Notes

THE PERMANENCE OF CONSTITUTIONALITY

It has long been the common notion that a state or federal statute, once declared either constitutional or unconstitutional by the Supreme Court, remains so indefinitely. The notion has been fostered by opinions which have explained constitutional rulings in terms of absolute principles and logical syllogisms. It is true that extra-legal facts, subject though they be to change, have been recognized in constitutional argument; but their import, wherever it has influenced decision, has habitually been crowded into hard-and-fast legal phrases, so that the point as to constitutionality, once written, has seemed permanently written. Two cases decided by the Court at its present term bear directly upon the permanence of constitutionality.

In Abie State Bank v. Weaver,¹ the Court was confronted with a Nebraska statute compelling state banks to contribute to a depositors' insurance fund. The Court had considered and sustained the same statute in Shallenberger v. First State Bank ² twenty years before. At that time, complaint had been made that the assessments for the fund amounted to a taking of property in violation of the Fourteenth Amendment. Mr. Justice Holmes, in Noble State Bank v. Haskell,³ a companion opinion, had then explained that compulsory bank insurance laws fell on the right side of "the line where what is called the police power of the states is limited by the constitution." Thus the cry of "confiscation" had been countered by the equally abstract justification, "police power." In the Abie State Bank case, protest again found its legal basis in the Fourteenth Amendment. Special assessments made under a later amendment to the statute, it was said, had proved an unwarranted burden upon solvent banks, while the fund remained inadequate to meet the demands of the many banks which had failed during the depression. The Court, instead of dismissing the case summarily with a reference to the Shallenberger decision, indicated that the new facts might well have led it to grant the injunction sought against future assessments, had not the state itself made provision for an orderly liquidation of the entire scheme. Mr. Chief Justice Hughes, writing the opinion, commented that "a police regulation, although valid when made, may become, by reason of later events, arbitrary and confiscatory."

In Missouri Pacific Railroad v. Norwood,⁴ the Court was asked to enjoin the enforcement of two Arkansas statutes, one regulating freight train crews, the other railroad switching crews. Each statute had once been before the Court in exactly the same form. Each had been declared valid in the face of constitutional objections. The new protests varied from the old only in the presentation of changed conditions since the earlier decisions. The Court, after a thorough review of the matter, held that the facts did

---

¹ 51 Sup. Ct. 252 (1931).
² 219 U. S. 114, 31 Sup. Ct. 189 (1911).
⁴ U. S. Daily, April 15, 1931, at 377.
not overbalance a presumption of statutory validity. Mr. Justice Butler, in a matter-of-fact opinion, failed to comment upon the re-consideration of identical statutes, apparently passing it over as an accepted practice.

Yet the Chief Justice, in support of his statement concerning the temporary validity of "police regulations," cited only utility rate cases. In these, the theory of re-consideration has been that the commission to which the statute delegated regulatory powers might have failed to adapt its orders to changing conditions—not that the delegating act, once held valid, might since have become unconstitutional. Thus rate schedules declared confiscatory are sent back for adjustment to the same commission acting under the same law. The Abie State Bank case, at its most conservative interpretation, puts orders made according to the specific terms of a slight statutory amendment in the same class with those made under a general grant of regulatory power. The Missouri Pacific case can only be interpreted as extending to a self-sufficient and unamended statute the same possibility of obsolescence in the light of new conditions.

The real significance of the two decisions lies in the opportunity they have opened for reverse application in the future. If the march of events can make a constitutional law unconstitutional, a law which has once been declared invalid may similarly ripen to constitutionality. Surely, a Supreme Court rule of review, if it work at all, must work both ways. Analogous precedent is found in one of the very passages cited by the Chief Justice, where it is said that "a rate order which is confiscatory when made may cease to be confiscatory, or one which is valid when made may become confiscatory at a later period." In fact, not if the Court had so intended could it have pointed a clearer path to official vindication of social laws which have in the past been declared in conflict with the constitution. Moreover, the present Court's demand for extra-legal facts to disprove constitutionality, strikingly expressed by Mr. Justice Brandeis in O'Gorman and Young v. Hartford Fire Insurance Co., was reiterated by Mr. Justice Butler in the Missouri Pacific case. Thus, were a minimum wage law, for example, to come before the Court again, it would stand with a presumption of validity in its favor, and its opponents would now be forced to challenge it with facts instead of legal theories. To the citing of the Adkins decision as allegedly decisive of the constitutional point, the ready answer would be a reference to the Abie State Bank and Missouri Pacific cases as proof that a constitutional ruling may grow stale with the shift of economic conditions. Then the lapse of time between cases may come to be the only index of the permanence of constitutionality.

