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Notes

North Carolina Law Review

Voorhees of Chicago, Treasurer. Mr. Thomas W. Davis of Wilmington continues as a member of the Executive Committee, having been elected last year for a three-year term. An invitation was extended to the Executive Committee to hold its winter meeting in Asheville next February.

The North Carolina delegation chose the following officers: T. C. Guthrie, Sr., of Charlotte, Vice-President for North Carolina; Alexander B. Andrews of Raleigh, member of General Council for North Carolina; and T. S. Rollins of Asheville, Henry E. Faison of Clinton, Kenneth C. Royall of Goldsboro, and Henry M. London of Raleigh, members of the Local Council.

In addition to the above, the following members of the North Carolina Bar attended the meeting: J. Crawford Biggs, Raleigh; J. H. Bridgers, Henderson; Thomas W. Davis, Wilmington; Lincoln L. Kellogg, Asheville; Charles T. McCormick, Chapel Hill; W. T. Morgan, Marion; K. Van Winkle, Asheville; R. M. Wells, Asheville; Vonno L. Gudger, Asheville.

At a recent meeting of the Executive Committee of the North Carolina Bar Association it was decided to hold the next annual meeting of the Association at Pinehurst, North Carolina, on May 1, 2 and 3, 1930. At that meeting addresses will be made by Hon. Wm. D. Mitchell, Attorney-General of the United States, Governor O. Max Gardner and Hon. Henry Upson Sims, President of the American Bar Association. Hon. Kenneth C. Royall, of Goldsboro, was elected to fill out the unexpired term of President T. L. Caudle whose untimely death occurred September 4, 1929.

NOTES

Payment to One Joint Payee

Dawson & White v. Nat'l. Bank of Greenville, 197 N. C. 499, 150 S. E. 38 (1929), was an "action by the payees to recover of the drawee bank the amount of a check, payable to their order," which the drawee-defendant is alleged to have paid, without indorsement, to some unauthorized person, not the plaintiffs. The court viewing this erroneous payment as equivalent to a certification of the check, allowed plaintiffs to recover. It is believed that no useful purpose is served by treating payment to one not a lawful holder[1] as an accept-

[1] The check is said by the statement of facts to have been "presented for payment by a *holder,* without the indorsement of the payees." (Italics ours).

ance of the check in favor of the rightful owner and, as observed in a previous comment,[2] many leading authorities condemn that view.

But the present appeal presents an additional issue of importance which will be considered briefly herein.

"Defendants offered evidence which they insist tended to show that the amount of the check was paid to one of the payees." The evidence was excluded at trial and this ruling was upheld. If the plaintiffs had been partners, as the title of the case suggests,[3] it would certainly have been in order for either partner to have received payment as agent for the firm, and the evidence offered would then have been proper.[4] If, as the record shows, they were not partners, they were evidently joint payees[5] and the question of whether payment to one discharges the debt is not so easily answered. At *common law* one of two joint creditors could receive payment on an obligation and give a discharge therefor.[6] Proceeding on that theory a few

The word "holder" is here used in a non-technical sense, for unless the person mentioned was one of the payees or an indorsee he would not be a holder. N. I. L. §191, Cons. Stat. N. C. 2976.

[2] 7 N. C. L. Rev. 191 (1929).

[3] "Larry Dawson and D. G. White, trading as Dawson and White, v. Nat'l. Bank of Greenville." The record on appeal (Vol. 5, fall term, 1928) shows that the plaintiffs were a landlord and tenant disposing of a crop jointly owned.

[4] Each partner has implied power to collect debts due the firm. Mechem, Elements of Partnership (2 ed.), §260; Gilmore, Partnership, §102. See Black Mountain R. R. v. Ocean Acc. and Guar. Co., 175 N. C. 566, 96 S. E. 25 (1918).

[5] N. I. L. §8 (4), N. C. Cons. Stat. Ann. (1919) §2989 (4). But not joint tenants in all respects. Adams, J., in Dozier v. Leary, 196 N. C. 12, 144 S. E. 368 (1928) declared joint payees to be tenants in common.

[6] Mangrum's Admrs. v. Sims, 4 N. C. (1 Car. L. Repos. 547) 160 (1814), *semble,* administrators; Richardson v. Jones, 23 N. C. 296 (1840), *semble:* Legrand v. Baker, 6 T. B. Mon. 235 (Ky. 1827); Morrow v. Starke, 4 J. J. Marsh, 367 (Ky. 1838); Jenkins v. Williams, 191 Ky. 165, 229 S. W. 94, 96 (1921), *semble;* People v. Keyser, 28 N. Y. 226, 228 (1863), executors; Bowes v. Seeger, 8 Watts & S. 222 (Pa. 1844), assignees of mortgage in trust; State v. Rose, 71 Tenn. 531, 534 (1879), *semble;* Allen v. So. Penn. Oil Co., 72 W. Va., 155, 77 S. E. 905 (1913); also Harding v. Parshall, 56 Ill. 219, 226 (1870), payment even after notice by other joint obligee not to pay; Jens Marie Oil Co. v. Rixse, 72 Okla. 93, 178 Pac. 658 (1919), payment to wife joint lessor with husband even though title to leased premises was in husband; Bank of Guntersville v. U. S. Fidel. and Guar. Co., 201 Ala. 19, 75 So. 168, 170 (1917), payment of dividends to one joint owner even though others were minors. And see Lyman v. Gedney, 114 Ill. 388, 29 N. E. 282, 286 (1885); Musgrave v. Musgrave, 86 W. Va. 119, 103 S. E. 302, 315 (1920); 22 A. and E. Ency. (2 ed.) 524. But payment to a third party authorized by only one of the joint obligees is not sufficient. Moore v. Bevier, 60 Minn. 240, 62 N. W. 281 (1895). This resembles the rule of N. I. L. §41, since indorsement of a negotiable instrument is commonly for collection. And though one joint obligee may discharge the obligation he may not alone maintain a suit upon it. Richardson v. Jones, *supra;* Fishell v. Evans, 193 N. C. 660, 137 S. E. 865 (1927), promissory note; Hatfield v. Cabell County Ct., 75 W. Va. 595, 84 S. E. 335 (1915); Henry v. Mt. Pleasant Twp., 70 Mo. 500 (1879). Cf. Delano v. Jacoby, *infra* note 7.

decisions have held likewise as to negotiable instruments.[7] Of course, the common law rule requiring both of two joint payees to indorse in order to pass title,[8] which was enacted into N. I. L. sec. 41,[9] does not specifically cover the case since an "indorsement" placed on the instrument in order to obtain payment amounts only to a receipt.[10]

But to decide a negotiable instrument question simply by the application of the ordinary rule of contracts is to overlook the very essentials in which the commercial law differs from common law—in this particular type of case, the fact that commercial paper is constantly drawn jointly to two payees for the express purpose of preventing either payee from transferring the instrument or receiving the money without the concurrence of the other.[11] Business convenience demands that a drawee who defends by showing payment direct to one of two joint payees should go further and show either the indorsement of the other payee or his authorization of the payment as made. And so, while section 41 concerning indorsements admittedly does not govern the case of a direct payment without intermediate parties,

[7] Before N. I. L., Bruce v. Bonney, 12 Gray 107, 111 (Mass. 1858), that one joint payee in possession of note may either receive payment or indorse; Wright v. Ware, 58 Ga. 150, 152 (1877), assigning artificial reason that one joint payee is temporarily agent of the other hence like partner; Delano v. Jacoby, 96 Cal. 275, 31 Pac. 290 (1892), *semble*. Since N. I. L. but without reference to it, Park v. Parker, 216 Mass. 405, 103 N. E. 936 (1914), payment to survivor; Ethington v. Rigg, 173 Ky. 355, 191 S. W. 98 (1917) *semble*, in a case where one of several obligees purported to release a mortgage of record by signing "R, agent Riggs Heirs," he being himself one of them,—proof of his agency essential. Since N. I. L. and referring to §41 but declaring it inapplicable to case of receiving payment. Dewey v. Metropolitan Life Ins. Co., 256 Mass. 281, 152 N. E. 82 (1926).

[8] Johnson v. Mangum, 65 N. C. 146 (1871), overruling without reference dictum in Sneed v. Mitchell's Extrs., 2 N. C. 289, 292 (1796) that "the endorsement by one of two joint payees, is good to transfer the whole contents of the note to an endorser" (sic); "Indorsement by one of several joint payees or indorsees not partners," 38 A. L. R. 801. Cf. Bruce v. Bonney, *supra* note 7. And compare special English rule relating to dividend warrants, 2 Halsbury, Laws of England 504, note (s).

[9] N. I. L. §41, N. C. Cons. Stat. Ann. (1919) §3022: "Where an instrument is payable to the order of two or more payees or indorsees who are not partners, all must indorse unless the one indorsing has authority to indorse for the others." Virginia-Carolina Joint Stk. Land Bk. v. First & Citz. Natl. Bk. of Eliz. City, 197 N. C. 526, 150 S. E. 34 (1929), drawer v. drawee; Crahe v. Mercantile T. & S. Bk., 295 Ill. 375, 129 N. E. 120, 12 A. L. R. 92 (1920), joint payee v. drawee; Kaufman v. State Sav. Bk., 151 Mich. 65, 114 N. W. 863 (1908), joint payee v. indorsee.

[10] And according to some authorities such indorsement as a receipt may not be required by the drawee as a condition to payment. Osborn v. Gheen, 16 D. C. (5 Mack.) 189 (1886). See Klaus, *Identification of Holder and Tender of Receipt on the Counter-Presentation of Checks* (1929) 13 MINN. L. REV. 281.

