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The Rule of Perpetuities and Powers of Sale

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A conclusion drawn from the authorities cited seems to leave the court with two alternatives. It may recede from the position taken in the *Caso* case and declare the remedy provided by Chapter 62, Laws of 1931, to be inadequate, or it may adhere to that position thereby adopting a view opposed to that heretofore accepted in this state. The result of adopting the latter alternative would seem to be to drive litigants into the federal courts.

SAUL D. HERMAN.

THE RULE AGAINST PERPETUITIES AND POWERS OF SALE. The rule against perpetuities is usually stated as prohibiting the creation of future interests or estates, which by possibility may not become vested within a life or lives in being and twenty-one years, together with the period of gestation, where the latter is necessary to cover cases of posthumous birth.[1] It is not enough that the estate may possibly or even probably vest within the time limited by the rule, but the court must be able to see by looking at the document creating the estate that the estate will necessarily vest within the time.[2] The Rule against Perpetuities applies in the case of equitable as well as legal interests. Therefore, the creation of a trust or equitable interest, which may not vest in the object of the trust within the time limited by law for the vesting of legal estates, will be nugatory [3] It is also well settled that the Rule against Perpetuities applies as well to powers over property as to interests and estates therein.[4] It is the purpose of this note to discuss some of the problems involved in applying the Rule against Perpetuities to the case where a trust has been created by will by which the trustees are given a power of sale.[5] In an effort to eliminate much of the confusion and inconsistencies which seem to have invaded this branch of the law,

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dent Commission, 23 Fed (2d) 109 (1918) *Hall City Ry. Co. v. Youngquist*, 32 Fed. (2d) 819 (1929) *Robinson v. Campbell*, 16 U. S. 212, 4 L. Ed. 372 (1818) *Boyle v. Zacharie*, 31 U. S. 648, 8 L. Ed. 532 (1832) *McConehay v. Wright*, 121 U. S. 201, 7 S. Ct. 94, 30 L. Ed. 932 (1887) *Chicago, B & Q. Ry. v. Osborne*, 265 U. S. 14, 44 S. Ct. 431, 68 L. Ed. 878 (1924).

[1] 21 R. C. L. 282; 48 C. J. 937 for a historical review of the rule, see Gray on the Rule Against Perpetuities (3rd ed.) secs. 123-200, and Perry on Trusts (7th ed.) Vol 1, page 632. This rule has been altered by statute in many states, and, generally speaking, statutory additions and substitutions have been in the direction of increased stringency, 48 C. J. 1000. See Tiffany on Real Property (2nd ed.), Vol 1, sec. 189, for an outline of these statutory changes. The rule is not changed by statute in Washington.

21 R. C. L. 289; Foulke on Perpetuities, sec. 342; 48 C. J. 942.

[3] Perry on Trusts (7th ed.), Vol. 1, page 639; *Norfolk's Case*, 1 Vern. 164, *O'Hare v. Johnston*, 273 Ill. 458, 113 N. E. 127 (1916) *Andrews v. Lincoln*, 95 Me. 541, 50 Atl. 898 (1901) *Clossett v. Burtchaell*, 112 Ore. 585, 230 Pac. 554 (1924).

[4] 48 C. J. 977 *Larence's Estate*, 136 Pa. 354, 80 Atl. 85, 20 Am. St. Rep. 925, 11 L. R. A. 185 (1891) Gray on the Rule Against Perpetuities (3rd ed.), sec. 474a, says: "Sometimes a power is spoken of as too remote; this is a natural, but it is not an exact, mode of expression, it is not the power which is too remote, but the estate or interest appointed by it." To like effect see 16 Col. L. Rev. 537.

[5] The rule has still wider application in the case of powers of appointment. See 49 C. J. 1261.

a classification of the cases according to the situs and quantum of the interests devised has been attempted.

