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Discussion of Recent Decisions

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DISCUSSION OF RECENT DECISIONS

BANKS AND BANKING—GUARANTY AND SURETYSHIP—VALIDITY OF CONTRACT BY SEVERAL BANKS TO INDEMNIFY ANOTHER AGAINST LOSS IN ASSUMING LIABILITIES OF FAILING BANK.—Can a group of banks bind themselves to indemnify one of their number against the loss that such one might sustain by its taking over the assets and assuming the liabilities of a failing bank in the community? That is the question that the Supreme Court of New Jersey was called upon to decide in the recent case of *Trust Company of New Jersey v. Jefferson Trust Company.*

The transaction had resulted in a loss to the bank that was acting as liquidating agent and the question arose when it sued to compel the defendant to pay its pro rata share of the loss.

As there could be no valid contract of indemnity unless the original contract between the failing bank and the liquidating agent was within the power of both, the validity of such contracts should be ascertained before the principal question is considered. It has been held by the United States Supreme

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1 186 A. 732 (N. J. L., 1936).
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Court\textsuperscript{2} and the Appellate Courts of Illinois\textsuperscript{3} among others,\textsuperscript{4} that it is within the powers of banks for one to transfer its assets to another upon the latter’s undertaking to assume the deposit liabilities of the transferor. While this is generally true without regard to the amount of assets transferred in relation to the debts assumed, the California doctrine seems to give greater protection to the depositors of the transferee bank by holding such a contract valid only if the assets received are sufficient to satisfy the debts assumed.\textsuperscript{5}

Thus, as to this basic contract, the law seems settled in favor of its validity.\textsuperscript{6} But if, as in the present case, no one bank in the community is willing to take over the failing bank to save the remaining ones from the probabilities of runs unless all of the banks will assume a share of the loss that might be sustained, have the banks the power to enter into such a contract of indemnity, especially where they receive no tangible assets to offset the liabilities they assume?\textsuperscript{7}

It is natural, because of the conflicting interests of the various groups, the different factual situations, and the conflicting legal principles involved, that the decisions or the reasons for them should be other than uniform. In the present case the court sustained the validity of the contract on the theory that it was not ultra vires or against public policy, but consistent with the public policy and for the benefit of the promissor bank. This is a liberal interpretation of the powers of a bank. The court relied on the cases of \textit{O'Connor v. Bankers Trust Company},\textsuperscript{7} and \textit{Southern Exchange Bank v. First National Bank of Dublin}.\textsuperscript{8}

In the first of these cases which was also decided recently, the court’s remarks on the validity of the alleged contract of guaranty is dictum, for it found that the contract did not exist in fact. It indicated that it would hold such a contract intra vires if there was a crisis threatening real and immediate danger of substantial loss to its depositors and if the risk assumed was not

\textsuperscript{5} Mitchell v. Beckman, 64 Cal. 117, 28 P. 110 (1883).
\textsuperscript{6} Carl Zollmann, Banks & Banking (1936), I, 288, sec. 347.
\textsuperscript{7} 289 N. Y. S. 252 (1936).
\textsuperscript{8} 37 Ga. App. 612, 141 S. E. 323 (1928), and 165 Ga. 289, 140 S. E. 753 (1927).
out of proportion to the damage threatened or out of harmony with the capital structure and financial condition of the banks participating. It says, "In considering whether a contract of this kind is ultra vires no hard and fast rule can be laid down. Each case must be decided on its own particular facts."

In the Southern Exchange case it was held that a similar contract was intra vires as it was primarily for the bank’s own benefit to save it from a probable monetary loss and financial ruin. However, in that case there was a limit set as to the amount of liability that the defendant would assume—a limit of such an amount that even if it were called upon to pay in full it would not jeopardize the depositors. On this fact it may be differentiated from the present case, where no limit to liability was stipulated.

Both of these cases and the principal case, while they do not expressly so state, seem to be based on the doctrine that if the assets of the promissor bank are not, by reason of having to pay the assumed liabilities, subjected to depletion beyond the point that they would be depleted had the contract not been entered into, the contract should be valid. However, if the contract of indemnity or guaranty had not been made and the promissor banks had been subjected to runs, from the depositor’s standpoint all of the assets would be available to pay them instead of a part of them being used to protect the depositors of the failing bank.

Among the cases that hold that such a contract is ultra vires, Board of Commissioners of Lake County v. Citizens’ Trust & Savings Bank⁹ is outstanding. There, suit was brought by a depositor of a defunct bank against the four defendant banks that had absorbed it and guaranteed its deposits. One of the defendant banks had issued its cashier’s check to the plaintiff for the amount of the deposit. Recovery was denied on the ground that such a contract was ultra vires as to all the banks involved as it did not come within the powers expressly granted to the banks by statute.

After stating the familiar corporation doctrine that enumeration of specific powers exclude all others except those reasonably necessary to carry out those expressed, the court in Gardiner Trust Company v. Augusta Trust Company,¹⁰ in holding a similar contract ultra vires, said, "Such is the rule with respect to corporations generally. But, in the case of a bank, which is in a sense a public institution, which holds itself out as qualified

⁹ 73 Ind. App. 76, 123 N. E. 130 (1919).
¹⁰ 182 A. 685 (Me., 1936).
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to care for the money of others, it is more than ever important that its charter should be strictly construed, and that those members of the public who entrust their property to its care should have assurance that it will act only within those limits the Legislature has defined." The Supreme Court of Illinois adhered to this doctrine in Knass v. Madison & Kedzie State Bank.11

In Norris v. Oklahoma State Bank12 where the contract was to pool the losses resulting from taking over a failing institution, recovery in a suit by the bank sustaining the loss against the other was denied on the theory that the agreement amounted to a partnership agreement and was thus ultra vires. This type of case has never been presented to the courts of Illinois. However, from the opinion of the court in People ex rel. Nelson v. Sherrard State Bank,13 where the statute14 declaring null and void any guaranty executed by a bank was interpreted, it would appear that under certain circumstances such a contract would be held to be void. The court said in substance that the only persons who could invoke the statute would be the ones the statute was designed to protect, that is the stockholders, creditors, or depositors who were prejudiced by the guaranty, and that the statute by its terms would not impair the entire contract but would render the assumption of liability void.

Throughout the cases dealing with this subject, the courts are confronted with the problem of keeping in mind the various groups whose interests are affected and of seeing that no one group is preferred at the expense of the others. It would be no great injustice to a depositor who has chosen a particular bank with whom to entrust his money to require him to look to the assets of that bank for the repayment of his deposit rather than to allow the depositors in all the other banks to be jeopardized by inter-bank guaranties or assumption of liabilities. If, in the interest of the public, a merger is considered essential, the safest principle to apply would be that applied in Mitchell v. Beckman,15 where it was said that such an assumption of liability is valid only if the bank assuming the liability received assets sufficient to satisfy the debts assumed. This would also be in

11 354 Ill. 554, 188 N. E. 836 (1934).
12 159 Okla. 51, 14 P. (2d.) 218, 84 A. L. R. 1424, and note p. 1425 (1932).
13 258 Ill. App. 168 (1930).
15 64 Cal. 117, 28 P. 110 (1883).
accord with the doctrine laid down in *First National Bank v. Slaton Independent School District*.

