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## THE IMPACT OF STATE LAW ON FEDERAL INCOME TAXATION

Robert C. Bartlett\*

THE FEDERAL income tax law ostensibly provides a uniform system of taxation of nationwide scope, applying equally to all who come within the varied classifications set up by Congress. But the present statute, just as in 1913 when the first constitutional income tax was imposed, is superimposed upon a kaleidoscopic pattern of state laws which differ from state to state. To the extent that these state laws affect federal income tax liability, the federal revenue system is far from uniform for federal tax liability differs with the state boundaries. In fact, as one author notes:

Much of our federal tax law is not federal tax law at all, but non-tax state law. Simplification talk is little more than the expression of pious hope unless it takes account of the fact that only in a limited sense do we have a "nationwide scheme of taxation." We shall get nowhere rapidly with the problem of simplification until we recognize that what we bravely call uniformity on a national scale is a myth.<sup>1</sup>

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<sup>1</sup> Paul, *Selected Studies in Federal Taxation* (Callaghan & Co., Chicago, 1938), Second series, p. 5.

In the light thereof, it is desirable to attempt to indicate the extent to which state law does affect federal income tax liability as well as to indicate the confusion produced by the existence of the varied state doctrines bearing on the point.<sup>2</sup> Discussion of such matters must, necessarily, take on an arbitrary pattern for, to a large degree, it is impossible to trace any connected thread of reason in the decisions or the departmental rulings.

## I. TAXABLE ENTITIES

### A. NATURAL PERSONS

Perhaps the first point at which a discussion might begin would be with respect to the person affected by the income tax law. So far as the "natural" taxpayer is concerned there is no particular problem. Although differing provisions apply to citizens and aliens, the federal statutes are uniform in application and govern regardless of state boundaries for the statutes apply to citizens or aliens in their relation to the United States and not to any particular state.<sup>3</sup> Differing tax provisions apply to residents and non-residents,<sup>4</sup> but again uniform rules are provided by the Treasury Department for determining resident or non-resident status.<sup>5</sup> While judicial examination of the question of residence or non-residence may involve a testing of state law, the determination is one upon the general rule intended by Congress rather than the effect to be given to the rules of any particular state.<sup>6</sup> Residence or domicile in a particular state may have significance in "choice-of-law" questions where state law is determinative of the scope of liability, but such law has no application to the question

<sup>2</sup> State law also affects other types of federal taxation, particularly estate, gift, and stamp taxes, but problems arising in relation thereto have been purposely excluded.

<sup>3</sup> U. S. Treas. Reg. 111, § 29.11-3.

<sup>4</sup> See particularly Int. Rev. Code § 116; 26 U. S. C. A. § 116.

<sup>5</sup> U. S. Treas. Reg. 111, §§ 29.211-2 to 29.211-5.

<sup>6</sup> See *Commissioner v. Swent*, 155 F. (2d) 513 (1946); *Commissioner v. Fiske's Estate*, 128 F. (2d) 487 (1942), cert. den. 317 U. S. 635, 63 S. Ct. 63, 87 L. Ed. 512 (1942). The latter case cites New York and Pennsylvania cases. The question of residence was there said to be one of law, not fact; an important distinction in determining whether the decision of the Tax Court is final as to the point.

of whether a given individual falls within the classification of resident, non-resident, citizen, or alien as designated by the special statutory provisions of the income tax law.

#### B. ARTIFICIAL PERSONS

With respect to "artificial" persons or "legal" entities, the question is entirely different. It has been observed that the "most complex problems in the income tax law arise out of the entity relationships of corporation-stockholder, partnership-partner, and fiduciary-beneficiary."<sup>7</sup> No little of this complexity is directly traceable to a confusion as to how far underlying state law is to control for, with the exception of certain organizations of very limited interest from the taxation standpoint,<sup>8</sup> artificial or legal entities must exist, if at all, under state law.

The name given to a particular type of organization formed under state law is not determinative as the official regulations provide:

For the purpose of taxation the Internal Revenue Code makes its own classifications and prescribes its own standards of classification. Local law is of no importance in this connection. Thus a trust may be classed as a trust or as an association (and therefore taxable as a corporation), depending upon its nature or its activities . . . The term "partnership" is not limited to the common law meaning of partnership, but is broader in its scope and includes groups not commonly called partnerships . . . The term "corporation" is not limited to the artificial entity usually known as a corporation, but includes also an association, a trust classed as an association because of its nature or its activities, a joint-stock company, an insurance company, and certain kinds of partnerships.<sup>9</sup>

The following instances will serve to illustrate the extent to which local characterization has been disregarded in determining fed-

<sup>7</sup> Rabkin and Johnson, *Trust and Beneficiary Under the Income Tax*, 1 *Tax L. Rev.* 117 (1946).

<sup>8</sup> For example, corporations organized under the China Trade Act of 1922, and incorporated federal agencies.

<sup>9</sup> U. S. Treas. Reg. 111, § 29.3797-1.

eral tax classification. In *Burk-Waggoner Oil Association v. Hopkins*,<sup>10</sup> for example, an unincorporated joint stock association organized under Texas law was technically a partnership, but upon determination that it conducted its business in the general manner of a corporation it was held to be subject to corporate income taxes. The Supreme Court observed that while Congress could not change a partnership into a corporation, it did not have to accept the state classification when prescribing a scheme of federal taxation. Again, in *Morrissey v. Commissioner of Internal Revenue*,<sup>11</sup> the business enterprise was organized in the form of a trust with management and control vested in certain trustees. It was, nevertheless, held to be taxable as an association, hence subject to corporation taxes. The court there said that "while the use of corporate forms may furnish persuasive evidence of the existence of an association, the absence of particular forms, or of the usual terminology of corporations, cannot be regarded as decisive."<sup>12</sup> In contrast, however, the grantor in *A. A. Lewis & Company v. Commissioner of Internal Revenue*,<sup>13</sup> desiring to subdivide and sell a tract of land, created a trust, named a trust company as trustee, designated herself and another as beneficiaries, and appointed the other person as the exclusive selling agent and manager of the trust. The court found that there was nothing more present than the common relationship of principal and agent, coupled with the collateral incidents of an ordinary trust, so the corporation tax was held not to apply.

### 1. Corporations

Particular types of corporations may be subject to special tax provisions or may be entirely exempt from tax. Insurance companies, for example, are in the first of these categories.<sup>14</sup> The qualification of the particular organization under state insurance

<sup>10</sup> 269 U. S. 110, 46 S. Ct. 48, 70 L. Ed. 183 (1925).

<sup>11</sup> 296 U. S. 344, 56 S. Ct. 289, 80 L. Ed. 263 (1935).

<sup>12</sup> 296 U. S. 344 at 358, 56 S. Ct. 289, 80 L. Ed. 263 at 271. For other instances of taxation of business trusts as corporations, see *Swanson v. Commissioner*, 296 U. S. 362, 56 S. Ct. 283, 80 L. Ed. 273 (1935), and *Helvering v. Coleman-Gilbert Associates*, 296 U. S. 369, 56 S. Ct. 285, 80 L. Ed. 278 (1935).

<sup>13</sup> 301 U. S. 385, 57 S. Ct. 799, 81 L. Ed. 1174 (1937).

<sup>14</sup> Int. Rev. Code §§ 201-7; 26 U. S. C. A. §§ 201-7.

laws may be an important factor in arriving at a determination whether these special provisions apply or not,<sup>15</sup> but it is not necessarily decisive. In *Bowers v. Lawyers Mortgage Company*,<sup>16</sup> a title guaranty company which invested in, bought and sold securities, without guaranty, was regarded as engaging in a business sufficiently lacking in insurance caliber to warrant excluding it from the special insurance provisions even though its operations were subject to state regulation. Banks may be similarly treated, yet it has been held that the activities of an industrial loan association qualified it as a "bank," hence subject to special tax provisions, even though the local law differentiated between banks and loan associations.<sup>17</sup>

In some instances, the federal statutory provisions which authorize exemption of certain corporations from tax import state law either directly or by implication. Mutual savings banks, for example, not having a capital stock represented by shares, are entitled to exemption.<sup>18</sup> According to Treasury Department regulations, if the state law requires that the mutual savings bank be incorporated or be under public supervision compliance with the state law is essential before the exempt status is established.<sup>19</sup> In the absence of state provisions, however, the mutual savings bank need be neither incorporated nor subject to supervision.<sup>20</sup> Domestic building and loan associations which confine substantially all of their business to making loans to members are also entitled to exemption from tax.<sup>21</sup> The use of the word "domestic" in the pertinent statutory provision has been taken, by the Supreme Court, to mean that the tax law accepts, with qualifica-

<sup>15</sup> *United States v. Home Title Ins. Co.*, 289 U. S. 191, 52 S. Ct. 319, 76 L. Ed. 695 (1932).

<sup>16</sup> 285 U. S. 182, 52 S. Ct. 350, 76 L. Ed. 690 (1932). See also *Dineen v. United States*, 153 F. (2d) 425 (1946), cert. den. 326 U. S. —, 66 S. Ct. 1370, 90 L. Ed. 1262 (1946).

<sup>17</sup> *Staunton Industrial L. Corp. v. Commissioner*, 120 F. (2d) 930 (1941).

<sup>18</sup> Int. Rev. Code § 101(2); 26 U. S. C. A. § 101(2).

<sup>19</sup> U. S. Treas. Reg. 111, § 29.101(2)-1; I. T. 2207, IV-2 CB 75.

<sup>20</sup> *A-C Inv. Ass'n v. Helvering*, 68 F. (2d) 386 (1933); G. C. M. 13602, XIII-2 CB 62.

<sup>21</sup> Int. Rev. Code § 101(4); 26 U. S. C. A. § 101(4).

tions expressly stated in the law, "what the states are content to recognize, unless there is a gross misuse of the name."<sup>22</sup>

Cemetery corporations may likewise be exempt from tax, depending on the existence of charter provisions and powers which can only be determined under state law.<sup>23</sup> To merit exemption, the net earnings of such corporations must not inure to the benefit of any stockholder or individual but, under regulations, the existence of preferred stock entitling the holders thereof to dividends at a fixed rate which does not exceed the legal rate of interest in the state of incorporation or 8%, whichever is greater, will not serve to disqualify so long as the articles of incorporation contain provisions for the retirement of the preferred stock and for the use of any remaining funds.<sup>24</sup> Farmers' co-operatives having a similar capital structure may also benefit from tax exemption.<sup>25</sup> In isolated cases, therefore, varying legal interest rates in the different states may provide varying exemptions from federal taxation.

The existence of other classes of exempt corporations under state law is not, however, determinative in tax matters. A housing corporation, for example, organized to provide homes for wage earners at cost, has been allowed an exemption as a "civic league," although it was denied an exemption under the domestic building and loan provision because it was not chartered as such under state law.<sup>26</sup> In much the same way, a club which was organized as a non-profit organization under state law, and had previously been held to be exempt from state income taxes under an exemption provision identical to that in the federal law, was held to be exempt from federal taxation but only after independent analysis of its activities.<sup>27</sup> It might also be noted that religious, charitable, and similar organizations are not automatically ex-

<sup>22</sup> *United States v. Cambridge Loan & Bldg. Co.*, 278 U. S. 55 at 59, 49 S. Ct. 39, 73 L. Ed. 180 at 182 (1928).

<sup>23</sup> Int. Rev. Code § 101(5); 26 U. S. C. A. § 101(5).

<sup>24</sup> U. S. Treas. Reg. 111, § 29.101(5)-1.

<sup>25</sup> Int. Rev. Code § 101(12); 26 U. S. C. A. § 101(12). Crop financing corporations are granted similar benefits under § 101(13).

<sup>26</sup> *Garden Homes Co. v. Commissioner*, 64 F. (2d) 593 (1933).

<sup>27</sup> *Coeur D'Alene Country Club v. Viley*, 64 F. Supp. 540 (1946). Appeal dismissed on appellant's motion.

empt for the courts have held that charter powers alone are not determinative. Thus, in *Roche's Beach, Inc. v. Commissioner of Internal Revenue*,<sup>28</sup> an operating corporation designed to provide income for a charitable organization and which did turn over all of its income to the latter was held to be entitled to exemption although its charter contained powers so broad that tax liability would have clearly followed had such powers been exercised. In so holding, the court repudiated the argument that the word "organized," used in the phrase permitting the exemption,<sup>29</sup> meant the same as "incorporated" and it thereby eliminated state provisions from consideration.<sup>30</sup>

Another question is apt to arise when the government or the taxpayer seeks to disregard the separate entity of a corporation for profit which has admittedly been regularly organized pursuant to some general state corporation law. Prior to 1943, there were numerous cases in which corporate identity was disregarded for tax purposes. For example, in *Heringer Brothers & Sons v. United States*,<sup>31</sup> a corporation which held record title to farm land and engaged in no other business, having no employees, no customary books of account, not holding directors' meetings nor paying salaries or dividends, was held not to be a taxable entity. In that year, however, the Supreme Court, through its decision in *Moline Properties, Inc. v. Commissioner of Internal Revenue*,<sup>32</sup> disapproved by inference all prior lower court decisions which had declared mere title-holding or holding companies to be immune from federal corporation taxes. It there stated the rule to be that whether the purpose was to gain an advantage under the law of the state of incorporation, or to avoid or comply with the demands of creditors, or to serve the creator's personal or undisclosed convenience, so long as that purpose was the equiva-

<sup>28</sup> 96 F. (2d) 776 (1938). See also *N.P.E.F. Corp.*, TC mem. op., 5 TCM —, CCH Dec. 15,146(M) (1946).

<sup>29</sup> Int. Rev. Code § 101(6); 26 U. S. C. A. § 101(6).

<sup>30</sup> *Sun-Herald Corporation v. Duggan*, 73 F. (2d) 298 (1934), cert. den. 294 U. S. 719, 55 S. Ct. 546, 79 L. Ed. 1251 (1935). The Commissioner, however, apparently refuses to follow the decision in *Roche's Beach, Inc. v. Commissioner*, 96 F. (2d) 776 (1938). See G. C. M. 23063, 1942-1 CB 103.

<sup>31</sup> 53 F. Supp. 716 (1943), appeal dismissed pursuant to stipulation.

<sup>32</sup> 319 U. S. 436, 63 S. Ct. 1132, 87 L. Ed. 1499 (1943).



lent of business activity or was followed by the carrying on of business by the corporation, the corporation was to remain a separate taxable entity. It did not, however, reject the exception to the rule that corporate entity may be disregarded in cases where the adoption of the corporate form is a sham device.

Since that determination, the Second Circuit Court of Appeals has upheld the right of a taxpayer to disregard, for tax purposes, the existence of a corporation formed to hold title to real estate which served no purpose in connection with the property and was intended only as a blind to deter creditors. Another corporation organized under the same circumstances but with the added factor that it had floated a loan and had given as part security the rights to two leases on property held by it, was held to be subject to corporation taxes.<sup>33</sup> In another case, that of *Halprin v. Commissioner of Internal Revenue*,<sup>34</sup> the corporation was organized solely for the purpose of taking title to property acquired at a foreclosure sale. Immediately after acquisition of title it deeded the property back to the stockholder, but the fact that permanent financing arrangements had been made in the name of the corporation was regarded as sufficient business activity to make the corporation a separate taxable entity so as to warrant disallowing to the stockholder alleged losses on rental operations arising after the execution but before the recording of the deed. In the present state of these authorities, it is difficult to enunciate any uniform rule,<sup>35</sup> other than to say that the effect given to the corporate entity by the state of its creation is not the controlling factor when the question is whether a separate taxable entity has been created.

While corporations whose organization is defective under state law may be treated as associations and thereby be subjected to corporation taxes,<sup>36</sup> the fact that a corporate charter has been

<sup>33</sup> *Paymer v. Commissioner*, 150 F. (2d) 334 (1945).

<sup>34</sup> 154 F. (2d) 112 (1946), affirming 4 TCM 789, CCH Dec. 14,692(M) (1945).

<sup>35</sup> See Cleary, *The Corporate Entity in Tax Cases*, 1 Tax L. Rev. 3 (1945).

<sup>36</sup> *Brown Coal & Coke Co.*, 14 BTA 609, CCH Dec. 4645 (1928), acquiescence noted; S. M. 972, 1 CB 233. See also *Soeder v. United States*, 142 F. (2d) 236 (1944), where conviction for felonious counsel and advice in the preparation of a false and fraudulent corporation return was upheld despite failure to prove the legal existence of the corporation under Ohio law, where the business was conducted as a corporate business.

issued does not require taxation as a corporation if the charter has never been used and the business is continuously operated as a partnership.<sup>37</sup> So, too, where a corporation has no existence, either *de jure* or *de facto*, under state law until its charter is filed with the Secretary of State, the first taxable accounting period as a corporation has been held not to begin until corporate existence under state law is recognized.<sup>38</sup> Similarly, the holding period of corporate assets, for purpose of computing invested capital under prior law, has been held to depend upon the state measure of corporate existence since until then it could not hold property nor could anyone else do so in such a way as to make the acquisition or ownership by the corporation antedate its existence.<sup>39</sup>

Termination of corporate existence is a matter for state law, but if the enterprise is continued in corporate form the organization will be taxable as an association, hence will continue to be subject to federal corporate income tax rates.<sup>40</sup> The tax results arising from the reinstatement of a corporate charter which has been forfeited for non-payment of state license taxes, however, may be affected by state law. If the forfeiture operated to dissolve the corporation, so that reinstatement requires the creation of a new corporation, the latter is not required to file returns for the period while the charter was forfeited and the directors held title to the assets.<sup>41</sup> In direct contrast, if the state law provides that upon reinstatement the charter should stand as if no forfeiture had occurred, the corporation is considered, for federal tax

<sup>37</sup> United States v. Jelenko, 23 F. (2d) 511 (1927); Central Auto Market, 7 BTA 973, CCH Dec. 2686 (1927), acq. noted; Bentley, 5 BTA 314, CCH Dec. 1871 (1926), acq. noted; O.D. 1078, 5 CB 232.

<sup>38</sup> Jupiter Oil Co., BTA mem. op., CCH Dec. 10,947-C (1939).

<sup>39</sup> Younker Bros. Inc., 8 BTA 333, CCH Dec. 2850 (1927). See also Hub Shoe Co., 2 BTA 836, CCH Dec. 834 (1925), acq. noted.

<sup>40</sup> Coast Carton Co. v. Commissioner, 149 F. (2d) 739 (1945); O. D. 365, 2 CB 222. Under an earlier Tax Board ruling, however, it was held that, on expiration of the time limit for revival of a charter which expired by operation of law, the stockholders received a constructive liquidating dividend as of the date the charter expired. At that time, the corporation ceased to exist and continuance of the business in corporate form was immaterial: Joel, 9 BTA 1027, CCH Dec. 3274 (1928). In Hub Shoe Co., 2 BTA 836, CCH Dec. 834 (1925), acq. noted, it was held that a corporation which was continued as a partnership upon expiration of the charter by limitation was not taxable as a corporation where it had neither *de jure* nor *de facto* existence under state law.

<sup>41</sup> I. T. 2260, V-1 CB 96.

purposes, as having been in existence throughout the whole period of forfeiture and is taxable accordingly.<sup>42</sup>

Strict compliance with state laws respecting legal dissolution of a corporation is not, generally speaking, required for federal tax purposes. Thus it has been held that where the assets and liabilities of the corporation were transferred to a partnership bearing the same name and all steps necessary to dissolution were taken prior to December 31st, the fact that a formal certificate of dissolution was not issued until in September of the following year did not require that the income of the partnership up to the time of formal dissolution be taxed to the corporation.<sup>43</sup> The Board of Tax Appeals there regarded it as particularly significant that the corporation had no assets, conducted no business and received no income after December 31st although it was, technically, still alive. But dissolution prior to the return date does not avoid tax liability,<sup>44</sup> any more than does dissolution prior to the enactment of a retroactive taxing act.<sup>45</sup>

After dissolution has actually occurred, the right to sue for a refund of taxes, as by directors claiming as trustees of creditors and stockholders, will depend on state law.<sup>46</sup> The right of a successor corporation to prosecute an appeal from a deficiency notice

<sup>42</sup> *Suburban Investment Co.*, 1 BTA 1121, CCH Dec. 435 (1925), acq. noted.

<sup>43</sup> *W. R. Ross*, 43 BTA 1155, CCH Dec. 11,732 (1941), acq. noted. See also *Southwestern Investment Co.*, 19 BTA 30, CCH Dec. 5364 (1944). U. S. Treas. Reg. 111, § 29.52-1, may be summarized about as follows: A corporation having an existence during any portion of a taxable year is required to make a return. If a corporation was not in existence throughout an annual accounting period (either calendar year or fiscal year), the corporation is not required to make a return for that fractional part of a year during which it was not in existence. A corporation is not in existence after it ceases business and dissolves, retaining no assets, whether or not under state law it may thereafter be treated as continuing as a corporation for certain limited purposes connected with winding up its affairs, such as for the purpose of suing and being sued. If the corporation has valuable claims for which it will bring suit during this period, it has retained assets and it continues in existence. A corporation does not go out of existence if it is merely turned over to receivers or trustees who continue to operate it. A corporation which has received a charter, but which has never perfected its organization, transacted no business, nor received income from any source may, upon presentation of the facts to the collector, be relieved from the necessity of making a return as long as it remains in an unorganized condition. In the absence of a proper showing to the collector, such a corporation will be required to make a return.

<sup>44</sup> *United States v. General Inspection & Loading Co.*, 192 F. 223 (1911).

<sup>45</sup> *United States v. Armstrong*, 26 F. (2d) 227 (1928); *Updike v. United States*, 8 F. (2d) 913 (1925); *United States v. McHatton*, 266 F. 602 (1920).

<sup>46</sup> *Oklahoma Contracting Co. v. Commissioner*, 153 F. (2d) 770 (1946).

addressed to its predecessor will also turn on state law, to which reference must be made to determine whether the successor was formed by consolidation or merger.<sup>47</sup> State law also governs the right of a successor corporation or the directors of a corporation in process of dissolution to execute binding waivers.<sup>48</sup> One other instance might also be cited to show that state law is important. Gain or loss, from the federal tax standpoint, will not be recognized in the case of a "reorganization," which is defined to be a "statutory merger or consolidation."<sup>49</sup> As the federal law refers to a merger or consolidation effected in pursuance of the corporation laws of the United States, of a State or Territory, or of the District of Columbia,<sup>50</sup> state law will strictly govern all such reorganization problems.<sup>51</sup>

## 2. Trusts

It has already been pointed out that business trusts may be taxed on the same basis as corporations if they possess the characteristics hereinbefore specified. Use of the term "trust" in the special trust provisions to be found in the federal tax law is, therefore, intended to refer to an ordinary trust such as might be created by will or by declaration under which a trustee or trustees take title to property for the purpose of protecting or conserving it "as is customarily required under the ordinary rules applied in chancery and probate courts."<sup>52</sup> Whether a trust or a mere agency relationship has been created, however, will be determined

<sup>47</sup> Alaska Salmon Co. (Northern Fisheries, Inc.), 39 BTA 455, CCH Dec. 10,601 (1939); Skaneateles Paper Co., 29 BTA 150, CCH Dec. 8256 (1933); Trahern Pump Co., 27 BTA 363, CCH Dec. 7865 (1932), holding that an Illinois "consolidation" permits of prosecution of appeal in the name of either the successor or predecessor corporation; Bowman Hotel Corp., 24 BTA 1193, CCH Dec. 7341 (1931), appeal dis. by consent; Gideon-Anderson Co., 18 BTA 329, CCH Dec. 5652 (1929), appeal dis. by consent in 45 F. (2d) 1011 (1930); Tide Water Oil Co., BTA mem. op., CCH Dec. 11,711-A (1944); International Mining Corp., BTA mem. op., CCH Dec. 11,701-C (1944); Falstaff Brewing Corp., BTA mem. op., CCH Dec. 10,794-J (1944).

<sup>48</sup> *Helvering v. Newport Co.*, 291 U. S. 485, 54 S. Ct. 480, 78 L. Ed. 929 (1934); *Commissioner v. Oswego Falls Corp.*, 71 F. (2d) 673 (1934); *McPherson v. Commissioner*, 54 F. (2d) 751 (1932).

<sup>49</sup> Int. Rev. Code § 112(g); 26 U. S. C. A. § 112(g).

<sup>50</sup> U. S. Treas. Reg. 111, § 112(g)(2).

<sup>51</sup> *Helvering v. Metropolitan Edison Co.*, 306 U. S. 522, 59 S. Ct. 634, 83 L. Ed. 957 (1939).

<sup>52</sup> U. S. Treas. Reg. 111, § 29.3793-3.

by reference to the law of the state of creation.<sup>53</sup> If state law requires certain essential elements such as the existence of a corpus,<sup>54</sup> beneficiaries,<sup>55</sup> a trustee who qualifies,<sup>56</sup> or compliance with the rule against perpetuities,<sup>57</sup> and these are lacking, there is no trust. In much the same way, the validity of an oral trust will depend on state law.<sup>58</sup>

Even though a valid trust exists, it does not follow that the trustee thereof is necessarily to be regarded as the taxpayer, for in the case of a revocable trust or where the title has become vested in one who has no substantial adverse interest to the settlor, the income is taxable to the settlor.<sup>59</sup> Whether the settlor has or has not remained, in substance, the owner of the trust property has been said not to depend on "the niceties of the particular conveyancing device used nor on the technical description which the law of property gives to the estate or interest transferred to the trustees or beneficiaries of the trust,"<sup>60</sup> but whether the trust is or is not revocable by its terms does depend on applicable state law.<sup>61</sup> Retention by the settlor of an interest in the income arising from the trust by which he is, or may at some time be, enabled to receive the benefits therefrom is enough to require that the income, otherwise taxable to the trustee, be taxed to the settlor.<sup>62</sup> In such a case, gains from the sale of securities have been taxed to the settlor without regard to whether or not state law would treat the gain as an addition to corpus.<sup>63</sup>

<sup>53</sup> *Rathborne v. Commissioner*, 103 F. (2d) 301 (1939), affirming 37 BTA 607, CCH Dec. 991 (1938); *Berolzheimer*, 40 BTA 645, CCH Dec. 10,828 (1939), nonacq. noted.

<sup>54</sup> Pension Trust Ruling No. 55, 464 CCH ¶ 6089.

