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RENTS AND RENTAL VALUES TAXABLE AS INCOME

By JAMES MORFIT MULLEN*

What is, or is not income has disturbed judicial thought for a long time. Many courts have pondered deeply to decide whether stock dividends go as income to the life tenant or as capital to the remainderman. Gains and losses in the sale of capital assets are matters which have perplexed both legislatures and courts. So also the apparently simple topic of rents and rental values, as subjects for income taxation, has given rise to much discussion and difference of opinion.

Before taking up the liability of any species of property to income taxation, it might be well to consider what legislative bodies mean by income, when they are about to tax it. The Federal, State, and British courts have different points of view about their fundamental concepts. This is largely due to the deeper legal ideologies from which these several tribunals proceed.

The Supreme Court of the United States has defined income in many cases. The two leading cases are *Eisner v. Macomber*¹ (the stock dividend case) and *Merchant's Loan and Trust Co. v. Smietanka*² (which involved profits and losses from the sale of capital assets). In them, this is said:³

“‘Income may be defined as the gain derived from capital, from labor, or from both combined,’ provided it be understood to include profit gained through a sale or conversion of capital assets . . .”

In defining income as just quoted, the Supreme Court went back to the Corporation Excise Taxing Act of 1909, and decided that the type of income intended by the Six-

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¹ 252 U. S. 189, 64 L. Ed. 521, 40 S. Ct. 189 (1920).

² 255 U. S. 509, 65 L. Ed. 751, 41 S. Ct. 386 (1921).

³ 252 U. S. 189, 207, 64 L. Ed. 521, 529, 40 S. Ct. 189, 193 (1920); 255 U. S. 509, 517-518, 65 L. Ed. 751, 755, 41 S. Ct. 386, 388 (1921).

teenth Amendment was that income referred to in the 1909 Corporation Law. In the decisions under the 1909 law, the income tax legislated upon was one "taxing the doing of business in corporate form."⁴

Thus, the Federal courts, in their conclusions about what is income, begin with a constitutional limitation found in the Sixteenth Amendment, in the single word "income", to which the Supreme Court has given a specialized meaning.

While the State courts have to deal variously with limitations arising from the due process clause, from other provisions in the Federal constitution, and from the customary requirement of uniformity found in the State constitutions, they have no such restrictions as the Federal courts find themselves under as a result of the Sixteenth Amendment.

Long before either the Federal or the State courts were bothered with any income tax controversies, the State courts had to determine, in stock dividend cases, what was income and what was capital. In such decisions their conclusions were radically different from what the Supreme Court determined. For instance, the Court of Appeals of Maryland, in 1902, decided that, as between life tenant and remainderman, profits from the sale of capital assets were not income.⁵ This ruling, with others of a similar nature, was cited to the Supreme Court in the *Smietanka* case, but that learned tribunal discarded the State ideas on the subject, as well as those of the British cases.

The State courts, in defining "income" for tax purposes, have commonly used the Supreme Court's phrase "gains derived from capital or labor, or both combined" *without* including therein gains and losses in the sale of capital assets.⁶

⁴ *Doyle v. Mitchell Brothers Company*, 247 U. S. 179, 62 L. Ed. 1054, 38 S. Ct. 467 (1918).

⁵ *Smith v. Hooper*, 95 Md. 16, 31, 54 A. 95 (1902).

⁶ See collection of cases in Prentice-Hall State and Local Tax Service, Sec. 91224.

Of course, an apt place of beginning in examining State laws to determine what is income is to see what the particular statute includes or excludes as a subject for taxation. Thus the first (and temporary) Maryland Income Tax Law, passed at a special session of the Legislature in 1937,⁷ included gains and losses from the sale of capital assets in the gross income liable to the tax. The presently applicable (permanent) Maryland Income Tax Law of 1939⁸ omitted this possible subject of income taxation.

The court of last resort of Wisconsin, in dealing with an unique situation (later herein to be discussed in detail) arising out of an income tax law of that State, said:⁹

“Income must be money or that which is convertible into money.”

The English income tax law does not in terms define what is income, but the House of Lords has stated that the income to be taxed is “money or money’s worth.”¹⁰

These varying concepts as to what is income result in similarly varying conclusions in connection with some aspects of the topic of income taxes upon rents and rental values, herein to be discussed.

