Notes

Repudiation by Supreme Court of Rule of *Coolidge v. Long* in Inheritance Taxation

When a donor transfers property by an irrevocable deed of trust, but retains for himself a life interest in the property, a tax upon "transfers intended to take effect in possession or enjoyment at or after the death of the grantor"[1] may be imposed only if the succession to the property is said not to be completed until the donor's death. For, if the succession is complete when the deed is executed, the transfer is not testamentary but is a gift *inter vivos*, upon which neither a transfer nor a succession tax may be imposed.[2]

The majority of state courts have held that "succession" is effected under such a deed of trust only when the donees acquire actual possession or enjoyment of the property, even though all their rights to the property became vested upon the execution of the deed.[3] A few courts, on the other hand, have taken the more technical view that the succession is complete when the right to possession or enjoyment becomes vested upon execution of the deed, and have held that no inheritance tax can be imposed because the death of the donor is not the generating source of any right in the donees.[4] But, if the deed is revocable,[5] or if the grantor reserves the power of appointing the beneficiaries of the trust,[6] or if he retains any other control over the property,[7]

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1. Statutes taxing such transfers are common, being in effect in at least forty-one states and territories. See dissent of Mr. Justice Roberts in Coolidge v. Long, 282 U. S. 582, 607 (1931).

2. Schlesinger v. Wisconsin, 270 U. S. 230 (1926); Heiner v. Donnan, 285 U. S. 312 (1932).

3. Harber v. Whelchel, 156 Ga. 601, 119 S. E. 695 (1923); People v. Moir, 207 Ill. 180, 69 N. E. 905 (1904); *In re* Marshall's Estate, 179 Minn. 233, 228 N. W. 920 (1930); *In re* Estate of Schuh, 66 Mont. 50, 212 Pac. 516 (1923); Farmers' Loan and Trust Co. v. Bugbee, 6 N. J. Mis. R. 415, 141 Atl. 579 (1928). But where the possession of the income is postponed only for the purpose of accumulation the transfer is not taxable. People v. Northern Trust Co., 330 Ill. 238, 161 N. E. 525 (1928). For a full discussion see Rottschaefer, *Taxation of Transfers Intended to Take Effect in Possession or Enjoyment at Grantor's Death* (1930) 14 Minn. L. Rev. 452.

4. Hunt v. Wicht, 174 Cal. 205, 162 Pac. 639 (1917); Brown v. Pennsylvania Co., 32 Del. 525, 126 Atl. 715 (1924); Houston's Estate, 276 Pa. 330, 120 Atl. 267 (1923).

5. Saltonstall v. Saltonstall, 276 U. S. 260 (1928); Chase National Bank v. United States, 278 U. S. 327 (1929); Smith v. State, 134 Md. 473, 107 Atl. 255 (1919); *In re* Fulham's Estate, 96 Vt. 308, 119 Atl. 433 (1923).

6. Orr v. Gilman, 183 U. S. 278 (1901); Chanler v. Kelsey, 205 U. S. 466 (1907); Minot v. Stevens, 207 Mass. 588, 93 N. E. 973 (1911).

7. People v. McCormick, 327 Ill. 547, 158 N. E. 861 (1927) (donor to designate charities to which income shall be paid); Lilly v. State, 156 Md. 94, 143 Atl. 661 (1928) (donor to retain power to sell and mortgage property); State and City Bank v. Doughton, 188 N. C. 762, 125 S. E. 621 (1924) (donor to retain right to vote stock).

the rights of the beneficiaries do not vest absolutely until the death of the grantor, and a tax may be imposed.

The United States Supreme Court in interpreting the Federal Estate Tax [8] in similar situations originally adopted the minority rule that no tax might be imposed when the grantees' rights vested during the grantor's life even though possession of the property passed only at his death.[9] The same rule was applied by the Court to the state succession tax involved in *Coolidge v. Long*.[10] In that case a statute levying a succession tax [11] had been enacted after an irrevocable deed of trust had given certain grantees vested rights in property, but before the grantor's death had given them possession of it. The Court, holding that the death of the grantor was not "a generating source of any right in the remaindermen" [12] and that therefore succession had been effected upon delivery of the deed, ruled that the tax provided in the statute thereafter enacted could not be imposed without violating the contract clause of the Federal Constitution. Following this decision the Court retreated somewhat from its position. In *per curiam* opinions the Court sustained the imposition of the Federal Estate Tax when the grantor had retained a life interest in the property, even though irrevocable deeds of trust had given the grantees vested rights during the grantor's life.[13] The Court also held that a gift in contemplation of death could be taxed at a rate imposed by a statute enacted after the gift was made.[14] And the Court recently overruled a *dictum* in the Coolidge case by sanctioning the imposition of a transfer tax upon the estate of a deceased tenant by the entirety, although the estate had been created prior to the taxing act.[15]

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8. 40 STAT. 1096 (1919), 26 U. S. C. § 1136-4(c) (1926); amended, 46 STAT. 1516 (1931), 26 U. S. C. SUPP. VI § 1136-4(c) (1932). Although the Estate Tax is imposed upon the right to transfer property while the succession taxes are imposed upon the right to receive it, gifts by deeds of trust should be equally taxable under either, since the nature of the tax cannot alter the time at which succession is completed.

9. Nichols v. Coolidge, 274 U. S. 531 (1927); Reinecke v. Northern Trust Co., 278 U. S. 339 (1929); May v. Heiner, 281 U. S. 238 (1930).

10. 282 U. S. 582 (1931); noted in (1931) 44 HARV. L. REV. 1103; (1931) 29 MICH. L. REV. 1095; (1931) 15 MINN. L. REV. 726; (1931) 40 YALE L. J. 1331.

11. The tax in that case was the familiar one imposed upon "transfers intended to take effect in possession and enjoyment after the grantor's death." MASS. GEN. LAWS (1932) c. 65 § 1.

12. Coolidge v. Long, 282 U. S. 582, 597 (1931). The state court had upheld the tax on the ground that the date of the grantor's death was the date of effective succession and that therefore the statute was not retroactive. Coolidge v. Commissioner, 268 Mass. 443, 167 N. E. 757 (1929).

13. Burnet v. Northern Trust Co., 283 U. S. 782 (1931); Morseman v. Burnet, 283 U. S. 783 (1931); McCormick v. Burnet, 283 U. S. 784 (1931), all decided March 2, 1931.

14. Milliken v. United States, 283 U. S. 15 (1931).

15. Gwinn v. Commissioner of Internal Revenue, 53 Sup. Ct. 157 (1932). The holding in Tyler v. United States, 281 U. S. 497 (1930), had been limited in the *Coolidge* case (282 U. S. at 599) to apply only where "the estate was created after the passage of the applicable Act."

This series of cases reached its culmination in the Court's recent decision in *Guaranty Trust Co. v. Blodgett.*[16] A donor transferred securities to a trustee by an irrevocable deed of trust which provided for the payment of the income to the donor for life[17] and for delivery of the principal thereafter to the donor's daughter.[18] Upon the donor's death a succession tax was imposed by the state.[19] The Connecticut Supreme Court of Errors upheld the tax on the ground that the legislature intended it to be levied upon the shifting of possession or enjoyment,[20] and impliedly ruled that succession is not complete under such a deed of trust until the donor's death. The decedent's executor appealed to the Federal Supreme Court, contending that succession was completed by the execution of the deed and that therefore a succession tax could not be imposed consistently with due process.[21] The Court in a brief opinion accepted the state court's construction of the statute and held that the imposition of the tax did not violate the Constitution.

Implicit in the decision of the Court in the *Blodgett* case is approval of the view that succession is not completed until the donee obtains actual possession of the property, even though the donee's rights become vested upon execution of the deed. This decision seems directly contrary to *Coolidge v. Long.*[22] In that case the Court could not have held that imposition of the tax would give retroactive effect to the statute without first holding that the succession was completed upon execution of the deed.[23] The Court in the *Blodgett* case relied upon a *dictum* in the *Coolidge* case to the effect that a tax upon the shifting of possession or enjoyment might be constitutionally imposed if the taxing act took effect before the deed was executed.[24] But the prior enactment of the taxing act could not make a gift *inter vivos* subject to an inheritance tax. The Court's *dictum* therefore, was contrary to its decision in the *Coolidge* case.

The principal case is an indication that, for the time being at least, the

16. 53 Sup. Ct. 244 (1933).

17. After the donor's death the income was to go to her husband for his life; but, though it does not appear, he apparently predeceased her.

18. If the daughter did not survive, the principal was to go to her issue with a gift over in the absence of such issue.

19. The taxing statute was almost identical with that involved in *Coolidge v. Long.* See note 11, *supra.*

20. Blodgett v. Guaranty Trust Co., 114 Conn. 207, 158 Atl. 245 (1932).

21. The appellant also urged that while the state court applied the Act in force when the deed was executed (CONN. PUB. ACTS (1923) c. 190, § 1), it in reality relied on the Act passed after the deed was made (CONN. PUB. ACTS (1929) c. 299 §§ 1, 2) and that therefore the contract clause was violated. The Supreme Court rejected this contention.