[11] See e.g., Virginia-Carolina Joint Stock Land Bank v. Liles, 197 N. C. 413, 149 S. E. 377 (1929).

the commercial policy which gave rise to that section can only be perfectly effected and the utility of instruments drawn to joint payees can only be preserved by a similar policy in both cases.[12]

The instant case is complicated in some of its aspects by the fact that the drawee directed the bank to pay his checks as if drawn to bearer,[13] but the present issue is not affected by that fact. And though the decision on this issue seems to be wholly unsupported by case authority elsewhere it establishes a desirable precedent.[14]

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[12] Indeed, when it is considered that the drawee is discharged if the funds actually come into the hands of the one entitled to them even if he did not indorse at all: Bell v. Murchison Nat. Bk., 196 N. C. 233, 145 S. E. 241 (1928), 7 N. C. L. R. 455, it seems that the provisions of N. I. L. §41 lose all significance except in a case where the person holding under the indorsement of only one joint payee is suing on the instrument. If one joint payee indorsed alone and sold the instrument to a third person who collected the draft the debt would be discharged. This is what happened in Dewey v. Metropolitan, *supra* note 7, where the check was "cashed" by one joint payee not at the counter of the drawee but at another bank. The check, therefore, contrary to the provision of §41, which the court said had no application, went through intermediate hands to payment with the genuine indorsement of only one of the joint payees. If the indorsement by one joint payee were for collection only the same result would seem to follow even more certainly—although *quaere* in Minnesota. See Moore v. Bevier, *supra* note 6.

[13] The direction was in writing and was of a sort commonly given to banks in the tobacco markets by tobacco buyers who paid farmers by check. The bank would of course be bound to respect the direction, somewhat as a telegraph company would be bound to pay money without identification when so directed by the transmitter. See W. U. Tel. Co. v. Wells, 50 Fla. 474, 39 So. 838 (1905) and language in Dodge v. Natl. Exch. Bk., 20 Ohio St. 234, 5 Am. Rep. 648 (1870); Davis v. Lenawee Co. Sav. Bk., 53 Mich. 163, 18 N. W. 629 (1884); W. U. Tel. Co. v. Bimetallic Bk., 17 Colo. App. 229, 68 Pac. 115 (1902).

If the payee had requested the drawer to so order his bank, it would seem that he should stand the loss as he would if a bearer check had been issued him. But a mere custom for the banks to pay all paper without identification as if drawn to bearer would hardly affect the rights of a payee holding a check drawn in plain terms to order.

As between drawer and drawee, the bank could of course charge against the drawer an item wrongfully paid by his express order. See Mackay Tel.-Cable Co. v. Ft. Worth Nat'l. Bank., 230 S. W. 244 (Tex. Civ. App. 1921). And it would seem that the drawer would be liable also for the further obligation imposed on the bank by the instant case in consequence of the depositor's act.

[14] Professor Lile in forcibly advocating this view adds the following: "If the Massachusetts rule be sound, paper payable to two or more payees under N. I. L. §8 (4), becomes, so far as payment is concerned, impliedly payable to 'one or some of the several payees,' under § 8 (5), thus rendering the latter subsection useless." He also calls attention to the fact that before the N. I. L. instruments payable in the alternative were not negotiable while those to joint payees were, as evidence of a wide difference between those two types. BIGELOW, BILLS, NOTES AND CHECKS, (3d. ed.) §147 n. 5.

THE CONSTITUTIONALITY OF STATUTORY PRESUMPTIONS

Legislation declaring that proof of one fact shall be presumptive of an ultimate fact to be proved is deemed invalid unless there is a rational connection between the facts proved and those which may be inferred.[1] Thus, a Georgia statute[2] placing upon a railroad company the burden of disproving a presumption of negligence[3] raised upon mere proof of injury caused by the "running of locomotives or cars" was held by the Supreme Court of the United States unconstitutional because there was no rational connection between the fact of injury and the negligence inferred therefrom.[4]

This same court, in construing a statute creating a presumption of knowledge of insolvency against bank officials upon proof of receiving deposits during insolvency, held that a rational connection between fact proved and fact inferred was unnecessary where the legislature had the power to impose absolute liability upon proof of the fact raising the presumption.[5] Under this ruling, a preliminary test as to the validity of a presumption would be whether a like rule, imposing absolute liability, would be invalid. Applying this test to the Georgia statute,[6] the first question would be, whether the legislature had the power to impose absolute liability upon a railroad for any injuries caused by the running of its locomotives or cars. That absolute liability may be imposed under certain conditions is shown by statutes making railroads absolutely liable for fire communicated

[1] Manley v. State, 166 Ga. 563, 144 S. E. 170, *rev'd.*, 49 S. Ct. 215 (1928); McFarland v. American Sugar Refining Co., 241 U. S. 79, 36 S. Ct. 498 (1916); Bailey v. Alabama, 219 U. S. 219, 55 L. Ed. 191, 31 S. Ct. 145 (1911).

[2] Ga. Ann. Code (Michie, 1926) §2780. "A railroad company shall be liable for any damage done to persons, stock or other property by the running of locomotives, or cars, or other machinery of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company."

[3] The above statute, *supra* note 2, is construed in the following cases, Western and Atlantic R. R. v. Thompson, 38 Ga. App. 599, 144 S. E. 831 (1928); Central of Georgia R. R. v. Barnett, 35 Ga. App. 528, 134 S. E. 126 (1926); Ellenberg v. Southern R. R., 5 Ga. App. 389, 63 S. E. 240 (1908).

[4] Plaintiff's husband was killed when the truck he was driving collided with the defendants' train at a crossing. The Georgia courts, in construing the statute above, *supra* note 2, held that the defendant railroad company must disprove by a preponderance of evidence every particular in which it was alleged to have been negligent. Western and Atl. R. R. v. Henderson, 35 Ga. App. 353, 133 S. E. 645 (1926), *aff'd*, 36 Ga. App. 679, 137 S. E. 855 (1927), *aff'd*, 167 Ga. 22, 144 S. E. 905 (1928), *rev'd*, 49 S. Ct. 445, 73 L. Ed. 519 (1929), *aff'd*, 149 S. E. 101 (1929).

[5] Ferry v. Ramsay, 277 U. S. 88, 48 S. Ct. 443 (1923); *cf.* Manley v. State, *supra* note 1, where a similar statute creating a presumption of criminal intent was held unconstitutional. See (1929) 7 N. C. L. REV. 62, 453.

[6] *Supra* note 2.

by its engines,[7] for injuries to passengers,[8] and for injuries to third persons caused by failure to maintain their crossings in safe condition.[9] Whether a legislature has the power to go a step further in imposing absolute liability upon a railroad seemingly resolves itself into a question of policy. As contrasted with the foregoing statutes, the Federal courts[10] and those of a majority of the states[11] adopt a policy more favorable toward railroads in imposing the duty to stop, look, and listen upon persons approaching railroad tracks. This is based upon the practical considerations that a person can avoid a train more easily than a train can avoid him, and the expense and inconvenience of stopping and starting trains. A frequent reason for imposing absolute liability is that in the particular type of cases, the class of persons so made liable is the one usually at fault. This would not be true in the railroad accident cases because the person injured is as often at fault as the railroad. On the other hand, it may be argued that due to the danger inherent in operating trains, a number of accidents occur unavoidably, and that still more occur through the fault of both parties, and that even where only one party is to blame, it is often impossible to prove that he is the one at fault. It may be suggested that society should indirectly bear the burden of these accidents by making the railroads pay for them in the first instance,—a burden which the railroads can ultimately shift to the public by means of their rates.[12] It seems then fairly arguable that absolute liability for train accidents might constitutionally be imposed upon the railroads. The court, however, in the Georgia case, absolutely ignored this phase of the question.

Conceding, however, that a legislature does not have the power

[7] St. Louis and S. F. R. R. v. Matthews, 165 U. S. 1, 41 L. Ed. 611, 17 S. Ct. 243 (1896); Anderson v. Minneapolis, etc. R. R. Co., 150 Minn. 530, 185 N. W. 299 (1921). See 5 WIGMORE, EVIDENCE, (2d. Ed.) §2509, and notes 3 and 4.

[8] Chicago, etc. R. R. v. Zernecke, 59 Neb. 689, 82 N. W. 26 (1900), *aff'd*, 183 U. S. 592, 46 L. Ed. 339, 22 S. Ct. 229 (1902). See also (1899), 13 HARV. L. REV. 604.

[9] Talley v. Pittsburg, etc. R. R., 231 Ill. App. 513 (1923); Mouson v. Chicago, etc. R. R., 181 Iowa 1354, 159 N. W. 679 (1916).

[10] "When a man goes upon a railroad track he knows that he goes to a place where he will be killed if a train comes upon him before he is clear of the track. He knows that he must stop for the train and not the train stop for him." Baltimore and Ohio R. R. v. Goodman, 275 U. S. 66, 67, 48 S. Ct. 24 (1922).

[11] Lutz v. Davis, 195 Iowa 1049, 192 N. W. 15 (1923); Castle v. Director General of the Railroads, 232 N. Y. 430, 134 N. E. 334 (1922); Costin v. Tidewater Power Co., 181 N. C. 196, 106 S. E. 568 (1921).

