

Notes

ADDITIONAL STATE INHERITANCE TAXATION TO TAKE ADVANTAGE OF CREDIT ALLOWANCE ON FEDERAL TAX

THE objection that federal estate taxation is an encroachment upon state control over the devolution of property¹ led Congress, in 1924, to provide that decedents' estates should be allowed a credit up to twenty-five per cent of their federal tax for any transfer or succession tax actually paid to a state.² This credit allowance proved insufficient to meet the objections of the state taxing authorities.³ Congress, therefore, in 1926 increased the maximum credit allowance to eighty per cent of the total federal tax,⁴ with the proviso, however, that an estate should be entitled to the credit only for state taxes paid within three years⁵ of the filing of the federal tax return. Since under this provision a state, merely by imposing a sufficiently high tax, may receive a tax which the estate would otherwise be required to pay to the federal government, the state legislatures have sought ways and means of taking advantage of the credit allowance. Some states merely increased their existing inheritance taxes.⁶ But Pennsylvania,⁷ in common with a number of other states,⁸ added to its "normal" inheritance tax a new and "additional" tax, to be imposed only when the "normal" tax does not equal eighty per cent of the federal tax or is not paid within the three years allowed by Congress;⁹ the "additional" tax in each case is made to equal the amount by which the credit allowance exceeds the

1. REPORT OF THE NATIONAL COMMITTEE ON INHERITANCE TAXATION (1925) 11.

2. 43 STAT. 304 (1924), upheld in *Rouse v. United States*, 65 Ct. Cl. 749 (1928).

3. DOUBLE TAXATION-PRELIMINARY REPORT OF A SUBCOMMITTEE OF THE HOUSE COMMITTEE ON WAYS AND MEANS, 72d Cong., 2d Sess. (1933) 164; Brady, *Statutory Solutions of Multiple Death Taxation* (1927) 13 A. B. A. J. 147, 149.

4. 44 STAT. 70 (1926), 26 U. S. C. § 1093 (1926).

5. The four-year period allowed by the 1932 amendment apparently applies only to the 1932 additional federal tax. 47 STAT. 278 (1932), 26 U. S. C. SUPP. VI § 413 (b) (1932).

6. For example, see N. J. COMP. STAT. (Supp. 1930) § 208-537. For a report of the taxes used by the different states see DOUBLE TAXATION-PRELIMINARY REPORT, *supra* note 3, at 123.

7. PA. STAT. ANN. (Purdon, 1930) tit. 72, § 2303.

8. CONN. GEN. ACTS (1931) § 248; FLA. COMP. LAWS (Supp. 1932) § 1342 (2); Ind. Stat. 1931, c. 75, § 38; ME. REV. STAT. (1930) c. 77, § 27, upheld in *In re Opinion of the Justices*, 137 Atl. 50 (Me. 1927); MD. ANN. CODE (Bagby, Supp. 1929) art. 62A, § 2; Mass. Acts 1932, c. 284; MINN. STAT. (Mason, Supp. 1931) § 2321-1; N. Y. Laws 1932, c. 322; N. C. CODE ANN. (Michie, Supp. 1933) § 7880 (6), upheld in *Hagood v. Doughton*, 195 N. C. 811, 143 S. E. 841 (1928); OHIO GEN. CODE (Page, Supp. 1931) § 5335-1; *cf.* *Morsman v. Commissioner of Internal Revenue*, 13 B. T. A. 415 (1928), 14 B. T. A. 108 (1928); *Morton v. Commissioner of Internal Revenue*, 23 B. T. A. 236 (1931); *Smith v. Commissioner of Internal Revenue*, 23 B. T. A. 278 (1931); *Cross v. Downes*, 164 Atl. 753 (Md. 1933).

9. While the Pennsylvania statute does not in terms impose the "additional" tax when the "normal" tax is not paid within the three-year period, it apparently does so by implication.

amount of the "normal" tax immediately due. Although the Pennsylvania "normal" tax is levied upon the privilege of succeeding to the property and so must be paid by the donee,¹⁰ the federal tax and the "additional" state tax are payable from the corpus of the estate.¹¹

In *In re Crane's Estate*¹² the deceased gave a large amount of property to trustees to pay the income to certain life tenants and at their deaths to deliver the property to remaindermen. The Pennsylvania "normal" tax assessed against these donees did not become due immediately, but could be paid by the life tenants from their income as received and by the remaindermen when they acquired possession of the property.¹³ On the other hand, the statute permitted the donees to pay these taxes immediately. If the "normal" taxes were thus paid promptly they would take the place of a large part of the assessment which the estate would otherwise pay either to the federal government or, under the Pennsylvania "additional" tax, to the state; but if the "normal" taxes were not paid within the three-year period, the estate would be required to pay the full amount of the federal tax, eighty per cent thereof going to the state, and the donees would still be liable for the "normal" tax upon their gifts when received. To avoid this double taxation the executor paid both the life tenants' and the remaindermen's "normal" taxes from the corpus of the estate. Thereafter the remaindermen brought suit to compel the life tenants to reimburse the estate for the payment of their "normal" tax. The court refused to require such contribution from the life tenants, declaring that while the life tenants were prejudiced by the loss of income upon the amount of the remaindermen's "normal" tax and the remaindermen by the depletion of the corpus from payment of the life tenants' "normal" tax, each of the donees had benefited by his release from future liability for his own tax.¹⁴

The court apparently proceeded upon the theory that the executor's payment of the donees' "normal taxes" reduced the corpus of the estate. But if the "normal" taxes had not been paid promptly, an equal amount would have been assessed against the estate as an "additional" tax or else the full federal tax would have been owed to the federal government. The executor thus paid the "normal" taxes not in addition to but, pro tanto, instead of the taxes levied against the estate. Therefore no depletion of the corpus resulted. In these circumstances the remaindermen suffered no detriment from the executor's payment, and their demand for contribution from the life tenants was properly refused.

It seems possible, however, that the state might raise some question with regard to the payment by the executor of the life tenants' "normal" tax and also as to his payment of that of the remaindermen. The "normal" tax is an obligation of the donees, not of the estate. The tax paid by the executor from the corpus of the estate resembled more the "additional" state transfer tax than it did the "normal" tax. If upon this theory the state were to contend that the executor had actually paid the "additional" tax and that the donees were still liable for their "normal" taxes, the donees could apparently defend only upon the assertion of their own inter-

10. Penn-Gaskell's Estate, 208 Pa. 342, 57 Atl. 714 (1904); see also *In re Hale's Estate*, 18 P. (2d) 808 (Ore. 1933).

11. Newton's Estate, 74 Pa. Super. Ct. 361 (1920); *In re Knowle's Estate*, 295 Pa. 571, 145 Atl. 797 (1929).

12. 165 Atl. 858 (Pa. Super. Ct. 1933).

13. PA. STAT. ANN. (Purdon, 1930) tit. 72, § 2304. See HANDY, INHERITANCE AND OTHER LIKE TAXES (1929) § 338.

14. The court, quoting the lower court, also said that if the remaindermen's contention were upheld, the estate would be liable for a further "additional" state tax. It would be difficult to reconcile this statement with the language of the statutes.

pretation of the executor's payment. This possible continued liability to the state would be avoided if not only the life tenants but also the remaindermen were to reimburse the estate for their respective "normal" taxes. The life tenants would in such a case lose the corpus value of their own "normal" tax; but they would receive the income upon this amount for their own lives, and would also receive the income from the amount of the remaindermen's "normal" tax during the same period. The remaindermen, on the other hand, would lose the income from the amount of their own "normal" tax during the lives of the life tenants, but thereafter would profit by the addition to the corpus of the life tenants' tax. If calculation of values based upon expectancies be considered sufficiently reliable for this purpose, what the life tenants lose and the remaindermen gain in *corpus* value by the life tenants' contribution of their "normal" tax will equal what the life tenants gain and the remaindermen lose in *income* from the tax contribution by the remaindermen.¹⁵ It would seem, therefore, that compelling reimbursement of the estate by both life tenants and remaindermen would not merely preclude the possibility of a subsequent levy for "normal" taxes, but would, theoretically at least,¹⁶ cause no financial damage to any of the parties.

REDUCTION OF INSURER'S LIABILITY BY PREFERENTIAL SETTLEMENTS
IN MULTIPLE CLAIM CASES

IN the recent case of *Bartlett v. Travelers' Insurance Company*,¹ the defendant, representing its insured under a liability insurance policy which obligated it, in the event of loss, to "serve the assured by such negotiation and such settlement of any resulting claims as may be deemed expedient by the company," attempted the settlement of three claims arising out of an automobile accident. There was slight possibility of compromise of all claims within the limits of the policy. The defendant settled and paid two of the claims in the belief that the plaintiff, the third claimant, would compromise for an amount within the remaining coverage of the policy. The plaintiff, however, refused to make such a compromise; instead, he

15. In determining such a result, the proportionate present values of the life estates and the remainders should be ascertained. The "normal" tax payable presently by the life tenants and the remaindermen would indicate that proportion, since the tax rate in the principal case was the same on both life estate and the remainders (ten per cent on gifts to collaterals, all the life tenants and remaindermen being collaterals). If the value of the life estates were twice that of the remainders, then the life tenants would have to contribute to the estate a sum (to meet the normal tax) twice that contributed by the remaindermen. But the present value of the life tenants' interest in the sum of the contributions would be twice the value of the remaindermen's interest. If the life tenants in such a case contribute \$1000 and the remaindermen \$500, an addition to the principal of the estate of \$1500 would result; the present value of the interests of the life tenants in such additional sum would be \$1000 and the present value of the interests of the remaindermen would be \$500. The sum which the life tenants would lose and the remaindermen gain in contribution to *corpus* is therefore the same as that which the life tenants would gain and the remaindermen lose in contribution to *income*. The actual proportion in value in the principal case (taken from the taxes assessed) was \$99,791.12 (life estates): \$79,518.25 (remainders). The illustration herein is expressed in terms of a two-to-one proportion for the sake of simplicity.

16. It should of course be recognized that the correspondence between expectancy tables and the actuality of specific cases is speculative.

1. 167 Atl. 180 (Conn. 1933).

brought suit against the insured and recovered a judgment for a sum equal to the full coverage of the policy. This judgment the insured could not pay. The plaintiff then sued the insurance company, contending that under the terms of the policy the company's settlement of unlitigated claims did not reduce its liability to a judgment creditor. The Supreme Court of Errors of Connecticut, rejecting this contention, held the company liable only for the amount still unpaid on the policy.