22. It is interesting to note that even if there had been no question of retroactivity in the *Coolidge* case the tax could not validly have been imposed for the court decided that the transfer was a gift *in praesenti.* See note 2, *supra.*

23. In both the *Coolidge* case and the *Blodgett* case there were such constitutional questions involved as would enable the Supreme Court to review the state court's interpretation of the transaction. See Railroad Commission v. Eastern Texas Rr. Co., 264 U. S. 79, 86 (1924).

24. Coolidge v. Long, 282 U. S. 582, 596 (1931). The *dictum,* however, is consistent with earlier pronouncements by the Court. Wright v. Blakeslee, 101 U. S. 174 (1879); Nickel v. Cole, 256 U. S. 222 (1921).

Supreme Court will be loath to interfere with the imposition of inheritance taxes by Congress or by the state legislatures. Statutes taxing transfers intended to take effect at the death of the grantor are enacted to prevent evasion of the death duties. Consequently in determining the imposition of the tax, the substance of the transfers rather than the legal technicalities involved should have governing force.

Scope of Federal Radio Commission's Power over Licenses

In *Federal Radio Commission v. Nelson Brothers' Bond & Mortgage Co.*[1] the Supreme Court for the first time[2] passed upon the power of the Federal Radio Commission to regulate the business of broadcasting. In the Radio Act of 1927,[3] the only rule set forth for the Commission's guidance in granting or refusing license applications was that the "public convenience, interest or necessity" be served thereby. The following year the Davis Amendment[4] added the requirement that "the licensing authority shall as nearly as possible make and maintain an equal allocation of broadcasting licenses . . . " among the various zones; "and shall make fair and equitable allocation of licenses . . . to each of the states . . . within each zone, according to population." Under the system adopted by the Commission in 1930 to comply with the Amendment,[5] Illinois was 55% over, and Indiana 22% under, its prescribed quota. Largely on this ground, the Commission in the instant case disregarded an examiner's recommendation and granted the petition of WJKS, an Indiana station which sought to change its frequency to, and acquire a clear channel on, a frequency previously shared by two Illinois broadcasters which had been rendering satisfactory service. A further basis for its decision was the finding that programs similar to those offered by the Illinois stations could be picked up elsewhere on the dial by their public, while WJKS, the only station giving good service to the region around Gary, consciously adapted its programs to the type of listeners it served.[6] The decision of the Commission was reversed

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1. 53 Sup. Ct. 627 (1933).

2. In Federal Radio Commission v. General Electric Co., 281 U. S. 464 (1930), the Court refused to review a decision of the Court of Appeals for the District of Columbia reversing an order of the Commission, on the ground that the Act constituted the District Court of Appeals a superior administrative board whose decisions did not create a judicial question reviewable by the Supreme Court. Congress promptly amended the Act to limit review by the Court of Appeals to questions of law (see note 11, *infra*), thus obviating the Court's objection that no "case or controversy" was presented for its decision.

3. 44 Stat. 1162-74 (1927), 47 U. S. C. Supp. VI §§ 81-121 (1932). The Commission is authorized to assign frequencies and powers "from time to time as public convenience, interest or necessity requires." 44 Stat. 1163 (1927), 47 U. S. C. Supp. VI § 84 (1932).

4. 45 Stat. 373 (1928), 47 U. S. C. Supp. VI § 89 (1932). The expressed purpose of the Amendment is to secure "equality of radio broadcasting service, both of transmission and of reception," to the people of the zones established by § 2 of the Act.

5. General Order No. 87, Report, Federal Radio Commission (1930) 19.

6. The population in and around Gary contains a high percentage of foreign born and many diverse nationalities. WJKS featured talks in different

by the Court of Appeals for the District of Columbia[7] as "arbitrary and capricious"[8] in that it deprived established stations in good standing of their right to broadcast. The Supreme Court, however, reversed the District Court of Appeals on the ground that that court should not have substituted its own conclusions for those of the Commission. The effect of the decision is apparently to rule the two Illinois stations off the air.[9]

Since the power of the Commission to deny licenses and to refuse to renew those of established stations is no longer open to question,[10] the only issue before the Court was whether the Commission's finding that public interest, convenience and necessity would be served by the granting of the application should be reversed. And here the Court properly adopted a policy of non-interference and declined to disturb a decision which could not be said to be unsupported by evidence. The provision in the Act making the Commission's findings of fact conclusive unless "arbitrary or capricious,"[11] coupled with the vagueness of the test adopted for passing upon applications,[12] clearly indicates the intention of Congress to leave the Commission free from judicial interference in its supervision of radio. The desirability of such administrative independence is apparent, since the decisions which the Commission is called upon to make require a technical knowledge beyond the courts. Furthermore, the principles by which broadcasting is to be regulated should be worked out by trial and error, a method to which legalistic reliance on precedent is singularly ill-fitted.[13] Adherence by the Court to the attitude taken in the principal case will keep the law of broadcasting free of a rigidity which might otherwise hamper future development.

From an administrative standpoint, however, the wisdom of the Commission's decision is open to question. Admittedly, in the instant case, the stated intention of the Commission was to foster the purpose of Congress, as expressed in the Davis Amendment, to equalize the distribution of broadcasting facilities. And some precedent for so rigid a compliance with the Amendment may be found in the radical changes in station assignments made in 1928[14] and again

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languages on community organization, safety devices used in the mills, good citizenship, *et cetera*.

7. 62 F. (2d) 854 (App. D. C. 1932).

8. *Id.* at 857. See note 11, *infra*.

9. Such is the assumption of both the Supreme Court and the District Court of Appeals. What disposition was to be made of the frequency abandoned by WJKS is not stated.

10. United States v. American Bond & Mortgage Co., 31 F. (2d) 448 (N. D. Ill. 1929), *aff'd*, 52 F. (2d) 318 (C. C. A. 7th, 1931), *cert. den.* 285 U. S. 538 (1931); Trinity Methodist Church v. Federal Radio Commission, 62 F. (2d) 850 (App. D. C. 1932). *Cf.* Union Bridge Co. v. United States, 204 U. S. 364 (1907).

11. 46 STAT. 844 (1930), 47 U. S. C. SUPP. VI § 96d (1932).

12. The standard of "public convenience, interest or necessity" has been praised as being sufficiently vague to give the Commission free rein in its judgments. Caldwell, *The Standard of Public Interest, Convenience or Necessity as Used in the Radio Act of 1927* (1930) 1 AIR LAW REV. 295.

13. Ashby, *Legal Aspects of Radio Broadcasting* (1930) 1 AIR LAW REV. 331, 347-8. The author has reference to legislative rather than judicial interference, but his arguments seem equally applicable to the instant situation.

14. General Order No. 40, Report, Federal Radio Commission (1928) 48.

in 1930.[15] Until its present decision, however, the Commission had denied renewals of licenses only to those stations that had failed to fulfill its requirements[16] and had limited its application of the Davis Amendment, which has been severely criticized,[17] to rejecting new applications from areas with full quotas.[18] Thus where a station in an under-quota state and zone sought an increase in power which would necessitate interference with established stations in an over-quota state, the Amendment was regarded as only one of several factors bearing upon the public interest and the petition denied.[19] This policy is in accord with that of state public utility commissions which, in analogous situations,[20] protect existing utilities by refusing certificates of public convenience and necessity to companies seeking to operate in a territory already adequately served.[21] Considering the substantial investments at stake,[22] it would seem that in the absence of more compelling reasons than those set forth in the instant litigation[23] the Commission should not depart from such a policy.

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15. See note 5, *supra*.

16. Chicago Federation of Labor v. Federal Radio Commission, 41 F. (2d) 422 (App. D. C. 1930); Report, Federal Radio Commission (1929) 32. But *cf.* Great Lakes Broadcasting Co. v. Federal Radio Commission, 37 F. (2d) 993 (App. D. C. 1930).

17. The criticism has been to the effect that the Amendment is based upon political considerations and is unsound from an engineering standpoint. Masters, *Construction of the Equality Clause in the Davis Amendment* (1931) 1 J. RADIO LAW 1, 5-10; Caldwell, *supra* note 12, at 299; Note (1930) 28 MICH. L. REV. 1032, 1039.

18. Report, *supra* note 14, at 166. *Cf.* Ansley v. Federal Radio Commission, 46 F. (2d) 600 (App. D. C. 1930); Westinghouse Electric & Manufacturing Co. v. Federal Radio Commission, 47 F. (2d) 415 (App. D. C. 1931); Durham Life Insurance Co. v. Federal Radio Commission, 55 F. (2d) 537 (App. D. C. 1931).

