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Forum Juridicum: The Louisiana Judiciary

Hon. John T. Hood Jr.

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Forum Juridicum

The Louisiana Judiciary*

Hon. John T. Hood, Jr.†

One of the announced purposes of this Law Day ceremony is to honor L.S.U. Law School alumni who now hold or who have held judicial positions in our state and federal courts. In keeping with that purpose, and with the thought that you would be interested in hearing something of the historical background of our present judicial system, I have selected as the subject of this address, "The Louisiana Judiciary."

The history of our present method of dispensing justice is as colorful and as fascinating as is the history of Louisiana. Many changes have taken place in the organization and jurisdiction of our courts, in methods of selecting judges, in the qualifications required for service on the bench, in terms of office, in the places where court is held, in trial procedures, and in many other particulars. At various times the control of our government has been in the hands of three different nations. Two wars and a period of reconstruction have had their effect on our laws. It seemed to me that a review of these facts would be interesting and would give us a better understanding of the reasons underlying the creation of some of the courts and the procedures which we now have. I believe it also will serve to make us more conscious of the responsibility which rests upon all of us, as lawyers and judges, to maintain an efficient and honorable judiciary.

A little more than two hundred and fifty years ago, when the French first established a military settlement on the west bank of the Mississippi River, Louisiana was a vast, thinly populated, unsettled wilderness. For more than sixty years thereafter all legislative, administrative and judicial authority emanated from Paris. Most of the settlers during that period were of French

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† Judge, Fourteenth Judicial District Court of Louisiana; President, Louisiana State University Alumni Federation; President, Louisiana District Judges Association.

descent; they were familiar with the laws which governed them, and by and large they were content with the judicial system provided by those laws, with the courts, the judges and with the methods then used for the enforcement of the rights and the redress of wrongs.

Then in 1762 the control of Louisiana passed to the Spanish who immediately abolished all previous laws and methods of dispensing justice and substituted in their stead other laws and methods which were unfamiliar to, and extremely unpopular with, the steadily increasing number of inhabitants. A rebellion was threatened, the leaders of the rebellion were cruelly punished, hoards of Spanish speaking immigrants began arriving, and for forty years thereafter all governmental functions, including those ordinarily performed by the judiciary, emanated from the Cabildo. Justice was dispensed largely through administrative officers called Alcaldes, and by military and ecclesiastical judges, called *fuero militar* or *fuero eclesiástico*, by commandants, by syndics, and by Perpetual Regidores.

France did not have an opportunity to reestablish its form of government during the short period of French control immediately prior to the Louisiana Purchase, so when the Louisiana Territory was acquired by the United States in 1803, Congress was presented with the difficult task of setting up a government for this extremely large area, consisting of a mixture of French, Spanish and English speaking peoples who for forty years had been living under a form of government which was entirely different from that of any other portion of the United States, and a judicial system which was extremely unpopular with most of the inhabitants.

W. C. C. Claiborne, as one of the commissioners appointed by President Jefferson for this newly acquired territory, was vested with practically all of the dictatorial powers formerly exercised by the Spanish Governor-General, and thus Claiborne became the first Supreme Judicial Tribunal in the entire area included in the Louisiana Purchase. He alone was the court of last resort in all matters, both civil and criminal. Claiborne was a Virginian who had been admitted to the bar in Tennessee. At the time of his appointment he was unfamiliar with the area and the people. He was only twenty-eight years of age, and it is remarkable that a person so young was able to assume the tremendous responsibilities which rested upon his shoulders and to

discharge those responsibilities with such wisdom and honor. Claiborne liked to refer to himself as the "Supreme Court," but history has recorded this original one-man tribunal as the "Governor's Court."

In 1804, when the southern portion of the Louisiana Purchase was sliced off and designated as the Territory of Orleans, a Superior Court, consisting of three judges, was established, and this Superior Court replaced Claiborne as the highest court in the territory. Eight years later Louisiana was admitted into the Union as a state and the State Supreme Court was created.

