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Attorney for Appellee.

No. 10,541

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. R. MASON,
Appellant,

vs.

EL DORADO IRRIGATION DISTRICT,
Appellee.

APPELLANT'S OPENING BRIEF.

J. R. MASON,
1920 Lake Street, San Francisco, California,
Appellant in Propria Persona.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

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JURISDICTIONAL FACTS AND PLEADINGS.

This proceeding is a petition for composition of certain bonds of the El Dorado Irrigation District, a State agency organized September 22, 1925, under the California Statutes of 1897, page 254. (Deering's General Laws, Act 3854, page 1792.) This proceeding is under and is subject to the provisions of Chapter IX of the Bankruptcy Act of 1898. (11 U. S. C. A., Sections 401-404.)

The jurisdiction of this Court in this appeal is under Sections 24 and 25 of the Bankruptcy Act of 1898, as amended June 22, 1938. (11 U. S. C. A., Sections 47-48.)

The appellant, who is a creditor of El Dorado Irrigation District, filed his answer and objections to petition (R. 23)[1] and his proof of claim. (R. 36.)

The petition was heard before the Honorable Martin I. Welsh, District Judge, February 27, 1940 (R. 49), and an interlocutory decree confirming the plan of composition was filed March 8, 1941. (R. 255-263.) Final decree discharging appellee was entered July 7, 1943 (R. 5-12, No. 10,541), and notice of appeal was filed August 6, 1943. (R. 12, No. 10,541.)

STATEMENT OF THE CASE.

Throughout this brief El Dorado Irrigation District will be referred to as the "appellee" and the appellant who was respondent below, will be referred to as "appellant".

Appellee is an agency and instrumentality of the State of California exercising governmental functions, exclusively. It was created September 26, 1925, pursuant to Cal. Stats. 1897, page 254 (supra), and includes about 30,702 acres, with the City of Placerville, located in El Dorado County, California. (R. 82.)

Appellee acquired its water works and other property with money borrowed by the issuance of general obligation non-callable bonds, in the amount of $688,000.00, of which $600,000.00 were sold in 1927 to J. R. Mason & Co., at 92 and accrued interest, and

[1]References are to the Record in case No. 9851 unless otherwise indicated. The Record in case No. 9851 is a part of the Record on Appeal herein.

$88,000.00 were sold in 1930 at 94 and accrued interest. (R. 87.) All of these bonds bear interest at the rate of 6% per annum, payable semi-annually and they mature serially January 1, 1948 to 1967. (R. 12.)

Appellant owns $8000.00 of the 6% non-callable bonds, none of which are due or payable. They mature 1951 to 1965. Appellee has paid none of the interest due on these bonds since July 1, 1932. (R. 37.)

The composition plan is described at R. 16.

At the time appellee filed its present petition 100% of the "assenting" bonds, and over 96% of all the outstanding bonds were in the possession of the Reconstruction Finance Corporation (R. 19) and no "assent" was ever gotten from the original holders. (R. 234.) In addition to these obligations, there were warrants in the sum of $24,437.77, some of which were held by the R.F.C. (R. 19.)

In 1934 the R.F.C., acting under the authority of Chapter 25, Title 2, paragraph 36, 48th Statutes, 49, granted appellee a loan of not to exceed $360,000.00 for the purposes authorized. (R. 142.)

On October 6, 1938 the instant plan of composition, under 11 U. S. C. A. 401-404, based on the assents as above, was submitted to the Court below by appellee.

In the District Court the plan was opposed by appellant on several grounds, the principal of which were the following:

1. That appellee, after more than 95% of the original bondholders had accepted a figure of 50½ for their bonds, made a compromise settlement with one

of its substantial creditors on the basis of 82½ on principal due, plus 82½% of interest.

2. The plan was unfair because appellee could pay more.

Interlocutory decree was entered and an appeal was taken from it to this Court. The opinion of this Court appears at 126 Fed. (2d) 922. The mandate went down to the District Court on October 22, 1942. (R. 5, Case No. 10,541.)

The record on this appeal is very short, so far as the proceedings subsequent to the entry of the interlocutory decree are concerned.

Perhaps the principal points raised on this appeal involve the very important difference between Section 303 and Section 403, found in subdivisions (e) and (f) of Section 403. Appellee perhaps assumed that the interlocutory decree may authorize the debtor to make distribution of the new securities, as occurred in this proceeding. The Act provides otherwise. It provides that distribution can be made by the Court only in its final decree. Further, the whole proceeding rests upon the consent of both the prescribed per cent of creditors affected by the composition and the debtor. Such consents are necessary for the jurisdiction of the Court, and are a prerequisite to the entry of the final as well as the interlocutory or any other order or decree permitted by the amended Act.

All of the "consenting" bonds had been fully "discharged" and cancelled before the entry of the final decree. (R. 8, No. 10,541.)

Furthermore, the final decree was entered without notice of any description to creditors, including appellant. The record on this appeal discloses no notice of the hearing on the final decree, nor does it show that the final decree was ever presented to appellant or his former counsel, or even any notice of the filing of the decree was ever given by counsel for the appellee.

These and other points on appeal, are as follows:

POINTS ON APPEAL.

The following points are made on this appeal (R. 16, 26, Case No. 10,541):

1. The Court erred in entering the final decree and should have dismissed the proceedings for the reason that all of the bonds involved in the composition except those of appellant and other minority holders were surrendered and cancelled before the entry of the final decree voluntarily and there was therefore no creditor whose consent to the plan of composition could form the basis of a final decree and discharge of the indebtedness nor any proper consent any longer before the Court.

