Notes

Taxability of Gain Resulting from Reduction of Liabilities

The taxpayer purchased a fleet of ships and in partial payment therefor gave $608,400 in serial notes secured by a mortgage on the fleet. Two years later a new contract was executed between vendor and purchaser whereby the latter was allowed to repurchase its notes at a cost substantially below their face value. Through this contract the taxpayer in 1924 reduced its indebtedness for $77,100 less than the face of the debt, and in 1925 for $81,300 less. The Commissioner of Internal Revenue treated these sums as taxable income with the result that a loss of $100,338.25 reported in the taxpayer's 1924 income returns was lowered to $23,238.25 and a taxable gain in 1925 of $5,633.58 was converted into taxable gain of $63,695.33. Evidence was introduced at a hearing before the Board of Tax Appeals[1] to prove that the fleet had shrunk in market value by an amount greater than the total saving realized in the discharge of the notes at less than par.[2] Upon this evidence the Board held that these sums had been erroneously included as income by the Commissioner since the final outcome of the transaction was a loss and since in essence the transaction amounted to a reduction in the purchase price of the fleet. This decision was reversed by the Circuit Court of Appeals on the ground that the contract between vendor and purchaser was concerned "solely about the notes and their value and not about the ships or their value," so that the transaction was purely one reducing indebtedness and not one involving a subsequent determination of purchase price.[3]

Net taxable income is computed annually by subtracting from gross receipts, derived from any source, certain deductions for expenses and losses incurred in the regular operations of the business.[4] The court, in attempting to ascertain when a given transaction has resulted in taxable income, ordinarily has regard for substance rather than form,[5] and rests its conclusion upon whether from a practical point of view the business has experienced an increase in net worth or has realized what is generally understood by the word "gain."[6] Thus the purpose of the income

1. Coastwise Transportation Corp. v. Commissioner of Internal Revenue, 22 B. T. A. 373 (1931); second hearing, 28 B. T. A. 725 (1933).

2. Total saving realized through cancellation of the notes amounted to $158,400, while depreciation of the ships in two years was calculated to be $184,080.27.

3. Commissioner of Internal Revenue v. Coastwise Transportation Corp., 71 F. (2d) 104 (C. C. A. 1st, 1934).

4. 43 Stat. 267 (1924), 26 U. S. C. A. § 953 (1928).

5. U. S. Treas. Reg. 77, Art. 41 (a) (1932). In Merchants' L. and T. Co. v. Smietanka, 255 U S. 509 (1921), it was said, at p. 519, "In determining the definition of the word "income" thus arrived at, this court has consistently refused to enter into the refinements of lexicographers or economists and has approved, in the definition quoted, what is believed to be the commonly understood meaning of the term which must have been in the minds of the people when they adopted the Sixteenth Amendment to the Constitution. See also Eisner v. Macomber, 252 U. S. 189, 206 (1920).

6. "'Income may be defined as the gain derived from capital, from labor, or from both combined,' provided it be understood to include profit gained through a sale or conversion of capital assets . . . Here we have the essential matter: *not* a gain *accruing* to capital, not a *growth* or *increment* of value *in* the investment; but a gain, a profit, something of exchangeable value, *proceeding from* the property, *severed from* the capital however invested

tax is to exact payment in accordance with ability to withstand the burden of such payment.[7] Accordingly, the saving realized through retirement of outstanding bonds at a cost below their par value has been called taxable income, since a decrease in liabilities has the same effect in increasing net worth as does an increase in assets.[8] And it must be conceded that in many instances either event will increase ability to pay taxes. But it is important to bear in mind that not every discharge of indebedness results in "severable," "realizable" gain, nor even in ability to discharge another obligation. Where, through a composition of creditors or by bankruptcy proceedings, the taxpayer is relieved of his liabilities, it is hardly arguable that he is therefore enabled to pay a tax on the amount that his liabilities are reduced.[9] This fact is artfully given recognition through a treasury regulation whereby the creditor is said to be the recipient of a "gift" from his creditors and therefore exempt from the income tax provisions.[10]

On three occasions the Supreme Court has been confronted with the general problem of when to tax under the Revenue law the discharge of liability effected at less than face value; but from the language used on those occasions there still remains an uncertainty as to how a situation such as presented by the instant case should be regarded. In the *Kerbaugh* case,[11] the taxpayer borrowed from the Deutche Bank about two million dollars, which sum was subsequently invested by a subsidiary in some unsuccessful construction projects and totally lost. In 1921 the taxpayer repaid its debt to the Deutche Bank in depreciated marks, realizing a saving of almost $700,000. The Supreme Court held that this saving was not taxable income because the result of the whole transaction was a loss, that "a mere

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or employed, and *coming in,* being *"derived,"* that is *received or drawn by* the recipient (the taxpayer) for his *separate* use, benefit and disposal;—*that* is income derived from property. Nothing else answers the description." Eisner v. Macomber, 252 U. S. 189, 207 (1920). "The income or profit of a given period may be defined as the increase in proprietorship which has taken place during that period, making due allowance for any part of such increment as may have been distributed." HATFIELD, ACCOUNTING (1928) 241.

7. "Adam Smith, in his WEALTH OF NATIONS, formulated four principles of taxation that have since become classic in the field of Public Finance. According to Smith: '(1) The subjects of every state ought to contribute to the support of the government, as nearly as possible in proportion to their respective abilities.'" HEWITT, THE DEFINITION OF INCOME AND ITS APPLICATION IN FEDERAL TAXATION (1928) 81-85.

8. "If, however, the corporation purchases and retires any of such bonds at a price less than the issuing price or face value, the excess of the issuing price or face value over the purchase price is gain or income for the taxable year." U. S. Treas. Reg. 77, Art. 68 (1) (c) (1932).

See Comment (1930) 40 YALE L. J. 960 for an accounting analysis of the proposition that the net effect of repurchasing bonds below par "is a reduction of liabilities accompanied by a corresponding increase in net worth." See also Wakefield, *Gain on Retirement of Bonds Issued for Property* (1933) 11 TAX MAGAZINE 249.

9. Commissioner of Internal Revenue v. Simmons Gin Co., 43 F. (2d) 327 (C. C. A. 10th, 1930); Burnet v. John F. Campbell Co., 50 F. (2d) 487 (App. D. C. 1931); Dallas Transfer and Terminal Warehouse Co. v. Commissioner of Internal Revenue, 70 F. (2d) 95 (C. C. A. 5th, 1934); Meyer Jewelry Co., 3 B. T. A. 1319 (1926); Towers and Sullivan Co., 25 B. T. A. 922 (1932).

10. "The cancellation and forgiveness of indebtedness may amount to a payment of income, to a gift, or to a capital transaction, dependent upon the circumstances." U. S. Treas. Reg. 77 Art. 64 (1932); 1 STANDARD FED. TAX SERVICE, par. 77.04.

11. Bowers v. Kerbaugh Empire Co., 271 U. S. 170 (1926).

diminution of loss is not gain, profit, or income."[12] Five years later in *United States v. Kirby Lumber Company*,[13] where the taxpayer issued its bonds for cash and later in the same year repurchased and retired some of them at a price below their face value, the court held that taxable gain had been realized to the extent of the difference between the par value of the bonds and the repurchase price. In distinguishing the *Kerbaugh* case, Mr. Justice Holmes remarked that "here there was no shrinkage of assets and the taxpayer made a clear gain."[14] In the *American Chicle Company* case,[15] it was decided, again in the absence of any evidence of losses, that a taxpayer who in part payment for the assets of another corporation contracted to assume that corporation's bonded indebtedness and who subsequently retired those bonds at a price below their face value must pay an income tax on the difference between the par value of the bonds and the price at which they were retired.

Thus the Court has indicated that where there has been a reduction in obligation, but also a corresponding loss resulting from the same transaction, no taxable gain would be deemed to result therefrom. But it is not clear what is meant by "corresponding loss." In the *Kerbaugh* case liability was excused by virtue of a loss, through business transactions, of the asset giving rise to the obligation. Subsequently it has been pointed out that these same losses previously were or could have been used as an offset against otherwise taxable income. And since to say that the same losses now again avoid liability for an otherwise taxable transaction is in effect to permit a second deduction of the same loss, the holding of the *Kerbaugh* case has been severely criticized.[16] But this same criticism cannot be directed against the loss claimed to exist in the present case. The loss in the present case is claimed to result either from an originally mistaken concept of value, or from a subsequent change due to general market trends or to the condition of the particular business. Since the asset is still owned and used by the corporation, it might be legally difficult to say that any of these factors have caused a loss; for it is ordinarily said that

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12. The *Kerbaugh-Empire Company* decision, notwithstanding the treasury regulation, was interpreted by the Board of Tax Appeals in subsequent cases to mean that no discharge of indebtedness below par is taxable income, even when corresponding losses are not present. To almost every decision of the Board on this point the tax Commissioner protested. See Comment (1930) 40 YALE L. J. 960; cases cited note 3, *supra*.

13. 284 U. S. 1 (1931).

14. After this decision the Board of Tax Appeals reversed its former stand, (see note 12 *supra*) and held a reduction of indebtedness realized through repurchase of bonds below par to be taxable income in the following cases: Consolidated Gas Co. of Pittsburg, 24 B. T. A. 901 (1931) (At p. 905 it was said: "The scope of the decision in the Kerbaugh-Empire Co. case is not as broad as was thought in deciding the line of cases beginning with Independent Brewing Co. of Pittsburg, 4 B. T. A. 870, and that line of cases is no longer authority for a situation such as exists in this case"); Woodward Iron Company, 24 B. T. A. 1050 (1931); Suncrest Lumber Co., 25 B. T. A. 375 (1932); Norfolk Southern Rr. Co., 25 B. T. A. 925 (1932); Twin Ports Bridge Co., 27 B. T. A. 346 (1932); Garland Coal and Mining Co., 28 B. T. A. 348 (1933). See also, Comment (1932) 20 CALIF. L. REV. 441, for good discussion of the effect of this case upon the rule of the Kerbaugh decision.

15. Helvering v. American Chicle Co., 54 S. Ct. 460 (1934). See *Developments in the Law—Taxation* (1934) 47 HARV. L. REV. 1259: "However, the language of the American Chicle case suggests that on an ampler record the court would have limited its scrutiny to the particular transaction out of which the debt arose."

16. Rottschaefer, *The Concept of Income in Federal Taxation* (1929) 13 MINN. L. REV. 637, 661; Note (1932) 6 U. OF CINN. L. REV. 357.

regardless of bookkeeping adjustments, until an asset has been sold or otherwise disposed of, no gain or loss can be realized thereupon.[17] Recognized methods of disposal are restricted to sale, exchange, abandonment or destruction; the function of such restriction being to prevent a placing of reliance on a gain or loss until it has had an actual irrevocable effect on the owner.[18] Accountants, also, are in general agreement that changes in the market value of fixed assets should not be reflected in the balance sheet since such changes do not affect the value of the asset to the "going concern."[19] Obviously a mere change in market value, even though accompanied by a corresponding adjustment of book values to change correspondingly items of net worth and depreciation, could not be considered as irrevocably affecting a business; consequently it is not difficult to bear with the accountants in their argument that annual reappraisals of fixed assets would be highly impractical and of doubtful advantage.[20] But where such change in market value has been accompanied by a bookkeeping adjustment and there has been, because of the change, a corresponding change in external liability, the effect upon the owner has thus been made irrevocable and final.[21] For example, when a transaction simultaneously effects a reduction in the book value of an asset and a corresponding reduction in the offsetting liability, these two entries appearing on the books, there would seem to be no doubt as to the economic effect of the transaction on the operating business, regardless of the language used by the parties in negotiations leading to the bargain. The Income Tax Statute affords a method of realizing a shrinkage in market value of the fleet by providing that the fleet may be sold and the resulting loss be taken as an offset against the income realized by discharging the liability.[17] In the present case, when the value of the fleet is reduced on the books and at the same time obligations founded thereon are correspondingly reduced, the effective cost price of the asset becomes just as irrevocably fixed as though the asset had been sold and replaced at the lower price level, the loss thereby realized and used to offset the gain from cancellation of the notes. The Board of Tax Appeals recognized this fact by holding that "the transactions merely amounted to a reduction in the purchase price of the fleet of vessels, that there was no release

17. Sec. 101 (Revenue Act of 1932) (c) (1) and (2). (1) "Capital gain" means taxable gain from the sale or exchange of capital assets . . ." (2) "Capital loss means deductible loss resulting from the sale or exchange of capital assets."

18. Cf. HAIG, THE FEDERAL INCOME TAX (1921) 137-159.

19. "Changes in the market value of an absolutely fixed asset are generally ignored on the ground that such changes do not affect the value to the going concern." HATFIELD, ACCOUNTING (1928) 76.

"Capital has become tied up in certain equipment essential to the undertaking, in the sense that to dispose of it in its entirety would mean a break-up of the business . . . Accordingly, the possible market value, as second-hand property, should not in any way influence the valuation at which this group of assets is carried on the books. Only full cost at the time of installation and depreciation, using the term in its broad sense, need be considered in the problem of valuation." 2 KESTER, ACCOUNTING (2d ed. 1925) 301.

20. HEWETT, op. cit. *supra* note 7, at 81-85.

21. See MONTGOMERY, FEDERAL TAX HANDBOOK (1932) 225: "By analogy we find support for the statement that when a transaction as a whole results in a loss there can be no taxable gain. Indeed, this is the position taken by the U. S. Supreme Court in Bowers v. Kerbaugh-Empire Co. Many railroad bonds are selling today at less than 10 per cent of their face. Congress is being urged to supply funds to enable the roads to buy in their bonds. If the discharge of debts at a discount always gives rise to a taxable profit, the apparent gain to the roads would be wiped out by the payment of taxes. But it is

of free assets by the transactions involved. . . ."[22] Such a statement is a legal conclusion that accurately describes the effect of the transaction.

It is questionable, however, whether the rule of the *Kerbaugh* decision, from which the method suggested by the instant case of realizing a shrinkage in asset value derives its precedent, retains its original validity in view of *Burnet v. Sanford and Brooks.*[23] In that case, the taxpayer was taxed by the commissioner on a money judgment which had been granted by the court admittedly to compensate the taxpayer for losses suffered in the preceding four years. The Supreme Court affirmed the tax on the ground that a year is the basic tax period and paid little heed to the taxpayer's argument that according to the *Kerbaugh* decision, the transaction should be regarded in its entirety and losses suffered in the preceding years should be taken into account. If this decision, as some commentators believe,[24] confines the *Kerbaugh* case to its own facts and declares a rule that each year's transactions must be considered separately, then it might be that the method proposed in the instant case could only apply if the reduction of indebtedness occurred within the year of purchase. Indeed, the method might prove unworkable because of the insurmountable difficulties that would accompany reopening of tax returns of past years to determine what past depreciation charges should have been in the light of the new cost figure. It might also be, by reason of still other limitations which suggest themselves, that as a matter of administrative policy such a method of treating a shrinkage in asset values would prove impractical. For example, in a case where no shrinkage in market value has been suffered, nothing would be accomplished by allowing the corporation to write down its asset and thus obscure its true financial position. Moreover, if economic effect is to be a criterion, it is difficult to limit this method of realizing a shrinkage in asset value to those cases where a particular asset is offset against the liability that is reduced, the only observable difference between such a case and one where the gain from a cancellation of an obligation would go to reduce the cost of some entirely unrelated asset being one of form. The economic effect is identical. But although the latter practice is directly forbidden, the former does have some sanction from the *Kerbaugh, Kirby,* and *American Chicle* cases. The Circuit Court can not, however, be criticized for giving no consideration to this possible method of realizing a shrinkage in value of an asset if it was not contended for by the taxpayer. Nevertheless, if the purpose of the Income tax is to require payment according to economic ability to make such payment, it is difficult to see how the nature of the contract subsequently made between vendor and purchaser, upon which the court seems to turn its decision,[25] is of more than formal significance; for it could be varied to suit the needs at hand regardless of the true nature of the transaction.

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apparent that railroad bonds sell at a fraction of face value because the assets back of the bonds have shrunk in the same degree as the market prices of the bonds. Hence, there can be no taxable profit. The same principle applies to compositions with creditors. It is safe to assume that there would be no compositions were there no corresponding shrinkage in the worth of assets."

See Haig, The Federal Income Tax (1921) 12-15, for a presentation of the factors involved in the question of whether a capital gain should be recognized for tax purposes before the asset is sold or disposed of. See Also Sweeney, *Income* (1933) 8 The Accounting Review 323; Note (1933) 11 N. Y. U. L. Q. Rev. 269.

22. 28 B. T. A. 725, 730 (1933).

23. 282 U. S. 359 (1931).

24. Altman, *Net Losses and the Taxable Year* (1933) 28 Ill. L. Rev. 525; Montgomery, Federal Tax Handbook (1932) 64; (1932) 45 Harv. L. Rev. 744.

25. 71 F. (2d) 104, 105 (C. C. A. 1st, 1934).

ADMINISTRATIVE DISCRETION AND THE LOWEST RESPONSIBLE BIDDER

To MAKE provision for judicial review of administrative abuses is both a philosophical and a practical necessity in states which adhere to the ideal classically expressed as "a government of laws and not of men." It is the duty of the courts to see that public officials abide by the laws enacted for their governance, and it is the right of the citizen to be protected against a governmental representative who transcends the power lawfully his. Yet at the same time the courts have been influenced by the opposing ideal of the separation of powers. The Supreme Court particularly has shown fear of trespassing upon the executive sphere, and although it early declared its power to hold public officers to their duty, it simultaneously distinguished ministerial acts, performance of which might be compelled by mandamus, from political or discretionary acts, into which the courts would not pry save to discover fraud, oppression, or arbitrariness.[1] This distinction has been widely followed by state courts,[2] but it is too vague a rule to furnish a clear guide in particular cases. In general the judiciary retains a broad power to review administrative action, but it retains equally broad avenues of escape from the investigation of unwelcome factual set-ups.[3]

The field of governmental supply or construction contracts is an interesting illustration of the way in which the courts go about their task of checking venality or injustice without at the same time clogging the wheels of government.[4] In such contracts the procedure of award is usually prescribed with some rigidity. For the federal government it is detailed by statute,[5] supplemented by the regulations of the various departmental heads.[6] For the states it is fixed by statute or constitutional provision.[7] Municipalities or other local administrative bodies are controlled either by general statute, or by municipal charter, or by special ordinance.[8] While the wording and interpretation of this legislation varies, it ordinarily requires that contracts shall be awarded to the lowest responsible bidder. It is universally recognized that, through the term "responsible" or its equivalent, the choice is elevated from

1. Marbury v. Madison, 5 U. S. 137, 162-167 (1803); Kendall v. United States ex rel. Stokes, 37 U. S. 524 (1838); Decatur v. Paulding, 39 U. S. 497 (1840); United States ex rel. Dunlap v. Black, 128 U. S. 40 (1888); Louisiana v. McAdoo, 234 U. S. 627 (1913).

