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DISCUSSION OF RECENT DECISIONS

CHATTEL MORTGAGES—TITLE OR INTEREST OF MORTGAGOR—WHETHER BUYER UNDER A CONDITIONAL SALE CONTRACT HAS AN INTEREST WHICH HE MAY MORTGAGE—In the recent case of *Automobile Service Corporation v. Community Motors, Incorporated*,¹ the Appellate Court of Illinois expressly stated that a buyer of goods under a conditional sale contract may execute a valid chattel mortgage. The plaintiff was the mortgagee under the recorded chattel mortgage; the defendant was an automobile dealer who had received the mortgaged automobile as part of the consideration for the purchase of another automobile by Benson, the chattel mortgagor. Without actual knowledge of the existence of the mortgage, the defendant paid the balance of the indebtedness under the conditional sale agreement and subsequently sold the car to a customer in the regular course of business. The chattel mortgagee sued for conversion of the car, seeking to recover the balance due on the chattel mortgage. The Appellate Court reversed a decision in favor of the defendant rendered in the lower court and held the plaintiff entitled to the sum remaining due on the chattel mortgage.

In view of the fact that no Illinois court had previously declared the

¹ 312 Ill. App. 263, 38 N.E. (2d) 512 (1941).

right of a purchaser under a conditional sale to execute a valid chattel mortgage, it should be interesting to examine the theories underlying the decisions in other jurisdictions. It is universally held that a conditional buyer has sufficient property in the subject matter of the sale to permit him to execute a chattel mortgage thereon. Most courts have proceeded on the theory that the conditional buyer gains a special interest in the goods from the time of the execution of the conditional sale contract and that such special interest may be the subject of a valid chattel mortgage.² This is expressly recognized by the uniform Conditional Sales Act.³ In the same statute there is a provision that a conditional buyer, prior to the performance of the condition, shall not "sell, mortgage or otherwise dispose of his interest in the goods" unless notice be given to the conditional seller.⁴ In the face of this provision, a mortgage on the conditional buyer's interest, without notice to the conditional seller, has been held valid and effectual between the mortgagor and mortgagee.⁵ It therefore seems likely that the mortgagee's lien would be strong enough to overcome the rights of prior creditors of the mortgagor.

Another theory is that the purchaser under the conditional sale contract has an equity in the goods to the extent of the amount paid and that such equity serves as security for the debt under the chattel mortgage.⁶ A valid chattel mortgage may be executed without the seller's consent;⁷ further, a valid chattel mortgage may be executed even though the sale contract expressly prohibits the execution of a chattel mortgage upon the goods sold,⁸ without prejudice to the conditional vendor.

The rights of the mortgagor under the conditional sale contract control the extent of the interest of the mortgagee.⁹ The latter's rights be-

² Keefe v. Worcester Trust Co., 253 F. 536 (1918); Tope v. Brattain, 172 Wash. 556, 21 P. (2d) 241 (1933); Pacific States Savings & Loan Co. v. Strobeck, 139 Cal. App. 427, 33 P. (2d) 1063 (1934); Hoeller v. Moog, 60 Mont. 74, 198 P. 367 (1921); Auto Mortgage Co. v. Montigny, 168 N.Y.S. 670 (1918); Bainbridge v. Warburton, 98 N.J. Eq. 81, 129 A. 474 (1925); Worcester Morris Plan Co. v. Mader, 236 Mass. 435, 128 N.E. 777 (1920); Blue v. Herkimer Nat. Bank, 30 F. (2d) 256 (1929); Howell v. Thew Shovel Co., 184 Ark. 777, 43 S.W. (2d) 366 (1931); Chafey v. Mathews, 104 Mich. 103, 62 N.W. 141, 27 L.R.A. 558 (1895); Cutting v. Whittemore, 72 N.H. 107, 54 A. 1098 (1903).

³ 2 Uniform Laws Ann. § 13. See Meisel Tire Co. v. Ralph, 1 N.Y.S. (2d) 143 (1937), and Meisel Tire Co. v. Fishman, 296 N.Y.S. 882 (1937).

⁴ 2 Uniform Laws Ann. § 13.

⁵ Bainbridge v. Warburton, 98 N.J. Eq. 81, 129 A. 474 (1925).

⁶ Thornton v. Findley, 97 Ark. 432, 134 S.W. 627, 33 L.R.A. (N.S.) 491 (1911); Albright v. Meredith, 58 Ohio St. 194, 50 N.E. 719 (1898); Moline Plow Co. v. Braden, 71 Iowa 141, 32 N.W. 247 (1887); Keepers v. Fleitmann, 213 Mass. 210, 100 N.E. 333 (1913); Loden v. Paris Auto Co., 174 Ark. 720, 296 S.W. 78 (1927); Wood v. Evans, 98 Ga. 454, 25 S.E. 559 (1896); Rochell v. Gates, 185 Ark. 350, 47 S.W. (2d) 35 (1932); State v. Griffin, 228 S.W. 800 (Mo., 1921).

⁷ Fairbanks, Morse & Co. v. Parker, 167 Ark. 654, 269 S.W. 42 (1925).

⁸ In re Russell Falls Co., 249 F. 260 (1918); Personal Finance Co. of Providence v. Henley-Kimball Co., 61 R.I. 402, 1 A. (2d) 121, 117 A.L.R. 1476 (1938); Tope v. Brattain, 172 Wash. 556, 21 P. (2d) 241 (1933); Meisel Tire Co. v. Fishman, 296 N.Y.S. 882 (1937).

⁹ Hayes v. Frank Rowe, Inc., 181 Okla. 598, 75 P. (2d) 882 (1938).

come complete upon performance of the condition by the former or his assignee.¹⁰ This mortgage will be valid against subsequent mortgagees or attaching creditors;¹¹ but it cannot destroy the rights or interests of the seller under the conditional sale agreement.¹²

It has been held that a vendee in possession under a conditional sale contract may make a valid mortgage even after default in payment under the contract.¹³ Further, where a vendee may gain title by a tender of full payment after the vendor has repossessed the chattel,¹⁴ the mortgagee's lien attaches upon the tender of such payment.¹⁵

It appears that the power of a buyer under a conditional sale contract to execute a valid chattel mortgage upon his interest in the goods has become very broad under the decisions of the courts of other jurisdictions. How far the Illinois courts will extend this power must, for the present, remain a matter of conjecture.

