RECENT CASES

Administrative Law—Courts—Johnson Act—Jurisdiction of Federal District Court over Rate-Fixing Where Notice and Hearing Were Given Though Not Required by Statute—Municipality under authority by statute[1] adopted an ordinance prescribing rates to be charged by plaintiff power company. Prior to the adoption of the ordinance, notice and hearing were given to the power company, although the statute authorizing the ordinance failed to provide for them. Plaintiff filed bill in federal district court seeking to enjoin enforcement of the ordinance on the ground that the rates fixed were confiscatory. The municipality moved to dismiss the bill on the ground that the court was deprived of jurisdiction under the Johnson Act,[2] which provides that if certain requisites, including a reasonable notice and hearing, are satisfied, the district courts should not entertain such a suit. *Held,* that the motion to dismiss be overruled, because reasonable notice and hearing within the meaning of the Act had not been given, and therefore the court had jurisdiction. *Mississippi Power Co. v. City of Aberdeen,* 11 F. Supp. 951 (N. D. Miss. 1935).

The court proceeded on the theory that the term reasonable notice and hearing was to be construed, for jurisdictional purposes, in the same way that it is interpreted for the purpose of deciding constitutionality under the due process clause; namely, that the notice and hearing must be such as is guaranteed by law and not such as is given voluntarily by the administrative body.[3] Viewed in that light it may well be that the court was correct in its holding. However, the Johnson Act was passed because the federal courts, supposedly having a less intimate knowledge than the state courts of the background and the exigencies of particular situations, were less likely to arrive at results satisfactory from the public viewpoint.[4] Furthermore, by permitting the utilities to go into the federal courts immediately, much delay and hardship was caused to the public; for the trial in the federal court is *de novo,* whereas the state courts rely primarily upon the record compiled by the administrative body,[5] thus effecting a great saving of time. Thus the purpose of the enactment was obviously to confine judicial review of state administrative bodies to the state courts. Moreover, the Johnson Act literally read, seems to require only that the order shall have been made after notice and hearing, and not that the order shall have been made in accordance with a procedure requiring notice and hearing. It would therefore seem that the court in the instant case should have held the Johnson Act applicable, particularly since the plaintiff was not injured by the failure of the legislature to provide for notice and hearing. However, aside from the statute, it seems that the court

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1. MISS. CODE ANN. (1930) §§ 2391, 2426.

2. 48 STAT. 775, 28 U. S. C. A. § 41 (1) (1934).

3. MCGEHEE, DUE PROCESS OF LAW (1906) 82; see Coe v. Armour Fertilizer Works, 237 U. S. 413, 424 (1915). In Mississippi Power Co. v. City of Jackson, 9 F. Supp. 564 (S. D. Miss. 1935), on facts identical with those in the instant case, the court arrived at the conclusion that due process was not violated and that therefore the court had no jurisdiction under the Johnson Act. The *ratio decidendi* of the Jackson case appears unorthodox from the viewpoint of precedent.

4. See SEN. REP. No. 125, 73d Cong., 1st Sess. (1933), which gives the entire background of the act; N. Y. Times, Feb. 16, 1934, at 16, where President Roosevelt in approving the statute cites an instance of seven years delay in the federal courts; 78 CONG. REC. 1915 1920 (1934). For the utilities' view against the acts see *Hearing before a Subcommittee of the Judiciary United States Senate on S. 752,* 73d Cong., 1st Sess. (1933) 3 *et seq.*

5. Lilienthal, *The Federal Courts and State Regulation of Public Utilities* (1930) 43 HARV. L. REV. 379 (federal practice at 402; state practice at 412).

should have denied jurisdiction on the following theory: Rate-making for a particular company is an administrative function.[6] In this instance the plaintiff had a statutory appeal from this order to a state court of equity, which was empowered not only to review the rates but also to determine them.[7] Such a court would be acting administratively, and the appeal to it would be an administrative appeal.[8] Comity between the state and federal courts requires that the latter should not intervene until all the state administrative remedies are exhausted.[9] Therefore, the federal district court should have refused to entertain the suit until the plaintiff had appealed to the state court of equity. Either under this theory or under the Johnson Act, it seems clear that the court should have refused to entertain jurisdiction.

Annuities—Exemption of Proceeds—Rights of Creditors to Annuity Contract—Bankrupt and wife sued trustee in bankruptcy for the return of annuity contracts which provided for monthly payments to annuitant after he should reach the age of 65. They provided for options to surrender at cash value, and to change the beneficiary, who was to receive a death benefit in the event that the annuitant died before the first payment.[1] The relevant statute exempted from creditors "the net amount payable under any . . . annuity contract upon the life of any person, . . . made for the benefit of . . . dependent relative of such person." [2] *Held,* for plaintiffs, because the contract was exempt under the statute. *Bowers et ux. v. Reinhard,* 78 F. (2d) 776 (C. C. A. 3d, 1935), cert. denied sub nom. *Reinhard v. Bowers,* Nov. 11, 1935, U. S. L. Week, Nov. 12, 1935, at 45.

In order to encourage men to provide for their dependents, both courts and legislatures have prevented creditors from claiming proceeds payable on life insurance policies and endowments made for the sake of dependents,[3] even though such contracts have granted options to the insured to change the named beneficiary and to claim the cash surrender value of the contract at any time before its due date.[4] The instant case, however, is the first to have arisen under one of the more

6. DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW (1927) 180; Knoxville v. Knoxville Water Co., 212 U. S. 1, 8 (1909).

7. MISS. CODE ANN. (1930) § 2426: "If the rates . . . be . . . unreasonable, they may be reviewed and *determined* by the chancery court of the county. . . ." (Italics added.)

8. Prentis v. Atlantic Coast Line Co., 211 U. S. 210 (1908); Porter v. Investors, 286 U. S. 461 (1932); see Merrill, *Does "Legislative Review" by Courts in Appeals From Public Utility Commissions Constitute Due Process of Law* (1926) 1 IND. L. J. 247, 251.

9. Prentis v. Atlantic Coast Line Co., 211 U. S. 210 (1908); American Mutual Liability Ins. Co. v. McDonough, 61 F. (2d) 558, *cert. denied,* 288 U. S. 602 (1932); see Merrill, *loc. cit. supra* note 8.

1. The death benefit, during the first five years the contract was in force, was a little more than the cash surrender value, and thereafter exactly the same.

2. PA. STAT. ANN. (Purdon, 1930) tit. 40, § 517.

3. Thus statutes have been enacted exempting life insurance policies from claims of creditors even where the insured has gone bankrupt. They have further provided that the insured may continue to make payments on such policies though refusing to pay his creditors. A fewer number of statutes include endowments in these exemptions; but even where endowments have not been included in such statutes, decisions have been made construing endowments as life insurance policies, and therefore exempt. Briggs v. McCullough, 36 Cal. 542 (1869); Flood v. Libby, 38 Wash. 366, 80 Pac. 533 (1905).

4. *In re* Lang, 20 F. (2d) 236 (E. D. Pa. 1927), *aff'd sub nom.* Dussoulas v. Lang, 24 F. (2d) 254 (C. C. A. 3d, 1928); *In re* Rose, 24 F. (2d) 253 (E. D. Pa. 1927), *aff'd sub nom.* Gridley v. Rose, 24 F. (2d) 254 (C. C. A. 3d, 1928); *In re* Reiter, 58 F. (2d) 631 (C. C. A. 2d, 1932).

recent statutes granting like protection to beneficiaries under annuity contracts.[5] The district court felt that the annuity in question was not one made "for the benefit of" dependents, and therefore should not be exempt under the statute.[6] It reasoned that the dependent would benefit only incidentally; for her rights were subject both to the insured's dying before payments were to begin, and to his omission to exercise his options. Such reasoning, it seems, would apply as well to endowment policies, which also appear to be made primarily for the investment advantages to the insured.[7] Yet in cases of endowments, exemptions have been allowed under statutes similar to the one here involved,[8] and courts have considered that beneficiaries enjoyed "vested" interests.[9] Such interpretations of statutes seem too broad, however, in view of the original purpose of granting exemptions. Probably neither annuities nor endowments should be exempt unless they are payable to the dependent, as is required by a number of statutes;[10] or at least, unless the dependent may recover whether the annuitant dies before or after payments begin.[11] But courts apparently desire to favor debtors, as the modern trend of legislation and decisions seems to indicate.[12] Perhaps another factor which also may supply the rationale for decisions such as the instant one, is a public policy seeking to encourage men to provide for their old age.[13] And yet, decisions such as this tend to encourage evasions of debt on the part of debtors who are able to pay.[14]

