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# Comments on Recent Cases: Federal Income Taxation - Alimony and Support Payments - Effect of a Questionable Foreign Divorce

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Since the United States Supreme Court has insisted that the state courts consider the circumstances surrounding a confession in their totality to determine the voluntariness of a confession,[42] the Iowa court should not have considered the facts in isolation.[43] It seems that defendant's mental incompetence could greatly increase the possibility that the false representation as to the possession of an arrest warrant would be misleading and its seriousness exaggerated. The delay in taking the defendant before a magistrate could likewise increase the chance of his being misled about the gravity of the charges against him since legal cause for detainment must be shown at the hearing. Also, the possibility that the defendant would make incriminatory statements during the period of delay, while being subjected to a lengthy interrogation, seems to be much greater than it would be with a person of normal intelligence. Admittedly, the conclusion that no single factor was necessarily sufficient to violate due process can be supported. However, since the law in respect to the admissibility of confessions is undergoing a thorough examination in light of the federal constitutional dictates, it may be reasonably concluded that the Iowa court should have considered whether the combination of circumstances rendered the confession inadmissible.

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**Federal Income Taxation—Alimony and Support Payments—Effect of a Questionable Foreign Divorce.**—In 1946 the appellant and his first wife separated by mutual consent and executed a separation agreement regarding the support of the wife and their only child.[1] Six years later the appellant obtained a divorce in Mexico on questionable jurisdictional and substantive grounds.[2] A short time later the appel-

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if made during a delay in taking the accused before a magistrate, is excluded to discipline the police officers. Perhaps the same result is presently occurring in the state courts through another process, specifically, the requirements of advising the accused of his right to counsel when the investigation has become accusatory in nature and of his privilege against self-incrimination. See Escobedo v. Illinois, 378 U.S. 478 (1964); Malloy v. Hogan, 378 U.S. 1 (1964). These acts might well be required ahead of the period of "without unnecessary delay" for which an accused must be brought before a magistrate under the Iowa statute.

[42] See, *e.g.*, Gallegos v. Colorado, 370 U.S. 49, 55 (1962); Payne v. Arkansas, 356 U.S. 560, 567 (1958); Fikes v. Alabama, 352 U.S. 191, 197 (1957).

[43] The Supreme Court of Iowa, in holding criminal convictions violative of due process, has previously considered the total effect of various factors in its determination that the confessions were involuntary. See State v. Archer, 244 Iowa 1045, 1056-57, 58 N.W.2d 44, 50 (1953); State v. Thomas, 193 Iowa 1004, 1020-21, 188 N.W. 689, 696 (1922).

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[1] The appellant was obliged to pay $575 a month by terms of this initial agreement. A consent decree was entered later that same year which increased the payments from $6,900 to $8,550 a year. Estate of Borax v. Commissioner, 349 F.2d 666, 668 (2d Cir. 1965).

[2] Jurisdiction appeared to be based on the fact that the taxpayer "had submitted himself to the jurisdiction of the court." The ground for divorce was "incompatibility of character." *Ibid.*

lant remarried. Both the Mexican divorce and the second marriage were declared invalid in a declaratory action brought by the first wife in New York.[3] Notwithstanding this decree, the appellant continued to live in New York with the second wife and filed joint federal income tax returns with her for the years 1952-1955 and 1957. On these returns the appellant claimed a deduction for the payments made to his first wife under the 1946 separation agreement and dependency exemptions for his second wife's parents and her children by a prior marriage. The Commissioner of Internal Revenue disallowed the deduction and the dependency exemptions and declared deficiencies for the years in dispute. This decision was sustained by the Tax Court.[4] On appeal to the United States Court of Appeals for the Second Circuit, *held,* reversed. In order to promote certainty and uniformity in the federal tax system, a foreign decree of divorce, with but few exceptions,[5] is a divorce within the meaning of the alimony provisions of the *Internal Revenue Code* despite a subsequent declaration of invalidity by a court of the taxpayer's domicile. *Estate of Borax v. Commissioner,* 349 F.2d 666 (2d Cir. 1965).

