

**Federal Jurisdiction—Appeal From State Court—Estoppel as Basis of Refusal to Exercise Jurisdiction.**—Defendant bank appropriated the funds of its depositors for the purpose of effecting a reorganization under a state statute.<sup>1</sup> Preferred shares of defendant's stock were tendered to plaintiff and all other depositors. Plaintiff refused the stock and declined to agree to this plan of reorganization. Two years thereafter, plaintiff brought this action for the amount of her deposits, attacking the constitutionality of the statute. The New Jersey Court of Errors and Appeals held that plaintiff was barred from maintaining her action by estoppel and that it was unnecessary, therefore, to pass upon the constitutional questions raised.<sup>2</sup> On appeal to the United States Supreme Court. *Held*: Defendant's motion to dismiss the appeal granted. *McSweeney v. Equitable Trust Co.*, 62 S. Ct. 805 (1942).

Jurisdiction to review the judgment of the Court of Errors and Appeals in this case is conferred upon the United States Supreme Court as follows:

“A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and where the decision is against its validity; or where is drawn in question the validity of a statute of a State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. . . .”<sup>3</sup>

and in 1928 the writ of error was abolished and the appeal was substituted in its stead. Appeal now lies to obtain all relief which previously could be secured by writ of error.<sup>4</sup>

Plaintiff contended that the statutes of New Jersey, relied on by defendant as supporting and authorizing defendant's actions, were un-

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1. R.S. 17:8-1; N.J.S.A. 17:8-1.

2. *McSweeney v. Equitable Trust Co.*, 127 N.J.L. 299, 22 A. 2d 282 (E. & A. 1942).

3. Title 28 U. S. Code, Section 344 (a), pp. 205, 206 (Act of February 13, 1925, c. 229, Section 1, 43 Stat. 937).

4. Title 28 U. S. Code, Section 861 (a) and 861 (b) (Act of January 31, 1928, c. 41, Section 1, 45 Stat. 54; Act of April 26, 1928, c. 440, 45 Stat. 466).

constitutional in that they were repugnant to the Fourteenth Amendment to the Constitution of the United States and to Article 1, Section 10, of the Constitution of the United States. Plaintiff claimed that the New Jersey statutes denied her her constitutional right to "due process." The New Jersey Supreme Court in its opinion stated that the most important question raised for determination was obviously that regarding the constitutionality of the 1933 Act of New Jersey.<sup>5</sup> The court then went on to sustain the validity of that Act. In view of the fact that the Court of Errors and Appeals saw fit to ignore the constitutional question and affirm the decision of the New Jersey Supreme Court, the United States Supreme Court declined to hear the case.

It is however proper for the United States Supreme Court to inquire and determine whether plaintiff has been denied constitutional protection in the courts below, by the reliance upon an unsubstantial non-federal ground by the lower court.<sup>6</sup> In *Lawrence v. State Tax Commissioner*, the United States Supreme Court held that the Constitution not only guarantees rights and immunities to the citizen but in addition it gives him the privilege of having them declared and protected judicially, when such judicial action is properly invoked. Even if the constitutional protection sought is denied on non-federal grounds, it is within the power of the United States Supreme Court to inquire whether the decision of the state court rests on a substantial basis. If not, the constitutional obligation can be avoided by such a subterfuge.<sup>7</sup> In the case of *Abie State Bank v. Bryan*, 282 U.S. 765, 5 S. Ct. 252, 75 L. Ed. 690 (1931), the state court used estoppel as the non-federal ground to prevent assertion of the federal right. In that case a state statute was attacked as unconstitutional, but the court sidestepped the federal question. On appeal, the United States Supreme Court investigated to determine whether the ground of estoppel had been used to prevent an appeal to the federal courts on federal grounds. The investigation was justified as follows:

"But the federal ground being present, it is incumbent upon

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5. *McSweeney v. Equitable Trust Co.*, 16 N.J.Misc. 193, 198 A. 529 (S. Ct. 1938).

6. *Lawrence v. State Tax Commissioner*, 286 U.S. 276, 52 S. Ct. 556, 76 L. Ed. 1102 (1932).

