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SOME REFLECTIONS ABOUT THE IMPACT OF FEDERAL TAXATION ON AMERICAN PRIVATE LAW*

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The theme of this 75th Anniversary Conference of the University of Buffalo School of Law, "The Challenge to Private Law in the United States," deserves our intense and unceasing attention. In our time immense pressures, exerted by and through the authority of the state, have been directed toward the institutions served by private law and, in turn, upon private law itself. The result has been change to both. This change, however, has not been described and analyzed in the manner in which it should be. Although even the most insensitive observer is aware of the almost constant shifting of the many strata of law and society under the mounting weight of state authority, very little systematic charting of this process has taken place. Much charting needs to be done because only when this task is undertaken will the social costs of our present tendencies become better known. This conference moves us forward in this incredibly large and complex task, and it is my hope that this occasion will lead others to contribute their energy and resources to its advancement.

My contribution is to be a limited one. In the first place it will consist of examples, arranged in convenient categories, depicting how federal tax law has influenced, shaped and directed substantive private law. These examples constitute only a small number of those available, and I am sure that all who study this paper will think of others, many of which probably would be more suitable for the purposes of this paper than those I have selected. In addition, those which are here used range from the important, obvious and dramatic to the relatively trivial, obscure and drab. Choice of examples occupying various positions in such a spectrum was made to emphasize the pervasiveness of the influence of federal tax law. Finally, certain steps which will tend to minimize the harmful aspects of this influence will be suggested and my not too optimistic estimate of the future will be offered.

A further introductory word is necessary in order for our topic to be put into proper perspective. The form and structure of federal taxation itself reflects the order of the society in which it operates. This occurs because fundamental political, economic and social institutions and habits always exert a countervailing force which shapes and channels the force of taxation.[1] The result of the converging and mingling of these forces is to a substantial degree mysterious and quite difficult to predict. I have attempted on other occasions to describe how federal tax law utilizes, as it must, certain deeply rooted insti-

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1. See my contribution to Part Two, *Fundamental Concepts of Public Law: A Symposium*, 11 J. Pub. L. 3 (1962).

tutions and customs and how these provide the skeletal framework of that law.[2] But federal tax law changes institutions and customs, and these changes, in turn, alter the tax law. Our present concern, however, is primarily with a species of the former type of change; but the opposing pressures of society and its institutions upon the tax law must be kept in mind.

I

Aspects of the Influence of Tax Law Upon Private Law

Three aspects of the influence of federal tax law upon private law will now be considered. While any scheme for classification of phenomena as subtle and diffuse as that being discussed is obviously incomplete, tentative and overlapping, the three aspects to be discussed do provide a fairly wide view of tax influence on private law. These three are: first, the aspect of distortion, correction or reinforcement of private law rules; second, the aspect of amplification, or enlargement, of certain private law issues because of their high degree of tax relevance; and third, the aspect of creation of conditions which generate new and different rules of law and legal relationships as well as cases and controversies between private parties.

A. *The Aspect of Distortion, Correction or Reinforcement*

Only a moment's thought is necessary to realize that the immediate purposes of much of private law and federal taxation are different. As a consequence the influence of tax law on private law in many instances distorts private law and frustrates its objectives. The permeating character of this influence, however, means that in some adventitious circumstances tax law either corrects the erring ways of private law or reinforces the inherent strength of a good rule. Whether distortion, correction or reinforcement is the result depends, of course, on one's judgment of the soundness of the particular tax-influenced private law rule.

The two instances of what I regard as distortion chosen for examination reveal not only the probable existence of such warping but also the quite often impossible task of precisely identifying the point in the case flow where the directional needle of the particular problem was deflected from the true position by the pull of tax considerations. Sometimes, however, this point can be fairly well established. I believe such to be the case, at least in respect to the situation which presently exists in the Second Circuit, in my first example, a relatively unimportant facet of the parol evidence rule.

A few months ago Judge Friendly, speaking for the Second Circuit in a tax case, *Commissioner v. Ferrer*,[3] was faced with opposing contentions in respect to the applicability of the parol evidence rule to a dispute involving a

2. *The Rule of Good Law and Federal Taxation*, II B.C. Ind. & Com. L. Rev. 203 (1961).
3. 62-2 U.S.T.C. ¶ 9518.

stranger to the contract. The Commissioner contended it was applicable and that the tax issues should be decided on the basis of the written instruments alone, while Jose Ferrer, the taxpayer, insisted that the rule was not applicable in a controversy with a third party and that the issue should be decided on the basis of the written instruments and certain extrinsic evidence. In deciding the case the court cited authorities involving tax controversies from several circuits bearing on the point, but concluded that the issue was not properly before them because the evidence offered did not vary the written instrument.

The issue is an interesting one, and when one turns to the treatises for guidance, one finds the most recent edition of Williston declaring the weight of authority to be that the parol evidence rule is not applicable to third parties except when they seek to enforce rights under the contract.[4] A federal tax case from the Tenth Circuit is cited as authority for this proposition.[5] The case was one in which the government unsuccessfully sought to increase its tax collections by confining the taxpayer to the relevant written documents. Corbin, although characteristically avoiding any conclusion as to the weight of authority, cites many cases pointing in the direction indicated by Williston, some of which are tax cases,[6] and concludes by disapproving a tax case which restricted the taxpayer to the written instrument.[7] The abundance of tax cases asserting the majority view suggests that something about the dynamics of these cases causes the issue to arise frequently and tends to influence the courts to limit the scope of application of the parol evidence rule.

So one digs more deeply. In examining one of the two Second Circuit decisions in which Judge Friendly cited *Stern v. Commissioner*,[8] it appears that the court upheld the Commissioner's right to go behind certain written instruments to fix liability for additional taxes and in so doing asserted: "But the parol evidence rule only excludes proof varying a written instrument, where the issues are between the parties to it, and *does not affect the right of the Commissioner, who was not a party, to go behind the written contract in order to discover the true facts.*"[9] (Italics added.) All this has a familiar ring, particularly the last part relating to the power of the Commissioner to discover the true facts. Does it not resemble the formulation of the Commissioner's prerogatives in matters of substance over form and "sham" transactions?[10]

One hastens on. Were there citations for the statement just quoted? What kind of cases were they? Yes, there were two,[11] both tax cases, in one of which,

4. 4 Williston, Contracts § 647 (3d ed. 1961).
5. American Crystal Sugar Co. v. Nicholas, 124 F.2d 477 (10th Cir. 1941).
6. Corbin, Contracts § 596, n.9 (1960).
7. The case was Comm'r v. Dwight's Estate, 205 F.2d 298 (2d Cir. 1953). See the discussion of this case *infra*.
8. 137 F.2d 43 (2d Cir. 1943).
9. *Id.* at 46.
10. See Blum, *Knetsch v. United States: A Pronouncement on Tax Avoidance*, The Supreme Court Review 135, n.73 (1961) for a classification of transactions which have been designated a "sham" for tax purposes.
11. Tex-Penn Oil Co. v. Comm'r, 83 F.2d 518 (3d Cir. 1936); United States v. Board, 14 F.2d 459 (W.D. Ky. 1926).