While federal courts have traditionally considered uniformity an important goal in federal tax policy,[6] it has been evident that this purpose could only be achieved to a limited extent where the federal tribunals have had to resort to state law in applying federal revenue provisions.[7] The intention of Congress, however, is paramount in initially determining whether state or federal law is to be applied.[8] In this regard the courts have declared that Congress does not intend to apply state law unless the "language or necessary implication" of the section involved requires it.[9]

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[3] Borax v. Borax, 119 N.Y.S.2d 819 (Sup. Ct. 1953).

[4] Ruth Borax, 40 T.C. 1001 (1964), *rev'd sub nom.,* Estate of Borax v. Commissioner, 349 F.2d 666 (2d Cir. 1965).

[5] The court in the instant case carefully limited the applicability of its decision to exclude situations where the rendering jurisdiction itself declares the divorce obtained invalid and where the rendering jurisdiction's concept of a divorce is totally alien to that contemplated by the tax laws. 349 F.2d at 672.

[6] See, *e.g.,* Helvering v. Stuart, 317 U.S. 154, 161 (1942); United States v. Pelzer, 312 U.S. 399, 402-03 (1941); Paul v. Commissioner, 206 F.2d 763, 765 (3d Cir. 1953).

[7] See PAUL, SELECTED STUDIES IN FEDERAL TAXATION 5 (2d ed. 1938). See generally Bartlett, *The Impact of State Law on Federal Income Taxation,* 25 CHI.-KENT L. REV. 103 (1947).

[8] See, *e.g.,* Helvering v. Stuart, 317 U.S. 154, 161 (1942); United States v. Folckemer, 307 F.2d 171 (5th Cir. 1962); Doll v. Commissioner, 149 F.2d 239, 242 (8th Cir. 1945). For further discussion of this principle, see 5 RABKIN & JOHNSON, FEDERAL INCOME GIFT AND ESTATE TAXATION § 71.08(1)-(8) (1965) and cases cited therein.

[9] This principle was first stated in Burnet v. Harmel, 287 U.S. 103, 110 (1932):

> Here we are concerned only with the meaning and application of a statute enacted by Congress, in the exercise of its plenary power under the Constitution, to tax income. The exertion of that power is not subject to state control. It is the will of Congress which controls, and the expression of its will in legislation, in the absence of language evidencing a different purpose, is to be interpreted so as to give a uniform application to a nation wide scheme of taxation. . . . State law may control only when the

This objective of uniformity and the problems posed by local law in achieving it have been quite evident in the taxation of alimony and support payments. Since marital separations are primarily a state concern, the courts have had to look to state law to resolve many of the tax disputes involving the various kinds of separation payments. Prior to 1942 little uniformity was achieved in this area. Generally, these payments were neither taxable to the wife nor deductible by the husband.[10] However, through the use of an alimony trust under favorable state law, a husband could shift the tax burden imposed on the income to his wife.[11] This caused disparity in the taxation of alimony and support payments since some taxpayers did not have sufficient financial resources to fund an alimony trust, and, even where a particular taxpayer did have sufficient funds, the application of the law of his domicile often resulted in an inferior tax position in relation to taxpayers in the same situation in other jurisdictions. In an attempt

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Federal taxing act, by express language or necessary implication, makes its own operation dependent upon state law.

For a more comprehensive analysis of this test, see 10 MERTENS, FEDERAL INCOME TAXATION § 61.02 (rev. 1964) and cases cited therein.

Once it has been determined that Congress intended local law to apply, the courts will often have to choose between two or more jurisdictions. Thus, when Congress intends local law to apply to a tax statute, it necessarily leaves to the judiciary the problem of "choice of state law." It has been suggested that the federal courts in applying the above standard in tax cases have sought to encourage uniformity by modifying the traditional conflict of law rules in favor of the concept of "economic situs" and by adopting devices for ease of administration. The former concept requires the application of the local law of the taxpayer's "economic situs," notwithstanding what law might govern the property or transaction normally. Cahn, *Local Law in Federal Taxation*, 52 YALE L.J. 799, 821 (1943). Such a device for ease of administration would be the application of general presumptions of state law in frequently recurring transactions. *Id.* at 822.