---


The Chief Justice might have found a closer analogy in the emergency rent law cases. Block v. Hirsch, 256 U. S. 135, 41 Sup. Ct. 458 (1921). But here legislative intent specifically limited the relief to a temporary measure, and it was specifically upheld as such. Whereas customarily, neither the statute, nor the application of the "police power" concept to uphold it, has been so restricted.

7 Smith v. Illinois Bell Telephone Co., supra note 6, at 162, 51 Sup. Ct. at 73.

8 282 U. S. 251, 51 Sup. Ct. 130 (1931).

9 Adkins v. Children's Hospital, 261 U. S. 525, 43 Sup. Ct. 394 (1923) (District of Columbia minimum wage law for women held invalid as conflicting with constitutional "freedom of contract").
STATE EXCLUSION OF FOREIGN CORPORATIONS FROM LOCAL BUSINESS

The oft assumed doctrine that a state may exclude foreign corporations from doing business within its borders 1 has been directly applied for the first time by the Supreme Court in the recent case of Railway Express Agency v. Virginia. 2 Relying on a clause of the Virginia Constitution forbidding the authorization of a foreign corporation to conduct a public service business, the state corporation commission had refused to allow a foreign interstate carrier, functioning as a joint facility of railroads throughout the country, to engage in local express transportation. In unanimously sustaining the ruling the Court did not ignore the company's contention that the exclusion amounted to a burden on its interstate commerce, but held simply that there was insufficient evidence of such a burden to overthrow the presumption of constitutionality. 3

The validity of the constitutional clause was further challenged, however, for the reason that reincorporation within Virginia would deprive the appellant of its right as a foreign corporation to invoke the diversity of citizenship jurisdiction of the federal courts. 4 The Supreme Court's struggle with the relation of foreign corporations to the diversity of citizenship jurisdiction presents an interesting chapter in constitutional history. It was early decided that a corporation is not a citizen within the meaning of the constitutional provision extending federal judicial power to controversies "between citizens of different states." 5 From the practical results of this interpretation the Court has, after much difficulty and without swerving from the verbal doctrine, managed to escape by the cumbersome device of disregarding the corporate entity, basing jurisdiction on the citizenship of the stockholders, and conclusively presuming that the stockholders were all citizens of the state of incorporation. 6 On this bed of quicksand an imposing structure of constitutional adjudication has been built. 7 Attempts by the states to retain in their own courts litigation concerning foreign corporations were, after some intermediate success, completely repulsed by the invention of the doctrine of "unconstitutional conditions." 8


4 Appellant's brief went somewhat further than was necessary in asserting that this deprivation was a denial of the equal protection of the laws. See Isaacs, Federal Protection of Foreign Corporations in American Constitutional Law (1926) 26 COL. L. REV. 263, 280-281. As the court drew no distinction between public service and private corporations, the holding of the instant case would seem to be applicable to foreign corporations generally. More cogent reasons exist for state exclusion of foreign public service corporations, however, than of private industrial corporations.


By the use of this device the Supreme Court has been able to invalidate statutes requiring an agreement not to remove suits to federal courts as a prerequisite to admission to local business, statutes visiting the penalty of expulsion from local business in the event of such a removal, and statutes imposing domestic status on foreign corporations doing local business.

Behind this zealousness to safeguard the foreign corporation's access to federal courts lies, perhaps, the supposed necessity of protecting capital moving from financial centers to "backward states" where a prejudice against foreign corporations is vaguely presumed to exist. In none of these cases was the state's absolute power to exclude foreign corporations from local business questioned. But, where the denial of privileges granted by the Federal Constitution and Statutes was so open, the Court, perhaps with a view to save dignity, was able to see a perversion of this "absolute" power to unconstitutional ends. The principal case indicates a method by which the states may attain by indirection that restriction on federal jurisdiction which was inhibited when sought by direct means. To confine local business to domestic corporations constitutes no patent denial of federal rights, and so long as the absolute power of exclusion from local business is affirmed, it would be difficult to deny it in a particular case by attributing "unconstitutional" motives for its exercise. Clearly the effect of exclusion provisions similar to those in the instant case is only incidentally to compel submission to local jurisdiction; other and perhaps greater burdens necessarily result.

The instant case thus reveals a curious anomaly: the state may require domestic incorporation and thus impose, among many other burdens, the incident of non-access to federal courts under the diversity of citizenship jurisdiction; yet the states may not offer to foreign corporations the opportunity to escape the other burdens by accepting the single incident of exclusion from diversity of citizenship.