F. S. ANGER

**Banks and Banking—Insolvency and Receivers—Transfer of Demand Deposit to Trust Department by Book Entries as Unlawful Preference.** — The Illinois Supreme Court rendered a decision which may have an important effect upon current trust and banking practice in the recent case of *People v. Cairo-Alexander County Bank*. The Cairo Bridge Company, claimant, was assignee of a demand deposit of some $33,000 in a state bank. The bank was authorized to do a trust business under the Trust Companies Act and had made a deposit of securities with the State Auditor pursuant to that Act. In the fall of 1932, the bridge company sought security for its deposit, and prevailed upon the bank president to write a letter ordering the bank to transfer the company's deposit from the bank's commercial department to its trust department. This he did in January, 1933. At this time the bank was limiting depositors to withdrawals of not more than 5 per cent of their deposits.

It carried out the president's instructions, however, by debiting the company's commercial account, and crediting a trust account, and by appropriate book entries. The company did not make the formal gesture of procuring cash or a cashier's check from one window and carrying it to the other for deposit. Nor did either party have a trust agreement drawn up.

In March, 1933, some three months after this transaction, the bank closed under the banking moratorium. It never reopened. It was put in liquidation in August, 1933, and a receiver was appointed. The bridge company filed a claim for the amount of its deposit as a trust account, secured by the assets deposited with the State Auditor, and entitled to a preference.

The Supreme Court rejected the claim. It denied the efficacy of the attempt to create a trust on the theory that the transaction here fell beyond the letter of authority granted by the Trust Companies Act. The court said, "No trust was created for any

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16 58 S. W. (2d) 870 (Tex., 1933).


2 Ill. State Bar Stats. (1935), Ch. 32, §§ 345 et seq.

3 Ibid., ¶ 928, which permits "corporations who have qualified under it, to accept or execute trusts, be appointed assignees or trustees by deed, executors or guardians by will, or receivers, assignees, guardians, conservators, executors, administrators, or trustees under order of court."
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purpose, nor was there any trust res segregated or set aside, the record showing all funds at the bank were at all times mingled in a common till. The most that can be said of the situation disclosed by the facts before us is that there has been an ineffectual effort to pledge assets of the bank to secure and give priority to one depositor over another, and People v. Wiersema State Bank, 361 Ill. 75, controls our decision."

Mr. Justice Wilson, dissenting, ventured that the Wiersema State Bank case was "not in point." His analysis of the two cases is accurate and complete, but the analogy presented by the majority opinion raises a further question. Was the transaction in the present case an illegal pledge in any sense? By it the bank attempted to allow the company to withdraw its demand deposit, and to open a trust account. Securities had already been pledged by the trust department with the State Auditor to secure other trust depositors. The bank was expressly required to make this pledge in order to qualify to execute trusts.

The constitutionality of the Trust Companies Act was not questioned; so the court could not hold the pledge of securities illegal as against all the trust depositors. Thus, unless the bridge company in some way differed from the other trust depositors the pledge could not be illegal, and the ground selected by the majority of the court appears utterly untenable.

Wherein did the bridge company differ from other trust depositors? The so-called "system of restricted withdrawals," said to be in effect when the company made its demand, was "admittedly unenforceable." The company was entitled to all of its money on demand. The force of this fact is not weakened by the added fact that at the moment of the entry here the bank

4 363 Ill. 593.
5 Ibid., p. 594. His explanation: "The fund created in that case was not a trust fund but an illegal preference. It arose out of a contractual agreement between the depositor and the bank, under which the bank placed certain securities in escrow in order to secure a deposit. The agreement provided that in the event the bank failed or did not pay the deposit when demanded, the depositor, the Fernwood Park District, could subject the collateral so deposited in escrow to the satisfaction of its claim. This was an attempt to place the deposit of the park district on an entirely different footing from all other deposits in the bank, and this, it was held, was beyond the power of the bank to do. In the case at bar the ... company could only share pro rata with the other creditors of the bank out of the funds deposited as security with the State Auditor and with such cestuis que trust as were similarly situated. In the case of People v. Wiersema State Bank the depositor pro-rated with nobody, but looked to the security placed in escrow to secure his claim. So far as I am able to see, there is no legal similarity."
6 363 Ill. 591.
7 3 R. C. L. 521, and cases cited in notes 12 and 13.
had little more cash on hand than the amount of this deposit. Its other assets do not appear. It had not been declared insolvent, however; and so long as it remained solvent its officers had a right, even owed a duty, to pay the company. This right and duty the bank fulfilled when it debited the company’s commercial account. Actual fraud being absent, the payment of cash could not be deemed fraudulent by analogy to a similar payment by a non-banking corporation within four months of bankruptcy. A bank depositor is entitled to whatever he can realize on his deposit at any time before actual insolvency.\(^8\)

The debit was proper, and was legally equivalent to a cash payment, in its effect upon the demand deposit.\(^9\) The next step was the crediting of a new trust account, which was no different, legally, from the acceptance of so much cash from any other depositor. There was, then, no legal difference between the bridge company and others who had made deposits with the trust department.

We have remarked that, assuming the validity of the Trust Companies Act, the court would not have held the pledge to the State Auditor *ultra vires* as giving trust depositors an illegal preference. The ground upon which the court relied in finding the pledge invalid as security for this depositor was that it was not the same as other trust depositors; it had not succeeded in making a trust deposit. The case was decided by this conclusion, which in turn, rests upon the solution by the court of a problem in trust law—that “no trust was created for any purpose,” and that “no trust res was segregated or set aside.”

What is the basis for the first statement? Cases are legion in which an express trust has been found to exist where no declaration of a purpose had been made, verbal or written.\(^10\)

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8 3 R. C. L. 684-6, Banks, secs. 315, 316.


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A sufficient purpose would have been present had the bridge company simply tendered cash to the bank and directed it to hold the fund apart (in its trust department) as a trust deposit.\(^\text{11}\) This is common practice, and such trusts have not failed for mere want of purpose or object.

The court's second objection, that no trust res was segregated, also needs scrutiny. Dissenting Justice Wilson spoke upon this point: "It is true the money was not drawn out of one window and redeposited in another, but such is not the way of doing business in banking institutions. The legal effect of the transfer on the books of the bank was the same, however, as if the . . . bridge company had withdrawn this fund and redeposited it with the trust department."\(^\text{12}\) The clear logic and practical value of this statement hardly need emphasis. Authorities stand solidly behind it.\(^\text{13}\)

This phase of the case is at once the most perplexing and the most important. What implications inhere in this holding? Will a settlor hereafter be compelled to present actual treasury notes or a stock certificate or a warranty deed to his trustee? And must a corporate trustee do more than indicate by appropriate entries that cash belongs in a specific trust? Must it keep the cash of each trust in a separate envelope?

No attempt is made to criticise the ultimate rejection of the bridge company's claim.\(^\text{14}\) But the court's decision that no trust was created does not seem to square with the views of other eminent equity courts. And it affords reason to speculate as to what changes, if any, will be expedient in present trust practice.

