jurisdiction should arise. The appellate court could consider the damage order as accessory to the main cause, and the lower court could assume it retained jurisdiction over the damage judgment until a final decision on the merits.[17]

Taxation—Reduction of Indebtedness as Taxable Income—[Federal].—The plaintiff sued for a refund of $330 paid as income tax for 1925. He had bought a farm for $20,000 subject to a $10,000 mortgage. In 1935 the mortgagee reduced the indebtedness and accepted $6,500 as full payment when the plaintiff was unable to pay the mortgage debt and an appraisal indicated that the property value had declined to less than $6,000. The plaintiff tried to set off against the $3,500 income realized in the cancellation of indebtedness his $3,500 loss through "depreciation." On the plaintiff's suit for a refund the court *held* that the transaction constituted a refinancing of the farm and involved a "determined loss" to the taxpayer equal to the gain realized through the satisfaction of his obligation at less than face value. Judgment for the plaintiff. *Hextell v. Huston.*[1]

The usual rule is that cancellation of indebtedness is taxable as income,[2] and decline in property value is not deductible unless there is a sale or relinquishment of title.[3] But in cases where a debtor has obtained a reduction of a debt incurred to purchase property and shows that the property has declined in value, the court may exempt the debtor-owner from tax liability. Cases of this type are decided by determining whether there is a loss on the whole transaction or whether assets are freed from offsetting obligations.

Under the whole transaction theory, the court, in determining whether a debt reduction gives rise to taxable income, will consider the losses sustained in any later transaction involving the money obtained by incurring the debt. For example, where a debt is created to obtain funds which are subsequently dissipated without any profit to the debtor or are invested in property that has declined in value, the court will deduct these losses from any gain through debt reduction and will assess an income tax only on the remainder. This principle was first enunciated in *Bowers v. Kerbaugh-Empire Co.*,[4] although in that case the court stated as a second ground for its decision that

[17] "A judgment which is founded upon another judgment that has subsequently been reversed or set aside may be vacated on this ground," 1 Freeman, Judgments 510 (5th ed. 1925).

[1] 28 F. Supp. 521 (Iowa 1939).

[2] United States v. Kirby Lumber Co., 284 U.S. 1 (1931). "Cancellation of Indebtedness—*In general*—the cancellation of indebtedness, in whole or in part, may result in the realization of income . . . . ," Treas. Reg. 101, art. 22(a)-14 (1938), reprinted in 391 C.C.H. Fed. Tax Serv. ¶ 77 (1939).

[3] Appeal of Schwarzler, 3 B.T.A. 535 (1926); cf. Lucas v. American Code Co., 280 U.S. 445, 449 (1930). "The term 'long term capital loss' means loss from sale or exchange of a capital asset . . . . ," 52 Stat. 501, 26 U.S.C.A. § 101 (a) (5) (1938); ". . . . losses for which an amount may be deducted from gross income must be evidenced by closed and completed transactions . . . . , " U.S. Treas. Reg. 101, Art. 23 (e)-1 (1938). Paul, Federal Income Tax Problems of Mortgagors and Mortgagees, 48 Yale L. J. 1315, 1318 (1939); Brown, The Time for Taking Deductions for Losses and Bad Debts for Income Tax Purposes, 84 U. Pa. L. Rev. 41, 49 (1935). But see Rhodes v. Com'r, 100 F. (2d) 966 (C.C.A. 6th 1939); Brumback v. Denman, 48 F. (2d) 255 (D.C. Ohio 1930).

[4] 271 U.S. 170 (1926). See also lower court opinion 300 Fed. 938 (D.C. N.Y. 1924).

a gain from debt reduction did not constitute taxable income within the definition of *Eisner v. McComber*.[5]

In *United States v. Kirby Lumber Co.*[6] this second ground of the *Kerbaugh* decision was disapproved, but the whole transaction principle was affirmed. In *Coastwise Transportation Co. v. Com'r*[7] a limitation was placed on the transaction theory by holding that where money obtained by incurring the debt was invested in property, the principle did not apply unless the property had been sold at the time of the debt reduction; but the Board of Tax Appeals has suggested that an alternative to the sale requirement might be the depreciation of the asset to a value below the amount of the reduced obligation.[8] In the principal case there was such depreciation without sale, and the court exempted the debtor from taxation.

A second approach to the problem of the present case ignores loss on the whole transaction and taxes the debtor whenever assets are freed from liability through a reduction of the liability.[9] If the debtor is *solvent* before the reduction, a tax is imposed on the full amount of the reduction; if the debtor is *insolvent* before reduction, he is taxed only to the extent of his resulting solvency.

The principal case was not decided by an express application of either of the preceding two theories. Since it involves recognition of a loss before the asset had been sold, the only precedent for it is a weak dictum in *L. D. Codden & Bros. Inc. v. Com'r*[10] that a debt reduction might not be taxed as income if the property purchased had decreased to a value below that of the reduced obligation. The case might also be supported on the broad principles announced in the *Kerbaugh* case, but not only has the *Kerbaugh* decision been limited, but it is distinguishable from the present case on the facts since there money had been completely lost and no assets remained to be sold.

The principal case is subject to the general objection to the "whole transaction" decisions: that they violate the revenue act provisions preventing direct deduction of capital losses from ordinary income.[11] Moreover, it is in conflict with the decisions

[5] Income was defined as "gain derived from capital, from labor, or from both combined, including profit gained through sale or conversion of capital," 252 U.S. 189, 207 (1920).

