee "commerce" was redefined more specifically as, for example, commerce between two states or between a state and a territory.\textsuperscript{13} According to the report of the Conference Committee and the explanation of the bill by its proponents, no substantial change had been made in the definition of the word.\textsuperscript{14} In subsequent debates on the Conference bill the only definitional change noticed was the exclusion of commerce with the possessions.\textsuperscript{15} There was no showing that Congress did not wish to use all its commerce power in regulating "unfair methods of competition" within the United States.

As at least presumptive evidence of Congressional intent to employ its full Constitutional power, it is also significant that, within the United States, Congress actually did use all the commerce power which the then current tenor of judicial opinion conceded in the administration of other acts. In \textit{United States v. E. C. Knight}\textsuperscript{16} the Supreme Court had held that a monopoly in the \textit{production} of interstate goods was a local matter and could not be duties affected interstate commerce. 53 \textit{Stat.} 1404 (1939), 45 U. S. C. A. § 51 (Supp. 1940).

\begin{itemize}
  \item \textsuperscript{11} \textit{Cf.} Food and Drug Act, 34 \textit{Stat.} 768 (1906), 21 U. S. C. § 2 (1935). The Packers and Stockyards Act, 42 \textit{Stat.} 160 (1921), 7 U. S. C. § 183 (1935), in attempting to control the selling of livestock, shipped in interstate commerce but sold within a single state, asserted power over a "current of commerce whereby the products are sent from one State with the expectation that they will end their transit after purchase in another." This narrow definition of commerce, taken from an opinion of Mr. Justice Holmes [\textit{Swift & Co. v. United States}, 196 U. S. 375, 398 (1905)], was evidently thought necessary to bring the evil within existing Congressional power. Even the Sherman Act, 26 \textit{Stat.} 209 (1890), 15 U. S. C. § 1 (1935) prevented restraints of trade or commerce "among" the several states. Only by a logomachical accident does a "restraint of commerce" apply to something not in commerce while "unfair competition in interstate commerce" to some does not.
  \item \textsuperscript{12} 51 \textit{Cong. Rec.} 14922, 14923 (1914).
  \item \textsuperscript{13} \textit{Id.} at 14919.
  \item \textsuperscript{14} \textit{Id.} at 14924.
  \item \textsuperscript{15} \textit{Id.} at 14927, 14935. Taking the commerce of the Possessions from the Act was defended on two grounds: first, that regulation of both the internal and external commerce of possessions, distant from the United States and with unique conditions, could be best effected by local agencies; second, that the Federal Trade Commission would "have enough to do here in the United States." Statement of Mr. Stevens explaining the Bill in the House, 51 \textit{Cong. Rec.} 14935 (1914).
  \item \textsuperscript{16} 156 U. S. 1, 16 (1895).
\end{itemize}
prosecuted under the Sherman Act, since its effect on interstate commerce was necessarily indirect. Although by 1914 there was a sufficient recession from this view to permit action against the oil, and the tobacco monopolies,17 the range of activities “directly affecting” interstate commerce was still narrowly confined. For instance, the first Employers’ Liability Act was invalidated because it applied to railroad employees whose duties related to a carrier’s intrastate activities which, the Court reasoned, only “indirectly affected” the carriage of interstate traffic.18

None of these cases demonstrate that an intrastate activity discriminating against interstate commerce only in a competitive retail market would, as a matter of judicial construction, “directly affect” interstate commerce. Competitive discrimination by an activity wholly within one state was, however, in issue in the Shreveport case.19 There the Interstate Commerce Commission was permitted to control the intrastate rates of an interstate carrier when shippers obtaining these rates thereby gained a preference over interstate shippers who were charged higher rates. The opinion was limited to asserting Congressional power over the discriminatory practices of interstate carriers — long subject to comprehensive regulation. It gave no assurance that Congress could also control a discriminatory intrastate activity, never before subject to regulation, and related to interstate trade only by market competition which had no readily calculable monetary effect. The contemporary judicial climate is best characterized as one which produced the doctrine of Hammer v. Dagenhart20 that Congress cannot prevent the producers in one state from using interstate commerce to compete unfairly by sub-standard labor practices against producers in another. But if the Shreveport case had instilled a general belief that Congress had Constitutional power to control discriminatory intrastate commerce, it might then have indicated to Congress that, as a matter of statutory construction, the words “in interstate commerce” sufficed to control discriminatory intrastate activity. Thus, Mr. Justice Hughes in the face of a statutory prohibition against fixing purely intrastate rates held that discriminatory intrastate rates were not simply matters “of transportation wholly within one state” and were, therefore, within the ICC’s statutory power.21

17. Standard Oil Co. v. United States, 221 U. S. 1, 68 (1911); American Tobacco Co. v. United States, 221 U. S. 106, 184 (1911); see also United States v. Patten, 226 U. S. 525, 542 (1913) (obtaining a corner on the New York Cotton Exchange was within the interdict of the Sherman Act); Loewe v. Lawlor, 208 U. S. 274, 301 (1903) (strike against production in one state combined with boycott against retailing of the product in another illegal under Sherman Act).


