Notes

EQUITY RECEIVERSHIPS AND THE MAINTENANCE OF HARMONY BETWEEN STATE AND FEDERAL COURTS

STATESMEN in the judiciary as well as in other branches of government have long urged that the success of a federal system requires harmony in the relations between state and nation. But in judicial administration the interest of one or the other of the parties to a private litigation frequently tends to obscure the public interest in the maintenance of harmony between tribunals of concurrent jurisdiction. Particularly in the administration of debtors' estates through the device of equity receiverships has conflict between state and federal courts been common. Again and again, in recent years, the Supreme Court has warned the lower federal courts to be chary with the equity receivership remedy—to watch it with a "jealous eye."[1] But, as indicated by the occasions for repetition of the warning, district courts have not always resisted the appeal of the parties or, perhaps, the opportunities for power and patronage which equity receiverships afford.[2] The covetous eye has sometimes displaced the jealous eye.

In *Biltrite Building Co. v. Elliott*[3] the dangers of a disregard of the Supreme Court's admonitions are seen in clear relief. A South Carolina state bank was closed by resolution of the directors, and its affairs were turned over to the state bank examiner. A month later, on the petition of a group of non-resident depositors, the federal court appointed an equity receiver for the bank and authorized him to sue the stockholders for the "double liability" imposed upon them by state statute.[4] Prior to this appointment another group of depositors acting under the same statute had begun an action against stockholders in a state court. The latter group sued the federal receiver in the state court to enjoin him from enforcing the stockholders' liability in any court.[5] This blanket injunction was granted upon the ground that the state

1. Michigan v. Michigan Trust Co., 286 U. S. 334 (1932); Shapiro v. Wilgus, 287 U. S. 348 (1932); see Harkin v. Brundage, 276 U. S. 36, 52 (1928). And criticism has been directed against the present liberality in the appointment of equity receivers by federal courts. Jacobs, *Problems in Federal "Receivership" Jurisdiction* (1932) 1 MERCER BEASLEY L. REV. 29; Note (1927) 41 HARV. L. REV. 70; see Glaser v. Achtel-Stetter's Restaurant, 106 N. J. Eq. 150, 153, 149 Atl. 44, 46 (1930).

2. See Mr. Chief Justice Taft in Harkin v. Brundage, 276 U. S. 36, 55 (1928): "Nor should there be any competition or rivalry on the part of the two courts themselves in regard to assuming jurisdiction."

3. 166 S. C. 534, 165 S. E. 340 (1932).

4. S. C. CIV. CODE (1932) § 7855 provides for the appointment and compensation of receivers to liquidate the assets of state banks which have been taken over by the state bank examiner. It further authorizes "any receiver appointed to liquidate the assets of any closed state bank" to enforce the stockholders' double liability provided for in S. C. CIV. CODE (1932) § 7868.

5. That the court intended to give the injunction this application is implicit in the fact that it was issued before any suit was brought by the receiver.

statute which entitled "any receiver" to sue for the stockholders' double liability did not apply to receivers appointed by the federal court. Thus was the scene laid for an explosive conflict between state and federal authority. It was obviated in part, however, by the federal court's subsequent revocation of the power it had conferred upon its receiver.

Doubtless the depositors who sought a federal receiver had good grounds for preferring federal to state administration of the insolvent bank. But the remedy of equity receiverships is traditionally available not as a matter of right, but of discretion on the part of the court,[6] and in the instant case it seems hardly justifiable that the federal court should have permitted itself to be injected into the controversy. The basis of jurisdiction was apparently diversity of citizenship. The petitioners were ostensibly ordinary depositors, not judgment or secured creditors. Without the stockholders' liability, the bank was admittedly insolvent in the bankruptcy sense. It was a state institution. Most of its depositors, debtors and stockholders probably were citizens or residents of that state. For the administration of insolvent state banks the state had provided an administrative and judicial machinery which had been duly invoked.[7] Here was preëminently a case in which the interests of federalism as well as proper discretion in the exercise of equity jurisdiction required that the federal court should defer to the state administration.

Because of the unwarranted exercise of jurisdiction by the federal court, the result reached by the state court in this case is at least understandable.[8] However, assuming that the appointment of a receiver by a federal court is valid and proper, the construction here placed upon the state statute, in denying to federal receivers the power to sue for the stockholders' double liability in any court, is unsound, and the issuance of the injunction dangerous. The power to sue in the federal courts in cases of diversity of citizenship is conferred by federal statute pursuant to constitutional authority.[9] But the rights and obligations thus sued upon are for the most part created by state law. If, therefore, a state were to be permitted to restrict the enforcement of substantive rights and obligations created by it and enforceable by ordinary judicial process to its own courts, the federal right to sue in the United States courts in cases of diversity of citizenship would be nullified. In the instant case the state statute created a substantive liability in the stockholders enforceable by judicial process.[10] The corresponding right to sue thereon, insofar as it is given to depositors, may not, in the case of non-residents, be confined to enforcement in the state courts.[11] And consequently the depositors' judicial

6. Chicago Title and Trust Co. v. Mack, 347 Ill. 480, 180 N. E. 412 (1932); Franklin National Bank v. Kennerly Coal and Coke Co., 300 Pa. 479, 150 Atl. 902 (1930).

7. See note 4, *supra*.

8. The state court could not dispute the federal court's assumption of jurisdiction since an appeal from the order appointing the federal receiver was never perfected and was dismissed by the Circuit Court of Appeals.

9. U. S. Constitution, Art. III, sec. 2 (1); 1 STAT. 76 (1789), 28 U. S. C. § 41 (1) (1926).

10. S. C. CIV. CODE (1932) §§ 7855, 7868.

11. Chicago and Northwestern Ry. Co. v. Whitton, 13 Wall. 270 (U. S. 1871); Madisonville Traction Co. v. Saint Bernard Mining Co., 196 U. S. 239 (1905); Guardian Savings and Trust Co. v. Road Improvement District No. 7, 267 U. S. 1 (1925); Grover v. Merritt Development Co., 7 F. (2d) 917 (D. Minn. 1925). Situations where the state has provided particular ad-

remedy through the appointment of a receiver to sue in their behalf cannot be restricted by the state to its own courts.[12]

A state court may, of course, under certain circumstances, refuse to entertain a suit brought by a foreign federal or state equity receiver.[13] Whether it should refuse to entertain such suit generally depends upon its own notions of comity.[14] But the scope of the receiver's powers, whether he is to represent

ministrative proceedings, as in the case of Workmen's Compensation statutes, would probably be without the scope of this doctrine.

12. It is true that a majority of courts have, in the absence of statute, denied the receiver the right to enforce the stockholders' double liability on the ground that such liability is not an asset of the corporation but a collateral liability flowing directly to the creditors and enforceable only by them. Alsop v. Conway, 188 Fed. 568 (C. C. A. 6th, 1911); Golden v. Cervenka, 278 Ill. 409, 116 N. E. 273 (1917); Hammond v. Cline, 170 Ind. 452, 84 N. E. 827 (1908); Bradley v. Aimar, 140 S. C. 14, 138 S. E. 401 (1927); THOMPSON, CORPORATIONS (3d ed. 1927) § 5178. A few courts have permitted the receiver to enforce the double liability by calling it a corporate asset. Howarth v. Angle, 162 N. Y. 179, 56 N. E. 489 (1900); Pyles v. Carney, 85 W. Va. 159, 101 S. E. 174 (1919). Or by considering it a trust fund for all creditors to be ratably distributed by the receiver. McNeill v. Pace, 69 Fla. 349, 68 So. 177 (1915); Rogers v. Selleck, 117 Neb. 569, 221 N. W. 702 (1928). Even assuming that on this matter a federal court is bound by the decisions of the court of the state in which it is sitting, contrary to the decision in Swift v. Tyson, 16 Pet. 1 (U. S. 1842), yet once a state statute has made the liability sufficiently an asset of the estate to permit suit by a state court receiver, or once the state has removed the obstacle to suit by a receiver appointed in a state court, the state cannot prevent the federal courts from affording a similar remedy to persons entitled to seek it there. Guardian Savings and Trust Co. v. Road Improvement District No. 7, 267 U. S. 1 (1925).

