him directly in his profession, and would therefore, under this test, be considered libelous per se. It is suggested, however, that if this interpretation of the court's opinion is adopted, an allegation that an attorney is a Communist is not the type of charge which, under prior decisions, has been considered as causing injury to him in his professional capacity.[28] To come within this classification the charge complained of must impute some quality which would be detrimental, or the absence of some quality which is essential, to the successful performance of his professional duties.[29] Words which injure a person's general reputation, and only incidentally affect his professional career, have generally been held not to fall within this definition.[30] Thus while a charge of violation of the code of professional ethics would directly affect an attorney in his professional capacity, a charge of unpatriotism during a period of fervent nationalism perhaps tends to injure his character generally,[31] but his professional capacity, only incidentally.

Trusts—Foreclosure under Trust Deed—Trustee, on Motion of Court, Ordered to Transfer Unclaimed Funds to Court—[Illinois].—In 1930 the plaintiff, trustee under a trust deed securing a bond issue, brought suit to foreclose. The property was sold to a committee representing 96 per cent of the bondholders, and on confirmation of the sale, the court ordered the master to pay $22,000 of the cash proceeds of the sale to the plaintiff for distribution to non-depositing bondholders. The court reserved jurisdiction, inter alia, "to provide for the prompt distribution by complainant . . . . of all moneys. . . . ." Eight years later, the court on its own motion and over plaintiff's objection to the court's jurisdiction, directed an accounting and ordered the plaintiff to pay any unclaimed sums remaining in trust to the clerk of court. On appeal to the supreme court, *held*, that since the plaintiff is trustee of an express trust for the benefit of unknown non-depositing bondholders, the lower court lacked power, on its own

[28] Sherin v. Eastwood, 27 S.D. 312, 131 N.W. 287 (1911) (false publication that attorney was publicly whipped by a former female client because of slanders uttered concerning her, held libelous as subjecting him to ridicule, but not as injuring him in his profession).

[29] Note 28 supra.

[30] Gatley, Libel and Slander 35 (3d ed. 1938). Words held actionable per se as injuring the plaintiff in his profession: Cohalan v. New York World-Telegram, 172 Misc. 1061, 16 N.Y.S. (2d) 706 (S. Ct. 1939) (that judge was unfit and deliberately tried to prevent justice); Bishop v. Latimer, 4 L. T. 775 (1861) (that attorney cheated his clients, though not actionable if it was said that he had cheated one client); 9 Bacon, Abridgments 51 (1852) (that attorney is guilty of barratry). Words not actionable per se: Stowers v. Western Bentley Mercantile Co., 140 S.W. (2d) 714 (Mo. 1940) (that government attorney was "a dirty crook and a dead beat"); Weidberg v. LaGuardia, 170 Misc. 374, 10 N.Y.S. (2d) 445 (S. Ct. 1939) (that attorney was a drunken bum sent to break up audience); Alleston v. Moore, Het. 167 (C.P. 1627) (that attorney was "cheating knave," when not said in regard to his profession).

[31] In the past courts have held such charges libelous. Switzer v. Anthony, 71 Colo. 291, 206 Pac. 391 (1922) (that woman called the American flag a "dirty rag" in 1916); Lewis v. Daily News Co., 81 Md. 466, 32 Atl. 246 (1895) (anarchist); Cerveny v. Chicago Daily News Co., 139 Ill. 345, 28 N.E. 692 (1891) (anarchist). Evidence that the courts consider those who espouse Communism as enemies of democracy is found in United States ex rel. Yokinen v. Com'r of Immigration, 57 F. (2d) 707 (C.C.A. 2d 1932).

motion, to order payment of the funds. Order reversed. *Chicago Title & Trust Co. v. Rogers Park Apts. Bldg. Corp.*[1]

The failure of American courts, in the absence of statute, to apply to personal property for which no owner can be found[2] a rule similar to the rule of escheat as applied to real property, has created difficult problems in the disposition of unclaimed bank deposits, property of missing heirs, and assets unclaimed on corporate dissolution or reorganization.[3]

