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Constitutionality of North Dakota's Federalized State Income Tax Introduction

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prevalent in our day. However, the decisions reveal that definite guidance for the application of the doctrine is sadly wanting. The courts are generally in agreement on the importance that the origination of criminal intent is with the defendant, but there is little certainty as to whether the criminal record of the accused can be used in determining reasonable cause.

Extreme positions have been taken in regard to the defense. Tennessee has rejected the defense completely.[40] Colorado has held that authorities who entrap suspected violators can be convicted of conspiracy.[41]

It appears to the writer that the most realistic approach is that of Mr. Justice Roberts, as espoused in the concurring opinion of *Sorrells*. Acceptance of this view, which is not law today, would limit consideration of conduct solely to that of the police and thus give impetus to what the writer feels is the true meaning of entrapment; it would allow court determination of the issue as a question of law, and would not depend upon a defendant's record for conviction on a particular charge. Travel on the road to certainty must be made in the field and this view would provide at least a suitable road map.

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CONSTITUTIONALITY OF NORTH DAKOTA'S FEDERALIZED STATE INCOME TAX

INTRODUCTION

"Federalization" of state income tax law means that the provisions of the state law are made to conform, to a greater or lesser degree, to the provisions of the federal Internal Revenue Code of 1954.[1] The need for this conformity is but one facet of the

40. Thomas v. State, 182 Tenn. 380, 187 S.W.2d 529 (1945); Goins v. State, 192 Tenn. 32, 237 S.W.2d 8 (1951).
41. Reigan v. People, 120 Colo. 472, 210 P.2d 991 (1949).

1. Generally, see Brabner-Smith, *Incorporation by Reference and Delegation of Power—Validity of "Reference" Legislation*, 5 Geo. Wash. L. Rev. 198 (1937); Kanter, *A Critique of Some Federal, State, and Local Tax Coordination Techniques*, 29 Ind. L.J. 28 (1953); King, *State Constitutions Forbidding Incorporation by Reference*, 16 B.U.L. Rev. 625 (1936); Lockyer, *Kentucky Income Tax Compared With Federal Income Tax*, 42 Ky. L.J. 368 (1954); Lockyer, *History of the Kentucky Income Tax*, 43 Ky. L.J. 457 (1955); Mermin, *"Cooperative Federalism" Again: State and Municipal Legislation Penalizing Violation of Existing and Future Federal Requirements: I*, 57 Yale L.J. 1, 19 (1947); J. Miller, *The New Iowa Income Tax Law*, 41 Iowa L. Rev. 85 (1955); P. Miller, *Proposal for a Federally-Based New York Personal Income Tax*, 13 Tax L. Rev. 183 (1958); Read, *Is Referential Legislation Worth While?*, 25 Minn. L. Rev. 261 (1941); Notes, 3 Geo. Wash. L. Rev. 482 (1935), 17 Montana L. Rev. 203 (1956); Annot., 42 A.L.R.2d 797 (1955); Annot., 166 A.L.R. 516 (1947); Address by Kenneth M. Jakes, Spec. Assistant Attorney Gen. for the N. Dak. State Tax Comm'r's Office, 1958 convention of the N. Dak. Soc'y of CPA's, October 4, 1958.

whole problem of uncoordinated taxation which faces today's taxpayer. He is taxed at a multitude of governmental levels and may be subject to income taxes levied by the federal government, two or more states,[2] and his municipal government.[3] Any substantial relief afforded him in ascertaining his tax liabilities is, it would seem, well worth any reasonable compromises found necessary.

I. FEDERALIZATION TECHNIQUES

ACTION IN OTHER STATES

The idea of federalization of state taxes, income and other, has found expression in the statutes of least twenty-six states[4] (besides North Dakota), Hawaii, the District of Columbia, and Alaska, when that state was still a territory. Federalization has taken many different forms, ranging from complete adoption of federal law by reference thereto, to the adoption, by whole statutes containing no reference to federal law, of one or more isolated portions of the IRC.[5] Kentucky,[6] Montana,[7] and Iowa[8] have statutes similar to Senate Bill 186, *infra* (which bill was modeled on the Iowa statute).[9]

ACTION IN NORTH DAKOTA

Senate Bill No. 186, introduced this year (1959) to the Thirty-Sixth Legislative Assembly of North Dakota,[10] is a federalization proposal.[11] The provisions of this bill here pertinent are:

Section 1. "Taxable income", with respect to fiduciaries, estates,

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2. See N.D. Rev. Code § 57-3804 (1943).

