RECENT CASES

Constitutional Law—Gratuities to Public Employees in Military Service—In a suit to enjoin spending of public funds taxpayer challenged validity of state statute which provided for payments to dependents of public employees serving in the armed forces.[1] *Held,* statute unconstitutional as violating the special privilege [2] and gratuity clauses [3] of the Pennsylvania constitution. *Kurtz v. Pittsburgh et al.,* 346 Pa. 362, 31 A. (2d) 257 (1943).

It is generally admitted that state and local governments can give preference to war veterans in public employment,[4] and during the Civil War their power to offer bounties for enlistment in the armed services was likewise upheld.[5] However, the instant statute is to be distinguished from such laws in that the payment involved pertains to men in the service rather than veterans and also in that it bears no relationship to whether the man volunteered or was drafted. There appear to be two constitutional problems raised by such a statute. If the payments are regarded as based on military service the question arises whether it violates the principles of classification to make them payable only to public employees and not to other citizens who are in the armed forces. The majority of the Court held that the classification was based neither on necessity [6] nor on substantial distinctions in the objects classified.[7] When the same question was raised under a similar New York statute,[8] the New York court [9]

1. PA. STAT. ANN. (Purdon, Supp. 1942) tit. 65, § 112. In substance the statute provided that when employees of the state or its political subdivisions enter the Armed Forces the dependent wives and children of such employees shall receive one-half of their salary during the period of military service. It also provided for payments to dependent parents.

2. PA. CONST. Art. III, § 7, provides that, "The General Assembly shall not pass any local or special law: . . . Granting to any . . . individual any special or exclusive privilege or immunity. . . ."

3. See note 11, *infra.*

4. Cook v. Mason, 103 Cal. App. 6, 283 Pac. 891 (1929); Com. *ex rel.* Graham v. Schmid, 333 Pa. 568, 3 A. (2d) 701 (1938); Note (1939) 120 A. L. R. 783.

5. Taylor v. Thompson, 42 Ill. 9 (1866); Hilbish v. Catherman, 64 Pa. 154 (1870); Speer v. School Directors of Blairsville, 50 Pa. 150 (1865). *But cf.* Amity Township v. Reed, 62 Pa. 442 (1869). Such legislation was generally sustained on the ground that the encouragement of enlistments benefited the community by helping to relieve it from a possible draft. It is highly problematical that such acts would be upheld today, for they would seem to be in direct violation of Section 7 of the 1940 Selective Service Act, 50 U. S. C. A. App. § 307 (Supp. 1942).

6. Appeal of Ayars, 122 Pa. 266, 16 Atl. 356 (1889).

7. Colgate v. Harvey, 296 U. S. 404 (1935); Joseph Triner Corp. v. McNeil, 363 Ill. 559, 2 N. E. (2d) 929 (1936); Commonwealth v. Grossman, 248 Pa. 11, 93 Atl. 781 (1915). The United States Supreme Court laid down the following test in the *Colgate* case: "The classification in order to avoid the constitutional prohibition, must be founded upon pertinent and real differences, as distinguished from irrelevant and artificial ones." 296 U. S. 404, 423.

8. The New York Military Law, § 245, as amended by c. 435 of the Laws of 1917, provided that state and city employees who were members of the National Guard, members of the Reserve Corps, or members in the Federal military, naval, or marine service and who were called to active duty should receive from the state or city any difference between civil and military pay.

9. Henn v. City of Mount Vernon, 198 App. Div. 152, 189 N. Y. S. 851 (1921). The New York law was tested under the equal protection clause of the Federal constitution, whereas the statute in the instant case was declared to violate the special privilege clause of the state constitution. However, the similarity between the two types of constitutional provisions will be realized when one considers that "The one prevents the curtailment of constitutional rights, the other prevents the enlargement of the right . . . of others." Cincinnati, H. & D. R. Co. v. McCullom, 183 Ind. 556, 560, 109 N. E. 206, 208 (1915). The rights protected are really identical. Miles v. Department of Treasury, 209 Ind. 172, 189, 193 N. E. 855, 862 (1935).

concluded such classification was valid, saying that it was similar to preferring war veterans in public employment. The type of statute which picks out one group of applicants for public jobs, namely those who are war veterans, and proceeds to prefer them over the other applicants, does not necessarily involve unreasonable classification because the preference can be justified on the theory that military training and discipline are such desirable qualities they deserve a preference.[10] But the type of statute here involved is entirely different; it picks out one group of men who are in military service, namely, those who were public employees. Such a classification is not only devoid of reason but discriminates against other citizens of the state who are also in the armed forces. If the payments are considered a part of the employer-employee relationship rather than for military service a different legal problem arises. The majority of the Court was of the opinion that these payments were gratuitous in character and hence in violation of the state constitution;[11] in reaching that conclusion they distinguished them from pensions,[12] sick leaves, and vacations.[13] The dissent on the other hand, regarded them as payments by the state for obtaining "better performance of public duty, superior discipline, loyalty and public spirit." [14] Perhaps the latter argument would have been more effective if the constitution had not been so explicit on the subject and if the statute itself had required a minimum length of service, as do most of the programs adopted by private industry.[15] The result accomplished by this decision would seem to be desirable; for this statute was mandatory on local governments rather than permissive in character, and consequently, with the growing number of public employees in the armed services, the financial burden was becoming increasingly severe.

