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THE UNITED SECURITY TRUST CO. CASE, 321 PA. 276

By JOSEPH P. MCKEEHAN*

The final sentence in the opinion of Justice Linn in this case is as follows:

"We think, therefore, that desirable uniformity of administration will be attained by applying the Bankruptcy Rule in all cases of the distribution of the assets of insolvents whether living or dead, individual or corporate, and that as this court, since the Act of 1901, is not committed to the application of any other rule, the Bankruptcy Rule should hereafter be considered of general application."

Granting the desirability of uniformity of administration of insolvent estates, it may be inquired as to whether the legislature or the courts should change an established rule of law. Doubtless many secured creditors had relied on the decision in *Fulton's Estate*¹ for the twenty years during which it stood unreversed. An act of assembly would have been prospective in effect. The court's overruling of this decision, however, is retroactive and could not fail to produce hardship in those cases in which the claims of secured creditors were outstanding.

Why had the Supreme Court applied the equity rule in the Orphans' Court prior to this decision? The answer is found in *Mason's Appeal*.²

A debtor of Mason died insolvent. Mason had a judgment against the decedent which was a lien on his real estate. He was a secured creditor. He contended that the fund arising from the personal property should be first distributed pro rata among all the creditors, lien and unsecured alike. If this were done, he would receive payment in full, as the proceeds of the sale of real estate were sufficient to pay the balance of the secured claims.

The lower court distributed the proceeds of the real estate first and as prior liens consumed this entire fund, Mason received a dividend only out of the

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¹65 Pa. Super. 437 (1917).

²89 Pa. 402 (1879).

personal estate. The Supreme Court reversed the lower court and held that the personal estate is the primary fund for the payment of debts, including such as were liens upon the real estate. "I know of no rule of law better settled than this," said Justice Paxton. Though the estate was insolvent, he continued:³

*"This is not a question of equities, or of the marshalling of assets. Nor is it a question of election by creditors between funds. On the contrary, it is a matter of the payment of debts in the order prescribed by the Act of Assembly. As before said, the personal estate is the primary fund for the payment of debts. Until that is exhausted, or shown to be insufficient, the law will not permit the administrator to sell the real estate, and then only as much thereof as may be necessary to make up the deficiency of the personal estate. The Act of 24th February, 1834, Pamph. L. 77, Purd. 421, provides that 'all debts owing by any person within this state, at the time of his decease, shall be paid by his executors or administrators, so far as they have assets, in the manner following, viz: 1. Funeral expenses, medicine furnished and medical attendance given during the last illness of the decedent, and servants' wages not exceeding one year; 2. Rents not exceeding one year; 3. All other debts, without regard to the quality of the same, except debts due the Commonwealth, which shall be last paid.' There is no distinction here between solvent and insolvent estates; the order of paying debts is the same in either case. Nor is there any question of equities or of marshalling of assets; it is an order of the payment of debts which must be observed in all cases. The executor or administrator has no discretion; he shall pay—is the imperative command of the statute—in the order therein prescribed. Hence, when personal estate comes to his hands, he must apply it first to the preferred debts specified in the act, and then to 'all other debts without regard to the quality of the same'; and for this he is responsible upon his official bond. Nor can this order of the payment of debts be changed by any arrangement between a class of creditors and the administrator. In the case in hand, had the personal estate been sufficient for the payment of all the debts, including general and lien-creditors, it is too plain for argument it would have been the duty of the administrator to have so applied it, and thus to have relieved the real estate for the benefit of the heirs. The same principle must be applied though the estate be insolvent."*⁴

³At page 405.

⁴Italics added.

The court points out that *Ramsey's Appeal*⁵ had established the rule in 1835 and added:

"I know of no case in conflict with Ramsey's Appeal; certainly no such case was cited upon the argument. That it has not been questioned is persuasive evidence of the general approval of the profession of the principles it established."