2. Duboise Construction Co. v. City of South Miami, 108 Fla. 362, 146 So. 833 (1933); Peeples v. Byrd, 98 Ga. 688, 25 S. E. 677 (1896); Williams v. City of Topeka, 85 Kan. 857, 118 Pac. 864 (1911); Willmott Coal Co. v. State Purchasing Commission, 246 Ky. 115, 54 S. W. (2d) 634 (1932); Hallet v. City of Elgin, 254 Ill. 343, 98 N. E. 530 (1912); Kratz v. City of Allentown, 304 Pa. 51, 155 Atl. 116 (1931); Gantenbein v. City of Pasco, 71 Wash. 635, 129 Pac. 374 (1913).

3. Cf. Comment (1933) 33 COL. L. REV. 104, at 109, n. 16: "In effect, refusal to review discretion, at least in the absence of a definite statement of the grounds for its exercise, is merely disguised approval of the decision of the lower court on the merits. Similarly review expresses disapproval." See also Dickinson, *Judicial Control of Administrative Discretion,* (1928) 22 AM. POL. SCI. REV. 275.

4. See Louisiana v. McAdoo, 234 U. S. 627, 632 (1913).

5. 36 STAT. 861 (1910); 41 U. S. C. A. § 5 (1926).

6. 5 U. S. C. A. § 22 (1926); REV. STAT. § 161 (1875).

7. See, for example, N. Y. STATE PRINT. LAW (1917) § 4; MASS. GEN. LAWS (1932) c. 7, § 22; ILL. CONST., art. IV, § 25.

8. See for example N. Y. SEC. CLASS CITIES LAW (1909) § 120; Charter, City of New Rochelle, § 143; Ordinances, City of New Haven, art. IX, § 64; cf. ASH, GREATER NEW YORK CHARTER, § 419 (special provisions for awarding the contract to other than the lowest bidder by a three-fourths vote of Board of Estimate and Apportionment).

the status of a purely mechanical task of following directions to that of a duty involving an irreducible minimum of discretion.[9] Upon this basis the courts have developed logical devices which leave them considerable freedom to interfere or not to interfere. It is perhaps indicative of the flexibility of the mechanism that, although it has furnished frequent excuse for abrogating the contracts of petty municipal officials,[10] it has seldom compelled the voidance of non-fraudulent state contracts,[11] and has never been successfully invoked against federal contracts.

A recent federal case[12] serves as an excellent example of the full use of the machinery of avoidance. An unsuccessful bidder for a contract to supply materials to the Federal Emergency Relief Administration sought an injunction against the officials of that Administration to restrain the execution of a contract awarded to another. The court refused the injunction on the grounds that, since the prescribed method of award had been followed, the choice of a lowest responsible bidder was an act requiring the exercise of a discretion beyond the power of the court to investigate, and that the plaintiff had capacity to bring suit neither as a disappointed bidder nor as a taxpayer.

The first great question generally in reviewing the grant of a governmental contract is whether the legal method of award has been followed. Herein the public official or administrative body has no discretion, and the courts do not condone even slight irregularities.[13] An official need not necessarily accept the bid of the lowest

9. Wood Preserving Co. v. Sundmaker, 186 Fed. 678, (C. C. A. 6th, 1911). Awarding of contract for construction, 33 Op. Att'y. Gen. 453 (1923); Duboise Construction Co. v. City of South Miami, 108 Fla. 362, 146 So. 833 (1933); Hallet v. City of Elgin, 254 Ill. 343, 98 N. E. 530 (1912); Williams v. City of Topeka, 85 Kan. 857, 118 Pac. 864 (1911); Board of Commissioners v. Davis, 92 Kan. 672, 141 Pac. 555 (1914); Bright v. Ball, 138 Miss. 508, 103 So. 236 (1925); Ellingson v. Cherry Lake School District, 55 N. D. 141, 212 N. W. 773 (1927); Gantenbein v. City of Pasco, 71 Wash. 635, 129 Pac. 374 (1913). See Note (1912) 38 L. R. A. (N. S.) 672. *Contra*: Scott v. United States, 44 Ct. Cl. 524 (1909); Seysler v. Mowery, 29 Idaho 412, 160 Pac. 262 (1916); Armitage v. Mayor and Council of Newark, 86 N. J. Law 5, 90 Atl. 1035 (1914).

10. Adolphus v. Baskin, 95 Fla. 603, 116 So. 225 (1928) (voided as unreasonable exercise of discretionary power); Seysler v. Mowery, 29 Idaho 412, 160 Pac. 262 (1916) (voided because, if contract is not awarded to lowest bidder, facts upon which administrative decision has been based must be on record); Willmott Coal Co. v. State Purchasing Commission, 246 Ky. 115, 54 S. W. (2d) 634 (1932) (though contract was not voided, court asserted right to review administrative discretion); Armitage v. Mayor and Council of Newark, 86 N. J. Law 5, 90 Atl. 1035 (1914) (voided because irregularly given to one not lowest bidder, on changing terms of contract without readvertisement); Miller v. Mayor and Council of Hoboken, 90 N. J. LAW 167, 100 Atl. 216 (1917) (bidder had made false statement to municipality); American Water Corp. v. Mayor and Council of Borough of Florham Park, 139 Atl. 169 (N. J. 1927) (voided because lowest bidder was not given opportunity to show his responsibility); Kratz v. City of Allentown, 304 Pa. 51, 155 Atl. 116 (1931) (voided for abuse of discretion in not making adequate investigation of low bid); City of Austin v. McCall, 95 Tex. 565, 68 S. W. 791 (1902) (voided because ultra vires act).

11. Ellison v. Oliver, 147 Ark. 252, 227 S. W. 586 (1921) (contract voided for gross irregularity in procedure); Mulnix v. Mutual Benefit Life Insurance Co., 23 Colo. 71, 46 Pac. 123 (1896) (same); Hopper v. Fagan, 151 Ark. 428, 236 S. W. 820 (1922) (gross irregularities in award); State v. Cornell, 52 Neb. 25, 71 N. W. 961 (1897).

12. O'Brien v. Carney, 6 F. Supp. 761 (D. Mass. 1934).

13. See cases cited in footnotes 10 and 11 *supra*.

responsible bidder; but if the bid is rejected, it is not permissible then to grant the contract to another. Often the whole procedure must be again followed until a suitable lowest responsible bidder appears and is accepted.[14] Such an insistence, however, is no mere formalism, for investigation of the circumstances behind each irregularity would involve the courts in a continual inquiry concerning the unwarranted exercise of a discretion on its face suspicious. The second question for review involves an inquiry as to whether the public official, although following the forms prescribed, has exercised a legitimate discretion. If it should clearly appear that the accepted bidder was not the lowest responsible bidder, the contract is of course void.[15] If it appears that no effort was made to discover whether a rejected lowest bidder was truly responsible, or if a higher bidder had been chosen without giving the lowest bidder the opportunity to offer proof of his responsibility,[16] the contract has sometimes been held to be abrogated. But if, as in the instant case, there has been no blatant impropriety, the courts will generally not inquire into the facts upon which the public official's decision was based, or into the validity of an objection based on a contractor's past record.[17] If discretion has been exercised the courts are reluctant to pass upon the quality of that discretion.

As manifested in the present case, the several legal conceptions centering about the plaintiff's capacity to bring suit provides an even more efficacious escape from the necessity of review than the distinction between discretionary and non-discretionary functions. The doctrine that an individual may seek relief in equity from wrongful actions of a municipal corporation to which he pays taxes[18] has given the courts a useful check upon these notoriously unreliable smaller units of governments, while the absence of an analagous doctrine for the federal and most state governments has saved the courts from the necessity of many decisions politically embarrassing or judicially unwise.[19] Only the proper public official may bring suit against the

14. Scott v. United States, 44 Ct. Cl. 524 (1909); St. Landry Lumber Co. v. Town of Bunkie, 155 La. 892, 99 So. 687 (1909); Molloy v. City of New Rochelle, 198 N. Y. 402, 92 N. E. 94 (1910). *Contra:* Sanitary District of Chicago v. McMahon & Montgomery Co., 110 Ill. App. 510 (1903).

15. Miller v. City of Des Moines, 143 Iowa 409, 122 N. W. 226 (1909); Holden v. City of Alton, 179 Ill. 318, 53 N. E. 556 (1899); Davenport v. Walker, 57 App. Div. 221, 68 N. Y. Supp. 16 (3rd Dep't, 1901); State v. State Office Buildings' Commission, 124 Ohio St. 413, 179 N. E. 138 (1931).

16. Kelley v. Board of Chosen Freeholders of Essex Co., 90 N. J. Law 411, 101 Atl. 422 (1917); American Water Corp. v. Mayor and Council of Borough of Florham Park, 139 Atl. 169 (N. J. 1927).

17. Duboise Construction Co. v. City of South Miami, 108 Fla. 362, 146 So. 833 (1933); Peeples v. Byrd, 98 Ga. 688, 25 S. E. 677 (1896); Williams v. City of Topeka, 85 Kan. 857, 118 Pac. 864 (1911); Board of Commissioners v. Davis, 96 Kan. 672, 141 Pac. 555 (1914); Kratz v. City of Allentown, 304 Pa. 51, 155 Atl. 116 (1931).

18. Crampton v. Zabriskie, 101 U. S. 601 (1879); Adolphus v. Baskin, 95 Fla. 603, 116 So. 225 (1928); City of Austin v. McCall, 95 Texas 565, 68 S. W. 791 (1902); cf. Talcott v. City of Buffalo, 125 N. Y. 280, 26 N. E. 263 (1891); Madden v. Van Wyck, 35 Misc. Rep. 645, 72 N. Y. Supp. 135 (Sup. Ct. 1901).

19. Massachusetts v. Mellon, 262 U. S. 447, 486 (1923); Sanders v. Ballard, 160 Ga. 366, 127 S. E. 851 (1925); Pierce, County Commissioner v. Smith, 48 Kan. 331, 29 Pac. 565 (1892); Sutton v. Buie, 136 La. 234, 66 So. 956 (1914); Miller v. Grandy, 13 Mich. 540, 550 (1865); Asplund v. Hannett, 31 N. Mex. 641, 249 Pac. 1074 (1926); Olmstead v. Meahl, 219 N. Y. 270, 114 N. E. 393 (1916); Jones v. Reed, 3 Wash. 57, 27 Pac. 1067 (1891); State v. Clausen, 146 Wash. 588, 264 Pac. 403 (1928). *Contra:* Turnipseed v. Blan,

officer of a sovereignty for a purely public wrong.[20] Private individuals may sue only for redress of private wrongs.[21] A taxpayer as a taxpayer has no justiciable interest in the wrongful acts of state or federal officials,[22] and the disappointed bidder usually finds himself in no better circumstance. Practically all advertisements for bids contain a clause reserving the right to reject any and all bids, thus removing the possibility of the usual contractual remedies. The federal courts, at least for federal contracts, have ruled out the possibility of a claim based upon statute by deciding that the statutory procedure together with the departmental regulations which declare that the award should be made to the lowest responsible bidder were enacted solely for the protection of the public, conferring no rights upon the contractor.[23] This, it may be noted, is in marked contrast to the policy of several states towards similar municipal or county regulations. Decisions in Louisiana and New Jersey, for example, expressly recognize that the lowest responsible bidder has a justiciable interest in an award, and may sue upon it, being entitled at least to proof of his own unfitness.[24]

In the instant case, which concerned a federal contract, there could of course be no doubt that the plaintiff was unable to sue in the capacity of a contractor. It would appear that his inability to sue as a taxpayer was also too well settled to be very seriously urged. The fact that the decision discussed several issues, any one of which was sufficient for dismissal, is probably indicative of the court's intent to close all avenues for such unwelcome suits in the future. An omission to do so would be an invitation to a multitude of plausible actions that would rise to obstruct governmental administration with a mountain of litigation. The possible private injustice done to a great number of contractors throughout the nation in avoiding such suits would not outweigh the public injury and expense that would be occasioned if every disappointed party could carry his grievance to the courts in search of injunctive relief. Yet a categoric refusal to inquire into the actions of public officials might have even more dire effects. It is the virtue and beauty of our legal system that by the quiet use of a complicated verbal technique either extreme is avoided.

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226 Ala. 549, 148 So. 116 (1933); Fergus v. Russell, 270 Ill. 304, 110 N. E. 130 (1915); Fischer v. Marsh, 113 Neb. 153, 202 N. W. 422 (1925); Burness v. Multnomah Co., 37 Ore. 460, 60 Pac. 1005 (1900); Page v. King, 285 Pa. 153, 131 Atl. 707 (1926); White Eagle Oil Co. v. Gunderson, 48 S. D. 608, 205 N. W. 614 (1925).

20. Jones v. Reed, 3 Wash. 57, 27 Pac. 1067 (1891); State v. Clausen, 146 Wash. 588, 264 Pac. 403 (1928).

21. Sanders v. Ballard, 160 Ga. 366, 127 S. E. 851 (1925); Miller v. Grandy, 13 Mich. 540, 550 (1865); Asplund v. Hannett, 31 N. Mex. 641, 249 Pac. 1074 (1926).

22. Massachusetts v. Mellon, 262 U. S. 447, 486 (1923); Pierce, County Commissioner v. Smith, 48 Kans. 331, 29 Pac. 565 (1892); Asplund v. Hannett, 31 N. Mex. 641, 249 Pac. 1074 (1926); Olmstead v. Meahl, 219 N. Y. 270, 114 N. E. 393 (1916); Jones v. Reed, 3 Wash. 57, 27 Pac. 1067 (1891).

23. American Smelting and Refining Co. v. United States, 259 U. S. 75 (1922).

24. Fourmy v. Franklin, 126 La. 151, 52 So. 249 (1910); St. Landry Lumber Co. v. Town of Bunkie, 155 La. 892, 99 So. 687 (1909); Maginnis v. City of Wildwood, 94 N. J. Law 90, 108 Atl. 780 (1920); American Water Corp. v. Mayor and Council of Borough of Florham Park, 139 Atl. 169 (N. J. 1927).

Power of Probate Court to Compel Attorney to Refund Excessive Fee Voluntarily Paid by Executor or Administrator

Customarily, before entering into agreements with others or disbursing assets of an estate in accordance therewith, an executor or administrator seeks the sanction of the probate court. He may, however, adopt the alternative course; that is, he may first transact the business, expecting later to receive the approval of the court. If he fails in gaining this approval and if he has made payments out of the funds of the estate,[1] he or his surety is accountable for the money so appropriated;[2] and if he has paid out of his own pocket, he cannot expect to be reimbursed for his unauthorized expenditure.[3] Similarly, the fiduciary who pays money to his counsel without first obtaining an order of the probate court is generally held to do so at his own risk.[4] If the court subsequently chooses to recognize his expenditure as proper, he is absolved from any liability for overpayment;[5] otherwise he is personally responsible to the estate for any amount over and above the reasonable allowance for attorneys' fees decreed by the court.[6] Of course, the representative is personally bound by the contracts that he makes with others,[7] but it would be most unfortunate if the estate were also under a duty to fulfill all the undertakings made by him in its behalf, without regard to their improvidence.[8]

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1. New York permits payment to be made for legal services directly out of the funds in the custody of the personal representative. N. Y. Surr. Ct. Act (1920) § 222.

2. Matter of Gilman's Administratrix, 251 N. Y. 265, 167 N. E. 437 (1929).

3. In re O'Reilly, 27 Ariz. 222, 231 Pac. 916 (1925); Johnson v. Telford, 3 Russ. 477 (Ch. 1827); Brown v. Burdett, 40 Ch. D. 244 (1888).

4. "The administratrix, therefore, was acting within her rights if she disbursed the moneys of the estate for reasonable and necessary expenses (here attorney's fees), though in advance of her accounting. She took the risk, however, that a surcharge would follow, if the expenses were disallowed as improper or excessive." Cardozo, C. J., in Matter of Gilman's Administratrix, 251 N. Y. 265, 271, 167 N. E. 437, 440 (1929).

5. Macnamara v. Jones, Dick. 587 (Ch. 1784); 2 Williams, Executors (Parry & Cherry, 12th ed. 1930) 1219.

6. In Sprinkle v. Forrester, 162 Ill. App. 45, 47 (1911), it was said: "The right of the county court to allow to an executor or administrator credit in his account for reasonable attorney's fees paid to an attorney at law for services in enabling such executor or administrator to properly and efficiently perform the duties of his office is undoubted, but the amount so paid for attorney's fees is to be determined by the court in the exercise of a judicial discretion. When items for which an executor or administrator asks credit in his report are disallowed in whole or in part by the court, such executor or administrator becomes personally liable to the estate for the amount of such items."

7. 2 Williams, op. cit. *supra* note 5, at 1161 et seq.; 2 Woerner, American Law of Administration (3d ed. 1923) § 356; Restatement, Trusts (Tent. Draft, 1933) §§ 253, 254. It may be possible for an executor or administrator to avoid personal liability by expressly providing in his contracts that the estate alone is to be responsible. Briggs v. Breen, 123 Cal. 657, 56 Pac. 633 (1899); Morehead Banking Co. v. Morehead, 116 N. C. 413, 21 S. E. 191 (1895); Restatement, Trusts (Tent. Draft, 1933) § 255 (1).

