YALE LAW JOURNAL

Subscription price, $4.50 a year *Single copy, 80 cents*
Canadian subscription price is $5.00 a year; foreign, $5.25 a year.

YALE LAW JOURNAL COMPANY, INC., Yale Station, New Haven, Connecticut
Publication Office, P. O. Box 552, Albany, N. Y.

SATISFACTION OF CASH DEMANDS OF DISSENTING CREDITORS ON REORGANIZATION BY APPRAISAL WITHOUT JUDICIAL SALE

IN *White v. Coriell*,[1] the Circuit Court of Appeals for the Second Circuit, made a striking contribution to the law applicable to the rights of dissenting creditors in a corporate reorganization. The case involved the consent receivership of a leather goods company and a reorganization plan providing for the transfer of the corporate assets to a new corporation which was to assume outstanding tax liabilities and issue (a) 1,000 shares of no-par common stock to White, owner of the entire stock of the old corporation, and (b) 9,000 shares of $100 par value cumulative preferred in extinguishment of 80% of the claims of creditors, the remaining 20% to be paid by successively maturing notes.[2] There were no outstanding bonds. A private sale pursuant

[1] New York Law Journal, Dec. 1, 1931, at 1117.

[2] The preferred stock of the new corporation was to elect 2 of the 5 directors. Otherwise, control was to be vested in the common stock. White was retained as president of the new corporation at a maximum salary of $60,000 a year for the first three years.

to this plan was approved by the district court. Unsecured creditors holding about 10% of the total claims petitioned to set the sale aside on the grounds that the plan gave the stockholders of the old corporation a substantial interest in the new company without requiring assessments, and made no offer of cash to creditors.[3]

Previous cases dealing with corporate reorganizations in which the problem of the instant case arose have turned upon the fairness of the reorganization plan to the complaining creditor or investor.[4] Had this issue controlled the disposition of the instant case, in all probability the sale would have been set aside since stockholders of the old company were allotted a substantial interest in the new corporation without the payment of an assessment[5] or the purchase of additional stock of the new company,[6] although a liquidation of the old company would have destroyed their equity therein. On the other hand, the result of an adjudication on this point would have been to permit a minority of creditors to thwart a reorganization deemed advantageous by the majority and thus force a judicial sale of the entire property. Undoubtedly with this element in mind, the court adopted a *juste milieu* whereby the question of the fairness of the reorganization plan became immaterial. It upheld the creditors' contention that they could not be forced to accept securities of a new company in discharge of their claims against an industrial corporation. Yet it did not reverse the decree confirming the sale, but instead offered the dissenting creditors payment in cash of *pro rata* shares of the appraised sum which the assets of the old company would bring if sold at public sale.[7]

[3] The principal creditors were: United States, $80,000 (taxes); New York State, $57,000 (taxes); banks, $440,000 ($250,000 of which were secured by a pledge of accounts receivable); merchandise creditors, $400,000. Dissenters held claims amounting to $102,238.

[4] *E.g.* Kansas City Terminal Ry. Co. v. Central Union Trust Co. of New York, 271 U. S. 445, 46 Sup. Ct. 549 (1926); same case in 28 F. (2d) 177 (C. C. A. 8th, 1928); Louisville Trust Co. v. Louisville, New Albany & Chicago Ry. Co., 174 U. S. 674, 19 Sup. Ct. 827 (1899); Temmer v. Denver Tramway Co., 18 F. (2d) 226 (C. C. A. 8th, 1927); North American Co. v. St. Louis & S. F. Ry. Co., 28 F. (2d) 174 (E. D. Mo. 1926).

[5] In the following cases the plan was held fair for the reason that stockholders were required to pay assessments: Kansas City Terminal Ry. v. Central Union Trust Co. of New York, *supra* note 4; P. R. Walsh Tie & Timber Company v. Missouri Pacific Ry., 280 Fed. 38 (C. C. A. 8th, 1922).

[6] In Temmer v. Denver Tramway Co., *supra* note 4, the plan was held fair because the stockholders were called upon to buy additional stock in the new company.

[7] The fact that White, the sole stockholder, was a key-man in the handbag industry, setting the styles and thus determining the nature of the raw materials supplied to the entire trade, and that the stability of the entire industry would be affected by the discontinuance of the company

It is by no means clear that a court does not have the power to force a dissenting creditor to participate in a reorganization plan.[8] Influenced by the frequently quoted *dictum* in *Northern Pacific Railway Co. v. Boyd*,[9] which tempered somewhat the effect of the "fixed principle" enunciated in that case, some federal courts have indicated that an offer of cash to dissenting creditors is not essential to the validity of a reorganization plan.[10] In *Phipps v. Chicago, Rock Island & Pacific Railway*

undoubtedly persuaded the assenting creditors to acquiesce in the plan and influenced the court as well. See Brief of Appellee White, at 3, 8-10. Moreover, the assent of a majority of creditors to a reorganization plan has been held to create a presumption of fairness. Jameson v. Guaranty Trust Co. of New York, 20 F. (2d) 808 (C. C. A. 7th, 1927); P. R. Walsh Tie & Timber Co. v. Missouri Pacific Ry., *supra* note 5; Swaine, *Reorganization of Corporations: Certain Developments of the Last Decade* (1927) 27 COL. L. REV. 901, 920.

[8] Mr. James N. Rosenberg has contended that federal courts should and do have inherent power to compel creditors to participate in reorganization plans. Rosenberg, *A New Scheme of Reorganization* (1917) 17 COL. L. REV. 523; *Reorganization—The Next Step* (1922) 22 COL. L. REV. 14; *Phipps v. Chicago, Rock Island & Pacific Ry. Co.* (1924) 24 COL. L. REV. 266. Mr. Robert T. Swaine has asserted the contrary with equal force and contends that the creditor is entitled to proceed to a judicial sale. Swaine, *Reorganization—The Next Step: A Reply to Mr. James N. Rosenberg* (1922) 22 COL. L. REV. 121; *Reorganization of Corporations: Certain Developments of the Last Decade* (1927) 27 COL. L. REV. 901. See also Cutcheon, *Devices Employed to Obviate the Embarrassments Created by the Boyd Case*, 8 LECTURES ON LEGAL TOPICS (1931) 35, 70 (in accord with Mr. Swaine); Cravath, *Reorganization of Corporations* in SOME LEGAL PHASES OF CORPORATE FINANCING, REORGANIZATION AND REGULATION (1917) 153, 188-198. Statutes in England and Delaware declare a compromise or arrangement between a corporation and creditors holding three-fourths in value of the total claims shall be binding on all the creditors. 8 EDW. VII, c. 69, § 120 (1908); Del. Laws 1925, p. 272, § 1, p. 275, § 4. Similar statutes in Ohio and Kentucky apply only to railway and bridge companies. OHIO GEN. CODE (Page, 1926) § 9092-9095; KY. STAT. (Carroll, 1930) c. 32, § 771-a.

[9] "This conclusion does not, as claimed, require the impossible and make it necessary to pay an unsecured creditor in cash as a condition of stockholders retaining an interest in the reorganized company. His interest can be preserved by the issuance, on equitable terms of income bonds or preferred stock." Northern Pacific Ry. v. Boyd, 228 U. S. 482, 508, 33 Sup. Ct. 554, 561, 562 (1913).

[10] See Kansas City Terminal Ry. v. Central Union Trust Co. of New York, *supra* note 4, at 454, 455, 46 Sup. Ct. at 551; P. R. Walsh Tie & Timber Co. v. Missouri Pacific Ry., *supra* note 5, at 44; Phipps v. Chicago, Rock Island & Pacific Ry., 284 Fed. 945, 950 (C. C. A. 8th, 1922). But *cf.* Merchants' Loan & Trust Co. v. Chicago Rys. Co., 158 Fed. 923 (C. C. A. 7th, 1907). In Ex parte Moore, 6 F. (2d) 905 (E. D. S. C. 1925), the court held that, in the absence of authority in the Banking Act, it had no power to compel creditors to accept securities of a new company. *Cf.* Gockstetter v. Williams, 9 F. (2d) 354 (C. C. A. 9th, 1925). Similarly, it has been held that no authority exists under the Bankruptcy Act to compel dissenting creditors to accept securities. In re Prudential Out-

Co.[11] which was actually decided upon grounds of estoppel,[12] Sanborn, J., said: "It was within the power and the judicial discretion of the court to adjudge and secure that interest or share to him or it [unsecured creditors] in the stock, bonds, or other securities of the reorganized company."[13] It is significant, however, that Judge Sanborn based his reluctance to require payment in cash upon the fact, which the device employed in the instant case obviates, that such a requirement would result in the dissenting creditor's receiving the *whole amount* of his claim in cash while other creditors received only a *pro rata* share of the property.[14] Furthermore it may be that the language in previous cases dealing with this point was intended to apply only to railroad and not to industrial reorganizations, for, since railroads cannot be liquidated, a requirement of cash payment to dissenting creditors in railroad reorganizations is theoretically impossible. Practically, however, dissenters rarely represent more than a small percentage of the outstanding indebtedness, and an amount sufficient to discharge their claims is generally provided by assessments paid by stockholders in return for a distribution to them of the securities refused by the dissenters.[15] Moreover, if the device of the instant decision be adopted, the probability of raising a sum sufficient to pay dissenters is increased since their claims are appraised at the liquidation value of the corporate properties, and the securities allotted to them by a fair scheme of reorganization represent, at a minimum, a corresponding share of that value. Consequently, it seems that the same considerations with reference to requiring cash payment are present in railroad as well as industrial reorganizations, and that the device employed in the instant case, although it may have forced a sale of some of the corporate properties by reason of the unusual fact that no new capital was realized by assessments, is available in both types of reorganization.

Furthermore, the desirability of this solution seems no less apparent than its simplicity, even from the dissenter's standpoint. He has advanced credit to the corporation with a view

fitting Co., 250 Fed. 504 (S. D. N. Y. 1918); In re J. B. & J. M. Cornell Co., 186 Fed. 859 (S. D. N. Y. 1911); In re Northampton Portland Cement Co., 185 Fed. 542 (E. D. Pa. 1911). However, minority creditors can be forced to accept a composition. 30 STAT. 549 (1898), 11 U. S. C. A. § 30 (b) (1926).

[11] *Supra* note 10.

[12] See Rosenberg, *Phipps v. Chicago, Rock Island & Pacific Ry. Company* (1924) 24 COL. L. REV. 266, 270.

[13] Phipps v. Chicago, Rock Island & Pacific Ry. Co., *supra* note 10, at 950.

[14] *Ibid.* at 953. See criticism in Harding v. American Sumatra Tobacco Company, 14 F. (2d) 168, 169 (N. D. Ga. 1926).

[15] Cravath, *op. cit. supra* note 8, at 182-185.

to a cash return upon possible liquidation; not to the potential necessity of investing in the stock of his customer or even in his notes. If his dissent is based upon a belief that the reorganized corporation will likewise be unsuccessful, he is unwilling to surrender a creditor's share of liquidation proceeds for a stockholder's share, subordinate to any debts the new corporation may incur. Nevertheless, he cannot claim more than he contracted for, that is, an aliquot share of the proceeds of liquidation, and since such proceeds are determined in the case of large corporations by judicial determination of an upset price,[16] a creditor cannot complain of a hypothetical in lieu of an actual judicial sale. This is particularly so since the existence of a reorganization plan and the presence of a reorganization committee as purchaser of the corporate properties will increase the upset price and likewise the amount at which the probable proceeds of a hypothetical judicial sale are appraised.

From the standpoint of the majority the present device serves the valuable purpose of eliminating the possibility of avoidance of the sale at the suit of a minority creditor who may not have been awarded a fair share in the reorganization, and accordingly reduces the threat of nuisance strikers. If the theory of the instant solution were consistently employed it would seem that the majority are also protected from the threat of the drastic remedy allowed complaining creditors in the *Boyd*[17] case and in *Mountain States Power Company v. A. L. Jordan Lumber Company*.[18] In the latter case, the dissenting creditor was decreed a *pro rata* share of the value of the old corporation's properties, appraised as a going concern, minus the amount of the foreclosure decree and of outstanding bonds. Since the value of the corporate properties as a going concern amounted to almost four times the upset price which governed the judicial sale to the reorganization committee, it is evident that a decree based upon the proceeds of an actual or hypothetical judicial sale would have been greatly to the advantage of the participants in the reorganization. The issue in this case and in the *Boyd* case arose upon actions by creditors against the new corporation and not,

---

[16] The huge sum usually required precludes competitive bidding, and the property is purchased by the reorganization committee at approximately the upset price. Weiner, *Conflicting Functions of the Upset Price in Corporate Reorganizations* (1927) 27 Col. L. Rev. 132, 138.

[17] Northern Pacific Ry. v. Boyd, *supra* note 9 (property of new company subjected to judgment to which old company was liable, although seven years had elapsed since reorganization).

[18] 286 Fed. 217 (D. Mont. 1923); 293 Fed. 502 (C. C. A. 9th, 1923), certiorari denied, 264 U. S. 582, 44 Sup. Ct. 332 (1923). Similar holdings: Kansas City Southern Ry. Co. v. Guardian Trust Co., 240 U. S. 166, 36 Sup. Ct. 334 (1916); Howard v. Maxwell Motor Co., 269 Fed. 292 (S. D. N. Y. 1920) (contingent claim).

as in the principal case, upon appeal from a decree confirming the sale. Nevertheless, it is inescapable that the device adopted in the instant case is inharmonious with the theory of prior adjudications which determine the creditor's rights by the relative benefits offered him by the reorganization plan, and his remedy by the value of the corporate property as a going concern.[19] The effect of this divergence is accentuated by observing that while the rights of dissenters have heretofore been determined irrespective of whether the value of the corporate properties at judicial sale exceeded the bonded indebtedness,[20] in the present device it is clear that the existence of a bonded indebtedness equal to the appraised proceeds of a judicial sale would have deprived the dissenting creditors of any relief.

Perhaps because the court in the instant case realized this radical divergence from the remedies decreed in prior cases it felt constrained to offer the complaining creditors alternative relief, namely, payment in cash of the appraised value of the stock and notes offered them at the time of the reorganization. It is evident that this option permits the creditors to share in the increased value of the corporate properties resulting from their transfer to a new corporation pursuant to the reorganization plan while relieving them of its speculative burdens. Such an outcome is clearly undesirable. If the dissenter is to share in the benefits of a reorganization, the fairness of the plan should be adjudicated and he should be required to accept the securities offered. If he is unwilling to accept securities of the new corporation, the first alternative offered by the court will give the dissenter approximately the same amount which he would have got had the corporate properties been sold for cash. This device is closely analogous to the underlying principle of the appraisal statutes relating to the remedy of stockholders who oppose a transfer of all corporate assets.[21] While a dissenting stockholder is entitled to cash payment of the appraised value of his holdings, he is not allowed to benefit by any appreciation in such value caused by a transfer in which he refuses to participate.[22] And there appears no reason why a different rule should apply to creditors.

---

[19] See Cutcheon, *op. cit. supra* note 8, at 45, 46.

[20] North American Co. v. St. Louis & S. F. Ry., *supra* note 4; Cutcheon, *op. cit. supra* note 8, at 45, 46. But *cf.* Hancock v. Toledo, Peoria & Warsaw R. R., 9 Fed. 738 (N. D. Ill. 1882).

[21] Lattin, *Remedies of Dissenting Stockholders under Appraisal Statutes* (1931) 45 HARV. L. REV. 233; Weiner, *Payment of Dissenting Stockholders* (1927) 27 COL. L. REV. 547. This device has been employed in the absence of statute. Tanner v. Lindell Ry., 180 Mo. 1, 79 S. W. 155 (1904). See DOUGLAS AND SHANKS, CASES AND MATERIALS ON CORPORATION FINANCE (1931) 897-929.

[22] Matter of Fulton, New York Law Journal, Dec. 11, 1931, at 1332

DEFENSES OF BANK STOCKHOLDERS TO DOUBLE LIABILITY

THE unprecedented frequency of bank failures in recent years following upon the financial depression[1] has centered renewed attention upon the diverse attempts by bank stockholders to avoid their statutory double liability.[2] For purposes of discussion, the defenses that have been asserted against the imposition of this liability may be grouped into (1) those which are incident to a transfer of the stock, and (2) those set up by a stockholder who is the actual owner and at the same time recorded as such on the corporation's books.

I

Where a transfer of bank stocks is involved courts have not hesitated to impose liability upon either an alleged actual owner who is not the stockholder of record or a stockholder of record who is not the actual owner. Two recent cases involving converse situations clearly illustrate this disposition to give broad effect

(New York Court of Appeals); Lattin, *op. cit. supra* note 21, at 243. In Jones v. Missouri-Edison Co., 203 Fed. 945 (C. C. A. 8th, 1913), dissenting stockholders were held entitled to the value of their shares as enhanced by the merger in order that trustees responsible for the transfer might not profit from their breach of trust.

[1] In the past four years the number of bank failures has increased as follows: 1928, 491; 1929, 642; 1930, 1345; 1931 (excluding December), 1932. Federal Reserve Bulletin, December, 1931, pp. 664, 697.

205 additional failures during December, 1931 are unofficially reported, making a total of 2,137 for that year. 60 BRADSTREET'S 93 (Jan. 23, 1932).

