RECENT CASES

Administrative Law—Medical Opinion Held Not Substantial Evidence to Sustain a Fraud Order—The Postmaster General issued a fraud order against the petitioner for selling a drug advertised as valuable for reducing.[1] The district court enjoined the local postmaster from carrying out the order.[2] On appeal the injunction was affirmed (one judge dissenting) on the ground that medical opinion based on general scientific knowledge, rather than upon personal observation, was not substantial evidence, when contested by contrary medical opinion, for a finding that the drug was valueless. *Pinkus v. Reilly,* 170 F. 2d 786 (3d Cir. 1948).

Courts have fixed strict requirements for the evidence necessary to sustain a fraud order. It was early held, in *American School of Magnetic Healing v. McAnnulty,*[3] that the postmaster can not issue a fraud order when a representation is honestly made about a subject where opinions reasonably differ. In this situation, the court stated, the truth of the representation was not capable of proof. This limitation appears to result from a requirement that either willful falsity [4] or such recklessness as to amount to bad faith be shown.[5] In the instant case, the *McAnnulty* case is used by analogy to draw a distinction between expert opinion evidence based on general medical knowledge and that based on personal observation. The court reasons that if there is conflicting medical opinion in the record, then the postmaster general has no more authority to issue a fraud order than he would if the representation were one not subject to proof, as in the *McAnnulty* case.

When similar issues have been raised concerning the truthfulness of patent medicine advertisements under the FTCA,[6] there has been little difficulty in upholding cease and desist orders on general medical testimony alone.[7] In such cases no distinction has been drawn between medical opinion based upon personal observation and that resulting from general medical knowledge.[8] The difference between the result reached in the principal case and that in FTC cases may perhaps be explained both by the greater reluctance of courts to enforce fraud orders because of their

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1. REV. STAT. § 3929 (1875), as amended, 39 U. S. C. § 295 (1946); REV. STAT. § 4041 (1875), as amended, 39 U. S. C. § 732 (1946). Together these statutes provide in substance that the Postmaster General, on substantial evidence of fraud, may order all letters addressed to a particular person returned to senders marked "fraudulent" and may order local postmasters to refuse to pay money orders in which such person is named as payee.

2. 71 F. Supp. 993 (D. N. J. 1947).

3. 187 U. S. 94 (1902).

4. Fields v. Hannegan, 162 F. 2d 17 (D. C. Cir. 1947); Rood v. Goodman, 83 F. 2d 28 (5th Cir. 1936).

5. Leach v. Carlile, 258 U. S. 138 (1922); Missouri Drug Co. v. Wyman, 129 Fed. 623 (C. C. E. D. Mo. 1904).

6. 38 STAT. 717 (1914), as amended, 15 U. S. C. § 45 (1946).

7. Neff v. FTC, 117 F. 2d 495 (4th Cir. 1941); Dr. Caldwell, Inc. v. FTC, 111 F. 2d 889 (7th Cir. 1940).

8. *See* Haynes & Co. v. FTC, 105 F. 2d 988, 989 (2d Cir. 1939).

harsh consequences to the individual[9] and, possibly by difference in statutory language.[10]

The result reached by the instant case might find support in authority if further factual evidence were easily obtainable.[11] However, the court rests its decision on the premise that if evidence is conflicting, there is then an honest difference of opinion. This reasoning disregards the fact that, as a practical matter, the opinion of experts can be obtained to support almost any proposition.[12] Further, the holding that more probative effect should be given to medical opinion based upon personal experience than to that based upon general scientific knowledge involves the danger of imposing impractical limitations on fact finders; for there are many areas in which conclusions can be reached only by basing them on scientific knowledge. In our present world of specialization, such knowledge is seldom the result of the personal observations or tests of a single individual.[13]

Bills and Notes—Drawing a Check Against Uncollected Funds Held Not a Violation of Bad Check Law—Appellant was indicted for swindling under the Texas bad check law.[1] He had made a deposit of a check drawn on an out-of-city bank for which he received a deposit slip. The bank had not notified him that checks against the item would not be honored. The accused drew a check on these uncollected funds which was, because of this fact, dishonored on presentment. Although he was found guilty by the jury, the court affirmed a reversal of the conviction. *Moody v. State,* 213 S. W. 2d 539 (Tex. App. 1948).

A criminal prosecution for drawing against a deposit of a valid but as yet uncollected check presents a novel case.[2] Since nearly every bad check law requires an intent to defraud,[3] the reversal of the conviction is not surprising. Although the Texas statute typically provides that non-payment shall be prima facie evidence of such intent, the court has required, to justify a conviction, proof of facts establishing an intent to defraud beyond reasonable doubt.[4] Even cases admitting the presumption

9. See note 1 *supra.*

10. *Compare* REV. STAT. § 3929 (1875), as amended, 39 U. S. C. § 295 (1946): ". . . any person . . . is conducting any . . . scheme or device for obtaining money . . . through the mails by means of false or fraudulent pretences . . ." *with* 38 STAT. 717 (1914), as amended, 15 U. S. C. § 45 (1946) providing: "any such person . . . has been or is using any unfair method of competition in commerce. . . ." See also Note, *Superstition and the Mails,* 35 LAW NOTES 130 (1931), for a descussion of the interpretation given the fraud order statute.

11. *E. g.,* Jarvis v. Shackelton Inhaler Co., 136 F. 2d 116 (6th Cir. 1943).

12. See Note, 46 HARV. L. REV. 1138, 1169 (1933) for the position that indiscriminate use of expert opinion evidence leads to a situation closely analogous to wager of law.

13. See 3 WIGMORE, EVIDENCE § 687 (3d ed. 1940) for reasoning denying any distinction between evidence based on observation and general knowledge in relation to the somewhat analogous problem of admissibility of evidence.

1. TEX. PENAL CODE, tit. 11, Art. 567 b (Vernon, Supp. 1947).

2. *Cf.* People v. Routh, 182 Cal. 561, 189 Pac. 436 (1920).

3. Although every state has one or more worthless check laws, only Kansas has held that an intent to defraud is not a necessary element of the crime. State v. Bechtelheimer, 151 Kan. 582, 100 P. 2d 657 (1940); State v. Gillen, 151 Kan. 359, 99 P. 2d 832 (1940).

4. Kuykendall v. State, 143 Tex. Cr. R. 607, 160 S. W. 2d 525 (1942).

allow its easy rebuttal [5] by evidence introduced by the accused or by the state.[6]

Although apparently unnecessary to sustain its reversal, the court stated its holding as follows: ". . . the check was dishonored because of the acts of the bank rather than those of the appellant. If the bank was not going to honor checks against the deposit, it should have in some way so advised appellant." [7] Taken literally, this holds the bank at fault for non-payment of a check drawn on uncollected funds, and impliedly gives appellant an action for credit damage. Such a result would be contrary to the cases [8] and to existing bank practice. It abrogates the rule of the courts,[9] the standard depositor's agreement,[10] and the statutes [11] that a bank is merely an agent for collection and not a purchaser of deposited checks. Carried to its extreme this interpretation may be said to condone check-kiting,[12] or at least put the burden of stopping such practices on the bank. The language can be narrowed merely to mean that if the practice has existed for a depositor to draw on uncollected funds the bank must take affirmative action if they intend to discontinue such practice.[13] Furthermore, since it is apparent that banks can watch only a few per cent of their accounts for checks drawn on uncollected funds, a depositor may draw on such funds unnoticed and uncontested for some time. Even if appellant was put on notice of the agency relationship by statute or by his depositor's agreement, such knowledge alone does not preclude permission to draw on uncollected funds.[14] Therefore, the accused had reasonable grounds to believe his check would be paid. Since the Texas court has squarely held that evidence of such a belief will rebut the presumption,[15] it seems logical to interpret the words of this criminal court [16] as merely a finding that the intent necessary for conviction under the statute was absent. For the reasons indicated, it seems important so to restrict the decision.