8. Connecticut is unusual in providing that if a claim against an executor or administrator "shall be found to be a just one, and one which ought to be equitably paid out of such estate, judgment may be rendered in favor of such claimant, to be paid wholly out of the estate so held by such executor, administrator, guardian, or trustee." Conn. Gen. Stat. (1930) § 5640. However, it is said: "This statute does not change the nature of the obligation incurred by an executor or administrator in the performance of his duties;

Having made a payment to an attorney for services rendered to an estate, the question arises as to the power of the fiduciary to recover from the attorney the excess above the allowance permitted by the court for counsel fees. In a recent New York case illustrative of this problem, an administratrix paid her attorney $7,750 without first obtaining the approval of the surrogate. Thereafter the surrogate concluded that $5,000 would be a reasonable fee for the services, and summarily directed the attorney to return to the estate the difference between the two sums. On appeal it was held that the surrogate had no jurisdiction to compel a refund, the matter being entirely a personal affair between the administratrix and her attorney whereof it was the right of the attorney to have the claim against him determined in a formal proceeding at law.[9] It is to be noted that in consequence of a recent amendment to the New York Decedent Estate Law, granting full jurisdiction to the surrogate to compel a refund by the attorney,[10] the present issue would no longer be presented in New York.

There are few cases that directly decide whether or not a probate court has power to compel the repayment by an attorney of an excessive fee paid to him by a personal representative. Of the cases that exist, all in jurisdictions other than New York are uniformly in accord with the present decision in denying such power.[11] For it is said that since an attorney may not without statutory authority bring suit directly against an estate for services rendered, because the determination of fees is considered to be an issue solely between him and the fiduciary, therefore the estate, as represented by its administrator or executor, ought not to be permitted to demand from the attorney a refund of sums paid voluntarily to him.[12] It would seem that a decision of this nature ought to be placed upon broader grounds than the fact that an attorney may not pursue his remedy against the estate itself. Between him and the fiduciary exists the relationship of attorney and client, and in accordance with the general principles governing that relation this issue should be decided.

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it merely affords the creditor a remedy by which, without injustice to the estate, the obligation owed to him may be discharged immediately from the fund which in any event would ultimately bear the burden." Hewitt v. Beattie, 106 Conn. 602, 614, 138 Atl. 795, 800 (1927).

9. Matter of Rosenberg, 263 N. Y. 357, 189 N. E. 452 (1934).

10. "In the event that any such attorney has already received or been paid a sum in excess of the fair value of his services as thus determined, the surrogate shall have power to direct him to refund such excess." N. Y. SURR. CT. ACT (Supp. 1934) § 231-a.

11. Tomsky v. Superior Court, 131 Cal. 620, 63 Pac. 1020 (1901); Jackson v. Superior Court, 210 Cal. 59, 290 Pac. 448 (1930); Sprinkle v. Forrester, 162 Ill. App. 45 (1911); In re Sullivan's Estate, 36 Wash. 217, 78 Pac. 945 (1904). New York surrogates were formerly of the opinion that the power to compel a refund by the attorney was conferred upon them by § 40 of the Surrogate's Court Act, giving them general jurisdiction over all matters of probate. See, for example, Matter of Strandburg, 138 Misc. Rep. 732, 247 N. Y. Supp. 194 (Surr. Ct., 1930), aff'd on rehearing, 138 Misc. Rep. 859, 248 N. Y. Supp. 164 (Surr. Ct. 1931); Matter of Duggan, 146 Misc. Rep. 596, 262 N. Y. Supp. 512 (Surr. Ct. 1933); Matter of Balazs, 147 Misc. Rep. 95, 264 N. Y. Supp. 346 (Surr. Ct. 1933).

12. State ex rel. Cohen v. District Court, 53 Mont. 210, 212, 162 Pac. 1053, 1054 (1917). This argument would not be applicable in New York, where a surrogate is empowered "to hear an application for and to fix and determine the compensation of an attorney for services rendered to an estate or to its representative, or to a devisee, legatee, distributee or any person interested therein," and the proceeding may be instituted "by petition . . . of an attorney who has rendered services." N. Y. SURR. CT. ACT (1923) § 231-a.

There is at the outset the question as to whether the attorney could under the present circumstances be compelled in an action at law instituted by the fiduciary to make restitution of the excessive fee. When an attorney retains from moneys of his client an unreasonable amount for his services, a court will not hesitate to consider the value of the performance rendered and require him to remit any amount above a proper charge.[13] But if the client, as here, has made a voluntary payment, there is some doubt as to the power of a court to direct a refund,[14] and under ordinary conditions there is slight likelihood that it will, in the absence of a showing that the attorney has been lax or fraudulent in the execution of his duties.[15] The present situation is unusual. In employing an attorney the personal representative is acting not primarily in his own interest but rather in the interest of the estate, and by statute he is required to account for the expenditures he has made during the course of administration.[16] If he has already paid for the legal services rendered to him, in all probability he accepted the judgment of his attorney as to the reasonableness of the charge. Accordingly, if thereafter the probate court reaches the conclusion that the amount of the fee was not justified, it should be the attorney rather than the fiduciary who ought ultimately to repay the excess.

Although the present decision does not necessarily deprive the administratrix of her remedy at law, nevertheless to require her to suffer the expense, delay, and trouble of an entirely new action "would be a postponement of justice equivalent to a denial."[17] Probate jurisdiction, governed by statute, is never in express terms so limited that it may not supervise the conduct of an attorney acting in behalf of an estate. If the attorney assesses an unreasonable fee on the fiduciary, the probate court should remove the burden of a surcharge from the shoulders of the fiduciary and his sureties by assuming full power to compel the attorney to repay the excess. Conceding that under these circumstances the court should have such jurisdiction,

13. Soper v. Manning, 147 Mass. 126, 16 N. E. 752 (1888); Burns v. Allen, 15 R. I. 32, 23 Atl. 35 (1885). As the dissenting opinion in the present case observes, Matter of Rosenberg, *supra* note 9, at 363, 189 N. E. at 454, the distinction is narrow between the attorney who receives a voluntary payment from the personal representative and the one who retains a certain sum for his fees out of funds collected by him, and yet on the one hand the probate court is denied the power to compel a refund, *supra* note 11, whereas on the other the power is sustained for the reason that the moneys in question, once having been collected, become a part of the estate and thereafter remain within the jurisdiction of the court until a formal order has been made for their disbursement. Matter of Dollar, 103 Misc. Rep. 137, 169 N. Y. Supp. 333 (Surr. Ct. 1918), aff'd, 194 App. Div. 948, 184 N. Y. Supp. 918 (3d Dep't, 1920), aff'd, sub nom. Matter of Hulett, 231 N. Y. 545, 132 N. E. 882 (1921); Matter of Anderson, 136 Misc. Rep. 110, 240 N. Y. Supp. 532 (Surr. Ct. 1930), rev'd on other grounds, 232 App. Div. 704, 247 N. Y. Supp. 1015 (2d Dep't, 1931), aff'd, 257 N. Y. 592, 178 N. E. 809 (1931).

14. In Matter of Hess, 133 App. Div. 654, 118 N. Y. Supp. 171 (1st Dep't, 1909), the executor sought in a court of law to compel his attorneys to repay a voluntary but allegedly excessive fee. The court held that its disciplinary power ought not to be exercised to so great an extent. In Matter of Jeffries, 219 N. Y. 573, 114 N. E. 1070 (1916), reported in a memorandum decision, the same conclusion was reached in a similar situation.

15. 2 THORNTON, ATTORNEYS AT LAW (1914) § 569.

16. See, for example, CONN. GEN. STAT. (1930) §§ 4972-4976; N. J. COMP. STAT. (1910) pp. 3856, 3857; N. Y. SURR. CT. ACT (1923) § 231-a; OHIO GEN. CODE (Page, Supp. 1931) § 10509-193; PA. STAT. ANN. (Purdon, 1930) tit. 20, § 2244.

17. Cardozo, C. J., in Matter of Raymond v. Davis, 248 N. Y. 67, 72, 161 N. E. 421, 423 (1928).

in the exercise of that jurisdiction the court ought also to entertain summary proceedings. Where an attorney has money to which his client is, ex aequo et bono, entitled, he may ordinarily be compelled in a summary action, as an officer of the court and within its sound discretion, to make restitution.[18] The case at hand appears to be eminently suited to the extension by the probate court of this same form of relief, for the amount to be recovered is certain and the right to a remedy should be unquestioned.

Business Compulsion as an Escape From The Parol Evidence Rule

In order to procure funds from a finance company, officers of the defendant motor car sales corporation required its salesmen, under threat of discharge, to purchase new automobiles. The plaintiff salesman traded in his old car, entered into a conditional sales contract, and signed a promissory note only after receiving oral assurance that he would be saved harmless from any monetary loss he might thereby suffer and that he need never pay the note. But the executed contract contained a clause negativing all warranties, representations, and agreements not included therein. Subsequently the plaintiff was discharged, and when the note was not met at maturity, the finance company repossessed the car. In a suit to recover damages for the loss resulting from the repossession of the car, it was held that, since the plaintiff acted under business compulsion, the defendant's agreement to save plaintiff harmless was admissible despite the parol evidence rule, and judgment was thereupon granted for the plaintiff.[1]

The result reached is an unusual relaxation of the parol evidence rule. Only the showing of fraud, accident, mistake, or duress may take a case out of the operation of the well established doctrine that contemporaneous or prior oral agreements are inadmissible when they tend to destroy, entirely[2] or substantially,[3] the very obligation of a written instrument which shows on its face adequate consideration.[4] Nevertheless, since the concept of business compulsion is regarded as an extension of the common law rule of duress[5] and accorded identical treatment in other types

18. 1 Thornton, op. cit. *supra* note 15, §§ 354-356.

1. Champlin v. Transport Motor Co., 33 P. (2d) 82 (Wash. 1934).

2. New Amsterdam Casualty Co. v. United States Shipping Board, etc., 16 F. (2d) 847 (C. C. A. 4th, 1927); Richardson v. Merchants' and Planters' Bank & Trust Co., 188 Ark. 1104, 69 S. W. (2d) 396 (1934); Doyle v. Nesting, 37 Colo. 522, 88 Pac. 862 (1906); Graham v. Savage, 110 Minn. 510, 126 N. W. 394 (1910); Security Savings Bank v. Rhodes, 107 Neb. 223, 185 N. W. 421 (1921); Second National Bank of Reading v. Yeager, 268 Pa. 167, 111 Atl. 159 (1920); Bank of Hooversville v. Sagerson, 283 Pa. 406, 129 Atl. 333 (1925); 5 Wigmore, Evidence (2d ed. 1923) § 2435.

3. Kilgore v. Arant, 25 Ala. App. 356, 146 So. 540 (1933); Lompoc Valley Bank v. Stephenson, 156 Cal. 350, 104 Pac. 449 (1909); State Bank of Ardock v. Burke, 53 N. D. 777, 208 N. W. 115 (1926); Myers v. Gibson, 304 Pa. 249, 155 Atl. 563 (1931).

4. This is especially true where there is a clause in the contract to the effect that the writing contains the whole agreement between the parties and that any oral representations or warranties are excluded. Harnischfeger Sales Corp. v. Sternberg Co., 179 La. 317, 154 So. 10 (1934); Gross v. Exeter Machine Works, 277 Pa. 363, 121 Atl. 195 (1923); Hauer v. Martin, 284 Pa. 407, 131 Atl. 187 (1925); Hall v. Hall, 133 Wash. 400, 234 Pac. 2 (1925); Kelly Co. v. Von Zakobiel, 168 Wis. 579, 171 N. W. 75 (1919).

5. The term "business compulsion" has been used chiefly by the Supreme Court of Washington. See Duke v. Force, 120 Wash. 599, 621, 208 Pac. 67, 74 (1922); Alwen v. Tramon-

of legal situations,[6] it can also be invoked to avoid the parol evidence rule. But the facts of the instant case are a drastic variation from the situations which have hitherto been regarded as properly included in the category of business compulsion.[7] To constitute business compulsion, it is stated, there must be present the exaction of an extortionate amount of money[8] or an unconscionable contract[9] under threat to do an unfair if not an illegal act on the one side, and the choice between complying with the unjust demand or possibly sacrificing a capital investment,[10] on the other side. It is furthermore iterated that the mere fear of financial injury or the existence of straitened circumstances is insufficient to constitute such duress,[11] particularly where the other party is not responsible therefor.[12]

But no good reason appears why these rules, crystallized from past factual situations, should become fixed limitations upon the further extension of the duress concept. The basis of that concept is the substantial coercion of a party's free will. That this underlying principle cannot be limited by rules in the form of objective standards is illustrated by the growth of the business compulsion extension itself. And similarly, that extension may further be enlarged to fit cases which meet the basic requirement of will coercion. In the light of the present economic depression,[13] it seems opportune, therefore, that the instant court should have placed this species of high-powered persuasion within the ambit of business compulsion. Although the plaintiff would have lost no conceptually acknowledged property right,[14] nevertheless, realistically, the fear of losing his job in a time of widespread and general unemployment would have accomplished as much in overcoming his free will as the possibility of financial ruin through loss of a large capital invest-

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tin, 131 Wash. 78, 80, 228 Pac. 851, 852 (1924); Jacobson v. Nicholas, 155 Wash. 234, 237, 283 Pac. 684, 685 (1930). In other courts, the same concept is recognized by such phrases as "moral duress," or "compulsion of circumstances" or "not technically duress." See Brown v. Worthington, 162 Mo. App. 508, 516, 142 S. W. 1082, 1084 (1912); Illinois Merchants Trust Co. v. Harvey, 335 Ill. 284, 289, 167 N. E. 69, 71 (1929); Harris v. Cary, 112 Va. 362, 369, 71 S. E. 551, 553, (1911); Note (1931) 79 A. L. R. 655.

6. Young v. Hoagland, 212 Cal. 426, 298 Pac. 996 (1931); Ferguson v. Associated Oil Co., 173 Wash. 672, 24 P. (2d) 82 (1933) (overcharge recovered).

7. This is perhaps evidenced by the seeming hesitancy of the court in the instant case to ascribe its decision solely to that factor.

8. Union Pacific Rr. Co. v. Public Service Commission, 248 U. S. 67 (1918); Rowland v. Watson, 4 Cal. App. 476, 88 Pac. 495 (1906); Redford v. Weller, 27 S. D. 334, 131 N. W. 296 (1911).

9. Sylvan Mortgage Co. v. Stadler, 113 Misc. 659, 185 N. Y. Supp. 293 (1920), noted in (1921) 7 VA. L. REV. 396; Johnson v. Ford, 147 Tenn. 63, 245 S. W. 531 (1922); Ramp Building Corp. v. Northwest Building Co., 164 Wash. 603, 4 P. (2d) 507 (1931), noted in (1932) 7 WASH. L. REV. 248.

10. Olympia Brewing Co. v. State, 102 Wash. 494, 173 Pac. 430 (1918); Sunset Copper Co. v. Black, 115 Wash. 132, 196 Pac. 640 (1921); Jacobson v. Nicholas, 155 Wash. 234, 283 Pac. 684 (1930) (recovery denied because of no capital investment).

11. Morton v. Morris, 72 Fed. 392 (C. C. A. 8th, 1896) (financial crisis insufficient as a defense); Hackley v. Hadley, 45 Mich. 569, 8 N. W. 511 (1881); Bartlett v. Richardson Co., 27 Ohio App. 263, 161 N. E. 403 (1927).

12. See French v. Shoemaker, 81 U. S. 314, 333 (1871).

13. For use of the novel argument of business depression, see Miller v. Eisele, 111 N. J. Law 268, 282, 168 Atl. 426, 432 (1933), noted in (1934) 82 U. OF PA. L. REV. 289.

14. People v. Cuddihy, 151 Misc. 318 (N. Y. Ct. Gen. Sess. 1934) (mere relation between employer and employee not a property right).

ment. Moreover, such an extension is especially advisable where it is helpful in arriving at an equitable result by avoiding the harsh operation of the parol evidence rule. This is quite in harmony with the underlying policy of many courts when, as in the principal case, the oral evidence introduced is uncontradicted.[15]

APPLICATION OF LAW OF RESIDENCE TO GOVERN SUIT AGAINST TORT FEASOR'S ESTATE FOR FOREIGN TORT

THE plaintiff and the defendant's testator, both residents of New York, were motoring in Virginia when an accident occurred, allegedly due to the testator's negligence, in which plaintiff was injured. Subsequently the testator died and his last will was probated in New York with the defendants as duly qualified executors thereof. By Virginia statute a cause of action for personal injuries survives the death of the wrongdoer and is maintainable against his personal representatives,[1] but by New York law such an action abates on the death of the tort feasor.[2] The plaintiff brought suit in New York against the personal representative of the alleged tortfeasor claiming that Virginia law should govern any cause of action growing out of the Virginia accident. The New York Court of Appeals refused to recognize the claim of the plaintiff and held that since New York alone had power to determine the devolution and distribution of the property of a deceased resident its courts did not have jurisdiction to entertain against the estate a suit based on Virginia law.[3]

Since both parties to this suit were citizens of New York and governed in most of their legal relations by New York law, and since it was only by a fortuitous circumstance that the operative facts occurred in Virginia, it does not seem entirely unreasonable from the layman's viewpoint that the rights of the parties should be adjudicated by the law of their own residence. However, in personal injury cases involving a conflict of laws, the residence of the parties has never been regarded as a justifiable and proper basis for distinguishing results.[4] Nor did the court here seek to draw any such distinction. Hence the decision in the instant case, as well as the reasoning by which the court reached this decision, would require that a similar case in which the plaintiff was a resident of the foreign state be decided in the same way. Such a result is undesirable both as a matter of judicial and political policy.

