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Constitutional Law -- Estoppel to Raise the Constitutional Question

Duncan Ian MacCalman

to rear the child in the Protestant religion on the ground that she found it difficult to rear him in a religion different from her own, and that this would be in the best interest and welfare of the child, this court might possibly have done what the court did in the *Martin* case. The fact of the mother's custody makes this result even more likely. On the other hand, the court could do what was done in the *Goldman* case and continue to enforce the agreement of the parties on the ground that it is in the best interest of the child to continue rearing him as a Catholic. If the mother had taken the action suggested above, whichever way the court held, its decision would necessarily be based upon what it found to be in the best interest and welfare of the child, and not upon the fact that the parents had previously reached a particular agreement in the matter.

It seems that Mrs. Lynch has taken the wrong step in openly violating the decree of the court without first seeking a modification. Under the cases discussed the courts have taken jurisdiction to enter decrees regarding the religious upbringing of children where the best interest of the child required it. As the court in the principal case has exercised jurisdiction under similar circumstances, Mrs. Lynch's appeal amounts to no more than an attempted collateral attack on the decree.[17]

MAITLAND GUY FREED.

Constitutional Law—Estoppel to Raise the Constitutional Question

In *Convent of the Sisters of Saint Joseph v. Winston-Salem*[1] the North Carolina Supreme Court enunciated the doctrine that a party may be estopped to assert a statute's unconstitutionality through some prior conduct on his part. In that case the Convent of Saint Joseph sought a declaration of rights under the zoning ordinances of Winston-Salem and

[17] Howat v. Kansas, 258 U. S. 181 (1921) in which the Court said at page 189: "An injunction duly issuing out of a court of general jurisdiction with equity powers upon pleadings properly invoking its action, and served upon persons made parties therein and within the jurisdiction, must be obeyed by them however erroneous the action of the court may be, even if the error be in the assumption of the validity of a seeming but void law going to the merits of the case. It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished." See also State v. Baldwin, 57 Iowa 266 (1881) which held that in injunction proceedings the order of a court having jurisdiction of the matter and of the parties, even if erroneous, is not void, and until reversed must be obeyed.

[1] 243 N. C. 316, 90 S. E. 2d 879 (1956). The plaintiff acquired a large private estate in a residential area of Winston-Salem zoned against all but residences, churches, and public schools. Through a special-use permit, permission was obtained by plaintiff from the city, over objections from residents, to create a private Catholic school on the estate. After the school was established, the plaintiff applied to the zoning board for modification of the permit to allow for the conversion of a garage into a chemistry laboratory, which conversion necessitated structural alterations. The modification was denied and plaintiff was held estopped to assert the unconstitutionality of the zoning ordinances under which the original permit was granted.

a special-use permit issued pursuant to the ordinances. Because the plaintiff had applied for and had been granted a special-use permit to convert a private estate into a church elementary school, it had employed the statute and enjoyed its benefits. The plaintiff was therefore estopped later to attack the ordinance's constitutionality when subsequently refused a modification of the permit to structurally change the exterior of the buildings.

The doctrine of estoppel to assert the unconstitutionality of laws and legal proceedings has long been recognized by American courts;[2] it operates upon the basis of waiver, either express or implied, of the right to challenge constitutionality. Such waiver of a statutory or constitutional right is permissible where no public policy or morals are involved.[3] In view of these principles, an examination of the application of the estoppel doctrine to situations where the right to challenge constitutionality has been waived would be useful. This also necessarily implies an examination of what constitutes waiver.

The two most generally recognized criteria giving rise to the estoppel are the invocation or employment of a statute and the receipt of benefits under a statute. One who employs a statute to his own use may later be estopped to assert its unconstitutionality because the courts will not allow one both to utilize and assail a statute at the same time.[4] Invoking the statute impliedly waives a defect in its constitutionality.[5] Similarly, the acceptance of or participation in benefits from a statute may also create the estoppel.[6] In the leading case, *Daniels v. Tearney*,[7] the United

[2] Notes, 34 COL. L. REV. 1495 (1934); 48 HARV. L. REV. 988 (1935).