3. See N.D.H.R. 837, 36th Legislative Assembly (1959).

4. Ariz., Cal., Colo., Conn., Del., Ga., Idaho, Iowa, Kan., Ky., La., Md., Mass., Minn., Mont., N.J., N.Y., Okla., Ore., Pa., R.I., Tenn., Utah, Vt., Va., and Wis.

5. See, *e.g.*, Alaska Comp. Laws § 48-10-5 (Supp. 1953); Colo. Rev. Stat. § 138-1-62(2) (1953); Ga. Code Ann. § 92-3109(a) (Supp. 1958) [Compare with Int. Rev. Code of 1954, § 162(a).]; N.Y. Laws 1917 c. 726 as amended by N.Y. Laws 1918 c. 276 [N.Y. Consol. Laws Svc., Tax Law, art. 9-A, § 209 (1952), the present New York statute, is similar. In People *ex rel.* Barcalo Mfg. Co. v. Knapp, 227 N.Y. 64, 124 N.E. 107 (1919), the application and construction of the 1917 statute was litigated. Article 3, § 16 of the New York constitution, *infra*, was not discussed.]; Pa. Stat. §§ 3420b-20c (1935).

6. Baldwin's Ky. Rev. Stat. § 141.010 (Supp. 1958). The constitutionality of a similar statute, passed in 1936, does not seem to have been litigated. Re its construction and application, see, *e.g.*, Commonwealth *ex rel.* Allphin v. Borders, 267 S.W.2d 940 (Ky. 1954); Churchill Downs-Latonia, Inc. v. Reeves, 297 Ky. 835, 181 S.W.2d 398 (1944).

7. Mont. Rev. Code §§ 84-4905-06 (Replacement Vol. 1955).

8. Iowa Code Ann. tit. 16, §§ 422.4, 422.7, 422.9, 422.12, 422.32, 422.33, 422.35 (Supp. 1958).

9. 34 N. Dak. L. Rev. 388 (1958).

10. Senate Bill 186 was passed in the N. Dak. Senate [N.D.S. Jour., 36th Legislative Assembly 391 (daily ed. Feb. 13, 1959)]. It was then passed in the N. Dak. House of Representatives [N.D.H.R. Jour., 36th Legislative Assembly 841 (daily ed. Feb. 25, 1959)]. No official information is available at the time of writing on the action taken by the Governor. It is to be assumed that he has signed the bill into law.

11. The North Dakota State Bar Association has been interested in the federalization of North Dakota's income tax law since 1956 at least. At its 1958 meeting, the Association directed its Committee on Tax Laws to draft a federalization bill and have it presented to the 1959 session of the Legislative Assembly. See 34 N. Dak. L. Rev. 397 (1958). For the report of the Committee and a discussion by the Association, see *id.* at 342 and 387.

and trusts, is defined as "the taxable income as computed for federal income tax purposes under the United States Internal Revenue Code of 1954 as amended . . . ."

Section 5. For individuals, "the phrase, 'net income' means the adjusted gross income as computed for federal income tax purposes under the United States Internal Revenue Code of 1954 as amended, with adjustments."

Section 7. Deductions for individuals are " . . . the larger of the amounts defined as follows: (a five per cent optional standard deduction, or) the total of contributions, interest, taxes, medical expenses, child care expense, losses and miscellaneous expenses deductible for federal income tax purposes under the United States Internal Revenue Code of 1954 as amended" with adjustments. Where a couple files a joint federal return and separate state returns, the deduction of federal taxes paid " . . . shall be divided between them according to law."

