

# Notes

## POWER OF BONDHOLDERS TO DEPOSE PROTECTIVE COMMITTEE

DURING the last decade, and particularly during the period of easy credit, S. W. Straus and Company, investment bankers, abandoned a previous course of conservative dealing in the sale and underwriting of first mortgage bonds,<sup>1</sup> and although continuing to advertise that the securities they sold were first liens as well as direct obligations of the underwriting house, offered to the investing public issues secured by second and third mortgages, leaseholds and even collateral bonds.<sup>2</sup> Specific provisions in the trust indentures reserved to the bankers the right to mingle any funds received under the terms of the mortgages with their own deposits, securities and credits. Accordingly, defaults could be concealed by diverting to the use of distressed issues interest and amortization payments received from other mortgagors, and bonds could be sold even though the properties securing them were incapable of maintaining interest payments. However, defaults increased in number and amount until the bankers became financially unable to continue this practice. Reorganization of the corporations whose bonds were in default became necessary,<sup>3</sup> and the investment house consequently formed bondholders' protective committees,<sup>4</sup> designed to establish contact between their sponsor and the multitude of investors.<sup>5</sup> Subsequently, the Straus company, its affiliates and the protective committees became implicated in litigation<sup>6</sup> wherein judicial criticism was directed at the practice of the company in holding positions of conflicting interests connected with approximately one hundred corporate reorganizations. It was at once underwriter of the issues,<sup>7</sup> trustee for the purchasers of the bonds,<sup>8</sup> manager of the properties by which

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1. *People v. S. W. Straus & Co.*, 236 App. Div. 796, 797, 259 N. Y. Supp. 975, 977 (2d Dep't 1932).

2. *Harrigan v. Pounds*, 239 App. Div. 1, 265 N. Y. Supp. 676 (1st Dep't 1933). The lower court's opinion is in 147 Misc. 666, 264 N. Y. Supp. 363 (Sup. Ct. 1933). Both courts outlined the history of S. W. Straus & Company. The New York Court of Appeals has denied review.

3. For a denouement of the practices adopted in the reorganization of one corporation (The Chicago, Milwaukee & St. Paul Railway), see LOWENTHAL, *THE INVESTOR PAYS* (1933), reviewed in (1933) 43 *YALE L. J.* 352.

4. This is the customary way in which the committees are created. DEWING, *FINANCIAL POLICY OF CORPORATIONS* (1926) 935 *et seq.* There are no statutes on the question. At one time Wisconsin had such a statute, *WIS. STAT.* (1927) § 181.06, but it has been repealed, *WIS. STAT.* (1931) § 181.06.

5. But see *Harrigan v. Pounds*, *supra* note 2, 147 Misc. at 675, 264 N. Y. Supp. at 372.

6. *Bergelt v. Roberts*, 144 Misc. 832, 258 N. Y. Supp. 905 (Sup. Ct. 1932), *aff'd*, 236 App. Div. 777, 258 N. Y. Supp. 1086 (1st Dep't 1932); *Sun Life Insurance Co. v. S. W. Straus & Co., Industrial & Realty Finance Co. v. S. W. Straus & Co.*, N. Y. L. J., Sept. 21, 1932, at 1039; *People v. S. W. Straus & Co.*, discussed in *Harrigan v. Pounds*, *supra* note 2, 147 Misc. at 670, 264 N. Y. Supp. at 367, modified on appeal, *id.*, *supra* note 1; *People v. S. W. Straus & Co.*, N. Y. L. J., May 2, 1933, at 2644.

7. *People v. S. W. Straus & Co.*, *supra* note 1, at 797, 259 N. Y. Supp. at 977. The bankers failed to disclose material facts about the bonds at the time of their sale. Quære, whether the bondholders would have deposited with these committees had they known the true condition of the bonds.

8. *Harrigan v. Pounds*, *supra* note 2, 147 Misc. at 667, 264 N. Y. Supp. at 364.

the defaulted issues were secured,<sup>9</sup> and dictator to the protective committees.<sup>10</sup> Because of these attacks upon their activities, the bankers then determined that the members of the seventy-eight separate committees should resign and elect in their stead a single Independent Bondholders' Committee. The men appointed to that body were experienced in corporate reorganizations and apparently had had no previous connection with the investment house.<sup>11</sup>

Several depositors who were parties to fifteen of the seventy-eight protective agreements, and who own a negligible proportion of the bonds involved, have now brought an action against the investment house, its affiliates and the newly-formed protective committee, alleging a fraudulent scheme wherein the Independent Bondholders' Committee was charged with participation and conspiracy. Pending trial of this action, the plaintiffs sought relief by way of rescission and dissolution of all deposit agreements; the return of the bonds to the depositors; an accounting and disclosure of the bondholders' lists; and an injunction and appointment of receivers. The New York Supreme Court granted the injunction, inspection and appointment of receivers on the grounds that the Independent Committee was not a lawful successor to its predecessors, and that because of the interrelation of the properties and the commingling of the funds by the investment house before and after default of various issues, adequate relief for the bondholders would be impossible unless the remedy sought were granted.<sup>12</sup> On appeal, the Appellate Division, one judge dissenting, reversed the decision.<sup>13</sup> It was held that the plaintiffs were without capacity to sue on behalf of the bondholders of issues to which the plaintiffs were not parties, and that, upon the evidence presented, the Independent Bondholders' Committee was properly elected.<sup>14</sup>

Scattered, uninformed as to the soundness of their securities, entirely dependent upon a trustee, and bound by covenants which effectually prohibit initiative on their part, investing bondholders<sup>15</sup> have no adequate means of forming an organization of their own to protect their interests. Proper solicitude for their demands, therefore, is with difficulty exacted of those in control of a reorganization.<sup>16</sup> At best, the bondholder can hope only for an opportunity to cast his lot with a protective committee formed and dominated by the bankers who originally sold the bonds to the

9. An associate of S. W. Straus & Co. was president of its subsidiary, the Reliance Property Management Company, Inc. *Id.* at 668, 264 N. Y. Supp. at 365.

10. *Id.* at 669, 264 N. Y. Supp. at 365; Bergelt v. Roberts, *supra* note 6, at 333, 258 N. Y. Supp. at 906 ("the majority are represented by the S. W. Straus interests . . . who, now that there has been a default, project, sponsor and dominate a reorganization plan").

11. The manner in which the new committee was formed is succinctly stated in Harigan v. Pounds, *supra* note 2, 147 Misc. at 671 *et seq.*, 264 N. Y. Supp. at 367 *et seq.* The qualifications of these men are enumerated by the appellate court, 239 App. Div. at 5 *et seq.*, 265 N. Y. Supp. at 680 *et seq.*

12. *Id.*, 147 Misc. 666, 264 N. Y. Supp. 363.

13. *Id.*, 239 App. Div. 1, 265 N. Y. Supp. 676. O'Malley, J., concurred in result only. Finch, P. J., dissented.

14. The petitioners have applied to the federal court for a federal receiver to replace the protective committees. N. Y. Times, Nov. 19, 1933, II-2.

15. See *People v. F. H. Smith Co.*, 230 App. Div. 268, 271, 243 N. Y. Supp. 446, 450 (4th Dep't 1930).

16. See Frank, *Reflections on Corporate Reorganizations* (1933) 19 VA. L. REV. 698, 711, n. 99a; Posner, *Investors' Problems in Receivership* (1932) 50 MAGAZINE OF WALL STREET 356.

public.<sup>17</sup> The relationship which thus arises has been denoted as one of trust, agency, bailment, assignment and power of attorney.<sup>18</sup> But whatever the appellation, it is agreed that the bondholders' committee must be regarded as having something in common with the ordinary trustee or fiduciary.<sup>19</sup> The specific conduct required of a protective committee is said to be determined by the terms of the instrument creating it.<sup>20</sup> But in interpreting the agreement, it is usually the collateral circumstances which suggest the rationalization for the court's decision. If the facts seem to warrant the committee's actions, the conclusion can be supported by the policy of not delaying the reorganization at a time when lengthy deliberations have at last crystallized into agreements. If, however, the complaint of the bondholders appears reasonable, a ruling favorable to them can be justified on the ground that the bondholders are cestuis and the agreement, prepared by the committee, should be construed strictly against it.<sup>21</sup>

In the instant case, there were before the court only six of the seventy-five thousand bondholders,<sup>22</sup> owning an insignificant portion of the sixty-five million dollars worth of bonds involved. Recognizing that minority groups are often recalcitrant, actuated by motives of personal gain and insincere in effecting a compromise, the court undoubtedly felt extremely reluctant to grant the drastic remedies demanded. Moreover, replacement of committees should not be encouraged,<sup>23</sup> and the mem-

17. Note (1933) 42 YALE L. J. 984. See *Industrial & Realty Finance Co. v. Straus & Co.*, *supra* note 6.

18. See Rodgers, *Rights and Duties of the Committee in Bondholders' Reorganizations* (1929) 42 HARV. L. REV. 899, 928, and cases cited.

19. *Id.* at 905; Rohrllich, *Protective Committees* (1932) 80 U. OF PA. L. REV. 670, 682; Cravath, *Reorganization of Corporations in SOME LEGAL PHASES OF CORPORATE FINANCING, REORGANIZATION AND REGULATION* (1917) 165; DEWING, *op. cit. supra* note 4, at 939; Carey and Brabner-Smith, *Studies in Realty Mortgage Foreclosures* (1933) 28 ILL. L. REV. 1, 7. But to treat this body as an ordinary trustee obviously overstates the extent of its duties, subjecting it to a standard of conduct not required by the nature of the contract, the terms of which often reveal a marked divergence from applied fiduciary principles. In dealing with the corpus, the committee has also been charged with fiduciary obligations to non-depositing bondholders of the corporation to be reorganized. *Bergelt v. Roberts*, *supra* note 6; see Carey and Brabner-Smith, *supra*, at 8 *et seq.*; Rodgers, *supra* note 18, at 918; Rohrllich, *supra*, at 683. *Cf.* *Southern Pacific Co. v. Bogert*, 250 U. S. 483 (1919). The theory is that the protective committees are often in a position to combine with those who control the reorganization, where the interests of the depositor and non-depositor are equally at stake. Note (1933) 42 YALE L. J. 984, 987. See *Southern Pacific Co. v. Bogert*, *supra*, at 492; Rodgers, *supra* note 18, at 901. But *cf.* *Bank of Manhattan Trust Co. v. Ellda Corporation*, 265 N. Y. Supp. 115, 120 (Sup. Ct. 1933). The same conclusion has been reached upon other theories. *Clinton Trust Co. v. 142-144 Joralemon St. Corporation*, 237 App. Div. 789, 793, 263 N. Y. Supp. 359, 363 (2d Dep't 1933); Note (1928) 41 HARV. L. REV. 377, 380.