Bankruptcy—Section 77B—Abatement of Creditors' Claims for Voting Purposes in Reorganization Proceedings—Underliers (creditors) petitioned for reorganization of the Philadelphia Rapid Transit Company under Section 77B of the Bankruptcy Act.[1] The proposed plan of reorganization included a reduction of petitioner's claim from $87,000,000 to $54,000,000. After the petition was approved by the court, and the plan submitted to creditors for their acceptance,[2] the present action was brought to restrict the Underliers to a claim of $30,000,000 for the purpose of voting upon the plan, which amount was contended

5. Most of these have granted such protection when the annuity is "made payable to" the dependent. ME. REV. STAT. (1930) c. 60,144; Neb. Laws 1933, c. 73, p. 315. Others, like the Pennsylvania statute, note 2, *supra*, have granted such protection when the annuity was "for the benefit of" the dependent. OHIO CODE ANN. (1934) § 9394.

6. *In re* Bowers, 11 F. Supp. 848 (E. D. Pa. 1934).

7. This was the earlier view. Talcott v. Field, 34 Neb. 611, 52 N. W. 400 (1892); VANCE, INSURANCE (2d ed. 1930) 548.

8. Jens v. Davis, 280 Fed. 706 (C. C. A. 8th, 1922); *In re* Weick, 2 F. (2d) 647 (C. C. A. 6th, 1924). *Contra: In re* Bray, 8 F. Supp. 761 (D. N. H. 1934) (statute exempted endowment made "in favor of" dependent).

9. Holden v. Stratton, 198 U. S. 202 (1905); *In re* Schaefer, 189 Fed. 187 (N. D. Ohio 1910).

10. Statutes cited note 5, *supra* (annuities); Mich. Laws 1927, no. 70; Me. Laws 1929, c. 205; N. H. Laws 1931, c. 175, §§ 1, 2 (endowments).

11. Some annuity contracts provide for payment to beneficiary, on annuitant's death, of funds remaining in reserve.

12. See Note (1935) 84 U. OF PA. L. REV. 236.

13. See Pierson, *Recent Legislation Preserving Insurance Proceeds for Beneficiaries* (1930) 16 A. B. A. J. 23.

14. This has been the contention of a number of writers. See Blum, *Rights of Creditors and Beneficiaries Under Policies of Life Insurance* (1928) 4 A. B. REV. 233, 234; Parkinson, *Statutes Exempting Life Insurance Proceeds from Creditors* (1923) 9 A. B. A. J. 112, 113.

1. 48 STAT. 912, 11 U. S. C. A. § 207 (Supp. 1934).

2. 48 STAT. 918, 11 U. S. C. A. § 207 (e) (1) (Supp. 1934). The plan of reorganization must be accepted by a vote of two-thirds in amount of the claims of creditors affected by the plan.

to be the actual value of their claim. *Held* (Welsh, J., dissenting), that the Underliers have the voting potentiality of an $87,000,000 claim, since the inquiry at this stage of the proceedings was limited to the classification of creditors for voting purposes, and did not extend to abatement of their claims. In re *Philadelphia Rapid Transit Co.*, 11 F. Supp. 865 (E. D. Pa. 1935).

A clear distinction must be drawn between a challenge to the good faith of a creditor's claim, as here presented, and a challenge to the good faith of a creditor's petition for reorganization of his corporate debtor. In the latter instance a well-founded challenge is ground for rejection of a petition, before or after judicial approval.[3] In the former instance, the claim may be steeped in the bad faith of the creditor,[4] and yet be legally provable.[5] In this regard, Section 77B provides that "creditors who have *provable* claims against any corporation . . . may . . . file a petition" [6] (italics added); and the court's power does not extend to requiring actual proof thereof,[7] but is limited to a classification of such claims.[8] The practical effect is to give creditors holding inflated claims a voting power proportionately greater than that given to those whose claims are fair; and, as was noted in the dissenting opinion,[9] the probabilities for a justifiable rejection of the plan at a later stage, on the ground of bad faith, are definitely diminished because of the natural aversion to discarding a plan already approaching fulfillment.[10] Nevertheless, the Act specifically permits acceptance by creditors of a plan of reorganization even before their filing of a petition,[11] and therefore before the court has even had an opportunity to ascertain the amount of the claims. It might be contended that, since the proposed plan of reorganization admitted the $87,000,000 claim to be worth, at the most, but $54,000,000, the Underliers should have been classified as having a 54/87 voting potentiality in respect to their full claim.[12]

3. 48 STAT. 912, 11 U. S. C. A. § 207 (a) (Supp. 1934). "Upon the filing of . . . a petition . . . the judge shall enter an order . . . if satisfied that such petition . . . has been filed in good faith. . . ." See also *In re* South Coast Co., 8 F. Supp. 43 (D. Del. 1934).

48 STAT. 919, 11 U. S. C. A. § 207 (f) (Supp. 1934) states that the plan, after presentation, will be confirmed only if the judge is ". . . satisfied that it is fair and equitable and does not discriminate unfairly in favor of any class of creditors or stockholders. . . ."

4. The same court as in the instant case recognized, in a prior action wherein the present challenger himself petitioned for reorganization and was denied, that "The history of the P. R. T. . . . is a history of the exploitation of great and valuable public franchises by selfish financial interests [*i. e.*, by the Underliers]. . . ." *In re* Philadelphia Rapid Transit Co., 8 F. Supp. 51, 52 (E. D. Pa. 1934).

5. A provable claim involving overvaluation should not be confused with a claim which is fraudulent and merely colorable. In the latter instance the court has ". . . the power . . . to determine whether an adverse claim is real and substantial or merely colorable, and may enter upon a preliminary inquiry to so determine. If found to be merely colorable, the [court] may proceed to adjudicate the merits summarily." American Finance Co. v. Coppard, 45 F. (2d) 154, 155 (C. C. A. 5th, 1930).

6. 48 STAT. 913, 11 U. S. C. A. § 207 (a) (Supp. 1934).

7. 48 STAT. 915, 11 U. S. C. A. § 207 (b) (10) (Supp. 1934) stipulates that "The term 'creditors' shall include for . . . purposes . . . of the reorganization plan, its acceptance and confirmation, all holders of claims of whatever character . . ., whether or not such claims would *otherwise* constitute provable claims under this Act."

8. 48 STAT. 916, 11 U. S. C. A. § 207 (c) (6) (Supp. 1934).

9. Instant case at 868.

10. Spaeth and Friedberg, *Early Developments Under Section 77B* (1935) 30 ILL. L. REV. 137, 148, discusses the effect of procrastination on the right of creditors to intervene in the case of Jameson v. Guaranty Trust Co. 20 F. (2d) 808 (C. C. A. 7th, 1927).

11. 48 STAT. 918, 11 U. S. C. A. § 207 (e) (1) (Supp. 1934). See *In re* Pilsener Brewing Co., 79 F. (2d) 63, 67 (C. C. A. 9th, 1935); 7 REMINGTON BANKRUPTCY (Supp. 1934) § 3154.85.

12. Friendly, *Some Comments on the Corporate Reorganizations Act* (1934) 48 HARV. L. REV. 39, 70 *et seq.*, discusses the classification of creditors according to their interest in the reorganization. See also Brandeis, J., in National Surety Co. v. Coriell, 289 U. S. 426, 437 (1933).