In the absence of statute, an injured person acquires no rights under a policy insuring the tort-feasor, unless the policy expressly or impliedly gives him some right.² Such policies usually obligate the company only to indemnify the insured for his payments to the injured party; they do not create a direct liability to the claimant.³ Modern statutes, however, require the insurer to assume liability also to claimants holding judgments against the insured which the latter has not satisfied.⁴ It was apparently the theory of the plaintiff in the principal case that since the policy did not expressly impose upon the insurance company liability to non-judgment claimants, the company's payments to such claimants were gratuitous and did not reduce its contractual liability to the insured and to the plaintiff as a judgment creditor of the insured. While it is true that the policy failed to provide expressly that the company's settlement of unlitigated claims should be counted in diminution of its liability upon the policy, such a provision may reasonably be implied from the clause authorizing the company to negotiate the settlements. The right of the insurance company to a reduction of its liability may also be established upon another ground. Since in negotiating settlements under a policy such as the one in the instant case an insurer acts as agent for the insured,⁵ the company's compromise agreements are binding upon the insured as principal. The company's payments under these agreements may therefore be regarded as payments by the insured. Had the insured actually paid the claimants himself, the company would have been obligated to reimburse him, and for such reimbursement would have been entitled by the terms of the policy to a reduction in its liability. The company's adoption of the obvious short-cut in paying the claimants directly should not deprive it of that right.

2. *Shea v. United States Fidelity and Guaranty Co.*, 98 Conn. 447, 120 Atl. 286 (1923); see Note (1924) 24 COL. L. REV. 173; VANCE, *INSURANCE* (2d ed. 1930) 682.

3. *Shea v. United States Fidelity and Guaranty Co.*, *supra* note 2; VANCE, *op. cit. supra* note 2, at 682, 685 n. 99. But *cf.* *Patterson v. Adan*, 119 Minn. 308, 138 N. W. 281 (1912); *Brucker v. Georgia Casualty Co.*, 326 Mo. 856, 32 S. W. (2d) 1088 (1930); *American Indemnity Co. v. Fellbaum*, 114 Tex. 127, 263 S. W. 908 (1924), all indicating the equities in favor of a more liberal rule.

4. The statutes in some states provide that in the event of the insolvency or bankruptcy of the insured the company shall become liable to the injured person holding an unsatisfied judgment against the insured. N. Y. *INSURANCE LAW* (McKinney Supp. 1933) § 109; WIS. STAT. (1931) § 204.30; see VANCE, *op. cit. supra* note 2, at 687, n. 5. In other states the statutes declare that the liability of the insurer to a judgment claimant shall not depend upon satisfaction of the judgment by the insured. The Connecticut statute is of the latter type. CONN. GEN. STAT. (1930) § 4231. As a result of these statutes, liability insurance has come to be regarded as a means of compensation for injured persons, rather than as primarily a protection to the insured. Comment (1933) 42 YALE L. J. 1103, 1105.

5. *Cf.* *Douglas v. United States Fidelity and Guaranty Co.*, 81 N. H. 371, 376, 127 Atl. 708, 711 (1924); *G. A. Stowers Furniture Co. v. American Indemnity Co.*, 15 S. W. (2d) 544, 547 (Tex. Com. App. 1929); *Hilker v. Western Automobile Insurance Co.*, 204 Wis. 1, 5, 231 N. W. 257, 259 (1930).

Since the compromise payments may thus be brought within the liability of the insurance company upon its contract of indemnity, it would seem clear that the insured, were he to sue upon the policy, could recover from the company only the sum remaining after deduction of those payments. It is not so clear, however, that the rights of the plaintiff, a judgment creditor, are similarly restricted. It might well be argued that if an insurance company in negotiating settlements prefers one claimant to the prejudice of another when it knows that settlement of all the claims within the policy limit is unlikely, then the second claimant acquires a right against the insurance company independent of the rights of the insured.⁶ But in view of the frequent reiteration by the courts of the doctrine that a judgment creditor of the insured acquires rights against the insurance company only as subrogee of the insured,⁷ the imposition of such additional liability upon the insurance company seems improbable.

Nor would considerations of public policy support a holding that an insurance company could settle claims only at the risk of incurring liability above its policy limit for claims which it could not compromise. Insurance companies would never risk settlements in multiple claim cases under such a rule. The ever-increasing congestion of court dockets⁸ is alone sufficient reason for favoring a contrary policy. The saving of expense to the parties and to the community⁹ when litigation is avoided adds force to the conclusion that settlement of claims should be encouraged. It does not follow, however, that insurance companies should have unrestrained liberty of action in settling claims. The insurance adjuster who persuades an injured person to accept a sum sufficient to cover only his hospital expenses certainly deserves no encouragement. If in multiple claim cases the adjuster could thus take advantage of the claimant's immediate need for funds and could also threaten exhaustion of the policy by payments to other claimants, the injured person might be completely at the mercy of the company.¹⁰ Furthermore, while the

6. In some states a judgment claimant may, under certain circumstances, acquire rights against the insurer independent of those of the insured. *Metropolitan Casualty Insurance Co. v. Albritton*, 214 Ky. 16, 282 S. W. 187 (1926); Comment (1933) 42 *YALE L. J.* 1103, 1106.

7. *Coleman v. New Amsterdam Casualty Co.*, 247 N. Y. 271, 160 N. E. 367 (1928); *Bro v. Standard Accident Insurance Co.*, 194 Wis. 293, 215 N. W. 431 (1927).

8. In the Supreme Court of New York, thirty per cent of all new actions placed on the calendar from October, 1928, to April, 1930, were automobile accident cases. About fifty per cent of all cases tried to juries in the courts of common pleas of Philadelphia County during that period were motor vehicle cases. REPORT BY THE COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS (Col. Univ. Research Council, 1932) 20; *id.* at 43, n. 24. In a number of large cities in which conditions were investigated the congestion of the dockets had become so acute that litigation lasted from one to three years or more. *Id.* at 42, n. 20.

9. The Committee computed the daily cost of running a common pleas trial court room in Philadelphia to be \$232. The average trial of an accident case took one and one-half days. When it is considered that the verdicts in fifty-seven per cent of the cases studied were for less than \$500, and seventy-five per cent for less than \$1000, the cost of jury trials in this type of litigation seems an unwarranted burden on the community. REPORT BY THE COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS, *supra* note 8, at 37.

10. In the principal case, the insurance company at one point in its negotiations with the plaintiff informed him that it would not be able to hold open its offer of \$3500 in settlement because of the demands of another claimant. When the plaintiff, despite this apparent coercion, refused to accept the offer, the company issued a letter of indemnity

preferring of one claimant over another by a company entitled to make settlements at its own convenience may not impose additional liability upon the company, it is not a desirable method of distributing the proceeds of the policy.

A solution of the problem which will provide for equal treatment of all of the claimants and which will also protect the insurance company is clearly necessary. The simplest device would perhaps be for the insurance company to settle with all of the claimants together. If this were not possible, the company could be required to incorporate in those compromise agreements which were executed a proviso that they be subject to revision downward in the event that other settlements were made, or judgments recovered, which when added to the amount of the prior settlements exceeded the policy limit.¹¹ If no such settlements were possible, the insured could be permitted to interplead all claimants, thereby avoiding both delay and a multiplicity of suits.¹² Similarly, any one claimant might be allowed to sue in equity and require the others to prove their claims.¹³ All claims reduced to judgments and all settlements, when their sum exceeded the coverage of the policy, should be satisfied pro rata, according to the amounts of the respective settlements or judgments.¹⁴

to the other claimant for the remaining coverage of the policy, guaranteeing payment of any judgment recovered by him within that amount. If this claimant had not later accepted a settlement, the plaintiff might have had no recourse to the proceeds of the policy.

11. If only one claim remained unsettled, this safeguard could be effected by allowing the insurer to pay immediately to claimants whose claims were settled only such proportion of the total settlements as would leave unpaid on the policy that same proportion of a final judgment for the full amount of the policy. If there were several claims outstanding, a correspondingly smaller sum would be payable immediately on settlements already made; for example, if two claims remained outstanding, the settlements already made would be paid only in such proportion as would leave unpaid upon the policy an equal proportion of two final judgments for the full coverage of the policy. If these remaining claims were settled, or were reduced to judgments, for less than the full coverage of the policy, the insurer would be allowed to pay any balance due on the settlements, and to pay the judgments pro-rata.

Such a solution of the problem would make possible immediate payment of some money to claimants without danger of preference of any of them over the others. The proposed scheme is open to the objection that a claimant obtaining a judgment for an amount greater than the policy limit might not receive his full pro-rata share of the proceeds of the policy. This objection would not seem to outweigh the advantages of the scheme.

12. There is no technical or theoretical difficulty in allowing interpleader where the petitioner disputes his liability in whole or in part. Chafee, *Modernizing Interpleader* (1921) 30 YALE L. J. 814, 840. Under several of the more liberal statutes a petitioner may interplead and yet, in the event of a judgment denying all of the claims, be discharged of all liability. CAL. CODE CIV. PROC. (Deering 1931) § 386; CONN. GEN. STAT. (1930) § 5911, construed in *Brown v. Clark*, 80 Conn. 419, 68 Atl. 1001 (1908); N. Y. C. P. A. (Parsons, 1932) § 287.

13. The New York Court of Appeals suggests this procedure in *Bleimeyer v. Public Service Mutual Casualty Insurance Corp.*, 250 N. Y. 264, 268, 165 N. E. 286, 288 (1929).

14. This procedure of dealing with all claimants as a group should be required even though the insured appears to be solvent and able to pay any judgment above the coverage of the policy. A New York statute [N. Y. VEHICLE AND TRAFFIC LAW (1929) § 17] providing for a pro rata distribution among judgment creditors of the proceeds of the bond required of operators of motor vehicles for hire, has been emasculated in part by a decision

POWER OF CREDITOR TO DEFEAT CONVEYANCE IN EXECUTION OF
UNENFORCEABLE RESULTING TRUST

THE two defendant corporations, *M* and *N*, were organized and solely owned and managed by two brothers, also defendants. In a purchase of real estate from the plaintiff's assignor, a substantial down payment was made by *N* corporation. Legal title, however, was taken by *M* corporation, which executed a bond and mortgage for the balance of the purchase price. It was understood that *N* corporation was to be the beneficial owner of the property and have charge of its operation and maintenance. Taxes, mortgage installments and carrying charges were paid by *N* corporation. Several other properties were purchased by the defendants under the same arrangement. Later, upon default of *M* corporation on its bond, the plaintiff instituted foreclosure proceedings resulting in a deficiency judgment against the *M* corporation. While this action was pending, the latter stripped itself of all assets by conveying to *N* corporation the properties it had acquired subsequent to the purchase from the plaintiff's assignor. The plaintiff, in order to satisfy the deficiency judgment out of these properties, sought to defeat the transfer. The New York Court of Appeals, two judges dissenting, refused to recognize a trust relationship between the two corporations, and set aside the conveyance as being without consideration and a fraud upon creditors.¹

It is well established that a conveyance without consideration, stripping a debtor of all his assets, is fraudulent as to creditors.² To obviate the effect of this rule, the defendants urged that the transfer had been made in execution of a valid trust obligation.³ The absence of a written agreement, however, would preclude the existence of an enforceable express trust.⁴ Nor can *N* corporation be considered the beneficiary of a resulting trust, for a New York statute has abolished such trusts.⁵ While under an exception to this rule, recovery is sometimes granted on a constructive trust theory to avoid abuse of a relation of confidence,⁶ the court in the instant case refused to find such a relationship existing between the two corporations.

of the Appellate Division holding that the provisions of the statute do not apply until the insured becomes insolvent or bankrupt. *Long Island Coach Co. v. Hartford Accident & Indemnity Co.*, 223 App. Div. 331, 334, 227 N. Y. Supp. 633, 636 (1st Dep't. 1928), *aff'd*, 248 N. Y. 629, 162 N. E. 552 (1928). The purpose of the statute is defeated under this interpretation because the insolvency of the insured seldom becomes apparent until the injured party seeks recourse against him. By that time, the policy limit may well be exhausted by payment of settlements or other judgments. In order to protect injured claimants, therefore, the insurer should not be allowed to exhaust the coverage of the policy because the insured is to all outward appearances solvent.

