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Editorial Board/Notes and Comments

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NOTES AND COMMENTS

Minor Parties and the Election Laws—The Socialist Petition.

On September 28, 1932, the State Board of Elections received petitions for the placing of presidential electors of the Socialist and Prohibition parties on the North Carolina official ballot.¹ It is reported that the Socialist petition carried more than the ten thousand signatures of legal voters required by the Board of Elections' interpretation of the legislative definition of a political party,² and accordingly the Board directed that the Socialist electors be placed on the ballot with the Republican and Democratic candidates. The Prohibition petition had less than three hundred names. Previously the Communist party had instituted mandamus proceedings to require the members of the

¹ Raleigh News and Observer, September 29, 1932.

² Apparently the Board applied the primary definition to a general election question. See *infra*.

Board of Elections to show cause why the Communist candidates should not be placed on the ballot without obtaining ten thousand signatures.³ Judge N. A. Sinclair in Wake County Superior Court denied the motion for a writ of mandamus.⁴

The Federal constitutional provision relating to the selection of these electors is that "Each State shall appoint, in such Manner as the Legislature thereof may direct . . ."⁵ thus leaving the method of choice within the exclusive control of the legislature of each state.⁶ It has been said that the legislature itself might choose the electors, or it might provide for their election by the people, their appointment by the governor, or by any other agent it might secure.⁷ The extent of the legislature's power in this field has been before the United States Supreme Court one time, where the answer was emphatic that the authority to direct the manner of appointment is plenary.⁸ What of a legislature's enactment that the state's presidential electors shall be chosen by the executive committee of a political party—or some such partizan arrangement?⁹ Suppose the 1927 General Assembly had

³ Raleigh News and Observer, September 14, 1932.

⁴ Raleigh News and Observer, September 17, 1932.

⁵ Art. 2, §1, cl. 2. "Each State shall appoint, in such Manner as the Legislature thereof may direct, a number of Electors, equal to the whole Number of Senators and Representatives, to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector." The time of choosing electors and the day on which they shall give their votes, which shall be the same throughout the United States, is left for Congressional determination. Art. 2, §1, cl. 3.

⁶ In the early days of the republic selection of the electors by the legislatures was common. North Carolina used this method in 1812. The same was true of South Carolina up to 1860. The electors who cast Colorado's vote in the Hayes-Tilden controversy were chosen by the legislature, and the vote was unchallenged. See, *McPherson v. Blacker*, 146 U. S. 1, 31-32, 35, 13 Sup. Ct. 3, 36 L. ed. 869, 875-876, 877 (1892). See also, Clark, *The Electoral College and Presidential Suffrage* (1917) 65 U. OF PA. L. REV. 737. Chief Justice Clark describes a variety of methods which have been utilized by the legislatures. He points out that in 1796 and in 1800 the legislature of Tennessee appointed certain persons to themselves select the electors. Hawley, *The Part of the People and of the States in Choosing the President* (1900) 171 NORTH AMERICAN REV. 273, ". . . the election of Presidents by the people is merely a popular custom, permitted, but not ordered by the fundamental law of the country." BEARD, AMERICAN GOVERNMENT AND POLITICS (1911) 179.

⁷ Senate Rep., 1st. Sess. 43 Cong., No. 395, quoted in *McPherson v. Blacker*, *supra* note 6, and there approved. Indeed, the North Carolina statute provides that in case of absence or ineligibility of any elector at the time of voting for a president and vice-president, those electors present shall select persons to supply the deficiency. N. C. CODE ANN. (Michie, 1931) §6012.

⁸ *McPherson v. Blacker*, *supra* note 6. The dispute there involved the power of the legislature to provide for selection of presidential electors in congressional districts rather than by the people at large.

⁹ Of course this is a moot question. It is hard to conceive of a dominant party in a state legislature attempting it. But see, STANWOOD, HISTORY OF THE

provided that the electors to be selected in 1928 should be chosen, not by the people at large, but by the State Democratic Executive Committee. Certainly their selection in 1928 would not have reflected the choice of the electorate in that memorable year. Absurd perhaps, but it's difficult to point out a specific constitutional objection. Is the Fourteenth Amendment's ban on discriminations preventive of this appalling theoretical situation? Since a politically one-sided legislature might constitutionally pick the electors,¹⁰ is it any the less constitutional, so far as discrimination goes, for the legislature to request one or more persons of the legislature's political hue to perform this function? It is not most satisfactory to persons of another political faith, but neither would legislative selection be satisfactory. Nor is there a formidable attack in the assertion that selection by a small group of persons does not meet the constitutional requirement of appointment of electors by the State. For where the contention was made that electors chosen in congressional districts was not selection by the State, the court replied, "The State does not act by its people in their collective capacity, but through such political agencies as are duly constituted and established."¹¹

It is not clear that the possibilities of what the state legislature might do with this power caused the Federal Convention great concern. The problem of devising a method for electing the president was the most difficult one the convention faced.¹² There was heated debate and considerable vacillation. Madison wrote to Jefferson that "The modes of appointment proposed were various, as by the people at large—by electors chosen by the people—by Executives of the States—by the Congress,—Several other modifications were started. The expedient at length adopted seemed to give pretty general satis-

PRESIDENCY (1898) 15. In 1892 Michigan reverted to the system of voting by congressional districts for all but two of the electors. "The party accidentally in power adopted this device with the express purpose of dividing the electoral vote of the State, which it had no hope of obtaining upon a general popular vote."

¹⁰ *McPherson v. Blacker*, *supra* note 6, at 40, 13 Sup. Ct. at 12, 36 L. ed. at 879. See, Clark, *supra* note 6, at 738, "In the first contested election in 1796, three electors chosen on the Democratic-Republican ticket felt free to vote for John Adams, the Federalist candidate, and thereby defeated Jefferson. . . ."

¹¹ *McPherson v. Blacker*, *supra* note 6, at 40, 13 Sup. Ct. at 6, 36 L. ed. at 873.

¹² FARRAND, *THE FRAMING OF THE CONSTITUTION* (1913) 160; 3 FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION* (1911) 166: "The Convention, Sir, were perplexed with no part of this plan so much as with the mode of choosing the President of the United States," said James Wilson in the Pennsylvania Convention.

faction to the members."¹³ This final plan, which was brought in by a committee, was the result of a compromise.¹⁴ The convention wished to avoid dependence of the executive upon the national legislature and yet lacked confidence in a popular election.¹⁵ Although the thought was that each elector would exercise independent judgment in casting his ballot, it was believed the number of favorite sons would prevent a majority for any one person and the eventual choice would be made by the national House of Representatives.¹⁶ Possibly this expectation precluded greater interest in the extent of the state legislature's power.

The North Carolina situation is interesting not only as regards the selection of presidential electors but as to the question of smaller parties generally. An argument was presented to the Board of Elections in September which analyzed the presidential problem in substantially this manner: The legislature has directed that the ballots contain the names of candidates who have been nominated by any political party in this State or who have filed notice of their independent candidacy.¹⁷ There are two definitions of the term "political party" in the North Carolina statutes. The one in the primary laws makes the term apply to all political parties having candidates for

¹³ 3 FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION* (1911) 132. Madison stated in the Virginia Convention, "That mode which was judged most expedient was adopted, till experience should point out one more eligible." *Id.*, 331.

¹⁴ FARRAND, *THE FRAMING OF THE CONSTITUTION* (1913) 166. Warren records that Madison wrote to George Hay, "The difficulty of finding an unexceptional process for appointing the Executive Organ of a Government such as that of the United States was deeply felt by the Convention; and as the final arrangement of it took place in the latter stage of the Session, it was not exempt from a degree of hurrying influence produced by fatigue and impatience in all such bodies; tho' the degree was much less than usually prevails in them." WARREN, *THE MAKING OF THE CONSTITUTION* (1928) 630. This same work reports (p. 629) that Hamilton urged the adoption of the committee's report stating that "he would take 'any system which promises to save America from the dangers with which she is threatened'."

¹⁵ James Wilson and Gouverneur Morris were perhaps the staunchest advocates of popular election, desiring to have the executive independent of both the national and state legislatures. George Mason, Charles Pinckney and Hugh Williamson thought it unwise for the people to select the executive. See, WARREN, *THE MAKING OF THE CONSTITUTION* (1928) 357-367, and FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION* (1911). HORWILL, *THE USAGES OF THE AMERICAN CONSTITUTION* (1925) 26. Cf. STANWOOD, *supra* note 9, at 3.

¹⁶ FARRAND, *THE FRAMING OF THE CONSTITUTION* (1913) 167. Rufus King wrote to C. R. King in 1823 that in his opinion the proper construction of the constitution was that the legislatures might "designate those who may appoint the Electors altho' they themselves may not appoint them." FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION* (1911) 459. BECK, *THE CONSTITUTION OF THE UNITED STATES* (1924) 264.

¹⁷ N. C. CODE ANN. (Michie, 1931) §6055 (a5).

state offices in the 1914 election, and in addition any political party in whose behalf could be secured ten thousand signatures.¹⁸ This is in the primary election law and can hardly be applicable to a general election question when the general election laws themselves define the term. The latter definition says a political party is an organization whose candidate for governor received as many as fifty thousand votes in the election of 1900.¹⁹ Of course that means the Democratic and Republican parties, and them only.²⁰ Article VI, §1 of the North Carolina Constitution guarantees the right to vote,²¹ and it is contended this carries with it the incidental rights of combination into political parties which may have the names of their candidates printed on the ballot.²² There may be reasonable restrictions, but a statute which restricts the right to the Democratic party and the Republican party is entirely unreasonable. The argument concluded that this general election definition was unconstitutional, and that the presidential electors nominated by the Socialist party were entitled to a place on the ballot.

Possibly the foregoing analysis fails to distinguish between the legislature's relation to the selection of presidential electors and the legislature's function in prescribing a system for the election of other officials. The first is the exercise of a power derived from the Federal Constitution, and which the State Constitution is powerless to limit.²³ Thus it might be that the legislative definition of a political party is unconstitutional for some purposes and not unconstitutional for the selection of presidential electors. If the legislature's power here is a plenary one, then could it not limit the candidates to Re-

¹⁸ N. C. CODE ANN. (Michie, 1931) §6052. This definition was adopted in 1915 and is part of "An Act to Provide Primary Elections Throughout the State." N. C. PUB. LAWS (1915) c. 101, §31.

¹⁹ N. C. CODE ANN. (Michie, 1931) §5913. This definition was adopted in 1901.

²⁰ The vote for governor in 1900 was, Aycock (Dem.), 186,650; Adams (Rep.), 126,296. NORTH CAROLINA MANUAL (1913) 1006.

²¹ "Every male person born in the United States, and every male person who has been naturalized, twenty-one years of age, and possessing the qualifications set out in this article shall be entitled to vote at any election by the people in this State, except as herein otherwise provided."

²² See, *State v. Phelps*, 144 Wis. 1, 128 N. W. 1041 (1910).

²³ See, Clark, *supra* note 6, at 740. "The legislature of each state, of course, is elected in the manner prescribed by its constitution, but the power and discretion vested in it to provide the manner in which the presidential electors shall be chosen is derived solely from the Constitution of the United States, and no state constitution can restrict the execution of such power. The federal constitution selected a state agency as the depository of this power, but the exercise of such power is given to the state legislature subject to no restriction from the state constitution. . . ."

publicans and Democrats? This of course is not a happy state of affairs, but probably a constitutional one.

Although North Carolina decisions on the point are lacking, it seems to be accepted in other states that a political group may be required to show a specified strength before it will be allowed a primary or its candidates be placed on the general election ballot.²⁴ The requirement is sometimes expressed in a percentage of the total vote cast at the last general election, or a certain number of petitioners may be demanded.²⁵ Representation on the general election ballot is permitted parties and candidates with a smaller strength than is required before a primary may be had. The justification advanced for these restrictions on candidates is a practical one—the size of the ballot must have some limit.²⁶ Petition requirements in the main are small enough so that parties and candidates with an immediate chance of success will not be kept off the ballot. It is, however, exceedingly doubtful whether little or no restrictions would really

²⁴ "Three persons may claim to be a political party, just as the three tailors of Tooley street assumed to be 'The People of England.' It follows, if an official ballot is to be used, nominations must be regulated in some way; otherwise—the ballot would become the size of a blanket." *DeWalt v. Bartley*, 146 Pa. 529, 24 Atl. 185 (1892). See *Milner v. Olin*, 159 Mass. 487, 34 N. E. 721 (1893); *State v. Poston*, 58 Ohio St. 620, 51 N. E. 150 (1898); *State v. Drexel*, 74 Neb. 776, 105 N. W. 174 (1905); *In re Terry*, 203 N. Y. 292, 96 N. E. 931 (1911); *People v. Smith*, 206 N. Y. 231, 99 N. Y. 568 (1912); *Cunningham v. Cokely*, 79 W. Va. 60, 90 S. E. 546 (1916).