[10] See Gould v. Gould, 245 U.S. 151 (1917), where it was held that alimony payments to the wife were not taxable to her because it was not income within the meaning of the Revenue Act of 1913, ch. 16, 38 Stat. 166. It was said that the payments were not based on contract, but on the natural and legal duty of the husband to support the wife. Gould v. Gould, *supra* at 152. The payments were not deductible by the husband because they were considered to be personal expenses. See Treas. Reg. 103, § 19.24-1 (1940).

[11] See Douglas v. Willcuts, 296 U.S. 1 (1935), where the court held that income payable to the wife from a trust created by the husband was taxable to the husband. The court reasoned that since the income was used to discharge a legal obligation imposed on him it was analogous to the situation where he received the income from the trust himself and paid it to his ex-wife. *Id.* at 9. Thus, the court was apparently using the doctrine of constructive receipt.

However, the doctrine announced in the *Douglas* case was narrowed by subsequent cases. If a husband could prove that the creation of the trust for the benefit of the wife gave him a full discharge and imposed no further obligation upon himself under local law, then the income was not taxable to him. See Helvering v. Leonard, 310 U.S. 80, 84 (1940); Helvering v. Fuller, 310 U.S. 69, 75 (1940); Helvering v. Fitch, 309 U.S. 149, 156-57 (1940). For an excellent discussion on the development of this area, see generally Gornick, *Taxation of Alimony Trusts—A Need for Congressional Reform*, 20 TAXES 529 (1942).

to eliminate such disparity and shift the tax burden to the beneficial recipients of alimony and support payments,[12] Congress in 1942 added sections 22(k) and 23(u) to the Internal Revenue Code of 1939.[13] As a result of these provisions, a certain degree of uniformity in the taxation of alimony and support payments was reached. The ability of the husband to shift the tax burden to his wife was no longer primarily dependent upon his financial status and the fortuity of living in a jurisdiction with favorable laws.

However, a disparity developed from the necessary application of state law to the new provisions. Section 22(k) was narrow in its scope since the inclusion of the payments in the wife's gross income and the deductibility of such payments by the husband under section 23(u)[14] occurred only if the very specific statutory requirements were met.[15] Under section 22(k) the parties had to be legally separated under a "decree" of divorce or separate maintenance.[16] Since the courts interpreted "decree" as requiring some sort of final judicial determination, they necessarily had to examine state law for the meaning of "decree."[17] Because of this construction, voluntary agreements between the spouses not pursuant to a court decree,[18] payments for support of the wife during the pendency of a divorce suit,[19] or payments for support under an order of separate maintenance did not fall within the provisions of section 22(k).[20] Consequently, many hus-

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[12] See S. REP. No. 1631, 77th Cong., 2d Sess. 83-87 (1942); H.R. REP. No. 2333, 77th Cong., 2d Sess. 46, 71-74 (1942). Another reason for the enactment of the alimony provisions was the desire to grant the husband relief from the high progressive wartime tax rates which, after alimony was paid, left very little for the husband's own needs.

[13] Int. Rev. Code of 1939, §§ 22(k), 23(u), added by ch. 619, 56 Stat. 816, 817 (1942).

[14] Int. Rev. Code of 1939, § 23(u), added by ch. 619, 56 Stat. 817 (1942), provided in essence that the payments to the wife were deductible by him to the extent such payments were includible in the wife's gross income under section 23(k) unless these payments were not includible in his gross income.

[15] Int. Rev. Code of 1939, § 23(k), added by ch. 619, 56 Stat. 817 (1942) provided:

> In the case of a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, periodic payments (whether or not made at regular intervals) received subsequent to such decree in discharge of, or attributable to property transferred (in trust or otherwise) in discharge of, a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce or separation shall be includible in the gross income of such wife, and such amounts received as are attributable to property so transferred shall not be includible in the gross income of such husband. . . .