In *Ramsey's Appeal*, at page 74, it is said:

"It is the opinion of the court, that the personal fund, of course including the money arising from the sale of the land not bound by judgments obtained in the lifetime of the deceased, must be distributed, in the first place, among the creditors, in the order prescribed by the act of the 19th of April, 1794. It is made the duty of an executor or administrator to pay all the debts of the intestate in the manner therein prescribed: viz. physic, funeral expenses, and servants' wages; second, rents not exceeding one year; third, judgments; and fourth, recognizances, &c. The personal property of a decedent is the primary fund for the payment of all debts; *and this is as true of a judgment, which is a lien on the real estate in the lifetime of the decedent, as of any other debt.* It is only in case there is an insufficiency of personal estate, that an orphans' court will order a sale of real estate to pay debts. *I do not look upon this as a case of subrogation, or one in which the doctrine of marshalling assets comes into play; but as a case of the distribution of a fund under the plain directions of an act of assembly.* The fund, therefore, which arises from the sale of the personal estate, &c, must, *in the first place*, be applied to the payment of the judgments which were obtained against William Ramsey, in his lifetime; and the fund which arises from the sale of the real estate must be paid to the judgment creditors, according to their respective priorities in point of time."⁶

On the other hand, in his opinion in the *United Security Trust Company Case*,⁷ at page 285, Justice Linn says:

"The equitable doctrine of marshalling also furnishes a persuasive analogy: '. . . equity may require the creditor with two funds to resort first to that which the other creditors cannot reach . . .': *Graff & Co.'s Est.*, 139 Pa. 69, 74, 21 A. 233."

⁵4 Watts (Pa.) 71 (1835).

⁶Italics added.

⁷321 Pa. 276, 184 A. 106 (1936).

Since this is not a question of equities but of obeying the mandate of the legislature, what has the legislature said since it adopted the Act of 1901 relating to assignments for the benefit of creditors?

On June 7, 1917, the Fiduciaries Act was enacted. It repeated verbatim the 21st section of the act of 1834, above quoted by Justice Paxson. This section was founded on section 14 of the act of April 19, 1794,⁸ so that it is almost as old as the Commonwealth.⁹

No reference is made in the *United Security Trust Company Case* to this section of the Fiduciaries Act or to the fact that the same provision in the Act of 1834 was held controlling in *Mason's Appeal*. The question is now treated as governed solely by equitable considerations.¹⁰

In *York's Appeal*,¹¹ the court had said:

"The *administration of estates* in Pennsylvania is a legal, not an equitable system. *It rests upon statute law*, and is a matter with which the conscience of a chancellor has nothing whatever to do."¹²

But when not governed by statute, it has often been said that the Orphans' Court is a court of equity.¹³

On May 1, 1917, Judge Gest said:

"*The status of the creditors of a decedent's estate is fixed at the date of his death, and if the estate is insolvent, the creditors are entitled to share pro rata* in proportion to their claims: *Fulton's Estate*, 25 Dist. R. 723. Equality here is equity and the general rule is so eminently just that it may be said to be of universal application. In this State *the act of Feb. 24, 1834, par 21, P. L. 70*, prescribes the order in which debts are to be paid when the assets are insufficient to pay all in full, and a preference is given to certain debts in the order named, *all other debts, without regard to the quality of the same, being postponed*."¹⁴

This was said in *Michaelsen's Estate*.¹⁵ The creditor at the audit of the account of the executrix, which embraced only personal estate claimed as a general creditor or though the estate proved insolvent. *The creditor was a mortgagee*. The mortgage was *foreclosed* and the property sold at sheriff's sale *after dece-*

⁸3 Sm. L. 143.

⁹1917, P.L. 447 sec. 13(a), 20 P.S. 501.

¹⁰*Emlen's Estate*, 333 Pa. 238, 243, 4 A. (2d) 143, 145 (1939).

¹¹110 Pa. 69, 74, 1 A. 162, 164 (1885).

¹²Italics added.

¹³*Heinz's Estate*, 313 Pa. 6, 10; 169 A. 365, 366 (1933); *Douglas's Estate*, 303 Pa. 227, 232, 154 A. 376, 378 (1931); *Murphy v. Murphy* 282 Pa. 179, 185, 127 A. 471, 473 (1925).

¹⁴Italics added.

¹⁵26 Pa. Dist. 503 (1917).

dent's death. The claim of the mortgagee was for taxes deducted by the sheriff from the proceeds of sale. It was held that the mortgagee "was undoubtedly entitled to participate in the fund as a general creditor."