Constitutional Law—Power of School Board to Compel Pupils to Salute Flag—The West Virginia Board of Education adopted a resolution [1] requiring all pupils in all schools to salute the flag. Plaintiffs,

10. Com. *ex rel.* Graham v. Schmid, 333 Pa. 568, 3 A. (2d) 701 (1938).

11. PA. CONST. Art. III, § 18, provides: "No appropriations shall be made for charitable, educational, or benevolent purposes to any person, . . . Provided, That appropriations may be made for pensions or gratuities for military services, to blind persons . . ., for assistance to mothers having dependent children, and to aged persons without adequate means of support."

12. "'A pension is a bounty or a gratuity given for services that were rendered in the past.' . . . Under the legislation now before us, length of service of the employee has no bearing whatever." Instant case at 374, 262.

13. "Vacations and sick leaves reasonable in length of time, without deduction of pay, are now generally recognized as implied in contracts of public employment. If vacation and sick leaves with pay were unreasonable they would justify the charge that public funds were being illegally used in payment for services not performed." Instant case at 377, 263.

14. Instant case at 400, 273. When it was challenged that the New York law violated a somewhat similar gratuities clause in the New York constitution, the Court of Appeals brushed the argument aside with the statement that the law "plainly invoked" Article V, § 6, of the state constitution. The latter section provides for a civil service system based on merit and competitive examinations. Hoyt v. Broome Co., 285 N. Y. 402, 406, 34 N. E. (2d) 481, 482 (1941).

15. In a study by the National Industrial Conference Board it appeared that approximately four-fifths of the companies adopting such benefit programs require a minimum length of service. NATIONAL INDUSTRIAL CONFERENCE BOARD REPORT No. 52 (March, 1943). It is interesting to note that Pennsylvania has specifically authorized such payments as within the power of corporations. PA. STAT. ANN. (Purdon) tit. 15, §§ 2852-315.

1. Adopted under authority of W. VA. CODE ANN. (Michie, Sublett and Stechman, Supp. 1941) § 1734.

members of the "Jehovah's Witnesses" sect,[2] whose beliefs forbid any obeisance except to God, brought suit in the United States District Court, asking for an injunction to restrain enforcement of this regulation against "Jehovah's Witnesses." The injunction was granted [3] and an appeal taken to the United States Supreme Court. *Held,* affirmed. The compulsory flag salute is a violation of the 14th Amendment,[4] which, as a guarantee of freedom of speech, is to be interpreted as imposing a limitation upon the states equally specific to that imposed upon the national government by the 1st Amendment.[5] *Minersville School District v. Gobitis* [6] is overruled.[7] *West Virginia State Board of Education v. Barnette, Stull and McClure,* 63 Sup. Ct. 1178 (1943).

Whereas the court in the *Gobitis* case assumed power in the state to compel the salute, and based its decision on a religious belief claimed as an exception to the general rule, the majority of the court in overruling it did not confine themselves to the question of freedom of religion but examined the question of the state's power in the matter and queried the right of the state to force any citizen to observe the ceremony, stating that irrespective of religious views, it was any individual's right to refuse to salute the flag [8] and any attempt to make him do so is to infringe upon the constitutional liberty of the individual. In so holding, the Supreme Court took another step in a definite trend towards greater constitutional protection of civil rights and personal liberties.[9] This movement is notable in a series of decisions involving "Jehovah's Witnesses." [10] The majority

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2. For an excellent discussion of the origins and beliefs of Jehovah's Witnesses, see MULDER AND COMISKE, *Jehovah's Witnesses Mold Constitutional Law* (1943) 2 BILL OF RIGHTS REVIEW 262.

3. Barnette, Stull and McClure v. West Virginia State Board of Education, 47 F. Supp. 251 (1942).

4. U. S. CONST. AMEND. XIV: ". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law."

5. U. S. CONST. AMEND. I: "Congress shall make no laws respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the government for a redress of grievances."

6. 310 U. S. 586 (1940); (1938) U. OF PA. L. REV. 431 (discussion of the lower court decision).

7. Justices Roberts and Reed dissented by merely stating that they adhered to the views expressed by the Court in the *Gobitis* case, while Justice Frankfurter dissented in an extensive opinion. Justices Black and Douglas wrote a brief concurring opinion as an explanation of their change of view, since they had been among the majority in the *Gobitis* case.

8. In this case the refusal to salute the flag was not due to any lack of genuine patriotism.

9. See Meyer v. State of Nebraska, 262 U. S. 390 (1923) (Statute prohibiting teaching in all schools of any language other than English is an unconstitutional interference with liberty of teaching); Pierce v. Society of Sisters, 268 U. S. 510 (1925) (A state may not prohibit children from attending private and parochial schools); Stromberg v. California, 283 U. S. 359 (1931) (An ordinance prohibiting the display of a red flag was held invalid); Hague v. CIO, 307 U. S. 496 (1939) (Court held that streets and parks could not be closed to public speakers); Schneider v. New Jersey, 308 U. S. 147 (1939) (A city ordinance preventing the distribution of literature on public streets was held invalid).

