NOTES

Review of Ecclesiastical Decisions by the Civil Courts*

In order to eliminate the racketeering which had infested New York City's kosher poultry trade, largely through its related labor unions,[1] and to prevent the sale as kosher of poultry slaughtered in violation of the Jewish dietary laws, a *Beth Din* or religious court of twenty-three members,[2] specially constituted after a series of conferences both lay and clerical initiated by the Mayor of New York, issued an *issur* or religious edict prohibiting orthodox Jews from consuming poultry not bearing a *plombe* or seal as token of *kashruth*.[3] The *issur* was adopted by the United Rabbinate, a loosely organized assembly of the orthodox rabbis of Greater New York, and subsequently accepted by the *schochtim's*[4] union. Its enforcement was placed in the hands of the Kashruth Association of Greater New York, a membership corporation of clergy and laymen. A Bronx poultry corporation, which had entered into a supervisory contract with the Kashruth Association, brought suit against the association to rescind its contract and to enjoin an alleged conspiracy among the association, the *schochtim's* union and a large group of rabbis to libel it by advertising that its poultry was non-kosher. The plaintiff contended that the *issur* was so improperly promulgated and enforced as to be void, and that its provisions were, therefore, not proper criteria of *kashruth*. The Supreme Court of New York dismissed the suit on the ground that the interpretation of ecclesiastical doctrine should be left to the religious bodies and that, in the absence of fraud or gross procedural irregularity, the courts "will only inquire whether the organization's officer or tribunal has the power to act, not whether he or it is acting rightly."[5] On the authority of this case the court in a subsequent suit denied a motion for a temporary injunction to restrain the same defendant from picketing and conspiring to conduct a secondary boycott

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*S. S. & B. Live Poultry Corp. v. Kashruth Ass'n of Greater New York, 158 Misc. 358, 285 N. Y. Supp. 879 (Sup. Ct. 1936).

1. See Feinstein, *Racketeering in the A. F. of L. I. The Poultry Racket* (Sept. 11, 1935) 141 Nation 288.

2. For outlines of Jewish court organization see Herzog, The Main Institutions of Jewish Law (1936) 13-20; Mendelsohn, The Criminal Jurisprudence of the Ancient Hebrews (1891) 87-102; Shohet, The Jewish Court in the Middle Ages (1931) 149-159.

3. Noun corresponding to the adjective "kosher."

4. Ritual slaughterers; singular, *schochet*.

5. S. S. & B. Live Poultry Corp. v. Kashruth Ass'n of Greater New York, 158 Misc. 358, 366, 285 N. Y. Supp. 879, 890 (Sup. Ct. 1936). According to information received from counsel by the Yale Law Journal no appeal will be taken. An ordinance incorporating the requirement of supervision by the Kashruth Association is now being considered by the Board of Aldermen of New York City. N. Y. Times, Dec. 11, 1936, p. 8, col. 4.

against a retail butcher shop which sold poultry slaughtered by the plaintiff in the principal case.[6]

Although a few courts have insisted that Church relationship rests upon an altogether "higher plane" than "connection with mere human associations for profit, pleasure, or culture,"[7] the jurisdiction of the various ecclesiastical courts in this country is said to be primarily contractual.[8] Whatever binding effect its exercise may have is attributed to the fact that every member of the Church impliedly or expressly agrees upon joining it to abide by the regulations embodied in its canons and usages, which usually provide for some tribunal to decide all matters of Church polity.[9] The basis of the jurisdiction of ecclesiastical courts is, therefore, comparable to that of the tribunals of other voluntary, non-profit associations.[10]

In either case there are two prerequisites to review by the civil courts.[11] The dispute must involve what is vaguely termed a "civil or property right,"[12]

6. Schipper Public Market Corp. v. Kashruth Ass'n. of Greater New York, N. Y. L. J., April 2, 1936, p. 1666, col. 5 (Sup. Ct.).

7. See Nance v. Busby, 91 Tenn. 303, 324, 18 S.W. 874, 879 (1892); Minton v. Leavell, 297 S.W. 615, 622 (Tex. Civ. App. 1927).

8. See Thomas v. Lewis, 224 Ky. 307, 311, 6 S.W. (2d) 255, 257 (1928); Bear v. Heasley, 98 Mich. 279, 307, 57 N.W. 270, 280 (1893); Trustees of East Norway, etc., Church v. Halvorson, 42 Minn. 503, 508, 44 N.W. 663, 665 (1890); Everett v. Trustees of First Presbyterian Church, etc., 53 N. J. Eq. 500, 507, 32 Atl. 747, 749 (Ch. 1895). But see Chafee, *The Internal Affairs of Associations not for Profit* (1930) 43 HARV. L. REV. 993, 1001–1007. There was a quasi-established Church in parts of New England for some time after the Revolution. See THE GENERAL LAWS AND LIBERTIES OF THE MASSACHUSETTS COLONY (1672) 43–46 in WHITMORE, THE COLONIAL LAWS OF MASSACHUSETTS (1890); Inhabitants of Alna v. Plummer, 3 Me. 88, 91 (1824); Dillingham v. Snow, 5 Mass. *547, *553 (1809); Holt v. Downs, 58 N. H. 170, 180 (1877).

9. See Sampsell v. Escher, 11 Ohio Dec. Reprint 351, 353 (C. P. 1891).

10. Lawson v. Hewell, 118 Cal. 613, 50 Pac. 763 (1897) (fraternal order); Belton v. Hatch, 109 N. Y. 593, 17 N. E. 225 (1888) (stock exchange); Robinson v. Dahm, 94 Misc. 729, 159 N. Y. Supp. 1053 (Sup. Ct. 1916) (labor union); WRIGHTINGTON, UNINCORPORATED ASSOCIATIONS AND BUSINESS TRUSTS (2d ed. 1923) 310. Church tribunals have also been compared to standing arbitrators. See Sanders v. Baggerly, 96 Ark. 117, 135, 131 S.W. 49, 56 (1910); Everett v. Trustees of First Presbyterian Church, etc., 53 N. J. Eq. 500, 507, 32 Atl. 747, 749 (Ch. 1895). For the causes sufficient to defeat arbitration awards see STURGES, COMMERCIAL ARBITRATION AND AWARDS (1930) §§ 366–368. Church officials may, of course, be chosen as common law arbitrators for non-religious disputes. Poggenburg v. Conniff, 23 Ky. L. Rep. 2463, 67 S.W. 845 (1902); Jones v. Binns, 27 Miss. 373 (1854); see Payne v. Crawford, 97 Ala. 604, 609, 11 So. 725, 727 (1892). And it has been considered irrelevant that the arbitration was required by Church regulation. See Payne v. Crawford, *supra*. *Contra:* Tubbs v. Lynch, 4 Harr. 521 (Del. Super. Ct. 1847). Unique with respect to arbitration by quasi-religious tribunals and under religious law is the Jewish Court of Arbitration in New York City, chartered by the state in 1920. See BUCHLER, COHEN COMES FIRST AND OTHER CASES (1933) vii *et seq.*

11. On review of ecclesiastical decisions generally see ZOLLMANN, AMERICAN CHURCH LAW (rev. ed. 1933) c. 9; Comments (1926) 39 HARV. L. REV. 1079, (1927) 13 VA. L. REV. 400; Note (1900) 49 L.R.A. 353, 384 *et seq.*

and there must have been a substantial exhaustion of the remedies within the association with reference to which the member has "contracted."[13] The refusal of the courts to interfere in religious disputes unless the controversy involves what the courts will call a civil or property right is viewed as depending not on the finality of the decision of the Church judicatory, but on the absence of any jurisdiction whatever in the civil courts upon matters purely ecclesiastical.[14] Mere membership in a religious body, for example, is frequently held to involve no property right, so that a member who has been expelled or suspended has no remedy in the civil courts.[15] But there is a pronounced conflict even on this point,[16] and the property requirement generally seems to be used as a formula for enlarging the discretion of the civil courts.[17]

These prerequisites satisfied, however, the courts seem peculiarly reluctant to interfere with the decisions of religious authorities. Review on the "merits" is uniformly denied,[18] even though civil or property rights are involved, unless it is essential to the enforcement of express,[19] or in many

12. Bouldin v. Alexander, 15 Wall. 131 (U. S. 1872); Gibson v. Singleton, 149 Ga. 502, 101 S. E. 178 (1919); Fussell v. Hail, 233 Ill. 73, 84 N. E. 42 (1908); Deloisted v. Hilson, 120 Neb. 788, 235 N. W. 340 (1931). But *cf.* Taylor v. Jackson, 273 Fed. 345 (App. D. C. 1921); Hatfield v. DeLong, 156 Ind. 207, 59 N. E. 483 (1901).

13. State *ex rel.* McNeill v. Bibb Street Church, 84 Ala. 23, 4 So. 40 (1888); Crawford v. Nies, 220 Mass. 61, 107 N. E. 382 (1914); German Reformed Church v. Commonwealth *ex rel.* Seibert, 3 Pa. 282 (1846). The point was expressly left undecided in Gonzalez v. Roman Catholic Archbishop of Manila, 280 U. S. 1, 17 (1929). In mutual benefit society cases provisions for appeal within the order have been held properly ignored when unreasonable or inadequate. See Note (1914) 52 L. R. A. (N. S.) 817, 842; Chafee, *supra* note 8, at 1019.

14. See Watson v. Garvin, 54 Mo. 353, 378 (1873).

15. Nance v. Busby, 91 Tenn. 303, 18 S. W. 874 (1892); Minton v. Leavell, 297 S. W. 615 (Tex. Civ. App. 1927), (1928) 6 TEX. L. REV. 227; see Note (1912) 36 L. R. A. (N. S.) 945; *cf.* Edwards v. DeVance, 138 Miss. 580, 103 So. 194 (1925), (1925) 11 VA. L. REV. 648 (disputed election of deacon); Note (1912) 35 L. R. A. (N. S.) 919 (dismissal of clergyman). But see Comment (1923) 71 U. OF PA. L. REV. 161.

16. See ZOLLMANN, *op. cit. supra* note 11, §§ 321, 322. There is said to be a trend toward the abandonment of the requirement with respect to voluntary associations generally in favor of the frank protection of interests of personality. See Chafee, *supra* note 8, at 998.

17. *Cf.* Pound, *Equitable Relief Against Defamation and Injuries to Personality* (1916) 29 HARV. L. REV. 640, 678.

18. Mack v. Kime, 129 Ga. 1, 58 S. E. 184 (1907); Grosvenor v. United Society of Believers, 118 Mass. 78 (1875); Borgman v. Bultema, 213 Mich. 684, 182 N. W. 91 (1921); see Note (1900) 49 L. R. A. 353, 389. *Contra:* Smith v. Nelson, 18 Vt. 511 (1846).

19. See Watson v. Jones, 13 Wall. 679, 723 (U. S. 1871); Hackney v. Vawter, 39 Kan. 615, 628, 18 Pac. 699, 703 (1888); Nance v. Busby, 91 Tenn. 303, 313, 18 S. W. 874, 876 (1892); Notes (1910) 24 L. R. A. (N. S.) 692, 700, (1920) 8 A. L. R. 105, 106.

jurisdictions of implied,[20] trusts for the continued observance by a congregation of the doctrines adhered to at the time of the acquisition of its property.

Judicial intervention is most likely to be secured on the contention that the discipline of the Church did not authorize its tribunals to settle the controversy at issue. The effectiveness even of this attack on the jurisdiction of the religious court may be diminished by reason of the force still given the decision in *Watson v. Jones*,[21] where the Supreme Court of the United States, obviously impelled by a desire to favor the northern faction in a border state schism arising out of the Civil War, held that the civil courts should not examine decisions of a generally ecclesiastical character[22] rendered by religious tribunals either on their merits or for lack of jurisdiction. This decision, however, departed from the uniform current of prior American authority, as well as the British cases involving non-established Churches;[23] and, while seldom expressly repudiated,[24] it is rarely followed outside of the federal courts,[25] and is usually distinguished. A year after the *Watson* case the Supreme Court itself excepted from the operation of its rule a case where the persons who wielded the Church authority were usurpers;[26] and the decisions of ecclesiastical courts are generally disregarded upon proof of fraud.[27] Some courts recognize merely a presumption of jurisdiction

20. Hale v. Everett, 53 N. H. 9 (1868); Kniskern v. St. John's and St. Peter's Lutheran Churches, 1 Sandf. Ch. 439 (N. Y. Ch. 1844); Chrapko v. Kobasa, 271 Pa. 447, 114 Atl. 254 (1921), (1922) 31 YALE L. J. 329; Peace v. First Christian Church of McGregor, 20 Tex. Civ. App. 85, 48 S. W. 534 (1898). On Church property and change of doctrine generally see WRIGHTINGTON, *op. cit. supra* note 10, § 61; ZOLLMANN, *op. cit. supra* note 11, cc. 7–8; Notes (1910) 24 L. R. A. (N. S.) 692, 703–715, (1920) 8 A. L. R. 105, 111 *et seq.*; (1908) 8 COL. L. REV. 492.

21. 13 Wall. 679 (U. S. 1871). For the previous history of the dispute see Watson v. Avery, 65 Ky. 332 (1867); Watson v. Avery, 66 Ky. 635 (1868); *cf.* Gartin v. Penick, 68 Ky. 110 (1869).

22. The civil and ecclesiastical courts may, however, have concurrent jurisdiction. Satterlee v. United States *ex rel.* Williams, 20 App. D. C. 393 (1902) (minister deposed after being found guilty by Church court of rape).

23. Long v. Bishop of Capetown, 1 Moore P. C. C. (N. S.) 411 (1863); Murray v. Burgers, 4 *id.* 250 (1866). Prior American cases were in accord with the British. See (1871) 19 AM. L. REG. 313, 315. The courts of the Church of England, however, occupy a position comparable to that of the inferior civil courts. See Smith v. Nelson, 18 Vt. 511, 549 (1856). On the jurisdiction of the tribunals of the Established Church see MAKOWER, CONSTITUTIONAL HISTORY AND CONSTITUTION OF THE CHURCH OF ENGLAND (1895) *passim*; Adams, *The Writ of Prohibition to Court Christian* (1936) 20 MINN. L. REV. 272.

24. Perry v. Wheeler, 75 Ky. 541 (1877); Bear v. Heasley, 98 Mich. 279, 57 N. W. 270 (1893); Watson v. Garvin, 54 Mo. 353 (1873); Landrith v. Hudgins, 121 Tenn. 556, 120 S. W. 783 (1907).

25. *E. g.*, Brundage v. Deardorf, 92 Fed. 214 (C. C. A. 6th, 1899); Satterlee v. United States *ex rel.* Williams, 20 App. D. C. 393 (1902); Kuns v. Robertson, 154 Ill. 394, 40 N. E. 343 (1895).

26. Bouldin v. Alexander, 15 Wall. 131 (U. S. 1872).

27. Hendryx v. People's United Church of Spokane, 42 Wash. 336, 84 Pac. 1123 (1906); *cf.* Hansel v. Purnell, 1 F. (2d) 266 (C. C. A. 6th, 1924), *cert. denied*, 266

in the Church court;[28] and at least one has limited the *Watson* doctrine to "legislative" as opposed to "judicial" determinations of religious bodies.[29] In effect, therefore, most courts examine ecclesiastical decisions, as they do the decisions of other private courts, for the presence of jurisdiction in the association's tribunals.[30]

Similarly, by the majority view, the civil courts render inoperative decisions by ecclesiastical tribunals when the latter have failed to observe their own organic rules of procedure.[31] This does not mean, however, that common law rules of evidence and procedure are enforced if they are not embodied in the canons of the Church. Religious tribunals "are not obliged to guide themselves in the disposition of causes by Blackstone and Chitty and Stephens."[32] They are said to have the same authority as the civil courts to adopt their own procedural rules, and they seem to be given more latitude in this regard than the tribunals of other voluntary associations, whose procedural rules are frequently required to satisfy standards of due process and "fair play" with respect to notice and opportunity to be heard.[33] Thus, it is no ground for attack, so long as no canon covering the point in issue has been violated, that the accused was not allowed to challenge his triers,[34] or that the testimony was not supported by oath,[35] that cross-examination was not permitted,[36] that, as in the New York case, members

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U. S. 617 (1924); Grupe v. Rudisill, 101 N. J. Eq. 145, 136 Atl. 911 (Ch. 1927); see Sampsell v. Escher, 11 Ohio Dec. Reprint 351, 353 (C. P. 1891).

