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The Yale Law Journal feels keenly the loss to itself and to the Yale Law School in the departure of Dean Robert M. Hutchins, whose resignation from the school to accept the presidency of Chicago University has recently been announced. Dean Hutchins brought to his post a brilliant mind and a forceful personality. Within the three years of his incumbency, he has gained the respect and admiration of the students and has won the confidence and cooperation of his colleagues on the faculty. New paths in legal education have been blazed within this period, and the emphasis of Dean Hutchins on the relation of law to the social sciences has been a distinct contribution. The school has been fortunate in having received Dean Hutchins' animating touch during this period of his remarkable career.

For Dean-elect Charles E. Clark the Journal already feels an

affectionate regard. It has enjoyed for many years his sympathetic counsel and active devotion to its interests. His breadth and depth of scholarship and personality have gained for him national recognition as a brilliant legal writer and teacher. The Yale Law School may well look forward with confidence to his administration of its fortunes.

THE VALUATION OF NATURAL GAS LEASEHOLDS

After thirty years of agitation it is to be expected that the problem of valuation in public utility rate cases should have lost the novelty that invites fresh analysis. The apparent similarity of the litigated questions has encouraged courts to rely strongly upon precedent, and the periodic reiteration of well phrased dicta has tended to create an abstract issue upon which each new case has been made to turn. Under such circumstances a re-analysis of the problem could receive impetus only when the courts were called upon to apply their doctrines to an unique situation in relation to which precedent was not even plausible. It is for this reason that the recent decision of the United States Supreme Court in *United Fuel Gas Co. v. Railroad Comm. of Ky.*¹ may be considered significant. In that case the Court was asked to determine the proper value to be ascribed to natural gas leaseholds, a question in public utility valuation which had not previously come before the Court.

The case was an appeal from the decree of a federal district court denying an injunction sought by the company to restrain the Railroad Commission of Kentucky from enforcing a schedule of rates at which natural gas was to be distributed in cities of that state. The district court had sustained the commission's valuation of the company's leaseholds at book cost.² The company contended for an appreciated value based upon an estimation of profits to be derived from future sales of gas contained in the land covered by the leases.³ These calculations were sup-

¹ 278 U. S. 300, 49 Sup. Ct. 150 (1929). *United Fuel Gas Co. v. Public Serv. Comm. of W. Va.*, 278 U. S. 322, 49 Sup. Ct. 157 (1929) is a companion case. Questions concerning the company's franchises treated in the Kentucky case are excluded from the present discussion. For the lower courts' opinions see *United Fuel Gas Co. v. Railroad Comm. of Ky.*, 13 F. (2d) 510 (E. D. Ky. 1925); *United Fuel Gas Co. v. Public Serv. Comm. of W. Va.*, 14 F. (2d) 209 (S. D. W. Va. 1926).

² The lower court in the Kentucky case took the book cost of the leaseholds, \$6,343,329. (This was something in excess of actual cost.) The lower court in the West Virginia case made no finding as to the total value of the company's gas rights, but, accepting the company's own computations, excluded a major part of the gas field as not "presently used or useful in public service," and reached an assumed valuation of \$10,317,311.

³ The company's gas field included 814,910 acres, located principally in West Virginia. The company owned 41,969 acres in fee. The remainder

plemented by the testimony of practical gas operators concerning the present exchange value of the leaseholds. The result in each case was an amount five times as great as that accepted by the commission.

The unanimous decision of the Supreme Court, in an opinion written by Mr. Justice Stone, affirmed the decree of the lower court on the ground that "the value of property used in a business whose rates are regulated is made to depend on an assumed earning capacity and the data relied on to establish assumed earning capacity are essentially speculative—so much so as to form no trustworthy basis for computation of value."⁴

A consideration of this decision should at the outset concern the relation of the case to the specific problem of regulating natural gas rates. The natural gas industry is in many respects unique. It is subject to obvious geographical limitations, and its activities must necessarily be terminated in a given area when the supply of gas there is exhausted.⁵ But there can be no doubt that a company distributing gas indiscriminately among domestic and industrial consumers is engaged in public service and subject to the jurisdiction of the commission of the state within which it operates.⁶ The state's control over the industry may, however, be restricted where interstate commerce is affected.⁷ But this conflict arises chiefly where the gas is produced by one

was controlled by lease or contract under which the lessee had the right to drill for gas for ten years, with the privilege of renewal, at a small annual rental, materially increased by royalties to the lessor when production was established. In computing value, the company's experts excluded 552,318 acres as of too uncertain content. The remainder was divided into proven territory, 136,384 acres, with an estimated content of 249,100,000,000 cubic feet of gas; and probable territory, 126,208 acres, with an estimated content of 414,600,000,000 cubic feet. The method of computing the content in the *proven* area, which was in actual operation, was to find the existing rock pressure of the gas in various pools, and to compare the rate of decrease in rock pressure with the amount of gas produced during the same period. Estimates in the *probable* acreage were by analogy to the nearest pool in operation.

It was found that natural gas could be sold for industrial purposes in an *unregulated* market in Pittsburg at 35 cents for 1000 cubic feet, and that on an estimated annual production, that market could absorb the company's gas supply in eighteen years. The cost of getting the gas to Pittsburg was calculated and the resultant profit was discounted to give an alleged "present value" of \$32,458,129 to the company's gas holdings.

⁴ United Fuel Gas Co. v. Railroad Comm. of Ky., *supra* note 1, at 317, 49 Sup. Ct. at 155.

⁵ See *Graves v. Iroquois Nat. Gas Co.*, P. U. R. 1920F 563, 568 (N. Y. Pub. Serv. Comm. 2d Dist.).

⁶ *Clarksburg Light and Heat Co. v. Public Serv. Comm.*, 84 W. Va. 638, 100 S. E. 551 (1919); *Arkansas Natural Gas Co. v. Norton Co.*, 165 Ark. 172, 263 S. W. 775 (1924); *People's Natural Gas Co. v. Public Serv. Comm.*, 270 U. S. 550, 46 Sup. Ct. 371 (1926).

⁷ A state may not require a distributing company also producing gas

company outside the state and sold to a distributor within the state.⁸

Once the state commission has established its jurisdiction, more difficult problems arise. Rules for the supervision of rates in other types of public service are inadequate. It is necessary to adapt the regulatory machinery to the unique technology of natural gas production. The matter of depreciation, for instance, presents the perplexing question of a policy of amortization to be included in the operating expenses to offset the peculiar kind of depletion that attaches to property devoted to production in rapidly exhaustible areas.⁹

A still more baffling problem has been to allocate to natural gas leaseholds a reasonable value for purposes of the rate base. The solution of this problem involves two considerations: (a) the proportion of a company's total reserves that may properly be deemed "presently used or useful" in public service;¹⁰ (b) the measure of value for that portion that is in use.

within the state to subordinate its interstate business to the demands of local consumers. *Pennsylvania v. West Virginia*, 262 U. S. 553, 43 Sup. Ct. 658 (1923). Nor may a state prohibit the construction of pipe lines for the transmission of gas in interstate commerce. *Oklahoma v. Kansas Natural Gas Co.*, 221 U. S. 229, 31 Sup. Ct. 564 (1911). But, on the other hand, a company directly distributing gas to consumers in one state may not escape regulation by that state simply because it produces its gas in another state and transmits the fuel in pipe lines across the border. *Pennsylvania Gas Co. v. Public Serv. Comm. of N. Y.*, 252 U. S. 23, 40 Sup. Ct. 279 (1920).

⁸ Thus, the state in which the distributing company operates may not regulate the price at which the producing company engaged in interstate commerce sells its product. *Missouri v. Kansas Natural Gas Co.*, 282 Fed. 341 (W. D. Mo. 1922); *Re Crystal City Gas Co.*, P. U. R. 1923B 828 (N. Y. Pub. Serv. Comm.); *cf. Re Gallatin Natural Gas Co.*, P. U. R. 1926A 145 (Mont. Pub. Serv. Comm.). However, the producing company may not object to the state's regulation of the distributing company's charges to the consumer on the ground that interstate commerce is thereby burdened. *Public Util. Comm. v. Landon*, 249 U. S. 236, 39 Sup. Ct. 268 (1919). The problem here is to be compared with that relating to the interstate transmission of electrical energy. *Public Util. Comm. of R. I. v. Attleboro Co.*, 273 U. S. 83, 47 Sup. Ct. 294 (1927).

⁹ See *Oklahoma Natural Gas Co. v. Corporation Comm.*, 90 Okla. 84, 216 Pac. 917 (1923); *Charleston v. Public Serv. Comm.*, 95 W. Va. 91, 120 S. E. 398 (1923); *Re Ashtabula Gas Co.*, P. U. R. 1917D 790 (Ohio Pub. Util. Comm.); *Re United Fuel Gas Co.*, P. U. R. 1924A 357 (W. Va. Pub. Serv. Comm.). See also lower court decisions in the instant cases, *supra* note 1. For a discussion of the general question of depreciation, see Comment (1926) 36 YALE L. J. 123.