The general effect of this bill is that to determine his state income tax liability, the individual starts with the adjusted gross income on his federal return. He makes the adjustments specified in the bill and arrives at his state net income. From this figure he subtracts the optional standard deduction or the total of his itemized federal deductions after making the specified adjustments thereto. The resulting figure is his state taxable income, to which he applies the state rates[12] to determine the tax payable.

II. CONSTITUTIONALITY
NORTH DAKOTA LAW

Article II, section 64 of the Constitution of North Dakota (hereafter referred to as "section 64") reads, "No bill shall be revised or amended nor the provisions thereof extended or incorporated in any other bill by reference to its title only, but so much thereof as is revised, amended or extended or so incorporated shall be re-enacted and published at length."[13] The constitutionality of Senate Bill 186 under this provision is the sole question considered here.[14]

The North Dakota decisions on section 64 are few and none are

12. N.D. Rev. Code § 57-3829 (Supp. 1957).

13. It is of practical interest that § 89 of the N.D. Const. reads in part, ". . . in no case shall any legislative enactment or law of the state of North Dakota be declared unconstitutional unless at least four of the judges [of the Supreme Court] shall so decide."

14. Two collateral questions not considered are whether there is an unconstitutional delegation of legislative power and whether Senate Bill 186 works an adoption of federal administrative rulings. Re the former, the courts have generally answered "no". Re the latter, see 34 N. Dak. L. Rev. 391 (1958).

squarely in point. A statute complete in itself,[15] which does not depend upon other statutes for the complete expression of the legislative purpose[16] is not in conflict with section 64 even though it modifies or amends other statutes by implication. In *Department of State Highways v. Baker*[17] the act in question, which referred to a prior act for certain definitions was held valid, the court stating that section 64 ". . . was not intended to require the re-enactment and publication at length of all definitions which might be employed in the construction of the law . . . ."[18] The court also had before it the question of the validity of incorporation by reference of both procedural and substantive provisions of a prior statute. The court did not decide these questions in terms of section 64. In its discussion, however, it implied that it would accept such an incorporation of procedural provisions but would reject an incorporation by reference of prior substantive law, stating at one point that section 64 ". . . was not intended to require the re-enactment and publication at length of . . . all details of procedure which might be required in carrying out the essential purpose."[19]

In considering these decisions and those which follow, an understanding of the meaning of the key words in section 64, *i.e.*, "revise", "amend", "extend" and "incorporate", is essential. The first three of these deal with the effect of the act in question on the prior act. "Incorporate", on the other hand, deals with the effect of the prior act on the act in question, in that the incorporation of a prior act has the effect of making its provisions an operative part of the act in question. It is not possible to extend the provisions of a prior act without, in one sense at least, amending the prior act.[20] In dealing with references to foreign law (as opposed to prior statutes of the forum) it must be remembered that no amendment or revision is possible. The power of the legislature in this situation is limited to the extension or incorporation of the foreign law.

It might be argued that section 64 is not applicable to anything but acts of the North Dakota Legislature (as opposed to federal or other-state legislation) where incorporation or extension by reference is concerned. Observe that an abridged version would read, "No bill . . . nor the provisions thereof (shall be) extended

15. State v. Fargo Bottling Works Co., 19 N.D. 396, 124 N.W. 387 (1910).
16. State *ex rel.* Gammons v. Shafer, 63 N.D. 128, 246 N.W. 874 (1933).
17. 69 N.D. 702, 290 N.W. 257 (1940).
18. *Id.* at 264.
19. *Ibid.*
20. Read, *supra*, note 1 at 280.

or incorporated in any *other bill* by reference . . . ." (Emphasis added.) The same might be said of the provisions of many other states. This precise question has not been litigated in North Dakota, but the other jurisdictions have not made a distinction between foreign and domestic law in this connection.[21]

The above analyses might be criticized as semantically shallow in that the real question is the intent of the framers of section 64. Unfortunately, neither the *Journal of the North Dakota Constitutional Convention* nor the *Debates of the North Dakota Constitutional Convention*[22] reveal anything of their intent. The only references to section 64 occur in the *Journal.*[23] They reveal only an orderly passage of the section, which elicited no comment, controversy or explanation. In the three North Dakota cases discussed above,[24] the court quoted, as have many other courts, a statement by Judge Cooley, then sitting on the Michigan high court, that "The mischief designed to be remedied was the enactment of amendatory statutes in terms so blind that legislators themselves were sometimes deceived in regard to their effect, and the public, from the difficulty in making the necessary examination and comparison, failed to become apprised of the changes made in the laws."[25] It must be remembered, however, that the Michigan constitutional provision, while it is in style similar to section 64, uses only the key words "revised, altered or amended" omitting "extended" and "incorporated", which latter key letters *are* used in section 64. And so we pass to a consideration of other-state constitutional provisions similar to section 64.