19. Reading Broadcasting Co. v. Federal Radio Commission, 48 F. (2d) 458 (App. D. C. 1931). Accord: Strawbridge & Clothier v. Federal Radio Commission, 57 F. (2d) 434 (App. D. C. 1932); Note (1931) 1 J. RADIO LAW 134.

20. Both the Radio Commission and public utility commissions are confronted with the problem of receiving more applications than they can grant. In the case of the Commission physical limitations prevent more than two or three stations from using the same frequency without disastrous interference, while in the case of the utility boards the reasons are economic, the competition resulting from operating two utilities in the same area making it impossible for either to earn a fair profit; but the problem before both is similar. See Caldwell, *supra* note 12, at 308-13.

21. Commissions: *Re* City Cab Service, P. U. R. 1930A, 113 (Conn. P. U. C. 1929); *Re* Cannonball Express Co., P. U. R. 1929A, 131 (Wis. R. C. 1928). Courts: McLain v. Public Utilities Commission, 110 Ohio St. 1, 143 N. E. 381 (1924); Abbott v. Public Utilities Commission, 48 R. I. 196, 136 Atl. 490 (1927).

22. Station WIBO, one of those deleted, had been in operation since 1925, employed 55 persons, had average monthly expenses of $17,000, and represented an investment of $346,000. 53 Sup. Ct. at 631.

23. The decisions of the Federal Radio Commission are not reported. The Commission's summary of its findings in the present case is reprinted in the opinion of the Supreme Court, 53 Sup. Ct. at 631.

VALIDITY OF FEDERAL ESTATE TAX ON SECURITIES OWNED BY NON-RESIDENT ALIEN

A FEDERAL estate tax was levied on foreign stocks and foreign and domestic bonds owned by a British subject who resided in Cuba at the time of his death. The securities were held in New York by representatives of the deceased for the sole purpose of collecting the income. The Supreme Court, after determining, not without difficulty, that the legislative intent was to include the securities in question within the provisions of the Revenue Act,[1] decided that the tax did not violate the due process clause of the Fifth Amendment,[2] even though an inheritance tax levied by a state upon a non-resident who owned securities physically within its borders would be invalid under the Fourteenth Amendment.[3]

The jurisdiction of a state to levy an inheritance tax has been defined in terms of due process, but until recently the meaning of due process in this connection has been far from intelligible. The decisions of the Supreme Court in the past decade, however, show a clearly defined trend toward an interpretation of the provision in the light of considerations of policy.[4] Where formerly a non-domiciliary state's imposition of an inheritance tax had been upheld as not contravening the Fourteenth Amendment,[5] the same tax has now been condemned for the reason that "practical considerations of wisdom, convenience, and justice alike dictate the desirability of a uniform general rule confining the jurisdiction to impose death transfer taxes as to intangibles to the state of the domicile."[6] Due process has therefore been said to prohibit taxing of intangibles by a non-domiciliary state, even though, according to the dissentients, it may accord them or their transfer benefits and protection that might reasonably be regarded as sufficient to support a tax.[7]

With this realization of the actual content of due process, the apparent conflict of the decision of the Court in the instant case with prior holdings

1. Section 303 (b) of the Revenue Act of 1924, 43 STAT. 306 (1924), 26 U. S. C. § 1095b (1926), provides in part that the value of the net estate of a non-resident shall be determined "by deducting from the value of that part of his gross estate which . . . is *situated* in the United States . . ." certain specified deductions (italics supplied). The provision is the same in prior and subsequent acts. See note 12, *infra*.

2. Burnet v. Brooks, 53 Sup. Ct. 457 (March 13, 1933).

3. See note 6, *infra*.

4. For an exhaustive discussion of the cases illustrating this point, see Rottschaeffer, *State Jurisdiction to Impose Taxes* (1933) 42 YALE L. J. 305.

5. Blackstone v. Miller, 188 U. S. 189 (1903).

6. Blackstone v. Miller, 188 U. S. 189 (1903), was overruled in Farmers' Loan and Trust Co. v. Minnesota, 280 U. S. 204 (1930), in which case the state of the obligor's domicile was held without power to impose an estate tax on bonds owned by a non-resident and physically present in the state of his domicile. The same result was reached in Baldwin v. Missouri, 281 U. S. 586 (1930), where the intangibles were physically present in the state attempting to tax. See also Beidler v. South Carolina, 282 U. S. 1 (1930).

7. See dissenting opinions by Mr. Justice Holmes in Farmers' Loan and Trust Co. v. Minnesota, 280 U. S. 204, 216 (1930); Baldwin v. Missouri, 281 U. S. 586, 595 (1930), and by Mr. Justice Stone in Baldwin v. Missouri, 281 U. S. 586, 596 (1930); First National Bank of Boston v. Maine, 284 U. S. 312, 331 (1932).

concerning the constitutionality of state taxes under the Fourteenth Amendment becomes more reconcilable. The Supreme Court, in deciding upon the constitutionality of a state tax, is in a position to define due process in the light of the general welfare of all the states as a whole. And since it is thought that double taxation is destructive of uniformity and harmony, due process is said to permit only the domiciliary state to tax. But when the Supreme Court considers the validity of a federal tax on aliens, it is unable to approach the problem with an international solution as an objective, for its decision will be binding only upon this country. Due process, therefore, becomes that which serves the best interests of the United States in view of the position other nations have adopted. Thus, it is quite understandable that the Court should have found its most persuasive authority for the proposition that the tax under consideration did not contravene the Fifth Amendment in a decision by the House of Lords upholding a precisely similar tax levied by England upon a citizen of the United States.[8] Precedent, moreover, existed for distinguishing between jurisdiction for the purposes of state and jurisdiction for the purposes of federal taxation. Although a domiciliary state may not tax tangible personalty permanently located in another state,[9] a federal tax on the use of foreign built yachts by citizens of the United States has been considered applicable to a yacht which never came within the territorial waters of the United States.[10]

The Court's interpretation of the due process clause of the Fourteenth Amendment as forbidding double taxation of intangibles has functioned to produce a freer capital market within the United States.[11] It is possible that the reversal of position in the principal case in respect to international taxation will have the opposite effect of diverting investments from this country. To escape the federal estate tax on foreign and domestic bonds and foreign stocks, non-resident aliens will remove the securities now physically present here to the domiciliary countries. The income earned by the securities, instead of being collected and used in this country, will be remitted to the domicile and seek investment in other markets. Furthermore, domestic stocks will find almost no market in foreign countries, since by the express provisions of the Revenue Act these securities are subject to an estate tax regardless of their physical situs.[12] Nevertheless, the decision is fully justified as an assurance

8. Winans v. Attorney-General, (1910) A. C. 27.

9. Frick v. Pennsylvania, 268 U. S. 473 (1924).

10. United States v. Bennett, 232 U. S. 299 (1914).

11. See Rottschaeffer, *supra* note 4.

12. Section 303(d) of the Revenue Act of 1924, 43 STAT. 307 (1924), 26 U. S. C. § 1095d (1926), provides that stock in a domestic corporation shall be deemed "property within the United States." The Board of Tax Appeals, in Burnet v. Brooks, 22 B. T. A. 71 (1931), held that the securities involved in the instant case were not meant to be taxed under the Revenue Act of 1924, reasoning that Section 303(d), *supra*, implies that securities other than stock in a domestic corporation are not to be regarded as "property within the United States." The Circuit Court of Appeals, in Burnet v. Brooks, 60 F. (2d) 890 (C. C. A. 2d, 1932), affirmed the Board's decision in reliance on the negative implication of Section 303(d). In First National Bank of Boston v. Maine, 284 U. S. 312 (1932), an estate tax by the state of a corporation's domicile on stock of the corporation owned by a non-resident was declared invalid.

to the United States of a tactical position in the movement to eliminate international double taxation, which has assumed increasing proportions since the World War.[13] In a draft convention presented to the League of Nations,[14] a proposal was made that the domiciliary country should deduct from its succession tax on "immovable property, furniture and fittings belonging thereto" the amount of duty payable in the country in which the assets are situated.[15] Because of the difficulty presented by "varying legal conceptions," no conclusion was reached as to which country should be permitted to tax testamentary transfers of intangibles.[16] The solution to this problem was thought to lie in reciprocal arrangements between the countries.[17] A contrary holding in the principal case, therefore, would have resulted in a self-imposed restriction placing the United States in an undesirable bargaining position to secure protection for its own citizens in future agreements with other countries.

