of conditions which the court has already held not to constitute convenience and necessity. The effect of an affirmation by the court of an order of the commission is somewhat different. A distinction must be drawn between those situations in which there is substantial evidence for either granting or denying a certificate and those in which there is substantial evidence only for granting, or only for denying, a certificate. The affirmation of the granting or denying of a certificate in the latter situation is final. But the affirmation of the granting or denying of a certificate in the former situation does not necessarily preclude the commission from subsequently reversing such an order. Consequently the statutory provisions for appeal to the state supreme court are not rendered meaningless, because the result objected to could arise only in the limited situation in which there is substantial evidence for either granting or denying a certificate.[12] Nor does such a circumstance involve a violation of the rule of *Hayburn's Case*,[13] that a court is without jurisdiction if its decision can be set aside by another branch of the government. The court's holding that there is substantial evidence for the order is final insofar as the commission is concerned, even though the court itself may subsequently find that there is also substantial evidence for a contrary order.

To allow the commission to decide whether, in the absence of a change in conditions, it should be bound by its prior decisions seems to provide the flexibility necessary in the determination of public convenience and necessity. For instance, the commission, because of its intimate knowledge of the trends in transportation, might anticipate an increased need for carriers in the near future, even though the evidence of such a possibility would not constitute proof of a change in conditions. Under these circumstances the commission should be allowed to reverse its prior denial of a certificate.[14] It also seems more conducive to the development of administrative responsibility to provide an opportunity for correcting what in many instances is essentially an error in judgment.

Bankruptcy—Provability and Priority of Back-Pay Award—[Federal].—The National Labor Relations Board found that the Hamilton Brown Shoe Company had engaged in unfair labor practices and ordered the reinstatement of discharged employees with back pay. Following affirmance of the board's order by the circuit court of appeals, the company was adjudicated a bankrupt. The board then asserted a claim for the back pay in the bankruptcy proceedings. The claim was disallowed by the referee on the ground that a back-pay order did not constitute a debt provable in bankruptcy. On appeal to the Circuit Court of Appeals for the Eighth Circuit from an order of the district court sustaining the position of the referee, *held*, that a back-pay award is a debt provable in bankruptcy which the National Labor Relations Board is

[12] In the instant case it was held that there was substantial evidence for granting a certificate. Likewise, on appeal from the prior order, the court in 1939 held that there was substantial evidence for denying the major portion of the substantially similar certificate. Fuller-Toponce Truck Co. v. Public Service Com'n, 99 Utah 28, 37–38, 96 P. (2d) 722, 726 (1939).

[13] 2 Dall. (U.S.) *409 (1792).

[14] This consideration would seem to outweigh that of the undesirability of requiring common carriers opposing the granting of a certificate previously denied to incur the burden of resisting a second application in the absence of a change in conditions. The latter point was urged by Pratt, J., dissenting. Mulcahy v. Public Service Com'n, 117 P. (2d) 298, 310 (Utah 1941).

authorized to assert and which is entitled to priority as a wage claim. *NLRB v. Killoren.*[1]

In disallowing the claim, the referee had ruled that a back-pay order may be enforced only against a going concern.[2] He viewed the order as a punitive measure designed to induce the employer to cease unfair labor practices. The court of appeals, however, properly considered the back-pay order as a remedial device designed to afford some assurance to employees that they may be compensated for loss occasioned by their discharge for union activities.[3] The court further recognized the board as the proper party to file a claim based upon the back-pay order. The Supreme Court has said that the courts have no jurisdiction to enforce a board order at the suit of a private person or group of persons.[4] Although Judge Van Valkenburgh, dissenting in the instant case, took the view that any claims should be filed by the several employees,[5] it has been assumed that individual employees could not sue on a back-pay order. Consequently, unless the power to file such claims falls within the general authority granted to the board to secure enforcement of its orders, it would appear that back-pay orders against bankrupts would be completely ineffectual.

