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CLAIMS PROVABLE IN RECEIVERSHIP PROCEEDINGS.

Although the power of the English Court of Chancery to appoint receivers is "one of the oldest remedies" of that Court[1] and although some of the most important questions arising in the whole field of commercial law concern the liquidation of insolvent corporations by receivers, many portions of the law of receivers remain curiously unsettled. This is particularly so as to the question of claims provable against the assets in the hands of a receiver. Thus in Connecticut the Aetna Indemnity Company has been in process of liquidation by receivers since early in 1911, but it is only now that the law has been partially settled by two recent decisions in these proceedings: *Bashford-Burmister Company v. Aetna Indemnity Company* (1919, Conn.) 105 Atl. 470; *Husbands v. Aetna Indemnity Company* (1919, Conn.) 105 Atl. 480.[2]

[1] Giffard, V. C. in *Hopkins v. Worcester, etc. Canal Co.* (1868) L. R. 6 Eq. 437, 447; 1 Clark, *Receivers* (1918) sec. 4.

[2] For complete statement of facts, see RECENT CASE NOTES, *infra*. In addition to the points herein discussed, other interesting questions arose. Thus the claimants were held to have been excused from presenting their claims within the time limited by the court by reason of the fact that the receivers, by court authority, had contested in foreign jurisdictions the suits on the claims there pending.

These cases deal with two very important questions: (1) within what time must claims mature in order to be provable in the receivership proceedings and share in the dividend from the assets held by the receiver? and (2) what constitutes a matured claim as distinguished from a contingent claim?

The rules recently announced in New York have influenced the course of decisions in Connecticut. In the first of a series of cases the New York Court of Appeals held that claims, to share in the dividend, must have matured at the time of the commencement of the action in which the receiver is appointed; and that a claim against a surety on a bond given in substitution of an attachment in a suit where judgment was not obtained until after the receiver's appointment, was contingent and could not share in the dividend.[3] Next it held, though with a vigorous dissenting opinion, that claims under the United States Statute, of unpaid materialmen against the surety on the bond of the contractor for government works and improvements, were contingent, judgment not having been secured prior to the receivership in the federal court specified in the statute.[4]

Subsequent to these decisions the lower courts in Connecticut adopted the New York rule for the Aetna Receivership, and this rule was applied against many claims in this receivership, until it has now been at least partially set aside by the principal cases above referred to. The New York court has meanwhile modified its position very materially in holding that materialmen under this same federal statute might share in the dividend where they had instituted suit in the federal court prior to the receivership, although such suit had not gone to judgment.[5]

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[3] *People v. Metropolitan Surety Co. (Matter of Fleet v. Yawger)* (1912) 205 N. Y. 135, 98 N. E. 412, Ann. Cas. 1913D 1180. The decision that the claim was contingent until judgment was obtained in the suit in which the bond was substituted for the attachment is obviously correct. Judgment was necessary to settle the question whether there would be any claim.

[4] *People v. Metropolitan Surety Co. (Matter of Smith Co. v. Yawger)* (1914) 211 N. Y. 107, 105 N. E. 99, three judges *dissenting*. The Act of Congress of August 13, 1894, ch. 280, amended by Act of February 24, 1905, ch. 778, 33 Stat. L. 811 (U. S. Comp. St. 1916, sec. 6923), provides that a contractor on government works shall give the usual surety bond with the additional obligation that he shall promptly pay all persons supplying labor or materials in the prosecution of the work. The Act then provides for suit on this bond by such materialmen, stating that the suit shall be brought in the federal court for the district in which the contract was to be performed "and not elsewhere." The government may bring suit within six months from the date of completion of the contract, during which period no suit may be instituted by materialmen, though they may intervene in any suit brought by the government. Only one action is to be brought, all other claimants intervening in that action.

[5] *Matter of Empire State Surety Co.* (1915) 216 N. Y. 273, 110 N. E. 610. Two of the three judges who dissented here were with the majority of the court in the case referred to in note 4, *supra*, but the complexion of the court had changed in the meantime. The court attempts to distinguish the previous decision on the ground that here claimants had instituted suit in the federal

The principal cases, which are decisions in favor of claimants, do not definitely settle the first question, namely within what time claims must mature in order to share in the dividend. They seem to tend toward the New York rule applied in the trial court and urged by the receiver, inasmuch as they state the rule that claims must have matured prior to the institution of receivership proceedings, but hold that the claims in question had so matured.[6] At most, the cases are only dicta on this point and in the absence of any discussion it may still be considered open in Connecticut. The point deserves careful consideration. While the New York Courts state the rule generally, it may there be rested on the New York Statute.[7] The bankruptcy rule is the same, but there likewise it follows from the wording of the Bankruptcy Act.[8] It has, however, been applied generally in many cases.[9] For a time it appeared to be the usual rule, but seems now to be losing in favor, due in large measure to the forceful opinion of Judge Noyes for the Circuit Court of Appeals for the Second Circuit, in the New York City Railway Receivership.[10] Only recently the Supreme Court of the

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court before the receivership, whereas in the previous decision no suit had been, or could have been, instituted, six months not having elapsed since the completion of the work. It is submitted that there is no real ground of distinction between the cases. Either the form of remedy under the Statute is so far part of the right created that the claim is contingent until judgment is obtained, or right and remedy are distinct and the claim matures when the default or breach of bond occurs. On the New York rule see also *Matter of Empire State Surety Company* (1915) 214 N. Y. 553, 108 N. E. 825.

[6] So also in *Bridgeport v. Aetna Indemnity Co.* (1916) 91 Conn. 197, 99 Atl. 566. *Cf.* however, *Wells v. Hartford Manilla Co.* (1903) 76 Conn. 27, 40, 55 Atl. 599.

[7] Art. VI of *General Corporation Law of N. Y.* An order is passed sequestrating the property of the corporation and dissolving the corporation. The distribution takes place first among the creditors whose claims represent a fixed liability at the time of the commencement of the action and the order of sequestration. *People v. Metropolitan Surety Co.* (1916, N. Y.) 171 App. Div. 15, 156 N. Y. Supp. 1027, 1139.

[8] Sec. 63 of the Bankruptcy Act; *Re Pettingill* (1905, D. Mass.) 137 Fed. 143, 146; *Re Neff* (1907, C. C. A. 6th) 157 Fed. 57, 84 C. C. A. 561, 28 L. R. A. (N. S.) 349; and cases cited notes 10 and 11 *infra.*

[9] *Attorney General v. Equitable Accident Ass'n* (1900) 175 Mass. 196, 55 N. E. 890 (applying statute); *Lenoir v. Linville Imp. Co.* (1900) 126 N. C. 922, 36 S. E. 185, 51 L. R. A. 146; *Appeal of Dean* (1889) 98 Pa. 101; *People v. Commercial Alliance Life Ins. Co.* (1896) 150 N. Y. 94, 45 N. E. 8; cases collected in 23 R. C. L. 102 and in Ann. Cas. 1913D 1184.

[10] *Pennsylvania Steel Co. v. New York City Ry.* (1912, C. C. A. 2d) 198 Fed. 721, 736. See page 741 of 198 Fed.: "It is not a light thing for a Chancery Court acting without statutory direction to say that a creditor shall lose his demand when he has not been at fault and when the settlement of the estate will not be protracted by allowing it." The court points out that this is not inconsistent with the rule of cases like *Lippitt v. Thames Loan & Trust Co.* (1914) 88 Conn. 185, 206, 90 Atl. 369, that no interest is allowed upon claims after the appointment of a receiver.

United States, speaking through Mr. Justice Holmes, has approved Judge Noyes' opinion and held that receivers, in the absence of statutory law, have no authority to give to the filing of the bill the effect of the filing of a petition in bankruptcy so as to exclude a claim maturing within a reasonable time before distribution can be made.[11] Here claims which matured within the period allowed by the court for the filing of claims were permitted to share in the dividend. Other cases have suggested other and later periods within which claims should mature to share in the dividend, notably within the period to the order declaring the dividend, or within a period limited by special order of court.[12]

Advocates of the stricter rule say that theoretically the division of the assets is made as of the date of the institution of proceedings. But this is not an argument, and actually division is never made then and is usually not made for some years thereafter. The entire question is one of policy, not of logic; the real argument for the stricter rule is that it is one of convenience, that a point of rest must be reached at some time in order that the affairs of the insolvent corporation may be wound up and its assets distributed, or else such proceedings can never terminate, and that in order to hasten this time the period should be set as far in advance as possible. In any event, so it is contended, some deserving creditors must suffer for the benefit of the many, and this early date is as fair as any which can be selected and is the most desirable date from the administrative standpoint. But the difficulty is that the date of institution of proceedings is not in the control of the court, and, if not fixed by chance, may be fixed by the acts or connivance of interested parties, either creditors or the debtor,—the parties litigant—who thus juggle with the contractual relations of those claimants whose contracts are still executory. Contractual relations should not be fixed in such a haphazard manner.[13] If they must be interfered with at all by a court of equity, they should be fixed directly by the court by its own order and in such manner as will make for as little interference as is consistent with due expedition in liquidating the property under the court's control. It is even doubtful if there would be very great delay in settlement if the time when the dividend is declared is to be taken as the point of rest, but certainly there will be

[11] *Wm. Filene's Sons Co. v. Weed* (1918) 245 U. S. 597, 602, 38 Sup. Ct. 211. See this case below in (1915, C. C. A. 1st) 230 Fed. 31, 33. In accord see *In Re Ross & Son, Inc.* (1915) 10 Del. Ch. 434, 95 Atl. 311.