¹⁰ The policy of the commissions on this point seems not yet to have fully crystallized. The West Virginia commission asserts the right to limit the amount of reserves necessary for the public service. *Re United Fuel Gas Co.*, P. U. R. 1918C 193 (W. Va. Pub. Serv. Comm.). The lower court in the instant West Virginia case dealt with the problem and excluded all but the actually proven acreage. *United Fuel Gas Co. v. Public Serv.*

This latter phase of the problem is one which has necessarily required close analysis. The issue has been that which confronted the Supreme Court in the instant case, namely, whether uncertain evidence as to appreciation will be accepted, or whether the value is to be fixed at an amount ascertainable from the company's own record of expenditures, and, therefore, approximating actual cost. The question has been considered most frequently in those cases where a single company is both producer and distributor of the gas. Where one company purchases its gas from another, the question arises only if the commission seeks to regulate the price at which the gas is sold to the distributor. This is impossible where the producing company is transmitting the gas from another state, unless the doctrine of *Pennsylvania Gas Co. v. Public Service Comm. of N. Y.* is to be extended.¹¹ But if the producing company is within the jurisdiction of the state commission it would seem that its relations with the distributing company, including the price set on its gas, may be subjected to official scrutiny.¹² Yet even here commissions often permit the distributing company to include the cost of the gas in its operating expenses at whatever price must be paid.¹³ In such cases the commissions, perhaps unwittingly, require the consumer to pay a return on the full market value of the producing company's leaseholds.

But where both the producing and distributing agencies are before the commission in one case, the problem of evaluating the leaseholds can be neither overlooked nor consciously avoided. And under these circumstances the Supreme Court of Pennsylvania has refused to ascribe anything less than "present market

Comm. of W. Va., *supra* note 1, at 221. Mr. Justice Stone, although affirming the lower court in that case, assumes in his opinion on the Kentucky case "that both proven and probable areas of appellant's gas acreage whether shown to be presently productive or not, if required in a prudent administration of appellant's business, are to be included in the valuation for rate making purposes." *United Fuel Gas Co. v. Railroad Comm. of Ky.*, *supra* note 1, at 313, 49 Sup. Ct. at 153. Similar questions arise concerning a distribution of reserves between the regulated and the unregulated phases of the company's business, and an allocation of proportions of the total holdings to business done in each of several states.

¹¹ *Supra* notes 7 and 8. See also *Joplin Gas Co. v. Public Serv. Comm.*, 296 Fed. 271 (W. D. Mo. 1924). In *St. Joseph Gas Co. v. Barker*, 243 Fed. 206 (W. D. Mo. 1916) the court refused to grant the distributing company an increase in charges to consumers because it feared such an increase would be immediately absorbed by the producing company over which it had no control.

¹² *Board of Education v. Guthrie Gas Light Co.*, P. U. R. 1915B 177 (Okla. Corp. Comm.); *Re Kokomo Gas and Fuel Co.*, P. U. R. 1921E 390 (Ind. Pub. Serv. Comm.); *Okmulgee Gas Co. v. Corporation Comm.*, 95 Okla. 213, 220 Pac. 28 (1923).

¹³ *Re Southern Counties Gas Co.*, P. U. R. 1921E 374 (Cal. R. R. Comm.); *Re Elmira Water, Light and Railroad Co.*, P. U. R. 1922D 231 (N. Y.

value" to the company's holdings.¹⁴ This view has also been expressed in a few other cases.¹⁵ Illustrating as they do the pitfalls that surround the present value concept, these cases have been sporadic impressions rather than the experienced reflections of administrative bodies that have grappled continuously over a long period of years with the task of regulating the natural gas industry. The West Virginia Public Service Commission is probably the most experienced body in the United States in this particular field. It is significant to trace the development of its policy.

In 1917 the commission was disposed to grant some appreciation in the value of leaseholds.¹⁶ Yet, later in the same year it reduced, without explanation, an excessive amount allocated to leases in a proposed rate base.¹⁷ In 1918 the commission came forward with the statement that since the consumers paid as operating expenses the delay rentals which maintained the leases, they should share in the eventual appreciation.¹⁸ Two years

Pub. Serv. Comm.) (in that case, however, the producing company may have been protected by the commerce clause); Coffeyville Gas and Fuel Co. v. Public Util. Comm., 116 Kan. 165, 225 Pac. 1036 (1924); Western Okla. Gas and Fuel Co. v. State, 113 Okla. 126, 239 Pac. 588 (1925); Re Kansas City Gas Co., P. U. R. 1925A 653 (Mo. Pub. Serv. Comm.).

¹⁴ Erie v. Public Serv. Comm., 278 Pa. 512, 123 Atl. 471 (1924).

¹⁵ Pennsylvania Gas Co. v. Public Serv. Comm., 211 App. Div. 253, 207 N. Y. Supp. 599 (3d Dep't 1925). Compare also: "We cannot close our eyes to the fact that these leases in Montana have today a more or less definite market or exchange value not necessarily related to their potential wealth-producing ability under fair rates. What they will or may produce and earn is recognized as too remote to warrant a guess at proper capitalization, but as 'potentials' they have a present value, and whatever that value is, their owners may capitalize and if the owners are engaged in a public service and raw acreage is held for that service, it is a proper capital charge therein." Re Baker Natural Gas Utility, P. U. R. 1921E 609, 622 (Mont. Pub. Serv. Comm.). The Kansas Public Service Commission has made the naive suggestion that where earnings scarcely exceed the expense of production it is impossible to give the holdings "present value." Landon v. Lawrence, P. U. R. 1916B 331 (Kan. Pub. Serv. Comm.).

¹⁶ "While it may be difficult to arrive at a fair value of applicant's property and the conclusions reached may not be much better than a mere guess or conjecture, we do not adhere to the proposition that the company must be limited to its actual investment. If one has been fortunate in leasing or purchasing undeveloped or partially developed territory at a remarkably low figure and by subsequent energy and labor developed said territory, thereby making a 'sure thing' out of a probability and materially enhancing the value thereof, he is certainly entitled to that increased value, even though, as suggested, it may be difficult to ascertain definitely what that value is." Re Clarksburg Light and Heat Co., P. U. R. 1917A 577, 592 (W. Va. Pub. Serv. Comm.).

¹⁷ Re Montgomery Gas Co., P. U. R. 1917C 924 (W. Va. Pub. Serv. Comm.).

¹⁸ Re West Virginia Cent. Gas Co., P. U. R. 1918C 453 (W. Va. Pub. Serv. Comm.).

later the United Fuel Gas Company's proposed valuation was rejected as being predicated upon earnings; and the commission, in view of uncertainty and speculation in the other methods suggested, limited its valuation of the leases in question to the actual cost.¹⁹ This view has been consistently followed in cases decided by the commission since that time.²⁰ It was suggested in 1924 that all complexities of the issue might be avoided by disregarding leaseholds in the rate base and valuing the gas as a commodity at the city gates.²¹ But this view has not been widely considered, and it would seem rather to gloss over the difficulties than to solve them.

The reports clearly indicate, therefore, that the West Virginia Commission, although at first subscribing to a vague measure of present value, has as a matter of practical administration been forced to turn to actual cost in evaluating leaseholds. This change of policy has received the approbation of the state supreme court²² and is also supported in other jurisdictions.²³ But the attitude of the West Virginia Commission does not rest solely on the speculative character of a measure of value other than actual cost. Its policy rests equally, as is expressed in one of its most recent opinions, upon a consideration of the consumer's share in any accruing appreciation, through his assumption of the burden of delay rentals.²⁴ And, consistently with this proposition, the commission would exclude even the sum of the delay rentals from the cost of the lease to the company.²⁵

The instant case may be considered an authoritative ratifica-

¹⁹ Re United Fuel Gas Co., P. U. R. 1920C 583 (W. Va. Pub. Serv. Comm.).

²⁰ Re Hope Natural Gas Co., P. U. R. 1921E 418 (W. Va. Pub. Serv. Comm.); Re Hope Natural Gas Co., P. U. R. 1922C 336 (W. Va. Pub. Serv. Comm.); Re United Fuel Gas Co., P. U. R. 1925B 705 (W. Va. Pub. Serv. Comm.); Re Cumberland and Alleghany Gas Co., P. U. R. 1928B 20 (W. Va. Pub. Serv. Comm.).

²¹ Re United Fuel Gas Co., *supra* note 9; *cf.* Re American Indian Oil and Gas Co., P. U. R. 1928C 815 (Okla. Corp. Comm.); Oklahoma Natural Gas Co. v. State, 78 Okla. 5, 188 Pac. 338 (1920); Re Osage and Oklahoma Co., P. U. R. 1917D 426 (Okla. Corp. Comm.).

²² Charleston v. Public Serv. Comm., 95 W. Va. 91, 120 S. E. 398 (1923). The opinion contains dicta in support of actual investment as a theory of valuation, but the court defers to what it believes to be the United States Supreme Court's theory of present value, and sustains the commission merely because there is no competent evidence of appreciation. *Cf.* Natural Gas Co. v. Public Service Comm., 95 W. Va. 557, 121 S. E. 716 (1924).

²³ Re Northeastern Oil and Gas Co., P. U. R. 1916D 692 (Ohio Pub. Util. Comm.); Re Iroquois Natural Gas Co., P. U. R. 1919D 76 (N. Y. Pub. Serv. Comm.); Re American Indian Oil and Gas Co., P. U. R. 1924E 114 (Okla. Corp. Comm.).

²⁴ Re West Virginia Central Gas Co., P. U. R. 1924E 24 (W. Va. Pub. Serv. Comm.). See also Re West Va. Cent. Gas Co., *supra* note 18.