²⁵ See for example, *Wis. STAT.* (1931) §5.05, primary election for party polling one per cent of votes cast in last presidential election; and for any other party presenting petition signed by one-sixth of voters in at least ten counties; §5.26, nominations other than by primary made by petition of one thousand voters, for a candidacy to be voted on throughout the state. New York requires twelve thousand petitioners for independent nomination for a state-wide office. *N. Y. ELECTION LAW* (1922) §137. There is not a semblance of uniformity among the states in these requirements.

²⁶ See, *supra* note 24. *Cf.* dissent of Marshall, J., in *State v. Poston*, 58 Ohio St. 620, 51 N. E. 150 (1898), "This simply places the size of the ballot—a piece of paper—above the right of the elector secured to him by the constitution." *SAIT, AMERICAN PARTIES AND ELECTIONS* (1927) 380, "The excuse for requiring numerous signatures is that otherwise there would be a plethora of candidates. The argument is of doubtful validity. If a man is well known and popular or if he is brought forward by the machine merely to draw votes from a dangerous reform candidate, he will not be deterred by a somewhat oppressive requirement. On the other hand, if he is obscure and without backing, and yet can offer himself because few signatures are required, his name will not add to the complexity of the ballot or injure the prospects of other candidates. The task of the voter is affected, not by the presence of many candidates—he will pick the man he knows and wants as easily from among a dozen candidates as from among three—but by the multiplicity of elective offices." To the effect that the Australian ballot has been a blow to independent candidates and the small party, see, *OSTROGORSKI, DEMOCRACY AND THE PARTY SYSTEM* (1921) 333; *cf.* *SAIT, supra* at 377.

create a costly or inconvenient ballot. And every effort should be made to encourage any manifestation of interest in government.²⁷ As for the presidential ballot, a number of states have combined convenience with reality by striking from the ballot the columns of electors and printing instead the names of the presidential and vice-presidential candidates—a vote for whom is a vote for their electors on file with the secretary of state.²⁸ A state with as many presidential electors as North Carolina could recognize a large number of parties without increasing the size of the ballot.²⁹

Confusion in the North Carolina statutes results mainly because of the two definitions of a political party. The general election definition of 1901 crystallized the term for Republican and Democrats. The primary election definition of 1915 recognizes the possibility of other parties and brings them under the primary act when petitioned by ten thousand voters. But there is nothing in the primary act to make this definition supplant the 1901 general election term, and it results from this line of reasoning that there is no way for political groups other than the two major parties to have party representation on the general election ballot. The view that a guaranty of the right to vote is also a guaranty of reasonable freedom in party affiliation and representation would condemn as unconstitutional a hard and fast two party definition. Another interpretation of the statutes might be that since the statutes provide that candidates of political parties shall be placed on the ballot, and the 1915 definition opens the way for new parties by petition, there is not a two party limitation. This, it seems, ignores the title and purpose of the 1915 law. But to make the ten thousand provision of the primary law a test for party representation in the general election would still leave a discrimination against independent or non-partisan candidates who must have a ten per cent petition,³⁰ and that would mean obtaining seventy thousand petitioners for a state-wide office,³¹

²⁷ See, BRUCE, *AMERICAN PARTIES AND POLITICS* (1927) 150. Minor parties "testify to the transcendent position that principles and convictions hold in the minds of the group as contrasted with political expediency."

²⁸ ILL. ANN. STAT. (Callahan, 1925-1931 Supp.) c. 46, §1; IOWA CODE (1931) c. 45; MICH. COMP. LAWS (1929) §3246; NEB. COMP. STAT. (1929) c. 32, §220; OHIO CODE SERVICE (Baldwin, 1929) §§4785-107; WIS. STAT. (1931) §6.23 (17); Pa. Laws 1931, No. 216. See, Aylsworth, *The Presidential Short Ballot* (1930) 24 AM. POL. SCI. REV., 966.

²⁹ A sample ballot in Wisconsin provides places for the candidates of six parties in a seven by seven inch space. See, WIS. STAT. (1931) §6.23 (17).

³⁰ N. C. CODE ANN. (Mich. 1931) §6055 (a6).

³¹ In the 1932 election the votes for such offices approximated seven hundred thousand. Raleigh News and Observer, December 7, 1932.

an insuperable task. It is believed that North Carolina could adopt a liberal election law and one that would assure good faith (which should be the important consideration) on the part of candidates. This might require of political groups which polled less than two per cent of the total vote cast in the last preceding gubernatorial election a petition signed by one per cent of such number for party representation on the general election ballot for a state-wide office, and a petition of two per cent of the votes cast in the preceding election for the particular office of a local nature. For independent candidates the requirements might be the same, a one per cent petition for a state-wide office and two per cent of the local vote for a local office. The required strength for a primary election might be two per cent of the vote in the last gubernatorial election or a petition of ten thousand voters. The gubernatorial vote in the 1932 election was over seven hundred thousand.³² A party which polls two per cent, or fourteen thousand votes, should be entitled to a place on the ballot, and, failing a two per cent vote, representation should be accorded a group which secures petitioners equalling one per cent of the gubernatorial vote. Even these requirements may be too rigorous.

E. M. PERKINS.

Banks and Banking—Interest Allowable to Depositors After Insolvency.

The assets of an insolvent bank were more than sufficient in amount for the payment in full of the aggregate principal amount of all claims of depositors. In a controversy without action submitted upon a statement of facts agreed, it was *held* that the depositors were entitled to interest as against the stockholders of the bank, from insolvency until final payment by the receiver; that insolvency was the equivalent of a refusal by the bank to pay and in legal effect a waiver of a demand for payment by the depositors.¹

³² The results certified by the State Board of Canvassers, as reported in the Raleigh News and Observer, December 7, 1932, give Ehringhaus (Dem.), 497,657; Frazier (Rep.), 212,561. The vote in the presidential election was, Roosevelt (Dem.), 497,566; Hoover (Rep.), 208,344; Thomas (Soc.), 5,591; Upshaw (Prohib.), 89. Thus the vote polled by the Socialist party was less than eight-tenths of one per cent of the total state vote.

¹ Hackney v. Hood, 203 N. C. 486, 166 S. E. 323 (1932).

A news item from the Greensboro (N. C.) Daily News on December 17, 1932, was headed: "Three Closed Banks Bring 100 Per Cent." Of these three North Carolina banks, two paid depositors interest, one of the two having assets

Upon insolvency of a bank, deposits become due and actionable² and in some jurisdictions have the same efficacy as judgments.³

Courts often announce a general rule that, after property of an insolvent passes into the hands of a receiver, no interest is allowable upon claims against the fund.⁴ This rule has been explained as applying only in cases in which the assets were less than the liabilities.⁵ Accordingly, the rule does not prevent the running of interest where the assets are sufficient,⁶ and interest is allowable in such case.⁷

In a distribution among ordinary creditors,⁸ interest is allowable to all or none.⁹ If the assets are less than the principal liabilities, no

left over for the stockholders. This item is noted in order to show that the problem disposed of in the instant case does arise.

² *Richmond v. Irons*, 121 U. S. 27, 7 Sup. Ct. 788, 30 L. ed. 864 (1886); *Hackney v. Hood*, *supra* note 1; *State ex rel. McConnell v. Park Bank & Trust Co.*, 151 Tenn. 195, 268 S. W. 638, 39 A. L. R. 449 (1925); *Gilbertson v. Northern Trust Co.*, 53 N. D. 502, 207 N. W. 42 (1925), 42 A. L. R. 1353 (1926); *England v. Hughes*, 141 Ark. 235, 217 S. W. 13 (1920); *Williams v. Johnson*, 50 Mont. 7, 144 Pac. 768, Ann. Cas. 1916D, 595 (1914); *People v. Merchants' Trust Co.*, 187 N. Y. 293, 79 N. E. 1004 (1907); *Baker v. Williams*, 42 Ore. 213, 70 Pac. 711 (1902); *McGowan v. McDonald*, 111 Cal. 57, 43 Pac. 418 (1896).

³ *Nat. Bank v. Mechanics' Nat. Bank*, 94 U. S. 437, 24 L. ed. 176 (1876); *State ex rel. McConnell v. Park Bank & T. Co.*, *supra* note 2, 268 S. W. at 642: "Construing the act, we hold that in insolvency proceedings allowed claims have the efficacy of judgments; and, further, that, in such proceedings, formal demand for payment is not necessary, but that such demand will be treated as having been made, and will bear interest from the filing of the petition in cases where a surplus exists after the payment of the face value of all claims." *Dorland v. Fidelity Development Co.*, 104 Misc. Rep. 97, 171 N. Y. Supp. 1000 (1918). *Re John Osborn's Sons & Co.*, 177 Fed. 184 (C. C. A. 2d, 1910), 29 L. R. A. (N. S.) 887 (1911) (as to allowed claims in bankruptcy).

⁴ *Am. Iron Co. v. Seaboard Air Line*, 233 U. S. 261, 34 Sup. Ct. 502, 58 L. ed. 949 (1914); *Thomas v. Western Car Co.*, 149 U. S. 95, 13 Sup. Ct. 824, 37 L. ed. 663 (1893); 23 R. C. L. 104. As to receivers: *Henricks v. Higley & Co.*, 199 Iowa 765, 202 N. W. 746 (1925).

⁵ *Am. Iron Co. v. Seaboard Air Line*, *supra* note 4, at 266, 34 Sup. Ct. at 504, 58 L. ed. at 953: "And it is true, as held in *Tredegar Co. v. Seaboard Ry.*, 183 Fed. Rep. 289, 290, that as a general rule, after property of an insolvent is in *custodia legis* interest thereafter accruing is not allowed on debts payable out of the funds realized by a sale of the property. But that is not because the claims had lost their interest-bearing quality during that period, but is a necessary and enforced rule of distribution, due to the fact that in case of receiverships the assets are generally insufficient to pay debts in full." *Moore v. Watauga & Y. R. Co.*, 173 N. C. 726, 727, 92 S. E. 361, 362 (1917): "Under the law of this State the appointment of a receiver for a corporation does not have the effect *eo instanti* to stop the interest upon all of its interest bearing obligations."

⁶ *Ohio Savings Bank & Trust Co. v. Willys Corp.*, 8 Fed. (2d) 463 (C. C. A. 2nd, 1925).

⁷ *Nolte v. Hudson Nav. Co.*, 8 Fed. (2d) 859 (C. C. A. 2nd, 1925); *Du Pont v. Ball*, 11 Del. Ch. 430, 106 Atl. 39 (1918), 7 A. L. R. 955 (1920).

⁸ As to general deposits, special deposits and deposits for a specific purpose, see (1931) 10 N. C. L. Rev. 381.

⁹ *Young v. Teutonia Bank & Trust Co.*, 134 La. 879, 64 So. 806 (1914).

interest is allowable as between them,¹⁰ because the assets are equitably the assets of all the creditors.¹¹ Obviously, to allow ordinary creditors interest in such case would be in effect a mere matter of bookkeeping entries and would not affect the ratable proportion to which each is entitled. But where the assets are greater than the liabilities, the ordinary creditor is entitled to both principal and interest before the return of any surplus to the stockholders of the bank,¹² even where it is necessary to assess the stockholders the amount of their statutory liability.¹³ Interest from insolvency until

¹⁰ *New York Security & Trust Co. v. Lombard Inv. Co.*, 73 Fed. 537, 554 (C. C. W. D. Mo., 1896): "Interest does not run, as against the estate, after the assignment or declared insolvency, unless there are funds sufficient on hand to pay all of the demands and accrued interest; otherwise, interest is to be allowed up to the time of the declared insolvency only." *Taylor v. Corning Bank & Trust Co.*, 185 Ark. 691, 48 S. W. (2d) 1102 (1932): "The general rule is that, unless there are sufficient funds to pay all the depositors, no depositor is entitled to interest on his claim." No interest was allowed in the following cases, probably because of insufficient funds: *Peoples' Nat. Bank v. Payne*, 26 Fed. (2d) 208 (C. C. A. 8th, 1928); *Shaw, Banking Com'r., v. Brown*, 29 S. W. (2d) 301 (Tex. 1930).

¹¹ See *People v. American Loan & Trust Co.*, 172 N. Y. 371, 65 N. E. 200, 201 (1902): "Interest should not run in favor of one creditor at the expense of another, while the law, acting for all, is administering the assets. If the assets are sufficient to pay all, including interest, it must be paid, for, as against the corporation itself, interest should be allowed before the return of any surplus to the stockholders. As between the creditors themselves, however, no interest should be allowed during the process of administration, and the delay necessarily resulting therefrom, because the assets are equitably their assets, the administration is for their benefit, and the delay is necessary to enable them to take action to present their claims in proper form, as well as to enable the court to put the assets in shape for distribution."