13. An equity receiver ordinarily has no right to sue beyond the territorial jurisdiction of the appointing court. Booth v. Clark, 17 How. 322 (U. S. 1854); Sterrett v. Second National Bank of Cincinnati, 248 U. S. 73 (1918); Flaacke v. Winona Mills Co., 104 Conn. 665, 134 Atl. 265 (1926). But where the law of the appointing forum confers title to the assets upon the receiver he may sue as of right in a foreign jurisdiction. Relfe v. Rundle, 103 U. S. 222 (1880); Hopkins v. Lancaster, 254 Fed. 190 (N. D. Ala. 1918); Irvine v. Baker, 225 Fed. 834 (S. D. N. Y. 1915); Hirning v. Hamlin, 200 Iowa 1322, 206 N. W. 617 (1925). However, in the principal case it may be doubted whether the state and federal courts were foreign to each other so that the federal receiver could be denied the right to sue in the state court, for courts having the same territorial jurisdiction are not generally considered foreign jurisdictions. Grant v. A. B. Leach Co., 280 U. S. 351 (1930); Shull v. Fidelity and Guaranty Co., 81 W. Va. 184, 94 S. E. 123 (1917); see Dickinson v. Chesapeake Ry., 7 W. Va. 390, 416 (1874). *Contra:* Olney v. Tanner, 10 Fed. 101 (S. D. N. Y. 1882).

14. The federal courts usually refuse to allow a foreign receiver to sue. Great Western Mining and Manufacturing Co. v. Harris, 198 U. S. 561 (1905); Fowler v. Osgood, 141 Fed. 20 (C. C. A. 8th, 1905); Fairview Fluor Spar & Lead Co. v. Ulrich, 192 Fed. 894 (C. C. A. 7th, 1911). But state courts usually allow the suit on grounds of comity. Stevens v. Tilden, 122 Minn. 250, 142 N. W. 315 (1913); Van Kempen v. Latham, 195 N. C. 389, 142 S. E. 322 (1928); Cole v. Sassenberry, 56 S. D. 595, 230 N. W. 22 (1930). Such suit is not allowed, however, when the rights of resident creditors would be prejudiced.

both the corporation and the creditors or to sue upon causes of action belonging to the former but not upon those belonging to the latter, is a question to be determined solely by the appointing court whose officer he is.[15] The privilege of another court to refuse its own facilities for the exercise of that power is not equivalent to a capacity to deny its existence or prohibit its exercise entirely.

PREFERENTIAL TREATMENT OF FUNDS DEPOSITED UNDER SPECIAL CONTRACT

IN *In re Warren's Bank*[1] the Wisconsin Banking Commissioner applied for a declaration that certain funds held by the bank to the credit of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company constituted a general deposit. Every two weeks during a period of more than nine years the railroad had sent a sufficient amount of currency to the bank to meet the pay checks which it had issued to its employees at Tomah, Wisconsin, where the bank was located. These checks were always drawn on the railroad's metropolitan depositaries. After all the checks had been presented to the bank and paid by it the cashier indorsed and returned them to the treasurer of the railroad together with a remittance for as much of the money forwarded by the company as had not been paid out, and closed the account. Thus the checks never passed through the clearing house. The bank became insolvent after it had received a shipment of currency but before all the pay checks had been presented and paid. The Wisconsin Supreme Court affirmed an order denying the Commissioner's application and directing him to pay the railroad the funds which had not been paid out, on the ground that they constituted a specific deposit and that the bank never took title to them but acted merely as the railroad's agent or trustee. That the cash had been mingled with the general assets of the bank was regarded as immaterial.

Where a specific chattel or specific moneys are deposited with a bank and it agrees to return the identical chattel or moneys, the bank is a bailee and the arrangement is called a special deposit.[2] Where moneys are deposited in a bank and it agrees to hold them in trust for the depositor, the bank is a trustee and the arrangement is called a trust.[3] But where moneys are deposited in a bank which agrees to return an equivalent amount, or to pay over an equivalent amount to a person or persons designated by the depositor, or to apply an equivalent sum to a particular purpose, or to do anything else except hold in trust or return the identical moneys, the bank is a debtor and

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Lackman v. Supreme Council O. C. F., 142 Cal. 22, 75 Pac. 583 (1904); Flaacke v. Winona Mills, *supra* note 13; Catlin v. Wilcox, 123 Ind. 477, 24 N. E. 250 (1889). For a full discussion see Laughlin, *The Extraterritorial Power of Receivers* (1932) 45 HARV. L. REV. 429; Note (1930) 4 So. CAL. REV. 146.

15. Evans v. Nellis, 187 U. S. 271 (1902); Converse v. Hamilton, 224 U. S. 243 (1912); Gruetzmacher v. Quevli, 208 Iowa 537, 226 N. W. 5 (1929).

1. 244 N. W. 594 (Wis. 1932).

2. Bloomheart v. Foster, 114 Kan. 786, 221 Pac. 279 (1923); State v. Bickford, 28 N. D. 36, 147 N. W. 407 (1914); 1 MORSE, BANKS AND BANKING (6th ed. 1928) § 183.

3. Grossman v. Taylor, 185 Ark. 64, 46 S. W. (2d) 13 (1932); Monticello v. Citizens State Bank, 180 Minn. 418, 230 N. W. 889 (1930); Mothershead v. Lewis, 117 Okla. 167, 245 Pac. 550 (1925).

the transaction is a general deposit.[4] If the bank becomes insolvent the return which the depositor will receive is directly related to the classification of his claim as a bailment, a trust, or a general deposit.[5]

All general depositors, however, are not treated uniformly. For example, where it could be argued that the funds were intrusted to the bank for a particular purpose,[6] general depositors have been accorded preferences. In such cases the claim has been variously called a trust,[7] a special deposit,[8] or a specific deposit.[9] Nor have the courts been consistent in granting or denying preferences in outwardly similar fact situations. Thus, where the claimant has intrusted funds to a bank for transmission contrary results have been reached.[10] And, although courts often rely upon the presence or absence of certain particular considerations as bases for their conclusions, an examination of the cases reveals that this reliance has not led to consistent results.

The question of the segregation from the general assets of the bank of the funds deposited is one of the considerations to which courts have looked. But some courts have been unwilling to grant a preference to the depositor unless the funds have been set aside.[11] On the other hand, an understanding that

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4. Warren v. Nix, 97 Ark. 374, 135 S. W. 896 (1911); Mutual Accident Association v. Jacobs, 141 Ill. 261, 31 N. E. 414 (1892); 1 MORSE, *op. cit. supra* note 2, § 186.

5. A general depositor must ordinarily share *pro rata* with the other creditors. 2 MORSE, *op. cit. supra* note 2, § 629.

6. As, for example, where the deposit is to be used by the bank to buy bonds for the customer or to pay a specific obligation of the customer which the bank is collecting for the obligor.

7. Ryan v. Phillips, 3 Kan. App. 704, 44 Pac. 909 (1896); Blythe v. Kujawa, 175 Minn. 88, 220 N. W. 168 (1928); Kimmel v. Dickson, 5 S. D. 221, 58 N. W. 561 (1894).

8. Stein v. Kemp, 132 Minn. 44, 155 N. W. 1052 (1916); Heckstall v. Citizens Bank of Windsor, 202 N. C. 350, 163 S. E. 107 (1932); North West Lumber Co. v. Scandinavian American Bank of Seattle, 130 Wash. 33, 225 Pac. 825 (1924).

9. Montagu v. Pacific Bank, 81 Fed. 602 (C. C. N. D. Cal. 1897); City of Miami v. Shutts, 59 Fla. 462, 51 So. 929 (1910); Woodhouse v. Crandall, 197 Ill. 104, 64 N. E. 292 (1902).

10. *Preference granted*: Bryan v. Cocoanut Grove Bank and Trust Co., 101 Fla. 947, 132 So. 481 (1931); Winkler v. Veigel, 176 Minn. 384, 223 N. W. 622 (1929). *Preference denied*: People v. California Safe Deposit and Trust Co., 23 Cal. App. 199, 137 Pac. 1111 (1913); Matter of Littman, 258 N. Y. 468, 180 N. E. 174 (1932). The same divergence is evident in other situations. 1). Deposit for payment of note at maturity. *Preference granted*: Central Bank and Trust Co. v. Ritchie, 120 Wash. 160, 206 Pac. 926 (1922). *Preference denied*: Brennan v. Tillinghast, 201 Fed. 609 (C. C. A. 6th, 1913). 2). Deposit to have bank buy bonds for customer. *Preference granted*: Secrest v. Ladd, 112 Kan. 23, 209 Pac. 824 (1922). *Preference denied*: Howland v. People, 229 Ill. App. 23 (1923). 3). Deposit to meet pay roll. *Preference granted*: Central Coal and Coke Co. v. State Bank of Bevier, 226 Mo. App. 594, 44 S. W. (2d) 188 (1931). *Preference denied*: Northern Sugar Corp. v. Thompson, 13 F. (2d) 829 (C. C. A. 8th, 1926).