20. Rodgers, *supra* note 18, at 904, 925; Rohrllich, *supra* note 19, at 676.

21. Rodgers, *supra* note 18, at 905, and cases cited. Rohrllich, *supra* note 19, at 678, and cases cited. DOUGLAS & SHANKS, *CASES AND MATERIALS ON CORPORATE REORGANIZATION* (1931) 395-428.

22. The number of complaining depositors is clearly of significance when the court is asked to pass upon the fairness of the reorganization plan. See *Jameson v. Guaranty Trust Co. of New York*, 20 F. (2d) 808, 815 (C. C. A. 7th, 1927), *cert. den.*, 275 U. S. 569 (1927); *Chicago, Milwaukee & St. Paul Reorganization*, 131 I. C. C. 615, 701, 702 (1928); *Harrigan v. Pounds*, *supra* note 2, 147 Misc. at 669, 264 N. Y. Supp. at 366.

23. This argument is particularly cogent if the court is unwilling to select a committee

bers of the present body were admittedly reputable and had had no previous association with the investment house. Finally, even if the relief here demanded were denied, the petitioners would have ample opportunity to prove their contentions at an early trial on the question of conspiracy. On the other hand, it should be recognized, the only authority for the creation of the Independent Bondholders' Committee was the provision in the protective agreements that the original committees could elect their own members in the event of resignations. This provision was probably designed to apply under ordinary circumstances, but not to permit unfaithful fiduciaries to appoint their successors. Furthermore, the personnel of the new body had been selected by the bankers who had interests and affiliations adverse to the owners of the securities. And a charge of conspiracy in a scheme to defraud the bondholders had been brought against it. A prima facie case for relief, it may be argued, was thereby established. For in a corporate reorganization there should be no question but that the protective committee will faithfully enforce the claims and rights of the bondholders against groups allied with the distressed corporation or concerned in the distribution of its securities.<sup>24</sup>

There were enough conflicting factors before the court, therefore, to support a conclusion for or against the plaintiffs.<sup>25</sup> However, the majority of the judges placed their decision upon the legalistic ground that the petitioners were not entitled to bring a representative action,<sup>26</sup> because the bondholders of issues in which they were not participants were not "similarly situated". Such a ruling not only forecloses due consideration of the merits of the controversy but was not justified by the unprecedented facts of the case. Because of the commingling and diversion of the proceeds of the various mortgages, each bondholder had an interest in one common but limited fund. And since the Independent Committee was the only one in the field, the individual security owners were dependent upon it for representation in the reorganizations. The decision seems to revive the dogma that strict limitations must be placed on equity's power, and that if any relief is forthcoming the legislature must act. It represents a departure from the equitable principle

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and assume the vast administrative responsibility. If the court here merely rescinded the deposit agreements and returned the bonds to the depositors, there would be a strong possibility that the present organization would secure them again. On March 3, 1933, S. W. Straus Co., Inc. was placed in receivership. On March 4th, Straus Securities Co., Inc. was organized, and, as was said in a circular, continued to deal in real estate bonds. The members of the old concern were associated with the new company. Committee Service, Inc., a company organized by the old S. W. Straus Co., Inc., assisted the protective committees in corporate reorganizations. It was retained by the Independent Bondholders' Committee. Apparently, the machinery was there, if needed, to indulge in a new campaign for deposits. See concurring opinion of O'Malley, J., *supra* note 13, 239 App. Div. at 14, 265 N. Y. Supp. at 690.

24. In a statement issued by the White House regarding the protection of American bondholders of foreign securities, it was said: "The organization [protective committee] . . . is to be entirely independent of any special private interest; it is to have no connections of any kind with the investment banking houses which originally issued the loans. It will decide its own affairs independently." N. Y. Times, Oct. 21, 1933, at 25.

25. An anomalous situation would be presented if the protective committee formulated and presented fair plans of reorganization but was subsequently deposed by an adverse holding in the trial on the issue of conspiracy.

26. N. Y. CIV. PRAC. ACT (1920) § 195 reads: "Where the question is one of a common or general interest or where the persons who might be made parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."

which gave rise to the judge-made doctrines of receivership certificates,<sup>27</sup> and the "six-months rule".<sup>28</sup> Moreover, it checks the more favorable trend of offering the bondholders some opportunity for relief before the presentation of the reorganization plan.<sup>29</sup>

VALIDITY OF GIFT IN TRUST TO CHARITABLE CORPORATION TO BE FORMED  
AFTER TESTATOR'S DEATH

EXPRESSIONS of judicial, as well as legislative,<sup>1</sup> solicitude for testamentary beneficence toward charity are of frequent occurrence. Thus perpetual trusts for charity, when properly formed, are generally sustained;<sup>2</sup> a charitable trust is exempt from the usual requirement of definitely ascertainable cestuis;<sup>3</sup> a liberal construction of what constitutes a charity is adopted;<sup>4</sup> and the doctrine of cy pres is invoked to effectuate or continue the testator's charitable intent.<sup>5</sup> Into charitable gifts, however, the rule

27. See Comment (1909) 7 MICH. L. REV. 239.

28. *Fosdick v. Schall*, 99 U. S. 235 (1878). "A court of equity's modes of relief are not fixed and rigid. It can mold its remedies to meet the conditions with which it has to deal." *Grasselli Chemical Co. v. Aetna Explosives Co.*, 252 Fed. 456, 459 (C. C. A. 2d, 1918).

29. Two recent cases on the question of disclosure of bondholders' lists are *Bergelt v. Roberts*, *supra* note 6 (non-depositing bondholders were granted a disclosure of the bondholders' lists in the hands of the protective committee); and *In re International Match Corporation*, 59 F. (2d) 1012 (S. D. N. Y. 1932) (disclosure denied). These cases are noted in (1933) 42 YALE L. J. 984; (1932) COL. L. REV. 1435; (1933) 46 HARV. L. REV. 713; (1933) 19 VA. L. REV. 517. There has been some attempt to introduce state legislation to compel disclosure. See *Carey and Brabner-Smith*, *supra* note 19, at 10. The recent amendment to the Bankruptcy Act, § 77 (c) (added by Amendatory Act of March 3 1933), providing for the reorganization of railroads, requires the debtor or the trustees to prepare lists of all known bondholders of the debtor. These lists must be open to the inspection of any security-holder. The Federal Trade Commission is apparently authorized under the Securities Act of 1933 to compel disclosure of these lists.

1. N. Y. TAX LAW (1909) §§220-221, and CONN. GEN. STAT. (1930) § 1367, for example, exempt from taxation property bequeathed or devised to charitable corporations. See HANDY, INHERITANCE AND OTHER LIKE TAXES (1929) §§ 400-407. Charitable corporations are exempt from payment of the federal corporation income tax. 47 STAT. 193 (1932), 26 U. S. C. SUPP. VI § 103(6) (1932).

2. *Estate of Hinckley*, 58 Cal. 457 (1881); *Morgan v. National Trust Bank of Charleston*, 331 Ill. 182, 162 N. E. 888 (1928); *Wright's Estate*, 284 Pa. 334, 131 Atl. 188 (1925). See 2 PERRY, TRUSTS (7th ed. 1929) § 736; WALSH, FUTURE ESTATES IN NEW YORK (1931) 128. If charitable and non-charitable purposes are so commingled that some portion is not devoted to the purely charitable object, a purported trust *in perpetuo* fails. PERRY, *op. cit. supra*, § 711; ZOLLMAN, AMERICAN LAW OF CHARITIES (1924) § 394.

3. Certainty of beneficiaries is essential in a private trust, but not in a charitable trust. *Clark v. Campbell*, 82 N. H. 281, 133 Atl. 166 (1926); BOGERT, TRUSTS (1921) 192, 422; *Scott, Education and the Dead Hand* (1920) 34 HARV. L. REV. 1.

4. *Chicago Bank of Commerce v. McPherson*, 62 F. (2d) 393 (C. C. A. 6th, 1932); *Haines v. Allen*, 78 Ind. 100 (1881); *George v. Braddock*, 45 N. J. Eq. 757, 18 Atl. 881 (1889); *In re Smith, Public Trustee v. Smith*, [1932] 1 Ch. 153; *Cf. English Statute of Charitable Uses*, 43 ELIZ. c. 4 (1601), enumerating charitable objects and purposes.

5. The judicial cy pres power is in common use where the execution of the charitable

against perpetuities<sup>6</sup> projects certain qualifications. Gifts to individuals, then on a contingency over to persons or a corporation in a charitable trust, involve an application of the rule, and the gift to charity is void, if the contingency may not occur within the period fixed for vesting.<sup>7</sup> Underlying such a holding is a policy of making property freely alienable in the hands of the immediate recipient of the gift. However, a gift to a second charity on a contingency, after a prior gift to a first charity, is considered outside the rule, and valid.<sup>8</sup> Here no argument against inalienability exists; the estate would be no more inalienable in two successive charities than in one, and the rule against remoteness has no application.<sup>9</sup> But where a gift is to charity without a prior gift, on a contingency which may not occur within the period fixed for vesting, it is usually held void as being too remote.<sup>10</sup>

Within this last category fall two recent decisions, distinguishable in circumstance and reaching somewhat different results, involving gifts to charitable corporations not in existence at the time of the death of the respective testators. In one, a New York case,<sup>11</sup> the testator directed his executors to form "as soon as convenient and possible" after his decease a charitable corporation to be known as the "Waterville Home for Homeless Ladies," and named trustees who were to serve in its management. The will then provided that "when such corporation shall be so incorporated, I give" the residuary estate to the trustees in trust for the perpetual endowment and maintenance of the home. The testator's next of kin sought to have the bequest held void under the New York perpetuities statute<sup>12</sup> on the ground that

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trust, as directed by the settlor, is impossible, impracticable, or where the settlor has imperfectly stated his purpose or the method of administration. *In re Durbrow's Estate*, 245 N. Y. 469, 157 N. E. 747 (1927), noted in (1927) 22 ILL. L. REV. 454, and (1928) 13 CORN. L. Q. 310; *Mears' Estate*, 299 Pa. 217, 149 Atl. 157 (1930), noted in (1930) 39 YALE L. J. 1219; *cf. Linney v. Cleveland Trust Co.*, 30 Ohio App. 345, 165 N. E. 101 (1928), noted in (1929) 38 YALE L. J. 1144. But judicial cy pres is inapplicable where no purpose to aid charity generally is apparent, and the objects of a charitable trust fail. *City of St. Louis v. McAllister*, 302 Mo. 152, 257 S. W. 425 (1924).

6. The rule is properly termed the rule against remoteness. GRAY, *RULE AGAINST PERPETUITIES* (3d ed. 1915) § 2; Anderson, *The Modern Rule Against Perpetuities* (1929) 77 U. OF PA. L. REV. 862. It is concerned solely with the time for vesting, not with the duration of the estate. *Cf. Armstrong v. Barber*, 239 Ill. 389, 88 N. E. 246 (1909).

