South Carolina Law Review

Volume 2 | Issue 3 Article 7

Spring 3-1-1950

Notes

A. A. Rosenblum

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Recommended Citation
A. Arthur Rosenblum, In Re Lie Detector, 2 S.C.L.R. 266. (1950).

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NOTES

In Re Lie Detector

Some fifty years ago, Cesare Lombroso, an Italian criminologist, published his findings concerning the changes in blood pressure and pulse rate when a person was questioned concerning his activities.[1] This was the feeble beginning of the utilization of scientific principles in the exposing of deception. Through the development of the technique by such men as Marston, Larson, and Keeler, evolved the polygraph, or what is commonly called the lie-detector.[2] The test is based on the theory that the respiration, and the systolic and diastolic blood pressure, vary from their "norm" when one is lying. In other words, truthfulness comes with no effort, but conscious effort is needed to tell a lie.[3]

The development of the scientific test for deception presents two main problems to the courts: 1. Should results of the tests themselves be admitted into evidence through an expert? 2. Should other evidence, such as confessions, obtained by the use of the lie detector be admitted?

Admission of the Tests into Evidence. — The lie detector has appeared in our court decisions with increasing frequency since 1923, when *Frye v. United States*[4] was decided by the Court of Appeals in the District of Columbia. The number of times the question has arisen in the lower courts is unknown, but it can be assumed, from the wide acceptance of the lie detector by the police and private investigating bodies, that they are numerous.[5]

In the *Frye* case the federal court held that the systolic blood pressure deception test, developed by Marston, was inadmissible. The grounds of the decision were that the scientific principle, upon which

1. Lombroso, C., L'Homme Criminel (2d French ed. 1895).

2. Though there are numerous lie detectors, the Keeler polygraph has received the widest acceptance by the police and other criminal investigating bodies.

3. Frye v. United States, 293 Fed. 1013 (1923). For a description of the Keeler polygraph and the mode of its use see Wigmore, Principles of Judicial Proof §246 (2d ed. 1931); Wigmore, Evidence §999 (3rd ed. 1940).

4. Frye v. United States, *supra.*

5. State v. Lowry, 163 Kan. 622, 185 P. 2d 147 (1947). For some unreported cases arising in the State of Wisconsin see the Wis. L. R. 430 (1943). For a case in New York City see N. Y. Times, Dec. 8, 1943, p. 25, col. 7. In November 1948, Judge J. W. Pless admitted expert testimony of the results of the lie detector in the case of *State v. Howell,* Cleveland Superior Court, N. C. This case was never appealed.

Published by Scholar Commons, 1950

the test was based, had not been "sufficiently established to have gained general acceptance in the particular field in which it belongs".

Ten years later, the Wisconsin court passed upon the question in *State v. Bohner.*[6] It decided that in the ten years that had elapsed since the *Frye* decision, the "instrument . . . had not progressed from the experimental to the demonstrable stage". The court did, however, express its opinion that the test might be admitted at some future date.

> "While it [the lie detector] may have some utility at present, and may ultimately be of great value in the administration of justice, it must not be over looked that a too hasty acceptance of it during this stage of its development may bring complications and abuses that will overbalance whatever utility it may be assumed to have."[7]

In contrast to this caution, the test received an enthusiastic reception by the Queen's County Court in New York state, five years later, in *People v. Kenny.*[8] There the defendant offered Rev. Summers as an expert to give the results of the test. Rev. Summers testified that his methods were 100 per cent efficient and accurate. Feeling that the pathometer was a more scientific approach to the ascertainment of the truth, the court accepted his testimony.

> "Both upon legal principle and sound reasoning it would seem that the courts, if willing to accept and receive handwriting testimony, psychiatric testimony and other expert opinion, would also admit in evidence testimony of the pathometer and the results disclosed thereby, when a proper foundation is laid."[9]

The *Kenny* case was never appealed, but a few months later the New York Appellate Court handed down a decision in *People v. Forte,*[10] which was relative to the same question. The court upheld the trial court's refusal to admit the testimony of Rev. Summers under a similar situation as that which arose in the *Kenny* case. The court, however, did not rule directly on the scientific approval of the test. It specifically stated, ". . . we cannot take judicial

6. 210 Wis. 651, 246 N. W. 314 (1933).
7. *Ibid.* at p. 317.
8. 167 Misc. 51, 3 N. Y. S. 2d 348 (1938).
9. *Ibid.* at p. 351. For a discussion of this case see *The Lie Detector and the Courts,* 16 N. Y. U. Q. REV. 202 (1939), where the writer concluded that the decision is "historically untenable, factually incorrect, and legally reversable". For other comments see 29 J. CRIM. LAW 287; 15 NOTRE DAME LAW. 159 (1939); 86 U. PA. L. REV. 903 (1935); 119 A. L. R. 1200.
10. 279 N. Y. 204, 18 N. E. 2d 31 (1938).

notice that the instrument is or is not effective for determining the truth". The court based its opinion on the grounds that there was *no evidence in the record* tending to show a general scientific recognition of the test. Many writers feel that *People v. Forte* did not overrule the *Kenny* case, though the court certainly had an opportunity to do so had it wished.[11]

In *People v. Becker*,[12] the Michigan court was faced with a similar problem as that decided in the *Forte* case. Here, too, the trial court refused to consider the results of the polygraph, and here, too, no proper foundation had been laid. The court felt that ". . . under the circumstances of this case," the results should not have been admitted.[13]