[3] In Sovereign Camp, W. O. W., v. Smith, 7 F. Supp. 569, 570 (M.D. Ala. 1934) the court stated, "A party may waive a rule of law or statute or even a constitutional provision enacted for his benefit or protection, where it is conclusively a matter of private right, and no consideration of public policy or morals is involved, and, having once done so, he cannot subsequently invoke its protection."

[4] Booth Fisheries Co. v. Industrial Commission of Wisconsin, 271 U. S. 208 (1926); Hurley v. Commission of Fisheries of Virginia, 257 U. S. 223 (1921); Nuckolls v. United States, 76 F. 2d 357 (10th Cir. 1935); Slick v. Hamaker, 28 F. 2d 103 (8th Cir. 1928).

In Shepard v. Barron, 194 U. S. 553 (1903), after the plaintiffs had inaugurated proceedings under an Ohio statute providing for local improvements, presented a petition for improvements, allowed a contract to be let, changed the plans as the work progressed, periodically recognized the justice of assessments, and signed a statement to induce the purchase of the county improvement bonds, they were estopped from asserting the act's unconstitutionality even though it had been so declared in another proceeding.

But cf. O'Brien v. Wheelock, 184 U. S. 450 (1901), where the construction of a levee along the Mississippi River was not within the authority of the Illinois statute. Some, including the plaintiff, petitioned for the levee and helped organize the assessment district. There was no estoppel to contest the statute's authorization of assessment. The statute had been held unconstituional in a previous litigation.

[5] There will be no waiver of a constitutional right when a statute is void ab initio. St. Paul Trust & Savings Bank v. American Clearing Co., 291 Fed. 212, 229 (S. D. Fla. 1923).

[6] Daniels v. Tearney, 102 U. S. 415 (1880); Rowekamp v. Mercantile-Commerce Bank & Trust Co., 72 F. 2d 852 (8th Cir. 1934); Federal Savings & Loan Cor-

States Supreme Court held: "It is well settled as a general proposition . . . that where a party has availed himself for his benefit of an unconstitutional law, he cannot, in a subsequent litigation . . . aver its unconstitutionality. . . ."

One method of utilization of a statute which will erect the estoppel is found when a legislative enactment provides a remedy and procedure for ajudicating a right, which if violated, would create a distinct cause of action in itself. Employing the statutory remedy and procedure rather than the non-statutory common law remedy is held to concede the validity of the statute.[8] The one estopped has the privilege of ignoring or assuming the invalidity of the statute and proceeding at law as if the statutory remedy were non-existant. In *Electric Company v. Dow*,[9] a New Hampshire statute created a procedure for land owners to recover damages suffered due to the flooding of property by mill dams. When the defendant proceeded under the terms of the statute, he was estopped later to assert that the statutory method of assessing damages was unconstitutional. The court held that the "act confers a privilege which the plaintiff in error was at liberty to exercise or not as it thought fit."

Some difficulty in determining a course of conduct is experienced when a party finds that if he chooses to proceed upon the assumption that the statute is unconstitutional he courts a heavy penalty or loss of rights granted by the statute, and if he invokes the statute he will be estopped later to contest it. Here the risk rests upon the litigant.[10] However, certain exceptions to the operation of the estoppel doctrine exist.

Where the penalty established by the statute for non-compliance is so great that the statute is invoked through duress, the United States

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poration v. Grand Forks Building & Loan Ass'n, 85 F. Supp. 248 (N. E. D. N. D. 1949); United States v. McIntosh, 2 F. Supp. 244 (E. D. Vir. 1932), *cert. denied*, 293 U. S. 586 (1934).

[7] 102 U. S. 415 (1880) *supra* note 6. The convention of Virginia enacted an ordinance providing that no sale be made under a deed of trust without the consent of the parties if the debtor put up a bond and security for payment of the debt. The ordinance was passed in 1861 to protect debtors against whom there was an execution in the hands of an officer. The defendants made their bond and otherwise complied with the statute; the debt remaining unpaid when the ordinance expired, suit on the bond was brought. Defendants claimed the bond was void and the statute unconstitutional. Held, defendants were estopped to plead unconstitutionality.

[8] Great Falls Mfg. Co. v. Attorney General, 124 U. S. 581 (1887). Plaintiff utilized an Act of Congress to recover the value of land taken by the United States. The court, in answer to the plaintiff's later assault on the statute's constitutionality, said: "The plaintiff, by adopting that mode, has assented to the taking of its property by the Government for public use, and has agreed to submit the determination of compensation to the tribunal named by Congress." *Id.* at 599.