Construction of Deed Alleged to Create Defeasible Estate

Commissioners were appointed by an act of the Missouri legislature in 1822 to receive proposals for a donation of land to be used as a county court house, to select a site, to accept the gift, and to cause a conveyance to be executed to the justices of the county court and their successors in office forever in trust for the use of the county. *X* and *Y* granted the land forever in trust for the use of the county "but upon this condition nevertheless that the said piece of ground shall be used and appropriated forever as the site on which the court house . . . shall be erected." A court house was built and used as such until 1930, when the courts were moved to a new building. The heirs of *X* instituted suit, claiming an interest in the land on the ground that either a determinable fee or an estate upon condition subsequent had been created by the original grant. It was admitted by counsel for both parties that any trust created by the deed was a dry trust executed by the statute of uses. It was also agreed that the conveyance was not a dedication of the land for a public use. The court held that the intention of the grantor was not to convey either a determinable or a conditional fee and that the heirs of the grantors had no interest in the property.[1]

A determinable fee simple is an estate created with a special limitation which delimits the duration of an interest in land[2] and is usually established by

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13. See Herndon, Relief from International Income Taxation (1932); *Taxation of Foreign and National Enterprises*, League of Nations, Geneva (1932).

14. Report presented by the General Meeting of Government Experts on Double Taxation and Tax Evasion to the League of Nations, Geneva (1923).

15. Or "The actual amount of duty levied by the country of domicile on assets situated in another country," whichever is lower. *Id.* at 22.

16. See Carroll, *Double Taxation Relief* (1927) Trade Information Bulletin No. 523.

17. See Report, *supra* note 14, at 22.

1. Chouteau v. City of St. Louis, 55 S. W. (2d) 299 (Mo. 1932).

2. Property Restatement (Am. L. Inst. 1929) § 22; Note (1925) 34 Yale L. J. 444; Note (1930) 28 Mich. L. Rev. 1015.

the use of appropriate words such as "so long as," "until," or "during,"[3] where these words are shown to be a part of the grant itself.[4] The argument advanced by some that after the statute of Quia Emptores, abolishing tenure, a determinable fee could not exist[5] has recently been shown to be erroneous in theory, and the American courts have long recognized such estates.[6] In the instant case the court decided that no determinable fee was created because appropriate words were not used and because the clause under consideration did not form a part of, but was superadded to, the original grant. The interest, if any, of the heirs, therefore, was at most a power of termination[7] after breach of condition subsequent.

Courts have frequently held that provisions analogous to those in the principal case were inserted in deeds merely to show the purpose for which the grantor intended the property to be used.[8] In other cases, similar clauses have been considered as creating a trust rather than a conditional estate, with the result that they might be enforced by a court of equity but that a breach thereof would not give a power of termination to the heirs of the grantor.[9] Still other courts have construed such provisions as creating a covenant, breach of which, though it might give rise to an action for damages, would not affect the title.[10] But even if it be conceded that the grant in the instant case created a fee upon condition subsequent, it might be argued that inasmuch as the land had been used for the purpose specified for over a century there had been a sufficient compliance with the terms of the grant to render a breach of the condition immaterial.[11] Again, it is probable, as the court indicated, that

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3. See note 2, *supra*, and note 6, *infra;* Jamaica Aqueduct Corp. v. Chandler, 91 Mass. 159 (1864); First Universalist Society of North Adams v. Boland, 155 Mass. 171, 29 N. E. 524 (1892); Pond v. Douglas, 106 Me. 85, 75 Atl. 320 (1909); Sperry v. Pond, 5 Ohio 387 (1832).

4. 1 TIFFANY, REAL PROPERTY (2d ed. 1920) § 90.

5. GRAY, RULE AGAINST PERPETUITIES (3d ed. 1915) §§ 31-42; Zane, *Determinable Fees* (1904) 17 HARV. L. REV. 297.

6. Powell, *Determinable Fees* (1923) 23 COL. L. REV. 207; Vance, *Rights of Reverter* (1927) 36 YALE L. J. 593; 1 TIFFANY, *op. cit. supra* note 4, §§ 93 *et seq.*

7. The phrase "power of termination" is used in preference to "right of re-entry" because the heir has not a right but a power and under modern law the estate may usually be terminated in other ways than by a re-entry. PROPERTY RESTATEMENT, *op. cit. supra* note 2, §§ 24, 27.

8. First Presbyterian Church v. Bailey, 11 Del. Ch. 116, 97 Atl. 583 (1916); Downen v. Rayburn, 214 Ill. 342, 73 N. E. 364 (1905); Episcopal City Mission v. Appleton, 117 Mass. 326 (1875); Greene v. O'Connor, 18 R. I. 56, 25 Atl. 692 (1892).

9. Stanley v. Colt, 72 U. S. 119 (1866); Bristol Baptist Church v. Connecticut Baptist Convention, 98 Conn. 677, 120 Atl. 497 (1923); South Kingston v. Wakefield Trust Co., 48 R. I. 27, 134 Atl. 815 (1926); Gabert v. Olcott, 86 Tex. 121, 23 S. W. 985 (1893).

10. Columbia Ry. v. South Carolina, 261 U. S. 236 (1923); Hawley v. Kafitz, 148 Cal. 393, 83 Pac. 248 (1905); Curtis v. Board of Education, 43 Kan. 138, 23 Pac. 98 (1890); Chicago, Texas, and Mexican Central Ry. Co. v. Titterington, 84 Tex. 218, 19 S. W. 472 (1892).

11. Mead v. Ballard, 74 U. S. 290 (1868); Hunt v. Beeson, 18 Ind. 380 (1862); Sumner v. Darnell, 128 Ind. 38, 27 N. E. 162 (1890).

the intention of the grantor was merely to make the deed conform to the terms of the legislative enactment giving the commissioners the power to accept the land for the county.[12] And finally, the absence here of a clause providing for a power of termination in case of a breach of the condition indicates a lack of intention on the part of the grantor to create a conditional fee.[13]

On the other hand, it should be noted that in the principal case the words used in the qualifying clause, "upon this condition," have frequently been said to be peculiarly appropriate to the creation of a condition subsequent[14] and to require enforcement as such. Ample support, therefore, might be found for a decision in accord with either plaintiffs' or defendants' contentions; and if the alleged breach of the condition had occurred within a comparatively short time after the execution of the deed,[15] the court would have been fully justified in declaring the defendants' interest to be forfeited. But since the creation of the grant preceded the institution of suit by more than a century, the court's conclusion in the instant case is probably the more desirable. It obviates any difficulties attendant upon locating the heirs[16] and avoids a restraint upon the free alienation of the land.[17]

POWER OF A SURETY COMPANY TO LIMIT ITS LIABILITY ON A DEPOSITARY BOND

A SURETY company executed a bond to the state of Pennsylvania stipulating that a bank would keep all moneys of the commonwealth deposited with it and would repay the full sum when and as requested by the state. By the terms of the bond the surety company held itself "bound as principal" and agreed to answer for the bank's debt "whether the said First National Bank be first pursued or not." Eight years later, the company served notice upon the proper officials of the state to collect all deposits secured by the bond within thirty days, and declared that if the notice were not complied with, its liability would cease at that time. The state took no action under the notice. Subsequently the bank failed and the state brought suit against the surety company.[1]

12. *Cf.* Stuart v. Easton, 170 U. S. 383 (1898); Wright v. Morgan, 191 U. S. 55 (1903); Harris v. Shaw, 13 Ill. 456 (1851); Kerlin v. Campbell, 15 Pa. 500 (1850); see Mo. Laws (1822) c. 40.

13. *Cf.* Garfield Township v. Herman, 66 Kan. 256, 71 Pac. 517 (1903); Rawson v. Inhabitants of School District, 89 Mass. 125, 131 (1863); Haydon v. St. Louis & San Francisco Rr. Co., 222 Mo. 126, 121 S. W. 15 (1909).

14. PROPERTY RESTATEMENT, *op. cit. supra* note 2, § 24; 1 TIFFANY, *op. cit. supra* note 4, § 78; 3 THOMPSON, REAL PROPERTY (1924) § 1962; see Mead v. Ballard, 74 U. S. 290 (1868); *cf.* Trustees of General Assembly of Presbyterian Church v. Alexander, 46 S. W. 503 (Ky. 1898); Second Universalist Society v. Dugan, 65 Md. 460, 5 Atl. 415 (1886); Gaskins v. Williams, 235 Mo. 563, 139 S. W. 117 (1911).

15. *Cf.* Daniels v. Wilson, 27 Wis. 492 (1871); Pepin County v. Prindle, 61 Wis. 301, 21 N. W. 254 (1884).

16. *Cf.* Sapper v. Mathers, 286 Pa. 364, 133 Atl. 565 (1926).

17. If the use had resulted in actual benefit to the grantors individually, a different result might have been reached. Horner v. Chicago, Milwaukee, & St. Paul Ry. Co., 38 Wis. 165 (1875); see Downen v. Rayburn, *supra* note 8; Rawson v. Inhabitants of School District, *supra* note 13, at 129.