The Wisconsin court had the opportunity to pass upon the admissibility of the lie detector again in *LeFevre v. State*,[14] a 1943 decision. Following precedent, particularly its own of the *Bohner* case, the court refused to admit the results of the test. The conviction was reversed on other grounds, but it is evident that the court itself, put some weight on the results of the test.[15]

The district attorney had made a stipulation with the defendant that either party could use the results of the tests at the trial. He was apparently dissatisfied with the results of the first test and requested the defendant to submit to another. At the trial, when defendant attempted to introduce the results into the evidence, there was an objection by the State on the ground that the test had not gained general scientific recognition. This objection was sustained. It appears from the report of the case that the district attorney admitted on rebuttle that the tests were favorable to the defendant. The Supreme Court, while discussing the evidence, said in part, ". . . while the findings of these experts were properly excluded from the jury, the district attorney's testimony came in without objection and we regard it as *very significant*".

Recently the Missouri court had a peculiar situation placed before it. The defendant, in *State v. Cole*,[16] requested that he and all the

11. See the dissenting opinion in Boeche v. State, 151 Neb. 368, 37 N. W. 2d 593 (1949). The New York Judicial council has recently stated, ". . . in the light of the decision in the *Forte* case, it cannot be said that the *Kenny* case has been overruled. The legal status of the lie detector in New York, therefore, remains uncertain". FOURTEENTH ANNUAL REPORT, JUDICIAL COUNCIL OF THE STATE OF NEW YORK, p. 266 (1948).

12. 300 Mich. 562, 2 N. W. 2d 503 (1942).

13. It is to be noted that here the test was made on the Keeler polygraph, while in the *Forte* case, a pathometer was used.

14. 242 Wis. 416, 8 N. W. 2d 288 (1943).

15. For an interesting comment on this decision see WIS. L. REV. 430 (1943).

16. 354 Mo. 181, 188 S. W. 2d 43 (1945).

state's witnesses submit to the lie detector test in view of the jury. The court decided that the refusal of the defendant's request was proper. It was stated that the court room was no place for dramatics, and that such would be the effect if defendant's motion had been accepted. It was also decided that the trial court was not in error for refusing to let the defendant take the test, first, because the test should not be made before the jury, and second, because the defendant did not offer *proof* that the method to be used had sufficient scientific support.

The request of the defendant is unusual, for all of the "experts" agree that the test must be taken in quiet surroundings, where there will be no distractions, for it to be effective.

In 1947, the Kansas court reversed a conviction, in *State v. Lowry*,[17] where the results of the lie detector were introduced by the State. The test had been given to both the defendant and the prosecuting witness upon the suggestion of the court after the first trial, and tended to show that the accused was guilty. The court founded its decision on the grounds that no appellate court had recognized the results of such test as competent, and further, that in no trial court, where the results had been admitted, was the test *adverse* to the defendant. The court was careful to point out that it was not considering a case where there had been a *prior stipulation* as to the use of the test, but one in which the test was introduced without such stipulation and over the defendant's objection. It can therefore be assumed that this court, in contrast to the stand taken by the Wisconsin court in the *LeFevre* case, would look with approval upon the admission of the results by stipulation by the parties.

The latest decision relative to the lie detector was in the case of *Boseche v. State*.[18] Here the defendant offered the polygraph operator for the Nebraska Safety Patrol as an expert witness to show that the lie detector tests made upon him recorded a favorable reaction indicating that he was not guilty. Objection made to the competency of such evidence was sustained. On appeal it was held by a divided court that no error had been committed, as the polygraph ". . . has not yet gone beyond the experimental and reached the demonstrable stage, . . . and that it has not yet received general scientific acceptance".

Justice Chappell, joined by two others, while concurring in the results, dissented from the majority's statement concerning the lie detector.

17. 163 Kan. 622, 185 P. 2d 147 (1947).
18. 151 Neb. 368, 37 N. W. 2d 593 (1949).

> "I am convinced that if such foundation were laid, as was done in *People v. Kenny,* then the testimony of the operator and the results obtained by the tests would be admissible in criminal cases, . . . wherein the defendant had voluntarily submitted to the tests."[19]

In his well written opinion, Justice Chappell reviewed all of the earlier decisions on the subject. He noted that *People v. Becker*[20] and *People v. Forte*[21] did not rule on the question of "general scientific recognition", but only that no proper foundation had been laid for admission of the results. In declaring that the time had arrived for the courts to recognize this scientific test he stated:

> "That complicated and difficult questions may arise therefrom in the trial of cases should be no reason for the exclusion of such evidence. Modern court procedure must embrace recognized modern conditions of mechanics, psychology, sociology, medicine . . . The failure to do so will only serve to question the ability of courts to efficiently administer justice."[22]

When the courts first considered the admissibility of the lie detector twenty-seven years ago it was stated:

> "Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs."[23]

Though it cannot be said that the lie detector has received unanimous support among the scientists,[24] it has been accepted by the criminal investigating bodies. Is this not the "particular field" in which it belongs? The acceptance of finger-print evidence by the courts was actuated partly because of its use by the police in England