5. Coffee v. State, 148 Tex. Cr. R. 71, 184 S. W. 2d 278 (1945); Lloyd v. State, 98 Tex. Cr. R. 504, 266 S. W. 785 (1924); *accord,* People v. Becker, 137 Cal. App. 349, 30 P. 2d 562 (2d Dist. 1934); State v. Vandenburg, 9 Harr. 320, 198 Atl. 701 (Del. Ct. Gen. Sess. 1938); Wolfe v. State, 76 Fla. 168, 79 So. 449 (1918).

6. State v. Thompson, 37 N. M. 229, 20 P. 2d 1030 (1933).

7. Instant case at 540.

8. *E. g.,* Cunningham v. Merchants' Nat. Bank, 4 F. 2d 25 (1st Cir. 1925), *cert. denied,* 268 U. S. 691 (1925).

9. *E. g.,* Keyes v. Paducah & I. R. R., 61 F. 2d 611 (6th Cir. 1932); Central Bank & Trust Co. v. Davis, 149 S. W. 290 (Tex. Civ. App. 1912).

10. Many banks, including that of the accused, stipulate in their passbook, depositor's agreement, or deposit slip the standard collection agreement as recommended by the American Bankers Association which specifies that the bank is acting solely as a collecting agent.

11. TEX. STAT., § 342-702 (Vernon, 1947).

12. An offense committed where there is a deliberate deposit of a worthless check in a bank for the purpose of creating a fictional credit against which further checks are drawn.

13. The Texas banking statute deems drafts on funds in the process of collection as extensions of credit by the bank to the drawer. However, the language appears to only allow such practice with the consent of the bank. See note 11 *supra.*

14. *In re* Jarmulowsky, 243 Fed. 632 (S. D. N. Y. 1917), *aff'd,* 249 Fed. 319 (2d Cir. 1918); see note 11 *supra.*

15. Coffee v. State, *supra.*

16. The Texas Court of Criminal Appeals reviews only criminal cases and is composed of different judges from those who review civil cases.

Conflict of Laws—Enforcement of Revenue Law of a Foreign State Refused—The City of Detroit, Michigan, and the Treasurer of the city, brought suit against the defendant in Delaware for the amount of a tax levied on defendant's personal property by plaintiff city. A demurrer to the complaint was sustained on the ground that one state will not enforce the revenue law of another state or political subdivision therof. *City of Detroit v. Proctor,* 61 A. 2d 412 (Del. Super. 1948).

The refusal of the Delaware court to entertain an original suit for enforcement of a sister state's revenue laws is in accord with all but a handful of decisions on the question.[1] The rule had its roots in an English desire to promote commerce beneficial to that country,[2] and arose in suits between private parties involving contracts invalid under foreign revenue laws.[3] The doctrine was early applied in this country under the same circumstances,[4] and was later extended to suits between states and delinquent taxpayers,[5] at first without enunciation of any reasons for the rule. When the doctrine was at last examined, it was said that the same policy which prevented states from enforcing each other's penal laws prevented enforcement of their revenue laws.[6] However, the analogy between penal laws and revenue laws was in turn subjected to criticism,[7] and when the situation again arose in this country, a Missouri court held that it would enforce the revenue laws of its sister state.[8]

Although a state is required to accord full faith and credit to foreign judgments obtained on tax liabilities,[9] whether it must similarly regard the obligation of foreign tax statutes, is still an open question.[10] But it is clear that one state may, if it wishes, enforce such revenue laws, on principles of comity.[11] The original reasons for refusal to entertain such suits are not convincing when viewed in the light of our federal system and under modern conditions of mobility. The interest of the states as a whole, or of any particular state, in preventing a delinquent taxpayer from

1. State *ex rel.* Oklahoma Tax Commission v. Rodgers, 238 Mo. App. 1115, 193 S. W. 2d 919 (St. Louis C. A. 1946); Standard Embossing Co. v. American Salpa Corp., 113 N. J. Eq. 468, 167 Atl. 755 (Ch. 1933); Holshouser v. Gold Hill Copper Co., 138 N. C. 248, 50 S. E. 650 (1905). The latter two cases, although not discussing the precise point here presented, allowed claims of foreign states for franchise taxes due from corporations in receivership.

2. *See, e. g.,* Lord Hardwicke, in Boucher v. Lawson, Cas. t. H. 85, 89, 95 Eng. Rep. 53, 55, 56 (1734).

3. *E. g.,* James v. Catherwood, 3 Dow. & Ry. 190 (1823); *see* Holman v. Johnson, 1 Cowp. 341, 343, 98 Eng. Rep. 1120, 1121 (1775); Boucher v. Lawson, *supra. Contra:* Alves v. Hodgson, 7 T. R. 241, 101 Eng. Rep. 953 (1797).

4. Ludlow v. Van Rensselaer, 1 Johns. 94 (N. Y. 1806).

5. *E. g.,* Moore v. Mitchell, 30 F. 2d 600 (2d Cir. 1929) (alternative holding), *aff'd. on another ground,* 281 U. S. 18 (1930); Colorado v. Harbeck, 232 N. Y. 71, 133 N. E. 357 (1921) (alternative holding); *see* Henry v. Sargeant, 13 N. H. 321, 332 (1843); for a parallel English case, see Municipal Council of Sydney v. Bull, [1909] 1 K. B. 7.

6. *See* concurring opinion of L. Hand, J., in Moore v. Mitchell, 30 F. 2d 600, 603, 604 (2d Cir. 1929).

7. *See* Milwaukee County v. M. E. White Co., 296 U. S. 268, 271 (1935): ". . . the obligation to pay taxes is not penal."; Note, 29 COL. L. REV. 782, 786 (1929).

8. Oklahoma v. Rodgers, *supra.*

9. Milwaukee County v. White Co., *supra.*

10. *Id.* at 275.

11. Oklahoma v. Rodgers, *supra.* It is to be noted that Oklahoma had passed a "reciprocity statute": "The courts of this State shall recognize and enforce liability for taxes lawfully imposed by other States which extend a like comity to this State." OKLA. STAT. ANN. § 1483, tit. 68 (1941).

evading his obligation by absconding to another state with his assets seems greatly to outweigh any objection the forum may have to adding another case to its already crowded docket,[12] construing a foreign tax statute, determining whether its tax policy conflicts with that of the foreign state,[13] or meddling with the relations of a sister state and its citizens;[14] and far from giving rise to interstate complications, such a practice of reciprocal aid would seem to promote interstate understanding.[15] The Delaware court, in refusing to take the position pioneered by the Missouri court, seems to have lost an opportunity to help properly resolve this dilemma of interstate relations.