<sup>55</sup> *Morsman v. Commissioner*, 90 F. (2d) 18 (1937), cert. den. 302 U. S. 701, 58 S. Ct. 20, 82 L. Ed. 542 (1937).

<sup>56</sup> *Standish*, 4 TC 995, CCH Dec. 14,450 (1945), affirmed on stipulation in 154 F. (2d) 1022 (1946).

<sup>57</sup> *Chamberlain*, 19 BTA 126, CCH Dec. 5878 (1930), nonacq. noted.

<sup>58</sup> *Gaylord v. Commissioner*, 153 F. (2d) 408 (1946); *Dye*, BTA mem. op., CCH Dec. 12,864-C (1942).

<sup>59</sup> Int. Rev. Code § 166; 26 U. S. C. A. § 166.

<sup>60</sup> U. S. Treas. Reg. 111, § 166-1.

<sup>61</sup> *Helvering v. Stuart*, 317 U. S. 154, 63 S. Ct. 140, 87 L. Ed. 154 (1942); *Gaylord v. Commissioner*, 153 F. (2d) 408 (1946); *Lowenstein*, 3 TC 1133, CCH Dec. 14,040 (1944), acq. noted.

<sup>62</sup> Int. Rev. Code § 167; 26 U. S. C. A. § 167.

<sup>63</sup> *Greenough v. Commissioner*, 74 F. (2d) 25 (1934).

Perhaps the most important development concerning the taxable status of a trust is to be found in the Supreme Court decision in *Helvering v. Clifford*.<sup>64</sup> It was there held that, independently of the provisions taxing the settlor on income arising from a revocable trust or from one under which the trust income could be used for his benefit, the settlor could be taxed on the trust income under the general taxing section<sup>65</sup> if he retained sufficient control to constitute him the "owner" of the corpus even though not holding the strict legal title thereto. Within five years of that holding, two hundred separate decisions were required to explain, interpret and apply the rule there announced so that the Treasury Department was finally forced to adopt specific regulations intended to cover the situation found therein.<sup>66</sup> Despite a purported disavowal of state law in determining the taxability of the settlor under situations falling within the Clifford case, state law has necessarily been applied to particular situations. The question of whether trust income could have been used for the support of the settlor's children, for example, important in determining whether the settlor retained the "bundle of rights" necessary to tax him on the trust income, has been answered by reference to state law.<sup>67</sup> Until a general body of federal law on the subject has been developed, then, it will be impossible to rule out the effect of state law upon the taxability of trusts even though there has been a Herculean effort to establish national uniformity.

Once it has been established that the trust is to be treated as a separate taxable entity, deduction is generally allowed to the trustee for amounts currently distributed to the beneficiaries. In that regard, local law controls as to whether particular items of receipt are to be added to corpus or are to be distributed,<sup>68</sup> thereby

<sup>64</sup> 309 U. S. 331, 60 S. Ct. 554, 84 L. Ed. 788 (1940).

<sup>65</sup> Int. Rev. Code § 22(a); 26 U. S. C. A. § 22(a).

<sup>66</sup> T. D. 5488, 1946-1 CB 19. Amendments to the regulation have been proposed. 12 F. R. 560 (Jan. 28, 1947), so the law must still be regarded as unsettled.

<sup>67</sup> *Cushman v. Commissioner*, 153 F. (2d) 510 (1946); *Gaylord v. Commissioner*, 153 F. (2d) 408 (1946).

<sup>68</sup> *Johnston v. Helvering*, 141 F. (2d) 208 (1944), cert. den. 323 U. S. 715, 65 S. Ct. 41, 89 L. Ed. 575 (1944). See also *Commissioner v. Pearson*, 154 F. (2d) 256 (1946); *Commissioner v. Gutman*, 143 F. (2d) 201 (1944); *DeBrabant v. Commissioner*, 90 F. (2d) 433 (1937); *Thornton*, 5 TC 1177, CCH Dec. 14,871 (1946), acq. noted.

operating to determine responsibility for payment of the tax. It has even been held, in that respect, that state court decisions on the subject are binding on the Commissioner even though he was not a party to the proceedings.<sup>69</sup>

### 3. Partnerships

Some special tax problems with respect to the partnership form of enterprise need to be noticed. The statutory definition of a "partnership" is short and reads as follows: "The term 'partnership' includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or corporation."<sup>70</sup> The organizations mentioned are not treated as taxable entities but the members thereof are taxed individually on their pro-rata shares of the net income, whether distributed or not,<sup>71</sup> even though the "entity" theory of partnership is accepted under local law. Where limited partnerships are concerned, however, tax liability as a corporation may be incurred if the organization is not interrupted by the death of a general partner or by a change in the ownership of his participating interest and the management is centralized in one or more persons acting in a representative capacity.<sup>72</sup> Whether these characteristics exist in a particular organization is to be determined by examination of the pertinent state statutes under which the limited partnership is organized,<sup>73</sup> but the nature of the ordinary business or professional partnership is not usually challenged by the Treasury Department.

The impact of high war-time corporate and personal income

<sup>69</sup> Eisenmenger v. Commissioner, 145 F. (2d) 103 (1944). Reformation of a trust instrument does not, however, affect tax liability for years prior to reformation: Sinopoulo v. Jones, 154 F. (2d) 648 (1946).

<sup>70</sup> Int. Rev. Code § 3797(a)(2); 26 U. S. C. A. § 3797(a)(2).

<sup>71</sup> Ibid., §§ 181-2.

<sup>72</sup> U. S. Treas. Reg. 111, § 29.3797-5.

<sup>73</sup> Glensder Textile Co., 46 BTA 176, CCH Dec. 12,249 (1942), acq. noted; Taywal, Ltd., BTA mem. op., CCH Dec. 12,592-G (1942); O. D. 444, 2 CB 11; O. D. 599, 3 CB 15; O. D. 800, 4 CB 13; I. T. 2904, XIV-2 CB 151; G. C. M. 2467, VII-2 CB 188.

taxes, however, has presented a new tax problem springing from the development of "family" partnership agreements, often entered into for the purpose of taking over closely-held corporations or sole proprietorships, which agreements purport to make the wife of or minor children of the original owner partners with him in the enterprise so as to gain the benefit of lower tax rates by dividing the net income among several people. Thousands of these family partnerships have been challenged by the Treasury Department and, in the cases of *Commissioner of Internal Revenue v. Tower*<sup>74</sup> and *Lusthaus v. Commissioner of Internal Revenue*,<sup>75</sup> it was finally held that where the wife or child contributed neither capital nor services to the enterprise no real partnership had been formed even though the organization was valid under state law. In the first of these cases, the court said:

When the existence of an alleged partnership arrangement is challenged by outsiders, the question arises whether the partners really and truly intended to join together for the purpose of carrying on business and sharing in the profits and losses or both. And their intention in this respect is a question of fact, to be determined from testimony disclosed by their "agreement, considered as a whole, and by their conduct in execution of its provisions." . . . We see no reason why this general rule should not apply in tax cases where the government challenges the existence of a partnership for tax purposes . . . But the Tax Court in making a final authoritative finding on the question whether this was a real partnership is not governed by how Michigan law might treat the same circumstances for purposes of state law. Thus, Michigan could and might decide that the stock-transfer here was sufficient under the state law to pass title to the wife, so that in the event of her death it would pass to whatever members of her family would be entitled to receive it under Michigan's law of descent and distribution. But Michigan cannot by its decisions and laws governing questions over which it has final say, also decide issues of federal tax law and thus hamper the

<sup>74</sup> 326 U. S. —, 66 S. Ct. 532, 90 L. Ed. (adv.) 559 (1946).

<sup>75</sup> 326 U. S. —, 66 S. Ct. 539, 90 L. Ed. (adv.) 567 (1946).



effective enforcement of a valid federal tax levied against earned income . . . The statutes of Congress designed to tax income actually earned because of the capital and efforts of each individual member of a joint enterprise are not to be frustrated by state laws which for state purposes prescribe the relations of the members to each other and to outsiders.<sup>76</sup>

It would seem that the court is, in reality, using the same "control" test that was applied, through *Helvering v. Clifford*,<sup>77</sup> to the family trust situations. If so, it rules out any question of strict legal title under state law. The court did note, however, that the "legal ownership of the capital purportedly contributed by a wife will frequently throw light on the broader question of whether an alleged partnership is real or pretended."<sup>78</sup> This disregard of state law and local determination as to legal title has been carried to its logical conclusion for a partnership has been found to exist for federal tax purposes even though a state statute prohibited the creation of a partnership between a husband and his wife.<sup>79</sup>

Termination of a partnership is important, from the tax standpoint, for upon termination the income of the partnership up to that date is to be included in the individual income tax returns of the partners.<sup>80</sup> The date of termination will also be important in

<sup>76</sup> 326 U. S. — at —, 66 S. Ct. 532 at 535-6, 90 L. Ed. (adv.) 559 at 563-4.

<sup>77</sup> 309 U. S. 331, 60 S. Ct. 554, 84 L. Ed. 788 (1940).

<sup>78</sup> 326 U. S. — at —, 66 S. Ct. 532 at 537, 90 L. Ed. (adv.) 559 at 565.

<sup>79</sup> Willis B. Anderson, 6 TC 956, CCH Dec. 15,133 (1946); Francis A. Parker, 6 TC 974, CCH Dec. 15,135 (1946). In *Claire L. Canfield*, 7 TC 135, CCH Dec. 15,225 (1946), the Tax Court could not find that the husband and wife intended to create a bona fide partnership but, since the wife had contributed to the capital, income was allocated, on the basis of capital contributions, as a "business arrangement." In an earlier decision, the Board of Tax Appeals had held that although a husband and wife partnership was invalid under the laws of Michigan it would be given effect for federal tax purposes as a joint enterprise: *Wing*, 17 BTA 1028, CCH Dec. 5528 (1929), acq. noted. An illegal partnership may be recognized, according to *E. C. Ellery*, 4 TC 407, CCH Dec. 14,255 (1945), acq. noted, where the husband gave one-half of his gambling machine business to his wife, conditioned on the formation of a partnership. The Tax Court held that the partnership, void because of illegality under the state law, would not be recognized for tax purposes any more than it is otherwise recognized by courts, except where there is no other feasible solution. Such a partnership would be denied recognition now, under the ruling in the *Tower* case, regardless of the illegal feature. In a subsequent decision, however, the Tax Court held that a partnership would be given tax recognition even though it was informal because engaged in illegal gambling: *Shaffer*, TC mem. op., 4 TCM 830, CCH Dec. 14,728(M) (1945).

<sup>80</sup> U. S. Treas. Reg. 111, § 29.182-1.

determining the holding period of the individual partnership interests, fixing whether the resulting gain or loss from the disposition of a partnership interest is a long or short term capital item. The cases are not uniform, but the tendency seems to be for the courts to follow state law in determining whether a partnership, admittedly effective for tax purposes, has been dissolved or terminated. The Circuit Court of Appeals for the Fifth Circuit, in *Henderson's Estate v. Commissioner of Internal Revenue*,<sup>81</sup> apparently holds that state law is determinative. In that case, a husband was a member of a partnership and his partnership interest was a community asset of the husband and wife according to Louisiana law. Upon the death of the husband, the Commissioner contended that the husband's share of the partnership income accruing to the date of death should have been taxed on the basis of one-half to his estate and one-half to his widow. After the death of the husband, the partnership apparently operated at a loss so that the income for the full year was less than for the period up to the date of death. The partnership articles provided that the firm should continue for one year after the death of any partner. The court, holding that a separate determination of income to the date of death was not required, said:

The Tax Court held that the partnership terminated with death and a new partnership came into being; that the articles were equivalent to an agreement that the business of the partnership should be carried on for one year after the death of any partner. This interpretation does violence to the words used by the parties within the purview of the statute. Article 2880 of the Louisiana Civil Code provides that: "Every partnership ends of right by the death of one of the partners, unless an agreement has been made to the contrary." The implication is irresistible that the partnership does not end of right by death if an agreement has been made to the contrary. . . .

The Government contends that a partnership, even by agreement, cannot be the same firm as it was before one of the partners died "unless the firm operates with a dead man as a

<sup>81</sup> 155 F. (2d) 310 (1946).

partner." We think it can, in legal contemplation, if the statute authorizes it. Since a corporation may be given continuity of existence that is unaffected by death, we see no reason why the State of Louisiana may not provide that a partnership does not end of right by the death of one of the partners. That the same firm continues is a legal fiction, but such a thing is not new in the history of our jurisprudence.<sup>82</sup>

Three Tax Court decisions rendered during 1946 also seem to point to a conclusion that state law serves to determine the date of dissolution or termination of a partnership. In the case of *Mary D. Walsh*,<sup>83</sup> a Texas partnership was held not to have been "terminated" by the death of a partner, even though the same was admittedly "dissolved," for the Tax Court distinguished between termination and dissolution on the basis of the Texas partnership law, holding that, insofar as the surviving partners were concerned, the death of a partner did not cut short the "taxable year" of the partnership. In the case of *Robert E. Ford*,<sup>84</sup> it determined, on the basis of the Minnesota version of the Uniform Partnership Act, that certain partnership assets, sold three years after two of the original partners had bought out the interest of the third partner, still retained the original cost basis to the partnership. Had the purchase of the third partner's interest been treated as terminating the partnership, the cost basis would have reflected the increase in value of the interest of the third partner. The Tax Court noted that the Uniform Partnership Act specifically provided that a transfer of interest did not, *ipso facto*, dissolve the partnership.<sup>85</sup> In the third case, that of *Allan S. Lehman*,<sup>86</sup> the court was obliged to pass upon the effect to be given to the death of a partner and of changes of membership in a partnership organized under New York law. Admitting that the death of the partner dissolved the partnership, the court nevertheless held that neither the death of the partner nor the transfer of

<sup>82</sup> 155 F. (2d) 310 at 313.

<sup>83</sup> 7 TC 205, CCH Dec. 15,237 (1946).

<sup>84</sup> 6 TC 499, CCH Dec. 15,034 (1946).

<sup>85</sup> Uniform Partnership Act, § 27, 7 U. L. A. 41.

<sup>86</sup> 7 TC —, CCH Dec. 15,457 (1946).

interests between partners or the admission of new partners worked such a change in the partnership as to cause a change in the holding period of the partner's interests where the articles of partnership provided for continuation of the business.<sup>87</sup>

#### 4. *Family Entities*

The tax effect of family relationships, at least in connection with trusts and partnerships, has already been discussed and it has been noted that the federal income tax law, to a large degree, disregards legal title as fixed by state law in determining just who is to be taxed upon the income received. It has been seen that the test is rather one of management and control of the income-producing property; an economic, instead of a legal concept. In direct contrast, an entirely different approach has been followed up to now in determining the tax effects of the community property form of ownership or of the variant types of common-law joint ownership permitted between husband and wife.

Found in eight western and southern states,<sup>88</sup> the community property system of ownership antedates the present income tax law. Its distinguishing characteristic lies in the co-ownership by husband and wife of all property acquired after marriage through their productive efforts, but the particularized application of the community property laws in the eight "traditional" community property states differs widely in many important respects. Questions as to the extent to which community income may be made separate income, and vice versa, by contract between the spouses; the effect of the system on property brought from a common-law

<sup>87</sup> A dissenting opinion to the Lehman decision points out, however, that the ruling in the Robert E. Ford case, 6 TC 499, CCH Dec. 15,034 (1946), was not authority for it was decided under a different state law. It also noted that the Circuit Court of Appeals for the Second Circuit, in *Darcy v. Commissioner of Internal Revenue*, 66 F. (2d) 581 (1933), cert. den. 290 U. S. 705, 54 S. Ct. 372, 78 L. Ed. 606 (1934), had specifically considered the pertinent section of the New York law in a case holding that decedent's share of partnership profits to the date of his death was to be included in his return and had there decided that the parties could not, by contract, prolong the life of the partnership after the death of one of the partners.

<sup>88</sup> Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington. In California, Nevada and Texas, the system is incorporated into the state constitutions. As found in Louisiana, it is of French origin; in the others, its antecedents rest upon Spanish law.

state to a community-property state; the classification of property purchased on individual or joint credit; and many similar questions will provoke different answers depending on the particular state law which is to be applied. In a very real sense, then, there is no general community property law but instead eight community property laws.

At the outset, the Treasury Department recognized the division of income pursuant to community property laws as a distinct and separate basis for taxation. With the advent of decisions which seemed to hold that the person who controlled and managed the income should be taxed on it regardless of technical title under state law,<sup>89</sup> cases were instituted to test the tax effect of the community property laws in four of these states. The result was the decision in *Poe v. Seaborn*<sup>90</sup> which based the federal tax consequences strictly on legal title under state law, disregarding any "control" theory. The Supreme Court there indicated that when Congress imposed the tax on the "income of every individual"<sup>91</sup> it meant income "owned" by the individual, *i.e.* owned as determined by reference to state law. Subsequent thereto, in *United States v. Malcolm*,<sup>92</sup> the court passed upon the effect to be given to certain California legislation enacted in 1927 which made the wife's community interest a present, vested one, rather than a mere expectancy in survivorship. It held such legislation was effective to split community income between husband and wife. There the question rested, with the federal courts called upon to determine hundreds of questions as to the effect of the eight community property laws on federal tax liability.

Unsuccessful attempts were made in 1934, in 1937, and again in 1941 to secure legislation for compulsory joint returns by hus-

<sup>89</sup> *United States v. Robbins*, 269 U. S. 315, 46 S. Ct. 148, 70 L. Ed. 285 (1926), where the wife had an "expectancy" only under California law as it stood prior to 1927; *Lucas v. Earl*, 281 U. S. 111, 50 S. Ct. 241, 74 L. Ed. 731 (1930), treating an agreement for the division of income between husband and wife as being ineffective; and *Corliss v. Bowers*, 281 U. S. 376, 50 S. Ct. 336, 74 L. Ed. 916 (1930), to the effect that a settlor was to be taxed on the income from a revocable trust.

<sup>90</sup> 282 U. S. 101, 51 S. Ct. 58, 75 L. Ed. 239 (1930).

<sup>91</sup> This phrase appears in Int. Rev. Code § 22(a), the same section that was relied on in *Helvering v. Clifford*, 309 U. S. 331, 60 S. Ct. 554, 84 L. Ed. 788 (1940).

<sup>92</sup> 282 U. S. 792, 51 S. Ct. 184, 75 L. Ed. 714 (1931).

bands and wives which would have eliminated the federal tax advantage arising from the existence of community income.<sup>93</sup> In the meantime, rising federal tax rates in the '30's put common-law states bordering on community-property states at a distinct disadvantage. Oklahoma particularly was faced with the loss of many of its wealthy inhabitants who found it economically advisable to move across the border into Texas to obtain the federal tax benefits arising from community property. In 1939, it passed an elective community property law. Oregon followed with one in 1943. The Treasury Department contested the effectiveness of the Oklahoma law for federal tax purposes and, in *Commissioner of Internal Revenue v. Harmon*,<sup>94</sup> was successful before the Supreme Court which held that the Oklahoma system was not one dictated by state policy as an incident to matrimony but was, rather, one which granted legislative permission for voluntary action effecting the transfer of rights of a husband and wife. At the next legislative session, Oklahoma repealed its elective law and adopted a new community property law without elective features.<sup>95</sup> The new statute provides generally that all property of the husband or wife owned or claimed before marriage or the effective date of the act, whichever is later, and all property acquired afterwards by gift, devise, or descent, or as compensation for personal injuries, remains separate property; but all other property acquired by either spouse during marriage, after the effective date of the act, is to be regarded as community property with each spouse having a vested one-half interest therein.

The federal tax effect of the new Oklahoma statute has not been tested for the Treasury Department has apparently decided to attempt to achieve uniformity on a national scale through adoption of the community property principle, rather than to fight it. The Bureau of Internal Revenue has formally ruled that both the Oklahoma law and a similar one adopted, in 1945, for the

<sup>93</sup> That advantage stems from the federal system of graduated tax rates. The tax on two incomes of \$5000, for example, is less than the tax on one income of \$10,000.

<sup>94</sup> 323 U. S. 44, 65 S. Ct. 103, 89 L. Ed. 60 (1944).

<sup>95</sup> Okla. Laws 1945, p. 118, effective July 26, 1945. Oregon repealed its elective community property law but has not, as yet, replaced it.

Territory of Hawaii<sup>96</sup> are to be given effect so that husbands and wives domiciled in Oklahoma or Hawaii may each include in their separate federal income tax returns one-half of the community income received after the effective dates of the respective statutes.<sup>97</sup> Treasury spokesmen have even gone so far as to recommend that the federal law be changed to permit husbands and wives in all states to combine their income, divide by two, and pay a total tax computed on the basis of two separate incomes.<sup>98</sup> Until the question is resolved either by forcing compulsory joint returns or by permitting a nation-wide division of income, the present high federal income tax rates may be expected to exert pressure on other states to follow the Oklahoma and Hawaii precedents and to adopt community property laws.<sup>99</sup>

Just as in the case of community property, common law concepts relating to joint ownership of property, whether such property is held by a husband and wife or by others, are recognized for federal income tax purposes. Thus a husband and wife, holding property as joint tenants under a system of state law which incorporates the principle that each joint tenant is entitled to his or her share of the rents or profits derived from the jointly-owned property, may each report one-half of the net income arising from the property.<sup>1</sup> Similarly, when such property is sold, for purpose of computing any gain or loss, the sale price is allocated among the spouses equally, unless a sale of the jointly-owned property had been arranged prior to the transaction creating the joint tenancy thereby bringing the bona fides of joint ownership into question.<sup>2</sup>

<sup>96</sup> Rev. Laws Hawaii, Ch. 301A, Tit. 32.

<sup>97</sup> I. T. 3782, 46-1 CB 84, as to Oklahoma residents, and I. T. 3784, 46-1 CB 85, as to those residing in Hawaii.

<sup>98</sup> Speeches by Joseph J. O'Connell, Jr., General Counsel of the Treasury Department, at the convention of the State Bar of California, Coronado, Cal., Sept. 28, 1946, and by Stanley S. Surrey, Tax Legislative Counsel of the Treasury Department, before the American Institute of Accountants, Atlantic City, N. J., Oct. 3, 1946.

<sup>99</sup> Forty-four state legislatures meet in regular session during the current year. It is understood that bills are ready for introduction, or under consideration, in many of them.

<sup>1</sup> *Edmonds v. Commissioner of Internal Revenue*, 90 F. (2d) 14 (1937), cert. den. 302 U. S. 713, 58 S. Ct. 32, 82 L. Ed. 551 (1937); *Tracy*, 25 BTA 1055, CCH Dec. 7510 (Florida), acq. noted; *Haynes*, 7 BTA 465, CCH Dec. 2569 (Michigan), acq. noted; I. T. 3754, 1945 CB 143 (Wisconsin).

<sup>2</sup> *McInerney v. Commissioner of Internal Revenue*, 82 F. (2d) 665 (1936); I. T. 3754, 1945 CB 143.

Determination of the basis for computing gain or loss, as well as depreciation, on jointly-owned property is also to be made pursuant to the state law under which the property right has been created. In Illinois, for example, the cost basis to a surviving spouse is the original total cost of the jointly-owned property; a conclusion which has been reached on the theory that, as each joint tenant is considered seized of the entire estate, the interest of the deceased joint tenant does not pass to the survivor but ceases at the moment of death.<sup>3</sup> Deductible items connected with jointly-owned property, such as taxes and mortgage interest, may be claimed by either spouse filing a separate return, so long as the other does not also claim the deduction, because, under appropriate state law, such items are the liabilities of either joint tenant as well as of both.<sup>4</sup>

Where the strict common-law tenancy by the entirety still exists, as in Massachusetts, the husband is entitled to the full use of the estate and the income arising therefrom during the period of the marital relationship so is taxable in full on the income from any property so held.<sup>5</sup> In other states, where modification of the common-law estate has occurred, income from the property is divisible equally between the spouses and taxable accordingly.<sup>6</sup> Decisions and rulings of that character turn upon the fact that local Married Women's Property Acts have so changed the nature of the common-law tenancy by the entirety that the income accruing from such property during continuance of the marital status belongs to both spouses and not to either one exclusively. Just as in the case of property held in joint tenancy, either husband or wife

<sup>3</sup> G. C. M. 6677, VIII-2 CB 172 (1929). See also Helen G. Carpenter, 27 BTA 282, CCH Dec. 7853, and I. T. 3785, 46-1 CB 98 (1946) (Minnesota).

<sup>4</sup> I. T. 3785, 46-1 CB 98 (1946).

<sup>5</sup> *Cooley v. Commissioner of Internal Revenue*, 75 F. (2d) 188 (1935), cert. den. 295 U. S. 747, 55 S. Ct. 825, 79 L. Ed. 1692 (1935).

<sup>6</sup> *Harrison v. Schaffner*, 312 U. S. 579, 61 S. Ct. 759, 85 L. Ed. 1055 (1941); Paul G. Greene, I. T. 3796, 1946-1 CB 88 (D. C.); I. T. 3235, 1938-2 CB 160 (Florida); *Saulsbury*, 27 BTA 744, CCH Dec. 7927, I. T. 1670, II-1 CB 146 (Maryland); *Gessner*, 32 BTA 1258, CCH Dec. 9058, acq. noted; G. C. M. 19143, 1937-2 CB 223, I. T. 1574, II-1 CB 143 (Michigan); *Upthegrove*, 33 BTA 952, CCH Dec. 9209, I. T. 2381, VI-2 CB 118 (Missouri); I. T. 1555, II-1 CB 142 (New York); I. T. 3743, 1945 CB 142 (Oregon); *Brennan*, 4 TC 1260, CCH Dec. 14,515; I. T. 3783, 1946 CB 84 (Pennsylvania). See also *Commissioner of Internal Revenue v. Hart*, 76 F. (2d) 864 (1935).



may take the deduction for interest, taxes, or the like,<sup>7</sup> and gains and losses arising from the sale of the property are to be divided between them equally.<sup>8</sup>

Subsequent to the determination reached in the *Tower* and *Lusthaus* cases above mentioned, the Tax Court had occasion to consider the tax effect of a conveyance to "A and B, husband and wife," creating a tenancy by the entirety under applicable Michigan law, where the husband alone furnished the consideration and paid for improvements thereafter made. The property was leased by the husband and wife, checks for the rent were payable to them both, but the entire income was deposited by the husband to his separate account. The Tax Court, nevertheless, held that, since an actual tenancy by the entirety existed, it was immaterial, for purpose of taxing the income equally to the husband and wife, that the income was received by the husband alone.<sup>9</sup> Such reliance on legal title in the strictest sense is indeed startling when contrasted with the attitude taken in the partnership cases.