¹² *Richmond v. Irons*, *supra* note 2; *Chemical Nat. Bank v. Bailey*, 5 Fed. Cas. No. 2,635 (C. C. S. D. N. Y., 1875); *State ex rel. McConnell v. Park Bank & Trust Co.*; *People v. Merchants' Trust Co.*, both *supra* note 2. See *People v. American Loan & Trust Co.*, *supra* note 11. *Colorado & So. Ry. v. Docking*, 124 Kan. 48, 257 Pac. 743 (1927) (by inference). *Contra*: *Lippitt v. Thames Loan & Trust Co.*, 88 Conn. 185, 90 Atl. 369 (1914); *Angello v. Hanover Trust Co.*, 253 Mass. 160, 148 N. E. 138 (1925). As to surplus in bankrupt's estate: *Johnson v. Norris*, 190 Fed. 459 (C. C. A. 5th, 1911) *L. R. A.* 1915B, 884 (1915). As to surplus of insolvent corporation's assets: *In re Empire State Surety Co.*, 125 Misc. Rep. 806, 212 N. Y. Supp. 258 (1925).

¹³ *Hackney v. Hood*, *supra* note 1; *Op. Att. Gen. No. 265* (Ky. 1928); *Flynn v. American Bkg. & T. Co.*, 104 Me. 141, 69 Atl. 771, 129 Am. St. Rep. 378 (1908), 19 L. R. A. (N. S.) 428 (1909); *Mahoney v. Bernhard*, 45 App. Div. 499, 63 N. Y. Supp. 642 (1899). See *Sickles v. Herold*, 149 N. Y. 332, 43 N. E. 852, 853 (1896): "In case it should turn out that the bank was solvent, and that the superintendent improperly took possession, it might be inequitable to impose upon the stockholders the liability to pay interest upon all deposits." An action to enforce the statutory liability of bank stockholders should be prosecuted in the *Commissioner of Banks' individual name*, not under his official title. *Commissioner of Banks v. Carrier*, 202 N. C. 850, 165 S. E. 678 (1932). But in no event may the stockholders be held liable for more than their statutory liability. *Richmond v. Irons*, *supra* note 2; *Mahoney v. Bernhard*, *supra*. Bank stockholders may not be assessed their additional liability to the par value of their

final payment by the receiver is computable at the legal rate, regardless of the rate contracted, in order not to favor one class of creditors at the expense of another.¹⁴

In some states interest on preferred claims is not allowable where the assets are less than all the liabilities.¹⁵ The reason given for the rule is that every other creditor has the same right as one holding a preferred claim, except the right to be paid first.¹⁶ It follows that preferred claims have no preference as to interest over ordinary claims from the date of insolvency.¹⁷

Where money is withheld in good faith by an insolvent bank under circumstances creating a relationship of agency or trust, no interest is allowable.¹⁸ But it has been held that interest actually

shares until the value of the bank's assets in proportion to its debts has been ascertained. *Corporation Commission v. Bank*, 193 N. C. 113, 136 S. E. 362 (1927).

¹⁴ *People v. Merchants' Trust Co.*, *supra* note 2. *Contra*: *American Surety Co. of N. Y. v. Peyton*, 244 N. W. 74 (Minn. 1932); *Davis v. Wilson*, 105 Kan. 560, 185 Pac. 41 (1919). Interest allowed in case of a certificate of deposit, which had a provision that no interest would be paid after maturity: *Baxley Bkg. Co. v. Gaskins*, 145 Ga. 508, 89 S. E. 516 (1916); *Note* (1921) 15 A. L. R. 650.

¹⁵ *Clark Sparks, etc., v. Americus Nat. Bank*, 230 Fed. 738 (S. D. Ga., 1916); *Taylor v. Corning Bank & Trust Co.*, *supra* note 10; *Leach v. Sanborn State Bank*, 210 Iowa 613, 231 N. W. 497, 69 A. L. R. 1206 (1930). Interest was not allowed on a preferred claim in *Guignon v. First Nat. Bank*, 22 Mont. 140, 55 Pac. 1051 (1899), nor was it allowed in *State v. Banking Corporation*, 74 Mont. 491, 241 Pac. 626 (1925), but, in *McDonald v. American Bank & Trust Co.*, 79 Mont. 233, 255 Pac. 733 (1927), interest was allowed. However, the rule in the latter case has now been changed by statute. Mont. Laws 1931, c. 145, §134. In *Rugger v. Hammond*, 95 Wash. 85, 163 Pac. 408 (1917), there was a dictum to the effect that interest could not be allowed on a preferred claim, but, in *Hitt Fireworks Co. v. Scandinavian-American Bank*, 121 Wash. 261, 209 Pac. 680 (1922) and in *Northwest Lumber Co. v. Scandinavian-American Bank*, 130 Wash. 33, 225 Pac. 825, 39 A. L. R. 922 (1924), interest was allowed, neither case referring to the *Rugger* case; but upon rehearing of the latter case, 132 Wash. 449, 231 Pac. 951, 39 A. L. R. 928 (1925), the court reversed itself and adopted the dictum of the *Rugger* case. Interest was allowed in the following cases, but it is not clear whether or not there were sufficient funds: *Shaw v. Morrison*, 14 S. W. (2d) 953 (Tex. 1929); *Johnson v. Farmers' Bank*, 223 Mo. App. 513, 11 S. W. (2d) 1090 (1928).

¹⁶ *Taylor v. Corning Bank & Trust Co.*, *supra* note 10.

¹⁷ *Leach v. Sanborn State Bank*, *supra* note 15; *People v. American Loan & Trust Co.*, *supra* note 11. *Contra*: *American Surety Co. of N. Y. v. Peyton*, *supra* note 14. As to insolvent corporation: *In re Empire State Surety Co.*, *supra* note 12; *American Surety Co. v. Carbon Timber Co.*, 263 Fed. 295 (C. C. A. 8th, 1919).

¹⁸ *Smith Reduction Corp. v. Williams*, 15 Fed. (2d) 874 (E. D. N. C., 1926); *Poisson v. Williams*, 15 Fed. (2d) 582 (E. D. N. C., 1926); *Butler v. Western German Bank*, 159 Fed. 116 (C. C. A. 5th, 1908); *Hallett v. Fish*, 123 Fed. 201 (C. C. D. Vt., 1903); *Merchants' Nat. Bank v. School Dist. No. 8*, 94 Fed. 705, 709 (C. C. A. 9th, 1899): "No interest is chargeable against the fund in the receiver's hands, based upon his erroneous action in disallowing claims.

earned may be recovered where there is a showing that the fund earned interest while in the hands of the receiver.¹⁹ If the trust fund claimed has been commingled with the general assets of the bank, the claimant becomes an ordinary creditor as to it and is not entitled to preference.²⁰

By statute in two states the amount of interest payable to the various claimants has been definitely fixed.²¹ In view of the uncer-

It is his function, by and under the direction of the comptroller, to disburse the fund according to the law. In the matter of allowance or disallowance of claims he must exercise his judgment. If he makes an erroneous decision, the law does not contemplate that the other creditors shall suffer therefor." *Fokken v. Smith*, 235 N. W. 120 (S. D. 1931); *Ex parte Hernlen*, 156 S. C. 181, 153 S. E. 133, 69 A. L. R. 443 (1930); *Shaw v. McCord*, 18 S. W. (2d) 200 (Tex. 1929). *Contra*: *Hall v. Citizens State Bank of Superior*, 122 Neb. 636, 241 N. W. 123 (1932). Owner of bonds misappropriated by bank held entitled to recover the face value of the bonds with interest according to their tenor up to the time of their conversion: *Larson v. Baird*, 60 N. D. 775, 236 N. W. 634 (1931). Interest is allowed on dividends where it is necessary to put the dividend creditor upon equality with the other creditors: *Armstrong v. American Exchange Bank*, 133 U. S. 433, 10 Sup. Ct. 450, 33 L. ed. 747 (1889); *Bank of Roxie v. Lampton*, 104 Miss. 427, 61 So. 650 (1913). Interest was allowed in the case of an insolvent debtor where payment of the dividend was withheld because of an unsuccessful contest of the claim: *In re Ilion Nat. Bank*, 59 Hun 307, 12 N. Y. Supp. 829 (1891).

¹⁹ *Sunflower County v. Bank of Drew*, 139 Miss. 408, 104 So. 355, 357 (1925): "It is not a mere case of interest being given as damages for wrongful detention, but it is a holding of the trustee to a strict accounting of the trust and refusal to permit the trustee to profit by its own wrong." But no interest is allowable where there is no showing that the fund earned interest. *Macon Grocery Co. v. Mobley*, 174 Ga. 185, 162 S. E. 711 (1932); *Vincent Grain Co. v. Docking*, 125 Kan. 383, 265 Pac. 38 (1928); *Skinner v. Porter*, 45 Idaho 530, 263 Pac. 993 (1928), 73 A. L. R. 59 (1931). No interest is allowable where it is impossible for the fund to earn interest: *Richardson v. Louisville Co.*, 94 Fed. 442 (C. C. A. 5th, 1899).

²⁰ *Bank v. Corporation Commission*, 201 N. C. 382, 160 S. E. 360 (1931); *Skinner v. Porter*, *supra* note 19; *McDonald v. American Bank & Trust Co.*, *supra* note 15.

²¹ *Mont. Laws, supra* note 15:

"The order of payment of the debts of a bank liquidated by the Superintendent of Banks shall be as follows:

(1) The expense of liquidation, including compensation of agents, employees and attorneys.

(2) All funds of any other bank in process of liquidation by the Superintendent of Banks and placed on deposit by the Superintendent of Banks.

(3) All funds held by the bank in trust.

(4) Debts due depositors. . . .

(5) Interest on all the foregoing classes of claims without regard to the priority computed from the date of closing of the bank at the rate of seven per centum (7%) per annum.

(6) Unliquidated claims for damages and the like, including claims of stockholders for amounts claimed to have been voluntarily advanced to the bank. . . ."

Idaho Laws 1925, c: 133, §77:

"The order of payment of the debts of a bank liquidated by the Commissioner shall be as follows:

tainty in many other jurisdictions, it is believed that similar legislation would be highly desirable in order to prevent further litigation. The North Carolina banking law might be readily amended by inserting immediately following paragraph number five of the North Carolina Code Annotated (Michie, 1931) Chapter 5, section 218(c), subsection 14, a new paragraph numbered six:

Interest at the legal rate on all the foregoing classes of claims, without regard to priority, to be computed from the date upon which the banking commissioner takes possession of the assets and business of the bank.²²

A. E. GARRETT, JR.

Damages—Punitive Damages for Breach of Contract.

Plaintiff sold his interest in the defendant company upon the condition that he would be retained at his position as business manager of a newspaper for three years at a salary of \$8,000 per year. He alleged that the defendant breached this contract by willfully and maliciously discharging him and that he was entitled to both actual and punitive damages. *Held*, that the allegations were insufficient to show a right to punitive damages.¹

As a general rule punitive or exemplary damages are not recoverable in actions for breach of contract.² This is true irrespective of

(1) The expense of liquidation, including compensation of agents, employees and attorneys.

(2) All funds held by the bank in trust.

(3) Debts due depositors, . . .

(4) All contractual liabilities pro rata.

(5) Interest on all the foregoing classes of claims without regard to the priority of the principal computed as follows:

Savings accounts at the same rate they bore at the time of the closing of the bank until the next regular date for the computation and crediting of the interest thereon, and thereafter at the rate of seven per cent (7%) per annum; time certificates of deposit at the rate fixed in the certificate until the same become due by their terms, and thereafter at the rate of seven per cent (7%) per annum; all other contractual obligations bearing interest at the rate they bore at the time of closing until due by their terms, and thereafter at seven per cent (7%) per annum, and those not bearing interest, at the rate of seven per cent (7%) per annum from the time when said bank came into the possession of the Commissioner; no interest to be compounded.

(6) Unliquidated claims for damages and the like."

It is suggested that there be an amendment to the North Carolina banking law similar to paragraph number two of the Montana statute above.

²² The Commissioner of Banks has been following as an administrative policy the very procedure set forth in the proposed statute (Letter of Dec. 28, 1932 from C. I. Taylor, Liquidating Agent).

¹ *Holland v. Spartanburg Herald-Journal Co.*, 165 S. E. 203 (S. C. 1932).