Tex-Penn Oil Co. v. Commissioner, the *taxpayer* was permitted to set aside the *unambiguous* form of the transaction and show that the sale of corporate assets was solely for stock, and in the other, *United States v. Board*, the taxpayer was able to introduce extrinsic evidence to explain ambiguous written instruments for the purpose of showing that a transaction was a sale of corporate stock by the stockholders and not a sale by the corporation of its assets. It is reasonably clear that in *Tex-Penn Oil Co.* the court was not being guided by the niceties of the parol evidence rule (although perhaps the same result could have been reached within its limits) but rather was simply according the taxpayer the advantage of the maxim that substance and not form should govern tax liability.[12] In *Board* the court appeared to mingle rather indiscriminately the substance-over-form maxim with language cast in the form of the parol evidence rule.[13]

One point is now clear. The maxim of substance-over-form contributed substantially to the formulation of the Second Circuit's view of the application of the parol evidence rule to third persons as expressed in *Stern*. And when the citations of *Stern* by subsequent decisions are examined, another thing becomes clear. The case has had significant influence.[14] Even so, one may ask, are not the problems of substance-over-form in tax cases and that of the applicability of the parol evidence rule to third persons sufficiently similar to justify cross citation from one to the other? Furthermore, even if not sufficiently similar to justify cross citation, is not the end result of this tax influence, if such it be,

12. The language used is revealing:
In determining tax liability on contracts, a party is not bound to accept the contract upon its face or the recitations therein, "but may burrow under the words used in the contract and by extraneous evidence, if necessary, determine the real agreement between the parties." (Citing the *Board* case) In form the documents upon which the Board of Tax Appeals relied stated that the $350,000 was corporate consideration passing from Transcontinental, but in fact it was not, and the rule is well settled that in determining tax liability, taxing authorities must look through form to fact and substance.
83 F.2d 518, 522 (3d Cir. 1936).

13. 14 F.2d 459, 460 (W.D. Ky. 1926).

14. *E.g.*, Brassert v. Clark, 162 F.2d 967, 974 (2d Cir. 1947) (non-tax case); Kind v. Clark, 161 F.2d 36, 47 (2d Cir. 1947) (non-tax case); Cooper Foundation v. O'Malley, 121 F. Supp. 438, 444 (D. Neb. 1954) (tax case); General Motors Acceptance Corp. v. Higgins, 120 F. Supp. 737, 738 (S.D.N.Y. 1953) (tax case); Boylin, 17 T.C. 542 (1950). It should be pointed out that the approach of *Stern* prevails in certain other circuits and that several reached this result independently of *Stern*. *E.g.*, Scofield v. Greer, 185 F.2d 551 (5th Cir. 1950) (tax case); American Crystal Sugar Co. v. Nicholas, 124 F.2d 477, 479 (10th Cir. 1941) (tax case). These cases have had their influence also. See, Thorsness v. United States, 260 F.2d 341, 345 (7th Cir. 1958) (tax case); Landa v. Comm'r, 206 F.2d 431, 432 (D.C. Cir. 1953). The *Landa* case is interesting because it states the *Stern* view of the parol evidence rule *and* the substance-over-form maxim as independent but equivalent grounds for admission of the parol testimony. Helvering v. F. & R. Lazarusi & Co., 308 U.S. 252, 255 (1939) was cited in support of the substance-over-form maxim, a case in which a transaction which in form was a sale and lease back was treated for tax purposes as a mortgage. Mr. Justice Black said, "In the field of taxation, administrators of the laws and the courts, are concerned with substance and realities, and formal written documents are not rigidly binding." (255) See Mustard v. United States, 155 F. Supp. 325, 332 (Ct. Cl. 1957). Haverty Realty & Investment Co., 3 T.C. 161, 167 (1944) (A) employs the *Stern* approach, although that case is not cited despite the fact that many other cases, both tax and non-tax, are marshalled in support.

to correct or reinforce rather than distort the parol evidence rule? My answer to the first question is essentially in the negative and to the second, distortion, not correction or reinforcement, gets my nod.

Let me defend these positions briefly. Both Wigmore[15] and Corbin[16] are critical of the tax-influenced general rule now prevailing and both recognize that if the written instrument has become through the proper operation of the parol evidence rule the exclusive embodiment of the legal relations of the parties, extrinsic evidence to vary the document should not be admissible even in litigation involving a third party not claiming under the contract.[17] This should be no less true in tax litigation *when the nature of the legal relations between parties is the tax relevant issue.* Such a view does not deprive the tax gatherer of his ability to assert substance-over-form because in his hands at least this weapon in one or more of its variant forms permits the reconstruction of a transaction for tax purposes in a manner which ignores many admittedly present or past legal relationships. Thus, a debt existing under local law may not be a debt for tax purposes,[18] the formation and liquidation of a corporation disregarded,[19] and other valid and existing legal consequences set to one side in counting up the tax bill.[20] What has happened, as should now be plain, is that the parol evidence rule has been deprived of its proper operative scope in controversies between a party to a writing and a third person because in the tax controversies in which the issue has been raised it has been thought that to afford such scope would impair the effectiveness of the substance-over-form maxim. This is simply wrong; but the error is the father of my first example of distortion.

A perhaps unfortunate consequence of this distortion has been to encourage taxpayers to believe that their carefully chosen legal forms would be no more binding on them than upon the Commissioner.[21] This is an expectation not always gratified[22] and one which leads us back to the second of the two

15. 9 Wigmore, Evidence § 2446 (3d ed. 1940).

16. *Supra* note 6, at § 596.