10. Lovell v. City of Griffin, 303 U. S. 444 (1938); Schneider v. State, 308 U. S. 147 (1939); Cantwell *et al.* v. Connecticut, 310 U. S. 296 (1940); Cox *et al.* v. New Hampshire, 312 U. S. 569 (1941); Leiby *et al.* v. City of Manchester, 33 F. Supp. 842 (1940); Borchert v. City of Ranger, Texas, 42 F. Supp. 577 (1941); Hannon v. Haverill, 120 F. (2d) 87 (C. C. A. 1st, 1941); City of Blue Island v. Kozu, 379 Ill. 511, 41 N. E. (2d) 515; McConkey *et al.* v. City of Fredricksburg, 179 Va. 556, 19 S. E. (2d) 682.

of these decisions outlawed local ordinances restricting local activities of the members of this sect. In a most recent case,[11] the Supreme Court has outlawed ordinances which required members of the sect to purchase licenses in order to distribute literature while disseminating their religious beliefs. The position taken by the court in the protection of civil liberties is in interesting contrast to the views it has been expressing when the issue was the invasion of property rights. In the latter situation the majority have been insisting that state legislation must not be held invalid unless so arbitrary as to be without rational foundation. Thus, property rights may be infringed if, in the opinion of the court, a majority or substantial number of men have rationally reached the conclusion that the public interest requires such action. But, according to the majority of the court in the instant case, this is not true of civil liberties, such as freedom of speech. Mr. Justice Jackson, in writing the opinion for the court, expresses this thought as follows: "The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect. . . ."[12] The dissenting opinion of Mr. Justice Frankfurter is devoted largely to the argument that the view of the majority is unsound in drawing a distinction between the scope of the protection accorded property rights and that given civil liberties. The dissenting Justice believes that the issue in both cases is whether or not the challenged legislation can be regarded as reasonable or completely arbitrary. Thus, the cleavage between the views of the majority and dissenting opinions raises a fundamental constitutional issue, which in importance goes far beyond the significance of whether or not school children shall be compelled to salute the flag. Future decisions of the court in the field of civil liberties will be closely watched by all those interested in the trend which the court will take on this important question.

Descent and Distribution—Intestacy—An Heir Cannot Destroy the Lien of His Judgment Creditor by Renunciation of the Inheritance—Defendant had a judgment against M, who later inherited a one-twelfth interest in certain real estate. She executed a writing purportedly renouncing her interest before the estate had been distributed. Then all the other heirs gave the plaintiff a quit-claim deed to the property. Execution and levy was then made on the one-twelfth interest and plaintiff sued for an injunction against this suit. *Held,* denied; the judgment lien was not destroyed by the attempted renunciation;[1] plaintiff did not take title to M's one-twelfth interest. *Coomes v. Finegan,* 7 N. W. (2d) 729 (1943).

11. Jones v. Opelika, 316 U. S. 584 (1943).

12. Instant case at 1186.

1. IOWA CODE (Reichmann, 1939) § 11,602, provides that all judgments obtained within the state are liens upon all real estate the debtor "may subsequently acquire, for the period of ten years from the date of the judgment."

Some writers have stated that under the common law estates by intestacy could not be renounced.[2] As a matter of fact the early writers did not touch on the problem in that form. They did say, however, that title under intestacy passed at the moment of the intestate's death.[3] But that is equally true in the case of devises,[4] according to the majority rule. The court argues that since the title to intestate property passes by operation of law, while the title to testate property passes by will,[5] therefore the title to intestate property need not be assented to. The court admits that prior to this case all such language was by way of dicta.[6] By its argument the court denies the privilege of renouncing "gifts," whether beneficial or onerous, so often alluded to in cases involving the renunciation of devises.[7] Another objection to treating intestacy like testacy is the possibility of escheat, which by English common law occurred only when the blood of the ancestor who was the first purchaser was entirely extinguished.[8] American statutes have greatly changed that rule; but regardless of that there would have been no escheat in the instant case because there were other heirs who could take. Still another possible objection would be that thus the heir would be able to defeat the letter of the succession statutes, by allowing the property of the intestate ancestor to devolve on the other heirs in quantities greater than that provided for by the statute. Since, however, the intestate could give the property to the others [9] this objection seems without substance. Nevertheless, the result of the distinction as applied in this case is sound. Renunciation involves the doctrine of relation back, which is that the renunciation takes effect as of the date of death, and therefore the devisee is treated as though he never had title.[10] Thus a judgment creditor's lien would not attach and the other heirs would take free and clear of any lien.[11] Therefore some

2. WILLIAMS, LAW OF REAL PROPERTY (23rd ed. 1920) 88, 89; 3 WASHBURN, REAL PROPERTY (6th ed. 1902) § 1829; see note 3 *infra*. [1938] WIS. L. REV. 632.