The judicial system which was set up by the framers of the Constitution of 1812, however, did not prove to be popular with or satisfactory to the delegates who attended later conventions and, in fact, no satisfactory judicial system appears to have been discovered by any of the succeeding conventions, because our court structure has been revised time and time again. During the period of a little more than the one hundred and forty years which has elapsed since Louisiana became a state, ten constitutional conventions have been held, and ten new constitutions have been adopted. The first Constitution adopted in 1812 was a brief, streamlined, ultraconservative document, which was unique in that it was probably the shortest state constitution then in existence. Our present Constitution is unique in that it is the longest. Oddly enough, however, that first Constitution, the shortest this state has ever had, remained the basic law of Louisiana for thirty-three years, and our present Constitution, the longest in existence, has remained in effect for that same period of time. Not a single one of the other eight constitutions remained in existence that long. One continued in effect for twenty-one years, but others have lasted only eleven years, nine years, seven years, four years, and in one instance only three years elapsed between constitutional conventions.

In all but one of these conventions complete revision of or material changes in the judicial system of the state have been accomplished. At various times legal disputes have been handled and disposed of in Louisiana by tribunals known as Parish Courts, County Courts, a Superior Court, the Governor's Court, a Court of Common Pleas, a Commercial Court, a Special Parish Court for Orleans, Criminal Courts, a Probate Court, a Provost Court, a Provisional Court of Louisiana, and a Court of Errors and Appeals, as well as the types of courts with which we are now fa-

miliar, and those which existed under the control of the French and Spanish governments. In 1825 there was created a "City Court of New Orleans" composed of two presiding judges and five associate justices. The courts with which we are now familiar, such as the Supreme Court, the Courts of Appeal, District Courts and Justice of the Peace Courts, have been designated by those names for many years, but even in those courts many changes in organization and jurisdiction have taken place from time to time with the adoption of new constitutions.

The first Supreme Court consisted of three members. In 1839 the number was increased to five. Six years later it was reduced to four. Shortly thereafter it was again fixed at five members, and it was not until 1921 that the number of justices on the Supreme Court was increased to seven. The senior member of the first Supreme Court was known as the "Presiding Judge," and the other members were designated simply as judges. It was not until 1845 that the words "Chief Justice," "Associate Justice" or "Justice" were used in designating the members of our highest court.

Just before Louisiana was admitted into the Union as a state the Superior Court of the Territory of Orleans was required to hold sessions in each of the twelve counties in the territory, and the county judge was compelled to attend each such session held in his county. And then for almost ninety years after Louisiana became a state, the State Supreme Court was required by law to go "on circuit." At the very beginning the state was divided into the Eastern and Western Districts of Appellate Jurisdiction. The Supreme Court was required to hold court nine months of the year in the city of New Orleans for the Eastern District, and to hold court during the remaining three months of each year in Opelousas for the Western District. The idea of a court vacation did not occur to lawmakers until many years after that time. Later the number of months required for holding court in New Orleans was reduced, and the Louisiana Supreme Court for many years held regular sessions in Opelousas, Alexandria, Natchitoches, Donaldsonville, Rapides, Pointe Coupee, and Monroe, as well as in New Orleans. It was not until 1898 that the Supreme Court was relieved of the necessity of riding a circuit.

The framers of the first Constitution included in it a requirement that the judges of all courts must adduce reasons on which the judgment is founded, and also that they must "cite the

particular law on which the decision is based as often as it may be possible to do so." This requirement, and particularly the provision that the judge must cite the particular law on which the decision is based, was bitterly opposed by the judges of the Supreme Court, but their opposition only prodded the legislature into adopting a statute which was even more obnoxious to them. This statute, passed in 1821, required *each* and *every* judge of the Supreme Court to deliver a *separate* and *distinct* opinion in each case, "seriatim, commencing with the junior judge of such court," which meant that each judge in the separate opinion which he thus was required to hand down also had to cite the particular law on which the decision was based, when possible. This remained the law for a number of years, but it was fulfilled in a most unexpected way. One judge wrote the opinion setting out reasons for judgment, and each of the other judges simply wrote, "I concur in this opinion for the reasons adduced." Our reports will show many cases, however, in which each judge actually delivered a separate and distinct opinion in compliance with this statute. Every succeeding state constitution has contained a provision that judges must adduce reasons on which judgments are found. In 1864, however, the constitution was changed to require that judges must cite the particular law on which the decision is based only when it is *advisable* to do so. A few years later the word "*advisable*" was changed to "*practicable*," and finally in 1921, the framers of that Constitution saw fit to provide simply that "the judges of all courts shall *refer to the law* and adduce the reasons on which every definitive judgment is founded." In one of the constitutional conventions where this matter was debated, a delegate who favored the requirement that the judge cite the particular law on which the decision is based stated that "only the Lord could point out the law on which some judgments are based, and even He occasionally was constrained to pass the point on to the ruler of the subordinate kingdom."

