DECISIONS NOTED

Admiralty—Money Found on Floating Body Subject of Salvage—Deceased drowned in Great South Bay when his boat capsized. Three months later the libelant found the body floating in the bay and towed it to shore where $2,133 was found in a pocket of deceased's clothing. Libelant proceeded in rem against the money for salvage services. The administrator of decedent's estate intervened, seeking to have the libel dismissed. The district court overruled the exception to the libel, holding the money properly the subject of salvage. [*Broere v. Two Thousand One Hundred Thirty-Three Dollars,* 72 F. Supp. 155 (E. D. N. Y. 1947)].

When the property saved is a ship or part of its cargo, there is no question but that such property is the subject of salvage so as to be within admiralty jurisdiction, but the Supreme Court has left open the question as to whether non-cargo goods lost at sea may be the subject of salvage. [*See Cope v. Vallette Dry Dock Co.,* 119 U. S. 625, 630 (1887)]. The lower federal courts have not agreed. Some have used the "commerce and navigation" test to determine whether the property is subject to salvage. This necessarily rules out property which is not a ship or part of its cargo. [*The Steamboat Hendrick Hudson,* 11 Fed. Cas. 1085, No. 6, 355 (S. D. N. Y. 1869)]. Others are of the opinion that "a salvage claim may be enforced in any case where valuable property in peril is saved" on the sea, or on a navigable river where maritime jurisdiction extends. [*The Cheesman v. Two Ferry Boats,* 5 Fed. Cas. 528, No. 2, 633 (S. D. Ohio 1870)]. It had already been decided by 1650 that a purse full of pistoles dropped overboard was properly the subject of salvage. [OBSERVATION to ART. IV, LAWS of OLERON]. Inasmuch as admiralty jurisdiction in the United States is based in part upon the practice of the admiralty courts of European nations, [*History of the Admiralty Jurisdiction in the Supreme Court of the United States,* 5 AM. L. REV. 581 (1871)], it might be questioned why the scope of admiralty jurisdiction should be limited by the "commerce and navigation" test in view of civil law precedents of such long standing. Reliance on such a test loses sight of the purpose for which salvage awards are made: to compensate for service rendered in saving property or rescuing it from impending peril on navigable waters, to reward the salvor for his bravery and honesty, and to encourage others to do likewise. [See *The Blackwall,* 10 Wall. 1, 14 (U. S. 1869)]. This purpose is applicable in the instant case. Nor is it likely that the decision in the principal case, when limited by this purpose, will permit a crowd of would-be salvors to recover where the law of salvage has no proper application.

Constitutional Law—Impairment of Contracts by Escheat of Unclaimed Insurance Funds—The N. Y. Abandoned Property Law requires insurance companies licensed to do business in New York to pay to the State Comptroller any moneys held or owing and remaining unclaimed for seven years by the persons entitled thereto under (1) matured endowment-plan life policies, (2) other type life policies where the insured, if living, would have reached the limiting age under the mor-

tality table upon which the reserves are based and (3) life policies where the insured has died. [N. Y. CONSOL. LAWS, bk. 2½, § 700 *et seq.* (McKinney, 1944)]. Payment relieves the companies of liability and claimants may thereafter prosecute claims against the Comptroller. The statute is silent as to the Comptroller's right or duty to investigate or adjust such claims. In an action attacking the constitutionality of the law and seeking injunction against its enforcement, the N. Y. Court of Appeals held that it was constitutional only in so far as applied to policies delivered in New York, and that the statute did not unlawfully deprive the companies of defenses upon the policies (*e. g.,* under suicide, aviation, *etc.* clauses). [*Conn. Mutual, et al. v. Moore,* 297 N. Y. 1, 74 N. E. 2d 24 (1947)].

The court relied, as to the question of defenses, on *Provident Institution for Savings v. Malone,* [221 U. S. 660 (1911)], where the United States Supreme Court sustained the application of the same "escheat" principle to unclaimed bank deposits. But risk-bearing contracts, unlike contracts of deposit with banks, are conditional. In addition to the principal condition, the death of the insured, there is almost universally the requirement of "due proof" of death. Mere notice is not the purpose of this requirement; it is to enable the insurer to determine the existence or extent of its liability, [*Lampert v. John Hancock Ins. Co.,* 28 F. Supp. 142 (E. D. N. Y. 1939)]; without it the insurer owes nothing. [Note, 28 IOWA L. REV. 683 (1943)]. Any modification by statute of the enforceable terms of an existing private contract, however slight, *e. g.,* requiring the insurer to pay without "due proof" as it must to the Comptroller here, constitutes in itself an impairment of the obligation in the constitutional sense. [2 STORY, COMMENTARIES ON THE CONSTITUTION (5th ed. 1891) 254.] In the instant case such a modification results in requiring the company to litigate defenses (as an alternative to paying to the Comptroller) without the opportunity, specifically contracted for in the form of "due proof," to determine the existence of such defenses, an effect that, if it does not cancel the conditions providing the defenses, at least so impairs the remedy for their non-fulfilment as to amount to a second species of impairment. [*Walker v. Whitehead,* 16 Wall. 314 (U. S. 1872).] The further objection of lack of due process is obviously also involved. If the statute is more than an attempt to fill the coffers of the treasury, [Legis., 14 ST. JOHN'S L. REV., 230 and n. 4 (1939)], disregarding the conditional nature of risk-bearing contracts, and if perhaps it is intended to "safeguard *unclaimed funds*" as a legitimate and reasonable exercise of the police power, then the decision might be justified. [*Home Bldg. & L. Ass'n v. Blaisdell,* 290 U. S. 398, 438-439 (1933).] But this was not the basis of the court's opinion.