17. Wigmore, *supra* note 15, puts it this way: "The truth seems to be, then, that the rule will still apply to exclude extrinsic utterances, even as against other parties, provided it is sought to use those utterances *for the very purpose for which the writing has superseded them as the legal act.*"

18. See Gilbert v. Comm'r, 248 F.2d 399, 403 (2d Cir. 1957).

19. Gregory v. Helvering, 239 U.S. 465 (1935).

20. See Blum, *supra* note 10.

21. *Cf.* the following observations of the court in Landa v. Comm'r, 206 F.2d 431, 432 (D.C. Cir. 1953),

> Generally "in the field of taxation, adminstrators of the laws, and the courts, are concerned with substance and realities, and formal written documents are not rigidly binding." (Citation omitted.) The taxpayer as well as the Commissioner of Internal Revenue is entitled to the benefit of this rule. Moreover, the oral testimony here was not barred by the parol evidence rule, since the Commissioner "was not a party or privy to a party to [the] written agreement[s]."

22. *Cf.* Television Industries, Inc. v. Comm'r, 284 F.2d 322, 325 (2d Cir. 1960) where the court in rejecting a taxpayer's argument that his transactions should be taxed as they would have been had they been in a different form said, "It would be quite intolerable to pyramid the existing complexities of tax law by a rule that the tax shall be that resulting

cases from his own circuit which Judge Friendly had before him in the matter of Jose Ferrer's taxes. The case was *Commissioner v. Dwight's Estate*.[23] In it the court prevented the introduction of a letter written by the grantor of a trust prior to the execution of the trust indenture, but delivered thereafter, which purported to explain his motive in establishing the trust. The issue in the case was whether the grantor had provided for the income of the trust to be applied toward the discharge of his legal obligation to support his wife. The court saw the case as one in which the legal obligations existing between the grantor and his spouse, as affected by the trust instrument, were relevant for tax purposes and concluded that in determining the nature of these obligations the parol evidence rule had a part to play. This is entirely proper, and, although one may doubt the manner in which the court applied the rule,[24] one must be grateful that the larger generalities in *Stern* have been confined.

So we come to this. The parol evidence rule sometimes is, and properly should be, applicable in controversies with the Commissioner even though he is not a party to the relevant documents. Of course, if they are not intended as the integration of certain negotiations, or reveal ambiguities, extrinsic evidence is admissible. The application of the maxim of substance-over-form and the doctrines of business purpose, step and "sham" transactions remains unimpaired. And, finally, the tax influenced "weight of authority" respecting the application of the parol evidence rule to third parties should be rejected, and the more careful formulations of the text writers and *Dwight's Estate* accepted. Perhaps you say this sort of confusion would have existed even without tax law. This is possible. My point is only that tax law contributed.

My second instance is taken from the area of conflict of laws and is one in which the step-by-step description of the influence of tax law must be less precise than in my first illustration. It has to do with the proper choice of law for the purposes of characterizing the income from immovable marital property.[25] The issue can be presented fairly simply. Income from immovable separate property located in Texas belonging to a spouse whose marital domicile is in the same state is community property. Does such income possibly acquire a different characterization when the immovable property from which it flows is located in a state other than Texas which provides that such income is separate property? The same problem is presented when a spouse whose marital domicile is other than Texas invests his separate property in immovable property located in Texas. Does the Texas characterization of income from separate property apply in such a case? The prevailing view is that the law of

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from the form of the transaction taxpayers have chosen or from any other form they might have chosen, whichever is less."

23. 205 F.2d 298 (2d Cir. 1953).

24. Corbin criticizes the application. *Supra* note 6, at § 596.

25. For a general survey of the entire area of conflict of laws as it relates to marital property, see Marsh, Marital Property in Conflict of Laws (1952).

the situs of the immovable controls, and a leading case for this proposition is a tax case, *Commissioner v. Skaggs*.[26]

My opinion, again not shared by the "weight of authority," is that this view is unsound and that the law of the marital domicile should control. Furthermore, the litigation history of the issue suggests that the pressures of interests normally present only in tax litigation have hampered, if not prevented, the careful scrutiny of policy which the issue deserves. In saying this it is recognized that the "weight of authority" is supported by other than tax authorities,[27] but my point is that either tax law has played a prominent role in deflecting the course of the law from the proper path,[28] or, should my judgment of the rule be wrong, tax law has reinforced a sound result.

In either event, in recent time the law has been influential. Let me briefly describe the manner in which this influence has manifested itself. In the first place the court in *Skaggs*, after pointing out that the laws of community property were statutes real and that immovable property is "exclusively subject to the law of the country or state in which it is situated,"[29] asserted that to permit Texas law, the law of the marital domicile, to characterize the rental income from real estate located in California would amount to permitting Texas law to control the ownership of California land. This equating of ownership of the income from land with ownership of the land is an idea which is certainly no stranger to tax law. And, not surprisingly, the court cited in support of its view two tax cases, *Commissioner v. Terry*[30] and the Supreme Court decision in *Irwin v. Gavit*.[31] In the latter, it will be remembered, the Court construed a testamentary gift of income from a portion of trust corpus for a period of years as equivalent to the gift of an interest in the corpus. By so doing the periodic receipts of income were placed outside the exclusion for bequests and made taxable. This result, while quite defensible as a matter of tax law,[32] is of little significance to the issue before the Fifth Circuit in *Skaggs*. Whether it is proper to equate the ownership of the income from the land with ownership of the land depends upon the purpose for which it is done. And the propriety of doing so for one purpose in no way establishes the propriety for doing so for another. The *Terry* case, involving the issue whether under Texas law the income received under a bequest of "the net interest, income and revenue . . . during . . . lifetime" was taxable as *community* income, built on *Irwin v. Gavit*[33] and reasoned that since such a bequest was the equivalent of "giving

26. 122 F.2d 721 (5th Cir. 1941), *cert. denied*, 315 U.S. 811 (1942).

27. See Hammonds v. Comm'r, 106 F.2d 420, n.7 (10th Cir. 1939), for a partial list of non-tax authorities.

28. For an effective argument for the law of the marital domicile, see Jackson, *Community Property and Federal Taxes*, 12 S.W.L.J. 1, 46-52 (1958).

29. *Supra* note 26, at 723.

30. 69 F.2d 969 (5th Cir. 1934).

31. 268 U.S. 161 (1925).

32. Alternative positions, however, are possible. See Bittker, Federal Income Estate and Gift Taxation 132-33 (2d ed. 1961).