19. *Ibid.* at p. 600.
20. 300 Mich. 562, 2 N. W. 2d 503 (1942).
21. 279 N. Y. 204, 18 N. E. 2d 31 (1938).
22. See note 19, *supra.*
23. Frye v. United States, 293 Fed. 1013, 1012 (1923).
24. The American Psychiatric Association expressed its opinion of the lie detector in a resolution adopted at its 1944 convention. They felt that the "feeling of guilt" is too complex to be tested by one machine. 16 SCI. DIG. 90 (Sep. 1944); also see letter by the author of the resolution in N. Y. TIMES, ag. 28, 1948, p. 14, col. 15.

and America.[25] Then should the courts not also give weight to the acceptance of the lie detector by the persons who actually use it for criminal investigations?[26]

It is true that the lie detector is not 100 per cent accurate,[27] nor is the theory behind it universally accepted. Yet, the courts accepted expert opinion on handwriting and psychiatry, even though the deduction of these experts are not at all uniform.[28] That two experts testify and come to different results does not in itself make the testimony incompetent.[29] Nor would the fact that an expert can come to no conclusion in a particular set of circumstances, make such testimony, under different circumstances, incompetent. It follows that no objection should be made to lie detector results because a small number of individuals fail to give an interpretable test.

The hesitancy of the courts to accept the lie detector at its face value can partly be attributed to their belief that an innocent person might be convicted. This danger, however, is minimized when the operation of the test is understood. The burden of showing "the lie" is thrown upon the operator who must read the graph produced by the machine. The operator is subject to cross-examination. His readiness to accept an indefinite result could therefore be shown. It is also well to remember that the margin of error is in favor of the guilty rather than the innocent. In other words, the likelihood of a guilty person not recording deception is greater than the innocent showing it. It is doubted if the statistical data as to the accuracy of the lie detector can ever be more comprehensive than it is today. Fear of detection, and the results thereof, is an important factor in the test; and this condition is not present in the laboratory. The only accurate method of obtaining statistics therefore, is from the confessions obtained or from a later conviction. And it might be questioned if a conviction is absolute proof of guilt.

All this is not to say that the courts should accept the lie detector haphazardly. Caution should certainly prevail. Yet if these tests aid the courts and juries in ascertaining the truth more than 70 per cent of the time, should they not be admitted, as other expert testi-

25. People v. Jennings, 252 Ill. 534, 96 N. E. 1077, 1081 (1911); People v. Roach, 215 N. Y. 592, 109 N. E. 618, 623 (1915).

26. For an interesting report by the polygraph operator of the Wichita Police Department in which it was concluded that the test was 99.9 per cent effective, see Jaycox, *Lies-Truth*, 161 SCI. AMER. 8 (Jl. 1939).

27. Rev. Summers claimed that his tests are 100 per cent accurate, though this figure has been questioned by other authorities. The most conservative figure seems to be around 10 per cent error.

28. People v. Kenny, 167 Misc. 51, 3 N. Y. S. 2d 348 (1938).

29. Gordon v. Bartell, 182 Wash. 268, 46 P. 2d 1063 (1935); Green v. Union Pac. States, 182 Wash. 268, 46 P. 2d 1063 (1935).

mony for what they are worth? And certainly, as some courts have indicated, they should be admitted upon prior stipulation of the parties. It is to be remembered that the lie detector results will not displace the jury. The results of the test and the opinion of the operator will be weighed as any other "expert" evidence. In the final analysis, the guilt or innocence of the accused will still be in the hands of the jury.

Many interesting questions, such as the question of self-incrimination, will arise once the lie detector results are admitted into evidence. It is not, however, in the scope of this note to discuss these problems.

The trend of the decisions is favorable to the acceptance of the lie detector test into evidence. The culmination of this trend is aptly expressed in the minority decision of the *Boeche* case. Though various courts have intimated they would accept the test, here for the first time, three eminent jurists explicitly sanctioned it. It is submitted that the dissent in the *Boeche* case is correct. The time has come when the courts must recognize that the lie detector has "crossed the line between the experimental and demonstrable stage". Mr. Justice Steinbrink, in *Beuschel v. Manowitz*,[30] aptly stated the desired attitude of the courts when he said:

> "Law and jurisprudence, which are sometimes more than dry tomes of the past, can be understood by considering fundamental principles not only of government and economics, but also at times by giving consideration in particular cases to sociology, medicine or other sciences . . . new concepts must beat down the crystallized resistance of the legally trained mind that always seeks precedent before the new is accepted into the law. Frequently we must look ahead and not backwards."

Confessions Obtained through the Use of the Lie Detector. — Only three cases, two of which arose in Pennsylvania,[31] have ruled directly on this question. The confessions, in both of these cases, were admitted on the theory that they had been obtained through voluntary means.

In *State v. DeHart*,[32] the defendant intimated that he was prejudiced in that the sequence of events was such as to leave the impression with the jury that the lie detector test had demonstrated his guilt, and that this circumstance actuated his confession. The court

30. 151 Misc. 899, 271 N. Y. S. 277, 278 (1934), where the court was considering the admissibility of expert testimony concerning blood grouping.
31. Commonwealth v. Hipple, 33 Pa. 33, 3 A. 2d 353 (1939), and Commonwealth v. Jones, 341 Pa. 541, 19 A. 2d 389 (1941).
32. 242 Wis. 562, 8 N. W. 2d 360 (1943).

did not feel that the defendant had been prejudiced, saying: "The thing that was prejudicial . . . was the confession, which is many times more conclusive than any implication that could be drawn from . . . the lie detector test".