The same learned judge had said only July 7th, 1916:¹⁶

"The principles of law applicable to this case would appear to be well settled. *The status of the creditors of a decedent is fixed at the date of his death*, and if the estate is insolvent the creditors are entitled to share pro rata in proportion to their respective claims, with interest calculated to that date. A creditor, who holds collateral security for his debt, is further entitled to retain it until the debt is paid, and if he sells the security for a sufficient amount is entitled to payment in full of the debt and interest: Morgan's Estate, 1 Dist. R. 402; Carr's Estate, 3 Dist. R. 470; Daus's Estate, 8 Dist. R. 326; in which cases the decisions are collected by Hanna, P. J. and Penrose, J."¹⁷

In *Daus's Estate*,¹⁸ Judge Penrose said:

"The right of creditors to participate in the distribution of an insolvent estate is measured by the amount due them, respectively, at the time the fund passes in trust for their benefit, and is not affected by the fact that some of them hold collaterals which enable them to realize from that source largely in excess of what the fund will pay those who are unsecured. The assignment, whether by the voluntary act of the debtor or by his death, cannot deprive creditors of collaterals so held, though of course they are bound to account for what they may receive in excess of debt and interest in full: Shunk's Appeal, 2 Pa. 304; Miller's Appeal, 35 Pa. 481; &c. It is true these were decisions with reference to assignments for benefit of creditors, but precisely the same principle applies to an insolvent's estate passing at his death to his personal representatives. *The rights of the creditors then become fixed*, and the executor or administrator holds simply as their trustee: Hess's Estate, 69 Pa. 272; Mason's Appeal, 89 Pa. 409; Skiles v. Houston, 110 Pa. 254; Cairn's Estate, 13 Phila. 350; Carr's Estate, 35 W. N. C. 448. The expectant is entitled, therefore, to his dividend without being compelled to surrender his collaterals."¹⁹

¹⁶Fulton's Estate, 25 Pa. Dist. 723 (1916).

¹⁷Italics added.

¹⁸8 Pa. Dist. 326 (1899).

¹⁹Italics added.

In *Carr's Estate*,²⁰ Judge Penrose also said:

"His right was fixed to the amount unpaid at the time of the decedent's death (Nice's Appeal, 54 Pa. 202; Kater v. Steinruck, 40 Pa. 501), and was not reduced by what he may subsequently have received from a fund appropriated as collateral (Shunk's Appeal, 2 Pa. 304; Miller's Appeal, 35 Pa. 481; Hess's Appeal, 69 Pa. 272; Cairns's Estate, 13 Phila. 350)."

In *Essick v. Bauman Iron Works*,²¹ Judge Shanaman of Berks County said:

"The respective advantages and disadvantages of either rule have been frequently expounded, but the Act of 1901, *supra*, by changing the law as to the very cases, above cited, on which the equity rule was founded, has in our opinion indicated a policy which we should, in the absence of any specific authority to the contrary, follow and enforce: see Brock's Assigned Estate (No. 2), 312 Pa. 18, 25, wherein our Supreme Court expressly referred to the fact that Miller's Appeal, *supra*, was decided before the passage of the Act of 1901, *supra*. This appears to be the only reference to the point under discussion which we have been able to find in any decision of our Supreme Court since 1901. That the Bauman Iron Works was insolvent, and that the principal object of the receivership was the administration of the estate of an insolvent, is clear. *The rule in Fulton's Estate, supra, of course, remains the established law in orphans' court distribution.*"²²

In *Utica Ins. Co. v. Easton S. Co., Inc.*,²³ it is held:

"In *Prudential Trust Co.'s Assignment*, 223 Pa. 409, 72 A. 798, at page 414, we said: 'The rights of creditors of an assigned estate are fixed as of the date of the assignment. By the deed of assignment the equitable ownership of the assigned property passes to the creditors. Each creditor owns such a proportional part of the whole as the debt due him bears to the aggregate of the indebtedness. The extent of the interest of a creditor is fixed by the deed of trust which also fixes the time to which the several claims must be referred for adjustment and not the date of the decree of distribution. The creditor having thus a fixed and vested interest as of the date of the assignment, *it cannot be reduced to his prejudice by subsequent legislation, or otherwise, without interfering with a vested legal right . . .*'"²⁴

²⁰3 Pa. Dist. 740 (1894).

²¹25 Pa. D. & C. 597, 606 (1936).

²²Italics added.

²³327 Pa. 241, 245, 193 A. 56, 58 (1937).

²⁴Italics added.

It has been observed by Judge Lamberton in the case of *In Re Edward G. Schmidheiser, Receiver of the Mortgage Bldg. & Loan Assn.*,²⁵ that it is hard to see why it is not unconstitutional for the courts to force a secured creditor to accept pledged securities as a partial payment of the debt, when it is unconstitutional for the legislature to do the same thing.²⁶ Congress may do this under its exclusive authority in the field of bankruptcy, but how can state courts do it in the absence of even a state statute purporting to relate to the distribution of decedents' estates, and so providing?