2. The provision in the final decree requiring creditors to surrender their bonds or be forever foreclosed from collecting anything upon them within a period of 12 months from the entry of the final decree is void and not authorized by the Bankruptcy Act; no time limit should be made and furthermore such funds as may not be paid out belong to the creditors and not to the debtor.

3. The hearing on the final decree was without due notice to the creditors.

4. The final decree so far as it cancels, annuls and holds for naught appellant's bonds exceeds the jurisdiction of the District Court in accordance with Chapter IX of the Bankruptcy Act.

5. The final decree takes the property of appellant unlawfully and in violation of the Fifth Amendment to the Constitution of the United States and in violation of the Constitution of the State of California.

6. The District Court had no jurisdiction of the matters nor the parties at the time of the entry of the final decree.

7. The final decree violates subsection (c) of Section 403, 11 U. S. C. A., because in "cancelling and annulling" the bonds at bar it operates to reduce the direct taxes lawfully payable by the private holders of land, which are mandatory under the contract in the bonds of the appellant, and thus it "interferes" (comes into collision) with the exercise and enforcement of political and government powers, explicitly prohibited by the Act.

8. The final decree violates Clause 2, Section 3, Article 4 of the Constitution of the United States, in that it operates to "prejudice * * * claims of a particular State".

9. The final decree is unconstitutional in that it violates the provisions of Article VI, Section 13 and Article XI, Section 13 of the Constitution of the State of California, because it serves to appropriate prop-

erty belonging to the State, designated a "public trust" and dedicated irrevocably for the "uses and purposes" of the Irrigation District Act, one of which is the fulfillment of the contractual obligation under the bonds owned by appellant, and which property it releases for the unlawful enrichment of persons with no legal or equitable right in or claim to it. The public derives no benefit whatever from such taking.

ARGUMENT.

FIRST PROPOSITION: THE COURT ERRED IN ENTERING THE FINAL DECREE AND SHOULD HAVE DISMISSED THE PROCEEDINGS FOR THE REASON THAT ALL OF THE BONDS INVOLVED IN THE COMPOSITION EXCEPT THOSE OF APPELLANT AND OTHER MINORITY HOLDERS WERE SURRENDERED AND CANCELLED BEFORE THE ENTRY OF THE FINAL DECREE VOLUNTARILY AND THERE WAS THEREFORE NO CREDITOR WHOSE CONSENT TO THE PLAN OF COMPOSITION COULD FORM THE BASIS OF A FINAL DECREE AND DISCHARGE OF THE INDEBTEDNESS NOR ANY PROPER CONSENT ANY LONGER BEFORE THE COURT.

The appellee shows (R. 8, No. 10,541) in the final decree, that prior to procuring the final decree, all of the "assenting" bonds had been "cancelled and delivered to the petitioning district". The consent of 66⅔% or more of the creditors affected by composition under 11 U. S. C. A. 401-404, is a prerequisite to jurisdiction, and such consents are necessary for jurisdiction, no less for a final decree than for an interlocutory decree.

But, perhaps more cogent is the provision in subdivision (f) of Section 403 which governs the dis-

tribution, whether of new securities or money involved in the plan of composition. Clearly, distribution made, as in the case at bar, before final decree is at the risk of all parties. If inequity or unfairness should result from distribution before a final decree of confirmation has been made, creditors accepting the new bonds will not be protected by the interlocutory decree.

The Act, in subdivision (f) of Section 403, provides that distribution can be made only by the Court in its final decree. Appellee and the "consenting" creditor (R.F.C.) may have assumed that an interlocutory decree may authorize the debtor to make distribution of the new securities. The Act provides otherwise.

Once the consenting bonds have been "cancelled", any assents based upon their ownership, are *ipso facto* deprived of the constitutional base, upon which their efficacy as consents rests.

Such was the square ruling by the Fifth Circuit Court in the case of *E. C. Wright v. City of Coral Gables,* 137 Fed. (2d) 192 (cert. granted Nov. 8, 1943). It was also held by the same Court in the case of *Green v. City of Stuart,* 135 Fed. (2d) 33 (cert. denied), that jurisdiction depends upon State consent, and in *Leco Prop. Co. v. Crummer & Co.,* 128 Fed. (2d) 110, that jurisdiction depends upon consent of the debtor.

In *In re Hartford Acc. Ins. Co.,* 39 F. Supp. 475, it is said:

> "Federal courts should scrupulously confine their own jurisdiction to the precise limits which the Statute conferring jurisdiction has defined."

Therefore, it is respectfully submitted that, absent the consents of creditors made a requisite under 11 U. S. C. A. 401-404 and because distribution took place under the interlocutory decree, jurisdiction to issue the final decree in the instant case was fatally lacking and the decree is invalid and it ought to be set aside.

SECOND PROPOSITION: THE PROVISION IN THE FINAL DECREE REQUIRING CREDITORS TO SURRENDER THEIR BONDS OR BE FOREVER FORECLOSED FROM COLLECTING ANYTHING UPON THEM WITHIN A PERIOD OF 12 MONTHS FROM THE ENTRY OF THE FINAL DECREE IS VOID AND NOT AUTHORIZED BY THE BANKRUPTCY ACT; NO TIME LIMIT SHOULD BE MADE AND FURTHERMORE SUCH FUNDS AS MAY NOT BE PAID OUT BELONG TO THE CREDITORS AND NOT TO THE DEBTOR.

The final decree provides that the moneys paid into the registry of the Court be disbursed by the registrar for the purpose of retiring in accordance with the plan of composition such remaining outstanding old obligations "which may be presented to the registrar within 12 months from the date hereof". And then the final decree goes on to provide that "all such outstanding old obligations of the petitioning district which are not so presented to the registrar within * * * from the date hereof shall thereafter be forever barred from participating in the plan of composition or in the funds held in the registry of this Court". (R. 10, Case No. 10,541.)