[12] *New York Security & Trust Co. v. Lombard Inv. Co.* (1896, C. C. W. D. Mo.) 73 Fed. 537; *Hayes v. Scudder* (1888) 32 Mo. App. 372.

[13] It may be said that as judgment may still be obtained against the debtor, contractual relations are not interfered with. But the judgment is of no value if the receiver holds all the debtor's assets. It may be that the *primary* relations resulting from the contract are not interfered with. But the *secondary* relations which concern the enforcement of any judgment dealing with these primary relations are interfered with.

none if the point chosen is that of the time within which claims must be filed. As the court will, for good cause shown, extend the time for presenting claims so as to prevent all injustice,[14] it seems eminently fair to take this as the point of rest. The stricter rule does shut out, without statutory authority, many claims which, in all fairness, should share in the dividend, without thereby hastening settlement of the estate. The only gain under this rule is an increase in dividend to certain claimants at the expense of others fully as deserving. This is a result which ought not to appeal to a court of equity.

The Connecticut court has, however, adopted an eminently fair rule as to what are matured claims. In the first case under discussion the court held that unpaid materialmen might, under the United States Statute above referred to,[15] share in the dividend to be paid by the receivers of the surety on the contractor's bond, although judgment was not obtained in the federal court until after the receiver's appointment in the state court. In the second case, where a principal in an indemnity bond was in default prior to the receivership of the surety, but the amount was not ascertained until judgment was thereafter entered in a foreign jurisdiction, it was held that the claim was not contingent, the court pointing out the well settled distinction between claims which are really contingent and claims which have matured, but where the amount of damages is unliquidated.

It is suggested that in reaching its decision in the first case the court made more difficulty out of the situation than was necessary. The court refers to the usual rule that a court controlling receivership proceedings may decide whether it shall determine for itself all claims of or against a receiver, or will allow them to be litigated elsewhere,[16] but then states that this rule must give away in this case to the express provisions of the Act of Congress creating the right and the remedy and definitely naming the court, i. e. the federal court, in which the remedy must be pursued. It therefore holds that the trial court was

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[14] In *Buzzell v. Aetna Indemnity Co.* (1917) 91 Conn. 359, 100 Atl. 32, the court held the matter of extension of time to be a question of discretion. For liberal practice in extending the time for presenting claims to a receiver, see *London & S. & F. Bank v. Willamette Steam Mill L. & M. Co.* (1897, C. C. S. D. Cal.) 80 Fed. 226; *Grinnell v. Merchants Insurance Co.* (1863, Ch.) 16 N. J. Eq. 283; *Pattberg v. Pattberg & Brothers* (1897, Ch.) 55 N. J. Eq. 604, 38 Atl. 205; *Wall v. Young* (1895, Ch.) 54 N. J. Eq. 24, 33 Atl. 526; *Richter v. Merchants Natl. Bank* (1896) 65 Minn. 237, 67 N. W. 995; *Taylor v. Moore* (1897) 64 Ark. 23, 40 S. W. 258; *Bank of Washington v. Creditors* (1877) 80 N. C. 9; *McNeal Pipe & Foundry Co. v. Woltman* (1894) 114 N. C. 178, 19 S. E. 109; *Eddy, Petitioner* (1887) 15 R. I. 474, 8 Atl. 694.

[15] See note 4, *supra*.

[16] *Porter v. Sabin* (1893) 149 U. S. 473, 479, 13 Sup. Ct. 1008, 37 L. ed. 151, 157, 815; *Attorney General v. American Legion of Honor* (1907) 196 Mass. 151, 157, 81 N. E. 966; *Odell v. Batterman Co.* (1915, C. C. A. 2d) 223 Fed. 298, 108 C. C. A. 540.

powerless to determine the validity and amount of the liabilities of the surety under this bond, and that the Congressional Act displaces *pro tanto* the jurisdiction of the court appointing the receiver, though the judgment itself does not affect the assets in the hands of the receiver until it is presented to the court of the receivership and the judgment creditor has intervened in the receivership action.

Obviously the receiver's assets are not affected by the judgment until it is proved in the receivership proceedings.[17] Is such proof only a matter of form, and must the court of the receivership accept the judgment of the federal court? The decision seems so to hold. If the remedy under the Statute is so far a part of the right created by the Statute as this, it would seem they are altogether inseparable, so that until the remedy is followed, there is no right; or in other words, any claim under the statute remains contingent until judgment is obtained.[18] Under the equitable rule allowing claims to mature after the institution of the receivership proceedings, such claim would still not necessarily be barred from sharing in the dividend. But is not the Connecticut court, under its own construction of the Federal Act, in reality here allowing a claim which was contingent at the date of the receivership?

But it is submitted that the true construction of the Federal Act is that the requirement as to the place of suit is merely a restriction on the remedy,—on the *adjective* relations, as distinguished from the *substantive* relations, arising under the Statute—which a court of equity in settling the affairs of an insolvent corporation need not require.[19] A court of equity which has taken possession of the affairs of a corporation for purposes of liquidation should, for reasons of administrative convenience at least, have the power, as it admittedly has in all ordinary cases, to decide the manner and place where claims shall be adjusted. Why should it not have that power in this case? Is it so hampered that it cannot recognize statutory causes of action, only judgments?[20] It is submitted that the court of the receivership not only may, but should, recognize statutory causes of action, though in this *extraordinary* proceeding it should not be hampered by the restric-

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[17] *U. S. v. Illinois Surety Co.* (1917, E. D. N. C.) 238 Fed. 840, 846.

[18] This was the theory of the court in *People v. Metropolitan Surety Co.* (1914) 211 N. Y. 107, 105 N. E. 99; *supra,* note 4.

[19] This was the theory of the dissenting judges in *People v. Metropolitan Surety Co., supra,* note 4: "There is a vital distinction between a condition of liability and a condition of the enforcement of that liability."

[20] Compare the decisions of which *Flash v. Connecticut* (1883) 109 U. S. 371, 3 Sup. Ct. 263, is an example, that where the statutory liability of one is subject to the condition precedent of an unsatisfied judgment against another, performance of this condition is rendered unnecessary by the other's bankruptcy. In *Blair v. St. Louis H. & K. R.* (1884, C. C. E. D. Mo.) 19 Fed. 861 the court of the receivership permitted persons claiming statutory liens to file them with the receiver with the same force and effect as if filed respectively in the state courts.

tions placed upon the enforcement of such causes by means of suit in *ordinary* litigation. In making its equitable distribution it should recognize substantive relations, whether arising under statute or otherwise, while the manner in which it is proceeding would make it unnecessary that it follow restrictions on adjective relations.

