RECENT CASES

BANKS AND BANKING—BILLS AND NOTES—EFFECT OF ACCEPTANCE OF DUE-BILL OF BANK IN PAYMENT OF PERSONAL DEBT OF PRESIDENT UNDER UNIFORM FIDUCIARIES ACT—The Girard Trust Company sold stock to the President of the Union Bank, in his personal capacity, demanding and receiving from him in exchange, a due-bill upon the Union Bank, signed and countersigned by the Teller and Cashier of the Bank in accordance with clearing house regulations. Unknown to the Girard Trust Company, the signature of the Cashier had been procured by the President through misrepresentation. The Union Bank becoming insolvent, its receiver brought suit to recover the value of the negotiated due-bill. *Held,* that the Girard Trust Company was a holder in due course, according to the provisions of Section Five of the *Uniform Fiduciaries Act. Union Bank to the Use of Corn Exchange Bank v. Girard Trust Co.,* 307 Pa. 488, 161 Atl. 865 (1932).

The important feature of the principal case is that it is one of the first enunciations of the principles of the *Uniform Fiduciaries Act,* which has now been adopted by fourteen states.[1] Section Five of the Act,[2] upon which the court relied, provides that where a check is drawn by a fiduciary (in this case the Cashier), the payee is not bound to inquire whether such fiduciary is committing a breach of his obligation in drawing the check, unless it appears on the face of the instrument or is known to the payee that the check is drawn in payment of a personal debt of the fiduciary, or for similar reasons of personal gain.[3] This section of the Act, together with Sections Four and Six, was designed by the draftsmen [4] to overcome the effect of cases which are a manifest excep-

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[1] For other decisions and material relative to the Act, see Norristown-Penn Tr. Co. v. Middleton, 300 Pa. 522, 150 Atl. 885 (1930); Pennsylvania Co. *etc.* v. Ninth Bk. & Tr. Co., 306 Pa. 148, 158 Atl. 251 (1932); Commissioners' Notes to the Act, 9 U. L. A. (1932) 147 *et seq.* On the general subject, see Scott, *Participation in a Breach of Trust* (1921) 34 HARV. L. REV. 454. This article, published a year before the Act was drafted, foreshadows the contents of the Act in every important particular.

[2] UNIFORM FIDUCIARIES ACT, § 5, PA. STAT. ANN. (Purdon, 1930) tit. 20, § 3371. Good faith, rather than due care, is generally the only requirement of holdership in due course, according to the Act. "A thing is done in 'good faith', within the meaning of this act, when it is in fact done honestly, whether it be done negligently or not". U. F. A. § 1, PA. STAT. ANN., tit. 20, § 3311. "The definition of 'Good Faith' is taken verbatim from the UNIFORM SALES ACT, § 76; UNIFORM WAREHOUSE RECEIPTS ACT, § 58; UNIFORM BILLS OF LADING ACT, § 53; UNIFORM STOCK TRANSFER ACT, § 22". Commissioners' Notes, *supra* note 1, at 148. But the court in the principal case disregarded the definition of good faith contained in the Act, and, by analogy, applied that held in decisions under the N. I. L. It arrived at the same result. Hodge v. Smith, 130 Wis. 326, 110 N. W. 192 (1907); City Nat. Bk. v. Mason, 192 Iowa 1048, 186 N. W. 30 (1922); Spires v. Jones, 212 Ala. 117, 101 So. 753 (1924). For a general discussion of the subject see Rightmire, *The Doctrine of Bad Faith in the Law of Negotiable Instruments,* (1920) 18 MICH. L. REV. 355; (1911) 59 U. OF PA. L. REV. 404. But see Elmore County Bk. v. Avant, 189 Ala. 418, 66 So. 509 (1914); Morris v. Muir, 111 Misc. 739, 181 N. Y. Supp. 913 (1920).

[3] The fiduciary considered in Section Five has reference to the *drawer* of the note, in this case the cashier. It may be with some reason asserted that the spirit of the section might be interpreted as including situations where checks are *caused* by a fiduciary to be drawn, as in the principal case, as raising a presumption of fraud, where such checks are made in fulfillment of the personal indebtedness of the fiduciary. But it must be kept in mind that the section may not be construed beyond its title, which refers only to checks drawn *by* a fiduciary. And hence, since in the absence of bad faith *all checks drawn by a fiduciary* are declared good (with irrelevant exceptions), the above argument is defeated.

[4] 9 U. L. A. *supra* note 1, at 152.

tion to the rule of Section Fifty-six of the *Negotiable Instruments Law*,[5] in holding the payee to a duty of due care in inquirying into the authority of the fiduciary.[6] The Fiduciaries Act, whose express purpose is to facilitate the performance by honest fiduciaries of their obligations,[7] should therefore be strictly construed. It can hardly be said that the intention of the Act was to include the present factual situation in the category where notice may be constructive,[8] since the drawer-fiduciary was found not to have acted for his personal benefit.[9] If, therefore, recovery against the Girard Trust Company is to be allowed, bad faith on the part of the payee must be shown. The fact that the coexecutor requested the President to furnish a due-bill upon his Bank is not in itself evidence of bad faith[10], in view of the fact that the Cashier is an independent officer with wide discretionary powers.[11] And so, although in such cases it may appear desirable to raise a duty of inquiry in order to prevent collusion,[12] the decision in the principal case must be justified as a logical interpretation of the Fiduciaries Act.[13]

CONFLICT OF LAWS—CONSTITUTIONAL LAW—VALIDITY IN PENNSYLVANIA OF CALIFORNIA DECREE ANNULLING FOREIGN MARRIAGE ON GROUNDS NOT RECOGNIZED IN STATE OF CELEBRATION—JURISDICTION OF COURT TO ANNUL A FOREIGN MARRIAGE—Defendant, a widow, recovered a Workmen's Compensation award in Pennsylvania against plaintiff company for the death of her husband. Later she remarried in Mexico, and subsequently had the marriage annulled in California, the state of her domicil, on grounds sufficient for annulment in California, but not recognized in Mexico. The company now seeks to have the award terminated under a provision of the *Workmen's Compensation Act* allowing termination upon remarriage.[1] *Held,* that the award should be

[5] PA. STAT. ANN (Purdon, 1930) tit. 56, § 136. "To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith."

[6] Ford v. Brown, 114 Tenn. 467, 88 S. W. 1036 (1905); Dollar Sav. & Tr. Co. v. Crawford, 69 W. Va. 109, 70 S. E. 1089 (1911).

[7] "In order to prevent occasional breaches of trust, the courts have sometimes adopted rules which can easily be evaded by a dishonest fiduciary, but which seriously hamper honest fiduciaries in the performance of their obligations." 9 U. L. A. *supra* note 1, at 148.

[8] *I. e.*, on the basis of negligence.

[9] If the fiduciary drew the bill in payment of his personal debt, a duty of inquiry on the part of the payee would arise. Norristown-Penn Tr. Co. v. Middleton, *supra* note 1; Ward v. City Trust Co., 192 N. Y. 61, 84 N. E. 585 (1908); Coleman v. Stocke, 159 Mo. App. 43, 139 S. W. 216 (1911); Gilman v. Bailey Carriage Co., 125 Me. 108, 131 Atl. 138 (1925).

[10] Spencer v. Alki Point Transp. Co., 53 Wash. 77, 101 Pac. 509 (1909); Montvale v. Peoples Bk., 74 N. J. L. 464, 67 Atl. 67 (1907). It was shown that the payee could have sold elsewhere at the same price with equal facility—strong evidence of good faith.

[11] Chapman v. First Nat. Bk., 26 Wyo. 138, 181 Pac. 360 (1919); Hewitt v. First Nat. Bk., 113 Tex. 100, 252 S. W. 161 (1923). There is, of course a strong argument against allowance of negotiability on the grounds of agency: that the payee should have regarded the signature of the cashier as being in effect the president's signature, and so have been put upon a duty of inquiry. But it is submitted that such analysis hardly falls within the meaning of Section Five.

[12] *Quære*, as to whether this decision encourages banks to be grossly negligent in dealing with fiduciaries.

[13] In view of the fact that it makes for negotiability, the decision is in keeping with the spirit of the N. I. L., and is illustrative of the intended harmony between the U. F. A. and the N. I. L. As a matter of fact, had the court merely applied the N. I. L., and held that the custom of the clearing house obviated the necessity on the part of the payee of inquiring into the authority of the drawer-fiduciary, the same result would have been reached. But the court was correct in following the latest expression of legislative will.

[1] PA. STAT. ANN. (Purdon, 1930) tit. 77, § 562.

terminated, since the rights lost by defendant upon her remarriage in Mexico were not reinstated by the California decree. *Dodds v. Pittsburgh, M. & B. Rys. Co.*, 162 Atl. 486 (Pa. Super. 1932).

Since a marriage, valid in the state of its celebration, is valid in all states,[2] a court declaring a foreign marriage null *ab initio* should, because of the contract involved, be governed by the *lex loci contractus*.[3] Because the California court applied the *lexi fori*, the Pennsylvania court concluded that the decree of the California court did not restore the rights lost by defendant upon her remarriage in Mexico.[4] Under the Constitution of the United States,[5] the Pennsylvania court was required to give full faith and credit to the decree, even though the *lex fori* was applied.[6] Under the facts of the case, the only ground to take the decree outside the "full faith and credit" clause would be lack of jurisdiction of subject matter;[7] but the Pennsylvania court did not deem it necessary to decide the question of jurisdiction.[8] However, it said, by way of *dictum*,[9] that its views were in accord with the *Conflict of Laws Restatement*[10] which declares that only a court of the state of celebration may annul a marriage.[11] Therefore, by a finding of lack of jurisdiction of subject matter, it would have arrived at the same result without offending the "full faith and credit" clause. While the *Restatement* rule is supported by sound logic, the courts generally have not followed it,[12] but have, on the basis of domicil, assumed jurisdiction to annul foreign marriages in accordance with the *lex loci contractus*.[13] This would seem to be the more convenient, if not the strictly logical, rule,[14] since it would be a needless burden on the parties to the marriage to re-

[2] Garcia v. Garcia, 25 S. D. 645, 127 N. W. 586 (1910).

