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Capital Gains Distributions Treated as Principal Under the Uniform Principal and Income Act

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RECENT DECISIONS

Mutual Funds — Capital Gains Distributions Treated as Principal Under the Uniform Principal and Income Act. — Alice Brock, the testatrix, died September 14, 1939. By her will, she created a perpetual trust of her residuary estate. She directed that certain fixed sums, totaling $18,700, be paid annually from the trust income to seven primary beneficiaries; any trust income in excess of this amount be paid annually to two secondary beneficiaries; and any income released from the trust, by the death or deaths of any, and finally all, of the primary and secondary beneficiaries, be paid forever in equal shares to Bryn Mawr College and the Pennsylvania Academy of the Fine Arts. The annual income from this trust presently exceeds $18,700; the excess being paid to the appellant income beneficiary. On September 3, 1964, the trustees purchased seven shares of the capital stock of Philadelphia Fund, Inc. (hereinafter Fund), a mutual fund and regulated investment company. On September 30, 1964, the trustees received from the Fund a distribution of $1.05. The authorizing resolution of the Fund described this distribution as a quarterly distribution of 7 cents per share out of ordinary net income and 8 cents per share payable from realized capital gains. The resolution further provided for payment of such distribution in cash or additional shares of stock, at the option of the receiving stockholders. The trustees elected to receive payment in cash and received 49 cents designated "ordinary net income" and 56 cents designated "realized capital gains." The trustees then filed an account in the Orphans' Court of Delaware County, Pennsylvania, wherein the entire distribution of $1.05 was allotted to income. Bryn Mawr College filed objections to this allocation on the ground that the amount of distribution from "realized capital gains" should be distributed to principal. The Orphans' Court sustained Bryn Mawr's objection. The Supreme Court of Pennsylvania, Judge Roberts dissenting, affirmed and *held:* a distribution made by a mutual fund or regulated investment company,[1] the source of which distribution is "realized capital gains," is properly allocable to principal under section 5(3) rather than section 5(1) of the Pennsylvania Principal and Income Act of 1947.[2] *In re Brock,* 420 Pa. 454, 218 A.2d 281 (1966).

A typical mutual fund is an open-end diversified management investment company.[3] Its business is to select, buy, hold, and sell corporate stocks and other securities.[4] The fund's income is twofold. It derives income from interest and dividends on the securities in its portfolio and gains or profits from advantageous

1 Hereinafter "mutual funds" will mean a regulated investment company under the Investment Company Act of 1940, 54 Stat. 789-847, 15 U.S.C. §§ 80a-1 to -52 (1964).

2 Pa. Stat. Ann. tit. 20, § 3470.5 (1964). The Pennsylvania statute is substantially the same as the Uniform Principal and Income Act § 5 (1931).

3 > [The fund is called] "open-end" because the capital of the fund grows with each new share sold and issued, and declines with each share redeemed. "Diversified" because fund investments are not heavily concentrated in individual issues. "Management" because the investments are not fixed, nor are they alterable only under rigidly defined conditions. "Companies" as a generic term to include trusts or other legal forms a fund can assume.

Lobell, *The Mutual Fund: A Structural Analysis,* 47 Va. L. Rev. 181, 182 n.3 (1961).

4 Lovett Estate (No. 2), 78 Pa. D. & C. 21, 24 (Orphans' Ct. 1951).

sales of its securities.[5] This income, after deduction of management fees, is distributed to the stockholders in two distinct dividends — cash and capital gains.[6]

The confusion presently begirding this area of dividend allocation has been caused, to a large extent, by the *unique nature* of a mutual fund. The principal issue is whether a mutual fund is analogous to an ordinary business corporation (a separate entity) or to a common trust fund (a mere conduit). The resolution of this issue is crucial. Under the separate entity theory, sales of securities by a mutual fund are treated as sales from inventory, and thus the gains from such sales are ordinary income to the trust allocable to the life income beneficiary. Under the conduit theory, however, such gains are treated as returns of capital and are thus allocable to principal, in the same manner as if the trustee had invested *directly* rather than through a mutual fund intermediary.[7]

Judge Roberts, in his dissent in *Brock*, argued that the conduit theory was inapplicable and that mutual fund distributions should be governed by the separate entity theory. The basic thesis of the separate entity theory is that the portfolio securities of a mutual fund are inventory or stock in trade.[8] In *Lovett Estate (No. 2)*,[9] the Orphans' Court of Luzerne County, Pennsylvania, stated:

> The portfolio assets of an investment company are not regarded as permanent assets of fixed capital by the managers of the company; the securities held are treated by the managers as funds to be turned over in the normal management of the business. Selling a portfolio asset is but a normal incident of the business. The managers of an investment company must: (1) select, (2) buy, (3) hold, (4) *sell* various issues of securities and stock, depending on market trend, price, indicated earnings, dividend potentials and other factors, in short, they "buy the market." The gain resulting from turning over of any portfolio asset by an investment company is income occurring in the ordinary conduct and course of such business.[10]

The "stock in trade" view is substantiated by the balance sheets of a mutual fund. Mutual funds carry their portfolio assets at market value rather than cost, a practice rarely used in the case of capital assets.[11] This concept of mutual funds as traders in securities, with the portfolio as its stock in trade, has been followed by courts in several jurisdictions.[12]

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5 See Annot., 98 A.L.R.2d 511 (1964).

6 A mutual fund must designate its dividends as either income or capital gains. 54 Stat. 821, 15 U.S.C. § 80a-19 (1964). The fund cannot offset investment losses (capital losses) against investment income. INT. REV. CODE OF 1954, § 852(a)(1).

7 Note, *Trusts — Mutual Funds — Allocation of Capital Gains Distributions*, 18 Sw. L.J. 508, 510 (1964).

8 See BOGERT, TRUSTS AND TRUSTEES § 858 (2d ed. 1962); Young, *A Dissent on Capital Gain Distributions*, 88 TRUSTS & ESTATES 280 (1949).

9 78 Pa. D. & C. 21 (Orphans' Ct. 1951).

10 *Id.* at 24.

11 See Cohan and Dean, *Legal, Tax and Accounting Aspects of Fiduciary Apportionment of Stock Proceeds: The Non-Statutory Pennsylvania Rules*, 106 U. PA. L. REV. 157, 182-83 (1957); Young, *supra* note 8.

12 In Rosenburg v. Lombardi, 222 Md. 346, 160 A.2d 601, 604 (Ct. App. 1960), the court quoted with approval Lovett Estate (No. 2), 78 Pa. D. & C. 21, 24 (Orphans' Ct. 1951): "Selling a portfolio asset is but a normal incident in the business." This view was concurred in by 74 HARV. L. REV. 796 (1961). In *In re* Gardner's Trust, 266 Minn. 127, 144, 123 N.W.2d 69, 80 (1963), the court said, "In other words, the securities held which are bought and sold in the normal course of business of an investment company constitute . . . its stock in trade." Briel v. Moody, 77 N.J. Super. 306, 186 A.2d 314 (Super. Ct. 1962).

The argument in favor of the conduit theory, advanced by the majority in *Brock,* is a persuasive one.[13] The conduit theory focuses on the *substance,* rather than the form, of a mutual fund's activities. This theory views the investor, rather than the mutual fund, as the real party in interest. Such a view is substantiated by the method of evaluating mutual fund shares. The shares are evaluated as if each stockholder owned a pro rata share of the portfolio.[14] Thus, an investment in a mutual fund is, in substance, the same as if the shareholder had invested the amount of his pro rata share in securities directly. The mutual fund is held to be a mere conduit for management purposes.

The argument that a mutual fund is a mere conduit is reinforced by certain provisions of the Internal Revenue Code of 1954.[15] Under the IRC, mutual funds which distribute at least ninety percent of their net investment income (income from interest and dividends) to their shareholders annually are not taxed on such income.[16] Instead, the shareholder receiving the dividend pays the federal income tax on it.[17] Likewise, the IRC provides that distributed capital gains dividends shall be treated by the shareholders as long term capital gains.[18] Thus, for federal tax purposes, the mutual fund is viewed as a mere conduit, the investor being the real party in interest.[19]

The last argument in favor of the conduit theory centers on the unique nature of a mutual fund.[20] A mutual fund is organized in corporate form. A

In Central Hanover Bank & Trust Co. v. Braman, 111 N.J. Eq. 191, 194, 161 Atl. 674, 675 (Ch. 1932), the court held that dividends on the entire stock of the corporation owned by the testator, devised in trust for life tenants' benefit, was income distributable to life tenants. The court stated, "The Alwyn Corporation dealt in securities. Securities were its stock in trade . . . as shoes or hats are the commodities of commercial companies." In *In re* Byrne's Estate, 192 Misc. 451, 452, 81 N.Y.S.2d 23, 24 (Surr. Ct. 1948), the court equated the activity of a mutual fund with that of a corporation engaged in the buying and selling of real estate. When such a corporation distributes the profits from the sale of property it is distributing income and not capital.