[9] 166 U. S. 489 (1897). The statute provided that if either party elected, the court would direct the issue to a jury to assess damages and judgment would be rendered on the verdict of the jury with 50% added to the damages to make a final judgment. The plaintiff in error contended that the method of assessing damages was repugnant to the federal Constitution.

[10] Wall v. Parrott Silver & Copper Co., 244 U. S. 407 (1917); Great Falls Manufacturing Company v. The Attorney General, 134 U. S. 581 (1888).

Supreme Court has waived the invocation. This occurred in *Union Pacific Railroad Company v. Public Service Commission of Missouri*,[11] where the state exacted an exorbitant fee for a certificate of authority to issue bonds pursuant to a statute which threatened heavy penalties and blacklisting if the certificate were not obtained. The court held that application for a certificate and payment of the fee under protest were made under duress and did not waive the right to challenge the statute's constitutionality. The same result has been reached in regard to federal acts.[12] This brings out the well-established rule that to create the estoppel the invocation of the statute must be voluntary.[13]

Another area of exception from the operation of the estoppel doctrine appears in the field of foreign corporations. A foreign corporation, by seeking and obtaining permission to do business in a state, does not thereby become estopped from objecting to any provision in the state statutes which is in conflict with the United States Constitution.[14] Accepting a license does not impose an obligation to respect any provision of the statute granting it that is repugnant to the Constitution.[15] A desire to maintain freedom of interstate commerce as well as a recognition that citizens of one state have a constitutional right to engage in business in another state give support to this rule.[16]

A less frequent exception to the operation of the estoppel doctrine is seen when only one section of a statute which has been invoked is attacked. When that section can be severed from the rest of the act without invalidating the entire statute a party may attack it, although estopped as to other portions of the statute.[17] This is particularly true in cases of statutory amendment.[18]

[11] 248 U. S. 67 (1918).

[12] Hart Coal Corp. v. Sparks, 7 F. Supp. 16 (W. D. Ky. 1934). Coal companies acquiescing in and operating under the Bituminous Coal Code, formulated under the National Industrial Recovery Act, were not estopped to contest its constitutionality; the companies operated under threat of dire penalties, blacklisting, and boycotts for noncompliance.

[13] Abie State Bank v. Bryan, 282 U. S. 765 (1931); Booth Fisheries Co. v. Industrial Commission of Wisconsin, 271 U. S. 208 (1926), in regard to attacks upon Workmen's Compensation Acts by employers who previously elected to obtain the benefits of such acts.

[14] Power Mfg. Co. v. Saunders, 274 U. S. 490 (1927); Hanover Fire Ins. Co. v. Carr, 272 U. S. 494 (1926).

[15] Quaker City Cab Co. v. Pennsylvania, 277 U. S. 389 (1927); W. W. Cargill Co. v. Minnesota *ex rel* Railroad & W. Com., 180 U. S. 452 (1901).

But cf. Pierce Oil Corporation v. Phoenix Refining Co., 259 U. S. 125 (1922); *In re* Standard Oak Veneer Co., 173 Fed. 103 (E. D. Tenn. 1909).

When the United States places conditions upon its consent to be sued, a party may not, in suit brought on that consent, contest the constitutionality of the conditions; the bar of estoppel will operate in such a case. Upchurch Packing Co. v. United States, 151 F. 2d 983 (5th Cir. 1945), *cert. denied*, 327 U. S. 803 (1946).

[16] Moredock v. Kirby, 118 Fed. 180 (W. D. Ky. 1902).

[17] Where the act itself carries a separability provision, an attack upon one section will not invalidate the entire act. Securities & Exchange Commission v. Torr, 15 F. Supp. 315 (S. D. N. Y. 1936); Mojave River Irr. Dist. v. Superior Court of California, 202 Cal. 717, 262 Pac. 724 (1928).

[18] Thompson v. Consolidated Gas Utilities Corporation, 300 U. S. 55 (1937).