[16] *Ibid.*

[17] See Commissioner v. Evans, 211 F.2d 378 (10th Cir. 1954); Treas. Reg. 118, § 39.22(k)-1-(a)(4) (1953); cf. Commissioner v. Ostler, 237 F.2d 501 (9th Cir. 1956); Marriner S. Eccles, 19 T.C. 1049 (1953).

[18] See, *e.g.*, Daine v. Commissioner, 168 F.2d 449 (2d Cir. 1948); Smith v. Commissioner, 168 F.2d 446 (2d Cir. 1948); Charles L. Brown, 7 T.C. 715 (1946).

[19] See Alice Humphreys Evans, 19 T.C. 1102 (1953), *aff'd*, 211 F.2d 378 (10th Cir. 1954); George D. Wick, 7 T.C. 723, 728 (1946).

[20] See Richardson v. Commissioner, 234 F.2d 248, 252 (4th Cir. 1956); Tressler

bands in an economic position similar to those able to take advantage of section 22(k) still were not permitted to deduct the payments.

In response to this problem, Congress in 1954 revised the alimony provisions of the *Internal Revenue Code*. These amendments have tended to achieve a much greater degree of uniformity in the taxation of alimony and support payments. Although virtually all of the provisions of section 22(k) were embodied in section 71(a)(1) of the 1954 Code,[21] paragraphs (2) and (3) of that section covered two classes of payments not within the 1939 Code. Under section 71(a)(2),[22] payments made pursuant to a written separation agreement executed after the enactment of the 1954 amendments were includable in the gross income of the wife and deductible by the husband under section 215, provided that the payments met the other requirements of the subsection.[23] Apparently, section 71(a)(2) was enacted to give those taxpayers relief who could not fall within the previous provisions because of religious beliefs.[24] Section 71(a)(3) required a wife separated from her husband to include in her gross income payments which the husband was required to make pursuant to a decree for her support or maintenance.[25] This latter provision eliminated the requirement of a final decree and thus alleviated much of the disparity caused by the reliance on state law to determine finality of the decree.

Although the 1954 amendments were not controlling in the instant case since it arose under section 22(k), the court did consider them in determining the meaning of a "decree of divorce" as used in sec-

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v. Commissioner, 228 F.2d 356, 360 (9th Cir. 1955); Frank J. Kalchthaler, 7 T.C. 625 (1946).

[21] *Compare* INT. REV. CODE OF 1954, § 71(a)(1) *with* Int. Rev. Code of 1939, § 22(k), added by ch. 619, 56 Stat. 817 (1942).

[22] INT. REV. CODE OF 1954, § 71(a)(2) provides:

> If a wife is separated from her husband and there is a written separation agreement executed after the date of the enactment of this title, the wife's gross income includes periodic payments (whether or not made at regular intervals) received after such agreement is executed which are made under such agreement and because of the marital or family relationship (or which are attributable to property transferred, in trust or otherwise, under such agreement and because of such relationship). This paragraph shall not apply if the husband and wife make a single return jointly.

[23] The right of the husband to deduct such payments was unchanged by the 1954 provisions. Before the husband could deduct the payments, they had to be included within the wife's gross income. Int. Rev. Code of 1939, § 23(u), added by ch. 619, 56 Stat. 817 (1942), relating to the right of the husband to deduct alimony and support payments, was incorporated without substantial change in INT. REV. CODE OF 1954, § 215.

[24] See McDonald, *Tax Aspects of Divorce, Separation, Alimony and Support*, 17 U. PITT. L. REV. 1, 3-4 (1955). The Senate Finance Committee recognized the discrimination between those separated under court order and those who were not. S. REP. No. 1622, 83d Cong., 2d Sess. 10-11 (1954).