7. *Institution for Savings in Roxbury v. Roxbury Home for Aged Women*, 244 Mass. 583, 139 N. E. 301 (1923); *Merritt v. Bucknam*, 77 Me. 253 (1885); *Merrill v. American Baptist Missionary Union*, 73 N. H. 414, 62 Atl. 647 (1905); see *Leonard v. Burr*, 18 N. Y. 96, 107 (1858).

8. *Storr's Agricultural School v. Whitney*, 54 Conn. 342, 8 Atl. 141 (1887); *Dickenson v. City of Anna*, 310 Ill. 222, 141 N. E. 754 (1923); *cf. MacKenzie v. Trustees of Presbytery of Jersey City*, 67 N. J. Eq. 652, 61 Atl. 1027 (1905); 4 HALSBURY'S LAWS OF ENGLAND (2d ed. 1932) § 286.

9. *Storr's Agricultural School v. Whitney*, *supra* note 8, at 345, 8 Atl. at 145.

10. GRAY, *op. cit. supra* note 6, § 605. The possibility, and not the certainty or probability, that the period fixed for vesting may be exceeded calls for an application of the rule. *Graves v. Graves*, 94 N. J. Eq. 268, 120 Atl. 420 (1923); see *Gageby's Estate*, 293 Pa. 109, 112, 141 Atl. 842, 843 (1928).

11. *In re Tower's Estate*, 147 Misc. 773, 266 N. Y. Supp. 43 (Surr. Ct. 1933).

12. N. Y. REAL PROP. LAW (1909) § 42 provides: "Every future estate shall be void in its creation, which shall suspend the power of alienation, by any limitation or condition whatever, for a longer period than during the continuance of not more than two lives in being at the creation of the estate." A similar provision appears in N. Y. PERS. PROP. LAW (1909) § 11. The common-law limitation is that the future estate must vest within lives

the gift would not take effect until the incorporation, which by the terms of the will might not occur within two lives in being. The court sustained the trust, declaring that "administrative delay in forming a corporation is not within the statute of perpetuities,"<sup>13</sup> and that under the New York charitable trust law<sup>14</sup> title vested immediately in the designated trustees. The second case, arising in New Jersey,<sup>15</sup> presents a somewhat contrary result in a factual situation less productive of sympathy for the ultimate charitable benefaction. By the terms of his will, the testator, after cutting off his widow and children with a pittance, directed the accumulation of the large residue of his estate during the lives of six named children and twenty-one years thereafter,<sup>16</sup> the longest period legally possible without selecting more lives. The will provided that after the expiration of the term, "said trustees shall proceed to form the corporation," and "shall then pay over the principal and accumulations of said trust fund to said corporation," which was to establish and maintain a charitable school for children. The hiatus between the termination of the trust and the formation of the corporation was held to be fatal to the bequest,<sup>17</sup> since the trust might not vest in the charity within the period limited by the rule against perpetuities.

As in the New York decision, courts have in general recognized the validity of gifts in trust for charitable corporations not in being at the time of the testator's death, although it was conceivable that the corporations might not be formed within the required period. The reasoning advanced for such a determination is that, the testator's general charitable purpose being immediate, the court will regard the bequest as a present unconditional gift to trustees in trust for charity.<sup>18</sup> The par-

in being and twenty-one years, with gestation periods. For variations of the limitation in other states, see FOURTH SUPPLEMENTAL REPORT, N. Y. Decedent Estate Commission, Leg. Doc. (1933) No. 55, p. 73 *et seq.*

13. Accord: *Maynard v. Farmer's Loan & Trust Co.*, 119 Misc. 503, 197 N. Y. Supp. 526 (Sup. Ct. 1922), *aff'd*, 208 App. Div. 112, 203 N. Y. Supp. 83 (1st Dep't 1924); *cf.* *Robert v. Corning*, 89 N. Y. 225, 238 (1882).

14. See N. Y. REAL PROP. LAW (1909) § 113 and N. Y. PERS. PROP. LAW (1909) § 12.

15. *First Camden National Bank & Trust Co. v. Collins*, 168 Atl. 275 (N. J. 1933), *rev'g* 110 N. J. Eq. 623, 160 Atl. 848 (1932). A similar holding appears in *Malmquist v. Detar*, 123 Kan. 384, 255 Pac. 42 (1927); *cf.* *Novak v. Orphan's Home*, 123 Md. 161, 90 Atl. 997 (1914); *Miller v. Weston*, 67 Colo. 534, 189 Pac. 610 (1920).

16. The case is analogous to *Thellusson v. Woodford*, 4 Ves. 227 (Ch. 1798), 11 Ves. 112 (Ch. 1805). *Thellusson* had directed accumulation of a large estate during the lives of all his sons, grandsons, and children of his grandsons, and directed a division at the termination of the trust among the three eldest male descendants of his three sons. The trust was sustained, although considerations of public policy, and the fact that it was created solely because of the testator's vain desire to create a vast fortune bearing his name, should have weighed against its validity. See 7 HOLDSWORTH, HISTORY OF ENGLISH LAW (1926) 228-231. Agitation precipitated by the decision led to the enactment of the statute of 39 & 40 GEO. III. c. 98 (1800), which forbids accumulations for longer than the life or lives of the settlor or settlers and twenty-one years, or the minority of any persons who shall be living or in *ventre sa mere* at the death of the settlor.

17. The lower court, in sustaining the trust, construed the words "after the expiration" of the term as equivalent to "at the expiration" of the term, and adopted the conventional construction that the residue vested at the death of the testator, with its enjoyment merely postponed. *First Camden National Bank & Trust Co. v. Collins*, *supra* note 15.

18. *Russell v. Allen*, 107 U. S. 163 (1883); *Coit v. Comstock*, 51 Conn. 352 (1884);

ticular method prescribed by the testator is the preferable manner of effectuating his general charitable purpose; but if that should fail his intent will be carried out *cy pres*.<sup>19</sup> Formation of the corporation is but a means directed by the testator of administering the charity.<sup>20</sup> Should no corporation be formed to receive the gift, the court will direct the application of the fund to purposes closely akin to that indicated by the testator. That this rationale is largely conceptual seems obvious. If a determination in favor of charity, and conformity to the oft-stated principle that where possible courts will accomplish the testator's intention, be the objectives sought to be attained, then clearly the New York decision is supportable. The logical reasoning that the bequest in trust to a corporation not in existence is an immediate and unconditional gift to trustees for charity becomes a satisfactory rationalization, and the resort to *cy pres* is sustainable except in jurisdictions where the doctrine is apparently not recognized.<sup>21</sup> Yet the disfavor with which the New Jersey opinion views the general tendency to apply rules favorable to charity simply because it is a charity seems justified by the circumstances involved in the case. There may well be other situations warranting a similar attitude, as, for example, where the trust fund is relatively so small as to make its charitable purpose impracticable of fulfillment, or the charity designated is so fantastic of conception that its realization is doubtful.

#### CONSTITUTIONALITY OF STATE PRIVILEGE TAX ON COTTON BROKERS

PURSUANT to a Mississippi statute, the city of Greenwood levied a flat-rate privilege tax upon cotton brokers. Plaintiff, seeking a refund, asserted that all his purchases and sales were made in response to orders from outside the state and that consequently a tax upon his business would be an unconstitutional burden upon interstate commerce. A small proportion of the cotton bought by plaintiff, though intended for ultimate shipment to foreign customers, was not consigned to anyone outside the state, but was placed in storage in Greenwood for withdrawal and sale at plaintiff's

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Franklin v. Hastings, 253 Ill. 46, 97 N. E. 265 (1912); Jansen v. Godair, 292 Ill. 364, 127 N. E. 97 (1920); *In re Potts' Will*, 205 App. Div. 147, 199 N. Y. Supp. 880 (3d Dep't 1923), *aff'd*, 236 N. Y. 658, 142 N. E. 323 (1923), noted in (1923) 37 HARV. L. REV. 275; *cf. In re John's Will*, 30 Ore. 494, 47 Pac. 341 (1896); Webster v. Wiggin, 19 R. I. 73, 31 Atl. 824 (1895).

"If the court, however, can see an intention to make an unconditional gift to charity, and the court is very keen-sighted to discover this intention, then the gift will be regarded as immediate, not subject to any condition precedent, and therefore not within the scope of the rule against perpetuities." GRAY, *op. cit. supra* note 6, § 607.

19. GRAY, *op. cit. supra* note 6, §§ 607, 608; KALES, ESTATES, FUTURE INTERESTS (1920) § 698.

20. Jansen v. Godair, *supra* note 18, at 374, 127 N. E. at 100; *cf. Crerar v. Williams*, 145 Ill. 625, 34 N. E. 467 (1893) (indicating that the gift is valid even though the corporation is never formed); see French v. Calkins, 252 Ill. 243, 257, 96 N. E. 877, 881 (1911).

21. *Cy pres* does not appear to be recognized in certain jurisdictions. Graff v. Wallace, 32 F. (2d) 960 (D. C. App. 1929); Lovelace v. Marion Institute, 215 Ala. 271, 110 So. 381 (1926); National Bank of Greece v. Savarika, 148 So. 649 (Miss. 1933); Thomas v. Clay, 187 N. C. 778, 122 S. E. 852 (1924); City of Columbia v. Montieth, 139 S. C. 262, 137 S. E. 727 (1927); Davis v. Bullington, 164 Tenn. 272, 47 S. W. (2d) 555 (1932); Pack v. Shanklin, 43 W. Va. 304, 27 S. E. 389 (1897); *cf. Russell v. Tyler*, 224 Ky. 511, 6 S. W. (2d) 707 (1928); Cornwell v. Mount Morris Methodist Episcopal Church, 73 W. Va. 96, 80 S. E. 148 (1913).

direction. The taxpayer argued that the sole purpose of those transactions was to fill out orders of foreign buyers and that they were an inseparable part of the interstate business. The state supreme court, one justice dissenting, rejected the contention and declared the tax valid as applied to purchases made by the plaintiff without specific destination outside the state.<sup>1</sup> Appeal was taken to the United States Supreme Court and probable jurisdiction has been noted.<sup>2</sup>

Traditionally, the disability of a state to impose a tax upon the privilege of engaging in interstate commerce has been regarded as absolute,<sup>3</sup> the sole problem in each case being whether what was taxed was or was not "interstate."<sup>4</sup> Moreover the commerce clause has been interpreted to designate mutually exclusive spheres of state and federal jurisdiction, and consequently the questions, whether a given activity is subject to state taxation and whether the same activity is within the power of the federal government to regulate, have been considered parts of the same basic issue.<sup>5</sup> If this theory is adopted in the instant case, a decision that all parts of plaintiff's business are interstate would seem to be compelled by the clear authority of recent cases.<sup>6</sup> For the extension of federal control over industry has required that the conceptual content of the term "interstate commerce" be vastly enlarged. And if the National Industrial Recovery Act is constitutional in its effect upon business clearly intrastate according to present criteria,<sup>7</sup> there would be no basis whatever, under the orthodox approach, for the distinctions relied upon by the Mississippi court.<sup>8</sup>

Unless the states are to be deprived of an important source of revenue, therefore, it must be recognized that the questions of federal power to regulate and of state power to tax are not parts of the same issue, but wholly distinct problems, and that cases decided in one field are not authority for questions arising in the

1. *Chassanoil v. City of Greenwood*, 148 So. 781 (Miss. 1933).