[2] Double liability statutes have been enacted by the Federal government and all the states except Alabama, Connecticut, Delaware, Louisiana, Massachusetts, Missouri, New Jersey, Rhode Island, Vermont and Virginia. The Idaho statute was declared unconstitutional in Fralick v. Guyer, 36 Idaho 648, 213 Pac. 337 (1923). Except for the Colorado statute, which imposes triple liability (Colo. Laws 1923, c. 67, p. 185), the state enactments follow generally the wording of the federal statute, which reads as follows:

"The stockholders of every national banking association shall be held individually responsible for all contracts, debts, and engagements of such association, each to the amount of his stock therein, at the par value thereof in addition to the amount invested in such stock. The stockholders in any national banking association who shall have transferred their shares or registered the transfer thereof within sixty days next before the date of failure of such association to meet its obligations, or with knowledge of such impending failure, shall be liable to the same extent as if they had made no such transfer, to the extent that the subsequent transferee fails to meet such liability; but this provision shall not be construed to affect in any way any recourse which such shareholder might otherwise have against those in whose names such shares are registered at the time of such failure." 12 U. S. C. § 64 (1926).

to the statutes. In *Corker v. Soper*,[3] the defendant subscribed to bank stock "as agent" for a corporation which he subsequently formed solely for the purpose of holding the stock as record owner. Upon the bank's subsequent insolvency, the court, without questioning the reality of the corporate existence, held that the corporation was a mere agent of the defendant, who was thus subject to double liability. In *Andrew v. People's State Bank*,[4] on the other hand, one who became a stockholder of record solely for the accommodation of the bank and with the purpose of remaining such only temporarily was nevertheless held liable on the stock.

When, upon a sale of bank stock, no transfer is made on the bank's books, the transaction is deemed effective between the parties and the transferee as the real owner is subject to double liability.[5] In addition, statutes make the transferor liable for a certain period after the transfer,[6] although in such event he is entitled to reimbursement from the transferee.[7] Furthermore, it is very generally held that the transferor remains liable even after the statutory period,[8] unless he has taken reasonable precautions to have the transfer recorded.[9] This continuing liability has been said to rest upon estoppel.[10] But no actual reliance by creditors upon the bank's records is required,[11] nor is the transferor liable for debts incurred subsequent to the transfer.[12] Moreover, mere knowledge of the transfer by the bank officials releases the transferor from liability.[13] The test

---

[3] 53 F. (2d) 190 (C. C. A. 5th, 1931). *Accord:* Houghton v. Hubbell, 91 Fed. 453 (C. C. A. 1st, 1899).

[4] 234 N. W. 542 (Iowa 1931).

[5] Baker v. Reeves, 85 Fed. 837 (C. C. D. Wash. 1898). See also Johnston v. Laflin, 103 U. S. 800 (1880).

[6] This period ranges from sixty days to one year. See Federal Statute, *supra* note 2; 2 S. D. COMP. LAWS (1929) § 8993. In this computation the day of transfer is excluded. Bank of Dassel v. March, 183 Minn. 127, 235 N. W. 914 (1931).

[7] Pace v. Shaw, 29 S. W. (2d) 965 (Tex. Comm. App. 1930). The question of the transferor's right to exoneration does not seem to have arisen.

[8] Karraker v. Ernest, 4 F. (2d) 404 (D. C. Ill. 1925); Taylor v. Ermon, 183 Ark. 323, 35 S. W. (2d) 1033 (1931); Shaw v. Green, 29 S. W. (2d) 818 (Tex. Civ. App. 1930).

[9] Whitney v. Butler, 118 U. S. 655, 7 Sup. Ct. 61 (1886); Dellert v. Stallman, 29 F. (2d) 236 (C. C. A. 7th, 1928); State v. Ware, 82 Okla. 130, 198 Pac. 859 (1921).

[10] See Pace v. Shaw, *supra* note 7; (1930) 43 HARV. L. REV. 1150.

[11] Chapman v. Pettus, 269 S. W. 268 (Tex. Civ. App. 1925).

[12] Mobley v. Phinizy, 172 Ga. 339, 157 S. E. 182 (1931); Bank of Dassel v. March, *supra* note 6; *cf.* Latimer v. Bennett, 167 Ga. 811, 146 S. E. 762 (1929).

[13] Snyder v. Forster, 73 Fed. 136 (C. C. A. 5th, 1896); Taylor v. McKennon, 178 Ark. 223, 10 S. W. (2d) 360 (1928); Darden v. Coward,

of liability thus would seem to be not estoppel but simply the negligence of the transferor in remaining the apparent owner resulting in injury to creditors. It is reasonable to suppose, however, that the statute is intended to set an absolute limit to the transferor's liability in the absence of bad faith, even though he remains the stockholder of record. But such a view has been adopted in only one jurisdiction.[14]

In the absence of consent by the transferee a transfer, even though recorded, is ineffective to impose double liability upon him.[15] Thus a wife who refused, upon her husband's death, to accept by descent bank stock bought by him as community property was not liable thereon.[16] And a subscriber who had paid for a specified number of shares of a "proposed increase" of a bank's capital stock was not subject to an assessment when the increase never eventuated but instead old stock was transferred of record by the bank officials without the knowledge or consent of the subscriber.[17] On the other hand, acquiescence rendering the record holder liable may be implied by his recognition of the stock's standing in his name, as by acceptance of a directorate,[18] by signing the stock certificate,[19] or by paying thereon an assessment which he is now contesting.[20]

A stockholder who, in anticipation of the bank's insolvency, transfers his holdings to a financially irresponsible person remains liable upon the bank's subsequent failure even though the transfer be recorded.[21] But according to the leading federal

---

197 N. C. 35, 147 S. E. 671 (1929). *Contra:* Fugua v. Shaw, 29 S. W. (2d) 319 (Tex. Comm. App. 1930).

[14] Austin v. Gamble, 297 S. W. 806 (Tex. Civ. App. 1927); Seidel v. Shaw, 7 S. W. (2d) 671 (Tex. Civ. App. 1928).

[15] Williams v. Vreeland, 250 U. S. 295, 39 Sup. Ct. 438 (1919); Smith v. Sogn, 226 N. W. 729 (S. D. 1929).

[16] Austin v. Strong, 1 S. W. (2d) 872 (Tex. Comm. App. 1928), rehearing denied, 3 S. W. (2d) 425 (1928). Where a stockholder refused to exchange his stock for stock in a merged bank, but instead gave it to his daughter who effected the exchange, he was not subject to double liability. Shaw v. Rogers, 36 S. W. (2d) 533 (Tex. Civ. App. 1931).

[17] Stephens v. Follett, 43 Fed. 842 (C. C. D. Minn. 1890). But *cf.* Rand v. Columbia National Bank, 94 Fed. 349 (C. C. A. 8th, 1899). A subscriber to new stock is not liable if the bank fails before the subscription proceedings are complete. Winters v. Armstrong, 37 Fed. 508 (C. C. D. Ohio 1889). But he is liable where the proceedings are complete although he has not received his stock certificate. Pacific National Bank v. Eaton, 141 U. S. 227, 11 Sup. Ct. 984 (1891).

[18] Finn v. Brown, 142 U. S. 56, 12 Sup. Ct. 136 (1891).

[19] Kenyon v. Fowler, 155 Fed. 107 (C. C. A. 2d, 1907), *aff'd* 215 U. S. 593, 30 Sup. Ct. 409 (1910).

[20] Rust v. MacLaren, 29 F. (2d) 288 (D. Kan. 1928).

[21] Stuart v. Hayden, 169 U. S. 1, 18 Sup. Ct. 274 (1898); Cooley v. Armstrong, 35 F. (2d) 401 (C. C. A. 8th, 1929).

case of *McDonald v. Dewey*,[22] the liability is limited to an amount sufficient to satisfy prior creditors. This distinction between prior and subsequent creditors, however, was not adopted by the only state court which has passed on the question,[23] and would seem to be without rational support. It is clear that the transferor's liability in this situation is based upon actual fraud on the creditors, for no liability is held to attach if he is ignorant of the bank's insolvency and transfers to a financially irresponsible person,[24] or if the bank is in a sound condition and an actual transfer is made to avoid liability,[25] or if a transfer is made to solvent transferees in anticipation of the bank's insolvency.[26] And subsequent creditors are prejudiced by the fraud to the same extent as are prior creditors.

Attempts to impose liability upon a bank holding stock of another bank are often frustrated by the judicial, and frequently statutory, limitation placed upon the power of banks legally to invest in such stock and therefore to assume liability upon it.[27] The rule is clearly to protect the stockholders and creditors of an investing bank. But its efficacy is somewhat vitiated by the holding that a bank may accept other bank stock as security for a loan and upon foreclosure become liable to assessment thereon.[28] Even in this situation, however, the courts, recognizing the tenuous nature of the distinction, go far in holding that the creditor bank, even after foreclosure, still holds the stock merely as collateral and is therefore not liable.[29]

A pledgee of bank stock, even though holding it of record "as collateral," is not subject to double liability thereon,[30] but, in

---

[22] 202 U. S. 510, 26 Sup. Ct. 731 (1906).

[23] Newton v. Bennett, 159 Ga. 426, 126 S. E. 242 (1924).

[24] Earle v. Carson, 188 U. S. 42, 23 Sup. Ct. 254 (1903); Vandargrift v. Rich Hill Bank, 163 Fed. 823 (C. C. A. 8th, 1908); see Fowler v. Crouse, 175 Fed. 646 (C. C. A. 2d, 1910).

[25] See Stuart v. Hayden, *supra* note 21.

[26] See McDonald v. Dewey, *supra* note 22, and Cooley v. Armstrong, *supra* note 21. But see Stuart v. Hayden, *supra* note 21.

[27] California Bank v. Kennedy, 167 U. S. 362, 17 Sup. Ct. 831 (1897); Concord First National Bank v. Hawkins, 174 U. S. 364, 19 Sup. Ct. 739 (1899); Veigel v. Dakota Trust & Savings Bank, 225 N. W. 657 (S. D. 1929). That the bank has received benefits from the stock is immaterial. Shaw v. National German American Bank, 132 Fed. 658 (C. C. A. 8th, 1904), *aff'd* 199 U. S. 603, 26 Sup. Ct. 750 (1905).

[28] National Bank v. Case, 99 U. S. 628 (1878); Veigel v. Dakota Trust & Savings Bank, *supra* note 27; see First National Bank v. Federal Land Bank, 177 N. E. 462 (Ind. App. 1931); Cassatt v. First National Bank, 156 Atl. 278 (N. J. L. 1931). *Contra:* Citizens Bank & Trust Co. v. Mabry, 136 So. 714 (Fla. 1931).

[29] Robinson v. Southern National Bank, 180 U. S. 295, 21 Sup. Ct. 383 (1901).

[30] Burgess v. Seligman, 107 U. S. 20, 2 Sup. Ct. 10 (1882); Pauly v. State Loan & Trust Co., 165 U. S. 606, 17 Sup. Ct. 465 (1897); Anderson

accord with the underlying principle of liability, he is liable if the stock stands in his name as owner,[31] even though he may have redelivered the pledge on payment of the loan [32] or subsequently colorably transferred it of record to a third person [33] if the latter be irresponsible. The pledgor's liability is unquestioned and he cannot by transfer confer such liability upon a third party who is ignorant of the pledge.[34]

It is settled that an infant is utterly without capacity to bind himself to double liability and as owner of bank stock can disaffirm liability after the bank's failure.[35] But to bar what would otherwise become a simple device to avoid liability, the courts have ruled that a purchase of bank stock by a parent in the name of his minor children or an absolute transfer of record to them does not relieve the parent from liability thereon.[36] Nor is the result altered even if after the assessment but before suit the infant comes of age and assents to ownership of the stock.[37] However, by invoking the statutory immunity to personal liability of trustees [38] in combination with the non-liability of children, an effective method of evading the statute seems to

v. Philadelphia Warehouse Co., 111 U. S. 479, 4 Sup. Ct. 525 (1884); Williamson v. American Bank, 185 Fed. 66 (C. C. A. 4th, 1911). But the pledgee is liable as soon as he assumes ownership of the stock, as by crediting the stock on the pledgor's debt, even though he may not become the stockholder of record. Ohio Valley National Bank v. Hulitt, 204 U. S. 162, 27 Sup. Ct. 179 (1907).

[31] Pullman v. Upton, 96 U. S. 328 (1877); National Bank v. Case, *supra* note 28. *Contra:* Chapman v. Marsico, 270 S. W. 1113 (Tex. Civ. App. 1925).

[32] Bowden v. Farmers & Merchants' Bank, Fed. Cas. No. 1714 (C. C. D. Md. 1877).

[33] National Bank v. Case, *supra* note 28.

[34] Burt v. Richmond, 107 Fed. 387 (D. C. Vt. 1901). Nor can a stockholder who is sued for double liability defeat execution on his assets by their assignment to a prior debtor as security. Masheter v. Carman, 130 Kan. 856, 288 Pac. 543 (1930).

[35] Mellott v. Love, 152 Miss. 860, 119 So. 913 (1929).

[36] Foster v. Chase, 75 Fed. 797 (C. C. D. Vt. 1896) (stock bought in children's names); Early v. Richardson, 280 U. S. 496, 50 Sup. Ct. 176 (1930) (transfer bona fide to children); Aldrich v. Bingham, 131 Fed. 363 (D. C. N. Y. 1904) (same); Shaw v. McMillan, 24 S. W. (2d) 536 (Tex. Civ. App. 1930) (same).

[37] Foster v. Wilson, 75 Fed. 797 (C. C. D. Vt. 1896). If, however, stock is transferred to an infant and he retransfers it to another adult, the original transferor is thereby relieved of liability from the date of the first transfer. In re Contract Corporation, (1872) L. R. 8 Ch. 266.

[38] By the Federal and most of the state statutes executors, administrators, guardians and trustees are not personally liable but the estate in their hands is liable to the same extent as the decedent, cestui or ward would be. See 12 U. S. C. A. (1927) § 66. See also note 40 *infra*. *Cf.* Matteson v. Dent, 176 U. S. 521, 20 Sup. Ct. 419 (1900) (estate of stockholder liable if bank fails after his death).

have been devised. Thus it has been held that no personal liability would attach where a father is trustee of bank stock bought by the children's money [39] or where a third person is constituted trustee for the transferor's children.[40] And in the recent case of *McNair v. Darragh,*[41] a father who in good faith and without knowledge of the bank's failing condition transferred national bank stock to himself as trustee for his minor children, was held to be thereby relieved of liability. Liability is thus entirely avoided, for the children's estates are not subject to assessment on the stock,[42] despite the striking analogy to the liability upon stock of a married woman who is incapable of contracting.[43] While the result may be consistent with a strict interpretation of the double liability statutes, it hardly accords with the statutory purpose of protecting creditors or with the usual judicial diligence in effectuating that purpose and thwarting ready devices of evasion.

II

The defenses of a stockholder of record who is also the actual owner usually arise out of transactions with the bank or with governmental banking officials. In this connection it is fundamental that double liability is solely for the benefit of creditors, and that the bank is without power to prejudice these rights. Thus although the stockholder's purchase was induced by the fraud of the bank's officers, of which he was ignorant until the bank's failure, he can neither rescind [44] nor set-off a claim for

[39] Fowler v. Gowing, 165 Fed. 891 (C. C. A. 2d, 1908).

[40] Corporation Commission v. Latham, 201 N. C. 342, 160 S. E. 295 (1931); Rutledge v. Stackley, 160 S. E. 429 (S. C. 1931). In these cases the cestuis were not disclosed upon the bank books, the father holding merely "as trustee," and in the Rutledge case the South Carolina statute did not specifically relieve trustees of liability. A trustee is liable if the stock stands in his individual name as owner, even though the bank knows it is held in trust. Lewis v. Switz, 74 Fed. 381 (C. C. D. Neb. 1896); American Trust Co. v. Jenkins, 193 N. C. 761, 138 S. E. 139 (1927). And a few cases hold that "as trustee" is merely *discriptio personae* and is not sufficient to relieve the trustee of personal liability. Flynn v. American Banking and Trust Co., 104 Me. 141, 69 Atl. 771 (1908); Grew v. Breed, 10 Metc. 569 (Mass. 1846). *Contra:* Welles v. Larrabee, 36 Fed. 866 (C. C. D. Iowa. 1888); Andrew v. City Commercial Savings Bank, 205 Iowa 42, 217 N. W. 431 (1928).

[41] 21 F. (2d) 906 (C. C. A. 8th, 1929), certiorari denied, 280 U. S. 563, 50 Sup. Ct. 14 (1929).

[42] Rutledge v. Stackley, *supra* note 40. *Cf.* Foster v. Lincoln, 74 Fed. 382 (C. C. D. Vt. 1896), *aff'd* 79 Fed. 481 (C. C. A. 2d, 1897); Clark v. Ogilvie, 111 Ky. 181, 63 S. W. 429 (1901).

[43] Keyser v. Hitz, 133 U. S. 138, 10 Sup. Ct. 290 (1890); Christopher v. Norvell, 201 U. S. 216, 26 Sup. Ct. 502 (1906).

[44] Scott v. Deweese, 181 U. S. 202, 21 Sup. Ct. 585 (1901); Anderson

damages for the fraud against his double liability.[45] Even though he rescinded prior to insolvency, he is liable as a transferor if such rescission were made within the statutory period of a transferor's liability after the transfer.[46] And the bank cannot by contract[47] or by the device of reducing its capital stock[48] release the stockholder from full liability. It seems also that the receiver's negligence in buying or collecting the assessment cannot affect the creditor's rights to a full payment of the double liability.[49]

The test of a stockholder's right to set off the payment of a prior assessment on his stock seems to depend upon the purpose and use of such a payment, that is, whether it be for the operation of the bank or for the benefit of creditors in liquidation proceedings. Thus payment of an assessment to enable the bank to restore impaired capital,[50] or to eliminate objectionable notes from its assets,[51] or to reopen[52] cannot be set off

---

v. Cronkleton, 32 F. (2d) 170 (C. C. A. 8th, 1929); Williams v. Stone, 25 F. (2d) 831 (C. C. A. 4th, 1928); Baird v. Anderson, 60 N. D. 444, 235 N. W. 150 (1931).