[12] See Elsbree and Roberts (1928) *Compulsory Insurance against Motor Vehicle Accidents*, 76 U. OF PA. L. REV. 690.

to impose absolute liability upon railroad companies for all injuries caused by the running of their trains, it does not necessarily follow that a legislature should be denied the power to impose the lesser handicap of a presumption. Thus, a presumption of negligence from derailment has been held constitutional on the ground that there was a rational connection between the fact proved and the fact presumed therefrom.[13] But the Court, in holding the Georgia statute[14] unconstitutional because its "reasoning does not lead from the occurrence back to its cause," overlooks the fact that presumptions without such rational connection have been held constitutional upon the ground that they were based upon some reason of policy distinct from the mere probability of the inference. Professor Zechariah Chafee, Jr., says, "Some rebuttable presumptions have no logical core but rest upon some policy of that particular branch of substantive law with which they are connected."[15] For illustration, the presumption that if goods are handled by several carriers, damage in transit was caused by the last carrier, is obviously based upon the policy of relieving the shipper of the initial burden of investigation and putting it on some one who has the facilities for doing it. Therefore, granting there is no basis of probability for the presumption created by the Georgia statute,[16] it should not be held unconstitutional if it is based upon some reasonable policy. That such a presumption would stimulate railroads to disclose facts peculiarly within their own knowledge, the non-disclosure of which would defeat the ends of justice; and, also

[13] Mobile, etc. R. R. v. Turnipseed, 219 U. S. 35, 55 L. Ed. 78, 31 S. Ct. 136, 55 L. R. A. (N. S.) 226, Ann. Cas. 1912 A, 463 (1910). It has been settled by the Supreme Court of the United States that a presumption must have a rational connection between fact proved and fact presumed therefrom, *supra* note 1. Thus, a statute raising a presumption of knowledge of actual possession of a still upon mere proof of finding the still on defendant's land was held valid because the "existence upon the land of distilling apparatus . . . has a natural relation to the fact that the occupant of the land has knowledge of . . . its existence." Hawes v. State, 258 U. S. 1, 42 S. Ct. 204 (1922). For further illustration see, Fong Yue Ting v. U. S., 149 U. S. 698, 729, 13 S. Ct. 1016 (1892); James-Dickinson Farm Mortgage Co. v. Harry, 273 U. S. 119, 71 L. ed. 569 (1926); Hawkins v. Bleakley, 243 U. S. 210, 214, 37 S. Ct. 255 (1916); Adams v. New York, 192 U. S. 585, 588, 24 S. Ct. 372 (1903). *Contra:* 2 WIGMORE, EVIDENCE (2d. ed.) §1354 at page 1672, "If the legislature can make a rule of evidence at all, it cannot be controlled by a judicial standard of rationality, anymore than its economic fallacies can be invalidated by the judicial conceptions of economic truth . . . the legislature is not obliged to obey either the axioms of rational evidence or the axioms of economic science."

[14] *Supra* note 2.

[15] *Progress of the Law, Evidence* (1921), 35 HARV. L. REV. 302, 311; see also, Bohen, *The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof* (1920), 68 U. PA. L. REV. 307, 317, 320.

[16] *Supra* note 2.

that their great wealth and power would enable them to disprove negligence more easily than an individual could prove it, are practical arguments for such presumptions. It is submitted that it should be within the exclusive power of the legislature to determine when public interest makes necessary a shift in evidential procedure so long as such change is not merely arbitrary or capricious.[17]

The Court also found the Georgia statute[18] unconstitutional because the presumption created by it placed upon the railroad not a mere duty of proceeding but the burden of disproving every allegation of negligence by a preponderance of the evidence. This statute was distinguished from a Mississippi statute[19] held constitutional by this same Court because the latter merely required that the railroad company go forward with the evidence.[20] So far as we have been able to find, this is the first time the Supreme Court of the United States has ever given the shifting of the risk of non-persuasion as a ground for holding a statutory presumption invalid. On the other hand, several statutes which shifted the risk of non-persuasion have been held constitutional.[21]

[17] 2 WIGMORE, EVIDENCE (2d ed.), §1354 at page 1670, "There is not the least doubt, on principle, that the legislature has entire control over such rules; as it has over all other rules of procedure in general, and evidence in particular, subject only to the limitations expressly enshrined in the Constitution." As to the constitutional limitations upon rules of evidence, see 1 WIGMORE, EVIDENCE (2d ed.), §7. The determination of the constitutionality of a rule of evidence resolves itself into a balancing of "rights." "Choice must be exercised. The choice is not, however, capricious, it involves judgment between defined claims, each of recognized validity, each with a pedigree of its own, but all of which cannot be satisfied completely." Frankfurter, *Constitutional Opinions of Justice Holmes* (1915) 29 HARV. L. REV. 636, 686.

[18] *Supra* note 2.

[19] Miss. Ann. Code (Hemmingway, 1927), §1645. ". . . Proof of injury inflicted by the running of the locomotives or cars of such company shall be prima facie evidence of the want of reasonable skill and care on the part of the servants of the company in reference to such injury." In Mobile etc. R. R. v. Turnipseed, *supra* note 13, this statute was held to impose upon the defendant railroad the duty of going forward with the evidence. It should be noted that the plaintiff in the Georgia case was a *third person killed* in a *crossing collision,* whereas the plaintiff in the Mississippi case was an *employee injured* by a *derailment.*

[20] The indiscriminate use of the word "presumption" has caused confusion. It may mean anything from just enough evidence to get to the jury to a conclusive presumption. McCormick, *Presumptions and Burden of Proof* (1927) 5 N. C. L. REV. 291, 307. That the Georgia statute does more than create a true presumption because it is not the function of a presumption to shift the onus of proof; see 4 WIGMORE, EVIDENCE (2d ed.), §2489. That a presumption may, exceptionally shift the onus of proof, see Bohlen, *The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof, supra* note 15.

[21] Minneapolis R. R. v. Minnesota, 193 U. S. 53, 48 L. ed. 614 (1903); Fong Yue Ting v. U. S., *supra* note 13; Adams v. New York, *supra* note 13; Hawes

The fundamental principle that the plaintiff must prove his case has been modified both by legislative enactment and judicial decision to meet the complexities of a changing civilization. Thus, there are statutes which shift certain portions of the burden of proof from the plaintiff, upon whom it originally rested, to the defendant. In some instances, the mere duty of producing evidence has been shifted to the defendant, in others, the risk of non-persuasion has been imposed, and in still others, absolute liability has been placed upon the defendant. Also, the courts, by invoking the doctrine of "res ipsa loquitor," have achieved the same results obtained by legislative enactments.[22] Of course it would be logical that where a legislature could impose absolute liability, it could also impose the lesser burdens of the risk of non-persuasion and of producing evidence. Likewise, if the legislature is empowered to shift the duty of proceeding with the evidence in a particular situation to the defendant, there seems little reason to deny it the power to impose the heavier burden of the risk of non-persuasion upon the defendant in a similar situation, as the effect of shifting the risk of non-persuasion is but to require the defendant, in his defense, to prove a part of the case which was originally required of the plaintiff. Illustrations of this apportionment can be found in every case of the so-called "affirmative defenses." Thus, in defamation, the plaintiff alleges but need not prove the falsity of the defendant's statements. The defendant must prove "truth."[23] So, in an action on a note the plaintiff avers that it is unpaid, but the defendant must plead and prove payment.[24] There is no logic in these apportionments, nor does experience indicate a probability that notes are unpaid or grave imputations false. The real reason for shifting this risk of non-persuasion is based upon beliefs as to the expediency of requiring one party or the other to bear the risk of the failure to disclose, convincingly, the pertinent facts about the particular issue.

v. Georgia, *supra* note 13; Hawkins v. Bleakley, *supra* note 13; James-Dickinson Farm Mortgage Co. v. Harry, *supra* note 13. It should be noted that the Supreme Court of the United States in construing the statutes in the above cases based their decisions upon the ground that there was probability in the presumptions created.

[22] See excellent comment (1923) 12 CAL. L. REV. 138.

[23] Warner v. Fuller, 245 Mass. 520, 139 N. E. 811 (1923); Riley v. Stone, 174 N. C. 588, 94 S. E. 434 (1917).

[24] Where the plaintiff produces in evidence the defendant's note, uncanceled, upon which suit was brought, the burden is on the defendant to show that he had paid it, in order to establish this as a defense. Citizens Bank v. Knox, 187 N. C. 565, 122 S. E. 304 (1924); Swan v. Carawan, 168 N. C. 473, 84 S. E. 706 (1915).

It is probable that the Court will not adhere to its distinction between presumptions imposing the risk of non-persuasion and those merely shifting the duty of proceeding with the evidence. If it continues to require that statutory presumptions be based upon a "rational connection," it will doubtless extend this same requirement to statutes shifting the mere duty of going forward with the evidence.[25] It is hoped, however, that it will do neither, but will adopt the more liberal attitude of holding every type of statutory presumption valid where absolute liability could be imposed in the same situation,[26] and, where absolute liability could not be imposed, of holding a statutory presumption valid if it is based either upon a "probable connection" or some authorized reason of policy.[27]

J. FRAZIER GLENN, JR.

RISK OF LOSS IN BANK COLLECTIONS UNDER NORTH CAROLINA STATUTE

As an emergency measure, North Carolina, together with a number of other states, enacted a statute[1] permitting a drawee bank to

[25] A statute making failure to perform labor contracted for without refunding the money paid therefor prima facie evidence of criminal intent was declared unconstitutional although it was construed as meaning just enough evidence to go to the jury from which they could find for either party. Bailey v. Alabama, *supra* note 1. This case seems to indicate the importance placed upon a probable connection by the Supreme Court of the United States.