While the liability of a tort feasor is usually said to be determined by the lex loci

15. This course is pursued even though it is criticized as emasculating the parol evidence rule and almost rendering the exception the rule. See Index Co. v. Wheeler, 81 Colo. 402, 408, 255 Pac. 982, 984 (1927); Greenawalt v. Kohne, 85 Pa. 369, 375 (1877).

1. VA. CODE ANN. (Michie, 1930) § 5790.

2. N. Y. DECEDENT EST. LAW (1909) § 120. Kelsey v. Jewett, 34 Hun. 11 (5th Dep't, 1884).

3. Herzog. v. Stern, 264 N. Y. 379, 191 N. E. 23 (1934), rev'g 240 App. Div. 881, 267 N. Y. Supp. 968 (1st Dep't, 1933), which reversed 148 Misc. 25, 265 N. Y. Supp. 72 (Sup. Ct. Special Term, 1933). *Contra:* Domres v. Storms, 236 App. Div. 630, 260 N. Y. Supp. 335 (4th Dep't, 1932); Kertson v. Johnson, 185 Minn. 591, 242 N. W. 329 (1932); Chubbuck v. Halloway, 182 Minn. 225, 234 N. W. 314, rev'd on other grounds on reargument, 182 Minn. 231, 234 N. W. 868 (1931).

4. See Lorenzen, *Tort Liability and the Conflict of Laws* (1931) 47 L. Q. REV. 483, 488-489.

delecti,[5] a denial of recovery on facts similar to the instant case could nevertheless be supported by a number of juridical concepts even though the plaintiff were a resident of the foreign state. First, by regarding the survival of actions as within the extremely flexible category of procedural matters,[6] that result could be considered the necessary corollary of the rule that in all matters procedural the law of the forum governs.[7] By analogy, the cases involving limitations on actions afford competent authority for this view, for where a question arises as to when a suit may no longer be brought because of statutory limitation, it is generally said that the question is one of procedure.[8] Here it might be said that the question was similarly one of limiting the period within which suit could be brought and that consequently the matter was one of procedure to be governed by the New York law. On the other hand, assuming that the matter involved were one of substantive law,[9] judgment for the defendant could still be justified on the ground that the survival statute of Virginia is against the "public policy" of New York,[10] which has often been considered proper justification for refusing to apply the law of a sister state either as a matter of comity or under the full faith and credit clause.[11] Or the rule that each sovereign has complete control of the devolution of a decedent's property[12] might be regarded, as in the instant case, as precluding any result but the one reached by the Court of Appeals.[13]

But the application of any one of these rules would lead to disposal of the case

5. I.e. the law of the place where the injury occurred. Northern Pacific Rr. Co. v. Babcock, 154 U. S. 190 (1894); Texas and Pacific Ry. Co. v. Humble, 181 U. S. 57 (1901); Hill v. Chattanooga Ry. and Light Co., 21 Ga. App. 104, 93 S. E. 1027 (1917); Gannett v. Boston and Maine Rr., 238 Mass. 125, 130 N. E. 183 (1921); Hasbrouck v. New York Central and Hartford Rr. Co., 202 N. Y. 363, 95 N. E. 808 (1911).

6. This rationalization was used by Surrogate Wingate in denying the plaintiff recovery under facts similar to the instant case. See In re Killough's Estate, 148 Misc. 73, 87-88, 265 N. Y. Supp. 301, 319-320 (Surr. Ct. 1933). This interpretation was repudiated, however, by the Supreme Court in denying recovery under similar facts. See Clough v. Gardiner, 111 Misc. 244, 182 N. Y. Supp. 803 (Sup. Ct. 1920); cf. Chubbuck v. Halloway, and Kertson v. Johnson, both *supra* note 3.

7. See Central Vermont Rr. Co. v. White, 238 U. S. 507, 511 (1915); cf. Chicago Terminal Transfer R. Co. v. Vandenberg, 164 Ind. 480, 73 N. E. 990 (1905); Sapone v. New York Central and Hartford Rr. Co., 130 Misc. 755, 225 N. Y. Supp. 211 (Sup. Ct. 1927).

8. Illinois Power and Light Corp. v. Hurley, 49 F. (2d) 681 (C. C. A. 8th, 1931); Munos v. Southern Pacific Co. 51 Fed. 188 (C. C. A. 5th, 1892); Backus v. Severn, 127 Misc. 776, 216 N. Y. Supp. 381 (Sup. Ct. 1926).

9. See Clough v. Gardiner, 111 Misc. 244, 182 N. Y. Supp. 803 (Sup. Ct. 1920).

10. This line of reasoning has been used to support decisions similar to the one in the instant case in previous cases arising in the lower New York courts. See Clough v. Gardiner, 111 Misc. 244, 182 N. Y. Supp. 803 (Sup. Ct. 1920); In re Killough's Estate, 148 Misc. 73, 88, 265 N. Y. Supp. 301, 320 (Surr. Ct. 1933). Contra: Domres v. Storms, 236 App. Div. 630, 260 N. Y. Supp. 335 (4th Dep't, 1932).

11. See Cuba Rr. Co. v. Crosby, 222 U. S. 473, 478 (1912); Stewart v. Baltimore and Ohio Rr. Co., 168 U. S. 445, 448-449 (1897); Loucks v. Standard Oil Co., 224 N. Y. 99, 106, 120 N. E. 198, 200 (1918).

12. Mager v. Grima, 8 How. 490, 493 (U. S. 1850); See United States v. Perkins, 163 U. S. 625, 629 (1896); State ex rel. McClintock v. Guinotte, 275 Mo. 298, 314, 204 S. W. 806, 808-809 (1918).

13. In re Killough's Estate, 148 Misc. 73, 265 N. Y. Supp. 301 (Surr. Ct. 1933).

on grounds narrower than the real problem involved in the litigation. That problem is whether a right given by a foreign state to one of its citizens by virtue of certain operative facts within its jurisdiction, is to be recognized and enforced by the state of the forum against one of its own citizens. It is true each state is sovereign and within its borders has a right to set the rules by which its own citizens shall live and conduct their business. But on the other hand it cannot be overlooked that modern commercial and social intercourse is largely interstate, which demands that the utmost respect be given the rights created by each state within its proper jurisdiction in order that cordial and profitable relations can be maintained.[14] And only by a reciprocal recognition and enforcement of rights arising within the jurisdiction of foreign states, can each state expect to gain the maximum control of matters arising within its own borders. Moreover, it seems only just that when a citizen of one state temporarily accepts the protection and advantages of another, the consequences of his acts within the foreign jurisdiction should be governed by the laws of that jurisdiction, particularly in so far as residents of the foreign state are concerned. Of course the right of a person who has suffered a personal injury is not an immediate right against the tortfeasor's property; but, it is a right the fulfillment of which depends directly on the appropriation of a part of his estate. That satisfaction of this right should depend on the continued life of the testator when the law of the state where the injury was committed contemplates otherwise is the result of an arbitrary attention to superficial factors. It is true a state has a right to determine the devolution of the property of its deceased residents,[13] but it is difficult to see that the present case is one of devolution. The question is not one of testate or intestate succession, which devolution would certainly include, but is one of determining whether or not the plaintiff is such a creditor of the estate as to have rights superior to those of devolution. His status is more nearly analogous to that of a creditor, so that property of the deceased that might go to the plaintiff is no part of the estate to which laws of devolution and succession should have application.

There is, of course, the further possibility that the mandate of the "full faith and credit" clause of the Federal Constitution requires the New York courts to recognize the Virginia statute by enforcing the present cause of action. While originally the clause was construed to apply only to judgments fairly obtained in a foreign state,[15] recent tendencies are toward applying it to the enforcement of foreign statutes under which a cause of action is said to have arisen. This tendency has been reflected in cases involving the special fields of insurance contracts[16] and workmen's compensation acts,[17] and the language of the clause invites further extension to include the present case.[18] The refusal of the Supreme Court to grant

14. For a full development of this argument, see Lorenzen *Territoriality, Public Policy and the Conflict of Laws* (1924) 33 YALE L. J. 736.

15. Fauntleroy v. Lum, 210 U. S. 230 (1908); see Corwin, *The "Full Faith and Credit" Clause* (1933) 81 U. OF PA. L. REV. 371, 375.

16. Royal Arcanum v. Green, 237 U. S. 531 (1915); followed in Modern Woodman of America v. Mixer, 267 U. S. 544 (1925); Aetna Life Insurance Co. v. Dunken, 266 U. S. 389 (1924).

17. Bradford Electric Light Co. v. Clapper, 286 U. S. 145 (1932); noted in (1932) 32 COL. L. REV. 131; (1932) 46 HARV. L. REV. 291; (1932) 42 YALE L. J. 115.

18. The extension of the "full faith and credit" clause to embrace foreign causes of action as well as judgments has been previously urged. See Beach, *Uniform Interstate Enforcement of Vested Rights* (1918) 27 YALE L. J. 656; Corwin, *The "Full Faith and Credit" Clause* (1933) 81 U. OF PA. L. REV. 371; Note (1930) 40 YALE L. J. 291. But see Dodd, *The Power of the Supreme Court to Review State Decisions in the Field of*

certiorari in this instance[19] may be an indication that it approved of the New York court's failure to make such an extension. But its refusal may just as well represent a desire upon the part of the Court to refrain from increasing either its conflict jurisdiction or its interference with state court discretion.

For some time the more advanced courts have recognized that similarity of legislation or judicial remedies is not an indispensible condition to the enforcement of foreign rights.[20] The more modern test is merely whether some fundamental principle of justice, or some prevalent conception of good morals would be violated; the application of such a test would hardly preclude the plaintiff from recovering.

Fees of Referees in Composition Agreements Under the Bankruptcy Act

The problem in determining the measure of fees for bankruptcy officials under the federal bankruptcy act is to strike a balance between the need of attracting a capable personnel, and the ideal of keeping costs low for the protection of creditors. In the Bankruptcy Act of 1867,[1] which awarded onerous fees apparently on the theory of compensation for work done, Congress erred on the side of leniency towards the supervising officials. The Act of 1898 endeavored to redress the balance by changing the basis of payment,[2] but the effect was excess in the other direction. Under this act the fees for services rendered were reduced to the point of being almost purely nominal, and compensation was given upon a commission basis "with reference to the benefit conferred upon the estate."[3] The commission given referees in involuntary bankruptcy was one per cent on all sums paid "as dividends and commissions."[4] By the same law referees in composition agreements were paid one half of one per cent "on the amount to be paid creditors upon the confirmation of a composition." Payments made under these provisions immediately proved too small to attract reputable lawyers. Consequently they were soon supplemented by diverse systems of extra-statutory charges, varying from district to district. Some districts developed rules permitting collection of fees for filing and allowing claims, others granted a per diem charge for hearings, or additional allowances for services as special master.[5] Thus the statutory intention of keeping costs low was lost in a maze of ingenious but expensive devices for making the position of referee attractive.

Conflict of Laws (1926) 39 Harv. L. Rev. 533 (intimating that the reason the scope of the "full faith and credit" clause has not been extended to causes of action is because of certain practical objections).

19. U. S. L. Week, Oct. 9, 1934, at 103, col. 3.

20. See Loucks v. Standard Oil Co., 224 N. Y. 99, 110-113, 120 N. E. 198, 201 (1918); Walsh v. New York and New England Rr. Co., 160 Mass. 571, 36 N. E. 584 (1894); Hanlon v. Leyland and Co. Ltd., 223 Mass. 438, 442, 111 N. E. 907, 908 (1916).

1. 14 Stat. 517 (1867).

2. 30 Stat. 556 (1898), c. 541, § 40, 11 U. S. C. A. § 68 (1926).

3. In re Meadows, 211 Fed. 948, 950 (C. C. A. 2d, 1914), aff'g 199 Fed. 304 (W. D. N. Y. 1912). As to the measure of compensation for assignees, cf. Randolph v. Scruggs, 190 U. S. 533, 538 (1903).

4. 30 Stat. 556, c. 541, § 40 (1898), 11 U. S. C. A. § 68 (1926). It was decided in the case of In re Utt, 105 Fed. 754 (C. C. A. 7th, 1901) that the dividends on which the commission was based did not include moneys paid to secured creditors. The Amendatory Act of 1903, 32 Stat. 799, 11 U. S. C. A. § 68 (1926) altered this, so that commissions were paid on amounts disbursed to secured as well as unsecured creditors.

5. See Collier, Bankruptcy (Gilbert's ed. 1930) 682, n. 5.

It was for the express purpose of ending these abuses that the Amendatory Act of 1903 was passed.[6] This strictly prohibited any other or further compensation to referees than that prescribed in the Act,[7] enlarged slightly the authorized fees, and enhanced the commission of referees in involuntary bankruptcy. The commission in voluntary compositions, however, was left unaltered.

Unfortunately the measure of that commission is ambiguously worded, so that from the very first the courts have been compelled to construe out of whole cloth what is "the amount to be paid creditors upon the confirmation of a composition." There was no difficulty in the ordinary situation where creditors were paid all in cash through the medium of the court. Where, however, something other than cash or some substitute for part of the cash was employed, the courts were compelled by their own efforts to seek an equitable balance of compensation. In one case, for example, bondholders secured by a first mortgage purchased the assets of the bankrupt at an allowance without actual exchange of money.[8] It was held that the commission should be computed just as if the cash had actually changed hands. Again where obligations were by stipulation substituted for cash in a composition agreement, the commission was not thereby diminished.[9] A little later, where a composition had already been confirmed and a third party agreed to pay a certain sum of money to a secured creditor for the bankrupt, but not through the medium of the court, it was held that the commission must be computed on the whole sum, including that not paid through the court.[10]

Decisions of this nature checked efforts by creditors to lower referees' fees, but the courts have also been vigilant against efforts of referees to secure more than they deserved. When a referee ordered and assisted in the sale of pledged assets although sale by the pledgee without his order would have been rightful and would have yielded as much, it was held that the referee's commission was not to be based

6. 32 STAT. 799 (1903), 11 U. S. C. A. § 68 (1926).

7. 32 STAT. 800 (1903), 11 U. S. C. A. § 112 (1926).

8. Varney v. Harlow, 210 Fed. 824 (C. C. A. 4th, 1913). The case of American Surety Co. v. Freed, 224 Fed. 333 (C. C. A. 3rd, 1915) is out of line with this decision, though not in actual conflict with it. Therein it was held that where creditors purchased the assets of a bankrupt corporation, encumbered with their own liens, and then cleared the liens by exchange of preferred stock for bonds and of common stock for the assigned claims of unsecured creditors, the compensation for the referee was to be measured by the purchase price of the encumbered assets and not by the value of the recapitalized company. The court in its desire to limit the referee's fees seems to have overlooked the important fact that the creditors secured from the bankrupt estate a far greater benefit than the cash paid for the encumbered property: namely, the value of their liens, whatever that might have been. It is a curious case, badly reasoned and obscure. Fortunately it leads only up a judicial blind alley.

9. In re J. B. White and Co., 225 Fed. 796 (S. D. Ga. 1915). This important decision is unfortunately so brief that it is obscure both as to facts and reasoning.

10. Matter of Carloss Ice Co., 41 Am. B. R. (N. S.) 306 (1918). The rule was succinctly stated in the case of In re Sandford Furniture Manufacturing Co., 126 Fed. 888 (E. D. N. C. 1903) as, in effect, that a mere outside agreement between the parties and their attorneys could not deprive a referee of his rights under the composition agreement. Probably the leading case on this whole matter, to judge from the number of citations, is Kinkhead v. Bacon, 230 Fed. 362 (C. C. A. 6th, 1916). This, however, goes no farther than the other cases, merely stating that the "amount to be paid creditors" was not limited to the amount paid through the court by deposit of the bankrupt but might include sums to which certain note holders were entitled by virtue of the composition agreement.

upon the sum realized by the sale.[3] Similarly, where an option was given creditors of taking twenty-five per cent in cash or one hundred per cent in stock of a new corporation formed to take over the bankrupt's business, and where the referee in determining his compensation attempted to take the new stock at par, the court refused its approval, holding the two offers to be obvious equivalents.[11]

Where, however, there is no alternative offer against which to weigh the value of securities offered in a composition, the problem is more complex. Such was the case recently presented in a composition agreement reorganizing a New York real estate investment corporation.[12] The corporation, with claims against it of $13,-008,038.30, filed a petition of voluntary bankruptcy. It offered its creditors fifteen per cent payment in cash, the balance to be paid by a continuance of the old bonds with certain indorsements. The bonds were to be scaled down to eighty-five per cent of their former value in consideration of the cash payment, the maturity was to be extended for periods up to seven years, and there was to be a new interest rate of five instead of six per cent. More important, interest was to be paid only out of earnings, if any. The whole scheme of settlement was to lapse in the event of default. On paper, of course, such a composition is quite attractive. The creditors lose little more than one per cent of interest and save one hundred per cent of their principal. If this were so, there would be no injustice in allowing the referee his full claim of $65,040.10. But in actuality this solution is not so just. The creditors are receiving at most $1,951,205 in cash, plus some highly dubious bonds, currently appraised in the open market, not at 85 or over, but at 22.[13] If the benefit conferred by the referee upon the estate is equitably worth one half of one per cent of this, and this sum would prove sufficient to attract the services of a capable referee, the amount claimed is gross overpayment. Very realistically, the court seized upon the market value of the bond as the test of what was actually saved to the creditors out of the wreckage, thus setting the commission as one half of one per cent on 37 per cent of the claims, or $24,064.87.[14]

In the light of previous decisions, it is not strange that the court should so construe the ambiguous terms of the statute. But there are two considerations that lay such a construction open to attack. The first is that in past cases where the cash rather than the face value of securities has been taken as the basis for computing the commission, there has been an optional offer in cash,[15] or the substitution has been for a definite part of a previously arranged cash composition.[16] It does not, however, require a great stretch of the judicial imagination to see in the opportunity for sale on the market, a kind of cash option for the bonds herein

11. In re Mills Tea and Butter Co., 235 Fed. 815 (D. Mass. 1916). To similar effect is the case of In re Batterman, 231 Fed. 699 (C. C. A. 2d, 1916), where a composition was confirmed on the basis of sixty-five per cent in cash, and thereafter certain creditors in lieu thereof accepted fifteen per cent in cash and eighty-five per cent in notes of another corporation; the court held that the alternatives were equivalent. This case, however, was an instance of a court checking the effort of creditors to diminish a referee's commission.