I. Legal and Equitable Title Vested in Beneficiaries

Probably the great majority of wills provide for an immediate vesting of the complete legal and equitable fee in the beneficiaries, which is accomplished by a simple devise to them by name, and making no provision for a further interest in the property to be settled upon another. Even in such a case, it is a common practice to give the executor of the estate, by means of executing a non-intervention will, a power of sale for the purpose of liquidating and distributing the estate.[6] In this type of situation, however, it will be readily seen that the Rule against Perpetuities has no application, since the equitable interest in fee is immediately vested in the beneficiaries, and such power as the executor has in dealing with the legal title can only affect the beneficiaries' time of enjoyment, and not the vesting of their estates.[7]

This type of devise should be distinguished from the case where the complete equitable fee is devised to beneficiaries, subject to being defeated by the exercise of a power of sale given to executors. In such a case the exercise of the power of sale operates only as a condition subsequent upon the complete vested fee, and hence is not objectionable to the rule, which applies only to conditions precedent to vesting.[8]

II. Legal Title Devised to Trustees and Equitable Title Devised to Beneficiaries.

Where the equitable interest which is devised to the beneficiaries is the complete equitable title, then, although the legal title be devised to trustees, and they be empowered to sell the property for the purpose of distributing or investing the same, there is no possible application of the Rule against Perpetuities.[9] This is true for the reason that there is no provision for a vesting of equitable interests except the immediate vesting in the beneficiaries at the time of the testator's death. Moreover, although the case is then one for the application of the Rule against Perpetual Restrains upon Alien-

[6] This may also occur where the court holds the vesting of title in the trustee to be invalid, but permits him to retain a power of sale for a reasonable time, *Miller v. Weston*, 67 Colo. 534, 189 Pac. 610 (1920). The same situation is presented where trustees are granted a power of sale coupled with the title, and the title vests in the beneficiaries, under the terms of the will, before the power has been exercised. The court may then permit such power to remain for a reasonable time. *In re Sudeley*, 1 Ch. 334 (1894) *In re Dyson*, 27 Ch. 720 (1896) Roland R. Foulke, writing in 16 Col. L. Rev. 544, likens such power of sale in executors to mere warrants of attorney

[7] *In re Cooper's Estate*, 150 Pa. 576, 24 Atl. 1057, 30 Am. St. Rep. 829· Godefroi on Trusts and Trustees (5th ed) p. 330.

[8] 23 R. C. L. 509. *Eary v. Raines*, 73 W Va. 513, 80 S. E. 806 (1914), is an interesting example of this type of case. Having first devised to certain children the land, which included the mineral in it, he then authorized a sale of the mineral by executors for the benefit of other children, but only on condition that it could be sold for ten dollars per acre. If it could not be sold at that price or more per acre, then the mineral was to become the property of the children upon whose land it was located, absolutely

[9] *Strout v. Strout*, 117 Me. 357, 104 Atl 577 (1918).

ation, there is no actual violation of the rule, since it is usually held that the equitable owners can call upon the holders of the legal title at any time, and hence as a practical matter there is no restraint upon the alienation of the fee.[10]

Where the equitable interest which is devised to the beneficiaries is not the complete equitable title, but is only a beneficial use of the property for life or for years, the case becomes one for the application of the Rule against Perpetuities. The problem then becomes one of determining whether the power of sale which the trustee has in connection with the legal title devised to him is such as to make certain that the shift in the equitable interest will be made within lives in being and twenty-one years thereafter.[11] In connection with this type of case, also should be considered the case where there is no present beneficial use provided for, but the same is held in abeyance until the trustees exercise the power of sale, since the effect in such a case is identical with the effect of a provision for a shift in a present beneficial use. A more detailed classification of cases falling within this type of situation will be attempted for the purpose of emphasizing the substantial factual distinctions which exist among the cases, and their effect upon the results attained in the decisions.

a. Power of Sale Expressly Limited to Lives in Being and Twenty-one Years Thereafter.

This type of provision represents the ordinary trust devise whereby trustees are given a power to sell the property and to divide the proceeds among named or ascertainable beneficiaries. By reason of the fact that the interests of such named beneficiaries may be contingent, or because they are to be ascertained by future events, the beneficiaries may have no present vested interest. But if, as is assumed under this sub-head, the power of sale is expressly limited to lives in being and twenty-one years thereafter, there is no possible violation of the Rule against Perpetuities. This express limitation may be obtained by limiting the power of sale itself, or by limiting the duration of the trust.[12] Either the power of sale or the duration of the trust may be limited by stating the limitation in years, or by date, or by reference to lives in being. In any event, where such limitation so provides that the shift in the vested interest must necessarily occur within lives in being and twenty-one years thereafter, there is no violation of the Rule against Perpetuities.

b. Power of Sale Not Expressly Limited to Lives in Being and Twenty-one Years Thereafter.

This type of case involves some of the most difficult problems

[10] Gray on the Rule Against Perpetuities (3rd ed.) sec. 509k.

