

merce. Whether it is a regulation is to be determined by examination of the economic effects of the tax.¹⁷ This would seem to be a fair summary of the position of Mr. Justice Stone and current majority of the Court as inferable from the instant case. Whether this position will continue to prevail is a question for the future.¹⁸

A. C. G.

CORPORATIONS—INDENTURE LIMITATION ON BONDHOLDER'S RIGHT OF ACTION—REFERENCE FROM BOND TO INDENTURE—[Michigan].—Plaintiff was the holder of past due and unpaid bonds secured by a trust indenture. The bonds contained the following provision: "reference is hereby made [to the indenture] for a description of the property mortgaged and the nature and extent of the security and the rights of the holders of said bonds in regard thereto and the terms and conditions upon which said bonds are issued and secured." The indenture provided that proceedings in law or equity could be instituted and maintained only in the name of the indenture trustee.¹ Plaintiff sought to recover on the bonds; defendant contended that plaintiff was not the proper party to bring suit because of the restrictive provision contained in the indenture and reference thereto in the bonds. *Held*, the plaintiff had the right to maintain the action.²

It is well settled that an individual's right to sue on corporate bonds can be so restricted that only the trustee named in the indenture can bring suit.³ If such restriction is found on the face of the bond itself, there is no question as to its validity. The problem usually arises where the bond refers the holder to a restrictive provision in the trust indenture. In these cases the question turns on whether the reference is sufficient.⁴ In the instant case the members of the court agreed in result but disagreed as to the basis of the decision. The majority of judges felt that, to be effective, the restriction must be on the face of the bond and that therefore the adequacy

17. The evidence of regulatory effect in the instant case—non-discrimination and non-cumulability—is perhaps an unsubtle gauge for measuring subtle relations. But there seems to be no reason why expert evidence should not be considered. Cf. Mann, Is American "Balkanization" Unavoidable? (Winter 1939-1940) 9 *The American Scholar* 52.

18. Three judges dissented strongly in the instant case. It is worthy noting that Mr. Justice Stone led a somewhat analogous revolt in the field of state taxation of federal instrumentalities. See *Graves v. New York ex rel. O'Keefe* (1939) 306 U. S. 466.

1. This provision further provided that only when the trustee refused to institute suit on the request of the needed number of bondholders can these bondholders institute suit in their own name and for the benefit of all the bondholders.

2. *Guardian Depositors Corp. v. David Stott Flour Mills Inc.* (Mich. 1939) 289 N. W. 122.

3. For a collection of cases, see Note (1937) 108 A. L. R. 90.

4. What is a sufficient reference varies in different jurisdictions. For a collection of cases in which the restriction was held binding, see Note (1937) 108 A. L. R. 96. For cases holding restriction not binding, see Note (1937) 108 A. L. R. 100. McClelland and Fisher, *Law of Corporate Mortgage Bond Issues* (1937) 139.

of the reference was immaterial.⁵ The minority, on the contrary, was of the opinion that the reference was not sufficient to apprise the bondholder of the fact that his right to sue at law on the bonds was affected by the indenture provision and that therefore the bonds' unconditional obligation to pay must prevail.⁶

The view of the majority was derived from *Cunningham v. Pressed Steel Car Co.*,⁷ a case decided by the Supreme Court of New York. From this case the following language was quoted: "If there was to be a restriction upon defendant's obligation to pay at maturity, then the bondholder was entitled to receive notice thereof in reasonably clear language expressed on the face of the bond. The mere reference to the indenture for a statement of the rights of the holders is not enough to take away by implication, drawn from another instrument, plaintiff's right to sue upon defendant's positive acknowledgement of an unconditional promise to pay the debt."⁸ Conceding that this language is open to the construction put upon it by the majority of judges in the instant case, a matter which admits of serious doubt,⁹ the quoted language should be read in the light of a prior statement in the *Cunningham* case which is as follows: "The reference to the indenture did not fairly place the bondholder on notice of any restriction upon defendant's obligation to pay at maturity, so as to preclude action at that time by individual bondholders to sue for and collect the principal."¹⁰

The New York Court of Appeals in affirming the *Cunningham* case repeated only the latter statement.¹¹ Later New York cases cite the *Cunningham* case as not requiring the restriction to be on the face of the bond, but hold, in accordance with the view of the minority of judges in the instant case and the prevailing weight of authority, that a restriction on the right to sue is binding if the reference fairly places the bondholder on notice that he is to look to the trust indenture for his rights in case of nonpayment at maturity.¹²

5. Nevertheless, the majority held that the reference was sufficient.

6. *Guardian Depositors Corp. v. David Stott Flour Mills, Inc.* (Mich. 1939) 289 N. W. 122, 125. In the opinion the minority is referred to as a dissent. However, it concurred in result and dissented only as to the rule of law advanced by the majority.