Other jurisdictions have indicated by dicta that they would accept a confession actuated by the lie detector test.[33] These decisions are in line with the generally accepted view that any confession is admissible if it is given voluntarily.[34] Since more than half of those who register deception confess their guilt,[35] this reception by the court is indeed gratifying. Even those who do not think the lie detector result is ready for admission into evidence realize its great value in obtaining admissions and confessions.[36] The end result, therefore, is that the polygraph will continue to be utilized in this manner by the criminal investigating bodies toward the more successful administration of justice.

A. ARTHUR ROSENBLUM.

FAMILY PARTNERSHIPS IN INCOME TAXATION

The problem of the so-called "family partnerships" was of little importance in the enforcement of the Revenue Laws until the advent of the high individual income tax rates during the past War Emergency. However, during this emergency, it became quite fashionable to attempt to alleviate a portion of the individual's tax burden by constituting a member of that individual's family as a partner in his enterprise. This took the form, generally, of a donation of a portion of the business to the member of the family with express understanding that such capital was to be reinvested in the business. Such a device for tax avoidance was, needless to say, greeted with a great deal of suspicion by revenue authorities.

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33. State v. Lowry, 163 Kan. 622, 185 P. 2d 147, 151 (1947). Also see the FOURTEENTH ANNUAL REPORT, JUDICIAL COUNCIL OF THE STATE OF NEW YORK, p. 267 (1948), wherein it is stated, "although no reported New York decision has been found in which this question arose, it does not appear that there should be any objection to the admission of such evidence".

34. State v. Goodwin, 127 S. C. 107, 120 S. E. 496 (1923); State v. Rush, 108 W. Va. 254, 150 S. E. 740 (1929).

35. According to the figures of the Chicago Police Detection Laboratory, 75 per cent of those registering deception on the machine confessed. 216 SAT. EV. POST, 9, (Ap. 1944). The Wichita Police Department found that 55.1 per cent of those decepted confessed. 74.7 per cent of those who did not confess, were later convicted. These figures were based on 4,000 tests made by the department for the years 1936, 1937, and 1938. Jaycox, *Lies-Truth*, 161 SCI. AMER. 8, (Jl. 1939).

36. FOURTEENTH ANNUAL REPORT, THE JUDICIAL COUNCIL OF THE STATE OF NEW YORK, p. 267 (1948).

It is axiomatic in our income tax structure that "income is taxed to the person who earns it".[1] As an illustration, consider the situation where a father, owner of a bond, retains the bond but assigns the coupons to his son shortly before they mature. The income from these coupons would be taxed to the father.[2] *Helvering v. Horst* rationalizes this result,[3]

> "Underlying the reasoning in these cases is the thought that income is 'realized' by the assignor because he, who owns or controls the source of the income, also controls the disposition of that which he could have received himself and diverts the payment from himself to others as the means of procuring the satisfaction of his wants. The taxpayer has equally enjoyed the fruits of his labor or investment and obtained the satisfaction of his desires whether he collects and uses the income to procure those satisfactions, or whether he disposes of his right to collect it as the means of procuring them".

The realities of the situation and not the peculiarities of local partnership law control in these instances.[4]

The rapid rise of the number of "family partnership" cases, in which each case possessed its own peculiar facts, presented a perplexing problem to the Courts. The Tax Court, for instance, was apparently hopelessly split, as was illustrated in one case[5] in which there were two concurring opinions and three dissents. One is reminded of Cervante's *Don Quixote* "and he immediately set off in all directions".

It was inevitable that this situation should reach the Supreme Court. This occurred in 1946, when two family partnership situations came before the Court.[6] The *Tower* case is the only one to be discussed here.

In the *Tower* case, the factual situation was that a husband gave his wife a substantial interest in a closely held corporation. The corporation was dissolved three days later and was succeeded by a partnership in which the rights of the wife were limited. The wife had no control over the management of the business nor did she perform

1. Lucas v. Earl, 281 U. S. 111 (1930); Helvering v. Horst, 311 U. S. 112 (1940).
2. Helvering v. Horst, *supra.*
3. *Ibid* at p. 116.
4. Gregory v. Helvering, 293 U. S. 465 (1936).
5. Thoirez, 5 T. C. 60 (1945).
6. Commissioner v. Tower, 327 U. S. 280 (1946); Commissioner v. Lusthaus, 327 U. S. 292 (1946).

any services for the business. Her withdrawals from the partnership were used for such expenditures as were usually made by a husband for his wife. The Tax Court refused to recognize this partnership.[7] The Circuit Court reversed the Tax Court.[8] The Tax Court's opinion stated in part,[9]

> "Here, the transfer of the corporate stock . . . was more fanciful than actual, since there was no purpose to transfer the stock to her apart from the agreed plan that the gift would determine her interest in the partnership. The gift, however, was not an absolute and unconditional one . . . it follows that she made no capital contribution to the partnership, and, since she admittedly rendered no services, it must be held that she was not a bona fide partner."

The Supreme Court's opinion affirmed the Tax Court's finding of fact in these words:[10]

> "Here the Tax Court, acting pursuant to its authority in connection with the enforcement of federal laws, has found from the testimony before it that respondent and his wife did not intend to carry on business as a partnership. This finding of fact, since supported by evidence is final."

In discussing the exception of the husband to the Tax Court's finding that the gift of the capital was incomplete, the court, after stating, "We do not find it necessary to decide this issue," continued, . . . Of course, the question of legal ownership of capital purportedly contributed by a wife will frequently throw light on the broader question of whether an alleged partnership is real or pretended. But here, the Tax Court's findings were supported by a sufficient number of other factors in the transaction, so we need not decide whether its holding as to the completeness of the gift was correct".

