RECENT CASES

Bankruptcy—Discharge—Trust Receipt as Creating Fiduciary Relation—[United States].—Defendant, a retail dealer, secured an advance of the purchase price of an automobile by giving a bill of sale, a chattel mortgage, and a trust receipt. The trust receipt required the defendant to procure the written consent of the plaintiff before selling the car. Defendant sold the car without consent, kept the proceeds, and secured a discharge in bankruptcy, listing the plaintiff as creditor. Plaintiff, bringing an action for conversion of the car, met the plea of discharge by alleging that the sale was a wilful and malicious injury to the property and that it was committed in breach of a fiduciary relation, within §§ 17(2) and (4) of the Bankruptcy Act (30 Stat. 550 (1898), 11 U.S.C.A., §§ 35(2), (4) (1927)), so that the discharge in bankruptcy would not bar him. *Held*, despite the "trust receipt" the parties were not in a trust relation within § 17(4). *Davis v. Aetna Acceptance Co.*, 55 Sup. Ct. 151 (1934).

The operation of § 17(4) of the present Bankruptcy Act has been limited by giving it the construction of similar provisions in the two preceding acts. The act of 1841 excepted from discharge all debts arising ". . . . in consequence of a defalcation as a public officer; or as executor, ... or trustee, or while acting in any other fiduciary capacity." 5 Stat. 441 (1841). Applying the *ejusdem generis* rule, the courts construed "fiduciary relation" to include only express, or technical trusts, like those enumerated. *Chapman v. Forsyth*, 2 How. (U.S.) 202 (1844); *Wolcott v. Hodge*, 15 Gray (Mass.) 547 (1860); *Williamson v. Dickens*, 27 N.C. 259 (1844). Illinois, however, included within the exception all claims where any grounds for holding a trust existed. *Matteson v. Kellog*, 15 Ill. 548 (1854). In *Hennequin v. Clews*, 111 U.S. 676 (1884) the United States Supreme Court held that the act of 1867 (14 Stat. 533 (1867)), though phrased less specifically, excepted only debts arising from express trusts; this has been generally followed. *Noble v. Hammond*, 129 U.S. 65 (1889); *Upshur v. Briscoe*, 138 U.S. 365 (1891); *Svanoe v. Jurgens*, 144 Ill. 507 (1893). The same construction has been placed on the act of 1898. *In re Harber*, 9 F. (2d) 551 (C.C.A. 2d 1925); *Western Union Cold Storage Co. v. Hurd*, 116 Fed. 442 (C.C. Mo. 1902); but see *Williams v. Va-Carolina Chemical Co.*, 182 Ala. 413, 62 So. 755 (1913). Section 17(4) has been limited to debts arising from express trusts where the fiduciary relation existed before the debt. *In re Burchfield*, 31 F. (2d) 118 (D.C.N.Y. 1929); *First National Bank of Enosburg Falls v. Pamforth*, 90 Vt. 75, 96 Atl. 600 (1916). Although there may be a constructive trust, debts arising out of contract or agency relation are not within the section. *In re Toklas Bros.*, 201 Fed. 377 (D.C.N.Y. 1912); *American Agricultural Chemical Co. v. Berry*, 110 Me. 528, 87 Atl. 218 (1913); *Clair v. Colmes*, 245 Mass. 281, 139 N.E. 519 (1923).

Noting the presence of the bill of sale and the chattel mortgage, the Supreme Court distinguished the principal case from one involving only a trust receipt. But, it would seem that even if there merely were a trust receipt, there could be no other result. Between the parties, trust receipts have been held to create the relation of chattel mortgage, *General Contract Purchase Corp v. Bickert*, 10 N.J. Misc., 958, 161 Atl. 830 (1932); *McLeod-Nash Motors v. Commercial Credit Trust*, 187 Minn. 452, 246 N.W. 17 (1932);

of conditional sale, *Commercial Acceptance Trust v. Bailey*, 87 Cal. App. 117, 261 Pac. 743 (1927); *White v. General Motors Acceptance Corp*, 2 F. Supp. 406 (D.C. Ky. 1932); of agency, *Foreign Trade Banking Corp. v. Gerseta Corp.*, 237 N.Y. 265, 142 N.E. 607 (1923); of bailment, *Commercial Credit Co. v. Peak*, 195 Cal. 27, 231 Pac. 340 (1924); *General Motors Acceptance Corp. v. Hupfer*, 113 Neb. 228, 202 N.W. 627 (1925). In all these cases it is plain that the financier is more anxious to protect himself against the creditors of the borrower than against his dishonesty. The trust receipt, itself, under which the lender (the would-be *cestui que trust*) has legal title is not consistent with the conception of a technical trust which would come within the exception of § 17(4). It is fundamentally a security and not a fiduciary relation. *Bloomingdale v. Dreher*, 31 F. (2d) 93 (C.C.A. 3d 1929).

Banks and Banking—Preferences—[Ohio].—Plaintiff, owner of two certificates of deposit on a bank, presented them to the bank, which cancelled them and marked them paid, giving plaintiff in payment two drafts upon correspondent banks. The bank having failed before presentment of the drafts, the correspondents refused payment. Plaintiff claimed a preference under the Ohio statute (Ohio Throckmorton's Ann. Code (1929), § 714), providing that a trust shall be impressed on the assets of any closed bank which draws a draft on another bank in payment of the proceeds realized from the collection of any negotiable instrument. *Held*, plaintiff is not entitled to a preference since the closed bank could not collect from itself and had no proceeds of collection. *Fulton v. Rundell*, 190 N.E. 457 (Ohio 1934).

The Ohio bank collection statute (*Ohio Throckmorton's Ann. Code* (1929), §§ 711–714) similar to the Bank Collection Code, though worded differently, provides in general: (1) if a bank receives an item for collection after it has been closed, it shall return it; (2) if an item drawn by a depositor is presented to a bank for payment and the bank fails after having charged the maker but without having unconditionally paid the owner, the owner is entitled to a preference; (3) if a bank collects an item and fails before making unconditional payment, the owner is entitled to a preference.

Provisions like the second have raised difficult questions of interpretation. The Illinois cases have given the provision a rather broad construction. It has been held that one who had his own check certified is entitled to a preference because a deduction is immediately made in his account and he is given only conditional payment. *McQueen v. Randall*, 353 Ill. 231, 187 N.E. 286 (1933). A similar result has been reached where a depositor drew a bearer check on his account and on presentment received a check on a correspondent bank. *People ex rel. Nelson v. Dennhardt*, 354 Ill. 450, 188 N.E. 464 (1933); as well as in the situation of the instant case where a draft was given in payment of certificates of deposit. *People ex rel. Nelson v. Joliet Trust and Savings Bank*, 237 Ill. App. 138 (1934). There has been, however, a tendency to construe strictly statutes giving preferences where there was none at common law. Thus, a statute providing that where a bank "receives by mail, express, or otherwise a check with request that remittance be made therefor, the charging of such items to the drawee and remitting in an unpaid check create a lien." N.C. Code 1931, § 218(c), subd. (14), has been held inapplicable to an over-the-counter transaction. *Morecock v. Hood*, 202 N.C. 321, 162 S.E. 730 (1932). Moreover, it has been held that one who presents an item for payment is not entitled to a preferred claim under a statute (Ark. Acts 1927, no. 107, § 1 subd. 7) providing for a preference to the owner of a remittance given by a bank as payment for the proceeds of collection of an item. *Taylor v. First Nat. Bank of De*