---


12 Discussion of the merits of the Norris Bill for the abolition of the diversity basis of federal jurisdiction has focussed attention, not only on its great historical significance in the development of the country, but also on the fact that modern economic cosmopolitanism has not eliminated sectional prejudice, especially against corporations. See Brown, op. cit. supra note 7; Newlin, Proposed Limitations upon our Federal Courts (1920) 16 A. B. A. J. 401; for an opposite view see Frankfurter, Distribution of Judicial Power between United States and State Courts (1928) 13 CORN. L. Q. 499. Congress has repeatedly refused to enact legislation to exclude foreign corporations from the federal courts on the ground that they are not citizens for purposes of diverse citizenship jurisdiction. Frankfurter and Landis, The Business of the Supreme Court (1927) c. 2(4), 3(4).

13 Western Union Telegraph Co. v. Kansas, 216 U. S. 1, 27, 30 Sup. Ct. 190, 197 (1910).

14 The most important respects in which state regulation of a domestic subsidiary may impose greater burdens than state regulation of the foreign corporation are taxation and control of security issues.
jurisdiction. The states may well hesitate, however, before availing them-
selves of the power sustained by the instant decision as a drastic means 
of depriving foreign corporations of the right to federal jurisdiction.

PAYMENT OF ADVANCE WAGES IN TRADE CHECKS ON COMPANY STORE

The practice of paying wages in trade-checks, or scrip, which so often
results in the exploitation of employees by their employers, has led to wide-
spread legislative efforts directed at its abolition. Some statutes have abso-
lutely prohibited such payment; 1 others have sought to discourage it by
giving the holder, whether the employee himself, or a purchaser from him,
the option of redeeming the scrip at its face value in legal currency. 2 The
courts have generally sustained the constitutionality of this legislation, 3
but they have not always shown keen perception in detecting ingenious
devices to evade its effect. These devices have generally been so contrived as
to make it appear that the scrip sought to be redeemed in money was not
given in payment of wages, and therefore that the statute did not apply
to compel its redemption. So, where the scrip is issued not by the em-
ployer but by a mercantile company, in return for an assignment to it
of the employee's wages then due or about to become due, it has been
held that even though the employer is the sole stockholder the company
need not redeem the scrip, since it was issued indiscriminately to all cus-
tomers of the store, whether or not they were employees. 4 In like manner,
some courts have held that where scrip redeemable in merchandise is issued
between contractual pay days, on the voluntary application of the employee,
it is not issued "in payment of wages" within the prohibition of the statute
but merely represents 'credit' given the employee. 5

In the recent case of Radford v. Louisiana Central Lumber Co., 6 the
plaintiff brought suit on certain writings, purchased by him from employees
of the defendant, alleging that they were scrip which the lumber company
was compelled to redeem at face value under the redemption provision of
the statute. The instruments read as follows: "Louisiana Central Lumber
Co.: Please charge my account for merchandise amounting to $ , not
to exceed $3.00 (Signature of employee)." The defendant claimed that
these instruments were not issued in payment of wages, but before wages
were earned, and were merely "credit slips" by which the employee was
enabled to obtain credit at the company's store, and which were not charged

1 See IND. ANN. STAT. (Burns, 1926) § 9338; KY. CONST. § 244; 1 & 2
WILL. IV, c. 37 (1831).
2 ILL. REV. STAT. (Smith-Hurd, 1929) c. 40 § 38; TENN. ANN. CODE
(Shannon, 1927) § 4342 F. La. Acts 1924, No. 210, provides that "any person,
firm or corporation issuing checks, punchouts, tickets, tokens, or other
device, redeemable either wholly or partially in goods or merchandise at
their, or any other place of business, shall, on demand of the legal holder
thereof. . . . be liable for the full face value thereof, in current money of
the United States."
3 Harbison v. Knoxville Iron Co., 183 U. S. 13, 22 Sup. Ct. 1 (1901), aff'g
103 Tenn. 421, 53 S. W. 955 (1899); Macbeth-Evans Glass Co. v. Van
Blaricum, 176 Ind. 69, 95 N. E. 313 (1911); Atkins v. Grey Eagle Coal Co.,
76 W. Va. 27, 84 S. E. 906 (1915). But cf. State v. Missouri Tie and Timber
Co., 151 Mo. 536, 60 S. W. 933 (1904).
5 Avent Beattyville Coal Co. v. Com., 96 Ky. 218, 28 S. W. 502 (1894).
6 131 So. 765 (La. 1930). For statute see note 2 supra.
against him until his purchase was made and then only to the amount of the purchase. It was further testified that the employee could, upon written application, receive a cash advance on his wages. The court held that the writings in question were not given in payment of wages within the meaning of the statute, since there was no obligation owed the employee when they were issued, and no such coercion as the statute was designed to prevent.