28. Schweiker v. Husser, 146 Ill. 399, 34 N. E. 1022 (1893); Connitt v. Reformed Protestant Dutch Church, etc., 54 N. Y. 551 (1874). *Contra:* Kerr's Appeal, 89 Pa. 97 (1879); see (1870) 18 AM. L. REG. 220, 221.

29. Philomath College v. Wyatt, 27 Ore. 390, 31 Pac. 206 (1892), *reheard,* 37 Pac. 1022 (Ore. 1894).

30. But *Watson v. Jones* has, in a few controversies involving large amounts of property located in several states, resulted in conflicting decisions by the respective civil courts of last resort. Compare Bear v. Heasley, 98 Mich. 279, 57 N. W. 270 (1893), with Brundage v. Deardorf, 92 Fed. 214 (C. C. A. 6th, 1899); compare Landrith v. Hudgins, 121 Tenn. 556, 120 S. W. 783 (1907), with Brown v. Clark, 102 Tex. 323, 116 S. W. 360 (1909); see Patton, *The Cumberland Church Cases* (1915) 64 U. OF PA. L. REV. 66.

31. First Church of Christ Scientist v. Rentzel, 242 Mich. 120, 218 N. W. 652 (1928); Jennings v. Scarborough, 56 N. J. L. 401, 28 Atl. 559 (Sup. Ct. 1894); Grupe v. Rudisill, 101 N. J. Eq. 145, 136 Atl. 911 (Ch. 1927); Wallace v. Trustees of General Assembly of United Presbyterian Church, etc., 201 Pa. 292, 50 Atl. 762 (1902). But *cf.* Satterlee v. United States *ex rel.* Williams, 20 App. D. C. 393 (1902).

32. Linderholm v. Kansas Conference of Swedish Evangelical Lutheran Synod, etc., 97 Kan. 212, 216, 155 Pac. 24, 26 (1916).

33. *Cf.* Comment (1936) 45 YALE L. J. 1248, 1265 *et seq.* (labor unions); Note (1900) 49 L. R. A. 353, 363-371 (benefit societies, exchanges, clubs).

34. Chase v. Cheney, 58 Ill. 509, 533 (1871).

35. McGuire v. Trustees of St. Patrick's Cathedral, 54 Hun 207, 221, 7 N. Y. Supp. 345, 352 (Sup. Ct. 1889).

36. *Ibid.;* Arthur v. Norfield Parish Congregational Church Soc., 73 Conn. 718, 733, 49 Atl. 241, 247 (1901).

of the court were witnesses as well as judges and accepted hearsay evidence,[37] or even that no hearing was granted the accused and no direct notice given him of the final determination.[38]

In this entire field of Church litigation there seems to be no direct precedent for allowing an ecclesiastical body to control a fifty million dollar industry,[39] as the New York court did,[40] and to do it so effectively that a violation of its decree is also an infraction of the State's penal law; for it is a misdemeanor in New York to offer non-kosher meat for sale as kosher if there is an "intent to defraud."[41] The adoption of the *issur* seems to have been legislative in a sense rather than judicial, more analogous, for example, to the *Index librorum prohibitorum* of the Roman Catholic Church[42] than to the usual ecclesiastical trial between members of the Church or opposing factions within it. By the weight of authority, however, no distinction is made between legislative and judicial determinations of ecclesiastical bodies, notwithstanding the broader potential scope of the latter.[43] The rule of secular review in either case should take into account the danger and difficulties of civil interference in religious affairs on the one hand[44] and the accusation on the other that ecclesiastical courts are "proverbially influenced more by prejudice and passion than any other species of judicial tribunal."[45] The rights of persons adversely affected would seem to be sufficiently protected if, as the New York court intimated, ecclesiastical decrees are subject to attack for lack of jurisdiction, fraud and gross irregularity of procedure.

37. S. S. & B. Live Poultry Corp. v. Kashruth Ass'n of Greater New York, 158 Misc. 358, 363, 285 N. Y. Supp. 879, 886 (Sup. Ct. 1936). But the award must have been rendered by an independent tribunal and not by one of the parties to the controversy. Mt. Zion Baptist Church v. Whitmore, 83 Iowa 138, 152, 49 N. W. 81, 85 (1891).

38. Cohen v. Silver, 277 Mass. 230, 236, 178 N. E. 508, 510 (1931); Stack v. O'Hara, 98 Pa. 213, 232 (1881). But *cf.* Gray v. Christian Soc., 137 Mass. 329 (1884).

39. Reister, Report to Dep't of Public Markets, Weights and Measures, New York City, The Live Poultry Industry in Greater New York, 1935, at 7. More than 80% of the fowl sold in the metropolitan area is represented to be kosher; estimates have run as high as 90%. *Ibid.*

40. *Cf.* Cohen v. Silver, 277 Mass. 230, 178 N. E. 508 (1931) (injunction denied against order to *schochtim* by Jewish court not to slaughter for wholesaler who violated Jewish laws and disregarded summons of religious court).

41. N. Y. PENAL LAW §§ 435–435a, constitutionality upheld, Hygrade Provision Co. v. Sherman, 266 U. S. 497 (1925).

42. See 7 CATHOLIC ENCYCLOPAEDIA (1910) 721. Pecuniary loss sustained by the publisher of a Polish language newspaper as a result of the circulation by several bishops of a pastoral letter forbidding members of the Church to read or write for the paper because of its alleged anti-Catholic spirit has been held *damnum absque injuria*. Kuryer Publishing Co. v. Messmer, 162 Wis. 565, 156 N. W. 948 (1916).

43. See Auracher v. Yerger, 90 Iowa 558, 566, 58 N. W. 893, 896 (1894); Landrith v. Hudgins, 121 Tenn. 556, 645, 120 S. W. 783, 806 (1907). But see note 29, *supra*.

44. These have been aptly termed the "hot potato" and "dismal swamp" considerations respectively. See Chafee, *supra* note 8, at 1024–1026.

45. (1871) 19 AM. L. REG. 308, 309; see, *e.g.*, Dees v. Moss Point Baptist Church, 17 So. 1 (Miss. 1895); State *ex rel.* Dubs v. Esher, 6 Ohio C. C. Rep. 312, *aff'd*, 51 Ohio St. 599 (1894).

NON-EXTRADITION OF NATIONALS*

IT IS well settled in this country that there can be no extradition to foreign States in the absence of a treaty or statute covering the particular case.[1] Whatever power Congress may have to provide for extradition independently of treaty has never been exercised except in relation to a foreign country or territory "occupied by or under the control of the United States."[2] The general extradition act simply defines the procedure for carrying out an existing extradition treaty.[3] Late in the last century the issue arose whether sufficient authority is given the executive to extradite American citizens under treaties containing the provision that neither State "shall be bound to deliver up" its own nationals.[4] This language, in contrast with the type of clause in the treaty with the Two Sicilies of 1855 which explicitly exempted "citizens and subjects of each of the high contracting parties,"[5] would seem *prima facie* to imply the reservation of a discretionary power to extradite nationals; and it appeared in substantially the same form, without apparent issue, in thirteen treaties between 1852, the date of the Prussian treaty in which it originated, and 1884.[6] In the latter year, however, came the first of a series of four refusals by the Secretary of State to extradite American citizens to Mexico or to request the extradition of Mexican citizens to the United States under a Mexican treaty with a provision of this type.[7] On the

*Valentine v. United States *ex rel.* Neidecker, 57 Sup. Ct. 100 (1936).

1. *Ex parte* Dos Santos, 7 Fed. Cas. No. 4,016 (C. C. D. Va. 1835); see Holmes v. Jennison, 14 Pet. 540, 549 (U. S. 1840); Factor v. Laubenheimer, 290 U. S. 276, 287 (1933); 1 MOORE, EXTRADITION (1891) 13; 4 MOORE, DIGEST OF INTERNATIONAL LAW (1906) 245. It is no defense to prosecution in the United States, however, that the defendant has been forcibly taken from another country, even in violation of treaty. Ker v. Illinois, 119 U. S. 436 (1886). The power to extradite is exclusively national. People *ex rel.* Barlow v. Curtis, 50 N. Y. 321 (1872); see Holmes v. Jennison, *supra*, at 571.

2. 31 STAT. 656 (1900), 18 U. S. C. § 652 (1934); see Neely v. Henkel, 180 U. S. 109, 122 (1901).

3. REV. STAT. § 5270 (1875), 18 U. S. C. § 651 (1934).

4. For a list of such treaties see Brief for Petitioners, pp. 43–44, Valentine v. United States *ex rel.* Neidecker, 57 Sup. Ct. 100 (1936). The exemption of nationals in extradition treaties has been the subject of much discussion. See BILLOT, TRAITÉ DE L'EXTRADITION (1874) 66; 1 MOORE, EXTRADITION 152; 4 MOORE, DIGEST 287; 5 TRAVERS, DROIT PÉNAL INTERNATIONAL (1922) 14; *Draft Convention on Extradition* (1935) 29 AM. J. INT. L. SUPP. 15, 123; Manton, *Extradition of Nationals* (1935) 10 TEMP. L. Q. 12. Internationally, of course, it would be unnecessary to confer discretion by treaty; but a grant of discretionary power may be necessitated by reason of an objection in the municipal law, in the absence of express treaty or statutory provision, to extradition generally (see note 1, *supra*) or to the surrender of nationals (*Draft Convention, supra*, at 125).

5. 11 STAT. 653 (1855).

6. See list cited *supra* note 4.

7. 1 MOORE, EXTRADITION 166 *et seq.*; 4 MOORE, DIGEST 301–302; see *Ex parte* McCabe, 46 Fed. 363, 378–379 (W. D. Tex. 1891). Under a similar treaty with Sweden and Norway, 12 STAT. 1126 (1860), the Swedish government twice refused to surrender Swedish subjects. 1 MOORE, EXTRADITION 169.

basis of these executive interpretations a federal court in Texas held in 1891, in *Ex parte McCabe*,[8] that there could be no extradition of American citizens under the Mexican treaty in the absence of an independent statutory grant of discretionary power. A new treaty was thereupon signed with Mexico in 1899 which, after reciting that neither party "shall be bound to deliver up" its own nationals, provided that "either shall have the power to deliver them up, if, in its discretion, it be deemed proper to do so."[9] This variation, which first appeared in the Japanese treaty of 1886,[10] was repeated in five of the nineteen extradition conventions,[11] exclusive of the new Mexican treaty of 1899, negotiated between 1891, the date of the *McCabe* decision, and 1909.

The extradition treaty with France of 1909 followed the language of the earlier Mexican treaty, without the proviso introduced in the Mexican treaty of 1899.[12] Finding evidence in the use of that clause of an intent to adopt the interpretation which the State Department had given it with respect to the earlier Mexican treaty, the Supreme Court of the United States has recently affirmed a discharge on *habeas corpus* of three Americans accused of various extraditable crimes of a financial character committed in France and held for extradition by the respondent, the Police Commissioner of New York City, on a warrant issued by a United States Commissioner upon request of the Acting French Consul General.[13]

In adopting the narrow construction of the State Department and of the *McCabe* case, the Court had to distinguish a contrary decision of the Queen's Bench on a clause of an Anglo-Belgian treaty identical with that of the French and earlier Mexican conventions:[14] since, the Court said, a provision in an Anglo-Swiss treaty that "no subject of the United Kingdom shall be delivered up" had earlier been construed as exempting British subjects absolutely from the general clause providing for surrender of fugitives,[15] the change to the wording, "in no case . . . shall the high contracting parties be bound to surrender their own subjects," in order to be

8. 46 Fed. 363 (W. D. Tex. 1891). Although repeated administrative interpretations in this sort of case will influence the court [see National Lead Co. v. United States, 252 U. S. 140, 145 (1920); Sullivan v. Kidd, 254 U. S. 433, 442 (1921)], the question remains a judicial one [United States v. Rauscher, 119 U. S. 407 (1886)]. See Lenoir, *Treaties and the Supreme Court* (1934) 1 U. OF CHI. L. REV. 602.

9. 31 STAT. 1822 (1899). Under this treaty the State Department the same year surrendered an American citizen accused of murder in Mexico. FOREIGN RELATIONS (U. S. Dep't State 1899) 497.

10. 24 STAT. 1017 (1886).

11. Orange Free State [31 STAT. 1815 (1896)]; Argentina [31 STAT. 1886 (1896)]; Guatemala [33 STAT. 2152 (1903)]; Nicaragua [35 STAT. 1874 (1905)]; Uruguay [35 STAT. 2033 (1905)]. This type of clause, however, seems to have disappeared after 1905.

12. 37 STAT. 1530 (1909).

13. Valentine v. United States *ex rel.* Neidecker, 57 Sup. Ct. 100 (1936), *aff'g* United States *ex rel.* Neidecker v. Valentine, 81 F. (2d) 32 (C. C. A. 2d, 1936) (Manton, C. J., dissenting), (1936) 30 AM. J. INT. L. 480, (1936) 49 HARV. L. REV. 1003.

14. *In re* Galwey, [1896] 1 Q. B. 230.

15. Regina v. Wilson, 3 Q. B. D. 42 (1877).

given any effect at all, must have been designed to confer discretion where before there had been a complete exemption. The history of the Mexican treaties, too, might have supported the Court in a contrary result. Although the first Secretary of State to rule on the earlier Mexican treaty construed several instances in which requests by the United States for the extradition of Mexicans had been denied as indications that the Mexican government considered the clause to exempt nationals absolutely, those cases might equally have been ascribed to the legitimate exercise by Mexico of her discretion under the treaty. This was the construction placed upon the attitude of the Mexican government by the Supreme Court of that country in a decision in 1878, seven years after the first request for extradition by the American Secretary of State, which allowed the discretionary extradition of two Mexicans accused of murder in Texas.[16]

The explicit reservation of a discretionary power in the later Mexican treaty, moreover, was a practical solution of a difficult problem along the border states created as a result of the conflicting interpretations of the earlier clause by the two countries; the situation with respect to France was different. The first treaty with France[17] had provided for the extradition of all "persons" without qualification. Although this type of treaty had been construed by the Department of State to include nationals, the French government had consistently refused to surrender French citizens.[18] The adoption of language in the treaty of 1909 to the effect that neither State "shall be bound" to extradite its own citizens might have been considered evidence of an intent to sanction the existing French practice without denying a discretion to this country consonant with the American policy of equal surrender in cases of nationals or of aliens.[19] A construction of this sort would seem to be fortified by the fact that the French law permits the punishment of French citizens for crimes committed abroad,[20] whereas the Anglo-American system of criminal law is generally territorial.[21] In view, however, of the judicial approval which has now been given the continued executive practice in this country under extradition clauses of the type contained in the French treaty, the solution would seem to lie in the adoption of a convention with a clear provision for the extradition of nationals.

16. *Extradition of Dominguez*, 1 VALLARTA, CUESTIONES CONSTITUCIONALES (1879) 39, translated, FOREIGN RELATIONS (U. S. Dep't State 1878) 562. Magistrate Ramirez held in his concurring opinion that no constitutional authority to extradite nationals existed in the absence of treaty.

17. 8 STAT. 580 (1843).

18. 4 MOORE, DIGEST 298. This practice was without statutory authority until 1927. TRAVERS, L'ENTRAIDE REPRESSIVE INTERNATIONALE (1928) 169.

19. 4 MOORE, DIGEST 288 *et seq.* Lack of reciprocity in the surrender of nationals is no objection to the validity of a treaty, even where the treaty requires such surrender. Charlton v. Kelly, 229 U. S. 447 (1913).

