the subject case in some important respects. The principle case is unusual in that the individual defendants never held title to the bank stock. This distinguishes it from *Corker v. Soper*,[5] where the shares were in the name of the defendant as "agent" prior to their transfer to a subsequently formed holding company.

The case falls squarely into a recognized gap in the statutory law.[6] The actual conflict is between the *policies* of encouraging business by affording personal immunity to corporate shareholders and offering protection to the creditors of national banks. That the court, when presented with the problem, felt it desirable to support the latter policy, is significant. The case suggests an answer to the demand for more comprehensive legislation in regard to holding company liability. For if the judicial process may properly go as far as in this case to effectuate and implement the policy of the National Banking Act, it would seem preferable to permit gaps to be filled by the more flexible, if somewhat less predictable, common law and principles of equity.

While the court's opinion is rather vague as to the breadth of the doctrine enunciated, the conclusion seems to be that a holding company cannot insulate its stockholders against assessment on national bank stock held by it, when the holding company has no other assets. It should be noticed that this proposition goes farther than is necessary for the decision of the case, and, to that extent, must be regarded as dictum. All the court need have decided here is that such insulation is impossible when the bank is, at the time of the formation of the holding company, in an unstable condition and is known to be so by the individuals forming the company. Therefore, it seems likely that the principle will be narrowed somewhat, for it is hardly applicable to the ordinary investment holding company which owns various stocks and does not terminate its existence with the accomplishment of a particular object. In considering this decision it should be kept in mind that the bank shares constituted the holding company's only assets. It has been felt that this is a special situation which justifies a rule declaring the holding company's shareholders personally liable.[7]

W. C. S., JR. '37.

BILLS AND NOTES—NEGOTIABILITY—BONDS OF MASSACHUSETTS TRUST LIMITED TO TRUST FUNDS—At common law the efficacy of the attached seal, and the incorporation of a specific fund for security, destroyed the negotiability of corporate bonds. In both the United States and England corporate bonds went through a long period of struggle for recognition as negotiable instruments, though they are now fully recognized as being

[5] Supra, note 2.

[6] i. e., the failure of the statutes to provide for the treatment of the double liability feature in the event that national bank stock is held by one of the various types of holding companies.

[7] 2 U. of Chicago L. Rev. 484, l. c. 485.

negotiable.[1] This view is declared to rest upon the faith that such bonds are expressly designed to be thus circulated and to be sold in the stock market like public securities and that they are universally so used.[2] It was this usage which gave to bills of exchange and promissory notes the qualities of negotiability which were brought into our law through the Law of Merchants and finally codified in the English Bills of Exchange Act and our Negotiable Instruments Law. Contra to the English Bills of Exchange Act the N. I. L. was so written, and has been so interpreted, as to include corporate bonds within the operation of its provisions.[3] Under the N. I. L. the law is well settled that the transfer of stolen commercial paper, negotiable by delivery, to a bona fide purchaser for value, without notice and before maturity, vests him with a good title against all the world,[4] but if the lost or stolen instrument is nonnegotiable the purchaser is not protected and the rightful owner is entitled to possession.[5] Negotiability requires conformity to certain provisions of the N. I. L., among which are that it must contain an unconditional promise or order to pay,[6] and that a promise to pay limited to payment out of a particular fund is not unconditional.[7]

Thus in *Lorimer v. McGreevy*[8] the debentures, being payable out of a trust fund alone, were held nonnegotiable. The defendant stockholders, through the New York Stock Exchange, handled the sale of two "Gold

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[1] Murray v. Lardner, (1864) 69 U. S. 110; Pratt v. Higginson (1918) 230 Mass. 256, 119 N. E. 661, 1 A. L. R. 714; Hibbs v. Brown, (1907) 190 N. Y. 167, 82 N. E. 1108; White v. Vt. & Mass. R. (1858) 62 U. S. 575; Hinckley v. Union P. R. (1880) 129 Mass. 52, 37 Am. Rep. 297; Barrett v. Schuyler County Ct. (1869) 44 Mo. 197; Gorgier v. Mierville (Exch. Chamb. 1824) 3 B. & C. 45.

