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Civil Procedure And Evidence—Dead Man Statute

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Service Commission). The Court was also of the opinion that the prayer for injunctive relief compelling the acquisition of new machinery could be more adequately handled by the Public Service Commission, and that a prohibitory injunction would interfere with the defendant's duty to collect the taxes.[67]

The dissenters would have allowed the complaint to stand as to the causes of action for injunction and declaratory judgment. The lower courts had not, in their discretion, dismissed[68] and the dissenters were of the opinion that a controversy existed, the issue being not whether the phone calls were taxable but whether the defendant could continue to force its subscribers to pay taxes not due and require those subscribers to submit to the company's private procedures as to refunds. They also thought direct application to the courts for injunctive relief was available here, on the ground that where plaintiff alleges illegal collection by a public utility of taxes not statutorily authorized, direct application for relief may be made to the Court.[69]

Dead Man Statute

In a suit against the estate of plaintiff's putative father, based upon an alleged oral contract to support the plaintiff made between plaintiff's alleged father and maternal grandmother, the Court *held,* the mother was a competent witness and the grandmother an incompetent witness under New York Civil Practice Act §347.[70] The interest which renders a witness incompetent under this section is only such as results from the direct legal operation of the judgment.[71] Therefore, although the effect of the agreement would be to lift from the mother the financial burden of the child's support, her testimony is admissible.[72]

The Court's conclusion as to the competency of the grandmother was based upon the general principle that where a person sues on a contract made for his benefit he derives his interest from the party who furnishes the consideration.[73] This general rule has at times been departed from,[74] but for the most part has been followed and is firmly entrenched as part of the law of this state.[75] The dissenters

67. Administrative Code of City of New York §N41-2.0.
68. Note 65, *supra.*
69. *Kovarsky v. Brooklyn Union Gas Co.,* 279 N. Y. 304, 18 N. E. 2d 287 (1938). The majority distinguished this case on the ground that here the company claimed the right to collect and *retain* the money collected.
70. *Duncan v. Clarke,* 308 N. Y. 282, 125 N. E. 2d 569 (1955).
71. *Hobart v. Hobart,* 62 N. Y. 80 (1875).
72. *Connelly v. O'Conner,* 117 N. Y. 91, 22 N. E. 753 (1889).
73. *Rosseau v. Rouss,* 180 N. Y. 116, 72 N. E. 916 (1904).
74. *Ward v. N. Y. Life Ins. Co,* 225 N. Y. 314, 122 N. E. 207 (1917).
75. *Croker v. N. Y. Trust Co.,* 245 N Y. 17, 156 N E. 81 (1927); *Matter of Browning's Estate,* 280 N. Y. 584, 20 N. E. 2d 25 (1939).

were of the opinion that this case was within an exception to the general rule.[76] This opinion was based on the contention that the *Rosseau* case[77] did not overrule the prior cases as the majority claimed, so that those cases were still part of the law of this state and thus constituted exceptions to the *Rosseau* doctrine. This contention seems erroneous in the light of Chief Justice Cullen's concurring opinion in the *Rosseau* case, in which he anticipated the confusion which would be caused by the failure of the majority to explicitly overrule these earlier cases.

Proof of Consideration

In an action on a letter promising to pay a sum of money on behalf of a third party debtor, defendant corporation alleged failure of consideration. Plaintiff claimed that the consideration was forbearance to sue the debtor, and that this fact was made known to defendant's officer by a telephone conversation between the debtor and the officer. The Court, (unanimously affirming a unanimous Appellate Division,[78] which had reversed the trial court)[79] *held,* there was sufficient evidence that defendant's officer was in fact the party at the other end of the telephone conversation, and thus knew of the consideration.[80]

The quantum of proof necessary to establish this fact was held to be met by, inter alia, testimony of plaintiff's lawyer that the debtor had made the telephone call in his presence, pursuant to a discussion they had had on this matter, had referred to a page in a little notebook on which defendant's officer's name and telephone number appeared, asked for defendant's officer by name, relayed the instructions which plaintiff's attorney wished to be given to defendant, including the information as to forbearance, and that subsequently the defendant had acted in accordance with the instructions.

This case is to be distinguished from those in which what was *said* on the other end of a telephone wire was a vital factor in the case;[81] here, all that was necessary was that the other party *heard* the information. A subsidiary point was the admission in evidence of an office memorandum made by plaintiff's lawyer's secretary in the ordinary course of business,[82] purporting to report a telephone call

76. *Healy v. Healy,* 55 App. Div. 315, 66 N. Y. Supp. 927 (4th Dep't 1900); *aff'd,* 166 N. Y. 624, 60 N. E. 1112 (1901); *Bouton v. Welch,* 170 N. Y. 554, 63 N. E. 539 (1902).
77. See note 73, *supra.*
78. 284 App. Div. 703, 134 N. Y. S. 2d 562 (1st Dep't 1954).
79. 205 Misc. 958, 131 N. Y. S. 2d 244 (1954).
80. *Ruegg v. Fairfield Securities Corporation,* 308 N. Y. 313, 125 N. E. 2d 585 (1955).
81. *Gubelman v. Ands Koch, Inc.,* 234 N. Y. 425, 138 N. E. 81 (1923).
82. See C. P. A. §374 (a).