

1922

For the Minnesota State Bar Association

Chester L. Caldwell

Follow this and additional works at: <https://scholarship.law.umn.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Caldwell, Chester L., "For the Minnesota State Bar Association" (1922). *Minnesota Law Review*. 1034.
<https://scholarship.law.umn.edu/mlr/1034>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

Minnesota Law Review

Published monthly, December to June inclusive, by the Faculty and Students of the Law School, University of Minnesota.

Subscription Price, \$3.00 per annum. Sixty cents per number.

HENRY J. FLETCHER - - - - - Editor-in-Chief
ARTHUR C. PULLING - - - - - Assistant Editor
JAMES PAIGE - - - - - Business Manager

STUDENT EDITORIAL BOARD

ALFRED J. SCHWEPPE, President, Recent Case Editor	NORRIS D. DARRELL
REX H. KITTS, Note Editor	MORRIS T. EVANS
PAUL S. CARROLL, Associate Editor	WILLIAM H. FRENG
JOHN W. AHLEN	OSCAR G. HAUGLAND
EDWARD S. BADE	ELMER C. JENSEN
WILLIAM A. BENITT	CHARLES A. LOUGHIN
ARTHUR M. CARLSON	GUY E. McCUNE
LEWIS W. CHILD	THOMAS B. MOUER
	ERVIN P. VAN BUREN

FOR THE MINNESOTA STATE BAR ASSOCIATION

CHESTER L. CALDWELL, Secretary - - - - - Editor

CORPORATIONS—NATURE OF STATUTORY LIABILITIES IMPOSED ON OFFICERS AND STOCKHOLDERS.—Parallel with the growth of modern corporations has come increased legislation guiding and controlling corporate conduct for the public protection. Many of these enactments have taken the form of liabilities imposed on officers and stockholders for corporate debts in favor of creditors, over and beyond the liabilities existing at common law. Apart from constitutional provisions¹ or statutes, a stockholder could be held only to the extent of his unpaid subscriptions,² and an officer

¹The Minnesota Constitution, Art. 10, par 3, provides a stockholders' liability to the amount of stock held, with certain exceptions.

² Morawetz, *Priv. Corp.*, 2d Ed., sec. 869; note 3 A. S. R. 834.

was not liable except as an agent.³ An important and frequently arising question is whether these statutory liabilities are by nature penal, contractual, or otherwise. Courts agree that the definite and fixed statutory liability of a stockholder for debts of an insolvent corporation, not contingent on some breach of duty, is contractual by nature,⁴ on the theory that it is a liability knowingly undertaken by the stockholder when he voluntarily subscribes for stock; and that he impliedly agrees with the corporation creditors to perform the obligations imposed on stockholders by the constitution and the laws then in force.

With regard to a second class of statutes, namely those which impose a personal liability, usually unlimited, upon officers and sometimes stockholders for official neglect or breach of statutory duty, the decisions are not in harmony.⁵ A majority of the courts has considered this liability to be strictly penal,⁶ on the ground that it is purely a statutory punishment for the violation of a law created for the public benefit, and the fact that a remedy is afforded private persons is indirect and incidental. One jurisdiction holds that only the liability imposed for a breach of a prohibitive statute is penal, and that the liability under a permissive statute, that is, one which merely imposes liability if certain things are or are not done, is contractual.⁷ The more recent authorities, however, have adopted what is believed to be a better and more liberal view of this class of statutes, namely, that they are penal only in part and are remedial with regard to creditors,⁸ since the duty is to the creditors

³Mitchell v. Hotchkiss, (1880) 48 Conn. 9, 40 Am. Rep. 146; note 48 A. S. R. 916.

⁴Flash v. Connecticut, (1883) 109 U. S. 371, 3 S. C. R. 263, 27 L. Ed. 966; Howarth v. Lombard, (1900) 175 Mass. 570, 56 N. E. 888, 49 L. R. A. 301; Bernheimer v. Converse, (1907) 206 U. S. 516, 27 S. C. R. 755, 51 L. Ed. 1163; 1 Page, Contracts, 2d Ed., sec. 66, n. 5; 1 Cook, Corporations, 6th Ed., sec. 223, p. 585.

⁵The distinction between the two classes of statutes indicated is clearly pointed out in Adler v. Baker-Dodge Theatre Co., (1a. 1921) 181 N. W. 254.

⁶For failure to publish certain notices and reports required by statute, Cable v. McCune, (1858) 26 Mo. 371, 72 Am. Dec. 214; Halsey v. McLean, (1866) 12 Allen (Mass.) 438, 90 Am. Dec. 157 and note; Adler v. Baker-Dodge Theatre Co., (1a. 1921) 181 N. W. 254; for contracting excessive debts, First National Bank of Plymouth v. Price, (1870) 33 Md. 487, 3 Am. Rep. 204; notes 37 A. S. R. 168 and 96 A. S. R. 989; 3 Thompson, Corporations, sec. 4164; 2 Morawetz, Priv. Corp., 2d Ed., sec. 907.