Although courts are in conflict as to whether a prior invocation of a statute raises a permanent estoppel,[19] it has been held in at least one case that when changed circumstances reveal that the estoppel, although validly invoked in a previous situation, would be violative of due process in the present instance, the estoppel is erased.[20]

The estoppel operates even when there has been a prior, separate adjudication that the statute assailed is unconstitutional. As a general rule such a prior adjudication will not relieve the party estopped.[21]

The early view in this country was that a state court's adjudication of the estoppel question was not reviewable by a federal court; this was true in every case where there were two grounds upon which to base the state court decision, one federal, and one non-federal.[22] Because the vast majority of estoppel cases fit this description, there was almost no federal review. The early cases held that the estoppel was not a federal question and relied upon the non-federal ground as sufficient basis for the state court determination.[23] This attitude of the United States Supreme Court gave the state court decisions a peculiar strength. But, as state courts abused this power of final decision, the federal courts gradually changed

[19] For cases holding that the bar by estoppel is permanent see Wall v. Parrott Silver & Copper Co., 244 U. S. 407 (1917), and Great Falls Manufacturing Company v. The Attorney General, 124 U. S. 581 (1888).

For a case holding that the bar may not be a permanent one see Buck v. Kuyendall, 267 U. S. 307 (1924).

[20] Abie State Bank v. Bryan, 282 U. S. 765, 776 (1931). State banks, after failing to have the state bank guaranty law declared unconstitutional, endeavored to conduct business pursuant to the law; they were not precluded for all time to assert the law's unconstitutionality. The operation of the law was vastly different from what was expected upon its enactment.

[21] In Daniels v. Tearney, 102 U. S. 415 (188), the court had this to say: "It is well settled as a general proposition . . . that where a party has availed himself for his benefit of an unconstitutional law, he cannot . . . aver its unconstitutionality as a defense, although such unconstitutionality may have been pronounced by a competent judicial tribunal in another suit. In such cases the principal of estoppel applies with full force and effect."

See Shepard v. Barron, 194 U. S. 553 (1903), *supra* note 4, and St. Louis Malleable Casting Co. v. Pendergast Construction Co., 260 U. S. 469, 472 (1923).

[22] Eustis v. Bolles, 150 U. S. 361 (1893). The court held that accepting a dividend on a negotiable note in composition proceedings under state insolvency laws waived the right to enforce a debt after the debtor's discharge. The court then cited Johnson v. Risk, 137 U. S. 300, 307 (1890), wherein that court said: ". . . where, in action pending in a state court, two grounds of defense are interposed, each broad enough to defeat a recovery, and only one of them involves a federal question, and judgment passes for the defendant, the record must show, in order to justify a writ of error from this court, that the judgment was rested upon the disposition of the federal question; and if this does not affirmatively appear the writ of error will be dismissed, unless the defense which does not involve a federal question is so palpably unfounded that it cannot be presumed to have been entertained by the state court."

[23] Pierce v. Somerset Railway, 171 U. S. 641, 648 (1898). "A person may by his acts or omission to act waive a right which he might otherwise have under the Constitution of the United States as well as under a statute, and the question whether he has or has not lost such right by his failure to act or by his action, is not a Federal one." Rutland R. R. Co. v. Central Vermont R. R. Co., 159 U. S. 630 (1895).

their attitude[24] until today they feel a duty to review state court decisions invoking the estoppel.[25]

Although the maxim that one must exhaust his administrative remedies before being heard at law will estop many actions, there will be no estoppel when the unconstitutionality of the statute under which an administrative commission or agency operates is asserted. There are two reasons for allowing a party to proceed directly in court; the inadequacy of administrative relief[26] and the inability of the administrative board to pass upon the constitutionality of the statute which created it.[27]

Two situations exist wherein the estoppel takes the form of res judicata: (1) when a party acquiesces in a court order; an order, though not a final decree, has the effect of res judicata when the parties, by inactivity and acquiescence, have accepted it as disposing of the controversy. The leading case is *City of Trinidad et al. v. Madrid et al.*[28] wherein the court denied the plaintiff's bill to enjoin the city's creating a paving district and levying a special assessment, but continued the case for the sole purpose of allowing plaintiffs to object to the sufficiency of any hearing on assessment. After two years, during which time the improvements were completed and the city let contracts and issued bonds, the plaintiffs attacked the validity of the ordinance; their acquiescence in the court's decision was held to estop such an attack.[29] (2) A failure to appeal from an adverse ruling of an administrative body, thus inducing

[24] Apparently the change in attitude came with state court abuse of the estoppel. In Union Pacific R. R. Co. v. Public Service Commission of Missouri, 248 U. S. 67 (1918), the court, declaring its policy to review the state court's decision, said: "Were it otherwise, as conduct under duress involves a choice, it always would be possible for a State to impose an unconstitutional burden by the threat of penalties worse than it in the case of failure to accept it, and then to declare the acceptance voluntary. . . ."

