RECENT CASES

Bankruptcy—Preference—Assignment of Accounts Receivable Set Aside Under Section 60 in Jurisdiction Where Notice to Debtor is Required—With the consent of the majority of the creditors, X assigned its accounts receivable to P bank as security for present loans. No notice of the assignments was given the debtors. More than four months after the original execution of the transaction, X was adjudicated a bankrupt and the bank filed proof of claim as a secured creditor. *Held*,[1] (Mr. Justice Roberts dissenting), since the assignments were never perfected as against a bona fide purchaser under Pennsylvania law,[2] they are deemed to have been made immediately prior to bankruptcy under Section 60 (a) [3] of the Bankruptcy Act, and can be avoided as preferences by the trustee because made for an antecedent debt.[4] *Corn Exchange National Bank v. Klauder*, 11 U. S. L. WEEK 4242 (1943).

From the inception of bankruptcy legislation it has been, in general, impossible to have a preference unless there results a diminution of the bankrupt's estate by reason of the transfer.[5] Prior to the instant case, the Supreme Court, relying on the language of Section 60 (a) as it existed before the Chandler Act,[6] consistently held that the time for determining the effect of a transfer on the debtor's estate is the date of the original execution of the transaction.[7] The new Section 60 (a) provides that the transfer shall be deemed to have been *made* when it becomes so far perfected that no bona fide purchaser could thereafter have acquired any rights in the property, and that if not so perfected it shall be deemed to have been made immediately before bankruptcy.[8] Therefore, in jurisdictions where the first

1. Affirming the decision of the Circuit Court, *In re* Quaker City Sheet Metal Company, 129 F. (2d) 894 (C. C. A. 3d, 1942).

2. Under the applicable Pennsylvania law a bona fide subsequent assignee who first gives notice will acquire rights superior to a prior assignee who has failed to give notice. Phillips's Estate (No. 3), 205 Pa. 515, 523, 55 Atl. 213, 215 (1903); *cf.* Phillips's Estate (No. 4), 205 Pa. 525, 55 Atl. 216 (1903). Pennsylvania no longer has this rule, although the instant case was decided under Pennsylvania law while this rule was still in effect. A record of assignment on the books of the assignor is now sufficient to perfect the transfer. PA. STAT. ANN. (Purdon, 1941) tit. 69, § 561.

3. ". . . for the purposes of subdivisions a and b of this section, a transfer shall be deemed to have been made at the time when it became so far perfected that no bona-fide purchaser from the debtor and no creditor could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee therein, and, if such transfer is not so far perfected prior to the filing of the petition in bankruptcy . . ., it shall be deemed to have been made immediately before bankruptcy." BANKRUPTCY ACT, § 60 (a), 52 STAT. 869 (1938), 11 U. S. C. A. § 96 (a) (Supp. 1942).

4. Provided the other elements of a preference, as defined in § 60 (a), are present and the transferee at the time of transfer has reasonable cause to believe that the debtor is insolvent. BANKRUPTCY ACT, § 60 (b), 52 STAT. 870 (1938), 11 U. S. C. A. § 96 (b) (Supp. 1942).

5. 3 COLLIER, BANKRUPTCY (14th ed. 1941) § 60.19, and cases there cited.

6. BANKRUPTCY ACT, §§ 60 (a) and (b), as amended in 32 STAT. 799 (1903), 11 U. S. C. A. § 96 (1927) and 44 STAT. 666 (1926), 11 U. S. C. A. § 96 (Supp. 1942). When the Martin, Carey, and Bailey cases, note 7 *infra*, were decided § 60 dealt only with those cases where recording was "required" by state law. Under the 1926 Amendment, the Section dealt with situations where recording was "required" or "permitted" by applicable local law. A subsequent decision, however, held that this addition in the 1926 Amendment did not change the result in these cases. First National Bank of Lincoln v. Live Stock National Bank, 31 F. (2d) 416 (C. C. A. 8th, 1929).

7. Martin v. Commercial National Bank of Macon, Ga., 245 U. S. 513 (1918) (chattel mortgage); Carey v. Donohue, 240 U. S. 430 (1916) (real property mortgage); Bailey v. Baker Ice Machine Co., 239 U. S. 268 (1915) (conditional sale).