² *Cochran v. Hall*, 8 F. (2d) 984 (C. C. A. 5th, 1925); *Baumgarten v. Alliance Assur. Co.*, 159 Fed. 275 (C. C. N. D. Cal. 1908); *Davis & Son v. Ruple*, 222 Ala. 52, 130 So. 772 (1930); *Westesen v. Olathe State Bank*, 75 Colo. 340, 225 Pac. 837 (1924); *American Ry. Express Co. v. Bailey*, 142 Miss. 622,

the motive which prompted defendant's breach.³ The reason is that in contract actions only such damages can be recovered as were reasonably within the contemplation of the parties when they made the contract, namely, the loss of the bargain.⁴ But there are certain exceptions to this rule. In actions for breach of a contract to marry, which are in fact based on tort as much as on contract, damages may be recovered for injury to feelings and wounded pride,⁵ and exemplary damages may be awarded where the breach is wanton and deliberate.⁶ Moreover, when the breach of other contracts is accompanied by fraud, malice, abuse, or such oppressive conduct as itself constitutes a tort, punitive damages are sometimes allowed.⁷

107 So. 761 (1926); *Hood v. Moffett*, 109 Miss. 757, 69 So. 664, L. R. A. 1916B 622, Ann. Cas. 1917E 410 (1915); *Trout v. Watkins Livery & Undertaking Co.*, 148 Mo. App. 621, 130 S. W. 136 (1910); *Richardson v. Wilmington & W. R. Co.*, 126 N. C. 100, 35 S. E. 235 (1900); *Ketcham v. Miller*, 104 Ohio St. 372, 136 N. E. 145 (1922); *Reaves v. Western Union Tel. Co.*, 110 S. C. 233, 96 S. E. 295 (1918); *Crouch v. Ramirez*, 269 S. W. 113 (Tex. Civ. App. 1925); *Gibson v. St. Antony Hotel*, 198 S. W. 412 (Tex. Civ. App. 1917); cases collected in notes, 3 Ann. Cas. 413, Ann. Cas. 1917E, 412; *HALE, DAMAGES* (2d ed. 1912) §318; *SEDGWICK, DAMAGES* (9th ed. 1920) §370. See *McCormick, Some Phases of the Doctrine of Exemplary Damages* (1930) 8 N. C. L. REV. 129 at 140.

³ *Western Union Tel. Co. v. Rowell*, 153 Ala. 295, 45 So. 73 (1907); *Independent Grocery Co. v. Sun Ins. Co.*, 146 Minn. 214, 178 N. W. 582 (1920); see *Hunter v. Sutton*, 45 Nev. 430, 205 Pac. 785, 788 (1922); *Western Union Tel. Co. v. Reeves*, 34 Okla. 468, 475, 126 Pac. 216, 217 (1912). *SEDGWICK, op. cit. supra* note 2, §603: "It may be considered then to be established that the motives of the defendant in breaching his contract are to be disregarded."

⁴ *Davis & Son v. Ruple*, *supra* note 2; *Trustees of Horton's Estate v. Sherwin*, 63 Okla. 259, 164 Pac. 469 (1917); cf. *McCall v. Gloucester Lumber Co.*, 196 N. C. 597, 146 S. E. 579 (1929).

⁵ *Gerber v. Shwartz*, 124 Me. 441, 127 Atl. 903 (1925); *O'Brien v. Manning*, 101 Misc. Rep. 123, 166 N. Y. Supp. 760 (1917); *SEDGWICK, op. cit. supra* note 2, §637.

⁶ *Hasted v. Van Wagnen*, 243 Mich. 350, 220 N. W. 762 (1928) (damages aggravated by seduction); *Drobnich v. Bach*, 159 Minn. 258, 198 N. W. 669 (1924); *Thorn v. Tetrick*, 93 W. Va. 455, 116 S. E. 762 (1923); *HALE, loc. cit. supra* note 2; *SEDGWICK, op. cit. supra* note 2, §§370, 637a; see *Trout v. Watkins Livery & Undertaking Co.*, *supra* note 2, 130 S. W. at 143; *Richardson v. Wilmington & W. R. Co.*, *supra* note 2 at 102, 35 S. E. at 235. *Dibbell, J.*, in *Drobnich v. Bach*, *supra*: "An action for the breach of a marriage contract is in form in contract, but damages are awarded as in tort actions."

⁷ *Burrus v. Nevada, California-Oregon Ry.*, 38 Nev. 156, 145 Pac. 926 (1915); *Forrester v. Southern Pac. Co.*, 36 Nev. 247, 134 Pac. 753, 48 L. R. A. (N. S.) 1 (1913); *Huffman v. Moore*, 122 S. C. 220, 115 S. E. 634 (1923); *Sullivan v. Calhoun*, 117 S. C. 137, 108 S. E. 189 (1921); *Dallas Hotel Co. v. McCue*, 25 S. W. (2d) 902 (Tex. Civ. App. 1930); *Scheps v. Giles*, 222 S. W. 348 (Tex. Civ. App. 1920); see *Cochran v. Hall*, *supra* note 2, at 985; *Birmingham Transfer & Traffic Co. v. Still*, 7 Ala. App. 556, 61 So. 611, 614 (1913); *American Ry. Express Co. v. Bailey*, *supra* note 2, 107 So. at 763; *Hood v. Moffett*, *supra* note 2, 69 So. at 665; *Colby v. Daniels*, 125 Okla. 202, 257 Pac. 298, 301 (1927); *Reaves v. Western Union Tel. Co.*, *supra* note 2, 96 S. E. at 297; *Welbourn v. Dixon*, 70 S. C. 108, 115, 49 S. E. 232, 234, 3 Ann.

Thus, exemplary damages have been recovered in the following contract actions: where an employer discharged the plaintiff and asserted before others that she was a liar;⁸ where the manager of a hotel in discharging the plaintiff clerk rudely took hold of her and shoved her into a public room;⁹ where a landlord who breached his contract with a cropper ran him off the premises and took his crops;¹⁰ where the defendant in violation of his contract fenced in his well and cut off the water supply for plaintiff's stock during a severe drought;¹¹ where the defendant misrepresented the condition of the car sold and then breached his contract of warranty;¹² where the defendant, having knowledge of the illness of the plaintiff's intestate, ejected him from its train;¹³ and where the defendant breached a contract to run a special train to convey the plaintiff's injured son and falsely pretended that the train had to go elsewhere.¹⁴

On the other hand, recovery of punitive damages has been refused: where the defendant's superintendent discharged the plaintiff and dragged or shoved her from the mill;¹⁵ where a liveryman who knew of the plaintiff's illness had agreed to carry her home from the hospital and then refused to go all the way because of the condition of the streets;¹⁶ where vendors breached a contract to drill a well and irrigate land which they had induced the plaintiff to buy;¹⁷ and where the defendant in breach of a lease forcefully entered and ejected the plaintiff.¹⁸

Smart money is awarded cautiously, even in torts. To grant it means adding a touch of vengeance to the compensatory purpose of

Cas. 407, 410 (1904). Tortious conduct, however malicious or inexcusable, committed after the breach, will not justify recovery of punitive damages in the contract action. *Okla. Fire Ins. Co. v. Ross*, 170 S. W. 1062, 1064 (Tex. Civ. App. 1914).

⁸ *Scheps v. Giles*, *supra* note 7.

⁹ *Dallas Hotel Co. v. McCue*, *supra* note 7.

¹⁰ *Sullivan v. Calhoun*, *supra* note 7.

¹¹ *Westfall v. Perry*, 23 S. W. 740 (Tex. Civ. App. 1893).

¹² *Huffman v. Moore*, *supra* note 7.

¹³ *Forrester v. Southern Pac. Co.*, *supra* note 7. Many of the suits against carriers are based on tort for breach of public duty for which punitive damages are allowed. *Webb v. Atlantic Coast Line R. Co.*, 76 S. C. 193, 56 S. E. 954 (1907).

¹⁴ *Burrus v. Nevada, California-Oregon Ry.*, *supra* note 7.

¹⁵ *Davis & Son v. Ruple*, *supra* note 2; *cf. Elmore v. Atl. Coast L. R. Co.*, 191 N. C. 182, 131 S. E. 633, 43 A. L. R. 1072 (1926); *Clayton v. Oliver*, (1930) A. C. 209, 16 B. R. C. 559; *Addis v. Gramophone Co., Ltd.*, (1909) A. C. 488, 3 B. R. C. 98.

¹⁶ *Trout v. Watkins Livery & Undertaking Co.*, *supra* note 2.

¹⁷ *Cochran v. Hall*, *supra* note 2.

¹⁸ *Ketcham v. Miller*, *supra* note 2.

damages. Perhaps, instead of a rule based on the supposed requirements of forms of actions, subject to omnibus exceptions, what we actually have, as illustrated by the foregoing, is an administrative line drawn between situations which on the one hand are so harsh as to call for some punishment and those, on the other, where purely remedial relief is deemed enough. In any event, the principal case seems correctly decided.

JULE McMICHAEL.

Extradition—Sufficiency of Evidence on Habeas Corpus.

Upon proper requisition, charging one Bailey with murder in South Carolina, the Governor of North Carolina issued a warrant of extradition. The accused obtained a writ of *habeas corpus*. At the hearing three witnesses identified him as the man who killed one Hunt. Bailey offered many witnesses to prove that he was not at the scene of the crime. The trial judge discharged him. *Held*: The finding of the judge upon competent evidence is conclusive on appeal.¹

The right of extradition is founded upon the Constitution² and laws of the United States.³ But in addition states have passed laws which are to be complied with in so far as they are consistent with the federal Constitution and statutes.⁴ The prerequisite to extradition is that the person whose return is sought should be a fugitive from justice.⁵ The warrant issued by the governor of the asylum state to have the accused arrested and delivered to the agent of the demanding state is not conclusive, but the extradition proceedings are subject to review on writ of *habeas corpus*.⁶

¹ *In re Bailey*, 203 N. C. 362, 166 S. E. 165 (1932).

² U. S. Const., Art. 4, §2, cl. 2: "A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime."

³ U. S. REV. STAT., §§5278, 5279 (1874); 1 STAT. 302 (1873); 18 U. S. C. A., §662.

⁴ *Innes v. Tobin*, 240 U. S. 127, 36 Sup. Ct. 290, 60 L. ed. 562 (1915); 9 U. L. A. 103 (1932); North Carolina, with seven other states, has adopted the Uniform Criminal Extradition Act: P. L., 1931, ch. 124, N. C. CODE ANN. (Michie, 1931) §§4556 (a) to 4556 (y).

⁵ The accused must have incurred guilt while in the state seeking his return: *Ex parte Montgomery*, 244 Fed. 967 (S. D. N. Y.) 1917; *Tenn. v. Jackson*, 36 Fed. 258, 1 L. R. A. 370 (E. D. Tenn. 1888); *Taft v. Lord*, 92 Conn. 539, 103 Atl. 644, L. R. A. 1918E 545 (1918).

⁶ *Biddinger v. N. Y. Police Com'r.*, 245 U. S. 128, 38 Sup. Ct. 41, 62 L. ed. 193 (1917); *Munsey v. Clough*, 196 U. S. 364, 25 Sup. Ct. 282, 49 L. ed. 515

The issuance of the warrant of extradition makes a *prima facie* case that the accused is a fugitive from justice, and the burden of proof is on him to show the contrary.⁷ When the extradition papers are in proper form, sufficiently charging the accused with a crime,⁸ the only evidence admissible is that which tends to prove that the accused was not in the demanding state at the time the crime was alleged to have been committed;⁹ or that he is not the person charged.¹⁰

There is no fixed rule as to the *quantum* of evidence the accused must introduce in order to obtain a discharge. Where there is merely contradictory or conflicting evidence on the subject of presence in, or absence from the demanding state, no court should discharge him.¹¹ It has been held in New York that a preponderance of evidence is sufficient.¹² The United States courts and many of the

(1905); *Roberts v. Reilly*, 116 U. S. 80, 6 Sup. Ct. 291, 29 L. ed. 544 (1885); *In re Veasey*, 196 N. C. 662, 146 S. E. 599 (1929); *Chase v. State*, 93 Fla. 963, 113 So. 103 (1927); *Ex parte Massee*, 95 S. C. 315, 79 S. E. 97, 46 L. R. A. (N. S.) 781 (1913); 9 U. L. A. 112 (1932); N. C. CODE ANN. (Michie, 1931) §4556 (i). *Contra: Ex parte Germain*, 258 Mass. 289, 155 N. E. 12 (1927) (where the offer of proof that the accused was not in the demanding state at the time of the alleged crime was held to raise questions of fact as to credibility of witnesses and alibi not triable on petition for *habeas corpus* and insufficient to show that he was not a fugitive from justice within the meaning of the federal Constitution).

⁷ *Hogan v. O'Neill*, 255 U. S. 52, 41 Sup. Ct. 222, 65 L. ed. 497 (1921); *Munsey v. Clough*; *Roberts v. Reilly*, both *supra* note 6; *Rafferty ex rel. Huie Fong v. Bligh*, 55 F. (2d) 189 (C. C. A. 1st, 1932); *State ex rel. Treseder v. Remann*, 165 Wash. 92, 4 Pac. (2d) 866, 78 A. L. R. 412 (1931); *Dawson v. Smith*, 150 Ga. 352, 103 S. E. 847 (1920); *Ex parte Walters*, 106 Miss. 439, 64 So. 2 (1914); *Ex parte Massee*, *supra* note 6.

⁸ *In re Hubbard*, 201 N. C. 472, 160 S. E. 569 (1931) (where requisition papers failed to substantially charge the commission of crime the accused was discharged on writ of *habeas corpus*); noted in (1931) 10 N. C. L. REV. 292.