> "There can be no question that a wife and husband may, under certain circumstances, become partners for tax, as for other purposes. If she either invests capital originating with her or substantially contributes to the control and management of the business, or otherwise performs vital services, or does all of these things she may be a partner . . . the Tax Court may properly take these circumstances into consideration in determining wheth-

7. 3 T. C. 396 (1945).
8. 148 F. 2d 388 (1945).
9. 3 T. C. 396, p. 404 (1944).
10. 327 U. S. 280, p. 287 (1945).

er the partnership is real within the meaning of the federal revenue laws."

Subsequent to the promulgation of the *Tower* and *Lusthaus* decisions, the Tax Court [11] and the Bureau[12] adopted the concepts of rendition of "vital services" and contribution of "substantial capital" as absolute criteria for determining the "reality" of a partnership within the family circle. If either of these criteria was not present the partnership was *ipso facto* invalid for federal tax purposes.[13]

The method of application of these criteria was possibly one of the reasons for the Supreme Court to grant certiorari in another "family partnership" situation, the now celebrated *Culbertson* case.[14] The Court criticized the Tax Court's use of the "test" of "vital services" or "original capital" as an "error in emphasis" as ignoring "what we said is the ultimate question for decision", namely "whether the partnership is real within the meaning of the federal revenue laws".

The court in a subsequent paragraph continued,

> "The question is not whether the services or capital contributed by a partner are of sufficient importance to meet some objective standard supposedly established by the Tower case, but whether, considering all the facts — the agreement, the conduct of the parties in execution of its provisions, their statements, the testimony of disinterested persons, the relationship of the parties, their respective abilities and capital contributions, the actual control of income and the purposes for which it is used, and other facts throwing light upon their true intent — the parties in good faith and acting with a business purpose intended to join together in the present conduct of the enterprise."

The Court, obviously perplexed at the Tax Court's inability to follow the trail of "intent to join together for the purpose of carrying on a business and sharing in the profits or losses or both . . . to be determined from the testimony as a whole" as blazed in the *Tower* case observed,

> "There is nothing new or particularly difficult about such a test. Triers of fact are constantly called upon to determine the in-

11. *Ibid* at p. 290.
12. I. T. 3845, C. B. 1947-1, p. 66.
13. 6 MERTENS, LAW OF FEDERAL INCOME TAXATION 136.
14. Commissioner v. Culbertson, 69 S. Ct. 1210 (1949).

tent with which a person acted[15] . . . Whether parties really intended to carry on business as partners is not, we think, any more difficult of determination or the manifestations of such intent any less perceptible than is ordinarily true of inquiries into the subjective."

In the recent cases before it the Tax Court has, in general, given polite recognition to the *Culbertson* case and continued its quest for the illusive objective concepts of "vital services and original capital" coupled often with a new discovery in the *Culbertson* case of "the actual control of income and the purposes for which it is used".

Among the first decisions of the Tax Court following *Culbertson* was the *Harmon* case.[16] In this decision the court considered that the wife performed no substantial services nor contributed any capital originating with herself. A son, also a member of the partnership, was found to be a valid partner, the court finding the requisite intent to join together in "the present conduct of the enterprise". This decision was closely followed in point of time, by the *Depue* case,[17] in which the Tax Court found the requisite intent in the wife's active participation during the formative years of the partnership as constituting a contribution to the business in 1944 equivalent to a tangible contribution of money and material. Judge Black dissented in this case upon the general grounds that this decision "does violence" to the *Culbertson* case.

The Tax Court found in two other decisions[18] that the *Culbertson* case was a two-edged sword. In the *Barrett* case, the wife had contributed a relatively large amount of capital to the business but rendered no services and knew nothing of the business affairs. The court cited *Culbertson* to the effect that "isolation of original capital" was an error of emphasis, and disregarded contribution of capital as an absolute criterion, and considered the other facts of the case, especially the degree of the wife's control over the proceeds of her share of the earnings and her lack of voice in the management of the business. It found, in this case, no intent to create a "real" partnership. In the *Funai* case, the wife contributed obviously substantial services. However, when questioned on the stand, she stated, in effect, that she did not realize that she was a partner. The court

15. The Supreme Court cited here the classic statement that "the state of a man's mind is as much a fact as the state of his digestion". Edgington v. Fitzmaurice, L. R. Ch. Div. (Eng.) 459.
16. W. F. Harmon, 13 T. C. (No. 53) (1949).
17. Estate of Frederick Depue, 13 T. C. (No. 62) (1949).
18. W. Stanley Barrett, 13 T. C. (No. 71) (1949); Funai, 13 T. C. (No. 90) (1949).

found no "actual control of income and purposes for which it is used", and that she rendered no services to the business except that of performing her duty as a helpful wife to advance the family welfare.

About a month later, the court found little difficulty in finding the requisite intent in a situation where the husband made a gift of certain securities to his wife with the avowed purpose of training her in their management. The wife subsequently used the securities to purchase a limited partnership interest in a firm in which her husband was a general partner. The court looked primarily to the husband's divesting himself of the control of the securities and to the wife's corresponding assumption of control over the gift and the proceeds of her partnership interest.[19]

The District Court for the Nothern District of Alabama had before it a fact situation which was not a "real" partnership under even the most lenient pronouncements of the courts.[20] In that case, the husband gave his wife and children an outright share in his lumber business for the purpose of avoiding estate taxes. Neither the wife nor children performed any services. The husband and father retained control of the business. However, the court cited the *Culbertson* case to the effect "that a heavy burden is placed upon the taxpayer to show the bona fide intent of the parties" and applies those familiar criteria: "However, where, as here neither of the three usual tests, original capital, management and control, or other vital services . . . are present and the taxpayer has to stand on the single weak leg of gift capital . . .". Needless to say the partnership was not recognized.