AMERICAN LAW GENERALLY

In the absence of a constitutional mandate such as section 64, legislation by reference is perfectly proper.[26] Thirty-six states have

21. See, *e.g.*, Wilentz v. Sears, Roebuck & Co., 12 N.J. Misc. 531, 172 Atl. 903 (1934); State v. Larson, 10 N.J. Misc. 384, 160 Atl. 556 (1932); State v. Armstrong, 31 N.M. 220, 243 Pac. 333 (1924); Darweger v. Staats, 267 N.Y. 290, 196 N.E. 61 (1935). *But see*, Jersey City v. Martin, 127 N.J. Law 18, 20 A.2d 697 (1941), where the court held that it is proper for the legislature to adopt by reference facts reasonably capable of acertainment and Texas Co. v. Dickinson, 79 N.J. Law 292, 75 Atl. 803 (1910), where the court held that the laws of sister states are facts; Commonwealth v. Alderman, 275 Pa. 483, 119 Atl. 551 (1923) can be distinguished in that the court there felt that the 18th Amendment required the states to adopt the interpretations of Congress.

22. Both published at Bismarck, N. D., by the *Tribune* (1889).

23. See pp. 83, 110, 141, 179, 225, and 280.

24. Other North Dakota decisions on section 64, not germane to this paper, are: City of Fargo v. Sathre, 76 N.D. 341, 36 N.W.2d 39 (1949); Egbert v. City of Dunseith, 74 N.D. 1, 24 N.W.2d 907 (1946); Larkin v. Gronna, 69 N.D. 234, 285 N.W. 59 (1939); Ford Motor Co. v. State, 59 N.D. 792, 231 N.W. 883 (1930).

25. People *ex rel.* Drake v. Mahaney, 13 Mich. 481, 496 (1865).

26. See, *e.g.*, Alton R.R. v. United States, 315 U.S. 15 (1942); Hassett v. Welch, 303 U.S. 303 (1938); Alaska S.S. Co. v. Mullaney, 180 F.2d 805 (9th Cir. 1950) (Rendered on Alaska territorial income tax statute, see n. 5, *supra.*); Karsten v. United

such a provision in one form or another. These provisions can be classified into some five different types, North Dakota and Louisiana[27] each having unique constitutions in this respect. (1) Twenty-one states[28] use the following form:

> "No act shall be revised or amended by mere refence to the title, but the section as amended shall be set forth and published at full length."

with some variations. The key words used, besides "revised" and "amended", are "revived", "altered", "repealed", or "reenacted". The last two are rare. (2) Three states[29] use the above general form with the key words "revised or amended or the provisions thereof *extended*". (Emphasis added.) (3) Six states[30] use the above general form with the key words "revived (or 'revised') or amended or the provisions thereof *extended or conferred*". (Emphasis added.) (4) Two states, New Jersey and New York, have provisions[31] that "No act . . . shall provide that any existing law . . . shall be made or deemed a part of said act, or which shall enact that any existing law . . . shall be applicable, except by inserting it in such act." (5) Iowa[32] and Virginia[33] have provisions similar to each other, that of Iowa reading:

> "Every law which imposes, continues, or revises a tax, shall distinctly state the tax, and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such tax or object."