C. E. Fox

CONFLICT OF LAWS—TRUSTS—WHAT LAW GOVERNS THE EXERCISE OF A POWER OF APPOINTMENT.—A settlor, in New York, by a trust agreement, established a trust of personal property for the benefit of his children for life with power of appointment to

\(^{12}\) 363 Ill. 593.  
\(^{13}\) See note 9, supra.  
\(^{14}\) It may be suggested that since the claimant and officers of the bank were parties to a transaction the purpose of which was to give a preference to one who was merely a general depositor, the transaction was illegal and should not be enforced, without regard to the question of whether or not a transfer from a commercial account to a trust account by book entries will create a trust. It appears evident that both parties were aware of the financial condition of the bank, and that the transaction in question was a clear consequence of that knowledge.
their lineal descendants. The trustee could be changed and the trust moved by consent of the interested parties. The trust, pursuant to that provision, was subsequently moved to Delaware. One child exercised the power of appointment in favor of his children and later died. According to the law of Delaware the provisions of the trust and appointment were valid and not in violation of the rule against perpetuities. By the New York computation of the period during which the right of alienation may be suspended, the trust agreement and appointment violated the rule against perpetuities.¹ The question raised in the recent case of Wilmington Trust Company v. Wilmington Trust Company ² on the foregoing facts was whether the law of New York, where the trust agreement was made and the trust was established, or the law of Delaware, where the trust res was situated at the time of the death of the donee of the power, should govern. It was held that the law of New York governed and, hence, that the provisions of the trust were void.

The exercise of the power of appointment is a matter concerning the creation of the trust, and the law to govern is to be determined in the light of the intention of the donor of the power at the time that the trust was created.³ The intention of the donor of the power was not expressly stated in the instrument creating the trust; so the court implied an intent that the law of New York should apply from the facts that the donor as well as the original trustee resided in that state, the corpus of the trust was delivered to the trustee there, and the trust was originally operative in New York. The court stated that it would be beyond the scope of logical reasoning to hold that the change of the situs of the trust, an act subsequent to the creation, could change the original intent of the settlor. If it could, it would mean that the intention of the settlor would be changed with every subsequent change of the situs of the trust.

The Delaware case appears to decide the specific problem for the first time in this country, but the decision of the court is

¹ The donee of the power of appointment is treated as the agent of the donor in the execution of the power. Hence, the appointment is a part of the original agreement for purpose of computing the period of inalienability. Lincoln Trust Co. v. Adams, 177 N. Y. S. 889 (1919); Cotting v. De Sartigas, 17 R. I. 668, 24 A. 530 (1892).

² 186 A. 903 (Dela., 1936).

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based on sound legal principles—principles recognized by a majority of courts confronted with similar problems—and may well furnish a guide for courts of other jurisdictions should the problem ever arise there.

G. H. Crane

CONTRACTS—Breach—Right of Vendee to Rescind and Seek Restitution Where Vendor Was Not Ready to Perform on the Contract Date.—In Platt v. Fischer¹ the defendant bought a subdivision lot from Bert H. Laudermilk Realty Association, selling agents for the plaintiffs. The plaintiffs had conveyed title to the land, in trust, to the Union Bank of Chicago, who, as trustee, agreed to give the defendant a deed and guaranty policy upon payment of certain specified sums, and upon the order of Laudermilk agreed to procure such conveyance upon the payment of the sums specified. Before the date set for the last payment, a receiver was appointed for the trustee, and the defendant made the last three payments to the receiver and demanded performance. The last payment and demand took place on September 19, 1932. The deed and policy were not delivered at that time; but subsequently, on February 27, 1933, the plaintiff made tender of the deed and policy, which was refused by the defendant. On March 6, 1933, the defendant filed a suit at law to recover the payments made by him, thereby electing to rescind the contract because of the vendor’s failure to perform. The vendor then filed a bill in equity to enjoin the suit at law brought by the purchaser, and further asked that he be ordered to accept the tendered deed. The matter was referred to a master, who decided that performance had been tendered within a reasonable time, and that consequently the vendor had substantially performed. Exceptions to the master’s report were overruled, and the defendant perfected this appeal.

The Appellate Court held that, as a broad proposition, a party who has contracted to do a thing which is possible in itself, and who fails to perform on the day performance is due, must be considered in default and be liable for his breach. In this connection the court cited several cases where rescission was granted for failure to perform, but all of the cases cited in that line dealt with transactions concerning personalty. Peculiarly, there was no mention made of the line of cases dealing with the specific problem that was before the court, that is, the sale of real estate by contract. The earliest case found in the latter line is Tyler v.

¹ 285 Ill. App. 110, 1 N. E. (2d) 735 (1936).
Young," decided in 1840, wherein the court said, "The time fixed for the performance of a contract is, at law, deemed the essence of the contract; and if the seller is not ready and able to perform his part of the agreement, on that day, the purchaser may elect to consider the contract at an end." It is worthy of note that in Tyler v. Young, as in the instant case, nothing appears in the opinion of the court to indicate that there was a stipulation in the contract specifically making time of the essence. The doctrine of the Tyler case is repeated in Conway v. Case, Smith v. Lamb, Clark v. Weis, and O'Brien v. Quirk, all of which are land contract cases, in which the purchaser who has paid according to the contract elects to rescind when the vendor cannot, or does not, convey on the day performance is due.

In the principal case, the Appellate Court neglected to make any comment on the finding of the master that performance had been tendered within a reasonable time. It will be conceded that there is a marked difference between a case where the vendor wilfully refuses to give a deed and one where he is willing but temporarily incapable of giving it. If the court were to determine the vendee's right to damages instead of for restitution, it might well have considered the problems of reasonable time and substantial performance. Then the court may or may not have agreed with the finding of the master that performance was tendered by the vendor within a reasonable time. The only excuse for delay in performance in this case was subjective impossibility, which would be no excuse in law. But since the case was decided on the right of restitution, the matter of reasonable time becomes even less pertinent. The vendee may be excused from his duty of performance without necessarily acquiring an action for breach against the vendor, and if he is excused from his duty, his right to restitution is unquestioned. It therefore appears that the Appellate court rightfully ignored the finding of the master.

K. S. MAINLAND

CONTRACTS—CONSIDERATION—WHETHER EXPRESS PROMISE IS NECESSARY TO FURNISH MUTUALITY OF OBLIGATION.—The Appellate Court of Illinois decided in the case of In re Estate of

2 3 Ill. (2 Scam.) 444 (1840).
3 22 Ill. 127 (1859).
4 26 Ill. 396 (1861).
5 87 Ill. 438 (1877).
6 204 Ill. App. 448 (1917).
7 See also Crim v. Umbsen, 155 Cal. 697, 103 P. 178 (1909).
8 3 Williston on Contracts (1st ed.) 2366, secs. 1315-1316.
Peterson\(^1\) that a written contract, whereby a vendor agreed to sell stock which he then owned for a certain sum and whereby the vendee promised to pay interest on the deferred payments but did not in so many words promise to make the principal payments, was an option contract and hence unenforceable by the vendor.

After the vendor's promise to sell in exchange for certain installment payments to be made, the contract contained the following language: "Second Parties agree to pay to the First Party interest on the aforesaid deferred payments at the rate of 6 per cent per annum from January 1, 1928, payable semi-annually. Said principal and interest to be payable at such place or bank as First Party may designate. . . . When the Second Parties have made all of the payments provided in this contract, the First Party agrees to deliver to the Second Parties the aforesaid 1375 shares. . . . It is further agreed that all dividends declared on the aforesaid 1375 shares . . . shall be applied toward the payment of the principal and interest due on this contract. This Agreement shall extend to and be obligatory upon the heirs, administrators, and assigns of the respective parties. . . ." The parties then signed and sealed the writing. A supplemental agreement was later entered into by the parties which did not materially change the foregoing provisions. Upon the death of one of the purchasers, a claim was filed and allowed in the Probate Court for payments due and unpaid. On appeal first to the Circuit Court and then to the Appellate Court, the claim was disallowed.