Theoretically the system involved in the principal case might operate without prejudice to the employee if the prices and policy of the company store were wholly fair, and the employee was in fact not compelled to use the scrip. But the necessities of living may constitute such "compulsion in fact where there is none in law" as will force employees to take wages in advance. It is significant that the statutes condemning the use of scrip make no mention of coercion and no distinction between the payment of wages in advance and payment of wages when due. The fact that the employer here called the transaction a "credit" does not alter the circumstance that wages are actually being paid in scrip, since the value of merchandise purchased with these slips is deducted from the cash given the employee on the pay day. Furthermore, that the company had already paid wages without deducting the value of the unused credit slips upon which suit is brought should not weigh in its favor where it appears that by this device the employer is given the opportunity both to exploit his employees and to effect a company store monopoly, the very dangers which the statute was designed to avert. It is this effect which courts should properly take as the test of the statutes' applicability.

The Liability of an Acceptor of an Altered Bill of Exchange

Section 62 of the Negotiable Instruments Law, which places liability upon the acceptor of a bill of exchange "according to the tenor of his acceptance," has been held not to alter the common law practice which allowed a certifying bank to recover the amount paid upon a check altered before certification, even from a bona-fide purchaser thereof.

Too much weight should not be given this testimony where it does not appear that the identical slips sued on could be used to obtain cash advances or that no discount would be made.


See the discussion in Pond Creek Coal Co. v. Riley, Lester & Bros., 171 Ky. 811, 188 S. W. 907 (1916), reaching a different result from the instant case on facts substantially similar.

§ 62 reads: "Liability of acceptor: The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance; and admits (1) the existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument, and (2) the existence of the payee and his then capacity to endorse."

decision, however, following the hitherto unique Illinois interpretation of this section, and basing its decision upon a strictly literal interpretation of its words, has reached the opposite result in protecting the bona-fide purchaser of a certified check in which the payee's name had been altered before certification.

The main support for such a holding is the argument that it will strengthen the security of certified checks. The results of a recent investigation, however, indicate that the imposition of such liability upon the certifying bank would materially curtail the practice of certifying checks and it may reasonably be queried whether a restricted use of instruments of somewhat greater security would be preferable to the general use of instruments whose security is traditional. It has been said further that the drawee bank is better qualified than the purchaser to detect alterations of a check and to distribute such risks by insurance; nevertheless, it is significant that the bank is merely providing a gratuitous service for its customer, while the purchaser who in fact trusted the fraudulent party, presumably expects a profit from the transaction and should more justly bear the attendant risks. Nor is the consideration that the purchaser relied upon the acceptance persuasive since the reasonableness of such reliance logically depends upon the extent of the acceptor's warranty, which is the point at issue. Furthermore, a bill altered before and one altered after certification offer identical aspects of security to the purchaser, and in the latter case the purchaser has been denied protection. Moreover, "that sound principle which declares that where one of two innocent parties must suffer a loss the law will leave the loss where it finds it," is peculiarly inappropriate here, since the purpose of Section 62 is to fix the acceptor with definite liabilities.

Although Section 62 is not limited in its scope to certified checks, the policy which undoubtedly prompted the instant decision would not extend to the case of ordinary commercial bills of exchange. Even if it were possible so to word the section as to single out for liability the certifier of an altered check, the effect of such action would be to subject the certifying bank to double liability, for the original payee has been allowed recovery from the bank on the theory of conversion. Furthermore it is

---

5 See Breckenridge and Llewellyn, Comment (1922) 31 YALE L. J. 522; BRANNAN, NEGOTIABLE INSTRUMENTS LAW (4th ed. 1926) 572.
7 The American Bankers' Association recommended an amendment to the Negotiable Instruments Law to avoid the result in National City Bank v. National Bank of the Republic, supra note 4, but the suggestion was rejected by the Commission on Uniform State Laws. See REPORT OF CONFERENCE ON UNIFORM STATE LAWS (1923) 226.
8 See Breckenridge and Llewellyn, op. cit. supra note 5. If the bank is negligent, however, the purchaser is protected without § 62. Cf. Continental National Bank v. Tradesmen National Bank, 36 App. Div. 112, 55 N.Y.Supp. 545 (1st Dep't 1899).
9 Cf. Ozark Savings Bank v. Bank of Bradleyville, 204 S. W. 570 (Mo. 1918).
difficult to see why a bank certifying an altered check should be in a less favorable position than one paying it,\textsuperscript{12} or giving a cashier's check in lieu of certification.\textsuperscript{13} Similarly there appears no justification for holding the bank liable where the payee's name has been altered and endorsed as changed, and allowing recovery by it where the original payee's endorsement has been forged.\textsuperscript{14} These analogous situations are not within the scope of Section 62, and consequently the result of the instant decision is to isolate merely one of the forms which the transaction might take. If, as it is thought, this is an undesirable innovation upon the common law rule, not contemplated by the framers of the act,\textsuperscript{15} clarification of the wording of this section would seem imperative.

