Banks and Banking-Pledging Assets

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Board of Governors of the State Bar. The method of election at the Annual Meeting remains the same, there is no change in the constitution of the American Bar Association, and the plan is based on the reasonable assumption that the choice of the Board of Governors will be ratified by the members of the California Bar, who are also members of the American Bar Association, in attendance at the Annual Meeting.

Whether such a device will form part of a more fully developed consolidation plan cannot of course be determined. But at this time it is clear that it contains implications very encouraging to the advocates of a broad form of consolidation. In the first place, it implies the belief of California lawyers that the member of the General Council should be as fully representative of the profession in the State as may be possible. Secondly, it implies the further belief that there should be, to this extent at least, an official connection between the State organization and the national body. It is only necessary to develop more fully the idea of official connection, as here proposed, to achieve some practical form of organic union.

Hardly less significant is the report of a Special Committee on Coordination of Local, State and National Bar Associations recently presented to the Minnesota State Bar Association and subsequently to the Conference of Bar Association Delegates at Milwaukee. That committee accepts wholeheartedly the idea of national coordination, while pointing out the difficulties which lie in the way, and makes proposals which go beyond the plan which has been adopted in California. It says, in part:

"It is the opinion of the committee that any movement towards unification must be worked out through the present American Bar Association. Despite the weakness of its form of organization and the consequent limitation upon its ability, that organization has rendered an important service to the profession and to the nation. Its traditions must be preserved and its machinery availed of in the movement for reorganization.

"Too much should not be attempted at once. The goal cannot be reached in one jump. We must be satisfied with a modest beginning and a gradual transformation. The committee recommends that a movement be started with a few concrete proposals. * * *

The committee proposes that the members of the General Council be elected by the State Associations exclusively; or that there be two members of the General Council for each State, one to be elected as at present and the other by the State Association; or that the membership of the General Council be increased and be prorated among the States on the basis of membership in the American Bar Association and be elected by the State Associations; that increased powers be vested in the General Council; and that the Chairman of the Conference of Bar Association Delegates be made ex-officio a member of the Executive Committee.

Regardless of what one may think of the advisability of the specific proposals, all will welcome such evidences that the State Bar Associations are taking up the subject of consolidation seriously, as a matter of special interest to themselves.

**RECENT CASE NOTES**

*Banks and Banking—Pledging Assets.* Plaintiff Railway Company was a depositor in a national bank. To secure it as such, the bank had pledged bonds and held them for the railway in the trust department of the bank. The bank failed and defendant was appointed receiver. Railway made proof as a secured creditor, but the receiver denied the validity of the pledge and ten-
dered a dividend check only for the amount to which the railway would have been entitled as an unsecured creditor. Thereupon, the railway brought suit in federal district court against the receiver praying that the bonds be delivered to it; or that they be sold for its benefit; or that the claim be paid in full with interest. The receiver filed a cross-bill praying the bank's title to the bonds be quieted. Court dismissed the bill and entered a decree for the receiver on the cross-bill holding that the pledge was void. Circuit court of appeals affirmed the decision. Held, on appeal to the United States Supreme Court, affirmed.¹

Statute of Illinois required the treasurer of the city to make deposits in bank of all moneys received by him, and also required the treasurer, before any such deposits were made, to execute a bond with sureties conditioned that the bank would keep and account for said money. Fidelity Company agreed to become surety on the treasurer's bond, provided he would get a bank which would give collateral security for the repayment of the deposits. Defendant National Bank agreed to do this, and delivered to another bank, as escrow agent, certain bonds.² Amendment of 1930 to National Bank Act of 1864 allows national banks to pledge assets to secure funds of a state or political subdivision thereof, if it is located in a state in which the state banks are so authorized. The bank failed and its receiver brought suit in federal district court against the city, its treasurer, the surety, and the escrow agent praying that the pledge be declared void and the bonds be delivered to him. District court dismissed the bill. Its decree was reversed by the Circuit Court of Appeals holding that the pledge was void, inasmuch as Illinois had not conferred upon its banks the power to pledge assets to secure deposits of political subdivisions of the state. Held, on appeal to the United States Supreme Court, affirmed.²

This note is supplementary to a previous note which discussed the right of a bank to pledge its assets to secure deposits. At that time, the decisions of the state courts were in sharp conflict and the few decisions by the lower federal courts, although holding such pledges void, were by divided courts. Nevertheless, in that note, the position was taken that, outside of statutory authorization, a bank had no right to pledge its assets to secure deposits because, it seemed, this view was in conformity with business practices and with the manifest public policy to protect the small depositor. In light of the confusion in the cases, it is indeed gratifying to have a declaration by the United States Supreme Court concerning the right of a national bank to pledge its assets to secure both public and private deposits where there is no statutory approval. Justice Brandeis, speaking for the court, in both cases, points out the fallacy in every argument that has been propounded to sustain the validity of such pledges.

First, there is no basis for the claim that the power to pledge assets to secure deposits is incident and necessary to carry on the business of deposit banking. For, as the court points out, from the establishment of the national banking system in 1864 to March 1, 1933, 2,159 national banks have failed but only two other reported cases have been found involving a pledge of assets to secure private deposits. Surely such action cannot be deemed a necessary incident to a business when in so few instances it has been taken.