This discussion leads directly to the question whether claims founded on executory contracts of the insolvent,[21] unfulfilled by the receiver, are provable. Clearly a receiver acting for the benefit of all creditors may find an executory contract so burdensome that he should not carry it out. May he refuse to complete it so that the obligee is without redress against the insolvent's property? Many cases so hold.[22] In a leading case[23] the Connecticut Supreme Court of Errors has urged that the "privilege"[24] of the receiver to refuse to carry out a burdensome contract would be a barren privilege if the claimant could then prove his claim for the breach. Yet his *power* of refusal may even then not be entirely barren; and as a matter of equity and fair dealing why should he have a *privilege* of refusal which will deprive the obligee of his contract merely to enrich other creditors? Moreover, by what law does a court of equity obtain authority thus in reality, if not in form, to impair the obligation of contracts?[25] It is submitted that as a matter of justice, as well as law, the individual should not be sacrificed to add a few dollars to the dividend of the many.[26]

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[21] The word "insolvent" is used advisedly, since no dispute as to liability arises if the estate ultimately proves solvent or more than sufficient to pay other creditors. See *Wells v. Hartford Manilla Co.*, note 6, *supra; cf.* note 13, *supra.*

[22] *People v. Globe Mut. Life Insurance Co.* (1883) 91 N. Y. 174; *Lenoir v. Linville Imp. Co.* (1900) 126 N. C. 922, 36 S. E. 185; *Law v. Waldron* (1911) 230 Pa. 458, 79 Atl. 647; *Wells v. Hartford Manilla Co., supra;* 34 *Cyc.* 258, 264. If the receiver does adopt the contract he must take the burdens with the benefits. *Butterworth v. Degnan Construction Co.* (1913, S. D. N. Y.) 208 Fed. 381; *Eames v. Claflin Co.* (1915, S. D. N. Y.), 220 Fed. 190; *Atchison T. & S. R..R. v. Hurley* (1907, C. C. A. 8th) 153 Fed. 503; *Eaton v. Houston & T. C. R. R.* (1889, C. C. E. D. Tex.) 38 Fed. 784; *Spencer v. World's Col. Exposition* (1896) 163 Ill. 117, 45 N. E. 250; *Worthington v. Park Improvement Co.* (1896) 100 Ia. 39, 69 N. W. 258; *Commercial Publishing Co. v. Beckwith* (1901) 167 N. Y. 329, 332, 60 N. E. 642; *Kuebler v. Haines* (1910) 229 Pa. 274, 78 Atl. 141.

[23] *Wells v. Hartford Manilla Co., supra.*

[24] "Privilege" is hardly the correct term, inasmuch as the very question for decision by the court was whether the *receiver* had a privilege. The expression should have been "power" here. The court does ultimately hold that there is a privilege. See Hohfeld, *Fundamental Legal Conceptions* (1913) 23 YALE LAW JOURNAL, 1; (1917) 26 *ibid.* 710; Corbin, *Offer and Acceptance, etc.* (1917) 26 *ibid.* 186 ff.

[25] *Cf.* note 13, *supra.*

[26] So held in *Spader v. Mural Dec. Mfg. Co.* (1890) 47 N. J. Eq. 18, 20 Atl. 378; *Pennsylvania Steel Co. v. N. Y. City Ry.* (1912 C. C. A. 2d) 198 Fed. 721, 740; *Rosenbaum v. Credit System Co.* (1898) 61 N. J. L. 543, 40 Atl. 591; *McLean Sons Co. v. Butler & Co.* (1914, D. C. Mass.) 208 Fed. 730; *Howe v.*

It is held under the Bankruptcy Act that the appointment of a receiver over a corporation by a state court constitutes a breach of the corporation's executory contracts, so that the obligees under such contracts may prove their claims against the corporation if it later goes into bankruptcy.[27] This seems entirely proper and would lead to this: that where the receiver may repudiate executory contracts of the insolvent corporation over which he is receiver, these obligees should thereafter, where permitted by the Bankruptcy Act, take measures to force the corporation into bankruptcy and thus share in the corporation's assets. In other words, this rule would naturally and properly have the effect of ousting the state court of jurisdiction.

It would seem that the true end to be sought in the settlement of an estate by receivers is the distribution of the assets, so far as consistent with a reasonably prompt settlement, among all those who have actual claims against the insolvent, and that it is not to shut out as many of such creditors as possible in order that the remaining creditors should receive an increased dividend.[28] Hence the principal cases are commendable as tending towards such equitable distribution.

EFFECT OF WAR ON BUSINESS ASSOCIATIONS

A recent decision of the House of Lords, *Rodriguez v. Speyer Brothers* (1918) 119 L. T. Rep. 409, raises a new aspect of the rule denying non-resident alien enemies the privilege of suing in municipal courts during the war. In that case, a partnership of six persons, of whom five were British and one a German residing in Germany—the partnership on the outbreak of the war being thereby dissolved—brought an action in the liquidation proceedings to recover a pre-war debt due the firm. All the partners being joined as co-plaintiffs, the

Hardy (1890) 76 Tex. 17, 13 S. W. 41, 18 Am. St. Rep. 17. Thus in *Spader v. Mural Dec. Mfg. Co., supra,* it is said by the court: "Natural justice demands that those who suffered from breaches of contract should be included in the distribution, even though the breaches and consequent damages follow the insolvency." *Cf.* also *Tiffen Glass Co. v. Stoehr* (1896) 54 Oh. St. 157, 43 N. E. 279; *Yelland's Case* (1867, Wood, V. C.) L. R. 4 Eq. 350; *Ex parte Clark* (1869, James, V. C.) L. R. 7 Eq. 550; *Ex parte Logan* (1870, Romilly, M. R.) L. R. 9 Eq. 149; *In re Dale & Plant, Ltd.* (1889, Kay, J.) L. R. 43 Ch. D. 255; *In re Newdigate Col. Ltd.* [1912] 1 Ch. 468. Some of the cases attempt to distinguish between voluntary and involuntary receiverships, basing the distinction on the point whether or not the corporation admitted insolvency and joined in the prayer for the appointment of a receiver It is then suggested that such claims are provable when the receivership is voluntary and not when it is involuntary. There seems to be no sound reason for this distinction. *In re Ross & Son, Inc.* (1915, Del. Ch.) 95 Atl. 311, 314.

[27] *In re Mullings Clothing Co.* (1916, C. C. A. 2d) 238 Fed. 58.

[28] See *People ex rel Attorney General v. Security Life Ins. Co.* (1879) 79 N. Y. 267, 271, that the receiver is not to advocate the cause of one claimant against another.

defendant filed a plea in abatement, asserting the disability of the German partner to appear as a plaintiff in an English court. The House of Lords, by a majority of three to two, held that the ordinary disability of the alien enemy plaintiff was not an inflexible rule to be applied irrespective of the public policy which supported it, and that it did not apply to the case of a partner joined as co-plaintiff merely to get in partnership assets in liquidation, from the proceeds of which the enemy partner could not be enriched during the war.

It is an established rule of Anglo-American law that partnerships between persons who by war become alien enemies are terminated by the war.[1] This rule is based on a variety of reasons, all leading to the same conclusion: (1) that the prohibition of all intercourse between alien enemies renders impossible that intimate association and mutual control which is essential to the partnership relation;[2] (2) that war being of uncertain duration, it is impossible for the partners to take up the threads of the business at the point where they were abandoned;[3] and (3) that a continuation of the partnership is incompatible with that hostile position which the war imposes, for the private and public duties of the partners would come into direct opposition.[4]

So much being clear, the question next arises as to how the interests of the partners shall be determined and distributed and as to the effect of the war upon those processes. In the absence of an agreement to the contrary, the ordinary rule is that on a dissolution of a partnership all the property of the partnership is to be converted by sale into money and the proceeds, after discharge of the debts, divided among the partners according to their respective shares.[5] The proceedings are usually conducted under the supervision of a court of equity, which may temporarily direct a continuation of the business. Although at common law the share of the enemy partner vested in the Crown, the modern rule prohibits its confiscation; and provided there is no immediate liquidation, he is entitled to that part of the profits which are earned during the war by his share of the assets.[6] Being unable to contribute personal service, his proportion of the profits may be less than that of the active partners having equal shares with him. He

[1] *Griswold v. Waddington* (1819, N. Y.) 16 Johns. 438; *Hugh Stevenson & Sons v. Aktiengesellschaft für Cartonnagen-industrie* (H. L.) [1918] A. C. 239. But in *Matthews v. McStea* (1875) 91 U. S. 7, it was held, by way of exception to the general rule, that where commercial intercourse was not prohibited until some time after the outbreak of the Civil War, a partnership was not dissolved until intercourse was prohibited.

[2] The best discussion of the reason for the rule is to be found in Chancellor Kent's opinion in *Griswold v. Waddington, supra.*

[3] Hall, *Int. Law* (7th ed.) 404.

[4] *Griswold v. Waddington, ubi supra,* at 489.

[5] English Partnership Act, 1890, sec. 42. *Hugh Stevenson v. Aktiensgesellschaft, supra.*

[6] *Hugh Stevenson v. Aktiengesellschaft, supra.*

cannot, of course, receive his property during the war, nor can he sue to recover it. The British and the United States Trading with the Enemy Acts have provided for the vesting of his interest in the hands of the Alien Property Custodian.