This point has not been squarely decided, it is submitted, although an attempt to present the point was made in the case of *Mason v. Anderson-Cottonwood*

Irrigation District, 126 Fed. (2d) 921. In this case this Court held that because the point had been omitted from the specification of errors in the brief that under Rule 20, subdivision 2(d), the point could not be considered.

In *Mason v. Palo Verde Irrigation District,* 132 Fed. (2d) 714, this Court said:

> "Appellant contends that: The fixing of a period of twelve months within which bondholders should deposit their bonds in court was error. The same point was made in Mason v. Anderson-Cottonwood Irr. Dist., supra. There is no merit to the contention."

It is plain to be seen that the Court erred in basing its decision on the case of *Mason v. Anderson-Cottonwood Irrigation District.* The opinion in the *Palo Verde* case was handed down on January 6, 1943. However, in the decision in *Nolander v. Butte Valley Irrigation District,* 132 Fed. (2d) 704, where the opinion was handed down December 31, 1942, and rehearing denied February 11, 1943, the Court, referring to the one year limitation, said:

> "The decree does so confine the period. Instead it should have made the time a year from the date the decree is disposed of on appeal and on petition for certiorari, if any, or by failure to appeal or to seek certiorari. The period here has been extended by stipulation and order and hence the appellant is held entitled to collect the amount due him within a year from the date the decree so becomes final. At the hearing it became clear that appellant was not prejudiced, hence he has no further standing here to make the contention."

It is respectfully submitted that there is no clear final disposition of this point and that the Court should revise its ruling in the case of *Mason v. Palo Verde Irrigation District.*

Denial of a writ of certiorari imports no expression of opinion upon the merits of a case.

U. S. v. Carver, 260 U.S. 482, 490, 43 S. Ct. 181, 67 L. Ed. 361.

Irrigation district bonds and coupons are not barred by the statute of limitations. (*Moody v. Provident Irrigation District,* 12 Cal. (2d) 389.) And there is no provision in 11 U. S. C. A., Sections 401-404, authorizing the Court to set up a period of time contrary to State law within which the bonds must be presented, or else become null and void.

In the important case of *In re Englander's Inc.,* 267 Fed. 1012, the Circuit Court held that Section 57(n) does not deny to a creditor the right to share in a fund offered by the bankrupt in composition and held:

> "No one can, by legal judgment, be deprived of his property unless he is fairly subject to some provision of law which visits the loss upon him."

In the case of *Nassau Smelting and Refining Works, Ltd. v. Brightwood Bronze Foundry Co.,* 265 U. S. 269, 44 S. Ct. 506, Mr. Justice Brandeis, considering Section 57(n) and Sections 12(a), 12(b) and 12(e), declared at page 272:

> "There is no provision in the act which declares in terms that the offer extends only to those who prove their claims. Why should proof within the year of existence of the debt be required, where

by including the claim in the schedule it has been admitted by the bankrupt?"

Judge Brandeis also declared:

> "Nor can the time of proof of claims, as distinguished from their allowance, be of legitimate interest to the bankrupt."

In the case of *Matter of Lenox,* 2 Fed. (2d) 92, the Court stated:

> "This is a provision for the benefit of creditors, not for the benefit of the bankrupt. Against all provable claims, the bankrupt is technically discharged. The bankrupt's property belongs to his creditors and not to himself. It has passed from him to the trustee for the payment of his creditors, as among them it is a matter of indifference to him how distribution is made."

As a matter of fact, Section 57(n) was amended by the Act of 1938 to provide that claims not filed within the time limit may nevertheless be filed within such additional time as the Court may allow and shall be allowed against any surplus remaining in the case. This further shows that the time limit of 57(n) is to benefit creditors rather than the bankrupt. (*Collier on Bankruptcy,* Vol. 3, 1941, page 334.)

(We are not contending that Section 57(n) has reference to municipal bankruptcy cases.)

It may be pointed out (there are cases but we are not citing them) that in some instances, even before the Act of 1938, equity set aside the time limit in favor of a creditor who could show cause.

In closing, your appellant submits that the final decree conflicts squarely with the law governing escheat of money similarly deposited in the custody of the District Court, as construed in *Louisville & R.R. Co. v. Robin,* 135 Fed. (2d) 704 (C.C.A. 5), and is as wholly unauthorized by any State law, as was the attempt to enact a State law providing for the escheat of deposits in a national bank, which was denounced in *First National Bank of San Jose v. State of Cal.,* 262 U. S. 366, 43 S. Ct. 602, and also in *Starr v. O'Connor,* 118 Fed. (2d) 548.

In *In re National Mills,* 133 Fed. (2d) 604, is quoted from *Manufacturers Fin. Co. v. McKey,* 294 U. S. 442, 55 S. Ct. 444, at 448, the following:

> "* * * a party may stand upon the terms of a valid contract in a court of equity as he may in a court of law."

THIRD PROPOSITION: THE HEARING ON THE FINAL DECREE WAS WITHOUT DUE NOTICE TO THE CREDITORS.

It will be observed from the record that no notice was given to appellant of application for the final decree (nor even of the entry of the final decree except the routine notice mailed out by the clerk, this routine notice applying only to the entry of the final decree).

The rules of practice of the United States District Court of the Northern District of California, Rule 22 provides:

> "In a proceeding where there is an adversary appearance, the party preparing any order, find-

ings, or decree, for the signature of the Court, shall present the same to his adversary for approval."

This rule also provides:

"As to findings or decrees, the adverse party shall have five days within which to serve and lodge with the Clerk proposed modifications of the document so presented."