20. CODE D'INSTRUCTION CRIMINELLE (1910) art. 5.

21. See MOORE, REPORT ON EXTRATERRITORIAL CRIME AND THE CUTTING CASE (1887) 23; Berge, *Criminal Jurisdiction and the Territorial Principle* (1931) 30 MICH. L. REV. 238; *Draft Convention on Jurisdiction with Respect to Crime* (1935) 29 AM. J. INT. L. SUPP. 439, 480.

POWER OF BANKS TO GUARANTEE THE LIABILITIES OF OTHER BANKS*

PLAINTIFF bank, induced by a group of banks which included the defendant, agreed to assume the liabilities of, and to liquidate the *X* bank, then on the verge of failure. In exchange for its assumption of liabilities, plaintiff took from the *X* bank a note secured by an assignment of all its assets. Defendant bank and its associates, in consideration of plaintiff's promise, severally agreed to indemnify plaintiff proportionally against any losses incurred by its assumption of *X's* liabilities. This cooperative action was prompted by a common interest in preventing the failure of *X* bank and the impact of that failure upon the public confidence in the banking group. The contract between the banks further provided that a committee, representing the defendant and the other banks in the group, should be appointed to supervise and control the liquidation carried out by the plaintiff and, if desirable, to conduct the liquidation itself.[1] Subsequently plaintiff bank, having proceeded with the liquidation as agreed, brought an action to recover the promised indemnity for the losses it had realized. The defendant bank then moved to strike out the complaint contending that its guaranty was *ultra vires*. The Supreme Court of New Jersey,[2] however, rejected this contention, holding in effect that promises of guaranty or indemnity made upon such a cooperative basis by a group of banks acting primarily for their own benefit, were *intra vires*.[3]

The corporate powers of a bank are generally said to embrace only those powers granted by statute, and those which a strict construction of statutes will admit as incidental and necessary to the exercise of the enumerated powers.[4] Banks customarily are authorized to carry on the banking business by discounting and negotiating evidences of debt; by receiving deposits; by buying and selling exchanges, coin, and bullion; and by lending money on security.[5] A general power to make guaranties is never expressly included in the statutory lists of powers.[6] The absence of an express grant of power, however, has not prevented the enforcement of guaranties which the courts

*Trust Company of New Jersey v. Jefferson Trust Company, 186 Atl. 732 (N. J. Sup. Ct. 1936).

1. *Ibid.* Plaintiff's Brief, p. 15.

2. No appeal has yet been taken.

3. See Trust Co. of New Jersey v. Jefferson Trust Co., 186 Atl. 732, 735 (N. J. Sup. Ct. 1936).

4. See California Bank v. Kennedy, 167 U. S. 362, 366 (1897); Texas & Pac. Ry. v. Pottorf, 291 U. S. 245, 253 (1933); Nassau Bank v. Jones, 95 N. Y. 115, 121 (1884). Considerations of public policy have induced courts to construe the broad words, "incidental and necessary" more strictly where banks are concerned than in the case of ordinary business corporations. Gardiner Trust Co. v. Augusta Trust Co., 182 Atl. 685 (Me. 1936); County of Divide v. Baird, 55 N. D. 45, 212 N. W. 236 (1927).

5. For typical instances of these statutes see 13 STAT. 101 (1864), 12 U. S. C. A. § 24 (1934); N. J. COMP. STAT. (Supp. 1920) tit. 17, § 6; N. Y. BANKING LAW § 106(1).

6. 1 ZOLLMAN, BANKS AND BANKING (1936) §§ 212, 231. Banks are sometimes granted a power to make guaranties for a limited purpose. Compare PA. STAT. ANN. (Purdon, 1930) tit. 7, § 208 (authorizing banks to guarantee bonds secured by mortgage on real estate).

would characterize as having been entered into by banks for the furtherance of their own rights or as an incident to the transaction of their own business.[7] Under the applications of this flexible rule, it is clear that in order to protect authorized loans, a bank may ordinarily guarantee to its debtors' other creditors that their pre-existing or subsequently created loans will be paid.[8] A bank may also guarantee the quality of its debtor's goods in order to induce a potential purchaser of those goods to assume the debt,[9] or warrant the quality of goods in order to realize on collateral security already obtained;[10] or guarantee payment of a note which is the obligation of another, if this is necessary to dispose of its own paper and securities;[11] and the guaranty of the liabilities of another bank, if accompanied by a receipt of assets, may be upheld as incidental to the exercise of the power either to purchase and discount paper and securities or to buy and sell coin and bullion.[12] Likewise letters of credit, though guaranties in effect,[13] are generally sustained by the courts. They may be upheld as incidental to a granted power; yet they are conventionally approved in deference to banking practice.[14]

The power of a bank to make guaranties is clearly bolstered when the liabilities assumed by the bank are proportionate in amount to the assets it

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7. 4 MICHIE, BANKS AND BANKING § 33 (1931); 7, *id.* § 163 (1932).

8. Allis-Chalmers Mfg. Co. v. Citizens Bank and Trust Co., 3 F. (2d) 316 (D. Idaho, 1924); Norton Grocery Company v. Peoples National Bank, 151 Va. 195, 144 S. E. 501 (1928); Second National Bank v. U. S. Fidelity Co., 266 Fed. 489 (C. C. A. 4th, 1920); *Contra:* Howard and Foster Co. v. Citizens National Bank, 133 S. C. 202, 130 S. E. 758 (1925); First National Bank v. Monroe, 135 Ga. 614, 69 S. E. 1123 (1911).

9. Exchange Bank v. Hensley and Roland, 240 S. W. 679, (Tex. Civ. App., 1922).

10. Gotham National Bank v. Sharwood, 23 F. (2d) 567 (C. C. A. 2d, 1928); Taylor v. Hemphill, 238 S. W. 986 (Tex. Civ. App. 1922), [Guaranty must, however, be a reasonably appropriate means of achieving the admittedly legitimate end].

11. International Harvester Co. v. State Bank of Upham, 38 N. D. 632, 166 N. W. 507 (1918); Collings v. Guaranty Trust Co. 10 F. Supp. 462 (D. N. J. 1935); Peoples Bank v. Manufacturer's Bank, 101 U. S. 181 (1879), *semble.*

12. Schofield v. State National Bank, 97 Fed. 282 (C. C. A. 8th, 1899).

13. Regarded functionally letters of credit are loans of credit and not loans of funds. See McCurdy, *Commercial Letters of Credit* (1922) 35 HARV. L. REV. 539, 542.

14. ZOLLMAN, BANKS AND BANKING (1936) § 5104 (linking the power to issue a letter of credit to the power to lend money). The attempt to rationalize in those terms the enforcement of banks' obligations under letters of credit has led to judicial hairsplitting on the issue of primary and secondary liability. Compare Chandanmull Benganey v. National Bank of India, 51 I. L. R. (Calc. Ser.) 43 (1923); FINKELSTEIN, LEGAL ASPECTS OF COMMERCIAL LETTERS OF CREDIT, (1930) 32-33, 38-39. Usage sufficiently indicates the necessity of letters of credit [McCurdy, *Commercial Letters of Credit* (1922) 35 HARV. L. REV. 539] and tangible benefits and security to the banks which they afford would justify their enforcement to the most sensitive proponent of depositors' rights. McCornick & Co. v. Citizens Bank, 304 Mo. 270, 263 S. W. 152 (1924). In many states the power to issue letters of credit is expressly granted to banks. Typical statutes are: OHIO GEN. CODE (Page, 1926) § 710-137; ORE. CODE ANN. (1930) § 22-527(6). See further FINKELSTEIN, *op. cit. supra* at 5, footnote 7.

seeks to preserve,[15] or when the guaranty is secured by the debtor's assignment of assets sufficient to protect it.[16] If the assets are insufficient or the relation is disproportionate, the validity of the guaranty may be questioned even though on the single issue of the power to make it, it may be justified as necessary and incidental to a granted power.[17] Some courts have indicated support for the contrary proposition that a guaranty which results in non-speculative financial profit to the lending bank may be *intra vires* whether or not it is incidental to usual banking business.[18] But the language to this effect is not clear since corporate estoppel is always available as an alternative basis of decision,[19] and since in the federal courts, at least, recovery may be had in quasi-contract to the extent of the benefit received, although the guaranty is admitted to be *ultra vires*.[20]

There is, therefore, adequate judicial authority for the proposition that when substantial, tangible benefit in the form of an assignment of assets has been received by a bank, it may, to further its own immediate banking interests, assume the liabilities of another bank whether it is proposed to merge, to consolidate, to liquidate the second bank, or to rehabilitate it.[21] This au-

15. Merchants' Bank of Valdosta v. Baird, 160 Fed. 642 (C. C. A. 8th, 1908) (unlimited guaranty of its debtor's future obligation held *ultra vires* of defendant bank); Second National Bank v. U. S. Fidelity Co. 266 Fed. 489 (C. C. A. 4th, 1920).

16. Catherine Planting and Mfg. Co. v. Pointe Coupe Trust and Savings Bank, 160 La. 963, 107 So. 711 (1926); Talman v. Rochester City Bank, 18 Barb. Sup. Ct. 123 (1854); Mott Iron Works v. Kaiser Co., 131 S. C. 392, 103 S. E. 783 (1920); Creditors Claim and Adjustment Co. v. Northwest Loan and Trust Co., 81 Wash. 247, 142 Pac. 670 (1914).

17. Merchants' Bank of Valdosta v. Baird, 160 Fed. 642 (C. C. A. 8th, 1908). In such a case though sustainable as within the power of the bank the guaranty may be declared void as against public policy.

18. *Cf.* American Surety Co. of N. Y. v. Philippine National Bank, 245 N. Y. 116, 131, 156 N. E. 634, 640 (1927); Gause v. Commonwealth Trust Co. 196 N. Y. 134, 89 N. E. 476 (1909) (that "benefit" received must be direct and tangible). Accord: *In re* Bankers' Trust Co., 27 F. (2d) 912 (N. D. Ga., 1928).

19. Mott Iron Works v. Kaiser Co., 131 S. C. 392, 103 S. E. 783 (1920); Central Railroad and Banking Co. of Georgia v. Farmers' Loan and Trust Co., 114 Fed. 263 (C. C. A. 5th, 1902); Lander State Bank v. Putnam, 40 Wyo. 312, 276 Pac. 926 (1929); 6 FLETCHER, CYCLOPEDIA OF CORPORATIONS [1931] § 2592.

A bank may be estopped to deny liability on its guaranty when the promisee has acted thereon to his injury. See Creditors Claim and Adjustment Co. v. Northwest Loan and Trust Co. 81 Wash. 247, 256, 142 Pac. 670, 672 (1914). The majority rule is, however, that estoppel will not be invoked against a bank unless it has received money or property as a result of its undertaking. Nowell v. Equitable Trust Co. 249 Mass. 585, 144 N. E. 749 (1924); *In re* Steele Furniture Co. 18 F. (2d) 490 (C. C. A. 3d, 1927), *cert. denied*, 274 U. S. 758 (1927) (benefit must be tangible).

20. First National Bank of Aiken v. Mott Iron Works, 258 U. S. 240 (1921); Citizens Central National Bank v. Appleton 216 U. S. 196 (1910); Oklahoma City National Bank v. Ezzard 58 Okla. 251, 159 Pac. 267 (1916); First National Bank v. Monroe 135 Ga. 614, 621, 69 S. E. 1123, 1126 (1910).

21. Commercial Trust Co. of Hagerstown v. Laurens County, 267 Fed. 879 (S. D. Ga. 1920); (consolidation); United States States Fidelity and Guaranty Co. v. Citizens

thority seems fully to support the bank guaranty under the facts of the principal case; and it should not be material that the assets of the weak bank were assigned to one bank as agent for the defendant and its associates rather than apportioned directly among the group of guarantors. There was, then, no need for the court to rely on a broader rule such as that suggested, by way of dictum, in the New York case of *O'Connor v. Bankers Trust Co.*,[22] involving different facts. There the guaranty was thought valid despite the fact that the bank did not receive tangible benefit sufficient under the traditional rule[23] to estop it from denying liability, and that there was no assignment of assets, to the purchase of which the guaranty might be sustained as incidental. There are few cases discussing comparable situations and they are in conflict.[24]

Any broad statement to the effect that a bank may, ostensibly to save itself from a disastrous "run", lend its credit to insure the liabilities of another bank,[25] makes possible indiscriminate legal approval of guaranties even though they are unsecured and their scope is unrestricted. Such a rule might nullify the legal safeguards of bank examination, statutory cash reserve, and restrictions of loans, since "overnight a bank" could, "without any addition to its own assets, assume (without limitation) the liabilities of one or more

National Bank, 13 F. (2d) 213 (D. N. M. 1924); Schofield v. State National Bank 97 Fed. 282 (C. C. A. 8th, 1899); Nakdimen v. First National Bank, 177 Ark. 303, 6 S.W. (2d) 505 (1928) (rehabilitation); Hightower v. American National Bank, 263 U. S. 351 (1923) (liquidation); Wyman v. Wallace, 201 U. S. 230 (1906); Wannamaker v. Edisto National Bank of Orangeburg, 62 F. (2d) 696 (C.C.A. 4th, 1933), (1933) 84 A.L.R. 1425. Where assets are received the courts have not been concerned with the precise power to which the guaranty is incidental; Southern Exchange Bank v. First National Bank, 37 Ga. App. 612, 141 S. E. 323 (1928).

22. 289 N. Y. Supp. 252 (Sup. Ct. 1936), noted (1936) 50 HARV. L. REV. 130.

23. Gause v. Commonwealth Trust Co. 196 N. Y. 134, 89 N. E. 476 (1909); Federal Land Bank of St. Paul v. Crookston Trust Co., 180 Minn. 319, 230 N. W. 797 (1930). The *O'Connor* case appears to broaden the estoppel rule as applied to banks to cover cases of complete performance and action in reliance by the promisee. See O'Connor v. Bankers' Trust Company, 289 N. Y. Supp. 252, 273 (Sup. Ct. 1936).

24. Southern Exchange Bank v. First National Bank, 37 Ga. App. 612, 141 S. E. 323 (1928) [promise by defendant bank to indemnify plaintiff bank proportionally against liabilities assumed, held *intra vires* under broad powers without regard to tangible benefit. Defendant was also estopped by plaintiffs' performance to deny liability. Presence of assignment of assets and reservation of power to take them over afford alternative ground of decision]; Board of Commissioners v. Citizens Trust and Savings Bank, 73 Ind. App. 76, 123 N. E. 130 (1909) (no reservation of power to take over assets by defendant bank and no limitation on the extent of guaranty. Dictum: *ultra vires*. Decision for defendant on other grounds); Gardiner Trust Co. v. Augusta Trust Co., 182 Atl. 685 (1936) (guaranty of deposits of another bank held *ultra vires* where guarantor bank failed precluding estoppel based on benefits received, and where no assets were assigned to the guarantor).

25. See Trust Co. of New Jersey v. Jefferson Trust Co. 186 Atl. 732, 736 (N. J. Sup. Ct. 1936): "The [*O'Connor*] decision holds that it was one of the 'incidental' and 'necessary' powers of a member of a group of banks to guarantee the deposits of an insolvent bank for the benefit of all the banks."

banks."[26] The facts of the *O'Connor* case approximate the limit beyond which legal sufferance of the banking practice of making "rescue loans" would jeopardize the guarantor bank's depositors. In that case the guarantors were banks with a strong credit position; they were accustomed to cooperate in salvaging weak members of the local financial community;[27] the liabilities assumed were reasonable; and the action was taken by the guarantors as a matter of business discretion to insure their own safety. The broad power of guaranty approved by the dictum of the *O'Connor* case should be cautiously used to validate guaranties only when that course would not imperil the guarantor's creditors.[28] There may indeed be a further and more basic objection to the use of the unsecured bank guaranty. It is really a device for allowing weak institutions to be perpetuated as liabilities to the community. In regions already "overbanked" this consequence is particularly to be avoided.[29] The shock of bank failure can be more effectively cushioned by merger, consolidation, or, as in the principal case, by liquidation eased through an assumption of the failing bank's liabilities in return for an assignment of its sound assets,[30] a workable solution and one consonant with the traditional law.