8. Note 3 *supra*.

assignee to give the debtor notice of the assignment acquires rights superior to those of other assignees,[9] if no notice is given by the assignee of a bankrupt, the transfer is deemed to have been made immediately prior to bankruptcy because never perfected as against a bona fide transferee.[10] Under the instant decision the time of perfecting the transaction defines the time when the transfer is made,[11] which time is essential in determining whether the transfer was made to secure or satisfy an antecedent debt and whether or not it was made within four months prior to bankruptcy. The interpretation placed on Section 60 (a) by the majority accords with the expressed intentions of the draftsmen of the Chandler Act,[12] favoring a policy of protecting the bankrupt's general creditors from the effect of secret[13] transactions even at the expense of frustrating the commercial practice of "non-notification financing"[14] sanctioned in a lower court decision,[15] forming the basis of Mr. Justice Roberts' dissent. The dissent in sanctioning the commercial practice seems to ignore the real issue in the case;[16] the majority squarely faces the legal problem presented, the Congressional intent expressed in Section 60 (a) as amended by the Chandler Act, and resolves it in accordance with the intent of the draftsmen[17] and the general policy of the Bankruptcy Act.[18]

Conflict of Laws—Burden of Proof as "Substance" or "Procedure" Under the Jones Act—Plaintiff, a seaman, brought action in the Pennsylvania court under the Jones Act[1] for negligent injuries. Judg-

9. This seems to be the majority view. See Note (1924) 31 A. L. R. 876. In Salem Trust Co. v. Manufacturers Finance Co., 264 U. S. 182 (1924), (1924) 72 U. OF PA. L. REV. 446, the Supreme Court sanctioned the view that a subsequent assignee takes nothing by his assignment since the assignor transferred all his rights in the first assignment and had nothing left to transfer by the subsequent assignment. In jurisdictions adopting this view, the problem of the instant case will not arise since the assignment will be perfected at the time of the original transaction.

10. § 60 (a), note 3 *supra*.

11. The instant decision does not have the effect of transforming a present consideration into a past consideration. Under this rule courts will determine, for the purpose of bankruptcy, when the transaction was perfected under local law and date the transfer from that time. Thus if the debt was contracted before the transaction was "perfected" against a bona fide purchaser and transferor goes bankrupt before such "perfection", the transaction is, by the express provisions of Section 60 (a) deemed made immediately before bankruptcy and hence the debt is pre-existing.

12. HANNA AND MCLAUGHLIN, THE BANKRUPTCY ACT OF 1898 AS AMENDED INCLUDING THE CHANDLER ACT OF 1938 (1939) 58; Mulder, *Ambiguities in the Chandler Act* (1940) 89 U. OF PA. L. REV. 10, 23; McLaughlin, *Aspects of the Chandler Bill to Amend the Bankruptcy Act* (1937) 4 U. OF CHI. L. REV. 369, 393.

13. While the consent of the creditors probably prevents these liens from being secret liens, this fact will not cure the failure of the prior assignee to give the requisite notice under state law.

14. Instant case at 4243. See also SAULNIER AND JACOBY, ACCOUNTS RECEIVABLE FINANCING (National Bureau of Economic Research, 1943) 3, 17, 32, 58 *et seq.*

15. Adams v. City Bank and Trust Co., 115 F. (2d) 453 (C. C. A. 5th, 1940), *cert. denied*, 312 U. S. 699 (1940).

16. Mr. Justice Jackson in the instant case at 4243 says: "Such a construction [the instant decision] is capable of harsh results, . . . but we find nothing in Congressional policy which warrants taking this case out of the letter of the Act." Plainly the question before the court was the construction of the language of Section 60 (a) as amended by the Chandler Act, not the wisdom of the policy there adopted. See THE AMERICAN BANKER, April 3, 1943, pages 1, 2 and 7, for a criticism of the instant case for destroying the effectiveness of a sound and prevalent policy.

17. Note 12 *supra*.

18. 3 COLLIER, BANKRUPTCY (14th ed. 1941) § 60.01 and note 1.

1. 38 STAT. 1185 (1915), 46 U. S. C. A. § 688 (1928).

ment for defendant was given on plaintiff's failure to sustain burden of proof, under Pennsylvania law, of fraudulently obtained written release. *Held,* reversed, burden of proof as to releases under the Jones Act is a substantive rather than a procedural matter, and the law of the forum does not apply. *Garrett v. Moore-McCormack Lines,* 317 U. S. 239 (1943).