11. Pacific States Savings and Loan Co. v. Commercial State Bank, 46 Idaho 481, 269 Pac. 86 (1928); Howland v. People, *supra* note 10; Mississippi

the funds are not to be used in the regular course of the bank's business has often been considered sufficient even though no segregation actually took place.[12] And in some instances preferences have been granted where the funds were not set aside and it was apparent that the bank intended to use them in the course of its business.[13]

Whether or not the bank's assets have been augmented by the deposit is another consideration on which the courts have based their decisions and which has led to conflicting results. In some instances it has been held that a mere transfer of credits on the books of the bank is not a sufficient augmentation of assets in the hands of the receiver to justify a preference,[14] and in others that the issuance to the bank of a check drawn on the depositor's checking account is such an augmentation.[15] Nor does the circumstance that the depositor had a right to draw checks against the fund furnish a conclusive indication that a preference will be withheld. In some instances the existence of such a right has resulted in the denial of a preference;[16] in others the right was considered immaterial and a preference was granted.[17]

That these considerations have not led to uniform results is entirely understandable. The dialectic of abstract legal analysis offers no sufficiently persuasive reason why a court should permit a preference merely because funds

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Central Railroad v. Conner, 114 Miss. 63, 75 So. 57 (1917). These cases apparently rest on the theory that there must be an identifiable *res* upon which the trust is to be impressed.

12. Titlow v. Sundquist, 234 Fed. 613 (C. C. A. 9th, 1916); Parker v. Central Bank and Trust Co. of Ashville, 202 N. C. 230, 162 S. E. 564 (1932); First National Bank of Ranger v. Price, 262 S. W. 797 (Tex. Civ. App. 1924). Many cases reaching this conclusion are based on the ground that co-mingling makes no difference. Marshall v. Farmers and Merchants Bank of Steele, 215 Mo. App. 365, 253 S. W. 15 (1923); North West Lumber Co. v. Scandinavian American Bank of Seattle, *supra* note 8. Or that the bank should receive no benefit from the wrongful conversion of the funds. Bryan v. Cocoanut Grove Bank and Trust Co., *supra* note 10; Kimmel v. Dickson, *supra* note 7. But it is to be noted that upon the bank's insolvency the general creditors and not the bank would benefit by a denial of the preference.

13. Where bank paid interest for the use of the money: Newsom v. Acacia Mutual Life Association, 136 So. 389 (Fla. 1931); Blummer v. Scandinavian American State Bank of Badger, 169 Minn. 89, 210 N. W. 865 (1926). Where bank was apparently to receive no compensation for its services: Greenfield v. Clarence Savings Bank, 5 S. W. (2d) 708 (Mo. App. 1928); Plano Manufacturing Co. v. Auld, 14 S. D. 512, 86 N. W. 21 (1901).

14. Phoenix Title and Trust Co. v. Central Bank of Phoenix, 30 Ariz. 431, 247 Pac. 1097 (1926); People v. California Safe Deposit and Trust Co.; Matter of Littman, both *supra* note 10.

15. Stoller v. Coates, 88 Mo. 514 (1885); Bryan v. Cocoanut Grove Bank and Trust Co.; Winkler v. Veigel; Central Bank and Trust Co. v. Ritchie, all *supra* note 10.

16. Northern Sugar Corp. v. Thompson, *supra* note 10; Campion v. Big Stone County Bank, 177 Minn. 51, 224 N. W. 258 (1929); Mississippi Central Railroad v. Conner, *supra* note 11.

17. Central Coal and Coke Co. v. State Bank of Bevier, *supra* note 10; First National Bank of Ranger v. Price, *supra* note 12.

have not been mingled,[18] or assets augmented,[19] or because depositors may not draw checks;[20] nor for denying a preference merely because funds have been mingled,[21] or assets not augmented,[22] or because depositors may draw checks.[23] The problem of granting and denying preferences is really one of deciding whether or not distinctions shall be made among creditors of a single class. If there be any basis for making distinctions between them it must be found in the particular circumstances giving rise to their respective claims. It is true that the above considerations deserve some weight; but the real determinant is whether or not the granting of a preference will deprive the estate of assets which the general creditors might reasonably have believed would be available for distribution to them.

In the principal case, therefore, the decision is wholly justified. Since the bank was a small one and could not have met the railroad's pay checks with its own cash, it must have used a large part of the identical currency received to accomplish the purpose. Moreover, since the bank received the cash only a day or two before the checks were presented and since the amount which was not used was remitted as soon as all the checks had been presented, the money which the railroad sent the bank never became part of its general assets, notwithstanding the fact that it may have been mingled with them. Consequently, the general creditors had no reason to believe that they would receive a dividend out of the money remaining from the railroad's shipment of currency.

Priorities Between Creditors and Claimants Under Stock Repurchase Agreements

A former stockholder sought to file proof of claim with the receiver of an insolvent corporation for instalments due him under a stock repurchase agreement which provided *inter alia* that the claimant might retain his stock upon returning the instalments paid. At the date the contract was made, eight years before, the corporation had ample assets to satisfy all creditors despite the contemplated capital reduction, and the other stockholders assented to the plan. The Court of Chancery of New Jersey[1] held that the repurchase agreement was valid; that the claimant had changed his status from stock-

18. Phoenix Title and Trust Co. v. Central Bank of Phoenix, *supra* note 14; Washington Shoe Manufacturing Co. v. Duke, 126 Wash. 510, 218 Pac. 232 (1923).

19. Leach v. Burton and Co. State Bank, 206 Iowa 675, 220 N. W. 113 (1928); Pacific States Savings and Loan Co. v. Commercial State Bank; Mississippi Central Railroad v. Conner, both *supra* note 11.

20. Brennan v. Tillinghast, *supra* note 10; Schofield Manufacturing Co. v. Cochran, 119 Ga. 901, 47 S. E. 208 (1904); Mattes v. Cantley, 39 S. W. (2d) 412 (Mo. App. 1931).

21. See cases cited notes 12 and 13, *supra*.

22. Star Cutter Co. v. Smith, 37 Ill. App. 212 (1890); Shopert v. Indiana National Bank, 41 Ind. App. 474, 83 N. E. 515 (1908); Townsend v. Athelstan Bank, 212 Iowa 1078, 237 N. W. 356 (1931).

23. See note 17, *supra*.

1. Wolff v. Heidritter Lumber Co., 163 Atl. 140 (N. J. 1932).

holder to creditor despite his option to rescind the contract; and that he should be permitted to share *pro rata* with the corporation's general creditors.[2]

If, as in the instant case, a stock repurchase agreement is not fraudulent and does not render the corporation insolvent, money paid out pursuant to the contract can not be recovered back from the vendor for the benefit of corporate creditors upon subsequent insolvency.[3] And if the agreement is executory, it is generally enforceable by the former stockholder against the corporation, if at the time of his suit for collection the company has a surplus equal to the amount of his claim.[4] But if the corporation is insolvent at the time payment is sought or would be rendered insolvent by payment, most courts, contrary to the present decision, have not allowed former stockholders whose claims are founded on executory stock repurchase contracts to share *pro rata* with the general creditors.[5] It is apparently immaterial whether the claim is based upon notes given for the stock or simply upon an agreement to repurchase.[6] In a few instances the reason given has been the existence of a statute expressly forbidding the repurchase of its own stock by a corporation except with surplus;[7] but usually courts have invoked the doctrine that the capital stock of a corporation upon insolvency is a trust fund to be

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2. A New Jersey corporation has the right to buy in its own stock for a legitimate corporate purpose. Berger v. United States Steel Corp., 63 N. J. Eq. 809, 53 Atl. 68 (1902); Oliver v. Rahway Ice Co., 64 N. J. Eq. 596, 54 Atl. 460 (1903). The right of a corporation to repurchase its own stock has been fully discussed. See Wormser, *The Power of a Corporation to Acquire its Own Stock* (1915) 24 YALE L. J. 177; Note (1914) 27 HARV. L. REV. 747; 11 FLETCHER, CYCLOPEDIA OF CORPORATIONS (Permanent Ed. 1932) § 5148. The court determined that the repurchase in the instant case was for a legitimate corporate purpose since at that time it furthered the best interests of the corporation.