Effect of Collecting Bank's Acceptance of Drawee Bank's Remittance Draft*

A RURAL New York school district delivered to an adjoining district a check drawn on a local bank for the full amount of a debt between them. The payee deposited it for collection in a second local bank, which credited the payee's account and presented the check by messenger to the drawee bank. Cash was neither demanded nor offered, and the drawee bank remitted its own draft on a New York City bank. At that time, March 3, 1933, the drawee cancelled the check "paid" and charged the drawer's

26. See Gardiner Trust Co. v. Augusta Trust Co., 182 Atl. 685, 689 (Me. 1936).

27. See O'Connor v. Bankers Trust Company, 289 N. Y. Supp. 252, 272 (Sup. Ct. 1936). The "rescue parties" referred to in the opinion are the familiar Clearing House Loans Certificates which have repeatedly been employed by the New York Clearing House for the salvaging of weak members. The transfer of assets which characterizes the Clearing House certificate arrangement would seem to distinguish it from the situation in the O'Connor case where the alleged guaranty was completely unsecured. O'Connor v. Bankers Trust Company *supra*, Plaintiff's Brief p. 13; SPRAGUE, HISTORY OF CRISES UNDER THE NATIONAL BANKING SYSTEM (1910) 45, 112, 142, 170, 314.

28. See Texas & Pac. Ry. v. Pottorf, 291 U. S. 245, 254 (1933); O'Connor v. Bankers Trust Co., 289 N. Y. Supp. 252, 272 (Sup. Ct., 1936).

29. WILLIS AND CHAPMAN, THE BANKING SITUATION (1934) 367.

30. WILLIS AND CHAPMAN, *op. cit. supra* note 29, at 369; Legis. (1932) 32 COL. L. REV. 1395, 1402-1403.

*Matter of Central High School District No. 1 v. Union Free School District No. 13 of the Town of Hempstead, 272 N. Y. 13, 3 N. E. (2d) 617 (1936).

account. The ensuing bank holiday prevented payment of the remittance draft, which was returned dishonored. On March 11, the bank of deposit charged the amount of the original item back to the payee's account and notified an officer of the payee district; the drawee bank recredited the drawer's account[1] and marked the cancelled check "cut in error."[2] When the drawee failed to reopen for normal banking business, the payee obtained a mandamus ordering the drawer to pay the original debt. After unanimous affirmance by the Appellate Division, the Court of Appeals reversed the order and dismissed the action,[3] basing its decision both on the "almost universal rule," hitherto unrecognized by New York courts, that the drawer of a check is discharged[4] when the collecting bank accepts the drawee's remittance draft, and on an inference drawn from a provision in the recently enacted "Uniform" Bank Collection Code.[5]

Courts in almost all jurisdictions have held that the drawer and indorsers are discharged when the drawee bank remits its own draft to the collecting bank, even though the remittance draft is subsequently dishonored.[6] These courts usually proceed on the theory that the drawer's check authorizes the holder to accept cash and orders the drawee to remit it; if the holder, without the drawer's knowledge or consent, accepts a different medium of remittance, he is said to do so for his own convenience and must assume

1. The drawer subsequently received a dividend from the Superintendent of Banks based on his account as recredited with the amount of the check. The drawer accepted this dividend expressly subject to the outcome of the present litigation. If the checks were declared paid, the dividend was to be based upon the drawer's account less the amount of the check, and any excess dividend previously received was to be returned to the Superintendent of Banks.

2. This is an alternative form of "cancelled by mistake."

3. Matter of Central High School District No. 1 v. Union Free School District No. 13, 272 N. Y. 13, 3 N. E. (2d) 617 (1936). O'Brien, Crouch and Loughran, J. J., dissented without opinion.

4. That is, the check has been collected and the original debt paid. Until collection, the check was only conditional payment of the debt. See Kessler, Levi and Ferguson, *Some Aspects of Payment by Negotiable Instrument: A Comparative Study* (1936) 45 YALE L. J. 1373, 1374-1376.

5. The Code was drafted by the American Bankers' Association, not by the Commissioners on Uniform State Laws. Misapprehension on this point may have been responsible for the celerity with which the Code was adopted by eighteen states. See Steffen, *The Check Collection Muddle* (1936) 10 TULANE L. REV. 537, 540, where the statutes are cited. New York went so far as to adopt the Code as a separate article of the N. Y. NEGOTIABLE INSTRUMENTS LAW §§ 350(a)-350(l).

6. O'Leary v. Abeles, 68 Ark. 259, 57 S. W. 791 (1900); Dewey v. Margolis & Brooks, 195 N. C. 307, 142 S. E. 22 (1928); Jensen v. Laurel Meat Co., 71 Mont. 582, 230 Pac. 1081 (1924); Texas Electric Service Co. v. Clark, 47 S. W. (2d) 483 (Tex. Civ. App. 1932); see Fed. Reserve Bank v. Malloy, 264 U. S. 160, 166 (1924); City of Douglas v. Fed. Reserve Bank, 271 U. S. 489, 493 (1926); Notes (1928) 52 A.L.R. 994, (1933) 87 A.L.R. 442. *Contra:* Lake Charles Feed Co. v. Sabatier, 14 La. App. 233, 125 So. 318 (1929).

the risks entailed.[7] Since payment of a check by actual transfer of cash is comparatively rare under modern banking usage,[8] the judicial assumption that the drawer contemplates this method exclusively seems unrealistic.[9] Its practical consequences are desirable, nevertheless, in that the time at which payment is deemed made becomes fixed at the earliest point which is both practicable and easily proven.[10] New York courts, however, maintaining that, in the absence of special agreement, a debt is not paid by delivery to the creditor of an obligation of the debtor or of a third person,[11] have hitherto held that the drawee's draft is conditional payment of the original item and becomes final payment only when it is itself satisfied.[12]

7. It is sometimes said that the holder, having "waived" his right to demand cash, is "estopped" from disclaiming the risk accompanying a different medium of collection. Capital Grain & Feed Co. v. Fed. Reserve Bank, 3 F. (2d) 614 (N. D. Ga. 1925); Morris v. Cleve, 197 N. C. 253, 148 S. E. 253 (1929); see Cleve v. Craven Chemical Co., 18 F. (2d) 711, 713 (C. C. A. 4th, 1927).

8. Settlement of inter-bank relationships by transfer of cash would be cumbersome and expensive. Use of exchange drafts is customary to settle both clearing house balances and inter-city items. See SPAHR, CLEARING AND COLLECTION OF CHECKS (1926) 189, 462; Turner, *Bank Collections—The Direct Routing Practice* (1930) 39 YALE L. J. 468, 483; Transcontinental Oil Co. v. Fed. Reserve Bank, 172 Minn. 58, 64, 214 N. W. 918, 920 (1927).

9. See Steffen and Starr, *A Blue Print for the Certified Check* (1935) 13 N. C. L. REV. 450, 469, 471. Courts have often declined to alter the assumption even where custom to the contrary was argued. Fed. Reserve Bank v. Malloy, 264 U. S. 160 (1924); O. B. Avery Co. v. Highway Comm'r, 363 Ill. 279, 2 N. E. (2d) 77 (1936); Nat. Bank of Commerce v. American Exch. Bank, 151 Mo. 320, 52 S. W. 265 (1899). But *cf.* note 32, *infra*. Where the custom of remitting drafts was sanctioned by statute, it has been held that the drawer consented to payment in something other than cash, making the general rule inapplicable and extending the drawer's liability to the time when the remittance draft itself is paid. Cleve v. Craven Chemical Co., 18 F. (2d) 711 (C. C. A. 4th, 1927) (construing the North Carolina anti-par clearance statute). *Contra:* Morris v. Cleve, 197 N. C. 253, 148 S. E. 253 (1929) (under the same statute). *Cf.* Braswell v. Citizens Nat. Bank, 197 N. C. 229, 148 S. E. 236 (1929) (where the same statute was held to relieve a collecting bank from liability for taking a draft instead of cash); see Comment (1929) 8 N. C. L. REV. 55.

10. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS (1934) 171. In the vast majority of collections the remittance draft will be satisfied; in these instances also the time fixed is appropriate.

11. Ward v. Evans, 2 Ld. Raym. 928 (Q. B. 1703); Turner v. Bank of Fox Lake, 3 Keyes 425 (N. Y. 1867); Vail v. Foster, 4 N. Y. 312 (1850); Porter v. Talcott, 1 Cowen 359 (N. Y. 1823); Standard Investment Co. v. Town of Snow Hill, 78 F. (2d) 33 (C. C. A. 4th, 1935); 30 CYC. 1194–1197; see BYLES, BILLS (19th ed. 1931) 303; 3 DANIEL, NEGOTIABLE INSTRUMENTS (7th ed. 1933) § 1458; Kessler, Levi and Ferguson, *supra* note 4, at 1374, n. 6.

12. Thomas v. Board of Supervisors of Westchester County, 115 N. Y. 47, 21 N. E. 674 (1889); see Smith v. Miller, 43 N. Y. 171, 175 (1870). But *cf.* People *ex rel.* Port Chester Sav. Bank v. Cromwell, 102 N. Y. 477, 7 N. E. 413 (1886).

As an alternative reason for holding that the subsequently dishonored remittance draft does not discharge the drawer, it has been said that the weakened condition of the drawee bank probably amounted to insolvency when the check was presented, and that

Strict adherence to this rule would be undesirable, since, if the bank on which a remittance draft is drawn should turn over to the bank presenting it a new draft on some *other* bank, the liability of the drawer of the original item would be unduly, if not indefinitely, extended.[13] Moreover, the New York courts have not consistently applied the rule, and a deposit credit to the holder on the books of the drawee bank, equally an obligation of a third person, constitutes payment and discharges the drawer.[14] The courts indeed have frequently avoided the rule by implying the required "special agreement" to accept the new obligation as unconditional payment.[15] Although an agreement to accept the drawee bank's obligation in place of the drawer's, necessary in order to discharge the latter, might have been implied in the instant case from the holder's surrender of the item when he could have retained it, requested legal tender, and treated the item as dishonored in the absence of cash remittance, the court abandoned the concept completely.[16]

While the result in the instant case brings New York into line with the bulk of authority, reliance on the Bankers' Collection Code seems to be misplaced. The check in question was presented by messenger, and the Code contains no express provision for the release of drawers of items not presented by mail. It does, however, contain a provision, not expressly limited to mail presentments, which confers on the holder of an item a preferred claim against the assets of a drawee bank which has failed "after having charged . . . the account of the . . . drawer . . . or otherwise discharged his liability."[17] Since this provision contains references to pre-

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the loss had already fallen on the drawer, from whom it should not be shifted to an unsuspecting payee. See (1929) 7 N. C. L. REV. 187, 188; Thomas v. Board of Supervisors, 115 N. Y. 47, 54, 21 N. E. 674, 675 (1889).

13. See Comment (1929) 8 N. C. L. REV. 55, 59.

14. *Cf.* Oddie v. Nat. City Bank of New York, 45 N. Y. 735 (1871); Consolidated Nat. Bank v. First Nat. Bank, 129 App. Div. 538, 114 N. Y. Supp. 308 (2d Dep't 1908) *aff'd without opinion* 199 N. Y. 516, 92 N. E. 1081 (1910). The fiction that money was handed over the counter and then immediately returned by the holder as a deposit [see (1932) 30 MICH. L. REV. 962, 963] is equally applicable to the instant situation, for it may be argued that the drawee's exchange draft was "bought" with the cash that might have been obtained in its place.

15. Where a contract calls for payment against delivery and the seller surrenders the goods in exchange for the credit of a third party, the courts presume that the credit was taken as the equivalent of absolute performance. This presumption puts on the seller the almost insurmountable burden of proving that the remittance he took was not accepted as full payment. Hamilton v. R. S. Dickson & Co., 85 F. (2d) 107 (C. C. A. 2d, 1936); Hall v. Stevens, 116 N. Y. 201, 22 N. E. 374 (1889); Gibson v. Tobey, 46 N. Y. 637 (1871); Noel v. Murray, 13 N. Y. 167 (1855); Whitbeck v. Van Ness, 11 Johns. 409 (N. Y. 1814).

16. See Matter of Central High School District No. 1 v. Union Free School District No. 13, 272 N. Y. 13, 16, 3 N. E. (2d) 617, 618 (1936).

17. N. Y. NEGOTIABLE INSTRUMENTS LAW § 350(1); § 13(2) of the Code as it was proposed by the Bankers' Association, a copy of which may be found in BRADY, THE UNIFORM NEGOTIABLE INSTRUMENTS ACT (1932 ed.) 107.

ceding sections of the Code which were expressly confined to mailed items,[18] its applicability to counter presentments is doubtful. But even if, as the court assumes, it is so applicable, it still does not provide for a release of the drawer whose account has here been recredited with the amount. The import of the section is that a preferred claim arises *if* the drawer has been discharged;[19] but the court, ignoring the condition precedent, construes the section to mean: the holder is accorded a preferred claim and *therefore* the drawer is discharged.[20]

The payee's failure to give timely notice of dishonor seems to be a more tenable ground for releasing the drawer.[21] When a negotiable instrument is duly presented for payment, it is considered dishonored if not paid.[22] If the remittance draft in the principal case was payment, the drawer is discharged thereby;[23] if the remittance draft was not payment, the instrument was dishonored and the failure to notify the drawer thereof before the end of the following day[24] should release him.[25] An alternative contention is that the debiting of the drawer's account and the remittance of a draft by the drawee bank, by withdrawing the amount of the original check from the funds controlled by the drawer and by making the drawee bank directly responsible for that amount, have the same effect as acceptance or certification, which — when procured by the holder — operate to discharge the drawer of the check.[26] Remittance of a draft or a cashier's check is used

18. The provisions referred to are §§ 7 and 11 of the Code. N. Y. NEGOTIABLE INSTRUMENTS LAW §§ 350(f) and 350(j).

19. *In re* Jayne & Mason, 140 Misc. 822, 251 N. Y. Supp. 768 (Sup. Ct. 1931) *semble;* see Townsend, *The Bank Collection Code of the American Bankers' Association* (1934) 8 TULANE L. REV. 376, 380-381. But see Matter of State Bank of Binghamton, 152 Misc. 579, 583, 274 N. Y. Supp. 41, 47 (Sup. Ct. 1934).

20. Matter of Central High School District No. 1 v. Union Free School District No. 13, 272 N. Y. 13, 17, 3 N. E. (2d) 17, 18 (1936).

21. Odle v. Barnes, 117 Tex. 174, 2 S. W. (2d) 577 (1927); see BRANNAN AND CHAFEE, THE NEGOTIABLE INSTRUMENTS LAW (5th ed. 1932) §§ 103, 89.

In the instant case, the only act which may be called notice of dishonor occurred eight days after the presentment, when the treasurer of the payee, who was also a clerk of the drawer, was orally informed that the remittance draft had not been satisfied and that the original check was being returned.

22. BRANNAN AND CHAFEE, THE NEGOTIABLE INSTRUMENTS LAW (5th ed. 1932) § 83.

23. *Id.* at § 119.

24. See *id.* at § 103.

25. BRANNAN AND CHAFEE, THE NEGOTIABLE INSTRUMENTS LAW (5th ed. 1932) § 89; see Kessler, Levi and Ferguson, *supra* note 4, at 1387-1388, 1392. There is a possibility, however, that the court might have held that notice of dishonor was unnecessary under N. Y. NEGOTIABLE INSTRUMENTS LAW § 185(4). *Cf.* Jones v. Board of Education, 242 App. Div. 17, 272 N. Y. Supp. 5 (2d Dep't 1934). See BRANNAN AND CHAFEE, THE NEGOTIABLE INSTRUMENTS LAW (5th ed. 1932) § 114(4).