Assuming the plaintiff in the instant case to be a mere "court depositary," as was argued by the lower court,[4] it seems clear that under the statute providing for the transfering of funds "in control of the court" to the county treasurer,[5] the court could accomplish its objective of getting such funds into the county treasury.[6] But it is doubtful whether the court in the instant case had power, even at the time of confirming the sale, to provide for distribution of these sums by a court depositary rather than by the trustee under the trust deed. The provisions of the trust deed contemplate distribution by the trustee, acting under the terms of the trust instrument.[7] It is true that courts of equity in foreclosure proceedings have power to disregard provisions of the trust deed when necessary,[8] but of course such power must be exercised reasonably. It seems difficult to justify a refusal to permit a trustee to distribute as trustee, and then

[1] 375 Ill. 599, 32 N.E. (2d) 137 (1941).

[2] The importance of the problem in the principal case is indicated by the fact that today in Cook County, Illinois, there is reported to be approximately $10,000,000 in the custody of courts, trust companies, banks and individual trustees, belonging to non-depositing bondholders who have failed to claim their money. Chicago Herald-American, col. 1, p. 1 (April 13, 1941).

[3] Under the common law in England, personal property without an owner passes to the crown under the doctrine of bona vacantia. Dyke v. Walford, 5 Moo. P.C.C. 434 (1846). American courts have not recognized this rule in the absence of statute. Illinois Bell Tel. Co. v. Slattery, 102 F. (2d) 58, 68 (C.C.A. 7th 1939), cert. den. 307 U.S. 648 (1939); cf. In the Matter of Certain Moneys in the Possession of the Harrisburg Bridge Co., 48 Dauph. Co. Rep. (Pa.) 274, 278 (1940).

[4] Chicago Title & Trust Co. v. Rogers Park Apts. Bldg. Corp., 375 Ill. 599, 607, 32 N.E. (2d) 137, 141 (1941).

[5] Ill. Rev. Stat. (1939) c. 141, § 4; cf. Ohio Code Ann. (Throckmorton, 1940) § 10506–78, 79.

[6] While, under the statute, op. cit. supra note 5, the court could probably not of its own motion order transfer to the county treasurer, it seems that if the plaintiff is a mere depositary, the court could of its own motion order the money paid into court. See In re Western Marine & Fire Ins. Co., 38 Ill. 289 (1865); Franklin Union v. People, 121 Ill. App. 647 (1905).

[7] The trust deed gave the trustee power to institute foreclosure proceedings and to do all acts necessary for the protection of the bondholders. Chicago Title & Trust Co. v. Rogers Park Apts. Bldg. Corp., 375 Ill. 599, 601, 32 N.E. (2d) 137, 138 (1941). Moreover, the express denial to the bondholders of all right to sue or take any action except upon refusal of the trustee to act supports this theory. Ibid. However, the trust deed expressly provides for distribution by the trustee of funds paid in an eminent domain proceeding, but is silent with respect to distribution in connection with mortgage foreclosure. Abstract of Record, at 30.

[8] Seigle v. First Nat'l Co., 338 Mo. 417, 90 S.W. (2d) 776 (1936); New Jersey Nat'l Bank and Trust Co. v. Lincoln Mortgage and Title Guaranty Co., 105 N.J. Eq. 557, 148 Atl. 713 (1930); Palisades Trust & Guaranty Co. v. Probst, 128 N.J. Eq. 332, 16 A. (2d) 271 (1940); Hoffman v. First Bond & Mortgage Co., Inc., 116 Conn. 320, 164 Atl. 656 (1933).

to appoint the same party to distribute as depositary. At the same time, if the party is a mere depositary, the court can maintain greater control over the distribution than would otherwise be possible, considering the lack of detailed provisions as to distribution in the trust instrument.[9]

But even assuming that the court had power, in confirming the sale, to appoint the plaintiff to act as depositary rather than as trustee, it is doubtful whether it meant to do so in the principal case. The plaintiff is referred to in the decree as "trustee," not as "depositary." And the reservation of jurisdiction to "advise, supervise and direct [plaintiff] in the distribution of the funds" is hardly consistent with an intention that the plaintiff act as a mere depositary, inasmuch as courts have complete control over such officers in any event. Such an express reservation of power is often used, however, where a court wishes to retain jurisdiction over a trustee.[10] Furthermore, no separate provision was made to compensate plaintiff for acting as depositary, plaintiff's only compensation being $4,000 for acting as trustee.[11] Presumably, distribution of sale proceeds was considered part of the duties as trustee.