The fact that the stock was issued *ultra* vires is, of course, always a defense to double liability. Randall v. Mickle, 138 So. 14 (Fla. 1931).

45 Lantry v. Wallace, 182 U. S. 536, 21 Sup. Ct. 878 (1901); Dyar v. Mobley, 170 Ga. 65, 152 S. E. 74 (1930). Such set-off is not even allowed against creditors prior to the purchase of the stock. Hawkins v. Swan, 52 F. (2d) 688 (N. D. W. Va. 1931). *Contra:* Smith v. Bradshaw, 54 S. D. 158, 222 N. W. 683 (1928) (bank examiner's deceit was also inducement to purchase).

46 Wehby v. Spurway, 30 Ariz. 274, 246 Pac. 759 (1926), certiorari denied, 273 U. S. 722, 47 Sup. Ct. 112 (1926). A correlative holding is that a purchaser with a right to rescind at the end of a year is liable to assessment. Winsett v. Spurway, 30 Ariz. 287, 246 Pac. 763 (1926), certiorari denied 273 U. S. 722, 47 Sup. Ct. 112 (1926).

47 Scott v. Latimer, 89 Fed. 843 (C. C. A. 8th, 1898), certiorari denied, 172 U. S. 649, 19 Sup. Ct. 886 (1899).

48 Dane v. Young, 61 Me. 160 (1872); Mitchell v. Banking Corporation of Montana, 83 Mont. 581, 273 Pac. 1055 (1929). But a bona fide reduction will give immunity to the amount of the reduction, and such reduction is not a "transfer" subjecting the stockholder to liability for the statutory period thereafter. Shaw v. Noyes, 13 S. W. (2d) 443 (Tex. Civ. App. 1929).

49 Beckham v. Hague, 38 Misc. 606, 78 N. Y. Supp. 79 (1902). The statute of limitations does not start to run on the claim until a judicial determination of the insufficiency of the assets. Denny v. Kennedy, 229 Ky. 178, 16 S. W. (2d) 1030 (1929); Kennedy v. Denny, 237 Ky. 649, 36 S. W. (2d) 41 (1931).

50 Delano v. Butler, 118 U. S. 634, 7 Sup. Ct. 39 (1886); Russ v. Golson, 136 So. 506 (Fla. 1931); Leach v. Arthur Savings Bank, 203 Iowa 1052, 213 N. W. 772 (1927); Citizens Bank v. Needham, 120 Kans. 523, 244 Pac. 7 (1926).

51 Smith v. Goldsmith, 50 S. D. 1, 207 N. W. 977 (1926).

52 Huff v. Page, 2 F. (2d) 544 (C. C. A. 5th, 1924), writ of error dismissed, 270 U. S. 671, 46 Sup. Ct. 470 (1926); Baird v. Eidsvig, 59 N.

against double liability, even when the state bank commissioner acted *ultra vires* in levying the prior assessment [53] or the bank officers defrauded the stockholder into paying it.[54] On the other hand an assessment originally designed to replace impaired capital but actually used in liquidation may be set off against double liability,[55] and conversely property delivered to a receiver expressly to be credited upon any subsequent levy must be so credited even though wrongfully diverted to other uses by the receiver.[56] Finally where a payment is made under a trust agreement, either with the bank commissioner [57] or with bank officials [58] to be used in the discretion of the trustee for the continued operation of the bank but in any event to be credited against double liability upon its failure, the set-off is available only if the payments were actually retained and applied in liquidation. This principle was early indicated by a federal court holding that, where a stockholder delivered securities to a bank in a financial stringency with the understanding that if the bank were saved the securities would be returned while if it failed the avails would be applied upon her double liability, such application could not be allowed upon the happening of the latter contingency when the securities had already been utilized for bank purposes.[59]

As to other claims a stockholder is generally allowed no preference over creditors by a set-off against double liability.[60] He is allowed an equal position with them, however, and may therefore have an equitable set-off when sued by an individual creditor.[61] Following the same distinction, where by statute the

D. 484, 230 N. W. 721 (1930); Baird v. Mall, 232 N. W. 47 (S. D. 1930). It is immaterial that the assessment is compulsory. Broadbent v. McFerson, 80 Colo. 264, 250 Pac. 852 (1926); Blackert v. Lankford, 74 Okla. 61, 176 Pac. 532 (1918).

[53] Duke v. Force, 120 Wash. 599, 208 Pac. 67 (1922).

[54] Page v. Jones, 7 F. (2d) 541 (C. C. A. 8th, 1925).

[55] Mosler Safe Co. v. Guardian Trust Co., 208 N. Y. 524, 101 N. E. 786 (1913). See also Korbly v. Springfield Institute for Savings, 245 U. S. 330, 38 Sup. Ct. 88 (1917).

[56] Cole v. Adams, 101 Neb. 21, 161 N. W. 1036 (1917).

[57] Andrews v. State, 178 N. E. 581 (Ohio, 1931); *cf.* Austin v. Hough, 10 S. W. (2d) 655 (Mo. App. 1928).

[58] Reed v. Mobley, 172 Ga. 116, 157 S. E. 321 (1931); Andrew v. Farmers' State Bank, 236 N. W. 392 (Iowa 1931); Minnesota State Bank of Amboy v. Tabbott, 238 N. W. 53 (Minn. 1931).

[59] Sowles v. Witters, 39 Fed. 403 (C. C. D. Vt. 1889).

[60] Farmers' State Bank v. Reed, 114 Kan. 216, 217 Pac. 320 (1923); Reimers v. Larson, 52 N. D. 297, 202 N. W. 653 (1925); *cf.* Sawyer v. Hoag, 17 Wall. (U. S.) 610 (1873).

[61] Pierce v. Topeka Commercial Security Co., 60 Kan. 164, 55 Pac. 853 (1899); Broadway National Bank v. Baker, 176 Mass. 294, 57 N. E. 603 (1900); Strauss v. Denny, 95 Md. 690, 53 Atl. 571 (1902). Federal courts, prior to the allowance of an equitable defence in an action at law [28

double liability is to be enforced by the receiver or trustee in insolvency in favor of creditors generally, payments made by a stockholder to an individual creditor may not be set off against his double liability,[62] but where the statutory liability is in favor of individual creditors, the set-off is proper,[63] even though the creditor paid was a corporation in which the bank stockholder owned stock.[64]

Bank stock acquired before the statutory imposition of double liability is not subject thereto, although subsequent to the statute the articles of incorporation were amended so as to increase the capital stock.[65] Constitutional objections of impairment of the obligation of contract and deprivation of property without due process of law might well be used to achieve this result. But if the holder of such stock consents to the statute by paying one assessment, he is subject to future assessments.[66]

As the legislatures and courts go to more extreme lengths in assessing bank stockholders for the benefit of creditors,[67] an inquiry as to the desirability and efficacy of double liability seems pertinent. Stockholders in other corporations, even of those assuming fiduciary aspects such as insurance companies, are not subject to added liability. A stockholder in these corporations may even rescind after insolvency for fraud inducing his pur-

U. S. C. § 398 (1926)] refused to allow the set off upon that basis. Crissey v. Morrill, 125 Fed. 878 (C. C. A. 8th, 1903).

[62] Swicord v. Crawford, 148 Ga. 719, 98 S. E. 343 (1919).

[63] Sargent v. Stetson, 181 Mass. 371, 63 N. E. 929 (1902); Garrison v. Howe, 17 N. Y. 458 (1858).

[64] Sedgwick City Bank v. Sedgwick Milling & Elevator Co., 59 Kan. 654, 54 Pac. 681 (1898).

[65] Dagg v. Hammons, 34 Ariz. 445, 272 Pac. 643 (1928); Hammons v. Crozier, 297 Pac. 567 (Cal. App. 1931).

[66] First State Bank v. Granville, 237 N. W. 708 (N. D. 1931). A stockholder who buys stock in violation of the requirements of the banking commissioner is subject to liability if before or after the bank's insolvency the commissioner ratifies the sale. Citizens' State Bank v. Burner, 131 Kan. 286, 291 Pac. 739 (1930).

[67] A recent Georgia statute authorizing the state bank superintendent to issue executions against stockholders who after notice neglect to pay their assessments and making such executions liens on their property from the date of issuance but providing for resort to the courts was upheld. Coffin Bros. v. Bennett, 277 U. S. 29, 48 Sup. Ct. 422 (1928). Under this statute necessity for an assessment at any time need not be shown. Mathers v. Citizens' Banking Co., 43 Ga. App. 260, 158 S. E. 455 (1931). Immediately upon taking control of the bank, the banking commissioners may collect the full amount of the superadded liability, but stockholders are entitled to a refund of any unused portion. Schwenker v. Bekkendal, 236 N. W. 581 (Wis. 1931). At one time it was held that directors without the stockholders' consent could not be authorized by statute to levy assessments. Duke v. Force, *supra* note 53. But subsequent statutes authorizing such action have not been questioned. First State Bank v. Cox, 237 N. W. 708 (N. D. 1931).

chase and thereby evade the unpaid portion of his subscription price.[68] The provision, moreover, directly contravenes the theory of distribution of loss which is considered so beneficent in other fields. The relatively small benefit to numerous creditors derived from the double liability payment[69] would not seem to offset the heavy loss devolving upon the stockholder and it cannot be unequivocally said that the stockholder is more able to stand the loss than the creditor. And since the stockholders are usually far removed from the intricacies of banking practice, the imposition of liability as a practical matter probably does not conduce to a safer banking course of business. A combination of a sense of responsibility of banking officials, of a fear of loss of their investment by stockholders, and of modern state control seems to furnish sufficient deterrent to speculative practices. Moreover, the imposition of too heavy liability may curtail necessary investments in bank stock which would offset any benefits arising from inducements of deposits by double liability protection. It seems, therefore, that legislatures and courts might reconsider the rights of bank stockholders. An indication of such a change of attitude may be seen in the decision of the California Court[70] that a statute permitting the state bank superintendent to assess bank stockholders without limit for the benefit of creditors in liquidation was unconstitutional.

---

[68] Hollander v. Heaslip, 222 Fed. 808 (C. C. A. 5th, 1915); 1 COOK, CORPORATIONS. (8th ed. 1923) 547, n. 1; *cf.* McMahon v. Macy, 51 N. Y. 155 (1872); Johnstone v. Black, 59 Wash. 144, 109 Pac. 367 (1910) (pledgee appearing upon corporation's books as absolute owner held not liable for unpaid subscription price).

[69] The capitalization of national banks is according to population and not to liabilities. The capital must be $100,000 except that national banks in cities with a population of not over 3000 need have only $25,000 capital, in cities of not over 6000 must have only $50,000 and in cities of over 50,000 must have $200,000. 12 U. S. C. § 51 (1926).

The capital stock of even the very strong banks rarely exceeds in value over 10% of the total liabilities. Thus as of Dec. 31, 1931, the Continental Illinois Bank and Trust Co. of Chicago, Illinois, with total liabilities of $1,008,463,768.31 including deposits of $773,437,524.72 has $75,000,000.00 capital stock; the Bank of Manhattan Trust Co. of New York City with total liabilities of $461,087,089.32 including deposits of $375,131,667.09 has a capital stock of $22,250,000.00. The National City Bank of New York with total liabilities of $1,857,975,421.34 including deposits of $1,418,702,859.54 has a capital stock of $124,000,000.00; the Chase National Bank of the City of New York with total liabilities of $1,988,669,180.01 including deposits of $1,459,114,886.43 has a capital stock of $148,000,000.00. 134 COMMERCIAL & FINANCIAL CHRONICAL (Jan. 9, 1932) pp. xi, xxi, xxvii, xxix.

[70] Wood v. Hamaguchi, 277 Pac. 113 (Cal. 1929).

RECOVERY OF FOREIGN ASSETS OF INSOLVENTS

UNDER existing systems for the administration of estates of insolvent persons or corporations, the rules and practice with respect to the disposition of assets lying outside the primary jurisdiction present many inconsistencies. The explanation for this situation lies largely in the distinctive legal doctrines which have attached themselves to the various types of assignments and receiverships and which by their very variety tend to obscure a practical common problem, namely, the efficient administration of all the assets, local and foreign. It is proposed in these comments * to accept the thesis that from a business standpoint unified control of administration is generally desirable and, in the light of it, to examine comparatively the powers with respect to foreign assets exercised by the following—assignees for the benefit of creditors, assignees and receivers under state insolvency and winding-up statutes, equity receivers deriving their powers from the appointing court and receivers and trustees under the National Bankruptcy Act.[1] In all the situations considered it is to be assumed that the powers which the assignee, receiver or trustee is attempting to exercise have been validly acquired under the law of the primary jurisdiction,[2] that is to say, the place of the original assignment or appointment.

I. Direct Proceedings in Foreign Courts

A. *When adverse claims are not involved.* The simplest test of the extraterritorial effectiveness of an assignee or receiver occurs when he sues in a foreign court on a right of action formerly in the insolvent or asks the aid of the court in obtaining possession of property in the state, no adverse claims of third parties being involved.

Under the general rule that a voluntary transfer by the owner for a valuable consideration, if valid where made, should be given effect everywhere [3] the standing of an assignee under an assignment for the benefit of creditors is rarely disputed under

* The second of these comments, on *Collection and Transfer of Assets by Ancillary Receivers,* will be published in the March issue of the Journal.

[1] 30 STAT. 544 (1898) as amended, 11 U. S. C. §§ 1-112 (1926).

[2] Only cases in which action is sought outside the state of the original assignment or appointment are considered. Problems arising in connection with proceedings brought within the same state but outside the jurisdiction of the court under which authority is first acquired are not involved.

[3] See Cole v. Cunningham, 133 U. S. 107, 129, 10 Sup. Ct. 269, 276 (1890); Security Trust Co. v. Dodd, 173 U. S. 624, 628, 19 Sup. Ct. 545, 546 (1899); BURRILL, ASSIGNMENTS (6th ed. 1894) § 275.

such circumstances.[4] However, statements to the effect that a foreign assignment contrary to the public policy of the forum need not be recognized frequently appear in the opinions,[5] and in the exceptional case, by what must be considered an improper application of this doctrine, the assignee has been prevented from enforcing a contract right against a resident of the state where suit is brought.[6] An assignment made by a debtor involuntarily, under an insolvency statute, for example, is generally said to have no legal operation in another jurisdiction.[7] Theoretically, therefore, a court may always refuse to recognize the foreign assignee. The practice, however, is more liberal and he is allowed to sue, as it said, "by comity." [8]

The extraterritorial authority of the receiver or other official vested with the rights of action of an insolvent corporation by force of a statute of the incorporating state has been rested on a stronger ground. In the familiar example of an action to enforce stockholders' liability, it has been held that the receiver so entitled may sue as of right, there being no leeway for the doctrine of comity.[9] In these cases the full faith and credit

[4] Salyer v. Blessing, 151 Ky. 459, 152 S. W. 275 (1913). See cases cited *infra* note 29, in which the right to sue is upheld even when adverse claims are asserted against the assignee. Where common law objections to the assignment of *choses in action* have not been overcome, he may not be permitted to sue. Orr v. Amory, 11 Mass. 25 (1814); ANSON, CONTRACTS (5th ed. Corbin 1930) § 305.

[5] See Security Trust Co. v. Dodd, *supra* note 3, at 628, 19 Sup. Ct. at 576; Means v. Hapgood, 19 Pick. 105, 106 (Mass. 1837); Birdseye v. Underhill, 82 Ga. 142, 147, 7 S. E. 863, 865 (1888); In re Paige Lumber Co., 31 Minn. 136, 138, 16 N. W. 700, 701 (1883).

[6] Ayers v. Des Portes, 56 S. C. 544, 35 S. E. 218 (1900) (assignment with preferences not permitted by state assignment statute; assignment made in New York where preferences are permitted held contrary to public policy of the forum). *Contra:* Barnett v. Kinney, 147 U. S. 476, 13 Sup. Ct. 403 (1893) (assignment law of forum forbidding preferences held not to apply to foreign assignments).

[7] See note 38 *infra*. BURRILL, *op. cit. supra* note 3, § 276.

[8] In re Waite, 99 N. Y. 433, 2 N. E. 440 (1885); Van Kempen v. Latham, 195 N. C. 389, 142 S. E. 322 (1928). *Contra:* Barth v. Iroquois Furnace Co., 63 Ill. App. 323 (1896) (the objection made is procedural, on the ground that the *lex fori* does not permit the assignee of a chose in action to sue in his own name).

[9] Converse v. Hamilton, 224 U. S. 243, 32 Sup. Ct. 415 (1912); Good v. Derr, 46 F. (2d) 411 (C. C. A. 7th, 1931). In reaching the same result the doctrine of comity is sometimes relied on. Cole v. Sassenberg, 230 N. W. 22 (S. D. 1930); Parker v. Stoughton, 91 Wis. 174, 64 N. W. 751 (1895). But *cf.* Van Tuyl Jr. v. Carpenter, 135 Tenn. 629, 188 S. W. 234 (1916) (statute of state of incorporation did not clearly vest title in bank superintendent taking over affairs of insolvent bank). The constitutional questions under the full faith and credit clauses are discussed by Dodd, *Supreme Court Review in Conflict of Laws* (1926) 39 HARV. L. REV. 532.

clause may be invoked,[10] and objections on the score of public policy in the state where suit is brought are met by the statement that provisions imposing stockholders' liability are within the regulatory powers of the state creating the corporation and that no other state can properly have a public policy thereon.[11] But in construing the powers of a receiver, the courts are bound by the construction of the statute adopted in the enacting state,[12] and if the receiver is thereby regarded as having less than titular powers, he is subject to the disabilities of the ordinary chancery receiver.