26. BRANNAN AND CHAFEE, THE NEGOTIABLE INSTRUMENTS LAW (5th ed. 1932) § 188.

as an alternative to certification by some banks,[27] and has been deemed equivalent to certification in at least one case.[28]

As between the drawer and the holder, then, the weight of the law puts the collection risk in question upon the holder, but it seems inequitable that either party should have to bear it. Many decisions have placed this risk upon the collecting bank, under the doctrine that an agent accepts at his peril anything other than money upon the account of a draft owing to his principal.[29] This result has been commended because the collecting bank is often in a position to know the financial standing of the drawee bank, and can demand cash if it is not satisfied with the drawee's credit.[30] The rule has been weakened, however, by statute,[31] by judicial recognition of banking custom,[32] and by the use of restrictive stipulations on deposit slips.[33] The holder, whose credit at the bank of deposit has been charged back, is thus left in an unenviable position. Its original claim on the drawer is "paid," although it has as yet received nothing. Its preferred claim against the insolvent drawee is of doubtful value.[34] Consequently, the holder may

27. See Steffen and Starr, *supra* note 9, at 459, 479. On the effect of certification, see 6 ZOLLMANN, BANKS AND BANKING (1936) § 3854.

28. Odle v. Barnes, 117 Tex. 174, 2 S.W. (2d) 577 (1927).

29. Fed. Reserve Bank v. Malloy, 264 U. S. 160 (1924); Fifth Nat. Bank v. Ashworth, 123 Pa. St. 212, 16 Atl. 596 (1889); Nat. Bank of Commerce v. American Exch. Bank, 151 Mo. 320, 52 S.W. 265 (1899); Noble v. Doughten, 72 Kan. 336, 83 Pac. 1048 (1905); *cf.* Anderson v. Gill, 79 Md. 312, 29 Atl. 527 (1894); see 1 MORSE, BANKS AND BANKING (6th ed. 1928) § 247; 1 MECHEM, AGENCY (2d ed. 1914) § 946.

30. This is especially true for local presentments. See (1933) 81 U. OF PA. L. REV. 994, 995; HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS (1931) 256, 276; *cf.* Turner, *supra* note 8, at 483, 484.

31. The states which permitted the collecting bank to accept remittance drafts in lieu of currency by statute prior to the drafting of the Bankers' Collection Code are collected in (1933) 81 U. OF PA. L. REV. 994. The Bankers' Collection Code relieves the collecting banks of liability for taking a draft "where ordinary care is exercised." § 9. N. Y. NEGOTIABLE INSTRUMENTS LAW § 350(h).

32. Cattaruzza v. First Nat. Bank, 106 W. Va. 458, 146 S. E. 393 (1928); United States Fidelity & Guaranty Co. v. Forest County State Bank, 199 Wis. 560, 227 N.W. 27 (1929); Barnes v. People's Bank, 194 N.C. 371, 139 S.E. 689 (1927); *cf.* Adams County v. Meadows Valley Bank, 47 Idaho 646, 277 Pac. 575 (1929).

33. See Pierson, *Legislation Relating to Problems of Check Collection* (1928) 14 A.B.A.J. 406; Comment (1933) 46 HARV. L. REV. 687; (1933) 81 U. OF PA. L. REV. 994. E. S. Macomber Co. v. Commercial Bank, 166 S. C. 236, 164 S.E. 596 (1932); Jefferson County Bldg. & L. Ass'n v. Southern Bank & T. Co., 225 Ala. 25, 142 So. 66 (1932); Fergus County v. Fed. Reserve Bank, 75 Mont. 582, 244 Pac. 883 (1926).

34. The time for making such claim may have elapsed. The assets of the failed bank may not cover even the preferred claims, if he gets one. In those cases where the drawee happens to be a national bank instead of a state bank, no preferred claim will be allowed. Old Company's Lehigh v. Meeker, 294 U.S. 227 (1935); Jennings v. U. S. Fidelity & Guaranty Co., 294 U. S. 216 (1935); Spradlin v. Royal Mfg. Co., 73 F. (2d) 776 (C.C.A. 4th, 1934); see Comment (1935) 13 N.C.L. REV. 487.

take a sizable loss for no better reason than that some one has to suffer for the imperfections of the collection process. It would seem that a more equitable allocation of collection risks could be achieved by extending the Federal Deposit Insurance statute to include collections.[35] Such action, supplemented by state legislation, would eliminate much of the prevailing loss and uncertainty.

INDISPENSABLE PARTIES IN THE FEDERAL COURTS AS AFFECTED BY THE DOCTRINE OF SOVEREIGN IMMUNITY*

ACTING as the agent of the Philippine Islands, the Secretary of War[1] opened deposit accounts in certain national banks, which pledged assets in the form of bonds as security, as required by a Philippine statute. Upon the insolvency of the banks, these bonds were sold by the Secretary and the proceeds deposited with the defendant bank to the credit of the Philippine Government. Suit was then brought by the receivers of the insolvent banks to impress this fund with a trust for the benefit of all their creditors and stockholders on the ground that the pledge was *ultra vires*. The defendant depositary bank moved to dismiss the complaint, alleging that the Philippine Government was an indispensable party, immune from suit without its consent. In making its interlocutory ruling, the court found it unnecessary to deal with the question of immunity. It held that under the recent decisions of the Supreme Court, pledges by national banks to secure deposits are *ultra vires* and void in the absence of express Congressional authority,[2] and that, as a consequence, the transfer and even the subsequent sale of the bonds and deposit of the proceeds passed no interest to the intended pledgee, or to his principal, the Philippine government, who, therefore, could not be considered an indispensable party where title to those deposit accounts was at issue.[3]

35. See Steffen, *supra* note 5, at 556.

*Baldwin v. Chase National Bank of New York, U. S. Dist. Ct. (S. D. N. Y.), August 5, 1936.

1. See PHIL. REV. ADMINISTRATIVE CODE (1917) § 625.

2. Texas & Pac. Ry. v. Pottorff, 291 U. S. 245 (1934); City of Marion v. Sneeden, 291 U. S. 262 (1934).

3. The statement of the instant court that an *ultra vires* pledge when executed passes no interest to the intended pledgee is not supported by several Supreme Court authorities, which hold that such a transfer is valid until set aside in a direct proceeding instituted for that purpose. Logan County Bank v. Townsend, 139 U. S. 67 (1891); Kerfoot v. Farmers' & Merchants' Bank, 218 U. S. 281 (1910). The question of sovereign immunity was not involved, however, in either of these cases.

It is obvious that the Philippine Government, under the ordinary rules of federal equity practice, would be termed an indispensable party to the suit so long as it could be said to have any interest in the deposited sums. United States v. Bank & Trust Co., 296 U. S. 463 (1936). A federal court may not proceed in the absence of an indispensable party, although it may do so in the case of a proper or of a necessary party. DOBIE, FEDERAL JURISDICTION AND PROCEDURE (1928) § 68. For a useful set of rules

The rule of sovereign immunity from suit[4] is mitigated in certain instances, to protect individuals against illegal acts, by holding that suits against officials in their individual capacity are not suits against the state, so long as the decree will neither subject it to liability nor directly affect its interests.[5] This result has been reached where the agent had control of property to which the state was held to have no legal title,[6] or where he was acting beyond the scope of his authority,[7] or under an unconstitutional statute or an illegal order.[8] It has also been held that the state is not an indispensable party where suit is brought to compel performance of a purely ministerial duty or to compel the exercise of discretion,[9] although mandamus will not lie to determine the result of an exercise of discretion or where such a decree would interfere with the general powers and functions of government.[10] In all such cases, the state, on the merits of the pleadings, would seem to have a direct interest in the controversy, and thus qualify under the ordinary rule as an indispensable party, so that the suit could not proceed in its absence. But the courts avoid this result, and retain jurisdiction of the suit, determining the merits of the case to decide the preliminary issue of parties,

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as to when a party is indispensable, see Roos v. Texas Co., 23 F. (2d) 171, 172 (C. C. A. 2d, 1927).

4. 3 WILLOUGHBY, CONSTITUTION OF THE UNITED STATES (2d ed. 1929) § 887.

5. See Hyneman, *Judicial Interpretation of the Eleventh Amendment* (1927) 2 IND. L. J. 371. A distinction seems to be made in the cases between suits for injunctions and those claiming affirmative relief. See Cunningham v. Macon & Brunswick R. R., 109 U. S. 446, 451–452 (1883); Pennoyer v. McConnaughy, 140 U. S. 1, 16 (1891). An individual, in the absence of consent on the part of the state, has no remedy against it for breach of contract. Hans v. Louisiana, 134 U. S. 1 (1890). And this is also true where suit is formally brought against one of its agents. Hagood v. Southern, 117 U. S. 52 (1886); Hooe v. United States, 218 U. S. 322 (1910). It has also been held that the state is an indispensable party where a decree in favor of the plaintiff would force the official to pay out sums from the state treasury. Governor of Georgia v. Madrazo, 1 Pet. 110 (U. S. 1828); Lankford v. Platte Iron Works Co., 235 U. S. 461 (1915). It would thus appear that no redress could have been awarded the plaintiff in the instant case had the sums in question been taken to the Philippines and there placed in the treasury.

6. United States v. Peters, 5 Cranch. 115 (U. S. 1809); Osborn v. Bank of United States, 9 Wheat. 738 (U. S. 1824); United States v. Lee, 106 U. S. 196 (1882); Tindal v. Wesley, 167 U. S. 204 (1897); Correa v. Barbour, 71 F. (2d) 9 (C. C. A. 1st, 1934); O'Connor v. Rhodes, 79 F. (2d) 146 (App. D. C. 1935); see 3 WILLOUGHBY, *op. cit. supra* note 4, § 913.

7. Johnson v. Lankford, 245 U. S. 541 (1918); Northern Pac. Ry. v. North Dakota, 250 U. S. 135 (1919).

8. Poindexter v. Greenhow, 114 U. S. 270 (1884); *Ex parte* Young, 209 U. S. 123 (1908); Truax v. Raich, 239 U. S. 33 (1915); Greene v. Interurban R. R., 244 U. S. 499 (1917).

9. Roberts v. United States, 176 U. S. 221 (1900); Miguel v. McCarl, 291 U. S. 442 (1934).

10. McCarl v. Rogers, 48 F. (2d) 1023 (App. D. C. 1931); McCarl v. Hoeppel, 68 F. (2d) 440 (App. D. C. 1933); see Cunningham v. Macon & Brunswick R. R., 109 U. S. 446, 452 (1883).

concluding, if the plaintiff is found to be right, that the state can be dispensed with as a party since its claim is thus revealed as groundless.[11]

The paradoxical quality of such reasoning is well exemplified by the frank admission of the judge in the instant case that he evaluates the claims of the parties as they might ultimately be determined in order to decide how their interests in the action should be classified, prior to the trial on the merits. There are substantial reasons to view the Philippine Government as an indispensable party in the present suit since it, and not the defendant bank, claimed ownership of the funds on deposit,[12] a claim which will be determined by an adjudication of other claims for the money, so as to require the claimant as an indispensable party. Not being bound by the decree, it could sue the defendant bank and conceivably subject it to double liability.[13] This possibility is an additional reason for considering its presence indispensable to the suit, since the courts have generally held that a decree must bind all those who might otherwise subject the defendant to further litigation over the same claim.[14] Although the immunity of the Philippines[15] was not dealt with in

11. *Ex parte* Young, 209 U. S. 123, 159 (1908). For a case making use of this substantive approach, but determining that the United States was an indispensable party, since a decision of the ultimate question would necessitate the interpretation of a doubtful statute, upon whose construction all interested parties had a right to be heard, see Louisiana v. Garfield, 211 U. S. 70 (1908).

12. It has usually been held that those having an interest in a fund are indispensable parties where the decree sought might so operate upon the fund as to put it beyond the reach of the absentees. Russell v. Clark's Executors, 7 Cranch 69 (U. S. 1812); Williams v. Bankhead, 19 Wall. 563 (U. S. 1873); Gregory v. Stetson, 133 U. S. 579 (1890); United States v. Bank of New York & Trust Co., 296 U. S. 463 (1936); see 1 STREET, FEDERAL EQUITY PRACTICE (1909) § 520.

13. REV. STAT. § 737 (1875), 28 U. S. C. § 111 (1934); SUPREME COURT EQUITY RULE 39 (1912); see Correa v. Barbour, 71 F. (2d) 9, 12 (C. C. A. 1st, 1934).

14. Goodman v. Niblack, 102 U. S. 556 (1880); Walsh v. Memphis, C. & N. R. R., 6 Fed. 797 (C. C. E. D. Mo. 1881); Continental Adjustment Co. v. Cook, 152 Fed. 652 (C. C. E. D. Wis. 1906). Such a recovery appears rather remote, since the Supreme Court would be the court of last resort in the suit attacking the validity of the pledge as well as in that brought by the Philippine Government to recover the deposited sums. 26 STAT. 828 (1891), 28 U. S. C. § 347 (1934); 43 STAT. 940 (1925), 28 U. S. C. § 349 (1934); *cf.* 47 STAT. 765 (1933), 48 U. S. C. § 1237 (6) (1934).

15. It appears that the subpoena in the instant case was served a few hours before the Commonwealth of the Philippine Islands was established on November 15, 1935. The United States, however, has retained some power of supervision over their affairs until July 4, 1946. 47 STAT. 761–770 (1933), 48 U. S. C. §§ 1231–1247 (1934). It seems that the Philippines would be immune from suit as an insular possession of the United States. See Merritt v. Government of the Philippine Islands, 34 Phil. 311, 316 (1916); MALCOLM, GOVERNMENT OF THE PHILIPPINE ISLANDS (1916) § 126; 1 WILLOUGHBY, *op. cit. supra* note 4, § 278. Porto Rico has been held immune from suit without its consent. Porto Rico v. Rosaly, 227 U. S. 270 (1913). And so too has Hawaii. Kawananakoa v. Polybank, 205 U. S. 349 (1907). Nor would the result be different if the Philippines were considered an independent sovereignty, for then it would be granted immunity as a matter of comity, *cf.* Williams v. Suffolk Ins. Co., 13 Pet. 415 (U. S. 1839); Oetjen v. Central Leather Co., 246 U. S. 297 (1918).

the opinion, its tenor makes evident that this consideration must have counted heavily with the court, whose method of examining the substance of the case before deciding the jurisdictional question of parties would thus appear apparently in line with precedent.[16]

The court's evident desire to subordinate the much criticized principle of sovereign immunity[17] to the policy of permitting each depositor to share in a *pro rata* distribution of the assets of an insolvent bank is not open to objection, but the soundness of the decision can be questioned upon either of two grounds. In the first place, the plaintiffs' right to a recovery on the merits has not been established; for, although the Supreme Court in several cases has held that pledges by national banks to secure deposits are *ultra vires*, those decisions may be distinguished. A Philippine statute, in force when the deposits were made, provided that government funds should be deposited only in those banks which would advance such security.[18] Since this statute was not annulled when it was reported to Congress,[19] it might be considered an act of Congress for the purpose of rendering valid the pledges in question. It is probable, however, that the express Congressional authorization required by the Supreme Court could not be spelled out in this manner; for it has generally been held that the mere failure of Congress to annul a law reported to it does not stamp that law with its express approval.[20] Moreover, the pledge to secure the Philippine deposits had been executed and the pledged bonds sold,[21] although it is doubtful whether this fact alone would take the case without the policy laid down by the Supreme Court against giving effect to *ultra vires* pledges by national banks. That the merits of the case, however, were not crystal clear would not of itself prevent the evasion of the doctrine of sovereign immunity under the authorities,[22] and the main ground for criticizing the result reached by the court lies in the fact that the proceeds from the sale of the pledged securities were deposited along with other Philippine funds in accounts with the defendant bank which were active. As a result, when the issue of tracing trust funds comes before the court, the

16. See cases cited *supra*, notes 5-11.

17. See Borchard, *Tort Liability of the State* (1930) 12 J. COMP. LEG. & INT. L. (N. S.) 1, at 2-3.

18. PHIL. REV. ADMINISTRATIVE CODE (1917) § 625.

19. 39 STAT. 551 (1916), 48 U. S. C. § 1054 (1934); 56 CONG. REC. 68, 104 (1917).

20. Miners' Bank v. Iowa, 12 How. 1 (U. S. 1851); Clayton v. Utah Territory, 132 U. S. 632 (1890); Springer v. Philippine Islands, 277 U. S. 189 (1928); United States v. Bull, 15 Phil. 7 (1910).