These constitutional declarations have generally been held to merit a strict construction,[34] especially where a literal interpretation

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States, 161 F.2d 337 (10th Cir.), *cert. denied*, 331 U.S. 851 (1947); Legat v. Adorno, 138 Conn. 134, 83 A.2d 185 (1951); Pinkard v. Smith, 16 Ky. (Litt. Sel. Cas.) 331 (1821) (The Kentucky constitution dates from 1850.); Colins v. Blake, 79 Me. 218, 9 Alt. 358 (1887); Commonwealth v. Kendall, 155 Mass. 357, 11 N.E. 425 (1887); Opinion of the Justices, 95 N.H. 540, 64 A.2d 322 (1949); Mettet v. Yankton, 71 S.D. 435, 25 N.W.2d 460 (1946); Town of Wauwatosa v. Milwaukee, 259 Wis. 56, 47 N.W.2d 442 (1951).

27. La Const. art. 3, §§ 17, 18.

28. Ariz. Const. art. 4, pt. 2, § 14; Cal. Const. art. 4, § 24; Fla. Const. art. 3, § 16; Ga. Const. art. 3, § 2-1916, par. 16; Idaho Const. art. 3, § 18; Ill. Const. art. 4, § 13; Ind. Const. art. 4 § 124; Kan. Const. art. 2, § 16; Md. Const. art. 3, § 29; Mich. Const. art. 5, § 21; Miss. Const. art. 4, § 61; Mo. Const. art. 3, § 28; Neb. Const. art. 3, § 14; Nev. Const. art. 4, § 17; Ohio Const. art. 2, § 16; Ore. Const. art. 4, § 22; Tenn. Const. art. 2, § 17; Tex. Const. art. 3, § 36; Utah Const. art. 6, § 22; Wash. Const. art. 2, § 37; W. Va. Const. art. 6, § 30.

29. Mont. Const. art. 5, § 25; N. M. Const. art. 4, § 18; Wyo. Const. art. 3, § 26.

30. Ala. Const. art. 4, § 45; Ark. Const. art. 5, § 23; Colo. Const. art. 5, § 24; Ky. Const. § 51; Okla. Const. art. 5, § 57; Pa. Const. art. 3, § 6.

31. N. J. Const. art. 4, § 7, para. 4; N. Y. Const. art. 3, § 16.

32. Iowa Const. art. 7, § 7.

33. Va. Const. art. 4, §§ 50, 52.

34. See, *e. g.*, Hermitage Spec. School Dist. v. Ingalls Spec. School Dist., 133 Ark. 157, 202 S.W. 26 (1918); Landis Township v. Division of Tax App., 137 N. J. Law 224, 59 A.2d 258 (1948); Jersey City v. Martin, 127 N. J. Law 18, 20 A.2d 697 (1941); People v. Learned, 5 Hun 626 (N. Y. Sup. Ct., Gen. T. 1875).

would render many important acts invalid.[35] Other courts have indicated that a reasonable construction is to be applied.[36] However, these provisions are nonetheless mandatory and require substantial compliance.[37] But just what is "substantial compliance"?

In the "revise or amend" jurisdictions,[38] the courts have found nothing in their constitutions forbidding the extension or adoption of prior statutes.[39] It is well settled that under the more stringent provisions, extension or adoption, by reference of matters of "procedureure", "remedy", or "enforcement" is proper[40] where the act in question is "complete within itself."[41] There is less certainty as to validity of extension or adoption, by reference, of *substantive* provisions.

Although section 64 has been referred to[42] as similar to the New York and New Jersey provisions,[43] it also seems closely akin to the "revised, amended, extended, or conferred" provisions[44] of Alabama, Arkansas, Colorado, Kentucky, Oklahoma, and Pennsylvania. Among these six states there is a split of authority as to whether substantive law can ever be incorporated or extended by reference, Colorado[45] answering "yes" and Alabama,[46] Arkan-

35. See, *e. g.*, People *ex rel.* Everson v. Lorillard, 135 N. Y. 258, 31 N.E. 1011 (1892).

36. Scoles v. State, 47 Ark. 476, 1 S.W. 769 (1886); Board of Penitentiary Comm'rs v. Spencer, 159 Ky. 255, 166 S.W. 1017 (1914); People *ex rel.* Drake v. Mahaney, 13 Mich. 481 (1865); Department of State Highways v. Baker, 69 N.D. 702, 290 N.W. 257 (1940).