[26] This attitude was adopted by the U. S. Supreme Court in Ferry v. Ramsay, *supra* note 5.

[27] Since the completion of this note, and after the United States Supreme Court's decision holding the Georgia statute unconstitutional, *supra* note 4, the Court of Appeals of Georgia held this same statute *constitutional* on the ground that the U. S. Supreme Court had erroneously construed the statute as shifting the risk of non-persuasion when its proper construction, indicated by a long line of decisions, merely required the railroad company to proceed with the evidence. Ga. Ry. and Power Co. v. Shaw, 149 S. E. 657 (Ga., Oct. 1929). The constitutionality of this decision will be the subject of a comment in a forthcoming issue of this LAW REVIEW.

It should be noted that the Georgia legislature, immediately after and apparently as a result of the decision in the Henderson case, *supra* note 4, passed an act approved August 24, 1929, which creates a presumption of negligence against a railroad company in the words of the Mississippi statute, held constitutional in Mobile, etc. R. R. v. Turnipseed, *supra* note 13.

[1] N. C. Code 1927, §220 (aa) as enacted by N. C. Pub. Laws 1921, Ch. 20, §2. In order to prevent the accumulation of unnecessary amounts of money in the vaults of the banks and trust companies chartered by this state, all checks drawn on said banks and trust companies shall, unless specified on the face thereof to the contrary by the maker or makers thereof, be payable in exchange drawn on the reserve deposits of said banks, when any such check is presented by or through any Federal Reserve Bank, postoffice or express company or any respective agent thereof. Held constitutional in Farmers' and Merchants' Bank of Monroe v. Federal Reserve Bank, 262 U. S. 649, 43 S. Ct.

pay by exchange draft an item presented to it for collection, by or through a Federal Reserve Bank, postoffice or express company, unless the drawer had specified on the check to the contrary. The statute, directed only against the practices of the Federal Reserve Bank during the par-clearance controversy, had the desired effect.[2] Since then it has apparently lain dormant until recently, when two North Carolina cases[3] raised the question as to its effect upon the rights of the payee of a check, (1) against the drawer, (2) against the collecting bank,[4] when a drawee bank in the exercise of the option granted it, remits in payment of an item, an exchange draft which is dishonored upon presentation.

(1) *As to the payee's rights against the drawer.*

It is accepted as a general rule that a check is deemed paid, and the drawer and indorsers discharged when the item is stamped "paid" and debited to the drawer's account by the drawee.[5] The

651 (1923), reversing state court decision, 183 N. C. 546, 112 S. E. 252 (1922). Similar statutes have been enacted in other states: Ala. Gen. & Loc. Acts (1920), No. 35; Fla. Gen. Laws (1921), Ch. 8532; Ga. Laws (1920), p. 107; La. Acts (1920), No. 23; Miss. Laws (1920), Ch. 183; S. D. Laws (1921), Ch. 31; Tenn. Pub. Acts (1921), Ch. 37.

The following statutes permit collecting banks to forward items direct to the drawee and accept exchange in payment: Cal. Gen. Laws (1925), Ch. 312, §5; Colo. Laws (1925), Ch. 64, p. 172; Minn. Laws (1927), Ch. 138, §1; Mont. Laws (1925), Ch. 63, p. 85; Ore. Laws (1925), Ch. 207, §126; S. C. Laws (1927), No. 202, p. 369, having a section giving a preferred claim in the assets of an insolvent drawee bank; N. D. Laws (1927), Ch. 92 H. B. 249.

[2] In order to force par clearance upon numerous southern state banks the Federal Reserve Bank of Richmond made a practice of accumulating checks on those drawees and presenting them over the counter with a demand for cash. This resulted in a loss of income from collection exchange charges and necessitated keeping large amounts of currency on hand. See C. T. Murchison, *Par Clearance of Checks* (1922), I N. C. L. REV. 133; SPAHR, CLEARANCE AND COLLECTION OF CHECKS (1926), 232, 269 *et seq;* note (1923) 37 HARV. L. REV. 133.

[3] Morris v. Cleve, 197 N. C. 253, 148 S. E. 256 (1929) suit by holder of a check against the drawer; Braswell v. Citizens Nat. Bank, 197 N. C. 229, 148 S. E. 236 (1929) suit by holder against the collecting bank.

[4] For the purposes of clarity, reference in the text to "collecting bank" will be to the final bank in the chain of collection between the depository bank and the drawee. Since North Carolina follows the "Massachusetts rule" in regard to liability of collecting banks, Bank of Rocky Mount v. Floyd, 142 N. C. 187, 55 S. E. 95 (1906), the final collecting bank, for the purposes of the discussion, will bear the liability for loss due to non-payment of a check. For a discussion of the rule see note (1924) 13 CAL. L. REV. 231. See *infra* note 27.

[5] Davidson v. Allen, 276 Pac. 43 (Idaho 1929); Baldwin's Bank v. Smith, 215 N. Y. 76, 109 N. E. 138, L. R. A. 1918 F 1089. But see Litchfield v. Reid, 195 N. C. 161, 141 S. E. 543 (1928) discussed in note (1928) 6 N. C. L. REV. 466. From a review of the cases it would appear that under the noted situation the check is deemed paid only insofar as is necessary to hold the drawee liable by reason of his acceptance. Ill. Trust and Sav. Bank v. Northern Bank

debt of the drawee to the drawer is at that time discharged and the bank becomes the debtor of the payee. A drawer is also held to be discharged when a collecting bank accepts from a drawee bank, a draft in payment of a check forwarded by it for collection, even though such acceptance be unauthorized; upon the ground that the drawer, when he issues a check engages that it will be paid in money if duly presented, and acceptance of anything else is at the payee's risk.[6] The drawer assumes the risk of loss due to the drawee's default while the check is in the ordinary course of collection but the duration of his risk must not be extended without his consent. So, a drawer may be discharged from liability when the loss is the result of circuitous routing or delay in forwarding by an intermediate collecting bank, or by any acts which extend his liability beyond the time generally necessary to present a check and receive payment.[7]

Have these rules been changed by the statute permitting payment in exchange drawn on reserve deposits? It was held by the Federal Court in *Cleve v. Craven Chemical Co.*,[8] a case which squarely presented the question herein discussed, that the drawer was not discharged; that since the drawer had not specified upon the check that it be paid in cash, he impliedly agreed that, if the check should be presented by or through a Federal Reserve bank, the drawee might pay by exchange draft. So it would seem to follow that since the drawer's discharge was formerly due to the acceptance of a draft when money could have been demanded,[9] he should now be held to have consented to an extension of the period of his liability occasioned by the acceptance of an exchange draft in payment of the check.[10]

and Trust Co., 292 Ill. 11, 126 N. E. 533 (1920). *Quaere,* however, whether a check would be paid so as to discharge the drawer when drawee made no remittance. Nineteenth Ward Bank v. First Nat. Bank, 184 Mass. 49, 67 N. E. 670 (1903); or when drawee revokes payment after finding drawer had insufficient funds. Southern Stove Works v. Converse Sav. Bank, 112 S. C. 230, 100 S. E. 75 (1919). See also Boatwright v. Rankin, 150 S. C. 374, 148 S. E. 214 (1929), to be discussed in a later issue.

[6] Federal Reserve Bank v. Malloy, 264 U. S. 160, 44 S. Ct. 296, 68 L. Ed. 617, 31 A. L. R. 1261 (1924); Jensen v. Laurel Meat Co., 71 Mont. 582, 230 Pac. 1081 (1924).

[7] N. I. L., §186; Sinclair Refining Co. v. Keith, 98 Okla. 55, 221 Pac. 1003 (1923); McEwen Bros. v. Cobb, 104 Misc. Rep. 477, 172 N. Y. Supp. 44 (1918); but see Empire-Arizona Copper Co. v. Shaw, 20 Ariz. 471, 181 Pac. 464, 4 A. L. R. 1229 and note (1917).

[8] Cleve v. Craven Chemical Co., 18 F. (2d) 711, 52 A. L. R. 980 (C. C. A., 4th, 1927).

[9] *Infra* note 22.

[10] Tarasek v. Kosciuszko Bldg. and Loan Assn., 218 Ill. App. 484 (1921), holding drawer not discharged by delay in presentation when such delay is induced by the drawer's request.

There is appealing force in the argument, especially since the apparent effect of the holding is to further protect the payee. As a matter of fact, it is the drawer who has chosen the bank on which the check is drawn and which he has trusted with his money. The payee generally knows nothing of the bank and in taking the check for value places his confidence in the drawer rather than the bank. One is less likely to accept the check of a stranger drawn upon the strongest bank in the country than that of a known responsible drawer, upon a bank known to be weak.

The North Carolina court, however, upon facts identical with those in the case referred to above, held that the drawer was discharged; that since the statute was in derogation of the common-law it should not be extended by implication in that direction further than indicated by its terms. The expressed purpose of the statute discloses no intention to deal with the rights and liabilities of the parties to an instrument. It was also urged that the choice of the agency for presentation rests with the payee[11] and that his selection of a Federal Reserve bank carried with it the authorization to accept an exchange draft in payment.

It is submitted that the result reached by the North Carolina court is practically more desirable.[12] First, to hold the drawer liable necessitates an extension of the law merchant to a point it did not previously reach in order to meet a situation arising unexpectedly from the operation of the statute. Actually the practice here condoned is merely what has been the overwhelmingly common usage and custom for a long time, namely, the payment of collection items by drafts.[13]

[11] Theoretically it may be said that the choice does rest with the payee. He may send a messenger and have it collected over the counter, but when his depository bank is once engaged to collect the item, the payee has neither choice nor knowledge as to its presentation.