1. *Fraw Realty Co. v. Natanson*, 261 N. Y. 396, 185 N. E. 679 (1933); noted in (1933) 33 COL. L. REV. 1066.

2. N. Y. DEBTOR AND CREDITOR LAW (1909) § 273; *Cole v. Tyler*, 65 N. Y. 73 (1875); see *Halsey v. Winant*, 233 App. Div. 103, 112, 251 N. Y. Supp. 81, 91 (1st Dep't 1931).

3. One holding naked legal title as trustee for another has no interest in the property which his creditors can reach. *Fehlig v. Busch*, 165 Mo. 144, 65 S. W. 542 (1901) (resulting trust); *Liberty Trust Co. v. Hayes*, 244 Mass. 251, 138 N. E. 582 (1923) (resulting trust); *Frank v. Linkop Realty Corp.*, 106 N. J. Eq. 567, 151 Atl. 550 (1930) (express trust).

4. N. Y. REAL PROPERTY LAW (1909) § 242.

5. *Id.* § 94.

6. *Goldsmith v. Goldsmith*, 145 N. Y. 313, 39 N. E. 1067 (1895) (mother and son); *Foreman v. Foreman*, 251 N. Y. 237, 167 N. E. 428 (1929) (husband and wife).

The decision to set aside the transfer may perhaps be attributed to the court's disfavor of the conduct of business in a manner susceptible of fraudulent practices. However, this device, common in real estate transactions, of avoiding liability for a deficiency judgment on purchase-money bonds by placing legal title to the mortgaged property in the name of a personal agent or "dummy," has long been accorded legal sanction.⁷ Where the mortgagee knows he is dealing with a "dummy," he is actually contracting for the land as his sole security. Since in the instant case there was no misrepresentation as to the real ownership of the property, there would seem to be slight justification for enlarging the mortgagee's security merely because the "dummy" in this transaction was a corporation holding legal title to other property. Furthermore, since this additional property had been acquired after the plaintiff's assignor had sold the mortgaged realty to the defendants and extended credit to *M* corporation on the purchase-money obligation, the plaintiff cannot claim reliance on the apparent ownership of other property by the nominal mortgagor.⁸

The "trust" concept is sufficiently flexible to have enabled the court to sustain the conveyance had it wished to give effect to the business practice involved. Thus, as the dissent indicates,⁹ a relation of confidence sufficient to give rise to a constructive trust may readily be found in the identity of stock ownership and control of the two corporations.¹⁰ Similarly, the payment of carrying charges on the property by *N* corporation may be regarded as constituting performance of sufficient unequivocal acts relative to that corporation's obligation under the trust understanding to make it enforceable as an express trust despite the absence of a writing.¹¹ Moreover, though the agreement to hold the legal title for one who has paid the purchase price of land may be unenforceable as between the parties, it has been held that where the "trustee" is willing to carry out the unenforceable "trust," his creditors have no cause for complaint.¹² Hence, the court might, consistent with established doctrine, have sustained a legally justifiable method of avoiding deficiency judgments.¹³

7. *Cf.* *Briggs v. Partridge*, 64 N. Y. 357 (1876) (undisclosed principal not liable on agent's executory contract under seal); *Crowley v. Lewis*, 239 N. Y. 264, 146 N. E. 374 (1925).

8. Where such reliance existed, the conveyance has been set aside, even though there was no misrepresentation by the beneficiary. *Bryant v. Klatt*, 2 F. (2d) 167 (S. D. N. Y. 1924); *Fritz v. Worden*, 20 App. Div. 241, 46 N. Y. Supp. 1040 (4th Dep't 1897); *Hegstad v. Wysiecki*, 178 App. Div. 733, 165 N. Y. Supp. 898 (2d Dep't 1917); *Budd v. Atkinson*, 30 N. J. Eq. 530 (1879). Similarly, where the beneficiary knew of misrepresentation by the trustee. *Besson v. Eveland*, 26 N. J. Eq. 468 (1875). *Contra*: *Davis v. Graves*, 29 Barb. 480 (N. Y. 1859); *Hayes v. Reger*, 102 Ind. 524, 1 N. E. 386 (1885).

9. *Fraw Realty Co. v. Natanson*, *supra* note 1, at 412, 185 N. E. at 684.

10. See note 6, *supra*.

11. *Jeremiah v. Pitcher*, 26 App. Div. 402, 49 N. Y. Supp. 788 (2d Dep't 1898), *aff'd*, 163 N. Y. 574, 57 N. E. 1113 (1900); *McKinley v. Hessen*, 202 N. Y. 24, 95 N. E. 32 (1911) (parole trust enforceable where beneficiary paid taxes, interest, repairs, and improvements).

12. *Bryant v. Klatt*, *supra* note 8; *Dunn v. Whalen*, 66 Hun 634, 21 N. Y. Supp. 869 (N. Y. 1893) (creditor's bill); *Desmond v. Myers*, 113 Mich. 437, 71 N. W. 877 (1897) (judgment creditor's bill in aid of execution); *Silvers v. Potter*, 48 N. J. Eq. 539, 22 Atl. 584 (1891) (action to set aside conveyance). The rule is the same even where creditors relied upon the "trustee's" apparent ownership. *Davis v. Graves*, *supra* note 8 (receiver's action to set aside conveyance); *Hayes v. Reger*, *supra* note 8 (judgment creditor's bill in aid of execution).

13. Recent statutes limiting the right to deficiency judgments indicate a new policy to restrict a mortgagee's claim to the value of the mortgaged property. See Comment (1933) 42 *YALE L. J.* 1236.

STATE JURISDICTION OVER INTERSTATE SHIPMENTS OF 3.2 BEER*

A GEORGIA sheriff seized a truck load of 3.2 beer in the course of transportation from Tennessee to Florida under a through bill of lading. Tennessee and Florida have legalized 3.2 beer, but Georgia has not. The carrier sought an injunction in the federal district court to restrain the sheriff from future interference with similar interstate shipments, and requested the return of his truck and beer. An interlocutory injunction was refused on the ground that the plaintiff, by merely pleading the federal Beer Act,¹ had not sustained his burden of proving that the beer was not an intoxicating liquor under the Eighteenth Amendment.²

Section 2 of the Eighteenth Amendment confers upon the states powers of enforcement concurrent with those of Congress, and the Supreme Court has declared that such powers are not to be divided between Congress and the states along the lines which separate or distinguish interstate from intrastate commerce.³ If 3.2 beer is in fact intoxicating, therefore, it is contraband, and the state may seize it even though it is moving in interstate commerce. If, however, it is non-intoxicating, it is a legitimate article of interstate commerce and may not be seized as long as it is being transported through and not into the state.⁴ It is true that the Beer Act does not expressly state that 3.2 beer is not intoxicating. Nevertheless, Section 4 does expressly provide for the issuance of permits for the manufacture and sale of alcoholic beverages containing not more than 3.2 percent of alcohol by weight. This section would be unconstitutional under the Eighteenth Amendment unless such beverages were non-intoxicating.⁵ It would seem, therefore, that the plaintiff, by introducing in evidence the act under which his permit was issued, established a *prima facie* case that 3.2 beer is not intoxicating. The burden of proof then rested upon the party who, in questioning its legality, challenged the constitutionality of the Beer Act.⁶

The court argued, however, that even if Congress defined 3.2 beer as non-intoxicating, its definition is not binding on the several states, and that the case was therefore governed by the Georgia laws, which, according to the court, "undoubtedly . . . make it unlawful to possess or transport intoxicating liquor within the state, whether moving in interstate commerce or not."⁷ That Congress did not in fact intend the Beer Act to be binding on the states within their jurisdictions is evinced by the reenactment of the Webb-Kenyon Act⁸ and the Reed Amendment⁹ almost

*The following discussion bears upon litigation the operative facts of which occurred prior to the ratification of the Twenty-First Amendment.

1. P. L. No. 3, 73d Cong., 1st Sess. (1933), 27 U. S. C. A. § 64a *et seq.* (1933).
2. *Richmire v. Legg*, 3 F. Supp. 787 (N. D. Ga. 1933).
3. *National Prohibition Cases*, 253 U. S. 350, 387 (1920).
4. *Adams Express Co. v. Commonwealth of Kentucky*, 214 U. S. 218 (1909).
5. *National Prohibition Cases*, *supra* note 3, at 386 (1920).
6. *Township of Pine Grove v. Talcott*, 19 Wall. 666, 673 (1873).
7. The Georgia prohibition law provides that "It shall be unlawful . . . to transport, ship or carry . . . from any point without this State to any point within this State, or from place to place within this State . . . any intoxicating liquors." GA. CODE ANN. (Michie, 1926) Pen. Code § 448 (36). Furthermore, "No property rights of any kind shall exist" in prohibited liquors, or in the vessels "kept or used for the purpose of violating any provision of this Act." *Id.* § 448 (21).
8. 37 STAT. 699 (1913). The Webb-Kenyon Act was designed to prevent the immunity of interstate commerce from being used to permit the receipt of liquor through such commerce in states whose laws forbid its ownership. *Clark Distilling Co. v. Western Maryland Ry. Co.*, 242 U. S. 311, 324 (1917).
9. 39 STAT. 1069 (1917). The Reed Amendment, prohibiting the transportation of

verbatim in Sections 6 and 7. Prior to the Eighteenth Amendment these laws, supplementing the Wilson Act,¹⁰ conferred upon the several states certain powers of regulating interstate commerce in alcoholic beverages. But under no one of them does the state have jurisdiction over alcoholic beverages traveling across the state and having no destination therein. The Eighteenth Amendment, as has been said, added to the jurisdiction of each state concurrent power to enforce the prohibition of intoxicating liquors, even if without destination within its boundaries. But it does not follow that the individual states were thereby given power to define what should be considered an intoxicating liquor for purposes of interstate commerce. That power has always been reserved to Congress,¹¹ and unless its pronouncement conflicts with the Eighteenth Amendment, a fact which must be affirmatively shown, interstate commerce in beverages is governed exclusively thereby. This interpretation of the extent of state jurisdiction under the Eighteenth Amendment was adopted by the Supreme Court of Georgia¹² when it declared, contrary to the court in the principal case, that Georgia has no law forbidding the movement of liquor across the state under a federal permit the constitutionality of which is not denied, and that if it had, such law would be invalid because in conflict with the interstate commerce clause. In the same case the Georgia court granted an injunction against a sheriff who had seized a carload of medicinal liquor in course of transportation through the state, on the ground that a prima facie case of compliance with the law of the land was established by pleading a federal permit acquired under the terms of the National Prohibition Act. The Beer Act, in providing for permits for the manufacture and sale of 3.2 beer, similarly exempts such beverage from the operation of the Eighteenth Amendment. Without affirmative proof of the unconstitutionality of the Act, therefore, the state's seizure of the beer in the instant case was beyond the scope of its authority.