As a general rule matters of procedure are determined by the lex fori and the matters of substance by the lex loci delicti.[2] Usually, burden of proof is considered procedural, but an application of dictionary-like definitions to determine whether it is a matter of substance or procedure is of little practical value.[3] Various rationales have been adopted where this "procedural" element has significant effect on substantive rights. In some cases a functional approach has been used and classification based upon the purpose for which the particular element involved is to be used.[4] Some courts have held that when a state court is enforcing federal statutory rights, it should not determine whether the element is substantive or procedural, but merely employ the federal rules on the matter.[5] Others have balanced the convenience of applying the state court's procedure against the risk of distorting the result intended by the federal statute.[6] The latter is more favorable to the state's position. Under any of these, however, burden of proof in the instant case should be held substantive. The intent announced through the Jones Act is clear. Both Congress[7] and the federal courts[8]

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2. RESTATEMENT, CONFLICT OF LAWS (1934) § 585; see also, *ibid.,* Introductory Note, Chapter 12.

3. In Sampson v. Channel, 110 F. (2d) 754 (C. C. A. 1st, 1940) burden of proof was viewed as falling within a "twilight zone" whereby rational classification could be made either way; see 1 CHAMBERLAYNE, THE MODERN LAW OF EVIDENCE (1911) § 171, "The distinction between substantive and procedural law is artificial and illusory. In essence, there is none. The remedy and the predetermined machinery, so far as the litigant has a recognized claim to use it, are, legally speaking, part of the right itself." Justice Holmes stated in THE COMMON LAW (1881) 253, "Whenever we trace a leading doctrine of substantive law far enough back, we are likely to find some forgotten circumstance of procedure at its source." See GOODRICH, CONFLICT OF LAWS (2d ed. 1938) 197.

4. International Stevedoring Co. v. Haverty, 272 U. S. 50, 52 (1926); see Note (1923) 33 YALE L. J. 308, 311, footnote 20, illustrating this functional approach: "The accuracy of every definition is to be tested only by the purpose for which it is made. Any classification which is helpful in solving a particular purpose is, to that extent, correct; difficulty is encountered only when we characterize a definition made for a particular purpose as true in some universal sense and insist that the same meaning be used for all other purposes."

5. "The law of the United States cannot be evaded by the forms of local practice." Holmes, J., in American Railway Express Co. v. Levee, 263 U. S. 19, 21 (1923); *see* Baltimore & Ohio R. R. Co. v. Kepner, 314 U. S. 44 (1941); Note (1923) 33 YALE L. J. 308, 315.

6. RESTATEMENT, CONFLICT OF LAWS (1934) Introductory Note, Chapter 12; Cook, *Substance and Procedure in the Conflict of Laws* (1933) 42 YALE L. J. 333; Tunks, *Categorization and Federalism: "Substance" and "Procedure" after Erie Railroad v. Tompkins* (1939) 34 ILL. L. REV. 271, 276.

7. The first Congress, on July 20, 1790, passed a protective act for seamen in the merchant marine service, 1 STAT. 131. General Congressional policy is further shown in the Longshoremen's and Harbor Workers' Compensation Act, 44 STAT. 1434 (1927), 33 U. S. C. A. (Supp. 1943) §§ 915, 916, in which all releases not under the express terms of the Act are declared invalid.

8. The great solicitude of the courts for seamen's contracts is illustrated by the words of Justice Story, "They [seamen] are emphatically the wards of the admiralty; and though not technically incapable of entering into a valid contract, they are treated in the same manner, as courts of equity are accustomed to treat young heirs, dealing with their expectancies, wards with their guardians, and cestuis que trust with their trustees." Harden v. Gordon, 11 Fed. Cas. No. 6,047, at 485; *see* Harmon v. United States, 59 F. (2d) 372, 373 (C. C. A. 5th, 1932); The Arizona, 298 U. S. 110, 123 (1936).

have traditionally safeguarded seamen's rights; and as the assignment of burden of proof concerning the validity of releases is likely to vitally affect the result of litigation, it is evident that the federal courts properly consider this element one of substance.[9] Decisions of state and federal courts in administering the Second Federal Employer's Liability Act,[10] upon which the Jones Act is based,[11] invariably have held burden of proof substance, further indicating that in interpreting a statute of this kind the courts will consider many "procedural" elements matters of substance. Finally the desire for uniformity of application of the Jones Act favors the federal classification of burden of proof as substance in regard to releases.[12] Thus the decision in the instant case follows the general tendency to protect personal rights secured by a federal statute.

