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T. B. Crandall

A. Dworkin

F. S. Rodkey Jr.

M. L. Price

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# CHICAGO-KENT LAW REVIEW

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## DISCUSSION OF RECENT DECISIONS

ALIENS—NATURALIZATION—WHETHER NATURALIZED CITIZEN MAY BE SUBPOENAED AS A WITNESS IN EFFORT TO DETERMINE IF GOOD CAUSE EXISTS TO SUPPORT PROCEEDINGS TO DENATURALIZE HIM—The United States Supreme Court recently took jurisdiction over two related cases in order to resolve a conflict between certain of the Courts of Appeal on the point as to whether or not a naturalized citizen may be subpoenaed and compelled to testify at an investigation undertaken to determine if cause existed to institute denaturalization proceedings.<sup>1</sup> In the first of these cases, the respondent, a naturalized citizen, failed to appear in response to an

<sup>1</sup> Proceedings of this character are authorized by 8 U. S. C. A. § 1451.

administrative subpoena,<sup>2</sup> disregarded a court order directing compliance, was adjudged in contempt, but succeeded in convincing the Court of Appeals for the Third Circuit that, being a putative defendant, he was not a person capable of being subpoenaed.<sup>3</sup> In the related case, the petitioner, also a naturalized person, appeared in response to a similar subpoena but refused to be sworn or to testify. His conduct was approved by the district court but the Court of Appeals for the Second Circuit reversed.<sup>4</sup> Following issuance of certiorari in each case, the United States Supreme Court, in the case entitled *United States v. Minker*,<sup>5</sup> affirmed the holding of the Court of Appeals for the Third Circuit and reversed that attained by the Second Circuit. It there held that Congress had failed to provide, with sufficient clarity, for the exercise of a subpoena power by the Immigration and Naturalization Service which would extend to persons who might be the potential subjects of denaturalization proceedings.<sup>6</sup>

In deciding this case, the Supreme Court left no doubt that, in the absence of an express mandate from Congress, it would not imply the power to subpoena and it went to to say that, in matters of citizenship, where the result might be "loss of both property and life, or all that makes life worth living,"<sup>7</sup> any doubt had to be resolved in favor of the citizen. To reinforce its decision, the court also cited four other sections of the Immigration and Naturalization Act<sup>8</sup> to show how and wherein a differentiation existed between persons who might be the subject of an investigation in contrast to those witnesses who were not. Treating the case as being primarily a construction problem, the court declined to consider the more fundamental problem as to whether the subpoena would have violated the constitutional protection against self-incrimination.<sup>9</sup>

<sup>2</sup> Authority for the use of a subpoena, designed to secure both the attendance and testimony of "witnesses" as well as the production of books and the like in relation to "the privilege of any person to enter" the United States or "concerning any matter which is material or relevant" to the enforcement of the Immigration and Naturalization Act of 1952, is set forth in 8 U. S. C. A. § 1225(a).

<sup>3</sup> See *United States v. Minker*, 217 F. (2d) 350 (1954). An earlier stage of the proceeding, from which no appeal was taken, appears in 118 F. Supp. 264 (1953).

<sup>4</sup> See *Application of Barnes*, 219 F. (2d) 137 (1955), reversing 116 F. Supp. 464 (1953). The Court of Appeals for the Fifth Circuit, in *Lansky v. Savoretti*, 220 F. (2d) 906 (1955), after giving consideration to both the *Minker* and the *Barnes* holdings, appears to have aligned itself with the *Barnes* view.

<sup>5</sup> — U. S. —, 76 St. Ct. 281, 100 L. Ed. (adv.) 191 (1956). Justice Black and Douglas each wrote a concurring opinion.

<sup>6</sup> While Justice Douglas concurred in the result, he expressed the belief that, had the statute in question been specific on the point, there would be grave doubt as to its constitutionality in the light of basic notions as to due process.

<sup>7</sup> — U. S. — at —, 76 S. Ct. 281, 100 L. Ed. (adv.) 191 at 198.

<sup>8</sup> 8 U. S. C. A., §§ 1226(a), 1252(b), 1446(b), and 1447.

<sup>9</sup> The Supreme Court has often said it would not pass upon a constitutional question if there was also present some other ground upon which the case could be decided: *Siler v. Louisville & N. R. Co.*, 213 U. S. 175, 29 S. Ct. 451, 53 L. Ed. 753 (1909).

Consequently, assuming that an unequivocal congressional authorization for the use of a subpoena existed, the likely status of a naturalized citizen subpoenaed in connection with his own denaturalization investigation still remains to be considered.

In that connection, the Fifth Amendment directs that no person "shall be compelled in any criminal case to be a witness against himself." At first glance, this would appear to protect only the accused in a federal criminal case.<sup>10</sup> However, the protection against compulsory self-incrimination has, in the course of years, been enlarged and extended by the courts so that an individual is now privileged not to answer incriminating questions propounded in the course of any and all judicial proceedings, official investigations, inquiries, hearings or the like wherein formal testimony is required.<sup>11</sup> Furthermore, the safeguard has come to have a dual aspect, shielding both the accused and the witness.<sup>12</sup> When utilized by the accused, the guarantee is a relatively simple proposition, and may be summed up in the statement that the accused may not be called as an involuntary witness in his own case. Correspondingly, since the privilege is purely personal, it may only be asserted by the witness where that witness does not want to inculcate himself.<sup>13</sup>

The basic feature of the protection so afforded is that it may be employed whenever the testimony of a person would tend to make him vulnerable to a criminal prosecution. Although there have been numerous attempts to expand the privilege into peripheral or quasi-criminal areas,<sup>14</sup> the courts have thus far recognized only two corollaries, to-wit: (1) where

<sup>10</sup> It is to be noted that the self-incrimination clause of the Fifth Amendment is not a limitation on the power of a state: *Twining v. New Jersey*, 211 U. S. 78, 29 S. Ct. 14, 53 L. Ed. 97 (1908). But see *Adamson v. California*, 332 U. S. 46, 67 S. Ct. 1672, 91 L. Ed. 1903, 171 A. L. R. 1223 (1947), where the four judges who dissented declared that the provision against self-incrimination found in the Fifth Amendment was to be regarded as a constituent part of the Fourteenth Amendment.

<sup>11</sup> See *United States v. Monia*, 317 U. S. 424, 63 S. Ct. 409, 87 L. Ed. 376 (1943), as to grand jury matters; *McCarthy v. Arndstein*, 266 U. S. 34, 45 S. Ct. 16, 69 L. Ed. 158 (1924), with respect to civil cases; *Quinn v. United States*, 349 U. S. 155, 75 S. Ct. 668, 99 L. Ed. 964 (1955), for treatment at hearings before legislative committees; *Wood v. United States*, 128 F. (2d) 265, 141 A. L. R. 1318 (1942), concerning preliminary hearings; and *Pfitzinger v. United States Civil Service Commission*, 96 F. Supp. 1 (1951), affirmed in 192 F. (2d) 934 (1951), with regard to administrative agencies.