PROPRIETY OF RAISING MUNICIPAL TAX RATE TO ALLOW FOR DELINQUENCIES

THE tremendous increase in municipal tax delinquency during recent months is perhaps the most important single cause of the present financial plight of many cities.¹ In 1926, the average rate of delinquency in twenty-four American cities was 5.8%.² It has been estimated that the average rate in 1929 for fourteen of the largest cities of the country was 7.93%.³ Today the rate in some of those cities is thirty to forty times higher than it was before the depression, while the

liquor into any state contrary to the laws of that state, refers to the state of destination, and does not prevent the movement of liquor in interstate commerce across a state. *United States v. Gudger*, 249 U. S. 373 (1919).

10. 26 STAT. 313 (1890). Under the Wilson Act liquor became subject to state law immediately upon delivery to the consignee, whether in the original package or not. *Delamater v. South Dakota*, 205 U. S. 93 (1907).

11. License Cases, 5 How. 504, 599 (1847); *In re Rahrer*, 140 U. S. 545 (1891).

12. *W. A. Gaines & Co. v. Holmes*, 154 Ga. 344, 114 S. E. 327 (1922).

1. "Collection of the city's tax arrears would end the city's financial troubles." Samuel Untermyer, discussing New York City's affairs in the *N. Y. Times*, Sept. 20, 1933, at 1. Also, see Bird, *The Present Financial Status of 135 Cities in the United States and Canada*, MUNICIPAL ADMINISTRATION SERVICE (1931) Statistical Series No. 5, at 4.

2. Computed from figures collected by the Philadelphia Bureau of Municipal Research, printed in (1926) 35 AM. CITY 741.

3. Bird, *supra* note 1, at 5.

estimated average is 26%.⁴ The general financial distress of taxpayers, the vacancy of industrial and residential buildings formerly productive of revenue, and the general reduction in rents and land values are important among the many causes of increased tax delinquencies. The rising percentages of municipal revenue required for debt service, from which there is no return visible to the taxpayer, are said to add to the reluctance with which taxes are paid.⁵

A few state legislatures, recognizing the probability of tax delinquencies, have given taxing officials authority to add a definite percentage to the tax rate to provide therefor.⁶ In most cases, however, the percentages thus specified are too low to take care of the present emergency in city finances.⁷ In some states municipal taxing authorities are permitted to raise the tax rate at their own discretion to allow for delinquencies,⁸ but most statutes merely direct that the tax rate be such as will produce the revenue needed, no mention being made of delinquencies.⁹ Interpreting the latter types of statutes, the courts have invoked a presumption of validity

4. Although delinquency rates are computed differently by different cities, so that comparisons as between the cities are not strictly accurate, the following table gives a graphic picture of the present situation. The figures are collected from (1926) 35 AM. CITY 741; HEARINGS BEFORE THE COMMITTEE ON THE JUDICIARY OF THE HOUSE OF REPRESENTATIVES, 73d Cong., 1st Sess., on H. R. 1670, 3083, 4311, 5267; Bird, *supra* note 1, at 5.

	% 1926	% 1928	% 1930	% Latest estimate
Boston	11.15	—	—	20.0
Detroit	0.99	6.0	15.0	36.0
Flint, Mich.	—	12.2	19.2	78.0
Milwaukee	—	3.52	12.34	40.0
Minneapolis	0.51	—	5.14	15.0 to 25.0
New Orleans	8.0	—	—	25.0
New York	10.60	14.2	15.9	43.0
Philadelphia	5.97	13.02	—	—
Pontiac, Mich.	—	5.2	26.6	43.1

5. For figures on the increases of bonded indebtedness in cities, see Bird, *supra* note 1, at 17. For the effect of this, see testimony of Mayor Frank Murphy of Detroit, a city devoting 76% of its revenue to debt service in 1933, in the HEARINGS BEFORE THE COMMITTEE ON THE JUDICIARY, *supra* note 4, at 85.

6. ARK. DIG. STAT. SUPP. (Castle, 1927) § 7690b (in raising money to pay principal and interest on bonds, the authorities may add 10% for "unforeseen contingencies"); CAL. POL. CODE (Deering, 1932) § 3713 (5% to be added for delinquencies in determining state tax rate to compensate for annual deficiencies); OKLA. STAT. (1931) § 12678 (10% may be added for delinquencies in the general property tax); TEX. REV. CIV. CODE (Vernon, 1928) art. 7043 (20% shall be added to total sum which must be collected by taxes, before computation of rate).

7. A provision in the Oklahoma statute empowering the officers of a municipal corporation to add 25% for delinquencies in levying for a sinking fund seems to be the most generous law now in force. OKLA. STAT. (1931) § 5913.

8. CONN. PUB. ACTS (1931) § 41a (authorities to fix a rate, "with due provision for estimated uncollectible taxes," sufficient to pay the expenses of the town); ME. REV. STAT. (1930) c. 13, § 68 (up to 2% may be added to the rate).

9. For example, see ARIZ. REV. CODE (Struckmeyer, 1928) § 3105; MASS. GEN. LAWS (1932) c. 59, § 23; ORE. CODE ANN. (1930) § 69-605. Such a statute is found in Pennsylvania, where the authorities may fix a rate up to 15 mills on the dollar that "will fully meet and cover" all estimated expenses. PA. STAT. ANN. (Purdon, 1932) § 12198-1810, 12198-2551.

of a tax rate and have upheld allowances for collection costs and for delinquencies,¹⁰ unless the objector has proved the rate to be so grossly excessive as to show a lack of good faith or of sound business judgment on the part of the taxing authorities.¹¹

In *Fitzpatrick v. Thomas*,¹² it appeared that the proportion of delinquent taxes in the city of Sharon, Pennsylvania, in 1932, was ten times greater than in any preceding year. In determining the tax rate for 1933, the city council estimated that there would be delinquencies amounting to 40% of the levy. The Pennsylvania statute permitted a tax rate that would "fully meet and cover" all expenses.¹³ To allow for this anticipated delinquency, the council fixed upon a rate which would result in 40% more revenue than needed if all taxes should be paid. On a bill filed by taxpayers, an injunction was issued restraining the collection of taxes at this rate. The Pennsylvania Supreme Court dismissed the taxpayers' bill and held that, in the absence of an allegation that the taxing authorities had acted in bad faith, even a 40% increase in the rate to provide for delinquencies was a valid exercise of administrative discretion. Mr. Justice Kephart in a dissenting opinion pointed out that such an increase opens the door to laxity in the collection of municipal taxes, and urged adoption of a "presumption of collectibility" in the determination of the legality of a tax rate.

Solution of the problem of municipal tax delinquency cannot be found in precipitate advances in the tax rate. Such advances place an altogether excessive burden upon the more fortunate or more conscientious citizens who are able to and do pay their tax obligations. Moreover, every increase in taxes adds to the delinquency list the names of persons theretofore able to meet their assessments; the resulting vicious circle clearly demonstrates the inadequacy of this means of solving the delinquency problem.¹⁴ On the other hand, literal enforcement of a presumption of collectibility, as suggested in the dissenting opinion in the principal case, would disregard the practical problem of securing the necessary funds for city expenses. To deprive the taxing authorities of all discretion in determining rates would be as dangerous as to permit them to raise the taxes arbitrarily. The presumption of collectibility might well be used, however, to place upon the taxing authorities the burden of justifying an allowance for anticipated delinquencies by proving that all reasonable efforts have been made to collect the taxes. Collectors should go after the taxes, not wait for them to come in.¹⁵ Adequate notice to delinquents, lacking to a surprising extent, and permission for payment of taxes by installments, are

10. *Vornberg v. Dunn*, 143 Ga. 111, 117, 84 S. E. 370, 373 (1915); *Edwards v. People*, 88 Ill. 340, 343 (1878); *Baltimore & Ohio Southwestern Rr. Co. v. People*, 200 Ill. 541, 548, 66 N. E. 148, 150 (1902); *People v. Chicago & Alton Rr. Co.*, 257 Ill. 208, 212, 100 N. E. 502, 504 (1912); *People v. Chicago & Alton Ry. Co.*, 289 Ill. 282, 288, 124 N. E. 658, 660 (1919); *People v. Chicago, Burlington & Quincy Rr. Co.*, 290 Ill. 327, 346, 125 N. E. 310, 318 (1919), all permitting allowances for delinquencies; *Chicago & Alton Rr. Co. v. Baldrige*, 177 Ill. 229, 232, 52 N. E. 263 (1898) (permitting an allowance for payment of a commission to the collector).

11. *People v. Chicago & Alton Rr. Co.*, 324 Ill. 179, 154 N. E. 893 (1926); *State v. St. Louis & San Francisco Rr. Co.*, 321 Mo. 35, 10 S. W. (2d) 918 (1928).

12. 166 Atl. 493 (Pa. 1933).

13. See note 9, *supra*.

14. "If they cannot pay the lower rate, how in the world can you expect them to pay a higher rate?" Paul V. Betters, of the American Municipal Association, quoted in HEARINGS BEFORE THE COMMITTEE ON THE JUDICIARY, *supra* note 4, at 83.

15. *Preliminary Report of the Committee of the National Tax Association on Tax Delinquency*, PROCEEDINGS OF THE TWENTY-FIFTH NATIONAL CONFERENCE, NATIONAL TAX ASSOCIATION (1932) 305. This report, presented by Professor Fred R. Fairchild of Yale, contains an excellent analysis of the problem and its remedies.

probably responsible in part for lower delinquency rates in some cities. Prompt imposition of a heavy penalty when defaults occur is, in normal times, a most effective aid to the collection of taxes;¹⁶ but the efficacy of such a penalty during a depression, when inability rather than unwillingness to pay is the most frequent cause of default, may well be doubted.

CONSTRUCTION OF GIFT TO DONEE FOR USE IN PROMOTING ENDS OF JUSTICE

TESTATRIX, a former member of the faculty of Wellesley College and an ardent supporter of movements for the benefit of the lower classes, undertook to dispose of her estate in a will drawn up without legal advice. In the will she requested that the "Internationale" be sung at her funeral; the nature of her sympathies was further evidenced by her provision of a fund for the establishment of a school for women industrial workers and by her substantial gifts to organizations for the promotion of free thought. By a residuary gift testatrix gave a large part of her estate to Mr. Arthur Garfield Hayes, with whom she had long been associated, for him "to use at his discretion in promoting the ends of justice." After the death of testatrix a controversy arose between the executor of her estate and Mr. Hays as to the proper interpretation of this residuary gift. The New York Surrogate's Court recently held that the bequest was an absolute gift to Mr. Hays with only a moral obligation on him to carry out the wishes of the testatrix.¹

It was clearly the intention of testatrix that the funds included in her residuary bequest be devoted entirely to such uses as the protection of civil liberties, the improvement of hours and conditions of labor, and the promotion of free thought. It may well be questioned whether the court's construction of the gift as absolute, though subject to a moral obligation, will prove a satisfactory method of carrying out this intention. Should the legatee appropriate the gift to his own uses, or should his creditors attempt to reach the fund, no court could interfere if it is said to be his absolutely; whereas a court of equity would retain control of the property if he were said to take it as a trustee.² Misappropriation is probably a remote contingency in the principal case in view of the character of the legatee, but a similar problem would arise in the event of his death, upon which, if the gift is absolute, any unexpended funds would pass to his testamentary³ or intestate successor—a result certainly not contemplated by the testatrix.

