The opposite view, that insolvency alone does not confer upon the court power to exercise the doctrine of equitable set-off, is held in many cases.

In Bradley *v.* Angell, 3 Comstock, 475, the reason for the position is thus stated: "The proposition is, in effect, to change the contract of the parties in some of its most important provisions, in order to meet a supposed equity arising from matters *ex post facto*."

A similar ground is taken in Spaulding *v.* Backus, 122 Mass., 553; Appeal of Farmers' and Mechanics' Bank, 48 Pa., 57; Bosler *v.* Bank, 4 Pa., 32; Kensington National Bank *v.* Shoemaker, 11 W. N. C. (Pa.), 215; Jeffryes *v.* Agra & Masterman's Bank, L. R., 2 Eq., 674; *in re* Commercial Bank, L. R., 1 Chan. App., 538; Lockwood *v.* Beckwith, 6 Mich., 168; Henderson *v.* McVey, 32 Ala., 471; Walker *v.* Wigginton, 50 Ala., 579.

As it is said in the principal case, these authorities are irreconcilable. In those States where there is no express declaration upon this question it is impossible to say which doctrine will be adopted.

The rule followed in the principal case seems, however, to be preferable. As an assignor for the benefit of creditors is not a purchaser for value, but a mere volunteer, representing the insolvent and the insolvent estate, it is not clear why a debt against the insolvent, maturing after insolvency, should not be set off in the same manner as one maturing before. The assignment is made for the benefit of all creditors of the insolvent, and it is immaterial, as far as the question of distribution is concerned, whether the debt is due at insolvency or not. If due at the time of distribution it is entitled to participate. There appears to be no ground for making the maturity of the debt at the time of insolvency determine the right to set-off. If allowing a set-off where the debt is not due at insolvency is to make a preference of creditors, it would also appear that such allowance to debts matured at insolvency creates a similar preference.

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EDITORIAL NOTES.

BY G. W. P.

As the present number of the AMERICAN LAW REGISTER AND REVIEW goes to press, news comes to us of the death of one of our most valued contributors. WILLIAM WHARTON SMITH, ESQ., of the Philadelphia Bar, was drowned at Newport, on July 3d. Those of the "Abstracts of Recent Decisions" in this number which are signed with his initials will have an interest well-nigh sacred in the

eyes of those who knew him, as being the last piece of work wrought by a dearly loved friend whose working days are over.

After taking his bachelor's degree at Harvard, Mr. SMITH entered the Law School of the University of Pennsylvania, from which he was graduated in the spring of 1888. The Sharswood Prize was awarded him for his able graduation essay on "Laws Impairing the Obligation of Contracts." Since that time he has devoted himself assiduously to the study and practice of his profession. He wrote the article on "Joint Executors," in the *American and English Encyclopedia of Law*, and contributed to the AMERICAN LAW REGISTER for December, 1891, a valuable annotation on the case of Hoyt *v.* Hoyt. For the April number of the current volume of the AMERICAN LAW REGISTER AND REVIEW he wrote the note on "Contributory Negligence," which has received much favorable notice. He had lately been collecting material for a monograph on the same subject, and had set himself the task of preparing, during the present summer, a work on the "Jurisdiction of Orphans' Courts in Pennsylvania as Courts of Equity." Only a few weeks ago he was elected to the honorable position of President of the Law Academy of Philadelphia.

In him the Junior Bar loses one of its most promising members; but it is not only the profession that feels his loss. His death has cast a gloom over an unusually large circle of acquaintances; and it has plunged in a grief too sacred to be expressed in public print that smaller circle of warm friends, who felt for him a love which it is the privilege of few men to inspire.

STARE DECISIS: A NEW METHOD OF AVOIDING THE RULE SUGGESTED.—The rule of *Stare Decisis*, together with the nature of appellate courts generally, has lately received a lengthy exposition by the Supreme Court of Georgia.[1] The necessity for the rule is set forth, half hu-

[1] Ellison *v.* Georgia Railroad and Banking Company, decided October 19, 1891.