Judge Gest and the other commissioners who drafted the Fiduciaries Act of 1917 certainly knew that the law relating to the rights of secured creditors in assigned estates had been changed by the act of 1901 and it is to be presumed that they considered whether similar provisions should be inserted in the Fiduciaries Act. They certainly knew that the Supreme Court had held the question as one settled by the statute of 1834 and when they repeated the controlling section of the Act of 1834, without any change, they presumably thought the law should not be altered. In passing the act as submitted, the legislature presumably thought the same.

In *Pinola v. Davis*,²⁷ Judge Cunningham said:

"When a statute under consideration is a general revision, the law, as therein written, will be deemed to be the same as it stood prior to the revision, unless the courts find from the statute itself, or its history, a *clear* intention to change it. *Miles' Estate*, 272 Pa. 329."²⁸

The Statutory Construction Act provides:²⁹

"Whenever a law is repealed and its provisions are at the same time re-enacted in the same or substantially the same terms by the repealing law, the earlier law shall be construed as continued in active operation. All rights and liabilities incurred under such earlier law are preserved and may be enforced."

In *Central Railroad of New Jersey v. Breisch*, Judge Jones in a dissenting opinion as a member of the United States Circuit Court of Appeals³⁰ referred to the fact that, since the Supreme Court of Pennsylvania construed the Workmen's Compensation Act in 1928, in *Miller v. Reading Co.*,³¹ though the legislature had amended the act a number of times and had made a comprehensive revision thereof in 1937, it had never repudiated the intention imputed to the

²⁵C.P. Phila. Co. 5, Dec. T. 1932, No. 12602.

²⁶*Beaver Co. B. & L. v. Winowich*, 323 Pa. 483, 187 A. 481 (1936).

²⁷106 Pa. Super. 217, 222, 161 A. 567, 568 (1932).

²⁸Italics added.

²⁹1937 P.L. 1019, sec. 82, 46 P.S. 582.

³⁰See 37 Pa. D. & C. 262a (1940).

³¹292 Pa. 44, 140 A. 618 (1928).

legislature by our highest court. Accordingly, he concluded that the present court was bound by that decision as the law of the state and that further changes in the compensation law are an appropriate matter for legislative action, whereby all persons will be duly advised and henceforth bound. The same may be said with equal truth as to the relative desirability of legislative rather than judicial change of a settled construction of an act of assembly.

The Statutory Construction Act also provides:³²

"That when a court of last resort has construed the language used in a law, the Legislature in subsequent laws on the same subject matter intended the same construction to be placed upon such language."

In a case decided by the Supreme Court on the same day in which they decided the *United Security Trust Company Case* and relating to another of the acts contained in the Report of the Commission to Codify and Revise the Law of Decedents' Estates, *Desh's Estate*,³³ Justice Kephart said:

"The commissioners who drafted the Act of 1917 had before them the previous Wills Act containing provisions identical with section 15 (b) and also our interpretations on these sections. The legislature did not, by the passage of section 15 (c), intend to change our settled interpretation of section 15 (b). If they had such purpose in mind as is here contended for by appellant, it should have modified section 15 (b) by a phrase which conveyed that intention in order that it would clearly appear that our prior decisions were overruled. *When an act employs the same language as was contained in prior statutes, it should be construed the same way* (*Barnes Foundation v. Keely*, 314 Pa. 112; *Buhl's Est.*, 300 Pa. 29), and by the application of this rule section 15 (b) and not section 15 (c) applies to the instant case.

"Settled rules of property ought not to be disturbed by loosely-phrased terms of statutes that are susceptible of many meanings."³⁴

In the case of *Union Trust Company of Pittsburgh's Account*,³⁵ Justice Schaffer quotes with approval from *Buhl's Estate*,³⁶ as follows:

"This being so, the general rule applies that where in a later act the legislature uses the same language as in a prior cognate statute, which had been construed by us, the presumption is that the

³²1937 P.L. 1019, sec. 52 (4), 46 P.S. 552.

³³321 Pa. 286, 184 A. 111 (1936).

³⁴Italics added.

³⁵326 Pa. 251, 255, 191 A. 658, 660 (1937).

³⁶300 Pa. 29, 150 A. 86 (1930).

language thus repeated is to be interpreted in the same way it previously had been when considering the earlier statute: *Spangler's Est.*, 281 Pa. 118; *Bell v. Bell*, 287 Pa. 269."

