income is entirely taxable in the year of the transaction regardless of the payment arrangement.[25] Two reasons for the distinction may be given: application of other tax principles when the doctrine of constructive receipt was inapplicable,[26] or the restrictions, being self-imposed, resulted only in "sham" transactions purely for the purpose of tax avoidance.[27] Although not truly a constructive receipt problem, it should also be noted that receipt of income by an agent is generally considered as receipt by the principal.[28]

Interest credited to the savings account of a taxpayer is constructively received by him when so credited, even though the taxpayer does not desire to withdraw such sums.[29] This is also true of interest coupons which have matured and are payable, though not cashed,[30] and the taxpayer's physical inability to reduce the income to actual possession is irrelevant.[31] Dividends on corporate stock are constructively received when unqualifiedly made subject to the demand of the shareholder.[32] However, such interest or dividend payments are not constructively received if there are no funds available for payment or if receipt is subject to substantial limitations or restrictions.[33]

The application of the constructive receipt doctrine in compensation plans and deferred compensation agreements is complex and extensive. The basic premise is that such compensation is income, although not actually reduced to possession, in the year it is credited to his account or set apart for him so that he may draw upon it at anytime.[34] However, if receipt is beyond the control of the taxpayer,[35] or there is no right to demand pay-

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[25] Williams v. United States, 219 F.2d 523 (5th Cir. 1955); Kuehner v. Commissioner, 214 F.2d 437 (1st Cir. 1954), *affirming* 20 T.C. 875 (1953); Williams v. United States, 185 F. Supp. 615 (D. Mont. 1960); Sproull v. Commissioner, 16 T.C. 244 (1951), *aff'd*, 194 F.2d 541 (6th Cir. 1952).

[26] Kuehner v. Commissioner, 214 F.2d 437 (1st Cir. 1954), *affirming* 20 T.C. 875 (1953); Corliss v. Bowers, 30 F.2d 135 (S.D. N.Y. 1929), *aff'd*, 34 F.2d 656 (2d Cir. (1929), *aff'd*, 281 U.S. 376 (1930); Sproull v. Commissioner, 16 T.C. 244 (1951), *aff'd*, 194 F.2d 541 (6th Cir. 1952).

[27] Williams v. United States, 219 F.2d 523 (5th Cir. 1955), Williams v. United States, 185 F. Supp. 615 (D. Mont. 1960).

[28] United States v. Pfister, 205 F.2d 538 (8th Cir. 1958), *reversing* 102 F. Supp. 640 (D. S.D. 1952); Helvering v. Schaupp, 71 F.2d 736 (8th Cir. 1934); F. H. Wilson, 12 B.T.A. 403 (1928).

[29] Treas. Reg. § 1.451-2 (b) (1957).

[30] *Ibid.*

[31] Loose v. United States, 74 F.2d 147 (8th Cir. 1934), *affirming* 4 F. Supp. 375 (W.D. Mo. 1933) (Matured interest coupons were taxable as income even though holder was physically unable to receive income). *But see:* Commissioner v. Fox, 218 F.2d 347 (3d Cir. 1954), *affirming* 20 T.C. 1094 (1953) (taxpayer could have collected dividends on December 31, 1949, at offices of various savings and loan companies, twenty-seven in number and all located outside of taxpayer's state of residence; court held doctrine of constructive receipt was not applicable).

[32] Treas. Reg. § 1.451-2 (b) (1957).

[33] Treas. Reg. § 1.451-2 (b) (1957).

[34] Treas Reg. § 1.451-2 (b) (1957; Cooke v. Commissioner, 203 F.2d 258 (10 Cir. 1953), *cert. denied*, 346 U.S. 815 (1953); C. H. Becker, 14 T.C. 361 (1950). The following cases indicate that the authorization of the amount of salary will not constitute constructive receipt: Eckland v. Commissioner, 182 F.2d 547 (10th Cir. 1950), *reversing* 12 T.C. 384 (1949); Hyland v. Commissioner, 175 F.2d 422 (2d Cir. 1949).

[35] Sanchez v. Commissioner, 6 T.C. 1141 (1946), *aff'd*, 162 F.2d 58 (2d Cir. 1947), *cert. denied*, 332 U.S. 815 (1947).

ment,[36] or if the amount due is in dispute,[37] the doctrine is not applicable. As in a sales transaction, compensation may be deferred to subsequent years by the making of a bona fide arm's length contract, provided the rights to payment are restricted to the terms of the contract.[38]

A farmer seeking to minimize taxes, as the rice grower in the principal case was, should remember, when contemplating the method of product disposition, that income may not be postponed by a request for future payment[39] or by the making of an unenforceable postponement agreement.[40] To prevent application of the constructive receipt doctrine he should store the product at the cooperative and sell in a subsequent year, or so contract as to preclude any right to the proceeds in the year of the sale.[41]

RONALD FRYKBERG (June 1963)

INTOXICATING LIQUOR—Is seller liable under Dram Shop Act when purchaser furnishes liquor to a third person who becomes intoxicated and causes injury?