Criminal Law—Interstate Rendition—Section 6 of Uniform Extradition Act Constitutional—Relator was arrested on warrant issued by direction of the Governor of Ohio on request of the Governor of New York for his extradition to New York, where he had been indicted as an accomplice in the crime of abortion. Relator had not been in New York when the crime was committed, and had not fled from New York before or after the event to avoid trial. Petition for habeas corpus dismissed. *Held,* affirmed. Section 6[1] of the Uniform Extradition Act is constitutional; and its enactment is a valid exercise of the police power of the State. *Culbertson v. Sweeney,* Court of Appeals of Ohio, 44 N. E. (2d) 807 (Cuyahoga Cty. 1942).

The decisions are in accord that to meet the requirements for extradition under the constitutional provision[2] and congressional statute,[3] physical presence of the accused within the demanding state at the time of the

9. If there is no evidence on the issue, assigning the burden to the plaintiff would result in entitling the defendant to a directed verdict. Hemingway v. Ill. Central R. Co., 114 Fed. 843, 846 (C. C. A. 5th, 1902). If there is some evidence on the issue and the only defense is contributory negligence, if the burden is on the defendant, the plaintiff may be entitled to a directed verdict, although had the burden been on him the same evidence would have been inadequate to assure his victory. Chicago, G. W. Ry. Co. v. Price, 97 Fed. 423 (C. C. A. 8th, 1899).

10. Louisville & N. R. Co. v. Hall, 223 Ala. 338, 135 So. 466 (1931), *cert. denied,* 284 U. S. 661 (1931) (contributory negligence); Central Vermont Ry. Co. v. White, 238 U. S. 507 (1915) (contributory negligence); Crugley v. Grand Trunk Ry., 79 N. H. 276, 108 Atl. 293 (1919) (assumption of risk); New Orleans & N. E. R. R. v. Harris, 247 U. S. 367 (1918) (original negligence). Although most of these cases involved burden of proof of negligence in some form, the reasoning seems equally applicable to other situations involving burden of proof as well.

11. Instant case at 244.

12. Panama R. R. Co. v. Johnson, 264 U. S. 375, 392 (1923), "The statute extends territorially as far as Congress can make it go, and there is nothing in it to cause its operation to be otherwise than uniform. The national legislation respecting injuries to railroad employees engaged in interstate and foreign commerce which it adopts has a uniform operation, and neither is nor can be deflected therefrom by local statutes or local views of common-law rules."

1. "The governor of this state may also surrender, on demand of the executive authority of any other state, any person in this state charged in such other state . . . with committing an act in this state, or in a third state, intentionally resulting in a crime in the state whose executive authority is making the demand, and the provisions of this act . . . shall apply to such cases, even though the accused was not in that state at the time of the commission of the crime, and has not fled therefrom." OHIO GEN. CODE, § 109-6.

2. U. S. CONST. Art. IV, § 2. "A person . . . who shall flee from Justice and be found in another State. . . ."

3. 1 STAT. 302 (1793), 18 U. S. C. A. § 662 (1942).

alleged crime and flight to the asylum state are essential.[4] Section 6 of the Uniform Act poses the question whether the federal provisions are exclusive and permit extradition only when the accused is actually a fugitive as defined by the courts [5] or are limited to the express terms of the grant,[6] thereby leaving the states competent to control all phases of extradition not relating to the handling of fugitives.[7] The latter view gains support when one looks at former state action, aiding and supplementing the federal statute, which for many years has been upheld by the courts. For example, the Constitution does not provide that states arrest fugitives from justice prior to requisition, but statutes authorizing such action have been held constitutional.[8] Further, a person illegally transported from one state to another for prosecution cannot in the federal courts compel his return to the asylum state.[9] There is, then, no constitutional right of asylum; and it is not unconstitutional to surrender a criminal by procedure other than that expressly set forth by the federal provisions. This coupled with the fact that no one can be extradited under the federal laws unless he is a fugitive [10] suggests that cases not involving flight are outside federal control.[11] Certainly there is no inconsistency between one law providing for fugitives and another for non-fugitives. The great development in means of communication have given rise to new criminal methods, and today the federal provisions are insufficient to combat them. Thus, section 6 closes a loophole in the extradition process, and the instant decision supports good public policy.[12]