<sup>12</sup> *McCarthy v. Arndstein*, 266 U. S. 34, 45 S. Ct. 16, 69 L. Ed. 158 (1924); *United States v. Goodner*, 35 F. Supp. 286 (1940).

<sup>13</sup> The privilege, being purely personal, may not be invoked against a willing witness's testimony by the accused, nor by a witness acting simply to aid the accused: *Rogers v. United States*, 340 U. S. 367, 71 S. Ct. 438, 95 L. Ed. 344, 18 A. L. R. (2d) 378 (1951).

<sup>14</sup> See, for example, *United States v. Dalton*, 286 F. 756 (1923), where it was held the immunity had no application to declarations required on entry of goods under custom laws.

the self-incrimination would lead to a forfeiture,<sup>15</sup> and (2) where there would be a penalty enforced by a civil action.<sup>16</sup> Correspondingly, the courts have refused to allow the privilege to be asserted where the disclosure would result in a pecuniary loss or ordinary civil liability,<sup>17</sup> where there would be incrimination under the laws of another sovereign,<sup>18</sup> or where the effect would be to do no more than disgrace the individual, degrade his character, or otherwise render him infamous in the community.<sup>19</sup>

Compulsory testimony before an immigration official, under threat of a contempt proceeding for refusal, could reasonably be said to place a naturalized citizen in the position of either helping to supply the evidence necessary for his denaturalization or of alternately exposing himself to a prosecution for perjury. This would seem to be a Star Chamber practice to say the least. And yet, since a denaturalization proceeding is a civil action,<sup>20</sup> it would necessarily follow that the threat of a potential denaturalization would not *per se* be sufficient to justify a refusal to testify under the constitutional protection against self-incrimination.<sup>21</sup> However,

<sup>15</sup> *Boyd v. United States*, 116 U. S. 616, 6 S. Ct. 524, 29 L. Ed. 746 (1886). Actions involving forfeiture which are strictly of an *in rem* character are not protected: *United States v. The Ruth Mildred*, 286 U. S. 67, 52 S. Ct. 473, 76 L. Ed. 981 (1932).

<sup>16</sup> *Belfield v. Dodge Publishing Co.*, 198 F. 658 (1911). There is, of course, an extremely nebulous distinction between a penalty and ordinary civil liability not protected by the privilege. See, for example, *Bowles v. Seitz*, 62 F. Supp. 773 (1945), where the treble damages authorized by the Emergency Price Control Act were held to be a "penalty" designed as reparations to sufferers from wrongs, hence not of the type which would entitle one to claim the protection against self-incrimination.

<sup>17</sup> *Tucker v. Hubner*, 129 F. Supp. 110 (1955).

<sup>18</sup> *Wolf v. Colorado*, 338 U. S. 25, 69 S. Ct. 1359, 93 L. Ed. 1782 (1949). But see the case of *Rea v. United States*, — U. S.—, 76 S. Ct. 292, 100 L. Ed. (adv.) 213 (1956), where a federal narcotics agent, having obtained evidence in the course of an illegal search and seizure, was enjoined from testifying concerning this evidence in a state prosecution.

<sup>19</sup> *Brown v. Walker*, 161 U. S. 591, 16 S. Ct. 644, 40 L. Ed. 819 (1896); *United States v. Ortman*, 207 F. (2d) 148 (1953).

<sup>20</sup> *Luria v. United States*, 231 U. S. 9, 34 S. Ct. 10, 58 L. Ed. 101 (1913); *Graham v. United States*, 99 F. (2d) 746 (1938). See also *Klaprott v. United States*, 166 F. (2d) 273 (1948), where the court pointed out that it was Congress which made denaturalization proceedings civil in character and that matters of this nature had not been changed into some form of criminal prosecution by the fact that the Supreme Court had required the production of clear and convincing evidence in a contested case.

<sup>21</sup> The Supreme Court itself, in the instant case, pointed out that denaturalization proceedings could result in "loss of both property and life, or of all that makes life worth living." If this be conceded, then it could conceivably be argued that a forfeiture would be involved; from which predicate a justifiable refusal to testify might be established. Protection against forfeiture, however, is usually restricted to property questions. Whether citizenship, which is a form of status, could be said to be a species of property, hence entitled to protection, is an open question. At least one court has held that a civil service position is not a matter of property right to be protected against forfeiture by the Fifth Amendment: *United States v. Ortman*, 207 F. (2d) 148 (1953).

as certain of the grounds for denaturalization are also criminal acts,<sup>22</sup> testimony with regard thereto would expose the individual to potential criminal prosecution as well as denaturalization. Under these conditions, then, there can be no doubt that the safeguard might be asserted.<sup>23</sup>

It is, of course, generally accepted law that the assertion of the privilege against self-incrimination must be timely; that the claimant may impliedly waive his right by failure to exercise it at the proper moment,<sup>24</sup> and that, in the event of a waiver, the testimony must be completed without regard to consequences. It is not timely for the privilege to be anticipated, so a witness under subpoena may not refuse to comply simply on the basis that he might possibly be forced to testify against himself.<sup>25</sup> However, an appearance pursuant to the subpoena is not in itself a waiver,<sup>26</sup> and the courts will allow a considerable latitude within which the witness may claim his rights against self-incrimination.<sup>27</sup>

In view of the fact that the rights of a citizen<sup>28</sup> were involved in the instant case, the Supreme Court quite correctly refused to imply the power to subpoena. Nevertheless, it would appear that there would be no constitutional objection to an express congressional authorization allowing an immigration official to subpoena a naturalized citizen to appear in connection with his own denaturalization investigation. During this hearing, all questions not incriminatory<sup>29</sup> would have to be answered whether

<sup>22</sup> It is, for example, a criminal act knowingly to procure naturalization contrary to law, 18 U. S. C. A. § 1425, and this conduct is also ground for denaturalization: 8 U. S. C. A. § 1451(a).

<sup>23</sup> *Schoeps v. Carmichael*, 177 F. (2d) 391 (1949), cert. den. 339 U. S. 914, 70 S. Ct. 566, 94 L. Ed. 1340 (1950).