[11] The power of sale which the trustee has in this type of situation has been likened to a special power of appointment by Roland R. Foulke, in 16 Col. L. Rev. 630. The writer therefore concludes: "Consequently, the period prescribed by the rule runs from the time of the creation of the trust and the limitation made by the trustee under the power are judged, as to their remoteness, accordingly."

[12] Likewise, where the purpose for which a power of sale was given has been accomplished or has failed, the power ceases. Perry on Trusts (7th ed.), Vol. 1, page 444; *Trask v. Sturges*, 170 N. Y. 482, 63 N. E. 534, (1902).

related to the effect of the Rule against Perpetuities upon Powers of Sale. The situation now to be considered is where the trustee is given power to sell and distribute the proceeds to persons not now holding a vested interest, in which the duration of the power is not expressly limited to lives in being and twenty-one years thereafter. In such a case the court is confronted with the problem of construing the testator's intent, for the purpose of determining whether the will, by necessary implication, limits the duration of the power within the period of remotenesss. If such necessary implication is to be drawn from the will, then the provision is valid —if it cannot be drawn from the will, the provision is void as constituting a perpetuity Before referring to the individual types of cases under this heading, some referece should first be made to a rule of construction which courts uniformly adopt in determining whether or not the provision is void for remoteness. No better statement can, perhaps, be made of the rule referred to than that by Professor Gray

> "The Rule against Perpetuities is not a rule of construction, but a peremptory command of law It is not, like a rule of construction, a test, more or less artificial, to determine intention. Its object is to defeat intention. Therefore, every provision in a will or settlement is to be construed as if the rule did not exist, and then to the provision so construed the rule is to be remorselessly applied.
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> "But there is a legitimate use of the Rule against Perpetuities in matters of construction. When the expression which a testator uses is really ambiguous, and is fairly capable of two constructions, one of which would produce a legal result, and the other a result that would be bad for remoteness, it is a fair presumption that the testator meant to create a legal rather than an illegal interest. While it is not to be conclusively presumed that a testator knew the Rule against Perpetuities, for such a presumption would often involve the absurdity that a testator intended to make a will which he was aware the law would not carry into effect, there is, on the other hand, no presumption that he did not know it, and therefore the fact that a provision would be too remote, if construed in a certain way, is a reason for supposing that it was not intended to be construed in that way, which, although it cannot avail against a clear form of words, may well be held to govern when the expression is ambiguous."[13]

1. Duration of Power Set Forth in General Terms

There appear to be no cases involving a power of sale which sets forth the duration of the power in general terms, such as "for as

[13] Gray on the Rule Against Perpetuities (3rd ed.), secs. 629 and 633. To the same effect see 48 C. J. 997 Godefroi on Trusts and Trustees (5th ed.), page 646.

long a period as legally possible." But, upon analogy to cases which limit the duration of the trust in such language, such a power of sale might be deemed valid. Thus in *Fichie v. Brown*[14] the testator gave his property in trust for the benefit of forty-two named beneficiaries and provided that the trust should remain in effect "for as long a period as legally possible." The Supreme Court of the United States held that the testator had shown by the use of this language that he realized that there were limits upon the length of time that a trust could continue, and that (to give effect to his expressed intention that it should remain in effect for as long a time as legally possible) he must have intended to limit the duration of the trust to twenty-one years after the death of the last named annuitant. This case appears to be a proper one for invoking the rule of construction set forth in the second paragraph of the quotation from Professor Gray, above.

2. Power to Sell at a Definite Time "More or Less."

In *Brandenburg v. Thorndyke*[15] the testator left his residuary estate to trustees for his wife's life, and then provided "At the expiration of three years from the death of my wife, or at said time, *whether earlier or later,* as may, in the discretion of the trustees, be found expedient and practicable for the final settlement and disposition of my estate, the trustees shall convey and transfer said fund in equal shares." The court held that the provision did not violate the Rule against Perpetuities, because "it does not leave it to the unlimited discretion of the trustees to delay the vesting or enjoyment of the estates to such time as they think expedient." Professor Gray believes that the decision was correct, saying:

> "A fair construction of the will was that the testator by the expression, 'at the expiration of three years from the death of my wife, or at such time, whether earlier or later, as may, in the discretion of the trustees be found expedient and practicable,' meant 'at such time, about three years, as the trustees may determine,' and certainly a period exceeding twenty-one years is not 'about three years' "[16]