The leading authority for the proposition that a chancery receiver is not entitled, even by comity, to sue outside the jurisdiction of the appointing court is *Booth v. Clark*.[13] So often has the case been cited as authority for this proposition that the particular fact situation has rarely been examined. As a matter of fact the position of the receiver in that case was extremely weak; not only had he been guilty of inexcusable *laches*, following his appointment on a creditor's bill for the benefit of a particular creditor only, but the fund sought was contested by other claimants. But although the issue as stated by the court was carefully phrased with reference to these facts,[14] the rejection of the suit has served as a controlling precedent in the federal courts.[15] The doctrinal objection to entertaining the suit of the foreign receiver, recognized in *Booth v. Clark* and relied upon in the subsequent cases, is that the receiver is merely the creature of the appointing court and has therefore no authority outside of its jurisdiction. In the state courts, however, the receiver is generally permitted to sue[16] in the absence of ad-

---

[10] Converse v. Hamilton, Good v. Derr, both *supra* note 9.

[11] Converse v. Hamilton, *supra* note 9, at 260, 32 Sup. Ct. at 419.

[12] Sterrett v. Second National Bank, 246 Fed. 753 (C. C. A. 6th, 1917).

[13] 17 How. 322 (U. S. 1854).

[14] "As an officer of a court of chancery, for a particular purpose, will he be recognized as such by a foreign judicial tribunal and be allowed to take from the latter a fund belonging to the debtor, for its application to the payment of a particular creditor within the jurisdiction of the receiver's appointment, there being other creditors in the jurisdiction in which he now sues, contesting his right to do so?" *Ibid.* 330. For an excellent discussion of the proper limitation of the holding in this case, see Parsons v. Charter Oak Insurance Co., 31 Fed. 305, 307 (C. C. S. D. Iowa 1887).

[15] Hale v. Allinson, 188 U. S. 56, 23 Sup. Ct. 244 (1902); Sterrett v. Second National Bank, *supra* note 12; Great Western Mining Co. v. Harris, 198 U. S. 561, 25 Sup. Ct. 770 (1905). *Cf.* Lewis v. American Naval Stores Co., 119 Fed. 391 (C. C. E. D. La. 1902) (predicting more liberal rule).

[16] Hardee v. Wilson, 129 Tenn. 511, 167 S. W. 475 (1914); Union Guardian Trust Co. v. Broadway National Bank, 138 Misc. 16, 245 N. Y. Supp. 2 (Sup. Ct. 1930). See Toronto General Trust Co. v. Chicago B. & Q. Ry., 123 N. Y. 37, 47, 25 N. E. 198, 201 (1890). *Contra:* Booker v. Ennis, 86 Pa. Super. Ct. 145 (1926) (action to recover overpayment on

verse claims. And in New York the application of a foreign receiver for the appointment of an ancillary receiver for no apparent reason except to recover the property of the debtor has been refused as useless and necessitating needless expense.[17]

Whether a receiver under the National Bankruptcy Act may sue even in the district of his appointment has been a disputed question in the federal courts.[18] And whether, having been authorized by the appointing court to sue outside the state, he will be recognized by a federal court in another state is a question which has apparently seldom arisen in cases not involving adverse property claims, but when the court looks to the traditional limitations upon the powers of a receiver the suit will not be entertained.[19] However, the receiver's authority properly granted by a federal court having jurisdiction of the bankruptcy proceedings is apparently secure from attack when he sues in a state court.[20] There remains the trustee under the Bankruptcy Act who is vested by federal statute with the title and powers of the bankrupt as well as with additional rights,[21] and whose

a claim presented in the receivership).

[17] Mabon v. Ougley Electric Co., 156 N. Y. 196, 50 N. E. 805 (1895). And all needful remedies are available to the receiver in reducing the property to possession. Also an action for the conversion of the assets. See *ibid.* 201, 50 N. E. at 806.

[18] Permission to sue refused: Boonville National Bank v. Blakey, 107 Fed. 891 (C. C. A. 7th, 1901) (suit to set aside preferential payments); Bingaman v. Commonwealth Trust Co., 1 F. (2d) 505 (D. Pa. 1924). The last case indicates that a distinction might be made under circumstances indicating danger to the property. See also In re Fixen & Co., 96 Fed. 748, 753 (S. D. Cal. 1899). A federal bankruptcy receiver has succeeded in suits brought in state courts. McGlue v. Louden, 251 Mass. 173, 146 N. E. 255 (1925); Muller v. Schram, 100 N. J. Eq. 143, 134 Atl. 657 (1926). See GILBERT'S COLLIER ON BANKRUPTCY (2d ed. 1931) 52; 5 REMINGTON, BANKRUPTCY (3d ed. 1923) § 2221; Note (1932) 41 YALE L. J. 462.

[19] In re Benedict, 140 Fed. 55 (E. D. Wis. 1905). *Cf.* In re National Mercantile Agency, 128 Fed. 639 (D. Pa. 1904) (order of appointing court did not authorize suits outside of the jurisdiction). In re Schrom, 97 Fed. 760 (N. D. Iowa 1899) (appointing court refused order to authorize suit on ground that there had not yet been an adjudication of bankruptcy.) See REMINGTON, *op. cit. supra* note 18, §§ 2211, 2212. The Amendment of 1910 provides that the federal courts shall have jurisdiction to exercise ancillary jurisdiction in aid of a receiver or trustee appointed in bankruptcy proceedings. 36 STAT. 1838, § 2 (1910), 11 U. S. C., § 11 (20). The effect of the Amendment on the authority of the receiver in another jurisdiction is discussed by Wollman, *Analysis of Bankruptcy Conditions* (1925) 1 A. B. REV. 336; Rhone, *ibid.* 368; Wollman, *ibid.*, 369; Joslyn (1926) 2 A. B. REV. 4.

[20] Slaughter v. Louisville, 125 Tenn. 292, 143 S. W. 603 (1911) (negligence action); Greenhall v. Hurwitz, 80 Misc. 186, 141 N. Y. Supp. 914 (City Court, N. Y. C. 1913).

[21] National Bankruptcy Act, *supra* note 1, § 67 (b) (c) (e) and (f), § 70 (a) (e); 11 U. S. C. § 107 (b) (c) (e) (f), § 110 (a) (e); REMINGTON, *op. cit. supra* note 18, §§ 1402, 1403, 2212.

authority to sue upon them in any appropriate jurisdiction is conclusively established.[22]

B. *Where property in the foreign state is adversely claimed.*

The disposition to challenge the very appearance in court of a foreign assignee or receiver has its basis in deep-seated habits of authority and protection. It persists, not so much because of its various doctrinal justifications, as because it represents a convenient way of parrying at arm's length threats to jealously regarded local interests such as the control of methods of transferring title to property, particularly real property, situated within the state. But of primary concern is the protection of residents of the forum against injury anticipated from allowing to be placed beyond their reach assets which represent security for the payment of debts owed to them. The treatment of the adverse claims to property lying outside the primary jurisdiction constitutes the fundamental difficulty in the problem of securing unity of administration.

Although, as has been noted, a distinction has generally been acknowledged between voluntary and involuntary assignments, the dividing line between the two types is sometimes difficult to find.[23] The common law right of general assignment may be regulated by statute without losing its distinctive voluntary character.[24] When the assignment is made pursuant to the terms of a statute, however, it is not alone the character of the act of the debtor which is looked to in determining whether the transfer is voluntary or involuntary. If the statute offers the debtor a complete discharge, the assignment is regarded as involuntary —the coercive effect upon the creditors being sufficient to throw it into this category, whether the debtor acted voluntarily or otherwise.[25] Even with the National Bankruptcy Act in force, and state insolvency statutes suspended to the extent to which they are conflicting,[26] these distinctions, on whatever theory supported, are of practical importance since general assignments

[22] GILBERT'S COLLIER, *supra* note 18, at 508, 523.

[23] For discussion of the distinction generally, see Security Trust Co. v. Dodd, *supra* note 3; Sunderland, *Voluntary Assignments for Benefit of Creditors* (1903) 2 MICH. L. REV. 112. The court of the *situs* determines whether the assignment is voluntary or involuntary. Zacher v. Fidelity Trust Co., 106 Fed. 593 (C. C. A. 6th, 1901).

[24] Mayfield Woolen Mills v. Goodrich Co., 189 Wis. 406, 207 N. W. 954 (1926).

[25] Security Trust Co. v. Dodd, *supra* note 3; Barth v. Backus, 140 N. Y. 230, 35 N. E. 425 (1893); Segnitz v. Garden City Trust Co., 107 Wis. 171, 83 N. W. 327 (1900). See next comment in this issue.

[26] GILBERT'S COLLIER, *supra* note 18, at 7; SMITH, EQUITABLE REMEDIES OF CREDITORS (1899) § 412.

are not only still possible but are frequently resorted to.[27]

Once the voluntary or involuntary character of the assignment is determined, little clue to the results can be found in the doctrinal explanation of the differences between them. A fair condensation of the language used is that a voluntary assignment passes the title of property wherever situated and will be respected unless it conflicts with public policy or the rights of local creditors, whereas an involuntary transfer operates only upon property within the jurisdiction and in other states has only such effect as the laws of those states permit, in general yielding to the rights of local creditors.[28] Obviously such a distinction is verbalistic, and one of approach. Neither assignment can of itself "operate upon" property situated within or without the state and its effectiveness is only what is given to it by a court when passing upon a claimant's rights.

In the case of a voluntary assignment the assignee will usually succeed even against attaching creditors.[29] But the grounds on which the local court may refuse to extend its comity are many. It may be because the assignment is of a type deemed contrary to the public policy of the forum,[30] or because it does not comply with some technical requirement of the local assignment stat-

[27] Hagar, *General Assignments and the Bankruptcy Law* (1917) 27 YALE L. J. 210; SMITH, *op. cit. supra* note 26, § 417 (b). The assignment may, however, lead to different results since the making of a general assignment now constitutes an act of bankruptcy. BANKRUPTCY ACT, *supra* note 1, § 3 (4), 11 U. S. C. § 21a (4).

[28] See particularly Security Trust Co. v. Dodd, *supra* note 3, at 628, 629, 19 Sup. Ct. at 546; STORY, CONFLICT OF LAWS (7th ed. 1872) §§ 404, 411.

[29] A voluntary assignment is effective as to personal property in another state. As against creditors who are not residents of that state: Barnett v. Kinney, *supra* note 6 (local assignment statute applicable only to assignment made within the state); Ward v. Connecticut Pipe Mfg. Co., 71 Conn. 345, 41 Atl. 1057 (1889); J. Walter Thompson Co. v. Whitehed, 185 Ill. 454, 56 N. E. 1106 (1900). As against resident creditors: Law v. Mills, 18 Pa. St. 185 (1851); Hanford v. Paine, 32 Vt. 442 (1860); In re Paige Lumber Co., *supra* note 5; BURRILL, *op. cit. supra* note 3, § 275.

The same rule has been held to apply equally to real property. As against non-resident creditors: Memphis Savings Bank v. Houchens, 115 Fed. 96 (C. C. A. 8th, 1902); Bloomingdale v. Weil, 29 Wash. 611, 70 Pac. 94 (1902). Also against resident creditors: Stowe v. Belfast Savings Bank, 92 Fed. 90 (C. C. D. Me. 1897), *aff'd* 92 Fed. 100 (C. C. A. 1st, 1899). The following maintain a distinction between personal and real property as affected by foreign assignments: Loving v. Pairo, 10 Iowa 282 (1859); Watson v. Holden, 58 Kan. 657, 50 Pac. 883 (1897). See BURRILL, *op. cit. supra* note 3, § 277, to the effect that the general rule of comity does not apply to real estate.

[30] Blake v. Williams, 6 Pick. 286 (Mass. 1828); King v. Johnson, 5 Harr. 31 (Del. 1848); Strickler & Co. v. Tinkham, 35 Ga. 176 (1866); Loving v. Pairo, *supra* note 29; Ayers v. Des Portes, *supra* note 6. *Cf.* Barnett v. Kinney, *supra* note 6.

ute,[31] or because the property is real and thought to be governed by a special rule,[32] or because there has not been a change of possession,[33] or because the state of the assignment does not extend the same brand of comity as is petitioned for in the state of the forum,[34] or because the interests of local creditors are thought to be injuriously affected.[35] In these cases it must be conceded that the doctrine of comity has worn exceedingly thin and makes for uncertainty of result.[36] Furthermore, the Supreme Court will not countenance the rejection of the assignee's claim against subsequent non-resident attaching creditors unless it clearly appears that the assignment is contrary to the public policy of the state where suit is brought.[37] In respect to involuntary assignments, however, the states are left free to apply their own notions of comity and in these cases attaching creditors are generally preferred,[38] even in respect

[31] Douglas v. Bank, 97 Tenn. 133, 36 S. W. 874 (1896).

[32] See note 29, *supra*.

[33] Rice v. Courtis, 32 Vt. 460 (1860); Philson v. Barnes, 50 Pa. St. 230 (1865); Smith v. Lamson, 184 Ill. 71, 56 N. E. 387 (1900).

[34] In re Nelson & Bro. Co., 149 Fed. 590 (S. D. N. Y. 1907). For a criticism of such a *lex talionis* see Hanford v. Paine, *supra* note 29, at 454; Means v. Hapgood, *supra* note 5, at 107.

[35] Ingraham v. Geyer, 13 Mass. 146 (1816); In re Nelson Bro. & Co., *supra* note 34; see Sunderland, *op. cit. supra* note 23, at 120, for the conclusion that Maine, Illinois, Washington and Massachusetts are the only states preferring domestic creditors. But see Train v. Kendall, 137 Mass. 366 (1884). And see *post.* p. 601, for the possible effect of the Supreme Court decision in the case of Blake v. McClung, *infra* note 48. See Sunderland, *op. cit. supra* note 23, at pp. 180-182, on the practice of refusing creditors who are residents of the state in which the assignment is made the benefit of subsequent attachments in the state of the forum. New York has refused to follow this distinction. Hibernia Bank v. Zacombe, 84 N. Y. 367 (1881); Warner v. Jaffray, 96 N. Y. 248 (1887).

[36] Hackett, *A Possible Future Status of Foreign Assignments to Creditors* (1900) 13 HARV. L. REV. 484.

[37] Barnett v. Kinney, *supra* note 6.

[38] Upton v. Hubbard, 28 Conn. 274 (1859); Blake v. Williams, *supra* note 30; Willitts v. Waite, 25 N. Y. 577 (1862); Barth v. Backus, 140 N. Y. 230, 35 N. E. 425 (1893); Happy v. Prickett, 24 Wash. 290, 64 Pac. 528 (1901); Segnitz v. Garden City Trust Co., *supra* note 25. In the following case the rule is apparently limited to real property. Adams v. Hartzell, 18 N. D. 221, 119 N. W. 635 (1909). An involuntary assignment made under the laws of one state is subject to subsequent liens valid according to the law of the state where the property is located. Zacher v. Fidelity Trust Co., *supra* note 23; Security Trust Co. v. Dodd, *supra* note 3. The state of the assignment may enjoin a resident creditor from proceeding in another state against assets there located. Cole v. Cunningham, 133 U. S. 107, 10 Sup. Ct. 269 (1890).

An involuntary assignment made in a foreign country is ineffective to pass title as against attaching creditors. Harrison v. Sterry, 5 Cranch. 289 (U. S. 1809); Holmes v. Remsen, 20 Johns. 229 (N. Y. 1882); Milne v. Moreton, 6 Binn. 353 (Pa. 1814). As regards a trustee in bankruptcy in a foreign country, each state is free to decide how far it will permit propto debts owed to the assignor by residents of the forum.[39] When the statute of an incorporating state specifically vests a receiver or other officer with title to all rights of action and assets of a domestic corporation wherever situated, he acts as its statutory successor,[40] and will prevail against attaching creditors. The theory is that the corporation, being the creature of the legislature, is compelled to act through agents whose status the legislature can control; and that it carries with it, wherever it goes, the laws of its domicil governing its existence and dissolution, so that those who deal with it are bound to notice of their terms. Although greatly aided from a doctrinal standpoint by the corporate character of the debtor, it is apparent that the courts have been influenced by considerations of business convenience in reaching results in these cases.[41]

From the practical standpoint, the arguments for unified administration of the insolvent estate, whether of natural persons or of corporations, apply alike to voluntary and involuntary assignments. The practical benefits to be realized from the dropping of jurisdictional barriers were set forth in the earlier opinions holding that full effect should be given to foreign

---

erty to be removed as against claims of local creditors. Disconto Gesellschaft v. Umbreit, 208 U. S. 570, 28 Sup. Ct. 337 (1907) (equal privileges and immunities clause of the constitution not involved when the assignment takes place in a foreign country).

39 Holmes v. Remsen, 20 Johns 229 (N. Y. 1822), overruling 4 Johns. Ch. 460 (N. Y. 1820); Barth v. Backus, Upton v. Hubbard, both *supra* note 38. The mythical *situs* of the debt is usually not discussed in these cases, but in Disconto Gesellschaft v. Umbreit, *supra* note 38, the debt is treated without discussion as "property within the state." In Upton v. Hubbard, *supra* note 38 ,and Segnitz v. Garden City Trust Co., *supra* note 25, the assignee was not allowed to sue.