It seems obvious that even if the twelve months limitation provision, for example, should be determined to have been authorized by any law, the appellant should have had an opportunity to present his arguments to the Court.

Rule 42 provides:

"Within five days after written notice of the opinion or memorandum order, the prevailing party shall prepare a draft of the findings of fact and conclusions of law, and lodge them with the Clerk, serving a copy thereof upon the adverse party, who may, within five days thereafter, lodge with the Clerk and serve upon the adverse party such proposed amendments or additions as he may desire."

This rule also indicates very strongly the necessity of giving notice to the adverse party of findings and orders and decrees.

Rule 5(a) of Rules of Civil Procedure for District Courts provides:

"SERVICE: WHEN REQUIRED. Every order required by its terms to be served, every pleading

subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties affected thereby, * * *"

Rule 7(b) (1) provides:

"An application to the court for an order shall be by a motion * * *"

These two rules appear to make it plain that inasmuch as appellant was an adversary party he was entitled to a notice of the application for the final judgment, which he did not receive.

In *In re Central R.R. of N. J.*, 136 Fed. (2d) 633 (C.C.A. 3, is found the following cogent language on the right to notice:

"The right to notice and a hearing is one of ancient origin and by the 'due process' clauses of the 5th and 14th amendments has been safeguarded to all against deprivation by the Federal and State governments. Mr. J. Field in Windsor v. McVeigh (1876), 93 U. S. 274, pages 277, 278, said: 'That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights is admitted * * * A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to a party: appear, and you shall be heard;

and when he has appeared, saying: your appearance shall not be recognized, and you shall not be heard.' "

Holding a person bound by a judgment entered without opportunity to be heard, deprives him of his property without due process of law.

Hansberry v. Lee, 85 L. Ed. 22, 311 U.S. 32, 61 S. Ct. Rep. 115.

FOURTH PROPOSITION: THE FINAL DECREE VIOLATES CLAUSE 2, SEC. 13, ART. 4 OF THE CONSTITUTION OF THE UNITED STATES, IN THAT IT OPERATES TO "PREJUDICE * * * CLAIMS OF A PARTICULAR STATE". THE FINAL DECREE IS UNCONSTITUTIONAL IN THAT IT VIOLATES THE PROVISIONS OF ART. VI, SEC. 13 AND ART. XI, SEC. 13 OF THE CONSTITUTION OF THE STATE OF CALIFORNIA, BECAUSE IT SERVES TO APPROPRIATE PROPERTY BELONGING TO THE STATE, DESIGNATED A "PUBLIC TRUST", AND DEDICATED IRREVOCABLY FOR THE "USES AND PURPOSES" OF THE IRRIGATION DISTRICT ACT, ONE OF WHICH IS THE FULFILLMENT OF THE CONTRACTUAL OBLIGATION UNDER THE BONDS OWNED BY APPELLANT, AND WHICH PROPERTY IT RELEASES FOR THE UNLAWFUL ENRICHMENT OF PERSONS WITH NO LEGAL OR EQUITABLE RIGHT IN OR CLAIM TO IT. THE PUBLIC DERIVES NO BENEFIT WHATEVER FROM SUCH TAKING.

The Supreme Court of California in *El Camino L. C. v. El Camino Irrigation District,* 12 Cal. (2d) 378, held squarely that all the taxes mandatory under the Irrigation District Act and all other property and revenues belonging to irrigation districts constitute property "owned by the State", designated a "public trust", and dedicated without time limit, for the

"uses and purposes of the Act", among which is the faithful fulfillment of all lawful obligations.

The fact that some portion of the tax revenues or usufruct of land acquired for unpaid taxes, after operation and maintenance costs are paid, must be paid to creditors, when and as collected, can not in any sense alter or lessen the fact that the final decree, if it stand, will result in "interfering" with the pledged exercise of political and governmental powers, and the transfer from appellant to the private holders of taxable real property "claims of a particular State", as well settled by the highest State Court.

In further support of this proposition, we cite:

Provident L. C. v. Zumwalt, 12 Cal. (2d) 365;
Metropolitan Water Dist. v. Riverside Co., 21 Cal. (2d) 640;
Moody v. Provident I. D., supra.

It is settled law that the property rights in the bonds of appellant constitute a contract with the State of California, and are vested.

Fallbrook I. D. v. Bradley, 164 U. S. 112;
Herring v. Modesto I. D., 95 Fed. 705;
Moody v. Provident I. D., supra;
Shouse v. Quinley, 3 Cal. (2d) 357.

Unlike the bonds involved in *Kiles v. Trinchera I. D.,* 136 Fed. (2d) 894, the bonds here constitute direct and general obligations under a law which authorizes and requires the levy and collection of taxes upon the value of all land within the district to

fulfill both past due and not yet due obligations, and the interest thereon.

Provident L. C. v. Zumwalt, supra.

The bonds and coupons here are negotiable instruments, differing radically from those before this Court in the *Getz v. Nevada I. D.,* 112 Fed. (2d) 497 case. It is not contended by appellee that there is any provision in these bonds or coupons or the statute pursuant to which they were issued which gives authority to the State or to any per cent of bondholders to take minority rights away. In the *Getz* case this Court pointed out that the alleged contract was not impaired because it was modified in accordance with a provision therein contained. There is no such provision in the bonds or coupons, here.

Selby v. Oakdale I. D., 140 Cal. App. 171;
County of San Diego v. Hammond, 6 Cal. (2d) 709;
Shouse v. Quinley, supra.

In a very recent decision the California Supreme Court reversed a very long line of cases, and ruled squarely that private holders of title deed to land have "no vested right in any given form of procedure for forfeiture of lands for nonpayment of taxes", as was also held in *Wood v. Lovett,* 313 U. S. 362.

