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DISCUSSION OF RECENT DECISIONS

COMMERCE—LICENSES AND PRIVILEGE TAXES—WHETHER OR NOT A MUNICIPAL LICENSE TAX IS VIOLATIVE OF THE COMMERCE CLAUSE WHEN LICENSEE'S INTERSTATE AND LOCAL BUSINESSES ARE INSEPARABLE—There is some reason to believe that the Supreme Court of the United States has recently decided to allow local taxation to invade previously prohibited territory, by an extension of the "home port" theory, judging by the

outcome of the case of *City of Chicago* v. *Willett Company*.[1] In that case, a cartage company engaged in business within a city without first having obtained, and having paid for, a license required by a municipal ordinance.[2] The city failed to secure a conviction for a violation of the ordinance and, on direct appeal to the Illinois Supreme Court because the validity of a municipal ordinance was involved,[3] the judgment of acquittal was there affirmed when the court concluded that the defendant was not subject to the license tax since it could not separate its loads into interstate and intrastate business, nor could it discontinue any part of its service.[4] The Supreme Court of the United States thereafter granted certiorari but, being uncertain as to whether the state court decision had been reached on the basis of a constitutional question, it remanded the case for clarification.[5] After the state supreme court had clearly held that the ordinance ran afoul of the commerce clause of the federal constitution,[6] the Supreme Court of the United States again took the case and this time it reversed the holding, declaring that the tax involved no violation of the federal commerce clause even though the defendant's interstate and local business operations were inseparable and the tax purported to apply only to the latter.[7]

Settlement of the problem of determining whether or not local taxation places an unconstitutional burden on interstate commerce has always been a troublesome matter at best, as is well illustrated by the split of the judges in the instant case, but, since *Brown* v. *Maryland*,[8] the principle that an occupational tax cannot be exacted for the privilege of engaging in interstate commerce has been firmly adhered to in American law.[9] It was there that Chief Justice Marshall announced the firm rule to be that, in the

1 — U. S. —, 73 S. Ct. 460, 97 L. Ed. (adv.) 333 (1953). Justice Douglas wrote a dissenting opinion.

2 Municipal Code, Chicago, 1931, Ch. 163.

3 Ill. Rev. Stat. 1951, Vol. 2, Ch. 110, § 199, provides for direct appeal in such cases.

4 See 406 Ill. 286 at 295, 94 N. E. (2d) 195 at 200 (1950).

5 341 U. S. 913, 71 S. Ct. 734, 95 L. Ed. 1349 (1951).

6 The clarifying opinion, which appears in 409 Ill. 480, 101 N. E. (2d) 205 (1951), was based on the proposition that a carter who engaged in both interstate and intrastate business could not validly be made subject to the ordinance when every load contained intrastate and interstate property, which could not be separated, and the carter could not continue either of its operations without the other.

7 Mr. Justice Reed, with whom the Chief Justice joined, wrote a separate concurring opinion, basing it on the fact that the carter did intrastate business on the streets of Chicago and vicinity. The dissenting opinion of Mr. Justice Douglas regarded the tax as unconstitutional as a burden on interstate commerce.

8 25 U. S. (12 Wheat.) 419, 6 L. Ed. 678 (1827).

9 The opinion in the instant case, — U. S. — at —, 73 S. Ct. 460 at 464, 97 L. Ed. (adv.) 333 at 338, lists the cases.

interest of federal power over interstate commerce, neither a state nor an instrumentality thereof could tax interstate commerce in any form or manner which would impose a direct burden on such commerce.[10]

Since taxation of any sort would, in some way, constitute an imposition upon interstate commerce, it became necessary to modify this rule to an extent sufficient to permit local taxation affecting interstate commerce in an incidental, rather than a direct, fashion; otherwise interstate commerce would enjoy an immunity from taxation while enjoying the benefit of state and local services. Various forms of indirect levy have, therefore, been upheld and the privilege has been extended to include the taxation of the occupation of interstate motor transportation so long as the tax proves to be reasonable and is fixed according to some uniform, fair, and practical standard.[11] This extension, made necessary in order to allow the states to receive reasonable compensation for the expense entailed in providing and maintaining roads, has been classified as coming under the police power of the states, a power which the state may delegate to a municipality, entitling it to exact a tax or fee from the interstate motor carrier for the same purpose.[12] The tax involved in the instant case, however, could not be justified as coming under the police power since it did not meet the aforementioned requirements. It was called an occupational tax by the Illinois Supreme Court,[13] and this classification was accepted by the federal court.

While states may, in the exercise of the police power, regulate or affect the business of interstate transportation in a variety of ways without violating the commerce clause, they have not been permitted to withhold the right to engage in interstate commerce, nor have they been permitted to make the existence of that right depend upon the fulfillment of state-imposed requirements. Thus, in *Spector* v. *O'Connor*,[14] a statute of Con-

[10] In the course of dealing with an argument made in Brown v. Maryland, 25 U. S. (12 Wheat.) 419 at 448, 6 L. Ed. 678 at 689, to the effect that a construction of the commerce power so as to prevent a state government from levying duties on imports would abridge the acknowledged power of a state to tax its citizens, Chief Justice Marshall said: "We admit this power to be sacred; but cannot admit that it may be used so as to obstruct the free course of a power given to Congress. We cannot admit that it may be used so as to obstruct or defeat the power to regulate commerce."

[11] Hendrick v. Maryland, 235 U. S. 610, 35 S. Ct. 140, 59 L. Ed. 385 (1915).

[12] Sprout v. South Bend, 277 U. S. 163, 48 S. Ct. 502, 72 L. Ed. 833, 62 A. L. R. 45 (1928). The police power was utilized, in the more recent case of Bode v. Barrett, — U. S. —, 73 S. Ct. 468, 97 L. Ed. (adv.) 343 (1953), to sustain a flat license fee, measured by the gross weight of a truck used both in interstate and intrastate commerce, assessed by Illinois for the privilege of using the state highways.

[13] See 406 Ill. 286 at 295, 94 N. E. (2d) 195 at 200.