3. Co. LITT. *15b, says: "But when a man dies seized of divers parcels in possession, and the freehold in the law is by the law cast upon the heire. . . ." This is cited in WATKINS, THE LAW OF DESCENTS (4th ed. 1837) 34, who paraphrases and says, "the law casts the estate upon the heir." Then WILLIAMS, *op. cit. supra* note 2, cites Watkins and agrees that the "heir at law, immediately on the decease of his ancestor, became at common law presumptively possessed, or seised in law, of all his lands." But then, without further citation, he goes on to say that "no disclaimer that he might make would have any effect, though, of course, he might, as soon as he pleased, dispose of the property by an ordinary conveyance." WASHBURN, *supra* note 2, cites WILLIAMS and 2 BL. COMM. *201. Blackstone's statement is that "An heir therefore is he upon whom the law casts the estate immediately on the death of the ancestor: and an estate, so descending to the heir, is in law called the inheritance." Blackstone and Coke supply the major premise; Williams the conclusion; but the source of the minor premise is unknown to this writer.

4. Greene v. King, 104 Conn. 97, 132 Atl. 411 (1926); *In re* Duffy's Estate, 228 Iowa 426, 292 N. W. 165 (1940); Neeld's Estate, 38 D. & C. 381 (Pa. 1940).

5. Instant case at 732. The court then says "[inherited] title can be lost by prescription, or adverse possession, or perhaps by estoppel" or parted with by ". . . intestacy, testamentary disposition, gift, contract, conveyance, and perhaps by other ways." Greene v. King, 104 Conn. 97, 132 Atl. 411 (1926).

6. Instant case at 730.

7. Townson v. Tickel *et al.*, 3 Barn. and Ald. 31 (1819), in which Abbott, C. J., says at 31, "The law certainly is not so absurd as to force a man to take an estate against his will." Holroyd, J., at 32 says, "I think that an estate cannot be forced on a man." Best, J., at 33 says, "It seems to be contrary to common sense to say, that an estate should vest in a man not assenting to it. . . ." Burrit v. Silliman, 13 N. Y. 93 (1855); Bouse v. Hull, 168 Md. 1, 176 Atl. 645 (1935).

8. BLACKSTONE, A TREATISE ON THE LAW OF DESCENTS (1759) 68.

9. Instant case at 732.

10. *Id.* at 730, and cases there cited. Brown v. O'Keefe, 300 U. S. 598 (1937); *In re* Matthiessen's Will, 175 Misc. 466, 23 N. Y. S. 802 (1940); Bacon v. Barber, 110 Vt. 280, 6 A. (2d) 9 (1939).

11. Instant case at 730.

cases deny the devisee the privilege of renouncing when creditor's rights are involved.[12] More cases deny the privilege when the creditor relies on apparent acceptance of the devise, or where there has been collusion between the renouncing devisee and the person who will take because of the renunciation.[13] Thus this case, in not permitting the debtor to elect whether or not his creditor will be able to collect, seems just.[14]

Habeas Corpus—Power of the Courts to Determine That the Danger Requiring Suspension of the Writ Has Passed—After the Japanese attack on Pearl Harbor, the Territory of Hawaii was placed under martial law, and the privilege of the writ of habeas corpus suspended until further notice by proclamation of the Governor.[1] Executive and judicial functions were vested in the military commander,[2] who continued the suspension and limited the functions of the courts.[3] Zimmerman was detained by the military authorities by order of a military and civilian board appointed to investigate subversive activities; no charges were made against him. Petition for a writ of habeas corpus was sought in his behalf, alleging that he was being illegally detained. *Held,* district court's denial of petition affirmed. *Ex parte Zimmerman,* 132 F. (2d) 442 (1942).

Not since the Civil War has the privilege of the writ of habeas corpus been suspended by federal authorities.[4] After prolonged controversy[5] it was decided at that time that Congress, and not the President, was authorized to suspend the writ.[6] By the Hawaiian Organic Act of 1900,[7] Congress delegated this power to the Governor of the Territory in certain cases where public safety demanded its exercise. There is no question but that the Governor's proclamation of December 7, 1941, was authorized by the Constitution[8] and the enabling act. A further and novel issue is presented by the instant case, however, that of judicial consideration of

12. Kalt v. Youngworth, 16 Cal. (2d) 807, 108 P. (2d) 401 (1941); Neeld's Estate, 38 D. & C. 381 (Pa. 1940).

13. For these and other conditions see 27 A. L. R. 472 and 123 A. L. R. 261.

14. (1934) 43 YALE L. J. 1030.

1. This action was authorized by § 67 of the Hawaiian Organic Act, 31 STAT. 153 (1900), 48 U. S. C. A. § 532 (1928).

2. It was questioned whether the Governor exceeded his authority in delegating this power to the military commander. The court in the instant case did not make a determination of this question.

3. On December 7, 1941, the civil courts were closed entirely; on January 27, 1942, they were authorized to resume their functions to a limited extent as agencies of the military governor.

4. In 1861, President Lincoln ordered that the writ of *habeas corpus* be suspended in respect to all persons arrested and imprisoned by military authorities. In spite of Marshall's dictum in *Ex parte* Bollman, 4 Cranch 75, 101 (1807), that the power of suspension was vested in Congress, Lincoln was advised by his Attorney-General that his action was constitutional. Taney's decision to the contrary in *Ex parte* Merryman, 17 Fed. Cas. 144, No. 9487 (C. C. Md. 1861), left the issue in a state of confusion which was resolved in 1863 by Congressional action which vested the power of suspension in the President, 12 STAT. 755 (1863).