7. (1933) 238 App. Div. 624, 265 N. Y. S. 256.

8. *Cunningham v. Pressed Steel Car Co.* (1933) 238 App. Div. 624, 265 N. Y. S. 256, 259.

9. In the statement quoted from the *Cunningham* case by the majority in the instant case, the word "notice" could mean notice of a sufficient reference, and in the next sentence the phrase "mere reference" could be interpreted as insufficient reference.

10. *Cunningham v. Pressed Steel Car Co.* (1933) 238 App. Div. 624, 265 N. Y. S. 256, 259.

11. *Cunningham v. Pressed Steel Car Co.* (1934) 263 N. Y. 671, 672, 189 N. E. 750, 751.

12. *Porte v. Polachek* (Mun. Ct. N. Y. 1934) 150 Misc. 891, 270 N. Y. S. 807; *Davidge v. Lake Placid Co.* (Mun. Ct. N. Y. 1934) 151 Misc. 542, 271 N. Y. S. 714, rev'd (Sup. Ct. 1934) 152 Misc. 307, 273 N. Y. S. 522. Also in a recent federal case both the majority and dissenting judge cite the *Cunningham* case and come to the conclusion that such restrictions qualifying the bondholder's right to sue are binding if sufficient reference is made from the bond thereto. *Dunham v. Omaha & Council Bluffs Street Ry.* (C. C. A. 2, 1939) 106 F. (2d) 1, 2, 4.

The view of the majority represents a step beyond any reported decision and can be explained in part by a mistaken interpretation of the language in the New York case and a desire not to be confronted by the difficulty of determining when a reference is sufficient.¹³

L. M. B.

CRIMINAL LAW—PRIVILEGE AGAINST SELF-INCRIMINATION—RECORDS KEPT BY ACCUSED—[New York].—A New York statute¹ makes it a misdemeanor for the driver of a motor truck or bus, who has been on duty for an aggregate of ten in any fourteen consecutive hours, again to go on duty without at least eight consecutive hours off duty. The statute further provides that the driver shall keep records, showing his time on duty, for exhibition on demand by any state policeman or peace officer. At the time of his arrest, defendant's time card showed merely the hour at which he had begun driving and the amount of time he had had off duty. By comparing these items with the time of arrest, the police officer concluded that defendant had been driving for more than the statutory number of hours. The time card and the testimony of the arresting officer were the only evidence offered on behalf of the people. *Held*, that the introduction of the time card in evidence did not unconstitutionally compel defendant to incriminate himself.²

The basis of the decision was that the time card, upon which no final entry had been posted, showed nothing incriminatory on its face, because supplemental testimony by the officer was needed in order to prove the duration of the driving period. This case therefore places the time card in the same category as reports of pharmacists,³ pawnbrokers,⁴ and narcotics dealers,⁵ which may constitute evidence of an infraction of the law.⁶ The

13. "By thus requiring express notice on the bond, we preclude repeated litigation to determine whether the referential language in any kind of bond issue is adequate or not. We eliminate once for all the vexing problem of negotiable corporate bonds, which is not questioned in the instant case." *Guardian Depositors Corp. v. David Stott Flour Mills, Inc.* (Mich. 1939) 289 N. W. 122, 123.

1. N. Y. Thompson's Laws (1939) Labor Law, sec. 167.

2. *People v. Creeden* (N. Y. 1939) 24 N. E. (2d) 105.

3. *State v. Smith* (1888) 74 Iowa 580, 38 N. W. 492; *State v. Cummins* (1888) 76 Iowa 133, 40 N. W. 124; *State v. Huff* (1888) 76 Iowa 200, 40 N. W. 720; *State v. Elliott* (1891) 45 Kan. 525, 26 Pac. 55; *Commonwealth v. Stevens* (1892) 155 Mass. 291, 29 N. E. 508; *People v. Henwood* (1900) 123 Mich. 317, 82 N. W. 70; *State v. Davis* (1892) 108 Mo. 666, 18 S. W. 894; *State ex rel McClory v. Donovan* (1901) 10 N. D. 203, 86 N. W. 709.

4. *Lauder v. Chicago* (1884) 111 Ill. 291, 253 Am. Rep. 625; *St. Joseph v. Levin* (1895) 128 Mo. 588, 31 S. W. 101. But see *id.* at 102 that in a criminal proceeding, the pawnbroker could not be required to produce the book to be used as evidence against him, or to permit an examination of it for that purpose, because to do so would be an invasion of his constitutional right.

5. *United States v. Sherry* (D. C. N. D. Ill. 1923) 294 Fed. 684.

6. But see *Pople ex rel. Ferguson v. Reardon* (1910) 197 N. Y. 236, 90 N. E. 829, 27 L. R. A. (N. S.) 141, where a statute taxing transfers of