In the following cases of voluntary assignment attaching creditors prevailed on the ground that the debt has a *situs* at the home of the debtor and is therefore property within the state. Ingraham v. Geyer, *supra* note 35; Smith v. Lamson, *supra* note 33. But other courts take the view that the debt is an incorporeal right which follows the creditor so that, once the assignment is made, there is no debt owing to the assignor which the latter's creditors may attach. Caskie v. Webster, 2 Wall. Jr. 131, Fed. Cas. No. 2500 (C. C. E. D. Pa. 1851); Fenton v. Edwards, 126 Cal. 43, 58 Pac. 320 (1899); Birdseye v. Underhill, *supra* note 5; Union Savings Bank v. Indianapolis Lounge Co., 20 Ind. App. 325, 47 N. E. 846 (1898) (bank deposit); Thomas Wilson & Co. v. Carson, 12 Md. 54 (1857); Gregg v. Sloan, 76 Va. 497 (1882); Mowry v. Crocker, 6 Wis. 326 (1858). See BURRILL, *op. cit. supra* note 3, § 282.

40 Relfe v. Rundle, 103 U. S. 222 (1880); Hopkins v. Lancaster, 254 Fed. 190 (N. D. Ala. 1918); Bockover v. Life Association, 77 Va. 85 (1883). The language of comity may be used in reaching the same result. Martyne v. American Union Insurance Co., 216 N. Y. 183, 110 N. E. 502 (1915); Gilman v. Ketcham, 84 Wis. 91, 54 N. W. 395 (1893). *Contra:* Shloss v. Surety Co., 149 Iowa 382, 128 N. W. 384 (1910).

41 See particularly Martyne v. American Union Ins. Co., *supra* note 40, at 975. Note (1916) 16 COL. L. REV. 145.

voluntary assignments[42] and likewise in the powerful though unavailing arguments of Chancellor Kent that foreign bankruptcy laws should operate with equal vigor.[43] In considering the problem in general terms, alongside the admitted benefits of centralized administration must be set the undoubted power of each state to control the transfer of property within its borders.[44] The most satisfactory results are those obtained when the courts have penetrated the foggy doctrines of comity to determine whether or not this power has been affirmatively exercised so as to prohibit recognition of the foreign assignment or stamp it definitely as against the policy of the state of the forum.[45] The interest of the state in the control of transfer of title would seem to be sufficiently respected if it is allowed to specify the mode of recording conveyances and liens and the requirements of possession deemed necessary to protect subsequent attaching creditors without notice.[46] The line between the legitimate protection which a state should give the rights of local creditors and a selfish insistance upon special advantage has not, however, been carefully traced in the assignment cases. But it has been held,[47] under the doctrine of *Blake v. McClung*,[48] a decision of far-reaching potentialities, that a rule by which a state recognizes foreign assignments except as against residents or citizens[49] is contrary to the equal protections and immunities clause of the Constitution. If this is correct—and, so far at least as the effect of non-recognition is to give citizens a priority, it would seem to be correct[50]—the problem in the

[42] Note particularly the language of the opinion in Hanford v. Paine, *supra* note 29, and in Caskie v. Webster, *supra* note 39.

[43] See opinion of Chancellor Kent, Holmes v. Remsen, *supra* note 39, at 470.

[44] Green v. Van Buskirk, 5 Wall. 307 (U. S. 1866), 7 Wall. 139 (U. S. 1868); Milne v. Moreton, *supra* note 38. STORY, *op. cit. supra* note 28, §§ 390, 410; WHARTON, CONFLICT OF LAWS (3d ed. 1905) § 311a. In respect to foreign corporations under the rule of Relfe v. Rundle, *supra* note 40, it would seem that, as to corporations of other states, the power must be exercised through prohibiting the acquisition of property or the doing of business within the state, since it will not be effective as to assignments made according to a statute of the state of incorporation vesting the receiver for the corporation with title to its assets.

[45] As in Barnett v. Kinney, *supra* note 6.

[46] See Stowe v. Belfast Savings Bank, *supra* note 29.

[47] Stowe v. Belfast Savings Bank, *supra* note 29 (particularly the second opinion, written after the decision in Blake v. McClung, *infra* note 48, and confirming the lower court decision which preceded Blake v. McClung). See WHARTON, *op. cit. supra* note 44, at 752.

[48] 172 U. S. 239, 19 Sup. Ct. 165 (1898).

[49] Fox v. Adams, 5 Me. 245 (1828); Chafee v. Bank, 71 Me. 514 (1880).

[50] See Blake v. McClung, *supra* note 48, at 253, 19 Sup. Ct. at 171. On the authority of this case, priority to local creditors has been refused as unconstitutional. Brunner v. York Bridge Co., 78 W. Va. 702, 90 S. E. 233 (1916).

assignment cases as in all other forms of insolvency administration emerges more clearly as the practical one of securing the best treatment of the assets for the benefit of all claimants,[51] without discrimination.

The practical problem is the same when a business is in the hands of a chancery receiver, but resort to an ancillary receivership is customary[52] whenever there are local creditors. It is insisted upon in the federal courts, even where there is no adverse demand upon the assets sought, whenever the receiver lacks "title."[53] In states which do not follow the federal rule suit or appearance by the primary receiver is sometimes allowed even when there are local claimants,[54] but whether he will prevail will turn, first, upon whether the property has been properly reduced to possession,[55] and, second, upon considerations which govern the transfer of assets.[56] From a business viewpoint it is not generally material whether the collector of the assets is the primary receiver acting as such, or the primary receiver who has been given an ancillary appointment, or an ancillary receiver acting in aid of the court having primary jurisdiction of the insolvent's affairs.

The status of the receiver in proceedings under the National Bankruptcy Act presents a special problem. Undoubtedly the period between the appointment of a receiver and the naming of a trustee is one in which there is great danger of the dis-

51 A discrimination against a corporation created in another state would not be subject to the same constitutional objection. See Blake v. McClung, *supra* note 48, at 259, 19 Sup. Ct. at 173.

52 See Great Western Mining Co. v. Harris, *supra* note 15. Wickersham, *Primary and Ancillary Receiverships* (1928) 14 VA. L. REV. 599; Byrne, *The Foreclosure of Railroad Mortgages in the United States Courts*, in STETSON, SOME LEGAL PHASES OF CORPORATE FINANCING (1927) 77-96; 23 R. C. L. Receivers § 157.

53 Great Western Mining Co. v. Harris, *supra* note 15; Sterrett v. Second National Bank, *supra* note 12. In this case the court justifies the refusal to permit suit on the ground that "there is always, theoretically at least, a possibility that the defendant may be subjected to further suit by the owner of the title and right of action." The attempt to distinguish on the basis of title is criticised as shadowy by Bolles, *Law Concerning Foreign Receivers* (1920) 18 YALE L. J. 488. The strictness of the federal rule is criticised in Note (1930) 43 HARV. L. REV. 805.

54 Buswell v. Supreme Sitting, 161 Mass. 224, 36 N. E. 1065 (1894); Bodge v. Skinner, 115 Neb. 41, 211 N. W. 203 (1926); Shloss v. Surety Co., 149 Iowa 382, 128 N. W. 384 (1910); In re First Russian Insurance Co., 253 N. Y. 365, 171 N. E. 572 (1930).

55 Standard Warehouse Co. v. Cooper, 30 F. (2d) 842 (W. D. N. C. 1929); Weber v. Waugh, 42 F. (2d) 515 (W. D. Wash. 1930); Chicago M. & St. P. Ry. v. Keokuk Northern Packet Co., 108 Ill. 317 (1884); Schoenwald v. McDonald, 5 Alaska 442 (1916). Davis v. Morgan Foundry, 23 S. W. (2d) 231 (Mo. 1930).

56 Treated in Part II of this comment.

sipation of foreign assets. That every bankruptcy court has ancillary jurisdiction to aid the trustee or receiver appointed in proceedings elsewhere is well established.[57] There is no practical reason why such aid should be given to the trustee directly but be required to pass through an ancillary officer when the proceedings are in the receivership stage.[58] The difficulty again arises from looking to the traditional restrictions upon a receiver's power.[59] For the court of primary jurisdiction, it would seem to be sufficient, on the request of the receiver to sue in another state, to ascertain that the suit is necessary for the carrying out of the custodial purposes of the receivership, and for the ancillary court to ascertain that he has been duly authorized to bring the suit. When this practice is followed the receiver, within his more limited powers, is enabled to perform as vigorously and effectively as the trustee, even to the extent of being aided by contempt orders when necessary.[60]

DISCHARGE OF DEBTOR BY ASSIGNMENT FOR BENEFIT OF CREDITORS

THE notoriously low percentage of creditors' total claims recovered as dividends upon the debtor's bankruptcy[1] has been variously attributed to (1) the difficulty of getting the most reasonable prices for the bankrupt's assets, and the assertion of dishonest and exorbitant claims, (2) the high cost of bankruptcy administration, (3) the non-cooperation of creditors and (4)

---

[57] Babbitt v. Dutcher, 216 U. S. 102, 30 Sup. Ct. 372 (1910). Prior to the 1910 Amendment of the National Bankruptcy Act, *supra* note 19, the decisions were in conflict as to the existence of ancillary jurisdiction. In re Sutter Bros., 131 Fed. 654 (S. D. N. Y. 1904) (jurisdiction recognized). *Accord:* In re Benedict, *supra* note 19. *Contra:* In re Tybo Mining Co., 132 Fed. 697 (D. Nev. 1904); In re Williams, 123 Fed. 321 (W. D. Tenn. 1903).

[58] In re Dunseath & Son Co., 168 Fed. 973 (W. D. Pa. 1909); In re Benedict, 140 Fed. 55 (E. D. Wis. 1905). See texts cited in note 19, *supra*.

[59] Note the citations in both In re Dunseath & Son Co. and In re Benedict of Booth v. Clark, *supra* note 13, and Hale v. Allinson, *supra* note 15.

[60] Receiver aided by contempt orders: In re Peiser, 115 Fed. 199 (E. D. Pa. 1902); In re Eckhaus, 14 F. (2d) 471 (E. D. N. Y. 1926). In the latter case two federal jurisdictions within the same state were involved. See note (1927) 27 COL. L. REV. 216. Trustee aided by contempt orders: In re Small Shoe Co., 5 F. (2d) 956 (C. C. A. 2nd, 1925); Scott v. Goodman, 25 F. (2d) 175, 25 F. (2d) 178 (N. D. Ohio 1928).

[1] Statistics for voluntary and involuntary bankruptcy proceedings in the United States show that general creditors receive as little as 6.48% of their unsecured liabilities. For involuntary cases alone, the return was slightly higher, 10.11% REPORT OF THE ATTORNEY GENERAL (1927) 178; see also Billig, *What Price Bankruptcy: A Plea for "Friendly Adjustment"* (1928) 14 CORN. L. Q. 413, 416.

the inadequacy of the "standard equipment" of the law courts.[2] To obviate these deficiencies it has been suggested that the National Bankruptcy Act be amended in accord with English and continental provisions allowing "a composition of creditors to forestall bankruptcy." [3] More recently Credit Men's Associations, availing themselves of their extensive marketing facilities, adjustment experts, *etc.*, have been able considerably to decrease liquidation expenses and to encourage "friendly adjustment" between debtors and creditors.[4] In many instances, however, the debtor's estate can be disposed of most expeditiously by the device of a voluntary assignment for the benefit of creditors without invoking the elaborate machinery provided by the Credit Men's Associations. Under such an assignment the creditor clearly benefits by the receipt of his share of the debtor's assets undiminished by the expenses of a proceeding in bankruptcy. As to the debtor, however, there is likely to be considerable reluctance to give up the certainty of a complete discharge in bankruptcy for a form of liquidation which the courts may either declare void in its entirety or at least insofar as it attempts to assure his release.

The questionable validity of assignments may be attributed in part to the uncertainty into which conflicting legislation of state and federal governments has thrown the entire problem of the disposition of debtors' estates. With the exercise of the Congressional power to regulate bankruptcy,[5] by the passage of the National Bankruptcy Act in 1898, the question immediately arose whether state insolvency laws in existence prior to that time were suspended *in toto* [6] or only so far as they conflicted

---

[2] *Merch. Ass'n of N. Y., Report by Com. on Bankruptcy Reform* (1924) 44; Gamer, *On Comparing Friendly Adjustment and Bankruptcy* (1930) 16 CORN. L. Q. 35; Billig, *op. cit. supra* note 1, at 417. *Cf.* also, Sturges, *Commercial Arbitration* (1924) 34 YALE L. J. 480, 489 *et seq.*

[3] Dunscomb, *Preventive Compositions* (1914) 20 CASE AND COMMENT 594.

[4] For detailed and favorable descriptions of this "extra-legal" method of distributing debtors' estates see Billig, *op. cit. supra* note 1, at 425; Billig, *Extra-Judicial Administration of Insolvent Estates: A Study of Recent Cases* (1930) 78 U. OF PA. L. REV. 293; *cf. In Defense of the Nation's Receivables* (1927) BULLETIN NATIONAL ASSOCIATION OF CREDIT MEN. But for a critical review of the "benefits" of this method, see Gamer, *op. cit. supra* note 2, at 37.

[5] Congress has exercised control over bankruptcy, granted by Art. 1 § 8 of the constitution, on four distinct occasions, 1800, 1841, 1867 and 1898.

[6] "Both [state and federal bankruptcy legislation] cannot go on together, without direct and positive collision; and the moment that the bankrupt act does or may operate upon the person or the case, that moment it virtually supersedes all state legislation." per Story, J., Ex parte Eames, Fed. Cas. No. 4,237 (1842).

with the Federal Act.[7] Adjudications on this question, apparently hopelessly discordant, are to some extent reconcilable in terms of the particular situations involved. Thus it appears that (1) where the state and federal laws both expressly provide for the situation, the former must yield;[8] (2) where the person or act has not been brought within the scope of the federal law, the state law controls.[9] But where a particular situation is contemplated by some provisions of the Federal Act and expressly excluded from the operation of others, and the state law seeks to comprehend only to the extent that the Federal Act excludes, the conflict appears irreconcilable. It is contended, on the one hand, that state legislation is not complementary to federal legislation and that where Congress has manifested an intent to deal with a subject that field is closed to state action.[10] In opposition it is argued that it is not the mere existence but the exercise of the federal power to establish a genuine bankruptcy law in conflict with the state laws which renders the latter inoperative.[11]

With the statutory regulation of the common-law right to assign developing alongside of, and in many instances crossing over and merging with, state insolvency laws, it became increasingly difficult for the courts to identify either and determine

---

[7] 5 REMINGTON, BANKRUPTCY (3d ed. 1923) § 2107; Ogden v. Saunders, 12 Wheat. 213 (U. S. 1827); Tua v. Carriere, 117 U. S. 201, 6 Sup. Ct. 565 (1886); Carling v. Seymour Lumber Co., 113 Fed. 483 (C. C. A. 5th, 1902); In re International Coal Mining Co., 143 Fed. 665 (D. C. Pa. 1906), *aff'd*, Cresson & Clearfield Coal & Coke Co. v. Stauffer, 148 Fed. 981 (C. C. A. 3d, 1906).

[8] Sturges v. Crowninshield, 4 Wheat. 122 (U. S. 1819); Harborough v. Costello, 184 Ill. 110, 56 N. E. 363 (1900); see also BLACK, BANKRUPTCY (1924) 9 *et seq.*

[9] Johnson v. Crawford, 154 Fed. 761 (C. C. Pa. 1907); Shepardson's Appeal, 36 Conn. 23 (1869); Geery's Appeal, 43 Conn. 289 (1876); Herron Co. v. Superior Court, 136 Cal. 279, 68 Pac. 814 (1902); In re Winternitz, 7 Phila. 380 (Pa. 1870); Landis Machine Co. v. Cooper, 53 Pa. Super. Ct. 416 (1913).

[10] Re Bruso-Ritter Co., 90 Fed. 651 (E. D. Wis. 1898); Littlefield v. Gay, 96 Me. 422, 52 Atl. 925 (1902); Moody v. Development Co., 102 Me. 365, 66 Atl. 967 (1907); Parmenter Mfg. Co. v. Hamilton, 172 Mass. 178, 51 N. E. 529 (1898); see also Williston, *Effect of National Bankruptcy Law on State Laws* (1909) 22 HARV. L. REV. 547; Note (1931) 35 DICKINSON L. REV. 78.

[11] Old Town Bank v. McCormick, 96 Md. 341, 53 Atl. 934 (1903); Singer v. Nat. Bedstead Mfg. Co., 65 N. J. Eq. 290, 55 Atl. 868 (1903). So, prior to the amendment of 1910, state courts could assume jurisdiction over voluntary bankruptcies of corporations, Roberts Cotton Oil Co. v. Morse & Co., 97 Ark. 513, 135 S. W. 334 (1911); also involuntary proceedings against wage earners or persons engaged chiefly in farming. Pitcher v. Standish, 90 Conn. 601, 98 Atl. 93 (1916). But state statutes are suspended as to voluntary bankruptcy of farmers. Rockville National Bank v. Latham, 88 Conn. 70, 89 Atl. 1117 (1914).

the extent of conflict with the Bankruptcy Act. For, where the common-law right to assign is subject only to a superficial regulation by state statutes,[12] as, for example, filing requirements, the assignment is voidable only by bankruptcy proceedings brought within four months.[13] And though the assignment is an act of bankruptcy,[14] any creditor acquiescing either by receiving his share or standing by and allowing the assignment to be consummated is estopped from petitioning the debtor into bankruptcy.[15] But an assignment under a state law which empowers the state courts to assume jurisdiction over the disposition of debtors' estates, to require the assignee to act under their supervision, to compel creditors to come in and prove their claims and to discharge the debtor automatically is usually held to be void even after the four months' period on the ground that such a statute is in the nature of an insolvency law and is therefore suspended by the Federal Act.[16] Since such an assignment is open to collateral attack, a creditor taking under such proceedings is not estopped from petitioning the debtor into bankruptcy.[17] Even in these states, however, a common law assignment may be valid as a conveyance unaffected by the National

[12] Such statutes are not suspended by the National Bankruptcy Act. Mayer v. Hellman, 91 U. S. 496 (1876); In re Sievers, 91 Fed. 366 (E. D. Mo. 1899), *aff'd*, Davis v. Bohle, 92 Fed. 325 (1899); Binder v. McDonald, 106 Wis. 332, 82 N. W. 156 (1900).