⁷Diversey v. Smith, (1882) 103 Ill. 378, 42 Am. Rep. 14, cited in Vestal Co. v. Robertson, (1917) 277 Ill. 425, 115 N. E. 629.

⁸Machinery Co. v. Smith, (1912) 87 Kan. 331, 124 Pac. 414, 41 L. R. A. (N.S.) 379 and note, 30 Ann. Cas. 243 and note; Credit Men's Co. v. Vickery, (1916) 62 Colo. 214, 161 Pac. 297; Northern Pac. Ry. Co. v.

and not to the public, the liability in many instances is not for an arbitrary fixed amount, and the remedy is private and civil. This doctrine was first asserted by the United States Supreme Court in *Huntington v. Attrill*,⁹ which held that these statutes are not penal in the international sense, i. e., with respect to extraterritorial enforcement, though they may be considered penal for other purposes.¹⁰ Strengthened by this decision, many of the recent cases have drawn away from the former doctrine holding the statutory liabilities penal, and have taken the position long since assumed by the Georgia court that these liabilities are not penal, but are more in the nature of contractual,¹¹ or purely remedial statutory obligations,¹² since primarily the legislative intent was to provide a remedy rather than to punish. This view is set forth in *Parks Shellac Company v. Harris*,¹³ a recent Massachusetts case, in which the court held that the liability of corporation officers under a Massachusetts statute for knowingly making false reports is not penal and so cannot be governed by the penal statute of limitations, on the ground that "the liability is not based on a public wrong but protects private rights . . . and is created for the creditors' benefit only; that since the creditor had a right to rely upon it when the debt was created, it constituted an implied term of every contract between the corporation and its creditors."

A conception of the effects of holding these liabilities entirely penal, penal in part only, or not at all penal can best be obtained from an examination of the results of each view. 1. Penal statutes cannot be enforced extra-territorially because the penal laws of one state are not recognized in another.¹⁴ But a contrac-

Crowell, (1917) 245 Fed. 668; 3 Thompson, Corporations, sec. 4166; 2 Morawetz, Priv. Corp., 2d Ed., sec. 908; and 3 Clark and Marshall, Priv. Corp., sec. 833, p. 2675.

⁹(1892) 146 U. S. 657, 13 S. C. R. 224, 36 L. Ed. 1123.

¹⁰The court says, p. 676, "As the statute imposes a burdensome liability on the officers, it may well be considered penal, in the sense that it should be strictly construed. But as it gives a civil remedy, at the private suit of the creditor only, and measured by the amount of his debt, it is as to him clearly remedial. We can see no just ground for holding such a statute to be a penal law, in the sense that it cannot be enforced in a foreign state or country."

¹¹*Farr v. Briggs' Estate*, (1900) 72 Vt. 225, 47 Atl. 793, 82 A. S. R. 930.

¹²*Neal v. Moultrie*, (1852) 12 Ga. 104; *Nebraska National Bank v. Walsh*, (1900) 68 Ark. 433, 59 S. W. 952, 82 A. S. R. 301; see also *Commercial National Bank v. Kirk*, (1909) 222 Pa. St. 567, 71 Atl. 1085, 128 A. S. R. 823.

¹³(Mass. 1921) 129 N. E. 617.

¹⁴*Halsey v. McLean*, (1866) 12 Allen (Mass.) 438, 90 Am. Dec. 157 and

tual or remedial liability may be so enforced,¹⁵ and a judgment based thereon must be recognized in a foreign state because of the full faith and credit clause of the federal constitution.¹⁶ Liabilities considered contractual or penal in part only are enforceable extra-territorially on the ground that only those liabilities which are entirely penal, their sole purpose being to punish for a public wrong, are denied recognition in a foreign state.¹⁷ 2 Many states have a shorter statute of limitations for penalties than for contractual or remedial actions. Liabilities considered penal only in part are generally held penal for this purpose.¹⁸ 3. If a statutory liability is penal the legislature may repeal the statute at any time before an action is brought thereon and judgment rendered.¹⁹ If a contractual liability, it cannot be taken away by legislative action, because the obligations of a contract cannot be so impaired.²⁰ 4. A penal liability does not survive in case of death, while a contractual liability survives to the personal representative.²¹ 5. Lastly, penal statutes are more strictly construed than contractual or remedial ones.²² Those penal only in part are held to a strict construction.²³

note; *First National Bank of Plymouth v. Price*, (1870) 33 Md. 487, 3 Am. Rep. 204.