13 The conduit theory has received support from a number of commentators. See Lobell, *supra* note 3, at 186-88. Lobell views a mutual fund as a cluster of individual service arrangements, its function being the same as a private investment counsellor — a mere conduit. See generally Ewart, *Principal and Income Problems of Trustees with Mutual Fund Dividends,* 95 Trusts & Estates 1025 (1956); Putney, *Capital Gain Dividends: Should They be Allocated to Income or Principal,* 95 Trusts & Estates 22 (1956); Wentworth, *Recent Developments Relating to the Treatment of Investment Company Capital Gains Distributions by Fiduciaries,* 49 Mass. L.Q. 147 (1964); Note, *supra* note 7, at 510-14 (1964).

14 The per share value of the fund is equivalent to the net market value of the fund's portfolio, including both net unrealized capital gains and gains which are realized but undistributed, divided by the total number of shares outstanding. Ignoring nominal management fees, any net capital gain of the fund results in an identical proportionate gain in the value of the mutual fund shares. Likewise, any distribution of realized capital gains necessarily must cause a reduction in per share value which is identical in amount to the per share distribution. Note, *supra* note 7, at 511 (1964).

15 Int. Rev. Code of 1954, §§ 851-55.

16 *Id.* § 852(a)(1),(b)(2)(D).

17 26 C.F.R. § 1.852-4(a) (1966).

18 Int. Rev. Code of 1954, § 852(b)(3)(B).

19 In their treatment of mutual fund earnings and gains, both the Investment Company Act and the Internal Revenue Code seek to avoid creating any fundamental difference between the consequences of owning securities outright or through ownership of shares in a mutual fund. Thus the Internal Revenue Code does not recognize the investment company as a separate tax entity with respect to dividends and capital gains so long as they are distributed annually. Instead, the investment company is treated as a conduit, without legal significance as far as the assessment of such taxes is concerned. Wentworth, *supra* note 13, at 151-52.

20 As a business enterprise the typical fund is unique from the moment of its

close analysis of the fund's purpose and activities, however, reveals essential deviations from the ordinary corporate enterprise. As one commentator recently noted:

> The more deeply one analyzes the mutual fund institution, its genesis, the expectations and understandings inherent in it, its ethical and contractual framework, the more one is forced to conclude that many doctrines evolved to fit the usual type of associative enterprise do not fit the fund. . . . In inspecting both judicial and legislative approaches to fund problems, we have seen examples of the *ineptness of various corporate concepts — both of operations and control — applied to the mutual fund.* The danger in that kind of approach is not merely in the harm that it may do, but in the good it does not do. For the fullest potentials for effective and livable regulation can be realized only by accepting, at the very outset, the fact that one is dealing with a set of relationships that do not lose either their personal character or their essentially personal ethical and conceptual framework because they are combined in an associative enterprise form.[21] (Emphasis added.)

A striking example of a mutual fund's uniqueness is that it cannot offset its investment losses against investment income under the IRC.[22] In contrast, an ordinary business corporation will always offset its investment losses against operating income, and only the balance will be treated as net earnings available for distribution.[23] It is submitted that the mutual fund is a unique business entity and should be treated as such. The doctrines evolved to govern the ordinary business corporation do not fit the fund and should not be applied.

Though the problem in *In re Brock* involved the nature of a mutual fund, the court based its decision on an interpretation of section 5 of the Pennsylvania Principal and Income Act.[24] The court sought to determine whether capital gains distributions fall within the provisions of section 5(1) or section 5(3) of this act. Section 5(1) deals with stock dividends, cash dividends, and optional dividends.[25] The court held that the exception clause in the second sentence of

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inception, the circumstances of its formation to some extent foreshadowing its essential character and its difference from other types of companies. Lobell, *supra* note 3, at 184.

