Case Notes

CASE NOTES

EVIDENCE — Privileged Communication — Attorney and Client — Effect of the Privilege on Disclosure of Client's Identity. — Appellant, a California tax attorney, was summoned before the Internal Revenue Service and directed to identify taxpayers for whom he made payments of over $12,000 in back income taxes, and to further identify the attorney and accountants employing him on the taxpayers' behalf. Appellant appeared in answer to the subpoena, but declined to name the taxpayers on the ground that he did not know their names, and declined to name the attorney or accountants on the ground that such information came to him as a privileged communicaton. Appellee then filed a petition for enforcement of its summons. At the hearing the district court rendered a judgment of civil contempt because of appellant's refusal to answer questions as to the identity of the taxpayers, and attorney appealed. A cross appeal was taken from that portion of the judgment which refused to require appellant to answer other questions, with respect to identity of the attorney and accountants. HELD: Reversed in part. An attorney cannot be compelled to divulge the names of clients who employ him to mail sums of money to the government in payment of their back taxes, which are at the time unsued upon, and as to which no government investigation is pending. *Baird v. Koerner*, 279 F. 2d 623 (9th Cir. 1960).

It is well settled that confidential communications between attorney and client are privileged both at common law and under express statutes, and may not, without the consent of the client, be divulged by the attorney. *Branden v. Gowing*, 7 Rich. L. 459 (1854). However, the existence of the relation of attorney and client is not a privilege communication. *Tomlinson v. United States*, 93 F. 2d 652 (1937); McCormick, Evidence § 94 (1954). So, ordinarily the client's identity is not within the scope of the privilege. *Martin v. Anderson*, 21 Ga. 301 (1857); 8 Wigmore, Evidence § 2313 (3d ed. 1940). Wigmore further states that much should depend on the circumstances of the case, 8 Wigmore, Evidence § 2313 (3d ed. 1940), and where the circumstances are such that the name is material only to show acknowledgement of guilt by the client of the very offense on account of which the attorney was employed, the client's identification is privileged. *Ex Parte McDonough*, 170 Cal. 230, 149 P. 566 (1915). Various rationales are given as the basis for this disclosure rule. It is said that the privilege is founded on proof of the fact that the relationship of attorney and client existed, *Harriman v. Jones*, 58 N. H. 328 (1878), or that a prevailing air of sharp practice pervades most attempts to suppress proof of professional employment, MCCORMICK, EVIDENCE, § 94 (1954) and that every litigant is entitled to know the identity of his opponent. 8 WIGMORE, EVIDENCE § 2313 (3d ed. 1940). The privilege applies, however, where giving out the client's name will serve no necessary purpose, but, on the contrary, would make public the very fact that the client is entitled to have kept secret, *In re Kaplan*, 8 N. Y. 2d 214, 168 N. E. 2d 660 (1960), or where there is no necessity for any inquiry and the question asked assumes the attorney did represent certain people as clients, *In re Shawmut Mining Company*, 94 App. Div. 156, 87 N. Y. Supp. 1059 (1904), or where the identification aids a hostile litigant in establishing evidence which could be the basis of a suit against the client, *Chirac v. Reinicker*, 24 U. S. (11 Wheat.) 280, 6 L. Ed. 474 (1826), or where the attorney does not purport to represent his client, *In re Malcom*, 129 App. Div. 226, 113 N. Y. Supp. 666 (1908). One case has gone so far as to imply that if an attorney is apprised, or has reason to believe, that the client desires his identity concealed, it becomes a privileged communication. *Gower v. Emery*, 18 Me. 79 (1841). It is recognized, however, that this rule of privilege has a tendency to prevent full disclosure of the truth, and ought to be construed strictly. *Foster v. Hall*, 12 Pick. (Mass.) 89, 22 Am. Dec. 400 (1831). This has been applied where the attorney's assertion of the privilege is to cover up wrongdoing, *People ex rel Vogelstein v. Warden of County Jail of New York County*, 150 Misc. 714, 270 N. Y. Supp. 362 (Sup. Ct.), *aff'd mem.*, 242 App. Div. 611, 271 N. Y. Supp. 1059 (1934), or in furtherance of some criminal purpose. *United States v. Lee*, 107 F. 702 (1901). Also, the fact of attorneyship should be established where the employment is made for the purpose of enabling the attorney to perform acts involving the rights of third parties who rely on the representation, *Martin v. Platt*, 51 Hun (N. Y.) 429, 4 N. Y. Supp. 359 (1889), or the ends of justice are defeated by preventing full disclosure, *United States v. Tomlinson, supra.* But the public's right must give way where an individual's name is useful in an attempt to convict him of a federal crime. *Hoffman v. United States,* 341 U. S. 479, 95 L. Ed. 1118 (1951) ; *Baird v. Koerner, supra.*