¹⁵*Whitman v. Oxford National Bank*, (1900) 176 U. S. 559, 20 S. C. R. 477, 44 L. Ed. 587. But see *Marshall v. Sherman*, (1895) 148 N. Y. 9, 42 N. E. 419, 34 L. R. A. 757, 51 A. S. R. 654.

¹⁶*Huntington v. Attrill*, (1892) 146 U. S. 657, 13 S. C. R. 224, 36 L. Ed. 1123. See notes 34 L. R. A. 737 and 33 L. R. A. (N.S.) 895.

¹⁷*Machinery Co. v. Smith*, (1912) 87 Kan. 331, 124 Pac. 414, 41 L. R. A. (N.S.) 379 and note, 30 Ann. Cas. 243 and note; 72 Cent. Law Journal 245.

¹⁸*State Savings Bank v. Johnson*, (1896) 18 Mont. 440, 45 Pac. 662, 33 L. R. A. 552, 56 A. S. R. 591; 1 *Cook, Corporations*, 6th Ed., sec. 223, p. 588. See, however, *Nebraska National Bank v. Walsh*, (1900) 68 Ark. 433, 59 S. W. 952, 82 A. S. R. 301. The case of *Merchant's National Bank v. Northwestern, etc., Co.*, (1892) 48 Minn. 349, 51 N. W. 117, terms the liability penal in this connection, but is asserted to be overruled in *Flowers v. Bartlett*, (1896) 66 Minn. 213, 216, 68 N. W. 976, where the court broadly states that the statutory liability "is not in any proper sense a penalty."

¹⁹*Gregory v. German Bank*, (1877) 3 Colo. 332, 25 Am. Rep. 760; see also *Globe Publishing Co. v. State Bank of Nebraska*, (1894) 41 Neb. 175, 59 N. W. 683, 27 L. R. A. 854; *Adler v. Baker-Dodge Theatre Co.*, (Ja. 1921) 181 N. W. 254, effect of a curative act.

²⁰See *Bernheimer v. Converse*, (1907) 206 U. S. 516, 27 S. C. R. 755, 51 L. Ed. 1163. But note *Moss v. Smith*, (1916) 171 Cal. 777, 155 Pac. 90.

²¹*Mitchell v. Hotchkiss*, (1880) 48 Conn. 9, 40 Am. Rep. 146; 3 *Thompson, Corporations*, sec. 4169; note 3 A. S. R. 869.

²²*Cable v. McCune*, (1858) 26 Mo. 371, 72 Am. Dec. 214.

²³See *Huntington v. Attrill*, (1892) 146 U. S. 657, 676, 13 S. C. R. 224, 36 L. Ed. 1123.

The divergence of the courts in determining the nature of officers' and stockholders' liabilities may be due in a degree to the effect of the language of the respective statutes, as expressing the legislative intent. However, though the weight of authority, as previously stated, considers the liability imposed by the class of statutes under consideration to be penal by nature, recent decisions evidence a tendency to abandon the strict application of the penal theory in favor of the more liberal interpretation that the statutes are remedial or contractual.

BANKRUPTCY—EXEMPTION OF INSURANCE POLICIES ALLOWED BY STATE LAW.—Section 70-a (5) of the Bankruptcy Act vests in the trustee property which the bankrupt might by any means have transferred or which was subject to judicial levy and sale, with the proviso "That when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives," he may pay its cash surrender value to the trustee and continue to hold such policy "free from the claims of creditors."¹ Section 6 provides the act shall not affect exemptions allowed by state laws.² These two sections have caused much litigation, and various interpretations have been placed upon them by the lower federal courts. The Supreme Court has finally set at rest certain points. 1. Where there is no local exemption statute, all the life and endowment policies of the bankrupt, whether payable to the bankrupt, his estate or representatives or to any other person, pass to the trustee, provided there was power in the bankrupt to obtain the cash surrender value.³ 2. The power of the insured to change the beneficiary and thus obtain the cash surrender value of the policy by its terms payable to another is an asset which will pass to the trustee.⁴ 3. The interest of the trustee extends only to the cash surrender value at the time of bankruptcy.⁵ 4. The "cash surrender value" embraces not only policies which by their terms so provide, but also policies having such value by the practice or con-

¹30 Stat. 565, Chap. 541, sec. 70; U. S. Comp. Stat. 1918, sec. 9654a (5).

²30 Stat. 548, chap. 541, sec. 6; U. S. Comp. Stat. 1918, sec. 9590.

³Cohen v. Samuels, (1917) 245 U. S. 50, 38 S. C. R. 36, 62 L. Ed. 143.