²⁵ Re Clarksburg Light and Heat Co., P. U. R. 1928B 290 (W. Va. Pub. Serv. Comm.).

tion of commission procedure, insofar as it excludes speculative methods of valuation. Mr. Justice Stone is particularly adroit in recognizing (a) that no market can be expected to remain unregulated for eighteen years, (b) that in predicating present value upon future earnings it is impossible to anticipate the extent to which advances in technology will reduce future costs of production, (c) that no valid ground exists for assuming that natural gas may not in the future be entirely supplanted by a more economical substitute. But the opinion ignores the possibility that, even if an enhanced value could be satisfactorily shown, the consumer might be entitled to share in the fruits of appreciation. Nor can the opinion be considered an unqualified approval of the actual cost measure, since Mr. Justice Stone at the outset expressly assumes ". . . that in the case as presented, present reproduction value of property used and useful in the business, if ascertainable, is to be taken as the rate base."²⁶ But this assumption is carefully qualified to avoid being mistaken for a statement of general policy. It is to be noted, however, that affirmance in this case is in fact a ratification of a value closely approximating actual cost.

Since the case on appeal was but a critical examination of the company's evidence, the Court was not compelled to allude to precedent. That policy undoubtedly obviated confusion and assisted a clear analysis. This might not have been possible had the Court become enmeshed in the tangle of its past inconsistencies. For although the *Minnesota Rate Cases* recognized the necessity for avoiding a "speculative increment of value,"²⁷ the Court was not there deterred from adopting the "fair market value of adjoining land" as a measure of value for railroad rights of way. And, while the Court in one case has frowned upon an inflated value of a franchise as too insecurely established,²⁸ it has in another case confidently stood for a capitalization of estimated reduction in future costs of production to be ascribed to new inventions in the manufacture of gas.²⁹ *The Knoxville Water Company* case assumed the certainty of reproduction cost.³⁰ The *Southwestern Bell Telephone* case insisted upon "an honest and intelligent forecast of probable future value, made upon a view of all relevant circumstances."³¹ The Court

²⁶ *United Fuel Gas Co. v. Railroad Comm. of Ky.*, *supra* note 1, at 313, 49 Sup. Ct. at 153.

²⁷ *Simpson v. Shepard*, 230 U. S. 352, 452, 33 Sup. Ct. 729, 762 (1913).

²⁸ *Wilcox v. Consolidation Gas Co.*, 212 U. S. 19, 29 Sup. Ct. 192 (1909).

²⁹ *Pacific Gas Co. v. San Francisco*, 265 U. S. 403, 44 Sup. Ct. 537 (1924).

³⁰ *City of Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 29 Sup. Ct. 148 (1909).

³¹ *Missouri v. Public Serv. Comm.*, 262 U. S. 276, 288, 43 Sup. Ct. 544, 546 (1923).

in the *McCardle* case³² was undisturbed by the possible elements of conjecture in a calculation of value based upon expected trends in future price levels.

It is possible, therefore, that the decision in this case represents a new attitude, and that the Court, which thirty years ago blandly announced the "proper" measures of value, has now developed an awareness of the problem which makes it anxious to avoid the creation of additional generalities which might become embarrassing in the disposition of future cases.

R. J. S.

ALLOCATION OF THE INCOME TAX AFTER ASSIGNMENT OF THE RIGHT TO THE INCOME

An important problem in income taxation which has arisen a number of times within the past few years is illustrated by the case of *J. V. Leydig*¹ which was recently before the Board of Tax Appeals. The facts of this case were briefly these. The petitioner leased land to an oil development company which agreed to sink wells and to give him, as compensation, a portion of the total oil produced. Thereafter, the petitioner, in consideration of love and affection, conveyed to his wife, by a written assignment, a one-half interest in all royalties subsequently to accrue under his contract with the development company. The petitioner and his wife filed separate income tax returns, dividing the royalty interests equally between them.² The commissioner recomputed the petitioner's income on the theory that, despite the assignment, the entire sum realized on the royalties constituted income to the assignor. On appeal to the board, the commissioner's ruling was reversed.

Although a number of cases representing various phases of this problem have recently been before the board, the inconsistency of their decisions has tended only to confuse the subject. This inconsistency may be ascribed, in large measure, to a failure to analyze and to distinguish between the different types of cases as well as to the absence of any accepted test by which to determine when the assignor should be taxed and when the

³² *McCardle v. Indianapolis Water Co.*, 272 U. S. 400, 47 Sup. Ct. 144 (1926).

¹ 15 B. T. A. 124 (1929); *cf.* *Marshall Field*, 15 B. T. A. 718 (1929); *T. J. Rogers*, 15 B. T. A. 638 (1929); *Wallace Huntington*, 15 B. T. A. 851 (1929).

² The effect of this would be, in most cases, to reduce substantially the total family income tax. Under our revenue laws, both the normal tax and the surtax rates are progressive, thereby imposing a proportionately heavier burden on larger incomes. 43 STAT. 264, 265 (1924), 26 U. S. C. §§ 951, 952 (1926); *cf.* 45 STAT. 795, 796 (1928), 26 U. S. C. A. §§ 2011-2012 (1928).

assignee. An attempt to state some such test has already been made. In the case of *Arthur H. Van Brunt*,³ the Board of Tax Appeals has laid down as a general rule that the assignor can avoid the payment of income tax only by an assignment of the "corpus" from which this income is derived and not by merely assigning the income. The *Leydig* case, while purporting to follow this rule, substituted for the term "corpus" the much broader term "property right,"⁴ which is comprehensive enough to include not only tangible property but contract rights as well. The effect of the board's decision is practically to overthrow the rule of the *Van Brunt* case.⁵ This test, moreover, has not been applied by the federal courts.⁶ It appears to rest on no very secure foundation.⁷ An attempt will here be made to work out a more satisfactory basis of decision from an analysis of the different types of cases.

1. The "assignee" is given only a personal claim against the "assignor." This type of case is illustrated by *Bing v. Bowers*.⁸ The taxpayer executed to his mother a so-called assignment of a certain sum out of his income. He was to collect the income himself, however, and the instrument gave her only a personal claim against her "assignor." Clearly this did not constitute a

³ 11 B. T. A. 406 (1928).

⁴ See the language of the Board *supra* note 1, at 132: "We conceive the rule to be that income *per se* cannot be assigned to relieve the assignor of the tax levy, but, where the thing assigned was a property right, real or personal, productive of income, income thereafter arising from such property is income to the assignee by virtue of his ownership."

⁵ It must be noted that all contract rights are property. Under the rule as stated, therefore, the absolute assignment of a right to receive income would always render that income taxable against the assignee. Thus, the owner of an apartment house, by making an assignment of the right to receive rents, would transfer with that right the duty to pay the taxes on that sum. This is radically different from the rule of the *Van Brunt* case, under which that duty could be transferred only by making a gift of the house. Although the language is somewhat vague, the test applied in the *Leydig* case is essentially the one recommended herein.

⁶ *O'Malley-Keyes v. Eaton*, 24 F. (2d) 436 (D. Conn. 1928); *Young v. Gritchel*, 28 F. (2d) 789 (D. N. J. 1928) (assignment by the petitioner to her husband, without consideration, of an annual sum from the income of a trust fund, but no interest in the fund itself; this sum held not taxable as the petitioner's income).

⁷ An irrevocable assignment of a right to receive income reduces the assignor's property rights quite as effectively as an assignment of the so-called "corpus." Thereafter the assignee is the sole owner of this valuable property right and can do with it what he wishes. It has escaped completely from the control of the assignor. Compare the remarks of Thomas, J., in *O'Malley-Keyes v. Eaton*, *supra* note 6, at 437: "After all, the stark fact is that the plaintiff did not receive this income and cannot receive this income. To say that he did receive it is to indulge in a deliberate fiction."

⁸ 22 F. (2d) 450 (S. D. N. Y. 1927), *aff'd*, 26 F. (2d) 1017 (C. C. A. 2d, 1928).

real assignment⁹ but amounted to no more than a promise to pay over a portion of the income after it should be received. In such cases the entire income has uniformly been held to be taxable to the "assignor,"¹⁰ whether or not the promise is enforceable¹¹ and even though he has received a consideration.¹² It is submitted that these decisions are sound. The taxpayer has in fact received the entire sum as income. If consideration was given for his promise to "assign" a portion of it, the promise made was enforceable, but the taxpayer thereby secured the benefit of the income. What he has really done is to spend it before receiving it. If no consideration is paid, the "assignment" amounts to no more than a promise to make a gift in the future, which promise, unless under seal, is unenforceable. If a gift is subsequently made in accordance with the promise it is difficult to conceive of any reason why the donor should not be taxed, in view of the fact that non-charitable gifts are not deductible expenditures.¹³

2. *The assignee receives a right to collect the income from third persons coupled with ownership of the land or capital which produces the income.* The case of *William W. Parshall*¹⁴ is a good example. The petitioner made a gift to his wife of his interest in a partnership, and thereafter the profits were paid to her directly. This is the opposite extreme from the cases just considered. The assignor has not only parted with his right to receive the income but with the very capital which produces the income. Probably no court would burden him with the tax.¹⁵ This is the only type of case in which he would escape under the rule of the *Van Brunt* case.

3. *The assignee receives a right to collect the income directly from third persons but no interest in the land or capital which produces the income.* (a) *For a valuable consideration.* If A has assigned to B for a valuable consideration his right to collect

⁹ An assignment carries with it the notion of a transfer. One can transfer the ownership of a chattel or can transfer rights against a third party by means of an assignment. One may create rights against himself by means of a promise. To call such a promise an assignment is clearly incorrect.

¹⁰ *Bing v. Bowers*, *supra* note 8; *Charles F. Colbert*, 12 B. T. A. 565 (1928); S. M. 2763, III-2 Cum. Bull. 53 (1924); *cf.* I. T. 1846, 11-2 Cum. Bull. 210 (1923).

¹¹ See *Bing v. Bowers*, *supra* note 8, at 454.