The disability of the alien enemy to sue[7] has attached to actions by partners, of whom the majority were alien enemies.[8] Whether this rule is of universal application to all actions by partners, however slight the enemy interest, was the question before the House of Lords in *Rodriguez v. Speyer Brothers.* The minority, Lords Atkinson and Sumner, regarded the alien enemy's disability as personal and as admitting of no qualification arising either out of the size of the enemy's partnership interest or out of the transaction in connection with which the suit arose. The majority, Lords Finlay, Haldane and Parmoor, tested the question by examining the rigidity of the rule of disability. They found that exceptions to it were admitted in the case of suits by executors and trustees;[9] that the purpose of the action in the instant case was to collect the partnership assets, which could not, during the war, benefit the alien enemy partner; that if the action were suspended until the termination of the war the five British partners would be the principal sufferers; that the enemy partner, had he refused the use of his name as co-plaintiff, might have been joined as co-defendant;[10] that, as it was unnecessary to communicate with him, it was permissible to join his name as co-plaintiff for the purpose of getting in the partnership assets. It was therefore, held that the rule of disability was not so firmly crystallized that it had become dissociated from the public policy which gave it birth, and that it did not require legislation to qualify it where its application in a particular case would be opposed to public policy or when it does not involve the mischief against which the rule was designed to guard.

It is doubtless true that the disability of the alien enemy to sue and the prohibition of trading with the enemy had a different historical origin. The former is much the older rule, having come into the law as early as the fifteenth century;[11] the latter is mentioned judicially toward the end of the eighteenth century only.[12] The disability to sue has been relaxed in favor of aliens who were permitted to remain

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[7] See (1917) 27 YALE LAW JOURNAL, 104.

[8] *McConnell v. Hector* (1802, C. P.) 3 B. & P. 113; *Candilis v. Victor* (1915, C. A.) 33 Times L. R. 20. See also *Actien-Gesellschaft für Amilin-Fabrikation and Mersey Chemical Works v. Levinstein, Ltd.* (1915, C. A.) 112 L. T. Rep. 963.

[9] Williams, *Executors* (10th ed.) 161; *Kensington v. Inglis* (1807, K. B.) 8 East, 273.

[10] *Cullen v. Knowles* [1898] 2 Q. B. 380.

[11] See Coke in *Calvin's case* (1609) 7 Rep. 17a.

[12] *The Hoop* (1799, Eng. Adm.) 1 C. Rob. 196.

under the protection of the laws;[13] the prohibition to trade, which is really a prohibition of all intercourse,[14] may be relaxed by license, as was done by the British in the Crimean War and by the United States in the Spanish-American war, when trade with the enemy in neutral vessels and non-contraband cargo was permitted. Doubtless, an enemy licensed to trade could sue.[15] In the modern development, therefore, the inhibition as well as the permission to sue and to trade appear to coincide, whatever the difference in origin of the public policy may have been. Whether a citizen of enemy nationality domiciled in a neutral country, with whom trade was prohibited by the blacklist regulation, could sue in a municipal court on a cause of action unconnected with enemy trade, is a question not yet judicially answered.

Whatever the public policy which denied the aid of the King's courts to alien enemies, it does not appear to have resulted in such an absolute disability that the courts took judicial notice of the alien enemy character of the plaintiff.[16] Not only did the plaintiff's disability have to be pleaded, but it had to be pleaded correctly; so that if the cause of action accrued before the war the remedy was only suspended during the war and a plea in abatement, not a plea in bar, lay.[17] Again, where the plaintiff was not an alien enemy, although the proceeds of a judgment might ultimately inure to his benefit, the courts have found no difficulty in allowing the action to proceed.[18] The personal disability is properly invocable in such cases only where the enrichment of the enemy by the transfer of value to his country is possible during the war—an offense against the criminal law—or where his institution of the action requires communication with the enemy country, e. g. by giving a power of attorney. So, the enemy's agent appointed before the war may make a sale for his principal[19] or may receive payment on his behalf of a debt or of interest thereon.[20] Similarly, a petition to

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[13] *Wells v. Williams* (1698) L Ld. Raym. 282; *Clarke v. Morey* (1813, N. Y.) 10 Johns. 69. See (1917) 27 YALE LAW JOURNAL, 104.

[14] *The Panariellos* (1915, Eng. Adm.) 112 L. T. Rep. 777.

[15] See *Kensington v. Inglis, supra.*

[16] *Flindt v. Waters* (1812, K. B.) 15 East, 260.

[17] *Ex parte Boussmaker* (1806, Ch.) 13 Vesey, Jr. 71; *Burnside v. Matthews* (1873) 54 N. Y. 78; *Heiler v. Goodman* (1918, N. J.) 105 Atl. 233; Bullen and Leake, *Precedents of Pleading* (7th ed.) 496; 2 Chitty, *Pleading* (16th Am. ed.) 297. But see *LeBret v. Papillon* (1804, K. B.) 4 East, 502.

[18] *Mercedes Daimler Motor Co., Ltd. et al. v. Maudsley Motor Co., Ltd.* (1915, K. B.) 31 Times L. R. 178,—where by contract power to sue for infringement of patent was vested in English company, partner of a German company, whose name, however, appeared as co-plaintiff. *Rombach Baden Clock Co. v. Gent* (1915, K. B.) 31 Times L. R. 492, where plaintiff was the English receiver of a partnership having one German partner.

[19] *Tingley v. Müller* (C. A.) [1917] 2 Ch. 144.

[20] *Conn v. Penn* (1818, U. S. C. C.) 1 Peter's C. C. 496.

prove a debt in bankruptcy has been admitted, payment of the enemy creditor's share being reserved until the close of the war.[21]

These cases sufficiently show that the disability, while personal, is closely identified with the economic advantage that might flow to his country by allowing a recovery during the war. If this is sufficiently guarded against, and if no communication with the enemy country is necessary, suit on the enemy's behalf may be allowed, especially if the disqualification would react to the injury of nationals.

So firmly ingrained in our law is the fiction that a corporation is an entity distinct from its stockholders, that no question appears to have been raised as to the status of the enemy stockholders. Notwithstanding the overwhelming proportion of enemy stock ownership in a domestically incorporated company, the corporation can not become an enemy corporation nor, unless the Alien Property Custodian deems it essential in the public interest, is it wound up under recent Trading with the Enemy Acts. Indeed, Lord Halsbury was the only member of the House of Lords in the *Daimler* case[22] who considered that the corporation was, like a partnership, a device to enable individuals to employ and enjoy their property.[23] But inasmuch as enemy stock ownership does not necessitate communication between the directors and the enemy stockholders, it appears to have been agreed, until the present war evolved the practice of selling or sequestrating their interest, that such stock shall continue the property of its owners, any voting thereon[24] and the payment of dividends[25] being inhibited and suspended during the continuation of the war. The alternative to preservation has heretofore been confiscation. This is expressly prevented by various treaties and Westlake seems to think it "is now out of the question."[26] The test of enemy character in this war seems to have been majority control by enemy directors,[27] and for the same reason that enemy partners drop out, thereby terminating the partnership, enemy directors must cease their functions,[28] although this does not

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[21] *Ex parte Boussmaker, supra.*

[22] *Daimler v. Continental Tyre Co.* (H. L.) [1916] A. C. 307.

[23] (1917) 27 YALE LAW JOURNAL, 108.

[24] *Robson v. Premier Oil and Pipe Co. Ltd.* (1915, C. A.) 113 L. T. Rep. 523. Even the giving of a proxy is prohibited, inasmuch as this requires communication with the enemy. *Rex v. London County Council* [1915] 2 K. B. 466. Lindley, *Companies* (6th ed.) 52.

[25] Robert A. Chadwick, *Foreign Investments in Time of War* (1904) 20 L. QUART. REV. 167, 178. The French Alien Property Custodian is deemed competent to receipt for dividends payable by a British company to a German stockholder resident in France. *Lepage v. San Paulo Copper Estates* (1917, Ch.) 33 Times L. R. 457.

[26] 2 Westlake, *Int. Law* (1907) 49.

[27] *Daimler v. Continental Tyre Co., supra.* See also (1917) 27 YALE LAW JOURNAL, 108.

[28] 2 Westlake, *op. cit.* 50.

necessarily terminate the corporation. But it is unquestionable that the enemy shares can continue to earn profits during the war and that their owners can after the war claim the benefits.[29]

The present war has developed a compromise between preservation and confiscation of the enemy's interest in associations. At common law, when it was still proper to confiscate the enemy's private property, the enemy partner's share vested in the Crown. Now the Alien Property Custodian is usually appointed to assist in the winding up of partnerships and to sequestrate the enemy's share. With respect to corporations, the Alien Property Custodian is empowered either to receive the dividends of enemy owned stock, or to sell it to nationals or to vote it and with it obtain representation on the Board of Directors. He is been further empowered to wind up any business which, by reason of enemy control, was carried on wholly or mainly for the benefit of enemy aliens.[30] Whether and how far this policy may result in confiscation of private property it will of necessity be difficult to judge until after the treaty of peace has been adopted and supplemented by municipal legislation.