The general effect given to questions concerning tenancies by the entirety has been accorded where the property is owned by tenants in common.<sup>10</sup> But where the income arises from property held in, or purchased from, a joint account so as to be in the nature of a tenancy in common although not meeting technical state requirements for such type of ownership, a husband and wife have been held taxable in proportion to their ratable contributions to the joint account, regardless of the record title.<sup>11</sup>

It might be noted, then, that the impact of existing state law on federal income taxation has probably reached its highest, and certainly its most consistent, level with respect to the tax problems of the family entity.

<sup>7</sup> G. C. M. 15530, XIV-2 CB 107 (1935).

<sup>8</sup> I. T. 1574, II-1 CB 143. It is interesting to note that this rule is to be applied even where strict common-law doctrines still prevail.

<sup>9</sup> Paul G. Greene, 7 TC 142, CCH Dec. 15,226 (1946).

<sup>10</sup> Hafner, 31 BTA 338, CCH Dec. 8731 (1934).

<sup>11</sup> Dunham, 27 BTA 1068 CCH Dec. 7987 (1933), acq. noted; Bekins, 20 BTA 809, CCH Dec. 6317 (1930); First National Bank of Duluth, 13 BTA 1096, CCH Dec. 4481 (1928), nonacq. noted.

### 5. Miscellaneous Problems

Certain other situations involving questions as to who is to be taxed disclose no more uniformity than that found in the cases already examined. The validity of an assignment of income is generally a question for state law. In a leading case on the subject, that of *Commissioner of Internal Revenue v. Blair*,<sup>12</sup> a federal court had determined that a trust created by an Illinois resident was of spendthrift character so treated an assignment by the beneficiary as being invalid. Thereafter, in other litigation, the Illinois Appellate Court decided that the trust was not a spendthrift one according to state law,<sup>13</sup> so the Supreme Court of the United States subsequently held that this also served to determine the tax question.<sup>14</sup> The fact that the state decision was rendered by an intermediate appellate tribunal was regarded as being immaterial, and as the second federal case involved income accruing in later years the first federal decision was held not to be *res judicata*. The court, noting that the donor was a resident of Illinois, said that "his disposition of his property in that State was subject to its law. By that law the character of the trust, the nature and extent of the interest of the beneficiary, and the power of the beneficiary to assign that interest in whole or in part, are to be determined."<sup>15</sup> Local law is not effective, however, to control the federal tax consequences of an assignment of income to be earned<sup>16</sup> or of income represented by interest coupons when taken apart from the ownership of the bonds themselves.<sup>17</sup> In such situations, the federal courts have reasoned that the assignor or donor has received an economic benefit from the disposition of the income which is sufficient to support the tax.

<sup>12</sup> 60 F. (2d) 340 (1932), cert. den. 288 U. S. 602, 53 S. Ct. 386, 77 L. Ed. 977 (1933).

<sup>13</sup> *Blair v. Linn*, 274 Ill. App. 23 (1934).

<sup>14</sup> *Blair v. Commissioner of Internal Revenue*, 300 U. S. 5, 57 S. Ct. 330, 81 L. Ed. 465 (1937). Conversely, a state court determination that the trust was of spendthrift character has been held to make the assignment void so as to leave the beneficiary subject to taxation on the assigned income: *St. Louis Union Trust Co. v. United States*, 143 F. (2d) 842 (1944).

<sup>15</sup> 300 U. S. 5 at 9-10, 57 S. Ct. 330, 81 L. Ed. 465 at 469.

<sup>16</sup> *Lucas v. Earl*, 281 U. S. 111, 50 S. Ct. 241, 74 L. Ed. 731 (1930).

<sup>17</sup> *Helvering v. Horst*, 311 U. S. 112, 61 S. Ct. 144, 85 L. Ed. 75 (1940).

Where a gift is recognized, though, state law governs the legal requirements necessary to effectuate it as well as the time when it becomes effective.<sup>18</sup>

Whether a contract for the sale of shares of stock is a conditional one or not, important in answering the question as to who is to be taxed for dividend payments made on such shares, has been settled according to state law.<sup>19</sup> But questions involving oil and gas interests, on the other hand, have been decided with complete disregard for state law. The right to depreciation or depletion allowances has been said not to depend on the retention of a legal interest but rather on a right to share in the oil or gas produced; an economic test instead of a legal one.<sup>20</sup> So, too, classification of oil in place has been treated as being exclusively a federal question unaffected by its fugacious nature according to state law.<sup>21</sup>

## II. TAX COMPUTATION

The situations already discussed have been primarily concerned with the question as to who was to be taxed. Equally complex problems concerning the application of state law may arise in respect to other points. If federal law prescribes the treatment to be given these problems it is, of course, controlling. Where federal law is not specific, however, there is an absence of uniformity for while many cases are decided on the assumption that there is no difference in the laws of the several states, other cases seem to assume the existence of a federal common law.

<sup>18</sup> Shelden, 25 BTA 5, CCH Dec. 7352 (1931).

<sup>19</sup> DeGuire v. Higgins, 65 F. Supp. 445 (1946). But, for accrual of dividends, where the stockholder died between date of declaration and date of payment, state law does not control: Estate of Putnam v. Commissioner of Int. Rev., 324 U. S. 393, 65 S. Ct. 811, 89 L. Ed. 1023 (1945).

<sup>20</sup> Burton-Sutton Oil Co. v. Commissioner of Int. Rev., — U. S. —, 66 S. Ct. 861, 90 L. Ed. (adv.) 801 (1946); Kirby Petroleum Co. v. Commissioner of Int. Rev., 326 U. S. 599, 66 S. Ct. 409, 90 L. Ed. (adv.) 293 (1946); Palmer v. Bender, 287 U. S. 551, 53 S. Ct. 225, 77 L. Ed. 489 (1933); Burnet v. Harmel, 287 U. S. 103, 53 S. Ct. 74, 77 L. Ed. 199 (1932).

<sup>21</sup> Fleming v. Commissioner of Internal Revenue, 153 F. (2d) 361 (1946); Boudreau v. Commissioner of Internal Revenue, 134 F. (2d) 360 (1943).

## A. THE "INCOME" CONCEPT

Conversions of capital from one form to another receive special federal tax treatment distinct from that accorded to "ordinary" income. A relatively early decision pointed out that whether there was a gain from the sale or exchange of capital assets was not to be controlled by any particular characterization, in state law, of the payments made.<sup>22</sup> Royalties from oil and gas leases, for example, as well as bonuses received upon the execution of such leases, were there held not to be subject to the capital gains provisions, regardless of the state characterization of the leases as present sales of oil and gas in place. The question was said to be entirely different from that raised when the lessor was a state instrumentality and the lessee was sought to be taxed. In the latter situation, however, state law, it happened to be the same state law in both cases, was examined to determine whether the oil and gas had ceased to be the property of a state instrumentality which was thought, at that time, to be constitutionally exempt from taxation.<sup>23</sup> Royalties from a mining lease have been treated as ordinary income even though, under state law, the lease would have been dealt with as a sale of mineral in place.<sup>24</sup> So, too, cash received upon the execution of a 99-year lease renewable forever has been classed as income and not a return of capital although, under Ohio law, such leases are treated in many respects like conveyances.<sup>25</sup>

The taxable effect of payments of money, as to both payor and payee, may be determined independently of state law. Whether a specific item constitutes the payment of interest has been so treated for the court, in *Deputy v. duPont*,<sup>26</sup> said: "In the busi-

<sup>22</sup> *Burnet v. Harmel*, 287 U. S. 103, 53 S. Ct. 74, 77 L. Ed. 199 (1932).

<sup>23</sup> *Group No. 1 Oil Corp. v. Bass*, 283 U. S. 279, 51 S. Ct. 432, 75 L. Ed. 1032 (1931). Such a determination would be unnecessary under *Helvering v. Mountain Producers Corp.*, 308 U. S. 376, 58 S. Ct. 623, 82 L. Ed. 907 (1938).

<sup>24</sup> *Bankers Pocahontas Coal Co. v. Burnet*, 287 U. S. 308, 53 S. Ct. 150, 77 L. Ed. 325 (1932).

<sup>25</sup> *Butler*, 19 BTA 718, CCH Dec. 6003, acq. noted.

<sup>26</sup> 308 U. S. 488, 60 S. Ct. 363, 84 L. Ed. 416 (1940). See also *Equitable Life A. Soc. v. Commissioner of Int. Rev.*, 321 U. S. 560, 64 S. Ct. 722, 88 L. Ed. 927 (1944); *Bond Auto Loan Corp. v. Commissioner of Int. Rev.*, 153 F. (2d) 50 (1946); *Workingmen's Loan Ass'n v. United States*, 142 F. (2d) 359 (1944); *Noteman v. Welch*, 108 F. (2d) 206 (1939).

ness world 'interest on indebtedness' means compensation for the use or forbearance of money. In the absence of clear evidence to the contrary, we assume that Congress has used these words in that sense.'<sup>27</sup> Distributions from corporate earnings may constitute dividends notwithstanding the fact that the formalities of declaration have not been observed, that the distribution is not recorded on the corporate books as such, is not made proportionately to stockholdings or even omits some stockholders from participation in the benefit thereof.<sup>28</sup> Again, in determining whether certain expenses are business expenses so as to be deductible, state law has been disregarded.<sup>29</sup> In order to ascertain whether interest on bonds or other obligations of states, of their political subdivisions, is exempt from federal tax, recourse to the terms of the state statute under which such obligations are issued has been necessary,<sup>30</sup> but a uniform federal rule has been applied when the question has been as to whether or not money or property received in compromise of a claim as an heir is exempt as a bequest.<sup>31</sup> In general, accounting questions are dealt with according to a uniform rule so that the word "paid," for example, is treated as meaning a cash payment and not a payment by note, even though the latter method be permitted under state law.<sup>32</sup> So, too, the fact that a reserve is required under state law is generally no warrant for its deduction for federal tax purposes.<sup>33</sup>

When the question is whether a debt has become worthless so as to support a claim for loss, however, the matter has turned on

<sup>27</sup> 308 U. S. 488 at 498, 60 S. Ct. 363, 84 L. Ed. 416 at 424.

<sup>28</sup> *Paramount-Richards Theatres v. Commissioner of Int. Rev.*, 153 F. (2d) 602 (1946).

<sup>29</sup> *Thomas Flexible Coupling Co. v. Commissioner of Int. Rev.*, — F. (2d) —, 46-2 USTC ¶ 9347 (C. C. A. 3, 1946); *Low v. Nunan*, 154 F. (2d) 261 (1946); *Eskimo Pie Corp.*, 4 TC 669, CCH Dec. 14,348, affirmed per curiam in 153 F. (2d) 301 (1946).

<sup>30</sup> See, for example, *Commissioner of Internal Rev. v. Shamburg's Estate*, 144 F. (2d) 998 (1944); *Fairbanks, Morse & Co. v. Harrison*, 63 F. Supp. 495 (1945).

<sup>31</sup> *Lyeth v. Hoey*, 305 U. S. 188, 59 S. Ct. 155, 83 L. Ed. 119 (1938).

<sup>32</sup> *Hart v. Commissioner of Internal Revenue*, 54 F. (2d) 848 (1932).

<sup>33</sup> *Helvering v. Illinois L. Ins. Co.*, 299 U. S. 88, 57 S. Ct. 63, 81 L. Ed. 56 (1936); *City Title Ins. Co. v. Commissioner of Internal Rev.*, 152 F. (2d) 859 (1946). However, federal tax law does expressly recognize that such reserves may be required by state law in some instances. See *Int. Rev. Code*, § 101(12), where exemption of farmers' co-operatives will not be denied where earnings are accumulated to meet state reserve requirements.

state law. For example, it has been decided that the right of an indemnitor to reach trust assets of the defaulting debtor would have to be settled by state law.<sup>34</sup> Much the same view has also been followed with respect to foreclosures under state law in fixing whether or not a debt has become bad, when the loss must be taken, and precisely when a capital asset is acquired at foreclosure sale.<sup>35</sup>

Whether or not money illegally acquired constitutes taxable income also presents a question of no small difficulty. Earlier decisions would seem to indicate that legal title to the money involved was not the controlling point. For example, the receipt of usurious interest has been held taxable although the taxpayer might be allowed to establish a loss if the borrower reclaims the interest paid.<sup>36</sup> Income from gambling or other illegal enterprises,<sup>37</sup> including kidnaping,<sup>38</sup> has been treated as taxable to the recipient even to the point where the expenses of the illegal business have been allowed as deductible items.<sup>39</sup> But the Supreme Court selected, in *Commissioner of Internal Revenue v. Wilcox*,<sup>40</sup> what might be considered a strange case to re-assert the appli-

<sup>34</sup> *Acheson v. Commissioner of Internal Revenue*, 155 F. (2d) 369 (1946).

<sup>35</sup> Loss on foreclosure occurs when the period of redemption under state law expires, according to *Commissioner of Internal Revenue v. Hawkins*, 91 F. (2d) 354 (1937). See also G. C. M. 19367, 1937-2 CB 115. Where there is no equity of redemption, the foreclosure sale, and not the decree preceding it, fixes the loss: *Helvering v. Hammel*, 311 U. S. 504, 61 S. Ct. 368, 85 L. Ed. 303 (1941). Similarly, the mortgagee's right to a bad debt deduction will depend on state law. If, under the state law, entry to foreclosure does not evidence complete or partial worthlessness, no deduction can be taken until expiration of the redemption period: *Hadley Falls Trust Co. v. United States*, 110 F. (2d) 887 (1940). But where property is bid in on foreclosure sale at less than the indebtedness and, under state law, no deficiency judgment can be obtained, the bad debt deduction is allowable to the extent that the cost basis for the mortgage exceeds the sale proceeds. In addition, gain or loss to the mortgagee is realized in the year in which his acquisition of the property becomes absolute and indefeasible: G. C. M. 19573, 1938-1 CB 214. Where the period of redemption has been extended by special state law, a bad debt deduction will be denied until expiration of the extended period: *Foley v. Reynolds*, 58 F. Supp. 228 (1944).

<sup>36</sup> *Barker v. Magruder*, 95 F. (2d) 122 (1938).

<sup>37</sup> *United States v. Sullivan*, 274 U. S. 259, 47 S. Ct. 607, 71 L. Ed. 1037 (1927); *National City Bank of New York v. Helvering*, 98 F. (2d) 93 (1938).

<sup>38</sup> *Murray Humphreys*, 42 BTA 857, CCH Dec. 11,326 (1940).

<sup>39</sup> *Commissioner of Int. Rev. v. Heininger*, 320 U. S. 467, 64 S. Ct. 249, 88 L. Ed. 171 (1943); *Commissioner of Int. Rev. v. Longhorn Portland Cem. Co.*, 3 TC 310, CCH Dec. 13,747 (1944), reversed on other grounds in 148 F. (2d) 276 (1945), cert. den. — U. S. —, 66 S. Ct. 33, 90 L. Ed. (adv.) 39 (1945).

<sup>40</sup> — U. S. —, 66 S. Ct. 546, 90 L. Ed. (adv.) 553 (1946).

cability of legal title under state law in determining questions concerning the taxability of illegal income. Wilcox, the taxpayer in that case, had been employed as a book-keeper. When the employer's books were audited, it was discovered that he had converted over \$12,000 of company funds in 1941, most of which he had lost in gambling houses in Nevada. He was convicted by a Nevada state court, in 1942, for the crime of embezzlement and was sentenced to serve a term in prison from which he was paroled in 1943. The employer never forgave nor condoned the taking of the money and was still holding the employee responsible to restore the same at the time of the Supreme Court decision.

The Commissioner of Internal Revenue had there determined that the amount converted in 1941 was to be regarded as taxable income to Wilcox in that year, predicating his holding on the general taxing section of the Internal Revenue Code<sup>41</sup> which had been found sufficient to justify taxing the settlor in the *Clifford* case<sup>42</sup> on the trust income. The Supreme Court disagreed and said:

For present purposes, however, it is enough to note that a taxable gain is conditioned upon (1) the presence of a claim of right to the alleged gain and (2) the absence of a definite, unconditional obligation to repay or return that which would otherwise constitute a gain. Without some bona fide legal or equitable claim, even though it be contingent or contested in nature, the taxpayer cannot be said to have received any gain or profit within the reach of Section 22(a).<sup>43</sup>

The court noted that, under Nevada law, while the crime of embezzlement was complete whenever an appropriation was made, the employer was entitled to replevy the money as soon as it was appropriated or to have it summarily restored by a magistrate. As the employer at all times regarded the embezzler liable to return the full amount appropriated and as the debtor-creditor relationship was definite and unconditional, the court concluded

<sup>41</sup> Int. Rev. Code § 22(a), 26 U. S. C. A. § 22(a).

<sup>42</sup> 309 U. S. 331, 60 S. Ct. 554, 84 L. Ed. 788 (1940).

<sup>43</sup> — U. S. — at —, 66 S. Ct. 546 at 549, 90 L. Ed. (adv.) 553 at 555.

that "all right, title and interest" in the money rested with the employer. That being so, the taxpayer was said to have received no taxable income from the embezzlement. Just how far the doctrine of the *Wilcox* case is to be carried is, of course, a matter of pure conjecture but it would seem as if money illegally acquired is no longer to be treated as income to the recipient if action might be maintained to compel the return thereof.

#### B. DEDUCTIONS FROM INCOME

The right to claim a deduction against income for money paid for state taxes furnishes a striking example of the impact of state law upon federal income tax liability. The Internal Revenue Code permits the deduction of "taxes paid or accrued within the taxable year"<sup>44</sup> except for most federal taxes, all estate, legacy, inheritance, succession or gift taxes, and local benefit taxes. The accompanying regulations indicate that, in general, such taxes are deductible only by the person upon whom they are imposed.<sup>45</sup> From the very beginning, determination as to who was the person upon whom the deductible tax items were imposed has been made by reference to state law. The question is, in reality, one of the "legal incidence" of the state or local tax.<sup>46</sup>

For example, the Florida state gasoline tax was at one time regarded as being imposed upon the consumer, so constituted a deductible item to him.<sup>47</sup> When the Florida Supreme Court declared that the tax was legally imposed upon the manufacturer, wholesaler or dealer who made the first sale in the state, the federal rule was modified accordingly.<sup>48</sup> In another instance, the Nebraska gasoline tax was originally held to be imposed upon the dealer so as to bar deduction thereof by the ultimate consumer.<sup>49</sup>

<sup>44</sup> Int. Rev. Code § 23(c); 26 U. S. C. A. § 23(c).

<sup>45</sup> U. S. Treas. Reg. 111, § 29.23(c)-1. Retail sales taxes, passed on and separately stated, constitute a statutory exception.

<sup>46</sup> For Tax Court determinations with regard to state sales taxes, see Eckstein, 41 BTA 746, CCH Dec. 11,048 (1940), as to Illinois retailer's occupation tax; L. & C. Mayers Co., Inc., BTA mem. op., CCH Dec. 12,167-E (1941), for New York City tax; Junius Adams, BTA mem. op., CCH Dec. 12,472-A (1942), and McDermott, 3 TC 929, CCH Dec. 13,951 (1944), for North Carolina.

<sup>47</sup> I. T. 3113, 1937-2 CB 86.

<sup>48</sup> I. T. 3636, 1944 CB 103.

<sup>49</sup> G. C. M. 7498, IX-1 CB 102.



In 1943, that state enacted legislation permitting consumers to obtain refunds of tax paid on gasoline used for non-highway purposes. The change in the law was considered sufficient evidence of a shift in the legal incidence of the state tax so as to permit its deduction by consumers thereafter.<sup>50</sup> Whether or not a sales tax is a "retail" tax within the purview of the statute<sup>51</sup> is also determined by local law.

Other vexing questions concerning the deduction of state and local taxes may revolve around the accrual date. Taxpayers on a cash basis, of course, may deduct such taxes only after actual payment, but where the accrual basis is used, or as between vendor and vendee, the deduction must be taken as of the time of accrual. Such a determination is usually a federal question but reference has been made to local law to determine the specific date to be used. In that regard, state and local real property taxes and state franchise taxes present the most difficulty.<sup>52</sup>

After calculation has been made of the amount of the net income, a personal exemption is granted to all natural taxpayers. In the computation thereof, such things as marriage, divorce, death, and adoption will have definite federal tax effects. Where two individuals enjoy the status of husband and wife at the end of the taxable year they may be eligible to file a joint return but the same fact may also permit one spouse to take the entire personal exemption in a separate return if the other spouse has no income. As the Internal Revenue Code uses the terms "husband," "wife," "married," and "spouse" without special definition it would seem that such terms should bear their ordinary connotation. There being no formal rulings or decisions directly in point, it would seem that the answer to whether or not two persons are in fact married must be settled by state law since creation of the marital status is subject only to state regulation. Dissolution of the marital status by a decree of absolute divorce, effective under state law for that purpose, would certainly serve to terminate the relationship for federal income tax purposes. Whether

<sup>50</sup> I. T. 3669, 1944 CB 112.

<sup>51</sup> Int. Rev. Code § 23(c)(3); 26 U. S. C. A. § 23(c)(3).

<sup>52</sup> *Magruder v. Supplee*, 316 U. S. 394, 62 S. Ct. 1162, 86 L. Ed. 1555 (1942).

a decree *a mensa et thoro* or one of separate maintenance would so serve has not been decided but, in cases of annulment, the Bureau of Internal Revenue has ruled that payments made pursuant to an annulment decree, if such decree is based on a cause which made the marriage void *ab initio*, are not to be considered as "alimony" payments.<sup>53</sup>

In much the same way, the federal tax law permits credits against net income in specified amounts for certain dependent relatives of the taxpayer. The law mentions, among other specified relationships, that a legally adopted child is to be considered as a blood child of the taxpayer.<sup>54</sup> Adoption by adequate legal proceedings according to the law of the pertinent state jurisdiction would be necessary for a legal guardian does not, solely by reason of such relationship, qualify for the dependency credit.<sup>55</sup> As to other relationships mentioned in the list of dependent relatives, the Treasury Regulations do provide that if a relationship by affinity has once existed it is not terminated either by divorce or death of the spouse,<sup>56</sup> thereby making it unnecessary to consult the appropriate state law, but other problems which theoretically could arise have been left undetermined. Typical of these are such questions as to whether illegitimate as well as legitimate children are to be included, whether the term "brother-in-law," for example, extends to the husband of a wife's sister, and whether the first, divorced wife of the father is a "stepmother" to the children of the father by his second wife. These, and other questions, would be apt to receive differing answers if state law is ultimately held to control<sup>57</sup> so, in the interest of uniformity of administration, some uniform federal rule should be devised.

Many tax consequences flow from the fact of death, whether of a taxpayer, his relatives, his partners, or others. Ordinarily, the date of a person's death is readily ascertainable but circumstances may arise where a presumptive date of death must be

<sup>53</sup> Bureau letter, Dec. 8, 1944, 454 CCH ¶ 6092.

<sup>54</sup> Int. Rev. Code § 25; 26 U. S. C. A. § 25.

<sup>55</sup> Mim. 5327, 1942-1 CB 81.

<sup>56</sup> U. S. Treas. Reg. 111, § 29.25-3.

<sup>57</sup> See, for illustration, 471 CCH ¶ 358D.065.

used, as in case of an unexplained disappearance for a long period of time. Here again there is no effective authority but seemingly state rules should be used. Certainly, a judicial determination of death under state law should be controlling for federal tax purposes.<sup>58</sup>

Two other notable changes in the matter of tax computation must be noted. Prior to 1944, responsibility for reporting the earnings of a minor child and paying the tax thereon depended upon state law. In the absence of proof to the contrary, the parent was assumed to have the legal right to the earnings of a minor child so was required to include them in his return. Termination of minority, by emancipation or by reaching the age of majority, necessarily varied with local law. As the law now stands, the minor is taxed on his own income, without regard to state law, except that the parent or person entitled to the services of the child remains liable for any tax attributable to the minor's earnings which belong to the parent under local law if the minor does not pay.<sup>59</sup> The power of a minor to enter into a contract affecting his earnings, however, would still apparently depend on state law.<sup>60</sup>

The other change was also brought about by statutory amendment. The Internal Revenue Code now states:

In the case of a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, periodic payments . . . received subsequent to such decree in discharge of or attributable to property transferred (in trust or otherwise) in discharge of, a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree

<sup>58</sup> Where actual date of death is not known and a presumptive date of death is determined under federal law for members of the armed forces missing in action, the presumptive date of death governs for tax purposes: I. T. 3750, 1945 CB 126; I. T. 3771, 1945 CB 194.

<sup>59</sup> Int. Rev. Code § 22(m); 26 U. S. C. A. § 22(m). See also U. S. Treas. Reg. 111, § 29.22(m)-1.

<sup>60</sup> For the general proposition that assignments are to be governed by the *lex loci contractus*, see *Lum v. Commissioner*, 147 F. (2d) 356 (1945), and *Blair v. Commissioner of Internal Revenue*, 300 U. S. 5, 57 S. Ct. 330, 81 L. Ed. 465 (1937).

or under a written instrument incident to such divorce or separation shall be includible in the gross income of such wife. . . .<sup>61</sup>

In accordance therewith, amounts taxed to the wife are either excluded from the husband's income or are allowed as deductions to him, depending upon whether they are attributable to property transferred to the wife or represent items paid by the husband.<sup>62</sup> The question of whether a divorce or legal separation has occurred is, of course, determined by reference to state law.<sup>63</sup> Payments under a judgment annulling a marriage, void *ab initio* according to state law, are not to be considered,<sup>64</sup> and a property agreement executed in anticipation of divorce will be effective only if approved by the divorce court as a final settlement or otherwise made a part of the state court decree.<sup>65</sup> Whether payments are "periodic" within the meaning of the statute must, of course, be determined by reference to the terms of the decree,<sup>66</sup> but if the decree or instrument specifies that the sums are payable for the support of minor children they are taxable to the husband rather than to the wife. Whether amounts so paid may be considered as paid for the support of dependents, to entitle one to claim a dependency credit, also must be settled by reference to the terms of the decree.<sup>67</sup> As a practical matter, the net result of the change is that state divorce and separate maintenance decrees are now written largely with the federal income tax provisions in mind,<sup>68</sup> or at least with an awareness of some of the tax consequences which may flow from the payment of alimony or support money. .