However, a classification based upon the extent of participation under the plan is questionable, in that adequate recognition might not be given to the "nature of . . . claims and interests" which the Act directs shall be the basis of classification.[13] The peculiar circumstances of the instant case make the Underliers' plan the only feasible one; for probably their claims would carry sufficient votes, under any reasonable valuation, to forestall acceptance of any plan not initiated by themselves.[14] Since reorganization is urgently needed by stockholders and public alike,[15] the action of the court in paving the way for a plan whereby the Underliers' claims, although still in excess of their probable value, are substantially reduced, is to be commended from the viewpoint that half a loaf is better than none.[16]

Banks and Banking—Set-off—Right of Depositor to Set Off Deposit Not Subject to Present Withdrawal—Petitioners, transferees of a savings account in defendant banking company, made demand on defendant to set off the funds in this account against the amount of petitioners' indebtedness to defendant on a matured note. Defendant refused on the ground that its by-laws and regulations prohibited present "withdrawal" of such funds. *Held,* that the set-off be allowed, since it did not constitute a "withdrawal" of deposits. *Hensch* et al. *v. Metropolitan Savings and Loan Co.,* 197 N. E. 416 (Ohio Ct. App. 1935), *petition for writ of error dismissed,* 129 Ohio St. 319, 195 N. E. 485 (1935).

The vast majority of American equity courts allow a depositor in an insolvent bank to set off the debt which the bank owes him *in præsenti* against a debt which he owes the bank *in futuro.*[1] Likewise, when the depositor's debt is due and payable but the insolvent bank's debt is not, many courts, Ohio included, allow a set-off.[2] If a set-off is permitted in this latter situation, where the claims

13. 48 STAT. 916, 11 U. S. C. A. § 207 (c) (6) (Supp. 1934); Spaeth and Friedberg, *Early Developments Under Section 77B* (1935) 30 ILL. L. REV. 137, 162. The *nature* of the claim would seem to refer to its preference in respect to other claims before institution of reorganization proceedings, or to a positive advantage to be gained over other claims by virtue of the proposed plan. *Cf. In re* Celotex Co., 12 F. Supp. 1 (D. Del. 1935).

14. The total assets of the P. R. T. are valued at $200,000,000 and the capital stock outstanding is approximately $60,000,000. See Rep. Pa. Dep't of Internal Affairs (1929-1930) 344; Wilson v. Philadelphia Rapid Transit Co., 5 P. U. R. (N. S. 1934) 58. The $87,000,000 claim of the Underliers would then seem to be well over the necessary one-third portion of total creditors' claims, which is adequate to reject any proposed plan of reorganization.

15. See *In re* Philadelphia Rapid Transit Co., 8 F. Supp. 51, 54 (E. D. Pa. 1934); dissenting opinion in the instant case, at 868.

16. See Sabel, *The Corporate Reorganizations Act* (1934) 19 MINN. L. REV. 34, 48. "The efficacy of a particular decision interpreting Section 77B varies directly with its favoring majority rule and speeding up the adoption of a plan and inversely with the possibility of holdups and tendency to cause delay."

1. Scott v. Armstrong, 146 U. S. 499 (1892); Yardley v. Clothier, 51 Fed. 506 (C. C. A. 3d, 1892); Steelman v. Atchley, 98 Ark. 294, 135 S. W. 902 (1911); 1 MORSE, BANKS AND BANKING (6th ed. 1928) § 338. It is generally said by the courts that allowing such a set-off does not give a "preference" to the depositor. See Note (1932) 80 U. OF PA. L. REV. 420.

2. Nashville Trust Co. v. Bank, 91 Tenn. 336, 18 S. W. 822 (1891); Niles v. Olszak, 87 Ohio St. 229, 100 N. E. 820 (1912); 1 MORSE, BANKS AND BANKING (6th ed. 1928) § 338. The argument advanced by these courts is that it would be "unconscionable" to require the depositor to make payment in full of his debt while receiving in return only a *pro-rata* share in the bank's assets. *Contra:* Fera v. Wickham, 135 N. Y. 223, 31 N. E. 1028 (1892); Chipman and Holt v. Ninth Nat. Bank, 120 Pa. 86, 13 Atl. 707 (1888). The courts which do not allow a set-off in this situation hold that insolvency is not a sufficient reason for dispensing with the requirement that to allow set-off the debts must be matured. Clark, *Set-Off in Cases of Immature Claims in Insolvency and Receivership* (1920) 34 HARV. L. REV. 178; (1929) 77 U. OF PA. L. REV. 927.

of creditors of the insolvent bank are involved, it would appear *a fortiori* that it should be allowed when, as in the instant case, the bank is solvent. But there is some theoretical opinion to the contrary.[3] However, it is to be noted that the instant suit was brought in equity, which allows a set-off more readily than does a court of law,[4] the latter requiring that both debts be presently due and payable.[5] Since equity will grant a set-off if necessary "to promote substantial justice",[6] it would seem that the court in the instant case was justified in allowing it on the facts presented. Petitioners were required to pay a much higher rate of interest on their loan than they received on their deposit. Morover, if the set-off were denied and they were required to pay their debt, they would assume the risk of defendant's becoming insolvent before withdrawal was permitted, in which event they would be entitled only to a *pro-rata* share of its assets. On the other hand, it might be argued that the mere fact that a given depositor is indebted to the bank, constitutes no sufficient reason for allowing him what might amount to a preference in case of the bank's subsequent insolvency. Nevertheless, since the defendant had the right to apply petitioners' deposit to payment of their debt,[7] it would seem that petitioners should be accorded the same right. Nor does it appear that allowing a set-off would cause defendant to suffer any diminution of its resources. In view of these facts, there was adequate reason for construing the restriction against "withdrawal" strictly, so as to grant petitioners the desired relief.[8]

Certiorari—Effect in Federal Court of State Supreme Court's Denial of Certiorari to Decision Construing Uniform Negotiable Instruments Act— State treasurer sought in federal court an adjudication of the ownership of certain Illinois Highway bonds. They had been stolen from their owner, *X*, who notified dealers of the theft. An agent of *Y* Co. received the notice, and thereafter another agent of *Y* Co. purchased the bonds, not knowing them to have been stolen. Illinois Appellate Court, in a previous case involving similar facts, had held that purchaser was not a holder in due course, and that title remained in original owner.[1] Illinois Supreme Court had denied a writ of *certiorari* in that case.[2] *Held,* that the Illinois Appellate Court decision and the denial of *certiorari* therein were not binding on federal court, and that purchaser, *Y* Co., might therefore be a holder in due course. *Graham v. White-Phillips Co.,* U. S. L. Week, Nov. 12, 1935, at 35 (U. S. Sup. Ct. 1935).

3. See National Trust Co. v. Bank, 91 Tenn. 336, 351, 18 S. W. 822, 825 (1892); 3 WILLISTON, CONTRACTS (6th ed. 1920) § 1998: "Where both parties to a controversy are solvent . . . with or without the right [of set-off] the ultimate condition of the parties will be the same." It is submitted that this is not necessarily true, since if a set-off is not allowed because the depositor's claim has not yet matured, while he is compelled to pay his debt at once, the bank may become insolvent before he can recover the amount due him.

4. See 3 STORY, EQUITY JURISPRUDENCE (14th ed. 1918) §§ 1866, 1867. For an historical analysis of the doctrine of set-off see Lloyd, *The Development of Set-Off* (1916) 64 U. OF PA. L. REV. 541.

5. 5 MICHIE, BANKS AND BANKING (1932) § 115b; see First Nat. Bank and Anglo-Oesterreichische Bank, 37 F. (2d) 564, 568 (C. C. A. 3d, 1930).

6. Hendrickson v. Brown, 39 N. J. L. 239, 242 (1877).

7. 5 MICHIE, BANKS AND BANKING (1932) § 114; 1 MORSE, BANKS AND BANKING (6th ed. 1928) § 334; 2 *id.* § 559 and cases cited therein.

8. For a similar construction of such a restriction see Leimons v. Lithuanian Savings and Loan Ass'n, 44 Ohio App. 454, 186 N. E. 107 (1933); *cf.* Taylor *et al.,* Executors v. City of New York, 82 N. Y. 10 (1880).

1. Northwestern Nat. Bank v. Madison & K. State Bank, 242 Ill. App. 22 (1926).

2. 242 Ill. App. xiv (1926).