3. Power to Sell Within a "Reasonable" Time.

As stated by an authority on Trusts

> "Where the trust is to sell within a reasonable time after the death of the life beneficiaries and to divide the proceeds among persons, some of whom were not in being at the time the trust was created, it has been held that the trust for sale and division does not violate the rule against perpetuities, since the reasonable time during which the sale is to be made and the trust terminated, cannot have been intended to exceed twenty-one years."[17]

[14] 211 U. S. 321, 29 Sup. Ct. 106, 53 L. Ed. 202 (1908), commented on in 20 Har. L. Rev. 221, 9 Col. L. Rev. 275.
[15] 139 Mass. 102, 28 N. E. 575 (1885).
[16] Gray on the Rule Against Perpetuities (3rd ed.), sec 214c.
[17] Perry on Trusts (7th ed.), Vol. 1, page 641.

Whether the author was referring to an express provision for the exercise of the power within a "reasonable" time or whether that was to be determined by implication, is not made clear. In any event the cases cited in support of the statement appear not to be, in fact, authority upon that point since they are substantially distinguishable upon their facts. Moreover, this writer was unable to find any cases expressly providing for the exercise of such a power of sale within a "reasonable time."[18] It is submitted that such a provision cannot be logically construed as necessarily vesting within lives in being and twenty-one years thereafter, in view of the rule of construction set forth in the first paragraph of the quotation from Professor Gray, above. Unless "reasonableness" is construed in reference to the period of remoteness (which is forbidden by the rule of construction referred to), there is probably no sound reason for holding that such provision places the duration of the power upon that absolutely certain basis required by the Rule against Perpetuities.

4. Commencement or Duration of Power of Sale Measured by an Event to Occur in the Future.

No cases involving powers of sale were found which provided for the commencement of the power or the duration thereof to be measured by the occurrence of a future event. But analogy to cases involving the duration of trusts may again be resorted to for the purpose of indicating the result to follow from such a provision respecting powers of sale. In *Coit v. Comstock*,[19] there was a devise to trustees to receive the rents and income "until an Act of Incorporation can be obtained from the General Assembly of the State," and then to convey the property to such corporation for charitable purposes. The court upheld the trust, saying: "It is clear, therefore, that a reasonable time only for the act to be obtained was contemplated by the testator." In *Belfield v. Booth*,[20] it was held that a period of fourteen years, to begin after the executor has settled with the judge of probate, must begin within seven years from the testator's death, since the court was not to presume that the settlement of the estate will or can be delayed beyond a reasonable time. The obvious objection to these decisions is that they constitute a clear violation of the rule of construction that the intention of the testator must be determined without reference to the Rule against Perpetuities. Professor Gray finds that these decisions are the result of special conditions existing in Connecticut, for he says

> "The case of *Belfield v. Booth* is an interesting illustration how the introduction or rejection of a legal doctrine may bring about unexpected consequences. Connecticut repu-

[18] *Miller v. Weston*, note (6) *supra*, used those words, but also additional words indicating that the testator meant the power to be exercised in about two years. This takes the case within the rule of *Brandenbury v. Thorndike*, note (13) *supra*, but in any event the equitable title was vested in *Miller v. Weston*.

[19] 51 Conn. 352 (1883)

[20] 63 Conn. 299, 27 Atl. 585 (1893).

diated the doctrine of *cy pres,* then came the case of *Coit v. Comstock,* easily to be decided under the doctrine of *cy pres,* but for which the Court, to preserve the form of consistency, had to invent several novelties, among others this implication of "reasonable time," to avoid the objection of remoteness, and from *Coit v. Comstock,* this idea has traveled to *Belfield v. Booth,* and is there no longer confined to charities."[21]

5. Power to Sell "at Such Times as the Trustees Shall Deem Best."

The recent Washington case of *Denny v. Hyland,*[22] which is the first case to be decided in this jurisdiction involving the Rule against Perpetuities, raises the issue of the validity of a power to sell "at such times as the trustees shall deem best." The published opinion of the court does not refer to this problem, but it was raised specifically by able and exhaustive briefs for and against granting a petition for a rehearing. The petition was denied, and inferentially the court decided against the proposition contended for. Because of the manner in which the question was disposed of, however, it may not necessarily settle the question in this jurisdiction. The specific proposition dealt with in the petitions for and against rehearing was stated as follows.