2. U. S. Law Week, Oct. 10, 1933, at 91.

3. *Sprout v. City of South Bend*, 277 U. S. 163 (1928). If the business is interstate only in part, the state tax is valid as a tax on the intrastate element. *Raley & Bros. v. Richardson*, 264 U. S. 157 (1924). But apparently such a tax might be invalid if the interstate element were in fact burdened thereby. *GAVIT, THE COMMERCE CLAUSE* (1932) § 180. Yet even if the tax is valid, failure to pay it and to procure a license would not invalidate contracts contemplating delivery in another state. *Flanagan v. Federal Coal Co.*, 267 U. S. 222 (1925).

4. *Heyman v. Hays*, 236 U. S. 178 (1915); *Texas Transport & Terminal Co. v. City of New Orleans*, 264 U. S. 150 (1924). The amount of the tax is said to be immaterial. See *Brown v. Maryland*, 12 Wheat. 419, 439 (U. S. 1827); *Alpha Portland Cement Co. v. Massachusetts*, 268 U. S. 203, 218 (1925).

5. *Station WBT v. Poulnot*, 46 F. (2d) 671 (E. D. S. C. 1931) (radio broadcasting is interstate commerce for purpose of federal regulation; therefore a state tax on radio receiving sets is invalid as a tax on interstate commerce); Note (1931) 40 YALE L. J. 990. See *Hill v. Wallace*, 259 U. S. 44, 69 (1922); *Eastern Air Transport v. South Carolina Tax Commission*, 285 U. S. 147, 152, 153, n. 5 (1932).

6. *Swift & Co. v. United States*, 196 U. S. 375 (1905); *Stafford v. Wallace*, 258 U. S. 495 (1922); *Chicago Board of Trade v. Olsen*, 262 U. S. 1 (1923); *cf. Appalachian Coals, Inc. v. United States*, 288 U. S. 344 (1933).

7. See Note (1933) 47 HARV. L. REV. 85.

8. The traditional distinction made was between local activities which are discrete transactions and those which are "inseparable incidents" of the interstate business. See *Bowman v. Continental Oil Co.*, 256 U. S. 642, 648 (1921); *Raley & Bros. v. Richardson*, *supra* note 3, at 159; *Sprout v. City of South Bend*, *supra* note 3, at 171.

other.<sup>9</sup> This proposition was explicitly articulated by the Supreme Court in the present term.<sup>10</sup> Minnesota levied a property tax upon cattle in the stockyards of the state. The livestock, it was admitted, were connected with a flow of commerce subject to federal regulation. But the Court refused to concede that the issue of the state's power to tax was thereby determined, and upheld the levy on the ground that the cattle had acquired a situs within Minnesota.

Once the problem of the proper sphere of state taxation is thus separated from its traditional conceptual background, it can be considered in the light of practical needs and practical limitations. The states "may not burden interstate commerce." But there is no reason why a business carried on in a given state, maintaining an office there and receiving the protection of local laws, should not be deemed to have a definitely intrastate element amenable to local taxes.<sup>11</sup> Even if engaged solely in interstate commerce, it may be argued, it should not be exempt from a reasonable non-discriminatory occupation tax,<sup>12</sup> especially since such exemption may actually work a discrimination in favor of interstate commerce. The question where to draw the line would of course remain. But if that problem were stated in terms of actual burden upon the free movement of commerce among the states,<sup>13</sup> each case could be determined upon its particular facts without binding the Court in other situations. In the related problem of the taxation of federal instrumentalities the Court has recently tended toward this approach. There, too, the cases formerly turned upon considerations not of degree but of power; but a regard for the taxing power of the states has induced a practical construction of the claimed immunity from taxation.<sup>14</sup> An opinion delivered in the instant case upon such a basis would be a timely recognition of the realistic principle, hitherto denied in occupation tax cases, that the juncture between state and federal jurisdiction is not a line but a penumbra of no small latitude.

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9. See *Swift & Co. v. United States*, *supra* note 6, at 400: "But we do not mean to imply that the rule which marks the point at which state taxation becomes permissible necessarily is beyond the scope of interference by Congress in cases where such interference is deemed necessary for the protection of commerce among the states." See also *Binderup v. Pathe Exchange*, 263 U. S. 291, 311 (1923).

10. *Minnesota v. Blasius*, 54 Sup. Ct. 34 (1933).

11. "Nor can I find any practical justification . . . for an interpretation of the commerce clause which would relieve those engaged in interstate commerce from their fair share of the cost of the government of the states in which they operate by exempting them from payment of a tax of general application which is neither aimed at nor discriminates against interstate commerce." Stone, J., concurring separately in *Helson and Randolph v. Kentucky*, 279 U. S. 245, 253 (1929). Moreover, interstate busses may be forced to compensate for the use of the roads. *Interstate Busses Corp. v. Blodgett*, 276 U. S. 245 (1928).

12. As to state taxation of foreign corporations engaged solely in interstate commerce, see Comment (1933) 42 *YALE L. J.* 1096.

13. See Brandeis, J., dissenting, in *Ozark Pipe Line Corp. v. Monier*, 266 U. S. 555, 567 (1925).

14. See *Susquehanna Power Co. v. State Tax Commission*, 283 U. S. 291, 294 (1931); *Fox Film Corp. v. Doyal*, 286 U. S. 123, 128 (1932); Note (1932) 41 *YALE L. J.* 1237.

## JOINDER OF TAXPAYERS IN MUNICIPALITY'S SUIT FOR DECLARATORY JUDGMENT

THE Uniform Declaratory Judgment Act in Oregon<sup>1</sup> provides that in any proceeding which involves the constitutionality of a municipal ordinance the municipality shall be made a party and shall be entitled to be heard, and "the attorney general of the state shall also be served with a copy of the proceeding and be entitled to be heard."<sup>2</sup> In *City of Salem v. Oregon-Washington Water Service Company*,<sup>3</sup> plaintiff, the city of Salem, had been authorized at a special election to acquire and operate its own water system and for that purpose to purchase defendant water company's plant. The city sought a declaratory judgment as to the validity of this authorization, and joined as parties defendant the water company, the attorney general of the state, and two representative taxpayers. A lower court sustained the water company's demurrer that there was a defect of parties in the failure to join all of the city's taxpayers as parties defendant. In reversing this decision, the state supreme court held that all of the parties essentially interested, the city and the water company, were before the court, and that to require joinder of all other taxpayers would in effect defeat the purposes of the declaratory judgment statute.

Before the introduction of the declaratory judgment procedure, administrative units were obliged, under American practice, to run the risk of the constitutionality of statutes under which they proposed to operate,<sup>4</sup> and to rely upon private initiative by persons adversely affected by the statute, or upon taxpayers' suits, to test the issue before their projects were too far advanced. With the advent of declaratory judgments, administrative units as plaintiffs have been able to secure judicial findings as to the validity of proposed projects involving either action over a period of time<sup>5</sup> or single acts.<sup>6</sup> Such practice has long been current in British jurisdictions.<sup>7</sup> In these proceedings, brought by the administrative unit as plaintiff, it has not been considered necessary to make taxpayers parties defendant.<sup>8</sup>

The taxpayer as one interested in the valid and orderly processes of general administration is largely an American invention,<sup>9</sup> based upon the theory that his relation

1. ORE. CODE ANN. (1930) §§ 2-1401 to 2-1416.

2. ORE. CODE ANN. (1930) § 2-1411. *Cf.* similar provisions in the declaratory judgment statutes in Arizona, Colorado, Indiana, Kentucky, Nebraska, North Carolina, North Dakota, Pennsylvania, Philippines, Porto Rico, South Dakota, Tennessee, Utah, Vermont and Wisconsin.

3. 23 P. (2d) 539 (Ore. 1933).

4. See Borchard, *Judicial Relief for Peril and Insecurity* (1932) 45 HARV. L. REV. 847-854.

5. *City of Owensboro v. Hazel*, 229 Ky. 752, 17 S. W. (2d) 1031 (1929); *City of Sturgis v. Christenson Brothers Co.*, 235 Ky. 346, 31 S. W. (2d) 386 (1930); *State Budget Commission v. Adams*, 61 S. W. (2d) 314 (Ky. 1933).

6. *City of Paducah v. Mallory*, 225 Ky. 692, 9 S. W. (2d) 1015 (1928); *Waller v. Union County*, 223 Ky. 636, 4 S. W. (2d) 414 (1928); *City of Louisville v. Board of Education of Louisville*, 229 Ky. 325, 17 S. W. (2d) 210 (1929); *City of Muskegon Heights v. Danigelis*, 253 Mich. 260, 235 N. W. 83 (1931); *City of Bristol v. Bank of Bristol*, 159 Tenn. 647, 21 S. W. (2d) 620 (1929); *Johnson City v. Clinchfield Railroad Company*, 163 Tenn. 332, 43 S. W. (2d) 386 (1931).

7. Borchard, *supra* note 4, at 847-854.

8. Of the cases cited in notes 5 and 6, *supra*, the presence of taxpayers appears clearly in the record only in *City of Muskegon Heights v. Danigelis*, *supra* note 6. Only two taxpayers were there named defendants; the sufficiency of the parties defendant was not questioned. See also *Victoria v. Commonwealth*, 38 C. L. R. 399 (1926), on the need to join all states in an action to test the validity of a federal statute.

9. According to British practice, the taxpayer has interest sufficient to sustain an action

to municipal government is like that of a shareholder in a corporation<sup>10</sup> or of a *cestui que trust*.<sup>11</sup> His right to sue to secure the proper administration of public funds or contracts is looked upon in some jurisdictions as an additional protection against maladministration,<sup>12</sup> while in others it is predicated upon the refusal of the proper officers to sue.<sup>13</sup> His pecuniary interest in the problem is avowedly small, often disregarded in favor of the corrective purposes of his suit.<sup>14</sup>

If, therefore, a taxpayer's function as plaintiff is a beneficent supervision of government, and the limitations of his function are based upon a generous analogy to the trust or private corporation,<sup>15</sup> it would seem that his interests for the purpose of appearing as defendant approach the vanishing point when the administrative unit whose action is challenged initiates suit, making parties defendant the property own-

only when he shows a personal injury; the Attorney General represents the public interest. *London County Council v. Attorney General*, [1902] A. C. 165; *Watson v. Mayor, etc.*, of Hythe, 22 T. L. R. 245 (Ch., 1906); *Attorney General v. Westminster City Council*, [1924] 2 Ch. 416; *Weir v. County Council of Fermanagh*, [1913] 1 Ir. R. 193; *Commonwealth v. Australian Commonwealth Shipping Board*, 39 C. L. R. 1 (1926); *Anderson v. Commonwealth*, 47 C. L. R. 50 (1932); *Hamer v. Mayor, etc.*, of Foxton, 33 N. Z. 507 (1913). See ROBINSON, *PUBLIC AUTHORITIES AND LEGAL LIABILITY* (1925) 262, 264.