Federal courts in applying a state's Negotiable Instruments Act are bound by the construction the state supreme court has placed upon it.[3] The novel problem facing this Court, however, was whether the Illinois Supreme Court's denial of *certiorari* was such an authoritative construction of the state Negotiable Instruments Act as would preclude the federal court from interpreting it differently. The desirability of promoting the free circulation of negotiable paper,[4] and of interpreting uniform acts uniformly,[5] would operate against the application in the instant case of the Illinois Appellate Court's holding, which was contrary to practically all of the cases on the point.[6] Apart from these reasons of policy,[7] the conclusion reached by the Court in the instant case would seem logically sound. Opinions of the Illinois Appellate Court are not binding authority in any case other than those in which they are filed,[8] although its judgments are final where the Supreme Court denies *certiorari*.[9] But denial of *certiorari* does not necessarily indicate approval of the Appellate Court's reasons.[10] Even though an Illinois statute permitted that writ to try the same issues as an appeal or writ of error,[11] its denial, without the reasons therefor being specified, leaves open to speculation whether the supreme court adopted the Appellate Court's view of the law, or whether it simply thought there were other issues in the case which made the lower court's result substantially just. While it may be thought likely that the Illinois Supreme Court approved the law set forth in the Appellate Court decision, yet some doubt remained and the federal court was therefore free to adopt the more desirable construction of the uniform statute.

Constitutional Law—Commerce Clause—State Tax on Intrastate Portion of Business as Burden on Interstate Commerce—An action was brought by the state of Washington to recover a tax of one and one-half per cent of defendant railroad's gross income, imposed for the privilege of engaging in business "within this state." [1] Defendant, whose business was both interstate and intrastate, was required by law as well as by considerations of practicability to maintain its intrastate service; this portion of its business was being operated

3. Burns Mortgage Co. v. Fried, 292 U. S. 487 (1934), 83 U. OF PA. L. REV. 83.

4. Principal case at 36.

5. *Cf.* Fordham, *The Federal Courts and the Construction of Uniform State Laws* (1928) 7 N. C. L. REV. 423, 429-432.

6. Merchants' Nat. Bank v. Detroit Trust Co., 258 Mich. 526, 242 N. W. 739 (1932), 31 MICH. L. REV. 424; Lord v. Wilkinson, 56 Barb. 593 (N. Y. Sup. Ct. 1870); Raphael v. Bank of England, 17 C. B. 161 (1855).

7. The effect of the Illinois Appellate Court decision is to find bad faith as a matter of law, overlooking the possibility that the purchaser was merely negligent. The authorities are nearly unanimous that negligence is not such bad faith as to disqualify a holder in due course. 2 DANIEL, NEGOTIABLE INSTRUMENTS (7th ed. 1933) §§ 885-893, and cases there cited; WILLISTON, NEGOTIABLE INSTRUMENTS (1931) 109; Note (1932) 81 U. OF PA. L. REV. 617. On the general proposition, the Illinois Supreme Court has held with the overwhelming weight of authority. Kavanaugh v. Bank of America, 239 Ill. 404, 88 N. E. 171 (1909).

8. ILL. REV. STAT. (Cahill, 1933) c. 37, par. 49.

9. Soden v. Claney, 269 Ill. 98, 109 N. E. 661 (1915).

10. People v. Grant, 283 Ill. 391, 119 N. E. 344 (1918).

11. ILL. REV. STAT. (Cahill, 1931) c. 110, par. 120. At common law, *certiorari* might be denied merely because the lower court had not exceeded its jurisdiction, or because there was another remedy available. Schlink v. Maxton, 153 Ill. 447, 38 N. E. 1063 (1894). Thus, denial of common law *certiorari* clearly could not be taken as an authoritative exposition of the law. People v. Lindblom, 182 Ill. 241, 55 N. E. 358 (1899). The statutory *certiorari* in the instant case, however, was not confined to matters of jurisdiction. ILL. CIV. PRACTICE ACT ANN. (McCaskill, 1933) 221, n. 21.

1. Wash. Laws 1933, c. 191, § 2.

at a loss which had to be borne by the receipts on its interstate business. As a result the tax, even though ostensibly imposed on the intrastate part alone, would necessarily be paid from interstate income. *Held* (two justices dissenting), that the tax was not such a burden on interstate commerce as to be repugnant to the commerce clause of the Federal Constitution,[2] because the defendant had failed to exhaust the remedy given by law allowing application to the public service authorities to increase its intrastate rates. *State v. Northern Pacific Ry. Co.*, 48 P. (2d) 931 (Wash. 1935).

While the interstate and intrastate portions of a single business undeniably constitute a unit as a matter of economics, they are regarded in law as separable for purposes both of rate-fixing[3] and of taxation.[4] But the general rule, that consistently with the commerce clause a state is free to tax the intrastate portion for the privilege of doing business within its borders,[5] is qualified by the United States Supreme Court's repeated declaration that where a company cannot withdraw from its intrastate business without also discontinuing its interstate business the taxing power of the state no longer prevails.[6] In choosing to ignore this limitation, and in effect rejecting at least the theory of one of its own earlier decisions,[7] the Supreme Court of Washington frankly indicated that its incentive was a matter of pure economic necessity, new sources of revenue being imperative as a result of a reduction of the property tax.[8] However, the mere fact that the defendant was paying a smaller amount in property taxes than was formerly required of it is not enough to justify an otherwise invalid privilege tax on the ground that in theory it may be regarded as a property tax.[9] And the technical legal ground on which the court did attempt to support its decision—that no one but the defendant is to blame if the tax must be paid from interstate income, since it has failed to obtain an increase in intrastate rates from the public service

2. U. S. CONST. Art. I, § 8, cl. 3.

3. The Minnesota Rate Cases, 230 U. S. 352 (1913).

4. Ratterman v. Western Union Tel. Co., 127 U. S. 411 (1888).

5. Pacific Express Co. v. Seibert, 142 U. S. 339 (1892); Ohio Tax Cases, 232 U. S. 576 (1914).

6. See Pullman Co. v. Adams, 189 U. S. 420, 421 (1902); Sprout v. City of South Bend, 277 U. S. 163, 171 (1928). But the inability contemplated by the rule apparently must arise from a legal requirement by which the defendant is compelled to maintain its intrastate business, as distinguished from the mere economic impossibility of discontinuing such business. Where only the practical inability exists, without the legal inability, it has been held that a tax of the type here under consideration is valid. East Ohio Gas Co. v. Tax Comm. of Ohio, 283 U. S. 465 (1931).

7. Great Northern Ry. v. State, 147 Wash. 630, 267 Pac. 506 (1928).

8. Instant case at 935. The economic and political background is not described in the opinion itself, however. In the early period of the present depression the discontented electors of the state exercised their power of initiative and enacted chapters 4 and 5, Wash. Laws 1933, placing a 40-mill levy limit on property and shifting the tax burden to incomes. In short order the Supreme Court of Washington held the income tax law (*i. e.*, chapter 5, Wash. Laws 1933) unconstitutional. Culliton v. Chase, 174 Wash. 363, 25 P. (2d) 81 (1933). The disorganization of the state's revenue system resulting from these badly executed schemes has since inspired the Washington court to strenuous efforts to sustain chapter 191, Wash. Laws 1933 (the statute involved in the instant case), which the legislature passed as an emergency measure in an attempt to make up the deficit. State *ex rel.* Stiner v. Yelle, 174 Wash. 402, 413, 25 P. (2d) 91, 95 (1933) (five-to-four decision upholding the general constitutionality of chapter 191, chiefly on the ground that "the state is facing stark necessity" and "temporary injustice must be borne for the common good"); Fisher's Blend Station v. Tax Comm. of Washington, 45 P. (2d) 942, 84 U. OF PA. L. REV. 251 (Wash. 1935) (radio broadcasting over several states held to constitute intrastate business for the purposes of the present tax law).

9. A state tax burdening the entire business of a company engaged in both intrastate and interstate operations may be justified as a reasonable property tax on intangible assets, only if it is in lieu of all other taxes and fair in proportion to the value of the company's property within the state. United States Express Co. v. Minnesota, 223 U. S. 335 (1912); Cudahy Packing Co. v. Minnesota, 246 U. S. 450 (1918).

department—was at best a subterfuge, which had previously been relied on in a single United States Supreme Court case of doubtful force in the present instance.[10] Conceding that an impending depletion of the state treasury is a powerful stimulus, yet the necessity of repairing the effects of faulty legislation by judicial patchwork, where an attempted redistribution of the costs of government by doubtfully constitutional means is involved, would still seem questionable.