[3] See Garcia v. Garcia, *supra* note 2. However, if such a mariage is fundamentally opposed to the public policy of the state of domicil, it may be annulled, even though valid in the state of celebration. Georgia v. Tutty *et al.*, 41 Fed. 753 (C. C. S. D. Ga. 1890) (miscegenation); United States *ex rel.* Devine *et al.* v. Rodgers *et al.*, 109 Fed. 886 (E. D. Pa. 1901) (incest). In these cases, the marriage is attacked on the status side, rather than on the contractual side, and therefore the *lex fori* may be applied instead of the *lex loci contractus*.

[4] Principal case at 489.

[5] Art. IV, Sec. 1.

[6] Fauntleroy v. Lum, 210 U. S. 230, 28 Sup. Ct. 641 (1908). See also Kenney v. Supreme Lodge of the World, Loyal Order of Moose, 252 U. S. 411, 40 Sup. Ct. 371 (1920); CONFLICT OF LAWS RESTATEMENT (Am. L. Inst. 1930) § 472.

[7] See Thompson v. Whitman, 18 Wall. 457 (U. S. 1873); GOODRICH, CONFLICT OF LAWS (1927) 460.

[8] Principal case at 488.

[9] *Id.* at 489.

[10] The law on the question of jurisdiction to annul foreign marriages is very much confused. For a discussion of this confusion see 2 SCHOULER, MARRIAGE, DIVORCE, SEPARATION AND DOMESTIC RELATIONS (6th ed. 1921) §§ 1154, 1155; Goodrich, *Jurisdiction to Annul a Marriage* (1919) 32 HARV. L. REV. 806; McMurray and Cunningham, *Jurisdiction to Pronounce Null a Marriage Celebrated in Another State or Foreign Country* (1930) 18 CALIF. L. REV. 105. Most of this confusion is due to the failure of courts to distinguish between divorce and annulment.

[11] CONFLICT OF LAWS RESTATEMENT (Am. L. Inst. 1930) § 122 and Comment (a).

[12] It is interesting to note that the few cases usually cited in support of this view have been distinguished, and there is practically no authority to support this view. These cases are distinguished in McMurray and Cunningham, *supra* note 9, at 107.

[13] Avakian v. Avakian, 69 N. J. Eq. 89, 60 Atl. 521 (1905); Kitzman v. Werner, 167 Wis. 308, 166 N. W. 789 (1918). See also 2 SCHOULER, *op. cit. supra* note 9, 1154; McMurray and Cunningham, *supra* note 9.

[14] Professor Goodrich, in his article, *supra* note 9, at 824, admits that this view is "expedient, convenient, certain". However, he suggests, as a remedy for the confusion, that annulments should not operate *"ab initio"*, but should, like divorces, be operative only from the time of decree. This would, he claims, solve the confusing problem of jurisdiction to annul marriages.

quire them to return to the state of celebration in order to obtain an annulment. The question was *res integra* in Pennsylvania, and this *dictum* would seem to commit its courts to the less desirable view. However, when the question is squarely presented to the Pennsylvania court, and it is asked to assume jurisdiction for its own domiciliaries, this *dictum* may give way to the more liberal rule.

CONSTITUTIONAL LAW—CONFLICT OF LAWS—VALIDITY OF SERVICE BY MAIL ON NONRESIDENTS UNDER BLUE SKY LAW—The *New Jersey Securities Act*[1] prohibited the fraudulent sale of securities. In an injunction proceeding, brought under the Statute, to enjoin such sales, service of process on the nonresident defendants was made outside the state, as permitted by the statute.[2] *Held,* that the service was valid. *Stevens, Att'y Gen'l v. Television, Inc., et al.,* 162 Atl. 248 (N. J. Eq. 1932).

A personal judgment or decree is ordinarily invalid if process is served on a nonresident outside the state unless the defendant consents to the jurisdiction.[3] The inadequacy of this rule led to the passage of statutes permitting substituted service in certain situations, particularly in the cases of nonresident motorists. These statutes seem to be based on the doctrine of implied consent, their language usually being that the use of the highways by the nonresident shall be deemed to be equivalent to the appointment of a state official as his agent to receive service.[4] That this consent is a fiction is obvious inasmuch as the average motorist knows nothing of the statute.[5] Furthermore, it seems that consent cannot be the basis, because a nonresident has the constitutional right to use the highways subject to reasonable regulation,[6] and if substituted service were an unreasonable regulation, a state could not require consent as a condition to using the highways.[7] The real reason for upholding these statutes is that a state may, under the police power, make reasonable regulations governing the use of its highways, and since substituted service is necessary to the effective control of nonresident motorists on the highways, such service is not contrary

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[1] N. J. COMP. STAT. (Supp. 1930) p. 1736.

[2] The statute applied to all persons, and not merely to nonresidents, and provided for a reasonably effective method of notifying the defendants by mail.

[3] This rule was established in Pennoyer v. Neff, 95 U. S. 714 (1877). It has been completely accepted. McDonald v. Mabie, 243 U. S. 90, 37 Sup. Ct. 343 (1916).

[4] Examples of such statutes are: MASS. GEN. LAWS (1932) c. 90, § 3A; N. J. COMP. STAT. (Supp. 1930) p. 1047; PA. STAT. ANN. (Purdon, 1930) tit. 75, § 1201. The Massachusetts statute was upheld by the United States Supreme Court in the famous case of Hess v. Pawloski, 274 U. S. 352, 47 Sup. Ct. 632 (1927). For a general treatment of the problem raised in that case, see Scott, *Jurisdiction Over Nonresident Motorists* (1926) 39 HARV. L. REV. 563. See also, CONFLICTS OF LAWS RESTATEMENT (Am. L. Inst. 1930) §§ 90, 91.

[5] In speaking of the same doctrine as applied to foreign corporations doing business within a state, Holmes, J., in Flexner v. Farson, 248 U. S. 289 at 293, 39 Sup. Ct. 97 at 98 (1919) says, "But the consent that is said to be implied in such cases is a mere fiction, . . ."

[6] "The privileges and immunities clause of the Constitution, Sec. 2, Art. IV, safeguards to the citizens of one state the right 'to pass through, or to reside in any other state for purposes of trade, agriculture, professional pursuits, or otherwise'." Hess. v. Pawloski, *supra* note 4 at 355, 47 Sup. Ct. at 633. See Meyers, *The Privileges and Immunities of Citizens in the Several States* (1903) 1 MICH. L. REV. 286, at 364.

[7] In Frost v. Railroad Commission, 271 U. S. 583 at 593, 46 Sup. Ct. 605 at 607 (1926) the court said, "It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the Federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold".

to the "due process clause".[8] The present case is simply an extension of this principle. A state may, under the police power, guard its citizens from imposition in the sales of fraudulently represented securities.[9] Substituted service appears to be reasonably necessary to the effective regulation of such sales, since an injunction would undoubtedly tend to prevent the return of the defendants into the state in order to transact more fraudulent sales. The statute in the instant case takes a definite step forward in the abandonment of the doctrine of consent. The previous statutes made service upon the state official the equivalent of personal service, whereas the present statute makes no mention of personal service.[10] The case is novel in that the proceeding although based on the acts done within the state, is primarily [11] for the purpose of enjoining future acts.[12] In this respect also, it marks a further extension of the police power.

CONSTITUTIONAL LAW—RIGHT TO REPRESENTATION BY COUNSEL AS COMPREHENDED BY THE DUE PROCESS CLAUSE—THE SCOTTSBORO CASE—The defendants, seven illiterate negroes, totally ignorant of criminal procedure and of their constitutional rights, were among very hostile circumstances convicted of rape and sentenced to death by an Alabama court. Since they were unable to pay for legal advice, the trial court appointed the entire local bar for purposes of the arraignment. Six days elapsed between the arraignment and the trial, during which period the defendants were not consulted by counsel, due to the assumption by the members of the local bar that the court's appointment was for the limited purpose of arraigning the accused, and that a specific designation would be made subsequently for the purpose of conducting the defense. No such specific designation was made until the day of the trial. The Supreme Court of the state held that the defendants' right to representation by counsel, as granted by the Alabama Constitution and statutes, was fully satisfied.[1] An appeal was taken to the Supreme Court of the United States. *Held,* that the appointment was purely *pro forma,* and as such was offensive to the due process clause of the Fourteenth Amendment. *Powell et al. v. Alabama,* 53 Sup. Ct. 55 (1932).

It is obvious that if the United States is a government of enumerated powers,[2] its judicial arm, the Supreme Court, can correct the criminal procedure of the states only by virtue of some grant of authority specifically set forth in the Constitution. Can the "due process" clause be said to confer such authority? One school of thought takes the position that the term "due process" telescopes

[8] This has been recognized in a few of the cases. State *ex rel.* Cronkhite v. Belden, 193 Wis. 145, 211 N. W. 916 (1927); *cf.* Smolik v. Phila. & Reading Coal and Iron Co., 222 Fed. 148 (S. D. N. Y. 1915). See Hinton, *Substituted Service on Non-Residents* (1925) 20 ILL. R. REV. 1, at 5, where, in speaking of foreign corporations doing business within a state, the writer says, "And the only real basis of the rule [is] that it is socially desirable that it should be subject to the state's process."

[9] Hall v. Geiger-Jones Co., 242 U. S. 539, 37 Sup. Ct. 217 (1917); Merrick v. N. W. Halsey & Co. *et al.,* 242 U. S. 568, 37 Sup. Ct. 227 (1917); FREUND, THE POLICE POWER (1904) § 12.

[10] *Supra* note 1.

[11] The New Jersey statute, *supra* note 1, also provided that in cases where the court granted an injunction, it could appoint a receiver to take over the property fraudulently acquired, and if the defrauder be a corporation, to take over any corporate property, in order to compensate the defrauded purchasers.

[12] In England, substituted service on a nonresident is held valid in a proceeding to enjoin acts to be done in England. Tozier v. Hawkins, 15 Q. B. 650 (1885); Chemische Fabrik, *etc.* v. Badische, *etc* Fabrik, 20 T. L. R. 552 (1904); DICEY, CONFLICT OF LAWS (4th ed. 1927) 265.

[1] 224 Ala. 524, 141 So. 215 (1932).