Although the result of the above case seems to be proper, it is adhering to the old chestnuts, rejected as absolute criteria by *Culbertson*. Another District Court, this time in Texas, had before it the fact situation, essentially, of a gift to taxpayer's minor children subsequently invested in a partnership. They performed no services. The court admitted that the facts caused it to hesitate a bit but stated, "As I understand the present holdings of the appellate courts, the good faith intention of the parties to form a partnership must be sought for, and, if found, it must prevail, if there is substantial assistance".[21]

In *Huff v. Glenn*[22] another District Court looked to "the conduct

19. John A. Morris, 13 T. C. (No. 127) (1949).
20. Grayson v. Deal, 85 F. Supp. 431 (1949).
21. Green v. Arnold, 87 F. Supp. 255 (1949).
22. 85 F. Supp. 386 (1949).

of the parties, their respective abilities, and capital contributions" which showed good faith and that they acted for a business purpose, and that the wife contributed substantial services.

The various Circuit Courts of Appeal have been apparently more successful in adhering to the principles of *Culbertson* than the Tax Court or the District Courts.

An illustration of this is the *Ginsburg* case.[23] The lower court having found as a fact that the only services were rendered by the father, the court stated,

> ". . . the capital used in creation of the business income to determine whether it furnishes the taxpayer with a valid reason to avoid taxation on that portion of the business income assigned to the children. While the capital interest furnished the children was originally received by them as a gift from the taxpayers, this, in and of itself, does not nullify the partnership for tax purposes. The partnership will be disregarded, however, if the capital change is a mere surface movement while dominion and control remain with the donor."

The court found that the distribution to the children was not a sufficient foundation upon which to rest a favorable decision.

The *Greenberger* case[24] stated that in *Tower, Lusthaus,* and *Culbertson* could be found "isolated statements . . . which, when considered alone, appear to afford support to both sides . . . What the court said in those cases must be considered in connection with the particular facts of this case". The court thus summarizes the difficulty encountered by the courts when, even in the view of *Culbertson* they persist in removing isolated "tests" from *Tower, Lusthaus* and *Culbertson* and applying them as rigid criteria, etc. They persist in their failure to use these facts as mere elements which go to form the composite picture of a "real" partnership and not as being the sole indications of the presence of "reality". The situation has become confused, not from lack of explicit authority, for *Culbertson* is our guide, but from the Court's attempts to justify these conclusions by application of objective principles. The remedy is not in amended Regulations nor another Court pronouncement, but rather a recognition and realization of the Supreme Court's expression in *Culbertson* directing the courts to search for the "true intent" of the parties gathered from "all the facts" and not by use of objective criteria.

JOHN ECK, JR.

23. Ginsburg v. Arnold, 176 F. 2d 879 (1949).
24. Greenberger v. Commissioner, 177 F. 2d 990 (1949).

STATUTORY CONFLICTS RELATING TO INCEST AND CONSANGUINEOUS MARRIAGES

Marriages within the closer degrees of relationship have been severely condemned and prohibited from early Biblical times. The peoples of the world have condemned such marriages not only because marriages of this type are shocking to one's sense of decency, but also because family intermarriage undermines the parental and filial relationship and tends to corrupt the sentiments of mankind. Scientifically, incestuous marriages are to be censured, for experience has shown that such marriages very often result in a deficient and degenerate offspring, which, if occurring to any great extent, would amount to serious deterioration of the race.[1] The prohibition of incest and incestuous marriages is found in the Book of *Leviticus,* where it is said, "None of you shall approach to any that is near of kin to uncover their nakedness". The prohibited degrees further set forth therein, known as the Levitical Degrees, form the basis of modern statutory prohibitions of incest and incestuous marriages.[2]

The law of incest and consanguineous marriages, in the English speaking world, was first recognized by the ecclesiastical courts of England. Because of the sacramental character of matrimony, jurisdiction thereof was vested solely within the ecclesiastical courts, the theory being that the common law judges had no knowledge of divine law. Within the ecclesiastical courts, incestuous marriages were only voidable, for the purpose of such courts, "being to vindicate the divine law rather than to assert property rights, the jurisdiction was merely to determine the validity of the marriage on direct application therefor, as a result of which impediments for which the ecclesiastical courts would avoid a marriage were called canonical impediments (such as consanguinity, affinity, corporal infirmities, etc.), and such marriages were voidable only in a direct proceding maintained during the lives of the parties. This necessarily followed from the fact that, as the ecclesiastical courts had sole jurisdiction to avoid the marriage, it was not void until so declared, and in the absence of such declaration must be regarded as valid for all civil purposes in all tribunals, either legal or equitable, because such courts could not question it".[3] Thus it can be seen, that because consanguinity was a canonical impediment to marriage recognized solely by

1. 35 Am. Jur., Marriage, §140.
2. LEVITICUS, 18:6-18.
3. L. R. A. 1916C, p. 723.

the ecclesiastical courts, a consanguineous marriage, in early English law, was therefore only voidable.[4]

Incest was also within ecclesiastical jurisdiction. "Though punishable by ecclesiastical courts of England as an offense against good morals, incest was not indictable at common law."[5]

In the United States today, all jurisdictions have enacted legislation making incest a crime.[6] In South Carolina, the statutory crime of incest can be found in section 1440 of the S. C. CODE OF LAWS (1942). This section provides that any person who shall have carnal intercourse with persons related within the prohibited statutory degrees (stated in this section) "shall be deemed guilty of incest, and shall be punished by a fine of not less than five hundred dollars, or imprisonment not less than one year in the penitentiary, or both such fine and imprisonment".