21 *Id.* at 216-17.

22 INT. REV. CODE OF 1954, § 852(a)(1),(b)(2)(D). If a mutual fund wishes to avoid paying tax on its investment income, which it must do in order to survive in the competitive field — it must distribute ninety percent of that income without deductions for current net losses on sales of investments.

23 Brief for Appellee, p. 11, *In re* Brock, 420 Pa. 454, 218 A.2d 281 (1966).

24 PA. STAT. ANN. tit. 20, § 3470.5 (1964).

25 Section 5(1) provides:

> *Corporate* distributions made to a trustee in the shares of the distributing *corporation,* however described or designated by the distributing *corporation,* shall be deemed principal but if the number of shares of any class distributed to shareholders of such class is six percent (6%) or less of the number of shares of that class outstanding on the record date for such distribution, the shares so distributed shall be deemed income. *Except as provided above and in other subsections of this section* all dividends payable otherwise than in shares of the distributing *corporation,* including ordinary and extraordinary cash dividends and dividends payable in shares or other securities or obligations of *corporations* other than the distributing *corporation,* shall be deemed income. *Where the trustee shall have the option of receiving a dividend, either in cash or in the shares of the distributing corporation, it shall be considered as a cash dividend and deemed income, irrespective of the choice made by the trustee.* (Emphasis added.) PA. STAT. ANN. tit. 20, § 3470.5(1) (1964).

section 5(1), dealing with cash dividends in general, applies to the third sentence dealing with optional dividends as well. Thus, the court would make the optional dividend provision of 5(1) applicable only if no other subsection provided to the contrary. It is submitted that the third sentence of 5(1) is complete in itself and governs optional dividends exclusively. It was settled law prior to Pennsylvania's enactment of section 5 that optional dividends are to be considered as cash dividends.[26] Thus, in order for the last sentence in section 5(1)[27] to be meaningful, the Pennsylvania legislature must have intended optional dividends to be treated in their own distinct manner, without being governed by the second sentence of 5(1) concerning cash dividends in general. It can be argued that the last sentence of 5(1) was added only to strengthen the previous case law interpretation of optional dividends as cash dividends, and thus the legal implications are to be gleaned from the second sentence of 5(1). This position, however, is untenable in light of the words, "and deemed income." Had the legislature intended the second sentence of section 5(1) to govern optional dividends, the qualifying phrase, "and deemed income," in the last sentence of 5(1) would have been superfluous. The last sentence of 5(1) is clear, precise, and complete; it does not require other subsections for explication.[28]

After superficially disposing of section 5(1), the court in *Brock* held that the second and third sentences of section 5(3)[29] control capital gains distributions of a mutual fund. It is submitted that the court erred in this determination. Section 5(3) applies only to the apportionment of dividends issued by the normal corporate enterprise. It has no application to capital gains distributions of a mutual fund.[30] The phrase, "return of capital," in the second sentence of 5(3),

26 See, *e.g.*, Hyde v. Holmes, 198 Mass. 287, 84 N.E. 318 (1908); Davis v. Jackson, 152 Mass. 58, 25 N.E. 21 (1890); *In re* Hurd's Will, 203 Misc. 966, 120 N.Y.S.2d 103 (1953); RESTATEMENT (SECOND), TRUSTS § 236(c) (1959); BOGERT, *op. cit. supra* note 8, § 846; 3 SCOTT, TRUSTS § 236.4 (2d ed. 1956); Annot., 44 A.L.R.2d 1286 (1955).

27 Where the trustee shall have the option of receiving a dividend, either in cash or in the shares of the distributing corporation, it shall be considered as a *cash dividend* and *deemed income,* irrespective of the choice made by the trustee. (Emphasis added.) See note 25 *supra.*

28 In *In re* Gardner's Trust, 266 Minn. 127, 123, N.W.2d 69 (1963), the decision was based on a provision of a Minnesota statute [MINN. STAT. ANN. § 501.47(4) (Supp. 1965)] which is substantially the same as the last sentence in § 5(1) of the Pennsylvania Principal and Income Act. In Summerfield Estate, 26 Pa. D. & C.2d 526, 529 (Orphans' Ct. 1962), the court stated in dictum: "The provisions of section 5(1) of the [Pennsylvania] Principal and Income Act are clear and unequivocal."