10. *Frothingham v. Mellon*, 262 U. S. 447 (1923); *Holt v. City of Fayetteville*, 169 Ga. 126, 149 S. E. 892 (1929); *Zuelly v. Caspar*, 160 Ind. 455, 67 N. E. 103 (1903); *Michigan City v. Marwick*, 67 Ind. App. 294, 116 N. E. 434 (1917); *Clark v. George*, 118 Kan. 667, 236 Pac. 643 (1925); *Schneider v. Yellott*, 124 Md. 92, 91 Atl. 779 (1914); *Hayes v. Davis*, 23 Nev. 318, 46 Pac. 888 (1896); *Asplund v. Hannett*, 31 N. M. 641, 249 Pac. 1074 (1926); *Jones v. Reed*, 3 Wash. 57, 27 Pac. 1069 (1891); *Willard v. Comstock*, 58 Wis. 565, 17 N. W. 401 (1883).

11. *New Orleans, Mobile & Chattanooga Ry. Co. v. Dunn*, 51 Ala. 128 (1874); *City of New London v. Brainard*, 22 Conn. 552 (1852); *Sherburne v. City of Portsmouth*, 72 N. H. 539, 58 Atl. 38 (1904); *Pierce v. Hagans*, 79 Ohio St. 9, 89 N. E. 519 (1908).

12. *Collins v. Davis*, 57 Iowa 256, 10 N. W. 643 (1881); *Fletcher v. Executive Council*, 207 Iowa 923, 223 N. W. 737 (1929); *Stiglitz v. Schardien*, 239 Ky. 799, 40 S. W. (2d) 315 (1931); *Handy v. City of New Orleans*, 1 So. 593 (La. 1887); *Garry v. Martin*, County Clerk, 70 Mont. 587, 227 Pac. 573 (1924); *Blanshard v. City of New York*, 141 Misc. 609, 253 N. Y. Supp. 419 (Sup. Ct. 1931); *Engstad v. Dinnie*, 8 N. D. 1, 76 N. W. 292 (1898); *Malone v. Peay*, 157 Tenn. 429, 7 S. W. (2d) 40 (1928); *Lawson v. Baker*, State Treasurer, 220 S. W. 260 (Tex. Civ. App. 1920).

13. *Grooms v. Bartlett*, 123 Ark. 255, 185 S. W. 282 (1916); *Miller v. Grandy*, 13 Mich. 540 (1865); *Asplund v. Hannett*, *supra* note 10; *White Eagle Oil & Refining Co. v. Gunderson*, Governor, 48 S. D. 608, 205 N. W. 614 (1925); *Johnson v. Black*, 103 Va. 477, 49 S. E. 633 (1905); *Rosenhein v. Frear*, 138 Wis. 173, 119 N. W. 894 (1909); *Milwaukee Horse & Cow Commission Co. v. Hill*, 207 Wis. 420, 241 N. W. 364 (1932).

14. *Brown v. Taunton*, 169 Ga. 240, 150 S. E. 206 (1929); *Fergus v. Russell*, 270 Ill. 304, 110 N. E. 130 (1915); *Ellingham v. Dye*, 178 Ind. 336, 99 N. E. 1 (1912); *Craft v. Commissioners of Jackson County*, 5 Kan. 518 (1870); *Sun Cab Co. v. Cloud*, 162 Md. 419, 159 Atl. 922 (1932); *Linde v. Hall*, 35 N. D. 34, 159 N. W. 281 (1916); *Page v. King*, 285 Pa. 153, 131 Atl. 707 (1926).

It has also been held immaterial that the project would be self supporting in fact, *Green v. Jones*, 164 Ark. 118, 261 S. W. 43 (1924); *Woodruff v. Welton*, 70 Neb. 665, 97 N. W. 1037 (1904), or that plaintiff taxpayer did not live in the district adversely affected by the legislation, *McAlpine v. Dimick*, 326 Ill. 240, 157 N. E. 235 (1927).

15. 1 HIGH, *INJUNCTIONS* (4th ed., 1904) 440; HIGH, *EXTRAORDINARY LEGAL REMEDIES* (3d ed., 1896) 657; KERR, *INJUNCTIONS* (1927) 570-571; McQUILLAN, *MUNICIPAL CORPORATIONS* (2d ed., 1928) § 2740; SPELLING, *INJUNCTIONS* (1926) 504, 533.

ers directly and immediately affected by the action and the attorney general as representative of the public. This is particularly true in the present case, in which the defendant corporation would be adversely affected by any action under the ordinance; and if the action affecting the corporation's property were held invalid, the whole project would fail and no question of a bond issue, in which the taxpayers' interests might be said to be more dominant, would arise. The fact that the taxpayer's interest as one of the general public is not sufficient in every case to sustain suit has already been recognized by the courts.<sup>16</sup>

If, however, it becomes apparent to the court at any stage of the proceeding that the taxpayers' interests have emerged and should be heard, either because the attorney general is in agreement with plaintiff city and thus does not represent public interests, or because the bond question has arisen, the declaratory judgment act empowers the court to cause the taxpayers' interests to be represented.<sup>17</sup> Until that situation becomes obvious, it would seem that the plaintiff city has properly constituted its action in making parties defendant the attorney general and the water company whose property would be affected by any action under the ordinance.

P. M.

#### POWER OF SETTLOR-BENEFICIARY TO TERMINATE SPENDTHRIFT TRUST

THE plaintiff established a trust fund, the income from which was to be paid to herself for life, the remainder to be disposed of by will or in default of testamentary appointment, distributed to her next of kin. In addition to a provision against revocation, the trust declaration contained spendthrift clauses prohibiting anticipation and alienation of payments of principal or income, and providing that all such payments were to be free from the claims of creditors of the settlor-cestui. Subsequently, the plaintiff filed a bill in equity to have the trust declaration declared null and void on the ground that there was no existing purpose to support it. The Supreme Court of Pennsylvania, holding that a spendthrift clause is sufficient of itself to sustain an active trust, refused to decree termination. The court intimated that this result would also have been reached on the further ground that since there was no proof of consent of the next of kin, all parties interested in the trust were not before the court.<sup>1</sup>

In general, trusts may be terminated with the consent of all interested parties<sup>2</sup> when the purpose of the trust has been attained,<sup>3</sup> or has become impossible of accomplishment.<sup>4</sup> But on the theory that these conditions cannot be fulfilled in

16. It is insufficient for suit against the federal government, *Frothingham v. Mellon*, *supra* note 10; and for suit against the state in some jurisdictions, *Asplund v. Hannett*, *supra* note 10.

17. ORE. CODE ANN. (1930) § 2-1411. An example of the procedure under this provision of the Uniform Act may be found in *Lyman v. Lyman*, 293 Pa. 490, 143 Atl. 200 (1928). For discussion of the use of the declaration in such cases, see Borchard, *The Declaratory Judgment—a Needed Procedural Reform* (1918) 28 YALE L. J. 105, 117-123.

1. *Rehr v. Fidelity-Philadelphia Trust Co.*, 310 Pa. 301, 165 Atl. 380 (1933).

2. *Burton v. Boren*, 308 Ill. 440, 139 N. E. 868 (1923); *Broadway National Bank v. Adams*, 133 Mass. 170 (1882); *Huber v. Donoghue*, 49 N. J. Eq. 125, 23 Atl. 495 (1892); *Stafford's Estate*, 258 Pa. 595, 102 Atl. 222 (1917).

3. *In re Estate of Cornils*, 167 Iowa 196, 149 N. W. 65 (1914); *Simmons v. Northwestern Trust Co.*, 136 Minn. 357, 162 N. W. 450 (1917); *McNeer v. Patrick*, 93 Neb. 746, 142 N. W. 283 (1913); *Packer's Estate*, 246 Pa. 97, 92 Atl. 65 (1914).

4. *Tilton v. Davidson*, 98 Me. 55, 56 Atl. 215 (1903); *Sears v. Choate*, 146 Mass. 395, 15 N. E. 786 (1888); 2 PERRY ON TRUSTS (7th ed. 1929) § 920.

the case of spendthrift trusts, their termination on the petition of the cestui is generally denied.<sup>5</sup> Since a primary purpose of the settlor is usually to provide the beneficiary with future protection against creditors, that purpose is never satisfied during the period of the trust, regardless of how capable or conservative the cestui may be at the time of the petition. While this may be a valid objection to the termination of spendthrift trusts established by the settlor for another, its application is doubtful where, as in the instant case, the settlor is likewise the beneficiary. In such cases creditors can generally reach the trust property in satisfaction of their claims.<sup>6</sup> This would render the main object of the trust unattainable where the purpose of the settlor-cestui was to protect his personal estate from creditors in the event of future business reverses. In those instances in which the trust is established by an actual spendthrift as a protection against dissipation of his estate, the prohibition against voluntary alienation of principal may have a protective influence sufficient to justify continuance of the trust.<sup>7</sup> However, the effectiveness of this restriction is questionable in view of the ease with which credit may be obtained<sup>8</sup> and the further fact that alienation or assignment of future income from a spendthrift trust created for the benefit of the settlor has been accorded legal sanction.<sup>9</sup> It is true that where the trust has been established to secure capable and efficient management of the settlor's property, the fact that creditors may reach the trust assets would not defeat the purpose of the trust. But since spendthrift clauses are immaterial for the accomplishment of that object, a settlor will rarely be prompted by that purpose to create a trust of the spendthrift type. Hence, since the purpose of a spendthrift trust, where the settlor is likewise the beneficiary, may become impossible of accomplishment, it would seem that the court was unwarranted in disposing of the instant case by a summary application of the rule that a cestui may not be granted termination of a spendthrift trust. A sounder conclusion would have been reached had the court examined the circumstances of the

5. *Fletcher v. Los Angeles Trust and Savings Bank*, 182 Cal. 177, 187 Pac. 425 (1920); *Bevier v. Hay*, 221 Ill. App. 1 (1921); *Stewart's Estate*, 253 Pa. 277, 98 Atl. 569 (1916); *Vines v. Vines*, 143 Tenn. 517, 226 S. W. 1039 (1920).

6. *McColgan v. Magee*, 172 Cal. 182, 155 Pac. 995 (1916); *Warner v. Rice*, 66 Md. 436, 8 Atl. 84 (1887) (attachment proceedings); *Schenck v. Barnes*, 156 N. Y. 316, 50 N. E. 967 (1898) (creditor's bill); *Benedict v. Benedict*, 261 Pa. 117, 104 Atl. 581 (1918); *Nolan v. Nolan*, 218 Pa. 135, 67 Atl. 52 (1907) (attachment proceedings); *Menken v. Brinkley*, 94 Tenn. 721, 31 S. W. 92 (1835) (creditor's bill). See Griswold, *Spendthrift Trusts Created in Whole or in Part for the Benefit of the Settlor* (1930) 44 HARV. L. REV. 203, 209.