The Appellate Court started its opinion with a statement of the principle of mutuality of obligation. Before mutuality of obligation becomes a matter of enquiry, a purported bilateral contract must exist. The court, however, appeared to presuppose the non-existence of a promise to buy. If the contract were intended to be an offer for an act, mutuality of obligation would be imper-\(^2\) and the court need not have discussed mutuality at all. If this had been an action by the buyer against the seller, the latter might have urged that there was no consideration for his promise in that the buyer did not agree to buy. But since the action is against the buyer, the defense of want of mutuality of obligation is equivalent to an assertion that there was no obligation on the part of the seller, which, of course, would not have been good

\(^{1}\) 286 Ill. App. 424, 3 N. E. (2d) 725 (1936).

here, as the seller did promise to sell. The pertinent enquiry, therefore, should have been whether or not the buyer made any promise at all—not whether there was consideration for it.

Numerous cases are to be found where one party, who has not made an express promise in a written contract, has been held to have made a promise impliedly. In all of these cases a promise on the part of one of the parties has been implied from the apparent intent of the parties as manifested by the surrounding circumstances and their express language. Thomas-Huycke-Martin Company v. T. M. Gray & Sons furnishes an example. There the Supreme Court of Arkansas enforced a contract whereby the vendee, by written contract signed by both parties, expressly promised to purchase the output of the vendor’s portable saw mill, but the vendor did not expressly promise to sell and deliver the output of the mill to the vendee. Since all the prices and terms of the buyer’s obligation were expressed in the agreement the assenting of the vendor to those terms was held by the court to imply a corresponding obligation on the part of the vendor to sell and deliver the lumber to the vendee at the terms of the contract.

The Appellate Court cited with approval two Georgia cases as deciding the proposition in controversy in this case. However, in Martin v. Cox, one of the cases relied on, the agreement expressly stated that the vendor would sell only if he so desired.

In the instant case the defendant signed and sealed a writing

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3 Lewis v. Atlas Mutual Life Ins. Co., 61 Mo. 534 (1876); Atlantic City v. Farmers’ Supply & Products Co., 96 N. J. L. 504, 115 A. 388 (1921); Ziehm v. Frank Steil Brewing Co., 131 Md. 582, 102 A. 1005 (1917); Dement Bros. Co. v. Coon, 104 Wash. 603, 177 P. 354 (1919); Minneapolis Mill Co. v. Goodnow, 40 Minn. 497, 42 N. W. 356 (1889); Jones v. Binford, 74 Me. 439 (1883); Thomas-Huycke-Martin Co. v. T. M. Gray & Sons, 94 Ark. 9, 125 S. W. 659 (1910); Ullman v. Bee Hive Dep’t Store, 193 Wis. 350, 214 N. W. 349, 53 A. L. R. 281 (1927); Kentucky Tobacco Products Co. v. Lucas, 5 F. (2d) 723 (1925); Mills-Morris Co. v. Champion Spark Plug Co., 7 F. (2d) 38 (1925); 1 Williston on Contracts (Rev. ed. 1936) 252, sec. 90; 4 Page on Contracts 3530, sec. 2042.

4 94 Ark. 9, 125 S. W. 659 (1910).


6 Bashinski Bros. v. Lake, 9 Ga. App. 352, 71 S. E. 702 (1911). Here the contract recited that in consideration of one dollar paid in advance the vendor agreed to sell. This fact might have indicated an express intent of the parties to make it an option. There were, however, other provisions in the agreement which indicated an intent on the part of the parties to make a bilateral contract.

7 By the Practice Act of 1907, Cahill’s Ill. Rev. Stat. (1929), Ch. 110, § 33, it was permissible to declare in assumpsit on a sealed instrument. The practice of declaring in assumpsit led to the general practice of investigating the consideration in any action on a sealed instrument. Beyond this, sealed
which both parties called an agreement, a word which connotes a mutual understanding. The buyer expressly promised to pay interest on the principal sums unpaid, a promise which would be inane if the vendee did not intend to assume the principal debt. It was "further agreed" that dividends were to be applied toward payment of principal and interest due under "this contract." The provision for the payment of interest and that for the application of dividends are certainly consistent with an intention to effect a present bargain and sale. The fact that the vendor was not to deliver the certificates until payment was made was not inconsistent with a present sale. The vendor sold specific shares—he did not merely agree to sell a certain number of shares not yet identified or appropriated as the subject matter of the contract. The agreement was to be binding on the heirs, administrators, and assigns of the "respective parties." Thus, the parties must have understood that there was an undertaking to be bound by, and surely they could not have intended that their heirs be bound and they themselves not be. An implied promise is merely a term to denote an intended undertaking, not expressed in so many words, but manifested by other circumstances. Since the buyer's intention here was evident, the court might well have found that he impliedly promised to buy.

V. A. FORSBERG

JURY—NUMBER OF JURORS—RIGHT OF DEFENDANT TO CONSENT TO TRIAL OF A CRIMINAL CASE BEFORE A JURY OF LESS THAN TWELVE.—Can the defendant in a criminal case waive his constitutional right to a trial by a jury of twelve and submit to trial by a jury of lesser number? This question was answered in the affirmative by the Supreme Court of Illinois in the case of People v. Scudieri. The defendant and three others were indicted for robbery. Counsel for both the defendants and the people consented to a trial by a jury composed of eleven members, since only this number were available on the panel. The instruments have never been expressly abolished in Illinois. Since the Practice Act of 1907 has been repealed by the Practice Act of 1933, and since no provision was made in the later act regarding sealed instruments, the inference might be drawn that sealed contracts should now be declared upon as in covenant and not as in assumpsit and that therefore consideration would not be involved.

8 See construction of contract in The Minnesota Lumber Co. v. The Whitebreast Coal Co., 160 Ill. 85, at 98, 43 N. E. 774 (1895); and in Bangor Furnace Co. v. Magill, 108 Ill. 656 (1884).

1 363 Ill. 84, 1 N. E. (2d) 225 (1936).
defendants were convicted, and the conviction was affirmed on appeal.

The main contention of the defendants on the appeal was that they were "unlawfully tried by an illegally constituted jury of eleven men." In overruling this contention, the court says that the defendant's constitutional right to a trial by jury may be waived just as any other right guaranteed by the Constitution, and that since this right may be waived as to trial by an entire jury, it may be waived as to one or more jurors, because the guaranty is procedural and not substantive nor jurisdictional.

It would appear that in deciding this case, Illinois is following the path of facilitating the trial of felony cases which was first followed in the case of People v. Fisher, and which was later modified somewhat, perhaps unfortunately, in the case of People v. Scornavache, which held that although the defendant could waive the right of trial by jury, it was necessary for the State to consent also. Since the right guaranteed by the Constitution is the right of the defendant, it does not appear why he should not be allowed to waive it whether the State consents or not. Since the State did consent to the waiver in the case under discussion, this question is not involved.

It is interesting to note that at the same time that the Illinois court was considering the principal case, the courts of North Dakota and Michigan had the same problem under consideration. In both of these cases, the courts held the same as the Illinois court.