[14] 340 U. S. 602, 71 S. Ct. 508, 95 L. Ed. 573 (1951).

necticut sought to impose a tax on the privilege of doing business within the state, which tax also fell upon motor carriers. The tax was held invalid, insofar as it related to exclusively interstate trucking operations, even though the tax was purported to be calculated only on the profits realized from local business. On the other hand, a state or one of its instrumentalities may, by appropriate legislation, require payment of an occupation tax on the part of one engaged in both interstate and intrastate commerce so long as (1) the tax is imposed solely on account of the intrastate business; (2) the amount exacted is not increased because of the interstate business done; (3) a person engaged exclusively in interstate commerce is not made subject to the imposition; and (4) a person taxed may discontinue intrastate business without being forced to withdraw from his interstate operations.[15] The instant case fell short of this established pattern in the last respect.

Principles developed over a period of years in an attempt to harmonize the prohibition against burdening interstate commerce with the right of a state to place licensing taxes on occupations conducted within its borders help to sharpen the contrast provided by the case at hand. Take, for example, one of the earliest and clearest cases on this problem, that of *Leloup* v. *City of Mobile*.[16] A New York telegraph company doing business in Alabama there failed to pay a license tax as required under the terms of a city ordinance relating to telegraph companies which did business in the city. Holding the tax invalid, the United States Supreme Court treated it as a general license tax affecting the entire business, interstate as well as local. Two years later, this principle was again invoked, in *Crutcher* v. *Kentucky*,[17] at the instance of a foreign express company which did both local and interstate business and the court found the tax objectionable since it might also fall on one engaged only in interstate activity.

These cases found a logical sequitur in the decision achieved in the case of *Western Union Telegraph Company* v. *Kansas*,[18] where it was held that a state could not exclude a foreign corporation from doing merely local business if such exclusion would unreasonably burden its non-excludable interstate business. Kansas there endeavored to collect a charter fee of a given percentage of the entire capital stock from all corporations doing local business, regardless of where the property was located. While the court felt that the tax might have been sustained if it had been imposed

[15] Sprout v. South Bend, 277 U. S. 163, 48 S. Ct. 502, 72 L. Ed. 833, 62 A. L. R. 45 (1928).

[16] 127 U. S. 640, 8 S. Ct. 1380, 32 L. Ed. 311 (1888).

[17] 141 U. S. 47, 11 S. Ct. 851, 35 L. Ed. 649 (1890).

[18] 216 U. S. 1, 30 S. Ct. 190, 54 L. Ed. 355 (1909).

on local property only, despite its use in connection with interstate commerce, and clearly indicated that the tax would have been upheld if it had been apportioned to that part of the capital utilized in intrastate activities, the primary basis for the decision rested on the fact that a burden could not be imposed on interstate activity through the guise of placing a burden on domestic commerce, when domestic and interstate transactions were inseparable.

Paralleling this line of development is another line of cases wherein local impositions have been upheld apparently because the tax fell exclusively on the intrastate portion of the business conducted. In *Osborne* v. *Florida,*[19] for example, a Florida statute required the payment of a license fee before doing intrastate business. The agent of an express company engaged in both interstate and local business failed to pay as he felt the tax did not apply in his case. The state sued and won on the theory that the license was exacted only from intrastate business, was one which could have been avoided if the company had refrained from doing intrastate business, and because the levy was in no way increased by reason of the interstate activity. The same principle was relied upon in another case where the tax was measured by the gross receipts arising from domestic business and not influenced by receipts from interstate business.[20] Even so, the principle is not one which can be easily applied, judging by the case of *Cooney* v. *Mountain State Telephone & Telegraph Company.*[21] The State of Montana there attempted to impose an annual license tax upon each telephone instrument used within the state which the taxpayer sought to restrain as an undue burden on interstate commerce. The court agreed, believing the tax to be improperly proportioned since, a larger number of instruments being in use because of the interstate business, the tax was increased because of the interstate activity.

Returning to the instant case, it is apparent that the case was not one which clearly met the requirements previously established in order to avoid a violation of the protection afforded by the commerce clause for the intrastate and interstate business could not be separated; the carter could not discontinue either operation without giving up the entire business; the amount of the tax was increased because of the interstate business; and there was no attempt to proportion the tax according to the amount of intrastate business done. The fact that the defendant engaged in interstate business obviously forced an increase in the number

[19] 164 U. S. 650, 17 S. Ct. 214, 41 L. Ed. 586 (1896).

[20] Pacific Express Co. v. Seibert, 142 U. S. 339, 12 S. Ct. 250, 35 L. Ed. 1035 (1892).

[21] 294 U. S. 384, 55 S. Ct. 477, 79 L. Ed. 934 (1935).

of trucks used, increased the tax and placed a direct burden upon interstate commerce via an occupational tax.

All of these considerations were disregarded when the court applied the "home port" theory to bring all of the trucks under state jurisdiction for purpose of taxation so as to make the flat license fee apply to all of them. Two outstanding cases expounding the "home port" theory were relied upon. In the first of them, that of *New York Central & Hudson River Railroad Company* v. *Miller*,[22] the State of New York imposed a franchise tax on all New York corporations computed on the amount of capital stock employed in New York. It levied this tax against the railroad on the basis of the number of cars used by the company within the state. The taxpayer contended the assessment was unfair as the cars were constantly in and out of the state and that a proper assessment could be made only by using some proportional factor such as the average number of cars in the state throughout the taxing period or the relation between the track mileage within the state when compared to the mileage elsewhere. The court, however, held that the state of origin remained the state of permanent situs of the property, notwithstanding the occasional excursion of the cars to foreign parts. It was also indicated that, as the cars had not obtained a taxation situs elsewhere, they could properly be taxed by New York.