⁹ *Biddinger v. N. Y. Police Com'r.*, *supra* note 6; *Levy v. Splain*, 267 Fed. 333, 50 App. D. C. 31 (1920); *Kollerman v. Johnson*, 184 Minn. 309, 238 N. W. 490, 77 A. L. R. 899 (1931); *State v. Westhues*, 318 Mo. 928, 2 S. W. (2d) 612 (1928).

¹⁰ *Rafferty ex rel. Huie Fong v. Bligh*, *supra* note 7; *Chase v. State*, *supra* note 6; see *Ex parte Jowell*, 87 Tex. Cr. Rep. 556, 223 S. W. 456, 11 A. L. R. 1407 (1920).

¹¹ *Munsey v. Clough*, *supra* note 6; *People v. Pease*, 207 U. S. 100, 28 Sup. Ct. 58, 52 L. ed. 121 (1907); *Ex parte Reggel*, 114 U. S. 642, 5 Sup. Ct. 1148, 29 L. ed. 250 (1885); *U. S. v. Williams*, 6 F. (2d) 13 (E. D. La. 1925) (where there was an affidavit introduced to show that the accused robbed the affiant, and a large number of "witnesses swore in court on behalf of the relator to prove that he was not a fugitive from justice" it was held that the governor's warrant was conclusive on disputed facts); *People v. Meyering*, 349 Ill. 198, 181 N. E. 620 (1932); *Chandler v. Sipes*, 103 Neb. 11, 170 N. W. 604 (1919); *State v. Currie*, 2 Ala. App. 251, 56 So. 736 (1911).

¹² *People ex rel. Fuchs v. Police Com'r.*, 83 Misc. Rep. 643, 32 N. Y. Cr. Rep. 465, 146 N. Y. Supp. 781 (1914).

state courts require clear and satisfactory proof that the accused is not a fugitive from justice.¹³ Some authorities say that the evidence must be conclusive.¹⁴ There are cases where contradictory evidence as to presence in the foreign state will not even be admitted.¹⁵ But when heard, the evidence should be regarded liberally in favor of the demanding state.¹⁶

The position of a judge reviewing extradition proceedings on *habeas corpus* is somewhat analogous to that of a magistrate determining the question as to whether the prisoner should be bound over for trial. And some courts have said that the evidence for extradition need only have that degree of certainty which would justify a magistrate to commit the accused.¹⁷

All cases, including the instant one, assert as a general rule that no case of extradition should be decided from the standpoint of guilt or innocence of the person demanded.¹⁸ But in the instant case the lower court said: "... Under the testimony I don't think there would be a jury anywhere that would ever find him guilty beyond a reasonable doubt. I shall, therefore, discharge him under the writ and let him go." These remarks were recognized by the Supreme Court as

¹³ *Hogan v. O'Neill*, *supra* note 7; *Levy v. Splain*, *supra* note 9; *Ellison v. Splain*, 261 Fed. 247 (App. D. C. 1919); *Ople v. Weinbrenner*, 285 Mo. 365, 226 S. W. 256 (1920): "We have before us the testimony of two or more witnesses that the plaintiffs were present at the scene of the crime and participated in the shooting. This is substantial evidence, and though we might consider the testimony preponderated which tended to show they were in St. Louis, Mo., at the time, we cannot affirm that the evidence meets the standard of the Supreme Court of the United States in being clear and satisfactory, or so convincing as to admit of no question."

¹⁴ *Hyatt v. New York*, 188 U. S. 691, 23 Sup. Ct. 456, 47 L. ed. 657 (1902) (the *prima facie* case must stand unless the accused overturns it "by admission ... or by other conclusive evidence"); *Hayes v. Palmer*, 21 App. D. C. 450 (1903); *People ex rel. Steele v. Mulrooney*, 139 Misc. Rep. 520, 248 N. Y. Supp. 520 (1931); *State v. Brown*, 162 Minn. 520, 203 N. W. 226 (1925); *Hansen v. Edwards*, 210 Mo. App. 35, 240 S. W. 489 (1922).

¹⁵ *E.g., Ex parte Wallace*, 265 Mass. 101, 163 N. E. 870 (1928).

¹⁶ *Barrett v. Bigger*, 17 F. (2d) 669, 670 (C. A. D. C. 1927): "... In construing the evidence we are not to be governed by the technical rules as in the case of a trial for a crime, but to regard it liberally in favor of the demanding state, 'because in delivering up an accused person to the authorities of a sister state' we 'are not sending him for trial to an alien jurisdiction, with laws which our standards might condemn, but are simply returning him to be tried, still under the protection of the federal Constitution, but in the manner provided by the state against the laws of which it is charged that he has offended'..."

¹⁷ *Ex parte Flournoy*, 310 Mo. 355, 275 S. W. 923 (1925); *Ex parte Jowell*, *supra* note 10; see *Ex parte Morgan*, 20 Fed. 298, 307 (W. D. Ark. 1883).

¹⁸ *Drew v. Thaw*, 235 U. S. 432, 35 Sup. Ct. 137, 59 L. ed. 302 (1914); see *Munsey v. Clough*; *Ex parte Massee*, both *supra* note 6; *Dawson v. Smith*, *supra* note 7; *State v. Westhues*, *supra* note 9.

an erroneous basis for the lower court's decision, but the written judgment was held to speak the mind of the trial judge. Actually the facts do not seem consistent with the proposition of law.¹⁹

The formal judgment says ". . . that the State of South Carolina has failed to show probable cause for holding the said Ray Bailey in custody, or that he committed the alleged crime, . . . and [the State of South Carolina] has failed to produce sufficient evidence to warrant the court in refusing the writ, . . ." It appears that the formal judgment views the case from the standpoint of guilt, and also indicates that the burden of producing "sufficient evidence to warrant the court in refusing the writ" was placed on the demanding state, instead of requiring the accused to rebut the *prima facie* case made by the governor's warrant.

Since the question of the accused's presence in the demanding state is the only proper issue to be considered at the hearing, the evidence introduced by Bailey was merely contradictory on this issue and not sufficient to overcome the evidence offered by the demanding state; and whatever was the actual basis for the decision of the trial judge, the result is contrary to other decisions and, it is believed, to what "justice appertains."²⁰ No state should, through proceedings in its courts, become a refuge by harboring offenders against the laws of other states. Where there is a doubt as to whether the accused is a fugitive from justice he should not be discharged.

W. E. ANGLIN.

Garnishment—Payment to Creditor by Surety After Garnishment of Debtor.

A has a cause of action against *B*; *B* is a creditor of *C*; *C* has a surety. *A* sues *B* and serves *C* as garnishée. *C* then makes arrangements with his surety and creditors whereby the surety pays immediately 75% of the claims of creditors, and *C* gives his note for the remainder, agreeing also to reimburse the surety. He then files answer to the garnishment process stating that he is indebted to *B* only on the note given to *B* as creditor. On trial, judgment is rendered against *C* for the amount of the original claim.¹

¹⁹ It would seem reasonable to believe that the real basis for the trial judge's action may be better ascertained from what he said, as set out in the record, than from the formal judgment, which is usually worded by counsel.

²⁰ N. C. CODE ANN. (Michie, 1931) §2234.

¹ *Yaarab Temple Bldg. Co. v. Carmichael Tile Co.*, 165 S. E. 319 (Ga. 1932).

This situation raises the question whether payment to the original creditor by *C's* surety discharges *C's* obligation to the plaintiff in garnishment. The principal case seems to be the first in which the situation has come directly before the courts. It will aid in the solution of this problem to find out whether the surety could also have been served as garnishee.²

Garnishment is a statutory proceeding to reach the property of a defendant in the hands of another. It was not known at common law.³ Therefore, the nature of both the remedy and its enforcement will vary according to the statutes of the different states. However, statutes are fairly uniform in subjecting to garnishment: (1) those who hold tangible property of defendant; (2) those who are indebted to defendant.⁴ A surety to be held as garnishee must come in this latter class.

The courts are not uniform in their construction of the word "indebted" within the terms of these statutes. When faced with a situation that demands only a general rule, they usually say that if a cause of action would lie by defendant against the garnishee, he may be garnished;⁵ but when the necessity for exact application of this rule arises, they restrict it to causes of action that would support the common-law action of *indebitatus assumpsit*.⁶ This virtually re-

² This question also seems never to have been decided. The legislature could extend garnishment to sureties specifically. 28 C. J. 43, §45. However, no statutes seem to have done this.

³ See 28 C. J. 16, §2, for a discussion of the origin.

⁴ N. C. CODE ANN. (Michie, 1931) §§816, 817, 819; VA. CODE ANN. (Michie, 1930) §6383; MASS. GEN. LAWS (1921) c. 246, §20; ARK. DIG. STAT. (Crawford & Moses, 1921) §503; ARIZ. CODE (Struckmeyer, 1921) §4264; ALA. CODE (Michie, 1928) §8051 *et seq.*; GA. CODE ANN. (Michie, 1926) §5272.

⁵ *Travelers Ins. Co. v. Inman*, 157 Miss. 810, 126 So. 399 (1930) (no debt existed between the defendant and garnishee); *Patton v. Smith*, 29 N. C. 438 (1847) (creditor had collected money before garnishment); *Bank v. O'Barr*, 12 Ala. App. 546, 67 So. 794 (1914) (debtor had assigned claim). But *cf.* *Corey v. Powers*, 18 Vt. 587 (1846). See also *Bonds Bros. v. Anniston City Nat'l Bank*, 198 Ala. 197, 73 So. 467 (1916), and *Walcott v. Richman*, 94 Me. 364, 47 Atl. 901 (1900), which seem to place the test of liability on the existence of a contract action.

⁶ *Beach Co. v. Brewers*, 101 Cal. 322, 35 Pac. 896 (1894); *Foere v. Miss. Transp. Co.*, 161 Ala. 567, 49 So. 87 (1909); *Hassie v. God Be With Us Congregation*, 35 Cal. 378 (1868); *DRAKE, ATTACHMENT* (1854) 526; *PELL, MONOGRAPHS ON N. C. LAW* (1918) 101.

Two cases in North Carolina illustrate and explain to some extent the reasons for the lack of clarity in stating the test. In *Hugg v. Booth*, 24 N. C. 282 (1842), the plaintiff was attempting to garnish a claim arising out of breach of contract. The court, refusing to allow the garnishment, clearly states that there must be a cause that will support *indebitatus assumpsit*. But in *Patton v. Smith*, *supra* note 5, the debtor had already paid the claim. The court merely said that there must be a cause of action between defendant and debtor to support garnishment.

stricts the construction of the word "indebted" to the relationship of debtor-creditor.⁷

Assuming that the courts will continue to apply the *indebitatus assumpsit* rule, a surety could not be garnished.⁸ The contract of suretyship is a collateral contract, without sufficient consideration moving from creditor to surety to support *indebitatus assumpsit*.⁹

This test of liability to garnishment is entirely inadequate. Aside from being highly technical, it is based upon a procedural form that is foreign to modern law. It does not give garnishment the comprehensive scope that modern commercial litigation demands. Through present-day business transactions a defendant may have substantial assets in the hands of, or claims against, third persons when the relation of debtor-creditor does not exist. These should be available to his creditors through garnishment.

Then if a surety could not be garnished, will the debtor be discharged from liability to the plaintiff in garnishment by the surety's paying the creditor after the debtor is garnished? The instant case says that he will not. The debtor was liable to creditor at the time of garnishment. After garnishment he is liable to plaintiff in garnishment, and payment to the creditor could not discharge this liability.

Following this reasoning it would seem that the liability of a *general* surety would also be transferred to the plaintiff in garnishment. And though a special surety contract could not, because of its very nature, be so transferred, it is difficult to see how the courts would enforce such a contract between the creditor and surety after the debtor has been garnished. Therefore, a surety should not be allowed to pay when he knows the debtor has been garnished, and in this way acquire a right of action against the debtor.

It would seem that the best solution to the problem is to allow the surety to be garnished. This would preclude the surety's paying

⁷ The test for liability in garnishment is sometimes placed on this basis. *Cooper v. Burgess*, 152 Mass. 189, 25 N. E. 100 (1890).

⁸ Keigwin states that *indebitatus assumpsit* will not lie when it is necessary to show an "undertaking collateral to the transaction." "Such are cases of wagers, warranties, policies of insurance, contracts of guaranty and suretyship, and all contracts still executory and contemplating things to be done in the future." KEIGWIN, *CASES ON COMMON LAW PLEADING* (1924) 193. *Tappen v. Campbell*, 9 Yerg. 436 (Tenn. 1836), holds specifically that only special *assumpsit*, and not *indebitatus assumpsit*, will lie on a contract of guaranty.

