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Constitutional Law-Bankers' Embezzlement-Definition of Insolvency

RECENT CASE NOTES

CONSTITUTIONAL LAW—BANKERS' EMBEZZLEMENT—DEFINITION OF INSOLVENCY—Appellant was indicted for and convicted of the crime of embezzlement in fraudulently receiving a deposit at a time when the bank, of which he was president, was insolvent.[1] He appealed, alleging that the trial court erred in instructing, in effect, that a bank is insolvent when the actual cash market value of its assets is not sufficient to pay its depositors on demand or in the regular course of business. *Held*, judgment reversed.[2]

The court, in reversing the judgment, held that this instruction was erroneous. It said "a bank is solvent if the fair cash value of all the assets of the bank, on the particular day in question, realizable within a reasonable time, by reasonably prudent persons, would be equal to or in excess of the total liabilities of the bank, exclusive of stock liability." The opinion pointed out that there are two definitions of the term "insolvency"—a narrow one, which the trial court adopted, and the broad one which the Supreme Court approved. The court was able to cite a considerable amount of authority for the view it took, and to point out that most of the cases in which the narrow view was adopted were not criminal cases. It was further suggested that it would be poor policy to put bankers in the position in which the law, so construed, would place them. In the light of the general rule of restricted construction of criminal statutes,[3] and the considerations employed by the court, it can hardly be doubted that the result reached was the correct one.

But is the statute under which the appellant was convicted, even so construed, constitutional? It is submitted that a recent decision of the United States Supreme Court casts grave doubt upon its validity.[4] This statute provides that it shall be a felony for any officer or employee of a bank to fraudulently receive a deposit at a time when the bank is insolvent. It then provides that the failure, suspension or involuntary liquidation of the institution within thirty days after the receipt of such a deposit shall be *prima facie* evidence of an intent to defraud. Is such a presumption constitutional under the due process clause?

Until 1910 the power of the legislature to create statutory presumptions seems to have been unchallenged in the federal courts.[5] In that year, however, the Supreme Court of the United States laid down the rule that any statutory presumption in which there is no rational connection between the fact proved and that inferred is void as a contravention of the due process clause.[6] This proposition has been reiterated many times since

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[1] Sec. 2479 Burns' Indiana Statutes, Revision of 1926.

[2] *Smith v. State*, Supreme Court of Indiana, June 23, 1932, 181 N. E. 519.

[3] *Branarn v. State* (1929), 200 Ind. 575, 165 N. E. 314; *Prussian v. United States* (1931), 282 U. S. 675, 51 Sup. Ct. 223.

[4] *Manley v. Georgia* (1929), 279 U. S. 1, 49 Sup. Ct. 215.

[5] Keeton W. Page, Statutory Presumptions, 10 Texas Law Review 34 (1931).

[6] *Mobile, J. & K. C. R. R. v. Turnipseed* (1910), 219 U. S. 35, 31 Sup. Ct. 136.

that date and must now be considered settled law.[7] An analysis of the problem will reveal that this is a rule with much merit. The power of the legislature in such matters depends upon the balance of social interests. It can not create a statutory presumption unless the social interest behind such a rule is greater than the conflicting social interests. No presumption which is entirely arbitrary and which is not based upon a rational connection can be due process of law, for any social interest which is advanced by such a rule is clearly outweighed by the social interest in a fair administration of justice. It might be said that even an arbitrary presumption has some benefits in that it may be a convenient divide, and may speed up the machinery of the judiciary. But surely, justice—the ultimate purpose of the judiciary—cannot be made subordinate to mere convenience. In the case of *Ferry v. Ramsey*[8] the Supreme Court held that the legislature has the power to create any presumption, without regard to its being reasonable, if it would have the power to impose the same liability where the presumed fact did not exist. The soundness of this doctrine is to be doubted. When a law containing such a provision is passed, the legislature is imposing the liability upon the ultimate fact—not upon the fact from which the presumption is made to arise. If the ultimate fact is to be arbitrarily presumed, the legislature is really imposing the liability upon a mere presumption. It is difficult to see how this can be due process, especially in a criminal case, where the state must prove the defendant guilty beyond a reasonable doubt.[9] In the case decided since *Ferry v. Ramsey* the general rule has been laid down without any reference to this qualification.[10] It might well be contended that these decisions impliedly overrule *Ferry v. Ramsey.*

But even if the rule of that case is accepted, it has no effect upon the principal case. It could hardly be contended that the legislature, under the due process clause, would have the power to declare the mere fact of receiving a deposit during insolvency a crime, in the absence of criminal intent, fraud, or such an exact definition of the state of insolvency that the banker could know when he was breaking the law.