37. Hazelrigg v. Hazelrigg, 169 Ky. 345, 183 S.W. 933 (1916); Board of Penitentiary Comm'rs v. Spencer, *supra*, note 36; Board of County Comm'rs v. Oklahoma Tax Comm., 202 Okla. 269, 212 P.2d 462 (1949).

38. See note 28, *supra*.

39. See, *e. g.*, Palermo v. Stockton Theatres, Inc., 32 Cal. 2d 53, 195 P.2d 1 (1948); Hecht v. Shaw, 112 Fla. 762, 151 So. 333 (1933); Reome v. Edwards, 226 Ind. 229, 79 N.E.2d 389 (1948); Johnson v. Killion, 178 Kan. 154, 283 P.2d 433 (1955); Westervelt v. Yates, 145 Tex. 38, 194 S.W.2d 395 (1946).

40. See, *e. g.*, *In re* Opinion of the Justices, 252 Ala. 199, 40 So.2d 330 (1949); White v. Loughborough, 125 Ark. 57, 188 S.W. 10 (1916); Campbell v. Board of Pharmacy, 45 N.J. Law 241 (1883); Middle Rio Grande W. U. Ass'n v. Middle Rio Grande C. D., 57 N. M. 287, 258 P.2d 391 (1953); Richfield Oil Corp. v. City of Syracuse, 287 N. Y. 234, 39 N.E.2d 219 (1942); Service Feed Co. v. City of Ardmore, 171 Okla. 155, 42 P.2d 853 (1935).

41. This term needs defining. The courts seem to consider an act "complete within itself" where, without the aid of another statute, it sets out a coherent rule of substantive law. See Grable v. Blackwood, 180 Ark. 311, 22 S.W.2d 41 (1929); State v. McKinley, 120 Ark. 165, 179 S.W. 181 (1915); State v. McNeal, 49 N. J. Law 407, 5 Atl. 805 (1886). In framing this rule, the courts have evolved the term "reference statute", which seems to mean references *valid under the rule*. Winton v. Bartlett, 181 Ark. 669, 27 S.W.2d 100 (1930); House v. Road Improvement Dist. No. 4, 154 Ark. 218, 242 S.W. 68 (1922); Board of County Comm'rs v. Oklahoma Tax Comm., 202 Okla. 269, 212 P.2d 462 (1949). See Bloxton v. State Highway Comm., 225 Ky. 324, 8 S.W.2d 392 (1928).

42. State v. Armstrong, 31 N. M. 220, 243 Pac. 333 (1925).

43. See note 31, *supra*.

44. See note 30, *supra*. See also the "revise, amend, or extend" provisions of Montana, New Mexico, and Wyoming, note 29, *supra*.

45. See Armstrong v. Johnson Storage & Moving Co., 84 Colo. 142, 268 Pac. 978 (1928); Denver Circle Ry. v. Nestor, 10 Colo. 403, 15 Pac. 714 (1887). *Contra*, People v. Friederich, 67 Colo. 69, 185 Pac. 657 (1919).

46. See Street v. Hooten, 131 Ala. 492, 32 So. 580 (1902); Stewart v. County of Hale, 82 Ala. 209, 2 So. 270 (1887).

sas,[47] and Kentucky[48] answering "no". The Pennsylvania decisions are in conflict.[49] The question has not been squarely answered in Oklahoma, but there is dictum implying that the courts would not accept a reference to substantive law.[50] New Jersey[51] and New York[52] both seem to have decided that reference to substantive law is prohibited by their constitutions. In New Mexico, a "revive, amend, or extend" state, the supreme court has held invalid as a prohibited *extension* an attempt to adopt provisions of the National Prohibition Act by mere reference.[53] In the same state, the attorney general has decided that a proposed statute allowing certain persons to pay a percentage of the federal income tax, with adjustments, in lieu of the regular state income tax, would violate the New Mexico counterpart of section 64.[54]

Occasionally, courts have been faced with fairly close questions as to whether the statute in question actually does incorporate the provisions of another statute. They have not been quick to find the contended-for incorporation in these situations.[55]

As we have seen, the North Dakota *Baker* case is some authority for the proposition that it is proper to incorporate definitions by reference. There is little other authority on the question in the states with provisions similar to North Dakota's.[56]

47. Farris v. Wright, 158 Ark. 519, 250 S.W. 889 (1923); Rider v. State, 132 Ark. 27, 200 S.W. 275 (1918); Beard v. Wilson, 52 Ark. 290, 12 S.W. 567 (1889); Watkins v. City of Eureka Springs, 49 Ark. 131, 4 S.W. 384 (1887).