Mercury Herald Co. v. Moore, 138 Pac. (2d) 673 (after rehearing).

A similar judgment was rendered by this Honorable Court in *Fallbrook P. U. D. v. Cowan,* 131 Fed. (2d) 513, in which case it was further decreed that the

title acquired by districts under the same law as appellee is "an absolute title for all purposes", and that the district is entitled to the "rents, issues and profits" appurtenant to such lands; this notwithstanding the offer made by the *sole* creditor of the Fallbrook Irrigation District to enlarge the period allowed for redemption for unpaid taxes.

In *St. Francis Lev. Dist. v. Kurn,* 98 Fed. (2d) 394 (C.C.A. 8, 1938), certiorari denied, 305 U. S. 647, 83 L. Ed. 418, 59 S. Ct. 153, it was squarely held that taxes on the value of land pledged as security for money borrowed must be enforced, notwithstanding reorganization proceedings under Chapter 77B, 11 U. S. C. A., Section 207. The Court decreed in considering the claims, that the levee district should follow the procedure prescribed by the State, and should adjudicate the amount and validity of the tax liens and foreclose them, just as the State Courts of Arkansas would do in a proper case.

The remedy for relief from any excessive tax burden, arising under the California Irrigation District Act, is defined by the Supreme Court of California in

Wores v. Imperial I. D., 193 Cal. 609, 632.

The fact that the Congress did not authorize any such enforcement of State law by its Courts under 11 U. S. C. A. 401-404, makes all the more significant the provisions in Section 403(c) explicitly prohibiting any *"interference"* with "political or governmental powers". The word *"interfere"* is defined in Webters to mean: "To come into collision; to clash; to run

at cross purposes; as interfering claims." Under Patent Law, the definition is:

> "To claim substantially the same invention so that the question of the priority of invention is involved between the claimants;—*distinguished from infringe.*"

In *Spellings v. Dewey,* 122 Fed. (2d) 652, an order enjoining irregularities in an election of district officers was reversed, on the ground that it was a violation of subsection (c), Section 403.

In this *Spellings v. Dewey* case, supra, the Court also said:

> "The Bankruptcy Court could have no greater powers than were given it by the special statute under which it was authorized to act. The right to interfere with any of the political and governmental powers of the district was expressly denied it, and, indeed, could probably not be held to exist, even in the absence of the prohibition."

It will not be questioned that the sovereign power to levy and collect direct taxes upon the value of land is a "political and governmental power".

When the Legislature, in the execution of a trust conferred upon it by the Constitution has, by appropriate legislation, as here executed that trust and put into operation and effect a constitutional mandate that its agencies, such as appellee, levy and collect annually direct taxes on the value of certain lands, without limit as to rate or the number of years necessary to fulfill its contractual obligations, and also to

collect the full rent or usufruct as long as necessary from any and all land which is not redeemed within the three year period allowed by the law, neither the Legislature at a subsequent session nor the Federal Courts may revoke and nullify what has been done, whether by imposing a tax rate ceiling, or indirectly but no less surely, by "cancelling, annulling and holding for naught" the bonds of appellant, the sole effect of which will be to curb and reduce the future tax rates or rent which the bonds owned by appellant obligated the private holders of title to land to pay annually to appellee.

Quoting from J. Cooley in *State v. McCann,* 4 Lea. 1, 72 Tenn. 1, at page 2, the Supreme Court of Tennessee said:

> "For the will of the people as declared in the Constitution, is the final law, and the will of the Legislature is only law when it is in harmony with, or at least is not opposed to, that controlling instrument which governs the legislative body equally with the private citizen."

The Florida Supreme Court in *State v. City of Venice,* 147 Fla. 70, said:

> "The appellants also bring before us a picture of the poverty and hardships of the taxpayers with which we have full sympathy, but as to which we are without power to render aid, *because we have an orderly government by law and not government controlled by the changing whims of men.*"
> (Emphasis ours.)

When a lien arises for rent belonging to a private party, such lien was held to be "not a lien by legal

proceedings", and so entitled to priority in bankruptcy.

Moses v. Labofish, 132 Fed. (2d) 16.

Surely, it was never intended by the Congress to authorize its Courts to adjudicate that the right of a sovereign State to collect the rent or usufruct from certain lands ranks below the claims of private parties to the same usufruct, when the State law has been otherwise construed by the highest State Court, and subsection (e) of Section 403 was, we believe intended to make impossible such a wrench in the sovereign State powers.

> "Manifestly, whether or not taxes are 'legally due and owing' to a state depends upon the valid laws of that state."
>
> *Arkansas Corp. v. Thompson,* 312 U.S. 673.

The Court of Chancery, N. J., in *Wilentz v. Hendrickson,* 33 Atl. (2d) 366, quotes with approval the following rule of law set down in *In re Voorhes Estate,* 123 N. J. Eq. 142, 196 Atl. 365, as follows:

> "A gift of public funds or property to a private corporation is unconstitutional whether made directly or indirectly; and the annulling by the Legislature of a financial obligation due from such corporation to the state, is (unless supported by some legal, equitable, or moral consideration therefor) such a gift, and hence invalid."

In the recent case of *Trustees Exeter Academy v. Exeter,* 33 Atl. (2d) 665, the New Hampshire Supreme Court said:

> "Substitutions, qualifications and variations of enacted law are beyond the judicial prerogative."

The constitutionality of a statute may be challenged in either of two ways. The act may, by its terms, disclose a constitutional violation; on the other hand, an enactment, constitutional on its face, may be unconstitutionally applied.

Brock v. Superior Court, 12 Cal. (2d) 605;
Yick Wo v. Hopkins, 118 U. S. 356, 373;
Virginia Coupon cases, 114 U.S. 269, 295.