The "home port" theory was extended even further in the second case, that of *Northwest Airlines, Inc.* v. *State of Minnesota*,[23] wherein the state was allowed to tax all of the airplanes used by the carrier, a Minnesota corporation, although the actual proportion of the mileage flown in Minnesota was only fourteen per cent. of the total. It was said that, with the presence of the "home port" in Minnesota, a relation existed between the carrier and the state which existed with no other state and the benefits ensuing from that relationship afforded the constitutional foundation for the property tax. While the case was not one concerning an occupational tax, it should be noted that a requirement calling for a determination of the exact proportion of property used within the state had previously been enforced.[24]

Selection of the "home port" theory, as expounded in these two cases, produced the result attained in the Willett case for the carter was a local corporation and all of its trucks were based in Illinois, but, to accomplish that result in a case involving an occupational tax, it was

[22] 202 U. S. 584, 26 S. Ct. 714, 50 L. Ed. 1155 (1905).

[23] 322 U. S. 292, 64 S. Ct. 950, 88 L. Ed. 1283, 153 A. L. R. 245 (1944).

[24] Johnson Oil Refining Co. v. State of Oklahoma, 290 U. S. 158, 54 S. Ct. 152, 79 L. Ed. 238 (1933).

necessary to avoid the holding in *Barrett* v. *New York*.[25] The city had there attempted to enforce a municipal ordinance requiring a local license as a condition precedent to conducting an express business within the city. The carrier, engaged in both intrastate and interstate transportation, was able to show that its strictly intrastate activity amounted to only two per cent. of its total business and, as a consequence, the court held the tax was invalid and unduly burdensome on interstate commerce. As no reference was made there to the Miller case, which had previously expounded the "home port" theory, the job of avoidance was not made very difficult.

The Willett case, then, now establishes the law to be that a local corporation, engaged in interstate and intrastate activities, with all of its property based within the state, can be subjected to an occupational tax without producing a violation of the commerce clause, unless it can discharge the burden of showing the proportion of its interstate activity and can demonstrate the fact that the tax constitutes an undue imposition thereon. Its mere inability to make the division will not be enough to avoid the levy. As the motor transport industry continues to grow, the problem of the degree to which interstate motor carriers may expect to receive protection under the commerce clause will grow more and more important. Until recently, the United States Supreme Court had greatly limited the right of a state government to tax such carriers, possibly because the economic interests of the country demanded that protection be afforded to fledgling corporations. The court seems to look at the problem differently today.

R. M. SCHELLY

CONSTITUTIONAL LAW—DUE PROCESS OF LAW—WHETHER OR NOT CONGRESS MAY CONSTITUTIONALLY TAX ILLEGAL INTRASTATE GAMBLING AND COMPEL SELF-INCRIMINATING DISCLOSURES WITH REGARD THERETO—The Supreme Court of the United States, through the medium of the recent case of *United States* v. *Kahriger*,[1] had occasion to pass upon the constitutionality of the highly controversial Gambler's Occupational Tax Act.[2] An information, filed against Kahriger, alleged that he was in the business of accepting wagers, had willfully failed to register[3] with the Collector of Internal Revenue, and had failed to pay the occupational

[25] 232 U. S. 14, 34 S. Ct. 203, 58 L. Ed. 483 (1913).

[1] —U. S.—, 73 S. Ct. 510, 97 L. Ed. (adv.) 504 (1953), reversing 105 F. Supp. 322 (1952). Mr. Justice Frankfurter wrote a dissenting opinion as did Mr. Justice Black, with whom Mr. Justice Douglas concurred.

[2] 26 U. S. C. § 3285, et seq.

[3] Ibid. § 3291.

tax in question.[4] He moved to dismiss the information on the ground the statutory sections relied on were unconstitutional for two reasons, to-wit: (1) because Congress, under the pretense of exercising the taxing power, had attempted to penalize a form of intrastate activity thereby usurping a police power reserved to the states, and (2) because the registration provisions violated the privilege against self-incrimination. His motion having been sustained by the district court, upon a declaration that the tax measure was unconstitutional, the Supreme Court, on direct appeal,[5] reversed that decision when a majority of the court concluded the tax statute was constitutional.

In order to reach this decision, the court had to determine three things, to-wit: (1) whether Congress could lawfully tax a specified business which was not within its power to regulate; (2) whether the penalty provisions in the tax statute were imposed for a breach of a regulation which concerned activities in themselves subject to state regulations; and (3) whether the information required by the registration provisions amounted to a denial of the privilege against self-incrimination. It answered the first question in the affirmative, indicating that an act of Congress which, "on its face," purports to be a proper exercise of the taxing power may not be regarded as any the less so because the tax tends to restrict, suppress, or discourage the thing or activity taxed. In such cases, the court said, it would refuse to inquire into unexpressed motives which may have impelled Congress to exercise a power constitutionally conferred upon it. On the second point, the court held that the regulatory provisions of the tax statute were directly and intimately related to the collection of a valid tax, hence were obviously supportable as in aid of the revenue provisions. With regard to the third question, the court decided that the privilege against self-incrimination applied only to past acts, not to future acts which may or may not be committed, and that the information required from the applicant did not force him to disclose that he had, in the past, been engaged in gambling activities but merely informed him that, to engage in future business of this type, he would have to comply with the conditions prescribed in the tax statutes.

Congress, of course, has been given the plenary power "to levy and collect taxes,"[6] which generic phraseology includes all species of taxation: duties, imposts, and excises, as well as other forms. The only express limitation upon this power to tax, insofar as excise taxes are concerned, lies in the fact that "all . . . excises shall be uniform throughout

[4] Ibid., §3290.

[5] Direct appeal, because of the constitutional issue, is authorized by 18 U. S. C. § 3731.