5. Although precedent and a majority of contemporary authorities agreed that the power to suspend the writ was vested in Congress alone, the proposition that suspension was an executive act vested in the President was maintained in Horace Binney's treatise, THE PRIVILEGE OF THE WRIT OF HABEAS CORPUS UNDER THE CONSTITUTION. See Fisher, *The Suspension of Habeas Corpus During the War of the Rebellion* (1888) 3 POL. SCI. Q. 454. See also, *Ex parte* Field, 9 Fed. Cas. 1, No. 4761 (C. C. Vt. 1862).

6. McCall v. McDowell, 15 Fed. Cas. 1235, No. 8673 (C. C. Cal. 1867).

7. 31 STAT. 153 (1900), 48 U. S. C. A. § 532 (1928).

8. U. S. CONST. Art. I, § 9, cl. 2.

the exigency of the situation requiring continuation of the suspension.[9] The district judge denied Zimmerman's petition, not because of the merits of his detention, but solely because the judge felt powerless to issue the writ in view of the order of the military governor. Judge Haney, dissenting in the Circuit Court from an affirmance of the district judge's ruling, points out the inherent danger of a doctrine which would permit military authorities to suspend indefinitely this constitutional guarantee of human liberty. The guarantee would be worthless if the courts were unable to protect the individual from the caprice of military commanders. The majority agrees in principle with Judge Haney, holding that the issuance of the writ in each particular case depends upon the averments of the petition, and "facts of which the court [is] . . . required to take judicial cognizance," [10] and concluding that the possibility of invasion of and fifth-column activities in Hawaii warranted Zimmerman's detention. The minority would remand the case to the lower court in order that it might determine whether the detention was reasonably necessary for the public welfare.[11] Both deny that the courts are bound by the military proclamation, and concur in the fundamental principle that review by the judiciary of the circumstances requiring suspension of the privilege of the writ of habeas corpus is essential to the preservation of constitutional government.

Restitution — Equitable Lien Granted Person Who Loaned Money to a Supposed Owner of Real Property Expressly to Discharge a Lien Upon the Property and to Make Required Repairs— Defendant lodge conveyed its clubhouse to X after it was made uninhabitable by floods. X then mortgaged the property to plaintiffs as security for a $6,000 loan. Approximately one-half of the proceeds was used by X to satisfy a judgment against defendant which was a lien on the premises and the remainder was used to pay for the majority of repairs necessary to make the premises fit for occupancy.[1] Subsequently, the conveyance from defendant to X was adjudged void [2] and the property was recon-

9. The problem of indefinite suspension and access to judicial review by the civil courts was eliminated by a provision of the Act of 1863 that persons detained be referred to a civil grand jury, and if not indicted within 20 days of their arrest, be permitted to petition the court to determine whether their detention be lawful. See *Ex parte* Milligan, 4 Wall. 2, 115-117 (1866).

10. Instant case at 445.

11. There are interesting differences in the opinions of the district judge, and the majority and minority in the Circuit Court, regarding the issuance of the writ. The district judge holds that the suspension of the writ precludes the possibility of its issuance by a court; Judge Haney, in his dissent, holds that the writ issues automatically, and that consideration of the merits of the prisoner's detention must be given on its return. A distinction is made between suspension of the writ, and suspension of the privilege of the writ. See *Ex parte* Milligan, 4 Wall. 2, 130-131 (1866). The majority sees little purpose in attempting to analyze this distinction (instant case at 445), and holds that the writ itself should be issued only after consideration of the petition and its surrounding circumstances. See 14 STAT. 385 (1867), 28 U. S. C. A. § 455 (1928). Only according to the view of the district judge is the suspension of the writ effective in practice, for both decisions in the higher court hold that any prisoner may be released if the court believes that the suspension is unwarranted, differing only in at what stage of the proceedings the court may so act.

1. The judgment lien amounted to $3,044.50 and the total repair bill was $3,475.00, of which $2,955.50 was paid from the mortgage proceeds.

2. Polish Falcons of America v. American Citizens Club for Poles of Natrona, 338 Pa. 218, 13 A. (2d) 27 (1940). The only ground was the lack of consent, necessary to convey any property, by the national organization of the Polish Falcons after the local branch elected to comply strictly with the former's laws and regulations.

veyed. While X held color of title, the plaintiffs received $2,000 in reduction of their mortgage. *Held,* equitable mortgage lien impressed on defendant's property not only for the amount of the satisfied judgment lien which was reinstated by subrogation, but also for the amount expended to make repairs since they were required or desired by the defendant; the total relief, however, limited to the $4,000 which remained unpaid on the mortgage. *Gladowski v. Felczak,* 346 Pa. 660, 31 A. (2d) 718 (1943).