> "No time being fixed for distribution, except within the discretion of the trustees, disposition must, in the exercise of the lawful discretion vested in the trustees, be made within a reasonable time, which is necessarily within the period allowed by the Rule against Perpetuities."

The cases cited in support of this contention appear to be substantially distinguishable upon their facts,[23] and no cases appear to have been cited to contradict the exact proposition. Moreover, the writer was unable to discover a single case which dealt with the specific problem. Any definite solution of the question must apparently be determined by a sort to fundamental principles and an analysis of the circumstances of this particular case.

A painstaking analysis of the problem raised by this particular case would be beyond the scope of the general discussion being

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[21] Gray on the Rule Against Perpetuities (3rd ed.) sec. 214d. An identical situation in Virginia has produced a similar result. See *Literary Fund v. Dawson,* 1 Rob. 402; *Kinnaird v. Miller,* 25 Grat. 107 and comment in Gray, sec. 616. Likewise the same cause and effect has occured in Iowa. *Miller v. Chittenden,* 2 Iowa 315, 4 Iowa 252; *Johnson v. Mayne,* 4 Iowa 180; *Byers v. McCartney,* 62 Iowa 339· *Phillips v. Harrow,* 93 Iowa 92, 61 N. W 434 (1894) Gray, sec. 625.

[22] 162 Wash. 68, 297 Pac. 1083 (1931).

[23] The cases cited in favor of this proposition and the footnotes in which they appear herein, are as follows: *Strout v. Strout* (9) Perry on Trusts, sec. 383 (17) *Miller v. Weston,* (6) and (18) *Brandenburg v. Thorndike,* (15) *In re Sudeley,* (6) *In re Dyson,* (6) *Eary v. Raines,* (8) *In re Cooper's Estate,* (7).

attempted in this note. It may be properly observed, however, that there seems to be a substantial argument in favor of the validity of this type of testamentary provision. This argument is based upon an application of fundamental trust principles to the situation in question. Unless trustees are given an absolute discretion whether or not the power need ever be exercised,[24] it would seem that a mere discretion as to the time of exercising it would not give trustees power to defeat the trust entirely by refusing to exercise the power.[25] If this is the case, there seems to be no logical difficulty in permitting the probate court to take judicial notice of those limitations upon the discretion of trustees. It will be observed that in doing so the court is not presuming the intention of the testator, but is recognizing the duties of trustees, such that there is no breach of the rule of construction set forth in the first paragraph quoted from Professor Gray, above. It should be further noted, that whatever decision the court reaches in this regard, there need be no fear of a relaxing of the Rule Against Perpetuities, but at worst only a misconstruction of the obligations of trustees, since in finding the trust to be valid, the court thereby makes certain the equitable interests will vest within lives in being and twenty-one years thereafter.[26]

Conclusion.

The Rule against Perpetuities is involved only in cases of voluntary transactions, such as by executing a will or by establishing a trust inter vivos. Hence compliance with the rule is at all times within the control of him who is vitally interested in compliance. In this matter, as in the case of directing the course of all voluntary relationships, the role of the lawyer is especially important, since he has it within his power to assure the accomplishment of his client's intentions, and at the same time to reduce to a minimum the likelihood of future litigation. With particular reference to Powers of Sale and the Rule against Perpetuities, the proper course is obvious. If the case is one for the proper application of the Rule against Perpetuities,[27] the time for the exercise of the power

[24] Discretionary powers may be imperative or optional, depending upon whether or not the power, though discretionary must ever be exercised. Perry on Trusts (7th ed.), sec. 507, page 852.

[25] Lewin on Trusts (13th ed.), pages 392 and 1062; *Herriott v. Good*, 153 Ky 418, 155 S. W 761 (1913). Perry on Trusts (7th ed.) page 858: "The discretion of the trustee will not be controlled or questioned so long as he is not guilty of bad faith or abuse of the power and trust; but it is difficult, if not impossible, to create in the trustee such unbounded power as to preclude a court of equity from controlling him when he acts fraudulently, or palpably abuses his power, as by unreasonably refusing to exercise it, or undertaking to exercise it in an unreasonable manner."

[26] There appears to be a curious attitude of mind with regard to this matter, the language of the courts quite often indicating that the court feared that to hold the trust valid in a close case would be to relax the Rule Against Perpetuities. But in holding a trust valid, the court is decreeing that the interests will vest within the period of remoteness, so that instead of relaxing the rule, the court is specifically applying and enforcing it. What may be involved, however, is a misconstruction of the intention of the testator, or a misapplication of some rule of law as to the legal effect of certain devises, in reaching the conclusion that the interest must vest within the period.