Constitutional Law—Taxation—Validity of the Pennsylvania Graduated Income Tax Act—Pennsylvania enacted an income tax law providing for progressive rates and for personal deductions for living expenses up to $1000.[1] Plaintiff sought to enjoin the officers of the Commonwealth from enforcing the act. *Held,* that the injunction should be granted, on the ground that the income tax, being a "property tax", contravened the uniformity clause of the state constitution[2] because levied at different rates upon the same class of property. *Kelley v. Kalodner,* Philadelphia Legal Intelligencer, Nov. 26, at 5 (Pa. Sup. Ct. 1935).

The court, after an extensive discussion of the nature of the income tax, concluded that it was a property tax, levied upon the property from which the income was derived. This view,[3] which has been frequently criticised,[4] is one of two related theories, the other holding that the subject matter of the tax is the property composing the income itself.[5] However, the income tax differs so essentially from what is usually connoted by the term "property tax",[6] that the adoption of either view is to be deprecated. Moreover, as the constitution required that *"all* taxes shall be uniform", definition of the income tax was unnecessary; for a progressive tax upon unreasonably classified incomes would be void whether regarded as a property tax, as an excise, as a personal tax, or as a unique method of taxation[7]—which, it is suggested, is the soundest solution.[8] But the classifi-

10. Postal Telegraph-Cable Co. v. City of Fremont, 255 U. S. 124 (1921). In that case the court's chief justification for sustaining a municipal license tax on intrastate telegraphing which defendant was compelled to do was found in two factors which were not present in the instant case: that the tax ordinance had been in force before the telegraph company had entered the city, and that the company had paid the tax for twelve years without finding any objection to it. Moreover, in that case no attempt had been made to obtain an increase of intrastate rates, whereas in the instant case the defendant had actually made an application to the public service department which had been denied, a second application being pending.

1. Acts Gen. Assembly, no. 314, §§ 201, 308, July 12, 1935.

2. PA. CONST. art. IX, § 1. "All taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax. . . ."

3. Bachrach v. Nelson, 349 Ill. 579, 182 N. E. 909 (1932); Opinion of the Justices, 220 Mass. 613, 108 N. E. 570 (1915). The majority view *contra* is represented by Miles v. Department of Treasury, 193 N. E. 855 (Ind. 1935); People v. Wendell, 197 App. Div. 431, 188 N. Y. Supp. 344, *aff'd,* 231 N. Y. 629, 132 N. E. 916 (1921); Maxwell v. Kent-Coffey Mfg. Co., 204 N. C. 365, 168 S. E. 397 (1933).

4. See Barnett, *An Income Tax in Illinois* (1932) 27 ILL. L. REV. 119, 125-136; Brown, *The Nature of the Income Tax* (1933) 17 MINN. L. REV. 127, 130-139.

5. Culliton v. Chase, 174 Wash. 363, 25 P. (2d) 81 (1933).

6. Property is taxed as of an instant of time; income is a flow of goods and services over a period. Ability to pay and productivity, while of importance in the property tax, are not the primary considerations. Contrary to the opinion of the court, a *general* income tax does not lessen the value of property, as every kind of property remains as desirable in terms of other kinds as before the tax. But see Eliasberg Bros. Mercantile Co. v. Grimes, 204 Ala. 492, 494, 86 So. 56, 57 (1920).

7. See, for the interpretation of constitutional provisions identical with those of the Pennsylvania Constitution, Reed v. Bjornson, 191 Minn. 254, 253 N. W. 102 (1934), and Standard Lumber Co. v. Pierce, 112 Ore. 314, 228 Pac. 812 (1934); *cf.* Cope's Estate, 191 Pa. 1, 21, 43 Atl. 79, 81 (1899).

8. Courts, in declaring the income tax constitutional, have analysed it differently. Diefendorf v. Gallet, 51 Idaho 619, 10 P. (2d) 307 (1932) (excise); Crescent Mfg. Co. v. South Carolina, 129 S. C. 480, 124 S. E. 761 (1924) (personal tax); Mills v. State Board of Equalization, 97 Mont. 13, 33 P. (2d) 563 (1934) (unique method).

cation involved in the instant case does not appear unreasonable. In declaring that it was necessarily arbitrary because it was based upon the quantity of the subject matter, the court ignored the contrary interpretation by the United States Supreme Court of substantially similar clauses in the Federal Constitution,[9] and instead followed the thirty-six year old precedent of *Cope's Estate,*[10] the effect of which had been virtually nullified by subsequent decisions.[11] Yet it would seem that a distinction in rates predicated upon the fundamental principle of taxation, ability to pay,[12] should be regarded as reasonable. Indeed, the court itself admitted that the tax "appears to be reasonable", but was apprehensive lest "the principle of inequality . . . , if once established, might lead to grossly unfair results." [13] It may well be argued, in view of the economic theory of Diminishing Utility,[14] that it is a tax at one rate upon disproportionate incomes which should be condemned for lack of genuine uniformity. The tax law could have been upheld with facility, therefore, by an opinion more cogent, better supported by authority, and certainly more desirable than that in the instant case.

Equity—Unfair Competition—Right of Vendors and Dealers to Enjoin the Sale of Imitation Stamps—Complainant, a corporation composed of owners and dealers of postage stamps, together with an individual dealer and a private collector, sought an injunction against defendant, who was perforating stamps which had been sold by the United States Government as imperforate, in such a manner as to make them appear identical with those perforated by the government. The latter, because of some imperfection or distinguishing mark, had acquired by their rarity a high value. The defendant sought to sell them not directly to the public, but to the retail dealers, who if unscrupulous, would sell them to the public as genuine stamps. *Held,* that defendant's acts amounted to unfair competition, and as such would be enjoined. *American Philatelic Soc. v. Claibourne,* 46 P. (2d) 135 (Cal. 1935).

Although the courts have given various definitions of "unfair competition",[1] there appear to be three main "theories" upon which equity will intervene to enjoin a person from conducting his business in a particular manner. They are: (1) to promote business honesty and fair dealing;[2] (2) to protect the public from de-

9. U. S. CONST. Art. I, § 8 (1), Amends. V, XIV. Brushaber v. Union Pacific R. R., 240 U. S. 1 (1916); State Board v. Jackson, 283 U. S. 527 (1931). Many state courts are in accord. McPherson v. Fisher, 143 Ore. 615, 23 P. (2d) 913 (1933). The Pennsylvania court has declared, "As applied to questions of taxation, the constructions of the two enactments (U. S. CONST. Amend. XIV, and PA. CONST. art. IX, § 1) run together." Commonwealth v. Girard Life Ins. Co., 305 Pa. 558, 562, 158 Atl. 262, 263 (1932).

10. 191 Pa. 1, 43 Atl. 79 (1899) (graduated inheritance tax termed property tax and held unconstitutional because not uniform).

11. Commonwealth v. Clark, 195 Pa. 634, 46 Atl. 286 (1900); *cf.* Knowles's Estate, 295 Pa. 571, 145 Atl. 797 (1929).

12. See Seligman, ESSAYS IN TAXATION (9th ed. 1921) 338-342; Rottschaefer, *A State Income Tax and the Minnesota Constitution* (1928) 12 MINN. L. REV. 683, 692-706.

13. Principal case, at Col. 3; see Knowlton v. Moore, 178 U. S. 41, 109 (1900).

14. After a certain point has been reached in the consumption of a given economic good, the utility of each successive unit diminishes as additional units are consumed. MARSHALL, PRINCIPLES OF ECONOMICS (8th ed. 1930) 93, 135, n. 1, 838; Carver, ESSAYS IN SOCIAL JUSTICE (1925) 397-409; see State v. Frear, 148 Wis. 456, 505, 134 N. W. 673, 688 (1912).

1. See Coca-Cola v. Boas, 27 F. (2d) 756, 757 (D. Idaho 1928); Gilbert Co. v. Shemitz, 36 F. (2d) 410, 411 (D. Conn. 1929); Vortex v. Ply-Rite Contracting Co., 33 F. (2d) 302, 313 (D. Md. 1929).