Nothing in the interlocutory decree "interferes" in any way with the powers or duties imposed by law upon appellee.

Appellee in that decree is in no way relieved or released from the trust duties imposed upon it by law, under the contract in the bonds belonging to appellant. The sole injunction is against certain creditors, but that is not directly an interference prohibited by the Act. The extreme care shown by the wording of the separability clause (Sec. 401) is *prima facie* that the Congress was not at all confident than at some step in its application, and with regard to certain types of bonds, its Courts would not decide that the Act had been unconstitutionally applied.

> "Suppose, again, that (Congress) * * * should undertake to abrogate a land-tax imposed by authority of the State; would it not be equally evident that this was an invasion of that concurrent jurisdiction in respect to this species of tax, which its Constitution plainly supposes to exist in the State governments?"
>
> *The Federalist,* No. XXXIII (Hamilton).

The final decree, by ordering the bonds of appellant "cancelled, annulled and held for naught", indubitably violates the provision governing the discharge of

such obligations, which are explicitly covered in Cal. Stats. 1903, page 3; Stats. 1915, page 859, Sections 7 and 8 of which is printed for convenience of the Court in the appendix.

The California Supreme Court in *Happy Valley Water Co. v. Thornton,* 1 Cal. (2d) 325, fully construed this statute. Also, on February 10, 1943, in *Shafter-Wasco Irr. Dist. v. Westenberg,* 57 A. C. A. 103, the Fourth District Court of Appeal of California denied the petition of the Shafter-Wasco District for dissolution, under this statute, and further construed its provisions. See also, *In re Horse Heaven I. D.,* 11 Wash. (2d) 218, 118 Pac. (2d) 972.

The provision governing escheat of Irrigation District funds is found in Section 1274(b) of the Code of Civil Procedure, and it is submitted the final decree also violates this State law, in respect to the 12 month limitation.

There is nothing contained in the State Consent Act, Chap. 72, Stats. 1939, which repeals or modifies the applicable State law, but if there be any doubt on this score, it is respectfully submitted that the contract in the bonds belonging to appellant is again validated by the Legislature in a later Act, Stats. 1940, 1st E. Sess., page 40, which show the latest legislation, and State law.

The jurisdiction given under Chap. IX of the Bankruptcy Act is also strictly subject to State consent and State law. This was held in the *Green v. City of Stuart,* 135 Fed. (2d) 33, recent case, and petition for writ of certiorari was denied by the Supreme Court. Rehearing denied, November 8, 1943.

CONCLUSION.

The bonds here, are construed by the California Supreme Court in *Provident L. C. v. Zumwalt,* supra, as simply the rent or usufruct of certain land, capitalized. The Court holds that this rent has been designated a "public trust", and dedicated by the State Legislature to the "uses and purposes" of the Irrigation District Act, among which purposes is the fulfillment of contracts.

Thus, the final decree, by ordering the bonds here "cancelled, annulled and held for naught", is in fact, tantamount to the abrogation of *ad valorem* taxes otherwise lawfully payable each year to the State, by the persons holding or using land in the District.

The sole beneficiary of the decree will be the private appropriators of the future rent of this irrigated land, because the final decree operates to release them from the continuing obligation in the bonds, to pay such part of the rental value of the land to appellee, as is required under State law.

The rental value of these lands will not be made higher or lower by the final decree, but more of it will remain to be privately appropriated as unearned income, in absolute disregard and violation of State law, if the final decree is not reversed.

The cash which the final decree orders appellant to accept for his bonds, amounts to less than the defaulted interest alone, with nothing for bond principal, although appellee has levied no taxes to pay the bond principal, and can not do so until the bonds mature in

1951 to 1965. The bonds are not redeemable before their maturity, and under State law, appellant has the right to interest in full to maturity of the bonds, should appellee attempt to retire them at any earlier date than they mature. In short the effect of the final decree, we submit, is to make a gift to private interests, with no legal right to them, of tax funds belonging to a State.

Thomas Jefferson in a letter written in 1795 to Rev. James Madison, said:

> LAND: "The earth is given a common stock for man to labor and live on. If, for the encouragement of industry we allow it to be appropriated, we must take care that other employment be provided to those excluded from the appropriation. If we do not, the fundamental right to labor the earth RETURNS TO THE UNEMPLOYED. It is too soon yet in our country to say that every man who cannot find employment, but who can find uncultivated land shall be at liberty to cultivate it, PAYING A WHOLESALE RENT. But, it is not too soon to provide by every possible means that as few as possible shall be without a little portion of land. The small holders are the most precious part of a State."

"LAND, for example, has in many, perhaps all of the States, been granted by the government since the adoption of the Constitution. This grant is a contract, the object of which is that the profits issuing from it shall inure to the grantee. Yet the POWER OF TAXATION may be CARRIED SO FAR as to ABSORB THESE PROFITS. Does this impair the obligation of

contracts? The idea is rejected by all." (Chief Justice Marshall in *Providence Bank v. Billings*, 4 Pet. 514, 560.)

"A tax on rent falls wholly on the landlord. There are no means by which he can SHIFT the burden upon anyone else. It does not affect the value or price of agricultural (or any other) products, for this is determined by the cost of production in the most unfavorable circumstances, and in those circumstances, as we have so often demonstrated, no rent is paid. A tax on rent, therefor, has no effect other than its obvious one. IT MERELY TAKES SO MUCH FROM THE LANDLORD AND TRANSFERS IT TO THE STATE." ("Principles of Political Economy," Bk. 5, Ch. III, Sec. 2. John Stuart Mill.) (Emphasis ours.)