<sup>24</sup> *United States v. Murdock*, 284 U. S. 141, 52 S. Ct. 63, 76 L. Ed. 210 (1931); *United States ex rel. Vajtauer v. Commissioner of Immigration*, 273 U. S. 103, 47 S. Ct. 302, 71 L. Ed. 560 (1927). In the last mentioned case the alien's privilege was held waived where the claim of privilege was not brought to the attention of the trial court.

<sup>25</sup> *Corretjer v. Draughon*, 88 F. (2d) 116 (1937).

<sup>26</sup> *N. L. R. B. v. Barrett Co.*, 120 F. (2d) 583 (1941).

<sup>27</sup> See, for example, *United States v. Toner*, 173 F. (2d) 140 (1949), where a witness in a criminal prosecution did not waive the right to claim the privilege against self-incrimination on cross-examination by reason of having answered non-incriminating questions on direct examination. In *United States v. Steffen*, 103 F. Supp. 415 (1951), the court pointed out that acts alleged to constitute constructive waiver must be carefully appraised and any doubt must be resolved against a waiver.

<sup>28</sup> Under the federal constitution, a naturalized citizen stands on an equal footing with a native-born citizen in all respects save that of eligibility for the presidency: *Baumgartner v. United States*, 322 U. S. 665, 64 S. Ct. 1240, 88 L. Ed. 1525 (1944).

<sup>29</sup> In *Joong Sui Noon v. United States*, 76 F. (2d) 249 (1935), it was held that, deportation being a civil proceeding, it was not error to require the defendant himself to testify as to whether or not he was an alien. Supposing Congress were to pass an immunity statute as to disclosures made in the course of denaturalization proceedings, it is conceivable that the shield against self-incrimination would

or not the answers served to furnish information disclosing the existence of grounds for denaturalization. The facts so gathered could then be turned over to the appropriate authority to be used in evidence at a subsequent denaturalization proceeding. If a practice of this character could be said to be inconsistent with the spirit of the Fifth Amendment, then Congress should leave the statute here concerned in its present form.

T. B. CRANDELL

**BANKRUPTCY — CLAIMS AGAINST AND DISTRIBUTION OF ESTATE — WHETHER CLAIM FOR CONTRIBUTIONS DUE FROM EMPLOYER TO A UNION WELFARE FUND FOR BENEFIT OF EMPLOYEES IS ENTITLED TO THE PRIORITY GRANTED A WAGE CLAIM**—The recent bankruptcy proceeding entitled *In re Brassel*<sup>1</sup> presented an issue as to whether or not a claim for contributions due from a bankrupt employer to a union welfare fund for the benefit of wage-earning employees was entitled to a preferred status over the other debts owed by the estate. The bankrupt there concerned had signed a collective bargaining agreement with the union<sup>2</sup> about three months prior to the filing of a voluntary petition in bankruptcy but had failed to pay the required contribution to the welfare fund, leading to the creation of a substantial debt. The trustees of the welfare fund filed a claim for the amount due and contended that the claim was entitled to a preference by reason of the provisions of the Bankruptcy Act relating to wage claims.<sup>3</sup> The United States District Court for the Northern District of New York, however, held the claim in question was not entitled to any degree of priority and, so doing, affirmed the conclusion of the referee in bankruptcy.

As the case appeared to be one without precedent, the problem had to be met and decided in accordance with the intent and language of the Bankruptcy Act.<sup>4</sup> The history of the particular section involved indicates

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then disappear altogether. Under such a statute, the naturalized citizen would be forced, by means of a penalty for contempt, to furnish the evidence necessary to establish the government's case, just as the defendant was forced to do in the case last mentioned. In such a situation, it would seem that the defendant's only hope would then lie in an appeal based on the forfeiture theory.

<sup>1</sup> 135 F. Supp. 827 (1955).

<sup>2</sup> The agreement made with the union stated, in part, that the employer was to "contribute . . . every week . . . 5% of the gross payroll for all employees covered" by the agreement. The sums so to be paid in were to be "held for insurance . . . and other benefits, including reasonable administration charges." The employer was not to be "responsible in any way for the expenditure of this fund" nor were the employees to "have any claim thereto," the discretion of the trustees of the fund being said to be "final."

<sup>3</sup> Section 64 of the Bankruptcy Act, 11 U. S. C. § 104, as amended in 1952.

<sup>4</sup> 11 U. S. C. § 104(a) (2) classifies, among other claims, those claims for "wages, not to exceed \$600.00 to each claimant, which have been earned within three

quite clearly that it was the intent of Congress to give a special type of protection, in a limited amount, to workmen who, by reason of the rate and amount of the remuneration, would ordinarily be expected to depend upon daily, weekly or monthly wages for the support of themselves and their families.<sup>5</sup> The claim of the workman, or of his assignee, had to be for those earnings which were due to him personally and for which the employer was liable by virtue of the labor performed. It is important, therefore, to note that the claim had to be for "wages," these wages had to be "due" to the workman, and "each claimant" was limited in his claim both as to the statutory amount and the period within which the claimed amount had accrued. If all conditions were met, the wage claimant would then be entitled to priority in payment immediately after satisfaction of the administration expenses; otherwise the claim would automatically be relegated to the class designated for unsecured creditors.<sup>6</sup>

Prior to the holding in the instant case, the statute in question had received a degree of interpretation at the hands of the courts. It has been said, for example, that the term "wages" should be construed liberally.<sup>7</sup> Since the statute provides no express definition as to what should constitute "wages," the cases have defined the term to cover the agreed amount of compensation, to be paid by the employer to the employee, for the labor which the latter has performed while serving in some subordinate capacity, with emphasis on the fact that such compensation should be the greatest source of income for the employee's support. Whether the employer has agreed to pay by the hour, day, week, month or by the piece is, however, wholly immaterial.<sup>8</sup> Despite the humane public policy reflected by the statute though, two stringent qualifications exist. In the first place, the total amount of the claim may not exceed the sum of \$600 for each claimant, and secondly, the amount sought must have been earned within the three months next preceding the filing of the bankruptcy petition. Any excess, either in the amount or in the time period, is to the extent of the excess treated as a sum due a general creditor.<sup>9</sup>

Because the provisions of the statute define and limit the debts which

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months before the date of the commencement of the proceeding, due to workmen, servants, clerks, or travelling or city salesmen on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt."

<sup>5</sup> In re Paradise Catering Corp., 36 F. Supp. 974, 45 Am. Bankr. Rep. (N.S.) 770 (1941).

<sup>6</sup> In re Ko-Ed Tavern, Inc., 129 F. (2d) 806, 142 A. L. R. 357 (1942).

<sup>7</sup> Mauly v. Hood, 37 F. (2d) 212 (1930); In re Caldwell, 64 F. 515 (1908). See also In re Erie Lumber Company, 150 F. 817 (1906).

