CONSTITUTIONAL LAW—PERMANENCE OF CONSTITUTIONALITY—EFFECT OF CHANGING CIRCUMSTANCES.—That a law once held constitutional under the police power may later be attacked again as confiscatory in the light of actual experience was the holding of the Supreme Court in the case of *Abie State Bank v. Weaver* (1931) 51 S. Ct. 252. This decision is likely to lead to the reconsideration of a vast amount of social and regulatory legislation. If a law once held valid may be proved confiscatory and unconstitutional in view of existing facts, so too a law once invalid may later be constitutional under the circumstances of the moment.

The statute involved in the *Abie Bank* case was a Nebraska law taxing banks up to six-tenths of one per cent of their average daily deposits to build up a state fund to pay to depositors of failing banks any losses they might suffer. Neb. Com. Stat. (1922) sec. 8024 *et seq.;* amended Neb. Laws 1930, ex. sess. c. 6. The tax had been attacked under the Fourteenth Amendment immediately after it was imposed, and had been upheld by the Supreme Court as a valid exercise of police power. *Shallenberger v. First National Bank of Holstein* (1910) 219 U. S. 114; *Noble State Bank v. Haskell* (1910) 219 U. S. 104. The Abie Bank in the principal case renewed the attack on the tax, on the same grounds, and the court held that the *Shallenberger* decision could not be regarded as precluding a subsequent suit to test the validity of assessments in the light of actual experience. Since the state itself had provided for liquidation of the scheme, it was unnecessary to consider the issuance of an injunction.

The reason for this decision must be found in the nature of the police power. For while it is true that a decision that a statute is constitutional does not prevent the court from reconsidering the question when the law is attacked on different grounds, *Boyd v. Alabama* (1876) 94 U. S. 645; *Davison v. Chicago, etc. Ry. Co.* (1917) 100 Neb. 462, 160 N. W. 877, generally the court will not inquire into constitutionality where it has been passed upon previously. *Kidd, Dater and Price Co. v. Musselman Grocer Co.* (1909) 217 U. S. 461. Decisions on constitutional questions should not lightly be set aside. *Carey v. South Dakota* (1919) 250 U. S. 118; *St. Louis Southwestern Ry. v. Arkansas* (1914) 235 U. S. 350. But where the validity of a statute depends upon the propriety of the exercise of police power, the fundamental character and qualities of that power seem to make it necessary for the court to consider changed conditions as perhaps changing the constitutional status of the statute.

The basic principle of the police power is that the state has a right to protect the health, safety, morals, and general welfare of society. *Bacon v. Walker* (1907) 240 U. S. 311; *Ex parte Rameriz* (1924) 193 Cal. 633, 226 Pac. 914. In exercising this right, the powers of the state are exceedingly broad; and police regulations may under particular circumstances be impolitic, harsh, and oppressive without contravening the constitutional inhibition. *Mobile County v. Kimball* (1880) 102 U. S. 69; *Southern Bell T. & T. Co. v. Calhoun* (D. C. W. D. S. C. 1923) 287 F. 381. The police power is among the least limitable of the powers of government and extends

to all great public needs. *District of Columbia v. Brooke* (1909) 214 U. S. 138; *Canfield v. U. S.* (1897) 167 U. S. 518. Yet it is not arbitrary, but must be exercised reasonably in connection with the public welfare. *Silz v. Hesterberg* (1908) 211 U. S. 311; *Dobbins v. Los Angeles* (1903) 195 U. S. 223. With these principles in mind the courts have held that the definition of police power changes with changed conditions, that it is to the public what the law of necessity is to the individual. *Mountain Timber Co. v. Washington* (1917) 243 U. S. 219. In determining whether an act of the legislature is within the police power, the court may consider all external or historical facts leading to its enactment. *Pennsylvania Coal Co. v. Mahon* (1922) 260 U. S. 393. The police power is coextensive with the needs of the case and the safeguarding of public interests. *Canfield v. U. S.*, above.