The use of juries has generally been authorized and in many instances was required in civil matters. It is interesting to note that for a period of approximately five years the law required that the Superior Court try all *appeals* by jury, and this was done. In spite of the fact that a jury was used in hearing appeals, the Superior Court in some manner managed to review all of the facts. One of the earliest decisions rendered by the Louisiana Supreme Court in 1813 was one overruling a motion for the trial of an appeal by jury.

In the early days it was necessary for the courts to make frequent use of Spanish, French and English interpreters. These interpreters would translate the testimony of witnesses and the charge of the court to the jury, but they did not interpret the arguments of counsel. It was common practice to excuse all jurors who did not understand the language being used by the lawyer who was arguing the case, and to permit those jurors to retire to the jury room while that argument was being presented if they desired to do so. Even though some of the jurors often did not hear all of the arguments advanced, the juries somehow managed to arrive at verdicts.

The debates which took place in some of the constitutional conventions are interesting and enlightening. The delegates did not hesitate to criticize the courts or any other officials if they saw fit to do so. In some instances the courts which were then in existence were praised and in others they were severely berated. I will mention some of the more unpleasant and uncomplimentary statements made about the courts during the debates which took place.

In the 1845 convention a proposal was made to the effect that parish courts be abolished because of the unsatisfactory way these courts had handled probate matters. Amaza Reed, a delegate from East Baton Rouge Parish, castigated the parish courts bitterly. He was opposed, he said, to any system "which made the parish judge first, last and best heir to every estate in the country. Thousands of widows and orphans," he argued, "have suffered from this miserable system which has cursed the country for years, while certain lifetime dignitaries have reveled in luxury and ill-begotten wealth."

Grymes, of New Orleans, declared that parish courts were created "merely to provide for certain individuals who wished to be billeted upon the public expense."

And Brent, of Rapides Parish, compared the parish judge to the Spanish Alcaldes or commandants who, he said, "redressed the wrongs complained of, or, too frequently, inflicted greater wrongs, according to the influence of the parties who came before them."

On that particular issue the arguments of these delegates prevailed, and the parish courts were abolished by the constitution adopted at that convention. The victory was short-lived,

however, because only a few years later the parish courts were re-established with the adoption of a new constitution, and they formed a part of our judicial system for at least eleven more years.

Prior to 1845, all judges were appointed. In arguing that they should be chosen by popular election the East Baton Rouge Parish delegate said:

"I assert without fear of successful contradiction, that our judiciary has become one of the most corrupt and irresponsible bodies of civil organization, and it is high time to cleanse the Augean stables by turning another Alpheus through the filthy apartments, to restrain their untoward career, by letting the voice of the people declare 'thus far shalt thou go, but no farther'."

In ridiculing the argument advanced to the effect that the selection or appointment of judges should be the responsibility of the Chief Executive, the Rapides Parish delegate declared:

"The responsibility of the executive! A more unmeaning jingle of words never smote upon the human ear. What is executive responsibility? Where is it? How is it ascertained and how is it enforced? The executive responsibility is moonshine, nothing but moonshine. . . . You might as well attempt to gather in a basket the fog that hovers over the bed of the Mississippi, as to attempt to locate this floating and undiscoverable responsibility of the chief executive."

In the 1845 convention, however, the delegates by a vote of two to one decided that the selection of all judges, except justices of the peace, should continue by appointment rather than by election. Seven years later a new constitution was adopted which provided just the opposite, that all judges should be selected by popular election. Twelve years after that, in 1864, the selection of judges again was returned to an appointive basis. Since 1898 our constitutions have provided that all judgeships are elective. It is apparent that both methods of filling judicial offices have been tried several times in Louisiana.