1. Commonwealth v. National Surety Co., 164 Atl. 788 (Pa. 1932).

In most states, contrary to the prevailing view at common law,[2] it is provided by statute that when a creditor's claim has matured, a surety may limit the duration of its liability by serving notice upon the creditor to proceed against the debtor within a reasonable time.[3] In Pennsylvania, however, even at common law a surety had power to limit its liability in this way,[4] and the statute merely provides that the surety "shall not be discharged . . . unless such notice shall be in writing and signed by the party giving the same."[5] Since this statute limits rather than enlarges the surety's power, there still remains open the question of the circumstances under which a surety may thus be released. In the instant case the court held that the surety, by binding itself as principal, had waived its power to compel the state to demand payment from the bank and consequently remained liable to the state despite the notice. A concurring opinion argued further that although bonds executed by surety companies for a consideration are in form contracts of suretyship, they are in all essentials contracts of insurance and should be subject to the same rules of construction and interpretation.[6] Except as provided in the policy an insurer may not cancel the contract without the insured's consent,[7] and where there is a beneficiary with a vested interest, his consent also must be obtained.[8] The commonwealth in this case had such an interest in the bond from the date of its execution, and there was no provision permitting the surety to limit its liability. If the bond is looked upon as a contract of insurance, therefore, the surety company should not be allowed to release itself without the state's consent.

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2. Lawyers' Surety Co. v. Ayrault, 165 App. Div. 254, 150 N. Y. Supp. 800 (1914); Harris v. Newell, 42 Wis. 687 (1877). *Contra*: Cope v. Smith, 8 S. & R. 110 (Pa. 1822); *cf.* Pain v. Packard, 13 Johns, 174 (N. Y. 1816). However, the surety could in equity compel the debtor to make payment. Taylor v. Beck, 13 Ill. 376 (1851).

3. Notice to proceed on a debt is permitted, "after a right of action has accrued thereon." MO. STAT. ANN. (1932) § 2931; OHIO GEN. CODE (Page, 1926) § 12191; TENN. CODE (1932) § 7526. A notice given before maturity of the claim has no legal operation. Scales v. Cox, 106 Ind. 261, 6 N. E. 622 (1886). Since a bank is under no duty to repay a depositor until actual demand is made, Phelps v. Bostwick, 22 Barb. 314 (N. Y. 1856); N. Joachimson v. Swiss Bank, (1921) 3 K. B. 110; and since the state had made no demand, no right of action had accrued prior to the giving of notice. It might be argued that this circumstance is sufficient to except the case from the operation of the statute. The court did not consider the question, however, apparently assuming that a deposit is due at all times.

4. Cope v. Smith, *supra* note 2.

5. PA. STAT. ANN. (Purdon, 1930) tit. 8, § 21.

6. Geo. A. Hormel and Co. v. American Bonding Co., 112 Minn. 288, 128 N. W. 12 (1910), annotated fully in (1911) 33 L. R. A. (N.S.) 513; Young v. American Bonding Co., 228 Pa. 373, 77 Atl. 623 (1910); Piedmont Guano and Mfg. Co. v. Morris, 86 Va. 941, 11 S. E. 883 (1890) (guaranty and suretyship distinguished).

7. Artificial Ice Co. v. Reciprocal Exchange, 192 Iowa 1133, 184 N. W. 756 (1921); Levan v. Pottstown, Phoenixville Ry. Co., 279 Pa. 381, 124 Atl. 89 (1924).

8. Brown v. Farmer's State Bank, 70 Ind. App. 182, 123 N. E. 224 (1919); Coleman v. Northwestern Insurance Co., 273 Mo. 620, 201 S. W. 544 (1917).

Moreover, even if the clause binding the surety as principal were not in itself deemed sufficient ground for the decision, considerations of policy and of the probable intent of the parties would justify the court in excepting the surety company in this case from the operation of the statute.[9] At the time the notice was served upon the state, the bank was apparently weak. If a run could be avoided the bank might have been able to strengthen its position, but a demand by the state for its entire deposit would probably have precipitated a run and might even have forced the bank into immediate insolvency. If, therefore, the surety company had succeeded in compelling the state to withdraw its funds, the bank and its other customers would have been seriously injured; the state would have gained nothing, for its deposit was insured; and only the surety company would have derived a benefit. Unless this result was clearly intended by the parties, the public interest would seem sufficient to forbid it. But the very purpose of the depositary bond, and the consideration for which the bank paid the surety its premiums, was to indemnify the state in the event of the bank's insolvency. Had the bank and the surety company, in executing the bond, intended that the surety could forestall the contingency by anticipating the bank's insolvency and compelling the state to withdraw its funds, a power so detrimental to the bank would surely have been stipulated in terms. In the absence of such express provision the power should not be implied.[10]

Execution of Replevin Judgment in the Alternative for Possession of Chattel or its Value

An insurance broker contracted with the lessee of a building to install in it a sprinkler system. The system, which was to remain affixed to the building for the balance of the lessee's term, was to be considered personal property and title to it was to remain in the broker. A new lessee later took possession of the building with notice of the broker's title to the sprinkler system, but refused to surrender the chattel to him. The broker thereupon brought an action of replevin, and obtained a judgment awarding him damages and a right to possession of the chattel, or, as an alternative if possession could not be secured, the value of the chattel as installed in the building. The New York Court of Appeals in reversing this judgment held that as an alternative to possession the plaintiff was entitled only to the value of the sprinkler system after removal from the building. To avoid the profit that such a measure of value would give to the defendant if he were to retain the chattel, the court declared that a replevin judgment can be satisfied by payment of

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9. *Cf.* Cedar County v. Johnson, 50 Mo. 225 (1872); Johnson County v. Gilkeson, 70 Mo. 645 (1879). But see Manitowc County v. Truman, 91 Wis. 1, 14, 64 N. W. 307, 310 (1895).

10. If the notice had been treated as an anticipatory repudiation, the court would have been justified in holding that the state did not act unreasonably in failing to withdraw the deposit in view of the surrounding circumstances. The damages, therefore, would still be the full amount of the loss. O'Neil v. Supreme Council American Legion of Honor, 70 N. J. Law 410, 57 Atl. 463 (1904).

the chattel's value only when the chattel itself has been removed from the jurisdiction or is otherwise unavailable.[1]

When a money recovery is sought for the loss of a chattel which has a higher value to the plaintiff than to the defendant, the well-established rule that the plaintiff is entitled to the value of the property to him[2] seems fair and reasonable. When, however, a defendant has acquired possession of premises with notice that plaintiff owns a fixture upon them and is entitled to remove it, a different question arises. In such circumstances a judgment for plaintiff measuring the chattel's value by its worth to the plaintiff would enable the defendant to profit from the transaction, for it would permit him to retain and use the chattel at a cost less than its value to him. Since the defendant presumably is the wrong-doer, such a result seems inequitable. On the other hand a similar judgment awarding the plaintiff the value of the chattel to the defendant would give a profit to the plaintiff, since it would allow him a sum larger than he could realize by selling the chattel in the condition in which he is entitled to it. While neither party has a legal right to the profit which the court in these circumstances must apparently allocate to one or the other of them, the claim of the plaintiff seems less inequitable than that of the defendant. The court in the principal case, however, reached a contrary conclusion,[3] apparently basing its decision upon the theory that the law seeks merely to compensate a plaintiff for his loss.[4] This decision has the somewhat startling implication that the law will permit a person to seize property which has a greater value to him than to its owner, and to retain it on payment of whatever lesser value the chattel has to the person losing it.

To avoid giving the defendant such an advantage the court attempted to make of the replevin action a strictly possessory remedy, holding that in such an action neither party can resort to the alternative judgment for the chattel's value if the chattel itself is available. In its effort to deprive the defendant of the privilege of electing to retain the chattel,[5] the court thus at the same

1. I. Tanenbaum Son & Co. v. C. Ludwig Baumann & Co., 261 N. Y. 85, 184 N. E. 503 (1933).

2. Thus where the plaintiff's right is to the possession of the chattel attached to property, and the fact of its attachment increases the chattel's value, the plaintiff may recover the larger value. Starkey v. Kelly, 50 N. Y. 676 (1872); Blake-McFall Co. v. Wilson, 98 Ore. 626, 193 Pac. 902 (1920); Thompson v. Pettitt, 10 Q. B. 101 (1847). But *cf.* Pennybecker v. McDougal, 48 Cal. 160 (1874). Where the difference in value arises from a personal or sentimental interest in the chattel, there being no market value for it, plaintiff may recover the value of the goods to him. Iler v. Baker, 82 Mich. 226, 46 N. W. 377 (1890); Swank v. Elwert, 55 Ore. 487, 105 Pac. 901 (1910).