On its facts, the case is correct, since the decision is based on the exception announced in *Ex Parte McDonough, supra.* The government's contention that this case was overruled by *Brunner v. Superior Court,* 51 Cal. 2d 616, 335 P. 2d 484 (1959) was dismissed. In considering the principal case, the absence of a Federal rule governing privilege led the court to determine the issue under the state rules of evidence. FED. R. CIV. P. 43(a). The court, therefore, deemed controlling the California statute that "An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment." CAL. CODE CIV. P. § 1881(2) (Deering 1959). The policy as to the attorney-client relationship was declared to be an absolute privilege, as construed by the *McDonough* case, based on no exceptions being created by the statute as was done with other privileges. Other factors in the court's opinion should be noted. First, the relationship of attorney and client was shown to exist from the circumstances which led the government to summon the attorney initially. Secondly, no litigation exists; the attorney does not purport to represent his client in a suit. In addition, there is no indication of future wrongdoing or fraud by hiding behind the privilege, as the dissent in the *McDonough* case indicates is often the situation. Rather, there is a desire to right a wrong; the voluntary nature of the payment indicates a feeling of guilt for nonpayment of taxes. (It is interesting to note that the Internal Revenue Service maintains an independent account for the express purpose of depositing anonymous payments. This account is appropriately named the "Conscience Fund.") Even the instant case recognizes that the policy of full disclosure is more fundamental than the attorney-client privilege. Consequently, it is believed that a balance must be struck. In each case, the public's right of full disclosure must be weighed against an individual's right to freely confide in his attorney. Of such tenets is our judicial system composed. Neither should give way to the other except as moved by the facts of the case. Either, existing absolutely and to the exclusion of the other, would fail because of its inability to do justice in all cases. They do, moreover, complement each other. Everyone has a right to legal advice, a fortiori he should have the right to judicial pronouncement upon these conflicting policies.

DAVID A. MERLINE.

FEDERAL INCOME TAX — Interest Deduction — Amounts Designated "Interest" on Annuity Contract Loan. — Taxpayer purchased an annuity policy from an Indiana insurance company on December 20, 1951, and simultaneously made the first of forty-one contemplated annual premium payments. The following day taxpayer prepaid the remaining premiums at a discount, after procuring the necessary funds by a bank loan on the policy. On December 24 he paid to the insurance company an amount which was mutually designated "prepaid interest" on an anticipated policy loan. Three days later taxpayer received the full cash loan value of the annuity, increased by a discount on the interest prepayment, and liquidated the bank loan with a portion of the proceeds. On December 31, 1952 he made an additional prepayment of interest, and immediately thereafter he received the increased cash value of the policy. The policy loans, which were non-recourse in nature, were never repaid. Taxpayer claimed the full amounts of the two "interest" payments as deductions of "interest paid" on his 1951 and 1952 Federal income tax returns. Taxpayer's net cash outlay was substantially less than the claimed interest deductions. The Commissioner of Internal Revenue in 1954 disallowed both deductions entirely, on the ground that such payments did not in fact constitute interest. Rev. Rul. 54-94, 1954-1 Cum. Bull. 53. The full Tax Court affirmed this decision in 1958. On appeal to the United States Court of Appeals for the Third Circuit, HELD: Affirmed. The entire transaction lacked substance, in that it had no real effect upon the taxpayer's economic status other than to create an income tax deduction, and therefore gave rise to no allowable deduction. *Weller v. Commissioner*, 270 F. 2d 294 (3d Cir. 1959), *cert. denied*, 81 Sup. Ct. 269, 5 L. Ed. 2d 223 (1960).