Because of the fact that the rent value of the taxable land within the district will in no way be affected by the final decree, the money involved in the controversy will tend for greater social betterment if it is collected by appellee as taxes, in accordance with the law, than if it is retained by taxpayers, and capitalized into unearned increment, and higher land prices, at the expense of appellant.

It is submitted that appellee was even less entitled to a discharge than was the Newport Heights Irrigation District, whose petition under Chap. IX was ordered dismissed by this Honorable Court in *Fano v. Newport Heights I. D.*, 114 Fed. (2d) 563, from which ruling we quote as follows:

> "We are unable to find any reason why the tax-rate should not have been increased sufficiently to

meet the District's obligations or why it can be said that the plan is 'equitable' and 'fair' and for the 'best interests of the creditors' with no sufficient showing that the taxing power was inadequate to raise the taxes to pay them."

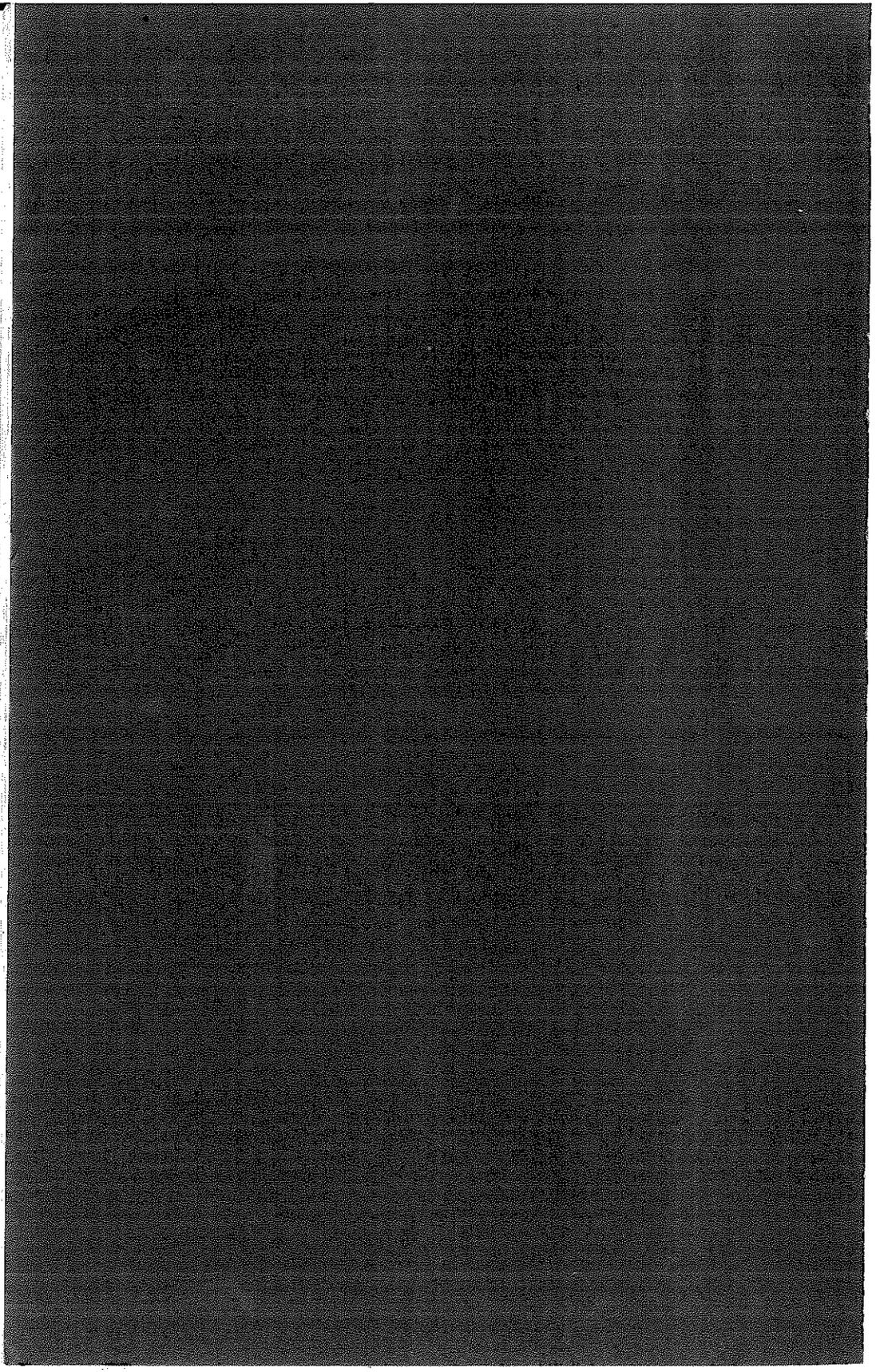
It is respectfully submitted that the final decree should be reversed.

Dated, San Francisco, California,
November 17, 1943.

J. R. MASON,
Appellant in Propria Persona.

(Appendix Follows.)

Appendix.



Appendix

Dissolution of Irrigation Districts and Discharge of Debts.

California Statutes 1903, p. 3; 1915, p. 859.

Sec. 7. A corporation may be organized under general laws for the purpose of acquiring the assets of said district, including the irrigation system, if any, dams, reservoirs, canals, franchises and water rights.
* * *

Sec. 8. Discharge of Debts and Distribution of Assets.