Had it so desired, the court in the principal case clearly could have impressed the testatrix's residuary gift with a valid trust. The fact that the testatrix failed to use words of trust would not necessarily preclude the creation of a trust relationship, for the will as a whole together with the extrinsic circumstances affords adequate evidence of an intention that the limitations on the use of the gift be mandatory.⁴ Although a trust thus created would lack definite cestuis,⁵ it could be

16. (1926) 35 AM. CITY 741; Chatters, *Methods That Have Proved Successful in Collecting Delinquent Taxes* (1929) 40 AM. CITY (no. 3) 108.

1. *In re Hayes' Estate*, 146 Misc. 660, 263 N. Y. Supp. 730 (Surr. Ct. 1933).

2. BOGERT, TRUSTS (1921) 327.

3. It is of course possible that Mr. Hays might bequeath the funds received from testatrix in such manner as to carry out her wishes.

4. A precatory trust will be created notwithstanding the absence of express words of trust when the circumstances indicate an intent to devote the estate to a particular purpose. *Thomas v. Buck*, 236 Ky. 241, 32 S. W. (2d) 1006 (1930); *Sherwin v. Smith*, 185 N. E. 17 (Mass. 1933); *Grand Rapids Trust Co. v. Herbst*, 220 Mich. 321, 190 N. W. 250 (1922); *In re Daintrey's Estate*, 125 Misc. 369, 211 N. Y. Supp. 529 (Surr. Ct. 1925); see collection of cases in Note (1927) 49 A. L. R. 10.

5. Definite cestuis are usually essential to the validity of private trusts; but the cestuis

sustained as a charitable trust, since almost any purpose which is for the benefit of society will suffice to bring a trust within this much-favored category.⁶ Thus, trusts have been upheld as charitable when they were for improving the structure of the government;⁷ for bettering economic conditions and obtaining justice between employer and employee;⁸ for teaching the principles of socialism;⁹ and for distributing literature on communism.¹⁰ A trust in the principal case could hardly be invalidated as contrary to public policy, for though trusts to disseminate un-Christian doctrines¹¹ or for the purpose of changing the laws of the country¹² have occasionally been avoided on that ground, a wide variety have been upheld as charitable.¹³

The objection that the purpose of a charitable trust must be explained with reasonable certainty,¹⁴ so that the court can administer the trust with due regard to the testator's intention may similarly be disposed of. The partiality of the courts to charitable trusts leads them to construe the requirement broadly; bequests in which the trustee was given complete discretion to dispose of the fund for charitable purposes, as was the legatee in the principal case, have frequently been upheld.¹⁵ Nor would administration of a trust in the principal case be impracticable.

of a charitable trust are necessarily indefinite. *Clark v. Campbell*, 82 N. H. 281, 133 Atl. 166 (1926); *BOGERT, op. cit. supra* note 2, at 192, 422.

6. *Tarver v. Weaver*, 221 Ala. 663, 130 So. 209 (1930); *Taylor v. Hoag*, 273 Pa. 194, 116 Atl. 826 (1922); see *School of Domestic Arts v. Carr*, 322 Ill. 562, 569, 153 N. E. 669, 671 (1926).

7. *Taylor v. Hoag, supra* note 6; *Harrison's Estate*, 50 Pa. Co. Ct. 200 (1921) (for municipal improvements).

8. *Collier v. Lindley*, 203 Cal. 641, 266 Pac. 526 (1928).

9. *Peth v. Spear*, 63 Wash. 291, 115 Pac. 164 (1911).

10. *George v. Braddock*, 45 N. J. Eq. 757, 18 Atl. 881 (1889).

11. *Zeisweiss v. James*, 63 Pa. 465 (1870); see *Manners v. Philadelphia Library Co.*, 93 Pa. 165, 172 (1880). A contrary result might well be reached today. *Bowman v. Secular Society*, [1917] A. C. 406; see also (1923) 21 MICH. L. REV. 482.

12. *Jackson v. Phillips*, 96 Mass. 539 (1867); *Bowditch v. Attorney General*, 241 Mass. 168, 134 N. E. 796 (1922); *In re Killen's Will*, 124 Misc. 720, 209 N. Y. Supp. 206 (Surr. Ct. 1925). *Contra: Garrison v. Little*, 75 Ill. App. 402 (1897); *Taylor v. Hoag, supra* note 6. On this subject see *Bartlett, Charitable Trusts to Effect Changes in the Law* (1928) 16 CALIF. L. REV. 478.

13. *Parkhurst v. Burrill*, 228 Mass. 196, 117 N. E. 39 (1917) (for promotion of peace); *Glover v. Baker*, 76 N. H. 393, 83 Atl. 916 (1912) (for promotion of Christian Science); *Vineland Trust Co. v. Westendorf*, 86 N. J. Eq. 343, 98 Atl. 314 (1916) (for furtherance of metaphysical thought); *Besant v. German Reich*, 145 L. T. 254 (1931) (for German soldiers disabled in World War). See also cases cited *supra* notes 6 to 10.

14. *In re Vance's Estate*, 118 Cal. App. 163, 4 P. (2d) 977 (1931); *Thomas v. Davis*, [1933] 1 Ch. 225. The requirement of a definite purpose does not conflict with, but arises because of the permitted indefiniteness of the cestuis in a charitable trust. *Collier v. Lindley, supra* note 8; *Cheshire Bank and Trust Co. v. Doolittle*, 113 Conn. 231, 155 Atl. 82 (1931); *Peth v. Spear, supra* note 9; *BOGERT, op. cit. supra* note 2, at 200.

15. *Chicago Bank of Commerce v. McPherson*, 62 F. (2d) 393 (C. C. A. 6th, 1932); *Clark v. Cummings*, 83 N. H. 27, 137 Atl. 660 (1927); *In re Welch*, 105 Misc. 27, 172 N. Y. Supp. 349 (Surr. Ct. 1918); *Anderson's Estate*, 269 Pa. 535, 112 Atl. 766 (1921). *Contra: Gooding v. Watson's Trustee*, 235 Ky. 562, 31 S. W. (2d) 919 (1930); *Wentura v. Kinnerk*, 5 S. W. (2d) 66 (Mo. 1928).

If the trustee were to die or become incapacitated before the termination of the trust, the court could appoint a new trustee,¹⁶ presumably some person engaged in similar activities and having similar sympathies, and could direct him to approximate the wishes of the grantor under the doctrine of *cy pres*.¹⁷

The court's decision in the principal case that the testatrix's residuary bequest constituted not a trust but an absolute gift may be explained on several grounds. In the first place, the argument that a valid charitable trust might have been created was probably not advanced at the trial, for Mr. Hays attempted to show that an absolute gift was intended, and the executor urged that the bequest constituted an invalid trust. The court's rejection of the latter contention is understandable; for if the trust were invalidated either for uncertainty or because its purpose was not considered charitable, the undesirable result of partial intestacy would follow,¹⁸ and the property would pass to the intestate successors¹⁹ in contravention of the obvious intent of the testatrix. Furthermore, the court's decision is in accord with the New York cases which have consistently disapproved of precatory trusts except in the clearest cases.²⁰

DISPOSITION OF INSURANCE PROCEEDS ARISING OUT OF DESTRUCTION OF
SUBJECT-MATTER OF OPTION AGREEMENT

THE defendant leased certain premises to the plaintiff for three years, giving the lessee an option to purchase before the expiration of the term. Four months later,

16. Because American courts are not said to possess the prerogative *cy pres* power, some cases have held that a charitable trust with full discretion in the trustee as to the disposal of the fund terminates on the retirement or death of the trustee. *Hall v. Harvey*, 77 N. H. 82, 88 Atl. 97 (1913); *In re Chellew's Estate*, 127 Wash. 382, 221 Pac. 3 (1923). But *cf.* PERRY, TRUSTS (7th ed. 1929) § 721, 731. New York formerly held this view. *Beekman v. Bonsor*, 23 N. Y. 298 (1861). But by statute the New York Supreme Court has been given power to administer indefinite charitable trusts and to appoint a trustee if none is named. N. Y. PERSONAL PROPERTY LAW (1917) § 12, subdiv. 1. And this has been construed to authorize the continuation of the trust although the trustees who were vested with discretion are deceased. *In re McLoughlin's Estate*, 139 Misc. 202, 248 N. Y. Supp. 253 (Surr. Ct. 1931) (fund to be used for charitable purposes in trustee's discretion). The same result has been reached in Pennsylvania by statute. *De Silver's Estate*, 211 Pa. 459, 60 Atl. 1048 (1905); *Thompson's Estate*, 282 Pa. 30, 127 Atl. 446 (1925). And the courts have appointed new trustees in similar cases in Massachusetts without statutory authority. *Minot v. Baker*, 147 Mass. 348, 17 N. E. 839 (1888); *Binney v. Attorney General*, 259 Mass. 539, 156 N. E. 724 (1927).

17. Under this doctrine the equity court may substitute a new and similar use for property given to charity when the original purpose becomes impossible of realization or when the testator has imperfectly outlined his scheme. BOGERT, *op. cit. supra* note 2, at 225; see note 16, *supra*.

18. Courts generally seek to avoid intestacy as to any part of the estate. *Meeks v. Meeks*, 161 N. Y. 66, 55 N. E. 278 (1899); see *Waterman v. New York Life Insurance and Trust Co.*, 237 N. Y. 293, 300, 142 N. E. 668, 670 (1923).

19. *Buzzell v. Fogg*, 120 Me. 158, 113 Atl. 50 (1921); *Gooding v. Watson's Trustee*; *Wentura v. Kinnerk*, both *supra* note 15.