33. The court in *Terry* also relied on other famous, or infamous as you prefer, instances

the property itself for life," the *bequest* was *separate* property but the *periodic income receipts* were *community*. Again there occurs a mingling of strands of tax law and private law in an indiscriminate manner.

But beyond these nice points lies one, larger, more intangible, and no doubt more important. It is that *Skaggs* and other tax cases involving the point[34] were concerned with taxpayers who sought to obtain the income splitting benefits of the community property system at a time when most Americans had no access to such benefits. Quite obviously the courts would be influenced and tend toward results which confined community property benefits within narrow geographical and doctrinal limits. This is what happened in *Skaggs*, for there the Texan was not permitted to export his system to California, and income splitting of California rentals was denied. The picture in other cases[35] also demonstrates this tendency.[36] While so engaged in guarding the revenues and promoting tax equity it is not surprising that private law problems fail to receive from the courts the examination they require. My last example of the aspect of distortion, correction or reinforcement is one in which tax influence did not achieve distortion, although that was threatened, but instead probably reinforces the proper approach to the private law area. The example relates to the rights obtained by the assignee of a chose in action. For centuries both scholars and courts have been concerned with the extent of such rights and their proper characterization as between "legal" on the one hand, and "equitable" on the other. In 1958 the Supreme Court in *United States v. R. F. Ball Construction Co.*[37] gave the tax liens of the federal government priority over the claims of a surety to whom a subcontractor in a housing project, the delinquent taxpayer, previously had made an assignment as collateral security of all sums due or to become due under the subcontract. In doing so the court cryptically observed the assignee's rights were "inchoate." The decision left many questions. Granting that the test of "choateness" is a federal question[38] was not the court, influenced by its desire to facilitate revenue collections, viewing the rights of an assignee in an antiquated manner?

in tax law in which the income from property was equated with the property from which it flows. Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 580 (1895).

34. *E.g.*, Trapp v. United States, 177 F.2d 1 (10th Cir. 1949); Noble v. Comm'r, 138 F.2d 444 (10th Cir. 1943); Hammonds v. Comm'r, 106 F.2d 420 (10th Cir. 1939); Benjamin H. McElhinney, Jr., 17 T.C. 7 (1951).

35. *Ibid.*

36. In *Noble*, although the oil and gas law was located in Texas, the income therefrom was treated as the separate income of the taxpayer, a resident of Oklahoma. Perhaps this case is in conflict with *Skaggs*, but it is probably more appropriate to classify it as distinguishable on its facts. In *Hammonds*, however, Oklahoma residents were permitted to split the income from a Texas oil and gas lease located in Texas which was acquired in exchange for personal services rendered in Texas and elsewhere. In *Trapp* the reasoning of *Noble* and *Hammonds* was combined to substantially limit the extent to which an Oklahoma owner of Texas oil and gas leases could split the income therefrom. In *McElhinney* all the above cases, even when joined by *Skaggs*, managed to convert only a small portion of the income of a Texas partnership into community income to a Virginia partner.

37. 355 U.S. 587 (1958).

38. *Cf.* United States v. L. R. Foy Construction Co., 300 F.2d 207 (10th Cir. 1962).

Corbin thought so and evidenced fear that such a view would produce mischief even in transactions in which the tax collector had no interest.[39] To him the Court's view was the ghost of a theory about the rights of assignees which he, Walter Wheeler Cook and others had destroyed decades before. And the assignees agreed. They fought back, and in *Crest Finance Co.*[40] "choateness" was established where the assignments, as well as the loans which they secured, occurred prior to perfection of federal tax liens against the property of the assignor. Thus, under the pressure of taxation, a significant step has been taken to exorcise this ghost of yester-century which, with the elegant impartiality we like to see in taxation, was brought forth by these same pressures.

B. *The Amplification Aspect*

Tax law not only sometimes distorts, corrects, or reinforces private law but also enlarges the importance of certain areas of private law. Indeed a not uncommon preliminary situation to legislative surgery of the type which will be mentioned in a moment is the amplification of a particular private law point. In many instances prior to the time the issue assumed its tax importance it had been considered either sufficiently well settled to be considered hornbook law or at least precise enough to serve the everyday needs of the jurisdiction. Once, however, significant tax consequences come to turn on these thought to be settled areas of the law, all the heretofore obscured defects in workmanship come to our attention and what was thought a finished legal composition appears as only a crude and unorchestrated score.

Such is what has happened recently in the law relating to allowances available to surviving members of the family of the deceased during the period of administration of his estate. The matter acquired its tax importance because of the marital deduction. Awards to the surviving spouse often will reduce federal estate taxes providing such awards qualify for the marital deduction. Whether they do turns on a number of issues; but for present purposes it is enough to say that the determinative issue usually is whether the allowance constitutes a "terminable interest." If so, the allowance does not qualify for the marital deduction. Again speaking generally, an interest is a disqualified, "terminable" one when it will terminate or fail upon the happening of some event and, as a result, one other than the surviving spouse may possess and enjoy it.[41]

It should now be clear that whether an allowance set aside for a surviving spouse qualifies for the marital deduction involves a fairly close scrutiny of local probate law to determine the contingencies, if any, which would

39. 4 Corbin, Contracts § 903 (1950, Supp. 1961).

40. Crest Finance Co. v. United States, 368 U.S. 347 (1962). Both this opinion and the majority opinion in *R. F. Ball, supra* note 37 are models of undesirable brevity—only a few lines in both instances. See United States v. Crest Finance Co., 305 F.2d 332 (7th Cir. 1962) for the circuit court opinion after the remand by the Supreme Court.