Probably the leading case on the subject is the United States Supreme Court case of Patton v. United States. In this case the court held that the defendant might either waive his right to a trial by jury altogether, or consent to a trial by less than twelve. All three of the cases recently decided cite and follow this decision.

Other states which have followed the view of the instant case

3 Ibid.
4 347 Ill. 221, 179 N. E. 909, 79 A. L. R. 553 (1931).
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include Iowa,\(^7\) Minnesota,\(^8\) Nebraska,\(^9\) Ohio,\(^10\) and Pennsylvania.\(^11\)
It would appear that these states are in the minority. States which have held that, in the absence of statutory or constitutional provisions providing for waiver, the defendant cannot waive his right in a felony case to be tried by a common law jury of twelve include California,\(^12\) Indiana,\(^13\) Kansas,\(^14\) Kentucky,\(^15\) Mississippi,\(^16\) Missouri,\(^17\) Montana,\(^18\) North Carolina,\(^19\) New Mexico,\(^20\) New York,\(^21\) Texas,\(^22\) and Wisconsin.\(^23\)

The distinction between the two lines of cases is that in one the constitutional right to a trial by a jury is regarded as a privilege which the defendant may waive if he sees fit;\(^24\) the other appears to be based on one of two ideas—either that the jury is an integral part of a constitutional governmental system or that public policy forbids the waiver thereof.

The basis upon which the Illinois Court places its decision appears to be the sounder. As was pointed out in the Fisher case,\(^25\) the jury is not an integral part of a constitutional governmental system, since "a court is fully organized and competent

\(^8\) State v. Sackett, 39 Minn. 69, 38 N. W. 773 (1888).
\(^12\) People v. O'Neil, 48 Cal. 257 (1874).
\(^13\) Jackson v. State, 6 Blackf. (Ind.) 461 (1843).
\(^15\) Jackson v. Com., 221 Ky. 823, 299 S. W. 983 (1927).
\(^17\) State v. Sanders, 243 S. W. 771 (Mo., 1922).
\(^20\) Territory v. Ortiz, 8 N. M. 154, 42 P. 87 (1895).
\(^21\) Cancemi v. People, 18 N. Y. 128, 7 Abb. Pr. 271 (1858).
\(^24\) Article II, section 5 of the Constitution of 1870 provides as follows, "The right of trial by jury as heretofore enjoyed, shall remain inviolate...."
Section 9 of the same article provides in part that "in all criminal prosecutions the accused shall have the right to... a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed." Blackstone in his Commentaries, Book III, page 379, referred to the jury trial as a privilege, as did Judge Story. 2 Story on the Constitution, par. 1779.
for the transaction of business without the presence of a jury."

Article VI of the Constitution of 1870 sets forth the judicial system of the state, and in no place is the jury mentioned. Likewise, it is no more contrary to public policy to allow a defendant to waive part or all of a jury under a plea of not guilty than it is to allow him to plead guilty and dispense with formal proof altogether.

The case, one of first instance in Illinois, together with the two decisions almost contemporaneously with it from other states, indicates the modern trend of authority on the question presented.

M. H. Tuttle

LIMITATION OF ACTIONS—MISTAKE—COMPUTATION OF LIMITATION FROM DATE OF PAYMENT OF MONEY UNDER MISTAKE OR FROM DATE OF DEMAND.—The Supreme Court of Florida, in the recent case of First State Bank of Fort Meade v. Singletary handed down a decision that where money is paid under a mutual mistake, notice of the mistake must precede the right of recovery, and the Statute of Limitations does not begin to run until a demand is made. This was an action at law brought in quasi contract on a count for money had and received. The plaintiff predicated her right to recover on an overpayment of interest made by virtue of a mutual mistake. The principal defense relied on was that more than the statutory period of limitation had elapsed since the payment had been made. The plaintiff contended that an action for money had and received was equitable in its nature and that the equitable rule with regard to the time when the Statute of Limitations begins to run should be applied.

Ordinarily the Statute of Limitations runs from the day when the cause of action arises; that is, when the payment is made. This is by far the weight of authority in this country.


1 169 So. 407 (Fla., 1936).

2 Reifman v. Micon, 207 Ill. App. 175 (1917).

3 This rule, as contended for, was correctly stated by the Illinois Supreme Court in the case of McIntosh v. Saunders, 68 Ill. 128 (1873), that in equity the Statute of Limitations will begin to run from the time of the discovery of the fraud or mistake and not before.

4 Leather Manufacturers Nat. Bank v. Merchants Nat. Bank, 128 U. S. 26, 32 L. Ed. 342 (1888); Richardson v. Bales, 66 Ark. 452, 51 S. W. 321 (1899); Schultz v. The Board of Commissioners of Cass County, 95 Ind. 323 (1883); City of Indianapolis v. Patterson, 112 Ind. 344, 14 N. E. 551 (1887); Jones v. School District No. 19, Elk County, 26 Kan. 490 (1891);
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Sturgis v. Preston, the Massachusetts court held that the right of action to recover the excess accrued immediately, without previous demand, and that the action was barred by the Statute of Limitations in six years from the date of the payment. This rule is also adopted and followed in Maine, and the United States Supreme Court has held similarly.

In the early English case of Bree v. Holbech, where an administrator received the amount of the mortgage money upon his assignment of a mortgage purporting to be made to the deceased, but in fact a forgery of which both parties were ignorant, it was held by Lord Mansfield and the Court of King's Bench that the right of action to recover from the administrator the money so paid was barred by the Statute of Limitations in six years from the time of payment.

The courts adopting the minority view as expressed in the Florida case under discussion have, apparently, confused two separate and distinct questions, treating them as one. One question deals with the time when the Statute of Limitations begins to run and the other deals with the necessity of making a demand. The jurisdictions following the minority view assume that the defendant is not a wrongdoer until there has been a demand and that it is then that the Statute of Limitations begins to run. This rule is followed in Florida and New York, and by statute it is the rule in California. The Virginia courts have attained

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5 134 Mass. 372 (1882).

6 Blethin v. Lovering, 58 Me. 437 (1870).

7 Leather Manufacturers Nat. Bank v. Merchants Nat. Bank, 128 U. S. 26, at page 35 of the opinion, where the court said: "Whenever money is paid upon the representation of the receiver that he has either a certain title in property transferred in consideration of the payment, or a certain authority to receive the money paid, when in fact he has no such title or authority, then, although there be no fraud or intentional misrepresentation on his part, yet there is no consideration for the payment; and the money remains, in equity and good conscience, the property of the payer, and may be recovered back by him, without any previous demand, as money had and received to his use. His right of action accrues, and the Statute of Limitations begins to run, immediately upon the payment."


9 Stocks v. Sheboygan, 42 Wis. 315 (1877).

10 169 So. 407 (Fla., 1936).

11 Wyckoff v. Curtis, 27 N. Y. S. 1012 (1894), reversed on other grounds in 30 N. Y. S. 940. This view has been consistently maintained in New York. Sharkey v. Mansfield, 90 N. Y. 227 (1882); Southwick v. First Nat. Bank of Memphis, 84 N. Y. 420 (1881).