3. Tierney v. Butler, 144 Iowa 553, 123 N. W. 213 (1909); Joseph v. Raff, 82 App. Div. 47, 81 N. Y. Supp. 546 (1st Dep't 1903), *aff'd*, 176 N. Y. 611, 68 N. E. 1118 (1903). *Cf.* Coleman v. Tepel, 230 Fed. 63 (C. C. A. 3d, 1916); Jesson v. Noyes, 245 Fed. 46 (C. C. A. 9th, 1917), *cert. den.*, 245 U. S. 667 (1917), 247 U. S. 512 (1918); Crandall v. Lincoln, 52 Conn. 73 (1884); Clapp v. Peterson, 104 Ill. 26 (1882); Atlanta & Walworth Butter & Cheese Association v. Smith, 141 Wis. 377, 123 N. W. 106 (1909). Insolvency is used in the equity or bankruptcy sense.

4. Lumber Co. v. Telephone Co., 127 Iowa 350, 101 N. W. 742 (1904); Richards v. Wiener Co., 207 N. Y. 59, 100 N. E. 592 (1912); see Cross v. Beguelin, 252 N. Y. 262, 169 N. E. 378 (1929); Note (1928) 26 MICH. L. REV. 790; Note (1930) 39 YALE L. J. 902; *cf.* Miles, *Stockholders as General Creditors* (1928) 17 KY. L. J. 3. By surplus is merely meant the amount by which the assets exceed the liabilities including the stated capital stock.

5. Keith v. Kilmer, 261 Fed. 733 (C. C. A. 1st, 1919), *cert. den.*, 252 U. S. 578 (1920); Matthews Bros. v. Pullen, 268 Fed. 827 (C. C. A. 1st, 1920); Clark v. Clark Machine Co., 151 Mich. 416, 115 N. W. 416 (1908); *cf.* Olmstead v. Vance & Jones Co., 196 Ill. 236, 63 N. E. 634 (1902); Rider v. Delker & Sons Co., 145 Ky. 634, 140 S. W. 1011 (1911). But see First Trust Co. v. Illinois Central Rr. Co., 256 Fed. 830 (C. C. A. 8th, 1919).

6. See cases cited note 5, *supra*.

7. *In re* Fechheimer Fishel Co., 212 Fed. 357 (C. C. A. 2d, 1914), *cert. den.*, 234 U. S. 760 (1914); Richards v. Wiener Co.; Cross v. Beguelin, both *supra* note 4.

administered for the benefit of creditors, and have refused to class as creditors claimants under stock repurchase agreements.[8]

The question of priority presented in such cases, however, should not be determined by the arbitrary application of any rule to all cases nor to all creditors in a single case. For example, a distinction should in some cases be drawn between the rights of those who advanced credit before the stock repurchase agreement and those who became creditors thereafter. The claims of the former should always be preferred to claims arising later from executory contracts to repurchase; for such creditors advanced their money relying upon a stated amount of capital of which the contributions of the withdrawing stockholders were a part.[9] On the other hand, the claims of persons who gave credit to the corporation after the stock repurchase agreement should not be preferred to the claims of withdrawing stockholders if adequate notice of the repurchase agreement was afforded them. But if the consequent reduction of capital is not displayed on the balance sheet of the corporation, the probability that, in the absence of actual notice, subsequent creditors were misled as to the company's true financial condition should require a preference in their favor.[10] Ordinarily there would not be sufficient notice if the stock repurchase agreement was merely carried on the books of the corporation as a liability.[11] At least one court has recognized these distinctions and refused to allow creditors with notice to enforce their claims ahead of mortgagees who received bonds in return for stock of the corporation.[12]

In the principal case there was a further consideration which, it may be argued, demanded a result contrary to that reached, although the court apparently did not take it into account.[13] If a stockholder, upon entering a repurchase agreement, wishes to be classed as a creditor upon insolvency, it should be apparent that he has irrevocably changed his position from that of shareholder to that of creditor. He should not be permitted, as was the claimant in the instant case, to retain for himself the dual benefits of stock-

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8. Keith v. Kilmer; Olmstead v. Vance & Jones Co.; Clark v. Clark Machine Co., all *supra* note 5.

9. From the point of view of such creditors, there is a plain distinction between a subsequent creditor and a claimant under a stock repurchase contract. The subsequent creditor has advanced additional funds to the corporation, but the retiring stockholder has merely depleted, or attempted to deplete, by the amount of his repurchase claim, the capital upon the security of which the existing creditors relied.

10. It is not to be implied that the repurchase agreement should be wholly invalidated. In any event the former shareholders should be allowed to enforce their claims before stockholders existing at the time the claim is presented are allowed to participate in the distribution of assets. Van Brocklin v. Queen City Printing Co., 19 Wash. 552, 53 Pac. 822 (1898).

11. If the transaction is recorded merely as a debt, although the sum of the corporation's liabilities will be accurate, the creditor will be deceived as to the amount of "cushion" of capital stock upon which he may rely.

12. First Trust Co. v. Illinois Central Rr. Co., *supra* note 5; see Cross v. Beguelin, *supra* note 4.

13. Speaking of the repurchase contract the court said: ". . . it converted him at once into a creditor and not a stockholder, although there was a clause giving him the opportunity to repurchase the stock . . ." *Supra* note 1, at 141.

holder and creditor by reserving an option to buy the stock back from the corporation merely by returning the money received.[14]

Extraterritorial Enforcement of Tax Claim Reduced to Judgment

The State of New York brought suit against a New Jersey corporation doing business in New York for the collection of a franchise tax. Jurisdiction was obtained and judgment rendered for the state. Subsequently, the state instituted suit in New Jersey to recover on the judgment. Plaintiff's motion to strike out defendant's answer was granted.[1] The court admitted that an action for the collection of foreign taxes is not ordinarily maintainable, but held that the original character of the claim had here been merged in the judgment of the New York court and that full faith and credit should be accorded it.

Historically, the refusal to enforce foreign tax claims is explained on the theory that the English courts considered such enforcement injurious to local commerce.[2] More recently it has been suggested[3] that a state should not enforce a foreign tax suit because of the additional burden thereby placed upon its courts and the difficulties attendant upon the assessment of a tax in conformity with complex foreign revenue statutes. In addition, the very nature of the tax might be inconsistent with established local policy.[4] But it may be questioned whether these arguments are applicable to the situation in the principal case, where the tax claim was reduced to judgment in the foreign state, since the local court would have to consider only matters of jurisdiction or defenses which might be raised on collateral attack in the taxing state.[5]

Causes of action of a penal nature are also unenforceable in a foreign jurisdiction.[6] But despite some text writers who state the contrary,[7] suits in one state for the enforcement of a judgment rendered in another state upon

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14. *Cf.* Note (1927) 76 U. of Pa. L. Rev. 80; Berl, *Creditors and Stockholders* (1928) 76 U. of Pa. L. Rev. 814.

1. People of State of New York v. Coe Manufacturing Co., 162 Atl. 872 (N. J. 1932).

2. Note (1929) 29 Col. L. Rev. 782.

3. *Cf.* Foley, S., in Matter of Martin's Estate, 136 Misc. 51, 54, 240 N. Y. Supp. 393, 396 (Sur. Ct. 1930), *aff'd*, 255 N. Y. 359, 174 N. E. 753 (1931). The Supreme Court in Moore v. Mitchell, 281 U. S. 18, 24 (1930), refused to pass upon the question whether a federal court in one state should enforce state revenue statutes of another. In one instance a state was allowed to file a claim for a franchise tax with a receiver appointed in another state to liquidate corporate assets. Holshouser Co. v. Gold Hill Copper Co., 138 N. C. 248, 50 S. E. 650 (1905).

4. See L. Hand, J., concurring in Moore v. Mitchell, 30 F. (2d) 600, 604 (C. C. A. 2d, 1929), *aff'd*, 281 U. S. 18 (1930).