12. In re Realty Associates Security Corporation, 6 F. Supp. 549 (E. D. N. Y. 1934).

13. Three per cent or slightly over is the current return on so-called gilt-edged bonds. Thus first class, safe bonds with a face value of 85 and a five per cent return would sell considerably above par.

14. Fifteen per cent cash settlement, plus 22, the market value of the bond, is 37—37% of par.

15. In re Batterman, 231 Fed. 699 (C. C. A. 2d, 1916); In re Mills Tea and Butter Co., 235 Fed. 815 (D. Mass. 1916).

16. In re J. B. White and Co., 225 Fed. 796 (S. D. Ga. 1915).

offered creditors. The second is that the Supreme Court, in its latest general order,[17] has declared that "for the purpose of computing the commissions of the referee . . . the amount of the debts whose maturity is extended . . . shall be deemed to be the amount to be paid creditors." It is certainly arguable that by "the amount of the debts whose maturity is extended" is meant the face value of the obligations. Whether in making this rule the Supreme Court has fully considered the possibilities of a case such as the present one, and means the words in that sense, is hard to know. In the past the lower courts have not construed "amount" appearing in the statute with any such strictness. In the absence of a more illuminating statement from the Supreme Court it would appear that the present rule presents no more clear criterion than the statute and ought to be construed in the same manner. Certainly the court in the instant case has made a striking adaptation to new circumstances, and although it is difficult to estimate the chances of reversal upon appeal, the stand of the lower court must be recognized for its evident courage and wisdom.

EFFECT UPON A MURDERER'S ESTATE OF STATUTES PRECLUDING MURDERER'S INHERITANCE FROM VICTIM

A PENNSYLVANIA statute[1] provides that no person "finally adjudged guilty of murder" shall inherit from the person killed. After a father had killed his daughter and then committed suicide before arrest and trial, the orphans' court ordered the daughter's estate to be distributed to the administrator of her father's estate. To this decree the next of kin objected on the ground that the statute precluded such inheritance by a murderer from his victim. But the Pennsylvania Supreme Court, three out of seven justices dissenting, affirmed the lower court's conclusion and held that the father's estate was not precluded from taking the daughter's estate by intestate succession as he had not been "adjudged guilty" within the terms of the statute.[2]

The split of judicial opinion in the United States concerning a murderer's right to inherit from his victim has been the subject of frequent comment,[3] and statutes similar to the one construed in the instant case have been enacted in at least twenty-three states.[4] In the absence of such a statute, some courts have held that

17. General Order XLVIII, § 4, (April 17, 1934).

1. PA. STAT. ANN. (Purdon, 1930) tit. 20, § 136.

2. In re Tarlo's Estate, 172 Atl. 139 (Pa. 1934).

3. E.g., 1 WOERNER, ADMINISTRATION (3d rev. ed. 1923) 186; Ames, *Can a Murderer Acquire Title by his Crime and Keep it?* (1897) 36 AM. L. REG. (N. S.) 225, reprinted in LECTURES ON LEGAL HISTORY (1913) 310; BORDWELL, *Statute Law of Wills* (1928) 14 IOWA L. REV. 304; Comments (1915) 9 ILL. L. REV. 505; (1908) 7 MICH. L. REV. 160; Notes (1927) 51 A. L. R. 1096; (1931) 71 A. L. R. 288; L. R. A. 1915C 328; (1891) 4 HARV. L. REV. 394; (1894) 8 id. at 170; (1914) 24 id. at 227; (1914) 27 id. at 280; (1917) 30 id. at 622; (1915) 9 ILL. L. REV. 502; (1933) 28 id. at 127; (1906) 4 MICH. L. REV. 653; (1908) 7 id. at 71; (1915) 13 id. at 336; (1918) 16 id. at 561; (1931) 29 id. at 745; (1931) 8 N. Y. U. L. Q. REV. 492; (1916) 64 U. OF PA. L. REV. 307; (1933) 19 VA. L. REV. 518; (1918) 27 YALE L. J. 964.

4. ARK. DIG. STAT. (Crawford & Moses, Supp. 1927) §§ 3514a, 3514b; CAL. CODE CIV. PROC. (Deering, 1931) § 258; COLO. ANN. STAT. (Mills, 1930) § 7838a; FLA. COMP. GEN. LAWS ANN. (Supp. 1934) § 5480 (9); IND. STAT. ANN. (Burns, 1926) § 3376; IOWA CODE (1931) §§ 12032-34; KAN. REV. STAT. ANN. (1923) c. 22, § 133; LA. CIV. CODE ANN. (Dart.,

they cannot interfere with the relevant statute of descent[5] and accordingly have allowed a murderer to inherit. Decisions embodying this view frequently concede that the result is unfortunate and in West Virginia a court has found a means, in cases involving the proceeds of a life insurance policy, to avoid the effect of its lip service to the statute of descent.[6] In other jurisdictions the common law maxim[7] that no one may profit by his own wrong has been thought to be sufficiently controlling to justify departure from the laws of descent and to deny inheritance by the murderer.[8] Commentators have insisted that it is more logical to hold that the legal title passes, but that it is subjected to a constructive trust; this suggestion, however, has met with scant judicial favor.[9] Thus court decisions in ten jurisdic-

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1932) § 966; MINN. STAT. (Mason, 1927) § 8734; MISS. CODE ANN. (1930) §§ 1413, 3566; NEB. COMP. STAT. (1929) c. 30, §§ 119, 120; N. C. CODE ANN. (Michie, 1931) §§ 10, 2522, 4099; N. D. COMP. LAWS ANN. (1913) § 5683; OHIO GEN. CODE (Page, Supp. 1932) § 10503 (17); OKLA. STAT. ANN. (Harlow 1931) § 1616; ORE. CODE ANN. (1930) c. 10, § 213; PA. STAT. ANN. (Purdon, 1930) tit. 20, §§ 136, 244; S. C. CODE (Michie, 1932) § 8374; TENN. ANN. CODE (Will. Shan. & Harlow, 1932) §§ 8388, 8395; UTAH REV. STAT. ANN. (1933) tit. 101, c. 3, art. 22; VA. CODE (Michie, 1930) § 5274; W. VA. CODE ANN. (Michie, 1932) c. 42, art. 4, § 2; WYO. REV. STAT. ANN. (Courtright, 1931) c. 88, § 4009. For a similar statute in the District of Columbia, see D. C. CODE (1929) tit. 25, § 250.

5. Hagan v. Cone, 21 Ga. App. 416, 94 S. E. 602 (1917); Wall v. Pfanschmidt, 265 Ill. 180, 106 N. E. 785 (1914); McAllister v. Fair, 72 Kan. 533, 84 Pac. 112 (1906); Eversole v. Eversole, 169 Ky. 793, 185 S. W. 487 (1916); Gollnik v. Mengel, 112 Minn. 349, 128 N. W. 292 (1910); Shellenberger v. Ransom, 41 Neb. 631, 59 N. W. 935 (1894); Wilson v. Randolph, 50 Nev. 371, 261 Pac. 654 (1927); Owens v. Owens, 100 N. C. 240, 6 S. E. 794 (1888); Deem v. Milliken, 6 Ohio C. C. R. 357, 3 Ohio C. D. 491, aff'd without opinion, 53 Ohio St. 668, 44 N. E. 1134 (1892); De Graffenreid v. Iowa Land and Trust Co., 20 Okla. 687, 95 Pac. 624 (1908); In re Carpenter's Estate, 170 Pa. 203, 32 Atl. 637 (1895); Lucas v. Harris (Tenn. 1904), unreported, referred to in Beddingfield v. Estill and Newman, 118 Tenn. 39, 50, 100 S. W. 108, 111 (1907); Hill v. Noland, 149 S. W. 288 (Tex. Civ. App. 1912); Johnston v. Metropolitan Life Insurance Co., 85 W. Va. 70, 100 S. E. 865 (1919).

6. Johnston v. Metropolitan Life Insurance Co., 85 W. Va. 70, 100 S. E. 865 (1919) (insurance company instructed not to pay to victim's administrator because murderer was sole distributee), followed in Wickline v. Phoenix Mutual Life Insurance Co., 106 W. Va. 424, 145 S. E. 743 (1928). For discussion see Note (1920) 18 MICH. L. REV. 430.

7. BROOM, LEGAL MAXIMS (8th ed. 1911) 233.

8. Price v. Hitaffer, 164 Md. 505, 165 Atl. 470 (1933); Slocum v. Metropolitan Life Insurance Co., 245 Mass. 565, 139 N. E. 816 (1923); Garwols v. Bankers' Trust Co., 251 Mich. 420, 232 N. W. 239 (1930); Perry v. Strawbridge, 209 Mo. 621, 108 S. W. 641 (1908); Riggs v. Palmer, 115 N. Y. 506, 22 N. E. 188 (1889); Smith v. Todd, 155 S. C. 323, 152 S. E. 506 (1930) (statute stating that conviction precludes murderer from inheriting held not to abrogate common law rule barring all murderers); De Zotell v. Mutual Life Insurance Co. of N. Y., 60 S. D. 532, 245 N. W. 58 (1932); Box v. Lanier, 112 Tenn. 393, 79 S. W. 1042 (1904); In re Tyler's Estate, 140 Wash. 679, 250 Pac. 456 (1926); In re Wilkins' Estate, 192 Wis. 111, 211 N. W. 652 (1927).

9. Riggs v. Palmer, 115 N. Y. 506, 22 N. E. 188 (1889) held, on the ground of the common law maxim, that a murderer could not take a devise from his victim and that he acquired no title. This rule was applied in the first decision of Shellenberger v. Ransom, 31 Neb. 61, 47 N. W. 700 (1891) where its operation was extended to a bona fide purchaser from the murderer. In order to prevent such a result commentators then suggested that it was preferable to let the murderer take title thus complying with the statute of descent

tions deny such inheritance as against fourteen states that permit inheritance. In accordance with this fact, it was said in a recent South Dakota case[10] that the "numerical weight of authority" was that which followed the statute of descent and allowed the murderer to benefit. But such a statement is misleading. In nine out of the fourteen states wherein murderers were permitted to take, the legislatures, often

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but as a constructive trustee in which case a bona fide purchaser could obtain the property free from the trust. Note (1891) 4 HARV. L. REV. 394; Note (1894) 8 id. 170; Ames, *Can a Murderer Acquire Title by his Crime and Keep it?* (1897) 36 AM. L. REG. (N. S.) 225. The New York Court of Appeals by a dictum in Ellerson v. Wescott, 148 N. Y. 149, 154, 42 N. E. 540, 542 (1896) supported the constructive trust theory and, while ostensibly explaining the Riggs decision as in accordance therewith, really overruled the prior case on that point. Unfortunately, the mistaken view that the Riggs case adopted the constructive trust theory for New York has been perpetuated. See CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921) 40-42; Comment (1931) 29 MICH. L. REV. 745. The opinion that the New York courts have made efforts to employ it following the dictum in the Ellerson case has also been advanced. *A Striking Omission in the New York Statute of Devolution* (1930) 1 FIDUCIARY L. CHRON. (No. 11 Dec.) 3-6; (1931) 2 id. 4-6, 15-17, 32-36. But the constructive trust theory is not adverted to in any of the subsequent decisions. In re Fleming, 5 App. Div. 190, 39 N. Y. Supp. 156 (1st Dep't, 1896); Logan v. Whitley, 129 App. Div. 666, 114 N. Y. Supp. 255 (2d Dep't, 1908); in re Wolf, 88 Misc. 433, 150 N. Y. Supp. 738 (Surr. Ct. 1914); In re Briggs, 171 App. Div. 52, 156 N. Y. Supp. 947 (3d Dep't, 1916); Van Alstyne v. Tuffy, 103 Misc. 455, 169 N. Y. Supp. 173 (Sup. Ct. 1918); In re Santourian's Estate, 125 Misc. 668, 212 N. Y. Supp. 116 (Surr. Ct. 1925).

Other courts in general have disregarded the constructive trust suggestion and have even, in a few instances, expressly or impliedly disapproved it. See Wall v. Pfanschmidt, 265 Ill. 180, 192, 106 N. E. 785, 789 (1914); In re Kuhn's Estate, 125 Iowa 449, 451, 101 N. W. 151, 152 (1904); Wellner v. Eckstein (opinion of Start, C. J.) 105 Minn. 444, 449, 117 N. W. 830, 834 (1908); Holloway v. McCormick, 41 Okla. 1, 5, 136 Pac. 1111, 1112 (1913). The only judicial decisions in support of the theory are those where a constructive trust was imposed on a tenant by the entirety in favor of the heirs of his spouse whom he had feloniously killed. Bryant v. Bryant, 193 N. C. 372, 137 S. E. 188 (1927); Barnett v. Couey, 224 Mo. App. 913, 27 S. W. (2d) 757 (1930). Contra: Beddingfield v. Estill and Newman, 118 Tenn. 39, 100 S. W. 108 (1907).

In his article advocating the theory, Dean Ames maintained that equity should compel the murderer to hold the property as a constructive trustee for the person wronged, "or, if he be dead, for his representative." Many commentators have approved of this suggestion. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921) 42; Note (1917) 30 HARV. L. REV. 622; Note (1918) 16 MICH. L. REV. 561; Comment (1931) 29 id. 745; Note (1916) 64 U. OF PA. L. REV. 307; Note (1918) 27 YALE L. J. 964. But adverse comment has not been lacking. Note (1911) 24 HARV. L. REV. 227; Note (1914) 27 id. at 280; Comment (1915) 9 ILL. L. REV. 505; Note (1931) 8 N. Y. U. L. Q. REV. 492. A serious criticism is that the application of this rule permits the other heirs of the victim, exclusive of the murderer, to inherit. They, however, were not intended by any one to take an interest in the victim's estate and cannot be considered as having been wronged by the murderer's act, except in so far as it deprived them of the chance that the deceased, had he lived, would have made a will in their favor or survived the slayer. It is rather the murderer's own heirs who would be wronged by their ancestor's crime if the constuctive trust were used for the end suggested by Dean Ames; it should more properly be employed as a device whereby the criminal would be decreed as holding for them.

10. See De Zotell v. Mutual Life Insurance Co. of New York, 60 S. D. 532, 538, 245 N. W. 58, 61 (1932).

very promptly, responded to judicial suggestion by enacting new laws or by modifying existing ones[11] to prevent in greater or less degree[12] recurrence of the result. And since 1922, seven of the eight states to pass upon the question for the first time have applied the common law rule and prohibited the murderer from taking.[13] Accordingly, in only five of the twenty-four jurisdictions discussed would a murderer now be able to inherit from his victim.

The question in the present case is not, however, the same as the question upon which the general legislative policy has been based. In the previous cases which led to legislation on the subject the issue has usually been raised where the murderer or his attorney would directly have benefited by inheritance. In six cases the claim was presented by counsel who had defended the murder and who held an assignment of the the inheritance,[14] while in three the estate was awarded to widows sentenced to imprisonment for killing their husbands.[15] In the other fourteen states which have enacted such legislation there is some evidence that it may have come to pass as the result of unreported cases[16] or as a consequence of murder

11. In re Kuhn's Estate, 125 Iowa 449, 101 N. W. 151 (1904) (statute amended 1902, while case still pending on appeal, to bring surviving spouse within its terms); McAlister v. Fair, 72 Kan. 533, 84 Pac. 112 (1906) (statute passed 1907); Gollnik v. Mengel, 112 Minn. 349, 128 N. W. 292 (1910) (statute passed 1917); Shellenberger v. Ransom, 41 Neb. 631, 59 N. W. 935 (1894) (statute passed 1913); Owens v. Owens, 100 N. C. 240, 6 S. E. 794 (1888) (statute amended 1889 to include dower, curtesy, year's provision and distributive share of surviving spouse); National Benefit Life Insurance Co. v. Davis, 38 Ohio App. 454, 176 N. E. 490 (1929) (statute passed 1931); Equitable Life Assurance Co. v. Weightman, 61 Okla. 106, 160 Pac. 629 (1916) (statute passed 1915 while case still pending on appeal); In re Carpenter's Estate, 170 Pa. 203, 32 Atl. 637 (1895) [statute passed 1917 expressly to meet situation presented by Carpenter case; see In re Tarlo's Estate, 172 Atl. 139, 141 (Pa. 1934)]. In Tennessee the common law rule was accepted in Box v. Lanier, 112 Tenn. 393, 79 S. W. 1042 (1904) and the statute, passed in 1905, may have been enacted as a result of the unreported case of Lucas v. Harris (Tenn. 1904) (tenancy by entireties), which is mentioned in Beddingfield v. Estill and Newman, 118 Tenn. 39, 50, 100 S. W. 108, 111 (1907).

12. For discussions of the varied phrasing of such statutes and its effect see Bordwell, *Statute Law of Wills* (1928) 14 Iowa L. Rev. 304; Note (1931) 29 Mich. L. Rev. 745, 749; Note (1931) 8 N. Y. U. L. Q. Rev. 492. For a suggestion of the various problems to be considered in drawing up such a statute see *A Striking Omission in the New York Statute of Devolution* (1931) 2 Fiduciary L. Chron. 35-36.