<sup>61</sup> Int. Rev. Code § 22(k) ; 26 U. S. C. A. § 22(k).

<sup>62</sup> *Ibid.*, § 22(k) and § 23(u).

<sup>63</sup> Kalchthaler, 7 TC 625, CCH 15,336 (1946) : I. T. 3761, 1945 CB 76.

<sup>64</sup> Bureau Letter, Dec. 8, 1944, 454 CCH ¶ 6092.

<sup>65</sup> Miller, 2 TC 285, CCH Dec. 13,315 (1943), acq. noted.

<sup>66</sup> Int. Rev. Code § 22(k) declares such payments must be "specified in the decree or instrument."

<sup>67</sup> *Ibid.* See also U. S. Treas. Reg. 111, § 29.22(k)-1(d).

<sup>68</sup> Cahn, *Local Law in Federal Taxation*, 52 Yale L. J. 799 (1943), particularly pp. 805-8.

## III. TAX COLLECTION

Federal law declares that unpaid federal taxes are to be a lien, in favor of the United States, upon "all property and rights to property, whether real or personal, belonging to" the taxpayer.<sup>69</sup> In addition, it provides for the collection of "the liability, at law or in equity, of a transferee of property of a taxpayer."<sup>70</sup> A "transferee" is defined, in the regulations, to include "an heir, legatee, devisee, distributee of an estate of a deceased person, the shareholder of a dissolved corporation, the assignee or donee of an insolvent person, the successor of a corporation, a party to a reorganization. . . and all other classes of distributees."<sup>71</sup> The term has been held to include any person who receives assets of the taxpayer for an inadequate consideration.<sup>72</sup>

With respect to the first of these statutory provisions, the state exemption laws generally do not serve to save the property of the taxpayer from the federal tax lien. For example, a provision of a Louisiana statute purporting to exempt the proceeds of insurance policies from the payment of debts was regarded ineffective to prevent the enforcement of an income tax lien.<sup>73</sup> In the same way, a provision of the Texas Constitution which exempts homesteads from forced sale has been held not to prevent the sale of a homestead to satisfy a federal tax lien.<sup>74</sup> But the tax cannot ordinarily be collected from property which, under state law, belongs to someone other than the taxpayer. If, then, as under Oklahoma law prior to its present community property statute, a husband and wife are granted an indivisible and vested interest in homestead property which neither may transfer without the consent of the other, an income tax lien based on the tax liability of a husband will fail because of the wife's interest.<sup>75</sup> In another case, arising under Colorado law, the wife was a bene-

<sup>69</sup> Int. Rev. Code § 3670; 26 U. S. C. A. § 3670.

<sup>70</sup> *Ibid.*, § 311(1).

<sup>71</sup> U. S. Treas. Reg. 111, § 29.311-1.

<sup>72</sup> *Costanza*, 16 BTA 1294, CCH Dec. 5306 (1929).

<sup>73</sup> *Smith v. Donnelly*, 65 F. Supp. 415 (1946).

<sup>74</sup> *Shambaugh v. Scofield*, 132 F. (2d) 345 (1943).

<sup>75</sup> *Jones v. Kemp*, 144 F. (2d) 478 (1944); *Bigley v. Jones*, 64 F. Supp. 389 (1946).

fiary under and enjoyed certain property rights in an annuity insurance policy taken out by her husband for her benefit. Sale of the whole policy for the husband's tax liability was enjoined, even though the husband retained the right to change the beneficiary.<sup>76</sup> A lien for taxes due from a lessor cannot be impressed upon funds in the hands of a lessee,<sup>77</sup> and it has been held that a valid gift of stock, even to the taxpayer's wife, is sufficient to defeat a lien for taxes if it is asserted after the transfer.<sup>78</sup> State exemption granted to the income of a spendthrift trust, however, has been held ineffective to prevent the collection of income taxes assessed upon the trust income.<sup>79</sup>

Under the second or transferee section, the Commissioner must show all facts necessary to establish a liability at law or in equity.<sup>80</sup> One authority has stated that the "liability here referred to is plainly under state law,"<sup>81</sup> but when questions under state exemption statutes have arisen, as upon insurance policy proceeds paid to a widow against whom transferee-liability for her deceased husband's income tax has been asserted, the decisions are not uniform and no conclusive authority is to be found in the decided cases. The Supreme Court noted and reserved the question in *Phillips v. Commissioner of Internal Revenue*<sup>82</sup> but has not considered it since. The Second Circuit Court of Appeals squarely held, after thoughtful consideration, that the question was one of federal law.<sup>83</sup> The Seventh Circuit has held

<sup>76</sup> *Cannon v. Nicholas*, 80 F. (2d) 934 (1935).

<sup>77</sup> *United States v. Western Union Telegraph Co.*, 50 F. (2d) 102 (1931); *United States v. Western Union Telegraph Co.*, 52 F. Supp. 553 (1943).

<sup>78</sup> *Driver v. Hooper*, 42-2 USTC ¶ 9687.

<sup>79</sup> *In re Rosenberg's Will*, 269 N. Y. 247, 199 N. E. 206 (1935), cert. den. 298 U. S. 669, 56 S. Ct. 834, 80 L. Ed. 1392 (1936). The state statute there involved limited creditors' claims to 10% of the income. See also *United States v. Dallas Nat. Bank*, 152 F. (2d) 582 (1946); *United States v. Dallas Nat. Bank*, 67 F. Supp. 573 (1946).

<sup>80</sup> *Temoyan*, 16 BTA 923, CCH Dec. 5232 (1929), nonacq. noted. The Government has, for example, been held entitled to take advantage of noncompliance with the notice requirements of Ill. Rev. Stat. 1945, Ch. 121½, § 78, dealing with bulk sales: *United States v. Goldblatt Bros.*, 128 F. (2d) 576 (1942).

<sup>81</sup> Paul, *Studies in Federal Taxation* (Callaghan & Co., Chicago, 1938). Second series, p. 12, without citation.

<sup>82</sup> 283 U. S. 589, 51 S. Ct. 608, 75 L. Ed. 1289 (1931).

<sup>83</sup> *Commissioner v. Western Union Tel. Co.*, 141 F. (2d) 774 (1944).

the same way.<sup>84</sup> There is, however, a decision in the Fifth Circuit, relying upon earlier decisions of the Second Circuit now superseded, indicating that state law controls,<sup>85</sup> and the Eighth Circuit has said much the same thing, relying upon authorities which hardly seem in point.<sup>86</sup> A recent decision from the Third Circuit summarizes the matter as follows:

On principle the question seems to us to be clearly one to be answered without reference to state law limitations. It would not be disputed that, in general, the imposition and collection of federal income tax is a federal function. One of the questions arising from such an undertaking is the determination of when B is to be liable to pay a tax assessed against A. The Congress could, no doubt, have left this question to be variously determined by the laws of the states if it had so desired. But in the absence of a clearly expressed intention to do so, we should not infer it, for such variation does not fit into a uniformly applied system of federal taxation.<sup>87</sup>

By specific federal provision, however, a lien for federal taxes is not valid as against any subsequent mortgagee, pledgee, purchaser or judgment creditor until notice thereof has been filed in the office authorized by state law in the state where the property subject to the lien is situated, or with the clerk of the appropriate district court if the state involved has not designated any office.<sup>88</sup> General state requirements as to the form of notice, acknowledgment and the like required to perfect a lien are of no consequence, as it is the fact of filing which is the only important thing.<sup>89</sup>

Since the decision in *Dobson v. Commissioner of Internal Revenue*,<sup>90</sup> determinations of fact made by the Tax Court are not subject to review before other federal tribunals although its holdings on questions of law are open to re-examination. A problem is, therefore, posed as to whether or not a determination by that body on the condition or scope of the law of a particular state,

<sup>84</sup> *Commissioner v. Keller*, 59 F. (2d) 499 (1932).

<sup>85</sup> *Liquidators of Exchange Nat. Bank v. United States*, 65 F. (2d) 316 (1933).

<sup>86</sup> *Botz v. Helvering*, 134 F. (2d) 538 (1943).

<sup>87</sup> *Pearlman v. Commissioner*, 153 F. (2d) 560 at 562 (1946).

<sup>88</sup> Int. Rev. Code § 3672; 26 U. S. C. A. § 3672.

<sup>89</sup> Sen. Fin. Comm. Report of 1942 Revenue Act, 1942-2 CB 504 at 686.

<sup>90</sup> 320 U. S. 489. 64 S. Ct. 239, 88 L. Ed. 248 (1944).

as distinguished from a determination as to whether state law is to govern at all or, if so, then which particular state law should govern, presents a question of fact not open to further determination.<sup>91</sup> Where the situation requires application of doctrines arising under the conflict of laws, however, the question is essentially a legal one so that the Tax Court ruling is not final.<sup>92</sup> It happens that cases in which there is opportunity for selection between the laws of two or more states are quite rare. The community property cases are likely to be more prevalent than others and there the law of the domicile has generally been applied<sup>93</sup> but, where ownership of real property has been involved, the law of the situs has been followed.<sup>94</sup> Questions concerning choice of law have not, however, been given detailed examination in the preparation of this article.

It might be suggested, by way of conclusion, that the general lack of uniformity thus found to exist in the federal decisions tends to indicate that each situation must be considered afresh, with little help from analogy. The relationship between state and federal law, despite thirty-three years of litigation and legislation, is still in an expanding phase for approximately one-half of the 300-odd court decisions on income tax liability rendered in the past year, excluding completely the Tax Court decisions announced in the same period, presented questions of state law either directly or by implication. If, then, uniformity is desirable, and it would seem that it should be in tax matters if anywhere, the remedy must be provided by Congress.

<sup>91</sup> There is, as yet, little direct authority on the extent to which the Dobson rule applies in determining state law for federal tax purposes. Determination is, however, made independently of the doctrine in *Erie R. Co. v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), which is applicable in other fields where special federal statutes are not involved. See note in 59 Harv. L. Rev. 948 (1946).

<sup>92</sup> *John Kelley Co. v. Commissioner of Int. Revenue*, 326 U. S. 521, 66 S. Ct. 299, 90 L. Ed. (adv.) 257 (1946). Although admittedly dictum, the court there mentioned, as true legal questions, "situations which involve conflicts of laws."

<sup>93</sup> *Von Der Hellen*, TC mem. op., 5 TCM —, CCH Dec. 15,329(M) (1946); *Grafe*, TC mem. op., 5 TCM —, CCH Dec. 14,988(M) (1946); *Kastel*, TC mem. op., 4 TCM 1006, CCH Dec. 14,842(M) (1945). See also *Commissioner v. Porter*, 148 F. (2d) 566 (1945).

<sup>94</sup> *Hammonds v. Commissioner*, 106 F. (2d) 420 (1939). *Cahn*, *Local Law in Federal Taxation*, 52 Yale L. J. 799 (1943), at 821, suggests that in determining state law generally for federal tax purposes, the local law is that of the "economic situs," whatever other law might govern the property or transaction in ordinary civil litigation.



## NOTES AND COMMENTS.

### DAMAGES FOR DEFAMATION BY RADIO.

With a growing tendency on the part of more and more radio personalities to indulge in the practice of "ad-libbing," the legal problem posed in the case of *Locke v. Gibbons*<sup>1</sup> assumes greater importance. It had there been determined that as the alleged defamatory matter had been spoken into a microphone without the benefit of a written script the same constituted a slander, rather than a libel, so that in the absence of an allegation of special damage, no cause of action had been stated in view of the fact that the alleged defamatory matter was not slanderous *per se*.<sup>2</sup> Had the same been treated as a libel, judgment for at least nominal damages would have been required.<sup>3</sup> The reason underlying any such distinction rests purely on historical accident,<sup>4</sup> has not passed uncondemned,<sup>5</sup> and now seems wholly illogical when applied to cases of defamation occurring during a radio broadcast.

A system of jurisprudence which provides for so strict an adherence to the past for the determination of novel situations like the one presented in the *Locke* case can only lead to unjust and inequitable judgments. Many have commented on the fact that the complexities of our present machine age cannot wisely be settled, in a scientific era, by principles formulated long before such developments as the radio were conceived or envisaged. Thus Gmelin asserts: "It follows that the essential element in the administration of justice is to be sought in a place different from that in which it has been looked for in the past. The very kernel of the work of the judiciary lies in the just government of the real interests and possessions of human beings. The scholastic and dialectical

<sup>1</sup> 164 Misc. 877, 299 N. Y. S. 188 (1937), affirmed without opinion in 253 App. Div. 887, 2 N. Y. S. (2d) 1015 (1938). In the companion case of *Locke v. Benton & Bowles, Inc.*, 165 Misc. 631, 1 N. Y. S. (2d) 240 (1937), a motion to dismiss the complaint had been denied but that order was reversed, 253 App. Div. 369, 2 N. Y. S. (2d) 150 (1938), on the ground that the pleader should provide a contrast between the script as written and the actual broadcast presented.

<sup>2</sup> *Pollard v. Lyon*, 91 U. S. 225, 23 L. Ed. 308 (1876); *Marion v. Davis*, 217 Ala. 16, 114 So. 357 (1927).

<sup>3</sup> *Jones v. Register & Leader Co.*, 177 Iowa 144, 158 N. W. 571 (1916).

<sup>4</sup> See Restatement, Torts, §568, historical note, and *Jones v. Jones*, [1916] 2 A. C. 481 at 489.

<sup>5</sup> Lord Mansfield, in *Thorley v. Lord Kerry*, 4 Taunt. 355 at 365, 128 Eng. Rep. 367 at 371 (1812), noted that "an assertion made in a public place, as upon the Royal Exchange, concerning a merchant in London, may be much more extensively diffused than a few printed papers dispersed, or a private letter: it is true that a newspaper may be very generally read but that is all casual." His statement would seem much stronger if the words were spoken into a microphone.

method prevailing today, attempting as it does to draw the decision as a logical conclusion from the legal rule, by means of verbal interpretation supplemented by purely verbal inferences, without proper weighing of conflicting interests and without considering whether the result will be reasonable or not, is decidedly wrong. Unless we realize that it is the business of courts to serve the interests of actual life and to adapt their judgments to them, instead of forcing the facts into a bed of Procrustes according to some schematic formula, we are on the wrong road, and we shall err fatally in imagining that we can ever obtain certainty of law in this manner.’<sup>6</sup> Dean Pound has pointed out that the real danger to the “administration of justice according to law is in timid resistance to rational improvement and obstinate persistence in legal paths which have become impossible in the heterogeneous, urban, industrial America of today.”<sup>7</sup> Justice Holmes once expressed his contempt for superannuated archaic precedents by stating: “It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.”<sup>8</sup>

While some hold to the view that the rule of *stare decisis* requires strict and immutable adherence to earlier precedents<sup>9</sup> because such an attitude gives permanency to the law, they overlook the fact that it deprives the law of adaptability to meet changing conditions. The better view would seem to be that precedent may serve as a strong formative influence without establishing a rigid pattern to which all future cases must strictly conform. As the legally operative factors in a rule of law change, the rule should change with them and courts have felt free to depart from the common law whenever they have found that precedent was wrongly decided<sup>10</sup> or when less mischief would come from reversal than from the perpetuation of outmoded ideas.<sup>11</sup> It is true that judges, reluctant to overrule existing law, often render lip-service to the status

<sup>6</sup> Johann Georg Gmelin, *Science of Legal Methods*, Modern Legal Philosophy Series, Vol. IX, pp. 123-4.

<sup>7</sup> Pound, *The Spirit of the Common Law* (Marshall Jones Co., Boston, 1921), p. xii.

<sup>8</sup> Holmes, *Collected Legal Papers* (Harcourt, Brace & Howe, New York, 1920), p. 187.

<sup>9</sup> Salmond, *Science of Legal Method*, Modern Legal Philosophy Series, Vol. IX, p. lxxxiii, for example, indicates that a judge “is bound by the decisions of his predecessors, not because they were necessarily or even presumably wiser than he is—not because their decisions are necessarily or presumably more correct than those at which he would himself arrive—but because it is in the public interest that questions once decided should remain decided.”

<sup>10</sup> Hicks, *Materials and Methods of Legal Research* (Lawyers Co-operative Pub. Co., Rochester, New York, 1923), p. 85.

<sup>11</sup> Cooley, *Const. Lim.*, 8th Ed., pp. 108-24.

quo,<sup>12</sup> but recent decisions do tend to reveal a willingness on the part of the judiciary to disregard precedents, frankly and on other factors than those implicit in a system of common law.<sup>13</sup> One is, then, confounded to note the court, in the Locke case, stating that courts "cannot legislate to eradicate the long established distinction between libel and slander,"<sup>14</sup> particularly when that distinction becomes faced with a new technique in defamation.

The subject of radio defamation is not so new that it has not received some attention. In *Summit Hotel Company v. National Broadcasting Company*,<sup>15</sup> the court acknowledged the special characteristics thereof by saying: "Publication by radio has physical aspects entirely different from those attending the publication of a libel or a slander as the law understands them. The danger of attempting to apply the fixed principles of law governing either libel or slander to this new medium of communication is obvious. But the law is not so firmly and rigidly cast that it is incapable of meeting a new wrong as the demands of progress and change require."<sup>16</sup> Judge Otis, in *Coffey v. Midland Broadcasting Company*,<sup>17</sup> likewise noted a difference between the utterance of the natural voice and its electrical transmission. He said: "I conceive there is a close analogy between such a situation and the publication in a newspaper . . . The latter prints the libel on paper and broadcasts it to the reading world. The owner of a radio station 'prints' the libel on a different medium just as widely or even more widely 'read.'"<sup>18</sup> Some authors would call such conduct libel;<sup>19</sup> others would abolish any dis-

<sup>12</sup> For example, the idea of the sanctity of the seal was riddled with exceptions and distinctions before it was reduced to a mere shadow. Judges have coined the phrase "instinct with an obligation" to support certain contracts which, according to their terms, only bound one side: *Wood v. Duff Gordon*, 222 N. Y. 88, 118 N. E. 214 (1917). They have resorted to a "technical trespass" to permit recovery for damage from falling debris caused by blasting without negligence: *Hay v. The Cohoes Co.*, 2 N. Y. 159 (1848). Other illustrations will, no doubt, come readily to mind.

<sup>13</sup> In *Hermitage v. Goldfogle*, 204 App. Div. 710, 199 N. Y. S. 382 (1923), affirmed in 236 N. Y. 553, 142 N. E. 281 (1923), tax exemption on new construction built to alleviate intolerable housing conditions was justified on sociological, rather than legal, grounds. The opinion of Bijur, J., in *Farmers' Loan & Trust Co. v. Pierson*, 130 Misc. 110, 222 N. Y. S. 532 (1927), limits the latitude found in the corporate entity theory by reference to "justice" and "fairness" rather than to legal syllogisms.

<sup>14</sup> 164 Misc. 877 at 880, 299 N. Y. S. 188 at 192.

<sup>15</sup> 336 Pa. 182, 8 A. (2d) 302 (1939).

<sup>16</sup> 336 Pa. 182 at 200, 8 A. (2d) 302 at 310.

<sup>17</sup> 8 F. Supp. 889 (1934).

<sup>18</sup> 8 F. Supp. 889 at 890.

<sup>19</sup> Zollman, *Law of the Air* (Bruce Publishing Company, Milwaukee, Wis., 1927), p. 125; Seelman, *The Law of Libel and Slander in New York* (J. B. Lyon Company, Albany, New York, 1933), p. 3; Vold, *The Basis for Liability for Defamation by Radio*, 19 Minn. L. Rev. 611 (1935).

inction between libel and slander.<sup>20</sup> At least three states have recognized that if the defamatory words spoken over the radio are read from a prepared script they are to be treated as libelous in nature,<sup>21</sup> although it may be said that precedent supports this view.<sup>22</sup> One is led to inquire how the radio audience is to know whether the matter being spoken is being read or recited from memory,<sup>23</sup> but the courts seem to have made some point over the distinction.

If distinction must still be drawn between libel and slander, it would seem that scientific developments dictate that the division should be between the manner of projection, whether simply oral or by mechanical impulse, rather than whether the defamation reaches the general public through the aural or the optic nerves. It is true that inventions have increased and improved the facility of circulating written or printed matter, but such progress is trivial compared to the potency bestowed upon the spoken word operating through mechanical devices for, through them, the defamation may not only be transmitted over the greater part of the earth in a moment of time but may be simultaneously fashioned into permanent form. Such verbal puissance did not exist when the courts first distinguished speech from writing or print. Any suggestion that such phenomena might some day be possible would have been ridiculed as beyond the realm of even the weird and fanciful. Yet it is now an accomplished scientific fact.

The existence of a distinction between the natural voice and the broadcasted one was noted by Justice Brandeis, in *Buck v. Jewell-LaSalle Realty Company*,<sup>24</sup> where he said: "We are satisfied that the reception of a radio broadcast and its translation into audible sound is not a mere audition of the original program. It is essentially a reproduction. As to the general theory of radio transmission there is no disagreement. All sounds consist of waves of relatively low frequencies which ordinarily pass through the air and are locally audible. Thus music played at a distant broadcasting studio is not directly heard at the receiving

<sup>20</sup> Veeder, *The History and Theory of the Law of Defamation*, 4 Col. L. Rev. 33 (1904).

<sup>21</sup> *Sorensen v. Wood*, 123 Neb. 348, 243 N. W. 82 (1932); *Hartmann v. Winchell*, 187 Misc. 54, 63 N. Y. S. (2d) 225 (1946); *Hryhorijiv v. Winchell*, 180 Misc. 575, 45 N. Y. S. (2d) 31 (1943). See also *Polakoff v. Hill*, 261 App. Div. 777, 27 N. Y. S. (2d) 142 (1941); *Weglein v. Golder*, 317 Pa. 437, 177 A. 47 (1935); *Restatement, Torts*, § 568. The Restatement does not purport to lay down any definite rule as to extemporaneous remarks. See criticism by Farnum, *Radio Defamation and the American Law Institute*, 16 Bost. L. Rev. 1 (1936).

<sup>22</sup> Reading written defamatory matter aloud has been treated as libel in *M'Coombs v. Tuttle*, 5 Ind. (5 Blackf.) 431 (1840); *Snyder v. Andrews*, 6 Barb. (N. Y.) 43 (1849); *Adams v. Lawson*, 58 Va. (17 Grat.) 250 (1867).

<sup>23</sup> See *Irwin v. Ashurst*, 158 Ore. 61, 74 P. (2d) 1127 (1938).

<sup>24</sup> 283 U. S. 191, 51 S. Ct. 410, 75 L. Ed. 971 (1931).

set. In the microphone of the radio transmitter the sound waves are used to modulate electrical currents of relatively high frequencies which are broadcast through an entirely different medium, conventionally known as the 'ether.' These radio waves are not audible. In the receiving set they are rectified; that is, converted into direct currents which activate the loud speaker to produce again in the air sound waves of audible frequency. The modulation of the radio waves in the transmitting apparatus, by the audible sound waves is comparable to the manner in which the wax phonograph record is impressed by these same waves through the medium of a recording stylus."<sup>25</sup> As the voice of the speaker does not travel the airways but merely sets a mechanism into action permitting an electrical product to be disseminated, the broadcast is the product of voice and electrical radiation combined. The voice alone could no more be called the source of defamation than could the finger which presses the trigger be called the source of the bullet which kills.

Should not the courts, then, attach different legal consequences to defamation spread completely by the pure natural voice as contrasted with that which is spread through an instrument activated by the human voice but made more dangerous by the tremendous potentialities thereby created? To hold that direct address to a present audience is legally the same as a radio broadcast is as preposterous as to assert that holding a lighted match in the ordinary atmosphere is the equivalent of placing it into a gas chamber! Seelman, who would allow application of the rule as to general damages to defamation in the course of a radio broadcast by reason of its resemblance to libel, states: "The widest circulation of the greatest newspaper is insignificant when compared to the audience of a national broadcast. The speaker over the radio often prepares his speech and submits it to the broadcasting authorities. Technically it is then published as a libel; but when he speaks, it is the voice which scatters his words to millions. He speaks with prepared deliberation; and to a vast, if an uncountable, audience. To them his words are still unrecorded. Even here, the words, eagerly awaited with radio acquisitiveness, may leave a record as permanent as if the eye had seen the printed page. The rules of libel and not slander should here apply."<sup>26</sup>

He might have noted, bearing on the extensive character of the damage that is likely to follow, that spoken defamation may be less deleterious if limited to the locality of its utterance but that it bears inherent characteristics which can make it more damaging than print if given an identical sphere of publication with the latter. Modulation and inflection of speech carry more conviction than cold print. The chance of mis-

<sup>25</sup> 283 U. S. 191 at 199-200, 51 S. Ct. 410. 75 L. Ed. 971 at 977. Notes omitted.

<sup>26</sup> Seelman, *op. cit.*, p. 3.

quotation is multiplied, for the very fact that writing has a physical existence makes misquotation less likely. Pope well knew how speech might be distorted when he wrote:

“The flying rumours gathered as they rolled  
 And all who told it added something new  
 And all who heard it made enlargement too  
 In every ear it spreads, on every tongue it grew . . .”<sup>27</sup>

The courts can hardly be less aware of the danger inherent in a wide dissemination of defamatory matter of that character.

Other elements may serve to justify the classification of defamatory radio broadcasts with other forms of libel. While slander involves no other conduct than the act of speaking, except perhaps for an accompanying gesture, a series of acts must precede the publication of a libel. So, too, in radio. The actual defamation by speaking into a microphone requires the setting up of the device, connecting it with the means of transmission, and the actual operation and control thereof during the course of transmission. These acts may be nondefamatory in themselves but, when coupled with the actual speaking, partake of its character and make the entire performance into one composite act.<sup>28</sup> Certainly, if a simultaneous recording of the broadcast is made an even stronger resemblance to libel is presented.<sup>29</sup> True the oral utterance precedes the recording into permanent form, but there is no factual difference of sufficient merit to require a different legal result for it was intimated, in *Ostrowe v. Lee*,<sup>30</sup> that placing defamation in permanent form contemporaneously with its oral publication is a libel.<sup>31</sup>

Enough has probably been said to show that the law is unrealistic if it persists in treating defamation over the radio as a species of slander.

<sup>27</sup> Pope, *The Temple of Fame*, p. 463.