5. See Hampton v. McConnell, 16 U. S. 234 (1818).

6. Wharton, Conflict of Laws (3d ed. 1905) § 4; Minor, Conflict of Laws (1901) § 10.

7. Goodrich, Conflict of Laws (1927) § 204; 3 Freeman, Judgments (5th ed. 1925) § 1360. But see 2 Black, Judgments (1891) § 871.

such causes of action have been allowed,[8] and more recently approved, by state tribunals.[9] And the Supreme Court has never directly decided whether or not a judgment, based either on a penal or revenue claim, must be given full faith and credit in a sister state.[10] In *Huntington v. Attrill*,[11] the plaintiff in effect brought a suit on a New York judgment in Maryland. The defense was that the original suit was founded on a penal cause of action and was therefore unenforceable in any state but New York. The Supreme Court decided in favor of the plaintiff, but in placing its decision on the ground that the original cause of action was not of a penal nature, the court intimated that the fact that the suit was based on a judgment was immaterial.[12] In *Wisconsin v. Pelican Insurance Company*,[13] the statement was made that even if suit were brought upon a previous judgment, a foreign state could not entertain it if the original action were of a penal nature or to enforce a tax claim.[14] However, the force of the dictum in the *Pelican* case has been considerably weakened by later expressions of the court apparently requiring a more rigid adherence to the full faith and credit clause.[15] Furthermore, the Court has subsequently stated that in a suit on a judgment of a sister state, where valid jurisdiction has been obtained, only such defenses are allowable as would be maintainable after final judgment in the state where it was rendered.[16] And the Court has recently decided that the fact that an original suit on a cause of action arising in a foreign jurisdiction would not be maintainable in local tribunals is no justification for a refusal to give full faith and credit to a suit brought on the claim after it has been reduced to judgment in the foreign state.[17]

The historical ground for denying enforcement of foreign tax claims has, of course, disappeared as between the several states. Moreover, the present concentration of wealth in the form of intangibles easily transported across state lines has rendered more difficult the problem of enforcement.[18] These considerations, in addition to the immediate and pressing need of the states

8. Schuler v. Schuler, 209 Ill. 522, 71 N. E. 16 (1904); State of Indiana v. Helmer, 21 Iowa 370 (1866); Healy v. Root, 28 Mass. 389 (1831); Spencer v. Brockway, 1 Ohio 259 (1824). *Contra*: Arkansas v. Bowen, 3 App. D. C. 537 (1894).

9. Halsey v. McLean, 94 Mass. 438, 440 (1866); Symons v. Eichelberger, 110 Ohio St. 224, 239, 144 N. E. 279, 283 (1924).

10. *Cf.* GOODRICH, *loc. cit. supra* note 7.

11. 146 U. S. 657 (1892).

12. However, the court may have wished to place its decision on this ground in order to limit the meaning of the word "penal" and thus restrict the non-enforcement of such claims.

13. 127 U. S. 265 (1888).

14. *Id.* at 290.

15. See Fauntleroy v. Lum, 210 U. S. 230 (1908); Bradford Electric Light Co. v. Clapper, 286 U. S. 145 (1932); *cf.* Atchison, Topeka & Santa Fe Ry. Co. v. Nichols, 264 U. S. 348 (1924); James-Dickinson Co. v. Harry, 273 U. S. 119 (1927).

16. Roche v. McDonald, 275 U. S. 449 (1928); Note (1928) 28 COL. L. REV. 659.

17. Kenney v. Loyal Order of Moose, 252 U. S. 411 (1920); Comment (1919) 28 YALE L. J. 264.

18. Leflar, *Extrastate Enforcement of Penal and Governmental Claims* (1932) 46 HARV. L. REV. 193, 216.

for revenue, might well outweigh the traditional opposition to extraterritorial enforcement of tax claims. Clearly at least, the constitutional mandate of full faith and credit affords ample support for the enforcement by a local court of such claim when it has been first reduced to judgment in the taxing state.

IMMUNITY FROM DOUBLE LIABILITY OF NOMINEE OWNING BANK STOCK FOR CORPORATION

THE Globe Financial Corporation, a bank stock holding company,[1] held in 1930 a controlling stock interest in four national banks.[2] To avoid the technical difficulties incident to a corporation's purchase and sale of stock, the corporation established a partnership consisting of its principal officers and directors[3] to hold its bank stock. The partnership had no capital, and no partner was to claim any beneficial interest in the securities held. In 1931 one of the banks controlled by the Globe Financial Corporation became insolvent, and an assessment equal to the par value of their shares was levied against the shareholders. In an action in which the bank's receiver sought to recover this assessment from the partners as nominal holders of the shares owned by the corporation, the court determined that since there was neither co-ownership, nor a business, nor any profit sharing, no partnership existed; and that therefore the defendants could not be assessed.[4]

The slow and cumbersome procedure which has been developed for the transfer of corporate stock has arisen from the burden placed upon corporations for wrongful transfers. A corporation transferring shares of its stock on its books when the owner of the stock lacked power to sell it, or did not authorize the sale, may be required to re-issue to the owner an equal number of shares or to pay him their value.[5] The liability thus imposed on the corporation is absolute,[6] the exercise of due care not being a defense. If the corporation has delegated the transferring of its stock to a bank or trust company as transfer agent, the latter may be held liable for an unlawful transfer either to its corporate principal, or directly to the stock owner.[7] To protect themselves from such liability, corporations and their transfer agents ordinarily demand of a vendor of stock clear proof of his power and authority to sell.[8] When

1. For a discussion of bank holding companies see BONBRIGHT AND MEANS, THE HOLDING COMPANY (1932) at 319.

2. MOODY, BANKS, INSURANCE, REAL ESTATE, INVESTMENT TRUST (1931) at 2648.

3. *Ibid.*

4. Schumacker v. Davis, 1 F. Supp. 959 (E. D. N. Y. 1932). A partnership is an association of two or more persons to carry on as co-owners a business for profit. N. Y. PART. LAW (1919) § 10.

5. BALLANTINE, CORPORATIONS (1927) § 151.

6. Western Union Telegraph Co. v. Davenport, 97 U. S. 369 (1878); Mackenzie v. Engelhard Co., 266 U. S. 131 (1924).

7. Conover v. Guarantee Trust Co., 88 N. J. Eq. 450, 102 Atl. 844 (1917); Clarkson Home v. Missouri, Kansas & Texas Ry. Co., 182 N. Y. 47, 74 N. E. 571 (1905); Elliott, *Transfer Agents and Registrars* (1931) 4 So. CALIF. REV. 203.

8. Clarkson Home v. Missouri, Kansas & Texas Ry. Co., *supra* note 7, at 54, 74 N. E. at 575.

the vendor is a corporation, the authority of its agents and officers is usually evidenced by a certified copy of resolutions adopted by the board of directors authorizing the transfers; by a certified copy of the resolutions appointing or electing the officers who sign the certificates in behalf of the corporation; and by a certificate from the secretary to the effect that such resolutions as are submitted are still in full force and effect on the date of transfer.[9]

These rules, which have been formulated by the New York Stock Transfer Association and apparently accepted by the New York Stock Exchange,[10] have proved too complex for use in present-day business transactions. To avoid them many corporations have adopted the device of placing their stock in the name of a nominee by whom transfers may be quickly and conveniently effected. The partnership in the principal case was formed as such a nominee, in apparent reliance upon the rule that no supporting documents are required for a transfer of stock by a partnership.[11] The attempt by the insolvent bank's receiver to hold the members of the fictitious partnership individually liable for the stock assessment was a potential threat to the stock nominee device. In going out of its way to protect the officers of the corporation by denying that a real partnership had been created, the court in effect recognized that the rules for the transfer of stock by corporations have become archaic. Perhaps a more adequate method of meeting the problem would lie in a drastic modification of those rules.

Assignability of Easement Appurtenant to Contemplated Dominant Estate

In classifying particular easements as either assignable or non-assignable, courts have long been accustomed to state their conclusions in terms of "easements appurtenant" and "easements in gross." These labels, however, are of little assistance in determining the assignability of an easement when the deed of grant, in the light of surrounding facts, leaves the matter in doubt. In such circumstances the courts endeavor to ascertain whether the intentions of the parties were that the easement should be assignable.[1] Thus, if the parties clearly intended to create an assignable easement, words of inheritance[2] and

9. Christy, The Transfer of Stock (1929) § 214. Such certificate need not always be under the corporate seal. Hutchinson v. Rock Hill Real Estate & Loan Co., 65 S. C. 45, 43 S. E. 295 (1902).

10. See Rules of the New York Stock Transfer Association discussed in Christy, *loc. cit. supra* note 9; see Rules of the New York Stock Exchange reprinted in Meyer, The Law of Stock Brokers and Stock Exchanges (1931) 890.

11. Christy, *op. cit. supra* note 9, § 217.

1. In practically every case involving the assignability of easements this is stated. See, for example, Goodwillie Co. v. Commonwealth Electric Co., 241 Ill. 42, 72, 89 N. E. 272, 283 (1909); Cleveland, Cincinnati, Chicago and St. Louis Ry. Co. v. Griswold, 51 Ind. App. 497, 509, 97 N. E. 1030, 1034 (1912); Weigold v. Bates, 144 Misc. 395, 397, 258 N. Y. Supp. 695, 698 (Sup. Ct. 1932). That the easement is beneficial to the grantee's estate is, of course, evidence of the parties' intent. See Eastman v. Piper, 68 Cal. App. 554, 568, 229 Pac. 1002, 1007 (1924); Smith v. Garbe, 86 Neb. 91, 96, 124 N. W. 921, 923 (1910); *cf.* Burgas v. Stoutz, 174 La. 586, 141 So. 67 (1932).