13. Price v. Hitaffer, 164 Md. 505, 165 Atl. 470 (1933); Slocum v. Metropolitan Life Ins. Co., 245 Mass. 565, 139 N. E. 816 (1923); Garwols v. Bankers' Trust Co., 251 Mich. 420, 232 N. W. 239 (1930); Smith v. Todd, 155 S. C. 323, 152 S. E. 506 (1930); De Zotell v. Mutual Life Insurance Co. of N. Y., 60 S. D. 532, 245 N. W. 58 (1932); In re Tyler's Estate, 140 Wash. 679, 250 Pac. 456 (1926); In re Wilkins' Estate, 192 Wis. 111, 211 N. W. 652 (1927). The exception is Wilson v. Randolph, 50 Nev. 371, 261 Pac. 654 (1927).

14. McAllister v. Fair, 72 Kan. 533, 84 Pac. 112 (1906); Shellenberger v. Ransom, 41 Neb. 631, 59 N. W. 935 (1894); Deem v. Milliken, 6 Ohio C. C. R. 357, 3 Ohio C. D. 491, aff'd without opinion, 53 Ohio St. 668, 44 N. E. 1134 (1892); De Graffenreid v. Iowa Land and Trust Co., 20 Okla. 687, 95 Pac. 624 (1908); In re Carpenter's Estate, 170 Pa. 203, 32 Atl. 637 (1895); Johnston v. Metropolitan Life Insurance Co., 85 W. Va. 70, 100 S. E. 865 (1919).

15. Gollnik v. Mengel, 112 Minn. 349, 128 N. W. 292 (1910); Owens v. Owens, 100 N. C. 240, 6 S. E. 794 (1888); National Benefit Life Insurance Co. v. Davis, 38 Ohio App. 454, 176 N. E. 490 (1929).

16. See remarks concerning Lucas v. Harris (Tenn. 1904), *supra* note 11.

trials wherein the matter of inheritance was not an issue but where public indignation was aroused by the fact that the victim's estate was being used to compensate the murderer's counsel.[17] But here the question is whether, the murderer having precluded himself by suicide from benefiting, there is any requirement of visiting his sins upon his presumably innocent successors.[18]

Had the deaths of the two persons involved in the instant case occurred in like sequence but as the result of an accident, unquestionably the father's administrator would have been awarded the daughter's estate. It may be argued that there is no sufficient reason why the father's creditors, devisees, or heirs should go empty-handed merely because the deaths resulted from a criminal action over which they had no control.[19] Public policy has favored abolishing forfeiture of property for crime;[20] and under the constitutional provisions which do permit it, merely an estate for the life of the criminal may be forfeited, as it was thought that no additional penalty should be imposed upon the wrongdoer's family.[21] Similar considerations seem applicable to any other class of innocent persons claiming under a criminal. On the other hand a doctrine permitting the estate of a self-destroyed murderer to take may be thought contrary to public policy. Cases of suicide by one in desperate circumstances who has insured his own life with the object of thus providing for his family or of making good defalcations committed while in a position of trust are by no means unknown. It is conceivable that a person in such straits and actuated

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17. See Thomas, *Public Policy as Affecting Property Rights as a Result of Wrongful Acts* (1908) 1 CALIF. L. REV. 299, 407, stating that the California statute passed in 1905 was due to such circumstances appearing in a criminal prosecution, People v. Weber, 149 Cal. 325, 86 Pac. 671, finally decided in 1906.

18. In several previous cases involving situations where the murderer had committed suicide the courts failed to discuss what seems to be the real question at issue: Price v. Hitaffer, 164 Md. 505, 165 Atl. 470 (1933); Perry v. Strawbridge, 209 Mo. 621, 108 S. W. 641 (1908); Holloway v. McCormick, 41 Okla. 1, 136 Pac. 1111 (1913); Wickline v. Phoenix Mutual Life Insurance Co., 106 W. Va. 424, 145 S. E. 743 (1928); In re Wilkins' Estate, 192 Wis. 111, 211 N. W. 652 (1927). The rights of the innocent heirs are considered only in the dissenting opinion in Box v. Lanier, 112 Tenn. 393, 79 S. W. 1042 (1904). In Van Alstyne v. Tuffy, 103 Misc. 455, 169 N. Y. Supp. 173 (1918) the problem is briefly dismissed as not a ground for distinction.

19. It may be said that heirs who would have benefited suffer just as much and just as innocently if their ancestor is convicted and sentenced. But in such a case it is so abhorrent to permit the murderer to employ the proceeds of his unjust enrichment for counsel fees or appeals, that the lesser inequity must prevail.

20. 1 STAT. 117 (1790), 18 U. S. C. A. § 544 (1927); ILL. CONST. art II, § 11; IND. CONST. art. 1, § 82; MINN. CONST. art. I, § 11; MO. CONST. art. II, § 13; OHIO CONST. art. I, § 12; WIS. CONST. art. I, § 12.

21. U. S. CONST. Art. III, § 3; KY. CONST. § 20; PA. CONST. art. I, § 19; 1 PAGE, WILLS (2d ed. 1926) 214. The courts which have applied the common law maxim and precluded a murderer from taking by descent or devise have maintained that no forfeiture was imposed because the murderer had never inherited and, therefore, was not deprived of an estate to which he had title. Perry v. Strawbridge, 209 Mo. 621, 108 S. W. 641 (1908); Riggs v. Palmer, 115 N. Y. 506, 22 N. E. 188 (1889); Box v. Lanier, 112 Tenn. 393, 79 S. W. 1042 (1904); In re Tyler's Estate, 140 Wash. 679, 250 Pac. 456 (1926); see WHARTON, HOMICIDE (3d ed. 1907) § 665. This subtle distinction between taking away an estate and the expectancy thereof is unfortunate because forfeitures were abolished for the benefit of children and heirs. Wallach v. Van Riswick, 92 U. S. 202 (1875); ROOD, WILLS (2d ed. 1926) § 143.

by like motives might plan a suicide preceded by the murder of some wealthy relative or friend from whom an inheritance or a bequest is expected. But such a premeditated double killing would probably occur infrequently. Nevertheless the possibility does exist and cases have come up where there appeared to be such intent, as where a murderer bequeathed the proceeds of his victim's life insurance policy during the period intervening between the murder and his own suicide.[22] Yet to eliminate succession only in such a case on the ground of the public policy against offering inducements to commit crime would require a determination of intent, which is impractical because of the difficulty of proving the presence or lack thereof.[23] Therefore, if it is thought essential on public policy grounds to preclude succession in cases where the intent to acquire property motivated the crime, it will be necessary to bar the murderer's estate from taking in every instance.[24] The alternative will be to permit succession in every case. It is difficult to choose between these two policies, and therefore hard to criticize adversely the result reached in the instant case where the Pennsylvania court by giving the statute a strict construction permitted the estate of this murderer, who had committed suicide before he could be brought to trial and convicted, to take.[25] This is particularly true as there is little information to determine whether, at the time the statute was passed, the legislature considered the further question of the rights of other parties should the murderer also be dead.

However, some statutes do not require "conviction," but are so broadly phrased as to preclude a murderer from succeeding to his victim's property under any circumstances. Under such a statute the result of permitting his estate to take could only be achieved if the court were willing to read into the law an intent to prohibit "enjoyment" by the murderer rather than succession, or if it were willing to adopt a constructive trust theory to attain the same result. No court, as far as is known, has ever attempted such judicial legislation. And such conduct on the part of a court, particularly in view of the misgivings attached to pursuing a policy which might offer a possible inducement to crime, would be justifiable only if there were a strong contrary public policy demanding it. And even though it may be desirable that

22. Such a situation did occur in Wickline v. Phoenix Mutual Life Insurance Co., 105 W. Va. 424, 145 S. E. 743 (1928), where a wife murdered her husband, on the next day bequeathed the proceeds of his life insurance to her sister, and on the day after that committed suicide.

23. It is significant that only one of the many statutes which prohibit a murderer from inheriting require that the crimes shall have been committed in order to obtain the victim's property. VA. CODE (Michie, 1930) § 5274. Two decisions make intent the criterion. Gollnik v. Mengel, 112 Minn. 349, 128 N. W. 292 (1910) (second degree murder); In re Wolf, 88 Misc. 433, 150 N. Y. Supp. 738 (Surr. Ct. 1914) (aggrieved husband accidentally killed wife instead of her paramour). But the latter decision was expressly overruled on the point of intent by Van Alstyne v. Tuffy, 103 Misc. 455, 169 N. Y. Supp. 173 (Sup. Ct. 1918). And in cases where intent was lacking, courts have stated that a murderer would inherit under the relevant statute of descent even had such intent been present. De Graffenreid v. Iowa Land and Trust Co., 20 Okla. 687, 95 Pac. 624 (1908); Holloway v. McCormick, 41 Okla. 1, 136 Pac. 1111 (1913).

24. Under a statute stipulating that conviction shall preclude a murderer from taking, such a result may be obtained by construing it not as a delimitation of, but as merely supplementary to the common law maxim barring murderers under all circumstances. Smith v. Todd, 155 S. C. 323, 152 S. E. 506 (1930).

25. Hogg v. Witham, 120 Kan. 341, 242 Pac. 1021 (1926) reached a like result under similar circumstances.

innocent persons should be protected, it must be remembered that devolution of property is largely fortuitous and that it is always difficult to summon a convincing argument to overthrow the clear words of a statute. In such an instance it might similarly be well for courts to follow the legislative statement and thus to place upon the legislatures the need either to express more clearly what is intended to be accomplished or to accept the responsibility for curious results.

RIGHT TO SET OFF PARTNER'S DEPOSITS IN INDIVIDUAL AND FIDUCIARY CAPACITIES AGAINST DEBT OWED BY PARTNERSHIP TO INSOLVENT BANK

A STATE banking commissioner, in control of an insolvent bank for the purpose of liquidation, sought payment of matured partnership notes. The defendant partners claimed set-offs for the personal deposit of one of the partners who had since deceased, for the account of another partner as decedent's administrator, and for the sum deposited by the same partner as guardian of the dead man's children and heirs. The court allowed the set-offs as to all of these deposits on the basis of the equities of the situation and the possible prevention of circuity of action.[1]

Originally a product of early equity courts, set-off is now a statutory right in actions between solvents.[2] Limiting its application, however, is the commonly accepted doctrine of mutuality which allows set-offs only of those claims due to and from the same parties in the same right and capacity.[3] This principle also has long been generally applied in suits between insolvent banks and their depositors[4] and particularly to deny in such suits the set-off of the personal deposit of one partner against a loan granted him in his joint capacity.[5] The fact that a partner is severally as well as

1. Bryant Bros. v. Wilson, 253 Ky. 578, 69 S. W. (2d) 1020 (1934).

2. See Lloyd, *Development of Set-Off* (1916) 64 U. OF PA. L. REV. 541.

3. The reason given for this rule is the "obvious injustice" of cancelling a debt due one against his obligation to a third person; or of setting off a credit gained in one capacity against a debt owed in a different role. WATERMAN, SET-OFF (2d ed. 1872) § 164; (1932) 80 U. OF PA. L. REV. 420, 426. When the question of set-off arises in bankruptcy administration, the basis of its application depends more upon the tenets of equity procedure than statutory allowance. Scott v. Armstrong, 146 U. S. 499 (1892).

4. Scott v. Armstrong, 146 U. S. 499 (1892); Thomas v. Potter Title and Trust Co., 2 F. Supp. 12 (W. D. Pa. 1932); Raymond v. Palmer, 41 La. Ann. 425, 6 So. 692 (1889); Lewis v. Pickering 58 Neb. 63, 78 N. W. 368 (1899); Coburn v. Carstarphen, 194 N. C. 368, 139 S. E. 596 (1927); Miller v. Receivers of Franklin Bank, 1 Paige 444 (N. Y. 1829); 5 MICHIE, BANKS AND BANKING (1932) §§ 152, 155, 157c; WATERMAN, SET-OFF §§ 148, 174.

5. Brashears v. Johnson, 106 Miss. 739, 64 So. 722 (1914); In re Allen, 37 Barb. 225 (N. Y. 1861); Bowling Green Savings Bank v. Todd, 64 Barb. 146 (N. Y. 1872); Bank of Anderson v. Allen et al., 146 S. C. 107, 143 S. E. 646 (1928); MECHEM, PARTNERSHIP (2d ed. 1920) §§ 340, 341; 1 MORSE, BANKS AND BANKING (6th ed. 1928) § 326 ("Neither can the individual partner and the firm so shift their respective credits and debts as to set them off, the one against the other, when the bank itself is insolvent."); (1934) 47 HARV. L. R. 1069. Contra: Owsley v. Bank of Cumberland, 23 Ky. L. Rep. 1726, 66 S. W. 33 (1902); Eyrich v. Capital State Bank, 67 Miss. 60, 6 So. 615 (1899); Jack v. Klepser et al., 196 Pa. St. 187, 46 Atl. 479 (1900). The same principle applies in cases not involving insolvent banks. Gregg v. James and Philips, 1 Ill. 143 (1825); Executors of Browne v. Thompson and Brackenridge, 1 N. J. L. 2 (1790); Hunter v. Booth et al., 84 App. Div. 85, 82 N. Y. Supp. 1000 (2d Dep't. 1903); Thomas v. Noonan et al., 133 App. Div. 459, 118 N. Y. Supp.

jointly liable for his firm's debts[6] does not make the distinction between the two capacities so tenuous as to permit set-off;[7] the operative consequences of the differentiation of individual and partnership capacities in other legal situations substantiate the tangibility of the formal discrimination. Thus where the partnership is solvent, the analogy of a surety has been applied requiring the firm to pay from its assets before its individual members are levied upon.[8] And where the problem of distribution to creditors of the assets of bankrupt partners and their insolvent firms has arisen, the impact of the Federal Bankruptcy Act[9] and the Uniform Partnership Law[10] has required distribution of partnership property to holders of claims against the firm, and individual assets to personal creditors of the members. The diversion of one source of payment to the other channel is permitted only when all claims against the initial sources have been satisfied. Recognition of the distinction of capacities in the principal case, therefore, would operate to bar the set-off of the decedent's individual account against the debt of his firm for lack of mutuality. In those jurisdictions where the fiduciary has the status of an ordinary individual depositor,[11] the set-off of funds held in administrative and guardianship capacities, as in the case of the second partner, is similarly obviated by the mutuality doctrine, for the application

25 (3d Dep't. 1909); Blumenthal v. Katz et al., 74 Misc. 456, 132 N. Y. Supp. 314 (1911); Pophan v. Rubin et al., 134 N. Y. Supp. 1067 (1912). *Contra:* McAllister v. Millhiser, 96 Ga. 474, 23 S. E. 502 (1895); Jeffries v. Evans et al., 45 Ky. 119, 43 Am. Dec. 158 (1845).

6. MECHEM, PARTNERSHIP §§ 313, 314.

7. Briggs v. Briggs and Vose, 20 Barb. 477 (N. Y. 1855); Youmans et al. v. Moore, 11 Ga. App. 66, 74 S. E. 710 (1912) semble. These decisions are based on the concept that the debt of the firm is the debt of each of the partners. But see Hodgin v. People's National Bank, 124 N. C. 540, 32 S. E. 887 (1899); 2 BOLLES, BANKING (1907) 745, 746 (". . the deposit of an individual partner cannot be applied to the partnership debt, notwithstanding the universal rule that each partner is severally responsible for the indebtedness of the concern.")

8. Edmonson v. Thomasson, 112 Va. 326, 71 S. E. 536 (1911). For discussion of the effect of the mutuality doctrine on set-off by sureties see Comment (1932) 41 YALE L. J. 881.

9. 30 STAT. 547 (1898), 11 U. S. C. A. § 23(f) (1926) (Bankruptcy Act) provides ". . . the net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts." Section 23(d) further requires separate accounting of partnership and individual property. In re Denning, 114 Fed. 219 (D. C. Mass. 1902); Titus v. Maxwell, 281 Fed. 433 (C. C. A. 6th, 1922); Paggi v. Rose Manufacturing Co. 285 S. W. 852 (Tex. Civ. App. 1926).

10. UNIFORM PARTNERSHIP LAW § 40(i), dealing with the payment to creditors by an insolvent partner, specifies prior payment of those debts owed to separate creditors over those due the partnership creditors. When a partner is deceased, although his property may be applied to the obligations of the partnership, it is subject to prior levy by his individual creditors. Id. § 36 (4).

11. Two considerations prompt the finding that the trustee is an individual depositor. Since he is personally responsible to the cestuis for the funds, the latter are not deprived of a remedy against him in the event of misappropriation. Funk and Son v. Young, 138 Ark. 38, 210 S. W. 143 (1919); Laubach v. Liebert, 87 Pa. St. 55 (1878). The stipulations, "guardian," "executor," or "treasurer" are mere descriptio personae, not altering the account's individual ownership. Forrester v. Cantley, 51 S. W. (2d) 550 (Mo. 1932); Miller v. Receivers of Franklin Bank, 1 Paige 444 (N. Y. 1829); Comfort v. Patterson, 70 Tenn. 670 (1879). For a general discussion of the right of set-off of funds held in fiduciary capacity see (1933) 31 MICH. L. REV. 844.

of these funds by the trustee in his individual capacity to partnership debts would be using the deposit of one member to off-set the liabilities of the firm to the bank. And a fortiori, if the fiduciary is considered a depositor solely in the capacity of a trustee,[12] he cannot subject these accounts to the payment of debts incurred by the firm. To reach the result in the principal case the court therefore rejected the normally accepted criterion of mutuality.