M. L. GOODMAN

CORPORATIONS — VOTING TRUSTS — WHETHER VOTING TRUSTEES MAY VOTE SHARES TO ELECT DIRECTORS WHOSE TERM OF OFFICE WILL OUTLAST DURATION OF VOTING TRUST—In *Friedberg v. Schultz*,¹ a reorganization plan resulted in the creation of a business corporation the entire shares of which were, under a voting trust agreement, placed in the hands of three trustees who were to vote the shares until the termination of the trust on November 18, 1941. The persons beneficially interested were given participation certificates in the trust entitling them to receive the actual stock within thirty days after the expiration date. The original by-laws of the corporation provided that the annual meeting should be held on the third Monday of March each year, but the meetings were held on staggered dates until June 14, 1941, at which meeting the by-laws were amended so as to provide that annual meetings were to be held on the second Monday of October. On October 9, 1941, the plaintiff, holder of certain of the participation certificates, filed a representative suit against the three voting trustees, both as trustees and as individuals, praying that they be restrained from electing themselves or any others as directors or officers of the corporation for any time later than Novem-

¹⁰ *Pacific States Savings & Loan Co. v. Strobeck*, 139 Cal. App. 427, 33 P. (2d) 1063 (1934); *Crompton v. Pratt*, 105 Mass. 255 (1870); *Thurston v. Osborne-McMillan El. Co.*, 13 N.D. 508, 101 N.W. 892 (1904); *Personal Finance Co. of Providence v. Henley-Kimball Co.*, 61 R.I. 402, 1 A. (2d) 121, 117 A.L.R. 1476 (1938).

¹¹ *Hinchman v. Point Defiance Ry. Co.*, 14 Wash. 349, 44 P. 867 (1896).

¹² *Dillon v. Mizell Live Stock Co.*, 66 Fla. 425, 63 So. 824 (1913); *Clinton v. Ross*, 108 Ark. 442, 159 S.W. 1103 (1912); *Taylor v. Barker*, 30 S.C. 238, 9 S.E. 115 (1889); *Greene v. Carmichael*, 24 Cal. App. 27, 140 P. 45 (1914).

¹³ *Chase v. Ingalls*, 122 Mass. 381 (1877); *Snow v. Mitchell*, 2 Wash. (2d) 424, 97 P. (2d) 1097 (1940).

¹⁴ *Uniform Conditional Sales Act*, § 18.

¹⁵ *Pisculli v. Bellanca Aircraft Corp.*, 17 Del. Ch. 151, 150 A. 81 (1930), affirmed in *Bellanca Aircraft Corp. v. Pisculli*, 18 Del. Ch. 427, 156 A. 508 (1931).

¹ 312 Ill. App. 171, 38 N.E. (2d) 182 (1941).

ber 18, 1941. The trial court granted such injunction and on appeal by the trustees it was held that such order should be affirmed.

By statute in Illinois it is provided: "At the first annual meeting of shareholders and at each annual meeting thereafter the shareholders shall elect directors to hold office until the next succeeding annual meeting, except as hereinafter provided.² Each director shall hold office for the term for which he is elected or until his successor shall have been elected and qualified."³ This section seems to be unambiguous and seems to authorize the shareholders of record, whether outright owners or merely trustees, to elect the directors of the corporation for a period of one year even though it be known at the time that the vote is cast that such shareholders will cease to be such before the director's term of office had expired. Such, at least, is the usual case.⁴ Further, it has been said that the vote for directors is a matter of internal management with which the courts will not interfere, in the absence of fraud or illegality.⁵ Hence it would seem, at first blush, that the voting trustees, as shareholders, in the instant case were entitled to cast their votes without restriction, being entitled as of right to elect officers who would hold terms extending from the date of the meeting, the second Monday of October, 1941, until one year from that date. Despite this the court enjoined the trustees from electing directors to continue in office beyond the date upon which, by the terms of the trust agreement, the trust was to terminate.⁶

When one considers the dual capacity of some shareholders, that is, those who are not only holding the shares as of record but are also holding the shares under a trust which entitles them to vote for a definite period only and provides that upon the termination of that period the actual shares shall be transferred to the beneficiaries, there appear to be other considerations which must be taken into account. In such cases the legal title resides in the trustees though the equitable title is in the beneficiaries, yet the legal title supports the trustees' right to vote even though they do not have the equitable interest,⁷ unless the beneficiary has re-

² The "hereinafter provided" refers to the qualifications applied to directors elected to fill vacancies, Ill. Rev. Stat. 1941, Ch. 32, § 157.36, and is not applicable to the instant case.

³ Ill. Rev. Stat. 1941, Ch. 32, § 157.34.

⁴ *Babcock v. Chicago Railways Co.*, 325 Ill. 16, 155 N.E. 773 (1927). Directors are elected at each annual meeting of shareholders to hold office until the next succeeding annual meeting and their term of office does not expire because the shareholders who elected them subsequently dispose of their shares.

⁵ *Hall v. Woods*, 325 Ill. 114, 156 N.E. 258 (1927).

⁶ The effect of such injunction would be to prevent the election of new directors at the annual meeting, since, by Ill. Rev. Stat. 1941, Ch. 32, § 157.34, the term of office for other than initial directors is from annual meeting to the next annual meeting. It does not appear how, in violation of the provision, new directors could be elected for a shorter period. The *impassé* could be met by taking no action, in which case the old directors would continue in office until successors had been elected and qualified. Adjournment of the annual meeting would seem necessary.

⁷ *Babcock v. Chicago Railways Co.*, 325 Ill. 16, 155 N.E. 773 (1927).

served such right to himself.⁸ Restraints might be placed on the trustees by the trust agreement concerning the manner of determining how the shares shall be voted,⁹ or forbidding them to vote such shares, but such was not the situation in the instant case. Furthermore, merely voting does not alone give control to the persons casting the vote since, once the vote is cast, the control is in the persons elected thereby.¹⁰ It would seem, then, that if the statutes and decisions affecting the right to vote were applied strictly, the trustees in the instant case were entitled to vote for whomsoever they pleased and the persons so elected should hold office until the next annual meeting of the shareholders.