[2] Porter v. McCollum (1854) 15 Ga. 528; Natl. Exch. Bank v. Hartford, P. & F. R. (1866) 8 R. I. 375, 91 Am. Dec. 237, 5 Am. Rep. 582; Morris Canal & Banking Co. v. Lewis (1858) 12 N. J. Eq. 323, 329; White v. Vt. & Mass. R., supra, note 1.

[3] The English Bills of Exchange Act, by express provision, relates only to bills of exchange, promissory notes, and checks. Edelstein v. Schuler & Co. (1902) 2 K. B. 144. On the other hand, though there has been considerable criticism, it is now well settled in the United States that the N. I. L. applies to bonds. Hibbs v. Brown, supra, note 1; King Cattle Co. v. Joseph, (1924) 158 Minn. 481, 198 N. W. 436; Manhattan Co. v. Morgan (1926) 242 N. Y. 38, 150 N. E. 594; Grosfield v. First Natl. Bank of Miles City (1925) 73 Mont. 219, 236 Pac. 250.

[4] O'Herron v. Gray, (1897) 168 Mass. 573, 47 N. E. 429, 40 L. R. A. 498; Manhattan Savings Inst. v. N. Y. Exch. Bank (1902) 170 N. Y. 58, 62 N. E. 1079; Kuhns v. Gettysburg Nat. Bank (1871) 68 Pa. 445.

[5] Dinsmore v. Duncan (1874) 57 N. Y. 573, 15 Am. Rep. 534; Young v. Brewster (1895) 62 Mo. App. 628.

[6] N. I. L. sec. 1, (2); R. S. Mo. 1929, sec. 2630.

[7] N. I. L. sec. 3; R. S. Mo. 1929, sec. 2632. The test is: if the promise or order carries the general credit of the maker or the drawer, it is absolute; if, on the contrary, there is only the credit of a fund, the instrument is not unconditional. Hibbs v. Brown, supra, note 1; Hutchinson First Nat. Bank v. Lightner (1906) 74 Kan. 736, 743, 88 Pac. 59, 118 Am. St. Rep. 353, 8 LRA (N. S.) 231.

[8] (June, 1935), 84 S. W. (2d) 667.

Debentures" of the "International Hydro-Electric System," a voluntary association created under the laws of the Commonwealth of Massachusetts under and by virtue of the declaration of a trust. Learning that they were stolen bonds, under the Rules of the Exchange, the defendant repurchased them from the holder in Boston. The plaintiff, as original owner, brought replevin for their recovery. Among the provisions of the bonds was the following: "no past, present or future trustee, shareholder, director, officer, or agent of the Company shall be held to any personal liability for the payment of the principal or of the premium or interest on this debenture." To be negotiable, corporate bonds must carry the general credit of the corporation[9] and the court felt that this provision precluded this and made the payment contingent. Holding that a business trust has no entity separate from that of its trustees the court ruled that the bonds were payable out of a specific fund, the trust, and hence nonnegotiable and recoverable by the true owner.

The business rust, or as it is more commonly known, the Massachusetts Trust, is a legal device by which it is sought to attain the benefits of incorporation, particularly limited liability, without subjecting the business to the numerous statutory regulations and taxes pertaining to corporations.[10] In determining liability it is often difficult to decide whether the organization is to be considered as a common law trust or a partnership or joint stock company. The view most universally adopted is that laid down in the leading case of *William v. Milton*[11] holding the test to be the amount of control reserved by the *cestuis*.[12] If ultimate control is conferred upon the trustees, the association will be considered as a common law trust. The relationship between the *cestuis* and the trustees is not that of principal and agent; rather the trustee is himself the principal.[13] Thus a prac-

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[9] Lorimer v. McGreevy, supra, note 8, l. c. 677; note 7.