In *First Wisconsin National Bank v. Kingston, Com'r. of Banking*,³⁷ the court said:

"It is conceded that the enactment of chapter 477, Laws 1933, making applicable to bank liquidations the bankruptcy rule, came too late to affect this case. It is suggested by defendant that the enactment of this chapter indicates the view of the banking department and of the Legislature that the bankruptcy rule is the equitable and fair rule. However, the Legislature has not seen fit to modify the equity rule until the enactment in question, and then has modified it only insofar as bank liquidations are concerned. The enactment may involve a recognition of the necessity of legislation to change a rule of property that had been long established and held in this state. Beyond that it has no materiality here."

The Supreme Court of Pennsylvania, on the other hand, changed a rule of property in the settlement of estates of decedents in a case involving an insolvent bank and this by a mere dictum. No chance for any argument as to the basis of the rule in the Orphans' Court was allowed. The question was in no way involved in the case before the court but the lower courts have felt bound to follow the pronouncement by the Supreme Court and it itself treats it now as having made a definite change in the law. *Emlen's Estate*.³⁸

Sometimes the court feels bound to follow its prior decisions, however it may regret them, and suggests that the legislature help out the situation. For example, in *Putman v. Ensign Oil Co.*,³⁹ Justice Kephart said:

"This is the law generally prevailing in other jurisdictions; while, owing to the prior decisions of this court, we cannot follow them in the present case, yet * * * some of us indulge the hope that the legislature, now that attention is called to the matter, will bring our law into harmony with other states."

This was said in 1922 and in 1925 the legislature did as suggested.⁴⁰

In *Bethlehem v. Allentown*,⁴¹ it is said:

"We also take occasion to note that the matter before us strongly suggests the necessity for further legislation, * * * * * but, pend-

³⁷213 Wis. 381, 252 N.W. 152 (1934).

³⁸333 Pa. 238, 243, 4 A. (2d) 143, 145 (1939).

³⁹272 Pa. 301, 310, 116 A. 285, 288 (1922).

⁴⁰Act of May 12, 1925, P.L. 615, 15 P.S. 42.

⁴¹275 Pa. 110, 116, 118 A. 643, 645 (1922).

ing this legislation, where such a situation arises, those representing the several communities should make every reasonable endeavor to reach a fair adjustment in their own way."

In *Welsch v. Pittsburgh Terminal Coal Corp.*,⁴² it is said:

"In every case what is actually decided is the law applicable to the particular facts; all other legal conclusions therein are but obiter dicta, though they may be entitled to great consideration because of the high standing of the tribunal announcing them: *Cohens v. Virginia*, 6 Wheaton 264, 399; *Weyerhaeuser v. Hoyt*, 219 U. S. 381, 394."

This was quoted from *Hill v. Houpt*.⁴³ These cases are again quoted and followed in *Schuetz's Estate*.⁴⁴

In *Commonwealth v. Shawell*,⁴⁵ Chief Justice Kephart said:

"In *Frick's Estate*, 277 Pa. 242, 252, we said: 'It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.'"

Mr. Warwick Potter Scott in *The Judicial Power to Apply Statutes to Subjects to Which They Were Not Intended to Be Applied*.⁴⁶ says:

"Unless the foregoing fundamental propositions are fallacious a doctrine of statutory construction, which has very recently made its appearance in Pennsylvania in at least one well known case and one little known case, is new and revolutionary and if persisted in to its logical conclusion would amount to deep penetration by the judiciary of purlieus hitherto held sacred to the legislative arm. In the few cases in which the Supreme Court has acted upon that doctrine the result reached in the particular case has (as might be expected) been eminently wise and satisfactory and equitable; but the consequences of allowing the doctrine to become entrenched as a recognized part of our law would be to erase by judicial invasion the old boundary between judicial territory and legislative territory; and such a *de marche* would render the invading forces gravely vulnerable to a counter attack which might prove even more serious

⁴²303 Pa. 405, 408, 154 A. 716, 717 (1931).

⁴³292 Pa. 339, 342, 141 A. 159, 160 (1928).

⁴⁴315 Pa. 105, 109, 172 A. 865, 867 (1934).

⁴⁵325 Pa. 497, 503, 191 A. 17, 20.

⁴⁶(1940) 14 Temple Law Review 318, 320.

than the attack recently launched against judicial territory by another coordinate branch of the government.

"The well-known leading decision in Pennsylvania in which the new doctrine is expressly invoked by the court (with citation of authority), and to which the new doctrine is indispensable as the ground on which the decision turns (so that there can be no question of dismissing as dictum or lip service the express invocation of the doctrine), is the *United Security Trust Company Case*."