In discussing the availability of rental values for income taxation, the subject will be considered in its three aspects:

I. When real estate is leased for a term or otherwise for the payment of rent.

II. When the taxpayer receives compensation, either partly or entirely, in the use of a dwelling or other real estate.

III. When the owner of real estate does not lease it, but occupies it himself.

⁷ Md. Sp. Laws 1937, Ch. 11, Sec. 216.

⁸ Md. Code (1939) Art. 81, Secs. 222-258, as amended by Md. Laws 1941, Ch. 36.

⁹ State ex rel. Bolens, v. Frear, 148 Wisc. 456, 134 N. W. 673, 135 N. W. 164 (1912).

¹⁰ Tennant v. Smith, (1892) A. C. 150. See Irish Law Times, November 30, 1940, 311.

I.

RENTALS PAID IN CASH

The term "real estate," as used in this article as a subject for leasing, is intended to include that form of personal property customarily known in Maryland as "chattels real." These leasehold estates result from the creation of ground rents by a system of 99 year leases renewable forever.

This particular division of our subject gives rise to little difficulty. The Federal Income Tax Law, and the State law generally, include "rents" under the gross income to be taxed.

The presently applicable (permanent) Maryland Income Tax Law¹¹ made a noteworthy discrimination in this respect. The act creates two kinds of income. One is called "ordinary income", which is taxable at 2% (formerly 2½%), and the other is called "investment income, which is taxable at 5% (formerly 6%).¹² For some reason, "ground rents" created under Maryland law by 99 year leases renewable forever, are in the 5% class; all other kinds of leases, including the ordinary demising of a dwelling house, are placed in the 2% class. In a case brought to test the constitutionality of this law, the Maryland Court of Appeals decided that this classification was not so arbitrary as to make the act invalid.¹³

The only pertinent question that has arisen under this section has been the usually simple one of what is "rent"; or whether or not the arrangement between the owner of real estate and the occupier thereof gives rise to a situation under which the owner of the real estate receives compensation which is taxable as rent.

Some typical holdings in this connection follow: Royalties for minerals removed under a mining lease made before the passage of the Sixteenth Amendment have been

¹¹ Md. Code (1939) Art. 81, Secs. 222-258, as amended Md. Laws 1941, Ch. 36.

¹² The rates as fixed in Md. Code (1939) Art. 81, Sec. 230, were changed as indicated in the text by Md. Laws 1941, Ch. 36.

¹³ *Oursler v. Tawes*, 178 Md. 471, 13 A. (2d) 763 (1940).

held taxable as income.¹⁴ In the case of a lease providing that the lessee should pay the lessor's net income tax on the avails of the lease, the value of such taxes has been held taxable income.¹⁵

Improvements constructed by a lessee pursuant to the requirements of a lease will not be deemed rent taxable as income to the lessor, unless there is plainly disclosed an intent that they shall be such.¹⁶ Where rentals are assigned by the lessor, and he retains title to the corpus producing the income, the rentals are taxable to the assignor as his income.¹⁷

Sometimes, corporations lease valuable properties and provide in the agreements for the payment of the rentals directly to the stockholders. Whether these rentals may be taxed as income to the corporation depends upon the details of the transaction.¹⁸

Advance rentals paid under a 99 year lease are income in the year when received. It is for Congress to decide whether amortization should be allowed.¹⁹

Where a taxpayer conveyed residence property to a family corporation, and provided for payment of taxes thereon from other property, also given to the corporation, the rental value of the property, which was less than the taxes, was held not taxable income.²⁰ In that case the Court discussed what the effect would have been if the rental value were in excess of the taxes. By way of dictum it said that no obligation to pay rent for use of premises would be involved in a family transaction, unless there was one by reason of an express stipulation.

¹⁴ *Banker's Pocahontas Coal Co. v. Burnet*, 287 U. S. 308, 77 L. Ed. 325, 53 S. Ct. 150 (1932). See also note, 74 A. L. R. 183.

¹⁵ *U. S. v. Boston and Maine R. Co.*, 279 U. S. 732, 73 L. Ed. 929, 49 S. Ct. 505 (1929).