[2] McCulloch v. Maryland, 4 Wheat. 316 (U. S. 1819).

all the incidents of "law of the land", as that phrase is employed in Magna Charta, and as those incidents are embodied, according to Anglo-American principles of liberty and justice, in the Bill of Rights of the United States Constitution.[3] It is clear that under this view the "due process" clause operates to raise a Federal question whenever a state acts or refrains from acting with respect to one of the guaranties enumerated in the Bill of Rights, and that the final decision in such matters rests not with the state's own courts, but with the Supreme Court of the United States. The opposing theory is that since no part of the Constitution is superfluous, the recitation of the Bill of Rights in the first eight Amendments, which are restrictions upon the powers of the Federal Government, not on those of the states,[4] is, under the maxim *inclusio unius est exclusio alterius,* something separate and distinct from the requirement of "due process" contained in the Fifth Amendment; and that when the phrase was repeated in the Fourteenth Amendment, which was passed to regulate *state* action in certain particulars, it therefore had reference to something quite different from those Constitutional guaranties.[5] Under this view, it is obvious that it is for the states themselves to decide whether or not they wish to provide in their organic or statutory law for any or all of the provisions of the Bill of Rights, and that any action or non-action in accordance with such decision is subject to review by no courts but their own.[6] The decision in the instant case adopts a middle course: it eschews any precise definition of "due process", but attempts to determine its intent and application "by the gradual process of judicial inclusion and exclusion, as the cases presented for decision may require".[7] The decision is rested strictly upon the "compelling considerations" of the case at bar: the ignorance, poverty and illiteracy of the defendants, the hostile surrounding circumstances, and the serious nature of the crime and penalty are held sufficient to justify the inclusion of adequate representation by counsel within the intendment of "due process of law"; where such circumstances as these are present, it is not sufficient that the defendants had a reasonable opportunity to procure counsel on their own initiative, but there is imposed upon the trial court the affirmative duty of seeing to it that such a defendant is represented in court. By restricting its decision as it did, the Court has shown a determination to wield the "big stick" of a paternalistic Federal government only when those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions" imperatively require such action. This indicates a commendable desire to interfere as little as possible with that "large residuum of sovereignty" which has been reposed in the states by the Constitution, and to restrict the scope of the "due process" clause to what seems to have crystallized as its legitimate function, the correction of only the plainest and most palpable abuse of some fundamental right.[8]

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[3] See dissenting opinions of Harlan, J., in Hurtado v. California, 110 U. S. 516, 4 Sup. Ct. 111 (1884); and Twining v. New Jersey, 211 U. S. 78, 29 Sup. Ct. 14 (1908).

[4] Barron v. Baltimore, 7 Pet. 243 (U. S. 1833) (taking of private property for public use without just compensation); Walker v. Sauvinet, 92 U. S. 90 (1876) (trial by jury); Kennard v. Louisiana, 92 U. S. 480 (1876) (trial by jury).

[5] Hurtado v. California, *supra* note 3.

[6] *Id.*; Twining v. New Jersey, *supra* note 3; Frank v. Mangum, 237 U. S. 309, 35 Sup. Ct. 582 (1915); Ashe v. Valotta, 270 U. S. 424, 46 Sup. Ct. 333 (1926); Hebert v. Louisiana, 272 U. S. 312, 47 Sup. Ct. 103 (1926).

". . . the Fourteenth Amendment was not intended to curtail the powers of the States to so amend their laws as to make them conform to the wishes of their citizens, to changed views of administration, or to the exigencies of their social life." Bolln v. Nebraska, 176 U. S. 83, 88, 20 Sup. Ct. 287, 289 (1900).

[7] *Per* Miller, J., in Davidson v. New Orleans, 96 U. S. 97 (1878).

[8] "Is it [exemption from compulsory self-incrimination] a fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of a citizen of such government? If it is, and if it is of a nature that pertains to process of

CORPORATIONS—VOTING TRUSTS—CERTIFICATE HOLDER AS SHAREHOLDER WITHIN MEANING OF STATUTE ALLOWING "SHAREHOLDER" TO CONTEST CORPORATE ELECTION—Complainant, holder of a voting trust certificate under an agreement entitling the trustee to vote the shares and also to exercise all rights and powers as absolute owners, brought a suit in equity to contest a corporate election under a statute allowing any "stockholder" to have a corporate election reviewed. *Held,* that the complainant was a "stockholder" within the meaning of the statute. *Chandler v. Bellanca Aircraft Corp.,* 162 Atl. 63 (Del. 1932).

Aside from the problem of voting trusts, the term "shareholder" has been generally held to apply only to the person in whose name the stock is registered on the corporate books.[1] A few courts have recognized that for some purposes a person having an equitable interest in the stock may be designated as a shareholder.[2] The law, however, of voting trust agreements differs materially from the ordinary trust relationship,[3] and the rights and liabilities of the *cestui que* trust, the certificate holder, are definitely broader.[4] This is due, primarily, to the evident distrust of the courts which while recognizing such agreements,[5] as being valid *per se,*[6] nevertheless view with precision their scope and legality.[7] Involved in this chariness of courts towards the voting trust is the problem of determining for what purposes the certificate holder, whose shares are registered on the corporate books in the name of the trustee, is a "shareholder". It has been suggested that the answer should be found in the agreement between the parties,[8] as in the case of an ordinary trust. Although this

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law, this court has declared it to be essential to due process of law." Twining v. New Jersey, *supra* note 3, at 106, 29 Sup. Ct. at 22.

For cases holding the right to representation by counsel to be fundamental to justice, see People v. Napthaly, 105 Cal. 641, 39 Pac. 29 (1895); Sheppard v. State, 165 Ga. 460, 141 S. E. 196 (1928); State v. Moore, 61 Kans. 732, 60 Pac. 748 (1900); Thomas v. Mills, 117 Ohio St. 114, 157 N. E. 488 (1927).

With the instant case compare that of Moore v. Dempsey, 261 U. S. 86, 43 Sup. Ct. 265 (1923), in which a trial held during a mob demonstration, was held to be not a fair trial before an impartial jury, and therefore offensive to due process.

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[1] Ludden v. Watt, 18 Ala. App. 652, 653, 94 So. 239, 240 (1922); The People v. Lehme, 269 Ill. 351, 358, 109 N. E. 1051, 1054 (1915).

[2] See Lloyd v. Preston, 146 U. S. 630, 645, 13 Sup. Ct. 131, 136 (1892); Colorado Iron Works v. Mining Co., 15 Colo. 499, 511, 25 Pac. 325, 329 (1890); Hall v. O'Reilly Realty Co., 306 Mo. 182, 195, 267 S. W. 407, 410 (1924); FLETCHER, CYCLOPEDIA CORPORATIONS (Perm. ed. 1932) § 5976. *Cf.* Gowan v. Certain Shares of Int. Agric. Corp., 276 Fed. 206, 208 (D. C. N. Y. 1921).

[3] It is interesting to note that a *cestui que* trust under an ordinary trust agreement has been permitted to sue as a shareholder if the trustee has refused to act and is joined as a party defendant. Hall v. O'Reilly Realty Co., *supra* note 2; Great Western Railway Co. v. Rushaut, 5 De G. & S. 290 (Ch. 1852).

[4] There is still doubt as to whether an executory trust agreement is revocable by the *cestui que* trust. A statutory voting trust was held irrevocable: *In re Morse,* 247 N. Y. 290, 160 N. E. 374 (1922). An agreement has been held irrevocable by any one certificate holder alone: Brightman v. Bates, 175 Mass. 105, 55 N. E. 809 (1900). Some cases distinguish between active and passive voting trusts, the former only being irrevocable: Commonwealth v. Roydhouse, 233 Pa. 234, 82 Atl. 74 (1911).

[5] They were early held invalid on grounds of public policy and restraint of trade. Clarke v. Central R. & Banking Co., 50 Fed. 338 (S. D. Ga. 1892); Harvey v. Linville Imp. Co., 118 N. C. 693, 24 S. E. 489 (1896); THOMPSON, CORPORATIONS (3d ed. 1927) § 995. *Cf.* Bostwick v. Chapman, 60 Conn. 553, 24 Atl. 32 (1890).

[6] Mackin v. Nicollet Hotel, Inc., 25 F. (2d) 783 (C. C. A. 8th, 1928); Babcock v. Chicago Rys., 325 Ill. 16, 155 N. E. 773 (1927); Bowditch v. Jackson, 76 N. H. 351, 82 Atl. 1014 (1912). For a thorough annotation of the present law of voting trusts see Note (1932) 5 So. CALIF. REV. 214.

[7] Hellier v. Achorn, 255 Mass. 273, 151 N. E. 305 (1926); Clark v. Foster, 98 Wash. 241, 167 Pa. 908 (1917); THOMPSON, *op. cit. supra* note 5, §§ 991, 998.

[8] PURDY'S BEACH, CORPORATIONS (1891) § 307 quoted in THOMPSON, *op. cit. supra* note 5, § 990.

would appear to be a propitious solution in that it would put the parties in the position they themselves desired, the law has not been satisfied that the rights and liabilities of the certificate holder should be so confined, but rather that he should for most purposes be classed as a shareholder.[9] The court in the principal case was so disposed for in treating the certificate holder as a shareholder it completely ignored the agreement [10] between the parties by which the trustees were made absolute owners of the shares.[11] It is evident, therefore, that courts, in restricting the alienation [12] of the various rights in the stock under a voting trust contract, have concluded that the certificate holder, although holding only an "equitable title" as far as the voting privilege is concerned, *is* a shareholder for all other intents and purposes.[13]

CRIMINAL PROCEDURE—RIGHT OF STATE TO APPEAL FROM INTERMEDIATE JUDGMENT GRANTING NEW TRIAL—Defendant, convicted on a criminal charge, moved for a new trial but was refused. He appealed by writ of error to the court of appeals which held that the trial court had erred.[1] Thereupon, the state, under a constitutional amendment giving the Supreme Court power "to require, by *certiorari* or otherwise, any case to be certified to the Supreme Court," [2] petitioned for a writ of *certiorari* to have the decision of the intermediate court brought up for review. Defendant moved to dismiss the petition on the ground that the writ did not lie at the instance of the state. *Held* (two justices dissenting), that petition be dismissed. *State v. B'Gos,* 165 S. E. 566 (Ga. 1932).