7. *Lawrence v. State Tax Commissioner*, *supra* note 5.

this court, when it is urged that the decision of the state court rests upon a non-federal ground, to ascertain for itself, in order that constitutional guarantees may appropriately be enforced, whether the asserted non-federal ground independently and adequately supports the judgment."<sup>8</sup>

It is undisputed by defendant that the proceedings of defendant's reorganization were unfair. Defendant was insolvent, no hearing was held wherein plaintiff had notice or opportunity to be heard before the final order of the New Jersey Commissioner of Banking and Insurance was entered, approving the reorganization plan. Due process requires that plaintiff be given notice and an opportunity to be heard at a fair hearing before the entry of such an order.<sup>9</sup> Therefore it is apparent that plaintiff has been denied his constitutional right to due process of law, as guaranteed to him by the Fourteenth Amendment of the Constitution of the United States. The right to a writ of certiorari in New Jersey, out of the New Jersey Supreme Court, is one lying completely within the discretion of the court, and no appeal lies from a denial of that writ.<sup>10</sup> Thus it is apparent that plaintiff's uncertain right to a writ of certiorari cannot and does not take the place of a hearing before the entry of the order by the Commissioner of Banking and Insurance. Thus a substantial federal question was presented in this case. The substantiality of the federal question is shown by the fact that the New Jersey statute in question has since been amended to provide for a court hearing upon notice to all parties, and for pro rata payment to dissenters to the reorganization plan.<sup>11</sup>

It was stated by the Court of Errors and Appeals of New Jersey that plaintiff's suit is barred by estoppel, and the court rested its opinion

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8. *Abie State Bank v. Bryan*, 282 U.S. 765, 51 S. Ct. 252, 75 L. Ed. 690 (1931); *Ancient Egyptian Arabic Order v. Michaux*, 279 U.S. 737, 49 S. Ct. 485, 73 L. Ed. 931 (1939); and *Ward v. Love County*, 253 U.S. 17, 40 S. Ct. 419, 64 L. Ed. 751 (1920).

9. *St. Joseph Stockyards v. U.S.*, 298 U.S. 38, 56 S. Ct. 730, 80 L. Ed. 1033 (1936); *Morgan v. U.S.*, 304 U.S. 1, 58 S. Ct. 733, 82 L. Ed. 1129 (1938); and *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 60 S. Ct. 437, 84 L. Ed. 656 (1940).

10. *Post v. Anderson*, 111 N.J.L. 303, 168 A. 622 (E. & A. 1933).

11. P.L. 1935, Chap. 221, p. 525; R.S. 1937, 17:8-1 to 17:8-3.

on two cases, *Basen v. Clinton Trust Co.*, and *Newman v. Asbury Park & Ocean Grove Bank*.<sup>12</sup> Both of these cases are distinguishable from the present case. In the *Basen* case the plaintiff accepted the plan proposed and under the plan he received 50% of his deposits in cash. In the *Newman* case the court found that the plan was fair and equitable, and did not use the word "estoppel" in its opinion. In the present case plaintiff neither accepted the plan, nor was the plan fair and equitable. The mere fact that plaintiff maintained a deposit account with defendant, of new funds, after the reopening of defendant bank, should not be held against plaintiff as an estoppel barring this suit. The facilities of the bank were open to the public at large, and plaintiff had as much right as anyone else to deposit with defendant. This action was in no way connected with acceptance or refusal to acquiesce in the plan of reorganization. Plaintiff's failure to take action to prevent subordination agreements made by defendant was due to defendant's failure to disclose the full details of the plan. All told, there was no substantial basis for the finding of an estoppel against plaintiff.

Since there was no substantial non-federal ground for the decision of the court, and there was a substantial federal question on which the decision of the court should have been based, the jurisdiction of the United States Supreme Court would appear to have been established.

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**Insurance—Fraud—Election of Remedies—Res Adjudicata.**—Defendant, as named beneficiary, obtained a judgment at law on a policy of insurance issued upon the life of the defendant's mother by the complainant insurer who defended the law action on the grounds that the policy had been issued as a result of fraudulent misrepresentations, suppression and concealment by the insured of certain facts material to the risk respecting illnesses, medical treatment, hospitalization, condition of health, etc. The complainant had in the law action asked for a declaratory judgment by counterclaim to cancel the policy under R. S. 1937,

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12. *Basen v. Clinton Trust Co.*, 115 N.J.L. 546, 181 A. 67 (E. & A. 1935); *Newman v. Asbury Park & Ocean Grove Bank*, 120 N.J.L. 122, 198 A. 286 (E. & A. 1937).