⁴Cohen v. Samuels, (1917) 245 U. S. 50, 38 S. C. R. 36, 62 L. Ed. 143; Cohn v. Malone, (1919) 248 U. S. 450, 39 S. C. R. 141, 63 L. Ed. 352.

⁵Burlingham v. Crouse, (1913) 228 U. S. 459, 473, 33 S. C. R. 564, 57 L. Ed. 920.

cession of the company issuing them.* 5. Policies which are exempt by state law do not pass to the trustee, because of section 6 of the Bankruptcy Act. Nor is section 6 limited by section 70a⁷

Many states have exemption statutes to the effect that if the bankrupt has insurance and the beneficiary named therein is his wife, or children, or in some statutes simply "another," the policy shall inure to such beneficiary's separate use and benefit free and clear from the claims of the creditors of the insured.⁸ The question then arises as to what effect the right to change the beneficiary, reserved to the insured, will have in bankruptcy proceedings. Since the Supreme Court has held that the power of the insured to change the beneficiary and obtain the cash surrender value is an asset which passes to the trustee in bankruptcy,⁹ it is necessary to rely on the interpretation of the state statute, to ascertain whether or not it denies the trustee the right to take under the power reserved in the bankrupt to change the beneficiary, or in other words, whether a policy containing such a power is within the terms of the exemption statute.

The federal court in allowing exemptions under a state statute is governed by the interpretation given by the highest court of the

**Hiscock v. Mertens*, (1907) 205 U. S. 202, 212, 27 S. C. R. 488, 51 L. Ed. 771.

⁷*Holden v. Stratton*, (1905) 198 U. S. 202, 213, 25 S. C. R. 656, 49 L. Ed. 1018; notes 26 L. R. A. (N.S.) 451 and 41 L. R. A. (N.S.) 123.

⁸G. S. Minn. 1913, secs. 3465, 3466. A similar provision is found in some state constitutions. North Carolina, Art. X, sec. 7. See 24 Green Bag 419.

⁹*Cohen v. Samuels*, (1917) 245 U. S. 50, 38 S. C. R. 36, 62 L. Ed. 143; *Cohn v. Malone*, (1919) 248 U. S. 450, 39 S. C. R. 141, 63 L. Ed. 352. By the weight of authority, the beneficiary under a mutual benefit certificate takes no property, but rather a mere expectancy of benefit under the contract. *Richmond v. Johnson*, (1881) 28 Minn. 447, 10 N. W. 596; *Hoelt v. Supreme Lodge K. of H.*, (1896) 113 Cal. 91, 45 Pac. 185, 33 L. R. A. 174; 5 MINNESOTA LAW REVIEW 316. It would seem therefore that the property remained in the insured. *Vance, Insurance*, sec. 136. The Virginia court in *Leftwich v. Wells*, (1903) 101 Va. 225, 43 S. E. 364, 99 A. S. R. 865, treated the right to change the beneficiary merely as a power. The general doctrine of powers is that where the donee has an absolute power of appointment and the power is not executed, a court of equity will not treat the subject-matter of the power as assets for the payment of the donee's creditors, that is, the beneficiary's rights are protected. *Crawford v. Langmaid*, (1898) 171 Mass. 309, 50 N. E. 606; 22 Am. & Eng. Ency. of Law, 1146. See 24 Green Bag 419, 425. The Supreme Court in *Cohen v. Samuels* "buttressed its decision by a reference to clause (3) of sec. 70a which confers on the trustee all powers which the bankrupt might have exercised for his own benefit." 27 Yale L. J. 403. It is not clear whether the court relied solely on clause (3) to pass this right to the trustee or not.

state,³⁰ but if the statute has not been construed, general rules of construction are applied.³¹ The authorities are divided as to the rights of the trustee. Those refusing the trustee any benefit contend that if such a construction were placed on exemption statutes it would practically nullify them, for the reason that nearly all modern policies give the insured the right to change the beneficiary.³² On the other hand, a minority allow the trustee the cash surrender value on the ground that the power to change the beneficiary gives the insured such dominion over the policy as to make it an asset of the estate.³³ The Supreme Court in *Cohn v. Malone*³⁴ seems to favor the latter view, though the question is not squarely presented. Such a result, it is submitted, defeats the purpose of the exemption statute.

BANKS AND BANKING—DISTINCTION BETWEEN SPECIAL DEPOSITS AND DEPOSITS FOR A SPECIFIC PURPOSE.—Whatever distinction may have existed in the past between these two classes of deposits, since the early case of *Farley v. Turner*¹ the courts have largely disregarded it, perhaps in an effort to avoid hard cases. The two deposits are in fact distinct, and the distinction is of practical importance whenever the bank becomes insolvent and is sued by a depositor claiming a preference over general creditors. "A

³⁰In re Gunzberger, (1920) 268 Fed. 673.

