Notre Dame Law Review

Volume 16 | Issue 3 Article 4

3-1-1941

Contributors to the March Issue/Notes

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Recommended Citation

James H. Neu, Lawrence J. Petroshius, Richard F. Swisher & Charles G. Hasson, *Contributors to the March Issue/Notes*, 16 Notre Dame L. Rev. 216 (1941).
Available at: http://scholarship.law.nd.edu/ndlr/vol16/iss3/4

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NOTES

Historical Background

ADVERSE POSSESSION IN INDIANA. — Probably one of the most important means by which one may obtain an original title to real estate is Adverse Possession. Of course, the obvious question now arises; what is adverse possession? Consequently, it may be well, first, to delve into some of the more prominent authorities that one may better understand the courts' interpretation of the concepts of adverse possession. One of the leading Indiana cases [1] seems to set forth that, in substance, adverse possession is the open, notorious, hostile, continuous, exclusive possession of property for the statutory period in defiance to all other claimants of the property. Another authority [2] states adverse possession to be, "The actual, open, and notorious possession and enjoyment of real property, or of any estate lying in grant,

1 Philbin v. Carr, 75 Ind. App. 560, 129 N. E. 19 (1920); Craven v. Craven, 181 Ind. 553, 103 N. E. 333 (1913).

2 BLACK'S LAW DICTIONARY.

continued for a certain length of time, held adversely and in denial and opposition to the title of another claimant, or under circumstances which indicate an assertion of color of right or title on the part of the person maintaining it, as against another person who is out of possession." Now, that one has an understanding of the legal definition of adverse possession, let us go a step further and trace the evolution of the concept of adverse possession.

Like many of the other laws embodied in American jurisprudence, the statutes which allow adverse possession in the United States found their way to this country from our English neighbors. As early as 1275, there was an enactment of a statute in England which dealt with the problems involved in adverse possession.[3] However, it was not until 1623, that England passed the statute which stands as the corner stone upon which has been built American statutes of adverse possession.[4]

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[3] Stat. 3 Edw. I c. 39 (1275).

[4] Stat. 21 Jac. I, c. 16, 1, 2 (1625).

"I. For quieting of men's estates, and avoiding of suits, be it enacted by the King's most excellent majesty, the lands spiritual and temporal, and commons, in this present Parliament assembled, and formedon in reverter, at any time hereafter to be sued or brought, of or for any manors, lands, tenements, or hereditaments, whereunto any person or persons now hath or have any title, or cause to have or pursue any such writ, shall be sued and taken within twenty years next after the end of this present session of Parliament; and after the said twenty years expired, no such person or persons, or any of their heirs, shall have or maintain any such writ, of or for any of the said manors, lands, tenements or hereditaments; (2) and that all writs of formedon in descender, formedon in remainder, and formedon in reverter, of any manors, lands, tenements, or other hereditaments whatsoever, at any time hereafter to be used or brought by occasion or means of any title or cause hereafter happening, shall be sued and taken within twenty years next after the title and cause of action first descended or fallen, and at no time after the said twenty years; (3) and that no person or persons that now hath any right or title of entry into any manors, lands, tenements or hereditaments now held from him or them, shall thereinto enter, but within twenty years next after the end of this present session of Parliament, or within twenty years next after any other title of entry accrued; (4) and that no person or persons shall at any time hereafter make any entry into any lands, tenements or hereditaments, but within twenty years next after his or their right or title which shall hereafter first descend or accrue to the same; and in default thereof, such persons so not entering, and their heirs, shall be utterly excluded and disabled from such entry after to be made; any former law or Statute to the contrary notwithstanding.

"II. Provided nevertheless, That if any person or persons, that is or shall be entitled to such writ or writs, or that hath or shall have such right or title of entry, be or shall be at the time of the said right or title first descended, accrued, come or fallen, within the age of one and twenty years, *femme covert, non compos mentis*, imprisoned or beyond the seas, that then such person or persons, and his or their heir and heirs shall or may, nothwithstanding the said twenty years be expired, bring his action, or make his entry as he might have done before this Act. (2) so as such person and persons, or his or their heir and heirs, shall within ten years next after his and their full age, discoveture, coming of sound mind, enlargement out of prison, or coming into this realm, or death, take benefit of and sue forth the same, and at no time after the said ten years."

Thus, from the English law, the basic principles of adverse possession found their way into this country. However, the right to gain an original title to land by open, notorious, hostile, continuous, exclusive possession is not a common law right, but rather this right is completely statutory and as such, the requirements for adverse possession depend solely upon the state statutes. Thus, the problem as to whether or not one is entitled to gain an original title to land by adverse possession is essentially a problem of statutory construction. The present article purports to discuss this problem of statutory construction in regard to the Indiana statutes.

Reason for Adverse Possession

Having traced the historical trend of adverse possession, there is another question which looms before one; namely, what is the reason for having the right of adverse possession? To answer this question adequately, one must again go to the authorities. One of the leading exponents on the subject of real property analyzes his reason for the statutes creating the right of adverse possession when he says, "The desirability of fixing, by law, a definite period within which claims to land must be asserted has been generally recognized, among the practical considerations in favor of such a policy being the prevention of the making of illegal claims after the evidence necessary to defeat them has been lost, and the interest which the community as a whole has in the security of title. The moral justification of the policy lies in the consideration that one who has reason to know that land belonging to him is in the possession of another, and neglects, for a considerable period of time, to assert his right thereto, may properly be penalized by his preclusion from thereafter asserting such right. It is apparently, by reason of the demerit of the true owner rather than any supposed merit in the person who has acquired wrongful possession of the land, that this possession if continued for the statutory period operates, to debar the former owner of all right to recover the land." [5]

However, the State of Indiana, through the medium of the court, has taken somewhat of a different view. In a leading Indiana case the court says, "The intention is not to punish one who neglects to assert his title, but to protect those who maintain the possession of the land for the time specified by the statute under claim of right or color of title." [6]

Another Indiana case [7] states, "Thus, while the statute is barring the right of recovery on the part of the true owner, it is ripening the title in the holder."