At page 322 he says:

"It cannot reasonably be suggested that there was any inadvertence in the Insolvency Act of 1901. Not only did that act make a specific change in the established law governing one or two classes of cases, but it allowed to remain unchanged the established law governing the other of those two classes. If there had been inadvertence (which no one is justified in assuming from the context of this act or from any companion act) it would undoubtedly have been corrected by the next legislature in 1903, or at the latest by the legislature of 1905, or during the depressions of 1907, 1921, or 1929, when insolvencies were the rule rather than the exception. "Nothing of the kind occurred. On the contrary, successive legislatures permitted the Equity Rule to continue to govern the claims of secured creditors against the insolvent estates of decedents during the first thirty-six years of this century just as it had governed in those cases in the past, while the Bankruptcy Rule, from the effective date of the Insolvency Act in 1901, governed the claims of secured creditors of the assigned estates of living insolvents.

"The possibility of inadvertence being thus completely eliminated, it is respectfully submitted that the sole judicial function, when faced with this sustained manifestation of the legislative intent, however, inscrutable the reason therefore, was to give effect to that intent. The position of the court may without irreverence be likened to that of those unfortunate members of a famous brigade of British cavalry in the Crimean War:

'Theirs not to reason why,
Theirs but to do and die.'

"In the *United Security Trust Company Case*, decided in 1936, the Supreme Court of Pennsylvania, with only four justices sitting, unequivocally dealt with the question of whether to apply the Equity Rule to the claim of a secured creditor against the insolvent estate of a decedent as it had always been applied before from time im-

memorial. For the reasons just carefully noted it is submitted that the intent of the legislature, whether reasonable or unreasonable, was clear beyond peradventure that the Equity Rule should continue to be applied in that class of cases."

In an annotation in *Lawyers Reports Annotated*,⁴⁷ it is said: (citing cases)—
 "By the contract between the debtor and creditor, the creditor secures a personal right against the debtor and also a right to proceed against the security in case the debt is not paid, the debt or personal right being the principal thing and the security being regarded as something collateral which does not reduce the debt, but only secures the creditor pro tanto in case the debt is not paid in full by the debtor or his estate; wherefore, *in the absence of the intervention of positive or statutory law*, the contract is not varied or changed by the insolvency of the debtor or his assignment, and the courts will not interfere with his contract rights."
 "Another statement is to the effect that the rule is the only one that can be enforced without trespassing upon the constitutional right of property."⁴⁸

The Supreme Court of the United States, speaking through Mr. Chief Justice Fuller, has said:

"Yet it is obvious that the bankruptcy rule converts what on its face gives the secured creditor an equal right with other creditors into a preference against him, and hence takes away a right which he already had. This a court of equity should never do unless required by the statute at the time the indebtedness was created."⁴⁹

Not only do we have no statute which required the application of the bankruptcy rule in insolvent decedents' estates, but the court in applying the rule ignored the fact that for a hundred years it had been held that the statutory law required the application of the equity rule. If the court had followed its usual practice and had waited for some case to come before it involving an insolvent decedent's estate, *Mason's Appeal*⁵⁰ and the cases following it would certainly have been considered, and it is submitted that the changing of the law by judicial dictum is a dangerous practice and one which, it may be hoped, will not frequently be indulged in.

The difficulties of the bench and bar in attempting to apply the "bankruptcy rule" in cases arising in the state courts, without the aid of a statute

⁴⁷L.R.A. 1918B 1045.

⁴⁸Italics added.

⁴⁹*Merrill v. National Bank*, 173 U.S. 131, 43 L. ed. 640, 19 Sup. Ct. 360 (1899).

⁵⁰89 Pa. 402 (1879).

covering the many incidental questions which arise, is disclosed in the reports of the Committee on the Law of Decedents' Estates and Trusts to the Pennsylvania Bar Association.⁵¹

The basis for the decision in the *United Security Trust Company Case* is the embodiment of the bankruptcy rule in the Act of 1901 relating to assignments for the benefit of creditors and the inference that this indicated the legislative view as to public policy, so that the effect of the decision is to change the law retrospectively from the effective date of the Act of 1901. All cases decided and estates settled in the thirty-five years intervening were accordingly disposed of under a mistake of law.

In *Geddes v. Brown*,⁵² it is said:

"Judgment is therefore rendered for the plaintiff on the special verdict, not because he has the law, but because he was entitled to believe that he had it when he took the mortgage on which he sues."