ESTOPPEL BY MISREPRESENTATION AND THE RECORDING ACTS

The doctrine of estoppel by misrepresentation in its general outlines is simple enough; its application to concrete cases involves many difficulties. Chief among these is the determination of whether given facts constitute a misrepresentation. This is due not merely to the ambiguity of language but also to the fact that representations can be made by conduct. The difficulty in each case is to determine just what representations are fairly to be understood from the words and conduct in question. To what extent, for example, does a person who is the "true owner" of property represent that the "true ownership" is vested in one to whom he transfers it, or has it transferred, by instruments of title which contain no indication that the person in whose favor the documents of title are drawn is not the true owner? This question has of course arisen most frequently in English law in connection with the assertion of equitable claims to property. To a brief discussion of some phases of this problem the present comment will be devoted.

It is well settled in English law that one may cause land purchased by him to be conveyed to a trustee by a deed which does not reveal the trust and which even contains a statement that the grantee has paid the purchase money, and hand over this deed to the grantee, all without losing his equitable claim even as against a purchaser, provided the

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[29] *Daimler v. Continental Tyre Co., ubi supra,* 347.

[30] British Act of January 27, 1916. United States Act of March 28, 1918. A comparison of the practice of various belligerents is to be found in (1918) 12 AMER. JOUR. OF INT. LAW, 744 ff. by J. W. Garner.

latter has not obtained the "legal title."[1] So also he may transfer his own property to a single trustee by an instrument which does not disclose a trust, and yet enforce his equitable claim against a purchaser or mortgagee from the trustee, if only such purchaser has not obtained the "legal title."[2] The acts of the equitable claimant in giving the trustee such "indicia of ownership" are not regarded as carrying a representation that there is no equitable claim. This conclusion is of course based upon the proposition that, given the English system of law—including equity law—and the ideas prevalent among Englishmen who have to deal with such matters, an "ordinarily reasonable and prudent man" would not draw such an inference. If, however, in the case last put, the instrument of transfer contains in addition a recital that the grantee has paid the full purchase price to the grantor, it has been held that there is in all fairness a representation that the grantee is the "true" or absolute owner, at least so far as claims of the grantor are concerned.[3] Given this representation, it follows that as against any one who changes his legal position to his detriment in reasonable reliance upon it, the equitable claimant is estopped from claiming the property as effectively as he would have been if he had made the representation in so many words.

Ordinarily, therefore, according to English law, to permit a trustee to hold documents of title which fail to disclose any trust is not to represent that none exists. In such cases to obtain protection, when dealing with the trustee, a purchaser or mortgagee must bring himself within the doctrine of purchaser for value without notice by acquiring the "legal estate" as well as parting with "value," and so cannot rely merely upon estoppel by misrepresentation.

How stands the matter if to the English system we add the American system of recording acts? Is the situation altered? Fully to appreciate the problem raised by these questions we must first of all note that some of the recording acts are so worded as to protect not only subsequent transferees, mortgagees and persons similarly situated, but

[1] *Carritt v. Real and Personal Advance Co.* (1889) 42 Ch. D. 263.

[2] *Shropshire Union Ry. etc. Co. v. Regina* (1875) L. R. 7 H. L. 496 (shares of stock). *Cf.* also *Edge v. Worthington* (1786) 1 Cox Ch. C. 211; *Cave v. Cave* (1880) 15 Ch. D. 639; Ewart, *Estoppel by Misrepresentation*, 265. If the one advancing the money also obtains the certificates of stock endorsed with a power of attorney authorizing their transfer, the American authorities regard him as a *bona fide* purchaser for value. *Duebar Watch Co. v. Daugherty* (1900) 62 Oh. St. 589, 57 N. E. 455. See discussion in Cook, *Alienability of Choses in Action* (1917) 30 HARV. L. REV. 478.

[3] *Rimmer v. Webster* [1902] 2 Ch. 163. The doctrine of "reputed ownership," first introduced into English bankruptcy law by the Statute of 1623 (21 Jac. I, c. 19, sec. 11) and incorporated in every successive English bankruptcy law (46-7 Vic. c. 52, sec. 44), applied only to bankruptcy cases and covered only "reputed ownership" of chattels. Glenn, *The Rights and Remedies of Creditors*, sec. 181. The American bankruptcy law does not include any such clause, nor is it found in state statutes. *Ibid.* sec. 198.

also creditors who without taking any conveyance or mortgage advance their money in reliance upon the "record title."[4] In states having statutes of that kind the problem discussed in the present comment does not, therefore, arise.

In a large number of states, however, the recording acts provide in so many words only for the protection of "purchasers" as distinguished from "creditors."[5] In spite of this, the courts in many of these states have found it possible, within certain limits, to protect creditors who have not obtained a lien upon any specific property by invoking the doctrine of estoppel by misrepresentation. The problem may be put as follows: If the instruments of title (which, although they disclose no trust, are not under the English law regarded as carrying a representation that equitable claims do not exist) are to the knowledge of the equitable claimant placed upon record, and if in addition the person who thus holds the "record title" is placed in possession of the property in question, what is an ordinarily reasonable and prudent person entitled to infer? Does one act prudently if he infers that the one thus in possession and holding the "record title" is the "true owner"? If so, then if anything of value is advanced in reliance upon such an inference, the doctrine of estoppel by misrepresentation applies. Whether such an inference can legitimately be drawn, however, is a question of fact, and we must accordingly be prepared for differences of opinion on the part of those who have to answer it. In the recent case of *Bergin v. Blackwood* (1919, Minn.) 170 N. W. 507, the equitable claimant knew that the "record title" stood in the name of a person who was carrying on a business which involved the incurring of indebtedness. He did not know that this person who had the "record title" was stating to those giving him credit that the property in question was in truth his own, nor did he know that the creditors were relying both upon this statement and upon the record. It was held that the apparent owner's trustee in bankruptcy could recover for the benefit of unsecured creditors the property in question from the equitable claimant, to whom the apparent owner had conveyed it when he was faced with bankruptcy proceedings.

The exact limits of the doctrine applied in the principal case are difficult to define—indeed, there is much difference of opinion upon the part of the courts which recognize the doctrine in some form. Apparently nearly all are agreed that a mere omission to record an instrument which would reveal the existence of the claim is not of itself sufficient to estop the claimant,[6] although the appearance to the

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[4] Glenn, *op. cit.*, sec. 213.

[5] There is much dispute in these jurisdictions as to whether a purchaser at an execution sale is a "purchaser," and, if so, just when he becomes a purchaser. *Cf.* Glenn, *op. cit.*, sec. 212.

[6] *Sawyer v. Turpin* (1875) 91 U. S. 114; *Rogers v. Page* (1905, C. C. A. 6th) 140 Fed. 596; Glenn, *op. cit.*, sec. 216.

creditors is in that case the same as when the failure to record is intentional. There is, be it noted, in connection with the whole doctrine of estoppel by misrepresentation much conflict of view as to whether purely innocent misrepresentations furnish a basis for estopping the one making them;[7] and it seems clear that in the class of cases under consideration most courts require at least something more than an unintentional, non-negligent representation. There is much talk in the cases of "fraud" and "want of good faith," but these are vague phrases with little meaning.

How far, then, do the cases actually go in estopping, as against unsecured creditors as well as purchasers, the claimant who has not recorded? Apparently there is a fair degree of unanimity in holding that if the failure to record is intentional and by agreement with the holder of the record title, the estoppel exists.[8] One of the cases which protects the creditors most liberally was decided in 1913 by the Connecticut Supreme Court of Errors.[9] A wife for years permitted her husband to appear as the holder of record of the title to all her property. Apparently he was not engaged in business and did not incur business debts. With her knowledge he became a stockholder in a corporation. Unknown to her he became surety upon an "officer's receipt" in order to release certain property of the corporation from an attachment at the hands of a creditor of the latter. Before accepting him as surety the persons involved examined the record of title and relied in accepting him upon his apparent ownership of the property in question. Before it became certain that he would ever be called upon as surety to pay anything, the husband conveyed the property to the wife. Having failed after judgment and execution against the corporation to obtain payment of his claim, the creditor obtained judgment against the husband as surety and then—apparently about two years after the reconveyance to the wife—filed a judgment-lien upon the property and brought an action to foreclose it. It was held that the wife was estopped to assert title in herself.[10]

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[7] Ewart, *Estoppel by Misrepresentation*, chaps. VIII and IX.