The deduction of interest paid during 1951 and 1952 was specifically authorized by statute: "In computing net income there shall be allowed as deductions: .... All interest paid or accrued within the taxable year on indebtedness . . . ." Int. Rev. Code of 1939, ch. 1, § 23(b), 53 Stat. 1 (now INT. REV. CODE OF 1954, §§ 163, 265). The Internal Revenue Service has consistently taken the position that interest paid on annuity contract loans is not interest on indebtedness within the meaning of the statute, and is not deductible. Rev. Rul. 54-94, 1954-1 CUM. BULL. 53. The statutory meaning of interest extends to what is usually called interest by those who pay and those who receive amounts so denominated, and the usual import of the term is the amount which one has contracted to pay for the use of borrowed money. *Deputy v. duPont*, 308 U. S. 488, 84 L. Ed. 416 (1940); *Old Colony R. R. v. Commissioner*, 115 F. 2d 856 (3d Cir. 1940); *Commissioner* interest payments to be deductible, there must exist a true debtor-creditor relationship and a fixed maturity date, at which time the creditor can demand payment. *Commissioner v. Hood and Sons*, 141 F. 2d 467 (1st Cir. 1944); *Preston v. Commissioner*, 132 F. 2d 763 (2d Cir. 1942). Interest is deductible only when paid upon an unconditional, enforceable obligation to pay a certain sum of money. *Autenreith v. Commissioner*, 115 F. 2d 856 (3d Cir. 1940); *Commissioner v. Park*, 113 F. 2d 352 (3d Cir. 1940). For purposes of Federal taxation, the interpretation of state laws concerning the nature of the disputed payments is inapplicable. *Doll v. Commissioner*, 149 F. 2d 239 (8th Cir. 1945); *Staunton Industrial Loan Corp. v. Commissioner*, 120 F. 2d 930 (4th Cir. 1941). In a previous case upon similar facts, *United States v. Bond*, 258 F. 2d 577 (5th Cir. 1958), the court declined to consider the question whether the payments in question were interest within the meaning of the statute, holding that interest payments on annuity policy loans were deductible on the ground that such deductions were not specifically excluded in the 1939 Code. (Int. Rev. Code of 1939, § 24(a)). The court disregarded the long established principle that a statutory provision granting exemption from laws imposing taxes is to be strictly construed against the taxpayer. *N. Y. Trust Co. v. Commissioner*, 68 F. 2d 19 (3d Cir. 1933); *Insurance and Title Guarantee Co. v. Commissioner*, 36 F. 2d 842 (2d Cir. 1929). In the present case the court likewise refused, in the final analysis, to hold that the disputed payments did or did not represent interest paid on indebtedness within the statutory intent, and chose to consider the substance and motivation of taxpayer's transactions. It has long been settled that a taxpayer may decrease the amount of his taxes, or altogether avoid them, by means which are within the law. *Gregory v. Helvering,* 293 U. S. 465, 79 L. Ed. 596 (1935); *United States v. Isham,* 84 U. S. (17 Wall.) 496, 21 L. Ed. 728 (1873). This principle is inapplicable, however, in situations in which the transactions in question clearly lie without the intent of the statute. *Gilbert v. Commissioner,* 248 F. 2d 399 (2d Cir. 1957); *Gregory v. Helvering, supra.* Therefore, the court "must not give effect to any contrivance which would defeat a tax Congress plainly intended to impose," nor permit the use of bookkeeping terms and accounting forms and devices to devitalize valid tax laws. *Foster v. United States,* 303 U. S. 118, 121, 82 L. Ed. 700, 701 (1938). To give effect to the intent of the tax laws, the government may disregard sham transactions, and look to the actual substance of the taxpayer's activities. *Higgins v. Smith,* 308 U. S. 473, 84 L. Ed. 406 (1940). Consequently, where deductions are claimed for interest payments involved in transactions which do not affect taxpayer's financial position other than by providing an interest deduction, the transactions lack substance and the deductions will be disallowed. *Sonnabend v. Commissioner,* 267 F. 2d 319 (1st Cir. 1959); *Goodstein v. Commissioner,* 267 F. 2d 127 (1st Cir. 1959); *Gilbert v. Commissioner, supra.*