Constitutional Law—Advisory Opinion Upholding Legality of Administering Electric Shock Treatments to Patients of State Mental Hospitals Without Consent—In an opinion requested by the Secretary of Welfare, the Department of Justice of Pennsylvania expressed the conclusion that electroshock treatments might legally be administered to mental patients of state hospitals, in the sound discretion of the superintendents thereof, without first obtaining the written permission of the patients, their relatives, guardians, or other persons empowered to give consent for such patients.—*Shock Therapy in State Hospitals,* 64 Pa. D. & C. 14 (1948).

The provisions of the Pennsylvania Mental Health Act of 1923[1] which provide for involuntary confinement of the mentally ill in state hospitals[2] have been declared constitutional.[3] This statute empowers the superintendent of any hospital for the treatment of mental diseases to receive and detain any person who is mentally ill or who may need or benefit by the treatment given persons who are mentally ill.[4] Thus, it is indicated that a fundamental reason for commitment is the care which is to be given. Since there is no consent necessary to the authorized restraint, it would seem that none should be required before this care might be legally undertaken. Such care has been stated to extend "so far as to include every provision known to medical skill and science for the

12. The problem of overburdened dockets is a real one in states such as New York, where there is a large amount of property owned by non-residents. Even so, New York has adopted a reciprocal death tax statute, which may indicate a change in policy as to enforcing foreign tax laws. N. Y. TAX LAW, § 249-t(2) (McKinney, 1943).

13. However, the problems of statutory construction and conflicting policy are not considered insuperable in other fields of Conflict of Laws.

14. The objection seems especially weak here, since it is the foreign state itself which is trying to enlist the aid of the forum.

15. For general problems concerning extra-territorial enforcement of revenue laws, see Leflar, *Extra-state Enforcement of Penal and Governmental Claims,* 46 HARV. L. REV. 193, 218 *et seq.* (1932).

1. PA. STAT. ANN., tit. 50, §§ 1-213 (Purdon, Supp. 1947).

2. PA. STAT. ANN., tit. 50, §§ 42, 43 (Purdon, Supp. 1947).

3. *See In re* Ryan, 47 F. Supp. 10, 12 (E. D. Pa. 1942). In Hammon v. Hill, 228 Fed. 999, 1001 (W. D. Pa. 1915) the court said that it is the duty of the state to restrain and confine the insane.

4. PA. STAT. ANN., tit. 50, §§ 41-58 (Purdon, Supp. 1947), the sections of the Act dealing with commitment, contain words granting such authority. These sections reflect the emphasis which the statute places upon the care which is to be given persons committed.

treatment of the diseased mind." [5] It seems clear that this language does not justify subjection of patients in public mental hospitals to new or experimental techniques, but requires that reasonable standard treatments be given these patients. Narcotics, insulin, and hydrotherapy have long been recognized as such, and have been administered without prior consent.[6] Since electric shock therapy is of very recent origin [7] and entails some risk of harm,[8] there may appear to be reason for requiring consent as a condition precedent to its use. However, the exceptionally high rate of cures resulting from electrically induced convulsions [9] seems conclusive of its therapeutic merit. As a result, it is widely uesd today [10] and has gained acceptance as the standard treatment for certain psychotic conditions.[11] Since the ill effects which might result are negligible either in frequency or character,[12] it is not such violent treatment as would amount to an unreasonable invasion of bodily integrity. Thus, it seems that electroshock may be considered as within the category of therapuetic measures which constitute an essential part of commitment. The overpopulation of public mental hospitals today is the basis of the state's inability to cope more adequately with the problem presented by the ever-increasing number of persons needing psychiatric attention.[13] There is strong evidence that general use of shock therapy in these hospitals will permit broader and more effective utilization of the facilities available.[14] In many cases, the patient might ordinarily remain in an institution for months or years, at public expense, where immediate progress could be made were electroshock treatments employed.[15] In view of the benefit to the public welfare that will accrue from unhindered use of shock therapy in public hospitals, there appears even stronger reason to permit administration of such treatment unhampered by a requirement of prior consent of a layman who may well be ignorant of its true nature. The public welfare has been held to justify the imposition upon mental defectives of such extreme measures as sexual sterilization.[16] The same considerations

5. *See* Hammon v. Hill, 228 Fed. 999, 1001 (W. D. Pa. 1915).

6. Instant opinion at page 18.

7. It was first developed in Italy in 1938. Shryock, *Shock Therapy Saves Minds,* 25 HYGEIA, THE HEALTH MAGAZINE 517 (1947).

8. A few deaths have been recorded and occasionally, fractures of the extremities occur because of the violence of the convulsion.

9. See Shryock, *op. cit. supra* note 7, at 552; Batt, *100 Depressive Psychoses Treated with Electrically Induced Convulsions,* 89 JOUR. MENT. SC. 289 (1943).

10. See KRAINES, THE THERAPY OF THE NEUROSES AND PSYCHOSES 452-459 (1943).

11. See KALINOWSKY AND HOCH, SHOCK TREATMENTS AND OTHER SOMATIC PROCEDURES IN PSYCHIATRY ix (1946); Gralnick, *A Three-Year Survey of Electroshock Therapy,* 102 AM. JOUR. PSYCHIAT. 583 (1946).

12. Shock treatments have been used in Pennsylvania state hospitals since 1939. There have been no deaths caused by these treatments. The fractures that occur from time to time can be avoided with careful and improved techniques. There appears to be no impairment of the memory resulting from electroshock. Sherman, *The Effect of Convulsive Treatment on the Memory,* 98 AM. JOUR. PSYCHIAT. 401 (1942). And since the patient loses consciousness immediately upon the passage of the current through the brain, there is no unpleasant experience.

13. See *The Situation in Pennsylvania Institutions for the Mentally Ill, Feeble-Minded, and Epileptic,* 49 PA. MED. JOUR. 764 (1946).

14. See Penrose, *Results of Shock Therapy Evaluated by Estimating Chances of Patients Remaining in Hospital,* 89 JOUR. MENT. SC. 374 (1947).

15. Instant opinion at 16.

16. Buck v. Bell, 274 U. S. 200 (1926).

would appear to warrant the use of an effective treatment even though it entails possible injury, particularly since such treatment, in most cases, is beneficial to the subject.

The instant opinion is the first authoritative legal pronouncement on the question here involved. The reasoning seems to represent a sound recognition of medical progress, and the conclusion, to evaluate properly the conflicting interests of society and of the individual.

Constitutional Law—Miscegenation Statute Violates Due Process and Equal Protection Clauses of United States Constitution—A county clerk, in compliance with a miscegenation statute,[1] refused to grant a marriage license to a Negro man and white woman, whereupon the couple proceeded in mandamus to compel the clerk to issue the license. The California Supreme Court (three judges dissenting), in granting the writ, held the statute an unreasonable and arbitrary regulation of the fundamental right to marry—a violation of the equal protection and due process clauses of the United States Constitution.[2] *Perez v. Lippold,* 198 P. 2d 17 (Cal. 1948).