[12] Apparently this suggestion has been elsewhere controverted. Jensen v. Laurel Meat Co., *supra* note 6, held the drawer discharged as in the principal case. In immediate repudiation of such result the Montana legislature passed an act holding the drawer liable, but failing to state for what length of time. Mont. Laws (1925), Ch. 65, S. B. 57. See note (1929) 4 WASH. L. REV. 39. Wyoming in 1923 passed an act holding the "maker" liable until final actual payment to the collecting bank. Wyo. Laws (1923), Ch. 84, p. 1 and 2, which right of action arising would normally become that of the payee's by subrogation. Graham v. Warehouse, 189 N. C. 533, 127 S. E. 540 (1925). In 1925 an entirely new banking law was enacted, Wyo. Laws (1925), Ch. 157, §47, from which the above maker's liability clause was omitted. It was again reinstated, however. Wyo. Laws (1927), Ch. 100, §47.

[13] See LANGSTON AND WHITNEY, BANKING PRACTICE (1921), pp. 102-3; 1 KNIFFIN, COMMERCIAL BANKING (1923), pp. 374-76; Noble v. Doughten, 72 Kan. 336, 83 Pac. 1048, 3 L. R. A. (N. S.) 1167 (1905); note (1924) 24 COL. L. REV. 903.

Secondly, if the drawer's liability is to be extended to protect the payee in the case discussed, at what point in the course of collection shall we discharge the drawer and hold that the check is paid? Certainly we cannot hold him until actual cash is finally received by the payee or his depository bank. Under the credit basis of modern banking his liability might be extended over an indefinite and often unreasonable period.[14] In truth, in the majority of banking transactions money is never transferred at all. Shall we hold him until the collecting bank has had an opportunity of accepting something in payment of the remitted exchange draft? Such solution would afford the payee little or no protection that he does not now have and would not justify the promulgation of a rule, rather arbitrary in legal contemplation and probably attended by the addition of a few more parties to collection controversies.

Lastly, since North Carolina now has a statute[15] giving the payee a preference in the assets of the insolvent drawee it is quite probable that a claim against the drawee is of more value than one against a drawer who refuses to pay a debt, which, to speak as a layman, is not actually paid. It is almost unheard of, that an insolvent bank does not have sufficient funds to pay its preferred claims. By filing a claim with the receivers a payee would be assured of payment within a much shorter time than that required for a suit against the drawer.

(2) *As to the payee's rights against the collecting bank.*

The question presented in the Braswell case[16] is whether or not, under the statute, the collecting bank is relieved of the liability it formerly had, for accepting a bank draft in payment of a check forwarded by it for collection, when such draft is not paid upon presentation.

An agent is liable to his principal, in the absence of an agreement to the contrary, for the loss occasioned by his acceptance of anything other than money in payment of a check.[17] And this rule applies to collecting banks.[18] It is based upon the assumption that a check is

[14] SPAHR, CLEARING AND COLLECTION OF CHECKS (1926), pp. 189, 462 *et seq.*
[15] N. C. Code (1927), §218 (c), subs. 14.
[16] *Supra* note 3.
[17] 1 MECHEM, AGENCY (2d ed., 1914), §946.
[18] Federal Reserve Bank v. Malloy, *supra* note 6; Jensen v. Laurel Meat Co., *supra* note 6; but see Bank of Memphis v. Bank of Clarendon, 63 Tex. Civ. App. 469, 134 S. W. 831 (1911) where collecting bank is held justified in accepting exchange draft in payment by reason of prevailing custom and usage. State v. Tyler County State Bank, 277 S. W. 625, 627, 42 A. L. R. 1347 and note (Tex. Civ. App. 1925). For discussion of custom and usage as affecting collecting bank's liability see note (1924) 24 COL. L. REV. 903.

payable in cash and the agent accepts payment in any other medium at his own risk.

In the Braswell case[19] Connor, J., says that the payee must be held to have authorized acceptance of a draft since he must have known that the collecting bank would avail itself of the postoffice as a means by which presentment would be made.[20] Therefore the payee cannot hold the bank liable. It has been held that the North Carolina statute does not change the rule that a check is payable only in cash.[21] Why should it not then follow that the collecting bank is authorized to present the check only in such manner as will enable it to demand cash?[22] A strong argument advanced in *Morris v. Cleve*[23] is that statutes in derogation of the common-law must be strictly construed under the limitation that the legislature will be presumed not to intend innovations upon the common-law, further than is indicated by their express terms. In the case of the *Federal Reserve Bank v. Malloy*,[24] where the plaintiff contended that a statute permitting forwarding direct to the drawee, also by implication carries with it the

[19] *Supra* note 3.

[20] *Infra* note 22.

[21] Farmers' and Merchants' Bank v. Federal Reserve Bank, *supra* note 1; see Dewey v. Margolis, *infra* note 22.

[22] In an admirable brief of the plaintiff appellant in the Braswell case it was forcefully argued that the statute permitting payment by draft was inapplicable. The check in that case had not been routed through the Federal Reserve Bank but had been sent by mail direct to the drawee by the collecting bank. The contention was that there was no presentment *by* the postoffice. Where a check is mailed direct to the drawee, it is held that the drawee is the agent for the purpose of presenting to itself. Smith v. Mitchell, 117 Ga. 772, 45 S. E. 47; note (1927) 52 A. L. R. 1001. It is obvious therefore that the court reached its result by construing this as presentment, "through" the postoffice. It must be admitted that the word "through" in the statute was not merely repetitious but was actually intended. Otherwise the Federal Reserve might have avoided the statute by forwarding items to another bank with instructions to present over the counter and demand cash. Since North Carolina follows the "Massachusetts rule" the presenting bank would be the agent of the payee to present and not of the prior bank in the chain of collection, and the above transaction would not be included in the phrase, "or any respective agent thereof." But if the foregoing is true it must follow that a check comes within the operation of the statute if it at any time in the course of collection comes into the hands of the postoffice. That such result was not intended by the legislature cannot be denied. See Dewey v. Margolis, 195 N. C. 307, 311, 142 S. E. 22 (1928), where when a check was presented as in the Braswell case, the court says, "It (the collecting bank) had the right to demand that the check of the defendants be paid in money. It waived this right at its own risk and not at the risk of the defendants." See also Quarles v. Taylor, 195 N. C. 313, 142 S. E. 25 (1928); Farmers' and Merchants' Bank v. Federal Reserve Bank, 262 U S. 649, 658, 659, *supra* note 1.

[23] *Supra* note 3.

[24] *Supra* note 6.

authority to accept a draft in payment, the court said, "But to justify an extension by implication of the terms of the regulation, it must be made to appear at least that the addition sought to be annexed is a necessary means to carry into effect the authority expressly given by the regulation." Accordingly, the inquiry becomes, does a statute authorizing the drawee to pay checks by exchange drafts in certain instances, carry with it the authority for a collecting bank to take such a course of collection as will force it to accept such payment?

It is submitted that it does not unless all possible methods of presentment come within the operation of the statute.[25] In view of the present turbid state of the laws pertaining to bank collections, the result of the varied constructions and interpretations advanced in the clash between statutory enactments and the law merchant, it would probably be wise to leave it to the legislature[26] to provide for the result reached in the instant case.[27]

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[25] It is said that if two or more courses of collection are open to a collecting bank, one of which may prove damaging to the payee, the bank is liable if damage does result from pursuing that course. Federal Land Bank v. Barrow, 189 N. C. 303, 309, 127, S. E. 3, 6 (1925). But see *supra* note 22. Apparently the only course of collection open not affected by the statute is to send the check by a personal agent, a practice so obviously inconceivable as to be humorous. The net effect of the deductions referred to is to make checks drawn on banks in this state non-negotiable by reason of their being payable in something other than cash. It may be argued that since it is still possible at all events to require payment in cash that negotiability has not been destroyed. Yet the doctrine of negotiability is a child of the law merchant which has as its foundation the practices of the commercial world. It cannot therefore be defined in terms foreign to commercial practice. See Note (1923) 33 YALE L. J. 752, 759, fn. 23.

[26] The American Banker's Association's proposed Bank Collection Code has now been adopted in the following states: Ind. Acts (1929), Ch. 164; Md. Laws (1929), Ch. .....; Mo. Laws (1929), p. 205; Neb. Laws (1929), Ch. 41; N. J. Laws (1929), Ch. .....; N. M. Laws (1929), Ch. 138; N. Y. Laws (1929), Ch. 589; Wash. Laws (1929), Ch. .....; Wis. Laws (1929), Ch. .....

One of the interesting changes effected by the Act is to introduce the "Massachusetts rule" into New Jersey, New York, New Mexico and Wisconsin, states which formerly followed the "New York rule" of collecting bank liability.

(a) §350 (f) of the N. Y. statute reads: "When an item is received by mail by a solvent drawee or payor bank it shall be deemed paid when the amount is finally charged to the account of the maker or drawer." §350 1 (2) contains: ". . . after having charged such item to the account of the maker or drawer thereof *or otherwise discharged his liability thereon*. . . ." Yet Mr. Brady, editor of the BANKING LAW JOURNAL, observes that in a case such as is discussed in the text the drawer remains liable, under §350 j. See (1929) 46 B. L. J. 755. The Code as adopted by Missouri does not have a section corresponding to §350 f of the N. Y. statute. The Committee on Uniform Act on Collection by Banks are at work on a Bank Collection Act which it is hoped will remedy the deficiencies of the Bankers Association Code.