⁹ "... In a contract of guaranty . . . the defendant's obligation is to pay money, but the plaintiff cannot recover in general *assumpsit* on the contract because the money to be paid by the defendant is not to pay compensation for benefits received." CLARK, *COMMON LAW PLEADING* (1931) 106.

creditors, and would thus eliminate any question of the surety's liability, and any possibility of the debtor's having to pay twice. In fairness to the plaintiff in garnishment, the duty should be placed on the surety, when he knows of the garnishment of the debtor, to disclose his existence in order that he, also, may be garnished.

WILLIAM MEDFORD.

Insurance—Interests of Assignee and Beneficiary When Life Policy Is Assigned Without Change of Beneficiary.

A husband as principal and his wife as surety execute a bond, and a deed of trust to secure it, for a loan to the husband from an insurance company. Then, pursuant to an agreement with the company, the husband takes out two policies of life insurance, in both of which he names his wife as beneficiary and reserves the right to change the beneficiary and assign the policy, and as a part of the transaction, they both assign the policies as additional security for the bond. *Held*: Upon the death of the insured, the entire proceeds became the property of the beneficiary, subject only to the rights of the assignee, and when the insurance company has paid the bond out of that property of the surety with her consent, she is subrogated to the rights of the insurance company and has a claim against the estate of the insured for the amount thus paid.¹

In a contest between an assignee and a beneficiary where, as in the principal case, by the terms of the policy there is both a right to change the beneficiary and to assign the policy, it is generally held that an assignment pursuant to such power defeats the interest of the beneficiary to the extent of the assignment, even though the beneficiary does not join therein.² And where there is no right reserved in the policy to assign, if there is a right to change the beneficiary, most courts say that the beneficiary has a mere expectancy³ and not a vested interest and that an assignment by the insured shuts out the

¹ *Russell v. Owen et al.*, 203 N. C. 262, 165 S. E. 687 (1932).

² *Farmer's-State Bank v. Kelly*, 155 Ga. 733, 118 S. E. 197 (1923); *Merchant's Bank v. Garrard*, 158 Ga. 867, 124 S. E. 715 (1924); *Antley v. N. Y. Life Ins. Co.*, 139 S. C. 23, 137 S. E. 199 (1927); *Hawkes v. Mobley*, 174 Ga. 481, 163 S. E. 494 (1932).

³ *Andrew v. Banker's Life Co.*, 240 N. W. 215. (Iowa 1932); *Williams v. Penn Mutual Life Ins. Co.*, 160 Miss. 408, 133 So. 799 (1931); *Wilkerson v. Gallahar*, 129 So. 799 (Ala. 1930); *Mutual Benefit Life Ins. Co. v. Clark*, 81 Cal. App. 546, 254 Pac. 306 (1927); *Mutual Benefit Life Ins. Co. v. Swett*, 222 Fed. 200 (C. C. A. 6th, 1915) (federal rule). Insured's control over policy is said to be as complete as if he himself had been beneficiary.

beneficiary *pro tanto* regardless of the latter's consent.⁴ On the other hand, some courts say the beneficiary has a vested interest,⁵ and under such a holding, it becomes material whether the beneficiary has consented to the assignment, for without such consent the beneficiary's interest would not pass to the assignee but would remain superior.⁶ However, a number of courts give effect to the intent of the insured and say that even though the interest of the beneficiary be vested, the insured's assignment of his "right, title, and interest and all beneficial advantage" effects a change of beneficiary without the beneficiary's consent.⁷

Then where the insurance company is assignee and the policy provides for a change of beneficiary and for a loan, courts hold that the assignee takes an interest superior to that of beneficiary, although the beneficiary has not consented to the assignment, and regardless of whether the beneficiary's interest is considered a mere expectancy or vested.⁸ Even where the policy has no such stipulation, the result should be the same, since here the loan by the company may be regarded as merely an advance on the policy which does not create any personal liability on the part of the insured.⁹

In the principal case, it is apparent that the assignee has taken an interest superior to that of the beneficiary and would take such an interest regardless of the consent of the beneficiary. The question

⁴ *Elmore v. Continental Life Ins. Co.*, 131 Kan. 335, 291 Pac. 755 (1930); *Antrim v. Internat'l. Life Ins. Co.*, 128 Kan. 65, 275 Pac. 1084 (1929); *Bank of Belzoni v. Hodges*, 132 Miss 238, 96 So. 97 (1923).

⁵ *Barron v. Liberty Nat'l. B'k. of S. C.*, 131 S. C. 441, 128 S. E. 414 (1925); *Anderson v. Broad St. Nat'l. B'k.*, 90 N. J. Eq. 78, 105 Atl. 599 (1918) (insured was said to have only a contingent right if he outlived beneficiary). *Tyler v. Treasurer & Receiver Gen.*, 226 Mass. 306, 115 N. E. 300 (1917); *Deal v. Deal*, 87 S. C. 395, 69 S. E. 886 (1911).

⁶ *Schoenholz v. N. Y. Life Ins. Co.*, 234 N. Y. 24, 136 N. E. 227 (1922) (insured's assignee was said to get only insured's interest); *City Nat'l. Bank of Lawton v. Lewis*, 73 Okla. 329, 176 Pac. 237 (1918); *Anderson v. Broad St. Nat'l. Bank*, *supra* note 5; *Muller v. Penn Mutual Life Ins. Co.*, 62 Colo. 245, 161 Pac. 148 (1916); *Sullivan v. Maroney*, 77 N. J. Eq. 565, 78 Atl. 150 (1910).

⁷ *Merchant's Bank v. Garrard*, *supra* note 2.

⁸ *Salridge v. Mutual Life Ins. Co. of N. Y.*, 195 Iowa 156, 191 N. W. 862 (1923); *Wagner v. Thieriot*, 197 N. Y. Supp. 560 (1922); *Faris v. Faris*, 76 Ind. App. 336, 130 N. E. 444 (1921); *Union Central Life Ins. Co. v. Woods*, 11 Ind. App. 335, 37 N. E. 180 (1894): The beneficiary is said to receive no more than the insured has contracted for in her behalf; she acquires the title burdened with all its conditions and by accepting the policy, she accepts the conditions and can't afterwards be heard to deny the company's rights.

⁹ *Stevens v. First Nat'l. Bank of Muskogee*, 117 Okl. 148, 245 Pac. 567 (1925); *Rawls v. Penn Mutual Life Ins. Co. of Phila.*, 253 Fed. 725 (C. C. A. 5th, 1918); *Orleans Parish v. N. Y. Life Ins. Co.*, 216 U. S. 517, 30 Sup. Ct. 385, 54 L. ed. 597 (1910); *Wagner v. Thieriot*, *supra* note 8.

then arises as to whether the beneficiary can recover from the estate of the insured on the ground that the proceeds to which the beneficiary was entitled have gone to pay the insured's debt. Where the beneficiary's interest is a mere expectancy, although he has consented to the assignment, it is held that such consent is not a transfer of his property in payment of insured's debt. The conclusion rests on the ground that the beneficiary has nothing to assign¹⁰ and also, that the assignment is a *pro tanto* change of beneficiary.¹¹ In other cases however, where the beneficiary's interest is considered vested and defeasible and he consents to the assignment, he is permitted to recover from the estate.¹² But this is not so, even though the interest of the beneficiary be vested, where the assignee is the insurance company, since here the loan is in a strict sense only an advance on the policy and doesn't create a debt.¹³

The result reached in the principal case seems erroneous.¹⁴ Since the assignment passed an interest superior to that of beneficiary and would have done so even if the beneficiary had not entered into the assignment, it cannot be said that the beneficiary, by consenting, passed anything to the assignee on behalf of the insured-assignor. The point made by the court, that on insured's death the beneficiary's interest vested, makes no difference. Her interest vested only in what remained to the insured, which was the difference between the entire value of the policy and the loan. Furthermore, the intent of the insured should be given effect.¹⁵ The policies were taken solely for the purpose of securing the loan. Insured's designation of his wife as beneficiary was intended as a gift and it probably never occurred to him that he was creating a liability against himself or his estate.

CECILE L. PILTZ.

¹⁰ *Ratray v. Banks*, 31 Ga. App. 589, 121 S. E. 516 (1924); *Mutual Benefit Life Ins. Co. v. Swett*, *supra* note 3.

¹¹ *Baldwin v. Wheat*, 170 Ga. 449, 153 S. E. 194 (1930); *Ratray v. Banks*, *supra* note 10.

¹² *Barbin v. Moore*, 159 Atl. 409 (N. H. 1932); *Douglas v. Equitable Life Assurance Society*, 150 La. 519, 90 So. 834 (1922).

¹³ *Wagner v. Thieriot*, *supra* note 8.

¹⁴ *Farracy v. Perry*, 12 S. W. (2d) 651 (Tex. Civ. App. 1928). In this case, where, as in the principal case, the beneficiary who was said to have a mere expectancy, consented to the assignment of the policy as additional security, the result reached is in accord with the principal case. But the case is distinguishable on the ground that the assignee was not the insurer, and the policy neither reserved the right to assign nor was it taken for the sole purpose of securing the loan.

¹⁵ *Walker v. Penick's Ex'r.*, 122 Va. 664, 95 S. E. 428 (1918); *Merchant's Bank v. Garrard*, *supra* note 2; *Herring v. Sutton*, 129 N. C. 107, 39 S. E. 772 (1901) (the dissenting opinion).

Mortgages—Enjoining Foreclosure Sale on Ground of General Business Depression.

Plaintiff mortgagor filed a bill seeking to have restrained a sale of land under a deed of trust. He alleged, as grounds for the injunction, that there existed "a condition of depression throughout the entire country in finance and real estate, and business conditions generally were unprecedentedly bad; that on account of the scarcity of money and poor market conditions, it was impossible to obtain the fair market value of lands at a judicial foreclosure or other forced or involuntary sale." It was also stated that "delay for a reasonable time . . . will do defendant no damage, for the reason that the loan is more than adequately secured; that there are many indications that in a short time business will have improved . . . and property can be sold even at a forced sale at approximately its market value." An order refusing the injunction, for lack of any ground for equitable interference, was affirmed.¹

The holding is supported by practically every case that has considered pleas of general "hard times"² scarcity of money,³ or unpropitious market⁴ as grounds for injunctive relief.⁵ Reluctance to speculate on future property values,⁶ regard for rights of the mortgagee, and deference to precedents requiring some showing of mistake, fraud or oppression are possible bases for the rule.⁷ There probably exists also an unexpressed fear on the part of the court that a contrary result would endanger future extension of credit on mortgage security.

¹ Bolich v. Prudential Insurance Co., 202 N. C. 789, 164 S. E. 335 (1932). See also Darien Bank v. Varner, 165 S. E. 82 (Ga. 1932).

² Thomas v. San Diego College Co., 111 Cal. 358, 43 Pac. 965 (1896); McGown v. Sandford, 9 Paige 290 (N. Y. 1841); Commonwealth Bank v. McDonell, 49 S. W. (2d) 525 (Tex. 1932); Muller's Adm'r. v. Stone, 84 Va. 834, 6 S. E. 223 (1888); WILTSIE, MORTGAGE FORECLOSURE (4th ed. 1927) §663; JONES, MORTGAGES (8th ed. 1928) §2354; 41 C. J. 930, §1353. See Nebraska Loan Co. v. Hamer, 40 Neb. 281, 58 N. W. 695, 697 (1894).

In McGown v. Sandford, "unsettled politics" in anticipation of an extra session of Congress was alleged as an additional ground for postponement. The case is weakened by the fact that sale had already been deferred for six months on the same grounds.

³ Muller v. Bayly, 21 Gratt. 521 (Va. 1871); Caperton v. Landcraft, 3 W. Va. 540 (1869); JONES, *loc. cit. supra* note 2; 41 C. J. 930, §1353. But see (1932) 81 U. OF PA. L. REV. 87.

⁴ Floore v. Morgan, 175 S. W. 737 (Tex. Civ. App. 1915); Muller v. Bayly, *supra* note 3.

⁵ In Anderson v. White, 2 App. D. C. 408 (1894), the court disallowed all three as grounds for setting aside the sale.

⁶ See Lipscomb v. Life Insurance Co., 130 Mo. 17, 39 S. W. 465, 466 (1897).

⁷ (1932) 81 U. OF PA. L. REV. 87, commenting on the principal case.

The opinion seems to hint,⁸ however, that perhaps a specific allegation of unusually adverse conditions existing at the particular locality of the sale would have had more weight with the court⁹ than did the general language used in the complaint. Such an attitude would be in accord with the practice of many corporate mortgagees, and of some trial courts, of avoiding useless sacrifice of the property so long as taxes and interest are paid by the mortgagor.

