VALIDITY OF PARTICIPATION TRUSTS—STATUS OF PURCHASERS OF PARTICIPATING CERTIFICATES

In *Ulmer* v. *Fulton, Supt. of Banks*, 129 Ohio St. 323, 195 N.E. 557 (1935), the plaintiff representing a majority of participation certificate holders sought to enjoin the transfer of the trust res to a new trustee, after the original trustee failed as a banking institution. The certificate holders sought the position of general creditors of the bank, for in this way they would realize more on their certificates than if they were compelled to satisfy their claims from the trust res. The court decided that the creation of the trust by the bank, which acted as settlor trustee, was an ultra vires act, was contra to public policy, and not within the power granted it by the Banking Act, Gen. Code, Sec. 710 et seq., and therefore was void. The net result of this case was to put the certificate holder in a position better than that previously occupied as the cestui in the trust.

Since the actual holding in the Ulmer case was that the purchasers of participating certificates were general creditors, the declaration that the trust was void as contra to public policy may, if later fact situations demand it, be limited to the facts in the particular case. It seems a pretty complete destruction of a useful business and investment device, if the syllabus in the Ulmer case is to be taken literally in all circumstances.

In a recent case, *State ex rel Squire* v. *The Central United National Bank*, 4 Ohio Op. 485, 20 Abs. 238 (1935), Judge Hertz of the Cuyahoga Common Pleas Court decided that facts existed for such an interpretation of the Ulmer case. The suit was instigated by the Superintendent of Banks to have the trust declared void. It was the position of the common pleas court that the participation certificate holders only were to have the alternative privileges of having the trust set aside, or of having it continued with the successor trustee. The court in refusing to upset the trust stated that the bank could not set up such abuse of its own authority to defeat its contract with the cestuis. Participation trusts are not improper when the settlor does not act as trustee, it was therefore held that the trust should not be considered void, but merely voidable. *Bowden* v. *Citizens Loan & Trust Co.*, 259 N.W. 815 (Minn. 1935); Bogert, Trusts & Trustees, Sec. 676 (1935).

Even if it is conceded that the participation trust was void, because the bank did not have the power under the Banking Act to act in the dual capacity of settlor trustee, the question remains what is to be done with the res? The trust can be considered void ab initio, in which event the res would still be in the settlor. Under those circumstances the cestuis in the participation trust would have to come in as creditors

of the settlor under the broad view of the Ulmer case. The case being one of first impression certain analogies may be suggested. The following might have a bearing in disposing of the trust res: first, declare a resulting trust for the cestuis; or perhaps, second, a constructive trust for the cestuis; third, establish an equitable lien for the cestuis; or, fourth, apply the principle of marshalling assets.

A resulting trust arises in any of three situations: first, where one pays the purchase money for property, but takes title to it in another's name; second, when an express trust fails in whole or in part; and third, where there is a surplus after the trust is administered. This case would fall within the second class, if this solution is suitable. A participation trust is a perfectly legal business device, when validly created. Cases falling within the second class of resulting trusts have been upheld where the express trust failed. For example: Where the beneficiary was not named in the trust, *Union Trust Co. of Pittsburg* v. *McCarigin*, 24 F (2d) 459 (D.C. 1927); *Byron* v. *Bigelow*, 77 Conn. 604, 60 A. 266 (1905); where the cestuis were named with uncertainty, *Clark* v. *Campbell*, 82 N.H. 281, 133 A. 166, 45 A.L.R. 1433 (1926); *Davison* v. *Wyman*, 214 Mass. 192, 100 N.E. 1105 (1913); where the trust was illegal under the rule against perpetuities; *St. Pauls Church* v. *Atty. General*, 164 Mass. 188, 41 N.E. 231 (1895); *Lillys Estate*, 272 Pa. 143, 28 A.L.R. 366 (1922); *Armory* v. *Trustees of Amherst College*, 229 Mass. 374, 118 N.E. 933 (1918); where the express trust failed for indefiniteness or impossibility; *Bosset* v. *Palletti, Andretta & Co.*, 117 Conn. 58, 166 A. 752 (1933). The device of a resulting trust is used in such cases by the court to effectuate the intent of the settlor. Bogert, Trusts & Trustees, sec. 468 (1935). See 9 Cinn. L. Rev. 940 (1935). Although the express trust in this case was not validly created it is possible that the doctrine underlying the cases mentioned, and many others, would not be extended unwarrantedly by applying the present facts.

Secondly, the court could use the device of a constructive trust to prevent the depositors from being unjustly enriched at the expense of the certificate holders. If the creditors of the bank had been permitted to share in the trust res, they would have been enriched to the extent of the original money paid for the res, which went into the general assets of the bank and was available to creditors. See generally, *Davis* v. *Otty*, 35 Beav. 208 (Chan. 1865); *Duncan* v. *Dazey*, 318 Ill. 500, 149 N.E. 495 (1925); Bogert, Trusts & Trustees, Sec. 471, 501 (1935).

It would be possible to establish an equitable lien on the proceeds of the res for the certificate holders. The cestuis, upon paying good con-

sideration for their certificates, thought they were actually becoming cestuis in a trust. However, by principles of equity, where the trust is set aside, the certificate holders may be given a lien on the res which was purchased with their money. The lien in this instance would give the certificate holders a preference over general creditors as to the proceeds of the res. A dictum from *Seiger* v. *Seiger*, 162 Minn. 322, 202 N.W. 742 (1925), advanced the point that, where a trustee wrongfully invests money, the beneficiary may have a lien or a charge upon the res.

Lastly, it is remotely possible to apply the theory of marshalling assets. According to the Ulmer case the creditors of the bank are allowed to satisfy their claims from the general assets of the bank, and from the trust res also. It would only seem equitable to require the creditors of the bank to come against the general assets first, and leave the res for the certificate holders, with whose money the res was purchased. See *McMahan* v. *Fetherstonhaugh*, 1 I.R. 83 (1895).

By the above four solutions, the cestui is put in status quo to the detriment of no other claimant. If *Squire* v. *Central United National Bank* is carried to the Supreme Court the Ulmer case may be reaffirmed in its sweeping nullification of the trust in the interest of general creditors, or it may be limited, and a remedy adopted in the interest of the certificate holders. It is a choice of policies.

SEYMOUR A. TREITELMAN

WORKMEN'S COMPENSATION

EXEMPTION OF AWARD FROM ATTACHMENT AFTER PAYMENT TO INJURED EMPLOYEE

Plaintiff employee recovered an award under the provisions of the Workmens' Compensation Act, and deposited it in a bank unmixed with other funds. There it was attached by plaintiff's creditors for the payment of pre-existing debts. Plaintiff petitioned the Common Pleas Court of Stark County to have the funds declared exempt from execution. The court held that compensation was not exempt from attachment and execution after payment in view of the express working of Section 1465-88 Ohio General Code. *Talaba* v. *Auld*, 19 Abs. 676, 3 Ohio Op. 556, affirmed by the Court of Appeals without opinion in 4 Ohio Op. 252 (1935).

The pertinent part of Section 1465-88 of the Ohio General Code provides that "Compensation before payment shall be exempt from all claims of creditors and from any attachment or execution, and shall be paid only to such employees or their dependents."