³¹Richardson v. Woodward, (1900) 104 Fed. 873, 44 C. C. A. 235, 5 A. B. R. 94.

³²In re Orear, (C. C. A., 8th Cir., 1911) 189 Fed. 888, 111 C. C. A. 150, 26 A. B. R. 521; In re Pfaffinger, (1908) 164 Fed. 526, 21 A. B. R. 255; In re Johnson, (D. C. Minn. 1910) 176 Fed. 591, 24 A. B. R. 277; In re Pittman, (1921) 275 Fed. 686. The supreme court of Minnesota in *Murphy v. Casey*, (1921) 184 N. W. 783, construed its statute, G. S. Minn. 1913, secs. 3465, 3466, as an exemption statute, and held that the cash surrender option and the power to change the beneficiary did not make the interest of the person insured liable to the claims of his creditors. The Bankruptcy Act was not involved.

³³In re Herr, (1910) 182 Fed. 716, 25 A. B. R. 142; In re Loveland, (1912) 192 Fed. 1005, 27 A. B. R. 765, both cases of endowment policies. In re Young, (D. C. Ohio, 1912) 208 Fed. 373, distinguishes between endowment policies and ordinary policies, holding that the former are purely speculative investments for the sole benefit of the bankrupt, not his wife, and therefore pass to the trustee, while the latter are clearly within the terms of the exemption statute and beyond the reach of the trustee.

³⁴(1919) 248 U. S. 450, 39 S. C. R. 141, 63 L. Ed. 352; 28 Yale L. J. 603.

¹(1857) 26 L. J. Ch. (N.S.) 710, 5 W. R. 666. For a sounder case see In re BARNED'S Banking Co., (1870) 39 L. J. Ch. (N.S.) 635, 22 L. T. R. 853, 18 W. R. 818.

special deposit is where the whole contract is that the thing deposited [as a chattel] shall be safely kept, and that identical thing returned to the depositor."² On the other hand, "when money is deposited to pay a specified check, drawn or to be drawn, or for any purpose other than mere safe keeping, or entry on general account, it is a *specific deposit* [deposit for a specific purpose] . . ."³ The special deposit is merely a bailment, title does not pass to the bank, and by the application of the ordinary principles of bailment, the depositor is entitled to recover his deposit whether the bank is solvent or insolvent.⁴

But the matter is not so simple nor are the authorities in harmony, in cases of deposits for a specific purpose. Here the circumstances of the deposit may give rise to an agency relation, a contract for the benefit of a third person,⁵ or, infrequently, a trust. The trust theory is often invoked to sustain the depositor's claim for a preference, but in most, if not all, of these cases there is no trust relation. The difficulty encountered is the lack of a definite trust res. Depositors are familiar with the present banking practice of commingling funds, particularly when the deposit is made to meet an obligation accruing at some distant point. Accordingly in the majority of cases it is never in the contemplation of the parties that the funds should be kept separate. The want of a specific trust res, however, is often ignored by the courts,⁶ a trust is recognized, and an unwarranted preferential recovery allowed.⁷ It should be noted that special circumstances may justify the application of the trust theory, i. e., where a deposit is made for a

²1 Morse, Banks and Banking, 5th Ed., secs. 183, 190. See also *In re Mutual Building, etc., Bank*, (1876) Fed. Cas. No. 9976, 2 Hughes 374.

³1 Morse, Banks and Banking, 5th Ed., sec. 185.

⁴Trover will lie to recover in specie. If the special deposit has been converted by the bank, i. e., if the fund has been commingled with other funds, assumpsit will lie. 1 Morse, Banks and Banking, 5th Ed., sec. 205.

⁵1 Ames, Cases on Trusts, 2d Ed., 43, note, reprinted in Scott, Cases on Trusts, 80, note.

⁶*Moreland v. Brown*, (1898) 86 Fed. 257, 30 C. C. A. 23; *Massey v. Fisher*, (1894) 62 Fed. 958; 11 Harvard L. Rev. 202; 12 Harvard L. Rev. 221; 16 Harvard L. Rev. 228. Some courts have sidestepped the difficulty by invoking the equitable maxim that considers as done that which ought to have been done, declaring that the depository ought to have kept the funds separate, and hence that it will be presumed to have done so. 3 Pomeroy, Eq. Jur., 4th Ed., note p. 2245. As a general rule there is no room for the application of this maxim in deposits for a specific purpose, since a separation of funds is not intended.