The salaries which have been paid to the judges of our highest court have always been somewhat below the income of the average practicing attorney. This has not been due to oversight on the part of the delegates to the conventions, because in most cases the amounts to be paid as salaries were fixed only after

heated debates. In one convention, for instance, the proposal was made to fix the salary of the Chief Justice at \$7,000 and the salary of each Associate Justice at \$6,500. Isaac T. Preston, of New Orleans, led the fight in opposing these enormous salaries. He argued that the salaries should not be fixed at a figure which would attract a lawyer who makes money, because a money-making lawyer, he contended, would not be a good judge. He proceeded to classify into three different classes all lawyers who make money from the practice of law, and then he very meticulously pointed out that all lawyers who are included in each such classification possess characteristics which disqualify them for judicial positions. He further argued that the salaries of Supreme Court judges should be fixed at such a figure that they would be compelled to live in modest apartment houses rather than in the "luxurious St. Louis or St. Charles Hotels." As a result of the determined fight which he presented, the convention fixed the salary of each member of the Supreme Court at a figure which was \$1,000 less than that which had been proposed. Ironically, the same Isaac T. Preston who led the fight for the lower salaries, was appointed as an Associate Justice of the Supreme Court shortly after that constitutional provision was adopted.

A word should be said about the circumstances which led up to the creation of the courts of appeal. Long prior to 1879 the Supreme Court had become overburdened with appeals, largely because of the low jurisdictional amounts fixed by the various constitutions. To remedy this situation, the 1879 Constitution divided the state into six court of appeal districts, and for each of said districts there was created a court of appeal consisting of two judges, who were elected by both houses of the legislature rather than by popular vote.

The popularity of the new courts of appeal did not endure. The judges laboriously rode their circuits, often under the most trying conditions, but the cry was soon raised that these judges had nothing to do. So eighteen years later, the drafters of the 1898 Constitution practically abolished all courts of appeal outside Orleans Parish as being distinct in personnel. Instead of separate judges for those courts, the Constitution provided that in each of the original court of appeal districts two district judges should be assigned temporarily to serve as an appellate court to hear appeals as well as to handle their own district court

work, except that they could not hear appeals in cases arising in their own districts.

This arrangement also proved to be unsatisfactory, so in 1906 separate courts of appeal were reestablished. The Constitution was amended during that year to create three courts of appeal, consisting of three judges each, and substantially that same provision has been continued in the Constitution to this date.

A discussion of the Louisiana judiciary would not be complete without mentioning at least some of the eminent jurists who have preceded those of us who are here today. They are responsible in a large measure for the dignity which our courts have acquired and the respect which they have commanded through the years.

In 1804, President Jefferson appointed as the first Superior Court of the Territory of Orleans: Duponceau of Pennsylvania; Kirby of Connecticut; and Prevost of New York. Duponceau declined the appointment. Kirby accepted and began the long and difficult trip by stagecoach, wagon and by boat from Connecticut to New Orleans to assume his new position. The hardships occasioned by the trip proved to be too much for him, however, and he died in Mississippi almost within a stone's throw of his destination.

John Bartow Prevost of New York was the only one of the appointees who accepted and arrived in New Orleans to assume his new duties. He organized and convened the first Superior Court in the Cabildo in New Orleans in 1804, with himself as its only judge. He was thirty-four years of age at that time. The other vacancies were never filled and Prevost continued to preside as the only judge of the highest appellate court in the territory until he resigned about two years later. Judge Prevost was born in the West Indies, the son of a British officer and later the step-son of Aaron Burr. He retired from the bench in 1806 because he was unable to support himself and his large family on the meager salary which the office paid. He continued to practice law in New Orleans for many years, however, and it was he who brought forward the first business before the Supreme Court of the State of Louisiana after that court was created.

The name of Francois Xavier Martin is familiar to all lawyers

and to all students of Louisiana history. In 1810 he was appointed as one of the three judges of the Superior Court of the Territory of Orleans.

Judge Martin has been described as being below medium height, with a large head, a Roman nose and a thick neck. He was stern, silent, serious, dogged and industrious. There was never a gleam of humor or sentiment in his productions, but he often rose to the sublime in writing his opinions. He was a noted phrase-maker, and his views of life were as fixed as the North Star. The story of his life is amazing and almost unbelievable.