21. *Cf.* National Bank of Xenia v. Stewart, 107 U. S. 676 (1882). In this case, one McMillan advanced to the bank certain shares of its own capital stock as security for a previously contracted debt. The receipt by the bank of such shares as security was expressly prohibited by statute. Recovery against the bank was denied, however, on the ground that the pledge had been executed. The *Xenia* case can be distinguished from the one at bar in that in the latter case the policy of the statutory restriction, *i.e.*, to protect the bank, would have been thwarted by permitting recovery against the bank for the proceeds of the executed pledge.

22. See United States v. Lee, 106 U. S. 196 (1882). But *cf.* Louisiana v. Garfield, 211 U. S. 70 (1908).

entire deposit account of the Philippine Government will be subjected to judicial scrutiny, and consequently the case on the merits will place in jeopardy property which admittedly belongs to the Philippines,[23] whose presence to the suit has been termed not indispensable. Such a position is without the support of precedent.

A further criticism may be directed at the decision in that it does not deal with the question of immunity, and therefore might be considered as sanctioning as a general practice the procedure of arriving at a conclusion upon the merits before determining the question of parties, a method used in the present case as an escape from the doctrine of sovereign immunity to permit relief to an otherwise remediless plaintiff.[24] Where some court, however, would afford the requisite jurisdiction, no justification remains for the use of a procedure which permits a case to be heard in the absence of the principle party in interest, who would normally be in the position to offer the best defense, and whose interests might be irreparably injured by the decree.

VALIDITY OF ABSENTEE REGISTRATION*

IN 1935 the Florida legislature enacted laws to allow absent, registered electors to vote by mail from without the state at all elections and to permit absent citizens to register by mail.[1] At a primary election where a few votes cast by persons registered under the new act were decisive, those votes were challenged. The Florida Supreme Court found the absentee registration law unconstitutional because the statutory oath deviated from the one required by the state constitution[2] and invalid because registration as the first step in voting is a sovereign act of an individual citizen which therefore must be performed within the state. While subsequent legislation might easily remedy the defective oath, the second objection renders absentee registration forever

23. It would be immaterial in this regard whether the court followed the "first in, first out" rule or adhered to the theory that where a trustee draws money out of a mixed account, he is presumed to draw out his own funds until they become exhausted. For a discussion of these two rules, see Hirsch, *Tracing Trust Funds—Modern Doctrines* (1936) 11 TEMP. L. Q. 11.

24. This substantive approach was used, however, in Hamilton v. Savannah, F. & W. Ry., 49 Fed. 412 (C. C. S. D. Ga. 1892), although the question of sovereign immunity was not involved in the suit.

*State *ex rel.* Gandy v. Pace, 169 So. 854 (Fla. 1936); (1936) 5 GEO. WASH. L. REV. 124.

1. FLA. COMP. GEN. LAWS ANN. (Skillman, Supp. 1936) § 438. Since many citizens of Florida are absent during the hot summer and fall months, absentee voting is especially desirable and absentee registration is a logical complement, for registration is a constitutional prerequisite to voting. FLA. CONST. art. VI, § 2.

2. FLA. CONST. art. VI, § 3. The court also inferred the necessity of personal registration from the constitutional requirement that naturalized citizens produce to the registration officers their certificates of naturalization. FLA. CONST. art. VI, § 1. State *ex rel.* Gandy v. Pace, 169 So. 854 (Fla. 1936).

unavailable in Florida, even by constitutional amendment.[3] But it seems a confusing use of metaphor to describe registration and voting as sovereign acts,[4] and a mistake of law to assume that such acts are capable of being exercised only within the territorial boundaries of the state in which the elector is one of the sovereigns.[5] Never before has the vague descriptive concept of sovereignty been mentioned when considering the validity of such legislation. Although no other court has passed directly upon the validity of an absentee registration statute,[6] absentee voting statutes have generally been upheld,[7] and where they have been held invalid, all the decisions have turned upon a fairly direct interpretation of a relevant constitutional provision rather than upon vague doctrines of law or political theory.[8]

It appears, however, that the desire of the court to minimize election frauds rather than its respect for doctrines of sovereignty motivated the invalidation of what it deemed to be an unsound registration law. The purpose of registration is to prevent illegal voting by permitting only those citizens to cast ballots who can be identified as properly qualified electors. Since the era of the Civil War every state has found it imperative to adopt some form of registration law as well as other reforms in election administration, and

3. Since the court assumes that it is beyond the legitimate jurisdiction of the state to confer the privilege of absentee registration, such an amendment would be ineffective.

4. The Florida court was apparently impressed with the fact that conceptually the people are the ultimate source of sovereign power delegated by them to the state and that voting is an exercise of this power. See COOLEY, CONSTITUTIONAL LIMITATIONS (8th ed. 1927) pp. 3, 4, 81, 82, 1354.

5. It hardly seems an extension of a state's jurisdiction beyond its borders. [*Cf.* Blackmer v. United States, 284 U. S. 421 (1932)] to permit it to grant the privilege of absentee registration to its absent citizens. See Jenkins v. State Board of Elections, 180 N. C. 169, 171, 104 S. E. 346, 347 (1920).

6. In Clark v. Nash, 192 Ky. 594, 234 S. W. 1 (1921), absentee voting was held unconstitutional, but that part of the same law which allowed absentee registration was said, by way of dictum, to be valid. See Jenkins v. State Board of Elections, 180 N. C. 169, 175, 104 S. E. 346, 349 (1920) where it was said that absentee registration if ever enacted in North Carolina would be invalid only because directly in conflict with the state's constitution.

7. Absentee voting laws are in effect in forty states. A typical decision upholding the validity of such a law is Moore v. Pullem, 150 Va. 174, 142 S. E. 415 (1923). See Notes (1921) 14 A.L.R. 1256, (1922) 19 A.L.R. 308, (1925) 35 A.L.R. 819; (1936) 5 GEO. WASH. L REV. 124, 125.

8. Bourlard v. Hildreth, 26 Cal. 161 (1864); Opinion of the Judges, 30 Conn. 591 (1862); Clark v. Nash, 192 Ky. 594, 234 S. W. 1 (1921); People v. Blodgett, 13 Mich. 127 (1865); Thompson v. Scheier, 57 P. (2d) 293 (N. M. 1936); Baca v. Ortiz, 61 P. (2d) 320 (N. M. 1936); Opinion of the Justices, 44 N. H. 633 (1863); Opinion of the Justices, 80 N. H. 595, 113 Atl. 293 (1921); Chase v. Miller, 41 Pa. 403 (1862); Lancaster City's Fifth Ward Election, 281 Pa. 131, 126 Atl. 199 (1924); Opinion of the Judges, 37 Vt. 665 (1864). Revisions of state constitutions or constitutional amendments have removed the constitutional infirmities on which the civil war decisions were predicated.

these measures have made election frauds at least more difficult, if not impossible.[9] The court apparently considered the Florida absentee registration law an unwise backward step, since it provided a relatively convenient method of evading election laws. If physical presence, upon which the state's criminal jurisdiction is normally predicated, is not compelled at some time during the voting process, there is no practical means by which the state may deter and punish those who attempt to register and vote by mail from without the state by misrepresenting themselves to be qualified electors.[10] Such a person would not be subject to rendition on demand by Florida;[11] for, although he has committed a crime which is properly punishable in Florida,[12] rendition is available as a matter of constitutional right only against fugitives from justice, and a fugitive is one who has committed at least part of the crime in the demanding state and then fled therefrom.[13] While election frauds can be effectively curbed only by honest, competent administration of an efficient system, the threat of prosecution is an essential ingredient of a comprehensive election plan. Although there is some weight in the court's concern for the purity of the Florida ballot, that anxiety may prove unfounded as a practical matter; for no special problems of election fraud have been reported in those states which permit extra-state registration and voting.[14]

The decision, however, may have indirect effects on permanent registration and absentee voting in Florida. Approximately 30 states have recently enacted some form of permanent registration, and when the law has been properly formulated, its competent administration has proven to be more convenient, efficient, and economical than the old system of periodic registration, and has decreased election frauds.[15] Since there is less need for absentee registration under a system of permanent registration,[16] the decision in the principal

9. See HARRIS, REGISTRATION OF VOTERS IN THE UNITED STATES (1929) c. 1, 3; HARRIS, ELECTION ADMINISTRATION IN THE UNITED STATES (1932) 381.

10. There are statutes in Florida, as in every other state, which make fraudulent registration or voting a crime punishable by fine and or imprisonment. FLA. COMP. GEN. LAWS ANN. (Skillman, 1927) §§ 8154-8157, 8163, 8171, 8179, 8200, 8201.

11. U. S. CONST. Art. IV, § 2 cl. 2; REV. STAT. § 5278 (1875), 18 U. S. C. § 662 (1934). See 2 MOORE, EXTRADITION AND INTERSTATE RENDITION (1891) c. 1.

12. See United States v. Bowman, 260 U. S. 94 (1922); *cf.* American Banana Co. v. United Fruit Co., 213 U. S. 347 (1909).

13. Strassheim v. Daily, 221 U. S. 280 (1911). See 2 MOORE, *op. cit. supra* note 11, at c. 4; Elpern, *Important Phases of the Law of Interstate Extradition* (1930) 33 LAW NOTES 188; (1927) 41 HARV. L. REV. 74.

14. See HARRIS, ELECTION ADMINISTRATION (1934) 381. Arizona, California, Iowa, Michigan, Minnesota, New Mexico, New York, Oregon, Tennessee and Washington all allow registration and voting by mail, at least in certain counties. No resulting election frauds have been reported.

15. See HARRIS, REGISTRATION OF VOTERS IN THE UNITED STATES (1929) at 17; Pollock, *Election Administration in Michigan* (1934) 23 NAT. MUNIC. REV. 343; (1932) 21 NAT. MUNIC. REV. 659; (1935) 24 NAT. MUNIC. REV. 118. But see (1936) 25 NAT. MUNIC. REV. 98.

16. See HARRIS, *op. cit. supra* note 15, at 206.

case may hasten its adoption in the state primary elections.[17] But the invalidity of absentee voting in Florida appears predetermined by the principal decision, unless the court is willing to distinguish it on the ground that the sovereign act of voting occurs at the election office where the ballot is cast and not outside the state where it is marked by the elector, whereas the sovereign act of registration occurs where the elector fills out the registration application blank.[18] Although such result would be highly illogical, it is far from improbable.[19] Thirty-nine states, excluding Florida, now allow registered electors to vote by mail from without the state,[20] and even though the number of absentee ballots usually cast is disappointingly small, such provisions are generally considered desirable.[21] Furthermore, in two cases decided since the principal one in which the validity of the Florida absentee voting law was attacked, the court declined to pass upon its constitutionality,[22] a situation which may suggest that the court is reluctant to invalidate the statute.

Conflict of Jurisdiction between Federal and State Courts with Respect to Water Rights*

In 1903 a state court entered a final decree fixing the respective priorities of various claimants to the water of a Montana creek, enjoining them from interfering with each other's rights as determined, and appointing a water

17. At present there is permanent registration in Florida in general elections but in the primaries, which are the really important state elections, there is biennial registration in most counties. See Fla. Gen. Comp. Laws Ann. (Skillman, 1927) §§ 364, 366, 367.

18. Presumably it could be argued that the post office was the absent elector's agent and that the vote is not cast until it is put in the ballot box by the precinct election officer, also the elector's agent. But in the act of registration, the fraud may occur where the oath of registration is taken and not when the registration certificate is delivered to the registrar.

19. See Jenkins v. State Board of Elections, 180 N. C. 169, 175, 104 S. E. 346, 349 (1920); (1936) 5 Geo. Wash. L. Rev. 124, 125.

20. In Kentucky, Maryland, Mississippi, Missouri, New Jersey, Oklahoma, Pennsylvania, and South Carolina absentee voting laws have either been repealed or declared unconstitutional except that in four of the above states absentee voting is allowed to those in military service. See Harris, Election Administration (1934) c. 8.

21. See *id.* at 63, 293.

22. In State *ex rel.* Gandy v. Pace, 170 So. 118 (Fla., 1936), which continued the principal litigation, the court held that personal registrations were not subject to collateral attack by mandamus which is permissible only when the jurisdiction to register is attacked, as it was in the principal case.

State *ex rel.* Titus v. Peacock, 170 So. 309 (Fla., 1936) held that the constitutionality of the absent voters' law could not be collaterally attacked by mandamus but must be left undecided until appropriately presented in some litigation wherein the affected voters may defend their rights, if any, which exist under the alleged unconstitutional laws.

*Sain v. Montana Power Co., 84 F. (2d) 126 (C. C. A 9th, 1936).

commissioner, pursuant to statute, to apportion the waters of the stream accordingly. A commissioner was still in authority thirty years later when a controversy between the successors in interest of the original parties culminated in a suit in the federal courts to enjoin the defendant from interfering with the plaintiff's adjudicated rights by changing its diversion points. The trial court dismissed the complaint without motion because of the prior assumption of jurisdiction by the state court and its exercise of continuing control over the creek through water commissioners.[1] The order of dismissal was reversed by the Circuit Court of Appeals.[2]

Where a state and a federal court have concurrent jurisdiction of an action *in rem,* the court which first acquires jurisdiction obtains exclusive authority to control and dispose of the *res,* so that the other is precluded on principles of comity from exercising jurisdiction over the same *res* to defeat or impair the jurisdiction of the first court.[3] Although the rule is nowhere clearly expressed, it seems to comprehend only those situations where the first suit is *in rem* and the second suit is either *in rem* or an *in personam* adjudication that will tend to interfere with the control of the first court,[4] such as an action of ejectment brought after the appointment by another court of a receiver of realty.[5] Actions to adjudicate water rights have uniformly been held *in rem* in this connection.[6] The application of this rule generally,

1. Sain v. Montana Power Co., 5 F. Supp. 792 (D. Mont. 1934).

2. Sain v. Montana Power Co., 84 F. (2d) 126 (C. C. A. 9th, 1936).

3. Kline v. Burke Construction Co., 260 U. S. 226 (1922). See generally Durfee and Sloss, *Federal Injunction Against Proceedings In State Courts: The Life History of a Statute* (1932) 30 MICH. L. REV. 1145; Taylor and Willis, *The Power of Federal Courts to Enjoin Proceedings in State Courts* (1933) 42 YALE L. J. 1169; Warren, *Federal and State Court Interference* (1930) 43 HARV. L. REV. 345.

4. *Cf.* Durfee and Sloss, *supra* note 3, at 1164. The rule of comity is applied although the same party has initiated both actions. Garner v. Second Nat. Bank of Providence, 67 Fed. 833 (C. C. A. 1st, 1895); Marchant v. Wannamaker, 176 S. C. 369, 180 S. E. 350 (1935). But *cf.* (1927) 36 YALE L. J. 419. And it would seem that a party attaching a *res* in one jurisdiction should not be able later to attach the same *res* after its removal in some manner to a more convenient jurisdiction. *Cf.* (1926) 40 HARV. L. REV. 314. It is not certain, however, whether garnishment is *in rem* for purposes of the rule of comity. Compare Nat. Fire Ins. Co. v. Sanders, 38 F. (2d) 212 (C. C. A. 5th, 1930), with Harvey v. Great No. Ry., 50 Minn. 405, 52 N. W. 905 (1892); *cf.* Penn Gen. Casualty Co. v. Pennsylvania, 294 U. S. 189, 195 (1935). In cases not falling within the rule of comity both courts may proceed until a judgment is obtained in one court which may be pleaded as *res judicata* in the other. Penn Gen. Casualty Co. v. Pennsylvania, *supra.*

5. Barnett v. Mayes, 43 F. (2d) 521 (C. C. A. 10th, 1930); *cf.* United States v. Bank of N. Y. & Trust Co., 296 U. S. 463 (1936).