¹⁶ *Blatt Co. v. U. S.*, 305 U. S. 267, 83 L. Ed. 167, 59 S. Ct. 186 (1938). See also *Hewitt Realty Co. v. Commissioner of Internal Revenue*, 76 F. (2d) 880, 98 A. L. R. 1201 (C. C. A. 2d, 1935); and note 98 A. L. R. 1207.

¹⁷ *Ward v. Commissioner of Internal Revenue*, 58 F. (2d) 757 (C. C. A. 9th, 1932).

¹⁸ *Gold and Stock Telegraph Co. v. Commissioner of Internal Revenue*, 83 F. (2d) 465 (C. C. A. 2d, 1936); and *Louisville, H. and St. L. Ry. Co. v. U. S.*, 20 F. Supp. 483 (D. C. W. D. Ky. 1937).

¹⁹ *Renwick v. U. S.*, 87 F. (2d) 123 (C. C. A. 7th, 1936)

²⁰ *Hillman v. Commissioner of Internal Revenue*, 71 F. (2d) 688 (C. C. A. 3rd, 1934).

It has been held that a mortgagee in possession of property for foreclosure purposes is not liable to income tax on the rents received which go in reduction of the debt.²¹

Rentals taxable as income under state laws have been judicially declared applicable to royalties to mine lessors, rental income to beneficiaries from realty devised in trust, payments to farmers under the Federal A. A. A., and in other like cases.²²

Rentals from real property outside the taxing state were formerly held not taxable, but the latest decision of the Supreme Court of the United States is to the effect that they are taxable if jurisdiction exists over the person of the taxpayer.²³ In two English decisions,²⁴ it was held that the annual value of the right to occupy property given by will, rent free, is taxable as income.

II.

RENTS ALLOWED IN LIEU OF, OR AS PART OF COMPENSATION

Practically all income tax laws (both Federal and State) include as a subject for taxation "compensation for services." These laws may vary in their treatment of such sources of taxation, variously treating them as "earned income," "ordinary income," or otherwise, but under all of them many different kinds of questions arise.

For example: A hotel manager is furnished a suite in the hotel employing him. A college professor is given a house on the college campus. An army officer has quarters furnished to him or, in lieu of this, he gets commutation of heat, light, and quarters in cash. A minister is given a manse to occupy. What is the liability of these specialists to be taxed on the species of property which their employment furnishes them?

Seen from the point of view of general law, it seems a sound principle to regard board furnished as part com-

²¹ *Hadley Falls Trust Co. v. U. S.*, 22 F. Supp. 346 (D. C. D. Mass., 1938).

²² See *Prentice-Hall State and Local Tax Service*, Sec. 91272.

²³ *New York, ex rel. Cohn, v. Graves*, 300 U. S. 308, 81 L. Ed. 666, 57 S. Ct. 466, 108 A. L. R. 721 (1937).

²⁴ *Shanks v. Commissioners of Inland Revenue* (1929) 1 K. B. 342; *Sutton v. Commissioners of Inland Revenue* (1929) 45 Times L. Rep. 565.

pensation as another form of wages, with all consequent benefits and liabilities. For instance, in Workmen's Compensation cases, the award allowed an injured servant may, in a proper case, be based upon the entire compensation, part of which is in cash and part of which is in board and lodging.²⁵

Ministers as a class are notoriously under-paid. They are not, however, to be regarded as entirely under-privileged, in view of the attitude of the Federal Income Tax laws toward them. In 1921, Congress, in the Income Tax Law of that year²⁶ first provided among the "exclusions from gross income":

"Ministers—The rental value of a dwelling house and appurtenances thereof furnished to a Minister of the Gospel as part of his compensation."

This exemption has been preserved in all subsequent Federal Income Tax laws. The provision seems clear. It has not been judicially construed, although the Internal Revenue Department has made some rulings as to its scope, including one deciding that a missionary claiming the benefit of this exemption must be an ordained minister.

The department further ruled that where a church made an allowance to its minister to cover the cost of a parsonage, the exemption did not apply, but that the expenses attributable to the portion of the parsonage devoted to professional use might be deducted.

No other class of persons has any specific statutory exemption for housing in the Federal law, nor does this law provide for any specific inclusion of the use of realty as gross income taxable against the taxpayer.