He was born in France, and at the age of twenty-two he came to the United States and then began learning the English language while working as a typesetter in a printing establishment in North Carolina. Within three years after arriving in America, he not only had learned the English language, but had printed a number of books, was editor of a daily newspaper, and was admitted to the practice of law. Thereafter, he issued a digest of North Carolina cases and laws; he translated Pothier on Obligations; wrote a history of North Carolina, was author of Martin's *Louisiana Digest*, and Martin's *History of Louisiana*. He served as a member of the North Carolina legislature, and was serving as a judge of the Mississippi Territory at the time of his appointment to the Superior Court of the Territory of Orleans in 1810. He also served as the first Attorney General of the State of Louisiana until 1815, and then at fifty years of age was appointed as a judge of the State Supreme Court, and he continued to occupy that position for thirty-one years, a record which has been exceeded only by one other person, the late Chief Justice Charles A. O'Niell. He actually was legislated out of office by the adoption of the 1845 Constitution, but he died before the end of that same year. His latter years on the bench were marred by total blindness and by certain disagreeable personal eccentricities.

Judge Martin was a brilliant man and a learned judge. He is the author of a number of opinions on some of the greatest questions that any American court up to that time had grappled with, laying foundations to which the ensuing years merely added a superstructure. But Judge Martin made another invaluable contribution to the State of Louisiana. Immediately after his appointment to the Superior Court in 1810, he set about to

prepare for publication the cases which were argued in his time and those argued immediately preceding his appointment. The first volume was printed in 1811, and he continued to publish these reports at his own expense and under his personal supervision for twenty years. The legislature made no provision for publishing the opinions of the Supreme Court until 1830, so had it not been for Judge Martin's foresight, industry, learning and devotion to his chosen profession, we would not have available for our constant use today the reports which we refer to as *Martin Old Series* and *Martin New Series*.

Just a few months before Judge Martin's death occurred, Edward Douglass White was born in the rich Evangeline country of Louisiana. His ancestors for two generations had been prominent in Louisiana governmental affairs. His father was a lawyer and a farmer, and was unusually successful in both fields. He served the people of this state as a district judge, as a representative in Congress for three or more terms, and eventually he was elected and served four years as Governor of the State of Louisiana.

When the younger Edward Douglass White was only sixteen years of age, he witnessed the people of the North and those of the South gather in opposing armies, and like many other boys of that age, he entered the ranks as a private soldier in the Confederate Army. He made a good soldier, and even though he was a teen-age boy, he bore the hardships of a seasoned fighter, including sickness and capture by the enemy. He was paroled at Port Hudson in 1863 while seriously ill. In spite of his illness and extremely high fever he began the long and toilsome journey across country by foot to his home in Lafourche Parish. He fell by the wayside, however, and for some time remained on the verge of death, but eventually recovered sufficiently to be returned to his home. After regaining his health, he resumed his self-education, and two years later began the study of law in the office of Edward Bermudez on Royal Street in the heart of the Vieux Carre in New Orleans. He received his license to practice law in 1868, and opened a law office in New Orleans.

He was a brilliant lawyer and soon built up an enviable practice, and then he was drafted into public service as a state senator. When he was thirty-three years of age, he was appointed by the Governor as an Associate Justice of the Supreme Court of Louisiana. Although he was the youngest man on the court at

that time, he quickly dispelled any disparity in their ages by the first opinion which he wrote. It was a small case, but it required for its decision an intimate knowledge of the history and sources of Louisiana law.

After serving a little more than one year as Associate Justice of the State Supreme Court, however, Justice White was effectively removed from office by the adoption of the Constitution of 1879, and he returned to the practice of law. He was again drafted into public life, however, and became United States Senator in 1891. Three years later Senator White of Louisiana was appointed by President Cleveland as an Associate Justice of the United States Supreme Court.

In 1910, just after the death of Chief Justice Fuller, President Taft, himself a lawyer of distinction and a member of a different political party, commissioned Justice White as Chief Justice of the Supreme Court of the United States, and Edward Douglass White served in that capacity with distinction until his death in 1921. He is the only Louisianian who, up to this time, has held that highest of all judicial positions. The opinions which he wrote, both as Associate Justice and as Chief Justice of that court, confirm the reputation which he quickly earned for clarity of thought and for keen intellect. It has been said that when Chief Justice White spoke from the bench it was with a dignity and force which made it seem that the delegated constitutional authority of the United States had been given voice through his person.