<sup>28</sup> Vold, *The Basis for Liability for Defamation by Radio*, 19 *Minn. L. Rev.* 611 at 640-1 (1935), suggests that attempts to classify defamation by radio “on principle” as constituting slander are hopelessly erroneous. He states: “Radio transmission in that case, as in every other case, takes place through active operations by the broadcaster which manifestly constitute ‘conduct’ on his part rather than mere speech. Unless the term ‘slander’ is to be so enlarged as to cover not only oral speech but defamation by conduct as well, the facts of radio transmission of defamatory utterances do not fall within it. On the other hand, defamation by conduct has ordinarily by the authorities been held equivalent to libel.”

<sup>29</sup> Defamation written in disappearing ink or spread in the sky by smoke from an airplane would be treated as libel, even though the script be of evanescent character. The recording of a broadcast, available for use on other occasions without further conduct, is far more permanent than these.

<sup>30</sup> 256 N. Y. 36, 175 N. E. 505 (1931).

<sup>31</sup> In that case, dictation to a stenographer of defamatory matter was regarded as libelous upon a rereading thereof by the stenographer as the notes were examined and transcribed. Should a distinction be made if the stenographer finds it unnecessary to transcribe her notes?

What attitude, then, should the law take? In some states, legislation has been enacted treating such conduct as criminal but without attempting to classify it<sup>32</sup> or putting it in the class of criminal libel.<sup>33</sup> In other states, legislation has been designed to limit the liability of the operator of the radio station but uses either the term "libel" or the term "slander" without discrimination;<sup>34</sup> evidencing some confusion in the minds of legislators. None of these statutes purport to settle the civil problems with respect to the nature of the tort or the measure of damage. Settlement thereof has been left, so far, to the courts. Are they firm enough to sweep away established doctrines not in accord with scientific developments; doctrines which shackle by the dead weight of precedent?

Many may urge that courts cannot legislate to eradicate established law, but they may be answered, at least in this respect, by a quotation from Francois Geny. He wrote: "Whenever it is the business of a judge to discover what the law is in fields in which it has not yet been formulated, his functions have an appearance analogous to that of the legislator himself . . . the considerations that must guide the judge in accordance with the end to be attained are exactly the same as those which would influence the legislator. For the one as well as the other aims at promoting by an appropriate rule the ends of justice and social utility . . . when the formal sources are silent or insufficient . . . he should formulate his decision in accordance with the same considerations which the legislator would have in mind if he were to prescribe rules relating to the question at issue."<sup>35</sup> That courts have done so many times in the past is beyond dispute, for even the very law of defamation is judge-made.

It would be useless to trace the steps by which the doctrine of stare decisis, at one time, obtained so strong a hold on our law and made the "sacredness of precedent" a template of justice,<sup>36</sup> or to follow the development of the strict division of powers of government among the three co-ordinate branches.<sup>37</sup> The fact is that such ideas no longer hold

<sup>32</sup> Deering, Cal. Penal Code, § 258; Ill. Rev. Stat. 1945, Ch. 126, § 4; Ore. Comp. Laws Ann., § 23.437.

<sup>33</sup> Remington, Wash. Rev. Stat. Ann., Vol. 4, § 2424 supp.

<sup>34</sup> Fla. Stat. 1941, Ch. 770.03; Burns, Ind. Stat. 1933, 1943 supp. § 2.518; Iowa Code 1946, Ch. 659.5; Rev. Code Mont., 1939 supp., Ch. 3A, § 5694.1.

<sup>35</sup> Geny, Science of Legal Method, Modern Legal Philosophy Series, Vol. IX, pp. 4-5.

<sup>36</sup> See Pollock and Maitland, Hist. Eng. Law, 2d Ed., Vol. 1, pp. 203-6.

<sup>37</sup> Cohen, Law and the Social Order (Harcourt, Brace & Co., New York, 1933), p. 115, notes the fact that no such strict division exists today.

true for, if they did, social progress would be immobilized.<sup>38</sup> Because the courts, at one time, held that oral defamation, if not slanderous *per se*, was actionable only if special damage could be shown is no reason to forever impose such a limitation. As courts once were willing to recognize the more serious consequences that flowed from giving the defamatory matter permanence and wider dissemination, so they should now recognize the more serious dangers flowing from an improper use of a new method of transmitting ideas. The question should not be was a voice involved but rather, is this type of disparagement a new method of spreading defamation calling for new and more stringent punishment?

M. S. MARKS.

<sup>38</sup> Frank, *Law and the Modern Mind* (Brentano, New York, 1930), pp. 6-7, indicates how, when human relationships are transforming daily, "legal relationships cannot be expressed in enduring form. The constant development of unprecedented problems requires a legal system capable of fluidity and pliancy . . . although changes cannot be made lightly, yet law must be more or less impermanent, experimental and therefore not nicely calculable. Much of the uncertainty of law is not an unfortunate accident: it is of immense social value."



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## DISCUSSION OF RECENT DECISIONS.

ARMY AND NAVY—WAR RISK INSURANCE—WHETHER OR NOT BENEFICIARY CLAIMING RELATIONSHIP IN LOCO PARENTIS MAY RECEIVE BENEFITS OF NATIONAL SERVICE LIFE INSURANCE ACT WHEN RELATIONSHIP AROSE BETWEEN ADULTS—In *Zazove v. United States*,<sup>1</sup> an adult beneficiary designated in a policy of insurance issued pursuant to the National Service Life Insurance Act<sup>2</sup> brought suit to establish her right to receive payments under the policy after the government had denied her right thereto.<sup>3</sup> The heirs at law of the insured were made third-party defendants and filed a counterclaim for the proceeds on the ground that the beneficiary, although designated as aunt, was in fact

<sup>1</sup> 156 F. (2d) 24 (1946).

<sup>2</sup> 54 Stat. 1008, as amended by 56 Stat. 657; 38 U. S. C. A. §§ 801-2.

<sup>3</sup> *Maulis v. United States*, 56 F. (2d) 444 (1931), indicates that action in denying a claim is sufficient ground to warrant application to the courts. See also *United States v. Williams*, 278 U. S. 255, 49 S. Ct. 97, 73 L. Ed. 314 (1929).

no relative of the insured hence was not entitled thereto. Plaintiff, admitting the lack of blood relationship, then contended that, as she stood in loco parentis to the deceased soldier for more than a year prior to his entry into service, she was such a person as might be named as beneficiary.<sup>4</sup> It appeared that the insured, when 25 years of age, had gone to live with the plaintiff, then 48, and had continued to reside with her for over four years prior to his entrance into service and the issuance of the policy in question. The District Court held that the relationship of in loco parentis could not arise between adult persons and awarded the proceeds to the insured's heirs. Upon appeal by the plaintiff, the Circuit Court of Appeals for the Seventh Circuit reversed on the ground that a liberal construction of the congressional language forbade imposing a technical meaning upon the words "in loco parentis" and, since there was no dispute as to the acts which established that relationship, it ordered judgment in favor of the plaintiff.

As the common definition for the phrase "in loco parentis" indicates that the person be one "who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation, without going through the formalities necessary to a legal adoption,"<sup>5</sup> it has been held that the relationship could only exist between an adult and a minor.<sup>6</sup> That, at least, has been the tenor of the few Illinois cases on the subject,<sup>7</sup> and would seem to be a necessary inference to be drawn from any statutes dealing with related problems<sup>8</sup> or from analogous

<sup>4</sup> At the time the policy was issued, the act declared: "The insurance shall be payable only to a . . . parent (including person in loco parentis if designated as beneficiary by the insured) . . . The insured shall have the right to designate the beneficiary . . . but only within the classes herein provided. . . ." 54 Stat. 1008 at 1010, 38 U. S. C. A. § 802(g). The statute was subsequently amended to delete the phrase "including person in loco parentis if designated as beneficiary by the insured" and substituted instead the words: "The terms 'parent,' . . . include . . . persons who have stood in loco parentis to a member of the military or naval forces at any time prior to entry into active service for a period of not less than one year." See 56 Stat. 657 at 659, 38 U. S. C. A. §§ 801(f) and 802(g).

<sup>5</sup> 46 C. J., Parent and Child, § 174, p. 1334.

<sup>6</sup> *Ex Parte Pye*, 18 Ves. 140, 34 Eng. Rep. 271 (1811). See also 2 Williams on Executors, 7th Am. Ed., p. 652, where emphasis is put on the idea that the person in loco parentis must be one who "puts himself in the situation of the lawful father of the child, with reference to the father's office and duty of making provision for the child."

<sup>7</sup> See *Brush v. Blanchard*, 18 Ill. 46 (1854). The later holding in *Faber v. Industrial Commission*, 352 Ill. 115, 185 N. E. 255 (1933), indicates that the doctrine has remained unchanged.

<sup>8</sup> Ill. Rev. Stat. 1945, Ch. 4, § 1—1, dealing with adoption, restricts the proceeding to cover adoption of minor children only. See also *Brown v. Hall*, 385 Ill. 260, 52 N. E. (2d) 781 (1944). For purpose of inheritance taxation, the phrase is expressly limited to apply only if the "acknowledged" child was fifteen years of age or under: Ill. Rev. Stat. 1945, Ch. 120, § 375(5). See, however, *In re Beach's Estate*, 154 N. Y. 242, 48 N. E. 516 (1897), where the court held that it was no bar to a tax exemption that the relationship originated at a time when both parties were adults.

decisions.<sup>9</sup> Such has also been the policy followed by the Veterans' Administration<sup>10</sup> when applying the provisions of the War Risk Insurance Act of 1917 as amended,<sup>11</sup> or of the World War Veterans Relief Act of 1924.<sup>12</sup>

Prior to the instant case, only three decisions of the specific point had been rendered by federal district courts. In *Tudor v. United States*<sup>13</sup> the court said that the relationship was a legal impossibility where the so-called "child" had reached majority and was capable of providing for himself. Much the same result was achieved in *Howard v. United States*.<sup>14</sup> In the case of *Meisner v. United States*,<sup>15</sup> however, an opposite result was reached upon a set of facts where the insured, an adult at the time the relationship arose, had designated the daughter of the so-called "parents" as beneficiary, describing her as his "sister." Upon finding that the "parent-child" relationship existed, the court concluded that the beneficiary was within the permitted class,<sup>16</sup> for it said the statute should be accepted "in accordance with common understanding"<sup>17</sup> and, in the absence of express limitation, would permit the relationship to arise between adults. The instant case has now brought the balance even insofar as the decisions deal specifically with insurance policies issued to veterans.<sup>18</sup> A different result, however, has been reached in cases involving policies issued by private companies.<sup>19</sup>

It is probably desirable that such should be the case in view of the liberal attitude the courts have generally taken in favor of servicemen<sup>20</sup> and the policy of liberalism which permeates the entire structure of war risk insurance. Identical language in the present and prior acts ought

<sup>9</sup> *Bartholomew v. Davies*, 276 Ill. 505, 114 N. E. 1017 (1917); *Capek v. Kropik*, 129 Ill. 509, 21 N. E. 836 (1889).

<sup>10</sup> See Administrator's Decisions No. 536 and No. 675.

<sup>11</sup> 41 Stat. 371, Ch. 16, § 4, since repealed.

<sup>12</sup> 43 Stat. 607-8, § 3(5); 38 U. S. C. A. § 424(5).

<sup>13</sup> 36 F. (2d) 386 (1929).

<sup>14</sup> 2 F. (2d) 170 (1924).

<sup>15</sup> 295 F. 866 (1924).

<sup>16</sup> Although the policy was issued under the War Risk Insurance Act of 1917 as amended, 41 Stat. 371, since repealed, its provisions are analogous to the statute here concerned.

<sup>17</sup> 295 F. 866 at 868.

<sup>18</sup> Since the foregoing was written, another case from the same district as the *Meisner* case, that of *Horsman v. United States*, 68 F. Supp. 522 (1946), involving the same general problem, has reached an identical result as that achieved in the *Meisner* case and the instant one. The preponderance of weight, then, now favors the instant case.

<sup>19</sup> *Hummel v. Supreme Conclave, Improved Order Heptasophs*, 256 Pa. 164, 100 A. 589 (1917).

<sup>20</sup> *Boyette v. United States*, 86 F. (2d) 66 (1936); *United States v. Martin*, 54 F. (2d) 554 (1931); *McNally v. United States*, 52 F. (2d) 440 (1931); *United States v. Sligh*, 31 F. (2d) 735 (1929); and *United States v. Cox*, 24 F. (2d) 944 (1928).

to receive the same interpretation if the intention of Congress is to be carried out.<sup>21</sup> The generous policy underlying the National Service Life Insurance Act calls for a breadth of interpretation of equal scope in the absence of clear limitation on the point. Even if such were not the case, there are equities in favor of a decision like the instant one for it is common knowledge that little was done to give servicemen a complete education in the basic principles governing the choice of a beneficiary or the consequences of making an improper choice. To deny relief to a designated beneficiary who may have provided the sentimental, if not the substantial, side of the parent-child relationship in order to favor a relative, would indeed place the law in the position of vouching for the adage that "blood is thicker than water".

R. W. BEART.

CONSTITUTIONAL LAW—DUE PROCESS OF LAW—WHETHER THE SIXTH AMENDMENT GUARANTEES AN ACCUSED PERSON THE RIGHT TO CHOOSE AS HIS ATTORNEY ONE NOT ADMITTED TO LOCAL PRACTICE—The defendants in *United States v. Bergamo*,<sup>1</sup> residents of New Jersey, were seized by the police while in Pennsylvania where they had gone to deliver counterfeit gasoline and sugar ration stamps. They were indicated for a federal offense<sup>2</sup> and were arraigned in a district court sitting in the latter state. Defendants retained a New Jersey lawyer in good standing in his own state to represent them. As the lawyer had not been admitted in the particular district court, a member of the local bar was also retained as resident associate counsel,<sup>3</sup> but the understanding was that the New Jersey lawyer should be admitted specially<sup>4</sup> and would actively conduct the defense. When the case was reached for trial, the district judge, who happened also to be a resident of New Jersey and who seemingly felt that some reflection might be cast by reason of the appearance of New Jersey lawyers before him, announced that the defendants' principal counsel and all like him, would not be permitted to appear in behalf of their clients.<sup>5</sup> The resident counsel moved for a continuance because of

<sup>21</sup> *Willis v. Eastern Trust & Banking Co.*, 169 U. S. 295, 18 S. Ct. 347, 42 L. Ed. 752 (1898).

<sup>1</sup> 154 F. (2d) 31 (1946).

<sup>2</sup> 18 U. S. C. A. § 72.

<sup>3</sup> Rule 3 of the U. S. Dist. Ct. for the Middle Dist. of Pa. provides: "Any attorney . . . who is not a resident . . . shall in each proceeding in which he appears have associate counsel, resident of and maintaining an office in the District. . . ."

<sup>4</sup> Rule 2, *ibid.*, provides: "Attorneys and counselors admitted to practice before other courts, who do not possess the full qualifications required by the foregoing rule, may be admitted specially for the purpose of a particular case."

<sup>5</sup> The attorney remained in the courtroom but took no part in the proceedings and, during the later stages became ill and was obliged to absent himself.

his lack of familiarity with the case, but the motion was denied. After a trial in which the resident counsel was said to have cross-examined in a very competent fashion, the defendants were convicted. On appeal, a contention by the defendants that they had been denied their constitutional right to be represented by counsel of their choice<sup>6</sup> was sustained when the Circuit Court of Appeals for the Third Circuit reversed and remanded the case for a new trial, pointing out that while the district court might have some discretion respecting the special admission of counsel in civil cases, no such discretion was permitted in criminal cases.

There does not appear to be any case presenting the exact problem involved in the instant case, although there is dictum in earlier cases which tends to point in the direction of such a holding.<sup>7</sup> It has even been stated that the "right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."<sup>8</sup> But there is also no question but what the right cannot be insisted upon to the point where, or in a manner which, to do so would obstruct orderly procedure of the courts and prevent them from an exercise of their inherent powers.<sup>9</sup> In view of the fact, then, that the defendants in the instant case had been given advance notice that their chosen attorney would not be permitted to appear in their behalf<sup>10</sup> and had ample opportunity to choose another from an adequate number of competent members of the local bar, the trial court's ruling would seem sound.

The determination that the rule regarding special admission of at-

<sup>6</sup> While U. S. Const., Amend. 6, merely states that the accused shall "have the assistance of counsel," it has been held to intimate the right to counsel of his own selection: *Smith v. United States*, 53 App. D. C. 53, 288 F. 259 (1923).

<sup>7</sup> In *Powell v. Alabama*, 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158, 84 A. L. R. 527 (1932), it was indicated that the accused should be granted an opportunity to select his own counsel before the court makes an appointment. Accord: *Walker v. State*, 194 Ga. 727, 22 S. E. (2d) 462 (1942); *People v. Shiffman*, 350 Ill. 243, 182 N. E. 760 (1932). If counsel is appointed, the court must see to it that defendants with possible adverse interests are represented by separate attorneys: *Glasser v. United States*, 315 U. S. 60, 62 S. Ct. 457, 86 L. Ed. 680 (1942). It is also error, according to *People v. Price*, 262 N. Y. 410, 187 N. E. 298 (1933), to appoint counsel prior to the time when the attorney selected by the defendant has withdrawn his appearance. The right of free choice in civil cases, but not involving choice of non-resident counsel, is discussed in *In re Mandell*, 69 F. (2d) 830 (1934), and *Kerling v. G. W. Van Dusen & Co.*, 109 Minn. 481, 124 N. W. 235 (1910).

<sup>8</sup> *Murphy, J.*, in *Glasser v. United States*, 315 U. S. 60 at 76, 62 S. Ct. 457, 86 L. Ed. 680 at 702.

<sup>9</sup> *Smith v. United States*, 53 App. D. C. 53, 288 F. 259 (1923). The trial court there delayed starting the trial a seasonable amount of time because of the absence of defendant's chosen attorney, then appointed counsel. The case had proceeded to the point where a jury had been impanelled and a witness sworn before defendant's original attorney arrived. Held: no error, because defendant was responsible for the situation, in absence of showing of actual prejudice.

<sup>10</sup> 154 F. (2d) 31 at 33.

torneys to practice had to yield to the defendants' right to counsel of their own choice also involves an issue to which the Circuit Court of Appeals appears to have given very little consideration. The question might be restated to be one as to whether or not there are any limits to the accused person's choice. He undoubtedly may reject the offer of counsel and act as his own attorney, if his waiver is intelligently made.<sup>11</sup> Unquestionably, his selection of a regularly admitted local attorney would be honored,<sup>12</sup> may even be ordered, if he was financially able to provide for his own defense.<sup>13</sup> When he seeks to retain an outside attorney, however, his desire comes into conflict with the well established proposition that not every one may act as an attorney at law for another, the practice being limited to those who have been duly licensed and admitted to practice. Certainly no court would regard itself bound to listen to a chosen advocate whose license had been forfeited for misconduct despite the fact that he might possess the skill and training of the most competent lawyer. Can the accused, then, force an attorney upon a court merely because he happens to be in good standing elsewhere? Admitted that courts will generally grant special license for a particular case in a spirit of comity, the intrinsic problem is whether it can be forced to do so. Granted that a constitutional right would be superior to any mere rule of court, especially if the latter was in conflict with the former,<sup>14</sup> is the accused person's right to counsel so broad as the court in the instant case would indicate it to be?

In common-law days, the accused possessed no such right whatever and counsel was permitted to speak in his behalf only if some question of law was involved.<sup>15</sup> Any present assurance of aid of counsel, then, is to be found simply because of constitutional or statutory provisions. Viewed from the angle of state practice, the case of *Betts v. Brady*<sup>16</sup> would indicate that the constitutional right to assistance of counsel is far from an absolute one nor is it one which must be accorded in all criminal cases, for it was there held unnecessary to appoint counsel for an indigent defendant in a non-capital felony case in the absence of local constitutional or statutory mandate. Not even the Fourteenth Amendment, with its requirement of due process, was deemed enough to make the assistance of counsel compulsory.

<sup>11</sup> *United States v. Mitchell*, 137 F. (2d) 1006 (1943), and 138 F. (2d) 831 (1943).

<sup>12</sup> *People v. Price*, 262 N. Y. 410, 187 N. E. 298 (1933).

<sup>13</sup> See, for example, Ill. Rev. Stat. 1945, Ch. 38, § 730; *State v. Steelman*, 318 Mo. 628, 300 S. W. 743 (1927).

<sup>14</sup> *People v. Davis*, 357 Ill. 396, 192 N. E. 210 (1934).

<sup>15</sup> *Sir William Withipole's Case*, Cro. Car. 147, 79 Eng. Rep. 730 (1628).

<sup>16</sup> 316 U. S. 455, 62 S. Ct. 1252, 86 L. Ed. 1595 (1942), noted in 21 CHICAGO-KENT LAW REVIEW 107.

It is true that the Federal constitution grants the right to have the aid of counsel in "all criminal cases," but the term "counsel" as used therein can be understood to have only one meaning, *i. e.* a duly licensed and admitted attorney at law. It was so understood at the time the constitution was adopted<sup>17</sup> and its meaning has not changed.<sup>18</sup> The right of the judiciary to select its own officers is equally well understood, even to the point where admission to practice before the United States Supreme Court does not confer the right to practice in the lower federal tribunals or before the state courts.<sup>19</sup> As an Illinois court once expressed the idea, "It would be strange, indeed, if the court can control its own court room, and even its own janitor, but that it is not within its power to inquire into the ability of the persons who assist in the administration of justice as its officers."<sup>20</sup> The rule involved in the instant case, therefore, seems to be perfectly consistent not only with the constitutional rights of the accused but also with generally accepted tenets regarding admission to practice in that it placed a discretion, by saying non-resident attorneys "may be admitted," where it properly belonged, that is in the court where the practice was to occur.

Without doubt, a denial of the right to appear as counsel for an accused person on purely arbitrary grounds would violate constitutional rights, for it has been said that the power to admit "is not an arbitrary and despotic one, to be exercised at the pleasure of the court, or from passion, prejudice, or personal hostility . . . it is the duty of the court to exercise and regulate it by a sound and just judicial discretion."<sup>21</sup> It does not appear in the instant case, however, that the action of the trial judge was reversed for an abuse of judicial discretion. Instead, the Circuit Court of Appeals, giving a mandatory effect to the rule, said that the circumstances "required" that the nonresident attorney be admitted specially, although the only circumstance of importance seemed to be that such attorney happened to be the one of defendants' choice. Carrying this interpretation to a logical conclusion, a district court might find itself obliged to permit repeated appearances of a non-resident attorney, if he was chosen by a succession of persons charged with crime, even though it might not be willing to grant him a general license.

<sup>17</sup> 3 Bl. Com. 26 indicates that no man "can practice as an attorney in any of those courts but such as is admitted and sworn an attorney of that particular court."

<sup>18</sup> 7 C. J. S., Attorney and Client, § 6, p. 711, states: "Attorneys being officers of the court, the power to admit applicants to practice law is judicial and not legislative, and is vested in the courts only."

<sup>19</sup> In re Day, 181 Ill. 73, 54 N. E. 646, 50 L. R. A. 519 (1899). See also 1 Pollock & Maitland, Hist. Eng. Law, p. 211 et seq.

<sup>20</sup> In re Day, 181 Ill. 73 at 95, 54 N. E. 646 at 652.

<sup>21</sup> 7 C. J. S., Attorney and Client, § 6, p. 711.

Perhaps the only alternative would be to adopt the idea expressed in the civil case of *In re Mandell*<sup>22</sup> wherein a local rule forbade a trustee in bankruptcy from selecting counsel from among those interested in the case. The court there said: "Only in the rarest cases should the trustee be deprived of the privilege of selecting his own counsel, and reasons which make it for the best interest of the estate the court select the attorney over the trustee's objection *should appear in the record.*"<sup>23</sup> If that idea were adopted, the defendant's supposed constitutional right to an attorney of his own choice, even one from outside the district, might be accommodated in the average case but still leave the trial court some discretion in the matter if the reasons impelling a denial thereof were sufficiently meritorious to warrant spreading the same on the public records.

N. McLEAN.

CRIMINAL LAW—SUCCESSIVE OFFENSE AND HABITUAL CRIMINALS—WHETHER OR NOT A PRIOR CONVICTION FOR CRIME WITHOUT THE STATE MAY BE USED TO SUPPORT A CONVICTION UNDER THE ILLINOIS HABITUAL CRIMINAL ACT—A problem of first impression was presented to the Illinois Supreme Court in the recent case of *People v. Poppe*.<sup>1</sup> The defendant there was found guilty of burglary and, having been previously convicted of an offense within the purview of the Habitual Criminal Act,<sup>2</sup> was sentenced to a term of life imprisonment in the penitentiary under a provision which directs that second offenders shall be punished for the full term permitted for the last conviction.<sup>3</sup> The defendant took the case to the Supreme Court on error,<sup>4</sup> contending that the conviction under the Habitual Criminal Act could not be sustained since the previous offense of burglary had occurred in Ohio and the Illinois statute did not expressly provide that convictions without the state should be considered, as do similar statutes in many other states.<sup>5</sup> The Supreme Court nevertheless affirmed the sentence

<sup>22</sup> 69 F. (2d) 830 (1934).

<sup>23</sup> 60 F. (2d) 830 at 831. Italics added.

<sup>1</sup> 394 Ill. 216, 68 N. E. (2d) 254 (1946).

<sup>2</sup> Ill. Rev. Stat. 1945, Ch. 38, § 602. The second conviction need not be for the same offense as the prior one, but must be for one of the crimes enumerated in the statute: *Kelly v. People*, 115 Ill. 583, 4 N. E. 644 (1886).

<sup>3</sup> *Ibid.*, Ch. 38, § 84, fixes the punishment for burglary at imprisonment for any term of years not less than one year or for life. A second conviction, pursuant to the Habitual Criminal Act, would carry a life sentence.

<sup>4</sup> Direct review is authorized by Ill. Rev. Stat. 1945, Ch. 38, § 780½.

<sup>5</sup> See, for example, Mason's Minn. Stat. 1927, § 9931, which provides: "Every person who, after having been convicted in this state of a felony or an attempt to commit a felony, or under the laws of any other state or country . . . shall be punished as follows. . . ." Italics added.



of the lower court, holding that convictions without the state were within the contemplation of the Illinois statute.