[27] See the second paragraph of 11, above.

should be expressly limited within such time that no violation of the rule is possible, under any reasonable construction. This may be done by limiting the duration of the power to a specific length of time within the period of remoteness, or by limiting its duration in reference to lives in being at the time of the testator's death. Should this practical suggestion be generally followed, we might hope to be presented with the problem in Washington courts as rarely in the future as it has apparently arisen in the past.

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RECENT CASES

CORPORATION—TRUST FUND DOCTRINE—RIGHT TO RESCIND STOCK SUBSCRIPTION AFTER INSOLVENCY. An insolvent corporation bought stock on the open market and sold it as treasury stock to the plaintiff, who seeks rescission because of fraudulent misrepresentations. Defendant claimed that plaintiff cannot rescind after insolvency as against the assignee of the corporation because it would reduce the creditor's trust fund. *Held*: A subscriber for the capital stock of a corporation may bring suit after insolvency of the corporation for rescission of his subscription if (1) he has used due diligence and (2) has not profited by the transaction, or (3) misled others to their detriment. The trust fund doctrine has no application to existing creditors and prior indebtedness. *Goodin v. Palace Stores Co.*, 64 Wash. Dec. 538 (1931).

It will be observed that the above case involves a conflict between the rights of creditors and a defrauded stockholder.

The doctrine that the assets of an insolvent corporation are a trust fund for the benefit of all its creditors is said to be an invention of the courts during the panic of the late nineteenth century when there was no federal bankruptcy act. THE TRUST FUND DOCTRINE: A STUDY IN PSYCHOLOGY, 1 Wash. Law Rev. 81. It was established in Washington by the cases of *Thompson v. The Huron Lumber Co.*, 4 Wash. 600, 30 Pac. 741, (1892) *Conover v. Hull*, 10 Wash. 673, 39 Pac. 166, 4 Am. St. Rep. 819 (1895). It continues despite the bankruptcy act; *Dysart v. Colonial Fire Underwriter* 142, Wash. 601, 254 Pac. 240 (1927) often being ground for declaring a preference when that act is not; *Benner v. Scandinavian American Bank*, 73 Wash. 488, 131 Pac. 1149, Ann. Cas. 1914 D 709 (1913) because the good faith of the parties is not gone into; *In re Elliott-O'Brien Co.*, 284 Fed. 507 (1922). Further the test of insolvency is different, *Jones v. Hoquiam Lumber & Shingle Co.*, 98 Wash. 172, 167 Pac. 117 (1917) the bankruptcy act holding a concern insolvent when at a fair valuation the aggregate of its property is insufficient in amount to pay its debts; *Simpson v. Western Hardware & Metal Co.*, 97 Wash. 626, 167 Pac. 113 (1917) and the trust fund theory when it is unable to pay its debts in the due course of business; *Nixon v. Hendy Machine Works*, 51 Wash. 459, 99 Pac. 11 (1909).

The court has limited the theory saying that where there is no depletion of the corporation's assets the basis of the doctrine is removed. *Terhune v. Weise*, 132 Wash. 208, 231 Pac. 954, 38 A. L. R. 94 (1925). Thus in exchange for a contemporaneous loan an insolvent corporation may mortgage all its assets; *Olive v. Tyler*, 257 Fed. 497 5 A. L. R. 557 (1919) though the lender be a stockholder· *Jensen v. American Bank of Spokane*, 157 Wash. 240, 288 Pac. 660 (1930) or an officer, *Terhune v. Wise, supra.* A repayment of a loan for a particular profitable transaction is not a preference; *Hoppe v. First National Bank*, 137 Wash. 41, 241 Pac. 662 (1925) nor is the altering of the character of a creditor's security· *Brinker v. Peoples Savings Bank*, 144 Wash. 93, 256 Pac., 1025 (1927). By paying itself from a corporation's funds which it holds a bank merely takes back a part of what it has contributed; *Smith v. National Bank of Commerce*, 142 Wash. 428, 253 Pac. 644 (1927) but see *Woods v. Metropolitan National Bank*, 126 Wash. 346, 218 Pac. 266 (1923). Under certain circumstances even a private person may obtain a set-off. *Dysart v. Colonial Fire Underwriters, supra.*