<sup>8</sup> In re Gurewitz, 121 F. 982 (1903). See also In re Public Ledger, 161 F. (2d) 762 (1946); In re Thomas Deutchle & Company, 182 F. 431 (1910).

<sup>9</sup> In re Ko-Ed Tavern, Inc., 129 F. (2d) 806, 142 A. L. R. 357 (1942).



are entitled to priority,<sup>10</sup> the statutory order of priority may not be varied nor departed from.<sup>11</sup> Nevertheless, in the case of *Blessing v. Blanchard*,<sup>12</sup> the court alluded to the fact that the concept of priority, as applied to wages, was intended to protect those who, because of the bankruptcy of the employer, would be in dire need of protection and, in the case of *In re Raiken*,<sup>13</sup> the provision was said to be designed to reward and protect those who had created assets for the bankrupt estate shortly before bankruptcy had intervened. Once the restrictions had been met, therefore, the term "wages" could take on a liberal meaning, with the result that cases can be found which, while earlier in point of time, still represent the present trend of thought on the subject.<sup>14</sup>

In an effort to answer the query as to who would constitute a "workman, servant, clerk, or travelling or city salesman," the court concerned with the case of *Strom v. Peikes*<sup>15</sup> stated that terms of this nature were to be defined the same way as they would be used in common conversation. Consequently, the persons referred to can include only those who work, labor or serve in a more or less subordinate capacity, with the character of the work and the economic status of the individual being important considerations. This idea, in contrast to the liberality shown with respect to the meaning of the term "wages," has been strictly adhered to and courts have refused to extend the scope of this part of the statute regardless of the meritorious nature of the particular case.<sup>16</sup> As the

<sup>10</sup> *State of Missouri v. Earhart*, 11 F. (2d) 992 (1940), cert. den. 311 U. S. 676, 61 S. Ct. 43, 85 L. Ed. 435 (1940); *In re Wilkes-Barre & E. R. R. Co.*, 46 F. Supp. 12 (1942); *In re Hutchins*, 36 F. Supp. 895 (1941).

<sup>11</sup> *In re Columbia Ribbon Company*, 117 F. (2d) 999 (1941); *In re Public Ledger*, 63 F. Supp. 1008 (1945); *In re Witt Dairy Co.*, 48 F. Supp. 964 (1942); *In re Renticoff*, 36 F. Supp. 1 (1941); *In re Paradise Catering Co.*, 36 F. Supp. 974 (1941).

<sup>12</sup> 223 F. 35, 35 Am. Bankr. Rep. 135 (1915).

<sup>13</sup> 33 F. Supp. 88 (1940).

<sup>14</sup> The case of *Ex parte Steiner*, Fed. Cas. No. 13,354 (1842), indicates that an apprentice would be entitled to priority. *In re Hawthorne*, Fed. Cas. No. 6162 (1870), holds that a minor's wages may be recovered by his guardian. The case of *Ex parte Rockett*, Fed. Cas. No. 11,977 (1876), states that a temporary accountant could be entitled to a priority. Even though the employer is actually insolvent, so long as he was in active business at the time of the employee's labor, a wage claim would be proper according to the holding in the case of *In re Wells*, 4 F. 68 (1880). Money advanced to an employer with which to pay wages, however, would not be privileged under the determination in *In re Paulson*, Fed. Cas. No. 10,849 (1842), nor would damages arising from a wrongful discharge from employment: *In re Peaver*, Fed. Cas. No. 11,053 (1878). It would, therefore, follow that orders for goods drawn by the bankrupt in favor of the employee would not be preferred, *In re Erie Rolling Mill*, 1 F. 585 (1880), any more than would a claim for rent owed by the bankrupt, *In re Auto Electric Repair & Parts Co.*, 41 F. Supp. 3 (1900), despite a state law creating a lien in favor of the landlord.

<sup>15</sup> 123 F. (2d) 1003, 138 A. L. R. 937 (1941).

<sup>16</sup> See, for example, *In re Estey*, 6 F. Supp. 570 (1934).

real basis of the relationship contemplated by the terms of the statute is one of master and servant, and the debt accruing must be one due the party who has labored for another, it can be seen that no mere contractual liability would be sufficient to meet the standard set forth in the definitive decisions of the courts,<sup>17</sup> hence the real test to support a claim of priority would turn on the relationship of the claimant to the bankrupt. Inasmuch as the term "priority," by its very nature, imports extraordinary rights, the courts jealously guard the privilege and subject all claims to a careful scrutiny to insure that all requirements have been met<sup>18</sup> and, even though the relationship be established, they will require that the wages must have been "earned" before approving the claim.<sup>19</sup>

While the identical problem presented by the instant case does not appear to have arisen prior to this, there are at least two analogous situations which have led to similar results. In the case of *McKee v. Paradise*,<sup>20</sup> the employer had failed to remit to an employee those sums which the employer had withheld from the employee's salary and which funds had been placed in a separate account for the benefit of the employee. Upon the employer's bankruptcy, the employee sought to obtain a priority of the type granted to a wage claim but the court there held that, as to the amount withheld, the relationship was not that of master and servant but rather that of debtor and creditor. In the case of *In re Flick*,<sup>21</sup> a somewhat similar situation existed except that, in that case, there was an express contract between the employer and the employee with regard to the sums to be withheld, so the court had little difficulty in concluding that the obligation was one based on contract, with no more than a simple debt being owed and the master-servant relationship terminating with respect thereto as the contract became effectuated.

The conclusion reached in the instant case, therefore, seems to be an inescapable one even under the most liberal construction of all of the terms of the relevant portions of the statute for the claimant was not a workman, or an assignee of a workman; the sum claimed did not represent wages in the ordinary sense of the term; and the amount payable, while measured by the amount of wages earned, formed no more than a contractual obligation owed to a third person. No degree of liberality in connection with the construction of the terms of the statute could justify the amount of nullification in the language of the act, much less justify the overruling of the long standing and incontrovertible decisions holding

<sup>17</sup> *In re Ageloff*, 40 F. Supp. 369 (1939).

<sup>18</sup> *In re Marshall E. Smith & Bros.*, 35 F. Supp. 56 (1940).

<sup>19</sup> *In re Kinney Aluminum Co.*, 78 F. Supp. 565 (1948).

<sup>20</sup> 299 U. S. 119, 57 S. Ct. 124, 81 L. Ed. 75 (1936).

<sup>21</sup> 105 F. 503 (1900).

otherwise, which would be necessary before a claim of the kind asserted could be upheld.<sup>22</sup> If the fringe benefits now common under modern mass employment contracts are to be protected against the impact of bankruptcy, substantial revision would have to be made both in the statutory language and in the fundamental concepts concerning priorities.