20. *Tillman v. Ogren*, 227 N. Y. 495, 125 N. E. 821 (1920); *Webster v. Gleizes*, 251 N. Y. 554, 168 N. E. 425 (1929); *In re Abbe's Estate*, 138 Misc. 210, 245 N. Y. Supp. 291 (Surr. Ct. 1930). Such trusts have been disapproved of even where the word "trust" was used. *In re Bogan's Estate*, 129 Misc. 119, 221 N. Y. Supp. 604 (Surr. Ct. 1927).

buildings on the leased premises were destroyed by fire. The lessor, at whose expense the property had been insured, refused a demand by the lessee to rebuild, and effected a cash settlement with the insurance company. The lessee continued in possession, however, paying taxes, interest, and a substantial part of the mortgage pursuant to the terms of the option agreement. Upon the lessee's subsequent election to exercise his option, the court held that the insurance money stood in lieu of the burned property, and could be recovered by the purchaser.¹

In practice, where property under an option to purchase is destroyed by fire, an election to buy will be made only when the insurance proceeds exceed the contract price of the injured property. Thus, the problem has been the final disposition of an unearned profit arising out of the fortuitous destruction of the subject-matter of the contract. In such situations, both in the case of mere option agreements,² and in that of leases with an option to purchase,³ the stated rule has been that the owner of the property need not account to the optionee for the insurance money he has collected. Since the optionor has generally paid for the insurance and would bear the loss if the value of the property exceeded the insurance proceeds, the equities would normally seem to be in his favor. The courts, however, in apparent disregard of such factors have preferred to rest their decisions upon the technical legal ground that an option agreement conveys no estate or interest in the property prior to an acceptance,⁴ or upon the doctrine that an insurance policy is a personal contract between the optionor and the underwriter to which the optionee is not a party.⁵ An exercise of the option is therefore considered an election to purchase the premises at the agreed contract price in the condition in which they are at the date of the acceptance.⁶

A number of courts, on the other hand, have taken the position that the damaged property and the insurance money together constitute the estate to be conveyed, and have granted the lessee-optionee a credit of the insurance proceeds against the contract price.⁷ This has been achieved largely through an extension of the doctrine of equitable conversion⁸ to option agreements.⁹ Under this view, the optionee-

1. Dolan v. Spencer, 92 Colo. 389, 21 P. (2d) 411 (1933).

2. Strong v. Moore, 105 Ore. 12, 207 Pac. 179 (1922); *id.*, 118 Ore. 649, 245 Pac. 505 (1926); Clark v. Burr, 85 Wis. 649, 55 N. W. 401 (1893).

3. Caldwell v. Frazier, 65 Kan. 24, 68 Pac. 1076 (1902); Gamble v. Garlock, 116 Minn. 59, 133 N. W. 175 (1911); Panhandle Oil Co. v. Therrell, 158 Miss. 810, 131 So. 263 (1930); Trumbull v. Bombard, 171 App. Div. 700, 157 N. Y. Supp. 794 (3d Dep't 1916); Rutherford v. MacQueen, 111 W. Va. 353, 161 S. E. 612 (1931); Edwards v. West, 7 Ch. D. 858 (Eng. 1878).

4. Gamble v. Garlock, *supra* note 3, at 62, 133 N. W. at 176.

5. Strong v. Moore, *supra* note 2, at 654, 245 Pac. at 507; JAMES, OPTION CONTRACTS (1916) § 512.

6. Caldwell v. Frazier, *supra* note 3, at 27, 68 Pac. at 1077; Panhandle Oil Co. v. Therrell, *supra* note 3.

7. Kaufman v. All Persons, 16 Cal. App. 388, 117 Pac. 586 (1911); Williams v. Lilley, 67 Conn. 50, 34 Atl. 765 (1895); Peoples Street Ry. Co. v. Spencer, 156 Pa. 85, 27 Atl. 113 (1893); Schnee v. Elston, 299 Pa. 100, 149 Atl. 108 (1930); Carnation Lumber and Shingle Co. v. Tolt Land Co., 103 Wash. 633, 175 Pac. 331 (1918); Reynard v. Arnold, 23 W. R. 804 (Eng. 1875).

8. The theory of equitable conversion is widely applied to executory contracts for the sale of land for the purpose of constituting the vendee an equitable owner of the premises and the vendor the trustee of the legal title. See 1 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1918) §§ 371, 372. For a critical discussion of the doctrine as applied to executory contracts, see Stone, *Equitable Conversion by Contract* (1913) 13 COL. L. REV. 369.

9. Peoples Street Ry. Co. v. Spencer; Schnee v. Elston, both *supra* note 7; see Williams v. Lilley, *supra* note 7, at 62, 34 Atl. at 769.

lessee has been considered an equitable owner of the premises for the duration of his option, so that upon an election to purchase, the acceptance relates back for all purposes to the beginning of the transaction.¹⁰ A similar result has been reached by an analogous distortion of some other legal doctrine. Thus, where the lessee-optionee has paid a substantial part of the purchase price for his option,¹¹ or has assumed the duties of ownership before the fire loss,¹² he has been credited with the insurance money on the ground that the parties considered him an inchoate purchaser under an executory contract. Similarly, where the lease and option agreement stipulated that the insurance proceeds were to be used in rebuilding the destroyed property, it has been held that the parties have expressly contracted against the rule that such funds may be retained by the optionor.¹³ A significant element common to these cases has been the payment of insurance premiums by the optionee-lessee. This factor, however, seems to have been ignored, perhaps because the loss is generally made payable to the owner of the property.

It is doubtful whether argument by analogy to equitable conversion or executory contracts serves a useful function in determining the ultimate disposition of the insurance proceeds. Such concepts are at best mere rationalizations of the result reached. Actually, the party who has borne the expense of insurance has been awarded the proceeds of the policy, although no express judicial articulation has been given to such a principle. The instant case represents a departure in that the insurance money was credited to the optionee though the owner of the property had paid the premiums. The optionee, however, in electing to purchase, was not seeking to obtain a profit out of the destruction of the premises. As the court found, the payment by the optionee of interest, taxes, and part of the principal of the mortgage indicated the intent of the parties that a sale would ultimately be consummated. Nor does this decision place any hardship upon the optionor, since all he had bargained for was the contract price of the premises. The solution, offered in the instant case, of awarding the insurance money on the basis of the conduct of the parties to the particular litigation, appears to be sounder than a disposition predicated upon a broad legal generalization.

VALIDITY OF UNATTESTED LEGACY SIGNIFIED IN AUTHENTICATED WILL

A TESTATOR in his will directed his executor to deliver certain sealed envelopes to the persons whose names appeared thereon. These envelopes had been placed by the testator in a safe-deposit box to which he alone had access, and bore inscriptions indicating that the contents were the property of the respective addressees. During his life the testator retained the income from the bonds which comprised the contents of the two envelopes involved in the probate proceedings. In construing this clause of the instrument, the court held the attempted gift ineffective because the envelopes were not signed and attested as required by the Statute of Wills.¹

This uncompromising decision is in accord with the orthodox attitude toward the statutory formalities required in executing a will. However, if it is considered that

10. Peoples Street Ry. Co. v. Spencer, *supra* note 7, at 91, 27 Atl. at 114.

11. Kaufman v. All Persons, *supra* note 7.

12. Williams v. Lilley, *supra* note 7.

13. Carnation Lumber and Shingle Co. v. Tolt Land Co., *supra* note 7, at 642, 175 Pac. at 334.

1. *In re Angle's Will*, 147 Misc. 445, 264 N. Y. Supp. 29 (Surr. Ct. 1933).

a primary function of the statute is to provide evidence of testamentary intention that will decrease the possibility of forged or perjured claims, it would seem that in the instant case that function is subserved by the presence of an unimpeachable type of evidence. The testator's use of the safe-deposit box would not appear to be less efficacious than mere compliance with the statute in rendering the chance of false claims remote. Rigid insistence upon technicalities thus seems unfortunate where, as here, the result is to defeat an unequivocally manifested bequest, and some deviation from a strict interpretation of the statute might well be condoned.

Had the court wished to carry out the indicated disposition, several possibilities might have suggested themselves. The argument most strenuously advanced was that the envelopes should be considered a part of the will. The court's refusal to sanction this position is merely another manifestation of New York's hesitancy to permit extrinsic documents, testamentary in character but not properly authenticated, to be incorporated into wills by reference.² But even in those jurisdictions where a more lenient view prevails,³ under the facts of the instant case the lack of any clearly expressed intention to make the envelopes part of the will would probably preclude such a result.⁴

Furthermore, it might be contended that this was a valid testamentary gift in a will sufficiently complete on its face, requiring extrinsic evidence solely for the purpose of curing ambiguities. If the beneficiary had been named and it were merely the subject-matter of the gift which required more precise determination, the court might have upheld the will upon an analogy to those cases which sustain bequests of the contents of a certain box.⁵ Here, however, both the beneficiary and the property must be identified by evidence extrinsic to the will.⁶ Moreover, the failure even to describe the beneficiary would be fatal to the argument, especially since the identifying act cannot meet the requisite test of being significant apart from the will.⁷

As an additional expedient the intended beneficiary might urge that under the will the executor holds the envelopes in trust for him. Since the bequest to the alleged trustee is not in absolute terms, this could not be construed as a secret trust, readily enforceable as a constructive trust.⁸ It could be supported, if at

2. The New York courts strongly disfavor incorporation by reference. See *Booth v. Baptist Church*, 126 N. Y. 215, 247-248, 28 N. E. 238, 242 (1891). But *cf. In re Barlow's Will*, 144 Misc. 210, 258 N. Y. Supp. 451 (Surr. Ct. 1932), which regards *In re Rausch's Will*, 258 N. Y. 327, 179 N. E. 755 (1932), as relaxing the New York rule.

3. Within limits, however, most jurisdictions freely permit incorporation by reference. 1 *PAGE, WILLS* (2d ed. 1926) § 242 *et seq.*; Note (1933) 17 *MINN. L. REV.* 527.

4. *Bottrell v. Spengler*, 343 Ill. 476, 175 N. E. 781 (1931); *Allenbach v. Ridenour*, 51 Nev. 437, 279 Pac. 32 (1929). *Cf. O'Leary v. Lane*, 149 Ark. 393, 232 S. W. 432 (1921).

5. *E. g. Appeal of Magoohan*, 117 Pa. 238, 14 Atl. 816 (1887); *In re Robson*, [1891] 2 Ch. 559.

6. See *Evans, Incorporation by Reference, Integration, and Non-testamentary Act* (1925) 25 *COL. L. REV.* 879, for a discussion of the problems involved.

7. *Hastings v. Bridge*, 166 Atl. 273 (N. H. 1933). It is interesting that New York holds void a bequest by a testator "to those who will take care of me during my last illness." *In re Wilson's Estate*, 143 Misc. 491, 256 N. Y. Supp. 813 (Surr. Ct. 1932). In such case the identifying act is not performed solely for the purpose of complementing the will, and practically all courts hold that the uncertainty as to the beneficiary will not defeat the bequest. *Bosserman v. Burton*, 137 Va. 502, 120 S. E. 261 (1923), 38 A. L. R. 767 (1925).

8. *Rudd v. Gates*, 191 Ky. 456, 230 S. W. 906 (1921); *Winder v. Scholey*, 83 Ohio St. 204, 93 N. E. 1098 (1910); *Hollis v. Hollis*, 254 Pa. 90, 98 Atl. 789 (1916).

all, as an express trust. However, most jurisdictions, including New York, hold that where a will purports to set up an express trust but omits the name of the beneficiary, the defect cannot be cured by extrinsic evidence.⁹ It follows that such a trust would be executory and hence unenforceable. Yet some courts, admitting the evidence in order to prevent a fraud on the intended beneficiary and a betrayal of the faith upon which the testator relied,¹⁰ have enforced such gifts upon constructive trust principles.¹¹

As a final recourse, the beneficiary might disregard the will and bring a separate action against the executor on the theory of a consummated inter vivos gift. The traditional requirement of delivery might seem an insurmountable difficulty, but several courts have provided an escape. The notations on the envelopes may be viewed not as words of transfer, but as evidence that all acts necessary to transfer title had been performed.¹² These memoranda may thus be considered declarations against interest, and admissible against the decedent's estate as an exception to the hearsay rule of evidence.¹³ However, this is but evidence from which delivery is inferred, and it may be that other factors would negative a completed gift.¹⁴ Yet even the fact that the decedent retained the income until his death would not prevent the drawing of this inference.¹⁵ True, in many jurisdictions there is a total rejection of the view that delivery may be proved by declarations or admissions that the property belongs to another.¹⁶ But where, as in the instant case, the facts work a guarantee against perjured claims, it would seem that the court should welcome an escape from such an intent-defeating interpretation of the policy underlying the Statute of Wills.