[6] U. S. Const., Art. I, § 8.

the United States," a limitation which has been interpreted to be measured merely in terms of geographical uniformity.[7] Except for this limitation, it is axiomatic that Congress possesses complete discretionary power to subject every person, every occupation, and every form of property to such taxation as it may deem necessary and proper to impose[8] and, while the primary purpose of taxation has been to obtain revenue, the power may also be used to accomplish incidental regulatory results. In fact, as it would be impossible to tax persons, things, and transactions without generating social and economic consequences of a non-fiscal nature, Congress has heretofore initiated taxation policies intended to discourage production, consumption, or the transfer of harmful, deleterious, or dangerous commodities[9] or to protect domestic industries against foreign competition.[10]

The absence of a general police power to regulate directly does not deny the possibility that regulation for ulterior purposes, through the exercise of a taxing power or some other delegated power, may not have been furnished to the federal government, providing it with a degree of police power incidentally derived therefrom. Thus, the United States Supreme Court has sustained tax measures, despite their regulatory features and even though they incidentally affected matters ordinarily considered state concern, with respect to a tariff to encourage domestic industries in competition with foreign producers,[11] a tax on state bank notes which had the effect of driving them out of circulation,[12] a license tax on dealers in firearms of the type used mainly by gangsters,[13] a tax which discouraged the manufacture and sale of oleomargarine,[14] a tax on the manufacture and sale of certain narcotic drugs,[15] and a tax on the transfer of marihuana.[16]

A different situation exists, however, when Congress attempts to use

[7] Knowlton v. Moore, 178 U. S. 41, 20 S. Ct. 747, 44 L. Ed. 969 (1900).

[8] Veazie Bank v. Fenno, 75 U. S. (8 Wall.) 533, 19 L. Ed. 482 (1869).

[9] See Grant, "Commerce, Production and the Fiscal Powers of Congress," 45 Yale L. J. 751 (1936).

[10] Hampton v. United States, 276 U. S. 394, 48 S. Ct. 348, 72 L. Ed. 624 (1927).

[11] The principal case on that point is Hampton v. United States, 276 U. S. 394, 48 S. Ct. 348, 72 L. Ed. 624 (1927).

[12] The holding in Veazie Bank v. Fenno, 75 U. S. (8 Wall.) 533, 19 L. Ed. 482 (1869), depends in part on an alternative ground relating to the federal monetary power.

[13] Sonzinsky v. United States. 300 U. S. 506, 57 S. Ct. 554, 81 L. Ed. 772 (1937).

[14] McCray v. United States, 195 U. S. 27, 24 S. Ct. 769, 49 L. Ed. 78 (1904).

[15] Nigro v. United States, 276 U. S. 332, 48 S. Ct. 388, 72 L. Ed. 600 (1928); United States v. Doremus, 249 U. S. 86, 39 S. Ct. 214, 63 L. Ed. 493 (1919).

[16] United States v. Sanchez, 340 U. S. 42, 71 S. Ct. 108, 95 L. Ed. 47 (1950).

the taxing power for the purpose of regulating matters wholly outside the scope of any delegated federal power. In that connection, an attempt to levy a tax on the employment of children under a specified age,[17] a tax on every bushel of grain involved in a contract of sale for future delivery,[18] a tax on retail dealers in malt liquors predicated solely on a violation of state law,[19] and a tax designed to regulate agricultural production,[20] have been invalidated.

The question naturally generated by the foregoing observations concerns itself with the extent to which the Supreme Court will act to restrict Congress in the enactment of tax measures coupled with incidental regulatory features. In an effort to provide some semblance of an answer, the Supreme Court has evolved two directly contrary tests which appear to have been mutually intended to strike a balance between the current economic pattern of the country and the Constitution. The first of these tests, developed in the case of *McCray* v. *United States*,[21] might be called the "on the face" test of constitutionality..

The McCray case grew out of the levy, imposed by Congress, of a tax of ten cents per pound upon oleomargarine which had been artificially colored to look like butter. The contention was made that this rate was so high as to justify a presumption that the Congressional motive was not that a revenue should be secured but that manufacture should be prevented, thereby rendering the act unconstitutional. The statute was upheld as being, upon its face, a revenue measure with the United States Supreme Court saying that neither the motives of Congress nor the ultimate effect of the law could be judicially inquired into. The court then relied on four principles, to-wit: (1) there is a general presumption of constitutionality which attaches to all statutes; (2) there are no constitutional limits upon the mere rate of taxation; (3) Congress has unlimited discretion in the selection of the objects of taxation; and (4) the judiciary should not inquire into or explore the motives of Congress which led to the exercise of the delegated power. This more or less mechanically produced result was the one which could be expected to

17 Bailey v. Drexel Furniture Co., 259 U. S. 20, 42 S. Ct. 449, 66 L. Ed. 47 (1922). But see United States v. Darby Lumber Co., 312 U. S. 100, 61 S. Ct. 451, 85 L. Ed. 609 (1941), wherein the Fair Labor Standards Act, 29 U. S. C. § 201 set seq., was upheld as a valid exercise of the commerce power, leading to an extention of congressional control over sub-standard labor conditions.

18 Hill v. Wallace, 259 U. S. 44, 42 S. Ct. 453, 66 L. Ed. 823 (1922). But see Board of Trade of City of Chicago v. Olsen, 262 U. S. 1, 43 S. Ct. 470, 67 L. Ed. 839 (1923), wherein the Commodities Exchange Act, 7 U. S. C. § 1 et seq., was upheld as a valid exercise of the interstate commerce power.

19 United States v. Constantine, 296 U. S. 287, 56 S. Ct. 223, 80 L. Ed. 233 (1935).

20 United States v. Butler, 297 U. S. 1, 56 S. Ct. 312, 80 L. Ed. 477 (1935).

21 195 U. S. 27, 24 S. Ct. 769, 49 L. Ed. 78 (1904).

flow from the use of the label of "a revenue measure," whether the application was correct or not.

The second test, achieved in *Bailey* v. *Drexel Furniture Company*,[22] might be dubbed the "purposes and effects" test. Congress once sought to prevent the employment in industry of children of tender years by providing for a tax of ten per cent on the net profits for the year earned by those who knowingly employed children within the prescribed age limits during any portion of the year. The Supreme Court decided that the act was unconstitutional because the various provisions of the statute indicated an intention to regulate matters over which Congress could claim no authority. The decision rested on several points, to-wit: (1) the tax was suggestive of a punitive purpose in that the amount of the tax did not vary with the amount of the thing being taxed; (2) the tax law drew a distinction between willful and unwitting employment of minors, a distinction more nearly appropriate in a criminal law rather than a revenue measure; (3) the statute provided for elaborate regulation of conduct over which Congress had no control; and (4) such regulation of conduct was paramount and dominant rather than the incidental regulation typical of a revenue measure. Under this test, the validity of a tax statute would be determined by its purposes and effects as disclosed by a sensible construction of all of its provisions.