21. Houston & Texas Ry. v. United States, 234 U. S. 342, 358 (1914). It should be noted, however, that a broad conception of Congressional power need not invariably entail the statutory construction of the Shreveport case. For, as pointed out in the principal case, the Interstate Commerce Act embodies the well defined purpose of preventing railroad discrimination—a purpose clearly thwarted by discriminatory intrastate commerce rates. The purpose of the Federal Trade Commission Act, on the other
In view, therefore, of Congress' probable intention to use all its constitutional power, as of 1914, in passing the Federal Trade Commission Act, that part of the opinion in the instant case which deals with construction of the statute on the verbal level seems profitless. The Court, however, proceeded to employ three other aids to construction. First, the want of assertion of the power by the Commission over a quarter century was considered an indication that the power had not been "conferred." Second, the failure of a clarifying amendment in 1935 "re-enforced" this conclusion. And finally, the extension of the FTC's power over a local business, heretofore controlled locally, was deemed generally unwise in the absence of a clearer Congressional mandate.

The Court's first two arguments seem to prove only that the problem of discriminatory intrastate commerce has never seemed sufficiently pressing to produce either legislative or administrative action. If true, these contentions are strengthened by the absence of any showing in either opinion that the problem of discriminatory intrastate commerce had recently sprung into significance. Even admitting that this problem is of lesser magnitude than others presented to various regulatory agencies, including the FTC, the evil should not be minimized. As a result of the principal case, a large volume of intra-state business will be relatively independent of the Federal Trade Commission Act, and the law in its present state, therefore, may unduly hand, is less ascertainable. Where it aims at immoral practices the discriminatory features of intrastate commerce, though undesirable, need not conflict with the purpose of the Act and, therefore, need not come within its interdict under the Shreveport doctrine forbidding discriminatory activity under a statute designed to prevent discrimination. On the other hand, viewing any questionable activity not as "discrimination" but as "unfair competitive immorality" toward interstate commerce, it is clear that such unfair competition is a substantive wrong within the purview of the Act whether or not the Act was designed extensively to cover it. Even if the discriminatory activity is not considered as an evil at which the statute aims, however, its control would still be desirable where the evil is a large and inevitable result of federal regulation and falls within federal power.

22. Reasons for non-use of power by a commission or for the fact that it urged no clarifying legislative action are, of course, in the realm of conjecture. The problem in the principal case may, for example, have been neglected for many years not because unimportant in an active administration of the FTC Act but because in fact the Commission was inactive. As has been aptly stated by Mr. Justice Black dissenting in United States v. The Cooper Corporation [9 U. S. L. Week 4268, 4271-2 (U. S. 1941)] where a similar non-use of power by the Attorney General was involved, "We do not know and cannot possibly determine why no prior suits were instituted for the benefit of the government. To assign reasons for such inaction is but to guess. And the guess would doubtless vary almost in accordance with the preconceived notions of the guessor."

23. This must necessarily follow the decision in the principal case for, although a man may engage in interstate commerce some of this commerce may still be intrastate unless with respect to a questionable transaction his interstate and intrastate business were inextricably mingled. It should also be noted that this decision may induce a similar restrictive result in administration of certain sections of the Robinson-Patman Act, as, for example, the section prohibiting "any person engaged in [interstate] commerce, in the course of such commerce," from paying brokerage fees where
favor producers who sell locally at the expense of competitors selling across state lines.

If, however, the Court's first two arguments attempt to do more than place the problem in its proper significance — i.e., if they purport to show that non-use of power by a commission is conclusive evidence of original Congressional intention, or that the intention of a subsequent Congress is decisive — they are more readily answerable. Aside from the fact that the first is of doubtful historical accuracy, it may as easily defeat legislative intention as implement it if invoked in subsequent cases to stultify administrative flexibility. Neither is the failure of an amendment to the Federal Trade Commission Act in 1935, which would have given the Commission jurisdiction over "unfair methods of competition affecting interstate commerce," convincing for it does not affirmatively show the intent even of the one House of Congress in which it was considered. This amendment, suggested in a Federal Trade Commission Report and reported by the Senate Interstate Commerce Committee as necessary to remove "doubt" in the Act, was passed as an unobjected bill. Subsequently one Senator obtained unanimous consent for reconsideration upon his belief that the measure would give the Commission control over intrastate commerce — a result which he considered neither within Congressional power nor desirable without a full dress Senate debate. But the amendment was never subsequently