Equity, however, has imposed the limitation on the trustees that they may not act, even though holding the legal title, where to do so would involve a fraud on the beneficiary, an exercise of a power not conferred, or an extension of a power actually conferred but beyond the duration thereof. In the instant case the plaintiff seems to have contended that the trustees had become involved in a "scheme" having as its purpose the perpetuation of themselves in the control and management of the corporation past their term of office as trustees. Though no actual fraud was alleged, such scheme of the trustees, if one was present, by electing themselves as directors would extend control by the same persons, but in a new capacity. If such control is to continue beyond the date for the termination of the trust, is it a violation of the agreement? The courts have been careful not to permit an extension of the control of the trustees beyond the happening of the event which measures the trust term.¹¹ The reasoning behind such a decision, as in the present case, is evidently that one who is both shareholder and trustee is first and primarily a trustee and the duties as such supersede the legal rights of one who is a stockholder. Hence, one who stands in such a dual capacity does not enjoy the unlimited choice of vote but must be cautious to vote in the best interests of those whom he represents.¹² When, as here, the trust agreement provides that all control shall be turned over to the beneficiaries upon the termination of the trust, the trustee must so apply his vote as to facilitate, to the best of his ability, compliance with the precise terms of the trust.¹³ When about to vote in a manner which can be

⁸ It would seem that the trust agreement in the instant case contained no such restriction, in fact even authorized the voting trustees to elect themselves directors and officers of the corporation. *Friedberg v. Schultz*, 312 Ill. App. 171, 175, 38 N.E. (2d) 182, 183 (1941).

⁹ *People ex rel. Courtney v. Botts*, 376 Ill. 476, 34 N.E. (2d) 403 (1941).

¹⁰ *Loughery v. Bright*, 267 Mass. 584, 166 N.E. 744 (1929), holding, in effect, a voting trust agreement did not give the trustees management and control of the corporation since management and control is vested in the directors and not in the stockholders.

¹¹ *Gomez v. Gomez*, 31 N.Y.S. 206 (1894).

¹² Restatement of Trusts, Vol. 1, § 193, comment (a). "It is the duty of the trustee in voting shares of stock to use proper care to promote the interests of the beneficiary . . . he may be restrained by injunction or otherwise from casting a vote which would violate his duty to the beneficiary."

¹³ *Chandler v. Bellanca Aircraft Corp.*, 19 Del. Ch. 57, 162 A. 63 (1932).

shown not to be in the best interests of the beneficiaries under the trust, even though the action is within the words of the trust instrument, the courts may, upon proper applications made, enjoin the act.¹⁴

It is regrettable that the court did not make clear the exact basis for its decision in the instant case. If the case stands for the proposition that voting trustees may not vote such shares when so to do would result in electing directors whose term of office would outlast the trust, then the case places a new limitation upon the power to vote shares, justification for which would be hard to find. If, however, the rationale of the decision rests upon the court's belief that chicanery was present in the situation, justifying equitable intervention, no objection can be offered to an obviously equitable result.

J. H. SMITH

COURTS—INJUNCTION BY UNITED STATES COURTS AGAINST PROCEEDINGS IN STATE COURTS—WHETHER SECTION 265 OF THE JUDICIAL CODE PROHIBITS FEDERAL COURTS FROM ENJOINING STATE ACTION ON ISSUES ALREADY DECIDED BY THE FEDERAL COURT. — A decision of importance on the power of the federal courts to enjoin proceedings in state courts was announced by the Supreme Court of the United States in *Toucey v. New York Life Insurance Company*.¹ In 1935 Toucey had brought suit in a Missouri court alleging that his policy called for disability benefits, and that the insurance company had concealed said benefits from him. Since the policy had lapsed, he asked for its reinstatement and payment of the benefits under the policy's disability clause. The requisite diversity of citizenship being present, and the amount involved being more than \$3,000, the suit was removed to the United States district court. The district court dismissed the bill, finding no concealment on the part of the insurance company. No appeal was taken. In 1937, one Shay, alleging an assignment from Toucey, sued on the policy in a Missouri state court. The insurance company did not answer, but filed a supplemental bill in the same district court that had rendered the decree, asking for an injunction to restrain Toucey from relitigating the issues settled by the district court's decree. The injunction was granted, and the decision was affirmed by the Circuit Court of Appeals.² Both federal courts considered Section 265 of the Judicial Code, and both courts felt that the restriction on the use of the writ of injunction as set out in this section does not deprive the federal court of power to enjoin state court proceedings where it is necessary to preserve to the litigants the fruits of, or to effectuate the decrees of, the federal courts.³ The Supreme Court reversed the

¹⁴ A.L.I. Restatement of Trusts, Vol. 1., § 201, comment (a). It is a breach of trust when the trustee acts under a mistake as to the interpretation of the trust agreement, and the court determines he is not authorized by the agreement to do the act.

¹ 314 U.S. 118, 62 S. Ct. 139, 86 L. Ed. 107 (1941).

² *Toucey v. New York Life Ins. Co.*, 102 F. (2d) 16, 122 A.L.R. 1415 (1939).

³ 28 U.S.C.A. § 379.

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

decision on the ground that Section 265 did preclude issuance of the injunction. Mr. Justice Reed wrote a vigorous dissenting opinion.

The issue in the case narrows down to the question: Can a federal court, having issued a decree, enjoin parties in a state action from relitigating the same issues decided by the federal decree, despite the prohibition in Section 265 of the Judicial Code?

Section 265 first appeared in the statutes in 1793⁴ without the bankruptcy exception and was re-enacted in the Judicial Code in 1907 in the same language. It cannot be said with any certainty what particular object Congress had in mind in originally enacting the statute. Both the questions of state's rights and the problem of equity control over law proceedings were contemporaneous problems at the time, and may have been considered. Of some significance, too, is the fact that the statute would relieve to some degree the burdensome circuit duties imposed by the 1789 Act. From the express language of the statute, however, and from its application in the first fifty years of its history, it seems probable that Congress meant at the time to forbid *all* federal injunctions against state actions.⁵

The restriction in the statute was first applied in 1807⁶ and has since been continually applied where the issues originate in the state courts and a federal injunction is sought.⁷ Statutes on bankruptcy have created exceptions to its application. Construction by the courts has added another exception to the statute, in cases where the issues were first brought to the federal court and later were involved in litigation in the state courts. Some of these cases have held that the federal court can, in a proceeding supplemental to its original jurisdiction, enjoin the parties from relitigating the same issues in a state court. The decision in the instant case becomes important in determining in which of these "relitigation" cases the federal court should enjoin the parties to the state action.