Laws prohibiting miscegenetic marriages can be traced to Colonial times.[3] California's dates from its first legislative session.[4] Twenty-nine other jurisdictions still have such statutes.[5] Though frequently attacked on constitutional grounds, they have always been upheld as a valid state regulation.[6] It is established law that marriage as affecting the morals and general welfare is subject to state regulation.[7] However, the right to marry is guaranteed to the individual through the concept of "liberty" in the Fourteenth Amendment.[8] Just how far the state may go in restricting this right without violating due process is uncertain.[9] The early courts in upholding miscegenation statutes based their decisions on supposedly scientific facts which if true would justify this limitation.[10] Later courts merely follow precedent. They talk in general terms, declaring that it is "well established law" that such statutes are a proper exercise of the state's police power, often substantiating this by analogy to statutes pro-

1. CAL. CIV. CODE § 69 (Deering, 1941).

2. The court also held that the statute denied freedom of religion, and was too vague and uncertain to be an enforceable restriction of a fundamental right, since it did not define "mulatto."

3. Instant case at 38.

4. CAL. STAT., c. 140, § 3 (1850).

5. 1 VERNIER, AMERICAN FAMILY LAWS § 44 (1931); Comment, *Intermarriage with Negroes—A Survey of State Statutes,* 36 YALE L. J. 858 (1927).

6. Green v. State, 58 Ala. 190 (1877); State v. Gibson, 36 Ind. 389 (1871); Lonas v. State, 50 Tenn. 287 (1871).

7. *See* Maynard v. Hill, 125 U. S. 190, 205 (1888); Andrews v. Andrews, 188 U. S. 14, 30 (1903).

8. *See* Skinner v. Oklahoma, 316 U. S. 535, 541 (1942); Meyer v. Nebraska, 262 U. S. 390, 399 (1923).

9. MATHEWS, THE AMERICAN CONSTITUTIONAL SYSTEM 410 (1932).

10. *See* Scott v. Georgia, 39 Ga. 321, 323 (1869) (intermarriage produces weak progeny); State v. Jackson, 80 Mo. 175, 179 (1883) (mixed unions incapable of reproduction).

hibiting incestuous marriages, polygamy, and restrictions based on age.[11] It may well be that the courts fear to limit the legislative sphere on such an emotional issue. The instant case takes a fresh approach in re-examining the factual basis allegedly supporting the statute's validity. It refutes the time honored arguments that crossing of the races is biologically unsound,[12] such marriages cause race tension,[13] and the progeny is a burden on society.[14] Finding no valid reason to support the statute, the court holds it discriminatory, arbitrary, and unreasonable—a deprivation of the right to marry the person of one's choice merely because of a difference in race.[15]

In view of the fact that the real basis for these statutes seems race prejudice and false notions concerning color superiority,[16] the court properly concluded that due process had been violated. In so holding, the court has removed the legal indorsement of race prejudice. The legal consequences will be to legitimize the progeny, permit inheritance,[17] and reduce prosecution for illicit relations. It is doubtful whether there will be corresponding social changes. More broadly, this decision might well be used as a basis for analyzing other customary restrictions on the right to marry where such prohibition might not be reasonable, *e. g.*, marriages prohibited on account of affinity.[18] Undoubtedly this decision will stimulate the bringing of similar suits in other jurisdictions, the issue eventually to be settled by the Supreme Court of the United States. The trend of this Court's decisions lends support to a conclusion that the holding in the instant case will be sustained.[19]

Criminal Procedure—State Statute Authorizing Extradition of Non-fugitives Held Constitutional—In an application for a writ of habeas corpus, the petitioner contended that he was not subject to interstate rendition, having been absent from the demanding state at the

11. *See* Arizona v. Pass, 59 Ariz. 16, 20, 121 P. 2d 882, 884 (1942); Kirby v. Kirby, 24 Ariz. 9, 11, 206 Pac. 405, 406 (1922); *In re* Takahashi's Estate, 113 Mont. 490, 496, 129 P. 2d 217, 220 (1942); Jackson v. Denver, 109 Colo. 196, 199, 124 P. 2d 240, 241 (1942).

12. Instant case at 22.

13. *Id.* at 25.

14. *Id.* at 27.

15. The court neatly distinguishes the miscegenation restriction from race segregation declaring the former a discriminatory deprivation of a right, the latter no substantial deprivation, since equal facilities must be provided.

16. 1 VERNIER, AMERICAN FAMILY LAWS § 44 (1931): "The peculiarly geographic distribution of statutes prohibiting racial intermarriage forces one to conclude . . . that such legislation is not based primarily upon physiological, psychological, or other scientific bases, but is for the most part the product of local prejudice and of local effort to protect the social and economic standards of the white race."

17. *E. g., In re* Estate of Fred Paquet, 101 Ore. 393, 200 Pac. 911 (1921); *In re* Takahashi's Estate, *supra.*

18. Twenty-four states have express statutes which prohibit individuals from marrying certain persons related by marriage. "It is difficult to construct any very logical case for prohibition of marriage on grounds of affinity. . . ." 1 VERNIER, AMERICAN FAMILY LAWS § 39 (1931).

19. *See* Hirabayashi v. United States, 320 U. S. 81, 100 (1943); Railway Mail Ass'n v. Corsi, 326 U. S. 88, 93 (1945); Korematsu v. United States, 323 U. S. 214, 216 (1944); Oyama v. California, 332 U. S. 633, 646 (1948); Shelley v. Kraemer, 334 U. S. 1, 22 (1948).

time of the alleged offense, and that a state statute [1] authorizing extradition in such cases was unconstitutional. Discharging the writ, the Court held that the statutory provision did not violate the Constitution. Ex parte *Morgan,* 78 F. Supp. 756 (S. D. Cal. 1948).

The Constitution and implementing federal legislation [2] have been construed to prohibit extradition under such authority unless the person sought had fled the demanding state; [3] hence, where relator could establish absence therefrom at the time of the crime, he was entitled to be released.[4] Since numerous crimes do not require physical presence within the state of jurisdiction, wrongdoers have frequently gone unpunished.[5] In an attempt to remedy this situation, the courts have given a liberal interpretation to the federal statute, and to interstate rendition in general. The Supreme Court has decided that interstate rendition is not governed by the strict requirements of international law.[6] It has countenanced instances where the relator was unlawfully seized by officers of the demanding state in the asylum state.[7] Arrest of the alleged fugitive by officers of the asylum state prior to receipt of the requisition is not authorized by the federal statute, yet such action has been upheld.[8] In some instances, however, even a liberal interpretation could not justify interstate rendition under federal authority, and certain courts suggested that state action was necessary and proper.[9] Accordingly, reciprocal state compacts have been made under congressional authorization, and have received judicial approval.[10] A lack of complete coverage and uniformity brought about the formulation of the Uniform Criminal Extradition Act, which has found increasing favor with state legislatures.[11] Section 6, under which petitioner was extradited in the instant case, has been the most frequently attacked provision of the Act, on the ground that the Constitution confers exclusive jurisdiction over extradition upon the Federal Government. Although this argument is supported by dicta in some of the early cases,[12] its validity is opposed by reason and the weight of authority. An examination of pre-constitutional history reveals that considerable acrimony was engendered among the states by a mutual failure to render extradition as a matter of comity,[13] and it has been convincingly argued that the constitutional provision was intended to provide an enforceable federal standard for interstate rendition, rather than to