Although a search of the authorities reveals that many states have statutes providing for enhanced punishment of subsequent offenders and discloses that these acts have been the targets of repeated attacks on constitutional and other grounds, it yields few decisions which bear directly on the problem involved in the instant case.<sup>6</sup> About the turn of the present century, it had been definitely established that a statute increasing the punishment for successive crimes is not unconstitutional as imposing a penalty for crimes committed without the jurisdiction.<sup>7</sup> But long before that decision the principle seems to have been established that a statute may impose an aggravated penalty on repeated offenders, so long as it expressly provides that crimes committed without the state be considered to determine the amount of punishment.<sup>8</sup> That a statute of this nature merely punishes more severely for the new crime because of the prior offenses has been generally regarded as proper by the courts.<sup>9</sup> Nor does the enumeration of specific felonies in such a statute violate due process requirements or operate to deny equal protection of the laws, since such classification, although it results in discrimination, has been held to be a proper matter for legislative discretion.<sup>10</sup> One general requirement, however, seems to be that the foreign conviction must be for such conduct as would amount to a felony under the laws of the forum if it had been committed therein.<sup>11</sup>

Where the statute expressly provides that prior convictions, whether within or without the state, shall be considered, the present problem is not likely to arise, although objections to being charged with a foreign conviction have been raised on a variety of grounds such as, for example, the claim that the offense had been pardoned,<sup>12</sup> that the sentence had

<sup>6</sup> See cases collection in annotations to *People v. Gowasky*, 244 N. Y. 451, 155 N. E. 737 (1927), in 58 A. L. R. 9; *People v. Brown*, 253 Mich. 537, 235 N. W. 245 (1931), in 82 A. L. R. 341; *People v. Biggs*, 9 Cal. (2d) 508, 71 P. (2d) 214 (1937), in 116 A. L. R. 205; *Re Jerry*, 294 Mich. 689, 293 N. W. 909 (1940), in 132 A. L. R. 89; *People ex rel. Prisament v. Brophy*, 287 N. Y. 132, 38 N. E. (2d) 468 (1941), in 139 A. L. R. 667.

<sup>7</sup> *McDonald v. Massachusetts*, 180 U. S. 311, 21 S. Ct. 389, 45 L. Ed. 542 (1901).

<sup>8</sup> See reference to N. Y. Sess. Laws 1823, p. 179, § 6, in *People v. Caesar*, 1 Parker Cr. R. (N. Y.) 645 at 648 (1855).

<sup>9</sup> *People v. Atkinson*, 376 Ill. 623, 35 N. E. (2d) 58 (1941); *State v. Findling*, 123 Minn. 413, 144 N. W. 142, 49 L. R. A. (N. S.) 449 (1913); *State v. Moore*, 121 Mo. 514, 26 S. W. 345, 42 Am. St. Rep. 542 (1894), affirmed in 159 U. S. 673, 16 S. Ct. 179, 40 L. Ed. 301 (1895).

<sup>10</sup> *People v. Lawrence*, 390 Ill. 499, 61 N. E. (2d) 361 (1945).

<sup>11</sup> 24 C. J. S., Criminal Law, § 1960(d).

<sup>12</sup> Pardon is apt not to relieve a defendant from the additional penalty: *People v. Biggs*, 9 Cal. (2d) 508, 71 P. (2d) 214, 116 A. L. R. 205 (1937), noted in 16 CHICAGO-KENT LAW REVIEW 187.

been suspended,<sup>13</sup> or that the prior offense was not identical in all of its elements with one punishable as a felony in the prosecuting state.<sup>14</sup> Where the statute does not contain such an express provision, judicial ruling on the problem herein considered is likely to be required.<sup>15</sup> As may be expected, the cases are not in accord as to the effect to be given such a statute. The court in the instant case concludes that the weight of authority permits the inclusion of foreign convictions in a prosecution under an habitual criminal act, and relies on decisions interpreting both the Minnesota and the Illinois types of habitual criminal statutes. Since the contention is not that a conviction in another state may not under any circumstances be considered, but that it shall not be charged against a defendant unless the statute expressly so provides, only the authorities from states with statutes similar to the Illinois act need be examined.

Of the cases cited in support of the court's position, only two have been found to be directly in point. One of the cases relied upon is that of *Fennen v. Commonwealth*.<sup>16</sup> There, an indictment had been returned against the defendant charging him with the commission of a felony and alleging that he had been twice previously convicted in Ohio, a sister state. The life sentence of the lower court was sustained, but the case is no authority for the proposition under examination for the defendant's objections went to the sufficiency of the language of the indictment in that the laws of Ohio were not pleaded *haec verba*. No point was made as to the admission of the Ohio convictions as such, doubtless for the very good reason, not noticed by the Illinois court in the instant case, that the Kentucky statute was not similar to the Illinois act but expressly provided that convictions whether within or without the state might be considered.<sup>17</sup> In the Texas case of *Johnston v. State*,<sup>18</sup> a conviction under an habitual criminal statute similar to that of Illinois was upheld notwithstanding the fact that the prior convictions had taken place in Okla-

<sup>13</sup> A defendant has been held properly convicted as a second offender despite the fact that sentence on the previous conviction was suspended: *People v. Wilson*, 12 N. Y. S. (2d) 395, 257 App. Div. 893 (1939), affirmed in 281 N. Y. 712, 23 N. E. (2d) 542 (1939).

<sup>14</sup> Substantial similarity in the offenses seems to be sufficient: *State v. Young*, 345 Mo. 407, 133 S. W. (2d) 404 (1939).

<sup>15</sup> The Illinois statute has been in force since 1883; *Laws 1883*, p. 76. The issue was raised once before in *People v. Stack*, 391 Ill. 15, 62 N. E. (2d) 807 (1945), but as the habitual criminal count was nolle prossed there was no decision thereon.

<sup>16</sup> 240 Ky. 530, 42 S. W. (2d) 744 (1931).

<sup>17</sup> *Carroll's Ky. Stat. 1930*, § 1130, provides: "Every person convicted a second time of felony, the punishment of which is confinement in the penitentiary, shall be confined in the penitentiary not less than double the time of the first conviction . . . Judgment in such cases shall not be given for the increased penalty, unless the jury shall find, from the record and other competent evidence, the fact of former convictions for felony committed by the prisoner, in or out of this state."

<sup>18</sup> 130 Tex. Cr. 524, 95 S. W. (2d) 439 (1936).

homa. That result was foreshadowed by a decision of the Texas court, rendered two years earlier, when it had permitted the inclusion of a conviction in a federal court located within the state.<sup>19</sup> A case not mentioned in the opinion in the instant case, but one supporting the outcome, is that of *Wiese v. State*.<sup>20</sup> A Nebraska statute there concerned provided that for a second or subsequent offense of chicken-stealing the offender should be deemed to be guilty of a felony and should be punished accordingly. It was held that upon conviction for the offense of chicken-stealing, an increase in the penalty could be imposed under the statute because of a prior conviction for a similar offense in Iowa.

Opposed to the foregoing cases are decisions from several other respectable jurisdiction. In the early case of *People v. Caesar*,<sup>21</sup> it was held that the defendant could not be punished for petit larceny as a second offender in New York, when the first larceny had been committed in Massachusetts, since the particular statute was silent with reference to offenses committed without the state. The court said that the penal statutes of each state must be construed to be applicable only to offenses committed within its own borders unless it affirmatively appear that the intention was otherwise.<sup>22</sup> In *Wiedner v. State*,<sup>23</sup> the defendant had had remitted to him six hundred days of a prison sentence in the New Jersey state prison. Subsequently, he was again committed to the state prison by a federal district court sitting within the state for a crime against the federal government. At the expiration of this term, he was taken to serve out the remitted portion of the state sentence. It was held, however, that the provisions of the local act did not apply where the second conviction was obtained in a federal court. Likewise, in Connecticut, under a statute imposing a heavier penalty upon an offender who had been twice before convicted, sentenced and imprisoned in a state prison or penitentiary, it was held that three prior convictions with accompanying detention in a state prison in New York would support a conviction as an habitual criminal,<sup>24</sup> but a confinement in a federal penitentiary would not, for the word "state" in the phrase "in a state prison or penitentiary" was regarded as qualifying the word "penitentiary" as

<sup>19</sup> *Arnold v. State*, 127 Tex. Cr. 89, 74 S. W. (2d) 997 (1934). The court intimated that the exact point had not been passed on before. Apparently its attention had not been directed to the decisions in *Wiedner v. State*, 59 N. J. L. 345, 36 A. 102 (1896), and *State v. Delmonto*, 110 Conn. 298, 147 A. 825 (1929). The Illinois Supreme Court, since the determination of the instant case and in reliance thereon, has also achieved the same result: *People v. Gavalis*, 395 Ill. 409, 70 N. E. (2d) 589 (1947).

<sup>20</sup> 138 Neb. 685, 294 N. W. 482 (1940).

<sup>21</sup> 1 Parker Cr. R. (N. Y.) 645 (1855).

<sup>22</sup> Accord: *Commonwealth v. Stack*, 20 Pa. Dist. R. 599 (1910).

<sup>23</sup> 59 N. J. L. 345, 36 A. 102 (1896).

<sup>24</sup> *State v. Riley*, 94 Conn. 698, 110 A. 550 (1920).

well as the word "prison."<sup>25</sup> The court held that since the statute was highly penal it should be strictly construed, and that it was up to the legislature to include a reference to a sentence in a federal penitentiary if that was what was intended. Finally, in *Lowe v. State*,<sup>26</sup> a relatively recent case and one directly in point, the indictment charged the defendant with possession of burglar tools in Georgia and alleged that he had been previously convicted of burglary in Tennessee. It was held that the habitual criminal act of Georgia was not applicable as the prior conviction and confinement had occurred in another state.

These latter decisions seem to indicate that the majority rule, if one could be said to exist, is to the effect that a conviction without the state may not be made the basis for the application of the habitual criminal statute unless the same so expressly provides. Bearing in mind that the primary rule for the interpretation of a penal statute is that it is to be strictly construed in favor of the accused,<sup>27</sup> certain decisions prior to a recent amendment of the Illinois statute<sup>28</sup> suggest that such a construction has previously prevailed in this state. Thus in one case the defendant was found guilty of burglary and, having a prior conviction of larceny of a motor vehicle against him,<sup>29</sup> he was sentenced as an habitual criminal. It was held that the conviction for larceny of a motor vehicle was not the same as one for grand larceny within the meaning of the habitual criminal statute.<sup>30</sup> In another case, that of *People v. Sarosiek*,<sup>31</sup> it was held that a larceny from the person,<sup>32</sup> in the absence of a finding that the value of the property so taken exceeded \$15, was not a grand larceny<sup>33</sup> within the purview of the act,<sup>34</sup> despite the fact that a larceny from the person is to be treated as the same as grand larceny

<sup>25</sup> *State v. Delmonto*, 110 Conn. 298, 147 A. 825 (1929).

<sup>26</sup> 50 Ga. App. 369, 178 S. E. 203 (1935), conforming to answer to a question certified in 179 Ga. 742, 177 S. E. 240 (1934).

<sup>27</sup> *People v. Lund*, 382 Ill. 213, 46 N. E. (2d) 929 (1943).

<sup>28</sup> Laws 1941, Vol. 1, p. 573; Ill. Rev. Stat. 1945, Ch. 38, § 602. The amendment merely added to the list of offenses coming within the purview of the Habitual Criminal Act.

<sup>29</sup> That conduct constitutes a separate and specific crime according to Ill. Rev. Stat. 1945, Ch. 38, § 388a.

<sup>30</sup> *People v. Parker*, 356 Ill. 301, 190 N. E. 358 (1934). But an election to indict the defendant for grand larceny brings the prior conviction within the purview of the act, according to *People v. Crane*, 356 Ill. 276, 190 N. E. 355 (1934), even though the property stolen consists of an automobile.

<sup>31</sup> 375 Ill. 631, 32 N. E. (2d) 311 (1941).

<sup>32</sup> Ill. Rev. Stat. 1945, Ch. 38, § 387.

<sup>33</sup> *Ibid.*, Ch. 38, § 389. The term "grand larceny" is not expressly defined by statute, but the courts have interpreted it to mean the theft of property of more than \$15 in value, thereby distinguishing it from petty larceny on the basis of punishment.

<sup>34</sup> It is now enumerated as one of the habitual offenses by reason of an amendment added in 1941: Laws 1941, Vol. 1, p. 573.

for purpose of punishment.<sup>35</sup> It would seem, then, that the court in the instant case has departed from its own standards in failing to apply the strict type of construction it has heretofore used.

There is, of course, a subsidiary rule that directs that a statute is to be construed so as to give effect to the obvious intention of the legislature.<sup>36</sup> The court in the instant case said it saw an intention on the part of the legislature to include a foreign conviction because of the statutory direction that a "duly authenticated" copy of the record of a former conviction and judgment of any court of record should serve as *prima facie* evidence of such conviction.<sup>37</sup> It pointed out that a transcript of a judgment of a court within the state need only be certified to be admissible in evidence,<sup>38</sup> hence the use of an authenticated copy could refer only to an out-of-state conviction. However persuasive this argument may be, it would appear, in the light of decisions from other jurisdictions and by an application of the rule of strict construction, that the present decision is at least questionable. As to the propriety of the result, however, there is no dispute. It is fitting that a wrongdoer who persists in his criminal conduct, whether at home or abroad, should be socially isolated by confinement, the period of which ought to be determined by the fact of his prior convictions and independent of the place where they may have been obtained. But this should be a matter for the legislature, which can express its views on the question in language admitting of but one meaning.

J. E. GALT.

INFANTS—ACTIONS—WHETHER OR NOT A CAUSE OF ACTION EXISTS IN FAVOR OF A CHILD FOR PRENATAL INJURIES INFLECTED UPON IT—The case of *Bonbrest v. Kotz*<sup>1</sup> involved a re-appraisal of the question as to whether or not an infant, after its birth, might maintain a suit against the attending physician, upon a cause of action predicated on malpractice, for injuries sustained in the process of removal from the mother's womb. A motion for summary judgment, based upon the ground that the complaint failed to state a cause of action on behalf of the infant, was there denied when the United States District Court concluded that the child, being viable at the time the injury was inflicted, was sufficiently a person to have a standing in court and to possess the rights which attend on all human beings, especially if the child survived to be born alive.

<sup>35</sup> Ill. Rev. Stat. 1945, Ch. 38, § 389.

<sup>36</sup> *Ash Sheep Co. v. United States*, 252 U. S. 159, 40 S. Ct. 241, 64 L. Ed. 507 (1920).

<sup>37</sup> Ill. Rev. Stat. 1945, Ch. 32, § 603.

<sup>38</sup> *Ibid.*, Ch. 51, § 13.

<sup>1</sup> 65 F. Supp. 138 (1946).

The decision was admittedly one without precedent either in the common law or in the jurisdiction of its determination, in fact was directly opposed to practically all recorded American cases dealing with the point,<sup>2</sup> and proceeded upon the concept that judges were free to mold the common law to meet changing conditions or to keep pace with progress in the other sciences. The infection of that bold disregard for fundamental doctrines such as was demonstrated recently in the case of *Daily v. Parker*<sup>3</sup> would, therefore, seem to be spreading through the federal judiciary. Dean Pound's prophesy that the law was "entering upon a new period of growth"<sup>4</sup> comes closer to accomplished fact.

Further novelty is projected into the case, however, by the idea that viability rather than birth or conception is to be deemed the test of human existence for the purpose of deciding whether the infant is a person capable of claiming human rights with their corresponding duties. The problem is not one of whether the mother can recover for injuries sustained by her at the time of the child's birth,<sup>5</sup> but whether the child can recover in his own right.<sup>6</sup> Only one similar case, a Canadian decision,<sup>7</sup> has reached the same result and there it was achieved upon the ground that (1) as the wrongful act might also constitute a crime against the unborn child it was difficult to see why its separate existence could not be recognized for purpose of redressing a tort, but (2) more likely because the court felt that the recovery by the parents would leave a residuum of injury for which compensation could not be had save at the suit of the child. The tenor of the reasoning underlying the decision is best exemplified by a quotation from the opinion. The court there said: "If a right of action be denied to the child it will be compelled, without any fault on its part, to go through life carrying the seal of another's

<sup>2</sup> See cases listed by the court, 65 F. Supp. 138 at 139, notes 1 to 4 inclusive. The court could have added *Smith v. Luckhardt*, 299 Ill. App. 100, 19 N. E. (2d) 446 (1939), noted in 27 Ill. B. J. 348, 87 U. of Pa. L. Rev. 1016; *Ryan v. Public Service Co-ordinated Transport*, 18 N. J. Misc. 429, 14 A. (2d) 52 (1940); *In re Robert's Estate*, 286 N. Y. S. 467 (1936); *Lewis v. Steves Sash & Door Co.*, 177 S. W. (2d) (Tex. Civ. App.) 350 (1943). The only cases contra, from courts of inferior status, are *Scott v. McPheeters*, 33 Cal. App. (2d) 629, 92 P. (2d) 678 (1939), predicated upon a provision of the California code, and *Kine v. Zuckerman*, 4 Pa. D. & C. 227, 97 A. L. R. 1525 (1939).

<sup>3</sup> 152 F. (2d) 174 (1945), noted in 25 CHICAGO-KENT LAW REVIEW 90.

<sup>4</sup> Pound, "The Spirit of the Common Law" (Marshall, Jones & Co., Boston, 1921), p. 181.

<sup>5</sup> See, for example, *Snow v. Allen*, 227 Ala. 615, 151 So. 468 (1933).

<sup>6</sup> Recovery has been denied upon the theory that in the absence of contract with the child there can be no duty owed to it: *Nugent v. Brooklyn Hts. R. Co.*, 154 App. Div. 667, 139 N. Y. S. 367 (1913); *Walker v. Great Northern Ry. Co.*, 28 Irish L. R. 69 (1891). Expanding use of the doctrine of third-party beneficiary contracts would nullify the argument underlying such cases.

<sup>7</sup> *Montreal Tramways v. Leveille*, 1933 Can. Sup. 456, 4 Dom. L. R. 337 (1933).

fault and bearing a very heavy burden of infirmity and inconvenience without any compensation therefor.<sup>78</sup>

Whatever might have been the view of the civil law,<sup>9</sup> it is undoubtedly true that the common law regarded a child *en ventre sa mere*, from the moment of conception rather than that of viability,<sup>10</sup> as a person capable of inheriting property<sup>11</sup> so long as the child was subsequently born alive.<sup>12</sup> The importance of such fictionalizing of personality can well be understood in the light of the then social significance of real property ownership and the feudal need for family perpetuation. At a time when much land was held under fee tail tenure, fictions of that character would be apt to be developed to prevent lapse of estates<sup>13</sup> but would be carried no farther than the need required. It is not remarkable, therefore, that the common law went no further than it did.

It is not so clear, however, that the unborn child was a person within the contemplation of the criminal law, Blackstone to the contrary notwithstanding.<sup>14</sup> More modern research has indicated that in common-law days such was not the case,<sup>15</sup> and abortion is generally treated as criminal today not because of any common-law doctrines but by reason of statutory prohibition.<sup>16</sup> There is, then, considerable uncertainty in the supposed analogy between tort law and criminal law used to support the instant case,<sup>17</sup> and expressed as a qualified "if" underlying the

<sup>8</sup> 1933 Can. Sup. 456 at 464, 4 Dom. L. R. 337 at 345.

<sup>9</sup> Dig. Just., lib. 1, tit. 5, § 26, does declare: "*Qui in utero sunt, in toto paene iure civili intelligentur in rerum natura esse.*" But it should be noted that the statement is qualified by the adverb "almost" and talks of the unborn as "things" rather than as "persons."

<sup>10</sup> There is a medical distinction between an embryo, or foetus in its earliest stages of development, and a viable foetus, or one which has reached such a stage of development that it can live outside of the uterus: *Encyclo. Americana*, Vol. 10, p. 283.

<sup>11</sup> 1 Bl. Com., p. 130. See also Ill. Rev. Stat. 1945, Ch. 3, § 164.

<sup>12</sup> *Smith v. Fox*, 53 Ont. L. R. 54, 3 Dom. L. R. 785 (1923); *Doe v. Clarke*, 2 H. Bl. 399, 126 Eng. Rep. 617 (1795); *Goodale v. Gawthorne*, 2 S. & Giff. 375, 65 Eng. Rep. 443 (1854).

<sup>13</sup> *Allaire v. St. Lukes Hospital*, 184 Ill. 359, 56 N. E. 638 (1900).

<sup>14</sup> It is stated, in 1 Bl. Com., p. 129, to be the law: "For if a woman is quick with child, and by a potion or otherwise, killeth it in her womb: or if any one beat her, whereby the child dieth in her body, and she is delivered of a dead child; this, though not murder, was by the ancient law homicide or manslaughter."

<sup>15</sup> *Rex v. Brain*, 6 Car. & P. 349, 172 Eng. Rep. 1272 (1834). But see *Rex v. Senior*, 1 Mood. 346, 168 Eng. Rep. 1298 (1832), as to criminal responsibility for injury inflicted at time of birth.

<sup>16</sup> See, for example, 43 Geo. III, c. 58; Ill. Rev. Stat. 1945, Ch. 38, § 3.

<sup>17</sup> Judge McGuire, 65 F. Supp. 138 at 140, poses the query: "Why a 'part' of the mother under the law of negligence and a separate entity and person in that of . . . crime?" The answer would seem to be that they are not to be so regarded in the absence of a statute so declaring.

comparable Canadian decision.<sup>18</sup> When it is recalled that a tort is a private wrong whereas a crime involves conduct offensive to the public generally, there is still further reason for observing distinctions between them which distinctions become clouded by drawing attempted analogies such as was done in the instant case.

It must be said, then, that the law, as presently constituted, does not support the holding in the instant case. Yet it is regrettable that no remedy has been provided for situations like the one here involved, for professional men should be penalized for their incompetence. A way out has been indicated in California, for the code of that state declares that a child "conceived, but not yet born, is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth."<sup>19</sup> That provision was interpreted, in *Scott v. McPheeters*,<sup>20</sup> to be sufficiently broad to permit suit, at the instance of the child, to recover for prenatal injuries inflicted upon it. Similar legislation enacted elsewhere should prove sufficient to create a cause of action in favor of the infant without the necessity of requiring judges to go beyond their province in devising remedies to fit hard cases. If such laws existed, it would be unnecessary to attempt distinctions between a child conceived and one that had reached the stage of viability, thereby eliminating some of the difficulty implicit in establishing a case like the instant one. It would not, however, obviate other difficulties in proving that the prenatal injury was proximately caused by the defendant's negligence or lack of skill, a factor which has led some courts to repudiate attempts to maintain such actions.<sup>21</sup> But difficulty in making proof, or the fact that damages may be deemed too remote to permit recovery, are scarcely reasons for denying the existence of a cause of action. Such things should merely serve to challenge the law and lawyers to keep pace with developments in other fields.

E. W. JACKSON.

<sup>18</sup> In *Montreal Tramways v. Leveille*, 1933 Can. Sup. 456 at 464, 4 Dom. L. R. 337 at 344, the court notes: ". . . if the law recognizes the separate existence of the unborn child sufficiently to punish the crime, it is difficult to see why it should not also its separate existence for the purpose of redressing the tort." Italics added.

<sup>19</sup> Deering, Cal. Civil Code, § 29.

<sup>20</sup> 33 Cal. App. (2d) 629, 92 P. (2d) 678 (1939).

<sup>21</sup> See note, 34 Harv. L. Rev. 549. In *Kine v. Zuckerman*, 4 Pa. D. & C. 227, 97 A. L. R. 1525 (1936), the court relied upon the unique theory that the defendant's neglect set in motion a harmful force which did not culminate in injury until the moment of birth. While that rationale was adopted to defeat the argument that the child was not in esse at the time of the wrong, hence could not sue, it might prove helpful in establishing a prima facie case. Since imbecility, paralysis, loss of function and the like are not normal incidents to natural birth under competent handling of delivery, the existence thereof might be regarded as a type of *res ipsa loquitur*.



INJUNCTION—SUBJECTS OF PROTECTION AND RELIEF—WHETHER OF NOT CITIZEN ACQUITTED ON CRIMINAL CHARGE CAN COMPEL SURRENDER OR DESTRUCTION OF FINGERPRINTS AND OTHER IDENTIFYING RECORDS TAKEN BY POLICE AT TIME OF ARREST—In the case of *State ex rel. Mavity v. Tyndall*<sup>1</sup> the Indiana Supreme Court had occasion to construe the effect of a local statute<sup>2</sup> which had created a State Bureau of Identification and had provided for the securing, by local police, of photographs, fingerprints and the like of persons convicted of certain crimes or who were well-known and habitual criminals. The statute required that such records be retained to compose an identification system integrated with those of other states and the one maintained by the Federal Bureau of Investigation. The statute was silent, however, as to what should be done with the records in the event the accused had no previous criminal record and was acquitted upon a proper hearing. According to that case, the relator, who had no criminal record except for one traffic violation, was arrested for gaming and keeping a gaming device. Following customary police practice, but against his will, relator's fingerprints were taken, he was photographed, a specimen signature was obtained, and certain descriptive material was added. Three sets of these records were made; one being retained at the local police headquarters, one being sent to the state police central office, and the third filed with the federal bureau. The criminal charges were subsequently dismissed. When relator sought the return of these records, his request was refused. He then sought to mandamus the local officials to compel surrender or destruction of the records claiming that the exhibition thereof in a rogue's gallery invaded his right of privacy. He conceded that the police had the right to secure the records in the first instance for purpose of identification, to arrange for his safekeeping pending trial or to aid in his recapture in case of escape, but claimed such purposes were spent after his acquittal. Upon finding that relator's photograph had been placed in a rogue's gallery and had been viewed by members of the public attempting to identify persons accused of committing other crimes, the Indiana Supreme Court concluded that relator's right of privacy had been invaded and, as a consequence, it reversed a judgment sustaining a demurrer to his complaint. It did indicate, however, that the retention of fingerprint records alone would ordinarily give rise to no unfavorable publicity as such records could be read only by experts.

Cases in point, either from Indiana or from other jurisdictions, are comparatively rare. The earlier decisions denied relief, although on

<sup>1</sup> — Ind. —, 66 N. E. (2d) 755 (1946).