3. Other courts have reached the same decision. Gosliner v. Briones, 187 Cal. 557, 204 Pac. 19 (1921); Walker v. Schindel, 58 Md. 360 (1882); Moore v. Wood, 12 Abb. Prac. 393 (N. Y. 1860); Johnston v. The Albany Dry Goods Co., 12 App. Div. 608, 43 N. Y. Supp. 164 (3d Dep't 1897). But *cf.* Smyth v. Stoddard, 203 Ill. 424, 67 N. E. 980 (1903).

4. Demogue, *Validity of the Theory of Compensatory Damages* (1918) 27 YALE L. J. 585.

5. Other courts have found a similar restriction desirable. Black v. Hilliker, 130 Cal. 190, 62 Pac. 481 (1900); Ladd v. Stratton, 122 Kan. 274, 252 Pac. 234 (1927); Koelling v. August Gast Bank Note & Lithographing Co., 103 Mo. App. 98, 77 S. W. 474 (1903); Lembeck & Betz Brewing Co. v. Tarrant, 79 N. J. L. 372, 75 Atl. 474 (1910); General Motors Acceptance Corp. v. American

time placed a similar restriction upon the plaintiff.[6] The harshness of this restriction will be avoided if the trial court in its discretion permits a plaintiff by amendment to change his form of action after verdict or even after judgment[7] to one entitling him to recover the chattel's value as found by the jury.[8] But unless such an amendment is allowed, the court's restriction upon the replevin action will require a plaintiff to elect whether to seek his chattel or its value before he knows what value the law will attribute to it and before he knows when or under what circumstances his judgment may be executed.[9] Other jurisdictions avoid placing the plaintiff at this disadvantage by providing that in such an action he may execute an alternative judgment in his favor for either the return of the chattel or for its value.[10] The broader

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Surety Co. of New York, 108 N. J. L. 229, 157 Atl. 98 (1931). But *cf.* Lundlade v. Pierce, 95 Cal. App. 192, 272 Pac. 329 (1928).

6. The New York Court has held in previous cases that the plaintiff should have no option in enforcing his judgment. Dwight v. Enos and Janes, 9 N. Y. 470 (1854); Fitzhugh v. Wiman, 9 N. Y. 559 (1854); but there was no question in these cases of a different value to the different parties, or of the expense of detaching the chattel from a building.

7. The supreme court in its discretion may set aside or vacate judgments and permit pleadings to be served, in furtherance of the ends of justice. Vanderbilt v. Schreyer, 81 N. Y. 646, 648 (1880). Plaintiffs have been allowed to amend after judgment to set forth a new cause of action even though the judgment had previously been satisfied, Hatch v. The Central National Bank, 78 N. Y. 487 (1879), and to allow interested parties who had not appeared to enter a defense. Vanderbilt v. Schreyer, *supra;* Ladd v. Stevenson, 112 N. Y. 325, 19 N. E. 842 (1889). But the plaintiff must show that refusal to vacate and amend will result in sufficient injustice to warrant a proceeding directly opposed to the usual rule of *res judicata.*

8. The primary object of the replevin action is the return of the property. An action of conversion or assumpsit would lie for the value of the chattel as of the time of the conversion. 2 SEDGWICK ON DAMAGES (9th ed. 1912) §§ 492, 497. That such an action would lie in the principal case, *cf.* Gosliner v. Briones; Walker v. Schindel; Moore v. Wood; and Johnston v. The Albany Dry Goods Co., all *supra* note 3.

9. After a final judgment, appeal may substantially delay the enforcement of the plaintiff's legal rights. Until a judgment is issued and the time for taking an appeal passed, there is little certainty or security in holding the judgment, since obsolescence of the chattel or insolvency of the plaintiff may present issues which were not foreseen but which would make a change of remedy desirable.

10. § 1124 of the NEW YORK CIVIL PRACTICE ACT requires that a replevin judgment award possession, or in the event possession cannot be had, the chattel's value as of the time of trial. Similar statutes are found in many states. *Cf.* ARK. DIG. STAT. (Crawford & Moses, 1921) § 8654; COLO. ANN. STAT. (Mills, 1930) § 4399; KAN. REV. STAT. ANN. (1923) c. 60, § 1010; N. C. COMP. LAWS ANN. (1913) § 7682; ORE. CODE ANN. (1930) c. 2, § 1503; W. VA. CODE (1931) c. 55, art. 6, § 6. In some states provisions for an alternative judgment are accompanied with a further provision that the plaintiff shall have the option to enforce an alternative judgment for either the return of the property or the money value. ARIZ. CODE (Struckmeyer, 1928) § 4352; IOWA CODE (1931) § 12195; KY. STAT. (Carroll, 1930) § 1665; MICH. COMP.

remedy thus provided gives the plaintiff more adequate relief without placing the defendant under any liability not already incurred.

Allocation of Loss for Tax Purposes When Building is Demolished Under Terms of Lease

Recent Revenue Acts[1] provide that in computing net income there shall be allowed as deductions losses sustained during the taxable year and "not compensated for by insurance or otherwise." In interpreting this provision the District of Columbia Court of Appeals has recently held that a property owner who leased land with the stipulation that the lessee demolish the existing building and erect a new structure to revert to the lessor on the expiration of the lease, may not deduct the value of the old building from his net income for the year in which it was demolished, but must amortize the loss over the period of the lease.[2]

Objection to the decision may be raised on the ground that small property owners do not keep their accounts in such form as to provide for long-term amortization. Moreover, it is possible, as the complainant contended in the principal case, that the lessor did not consider the value of the demolished building in determining the rental under the new lease, but viewed the demolition as a loss. Nevertheless, the court's ruling appears sound. The property owner did not sustain a loss for which he was not compensated "by insurance or otherwise"; on the contrary, he secured a long-term lease, the rent thereon, a new building constructed at no cost to himself, and prospective title to the new building at the expiration of the lease. The value of the demolished structure may thus be considered one of his expenses in securing the new lease, similar to other costs involved in the lease negotiations. It was part of the lessor's investment and, as a capital expenditure, should be amortized over the full lease period rather than deducted all in one year.

This reasoning is in accord with previous holdings of the federal courts and of the United States Board of Tax Appeals. In a similar case[3] a Circuit Court of Appeals held that if the lessors added to their assets or if they substituted real property for another form of capital assets, the cost of working out the change should be classified as a contribution to assets and should not be immediately deducted as an expense charged against the income account. In that case the court emphasized a section in the Revenue Act of 1924 which provided that no deduction should be made for "any amount paid out for

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Laws (1929) §§ 14840, 14844; Mo. Rev. Stat. (1929) § 2565; Pa. Stat. Ann. (Purdon, 1930) tit. 12, § 1836.

1. Revenue Act of 1921, 42 Stat. 240, 255; Revenue Act of 1932, § 23 (e, f).

2. Spinks Realty Co. v. Burnet, 62 F. (2d) 860 (App. D. C. 1932).

3. Young v. Commissioner of Internal Revenue, 59 F. (2d) 691 (C. C. A. 9th, 1932). *Cf.* Anahma Realty Corp. v. Commissioner of Internal Revenue, 42 F. (2d) 128 (C. C. A. 2d, 1930); Manning v. Commissioner of Internal Revenue, 7 B. T. A. 286 (1927); Ward v. Commissioner of Internal Revenue, 7 B. T. A. 1107 (1927); Pig & Whistle Co. v. Commissioner of Internal Revenue, 9 B. T. A. 668 (1927); Eysenbach v. Commissioner of Internal Revenue, 10 B. T. A. 716 (1928).

new buildings or for permanent improvements or betterments made to increase the value of any property or estate." [4]

Approved accounting methods also support the decision in the principal case. The cost of permanent assets, serving a productive use for a period of years, is usually spread as an expense over the period of use.[5] And in this connection it is proper to consider not the year, but the entire period of production as the fiscal unit of time.[6] Furthermore, the cost of a building, for accounting purposes, should include the necessary incidental expenses such as the removal of a previous building occupying the site; [7] and the cost of demolishing a building for the purpose of reconstruction is regarded as a capital investment in the new structure.[8] By similar analysis the costs involved in securing a new lease, including the value of a building demolished to make room for a new structure provided for in the lease, are part of the cost of acquiring a fixed asset and should be amortized over the life of that asset.