1. CAL. PEN. CODE § 1549.1 (Deering, 1941).

2. U. S. CONST. Art. IV, § 2(2); REV. STAT. § 5278 (1875), 18 U. S. C. § 662 (1946).

3. South Carolina v. Bailey, 289 U. S. 412, 421 (1933); *Ex parte* Reggel, 114 U. S. 642, 651 (1885).

4. Hyatt v. People *ex rel.* Cockran, 186 U. S. 691 (1903).

5. Wigchert v. Lockhart, 114 Colo. 485, 166 P. 2d 988 (1946); State v. Hall, 115 N. C. 811, 20 S. E. 729 (1894).

6. Biddinger v. Comm'r, 245 U. S. 128, 132 (1917); *see* Lascelles v. Georgia, 148 U. S. 537, 542 (1893).

7. Pettibone v. Nichols, 203 U. S. 192 (1906); Mahon v. Justice, 127 U. S. 700 (1888).

8. Burton v. New York Centr. R. R., 245 U. S. 315 (1917).

9. *See* United States v. Flegenheimer, 14 F. Supp. 584, 585 (D. N. J. 1935).

10. See, *e. g.,* COLO. STAT. ANN., c. 153, § 44 (Supp. 1947); 48 STAT. 909 (1934), 18 U. S. C. § 420 (1946); *In re* Tenner, 20 Cal. 2d 670, 128 P. 2d 338 (1942).

11. At the date of writing, 33 states have adopted the Act. 9 UNIFORM LAWS ANN. 29 (Supp. 1947).

12. *See* Prigg v. Commonwealth of Pennsylvania, 16 Pet. 539, 617 (U. S. 1842).

13. A. P. SCOTT, CRIMINAL LAW IN COLONIAL VIRGINIA 55 (1930).

curtail the exercise of the privilege by the states.[14] Therefore, while a state may not limit federal extradition, it should have the right to enact legislation to cover those situations falling outside the federal scope. Since federal jurisdiction is confined to instances where accused has fled the demanding state, legislation dealing with non-fugitives appears a valid exercise of the police power under the Tenth Amendment.[15] Although state courts have uniformly found § 6 constitutional,[16] the instant case represents the initial federal construction. The growth of interstate criminal activity[17] makes mandatory the complete coverage provided by the Uniform Act. However, optimum results cannot be obtained until enactment by all jurisdictions, and it is to be hoped that those states which have not yet done so will be urged in that direction by the unqualified approval of a federal court.

Evidence—Requiring Accused to Repeat Certain Words for Identification of His Voice Held Violation of Privilege Against Compulsory Self-incrimination—Shortly after his arrest, and before trial,[1] accused was compelled, along with several other suspects, to repeat certain words which the prosecutrix had previously stated were used by the person who raped her. Solely on this basis, prosecutrix picked defendant as her attacker and testified to that fact upon trial. Upon appeal from a conviction, the court held that this procedure had violated defendant's right against self-incrimination. *State v. Taylor,* 49 S. E. 2d 289 (S. Car. 1948).

The extent to which an accused, who has not testified in his own behalf, may be compelled to perform some affirmative act to aid the State in connecting him with the crime is the subject of considerable judicial controversy. While the courts are agreed that the privilege extends only to "testimonial utterances," they differ as to the connotation of that phrase. A few courts take the position that it relates only to oral or written testimonial utterances, others that it includes any affirmative acts, while the majority do not go so far in either direction.[2] It has been held that a defendant may not even be required to stand up in court to give the jury or a witness a better look at him.[3] Most courts permit an examination of accused's body for identifying marks such as tattoos and scars,[4]

14. *See* Lascelles v. Georgia, *supra* at 542; Cassis v. Fair, 126 W. Va. 557, 563, 29 S. E. 2d 245, 248 (1944).

15. Culbertson v. Sweeney, 70 Ohio App. 344, 348, 44 N. E. 2d 807, 809 (1942), *appeal dismissed for lack of debatable constitutional question,* 140 Ohio St. 426, 45 N. E. 2d 118 (1942).

16. English v. Matowitz, 148 Ohio St. 39, 72 N. E. 2d 898 (1947); *see In re* Campbell, 147 Neb. 820, 825, 25 N. W. 2d 419, 423 (1946); Cassis v. Fair, *supra* at 562, 29 S. E. 2d at 247.

17. PROCEEDINGS OF THE ATTORNEY GENERAL'S CONFERENCE ON CRIME 3 *et seq.* (1934).

1. Although there is disagreement, most courts hold that the privilege against compulsory self-incrimination extends to pre-trial investigations. 8 WIGMORE, EVIDENCE § 2265 n. 2. Wigmore contends that it does not. 8 *id.* § 2266.

2. See Note, 171 A. L. R. 1144 (1947).

3. Smith v. State, 247 Ala. 354, 24 So. 2d 546 (1946).

4. O'Brien v. State, 125 Ind. 38, 25 N. E. 137 (1890); State v. Oschoa, 49 Nev. 194, 242 Pac. 582 (1926); State v. Garrett, 71 N. C. 85 (1874); *see* People v. Strauss, 174 Misc. 881, 882, 22 N. Y. S. 2d 155, 156 (King's County 1940).

but virtually all courts refuse to compel accused to submit to a medical examination for pregnancy [5] or venereal disease.[6] Many courts hold that the privilege does not protect defendant from being required to try on wearing apparel known to belong to the guilty person,[7] or from being compelled to make a comparison of his foot with a footprint,[8] although others refuse to permit either. Prior to the instant case the application of the privilege to a defendant who had been compelled to repeat certain words for identification of his voice had been discussed in only two cases. In one, a Pennsylvania case, the court stated by way of dictum that this did not violate the privilege,[9] while in the other a Texas court squarely held that it did.[10]

Although the historical details giving rise to the privilege are not clear,[11] it is generally accepted that its original purpose was to bring to an end the practice of employing legal process to extract from a person an admission of his guilt.[12] In view of this, "testimonial utterances" have been defined as those which involve the defendant's knowledge of the facts and the operations of his mind in expressing them.[13] Consequently, all legal writers on the subject contend that the privilege does not prevent the prosecution from requiring an accused to do certain things to permit others to identify him.[14] It seems clear that requiring defendant to parrot back certain words neither compels an admission of guilt nor engenders any of the dangers that the safeguard was intended to prevent. Acceptance by the courts of this line of reasoning will do much to enable application of the privilege to preserve the constitutional guarantees of a fair trial without making it a barrier to the investigation and punishment of crime.

Income Taxation—Corporation Held Taxable for Collections by Stockholders on Charged-Off Notes Made Subject to Dividend in Kind—A bank charged off certain notes as bad debts and deducted them from its taxable income. Shortly after it had begun to receive collections on these notes, it declared a dividend in kind of those outstanding and considered collectible, indorsing them to an employee as trustee for the stock-

5. People v. McCoy, 45 How. Prac. 216 (N. Y. 1873). *Contra:* Villaflor v. Summers, 41 Philippine 62 (1920).

6. People v. Akin, 25 Cal. App. 373, 143 Pac. 795 (D. C. App. 1914); State v. Height, 117 Iowa 650, 91 N. W. 935 (1902); McManus v. Commonwealth, 264 Ky. 240, 94 S. W. 2d 609 (1936); see Note, 17 NOTRE DAME L. 243 (1942).