A. DWORIN

PARTNERSHIP — DEATH OF PARTNER AND SURVIVING PARTNERS — WHETHER PROVISION FOR JOINT TENANCY IN PARTNERSHIP ASSETS OPERATES TO VEST SURVIVING PARTNER WITH SOLE OWNERSHIP OF PARTNERSHIP PROPERTY—A relatively rare but nevertheless a significant problem concerning the effect to be given to a survivorship provision in a partnership agreement came before the United States Court of Appeals for the Seventh Circuit in the case of *Jones v. Schellenberger*.<sup>1</sup> It appeared therein that the plaintiff, a Texas administratrix of a deceased partner's estate, sought an accounting of the partnership affairs as against the surviving partner, a resident of Illinois. The partnership contract, among other things, provided that the partners were to own the business and the partnership "as joint tenants with right of survivorship" and that, upon the death of either partner, "all right, title, and interest therein" should vest immediately in the surviving partner. On the basis of this language, the surviving partner contended that he had become the sole owner of the partnership property, hence was under no obligation to give an accounting to any one with respect thereto. The federal district court decided adversely to the defendant and the reviewing tribunal, at first, agreed with this holding. On petition for rehearing, however, the Court of Appeals recalled its original opinion, vacated all orders based thereon, and directed that the complaint be dismissed. It achieved that decision on the basis that it was the duty of the federal court to follow any applicable state court decision on the subject, even though the same may have been reached subsequent to the rendition of the judgment by a federal court, and that it was possible, under controlling Illinois law, for partners to agree upon a survivorship provision with respect to partnership assets.

In the time intervening between the first ruling of the Court of Appeals and the second one, the Illinois Appellate Court for the First

<sup>22</sup> The case of *United States v. Carter*, 229 F. (2d) 645 (1956), holds that the trustees of a health and welfare fund may not maintain an action against a general contractor's surety on a Miller Act bond, given to secure the payment of wages for labor on a public project, to recover unpaid contributions to a health and welfare fund, on the ground that while such contributions were measured by the amount of labor performed they did not represent "sums justly due" to the persons who furnished the labor.

<sup>1</sup> 225 F. (2d) 784 (1955). Earlier aspects of the case are discussed in 196 F. (2d) 852 (1952), and in 201 F. (2d) 29 (1953).

District, in the case of *Lynch v. Ilg*,<sup>2</sup> had ruled that a survivorship provision in a partnership agreement was to be regarded as valid, hence would be enforced, but it should be emphasized that, in both cases, neither court held that a joint tenancy *per se* had been created. Rather, as in the *Lynch* case, the court had been faced with language that was not sufficient, in and of itself, to create a technical joint tenancy<sup>3</sup> but which the court treated as amounting to a valid contract provision, based on a sufficient consideration, to create a right of survivorship which, not being in violation of law, could be enforced.

By contrast, the language used in the instant case was sufficient, in form, to create a joint tenancy, nevertheless the court said that no joint tenancy had been initially created because the Illinois version of the Uniform Partnership Act made it mandatory that all partnership property should be held under a partnership form of tenancy.<sup>4</sup> For this reason, the court said that a tenancy by partnership and a joint tenancy could not coexist as to the same property inasmuch as the former expressly provided against any right of survivorship except that degree of survivorship made necessary for liquidation purposes<sup>5</sup> as distinguished from the survivorship right in the individual usually attendant upon a joint tenancy. Despite this, the court then went on to say that, because of the ruling in the *Lynch* case, it would be permissible, in Illinois, to contract for an eventual right of survivorship, either initially in the partnership agreement or subsequent thereto, which promise could be enforced, so it ended up with a holding which, in practical effect, permitted the creation of a tenancy in partnership combined with an enforceable contract right for survivorship analogous to a holding in joint tenancy.

About the only other instance wherein an attempt has been made to incorporate a joint tenancy in a partnership arrangement is to be found in the case of *Fleming v. Fleming*,<sup>6</sup> argued before the Supreme Court of Iowa. The case was one in the form of a suit by the widow of a deceased partner against the surviving partners to have her distributive share as surviving spouse ascertained and set aside in so much of the property as her husband had been seized during his lifetime. The defendant partners resisted, claiming that all the property in controversy had been held by the partners as joint tenants and that customary rights

<sup>2</sup> 348 Ill. App. 545, 109 N. E. (2d) 362 (1952). Leave to appeal was denied: 413 Ill. 633 (1953).

<sup>3</sup> See Ill. Rev. Stat. 1955, Vol. 1, Ch. 76, § 1 et seq.

<sup>4</sup> *Ibid.*, Vol. 2, Ch. 106½, § 25.

<sup>5</sup> *Ibid.*, § 25(d).

<sup>6</sup> 194 Iowa 71, 174 N. W. 946 (1919), affirmed in 180 N. W. 206 (1920). Some later aspects of the case may be observed in 211 Iowa 1251, 230 N. W. 359 (1930).

of survivorship had attached. This claim was based on three partnership agreements, each of which provided that, upon the death of any one of the partners, the property then owned by the partnership should become the property of the survivors. The Iowa court, pointing to the fact that, in that jurisdiction, the use of a joint tenancy had fallen into disfavor, decided the case for the deceased partner's widow, saying: "Considering the foundation upon which the doctrine of joint tenancy rests, it is the opinion of this court that it does not apply to commercial enterprises of this kind, and that no joint tenancy can arise out of a commercial enterprise such as we have before us in this case. It is inconsistent with the very foundation principle upon which joint tenancy exists or can exist."<sup>7</sup> It is evident that what the court meant by this statement was that, at common law, the formation of a joint tenancy required the presence of the four unities of possession, title, interest, and claim of title under the same conveyance. In a partnership, however, title to property may be acquired in the name of the entity, in the name of all the partners as individuals, or in the name of a single partner, none of which would be permitted in the case of a technical joint tenancy.<sup>8</sup> The court also pointed out that the provisions in the contracts that, upon the death of any member, his interest in the partnership property was to pass to his brother partners was "an attempt to make a testamentary disposition of the interest of each partner,"<sup>9</sup> and was void for this additional reason.<sup>10</sup>

It is difficult, if not impossible, to reconcile a common law joint tenancy with the type of tenancy usually created as the result of a partnership agreement but it is clear that provisions in partnership agreements for the disposition of a partner's interest at death are both valid and enforceable.<sup>11</sup> The classic illustration in that respect is the case of *McKinnon v. McKinnon*.<sup>12</sup> In that case, an uncle and nephew had entered into

<sup>7</sup> 194 Iowa 71 at 82, 174 N. W. 946 at 950.