12 California Code, sec. 338.
the same result by holding that there is an analogy between cases of fraud and an action to recover money paid under mutual mistake.\textsuperscript{13}

The courts which follow the majority view have made a distinction between the necessity of a demand and the time when the Statute of Limitations begins to run. The plaintiff is required to make a demand before bringing suit in order that the defendant will not be subjected to litigation before he has had an opportunity to make restitution; and interest will be allowed only from the time of making the demand.\textsuperscript{14} However, in these jurisdictions the time when the Statute of Limitations begins to run is not dependent upon the making of a demand, but the cause of action accrues when payment is made.\textsuperscript{15}

Apparently the question of when the statute begins to run in actions at law arising from mutual mistake has not been directly decided in Illinois. In suits in equity,\textsuperscript{16} however, the Illinois Supreme Court has followed the view adopted by the Florida court in the principal case.

H. N. Lingle

Parent and Child—Support—Duty of Father to Support After Adoption of Child and Subsequent Readoption by Divorced Mother.—The Appellate Court of Illinois in the case of Dwyer v. Dwyer\textsuperscript{1} held that an adoption proceeding relieved the natural parents of the adopted child from any further obligation to support the child. The parties to this action, the natural parents of the child, were divorced. Prior thereto their child was adopted by its maternal grandparents. Upon the death of the maternal grandfather, the natural mother readopted her child, and sought to compel the natural father of the child to contribute to the support of their child. On appeal from an order of the lower court granting such payments, the Appellate Court held the lower court lacked jurisdiction, because the first adoption forever relieved the father from any further duty to support his child.\textsuperscript{2} A dissenting judge was of the opinion that the father

\textsuperscript{13} Crawford's Admr. v. Smith's Ex'r, 93 Va. 623, 23 S. E. 235, 25 S. E. 657 (1895-6); Hall v. Graham, 112 Va. 560, 72 S. E. 105 (1911).

\textsuperscript{14} Ashurst v. Field's Admr., 28 N. J. Eq. 315 (1877).

\textsuperscript{15} 128 U. S. 26, 32 L. Ed. 342, 9 S. Ct. 3 (1888).

\textsuperscript{16} Shafer v. Newlan, 29 Ill. 44 (1862); McIntosh v. Saunders, 68 Ill. 128 (1873).

\textsuperscript{1} 286 Ill. App. 588, 4 N. E. (2d) 124 (1936).

\textsuperscript{2} The court disagreed with the language used in McNemar v. McNemar, 137 Ill. App. 504 (1907), the only Illinois case purporting to hold the natural father liable for his child's support regardless of prior adoption. In that
should be held liable, first, on grounds of public policy, to keep the child from becoming a burden on the public, and second, because the readoption proceedings of the mother revoked the prior adoption and restored the child to its natural parents.

The Court of Domestic Relations of New York in Betz v. Horr, where the natural child of the respondent was the petitioner, followed the view of the dissenting opinion of the Dwyer case, saying that where the only alternative is to make the child a charge on the public, the natural father will be held liable for the support of his child on the ground of public policy, notwithstanding the prior adoption of the child. The action in that case, however, was based on a New York Statute allowing a pauper, by a proper petition, to compel his next of kin to contribute to his support, when, for satisfactory reasons, he is unable to care for himself. The father in the Illinois case might have been held for the support of his child under the Illinois Pauper Act, as that act does not mention or make an exception of cases of adoption, but the petition in that case would have to be filed by the State’s Attorney. Therefore the Pauper act could not be involved in the Dwyer case.

The Supreme Court of Illinois in Ryan v. Foreman, which was cited with approval by the court in the principal case, said that the adoption proceeding imposes the legal duty of care and support of the adopted child on the adoptive parents and relieves the natural parents from any further obligation. The natural parents become as total strangers to their child, with no more rights and obligations to him than any other stranger would have. This view is entertained in the majority of cases and, with the exception of the McNemar case, has been the uniform hold-

case, the natural father of an adopted child sued the adoptive parent to recover payments made by the plaintiff to support his child subsequent to the adoption. Since the court held the plaintiff was a mere volunteer and no obligation to repay could be implied, that part of the opinion saying the adoption decree did not relieve the natural parent from his obligation to support his child was dictum only.

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3 290 N. Y. S. 500 (1936).
5 181 Ill. App. 262, aff’d, 262 Ill. 175, 104 N. E. 189, Ann. Cas. 1915B, 780 (1914).
6 Mitchell v. Brown, 18 Cal. App. 117, 122 P. 426 (1912); In re Cozza, 163 Cal. 514, 126 P. 161, Ann. Cas. 1914A, 214 (1912); Schlitz v. Roenitz, 86 Wis. 31, 56 N. W. 194, 21 L. R. A. 483 (1893); In re Knott, 138 Tenn. 349, 197 S. W. 1097 (1917); In re Hood’s Estate, 206 Wis. 227, 239 N. W. 448 (1931); State v. Kelley, 32 S. D. 526, 143 N. W. 953 (1913); In re Masterson’s Estate, 45 Wash. 48, 87 P. 1047 (1906).
ing in this state. Since the question whether the child might become a public burden was presented in each of the Illinois cases it would seem that public policy is not a sufficient ground to charge the natural father with his child’s support after its adoption.

The death of the adoptive parent in no way affects the natural parent, and the duty to care for and support this child does not again devolve upon the natural parent, except upon his voluntary assumption of the obligation. Further, the divorce decree of the parties in the instant case acted to destroy their marital relation; so the petitioner, by her readoption of her child, could affect the rights and duties of the respondent no more than she could those of any other stranger. It follows, therefore, that the respondent was not affected by either of those events in the instant case, and his rights and obligations remained the same as they were at the time of his divorce. Since, by the weight of authority, the respondent would not be responsible for the care of his child at that time, neither would he be responsible at the time of the petition. On the facts of the case, the majority of the court were undoubtedly correct.

V. A. FORSBERG

PLEADING—PRAYER FOR RELIEF—RIGHT TO RELIEF NOT PRAYED FOR, IN ABSENCE OF GENERAL PRAYER (CIVIL PRACTICE ACT).—In the case of Kaifer v. Kaifer, decided by the Illinois Appellate Court for the Second District, section 34 of the Civil Practice Act was construed for the second time since the Act went in force. In 1920 a decree of divorce was entered in favor of the petitioner herein, and by the decree the respondent was ordered

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7 Plaster v. Plaster, 47 Ill. 290 (1868); Sayles v. Christie, 187 Ill. 420, 58 N. E. 480 (1900).
8 In re MacRae, 189 N. Y. 142, 81 N. E. 956 (1907); Shepherd v. Murphy, 332 Mo. 1176, 61 S. W. (2d) 746 (1933); Carpenter v. Buffalo General Electric Co., 213 N. Y. 101, 106 N. E. 1026, Ann. Cas. 1916C, 754 (1914); In re Hunsicker's Estate, 65 Cal. App. 114, 223 P. 411 (1923).
1 286 Ill. App. 433, 3 N. E. (2d) 886 (1936).
2 Ill. State Bar Stat. (1935), Ch. 110, ¶ 162.
3 Bauer v. Lindgren, 279 Ill. App. 397 (1935). Plaintiff filed a bill asking for (1) removal of a trustee (2) appointment of a successor trustee (3) an accounting and (4) that the title to land held by Defendant be declared as held in trust for the bondholders, and no other relief. On the hearing of a motion the chancellor made several findings and issued an injunction restraining defendant from foreclosing, saying such an order could be entered by virtue of section 34 of the Civil Practice Act. The Appellate Court reversed the order saying section 34 is not broad enough to cover an order where neither the “allegations nor the prayer of the bill, nor the notice served... gave any notice that an injunction would be asked for...”
to pay a certain sum each month for the support of a minor child. He stopped paying in 1926. In October, 1935, the plaintiff in the original action filed her petition alleging the entry of the decree of divorce, the order to pay money to her for support of the child, and the failure to pay as ordered. She prayed that a rule be entered that the defendant show cause why an attachment should not issue against him and that he be punished for contempt of court for his refusal and neglect to pay. No other relief was prayed for. On the hearing, the Chancellor found the defendant to be delinquent and entered a money decree for the amount found to be due under the former decree, and discharged the rule to show cause. The defendant, who was before the court, appealed from the decree saying that a decree for money could not be entered because it had not been prayed for.