**RIGHT OF COMPENSATED EMPLOYEE TO SUE THIRD PARTY TORT-FEASOR**

UNDER most Workmen's Compensation Acts an employer is expressly subrogated to the rights of a compensated employee against third parties causing the injury.\textsuperscript{2} The question has frequently arisen whether this statutory subrogation constitutes a bar to an independent action by a compensated employee against a third party tort-feasor.\textsuperscript{3} Specifically provided for by only four compensation acts,\textsuperscript{3} this situation has produced a confusion of holdings not entirely explicable by the wide diversity in the subrogation provisions themselves.\textsuperscript{4} In a recent Missouri Case,\textsuperscript{5} a statute allowing


\textsuperscript{12} Cf. Interstate Trust Co. v. U. S. National Bank, 67 Colo. 6, 185 Pac. 260 (1919). See Breckenridge and Llewellyn, op. cit. supra note 5, at 527.

\textsuperscript{13} Cf. Central National Bank v. Drosten, 203 Mo. App. 646, 220 S. W. 511 (1920). A cashier's check is but a substitute for a certified check. See BRANNAN, op. cit. supra note 5, at 907.


\textsuperscript{15} See Note (1922) 16 ILL. L. REV. 615.

\textsuperscript{2} Of the forty-three state Workmen's Compensation Acts, all have subrogation provisions except Arizona, Montana, New Hampshire, Ohio, Utah and West Virginia.

\textsuperscript{3} See Note (1924) 33 HARV. L. REV. 972.

\textsuperscript{3} See ALA. ANN. CODE (1928) §§ 7586, 7587; MINN. STAT. (Mason, 1927) § 4291 (2); NEB. COMP. STAT. (1929) 48:118 (permits compensated employee to sue third party in his own name if he makes subrogated employer a party to the action); WIS. STAT. (1929) 102.29 (failure of subrogated employer to sue third party within ninety days after written demand entitles compensated employee to sue in his own name).

\textsuperscript{4} The various types of provisions subrogating the employer to the rights of his employee in case of third party liability may be classified thus: (a) Statutes providing that the employee shall receive any amount recovered by the employer in excess of compensation; (b) Statutes with the same provision as to excess recovery, but requiring the employee at his option to take compensation or sue the third party; (c) statutes which limit the employer's recovery to the compensation he has paid; (d) statutes which permit the employee to proceed either against his employer or the third party, but not against both; (e) statutes that neither provide for excess

recovery of full damages by the subrogated employer but providing that any recovery in excess of the compensation paid or payable was to be transferred to the employee was held not to destroy the compensated employee's right to sue the wrongdoer.

Under the few statutes which specifically prohibit the employee from proceeding against both his employer and the third party wrongdoer, acceptance of compensation is uniformly held to be a bar to a subsequent independent action. And where there is no provision regarding the extent of the employer's recovery or for the disposition of excess recovery, the employee has been held to have no further right of action if he elects to take compensation. Indeed, in at least one state it has been repeatedly stated that when the employee thus forfeits his common law action, the subrogated employer may recover full damages and retain them for his own benefit.

Where, however, the statute subrogates the employer only to the extent of the compensation paid or payable, or, as in the instant case, provides for the disposition of excess recovery by the employer, the subrogation has very generally been held no bar to the employee's suit against the third party wrongdoer.
party for full damages. In such a case he is, of course, required to hold in trust for his employer a portion of the judgment equal to the amount of compensation already received.12 Under these two types of subrogation provisions this same result has been reached even when the statute further stipulated that the employee may at his option take compensation or sue the third party, although such a provision might seem to contemplate but one remedy.13

The court in the instant case reasoned that the provision for disposition of excess recovery made the compensated employee in effect the beneficiary of an express trust, hence a real party in interest and entitled to sue. Whatever the reasoning, the result seems desirable in view of the fact that the employee is often forced by necessity to take immediate compensation; to deprive him, because of this necessity, of his larger common law expectancy, unless his employer sees fit to exercise his subrogation privilege against the third party, would seem hardly in keeping with the spirit of the Acts.