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5 TIFFANY, REAL PROPERTY, 3rd Edition, § 1134, Theory of Legislation.

6 Craven v. Craven, *supra*.

7 Jasperson v. Scharnikow, 150 Fed. 571, 80 C. C. A. 373, 15 L. R. A. (N. S.) 1178 (1907).

From these authorities it might be possible to deduce that in reality the reason for allowing adverse possession is two-fold, to penalize the legal title holder for his laches, and to reward the adverse possessor for his occupancy. This concept is based on the theory that land should be used and a premium is given to the one who keeps the land occupied and used. Thus, by allowing one to gain title to land by adverse possession, the party who does not till the soil or pay attention to the activities upon his land is punished for this non-interest or laches, and the party who claims such land, lives on it and improves it, is rewarded for his interest thereon by giving him title to the land at the end of the statutory period. Also, as a practical matter, the law needs adverse possession as a post upon which to hang mistakes in recording, defects in title, etc.

So, briefly, it may be said that the right of adverse possession developed as a matter of public policy, that long limb of justice on which needed legal principles are hung where no other branch of the law is available.

Status of Adverse Possession in Indiana

Indiana, like the other states of the union, early saw a need for a statutory enactment which would require one who owned property and sought recovery of possession of said property to bring an action for recovery of possession of said property within some specified time. So, in the statute passed by the Indiana Legislature one may find the following under Limitation of Actions, "The following actions shall be commenced within the periods herein prescribed after the cause of action has accrued, and not thereafter: . . .

Six: . . . and for the recovery of the possession of real estate, within twenty years."[8] This statute has been in force for many years and it is the statute used by adverse claimants as a defense in suits of ejectment. So, in Indiana, the requirements for adverse possession were simply that the adverse party hold the property as his own against the world in an open, notorious, hostile, exclusive and continuous manner for the statutory period of twenty years.[9]

Then came the year 1927. This particular year may not have affected the world in general, but in Indiana in regard to adverse possession the "lid was blown off the kettle" by the passage of Chapter 42, Acts 1927 Indiana Legislature.

In 1927, in the State of Indiana, there was great agitation in the northern part of the state caused principally by "squatters" who were obtaining original titles to lands by adverse possession. The principal complaint was to the effect that many large corporations, which owned

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8 BURNS ANNOTATED STATUTES, § 2-602 (1933).

9 Craven v. Craven, *supra*.

great tracts of unoccupied lands, were paying taxes on these lands as well as being the legal title holders, and mere "squatters" had settled all over these tracts and by 1927, these "squatters" had obtained original titles to these lands by adverse possession. The situation called for immediate action or these corporations would lose many thousands of dollars.

The obvious remedy to the tense situation was the passage by the Indiana Legislature in 1927 of Chapter 42 of the Acts of 1927 Indiana Legislature:

"Section 1. Be it enacted by the general assembly of the State of Indiana, that hereafter in any suit to establish title to lands or real estate no possession thereof shall be deemed adverse to the owner in such manner as to establish title or rights in and to such land or real estate unless such adverse possessor or claimant shall have paid and discharged all taxes and special assessments of every nature falling due on such land or real estate during the period he claims to have possessed the same adversely: Provided, however, that nothing in this Act shall relieve any adverse possessor or claimant from proving all the elements of title by adverse possession now required by law." [10]

By the passage of this 1927 Statute, the Indiana Legislature in effect creates another requirement to obtain title to land by adverse possession, to-wit: the payment of taxes on the land for the twenty-year period.

Thus, it is immediately apparent that this statute is bound to cause a great deal of controversy among the members of the judicial arm of the government. It appears very clear that this apparently simple statute may cause a great problem in statutory construction, and a great deal of "food for thought" as to its constitutionality, its effect on "squatters" and sundry other technical legal problems.

So, in short, these two statutes, to-wit: The limitation of twenty years, in which the owner of land may regain possession, and the statute requiring the payment of taxes on land for adverse possession, cause a dilemma among attorneys as to their proper statutory construction.

Problem Created

It is now the purpose of this article to review some of the pertinent problems which are created by the Adverse Possession Act of 1927, and also to suggest some possible solutions to these problems.

First, in regard to any legislative act, the question at once arises, is the act constitutional? A splendid commentary on this phase of the Act which held the act constitutional, reads in part, "... we are also brought to the conclusion that the act is constitutional because the statute is

10 BURNS ANNOTATED STATUTES, § 3-1314 (1933).

readily susceptible to a construction which excludes from its operation right and interests vested before the statute became operative." [11] Thus, one can dispense with the constitutionality of this statute.

Another question arises as to the rights of a legal title holder as against an adverse possessor. Let us assume the following facts. Mr. A has the legal title to a certain tract of land, "Blackacre," which is situated in Indiana. Mr. B has been in adverse possession of "Blackacre" for twenty years. Mr. B has fully performed all of the requirements for adverse possession in Indiana except payment of the taxes on said land, which payment of taxes has been made by Mr. A. At the end of this twenty-year period Mr. A brings a suit in ejectment against Mr. B. Mr. B's defense is the statute of limitations which in substance requires the legal owner of land to bring any possession proceedings for real property within twenty years. It is at once apparent that a problem has been created. The question is essentially one of statutory construction. It is true that Mr. B cannot claim the land as an adverse possessor for to claim an original title to the land by adverse possession in Indiana, one must have paid the taxes on the land.[12] But Mr. B wisely doesn't claim adverse possession, he merely claims that he, Mr. B, can't be ejected from the land because of Mr. A's laches in not bringing his suit within the prescribed statutory period. The writer submits that Mr. B may not be ejected from the land unless the statute of limitations [13] and the taxation statute [14] for adverse possession are read together, and this tortures the author's concepts of statutory construction. Mr. Gavit, in his learned comment on the problem [15] suggests that the legal title holder should proceed to have title quieted first, and then eject the "squatter." To reassure one that by getting title quieted, the legal owner would be assured of possession, Mr. Gavit submits *Trittip v. Morgan* [16]: "The provisions on the subject of quieting title and recovering possession are too closely interwoven to be separated." But, the fact that this case was decided in 1884, before the present problem of construction of the statute prevailed seems to lessen the effectiveness of the quotation.