41. Int. Rev. Code of 1954 § 2056(b)(1) contains the precise statement of the "terminable interest rule."

extinguish the right to such an allowance. For the past half dozen or more years such scrutiny has been taking place in the courts charged with tax matters.[42] One of the key areas of local law examined by these courts is the effect under such law of the death or remarriage of surviving spouse upon his right to the allowance. You will recall that because the family allowance is related to the right of support in many jurisdictions these contingencies do extinguish or diminish the right of the surviving spouse.[43] The tax law, however, is not merely interested in this general pattern but is concerned with the precise manner in which these contingencies operate. For example, the Fifth Circuit and the Tax Court appear to regard the tax relevant issue as being the effect on the surviving spouse's right to the allowance of death or remarriage *subsequent* to the time the decree establishing the allowance becomes final.[44] Unfortunately this is a point not often explicitly dealt with in local law[45]

42. For a good collection of the cases, See Casner, Estate Planning 12-17 (3d ed. 1961).

43. *E.g., California,* In re Estate of Blair, 42 Cal.2d 728, 269 P.2d 612 (1954); *Georgia,* May v. Braddock, 92 Ga. App. 302, 88 S.E.2d 539 (1955) (interpretation of law prior to several recent amendments); *Maine,* Tarbox v. Fisher, 50 Me. 236 (1863); *Massachusetts,* Adams v. Adams, 51 Mass. 170 (1845); *Nebraska,* Re Estate of Oscar Samson, 142 Neb. 556, 7 N.W.2d 60 (1942), 144 A.L.R. 264; *Oregon,* Varner v. Portland Trust Bank, 210 Ore. 658 (1957); 313 P.2d 444.

44. United States v. First National Bank & Trust Co. of Augusta, 297 F.2d 312 (5th Cir. 1961); Estate of Michael G. Rudnick, 36 T.C. 1021 (1962); Estate of Margaret R. Gale, 35 T.C. 215 (1962). In *First National Bank & Trust Co. of Augusta* the court said "that the question of the terminability of the interest or award is to be decided upon the law of the state where the interest arose, using the rule of examination of the interest at the time that interest arose, treating that time as being at the time of the court award." (316) The court examined Georgia law and concluded that even though death of the surviving spouse within twelve months following the death of the decedent and prior to the filing of an application for the award would terminate the right of the widow to an allowance, Georgia law clearly indicated that the allowance "once claimed" and "reduced to certainty by the order of the court in the form of an award" was "vested indefeasibly." (317) In *Rudnick* the Tax Court declared that the terminability of the widow's allowance must be examined as of the time the interest arose and that time was "the time the Probate Court entered its order granting the allowance." (1003) In *Gale* a similar position was taken. Maine law was examined to determine whether the allowance was indefeasibly vested at the time of the entry of a final decree authorizing the allowance. Although the point is arguable, the Ninth Circuit appears to approach the matter differently and to focus upon whether the characteristics of the allowance existing at the date of death make it a terminable interest. See Cunha's Estate v. Comm'r, 279 F.2d 292 (9th Cir. 1960); United States National Bank of Portland v. United States, 188 F. Supp. 332 (D. Ore. 1960). The Service has acquiesced in *Gale, supra,* and *Rudnick, supra.*

45. See Estate of Margaret R. Gale, *supra* note 44, where Tax Court said: "No Maine court has decided the exact point at issue here, but a strong inference may be drawn from such cases as exist where widows' allowances have been attached on other grounds." (220) Also in Estate of Blair, *supra* note 43, a California case relied on heavily by Cunha's Estate, *supra* note 44, the widow died *prior* to the filing of any petition to secure a family allowance and not subsequent to the decree becoming final. However, in Estate of Hamilton, 66 Cal. 576, 6 Pac. 493 (1885) the California court held that upon remarriage by a widow: "The order of allowance to her, theretofore made, terminated at her second marriage, without the further order of the court." (576-77). This ruling apparently has reference to payments which under the terms of the order were not accrued prior to remarriage. As to such sums as are due and owing prior to death or remarriage under an order granting a family allowance, *In re Lux,* 114 Cal. 73, 45 P. 1023 (1896) holds that these contingencies will not terminate the widow's rights. It is not certain where this puts California if the relevant issue for tax purposes is as described by the Fifth Circuit and the Tax Court.

despite the fact that the "system" of family allowances has been working reasonably well for, in some cases, a century or more. Thus, a gap in local law is revealed, and an area long removed from intense professional concern emerges from its obscurity. This, in short, is the amplification aspect of tax law on local law.

This example, furthermore, depicts but a small segment of a larger area of private law which also nicely illustrates the amplification aspect. This larger area is that of the existence and scope of the obligation to support. The tax relevance of this area has been delineated by others,[46] sometimes quite elaborately,[47] and need not be described again in detail. It is enough to point out (1) that under sections 662, 677 and 678 of the 1954 Code the presence and nature of the obligation to support is relevant to the issue whether the income of a trust is attributable to the obligor of such duty; (2) that the retention by a grantor of a right, or perhaps even a possibility, to have the income of property applied in discharge of his obligation of support is relevant in determining the grantor's gross estate; and (3) that whether a lifetime transfer discharges or diminishes the transferor's obligation to support the transferee may determine gift tax consequences. These, and many related issues, have forced an examination of local law to learn, *inter alia*, the identity of the obligees, whether the obligor's responsibility is affected by the financial condition of the obligee,[48] the extent to which the obligation is secured by effective enforcement in other than divorce and separation,[49] and, of course, the type of expenditures made mandatory by the obligation.[50] However, local law, particularly with respect to the latter two of these issues, is not abundantly clear.[51] Although the divorce and separation cases provide a benchmark,[52] the

46. *E.g.*, Savage, *Comparative Advantages and Disadvantages of Support Trusts and Uniform Gifts to Minors Statute Gifts; What Support for Tax Purposes*, N.Y.U. 17th Inst. on Fed. Tax 1097 (1959); Pedrick, *Familial Obligations and Federal Taxation: A Modest Suggestion*, 51 Nw. U.L. Rev. 53 (1956).

47. *E.g.*, Note, 74 Harv. L. Rev. 1191 (1961).

48. *Cf.* Treas. Reg. § 1.662(a)-4 (1956).

49. See Note, *supra* note 47 at n.27.

50. *E.g.*, College education expenses, the second-hand or new car, the summer vacation trip to Europe and so on through the items which, when available, make the years before 21 very full indeed. Are these mandatory? If not, can their payment be in discharge of an obligation of support?

51. There is little or no local law of a definitive nature on the subject of the nature or extent of the family support obligation while the family is united. Pedrick, *supra* note 46, at 63 and n.37.

The most frequently litigated aspect of the expenditures a court may require is support for a college education. But even on this point, the cases are divided. *E.g.*, in Maitzen v. Maitzen, 24 Ill. App. 2d 32, 163 N.E.2d 840, 843 (1960), it is held that college education for children of average or better scholarship is a necessity of the day requiring the increase of the support of an adult child. This view is gaining the ascendancy. *E.g.*, Rawley v. Rawley, 94 Cal. App. 593, 210 P.2d 891 (1949), Hart v. Hart, 239 Iowa 142, 30 N.W.2d 748 (1948).