LIABILITY OF CORPORATE TRUSTEE FOR FAILURE TO RECORD

In the recent case of Benton v. Safe Deposit Bank of Pottsville, a bondholder brought suit against the trustee under a corporate indenture for damages occasioned by the latter's failure to record the mortgage. By provision of the indenture the trustee was under no duty to record and was to be liable only for gross negligence or wilful default. As the indenture was executed in Pennsylvania, the court applied authority of that state, and held that the exculpatory provisions immunized the trustee from liability to the plaintiff in this action. The strong and well considered dicta, however, leave but little doubt that the New York court is committed to the validity of such provisions wherever executed.

The duties of the trustee under a corporate mortgage are generally specified in the indenture under which the bonds are issued. Certain obligations, however, such as the duty to refrain from issuing bonds when it is known that the funds received therefore are being misapplied,2 and the duty of protecting funds set aside for the removal of prior encumbrances,3 have been implied from the mere existence of a trustee-bondholder relationship, even though not expressly set out in the indenture. Recordation was early recognized as such an implied duty,4 but in most modern indentures the

12 See cases cited supra note 11.

4 See Miles v. Vivian, 79 Fed. 848, 851 (C. C. A. 2d, 1897).
trustee, as in the instant case, expressly disavows this obligation, and in the only case in which the issue has been directly raised, prior to the instant decision, exculpatory provisions were held to relieve the trustee from liability for failure to record the mortgage. The New York Appellate Division, however, has stated in a strong dictum that grounds of public policy forbid that such provisions should relieve the trustee of the duty to record.

The establishment of limits beyond which a party in an advantageous position lacks power to contract out of responsibility constitutes no new departure in the common law. Moreover, practical considerations seem to compel the view that recordation should be placed in that class of duties that may not be escaped by contract. Corporate bondholders, often widely scattered, and rarely advised by counsel, are in no position to investigate the indenture or to ascertain whether the mortgage has been recorded. In a matter so vital to the security of the mortgage the investor seems justified in relying upon the trustee, whose name often serves as an assurance implied duty is too strong to be over-ridden by a disavowal that contradicts the transaction itself. . . . Such obligations (recordation) are imposed by law regardless of intention and exist because the trust exists . . . because they are part of the trust itself.” Posner, op. cit. infra note 5, at 210.

Posner, Liability of the Trustee Under the Corporate Indenture (1928) 42 HARV. L. REV. 198, 209, 244; Drinker, Concerning Modern Corporate Mortgages (1925), 74 U. of PA. L. REV. 360.

Bell v. Title Trust & Guarantee Co. of Johnstown, 222 Pa. 223, 140 Atl. 900 (1928).


With regard to breach of trust duties other than recordation, general exculpatory clauses have been almost always held effective in the few cases in which the issue has been raised, but complaining bondholders have conceded that these provisions were the measure of the trustee's liability, preferring to direct their attack towards showing that the acts of the trustee constituted gross negligence, or that they were outside the scope of the trustee's authority. Cf. Hunsberger v. Guaranty Trust Co., 164 App. Div. 740, 150 N. Y. Suppr. 190 (1st Dep't 1914); aff'd, 218 N. Y. 742, 113 N. E. 1058 (1916); Browning v. Fidelity Trust Co., 250 Fed. 321 (C. C. A. 3d, 1918). If such an attack is successful, the exculpatory clause is, in effect, nullified to some extent. Cf. Conover v. Guarantee Trust Co., 88 N. J. Eq. 450, 102 Atl. 844 (1917) (acceptance of collateral in the form of mortgages executed by the corporation, instead of mortgages assigned by the corporation, held to transcend the trustee's powers and hence not within the exculpatory provision). Where, however, the trustee expressly exculpates himself from the responsibility of performing specific duties, such as the duty to record, such an indirect attack cannot prevail.

The court in the instant case relies on the argument that the small fee earned by the mortgage trustee justifies giving him the power to exempt himself from liability for failure to record. There is, however, lively competition among trust companies for this type of business, presumably because it attracts more lucrative business from corporations issuing the bonds. Cf. Isaacs, Trusteeship in Modern Business (1929) 42 HARV. L. REV. 1048.
of the safety of the investment.\textsuperscript{11} It is to be hoped that when the problem is again presented, the New York courts will see fit to distinguish the instant case as a mere application of Pennsylvania Law.