6. Rickey Land & Cattle Co. v. Miller & Lux, 218 U. S. 258 (1910). Water right adjudications have also been likened frequently to suits to quiet title [Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist., 3 Cal. (2d) 489, 45 P. (2d) 972 (1935)] and to partition land [*In re* Silvies River, 199 Fed. 495 (D. Ore. 1912)], both of which are *in rem* for the purposes of the rule of comity [Dennison Brick & Tile Co. v. Chicago Trust Co., 286 Fed. 818 (C. C. A. 6th, 1923) (quiet title); Martin v. Baldwin, 19 Fed. 340 (C. C. D. Cal. 1884) (partition land)].

however, has occasioned much difficulty; for the distinction between actions *in rem* and actions *in personam* is at best an uncertain one,[7] and, if the first action is held to be *in rem* and the second *in personam*, the further difficulty arises of determining when the jurisdiction of the first court would be impaired by the second action and when it would not.[8] Thus, the Circuit Court of Appeals declared the principle of comity inapplicable, although it apparently recognized that the state court was exercising continuing control over the *res* through its commissioner,[9] on the ground that the federal court had not been requested to assert jurisdiction *in rem* over the waters in dispute, but only to issue an *in personam* adjudication, which would not interfere with the water commissioner in his administration of the *res*.[10] This conclusion seems untenable[11] even if the doubtful assumption be made that the second action was *in personam*, unlike the first. Direct conflict would seem no less likely where two courts seek to distribute a limited supply of water[12] than where they attempt to apportion a limited fund of assets through different receivers.[13]

Irrespective of principles of comity, moreover, the exercise of jurisdiction by the federal courts in a situation of this sort would seem to be an abuse of discretion. The economical and effective adjudication of water rights has been one of the most persistent problems of the semi-arid states. The endless litigation, multiplicity of suits and uncertainty with respect to water

7. See Durfee and Sloss, *supra* note 3, at 1163; Dodd, *Equity Receiverships as Proceedings in Rem* (1928) 23 ILL. L. REV. 105.

8. Compare, *e.g.*, Riehle v. Margolies, 279 U. S. 218 (1929), with United States v. Bank of N. Y. & Trust Co., 296 U. S. 463 (1936); see also Comment (1930) 43 HARV. L. REV. 462.

9. The control of a court officer, such as a receiver, acting subject to the orders of a court, is generally held equivalent to that of the court itself, even though he is a statutory officer. United States v. Bank of N. Y. & Trust Co., 296 U. S. 463 (1936); see Rocky Ford Canal Co. v. Cox, 59 P. (2d) 935, 938 (Utah 1936).

10. *Cf.* Penn Gen. Casualty Co. v. Pennsylvania, 294 U. S. 189, 195 (1935).

11. Rickey Land & Cattle Co. v. Miller & Lux, 218 U. S. 258 (1910); Pitt v. Rodgers, 104 Fed. 387 (C. C. A. 9th, 1900); United States v. American Ditch Ass'n, 2 F. Supp. 867 (D. Idaho 1933); *cf.* Twin Falls Land & Water Co. v. Twin Falls Canal Co., 7 F. Supp. 238 (D. Idaho 1933). But *cf.* Pacific Live Stock Co. v. Lewis, 241 U. S. 440 (1916).

12. *E.g.*, Weiland v. Reorganized Catlin Consol. Canal Co., 61 Colo. 125, 156 Pac. 596 (1916), cited *infra* note 17; see note 11, *supra*; Carpenter, *Conflict of Jurisdiction Respecting Control of Waters in Western States* (1930) 2 ROCKY MT. L. REV. 162, 171; *cf.* Zimmerman v. So Relle, 80 Fed. 417 (C. C. A. 8th, 1897) (conflict between two suits to quiet title).

Furthermore, jurisdiction has been refused where the act sought to be enjoined would, if committed, constitute contempt of a prior decree. United States v. Pedroli, 111 Fed. 14 (C. C. D. Nev. 1901); *cf.* Wade v. Clower, 94 Fla. 817, 114 So. 548 (1927). The Montana statutes allow written complaint to be filed in the court issuing the decree if there is dissatisfaction with the method of distribution. MONT. REV. CODES ANN. (Anderson & McFarland, 1935) § 7150.

13. Penn Gen. Casualty Co. v. Pennsylvania, 294 U. S. 189 (1935).

titles which accompanied traditional common law procedure often retarded the development of potentially prosperous areas.[14] Almost all of the western states have consequently established statutory methods of adjudicating water rights. Some plans provide for almost complete administrative control;[15] others retain judicial control with administrative assistance;[16] all aim, among other things, at unity of control by determination of all rights to a particular stream in one proceeding.[17] When states seek to improve their water administrations by providing economical and effective methods of settling water right controversies, it seems inappropriate for the federal courts to interfere by entertaining separate actions concerning water rights which have already been adjudicated and are still being supervised by the state authorities.[18] Especially is this so where proper effectuation of decrees requires constant administrative supervision[19] of a type which the federal courts are not empowered to provide.[20]

14. See Pacific Live Stock Co. v. Lewis, 241 U. S. 440, 448 (1916); Lasky, *From Prior Appropriation to Economic Distribution of Water by the State—Via Irrigation Administration* (1929) 1 ROCKY MT. L. REV. 161, 248, 2 *id.* 35; Mont. Irr. Comm., Report to Governor, July, 1906, at 3; Ore. State Engineer, Special Report No. 1, The Need of Water Legislation in Oregon, Dec., 1907; MEAD, IRRIGATION INSTITUTIONS (1903) 350.

15. See, *e.g.*, Ore. State Engineer, Bull. No. 2, The Oregon System of Water Titles, April 15, 1912.

16. This is the case in Montana. Lasky, *supra* note 14, 1 ROCKY MT. L. REV. at 252, 260.

17. See Pacific Live Stock Co. v. Lewis, 241 U. S. 440, 448 (1916); Lasky, *supra* note 14, 1 ROCKY MT. L. REV. at 173. Colorado courts early held that to allow one state district court to take jurisdiction after the entrance of a decree adjudicating water rights by another would be contrary to the purpose of the water adjudication statutes. Weiland v. Reorganized Catlin Consol. Canal Co., 61 Colo. 125, 156 Pac. 596 (1916). But subsequent attempts to establish an exception to this rule confused the law on this point. Compare Hazard v. Joseph W. Bowles Reservoir Co., 87 Colo. 364, 287 Pac. 854 (1930), with Faden v. Hubbell, 93 Colo. 358, 28 P. (2d) 247 (1933); see Whitcomb v. Murphy, 94 Mont. 562, 565, 23 P. (2d) 980, 981 (1933).

18. It has been held an abuse of discretion for a federal court to assume jurisdiction when a state has provided a statutory method of liquidating insurance companies. Pennsylvania v. Williams, 294 U. S. 176 (1935); Gordon v. Washington, 295 U. S. 30 (1935); see Comment (1927) 41 HARV. L. REV. 70; *cf.* Kansas City Pipe Line Co. v. Fidelity Title & Trust Co., 217 Fed. 187 (C. C. A. 8th, 1914) (no statutory scheme). On discretionary jurisdiction generally see Comment (1936) 45 YALE L. J. 1235, 1242 *et seq.*

19. See Montezuma Canal Co. v. Smithville Canal Co., 218 U. S. 371, 384 (1910); Carpenter, *supra* note 12, at 163, 169; Lasky, *supra* note 14, 1 ROCKY MT. L. REV. at 249.

20. On the respective merits of state control and federal control (under statutory provision) see Carpenter, *loc. cit. supra* note 12.

RIGHT OF NAMED INSURED TO RECOVER FOR INJURY UNDER OMNIBUS CLAUSE*

THE OWNER of an automobile was injured through the negligence of a guest driver. An insurance policy bound the insurer to indemnify the owner as named insured, and anyone responsible for the operation of his car with his permission,[1] "against loss by reason of the liability to pay damages to others for bodily injuries" sustained through the operation of the car, by any person other than those in certain excepted classes. The injured owner brought action against the insurer on an unsatisfied judgment against the guest driver, who was concededly protected by the omnibus clause of the policy.[2] The Supreme Court of Errors of Connecticut held[3] that the insurer had not contracted to indemnify the driver against liability to the named insured, by virtue of the clause making it an indemnitor only against liability "to others," words here read to mean not "others than the persons responsible for a particular accident," but "others than the named insured."[4]

Omnibus coverage clauses, now virtually standard in automobile liability insurance policies,[5] extend the protection of such policies to a defined group

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*Cain v. American Policyholders Ins. Co., 120 Conn. 645, 183 Atl. 403 (1936).

1. The extraterritorial coverage endorsement, under which this suit was brought, extended this coverage to include "any person or persons while riding in or legally operating" the motor vehicle, but did not change the effect of the wording of the insuring clause.

2. Such an action is expressly authorized by CONN. GEN. STAT. (1930) § 4231.

3. The Connecticut court in the instant case considered itself bound to interpret the insurer's obligation as one defined by Massachusetts law, since the policy was executed in Massachusetts by a Massachusetts company to a Massachusetts resident, and in its view the law of that state on the point was clearly indicated in a case construing the clause in the Compulsory Motor Vehicle Liability Statute to which the insuring clause in the present policy conformed. [MacBey v. Hartford Accident & Indemnity Co., 197 N. E. 516 (Mass. 1935).] Although the insurer's liability in the instant case was measured exclusively by the provisions of the extraterritorial coverage indorsement which constituted a distinct policy, applicable to matters and territory not covered by the policy to which it was attached [*cf.* Blair v. Travelers Ins. Co., 197 N. E. 60 (Mass. 1935)], the decision of the Massachusetts court was sufficient evidence of the construction it would have deemed proper. Two judges concurred on this ground alone, while the majority interpreted the contract independently to agree with what both groups considered the Massachusetts result. It is to be noted, however, that the two cases may be distinguished on the ground that in the Massachusetts case a statute was the object of inquiry, whereas in the present case a standard insurance policy was involved, and different rules of construction are applicable to each.

4. Cain v. American Policyholders Ins. Co., 120 Conn. 645, 183 Atl. 403 (1936).

5. See Blanchard, *Compulsory Motor Vehicle Liability Insurance in Massachusetts* (1936) 3 LAW AND CONTEMPORARY PROBLEMS 537, 540.

of persons[6] in addition to the insured specifically named therein.[7] A member of the group thus insured is directly protected by the policy,[8] and the insurer's liability to him is independent of any responsibility of the insurer to the owner,[9] and is not conditional on the existence of the owner's liability to the injured person as principal for the negligent driver.[10] Nor is the liability of the insurer, apart from express exceptions, affected by the character of the person to whom the assured becomes liable.[11] It follows, then, that recovery under such a policy should not be denied an injured claimant merely because he would have been protected against liability by the same policy had he negligently caused injury to others, instead of being himself injured by the negligence of another assured. In general the courts follow this reading, and determine the plaintiff's rights under the policy with reference to the circumstances of the case at hand, without regard to what his rights under the policy would be should a different situation arise.[12]

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6. Although the group defined varies with the policy, the omnibus clause is customarily phrased to insure those responsible for the operation of the automobile and those legally operating or riding in it, provided such use or operation is with the consent of the named insured.

7. 5 COUCH, INSURANCE (Supp. 1933) 66; KULP, CASUALTY INSURANCE (1928) 303; Legis. (1933) 8 WIS. L. REV. 349, 350.

8. United States Fidelity & Guaranty Co. v. Mann, 73 F. (2d) 465 (C. C. A. 4th, 1934); Fried v. London Guarantee & Accident Co., 136 Misc. 740, 242 N. Y. Supp. 60 (1930); Barsuk v. Independence Co., 142 Misc. 260, 254 N. Y. Supp. 352 (1931); see Sauriolle v. O'Gorman, 86 N. H. 39, 48, 163 Atl. 717, 722 (1932); (1934) 3 BROOKLYN L. REV. 343, 344. The omnibus clause often specifically provides that the protection of the policy is made available to the additional assureds as if they were named in the policy.

9. Century Indemnity Co. v. Norbut, 117 N. J. Eq. 584, 177 Atl. 248 (Ch. 1935).

10. Ocean Accident & Guaranty Co. v. Schmidt, 46 F. (2d) 269 (C. C. A. 6th, 1931); Smith v. United States Fidelity & Guaranty Co., 109 W. Va. 280, 153 S. E. 584 (1930); *cf.* Brower v. Employers' Liability Assur. Co., 318 Pa. 440, 177 Atl. 826 (1935); RICHARDS ON INSURANCE (1932) 893; 13-14 HUDDY, ENCYCLOPEDIA OF AUTOMOBILE LAW (1931) 406; (1935) 83 U. OF PA. L. REV. 765.

11. Union Automobile Ins. Co. v. Samuelson, 71 Colo. 479, 207 Pac. 1113 (1922); *cf.* Adams v. American Employers Ins. Co. of Boston, 198 N. E. 147 (Mass. 1935); see Farmer v. United States Fidelity & Guaranty Co., 11 F. Supp. 542, 543 (M. D. Ala. 1935).

12. Farmer v. United States Fidelity & Guaranty Co., 11 F. Supp. 542 (M. D. Ala. 1935); Adams v. American Employers Ins. Co. of Boston, 198 N. E. 147 (Mass. 1935); Howe v. Howe, 87 N. H. 338, 179 Atl. 362 (1935); Archer v. General Casualty Co. of Wis., 219 Wis. 100, 261 N. W. 9 (1935); Harrison v. United States Fidelity & Guaranty Co., 255 Ill. App. 263 (1929) (proposition assumed); *cf.* Bachman v. Independence Indemnity Co., 214 Cal. 529, 6 P. (2d) 943 (1931); Dickinson v. Maryland Casualty Co., 101 Conn. 369, 125 Atl. 866 (1924); see American Automobile Ins. Co. v. Cone, 257 S. W. 961, 965, 966 (Tex. Civ. App. 1923); Note (1931) 72 A. L. R. 1375, 1384. *Contra:* Johnson v. Employers' Liability Assur. Corp., 158 Misc. 758, 285 N. Y. Supp. 574 (Sup. Ct. 1935); *cf.* MacBey v. Hartford Accident & Indemnity Co., 197 N. E. 516 (Mass. 1935).

The Connecticut court apparently adopts the opposite view, at least for the named insured, in construing the phrase "to others" as expressly excepting any liability in damages to the named insured from the coverage of the policy. Such a restrictive interpretation seems inconsistent with customary usage in expressing similar exceptions in insurance policies,[13] with the practical objectives of the particular policy here in issue,[14] and with familiar canons of construction.[15] Moreover, this court would hardly extend its view of the policy to bar recovery to injured claimants who happened to qualify as members of the insured group at the time of the accident.[16] It would therefore seem more reasonable and desirable to interpret the phrase "to others" descriptively as indicating persons other than those incurring liability and invoking the protection of the policy in a given case,[17] rather than restrictively to exclude from the coverage of the policy in all cases liability by one of the assureds to injured members of the defined group, or to the named insured.

In the instant case, the court seemed persuaded by the proposition that to allow a named insured to recover under the policy for his own injuries would convert it into a contract of personal accident insurance, a result

13. Had it been intended to except injuries to the named insured from the coverage of the policy, it is reasonable to suppose that the policy would have employed the unequivocal terms used to exclude damages to the property of the named insured. See Howe v. Howe, 87 N. H. 338, 179 Atl. 362, 364 (1935) (in this case the court also indicates that it finds no distinction between the phrases "liability to others" and "liability to any persons" as regards any intent to exclude liability to the named insured from the coverage of the policy). The form of policy now generally used in most states specifically excepts from the coverage of the policy "bodily injury to or death of any person who is a named insured." See Blanchard, *Compulsory Motor Vehicle Liability Insurance in Massachusetts* (1936) 3 LAW AND CONTEMPORARY PROBLEMS 537, 541.

14. By the omnibus clause, the object of the policy is extended to indemnify the members of the defined group as well as the owner of the car against loss through liability to others. For this additional protection an additional premium has undoubtedly been paid. See Barsuk v. Independence Indemnity Co., 142 Misc. 260, 263, 254 N. Y. Supp. 352, 355 (Sup. Ct. 1931); also Dickinson v. Maryland Casualty Co., 101 Conn. 369, 381, 125 Atl. 866, 870 (1924). See Stovall v. New York Indemnity Co., 157 Tenn. 301, 313, 8 S. W. (2d) 473, 476 (1928).