[25] INT. REV. CODE OF 1954, § 71(a)(3) provides:

> If a wife is separated from her husband, the wife's gross income includes periodic payments (whether or not made at regular intervals) received by her after the date of the enactment of this title from her husband under a decree entered after March 1, 1954, requiring the husband to make the payments for her support or maintenance. This paragraph shall not apply if the husband and wife make a single return jointly.

tion 22(k). In prior decisions by the courts where the marital status of the taxpayer was in issue under section 22(k), the law of the taxpayer's domicile was controlling as to such status.[26] However, in the instant case the court looked solely for a decree of divorce. After considering the 1954 liberalization of the tax laws, the court then applied federal standards to determine the decree's validity. The court declared that a decree was valid within the meaning of section 22(k) as long as it did not frustrate the revenue purposes of the tax laws.[27] Such a rule of validation, according to the court, promoted uniformity and certainty in the federal tax scheme and also tended to further the congressional policy of placing the tax burden of the separation payments on the party enjoying such payments.[28] At first glance the court's rationale seems in conformity with congressional intent as evidenced by the legislative history.[29] However, carrying these general purposes to their logical extreme could have serious ramifications of which the courts must be cognizant.

By logically extending the rationale of the instant case, the courts might create disparity with other provisions of the *Internal Revenue Code*. If the appellant in the instant case had died intestate upon returning to New York, a question would arise concerning the estate tax marital deduction.[30] Certainly the second wife could not take any of the decedent's estate since state law had declared their marriage invalid. However, the first wife would probably be entitled to part of the estate under state law. In determining whether the first wife's share of the estate would come under the marital deduction, the court would have to choose between two inconsistent alternatives. One such alternative would be to follow the decision in the instant case and recognize the decree as valid thereby giving uniform construction to all sections within the Code dealing with the marital status.[31] Under such a construction, since the second wife could not take any of the estate but would be validly married for tax purposes, the estate would not get a marital deduction for the amount going to the first wife. The court's other alternative would be to choose the law of the decedent's

[26] See Commissioner v. Evans, 211 F.2d 378 (10th Cir. 1954); Lily R. Reighley, 17 T.C. 344 (1951).

[27] 349 F.2d at 672. In Wondsel v. Commissioner, 350 F.2d 339 (2d Cir. 1965), the court, using the same rationale as that articulated in the instant case, held that an ex parte divorce granted in Florida was a divorce within § 22(k).

[28] 349 F.2d at 670.

[29] See authority cited note 12 *supra*.

[30] INT. REV. CODE OF 1954, § 2056.

[31] It is evident from the legislative history of the joint return provisions enacted in 1948 that Congress intended to give uniform construction to the sections relating to marital status under the joint return provisions and to marital status under the provisions granting an exemption for the spouse of the taxpayer filing a separate return. The language used in these sections was adopted from Int. Rev. Code of 1939, § 22(k), added by ch. 619, 56 Stat. 816 (1942). By implication it would seem that section 22(k) should be given the same uniform construction. See S. REP. No. 1013, 80th Cong., 2d Sess. 58 (1948); H.R. REP. No. 1274, 80th Cong., 2d Sess. 44-45 (1948). Although there is no indication as to whether Congress intended the same uniform construction for purposes of the marital deduction, it is likely the courts would strive for uniformity.

domicile as to the first wife's marital status in order to give the estate the benefit of the marital deduction.[32] Choosing the latter alternative in the intestacy situation, however, would create disparity among the tax provisions as to whether a decree and subsequent remarriage are valid for tax purposes.