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[9] Similar to the principal case courts have in analogous situations termed certificate holders shareholders: O'Grady v. United States Indep. Tel. Co., 75 N. J. Eq. 301, 71 Atl. 1040 (1909) (where the court held the certificate holder to have a shareholder's right to wind up corporate insolvency); Cooney v. Arlington Hotel Co., 11 Del. Ch. 286, 101 Atl. 879 (1917) (where certificate holder was held to have shareholder's responsibility for unpaid subscriptions).

[10] See the principal case, at 65, where the agreement stated that the trustees should "possess and shall be entitled in their discretion to exercise . . all rights and powers as absolute owners of all shares of stock of the company . . including the unrestricted right to vote thereon . . ." It thus appears that the right to vote was, by the agreement, to be only incidental to a complete power over the shares.

[11] The result of the principal case was foreshadowed in an early decision: Griffith v. Jewett, 9 Ohio Dec. 627, 631 (1886): "As soon as the stock was transferred to the trustees they issued a certificate to the person from whom they received it, showing that he was entitled to every element of value that enters into the stock in the same proportion and the same manner as when he held the certificate of stock, except the right to vote on it. The latter is all that is left the trustee . . (632) The agreement may finally be reduced to this: the entire beneficial interest in the stock is severally vested in the certificate holders, the voting power in the trustees and the situation does not differ materially from what it would be if the stockholders retaining their shares had simply united in a proxy . . "

[12] It has been ruled that the holder of a voting trust certificate on transferring his certificate for value, is liable for a tax imposed on transfers of stock. United States Radiator Co. v. State, 151 App. Div. 367, 135 N. Y. Supp. 981 (1912). See also Union Trust Co. v. Oberg, 214 N. Y. 517, 108 N. E. 809 (1915), holding that the law of negotiable instruments as to stocks, applies similarly to voting trust certificates. But see Clark v. Johnson, 245 Fed. 442 (C. C. A. 8th, 1917), where the court states that a purchaser of a voting trust certificate does not purchase stock. *Cf.* Miller v. Kaliwerke, 283 Fed. 746 (C. C. A. 2d, 1922).

[13] In Wise v. Miller, 215 Ala. 660, 111 So. 913 (1927), the court ruled that where shares were transferred to a trustee to vote, the trustee had only such title as was necessary to support the trust, the beneficial ownership and ultimate title being in the certificate holder. See also Consumers Gas Trust Co. v. Quinby, 137 Fed. 882, 895 (C. C. A. 7th, 1905).

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[1] B'Gos v. State, 43 Ga. App. 379, 159 S. E. 137 (1931).

[2] GA. CONST. Art. 6, § 2 (5) (as amended 1916); CIV. CODE, § 6502. The writ of *certiorari* lies to correct any errors of law committed by an inferior tribunal: Young v. Broyles, 16 Ga. App. 356, 85 S. E. 366 (1915).

It has been generally held that the state has no right to appeal or seek a review in a criminal case in which there has been an acquittal.[3] Where there has been a conviction and the defendant has been granted a new trial the state, in the absence of enabling legislation,[4] is also denied the right to appeal.[5] In recent years, however, it has been recognized that both of these rules hamper the proper administration of the criminal law and a vigorous attack has been leveled against them.[6] In the instant case the court held that the constitutional amendment [7] did not give the state the right to ask for the writ [8] and applied the general rule. The minority, however, contended that the reason upon which the majority opinion turned, namely, the constitutional provision that "no person shall be put in jeopardy of life, or liberty, more than once, save on his or her own motion for a new trial after conviction",[9] was not involved in this case by virtue of the fact that it was the defendant who had appealed.[10] Permitting the state to appeal from an order granting a new trial is not a violation of the constitutional guarantee against being twice in jeopardy for the same offense for if the state wins the appeal the first conviction is made final and if it loses the situation remains unchanged.[11] In view of the strong support for a change in the gen-

[3] Connecticut is the only state in which the state may after an acquittal secure a new trial for errors on the first trial prejudicial to the state: State v. Lee, 65 Conn. 265, 30 Atl. 1110 (1894); CONN. GEN. STAT. (1930) § 6494. The decisions the other way are based upon varying theories (1) That there is no statutory or common law authority for such procedure: State v. Shields, 49 Md. 301 (1878); State v. Credle, 63 N. C. 506 (1869); see United States v. Sanges, 144 U. S. 310, 318, 12 Sup. Ct. 609, 612 (1892); (2) That the state constitution specifically prohibits appeals in such cases: State v. Spear, 6 Mo. 644 (1840); (3) That the state constitution guarantees that no person shall be twice put in jeopardy for the same offense: *Ex parte* Bornee, 76 W. Va. 360 (1915), L. R. A. 1915 F. 1093. (There is no jeopardy clause in the constitutions of Connecticut, Maryland, Massachusetts, North Carolina, and Vermont.)

[4] It is provided in the following statutes that the state may appeal from an order granting a new trial: ARIZ. REV. CODE (1928) § 5136; CAL. PEN. CODE (1925) § 1238 (3); IDAHO COMP. STAT. (1919) § 9069 (2); LA. CODE OF CR. PR. (1929) arts. 540, 541 (inferentially); MONT. REV. CODES (1921) § 12108 (2); NEV. REV. LAWS (1912) § 7286 (2); N. D. COMP. LAWS (1913) § 10993 (2); S. C. CODE OF LAWS (1922), Civ. Pr., §§ 26 D2, 645; S. D. SESS. LAWS (1919) 146, § 5032 (4); WASH. COMP. STAT. (Remington Supp. 1927) § 2183-1 (4); WIS. STAT. (1929) § 358.12 (4).

[5] State v. Welsh and Fagan, 23 La. Ann. 142 (1883); State v. Hinson, 123 N. C. 755, 31 S. E. 854 (1898).

[6] See the dissenting opinion of Holmes, J., with whom concurred White and McKenna in Kepner v. United States, 195 U. S. 100, 134, 24 Sup. Ct. 797, 806 (1904); Miller, *Appeals by the State in Criminal Cases* (1927) 36 YALE L. J. 486; CODE OF CRIMINAL PROCEDURE (Am. L. INST. 1930) §§ 423 and 428; ADMINISTRATION OF THE CRIMINAL LAW, Tentative Draft No. 2 (Am. L. Inst. 1932) §§ 28 and 29.

[7] *Supra* note 2.

[8] This construction of the constitutional amendment is in accord with the rule that such powers must be conferred by express statutory or constitutional provision: State v. Jones, 7 Ga. 422 (1849); State v. Simmons, 49 Ohio St. 305, 31 N. E. 34 (1892); United States v. Sanges, *supra* note 3. The minority however reasoned that the words "any case" should be construed as an express provision for an unlimited constitutional right of review by certiorari in *all* cases.

[9] GA. CONST. Art. 1, § 1, par. 8; CIV. CODE, § 6364.

[10] At 572,—"if one who has been convicted seeks a new trial on his own motion, the second trial, granted in answer to his prayer, is not a second jeopardy . . . If . . . refused another trial he is not compelled to file a bill of exceptions. But if he . . . does he knowingly takes the risk of having the case decided upon certiorari by the Supreme Court; for it is a part of the review of the judgment overruling the motion for a new trial of which he complains."

[11] If it were otherwise the various statutes giving the state the right to appeal from an order granting a new trial, *supra* note 4, would be held to be unconstitutional. That there is a marked difference between this situation and that involved where the state seeks an appeal from an acquittal of the defendant is shown by the fact that statutes attempting to give the state the latter right have been held to be unconstitutional: People *ex rel.* Hodson v. Miner, *et al.*, 144 Ill. 308, 33 N. E. 40 (1893); State v. Van Horton, 26 Iowa 402 (1868).

eral rule on appeals by the state,[12] the court in the instant case might properly have adopted the minority opinion.

DIVORCE—ALIMONY—EQUITABLE ENFORCEMENT OF THE DECREE OF A SISTER STATE—CONTEMPT OF THE DOMESTIC COURT—Petitioner's wife was granted a divorce by a Nevada court, accompanied by a decree that she be paid alimony in stipulated installments. By a bill in equity in California she secured an order establishing the Nevada decree and directing payment of the amount in arrears. For failure to observe the latter decree petitioner was required to show cause why he should not be punished for contempt, and brought a writ of prohibition, claiming that there was no equitable jurisdiction in California since the Nevada decree was there enforceable only as a money judgment. *Held,* that the equitable enforcement granted was proper. *Creager v. Superior Court of Santa Clara County,* 14 P. (2d) 552 (District Court of Appeal, First District, Cal. 1932).

The cases dealing with the point at issue are in direct conflict.[1] It is now established that "full faith and credit" requires the recognition of a final alimony decree of a sister state as determining the rights of the parties,[2] but that the means of enforcement thereafter granted these rights is not a federal question.[3] The courts in accord with the principal case have recognized the practical difficulties attendant upon the necessity of repeated suits in cases of installment payments and the ease with which a law judgment can be evaded as creating a need for equitable enforcement.[4] The contrary decisions, on the other hand, have held that the foreign decree constitutes a "debt of record" which is enforceable only at law, since an "adequate remedy" is there provided.[5] The conception of an equitable decree as setting up a mere "debt" is logically anomalous; the basis of the extra-territorial effect of a decree would seem to rest simply in the original right of action established as existent, and not in a separate quasi-contractual right such as arises from a law judgment.[6] It appears, moreover, that to an alimony decree there attaches a public policy in securing to a wife the performance of the duty of support, which in many respects obtains for it an effect denied the average law judgment or even the average money decree. So, an alimony order may generally be locally accorded the full scope of equitable

[12] *Supra* note 6.

[1] In accord with the principal case: Cummings v. Cummings, 97 Cal. App. 144, 275 Pac. 245 (1929); Fanchier v. Gammill, 148 Miss. 723, 14 So. 813 (1927). See (1927) 41 HARV. L. REV. 798. *Contra:* Bennett v. Bennett, 63 N. J. Eq. 306, 49 Atl. 501 (1901); Davis v. Davis, 29 App. Cas. 258 (D. C. 1907); Page v. Page, 189 Mass. 85, 75 N. E. 92 (1905). But with the last decision compare White v. White, 233 Mass. 39, 123 N. E. 389 (1919).