The writer still contends that even assuming Mr. Gavit's ideas to be correct and possession to be subsequently recreated in the legal title holder, yet the adverse possession act in question is defective in that it certainly creates an ambiguity in the case of Mr. A and Mr. B submitted by the writer. For, if the courts allow Mr. B to be ejected,

11 Commentaries on the Public Acts of Indiana, 1927 — II The Adverse Possession Act, by G. A. Farabaugh and Walter R. Arnold, 4 IND. L. R. 113 (1927).

12 BURNS ANNOTATED STATUTES, § 3-1314 (1933).

13 BURNS ANNOTATED STATUTES, § 2-606 (1933).

14 BURNS ANNOTATED STATUTES, § 3-1314 (1933).

15 In Defense of the Indiana Adverse Possession Act by Alfred H. Gavit.

16 99 Ind. 269 (1884), from Mr. Gavit's article "In Defense of the Indiana Adverse Possession Act of 1927."

they have simply overlooked the limitation statute requiring possession actions to be brought within twenty years, and the case would have been decided solely on the 1927 Adverse Possession Act requiring payment of taxes for adverse possession. And, the author submits that is not a proper rationalization of the two acts in question. Thus, the act of 1927 is defective in substance since it is a poor law which does not work both ways.

It is true that these adverse possession tax statutes are not a novel step in legislation [17] and it may be well to review some of the problems created by them in other jurisdictions, and perhaps attempt possible solutions to these problems in Indiana under the Adverse Possession Act of 1927.

Let us consider the problem of an adverse possessor who claims land on which there has been no tax assessment or an illegal assessment. Does this dispense with the tax requirement? The Indiana Act says that all taxes and special assessments *"of every nature falling due on such land or real estate during the period he claims to have possessed the same adversely"* must be paid to justify the claimant to adverse possession. The cases are in hopeless conflict on this point.[18] The writer submits that if there is a void assessment or no assessment in fact, then no taxes fall due and if none fall due, according to the statute, none need to be paid. However, the problem is one of statutory construction to be determined by the courts.

Also, another problem as to whether the statute requiring tax payment acts retroactively. That is, do those who prior to the act gained property by adverse possession lose it because they have paid no taxes on the land. California answers this question in the negative.[19]

Another pressing question is, who may pay the taxes? Does the "squatter" himself have to pay the taxes or may someone in privity with the adverse claimant pay the taxes? Some states hold that if the taxes are paid by one having a privity with the adverse claimant this is all that the statute requires.[20] However, the Indiana statute specifically requires "*. . . the adverse possessor or claimant shall have paid and discharged all taxes . . .*" So, in Indiana, a party, privity to claimant paying the taxes would probably not be sufficient under the statute.

Also, may the adverse claimant pay the taxes in a lump sum, or can he only pay the taxes each year as they accrue? Quoting an authority on this point: "Some courts, even though the statute does not expressly

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17 Arizona, Arkansas, California, Colorado, Idaho, Illinois, South Dakota, Utah, Wyoming, Texas and West Virginia, 2 C. J. 203-212, 2 C. J. S. 745.

18 California, Idaho and Kentucky hold the requirement of payment of taxes is dispensed with where no assessment or void assessment made. Colorado, Illinois, Missouri, Texas are contra.

19 Wachter v. Bullard, 215 P. 696, 61 Cal. App. 683 (1923).

20 Southern Pacific R. Co. v. Whitaker, 41 P. 1083, 109 Cal. 268 (1895).

so provide, require claimant to pay the taxes each year of the period before they become delinquent so that the true owner may have due notice that his land is being claimed adversely. Other courts refuse to apply such a construction to the statute and hold that the payment of the accrued taxes for the consecutive years constituting the statutory period at any time when such taxes are payable during the period is a sufficient compliance with the statute." [21]

Here, then, is another problem of construction which faces the courts in regard to the Indiana Statute.

So, it is evident that these and many other problems face the courts when they come to construe this new adverse possession statute.

Conclusion

One may conclude that, by the passage of the 1927 Adverse Possession Act, the rights of a person to gain an original title to land or real estate by adverse possession, have added one new requirement to the former pre-requisites, namely, that the adverse claimant must pay taxes on the land for the statutory period.

The reason for this new requirement is also apparent, the further protection of the legal title holder and the greater notice afforded to him.

Then, one examined the actual law itself, and saw the conflict of the Adverse Possession Act 1927 with the Statute of Limitations for possession of land. It is impossible, in all instances, to construe these acts separately and rationalize them.

Then, one has viewed the sundry problems which are created by this type of legislation. From these problems it is evident that in the near future the courts of Indiana will be called upon to construe this 1927 statute to fit the needs of the populace and the intent of the legislature.

So, this new trend in Indiana Adverse Possession created by Chapter 42, Acts 1927, Indiana Legislature may afford the desired change in the Adverse Possession requirement, but the act certainly creates many new problems in statutory construction, and ample opportunity for attorneys to speculate in the administration of this act — before the courts settle all of the questions and problems which confront the students of law in regard to this innovation in adverse possession in Indiana.

James H. Neu.

21 2 C. J. S. (Adverse Possession) § 175.