The decision, that there was no error in the decree as entered, was based on section 34 of the Civil Practice Act. Referring to the last sentence of section 34, the court said that the section merely preserves the former rights in equity under a general prayer for relief. This construction appears to be in keeping with the spirit of the Act. McCaskill, in discussing the granting of relief which is not prayer for, but which is in keeping with facts alleged and proved, says, "Given protection against prejudicial surprises, he is in no position to assert that some other use than that prayed may not be made of the facts alleged against him."

It must be stated, however, that as this was really a supplemental order, it may be that the original bill filed in 1920 contained a general prayer. Nevertheless, as the court did not make any mention of the original bill in this connection, it seems apparent that the decision in the instant case was based solely and squarely on section 34, that "except in cases of default, the prayer for relief shall not be deemed to limit the relief obtainable. . . ."

K. S. MAINLAND

4 Section 34. "Every complaint and counterclaim shall contain specific prayers for the relief to which the pleader deems himself entitled. Such relief, whether based on one or more counts, may be asked in the alternative. Demand for relief which the allegations of the pleading do not sustain may be objected to on motion or in the answering pleading. Except in cases of default, the prayer for relief shall not be deemed to limit the relief obtainable but where other relief is sought the court shall, by proper orders, and upon such terms as may be just, protect the adverse party against prejudice by reason of surprise."

5 McCaskill, Illinois Civil Practice Act Annotated (1933), p. 73.
Trusts -- Deposits -- Liability of One Co-Trustee Who Alone Could Be Aware of Depositary's Difficulties.—The Court of Appeals of Maryland was confronted with a novel situation in regard to trust investments in the case of Zimmerman v. Coblentz et al.¹ One trustee, because of his official capacity, was chargeable with knowledge of the danger of loss in a depositary, and since such knowledge was not reasonably available to his co-trustee, a nominal official, only the former was held liable to make restitution to the estate.

The will, under which the trust arose, divided the residuary estate between three beneficiaries, the share of each to be paid as they respectively arrived at the age of twenty-five years. The defendants Coblentz and Fulton were appointed executors, and after their final account of administration was approved, they proceeded to manage the trust. Just before the eldest beneficiary became entitled to his share, authority of the court was obtained to sell out all the investments so as to have cash to distribute equally. About a year later, the court also granted permission on petition to retain the other two shares on deposit in the Walkersville Savings Bank, at 4 per cent interest, subject to its further order. The defendant Fulton was president of that bank, while his co-trustee, Coblentz, was president of the Central Trust Company. In the same year that the court's permission was granted, the second beneficiary was paid her share of the fund. Four years thereafter, the Central Trust Company purchased the assets and assumed the liabilities of the Walkersville Savings Bank, and it was then continued as a branch of the trust company. Fulton was retained as president of the bank, but nominally only; he was not an officer nor did he have any authority in the trust company. More than a year later, the Central Trust Company went into the hands of the bank commissioner as receiver, and after it had so remained for about five years, the youngest beneficiary, now aged 22, sued the two executors, praying that they be required to make restitution of his loss. The circuit court dismissed his bill, but the Court of Appeals reversed that decree as to the defendant Coblentz. The majority of that court were of opinion that he was chargeable personally with that amount.²

¹ 185 A. 342 (Md., 1936).
² The court first disposed of the questions of whether the defendants were not discharged from all duties when the administration of the estate was closed, and if not, in what capacity they continued to hold the fund. While a trust may be established without explicit declaration, the court said that wills frequently extend duties of distribution by executors, in that unaltered
DISCUSSION OF RECENT DECISIONS

Maryland has no statutory specification of trust investments. Nevertheless, the opinion states the generally accepted rule that a general bank deposit is a highly undesirable form, except as a temporary expedient, because it is a simple unsecured debt. Although this deposit had had the prior approval of the court, the opinion remarks that the taking over of the bank by the trust company amounted to a removal of the fund to a different depositary, involving a new set of risks. Furthermore, when the second beneficiary was paid her share, the sole reason for having the money on deposit ceased to exist, and as the trust was scheduled to continue twelve years longer, a change in the nature of the investment would seem to demand consideration. Thus far the expressions are amply supported by authority. However, the court then refers to a tendency to relax the rule against such loans. Savings bank deposits are permitted for trust investments in a few states, at least for a portion of the fund. The opinion remarks that the judges of the circuit court had declared that they would have approved the new situation if application had been made to them. Consequently the trustees were entitled to the benefit of such approval nunc pro tunc, although it was their duty to decline the change in their deposit without an order of court, and therefore their failure to do so was not such a breach of trust as to require them to make restitution. Thus, a result was quite easily reached which is diametrically opposed to the traditional doctrine that where a trustee allows a deposit to continue for an unreasonably long period, and the bank fails, he will be responsible for the loss. This seems forcibly to illustrate that capacity, to a distant date. The determination of which relationship is created might have important consequences, chiefly in questions of taxation, the right of a creditor of a beneficiary to garnishee the fund, the right to sue in a foreign jurisdiction, and, what might be most vital in a controversy over investments, whether the power of more than one fiduciary to act is joint only and not several, which is usually the case in a private trust. Bogert, Trusts and Trustees, I, sec. 12, III, sec. 554.

Although the will in this case repeatedly spoke of the fund in question as a trust fund and the defendants had referred to themselves as trustees, the court held that the duties could be included within those of either executors or trustees indifferently, and concluded that they should be considered executors throughout the distribution. This holding had no effect on the ultimate decision, and did not have the jurisdictional consequences it would have in other states. In Maryland, any equity court has concurrent jurisdiction with the orphans' court to decree or give directions as to the application of the personal estate after all debts are discharged. Code of Maryland, Art. 93, sec. 10.

3 Bogert, Trusts and Trustees, III, sec. 680.

4 See Barney v. Saunders, 16 How. 535, 14 L. Ed. 1047 (1853); In re Whitecar's Estate, 147 Pa. 368, 23 A. 575 (1892); Cann v. Cann, 33 W. R. 40 (1884).
stability in such questions can only be achieved through statutory limitations.

After thus exonerating the defendants from liability for retaining the deposit as such for a five year period, the opinion expresses the principle that authority to invest in a certain security is not authority to continue the investment under all circumstances. As the trustee is held to the standard of care of the ordinarily careful business man intrusted with investments, it is his duty to present to the court any development which reasonable watchfulness would discover which might render it advisable to change an investment. After this court investigates the somewhat complicated internal affairs of the trust company which led up to its inability to meet its obligations, the opinion concludes that any one who was closely familiar with them should reasonably have appreciated the danger deposits were in for a considerable period before the receiver took control. The difficulties did not arise suddenly; in fact more than six months before the closing it must have been manifest that a deposit as large as this fund could not be paid easily. Although a banker would naturally avoid admitting that his bank is unsuitable as a depositary, whenever such a conflict of interests arises, the trustee's personal interest must yield to the fiduciary one. So the defendant Coblentz was bound to realize from his knowledge of the situation that it was imperative that the trust fund be withdrawn, and his failure to remove it, was held to warrant a decree against him for restitution.