7. Holt v. United States, 218 U. S. 245 (1910); State v. Oschoa, *supra;* Bruce v. State, 31 Tex. Cr. R. 590, 21 S. W. 681 (1893). *Contra:* Allen v. State, 183 Md. 603, 39 A. 2d 820 (1944); Ward v. State, 27 Okla. Crim. 362, 228 Pac. 498 (1924).

8. Magee v. State, 92 Miss. 865, 46 So. 529 (1908); State v. Barela, 23 N. M. 395, 168 Pac. 545 (1917). *Contra:* Day v. State, 63 Ga. 667 (1879); State v. Griffin, 129 S. C. 200, 124 S. E. 81 (1924). See Note, 64 A. L. R. 1089 (1930); Inbau, *Self-incrimination—What Can an Accused Person Be Compelled to Do?,* 28 J. CRIM. L. 261, 264 (1937).

9. *See* Johnson v. Commonwealth, 115 Pa. 369, 395, 9 Atl. 78, 81 (1886).

10. Beachem v. State, 144 Tex. Cr. R. 272, 162 S. W. 2d 706 (1942).

11. For a discussion of the history of the privilege see 8 WIGMORE, EVIDENCE § 2250 and Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America,* 21 VA. L. REV. 763 (1935).

12. Inbau, *supra* at 263. For this reason it is often confused with the rule against untrustworthy confessions. See 8 WIGMORE, EVIDENCE § 2266; Comment, 21 TEX. L. REV. 816 (1943).

13. 8 WIGMORE, EVIDENCE at 375.

14. 2 *id.* § 2265; Inbau, *supra;* Notes, 5 N. C. L. REV. 333, 339 (1927, 1 VAND. L. REV. 243 (1948).

holders.[1] Collections were then made on these notes and deposited in a trustee account. The commissioner assessed a deficiency against the bank for the proceeds so collected. The Tax Court upheld the taxpayer.[2] On appeal, the Tax Court was reversed (two judges dissenting). *Commissioner of Internal Revenue v. First State Bank of Stratford,* 168 F. 2d 1004 (5th Cir. 1948), *cert. denied,* 335 U. S. 867 (1948).

The Internal Revenue Code and Treasury regulations omit any general provisions concerning the tax liability of a transferor for proceeds collected by a transferee.[3] Cases indicate that the transferor is not taxable for income produced by the property after its transfer.[4] The dogma distinguishes between a transfer of an asset and the transfer of income alone, generally asserting that when income alone is transferred the transferor remains taxable.[5] This result is reached most easily when accrued income is transferred since, practically, the effect is as if the transferor had first collected the income and then transferred the proceeds to another.[6] Transfers anticipating future earnings present a greater problem since the right to receive income in the future is, in one sense, an asset. Courts seem to hold that one who transfers with a reasonable expectation that the transferee will realize income within a relatively short time may be taxed if the transferee makes such realization. Such situations are said to be anticipatory assignments of income.[7] The majority in the instant case held that the notes represented a claim on income only and hence this rule applied. This followed because once the notes had been charged off and a tax benefit received, any proceeds, if collected, would have been taxable to the corporation had there been no transfer.[8] The transfer was probably effected with the expectation that the notes would shortly be turned into cash, since collections on others had been made even before the transfer. Therefore, this decision accords with authority.[9] The concurring opinion reaches the same result by applying a different line of authority. Decisions have indicated that if an appreciated asset is transferred by dividend in kind under such circumstances that the stockholders appear to be acting for the corporation, then profits realized by the stock-

1. The majority of the court felt bound by the finding of fact of the tax court that the dividend transfer was "real" and in "good faith." Instant case at 1006.

2. 8 T. C. 831 (1947).

3. INT. REV. CODE § 22a defines gross income only in the most general terms. INT. REV. CODE § 115 j, fixing the value of a dividend in kind as of the value at the time of transfer, has no application since it deals with the tax of the shareholder rather than the corporation. Similarly National Bank of Commerce v. Commissioner of Internal Revenue, 115 F. 2d 875 (9th Cir. 1940), is not controlling. U. S. Treas. Reg. 111, § 29.22(a)(20) (1943), providing that the distribution of assets in liquidation will result in no loss or gain to a corporation, is inapplicable since there is here no liquidation and because the regulation does not define an asset.

4. Blair v. Commissioner of Internal Revenue, 300 U. S. 5 (1937).

5. Lucas v. Earl, 281 U. S. 111 (1930). See also Note, 131 A. L. R. 661 (1941).

6. Austin v. Commissioner of Internal Revenue, 161 F. 2d 666 (6th Cir. 1947).

7. Harrison v. Schaffner, 312 U. S. 579 (1941); Helvering v. Horst, 311 U. S. 112 (1940). U. S. v. Joliet & C. R. R., 315 U. S. 44 (1943), reaches the same result in upholding U. S. Treas. Reg. 111 § 29.22(a)(19) (1943).

8. INT. REV. CODE § 22b(12); U. S. Treas. Reg. 111 § 29.22b(12-1) (1943).

9. Taxpayer relied upon General Utility v. Helvering, 296 U. S. 200 (1935). This decision is no authority for denying tax liability in the instant case because: (1) without defining an asset, it merely lays down the broad general rule that the transfer of an appreciated asset does not result in tax liability; and (2) the opinion expressly excludes the question of "bad faith" because the commission failed to raise the issue in the lower court.

holders on such assets are taxable to the corporation.[10] Such a transfer has been labelled a subterfuge to escape tax liability.

The decision in the instant case is sensible and in accord with authority. When the problem of taxability of the transferor is raised, the prevention of tax evasion must be weighed against the practicability of administration and fairness to the transferor. While the courts' dichotomy between asset and potential income is misleading, if we accept it, the decision that the transfer of these charged-off notes was an anticipatory assignment of income appears to be more valuable as precedent than a subterfuge theory. It is far easier to prove that a transfer has been made with the expectation of immediate realization to the transferee than it is to prove such facts as will lead the courts to upset the whole transfer as a subterfuge.[11]

Torts—Radio Broadcasting Company Held Liable Only for Negligent Transmission of Defamatory Utterances of Sponsor's Employee—Defendant radio broadcasting company leased its facilities to a sponsor for a news broadcast, during which the announcer, hired by the sponsor and reading from a prepared manuscript, made certain defamatory remarks concerning the plaintiff. On demurrer to the complaint, the court held that the radio station was a disseminator rather than a publisher and consequently liable only for negligent failure to prevent transmission of the defamatory utterances. *Kelly v. Hoffman,* 61 A. 2d 143 (N. J. Ct. Err. & App. 1948).