2. Messenger v. Ritz, 345 Ill. 433, 178 N. E. 38 (1931).

reference to the dominant estate[3] in the deed of grant are not essential; nor is express mention of an easement intended to be assignable necessary in order to pass the benefit[4] with a conveyance of the dominant estate and the burden with the servient.[5]

This regard for the intentions of the parties is well illustrated in the recent case of *Lindenmuth v. Safe Harbor Water Power Corporation*.[6] In 1902 the promoter of a water power project secured from a landowner on the Susquehanna River a deed which granted the right of overflowing the grantor's land by the erection of a dam to the promoter, his heirs and assigns, and released them from all resulting damages. The deed was recorded, but the promoter apparently took no steps to acquire a dam site or to build a dam, and in 1905 he assigned his rights to another. In 1930 the rights granted by the deed were assigned to defendant, who immediately began to erect a dam. Plaintiff, a remote assignee of the original grantor, prayed an injunction to restrain defendant from overflowing his land without proper condemnation proceedings. The court, emphasizing that the original parties apparently had intended to create a permanent and assignable right, held that the deed granted an easement appurtenant to the dam which the grantee expected to build. The injunction was therefore refused.

The court's conclusion that the original parties intended to create an assignable right seems well justified, even if the fact that the grantee owned no dominant estate were said to necessitate the conclusion that the easement was in gross. The objection that such easements should not be assignable because they may constitute unknown and hence irremovable clogs upon title[7] would not be available in this case since both the original grant and the subsequent transfers of the easement were recorded. Nor would the danger of surcharge[8] present a serious objection, since the flowage right would be subject to the

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3. Hopper v. Barnes, 113 Cal. 636, 45 Pac. 874 (1896); Nay v. Bernard, 40 Cal. App. 364, 180 Pac. 827 (1919); Goldstein v. Raskin, 271 Ill. 249, 111 N. E. 91 (1915); Lidgerding v. Zignego, 77 Minn. 421, 80 N. W. 360 (1899); Tusi v. Jacobsen, 134 Ore. 505, 293 Pac. 587 (1930).

4. Khouri v. Dappinian, 46 R. I. 163, 125 Atl. 268 (1924); see 2 TIFFANY, REAL PROPERTY (2d ed. 1920) § 448. The easement must be in existence before the conveyance. Duvall v. Ridout, 124 Md. 193, 92 Atl. 209 (1914).

5. See CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH LAND" (1929) 52. But most courts state the rule as qualified by the necessity of constructive notice from the recording of the deed. See Riddle v. Jones, 191 Ky. 763, 768, 231 S. W. 503, 506 (1921); Burgas v. Stoutz, *supra* note 1, at 593, 141 So. at 69. If one estate derives from another an advantage of a permanent and self-apparent character, the purchaser of the servient estate is deemed to have "actual" notice. See Gulick v. Hamilton, 287 Ill. 367, 373, 122 N. E. 537, 539 (1919); Greve v. Caron, 233 Mich. 261, 267, 206 N. W. 334, 335 (1925). A gratuitous grantee assumes the burden without either constructive or actual notice. Riddle v. Jones, *supra*.

6. 163 Atl. 159 (Pa. 1932).

7. This objection to the assignability of easements in gross is raised by CLARK, *op. cit. supra* note 5, at 57-59.

8. See Comment by Professor Vance in (1923) 32 YALE L. J. 813, 817, suggesting that easements in gross not open to surcharge have been held assignable. But see Simes, *The Assignability of Easements in Gross in American Law* (1924) 22 MICH. L. REV. 521, 524; and CLARK, *op. cit. supra* note 5, at 60-64.

same limitations in the hands of an assignee as it would be in those of the original grantee. But the court did not find it necessary thus to meet the objections to the assignment of an easement in gross. Clearly, the parties intended to create a right which by its very nature could not be personal to the grantee, but was incident and beneficial only to the dam which the parties expected to be built. The court's declaration that the easement was attached to the dam as a contemplated dominant estate therefore appears sound, though authority for the recognition of such a dominant estate is lacking.[9] It seems possible, however, that the court could have reached the same result without discussing the distinction between easements appurtenant and in gross,[10] on the ground that the parties expected the flowage rights to be assigned before being exercised [11] and that the deed was intended primarily to bind the grantor's assignees to release the owners of the right from damages caused by its future exercise.[12]

Availability of Tentative Trust Fund for Payment of Testamentary Expenses of Depositor

Judicial desire to uphold savings bank deposits made by one person in trust for another as a convenient method of disposing of small estates without the necessity of compliance with testamentary requirements, has found expression in the highly elaborate tentative trust doctrine.[1] Varying situations presented

9. But *cf.* Gardner v. San Gabriel Valley Bank, 7 Cal. App. 106, 93 Pac. 900 (1907) (easement intended to be appurtenant to a second story not yet built; upheld as appurtenant to the land); Nash v. Eliot Street Garage Co., 236 Mass. 176, 128 N. E. 10 (1920) (right of way attached to occupants of certain houses erected subsequent to time of grant); Pioneer Sand and Gravel Co. v. Seattle Construction and Dry Dock Co., 102 Wash. 608, 173 Pac. 508 (1918) (contract for creation of future easement enforced against assignee as an equitable covenant running with the land, but dominant estate apparently existed when contract was made).

10. *Cf.* Tide Water Pipe Co. v. Bell, 280 Pa. 104, 124 Atl. 351 (1924).

11. See Saratoga State Waters Corp. v. Pratt, 227 N. Y. 429, 445, 125 N. E. 834, 839 (1920), where it was held that since the parties in the written instrument expressly contemplated that the rights granted were to be transferred to plaintiff, the rule of non-assignability of easements in gross did not apply. In the principal case the court might have inferred such an understanding from the terms of the deed, or taken judicial notice of the fact that power dams are generally erected by corporations rather than by individuals.

12. See Tide Water Pipe Co. v. Bell, *supra* note 10, at 113, 124 Atl. at 354.

1. In Matter of Totten, 179 N. Y. 112, 125, 71 N. E. 748, 752 (1904), the New York theory of tentative trusts is expounded as follows: "A deposit by one person of his own money in his own name as trustee for another, standing alone, does not establish an irrevocable trust during the lifetime of the depositor. It is a tentative trust merely, revocable at will, until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration, such as delivery of the passbook or notice to the beneficiary. In case the depositor dies before the beneficiary without revocation, or some decisive act or declaration of disaffirmance, the presumption arises that an absolute trust was created as to the balance on hand at the death of the depositor." For a fuller and more exhaustive discussion of the New York doctrine of

by constant litigation on these trusts have forced the courts to become increasingly technical in their efforts to preserve the intention of the depositor.[2] An example of the doctrinal manipulations which are used to reach a desirable result is found in the recent case of *Matter of Siegelbaum*,[3] in which the funeral and administration expenses of the intestate were charged against a savings bank deposit made by the intestate in trust for another, because the general assets of the estate in the hands of the administrator were otherwise insufficient. The court, admitting that "candor compels the concession that it [the tentative trust theory] amounts to a judicial addition to the mode permitted by Section 21 of the Decedent Estate Law for the transmission of property on death," declared in effect that the ordinary rules governing such transfers should apply. Payment of the expenses in question out of the savings account was therefore justified by analogizing the deposit in trust to a specific bequest which would be available for testamentary expenses where the balance of the estate was insufficient to pay them. "For those, however, to whom such a frank recognition of the verities of the nature of the transaction would be abhorrent," the court reached the same result on the basis of the tentative trust theory by reasoning that the presumption of an absolute trust arising at the death of the depositor without a prior revocation was rebutted to the extent necessary to pay reasonable funeral and administration expenses.

Upon the death of a depositor of money in a savings bank in trust for another, the creditors of the depositor may seek payment of their claims out of this fund,[4] even though, according to the tentative trust theory, the trust becomes absolute at that moment. The depositor has a right to the absolute disposition of the fund, since he may revoke the trust at any time before death by "some decisive act or declaration of disaffirmance"[5] or make any withdrawals without subjecting the estate to liability to the beneficiary.[6] The depositor, therefore, is regarded as being under a duty to apply this fund to the payment of claims of creditors existing during his lifetime, since to hold otherwise would permit him to place his property beyond the reach of his creditors.