48. Board of Penitentiary Comm'rs v. Spencer, 159 Ky. 255, 166 S.W. 1017 (1914) (dictum).

49. See *in re* Guenrhoer's Estate, 235 Pa. 67, 83 Atl. 617 (1912). *Contra,* Titusville Iron-Works v. Keystone Oil Co., 122 Pa. St. 627, 15 Atl. 917 (1888).

50. City of Pound Creek v. Haskell, 21 Okla. 711, 97 Pac. 338 (1908).

51. See Jersey City v. Martin, 127 N. J. Law 18, 20 A.2d 697 (1941); Wilentz v. Sears, Roebuck & Co., 12 N. J. Misc. 531, 172 Atl. 903 (1934); State v. Larson, 10 N. J. Misc. 384, 160 Atl. 556 (1932). *Contra,* Texas Co. v. Dickinson, 79 N. J. Law 292, 75 Atl. 803 (1910). *But see,* State v. Hotel Bar Foods, 18 N. J. 115, 112 A.2d 726 (1955).

52. See Becker v. Eisner, 277 N. Y. 143, 13 N.E.2d 747 (1938); Darweger v. Staats, 267 N. Y. 290, 196 N.E. 61 (1935). *Contra,* Curtin v. Barton, 139 N. Y. 505, 34 N.E. 1093 (1893)

53. State v. Armstrong, 31 N. M. 220, 243 Pac. 333 (1924).

54. Op. Att'y Gen. No. 5645 (1953-54).

55. See, *e. g.,* Watkinson v. Hotel Pennsylvania, 195 App. Div. 624, 187 N. Y. Supp. 278 (3d Dep't), *aff'd mem.,* 231 N. Y. 562, 132 N.E. 889 (1921); People *ex rel.* Weaver v. Van De Carr, 150 N. Y. 439, 44 N.E. 1040 (1896); Commonwealth v. Warner Bros. Theatres, Inc., 345 Pa. 270, 27 A.2d 62 (1942). The Arkansas Supreme Court, in House v. Road Improvement Dist. No. 4, 154 Ark. 218, 242 S.W. 68 (1922), stated that "reference statutes" (used in the special sense) do not incorporate into themselves the statutes referred to.

56. In Colorado, a statute reading in part, ". . . any law of this state defining delinquency or concerning contributory delinquency shall . . . be held to include all girls under the age of eighteen (18) years." was held invalid as a prohibited extension by reference. People v. Friederich, 67 Colo. 69, 185 Pac. 657 (1919). A line of Oklahoma cases has held that a reference to a prior section of the act in question for a definition of the word "highway" is proper. See, *e. g.,* State v. Sheldon, 96 Okla. Crim. 38, 247 P.2d 975 (1952); *Ex parte* McMahan, 94 Okla. Crim. 419, 237 P.2d 462 (1951). Iowa, after whose income tax statute Senate Bill 186 was patterned, has held that a reference to federal law for the definition of "moneyed capital" in a corporate franchise tax statute was proper, after holding that the reference was for a definition only and not

In addition to applying the foregoing tests, *i.e.*, whether the act in question is "complete in itself", whether the reference is to "procedure", "remedy", "enforcement" or "definition", and whether an "incorporation" has actually been worked, the courts have resorted to another standard less mechanical and conceptualistic. Here the issue is whether the act under consideration is in conformity with the basic policy of the framers of the constitutional mandate concerned.[57] The standard statement of the "mischief designed to be remedied" was made by Judge Cooley and is quoted *supra*.[58] This test is not, however, independent of the others used by the courts. For instance, all but one[59] of the cases cited in support of the "mischief" rule involved the fundamental facts necessary for the application of one or another of the "mechanical" rules. In most, the court expressly made the rules supplementary to each other.