In *Farrior v. New England Mortgage Security Co.*,⁵³ the court said:

"Persons contracting are presumed to know the existing law, but neither they nor their legal advisers are expected to know the law better than the courts, or to know what the law will be at some future day. Any principle or rule, which deprives a person of property acquired by him, or the benefit of a contract entered into in reliance upon and strict compliance with the law in all respects as interpreted and promulgated by the court of last resort, at the time of the transaction, and no fault can be imputed to him in the matter of the contract, unless it be held a fault not to foresee and provide against future alterations in the construction of the law, must be radically wrong. Such a principle, or rule of law would clog business transactions, unsettle titles, and destroy all confidence in the decisions of the Supreme Court of the State."

In *Ray v. Natural Gas Co.*,⁵⁴ it is said:

"The courts of highest authority of all the states, and of the United States, are not infrequently constrained to change their rulings upon questions of the highest importance. In so doing, the doctrine is, not that the law is changed, but that the court was mistaken in its former decision, and that the law is, and really always was, as it is expounded in the later decisions upon the subject. The members

⁵¹See No. 36 Pa. Bar Association Quarterly 302, 310 (1938) and Vol. XI id. 231-238 (1940).

⁵²5 Phila. 180 (1863).

⁵³92 Ala. 176, 181, 9 So. 532, 533 (1891).

⁵⁴138 Pa. 576 (1891).

of the judiciary in no proper sense can be said to make or change the law; they simply expound and apply it to individual cases. To this general doctrine there is a well-established exception, as follows:—"After a statute has been settled by judicial construction, the construction becomes so far as contract rights are concerned as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in effect on contracts as an amendment of the law by means of a legislative enactment"; *Douglass v. Pike Co.*, 101 U. S. 677. See, also, *Anderson v. Santa Anna*, 116 U. S. 361, and cases there cited; *Cooley, Const. Lim.*, 474-477."

In *Menges v. Dentler*,⁵⁵ it is said:

"The law which gives character to a case, and by which it is to be decided (excluding the forms of coming to a decision), is the law that is inherent in the case, and constitutes part of it when it arises as a complete transaction between the parties. If this law be changed or annulled, the case is changed and justice denied, and the due course of law violated.

"When, therefore, the constitution declares that it is the exclusive function of the courts to try private cases of disputed right, and that they shall administer justice 'by the law of the land,' and 'by due course of law'; it means to say that the law relating to the transaction in controversy, at the time when it is complete, shall be an inherent element of the case, and shall guide the decision; and that the case shall not be altered, in its substance, by any subsequent law.

"Men naturally trust in their government, and ought to do so, and they ought not to suffer for it.

"This is acting in conformity with ordinary experience, and with the appearance of things as sanctioned by the highest civil authorities; and it is a plain moral duty of government to protect such acts. This duty is the most obvious moral element on which the doctrine of stare decisis is founded; and when this doctrine must be departed from, the courts ought to see that no transaction that is evidently based upon it should be affected by the departure.

"Indeed, it is an essential principle of government; for, if the right to trust to the highest governmental functionaries is denied, and such trust is unprotected every man is bound to question every act

⁵⁵33 Pa. 495, 498 (1859).

of government that affects him, and to resist whatever he does not approve—a doctrine that would make government impossible.”

In *Mason v. Nelson Cotton Co.*,⁵⁶ it is said:

“The general principle is that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation, and the effect is not that the former decision is bad law, but that it never was the law. To this the courts have established the exception that where a constitutional or statute law has received a given construction by the courts of last resort, and contracts have been made and rights acquired under and in accordance with such construction, such contracts may not be invalidated nor vested rights acquired under them impaired by a change of construction made by a subsequent decision.”

In 18 *North Carolina Law Review* 199 at page 220 it is said:

“It has been proposed that in cases where a court changes a rule of law upon which parties have relied, the court should apply the old rule to the case before it and merely announce the new rule for prospective operation. While this method is not new, it has received special attention of late. This seems to be due to the publicity incident to a decision by the Supreme Court of the United States to the effect that if a state court wishes to follow this procedure, there is no provision of the Federal Constitution to prevent it from so doing. The procedure followed in this, the *Sunburst Oil* case, in the state court, has been much discussed and has received a measure of approval.

“On the other hand, however, a number of objections have been raised to this suggestion that the court should confine itself to announcing new rules for the future while applying old ones. The first is that such a declaration of rule for the future is undisguised legislation. This is a great objection to the idealists; but it seems to carry no weight. If, however, this procedure be established by statute, rather than undertaken on judicial initiative, there is a possibility of constitutional difficulties, and there is more likelihood of popular suspicion of the method.” (Citing, CANFIELD, *OUR JUDICIAL SYSTEM* (1917) S. C. B. A. REP. 66; Freeman, *The Protection Afforded Against the Retroactive Operation of An Overruling Decision* (1918) 18 COL. L. REV. 230; KOCOUREK, *RETROSPECTIVE DECISIONS AND STARE DECISIS AND A PROPOSAL* (1931) 17 A. B. A. J. 180).