[2] Barber v. Barber, 21 How. 582 (U. S. 1858); Sistare v. Sistare, 218 U. S. 1, 30 Sup. Ct. 682 (1910). The decree must not be so possible of modification as not to be a "final disposition". *Id.* at 16, 30 Sup. Ct. at 686. Although not treated in the principal case, such latter objection could not be raised against the Nevada decree, since by Nevada practice an alimony decree is not open to modification. Sweeney v. Sweeney, 42 Nev. 431, 179 Pac. 638 (1919).

[3] Sistare v. Sistare, *supra* note 2, at 26, 30 Sup. Ct. at 690.

[4] Fanchier v. Gammill, *supra* note 1, at 738, 114 So. at 814.

[5] A money decree of a sister state was early held to support an action of debt. Post v. Neafie, 3 Caines 22 (N. Y. 1805); Pennington v. Gibson, 16 How. 65 (U. S. 1853). The conception of an alimony decree as effecting a debt of record seems to have sprung from the use of the analogy to these cases in the early decisions holding that full faith and credit must be granted. "Alimony . . . is as much a debt of record, until the decree has been recalled, as any other judgment for money is." Barber v. Barber, *supra* note 2, at 595. So used, the analogy appears to have been simply a convenience.

[6] See: Barbour, *The Extra-Territorial Effect of the Equitable Decree,* (1919) 17 MICH. L. REV. 527; Pound, *The Progress of the Law—Equity,* (1920) 33 HARV. L. REV. 420, at 423.

enforcement, injunction,[7] sequestration,[8] receivership,[9] writ of *ne exeat*,[10] contempt process.[11] It is generally held to prevail over exemption laws,[12] and to survive bankruptcy.[13] By the best-considered view, the possibility of garnishment of alimony funds is restricted to debts contracted for necessaries.[14] The same policy would seem to demand the according of the more effective extra-territorial enforcement in equity, even when denied to law judgments or ordinary money decrees. Moreover, the objection that an "adequate remedy" exists at law is scarcely an excuse, since equity is held not to lose jurisdiction because of the modern creation of a concurrent legal remedy.[15] The principal decision would seem to be the only result in keeping with the trend toward compelling specific performance of a decree of a sister state ordering conveyance of land in lieu of alimony.[16] In addition, the argument that equitable enforcement would create a remedy foreign to domestic jurisprudence is not here available.[17] The result would seem at once to be logically consistent with the modern status of the equitable decree,[18] and to create a more flexible and effective practice. It is in harmony with the desirable trends toward uniformity of national practice and utilization of equitable remedies whenever advantageous.[19]

ELECTIONS—VALIDITY OF "GERRYMANDERING" UNDER THE FEDERAL REPRESENTATIVE REAPPORTIONMENT ACT OF 1929—Congress in 1911 [1] provided for the reapportionment of representatives under the thirteenth census, and exercising its constitutional power,[2] indicated the method to be used in redistricting. Section 3 re-enacted the requirement of preceding Acts [3] that the districts be

[7] *In re* White, 113 Cal. 282, 45 Pac. 323 (1896); Errissman v. Errissman, 25 Ill. 136 (1860).

[8] Swallow v. Swallow, 84 N. J. Eq. 109, 92 Atl. 872 (1915); Casteel v. Casteel, 38 Ark. 477 (1882).

[9] Stallings v. Stallings, 127 Ga. 464, 56 S. E. 469 (1907); Barker v. Dayton, 28 Wis. 367 (1871).

[10] McGee v. McGee, 8 Ga. 295 (1850); Boucicault v. Boucicault, 21 Hun. 431 (N. Y. 1880).

[11] Wightman v. Wightman, 45 Ill. 167 (1867); Foster v. Foster, 130 Mass. 189 (1880).

[12] See cases collected in (1921) 11 A. L. R. 123. See, as distinguishing alimony from a debt, Bates v. Bates, 74 Ga. 105, 107 (1884); Menzie v. Anderson, 65 Ind. 239 (1879).

[13] 11 U. S. C. A. § 35 (1927); Audubon v. Shufeldt, 181 U. S. 575, 21 Sup. Ct. 735 (1901); Barclay v. Barclay, 184 Ill. 375, 56 N. E. 636 (1900). It is in these cases, particularly, that the obligation of an alimony decree is distinguished from a debt. "Permanent alimony is regarded rather as a portion of the husband's estate to which the wife is equitably entitled, than as strictly a debt." Audubon v. Shufeldt, *supra* at 578, 21 Sup. Ct. at 736. There is also recognition of the unique public interest in the securing of alimony payments. Turner v. Turner, 108 Fed. 785, 788 (D. Ind. 1901).

[14] See Harper, *Garnishment of Alimony* (1928) 13 IOWA L. REV. 164.

[15] 1 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1918) § 182.

[16] Mallette v. Scheerer, 164 Wis. 415, 160 N. W. 182 (1916). See Barbour, *supra* note 6; Goodrich, *Enforcement of a Foreign Equitable Decree* (1920) 5 IOWA L. BULL. 230.

[17] *Cf.* Fall v. Fall, 75 Neb. 104, 106 N. W. 412 (1905).

[18] See articles cited, *supra* note 6.

[19] For the general advance in utilization of equity and the lending of effect to its remedies, see HUSTON, THE ENFORCEMENT OF DECREES IN EQUITY (1915), chapters 1 and 5. "So far as possible remedial agencies should be unified by making them operate throughout the land. That one may escape the operation of a judicial decree by going into another state is surely a reproach to any system of legal administration." Barbour, *supra* note 6, at 552.

[1] 37 STAT. 13 (1911), 2 U. S. C. A. (1927).

[2] Art. 1, Sec. 4. The times, places and manner of holding elections "shall be prescribed in each state by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

[3] 17 STAT. 28 (1872); 22 STAT. 5, 6 (1882); 26 STAT. 735, 736 (1891); 31 STAT. 733, 734 (1901).

contiguous, compact and practically equal in population.[4] After the census of 1920, for the first time Congress failed to comply with the constitutional mandate of a decennial apportionment.[5] To frustrate any future omission, Congress in 1929[6] created an automatic system for apportionment under all subsequent censuses; the Act, however, failed to limit or in any way provide for redistricting. After the 1930 census, the President, complying with said Act, submitted to Congress apportionments computed by three methods; and when Congress failed to act thereon by March 4, 1931, the distribution by the method used in the last preceding apportionment became effective.[7] Mississippi was among those whose quota was reduced and the legislature redivided the state into districts, which were in obvious violation of Section 3 of the Act of 1911.[8] Complainant, a qualified elector, sought an injunction in equity to prevent the state officers from taking proceedings for an election under this enactment. *Held*, (four justices concurring specially),[9] that the bill should be dismissed, since the Act of 1911 was superseded by the Act of 1929. *Wood v. Broom*, 53 Sup. Ct. 1 (1932).

The Act of 1911, which provided against "gerrymandering," expressly limited itself both in body[10] and title[11] to the apportionment under the Thirteenth Census, and therefore is no longer in effect. The proposal of a similar clause in the Act of 1929 was ruled out of order because it was not germane to the purpose of the Act,[12] namely, an automatic reapportionment if Congress failed to act. Is then such an enactment as the present one to be sanctioned? The majority of the other courts,[13] swayed by social expediency, contend that Congress never intended to open the door to such schemes, and regardless of its limitations the earlier act must live on; and, if all former appropriation Acts are abrogated, there exists no necessity for even the district method.[14] The Supreme Court, to the contrary, interpreted the Act of 1911 as self-terminating; and refused to assume legislative power to correct the omissions of Congress in its latest enactment: the latter's intention to include such a clause was evident from their records,[15] and so a contrary intention is not to be implied. It is sug-

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[4] *Supra* note 1, § 3. "Representatives . . . shall be elected by districts composed of a contiguous and compact territory and containing as nearly as practicable an equal number of inhabitants."

[5] Art. 1, Sec. 2, U. S. C. A. Const. Part I, p. 94 (1928). "The actual Enumeration shall be made within three years after the first Meeting of Congress of the United States, and within every subsequent Term of ten years."

[6] 46 STAT. 26 (1929), 2 U. S. C. A. § 2a (1932).

[7] *Cf.* N. Y. Times, Feb. 28, 1931, at 6.

[8] The populations of the districts ranged from 184,000 (4th Dist.) to 414,000 (7th Dist.).

[9] Justices Brandeis, Stone, Roberts and Cardozo in a cursory opinion dismissed the bill for want of equity, without any citation of cases or reasons therefor. They justified their concentration on procedure rather than substantive right, on the grounds that the latter point was not included in the briefs of the parties nor the pleadings.

[10] Section 3 of the Act (*supra* note 1) began: "That in each state entitled *under this apportionment* to . . ."

[11] The Act (*supra* note 1) itself was entitled, "An Act for the Apportionment of Representatives in Congress among the several States *under the Thirteenth Census.*"

[12] CONG. REC., 71ST CONG. 1st sess., vol. 71, pp. 2279-80, 2363-4, 2443-5. The Representative from New York, Mr. Reed, failed on three occasions to get his amendment on the floor. While not definitely expressed, it is apparent that Congress did not realize that the 1930 apportionment would cause the Act of 1911 to expire by its own terms.

[13] Moran v. Bowley, 347 Ill. 148, 179 N. E. 526 (1932); see Koenig v. Flynn, 258 N. Y. 292, 179 N. E. 705 (1932); State *ex rel.* Carroll v. Becker, 45 S. W. (2d) 533 (Mo. 1932); Hume v. Mohan, 1 F. Supp. 142 (E. D., Ky. 1932). In accord with the principal case: State *ex rel.* Smiley v. Holm, 184 Minn. 228, 238 N. W. 494 (1931) (reversed on other grounds) 285 U. S. 355, 52 Sup. Ct. 397 (1932). See also the dissenting opinions in Moran v. Bowley, *supra*, and in Broom v. Wood, 1 F. Supp. 134, 136 (S. D. Miss. 1932).