It seems, therefore, that section 2479 of Burns' Indiana Statutes is unconstitutional unless a rational connection exists between the fact to be proved and that to be inferred—that is, a rational connection between the fact that a bank has closed within thirty days after a deposit was received, and the fact that such deposit was received with an intent to defraud. It is difficult to determine just how much connection there must be. So far, the Supreme Court has never adopted any particular test, so the only method of determining the question is to compare the facts of the cases which the Supreme Court has passed upon with the facts of the case under

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[7] *Bailey v. Alabama* (1911), 219 U. S. 219, 31 Sup. Ct. 145; *McFarland v. American Sugar Co.* (1916), 241 U. S. 79, 36 Sup. Ct. 498; *Hawes v. Georgia* (1922), 258 U. S. 1, 42 Sup. Ct. 204; *Yee Hem v. United States* (1925), 268 U. S. 178, 45 Sup. Ct. 470; *Western R. R. v. Henderson* (1929), 279 U. S. 639, 49 Sup. Ct. 445; *Bandini Petroleum Co. v. Superior Ct.* (1931), 52 Sup. Ct. 103.

[8] (1928), 277 U. S. 88, 48 Sup. Ct. 443.

[9] *Fritz v. State* (1912), 178 Ind. 463, 99 N. E. 727.

[10] *Manley v. Georgia* (1929), 279 U. S. 1, 49 Sup. Ct. 215; *Western R. R. v. Henderson* (1929), 279 U. S. 639, 49 Sup. Ct. 445; *Bandini Petroleum Co. v. Superior Ct.* (1931), 52 Sup. Ct. 103.

consideration. In *Manley v. Georgia*,[11] a statute[12] very similar to the one under which the appellant was convicted was held unconstitutional. That statute provided that "every insolvency of a bank shall be deemed fraudulent, and the directors shall be severally punished * * *; provided that the defendant * * * may repel the presumption of fraud by showing that the affairs of the bank have been fairly and legally administered." The statute then defines "insolvency," adopting a definition quite similar to the one set out by the trial court in the principal case. The Supreme Court said that this statute contravened the due process clause of the Fourteenth Amendment because the presumption was arbitrary in that there was not a rational connection between the fact to be proved and that to be inferred. It was pointed out that proof of any one of the conditions described as insolvency would, under such a statute, give rise to a presumption of fraud.

It is submitted that the court could not consistently hold that there is not sufficient connection between the fact of insolvency so defined, and the fact that such insolvency was caused by fraud, and at the same time say that there is enough connection between the fact that a bank has closed within thirty days after the receipt of a deposit, and the fact that such deposit was received with fraudulent intent. It is true that the Indiana court in the principal case repudiated the definition of insolvency contained in the Georgia Statute. But under the Indiana statute it is not the fact of insolvency which gives rise to the presumption, but the fact that the bank suspends within thirty days after the deposit has been received. An examination of the Indiana banking laws will show that the banking department, in which is vested a great deal of discretion, can close a bank because of the existence of the very conditions described as insolvency in the Georgia statute and held to be insufficiently connected with fraud by the United States Supreme Court.[13]

W. H. H.

INTOXICATING LIQUOR—TRANSPORTATION—SUFFICIENCY OF EVIDENCE—When officers first saw the appellant, he was standing by the side of an automobile and Gambino was repairing a tire. When the officers returned, the appellant and Gambino drove away. Later, when the appellant was arrested, he was riding in the car with Gambino, the confessed owner thereof, in which there was found hidden from view one hundred and thirty gallons of liquor, which was being transported. Appellant was tried and convicted in the circuit court of Cass county on a charge of transporting liquor under the Indiana statute.[1] Appellant appealed, assigning as error, the overruling of his motion for a new trial, by challenging the sufficiency of the evidence to support the conviction. *Held*, evidence was insufficient to support the conviction.[2]

Evidence showed that appellant was an Italian by birth, who has resided in Grand Rapids for almost four years and at the time of the arrest was a hitch-hiker on his way to Indianapolis to look for work, when he was per-

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[11] (1929), 279 U. S. 1, 49 Sup. Ct. 215.

[12] Sec. 28, Art. 20, Georgia Banking Act of 1919.

[13] See Sec. 3965, Burns' Indiana Statutes, 1929 Sup.

[1] Burns' R. S. (1926), Sec. 2720.

[2] *Impellizeri v. State*, Supreme Court of Indiana, June 10, 1932.