[8] *Pierce v. Hoover* (1895) 142 Ind. 626, 42 N. E. 223; *Talcott v. Levy* (1892, Super. Ct.) 20 N. Y. Supp. 440; affirmed (1894) 143 N. Y. 636, 37 N. E. 826.

[9] *Goldberg v. Parker* (1913) 87 Conn. 99, 87 Atl. 555. Roraback, J., dissented.

[10] In the opinion Wheeler, J., says: "Mr. Parker was financially interested in the Chemical Company; he represented that he owned this property; the plaintiff looked up the public records, and ascertained that by them, for years, he had been the owner, and that he had, for over twenty years, owned property of record in Bridgeport, assumed mortgages upon purchases, and given mortgages upon purchases. The titles were such that the most conservative investor or institution would have accepted them and loaned upon their faith. These circumstances were naturally calculated to mislead the plaintiff as they did. The plaintiff did rely upon these titles of record, released his attachment against the Chemical Company, and in its stead accepted an officer's receipt with Mr. Parker as surety. It would be difficult to conceive of a stronger case of equitable estoppel. Any other holding would do violence to the faith which,

In discussing what the misrepresentor must have done in order to be estopped, the Connecticut court said: "The test is whether the act of the wife was naturally calculated to cause the plaintiff to extend credit to her husband. It is not, as has sometimes been suggested, whether the wife had reason to expect credit would be extended to her husband."[11] This general language must, of course, be interpreted in the light of the facts before the court—facts which involved an intentional withholding from the record of any evidence of the wife's interest in order that the husband might "appear as the head of the house." Apparently the great majority of the courts which recognize the doctrine hold that consciously permitting the record title to stand for a considerable period of time is sufficient without other fraudulent intention, provided, be it noted, that the holder of the record title is also left in possession or control of the property.[12] The striking thing about the whole doctrine is that it protects a class of persons—creditors—not provided for in the recording acts in question. This does not mean that the result reached is unsound. It does mean that the recording acts have themselves become operative facts which, taken in connection with the general methods of transacting business which have grown up under the influence of such acts, enable one to make a representation in a way unknown to the English law as we inherited it. The whole doctrine is thus based upon a recognition of the ideas which the

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time out of mind, we have given to our registry laws. With inflexible adherence we have made every title to land, so far as practicable, appear of record. We have held the record constructive notice to all the world of land titles. We have authorized reliance to be placed thereon. We have sustained contracts and conveyances made upon their faith. We cannot hold that a credit, extended in reliance upon the land records, must yield to the equitable owner of the title without doing irreparable injury to the registry laws and going counter to our decisions.

"The maintenance of our system of registry of titles is of the greatest public importance, and he who acts in reliance upon the record has behind him not only the natural equities of his position, but also the especial equity arising from the protection afforded every one who trusts the record."

[11] The learned court then went on to hold that even if the latter test were to be accepted, the facts of the case before it fell within that test. A very large number of the cases, naturally enough, involve husband and wife. The cases of that kind are collected in the monographic note in Ann. Cas. 1914C 1066. The doctrine, however, is not confined to husband and wife. *Susong v. Williams* (1870) 48 Tenn. (1 Heisk.) 625. Nor is it confined to real property. *Williams v. Kirk* (1897) 68 Mo. App. 457.

[12] *McCormick Harvesting Mch. Co. v. Perkins* (1906) 135 Iowa, 64, 110 N. W. 15, and cases cited in Ann. Cas. 1914C 1069. The creditors who assert the estoppel must of course have relied upon the record; but some courts are apparently willing to establish a presumption that they did so rely, as in *Susong v. Williams, supra,* note 11. If a court were to accept the theory that an innocent misrepresentation furnishes a basis for estoppel, it ought logically to hold any failure to record, if continued long enough, equally as effective as an intentional withholding from the record.

courts believe do in fact prevail among business men. Whether such notions really are the prevailing ones is obviously purely a question of fact. If the facts are as the courts have assumed them to be, there can be no question of the soundness of the result, both from the point of view of legal principle and that of sound business policy.

W. W. C.

MASSACHUSETTS TRUSTS AND THE INCOME TAX

Decidedly the Massachusetts trust has advantages over the corporation in this matter of taxation.[1] Some years back, in *Eliot v. Freeman*,[2] the Supreme Court construed the language of the Tariff Act of August 5, 1909, ch. 6,[3] which laid an excise tax on "every corporation, joint stock company or association, organized for profit and having a capital stock represented by shares, and every insurance company, now or hereafter *organized under the laws of the United States or of any State*."[4] Stressing the word *laws* as opposed to *law,* the Court held that the tax was imposed only on organizations deriving powers from statutory enactment; and that a Massachusetts trust could "hardly be said to be organized, within the ordinary meaning of that term; it certainly was not organized under statutory laws as corporations are." It therefore was not included in the tax. Two years later came the Income Tax Act of October 3, 1913, ch. 16, sec. II G (a),[5] with a change of wording which at least has the appearance of being made to meet the above decision. The tax was to be levied upon the income of "every corporation, joint-stock company or association, and every insurance company, engaged in the United States, *no matter how created or organized,* not including partnerships." The effect of the new statute on the Massachusetts trust came before the Supreme Court in *Crocker v. Malley* (March 17, 1919) U. S. Sup. Ct. Oct. Term, 1918, No. 649.[6] The

[1] The Massachusetts trust is a creation of the profession in Massachusetts, designed originally to supply a means—not available under the corporation law of that state—of quasi-corporate dealing with real estate holdings; transferable trustees' receipts taking the place of shares of stock. It has proved so successful as to be carried over into other fields. According to the constitution of the particular trust, its attributes are in varying degree those of a partnership (the earlier form) and those of a trust (the later form). Closer description, discussion and analysis, together with a collection of the printed material on this form of organization, can be found in S. R. Wrightington, *Voluntary Associations in Massachusetts* (1912) 21 YALE LAW JOURNAL, 311-326; and in COMMENTS (1918) 27 *ibid.* 677-683.

[2] (1911) 220 U. S. 178, 31 Sup. Ct. 360.

[3] 36 Stat. L. 11, 112.

[4] The italics throughout are the editor's.

[5] 38 Stat. L. 114, 166, 172.

[6] For a fuller statement of the facts see RECENT CASE NOTES, *infra, sub. tit.* TRUSTS.

question there was whether the trustees had been properly taxed on the income from their holdings of stock in a corporation, the corporation having already been taxed on its own income. If they were a "joint-stock company or association," the additional tax was proper; otherwise, not. The Circuit Court of Appeals[7] decided that the income received by the trustees was not income arising or accruing during the year "to the persons for whom they acted," under sec. II D, because there was nothing in the terms of the trust to make the trustees pay their receipts over, as income, until they so chose; it found their powers and functions to "resemble those ordinarily exercised by the managers of an organization so constituted as to be itself a recipient of taxable income independently of the individuals beneficially interested in the property," much more than they resembled the powers of ordinary fiduciaries acting merely as such for ordinary beneficiaries. It therefore lumped trustees and beneficiaries together as an "association" taxable under the Act.

The weakness of the decision of the Circuit Court of Appeals would appear to lie in the insertion of a comma, throughout the opinion, between the phrases *joint-stock company* and *or association.* And it is at the fact that no such comma or other breaking of the text can fairly be implied, as well as at the argument derived from *Eliot v. Freeman,* that the Supreme Court aims when it says: "The trust . . . would not fall under any familiar conception of a *joint-stock association,*[8] whether formed under a statute or not." The conclusion is that the beneficiaries, admittedly not partners in any sense,[9] are not by themselves a joint-stock association; that the trustees by themselves are not; and that there is no ground for lumping the two to make them one. "We presume that the taxation of corporations and joint-stock companies upon dividends of corporations that themselves pay the income tax was for the purpose of discouraging combinations of the kind now in disfavor . . . There is nothing of that sort here."

But there is here an invitation to the business men and the profession in other states to investigate the Massachusetts trust and its possibilities, both in the matter of taxation and in that of corporation-baiting more generally.[10]

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[7] *Crocker v. Malley* (1918, C. C. A. 1st) 250 Fed. 817.

[8] Should the Act be amended to read in some such way as "joint-stock company, or other association," it will be interesting to find whether the Massachusetts trust can avoid being held to be such an "association." It has already been held, by a lower court, to be an "unincorporated company" within the Bankruptcy Act. *In re Associated Trust* (1914, D. Mass.) 222 Fed. 1012.