4. Hyatt v. Corkran, 188 U. S. 691 (1903); State v. Parrish, 242 Ala. 7, 5 S. (2d) 828 (1941); *Ex parte* Ellis, 223 Mo. App. 125, 9 S. W. (2d) 544 (1928).

5. Hyatt v. Corkran, 188 U. S. 691 (1903); *Ex parte* Roberts, 186 Wash. 13, 56 P. (2d) 703 (1936); *see* Prigg v. Commonwealth, 41 U. S. 539, 617, 618 (1842). For support of this view as a basis for the unconstitutionality of the Uniform Act, see Green, *Duties of the Asylum State Under the Uniform Criminal Extradition Act* (1939) 30 J. CRIM. L. 295, 319 ff.

6. State v. Wellman, 102 Kan. 503, 170 Pac. 1052 (1918); Cockburn v. Willman, 301 Mo. 575, 257 S. W. 458 (1923); *see* Holmes v. Jennison, 39 U. S. 540, 597 (1840); Dennison v. Christian, 72 Neb. 703, 707, 101 N. W. 1045, 1046 (1904), *aff'd sub nom.*, Dennison v. Christian, 196 U. S. 637 (1905); State v. Hall, 115 N. C. 811, 818, 20 S. E. 729, 731 (1894).

7. This power arises under Amendment X of the U. S. Constitution, which reserves to the states all soverign power not granted to the federal government. (1908) 21 HARV. L. REV. 224. (To remove undesirable persons from its territory is an inherent power of every sovereignty. Before the Constitution, or in the absence of any statute, each state could surrender criminals or refuse surrender at its discretion. It does not follow that because the Constitution requires it to surrender them in some cases, it has lost its discretion in the rest. Otherwise, the 10th amendment would be of no effect.)

8. Kurtz v. State, 22 Fla. 36, 1 Am. St. Rep. 173 (1886); Commonwealth v. Tracy, 46 Mass. 536 (1843); *Ex parte* Ammons, 34 Ohio 518 (1878).

9. Innes v. Tobin, 240 U. S. 127 (1916); Pettibone v. Nichols, 203 U. S. 192 (1906); Kelly v. Mangum, 145 Ga. 57, 88 S. E. 556 (1916).

10. See note 4 *supra*.

11. It follows that a statute, such as the Uniform Act, in the asylum state would make the transfer of the accused neither illegal nor unconstitutional. For additional arguments upholding this Section see Report of the Uniform Commissioners as set forth in Green, *Duties of the Asylum State Under the Uniform Criminal Extradition Act* (1939) 30 J. CRIM. L. 295, 315; arguments *contra*, *id.* at 319 ff. (1908) 21 HARV. L. REV. 224 (until amendment providing for rendition of criminals not present in the demanding state at the time of the crime, federal legislation on the matter would be unconstitutional as Congress has power only in cases of fleeing criminals. State action is the only source of relief); HANDBOOK OF THE NATIONAL COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS (1930) 134; *id.* (1932) at 399, 400. (The statute embraces a field entirely outside the province of the federal constitution. . . .)

12. Section 6 was included because it is well recognized that leaders of criminal gangs send henchmen into a state to do an unlawful act, and purposely remain outside its jurisdiction. Also, it reaches persons engaged in unlawful conspiracies and obtaining money by false pretenses.

Eminent Domain—Damages—Time of Valuation—In August, 1937 Congress authorized the Central Valley Reclamation Project in California. The project necessitated relocation of railroad tracks, and on December 14, 1938, a complaint in eminent domain was filed in the federal district court. Valuation was fixed as of December, 1938 less any appreciation since August, 1937. Reversed by Circuit Court of Appeals. *Held,* judgment of circuit court reversed and that of district court affirmed. Defendants are entitled to no increase occurring after the Congressional authorization, since there was a possibility the land might be condemned as part of the project. *United States v. Miller,* 317 U. S. 369 (1943).