[14] State *ex rel.* Carroll v. Becker, *supra* note 13.

[15] *Supra* note 12.

gested that the Court might well have interpreted the clause that in case of no action by Congress (as in the instant case) the apportionment is to be "by the method used in the last preceding apportionment," [16] to include the provisions as to districting as well as the method of arithmetical computation.[17] Such an interpretation would not be inconsistent with the rejection by Congress of the aforementioned clause, since that applied to any apportionment, while this would only apply to automatic ones. The result achieved would be much more desirable and the extreme variations of district population already existing in many states [18] could be corrected. Under the instant case, the remedy is in Congress, if and when it finds time to so act.

INCOME TAX—TRUSTS—REVOCABLE TRUST AS A DEVICE TO EVADE INCOME SURTAX—The settlor of a trust, the income of which was payable to another, reserved the power to revoke the trust by giving notice to the trustee within the first fifteen days of the December preceding the year in which the revocation was to be effective. Section 219g of the Federal Income Tax Law [1] provides that the income of a trust is taxable to the settlor where "at any time during the taxable year" the power to revoke the trust is in the settlor.[2] *Held,* that the trust income was not taxable to the settlor. *Mabel A. Ashforth, Board of Tax Appeals, decided October 12, 1932.*

The court based its decision on the ground that the words "in any taxable year" modified the entire section so that not only the exercise of the power of revocation, but the actual revesting of the income must take place in the same taxable year.[3] This construction is in accord with the legislative intent expressed in the congressional records.[4] Even if this were not clear the constitutionality of a contrary construction would be very doubtful. The Supreme Court has decided that a tax imposed on one person based on the income of another is unconstitutional [5] as against due process, even in the case where the income, subject to

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[16] *Supra* note 6. 22b, 2 U. S. C. A. 2a (1932).

[17] This suggestion was mentioned in passing by the Court in State *ex rel.* Carroll v. Becker, *supra* note 13.

[18] Under the 1930 apportionment, the districts of certain states are extremely unequal: Alabama 250,000 to 450,000; California 165,000 to 350,000; Michigan 225,000 to 400,000; Ohio 168,281 to 633,678; Pennsylvania 125,322 to 445,109; South Dakota 200,000 to 650,000; Tennessee 195,000 to 380,000.

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[1] 44 STAT. 125 (1926), 26 U. S. C. A. § 960 (1928). This merely repeats the provisions of the 1924 act, 43 STAT. 275 (1924). The provision is substantially the same in the 1932 act, Acts of 1932, c. 209, § 166. For a discussion of this new section see Legis (1932) 32 COL. L. REV. 1205 at 1223. Grace Witney Hoff, 20 B. T. A. 86 (1930) decides that section 219g is merely declaratory of the existing case law by which the earlier income tax statutes were construed. *Cf.* KLEIN, FEDERAL INCOME TAXATION (1929) Par. 34:11 (d).

[2] The validity of this section has been upheld even as to trusts created before the act. Corliss v. Bowers, 281 U. S. 376, 50 Sup. Ct. 336 (1930); Clapp v. Heiner, 34 F. (2d) 506 (W. D. Pa. 1929), *aff'd,* 51 F. (2d) 224 (C. C. A. 3d, 1931). *Contra:* Reinecke v. Smith, 61 F. (2d) 324 (C. C. A. 7th, 1932) (trust created before the statute where the power of revocation is not in the settlor alone).

[3] *Contra:* Elida B. Langley, 24 B. T. A. 1156 (1931) where the settlor had had to give twelve months and one day notice of revocation. The court said at 1160, "it is not necessary . . . that the grantor be able actually to revest the trust property in himself during the taxable year, but only that he have during the taxable year the power to revest it in himself." In accord with the principal case see Lewis v. White, 56 F. (2d) 390 (D. C. Mass. 1932) where the trust could be altered for any year by notice given in the preceding year and the income was held to have been improperly taxed to the settlor.

[4] Senate Finance Committee Report No. 398, 68th Cong., 1st Sess. *Cf.* Lewis v. White, *supra* note 3, at 392.

[5] Hoeper v. Tax Commission, 284 U. S. 206, 52 Sup. Ct. 120 (1931); Blodgett v. Holden, 275 U. S. 142, 48 Sup. Ct. 105 (1927) (tax based on property owned by another).

a surtax, is divided among several persons, an evasion the tax statute was intended to prevent.[6] It is therefore necessary, in determining the validity of such a taxing statute, to determine whose is the income which is the basis of the tax. Where the settlor may take the income for himself in any year by the exercise of a power to revoke the will, or to change the beneficiary, then the income is taxable to him,[7] even though the beneficiary actually receives it.[8] This is analogous to the situation where the one entitled to the income receives it and gives it to a donee. In the former case it is the non-exercise of a power to revoke, in the latter the exercise of a power to give his property, which passes to another the income he could have enjoyed. Where, however, the settlor has formed an irrevocable trust, he gives up all right to the income for the term of the trust and the income is not taxable to him.[9] When, as in the instant case, the settlor has neither the income nor the power to get the income in the calendar year, it would seem that any attempt to tax him for the income of that calendar year would be based on the income of another and unconstitutional.[10] The analogy to the irrevocable trust, for any one calendar year, is complete and the same rule should apply. Since even an attempt by congressional action to tax the settlor on income from this type of trust would be subject to the same objections of unconstitutionality, a new and fertile field for surtax avoidance is pointed out whereby income may be made payable to chosen beneficiaries, with the retention of a strong degree of control over these beneficiaries through the power of revocation.[11]

INFANTS—CONTRACTS—MISREPRESENTATION OF AGE—RIGHT OF EMPLOYER UPON DISAFFIRMANCE TO SET-OFF STOCK SHORTAGE AGAINST DEMAND FOR RETURN OF DEPOSIT—To guarantee performance of his contract of employment, in which he represented himself to be twenty-two years old and under which he was to be liable for inventory shortages, the infant plaintiff deposited two hundred dollars with his employer, the defendant. Defendant subsequently dispensed with his services and plaintiff sought to recover his deposit. Defendant, on cross-petition, alleged an inventory shortage of three hundred dollars. *Held,* that defendant might recoup inventory losses against the infant's demand for the return of a deposit made for that purpose. *Smith v. Newark Shoe Co.,* 182 N. E. 347 (Ohio App. 1932).

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[6] In the Income Tax Cases, 148 Wis. 456, 134 N. W. 673, 135 N. W. 164 (1912) it was decided that a tax statute, despite its otherwise unconstitutional discrimination might be sustained on the ground that it tends to prevent tax evasion. This theory was exploded by the Supreme Court in Schlesinger v. Wisconsin, 270 U. S. 230, 46 Sup. Ct. 260, and Hoeper v. Tax Commission, *supra* note 5. Justices Holmes, Brandeis and Stone dissented in both cases on this point.

[7] Corliss v. Bowers, *supra* note 2; Clapp v. Heiner, 51 F. (2d) 224 (C. C. A. 3d, 1931); Emma Louise Smith, 23 B. T. A. 631 (1931).

[8] In Corliss v. Bowers, *supra* note 2, Justice Holmes said at 378, "with reference to taxation, if a man disposes of a fund in such a way that another is allowed to enjoy the income which it is in the power of the first to appropriate it does not matter whether the permission is given by assent or failure to express dissent. The income that is subject to a man's unfettered command and that he is free to enjoy at his own option may be taxed to him as his income, whether he sees fit to enjoy it or not."

[9] S. A. Lynch, 23 B. T. A. 435 (1931).

[10] See Lewis v. White, *supra* note 3, 392, *cf.* Note (1930) 43 HARV. L. REV. 1282 at 1285-6.

[11] The fact that the trust falls within the exception of § 219g (§ 166 of Act of 1932) leaves the interesting question as to whether the *corpus* may not be taxable as a gift since the trust would fall outside the corresponding section of the new Gift Tax, Acts of 1932, c. 209, § 501c. The income of the trust payable to the beneficiary is of course taxable as a gift under § 501c. See Legis. (1932) 32 COL. L. REV. 1205 at 1210.

Most courts require infants to return, upon disaffirmance, only the consideration remaining in their possession,[1] even though they have misrepresented their ages.[2] Many jurisdictions, however, irrespective of misrepresentation, require a disaffirming infant to account for the value of the consideration received by him although it is wasted, lost or depreciated,[3] and permit such claims against the infant to be set-off against the infant's demand for the return of his consideration.[4] The instant court, in permitting recoupment of inventory losses against the infant's deposit professedly follows the Supreme Court case of *Myers v. Hurley Motor Co.*[5] In that case the Court permitted a vendor to set-off a chattel's depreciation against the demand of an infant vendee for a return of his consideration because the infant had misrepresented his age. In similar cases of misrepresentation courts in Ohio[6] and elsewhere[7] have followed the *Myers* case. In all cases, however, where the infant has been held accountable for the depreciation or loss of chattels, upon disaffirmance, the infant had received the possession, use and enjoyment of the property.[8] In recognition of this the instant court called the infant a bailee.[9] As a sales-clerk, however, the infant was more likely a mere custodian of the goods. Furthermore, the consideration received by the infant was not the possession of goods but employment, the loss to the employer being incidental to and arising out of such employment. The instant court, therefore, while professing to follow the *Myers* case is in fact extending the application of its doctrines to a case where an infant who has had neither possession nor use of chattels has assumed responsibility for their safekeeping in the course of his employment. Though contrary to the weight of judicial opinion[10] the instant court seems to be following the present tendency to hold infants to a higher standard of economic responsibility.[11]

[1] Wright v. Buchanan, 287 Ill. 468, 123 N. E. 53 (1919); McGuckian v. Carpenter, 43 R. I. 94, 110 Atl. 402 (1920), 16 A. L. R. 1473 (1922), (1921) 34 HARV. L. REV. 436; 1 WILLISTON, CONTRACTS (1924) 461. See MADDEN, DOMESTIC RELATIONS (1931) 586 n. 95.