⁷1 Morse, Banks and Banking, 5th Ed., secs. 186, 210; Scott, Cases on Trusts, note p. 69, 70.

specific purpose and the depositor expresses a clear intent that the identical fund and no other be used, there is a definite res and since title to the fund is in the bank,⁸ the essentials of a trust are present, and the bank may be charged as trustee and a preference upheld in case of insolvency. But as previously stated, the depositor rarely intends that the fund be kept separate, and the class of cases in which the contrary is true is so limited as not to be important in modern banking transactions.⁹

It is argued by some courts that in the case of a deposit for a specific purpose, the title remains in the depositor and does not pass to the bank,¹⁰ and hence a recovery is allowed from the bank as trustee. Obviously the whole legal title cannot be in two persons simultaneously, and if title does not pass to the bank, it cannot be in the bank as trustee. If it remains in the depositor, he himself must be trustee, and his deposit of the trust funds in the bank gives him no right to a preference over general creditors by reason of his trusteeship, in case of the subsequent insolvency of the bank.¹¹ However it is apparent that in the case of a deposit for a specific purpose, the statement that title does not pass to the bank is untrue, in view of the fact that the parties do not intend a separation of funds and that title passes even when such a separation is expressly provided for.¹²

In the case of deposits for a specific purpose then, with the exception of the narrow class of cases before noted, no preference should be shown the depositor when the bank has become insolvent.¹³ Such cases are often hard cases, but no harder than if the

⁸Ames, *Lectures on Legal History*, 118-120; 19 *Harvard L. Rev.* 55. Title to a fund, not in a bag or box and therefore a special deposit, passes to the bank even though the fund is to be returned or applied in specie.

⁹The unsatisfactory decisions of many courts allowing the depositor an undeserved preference are caused by the application of the trust theory to all cases of deposits for a specific purpose, whereas the theory is in fact applicable only to the restricted class of cases indicated.

¹⁰*Montagu v. Pacific Bank*, (1897) 81 *Fed.* 602, 608; see also *Southern Exch. Bank v. Pope*, (Ga. 1921) 108 *S. E.* 551; 1 *Morse, Banks and Banking*, 5th Ed., sec. 185; and 7 *C. J.* p. 632. Some of the authorities cited on this point by *Corpus Juris* are not applicable. See for instance *Woodhouse v. Crandall*, (1902) 197 *Ill.* 104, 64 *N. E.* 292, 58 *L. R. A.* 385, which is not a case of a deposit for a specific purpose. The same is true of *Anderson v. Pacific Bank*, (1896) 112 *Cal.* 598, 44 *Pac.* 1063, 32 *L. R. A.* 479, 53 *A. S. R.* 228.

¹¹7 *C. J.* sec. 308, p. 633; 1 *Morse, Banks and Banking*, 5th Ed., sec. 186.

¹²Ames, *Lectures on Legal History*, 118-120; 19 *Harvard L. Rev.* 55.

¹³By considering the depositor and the bank as "tenants in common"

same depositor had on the same day in the same bank opened a general account, in which case, in the absence of special circumstances, there would be no preference.

FOREIGN CORPORATIONS—SERVICE OF PROCESS ON SOLICITING AGENT AS CONSTITUTING DUE PROCESS OF LAW.—The recent decisions of *Farmers' Co-op. Equity Co. v. Payne*¹ and *Stephan v. Union Pac. Ry. Co.*² call attention again to the conflict between the decisions of the Minnesota supreme court and the federal district court of Minnesota as to the sufficiency of process served on a soliciting agent of a foreign corporation.³ The desirability of sustaining such service is not here questioned, and it is reasonable to suppose that the same consideration prompted Start, J., in an earlier case, to suggest that had a statute authorized service on a soliciting agent the service might be sustained.⁴ In its initial decision under the statute amended to conform with the suggestion mentioned, the court definitely recognized the desirability of sustaining service on soliciting agents,⁵ and its conclusion holding the process sufficient has been commended.⁶ In arriving at this conclusion, however, it is submitted that the state court maintains a position inconsistent with its own decisions on what constitutes due process of law under the fourteenth amendment to the federal constitution and also inconsistent with the constructions it has placed on decisions of the United States Supreme Court.

of the commingled fund, the depositor possessing an interest in the bank's funds to the extent of his specific deposit, a preferential recovery might be sustained where the depositor can trace his deposit to the vaults and find that at all times there were sufficient funds on hand to meet the obligation. This suggestion finds no support in the adjudged cases but is analogous to the grain-elevator cases in which the depositor's grain is mingled with grain owned by the warehouseman. It is believed that this view does less violence to the actual intent of the parties than any of the other theories upon which preferential recoveries are based.

¹(Minn. 1921) 186 N. W. 130.

²(1921) 275 Fed. 709.