There is no doubt that the tax statute involved in the instant could readily be sustained by an application of the "on the face" test of constitutionality, particularly since it was wrapped in the "verbal cellophane of a revenue measure,"[23] even though the holding would permit Congress to achieve results in an area where it had no direct power to act and where the attainment of social reform was the primary purpose with thought of revenue a secondary matter. This rather dim acknowledgment, however, leaves one in quest for a doctrine sufficient to sustain a regulatory tax which would fall within the precise limits of the taxing power. The wisdom of the legislature cannot be questioned, but the promotion of social reform could have been accomplished in another fashion without causing the guise of a regulatory tax measure to overshadow the police power of the states.[24] Justification of the principle that Congress may use its powers to aid the states in the enforcement of criminal laws may be found in such instances as the provision for supplying information to state officers after the same has been gathered by the division of identification and

22 259 U. S. 20, 42 S. Ct. 449, 66 L. Ed. 817 (1922).

23 See dissenting opinion of Mr. Justice Frankfurter, — U. S. — at —, 73 S. Ct. 510 at 518, 97 L. Ed. (adv.) 504 at 513.

24 See Baker, "Taxation: Potential Destroyer of Crime," 29 CHICAGO-KENT LAW REVIEW 197 (1951).

information of the federal Bureau of Investigation,[25] as in the federal kidnapping act,[26] and in the National Motor Vehicle Theft Act.[27] Legislation of that character would have been more in keeping with the fundamental purpose here sought to be subserved.

R. JURCZAKIEWICZ

CORPORATIONS — MEMBERS AND STOCKHOLDERS — WHETHER MINORITY SHAREHOLDERS WHO DISSENT AT TIME OF MERGER LOSE RIGHT TO QUESTION CORRECTNESS OF ALLOTTED SHARE VALUES BY SURRENDER OF SHARE CERTIFICATES AND ACCEPTANCE OF SUM TENDERED—Certain minority stockholders, in the New York case of *In re Silverman*,[1] having duly objected to the consolidation of their corporation with another, thereafter filed a petition to secure a determination as to the valuation of their shares in the manner prescribed by the New York Stock Corporation Law.[2] Dissatisfied with the valuation placed on the stock by an appraiser, they then took the matter before the Supreme Court, Special Term, only to have the appraisal there affirmed. Pending an appeal to the Appellate Division of the Supreme Court, several of the dissenting shareholders voluntarily turned over their certificates to the corporation and were paid the adjudicated rate. Upon this showing, the Appellate Division granted a motion, filed on behalf of the corporation, to dismiss the appeal as to these individuals, relying on the idea that the dissenters had relinquished all their rights in the shares and had thereby turned the appeal into a moot case. On further appeal to the New York Court of Appeals, this holding was reversed when the high court concluded that awards made in stock valuation proceedings were to be regarded as among the listed exceptions to the general rule that a litigant may not accept the benefits of a judgment and also be permitted to appeal therefrom.[3]

25 5 U. S. C. § 340.

26 18 U. S. C. § 1201 et seq.

27 Ibid. § 2311 et seq.

1 305 N. Y. 13, 110 N. E. (2d) 402 (1953), reversing 117 N. Y. S. (2d) 920 (App. Div., 1952). Froessel and Conway, JJ., dissented. The report of the proceedings at Special Term appears in 115 N. Y. S. (2d) 97 (1952).

2 Thompson, N. Y. Consol. Laws, 1950 Supp., Stock Corporation Law, Art. 3, § 21. An interesting sidelight on statutes of this character is afforded by the decision in the case of Booma v. Bigelow-Sanford Carpet Co., — Mass. —, 111 N. E. (2d) 742 (1953). In that case, a person who owned no shares on the date notice was given of a special stockholders' meeting to vote on a proposed consolidation but who acquired and secured registration of shares prior to the date of the meeting, gave notice of dissent and demanded appraisal of his stock. Relief was denied on the ground that he was not a person entitled to have the benefit of the statute.

3 For a general discussion of this rule and its exceptions, see 2 Am. Jur., Appeal and Error, §§ 214-5; 4 C. J. S., Appeal and Error, §§ 215-6; and annotation in 169 A. L. R. 987 and in 29 L. R. A. (N.S.) 1.

To offset the common law doctrine that no change could be effected in the form of a corporate organization except by the unanimous consent of all shareholders,[4] forty-two states today have statutes regulating the procedure for corporate merger and consolidation upon the vote of less than all the outstanding stock. These statutes do, however, grant recognition to a right on the part of dissenting shareholders to withdraw from the enterprise and to have the value of their shares determined and repurchased by the corporation.[5] Typically, these statutes provide for the appointment by a court of disinterested appraisers, usually three in number, who are directed to place a valuation on the stock.[6] If the valuation so fixed is not objected to by either the shareholder or the corporation, it forms the basis upon which the shares are repurchased. If, however, either party is not satisfied with the appraisers' determination, the right to secure judicial review thereof is made dependent upon the particular statute governing the merger or consolidation procedure.

In that regard, the New York statute involved in the instant case provided that, upon objection to the appraised valuation of the stock, the objector had the right to secure review only if action was taken to that end within a designated time. The initial utilization of this right by the dissenting shareholders concerned in the instant case gave rise to the particular problem under discussion. It should be noted, however, that the question as to whether or not this problem could arise in other jurisdictions would have to depend upon whether the particular statute makes provision for an appeal under similar circumstances. A survey of the various state statutes covering appraisal procedure would seem to indicate that such statutes fall into one or the other of three possible categories.

A small number of these statutes not only declare that the valuation of the appraisers is to be final and binding on all parties but also expressly deny any right of appeal therefrom.[7] As a consequence, in these jurisdictions, the problem which faced the court in the instant case could never arise. In several other states, forming the second category, the statutes contain no expression with regard to the allowance or denial of a right to appeal, these statutes merely stating that the appraiser's determination

[4] Zabriskie v. Hackensack & N. Y. R. Co., 18 N. J. Eq. 178, 90 Am. Dec. 617 (1867). But see Banet v. Alton & Sangamon R. R. Co., 13 Ill. 504 (1851).