Deceased's wife and her infant daughter brought suit under the North Dakota Civil Damage Act[1] against defendant liquor dealer for the death of their husband and father. Defendant illegally sold liquor to a minor, who subsequently shared the liquor with deceased, also a minor. Deceased became intoxicated and was involved in a fatal auto accident. There was no evidence that the sale was made to the minor by the defendant in the presence of deceased, whereby defendant would have known or had reasonable grounds to believe that deceased would consume a part of the liquor sold. Plaintiff's petition was dismissed by the trial court and plaintiff appealed. *Held,* affirmed. Liability under the Civil Damage Act for the unlawful sale of alcoholic beverages rests on the seller for damages caused by intoxication of the immediate buyer only, unless the seller knew or reasonably should have known that others would consume a part of such liquor. *Fladeland v. Mayer,* 102 N.W.2d 121 (N.D. 1960).

Many states have enacted statutes, commonly called Dram Shop Acts, to provide for civil liability of sellers or givers of intoxicating liquors. The North Dakota Civil Damage Act[2] states: "Every wife, child, parent, guardian, employer, or other person who shall be injured in person, property, or means of support, by any intoxicated person, or in consequence of intoxication, habitual or otherwise, of any person, shall have a right of action, in his or her own

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[36] James Gould Cozzens, 19 T.C. 663 (1953).
[37] Walter I. Bones, 4 T.C. 415 (1944).
[38] Oates v. Commissioner, 18 T.C. 570 (1952), *aff'd,* 207 F.2d 711 (7th Cir. 1953),
[39] Hineman v. Brodrick, 99 F. Supp. 582 (D. Kan. 1951).
[40] Glenn v. Penn, 250 F.2d 507 (6th Cir. 1958), *aff'd,* 265 F.2d 911 (6th Cir. 1959).
[41] J. D. Amend, 13 T.C. 178 (1949).

[1] N.D. Gen. Code Ann § 5-01-21 (1960).
[2] *Ibid.*

name, against any person who, by selling, bartering, or giving away alcoholic beverages contrary to the provisions of this title, shall have caused the intoxication of such person, for all damages actually sustained as well as for exemplary damages . . . ." The Iowa Dram Shop Act[3] is practically identical to the North Dakota statute. The issue presented in *Fladeland v. Mayer* is whether the seller is liable under the statute if he sells liquor to a third person who subsequently provides it to the person who becomes intoxicated.

Unless the statute clearly imposes liability on the seller even though intoxication of someone other than the purchaser is the basis for the action, a number of the cases[4] directly deciding this question seem to support the statement in *Corpus Juris Secundum*[5] that, "Ordinarily statutory liability rests only on the immediate seller of the liquor in an action under the civil damage laws. The statutory liability rests on the immediate, not the remote, seller of the liquor; so that, if the liquor passes through several hands, only the person who made the last sale to the person who became intoxicated by it is responsible. If, however, the seller knew or had good reason to believe when he sold the liquor that the purchaser intended to furnish it to another person, and such person afterwards becomes intoxicated and causes damage, the seller will be liable, and under some statutes the original makers and sellers have been held liable where they illegally made and sold the liquor.[6] If two separate liquor dealers furnish liquor at different times to the same person, producing two separate fits of intoxication, with an interval of sobriety between, and injury results from the second intoxication, the first seller is not liable therefore."

The primary test in these cases is whether the seller of the liquor knew, or had reason to know at the time of the sale, that persons other than the immediate purchaser would drink some of the liquor.[7] The weight of authority is to the effect that, although the liquor was called for and paid for by another, yet if it were designed to be drunk by the person present in the seller's tavern and the seller had knowledge of this fact, such act by the

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[3] IOWA CODE § 129.2 (1958): "Every wife, child, parent, guardian, employer, or other person who shall be injured in person or property or means of support by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her own name against any person who shall, by selling or giving to another contrary to the provisions of this title any intoxicating liquors, cause the intoxication of such person, for all damages actually sustained, as well as exemplary damages.