It has become well settled that the federal court will enjoin when the federal court has taken jurisdiction of a res, and where, therefore, a state proceeding concerning the same subject matter would interfere with the custody of the res in the hands of the federal court. A line of decisions bears out this rule, and these cases applied it first where the property was actually in possession of the federal court or its officer, and then where the property or res was, at the time of the proceeding in

⁴ Act of March 2, 1793, 28 U.S.C.A. § 379.

⁵ See for a discussion of this point Charles Warren, "Federal and State Court Interference," 43 Harv. L. Rev. 345 (1930).

⁶ *Diggs & Keith v. Wolcott*, 4 Cranch 179, 2 L. Ed. 587 (1807).

⁷ *Watson v. Jones*, 13 Wall. 679, 20 L. Ed. 666 (1872); *Haines v. Carpenter*, 91 U.S. 254, 23 L. Ed. 345 (1876); *Dial v. Reynolds*, 96 U.S. 340, 24 L. Ed. 644 (1878); *Lawrence v. Morgan's Louisiana and Texas R. & S. Co.*, 121 U.S. 634, 7 S. Ct. 1013, 30 L. Ed. 1018 (1887); *Hull v. Burr*, 234 U.S. 712, 34 S. Ct. 892, 58 L. Ed. 1557 (1914); *U.S. v. Parkhurst-Davis Mercantile Co.*, 176 U.S. 317, 20 S. Ct. 423, 44 L. Ed. 485 (1900).

the state court, already involved in federal litigation.⁸ The rule was based on principles of comity between the two jurisdictions. The feeling was that the possession of the res vests the court first acquiring possession with power to hear and determine all controversies as to the res, to the exclusion of courts of concurrent jurisdiction.⁹ The instant case involves the question as to whether a similar rule justifying an injunction by the federal court has grown up in the so-called relitigation cases, on the theory that the decree of the federal court, *whether it involved a res or not*, should be protected from the effects of subsequent litigation in state courts.

From cases allowing injunctions where the res was still in the custody of the federal court, the res rule expanded to cases where the federal court had by its judgment already dealt with the res or property. In such cases the federal courts still enjoined state actions involving the same subject matter.¹⁰ However, where the federal decree does not involve a specific res, but is *in personam*, the rule is not well defined. That there has developed such a rule, however, seems clear from a study of the cases, whether it be the result of what Mr. Justice Frankfurter mentions as "loose language" and a few "ill considered opinions" or not.

The relitigation line of cases springs from a decision rendered in 1875.¹¹ In that case the action was removed to a federal court, but before final disposition there, a suit on a transcript of the record in the state court was brought in another state court. On disposition of the federal case the defendant sought and got ancillary relief by injunction in the federal court, Justice Swayne saying that the "prior jurisdiction below takes the case out of the operation of the provisions of Section 265." Here the decree of the federal court was *in personam*, calling for the payment of money. In 1893 the Supreme Court held that where the plaintiff had received a decree giving title to land to him, the defendant could be restrained in an ancillary proceeding from interfering with the plaintiff's possession.¹² While this case cannot be considered controlling on the relitigation issue, since there was no state action and the decree involved real property, the language of the court is significant where it reads, "It is well settled that an equity court by supplemental bill can carry into effect its own decrees and judgments." In 1903 a federal cir-

⁸ *Slocum v. Mayberry*, 2 Wheat. 1, 4 L. Ed. 169 (1817); *Harris v. Dennie*, 3 Pet. 292, 7 L. Ed. 683 (1830); *Wallace v. M'Connell*, 13 Pet. 136, 10 L. Ed. 95 (1839); *Freeman v. Howe*, 24 How. 450, 16 L. Ed. 749 (1861); *Farmers' Loan & Trust Co. v. Lake St. EL R. R. Co.*, 177 U.S. 51, 20 S. Ct. 564, 44 L. Ed. 667 (1900); *Wabash R. Co. v. Adelbert College*, 208 U.S. 38, 28 S. Ct. 182, 52 L. Ed. 379 (1908), reh. den. 208 U.S. 609, 28 S. Ct. 425, 52 L. Ed. 642 (1908); *Prout v. Starr*, 188 U.S. 537, 23 S.Ct. 398, 47 L. Ed. 584 (1903).

⁹ See Simkins, *Federal Practice* (3d ed., 1938), § 785.

¹⁰ *Julian v. Central Trust Co.*, 193 U.S. 93, 24 S. Ct. 399, 48 L. Ed. 629 (1904); *Riverdale Cotton Mills v. Ala. & Ga. Mfg. Co.*, 198 U.S. 188, 25 S. Ct. 629, 49 L. Ed. 1008 (1905); *St. Louis Mining & Milling Co. v. Montana Mining Co.*, 148 F. 450 (1906).

¹¹ *French v. Hay*, 22 Wall. 231, 22 L. Ed. 799 (1875).

¹² *Root v. Woolworth*, 150 U.S. 401; 14 S. Ct. 136, 37 L. Ed. 1123 (1893).

cuit court enjoined enforcement of certain railroad rates in Nebraska. When the attorney general of the state sued for penalties prescribed under the enjoined rates, his action was enjoined in a supplemental proceeding.¹³ This, too, is not strictly a relitigation case, since the federal court had entered a temporary restraining order, and was more interested in protecting its immediate jurisdiction. However, in 1906, the court sustained a supplemental bill enjoining the taxing of a railroad which it had declared exempt from taxation in a decree rendered in 1872, which had also enjoined enforcement of the unconstitutional tax.¹⁴ While Mr. Justice Frankfurter doubts the value of the decision on the relitigation issue, it seems clear from the language of the court that it was chiefly interested in protecting rights secured under its original decree, not in protecting a res. Two other cases decided by the Supreme Court in 1904¹⁵ and in 1905¹⁶ did involve a res, but the property sold under decree of the federal court had passed from its hands, and it is apparent that the court in granting the ancillary injunctions was interested as well in preventing relitigating of the issues settled by its decrees. In 1921 the Supreme Court decided that a decree, rendered in a class suit in 1913, dismissing the suit could be the basis for an ancillary injunction against members of the class represented in a subsequent state suit.¹⁷ Here the decree was *in personam* for an accounting, and while dismissed by Mr. Justice Frankfurter as not of sufficient weight, it is directly in point on the relitigation question, both on its facts and on its language.