[13] Boese v. King, 108 U. S. 379, 2 Sup. Ct. 765 (1883). If bankruptcy proceedings are brought more than four months after the assignment, it cannot be set aside by the trustee nor is he entitled to the possession and administration of the estate as against the assignee. Mayer v. Hellman, *supra* note 12 (6 months' period because under Act of 1867); In re Arledge, Fed. Cas. No. 533 (S. D. Ga. 1873); In re Farrell, 176 Fed. 505 (C. C. A. 6th, 1910). But otherwise, where proceedings in bankruptcy are brought within the four months' period. May v. Henderson, 268 U. S. 111, 45 Sup. Ct. 456 (1925); Stellwegen v. Clum, 245 U. S. 605, 38 Sup. Ct. 215 (1918); In re Louis Newburger, 240 Fed. 947 (C. C. A. 2d, 1917).

[14] 30 STAT. 546 (1898), 11 U. S. C. § 21 (1926).

[15] In re Romanow, 92 Fed. 510 (D. Mass. 1899); Simmonson v. Sinsheimer, 95 Fed. 948 (C. C. A. 6th, 1899); In re Creech Bros. Lumber Co., 240 Fed. 8 (C. C. A. 9th, 1917). See also 2 COLLIER, BANKRUPTCY (13th ed. 1923-4) 1221 and authorities cited, n. 89.

[16] In re Smith, 92 Fed. 135 (D. Ind. 1899); Thornhill v. Bank of Louisiana, Fed. Cas. No. 13, 992 (C. C. D. La. 1870); Rowe v. Page, 54 N. H. 190 (1874); Pelton v. Sheridan, 74 Ore. 176, 144 Pac. 410 (1914); First National Bank of Bandon v. Mannassa, 80 Ore. 53, 150 Pac. 258 (1915). But *cf.* Shaw v. Standard Piano Co., 87 N. J. Eq. 350, 100 Atl. 167 (1917) and Carling v. Seymour Lumber Co., *supra* note 7, where actions taken under state insolvency laws were held voidable at most and that only at the instance of the trustee in bankruptcy. See, too, SMITH, EQUITABLE REMEDIES OF CREDITORS (1899) § 402; 5 REMINGTON, *op. cit. supra* note 7, at § 2076.

[17] In re Weedman Stave Co., 199 Fed. 948 (E. D. Ark. 1912); see 2 COLLIER, *loc. cit. supra* note 15.

Bankruptcy Act.[18] Furthermore, some statutes go beyond a mere superficial regulation and supplement the common law right to assign with the essential feature of insolvency laws, that is, the complete discharge of the debtor after the distribution of his estate. Yet, rather than hold such an assignment to be suspended as a state insolvency law, the courts have spuriously argued that since state laws are suspended only to the extent that they conflict with the Federal Act, and since the discharge of the debtor is entirely separate from the right to assign inherent in the ownership of property and existing at common law independent of statute, the discharge provision alone is suspended.[19]

While statutory prescriptions for discharge in the case of all common law assignments are thus suspended by the Bankruptcy Act, the legality of a specific stipulation for release included in the deed of assignment must still be judged by its status at common law.[20] In England an assignment which conveys all the debtor's property and provides for his release is held to be valid.[21] The predominant rule in this country, on the other hand, is said to deny the validity of an assignment with a stipulation for release.[22] But this is true only where the release is coupled with provisions cutting off all non-assenting creditors from participating in the assignment and reserving their shares to the assignor himself.[23] The prevailing current of state decisions upholds the validity of an assignment where the condition of release creates a preference only, and allows non-assenting creditors to share in the surplus.[24] While the federal courts, on the few occasions when the question has come before them, have upheld the validity of such assignments, they have done so reluctantly and have been influenced in their decision by the con-

[18] Danville Auburn Auto Co. v. Nat'l Trust & Credit Co., 212 Ill. App. 116 (1918); Pogue v. Rowe, 236 Ill. 157, 86 N. E. 207 (1908); Patty-Joiner & Eubanks v. Cummins, 93 Tex. 598, 57 S. W. 566 (1900); see also Williston, *op. cit. supra* note 10, at 559.

[19] In re Tarnowski, 191 Wis. 279, 210 N. W. 836 (1926); Boese v. King, *supra* note 13; Stellwegen v. Clum, *supra* note 13; Binder v. McDonald, *supra* note 12.

[20] In re Bridge, 230 Fed. 184 (W. D. Wash. 1916); Sabin v. Chrisman, 79 Ore. 191, 154 Pac. 908 (1916); Patty-Joiner & Eubank v. Cummins, *supra* note 18; Hajek & Simicek v. Luck, 96 Tex. 517, 74 S. W. 305 (1903).

[21] King v. Watson, 3 Price (Exch.) 6 (1816); see Janes v. Whitebread, 20 L. J. C. P. (N. S.) 217, 5 Eng. L. & Eq. R. 431 (1851); Forbes v. Lumond, 4 De G., M. & G. 297 (1854). See also BURRILL, ASSIGNMENTS (6th ed. 1894) § 149.

[22] BURRILL, *op. cit. supra* note 21, § 164.

[23] Miller v. Conklin, 17 Ga. 430 (1854); Conkling v. Carson, 11 Ill. 503 (1850); Bridges v. Hindes, 16 Md. 101 (1860).

[24] 2 KENT, COMMENTARIES §§ 534, 536; Andrews v. Ludlow, 5 Pick. 28 (Mass. 1827); see also Halsey v. Fairbanks, Fed. Cas. No. 5,964 (C. C. D. Mass. 1826) (held good, even though a partial assignment).

struction of such deeds by the courts in the states where they were executed.[25]

Previous to the passage of the Bankruptcy Act an assignment with a stipulation for release may have been repugnant to the court's sense of justice in that the debtor was not only coercing the creditors into relinquishing part of their demand[26] but was also preventing them from bringing attachment proceedings by putting his property beyond their reach until they complied with the provisions of the instrument. A non-assenting creditor was therefore without legal remedy until after the distribution of the assets under the assignment and stood to lose all if the surplus proved negligible. For these reasons a composition agreement seemed preferable, for, although it exacted a complete release after the payment of a portion of the creditor's claim, it nevertheless allowed a non-assenting creditor immediately to attach the assets.[27] But, today, the creditor's ability to attach the insolvent debtor's estate for the payment of his debt is practically worthless since either the debtor or the proper number of other creditors may file a petition in bankruptcy and dissipate the attaching creditor's preference.[28] Where the debtor surrenders his right to receive a complete discharge in bankruptcy and instead makes an assignment at the request of his creditors whereby their share of the assets are saved from depletion by the exorbitant costs of bankruptcy, there seems to be no basis for the emotional reaction against the validity of a release stipulation. Moreover, although an assignment is an act of bankruptcy, it is not repugnant to the purpose of the Bankruptcy Act to distribute the assets of the debtor ratably among his creditors and to relieve him from the burden of debts which through business misfortunes or otherwise he is unable to pay.[29]

---

[25] Brashear v. West, 7 Pet. 608 (U. S. 1833); Halsey v. Fairbanks, *supra* note 24; see BURRILL, *op. cit. supra* note 21, § 163; 2 KENT, COMMENTARIES § 534 n. (c).

[26] See Widgery v. Haskell, 5 Mass. 144, 152 (1809); Grover v. Wakeman, 11 Wend. 187, 201 (N. Y. 1833); also BUMP, FRAUDULENT CONVEYANCES (3d ed. 1882) 428.

[27] HUNT, ACCORD & SATISFACTION, COMPROMISE AND COMPOSITION AT COMMON LAW (1912) 384, 414, 437.

[28] Remington, *Bankruptcy Law and the Peaceable Settlement of Business Failures* (1909) 18 YALE L. J. 590.

[29] See Taft, J., in Leidigh Carriage Co. v. Stengel, 95 Fed. 637, 647 (C.C.A. 6th, 1899). So the assignor is not stigmatized as having intended to hinder, delay and defraud creditors by the transfer and is not thus barred from receiving a discharge in bankruptcy proceedings brought later on. 1 COLLIER, *op. cit. supra* note 15, at 565.

STATE TAXES AND THE NATIONAL BANKS

AMONG the most serious and constant dangers which confront state taxes is that of being declared invalid by the courts as discriminating against the federal instrumentality of national banks. Congress, in its discretion to determine how the banks may be taxed,[1] has granted the states authority to levy upon national bank shares held by the stockholders but only on condition that competing "moneyed capital" be taxed at the same rate.[2] The problems thus raised, as to what capital competes and what rates are the same have provoked endless litigation for well over sixty years.[3]

In affirming *Public National Bank v. Keating*[4] the Federal Supreme Court recently imposed upon New York State and the City of New York the necessity of refunding to the banks over $30,000,000 collected during the years 1923 to 1926.[5] The state statute involved, which established an *ad valorem* share tax, was phrased in the precise words of the Act of Congress.[6] Never-

---

[1] The extent of Congressional authority in this matter is in some dispute and has not been directly passed upon. That it is practically unlimited, see the first of the comprehensive articles by Traynor, *National Bank Taxation in California* (1929) 17 CALIF. L. REV. 83, 232, 456. That Congress would probably have no power to permit serious discrimination against the banks see Rottschaefer, *State Taxation of National Banks* (1923) 7 MINN. L. REV. 357, 377. See also Schweppe, *State Taxation of National Banks Stocks: Uncertainty of its Constitutional Basis* (1922) 6 MINN. L. REV. 219.

[2] 44 STAT. 223 (1926), 12 U. S. C. § 548 (1926), prescribing four methods, of which the share-tax is one. The relevant portion declares, "In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed on other moneyed capital in the hands of individual citizens of such state coming into competition with the business of national banks: Provided, that bonds, notes or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section." The permission was first granted by 13 STAT. 112 (1864). The law has been amended three times, 15 STAT. 34 (1868), 42 STAT. 1499 (1923), 44 STAT. 223 (1926). It was § 5219 in the Revised Statutes of 1874, by which number it is often referred to at present.

[3] For various of the historic aspects of the problem and their bearing on the present situation see, in addition to the authorities cited in note 1, *supra*, Bolles, *Some Aspects of National Bank Taxation* (1909) 57 U. OF PA. L. REV. 505; Bryan, *State Taxation of National Banks* (1914) 24 YALE L. J. 149; Buschmann, *Taxation of National Bank Shares* (1931) 6 IND. L. J. 316.

[4] 47 F. (2d) 561 (C. C. A. 2d, 1931), *aff'g* 38 F. (2d) 279 (S. D. N. Y. 1930), noted in (1930) 30 COL. L. REV. 578.

[5] Keating v. Public National Bank (mem.), 52 Sup. Ct. 137 (1931). See New York Times, Dec. 8, 1931. p. 1, col. 3.

[6] TAX LAW, CAHILL'S CONSOL. LAWS (1923) c. 61, § 4-a; see also §§ 13, 14, 24, 25.

theless it was held invalid by the two lower federal courts and an injunction was granted against collection of the levy for 1926. The ground for these decisions was that the New York Court of Appeals, in construing the statute in the case of *People ex rel. Pratt v. Goldfogle*[7] and a group of connected cases,[8] had read into it a definition of competing capital which was more restricted than that incorporated into the Federal Act by the decisions of the Supreme Court, so that many of the bank's competitors escaped taxation. The Supreme Court has said in *Minnesota v. First National Bank of St. Paul*[9] that "the competition guarded against . . . may arise from the employment of capital invested by institutions or *individuals* in particular *operations or investments* like those of national banks."[10] Paraphrasing this statement the circuit court contrasted it with the following excerpt from the *Pratt* opinion: "We at once conclude that the competition here prescribed means a condition of business rivalry which arises when moneyed capital is devoted with reasonable continuity and regularity to employment and operations which have for their primary and characteristic purpose, as distinguished from some incidental operations or details, the transaction of some branch of business which may be carried on by national banks."[11] The circuit court apparently interpreted this passage in the *Pratt* opinion to mean that no capital is competitive except that used in businesses similar to the banking business.[12] But only a few lines below the excerpt

[7] 242 N. Y. 277, 151 N. E. 452 (1926), *aff'g* 213 App. Div. 706, 211 N. Y. Supp. 110 (1st Dep't 1925), *aff'g* 123 Misc. Rep. 399, 205 N. Y. Supp. 870 (Sup. Ct. 1924); see (1927) 27 COL. L. REV. 93.

[8] People ex rel. Bonner v. Goldfogle, 242 N. Y. 541, 152 N. E. 418 (1926), *aff'g* 213 App. Div. 715, 211 N. Y. Supp. 119; People ex rel. Berdan v. Goldfogle, 242 N. Y. 542, 152 N. E. 419, *aff'g* 213 App. Div. 702, 211 N. Y. Supp. 107; People ex rel. Peabody, Houghteling & Company, Inc. v. Goldfogle, 242 N. Y. 543, 152 N. E. 419, *aff'g* 213 App. Div. 710, 211 N. Y. Supp. 114; People ex rel. James Talcott, Inc. v. Goldfogle, 242 N. Y. 544, 152 N. E. 420, *aff'g* 213 App. Div. 719, 211 N. Y. Supp. 122; People ex rel. Bankers Commercial Security Company, Inc., 242 N. Y. 545, 152 N. E. 420, *aff'g* 213 App. Div. 716, 211 N. Y. Supp. 120; People ex rel. Bankard v. Goldfogle, 242 N. Y. 546, 152 N. E. 420, *aff'g* 213 App. Div. 713, 211 N. Y. Supp. 117. All these cases were decided in 1925 in the first department, affirming separately causes consolidated in 123 Misc. Rep. 399, 205 N. Y. Supp. 870 (Sup. Ct. 1924).

[9] 273 U. S. 561, 47 Sup. Ct. 468 (1927), decided the same day as First National Bank of Hartford v. Hartford, Wisconsin, 273 U. S. 548, 47 Sup. Ct. 462, and Georgetown National Bank v. McFarland, 273 U. S. 568, 47 Sup. Ct. 467. In the three cases Mr. Justice Stone spoke for a unanimous court. All are noted in (1927) 11 MINN. L. REV. 677.

[10] *Supra* note 9, at 567, 47 Sup. Ct. at 470. In this and the subsequent quotations, the italics are the writers.

[11] *Suprà* note 7, at 302, 151 N. E. at 461.

[12] The Circuit Court stated that the Supreme Court "did not imply

chosen by the Circuit Court, the state court had clarified its own words by referring to "our interpretation of competition as meaning an employment of moneyed capital whose characteristic and principal *purpose* brings it into rivalry with the business of banks . . ."[13] No doubt was expressed but that the capital of individuals *may* compete, in some circumstances, merely by virtue of its investment in securities similar to those sought by banks.[14] The discussion pertained to businesses only and the theory advanced was simply that there are some businesses whose purposes—whose economic functions—are so different from those of national banks that, even though they may invest in some or many of the same securities as do banks, their capital, and hence the shares of that capital in the hands of individuals, cannot be considered competitive. Such a theory merely incorporates decisions of the Supreme Court holding that deposits in savings banks,[15] shares in insurance companies,[16] and per-

that equality of taxation under the federal statute refers only to moneyed capital invested in business substantially identical with the business carried on by national banks." Public National Bank v. Keating, *supra* note 4, at 564.

[13] *Supra* note 7, at 303, 151 N. E. at 461.

[14] The following dictum has not been overlooked: ". . . the individual who, from time to time for the sake of investing his money, takes a mortgage, buys a bond or 100 shares of stock, clearly would not be engaged in competitive business." Pratt v. Goldfogle, *supra* note 7, at 305, 151 N. E. at 462. The court was here elaborating its interpretation of the federal statute "as meaning a competition which is something more than isolated or sporadic transactions . . ." *Ibid.* at 303, 151 N. E. at 461. The *dictum* must be read in the light of the following considerations, among others: (a) the total of competitive capital must be *substantial in amount*. First National Bank v. Hartford, *supra* note 9, at 558, 47 Sup. Ct. at 465. (b) Capital, to come within the federal statute must be ". . . *employed in such a way* as to bring it into *substantial competition* . . ." First National Bank of Guthrie Center v. Anderson, 269 U. S. 341, 348, 46 Sup. Ct. 135, 138 (1926). (c) "It is not sufficient to show that untaxed capital is invested in loans and securities without showing also that *the class of investments* favored is open to national banks." First National Bank v. Hartford, *supra* note 9, at 558, 47 Sup. Ct. at 466. (d) The court had not overlooked the Anderson case, *supra*, which held that merely personal investments might be competitive in spite of the 1923 amendment which inserted the proviso in the federal statute, *supra* note 2. See People ex rel. Pratt v. Goldfogle, *supra* note 7, at 298, 151 N. E. at 459; (1927) 41 HARV. L. REV. 82, 84; (1926) 10 MINN. L. REV. 241, 271.

[15] Davenport Bank v. Davenport Board of Equalization, 123 U. S. 83, 8 Sup. Ct. 73 (1887); National Bank of Redemption v. Boston, 125 U. S. 60, 8 Sup. Ct. 772 (1888). "No one can suppose for a moment that savings banks come into any possible competition with national banks of the United States." Mercantile Bank v. New York, 121 U. S. 138, 161, 7 Sup. Ct. 826, 838 (1887).