It can also be said that all jurisdictions of the United States now have statutes on the subject of marriages prohibited because of consanguinity.[7] Although all states have such statutes, the statutes are not in accord as to whether such marriages are void *ab initio* or voidable. In many jurisdictions such as New Hampshire, consanguineous marriages are expressly declared void by statute.[8] On the other hand, the state of Virginia by statutory enactment declares that, "All marriages which are prohibited by law on account of consanguinity or affinity between the parties . . . shall, if solemnized in this State, be void from the time they shall be so declared by a decree of divorce or nullity . . ."[9] Many states neither expressly declare such marriages to be voidable nor absolutely void. In such jurisdictions, it is necessary to revert to judicial opinion to determine whether incestuous marriages are void or voidable.

South Carolina is among such states. In South Carolina, statutory prohibition of marriages within the Levitical Degrees is found in section 8556 of the S. C. CODE OF LAWS (1942). Section 8556 provides that:

> "No man shall marry his mother, grandmother, daughter, granddaughter, stepmother, sister, grandfather's wife, son's wife, grandson's wife, wife's mother, wife's grandmother, wife's

4. By the statute 5 and 6 Williams, ch. 54, passed in 1835, consanguineous marriages are now void in England. State v. Scion Barefoot, 2 Rich. L. 209 (1845).
5. State v. Sauls, 190 N. C. 810, 130 S. E. 848 (1925).
6. 27 Am. Jur., Incest, §1.
7. VENIER, AMERICAN FAMILY LAW, Vol. 1, §38, p. 173.
8. N. H. REV. LAWS, c. 359, §1 (1942).
9. VA. CODE, c. 204, §5088 (1942).

daughter, wife's granddaughter, brother's daughter, sister's daughter, father's sister or mother's sister.

"No woman shall marry her father, grandfather, son, grandson, stepfather, brother, grandmother's husband, daughter's husband, granddaughter's husband, husband's father, husband's grandfather, husband's son, husband's grandson, brother's son, sister's son, father's brother or mother's brother."

As can be seen, this statute does not expressly declare such marriages to be either voidable or void *ab initio*. What is the judicial interpretation of this section? The first case decided on this subject was *State v. Barefoot*,[10] an 1845 decision. In that decision the court ruled that "the impediment of consanguinity renders the marriage voidable, not void". The court in discussing the advisability of declaring such marriages absolutely void spoke in the following manner: "Reflect for a moment upon such consequences, of this court undertaking to set aside such marriages as null and void. The father would lose all right to his offspring, which in law can be no other than the children of his wife and the children would equally lose their father, and become bastards. Have not the unborn children, and the public too, their rights in every marriage? Children are plainly a third party to marriage, and demand its permanancy". In *State v. Smith*,[11] the court, quoting from Bishop, *Marriage and Divorce*, points out that consanguineous marriages were voidable in England. The court then states that "as every enactment is to be interpreted in harmony with the written law, and as superseding it only to the extent required by its express terms or necessary operation, it results that, unless the one defining the forbidden degrees declares the marriage prohibited void, it is but voidable".

It is the opinion of the writer that the South Carolina Courts have followed the old English law on the subject. As pointed out, incestuous marriages were voidable in England because consanguinity was a canonical impediment. However, as time passed and ecclesiastical courts disappeared from English jurisprudence, the reason for declaring consanguineous marriages voidable also disappeared. The rule, however, remains and the courts have bent to the task of establishing a new basis for the rule. Such a situation is analogous to that presented by Chief Justice Oliver Wendell Holmes, Jr., who states that, "A very common phenemenon, and one very familiar to the student of history, is this. The customs, beliefs, or needs of

10. 2 Rich. L. 209 (1845).
11. 101 S. C. 293, 85 S. E. 958 (1915).

primitive time established a rule or formula. In the course of centuries the custom, belief, or necessity disappears, but the rule remains. The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it is to be accounted for. Some ground of policy is thought of, which seems to explain it and to reconcile it with the present state of things; and then the rule adapts itself to the new reasons which have been found for it, and enters a new career".[12] Thus, the South Carolina Courts have followed the early English law. But, finding that the reason for such law had disappeared, the courts determined upon a new basis; a basis which was not, at least, the determining reason for the rule that consanguineous marriages are voidable and not void *ab initio*. The new basis which was determined upon by the court was and is the dictate of public policy which demands the protection of the offspring of such marriages.

What is the effect of the South Carolina decisions declaring marriages within the prohibited degrees voidable? Section 1440 declares that carnal intercourse with a party related within the prohibited degrees to be a crime punishable by imprisonment or fine. Section 8556, by judicial interpretation, is construed to mean that a consanguineous marriage is only voidable and thus valid in law until set aside. The effect is a great inconsistency in South Carolina law — a valid marriage, legal for all intents and purposes, wherein the parties are subject to fine or imprisonment for the crime of incest.