Even though the plaintiff is said to hold these funds as trustee under the trust deed, the funds might be taken out of its hands in either one of two ways. If it can be said that the trust is a passive one, with title automatically passing to the bondholders,[12] the attorney general might be successful in asserting claim to the property under the common law doctrine of bona vacantia.[13] Other courts have held such trusts passive,[14] but the court in the instant case, stressing the fact that the plaintiff still has the duty of enforcing the deficiency judgment and of identifying the claimants and distributing the fund, refused so to hold. Even so, it would seem that the court could have regarded the trust as active with respect to the judgment, but passive as to the cash payable to the unknown bondholders. Securing recognition of the doctrine of bona vacantia in the absence of statute is a further difficulty; the Circuit Court of Appeals for the Seventh Circuit in a somewhat different type of case has denied that the doctrine exists in Illinois.[15]

The second method is that attempted by the court in the instant case: as a condition of confirming the foreclosure sale, the court expressly retains jurisdiction to supervise and direct the trustee in the distribution of the proceeds. It may be objected that this suggested procedure violates the general rule that a court cannot, on its own motion, alter a trust deed or direct a trustee to comply with the terms of a trust. The

[9] Cases cited in note 6 supra.

[10] Seigle v. First Nat'l Co., 338 Mo. 417, 90 S.W. (2d) 776 (1936).

[11] Abstract of Record, at 41.

[12] Westcott v. Edmunds, 68 Pa. 34 (1871); see 1 Bogert, Trusts and Trustees § 206 (1935).

[13] Middleton v. Spicer, 1 Bro. C.C. 201 (1783); Dyke v. Walford, 5 Moo. P.C.C. 434 (1846); Powell v. Merrett, 1 Sm. & G. 381 (Ch. 1853); Read v. Stedman, 26 Beav. 495 (Ch. 1859); Cunnack v. Edwards, [1896] 2 Ch. 679; In re Higginson & Dean, [1899] 1 Q.B. 325; In re Barnett's Trusts, [1902] 1 Ch. 847. In Pennsylvania a passive trust where no heirs can take is subject to escheat by statute. Linton's Estate, 198 Pa. 438, 48 Atl. 298 (1901).

[14] Note 12 supra.

[15] Illinois Bell Tel. Co. v. Slattery, 102 F. (2d) 58 (C.C.A. 7th 1939), noted in 34 Ill. L. Rev. 171 (1939). The fact that the "unclaimed property" in that case was a debt owing from the defendant to the unknown persons may distinguish it from the instant case.

cases indicate, however, that a court may in the course of administration of a trust modify its terms.[16] Moreover, there is an increasing tendency for courts on their own motion to compel a trustee to comply with the terms of a trust.[17] And whatever may be the tendency in the administration of an ordinary trust, the court's power to modify the terms of a trust mortgage and retain jurisdiction over the trustee during its administration seems clear.[18] The Illinois court has itself recognized the peculiar nature of foreclosures under trust deeds and declared that courts have broad powers to withhold confirmation of a foreclosure sale if the plan of reorganization proposed is not a fair one.[19]