[16] People v. Commissioners, 4 Wall. 244 (U. S. 1866); National Bank of Redemption v. Boston, *supra* note 15. "A railroad company, a mining

haps in building and loan associations[17] are non-competitive capital, not to mention the stock of ordinary commercial and industrial enterprises.[18] These decisions obviously limit all *dicta* which declare mere investment in similar securities an infallible criterion of competition. Consequently, in commenting that ". . . whatever *supposed* competition there was in the way of loaning money was indirect and was simply incidental to the main business which was not a competitive one . . ."[19] the New York court did not say that indirect, remote, or incidental competition would be overlooked. On the contrary it suggested that if a normally non-competing business were to invest a substantial portion of its capital in securities similar to any of those sought by banks the character and extent of those investments would be evidence of a business purpose similar to that of banks, so that the business as a whole might cease to be non-competitive and its shares be taxable. Such a suggestion imports an attitude perhaps more generous to the banks than that of the Supreme Court itself.

While there is thus nothing in the doctrine of the *Pratt* case which required it to be held erroneous, nor in its naked holding, since the relator Pratt was held taxable, several connected cases elsewhere treated in *per curiam* opinions and incorporated into the *Pratt* opinion by reference, were also relied on by the federal courts in reaching their conclusions.[20] In these cases the relators were exempted from equal taxation with the banks. The *Talcott* case[21] involved a corporation doing business as a textile factor, storing and selling goods, and guaranteeing and collecting payment on a commission basis. The business in general seems

company, an insurance company, or any other corporation of that description, may have a large part of its capital invested in securities payable in money . . . but . . . the shares of stock in such companies held by individuals are not moneyed capital." Mercantile Bank v. New York, *supra* note 15, at 156, 7 Sup. Ct. at 836.

[17] Lander v. Mercantile Bank, 186 U. S. 458, 22 Sup. Ct. 908 (1902), *aff'g* Mercantile Bank v. Hubbard, 98 Fed. 465 (C. C. N. D. Ohio 1899); First National Bank of Glendive v. Dawson County, 66 Mont. 321, 213 Pac. 1097 (1923). But *cf.* Commercial Nat. Bank of Columbus, Ohio v. Treasurer of Franklin County, 45 F. (2d) 213 (S. D. Ohio 1930); People ex rel. Morris Plan Co. of Buffalo v. Burke, 253 N. Y. 85, 170 N. E. 502 (1930) (Morris Plan loans).

[18] Talbott v. Silver Bow County, 139 U. S. 438, 11 Sup. Ct. 594 (1891); Aberdeen Bank v. Chehalis County, 166 U. S. 440, 17 Sup. Ct. 629 (1897); see the quotation from Mercantile Bank v. New York, *supra* note 15, and the following from the same case: "Neither is the difference to be determined by the character of the investments in which, either by law or in fact, the bulk of the capital and the accumulated surplus of the corporation is from time to time invested." 121 U. S. at 153, 7 Sup. Ct. at 834.

[19] *Supra* note 7, at 303, 151 N. E. at 461.

[20] *Supra* note 8.

[21] People ex rel. Talcott, Inc. v. Goldfogle, *supra* note 8.

clearly non-competitive. As to the fact that the company charged its principals interest where it paid them before collecting from the purchaser, the Appellate Division properly held that such payments were advances and not loans, and hence not made in competition with the loan phase of banking.[22] The *Commercial Security* case [23] was brought by a corporation dealing entirely in installment paper evidencing sales of pianos on deferred payments. The controversy concerned the nature of the entire business. In finding it non-competitive the Appellate Division rested on the facts of the particular case alone, concluding that New York banks did not in fact participate in the transactions involved. The opinion adheres so closely to the special case that it cannot have controlled administrative discretion except in businesses similar in every detail. The decision in the *Peabody* case,[24] which involved a corporation engaged solely in buying and selling corporate bonds, is grounded on the lack of express or incidental authority in national banks to deal in this manner in the restricted type of security there handled.[25] The remaining cases dealt with firms doing business as stockbrokers. If it be conceded that the main business of stockbrokers is non-competitive, either because its purpose is different or because banks lack the power to deal in the particular securities or at least to speculate in them,[26] the question remains whether loans made

[22] The relevant characteristics of advances are discussed in Appeal of Talcott, 3 App. Div. 578, 38 N. Y. Supp. 338 (1st. Dep't 1896); Talcott v. Waller, 191 Fed. 725 (C. C. A. 2d, 1911); Newburger-Morris Company v. James Talcott, 219 N. Y. 505, 114 N. E. 846 (1916).

[23] People ex rel. Bankers Commercial Security Company, Inc., *supra* note 8.

[24] People ex rel. Peabody Houghteling & Company, Inc. v. Goldfogle, *supra* note 8.

[25] There was no issue as to federal, state, municipal, railroad, or utility bonds, or bonds secured by such mortgages as national banks' are empowered to acquire. It has been held that a national bank may not engage in selling corporate bonds on commission. Weckler v. First National Bank of Hagerstown, 42 Md. 581 (1875); *cf.* Farmers' & Merchants & National Bank v. Smith, 77 Fed. 129 (C. C. A. 8th, 1896); Curtis v. Metcalf, 259 Fed. 961 (D. R. I. 1919). That it has no power whatever to deal in bonds, see Leonhardt v. Small, 117 Tenn. 153, 164, 96 S. W. 1051, 1053 (1906). It may, of course, take them as collateral on loans. Curtis v. Metcalf, *supra.* National banks may not participate in speculative enterprises or purchase securities for speculative purposes. First National Bank of Ottowa v. Converse, 200 U. S. 425, 26 Sup. Ct. 306 (1906); Merchants' National Bank of Cincinnati v. Wehrman, 202 U. S. 295, 26 Sup. Ct. 613 (1906); see First National Bank of Charlotte v. National Exchange Bank of Baltimore, 39 Md. 600, 610 (1873), *aff'd* 92 U. S. 122 (1876); McBoyle v. Union National Bank, 162 Cal. 277, 281, 122 Pac. 458, 461 (1912); Chapman v. First National Bank of Mineola, 285 S. W. 1118, 1119 (Tex. Civ. App. 1926); *cf.* Cassatt v. First National Bank of West New York, 9 N. J. Misc. Rep. 848, 156 Atl. 278 (1931).

[26] It has been held that the brokerage business is distinct from the

by brokers to customers compete. To the degree that such loans are financed by re-hypothecation of customers' securities the capital used is obviously not that of the broker.[27] On the other hand, the net capital of the broker is frequently used only to increase the amount of the loan beyond that which banks are willing to lend on the security. In such cases it is not unreasonable to consider it as employed in a different type of investment than that made by banks, or one not substantially competitive; or to argue, in the phraseology of the New York court, that the employment of capital in such a manner may be merely incidental to a non-competitive business. Thus it should have been quite possible in the *Keating* case for the federal courts to discover harmony between the New York and federal decisions. While the validity of the statute would be irrelevant if discrimination in fact could still be shown,[28] it might have been possible, granted a valid law, to deny equitable relief on grounds of adequate remedies once available by administrative review, or legal action in the state courts to recover taxes paid.[29]

As part of the torrent of litigation which has submerged the share tax in the last decade the *Keating* case should help to convince state governments that the tax is unworkable. Perhaps for this reason the decision may be justified, since the alternative of the income tax is now open.[30] But the very fact that the share tax is being abandoned by the states [31] strips long-range con-

banking business. Farmers' & Merchants & National Bank v. Smith, *supra* note 25; *cf.* California Bank v. Kennedy, 167 U. S. 362, 17 Sup. Ct. 831 (1897); McBoyle v. Union National Bank, *supra* note 25. As to a national bank's power to deal in bonds, or to speculate see note 25, *supra.* It has been held that a national bank has no power to purchase, subscribe for, or invest in stocks of other corporations and that a contract by which it assumes to do so is void. California Bank v. Kennedy, *supra; cf.* First National Bank v. Hawkins, 174 U. S. 364, 19 Sup. Ct. 739 (1899); Hotchkin v. Syracuse Third National Bank, 219 Mass. 234, 106 N. E. 974 (1914).

27 Compare the argument in First National Bank of Guthrie Center v. Anderson, 196 Iowa 587, 604, 192 N. W. 6, 14 (1923), *rev'd* 269 U. S. 341, 46 Sup. Ct. 135 (1926), wherein the existence of the practices urged as a defense by the state was held to be unproved. The New York banks would seem to have profited rather than suffered by the activities of brokers in the gala years.

28 The bank has the burden of proving that untaxed capital is competitive. Georgetown National Bank v. McFarland, *supra* note 9.

29 See Montana National Bank of Billings v. Yellowstone County, 276 U. S. 499, 505, 48 Sup. Ct. 331, 333 (1928).

30 By the admendments of 1923 and 1926, see note 2, *supra.* The method presents problems of its own, however, in connection with tax-exempt securities. *Cf.* Macallen Company v. Massachusetts, 279 U. S. 620, 49 Sup. Ct. 432 (1929); see Traynor, *op. cit. supra* note 1, at 456 *et seq.*

31 See (1927) 5 NAT. INCOME TAX MAG. 294; (1930) 8 NAT. INCOME TAX MAG. 410.

siderations of some of their importance, inasmuch as prediction, always very difficult, here becomes in some degree unnecessary. Before the principal case came into court New York had changed its law,[32] and the taxes for the year 1926 were to have been the last of their kind. Freed in this way, a sense of justice more closely focussed upon the times and the parties and considerate of the risks run by inflicting huge financial burdens on local government during the crisis, might have wrought differently.

Issues of quite another kind are presented in the case of *Iowa-Des Moines National Bank v. Bennett*,[33] reversing a decision of the Supreme Court of Iowa.[34] There the statute and its interpretation are concededly valid but intentional and repeated discrimination in administration clearly appears. The state code provided for the taxation of national and state bank shares and competitive capital at one rate and for the taxation of non-competing investments at a rate which was only from one-fifth to one-seventh as great.[35] The assessor and the board of review correctly applied the bank rate in taxing the shares of a number of competing domestic corporations. But after the board had adjourned for the year, so that administrative review was impossible, the county auditor changed these assessments. Although conceding the discrimination thus practised, the state court held that the auditor was without authority to make the alteration and that consequently his act and the ensuing collection were void and not attributable to the state. The balance of the taxes due from the bank's competitors were still collectible, the court said, and the banks would have to await action to that end by the proper officials or initiate proceedings themselves to compel such action. In reversing, the Supreme Court held that the state was responsible for the consequences of the illegal acts of its taxing officers and that in addition, the state court, in giving judgment against the bank, had ratified the act of the state in retaining the taxes known to be wrongfully collected. The most interesting element of the case, however, is the Supreme Court's further statement that "a taxpayer who has been subjected to discriminatory taxation through the favoring of others in violation of Federal law, cannot be required himself to assume the burden of seeking an increase of the taxes which the others should have paid." [36]

Of the two cases cited by the Supreme Court for this proposi-

[32] TAX LAW, CAHILL'S CONSOL. LAWS (1930) c. 61, § 219 rr *et seq.*

[33] 52 Sup. Ct. 133 (1931), with which, on questions of equal protection, was tried Central State Bank v. Bennett, *ibid.* Opinion by Brandeis, J., no dissent.

[34] Iowa National Bank v. Stewart, 232 N. W. 445 (Iowa 1930); noted in (1931) 19 GEO. L. J. 382.

[35] IOWA CODE SUPP. (1913) §§ 1310, 1311, 1321, 1322, 1322-1a.

[36] *Supra* note 33, at 2340:3.

tion,[37] that of *Greene v. Louisville & Interurban R. R.*[38] involved a corporation taxed on its intangibles at 75 per cent of their value while the property of individuals in the state was taxed at only 60 per cent in violation of the equality provisions of the Kentucky constitution. A Kentucky statute provided that the county boards of supervisors should examine the assessment books annually and alter all entries which unmistakable evidence might show did not represent fair cash value, the boards being given the power to hear complaints and summon witnesses. The Supreme Court rejected the suggestion that this machinery might be used by the injured tax payer to increase the assessments of others. The grounds given were that (a) it was not shown that the complaining company had any distinctive interest beyond that of ordinary citizens of the state to enable it to compel such increases in such a way, (b) there was no precedent for such a thing, and (c) the remedy of reassessment appeared to be a public, not a private one. In the second case cited, *Sioux City Bridge Company v. Dakota County, Nebraska,*[39] the Bridge Company's real property was assessed at 100 per cent of its valuation in accordance with state law while all other realty in the county was assessed at 50 per cent. The Nebraska court held that the company was not entitled to a reduction, the proper remedy being to have the taxes on the other property increased. No means were suggested for the accomplishment of such a result. Following the *Greene* case the Supreme Court reversed the decision with the explanation that it denied an injured taxpayer all remedy since "it is utterly impossible for him by any judicial proceeding to secure an increase in the assessment of the great mass of under-assessed property in the taxing district."[40]

It is clear that both of these authorities draw their strength from the fact that no procedure was shown to be available as a substitute for the reductions allowed. And in the principal case the court makes it plain that there is nothing inherently preferable in a decrease of a complaining taxpayer's assessment as opposed to an increase of other assessments.[41] The objection

[37] Two other cases, cited at this point, Chicago Great Western Railway Company v. Kendall, 266 U. S. 94, 45 Sup. Ct. 55 (1924) and Cumberland Coal Company v. Board of Revision, 52 Sup. Ct. 48 (1931), were apparently not used to support this statement but to support connected sentences.

[38] 244 U. S. 499, 37 Sup. Ct. 673 (1916).

[39] 260 U. S. 441, 43 Sup. Ct. 190 (1923).

[40] *Ibid.* 446, 43 Sup. Ct. at 192.

[41] "It may be assumed that all ground for a claim for refund would have fallen if the state, promptly upon discovery of the discrimination, had removed it by collecting the additional taxes from the favored competitors. By such collection the petitioners' grievances would have been redressed, for these are not primarily overassessment. The right invoked

is rather to the imposition of what seems to have been considered an undue burden of self-defense. Yet it may be assumed without extravagance that where a taxpayer has timely knowledge of unauthorized leniency to others, or where constructive knowledge may fairly be established, he might without harshness be required to make protest to the offending officer. And if to the officer why not to the officer's superiors who might compel a correction? If to them why not to a court, if adequate corrective machinery be available? Plainly, the party discriminated against must bring his action in any case. And it should make no difference that the time available for the enforcement of an increase must of necessity be limited to that within which the state may exercise its power of reassessment.[42] It is unlikely that any greater burden of vigilance would normally be imposed than that met by taxpayers compelled to take their usual first resort to administrative boards within a given period.

In the principal case the Iowa court suggested that the remedy of mandamus might be available to the plaintiffs to compel the raising of their competitors' taxes. At that date, over ten years after the cause of action arose, it was obviously impossible to correct the error in that manner. The findings indicate, however, that the banks, at or shortly after the time of the under-assessments, were aware of the discriminations, yet made no protest, at least none to the auditor's superiors. Under these circumstances if it had been shown that mandamus was available to the banks at the time of the levy, a court of equity might have been justified in refusing relief on grounds of estoppel, laches, fraud on other taxpayers, or the requirement of clean hands, where, to the damage of the state, the remedy was not used.[43]

It is not unusual law, and it was established in Iowa when the principal case arose, that an auditor who, as here, is exercising merely ministerial and non-discretionary powers of transcription, may be compelled by mandamus to correct unauthorized changes in the tax rolls even after the rolls have passed out of his hands into the hands of the treasurer.[44] It is

is that to equal treatment; and such treatment will be attained if either their competitors' taxes are increased or their own reduced." Iowa-Des Moines National Bank v. Bennett, *loc. cit. supra* note 36.

[42] *Cf.* IOWA CODE SUPP. (1913) § 1330-h; Weyerhaueser v. Minnesota, 176 U. S. 550, 20 Sup. Ct. 485 (1900); White River Lumber Company v. Arkansas, 279 U. S. 692, 49 Sup. Ct. 457 (1929).

[43] Mandamus is an equitable action in Iowa. IOWA CODE SUPP. (1913) § 4341.

[44] Ridley v. Doughty, County Auditor, 85 Iowa 418, 52 N. W. 350 (1892); *cf.* People v. Ashbury, 44 Cal. 616 (1872); State v. State Board of Equalization of Montana, 67 Mont. 340, 215 Pac. 667 (1923); State v. Raine, Auditor, 47 Ohio St. 447, 25 N. E. 54 (1890); State v. Covington, Auditor, 35 S. C. 245, 14 S. E. 499 (1892); State v. Herrald, Commissioner, 36

also widely true, and it was true in Iowa at the time in question, that mandamus is by no means a remedy available to government officials only.[45] On the contrary where a public duty is to be enforced a tax-payer and citizen may usually employ it without showing any peculiar personal interest.[46] In the expansion and improvement of this instrument, whether by legislation or adjudication or both, lie possibilities of substantial improvements in the administration of taxing measures. Had the courts in the *Iowa-Des Moines Bank* case seen fit to work out their problem in some such measure, an undesirable tendency to foreclose discussion of such methods might have been checked. And since the action was to recover money paid to the state many years ago, a result might simultaneously have been reached more harmonious, perhaps, with these difficult days of unemployment relief and insolvent cities and states.

THE PRIVILEGE AGAINST SELF-INCRIMINATION AND THE SCOPE OF STATUTORY IMMUNITY

ORIGINATING as a rule of evidence to prevent the extraction of forced testimony,[1] the ancient common law privilege against self-incrimination found sanction in the Federal Constitution,[2] and in all the state constitutions but two.[3] Not until the rise of gov-

W. Va. 721, 15 S. E. 794 (1892). In the principal case the auditor had power, given in permissive words, to correct the tax list. IOWA CODE SUPP. (1913) § 1385-b. The Ridley case, *supra*, was decided under a statute containing similar phrases. 1 IOWA CODE (1888) § 841. It was held that a mandatory duty was imposed thereby. *Cf.* State v. Raine, Auditor, *supra*.