<sup>2</sup> Burns Ind. Stat. Ann. 1933, § 47-846 et seq. See also Acts 1945, Ch. 344, §§ 12-14.

grounds unconnected with any right of privacy. More recent cases, however, disclose a tendency to provide a remedy when an innocent person's right of privacy has been wrongfully invaded as by taking and distributing identification records after arrest and before trial. The first Indiana case, that of *State ex rel. Burns v. Clausmier*,<sup>3</sup> for example, was one in which the arrested person, after his discharge, sought to recover damages on a sheriff's bond for the taking of his photograph while in custody on a charge of forgery. The court held that, as there was no official duty on the part of the sheriff to take photographs for identification records and to publish them before conviction, there could be no recovery on the official bond. The question of whether or not the sheriff could have been held personally liable, as for the publication of a libel, was not before the court and was not decided. With the passage of the Indiana statute construed for the first time in the instant case, a different result for similar litigation in that state might now well be obtained.

Early cases in New York also denied relief to persons seeking the return or destruction of identification records. In *Owen v. Partridge, Police Commissioner*,<sup>4</sup> it was pointed out that "any invasion of one's right to be let alone can be remedied only by a statutory enactment directed against the particular case."<sup>5</sup> An innocent man, in another case, whose prison records were still on file after he had been acquitted of first degree murder upon appeal, was also referred to the legislature.<sup>6</sup> Relief was likewise denied, in *Gow v. Bingham*,<sup>7</sup> on the ground that mandamus was an improper remedy, although the court recognized that a gross injustice had been committed in obtaining the identification records prior to even a preliminary hearing.

In the Maryland case of *Downs v. Swann*,<sup>8</sup> the accused person sought to obtain an injunction against the police officials but failed to allege that the defendants were improperly planning to place his picture, after acquittal, in an existing rogue's gallery. Upon police denial that it was their practice to so use such photographs unless the offender was convicted or escaped custody, injunctive relief was denied. The court did state, however, that police officers "have no right to needlessly or wantonly injure in any respect persons whom they are called upon in the course of their duty to arrest or detain, and for the infliction of any such injury they would be liable, to the injured person, in the same manner

<sup>3</sup> 154 Ind. 599, 57 N. E. 541 (1900).

<sup>4</sup> 40 Misc. 415, 82 N. Y. S. 248 (1903).

<sup>5</sup> 40 Misc. 415 at 421, 82 N. Y. S. 248 at 253.

<sup>6</sup> *In re Molineux*, 177 N. Y. 395, 69 N. E. 727, 65 L. R. A. 104 (1904).

<sup>7</sup> 57 Misc. 66, 107 N. Y. S. 1011 (1907).

<sup>8</sup> 111 Md. 53, 73 A. 653 (1909).

and to the same extent that private individuals would be.'<sup>9</sup> Much the same rationale has been followed in Arkansas<sup>10</sup> and Washington.<sup>11</sup>

An attempt to resolve the conflict between the rights of society on the one hand and those of the individual on the other may be observed in the New Jersey case of *Bartletta v. McFeeley, Commissioner of Public Safety*,<sup>12</sup> where the court refused to enjoin the police exhibition of the accused's identification records, in the absence of any showing that malice prompted the police to expose plaintiff to ridicule and disgrace, on the ground that public safety required the exercise of a certain amount of discretion on the part of police officials. Shortly thereafter a statute was adopted requiring the immediate taking of photographs and fingerprints of a person arrested for an indictable offense as well as the forwarding of copies thereof to the state Bureau of Identification without delay.<sup>13</sup> As is the case with most such statutes, no mention was made therein of the right of an accused person, if acquitted, to secure the surrender or destruction of these records. Under the circumstances, when the plaintiff in the case of *Fernicola v. Keenan*<sup>14</sup> asked for the surrender of records because he was never indicted, the court again said the question of whether or not the records were to be retained was a question to be decided by the police. In that regard, the chancellor said: "The taking of the fingerprints in the first place and the whole process of arrest of a possibly innocent person are a humiliation to which he must submit for the benefit of society. To the same end, the police are justified in retaining such records, in certain cases, after an acquittal or a failure of the Grand Jury to indict . . . On the other hand, when a man of good repute has a false charge made against him and is cleared of it, it seems to me that the police should destroy his fingerprints or photographs or remove them from the Rogues' Gallery. But in the absence of the statute, discretion in the matter belongs to the police . . . It is not for the court to make decision."<sup>15</sup>

Two later cases arising in New Jersey brought the problem into sharper focus. In one of them, that of *Jenkins v. McGovern*,<sup>16</sup> the arrested person obtained a temporary injunction restraining the sheriff

<sup>9</sup> 111 Md. 53 at 64, 73 A. 653 at 656.

<sup>10</sup> *Mabry v. Kettering*, 92 Ark. 81, 122 S. W. 115 (1909).

<sup>11</sup> *Hodgeman v. Olsen*, Supt. State Reformatory, 86 Wash. 615, 150 P. 1122 (1915).

<sup>12</sup> 107 N. J. Eq. 141, 152 A. 17 (1930), affirmed in 109 N. J. Eq. 241, 156 A. 658 (1931).

<sup>13</sup> Rev. Stat. N. J., Vol. II, § 53:1—19.

<sup>14</sup> 136 N. J. Eq. 9, 39 A. (2d) 851 (1944).

<sup>15</sup> 136 N. J. Eq. 9 at 10, 39 A. (2d) 851 at 851-2.

<sup>16</sup> 136 N. J. Eq. 563, 43 A. (2d) 526 (1945), reversed in — N. J. Eq. —, 45 A. (2d) 844 (1946).

from distributing the records, at least before verdict of guilty, to the federal authorities, to the police of other states, and of other countries. When the sheriff respected the temporary injunction, and also refrained from acting as to other arrested persons, he was indicted for failure to perform his duty. He then sought to prevent the prosecuting officials from violating his right of privacy by photographing him and disseminating his identification records prior to conviction.<sup>17</sup> As the court felt the mere taking of the photograph and fingerprint impressions before conviction would do no harm, it did not enjoin such action. It did not, however, have the same opinion about forwarding copies of such records to other police before a verdict of guilty, and held that so much of the statute as required the premature dissemination of such records violated constitutional rights.<sup>18</sup>

The improper display of a photograph in a rogue's gallery has also been denounced in the recent Missouri case of *State ex rel. Reed v. Harris*<sup>19</sup> where pictures of the accused, who had no record of conviction for felony, were taken while he was held for a traffic violation. When the accused, contending that the statute provided merely for the taking and keeping of records of persons convicted of a felony whose convictions had not been set aside or reversed,<sup>20</sup> asked for an injunction, the state Bureau of Identification sought a writ of prohibition to stop the trial judge from entertaining that proceeding, but did not succeed on much the same theory as that developed in New Jersey.

Two cases from Louisiana definitely uphold a right of privacy on the part of an innocent person of such character as to warrant preventing the retention and distribution of pictures of the accused even though, in each case, the plaintiff had been arrested on numerous occasions.<sup>21</sup> The reasoning behind both decisions rests on the fact that posting a picture in a rogue's gallery and sending it to other jurisdictions as a criminal record constitutes permanent proof of dishonesty which is unwarranted unless and until a conviction is obtained.

These are the only cases which have reached reviewing courts, but further material may be gathered by examining the practices of police officials in making criminal identification files. The Illinois practice is

<sup>17</sup> *McGovern v. Van Riper*, 137 N. J. Eq. 24, 43 A. (2d) 514 (1945).

<sup>18</sup> The statute was said to be an improper exercise of the police power in view of the natural and inalienable rights belonging to every citizen: 137 N. J. Eq. 24 at 46, 43 A. (2d) 514 at 525.

<sup>19</sup> 348 Mo. 426, 153 S. W. (2d) 834 (1941).

<sup>20</sup> Mo. Rev. Stat. Ann., Vol. 12, § 4184.

<sup>21</sup> *Itzkovitch v. Whitaker*, 115 La. 479, 39 So. 499 (1905), affirmed in 117 La. 708, 42 So. 228 (1906); *Schulman v. Whitaker*, 115 La. 628, 39 So. 737 (1905), affirmed in 117 La. 704, 42 So. 227 (1906).

illustrative. Under the rules and regulations of the state Bureau of Identification, as well as of local police, it has become standard practice to secure photographs, fingerprint impressions, Bertillon measurements, and the like of virtually all persons arrested except those seized for traffic violations and for juvenile offenders. Such information is kept in local police and state files, is sent to the federal bureau and is made available to the police of other states, if requested by them. Complaining witnesses are permitted to view photographs on file when attempting to identify offenders. While the Illinois statute provides for keeping these records, it declares that they are not to be made public except where necessary in the identification of persons accused of crime or, on trial, where such persons have been previously imprisoned for prior offenses.<sup>22</sup> Petitions have, therefore, been filed in *nisi prius* courts seeking the surrender or destruction of such identification records where the accused person has subsequently been discharged and, after due consideration of the circumstances, such petitions have been allowed or denied on the merits of each individual case. The matter has, however, been left on no more firm foundation than that, not only in Illinois but in most of the states whose statutes are silent on the point. In only ten instances is there specific treatment on the subject, by requiring either the destruction of such records,<sup>23</sup> their return to the accused person,<sup>24</sup> or their return upon request,<sup>25</sup> provided the accused person has been acquitted.

The need for adequate identification records to aid in the apprehension of criminals is recognized. In the discharge of their general duty to protect the public, police officials may well have occasion to take photographs, fingerprints and the like of arrested persons. But the falsely accused person is likewise in need of protection against the disgrace and humiliation of being permanently cataloged with felons. Police officials may exercise their discretion properly and avoid the demand for legislative action. But discretion may be abused, in fact has been so abused judging by the decided case, so if the legislature has not acted, the courts should allow relief, as in the instant case, by recognizing an innocent person's right of privacy.

Mrs. D. W. SPINKA

<sup>22</sup> Ill. Rev. Stat. 1945, Ch. 38, §§ 780a-780g.

<sup>23</sup> Iowa Code, § 728.8; N. H. Rev. Laws 1942, Ch. 421, § 16-19; R. I. Gen. Laws 1938, Ch. 620, § 7.

<sup>24</sup> Conn. Gen. Stats. 1941, Ch. 127, §§ 399f-405f; Mason's Minn. Stats. 1941, § 626.40; Thompson, N. Y. Cons. Laws, Penal Law, § 516; W. Va. Code Ann. 1943, § 1264 (1).

<sup>25</sup> Mich. Stat. Ann., Vol. II, Ch. 24, § 4.462 and § 4.463; Page's Ohio Gen. Code Ann., Vol. II, § 1841-18; Vt. Pub. Laws 1933, § 5503.

INSURANCE—EXTENT OF LOSS AND LIABILITY OF INSURER—WHETHER OR NOT FACT DEATH OCCURRED IN MILITARY SERVICE PRECLUDES RECOVERY ON LIFE INSURANCE POLICY CONTAINING MILITARY SERVICE CLAUSE—The proper construction to be given to a “war clause”, excepting liability in a life insurance policy, was the prime controversy in the recent case of *Hooker v. New York Life Insurance Company*.<sup>1</sup> Plaintiff there sued as the beneficiary of an insurance policy upon the life of his son who was killed by an accidental fall from a cliff during training as a United States Marine on active duty in New Zealand. Controversy as to the essential facts of his death was more formal than real. Liability for double indemnity was denied by the insurance company under an exemption clause that limited liability “if the insured’s death resulted directly or indirectly from . . . (d) War or any act incident thereto.” Recovery on the policy was allowed on the ground that the insured’s death did not “result” from an act incident to war.

While “war” or “service” exemptions are not against public policy,<sup>2</sup> for an insurance company has the right to select the risks it will assume,<sup>3</sup> the applicability of any given policy exception is not a question of fact but a matter of construction for the court.<sup>4</sup> Courts have been found to adopt the construction most favorable to the insured,<sup>5</sup> but at that point accord ceases. Any apparent conflict is due in a great measure to the difference in the phraseology of the exemption clauses, but the courts, in many of these cases, adopting an interpretation against the company, have gone to some length in taking a particular word or phrase in the military clause, construing the same as ambiguous, then resolving that ambiguity as meaning activity of a military nature rather than status, thereby holding the insurer liable.<sup>6</sup>

Three distinct lines of cases may be discerned in the treatment given by the courts to what may be generically termed “war” or “military” exemption clauses. The narrowest class is one in which the *status* of the insured, present where the clause typically reads “while in military or

<sup>1</sup> 66 F. Supp. 313 (1946).

<sup>2</sup> *Miller v. Illinois Bankers' Life Ass'n*, 138 Ark. 442, 212 S. W. 310, 7 A. L. R. 378 (1919).

<sup>3</sup> *Marks v. Supreme Tribe of Ben Hur*, 191 Ky. 385, 230 S. W. 540 (1921).

<sup>4</sup> *Bull v. Sun Life Assur. Co.*, 141 F. (2d) 456 (1944), cert. den. 323 U. S. 723, 65 S. Ct. 55, 89 L. Ed. 581 (1944).

<sup>5</sup> *Aschenbrenner v. United States Fid. & G. Co.*, 292 U. S. 80, 54 S. Ct. 590, 78 L. Ed. 1137 (1934).

<sup>6</sup> *Bending v. Metropolitan Life Ins. Co.*, 74 Ohio App. 182, 58 N. E. (2d) 71 (1944).

naval service", is regarded as the sole criterion.<sup>7</sup> Expounding on such a clause, the Ohio Appellate Court once said, "This language is clear and unambiguous. There is nothing to construe. The language plainly makes status of the insured in military or naval service the ground of exemption from liability."<sup>8</sup> Nor is the duty status of the insured material, for the same court indicated that one "is in the military service from the time he takes the oath until he receives his discharge, honorable or otherwise."<sup>9</sup> Under this type of exemption, then, the only inquiry is whether the insured was in military or naval service at the time his death or disability was incurred,<sup>10</sup> causation or activity is not a factor.<sup>11</sup>

The nature of the *activity* in which the insured was engaged at the time of his death or disability forms the basis of the middleground viewpoint adopted by many of the courts,<sup>12</sup> a viewpoint which incorporates

<sup>7</sup> The following cases, involving interpretation of the quoted clauses, are illustrative: *Miller v. Illinois Bankers' Life Ass'n*, 138 Ark. 442, 212 S. W. 310, 7 A. L. R. 378 (1919), ("while in the service in the army or navy . . . in time of war"); *State Mut. Ins. Co. v. Harmon*, 72 Ga. App. 117, 33 S. E. (2d) 105 (1945), ("under enrollment in any branch of military or naval service in time of war"); *Life & Casualty Ins. Co. v. McLeod*, 70 Ga. App. 181, 27 S. E. (2d) 871 (1943), ("while enrolled in military or naval service in time of war"); *Bradshaw v. Farmers' & Bankers' Life Ins. Co.*, 107 Kan. 681, 193 P. 332, 11 A. L. R. 1091 (1920), ("shall engage in military or naval service in time of war"); *Ruddock v. Detroit Life Ins. Co.*, 209 Mich. 638, 177 N. W. 242 (1920), ("enter or be engaged in such [military or naval] service"); *Slaughter v. Protective League Life Ins. Co.*, 205 Mo. App. 352, 223 S. W. 819 (1920), ("while engaged in military or naval service in time of war"); *Olson v. Grand Lodge A. O. U. W. of North Dakota*, 48 N. D. 285, 184 N. W. 7 (1921), ("engage in occupation of soldier in time of war").

<sup>8</sup> *Bending v. Metropolitan Life Ins. Co.*, 74 Ohio App. 182, 58 N. E. (2d) 71 (1944).

<sup>9</sup> 74 Ohio App. 182 at 191, 58 N. E. (2d) 71 at 75.

<sup>10</sup> *Miller v. Illinois Bankers' Life Ass'n*, 138 Ark. 442, 212 S. W. 310, 7 A. L. R. (1919); *Life & Casualty Ins. Co. v. McLeod*, 70 Ga. App. 181, 27 S. E. (2d) 871 (1943); *Olson v. Grand Lodge A. O. U. W. of North Dakota*, 48 N. D. 285, 184 N. W. 7 (1921); *Bending v. Metropolitan Life Ins. Co.*, 74 Ohio App. 182, 58 N. E. (2d) 71 (1944).

<sup>11</sup> *Bradshaw v. Farmers' & Bankers' Life Ins. Co.*, 107 Kan. 681, 193 P. 332 (1920).

<sup>12</sup> Illustrative of this class are the following cases: *Benham v. American Central Life Ins. Co.*, 140 Ark. 612, 217 S. W. 462 (1919), ("engaged in military or naval service in time of war, or in consequence of such service"); *Long v. St. Joseph Life Ins. Co.*, 225 S. W. (Mo. App.) 106 (1920), affirmed in — Mo. —, 248 S. W. 923 (1923), ("while engaged in any military or naval service in time of war"); *Reid v. American Nat. Assur. Co.*, 204 Mo. App. 643, 218 S. W. 957 (1920), ("engage in military or naval service in time of war"); *Malone v. State Life Ins. Co.*, 202 Mo. App. 499, 213 S. W. 877 (1919), ("engage in military or naval service and die while so engaged"); *Mylly v. American Life Ins. Co.*, 43 N. D. 495, 175 N. W. 631, 11 A. L. R. 1097 (1919), ("while engaged in military or naval service in time of war"); *Illinois Bankers' Life Ass'n v. Davaney*, 102 Okla. 302, 226 P. 101 (1924), ("while in the service in the army or navy in time of war"); *Barnett v. Merchants' Life Ins. Co.*, 87 Okla. 42, 280 P. 271 (1922), ("engage in military service in time of war"); *Young v. Life & Casualty Ins. Co. of Tennessee*, 204 S. C. 386, 29 S. E. (2d) 482 (1944), ("while insured is in military or naval service in time of war"); *West v. Palmetto State Life Ins. Co.*, 202 S. C. 422, 25 S. E. (2d) 475 (1943), ("engaged in military or naval service in time of war"); *Kelly v. Fidelity Mut. Life Ins. Co.*, 169 Wis. 274, 172 N. W. 152, 4 A. L. R. 845 (1919), ("engage in military service in connection with actual warfare and shall die as result").

some aspects of status and some of causation.<sup>13</sup> When denying operative effect to an exemption which read "While engaged in any military or naval service in time of war" in a case where the insured died of natural causes while home on furlough, a Missouri court once said, "If insured's mere status of being an enlisted soldier or sailor at the time of his death is to give effect to the clause and reduce liability, what necessity existed for saying therein that death must occur while insured is 'engaged' in any such service? As applied to military or naval service, the word 'engaged' denotes action or participation in something done in that service. By putting the word 'engaged' in the exemption clause, the idea is conveyed that death must occur while insured is participating or taking part in that service in some way, and not merely during the period he occupies the status of being a soldier or sailor."<sup>14</sup>

In discussing causation under a similar clause, an Arkansas court stated, "In the case at bar the insured died from influenza, and the record shows that this disease was prevalent throughout the United States, and that soldiers and civilians alike contracted it. The death of the insured, then, was in no sense caused by performing any military service, or in consequence of *being engaged* in military service."<sup>15</sup> The inquiry in cases of this character, then, includes not only an investigation as to the insured's status and his activity within that service,<sup>16</sup> but also as to causal factors<sup>17</sup> peculiar to military service<sup>18</sup> in order to determine the effect to be given to the exception.<sup>19</sup>

The third group of cases turns on the *causal relation* between the military and naval service, or war, and the death or disability of the

<sup>13</sup> See *Benham v. American Central Life Ins. Co.*, 140 Ark. 612, 217 S. W. 462 (1919), *Malone v. State Life Ins. Co.*, 202 Mo. App. 499, 213 S. W. 877 (1919), and *Kelly v. Fidelity Mut. Life Ins. Co.*, 169 Wis. 274, 172 N. W. 152 (1919), for examples of the incorporation of this dual nature in the very clause itself.

<sup>14</sup> *Long v. St. Joseph Life Ins. Co.*, 225 S. W. (Mo. App.) 106 at 107 (1920).

<sup>15</sup> *Benham v. American Central Life Ins. Co.*, 140 Ark. 612 at 618, 217 S. W. 462 at 463 (1919). Italics added.

<sup>16</sup> Whether the insured was on leave or furlough, or was performing military or naval duties, become matters of consequence.

<sup>17</sup> Pertinent questions are: Did the death or disability result from the service? Was it a disease common to civilian and military alike? Was accidental death, like an auto accident, common to both civilian and military alike? Was death within the extra risk occasioned by military or naval service?

<sup>18</sup> See *Kelly v. Fidelity Mut. Life Ins. Co.*, 169 Wis. 274, 172 N. W. 152 (1919), where the court limited the exception to a cause "peculiar to military service," recovery was allowed for the death of insured when a motorcycle skidded 100 miles from the front lines in France, insured being a messenger carrying dispatches at the time.

<sup>19</sup> *Young v. Life & Casualty Ins. Co. of Tennessee*, 204 S. C. 386, 29 S. E. (2d) 282 (1944), permitted recovery for death growing out of an auto accident while on furlough, on the ground that the exemption was not arbitrary, not status, but was designed to eliminate the extra risks arising while insured is in military service.



deceased,<sup>20</sup> which death or disability must result from such service<sup>21</sup> or from war,<sup>22</sup> as in the instant case, before the exemption clause becomes effective. Thus, as was pointed out in *Gorder v. Lincoln National Life Insurance Company*,<sup>23</sup> the cause must have some distinctive character intimately related to the military service and not be a hazard which would have been insured against had the soldier remained in civilian life. Phrases such as "result of" or "in consequence of" are typical earmarks to be watched for in cases falling in this class. But again, the "result" reasoning is met in the "activity" decisions. Contributing or remote cause is insufficient;<sup>24</sup> it must be the direct cause.<sup>25</sup>

The exemption clause in the instant case<sup>26</sup> is clearly within this latter division and is so analyzed and discussed by the court. "War or any act incident thereto" doubtless caused the insured's presence in New Zealand, even to his participating in training maneuvers, but since the death of the insured occurred in the course of routine training, it did not result from an act "incident" to war. Causation doctrines have been succinctly applied to this type of exemption both by the Massachusetts<sup>27</sup> and Federal District courts,<sup>28</sup> but difficulty has been encountered in defining the term "war." A recent Iowa case,<sup>29</sup> while correctly an-

<sup>20</sup> Cases and clauses in this group are: *Savage v. Sun Life Assur. Co.*, 57 F. Supp. 620 (1944), ("death resulting from war or any act incident thereto"); *Eggena v. New York Life Ins. Co.*, 236 Iowa 262, 18 N. W. (2d) 530 (1945), ("death resulted directly or indirectly from war or any act incident thereto"); *Stankus v. New York Life Ins. Co.*, 312 Mass. 366, 44 N. E. (2d) 687 (1942), ("death resulted directly or indirectly from war or any act incident thereto"); *Gorder v. Lincoln Nat. Life Ins. Co.*, 46 N. D. 192, 180 N. W. 514, 11 A. L. R. 1080 (1920), ("death in consequence of such [military or naval] service without the company's permit"); *Smith v. Sovereign Camp, W. O. W.*, 204 S. C. 193, 28 S. E. (2d) 808 (1944), ("if disability shall result from military or naval service in time of war").

<sup>21</sup> See *Gorder v. Lincoln Nat. Life Ins. Co.*, 46 N. D. 192, 180 N. W. 514 (1920), and *Smith v. Sovereign Camp, W. O. W.*, 204 S. C. 193, 28 S. E. (2d) 808 (1944).

<sup>22</sup> *Savage v. Sun Life Assur. Co.*, 57 F. Supp. 620 (1944).

<sup>23</sup> 46 N. D. 192, 180 N. W. 514 (1920).

<sup>24</sup> The court in *Savage v. Sun Life Assur. Co.*, 57 F. Supp. 620 (1944), held that the death of a naval ensign at Pearl Harbor on Dec. 7, 1941, in the course of the Japanese sneak attack was accidental. *Gorder v. Lincoln Nat. Life Ins. Co.*, 46 N. D. 192, 180 N. W. 514 (1920), held that death from pneumonia in Liverpool within a week of debarkation from a troop transport was not in consequence of military service.

<sup>25</sup> *Smith v. Sovereign Camp, W. O. W.*, 204 S. C. 193, 28 S. E. (2d) 808 (1944). But see *Eggena v. New York Life Ins. Co.*, 236 Iowa 262, 18 N. W. (2d) 550 (1945), which denied liability for death when a tank in which insured was riding crashed from a bridge during training activities in the United States, and the comment thereon in *Hooker v. New York Life Ins. Co.*, 66 F. Supp. 313 at 317 (1946).

<sup>26</sup> The clause read: ". . . if the insured's death resulted, directly or indirectly from . . . (d) war or any act incident thereto." 66 F. Supp. 313 at 314.

<sup>27</sup> *Stankus v. New York Life Ins. Co.*, 312 Mass. 366, 44 N. E. (2d) 687 (1942).

<sup>28</sup> *Hooker v. New York Life Ins. Co.*, 66 F. Supp. 313 (1946), and *Savage v. Sun Life Assur. Co.*, 57 F. Supp. 620 (1944).

<sup>29</sup> *Eggena v. New York Life Ins. Co.*, 236 Iowa 262, 18 N. W. (2d) 530 (1945).

nouncing the problem under the same exemption to be one of causation, nevertheless misapplies the doctrine<sup>30</sup> for it conceives the term "war" to refer to a period of time rather than to a causative factor.

But discussion and attempts at classification yield little of practical value for the lawyer confronted with a similar exemption clause. Excellent and exhaustive annotations<sup>31</sup> and discussions<sup>32</sup> serve only to highlight the confusion. Clauses used by the same insurance company have been held sufficient to exempt in one case in one jurisdiction<sup>33</sup> but inoperative in another.<sup>34</sup> A court of the same state, strongly anti-status when allowing recovery for death from influenza in the United States,<sup>35</sup> nevertheless later denied recovery for death from pneumonia in France on the basis that status, not activity, was the ground of limitation under almost identical clauses.<sup>36</sup> Even comparable fact situations have been productive of different results. For example, the death of a seaman on a United States destroyer, sunk by a torpedo in the North Atlantic in 1941 was held to be "from war", although prior to any formal declaration,<sup>37</sup> but death during the bombing of Hawaii by Japanese planes was treated as not "in time of war."<sup>38</sup>

Definition and comparison, then, do not resolve the problem, for there are no well-defined "rules." Objective analysis demonstrates that the genesis of the problem lies in the need for judicial construction of "ambiguous" exemption clauses. The obvious remedial action is to re-examine the verbiage used in the policy, for a concise, clear, complete exemption should leave no room for ambiguity and consequent construc-

<sup>30</sup> See comment in *Hooker v. New York Life Ins. Co.*, 66 F. Supp. 313 at 317 (1946).