Upon a motion to set aside a sale due to inadequacy of price, plaintiff would have the advantage of definite proof as to the depression's effect on property values in this community in general and in this instance in particular, but the court's hesitancy to interfere with executed transactions and with rights of mortgagees might still militate against him.¹⁰ Most courts agree that mere inadequacy of price is insufficient ground for setting aside a foreclosure sale, either before¹¹ or after¹² confirmation. Contrary, however, to the dictum of the principal case that "an unconscionable purchase price has not heretofore been deemed adequate to invoke equitable power," a well-recognized exception justifies either refusal to confirm the sale¹³ or setting it aside¹⁴ where the price is so grossly disproportion-

⁸ "Perhaps no court is wise enough to declare with absolute finality that no economic or financial stringency or distress would warrant the intervention of equitable principles in restraining the power of sale in instruments securing debts. . . ." 202 N. C. at 792, 164 S. E. at 336.

⁹ See *Lansing v. Goelet*, 9 Cow. 346, 402 (N. Y. 1827); *WILTSIE*, *loc. cit.* *supra* note 2. But see *Palmer v. McCormick*, 30 Fed. 82, 85 (1887) ("grasshopper plague" held no ground for relief).

The principal case arose in Forsythe, a relatively prosperous county; but what if it had arisen, for example, in Buncombe?

¹⁰ See *Anderson v. White*, *supra* note 5, at 418.

¹¹ *Springer v. Law*, 185 Ill. 542, 57 N. E. 435 (1900); 42 C. J. 223, §1861.

¹² *Carlisle v. Dunlap*, 203 Mich. 602, 169 N. W. 936 (1918); *Lipscomb v. Life Insurance Co.*, *supra* note 6; *Guarantee Trust Co. v. Fitzgerald Hotel Corp.*, 97 N. J. Eq. 277, 127 Atl. 672 (1925); *State Realty Co. v. Villaume*, 121 App. Div. 793, 106 N. Y. Supp. 698 (1907); *Monroe Bros. v. Fuchter & Kern*, 121 N. C. 101, 28 S. E. 63 (1897); *Watkins v. Justice*, 256 Pa. 37, 100 Atl. 488 (1917); (1927) 26 MICH. L. REV. 87; (1929) 27 MICH. L. REV. 822; *JONES*, *op. cit. supra* note 2, §§2140, 2462; *WILTSIE*, *op. cit. supra* note 2, §§752, 759; (1920) 8 A. L. R. 1001; see *Nebraska Loan Co. v. Hamer*, *supra* note 2, at 697; *Warner v. Jacob*, 20 Ch. D. 220, 221 (1882).

¹³ *Ballentyne v. Smith*, 205 U. S. 285, 27 Sup. Ct. 527, 51 L. ed. 803 (1907) (price 1/7 of value); *Moeller v. Miller*, 315 Ill. 454, 146 N. E. 449 (1925) (price 1/10 of value); *Farmers' Life Insurance Co. v. Stegink*, 106 Kan. 730, 189 Pac. 965 (1920) (price 1/3 of value).

Some courts require the mortgagor to show there is no right of redemption. See *Moeller v. Miller*, *supra*.

¹⁴ *Vail v. Jacobs*, 62 Mo. 130 (1876) (price 1/6 of value); *Hoffman v. McCracken*, 168 Mo. 337, 67 S. W. 878 (1902) (land worth \$4,500 sold for \$40 to pay a debt of \$4.50); see *Rohrer v. Strickland*, 116 Va. 755, 82 S. E.

tionate to value as to shock the court's conscience¹⁵ or imply fraud.¹⁶ Due, however, to the fact that no personal culpability is here involved, this exception is of little value in the present case.

In any event, rules with reference to individual price inadequacies, or to individual fraud, mistake and duress have no relation to a world-wide depression. Are the courts to continue to give to Shylock his promised pound of flesh, or is there some way in which the creative powers of courts of equity may be put to work on a program of economic coöperation with all of the other agencies of society that are trying to ameliorate the effects of and to bring an end to the depression? Happily, the principal case leaves the way open.

JAMES M. LITTLE, JR.

Mortgages—Mortgage as Security for Obligations Subsequent to Original Note.

A executed a note secured by a duly recorded deed of trust. While the obligation was in effect *A* executed a second note, agreeing on the face of the same that the first note and mortgage should serve as collateral for the second note and any other obligation of *A* to the mortgagee. It does not appear that this transaction was ever recorded. Without notice, *B* became second mortgagee and his assignee sought to redeem from the first mortgagee by tendering the unpaid balance due on the original note secured by the first mortgage. *Held: A's* mortgage was security not only for the note it originally secured, but for other obligations of *A* to the mortgagee,

711, 712 (1914). But see *Baldwin v. Brown*, 193 Cal. 345, 224 Pac. 462, 466 (1924) (price 1/10 of value held insufficient).

A trustee acting by virtue of a power of sale is deemed to be agent of both parties, and must use reasonable diligence, even to adjourning the sale from time to time, to prevent sacrifice of the property. Courts will examine the transaction closely where a deed of trust allows speedy sale without judicial supervision upon default. See *Anderson v. White*, *supra* note 5, at 416; *Clapp v. Gardner*, 237 Mass. 187, 130 N. E. 47, 48 (1921); *Rohrer v. Strickland*, *supra*, at 712; *Linney v. Normoyle*, 145 Va. 589, 134 S. E. 554 (1926); *Jones, op. cit. supra* note 2, §2451.

Where the price is inadequate courts often seize upon some minute irregularity as ground for vacating the sale. See (1932) 81 U. OF PA. L. REV. 87; *Linney v. Normoyle, supra*, at 555.

¹⁵ (1920) 8 A. L. R. 1001; 42 C. J. 235, §1876.

¹⁶ See *Clark v. Eaton*, 100 U. S. 149, 152, 25 L. ed. 573, 574 (1879); *Anderson v. White, supra* note 5, at 416; *WILTSIE, op. cit. supra* note 2, §752.

The North Carolina court requires a discrepancy so great as to cause "all acquainted with the value of the land to say at once 'The purchaser got it for nothing.'" See *Monroe Bros. v. Fuchter & Kern, supra* note 12, at 105.

and specifically for a third note on which *A* was liable to the mortgagee.¹

Priority of mortgage claims depends upon date of recordation.² An unregistered mortgage is a claim second to a subsequent, but recorded, instrument.³ In North Carolina rigid interpretation of the recordation statute is made.⁴

Although in various types of mortgage transactions secret equities are usually enforceable as to the original parties, they are rarely allowed to defeat the rights of innocent third parties.⁵ For example, in *Continental Bank v. Kowalsky*,⁶ *A* gave a recorded mortgage to *B*, later paying a portion of the debt and executing a renewal note for the unpaid balance which recited that the mortgage should serve as collateral for past and future obligations of *A* to *B*. This transaction was not recorded and *C*, vendee of *A*, had no actual notice thereof. *B* was held estopped to claim more than the unpaid balance of the note.⁷ It has also been held that the mortgagee of a vendee could pass good title to a purchaser irrespective of equities of the original vendor,⁸ and that an innocent purchaser of property is chargeable only with the recorded amount of an incumbrance, al-

¹ *Rabil v. Fagan*, 203 N. C. 224, 165 S. E. 691 (1932).

² N. C. CODE ANN. (Michie, 1931) §3311: "No deed of trust or mortgage for real or personal estate shall be valid at law to pass any property as against creditors or purchasers for a valuable consideration from the donor, bargainor, or mortgagor, but from the registration of such deed of trust or mortgage in the county in which the land lies. . . ." This is a fairly representative type of recordation statute.

³ *Wood v. Lewey*, 153 N. C. 401, 69 S. E. 268 (1910). This rule is subject to certain minor exceptions not applicable here.

⁴ In *Quinnerly v. Quinnerly*, 114 N. C. 145, 148, 19 S. E. 99 (1894), Clark, J., said: "All secret trusts, latent liens and hidden encumbrances are and were intended to be cut up by the roots, by force of our registration laws." See (1931) 9 N. C. L. REV. 221, and cases cited therein.

⁵ Numerous cases lay down this doctrine, and in so far as the writer has discovered none have denied it. "It is too well settled to admit of serious controversy that the parties to a mortgage originally intended to secure a particular debt, may later agree in writing that, *as to themselves*, it shall be security for the payment of a different debt or future advances" (italics the writer's). *First Nat. Bank of Missoula v. Marlowe*, 71 Mont. 461, 230 Pac. 374, 377 (1924).

⁶ 247 Mich. 348, 225 N. W. 496 (1929).

⁷ An additional fact in the case supporting the decision, made on an estoppel basis, was that *B* had intentionally misrepresented the extent of *A*'s indebtedness under the first mortgage, although there is no intimation in the case that had this element been lacking the decision would have been *contra*. The binding effect of the record upon *B* was pointed out.

⁸ *Broussard v. Broussard*, 45 La. Ann. 1085, 13 So. 699 (1893). The same result was reached in an almost identical situation in *Thompson v. Whitbeck*, 47 La. Ann. 49, 16 So. 570 (1895).

though the sum intended was ten times as great.⁹ Again, in *Battle v. Jennings Naval Stores Co.*,¹⁰ *A* and *B* gave a mortgage to secure five notes and other obligations arising out of a separate contract. New, unrecorded agreements similar to the first and to be secured by the first mortgage were made from time to time. *C*, a judgment creditor, was awarded priority over these last contracts since he had no actual or constructive notice of them. The rights of an innocent mortgagee would not be less than those of *C*.

The essential nature of the instant transaction suggests that it would be correct to designate the addition of another note to the obligation secured by the mortgage as a second mortgage since the results obtained (between the parties) were precisely the same as though a second mortgage had been given.¹¹

But it is submitted that the principal case was improperly decided whether the transaction be considered as a simple assignment or a second mortgage: (1) secret equities ought not to be allowed to defeat the rights of one who has absolutely no means of ascertaining the true state of facts from the record, and (2) the decision makes serious inroads upon the effectiveness of the North Carolina recordation statute.

WILSON BARBER.

Negotiable Instruments—Negotiability of Notes Detachable From Contract.

The defendant was induced to sign a contract of purchase and each of six promissory notes, attached to the contract, but separated from the main body thereof by perforated lines. Each note matured on a different date. The contract contained warranties limiting the maker's liability on the notes. The payee, upon receiving the instrument from his agent, detached the notes and discounted them to the plaintiff who sues as a holder in due course. *Held*: The detachment was a material alteration; maker discharged.¹

If the detachment is either expressly or impliedly authorized, the

⁹ *Beekman v. Frost*, 18 Johns, 544, 9 Am. Dec. 246 (N. Y. 1820).

¹⁰ 74 Fla. 12, 75 So. 949 (1917).

¹¹ One cannot escape the feeling that if the doctrine laid down in the instant case be allowed to prevail for long, endless fraud could be practiced on innocent second mortgagees, other encumbrancers and creditors by unscrupulous mortgagors and first mortgagees, demanding that the security of first mortgages be extended to additional obligations. A second mortgagee has no way of ascertaining what debts the first mortgage secures.

¹ *Whaley Bros. v. Stevens*, 165 S. E. 645 (Va. 1932).

notes when detached are properly held to be valid negotiable notes.² This is true even though the contract contains conditions modifying the liability on the notes, and a holder in due course recovers from the maker despite defenses good against the payee.³ In the absence of such authority, however, the whole paper can only be considered as one non-negotiable contract.⁴ Detachment in this case is uniformly held to be a material alteration which avoids the obligation even in the hands of a holder in due course.⁵ In a few jurisdictions, this rule is subject to the exception that the holder can recover upon showing that the maker was negligent in executing and delivering the notes in such form that they might be easily detached and put into circulation.⁶

It has been suggested that the policy of protecting *bona fide* holders evidenced by the Negotiable Instruments Law should result in protecting a person in the position of the plaintiff who holds a writing in the form of a negotiable note, as against a defendant whose conduct made the alteration possible.⁷ This would require implying authority to detach in every case in which such a note comes into the hands of a holder in due course, thus going further than the minority common-law rule which reaches such a result only where the maker was negligent.

Indeed, where there is no express authority to detach, the nature of the transactions itself would seem to show almost conclusively that such authority is implied. It is hard to see how the maker, when he signed his name six times, to each of six notes maturing on different dates and set off from the main contract by perforated lines, intended otherwise than that each should be presented to him as a separate and distinct obligation.

In spite of these considerations, in almost all the cases in which there were ample grounds for implying authority,⁸ and even in a

² *Harrison v. Hunter*, 168 S. W. 1036 (Tex. Civ. App. 1914); *Foster v. Iowa City State Bank*, 201 S. W. 733 (Tex. Civ. App. 1918).

³ *Stevens v. Vermillion*, 109 Kan. 504, 200 Pac. 277 (1921); *Stevens v. Khetter*, 110 S. C. 271, 96 S. E. 406 (1918).

⁴ *General Motors Acceptance Corp. v. Garrard*, 41 Idaho 151, 238 Pac. 524 (1925); *Citizens' Nat. Bank of Abilene v. Campbell*, 6 S. W. (2d) 799 (Tex. Civ. App. 1928).

⁵ *Stevens v. Venema*, 202 Mich. 232, 168 N. W. 531, L. R. A. 1918F, 1145 (1918); *Landon v. Holcomb*, 184 S. W. 1098 (Tex. Civ. App. 1916).