morously, in the opinion by Chief-Justice BECKLEY: "Some courts," writes the learned Judge, "live by correcting the errors of others and adhering to their own. On these terms courts of final review hold their existence, or those of them which are strictly and exclusively courts of review, without any original jurisdiction, and with no direct function but to find fault or see that none can be found. With these exalted tribunals, who live only to judge the Judges, the rule of *Stare Decisis* is not only a canon of the public good, but a law of self-preservation. At the peril of their lives they must discover error abroad, and be discreetly blind to its commission at home. Were they as ready to correct themselves as others, they could no longer speak as absolute oracles of legal truth; the reason for their existence would disappear, and then destruction would speedily supervene. Nevertheless, without serious detriment to the public, or peril to themselves, they can and do admit, now and then, with cautious reserve, that they have made a mistake. Their rigid dogma of infallibility allows of this much relaxation in favor of truth, unwittingly forsaken. Indeed, reversion to the truth, in rare instances, is highly necessary to their material well-being. Though it is a temporary degradation from the type of judicial perfection, it has to be endured to keep the type itself respectable. Minor errors, even if quite obvious, or important errors, if their existence be fairly doubtful, may be adhered to, and repeated indefinitely; but the only treatment of a great and glaring error, affecting the current administration of justice in all the courts of original jurisdiction, is to correct it. When an error is of this magnitude, and moves in so wide an orbit that it competes with truth in the struggle for existence, the maxim for a Supreme Court—supreme in the majesty of duty as well as in the majesty of power—is not *Stare Decisis*, but *fiat justitia ruat cælum.*"

The frank way in which the Chief Justice acknowledges that courts of appeal, not only live by correcting the errors of others, but, by "adhering to their own" is refreshing. Yet it may be questioned whether appellate courts are necessarily always placed in the position, when

a wrong principle of law leads to a mistaken decision and a similar case comes before them, of adhering to the error, or lowering their dignity by confessing themselves in the wrong. The true method by which both of these alternatives may in many cases be avoided, is indicated by the way in which courts unconsciously overrule themselves. The Supreme Court of the United States, in the development of the constitutional law has given several examples of this unique method of avoiding a lengthy exposition of the rule of *Stare Decisis*. One example will suffice:

In the case of Hinson *v.* Lott[1] the Court, following the principles adopted in Woodruff *v.* Parham,[2] decided that a State could tax one who imported liquors from another State, provided an equal tax was imposed upon the manufacture of liquor within the State. The principle of the decision was that the tax, which did not discriminate between the product of a State and other products, was constitutional. Instead of repudiating this principle as applied to liquor in the hands of the importer before the first sale, the Court affirmed their previous decisions in the case of Machine Company *v.* Gage,[3] which case presented a similar state of facts, involving the constitutionality of a tax on the importation of sewing machines. At the same time, when the next case, involving a discriminating tax, Welton *v.* Missouri,[4] came up for decision, instead of treating the tax as void, because discriminating, the Court treated it as a regulation of commerce, void because the national nature of the subject required an uniform rule, and, therefore, the right to regulate was exclusively in Congress.

This last principle was firmly established by repeated decisions. Then the case of Robbins *v.* Shelby County Taxing District[5] came before the Court. This case involved the constitutionality of a tax on all drummers doing business in the State, as applied to those who sold the products of other States. The law did not discriminate between drummers who were citizens of other States and those of Tennessee. And yet the Court, through Mr. Justice BRADLEY,

[1] 8 Wall, 148. [3] 100 U. S., 676. [5] 120 U. S., 489.
[2] 8 Wall, 123. [4] 91 U. S., 275.

was now able to say with an appearance of surprise: "It is strongly urged, *as if it were a material point in the case*, that no discrimination is made between domestic and foreign drummers—those of Tennessee and those of other States—that all are taxed alike. But that does not meet the difficulty. Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the State."[1]

As a result, the case of Hinson *v.* Lott, and its predecessor, Woodruff *v.* Parham, may be considered to be discarded. Yet this has been accomplished without the Court being put to the necessity of lowering their dignity by expressly overruling the decisions in those cases.

Bad decisions, where they are not based on the facts of a particular case, in which instance they are usually unimportant, and can be easily corrected, almost invariably rest on wrong principles of law. It is seldom that a court makes a wrong deduction from the right principle. In the foregoing illustration the rule that the constitutionality of a State tax on interstate commerce depended on the fact of discrimination was unsound. To have expressly abandoned this principle in the case of Machine Company *v.* Gage, which they would have had to do to declare the tax in that case unconstitutional, would have been to lower their dignity and so far impair that "oracular quality" which is essential to the continued usefulness of an appellate court. It may be that the change of ground was unconscious. The consciousness or unconsciousness of the action is immaterial. One thing, however, is proved by the example given: the true method to avoid following a bad decision, and yet preserve the dignity of the appellate tribunal, is for the members of the bench to be careful not to base similar cases on the wrong principle; but, at the same time, until new and correct principles have been substituted, to follow the wrong decision when a case involving similar facts comes before them. W. D. L.

[1] 120 U. S., 497.