However, that knowledge which was the basis of the breach of duty was possessed by Coblentz alone and not by his co-trustee, Fulton. The latter was dependent for his information, the opinion says, upon the published statements of the trust company, which were confirmed by state officials for the very purpose of giving assurance to depositors. The court was of opinion that they furnished sufficient information for one not an official or employee to rely upon. Since the breach of trust, then, was entirely that of Coblentz, the liability for loss fell on him alone, as there was no showing that his co-trustee was guilty of any collusion or culpable omission of duty.

No precedent was cited for this separation of responsibility on the ground of personal knowledge, and none in point has been found, but there are cases indicating a tendency in accord with the view of this court. Prima facie, trustees are jointly and severally liable for a breach of their investment duty as well
as for others. However, one is not liable to the beneficiary for a breach of trust committed by his co-trustee in which he does not in any way participate, as where such other trustee embezzles, or takes advantage of his position to purchase trust property at less than its value, or converts securities properly intrusted to him to his own use. Still, one who improperly delegates the administration of the trust estate to a co-trustee is held fully responsible for a resulting loss, even where it was caused by the co-trustee's reliance upon unfaithful agents. A trustee is also liable if he enables his co-trustee to commit a breach of trust by a failure to exercise reasonable care, but negligence must be shown as well as the other trustee's defalcations. Certainly the ultimate decision in the principal case cannot be said to be at variance with these doctrines.

This is not the first occasion, however, when the element of personal knowledge has received consideration. In the New York case of In re Howard a trustee was held to be negligent in permitting his co-trustee to collect rents after having knowledge of his questionable acts. In a later case, In re Mann's Estate, a lawyer was held justified in placing confidence in his co-trustee, who was a financier as well as the testator's son, and permitting him to manage the investments. The former was held not accountable for a theft of securities which he had no knowledge of until after the latter died. It thus appears that an equity court will give consideration to the exact situation of each trustee when there is a default to be answered for, and if this Maryland court was correct in its finding that Coblentz was the only trustee who was blameworthy, its decision is amply supported by reason and authority.

J. M. HADSALL

5 Bogert, Trusts and Trustees, III, sec. 701.
8 Adair v. Brimmer, 74 N. Y. 539 (1878).
9 Caldwell v. Graham, 115 Md. 122, 80 A. 839 (1911); Brown v. Phelan, 228 N. Y. S. 466 (1928).
10 Earle v. Earle, 93 N. Y. 104 (1883).
11 Bermingham v. Wilcox, 120 Cal. 467, 52 P. 822 (1898); Barroll v. Foreman, 88 Md. 188, 40 A. 883 (1898); Bruen v. Gillet, 115 N. Y. 10, 21 N. E. 676 (1889).
13 97 N. Y. S. 23 (1905).
14 266 N. Y. S. 110 (1933).
WILLS—POWER OF APPOINTMENT—GENERAL DEVISE OF ENTIRE ESTATE AS EXERCISE OF POWER.—In the recently decided case of Rettig v. Zander, 1 the Illinois Supreme Court reiterated the doctrine it adopted in 1879 2 that a power of appointment in a will may be held to have been exercised when the surrounding circumstances evince an intent by the devisee of the power to exercise it.

The early English doctrine required, in order the power be considered exercised, either that the devisee of the power refer in his will specifically to the power, or to the subject matter of the power, or that the will be such that failure to hold the power to have been exercised would render the will entirely inoperative. If none of these three conditions was present, the power was held not exercised, because no intent to exercise it was shown. 3

The result of enforcing this rule was recognized by the courts as forcing them to decide that intent was lacking in cases where, from the circumstances surrounding the execution of the devisee’s will, they felt such intent did in fact exist. 4 Consequently, the rule was modified to make reference to the power unnecessary where there was a clear intent to exercise it. 5 That is the Illinois position.

Some courts have gone farther and hold that a general devise of all one’s property 6 or a general residuary clause 7 exercises a power of appointment where no contrary intent appears from the will. Others hold that an expressed intention to dispose of all the property of which one has the right to dispose exercises the power. 8 Such decisions are based on no specific evidence of intent but solely on the presumption of intent arising from general language.

1 364 Ill. 112, 4 N. E. (2d) 30 (1936).
2 Funk v. Eggleston, 92 Ill. 515 (1879).
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Since the chief purpose of a will is to enforce its maker’s intention, logic favors the practice of presuming that what the testator did he intended to do, and that where he made a general devise or bequest of all his property, or a residuary devise of all the remainder of his property, he intended all the property of which he had a right to dispose to pass by his will, and of requiring that presumption to be overruled only by clear evidence of intent to the contrary.

L. WHIDDEN

WILLS — REMAINDERS — WHETHER REMAINDER IS VESTED OR CONTINGENT AS DEPENDING ON CONSTRUCTION OF “HAVING ISSUE.”—The case of Skelton v. Cross,1 decided by the Supreme Court of Iowa, presents an interesting question that has perplexed our courts for many years. The plaintiff had had a judgment rendered against him and the judgment creditor had taken execution, and the defendant sheriff had levied and sold the plaintiff’s interest in certain real estate under the will of his father. The plaintiff then sought to set aside the execution, levy and sale. The plaintiff’s father had died testate leaving all his property, real and personal, to his wife for life or until she remarry and “after the death of my wife or her re-marriage as provided . . . to my daughter Amy Ethel and my son Morrice Raymond Skelton share and share alike, or the issue of any such child who may have then deceased. If said deceased child has no issue, then it is my will that said deceased’s child’s share shall pass to and become the property of the surviving child.” At the time this action was begun the life tenant was alive and unmarried and both the daughter, Amy Ethel, and the son, Morrice Raymond, plaintiff herein, were living and had children living.

The court decided that the interest of the plaintiff was a contingent remainder, and not subject to levy. The defendant had contended that the plaintiff’s interest was a vested remainder. In arriving at this conclusion the court had to decide that under the common law rule this was a contingent remainder, as, at the time of the death of the testator, the party who would take upon the determination of the life estate was uncertain. With this there is no quarrel. However, it is doubtful when the testator meant this contingent remainder to vest. There are endless possibilities as to what he may have meant when he used the phrase

1 268 N. W. 499 (Iowa, 1936).
"has no issue," but only two are material in this case: first, any child born alive, whether surviving or not, and, second, a child born and surviving at the termination of the life estate. The court decided that the latter meaning was intended, and that hence the plaintiff still had only a contingent remainder. There is authority for this construction.²

Although the testator must have known how he wanted his property to be distributed, and although his attorney also should have known, they failed to heed the warning provided by many a similar case in the reports—failed to use the few additional words necessary to avoid ambiguity. Had the words "surviving at the marriage or death of my wife" been added after the word "issue" in the last sentence of the will, it would have been clear that the plaintiff had only a contingent remainder, and the defendant would, or should, have known that the interest under the will could not be levied upon. Thus, this protracted and costly litigation would have been avoided.

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