<sup>31</sup> See annotation to *West v. Palmetto State Life Ins. Co.*, 202 S. C. 422, 25 S. E. (2d) 475 (1943), in 145 A. L. R. 1461 and the general annotation in 137 A. L. R. 1263 bringing earlier World War I notes down to date. The latter annotations may be found in 15 A. L. R. 1280, 11 A. L. R. 1091, 7 A. L. R. 378, and 4 A. L. R. 845.

<sup>32</sup> Two of the better articles on the subject are: Barton, "The War and Aviation Clauses in Life Insurance Policies," 24 Neb. 264 (1945), and Rively, "War Clauses in Life Insurance Policies," 46 Dick. L. Rev. 192 (1942). See also comment on *Savage v. Sun Life Assur. Co.*, 57 F. Supp. 620 (1944), in 25 Bost. U. L. Rev. 239 (1945).

<sup>33</sup> *Miller v. Illinois Bankers' Life Ass'n*, 138 Ark. 442, 212 S. W. 310 (1919).

<sup>34</sup> *Illinois Bankers' Life Ass'n v. Davaney*, 102 Okla. 302, 226 P. 101 (1924).

<sup>35</sup> *Gorder v. Lincoln Nat. Life Ins. Co.*, 46 N. D. 192, 180 N. W. 514 (1920).

<sup>36</sup> *Olson v. Grand Lodge A. O. U. W. of North Dakota*, 48 N. D. 285, 184 N. W. 7 (1921).

<sup>37</sup> *Stankus v. New York Life Ins. Co.*, 312 Mass. 366, 44 N. E. (2d) 687 (1942).

<sup>38</sup> *Savage v. Sun Life Assur. Co.*, 57 F. Supp. 620 (1944); *Rosenau v. Idaho Mut. Ben. Ass'n*, 65 Ida. 408, 145 P. (2d) 227 (1944); and *West v. Palmetto State Life Ins. Co.*, 202 S. C. 422, 25 S. E. (2d) 475 (1943), all permit recovery for deaths incurred during the Japanese attack on Pearl Harbor.

tion. Certainty of exemption would not only benefit both insured and insurer but would minimize the need for judicial construction.<sup>39</sup>

It is obviously impossible, however, to re-write exemption clauses in the course of current litigation. But careful and accurate analysis and presentation of the problem from the standpoint of the purpose of the exemption clause,<sup>40</sup> where construction may be necessary, should avoid further chaos that might arise from attempting to match definitions or from the comparison of verbiage. Correct analysis should first involve an inquiry as to whether any construction is necessary; not whether the clause can possibly be made ambiguous. If the clause is fairly and objectively ambiguous, however, that ambiguity should be resolved, upon careful analysis of the exemption, in terms of *status*, *activity*, or *result*. Particularly to be avoided is the "rewriting" of the clause in terms of another exemption. When analyzing the exemption, primary attention should be given to the exemption as a whole, viewed in its entirety. If it appears, after fair consideration, that *status* or *activity* of the insured, in contrast to disability *resulting* from service of war, is the basis of avoidance of liability, the ordinary rules for each class may then be applied to achieve a final determination as to whether or not the death or disability occurred within or without the particular exemption.

W. O. KROHN

LANDLORD AND TENANT—RE-ENTRY AND RECOVERY OF POSSESSION BY LANDLORD—WHETHER OR NOT RIGHT OF ACTION FOR FORCIBLE DETAINER IS IN TRUSTEE OR IN BENEFICIARY OF A LAND TRUST—The case of *Liberty National Bank of Chicago v. Kosterlitz*<sup>1</sup> presented a novel problem concerning the respective rights of a trustee and a beneficiary under a land trust to maintain an action for forcible entry and detainer; a problem made more complicated because of the existence of certain regulations promulgated by the Office of Price Administration. Title to the premises involved had been vested in the plaintiff, as trustee, under a typical land trust agreement which declared that the right of the beneficiary was simply one of personal property nature and gave him no legal or equitable interest in the real estate. The defendant had been a tenant from month

<sup>39</sup> Changing methods of warfare, new means of starting or "declaring" war, as well as increased civilian participation in war activities pose additional problems for the framers of exemption clauses.

<sup>40</sup> *I. e.*, was the purpose to avoid liability for *any* death; for death from any reason *all the time* insured is a soldier, sailor, or marine; only for the *extra hazard* while insured is actively performing military duties; or for death occurring as a *result* of military duties; or for death from an act of war, even as applied to civilians; or for death from any other specific hazard?

<sup>1</sup> 329 Ill. App. 244, 67 N. E. (2d) 876 (1946).

to month, had been served with notice of termination of tenancy by the beneficiary acting as agent for the trustee, and, upon failure to vacate, had been sued for possession of the premises by the trustee under authority of a certificate of eviction issued by OPA in the name of the beneficiary. Summary judgment in the trial court in favor of plaintiff was reversed on appeal by defendant on the ground that the trustee, although possessed of the right to sue under local law, lacked the necessary authority under OPA regulations in the absence of a certificate issued in the name of the trustee, and the existence of such a certificate favoring the beneficiary of the trust was of no consequence since the latter could have no right of action under local law.

As the existence of a proper OPA certificate issued in the name of the plaintiff would seem, by the decision, to be an essential prerequisite to an action for possession and not just a mere procedural technicality,<sup>2</sup> the first question presented is whether or not such a certificate could be obtained by one who merely holds title in trust for another. The rent regulations presently direct that such certificate shall be issued to the "landlord" upon compliance with certain requirements not here material, and the term "landlord" is therein defined to be "an owner, lessor, sublessor, assignee or other person receiving or entitled to receive rent for the use or occupancy of any housing accommodations or an agent of any of the foregoing."<sup>3</sup> While no construction has been given to these provisions by the courts as yet, it would seem that a person vested with the rights and powers ordinarily conferred upon a trustee should be entitled to have such a certificate. In *Wahl v. Schmidt*,<sup>4</sup> for example, it was indicated that, at least in a court of law, a trustee holding the legal title together with the right to possession was to be regarded as "owner" of the premises, having all the rights and subject to all the liabilities attaching to ownership. Whether a trustee can be said to be a person "entitled to receive rent" for the premises, so as to come within the definition of "landlord," is, however, a matter entirely dependent upon the terms of the trust agreement. If the agreement, as in the instant case, gives to the beneficiary the control of the management of the property, including renting thereof and the collection and handling of rents, a strict construction of the regulation in question would lead to the conclusion that the trustee, while holder of the legal title, is not a person "receiving or entitled to receive rent" from the premises, hence

<sup>2</sup> O. P. A. Maximum Rent Regulation No. 28, § 6(B)(2)(1), requires the purchaser of rented premises desiring to occupy the same personally to obtain such a certificate before pursuing his remedies under local law to oust the tenant.

<sup>3</sup> *Ibid.*, § 13(a).

<sup>4</sup> 307 Ill. 331, 138 N. E. 604 (1923). See also, *Randolph v. Hinck*, 288 Ill. 99, 123 N. E. 273 (1919).

could not procure the necessary certificate.<sup>5</sup> If so, and the necessary certificate is to be issued solely to the beneficiary, the problem then becomes one as to whether or not the beneficiary may maintain the action, for if he cannot and the trustees cannot get the requisite certificate it would seem that the resulting stalemate would prevent ouster of the tenant.

The prime issue in every action for forcible entry and detainer is one concerning the right to possession,<sup>6</sup> for questions concerning title are immaterial<sup>7</sup> and may not be determined therein.<sup>8</sup> That it is the right to possession which must be emphasized is borne out by the cases which hold that it is the lessee who should sue the hold-over tenant<sup>9</sup> rather than the lessor, since the latter, after lease granted, no longer has the right to possession.<sup>10</sup> If the beneficiary can be said to enjoy the right to possess and likewise holds the requisite certificate, it would seem to follow that the action can be successfully maintained by him, provided he sues in his own name but in his capacity as beneficiary. Recourse to the trust instrument will be necessary to establish the beneficiary's right to possession so careful analysis of its terms would be highly desirable. The court in the instant case, although by way of dictum, indicated that the common provisions found in the usual land trust agreement<sup>11</sup> gave the

<sup>5</sup> The court in the instant case concluded that the declaration in the trust agreement that the beneficiary's interest was solely personal property overrode the provisions therein regarding management, so as to prevent the beneficiary from being "landlord" to the defendant: 329 Ill. App. 244 at 246, 67 N. E. (2d) 876 at 877. It is understood that the Regional Office of the Chicago Defense Rental Area, perhaps on the theory that if the beneficiary is not "landlord" then the trustee must be, has now issued a certificate of eviction in the name of the trustee, plaintiff in the instant case.

<sup>6</sup> Ill. Rev. Stat. 1945, Ch. 57, § 2. See also *Biebel Roofing Co. v. Pritchett*, 373 Ill. 214, 25 N. E. (2d) 800 (1940); *West Side Tr. & Sav. Bank v. Lopoten*, 358 Ill. 631, 193 N. E. 462 (1934).

<sup>7</sup> *Palmer v. Frank*, 169 Ill. 90, 48 N. E. 426 (1897).

<sup>8</sup> *Davis v. Robinson*, 374 Ill. 553, 30 N. E. (2d) 52 (1940).

<sup>9</sup> *Allen v. Webster*, 56 Ill. 393 (1870); *Travis v. Geiger*, 215 Ill. App. 461 (1919); *Geo. J. Cooke Co. v. Kaiser*, 163 Ill. App. 210 (1911).

<sup>10</sup> *Gazzolo v. Chambers*, 73 Ill. 75 (1874).

<sup>11</sup> The instant agreement provided, among other things, that "the interest of any beneficiary hereunder shall consist solely of a power of direction to deal with the title of said property and to manage and control said property as hereinafter provided, and the right to receive the proceeds from rentals and from mortgages, sales or other disposition of said premises, and that such right in the avails of said property shall be deemed to be personal property, and may be assigned and transferred as such . . . and that no beneficiary now has, and that no beneficiary hereunder at any time shall have any right, title or interest in or to any portion of said real estate as such, either legal or equitable, but only an interest in the earnings, avails and proceeds as aforesaid." It also provided that the "beneficiary or beneficiaries hereunder, in his, her or their own right shall have the management of said property and control of the selling, renting and handling thereof, and shall collect and handle the rents, earnings, avails and proceeds thereof, and said trustee shall have no duty in respect to such management or control, or the collection, handling or application of such rents, earnings, avails or proceeds, or in respect to

beneficiary no rights in the real estate or its possession since the beneficiary had nothing which could be made the subject of a lease to a tenant unless any lease negotiated by the beneficiary was made by him as agent for the trustee. It cited only one case in support of that view, that of *Chicago Title & Trust Company v. Mercantile Trust & Savings Bank*,<sup>12</sup> which case is not squarely in point for the issue there was whether or not a judgment against a beneficiary was superior to the lien of a mortgage subsequently executed by the trustee. No question of the right of the beneficiary to possession of the premises was involved therein, hence the support from such a case is slender. The inference to be drawn from other cases, also involving land trusts of the type here concerned, wherein the trustee has been isolated from liability for personal injury to persons coming on the premises because of absence of possession, control or management,<sup>13</sup> would seem to dictate an opposite conclusion.

The suggested conflict between these decisions makes the instant case even more unique, for if credit is given to both views then neither trustee nor beneficiary has the right to possession. As all the rights incident to property ownership were once vested in the settlor of such a trust, he must have, by the terms of the conveyance and the trust indenture, transferred them to the trustee and the beneficiary jointly or divided such rights between them. If the beneficiary is also the settlor, as here, the agreement would not confer rights on him but such rights would be regarded as reserved unless clearly given to the trustee.<sup>14</sup> It cannot be supposed that the beneficiary, having been given the right or having reserved the right to manage and control the property, including the renting and handling thereof, acts simply as agent for the trustee,<sup>15</sup> so it should follow that such a beneficiary is vested with the right to possession unless the arrangement indicates the contrary. If the trustee is charged with the duty of management, it could well be implied that possession should be vested in him<sup>16</sup> in order that such duty might be

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the payment of taxes or assessments or in respect to insurance, litigation or otherwise, except on written direction as hereinabove provided, and after the payment to it of all money necessary to carry out said instructions." Such provisions are believed to be typical of trust agreements covering land in the Chicago area.

<sup>12</sup> 300 Ill. App. 329, 20 N. E. (2d) 992 (1939).

<sup>13</sup> *Brazowski v. Chicago Title & Trust Co.*, 280 Ill. App. 293, leave to appeal denied 280 Ill. App. xiii (1935), noted in 13 CHICAGO-KENT REVIEW 383; *Whitaker v. Central Trust Co.*, 270 Ill. App. 614 (1933), abst. opin.

<sup>14</sup> *Irish v. Antioch College*, 126 Ill. 474, 18 N. E. 768 (1888); *Equitable Trust Co. v. Fisher*, 106 Ill. 189 (1883).

<sup>15</sup> *Gallagher & Speck v. Chicago Title & Trust Co.*, 238 Ill. App. 39 (1925).

<sup>16</sup> *Perry, Trusts and Trustees*, Vol. 1, § 329. See also *Yates v. Yates*, 255 Ill. 66, 99 N. E. 360, Ann. Cas. 1913D 143 (1912); *McDale v. Shepardson*, 53 Ill. App. 513 (1893), appeal dismissed 156 Ill. 383, 40 N. E. 953 (1895); *Williamson v. Wilkins*, 14 Ga. 416 (1854); *Ellis v. Woodruff*, 88 Kan. 734, 129 P. 1193 (1913).

performed, but if the plain intention is otherwise all such considerations must give way<sup>17</sup> unless the parties, by their conduct, have furnished their own interpretation of the situation.<sup>18</sup>

These views are not affected by such decisions as that in *Continental Illinois National Bank & Trust Company v. Windsor Amusement Company*,<sup>19</sup> for the court there relied upon a special provision, not typically found in land trust agreements, to the effect that "the trustee is the sole owner . . . and so far as the public is concerned has full power to deal" with the property, as warranting suit for possession by the trustee against a hold-over tenant. The term "public" in such provision was held to include persons in the defendant's position, but without such clause it is doubtful if that result would have been obtained. The holding in *Chicago, North Shore & Milwaukee Railway Company v. Chicago Title & Trust Company*,<sup>20</sup> a condemnation action in which it was regarded as unnecessary to make the beneficiary a party defendant because the trust agreement declared his interest to be personal property only, is likewise not controlling for the agreement there gave the power of management to a third person.

The law can well be assumed to be, therefore, that the right to possession may be in the beneficiary and that he, by virtue of such right, is entitled to bring a forcible entry and detainer action to recover possession of trust premises. The instant case, however, does serve as a warning that care must be exercised in undertaking such an action as to real estate held in trust.

J. P. RAUSCHERT

<sup>17</sup> For cases where, by express language in the trust agreement, the beneficiary was given the right to possession, see: *Lethbridge v. Lethbridge*, 3 DeG. F. & J. 523, 45 Eng. Rep. 981 (1861); *Freeman v. Cook*, 14 N. C. 373 (1848); *Lewis v. Henry's Ex'ors*, 69 Va. (28 Grat.) 192 (1877). See also Bogert, *Trusts and Trustees*, Vol. 3, § 583. For cases where, from the surrounding circumstances, it could be said that the beneficiary had the right to possession, see: *Glover v. Stamps*, 73 Ga. 209 (1884); *Fernstler v. Seiberg*, 114 Pa. 196, 6 A. 165 (1886); *School Directors v. Dunkleberger*, 6 Pa. (Burr) 29 (1847).

<sup>18</sup> The record in the instant case would indicate that rent, after attornment, had been paid by checks made payable to the trustee and all requisite notices, etc., had been given by the beneficiary as agent for the trustee. Such conduct may serve to disclose that the parties themselves regarded the trustee as the one having the right to possession. If so, the court's statement that the beneficiary had no right to sue must be regarded as being correct under the circumstances.

<sup>19</sup> 288 Ill. App. 57, 5 N. E. (2d) 606 (1936).

<sup>20</sup> 328 Ill. 610, 160 N. E. 226 (1928).

MASTER AND SERVANT—SERVICES AND COMPENSATION—WHETHER OR NOT REFUSAL OF UNION WORKER TO ACCEPT NONUNION EMPLOYMENT DISQUALIFIES FOR UNEMPLOYMENT COMPENSATION—In the recent Ohio case of *Chambers v. Owens-Ames-Kimball Company*,<sup>1</sup> plaintiff was an unemployed union carpenter drawing benefits under the local Unemployment Compensation Act.<sup>2</sup> Being able to work and available for work, as required by the pertinent provision of the statute,<sup>3</sup> he was referred to a nonunion job as a carpenter. He refused the proffered employment on the ground that, as acceptance of the nonunion job would violate the rules of his union,<sup>4</sup> and would subject him to expulsion,<sup>5</sup> he was excused from accepting the employment by a statutory provision<sup>6</sup> which provided that an individual shall not lose the right to benefits by reason of a refusal to accept new work, if, "as a condition of being so employed," he would be denied the right to retain his membership in the union and to observe its lawful rules. The Board of Review of the Bureau of Unemployment Compensation interpreted "condition" to refer to restrictions and qualifications contained in the offer of employment made by the employer to the prospective employee, and did not mean "result" of being so employed as plaintiff contended. From an order suspending the employment benefits, plaintiff appealed to the Common Pleas Court, where the order of the administrative tribunal was affirmed. The Court of Appeals reversed the judgment and remanded the cause,<sup>7</sup> and the case came before the Ohio Supreme Court upon motion to certify the record of the intermediate court. The Supreme Court, two justices dissenting, reversed the judgment of the Court of Appeals and affirmed that of the Common Pleas on the ground that "condition," as used in the statute, was the equivalent of "requisite" or "requirement," and

<sup>1</sup> 146 Ohio St. 559, 67 N. E. (2d) 439 (1946). Zimmerman, J., wrote a dissenting opinion, concurred in by Bell, J.

<sup>2</sup> Ohio Gen. Code, § 1345-1 et seq., 119 Ohio Laws 836.

<sup>3</sup> *Ibid.*, § 1345-6 a (4).

<sup>4</sup> § 7, ¶ C of the trade rules of the local union provided that no members "will be permitted to work on jobs where nonunion carpenters are working, or for employer [sic] who employs nonunion carpenters." See 146 Ohio St. 559 at 560, 67 N. E. (2d) 439 at 440.

<sup>5</sup> The union rules provided that any "officer or member who wilfully . . . violates the trade rules of the locality in which he is working . . . may be fined, suspended or expelled, as the local union may decide." See 146 Ohio St. 559 at 560, 67 N. E. (2d) 439 at 440.

<sup>6</sup> Ohio Gen. Code, § 1345-6a(1), 119 Ohio Laws 836, declares that "No individual otherwise qualified to receive benefits shall lose the right to benefits by reason of a refusal to accept new work if: (1) As a condition of being so employed, he would be required to join a company union, or to resign from or refrain from joining any bonafide labor organization, or would be denied the right to retain membership in and observe the lawful rules of any such organization."

<sup>7</sup> 44 Ohio Law Abs. 146, 62 N. E. (2d) 496 (1945).



that to hold otherwise would permit the statute to operate in an unconstitutional manner through the discrimination that would result by granting benefits to a union worker while denying them to a nonunion worker under similar circumstances.

State unemployment laws generally provide that an individual, to be eligible for benefits, must be able to work and must be available for work; and that an individual shall be ineligible for benefits if he has failed, without good cause, to accept suitable work when the same is offered. A clause usually enumerates a number of factors which shall be considered when determining the suitability of work. In addition to these, all state laws contain a clause, corresponding to the so-called "labor standards provision" of the Internal Revenue Code,<sup>8</sup> which in substance provides that "Notwithstanding any other provisions of this Act, no work shall be deemed suitable and benefits shall not be denied under this Act to any otherwise eligible individual for refusing to accept new work . . . (c) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization."<sup>9</sup>

One author, when interpreting this provision, has stated that where the employee would be forced to resign from a union, he would not be disqualified from receiving benefits if he refused the employment; but where he would be expelled from the union, disqualification will follow, for the expulsion is a result of, and is not required as a condition to, being employed. He has recommended, however, that regardless of the reasonableness or unreasonableness of the union rule, a finding should be made that the individual had good cause for refusing the employment, since loss of status is a substantial harm to him.<sup>10</sup>

The decision in *Barclay White Company v. Unemployment Compensation Board of Review*<sup>11</sup> accords with this recommendation, for the claimant there, referred to a job as a ship's carpenter, refused the employment after notice by the secretary-treasurer of the union that acceptance of the referral would result in the member's suspension. It was held that although the work was suitable within the meaning of the act, the claimant refused it with good cause and was therefore not disqualified from benefits. The court said that the rights which membership in a union confers upon its members constitute property so valuable that equity will restrain against their impairment.

<sup>8</sup> 26 U. S. C. A. § 1603(a) (5).

<sup>9</sup> See, for example, Ill. Rev. Stat. 1945, Ch. 48, § 223(c) (2).

<sup>10</sup> A. M. Menard, "Refusal of Suitable Work," 55 Yale L. J. 134 (1945), particularly p. 143.

<sup>11</sup> Pa. Super. Ct., 1946, CCH Unemployment Insurance Service ¶ 8140.

Of a contrary tenor, however, is the decision in *Bigger v. Unemployment Compensation Commission*.<sup>12</sup> There, plaintiff, an unemployed union painter, declined a nonunion job and justified his refusal, among other reasons, by reliance on the non-disqualification clause in the Delaware Act. He contended that the words "condition of being employed" should be interpreted to mean a condition which inheres in the entering upon or carrying out of the employment, as distinguished from a condition imposed by an employer. The court, holding the employment to be suitable and denying compensation, said that the interpretation sought by the plaintiff could not be attained by judicial construction, but that resort must be had to legislative sanction. It also pointed out that the phrases "resign from" and "expelled from" are not analogous, but opposed to each other.

In a number of other instances, courts in passing upon the justification of a refusal to work, have as a rule denied benefits on the ground that the claimant was not available for work.<sup>13</sup> Thus in *Huiet v. Schwob Manufacturing Company*<sup>14</sup> the claimant left her job to follow her husband to a military camp, where she was unsuccessful in finding employment. Upon notice of a claim for benefits, her former employer advised that her former position was still open. She refused to return and was disqualified on the ground that she was not available for employment previously held. In *Mills v. South Carolina Unemployment Compensation Commission*<sup>15</sup> the applicant was a married woman who had been employed on the third shift. Desiring to devote some time to her family, she refused to work on shifts other than the first or second. The court held that limited availability for work disqualified her from benefits. Likewise in *Kut v. Albers Super Markets, Inc.*,<sup>16</sup> the applicant, a member of the orthodox Jewish faith, refused Saturday employment and was disqualified from benefits on the ground that he was not available for work.

These latter cases illustrate the decision that may be expected when the refusal is a matter of independent choice and is not dictated by considerations imposed from without. In the instant case, however, the plaintiff was not at liberty to accept the nonunion employment without risk of serious consequences. In view of the fact that courts have upheld the right of labor unions to prohibit their members from working with

<sup>12</sup> 46 A. (2d) (Del. Super. Ct.) 137 (1946).

<sup>13</sup> See the cases collected in an annotation to *Fannon v. Federal Cartridge Corporation*, 219 Minn. 306, 18 N. W. (2d) 249 (1945) to be found in 158 A. L. R. 396.

<sup>14</sup> 196 Ga. 855, 27 S. E. (2d) 743 (1943).

<sup>15</sup> 204 S. C. 37, 28 S. E. (2d) 535 (1944).

<sup>16</sup> 76 Ohio App. 51, 63 N. E. (2d) 218 (1945), noted in 24 CHICAGO-KENT LAW REVIEW 281 (1946).

nonunion men and to enforce such rules through fines or expulsion,<sup>17</sup> it is submitted that the result reached by the instant case is not satisfactory from the hapless employee's standpoint, for he is, as it were, caught in the middle between conflicting alternatives. The court, it seems, could well find that, whether the loss of union status is demanded as a condition of employment or comes as a result of the employment, the employee had good cause for refusing the tendered work. The only other alternative is to deny the power of unions to make and to enforce rules prohibiting their members from accepting nonunion employment.

It is interesting to note, in this connection, that the Illinois Unemployment Compensation Act<sup>18</sup> contains a non-disqualification clause similar to the federal labor standards provision.<sup>19</sup> Although not judicially construed as yet, the decision of the Board of Review in the matter of *Dunbar v. Biggs*<sup>20</sup> is typical. There, the claimant, a steam fitter, was referred to a contractor who had not qualified under the rules of the union to which the employee belonged. Informed by his union that he would be subject to disciplinary action if he accepted the employment, the claimant did not report for work. It was held that there was good cause for refusing the work, for the principle seems to be established in Illinois, at least to the Director's satisfaction, that work is not suitable if its acceptance will jeopardize the employee's union relations, especially where the main reliance for a livelihood is placed on such an affiliation. However, since the most recent employer is a party to the determination of the claimant's eligibility for benefits,<sup>21</sup> and can appeal to the courts from an adverse ruling after his administrative remedies are exhausted,<sup>22</sup> the matter may yet be made the basis of judicial determination in this state.<sup>23</sup>

J. E. GALT

<sup>17</sup> *Cohn & Roth Electric Co. v. Bricklayers', etc., Local U. No. 1*, 92 Conn. 161, 101 A. 659, 6 A. L. R. 887 (1917); *Bossert v. Dhuy*, 221 N. Y. 342, 117 N. E. 582, Ann. Cas. 1918D 661 (1917).

<sup>18</sup> Ill. Rev. Stat. 1945, Ch. 48, § 217 et seq.

<sup>19</sup> *Ibid.*, § 223(c) (2).

<sup>20</sup> See Decision No. 46-BRD-425 (46-RD-1800), May 2, 1946.

<sup>21</sup> Ill. Rev. Stat. 1945, Ch. 48, § 225(b).

<sup>22</sup> *Ibid.*, § 230.

<sup>23</sup> The employer in *Biggs v. Dunbar* is now seeking judicial reversal of the decision of the Board of Review. See case No. 46C-7058, Circuit Court of Cook County, Illinois.