The law concerning liability for defamatory radio broadcasts is unsettled and few decisions exist on the subject. No case has been found where the broadcasting company itself has produced the program; but where it merely transmits the program an analogy to newspaper publication has been seized on to invoke absolute liability for defamatory transmissions.[1] Although the earlier decisions were restricted to readings from prepared manuscripts,[2] there has been dictum that, because the effect on the audience is the same, the analogy applies even to interpolations;[3] and in one case there was no evidence that the utterances were read from a prepared manuscript.[4] *Summit Hotel Co. v. National Broadcasting Co.*[5] made a break in the tendency to impose absolute liability and held, at least for interpolative remarks, that the radio station is not liable without negli-

10. Commissioner of Internal Revenue v. Court Holding Co., 324 U. S. 331 (1945).

11. *E. g.,* Howell Turpentine Co. v. Commissioner of Internal Revenue, 162 F. 2d 316 (5th Cir. 1947) (distinguished from Commissioner of Internal Revenue v. Court Holding Co., *supra,* solely on the ground that the stockholders rather than the corporation as an entity entered into negotiations with the vendee for the sale of the property).

1. Coffey v. Midland Broadcasting Co., 8 F. Supp. 889 (W. D. Mo. 1934); Sorenson v. Wood, 123 Neb. 348, 243 N. W. 82 (1932); Miles v. Louis Wasmer, Inc., 172 Wash. 466, 20 P. 2d 847 (1933). The analogy rests on similarity of subject matter, broad dissemination, and economic competition. *Cf.* Irwin v. Ashurst, 158 Ore. 61, 74 P. 2d 1127 (1938) (station not liable in broadcast of murder trial proceedings from court room).

2. Sorenson v. Wood, *supra;* Miles v. Louis Wasmer, Inc., *supra.*

3. *See* Irwin v. Ashurst, *supra* at 66, 74 P. 2d at 1129.

4. Coffey v. Midland Broadcasting Co., *supra.*

5. 336 Pa. 182, 8 A. 2d 302 (1939); 88 U. OF PA. L. REV. 122 (1939).

gence.[6] The instant case adopted that doctrine by calling the station a disseminator; but since the remarks were read from a prepared manuscript, it represents an extension.[7]

The problem as to whether to impose absolute liability for all defamatory transmissions by a broadcasting company is not solved by deciding whether it is a disseminator or a publisher. The reasons which justify compensating the injured party exist irrespective of the status of the station as a publisher or disseminator. Argument supporting analysis in such terms apparently stems from a reluctance to impose liability without fault. Such a reluctance has been overcome elsewhere in the law where other considerations were sufficiently persuasive.[8] Although the argument that the radio station is better able to pass along the burden of loss by indemnity insurance has been said to beg the question,[9] it is a valid factor. Often it is more convenient for the injured party to sue the local station than to sue the sponsor or speaker, especially in the case of national hookups. The station may implead the other responsible persons, or may by contract with them protect itself against loss resulting from their use of its facilities.[10] To say that the nature of the situation requires the highest degree of care as a disseminator leaves an area in which the innocent party can not recover against the station. That area includes chiefly interpolation and chain broadcasts where no amount of diligence by the local station can prevent defamatory transmissions. However, the extent of that area does not seem to justify a rule requiring the injured party to litigate negligence in all cases against the station—a heavy burden even with the procedural assistance of *res ipsa loquitur.*

Unauthorized Practice of Law—Accountant Enjoined From Giving Federal Tax Law Advice—Bercu, an experienced certified public accountant, made a study of reported decisions and advised a taxpayer that a proposed settlement of prior years city's tax claims could be treated as a current year expense under the Internal Revenue Code. The Lawyers Association brought this suit to enjoin Bercu from giving legal opinions concerning the tax laws.[1] The court (one justice dissenting) held that Bercu was illegally practicing law and enjoined him from giving tax law advice.[2] *New York County Lawyers Ass'n. v. Bercu,* 273 App. Div. 524, 78 N. Y. S. 2d 209 (1st Dep't 1948).

6. See, to the same effect, Josephson v. Knickerbocker Broadcasting Co., 179 Misc. 787, 38 N. Y. S. 2d 985 (Sup. Ct. 1942).

7. It may be significant that in Pennsylvania even newspapers are not held to absolute liability for defamatory publications. *See* Summit Hotel Co. v. National Broadcasting Co., *supra* at 192, 8 A. 2d at 307.

8. *E. g.,* Exner v. Sherman Power Constr. Co., 54 F. 2d 510 (2d Cir. 1931) (absolute liability for ultra-hazardous activity); Bekkevold v. Potts, 173 Minn. 87, 216 N. W. 790 (1927) (absolute liability of vendor based on implied warranty); McKee v. Trisler, 317 Ill. 536, 143 N. E. 69 (1924) (absolute liability of owner of dangerous animal).

9. Summit Hotel Co. v. National Broadcasting Co., *supra* at 203, 8 A. 2d at 312.

10. See McDonald & Grimshaw, *Radio Defamation,* 9 AIR L. REV. 328, 350 (1938). In fact this was done by the station in Summit Hotel Co. v. National Broadcasting Co., *supra.*

1. N. Y. PENAL LAW § 271 prohibits the practice of law by a layman.

2. The injunction, however, did not restrain Bercu from applying his knowledge of tax laws when employed primarily in auditing or preparing tax returns.

From the inception of federal taxation the accountant has handled the bulk of the community's taxation problems.[3] The lawyer's early absence from the tax field was due both to his unfamiliarity with tax matters and to the accountant's expertness with financial data.[4] The present Internal Revenue Code, however, largely disregards accepted accounting principles in favor of legalistic requirements.[5] The tremendous increase in the volume and complexity of federal taxation has substantially enlarged the scope of the lawyer's jurisdiction thus adding to the difficulty of drawing the "line" between the functions of the two professions.[6] The few cases offer little in the way of solution,[7] though a recent Massachusetts Supreme Court decision supports the instant result.[8] Analysis of the instant case indicates an effort to draw an objective line, at very least, where the accountant undertakes to pass upon a legal question not incidental to auditing books or preparing tax returns. Concededly, convenience and immediate economy may favor the accountant assuming jurisdiction over both the legal and accounting aspects of a tax transaction. The federal agencies have recognized the need of accountants in the tax field by allowing them to appear in a representative capacity before the Tax Court[9] and the Treasury Department.[10] It seems imperative, however, that the danger of imposition or injury to the public by the unqualified legal adviser be eliminated.[11] Although the accountant's skill is desirable in minimizing the client's immediate tax liability, a lawyer's technical judgment is indispensable in statutory interpretation and in obtaining the best procedural devices available in event the recorded tax liability is disputed.[12]

The instant decision is commendable in that it tends to protect taxpayers from incompetent legal advice. As a matter of practical administration, however, what is needed is not a demarcation of functions but co-operation and team-work between the accountant and the lawyer to afford the public an efficient tax service. Such a result is already en-

3. May, *Accounting and the Accountant in the Administration of Income Taxation,* 47 COL. L. REV. 377 (1947).

4. Vernon, *American Bar Association to Sponsor Tax Courses for General Practitioners,* 29 A. B. A. J. 516 (1943).

5. *E. g.,* Edelman, *Is Income Tax Accounting "Good" Accounting Practice,* 24 TAX MAG. 112 (1946); Wienshienk, *Accountants and the Law,* 96 U. OF PA. L. REV. 48, 51 (1947).