CONCLUSION

The authorities dictate that section 64 be construed to include references to any legislation, not merely references to North Dakota statutes. This leaves the court with a choice of basic approaches to section 64, *i.e.*, either the "mechanical" or the "mischief" approach. If the court chooses the former, the question arises whether Senate Bill 186 works an incorporation of the IRC. It is apparent that it does. The cases close to the point which have found no incorporation arrive at that conclusion either because procedural provisions were adopted[60] or because the court differentiated between a franchise tax and an income tax.[61] It might be said that the *Baker* case supports the constitutionality of Senate Bill 186 in that it held valid a *definition* by reference. But it should be noted that the definitions there referred to did not affect the computation of the tax, as do the definitions of "net income", "taxable income" and "deductions" in Senate Bill 186. In the cases where definitions by reference were upheld, the definitions were

for the purpose of fixing the tax. Ballard-Hassett Co. v. Local Bd. of Review, 215 Iowa 556, 246 N.W. 277 (1933).

57. See, *e. g.*, Bay Shell Road Co. v. O'Donnell, 87 Ala. 376, 6 So. 119 (1889); Grable v. Blackwood, 180 Ark. 311, 22 S.W.2d 41 (1929); Lyman v. Ramey, 195 Ky. L. Rep. 223, 242 S.W. 21 (1922); Edmonds v. Haskell, 121 Okla. 18, 247 Pac. 15 (1926); State v. McNeal, 48 N. J. Law 407, 5 Atl. 805 (1886); Becker v. Eisner, 277 N. Y. 143, 13 N.E.2d 747 (1938).

58. Speaking of the Arkansas constitution in the leading case Watkins v. City of Eureka Springs, 49 Ark. 131, 4 S.W. 384, 385 (1887), the court said, "They [the framers of the constitution] meant only to lay a restraint upon legislation where the bill was presented in such form that the legislator could not determine what its provisions were from an inspection of it. What is not within the mischief is not within the inhibition." See also, People *ex rel.* Bd. of Comm'rs v. Banks, 67 N. Y. 568, 575 (1876).

59. Lyman v. Ramey, 195 Ky. L. Rep. 223, 242 S.W. 21 (1922).

60. House v. Road Improvement Dist. No. 4, 154 Ark. 218, 242 S.W. 68 (1922).

61. Commonwealth v. Warner Bros. Theatres, Inc., 345 Pa. 270, 27 A.2d 62 (1942).

peripheral to the purpose of the statute. In contrast, the definitions adopted in Senate Bill 186 are its heart and substance, its whole purpose. Further, the provisions in section 7 of the bill for the splitting of the federal tax deduction by couples filing separately "according to law" is not a definition. In the light of these facts, it would seem that the *Baker* case might be distinguished.

Finally, the court has not yet decided whether section 64 allows an adoption of substantive law by reference. The determination of what is substantive and what is procedural is often difficult, but in the case of section 64 there seems little room for argument. The federal law adopted is not concerned with the mechanics of the collection of the tax, the remedy of the state or the enforcement of the levy. It is concerned with the determination of the tax due. In the *Baker* case the fact that the statute in question *itself* fixed the tax was one of the circumstances emphasized by the court in upholding that statute. In determining whether section 64 allows reference to substantive law, the court is faced with a clear majority of decisions which denounce such a reference in the states whose constitutional provisions most closely parallel North Dakota's.

If the court chooses to use the "mischief" approach, there arises the question whether a legislator could tell from the face of Senate Bill 186 just what provisions he was enacting into law. Rather obviously, he could not. On the other hand, it is equally obvious that the legislator knew that it was the federal law that was being made North Dakota's. Is this enough under the "mischief" rule?[62] If and when the Supreme Court of North Dakota passes on the questions, we shall know.

PEDAR C. WOLD

62. See Watkins v. City of Eureka Springs, 49 Ark. 131, 4 S.W. 384 (1887).