Applicability of Substituted Service of Process Statutes to Federal Corporations

The Federal Land Bank of Columbia, South Carolina, was organized to serve and is doing business in Florida, Georgia, and North and South Carolina.[1] Suit was instituted against it in North Carolina and service of process was attempted under a statute providing that "every corporation having property or doing business in this state, whether incorporated under its laws or not," must submit to substituted service upon the secretary of state if it does not have a local agent upon whom process can be served.[2] The Supreme Court of North Carolina held that the statute is applicable only to foreign corporations doing business in North Carolina by the comity of the state; that the Federal Land Bank, since it derives its right to do business solely from Congress, is not a foreign corporation within the power of the state to exclude; and that therefore the provisions of the act are not applicable to it.[3]

The fact that the Federal Land Bank is a federal corporation cannot be used to secure federal jurisdiction, because the required 50% of its stock is not owned by the federal government.[4] Moreover, the present decision that

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4. Revenue Act of 1924, 43 Stat. 271, 26 U. S. C. § 956 (a) (2) (1926). This provision also appears in the Revenue Act of 1921, 42 Stat. 242, and in the Revenue Act of 1932, § 24 (a) (2).
5. Hatfield, Accounting (1928) 131.
6. *Id.* at 133-4.
7. *Id.* at 85.
8. 1 Montgomery, Auditing Theory and Practice (1922) 645.
1. 39 Stat. 360 (1916), 12 U. S. C. § 641 (1926); Moody's Banks & Finance (1932) 1980.
2. N. C. Code Ann. (Michie, 1931) § 1137.
3. Leggett v. Federal Land Bank of Columbia, S. C., 204 N. C. 151, 167 S. E. 557 (1933).
4. 43 Stat. 941 (1925), 28 U. S. C. § 42 (1926).

service of process cannot be secured in North Carolina precludes suit against it in the federal courts of that state on the ground of diversity of citizenship.[5] All actions against the Federal Land Bank arising in North Carolina, therefore, must now be brought in South Carolina where its office is located and where service on its officials can be secured, unless it consents to service elsewhere.

Most of the other states have similar statutes stipulating for substituted service, and it is true that they were originally upheld on the ground that the power of a state to exclude a foreign corporation includes the power to impose upon it reasonable regulations and requirements.[6] But many courts, contrary to the present decision, have not found it necessary to follow the negative of the proposition and to hold that whenever the state cannot exclude, it cannot prescribe for substituted service.[7] To meet the lack of any real consent and to avoid the necessity of resorting to a fiction, it has been said that jurisdiction may be based upon the mere presence of the corporation within the state.[8] And one federal court [9] has recommended that if a foreign corporation voluntarily does business within the state it should be bound by the reasonable regulations of that state on the ground that it has impliedly consented to them.[10] The limitations imposed by the courts are that the method of service

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5. See Federal Conformity Act, 43 STAT. 1264 (1925), 28 U. S. C. § 112 (1926).

6. Lafayette Insurance Co. v. French, 18 How. 404 (U. S. 1855), is the leading case on this doctrine. See HENDERSON, POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW (1918) 77; Cahill, *Jurisdiction over Foreign Corporations and Individuals who Carry on Business Within the Territory* (1917) 30 HARV. L. REV. 676; Scott, *Jurisdiction over Nonresidents Doing Business Within a State* (1919) 32 HARV. L. REV. 871.

7. See Cahill, *supra* note 6.

8. Barrow Steamship Co. v. Kane, 170 U. S. 100 (1898); International Harvester Co. v. Kentucky, 234 U. S. 579 (1914); Louisville & Nashville Rr. Co. v. Chatters, 279 U. S. 320 (1929); Erikson v. Frink Co., Inc., 16 F. (2d) 498 (D. Mass. 1926); Tauza v. Susquehanna Coal Co., 220 N. Y. 259, 115 N. E. 915 (1917).

9. Smolik v. Philadelphia & Reading Coal & Iron Co., 222 Fed. 148 (S. D. N. Y. 1915).

10. A state cannot exclude a corporation engaged only in interstate commerce, yet in some states statutes have been sustained providing that such corporations must appoint an agent for process, and thus be brought within the jurisdiction of the state. International Harvester Co. v. Kentucky, *supra* note 8. Compare also statutes providing for securing judgments against partnership assets when some of the partners are non-residents and service of process upon them cannot be obtained. Sugg v. Thornton, 132 U. S. 524 (1889). The judgment in such cases, however, is good only against the partnership assets, and not against the individual assets of a partner outside the state. In Flexner v. Farson, 268 Ill. 435, 109 N. E. 327 (1915), the Illinois court regarded as unconstitutional a Kentucky statute providing that all foreign partnerships, unincorporated associations and individuals doing business within the state must submit to constructive service upon their agents. This same statute had been upheld by the Kentucky court in Guenther v. American Steel Hoop Co., 116 Ky. 580, 76 S. W. 419 (1903). For arguments that the

should be reasonable and one in which due notice is given,[11] and that the requirements of the statute should not place any greater burden upon the non-resident than is placed upon the residents of the state.[12]

In the instant case it was not said that North Carolina may not for any purposes classify the Federal Land Bank as a foreign corporation, but the opinion indicates that the court found difficulty in so conceiving it. No case involving an interpretation of a service of process statute has been found in which there was discussed the question of whether a given state should consider a federal corporation foreign or domestic. And the problem has not been raised in any circumstances as to Federal Land Banks. However, in the application of statutes providing for levying attachment against foreign corporations,[13] statutes regulating the giving of security for costs in law suits,[14] pleading statutes,[15] and taxation statutes,[16] the New York courts have followed the rule that a national bank[17] is domestic to the state in which it is located and foreign to all other states.[18] Federally incorporated railroads and insurance companies have also been classified as foreign corporations,[19] although Pennsylvania has decided that a federally incorporated railroad is not foreign to Pennsylvania.[20] In the instant case, therefore, the court would have been fully justified in holding that the Federal Land Bank should be considered a foreign corporation doing business in North Carolina, and in applying to it the statutory requirements for substituted service of process.

Federal Land Banks, Federal Intermediate Credit Banks, the Reconstruction Finance Corporation and other federal corporations are at present carrying on a large amount of business throughout the entire country, and the present legislative tendency is to increase both their number and their activities. The most satisfactory solution of the jurisdictional problems involved would clearly be for Congress, in the incorporating acts, to state definitely its intent as to the jurisdiction in which the corporations are to sue and be sued, and the extent of state control to be permitted. But in the absence of

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reasoning in the *Guenther* case rather than that in the *Flexner* case should be followed, see Cahill; Scott, both *supra* note 6.

11. Wuchter v. Pizzutti, 276 U. S. 13 (1928).

12. Moredock v. Kirby, 118 Fed. 180 (C. C. W. D. Ky. 1902).

13. Bowen v. First National Bank of Medina, 34 How. Pr. 408 (N. Y. 1867).

14. National Park Bank v. Gunst, 1 Abb. New Cases 292 (N. Y. 1876); Beckham v. Hague, 44 App. Div. 146, 60 N. Y. Supp. 767 (1899).

15. First National Bank of Northampton v. Doying, 13 Daly 509, 11 N. Y. Civ. Pr. 61 (1886).

16. Cooke v. State National Bank of Boston, 3 Abb. Pr. (N. S.) 339, 50 Barb. 339 (N. Y. 1867); *In re* Cushing's Estate, 40 Misc. 505, 82 N. Y. Supp. 795 (Sur. Ct. 1903).

17. The National Banking Act provides that the national banks are to sue and be sued in the state and federal courts where the banks are located. 18 STAT. 320 (1875), 12 U. S. C. § 94 (1926).

18. See cases cited notes 13, 14, 15 and 16, *supra*.

19. Daly v. The National Life Insurance Co. of the U. S. A., 64 Ind. 1 (1878); Caledonian Coal Co. v. Baker, Justice, 12 N. M. 456, 78 Pac. 624 (1904).

20. Eby v. Northern Pacific Rr. Co., 13 Phila. 161 (Pa. 1879); Commonwealth v. Texas & Pacific Rr. Co., 98 Pa. 90 (1881).

Congressional action there is no reason why a state court should hesitate to apply its service of process statutes to federal corporations. The Supreme Court and the lower federal courts have said nothing to forbid it; on the contrary they have approved recurrent attempts to substitute for outworn doctrine in the matter a rule of practical convenience.[21]

VALIDITY OF TRUSTS IN FAVOR OF ANIMALS

IN a recent New York decision a testamentary trust established for the benefit of, and limited upon the lives of, five household pets and one human being was declared invalid on the ground that such a trust violated the New York statute forbidding the suspension of the absolute ownership of personal property for a period longer than two lives in being.[1] The common law rule against perpetuities insofar as it forbids only remoteness of vesting would not apply to the instant case, since the interest following the trust for the domestic animals was vested.[2] More serious difficulty is encountered in the general requirement that every non-charitable trust have a definite *cestui* who can demand its enforcement.[3] This objection would be avoided if the trust in the instant case could be considered charitable;[4] but the rule that a charitable trust must be for the benefit of the public rather than for definite or ascertainable persons seems to preclude such a possibility.[5]

But classification of the trust in the principal case as charitable is not essential to its validity, since the trustee has been held privileged to perform in several types of non-charitable trusts, primarily those for funerals, monuments, manumission, and masses, without a *cestui* who could demand enforcement.[6] According to one commentator funeral expenses, the only real

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21. Sugg v. Thornton, *supra* note 10; Barrow Steamship Co. v. Kane; International Harvester Co. v. Kentucky, both *supra* note 8; Smolik v. Philadelphia & Reading Coal & Iron Co., *supra* note 9.

