RECENT CASES

Banks and Banking—Preferences—[Federal].—The plaintiff's note was received by a national bank at which it was payable and then surrendered to the maker in return for his check upon his account. Upon failure of the bank before it had paid the plaintiff, an action was brought under a state statute which, in such a situation, purported to impress a trust upon the assets of the bank in favor of the owner of the note. N.Y. Cahill's Consol. Laws (1933), c. 39 § 350–1, subd. 2 (Bank Collection Code, section 13 (2)). *Held,* that the state statute was "unavailing" because contrary to the federal statute, 13 Stat. 115 (1864), U.S.C.A. title 12, § 194 (1926), construed to forbid certain preferences among claims to the assets of failed national banks. *Old Company's Lehigh, Inc. v. Meeker,* 71 F. (2d) 280 (C.C.A. 2d 1934).

State legislation may govern national banks only so long as it does not conflict with federal law. *McClellan v. Chipman,* 164 U.S. 347 (1896); *First National Bank v. Missouri,* 263 U.S. 640 (1924); *Lewis v. Fidelity & Deposit Co.,* 54 Sup. Ct. 848 (1934); *Webster v. Sweat,* 65 F. (2d) 109 (C.C.A. 5th 1933); *Royal Mfg. Co. v. Spradlin,* 6 F. Supp. 98 (D.C.N.C. 1934). In the distribution of assets of failed banks, the National Banking Act, 13 Stat. 15 (1864), U.S.C.A. Title 12, § 194 (1926) has been construed to forbid preferences dependent for their existence upon the fact of insolvency or failure. *Davis v. Elmira Savings Bank,* 161 U.S. 275 (1896); *Steele v. Randall,* 19 F. (2d) 40 (C.C.A. 8th 1927); *Palo Alto County v. Ulrich,* 199 Iowa 1, 201 N.W. 132 (1924); 7 Michie, Banks and Banking (perm. ed. 1932), § 251. The New York statute, N.Y. Cahill's Consol. Laws (1933), c. 39, § 350–1, subd. 2 (Bank Collection Code, § 13(2)), by the court's construction in the present case, made the preference dependent upon the failure or insolvency of the bank; hence, the statute conflicted with the federal law. See Bogert, Failed Banks, Collection Items, and Trust Preferences, 29 Mich. L. Rev. 545, 566 n. 43, where this decision is, in effect, anticipated; see also the proposed Uniform Bank Collection Act (Tentative Draft #5, 1934), § 24, which is objectionable for the same reason. In place of the invalid state statute the applicable federal law is of a simple debtor-creditor relationship. *Larabee Flour Mills v. First National Bank,* 13 F. (2d) 330 (C.C.A. 8th 1926); *Allied Mills v. Horton,* 65 F. (2d) 708 (C.C.A. 7th 1933); *Lifsey v. Goodyear Tire and Rubber Co.,* 67 F.(2d) 82 (C.C.A. 4th 1933); *First National Bank v. Miami,* 69 F. (2d) 346 (C.C.A. 5th 1934).

Though the result reached by allowing the preference sought to be created by the Bank Collection Code is to place the losses of the bank collection system due to bank failures upon the depositors of closed banks, instead of upon those who use the bank collection system, (Bogert, Failed Banks, Collection Items, and Trust Preferences, 29 Mich. L. Rev. 545, 561 (1931)), the present decision creates an arbitrary distinction between state and national banks. This may be avoided by creating the preference at the time of the charge or collection of the item. *Royal Mfg. Co. v. Spradlin,* 6 F. Supp. 98 (D.C.N.C. 1934); North Carolina Code (1931), c. 5, § 218(c).

Evidence—Cross-Examination of Witness on Collateral Matters to Discredit—[Federal].—A federal prohibition officer was prosecuted for accepting a bribe. The

prosecuting witness testified that he gave the defendant marked money, which was found in his possession, in return for protection of his speak-easy. When cross-examined as to the source of the money he refused to answer, and an exception was taken to the ruling that he was not required to answer. *Held*, that the cross-examination was properly excluded provided that the money in question had not come from some one in the government service. *United States v. Remington*, 64 F. (2d) 386 (C.C.A. 2d 1933).

While the decision itself is to be expected, the case interest lies in the fact that the court seems to feel that if the total result would be changed by discrediting the prosecuting witness, contradicting his testimony as to the source of the money though not from governmental sources, it would be permissable to cross-examine him concerning this purely personal matter in no way connected with the case at bar. The Supreme Court in 1873 decided in a very similar case that the source of money was immaterial, and the information might be reserved if it were purely personal. *Rea v. Missouri*, 84 U.S. 532 (1873). Text writers uniformly say that a witness cannot be contradicted on facts which could not have been shown in evidence for any purpose independently of the contradiction. 2 Wigmore, Evidence (2d ed. 1923), 242, 432, 435, §§ 878, 1001, 1003.

When *Alford v. United States*, 282 U.S. 687 (1932), was pressed in support of the alleged prejudicial error the court seized an almost apparitional opportunity to treat their own decision, *United States v. Easterday*, 57 F. (2d) 165 (C.C.A. 2d 1932), certiorari denied, 286 U.S. 218 (1932), as a modification of the urged case. The *Alford* case was one in which it was held error to refuse cross-examination as to a witness's residence, the declared purpose being to show coercion by the government in whose custody the witness was residing. In the *Easterday* case the question of residence was put, answer refused, and the refusal upheld on appeal, but there was no effort on the part of the defense to show the present compulsion of the witness by the prosecution. The cases and their distinctions are patent, but their relation to the case at hand is abstruse. The question involved in the present case is the demanded right to disparage a prosecuting witness's testimony by showing a particular instance of fabrication, the subject matter of which is not involved in the case and could not be admitted for the purpose attempted.