The ultimate decision crystallizing the view that changed circumstances may make a law once held valid open to subsequent attack as unconstitutional was preceded and suggested by two decisions cited by the court as authority, *Smith v. Illinois Bell Telephone Co.* (1930) 282 U. S. 133, and *Allen v. St. Louis, Iron Mountain & Southern Ry. Co.* (1912) 230 U. S. 553. In the latter case it was held merely that the putting into effect of prescribed rates did not preclude the railroad from attacking them a year later as confiscatory. Such period would give an opportunity to ascertain the actual results. The former case is more directly in point, for it held that in determining whether rates are confiscatory, their actual effect in view of a utility's situation, requirements, and opportunities must be considered, and that a rate order, confiscatory when made, may cease to be so, and one valid when made, may later become confiscatory. From this it is a short step to holding that a tax valid per se may prove in experience to be confiscatory. This rule was even more directly foreshadowed by a series of cases not cited by the court, in which prescribed rates for utilities had been held valid on their face, but which were permitted to remain open to future attack if the utilities should prove them confiscatory in practice. The court in these cases declined to hold prescribed rates invalid, but stated that the petitioners could present the cases again if experience showed the rates confiscatory. *Willcox v. Consolidated Gas Co.* (1908) 212 U. S. 19; *Knoxville v. Water Co.* (1908) 212 U. S. 1; *Des Moines Gas Co. v. Des Moines* (1914) 238 U. S. 153.

The significance of the definite decision in the present case in its application to social legislation has been widely recognized. See note (1931) 40 YALE L. J. 1101. It is conceivable, it has been pointed out, that laws once held invalid may in time be re-enacted and be upheld in the light of prevailing circumstances. It must be remembered, too, that not only changes in the physical facts may lead the court to alter its previous decisions. If a statute involving social policy once declared unconstitutional is repassed in its essence twenty years later, the pressure of a changed public attitude toward the obligations of the state may play a part in the decision then as important as the factor of actual physical circumstances. A growing so-

cial consciousness, a deepening sense of public responsibility—these abstract social attitudes and opinions may have a powerful effect on the subsequent decision. Such factors may not be immediately important, but a quarter of a century may prove them significant in the highest degree.

W. E. S., '33.

CONSTITUTIONAL LAW—WITNESSES—COMPULSION OVER ABSENT NATIONALS.—Harry M. Blackmer, a citizen of the United States, found it convenient to absent himself from the country when his testimony was wanted in the investigation of the Monmouth Oil Company leases, commonly known as the Teapot Dome Affair. He refused to answer letters rogatory issuing from the District Court of Wyoming to a Court in France. Subsequently, Congress passed a bill known as the Walsh Act, providing a method of compelling attendance of witnesses absent in a foreign country. 28 U. S. C. A. secs. 712-717. Blackmer was served with a subpoena by a United States consul in France but refused to return. He was subsequently cited for contempt and on failure to appear in that proceeding was fined $60,000. These measures were taken pursuant to and in accordance with the Walsh Act. Blackmer's attorneys contested the constitutionality of the statute. *Held*, that there was sufficient personal jurisdiction over the citizen domiciled in a foreign country to authorize service of an extraterritorial subpoena ordering him to appear and testify under penalty of a fine, which could be satisfied out of property sequestrated simultaneously with service of an order to show cause. *Blackmer v. United States* (Ct. of App. D. C. 1931) 49 F. (2d) 523. A review is now pending in the Supreme Court.

It is generally held that a court in one jurisdiction cannot compel attendance of a witness resident in another jurisdiction. *State v. Pagels* (1887) 92 Mo. 300, 4 S. W. 931; *Fidelity Trust and Casualty Co. v. Johnson* (1894) 72 Miss. 333; *State v. Murphy* (1896) 48 S. C. 1, 25 S. E. 43. A subpoena issued in one state and served in another is invalid. *State v. Huff* (1901) 161 Mo. 459, 61 S. W. 900. A court cannot compel attendance of a witness resident in a foreign country. *Tyre v. Wilkes* (1853) 10 U. C. Q. B. 639; *Patchin v. Davis* (1873) 18 U. C. Q. B. 46. Federal district courts compel attendance of witnesses resident outside their district, only when they reside within one hundred miles of the place of holding court. 28 U. S. C. A. sec. 654; *United States v. Stein* (D. C. E. D. Pa. 1929) 177 F. 479; *United States v. Southern Pacific* (D. C. Cal. 1916) 230 F. 270.

The legislatures of various states have sought means of compelling testimony of absent or nonresident witnesses, and have generally accomplished this by providing for the taking of depositions by commissioners. R. S. Mo. (1929) sec. 1754; R. S. Ill. (Cahill, 1929) sec. 26. The holding in the principal case seems to present a means whereby the attendance of absent witnesses may be enforced. New York has already passed a similar statute which is being tested in the present New York City municipal investigation. N. Y. C. P. A. sec. 406. However, the view has been urged that state statutes following the Federal statute would be void, as state powers unlike