2. See McLean v. Fleming, 96 U. S. 245, 251 (1877); American Washboard Co. v. Saginaw Mfg. Co. 103 Fed. 281, 284 (1900), and cases cited therein.

ception;[3] (3) to protect the rights and property of individual producers and manufacturers.[4] All these factors are considered in the decisions, although some of the courts are prone to stress one rather than the other. In the instant case, the defendant himself was not directly attempting a fraud, for the stamp dealers to whom he desired to sell were aware that the stamps were imitations. But it has been held that one who places the means to commit a fraud in the hands of another is as guilty as the one actually committing the fraud.[5] Since in the circumstances of the instant case it would have been difficult for anyone but an expert to distinguish the genuine from the imitation, it is obvious that the majority of the purchasing public would be deceived. Despite the fact that the complainants were neither manufacturers nor producers, since the government, which may be termed the producer or manufacturer, has no concern in the philatelic value of the stamps, the complainants were in a position analogous to that of a manufacturer, and therefore would seem to have a sufficient "property right" to allow equity to give relief.[6] In line with the statement, "there is no part of the law which is more plastic than unfair competition",[7] the court in the instant case, confronted with a novel situation in that the complainants were neither manufacturers nor producers, did not allow the lack of precedent to prevent them from reaching an equitable result.

Partnership—Liability to Third Persons—Liability for Negligence of a Partner When Latter Has Injured His Own Wife—Plaintiff, while riding in an automobile owned by partnership of which her husband was a member, and which he was driving on partnership business, was injured in a collision caused by her husband's negligence, for which injury she sued the partners jointly and severally. *Held* (one judge dissenting), for defendants, on the ground that a husband is not liable for personal injuries to his wife, and that members of a partnership are not liable for the wrongful act of a partner for which he is not himself liable. *Caplan v. Caplan*, 268 N. Y. 445, 198 N. E. 23 (1935).

Under the Uniform Partnership Act, for injuries to third persons resulting from the wrongful act or omission of a partner acting within the scope of the partnership's business his co-partners are liable jointly and severally "to the same extent as the partner so acting or omitting to act." [1] As New York is one of the majority jurisdictions holding that statutes permitting married women to sue in the same manner and with the same effect as if they were unmarried, do not permit a wife to sue her husband in tort,[2] the decision in the instant case repre-

3. See Cole Co. v. American Cement Co., 130 Fed. 703, 705 (C. C. A. 7th, 1904); General Baking Co. v. Gorman, 3 F. (2d) 891, 893 (C. C. A. 1st, 1925).

4. See Shaver v. Heller, 108 Fed. 821, 827 (C. C. A. 8th, 1901); NIMS, UNFAIR COMPETITION AND TRADE-MARKS (3d ed. 1929) § 6.

5. See Von Mumm v. Frash, 56 Fed. 830, 836 (C. C. E. D. N. Y. 1893).

6. In International News Service v. Associated Press, 248 U. S. 215, 236 (1918), it was said: "The rule that a court of equity concerns itself only in the protection of property rights treats any civil right of a pecuniary nature as a property right."

7. See Ely-Norris Safe Co. v. Mosler Safe Co., 7 F. (2d) 603, 604 (C. C. A. 2d, 1925).

1. UNIFORM PARTNERSHIP ACT §§ 13, 15; N. Y. PARTNERSHIP LAW (1919) §§ 24, 26; PA. STAT. ANN. (Purdon, 1927) tit. 59, §§ 35, 37.

2. Thompson v. Thompson, 218 U. S. 611 (1910) (construing CODE OF THE DISTRICT OF COLUMBIA § 1155); David v. David, 161 Md. 532, 157 Atl. 755 (1932); Allen v. Allen, 246 N. Y. 571, 159 N. E. 656 (1927). *Contra:* Bennett v. Bennett, 224 Ala. 335, 140 So. 378 (1932); see Kalamian v. Kalamian, 107 Conn. 86, 89, 139 Atl. 635, 637 (1927). For a more complete compilation see Note (1934) 89 A. L. R. 118. The Pennsylvania statute expressly provides that "she may not sue her husband except in a proceeding for divorce or in a proceeding to protect and recover her separate property." PA. STAT. ANN. (Purdon, 1930) tit. 48, § 111.

sented a literal following of the above clause of the partnership act. Other courts in almost identical cases have reached the same conclusion, with [3] or without [4] recourse to the statute. But on the somewhat similar problem of the liability of a master to the wife or child of a servant injured by negligent acts of that servant, the New York court and others have stated that the basis of vicarious liability is not the servant's liability but his wrongdoing, and have therefore held the master liable irrespective of a personal immunity on the part of the servant.[5] Since a partner is regarded as the agent of the partnership,[6] a symmetrical development of this line of reasoning would require holding the partnership liable. More fundamentally, since the justification of vicarious liability is the fact that it permits including in the cost of the product the risks normally incident to the business,[7] the fact that the person injured happens to be a member of the wrongdoer's family should make no difference.[8] Where additional considerations of this nature are present, the arguments which give validity to the rule of a husband's immunity in some instances [9] lose much of their force. The court in the instant case might therefore have held that the ancient rule, offspring of purely personal relations, did not apply to a husband's interest in the partnership; the wife might then have been allowed to recover against the firm.[10] Or even while maintaining the full effect of that rule, it might have interpreted the Uniform Act to intend that the co-partners should have been liable, even as regarded their separate estates, *at least* "to the same extent as the partner so acting." [11] Some such interpretation would be particularly desirable in a case where the husband was judgment-proof as regarded his separate estate.[12]

3. Belleson v. Skilbeck, 185 Minn. 537, 242 N. W. 1 (1932) (child suing father's partner).

4. Mahaffey v. Mahaffey, 15 Tenn. App. 570 (1933) (child suing father's partner); David v. David, 161 Md. 532, 157 Atl. 755 (1932) (wife unable to recover against husband's firm for negligence attributable to fault of partnership generally, not specifically that of her husband). Both Tennessee and Maryland, however, had enacted the Uniform Act prior to these decisions.

5. Chase v. New Haven Waste Material Co., 111 Conn. 377, 150 Atl. 107 (1930); Schubert v. Schubert Wagon Co., 249 N. Y. 253, 164 N. E. 42 (1928); Poulin v. Graham, 102 Vt. 307, 147 Atl. 698 (1929); RESTATEMENT, AGENCY (1933) § 217 (2). *Contra:* Maine v. Maine & Sons Co., 198 Iowa 1278, 201 N. W. 20 (1924); Sacknoff v. Sacknoff, 131 Me. 280, 161 Atl. 669 (1932); Riser v. Riser, 240 Mich. 402, 215 N. W. 290 (1927); *cf.* Emerson v. Western Seed & Irr. Co., 116 Neb. 180, 216 N. W. 297 (1927).

6. UNIFORM PARTNERSHIP ACT §§ 4 (3), 9 (1); N. Y. PARTNERSHIP LAW (1919) §§ 4 (3), 20 (1); PA. STAT. ANN. (Purdon, 1927) tit. 59, §§ 4 (3), 31 (1).

7. See Smith, *Frolic and Detour* (1923) 23 COL. L. REV. 444.

8. *Cf.* Chase v. New Haven Waste Material Co., 111 Conn. 377, 150 Atl. 107 (1930).

9. The principal practical objection raised against letting a wife sue her husband in tort is "the broader sociological and political ground that it would introduce into the home, the basic unit of organized society, discord, suspicion, and distrust, and would be inconsistent with the common welfare." David v. David, 161 Md. 532, 535, 157 Atl. 755, 756 (1932); Thompson v. Thompson, 218 U. S. 611 (1910). Where the injury is purely the result of negligence, and no family squabble is involved, it would surely be more consistent with the common welfare, as well as better for the family, to have the loss borne not by the family but by the organization in the course of whose business the injury occurred.

10. An instance of this distinction is seen in the rule which prohibits collecting a debt out of a partner's individual assets until the assets of the firm have been exhausted. Everall v. Stevens, 158 App. Div. 723, 143 N. Y. Supp. 874 (1st Dep't 1913).

11. As Finch, J., stated in the dissenting opinion, the purpose of this provision was not to shield the partners but to declare the common law. 268 N. Y. at 456, 198 N. E. at 29. It might thus be construed as simply assuring a right of action against the partnership, rather than as limiting its extent.

12. In other circumstances the partners would be able to enforce the right to indemnification against him. UNIFORM PARTNERSHIP ACT § 18 (b); N. Y. PARTNERSHIP LAW (1919) § 40 (2); PA. STAT. ANN. (Purdon, 1927) tit. 59, § 51 (b).