The court in the *Bond* case considered neither the real nature of the "interest" payments nor the substantial effect of the transaction as a whole. That decision was followed in *Roderick v. United States,* 59-2 USTC ¶ 9650 (W. D. Tex. 1959), but the Court of Appeals in *Liston Zander Credit Co. v. United States,* 276 F. 2d 417 (5th Cir. 1960), adopted the principle of the *Weller* case. *Weller* has been followed in *Knetsch v. United States,* 272 F. 2d 200 (9th Cir. 1959), *aff'd* 81 Sup. Ct. 132, 5 L. Ed. 2d 128 (1960) and *Oliver L. Williams,* 1959 P-H Tax Ct. Mem. ¶ 59, 045. The substance rule employed in these decisions undoubtedly provides a correct result, but it is not the most proper basis upon which to rest that result. When the legislative intent would otherwise be avoided, the court may look to the substance of the transaction. Such authority is necessary to the proper administration of the tax laws; but it must be remembered that that authority is not unlimited. The court should not look to the substance of the transaction where the legislative intent can otherwise be effected. The court in the instant case had no need to determine that the transactions involved lacked economic substance, for the reason that a more simple and direct ground existed for disallowing the questioned deductions. The "interest" payments were not "interest on indebtedness" as that term has been construed by the courts, and accordingly were not deductible as such. The interest claimed was not incurred on indebtedness having a fixed maturity date and consisting of an unconditional and enforceable obligation. The payments lack all of those essential features, prescribed by overwhelming judicial authority, which must exist in order to give rise to a deduction for interest on indebtedness within the meaning of the Internal Revenue Code. This viewpoint was adopted in *Haggard v. United States*, 59-1 USTC ¶ 9299 (D. Ariz. 1959). The problem of adopting the proper basis for disallowance of such deductions extends only to situations involving payments made prior to March 1, 1954, for the reason that interest paid since that date on annuity policy loans is now specifically non-deductible by statute. INT. REV. CODE OF 1954, § 264(a) (2).

ROBERT A. DOBSON, JR.

PROPERTY — Adverse Possession — Requirement of Ouster and Necessity of Proof as Related to Tenants in Common. — In an action for partition of farmland, plaintiff contended that she and defendants, her mother's brothers, were tenants in common. Plaintiff acquired her title by deed while defendants acquired their interest partially through a deed and partially by way of inheritance. Defendants denied the tenancy in common asserting title to the land by adverse possession. They contended ouster of the plaintiff and as a basis therefor proved that they were in possession, had paid taxes, cut wood, rented and tilled the soil, constructed buildings and held themselves out as owners, refusing to recognize others as cotenants. Upon trial plaintiff was granted a directed verdict and defendants appealed. HELD: Affirmed.

The evidence was insufficient to refute the general rule that each tenant in common, with his cotenant, has the right of possession of the premises and the possession of one tenant is the possession of all, thus plaintiff was entitled to partition. *Horne v. Cox*, 237 S. C. 41, 115 S. E. 2d 513 (1960).

Adverse possession has been defined as an actual, visible and exclusive appropriation of real estate under claim of right. *Goldman v. Quadrate*, 142 Conn. 398, 114 A. 2d 687 (1955); *Lewis v. Pope*, 86 S. C. 285, 68 S. E. 680 (1909). Tenancy in common is the holding of property by several distinct titles with unity of possession, each tenant being seized of an individual part of the whole estate and each being entitled to the possession of every part. *Deal v. State*, 14 Ga. App. 121, 80 S. E. 537 (1914); 4 THOMPSON, REAL PROPERTY § 1831 (2d Ed. 1939). The presumption is that the possession of one cotenant is the possession of all, and this becomes adverse only upon some unequivocal act clearly showing the claim of exclusive possession in himself and repudiation and ouster of the others. *Rhodes v. Black*, 170 S. C. 193, 170 S. E. 158 (1932); *Weston v. Morgan*, 162 S. C. 177, 160 S. E. 436 (1928). Acts relied upon to establish ouster must be of an unequivocal nature and so distinctly hostile to the rights of the other cotenants that the intention to disseize is clear and unmistakable. *Terwilliger v. White*, 222 S. C. 176, 72 S. E. 2d 169 (1952); *Wells v. Coursey*, 197 S. C. 483, 15 S. E. 2d 752 (1941). Although unity of possession may be destroyed by actual ouster of a tenant in common, the ouster will not be presumed; it must be proved. *Odom v. Weathersbee*, 26 S. C. 244, 1 S. E. 890 (1885); *Allen v. Hall*, 1 McCord L. 131 (S. C. 1821). To constitute ouster, it is not necessary that there should be an actual turning out or forcible ejectment. *Jefcoat v. Knotts*, 13 Rich. L. 50 (S. C. 1860); *Gray v. Givens*, 2 Hill Equity 511 (S. C. 1836). It has been held that the cutting of timber and payment of taxes are not such acts as will amount to adverse possession. *McBeth v. Donnelly*, 1 Dud. L. 177 (S. C. 1838). Similarly, continuous possession for a period of twenty years with an appropriation of rents and profits creates only a rebuttable presumption of ouster. *Whitaker v. Jeffcoat*, 128 S. C. 404, 122 S. E. 495 (1922); *Metz v. Metz*, 48 S. C. 472, 26 S. E. 787 (1896). Where the acts relied upon for claim of adverse possession are public and notorious and of such character as to leave no doubt that the exclusive right of enjoyment is assailed by the holder, they are deemed sufficient notice of ouster to the tenants in common, *Weston v. Morgan, supra; Miller v. Cramer,* 48 S. C. 282, 26 S. E. 657 (1896). The courts have concluded that the open, notorious, continuous, hostile and exclusive possession for a period of twenty years gives rise to the presumption of ouster; however, title through ten years adverse possession requires actual ouster, of which cotenants have or should have actual knowledge. *Watson v. Little,* 224 S. C. 359, 79 S. E. 2d 384 (1953); *Bevard v. Fortune,* 221 S. C. 117, 69 S. E. 2d 355 (1952).