¹² *Mitchell v. Bowers*, 9 F. (2d) 414 (S. D. N. Y. 1925), *aff'd*, 15 F. (2d) 287 (C. C. A. 2d, 1926); *Yale Kneeland*, 1 B. T. A. 150 (1924); *Ormsby McKnight Mitchell*, 1 B. T. A. 143 (1924).

¹³ 43 STAT. 269 (1924), 44 STAT. 26 (1926), 26 U. S. C. § 955 (1926).

¹⁴ 7 B. T. A. 318 (1927).

¹⁵ This situation is so clear that it has seldom been litigated. In addition to the *Parshall* case *supra* note 14, see *James R. Cray*, 7 B. T. A. 322 (1927).

from *C* an unmatured obligation owing from *C* to *A*, we must say that this sum should be taxed against *A* if we are going to follow the rule of the *Van Brunt* case to its logical conclusion. It is here that the test breaks down utterly. Clearly *A* should not be taxed merely because there has been no assignment of "the corpus." As a matter of fact it is *B* who has received the benefit of the income.¹⁶ The assignment, being for a consideration, is irrevocable and *A* no longer has any rights with regard to the assigned claim. Clearly *A* should be taxed only on the consideration received from *B* which is his only real income.

One class of cases seems at first glance to be in conflict with the test of irrevocability, *i.e.*, where *B* is a creditor of *A* and the assignment of the claim against *C* is in payment of *A*'s debt.¹⁷ Applying the same rule as above, *A* should be taxed only on the consideration received from *B*. Since that consideration, however, is the payment of a debt or the discharge of a duty and may be of uncertain value it may be more expedient to tax *A* on the amount paid to *B*. It is not unfair to assess the value of the consideration which he received at what he himself recognized as the equivalent of it. As he has really received the benefit of *C*'s payment, there may be some justification for saying that he has "constructively" received it.¹⁸

(b) *Without consideration.* Where the assignment has been

¹⁶ See the remarks of Thomas, J., *supra* note 7. It should be noted that the right to receive future income is "property" but is not in itself income. If income is assigned, the assignor has had the use of it and should be taxed. We are speaking here of the assignment of an incorporeal right, which right is not itself income but is productive of income.

¹⁷ I. T. 1846, *supra* note 10. Cf. Arthur H. Van Brunt, *supra* note 3 (assignment by taxpayer to his wife in consideration of her agreement to pay household expenses; the taxpayer held responsible for the tax on the income received by his wife under the assignment). The decision appears sound. It is only the test laid down that is objectionable. On identical facts the same result was reached in A. R. R. 2245, II-1 Cum. Bull. 61 (1923).

Where a corporation has leased all its property to another concern, the lessee agreeing to pay a nominal sum to the lessor and the balance to the shareholders of the lessor as dividends, we have another, and perhaps slightly analogous, exception to the general test of irrevocability. The courts have generally held that the lessor must pay the tax. *Blalock v. Georgia Ry. & Electric Co.*, 246 Fed. 387 (C. C. A. 5th, 1917); *Rensselaer & S. R. R. v. Irwin*, 249 Fed. 726 (C. C. A. 2d, 1918), *cert. denied*, 246 U. S. 671, 38 Sup. Ct. 424 (1918). Since dividends received are not computed in the "normal" tax of shareholders this is apparently the only way in which the tax could be collected and accordingly, these decisions are probably justified. 45 STAT. 802 (1928), 26 U. S. C. A. § 2025 (1928).

¹⁸ The doctrine of constructive receipt has done much to confuse this problem by obscuring the issue. See, for example, KLEIN, FEDERAL INCOME TAXATION (1929) 124. After making the very sensible statement that "the person who can legally demand the payment of the income is the person to be taxed" he wanders off into the maze of constructive receipt. "Usually,

merely gratuitous, the problem is somewhat more complex. Applying the same test as above, we must decide that if the assignment is irrevocable,¹⁹ the assignee should be taxed—not the assignor. On the question of when a gratuitous assignment is irrevocable, there is a conflict of authority.²⁰ If it is under seal, it is clearly irrevocable.²¹ Where seals no longer have their common-law effect, it is exceedingly doubtful just what is necessary to make an irrevocable assignment, but it is very probable that any writing which clearly expresses an intention to make a present transfer of the right would be held to have that effect. In the tax cases here involved the courts have so held without discussion and have refused to tax the assignor.²²

of course, the person who owns the property . . . owns the income . . . This is true even though he makes a gift of this income, before it arises, to some third person. When received by such third person, it is constructively received by the donor.” Clearly the last sentence only tends to confuse matters. If there is ever any utility in using the fiction of constructive receipt (which is extremely doubtful) it should be limited strictly to cases where the taxpayer assigns his claim in payment of an antecedent debt.

¹⁹ See KLEIN, *ibid.* The statement that the owner of the property “owns” the income even though he has made a gift of it before the income arises is clearly incorrect. Before it arises he could make no gift of the income but only of the right to collect it. Since a valid gift is irrevocable the donee alone has the right of collection. It is impossible to reconcile this statement of the author with the one following which says that where the original owner has divested himself of the legal right to demand the future income, collection by the assignee is not deemed constructive receipt by the original owner. The author is here speaking of a transfer for a legal consideration, apparently disregarding the possibility of an irrevocable assignment without consideration.

²⁰ CONTRACTS RESTATEMENT (Am. L. Inst. 1928) § 158 (1) says that such an assignment is revocable unless:

“(a) the assignment is in writing either under seal or of such a nature as to be capable of transferring title to a chattel without delivery thereof and without consideration; or

(b) the assigned right is evidenced by a tangible token or writing, the surrender of which is required by the obligor’s contract for its enforcement, and this token or writing is delivered to the assignee; or

(c) the assignor should reasonably expect the assignment to produce action or forbearance of a definite and substantial character on the part of the assignee, and such action or forbearance is induced.”

See also the note to this section for a collection of cases. *Ibid.* 268.

²¹ Chase Nat. Bank v. Sayles, 11 F. (2d) 948 (C. C. A. 1st, 1926), *rev’d* 6 F. (2d) 403 (D. R. I. 1925), *cert. denied*, 273 U. S. 708, 47 Sup. Ct. 99 (1926).

²² O’Malley-Keyes v. Eaton; Young v. Gnitchel, both *supra* note 6. The Board of Tax Appeals apparently has not considered the question of revocability to be involved. They have, however, generally taxed the assignor. Alexander S. Brown, 3 B. T. A. 826 (1926); Fred W. Warner, 5 B. T. A. 963 (1926); Julius Rosenwald, 12 B. T. A. 350 (1928); *cf.* S. M. 2763, *supra* note 10. Recent decisions of the Board, however, are in accord with the Young case. J. V. Leydig, *supra* note 1; Edith H. Blaney, 13 B. T. A. 1315 (1928); William I. Paulson, 10 B. T. A. 732 (1928).

Under this analysis one who makes a revocable gratuitous assignment does not avoid the duty of paying the tax. There is no *a priori* necessity for determining these cases one way rather than the other. The assignee has the right to collect the income so long as the assignment is unrevoked and can retain whatever he has collected in this way.²³ On the other hand, the assignor retains a power of revocation until the assignee has enforced his right and has, therefore, a power of disposition over the income at the time when the right to receive it accrues. In view of this reserved power in the assignor it may be more expedient to tax the assignor when the assignment is revocable.

A similar situation arises when there has been no assignment but the taxpayer has entered into a contract containing a provision that part of the profits shall be paid directly to a third party. Since by the better view a donee-beneficiary gets an irrevocable right immediately,²⁴ he would seem to be in exactly the same position as one holding an irrevocable assignment. In the single case in which this problem arose before the Board of Tax Appeals²⁵ it was decided that the promisee must pay the tax on the income paid to the beneficiary. This decision seems unsound. If, however, the promisee had merely directed the debtor to make the payments to the beneficiary, reserving the power to revoke these directions, the decision would be unobjectionable.²⁶

There would seem to be no adequate reasons of policy for deciding that one who makes an irrevocable assignment of his right to receive income before that right accrues should nevertheless be chargeable for that sum as income when it has been collected by his assignee. The arguments generally advanced are that the government will be deprived of income unless very stringent rules are applied²⁷ and that such assignments enable some individuals to avoid paying their just share of the taxes. The second objection seems to beg the question by assuming that the assignor should properly pay a tax upon sums so assigned. With regard to the first objection, Congress can levy the income tax in any way it sees fit and can, if it so desires, expressly provide that the assignor shall be taxed in all these cases. It is believed that the more important policy involved is that of hav-

²³ CONTRACTS RESTATEMENT, *op. cit. supra* note 20, at § 158 (2).

²⁴ *Ibid.* § 142.

²⁵ Samuel V. Woods, 5 B. T. A. 413 (1926); *cf.* Blalock v. Georgia Ry. & Electric Co.; Rensselaer & S. R. R. v. Irwin, both *supra* note 17.

²⁶ KLEIN, *op. cit. supra* note 18, at 318. In the Woods case, *supra* note 25, there were two contracts, one reserving the power of revocation and the other not reserving it. It was held that neither was sufficient to transfer the duty of paying the tax. Klein apparently treats the case as if the power of revocation were reserved in both contracts.