no actual service was rendered. 49 Stat. 1527 (1936), 15 U. S. C. § 13(c) (Supp. 1939). The decision in the principal case should not, however, confine as completely the price discrimination section of the Act. 49 Stat. 1526 (1936), 15 U. S. C. § 13(a) (Supp. 1939). Under this section, partly because of different language but more because of Congressional intent as measured by committee reports on the final bill, it is clear that a person discriminating between his interstate and intrastate buyers comes within the Act. Sen. Rep. No. 1502, 74th Cong., 2d Sess. (1936) 4; H. R. Rep. No. 2237, 74th Cong., 2d Sess. (1936) 8; see Senator Logan explaining the Bill in the Senate, 80 Cong. Rec. 3113 (1936). It is also possible that since the Robinson-Patman Act has a more specific application than the "unfair methods of competition" section of the Federal Trade Commission Act, the Court will follow the Shreveport case [Houston & Tex. Ry. v. United States, 234 U. S. 342 (1914)], as it refused to do in the principal case.

24. Though there has never been a serious effort prior to the commencement of the instant case to assert the power for which the FTC contends, the problem was brought up in two earlier cases. Canfield Oil Co. v. Federal Trade Comm., 274 Fed. 571 (C. C. A. 6th, 1921); Chamber of Commerce v. Federal Trade Comm., 13 F. (2d) 673, 684 (C. C. A. 8th, 1926). By contrast to the instant dissent, the majority held that these cases established no "administrative practice" since, in the first, the contention was supported by no evidence of discrimination, and the second case differed factually from the instant case. Federal Trade Comm. v. Bunte Bros., 61 Sup. Ct. 580, 582, n. 3 (U. S. 1941).

25. Administrative flexibility has in recent years been a determining factor in judicial decision. Opp Cotton Mills v. Admr. of Wage and Hour Div., 61 Sup. Ct. 524 (U. S. 1941); Railroad Comm. of Texas v. Rowan & Nichols, 310 U. S. 573 (1940); Helvering v. Wilshire Oil Co., 308 U. S. 90 (1939).


27. 79 Cong. Rec. 1843 (1935).
reconsidered since it was superseded by a new bill emanating from another Trade Commission Report, and not advising the addition to the Act of the word "affecting." Even had the failure of the 1935 amendment shown the intent of the Senate, however, it would not have been controlling here, since interpretation of an ambiguous statute is a court function—the views of a subsequent Congress being relevant only when transformed into legislation by the vote of both Houses of Congress and the signature of the President.

The majority opinion is based mainly on the third point of construction—an aversion to a statutory implication which "would give a federal agency pervasive control of myriads of local businesses in matters heretofore left to local custom or local law." The objection to such an implication in the absence of "a clearer mandate from Congress" is most plausibly explained as an attempt to limit the scope of so-called "judicial legislation." It has already been pointed out, however, that an independent judicial consideration of the merits is desirable in the circumstances of the instant case. Furthermore, a meticulous judicial concern not to "legislate" may be unwise in view of the difficulty of securing Congressional action on this relatively minor problem; and it is not in keeping with such recent decisions as United States v. Hutcheson and Securities and Exchange Commission v. The United States Realty & Improvement Company. The Court's objection to extending the statute might, of course, stem from a disapproval of federal regulation of local business. But it is difficult to understand the force of this argument in view of the Court's approval of recent federal farm and labor legislation.

The magnitude of the substantive problem and the degree to which any questionable activity affects interstate commerce would seem more significant; and the instant case may well have turned on an unexpressed aversion of the Court to federal regulation of petty immoral practices in the candy trade (although these had already been declared subject to FTC control) rather than on the undesirability of allowing the FTC to regulate discriminatory intrastate commerce.