[27] The effect of a contrary decision had it been reached in the Braswell case would immediately have been avoided by banks by the use of deposit slip

FEDERAL INJUNCTION AGAINST DISCRIMINATORY STATE TAX

Theoretically, in the absence of statute, injunctive relief against an illegal or invalid tax is obtainable when the case can be shown to lie clearly within one of the recognized branches of equity jurisdiction,[1] such as avoidance of multiplicity of suits,[2] removal of cloud on title,[3] or prevention of irreparable injury.[4] Actually, however, for cogent reasons of public policy derived from a supposed necessity for uninterrupted revenues, supported by restrictive legislation, equitable relief against taxes, is in most jurisdictions, either limited or denied.[5]

Thus, injunction against federal tax is practically eliminated by Rev. Stat. 3224.[6] In only the most "extraordinary and exceptional circumstances" have the provisions of the section been held inapplicable,[7] and in only one situation—distraint during the pendency of an appeal to the Board of Tax Appeals—is there any statutory recognition of injunction.[8]

contracts with their customers. It may be suggested that payees, especially merchants and credit organizations who receive a considerable number of checks might likewise protect themselves by contracts with the debtors that checks tendered in payment are taken subject to final receipt of cash or solvent credits thereon.

[1] 37 Cyc. 1258; 4 COOLEY, TAXATION (4th ed. 1924), §1641; (1894), 22 L. R. A. 700. See Dowes v. Chicago, 11 Wall. 108, 20 L. ed. 65 (1870). For helpful notes on injunction as remedy for unlawful taxation see: (1924) 22 MICH. L. R. 594; (1910) 10 COL. L. REV. 564.

[2] Raymond v. Chicago Union T. Co., 207 U. S. 20, 28 Sup. Ct. 7, 52 L. ed. 78, 12 Ann. Cas. 757 (1907); Porto Rico Tax Appeals, 16 F. (2d) 545 (C. C. A. 1st, 1926); Fairley v. Duluth, 150 Minn. 374, 185 N. W. 390, 32 A. L. R. 1258 (1924); (1870) 22 L. R. A. 703; COOLEY, *supra* note 1, §1642.

[3] Ogden City v. Armstrong, 168 U. S. 224, 18 S. Ct. 98, 42 L. ed. 444 (1897); Note (1891) 10 L. R. A. 293; COOLEY, *supra* note 1, §1643.

[4] Southern Ry. Co. v. Asheville, 69 F. 359 (C. C., W. D., N. C., 1895); Odlin v. Woodruff, 31 Fla. 160, 12 So. 227, 22 L. R. A. 699 (1893).

[5] 4 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1919), §§1779-81; 37 Cyc. 1257; (1928) 26 MICH. L. R. 922.

[6] Comp. Stat. 5947, 26 U. S. C. A. 154. Statute does not prevent injunction against collection of a penalty. Lipke v. Lederer, 259 U. S. 557, 66 L. ed. 1061, noted: (1922) 22 COL. L. REV. 761. Stockholder may maintain suit to restrain a corporation from voluntarily paying a tax. Brushaber v. Union Pac. Ry. Co., 240 U. S. 1, 60 L. ed. 493 (1916); Stanton v. Baltic Mining Co., 240 U. S. 103, 60 L. ed. 493 (1916).

[7] Hill v. Wallace, 259 U. S. 44, 66 L. ed. 822 (1922); Dodge v. Brady, 240 U. S. 122, 60 L. ed. 560 (1916).

Illegality of the tax will not take a case out of the statute. Snyder v. Marks, 109 U. S. 189, 27 L. ed. 801 (1883); Bailey v. George, 259 U. S. 16, 60 L. ed. 818 (1922). On the same day that it refused an injunction in Bailey v. George, the court held in the Child Labor Cases, 259 U. S. 20, 66 L. ed. 818 (1922), that the "tax" in question was a penalty and unconstitutional, and a few days later it granted an injunction against the collection of a penalty! Lipke v. Lederer, *supra* note 6.

[8] Sec. 272 (a) Rev. Act 1928; 26 U. S. C. A. 1048. Peerless Mills v. Rose, 28 F. (2nd) 661 (C. C. A. 5th, 1928). See: (1926) 26 COL. L. REV. 493.

Many states, including North Carolina, by statute, permit tax injunctions but limit this relief to cases involving an illegal or invalid tax.[9] This does not mean, however, that the court will restrain a tax simply because it is irregular, erroneous or excessive.[10] An illegality resulting from the violation of some fundamental law is required.[11] Thus, relief was granted when the tax was levied under an unconstitutional statute,[12] when the tax was for an unlawful purpose,[13] and when the levy was vitiated by fraud.[14]

A systematic and intentional adoption of any principle of valuation contrary to the constitutional requirements of equality and uniformity is clearly discriminatory and is a basis for injunction.[15] Hence, relief has been granted when there was undervaluation of other taxable property in same class with complainant's;[16] where corporate holdings were assessed at full value according to law while valuation of non-corporate items were illegally fixed lower;[17] where different classes of property were assessed at different percentages

[9] N. C. Code (1927) 858, 7979; Hunt v. Cooper, 194 N. C. 265, 267, 139 S. E. 446 (1927); Ry. v. Commissioners, 188 N. C. 265, 266, 124 S. E. 560 (1924). POMEROY, *supra* note 5, par. 1781, cases collected by states.

[10] Wilson v. Green, 135 N. C. 343, 47 S. E. 469 (1904); McDonald v. Teague, 119 N. C. 604, 26 S. E. 158 (1896); City. Ry. Co. v. Beard, 293 F. 448 (S. D. Ohio, 1923); Sou. Ry. v. Watts, 260 U. S. 519, 67 L. ed. 375 (1923); Fordson Coal Co. v. Moore, 31 F. (2nd) 606 (E. D. Ky. 1929); Chicago etc. Ry. v. Kendall, 266 U. S. 94, 45 S. Ct. 55, 69 L. ed. 183 (1924).

[11] Tax assessed at higher rate than allowed by city charter may be enjoined. Colquit etc. Co. v. Colquit, 146 Ga. 519, 91 S. E. 555 (1917). But tax is not illegal because the sidewalks of the taxing municipality were not of width prescribed by charter. Soniat v. White, 155 La. 290, 99 So. 223 (1924). 37 Cyc. 1259.

[12] Purnelle v. Page, 133 N. C. 125, 45 S. E. 534 (1903), state tax on salary of Federal Judge; Koonce v. Pierce Petroleum Corp., 3 S. W. (2d.) 9 (Ark. 1928), unauthorized franchise tax; Greene v. Louisville etc. Co., 244 U. S. 499, 61 L. ed. 1280, Ann. Cas. 1917 E. 88 (1917).

[13] Rigsbee v. Durham, 94 N. C. 800 (1886); Richardson v. Kildow, 218 N. W. 429 (Neb. 1928), noted: (1928) 38 YALE L. J. 122; Kan. City Sou. Ry. v. Hendricks, 150 La. 134, 90 So. 545 (1922).

[14] Johnson v. Wells Fargo & Co., 239 U. S. 234, 36 Sup. Ct. 62, 60 L. ed. 243, L. R. A. 1916 C. 522 (1915); Raymond v. Traction Co., *supra* note 2; COOLEY, *supra* note 1, §1645.

[15] Bohler v. Calloway, 267 U. S. 479, 45 S. Ct. 431, 69 L. ed. 746 (1925); Gammil Lumber Co. v. Board, 274 Fed. 630 (S. D. Miss., 1921); Elgin v. Hessen, 282 Fed. 281 (D. C. Tenn., 1921); Chicago etc. Ry. v. Eveland, 13 F. (2nd) 442 (C. C. A. 8th, 1926); G. W. Ry. v. Kendall, 266 U. S. 94, 98, 45 S. Ct. 55, 57, 69 L. ed. 183 (1924).

[16] Mayor *et als.* v. N. Y. Bay Ry. Co., 13 F. (2d) 982 (C. C. A. 3rd, 1926); Bank of Ariz. v. Howe, 293 Fed. 600 (D. C. Ariz., 1923); Sunday Lake Iron Co. v. Wakefield, 247 U. S. 350, 352, 38 S. Ct. 495, 62 L. ed. 1155 (1918).

[17] Boonville Nat. Bank v. Schlotzhauer, 298 S. W. 732, 55 A. L. R. 489 (Mo. 1927); Magnolia Bank v. Bd. Supervisions, 111 Miss. 857, 72 So. 697, 55 A. L. R. 1365 (1916).

of value, contrary to law;[18] and where complainant's property was so exorbitantly valued as to amount to spoliation.[19] However, there must be clear and convincing proof of intentional and systematic discrimination,[20] and injunctive relief has been refused when the assessment was due to error,[21] or to mistakes of judgment.[22]

Many cases involving injunction against discriminatory taxes are carried into the Federal Courts on the grounds of violation of the due process and equal protection clauses of the constitution.[23] Once having obtained jurisdiction, the power of the United States courts to grant equitable relief against an illegal state tax is limited only by the provision of the Judicial Code[24] concerning the adequacy of the remedy on the law side of the court.[25]

It is interesting in this connection to note that two recent Federal cases, one from North Carolina[26] and one from Ohio[27] apparently reach opposite results. In each case the complainant alleged that its own property had been assessed at, or above, its proper value while the property of others had been systematically and intentionally assessed at less than actual value. In both states, injunction against illegal tax is recognized by statute,[28] and in each an action at law may be brought for recovery of tax paid under protest.[29]

[18] Chi. etc. Ry. v. Osborne, 265 U. S. 14, 44 S. Ct. 431, 68 L. ed. 878 (1924); Mobile & O. Ry. Co. v. Schnipper, 31 F. (2d) 587 (E. D., Ill., 1929); Chi. M. & St. P. Ry. v. Kendall, 278 Fed. 298 (S. D. Iowa, 1921). But see (1910) 3 COL. L. REV. 298.