²⁷ See (1928) 41 HARV. L. REV. 675 for an expression of this point of view.

ing a fairly certain basis for decision as to when the assignor should be taxed and when the assignee. It is submitted that this advantage is attained under the rule suggested—that the assignor must pay the tax unless he has made an irrevocable assignment of the right to receive the income.²³

MARRIAGE ON THE HIGH SEAS

In the recent case of *Fisher v. Fisher*¹ the New York Court of Appeals was confronted with the problem of determining what law governs the validity of a marriage on the high seas. The issue arose in an action of judicial separation against the defendant husband. The wife alleged that the parties "were duly married on the 24th day of October 1925." The defendant denied this allegation. It appeared that on this day the purported marriage ceremony had been performed by the captain of the *Leviathan* while the steamer was forty miles out from New York bound for Southhampton, England. Cohabitation followed the ceremony. The steamer was registered in New York. Title to it, however, was in the United States Shipping Board, which is domiciled in the District of Columbia.

Prior to this high seas ceremony the defendant had been divorced from his former wife on the ground of adultery. Under such circumstances a New York statute² prohibits remarriage during the lifetime of the former wife. It is well settled that this statute is binding only in New York and has no extra-territorial effect.³ Since the former wife was still living the question was raised as to whether the laws of New York followed the *Leviathan* on the high seas and thus invalidated the marriage.

The Court of Appeals in affirming the decision of the Appellate Division⁴ held the marriage valid. The court said that since a federal statute⁵ provided that "Every vessel making voyages from a port in the United States to any foreign port" should

²³ It should be noted that none of the cases which have reached the courts are inconsistent with the analysis herein suggested. The conflicts and inconsistencies which are found are all in the Board of Tax Appeals reports and in the decisions of the Commission and other quasi-judicial officers.

¹ 250 N. Y. 313, 165 N. E. 460 (1929).

² DOMESTIC RELATIONS LAW (1923) § 8.

³ *Van Voorhis v. Brintnall*, 86 N. Y. 18 (1881); *Moore v. Hegeman*, 92 N. Y. 521 (1883).

⁴ *Fisher v. Fisher*, 223 App. Div. 19, 227 N. Y. Supp. 345 (1st Dep't 1928). There were two questions before the court in the Appellate Division: (1) were the parties legally married; (2) was the plaintiff entitled to a judgment of separation and an award for separate maintenance under the statutory provisions? (N. Y. C. P. A. § 1161) The first question was the only one before the Court of Appeals. For a discussion of the case in the Supreme Court see *New York Times*, Feb. 2, 1927, at 9.

⁵ 17 STAT. 275 (1872), 46 U. S. C. § 201 (1926).

have an official log book, and that every master of such vessel should make entry therein of "every marriage taking place on board, with names and ages of the parties," it must be assumed that marriages could take place on board the ship. The question then was: what law controlled? The court saw three possibilities: (1) the law common to all nations; (2) the law of the state of the ship's registry; and (3) the law of the domicile of the owner. The court held that the New York law did not follow the *Leviathan* on its journey, but that there is a law upon the high seas common to all nations which upholds the validity of consensual marriages between competent parties; and that if the federal statute could not be so interpreted, the marriage was nevertheless valid because the law which applies to marriages on the high seas is the law of the domicile of the owner of the vessel, and not the law of the state where it is registered. In the absence of proof of the law in the District of Columbia, it was presumed that the common-law of that jurisdiction sanctioned the marriage.⁶

Marriages on the high seas recently received considerable publicity⁷ as a result of an advisory opinion⁸ of Mr. Parker, counsel for the United States Shipping Board. This opinion adopted the view, which the instant case rejected, that the law of the port of the ship's registry controls.⁹ This is in accord with the rule expressed by the American Law Institute Restatement, that the law of the place of registry governs all acts done on board the ship on the high seas:¹⁰ claims for an injury committed on

⁶ The validity of common-law marriage in the District of Columbia today is doubtful. KOEGEL, *COMMON LAW MARRIAGE* (1922) 152, 162, 164; MAY, *MARRIAGE LAWS AND DECISIONS IN THE UNITED STATES* (1929) 95; cf. 3 HOWARD, *A HISTORY OF MATRIMONIAL INSTITUTIONS* (1904) 175, 176.

⁷ (1926) 30 *LAW NOTES* 103, 152; 90 *LITERARY DIGEST*, Sept. 25, 1926, at 31; (1926) 162 *LAW TIMES* 102; (1926) 70 *SOL. J.* 826.

⁸ *New York Times*, July 18, 1926, at 12. According to this opinion the masters of merchant vessels have no authority to conduct marriage ceremonies unless they are so authorized or licensed by the state in which the vessel is registered; but if a state does not specifically authorize marriages to be performed by sea captains, the marriage may be valid if that state recognizes common-law marriages. It has been suggested that the rule laid down in the first part of this statement is the common-law rule of the United States and England. See (1926) 162 *LAW TIMES* 102.

⁹ New York does not specifically authorize marriages to be performed by sea captains; but it does recognize common-law marriages. *Ziegler v. Cassidy's Sons*, 220 N. Y. 98, 115 N. E. 471 (1917); *MAX*, *op. cit. supra* note 6, at 297; *New York Times*, July 18, 1926, at 12. Since most American steamers are registered in New York, most marriages complying with the common-law marriage requirements would be held valid if Mr. Parker's opinion is followed. As far as European countries are concerned it is quite probable that their courts would look to the United States law as a whole and that they would find our "common-law" to be that consensual marriages are valid.

¹⁰ "The jurisdiction of a state extends over a vessel flying its flag on

board the vessel;¹¹ the navigation of the vessel;¹² collisions on the high seas;¹³ and marriages performed on the vessel.¹⁴ This rule has the advantage of being uniform, definite, and comparatively easy of application.¹⁵ But the mere fact that a vessel happens to be registered in a particular state does not necessitate the application of the law of that state for all purposes while it is on the high seas. The problems arising from the navigation of a vessel cannot be said to involve the same considerations as those incident to marriage on the high seas. The Restatement generalizations would seem to be too inclusive.

It is doubtful, moreover, whether the Restatement view is supported by the existing authorities. As to injuries committed on board the vessel probably more cases apply the law of the domicile of the owner than the law of the state of the ship's registry.¹⁶ The law of the domicile of the owner has also been

the high seas and its law regulates all acts done thereon. . . . Rights acquired on a vessel on the high seas are acquired under the law of the flag." CONFLICT OF LAWS RESTATEMENT (Am. L. Inst. 1926) §§ 46, 46 (b). International Law recognizes that a ship on the high seas for certain purposes remains under the jurisdiction of the flag; but it does not recognize this "floating island" theory for all purposes. 1 OPPENHEIM, INTERNATIONAL LAW (4th ed. 1928) 491; 1 MOORE, INTERNATIONAL LAW DIGEST (1906) 930; cf. VAHINGER, THE PHILOSOPHY OF AS IF (1924) 33. For a recent application of the theory for purposes of criminal jurisdiction see The Case of the S. S. "Lotus," Permanent Court of International Justice (1927) Series A, No. 10, Judgment No. 9; Brierly, *The Lotus' Case* (1928) 44 L. Q. REV. 154; Comment (1928) 37 YALE L. J. 484. The myth of the "floating island" would probably be applied in the case of marriages on board a man of war. 2 MOORE, *op. cit. supra* at 491, 492.

¹¹ CONFLICT OF LAWS RESTATEMENT, *supra* note 10, § 443.

¹² *Ibid.* § 446.

¹³ "A claim for an injury caused by collision between two vessels on the high seas is governed by the law of the flag of the vessel injured, or of the vessel on which the person or thing injured is carried at the time of the injury." *Ibid.* § 444.

¹⁴ "A marriage on board a private vessel is valid only if the law of the flag is complied with." CONFLICT OF LAWS RESTATEMENT, *supra* note 10, § 133. The "law of the flag" in the United States is defined as the law of the state in which the vessel is registered. *Ibid.* § 46 (a); cf. GOODRICH, CONFLICT OF LAWS (1927) 255.

¹⁵ But it should be noticed that, when the marriage takes place on a foreign vessel, the problem of determining what is "the law of the flag" arises. DICEY, CONFLICT OF LAWS (3d ed. 1922) 669. If the "flag" is English, the consensual marriage would probably be invalid. White, *Marriages at Sea* (1901) 17 L. Q. REV. 283; Charteris, *Marriages on the High Seas* (1908) 19 JURIDICAL REV. 178; Wilkinson, *Marriages at Sea* (1916) 28 *ibid.* 253. The laws of France and Russia make specific provision for marriages on the high seas. Laws 1893, 9 June; CODE CIVIL (Carpenter, 1927) § 144; 93 DUVERGIER, COLLECTION DES LOIS (1893) 209; 1 MARRIAGE LAWS OF SOVIET RUSSIA (1921) c. 1, n. 2; 2 *ibid.* §§ 53, 54.