The general rule is that the time of valuation shall be the time of the "taking" of the property.[1] However, the whole course of the condemnation process from beginning to end is really a taking; and various steps in the procedure have been singled out as the proper time for valuation.[2] Some of those selected have been the time of entry on the property,[3] the date of filing the petition or of commencing the condemnation proceedings,[4] the time of the commissioners' award,[5] and the time of the trial.[6] Of these the most common time selected is the date when the condemnation petition is filed.[7] The theory behind this latter rule is that the filing constitutes an official declaration that the property is desired for public use, and that it affords a convenient, definite, and invariable point of time in every case to which the question of compensation may later be referred.[8] When there has been a legislative act describing particular lands and declaring them taken, or a legislative authorization of a project which will definitely necessitate the acquisition of certain specific pieces of property, it has been held that the date of such legislative action should be the time of valuation[9] rather than the time when condemnation papers are filed. This exception from the rule can be justified on the grounds that the government should not have to pay for any enhancement in value arising from the known fact that the land will be condemned. In the instant case the Supreme Court, relying on a previous decision,[10] applied the same exception where there

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1. Olson v. United States, 292 U. S. 246 (1934); 2 LEWIS, EMINENT DOMAIN (3d ed. 1909) § 705.

2. 2 NICHOLS, EMINENT DOMAIN (2d ed. 1917) § 436; 2 LEWIS, EMINENT DOMAIN (3d ed. 1909) § 705; McCormick, *The Measure of Compensation in Eminent Domain* (1933) 17 MINN. L. REV. 461, 496.

3. North Carolina State Highway Commission v. Young, 200 N. C. 603, 158 S. E. 91 (1931); Board of Commissioners v. Richardson, 122 S. C. 58, 114 S. E. 632 (1922); *cf.* Howell v. State Highway Dept., 167 S. C. 217, 166 S. E. 129 (1932).

4. Ralph v. Hazen, 93 F. (2d) 68 (App. D. C. 1927); Smith v. Jeffcoat, 196 Ala. 96, 71 So. 717 (1916); Sanitary District of Chicago v. Chapin, 226 Ill. 499, 80 N. E. 1017 (1907); Acquackanonk Water Co. v. Weidmann Silk Dyeing Co., 98 N. J. L. 413, 119 Atl. 782 (1923); Stahl v. Buffalo, R. & P. Ry. Co., 262 Pa. 493, 106 Atl. 65 (1919).

5. City of Chicago v. Farwell, 286 Ill. 415, 121 N. E. 795 (1918).

6. Mulford v. Farmers' Reservoir & Irrigation Co., 62 Colo. 167, 161 Pac. 301 (1916); St. Louis, O. H. & C. Ry. Co. v. Fowler, 142 Mo. 670, 44 S. W. 771 (1898).

7. It should be kept in mind, though, that there is little uniformity of opinion, even within the same state, let alone in different states; decisions vary widely due to different statutes and different circumstances. In general the courts try to weigh the equities of each particular case in determining the time of valuation.

8. 2 LEWIS, EMINENT DOMAIN (3d ed. 1909) § 705.

9. Stuhr v. City of Grand Island, 124 Neb. 285, 246 N. W. 461 (1933); *cf.* Kerr v. South Park Commissioners, 117 U. S. 379, 387 (1886); Bourland v. City of Jackson, 196 S. W. 1045 (1917). Compare *In re* Department of Public Parks, 53 Hun. 280, 6 N. Y. S. 750 (1889) with *In re* New York, 140 App. Div. 238, 125 N. Y. S. 210 (1910).

10. Shoemaker v. United States, 147 U. S. 282 (1893).

was a possibility the land would be acquired although no assurance of it.[11] When there is no certainty that a given piece of property will be condemned some courts have refused to accept the date of legislative action as the date for valuation.[12] They reason that the property owner is entitled to any increment in value up to the time when it is definitely known that his land will be taken,[13] and that a departure from the more general rule of valuation when condemnation papers are filed is unjustified under such circumstances.[14] These latter decisions seem to apply the more equitable rule.

Trusts—Power of Settlor-Sole Beneficiary to Terminate—Petitioner created a sole and separate use and a spendthrift trust for herself [1] for life and remainder to son. Son having full legal capacity, conveyed his interest to petitioner. *Held,* petition for termination granted. There was no valid reason for the continuation of the trust. *Bowers' Trust Estate,* 346 Pa. 85 (1943).