<sup>8</sup> 68 C. J. S., Partnership, § 72, pp. 505-12.

<sup>9</sup> 194 Iowa 71 at 89, 174 N. W. 946 at 953. Other courts, on occasion have held this way. See *Ferrara v. Russo*, 40 R. I. 533, 102 A. 86, L. R. A. 1918B 905 (1917), but note the change made by R. I. Gen. Laws 1938, Ch. 428, § 10, and U. S. Trust Co. v. Giveans, 97 N. J. L. 265, 117 A. 46 (1922). The last mentioned case was overruled at the time of the holding in *Michaels v. Donato*, 4 N. J. S. 574, 67 A. (2d) 911 (1949).

<sup>10</sup> It might be noted, however, that the same Iowa court had enforced a survivorship provision in a partnership contract between a husband and wife: *Stewart v. Todd*, 190 Iowa 233, 173 N. W. 619, 20 A. L. R. 1272 (1919).

<sup>11</sup> See *Hale v. Wilmarth*, 274 Mass. 186, 174 N. E. 232 (1931), and an annotation in 73 A. L. R. 938 for a discussion of the validity of agreements for disposition of an interest in a partnership in the event of the death of a partner.

<sup>12</sup> 56 F. 409 (1893), reversing 46 F. 713 (1891). The case, which evidently got into the federal court because of diversity of citizenship, was a suit in equity by the surviving partner to enjoin the defendants, heirs of the deceased partner,

articles of partnership for the practice of medicine by which it was agreed that, in the event the senior member of the firm should die first, all that property, personal and otherwise, which he held in the partnership at the time of his death should go to the junior partner. The court held that this arrangement did not amount to a testamentary disposition of the property, hence was capable of being enforced in equity even though the arrangement had not been executed with all the formalities required of a will. Consideration for this provision was said to be present in the form of the mutual promises of the parties to become partners and to conduct the business under the terms of the agreement, a consideration which pervaded the whole agreement. Following that holding, a number of other jurisdictions have seen fit to enforce survivorship provisions in partnership contracts,<sup>13</sup> holding that such provisions are not testamentary in nature<sup>14</sup> and finding a sufficient consideration to exist in the mutual promises of the partners.<sup>15</sup> It should be remembered, however, that partners must observe the utmost good faith toward each other in the making of these agreements and, if they have not done so, courts will refuse to enforce promises of this character.<sup>16</sup>

Variations upon survivorship provisions in partnership agreements have likewise often been made and enforced.<sup>17</sup> One common example is a provision which directs that, upon the death of a partner, title to all of the partnership property is to vest in the survivor who thereupon becomes indebted to the estate of the deceased partner for an agreed or a calculable sum.<sup>18</sup> Another popular type of arrangement contemplates

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from conducting certain ejectment actions and to specifically enforce his right of survivorship under the partnership agreement. The trial court dismissed the bill but, on appeal, the Circuit Court of Appeals for the Eighth Circuit reversed.

<sup>13</sup> See, in general, 40 Am. Jur., Partnership, § 312, p. 347, and annotation in 1 A. L. R. (2d) 1265.

<sup>14</sup> *Coe v. Winchester*, 43 Ariz. 500, 33 P. (2d) 286 (1934); *More v. Carnes*, 309 Ky. 50, 214 S. W. (2d) 984 (1948); *Hale v. Wilmarth*, 274 Mass. 186, 174 N. E. 232 (1931); *Murphy v. Murphy*, 217 Mass. 233, 104 N. E. 466 (1914); *Michaels v. Donato*, 4 N. J. S. 574, 67 A. (2d) 911 (1949); *In re Karlinski's Estate*, 180 Misc. 44, 38 N. Y. S. (2d) 297 (1942); *In re Mildrum's Estate*, 108 Misc. 114, 177 N. Y. S. 563 (1919); *Silverthorne v. Mayo*, 238 N. C. 274, 77 S. E. (2d) 678 (1953).

<sup>15</sup> *First Nat. Bank of Rome v. Howell*, 195 Ga. 72, 23 S. E. (2d) 415 (1942).

<sup>16</sup> *In Alexander v. Sims*, 220 Ark. 649, 249 S. W. (2d) 832 (1952), the deceased partner, at the time the partnership agreement was made, was suffering from a malignant cancer which fact was unknown to him but known to the surviving partner. The court held that the failure to communicate this knowledge indicated a lack of good faith sufficient to invalidate the agreement.

<sup>17</sup> A note in 7 *Baylor L. Rev.* 291 provides a general discussion of the various methods which have been utilized for the disposition of partnership property on the death of a partner.

<sup>18</sup> *Murphy v. Murphy*, 217 Mass. 233, 104 N. E. 466 (1914); *Ireland v. Lester*, 298 Mich. 154, 298 N. W. 488 (1941); *Silverthorne v. Mayo*, 238 N. C. 274, 77 S. E. (2d) 678 (1953); *Gaut v. Reid*, 24 Tex. 46, 76 Am. Dec. 94 (1859); *Randall v. Towell*, 29 Wash. (2d) 447, 188 P. (2d) 71 (1947).

that the widow or the estate of the deceased partner shall be compensated from the proceeds of insurance taken out on the lives of the partners, the premiums thereon being paid by the partnership, and the partnership assets thereafter are to belong to the surviving partner or partners.<sup>19</sup> Provisions of this nature could well be expected to succeed as they would tend to relieve the courts of the burdens incident to the conduct of liquidation proceedings.

Since partnerships enjoy certain tax advantages over the corporate form of business association, it is likely that partnerships will remain popular despite the principal shortcoming that operates to automatically terminate the partnership on the death of a single partner,<sup>20</sup> a fact which, in the absence of an agreement to the contrary,<sup>21</sup> forces a costly winding-up and an accounting with respect to the business.<sup>22</sup> Very naturally, therefore, courts would incline in the direction of upholding provisions designed to avoid loss and waste of this character. Where some form of substitute compensation is provided, the heirs or legal representatives of the deceased partner would probably not refuse to accept the same even though this meant the relinquishment of their rights in the partnership assets. The issue may become more sharply drawn where, as in the instant case, the surviving partner is to end up with all the property and be under no obligation to account or pay further for the same. Nevertheless, if such should be the nature of the agreement made by competent parties, whether the arrangement be designated as a joint tenancy or not, there would seem to be no rational basis in law to reject or to refuse to enforce the same.