Since the court in the instant case recognized the divorce decree and remarriage as valid for purposes of the joint return provisions on similar grounds as those articulated for the alimony provisions,[33] possible disparity in the filing of joint returns could result because of the complicated concepts of community income. Congress, in enacting the joint return provisions of 1948,[34] did not intend to abrogate the community property theory of income in such states.[35] Therefore, if a husband and wife filed separate returns in a community property state, each spouse would have to include their respective share of community income in the separate returns.[36] This requirement, however, is eliminated when the community is terminated,[37] as in an absolute decree of divorce or a decree of separate maintenance.[38] Similarly, the right to file a joint return is terminated upon such an occurrence.[39] While the tests determining the termination of the community in community property states and the right to file a joint return appear to be the same, a problem might arise if a divorce and remarriage under circumstances similar to the instant case were not recognized by a community property state. If they were not recognized under the state law, the

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[32] Although there are no cases directly on point, the effect of the local law of a decedent's domicile on the right of the decedent's estate to obtain the benefit of the marital deduction has been very important. See Estate of Awtry v. Commissioner, 221 F.2d 749, 759-60 (8th Cir. 1955) (effect of mutual will on joint tenancy property); Nettz v. Phillips, 202 F. Supp. 270 (S.D. Iowa 1962) (effect of mutual will on survivor's power to transfer property); Poage v. Phillips, 202 F. Supp. 267 (S.D. Iowa 1961) (effect of presumption of revocation where will cannot be found).

[33] 349 F.2d at 675.

[34] INT. REV. CODE OF 1954, § 6013.

[35] See S. REP. No. 1013, 80th Cong., 2d Sess. 22-25 (1948); H.R. REP. No. 1274, 80th Cong., 2d Sess. 1, 21-24 (1948). For a comprehensive analysis as to what constitutes community income, see 3 MERTENS, *op. cit. supra* note 9, § 19.72.

[36] The right of the husband and wife to split their income on a community property basis was firmly established in the following companion cases. See Poe v. Seaborn, 282 U.S. 101, 118 (1930); Goodell v. Koch, 282 U.S. 118 (1930); Hopkins v. Bacon, 282 U.S. 122 (1930); Bender v. Pfaff, 282 U.S. 127 (1930). Although these decisions did not deal with the question of whether it was mandatory to include their share of the community, subsequent decisions have so held. See Lorraine I. Dippel, 24 P-H Tax Ct. Mem. 193 (1955); Ella E. Harrold, 22 T.C. 625, 630 (1954), *rev'd on other grounds*, 232 F.2d 527 (9th Cir. 1956); Marjorie Hunt, 22 T.C. 228, 230 (1954); Paul Cavanagh, 42 B.T.A. 1037 (1940), *aff'd*, 125 F.2d 366 (9th Cir. 1942); 3 MERTENS, *op. cit. supra* note 9, § 19.05, at 21-22.

[37] See Christine K. Hill, 32 T.C. 254 (1959); Bettie R. Funderburk Sparks, 28 P-H Tax Ct. Mem. 587 (1959) (by implication); Margaret Ruth Ruiz, 22 P-H Tax Ct. Mem. 73 (1953); Marjorie Hunt, 22 T.C. 228, 230 (1954) (dictum).

[38] See 3 MERTENS, *op. cit. supra* note 9, § 19.42.

[39] INT. REV. CODE OF 1954, § 6013(d)(2).

community would not be terminated.[40] Therefore, a husband obtaining the divorce and remarrying might only have to report half of the community in his return, with the other half being reported by the first wife, and would also receive a second income-splitting advantage by filing a joint return with his second wife under the rationale of the instant case. If this were permissible it would be very beneficial to live in a community property state.[41] The courts, however, might not allow a taxpayer to obtain this two-fold income splitting advantage since it would seem to frustrate revenue purposes of the tax laws. One possibility would be to prevent the taxpayer from filing a joint return with his second wife.[42] In choosing this method, though, disparity of construction would result because such divorce and remarriage would be valid for joint return purposes in common-law property states but invalid in community property states.[43]

There is also the possibility that subsequent litigation concerning the validity of a post-1954 divorce decree where the parties had entered into a pre-1954 written separation agreement would cause the courts difficulty in applying the tax laws. There could be a tendency to apply the precedent in the instant case which arose under section 22 (k) of the 1939 Code instead of applying section 71 of the 1954 Code. This would seemingly cause noncompliance with the clear congressional mandate set forth in section 71 (a) (2).[44] It can be inferred

[40] See cases cited note 37 *supra*.