Also, possible confiscatory legislation being validly construed by state courts via the estoppel doctrine helped bring this change in attitude about. Abie State Bank v. Bryan, 282 U. S. 765 (1931).

[25] Union Pacific R. R. Co. v. Public Service Commission of Missouri, *supra* note 24; Enterprise Irrig. Dist. v. Canal Co., 243 U. S. 157 (1917).

[26] Aircraft & Diesel Corp. v. Hirsch, 331 U. S. 752, 773 (1947). The United States Supreme Court, in a case involving the Renegotiation Acts, held that: "It is true that the presence of constitutional questions, coupled with a sufficient showing of inadequacy of prescribed administrative relief and of threatened or impending irreparable injury flowing from delay incident to following the prescribed procedure, has been held sufficient to dispense with exhausting the administrative process before instituting judicial intervention."

[27] An administrative board to which a complaint might appeal has no authority to pass on constitutional questions. Hillsborough Tp. v. Cromwell, 326 U. S. 620, 625 (1946).

[28] 80 Colo. App. 210, 250 Pac. 158 (1926).

[29] Railroad Commission v. Shell Oil Co., 165 S. W. 2d 502 (Tex. Civ. App. 1942). The court, while finding that suit was not barred, held ". . . that unreasonable delay in appealing which causes the opposite party to act, to his injury, might give rise to a question of estoppel." This would intimate that failure to appeal would raise the estoppel to contest constitutionality only when such failure causes the opposite party to act to his injury. City of Huntsville v. Mayes, 271 S. W. 162 (Tex. Civ. App. 1925); Vesser v. Nashville, 190 N. C. 265, 126 S. E. 593 (1925).

action in the other party, creates an estoppel by res judicata to a later attack upon the constitutionality of the statute under which the disputed ruling was promulgated.[30]

A major cause for utilization of the estoppel doctrine is laches, or the failure to act at a necessary time.[31] Failure to object while another acts under a statute, with your knowledge, to his detriment will estop one to assert the unconstitutionality of that statute.[32] Laches on the part of one's predecessors may also create the estoppel.[33] Only a few cases require a party to change his position as a requisite to pleading the estoppel.[34]

The failure to assert a constitutional right at the proper time may estop a later attack upon the constitutionality of court proceedings.[35] Ordinarily, the failure to raise a constitutional right during trial amounts to a waiver thereof, unless due to ignorance or duress, and an appeal

[30] White v. Glenn, 138 S. W. 2d 914 (Tex. Civ. App. 1940); *In re* Pierce's Estate, 28 Cal. App. 2d 8, 81 P. 2d 1037 (1938). Petitioners, as trustees of a missing heir, waited two and one half years to object to the making of a court order; they were estopped to attack the order. Grant v. Birmingham, 210 Ala. App. 239, 97 So. 731 (1923). Statutory estoppel precluded collateral attack on an assessment proceeding.

[31] Failure to appear at an administrative hearing afforded pursuant to statute will estop one later to assert the unconstitutionality of matters relevant to that hearing. Milheim v. Moffat Tunnel Improvement Dist., 262 U. S. 710 (1923).

In Bradley v. Richmond, 227 U. S. 477 (1913), parties failing to appear to be heard on classification given by an ordinance providing for licensing occupations cannot claim he has been unjustly discriminated against because he was so classified as to subject his business to a higher license tax than that required of others in the same business.

Failure to contest proposed legislation within the time expressly afforded by statute waives the right to later assert its unconstitutionality when adopted. City of Enid *ex rel* Versluis v. Robinson, 39 F. Supp. 923 (W. D. Okla. 1941).