[4] Pierce v. Albanese, 144 Conn. 241, 129 A.2d 606 (1957); Bell v. Poindexter, 336 Ill. App. 541, 84 N.E.2d 646 (1949); Harris v. Hardesty, 111 Kan. 291, 207 Pac. 188 (1922); Bush v. Murray, 66 Me. 472 (1876); Maldonado v. Claud's Inc., 347 Mich. 395, 79 N.W.2d 847, 853 (1956) ("As a general proposition statutory liability for the unlawful sale of intoxicating liquor rests on the immediate seller so that if such liquor is transferred to others who drink it, become intoxicated, and cause injury to either person or property of a third party, the original seller is not liable."); West v. E. P. Leiphart & Co., 169 Mich. 354, 135 N.W. 246 (1912); Pilkins v. Hans, 87 Neb. 7, 126 N.W. 864 (1910) (If a saloonkeeper sells liquor knowing or having good reason to believe that it is intended for deceased, or intended that the deceased shall participate in drinking it, and deceased does so participate, he is liable as though he sold it directly to the deceased.); Sullivan v. Conrad, 79 Neb. 303, 112 N.W. 660 (1907); Dudley v. Parker, 132 N.Y. 386, 30 N.E. 737 (1892).

[5] 48 C.J.S. 727 *Intoxicating Liquors* § 456 (1947).

[6] Benes v. Campion, 186 Minn. 578, 244 N.W. 72 (1932) (case decided on basis of the illegal manufacture and sale of the liquor.)

[7] Sullivan v. Conrad, 79 Neb. 303, 112 N.W. 660 (1907).

seller would constitute a furnishing of the liquor as required by the statute.[8] However, in *Blackwell v. Fernandez*,[9] the seller was not held liable for damages where one purchased liquor from him while the person who eventually drank the liquor (outside the seller's place of business) and became intoxicated stood only about two feet from the purchaser during the transaction. The court stated the liquor was not sold or given directly to the subsequent inebriate.

It has been held that there may be a recovery without proof that the liquor was actually purchased from the seller, a prima facie case being made by showing that the bottle contained the label of the seller's store and that such drinking contributed to the death of the deceased.[10] The seller has been held liable where the purchaser later gives the liquor to a third party on the theory that the purchaser was an agent for the third person.[11]

The few Iowa cases that have dealt with this point seem to hold contra to the majority decisions. The court stated in *Carrier v. Bernstein Bros.*: "The evidence shows that some of the liquors drank [sic] by the plaintiff's husband were bought by other persons, and it is contended that this was not selling beer to Jack Carrier [the husband]. There is no merit in this contention . . . ."[12] Several other Iowa cases seem to consider it a sale to the one intoxicated when purchased by a third person who gives it to the one intoxicated.[13]

The Dram Shop Act[14] has been used very little in Iowa in the past few years because of the uncertainty whether beer was excluded from this statute,[15] recently resolved in favor of exclusion.[16] However, the Act is available for use in any case involving illegal sales of liquor. Should use of this statute be revived, the question of liability when sales are made to a third person would become quite important in view of the apparent difference between the old Iowa holdings and the majority opinion as expressed by *Fladeland v. Mayer*.

MARVIN HEIDMAN (June 1962)

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[8] Sibila v. Bahney, 34 Ohio St. 399 (1878); Johnson v. Gram, 72 Ill. App. 676 (1897).

[9] 324 Ill. App. 597, 59 N.E.2d. 342 (1945).

[10] Thamann v. Merritt, 107 Neb. 602, 186 N.W. 1003 (1922).

[11] Ryerson v. Phelps, 163 Mich. 237, 128 N.W. 200 (1910) (defendant sold whiskey to intoxicated individual's 18 year old son who bought it at request of his father and delivered it to him). *But see:* Bell v. Poindexter, 336 Ill. App. 541, 84 N.E.2d 646 (1949) (no allegation tavern keeper knew of agency).

[12] Carrier v. Bernstein Bros., 104 Iowa 572, 580, 73 N.W. 1076, 1079 (1898).

[13] Judge v. Jordan, 81 Iowa 519, 523, 46 N.W. 1077, 1079 (1890) (Defendant furnished liquor to firemen who were fighting a fire across the street. The Court instructed the jury that, "If Jordan or his bartender, acting upon the direction of Gage [owner of the burning building], furnished Judge intoxicating liquors, or furnished it to others in his saloon, from whom the plaintiff's husband obtained it, then it was a selling to the said Gage and the plaintiff's husband . . . ."); Kearney vs. Fitzgerald, 43 Iowa 580 (1892) (where there was evidence to show that plaintiff bought liquor and took it home to her husband for the purpose of detaining him there, she coud still benefit from the statute.)

[14] Iowa Code § 129.2 (1958).

[15] See *Civil Remedies for Intoxication*, 2 DRAKE L. REV. 54, 57 (1953); *Editorial Note*, 5 Drake Law Review 62 (1955).

[16] Cowman v. Hansen, 250 Iowa 358, 92 N.W.2d 682 (1958) ("intoxicating liquor" as used in this statute does not include beer containing less than 4% of alcohol by weight), discussed in Hudson, *When a Vending Machine Is Not a Vending Machine*, 11 DRAKE L. REV. 3, 10 (1961).