[19] Nevada-California Power Co. v. Hamilton, 240 Fed. 485 (D. C. Nevada, 1917); Sanford v. Roberts, 193 Ky. 377, 236 S. W. 571 (1922); City of Sweetwater v. Baird Devel. Co., 203 S. W. 801 (Tex. Civ. App. 1918).

[20] Taylor v. L. & N. Ry. Co., 88 Fed. 350, 373 (C. C. A. 6th, 1898); Louisville Trust Co. v. Stone, 107 Fed. 305, 308 (C. C. A. 6th, 1901); Chi. Ry. Co. v. Kendall, 266 U. S. 94, 45 S. Ct. 55, 69 L. ed. 183 (1924). And as a necessary condition precedent to equitable relief, the complainant must pay the amount of the tax he would have to pay if the discrimination did not exist. Raymond v. T. Co., *supra* note 2; POMEROY, *supra* note 5, §1784.

[21] Siler v. Bd., 221 Ky. 100, 298 S. W. 189 (1927), noted: (1928) 16 KY. L. J. 275.

[22] Harrison v. Ry., 142 Ark. 118, 218 S. W. 208 (1920).

[23] See Powell, *Due Process Tests of State Taxation* (1926) 74 U. PA. L. REV. 423, 573.

[24] §267, 28 U. S. C. A. 384.

[25] Federal Courts in the exercise of equity jurisdiction not bound by state statute prohibiting tax injunction: Standard Oil Co. v. Howe, 257 Fed. 481 (C. C. A. 9th, 1919); *Ex parte* Tyler, 149 U. S. 164, 188, 37 L. ed. 689 (1893).

[26] Henrietta Mills Co. v. Rutherford County, 32 F. (2d) 570 (C. C. A. 4th, 1929).

[27] Conn v. Ringer, 32 F. (2d.) 639 (C. C. A. 6th, 1929).

[28] North Carolina: N. C. Cons. Stat. Ann. (1919) §858; Ohio: Gen. Code §12075.

[29] North Carolina: N. C. Cons. Stat. Ann. (1919) §7979; Ohio: Gen. Code §12075.

Held: in the North Carolina case, adequate remedy at law, no relief; in the Ohio case, adequacy of the legal remedy doubtful, injunction granted.

The two cases are, however, distinguishable along these lines: (1) In the Ohio case, the complainants were trustees of a charitable trust, the disruption of whose functions perhaps affected the public interest sufficiently to counterbalance the state's interest in the certainty of collection of taxes; in the North Carolina case, the complainant was a manufacturing company. (2) In the Ohio case, the discrimination alleged was between real property assessments on the one hand and those of personal property on the other, each class concededly being treated uniformly within itself; in the North Carolina case, the allegation was that as to the same class of property, complainant was assessed at a figure in excess of its property's true value, while the assessed value of others' was fixed at 60 per cent of its true value. (3) In the Ohio case, the tax commission, at plaintiff's request alone, could not remedy the situation; in the North Carolina case, a similar administrative agency had actually lowered plaintiff's assessment somewhat. (4) The court in the Ohio case was not concerned with the adequacy of a suit to recover taxes paid under protest but with the efficacies of an untaken appeal to the tax commission to cause personal property to share its burden of taxes so as to prevent such burdensome taxes on realty; the court in the North Carolina case was wholly concerned with the adequacy, under the North Carolina statute, of a possible suit on the law side of the Federal Court to recover taxes to be paid under protest.

Even so, the view of the Federal Court in North Carolina seems unnecessarily restrictive. It felt that a Federal Court should be cautious about enjoining the collection of a state tax. The Ohio court expressed no such hesitancy, however, and, as the cases cited in the note[30] indicate, this caution has frequently yielded to the demands of meritorious facts. Moreover, the Federal law court, if and when it gets the case, will, if the allegations are found true, interfere by its judgment to as great an extent with the fiscal operations of the state. Perhaps, however, although the case was considered on the sufficiency of the allegations in the complaint, the

[30] Accord: Cummings v. Nat. Bank, 101 U. S. 153, 25 L. ed. 903 (1879); Western Union v. Tax Com., 21 F. (2d) 355 (C. C. A. 6th, 1927); Dawson v. Distilleries etc. Co., 255 U. S. 288, 65 L. ed. 638 (1920); Gammil Lumber Co., *supra* note 15; State Bd. v. Ry., 191 Ind. 282, 130 N. E. 691 (1921); Paxton v. Ohio Fuel Co., 11 F. (2d) 740 (C. C. A. 6th, 1926).

court was unconsciously influenced by the fact that the District Court had expressly found that no discrimination of the sort alleged actually existed.

If discrimination between the assessment of real and personal property was enough in the Ohio case, is not the alleged discrimination between assessments of properties in the same class more deserving of equitable relief?[31] Moreover, the exception in the North Carolina statute, in favor of injunctive relief against illegal taxes, creates no greater right to that relief than exists in jurisdictions without any such statute.[32] The view that this statute, by virtue of that exception, operates to increase the remedies available in the Federal Equity Court and must therefore be ignored, is perhaps derived from the court's willingness to make the same statute, insofar as it authorizes suits to recover taxes paid under protest, the affirmative basis of a proceeding on the law side of the same tribunal.

Finally, even if a recovery at law of the difference between the tax on a legal assessment and the actual amount of the tax paid under protest, with interest, will theoretically make the complainant whole, and even if this decision would be *res judicata* as to subsequent levies pending the next quadrennial assessment (which might be doubted in view of the technical change in the issues and subject matter from year to year) the relief to be awarded at law can take no notice of the jeopardizing of the complainant's financial structure incident to the loss of those funds during the period of suit. A jury could not deal intelligently with the issue to be presented at law; a judge sitting alone will have to handle the task that a court consisting of three judges in the instant case refused to attempt. It is not believed that the remedy at law is adequate.

The North Carolina case is now before the Supreme Court of the United States on a writ of *certiorari*.

THOMAS W. SPRINKLE.

TITLE TO CORPORATE PROPERTY UPON DISSOLUTION

Smith v. Dicks[1] presents a question as to property rights of stockholders where, without knowledge on the part of the corporate mem-

[31] See Western Union Tel. Co. v. Tax. Com., *supra* note 30.

[32] See notes 1 to 5 *supra*. The court examined the state supreme court's construction of the statute and found it difficult to determine precisely when injunction against illegal taxes would be granted. It assumed, however, that the state court would have granted that relief in the case at bar. Herietta Mills Co. v. Rutherford County, *supra* note 26, at p. 573.

[1] 197 N. C. 355, 148 S. E. 463 (1929).

bers, the charter had expired by limitation and operations had been continued thereafter for seven years, without any move for winding up as provided for by statute. It was held that upon expiration of the charter, the only outstanding indebtedness being a mortgage, the members became tenants in common of an undivided interest in fee, subject to the mortgage indebtedness, with power of conveyance accordingly on the part of any member.

Upon the expiration or revocation of a corporate charter with resultant dissolution, all jurisdictions in dealing with the assets, in the final analysis, reach the same practical result—payment of corporate debts with distribution of any residue among the stockholders. But in the matter of defining stockholders' rights, and the situs of title, in the corporate assets during the period of dissolution, opinions are both confusing and conflicting.[2] Decisions may be roughly grouped under three heads.

Under the so-called "trust-fund" doctrine[3] the assets of a dissolved corporation constitute a trust fund for the primary benefit of creditors, with distribution of the residue among the stockholders. Legal title to the property vests in the trustees[4] who are provided for by statute[5] or appointed by the court,[6] the shareholders having only an equitable interest.[7] An invention of the courts of equity whereby to defeat the old common law rules of reverter and escheat,[8] the "trust-fund" doctrine has been continued in modern times by decis-

[2] See 8 THOMPSON, CORPORATIONS (3rd ed.), §§6505-6523; BALLANTINE, CORPORATIONS (1927), §267; note (1927) 47 A. L. R. 1288.

[3] McWilliams v. Excelsior Coal Co., 298 Fed. 884 (C. C. A. 8th. 1924); Burke v. Wall, 29 La. Anno. 38, 29 Am. Rep. 316 (1877); Roman Catholic Church v. Texas & P. R. Co., 41 Fed. 564 (C. C. E. D. La. 1890); New York B. & E. R. Co. v. Motil, 81 Conn. 466, 71 Atl. 563 (1908); note (1927) 47 A. L. R. 1288; (1921) 35 HARV. L. REV. 58; (1916) 29 HARV. L. REV. 780.

[4] Aalwyns Law Institute v. Martin, 173 Cal. 21, 159 Pac. 158 (1916); Roseboom v. Warner, 132 Ill. 81, 23 N. E. 339 (1890); Neptune Fire Engine & Hose Co. v. Board of Education, 166 Ky. 1, 178 S. W. 1138 (1915); Thomas v. Rogers, 191 N. C. 736, 133 S. E. 18 (1926); In re Friedman, 164 N. Y. Supp. 892, 177 App. Div. 755 (1917).

[5] Young v. Fitch, 182 Ky. 29, 206 S. W. 29 (1918); N. C. Con. Stat. Ann. (1919), §1194.