29 Section 5(3) provides:

Where the assets of a *corporation* are liquidated, wholly or partially, amounts paid upon *corporate* shares as cash dividends, declared before such liquidation began, or as arrears of cumulative preferred, or guaranteed dividends shall be deemed income, all other amounts paid, upon *corporate* shares on disbursement of the *corporate* assets to the stockholders shall be deemed principal. *All disbursements of corporate assets to the stockholders, whenever made, which are designated by the corporation as a return of capital or division of corporate property, shall be deemed principal. Any profit or loss resulting from the sale or liquidation of corporate shares shall enure to or fall upon principal.* (Emphasis added.) PA. STAT. ANN. tit. 20, § 3470.5(3) (1964).

30 *In re* Gardner's Trust, 266 Minn. 127, 123 N.W.2d 69 (1963), involved a statute containing sections [MINN. STAT. ANN. §§ 501.47(3), (4) (Supp. 1965)] identical with the second sentence of § 5(3) and the third sentence of § 5(1) respectively. The Minnesota court did not deem § 501.47(3) worthy of discussion but instead held that § 501.47(4) was controlling.

means a return of capital invested.[31] That is clearly not the situation in *In re Brock,* as the trustee did not receive a return of his initial capital investment. The final provision of 5(3) refers to the sale or liquidation of treasury shares, that is, shares of a corporation's own stock held by that corporation. This sentence provides that those dividends which represent gains from the sale or liquidation of the corporation's own stock (treasury shares) are to be deemed principal. It is submitted that the court in *Brock* ignored the statute's intended scope and applied the final provision out of context to mutual funds. Mutual fund distributions which represent gains from the sale of stock and securities held by the fund are not analogous to those corporate dividends which represent gains from the sale of treasury stock.

The policy considerations which the court discusses in *In re Brock* are of the utmost significance in the determination of dividend allocation. The Internal Revenue Service has ruled that when capital gains distributions of a mutual fund are allocable to the income life tenant, a remainder to charity will not qualify for a charitable deduction under the federal estate tax law.[32] In the Greater Philadelphia area alone, at least fifty-nine estates, involving taxes in excess of $3,600,000, are affected by this ruling.[33] This tremendous impact on charitable trusts almost compels the conclusion that capital gains distributions of a mutual fund be allocated to principal.[34] Another policy argument in favor of allocation to principal is that both capital gains and capital losses should inure to the same beneficiary. As the Massachusetts Supreme Court recently noted:

> It is argued that if capital gain distributions . . . [are] paid to the income beneficiary, the trust principal will inevitably suffer in years of losses, which must be expected even in an era generally inflationary, so that, in effect, the investment company shares may become a wasting investment.[35]

Allocating capital gains distributions to the income life tenant will result in

31 *E.g.,* such as distributions received on corporate reorganization, on proceeds of the forced sale of a capital asset, or as the result of a true stock split. See Steel Estate, 32 Pa. D. & C.2d 553 (Orphans' Ct. 1964). In *Steel,* the court held that the distribution by DuPont of its stockholdings in General Motors, pursuant to a court divestiture order, constituted a partial liquidation of the assets of DuPont within the meaning of the second sentence of § 5(3).

32 Rev. Rul. 60-385, 1960-2 Cum. Bull. 77. The court in *In re Brock* noted that under this ruling:

> [W]here a will creates a trust with income payable to someone for life and the principal thereafter to a charity and the trustee is empowered to invest in mutual or regulated investment company funds, the remainder to charity will not qualify for the charitable deduction under federal estate tax law if, *under the applicable state law,* any capital-gains distribution on the shares of the mutual fund or regulated investment company would be allocated to income and distributed to the income beneficiaries. *In re* Brock, 420 Pa. 454, 218 A.2d 281, 282, n.4 (1966).

33 *Ibid.*

34 The Introductory Statement to N.J. REV. STAT. § 3A:14A-5, p. 13 (Supp. 1965) states:

> The change in Section 5 of the [Principal and Income] Act [classifying capital gains distributions of a mutual fund as principal] is proposed as a result of Briel v. Moody . . . . Under this decision where property is transferred or bequeathed in trust to one for life and on his death to charity, then if the trust may be invested in shares of an investment trust, no charitable deduction is allowed under the income, estate and gift tax laws. Rev. Rul. 60-385.