[2] Collins Inv. Co. v. Beard, 46 Okla. 310, 148 Pac. 846 (1915); Whitcomb v. Joslyn, 51 Vt. 79 (1878); PAGE, CONTRACTS (2d ed. 1920) 2789. See Tobin v. Spann, 85 Ark. 556, 109 S. W. 534 (1908). For a review of the earlier American authorities see annotation by A. C. Freeman in (1891) 18 AM. ST. REP. 683 *et seq.*

[3] Arkansas Reo Motor Car Co. v. Goodlett, 163 Ark. 35, 258 S. W. 975 (1924); Petit v. Liston, 97 Ore. 464, 191 Pac. 660 (1920), 11 A. L. R. 487 (1921). See (1929) 28 MICH. L. REV. 79; 1 WILLISTON, *op. cit. supra* note 2, at 462.

[4] The courts generally limit the recoupment to the amount of the infant's demand. If the courts would require the infant to pay for all depreciation even though such a sum would exceed the amount of his claim it would be tantamount to enforcing a contract obligation against him. As was aptly remarked by Lord Kennedy, in R. Leslie Ltd. v. Sheill [1914] 3 K. B. 607, 618, "Retribution stopped where repayment began". California, however, has gone so far as to permit an affirmative recovery rather than mere recoupment against the infant. See Toon v. Mack Int. Truck Corp., 87 Cal. App. 151, 262 Pac. 51 (1927).

[5] 273 U. S. 18, 47 Sup. Ct. 277 (1927), 50 A. L. R. 1181 (1927), (1927) 75 U. OF PA. L. REV. 570.

[6] Mestetzko v. Elf Motor Co., 119 Ohio 575, 165 N. E. 93 (1929), (1929) 28 MICH. L. REV. 79. The court in the instant case implies that the Mestetzko case followed the Myers case in that it dealt with an infant who misrepresented his age.

[7] The principle of the Myers case was more recently reiterated in Steigerwalt v. Woodhead Co., 244 N. W. 412 (Minn. 1932).

[8] "The consideration that was mooted in these cases, apparently, . . . was against infant's taking the initiative in a law suit, in an effort to get something for nothing, as where he went into a store, bought something consumable for cash, went outside, consumed what he had bought and then applied for his money back." (1927) 21 ILL. L. REV. 810. See McGuckian v. Carpenter, *supra* note 1; Mestetzko v. Elf. Motor Co., *supra* note 6, and to the same effect see Corpe v. Overton, 10 Bing. 252 (1833).

[9] Instant court at 348. "Certainly an adult bailee who has deposited a sum with his employer to cover losses of a stock of goods intrusted to such bailee could not recover the deposit without having offset against his recovery the value of such part of the stock as he failed to account for. That, as we conceive it, is this case."

[10] *Supra* notes 1 and 2.

[11] See Petit v. Liston, *supra* note 3 at 470, 191 Pac. at 662; (1927) 21 ILL. L. REV. 810 at 813.

MORTGAGES—DIVESTMENT OF LIENS—PUBLIC SALE BY MORTGAGE BOND TRUSTEE—After the defendant corporation had mortgaged the property in question by conveying it to a trustee [1] through a duly recorded deed of trust for the protection of its bondholders, the plaintiff performed such services as entitled him to a mechanic's lien thereon.[2] Then, the corporation having defaulted on the bonds, the trustee publicly sold the property to the now terre-tenant who, contending that the trustee's sale divested the lien, intervened in an action brought by the plaintiff to assert his lien against the property.[3] *Held*, that the foreclosure by the trustee, not being a judicial sale, did not divest the junior incumbrance. *Bruckman Lumber Co. v. Pittsburg Ins. Exchange, Inc.*, 307 Pa. 561, 162 Atl. 204 (1932).

Deeds of trust in the nature of a mortgage generally give rise to the same legal incidents as other mortgage forms.[4] The problem here is whether the basic difference between a sale under a power given in a deed of trust [5] and a foreclosure by judicial decree affects the title of the purchaser, respecting junior statutory liens of record. In the normal case of foreclosure by judicial sale, the junior lien holder has recourse according to the rules of priority [6] only to the proceeds, and the property is released to the purchaser unincumbered.[7] Many jurisdictions, therefore, in considering sales under a power in the deed of trust, without judicial intervention, hold that the purchaser takes title from the trustee as of the time of the creation of the power of sale and, therefore, he takes it free from liens attached subsequent to that time.[8] But the detailed statutes in these jurisdictions, insuring adequate notice to lien creditors [9] indi-

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[1] Properly speaking, there is no trust. The so-called "trustee" is holder only of a determinable fee, subject to the redemption of the mortgagor. He has been described as the "agent" for both mortgagor and mortgagee. 3 JONES, MORTGAGES (8th ed. 1928) § 2292.

[2] The lien for improvements or material furnished dates from the time the work was begun even though the required filing of the claim is later. Hahn's Appeal, 39 Pa. 409 (1861). In the instant case, the mechanic had notice of the trust deed, and the purchaser under the trustee's sale presumably had notice of both the deed and the lien claim.

[3] The plaintiff, the lien claim holder, is proceeding by *scire facias* directly against the property in the possession of the purchaser; if successful, the sheriff under a writ of *levari facias* will sell the property to satisfy the claim. PA. STAT. ANN. (Purdon, 1930) tit. 21, § 791.

[4] JONES, *op. cit. supra* note 1, §§ 77, 2290. In California, a deed of trust by statute (CAL. CIV. CODE (Deering, 1923) §§ 1114, 2827) is not a lien on the property, but the conveyance of an estate. See *infra* note 8.

[5] Under a deed of trust, the right to sell upon default is acquired by agreement of the parties and is independent of the courts. The terms of the agreement must, however, be strictly complied with. Rice v. Brown, 77 Ill. 549 (1875); JONES, *op. cit. supra* note 1, §§ 2295, 2451.

[6] The priority of mechanic's liens and mortgages depends upon the jurisdiction. The three principal treatments are: (1) The improvement becomes a party of the realty and is subject to all incumbrances prior in time. (2) The improvement is physically separated from the land and each is then subject only to its respective lien. (3) Both land and improvement are sold together but their value is separately determined. Then the proceeds are distributed to the mortgage and mechanic's lien claimants proportionately. Note (1926) 39 HARV. L. REV. 384.

Pennsylvania follows the first practice in that a mortgage prior in time to a mechanic's lien also has a preference even as to the value of the improvement. Lyle v. Ducomb, 5 Bin. 585 (Pa. 1813).

[7] Lied v. Bean, 1 Ashm. 207 (Pa. 1828).

[8] Jones, *op. cit. supra* note 1, § 2439, n. 73, 74, 75; *cf.* Weber v. McCleverty, 149 Cal. 316, 86 Pac. 706 (1922) (sale by trustee divested homestead rights); Metropolis Bank v. Barnet, 165 Cal. 449, 132 Pac. 833 (1913) (trustee's sale pending foreclosure of mechanic's lien conveyed unincumbered title.) It should be noticed that one of the cases cited to support the proposition that the purchaser takes free from junior liens is Bancroft v. Ashhurst, 2 Grant 513 (Pa. 1860) which, in spite of the strong language, the court in the instant case said was not controlling as the lien holders were not parties to the suit.

[9] A summary of the statutes will be found in Jones, *op. cit. supra* note 1, §§ 2231-2280. Specifically, in reference to California, see Sargent v. Shumaker, 193 Cal. 122, 223 Pac. 464 (1924). *Cf.* Note (1931) 3 MISS. L. J. 244.

cate a recognition of the fact that the divesting power of any sale should depend substantially upon the opportunity given threatened interests to protest [10] rather than upon the nature of the seller, be he sheriff or trustee. Where there is no statute, as in the instant case, the trustee is limited only by the terms of the deed which need not include requirements of notice or publicity. Thus, if the statutory right granted to mechanics and materialmen is to be of full value, conservative policy demands that it shall not be destroyed by a sale, which is surrounded by neither judicial nor legislative safeguards.

SURETYSHIP AND GUARANTY—EFFECT OF EXTENDING MATURITY OF NOTE TO DEBTOR CORPORATION WHERE SURETY IS STOCKHOLDER—Decedent, a shareholder and officer of debtor corporation, guaranteed to plaintiff bank, up to specified date, the "payment at maturity of any and all sums" up to $35,000 which the corporation "may in any way owe" to bank. Bank renewed notes of corporation without decedent's consent. Corporation defaulted and bank sued surety. *Held,* that renewal without surety's consent came within terms of the guaranty and decedent is liable. *In re Cancelmo's Estate,* 308 Pa. 178, 162 Atl. 454 (1932).

Where a creditor and debtor, without the consent of the surety, extend the maturity of a note, a gratuitous surety is immediately released,[1] whereas a compensated surety must prove material injury before he is discharged.[2] Further, where the contract of suretyship is ambiguous, its terms are construed strictly in favor of a gratuitous surety [3] but are interpreted liberally against the compensated surety.[4] This disparity of treatment has been justified on the respective grounds that while a gratuitous surety acts out of friendship and signs another's contract, the compensated surety exacts a profit for his risk and requires the use of contracts drafted by his own legal counsel.[5] In the instant case, the court, finding that the decedent's interest in the debtor placed him in the class of a compensated surety, construed the agreement broadly and held

[10] The use of injunctive procedure to restrain sales by trustees is described in JONES, *op. cit. supra* note 1, §§ 2330-2358.

[1] Edwards v. Goode, 228 Fed. 664 (C. C. A. 5th, 1916); Braun v. Crew, 183 Cal. 728, 192 Pac. 531 (1920); National Park Bk. of New York v. Koehler, 204 N. Y. 174, 97 N. E. 468 (1912). The reasons given for such discharge are, first, the extension of time impairs the surety's right to subrogation and, second, the new agreement terminates the contract on which the surety is bound. See ARANT, SURETYSHIP AND GUARANTY (1931) § 68.

[2] United States Fid. & Guar. Co. v. Pressed Brick Co., 191 U. S. 416, 24 Sup. Ct. 142 (1903); Philadelphia v. Fidelity etc. Company of Maryland, 231 Pa. 208, 80 Atl. 62 (1911); Trustees of M. E. Church v. Equitable Surety Co., 269 Pa. 411, 415, 112 Atl. 551, 552 (1921); Arnold, *The Compensated Surety* (1926) 26 COL. L. REV. 171 at 185.