But it does not seem that the case marks an advance in the development of equitable set-off which, independently of statute, avoids the rigidities of the rule requiring mutuality. Such liberality has featured a long line of cases granting equitable relief because of the insolvency of one of the parties in order to escape the unfair result of payment on one side by the solvent obligor with no return from the delinquent.[13] But it is evident that insolvency alone did not motivate these findings as much as did the peculiar circumstances of each individual case.[14] In the instant situation, balancing of the apparent equities would scarcely seem to favor disregarding the strict mutuality doctrine. Assuming that the children[15] would be entitled to reimbursement in full from the trustee or from the firm for the funds appropriated to the latters use[16] allowance of the set-off would give them a preference over the other depositors

12. Many decisions so hold on the reasoning that there is no mutuality in the capacities of the trustee-depositor and the individual debtor. Thomas v. Potter Title and Trust Co., 2 Supp. 12 (W. D. Pa. 1932); Cosmopolitan Trust Co. v. Wasserman, 251 Mass. 514, 146 N. E. 772 (1925); Lawrence v. Lincoln County Trust Co., 123 Me. 273, 122 Atl. 765 (1923); Lewis v. Pickering, 58 Neb. 63, 78 N. W. 368 (1899); Gallagher v. David Stevenson Brewing Co., 13 Misc. 40, 34 N. Y. Supp. 594 (1895); Rubel v. Hunt, 40 Ohio App. 561, 179 N. E. 367 (1931); Tobey v. Manufacturers National Bank, 9 R. I. 236 (1869); Wagner v. Citizen's Bank and Trust Co., 122 Tenn. 164, 122 S. W. 245 (1909); cf. Wasson v. Gould, 3 Blackf. 18 (Ind. 1832) (off-set against plaintiff suing as executrix of debt owed by her individually to defendant refused); Robertson v. Garshwiller, 81 Ind. 463 (1882) (note executed in guardianship capacity could not be set off against debt owed guardian personally). Other cases reason that it is inequitable to allow a fiduciary to appropriate the funds of the beneficiary to his own use. People v. German Bank, 16 App. Div. 687, 101 N. Y. Supp. 917 (4th Dep't. 1906), aff'd, 192 N. Y. 533, 84 N. E. 1117 (1908); Sanford v. Pike, 87 Ore. 614, 170 Pac. 729 (1918); Dobyns and Davis v. Rawley, 76 Va. 537, 542 (1882) ("The court will not allow much less aid, a guardian to apply the estate of his wards to the discharge of his individual indebtedness.")

13. Scott v. Armstrong, 146 U. S. 499 (1892); Lindsay v. Jackson, 2 Paige 581 (N. Y. Ch. 1837); Holbrook v. Receivers of American Fire Insurance Co., 6 Paige 220 (N. Y. Ch. 1836); Wyckoff v. Williams, 135 App. Div. 495, 121 N. Y. Supp. 181 (1st Dep't. 1910).

14. North Chicago Rolling Mill Co. v. St. Louis Ore and Steel Co., 152 U. S. 596 (1894) (garnishee allowed set-off despite immaturity of his claim because of non-residence in addition to insolvency); Colton v. Dover Perpetual Building and Loan Association of Baltimore, 90 Md. 85, 45 Atl. 23 (1899) (refusal to allow set-off of deposit made expressly to repay loan held unjust); Moore v. Greeneville Banking and Trust Co. et al., 173 N. C. 180, 91 S. E. 793 (1917) (a fraudulent conveyance was discovered in addition to insolvency); Hughitt v. Hayes, 136 N. Y. 163, 32 N. E. 706 (1892) (the off-set sought was specific performance of a contract for the sale of land after defendant-purchaser had made valuable improvements in reliance on expected conveyance); WATERMAN, SET-OFF §§ 431, 432.

15. Since the children were the only legatees the money in the decedent's personal account and the money in the administrator's account as well as that in the guardian's account would inure to them.

16. Aside from loose equitable rationalization which would prevent the trustee's and the partnership's deriving sole benefit from the set off there are two theories upon which

and creditors of the bank. If, on the other hand, the children's reimbursement should be considered as limited to the amount of dividends they would have received as general depositors of the insolvent bank,[17] to allow the set-offs would present the partnership with a gift of the difference between the amount declarable as dividends and the face value of the deposits. In addition it would deplete by the entire amount of the set-offs the fund available for distribution among depositors and creditors. To allow the set-off would, moreover, subject the children to the risk of further loss in the event that the trustee and the firm should become insolvent and pay lower dividends than the bank. Nor can there be prevention of circuity of action in granting the set-off as to the administrator-guardian since he has no right to claim for any more than the bank dividends which are paid out by the state banking commissioner.[18] Since it is commonly accepted that in order to claim equitable set-off the substantial justice in its favor must be superior to the equitable arguments in opposition[19] it would seem that even on equitable grounds the instant decision is questionable.

ENFORCEMENT OF ORAL PROMISE TO RETURN PERSONALTY TRANSFERRED WITH INTENT TO DEFRAUD

PLAINTIFF, under indictment for criminal assault and in fear of an additional civil suit, transferred his bank account and other personalty to his niece, she promising orally to return it upon request. The second suit having failed to materialize, the plaintiff demanded return of the property transferred but the transferee refused. In an action for breach of the contract agreement, the court awarded the plaintiff damages on the ground that the transferee should not be allowed to avail herself of the attempted fraud in which she had participated for the purpose of avoiding the obligation of the contract.[1]

It is well established that existing creditors may set aside a conveyance made for

full reimbursement can be based. If the account be considered as the trustee's individual deposit (see cases cited note 11, *supra*) he appropriated it when the deposit was made and hence is responsible to the cestuis for the full amount. Or the appropriation may be considered an unsecured loan of the cestuis' funds to the partnership which is a breach of trust and renders the fiduciary liable and the partnership responsible as trustees in invitum since they knew of the nature of the deposit. Cf. Leach v. Gray et al., 201 Ala. 47, 77 So. 341 (1917).

17. It might be argued that the deposits, which really belong to the children (see cases cited note 12, *supra*), were not appropriated until, after the state bank commissioner took control of the insolvent bank, the set-offs were asserted. The value of the deposits so appropriated was the dividend, 20 per cent of the original amount. And since this was all the children lost by the appropriation, it was all they were entitled to in reimbursement.

18. If the deposit is considered as an individual account (see note 11, *supra*), the fiduciary standing in the same position as any other depositor will come under the distribution to general depositors; even if considered a trust fund, the account is not in the category of a special preferred fund. People v. Home State Bank, 338 Ill. 179, 170 N. E. 205 (1930); Denny v. Thompson, 236 Ky. 714, 33 S. W. (2d) 670 (1930); Pethybridge v. Frost State Bank, 75 Mont. 173, 243 Pac. 569 (1926); 5 MICHIE, BANKS AND BANKING § 330. Hence he receives no preference or priority in payment.

19. WATERMAN, SET-OFF § 439.

1. Gallo v. De Michael, 118 Conn. 487, 172 Atl. 922 (1934).

the purpose of hindering or defrauding creditors.[2] But the defrauding transferor may not ordinarily have such a conveyance set aside;[3] the court, by way of punishment for the attempted fraud, will refuse to grant relief to a party who, in technical language, has unclean hands[4] or is in pari delicto.[5] Such is frequently the result where the equitable remedies of specific performance of a promise by the transferee to reconvey[6] or oral and resulting trusts[7] are claimed by the transferor. Thus, although the conveyance is itself not fraudulent as to the parties thereto, equity refuses to lend its aid to relieve a party from the consequences of his own fraud.[8] In the principal case, however, the plaintiff did not seek an equitable remedy to nullify the transfer but sought to enforce a secondary right arising from the transfer contract by claiming damages for its breach.[9] Since the facts of the case do not bring it within any of the usual exceptions which allow recovery where the transferee has been more at fault, viz. by false inducement,[10] advantage taken of a fiduciary position,[11] and undue influence exerted over one of weak mental capacity,[12] the attempt was made to take the case to the law side of the docket in order to

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2. 13 ELIZ., c. 5 represents the common law rule followed in case law and statutory provisions in all the states except the sixteen which have adopted the Uniform Fraudulent Conveyance Act. See (1934) 43 YALE L. J. 1341, n. 15. For the text of 13 ELIZ., c. 5, see GLENN FRAUDULENT CONVEYANCE (1931) 587.

3. Dent v. Ferguson, 132 U. S. 50 (1889); Baird v. Howison, 154 Ala. 359, 45 So. 668 (1907); Gest v. Gest, 117 Conn. 289, 167 Atl. 909 (1934); Castellow v. Brown, 119 Ga. 461, 46 S. E. 632 (1904); Rosenbaum v. Huebner, 277 Ill. 360, 115 N. E. 558 (1917); Reed v. Robbins, 58 Ind. App. 659, 108 N. E. 780 (1915); Carson v. Beliles, 121 Ky. 294, 89 S. W. 208 (1905); Massi v. Lavine, 139 Mich. 140, 102 N. W. 665 (1905); Tantum v. Miller, 11 N. J. Eq. 551 (1858); White v. Cuthbert, 41 N. Y. S. 818 (1896).

4. Gest v. Gest, 117 Conn. 289, 167 Atl. 909 (1934); Rosenbaum v. Huebner, 277 Ill. 360, 115 N. E. 558 (1917); Massi v. Lavine, 139 Mich. 140, 102 N. W. 665 (1905).

5. Dent v. Ferguson, 132 U. S. 50 (1889); Baird v. Howison, 154 Ala. 359, 45 So. 668 (1908).

6. Vollaro v. Gargano, 97 Conn. 275, 116 Atl. 179 (1922); Hoff v. Hoff, 106 Kan. 542, 189 Pac. 613 (1920); White v. Cuthbert, 41 N. Y. Supp. 818 (1896).

7. Higginbotham v. Boggs, 234 Fed. 253 (C. C. A. 4th, 1916); Caines v. Sawyer, 248 Mass. 368, 143 N. E. 326 (1924); Lieb v. Griffin, 147 Atl. 634 (N. J. 1929), noted in (1930) 39 YALE L. J. 758; Scarborough v. Blount, 154 S. W. 312 (Tex. Civ. App. 1913); Note (1931) 44 HARV. L. REV. 1143. In conveyances of realty made with an oral promise to reconvey, the Statute of Frauds raises an additional barrier of proof not found in transfers of personalty and necessitates the use of the resulting trust presumption. Randall v. Howard, 67 U. S. 585 (1862).

8. BUMP, FRAUDULENT CONVEYANCES (3d. ed. 1882) 443; 1 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1918) § 401; 2 id. §§ 940, 941. See also cases cited notes 4 and 5, *supra*.

9. Cf. Lufkin v. Jakeman, 188 Mass. 528, 74 N. E. 933 (1905) (held that since a fraudulent conveyance is good between parties to the conveyance the transferor could enforce against the transferee the resulting trust attaching to a gratuitous conveyance).

10. Prewett v. Coopwood, 30 Miss. 369 (1885); Holliway v. Holliway, 77 Mo. 392 (1883); Kleeman v. Peltzer, 17 Neb. 381, 22 N. W. 793 (1885); 2 POMEROY, op. cit. *supra* note 8, § 942; cf. WOODWARD, QUASI-CONTRACTS (1913) § 142.

11. Anderson v. Nelson, 83 Cal. App 1, 256 Pac. 294 (1927); Brant v. Brant, 115 Iowa 701, 87 N. W. 406 (1901); Harper v. Harper, 85 Ky. 160, 3 S. W. 5 (1887).

12. Anderson v. Nelson, 83 Cal. App. 1, 256 Pac. 294 (1927); Holliway v. Holliway, 77 Mo. 392 (1883).

avoid the equitable barrier. This, however, would be unavailing since the same result is achieved in law as in equity by declaring the transaction to be based on an illegal contract[13] or by the interposition of the equitable defense in a code court.[14] The plaintiff would gain little by the attempt to keep to the law side except perhaps to force the defendant to plead the fraud specially[15] or to remove to the equity side.

Where there were no creditors actually defrauded, the courts have generally allowed the transferor to recover on the promise to reconvey or on the trust in spite of his fraudulent intent.[16] Apparently there is then less desire to punish the transferor and comparatively greater aversion to allowing the unjust enrichment of the transferee who is also tainted with fraud. In the instant case there was no existing creditor to be defrauded; the expected claimant had not even begun suit[17] much less successfully obtained a judgment.[18] Where the transfer is made on the basis of such expected tort claims, the case is usually treated like those in which fraudulent representation of possible claims, not actually based in fact, induced the conveyance to the benefit of the transferee.[19] Moreover, in view of the fact that the intent was to evade a possible future creditor, such a case is less to be considered as an actual fraudulent conveyance than as a transaction only morally questionable.[19] Yet recovery may sometimes be disallowed, even in such instances, in order to discourage the making of the transfers. This practice is then said to be repugnant to public policy because it permits discouragement of possible claims and facilitates placing property beyond reach of the law.[20] But neither in the latter case nor in the case of refusal to set aside transfers where there were existing creditors can such punishment in a civil suit be truly justified. The penalty imposed is necessarily accidental and not measured by the offense, and it inures to the benefit of the transferee, a private party who is equally culpable. If a penalty is to be imposed for this type

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13. Britt v. Aylett, 11 Ark. 475 (1850); Sewell v. Norris, 128 Ga. 824, 58 S. E. 637 (1907).

14. Gest v. Gest, 117 Conn. 289, 300-301, 167 Atl. 909 (1934). Compare instant case with respect to the duty of the court to apply the unclean hands doctrine regardless of any averment in the pleadings.

15. The American Surety Co. of N. Y. v. The Pacific Surety Co., 81 Conn. 252, 70 Atl. 584 (1908); CONN. PRACTICE BOOK (1934) § 104.

16. Vollaro v. Gargano, 97 Conn. 275, 116 Atl. 179 (1922); Hoff v. Hoff, 106 Kan. 542, 189 Pac. 613 (1920); Tiedemann v. Tiedemann, 194 N. Y. Supp. 782 (1922); Rivera v. White, 94 Tex. 538, 63 S. W. 125 (1901). *Contra:* Tantum v. Miller, 11 N. J. Eq. 551 (1858); Nunnally v. Stokes, 116 Va. 472, 82 S. E. 79 (1914).

17. Where a suit on a tort claim has been instituted but not brought to judgment before the conveyance, the plaintiff is related back after judgment as an existent creditor and the conveyance is fraudulent as to him. Rosenbaum v. Huebner, 277 Ill. 360, 115 N. E. 558 (1917); Harris v. Harris, 64 Va. 737 (1873); cf. Lange v. Semanske, 103 N. J. Eq. 538, 155 Atl. 783 (1931) (held that a person obtaining a judgment under the Death Act became an existing creditor under the Fraudulent Conveyance Act notwithstanding the fact that suit had not been instituted at the time of conveyance).

18. If the victim of the assault had brought civil suit and had recovered a judgment even after the conveyance, she would nevertheless have been able to set aside the conveyance as void. Davis v. Gates, 235 Fed. 192 (D. C. M. D. Penn. 1916); Eastern Sash and Door Co. v. Meister, 99 N. J. Eq. 819, 134 Atl. 619 (Ch. 1926).

19. The element of the conviction for criminal assault is to be excluded from the determination of unclean hands or fraudulent intent for purposes of the civil suit.

20. Carson v. Beliles, 121 Ky. 294, 89 S. W. 208 (1905); Tantum v. Miller, 11 N. J. Eq. 551 (1858).

of conduct, it should be made criminal; and the fine, proportioned to the gravity of the offense, should go to the state.[21] Reconveyance should be freely obtainable on the legal merits of the case. By the granting of the reconveyance, moreover, subsequent creditors would benefit in easier recovery from the transferor. In the absence of such thoroughgoing reform, the punitive policy of the courts in all but particularly flagrant instances might well be minimized. Thus in the principal case, the fact that no creditors were actually injured would be ample justification for allowing recovery.

Revocation of Personal Funded Life Insurance Trust

A successful business man who had a wife and two adult and two minor children deposited securities representing the bulk of his savings with a trust company under a deed of trust in which his wife was named as settlor and in which no power of revocation was reserved. The trust instrument was drawn to effect a funded life insurance trust plan conceived by an agent of the insurer with the agreement of the husband and the trustee. It provided that the income of the securities should be used to pay premiums for insurance on the husband's life, that upon his death the proceeds of the policy together with the securities in the fund were to be held by the trustee for the benefit of the wife for life, then of her children for life, the corpus to be distributed to their legatees, or in default of such to the insured's issue, or in default of both will and such issue, to the insured's brother or his issue. Subsequently, impoverished by business reversals and no longer able to provide for his family, the actual settlor together with his wife and the two adult children brought a bill in equity against the trustee, the minor children, the brother and his children to ask that the trust be set aside and the securities returned to the settlor. The guardian ad litem of the infants and the trustee opposed the request in order to protect the interests of the minors and to excuse the trustee from future liability because of any action taken. Although a court could not ordinarily set aside an active trust whose expressed purpose could still be accomplished and all of whose beneficiaries were not sui juris and of one mind, the New Jersey Court of Errors and Appeals did so.[1]

In the instant case the court did not attempt to distinguish the funded life insurance trust from the ordinary trust, but sought to justify its action by recourse to previously accepted doctrines under which living trusts may be terminated or revoked. That these doctrines justify the present action is questionable. The court discussed the facts surrounding the creation of the trust to demonstrate the possibility that because of mistake the deed of trust did not reflect the settlor's true intention. It is true that existence of mistake might support the cancellation of the trust.[2] However, to show such a mistake it must appear that the settlor had, when the trust was created, a positive intent to make it revocable.[3] In the present case it does not

21. See Wigmore, *A Summary of Quasi-Contracts* (1891) 25 Am. L. Rev. 695, 712.

1. Reuther v. Fidelity Union Trust Co., 116 N. J. Eq. 81, 172 Atl. 386 (1934).

2. Atkinson v. Atkinson, 157 Md. 648, 147 Atl. 662 (1929); Garnsey v. Mundy, 24 N. J. Eq. 243 (1873); Bell v. McCoin, 184 N. C. 117, 113 S. E. 561 (1922); Bristor v. Tasker, 135 Pa. 110, 19 Atl. 851 (1890); 1 Perry, Trusts (7th ed. 1929) § 104; Stevenson, *Revocation of Trust by the Settlor* (1903) 57 Cent. L. J. 183.