Authority for the proposition that such an ancillary bill should not be entertained where the prior jurisdiction of the federal court involves no custody of a res springs from a decision handed down in *Kline v. Burke Construction Company* in 1922.¹⁸ There a suit on a contract was commenced in a federal court. While it was still pending the defendant sued in a state court on the same issues. Mr. Justice Sutherland, in refusing to enjoin the state proceedings, admitted the well-established rule in the res cases, but stated that the rule is not applicable where the federal jurisdiction was *in personam* and sought only a personal judgment. He felt that in such cases a suit in a state court would not impair the jurisdiction of the federal court and hence the "necessity" for the rule allowing an injunction in the res cases was not present. The decision on the facts was no doubt correct, and a line of cases bears out the recognized rule that mere *pendency* of an action in a federal court, where its jurisdiction involves no res, is not grounds for abatement of a suit

¹³ *Prout v. Starr*, 188 U.S. 537, 23 S. Ct. 398, 47 L. Ed. 584 (1903).

¹⁴ *Gunther v. Atlantic Coast Line R. Co.*, 200 U.S. 273, 26 S. Ct. 252, 50 L. Ed. 477 (1906).

¹⁵ *Julian v. Central Trust Co.*, 193 U.S. 93, 24 S. Ct. 399, 48 L. Ed. 629 (1904).

¹⁶ *Riverdale Cotton Mills v. Ala. & Ga. Mfg. Co.*, 198 U. S. 188, 25 S. Ct. 629, 49 L. Ed. 1008 (1905).

¹⁷ *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356, 41 S. Ct. 338, 65 L. Ed. 673 (1921).

¹⁸ 260 U.S. 226, 43 S. Ct. 79, 67 L. Ed. 226, 24 A. L. R. 1077 (1922).

on the same issues in a state court.¹⁹ However, the applicability of the decision to the relitigation question is doubtful when it is considered that no decree had as yet been entered in the federal court. The language is misleading on the relitigation question, and it seems that Mr. Justice Sutherland did not have the relitigation issue in mind in view of his opinion in *Local Loan Company v. Hunt* some years later.²⁰ In that case, while the proceeding was ancillary to a proceeding in bankruptcy and could therefore have been within the statutory exception to the application of Section 265, Mr. Justice Sutherland said, "That a federal court of equity has jurisdiction of a bill ancillary to an original case or proceeding in the same court, whether at law or in equity, to secure and preserve the fruits and advantages of a judgment or decree rendered therein, is well settled."

When these cases are considered along with a number of lower federal court cases, it seems obvious that the instant case overrules a doctrine, if not well established, at least recognized by our courts, that the parties in state action, relitigating matter already settled by federal courts, can be enjoined by a proceeding ancillary to the federal court's original decree. Some of these cases involved custody of a res by the court,²¹ but others involved no property in the hands of the federal court.²² In most of them, the court is obviously more concerned in preserving the effects of its decree rather than in the problem represented by concurrent jurisdiction of the same subject matter in the nature of a res. In at least two cases the subject matter at hand, was, as in the instant case, the validity of an insurance policy,²³ and the federal court did not hesitate in enjoining the parties to the state proceeding. Only one Supreme Court decision, decided in 1878 actually refused to enjoin state proceedings on a previously litigated federal issue, basing the decision on Section 265 of the Judicial Code.²⁴ The court in that case made no mention of the relitigation question.

A fair criticism of the instant case might result in agreement with Mr. Justice Frankfurter that the relitigation exception to Section 265

¹⁹ *Holmes County v. Burton Const. Co.*, 272 F. 565 (1921); *Standley v. Roberts*, 59 F. 836 (1894); *Hubinger v. Central Trust Co.*, 94 F. 788 (1899); *Stanton v. Embry*, 93 U.S. 548, 23 L. Ed. 983 (1877); *Barber Asphalt Paving Co., v. Morris*, 132 F. 945 (1904); *Western Union Tel. Co. v. U.S. & M. Trust Co.*, 221 F. 545 (1915); *Merritt v. American Steel-Barge Co.*, 79 F. 228 (1897); *Ball v. Tompkins*, 41 F. 486 (1890); *W. E. Stewart Land Co. v. Arthur*, 267 F. 184 (1920); *Hull v. Burr*, 234 U.S. 712, 34 S. Ct. 892, 58 L. Ed. 1557 (1914).

²⁰ 292 U.S. 234, 54 S. Ct. 695, 78 L. Ed. 1230, 93 A.L.R. 195 (1934).

²¹ *St. Louis-San Francisco Ry. Co. v. McElvain*, 253 F. 123 (1918); *Wilson v. Alexander*, 276 F. 875 (1921); *Hickey v. Johnson*, 9 F. (2d) 498 (1925); *St. Louis Mining & Milling Co. v. Montana Mining Co.*, 148 F. 450 (1906); *Sterling v. Gredig*, 5 F. Supp. 329 (1932); *Swift v. Black Panther Oil & Gas Co.*, 244 F. 20 (1917).

²² *American Surety Co. of New York v. Baldwin*, 2 F. Supp. 679 (1933); *Misouri Pac. Ry. Co. v. Jones*, 170 F. 124 (1909); *Sharon v. Terry*, 36 F. 337 (1888).
²³ *Hesselberg v. Aetna Life Ins. Co.*, 102 F. (2d) 23 (1939); *Brown v. Pacific Mutual Life Ins. Co.*, 62 F. (2d) 711 (1933).

²⁴ *Dial v. Reynolds*, 96 U.S. 340, 24 L. Ed. 644 (1878).

has developed from "stretching" the exception allowed in cases where the federal court has custody of a res, in which cases to allow state action on the same subject matter would interfere with the federal court's jurisdiction. It is probable, too, that "loose language" has contributed to the relitigation theory. However, to refuse the injunction because the federal action is *in personam*, and allow it where the action is *in rem* is not an altogether satisfactory rule, either, if we conclude that the reason for enjoining the state action is to preclude a conflict of jurisdiction and process between the two courts. The distinction between actions *in rem* and *in personam* is, when applied to the effects of a decree, elusive.²⁵ A situation could easily occur where the federal decree is *in personam* and yet state action would interfere actually with the process of the federal court: for example, where a federal court has entered a money judgment, property has been attached, and a sheriff as a result of a state suit on the same issues attempts to levy on the same property. It would seem that a better result than that reached merely by distinguishing between *in personam* and *in rem* proceedings would be reached by allowing an injunction wherever it appears from the subsequent state proceeding that control by the federal court over property involved in the original federal proceeding is imperiled by the state action.