The court in its decree shall have power to make the orders necessary to carry out said proposition for the *discharge* of the indebtedness and distribution of the property of said district, including the right to apportion *any* indebtedness *found due,* and to *declare said portions liens* upon the various parcels and lots of land within the district, and may decree a sale of its assets in such manner as may effectuate said proposition and as said court may judge best, either in one lot or in such parcels as may be provided, and may provide for the conveyance of said irrigation system, including dams, reservoirs, canals, franchises and water rights, *and also of any other assets of the district, including lands sold thereto and the assessments due it.*

Sec. 10. Whenever *all* the property of such irrigation district shall have been disposed of, and *all* the indebtedness and obligations thereof, if any there be,

shall have been *discharged, the balance* of the money of said district shall be distributed to the assessment payers in said district upon the last assessment roll in the proportion in which each has contributed to the total amount of said assessment, and the court shall enter a *final decree* declaring said district to be dissolved.

Escheat of Funds of Dissolved District.

Code of Civil Procedure, Sec. 1247b.

Whenever any money in litigation in any superior or inferior court, or any excess fees or other money deposited in connection with such litigation, has come or shall be paid into the county treasury, or any money has come or shall come into the hands of a county treasurer as ex-officio treasurer of a dissolved irrigation district, and *three years* thereafter it is made to appear to the satisfaction of the court or judge, by affidavit or by testimony taken in open court, that said money has not been and can not be paid out because the owner thereof can not be found, the court or judge must direct that such money be deposited in the State Treasury for the benefit of the owner thereof or his legal representative, to be paid to him whenever, within *five years after such deposits,* proof to the satisfaction of the State Controller and the State Treasurer is produced that he is entitled thereto. When so claimed, an affidavit of the claimant setting forth the facts establishing his ownership, and the joint order of the Controller and Treasurer

must be filed by the Treasurer as his voucher, and the amount of the claim paid to the owner or his legal representative on the filing of the proper receipt.

If no one claims the amount as herein provided, THE MONEY DEVOLVES AND ESCHEATS TO THE PEOPLE OF THE STATE OF CALIFORNIA, and shall be placed by the State Treasurer in the School Fund.

California Irrigation District Act.

California Statutes 1897, p. 254.

Exclusion of Lands.

Assent of Bondholders: Release From Lien.

Sec. 79. If there be outstanding bonds of the district at the time of filing said petition, the holders of such outstanding bonds *may* give their assent, in writing, to the effect that they severally consent that the lands mentioned in the petition, or such portion thereof as may be excluded from said district by order of said board, or the decree of the superior court as hereinafter provided, may be excluded from said district; and if said lands, or any portion thereof, be thereafter excluded from the district, the lands so excluded shall be released from the lien of *such* outstanding bonds. The assent must be acknowledged by the several holders of such bonds in the same manner and form as is required in case of a conveyance of land, and the acknowledgment shall have the same force and effect as evidence as the acknowledgment of such conveyance. * * *

LANDS EXCLUDED NOT RELEASED FROM LIABILITIES FOR INDEBTEDNESS.

Sec. 84. *Nothing* in this act provided shall, in any manner, operate to *release* any of the lands so excluded from the district *from any obligation to pay,* or any lien thereon, *of any* valid outstanding bonds or other indebtedness of said district at the time of the filing of said petition for the exclusion of said lands, but upon the contrary, said lands shall be held subject to said lien, and answerable and chargeable for and with the payment and discharge of *all* of said outstanding obligations at the time of the filing of the petition for the exclusion of said land, as fully as though said petition for such exclusion were never filed and said order or decree of exclusion never made; and for the purpose of *discharging* such outstanding indebtedness, said lands so excluded shall be deemed and considered as part of said irrigation district the same as though said petition for its exclusion had never been filed or said order or decree of exclusion never made; and all provisions which may have been resorted to to compel the payment by said lands of its quota or portion of said outstanding obligations, had said exclusion never been accomplished, may, notwithstanding said exclusion, be resorted to to compel and enforce the payment on the part of said lands of its quota and portion of said outstanding obligations of said irrigation district for which it is liable, as herein provided. But said land *so excluded* shall not be held answerable or chargeable for any obligation of any nature or kind whatever, incurred *after* the filing with

the board of directors of said district of the petition for the exclusion of said lands from the said district; *provided,* that the provisions of this section shall not apply to any outstanding bonds, the holders of which *have* assented to the exclusion of such lands from said district, as hereinbefore provided. (Emphasis ours.)

Mr. Justice Orr, speaking for the Supreme Court of Nevada in the case of *Magee v. Whiteacre,* 106 Pac. (2d) 751, referred to the California Irrigation District Act in the following language:

> "It is conceded that the Irrigation District law of Nevada, AS WELL AS MOST OF THE WESTERN STATES, is PATTERNED AFTER THE WRIGHT ACT OF CALIFORNIA, and the decisions of the State of California interpreting that Act will be given great weight in the determination of cases involving the latter. * * *
>
> It is conceded that the policy of the State is to encourage the formation of Irrigation Districts, so that the arid lands may be brought under cultivation, the welfare and comfort of its inhabitants enhanced, and the taxable value of the State enlarged. * * * The argument that unless general taxes are made superior, counties, cities and towns will perish, finds little support when it is understood that the lands within an Irrigation District would afford little sustenance to the inhabitants and small tax returns to the counties, cities and towns if it were not for the benefits which the formation of an Irrigation District and the resulting

opportunity to bring land under cultivation provide.

In furtherance of this plan, the Legislature of the State of Nevada has spoken, and assured those who have advanced the capital to make the improvements that THE LAND THUS IMPROVED SHALL REPAY THE AMOUNTS ADVANCED AND EXPENDED, AND HAVE ENACTED THAT A LIEN SHALL SUBSIST UPON SAID LANDS TO INSURE THE PAYMENT THEREOF. SUCH IS THE ANNOUNCED PUBLIC POLICY. IT IS FAIR, EQUITABLE AND JUST and should not be struck down by the courts unless there is a very clear and compelling reason for so doing." (Emphasis ours.)