ILLINOIS RETAILER'S OCCUPATION TAX—IS THE CONSUMER (BUYER) LIABLE FOR THE TAX?—TO WHAT EXTENT IS THE SELLER EVADING THE TAX?—The Retailer's Occupation Tax of the state of Illinois has been given the common name of "sales tax," and the practice has developed in that state of passing this tax on to the consumer as a tax which is placed upon the consumer or buyer. Thus the retailer in the state of Illinois after agreeing to sell an article for a stipulated sum will then add three percent to the sales price and tell the purchaser that the agreed upon price plus three percent "sales tax" is what the purchaser must pay for the article. The question thus arises as to whether or not the tax is a "sales tax" and by what right does the seller represent to the buyer that the buyer must pay this "sales tax." It is with this problem that this paper is intended to treat, hence it is necessary to establish exactly what the tax is, and upon whom is the burden to fall directly. Indirectly, of course, the tax may fall upon any individual, but such is not true as to the direct burden of the tax. Excluding all other problems in relation to this act, let us delve into its exact nature.

The statute gives the short title to the act as "An act in relation to a tax upon persons engaged in the business of selling tangible personal property to purchasers for use or consumption." [1] The tax is placed upon persons engaged in the business of selling personal property to the ultimate user or consumer. The statute defines a sale at retail in the following manner: "'A sale at retail' means any transfer of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration." [2] The use of the term "sales tax" in reference to this tax is a legal *misnomer*, and the cases on the matter have settled this point definitely. In the case of *Herlihy Mid-Continent Co. v. Nudelman, Director of Finance*,[3] the court stated in regard to this tax: "The tax here questioned is not a privilege tax imposed upon purchasers, like the motor fuel tax; it is not a property tax upon the items sold; nor is it a sales tax. The tax involved here is an occupation tax upon a class of vendors and is measured by the gross receipt from their sales." The case of *Franklin County Coal Co. v. Ames*,[4] also holds that the act imposes an occupation tax, and not a sales tax. Having thus seen that the tax in question is an occupation tax and not a sales tax or property tax, we shall next find out what the definitions of these various types of taxes have been held to be.

A property tax is a tax levied against property merely for the purpose of raising revenue, and not to control the use or operation of prop-

1 ILLINOIS REV. STAT. 1939, c. 120 § 440.

2 *Ibid.*

3 367 Ill. 600, 12 N. E. 2d 638.

Also Revzon v. Nudelman, Director of Finance, 370 Ill. 180, 18 N. E. 2d 219 (1938).

4 Franklin County Coal Co. v. Ames, 359 Ill. 178, 194 N. E. 268 (1934).

erty.[5] An occupation tax is a tax levied for the purpose of regulating and controlling a given business or occupation, or levied on the privilege of exercising, undertaking, or operating any given occupation, trade, or profession. "Its effect is to license a person engaged in a given calling or occupation. A license in form may not be issued to a taxpayer, but the payment of the tax is the license under the authority of the state to engage in such occupation." [6] Hence this case shows that the retailers who come under this act are obligated to pay the tax for the privilege of engaging in that business, and such payment constitutes the securing of a license to engage in that business. Thus it can be seen that the tax is not one placed upon the purchaser, but is directly upon the seller. This fact must of necessity be accepted as true, and the question may then arise as to the authority of the state to so license business, but the discussion of that matter is not within the scope of this paper. A sales tax is an excise tax on sales, yet not one on the articles sold.[7] It is thus clear that the tax here in question is definitely an occupation tax as distinguished from either a sales tax or property tax.

The act provides that the amount of the tax to be paid by the retailer is to be computed by the amount of sales, but this fact does not make the tax a sales tax. The statute does not purport to levy a tax upon sales as such, but computes the tax levied for the privilege of following an occupation upon the volume of sales.[8] The fact that an occupation tax is measured by gross income or sales does not change its character, or make it a sales tax.[9]

Thus these cases show that the tax is an occupation tax placed upon the retailer for the privilege of engaging in business. Since the tax is on the retailer, by what right or authority does he directly pass the tax on to the buyer? Where a sale is completed, or a contract to sell is completed, could the purchaser demand possession of the article bought without paying the so-called "sales tax" that the seller tells him he must pay? From the cases thus set out it appears that the seller has no legal right to demand that the buyer pay the tax. If the seller includes the tax in the selling price of the article, then the buyer has contracted to pay that selling price, and the mere fact that it also includes the tax is immaterial; but it is in that class of business transactions where the buyer buys an article for a certain price and is later told that he must pay a "sales tax" that it appears that an injustice is being done, and that the seller is demanding something to which he has

5 Reif et al. v. Barret, Auditor of Public Accounts, 355 Ill. 104, 188 N. E. 889 (1933).

6 *Ibid.*

7 Glenn L. Martin Co. v. United States, 23 F. Supp. 262 (1938).

8 *In re* Messenger's Merchants Lunch, 85 F. 2d 1002 (1936).

9 Seattle Gas Co. v. City of Seattle, 192 Wash. 456, 73 P. 2d 1312 (1937).

no right. The payment of the three per cent levy by the buyer to the seller is then a mere donation to the seller.

Upon what theory does the seller directly place this tax upon the buyer? Is it upon the grounds that the legislature intended that the three per cent levy be added to every sale? Or perhaps, is it upon the ground that it has become the well established custom and the buyer knows that he must pay the tax, hence the buyer should be held to know that the selling price of all goods will be three per cent more than advertised, or contracted for?

The first theory is treated in the cases in this state, and is refuted by these cases. In the case of *Franklin Coal Co. v. Ames, Director of Finance* [10] the court held that even though in some instances the seller may not be able to pass the tax on to the consumers, this is by reason of competition and is not such an incident as would support an allegation that the act imposes a tax upon the occupation of the seller as is unlawful or that the legislature did not intend to impose the tax upon them. If the legislature had intended that the tax be placed upon the consumer rather than the seller, a sales tax should have been passed, as was first attempted in Illinois. In the states where sales taxes exist, the burden is placed upon the buyer directly, and since the Illinois statute directly and clearly states that the tax is upon the retailer, it cannot successfully be contended that the legislature intended that the retailer directly pass it on to the buyer. In the state of Pennsylvania a case arose involving double taxation as to a sales tax and a license tax. In that state a retail sales tax ordinance enacted by the city of Philadelphia was not invalid as applied to various corporations as a duplicate of the mercantile license tax imposed by the commonwealth, since the mercantile license tax is an excise tax on the privilege of doing business, whereas the sales tax is a tax paid by the purchaser on transactions.[11] Where the tax is to be placed directly upon the purchaser, the states having a sales tax express that fact in the statute creating the tax. Thus this first theory is not well founded.