[10] In the case of Hecht v. Malley (1924) 265 U. S. 144, 146, 44 S. Ct. 463, 68 L. Ed. 949, Mr. Justice Sanford defined such an organization as follows: "The 'Massachusetts Trust' is a form of business organization common in that State, consisting essentially of an arrangement whereby property is conveyed to trustees, in accordance with the terms of an instrument of trust, to be held and managed for the benefit of such persons as may from time to time be the holders of transferable certificates issued by the trustees showing the shares into which the beneficial interest in the property is divided. These certificates, which resemble certificates for shares of stock in a corporation and are issued and transferred in like manner, entitle the holders to share ratably in the income of the property, and, upon termination of the trust, in the proceeds."

[11] (1913) 215 Mass. 1, 102 N. E. 355.

[12] The test laid down seems to be: If by the declaration of trust the shareholders reserve the actual or potential power, as a practical matter, to control the trustees in conducting the business of the organization it is a partnership. But, on the other hand, if the trustees are the principals and not subject, as a practical matter, to the actual or potential control of the shareholders, the organization is a pure trust and not a joint stock company. Frost v. Thompson (1914) 218 Mass. 260, 106 N. E. 1009; Neville v. Gifford (1922) 242 Mass. 124, 136 N. E. 160.

[13] Taylor v. Davis (1884) 110 U. S. 330, 4 Sup. Ct. 147, 28 L. Ed. 163;

tically unbroken line of authorities hold that the trustees are personally liable on all contract and tort obligations incurred by them or their agents in conducting the business of the trust.[14] From this is derived the view that the trust, as distinguished from the trustee, is not in itself a legal entity. But despite this view it is possible for the trustees to escape personal liability by a specific contract provision limiting recovery against them to the trust property. And both England and the United States support the view that such a provision creates a charge upon the trust estate and releases the trustee from his personal liability.[15] It would seem to follow that such cases have the tendency to make the trust itself, practically speaking, a separate entity, for the trustees themselves are not bound and the sole security is the trust. But the courts have not recognized the entity, as a separate personality, of the trust.

Too it would seem that the N. I. L. intended to recognize the trust as a legal entity. When the trustee designates himself sufficiently clear as such, or indicates clearly the name of the principal, he exempts himself from personal liability.[16] And the Act defines a person as "a body of persons, whether incorporated or not," which seems reasonably broad enough to cover business trusts and other similar associations.[17] The weight of authority holds that the trustee may thus exempt himself from personal liability but they have failed to go further and recognize the trust itself as a separate legal entity.

Such decisions certainly raise many practical difficulties. If bonds such as these are to be allowed to circulate freely and to be listed upon the various stock exchanges they should surely be such as would meet the ordinary requirements of negotiability. If the courts continue to treat trust bonds as nonnegotiable it would seem that they should not be allowed to be

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McGovern v. Bennett (1906) 146 Mich. 558, 109 N. W. 1055; Connally v. Lyons (1891) 82 Tex. 664, 18 S. W. 799.

[14] Hewitt v. Phelps (1882) 105 U. S. 393, 26 L. Ed. 1072; Sanford v. Howard (1857) 29 Ala. 684; New v. Nicoll (1878) 73 N. Y. 127; Johnson v. Leman (1890) 131 Ill. 609, 23 N. E. 435, 7 L. R. A. 172; Odd Fellows Assn. v. McAllister (1891) 153 Mass. 292, 26 N. E. 862, 11 L. R. A. 172.

[15] Hussey v. Arnold (1904) 185 Mass. 202, 70 N. E. 87; McCarthy v. Parker (1923) 243 Mass. 465, 138 N. E. 8; Rand v. Farquhar (1917) 226 Mass. 91, 115 N. E. 286; Hardee v. Adams Oil Co. (1923, Tex. C. App.), 254 S. W. 602. In Watling v. Lewis (1911) 1 Ch. 414, the court said that if the trustee is not bound no one is bound, and hence it held that the provision that the trustee could not be personally liable was repugnant and void. But this was later reversed, In re Robinson's Settlement (1912) 1 Ch. 717, and England is now in accord with the U. S.