² City of Marion, Ill., v. Sneeden (1934), 54 S. Ct. 421.
³ 9 Ind. L. J. 322.
⁴ Texas & P. Ry. Co. v. Pottorff (1934), 54 S. Ct. 416, 417; City of Marion, Ill., v. Sneeden (1934), 54 S. Ct. 421, 422.
Second, the argument that the Amendment of 1930 was passed merely to settle any doubts as to the power of national banks to pledge their assets to secure deposits is without avail. For if the amendment had been passed merely to settle such doubts, the amendment would not have been made to section 45 of the National Banking Act of 1864 which provides that the Secretary of the Treasury might deposit money in national banks upon receiving satisfactory security, but would have been made to section 8 which contains the grant of incidental powers.6

Third, to permit such a pledge would be inconsistent with many provisions of the National Banking Act which are designed to ensure in case of failure of the bank, a ratable distribution of the assets among the depositors. "The effect of a pledge is to withdraw for the benefit of one depositor part of the fund to which all look for protection."7

Fourth, the contention that a bank may pledge its assets to secure a loan, that a deposit is a loan, and therefore a bank may pledge its assets to secure, is fallacious. As Justice Brandeis writes, "The difference between deposits and loans is fundamental and far-reaching. The amount of the deposits is commonly accepted as measure of a bank's success; an increase of deposits is evidence of increased prosperity. The depositor does not think of himself as lending money to the bank. The modern deposit grew out of the older form of deposit in which the fund was held separate and intact, and the sole purpose of the deposit was safe-keeping. Safe-keeping is still an important function of deposit banking; and from the point of view of most depositors the chief one. Borrowing by a bank (as distinguished from a rediscount) is commonly regarded as evidence of weakness."8

Fifth, the receiver is not estopped to deny the validity of the pledge, for the unauthorized pledge reduces the assets available to the general creditors, and it is the duty of the receiver to take steps to set aside transactions which fraudulently or illegally reduce the assets available to general creditors, even though the bank itself is not in a position to do so.9

Lastly, the receiver may assert the invalidity of the pledge without making restitution by paying the pledgee's claim in full; the court saying, "Such claim under the doctrine of unjust enrichment is assimilated to an obligation of contract; and does not in the absence of an identifiable res and a constructive trust based on special circumstances of misconduct, confer a preference over other creditors."10

6 Texas & Pac. Ry. Co. v. Pottorff (1934), 54 S. Ct. 416, 419; City of Marion, Ill., v. Sneed (1934), 54 S. Ct. 421, 422.
These two cases will lay down a binding rule for national banks and the lower federal courts, and it is hoped, by the writer, that this declaration by the highest court in the land will carry sufficient weight to persuade state courts to take a like view.

S. E. M.

Constitutional Law—Presumptions of Fact. Appellant was tried for murder. During the course of the trial the state was permitted to prove that appellant did not have a permit to carry a pistol or revolver. Appellant was convicted and appealed. Appellee, in its brief called attention to Sec. 8025, Burns' Ann. St. 1926, which reads: "In the trial of a person charged with committing or attempting to commit a felony against the person or property of another while armed with a pistol or revolver, without having a permit to carry such firearm as hereinbefore provided, the fact that such person was so armed shall be prima facie evidence of his intent to commit such felony." Although this was not embodied in an instruction below and appellant does not complain that it was read to the jury in argument, appellee urges that evidence of the fact that appellant did not have a permit was competent on the question of intent and that its proof established a prima facie case of felonious intent. Held, evidence inadmissible and prejudicial and the statute is beyond the power of the legislature. 1

The court is clearly correct in its decision regarding the admission of evidence to the effect that the appellant had no permit to carry a firearm. Carrying a concealed weapon, though an offense in itself, is not a material element of the crime of murder, 2 nor does the mere carrying of a revolver without a permit render a defendant guilty of involuntary manslaughter. 3

The general rule is well established that it is competent for a legislative body to provide by statute that certain facts shall be prima facie or presumptive evidence of other facts, if there is a natural and rational evidentiary relation between the facts proved and those presumed. 4 Such statutes are properly regarded as rules of procedure, changing the burden of proof and do not contravene the constitutional provisions for due process of law. 5 The opposite party must not be denied the right to rebut the presumption in some fair manner accorded by rules of law or procedure. 6

On the other hand, the legislature cannot constitutionally make one fact conclusive evidence of another material fact in controversy, if the former is not, in and of itself, by virtue of its own force, conclusive, unless the statute may be regarded as declaring a rule of substantive law, dispensing with certain elements in the chain of proof necessary to establish a case in which case the legislature would be making a new crime. 7 Such a statute would be arbitrary and have no relevancy to the facts already proved or those necessary to be proved.

In many cases statutes making certain facts presumptive evidence of other facts are very desirable as eliminating from the state's burden of proof matters that are almost taken for granted, but the proof of which would be considerable burden upon the state and of no practical aid or defense to the accused. The accused has his right to show that the inference to be made

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2 Males v. State (1927), 199 Ind. 196, 156 N. E. 403.
4 Hawes v. Georgia (1922), 258 U. S. 1, 66 L. Ed. 431.
5 Chicago Terminal Transfer Co. v. Chicago (1905), 217 Ill. 343, 75 N. E. 499.
6 Goldstein v. Maloney (1911), 62 Fla. 198, 57 So. 342.