The fact that possession of one cotenant is deemed the possession of all makes it obvious that clearer and more conclusive evidence is required in proof of adverse possession between them than would be required between strangers. While on the surface the principal case appears to furnish all the necessary requirements, yet the evidence showed that the defendants did recognize others as cotenants because they purchased their interest in the property. Thus the acts relied upon by the defendants to establish their claim of adverse possession were not of such a clear and unequivocal nature as would indicate ouster of plaintiff. As to exclusive possession and the doing of certain other acts in conjunction with the land, only in rare cases will an ouster be implied. *Wells v. Coursey, supra; Whitaker v. Jeffcoat, supra.* The instant case is in agreement with the fundamental principles and requirements as recognized by the courts as to adverse possession by tenants in common. The rules are strict in cases of this nature and rightfully so due to the peculiar relationship here involved.

FRANCIS W. SHEALY.

TAXATION — Alimony — Payments for Support of Wife and Children Pursuant to Divorce Decree Deductible by Husband If No Specific Amount Allocated for Children. — In anticipation of divorce husband and wife entered an agreement which provided that the wife would have custody of their three minor children and that the husband would pay specified amounts annually to support and maintain the wife and children. Payments would end on the death of either the wife or the husband, or upon the wife's remarriage. If any of the children should become emancipated, marry, or die, the payments would be decreased by one-sixth. This agreement was subsequently incorporated into the divorce decree. For the years 1951-52 the husband deducted all payments to his wife as alimony on his income tax returns. The Commissioner determined a deficiency and held that he was entitled to deduct only one-half of the payments as alimony because the agreement showed the wife was to keep half of the payments for her own use and to devote the other half to the support of the children. Reading the agreement as a whole the Tax Court found it was reasonable inference that at least one-sixth of each payment was intended to discharge husband's obligation to support his children during their minority. *Jerry Lester,* 32 T. C. 1156 (1961). On appeal, HELD: Reversed. Provisions for reduction of payments upon the happening of some future event is not the equivalent of fixing a precise amount which the wife must expend on support of the children. *Lester v. Commissioner,* 279 F. 2d 354 (2d Cir. 1960).

The Internal Revenue Code of 1939 for the first time allowed a taxpayer to deduct from his gross income alimony or separate maintenance to his divorced or separated wife. Int. Rev. Code of 1939, § 23 (u), as amended, 56 Stat. 817 (1942) (now Int. Rev. Code of 1954, § 215(a)). These periodic payments were made taxable to the wife, excluding any portion of the payments fixed by decree or agreement for support of minor children. Int. Rev. Code of 1939, § 22 (k), as amended, 56 Stat. 816 (1942) (now Int. Rev. Code of 1954, §§ 71(a) and 71(b)). To determine whether a sum is fixed for the support of children it is necessary to construe the agreement as a whole. *Robert W. Budd,* 7 T. C. 413 (1946), *aff'd,* 177 F. 2d 198 (6th Cir. 1947). Where the agreement makes no distinction between what is for the wife's support and what is intended for the children's support, the entire amount paid by the husband must be treated as income to the wife. *Henrietta S. Seltzer,* 22 T. C. 203 (1954); *Dora H. Moitoret,* 7 T. C. 640 (1946). How the money is actually spent by the wife is of no importance in making this determination. *Truman W. Morsman,* 27 T. C. 520 (1956); *Dora H. Moitoret,* 7 T. C. 640 (1946). Many cases have arisen under the statute, however, which involve agreements that provide for reduction or elimination of payments contingent upon the wife's remarriage, or upon the marriage, emancipation, or death of one or more of the children. *Leon Mandel,* 8 CCH Tax Ct.