[16] N. I. L. Section 20, R. S. Mo. 1929, Sec. 2649; Cotton v. Courtwright (1926) 215 Ala. 474, 111 So. 7; First Nat. Bank of Pennsboro v. Delancey (1930) 109 W. Va. 136, 153 S. E. 908; Gutelius v. Stanton (D. C. Mass. 1929) 39 F. (2d) 621; Hamilton v. Young et al. (1924) 116 Kans. 128, 225 Pac. 1045, 35 A. L. R. 496; Adams v. Swig (1919) 234 Mass. 584, 125 N. E. 857.

[17] N. I. L. Section 191, R. S. Mo. 1929, Sec. 2822; In re Ziegenhein (Mo. App. 1916) 187 S. W. 893; Shaw v. Smith (1889) 150 Mass. 166, 22 N. E. 887, 6 L. R. A. 348.

listed upon the Exchanges as negotiable securities. If they are thus listed any innocent purchaser is always taking the risk that the true owner will some day reclaim them.

P. A. M. '36.

CONSTITUTIONAL LAW—IMPAIRMENT OF THE OBLIGATION OF CONTRACTS—MORATORIUM LEGISLATION.—In *Home Building and Loan Association v. Blaisdell*[1] the Supreme Court held that a provision of the Minnesota Mortgage Act of 1933[2] for a two-year moratorium on mortgages was not an impairment of the obligation of a contract under the contract clause of the Constitution nor an infringement of the due process provision of the Fourteenth Amendment. The law applied to mortgages existing at the effective date of the law and provided that mortgagors, by judicial proceedings, might secure a stay of foreclosures for a period not extending beyond May, 1935, and varying according to the circumstances of each case. The act further provided that in the proceedings which it authorized an order might be had upon notice "determining the reasonable value of the income on said property, or, if the property has no income, then the reasonable rental value of the property. . . ., and directing and requiring such mortgagor or judgment debtor, to pay all or a reasonable part of such income, or rental value, in or toward the payment of taxes, insurance, interest, mortgage, or judgment indebtedness at such times and in such manner as shall be fixed and determined and ordered by the court." The act recited an emergency, occasioned by the depression.

Since the Minnesota Mortgage case three decisions have clarified the position of the Supreme Court on the general subject of retroactive legislation applied to debts. In *W. B. Worthen Company v. Thomas*[3] the Court declared unconstitutional an Arkansas statute which exempted the benefit payments on life, sickness, and accident insurance policies from legal process for the satisfaction of any indebtedness existing at the time the act was passed.[4] Just before the law became effective the plaintiff company had garnished a payment to a beneficiary by an insurance company, thus acquiring a lien under the Arkansas law.[5] The statute was upheld by the State supreme court,[6] but was reversed in the Supreme Court of the United States on the ground that it impaired the obligation of contracts. The Arkansas legislature, unlike that of Minnesota, made no attempt to discriminate on the basis of need on the part of debtors or classes of debtors

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1 (1934) 290 U. S. 398.

2 Laws of Minnesota, 1933, p. 514.

3 (1934) 292 U. S. 426.

4 Laws of Arkansas, 1933, p. 321.

5 Desha v. Baker (1840) 3 Ark. 509, 520, 521; Martin v. Foreman (1856) 18 Ark. 249, 251; Smith v. Butler (1904) 72 Ark. 350, 351, 80 S. W. 580; St. Louis Southwestern Ry. Co. v. Vanderberg (1909) 91 Ark. 252, 255, 120 S. W. 993; Foster v. Pollack Co. (1927) 173 Ark. 48, 51, 291 S. W. 989.

6 (1933) 65 S. W. (2d) 917.