RECOVERY BY NOTARY PUBLIC OF FEES EARNED DURING EMPLOYMENT BY BANK

PLAINTIFF, a notary public, agreed with the defendant bank to render notarial services in connection with the protest of negotiable instruments. The bank was to pay him a monthly salary, and retain whatever fees he might earn. This arrangement continued for twenty-two years, during which the plaintiff received and accepted the agreed wage in full payment of his services. At no time did he make a claim or demand for the whole or any part of the notarial fees. Upon terminating his

9. *Reynolds v. Reynolds*, 224 N. Y. 429, 121 N. E. 61 (1918), noted in (1919) 28 YALE L. J. 411.

10. See *Blackwell v. Blackwell*, [1929] A. C. 318, 328.

11. *Blackwell v. Blackwell*, *supra* note 10; *Hughes v. Bent*, 118 Ky. 609, 81 S. W. 931 (1904). See Scott, *Conveyances Upon Trusts Not Properly Declared* (1924) 37 HARV. L. REV. 653, 683, n. 85.

12. *Govin v. De Miranda*, 140 N. Y. 474, 35 N. E. 626 (1893); *Miller v. Silverman*, 247 N. Y. 447, 160 N. E. 910 (1928); *Zollicoffer v. Zollicoffer*, 168 N. C. 326, 84 S. E. 349 (1915). See Mechem, *Delivery in Gifts of Chattels* (1926-1927) 21 ILL. L. REV. 341, 607, especially cases cited at 608, n. 325.

13. *Dean v. Wilkerson*, 126 Ind. 338, 26 N. E. 55 (1890); *Peacock v. Ambrose*, 121 Me. 297, 116 Atl. 832 (1922); *Gallagher v. Brewster*, 153 N. Y. 364, 47 N. E. 450 (1897). Cf. *In re Mackintosh's Estate*, 140 Misc. 12, 249 N. Y. Supp. 534 (Surr. Ct. 1931).

14. Cf. *In re Smith's Will*, 132 Misc. 421, 230 N. Y. Supp. 434 (Surr. Ct. 1928).

15. *In re Estate of Dayton*, 121 Neb. 402, 237 N. W. 303 (1931). See *Robinson v. Pero*, 272 Mass. 482, 172 N. E. 599 (1930). *Contra*: *Knox v. El Dorado National Bank*, 137 Kan. 500, 21 P. (2d) 353 (1933).

16. *Thomas v. Buck*, 236 Ky. 241, 32 S. W. (2d) 1006 (1930); cases cited in Mechem, *supra* note 12, at 609, n. 326.

employment with the bank, the notary brought an action¹ under state law² to recover the fees for the notarial work he had performed. The court, declaring the contract between the notary and the bank void as contrary to public policy, held that the bank must return the full amount of notarial fees received during the last six years,³ less the remuneration paid to the notary during that period.

A contract by a public officer to render services gratuitously, or for a compensation less than that provided by statute, is ordinarily considered invalid as against public policy.⁴ An officer so contracting may recover his legal remuneration,⁵ despite his participation in the illegal agreement, since he does not claim through the contract but independently of it, and under statute.⁶ This policy is based upon the assumption that the remuneration incident to a public office is essential to the support of the incumbent, and that to deprive him of it would disturb that vigilance in office which the expectation of emoluments keeps alive.⁷ While this function is subserved if the rule of non-assignability of official fees is restricted to those which have not yet been earned, that principle has been indiscriminately applied to cases of executed agreements as well.⁸

The cases that have considered the applicability of this policy to notary publics have not been in accord. Where a notary has been permitted to recover his fees, it has been on the ground that there is a public interest prohibiting the assignment of unearned income,⁹ which cannot be frustrated by the notary's acquiescence or past line of conduct.¹⁰ The finding that the notary is a public officer is fundamental to this conclusion. A number of courts, however, have accorded their sanction to such agreements insofar as they have been executed.¹¹ This has been accomplished

1. *Kip v. People's Bank and Trust Co.*, 110 N. J. L. 178, 164 Atl. 253 (1933).

2. N. J. COMP. STAT. (1910) 3760.

3. It was held that the Statute of Limitations would prevent the recovery of fees earned outside the six-year period. *Supra* note 1, at 186, 164 Atl. at 256.

4. *Ohio National Bank v. Hopkins*, 8 App. D. C. 146 (1896).

5. *Bliss v. Lawrence*, 58 N. Y. 442 (1874); *Ohio National Bank v. Hopkins*, *supra* note 4.

6. *Ohio National Bank v. Hopkins*, *supra* note 4, at 155.

7. *Ibid.*

8. *Ohio National Bank v. Hopkins*, *supra* note 4; *Pitsch v. Continental and Commercial Bank*, 305 Ill. 265, 137 N. E. 198 (1922); *Wood v. Kansas City*, 162 Mo. 303, 62 S. W. 433 (1901); *Geddis v. Westside National Bank*, 7 N. J. Misc. 245, 145 Atl. 731 (1929), *aff'd*, 106 N. J. L. 238, 148 Atl. 917 (1930). *Contra*: *De Boest v. Gambell*, 35 Ore. 368, 58 Pac. 72 (1899); *Hobbs v. City of Yonkers*, 32 Hun 454 (Sup. Ct. N. Y. 1884), *aff'd*, 102 N. Y. 13 (1886). See *Dye, Agreement by Public Officer to Render Services for Sum Less than Compensation Fixed by Law as a Valid Agreement when Executed* (1921) 92 CENT. L. J. 192, 194.

9. See *Ohio National Bank v. Hopkins*, *supra* note 4, at 153. "The policy is obvious that will forbid such relation to exist, as that created by the agreement . . . between a bank and a notary public, handling the paper affecting the rights of third persons, and where the incentive might often be strong to suppress or conceal evidence of the negligence of each other . . . From the moment that he [notary] receives the paper for notarial action, he thereby becomes the agent of the owner of the paper, and his paramount duty is to him, and those affected by his official action."

10. *Geddis v. Westside National Bank*, *supra* note 8.

11. *Leach v. Hannibal & St. Joseph's Rr. Co.*, 86 Mo. 27 (1885); *Mussing v. The Corn Exchange National Bank*, 173 Ill. App. 53 (1912) (on its facts distinguishable from *Pitsch v. Continental and Commercial Bank*, *supra* note 8); *Second National Bank v. Ferguson*, 114 Ky. 516, 71 S. W. 429 (1903); *McNulty v. Kansas City*, 201 Mo. App. 562, 198 S. W.

largely by invoking an estoppel on the notary's part,¹² by adjudging his guilt to be equal to that of his employer,¹³ or by considering the executed transaction as an assignment by the notary of the earned portion of his fees.¹⁴

While there is no objection to considering a notary a public officer,¹⁵ it is questionable whether he should be amenable to the rule which invalidates an agreement for the assignment of official fees. The notary's calling is largely transient in nature, his duties do not appear to be mandatory, the collection of fees is optional, and the qualifications for the position are of small consequence.¹⁶ In general, he does not appear to be a public official requiring the extreme protection accorded him in the instant case. Since there was ample consideration for the contract in that the notary received a definite and fixed sum payable to him every month in return for surrender of an uncertain amount,¹⁷ the court might well have decided that there was nothing invalid in such an assignment of income.¹⁸ In addition, the employer, acting upon the assumption that its employee had no claim to earned notarial fees, may have failed to collect some of them, so that to permit a recovery by the notary would be to throw upon the employer a loss which cannot be recouped.¹⁹ It would seem, therefore, that the public interest can better be subserved by compelling parties dealing with each other at arm's length to honor their agreements.

POWER OF A STATE TO EXEMPT A SINGLE RAILROAD FROM TAXATION

TEN years of progressively declining revenues brought the Washington, Baltimore, and Annapolis Electric Railroad into the hands of a receiver. The company was of strategic importance to the Maryland transportation system; it offered the only rail service to the state capitol, and carried millions of passengers annually.¹ To facilitate the continued operation of the road, the state legislature exempted from state and local taxes, for a period of two years, all of the company's property used for railway purposes.² The cities of Baltimore and Annapolis challenged the validity of such limitation upon their taxing power before the federal district court administering the receivership, contending that the exemption violated both the rule of uniformity in taxation embodied in the state constitution,³ and the equal protection

185 (1919) (supplanting *Wood v. Kansas City*, *supra* note 8, the ordinance in the latter case having been repealed). See *Bryden v. Delaware, Lackawanna & Western Rr. Co.*, 262 Pa. 211, 214, 105 Atl. 79, 80 (1918) (adhering to the *Leach* case, *supra*). See also JOHN, *AMERICAN NOTARIES* (Bauer, 4th ed. 1931) § 36.

12. *Second National Bank v. Ferguson*, *supra* note 11.

13. *Mussing v. The Corn Exchange National Bank*, *supra* note 11.

14. *Leach v. The Hannibal & St. Joseph's Rr. Co.*, *supra* note 11.

15. See JOHN, *op. cit. supra* note 11, § 4 and cases cited therein.

16. *Id.* §§ 8, 37. In New Jersey, he seems to have purely ministerial functions.

17. *McNulty v. Kansas City*, *supra* note 11, at 570, 198 S. W. at 188.

18. The arrangement between the parties was not made clear by the court in the instant case. The court reserved opinion on the power of the officer to waive or remit a fee after it has been earned. This seems to imply that the notary was employed by the bank in a public capacity, and was not doing notarial work incidental to employment in a private capacity. Cf. *Mussing v. The Corn Exchange National Bank*, *supra* note 11.

19. *Second National Bank v. Ferguson*, *supra* note 11, at 521, 71 S. W. at 431.

1. The total trackage is only 134.9 miles. Over 3,000,000 passengers are carried annually (1926-1931). POOR'S PUBLIC UTILITIES (1932) 254.

2. Md. Acts 1931, c. 497.

3. "... all taxes . . . shall be uniform as to land within the taxing district, and uniform

clause of the Fourteenth Amendment. The Supreme Court, affirming the decision of the district court⁴ and reversing the Circuit Court of Appeals,⁵ sustained the validity of the exemption.⁶

Since a city is merely a creature of the state government, it "has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator."⁷ The Supreme Court, therefore, refused to consider the contended violation of the Fourteenth Amendment and confined its decision to the single issue whether the special exemption here challenged conflicted with the rule of uniformity embodied in the Maryland Constitution.⁸ But since this same rule has been read into the Fourteenth Amendment,⁹ and exists, expressly or impliedly, in other state constitutions,¹⁰ cases arising outside of Maryland are directly in point.