7. *Willard v. Integrity Trust Co.*, 273 Pa. 24, 116 Atl. 513 (1922); *Kutz v. Nolan*, 224 Pa. 262, 73 Atl. 555 (1909); *cf. Downs v. Security Trust Co.*, 175 Ky. 789, 194 S. W. 1041 (1917) (no spendthrift clauses included in trust declaration).

8. Where the settlor-cestui has credit, the mere restraint on voluntary alienation of principal will not protect the estate against dissipation, since creditors can reach the trust property in satisfaction of their claims. See note 6, *supra*.

9. *Pacific National Bank v. Windram*, 133 Mass. 175 (1882) (life estate in settlor, vested remainder of part to settlor's children); *Newton v. Hunt*, 201 N. Y. 599, 95 N. E. 1134 (1911), *aff'g* 134 App. Div. 325, 119 N. Y. Supp. 3 (1st Dep't 1909) (mortgage of income to accrue under settlor's beneficial life estate, vested remainder to settlor's children); *Egbert v. DeSolms*, 218 Pa. 207, 67 Atl. 212 (1907) (income from settlor's beneficial estate held assignable where remainder was vested in children). In *Patrick v. Bingaman*, 2 Pa. Super. Ct. 113 (1896), the court held that the settlor could make a valid assignment of future income under a trust created for his own benefit, but was powerless to assign any part of the corpus. But *cf. Hackley v. Littell*, 150 Mich. 106, 113 N. W. 787 (1907) (assignment of income from settlor's beneficial life estate inoperative where remaindermen were named in the trust deed). • See Griswold, *supra* note 6, at 218.

case to find whether or not the settlor-cestui had any object in establishing the trust which would be defeated by a decree of termination.

The court's suggestion that termination of the trust might also be denied because of failure to obtain consent of the next of kin of the settlor-beneficiary, likewise seems of doubtful validity. Unless the next of kin have an interest in the property under the trust deed, their consent would not be required for termination of the trust.<sup>10</sup> But it is a general common-law rule that no interest is conveyed by a gift to the heirs of the grantor.<sup>11</sup> This has been applied to situations like the instant case where the settlor creates a trust for his own benefit for life, with remainder to his heirs in default of testamentary disposition.<sup>12</sup> While the rule is departed from in an early Pennsylvania case,<sup>13</sup> it prevails in most jurisdictions.<sup>14</sup> Even in New York, where the rule has been modified to the extent that a gift to the heirs of the settlor will create a vested interest if it is "clearly" the intent of the settlor to create a vested remainder,<sup>15</sup> a decision such as that suggested in the instant case would be questionable, since no such clear intention is expressed in the deed of trust.

#### POWER OF STATE TO ALTER EFFECT OF BANKRUPTCY DISCHARGE

A NEW YORK statute of 1929 requires the state Commissioner of Motor Vehicles to suspend the driving license of any person against whom a judgment for damages arising from an automobile accident is outstanding for more than fifteen days; the statute further provides that the license shall remain suspended until such judgment is satisfied "except by a discharge in bankruptcy," and until the debtor has given proof that he will thereafter be able to respond in damages.<sup>1</sup> In *In re Perkins*,<sup>2</sup> defendant had recovered a judgment against plaintiff for injuries resulting from the latter's negligent operation of an automobile. Plaintiff had subsequently been adjudged a bankrupt, and had been discharged. The defendant threatened that unless

10. See *Stephens v. Moore*, 298 Mo. 215, 226, 249 S. W. 601, 603 (1923); *Cram v. Walker*, 173 App. Div. 804, 806, 106 N. Y. Supp. 486, 487 (1st Dep't 1916).

11. *Akers v. Clark*, 184 Ill. 136, 56 N. E. 296 (1900); *Doctor v. Hughes*, 225 N. Y. 305, 122 N. E. 221 (1919); *Robinson v. Blankinship*, 116 Tenn. 394, 92 S. W. 854 (1906); 1 TIFFANY, REAL PROPERTY (2d ed. 1920) § 130. *Contra*: *Brown v. Renshaw*, 57 Md. 67 (1881), apparently overruled in *Raffel v. Safe Deposit Trust Co.*, 100 Md. 141, 59 Atl. 702 (1905).

12. *Fidelity and Columbia Trust Co. v. Gwynn*, 206 Ky. 823, 268 S. W. 537 (1925); *Stella v. New York Trust Co.*, 224 App. Div. 50, 229 N. Y. Supp. 166 (1st Dep't 1928); *Cruger v. Union Trust Co.*, 173 App. Div. 797, 160 N. Y. Supp. 480 (1st Dep't 1916); *Stephens v. Moore*, *supra* note 10; *Raffel v. Safe Deposit Trust Co.*, *supra* note 11. *Contra*: *Gray v. Union Trust Co.*, 171 Cal. 637, 154 Pac. 306 (1915); *Ewing v. Warner*, 47 Minn. 446, 50 N. W. 603 (1891).

13. *Ashhurst's Appeal*, 77 Pa. 464 (1875).

14. See *Evans, Termination of Trusts* (1928) 37 YALE L. J. 1070, 1072.

15. The rule first originated in *Doctor v. Hughes*, *supra* note 11, and was applied in *Schwartz v. Fulton Trust Co.*, 119 Misc. 831, 198 N. Y. Supp. 275 (Sup. Ct. 1922) (court found no such intention even where the grantor declared that the interest of the heirs should be considered vested). But *cf. Whittemore v. Equitable Trust Co.*, 250 N. Y. 298, 165 N. E. 454 (1929), noted in (1932) 41 YALE L. J. 913.

1. N. Y. VEHICLE AND TRAFFIC LAW (Cahill, 1930) § 94-b. Payment of \$5,000 in the case of injury to one person, \$10,000 for two or more, or \$1,000 for injury to property, is deemed satisfaction if the judgment is for a greater amount.

2. 3 Fed. Supp. 697 (N. D. N. Y. 1933).

his judgment were nevertheless paid he would file a copy of it with the Commissioner of Motor Vehicles, with the result that plaintiff would lose his driving license. Upon a bill filed by plaintiff, a federal district court enjoined the defendant from taking this action, and held that the New York statute in denying to plaintiff the full effect of his discharge was in conflict with the Bankruptcy Act and was therefore invalid.

State encroachments upon matters over which the federal government has paramount jurisdiction have been variously treated. The Supreme Court has zealously guarded the immunity of interstate commerce from state taxation,<sup>3</sup> disapproving the imposition of taxes even where no substantial burden was put upon that commerce.<sup>4</sup> On the other hand, state taxes upon federal instrumentalities have frequently been upheld.<sup>5</sup> The view now accepted in the latter cases, that the conflict between laws and policies of the state and federal governments should be resolved in a practical manner which will not impair the proper exercise of the functions of either,<sup>6</sup> seems properly applicable also to the relation between the Bankruptcy Act and conflicting state laws. If the purposes of the Act in protecting creditors and relieving debtors will not be defeated by enforcement of the state statute, and if the state law was enacted in furtherance of an important local policy, it would seem reasonable that it should prevail. In the principal case, it is not clear what policy the New York legislature sought to effectuate in providing that a discharge in bankruptcy should not entitle a debtor against whom a tort judgment is outstanding to the return of his license,<sup>7</sup> since the further provision that in addition to paying the judgment such a debtor must also give proof of financial responsibility would effectively ban from the state's highways drivers whose financial irresponsibility has been demonstrated. If the former provision is not intended as a remedy available to creditors, it may be explained only as a penalty designed to induce motorists to carry liability insurance or to exercise greater care upon the highways.<sup>8</sup> That the statute would be effective to accomplish this purpose may well be doubted.<sup>9</sup> But the efficacy of a state law should not concern a federal court in passing upon a conflict between that law and the Bankruptcy Act. If the purpose is itself a proper subject for state legislation, the incidental benefit which the tort judgment creditor might receive from the statute would appear to be of small consequence. While it is perhaps true that the operation of bankruptcy discharges should not vary from state to state, bankrupts in one state

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3. Comment (1933) 42 YALE L. J. 1096.

4. See discussion in Note (1933) 43 YALE L. J. 337.

5. Note (1932) 41 YALE L. J. 1237, discussing *Willcuts v. Bunn*, 282 U. S. 216 (1931); *Susquehanna Power Co. v. State Tax Commission*, 283 U. S. 291 (1931); *Group No. 1 Oil Co. v. Bass*, 283 U. S. 279 (1931); and *Fox Film Corp. v. Doyal*, 286 U. S. 123 (1932).

6. See *Susquehanna Power Co. v. State Tax Commission*, *supra* note 5, at 294.

7. Statutes of this type have been enacted in at least thirteen other states. The provisions vary considerably, however, and in some instances the operation depends entirely upon the action of the judgment creditor. Only the New York statute provides that a bankruptcy discharge shall have no effect upon its operation. Cf. CAL. GEN. LAWS (Deering, 1931) Act 5128, § 73 (g); CONN. GEN. STAT. (1930) § 1608; Del. LAWS 1931, c. 14, § 2; Ind. Acts 1931, c. 179, § 2; IOWA CODE (1931) § 5079-c4; ME. REV. STAT. (1930) c. 29, § 97; Md. LAWS 1931, c. 498, § 1; MINN. LAWS 1933, c. 351, § 3; NEB. LAWS 1931, c. 108, §§ 3, 10; N. H. LAWS 1929, c. 189; N. J. STAT. ANN. (1931) § 135-119 (B); N. C. CODE ANN. (Michie, 1931) § 2621 (112); S. D. LAWS 1933, c. 144.

8. For a discussion of this type of statute see REPORT BY THE COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS (Col. Univ. Research Council, 1932) 97-111. For a study of the use of bankruptcy to escape liability for automobile accident judgments, see Douglas, *Some Functional Aspects of Bankruptcy* (1932) 41 YALE L. J. 329, 340 *et seq.*

9. See REPORT BY THE COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS, *supra* note 8.

are not in fact prejudiced because those in another have different rights. These considerations suggest that the validity of the New York statute should be upheld.

A different result was clearly justified in the principal case, however, since the Commissioner of Motor Vehicles was not on his own initiative seeking to carry out the purpose of the statute; instead, a creditor was attempting to use the law as a remedy by which he could penalize the discharged debtor in a manner wholly inconsistent with the purpose of the Bankruptcy Act. A bankruptcy discharge does not amount to payment of debts, for a moral duty to pay them remains and a promise to do so will create a new and binding obligation.<sup>10</sup> But the discharge may be pleaded as a bar to an action on the debt,<sup>11</sup> or to any other remedy which a creditor might previously have had to enforce payment<sup>12</sup> or to discommode the debtor for his failure to pay.<sup>13</sup> If defendant had been allowed to use the provisions of the New York statute in question to serve his own ends after plaintiff's discharge, he could at his option subject plaintiff to the loss of a valuable privilege for so long as the debt remained unpaid. Such a remedy is so in conflict with the purpose of a bankruptcy discharge as to be invalid.