29. United States v. American Trucking Ass'n, 310 U. S. 534, 550, n. 42 (1940) (despite refusal by House conferees to report a bill supported by the ICC and intended to clarify an ambiguity in the Motor Carriers Act concerning the Commission's jurisdiction, the Court resolved the ambiguity in the ICC's favor).
31. 61 Sup. Ct. 463 (U. S. 1941) (Though the legal immunities of labor activities under the Norris-La Guardia Act applied by the terms of the Act only in equity jurisdiction, the Court determined that the Act was also a "disapproval" of prior decisions which would otherwise have controlled criminal prosecution under the Sherman Act; and, thus, the Court granted criminal immunities similar to those in equity).
32. 310 U. S. 434 (1940) (corporations were prevented from filing under Chapter 11 of the Bankruptcy Act although the Act contained no such prohibition and although such a provision had been suggested during the Act's passage).
33. Mulford v. Smith, 307 U. S. 38 (1939); see note 1 supra.
34. See note 4 supra.
35. The third argument of the Court may be addressed to protecting local governmental functions—a consideration which has proved persuasive in the recent construction of other acts. The governmental functions given protection were, however, much more
It is difficult to harmonize the principal case with the policy of the existing decisions which mark the permissible degree of state interference with interstate commerce. In determining the validity of any state regulation affecting interstate commerce, where the regulation is for the protection of some vital local interest, the disadvantages thereby caused interstate commerce has today been held a matter of Congressional, not judicial, concern. This judicial unconcern does not, however, permit a state even indirectly to reap a benefit solely at the expense of non-residents. A state may not restrict a tax on persons selling by sample to those who are not "regular retail dealers" of the state; nor may it by regulation destroy the competitive advantages of producers in other states; nor in many situations give competitive advantages to resident producers. While Illinois has passed no discriminatory law, the decision in the principal case has created a situation which has that economic effect. Likewise the decision operates as a discriminatory law in a political sense, for in the present troubled legislative times, Congress is unlikely to remedy the situation; and state remedial action may, as in all discriminatory situations, prove unavailing for it "is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interest within the state." Though the analogy is legally imperfect, it seems worthy of consideration in weighing the policy question here of whether to extend FTC power by judicial implication.

By contrast to the three majority arguments the dissent urged a somewhat more convincing rule of construction — an interpretation of the Federal Trade Commission Act in light of its statutory background. Traditionally the Com-

36. South Carolina State Hwy. Dep't v. Barnwell, 303 U. S. 177 (1938) (states permitted to declare weight and width of trucks traversing their roads adversely to interstate trucking service); see Dowling, Interstate Commerce and State Power (1940) 27 Va. L. Rev. 1.
39. Foster-Fountain Packing Co. v. Haydel, 278 U. S. 1 (1928) (invalidation of state law preventing shipment of raw material from the state).
40. South Carolina Hwy. Dep't v. Barnwell, 303 U. S. 177, 184, n. 2 (1938).
41. 61 Sup. Ct. 580, 584 (U. S. 1941).
mission's jurisdiction has been viewed as supplementary to Sherman Act enforcement, thus permitting the Commission to attack restraints of trade not in themselves unfair methods of competition—e.g., resale price maintenance by a monopolistic manufacturer. But if the Federal Trade Commission Act has been interpreted as prohibiting the same evils as the Sherman Act, it might well be extended to include control of intrastate commerce in a manner similar to the Sherman Act. Such a statutory analysis, however, is inconclusive in the principal case since there is no showing that by discrimination Bunte Brothers will be able to gain a monopoly or restrain competition in the Illinois candy market. Consequently the decision probably does not preclude application of the Act to discriminatory intrastate commerce when its effect goes beyond the sphere of unfair competition to restrain trade or create monopoly.

While the interpretive rule of the dissent and the last canon of construction of the majority may be significant in determining the scope of some Congressional laws, designed to utilize completely a once restricted Congressional power, they do not seem to compel a decision either way in the principal case. Preferably the case should have been decided on the desirability of controlling that intrastate commerce which can be shown to discriminate substantially against interstate commerce in the limited situation where a prior commission ruling has circumscribed the conduct of interstate business. The decision may, however, have a desirable effect in so far as it forces the FTC to turn its attention away from the restricted orbit of petty competitive immoralities without restricting its supervision of that intrastate commerce which is in substantial restraint of trade.


44. That many activities, occurring wholly within a state and not "commerce" within its meaning in Mullford v. Smith, 307 U. S. 38 (1939), come within the interdict of the Sherman Act is clear. See, e.g., Standard Oil Company v. United States, 283 U. S. 163, 168-9 (1931).

45. Commission power necessary to eliminate discrimination in this limited situation is far smaller than a general power to prohibit unfair methods of competition "affecting" interstate commerce.

46. There has been no observable tendency on the part of the FTC since the instant decision to turn from the control of relatively minor evils. Three cease and desist orders have been issued against candy sales by lottery similar to dealings in "break and take" candy. (1941) 9 U. S. L. Week 2569, 2601, 2633. It is doubtful that the decision will have any practical effect in the future in changing the subject matter of the FTC's jurisdiction.