I will mention briefly only a few other distinguished jurists who have served in Louisiana courts. Edward Bermudez, under whose tutorship Chief Justice Edward Douglass White studied law, immediately succeeded his own pupil as Justice of the State Supreme Court and served as Chief Justice of that court for twelve years. He was a scholar and was regarded as an authority on civil law and Louisiana history.

Judge Pierre Auguste Charles Bourisgay Derbigny was appointed as a member of the first State Supreme Court. In addition thereto he served as Mayor of the City of New Orleans, member of the first Louisiana House of Representatives, Secretary of State, one of the revisors of the 1825 Civil Code, and as Governor of Louisiana. He also was a prime factor in obtaining the admission of Louisiana into the Union, and he operated the first ferry across the Mississippi River at New Orleans.

Judge Alexander Banks George, who served as a judge on one of the first Courts of Appeal, became paralyzed to such an extent that his lower limbs were useless. Yet he rode his circuit regularly in a surrey, accompanied by a large Negro servant who would carry him bodily to and from the courtroom.

Chief Justice Francis T. Nicholls served as a member of the Supreme Court for nineteen years. During the Civil War he lost an eye, foot and arm while serving as a Major General in the Confederate Army. Prior to his appointment to the Supreme Court he served two separate terms as Governor of Louisiana. His first election was in 1876 when he overthrew the "carpetbag" rule. He again was elected as Governor in 1889 on a platform which pledged the overthrow of lotteries in Louisiana, and that pledge was carried out during his term of office.

Chief Justice Thomas Courtland Manning served a short time as an Associate Justice of the Supreme Court, and after an interval of twelve years returned to that court as its Chief Justice. He served as a Brigadier General in the Confederate Army, as Vice-President of the Tilden Nominating Convention, was appointed United States Senator, and died while serving as United States Minister to Mexico. He edited and published "Manning's Unreported Cases."

Joseph A. Breaux, who served as the ninth Chief Justice of the State Supreme Court, was the compiler of "Breaux's Digest."

Many others who have distinguished themselves as jurists in Louisiana could be named if time would permit me to do so. I do not doubt but that a number of those who won such places of honor in our judicial history bear some blood relationship to many of you who are here today. And neither is there any question but that the present Chief Justice of our State Supreme Court and many of the Justices and Judges of our time will be regarded by future historians as great jurists and as great statesmen.

In this address, however, I have attempted to refer only to a few of the earlier jurists who played a material part in pioneering our judicial system.

No reference has been made to the effect of the Civil War and the Reconstruction period upon the development of our court structure because many addresses as long as this could be devoted to that subject.

While Louisiana has been unusually fortunate in having so

many men of wisdom, character and ability as members of its early courts, it must be conceded that all persons holding judicial positions during that period did not measure up to those standards. The fact that they did not do so, however, has strengthened, rather than weakened, our judicial system because it has served to point out its weaknesses and thus afford an opportunity to make necessary corrections.

The fact that our court structures and judicial procedures have been frequently revised by the adoption of new constitutions, constitutional amendments and legislative acts, may indicate some instability; but I am inclined to feel that on the contrary it indicates progressiveness, a readiness and a willingness to discard the old, unworkable or bad features of our laws, and to adopt new laws which eliminate the undesirable provisions of the old.

A review of this kind causes me to realize more forcefully that the building of our judicial system is a project which is never actually completed. It is a continuing process. We have been provided with a solid foundation but we are still constructing the building, and those of us who are lawyers and judges today are the skilled workers who are performing important tasks in the erection of this structure. Everything we do in the field covered by our chosen profession has the effect of adding another brick to this edifice, and the manner in which we lay these bricks will determine whether the walls will be straight and strong. And so I close with the challenge that we should use care in laying these bricks, so that the structure of the Louisiana judiciary will be sound.

Federal Gift Tax on Life Insurance in Louisiana: A Critique of Revenue Rulings 48 and 232

*Edward T. Roehner and Sheila M. Roehner**

Revenue Rulings 48 and 232, handed down by the Commissioner of Internal Revenue in 1953,¹ hold that if a married man

* Members, Bar of New York City.

1. Rev. Rul. 48, 1953-1 CUM. BULL. 392; Rev. Rul. 232, 1953 INT. REV. BULL. No. 22 at 22.