The second possible theory upon which the seller directly passes the tax on to the consumer may be more difficult to refute, yet it is equally unjust. If this custom has been well established that the buyer has knowledge that the price of any good will be increased by three percent, such that it must be inferred that such augmented price is the real selling price in the minds of both parties, and the one actually agreed upon, by whom was this custom established? It is apparent that the buyers did not themselves volunteer to pay the tax and thus create the custom, but such custom, if indeed it exists, was established through the misrepresentations of the seller to the buyer that the Retailer's Oc-

10 Franklin County Coal Co. v. Ames, 359 Ill. 178, 194 N. E. 268 (1934).

11 Blauner's Inc. v. City of Philadelphia, 330 Pa. 342, 198 A. 889 (1938).

cupation Tax was in reality a "sales tax" placed upon all sales, and that the buyer must pay the tax. Hence the seller through misrepresentation and fraud would be said to have created a custom which enables him to fraudulently pass on the tax to the buyer. To hold to this last theory would be to place a premium upon fraud, and such the law cannot do.

To refute this second theory in another manner, it is expedient to go back to an old legal maxim and pure reasoning. The legal maxim is that every person is presumed to know the law. Since the buyer is a person, the buyer is presumed to the know the law. The law is that the seller is obligated to pay the tax to the state. Since the buyer is presumed to know the law, the buyer is thus presumed to know that the seller must pay the tax to the state. Now taxes are a part of the cost of business, and the selling price of articles is determined by the costs of production and distribution. This is a fact known to the average layman. Now since the buyer is the average layman, he knows that the selling price of the articles he purchases is determined by cost, and that the taxes on that business are included in the selling price. Hence, since the buyer is presumed to know that the seller must pay the tax in question, and since he also knows that such tax is one of the elements that determines the selling price of the articles, he thus can assume that the selling price he has agreed to pay already includes the tax. Hence it cannot be said that he knows that the tax will be added to the price he has agreed to pay, for he already is presumed to know that the selling price has already included the tax. Thus with a simple legal maxim, a few bits of common knowledge, and a bit of reasoning set out in syllogistic form, the theory that the buyer knows and expects that the tax will be added to the price he has agreed to pay for an article is refuted.

Thus we have a practice in the state of Illinois which seems to have no legal basis for its existence. It must be remembered that herein we are dealing only with those cases in which the seller attaches the tax to the sales price after such has been agreed upon by the parties. In the cases where the seller notifies the buyer that the selling price of the goods is the advertised price plus the three percent levy, then the buyer knows that he will have to pay the augmented selling price, not the price advertised, and he cannot complain. Even in cases of this kind, while there may be nothing legally wrong, is it to be considered very moral or decent to advertise goods for sale at one price, and then sell at a price three percent higher? This is the practice in the state of Illinois, where the seller creates desires and demands for certain goods by advertising them for sale at one price, and then, upon getting the interest of the public aroused to such an extent that they want the article, charges them not the advertised price, but a price three percent higher. This is an unethical practice and should not be condoned.

Further authority for the contention that this tax is not to be passed on to the buyer as a direct tax, and one which the buyer is legally obligated to pay, is found in the tax cases of the federal government. State, county, town and municipal taxes, paid or accrued within the fiscal year, are deductible from gross income in that year in computing the amount of taxable income under the federal income tax.[12] Yet the federal tax board has held that the tax imposed under the Retailer's Occupation Tax Act of Illinois, being imposed upon and payable by the vendor, is not deductible by the vendee even though the latter makes payment to the vendor of the amount of the tax.[13] Thus the federal government does not recognize that this tax is placed on the buyer, and even though the buyer does pay the tax, he cannot deduct such payment from his gross income in determining the amount due under the federal income tax. Hence since all other state taxes levied upon the individual and paid by him are deductible, this one is not, for it is not levied upon him, and his payment of such is in the nature of a mere donation to the seller.

Section six of the act provides that when any amount of tax has been paid which was not due under this act, whether as a result of mistake of fact or on error of law, then such amount shall be credited against any tax due or to become due under this act from the person who made the erroneous payment, or such amount shall be refunded to such person by the department. In cases where persons not subject to the tax paid it to the state, they were refunded their money.[14] If these individuals who through mistake paid the tax directly to the state were allowed to get their money back, what right has the individual buyer who pays the tax, not directly to the state, but to the seller who represents to him that he must pay the "sales tax," under the mistaken belief that he was legally obligated to pay the tax as such, to have this money refunded on the grounds that he paid it under a mistake of law or fact? This question has not been answered by the courts, but it is worthy of thought.

From our research up to this point it is apparent that the sellers collect this three precent tax from the buyers, either on the grounds that the tax is directly placed upon the buyer, or that the selling price of the goods sold is not what was advertised and agreed upon, but actually that price plus the rate of the tax. We have seen that the tax is not directly placed upon the buyer, and if the seller collects it on that theory he is receiving this money under false and fraudulent representations to the buyer, and is collecting it as a tax, in which case the buyer is paying the tax under mistake, and should be able to sue under Section

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12 1 B. T. A. 194 (1924); 8 B. T. A. 112 (1927); 2 B. T. A. 788 (1925).

13 Eckstein v. C. I. R., 41 B. T. A. 746 (1940).

14 Herlihy Mid-Continent Co. v. Nudelman, 370 Ill. 237, 18 N. E. 2d 225 (1938); People, ex rel. Blome v. Nudelman, 373 Ill. 220, 25 N. E. 2d 811 (1940).