[41] This would especially be true if the community income was represented by the personal earnings of the husband. Thus, if a husband earned $10,000 in wages and salaries, he would report $5,000 of this in a joint return with his second wife. The first wife would have to include the other $5,000 in her return. Since the husband would have control over the entire $10,000 he could easily consume this amount and the first wife might never obtain the enjoyment of this income.

[42] The weight of authority prior to the decision in the instant case would probably not allow the taxpayer to file a joint return with the second wife because the law of the taxpayer's domicile was considered controlling. See, *e.g.*, Commissioner v. Ostler, 237 F.2d 501 (9th Cir. 1956); Louise Ross, 33 P-H Tax Ct. Mem. 2275, 2279 (1964); Marriner S. Eccles, 19 T.C. 1049, 1051, *aff'd per curiam*, 208 F.2d 796 (4th Cir. 1953).

[43] Such a procedure would promote equality of treatment among taxpayers. This interest would likely prevail over the interest in uniform construction of "marital status." Another possible alternative for the courts would be to say that the taxpayer is estopped from denying the termination of the community because of the Mexican divorce. Thus, the taxpayer would have to report all of the income held in community with the first wife in the joint return filed with the second wife even though state law still recognized the first community. Such a construction would tend to cause disparity in the application of community income concepts, although promoting equal treatment of husband taxpayers. It would also raise the question of whether the issues were sufficiently identical in both situations to enable the court to invoke the doctrine of "collateral estoppel." For a comprehensive analysis of the principles of estoppel as they relate to tax cases, see generally Branscomb, *Collateral Estoppel in Tax Cases: Static and Separable Facts*, 37 TEXAS L. REV. 584 (1959); Griswold, *Res Judicata in Federal Tax Cases*, 46 YALE L.J. 1320 (1937).

[44] INT. REV. CODE OF 1954, § 71 (a) (2) states in part: "If a wife is separated from

from the legislative history that Congress in enacting section 71 (a) (2) intended that pre-1954 agreements should not be subject to the provisions of section 71 unless such agreements were substantially modified after 1954.[45] The apparent reason for this limitation was to give effect to instruments drafted with the thought that they would be nontaxable to the wife.[46] It does not seem possible that Congress intended for a taxpayer to circumvent the limitation in section 71 (a) (2) by unilaterally reforming a pre-1954 separation agreement through use of a quickie Mexican divorce.

Another problem posed by the decision in the instant case arises from the court's implied approval of a unilateral change of the wife's tax status without her knowledge. However, language in the alimony and support provisions indicates Congress intended each spouse to have an opportunity to bargain as to their respective tax status. The requirement of a written agreement in section 71 (a) (2) suggests such an opportunity to bargain.[47] The importance of an opportunity to bargain is also evident upon examining section 22 (k). This section, when originally enacted in 1942, declared that the wife was not taxable on any part of the payment which the "terms of the decree," or a written instrument incident to such decree, fixed as a sum payable for the support of the husband's minor children.[48] The rationale for this provision appeared to be that the wife could not be the beneficial recipient of amounts which were needed for the children. In order for this exception to apply, however, the payments for support of minor children had to be "fixed" by the instrument or decree.[49] If no notice were given of a divorce proceeding, the spouse bringing the action could unilaterally fix the terms of the decree regarding child support. Thus, if the husband brought the action he would likely seek to incorporate the old instrument, with modifications of the amount for child support, into the divorce decree. If the wife were bringing the action, the husband could try to pre-empt her by starting an action in a jurisdiction where the notice requirements would not apprise her of such action in hopes that he could obtain the initial judgment. To defeat this possibility and adequately protect the opportunity to bargain, the wife should be given sufficient notice to apprise her of the pendency of a divorce suit. Apparently, prior decisions as to the validity of a divorce decree achieved this result using the concept of domicile. The court in the instant case suggested that the spouse's

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her husband and there is a written separation agreement executed *after the date of the enactment of this title . . .*" (Emphasis added.)