[9] Under *Williams v. Milton* (1913) 215 Mass. 1, 102 N. E. 355, because the *management* of the trust was not in the certificate-holders, but in the trustees.

[10] See the discussions cited in note 1. To the cases therein cited should be added *In re Associated Trust, supra.*

RECENT HOLDINGS OF GENERAL INTEREST

Kelso & Co. v. Ellis (1918, N. Y.) 121 N. E. 364, may well bring comfort to those who have been disturbed by the occasional tendency of some courts to branch out into variant interpretations of the provisions of uniform commercial acts. The New York Court of Appeals in that case took a long-hoped-for step toward uniformity in the law of negotiable instruments. It seems that from now on an antecedent or pre-existing debt will, in New York as well as elsewhere, constitute value for the transfer of an instrument, even though the transfer be only by way of security for that debt. To be sure, the anomalous decisions to the contrary in the lower courts of the state are not necessarily overruled by the actual holding in the instant case. That case might at a pinch be construed as involving not security for, but actual payment of, an antecedent debt. But the change in the court's attitude on the point is unmistakable.[1] The earlier cases are excused as revealing "the habit of bench and bar to look to cases rather than statutes for principles of commercial law until attention is sharply directed to the extent that the movement for uniformity of laws through legislation has been successful." Surely this is the *requiem* of the doctrine of *Sutherland v. Mead.*[2] The probable future action of the court is indicated in no uncertain terms. "It is perfectly clear that for the sake of uniformity New York has abrogated the rule which had been in force since the year 1822 . . . *Coddington v. Bay*[3] and section 51 [25, original notation] of the Negotiable Instrument Law are irreconcilable in the mind of any candid student of the decisions *in this and other jurisdictions.*"[4]

The power of administrative boards to revoke occupational licenses, while growing in extent, is subjected by the courts to strict compliance with due process of law and the technical requirements of the statute under which the board operates. This is illustrated in a recent Illinois case, *Blunt v. Shepardson* (1918, Ill.) 121 N. E. 263. Here a physican was notified to appear before an administrative board to show cause why his license should not be revoked. No charges were included in

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[1] The judgment below for the plaintiff was reversed, but only in order to let the jury pass on the plaintiff's good faith in taking the instrument. Crane, J., dissented: "on the ground that the evidence would not sustain a finding that plaintiff was not a *bona fide* holder *for value*." (Italics are the editor's.)

[2] (1903, N. Y.) 80 App. Div. 103, 80 N. Y. Supp. 504, construing the N. I. L. not to change the old New York rule that the giving of an instrument as *security* for an antecedent debt was not such a transfer for value as to make the taker a holder in due course.

[3] (1822, N. Y.) 20 Johns. 637.

[4] Italics are the editor's.

the notice. When he appeared he was informed verbally that the board had heard that he had been convicted of violation of the Harrison Drug Act. This he admitted, but stated that a writ of error had been granted and that he felt assured the verdict would be set aside. Shortly thereafter, without statement of any grounds, he received a notice that his license to practice had been withdrawn. On a petition for *certiorari*, the court held the entire proceeding irregular. The board should have notified him of the charges, in writing, and given him an opportunity to be heard on them; and the notification of withdrawal of license should have stated the specific reasons therefor. In other respects, technical departure from the statute was found. The court emphasized the necessity of a formal written record in such an important proceeding as the revocation of a license, and particularly the necessity that the order of revocation should show the facts conferring jurisdiction on the board. The propensity of boards of education and other administrative boards arbitrarily to exercise their power to revoke licenses is very properly becoming the object of close judicial supervision and of restriction within the limits of due process.[5]

It was pointed out in a previous number of the JOURNAL that the English cases refused rescission of an executed sale of property where a misrepresentation is innocently made, but that the recent cases quite properly settle the law to the contrary in this country.[6] To the cases cited in the earlier discussion we may now add *Gihon v. Morris* (1918, N. J. Ch.) 105 Atl. 455, where the court decreed recission of a completed sale and transfer of realty, because of an innocent misrepresentation. It is interesting to note that the court relied, *inter alia*, on general language in one of the English cases, without noting the distinction made in that country between contracts to sell and completed transfers of property.

The case of *Davis v. St. Paul Coal Co.* (1918, Ill.) 121 N. E. 181 shows that the Illinois courts still cling to the indefensible rule that a declaration which totally omits to allege an essential fact is so much of a nullity that an amendment adding the missing fact amounts, so far as the Statute of Limitations is concerned, to starting a new action. As the requirements which establish what facts must be alleged in the declaration, and what by way of confession and avoidance, are to a considerable extent arbitrary, reason and common sense are opposed to the Illinois rule. For the purpose of stopping the running of the Statute of Limitations an action should be regarded as started if

[5] See COMMENTS (1919) 28 YALE LAW JOURNAL, 391.
[6] (1918) 27 YALE LAW JOURNAL, 929.

enough facts are stated to inform the defendant of the general nature of the claim against him.[7]

When in the old days the judges took judicial notice that, in fact, men did not throw bricks *molliter* at a trespasser, it was put upon the ground that what all men know, the court might also know, without more. It would seem as if the same might hold of things all lawyers know; but the case of *Crume v. Brightwell* (1919, Ind. App.) 122 N. E. 230, shows this seeming to be at times illusory. Order promissory notes made and payable in Georgia were before the Indiana court, without any pleading of the Georgia law. The court found the law settled that it could not in any case take judicial notice of the statutory laws of other states; that there was a presumption that the common law, and so here the customary law merchant, prevailed in such other states; that by such law promissory notes, and therefore the notes in suit, were non-negotiable. California is doubtless extreme in her presumption that all other states have been moved to pass just such statutes as she herself.[8] The principal case is no less extreme on the other side. Surely it is common knowledge that the movement for uniform commercial laws has been on foot for years, and with considerable success; that the pioneer act was the N. I. L.; that even in 1912, when the notes in suit were made, that uniform act was law in three-quarters of the American jurisdictions. Might not a court take notice of these things? If there is any presumption as to such an act, under such circumstances, should it not rather be that of adoption?[9] But a court may be slow to presume progress in the law, whatever the fact. Good; shall the court therefore be quick to presume regress? There remains the statute of Anne. It was passed some seven decades before the American colonies took up separate existence; shall the colonies be presumed to have rejected it? It would seem that a time might come, in the ripe old age of a statute—at least

[7] For a discussion of the general subject, see (1918) 27 YALE LAW JOURNAL, 1053.

[8] *Peck v. Noee* (1908) 154 Cal. 351, 97 Pac. 865; *Cavallaro v. Texas & P. Ry.* (1895) 110 Cal. 348, 42 Pac. 918. But the holdings have not been wholly consistent. *Cf. North Alaska Salmon Co. v. Ryan* (1908) 153 Cal. 438, 95 Pac. 862.

The only rational regulation of judicial notice of foreign law, under present conditions, is one like that of Connecticut. There "the public statutes of the several states and territories in the United States, as printed by authority of the state or territory enacting the same, shall be legal evidence, and the courts shall take judicial notice of them." "The reports of the judicial decisions of other states and countries may be judicially noticed by the courts of this state as evidence of the common law of such states or countries, and of the judicial construction of the statute or other laws thereof." Conn. Rev. St. 1918, secs. 5726, 5727. This has been law for three-quarters of a century. Conn. Genl. L. 1849, 438.

[9] Georgia has in fact, however, failed as yet to adopt the N. I. L.

with one passed by the English Parliament before the Revolution—when it takes on the character of common law sufficiently to be presumed existent in another state. Even if not—is "common knowledge" to be limited wholly to non-legal facts? It is flying in the face of sense for the court to ignore what every lawyer knows, or for that matter, every business man: that throughout the United States order notes—whether by express statute in each state or not—have, with occasional minor differences of form, been as negotiable as order bills.[10] The validity of the court's conclusions as applied to the classes of statutes concerned in the present case, is therefore questioned. Even so, little harm would have been done, had not the "customary law merchant" been misconstrued as well. The theory that under the law merchant promissory notes were non-negotiable goes back to two hot-tempered decisions of Lord Holt;[11] it has found currency since, as in the present case.[12] But it was long ago shown that Lord Holt in his dislike of Lombard Street mistook his law merchant; that the statute of Anne was passed not to make new law but to declare anew old law that was good, and so bar Holt from further misdeclaring it; and that under the common law of England a promissory note to order stood, as a negotiable instrument, on the same footing with inland bills of exchange.[13]

Now and again the courts are confronted with a vivid illustration of the truth that the best of law-makers cannot provide against all those countless notable things which, as yet, "the ear of man hath not seen and the eye of man hath not heard." The problem is at once baffling and amusing when the case shows, as clear as day, that there is only one fair and just solution, while at the same time no sound technic of reaching that solution seems provided by the law. In *Sutherland State Bank v. Dial* (1919, Neb.) 170 N. W. 666, the suit was on a negotiable note, delivered for value to the plaintiff by the defendant maker. But the instrument had been made payable not to the plaintiff, but to a third party, W, to whom the plaintiff had expected to negotiate it. W, however, could not be induced to take the note, and the plaintiff perforce kept it. Apparently the maker thought this supplied him with a way out of paying the money; in any case, he did not pay, and put

[10] And so of course in Georgia. Code 1911, secs. 4270, 4273. With notes, additional words have sometimes been required for negotiability: "without defalcation," "value received," "payable at the X bank," etc. On the other hand, notes—and not bills—were in some states negotiable, though payable in commodities. So Georgia. Code 1911, sec. 4270.