[32] Pierce v. Somerset Ry., 171 U. S. 641 (1898). The defendant company defaulted on its bonds and the majority of bondholders, under statute, reorganized, completed the railway line and issued more bonds; two years later the trustees holding a mortgage securing the original bond issue sued to foreclose and the court held: "Their long acquiescence, without objection, coupled with the changed conditions and the relations resulting from the possession and management of the property by the Somerset Railway, estops them from now questioning the legality of the organization of the new corporation." *Id.* at 647.

[33] Bostwick v. Baldwin Drainage Dist., 152 F. 2d 1 (5th Cir. 1945).

[34] Los Angeles v. Los Angeles City Water Co., 177 U. S. 558 (1900). In a dispute over water rates the court said that ". . . there was no misleading, no injury, no change of condition, no circumstance which could invoke the doctrine of estoppel . . . ," thus intimating that perhaps such change of position might be a prerequisite for invoking the estoppel.

In Women's Kansas City St. Andrew Soc. v. Kansas City, 58 F. 2d 593, 606 (8th Cir. 1932), the plaintiff was not estopped to plead unconstitutionality because it had received no benefit from the contested statute, "and, secondly, there has been no change whatever in the position of the city because of the plaintiff's action."

[35] Cantrell v. City of Caruthersville, 128 F. Supp. 637 (E. D. Mo. 1955). Landowners had brought seven suits in the state courts involving the same dispute and never raised the constitutional objection that the city had denied them equal protection of the laws; the right to raise the constitutional question on appeal in a federal court was waived.

based upon abrogation of constitutional rights may be permanently estopped;[36] this is true of criminal as well as civil actions.[37]

From this review of the operation of the doctrine of estoppel to assert unconstitutionality it is apparent that it is an equitable instrument, the importance of which can best be expressed by a realization that a constitutionally guaranteed right may be permanently lost through a failure to act or by imprudent action at a critical time.

DUNCAN IAN MACCALMAN.

Constitutional Law—Rule of Exclusion—Federal Injunction against Federal Officer from Testifying in State Criminal Prosecution

In what will undoubtedly prove to be a landmark decision in the law of search and seizure, the United States Supreme Court in a recent case, *Rea v. United States*,[1] held by a five to four margin, that the equitable power of the federal courts should extend to give relief under the following circumstances: Petitioner had been indicted in a federal district court for the unlawful acquisition of marihuana in violation of federal law.[2] A federal agent had obtained the evidence under a search warrant invalid under Rule 41(c) of the Federal Rules of Criminal Procedure—this rule states the necessary requisites for a valid federal search warrant. Petitioner made a motion to suppress the evidence. The motion was granted and the indictment was dismissed. Thereafter, the agent instigated a state criminal action charging the petitioner with possesion of marihuana in violation of New Mexico law.[3] While awaiting trial in the state court the petitioner filed a motion in the same federal court to enjoin the federal agent from testifying in the state action with respect to the narcotics obtained by him as a result of the invalid search warrant. The district court denied the relief and the court of appeals affirmed.[4] On writ of certiorari the United States Supreme Court reversed.

[36] Yakus v. United States, 321 U. S. 414 (1944); Sanderlin v. Smyth, 138 F. 2d 729 (4th Cir. 1943).

The constitutional right to move for the return of property illegally seized and to object to evidence obtained may be impaired, if not lost, when not seasonably asserted. United States v. Napela, 28 F. 2d 898 (N. D. N. Y. 1928).

The court has discretionary power and authority over the waiver. United States *ex rel* Athanosopoulos v. Reid, 110 F. Supp. 200 (D. C. Cir. 1953).

In Cameron v. McDonald, 216 N. C. 712, 6 S. E. 497 (1940), the court said, "A defendant may waive a constitutional as well as a statutory right, and this may be done by express consent, by failure to assert it in apt time, or by conduct inconsistent with a purpose to insist upon it." State v. Dunn, 159 N. C. 470, 74 S. E. 1014 (1912).

[37] Carruthers v. Reed. 102 F. 2d 933 (8th Cir. 1939).

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[1] 350 U. S. 214 (1956).

[2] Marihuana Tax Act, 50 STAT. 554 (1937), 26 U. S. C. § 2593(a) (1952).

[3] N. M. STAT. ANN. § 71-636 (1941).

[4] Rea v. United States, 218 F. 2d 237 (10th Cir., 1954), *cert. granted*, 348 U. S. 958 (1955).