³Minn. G. S. 1913, sec. 7735 (3), "provided that any foreign corporation having an agent in this state for the solicitation of freight and passenger traffic or either thereof over its lines outside of this state, may be served with summons by delivering a copy thereof to such agent."

⁴North Wisconsin Cattle Co. v. Oregon Short Line R. Co., (1908) 105 Minn. 198, 206, 117 N. W. 391.

⁵W. J. Armstrong Co. v. New York C. & H. R. R. Co., (1915) 129 Minn. 104, 111, 151 N. W. 917, L. R. A. 1916E 232 and note, Ann. Cas. 1916E 335 and note.

⁶33 Harvard L. Rev. 114, but note that the writer does not recognize the fact that Minnesota holds that solicitation is not "doing business."

Whether the process is sufficient is without dispute recognized to involve fundamentally the question of due process under the federal constitution, and since it is a federal question the Supreme Court of the United States is the final arbiter.⁷ The constitutional requirement of due process is recognized as placing "a limit beyond which the state cannot go in subjecting foreign corporations to the jurisdiction of its courts."⁸ This line of demarcation would seem to have been as clearly established as literal description permits, for in reference to the service prescribed by a statute in *Atkinson v. United States Operating Co.*,⁹ the Minnesota court said,

"But this is not determinative of the question of jurisdiction. The service of process upon the agent designated by a state statute in order to confer jurisdiction must constitute due process of law under the requirements of the fourteenth amendment to the constitution of the United States. Whether it does or not is a federal question, ruled by federal decisions. To meet the requirement of due process of law in an action against a foreign corporation there must not only be service of process upon an officer or agent within the state, *but the corporation must be doing business in the state.*"

What constitutes "doing business" in general is not here in question. Neither is it pertinent to consider the practical objections to the view that solicitation is not "doing business" for the state court has frequently held that solicitation does not constitute "doing business."¹⁰

If a foreign corporation is not "doing business" and is thus beyond the limit imposed by the fourteenth amendment, and if the statute is not determinative of the question of jurisdiction, on what ground may the service of process under consideration be consistently upheld? A prior number of the MINNESOTA LAW REVIEW¹¹ enumerates the various theories invoked to justify ser-

⁷See *W. J. Armstrong Co. v. New York C. & H. R. R. Co.*, (1915) 129 Minn. 104, 108, 151 N. W. 917, L. R. A. 1916E 232, Ann. Cas. 1916E 335; *Callaghan v. Union Pac. R. Co.*, (1921) 148 Minn. 482, 182 N. W. 1004; *Farmers' Co-op. Equity Co. v. Payne*, (Minn. 1921) 186 N. W. 130.

⁸*W. J. Armstrong Co. v. New York C. & H. R. R. Co.*, (1915) 129 Minn. 104, 107, 151 N. W. 917, L. R. A. 1916E 232, Ann. Cas. 1916E 335.

⁹(1915) 129 Minn. 232, 233, 152 N. W. 410, L. R. A. 1916E 241. Note that this case was decided after the *Armstrong* case. The decision is but a reaffirmation of the position taken by the court before the statutory amendment in question. See *Wold v. J. B. Colt Co.*, (1907) 102 Minn. 386, 389, 114 N. W. 243; *North Wisconsin Cattle Co. v. Oregon Short Line R. Co.*, (1908) 105 Minn. 198, 205, 117 N. W. 391.

¹⁰*North Wisconsin Cattle Co. v. Oregon Short Line R. Co.*, (1908) 105 Minn. 198, 207, 117 N. W. 391; see *Archer-Daniels Linseed Co. v. Blue Ridge Despatch*, (1911) 113 Minn. 367, 372, 129 N. W. 765.

¹¹1 MINNESOTA LAW REVIEW 192.

vice on foreign legal entities. The difficulties are more apparent when considered in the light of the early doctrine that a corporation cannot be *found* outside of the state of its incorporation.²² In the *Armstrong Case* the court expressly recognizes a departure from this doctrine²³ and although the exact theory there adopted to sustain jurisdiction is not clearly outlined, a later decision under the same statute definitely states that jurisdiction is founded on the "presence" of the corporate entity.²⁴ It is to be noted that Starr J., did not suggest that a statute in the present form would be of assistance under the application of this latter doctrine but specified the "consent" doctrine.²⁵ The court in the *Armstrong case* refuses to be content with placing its decision on such "narrow ground." The consent doctrine has been severely criticized.²⁶

It has been contended that what constitutes this "presence" under the fourteenth amendment is a broader question than what constitutes "doing business"²⁷ and thus, it may be argued, service on a foreign corporation not "doing business" would still be permissible and would constitute due process so long as the corporation was "present." In sustaining process under the statutory amendment in question, the Minnesota court has made statements which might be construed as establishing such a distinction.²⁸ It

²²*Sullivan v. La Crosse & Minnesota Packet Co.*, (1865) 10 Minn. 386 (308); *Tolerton & Stetson Co. v. Barck*, (1901) 84 Minn. 497, 88 N. W. 19. Note that the doctrine here invoked to sustain jurisdiction rests on the right of the state to impose conditions precedent to the right of a foreign corporation to do business therein, a doctrine since abandoned. For a criticism of this doctrine see 1 MINNESOTA LAW REVIEW 192, 32 Harvard L. Rev. 871, 878.