Powers—Exercise of a General Power of Appointment—Appointed Property as Equitable Assets for Payment of Donee's Debts and Administrative Expenses of Donee's Estate—Testatrix was the donee of a general power of appointment over trust property, of the income from which she was the beneficiary during her life. She devised the trust estate to her children and executor. The latter petitioned the court to determine whether the appointed property was chargeable with the debts of testatrix and her estate. *Held,* that the donee's creditors, in so far as the donee's estate was insufficient to satisfy their claims, had a preference over the legatees in the appointed property, but that the property was not subject to payment of the administration expenses of testatrix's estate. *Seward v. Kaufman,* 180 Atl. 857 (N. J. Ch. 1935).

The decree of the instant court, awarding a preference to the creditors, is well supported by authority.[1] As was indicated in a previous issue of this REVIEW,[2] this policy is equitable, satisfying the donee's obligations without nullifying the intention of the donor, who sought to confer an unrestricted power of disposition. Indeed, it is difficult to understand why the court did not extend the doctrine to include the administration expenses, among which were taxes.

Taxation—Liability of Persons and Property—Right of Government to Reach Income of Spendthrift Trust for Back Taxes Due from Beneficiary—The federal government, holding a claim for unpaid income taxes and penalties against the beneficiary of a spendthrift trust, asserted a statutory lien on the income of the trust.[1] A receiver having been appointed for judgment creditors of the beneficiary, the latter petitioned for an order directing the trustees to pay over the income to him. *Held* (two judges dissenting), that the federal taxing authorities were entitled to the income (except for ten per cent, to which the holders of judgments prior to the filing of notice of the lien were entitled[2]). In re *Rosenberg's Estate,* Nov. 26, 1935 (N. Y. Ct. App. No. 459).

In reversing the judgment of the Appellate Division, the court was moved by considerations suggested in a previous issue of this REVIEW.[3] These were chiefly that the effect of the lower court's decision was to create an improper exemption to the federal income tax, and that the power to enjoy property should be subordinate to the sovereign tax power. The decision in the instant case embodies a wise exception to the general rule as to spendthrift trusts.

Torts—Res Ipsa Loquitur—Application of Res Ipsa Loquitur in Action against Decedent's Estate—Plaintiff, a guest in an automobile owned and driven by decedent, was injured when the vehicle, for an unascertained cause, suddenly left the road and plunged over an embankment, killing the decedent immediately. *Held,* in an action against the executrix, that the doctrine of *res ipsa loquitur* applied, thereby justifying the inference of negligence drawn by the jury. *Weller v. Worstall,* 129 Ohio St. 596, 196 N. E. 637 (1935).

1. Clapp v. Ingraham, 126 Mass. 200 (1879); Lawrence v. Huxtable, [1931] 1 Ch. 347.
2. (1935) 84 U. OF PA. L. REV. 107, discussing St. Matthews Bank v. De Charette, 83 S. W. (2d) 471 (Ky. 1935).

1. Pursuant to 45 STAT. 875, 26 U. S. C. A. § 115 (1928).
2. Under N. Y. C. P. A. (1920) § 684.
3. (1935) 84 U. OF PA. L. REV. 110.

More clearly than other situations, the automobile cases demonstrate the consistent failure of the courts to understand the true basis of the *res ipsa loquitur* doctrine. Thus the instant court, repeating the formula [1] which in its least effect permits a case to go to the jury upon the mere showing of what has happened,[2] failed in two particulars to apply correctly the principles for determining whether the situation was really *res ipsa*. That the instrumentality causing the harm must be within the exclusive "responsibility", rather than the mere exclusive "control", of the defendant in order that the doctrine may be applicable, is becoming increasingly recognized.[3] If the unexplained action of the vehicle was caused, as it might well have been, by mechanical defects of which the decedent neither knew nor had reason to know, the defendant would not be liable, because he was not "responsible" for their actions.[4] Yet the decedent would have had exclusive "control" of the vehicle, in the sense that he was at the wheel steering it. More interesting, however, was the second lapse of the court in its application of the doctrine, in this case of first impression, against the decedent's estate. The proper basis for the rule lies in its equalization of the position of the parties with respect to their ability to show the facts which caused the injury.[5] If the parties are equally able to explain the cause of the injury, the doctrine is not applied; there is no reason why the same result should not be reached where they are equally unable to show what caused the accident. Otherwise, the plaintiff would be given an unfair advantage, for in every jurisdiction the application of the principle under the rules of evidence places the plaintiff in a more favorable position than that in which he would ordinarily be. Since in the principal case the defendant, because of the driver's instant death, was certainly in no better, and very likely was in a less advantageous position than the plaintiff to explain the circumstances leading up to the accident, the application of the doctrine to permit recovery was a gross injustice to the defendant.

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1. Instant case at 600, 196 N. E. at 639.

2. The jurisdictions are not in accord as to the weight to be given the presumption that arises from the application of the doctrine. In every state the plaintiff is entitled at least to go to the jury merely by showing that his case is *res ipsa*. Heckel & Harper, *Effect of the Doctrine of Res Ipsa Loquitur* (1928) 22 ILL. L. REV. 724. See also Carpenter, *The Doctrine of Res Ipsa Loquitur* (1934) 1 U. OF CHI. L. REV. 519, 530 *et seq.*, for the unorthodox view that *res ipsa loquitur* situations should shift the burden of proof to the defendant.

3. See Bohlen, *Aviation Under the Common Law* (1934) 48 HARV. L. REV. 216, 228, n. 27. Many courts, although not verbally distinguishing between "control" and "responsibility", actually do make the differentiation. Thus in Galbraith v. Busch, 267 N. Y. 230, 196 N. E. 36 (1935), a situation more favorable than the instant one, from the plaintiff's viewpoint, was presented to the court. The plaintiff had sustained injuries when the automobile driven by the defendant suddenly swerved sharply. The latter, although apparently able to explain, did not choose to do so. Yet the court held that the facts did not constitute a *res ipsa* situation, on the ground that the injury might have been caused by mechanical defects for which the defendant was not responsible. In accord are Giddings v. Honan, 114 Conn. 473, 159 Atl. 271 (1923); Riley v. Woodin, 310 Pa. 449, 165 Atl. 738 (1933).

4. Higgins v. Mason, 255 N. Y. 104, 174 N. E. 77 (1930); O'Shea v. Lavoy, 175 Wis. 456, 185 N. W. 525 (1921). Although at first thought this distinction would seem to exclude the application of the *res ipsa loquitur* doctrine, since it requires that the plaintiff eliminate the probability that the injury was caused by mechanical defects, that is not the necessary result. Many states require that automobiles be inspected at regular intervals, and a showing by the plaintiff that the defendant's automobile had an official inspection sticker on its windshield should satisfy the court that the probability of the injury having been caused by mechanical defects was very slight, and that therefore the rule of *res ipsa loquitur* should be applied.

5. Johnson v. Ostrom, 128 Cal. App. 38, 16 P. (2d) 794 (1932); Bohlen, *supra* note 3, at 227; HARPER, LAW OF TORTS (1933) 185; 5 WIGMORE, EVIDENCE (2d ed. 1923) § 2509.

Trusts—Establishment and Enforcement—Constructive Trust in Illegally Deposited Township Funds Where Depository Accepts Designation—A Michigan statute [1] authorized deposit of township funds in banks designated as depositories by the township board, provided such bank gave a bond for safekeeping. The statute also declared it the duty of the township treasurer, on penalty of liability on his own official bond, to prevent deposit in excess of the amount of the depository bond. Defendant bank was designated by township intervenor, in contravention of the statute,[2] but accepted this designation and furnished a bond. Township treasurer thereafter deposited funds in excess of the sum secured by defendant's bond. Defendant's receiver and the township then sought to impress a trust on these funds.[3] *Held,* that a trust be declared, because the bank had "accepted" the designation and received deposits in the capacity of a designated depository. *Reichert v. Lochmoor State Bank,* 262 N. W. 386 (Mich. 1935).