[5] Statutes bearing on the subject appear to be lacking in the states of Miss., N. D., S. D., Tex., Utah, and W. Va.

[6] Mass. Ann. Laws 1948, Ch. 156, § 46e, serves as a good illustration. See also Lattin, "A Reappraisal of the Appraisal Statutes," 38 Mich. L. Rev. 1165 (1940).

[7] See, for example, Mich. Comp. Laws 1948, § 450.54, which declares: "The appraisers shall submit their determination to the circuit court for confirmation and upon entry of an order confirming said report their determination shall be final and conclusive and from such order there shall be no appeal."

is to be "final and conclusive."[8] Whether an appeal could, by implication, be had in these jurisdictions would have to depend entirely upon the interpretation which might be placed upon such language. A typical example of one possible interpretation is to be found in the Delaware case of *Chicago Corporation* v. *Munds*,[9] where the court held that, under the language of the then Delaware statute,[10] the appraisers' valuation would actually be final and binding upon all parties except for those reasons which would make any appraisal open to inquiry. It is true that the court there proceeded to modify the appraised value for the reason that the appraisers had considered only the market value of the stock in arriving at the determination, but it is doubtful whether further appeal from the modified appraisal would have been permitted. It is, therefore, unlikely that the instant problem could arise in these jurisdictions.

The third, and final, category includes by far a majority of the states, those possessing statutes wherein allowance of appeal to a higher court has been given legislative approval. In these jurisdictions, the problem under discussion could well arise and the holding in the instant case may provide persuasive authority for similar holdings. As the Illinois statute in point,[11] except for the element of compulsory appraisal, is like that of New York, it becomes a matter of interest as to whether or not, given a set of facts similar to those of the instant case, an Illinois court would also permit a dissenting shareholder to accept the benefits of a judgment for the value of his shares and still pursue an appeal therefrom. A survey of Illinois decisions discloses no case directly in point, although cases do exist in which review has been had over the point of the correctness of the amount awarded.[12]

The attitude of the Illinois courts in analogous situations, however, might be said to be revealed by the case of *Holt* v. *Rees*[13] where the court said: "A party cannot accept money directed to be paid to him by decree, and then ask reversal on the ground that it did not give him enough."[14]

[8] The statutes of Colo., Conn., Ida., Mass., Mont., Neb., N. H., N. M., and Wash., would appear to be of that form.

[9] 20 Del. Ch. 142, 172 A. 452 (1934). The holding therein was followed in the later case of Root v. York Corp., 29 Del. Ch. 351, 50 A. (2d) 52 (1946).

[10] See Del. Rev. Code 1935, Ch. 65, § 61. The statute was afterwards amended to provide for review: Del. Corp. Laws Ann. 1951, Ch. 65, § 61.

[11] Ill. Rev. Stat. 1951, Vol. 1, Ch. 32, § 157.70, providing for a judicial determination of the valuation of the dissenter's shares, states: "The practice, procedure, and judgment shall be governed by the Civil Practice Act of this State." Appeal is regulated by ibid., Vol. 2, Ch. 110, § 201.

[12] The cases are collected in a note in Ill. Bus. Corp. Act Annotated (Burdette Smith Co., Chicago, 1947), Vol. 1, pp. 285-7.

[13] 46 Ill. 181 (1867).

[14] 46 Ill. 181 at 183.

This statement may be regarded as typical of a consistent position taken by the Illinois courts in denying to a litigant, after he has accepted an award or legal advantage under a judgment, a right to secure a review of such adjudication as might again put in issue his right to the benefit conferred.[15]

Two principal exceptions do appear, but neither would appear to be helpful in this connection. One such exception notes that there is no waiver of the right to appeal where the benefit accepted under the judgment is conceded by all parties to be due.[16] The second supposes that no waiver occurs where the appeal is taken from a separable part of the decree not involved in the payment made.[17] While considerable latitude has been exercised in the application of these exceptions by the courts of other jurisdictions,[18] they appear to have been narrowly construed in Illinois,[19] hence it is unlikely that either would prove to be of assistance in a matter of the type under consideration.

While a contrary holding might seem to put the dissenting shareholder at a disadvantage, since he may be ill able to afford the expense and delay of prosecuting his appeal,[20] the legislature may have considered the liberal provision for interest on the whole amount finally awarded[21] as a sufficient offset to this burden. It is unlikely, therefore, that the Illinois court would follow the New York view expounded in the instant case. The decision does suggest, however, a possible point for further legislative consideration. The statute might be revised to provide for the deposit in court of the

15 Gridley v. Wood, 305 Ill. 376, 137 N. E. 251 (1922); Scott v. Scott, 304 Ill. 287, 136 N. E. 659 (1922); Langher v. Glos, 276 Ill. 342, 114 N. E. 590 (1916); Corwin v. Shoup, 76 Ill. 246 (1875); Ruckman v. Alwood, 44 Ill. 183 (1867); Thomas v. Negus, 7 Ill. 700 (1845); Morgan v. Ladd, 7 Ill. 414 (1845). See also Powell v. Amestoy, 337 Ill. App. 631, 86 N. E. (2d) 557 (1949).

16 In Schaeffer v. Ardery, 238 Ill. 557, 87 N. E. 343 (1909), for example, it was held that the acceptance of tax money admittedly due did not preclude the tax collector from appealing from an unfavorable decision concerning disputed taxes.

17 Kerner v. Thompson, 365 Ill. 149, 6 N. E. (2d) 131 (1937).

18 Note the critical discussion of the case of Bass v. Ring, 210 Minn. 598, 299 N. W. 679 (1941), appearing in the annotation in 169 A. L. R. 985 at 1031.

19 Boylan v. Boylan, 349 Ill. 471, 182 N. E. 614 (1932). In that case, the court, concerned with an appeal from a decree of divorce, held the wife's acceptance of a sum awarded for attorney's fees was sufficient to preclude her from questioning other parts of the decree, first because the husband had not admitted liability for such fees, and second, because the decree was deemed to be a unit and not composed of separable parts.