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11. At the time of the authorization, August 26, 1937, two routes were under consideration for the railroad relocation. One of these routes required the use of defendants' lands, but no decision had as yet been reached regarding which route would be followed.

12. Maher v. Commonwealth, 291 Mass. 343, 197 N. E. 78 (1935). Massachusetts seems to have adopted the principle that valuation shall be estimated as of the time that title is conveyed, regardless of when there was statutory authorization of the project. Rowan v. Commonwealth, 261 Pa. 88, 104 Atl. 502 (1918). In this case Pennsylvania condemned land for a public park at Valley Forge and claimed valuation should be as of the date of the enabling statute. The statute provided for the acquisition of grounds, "including Forts Washington and Huntington, and the entrenchments thereto, and the adjoining grounds, in all not exceeding two hundred and fifty acres." In holding that the time of the statute should not be used in valuation, but that the time of appropriation should govern, the Supreme Court of Pennsylvania said no specific area except the forts and entrenchments were named in the act and reasoned that, "Until after the commissioners had fixed the exact location and boundaries, owners of land not covered by these designated objects were without means of determining whether or not their property would be within the area required by the state." *Id.* at 95, 504.

13. Rowan v. Commonwealth, 261 Pa. 88, 104 Atl. 502 (1918), cited *supra* note 12; *In re* Condemnation of Certain Land for New Statehouse, 19 R. I. 382, 33 Atl. 523 (1896). The Rhode Island Court held that since hearings of public necessity were necessary after filing the condemnation certificate, even the latter time should not be considered as the date for valuation, that the valuation time was the time when it became certain the land would be taken.

14. The position which Louisiana has adopted is probably the farthest, at least in statutory terms, that any state has gone in selecting an early point in the taking process for purposes of valuation. In that state legislation was passed fixing the time the contemplated improvement was "proposed" as the date for valuation. LA. CIV. CODE ANN. (Dart, 1932) Art. 2633. However, the Louisiana courts have held a project is not "proposed" until there are some rather definite appropriating acts. Thus the Louisiana Supreme Court said in Opelousas G. & N. E. Ry. Co. v. St. Landry Cotton Oil Co., 118 La. 290, 42 So. 940 (1907), that "the value has to be computed as of the day when, the line of the railroad having been definitely located, and the need for the land having actually arisen, the expropriating company demands to have it and offers to make payment."

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1. The deed of trust stated payments to be made to the settlor "for her sole and separate use, she being now in contemplation of marriage with George A. Beech, so that the same shall not be subject or liable to the debts, contracts or engagements of the said George A. Beech, nor of her own, and so that the same shall not be taken in execution, or attachment, or sequestration, or be subject to any conveyance, assignment or anticipation whatsoever; it being the intent of the donor herein to preserve the principal or corpus of the said trust estate for the benefit of her son. . . ."

The decision in the instant case is in accord with both the majority view [2] and the Restatement of Trusts [3] in permitting termination of a trust by the settlor and the beneficiaries. Here, however, settlor and beneficiary were one person, and prior Pennsylvania decisions did not unreservedly adopt the general view in this situation.[4] The former Pennsylvania view resulted in part from a failure to distinguish between a testamentary or an inter vivos trust the settlor of which is dead, and an inter vivos trust, the settlor of which is living and joins with the beneficiaries in requesting termination.[5] Another reason was the insistence of Pennsylvania courts that a spendthrift trust created for oneself shall not be terminable,[6] the rationale being that a settlor who has provided against his own weakness, should not be permitted to undo such provision in a moment of folly.[7] The fallacy of this approach is obvious.[8] Therefore, by the instant decision the court has reversed the prior Pennsylvania law; and this places the juris-

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2. Roberts, J., "The general rule is that all parties in interest may terminate the trust." Helvering v. Helmholz, 296 U. S. 93, 97 (1935); Botzum v. Havana National Bank, 367 Ill. 539, 12 N. E. (2d) 203 (1937); Fredricks v. Near, 260 Mich. 627, 245 N. W. 537 (1932); Fowler v. Lanpher, 193 Wash. 308, 75 P. (2d) 132 (1938); 3 SCOTT, TRUSTS (1939) § 338. This rule is not applicable if at the time of the attempted revocation any party in interest was under a disability. Twinings Appeal, 97 Pa. 36 (1881).