It is well-settled, though the cases are not unanimous,[3] that where an invalid or defective mortgage is given to secure a loan to another for the express purpose[4] of discharging a prior encumbrance and the money is so used, the mortgagee is entitled to be subrogated to the rights of the original lienor whose lien was discharged provided he innocently believed the mortgage to be valid.[5] The same rule exists where, as in the instant case, the mortgage is void because the person giving it had only partial or no title.[6] The cases which announce this rule were properly cited by the court as authority for reinstating the lien in favor of the plaintiffs, but it cited no authority, except broad restitutionary principles laid down by the *Restatement of Restitution,*[7] and made no argument for including within the equitable lien the amount expended for necessary repairs. With the exception of one case,[8] not cited although it tends to support the court's conclusion, a three party situation is a novel one, all former litigation having involved just two parties, the landowner and the improver. At common law, an occupant of land placed improvements thereon at his own peril. Three reasons were given for this harsh rule: one, a person can not make another a debtor without his consent;[9] two, any other rule would encourage heedlessness in the examination of titles;[10] and three, it prevented officious intermeddling resulting in hardship to the owner.[11] Even today, the common law rule has been only modified. A *bona fide* improver of real property, which he mistakenly believes to be his own, still can not bring an affirmative action in law or equity[12] unless expressly permitted

3. See RESTATEMENT, RESTITUTION, REPORTER'S NOTES (1937) § 43, and the cases cited therein.

4. It is not clear from the record or the opinion whether the plaintiffs did lend the money for these two express purposes, but as a practical matter, it is very improbable that they bargained for a junior lien. It is clear, however, that the main reasons for conveying the property from defendant to X was to borrow money to pay the lien and make repairs.

5. A long list of authorities is cited in Ingram v. Jones, 47 F. (2d) 135, 140 (1931). See also RESTATEMENT, RESTITUTION (1937) §§ 43 (c), 162.

6. *Ibid.* Haverford Loan and Building Association v. Fire Association of Philadelphia, 180 Pa. 522, 37 Atl. 179 (1897); Smith v. Smith, Jr., 101 Pa. Super. 545 (1931); *cf.* General Casmir Pulaski Building and Loan Association v. Provident Trust Co., 338 Pa. 198, 12 A. (2d) 336 (1940).

7. §§ 4 (d), 161.

8. Calloway Bank v. Ellis, 215 Mo. App. 72, 238 S. W. 844 (1922); Note (1923) 23 COL. L. REV. 569. Landowner, knowing validity of the organization of the improver school district was in question, conveyed land to the improver, who issued $4,000 in bonds to the plaintiff. The money was used to erect a school house on the land. When the organization of the district was declared invalid, the conveyance was held to be void from the beginning. *Held,* equitable lien granted plaintiff on the building, not on the whole property, on the ground that the school directors were trustees of the funds of the plaintiff used to erect the building, and when the landowner regained possession he did so subject to the trust.

9. RESTATEMENT, RESTITUTION, REPORTER'S NOTES (1937) § 43.

10. WOODWARD, QUASI-CONTRACTS (1913) § 187; 27 AM. JUR. 262.

11. RESTATEMENT, RESTITUTION (1937) § 42, comment *a.*

12. See Note (1936) 104 A. L. R. 577.

by statute.[13] However, where the improver is sued at law in ejectment with a count for mesne profits or where an accounting for rents and profits is sought by the owner, the improver may set-off the value of his improvements but only to the extent of the value of the rents and profits.[14] Also, if the owner brings an equitable action, equity will, as a condition of giving relief, allow the improver compensation to the extent of the value of his improvements.[15]

Though a modified form of the old rule still exists, the reasons which called it into being either do not exist today or are not applicable where owner and improver act *bona fide*. The first reason is unsound in the light of modern contract law permitting assignments. The second and third reasons do not apply where the landowner by his own conduct induces the improver's mistaken belief that he is the real owner. In view of this, the action of the court in not extending the rule to a new situation involving the lender, and allowing recovery in an affirmative action by him, is entirely sound. It should be noted that on the facts recovery was allowed only for the amount expended on improvements necessary to make the premises habitable and which the owner required or desired. This case again shows the virility of the broad principles of Restitution.

Trusts — Mortgage Salvage Operations—Constitutionality of Retroactive Statute Granting Fixed Income Right to Life Beneficiary —A testator's residuary estate in trust (income payable to wife for life, with remainders over) included mortgages which went into default after the testator's death. Salvage operations were commenced. The estate acquired title to the real property prior to the enactment of a statute,[1] a retrospective provision of which ordered trustees to pay ". . . net income during the salvage operation up to three per centum per annum, regardless of principal advances for expenses of foreclosure . . . arrears of taxes, . . . Payment [of income] shall be final . . . and not subject to recoupment from the life tenant or surcharge against the trustee. . . ." The remaindermen attacked the constitutionality of the retroactive provisions. *Held* (two justices dissenting), although the statute is retroactive it is not an unconstitutional "taking of property". *In re West's Estate,* 289 N. Y. 423, 46 N. E. (2d) 501 (1943).[2]

13. See WOODWARD, QUASI-CONTRACTS (1913) 302, note 1, for cases referring to statutes. Although most states now have these statutes, commonly termed "betterment acts" or "occupying claimant acts", only under some can one recover for improvements made by him in an affirmative action against the owner.

14. Hylton v. Brown, 2 Wash. (U. S. C. C.) 165; 12 Fed. Cas. 1133 (1808); McCloy v. Arnett, 47 Ark. 445, 2 S. W. 71 (1886); Taylor v. James, 109 Ga. 327, 34 S. E. 674 (1899); Parsons v. Moses, 16 Iowa 440 (1864); Jackson v. Loomis, 4 Cow. 168 (N. Y. 1825); Jones' Heirs v. Perry, 10 Yerg. 59 (Tenn. 1836).