This proposition, however, furnishes no authority for a similar result in the case of claims arising out of testamentary expenses. These claims, having come into existence after the death of the depositor, do not constitute debts of the deceased. Consequently, were there no pre-existing creditors, the depositor would practice no fraud by a disposition of his property through the use of the savings bank trust device. The court, therefore, finding itself without

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tentative trusts, see Larremore, *Judicial Legislation in New York* (1905) 14 YALE L. J. 312, 315; Scott, *Trusts and the Statute of Wills* (1930) 43 HARV. L. REV. 521, 539; Comment (1928) 37 YALE L. J. 1133; Comment (1933) 81 U. OF PA. L. REV. 737.

2. For instance, the execution of a will inconsistent with the existence of the trust is considered a sufficient revocation, even though the trust is said to become absolute upon the death of the testator, at which time the will also takes effect. *In re* Murray's Estate, 143 Misc. 499, 256 N. Y. Supp. 315 (Sur. Ct. 1932); Note (1932) 42 YALE L. J. 141.

3. N. Y. L. J., Mar. 1, 1933, at 1226.

4. Beakes Dairy Co. v. Berns, 128 App. Div. 137, 112 N. Y. Supp. 529 (2d Dep't 1908).

5. Matter of Totten, *supra* note 1.

6. *Ibid.*

support for the precise situation involved in the instant case, was forced to adopt an admittedly complex rationalization to make the only equitable distribution of the fund.

Election of Intestate Share by Surviving Spouse in Absence of Testamentary Gift.

A new complication arising under § 18 of the New York Decedent Estate Law was considered in a recent case, thus adding to the slowly growing collection of precedent established since the statute was given new form in 1929.[1] Under the provisions of the amended law, the surviving spouse of a testator is accorded the right to elect an intestate share against the terms of the decedent's will, upon compliance with certain prescribed formalities.[2] In the instant case a widow, who had received nothing under her husband's will, failed to file a personal notice of election to take her intestate share within the six months allowed by statute.[3] Notice of election, bearing only the typewritten signature of her attorney and not filed in the surrogate's court as required, had allegedly been served upon one of the executors. In the widow's application for leave to file proper notice of election, it was held that the fact that the will made no provision for her did not dispense with the requirement of election, and that neither her participation in a will contest, subsequently withdrawn, nor the paper alleged to have been served by the attorney, was proper notice of an intention to take her intestate share.[4]

From the practical standpoint of certainty and effective administration there is much to be said for the court's insistence upon a narrow construction of the statute. In return for benefits decidedly more liberal than dower, compliance with its terms would seem a small procedural price to pay. Had the court on the other hand been at all solicitous of the welfare of the widow, it might well have presumed that she would elect to take against a will which gave her nothing. The equities in a case, however, have seldom moved courts to depart from the strict enforcement of estate laws. Thus where a period has been fixed for the filing of claims against a decedent's estate, an infant's claim arising out of the misappropriation of trust funds by a deceased guardian has been

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1. N. Y. Laws 1929, c. 229, § 4, amending N. Y. Decedent Estate Law (1909) § 18.

2. Decedent Estate Law, *supra* note 1, at §§ 82, 83; N. Y. Real Property Law (1909), amended by N. Y. Laws 1929, c. 229, § 201. Common law rights of dower and curtesy were abolished: *id.* § 189, 190.

3. As to the necessity of such personal election see *In re* Mihlman's Will, 140 Misc. 535, 251 N. Y. Supp. 147 (Sur. Ct. 1931). The same situation previously prevailed in the case of election against a testamentary provision in lieu of dower. Youngs v. Goodman, 240 N. Y. 470, 148 N. E. 639 (1925); Flynn v. McDermott, 183 N. Y. 62, 75 N. E. 931 (1905); Carmardella v. Schwartz, 126 App. Div. 334 (2d Dep't 1908); Report of N. Y. Decedent Estate Commission, 117 (1930). The court may elect for an incompetent devisee, however. Matter of Brown, 240 N. Y. 646, 148 N. E. 742 (1925).

4. *In re* Lottman's Estate, 145 Misc. 839, 261 N. Y. Supp. 400 (Sur. Ct. 1932). Accord: *In re* Zweig's Will, decided with the *Lottman* case, wherein all but a minor portion of the testator's estate was left to his widow for life.

disallowed when filed after the expiration of the statutory period.[5] Likewise, the non-claim statute has prevented recovery by a tardy creditor, although his delay was occasioned by the administrator's fraudulent misrepresentations.[6] Consistent with this indifference to individual hardship, other courts which have been confronted with a problem similar to that of the instant case, have reached the same conclusion,[7] reasoning that the election offered was an actual one between the benefit given under the will, which in fact was nothing, and the benefit to be secured by compliance with the estate law.[8] This somewhat paradoxical explanation of election has elsewhere been stated more plausibly as a choice, not between alternative benefits, but between the right of overriding or abiding by the testator's disposition of his property.[9]

Recent decisions under the New York Law have adopted interpretations more favorable to the widow, in striking contrast with the attitude of the present court. Thus, while the widow may in certain cases be barred from election if granted a life estate in an amount equal to her intestate share, the right has been held to exist where the life estate was conditioned on her remaining unmarried.[10] Although an estate until remarriage is technically a life estate, to effectuate the legislative intent to provide for the widow, the court construed the statute as embracing only an indefeasible life estate. Similarly, the execution of a codicil subsequent to the statute has been given the effect of sufficient republication of a will executed before its enactment, to extend to the surviving spouse the alleged advantages of § 18.[11]

Since the purpose of the statute is to enhance the protection of the surviving spouse by providing a more substantial substitute for the tenuous benefits of dower, an election might well be considered unnecessary where the will itself offers nothing to elect. Prior to the statute the widow was at least assured that she could not be deprived of her dower interest by a will which gave her nothing.[12] Though purporting to increase her protection, the law as here

5. Davis v. Shepard, 135 Wash. 124, 237 Pac. 21 (1925); noted in (1925) 35 YALE L. J. 504; *cf.* Morgan v. Hamlet, 113 U. S. 449 (1885).

6. Scherber v. Probate Court, 145 Minn. 344, 177 N. W. 354 (1920); noted in (1920) 30 YALE L. J. 97.

7. Shelton v. Sears, 187 Mass. 455, 73 N. E. 666 (1905); Shannon v. White, 109 Mass. 146 (1872); Minnich's Estate, 288 Pa. 355, 136 Atl. 236 (1927); Cunningham's Estate, 137 Pa. 621, 20 Atl. 714 (1890); Flower's Estate, 30 Pa. D. & C. 967 (1921); but *cf. In re* Dalsen's Estate, 165 Atl. 6 (Pa. 1933). See also 1 POMEROY, EQUITY JURISPRUDENCE, (4th ed. 1918) § 515 *et seq.*

8. Flower's Estate, *supra* note 7.

9. Kittel v. Smith, 136 Kans. 522, 16 P. (2d) 538 (1932); Cunningham's Estate, *supra* note 7, at 628, 20 Atl., at 715.

10. *In re* Byrne's Estate, 141 Misc. 346, 252 N. Y. Supp. 587 (Sur. Ct. 1931), *aff'd*, 235 App. Div. 782, 257 N. Y. Supp. 884 (1st Dep't 1932); noted in (1931) 31 COL. L. REV. 1202.

11. *In re* Greenberg's Will, 141 Misc. 874, 253 N. Y. Supp. 667 (Sur. Ct. 1931), *aff'd*, 236 App. Div. 733, 257 N. Y. Supp. 1078 (2d Dep't 1932); noted in (1932) 45 HARV. L. REV. 1122; Note (1931) 31 COL. L. REV. 128, 135; *In re* Simeone, 141 Misc. 737, 253 N. Y. Supp. 683 (Sur. Ct. 1931). But *cf. In re* Bertuch's Will, 225 App. Div. 773, 232 N. Y. Supp. 36 (2d Dep't 1928).

12. McGhee v. Stephens, 83 Ala. 466, 3 So. 808 (1888); Laurence v. Balch, 195 Ill. 626, 63 N. E. 506 (1902); Carper v. Crowl, 149 Ill. 465, 36 N. E. 1040 (1894); *In re* Zakroczymski, 222 Ill. App. 299 (1921); see Akin v. Kellogg, 119 N. Y. 441, 450, 23 N. E. 1046, 1048 (1890); Jenkins v. Mollenhauer, 105

construed actually removes all safeguard of a statutory return. Certainly in this case the alleged serving of notice, admittedly defective, and the widow's contest of the will, combined with the fact that the will itself left her nothing, would seem sufficiently to indicate her dissatisfaction with its terms.