F. S. RODKEY, JR.

PLEDGES — ENFORCEMENT — WHETHER POWER GIVEN PLEDGEE BY AGREEMENT TO SELL PLEDGED COLLATERAL WITHOUT ADVERTISEMENT OR NOTICE LEAVES LEGALLY IMPOSED GOOD FAITH REQUIREMENT INTACT—  
The question as to whether, and what, advertisement or notice concerning the sale of pledged collateral is to be given by the pledgee in order to satisfy equitable obligations as to good faith on the pledgee's part was recently discussed by the New York Court of Appeals in the case

<sup>19</sup> *Coe v. Winchester*, 43 Ariz. 500, 33 P. (2d) 286 (1934); *First Nat. Bank of Rome v. Howell*, 195 Ga. 72, 23 S. E. (2d) 415 (1942); *More v. Carnes*, 309 Ky. 50, 214 S. W. (2d) 984 (1948).

<sup>20</sup> 40 Am. Jur., Partnership, §§ 285-6, pp. 326-7.

<sup>21</sup> 68 C. J. S., Partnership, § 294, p. 798. See also Fuller, "Partnership Agreements for Continuation of an Enterprise After the Death of a Partner," 50 Yale L. J. 202 (1940).

<sup>22</sup> 40 Am. Jur., Partnership, §§ 293-315, pp. 332-50.

entitled *In re Kiamie's Estate*.<sup>1</sup> The respondent in that case, a trust company which had loaned money upon a collateral note secured by a deposit of shares of stock in certain closely-held family holding corporations, had found it necessary to enforce sale of the collateral upon non-payment of the note. Despite authority to proceed without so doing,<sup>2</sup> respondent had given notice of intent to sell, had placed advertisements in certain daily newspapers,<sup>3</sup> and had bid in the property at the ensuing sale. Following the death of the pledgor, his legal representative began discovery proceedings to determine whether a conversion had occurred. This petition was dismissed by the trial court and the Appellate Division of the Supreme Court affirmed the action so taken. Upon further appeal, the highest New York court reversed, holding that the power conferred on the pledgee to sell the collateral without advertisement or notice nevertheless left intact the legal requirement that the sale had to be conducted in good faith. It also held that, as the published notice of sale was defective in relation to the description of the property to be sold, the sale was void.

The basic theory expounded by the New York court, *i. e.*, that there is a requirement of good faith which adheres to all sales of pledged collateral when sold by the pledgee, is a well-recognized one,<sup>4</sup> applying with equal force whether or not the pledgor has seen fit to waive his common law and any statutory right to notice, advertisement, and the conduct of a public sale.<sup>5</sup> This is equally true even though a literal interpretation of the pledge agreement might indicate that the pledgor had relinquished all right to have a bona fide public sale, for courts of equity have refused to accept any other interpretation although waiver provisions, in other respects, have been held to be controlling and not against public

<sup>1</sup> 309 N. Y. 325, 130 N. E. (2d) 745 (1955), reversing 283 App. Div. 941, 131 N. Y. S. (2d) 302 (1954), which had affirmed, without opinion, the holding in 191 Misc. 179, 76 N. Y. S. (2d) 684 (1948). An incidental aspect of the case relating to the conduct of the appeal may be noted in 116 N. Y. S. (2d) 179 (1952).

<sup>2</sup> The note in question authorized a sale of the collateral, upon default in payment, either at "public or private sale . . . without demand, advertisement, or notice," which were expressly waived, and permitted the payee to "purchase and hold the whole or part of the property sold" without right of redemption.

<sup>3</sup> The advertisement, which appeared twice in each of two daily newspapers, gave details as to the time and place of sale at public auction but only briefly referred to the collateral to be sold, specifying no more than the number of shares and the names of the corporations concerned.

<sup>4</sup> Restatement, Security, Ch. 1, § 49(1), p. 142, states: "A pledgee in enforcing his power of sale has the duty to act in good faith and with diligence in protecting the interests of the pledgor." See also annotation in 76 A. L. R. 722 as to colorable transactions and one in 37 A. L. R. (2d) 1392 relating to the duty of fair dealing.

<sup>5</sup> In *Hudgens v. Chamberlain*, 161 Cal. 710 at 716, 120 P. 422 at 424 (1911), the court said: "No matter to what extent unlimited power to deal with the pledged property is given, the law implies, from the relation of the parties, that these powers shall be exercised in good faith."



policy.<sup>6</sup> In essence, therefore, the powers granted to the pledgee are regarded as being limited to the conduct of a lawful sale<sup>7</sup> on the assumption that, while a pledgor may have relinquished many of his rights, he cannot be considered as having given the pledgee the power of acting in such a manner as to preclude "the possibility of competitive bidding or in dispensing with a sale as ordinarily conducted."<sup>8</sup> As a consequence, it has been said that a sale must be made "in an effort to accomplish the purpose of the pledge, that is, the realization of the value for payment of the indebtedness, and return of any excess to the pledgor."<sup>9</sup>

Obviously, there cannot be a valid sale unless the general public is invited or at least permitted to participate therein,<sup>10</sup> so when, as in the principal case, the pledgee has the power to sell at either a public or private sale and elects to sell at a public sale, he would be bound to invite the public to attend so as to encourage public competitive bidding<sup>11</sup> and, for this purpose, should be expected to comply with requirements as to advertisement and notice.<sup>12</sup> A Texas court once explained the reason for this by pointing out that while a pledgee had the right, at private sale, to reject any offer if in his judgment the same was not a fair one, yet "at public auction, he would not have such a right, and the absence of such notice might result in the sacrifice of the securities."<sup>13</sup>

Naturally, therefore, in order to comply with the requirement as to advertisement, the pledgee would have to give such public notice as would be likely to attract the attention of wise investors. An advertisement of this character should state not only the time, place, and object of the sale, but, in addition, provide such facts as would invite competition and enable the public to make an intelligent investigation of the collateral<sup>14</sup>

<sup>6</sup> *Hiscock v. Varick Bank*, 206 U. S. 28, 27 S. Ct. 681, 51 L. Ed. 945 (1907); *In re Mertens*, 144 F. 818 (1906); *Clapp v. Associated Depositors*, 33 F. Supp. 686 (1940).

<sup>7</sup> *Whitman v. Boston Terminal Refrigerating Co.*, 233 Mass. 386, 124 N. E. 43 (1919).

<sup>8</sup> *Cole v. Manufacturers Trust Co.*, 164 Misc. 741 at 747, 299 N. Y. S. 418 at 426 (1937).

<sup>9</sup> *Kemp v. Kemp*, 178 Md. 645 at 655, 16 A. (2d) 888 at 893 (1940).

<sup>10</sup> *Clapp v. Associated Depositors*, 33 F. Supp. 686 (1940).