It would, however, have been proper cross-examination to ask the source of the money to lay a foundation for contradicting evidence to prove that the witness had no money and inferentially could not have bribed the defendant, 2 Bishop, Criminal Law (9th ed., Zane and Zollman, 1923), 777, § 1032. In the present case that had already been done without question when the defendant alleged that he had received the money from a certain person who on examination denied that he had paid the money to the defendant. In *East Tenn., Va., and Ga. Ry. Co. v. Daniel*, 91 Ga. 768, 18 S.E. 22 (1893), the decision of the lower court was reversed when it did not allow the defense to prove by a storekeeper that the witness did not go to his store and purchase tobacco at the time referred to, as the witness had testified, to explain his presence at the time and place in question. Such testimony would have been proper to discredit the witness as to the fact of his presence. In the prosecution of a mail carrier for abstraction of money from a letter, *Scott v. United States*, 172 U.S. 343 (1898), the defendant attempted to raise a suspicion that his enemies had placed the marked money in his pockets. The enemies named were properly allowed to testify that they had no ill will toward the defendant and that they had never quarrelled with him, the object of such testimony

being to refute the inference from defendant's testimony that he had lawful possession of the money.

Such cross-examination would also have been proper to show that the prosecuting witness had obtained the money from someone in the governmental service to lay the foundation for the possible defense of entrapment. See *Martin v. United States*, 278 Fed. 913 (C.C.A. 2d 1922); *O'Brien v. United States*, 51 F. (2d) 674 (C.C.A. 9th 1931).

In the case under consideration, however, the defense did not state any such purposes for the cross-examination, and the questions were not raised.

Life Insurance—Beneficiary as Murderer and Sole Next of Kin—[West Virginia].—The beneficiary of a life insurance policy and sole next of kin of the insured murdered the insured. The administrator of the insured's estate, which was debt free, sued for the proceeds of the policy but was denied recovery. *Wickline v. Phoenix Mut. Life Ins. Co.*, 106 W.Va. 424, 145 S.E. 743 (1928). The state then sued the insurance company claiming the proceeds as bona vacantia. *Held*, there being no equity in favor of the state, the insurance company need not pay. *State v. Phoenix Mut. Life Ins. Co.*, 170 S.E. 909 (W.Va. 1933).

A beneficiary of a life insurance policy who murders the insured loses his rights under the policy and the insurance money goes to the estate of the insured. *Inter-Southern Life Ins. Co. v. Butts*, 179 Ark. 349, 16 S.W. (2d) 184 (1929); *Schmidt v. Northern Life Assn.* 112 Ia. 41, 83 N.W. 800 (1900); *Anderson v. Life Ins. Co. of Va.*, 152 N.C. 1, 67 S.E. 53 (1910); but see *Spicer v. N.Y. Life Ins. Co.*, 268 Fed. 500 (1920). Where the wrongdoing beneficiary is also a next of kin of the insured some courts permit the insured's administrator to recover, apparently even though this may permit the murderer to take as next of kin. *National Benefit Life Ins. Co. v. Davis*, 38 Oh. App. 454, 176 N.E. 490 (1929); *Equitable Life Assurance Society v. Weightman*, 61 Okla. 106, 160 Pac. 629 (1916); *Murchison v. Murchison*, 203 S.W. 423 (Tex. Civ. App. 1918). Other courts recognize the administrator's right to recover, but treat the murderer as non-existent for purposes of distribution of the estate, thus preventing the murderer recovering as next of kin after having denied him as beneficiary. *Illinois Bankers' Life Assn. v. Collins*, 341 Ill. 548, 173 N.E. 465 (1930); *Slocum v. Metropolitan Life Ins. Co.*, 245 Mass. 565, 139 N.E. 816 (1923); *De Zotell v. Mutual Life Ins. Co. of N.Y.*, 60 S.D. 532, 245 N.W. 58 (1932). But, since under the view of certain courts the statutes of descent and distribution allow no exception, the policy which prevented the murderer from recovering as beneficiary will also prevent the administrator from recovering. *McDonald v. Mutual Life Ins. Co.*, 178 Ia. 863, 160 N.W. 289 (1916); *Johnston v. Metropolitan Life Ins. Co.*, 85 W.Va. 70, 100 S.E. 865 (1919). This was the position taken by the West Virginia court when the administrator sued on the policy involved in the present case. *Wickline v. Phoenix Mut. Life Ins. Co.*, 106 W.Va. 424, 145 S.E. 743 (1928). The court in that case might well have permitted the administrator to recover and then have held the sole distributee-murderer as a constructive trustee for the ones properly entitled to take, all the other heirs of the insured except himself, the state taking as bona vacantia in the absence of other heirs. This solution has been suggested for an analogous problem, the murder of an ancestor or testator by an heir or legatee. See *Barnett v. Couey*, 224 Mo. App. 913, 27 S.W. (2d) 757 (1930); *Ellerson v. Westcott*, 148 N.Y. 149, 42 N.E. 540 (1896); *Van Alstyne v. Tuffy*, 169 N.Y.S. 173, 103 Misc. 445 (1918); *Bryant v. Bryant*, 193 N.C. 372, 137 S.E. 188 (1927); Ames,