But see, contra, Boens v. Bennett, 20 Cal.App.2d 477, 67 P.2d 715 (1937): "The father is under no legal duty, after his son has attained the age of 16 years to send the latter to college, no matter what the father's financial circumstances may be." (718).

52. *E.g.*, Maitzen, *supra* note 51; Pass v. Pass, 238 Miss. 449, 118 So. 2d 769 (1960); Calogeras v. Calogeras, 10 Ohio Op. 2d 441, 163 N.E.2d 713 (Juv. Ct. 1959). There is

obscurities of law in other situations simply reflect the absence of a strong social need for precise guides in such areas. It remained for tax law to make important its omissions and uncertainties. These now painfully clear defects naturally suggest that local law be altered; and thus we come to the creative aspects of tax law's influence on local law.

C. *The Creative Aspect*

The examples of this type of influence are so numerous it is difficult to know where to begin. Perhaps a return to the family allowance situation will provide both continuity and the first example of this aspect. The amplification resulting from the examination of the rights of the surviving spouse to an allowance during the course of administration to determine their qualification for the marital deduction has already induced at least one state, Connecticut, to alter its law so that death during administration does not extinguish the right of such spouse to an allowance.[53] A similar response is occurring with respect to the local law consequences of disclaimers by those who take by intestate succession. Tax law, using the approach of *Hardenbergh v. Commissioner*,[54] treats a disclaimer as a taxable gift where, under the applicable local law, title to the interest disclaimed vested in the person disclaiming prior to such disclaimer and the effect of such disclaimer is to pass the title from such person to another. Frequently such are the local law consequences of a disclaimer by one who takes by intestate succession, but it is often otherwise with respect to legatees and devisees under a will.[55] This distinction, while perhaps useful under some circumstances involving the rights of private parties,[56] is not of sufficient substance to justify the difference in tax consequences between a disclaiming heir and legatee.[57] As a consequence there is an unmistakable trend in the states toward amendment of their statutes to provide similar consequences for disclaimers by heirs, legatees and devisees.[58]

In both these situations tax law is the generating source of the change but nothing in the formulation of the relevant tax law suggests that such a change was an explicit object of such law. Indeed, in the disclaimer situation it is probably of little concern to the Treasury what approach the local law takes,[59] and little, if any apprehension apparently exists in respect to family allowances.[60]

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some evidence that the divorce and separation cases have been used as analogies controlling the united-family situations. 74 Harv. Law Rev. 1191, 1205 (1961).

53. Conn. Gen. Stat. Rev. §§ 45-250 (1958, Supp. 1961).

54. 198 F.2d 63 (8th Cir. 1952), *cert. denied*, 344 U.S. 836 (1952).

55. See Brown v. Routzahn, 63 F.2d 914 (6th Cir. 1933).

56. *E.g.*, the consequences of intestacy proved useful to aid in determining the title to land in Lathrop v. Kellogg, 322 P.2d 572 (D.C. Cal. 1958).

57. In accord, see Lauritzen, *"Only God Can Make an Heir,"* 48 Nw. U. L. Rev. 568 (1953); 31 Texas L. Rev. 599 (1953).

58. See Smith-Hurd Illinois Ann. Stat. ch. 30, §§ 211-213 (1962); Page's Ohio Rev. Code § 2105.061, effective October 6, 1961. For additional citations to recent legislative changes in this area, see Casner, Estate Planning 35, note 67 (3d ed. 1961).

59. *Cf.* Treas. Reg. § 25.2511-1(c), (1958).

60. The recent acquiescences in *Gale* and *Rudnick*, *supra* note 44, suggest that a change

Not always, of course, does the Treasury observe with apparent equanimity a change of local law which it did not foresee or explicitly seek to induce. Many examples of changes which elicited Treasury concern readily come to mind, and certainly, one of the most notable is the threatened adoption of community property systems by many states just prior to the Revenue Act of 1948. A current situation which could have produced an unintended change of local law by numerous jurisdictions and caused concern to the Treasury involved a local institution—The Buffalo Savings Bank. The New York Court of Appeals in *Buffalo Savings Bank v. Victory*[61] interpreted New York law in a way which freed mortgages of the burden of local taxes accruing subsequent to the perfecting of a federal tax lien, but prior to foreclosure of the mortgage debt, and imposed such burden on the United States. The Supreme Court reversed.[62] Had this not occurred many states would have made certain that their law embodied provisions similar to those of New York.[63]

Naturally the spectacle of state legislatures and courts quickly altering their laws to provide tax advantages to their citizens is offensive to some; but before such activity be vigorously condemned, it must be remembered that the national government has employed this propensity of the states to achieve national purposes. The federal estate tax credit for death taxes imposed by the states was enacted, for example, to induce the states either to enact such taxes or to refrain from abolishing those which they had in response to interstate competition for the wealthy.[64] More recently the enactment of the Internal Revenue Code provisions establishing the real estate investment trust[65] and the promulgation of comprehensive regulations relating to associations taxable as corporations[66] has encouraged fairly extensive legislation[67] on the part of the

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of local law to vest family allowances at the time the decree becomes final will in no way impair the interests of the Treasury.

61. 11 N.Y.2d 31, 181 N.E.2d 413, 226 N.Y.S.2d 382 (1962).

62. United States v. Buffalo Savings Bank, 63-1 U.S.T.C. ¶ 9166. The court stated that the priority rules of federal tax liens could not be avoided "by the formalistic device of characterizing subsequently accruing local liens as expenses of sale."

63. This would have involved not only the adoption of the substance of section 1087 of the Civil Practice Act but also the view of the Court of Appeals that local real estate taxes and water rent liens constitute an indebtedness of the property itself incurred "for essential services supplied for the benefit of the land" and not "an unconnected indebtedness of the owner of the land." 11 N.Y.2d 31, 38-39, 181 N.E.2d 413, 416, 226 N.Y.S.2d 382, 387 (1962).