1. *In re* Howells' Estate, 145 Misc. 557, 260 N. Y. Supp. 598 (Sur. Ct. 1932).

2. Whether such trusts are limited in duration by the rule against perpetuities itself or by a distinct rule created for the purpose, need not be discussed as the result is the same in either case. See Smith, *Honorary Trusts and the Rule Against Perpetuities* (1930) 30 COL. L. REV. 60.

3. Filkins v. Severn, 127 Iowa 738, 104 N. W. 346 (1905); *In re* Catlin, 97 Misc. 223, 160 N. Y. Supp. 1034 (Sur. Ct. 1916).

4. Ripley v. Brown, 218 Mass. 33, 105 N. E. 637 (1914); Richtman v. Watson, 150 Wis. 385, 136 N. W. 797 (1912). A charitable trust can be enforced by the Attorney General.

5. *In re* Dean, 41 Ch. Div. 552 (1888). There is little authority actually in point. Trusts for the benefit of animals in general are charitable. *In re* Coleman's Estate, 167 Cal. 212, 138 Pac. 992 (1914); *In re* Estate of Graves, 242 Ill. 23, 89 N. E. 672 (1909).

6. Lawrence v. Prosser, 89 N. J. Eq. 248, 104 Atl. 772 (1918); Keasbey, *Gifts for Public Monuments* (1920) 29 YALE L. J. 729; Abercrombie v. Aber-

exception to the *cestui* requirement, include trusts for monuments, while masses and manumission are treated as charities.[7] This theory succeeds in eliminating all but one of the above exceptions to the *cestui* requirement only to expand the concepts of charity and funeral expenses to include the others;[8] furthermore, it does not account for other non-charitable trusts which have been upheld.[9] The suggestion of another commentator that when such "honorary" trusts are for a legal purpose the court should not interfere, at the behest of an unscrupulous heir, with a trustee who is willing to perform,[10] provides a general rule so broad that it includes many situations in which the definite *cestui* requirement has been properly upheld.[11] Perhaps the most feasible theory is to accept those exceptions which have received judicial recognition and to create others only if, as, and when the need is clearly demonstrated. Three English cases and one Irish case provide authority for including trusts for domestic animals in the exceptions to the *cestui* requirement.[12]

A further difficulty is encountered in the uncertain duration of trusts excepted from the requirement of a definite *cestui*. The courts that have upheld these trusts seem to feel that they should be limited to the period permitted by the rule against perpetuities.[13] Inasmuch as the life expectancy of a dog

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crombie, 27 Ala. 489 (1855); Wilmes v. Tierney, 187 Iowa 390, 174 N. W. 271 (1919); Note (1919) 5 IOWA L. BULL. 253.

7. Gray, *Gifts for a Non-charitable Purpose* (1902) 15 HARV. L. REV. 509.

8. It is not apparent that the liberation of a slave or the saying of masses for the soul of the testator is of benefit to the public, though the latter may be considered a religious service. Nor is the erection of a monument when not expressly authorized a proper charge against an estate.

9. For example trusts have been held valid when for unincorporated voluntary associations [Penny v. Central Coal and Coke Co., 133 Fed. 769 (C. C. A. 8th, 1905); Partridge, *The Legal Status of a College Fraternity Chapter* (1908) 42 AM. L. REV. 168, 180], for an Indian tribe [Ruddick v. Albertson, 154 Cal. 640, 98 Pac. 1045 (1908)], for the purchase of an advowson [Gott v. Nairne, 3 Ch. Div. 278 (1876)], and for support of animals [cases cited *infra* note 12]. It is not likely that Gray's theory will be adopted. See Clark, *Unenforceable Trusts and the Rule Against Perpetuities* (1911) 10 MICH. L. REV. 31.

10. Ames, *The Failure of the "Tilden Trust"* (1892) 5 HARV. L. REV. 389.

11. As stated by Ames, *supra* note 10, at 392, his rationale opposes the doctrine of Morice v. Bishop of Durham, 9 Ves. 399, 10 Ves. 522 (1805), followed in cases cited therein.

12. Mitford v. Reynolds, 16 Sim. 105, 1 Ph. 185 (1848) (trust for horses allowed without discussion of its validity or duration); Pettingall v. Pettingall, 11 L. J. Eq. n.s. 176 (1842) (validity of trust for mare uncontested); *Re* Dean, 41 Ch. Div. 552 (1888) (trust for horses and hounds apparently allowed for fifty years); Cleary v. Dillon, 1932 Irish Rep. 255 (trust for dogs allowed for twenty-one years). In Willett v. Willett, 197 Ky. 663, 247 S. W. 739 (1923), a similar result was reached on the basis of a statute exempting both trusts for humane purposes and those for charities from the definite *cestui* requirement. See Note (1925) 31 CASE AND COM. 8.

13. The cases so indicating are collected and deplored in Sweet, *Restraints on Alienation* (1917) 33 LAW Q. REV. 342, 359. See Warren, *The Progress of*

is much shorter than that of a man, a trust limited on the life of a dog would not contravene the policy of the rule. But although dogs are definite "persons" so that trusts in their favor may not be considered charitable, they are said not to have "lives" within the meaning of the rule against perpetuities.[14] Trusts limited on their lives are therefore void. The reason for thus invalidating these trusts seems to be a vague fear that if testators are allowed to limit trusts on the lives of dogs, they may begin limiting them on the lives of favorite carp, crows, crocodiles, and California conifers.[15] Although the ingenuity of the commentators could, no doubt, be depended upon to devise a technique for distinguishing crocodiles and crows from dogs, the decision that dogs don't live for purposes of the rule against perpetuities [16] may be justified as furthering the simplicity of the rule. But trusts for animals can still be allowed for a period of twenty-one years where the common law rule against perpetuities is in force, if the testator's intent was that the trust be severable.[17]

The trust in the instant case was governed by the New York statute modifying the rule against perpetuities and forbidding suspension of the absolute ownership of personal property for longer than two lives in being.[18] Absolute ownership is suspended if there are no persons who can convey an absolute interest.[19] It could hardly be questioned that dogs are unable to join in a conveyance, and since the power given to the trustee in the instant case to reinvest does not satisfy the statute,[20] the trust was properly held void. A testator can,

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the Law (1921) 34 HARV. L. REV. 639, 647. Smith, *Honorary Trusts and the Rule Against Perpetuities* (1930) 30 COL. L. REV. 60, contends that this is simply an application of the rule against perpetuities.

14. So stated in Cleary v. Dillon, *supra* note 12, at 260; Note (1933) 46 HARV. L. REV. 1036.

15. Such forebodings are found in Gray, *Gifts for a Non-charitable Purpose* (1902) 15 HARV. L. REV. 509, 530, and in Cleary v. Dillon, *supra* note 12, at 261.

16. Nor, in all probability, do they have periods of gestation as contemplated by that rule. Ever since it became established at common law that there could be no larceny of a dog because of his base nature and unsuitability for food, but that there could be larceny of a dead dog's skin, the judicial treatment of dogs has been erratic to say the least. Dogs have been held to be on a plane with cats, monkeys, and parrots; to be instruments of music, to be of no value, worth a seal skin coat, or a Jersey cow, or $125,000 dead; to be *ferae naturae* but also *ferae domesticae;* to go to the heirs as well as to the administrator; to be harmless and docile but presumptively the aggressor in a fight with a man; to be best beloved of all pets but not a fellow servant or equipment and tools; to be entitled to one free bite but liable for double the damages caused by every succeeding bite. This is the law; the authorities will be found in 40 L. R. A. 503 (1897).

17. Authority must again be supplied by Cleary v. Dillon, *supra* note 12. See Clark, *Unenforceable Trusts and the Rule Against Perpetuities* (1911) 10 MICH. L. REV. 31, 41.

18. N. Y. PERSONAL PROPERTY LAW (1929) § 11.

19. Sawyer v. Cubby, 146 N. Y. 192, 196, 40 N. E. 869 (1895); see Wells v. Squires, 117 App. Div. 502, 503, 504, 102 N. Y. Supp. 597 (1st Dep't 1907), *aff'd,* 191 N. Y. 529, 84 N. E. 1122 (1908).

20. Belmont v. O'Brien, 12 N. Y. 394, 405 (1855). For a criticism of the interpretation of the New York Statute see Whiteside, *Suspension of the Power of Alienation in New York* (1927) 13 CORN. L. Q. 31; *id* at 167.

however, provide for his dogs by leaving a legacy to any person on the condition that the animals be cared for as stipulated, since in the United States conditions are not subject to the rule against perpetuities.[21]

21. GRAY, RULE AGAINST PERPETUITIES (3d ed. 1915) §§ 309, 310 *et seq.*