15. The rule is that ambiguous insurance policies are to be construed strictly against the insurer so as to sustain the claim and cover the loss, if reasonably possible. 5 COUCH, INSURANCE (Supp. 1933) 67; VANCE, INSURANCE (1930) 691.

16. Adams v. American Employers Ins. Co. of Boston, 198 N. E. 147 (Mass. 1935); Harrison v. United States Fidelity & Guaranty Co., 255 Ill. App. 263 (1929) (proposition assumed); *cf.* Dickinson v. Maryland Casualty Co., 101 Conn. 369, 125 Atl. 866 (1924); see American Automobile Ins. Co. v. Cone, 257 S. W. 961, 965, 966 (Tex. Civ. App. 1923); SUNDERLIN, AUTOMOBILE INSURANCE (1929) §930; Note (1931) 72 A. L. R. 1375, 1384.

17. This construction also conforms to the meaning accorded the mooted phrase in similar contexts throughout treatises and judicial opinions. Typical example: RICHARDS ON INSURANCE (1932) 893.

considered inconsistent with its form and object.[18] But the analogy is misleading, for personal accident insurance policies indemnify directly against a loss suffered by the injured party who is insured, whereas the construction of the policy for which the plaintiff contended in the instant case would indemnify the person whose negligence was considered at law to have caused the injury against a liability to the injured claimant, who happened in this case to be the owner of the car. The plaintiff does not claim as an insured under the policy, but merely by virtue of a statute[19] which allows him to recover from the insurer directly what it promised to pay to the person incurring the liability to him. This statute subrogates the plaintiff to the rights of the judgment-debtor-driver-indemnitee, and the present suit must therefore be viewed as if the latter were seeking to recover the promised indemnity for his liability; in such a case the analogy of a personal accident insurance policy could hardly be accepted.

Apportionment Between Life Tenant and Remaindermen of Stock Issued in Reorganization*

The corpus of a trust, created in 1913 to pay the income to *L* and the principal on his death to *R*, consisted in part of 200 shares of the Diamond Match Company of Illinois, each share having an intact, or book value of $90.67, the aggregate book value of the stock in the corpus being $18,134. In 1930, when the book value of the same shares had increased to $180.22 each, the Illinois company sold all its assets to the newly organized Diamond Match Company of Maryland, receiving in exchange all of the stock of the Maryland company. Thereupon, the Illinois company sold all the Maryland stock to the Diamond Match company of Delaware, a newly organized holding company, and received in exchange all the stock of the Delaware company, which it then distributed to its stockholders. Finally the Illinois company was dissolved and its stock cancelled. The trust estate, in exchange for its 200 shares in the Illinois company, received 1,000 preferred and 800 common shares in the new Delaware holding company, having a book value of $25 and $13.81 respectively, or an aggregate book value of $36,048. The trustee held the new stock until the death of *L* in 1934 when, on an adjudication of the trust estate, the question of an apportionment between *L* and *R* arose. The court decreed that the remainderman should be awarded as corpus that proportion of the new stock which the intact value of the Illinois stock at the creation of the trust ($18,134) bears to the book value of the holding company stock received by the trustee in 1930 ($36,048), or 50.31% of the new stock. The balance was held to represent an accumulation of trust income to which *L*, the life tenant, was entitled.[1]

18. *Cf.* Johnson v. Employers' Liability Assur. Corp., 158 Misc. 758, 285 N.Y. Supp. 574 (Sup. Ct. 1935), cited *supra* note 12.

19. Conn. Gen. Stat. (1930) § 4231.

**In re* Daily's Estate, 186 Atl. 754 (Pa. 1936).

1. *Ibid.*

It is well settled that a life tenant cannot claim any part of a simple increase in the value of the corpus,[2] which belongs conceptually to the remainderman as capital. Before apportionment of a gain between the life tenant and the remaindermen will be decreed, there must be some action either by the corporation in the form of a cash, stock, or liquidating dividend, or by the trustee in the form of a sale of the trust assets[3]—some transition which will justify the court's attempt to separate the gain into income and capital. Since the new holding company stock received by the trustee in the principal case was not, strictly speaking, a dividend at all but rather a substitution in the trust corpus, the court was required to determine, as a preliminary question, whether the reorganization of the Illinois company constituted a liquidation of the original company and a purchase of stock in a different corporation with the proceeds or was merely a nominal change in the form of the original investment.[4] Although the proportional share of each stockholder in the original physical assets of the Illinois company was left undisturbed by the reorganization, there was a substantial change in the relationship of the stockholders to those assets. The Pennsylvania court held that the "creation of a new corporation acting under the laws of a different forum and with new rights and new interests," coupled with the interposition of a holding company, worked "a complete change and separation in the corporate shares."[5] Although the court was forced to distinguish on tenuous grounds a recent case holding that a merger of several companies did not effect a change in the nature of the trust investment in stock of one of the constituent companies,[6] the decision in the principal case seems inescapable. The physical assets of the Illinois corporation are now held by a Maryland corporation with control vested in a Delaware holding company. The beneficial owners have been removed one step from the corporate property and have lost direct control. Their equities may be seriously impaired by the imposition of prior liens on the operating corpora-

2. Gibbons v. Mahon, 136 U. S. 549 (1890); Anderson v. Bean, 272 Mass. 432, 172 N. E. 647 (1930); United States Trust Co. v. Heye, 224 N. Y. 242, 120 N. E. 645 (1918); Macy v. Ladd, 128 Misc. 732, 219 N. Y. Supp. 449 (1926); *In re* Nirdlinger's Estate, 290 Pa. 457, 139 Atl. 200 (1927); Connolly's Estate, 198 Pa. 137, 47 Atl. 1125 (1901); see Bryan v. Aikin, 10 Del. Ch. 446, 468, 86 Atl. 674, 684 (Sup. Ct. 1913): Matter of Osborne, 209 N. Y. 450, 475, 103 N. E. 723, 730 (1913); 4 BOGERT, TRUSTS AND TRUSTEES (1935) § 824; 2 PERRY, TRUSTS AND TRUSTEES (7th ed. 1929) § 546.

3. *In re* McKeown's Estate, 263 Pa. 78, 106 Atl. 189 (1919); *In re* Buist's Estate, 297 Pa. 537, 147 Atl. 606 (1929); 4 BOGERT, *loc. cit. supra* note 2.

4. See rule expressed in *In re* Buist's Estate, 297 Pa. 537, 147 Atl. 606 (1929).

5. *In re* Daily's Estate, 186 Atl. 754, 756 (Pa. 1936).

6. *In re* Buist's Estate, 297 Pa. 537, 147 Atl. 606 (1929). It is felt that the *Buist* case should have been overruled rather than distinguished. In the case of both reorganization and merger there is a change in the legal relationship between the beneficial owner and the corporate property. The merger may result in very serious practical changes in the character of the investment by reason of the old stock's reduced voting power in the new corporation and of the injection into the new corporation of additional liabilities, new management and operating policy.

tion's earnings; and the entire assets of that company may even be sold or mortgaged without their consent.[7]

Since it viewed the reorganization as a liquidation of the trust corpus, the court was required to divide the stock received as a liquidating dividend between life tenant and remainderman. With respect to the distribution of ordinary dividends[8] between life tenant and remainderman, American courts have generally followed one of two well defined rules.[9] The Pennsylvania rule,[10] in an effort to carry out what it considers to be more nearly the testator's intent and to achieve an equitable result, apportions such dividends, whether declared in cash or in stock, so that the intact value of the corpus calculated as of the time of the creation of the trust is preserved.[11] The

7. For a general treatment of the effect on the rights and liabilities of stockholders of corporate reorganizations, mergers, consolidations, dissolutions, etc., see 1 FLETCHER, CYCLOPEDIA CORPORATIONS (Perm. ed. 1931) § 48; 15 *id.* c. 61, 62; 16 *id.* c. 65.

8. The term "ordinary dividend" is used herein to describe the regular or periodic corporate distribution of earnings as distinguished from extraordinary and/or liquidating dividends. See 4 BOGERT, *op. cit. supra* note 2, § 844.

9. In any jurisdiction, however, the expressed intent of the testator, wherever ascertainable, will govern the distribution of the trust income. Gibbons v. Mahon, 136 U. S. 549 (1890); Union and New Haven Trust Co. v. Watrous, 109 Conn. 268, 146 Atl. 727 (1929); Anderson v. Bean, 272 Mass. 432, 172 N. E. 647 (1930); United States Trust Co. v. Heye, 224 N. Y. 242, 120 N. E. 645 (1918).

10. 4 BOGERT, *op. cit. supra* note 2, § 850 lists the following jurisdictions as adopting the Pennsylvania rule: California, Delaware, Hawaii, Iowa, Indiana, New Jersey, South Carolina, Tennessee, Vermont, and Wisconsin. See also 1 RESTATEMENT, TRUSTS (1935) §§ 235, 236.

11. Earp's Appeal, 28 Pa. 368 (1857); Matter of Osborne, 209 N. Y. 450, 103 N. E. 723 (1913); *In re* Nirdlinger's Estate, 290 Pa. 457, 139 Atl. 200 (1927); *In re* Graham's Estate, 296 Pa. 436, 146 Atl. 111 (1929); *In re* Bullitt's Estate, 308 Pa. 413, 162 Atl. 288 (1932); *In re* Waterhouse's Estate, 308 Pa. 422, 162 Atl. 295 (1932); *In re* Cassatt's Estate, 105 Pa. Super. 14, 158 Atl. 586 (1932). Courts applying the Pennsylvania rule consider that income to the corporation should be income to the life tenant regardless of the corporation's treatment of its income. *In re* Nirdlinger's Estate, *supra*. But capital gains from speculative market conditions, appreciation of assets, increased earning power and good will are said to belong to the corpus. *In re* Nirdlinger's Estate, *supra;* McCoy v. McCloskey, 94 N. J. Eq. 60, 117 Atl. 473 (Ch. 1922); 4 BOGERT, *op. cit. supra* note 2, § 824. In making the actual apportionment, however, the courts say the essential thing is to find the book value of the stock in the estate at the time of its creation and to apportion to the corpus only such amount of future dividends as will maintain the original value. *In re* Stokes's Estate, 240 Pa. 288, 87 Atl. 975 (1913); *In re* Mallory's Estate, 285 Pa. 186, 131 Atl. 714 (1926); *In re* Baird's Estate, 299 Pa. 39, 148 Atl. 907 (1930); *In re* Waterhouse's Estate, *supra; In re* Cassatt's Estate, *supra*. Since speculative market conditions, appreciation of assets, and increased good will may be reflected in the book value, the application of the Pennsylvania rule will not square with its theory unless the bookkeeping and financial practice of the corporation for the period under consideration is minutely analyzed, and capital increases are segregated to the account of the corpus.

The Pennsylvania rule will not require an apportionment unless some segregation of income or earnings has occurred. *Supra*, notes 2 and 3. On the other hand, and

Massachusetts rule[12] arbitrarily awards all cash dividends to the life tenant and all stock dividends to the corpus.[13] These differences are carried over into the field of liquidating dividends, or distribution of assets upon dissolution of the corporation.[14] Courts adhering to the Pennsylvania rule look into the corporate records to apportion to the life tenant that portion of the liquidation payment which is traceable to accumulated net earnings, preserving for the remainderman the value of the original corpus intact.[15] But in Massachusetts rule jurisdictions dividends in liquidation are considered capital and are awarded to the corpus.[16] By treating retained earnings as capital,[17] the Massachusetts rule has the virtue of being easy to administer, and makes the life tenant's income entirely conditional on the dividend policy of the corporation whose stocks are held in the corpus.[18]

Although under the Pennsylvania rule an apportionment is clearly required where, as in the principal case, a reorganization is held to constitute a sale of the trust property, the prudence of such action may be questioned. The extreme difficulty of analyzing the past history of the corporation's transactions, coupled with the trustee's interest in avoiding personal liability for a mistaken calculation requires, in each doubtful case, resort to the courts for judicial interpretation, with attendant delay and expense to the trust

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illogically, it will decree an apportionment on as slight a segregation as the declaration of a stock dividend which, in its ultimate analysis, effects no more of a change in the corporate position than an adjusting bookkeeping entry from surplus to capital.

12. 4 BOGERT, *op. cit. supra* note 2, § 851 lists the following jurisdictions as adopting the Massachusetts rule; United States Supreme Court, Connecticut, District of Columbia, Illinois, Maine, Michigan, Missouri, Nebraska, Ohio, Rhode Island, Virginia, and West Virginia. Statutes of Connecticut, Georgia, New York and Oregon have enacted the Massachusetts rule. CONN. GEN. STAT. (1930) § 4966; GA. CODE (1933) § 85-605; N. Y. PERSONAL PROPERTY LAW § 17-a; ORE. CODE ANN. (Supp. 1935) § 63-1205. THE UNIFORM PRINCIPAL AND INCOME ACT § 5 has accepted the Massachusetts rule.

13. Minot v. Paine, 99 Mass. 101 (1868); Buder v. Franz, 27 F. (2d) 101 (C. C. A. 8th, 1928); Spooner v. Phillips, 62 Conn. 62, 24 Atl. 524 (1892); Union and New Haven Trust Co. v. Taintor, 85 Conn. 452, 83 Atl. 697 (1912); Billings v. Warren, 216 Ill. 281, 74 N. E. 1050 (1905); D'Ooge v. Leeds, 176 Mass. 558, 57 N. E. 1025 (1900); Anderson v. Bean, 272 Mass. 432, 172 N. E. 647 (1930).

14. 4 BOGERT, *op. cit. supra* note 2, § 855.

15. *In re* Schaeffer, 222 N. Y. 533, 118 N. E. 1076 (1917); *In re* McKeown's Estate, 263 Pa. 78, 106 Atl. 189 (1919); *In re* Nirdlinger's Estate, 290 Pa. 457, 139 Atl. 200 (1927).

16. Gifford v. Thompson, 115 Mass. 478 (1874); Brownell v. Anthony, 189 Mass. 442, 75 N. E. 746 (1905); Anderson v. Bean, 272 Mass. 432, 172 N. E. 647 (1930).

17. Wilberding v. Miller, 88 Ohio St. 609, 106 N. E. 665 (1913), supplementary opinion, 90 Ohio St. 28, 106 N. E. 665 (1914); see Gray v. Hemmenway, 268 Mass. 515, 168 N. E. 102 (1929).

18. 4 BOGERT, *op. cit. supra* note 2, § 857. Under the Massachusetts rule the life tenant usually obtains the benefit of an increased income through the reinvestment of the property by the corporation, if a stock dividend, or by the trustee of a liquidating dividend. In the principal case the trust income from the corporate investment increased from an average of $1800 per year before the reorganization to $2300 per year thereafter. Record, pp. 7a-9a, *In re* Daily's Estate, 186 Atl. 754 (Pa. 1936).

administration. Further, it would seem that factors other than an identification of undistributed earnings should be considered to obtain an equitable apportionment. It may be that the stock in the corpus is sufficient to give the trust estate a controlling voice in the corporate management and where this is so, an apportionment of a stock dividend might well operate to divest the estate of such control. Furthermore, since in the ordinary course of events the life tenant has been receiving the customary proportion of the corporate earnings for the duration of the trust through the medium of periodical dividends, it seems highly fictitious to assume that the testator intended that all earnings during the life of the life tenant accrue to him, including undistributed profits which become available for distribution only on the dissolution of the corporation, and then can be identified only after a difficult analysis of the corporation's books.[19] It seems just as reasonable to contend, on the issue of the settlor's intention, that the structure of the trust contemplates a division of the rewards of stockholding between the life tenant, who is to receive the income ordinarily paid over to the stockholder as dividends, and the remainderman, who takes the entire equity of the stock, including surplus accumulated out of undistributed profits.

19. Gibbons v. Mahon, 136 U. S. 549 (1890) *semble.*