3. "If the settlor and all of the beneficiaries of a trust consent and none of them is under an incapacity, they can compel the termination or modification of the trust, although the purposes of the trust have not been accomplished." RESTATEMENT, TRUSTS (1935) § 338 (1).

4. "If the settlor is the sole beneficiary of a trust and is not under an incapacity, he can compel the termination of the trust, although the purposes of the trust have not been accomplished." RESTATEMENT, TRUSTS (1935) § 339. This, however, is qualified in its application by the Pennsylvania courts and the Pennsylvania rule had been stated as follows: "If the settlor is the sole beneficiary of a trust and is not under an incapacity, he can compel the termination of the trust provided it was neither made to protect him from his own habits nor is a spendthrift trust." RESTATEMENT, TRUSTS, PA. ANNOT. (1939) § 339.

The only jurisdiction that seemed to be in accord with Pennsylvania was Kentucky. The courts of the latter state qualified the rule by refusing revocation where the trust was to save the settlor-beneficiary from folly or special incapacity. Downs v. Security Trust Company, 175 Ky. 789, 194 S. W. 1041 (1917) (settlor was a drunkard); Fidelity & Columbia Trust Co. v. Gwynn, 206 Ky. 823, 268 S. W. 537, 38 A. L. R. 937 (1925) (settlor was an epileptic).

5. Generally courts have taken the attitude that they should see that property be disposed of according to the wishes of the settlor. Therefore, failure to distinguish between these two situations would restrict living settlors who consent to termination of the trust from effecting such a termination. There does not seem to be any valid reason why a trust should not be revocable if all parties in interest consent. Naturally the death of the settlor precludes such consent and in this situation the trust should not be terminable.

In England consent of all beneficially interested has been held sufficient, even though the settlor does not join them in the request. 3 SCOTT, TRUSTS (1939) § 338.

6. A spendthrift trust created for the benefit of the settlor is not in itself invalid, but one cannot create such a trust effective against the rights of subsequent creditors of the settlor. GRISWOLD, SPENDTHRIFT TRUSTS (1936) § 474.

7. Rehr v. Fidelity-Philadelphia Trust Co., 310 Pa. 301, 165 Atl. 380, 91 A. L. R. 99 (1933), (1933) 43 YALE L. J. 342. For further history of this litigation see Rehr v. Fidelity-Philadelphia Trust Co., 37 D. & C. 324 (Pa. 1940), (1940) 39 MICH. L. REV. 174.

8. For adverse criticism see (1933) YALE L. J. 342; Note (1937) 46 YALE L. J. 1005, 1015; (1940) 39 MICH. L. REV. 174. The fact that the trust may be the product of folly and the attempted termination the product of wisdom does not seem to have occurred to the earlier Pennsylvania courts. Furthermore, the trust does not offer the settlor-beneficiary any protection (*supra* note 6) and his efforts in no manner conserve his estate. 3 SCOTT, TRUSTS (1939) § 339; GRISWOLD, SPENDTHRIFT TRUSTS (1936) § 498.

diction in accord with the majority view.[9] In some states the question of termination of a trust has been removed from the courts by legislative enactment,[10] but such statutes are comparatively few in number.[11] In view of so acceptable and so desirable a rule it would seem that statutory provisions were unnecessary since the courts have adequately dealt with the matter.

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9. Undoubtedly the court was motivated in part by the particular economic considerations involved since it specifically mentions that the "income has been reduced from about $1,800 to less than $400 per annum." But the language of the court is unmistakable and we are compelled to conclude that the court is changing the existing decisional law of the state.

10. N. Y. PERSONAL PROPERTY, § 23 states: "Upon the written consent of all the persons beneficially interested in a trust . . . the creator of such trust may revoke . . . and thereupon the estate of the trustee shall cease. . . ." A substantially similar provision is to be found in § 118 of the N. Y. REAL PROPERTY LAW. For other statutory provisions see CAL. CIV. CODE (Deering, 1937) § 2280, and N. C. CODE ANN. (Michie, 1935) § 996.

11. Note (1937) 46 YALE L. J. 1005, 1018.