3. Security Trust and Safe Deposit Co. v. Farrady, 9 Del. Ch. 306, 82 Atl. 24 (1912); du Pont v. du Pont, 19 Del. Ch. 131, 164 Atl. 238 (1933); Love v. Love, 17 Hawaii 206 (1905); Brown v. Mercantile Trust Co., 87 Md. 377, 40 Atl. 256 (1898); Peck v. City Trust Co., 104 Vt. 20, 156 Atl. 403 (1931); Toker v. Toker, 3 DeG. J. & S. 487 (Ch. 1863);

appear that even the settlor claimed the existence of such intent. Thus inquiry along this line is unproductive, for it is accepted that a secret or unexpressed intention is of no significance.[4] Again, the court discussed the fact that subsequent events proved the gift to be improvident as to the settlor. And although a court may set aside an improvident gift obtained by undue influence when practically all of the donor's estate has been given to a person in a relation of trust and confidence with the donor, and where the donee occupies a position of dominance, the donor not having had the benefit of competent independent advice,[5] here none of these requirements is fulfilled. The husband apparently occupied the dominant position, had the advice of persons whose interests were independent of the donee and had remaining at the time of his gift a profitable business as well as his home. Finally the court sought to justify the revocation on the ground of mutual consent. It is true that it is possible to dissolve a voluntary trust if all parties in interest[6] are capable of consenting,[7] do consent, and there is no longer any valid reason for preserving the trust.[8] But, in the absence of statute,[9] where there are unborn or un-

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see Melvin v. Hoffman, 290 Mo. 464, 494, 235 S. W. 107, 114 (1921). For an analysis of the earlier cases, see (1874) 22 AM. L. REG. (13 N. S.) 351-354. Cf. Coolidge v. Loring, 235 Mass. 220, 126 N. E. 276 (1920) (claim of mistake as to legal effect; reformation of trust deed refused).

4. du Pont v. du Pont, 19 Del. Ch. 131, 164 Atl. 238 (1933); cf. In re Tolerton, 168 Iowa 677, 150 N. W. 1051 (1915).

5. Ewing v. Wilson, 132 Ind. 223, 31 N. E. 64 (1892); Riddle v. Cutter, 49 Iowa 547 (1878); Smith v. Boyd, 61 N. J. Eq. 175, 47 Atl. 816 (1901); Slack v. Rees, 66 N. J. Eq. 447, 59 Atl. 466 (1904); Albert v. Haeberly, 68 N. J. Eq. 664, 61 Atl. 380 (1905); Post v. Hagan, 71 N. J. Eq. 234, 65 Atl. 1026 (1907); Pearce v. Stines, 79 N. J. Eq. 51, 80 Atl. 941 (1911); Hays v. Union Trust Co., 27 Misc. 240, 57 N. Y. Supp. 801 (Sup. Ct. 1899); Bristor v. Tasker, 135 Pa. 110, 19 Atl. 851 (1890). For a review of many other New Jersey cases on this rule, see In re Fulper, 99 N. J. Eq. 293, 132 Atl. 834 (1926). A gift will not be set aside merely because it is improvident. Goodwin v. White, 59 Md. 503 (1882); James v. Aller, 68 N. J. Eq. 666, 62 Atl. 427 (1905); Farley v. First Camden National Bank and Trust Co., 107 N. J. Eq. 272, 152 Atl. 245 (1930).

6. Where the trustee alone disputes the application for termination of the trust his interest is deemed insufficient to block such termination. Eakle v. Ingram, 142 Cal. 15, 75 Pac. 566 (1904); Aranyi v. Bankers' Trust Co., 201 App. Div. 706, 194 N. Y. Supp. 614 (1st Dep't, 1922); Armistead's Executors v. Hartt, 97 Va. 316, 33 S. E. 616 (1899); see Slater v. Hurlbut, 146 Mass. 308, 314, 15 N. E. 790, 794 (1888).

7. Eakle v. Ingram, 142 Cal. 15, 75 Pac. 566 (1904); Anderson v. Williams, 262 Ill. 308, 104 N. E. 659 (1914); Matthews Administrator v. Thompson, 186 Mass. 14, 71 N. E. 93 (1904); Williams v. Sage, 180 App. Div. 1, 167 N. Y. Supp. 179 (2d Dep't, 1917); Whittemore v. Equitable Trust Co., 250 N. Y. 298, 165 N. E. 454 (1929), rev'g 223 App. Div. 693, 229 N. Y. Supp. 440 (1st Dep't, 1928); Culbertson's Appeal, 76 Pa. 145 (1874); Cowie v. Strohmeyer, 150 Wis. 401, 136 N. W. 956, 137 N. W. 778 (1912); 2 PERRY, TRUSTS (7th ed. 1929) § 920.

8. Gray v. Union Trust Co. of San Francisco, 171 Cal. 637, 154 Pac. 306 (1915); Fletcher v. Los Angeles Trust and Savings Bank, 182 Cal. 177, 187 Pac. 425 (1920); Moor v. Vawter, 84 Cal. App. 678, 258 Pac. 622 (1927); Fidelity and Trust Co. v. Gwynn, 206 Ky. 823, 268 S. W. 537 (1925). Cases where trusts have been terminated include Booe v. Vinson, 104 Ark. 439, 149 S. W. 524 (1912); Black v. Bailey, 142 Ark. 201, 218 S. W. 210 (1920); Smith v. Harrington, 86 Mass. 566 (1862); Bowditch v. Andrew, 90 Mass. 339 (1864); Inches v. Hill, 106 Mass. 575 (1871); Camden Safe Deposit and Trust Co. v. Guerin, 89 N. J. Eq. 556, 105 Atl. 189 (1918); Thebaud v. Schemerhorn, 30 Hun. 332 (N. Y. 1883).

9. N. C. CODE ANN. (Michie, 1931) § 996, applied in Stanback v. Citizens' National Bank,

determined beneficiaries, termination will be refused.[10] Here there were two existing cestuis who were legally incapable of consenting because of their minority and three classes of beneficiaries that might be opened to admit persons not yet in being:[11] namely, the children of the wife, the issue of the husband, and the issue of the husband's brother. Although the court may have had the power to give the consent of infant beneficiaries if the trust was improvident as to them and if by so doing the court would promote their welfare,[12] it is hardly possible for the same reason to give consent on behalf of the cestuis not yet in being. As to the minor children of the settlor it may be said that present poverty might be sufficiently harmful to justify sacrifice of future benefit for present need. This the court did. But as to unborn children of either husband or wife, possibly by another marriage, that argument is slightly less persuasive since they may not be born to circumstances of poverty but could be born some time later when fortunes were reversed. And, finally, as to the unborn issue of the husband's brother, the argument is entirely inapplicable. They are not affected by the present fortune of the husband or his family and could have no other than an adverse interest. For no reason that has been disclosed the court did not investigate these points but instead reached its conclusion by the simple expedient of disregarding them.

It is apparent that the facts of the instant case bring it more nearly within the

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197 N. C. 292, 148 S. E. 313 (1929), noted in (1929) 8 N. C. L. REV. 92; McRae v. Commerce Union Trust Co., 199 N. C. 714, 155 S. E. 614 (1930). N. Y. PERS. PROP. LAW (1909) § 23, has been construed so that the term "persons beneficially interested" includes only persons in being. Cram v. Walker, 173 App. Div. 804, 160 N. Y. Supp. 486 (1st Dep't, 1916); Aranyi v. Bankers' Trust Co., 201 App. Div. 706, 194 N. Y. Supp. 614 (1st Dep't, 1922). However, a recent case would seem to indicate that the point is still in doubt. See Schoellkopf v. Marine Trust Co. of Buffalo, 242 App. Div. 11, 16, 272 N. Y. Supp. 613, 619 (4th Dep't 1934).

10. Hurt v. Gilmer, 59 App. D. C. 282, 40 F. (2d) 794 (1930); Underhill v. United States Trust Co., 227 Ky. 444, 13 S. W. (2d) 502 (1929); In re Thurston, 154 Mass. 596, 29 N. E. 53 (1891); Isham v. Delaware, Lackawanna and Western Rr., 11 N. J. Eq. 227 (1856); Closset v. Burtchaell, 112 Ore. 585, 230 Pac. 554 (1924); Jones' Trust Estate, 284 Pa. 90, 130 Atl. 314 (1925); cf. Stewart v. Hamilton, 151 Tenn. 396, 270 S. W. 79 (1925); 2 PERRY, TRUSTS (7th ed. 1929) § 920.

11. In the United States possibility of issue is deemed never to be extinct. Byers v. Beddow, 106 Fla. 166, 142 So. 894 (1932), noted in (1933) 1 DUKE B. Ass'n J. 43; Allen v. Allen's Trustees, 141 Ky. 689, 133 S. W. 543 (1911); Fletcher v. Los Angeles Trust and Savings Bank, 182 Cal. 177, 187 Pac. 425 (1920); Note (1923) 23 COL. L. REV. 50. An exception has been made in questions of taxation. United States v. Provident Trust Co., 54 Sup. Ct. 389 (1934), noted in: (1934) 32 MICH. L. REV. 702; (1934) 47 HARV. L. REV. 1061; (1934) 43 YALE L. J. 1193.

In England trusts have been set aside on the assumption that the possibility of issue was extinct. Reynolds v. Reynolds, 1 Dick. 374, 21 Eng. Reprint 314 (1764); Hamilton v. Brickwood, 5 L. J. Rep. N. S. 144 (1836); Mackenzie v. King, 17 L. J. Eq. N. S. 448 (1848). For a list of many additional English cases, see Apgar's Case, 37 N. J. Eq. 501, n. at 502 et seq. (1883).

12. One case, at least, implies that the courts have not the power to consent for contingent beneficiaries. Underhill v. United States Trust Co., 227 Ky. 444, 13 S. W. (2d) 502 (1929). It is possible, however, to draw an analogy to a court's action in revoking a gift to infant donees where the gift was not for their advantage, even though they had in terms accepted it. See DeLevillain v. Evans, 39 Cal. 120 (1870); Youngblood v. Hoeffle, 201 S. W. 1057 (Tex. 1918).

doctrine of revocation by mutual consent than within the scope of the other doctrines discussed. As a practical matter the court had before it all persons who could express displeasure in the action requested, and whereas there is the possibility that unborn persons could eventually object to a present revocation, such a contingency seems less real than possible. Under somewhat analogous circumstances courts have reached otherwise impossible conclusions by invoking the doctrine of representation whereby members of a class may be said to give consent on behalf of all possible members of the same class.[13] It has even been suggested that courts could go so far as to allow a trustee to do this for them.[14] Usually, however, where representation has been allowed the interests thus foreclosed have been remote and the action taken less drastic than in the instant case.[15] Thus where owners of present interests wish to change the nature of the property held under limitations and are unable safely to do so without the consent of all possible takers, a court may permit consent by representation of unborn takers, which is nearly the same as to say that in such instances consent is not necessary where even an expression of attitude cannot be obtained and where no objection to the action can be seen. In the recent Property Restatement of the American Law Institute this doctrine is stated as general law and is stated to apply to a situation such as the one before the court.[16] And although, but for the authority of the Restatement, application of the doctrine in the present case would be a step in advance of its previous use, nevertheless recognition of that doctrine would have given a legal sanction to the court's action and would have expressed in doctrine what the court has here done in fact. But even had the court extended the doctrine of representation to apply to the case in hand it would have left unresolved the further problem of whether, if some of the beneficiaries or their representatives had opposed the revocation, the peculiar nature of funded life insurance trusts would have sufficed to remove them from the operation of the usual principles governing the revocation of living trusts.[17]

Certainly a contrary result would have been unfortunate. Personal funded life insurance trusts are of comparatively recent origin, arising out of an application of trust principles to insurance contracts and motivated by the desire to achieve future security for the beneficiaries of the policies.[18] Though such a trust has much in common with other trusts, it also has individual characteristics which set it apart. Under it, income-producing securities are placed in trust and the income thereon is

13. RESTATEMENT, PROPERTY (Tent. Draft, 1934) §§ 225, 226 (a). Cf. McCampbell v. Mason, 151 Ill. 500, 38 N. E. 672 (1894) (mortgage foreclosure); Whallen v. Kellner, 31 Ky. Law. Rep. 1285, 104 S. W. 1018 (1907) (appointment of new trustee); Wayne v. Brumley, 190 Ky. 488, 227 S. W. 996 (1921) (sale of land to pay debts); Nanreik Realty Co. v. Kiernan, 106 Misc. 430, 174 N. Y. Supp. 726 (Sup. Ct. 1919) (judicial sale); Barber v. Barber, 195 N. C. 711, 143 S. E. 469 (1928) (partition).

14. RESTATEMENT, PROPERTY (Tent. Draft, 1934) § 228.

15. Cases cited in note 13, *supra*.

16. RESTATEMENT, PROPERTY (Tent. Draft, 1934) § 222, comment b. In one case, Underhill v. United States Trust Co., 227 Ky. 444, 13 S. W. (2d) 502 (1929), the settlor and the life tenant claimed that the latter represented the interests of the remaindermen, her as yet unborn children. The court refused to terminate the trust, holding that a life tenant's interest was antagonistic to the interest of a taker in fee and, therefore, the life tenant could not represent the remaindermen.

17. The doctrine of representation would be of no avail in the situation where one cestui, however remote, refused to consent.

18. Cf. Fraser, *Personal Life Insurance Trusts in New York* (1930) 16 CORN. L. Q. 19; Hanna, *Some Legal Aspects of Life Insurance Trusts* (1930) 78 U. OF PA. L. REV. 346.

used to pay the premiums on policies of life insurance. Although that income, for purposes of taxation, may be taxable to the settlor or the beneficiary as income used for the benefit of the one or the other, the important fact remains that no person has a present right to the use of that income until the death of the insured and thus nothing is available to mitigate the effects of a sudden reversal of fortune. In the ordinary case of a living trust the income is presently enjoyed by the beneficiaries thereof, and the operation of the trust results in protecting them from the effects of adverse conditions because of the availability of the income for use in alleviating the effect of a loss of all but the trust fund. Only in the unusual case of an accumulation in which income is added to principal and its expenditure prevented until the death of the settlor would an analogy be found in the field of living trusts.[19] Although the immediate motive of the settlor of such a trust may be, as here, to assure the financial independence of his family after his death, there is present, though behind the gift, the broader purpose of the general welfare of his family. Providing for them after his decease is but one step in his program of insuring their welfare both before and after his death. When this real purpose behind all personal funded life insurance trusts is remembered, it is not clear that there should be any necessity of attempting to find intent, consent, or representation. Because of the unusual nature of the funded life insurance trust it might well appear that it should, as a matter of policy, be revocable by a court when circumstances have so altered as to defeat a fundamental purpose motivating its creation. To make such revocation depend upon the consent of beneficiaries who are remote, and who are not necessarily affected by the conditions that make the continuance of the trust undesirable as to the settlor and the immediate beneficiaries does not face squarely the issue raised by this particular type of trust. It is reasonable to feel that even had the brother and his children here opposed the revocation, it should have been granted. Nor is it necessarily going too far to reason that under some circumstances such a trust should be revocable even though consent be withheld by an adult child of the settlor. Legislative action to meet the question would either have to make the trust revocable at the settlor's option, or would have to require the existence of certain conditions under which the trust should be set aside. The first is undesirable as going further than the problem requires and would largely change the taxability of such trusts, for a revocable trust is subject to succession taxes upon the death of the settlor. The second suggestion would still require resort to court supervision to determine the existence of the necessary conditions. No reason appears why a court should not of its own choice exercise discretion in such a limited field. It is neither unusual nor unknown that a court of equity should have the burden of determining whether or not it would be for the welfare of the family to terminate such a trust, for even in the matter of the ordinary trust where all the interested parties consent to its termination the power of the court to dissolve it is discretionary and will be

19. Such an accumulation would be illegal in New York, California, Indiana, North Dakota and South Dakota, where accumulations are permitted only during the period of the minority of a person who would be a beneficiary. Whether in those states a funded life insurance trust would be considered an unlawful accumulation was at one time the source of much controversy. Bogert, *Funded Insurance Trusts and the Rule against Accumulations* (1924) 9 CORN. L. Q. 113; Hanna, op. cit. *supra* note 18, at 360-373 [criticizing the reasoning in In re Hartman's Estate, 126 Misc. 862, 215 N. Y. Supp. 802 (Surr. Ct. 1926), where funded life insurance trust was held not to constitute an accumulation]; Fraser, op. cit. *supra* note 18, at 24-25. By amendment in 1927 to the Personal Property Law, New York excluded funded life insurance trusts from consideration as accumulations. N. Y. PERS. PROP. LAW (1909) § 16, as amended by Laws 1927, c. 681.

used only in proper cases.[20] Nor is it unknown for a court to give consideration to the general intent of the settlor as distinguished from the specific purpose of the gift. Such conduct is customary in the application of the doctrine of cy-pres to sustain charitable gifts where the specific scheme of the testator has been rendered impractical by changes in law or circumstances and the general purpose of the gift is discernible.[21] Furthermore, the court would here be subject to restrictions of fact, if not of doctrine, in that extreme reversal of the settlor's fortunes would be a condition precedent to court action, and the reversal would have to be such as to affect seriously the more immediate beneficiaries.

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20. Gray v. Union Trust Co. of San Francisco, 171 Cal. 637, 154 Pac. 306 (1915). For situations in which the court considered termination proper, see cases cited in note 8, *supra*.

21. Scott, *Education and the Dead Hand* (1920) 34 Harv. L. Rev. 1; cf. Jackson v. Phillips, 96 Mass. 539 (1867); Rhode Island Hospital Trust Co. v. Williams, 50 R. I. 385, 148 Atl. 189 (1929).

Principles similar to those of the doctrine of cy-pres have been applied to private trusts where a change in circumstances has made it impossible to achieve the main intent of the settlor by exact conformity to the terms of a trust. Bankers' Trust Co. v. Greims, 103 Conn. 259, 142 Atl. 796 (1928); Russell v. Russell, 109 Conn. 187, 145 Atl. 648 (1929); Matter of Pulitzer, 139 Misc. 575, 249 N. Y. Supp. 87 (Surr. Ct. 1931). See also Scott, *Deviation from the Terms of a Trust* (1931) 44 Harv. L. Rev. 1025.