Mem. 445 (1949), *aff'd* 185 F. 2d 50 (7th Cir. 1950); *Mark B. Deitsch*, 26 T. C. 751 (1956), *rev'd*, 249 F. 2d 534 (6th Cir. 1957). To decide these cases the Tax Court of the United States has developed the following test: if the agreement provides for a division or reduction in the total payment upon the happening of some future event, the provision is a designation of what part of the whole sum is to be used to support the children and is applicable to all payments; although the event may never happen, its mention is sufficient to allocate a definite sum for the children's support; and when this test is applied, the husband may deduct only the wife's portion of the whole amount just as though the event had actually taken place. *Estate of Dorothy R. Hirshon, Jean M. Hirshon*, 27 T. C. 558 (1956), *rev'd*, 250 F. 2d 497 (2d Cir. 1957); *Charles S. Weil, Beulah Weil*, 22 T. C. 612 (1954), *supplemental opinion*, 23 T. C. 630 (1955), *rev'd*, 240 F. 2d 584 (2d Cir. 1957), *cert. denied*, 353 U. S. 958 (1957); *Warren Leslie, Jr.*, 10 T. C. 807 (1948). There is a widening difference of interpretation between the Tax Court and the Courts of Appeals, and among the circuits themselves there is an increasingly sharp division. The Seventh Circuit has adopted the rationale of the Tax Court, pointing out that while the statute is remedial and must be construed liberally, there is no reason to conclude the statutes should be construed liberally in the husband's favor as against the wife. *Mandel v. Commissioner*, 185 F. 2d 50 (7th Cir. 1950). The Ninth Circuit upholds the Tax Court, although this circuit mitigates the rule somewhat by saying that when the agreement read as a whole indicates a division of payments as between the wife and children, without reference to contingencies which may never come into being, then part of the amount has been fixed and is payable only for support of children. *Eisinger v. Commissioner*, 250 F. 2d 303 (9th Cir. 1957), *cert. denied*, 356 U. S. 913 (1958). The First Circuit, using Ninth Circuit logic, also reaches the same conclusion as the Tax Court, and, while it doesn't reject it, it does announce a distrust of the "broad language" of the Second Circuit. *Metcalf v. Commissioner*, 271 F. 2d 288 (1st Cir. 1959). On the other side of the controversy, the Second Circuit has developed and applied the rule that unless the agreement specifically designates a named sum for the support of children, then the entire amount is to be charged to the wife as alimony; the agreement must require the wife to devote these sums exclusively to the children's support, and she must have no independent beneficial interest in such sums or expenditure. *Weil v. Commissioner*, 240 F. 2d 584 (2d Cir. 1957), *cert. denied*, 353 U. S. 958 (1957); *Hirshon v. Commissioner*, 250 F. 2d 497 (2d Cir. 1957). *Accord, Deitsch v. Commissioner*, 249 F. 2d 534 (6th Cir. 1957). In following the rule that to fix, in the statutory sense, is to assign precisely, the court in the principal case reasons that just because payments are to be reduced in the event of some contingency does not mean "from the outset that child's support has been 'fixed' by the amount of the possible reduction"; the purpose of such agreements is to give the wife discretion in spending the entire payment in the best interest of both the children and herself and that any other construction would defeat the purpose of the agreement and the statutes. *Lester v. Commissioner*, 279 F. 2d 354 (2d Cir. 1960).

What confronts the courts in this area is a fuzzily worded statute susceptible of various constructions. When this problem arises, the construction to be favored is the one which most nearly accomplishes the legislative purpose as it establishes a clear rule. The opposing rules of the Tax Court and of the Second Circuit have the requisite clarity and ease of application, while those adhered to by the First, Seventh, and Ninth Circuits are not so clear or definite. However, the construction the Tax Court has developed would seem, as Judge Hand points out, to rob the wife of discretion in spending what money she receives to support herself and her children. As long as the courts continue to rule diversely in these situations, the lawyer specializing in domestic relations must take care to draft maintenance agreements according to the law as propounded in his circuit. To do less could involve his client in costly tax proceedings in the future.

PETE MARTIN.