<sup>11</sup> *Huntingdon Valley Trust Co. v. Norristown-Penn Trust Co.*, 329 Pa. 356, 196 A. 821 (1938).

<sup>12</sup> *Union & Mercantile Trust Co. v. Harnwell*, 158 Ark. 295, 250 S. W. 321 (1923); *Eppert v. Lowish*, 92 Ind. App. 231, 168 N. E. 616 (1928). In *Foote v. Utah Commercial & Savings Bank*, 17 Utah 283 at 294, 54 P. 104 at 106 (1898), the court said that, as the pledgee had chosen to make the sale public, it was "required to conform to the rules governing public sales as far as publicity was concerned."

<sup>13</sup> *Amarillo National Bank v. Harrington*, 62 Tex. Civ App. 179 at 181, 131 S. W. 231 at 232 (1910).

<sup>14</sup> *Eppert v. Lowish*, 92 Ind. App. 231, 168 N. E. 616 (1928); *Laclede National Bank v. Richardson*, 156 Mo. 270, 56 S. W. 1117 (1900).

and to bid intelligently.<sup>15</sup> Being under an obligation to "use every possible advantage of time, place, and publicity,"<sup>16</sup> the pledgee would be "duty bound to make every reasonable endeavor to obtain the highest price possible, not merely the market price."<sup>17</sup>

In that connection, the pledgee occupies a fiduciary relationship,<sup>18</sup> often being described as a "trustee"<sup>19</sup> or a "trustee to sell,"<sup>20</sup> with the pledge itself being referred to as "a trust for the protection of the debt."<sup>21</sup> In view of this relationship, the entire pledge transaction as well as its enforcement will be subject to the strictest scrutiny by courts of equity<sup>22</sup> with the sale in particular being examined "to determine whether a realization of the value of the pledge has been sought in good faith."<sup>23</sup> This is especially true where the pledgee, as in the instant case, becomes the buyer at his own sale. The point has been most aptly put in an oft-quoted statement to be found in the Massachusetts case of *Montague v. Dawes*.<sup>24</sup> The court there stated: "One who undertakes to execute a power of sale is bound to the observance of good faith, and a suitable regard for the interests of his principal. He cannot shelter himself under

<sup>15</sup> *Dulin v. National City Bank*, Ind. App., 130 N. E. 426 (1921).

<sup>16</sup> *Perry*, *Trusts and Trustees*, 4th Ed. § 602.

<sup>17</sup> *Cole v. Manufacturers Trust Co.*, 164 Misc. 741 at 747, 299 N. Y. S. 418 at 427 (1931). The majority opinion in *Highland v. Davis*, 119 W. Va. 501 at 514, 195 S. E. 604 at 610 (1937) would appear to employ a different standard, for the court there said the pledgee's obligation "does not extend beyond exercise of 'ordinary diligence,' that is, the diligence which an ordinary prudent man would exercise in the conduct of his own business."

<sup>18</sup> *Toplitz v. Bauer*, 161 N. Y. 325 at 332, 55 N. E. 1059 at 1061 (1900), states that the duties of the pledgee "are governed more by the general maxims of equity than by the strict rules of the common law."

<sup>19</sup> *In re Thompson*, 276 F. 313 at 318 (1921).

<sup>20</sup> *Dibert v. Wernicke*, 214 F. 673 (1914). See also *Pauly v. State Loan & Trust Co.*, 165 U. S. 606 at 620, 17 S. Ct. 465 at 470, 41 L. Ed. 844 at 849 (1897), where Mr. Justice Harlan stated that the "pledgee of personal property occupies towards the pledgor somewhat of a fiduciary relationship, by virtue of which, he being a trustee to sell, it becomes his duty to exercise his right of sale for the benefit of the pledgor."

<sup>21</sup> *Dibert v. D'Arcy*, 248 Mo. 617 at 647, 154 S. W. 1116 at 1125 (1913). But see *Wade v. Markwell*, 118 Cal. App. (2d) 410, 258 P. (2d) 497 (1953), and *Willett v. Herrick*, 258 Mass. 585 at 599, 155 N. E. 589 at 594 (1927), where the court said that, while pledgees were required to use good faith in dealing with the property pledged or in conducting a sale, "this did not impose on them the additional duties of a fiduciary in matters unrelated to the pledge. A pledge is not a trust and the defendants were not trustees in the true sense of the term."

<sup>22</sup> *Gins v. Mauser Plumbing Supply Co.*, 148 F. (2d) 974 (1945); *Wade v. Markwell*, 118 Cal. App. (2d) 410, 258 P. (2d) 497 (1953). In *Ritchie v. McMullen*, 79 F. 522 at 557 (1897), the late Chief Justice Taft, then a judge of the Sixth Circuit, mentioned the fact that, with reference to a pledge agreement, equity "does not hesitate to set aside such a contract if there is any ground for thinking it is a harsh contract, and one brought about by the position of vantage that the pledgee occupies with reference to the pledgor."

<sup>23</sup> *Kemp v. Kemp*, 178 Md. 645 at 655, 16 A. (2d) 888 at 893 (1940).

<sup>24</sup> 96 Mass. (14 Allen) 369 (1867).

a bare literal compliance with the conditions imposed by the terms of the power. He must use a reasonable degree of effort and diligence to secure and protect the interests of the party who intrusts him with the power . . . When a party who is intrusted with a power to sell attempts also to become the purchaser, he will be held to the strictest good faith and the utmost diligence for the protection of the rights of his principal."<sup>25</sup>

Inasmuch as the fiduciary relationship outlined above has been described in such strict terms as to impose an "imperative" duty on the pledgee to use the "utmost" of good faith,<sup>26</sup> it is not entirely surprising to find the New York court accepting and applying the good faith requirement most vigorously. As it regarded the inadequacy in the advertisement, regardless whether advertisement was or was not waived, as a clear breach of the duty owed by the pledgee, the outcome of the case became an inexorable one. The prudent pledgee, therefore, would do well to heed the lesson contained in the instant holding and avoid the placing of too great a reliance upon the terms of the pledge contract.

M. L. PRICE

<sup>25</sup> 96 Mass. (14 Allen) 369 at 373 (1867).

<sup>26</sup> *Eppert v. Lowish*, 92 Ind. App. 231, 168 N. E. 616 (1928); *Laclede National Bank v. Richardson*, 156 Mo. 270, 56 S. W. 1117 (1900). But note that in *Joliet Iron Co. v. Scioto Fire Brick Co.*, 82 Ill. 548 at 550 (1876), the court, after indicating that a pledgee "occupies the relation of trustee for the owner," went on to say that, "in the absence of special power to do otherwise," the pledgee would be "bound to proceed as a prudent owner would do with his own."