⁵⁶148 N.C. 492, 510, 62 S.E. 625, 632 (1908).

In *Utica Ins. Co. v. Easton S. Co., Inc.*,⁵⁷ it is held:

"In *Prudential Trust Co.'s Assignment*, 223 Pa. 409, 72 A. 798, at page 414, we said: "The rights of creditors of an assigned estate are fixed as of the date of the assignment. By the deed of assignment the equitable ownership of the assigned property passes to the creditors. Each creditor owns such a proportional part of the whole as the debt due him bears to the aggregate of the indebtedness. The extent of the interest of a creditor is fixed by the deed of trust which also fixes the time to which the several claims must be referred for adjustment and not the date of the decree of distribution. The creditor having thus a *fixed and vested interest as of the date of the assignment, it cannot be reduced to his prejudice by subsequent legislation, or otherwise, without interfering with a vested legal right . . .*"⁵⁸

In *Emlen's Estate*,⁵⁹ Mr. Justice Linn said:

"It is necessary that some time be agreed upon when creditors' rights shall be regarded as fixed for the purposes of title and distribution. The general rule is that they are fixed as of the date of appointment of receivers, or, as of the date of the assignment for the benefit of creditors (*United Security Trust Company Case*, 321 Pa. 276, 284 A. 106) and, *in the case of a decedent, at the time of his death.*"⁶⁰

In *Blum Bros. v. Girard Natl. Bank*,⁶¹ Mr. Justice Moschizsker said:

"When receivers are appointed for an insolvent corporation the *rights of creditors are fixed by the facts as they then stand*, and these rights cannot be enlarged by subsequent events (such as the maturing of the notes held by the banks in this case, after the appointment of the present receivers), for when the receivers are designated the assets of the corporation pass into the custody of the law to the same extent as in the case of a decedent's estate. In such instances it has been uniformly held that, *if the decedent was insolvent when his estate passed into the hands of the law*, a debt owing by him at the time of his death, but not then due cannot be set off against a debt then actually due to him."⁶²

⁵⁷327 Pa. 241, 245, 193 A. 56, 58 (1937).

⁵⁸Italics added.

⁵⁹333 Pa. 238, 248, 4 A. (2d) 143, 147 (1939).

⁶⁰Italics added.

⁶¹248 Pa. 148, 157, 93 A. 940, 943 (1915).

⁶²Italics added.

In the *United Security Trust Company Case*,⁶³ Justice Linn quotes from what was said by the Superior Court in *Fulton's Estate*,⁶⁴ as follows:

"The estate of the decedent was insolvent. His death, *under such circumstances*, practically effected an assignment of all his property to his creditors and thereafter it belonged to them in proportion to the amount of the debt due to each."⁶⁵

Though other portions of the opinion of Judge Head are not approved, this portion is not criticized. Justice Linn then says:

"The *finding of insolvency* has produced a change in the status of the claims upon, and the custody of, the insolvent's assets; etc."⁶⁶

On the other hand, since real estate is an asset for the payment of debts for at least one year after the debtor's death, if the entire estate of a decedent, real and personal, is then ample to pay all his debts, the right of a secured creditor to prove the amount of his claim as it existed on the date of death should not be impaired by depreciation in assets occurring during administration or by the failure of other creditors to continue their lien on the real estate. In other words, the bankruptcy rule should be confined in its application to estates which are insolvent at date of death and the secured creditor should have some notice that this is the fact from the personal representative as soon as insolvency is ascertained, so that he may know that he is exposed to having the bankruptcy rule applied to his claim.

The ultimate fund for distribution may be less than the claims presented and allowed, due to the failure of the executor to take the necessary steps to make the rents of real estate available to pay debts or to his failure to sell the real estate before the debts ceased to be a lien thereon. The estate of the decedent in such cases cannot truthfully be said to be insolvent and the rights of a secured creditor should not be affected by the neglect of the personal representative and/or of the unsecured creditors to see that all the assets of the estate are realized and made available for the payment of debts.

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⁶³321 Pa. 276, 283, 184 A. 106, 110 (1936).

⁶⁴65 Pa. Super. at 441 (1917).

⁶⁵Italics added.

⁶⁶Italics added.