64. See Perkins, *State Action Under the Federal Estate Tax Credit Clause*, 13 N.C.L. Rev. 270 (1935).

65. Int. Rev. Code of 1954 §§ 856-58.

66. Treas. Reg. § 301.7701 (1960).

67. In the real estate investment trust area see, N.Y. Real Property Law § 96(7); N.Y. Personal Property Law § 11(c); Vernon's Tex. Civ. Stat. Art. 6138A (Supp. 1962). Approximately one-third of the states have adopted some form of "professional association" statute which is a direct response to the regulations, *supra* note 65 and other tax pressures. For a penetrating study of some of these statutes on the basis that the regulations are valid, see Bittker, *Professional Associations and Federal Income Taxation: Some Questions and Comments*, 17 Tax L. Rev. 1 (1961). Perhaps the recent enactment of the Self-Employed Individual Tax Retirement Act of 1962, P.L. 87-792 will stay the hand of some of the remaining states. Should this happen it too would demonstrate the power of tax law to induce a legislative response, inaction in this instance.

states which, to some extent at least, was foreseeable. It is true, of course, that in these instances national policy is not as prominent as in the tax credit for state death duties; but in all three tax law or administrative rulings initiated a not wholly unpredictable legislative response by the states.

There is another body of cases which also illustrate the creative aspect and which in many ways are the most fascinating of all. The operation of tax law, sometimes harsh and fortuitous in its consequences, produces good faith controversies between private parties. These controversies are not the non-adversary "collusive" proceedings in state courts which are designed for the explicit purpose of influencing tax results,[68] but are genuine disputes generated by the impact of a particular federal tax.

The first, *Miles v. Livingstone*,[69] a quite recent First Circuit decision, is difficult to read without being reminded of the long standing judicial attitude which has often led a court to deny a recovery in restitution when sought by a party to an illegal transaction.[70] The case developed from the efforts of the plaintiff and defendant to arrange a device, involving the plaintiff's purchase with borrowed funds and subsequent sale of government securities, which would yield the plaintiff a substantial tax reduction through the interaction of an interest deduction and capital gains. The device was a failure.[71] The plaintiff, deprived of his interest deduction, sought to recover the prepaid interest from the defendant on the grounds, *inter alia*, of deceit. The First Circuit, wavering between asserting that the device appeared to have possibilities when proposed and that no reasonable person could have believed that it would succeed, held for the defendant. The burden imposed by an unaccommodating tax law was not shifted.[72]

My second example involves a cluster of cases in which tax burden shifting, or at least rearrangement, has often been accomplished. The problem of these cases arises in quite complicated forms, but its essence is the extent to which the impact of federal income and estate taxes is to be permitted to alter the relative positions of various beneficiaries of trusts and estates *inter se*. A sketch of *Estate of Bixby*[73] will be illustrative. A substantial part of the taxable income of an estate consisted of dividend income which under California law

68. See Oliver, *The Nature of the Compulsive Effect of State Law in Federal Tax Proceedings*, 41 Calif. L. Rev. 638 (1953). For a case where "collusive" was interpreted broadly see Merchants National Bank & Trust Co. v. United States, 246 F.2d 410 (7th Cir. 1957).

69. 301 F.2d 99 (1st Cir. 1962).

70. In Bartle v. Nutt, 4 Pet. 184, 189 (U.S. 1830) the Supreme Court said: "If either [party to an illegal contract] has sustained a loss by the bad faith of a *particeps criminis*, it is but a just infliction for premeditated and deeply practiced fraud; which, when detected, deprives him of anticipated profits, or subjects him to unexpected losses."

71. The cases are numerous. See Eli D. Goodstein, 30 T.C. 1178 (1958), *aff'd* 267 F.2d 127 (1st Cir. 1959) and the other cases cited in Miles v. Livingstone, *supra* note 68, n.2.

72. A representation as to tax consequences can be the basis of liability under the doctrine of Glanzer v. Shepard, 233 N.Y. 236, 135 N.E. 275 (1922). In such instances the tax disappointment will be visited upon others. *Cf.* Gediman v. Anheuser Busch, Inc., 299 F.2d 537 (2d Cir. 1962).

73. 140 Cal. App. 2d 326, 295 P.2d 68 (1956).

belonged to the legatee of a specific legacy of the stock in respect to which the dividends were declared. Administration expenses were deducted against this income rather than against the gross estate for estate tax purposes. The effect was to increase the estate tax burden to certain beneficiaries under the will, reduce the income tax paid by the estate, and augment the entire estate by the amount the income tax savings exceeded the increase in estate taxes. The court permitted the prejudiced beneficiaries to recoup a portion of their loss from the legatee of the stock who was benefited substantially by the deduction of administration expenses from estate income.[74] A similar case *In re Warms' Estate*,[75] exists in New York, and the general problem is a substantial one in the administration of trusts.[76]

Now let us step back a pace or two. Our picture of the influence of federal tax law, while but little more than a fragmentary outline, permits us to glimpse, at lease in the mind's eye, a bit of both the grand sweep and intricate detail which a completed canvas might reveal. As we imagine how the future strokes of the brush will be placed, surely we must wonder whether its coloration will be somber or bright. Let me describe for you my view.

II

Some Suggestions and a Hard Look at the Future

The previous discussion plainly suggests that, although the problem of the influence of the law upon private law is both enormous and pervasive, there are a few procedures which could do a bit to minimize the undesirable features of this influence. In the first place tax cases enunciating private law principles should be used as authorities in litigation between private parties only after a careful examination of the tax relevance of the principle to determine the possibility of distortion by tax pressures. Every lawyer and judge should become aware of this possibility; and if a reformulation of the principle is necessary to protect the non-fiscal interests intended to be served by the principle, the fiscal concerns of neither the sovereign nor the subject should bar such a restatement. In short, private law in the main should serve non-fiscal ends, and in our society only vigilance of an unusual sort will make this so.

74. In this particular case the legatee retained a significant portion of the tax benefit because the income tax savings greatly exceeded the amount necessary to compensate the beneficiaries prejudiced by the loss of an estate tax deduction.

75. 140 N.Y.S.2d 169 (Surr. Ct. 1955); see N.Y.U. 20th Inst. on Fed. Tax 316 (1962).

76. *E.g.*, In re Estate of Dick, 29 Misc. 2d 648, 218 N.Y.S.2d 182 (Surr. Ct. 1961) (trustee not permitted to adjust accounts between an income beneficiary and remaindermen under a trust even though charges against trust principal when taken as deductions against distributable net income benefited the income beneficiary and not the remaindermen). For a discussion of the problem see 2 Page, Wills 44 (Bowe and Parker ed. 1960). For other examples of tax spawned litigation, see Allen v. Spencer, 214 F.2d 205 (D.C. Cir. 1954) (unsuccessful suit to compel change of retirement orders so as to make pension tax free); Stone v. Stone, 319 Mich. 194, 29 N.W.2d 271 (1947) (transfers to partnership to minimize taxes set aside on grounds of mistake where scheme failed); In re Floyd's Estate, 43 AFTR 1301 (Orphan's Ct. Del. County, Pa. 1951) (executrix ordered to sign a joint return to provide benefits of income splitting).