There are persuasive analogies in support of the holding that a back-pay order is provable as a claim arising from a "contract express or implied" within the meaning of Section 63a(4) of the Bankruptcy Act.[6] The Supreme Court held in *Brown v. O'Keefe*[7] that the statutory liability of the holders of shares in national banks is "quasi-contractual," a liability "upon an 'implied contract,' and so provable in bankruptcy. . . . ."[8] A similar view has been taken of a statutory liability of corporate directors[9] and of the obligation to pay an income tax.[10] These decisions seem to support a general proposition that statutory obligations are provable, but doubt has arisen from two sources. In the first place, there are indications in the opinion in *Brown v. O'Keefe* that the court may have used the term "quasi-contractual" in the sense of an obligation "affixed by law to the contract of membership between shareholder and bank."[11] In the second place, a view recognizing all statutory obligations as provable

[1] 122 F. (2d) 609 (C.C.A. 8th 1941), cert. den. 62 S. Ct. 412 (1941).

[2] In the Matter of Hamilton Brown Shoe Co., 2 Labor Cases ¶18,650 (D.C. Mo. 1940).

[3] Republic Steel Corp. v. NLRB, 311 U.S. 7 (1941); see Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 197 (1941); Consolidated Edison Co. v. NLRB, 305 U.S. 197, 236 (1938).

[4] Amalgamated Utility Workers (CIO) v. Consolidated Edison Co., 309 U.S. 261 (1940) (application by union to invoke contempt process denied).

[5] NLRB v. Killoren, 122 F. (2d) 609, 614 (C.C.A. 8th 1941).

[6] 30 Stat. 563 (1898), 11 U.S.C.A. § 103a(4) (Supp. 1941).

[7] 300 U.S. 598 (1937). [8] Ibid., at 607.

[9] In re Post, 12 F. (2d) 941 (D.C. N.Y. 1925), aff'd 12 F. (2d) 942 (C.C.A. 2d 1926); In re Brown, 164 Fed. 673 (C.C.A. 9th 1908).

[10] United States v. Bernstein, 16 F. (2d) 233 (C.C.A. 8th 1926).

[11] Brown v. O'Keefe, 300 U.S. 598, 607 (1937). Back-pay orders incidental to reinstatement, as in the instant case, might be similarly characterized. "Instatement" orders with back pay provide a more difficult problem under this theory, but it might be argued that, in the event of discrimination in hiring, the Wagner Act imposes an employer-employee relationship as well as public remedies for any breach of the terms of this relationship. Cf. Steamship Co. v. Joliffe, 2 Wall. (U.S.) 450 (1864) (statutory liability to pay half-fees upon refusal to accept tender of pilot services held quasi-contractual).

would seem to cover awards under a workmen's compensation act, yet these have been held not provable.[12] The ground relied upon for this result was that the liability arose from a "status" and was not a liability upon an implied contract. This view had been developed in support and alimony cases; there the question usually arises when a discharge is pleaded, and the courts have apparently been moved to hold the claim not provable in order that they might hold it not discharged.[13] Even assuming that similar considerations might be urged in the case of workmen's compensation and back-pay awards, continuation of the obligation would be of doubtful value in a field largely occupied by corporate obligors, which for all practical purposes cease to exist when bankruptcy occurs.[14]

The Bankruptcy Act, of course, makes no specific provision for the priority to be accorded claims based on back-pay orders, but, since the Wagner Act labels the orders "back pay" owing to "employees," the court concluded that the claim should be given the same priority as claims for ordinary wages. Wage priority is limited to $600 and covers only wages earned within three months of the filing of the petition in bankruptcy.[15] The board had argued that the portion of the award not covered by wage priority should be given priority as a debt owing to the United States or, in the alternative, that the latter priority should be accorded to the whole claim. Debts owing to the United States are subject to no limitations as to time or amount. The court assumed that to assign back-pay orders a more advantageous priority than ordinary wage claims "would hardly tend to further industrial peace," although stating in the same paragraph that the purpose of the order is "to leave an employee, as nearly as possible, in the same situation he would have occupied, if there had been no discrimination against him."[16] The accomplishment of this purpose, however, would often be defeated if the award is to have only the status of a wage claim. Ordinarily industrial wages are paid currently, and wage claims thus seldom exceed the amount which is granted priority. But since the machinery of the NLRB necessarily moves slowly, back-pay awards almost always cover a period much longer than three months. If the back-pay award is given the limited wage priority, the employee is therefore not placed "in the same position he would have occupied if there had been no discrimination against him."