20 See Pierce, "Right of Dissenting Shareholders," in Current Trends in State Legislation (Univ. of Michigan Law School, Ann Arbor, 1952), pp. 145-63, particularly p. 151.

21 Ill. Rev. Stat. 1951, Vol. 1, Ch. 32, § 157.70, provides for interest on the amount fixed as fair value of the shares "to the date of such judgment." The judgment itself would draw interest at the rate of 5% from date of rendition: ibid., Ch. 74, § 3.

sum which the corporation is willing to pay for the dissenter's shares, freeing it from the obligation to pay interest thereon, with recognition of a right to the withdrawal thereof on the part of the dissenter without jeopardizing the right to appeal, but with further costs, expenses, and interest claims to abide the eventual result.[22] Such a revision would embody the good features of the New York case without leaving its acceptance open to the chance of judicial views on the point.

H. KEIL

DIVORCE—DEFENSES—WHETHER OR NOT THE RECRIMINATORY MISCONDUCT OF PLAINTIFF OPERATES TO BAR A CAUSE OF ACTION FOR DIVORCE —Construction of a statute relating to recrimination[1] was required in the recent California case of *DeBurgh* v. *DeBurgh*.[2] The plaintiff there sued her husband for divorce, charging extreme cruelty. In response thereto, the defendant filed a cross-complaint for divorce, also relying on the ground of extreme cruelty. The lower court, after receiving proof of the alleged facts, found that the acts of each party had been provoked by the other; that each had been guilty of a cause for divorce; that the doctrine of recrimination applied; and that neither party was entitled to a divorce. On appeal to the Supreme Court of California, the judgment was reversed principally because the court decided that cruelty which had been provoked would not give rise to a cause of action for divorce, hence would not afford a basis for the defense of recrimination, but it also interpreted the statute in question so as to permit the trial court to exercise a sound judicial discretion as to the effect to be given to recrimination. It thereby promulgated an opportunity for the application of the startling doctrine that a court could grant a divorce, even though both parties were at fault, provided the relationship of husband and wife had become such that the legitimate objects of matrimony had been destroyed and a continuation of the marriage would be against public policy.[3]

22 Laws 1947, p. 905, held unconstitutional for reasons not here pertinent in Department of Public Works v. Gorbe, 409 Ill. 211, 98 N. E. (2d) 730 (1951), noted in 30 CHICAGO-KENT LAW REVIEW 142, could serve as an illustration for an acceptable model.

1 Deering Cal. Civ. Code 1941, § 111, provides that "divorces must be denied upon [a] showing . . . [of] recrimination." Section 122 thereof defines recrimination as a "showing by the defendant of any cause of divorce against the plaintiff in bar of the plaintiff's cause of divorce."

2 39 Cal. (2d) 858, 250 P. (2d) 598 (1952), reversing 109 Cal. App. 335, 240 P. (2d) 625 (1952).

3 Edmonds, J., and Shenk, J., each wrote a dissenting opinion in which they concurred in the reversal because of the failure of the lower court to distinguish between recrimination and provocation, but voiced the opinion that the statute was mandatory in character so that, any time it appeared that both parties were at fault, the defense of recrimination would become absolute and the trial court would then lack power to do anything except to dismiss the action.

The doctrine of recrimination, originating in the twelfth century turies later when Lord Stowell, sitting in an English ecclesiastical court, Roman canon law,[4] appears to have been designed solely for the purpose of protecting the property interests of the wife where both parties had been guilty of adultery. It did not appear on the English scene until cendecided the case of *Forster* v. *Forster*,[5] applied the doctrine of recrimination, and denied a divorce to the parties on that ground. While later English courts appear to have realized the consequences of recrimination, in that cohabitation between the parties was usually discontinued and immorality was usually increased, such courts were reluctant to overrule the doctrine so established until the situation was remedied by the Matrimonial Causes Act[6] and its subsequent amendments[7] which operated to transfer divorce jurisdiction from ecclesiastical tribunals to the common law courts and empowered the judges thereof to exercise a discretion in the matter of granting a divorce where both parties were at fault.

One of the leading cases in the United States on the subject of recrimination as an absolute bar to divorce, oddly enough, is the California case of *Conant* v. *Conant*.[8] It appears to have been instrumental in causing the enactment, in 1872, of the California statute here in question and it achieved the absolute bar to divorce result promulgated earlier by Lord Stowell. Since then, the doctrine of recrimination so developed has been explained on a number of theories. One theory, used most frequently, rests on the doctrine of unclean hands and is based on the equitable principle that the court should not aid one who has been guilty of inequitable conduct, at least in relation to the matter in which he seeks relief from the court.[9] Another explanation follows the mutually dependent covenant theory.[10] Under it, the marriage contract is considered as one of mutually dependent covenants so that, if both parties have been guilty of a breach of any of these covenants, neither can be granted relief in the form of divorce.

Still another theory, one likewise calling for a denial of divorce, has

[4] Beamer, "The Doctrine of Recrimination in Divorce Proceedings," 10 U. of Kansas City L. Rev. 213 (1941).

[5] 1 Hag. Con. 144, 161 Eng. Rep. 504 (1790).

[6] 20 & 21 Vict., c. 85 (1857).

[7] See 1 Edw. VIII, c. 31 (1936), and 1 Geo. VI, c. 57, § 4 (1937).

[8] 10 Cal. 249 (1858).

[9] See, for example, Thorem v. Thorem, 188 Minn. 153, 246 N. W. 674 (1933), and Phillips v. Phillips, 48 Ohio App. 322, 193 N. E. 657 (1933).