¹⁶ *International Navigation Co. v. Lindstrom*, 123 Fed. 475 (C. C. A. 2d, 1903); *Bjostad v. Pacific Steamship Co.*, 244 Fed. 634 (N. D. Cal. 1917). *Contra: Fisher v. Boutelle Trans. and Towing Co.*, 162 Fed. 994

applied to determine the taxable situs of a vessel.¹⁷ The case of *Bolmer v. Edsall*¹⁸ seems to be the only American case besides *Fisher v. Fisher*¹⁹ which considers the possibility that the law of the port of registry might govern the validity of marriages upon the high seas. This case involved an ex parte suit by the husband against the wife for the annulment of their marriage. The marriage ceremony had been performed by the ship's surgeon on board the steam ship *Algonquin*, between the ports of La Romana and Marcoris, in San Domingo. It did not appear where the vessel was owned, registered, or whose flag she flew; nor was it shown whether the marriage took place within territorial waters or on the high seas. The court presumed, in the absence of evidence of the ship's ownership and registry, that the marriage was governed by the law of the forum. At the first hearing the court said: "Assuming that the steamship *Algonquin* was an American vessel, it would seem from the admiralty law that the validity of the marriage . . . would depend upon the law of the state of the union in which the vessel was registered or where it was owned. . . ." In the court's supplemental memorandum it appeared that the ship was owned and registered in this country. The court in granting the annulment upheld the marriage but was not specific as to whether the law of the domicile of the owner or that of the port of registry applied to the marriage on board the ship.²⁰

Another theory as to marriages on the high seas is that since

(E. D. Pa. 1908) (law of port of registry); see Magruder and Grout, *Wrongful Death Within the Admiralty Jurisdiction* (1926) 35 YALE L. J. 395, 416. In the following cases the law of the domicile of the owner was held to apply, but it did not appear where the vessel was registered. *Southern Pacific Co. v. DeValleda Costa*, 190 Fed. 689 (C. C. A. 5th, 1911); *Sonden v. Fore River Shipbuilding Co.*, 223 Mass. 509, 112 N. E. 82 (1916). There are several cases in which the state of registry coincided with the domicile of the owner. *McDonald v. Mallory*, 77 N. Y. 546 (1879); *U. S. Shipping Board v. Greenwald*, 16 F. (2d) 948 (C. C. A. 2d, 1927). As to foreign law governing collisions on the high seas, see LORENZEN, *CASES ON THE CONFLICT OF LAWS* (1924) 282 n.

¹⁷ *Southern Pacific Co. v. Kentucky*, 222 U. S. 63, 32 Sup. Ct. 13 (1911); cf. *The Havana*, 64 Fed. 496 (C. C. A. 2d, 1894). One of the first cases cited as supporting the law of the port of registry was *Crapo v. Kolloy*, 16 Wall. 610 (U. S. 1872); but in this case the state of registry and the domicile of the owner were the same.

¹⁸ 90 N. J. Eq. 299, 106 Atl. 646 (1919); cf. *Hynes v. McDermott*, 91 N. Y. 451 (1883) (where it was said that, in the absence of any evidence, it could not be presumed that a vessel plying the English channel, on which a citizen of New York contracted a marriage, was under a flag which would subject the marriage to a law different from that of New York).

¹⁹ *Supra* note 1.

²⁰ The fact that the court cited *International Nav. Co. v. Lindstrom*, *supra* note 16, and said in referring to it that: "A steamship owned by a corporation of New Jersey is a vessel of that state and subject to its laws,

the sea is *res communis* it is subject only to international law.²¹ It has been said that according to the law of all Christendom consensual marriages between competent parties are valid.²² And long standing customs acquiesced in by the nations are sufficient to establish a rule of international law.²³ It might thus be argued that by international law the marriage on board the Leviathan was valid.²⁴

The "no law" theory may also be offered as a solution of the problem. This theory postulates the open sea as a place without law. Starting with this assumption several conclusions may be reached. If we take Bishop's view that marriage is a "natural right" of man, of which the law cannot deprive him, the fact that there is no law sanctioning the marriage cannot prevent its taking place according to the parties' own forms.²⁵ This view, however, is not supported by any case and seems to be too ingeniously metaphysical. On the other hand it may be argued that since there is no law governing the marriage on the high seas it must be controlled by the *lex domicilii* of the parties. This view was adopted in *Norman v. Norman*.²⁶ In this case the parties went upon the high seas to evade the California law. The captain of the schooner performed the marriage ceremony while they were outside the three mile limit. On the same day and immediately after the ceremony the parties returned to Los Angeles county. They lived together as man and wife. The wife subsequently left her husband, who thereupon brought an action to have the marriage declared valid and binding. The court held that the law of the domicile of the parties, *i.e.*, California, governed the marriage on the high seas; and that by that law the marriage was invalid. The difficulty with this approach arises when the parties have different domiciles. And a similar difficulty arises, when the law of the domicile of the ship's owner is considered as controlling, if the vessel is owned by several owners domiciled in different states, or if successive sales take place while the vessel is on the high seas.

notwithstanding its registry in New York," would lead one to believe, in spite of several other ambiguous statements, that the law of the domicile of the owner was controlling.

²¹ As has been pointed out, *supra* note 10, the courts give only partial recognition to the "floating island" theory.

²² See *Hutchins v. Kimmel*, 31 Mich. 126, 132 (1875).

²³ *The Paquete Habana*, 175 U. S. 667, 20 Sup. Ct. 290 (1900).

²⁴ *Cf. Loring v. Thorndike*, 5 Allen 257 (Mass. 1862); and dictum of Lord Stowell in *Reading v. Smith*, 4 Eng. Ecc. 551, 560 (1821).

²⁵ 1 BISHOP, MARRIAGE AND DIVORCE (5th ed. 1873) § 351. It is also generally recognized, in theory, that parties marooned on an island, where "no law" applies, could marry according to their own forms.

²⁶ 121 Cal. 620, 54 Pac. 143 (1898); Note (1898) 12 HARV. L. REV. 273-Note (1898) 60 AM. ST. REP. 947; BEALE, CASES ON THE CONFLICT OF LAWS (2d ed. 1928) 581.

In its larger aspects the *Fisher* case²⁷ involves an equilibration of two conflicting policies: that which prohibits remarriage after divorce, and that which seeks to uphold marriage wherever possible.²⁸ The New York legislature has expressed its policy on the first point by statute;²⁹ and the Uniform Marriage Evasion Act³⁰ has gone to the logical extreme in fostering this policy. But is not the policy of upholding a marriage stronger than this prohibition on remarriage? To declare a marriage invalid may mean the bastardization of children, the defeating of rights of inheritance, subjection to criminal prosecution or a disturbance of many of the other legal relations which surround the marriage status.³¹ The courts are reluctant to upset these relations; and perhaps this is one reason for the maxim *semper presumitur pro matrimonio*.³² In the *Fisher* case³³ the parties thought they

²⁷ *Supra* note 1.

²⁸ *Cf.* GOODRICH, *op. cit. supra* note 14, at 261.

²⁹ *Supra* note 2; *cf.* (1929) 42 HARV. L. REV. 701; GOODRICH, *op. cit. supra* note 14, at 259.

³⁰ "If any person residing in and continuing to reside in this state who is disabled or prohibited from contracting marriage under the laws of this state shall go into another state or country and there contract a marriage prohibited and declared void by the laws of this state, such marriage shall be null and void for all purposes in this state, with the same effect as though the particular marriage had been entered into in this state." UNIFORM MARRIAGE EVASION ACT § 1; *cf. ibid.* § 2; TERRY, UNIFORM STATE LAWS (1920) 404. The Act has been adopted in five states: Illinois, Louisiana, Massachusetts, Vermont and Wisconsin. RICHMOND AND HALL, MARRIAGE AND THE STATE (1929) 194; *cf.* FLUGEL, THE PSYCHO-ANALYTIC STUDY OF THE FAMILY (1926) 101.

³¹ See *Hyde v. Hyde*, 1 Prob. and Div. 130 (1866); CONFLICT OF LAWS RESTATEMENT, *supra* note 10, § 126; JENKS, A BOOK OF ENGLISH LAW (1929) 278. That the state also has an interest in the marriage relationship is obvious; it may exercise this interest by fixing degrees of consanguinity and affinity, by establishing a minimum marriage age, etc. RICHMOND AND HALL, *supra* note 30, at 335.

³² See *In re Lando's Estate*, 112 Minn. 257, 266, 127 N. W. 1125, 1128 (1910). In addition to not wishing to disturb the web of legal relations which surround the marital relationship the courts probably have another reason for sustaining a marriage wherever possible: they inarticulately postulate marriage as a desirable state. Recent investigations would lead us to believe that the courts are correct in their observations, at least with respect to death, crime, and insanity. GROVES AND OGBURN, AMERICAN MARRIAGE AND FAMILY RELATIONSHIPS (1928) 126, 137, 141. And under the pressure of changing conditions and the advance of industrialism marriage as an institution seems to be disintegrating. MOWRER, FAMILY DISORGANIZATION (1927) 146, 149; GOODSSELL, PROBLEMS OF THE FAMILY (1928) 302. This may be a further reason for the courts sanctioning marriage; and it has been suggested that a marriage should be good if it is valid "according to any law which may reasonably be invoked as applicable—*lex loci, lex domicilii, lex civitatis ligeantiae, perhaps lex fori.*" Baty, *Capacity and Form of Marriage* (1917) 26 YALE L. J. 444, 456.

³³ *Supra* note 1.

were married; they lived together as man and wife for several years; and their friends and associates assumed that they were validly married. Under such circumstances it seems probable that the Court of Appeals decided to resolve the conflicting policies in favor of upholding the marriage, and then learnedly marshalled the existing theories sanctioning marriage on the high seas.

It is obvious that the rule alternatively laid down in the instant case, that marriage on the high seas is governed by the law of the domicile of the owner of the vessel, will not always result in upholding consensual marriages. If the predominant factor in the court's mind was the desire to resolve doubtful questions in favor of the validity of such marriages, and the next case to arise is one where the law of the domicile of the owner does not recognize consensual marriages, the court may find it desirable to limit the holding of the principal case and apply the law said to be "common to all nations."³⁴

SETTLOR'S RETENTION OF CONTROL AS DEFEATING THE RIGHT OF THE BENEFICIARIES TO TAKE AFTER HIS DEATH

The common practice for people to entrust the management of their property and the disposition of it after their deaths to trust companies has often brought into question the validity of the provisions for disposition after death. Does the law allow the property to go to the beneficiaries named, or does it invalidate the transaction and give it to the estate of the settlor? This question will be here considered in regard to the common situation where the property turned over to the trustee is personalty.¹

In the simplest case, where legal title passes to the trustee, and no interest remains in the settlor except the right to the income for his life, little objection has been raised to the right of the beneficiaries to take after the death of the settlor,² the courts treating the beneficiaries as acquiring thereby the interests of

³⁴ *Supra* note 24; *cf. Baty, loc. cit. supra* note 32.