It follows from this that, where tax law has bent the private law into a shape that best serves the non-fiscal interests involved, the tax cases accomplishing this feat be used only as secondary support for a result already suggested by reason and private law authorities. Legal scholars when describing an area of private law should employ such tax cases circumspectly and avoid the practice of citing them as primary authorities.

It is not enough, however, to use tax decisions circumspectly in tracing out the details of a private law area. In addition, law men, to use Llewellyn's term,[77] should avoid the temptation of fashioning a rule or principle in the context of a private dispute which, despite its deficiencies in such context, admirably solves some real or imagined tax issue. To do this is improper for one or more of three reasons: the non-fiscal interests are poorly served, the tax issue may be non-existent and, even if present, the tax law probably will be changed in no less than a decade. The same adjuration is applicable to the law men who serve in, or appear before, or attempt to influence legislatures. Naturally a solution to a private law issue which admirably serves both the fiscal and non-fiscal interests involved should not be condemned even if the solution favors the taxpayer. It is pure cant, to borrow a mode of expression from Judge Learned Hand,[78] to urge that local law of the states should maximize the tax collections of the federal treasury at the expense of all other competing interests.

Restraint and wisdom, however, are burdens of law men at the federal level as well as at that of the states. All feasible efforts should be made to avoid pivoting significant tax distinctions on insignificant features of local law.[79] For example, to return to the disclaimer situation, tax law should never have established a distinction between legatees and devisees on the one hand and heirs on the other. To have done so is but slightly more defensible than permitting the "title" to property to materially influence the attribution of income therefrom to the proper taxpayer. All agree that the latter is unthinkable. Nonetheless, a small random sampling of tax cases demonstrates to me a readiness on the part of the Commissioner to employ in litigation with taxpayers nicely refined features of local law, whose substantive consequences in the context of the relevant tax issues were of little significance, where such

77. Llewellyn, The Common Law Tradition 23, n.14 (1960).

78. Commissioner v. Newman, 159 F.2d 848 (2d Cir. 1947) involved the taxability of income to the husband and trustee of two trusts established to provide for two minor children by their mother. The majority of the Court held that the grant of power to the trustee to revoke or alter the trust was too broad, and that the purpose of the trusts was actually to avoid taxation. Judge Hand attacked the latter argument at the conclusion of his dissent: "Over and over again courts have said that there is nothing sinister in so arranging one's affairs as to keep taxes as low as possible. Everybody does so, rich or poor; and all do right for nobody owes any public duty to pay more than the law demands! Taxes are enforced exactions, not voluntary contributions. To demand more in the name of morals is mere cant." (850-51).

79. The Treasury Regulations, *supra* note 65, relating to associations taxable as corporations are guilty of this.

features possibly would be of assistance to him.[80] This practice to some extent encourages courts to forego a hard-headed analysis of the social, economic, and legal consequences of the tax relevant situation before them and leads taxpayers to smile wryly when the Commissioner righteously asserts the inapplicability of formal distinctions rooted in local law. While the prescription is a difficult one to follow, the taxing authorities should seek always to turn tax issues on features of local law which are (1) not easily manipulated without injury to significant private interests, (2) reasonably unambiguous and well established and (3) consistent with the goals of equality and uniformity.[81] Furthermore, it appears to me to be unwise for the federal government to seek frequently the alteration of state law by rewarding such change with tax advantages. Enough has been said to indicate that this is a game at which two can, and do, play. To alleviate its consequences restraint by both the federal government and the states is required.

This paper could be brought to a felicitous end were it possible for me at this point to predict that the handful of obvious measures just described would be made effective. This I cannot do, however. The reasons? They do not originate in any plot to unravel the fabric of federalism, but rather they spring from our commitment to greatness. As this nation in the nineteenth century instinctively recognized in "Manifest Destiny" the summation of its temporal aspirations, so today "Leadership of the Western World" draws us onward. The challenge of our twentieth century mission leads us to shoulder the steadily increasing burden of taxation imposed by our governments with a reasonably moderate amount of criticism. We do not like to pay taxes, it is true; but we prefer the greatness of leadership to relief from taxes.

These things being true, there neither exists presently nor in the foreseeable future any significant prospect of abatement of revenue demands, and in the absence of such abatement the processes of "fiscalizing" our private law

80. The sample is 21 Tax Court of the United States Reports. References to local law appeared in many of the cases. In three instances the Commissioner relied on features of local law which do not embody substantial legal or economic consequences. In *Stern*, 21 T.C. 155 (1953) the Commissioner relied on the common law characterization of a tenancy by the entirety which made each spouse seized *per tout et non per my* to contend that a sale by taxpayer to his son-in-law and daughter as tenants by the entirety was a sale "between members of a family" within the meaning of section 24(b) of the 1939 Code. His contention was upheld by the Tax Court, but rejected by the Third Circuit. 215 F.2d 701, 705-06 (3d Cir. 1954). In *Doran*, 21 T.C. 374 (1953) a South Carolina statute making all payments to state employees salary and not perquisites was relied on partially to make a rental allowance paid the taxpayer by the state compensation and not quarters furnished for the convenience of the employer. However, in *Saunders*, 21 T.C. 630 (1953) a New Jersey characterization of a payment as a ration allowance and not compensation was asserted to be insufficient to remove the allowance from gross income. The Commissioner won in both instances; but *Saunders* was reversed, 215 F.2d 768 (3d Cir. 1954). The third instance was found in *Andigier*, 21 T.C. 665 (1954) where the Commissioner to buttress an already strong case relied upon the Tennessee rule that a written contract signed by the party to be bound is prima facie evidence of consideration to rebut the taxpayer's claim of gift. He was successful, and there was no reversal.

81. See Note, *The Role of State Law in Federal Tax Determinations*, 72 Harv. L. Rev. 1350 (1959) where these criteria are examined in some detail.

which I have described will probably continue. Move, counter-move, and then counter-counter-move are the now familiar steps of this process. Some things can be done to avoid its excesses, but in the end I doubt the developments I have been describing will be halted. But then we will have greatness—perhaps.