[10] MacMillan v. MacMillan, 113 Wash. 250, 193 P. 673 (1928). See, however, the cases of Flagg v. Flagg, 192 Wash. 679, 74 P. (2d) 189 (1937), and Huff v. Huff, 178 Wash. 684, 35 P. (2d) 86 (1934), applying the doctrine of comparative rectitude in a state where there is no statute on the point.

been designated as the *pari delicto,* or equal fault, doctrine[11] from which there has appeared, by implication, a subordinate doctrine to the effect that, where the parties are not equally at fault, divorce may be granted to the one least guilty. This last mentioned doctrine, sometimes designated as the doctrine of comparative rectitude, although designed to eliminate some of the anomalous consequences of recrimination, has not yet received wide acceptance either in statutory or case form. It has, however, been adopted in Iowa through the medium of the case of *Smith* v. *Smith,*[12] and the courts of several other states, by way of dictum, have stated that, in a sufficiently extreme case, a decree for divorce might be given to the least guilty party.[13]

Independently of case-made law on the point, thirty-two American jurisdictions make some provision by statute with respect to recrimination while all others, with the exception of Connecticut, recognize some form of the concept by judicial decision.[14] Twenty-nine of these states have statutes which seemingly make it mandatory to deny divorce when the defendant proves a recriminatory defense,[15] but many call for a consideration of certain specific principles which must be complied with before recrimination may be established. In some instances, for example, recrimination only applies where the ground relied on is of the same statutory character as that asserted by the plaintiff.[16] In others, the recriminatory charge is confined to adultery only and does not apply to other grounds for divorce,[17] nor may it be applied where the prior adultery has been condoned.[18] In

[11] Johns v. Johns, 29 Ga. 718 (1860).

[12] 64 Iowa 682, 21 N. W. 137 (1884). See also Innskeep v. Innskeep, 5 Iowa 204 (1857).

[13] Hoagland v. Hoagland, 218 Ky. 636, 291 S. W. 1044 (1927); Kolaks v. Kolaks, 75 S. W (2d) 600 (Mo. App., 1934); Mueller v. Mueller, 165 Ore. 153, 105 P. (2d) 1095 (1940).

[14] See Vernier, American Family Laws, Vol. 2, § 78, at p. 87.

[15] An exception could be noted with respect to the statutes of Kansas, Oklahoma, and Nevada, which expressly authorize the exercise of discretion. See Kans. Gen. Stats. 1949, § 60-1506. as applied in Lassen v. Lassen, 134 Kan. 436, 7 P. (2d) 120 (1932); Okla. Stat. Ann. 1951, Tit. 12, § 1275, and the case of Panther v. Panther, 147 Okla. 131, 295 P. 219 (1931); Nev. Comp. Laws 1931, § 9467.01. The District of Columbia Code received a similar interpretation in the case of Vanderhuff v. Vanderhuff, 79 App. 4. C. 153, 144 F. (2d) 509 (1944).

[16] See Mich. Comp. Laws 1929, § 12732; Neb. Comp. Stats. 1929, Ch. 42, § 304; Wyo. Rev. Stat. Ann. 1931, § 35-110. In Carter v. Carter, 151 S. W. (2d) 884 at 885 (Tex. Civ. App., 1941), the court stated: "To bar divorce, complainant's misconduct need not be of equal degree with that of defendant's, but must be of the same general character."

[17] Ala. Stat. 1940, Tit. 34, § 26; Ariz. Stat. 1939, Ch. 27, § 806. See also Pavlevitch v. Pavlevitch, 50 N. M. 224, 174 P. (2d) 826 (1946), overruling Chavez v. Chavez, 39 N. M. 480, 50 P. (2d) 264 (1935).

[18] Dela. Rev. Code 1935, Ch. 86, § 5; W. Va. Code Ann. 1937, § 4714; Wis. Stats. 1937, § 247.10.

most of these statutes, however, the bar is stated as being applicable only to mutual charges of adultery[19] although the ground may have been given wider application as the result of judicial expansion upon statutory language.[20] In only three instances can it be said that legislatures have been sufficiently impressed with the doctrine of comparative rectitude to make it the statutory ground for decision in cases calling for the application thereof.[21]

Despite this, a slow trend toward the acceptance of that doctrine may be noticed even in the face of certain evident reversals on the point.[22] Much as the instant holding may be open to criticism for its failure to follow what would seem to be a positive statute on the point,[23] the result attained appears to be far more equitable and desirable than has been true with respect to many of the earlier holdings. To say the least, it discloses a degree of liberality in the matter of granting divorce more nearly in accord with present day practices.[24]

A. SILVER

19 Ill. Rev. Stat. 1951, Vol. 1, Ch. 40, § 11, in part states: "If it shall appear . . . that both parties have been guilty of adultery, when adultery is the ground of complaint, then no divorce shall be decreed."

20 See, for example, the case of Grady v. Grady, 266 Ill. App. 271 (1931), where, on a complaint for divorce charging adultery, the defendant recriminated by charging cruelty and desertion and divorce was denied. See also Zacharias, "Recrimination in the Divorce Law of Illinois," 14 CHICAGO-KENT REVIEW 217-39 (1936).

21 See statutes cited in note 15, ante.

22 The Michigan Supreme Court, in Legatski v. Legatski, 230 Mich. 186, 203 N. W. 69 (1925), retreated from the position it had taken in the case of Weiss v. Weiss, 174 Mich. 431, 140 N. W. 587 (1913). See also the case of Hove v. Hove, 219 Minn. 590, 18 N. W. (2d) 580 (1945), where a court, not yet committed either way, refused to adopt the principle.

23 Nelson, Divorce and Annulment (Callaghan & Co., Chicago, 1945), 2d Ed., Vol. 1, p. 358, commenting on the California statute, states: "It is simple and unambiguous and is fairly based on the reasoning given by the courts for the doctrine of recrimination. This type of statute provides that in a suit for divorce for any cause a defendant may show recrimination by showing that the plaintiff is guilty of any cause. It is the same rule as exists in states having no statutes on the subject. Denial of the divorce is mandatory."

24 Jacobs, "Attack on Decrees of Divorce," 34 Mich. L. Rev. 749 at 751 (1936), declares that "the manner in which present day divorces are handled is extremely liberal. It is only in increasingly rare cases that the courts refuse to grant divorces. Free consent divorce exists in the United States today as fact, not merely as a phenomenon of the divorce mill, but as the standard practice throughout the country."