¹ Since there are a number of considerations which make the problem more complicated where land is involved, no attempt will be made to discuss the situation arising when the trust is one of realty. One readily calls to mind such considerations as the statute of frauds and the other formalities required for the validity of deeds of land, the possibility of future estates in realty as against their restricted use in cases of personalty, and the rules of construction peculiarly applicable to deeds of realty. A study of the cases impresses one at once with the fact that conveyances of land to a trustee under the conditions herein discussed are viewed from a quite different standpoint than conveyances of personalty. Furthermore, the problem generally arises today in cases where only personalty is involved. The turning over of land to a trust company to manage and invest is not a common practice.

² See cases cited *infra* note 6.

cestuis, which became absolute on the death of the settlor. But few settlors are content to rid themselves of all control over the property except the right to the income from it for life. With the retention of further control arise two objections. The settlor may have transferred what would appear to be the legal title to the trustee,³ but nevertheless may have retained so great an interest that the court will treat the gift over to the beneficiaries, after the settlor's death, as a testamentary disposition, and consequently invalid if not made in accordance with the statute of wills. Or the settlor may retain such a degree of control that the court will look upon the trustee as his agent or bailee, both of which relations are revoked by the death of the principal or bailor. Under either view, the beneficiaries lose, and at the death of the settlor the property goes to his estate.⁴

From a practical standpoint, there is no real difference between the two objections. If the amount of control that is reserved during the life of the settlor is such as to establish an agency or bailment relation, the only effect of the trust is to pass the title at the settlor's death. This makes the gift over void as a testamentary disposition, unless there is a compliance with the statutes of wills. Courts speak sometimes the direct language of testamentary disposition, and sometimes the indirect language of agency or bailment, but apply, obviously, the same considerations

³ The person to whom the property is turned over by the legal owner thereof cannot, of course, be a trustee for the beneficiaries unless he is given the legal title to the property. Hence, if the legal title is transferred to the beneficiaries, the person holding the property cannot be trustee for them. Thus, in *Noble v. Leonard*, 153 Cal. 245, 94 Pac. 1047 (1908), where certificates of stock were delivered to a person to pay the dividends to the donor for his life, and then to turn them over to certain beneficiaries, and the certificates were assigned to these beneficiaries, it was held that the person to whom the stock was delivered could not be trustee for the beneficiaries, and that the beneficiaries could not take since the disposal was testamentary. Similar facts, except that the dividends were payable to the beneficiaries, have been held to constitute a valid gift. In *re Lindhorst's Estate*, 216 Mo. App. 473, 270 S. W. 150 (1925).

The passing of legal title is here used to mean that the donor has made the delivery or performed the other formalities necessary to convey the legal title to the person who is to manage the property. In all of the cases cited in subsequent notes this was true. There are a few cases in which the reservation of a power of control, despite a manual tradition or formal assignment, has been held to defeat the requirement of delivery necessary to pass title to the trustee, through its implication of an intent that title shall not pass. See *Brown v. Crafts*, 98 Me. 40, 56 Atl. 213 (1903); *Shea v. Crofut*, 203 App. Div. 210, 196 N. Y. Supp. 850 (2d Dep't 1922); cf. *McGillivray v. First National Bank*, 56 N. D. 152, 217 N. W. 150 (1927).

⁴ Attention should here be called to the fact that the courts attach little significance to the words used by the parties. If a court feels that the effect of the transaction was to establish an agency, or to make a testamentary disposition, it will ignore the fact that the parties called the transaction a "trust," or the person holding the property a "trustee." Or if it feels that

in determining the fundamental problem of whether the beneficiaries or the estate will take. Realizing that the basis of these two objections is the same, we shall treat both cases as analogous in facing the question of how much control the settlor may retain, after having gone through the formalities of conveying legal title, without defeating the rights of the beneficiaries to take after his death.⁵

The first steps are well defined. As has been pointed out, if the settlor retains nothing but the income for his life, a valid trust is created, and the property goes to the beneficiaries.⁶ This is so regardless of the quantum of the income to be paid, whether it be the entire income from the property,⁷ or only a fixed amount a year,⁸ or even if it be a sum sufficient to support the settlor for his life, though this requires part of the principal as well as the income, the discretion as to what sum is necessary being left with the trustee.⁹ And the trust is almost universally held to be valid, so as to enable the beneficiaries to take, where the settlor retains

the transaction created a trust, the use of the terms "agent" or "attorney" will be disregarded. *Cf.* *Warsco v. Oshkosh Sav. & Trust Co.*, 183 Wis. 156, 196 N. W. 829 (1924); *Mersereau v. Bennet*, 124 App. Div. 413, 108 N. Y. Supp. 868 (1st Dep't 1908). In deciding the problems involved in the situation herein discussed, the courts face the issues squarely and are not befuddled by terminology.

⁵ No attempt has here been made to consider the cases where the property is a bank deposit, and the trustee is the bank. In that situation there is a relation of a contractual nature between the bank and its depositor which makes the problem quite different from the one discussed here. Nor is this discussion concerned with the rights of the beneficiaries with respect to any party other than the estate of the settlor. The rights of creditors, or of the state under the inheritance tax statutes present different considerations that cannot be discussed herein. In regard to the latter problem, see Comment (1929) 38 *YALE L. J.* 657.

⁶ *Robertson v. Robertson*, 147 Ala. 311, 40 So. 104 (1906); *Miles v. Miles*, 78 Kan. 382, 96 Pac. 481 (1908); *Hall v. Hall*, 109 Va. 117, 63 S. E. 420 (1909); *Smith v. Wold*, 125 Minn. 190, 145 N. W. 1067 (1914); *Brown v. Fidelity Trust Co.*, 126 Md. 175, 94 Atl. 523 (1915). Likewise, where the income is to be paid half to the grantor and half to the trustee. *Roberts v. Taylor*, 300 Fed. 257 (C. C. A. 9th, 1924). Or where two-thirds to grantor, and one-third to another person. *McHenry v. McHenry*, 152 Ga. 105, 108 S. E. 522 (1921).

⁷ See cases cited *supra* note 6.

⁸ *Haulman v. Haulman*, 164 Iowa 471, 145 N. W. 930 (1914) (four per cent on the principal to be paid annually); *cf.* *Mersereau v. Bennet*, *supra* note 4 (\$12 a week to settlor, same amount apiece to two other persons).

⁹ *Lyle v. Burke*, 40 Mich. 499 (1879); *Sands v. Old Colony Trust Co.*, 195 Mass. 575, 81 N. E. 300 (1907); *Harrod v. McComas*, 78 Kan. 407, 96 Pac. 484 (1908); *cf.* *Gilman v. McArdle*, 99 N. Y. 451, 2 N. E. 464 (1885) (support of settlor and her husband, and the survivor of them, residue to go for masses; husband allowed to take income after the death of the settlor). In the latter case, the court treated the transaction as a contract, but said that a valid trust probably existed.

the power to revoke, modify, or change the provisions of the trust.¹⁰

But once we pass beyond these lines, and give the settlor more elements of control than these, the validity of the trust, from the beneficiaries' standpoint, is not so certain. Elements of control that have been held insufficient to invalidate a trust are the retention of possession of the property¹¹ (where such retention does not defeat the passing of title to the trustee) and the retention of the power to direct the investments¹² or reinvestments¹³ to be made. And in several cases courts have held a trust to be valid, so as to allow the beneficiaries to take in preference to the estate, even though the settlor reserved the right to draw from the trustee such sums as he should desire during his lifetime,¹⁴ or such sums as he should deem necessary for his comfort and support.¹⁵ A power to change the beneficiaries has been

¹⁰ *Stone v. Hackett*, 12 Gray 227 (Mass. 1858); *Lines v. Lines*, 142 Pa. 149, 21 Atl. 809 (1891); *Brown v. Spohr*, 180 N. Y. 201, 73 N. E. 14 (1904); *Wilcox v. Hubbell*, 197 Mich. 21, 163 N. W. 497 (1917); *Jones v. Old Colony Trust Co.*, 251 Mass. 309, 146 N. E. 716 (1925); *Nat'l Newark & Essex Banking Co. v. Rosahl*, 97 N. J. Eq. 74, 128 Atl. 586 (1925); *Roche v. Brickley*, 254 Mass. 584, 150 N. E. 866 (1926). An agreement by the trustee to reconvey on demand is similar to a power of revocation, and does not defeat the validity of the trust. *Rosenburg v. Rosenburg*, 40 Hun 91 (N. Y. Sup. Ct. 1886).

In *Worthington's Adm'r v. Redkey*, 86 Ohio St. 128, 99 N. E. 211 (1912) the reservation of a power of revocation was considered to be a strong element in negating an intent to pass title. This case cannot be said to hold squarely that the reservation of a power of revocation will invalidate a trust of this type, but it comes the nearest to such a holding of any American decision.