Receiver and township argued that the designation was lawful, but that the deposit of a sum exceeding the amount of the bond created a trust fund therein.[4] A depositor intervenor, on the other hand, contended that the designation was unlawful and "void", had consequently the same effect as no designation at all, and therefore that there was no trust [5] because of the rule that a township treasurer may place money on general deposit in a bank which has not been designated, under his general authority as custodian of the funds, without thereby making the bank a trustee *ex maleficio.*[6] A trust was constructed in the instant case, even though the designation was held illegal. Remarking that this case was one of first impression, the court considered the "public policy" which protects township funds, and declared that "one who receives public funds in a special capacity shall not be permitted to refer the taking to another relationship in order to gain advantage to himself and deprive the public of its moneys." [7] The statute's provision for liability in the treasurer was said to give a right of election to the public. Cited in aid of these conclusions were the rules that (1) an unlawful deposit of public funds in a bank which receives them knowingly makes such bank a trustee *ex maleficio* upon insolvency;[8] and (2) sureties on a depository bond cannot escape liability for deposits by showing that the designation was invalid.[9] How relevant these principles really are is doubtful, particularly since the ultimate result appears to ignore the obvious intention of the statute—that the treasurer alone be answerable for excessive deposits. However, inasmuch as the bank must be deemed to have had full knowledge of all facts, and as the treasurer's bond would probably have proved inadequate to cover the actual losses, the decision on the whole seems fair and practical.

1. 1 MICH. COMP. LAWS (1929) § 1017.

2. No facts indicate in what respect the designation was contrary to the statute; the court flatly so held. Presumably there was some formal defect in the township board's resolution.

3. It is interesting to note that the *receiver* is here advancing the trust argument. The explanation is that other municipal funds, not secured by sufficient bonds, were also on deposit and impressed with a trust. These municipalities thereby had preferential claims on the cash at hand. It was conceded, however, that if the funds in the instant case were held on trust, the trust deposits would then exceed the cash and no preferences could be claimed by anyone.

4. Principal case at 387.

5. *Ibid.*

6. Reichert v. United Savings Bank, 269 Mich. 136, 256 N. W. 831 (1934); United States Fidelity & Guaranty Co. v. Carter, 161 Va. 381, 170 S. E. 764 (1933).

7. Principal case at 388.

8. Reichert v. United States Bank, 255 Mich. 685, 239 N. W. 393 (1931).

9. National Surety Co. v. Leflore County, 262 Fed. 325 (C. C. A. 5th, 1919); Hennepin County v. State Bank, 64 Minn. 180, 66 N. W. 143 (1896).

Workmen's Compensation Acts—Construction—Right to Compensation for Contagious Disease Contracted from Fellow Employee—A waitress in a cafeteria of a hospital, which did not receive patients suffering from contagious diseases, contracted scarlet fever in the course of necessary contact with a nurse who was at the time in the period of incubation. Compensation board found that the scarlet fever was a "personal injury arising out of and in the course of employment," [1] and made an award for the resulting disability. *Held,* award reversed, because a contagious disease is not an "accidental" injury, and is therefore not within the Compensation Act.[2] *Basil v. Butterworth Hospital,* 262 N. W. 281 (Mich. Sup. Ct. 1935).

The wide majority of jurisdictions make no express statutory provision for contagious disease,[3] but simply require—either expressly [4] or by construction, as here [5]—that injuries be "accidental" to be compensable. In reaching the conclusion that the transfer of germs was, in the instant case, not accidental,[6] the court was faced with cases awarding compensation (1) where germs entered through a cut or lesion,[7] (2) where the transfer of the germs was due to "special exposure" to disease,[8] and (3) where typhoid germs came from water supplied by the employer, including the case of *Frankamp v. Fordney Hotel,*[9] decided by the instant court itself. The first class of cases is distinguishable on the rather tenuous ground that the traumatic injuries were accidental, and therefore the diseases that followed were accidental. The "special exposure" cases, however, cannot be distinguished; for contagion is less "accidental", rather than more, in infested areas. Nor can the typhoid cases be distinguished on the ground of accident. The Michigan court might, however, have availed itself of a more logical distinction; to wit, that the injury in the instant case did not "arise out of" the employment,[10] the causal connection between the disease and the employment being here more remote than in the other cases. The *Frankamp* case, referred to as "an extreme border-line case", was distinguished on the basis of the court's "belief that the defendant [was] bound to provide its employees with safe prem-

1. MICH. COMP. LAWS (1929) § 8417, which makes no mention of "accident."

2. Since defendant did not receive patients suffering from contagious disease, the court properly treated it as an ordinary employer. There was no question of fault on the defendant's part, since the germs were communicated during the period of incubation. See instant case at 282.

3. But see Conn. Pub. Acts 1921, c. 306, § 11 (not incorporated entirely in CONN. REV. STAT. [1930]). Oddly enough, the instant case is the first squarely meeting the issue. See, however, Chase v. Industrial Commission, 81 Utah 141, 149, 17 P. (2d) 205, 208 (1932) (compensation denied because no proof that the typhoid was contracted in the course of employment); Martin v. Manchester Corp., 106 L. T. 741, 742 (Ct. App. 1912) (no compensation for scarlet fever for same reason); Note (1935) 51 SCOTT. L. REV. 58-59.

4. *E. g.,* ILL. REV. STAT. (Cahill, 1933) c. 48, § 201; MO. REV. STAT. (1929) § 3301.

5. The court followed Adams v. Acme White Lead & Color Works, 182 Mich. 157, 148 N. W. 485 (1914). Accord: Linnane v. Aetna Brewing Co., 91 Conn. 158, 99 Atl. 507 (1916); Renkel v. Industrial Commission, 109 Ohio St. 152, 141 N. E. 834 (1923). *Contra:* Mooradjian's Case, 229 Mass. 521, 118 N. E. 951 (1918).

6. *Cf.* Connelly v. Hunt Furniture Co., 240 N. Y. 83, 147 N. E. 366 (1925). But it was held that the infection itself was an accident in Arquin v. Industrial Commission, 349 Ill. 220, 181 N. E. 613 (1932).

7. *E. g.,* Connelly v. Hunt Furniture Co., 240 N. Y. 83, 147 N. E. 366 (1925).

8. Fidelity and Casualty Co. v. Industrial Accident Comm., 84 Cal. App. 506, 258 Pac. 698 (1927); De la Pena v. Jackson Stone Co., 103 Conn. 93, 130 Atl. 89 (1925); Vilter Mfg. Co. v. Jahncke, 192 Wis. 362, 212 N. W. 641 (1927). On the subject of "special exposure", see (1915) 64 U. OF PA. L. REV. 108.

9. 222 Mich. 525, 193 N. W. 204 (1923). Accord: Brodin's Case, 124 Me. 162, 126 Atl. 829 (1924). *Contra:* State *ex rel.* Faribault Woolen Mills Co. v. District Court, 138 Minn. 210, 164 N. W. 810 (1917).

10. See (1915) 63 U. OF PA. L. REV. 350; (1930) 78 U. OF PA. L. REV. 442.

ises." [11] Yet the degree of fault of the employer is theoretically immaterial in workmen's compensation cases. The decision can probably best be explained as a reaction toward the gradual extension of workmen's compensation to cases somewhat outside the popular understanding of the words "industrial accident", which extension the generality of the workmen's compensation provisions has facilitated,[12] and which the growing popularity of social insurance [13] has stimulated. The resulting confusion [14] might be clarified by the enactment of more specific workmen's compensation laws, or by an express change to social insurance.[15]

11. Instant case at 283.

12. Note, *e. g.*, cases allowing recovery for injury by lightning: State *ex rel.* People's Coal & Ice Co. v. Dist. Ct. of Ramsey Co. 129 Minn. 502, 153 N. W. 119 (1915); Consolidated Pipe Line Co. v. Mahon, 152 Okla. 72, 3 P. (2d) 844 (1931). *Contra:* Wiggins v. Industrial Accident Board, 54 Mont. 335, 170 Pac. 9 (1918).

13. See (1933) 170 ANNALS, the entire volume being devoted to social insurance.

14. *Cf.* (1935) 84 U. OF PA. L. REV. 257, which points out the corresponding confusion in the law of accident insurance.

15. A middle course, which would permit compensation in the instant situation, and which would probably be more generally acceptable, would be a statutory enactment allowing compensation for all personal injuries arising in the course of employment, and dispensing with the necessity that such injuries be accidental and that they arise out of the employment.