J. HONOROFF

EXECUTORS AND ADMINISTRATORS — DISTRIBUTION OF ESTATE — WHETHER LIABILITY OF LEGATEE OR DISTRIBUTE TO ESTATE IS BARRED BY STATUTE OF LIMITATIONS—In *Fleming v. Yeazel*,¹ the Supreme Court of Illinois passed for the first time on a question that has long been unsettled in this state—the right of an executor to charge against a legacy about to be distributed a debt of the legatee to the testator which has been barred by the ten-year statute of limitations. One Ellen Yeazel died on January 11, 1939, leaving a last will and testament, bearing date October 27, 1927, which, after providing for the payment of debts and other bequests not in controversy, directed the executor to divide the money remaining in his hands into nine equal parts, of which one-ninth was to be distributed to a son, Clark Yeazel, and one-ninth to a foster son, Jesse Hight. On June 2, 1924, Clark Yeazel, for value received, had given Ellen Yeazel his promissory note payable three years after date. Likewise, on July 23, 1926, Jesse Hight, for value received, gave Ellen Yeazel his promissory note payable one year after date. The executor filed his petition in the probate court asking that the amounts owing by these two beneficiaries under the will be set off against their respective legacies, and the plea of the statutes of limitations was interposed on behalf of both parties. The probate court held in favor of the petition, but on appeal the circuit court allowed the defense. On further appeal to the Appellate Court for the Third District, the decree of the circuit court was reversed and the

²⁵ See Walter Wheeler Cook, "The Powers of Courts of Equity," 15 Col. L. Rev. 37 (1915).

¹ 379 Ill. 343, 40 N.E. (2d) 507 (1942).

order of the probate court was upheld. The cause then went to the Illinois Supreme Court on certificate of importance.

In approving the conclusion of the Appellate Court, the Supreme Court recognized that the point had never been directly passed upon by it and that there are conflicting decisions in other states, but commented with favor on the dictum in an earlier case, *Jeffers v. Jeffers*.² The court concluded:

"As stated, the authorities in other jurisdictions are not in agreement, but without citing and analyzing cases on both sides of the question, we are of the opinion that the weight of authority, better reasoning and more equitable solution of the problem lies in the view indicated in *Jeffers v. Jeffers*, and that the executor has the right to deduct debts of legatees though suit for same be barred by the statute of limitations.

"We are of the opinion that in this case it was and is the duty of the executor to inventory these notes as a part of the estate and from one-ninth of the total estate, which was the share of each of appellants, to deduct the amount of his debt."³

The view taken here is fully in accord with the rule followed in a majority of the courts in this country⁴ and in England,⁵ though there is authority to the contrary.⁶ And the general rule is that, when the distribution problem is of this nature, the same rule should apply whether decedent died testate or intestate.⁷

The fundamental theory upon which the majority of courts proceed is that the statute of limitations is one of repose and bars only the right

² 139 Ill. 368, 28 N.E. 913 (1891).

³ *Fleming v. Yeazel*, 379 Ill. 343, at p. 347, 40 N.E. (2d) 507, at p. 508. The authorities are considered at greater length in the opinion of the Appellate Court, 311 Ill. App. 641, 37 N.E. (2d) 568 (1941).

⁴ *Noble v. Tait*, 140 Ala. 469, 37 So. 278 (1904); *Cox v. Brady*, 58 Ga. App. 498, 199 S.E. 242 (1938); *Holmes v. McPheeters*, 149 Ind. 587, 49 N.E. 452 (1898); *Garratt v. Pierson*, 29 Iowa 304 (1870); *Holden v. Spier*, 65 Kan. 412, 70 P. 348 (1902); *Goodnough v. Webber*, 75 Kan. 209, 88 P. 879 (1907); *Wilson v. Channell*, 102 Kan. 793, 175 P. 95, 1 A.L.R. 987 (1918); *Frank v. Wareheim*, 177 Md. 43, 7 A. (2d) 186 (1939); *In re Lindmeyer's Estate*, 182 Minn. 607, 235 N.W. 377 (1931); *In re Lietman's Estate*, 149 Mo. 112, 50 S.W. 307, 73 Am. St. Rep. 374 (1899); *Oerly v. Renken*, 222 Mo. App. 1094, 12 S.W. (2d) 943 (1928); *Ex parte Wilson*, 84 S.C. 444, 66 S.E. 675 (1910); *Tinkham v. Smith*, 56 Vt. 187 (1884); *In re Reiser's Estate*, 57 Utah 434, 195 P. 317 (1921); *In re Smith's Estate*, 179 Wash. 417, 38 P. (2d) 244 (1934).

⁵ *Courtenay v. Williams*, 3 Hare 539, 67 Eng. Rep. 494, 13 L.J.Ch. 461, 8 Jur. 844 (1844); *Rose v. Gould*, 15 Beav. 189, 51 Eng. Rep. 509, 21 L.J.Ch. 360 (1852); *Coates v. Coates*, 33 Beav. 249, 55 Eng. Rep. 363, 33 L.J.Ch. 448, 10 Jur. N.S. 532, 9 L.T. 795, 12 W. R. 634 (1864); *In re Cordwell's Estate*, 44 L.J.Ch. 746, L.R. 20 Eq. 644, 23 W. R. 826 (1875).

⁶ *In re Schaeffer's Estate*, 53 Cal. App. 493, 200 P. 508 (1921); *Luscher v. Security Trust Co.*, 178 Ky. 593, 199 S.W. 613, L.R.A. 1918C 615 (1918); *Watkins v. Harwood*, 2 Gill & J. 307 (Md., 1830); *Holt v. Libby*, 80 Me. 329, 14 A. 201 (1888); *Allen v. Edwards*, 136 Mass. 138 (1883); *Old Colony Trust Co. v. Underwood*, 297 Mass. 320, 8 N.E. (2d) 792 (1937); *Boden v. Mier*, 71 Neb. 191, 98 N.W. 701 (1904).