¹¹ *Kelley v. Snow*, 185 Mass. 288, 70 N. E. 89 (1904) (power to change the dispositions also reserved); *Spangler v. Vermillion*, 80 W. Va. 75, 92 S. E. 449 (1917). The fact that the trustee allows the settlor to retake possession from him does not defeat the trust. *Williams v. Evans*, 154 Ill. 98, 39 N. E. 698 (1895); *Talbot v. Talbot*, 32 R. I. 72, 78 Atl. 535 (1911).

¹² *Forney v. Remey*, 77 Iowa 549, 42 N. W. 439 (1889) (absence of a power of revocation noted by the court). Same where direction that no investments be made in other than legal securities without consent of settlor. *Windolph v. Girard Trust Co.*, 245 Pa. 349, 91 Atl. 634 (1914) (power to revoke also reserved).

¹³ In *re Soulard's Estate*, 141 Mo. 642, 43 S. W. 617 (1897); *Talbot v. Talbot*, *supra* note 11.

¹⁴ *Davis v. Ney*, 125 Mass. 590 (1878) (power treated similarly to the power of revocation); *Hellman v. McWilliams*, 70 Cal. 449, 11 Pac. 659 (1886) (retention of power held to indicate intention of retaining a life estate only); *Wade v. Button*, 72 Vt. 136, 47 Atl. 406 (1900) (beneficiaries, according to directions of settlor, to take only such property as settlor did "not live to use up"); *cf. Rosenburg v. Rosenburg*, *supra* note 10.

¹⁵ *Lovett v. Farnham*, 169 Mass. 1, 47 N. E. 246 (1897). In *West v. White's Estate*, 56 Mich. 126, 22 N. W. 217 (1885), the trial court instructed the jury that the question of whether or not a trust was established, where the settlor was to be paid such sums as she should need to

held by one court not to invalidate a trust, though the transaction resembled an insurance policy more than it did a trust.¹⁶

On the other hand, the trust has been held invalid, and the estate allowed to take, in cases where the elements of control retained were not much greater, if as great, as some of those just stated. A retention by the settlor of the right to be paid such sums as she should demand during her life, coupled with a power of revocation, has been held to make the dispositions after the settlor's death invalid as testamentary.¹⁷ And where the trustee agreed to turn back the property on demand, it was held that an agency or bailment had been created.¹⁸ Where the trustee was to hold the property subject to the "control and demands" of the settlor during his lifetime, the disposition to be made on his death has been declared to be testamentary.¹⁹ The same view was taken where the settlor was allowed to draw out whatever money he desired during his lifetime.²⁰ In another case, the trustee was held to be a mere agent of the settlor, where the latter retained the power to direct the trustee to pay to him or to a third party such sums as he should desire, together with the power to appoint a new trustee.²¹ A like view has been taken

live comfortably, depended on whether the settlor intended to create an agency or a trust. The jury returned a verdict for the beneficiaries. The instruction was upheld on appeal.

Cf. Pirie v. LeSaulnier, 161 Wis. 503, 154 N. W. 993 (1915). Here the settlor assigned the legal title to a note to the beneficiary and made her own agent the agent for the beneficiary. The agent paid the income to the settlor, collected the note when due, and invested the proceeds in a bond in the name of the beneficiary, all by direction of the settlor, and without the knowledge of the beneficiary. The court held that title passed to the beneficiary on the assignment, and that the beneficiary took on the settlor's death.

¹⁶ *Siter v. Hall*, 220 Ky. 43, 294 S. W. 767 (1927).

¹⁷ *McEvoy v. Boston Five Cents Savings Bank*, 201 Mass. 50, 87 N. E. 465 (1909). This decision has been regarded as the leading case on the reservation of control sufficient to defeat the trust. It is difficult to reconcile it with *Davis v. Ney*, *supra* note 14, and *Lovett v. Farnham*, *supra* note 15. *Stevenson v. Earl*, 65 N. J. Eq. 721, 55 Atl. 1091 (1903) is often cited as being in accord with the *McEvoy* case. However, it really represents a different situation, for the railroad in the case was in the same position as a bank holding a deposit as trustee. See *supra* note 5.

¹⁸ *Russell v. Webster*, 213 Mass. 491, 100 N. E. 637 (1913).

¹⁹ *Rudd v. Rudd*, 184 Ky. 400, 214 S. W. 791 (1919). The transfer to the trustee was also held to be invalidated because of fraud on the part of the trustee and beneficiaries in inducing it to be made.

²⁰ *Demartini v. Allegretti*, 146 Cal. 214, 79 Pac. 871 (1905). The trustee admitted that the purpose of the transaction was to evade the necessity of probate proceedings. The opinion gives no light as to how much this fact influenced the court. In the *McEvoy* case, *supra* note 16, the same situation existed, the trustee testifying that the settlor "told him that she intended the instrument in place of any will she might leave." That decision also gives no indication as to the effect this had on the court.

²¹ *Warsco v. Oshkosh Sav. & Trust Co.*, *supra* note 4; *cf. Darling v.*

where the settlor retained possession of the corporate stock which formed the *res* of the purported trust, and voted it.²² The fact that the settlor was to be paid such money as she needed to live on, together with the statement in the creating instrument that the property was held in trust for the settlor influenced one court in holding the disposition after death testamentary.²³ Another court held the reservation of a power of revocation coupled with the use of the phrase "my trustee" and similar expressions by the settlor to be sufficient to show an intent that the purported trustee be merely the agent of the settlor.²⁴

The problem has come up again in the recent case of *Union Trust Co. v. Hawkins*.²⁵ There the settlor retained the power to control the investments and the power to revoke the trust, and also agreed to pay all the taxes on the *res*. The Court of Appeals

Mattoon State Bank, 189 Wis. 117, 207 N. W. 254 (1926) (person directed bank to pay certificate of deposit to beneficiaries after death, but reserved full control over it; Warsco case followed, and beneficiaries not allowed to take).

²² *Witthoft v. Comm. Development & Inv. Co.*, 268 Pac. 31 (Idaho 1928); *cf. Comer v. Comer*, 120 Ill. 420, 428, 11 N. E. 848, 851 (1887) (settlor deposited bonds with trustee to pay interest to his wife for her life, then the bonds to go to his heirs; settlor notified trustee that he (the settlor) was "to control the bonds" during his life; this was said not to create a trust).

²³ *Smith v. Ferguson*, 90 Ind. 229 (1883).

²⁴ *Worthington's Adm'r v. Redkey*, *supra* note 10. This case may not fall exactly into the class herein discussed, for it is not clear that the trustee was to pay the income to the settlor for life. In other respects it is in point. *Cf. Trubey v. Pease*, 240 Ill. 513, 88 N. E. 1005 (1909). In this case personalty was turned over to an attorney to hold, and to give to certain persons on the donor's death. The donor tore off interest coupons for the next few installments due on the bonds and collected them. She died before further interest was due. It was held that the attorney was the agent of the donor, and the administrator was allowed to take. *Cf. Egerton v. Carr*, 94 N. C. 648 (1886).

With the cases cited in notes 17 through 24, *supra*, *cf. Morrison v. Bartlett* 148 Ky. 833, 147 S. W. 761 (1912), where an assignment of a note, which provided that the grantee should have no right to deal with it during the grantor's life, was admitted to probate as a will. See also *Pritchett's Estate*, 9 Pa. Co. Ct. Rep. 600 (1891), where an instrument conveying both realty and personalty to another to hold, as attorney, for the purpose of paying over the income to the grantor to the extent necessary to support him for his life, and then to distribute among certain beneficiaries, was likewise admitted to probate.

²⁵ 161 N. E. 548 (Ohio App. 1927). The case was appealed to the Supreme Court of Ohio, and a decision was handed down on May 31, 1928, affirming the Court of Appeals decision. Since then a rehearing has been granted, which is now pending. In the opinion (which has not yet been reported) handed down on May 31, 1928, the court held that the instrument was testamentary, and that the beneficiaries could not take since it was not properly executed as a will. The court severely condemns the use of trusts of this nature, alleging that they replace the probate court with the trust company.

of Ohio held that the purported trustee, a trust company, was merely the agent of the settlor, and that the provision for payment to beneficiaries after the death of the settlor was invalid as an attempted testamentary disposition.²⁶

Few generalizations may be drawn from a survey of these cases. If the settlor who has reserved the income for life reserves also a power of revocation, and no more, the beneficiaries named by him will probably take the property on his death. But if he goes further and retains other elements of control, uncertainty enters in as to the validity of the provisions made for the beneficiaries. The fact that most of the cases denying validity because of the retention of further elements of control are recent ones seems to indicate that the problem has only lately become acute.

To a layman it might seem foolish that a settlor could reserve a power of revocation without defeating the dispositions after death, but could not reserve certain other elements of control, for nothing appears to be greater than the power of revocation. The answer is that the courts have reached their conclusions on the basis of certain doctrines of property law. The law has never considered a power of appointment as an interest in land in the usual sense of that term, and to this day recognizes that one man may be the "owner" of property even though another has a power of appointment in regard to it. So, too, the reservation in a settlor of a power to revoke the trust, even though he himself is a beneficiary for life, is not considered as inconsistent with the creation of a presently vested interest in the other beneficiaries. And when we find the courts upholding the reservation of certain other elements of control, their opinions in most cases base it on the ground that the particular situation is analogous to the reservation of the power of revocation.

²⁶ It is, obviously, impossible to reconcile all of the cases where the disposition has been defeated with those where it has been upheld. However, there appear to be no inconsistencies in the decisions in any particular jurisdiction, except perhaps Massachusetts, where it is very difficult to reconcile the McEvoy case with certain others, as is pointed out *supra* note 17.