It might of course be argued that even though jurisdiction was retained in the instant case, there was no compelling reason for ordering the transfer. The plaintiff, although it originally refused to account, later complied with the order, and has not been guilty of conduct which would ordinarily be taken to justify its removal as trustee. And it can hardly be said that the change of the bondholders' claim from one against the trustee to one against the county makes the money any more secure. But if the trustee retains the funds, they remain on deposit in a bank earning income for the bank but not for the unknown bondholders; whereas if the funds were transferred to the clerk of court and then to the county treasurer, the county would obtain the use of those funds. In addition to an argument that the public has greater right to the use of such funds until claimed than does a bank chosen by the trustee, there is the fact that the trustee's management of the funds should be subject to periodic court investigation. Yet courts may hesitate to order such accountings and investigations if the costs of such proceedings would have to be paid out of the trust corpus. This would diminish the share due to non-depositing bondholders later claiming their share and might result in exhaustion of the trust fund in some cases.[20] In those instances where the court lacks power to use the trust corpus to defray the expenses of an accounting, transfer of the funds to the county treasurer becomes desirable as a means of avoiding expense to the trustee and inconvenience to the court through holding accountings in the numerous real estate bond mortgage foreclosure cases. Mere transfer to the clerk of court does not, of course, eliminate the need for accountings; but if the funds are transferred to a court officer, they may be turned over to the county treasurer, thus eliminating the need for further accountings.

In the absence of adequate provision for handling unclaimed money in the hands of a trustee, legislation seems desirable. The legislator might adopt any one of four solutions. The funds, after a period of time, could be used for: (1) search for the unknown

[16] Seigle v. First Nat'l Co., 338 Mo. 417, 90 S.W. (2d) 776 (1936), and cases cited therein.

[17] State ex rel. Pryor v. Paul, 104 P. (2d) 745 (Wash. 1940); 2 Scott, Trusts § 200.4 (1939); Rest., Trusts § 200 Comment g (1935). But see Ex parte Kilgore, 120 Ind. 94, 22 N.E. 104 (1889).

[18] New Jersey Nat'l Bank and Trust Co. v. Lincoln Mortgage and Title Guaranty Co., 105 N.J. Eq. 557, 148 Atl. 713 (1930); Hoffman v. First Bond & Mortgage Co., 116 Conn. 320, 164 Atl. 656 (1933); Nay Aug Lumber Co. v. Scranton Trust Co., 240 Pa. 500, 87 Atl. 643 (1913); see Katz, Protection of Minority Bondholders, 3 Univ. Chi. L. Rev. 517, 549 (1936).

[19] First Nat'l Bank v. Bryn Mawr Bldg. Corp., 365 Ill. 409, 6 N.E. (2d) 654 (1937).

[20] It appears that in the instant case the trustees received a fee of $4,000, which covered both past and future services, and that no further charges were being made to the undistributed trust fund. Abstract of Record, at 41.

owners; (2) distribution to the assenting bondholders who supplied the money to pay dissenters; (3) distribution to the other non-depositing bondholders who can be found; or (4) payment to the state, absolutely, or subject to a right in the non-depositing bondholder at any time in the future to claim his share. In view of the small amount of the usual payment to any one bondholder, search for unknown owners seems undesirable. That legislatures have generally not favored this solution is evidenced by the absence of statutory provisions for search for missing heirs, or owners of unclaimed bank deposits. Payment of the unclaimed funds to the majority bondholders might be urged, since they furnished the money. Against such disposition it may be argued that the majority bondholders have already received property worth more than the small cash sum paid the dissenters, since the cash payable to the dissenters was determined by an upset price carefully set below the value of the property in order to discourage dissent from the plan. A stronger argument can be made for payment of these funds to known non-depositing bondholders. This would to some extent offset the loss they suffered because of the low upset price. Such a solution, moreover, would be consistent with the statutory provisions in bankruptcy and administration of decedent's estates where unclaimed funds are distributed to the known members of the class entitled to the fund.[21] The objection to this solution, however, is that it necessitates the expense and inconvenience of a second distribution. The small sums often available for distribution in many cases hardly justify this. The most desirable solution seems to be transfer of the unclaimed funds to the state. This accords with the general common law notion that unclaimed property belongs to the sovereign. This solution, moreover, makes it possible to allow a bondholder to claim his share in the fund even after transfer to the state by giving him a claim against the state.

[21] 52 Stat. 875, 11 U.S.C.A. § 106 (Supp. 1940); Ore. Code Ann. (1940) § 19-1305.