[45] "The order of mandamus is granted on the petition of any private party aggrieved, without the concurrence of the prosecutor for the state . . . when the public interest is concerned . . ." IOWA CODE (1919) § 8235.

[46] Case v. Blood, 71 Iowa 632, 33 N. W. 144 (1887); State v. Judge of Marshall County, 7 Iowa 186 (1858); State v. Bailey, 7 Iowa 390 (1858); People v. Board of Supervisors of Gallatin County, 294 Ill. 579, 128 N. E. 645 (1920); People v. Czasewicz, 295 Ill. 11, 128 N. E. 739 (1920); Garrison v. City of Laurens, 55 S. C. 551, 33 S. E. 577 (1899); Harrison v. Banksdale, 127 Va. 180, 102 S. E. 789 (1920); Zigler v. Sprinkel, 131 Va. 408, 108 S. E. 656 (1921); *cf.* Felt v. Waughop, 193 Cal. 498, 225 Pac. 862 (1924); State Text-Book Commission v. Weathers, 184 Ky. 748, 213 S. W. 207 (1919).

[1] 4 WIGMORE, EVIDENCE (2d ed. 1923) § 2250.

[2] "No person . . . shall be compelled in any Criminal Case to be a witness against himself . . ." U. S. CONSTITUTION, 5th AMENDMENT.

[3] 4 WIGMORE, EVIDENCE § 2252, note 3. Iowa and New Jersey recognize the privilege as part of their common law. State v. Height, 117 Iowa 650, 91 N. W. 935 (1902); State v. Zdanowicz, 69 N. J. L. 620, 55 Atl. 743 (1903).

ernmental regulation of private enterprise,[4] however, was there occasion for its constitutional interpretation and delimitation.[5] Hampered in its combat with super-trusts and conspiracies in restraint of trade unless alleged conspirators could be made to talk, the Federal Congress enacted provisions compelling such testimony and granting immunity from prosecution therefor.[6] The Supreme Court held these provisions valid and compelling only when the immunity given was coextensive with the privilege for which it was substituted;[7] and thus was raised a question which is still troublesome, whether complete immunity from federal prosecution is sufficient to compel testimony incriminating under the laws of a state, against whose criminal processes no immunity can be extended by federal enactment.[8] For it has long since been settled that the Fifth Amendment applies only to proceedings in federal courts, and does not protect the individual in his capacity as a citizen of the state.[9] Under the further ruling by the Supreme Court that the privilege is not part of the fundamental law of the land protected from abridgment by the states,[10] these latter sovereignties are free to interpret the privilege without fear of federal review under the due process clause of either the Fifth or Fourteenth Amendment. But they in turn are faced with the converse problem of whether immunity conferred by the state is sufficient to compel testimony, although it cannot protect against federal prosecution.[11]

Any determination of the extent of the privilege necessarily involves a balancing of its disadvantage in the prosecution of crime as against the benefit which it affords in protecting the liberty of the individual.[12] Despite an increasing tendency to limit its sphere of application,[13] it is argued that the privilege

[4] David E. Lilienthal, *The Power of Governmental Agencies to Compel Testimony* (1926) 39 HARV. L. REV. 694.

[5] Edward S. Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause* (1930) 29 MICH. L. REV. 191, 192.

[6] 27 STAT. 443 (1893), 49 U. S. C. § 46 (1926); 32 STAT. 904 (1903), 49 U. S. C. § 47 (1926).

[7] Counselman v. Hitchcock, 142 U. S. 547, 12 Sup. Ct. 195 (1892); Brown v. Walker, 161 U. S. 591, 16 Sup. Ct. 644 (1896).

[8] Corwin, *op. cit. supra* note 5, at 197; Note (1896) 10 HARV. L. REV. 120; (1925) 38 HARV. L. REV. 389.

[9] Barron v. Baltimore, 7 Pet. 243 (U. S. 1833); Twining v. New Jersey, 211 U. S. 78, 29 Sup. Ct. 14 (1908).

[10] Twining v. New Jersey, *supra* note 9; Jack v. Kansas, 199 U. S. 372, 26 Sup. Ct. 73 (1905); see Corwin, *op. cit. supra* note 5, at 202.

[11] *Cf.* United States v. Smith, 51 F. (2d) 803 (S. D. Tex. 1931), noted in (1932) 30 MICH. L. REV. 461.

[12] 4 WIGMORE, EVIDENCE § 2284. *Cf.* the adoption by West Virginia of Wigmore's suggestion that immunity be authorized in all crimes without exception by a single statutory section. OFFICIAL CODE OF W. VA. (1931) c. 57, art. 5, § 2.

[13] 4 WIGMORE § 2251; and *ibid.* 934-954, for complete list of immunity

itself is necessary to guard against the unlicensed extortion of testimony which may ensue in its absence.[14] But in these days of legislative committee[15] and judicial grand jury[16] inquiries into governmental administration, when evidence is exceedingly difficult to obtain unless disclosures may be compelled, state and federal legislatures have felt it highly desirable to abrogate the privilege in many instances,[17] and they have not considered statutory amnesty for past crimes too high a price to pay for valuable information.[18] And where the witness attempts to maintain silence, thus protecting his accomplices as well as himself, on the ground of possible incrimination under the laws of a foreign jurisdiction, some courts have felt constrained, in furtherance of the legislative purpose, to declare that the privilege is limited to dangers arising under the laws of the local sovereignty.

In the light of conflicting Supreme Court decisions the question has been regarded as an open one in the inferior federal courts.[19] While the Court, relying on the authority of a very early case,[20] once held that a witness may refuse to testify where to do so would expose him to prosecution under state laws,[21] it has more consistently ruled that complete immunity within the jurisdiction in which the witness is examined is sufficient, on the theory that the danger of foreign prosecution is too remote

statutes; William H. Taft, *The Administration of Criminal Law* (1905) 15 YALE L. J. 1; Henry T. Terry, *Constitutional Provisions Against Forcing Self-Incrimination* (1906) 15 YALE L. J. 127.

14 4 WIGMORE § 2251, at p. 823.

15 New York Times, Aug. 28, 1931, at 1.

16 *Ibid.*, Nov. 20, at 22.

17 *Supra* note 13.

18 "Congress, and the legislatures of many states, have enacted immunity statutes for the purpose of securing conviction for such offenses, as gambling, bribery, the manufacture or sale of intoxicating liquors, usury, combinations in restraint of trade, and like offenses, in which two or more persons participate to constitute the crime, the necessities of the case, and the difficulty of obtaining witnesses to establish the offense, punish the offenders, and suppress the crime, being deemed sufficient to warrant the extending of immunity to a participant in order to constitute him a competent witness against the other offenders." State v. Jack, 69 Kans. 387, 396, 76 Pac. 911, 914 (1904); *aff'd* 199 U. S. 372, 26 Sup. Ct. 73 (1905).

19 See Vajtauer v. Immigration Comm'r, 273 U. S. 103, 113, 47 Sup. Ct. 302, 306 (1927); In re Doyle, 42 F. (2d) 686, 688 (S. D. N. Y. 1930); Note (1931) 17 VA. L. REV. 285.

20 U. S. v. Saline Bank, 1 Pet. 100 (U. S. 1828) (distinguished in Hale v. Henkel, 201 U. S. 43, 69, 26 Sup. Ct. 370, 377 (1906) on ground that the federal court was merely proceeding under state law which provided the penalty, and that consequently no question arose as to a prosecution under another jurisdiction).

21 Ballmann v. Fagin, 200 U. S. 186, 26 Sup. Ct. 212 (1905).

and unsubstantial to be material. In *Brown v. Walker*,[22] the danger was factually considered and held too remote by a five to four decision.[23] But in a later case[24] this doctrine was extended to incorporate what was supposed to be the English rule: that as a *matter of law* the danger of prosecution under the laws of a foreign jurisdiction is too remote and unsubstantial to be considered, since in passing upon the claim of privilege the court cannot well know the laws of the other sovereignty or the danger of prosecution thereunder.[25] The recent Supreme Court decision in *United States v. Murdock*,[26] adopting the latter view without mention of the former, would seem, however, to settle the matter for the federal courts. But under our federal system of government this danger seems substantial enough.[27] The Supreme Court has held that prosecution by the state courts, based on the same act or transaction which constitutes a similar offense against the federal government, will not bar federal prosecution therefor.[28] And the danger of double prosecution for a different offense, whether or not it be based on the same act or transaction, is even more imminent.

The recent entanglement of Dr. Doyle, New York veterinarian, with both federal and state authorities, specifically illustrates the possibility. Accused of violation of the federal income tax laws, Doyle refused to testify before a grand jury in regard to the

[22] *Supra* note 7.

[23] In his dissenting opinion, Mr. Justice Shiras took issue squarely on this point. "It is urged that . . . such a jeopardy is too remote to be considered. The force of this contention is not perceived. On the contrary such is the nature of the commerce which is controlled by the interstate commerce law, so intimately involved are the movements of trade and transportation . . . that just such questions as those which are now considered may be naturally expected to frequently arise." 161 U. S. at 625, 16 Sup. Ct. at 662.

[24] Hale v. Henkel, *supra* note 20.

[25] The King of Two Sicilies v. Willcox, 1 Sim. (N. S.) 301 (1851). The doctrine is summed up and approved in 4 WIGMORE § 2258. But *cf.* note 43 *infra*. And see U. S. v. McRae, L. R. 4 Eq. 327, 336, 3 Ch. App. 79, 85 (1867), in which Lord Chancellor Chelmsford said of Lord Cranworth's judgment in the Two Sicilies case, "It was unnecessary to lay down so broad a proposition to support the judgment which he pronounced, and he certainly could not have contemplated a case where the presumed ignorance of the Judge as to foreign law is completely removed by the admitted statements upon the pleadings, in which the exact nature of the penalty or forfeiture incurred by the party objecting to answer is precisely stated." But *cf.* In re Atherton, 2 K. B. 251 (1912) (privilege denied, with no citation of authority for or against). See also, Power v. Ellis, 6 Can. Sup. 1, 6 (1881) (undecided).

[26] 52 Sup. Ct. 63 (1931).

[27] D. O. McGovney, *Self-Criminating Testimony Code Revision Bill* (1920) 5 IOWA L. BULL. 174, 182-184; New York Times, Dec. 11, 1931, at 2, col. 3.

[28] U. S. v. Lanza, 260 U. S. 377, 43 Sup. Ct. 141 (1922).

splitting of fees earned by him in his practice before the New York Board of Standards and Appeals, on the ground that it would incriminate him under a New York law making it a penal offense to bribe public officials. The court affirmed the privilege,[29] since federal immunity could not protect him in the state courts. A year later, Doyle, subpoenaed by the Hofstadter committee, refused to answer similar questions on the ground that it would incriminate him under the federal income tax laws. The Court of Appeals of New York denied the privilege,[30] citing *Jack v. Kansas* [31] to the effect that the danger of prosecution was too remote. However, the collaborative action by the representatives of the federal and state authorities in nolprossing a pending federal indictment in anticipation of Doyle's claim of foreign incrimination,[32] seems to indicate the real and substantial character of the danger involved.

Since federal courts take judicial notice of the public laws of all the states,[33] and, conversely, states must take judicial notice of federal laws,[34] there is no difficulty in discovering these foreign laws. Curiously enough, however, while the lower federal courts have acted unanimously in permitting the witness to reject the statutory immunity and rely on the privilege where incrimination under state laws would otherwise ensue,[35] the state courts have not attained such unanimity where incrimination under federal laws is involved,[36] although in a few cases where

---

[29] In re Doyle, *supra* note 19.

[30] Doyle v. Hofstadter, 257 N. Y. 244, 177 N. E. 489, 497 (1931).

[31] *Supra* note 10; Note (1906) 15 YALE L. J. 234; Note (1906) 19 HARV. L. REV. 299.

[32] New York Times, July 17, 1931, at 1.

[33] Hanley v. Donoghue, 116 U. S. 1, 6 Sup. Ct. 242 (1885); Lane v. Sargent, 217 Fed. 237 (C. C. A. 1st, 1914).

[34] Baltimore & Ohio S. W. R. R. v. Berdon, 195 Ind. 265, 145 N. E. 2 (1924); Metropolitan Stock Exchange v. Lyndonville National Bank, 76 Vt. 303, 57 Atl. 101 (1904); U. S. CONSTITUTION, Art. VI.

[35] In re Nachman, 114 Fed. 995 (D. S. C. 1902); In re Kanter, 117 Fed. 356 (S. D. N. Y. 1902); In re Hooks Smelting Company, 138 Fed. 954 (E. D. Pa. 1905); In re Doyle, *supra* note 19; see Buckeye Powder Company v. Hazard Powder Company, 205 Fed. 827, 829 (D. Conn. 1913); *cf.* In re Scott, 95 Fed. 815 (W. D. Pa. 1899); In re Feldstein, 103 Fed. 269 (S. D. N. Y. 1900); U. S. v. Lombardo, 228 Fed. 980 (W. D. Wash. 1915) *aff'd* (on another ground) 241 U. S. 73, 36 Sup. Ct. 508 (1916), Note (1916) 29 HARV. L. REV. 876; In re Gasteiger, 290 Fed. 410 (E. D. N. Y. 1923); In re Hess, 134 Fed. 109 (E. D. Pa. 1905).

[36] Privilege denied: People v. Butler St. Foundry & Iron Company, 201 Ill. 236, 66 N. E. 349 (1903); State v. Jack, *supra* note 18; Dunham v. Ottinger, 243 N. Y. 423, 154 N. E. 298 (1926); Doyle v. Hofstadter, *supra* note 30; see Ex Parte Copeland, 91 Tex. Crim. Rep. 549, 240 S. W. 314 (1922). Privilege affirmed: People v. Nussbaum, 55 App. Div. 245, 67 N. Y. Supp. 492 (3d Dep't 1900); *cf.* State v. Verecker, 124 Me. 178, 180, 126 Atl. 827, 828 (1924): "We are of the opinion that comity between the United States and state courts should be observed to the fullest extent

the state courts have denied the privilege, they have endeavored to restrict the testimony to intrastate transactions which would not include any disclosures of federal offenses,[37] a procedure naturally impossible in federal proceedings.

On the other hand, where the claim of privilege is made in a state court on the ground of incrimination under the laws of another state, it is universally denied.[38] But here also there is no difficulty in discovering the foreign law, since some states have statutes authorizing their courts to take judicial notice of the laws of sister states,[39] and all permit proof by proper authentication.[40] Moreover the danger of interstate rendition threatens the witness in a real and substantial way.[41]

In the only case discovered in which the claim was made in a state or federal court on the ground of incrimination under the laws of a foreign country, the Supreme Judicial Court of Massachusetts held that the only danger to be considered was that arising under the laws of Massachusetts.[42] In view of the fact, however, that the court took judicial notice that there existed no treaty of extradition between the Republic of Greece and the United States, the declaration of such a rule may be said to have been superfluous in the face of the factual remoteness of the danger.

Limitation of the privilege against self-incrimination to protection from dangers arising under the laws of the forum causes great reluctance to testify in the more usual case of a person who is innocent under those laws, but who has sinned against the laws of a second jurisdiction.[43] There is also the possibility of

when the question of immunity is properly made an issue in the state court, and that statutes of immunity should be given the broadest application."

[37] People v. Butler St. Foundry & Iron Company, *supra* note 36; State v. Jack, *supra* note 18.

[38] State v. March, 1 Jones (N. C.) 526 (1854); State v. Thomas, 98 N. C. 599 (1887) (reluctant approval of State v. March, although decision was preferably placed on a different ground of waiver); In re Werner, 167 App. Div. 384, 152 N. Y. Supp. 862 (1st Dep't 1915); In re Cappeau, 198 App. Div. 357, 190 N. Y. Supp. 452 (1st Dep't 1921), noted in (1922) 22 Col. L. Rev. 282; State v. Wood, 99 Vt. 490, 134 Atl. 697 (1926); Note (1927) 40 Harv. L. Rev. 657.

[39] Darling v. Dent, 82 Ark. 76, 100 S. W. 747 (1907). See Note (1922) 21 Mich. L. Rev. 223; Official Code of W. Va. (1931) c. 57, art. 1, § 4.

[40] U. S. Constitution, Art. IV § 1; 1 Stat. 122 (1790), 28 U. S. C. § 687 (1926).

[41] *Ibid.*, Art. IV. § 2.

[42] Republic of Greece v. Aristides Koukouras, 264 Mass. 318, 162 N. E. 345 (1928).

[43] "The witness-stand is today sufficiently a place of annoyance and dread. The reluctance to enter it must not be increased. Every influence which tends to suppress the sources of truth must be removed. To remove all the limits of inquiry into the secrets of the persons who have no stake

a nullification of the privilege by collaborative action on the part of federal and state attorneys, whereby, for instance, a state attorney may call for a grand jury inquiry, with no hope of obtaining an indictment under state laws, merely for the purpose of bringing to light relevant testimony which may serve to effect a federal indictment.

Yet in the *Murdock* case, all these considerations indicating the substantial nature of the burden placed upon the witness were apparently outweighed by the exigencies of governmental investigation. The extreme complexity of modern business operations requires that every investigatory weapon be placed at the disposal of the state. And as these requirements make themselves more keenly felt it may not be surprising to see still further limitations placed upon the ancient privilege against self-incrimination.

---

in the cause but can furnish help in its investigation, would be to add to the motives which now sufficiently dispose them to evade their duty." 4 WIGMORE, § 2251, at 822.