Six of the act and recover the amount so erroneously paid. If the seller collects the tax on the theory that it is a part of the sales price, then he must pay to the state a tax upon the entire amount collected from the buyer. As a matter of practice in many stores in the state, the seller lists the price of the goods, and the three per cent "sales tax" collected separately, and pays the state the tax on the price listed, but not on the "sales tax" collected. As mentioned before, the act provides that the tax is to be collected on the gross sales of the business. Now if the retailer treats the amount he collects from the buyer under the term of "sales tax" as a part of the sales price of the articles, then that amount must be included in totalling the gross sales as a part of the purchase price, and the three per cent levy will apply to it also. The fact that this is not done in many of the businesses in the state shows that there is widespread evasion of the tax. Hence the retailer who collects the "sales tax" from the buyer must beware, for if he collects it under the theory that the buyer is legally obligated to pay, he may be liable to repay it to the buyer; or if he collects it under the theory that it is understood that it is a part of the purchase price and is collectible as such, he must pay the state the tax on the part so collected, as well as on what he lists as the price of the goods, for the tax is a levy on the amount of the gross sales, and the complete selling price of each article sold must be totalled in computing the gross income from sales.

By way of comparison, this tax in Illinois does not resemble a sales tax, but instead resembles a tax such as the gross income tax of the state of Indiana as applied to business. In Indiana the retailer is obligated to pay a tax upon the gross income from his business, and while he must make his prices higher to be able to make enough to pay the tax, the custom has not arisen there to charge the tax to every purchaser, and probably will not arise, for it is doubtful that the seller could collect such tax. With two sister states having taxes which resemble each other, and the practice of merchants as to those taxes differing widely, the question arises as to why such a difference exists. Perhaps it is that the retailers of the state of Illinois are more adept at being able to sell ideas to the public, even though such ideas or facts are not true.

Thus it is seen that the so called "sales tax" of the state of Illinois is not a sales tax, but an occupation tax; it is not a tax placed upon the buyer, but is rather placed upon the seller; the practice of collecting it from the buyer as if the buyer were under the direct legal obligation to pay, is without legal foundation; and the collecting of the tax from the buyer as a part of the sales price without paying a tax upon the extra amount collected is an evasion of the tax by the retailer.

Lawrence J. Petroshius.

THE CHANGED NATURE OF INCOME IN A JOINT RETURN UNDER FEDERAL INCOME TAX.—Under the Federal Income Tax law, it has long been possible for a man and wife to file a joint tax return; it is important to determine the nature of the income in such a return. For some time, this income was thought to be the income of two separate taxpayers. Recently the Supreme Court of the United States decided that such income is the result of a single entity, the separate incomes of the spouses comprising a unit, taxable as such, regardless of which spouse furnished the income and which spouse furnished the deductions. The importance of such a determination is evident in the computation of any deduction which is limited to a certain portion or percentage of the income. It is obvious on examination of the cases that this changed nature of the income in a joint return may, in some cases at least, result in a saving in amount of taxes paid under a joint return.

The new ruling was handed down by the Supreme Court of the United States in *Helvering v. Janney*,[1] and in *Taft v. Helvering*.[2] At the same time that it decided the Janney case, the Supreme Court also reversed and remanded a judgment of the Circuit Court of Appeals of the Second Circuit, *Gaines v. Helvering*.[3] In these cases, the court expressly rules that the income as reflected in a joint return filed by man and wife is the aggregate net income of the man and wife, the two persons being deemed an entity for tax purposes rather than as two individual taxpayers.

The Revenue Act of 1934, Section 51 (b),[4] provides: "If a husband and wife living together have an aggregate net income for the taxable year of $2,500 or over, or an aggregate gross income for such year of $5,000 or over — (1) Each shall make such a return, or (2) The income of each shall be included in a single joint return, in which case the tax shall be computed on the aggregate income." This provides the basis for the filing of a joint return by a man and wife if they so choose.

In 1934, Walter C. Janney and his wife, Pauline F. M. Janney, filed a single joint tax return with the collector of internal revenue for the first district of Pennsylvania at Philadelphia. They lived together for the entire year at Bryn Mawr, Pennsylvania. During that year Mrs. Janney realized a gain from the sale of capital assets in the amount of $127,501.00. The amount of such gains which was taxable under the 1934 Revenue Act, Section 117 (a),[5] was $94,491.00. During the same year Mr. Janney suffered losses from the sale of capital assets of $229,544.66. The amount of this to be taken into account under Section 117 (a) of the Revenue Act was $91,963.35. In filing their

1 61 S. Ct. 241 (1940).
2 61 S. Ct. 244 (1940).
3 61 S. Ct. 241 (1940) reversing 111 F. 2d 144 (1940).
4 26 U. S. C. A. Int. Rev. Acts, p. 683.
5 26 U. S. C. A. Int. Rev. Acts, p. 707.

joint return for 1934 Mr. and Mrs. Janney showed the $94,491.00 as an inclusion in gross income and deducted the $91,963.35 loss in *toto*. The return showed a net income of $26,160.30 on which taxes amounted to $1,648.91. Under Treasury Regulation 86, Article 117-5, the commissioner refused to allow the loss of $91,963.35 to be deducted except to the extent of $2,000.00 as provided for by Section 117 (d) of the Revenue Act of 1934.[6] Thus the disallowance was $89,963.35, giving rise to a deficiency in the tax of $37,109.29.[7]

The Revenue Act of 1934 provides: Section 23 (j) "Losses from sales or exchanges of capital assets shall be allowed only to the extent provided in Section 117 (d)";[8] Section 117 (d) "Limitations on Capital Losses. Losses from sales or exchanges of capital assets shall be allowed only to the extent of $2,000.00 plus the gains from such sales or exchanges. . . ."[9]