Is there a solution to this conflict? The question resolves itself to determining a reconciliation of two conflicting public policies, each equally strong. On the one hand there is that policy which declares that incestuous marriages are shocking to one's sense of decency and demands that such marriages be prohibited. This policy has culminated in the enacting of the incest statute. On the other hand, there is the public belief which steadfastly maintains that no child should suffer the ostracism of bastardy. Thus, incestuous marriages are voidable. Can these conflicting policies be reconciled into a harmonious law? What was the intention of the legislature and how can that intention be realized?

In ascertaining legislative intent in relation to the two conflicting sections, it is permissible to utilize the rule of constructon that statutes in *pari materia* must be construed with reference to each other. "The rule which thus allows the court to resort to statutes

12. HOLMES, THE COMMON LAW, p. 5.

in pari materia finds its justification in the assumption that statutes relating to the same subject matter were enacted in accord with the legislative policy, that together they constitute a harmonious or uniform system of law; and that, therefore, in order to maintain this harmony, every statute treating of the same subject matter should be considered. As a result, statutes in pari materia should not only be considered but also construed to be in harmony with each other in order that each may be fully effective. They are to be construed together as if they constituted one act".[13] It is certain that sections 1440 and 8556 relate to the same subject and stem from a common source, the Levitical Degrees. They should therefore be construed together. Section 1440 expressly makes incest a crime. Section 8556 does not declare incestuous marriages to be either void or voidable. Thus, there is an ambiguity which can be made clear by construing the ambiguous section, 8556, with section 1440. It would seem therefore, that consanguineous marriages, in view of section 1440, should be absolutely void.

This result was reached by the Supreme Court of Alabama. The Alabama Code relating to incestuous marriages simply declares, after setting forth the prohibited degrees, that "all such marriages are incestuous".[14] Alabama has also a criminal statute declaring that if any one has sexual intercourse, or commits adultery, with a relation within the prohibited degrees, "each of them shall, on conviction, be imprisoned in the penitentiary for not less than one nor more than seven years".[15] The Alabama Supreme Court in construing these sections declared that "It cannot be argued, with any degree of plausibility, that marriages between persons within the prohibited degrees of relationship are not by the incest statute of Alabama declared to be incestuous and void. The two sections of the Code stand in pari materia, and must be construed together. So construed, we must and do hold that marriages prohibited by sections . . . are absolutely void, void ab initio".[16] (The fact that section 1440 was not enacted until 1884 may have had a great deal to do with the existing law as to consanguineous marriages in South Carolina. For the first case declaring incestuous marriages to be voidable, which case established a precedent in South Carolina, was handed down in 1845, thirty-nine years before the enactment of the incest statute, section 1440.)

Thus the legislative intent may be said to declare incestuous mar-

13. CRAWFORD, THE CONSTRUCTION OF STATUTES, §231, pp. 433-444.
14. ALA. CODE, tit. 34, §1 (1940).
15. ALA. CODE, tit. 14, §325 (1940).
16. Osoinach v. Watkins, 235 Ala. 564, 180 So. 577 (1938).

riages void. By so construing section 8556, the public policy which condemns such marriages is satisfied. But what of that policy which demands the protection of the offspring? To declare the marriage void is to subject such children to the shame of a position of illegitimacy. Is there some way in which consanguineous marriages may be declared void and yet satisfy the public demand for the protection of the children of void marriages?

The answer to this dilemma can be found by an appraisal of legislation of other jurisdictions. In the State of New York, there are statutes declaring marriages of persons within the prohibited degree void[17] and penal statutes making incest a criminal offense.[18] However, New York has satisfied the public dictate which demands the protection of the progeny of void marriages by the following statutory provision: "If a marriage is declared to be a nullity as incestuous, a child of the marriage is deemed the ligitimate child of both parents".[19] A similar statute exists in Arkansas which provides that "The issue of all marriages deemed null in law, or dissolved by divorce, shall be deemed and considered as legitimate".[20] There are similar statutes in other jurisdictions.

It has been the aim of the writer to point out the inconsistency in the law of South Carolina existing between section 1440, the incest statute, and section 8556, which prohibits marriages within the statutory degrees. It can be seen that there is need for legislative action to make for uniformity in the law of South Carolina. Such uniformity can be accomplished through an amendment to section 8556 whereby consanguineous marriages will be declared void *ab initio*. It is believed that this was the intention of the Legislature, in view of the incest statute and the doctrine of *pari materia*. The Legislature should not only be urged to amend section 8556 by making incestuous marriages void *ab initio*, but also in order to completely satisfy the dictates of public policy, the General Assembly should take steps to make the issue of such marriages legitimate, as did New York and Arkansas. In this way, the conflict in the South Carolina law relating to the Levitical Degrees can be reconciled and the demands of public policy satisfied.

BENJAMIN GOLDBERG.

17. N. Y. CONSOL. LAWS, Book 14, Domestic Relations Law, art. 2, Marriages, §2 (McKinney's).
18. N. Y. CONSOL. LAWS, Book 39, Part 1, Penal Law, art. 102, Incest. §1.
19. N. Y. LAWS, Part III, Civil Practice Act, §1135, sub. 5 (1939); Smith v. Smith, 37 N. Y. S. 2d 137, 179 Misc. 19 (1942).
20. ARK. STAT., tit. 55, §55-103.