²³*W. J. Armstrong Co. v. New York C. & H. R. R. Co.*, (1915) 129 Minn. 104, 107, 151 N. W. 917, L. R. A. 1916E 232, Ann. Cas. 1916E 335.

²⁴*Nienhauser v. Robertson Paper Co.*, (1920) 146 Minn. 244, 178 N. W. 504.

²⁵By directing its agents to enter a foreign state the corporation impliedly consents to service of process in manner prescribed by the law of that state. *North Wisconsin Cattle Co. v. Oregon Short Line R. Co.*, (1908) 105 Minn. 198, 206, 117 N. W. 391.

²⁶1 MINNESOTA LAW REVIEW 192; 30 Harvard L. Rev. 676, 689-695; 32 Harvard L. Rev. 871, 881.

²⁷30 Harvard L. Rev. 676, 695, but the citations given by the writer in support of the theory advanced show only a distinction as to what constitutes "doing business" for purposes of taxation and the imposition of license fees, etc., as contrasted with what constitutes "doing business" for purposes of serving process, and not a distinction between what constitutes "doing business" and what constitutes "presence" for the purpose of serving process. See 32 Harvard L. Rev. 871, 881, which approves the doctrine of jurisdiction founded on "presence" but distinctly uses the term "doing business" as a designation of that "presence."

²⁸Instead of defining the limit beyond which states cannot go in subjecting foreign corporations to the jurisdiction of their courts, the re-

would seem, however, that prior decisions preclude the taking of this position in that the court has consistently used the terminology "doing business" to designate that limit which is now described as "presence." Does the desirability of the result attained warrant the severe strain on the former decisions and the constructions there placed on decisions of the Supreme Court of the United States on a federal question?

RECENT CASES.

ADMIRALTY—HYDROAEROPLANE WHILE ON WATER IS A "VESSEL" WITHIN ADMIRALTY JURISDICTION.—Claimant was employed in the care and management of a hydroaeroplane which was moored in navigable waters at Brooklyn. To save the plane, which had begun to drag anchor and drift toward the beach, from being wrecked, claimant waded into the water and was injured by the propeller. The State Industrial Commission awarded compensation to the claimant. *Held*, that, while on the water, the plane was within admiralty jurisdiction, and therefore the Commission had no jurisdiction. *Reinhart v. Newport Flying Service Corporation*, (N. Y. 1921) 133 N. E. 371.

Thus this new craft which, according to Cardozo, J., writing the illuminating opinion, "would have mystified the lord-high admiral in the days when he was competing for jurisdiction with Coke and the courts of common law," has, as to its water activities at least, found its legal pigeon-hole, although while in the air it is not the subject of admiralty. *Crawford Bros., No. 2*, (1914) 215 *Fed.* 269.

BANKRUPTCY—BUSINESS TRUSTS—APPLICABILITY OF FEDERAL BANKRUPTCY ACT.—On motion to dismiss an involuntary petition in bankruptcy on the ground that a business or Massachusetts trust did not come within sections 4 and 5 of the federal Bankruptcy Act (Comp. Stat. 1918, secs.

quirement "doing business" has been said to be but an incident in the determination of whether there is a proper agent as designated by the statute, and at least in these instances has lost its fundamental function of determining whether under the federal constitution the corporation is subjected to the jurisdiction of the courts of that state. *W. J. Armstrong Co. v. New York C. and H. R. R. Co.*, (1915) 129 Minn. 104, 110, 151 N. W. 917, L. R. A. 1916E 232, Ann. Cas. 1916E 335; see *Rishmiller v. Denver & Rio Grande R. Co.*, (1916) 134 Minn. 261, 265, 159 N. W. 272, aff'd., 159 N. W. 947, where it is stated that a foreign corporation "is present in the state when it has an agent there transacting its business, whatever the character of the business may be," the court concluding that "Neither the nature of the business nor the volume of the business transacted is important so long as the corporation can fairly be said to be doing business in the state." Evidently the Minnesota Court is resolved to retain the jurisdiction until squarely overruled by the federal Supreme Court.