6. *E. g.,* Levy, *Accountants' Relationship with Lawyers,* 72 J. ACCOUNTANCY 26 (1941); Donaldson, *The Interrelation of the Lawyer and the Certified Public Accountant,* 18 N. Y. STATE BAR ASS'N BULL. 67 (1946).

7. Accountants' activities held to constitute illegal practice of law: Chicago Bar Ass'n. v. United Taxpayers of America, 312 Ill. App. 243, 38 N. E. 2d 349 (1st Div. 1941) (negotiation of tax matters before administrative body); Mandelbaum v. Gilbert & Barker Mfg. Co., 160 Misc. 656, 290 N. Y. Supp. 462 (City Ct. of N. Y. 1936) (interpretation of statute). Accountants' activities held not the practice of law: Dunlap v. Lebus, 112 Ky. 237, 65 S. W. 441 (1901 (settlement of tax claim); Elfenbein v. Luckenbach Terminals, Inc., 111 N. J. L. 67, 166 Atl. 91 (Ct. Err. & App. 1933) (devising of tax savings plan).

8. Lowell Bar Ass'n. v. Loeb, 315 Mass. 176, 52 N. E. 2d 27 (1943).

9. 26 CODE FED. REGS. § 601.3b (1938).

10. Treas. Circ. No. 230, 1 FED. REG. 1413 (1936).

11. Note, *Public Interest in the Restraint of the Unauthorized Practice of Law,* 28 IOWA L. REV. 116 (1942); Hermax Co. 11 T. C. No. 55 (1948).

12. It should be noted in this connection that a favorable settlement on the administrative level is only achieved because of a strong litigating position.

visaged by the Conference Plan,[13] and might be furthered by additions to the educational programs of both professions.[14]

Wills—Incompetent Heir—Evidence of Invalidity Requires Court to Allow Contest by Guardian—Testatrix left surviving a mentally incompetent elderly bachelor brother, and a number of cousins. By her will, duly probated, she placed everything in trust for the incompetent for life, with remainder in fee to the executor-trustee and another. The cousins, for whom no provision had been made by the will, petitioned for the appointment of a guardian ad litem to appeal from the probate,[1] alleging that the will was invalid because of fraud, undue influence, and lack of testamentary capacity. A series of proceedings followed,[2] during which proponents of the will intervened, and a hearing was finally held at which evidence was presented on all questions involved.[3] The lower court decreed that the appeal from probate proceed no further. It did not pass in any way on the validity of the will, but rested its decision on the ground that an appeal would be detrimental to the best interests of the incompetent.[4] On appeal the decree was reversed, and an issue *devisavit vel non* to the common pleas ordered.[5] *Brindle Will,* 360 Pa. 53, 60 A. 2d 1 (1948).

As sole heir, the incompetent brother was the only person with standing to contest the will.[6] Had he been competent, evidence of the will's invalidity would not have imposed upon him a duty to appeal from

13. The Conference Plan is co-operation at the national level between the Bar Association's Committee on Unauthorized Practice and groups of business and professional men. Maxwell and Charles, *Joint Statement as to Tax Accounting and Law Practice,* 32 A. B. A. J. 5 (1946).

14. See McDougal, *The Law School of the Future: From Legal Realism to Policy Science in the World Community,* 56 YALE L. J. 1345, 1351 (1947).

1. The regularly appointed guardian refused to initiate the appeal, but agreed to the appointment of a guardian ad litem. Guardians of weak-minded persons are under the complete control of the common pleas in Pennsylvania. PENNA. STAT. ANN., tit. 50, §§ 941-994 (Purdon, 1931). *See* Barclay-Westmoreland T. Co. v. Dollar Sav. Bank, 338 Pa. 421, 425, 12 A. 2d 586, 587 (1940).

2. Because only five days remained before the expiration of the statutory period provided for appeal, the common pleas granted the petitions *ex parte,* and an appeal was taken immediately to the orphans' court. Then the proponents of the will intervened.

3. Two proceedings were consolidated: one on a petition to the common pleas to revoke the authorization of the guardian ad litem to appeal from the probate; the other on the appeal itself before the orphans' court. The evidence received applied equally to both proceedings. Mifflin County, where the case arose, has only one judge, who sits on all sides of the court.

4. No. 232, May Term, 1946, Court of Common Pleas, Mifflin County, opinion filed Nov. 7, 1947. Printed in Record, pp. 45a-60a.

5. PENNA. STAT. ANN., tit. 20, § 2582 (Purdon, 1930): "Whenever a dispute upon a matter of fact arises before any orphans' court, on appeal from any register of wills, . . . the said court shall, at the request of either party, direct a precept for an issue to the court of common pleas. . . ."

6. By PENNA. STAT. ANN., tit. 20, § 1961 (Purdon, 1930), only "interested persons" may contest wills. *E. g., In re* McCarty's Estate, 355 Pa. 103, 49 A. 2d 386 (1946); *In re* Knecht's Estate, 341 Pa. 292, 19 A. 2d 111 (1941). The cousins lacked standing to contest the will. *See* Hogarth-Swann v. Weed, 274 Mass. 125, 128, 174 N. E. 314, 315 (1931).

the probate. Because he was incompetent, his affairs lay entirely within the supervision of the common pleas. The opinion lays such a duty upon the court acting for him. No precedents on the question have been found. In an election by an incompetent widow whether to take against a will, the court decides the matter by determining what is best for its ward,[7] but in such a case there is no question of the validity of the will. While a narrow construction of the case is possible,[8] the opinion may fairly be held to mean that, although the law leaves the decision whether to contest a will to "interested persons" to decide as they see fit, when such a decision must be made by a court it must display a higher kind of honor to which evidence of fraud is an anathema overcoming every conflicting consideration.[9] The difficulty with this view would seem to be that it deprives incompetents discriminatorily of advantages which persons *sui juris* retain. Such persons, for example, may settle will disputes by compromise.[10] Since they may be estopped, also, in a variety of ways, from contesting,[11] it is apparent that the policy of the law is not always calculated to further the uncovering of invalidity of wills. Unless we are prepared to make will contests a public concern, it seems wiser to allow courts who must safeguard incompetents' estates to make their decisions as every prudent man makes his own.

7. Harris' Estate, 351 Pa. 368, 41 A. 2d 715 (1945), collecting the Pennsylvania cases.

8. Since the issues involved were all raised on the appeal, the decision might be construed as a mere mechanical application of the statute. See note 5 *supra*. Such an interpretation does not seem persuasive, however.

9. Most clearly expressed by the concurring opinion, instant case at 63, 60 A. 2d at 6.

10. PENNA. STAT. ANN., tit. 20, § 787 (Purdon, 1930), construed in *Re* Norris's Estate, 329 Pa. 483, 198 Atl. 142 (1938). This is the heavy majority rule. *Contra: In re* Gunderson's Estate, 251 Wis. 41, 27 N. W. 2d 896 (1947); Lazenby v. Lazenby, 132 Ga. 836, 65 S. E. 120 (1909).

11. *E. g.*, Miller's Appeal, 166 Pa. 97, 31 Atl. 58 (1895); Safe Dep. & T. Co. v. Hanna, 159 Md. 452, 150 Atl. 870 (1930).