⁶ *Harrison v. Union Store Co.*, 179 Ky. 672, 201 S. W. 31 (1918); *Security Finance Co. v. Floyd*, 294 S. W. 1113 (Tex. Civ. App. 1927).

⁷ Note (1926) 26 COL. L. REV. 478.

⁸ Of some ten cases in which the character of the instrument was such as to permit finding that authority to detach was implied, only three so held. Con-

few cases in which there was an express authorizing clause, by ignoring or explaining away the clause,⁹ the courts have held the detachment unauthorized and thus a material alteration. This attitude is explained by the fact that the courts take notice of a long line of cases which shows that this type of contract is used by only a few concerns,¹⁰ that the notes are in frequent litigation, that the element of fraud in the inception is often introduced, and that the plaintiff is seldom able to prove himself a holder "without notice."¹¹

A few cases have held the detachment to be a material alteration, and then permitted the plaintiff to recover according to the original terms of the contract on the basis of Section 124 of the Negotiable Instruments Law.¹² The Negotiable Instruments Law, however, applies only to instruments negotiable in their origin, so Section 124 has no proper application.¹³

With this background, it is not surprising that the courts refuse to create implications to aid the plaintiff, but instead hold that the

queror Trust Co. v. Simmon, 62 Okla. 252, 162 Pac. 1098 (1917); Landon v. Wm. E. Huston Drug Co., 190 S. W. 534 (Tex. Civ. App. 1916); Landon v. Foster Drug Co., 186 S. W. 434 (Tex. Civ. App. 1916). In the first two of these cases, the makers had paid one of the notes, so that the element of affirmation of the alteration helped bring about the decision. Cases refusing to find implied authority include: Stevens v. Venema, *supra* note 5; General Motors Acceptance Corp. v. Garrard, *supra* note 4; Landon v. Halcomb, *supra* note 5; Citizens' Nat. Bank of Abilene v. Campbell, *supra* note 4; Wichita Farm Lighting Co. v. Moore, 46 S. W. (2d) 383 (Tex. Civ. App. 1932).

⁹ Stevens v. Venema, *supra* note 5; Stevens v. Barnes, 43 N. D. 483, 175 N. W. 709, 18 A. L. R. 10 (1919) ("Such detachment constitutes a material alteration of the note * * * even if in the order there are words authorizing said note to be detached, for they only show more clearly the fraudulent purpose of the combination of the two instruments."); Stevens v. Clintwood Drug Co., 155 Va. 353, 154 S. E. 515 (1930).

¹⁰ This type of contract seems to be standard with the Brenard Mfg. Co., the Donald-Richard Co., the Lyon-Taylor Co., and the Puritan Mfg. Co., all located in Iowa City, Iowa, and with the Vernon Advertising Co. of Schell City, Mo., and the Partin Mfg. Co. of Memphis, Tenn. All but a few of the cases involving instruments of this nature were based on notes of which one of these companies was payee. The notes of each concern have been in frequent litigation with the defense of fraud almost always appearing.

¹¹ Stevens v. Venema, *supra* note 5; Stevens v. Pearson, 138 Minn. 72, 163 N. W. 769 (1917); Stevens v. Barnes, *supra* note 9; Stevens v. Clintwood Drug Co., *supra* note 9; Landon v. Halcomb, *supra* note 5. It is noticeable how often the same party has sued on notes of this type over a period of years as a holder "without notice." Stevens, Harrison, Iowa City State Bank, and the Security Finance Co. have appeared in some twenty cases which reached the appellate courts, as holders "without notice" of the notes payable to the various Iowa City concerns.

¹² Stevens v. Wheeler, 3 S. W. (2d) 122 (Tex. Civ. App. 1928).

¹³ General Motors Acceptance Corp. v. Garrard, *supra* note 4; Citizens' Nat. Bank of Abilene v. Campbell, *supra* note 4.

obligation is void. The plaintiff, should he be a *bona fide* holder, still has his action against the payee.

IRVIN E. ERB.

Trusts—Right of Residuary Legatee on Failure of Charitable Trust.

Testatrix bequeathed certain personal property to the trustees of an orphanage to be held in trust for the education through high school of selected girl inmates. The residuary legatee brings suit five years later, claiming that the trust has failed, and that the property reverts to him, because the state provides free education for orphans. *Held*: The trust has not failed, and plaintiff has no cause of action against the trustees, though there has been a misapplication of the trust funds.¹

The decision in the instant case that the trust has not failed seems correct. Only a six months school term is supported by the state,² and the statute extending the public school facilities to inmates of orphan homes is permissive only.³ Furthermore, the trust funds may be used for the purchasing of books,⁴ or of clothes.⁵ In the early days of the country there were many trusts established for the purpose of affording free public schools for the poor.⁶ Many of these trusts have been held not to have failed after the establishment of free schools by the state, for the funds could be used for various incidental expenses of education.⁷ Indeed, some courts hold that the proceeds of the trust may be paid directly to the public school fund, in which case the only effect is a reduction in taxes, falling alike upon the rich and the poor.⁸

¹ *Humphrey v. Board of Trustees of I. O. O. F. Home of Goldsboro*, 203 N. C. 201, 165 S. E. 547 (1932).

² N. C. CODE ANN. (Michie, 1931) §5383.

³ N. C. CODE ANN. (Michie, 1931) §5446.

⁴ *Birchard v. Scott*, 39 Conn. 63 (1872); *Crow v. Clay County*, 196 Mo. 234, 95 S. W. 369 (1906); *Bolick v. Cox*, 145 Ga. 888, 90 S. E. 54 (1916).

⁵ *Tincher v. Arnold*, 147 Fed. 665 (C. C. A. 7th, 1906); *McIntire's Adm'rs. v. City of Zanesville*, 17 Ohio St. 352 (1867).

⁶ *Griffin v. Graham*, 8 N. C. 96, 9 Am. Dec. 619 (1820); *Barr v. Weld*, 24 Pa. 84 (1854); *Green v. Blackwell*, 35 Atl. 375 (N. J. Ch. 1896); *In re John's Will*, 30 Ore. 494, 47 Pac. 341 (1896).

⁷ *Tincher v. Arnold*, *McIntire's Adm'rs. v. City of Zanesville*, both *supra* note 5; *Birchard v. Scott*, *Bolick v. Cox*, both *supra* note 4; *Green v. Blackwell*, *In re John's Will*, both *supra* note 6; *Elliott v. Quinn*, 109 Neb. 5, 189 N. W. 173 (1922).

⁸ *Adams Female Academy v. Adams*, 65 N. H. 225, 18 Atl. 777 (1889); *Crow v. Clay County*, *supra* note 4. *Contra*: *McIntire's Adm'rs. v. City of Zanesville*, *supra* note 5.

Most states have adopted in the law of charities what is known as the *cy pres* doctrine.⁹ That is to say, when a charitable trust has become impossible of execution as specified, the courts, rather than decree a failure of the gift, will, if a general charitable intent appears, direct the application of the property to other charitable purposes.¹⁰ Therefore, in these jurisdictions, cases very rarely arise where a charitable trust can be held to have failed, with a consequent devolution to a residuary legatee or the donor's heirs.¹¹ Indeed, this situation has led several courts to say that when property is given for charitable purposes, with no provision for reverter, neither the donor nor his heirs nor the residuary legatee can ever have the property back.¹² On the other hand, in the few states that do not accept the *cy pres* doctrine, the failure of charitable trusts occurs more often.¹³ North Carolina, though it maintains a liberal attitude toward charitable trusts,¹⁴ falls within this group. Thus, where some obstruction has arisen to make it impossible to carry out the expressed purpose of the testator,¹⁵ or the trust is for an illegal purpose,¹⁶ the court has no alternative but to decree a failure of the trust and an intestate succession by the donor's heirs or personal representative, or a passage under the will to the residuary legatee, if there be one.

As a general rule, in the absence of an express provision for reverter, though the trustees abuse the trust, misemploy the funds, or commit a breach of the trust, the only remedy is an action to en-

⁹ BOGERT, TRUSTS (1921) §63; Note (1922) 1 N. C. L. REV. 41.

¹⁰ *City of Philadelphia v. Girard's Heirs*, 45 Pa. 9, 84 Am. Dec. 470 (1863); *Keene v. Eastman*, 75 N. H. 191, 72 Atl. 213 (1909); *Bruce v. Maxwell*, 311 Ill. 479, 143 N. E. 82 (1924); BOGERT, *loc. cit. supra* note 9; Note (1925) 35 YALE L. J. 643.

¹¹ *Jackson v. Phillips*, 96 Mass. 539 (1867); *Ely v. Atty. Gen.*, 202 Mass. 545, 89 N. E. 166 (1909); BOGERT, *loc. cit. supra* note 9.

¹² *White v. Keller*, 68 Fed. 796 (C. C. A. 5th, 1895); *Academy of the Visitation v. St. Clemens*, 50 Mo. 167 (1872); *Richards v. Wilson*, 185 Ind. 335, 112 N. E. 780 (1916).

¹³ *McCauley v. Wilson*, 16 N. C. 276, 18 Am. Dec. 587 (1828); *Universalist Convention of Ala. v. May*, 147 Ala. 455, 41 So. 515 (1906); *Taylor v. Rogers*, 130 Ky. 112, 112 S. W. 1105 (1908); *Golding v. Gaither*, 113 Md. 187, 77 Atl. 333 (1910); *Grundy v. Neal*, 147 Ky. 729, 145 S. W. 401 (1912); *Mars v. Gilbert*, 93 S. C. 455, 77 S. E. 131 (1913).

¹⁴ Note (1922) 1 N. C. L. REV. 41. North Carolina has provided by statute that no gift for charitable uses shall be invalid by reason of any indefiniteness or uncertainty of the object or beneficiaries of such trust. N. C. CODE ANN. (Michie, 1931) §4035.

¹⁵ *McCauley v. Wilson*, *supra* note 13; *Trustees of Davidson College v. Chambers*, 56 N. C. 253 (1857).

¹⁶ *Lemmond v. Peoples*, 41 N. C. 137 (1848).

force the trust.¹⁷ Usually, such an action must be brought by the attorney-general.¹⁸ North Carolina has provided by statute that an action to enforce a charitable trust must be brought by the attorney-general or county solicitor in the name of the state.¹⁹ This statute, however, must not be construed as meaning that the heir or residuary legatee can never sue to recover trust property. If the trust has actually and completely failed, he might well have a good cause of action, for the statute would not apply.²⁰ In *State v. Gerard*²¹ the Court stated the function of this statute, saying: "The Statute of Elizabeth was avowedly passed to redress the misemployment of lands, goods, and stocks of money, theretofore given to certain charitable uses, though the mode of redress directed was by its enactments made to apply to subsequent dispositions for such uses. This statute was in force in this State, and so remained, until it was superseded by our act concerning charities, which was passed expressly for the same purpose, viz., to secure the faithful management of all property, real or personal, which had been or thereafter should be granted by deed, will or otherwise for such charitable purposes as were allowed by law." From this, it is evident that the statute has no application to cases where the trust purpose cannot be effectuated.

Consequently, the holding in the principal case that the residuary legatee has no right to sue is confined to the particular facts of that case. It would be manifestly unjust not to allow the heir or residuary legatee to sue for the recovery of property which, upon failure of the trust, should become his by operation of law.

ROBERT A. HOVIS.

¹⁷ *Brown v. Meeting St. Baptist Church*, 9 R. I. 177 (1869); *In re Sellers Chapel Meth. Church*, 139 Pa. 61, 21 Atl. 145, 11 L. R. A. 282 (1891); *Alumni Assoc. v. Gen. Theological Seminary*, 163 N. Y. 417, 57 N. E. 626 (1900); *Stewart v. Franchetti*, 153 N. Y. Supp. 453 (1915); *Northwestern University v. Wesley Memorial Hospital*, 290 Ill. 205, 125 N. E. 13 (1919); 2 PERRY, TRUSTS (6th ed. 1911) §744.

¹⁸ See Note (1928) 62 A. L. R. 881 and cases there cited. "Heirs and personal representatives of a donor have no beneficial interest reverting or accruing to themselves from the breach or non-execution of a trust for a charitable use," 2 PERRY, *loc. cit. supra* note 17. But see *McGee v. Vandeventer*, 326 Ill. 425, 158 N. E. 127, 133 (1927) and Note (1927) 37 YALE L. J. 533, indicating that the donor's heir might have a right to sue to prevent diversion of the trust funds.

¹⁹ N. C. CODE ANN. (Michie, 1931) §4034. The action may be brought at the suggestion of the clerk of the superior court, with whom the trustees must file accounts, or upon request of two reputable citizens. See N. C. CODE ANN. (Michie, 1931) §4033.

²⁰ Cases cited, *supra* notes 15 and 16.

²¹ 37 N. C. 210, at 220 (1842).