[6] Bacon v. Robertson, *supra* note 3; N. C. Con. Stat. Ann. (1919), §1194.

[7] Morman Church v. United States, 136 U. S. 1, 34 L. Ed. 478 (1889); Richards v. Attleboro Nat. Bank, 148 Mass. 187, 19 N. E. 353, 1 L. R. A. 781 (1889); Muir v Citizens Nat. Bank, 39 Wash. 57, 80 Pac. 1007 (1905), holding that an assignment or transfer of stock by a stockholder after the dissolution of a corporation is merely an equitable assignment of his interests in the assets of the concern as it may appear upon the settlement.

[8] For cases dealing with the doctrines of reverter and escheat see: Neptune Fire Engine & Hose Co. v. Board of Education, *supra* note 4; Wilson v. Leary, 120 N. C. 90, 26 S. E. 30 (1897); Note (1927) 47 A. L. R. 1288, 1334.

ions and statutes. Under the statutes in many states provision is made for a period in which to wind up the corporate affairs,[9] with stipulations for the corporate officers to act as trustees,[10] or for appointment of receivers,[11] or for the corporation itself to act as trustee.[12]

Another view, although protecting the rights of creditors under a trust, presents a hybrid situation so far as the interests of the stockholders are concerned, wherein the interests of stockholders are equitable, and legal title is in the trustees until debts are paid; legal title in the residue thereafter vesting in the stockholders as tenants in common.[13] North Carolina comes under this grouping by virtue of construction of statutes and decisions; statutes provide for a three year period of dissolution during which in the absence of court action, the directors are trustees;[14] decisions hold that the assets of a dead corporation constitute a trust fund;[15] and the principal case[16] holds that in the absence of corporate debts and active dissolution proceedings, the stockholders become tenants in common.

Still other decisions bring forward the doctrine that when the corporate existence ceases the stockholders become vested with a legal title to its property as tenants in common, subject, of course, to

[9] Refer to statutes of particular states. For North Carolina see N. C. Con. Stat. Ann. (1919), §1193, providing a 3 year period; Buckley v. Anderson *et al*, 137 Ala. 325, 34 So. 238 (1903); Sullivan Timber Co. v. Black, 159 Ala. 570, 48 So. 870 (1909); Boston Towboat Co. v. Medford Nat. Bank, 228 Mass. 484, 117 N. E. 928 (1917); Knott v. Evening Post Co., 124 Fed. 342 (C. C. W. D. Ky. 1903); (1928) 17 Ky. L. J. 54, pointing out that property held by corporation before dissolution vests in stockholders subject to corporate liabilities; and in interpreting the Kentucky statute authorizing a corporation to close up its affairs on expiration of charter, it was held that no specific mode was described, nor was one at all desirable.

[10] Thomas v. Rogers, 191 N. C. 736, 133 S. E. 18 (1926); In re Friedman, *supra* note 4; Loudermilk v. Butlert, 182 N. C. 502, 109 S. E. 571 (1921). Refer to statutes of particular states: Bucklet v. Anderson, *supra* note 9; Sullivan Timber Co. v. Black, *supra* note 9.

[11] Refer to statutes of particular states: State v. New Orleans Debenture Redemption Co., 107 La. 562, 32 So. 102 (1902).

[12] McBride v. Murphy, 124 Atl. 198 (Del. Ch. 1924); also refer to statutes of particular states.

[13] Baldwin v. Johnson, 95 Tex. 85, 65 S. W. 181 (1901); Capuccio v. Caire, 189 Cal. 154, 209 Pac. 367 (1922).

[14] N. C. Con. Stat. Ann. (1919), §1194.

[15] Heggie v. Bldg. & Loan Ass'n., 107 N. C. 581, 12 S. E. 275 (1890); Merchants Nat. Bank of Richmond v. Newton Cotton Mills, 115 N. C. 507, 20 S. E. 765 (1894); Holshouser v. Copper Co., 138 N. C. 248, 50 S. E. 650 (1905); Hill v. Lumber Co., 113 N. C. 174, 18 S. E. 107 (1893); Loudermilk v. Butlert, 182 N. C. 502, 109 S. E. 571 (1921).

[16] Smith v. Dicks, *supra* note 1.

corporate debts.[17] In accepting this view some courts lay down varying limitations in that the title is held to vest in the stockholders as tenants in common on conditions that no receiver is appointed,[18] or there is no insolvency,[19] or creditors,[20] or that the property will be subject to a "trust" for the benefit of creditors.[21] Still another holds that, even though the debts have already been extinguished, title vests in the stockholders only at the end of the statutory period for winding up.[22] A few courts hold that title vests in the stockholders as a partnership,[23] while others use the terms "tenants in common" and "partnership" interchangeably.[24]

By drawing an analogy to the situation upon the death intestate of a natural person, one court[25] holds that even though a trustee be appointed he would not hold the legal title to the property, but would only be the custodian of the court with power of disposition, for the purpose of paying debts and of distribution, his right being similar to that of an administrator, legal title having "descended" to the stockholders. On the other hand, even courts firmly adhering to the "trust-fund" doctrine, or to the tenancy in common theory, draw an analogy to the situation where a natural person has died intestate.[26]

In contradistinction to the holdings of decisions previously discussed, it is submitted that in those states providing for a winding-up

[17] Capital Garage Co. v. Powell, 98 Vt. 145, 118 Atl. 524 (1922); Meredith v. Washington Loan & Trust Co., 151 Md. 274, 134 Atl. 206 (1926); Shadoin v. Sellars, 237 Ky. 751, 4 S. W. (2d) 717 (1928); Young v. Fitch, 181 Ky. 20, 206 S. W. 29 (1918); Taylor v. Interstate Investment Co., 75 Wash. 490, 135 Pac. 240 (1913); Montgomery v. Heath, 283 S. W. 324 (Tex. Civ. App. 1926).

[18] Cummington Realty Ass'n. v. Whitten, 238 Mass. 313, 132 N. E. 53 (1921); Baldwin v. Johnson, *supra* note 13; Stone v. Edwards, 32 Ga. 479, 124 S. E. 54 (1924).

[19] Baldwin v. Johnson, *supra* note 13.

[20] Service & Wright Lumber Co. v. Sumpter Valley Ry. Co., 81 Ore. 32, 158 Pac. 175 (1916); Stone v. Edwards, *supra* note 18.

[21] Stearns Coal & Lumber Co. v. Van Winkle *et al*, 221 Fed. 590 (E. D. Ky. 1915); Pioneer Coal Co. v. Asher, 210 Ky. 498, 276 S. W. 487 (1925).

[22] Stearns Coal & Lumber Co. v. Van Winkle, *supra* note 21; Ewald Iron Co. v. Commonwealth, 140 Ky. 692, 131 S. W. 774 (1910).

[23] Ewald Iron Co. v. Commonwealth, *supra* note 22.

[24] Mason v. Pewabic Mining Co., 133 U. S. 50, 33 L. ed. 524 (1890).

[25] Stone v. Edwards, *supra* note 18; see Service & Wright Lumber Co. v. Sumter Valley Ry. Co., *supra* note 20.

[26] Stearns Coal & Lumber Co. v. Van Winkle, *supra* note 21; Stone v. Edwards, 32 Ga. 479, 124 S. E. 54, 56, the court observing, "Oddly enough, but more specifically, the relation of the stockholders to the assets of the dissolved corporation is still more similar to the relation of a surviving husband or wife to the real estate of a spouse who died intestate, leaving no lineal decendants"; Von Glahn v. DeRosset, 81 N. C. 472 (1879); Dobson v. Simonton, 86 N. C. 495 (1882); Wilson v. Leary, 120 N. C. 90, 26 S. E. 30 (1897).

period no actual change of title takes place upon the expiration or annullment of the corporate charter. The dying process is extended for a fixed or reasonable period, wherein the corporation, though nominally dead, still lives for the purpose of liquidation. Title to property remains in the corporation,[27] the same as before its partial legal death, subject to the winding-up proceedings. During this period the stockholders are not tenants in common of the corporate property, but have the same equitable interests as existed before the charter's expiration. At the end of the period of extended existence, in the absence of court action creating a receivership or trust, legal title descends to the stockholders as tenants in common, in exactly the same manner as title to realty vests in heirs upon death of a natural person; and concurrence of each individual stockholder would be necessary to convey his interest.[28] If debts still existed after such "descent" of title, the property of the former corporation, now vested in the stockholders as tenants in common, would be liable.

Regardless of which theory is adopted as to the place of title during dissolution, the practical results will be the same in that creditors will always be protected, and a distribution made of any residue. But it is submitted that the exigencies of modern business demand uniformity in the decisions, and the adoption of the simplest and most practicable theory in order that disposition of interests in dead corporations may be facilitated, and proceedural difficulties avoided.

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[27] See Duchutes Co. v. Lara, 127 Ore. 57, 270 Pac. 913 (1928), that corporation is capable of serving as repository of title during winding up period. In Rossi v. Caire, 186 Cal. 544, 199 Pac. 1042 (1921), the court squarely faces the question of "where is the title?" but refuses to answer, being content with the statement that whether the interests of the stockholders be legal or equitable, it is a vested right which becomes absolute when the statutory trust of the former directors or trustee of the dead corporation have been fulfilled, there being no further claim necessitating the right of disposition of corporate property in the trustees in order to insure satisfaction of creditors.

[28] See Capuccio v. Caire, 189 Cal. 514, 209 Pac. 367 (1922), that a revived corporation could become vested with property of former dissolved corporation only by means of conveyances from all of stockholders of former corporation.