Treasury Regulation 86, Article 117-5, which gave rise to the Commissioner's ruling, provides: "Application of section 117 in the case of husband and wife. — In the application of section 117 a husband and wife, regardless of whether a joint return or separate returns are made, are considered to be separate taxpayers. Accordingly the limitation under section 117 (d) on the allowance of losses of one spouse from sales or exchange of capital assets is in all cases to be computed without regard to gains and losses of the other spouse upon sales or exchanges of capital assets." On the authority of this regulation and *Pierce v. Commissioner of Internal Revenue*,[10] the Board of Tax Appeals upheld the commissioner and disallowed the deduction.[11]

The Circuit Court of Appeals for the Third Circuit reversed the decision of the Board of Tax Appeals.[12] The court agreed with the dissent given by Judge Learned Hand in the Pierce case, saying: "Other allowable deductions in excess of gross income of one spouse may be deducted from the net income of the other, for otherwise there would be no point in filing a joint return. Thus the right to file the joint return involves the necessity of disregarding the source from which the deduction is derived." "Since the statute provides that in the case of a joint return 'the tax shall be computed on the aggregate income' it logically and indeed necessarily follows, in the absence of an express statutory provision to the contrary, that in arriving at joint net in-

6 26 U. S. C. A. Int. Rev. Acts, p. 708.

7 This deficiency also represents the deficiency due to a disallowed loss of $729.82, but for purposes of this article, the item is inconsequential.

8 26 U. S. C. A. Int. Rev. Acts, p. 673.

9 *Supra*, note 6.

10 100 F. 2d 397 (1938).

11 39 B. T. A. 240 (1939).

12 108 F. 2d 564 (1939).

come both gross income and deductions of the spouses must be aggregated and treated as the income and deductions of a single taxpayer."

The Pierce case had arisen on a similar set of facts, and on appeal the Circuit Court of Appeals for the Second Circuit had upheld the commissioner in his reliance on the treasury regulation in question. In his dissent in that case, Judge Learned Hand had said: "When Section 51 (b) (2) requires the tax to be computed on the net aggregate income, it means the balance found by adding together all those items of gross income, which both spouses would be obliged to enter on both their separate returns, and subtracting all those deductions, which the statute allowed to both upon such returns." Hand argues that the basis of the privilege of filing a joint return is the disregarding of the source of income: "the spouses exercise it only when they can get some benefit from it; that is, when some loss of one can be set off against some gain of another."

On appeal, the Supreme Court of the United States upheld the lower court's ruling in the Janney case. Mr. Chief Justice Hughes gave the opinion: "The 'aggregate income,' to which paragraph 2 of Section 51 (b) refers, is clearly the aggregate net income as it is the aggregate income on which the 'tax shall be computed.' In that view the deductions to which either spouse would be entitled would be taken, in the case of a joint return, from the aggregate gross income." The court concludes, "We are of the opinion that under the provisions of the Act of 1934 as to joint returns of husband and wife, which embodied a policy set forth in substantially the same terms for many years, Congress intended to provide for a tax on the aggregate net income and that the losses of one spouse might be deducted from the gains of the other; and that this applied as well to deductions for capital losses as to other deductions. This, we think, was the meaning of the provision of the Revenue Act of 1934 when it was enacted, and it was subject to change only by Congress, and not by the Department." Thus, the court expressly reversed the holding of the Circuit Court of Appeals for the Second Circuit in *Gaines v. Helvering,* and impliedly reversed *Pierce v. Commissioner of Internal Revenue,* which the Circuit Court relied on in ruling the Gaines case.

The Taft case arose under the regulation of the Treasury whereby the deductions in respect to charitable contributions are to be computed in regard to the income of the spouse making the contribution. Henry W. Taft and his wife Julia W. S. Taft of New York, N. Y. in the years 1934 and 1935 filed joint tax returns. In 1934 the aggregate net income was $83,682.99 after making a deduction of $2,852.00 for charitable contributions. Of this Mrs. Taft contributed more than half, $1,477.00 and her husband $1,375.00. Without reference to her deductions, Mrs. Taft's net income for the year was only $12.10. In 1935 the aggregate net income of the couple was $92,374.59 after making a deduction of $2,715.80 for charitable contributions. Mrs. Taft's contributions accounted for $1,545.80 of this and Mr. Taft's for $1,170.00. Mrs. Taft's net income for that year was $15.30. During both years, except for the nominal amount of her own net income, the source of Mrs. Taft's contributions were gifts from her husband. By the Revenue Act of 1934 and 1935 the amount of charitable contributions deductible was limited to 15% of the net income.[13] Treasury Regulation 86 Article 23 (o)-1 provides: "Contributions or gifts by individuals. — Whether a husband and wife make a joint return or separate return, the 15 percent limitation of the deduction for contributions or gifts is based on the separate net income (computed without regard to such contributions of gifts) of the spouse making the contributions or gifts." By applying this regulation, the Commissioner disallowed the contributions made by Mrs. Taft except to the extent of 15% of $12.10 and of $15.30. This gave rise to a petition on the part of the taxpayers for redetermination of tax for 1934 and 1935 in the amounts of $722.79 and $827.17 respectively. The petitioners asserted the single entity of a joint return but the Board of Tax Appeals upheld the Commissioner.[14] On appeal, the Circuit Court of Appeals upheld the Board's ruling.[15] The Supreme Court of the United States reversed the decision to bring it into harmony with the Janney case. The opinion in both cases were handed down on the same day. The court laid stress on the fact that a joint return is to be treated as a "taxable unit." The court said, "We are of the opinion that under the Revenue Act of 1934, taken with the meaning we think it had when enacted, petitioners were entitled to the combined deductions they claimed, and that the departmental regulation to the contrary was ineffective to deprive them of that right."