\textbf{THE CONSTITUTIONALITY OF STATUTES RESTRICTING THE USE OF TRADING STAMPS}

A recent New Hampshire decision\textsuperscript{1} which declares unconstitutional a statute imposing a prohibitive tax on the use of trading stamps has reopened the whole question of the validity of legislation of this type. Beginning in 1880 there was severe agitation against the use of trading stamps.\textsuperscript{2} This agitation arose chiefly because certain types of business found the use of stamps highly effective, whereas others did not and feared their competition. Those stores which made the most frequent repeat sales to the same customer, i.e., the grocery as opposed to the hardware store, got the best results from their use. Thus clothing and shoe stores, markets, groceries, laundries, and later gas stations were equipped with an effective advertising device not available to other businesses. The result was that statutes were passed in thirty-one jurisdictions either expressly forbidding stamps or imposing prohibitive taxes on their use.\textsuperscript{3} The practice has been variously called "the imposition of a compulsory, useless, and unnecessary tax on the entire community"\textsuperscript{4} "an industrial parasite"\textsuperscript{5} and "a lure to

\textsuperscript{11} "... the salability of the bonds depends in no inconsiderable degree upon the character of the persons who are selected to manage the trust. If they are of well known integrity and pecuniary ability, the bonds are more readily sold than if this were not the case. It is natural that it should be so ..." Merrill v. Farmers' Loan & Trust Co., 24 Hun. 297, 299 (N. Y. 1881). See Northampton Trust Co. v. Northampton Traction Co., 270 Pa. 199, 202, 112 Atl. 871, 872 (1921); Posner, op. cit. supra note 5, at 199.

\textsuperscript{1} State v. Lathrops-Farnham Co., 150 Atl. 551 (N. H. 1930).

\textsuperscript{2} The trading stamp business consists of the sale of checks or stamps to merchants who issue them to customers making cash purchases, the number of stamps given out being determined by the amount of the purchase. When presented at the trading stamp store, or often at the store where the purchases were made, they entitle the holders to select certain articles from a catalogue or display of merchandise.


\textsuperscript{4} "One of the most shrewdly planned of the devices to secure something for nothing ... With no stock in trade but that device and the necessary books and stamps and so-called premiums with which to operate it successfully, they have intervened in legitimate business between seller and buyer, not for the advantage of either, but to prey upon both. ... The merchant who yields to their persuasion does so partly in the hope of obtaining the customers of another and partly through fear of losing his own if he declines. Again, a limited number only are included in the list for distribution of the stamps, and other merchants who cannot enter must run the risk of losing their trade or else devise some other scheme to counteract the adverse agency. ... Unless the premiums are grossly overvalued the scheme cannot maintain itself." Lansburgh v. District of Columbia, 11 App. D. C. 512, 531 (1897). Cf. (1916) 29 Harv. L. Rev. 779.

\textsuperscript{5} See State v. Underwood, 139 La. 288, 303, 71 So. 513, 518 (1916).
improvidence.”

It has also been contended that the contract between the holder and the redeemer of the stamps is void for uncertainty and lack of consideration, that much of the profits of the business come from lost or unused stamps, and that it is an improper appeal to one's gambling instincts.

These statutes were immediately contested in twenty-seven jurisdictions and in twenty-one were held to be unconstitutional as violative of the “equal protection” and “due process” clauses in the Federal Constitution, and of the Bills of Rights in the state constitutions.

Trading stamps were approved as a novel but lawful form of advertising rather than a “lure to improvidence,” the courts feeling that they encouraged cash sales, “which are in general more carefully considered than those in which the time of payment can be deferred.” The element of coercion of merchants was not considered persuasive and it was demonstrated to the satisfaction of the courts that the scheme contained none of the elements of a lottery.

Thus it would have seemed to be well established that prohibitory statutes of this sort were an unwarranted interference with a legitimate business when aimed at the trading-stamp companies themselves and an unjust discrimination against one form of advertising when directed at the merchants who bought and issued them. Statutes purporting to be regulatory but imposing prohibitive taxes were open to the further objection of unreasonable classification.

Thus, although the United States Supreme Court is often more lenient in criticizing state legislation than are the state courts it might have