Under the precedents the court might have held the claim entitled to priority as a debt due the United States. The cases seem to require only that such claims be filed in the name of the United States or an agency thereof. Thus the claim of a superintendent of an Indian reservation was treated as a debt owing to the United States even though it represented funds belonging to his Indian wards.[17] Although back-pay

[12] Lane v. Industrial Com'r, 54 F. (2d) 338 (C.C.A. 2d 1931); see Bowen v. Hockley, 71 F. (2d) 781, 782 (C.C.A. 4th 1934). The Bankruptcy Act was subsequently amended to provide specifically for the proof of such claims. 48 Stat. 923 (1934), 11 U.S.C.A. § 103a (6) (Supp. 1941).

[13] Wetmore v. Markoe, 196 U.S. 68 (1904); Audubon v. Shufeldt, 181 U.S. 575 (1901).

[14] See Glenn, Basic Considerations in Tort Claims in Bankruptcy and Reorganization, 18 N.Y.U. L. Q. Rev. 367, 370 (1941).

[15] 52 Stat. 874 (1938), 11 U.S.C.A. § 104a(2) (Supp. 1941).

[16] NLRB v. Killoren, 122 F. (2d) 609, 613 (1941).

[17] Bramwell v. United States Fidelity & Guaranty Co., 269 U.S. 483 (1926); cf. United States Shipping Board Emergency Fleet Corp. v. Wood, 258 U.S. 549 (1922), denying priority to the

claims, like the claim just referred to, do not affect government finances, the fact that they are collectible in the name of a government agency may indicate a sufficiently public nature to warrant such treatment. This is especially true when, as in the instant case, the policy of a federal act is thereby vindicated.[18]

There are, however, two advantages in considering a back-pay order as creating a wage debt. In the first place, such claims are not discharged in bankruptcy,[19] and, in the second place, they have priority over government claims.[20] In most cases these considerations would not compensate for the limitations of the wage priority, but they do suggest the inadequacy of judicial attempts to fit the back-pay order into the framework of the Bankruptcy Act. If the decision in the instant case proves unsatisfactory, legislation still provides the obvious way to solve completely the perplexing problems of priority and discharge.

Banks and Banking—Insolvency—Application of Statute of Limitations to Rights of Receiver against Depositor Secured by Ultra Vires Pledge—[Illinois].—To secure deposits of the defendant park district a bank pledged certain of its bonds to the defendant pledgee. When the bank became insolvent, the pledgee sold the bonds, kept proceeds equal to its deposits in the insolvent bank, and turned over the remainder to the auditor of public accounts. Under Illinois law the pledge of a bank's assets to secure a depositor is ultra vires and illegal.[1] The receiver of the bank therefore brought suit for conversion; five years, the period of limitations for such actions,[2] had elapsed since the date of the pledge but not since the sale. The receiver contended that, although the bank had no power to ratify the pledge, it did have power to consent to the taking of possession by the defendant pledgee, and that, no demand having been made, a cause of action for conversion did not arise until the sale of the bonds. *Held*, that possession by the defendant pledgee was wrongful and adverse to the rights of the bank from the outset and that the pledge gave rise to an immediate cause of action for the

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corporation. The Court said: "The Shipping Act contemplated a corporation in which private persons might be stockholders and which was to be formed like any business corporation under the laws of the District, with capacity to sue and be sued. The United States took all the stock, but that did not affect the legal position of the company." Ibid., at 565.

[18] The Supreme Court has adopted the technique of determining whether the purpose of the statute under which the claim arises will be furthered by according priority as a debt due the United States. See Mellon v. Michigan Trust Co., 271 U.S. 236, 239–40 (1926); United States v. Guaranty Trust Co., 280 U.S. 478, 485–86 (1930). Compare the restricted scope of these cases as applied in United States v. Emory, 62 S. Ct. 317 (1941) (National Housing Act does not defeat government priority for FHA claims).

[19] 42 Stat. 354 (1922), amended by 52 Stat. 851 (1938), 11 U.S.C.A. § 35a(5) (Supp. 1941).

[20] 3 Collier, Bankruptcy ¶ 64.201, at 2083 (14th ed. 1941).

[1] This rule is based on interpretations of Illinois banking statutes and banking provisions of the Illinois Constitution. People ex rel. Nelson v. Wiersema State Bank, 361 Ill. 75, 197 N.E. 537 (1935); Marion v. Sneeden, 291 U.S. 262 (1934) (applying Illinois law); see Knass v. Madison & Kedzie State Bank, 354 Ill. 554, 188 N.E. 836 (1934).

[2] Ill. Rev. Stat. (1941) c. 83, § 16.