[11] *Clerke v. Martin* (1702, K. B.) 2 Ld. Raym. 757, 1 Salk. 129; *Buller v. Crips* (1704, K. B.) 6 Mod. 29.

[12] *Cf.* also 1 Daniel, *Negotiable Instruments* (6th ed. 1913) secs. 5, 162.

[13] (1804) 1 Cranch, App. note A, 3 *Select Essays in Anglo-American Legal History*, 72.

the plaintiff to his action. It is evident that the plaintiff realized the irregularity of any suit by him on the instrument; still, finding no other way out, he did bring suit thereon—*in equity,* to save his face. But the plaintiff was not named on the note. There was no mistake or inadvertence in naming the third party as payee, to found reformation in equity; or to let in a suit by the true owner under the decision in *Spreng v. Juni* (1909) 109 Minn. 85, 122 N. W. 1015, on which the court relies.[14] There was no transfer by the named payee, to bring sec. 49 of the N. I. L. into application. Still—and much as such an action on the note seems at variance with the whole purpose and function of negotiable paper—one can hardly criticize the court for allowing recovery. Something had to be done; the *mores* decidedly called for action in some form.

A somewhat similar situation, although one doubtless regulated by the course of business, is presented where a "remitter" obtains a bank draft payable to his creditor, but later determines not to use it; or where a man has his bank certify a check payable to the order of another, and later makes up his mind to use the credit in some other way. One might juggle the law of contract to protect the holder of an instrument in such a case, on some such "interpretation" as that: the bank's promise was in truth to provide a certain amount of credit, to be used in the first instance in the way indicated, but if that should prove undesirable, then to be used in another way at the option of the promisee, on his surrender of the instrument; in the instant case, for example, the "taking for value" of the note might be considered to be "in the intention of the parties" only a loan to the maker, the note being given merely as a very limited security.[15] Or one might work with quasi-contract, and require restitution of the money paid over—or of the credit withdrawn because of the certification—on the failure of an "implied condition" whose actual occurrence the court would require in order to render the contract binding in its strict terms,[16]

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[14] There is language in *Spreng v. Juni* which seems to sustain the decision in the instant case; but that language is not borne out by the case cited to sustain it, and is not necessary to the decision. And the Nebraska court appreciated that the decision involved only a mistaken naming of the wrong payee.

[15] It was negotiable only to a single party; and under any principle of the law of negotiable instruments hitherto, it is hard to see how it could give any procedural advantage to the present plaintiff, even as evidence.

[16] By rigid interpretation of the contract one might of course reach the conclusion that the buyer of the instrument had bought merely the maker's promise to pay a certain person or to that certain person's order; and had bought that promise in utter willingness to gamble on the expectation of profiting by the strict terms of the promise without more. Failure of consideration, as currently understood, can hardly be advanced to change the situation, as the maker is still willing to perform his promise, to the letter.

It may be noted that the "contract" solution offered above, like any doctrine of conditions constructed by the court, savors strongly of quasi-contract—i. e., of paucital duty imposed on man by the law, without his consent.

a condition that the transaction actually work out as the parties expected. Whatever the technical justification of allowing recovery, however, it is believed that the principal case is one of those in which the court should indeed do justice, but must to do justice create new law.

"Squatters' Rights" on the public domain are frequently given judicial recognition. This is as true of mineral lands as of other kinds. To initiate title under the mineral land laws as against the United States, an actual discovery of mineral is necessary; but where a prospector has staked out a claim, has actual *pedis possessio,* and is diligently exploring the ground, he has rights as against a forcible, fraudulent, or clandestine intrusion. This is fully recognized in the case of *Union Oil Co. v. Smith* (March 31, 1919) U. S. Sup. Ct. Oct. Term, 1918, No. 8; but it is held that in the absence of a discovery an oil claim is open to relocation by others if the first locator is not in actual physical possession. A recent act of Congress provides that where several contiguous oil claims have been located under the placer mining laws, the annual assessment work may all be done on any one of the claims, provided it tends to develop them all. This is held to have no application to contiguous oil locations unless a discovery has actually been made on each of them.

The admiralty jurisdiction of the federal courts is not limited by "those trammels that arose from the restrictive statutes and judicial prohibitions of England." In the case of contracts this jurisdiction extends not merely to contracts made upon navigable waters, but also to contracts that "have reference to maritime service or maritime transactions." So in *North Pacific S. S. Co. v. Hall Bros. Marine R. & S. Co.* (1919) 39 Sup. Ct. 221, it was held that a contract for the repair of an existing ship is within admiralty jurisdiction, even though such repairs are to be made after hauling the ship out of the water by a marine railway and upon dry land. Jurisdiction is not restricted to contracts for repairs in dry dock. However, it does not cover contracts for the original construction of a ship on dry land. In a previous case the Supreme Court said: "A ship is born when she is launched, and lives as long as her identity is preserved. Prior to her launching she is a mere congeries of wood and iron—an ordinary piece of personal property—as distinctly a land structure as a house. . . . From the moment her keel touches the water she is transformed and becomes a subject of admiralty jurisdiction."

Those who are the most ready to refuse to obey the existing laws, whether bcause of supposed conscientious scruples or otherwise, are ever the most prompt to appeal to the protection of those laws when

their own legal rights are infringed. Those who make the most bitter attacks upon our Country and its Constitution are the quickest to appeal to their protection. This has been amply illustrated during the course of the great war, especially with respect to the Conscription Act and the Espionage Act. In three recent cases, *United States v. Schenck* (1919) 39 Sup. Ct. 247, *Frohwerk v. United States* (1919) 39 Sup. Ct. 249, and *Debs v. United States* (1919) 39 Sup. Ct. 252, the constitutionality of the Espionage Act was attacked on the ground that the First Amendment prohibits legislation against free speech. It was held that this amendment does not deprive Congress of all power, nor create absolute immunity, with respect to any possible use of language. A statute is not unconstitutional because it declares the counselling of murder to be a crime, nor because it forbids a false alarm of fire in a theatre. So a conviction for a conspiracy to obstruct recruiting by words of persuasion was sustained. Such a conspiracy is criminal, irrespective of the means to be used and even though the attempt is in fact unsuccessful. Utterances in furtherance of such a conspiracy are not privileged even though they are "expressions of a general and conscientious belief." The exact line to be drawn between the power of Congress to abridge freedom of speech under the war and police powers of the Constitution and the disability of Congress created by the First Amendment is not fixed hard and fast by the Constitution itself. "It is a question of proximity and degree."

Our courts must continually, and not merely in exceptional cases, make the choice between the new rule and the old. They must continually determine whether the *mores* of our society have so changed as to require the replacement of the old by the new. No doubt a just and correct determination requires the application of the old rule far more often than the adoption of a new one. In *Rosen v. United States*,[17] decided in 1918, the Supreme Court decided in favor of a new rule of evidence, saying "we conclude that the dead hand of the common-law rule of 1789 should no longer be applied."[18] In the recent case of *State v. Herbert* (Dec. 31, 1918, N. J. Sup. Ct.) 105 Atl. 796, the court very properly adhered to the old rule, Mr. Justice Kalisch saying: "Firmly established precedents should not be treated as mere antiquated judicial wisdom and out of joint with modern time, unless the reason which called them into being has ceased. It cannot be properly said that the reason which excludes the husband or wife from giving testimony in a collateral proceeding, to which he or she is a party, charging the other with an indictable offense, is not as sound and forceful to-day as it ever was."

[17] 38 Sup. Ct. 148, discussed (1918) 27 YALE LAW JOURNAL, 572.

[18] See COMMENT in (1918) 27 YALE LAW JOURNAL, 668, *The Dead Hand of the Common Law; cf.* also (1919) 28 *ibid.* 592.