15. Byers & McDonald v. Fowler, 12 Ark. 218 (1851); Greer v. Vaughan, 96 Ark. 524, 132 S. W. 456 (1910); Hawkins v. Brown, 80 Ky. 186 (1882); Jones, Adm'r v. Jones, 4 Gill 87 (Md. 1846); Warwick v. Harvey, 158 Md. 457, 148 Atl. 592 (1930); Hicks v. Blakeman, 74 Miss. 459, 21 So. 7 (1896); Freichnecht v. Meyer, 39 N. J. Eq. 551 (1885); Thomas v. Evans, 105 N. Y. 601, 12 N. E. 571 (1887); Skiles v. Houston, 110 Pa. 248, 20 Atl. 722 (1885).

1. N. Y. PERS. PROP. LAW, § 17-c, effective April 13, 1940 (tit. 40, McKinney, Supp. 1943).

2. Lewis, J., dissented as he felt a vested property interest was being violated. Loughran, J., concurred, and added that he saw no justification for disregarding the recoupment rights of the remainderman. Lower court opinion was in 175 Misc. 1044, 26 N. Y. S. (2d) 622 (1941).

The contested statutory provision only purports to make procedural and remedial changes.[3] It retains the Chapal-Otis judicial rules [4] governing salvage apportionment, of principal and income, of trusts created prior to the date of enactment.[5] Procedurally, the administrative discretion of the trustee, which had heretofore guided income payments,[6] was replaced by a "fixed right" that guaranteed the life tenant three per centum income (where earned) per annum on the face value of the investment. The remedial change eliminated the remainderman's right to recoup or surcharge these payments.[7] The latter provision was designed to overcome the reluctance of the trustees to distribute any income before the completion of the usually lengthy salvage operations.[8] There would be no constitutional objection if the income amount found due under the final apportionment computation always exceeded the amount of income irrevocably paid over the life of the salvage operations.[9] Actually, this is not a mathematical certainty.[10] Neither can the trustee always make an accurate enough prognostication of the ultimate apportionment shares to

3. *Supra* note 1, at § 17-c, subsection 2 (d).

4. Meldon v. Devlin, 31 App. Div. 146, 53 N. Y. S. 172 (1898), *aff'd.* 167 N. Y. 573, 60 N. E. 1116 (1907); Matter of Chapal, 269 N. Y. 464, 472-3, 199 N. E. 762 (1936); Matter of Otis, 276 N. Y. 101, 11 N. E. (2d) 556 (1937). Briefly stated the rule is: "In the capital account will be the original mortgage investment. In the income account will be the unpaid interest accrued to the date of sale upon the original capital. The ratio established by those respective totals determines the respective interests in the net proceeds." Matter of Chapal, *supra* at 173.

5. The first section completely abolishes the clumsy Chapal-Otis rules as to all trusts and mortgage investments made after the effective date of the act. Now, the foreclosed mortgage becomes a principal asset of the estate. The life tenant immediately receives all net income earned. Expenses of foreclosure, taxes, and costs are charged out of the principal.

6. *In re* Phelps, 162 Misc. 703, 706, 295 N. Y. S. 840 (Surr. Ct. 1937); *In re* Martin, 165 Misc. 597, 612, 613, 1 N. Y. S. (2d) 80 (Surr. Ct. 1937). Salvage income is usually derived from three sources: (1) rents received by trustee as mortgagee in possession; (2) rents received by trustee after foreclosure as owner of the property; (3) interest and amortization payment received by trustee upon resale, where part of purchase price consists of a purchase money mortgage. SKILTON, *The Rights of Successive Beneficiaries in Unproductive Trust Assets Bearing Interest* (1941) 15 TEMP. L. Q. 378, 396. *Cf.* Nirdlinger's Estate, 331 Pa. 135, 200 Atl. 656 (1938), for the Pennsylvania problem.

7. *In re* Egger, 167 Misc. 66, 3 N. Y. S. (2d) 474 (Surr. Ct. 1938); *In re* Brainerd, 169 Misc. 640, 644, 8 N. Y. S. (2d) 413, 417 (Surr. Ct. 1938).

8. Otherwise . . . "the life tenant of the trust must wait in the majority of the cases for a long period of time before he becomes entitled to the payment of any income, because the present requirement that advances from principal for the expenses of foreclosure and for arrears of taxes . . . must be paid first from the net income of the property. . . ." Note of Commission, N. Y. PERS. PROP. LAW, § 17-c.

9. If this were always true, under the previous rule the trustee could have paid in his discretion what he is now directed to do. See Note (1937) 5 U. OF CHI. L. REV. 122, for a mathematical discussion of apportionment.