⁷ *Cox v. Brady*, 58 Ga. App. 498, 199 S.E. 242 (1938); *Holmes v. McPheeters*, 149 Ind. 587, 49 N.E. 452 (1898); *Wilson v. Channell*, 102 Kan. 793, 175 P. 95, 1

of action, not the debt itself,⁸ and therefore the amount of the statute-barred debt, being still owed to the estate, may be applied by the executor or administrator in satisfaction of the debtor's legacy or distributive share. The courts express differently their reasons for reaching this conclusion, as, for example, that the debtor has assets of the estate already in his hands which are applicable to his share,⁹ or that the executor or administrator has an equitable lien on an amount equal to the debt,¹⁰ or that the debt constitutes a fund already in the hands of the executor or administrator,¹¹ or that the legatee or distributee should not be permitted to receive more than his equal share, when he has in his hands a part of the fund out of which his own or other shares are to be paid.¹² Moreover, in a number of states, the statute of limitations on debts contains a clause authorizing a retention by the defendant of such amount of the barred claim owed by the plaintiff as equals the amount claimed by him.¹³ But most courts do not in fact rationalize their conclusion on any one of these reasons, but constantly mingle them or use one or more of them to reach the desired result, nor do they specifically mention the statute itself as a ground for their decision.

*In re Lindmeyer's Estate*¹⁴ was a case quite similar to the instant case on its facts, and the court there considered at length the view of the majority of jurisdictions. In that case the decedent by the terms of his will gave his property to his nine children, share and share alike. The executor was permitted in the process of distribution to retain an amount equal to the unpaid portion of outlawed promissory notes of three of the children. The court commented:

"It seems but justice and good conscience that the distributee should not be permitted to receive anything out of the fund to be distributed without deducting therefrom the amount or portion of that fund which is already in his hands as a debtor to the estate. Perhaps the best theory for reaching the conclusion that we do is that the debt is already in the hands of the representative of the estate as assets collected by being deducted from the amount to be distributed. The right to make the deduction in such case is usually termed a right of set-off, but that term is inaccurately used, the right being rather the right to pay out of a

A.L.R. 987 (1918); *In re Smith's Estate*, 179 Wash. 417, 38 P. (2d) 244 (1934); *In re Cordwell's Estate*, 44 L.J.Ch.N.S. 746, L.R. 20 Eq. 644, 23 W. R. 826 (1875).

⁸ *Holmes v. McPheeters*, 149 Ind. 587, 49 N.E. 452 (1898); *Frank v. Wareheim*, 177 Md. 43, 7 A. (2d) 186 (1939); *In re Lindmeyer's Estate*, 182 Minn. 607, 235 N.W. 377 (1931); *Thompson v. McCune*, 333 Mo. 758, 63 S.W. (2d) 41 (1933); *In re Smith's Estate*, 179 Wash. 417, 38 P. (2d) 244 (1934).

⁹ *Holmes v. McPheeters*, 149 Ind. 587, 49 N.E. 452 (1898).

¹⁰ *Cox v. Brady*, 58 Ga. App. 498, 199 S.E. 242 (1938); *Wilson v. Channell*, 102 Kan. 793, 175 P. 95, 1 A.L.R. 987 (1918).

¹¹ *In re Lindmeyer's Estate*, 182 Minn. 607, 235 N.W. 377 (1931); *In re Lietman's Estate*, 149 Mo. 112, 50 S.W. 307, 73 Am. St. Rep. 374 (1899).

¹² *Frank v. Wareheim*, 177 Md. 43, 7 A. (2d) 186 (1939).

¹³ E.g. Ala., Code 1907, § 5863; Ind., Burns Anno. (1933), § 2-1036; Okla., Comp. Stat. 1921, § 274.

¹⁴ 182 Minn. 607, 235 N.W. 377 (1931).

fund in hand than a right of set-off. Regardless of the reason given for the rule, it rests upon wholesome principles of right and justice, and we conclude that we should adopt the common law rule which prevails in a majority of the states wherein the question has been considered."¹⁵

However, as above stated, a minority of courts adhere to the contrary doctrine. Some of these can be distinguished because in a few states the statute of limitations is viewed as extinguishing the debt.¹⁶ But even where the statute is one of repose and bars only the remedy, a number of courts adhere to the view that the executor or administrator cannot retain the amount of the statute barred debt.¹⁷ The view taken in these cases is that to permit such a deduction would be equivalent to allowing an action at law to collect the amount of the barred debt.¹⁸ *Holt v. Libby*¹⁹ is a leading case, entertaining this view. The court there rejected the English rule and, commenting that in England the legatee could only assert a right to his legacy in the Chancery courts, stated:

"With us it is a distinct and independent legal claim. The estate is just as much of a debtor to the indebted legatee as the legatee is to the estate. Each has a legal right and remedy, and a statute-barred debt is no more recoverable by an estate than by any other creditor. To our minds, this is the better doctrine."²⁰

In Illinois, prior to the instant case, dicta in a number of cases²¹ had tended to support the majority view, but the only case heretofore decided on this point in any of the higher courts of this state was *Hesley v. Shaw*,²² an Appellate Court case, and the conclusion there arrived at was in accord with the minority view. In that case the court

¹⁵ *In re Lindmeyer's Estate*, 182 Minn. 607, 235 N.W. 377, at p. 378. For a discussion of the view here taken that this right of retainer should not be termed "set-off," see note, 27 Ill. L. Rev. 50.

¹⁶ *Greene v. Greene*, 145 Miss. 87, 110 So. 218, 49 A.L.R. 565 (1926); *In re Light's Estate*, 136 Pa. 211, 20 A. 536 (1890); *In re Weidig's Will*, 207 Wis. 107, 240 N.W. 832 (1932). In *Greene v. Greene*, the statute there involved was the statute of limitations relative to open accounts, since the intestate had kept book accounts in his business as to amounts owed him by his children as well as his business associates. The court held that this statute extinguished the debt as well as the remedy.

¹⁷ *In re Schaeffer's Estate*, 53 Cal. App. 493, 200 P. 508 (1921); *Luscher v. Security Trust Co.*, 178 Ky. 593, 199 S.W. 613, L.R.A. 1918C 615 (1918); *Holt v. Libby*, 80 Me. 329, 14 A. 201 (1888); *Boden v. Mier*, 71 Neb. 191, 98 N.W. 701 (1904).