Federal Judicial Code—Removing District Judge in Pending Case—Petitioners requested the senior circuit judge to designate a circuit judge to sit in a pending district court action and to displace the sitting district judge on the ground that he was obstructing execution of a reorganization plan approved by the ICC, the United States District Court, and the Circuit Court of Appeals. Petition was predicated on § 18 of the Judicial Code. [36 STAT. 1089 (1911), as amended, 28 U. S. C. § 22 (Supp. 1946).] The petition was denied on the ground that Congress intended only to expedite judicial work and utilize the services of

all judges, and not to give the senior circuit judge authority to change judges in cases pending in another court. [In re *Chicago, R. I. & Pac. Ry.*, 162 F. 2d 606 (C. C. A. 7th 1947).]

§ 18 of the Judicial Code has been uniformly interpreted in all circuits to allow the senior circuit judge to appoint himself or another circuit judge to hear a specific cause. It has also been construed to permit the appointment of a circuit judge to hear a case where the district judge has declared himself disqualified under § 20. [*United States* ex rel. *Fehsenfeld v. Gill*, 292 F. 136 (C. C. A. 4th 1923).] But the refusal of a district judge to disqualify himself under § 20 is not appealable, [*McColgan v. Lineker*, 289 F. 253 (C. C. A. 9th 1923)], and in such a situation a senior circuit judge has denied that he could exercise the power of designation given in § 18. [In re *Wingert*, 22 F. Supp. 483 (D. Md. 1938).] Clearly, then, the present petition should have been dismissed, since it utterly by-passed the district judge. One circuit judge had previously denied such a petition as this on the facts, but his opinion gives no indication that he had paused to consider whether he had authority to act. [*The M. L. Sylvia*, 34 F. Supp. 404 (D. Mass. 1940).] There can be no doubt but that the original intention of Congress in enacting the section in question was merely to prevent congestion of business in the district courts by providing a flexible plan for the assignment of judges where needed. [H. R. Doc. Vol. 127, 61st Cong., 2d Sess. (1909-10), Doc. No. 783, part 1, p. 13.] Federal procedure provides for appeal from most orders involving discretionary action, for the filing of an affidavit of prejudice, or, though the present allegations would scarcely warrant it, for impeachment. To allow resort to § 18 because a party feels that the district judge has made a prejudicial declaration would weaken the dignity and independence of the courts of first instance. It would bring the district judge into disrepute, while by-passing express legislative provisions for such action. The denial of such summary judgment is, therefore, in accord with the intent of Congress and with sound judicial organization.

Veterans—Seniority Subject to Collective Bargaining Agreements—A veteran and a union official were laid-off within a year after the veteran's reemployment. The union official, junior to the veteran in length of service, was rehired before the veteran under the terms of a collective bargaining agreement granting preferred seniority to union officials in the event of lay-offs executed while the veteran was in the armed forces. In an action by the veteran for loss of wages and a declaration of reemployment rights under § 8, Selective Training and Service Act, [54 Stat. 890, 50 U. S. C. App. § 308 (1940), as amended, 58 Stat. 798 (1944), 50 U. S. C. App. § 308 (Supp. 1946)], it was held that, "The employee absent in war service is bound by the non-discriminatory arrangements made between the bargaining unit and the employer during his absence." [*Gauweiler v. Elastic Stop Nut Corporation of America*, 162 F. 2d 448 (C. C. A. 3d 1947).]

§ 8 is here interpreted to require only that the veteran be returned to his position within the framework of the seniority system as if he had been employed continuously or on furlough, so that in either situation the veteran would have been governed by the terms of the bargaining agreement. Under similar facts, a district court has reached a different result. [*Campbell v. Lockheed Aircraft Corporation*, U. S. Dist. Ct., S. D.

Cal., 16 U. S. L. WEEK 2083 (U. S., July 17, 1947).] Congress expressed the intent to restore the veteran to the place and status he held upon entry into the armed forces without loss of seniority or other benefits. [86 CONG. REC. 10107, 10295, 11702 (1940).] Dicta of the Supreme Court have stated that the veteran was to be returned to his position within the framework of the seniority system without loss because of his absence; that he was not to be discharged without cause or demoted for the statutory year; that demotion included any loss of rights guaranteed by the Act including statutory seniority; but that the veteran should have no advance in seniority over that which he would have had if he had remained continuously employed. [See *Fishgold v. Sullivan Drydock and Repair Corporation,* 328 U. S. 275, 285-288 (1946).] In view of the fact that the Supreme Court in the *Fishgold* decision was ruling on an attempt to give the veteran preferred seniority over all non-veterans and the statement there that the veteran was to suffer "no loss of ground or demotion on his return," it may be concluded that the court defines seniority, for the purposes of this Act, as actual length of service. Nor may agreements between the employer and the union interfere with the benefits granted by the Act. [See *Trailmobile Company v. Whirls,* 331 U. S. 40, 58 (1947).] This bargaining agreement, in which the veteran had no voice, by creating an artificial seniority for the union official results in: (1) the loss of seniority because of the reemployment of the veteran at a lower position in the relative seniority scale; (2) a change in status, a "loss of ground," and an alteration of the original employment relationship. If one looks only at the relief demanded (damages for loss of wages), the decision may seem to be justified; but when the issue is examined outside of the procedural context, it is apparent that the veteran was not seeking an advance in his own position but rather, in the only form of action available, was seeking to prevent a loss of seniority and a change in status by the preferential treatment of the union official.