---

10 See Young v. Commonwealth, 101 Va. 833, 869, 45 S. E. 327, 331 (1903).
11 See Denver v. Frueauf, 39 Colo. 20, 37, 88 Pac. 389, 395 (1906).
12 Such argument would apply equally well to any form of advertising or labor-saving device. Cf. State v. Ramseyer, 73 N. H. 31, 39, 58 Atl. 958, 962 (1904).
13 The articles to be given as premiums are generally on display and visible to customers. There is no doubt but that if the collector gets together a certain specified number of stamps he will be given the choice of a definite value in merchandise from a definite collection or catalogue. Furthermore, it has been held repeatedly that although (1) the stamps are redeemed by a party other than the one from whom the purchaser obtains them, (2) the premium is dependent on the acquisition of a certain number of stamps and (3) the article to be chosen is not definitely named, nevertheless the scheme is not invalid as a “lottery” or “gift-enterprise.” State v. Shugart, 138 Ala. 86, 85 So. 22 (1902); State v. Ramseyer, supra note 12; Denver v. Frueauf, supra note 11; State v. Caspare, 115 Md. 7, 80 Atl. 606 (1911); State v. Lutey Bros., 55 Mont. 545, 179 Pac. 457 (1919).
16 It has been especially tolerant in allowing expansion of the “police power” category of states’ rights since its inclusion under the term “due
been expected that when the matter was first presented for its considera-
tion, it would have been influenced by so strong an expression of state
opinion. Yet that court, through Mr. Justice McKenna, upheld statutes
prohibiting the use of trading stamps\textsuperscript{17} after a parade of "imagined hor-
rribles" and on general grounds of public policy.\textsuperscript{18} Not a case in point was
cited and reliance was had solely on references to extreme cases of inter-
ference with private enterprise, which the court had sanctioned. The
decision was even more striking when contrasted to the well-defined policies
of the Supreme Court in other matters, notably with respect to the preven-
tion of discounts by resale price-fixing agreements. In this field the court
has consistently allowed retail merchants to cut prices as they choose.\textsuperscript{19}

Since these decisions there has been a break in the uniformity of con-
demnation of trading stamp statutes. They have been contested fourteen
times\textsuperscript{20} and upheld in half of the decisions,\textsuperscript{21} but the effect if any of this
change of judicial attitude upon the actual use of stamps has not been
appreciable. The volume of business of the chief concern engaged in
selling stamps has increased steadily for the last ten years, and even in
face of the present widespread business depression, has not decreased since
process" by Justice Field in Barbier v. Connolly, 113 U. S. 27, 31 (1885).
\textsuperscript{17} Rast v. Van Deman-Lewis Co., supra note 6; Tanner v. Little, 240 U.
S. 369, 36 Sup. Ct. 379 (1916); Pitney v. Washington, 240 U. S. 387, 36
Sup. Ct. 385 (1916).

Mr. Justice McKenna answers the objection of arbitrary classification
for purposes of taxation by saying "It is established that a distinction in
legislation is not arbitrary if any state of facts reasonably can be con-
ceived which would sustain it, and the existence of that state of facts
at the time the law was enacted must be assumed." \textit{Ibid.} 357, 36 Sup. Ct.
at 374.

Dr. Miles Medical Co. v. Parks, 220 U. S. 373, 31 Sup. Ct. 376 (1911);

The Montana and North Dakota cases are not direct holdings in favor of the statutes, but seem to assume their
constitutionality. Only four jurisdictions, Ind., Kan., Md., La., have
expressly followed the Rast case, and only two of these involved a real
change of attitude, the matter never having been raised before in Kansas,
and Louisiana having earlier tacitly adopted the same policy. State v.
Merchants Trading Co., 114 La. 529, 38 So. 443 (1905).
last year. This may in part be explained by the fact that the statutes in question are now less rigorous, some of them exempting trading stamps redeemable by the merchant who makes the sale22 and some exempting stamps redeemable \textit{in cash} either by the merchant who issues them or by a third party.23 Moreover, an examination of the decisions themselves, reveals that in seven jurisdictions the right of the legislature to prohibit trading stamps has been expressly denied24 and that the particular statute under consideration has been upheld in only three.25 In the remaining four instances the court, while recognizing the general right of the legislature to regulate the business, has declared the particular statute void as arbitrary or discriminatory.26 The instant court considers the opinion of the United States Supreme Court and expressly discards it. Thus the latest judicial pronouncement on the subject is in accord with the weight of reason and authority in holding trading stamps to be a legitimate business device and in defeating as unconstitutional any attempt to prohibit their use.


An attempt has been made to explain this confusion of cases by pointing out that there are in general three types of statutes: (1) statutes against gaming and lotteries in general; (2) statutes against stamps redeemable either by the merchant issuing them on sales of goods or by a third party; (3) statutes against the redemption of stamps by a third party only. It is not apparent how this classification serves to explain the contradictions of the matter. The first types mentioned are irrelevant (supra note 13) and there is no distinction in principle between the second and third types. It is admittedly unconstitutional to prevent the issuance of coupons redeemable by the issuing merchant himself. Hence it is difficult to see any legitimate basis for discrimination. People v. Dycker, 72 App. Div. 308, 76 N. Y. Supp. 111 (3d Dep't 1902); State v. Dodge, 76 Vt. 197, 56 Atl. 983 (1904). See Young v. Commonwealth, supra note 10, at 865, 45 S. E. at 230; State v. Sperry & Hutchinson Co., supra note 7, at 393, 126 N. W. at 124. The constitutionality of the last-mentioned practice is expressly recognized in the latest Wisconsin statute on the subject. Wis. Laws (1929) v. 134.