Although these two cases were decided in regard to previous Revenue Acts and the Treasury Regulations promulgated by those acts, the effectiveness of the decisions will not be lost on current code provisions and departmental regulations.[16] Treasury Regulation 103 Section 19.23 (o)-1 is exactly the same as Treasury Regulation 86 Article 23 (o)-1. Treasury Regulation 103 was promulgated by the Revenue Act of 1940. Under the current Revenue Act, capital gains and losses are either short term or long term, depending on whether the securities from which the gain or loss arises has been held more or less than eighteen months. Treasury Regulation 103 Section 19.117-5 provides: "Application of section 117 in the case of husband and wife. (a) Short-term capital gains and losses. — Under the general rule with respect

[13] 26 U. S. C. A. Int. Rev. Acts, p. 674.

[14] 40 B. T. A. 229 (1940).

[15] 111 F. 2d 145 (1940).

[16] For the current code provisions, see 26 U. S. C. A. § 51 (b); 26 U. S. C. A. § 117 (d); 26 U. S. C. A. § 23 (o).

to taking deductions in a joint return of husband and wife, a deduction which is not allowable in computing the net income of one spouse making a separate return is not allowable in a joint return made by both spouses. Hence the limitation under paragraph (2) of section 117 (d), prior to its amendment, and section 117 (d) as amended, relating to the allowance of short term capital losses, is in the case of one spouse, to be computed without regard to the short-term capital gains and losses of the other spouse, regardless of whether a joint return or separate returns are filed." By this regulation the department seeks to prevent the deductions of short-term capital losses of one spouse from the short term capital gain of the other spouse in a joint return. There is little doubt but that the Supreme Court would overrule this regulation as readily as it did the former regulation. These two decisions make the inconsistency between legislative and departmental provisions just as great now as under the 1934 act.

Richard F. Swisher.

WILLS—THE LUCID INTERVAL IN TESTAMENTARY MENTAL CAPACITY.—Testamentary mental capacity is necessary to make a valid will. Juctice Blackstone spoke of it [1] when psychiatry in its present form was unknown and the treatment of mental defectives a crude science. Despite the serious nature of mental illness in its varied forms, there occasionally occurs, as we shall later see, a lapse in the condition, producing a period of lucidity. Courts have accepted the mental capacity present in such periods, and the doctrine that "a will executed by a testator in a lucid interval is valid," [2] has enjoyed almost universal acceptance. In an early American case, it was decided that deliberation and thought, in the execution of a will, may establish a complete intermission of the insanity of one before afflicted with habitual insanity.[3]

Because of differences in expert testimony and the limited medical knowledge of the courts, the problem of giving a strict definition of the term "lucid interval" is still present today. An early attempt to define the term can be found in English law. It was described as "an interval in which the mind, having thrown off the disease, had recovered its gen-

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1 "Madmen, or otherwise *'non compotes,'* idiots, or natural fools, persons grown childish by reason of old age or distemper, such as have their senses besotted with drunkenness — all these are incapable, by reason of mental disability, to make any will so long as such disability lasts." Commentaries II. p. 497.

2 *In re* Martin's Estate, 170 Cal. 657, 151 P. 138 (1915); Lum v. Lasch, 93 Miss. 81, 46 So. 559 (1908); *In re* McDermott's Will, 14 Mills 356. 154 N. Y. S. 923 (1915).

3 Lee's Heirs v. Lee's Executors, 4 McCord 183 (S. C.), 17 Am. Dec. 722 (1827).

eral habit." [4] Professor Page has criticized this language, however, because it places an unreasonably high standard of mental capacity where a lesser one would be adequate. He further states that such an interval, according to scientific findings, is rarely found.[5] The New York court, in defining the mental capacity present in a lucid interval, states that the testator must be laboring under no delusions with reference to those who have claims on his bounty.[6] Another legal writer, in speaking of the period of lucidity, says "but the legal idea is that the insane person's mind, though not positively and absolutely restored to normal health, was at least capable, at the time of the testamentary act, of performing that act, and did so with independence and intelligence sufficient to justify the conclusion that his will should be sustained as a valid one." [7] Two definitions are found in *Melody v. Hamblin.*[8] The first follows to a great extent the stand taken in *Attorney-General v. Parnther,*[9] while the second insists upon a complete recovery without any possibility of a relapse.

There are many examples of the lucid interval occurring in specific mental diseases that have come before the courts. A Maine case recognized the testamentary capacity of a person afflicted with *senile dementia* when the will was made during a lucid interval.[10] A "pathologically unsound mind" was the illness of a testator whose will was allowed in another case.[11] A Louisiana case permitted the will of a patient suffering from *delirium tremens* to be probated because it was made during a lucid period.[12] The existence of acceptable mental capacity during *monomania* can be seen in *Gholson v. Peters.*[13]

The presence of lucid intervals in mental illness will manifest itself in ways peculiar to each psychosis. Strictly speaking, lucidity may not always indicate acceptable testamentary capacity. In *Catatonia Stupor,* a type of *Dementia Praecox,* the patient suffers from a disorder of the will and not an intellectual disorder proper. Lucidity is often maintained despite the fact that the patient may appear unconscious.[14] Obviously the presence of negativism, stereotypy (in features and attitudes) and pathological suggestibility in these cases renders the will unfit to make a disposition of property. Negativism alone might make the intention

4 Attorney-General v. Parnther, 3 Brown Ch. 441.

5 PAGE, THE LAW OF WILLS, § 156.

6 *In re* White, 15 N. Y. St. Rep. 753 (1888).

7 SCHOULER, LAW OF WILLS, EXECUTORS, AND ADMINISTRATORS, 1923 Vol. I, p. 227.

8 115 S. W. 2d 237 (Tenn., 1938).

9 Note 4, *supra.*

10 *In re* Loomis' Will, 133 Me. 81, 174 Atl. 38 (1934).

11 Daly v. Hussey, 275 Mass. 28, 174 N. E. 916 (1931).

12 Succession of Cronzeilles, 106 La. 442, 31 So. 64 (1901).

13 176 So. 605 (Miss., 1937).

14 ROSANOFF, MANUAL OF PSYCHIATRY, 1927, Ch. III, p. 108.