EQUITY JURISDICTION OVER LIQUIDATION OF INSOLVENT BANK BY STATE  
BANK COMMISSIONER

DEPOSITORS of an insolvent state bank requested the State Bank Commissioner in charge of liquidation to accept an offer to purchase the remaining assets of the bank. Upon the commissioner's refusal to make the sale, the depositors intervened in the liquidation proceedings in the chancery court to obtain an order of sale. The State Banking Act provides that the commissioner shall upon order of the chancery court, "sell or exchange any or all of the property" of the insolvent bank.<sup>1</sup> Upon an appeal from a decree dismissing the petition, the Supreme Court of Arkansas held that the chancery court, having the power to approve a sale initiated by the commissioner, could likewise compel the commissioner to make a sale it deemed provident, and therefore had jurisdiction to determine the question presented by the intervention.<sup>2</sup>

A majority of the statutes regulating the liquidation of insolvent state banks<sup>3</sup> are

10. GILBERT'S COLLIER, BANKRUPTCY (2d ed. 1931) 439.

11. *Id.* at 408, n. 14.

12. *In re Voorhees*, 41 F. (2d) 81 (N. D. Ohio 1930); *Brenen v. Dahlstrom Metallic Door Co.*, 189 App. Div. 685, 178 N. Y. Supp. 846 (1st Dep't. 1919).

13. *In re F. Stephen Grist*, 1 Am. B. Rep. 89 (N. D. N. Y. 1898); *In re Hicks*, 133 Fed. 739 (N. D. N. Y. 1905); *Rosebud Shops, Inc. v. Kipnis*, 139 Misc. 861, 249 N. Y. Supp. 474 (Mun. Ct. 1931). However, in an unreported case, the federal district court in Massachusetts refused habeas corpus to a discharged bankrupt who was held in contempt proceedings by the Boston Poor Debtors' Court for failure to pay a debt. *Douglas, Wage-Earner Bankruptcies—State vs. Federal Control* (1933) 42 YALE L. J. 591, 619.

1. ARK. ACTS (1933) act 61, § 1.

2. *Jefferies v. Wasson*, 60 S. W. (2d) 903 (Ark. 1933).

3. ALA. CODE (Michie, 1928) § 6307; ARIZ. CODE (Struckmeyer, 1928) § 246; ARK. ACTS (1933) act 61, §§ 1-6; CAL. GEN. LAWS (Deering, 1931) act 652, § 136; COLO. ANN. STAT. (Mills, 1930) § 381j; FLA. COMP. LAWS (1927) § 6102; GA. CODE ANN. (Michie, 1926) § 2366 (58); IDAHO CODE ANN. (1932) § 25-908; KAN. REV. STAT. ANN. (1923) c. 9, § 130; LA. GEN. STAT. (Dart, 1932) § 697; MASS. GEN. LAWS (1932) c. 167, § 24; MINN. STAT. (Mason, 1927) § 7689; MO. REV. STAT. (1929) § 5330; MONT. REV. CODE (Choate, Supp. 1927) § 6014.127; NEV. COMP. LAWS (Hillyer, 1929) § 703; N. H. PUB. LAWS (1926)

modeled after the National Banking Act,<sup>4</sup> which has been interpreted as conferring upon the Comptroller of Currency exclusive control over the assets of defunct banks, subject to the power of a court of competent jurisdiction to approve the acts of the liquidating official appointed by the Comptroller.<sup>5</sup> Some state courts have adopted this construction of their banking laws and have found a legislative intent to create a statutory official free from judicial control.<sup>6</sup> Others have reserved to Chancery its common-law power, and have regarded the bank commissioner as a mere administrative official who exercises his authority under the control and supervision of the courts.<sup>7</sup> Prior to the decision in the instant case, the Supreme Court of Arkansas had held that the State Banking Act had been borrowed from the National Banking Act and was therefore subject to the interpretation given the latter by the federal courts.<sup>8</sup> Thus, where the bank commissioner levied a statutory assessment on the stockholders of an insolvent bank, it was held, in accord with the federal<sup>9</sup> and a majority of the state courts,<sup>10</sup> that the commissioner could act without a court order.<sup>11</sup> In the instant case, the court is apparently repudiating its former position, by recognizing a judicial power to compel the bank commissioner to make a provident sale of the bank's assets.

Although the statute expressly vests the bank commissioner "at law and in equity with the sole, exclusive and unconditional ownership of the property and assets,"<sup>12</sup> the court declared that the assets of the bank were in *custodia legis*.<sup>13</sup> With this premise as a basis for its decision, the court provided an equitable and expeditious

c. 268, § 5; N. Y. BANKING LAW (1914) § 69; N. C. CODE ANN. (Michie, 1931) § 218 (c) (7); OHIO GEN. CODE (Page, 1931) § 710-95; OKLA. STAT. (Harlow, 1931) § 9174; ORE. CODE ANN. (1930) § 22-2012; TENN. GEN. CODE (Shannon, 1932) § 5973; UTAH COMP. LAWS (1917) § 1007; WASH. REV. STAT. ANN. (Remington, 1932) §3269; WIS. STAT. (1931) § 220.08 (3); WYO. REV. STAT. ANN. (1931) § 10-512.

4. 13 STAT. 114 (1864), 12 U. S. C. § 192 (1926).

5. An application by a receiver of a national bank appointed by the Comptroller of Currency to the District Court for approval of the sale of assets, does not subject the receiver and the affairs of the bank to the jurisdiction of, or place the assets of a bank under control of the court in the sense that a receiver appointed by a court and the assets in his possession are under the court's control. *Easton v. Iowa*, 188 U. S. 220 (1903); *In re Chetwood*, 165 U. S. 443 (1897); *Hulse v. Argetsinger*, 18 F. (2d) 944 (C. C. A. 2d, 1927); *Liberty National Bank v. McIntosh*, 16 F. (2d) 906 (C. C. A. 4th, 1927).

6. *Therrell v. Rinamen*, 144 So. 327 (Fla. 1932); *Commerce Trust Co. v. Farmer's Exchange Bank*, 61 S. W. (2d) 928 (Mo. 1933); *Riches v. Hadlock*, 15 P. (2d) 283 (Utah 1932); *Richmond v. District Court*, 14 P. (2d) 673 (Wyo. 1932).

7. *Rankin v. Yegen*, 79 Mont. 184, 255 Pac. 744 (1927); *Blades v. Hood*, 203 N. C. 56, 164 S. E. 828 (1932); *Yeargain v. Shull*, 149 Okla. 221, 300 Pac. 303 (1931); *Robertson v. Bank of Bristol*, 165 Tenn. 354, 54 S. W. (2d) 967 (1932); *In re Liquidation of Cashmere State Bank*, 169 Wash. 258, 13 P. (2d) 892 (1932).

8. *White v. Taylor*, 58 S. W. (2d) 210 (Ark. 1933); *Aber v. Maxwell*, 140 Ark. 203, 215 S. W. 389 (1919); *Davis v. Moore*, 130 Ark. 128, 197 S. W. 295 (1917).

9. *Casey v. Galli*, 94 U. S. 673 (1876).

10. *Bennett v. Wheatley*, 154 Ga. 591, 115 S. E. 83 (1922); *In re Liquidation of Oklahoma State Bank*, 110 Okla. 295, 237 P. 603 (1925). But *cf.* *Isaac v. Marcus*, 258 N. Y. 257, 179 N. E. 487 (1932).

11. *Davis v. Moore*, *supra* note 8; *Poch v. Taylor*, 186 Ark. 618, 54 S. W. (2d.) 994 (1932).

12. Note 1, *supra*.

13. *Jefferies v. Wasson*, *supra* note 2, at 905. But *cf.* *Kruppen v. Taylor*, 183 Ark. 1046, 40 S. W. (2d) 775 (1931).

means of redress to the depositors against possible arbitrary action on the part of the commissioner. The same result, however, could have been reached without this somewhat strained interpretation of the statute, on the analogy of an equity court's inherent jurisdiction over fiduciaries. Thus, where a trustee is empowered to apply for an order of sale of the trust res, the beneficiary can always obtain a judicial determination of whether the trustee has abused his discretion in petitioning, or refusing to petition, the court for such an order.<sup>14</sup> Likewise the position of the depositor is comparable to that of a corporate stockholder, who may petition a court of equity to interpose its powers when the corporate directors refuse to take appropriate action for the best interests of the corporation.<sup>15</sup> An extension of the jurisdiction of equity over trustees would have enabled the court in the instant case to obviate the holding that the assets of the bank were in custodia legis, by merely determining that it had jurisdiction to entertain a petition of the depositors for a decision on the question of whether the commissioner, as a fiduciary, had abused his discretion.

#### STATE TAXATION OF ASSETS HELD BY RECEIVERS OF INSOLVENT BANKS

AN Arizona statute<sup>1</sup> provides as an exclusive method for the taxation of banks a levy on the shareholders, assessed upon the value of the shares as determined by the distributable assets; the tax is collected through the bank as agent of the stockholders. In *Federal Land Bank of Berkeley v. Yuma County*,<sup>2</sup> real estate in which an insolvent state bank held the equity of redemption, and which was mortgaged to the plaintiff, had been assessed under a statute imposing a general property tax, and a tax lien filed against the land. In seeking to foreclose its mortgage, the plaintiff contended that the county's tax lien was void because the tax upon the shares precluded other assessments against the bank's assets even during insolvency, when the tax upon the shares would bring the state no revenue. But the Supreme Court of Arizona, declaring that a legislative intention to exempt the assets of an insolvent bank from taxation should not be implied, held that such assets were properly subjected to the general property tax. The county's lien was therefore given priority over the plaintiff's mortgage.

The Arizona tax, levied upon the value of a bank's shares and collected through the bank, is sanctioned by Congress as a method for taxing national banks,<sup>3</sup> and although uniformity of bank taxation is not necessary since state and national banks are separately classed,<sup>4</sup> the desirability of imposing equal burdens on com-

14. *In re Schuster's Estate*, 35 Ariz. 457, 281 Pac. (1929); *Metsker v. Metsker*, 320 Ill. 547, 151 N. E. 539 (1926); *Headley v. Headley*, 226 Ky. 483, 11 S. W. (2d) 123 (1928).

15. *Dickerman v. Northern Trust Company*, 176 U. S. 181 (1900); *Blythe v. Enslin*, 219 Ala. 638, 123 So. 71 (1929); *Isaac v. Marcus*, *supra* note 10; *Bosworth v. Allen*, 168 N. Y. 157, 61 N. E. 163 (1901); *Brewster v. Hatch*, 122 N. Y. 349, 25 N. E. 505 (1890).

1. ARIZ. CODE (Struckmeyer, 1928) §§ 3069, 3070.

2. 22 P. (2d) 405 (Ariz. 1933).