10. There was a sharp disagreement in the Surrogate Court. Surrogate Foley in Matter of West, 175 Misc. 1044, 1052, 26 N. Y. S. (2d) 622, 632 (1941), argues that income payments will not exceed the final share. . . . "The possibility that such a situation might result is infitesimal." However, he offers no concrete examples. Surrogate Delehanty in *In re Wacht's* Estate, 32 N. Y. S. (2d) 871, 880-88 (1942), gives several actual and hypothetical examples of the opposite result and criticizes the above assumption in *West's* case. In the *West* case at the time the constitutional objection was raised the salvage operations were not yet complete, while in the *Wacht* case they were. Thus it might be said that the final constitutional objection is not yet settled.

prevent the irrevocable "overpayments".[11] Therefore if the remainderman's ultimately computed share of the salvage proceeds can be considered a vested proprietary interest there could conceivably be a "deprivation of property without due process".[12] However, the court denies any vested interest.[13] The fact is stressed that the Chapal-Otis rules[14] were only based upon a convenient fiction, and therefore retained enough flexibility to be procedurally reshaped by the exigencies of better trust administration.[15] Nevertheless, since a fixed standard of apportionment is still deemed to be in effect,[16] it is an undesirable inconsistency to compel an accounting in accordance with that standard and then completely ignore a conceivable violation of the remainderman's "determined rights" under it.[17] A more cogent constitutional objection has been raised since the decision of the instant case.[18] Remaindermen are required to advance new principal to pay the expenses of the salvage operation.[19] Thus, if the entire original investment is ultimately lost, any irrevocable income payments will be in effect an expropriation of the remainderman's contributed capital.[20] Although it is extremely desirable to simplify salvage operations, it is equally essential that an equitable balance between the

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11. *In re* Martin's Estate, 165 Misc. 597, 1 N. Y. S. (2d) 80 (1937) (length of time involved and number of errors made in calculation). *In re* Pelcyger's Estate, 157 Mis. 913, 285 N. Y. S. 723 (Surr. Ct. 1936) (uncertainty of computation due to great number of items). Surrogate Foley, who so strongly upheld the new provision, once held . . . "It may appear to be a hardship to the life tenants to withhold income, but the necessity for safeguarding the rights of the remaindermen forbid a premature distribution. . . . The rights of all parties must be protected. It is impossible to treat current income as actually earned income. The hazards of a loss to the remaindermen continue. Only an actual sale and the termination thereby of the salvaging operation can establish the true facts." Matter of Otis, 158 Misc. 808, 817, 287 N. Y. S. 758, 767 (Surr. Ct. 1936).

12. Instant case, 46 N. E. (2d) at 507, 508, and cases cited. See Matter of Lansing, 182 N. Y. 283, 74 N. E. 882 (1905); Matter of Pell, 171 N. Y. 48, 63 N. E. 789 (1902).

13. Instant case, 46 N. E. (2d) at 505. *See* Munn v. Illinois, 94 U. S. 133, 134 (1876); Hurtado v. California, 110 U. S. 516, 532 (1883); N. Y. Cent. R. R. v. White, 243 U. S. 188, 198 (1916).

14. *Supra* note 4.

15. Matter of Otis, 276 N. Y. 101, 115, 11 N. E. (2d) 556, 559 (1937): ". . . a general rule . . . cannot be attained at a bound, that no rule can be final for all cases, and that any rule must in the end be shaped by considerations of business policy. . . . Only the sure result of time will tell how far we have succeeded."

16. *Supra* note 1. The ascertainment of the final share is still by the Chapal-Otis rules.

17. *See* Wacht's Estate, 32 N. Y. S. (2d) 871, 880-886 (1942).

18. *In re* Schnitzler's Estate, 40 N. Y. S. (2d) 554 (1943). The original principal was $4000 and new principal advances amounted to $3300. Total income during the management period was $2040. Net proceeds of the foreclosure sale were $900. Trustee computed and paid $600 interest payments under § 17-c for the previous five years (before 1940). Remainderman claimed an apportionment credit of $4360 ($7300 —$2940), out of which $360 was additional capital he contributed. He claims no retroactive income payments should have been made as the entire original capital was gone and the irrevocable payment of "income" was an expropriation of his contributed capital. (Figures approx.) N. Y. LAW J., Dec. 17, 1942, p. 1947. See also Matter of Egger, 167 Misc. 66, 3 N. Y. S. (2d) 474 (1938), for the stringent requirement of trustee to apply income first to the repayment of capital advances.

19. *Ibid.* See, on problem of principal advances, Matter of Otis, 276 N. Y. 101, 11 N. E. (2d) 556 (1937).

20. *Supra* note 18.

life tenant and the remainderman be maintained.[21] The instant statute displays a tendency to hedge the problem, the precise outcome of which is unforeseeable, and to that extent ignores the equitable rights of the remainderman.

21. The new provision attempts to preserve the equitable balance by providing that any excess income over the three per centum be first applied to cover advancements from principal. Also where any balance of unpaid principal advances remained due at the close of salvage operations, such balance was declared to be a primary lien upon the proceeds of the sale and shall first be paid out of any cash derived. The instant objection is where there isn't enough cash derived. Where there is a purchase money mortgage the remainderman receives dubious satisfaction for his new capital in the form of a primary lien for any unpaid balance of advanced principal. See also Notes (1941) 89 U. OF PA. L. REV. 1081, 1087-1089; (1942) 90 U. OF PA. L. REV. 831, 836-842.