[3] People, for use of Houghton v. Travers, 188 Mich. 345, 154 N. W. 130 (1915); see Trustees of M. E. Church v. Equitable Surety Co., *supra* note 2. Courts apply the doctrine of *strictissimi juris* (in favor of surety) when interpreting the contract of a gratuitous surety. See Arnold, *op. cit. supra* note 2, at 173; Note (1930) 15 IOWA L. REV. 470. The gratuitous surety therefore, has become known as "the favorite of the law". See Lloyd, *The Surety* (1917) 66 U. OF PA. L. REV. 40; Jewel Tea Co. v. Shepherd, 172 Iowa 480, 154 N. W. 755 (1915).

[4] Rule v. Anderson, 160 Mo. App. 347, 142 S. W. 358 (1911); Duke v. National Surety Co., 130 Wash. 276, 227 Pac. 2 (1924); National Surety Co. v. Hicklin, 155 Va. 577, 150 S. E. 398 (1929); Young v. American Bonding Co., 228 Pa. 373, 77 Atl. 623 (1910). It has been the practice of the courts to construe compensated sureties as insurance companies and their contracts as policies. See ARANT, *op. cit. supra* note 1, at § 40; STEARN, SURETYSHIP (3d ed. 1922) § 235; Arnold, *op. cit. supra* note 2, at 178; Note (1930) 8 TEX. L. REV. 272, 286.

[5] ARNOLD, SURETYSHIP AND GUARANTY (1927) § 228; ARANT, *op. cit. supra* note 1, at § 40; City of Montpelier v. National Surety Co., 97 Vt. 111, 122 Atl. 484 (1923); Tebbets v. Mercantile Credit Guaranty Co., 73 Fed. 95, 97 (C. C. A. 2d 1896).

its terms were not violated. Inasmuch as the decedent had not drafted the agreement in question, the court might have disregarded the rule of liberal interpretation, a technique usually associated with professional sureties. In so doing it might, following precedent, have construed the agreement as violated,[6] and then, because of his interest in the debtor, put the surety to proof of his injury. The effect of such action, however, would be to treat such sureties as an intermediate class and so would give rise to the necessity of making nice distinctions in the adjudication of future cases. Hence, to avoid confusion, the court was justified in classifying the decedent as a compensated surety and attaching to him the established incidents.[7] It is submitted, however, that a compensated surety's burdens should be extended to a shareholder-surety only where the stock interest involved is substantial or where the shareholder is an officer of the corporation, or both, as in the instant case.

TAXATION—INHERITANCE TAX—TAXABILITY OF DOMESTIC STOCK OWNED BY A NONRESIDENT ALIEN—Decedent, a nonresident alien, owned stock in a foreign corporation and bonds of foreign and domestic corporations. The paper evidences of these securities were held for him in New York for the sole purpose of having the income collected and deposited to his credit in a bank. *Held,* that the securities were not taxable as property of a nonresident situated in the United States within the meaning of the Revenue Act of 1924.[1] *Commissioner of Internal Revenue v. Brooks et al.,* 60 F. (2d) 890 (C. C. A. 2d, 1932).[2]

Decedent, a nonresident alien, owned stock of domestic and foreign corporations and bonds of foreign governments. The paper evidences of the same were held by a Boston bank to collect the income therefrom. *Held,* that, following the *Brooks* case, the foreign stocks and bonds may not be taxed; but the stock of domestic corporations is taxable under sec. 303 (d) of the Revenue

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[6] In American Trust Co. v. Louderback, 220 Pa. 197, 69 Atl. 673 (1908), where a gratuitous surety was involved the Pennsylvania court construed a similar contract of guaranty as being breached by extension of time without the consent of the surety.

[7] Of the cases cited by the court in support of the contention that a shareholder-surety is a compensated surety, only one, First National Bank v. Livermore, 90 Kan. 395, 133 Pac. 734 (1913), adequately supports the proposition. Moreover, Home National Bank v. Waterman's Estate, 134 Ill. 461, 29 N. E. 503 (1890) is directly *contra.* In the recent case of North Texas Nat. Bk. v. Thompson, 23 S. W. (2d) 494, 498 (1929) the court based liability on the interest of the shareholders in the corporation whose obligations they guaranteed. In Mercantile Trust Co. v. Donk, 178 S. W. 113, 116 (Mo. 1915) the court, citing no authority to support it, expressed an opinion that shareholders were not entitled to the benefit of the rules favoring gratuitous sureties. It should be noted that in the cases which hold a shareholder-surety to be in the class of a compensated surety, the shareholder was either a substantial shareholder or officer, or both, of the corporation.

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[1] The pertinent sections of the REVENUE ACT, 26 U. S. C. A. §§ 1094, 1095, are:

"Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated .

"Sec. 303. For the purpose of the tax the value of the net estate shall be determined . . .

"(b) In the case of a nonresident, by deducting from the value of that part of his gross estate which at the time of his death is situated in the United States . . .

"(d) For the purpose of Part I of this title, stock in a domestic corporation owned and held by a nonresident shall be deemed property within the United States . . ."

[2] The balance on account was ruled non-taxable since § 303 (e) of the REVENUE ACT of 1924, 26 U. S. C. A. § 1095 (e), specifically excludes moneys of a nonresident alien, on deposit with a person regularly carrying on the banking business.

Act of 1926[3] providing that stock in a domestic corporation shall be deemed property within the United States. *Estate of Garvan v. Commissioner of Internal Revenue,* 25 B. T. A. 612 (Docket No. 44746, 1932).

The Supreme Court has recently extended the doctrine *mobilia sequuntur personam*[4] to include shares of corporate stock.[5] Thus, the state of incorporation may not, without violating the due process clause of the Fourteenth Amendment, impose a death transfer tax if the decedent is domiciled in another state; since the stock has an exclusive *situs* at the domicil of the owner.[6] The principal cases present the applicability of this doctrine to the international situation. Can it be said, without demolishing the fiction of *situs* altogether, that intangible property has a certain *situs* for the purposes of state taxation and another and different *situs* for the purposes of federal taxation? The majority of the court, by deciding that Congress intended to tax only *stock* of a *domestic* corporation owned and held by a nonresident decedent, found it unnecessary to consider this question in disposing of the *Brooks* case.[7] The *Garvan* case, however, propounds the issue squarely. In holding the shares of domestic corporations taxable, the Board reasoned that the Supreme Court decisions[8] arose under the Fourteenth Amendment, which limits the power of states to tax, and therefore they are not controlling where the power of Congress to tax is considered. It is highly conjectural whether the *Garvan* case will be affirmed.[9] The Supreme Court has manifested a decided disapproval of multiple state taxation of intangibles. If expediency calls for a similar attitude in this situation, the due process clause of the Fifth Amendment which imposes a restriction on the federal government corresponding to that placed on the states by the Fourteenth Amendment,[10] may provide a ready instrumentality for attaining the desired end. This Amendment extends to and includes aliens.[11] Moreover, if sec. 303 (d) be regarded as creating an irrebutable presumption of *situs,* its

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[3] Sec. 303 (d) of the REVENUE ACT OF 1926 is identical with the corresponding section of the REVENUE ACT of 1924, *supra* note 1. It is interesting to note that this section does not even say that the paper evidences of the stock ownership must be held in the United States at the time of death.

[4] Farmers Loan & Trust Co. v. Minnesota, 280 U. S. 204, 50 Sup. Ct. 98 (1930); Baldwin v. Missouri, 281 U. S. 586, 50 Sup. Ct. 436 (1930); Beidler v. South Carolina Tax Commission, 282 U. S. 1, 51 Sup. Ct. 54 (1930). For comment see (1931) 15 MINN. L. REV. 254; (1931) 29 MICH. L. REV. 389; Note (1930) 40 YALE L. J. 99.

[5] Bank of Boston v. Maine, 284 U. S. 312, 52 Sup. Ct. 174 (1932). See Lowndes, *The Passing of Situs—Jurisdiction to Tax Shares of Corporate Stock* (1932) 45 HARV. L. REV. 777; (1932) 20 CALIF. L. REV. 332; (1932) 32 COL. L. REV. 548; Note (1932) 81 U. OF PA. L. REV. 177.

[6] The question of whether the rule in Bank of Boston v. Maine, and similar cases, may find an exception where an intangible may be said to have gained a "business situs" is specifically reserved by the Court. See Bank of Boston v. Maine, *supra* note 5, at 331, 52 Sup. Ct. at 178.

[7] However, see the concurring opinion of L. Hand, J., in the Brooks case, 60 F. (2d) at 892: "We should have to say that a different doctrine applies when Congress taxes the transfer of bonds of an American corporation held by an Englishman. Certainly the cases are so far parallel as to put the validity of such an act in great question."

[8] *Supra* notes 4 and 5.

[9] Petition for review has been filed in the United States Circuit Court of Appeals for the First Circuit.

[10] "The congress of the United States can have no greater power to tax persons or property not within the jurisdiction of the United States, than a state has to tax persons and property not within its jurisdiction." United States v. Erie Ry., 25 Fed. Cas. 1019, 1021 (S. D. N. Y. 1877). Tonawanda v. Lyon, 181 U. S. 389, 21 Sup. Ct. 609 (1900); see State Tax on Foreign-Held Bonds, 15 Wall. 300 (U. S. 1872); Michigan Cent. Ry. v. Slack, 17 Fed. Cas. 263 (C. C. D. Mass. 1876).

[11] Russian Volunteer Fleet v. United States, 282 U. S. 481, 51 Sup. Ct. 229 (1931).

unconstitutionality is probably foreshadowed by the decision in *Heiner v. Donnan*.[12] But whatever the ultimate ruling of the *Garvan* case may be, it will doubtless have the effect of bringing about a realization that the problem of international double taxation can better be solved by treaty than by adjudication.

[12] 285 U. S. 312, 52 Sup. Ct. 358 (1932). It was held that that part of § 302 (c) of the REVENUE ACT OF 1926, 26 U. S. C. A. § 1094 (c), which provides that all transfers within two years of death shall be conclusively presumed to have been made in contemplation thereof, and therefore taxable as part of the decedent's gross estate, was a violation of the Fifth Amendment.