3. Permitted alternatives to the tax on the shares are a tax on net income, an excise tax measured by net income, and inclusion of income from the shares within the taxable income of the holder. 44 STAT. 223 (1926), 12 U. S. C. SUPP. VI § 548 (1932). Under the principle of *McCulloch v. Maryland*, 4 Wheat. 316 (U. S. 1819), it has been assumed that such congressional permission is necessary, but this assumption has been doubted. Schweppe, *State Taxation of National Banks: Uncertainty of its Constitutional Basis* (1922) 6 MINN. L. REV. 219.

4. *Primghar State Bank v. Rerick*, 96 Iowa 238, 64 N. W. 801, 802 (1895). Not even

peting businesses<sup>5</sup> has led to taxation of state banks in the same way.<sup>6</sup> Such a tax has been further recommended for the reason that when the bank is a going concern the assessment of the value of the shares is inclusive of the income from all the bank's assets without any deductions for property which would be exempt under a direct property tax.<sup>7</sup> But since upon a bank's insolvency its shareholders no longer have any interest in it, and since legislatures have not specifically provided for this contingency,<sup>8</sup> both the personal property and, in those states which have no separate tax on bank realty,<sup>9</sup> the real property of an insolvent bank are wholly tax exempt unless the general property tax may be imposed.<sup>10</sup>

the interpretation of the statutes taxing bank shares needs to be uniform as to both state and national banks. *Union Bank & Trust Co. v. Phelps*, 288 U. S. 181 (1933). *Contra: Ashland County Bank v. Village of Butternut*, 208 Wis. 90, 241 N. W. 638, 639 (1932).

5. SELIGMAN, *ESSAYS IN TAXATION* (1921) 151-161.

6. ARK. DIG. STAT. (Crawford & Moses, 1921) §§ 9945-9949; CONN. GEN. STAT. (1930) § 1272; GA. CODE ANN. (Michie, Supp. 1930) § 993 (290); IDAHO CODE ANN. (1932) § 61-1401-1407; ILL. REV. STAT. (Smith & Hurd, 1933) c. 120, § 39; IOWA CODE (1931) §§ 6998, 7002, 7007-a1; KAN. REV. STAT. ANN. (1923) c. 79, § 1101, amended Kan. Laws 1931, c. 304, p. 430; KY. STAT. (Carroll, 1930) § 4092; LA. GEN. STAT. (Dart, 1932) §§ 684-688; MD. ANN. CODE (Bagby, 1924) art. 81, § 157-158; MASS. GEN. LAWS (1921) c. 63, § 2; MINN. STAT. (Mason, 1927) § 2026-1; MISS. CODE ANN. (1930) § 3138; MO. REV. STAT. (1929) §§ 9765-66; NEB. LAWS 1933, c. 156, § 4; NEV. COMP. LAWS (Hillyer, 1929) §§ 6572-6577; N. J. COMP. STAT. (1910) p. 5096; N. M. STAT. ANN. (Courtright, 1929) § 141-504; N. C. CODE ANN. (Michie, Supp. 1931) § 7971 (59); N. D. COMP. LAWS ANN. (1913) § 2115; OHIO GEN. CODE (Page, Supp. 1931) § 5408; OKLA. STAT. (1931) c. 66, art. 7; PA. STAT. ANN. (Purdon, 1931) tit. 72, §§ 1911, 1912, 1931, 1932, 1961, 1962, 2243; S. C. CODE OF LAWS (1932) § 2663-2669; S. D. COMP. LAWS (1929) §§ 6696-6698; TENN. CODE. (1932) §§ 1351, 1391-92; VT. GEN. LAWS (1917) § 754; VA. CODE ANN. (Michie, 1930) §§ 89-97; WASH. REV. STAT. (Remington, 1932) § 11151-52; W. VA. CODE (1931) § 11-3-14; WYO. REV. STAT. ANN. (1931) § 115-118. In the states that impose direct taxes on state banks' personal property, COLO. ANN. STAT. (Mills, 1930) § 6253; FLA. COMP. LAWS (Skillman, 1927) § 908; Ind. Acts 1933, c. 83, p. 545; ME. REV. STAT. (1930) c. 12, §§ 72-77; MICH. COMP. LAWS (1929) § 10166; MONT. REV. CODE (Choate, Supp. 1927) § 2067; R. I. GEN. LAWS (1923) § 467; TEX. REV. CIV. CODE (Vernon, 1928) §§ 7165-66, and in those that impose taxes in the nature of excises, Ala. Acts 1933, no. 111, p. 104; CAL. GEN. LAWS (Deering, 1931) § 8488; Del. Laws 1931, c. 7, § 103-66; N. H. PUB. LAWS (1926) c. 70, §§ 1, 9, 11; N. Y. TAX LAW (1909) §§ 219 q, 219 rr; Ore. Laws 1931, §§ 2, 3, p. 436; Utah Laws 1931, c. 39, p. 87; Wis. STAT. (1931) § 70.40, the present problem would not arise.

7. The assessable value is determined by the capital stock, surplus, undivided profits, and market value. 3 COOLEY, *TAXATION* (4th ed. 1924) § 985. No deduction is allowed for non-taxable United States bonds, *Home Savings Bank v. City of Des Moines*, 205 U. S. 503, 510 (1907); *Head v. Board of Review of City of Jefferson*, 170 Iowa 300, 301, 152 N. W. 600, 601 (1915), nor for charter-exempt capital, 8 MICHIE, *BANKS AND BANKING* (1932) c. 19 § 18.

8. In Indiana when banks are insolvent only liquidating dividends to depositors and stockholders are taxed. Ind. Acts 1933, c. 83, § 14. Oklahoma, under its tax on shares, *supra* note 6, makes receivers liable for taxes due. *Cf.* 20 STAT. 351 (1879), 12 U. S. C. § 570 (1926), exempting insolvent banks from taxes of the Federal Government if the depositors' interests, by imposition of the taxes, would be diminished. *Jackson v. United States*, 20 Ct. Claims 298, 303 (1885).

9. Arizona, Arkansas, Florida, and Mississippi, *supra* note 6.

10. *Bestold v. Toluca State Bank*, 327 Ill. 638, 642, 159 N. E. 240, 242 (1927); *cf.*

The only indication of legislative intention to exclude, by a tax on the shares, all assessments on a state bank's property during receivership, is that the policy requiring uniform tax burdens on solvent banks pertains equally to insolvent institutions. In *Rosenblatt v. Johnson*<sup>11</sup> the United States Supreme Court held that insolvency and receivership did not destroy the corporate status of a national bank as a federal instrumentality immune from state taxation except through methods sanctioned by Congress; hence, only an insolvent national bank's real property, direct taxation of which is sanctioned,<sup>12</sup> is subject to state levies, its personal property being exempt. If the personal property of a national bank in receivership is immune, it would not be unreasonable to hold that the same assets of state banks should also be given immunity.<sup>13</sup> The rule of *Rosenblatt v. Johnson* thus would deprive states of much revenue from insolvent state as well as national banks. But a more desirable method of achieving uniformity in the taxation of insolvent banks lies in the repudiation of the fifty-year old *Rosenblatt* case. And the holding that an insolvent national bank is a federal instrumentality may certainly be questioned,<sup>14</sup> for the determination of whether a business is an instrument of the federal government depends upon its relation to that government;<sup>15</sup> and the relation of an insolvent national bank in the process of liquidation to the federal government is negligible.<sup>16</sup>

But, strong as are the factors commending a policy of uniformity in the taxation of insolvent state and national banks, the needs of the state for revenue are perhaps greater.<sup>17</sup> Since the court in the instant case was without power to overrule *Rosenblatt v. Johnson*, its refusal to insist upon a uniformity which would exempt a great deal of property from taxation seems well justified. There are plausible grounds upon which it may be argued that such an exemption was not contemplated by the legislature. The tax upon shareholders' interests in a bank is in lieu of, and exempts the bank's assets from, the general property tax. When the bank's insolvency renders impossible assessment of the tax upon the shares, the basis for exemption from the general property tax is gone.<sup>18</sup> The only grounds upon which continued exemption could be justified would be a policy favoring aid to bank depositors. In a few states,<sup>19</sup> statutes giving the claims of depositors preference over taxes indicate

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*Town of Rockingham v. Hood*, 204 N. C. 618, 169 S. E. 191 (1933) (tax on shares held to be a tax on bank).

11. 104 U. S. 462 (1881).

12. *Gray v. Logan*, 7 Okla. 321, 323, 54 Pac. 485, 486 (1898).

13. See *Security Savings Bank v. Board of Review of City of Waterloo*, 189 Iowa 463, 468, 178 N. W. 562, 564 (1920); *State v. State Trust & Savings Bank*, 31 N. M. 282, 290, 245 Pac. 253, 257 (1926).

14. The federal instrumentalities doctrine appears to have been minimized in recent cases. Note (1932) 41 YALE L. J. 1237.

15. Powell, *Indirect Encroachment on Federal Authority by the Taxing Power of the State* (1917) 31 HARV. L. REV. 321, 326.

16. At least a tax on the assets would impose no real or direct burden on the federal government. Cf. *Educational Films Corp. v. Ward*, 282 U. S. 379, 388, 391 (1931).

17. *Hewitt v. Traders Bank*, 18 Wash. 326, 330, 51 Pac. 468, 469 (1897), held, on facts analogous to those in the instant case, that the bank receiver was liable for a tax on the personal property because of the government's paramount claim.

18. Only institutions actually engaged in banking are taxable as banks and subjected to the tax on bank shares. *Compton v. Buder*, 308 Mo. 253, 271 S. W. 770 (1925); *Union Trust Co. of Spokane v. Spokane County*, 145 Wash. 193, 259 Pac. 9 (1927).

19. GA. CODE ANN. (Michie, Supp. 1930) § 2366 (70); IOWA CODE (1931) § 12719-a1. Such a preference has been upheld. *Baggett, Tax Collector v. Mobley*, 171 Ga. 268, 271, 155 S. E. 334, 335 (1930); *Felton v. McArthur*, 173 Ga. 465, 470, 160 S. E. 419, 421

such a policy. In the absence of such legislation, however, it would be reasonable to assume that the legislature intended no exemption of the state bank's assets.<sup>20</sup>

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(1931). But ordinarily taxes receive priority. 1 CLARK, RECEIVERS (2d ed. 1929) §§ 669, 670.

20. A few courts have held that an insolvent bank's assets are subject to the general property tax. *Ryan v. Gallatin County*, 14 Ill. 78 (1852); *Bond v. Moore*, 300 Ill. 32, 132 N. E. 777 (1921); *St. Armand v. Bank of Commerce*, 50 La. Ann. 696, 23 So. 464 (1898); *cf. Coy v. Title Guarantee & Trust Co.*, 212 Fed. 520, 521 (D. Ore. 1914), *aff'd*, 220 Fed. 90, 92 (C. C. A. 9th, 1915).