35 Tait v. Peck, 346 Mass. 521, 194 N.E.2d 707, 712 (1963). See Shattuck, *Capital Gain Distributions: Principal or Income?* 88 TRUSTS & ESTATES 160 (1949). *Contra,* Young, *supra* note 8.

the anomalous situation that losses resulting from the sale of securities would be borne by the remainderman, while the profits of such sales would go to the life tenant.[36] Since remaindermen have to bear any net capital loss which might occur,[37] it is reasonable to hold that they should be entitled to any net capital gain.

It is submitted that the court in *In re Brock* could have reached the same desirable result that it did, without violating the provisions of section 5 of the Pennsylvania Principal and Income Act. This result could have been achieved by a fuller utilization of the conduit theory. The mutual fund is a unique entity.[38] The "many doctrines evolved to fit the usual type of associative enterprise do not fit the fund."[39] The conduit theory recognizes this uniqueness and properly classifies the mutual fund as a mere conduit for management purposes. The mutual fund is not analogous to an ordinary business corporation and the doctrines evolved to govern the normal business corporation should not be superimposed upon a mutual fund. Since section 5 deals only with the dividend allocations of an ordinary business corporation,[40] the Pennsylvania Supreme Court could have held that due to the unique nature of a mutual fund, section 5 did not apply at all. The court then would have been free of statutory restrictions and able to adopt completely the approach of the conduit theory under which capital gains distributions are classified as principal.

The conduit theory and section 5 cannot logically coexist. The conduit theory asserts that a mutual fund is not an ordinary business corporation, whereas section 5 is applicable only to ordinary business corporations. It is submitted that the court in *In re Brock* should have clarified this area of law by holding that the conduit theory is applicable, but that section 5 is not.[41] Though the Pennsylvania Supreme Court may have erroneously interpreted section 5 of the Pennsylvania Principal and Income Act, the real impact of *In re Brock* is the court's acceptance of the conduit theory.

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36 *In re* Brock, 420 Pa. 454, 218 A.2d 281, 290 (1966).

37 As the portfolio assets decrease in value, the market value of the mutual fund shares decreases proportionally.

38 See note 20 *supra*.

39 Lobell, *supra* note 3, at 216. See text accompanying notes 21-22 *supra*.

40 See notes 25, 29 *supra*.

41 This view is expressed in the REVISED UNIFORM PRINCIPAL AND INCOME ACT § 6. The REVISED UNIFORM PRINCIPAL AND INCOME ACT § 6(c) gives mutual fund distributions their own separate classification consonant with the conduit theory. Maryland, MD. ANN. CODE art. 75B, § 6(c) (1965), and New Jersey, N.J. REV. STAT. § 3A:14A-5(d) (Supp. 1965), also have passed legislation granting mutual fund distributions their own separate classification consistent with the conduit theory, but distinct from such sections as 5(1) and 5(3) of the Pennsylvania Principal and Income Act. The trend is definitely toward the view that sections such as 5(1) and 5(3) do not apply, but rather that mutual funds should have their own classification. States that have enacted such legislation are: Connecticut, CONN. GEN. STAT. ANN. § 45-113(1) (Supp. 1965); Florida, FLA. STAT. ANN. § 690.06 (Supp. 1965); Idaho, IDAHO CODE ANN. § 68-1006(c) (Supp. 1965); Kansas, KAN. GEN. STAT. ANN. § 58-905(c) (Supp. 1965); Louisiana, LA. REV. STAT. § 9:2149C (1965); Maine, ME. REV. STAT. ANN. tit. 18, § 4054 (1964); Maryland, MD. ANN. CODE art. 75B, § 6(c) (1965); Michigan, MICH. STAT. ANN. § 26.79(6)(c) (Supp. 1965); New Jersey, N.J. REV. STAT. § 3A:14A-5(d) (Supp. 1965); North Carolina, N.C. GEN. STAT. § 37-5(e) (Supp. 1965); South Carolina, S.C. CODE ANN. § 67-509(c) (Supp. 1965); Tennessee, TENN. CODE ANN. § 35-706(1) (Supp. 1966); Wisconsin, WIS. STAT. ANN. § 231.40(5)(a) (Supp. 1966); Wyoming, WYO. STAT. ANN. § 34-379(c) (Supp. 1965).