[6] 284 U.S. 1 (1931); Helvering v. American Chicle Co., 291 U.S. 426 (1934); Norfolk and So. R. v. Com'r, 25 B.T.A. 925 (1932); Suncrest Lumber Co. v. Com'r, 25 B.T.A. 375 (1932); Woodward Iron Co. v. Com'r, 24 B.T.A. 1050 (1931).

[7] 62 F. (2d) 332 (C.C.A. 1st 1932), supplemental opinion rendered 71 F. (2d) 104 (C.C.A. 1st 1934), cert. den. 293 U.S. 595 (1934); Consol. Gas. Co. of Pittsburgh v. Com'r, 24 B.T.A. 901 (1931).

[8] See L. D. Coddon & Bros. Co. v. Com'r, 37 B.T.A. 393 (1938).

[9] Lakeland Grocery Co. v. Com'r, 36 B.T.A. 289 (1937); Fifth Avenue-Fourteenth Street Co. v. Com'r, 39 B.T.A. ———, Apr. 29, 1939, 393 C.C.H. Fed. Tax Serv. ¶ 7154-G (1939); Springfield Industrial Building Co. v. Com'r, 38 B.T.A. ———, Dec. 28, 1939, 393 C.C.H. Fed. Tax Serv. ¶ 7141 (1939); cf. Dallas Transfer & Terminal Warehouse Co. v. Com'r, 70 F.(2d) 95 (C.C.A. 5th 1934); Transylvania R. v. Com'r, 99 F. (2d) 69 (C.C.A. 4th 1938) (semble).

[10] 37 B.T.A. 393 (1938).

[11] The revenue act prevents direct deduction of long-term capital losses from gross income. Individuals can set off long-term capital losses against long-term capital gains, but any net long-term capital loss cannot be used to lower the tax on ordinary income. The rules applicable to corporations are the same except that they can deduct net long-term capital losses from ordinary income to the extent of $2,000, 52 Stat. 461 (1938), 26 U.S.C.A. § 23 (g) (Supp. 1938); 52 Stat. 501 (1938), 26 U.S.C.A. § 101 (a)-9, (c) (Supp. 1938).

which impose a tax to the extent that assets are freed from all offsetting obligations. Besides, there is a special difficulty in the principal case since it allows deduction of a loss through decline in value before sale of the depreciated asset. Although from the standpoint of good policy taxation of debt reductions may be questionable,[12] once it is accepted, there is no justification for the exception created by the principal case.

Trade Regulation—Robinson-Patman Act—Granting of Brokerage Allowances—[Federal].—The petitioner, an interstate retail chain-grocery, maintained a subsidiary field-buying agency to contact sellers and supply market information. The agents received a fixed salary from the petitioner and, in addition, brokerage allowances from sellers in the form of net price concessions to the petitioner. The Federal Trade Commission issued a cease and desist order in accordance with Section 2(c) of the Robinson-Patman Act[1] which forbids the granting of brokerage to buyers or their agents except for services actually rendered. On appeal to the Circuit Court of Appeals for the Third Circuit, *held*, the petitioner's activities constituted a violation of Section 2(c). The order of the commission was affirmed. *The Great Atlantic & Pacific Tea Co. v. Federal Trade Commission.*[2]

An analysis of the instant decision can only be made in the light of the purpose of the Robinson-Patman Act. Congress desired, by amendment to the Clayton Act, more effectively to prevent price discrimination and interference with freedom of competition.[3] Section 2(c) in particular was designed to preclude large buyers from receiving secret discounts not granted to other buyers.[4] Congressional hearings had disclosed that A. & P. and other large chain-stores, by ostensibly rendering brokerage services, were in effect gaining net price concessions which enabled them to undersell competi-

[12] One objection to taxation of debt reductions is that it levies an income tax on those least able to pay since reductions are often made in return for cash settlements given by debtors near insolvency. In the recent Chandler Act Amendment to the Bankruptcy Act, Congress seems convinced of the undesirability of the present law which often levies an "income tax" on an insolvent debtor, Income Tax Provisions of the Chandler Act, 6 Univ. Chi. L. Rev. 447, 451 (1938); Taxability of Gains Resulting from Reduction of Liabilities, 44 Yale L. J. 144 (1934).

[1] "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid," 49 Stat. 1526 (1936), 15 U.S.C.A. § 13(c) (Supp. 1938).

[2] 106 F. (2d) 667 (C.C.A. 3d 1939).

[3] H.R. Rep. 2287, 74th Cong. 2d Sess. (1936); S. Rep. 1502, 74th Cong. 2d Sess. (1936). For a general discussion of the Robinson-Patman Act, see Patman, The Robinson-Patman Act (1938); Sharp, Discrimination and the Robinson-Patman Act, 5 Univ. Chi. L. Rev. 383 (1938); Zorn and Feldman, Business under the New Price Laws (1937); The Legality of Discrimination under the Robinson-Patman Act, 36 Col. L. Rev. 1285 (1936); The Robinson-Patman Act: Some Prospective Problems of Construction and Constitutionality, 50 Harv. L. Rev. 106 (1936).

[4] H.R. Rep. 2951, 74th Cong. 2d Sess., at 7 (1936).