The customary statement of the rule of uniformity is that all persons in similar circumstances shall be equally and uniformly treated.¹¹ However, the validity of reasonable classification, even if it results in unequal taxation, has long been recognized.¹² The determination of what constitutes a separable class is said to be largely a matter of legislative discretion.¹³ But the criterion of proper discretion in each case is the attitude of the court before which the validity of the enactment is challenged. Thus, in one jurisdiction legislative discretion is apparently limited to classification based upon the extrinsic nature of property. Consequently, buildings erected for dwelling purposes during a period of widespread shortage of housing facilities were held arbitrarily exempted from taxation because all dwelling houses were not so exempted;¹⁴ and, similarly, the attempted exemption from taxation of

within the class or sub-class of improvements on land and personal property." Maryland Declaration of Rights, art. 15.

4. Decision not reported.

5. *Williams v. Mayor and City Council of Baltimore*, 61 F. (2d) 374 (C. C. A. 4th, 1932).

6. *Williams v. Mayor and City Council of Baltimore*, 289 U. S. 36 (1933).

7. *Id.* at 40.

8. Other issues were considered, but they are not relevant to the question here discussed.

9. *Louisville Gas Co. v. Coleman*, 277 U. S. 32, 37 (1928); *Black v. State*, 113 Wis. 205, 219, 89 N. W. 522, 527 (1902).

10. Decisions from states with constitutional enumerations of permitted exemptions are not in point, for such enumerations are held to exclude other exemptions. *Consolidated Coal Co. v. Miller*, 236 Ill. 149, 86 N. E. 205 (1908); *Louisiana Cotton Manufacturing Co. v. New Orleans*, 31 La. Ann. 440 (1879); *Hogg v. Mackay*, 23 Ore. 339, 31 Pac. 779 (1893); *Ry. Co. v. Wilson*, 89 Tenn. 597, 15 S. W. 446 (1891). *Contra*: *Alpha Tau Omega v. Douglas County Commissioners*, 136 Kan. 675, 18 P. (2d) 573 (1933).

11. *Magown v. Illinois Trust and Savings Bank*, 170 U. S. 283, 293 (1898); *Royster Guano Co. v. Virginia*, 253 U. S. 412, 415 (1920); *Baltimore v. Starr Church*, 106 Md. 281, 288, 67 Atl. 261, 264 (1907); *Bernhard Stern and Sons v. Bodden*, 165 Wis. 75, 79, 160 N. W. 1077, 1078 (1917).

12. See *American Sugar Refining Co. v. Louisiana*, 179 U. S. 89, 92 (1900); *Baltimore v. German-American Fire Insurance Co.*, 132 Md. 380, 386, 387, 103 Atl. 980, 982, 983 (1918); *Bank of Miles City v. Custer County*, 93 Mont. 291, 300, 19 P. (2d) 885, 889 (1933); *Bernhard Stern and Sons v. Bodden*, *supra* note 11, at 82, 160 N. W. at 1079.

13. See *Bell's Gap Rr. Co. v. Pennsylvania*, 134 U. S. 232, 237 (1890); *Florida Central and Peninsular Rr. Co. v. Reynolds*, 183 U. S. 471, 476, 477 (1902); *Citizens' Telephone Co. v. Fuller*, 229 U. S. 322, 329, 330, 331 (1913); *Lake Superior Mines v. Lord*, 271 U. S. 577, 582 (1926); *Jackson City v. Mississippi Fire Insurance Co.*, 132 Miss. 415, 420, 421, 95 So. 845, 848 (1923); see also note 12, *supra*.

14. *Koch v. Essex County Board of Taxation*, 97 N. J. L. 61, 116 Atl. 328 (1922).

county lands, when like municipal property was not so favored, was condemned on the ground that mere ownership and location were made the basis for classification.¹⁵ Most courts allow their legislatures greater freedom of discretion.¹⁶ Ownership as a ground for classification has been sanctioned by one court in sustaining the exemption of mortgages owned by domestic fire insurance companies,¹⁷ and by another court in upholding an act which relieved from taxation shares of stock in local corporations when owned by residents of the state.¹⁸ The use made of money and credit by banks, as distinguished from its use by other institutions, has been held to justify heavier taxation;¹⁹ the size of telephone companies²⁰ and the weight of trucks,²¹ have been sustained as reasonable grounds for exemption; and the collateral fact that refiners of sugar and molasses were also the producers of what they refined, has been deemed to justify an exemption of such persons from a general tax on refineries.²² Moreover, if the attempt of a legislature to meet a vital public need has required a certain discrimination in taxation, the rule of uniformity has not been permitted to thwart it.²³ Thus, the promotion of manufacturing by tax exemptions to increase the state wealth²⁴ and the encouragement of domestic life insurance companies to induce lower insurance rates and larger investments in state enterprises,²⁵ have been declared to be within the legislative discretion. Courts have likewise approved the exemption of small incomes to encourage thrift,²⁶ and of motor vehicles used exclusively in transporting dairy and other farm products.²⁷ One court has even ruled that although the tax exemption of a certain utility was unquestionably contrary to the rule of uniformity, it should not be declared unconstitutional if the legislature, in its proper discretion, thought such special treatment necessary to promote the public welfare.²⁸

15. *Secaucus v. Huber*, 87 N. J. L. 464, 95 Atl. 123 (1915).

16. "Any classification is permissible which has a reasonable relation to some permitted end of governmental action." See *Watson v. State Comptroller*, 254 U. S. 122, 124 (1920); *Heisler v. Thomas Colliery Co.*, 260 U. S. 245, 255 (1922); *Bank of Miles City v. Custer County*, *supra* note 12, at 296, 19 P. (2d) at 887. Differences between property need not be great to justify classification. See *Citizens' Telephone Co. v. Fuller*, *supra* note 13, at 331; *Bank of Miles City v. Custer County*, *supra* note 12, at 296, 19 P. (2d) at 887. The limitation on exemption classification is that exemptions shall not result in "clear and hostile discriminations against particular persons and classes." See *Citizens' Telephone Co. v. Fuller*, *supra* note 13, at 330, 331; *Heisler v. Thomas Colliery Co.*, *supra* at 255; *Lake Superior Mines v. Lord*, *supra* note 13, at 582.

17. *Baltimore v. German-American Fire Insurance Co.*, *supra* note 12.

18. *Travellers' Insurance Co. v. Connecticut*, 185 U. S. 364 (1902).

19. *Bank of Miles City v. Custer County*, *supra* note 12.

20. *Citizens' Telephone Co. v. Fuller*, *supra* note 13.

21. *State v. Public Service Commission*, 207 Wis. 664, 242 N. W. 668 (1932).

22. *American Sugar Refining Co. v. Louisiana*, *supra* note 12.

23. See *Citizens' Telephone Co. v. Fuller*, *supra* note 13, at 331; *Royster Guano Co. v. Virginia*, *supra* note 11, at 415; see also note 16, *supra*.

24. *Colton and Moore v. City of Montpelier*, 71 Vt. 413, 45 Atl. 1039 (1899). The vague constitutional provisions on taxation in Vermont embody the rule of uniformity. *In re Hickok's Estate*, 78 Vt. 259, 62 Atl. 724 (1906).

25. *Miller v. Lamar Life Insurance Co.*, 158 Miss. 753, 131 So. 282 (1930).

26. *In re Opinion of the Justices*, 82 N. H. 561, 138 Atl. 284 (1927). Here again indefinite constitutional provisions have been read to require uniformity in taxation. *State v. Express Co.*, 60 N. H. 219 (1880).

27. *State v. Public Service Commission*, *supra* note 21.

28. *Canaan v. District*, 74 N. H. 517, 70 Atl. 250 (1908) (see reasoning of Parsons,

There is no apparent reason why the exemption of a single company or enterprise, as in the instant case, should not also be within the legislature's power of reasonable classification.²⁹ In one case a single water company was held to constitute a class for exemption purposes upon the ground that although it was similar to other water companies in most respects, special benefits could be derived from its location.³⁰ Charter grants of tax exemptions to individual railroads in order to stimulate commerce within the state are familiar examples wherein such narrow classification has been judicially sanctioned.³¹ And, as said by Mr. Justice Cardozo, speaking for the Court in the principal case, "The policy that sustains an exemption in order to keep a crippled railroad going is precisely the same as the one that sustains an exemption to set it going at the start."³²

The dangers inherent in this decision are obvious. Legislative liberality in the form of tax exemptions has been largely responsible for the financial difficulties which many state and local governments are facing.³³ Special exemptions, supplementing the traditional, large tax-exempt classes, will impose new burdens upon those who still must pay and further weaken the credit structures of state and local governments. The possibilities of legislative favoritism in the awarding of special privileges to private interests should also be seriously considered. However, if the exemption in a given case clearly benefits the community, it should not be invalidated merely because another exemption might not be so conducive to the public welfare.

C. J.). A later decision, while admitting the validity of the ruling, declares the tax exemption of a certain mill unconstitutional. *Eyers Woolen Co. v. Gilsum*, 84 N. H. 1, 146 Atl. 511 (1929).

29. Judicial dicta have often upheld special exemptions. See *Tucker v. Ferguson*, 89 U. S. 527, 574 (1874); *West Wisconsin Ry. Co. v. Supervisors*, 93 U. S. 595, 598 (1876); *Grand Lodge v. New Orleans*, 166 U. S. 143, 149 (1897); *Canaan v. District*, *supra* note 28, at 547, 548, 70 Atl. at 262, 263; *Lawrence University v. Ontagamie County*, 150 Wis. 244, 248, 136 N. W. 619, 621 (1912). The exemption of a single brick mill was held arbitrary in *Brewer Brick Co. v. Brewer*, 62 Me. 62 (1873); as was that of a church wharf in *Baltimore v. Starr Church*, *supra* note 11; a hotel in *City of Jackson v. Edwards House*, 145 Miss. 135, 110 So. 231 (1926); and a textile mill in *Eyers Woolen Co. v. Gilsum*, *supra* note 28. These cases decided that there existed no public need justifying the specific narrow classifications; but they do not deny the validity of any unit classification.

30. *Portland v. Water Co.*, 67 Me. 135 (1877). For similar reasoning in a non-exemption case, see *Railroad Co. v. Richmond*, 96 U. S. 521, 529 (1877).

31. The cases cited in the instant decision, at 41, are typical. It was pointed out that social policy was the justification for those individual grants, not, as alleged, their contractual nature; for contracts may embody sufficient legal consideration and fail of constitutionality if the tax exemption is contrary to the public interest.

32. *Williams v. Mayor and City Council of Baltimore*, *supra* note 6, at 44.

33. Two excellent articles on the extent of tax exemptions are: Baker, *Tax Exemption Statutes* (1928) 7 TEX. L. REV. 50; Stimson, *Stimulation of Industry Through Tax Exemption* (1933) 11 TAX MAG. 169, 221.