[45] Although the committtee reports did not specifically refer to this situation, the House. Conference Report made it clear that any decree for support altered or modified after March 1, 1954, should be treated as a decree entered after March 1, 1954, for purposes of INT. REV. CODE OF 1954, § 71 (a) (3). See H.R. REP. No. 2543, 83d Cong., 2d Sess. 23 (1954). The Internal Revenue Service has taken the position that any pre-1954 agreement altered or modified in any material respect shall be treated as a post-1954 agreement. See Treas. Reg. § 1.71-1 (b) (2) (ii) (1957).

[46] S. REP. No. 1622, 83d Cong., 2d Sess. 10-11 (1954).

[47] See text of INT. REV. CODE OF 1954, § 71 (a) (2) cited note 22 *supra*.

[48] INT. REV. CODE OF 1939, § 22 (k), added by ch. 619, 56 Stat. 816 (1942) (now INT. REV. CODE OF 1954, § 71 (b)).

[49] *Ibid.*

remedy where she did not have the opportunity to defend herself was to have her payments increased by a court within her state. However, because of the expense and possibility that the state court might not grant such an increase, this suggestion loses much of its relevance.

The application of a federal standard of validation by the court in the instant case is a noteworthy attempt to define marital status for tax purposes. Such a standard eliminates the requirement of an exhaustive survey of state law by the Internal Revenue Service. In the application of the alimony provisions, with the exception of possible harm to the opportunity to bargain, such a standard furthers the concept of uniformity of treatment to taxpayers in similar factual situations. However, the courts must be aware of the problems involved in using this federal standard in other areas where marital status is in issue.

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**Insurance—Liability—Unintentional Injury From an Intentional Act.—** The defendant, holder of a homeowner's insurance policy, entered a restaurant and attempted to shoot a waitress. Another waitress, the plaintiff, was injured by a stray bullet. In a civil action the plaintiff was awarded damages. She then brought a citation to discover assets against the insurance company.[1] The insurer denied liability claiming that the policy excluded from coverage an "injury . . . caused intentionally by or at the direction of the Insured."[2] The insurance company was found liable for plaintiff's judgment in the citation proceeding. On appeal to the Appellate Court of Illinois, *held,* affirmed. An injury to a third person may be accidental and therefore covered by an insured's liability insurance policy even though the insured's act was intentional. *Smith v. Moran,* 209 N.E.2d 18 (Ill. Ct. App. 1965).

Liability insurance primarily seeks to indemnify the insured for liability incurred for injuries or damage to the person or property of others.[3] One of the typical contract provisions attempts to limit the insurer's liability to accidental injury or damage. Some of the early

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[1] The judgment against the insured was returned unsatisfied and, pursuant to an Illinois statute, plaintiff had the judgment debtor and the insurer brought before the court in a supplementary proceeding to discover assets. ILL. REV. STAT. ch. 110, § 101.24 (1961). This statute has a two-fold purpose of discovering assets, whether they be in the hands of the debtor or a third person, and compelling payment. See O'Shaughnessy & Sherman, *Procedure for Discovery of Assets After Judgment,* 50 NW. U.L. REV. 649, 652 (1955). It seems that if the third party, the insurer in the instant case, has any defense as against the debtor he must raise it at this time and the case will be heard on its merits. See Klim v. Johnson, 16 Ill. App. 2d 484, 148 N.E.2d 828 (1958). Since the case has been decided on the merits it does not appear that the insurer could have any recourse against the insured for this claim.

[2] Smith v. Moran, 209 N.E.2d 18, 19 (Ill. Ct. App. 1965). In the original appeal the Appellate Court of Illinois had declared that the shooting was an intentional wrongful act. Smith v. Moran, 43 Ill. App. 2d 373, 377, 193 N.E.2d 466, 469 (1963).

[3] See generally 1 RICHARDS, INSURANCE § 168 (5th ed. 1952); VANCE, INSURANCE § 196 (3d ed. 1951).