Effect of National Bankruptcy Act Upon Assignments for Benefit of Creditors.

In the decisions of state courts determining the effect of national bankruptcy legislation upon local statutes regulating general assignments for the benefit of creditors, are to be found two conflicting views. Some courts have taken the position that the state assignment statute is unaffected by the Bankruptcy Act, except insofar as it provides for the discharge of the debtor.[1] Others, reasoning that the Bankruptcy Act and the assignment statutes have the identical purpose of securing an equal distribution of the insolvent estate among creditors, and that the two could not exist together, have reached the conclusion that the state regulation was entirely superseded by the federal law.[2] In such cases, however, the common law assignment has been regarded as still available to a debtor anxious to place his assets at the disposal of creditors,[3] though judicial supervision of the administration of the estate was lost.[4]

Although essentially a federal problem, it was not until recently that the United States Supreme Court had taken a definite stand on the question of the extent to which the state assignment statutes and national insolvency laws conflicted. The problem had been considered in the leading case of *Boese v. King*[5] where the Supreme Court sustained a statutory assignment against an attack by two dissenting creditors. The Court, while conceding the suspension of the discharge clause of the state statute, denied relief on the ground that since the assignment constituted an act of bankruptcy,[6] the attacking creditor could have secured an administration of the debtor's assets for the equal benefit of all creditors by a timely filing of an involuntary petition in bankruptcy.[7]

Misc. 15, 17, 173 N. Y. Supp. 870, 872 (Sup. Ct. 1918). Where an actual devise was made in lieu of dower, failure to elect dower constituted an election to take under the will. Schaffenacker v. Beil, 320 Ill. 31, 150 N. E. 333 (1926); Davis v. Mather, 309 Ill. 284, 141 N. E. 209 (1923); Akin v. Kellogg *supra*.

1. Patty-Joiner & Eubank Co. v. Cummins, 93 Tex. 598, 57 S. W. 566 (1900); *In re* Tarnowski, 191 Wis. 279, 210 N. W. 836 (1926).

2. Harbaugh v. Costello, 184 Ill. 110, 56 N. E. 363 (1900); Rowe v. Page, 54 N. H. 190 (1870), under the National Bankruptcy Act of 1867, 14 Stat. 536 (1867). See Ketcham v. McNamara, 72 Conn. 709 (1900).

3. Mayer v. Hellman, 91 U. S. 496 (1875); Pogue v. Rowe, 236 Ill. 157, 86 N. E. 207 (1908).

4. Harbaugh v. Costello, *supra* note 2.

5. 108 U. S. 379 (1883).

6. While there does not appear to have been any specific provision in the Act of 1867 making a general assignment an act of bankruptcy, it was so held. *In re* Burt, 4 Fed. Cas. 855 (C. C. Minn. 1870). There is no longer any doubt under the Act of 1898 as first written, 30 Stat. 546 (1898), or as the Act now reads as amended in 1926, 44 Stat. 662 (1926), 11 U. S. C. § 21(4) (1926).

7. Act of 1867, 14 Stat. 536 (1867).

The *Boese* case was generally regarded as holding that the assignment statute was not suspended, except as to its provision for the discharge of the debtor,[8] and for a time it seemed as though the confusion among the state courts had been settled. But that the motivating cause for the decision in the *Boese* case may simply have been a reluctance to grant the attacking creditors a preference at the expense of consenting creditors,[9] was brought out in the later Supreme Court decision of *International Shoe Co. v. Pinkus*.[10] Pursuant to a state insolvency law containing a discharge clause,[11] a debtor had transferred his assets to a receiver to be held for the benefit of creditors. A dissenting creditor, attacking the validity of the state law under which the transfer had been made, sought to satisfy a judgment out of the funds in the hands of the receiver. Mr. Justice Butler, who spoke for the Court, sustained the attack, distinguishing the *Boese* case principally on the ground that here the dissenting creditor could not have invoked the jurisdiction of the bankruptcy court, since his claim was less than $500.[12] The result of the *Pinkus* case was to revive the confusion surrounding the problem of the degree to which the state and national insolvency laws conflicted. For it seemed as though the Court had taken the anomolous position that the validity of the state insolvency laws depended upon the amount of the attacking creditor's claim.[13]

In two recent cases,[14] Mr. Justice Butler has done much to clear up this confusion. In both actions assignments were sustained against attacking creditors who had attempted to garnish the property of the debtors in the hands of their assignees. The respective state courts had held that except for the suspension of the discharge clauses, the assignment statutes were unaffected by the Bankruptcy Act.[15] In affirming this conclusion, the Supreme Court declared in unmistakable language that its future policy would be to follow the construction which the state courts place upon their local statutes. The

8. See Patty-Joiner & Eubank Co. v. Cummins, *supra* note 1, at 604, 57 S. W. at 568; Williston, *The Effect of a National Bankruptcy Law on State Laws* (1909) 22 HARV. L. REV. 547, 560; Note (1918) 16 MICH. L. REV. 540, 543.

9. "It can hardly be that a court is obliged in vindication of an act of Congress [the Bankruptcy Act] to lend its aid to those who, neglecting or refusing to avail themselves of its provisions, seek to accomplish ends inconsistent with that equality among creditors which those provisions were designed to secure." *Supra* note 5, at 386.

10. 278 U. S. 261 (1929), noted in (1929) 29 COL. L. REV. 519; (1929) 42 HARV. L. REV. 823; (1929) 27 MICH. L. REV. 696.

11. ARK. DIG. STAT. (Crawford & Moses, 1919) c. 93, §§ 5885-5893. Note that this statute was not the Arkansas law regulating general assignments for the benefit of creditors. The latter is found in *id.* c. 9, §§ 486-493.

12. "Three or more creditors who have provable claims against any person which amount in the aggregate . . . to five hundred dollars or over; or if all the creditors . . . are less than twelve in number, then one of such creditors whose claim equals such amount may file a petition . . . " 30 STAT. 561 (1898), 11 U. S. C. § 95 (b) (1926).

13. See Note (1932) 10 TEX. L. REV. 197.

14. Pobreslo v. Joseph Boyd Co., 53 Sup. Ct. 262 (U. S. 1933); Johnson v. Star, 53 Sup. Ct. 265 (U. S. 1933).

15. Pobreslo v. Guaranty Mortgage Corp., 242 N. W. 725 (Wis. 1932); Johnson v. Star, 47 S. W. (2d) 608 (Tex. 1932); see note 1, *supra*.

court gave no consideration to the fact that in one of the cases bankruptcy proceedings were not available to the plaintiff, whose claim was well under $500.[16] That factor, so influential in the *Pinkus* case, appears to be no longer of significance. An attempt was made to distinguish the *Pinkus* case on the ground that the statute there involved was an insolvency law distinct from the state's general assignment statute.[17] The weakness in this distinction, however, becomes apparent when it is noted that the Arkansas Supreme Court had construed the insolvency law in the *Pinkus* case as having the same effect as a general assignment.[18]

The policy adopted in the instant cases obviously does not create uniformity among the states, but rather permits them to determine for themselves their jurisdiction over general assignments. In one of the instant cases, the Supreme Court expressly sanctioned the Texas policy of permitting a debtor to make a statutory assignment for the sole benefit of those creditors who would release him from further liability.[19] Under such an assignment the debtor's property is immunized from garnishment or levy of execution by non-assenting creditors.[20] Nor can a consenting creditor later repudiate his agreement and sue for the balance of his claim, on the ground that the release is equivalent to a discharge and is therefore invalidated by the Bankruptcy Act.[21] Although the assignment could be set aside by bankruptcy proceedings, an attacking creditor would have nothing to gain, for in either case the property would be ratably distributed among creditors, and the debtor would receive an effective discharge. And since there would be no other property of the debtor from which creditors could satisfy their claims, there is a strong inducement for them to come in under the assignment. Thus with an adoption of the Texas rule, the general assignment with a discharge can be made available to the individual debtor as an effective and convenient method of settling with his creditors.

16. Johnson v. Star, *supra* note 14.
17. See note 11, *supra*.
18. International Shoe Co. v. Pinkus, 173 Ark. 316, 292 S. W. 996 (1927).
19. Johnson v. Star, *supra* note 14.
20. Patty-Joiner & Eubank Co. v. Cummins, *supra* note 1.
21. Hajek & Simecek v. Luck, 96 Tex. 517, 74 S. W. 305 (1903). The release provision under the Texas Statute is restricted to the case where the creditor receives at least one-third of his claim.