¹⁸ "The real purpose of the petition was, and its only effect, if granted, would be, to enforce collection of the debt in question. The proceeding was therefore clearly analogous to an action at law for the same purpose."—*In re Schaeffer's Estate*, 53 Cal. App. 493, 200 P. 508, at p. 509.

¹⁹ 80 Me. 329, 14 A. 201 (1888).

²⁰ *Holt v. Libby*, 80 Me. 329, 14 A. 201, at p. 202 (1888).

²¹ *Jeffers v. Jeffers*, 139 Ill. 368, 28 N.E. 913 (1891); *Esmond v. Esmond*, 154 Ill. App. 357 (1910); *Gray v. Hayhurst*, 157 Ill. App. 488 (1910); *Jordan v. Jordan*, 201 Ill. App. 44 (1915), reversed on grounds not now in question in 274 Ill. 251, 113 N.E. 631 (1916); *White v. Lewis*, 201 Ill. App. 105 (1915); *Pollock v. Cantlin*, 253 Ill. App. 229 (1929).

²² 120 Ill. App. 92 (1905).

considered the petition of an administrator to apply a part of the distributive shares of various heirs to payment of amounts due on notes to the intestate, which notes matured more than ten years prior to the intestate's death. The heirs raised the defense of the statute of limitations, and this was held to be a good defense. The court referred to *Jeffers v. Jeffers*,²³ and stating that the question was still open in this state, concluded as follows:

"The purpose of the petition was, and the effect of granting the same would be, to enforce the payment of the notes in question. The proceeding was, therefore, clearly analagous to an action at law for the same purpose. There is no claim that any new promise to pay the notes existed, nor that any mutual claims existed between the deceased and the makers of the notes. The trial court properly held that the Statute of Limitations, which is a statute of repose, based upon the presumption that the debt has been paid, barred not only the remedy of appellant, as the representative of his intestate, but the right, which it was intended to vindicate, as well."²⁴

This has caused Illinois to be cited²⁵ as being in line with those states which have supported the minority rule. However, the *Hesley* case was considered a doubtful decision even before the instant decision. Dicta of the courts of this state,²⁶ both before and subsequent to that case had expressed a contrary policy. Furthermore, it is clear that in this state the statute of limitations is viewed as a statute of repose, affecting only the remedy and not the right. It raises no presumption of payment, the debt or right not being extinguished.²⁷

Hesley v. Shaw was commented on by the Appellate Court, when the present case was there for consideration²⁸ but the reasoning was not approved. The Supreme Court did not mention *Hesley v. Shaw*, but being contrary in principle to this decision it must be considered overruled.

The instant case clearly places Illinois in line with the majority of jurisdictions as to the present problem, and the basis for the decision is plainly expressed in the following language:

"The right of an executor to deduct such an indebtedness is based upon the equitable principle that no one should be permitted to share in a fund until he has discharged his obligation to contribute to that fund. Here appellants already have funds of the estate in their hands in the form of indebtedness owed to it. To allow them to escape payment of

²³ 139 Ill. 368, 28 N.E. 913 (1891).

²⁴ *Hesley v. Shaw*, 120 Ill. App. 92, at p. 100 (1905).

²⁵ 16 A.L.R. 342; 18 C.J. at p. 884; *In re Schaeffer's Estate*, 53 Cal. App. 493, 200 P. 508 (1921).

²⁶ *Jeffers v. Jeffers*, 139 Ill. 368, 28 N.E. 913 (1891); *Esmond v. Esmond*, 154 Ill. App. 357 (1910); *Gray v. Hayhurst*, 157 Ill. App. 488 (1910); *Jordan v. Jordan*, 201 Ill. App. 44 (1915), reversed on grounds not now in question in 274 Ill. 251, 113 N.E. 631 (1916); *White v. Lewis*, 201 Ill. App. 105 (1915); *Pollock v. Cantlin*, 253 Ill. App. 229 (1929).

²⁷ *Keener v. Crull*, 19 Ill. 189 (1857); *Newland v. Marsh*, 19 Ill. 376 (1857); *Chicago Board of Underwriters v. Industrial Comm.*, 332 Ill. 611, 164 N.E. 216 (1928).

²⁸ *In re Yeazel's Estate*, 311 Ill. App. 641, 37 N.E. (2d) 568 (1941).

their debt and at the same time receive a full distributive share of the estate, would serve to increase their share by the amount of their indebtedness. There is nothing to indicate that the testatrix intended such a result. On the contrary, her will evidences an intention to equally divide her estate."²⁹

This result, and the reasoning behind it, seem desirable in such a case, in that one who is supposed to share equally in the gratuitous benefits of the estate of a decedent should not receive a greater share by reason of failure to pay just debts, and, under such circumstances, the strict application of the bar of the statute of limitations would appear inequitable. This view is in accord with equitable principles as applied by the Illinois courts.³⁰

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²⁹ *Fleming v. Yeazel*, 379 Ill. 343, at p. 346, 40 N.E. (2d) 507, at p. 508. It is clear that the intention the court was looking for was the intention to forgive the debt, not the intention to keep the debt alive. If the latter intention were necessary to be expressed, it would be hard to explain the cases where the administrator in an intestate estate is allowed to retain the amount of the statute-barred debt. But if evidence of forgiveness is sought, it is not clear whether the court would require the intent to be expressed in the will or whether it might be inferred from circumstances such as that at the time the testator made his will the debt was already over the statutory age, and hence the absence of any reference to it in the will would indicate that the testator considered it dead and therefore intended to give a full legacy without deduction.

³⁰ That limitations are not strictly enforced in Equity, where their application would be inequitable, see *Thorndike v. Thorndike*, 142 Ill. 450, 32 N.E. 510, 21 L.R.A. 71 (1892), and *Evans v. Moore*, 247 Ill. 60, 93 N.E. 118 (1910). It should be noted that, in Illinois, probate courts may apply equitable principles and modes of procedure in the exercise of their jurisdiction over the administration of estates: *Spencer v. Boardman*, 118 Ill. 553, 9 N.E. 330 (1886); *Shepard v. Speer*, 140 Ill. 238, 29 N.E. 718 (1892); *Bliss v. Seaman*, 165 Ill. 422, 46 N.E. 279 (1896); *Heppe v. Szczepanski*, 209 Ill. 88, 70 N.E. 737 (1904).