Early in the history of the Federal income tax law, the Internal Revenue Department made an effort to collect Federal income taxes upon the cash commutation of quarters allowed to Army officers in lieu of the furnishing of actual quarters. Then, as now, the Federal income tax

²⁵ *Picanardi v. Emerson Hotel Co.*, 135 Md. 92, 108 A. 483 (1919), which held, however, that the value of the board could not be considered in awarding compensation unless a value had been fixed between employer and employee at the time of hiring.

²⁶ Now 26 U. S. C. A. 22(b) (6).

law included under gross income taxes "compensation for personal services."

In 1925 the Court of Claims decided that this allowance by way of commutation was not taxable, under the salutary principle that, when the residence or other lodging furnished the taxpayer is in a specific place for the particular benefit of the employer, rather than as compensation for specific services, the taxpayer is not liable for this allowance as income.²⁷ There have been several later decisions by the Board of Tax Appeals in which the principle of this ruling has been applied to varying states of facts.²⁸

In the *Benaglia* case, the Board of Tax Appeals held that board and lodging allowed the manager of Hawaiian Hotels and his wife was not by way of compensation for services, but was for the convenience of the employer, and so was not taxable. While there was dissent from this in the Board, yet an appeal from the ruling was dismissed upon petition.²⁹

In the *Chandler* and *Fox* cases, the rental values of buildings furnished to officers of business corporations were found to be as compensation for services, and taxable as such.

The present regulations of the Internal Revenue Department in terms accept and express the general principles of the *Clifford Jones* case. But their practices in some connections seem at variance with their accepted dogma; we say this particularly about the departmental practices as to the housing furnished college presidents and professors. These cases are distinguished with difficulty from those of Army officers. In both situations the performance of duty requires the presence of the taxpayers at the place where their respective employers need their services. In some instances of college professors required to live on the campus, the standard of accommodations makes the requirement more of a personal liability to the occupant

²⁷ *Clifford Jones v. U. S.*, 60 Ct. Cl. Rep. 552.

²⁸ *Fox v. Commissioner of Internal Revenue*, 30 B. T. A. 451 (1934); *Benaglia v. Commissioner of Internal Revenue*, 36 B. T. A. 838 (1937); and *Chandler v. Commissioner of Internal Revenue*, 41 B. T. A. 165 (1940).

²⁹ *Commissioner of Internal Revenue v. Benaglia*, 97 F. (2d) 996 (C. C. A. 9th, 1938).

than real compensation. This accentuates the persuasive force of the claim that the Army officer rule should apply equally to such college professors.

In addition to the court and tax board decisions, there have been departmental rulings in which the housing of seamen, hospital employees, plantation managers, as well as a State Governor's mansion have been determined not liable to income taxation. In the case of domestic servants, there have been rulings both ways. Civilian employees of the Federal government have been ruled to be taxable on the value of quarters furnished to them.³⁰

The British decisions (which have not, however, been generally followed in this country in determining what is income) take a point of view similar to that of the *Jones* case, but add a clearer test of taxability.³¹

In *Tennant v. Smith*, the House of Lords had before it for decision whether or not an agent of a bank who, as part of his duty as "custodian", occupied a house upon the bank premises, was liable for an income tax upon the rental value. The house was part of larger premises belonging to the bank and used for banking business. The "custodian" could not rent the house, nor use it for other than bank business.

The House of Lords decided that this rental value was not liable to the income tax. Lord Halsbury put his view on the money or money's worth principle, and said:³²

"Of course, the possession of a house which may be used for purposes of profit is property and taxable as such."

In the case of *Corke v. Fry*,³³ the Court held that a minister's right to occupy a manse forms a part of his income, and the annual rental value thereof must be assessed as income under the English law. This decision was made in 1895, long before any war exigencies required exhaustive efforts to develop new sources of taxes. It

³⁰ See Prentice-Hall Federal Tax Service, Secs. 7727, 7733-34.

³¹ *Tennant v. Smith* (1892) A. C. 150; *Corke v. Fry* (1895) 32 Scottish L. Rep. 341.

³² (1892) A. C. 150, 154.

³³ *Supra*, n. 31.

was decided upon the question of the right of the minister to let the manse, in lieu of occupying it himself, should he so determine. The rationale of the decision was that when one occupied a residence furnished him as part of his compensation, and which he could rent at a profit to himself if he should so elect, the occupancy of the building was a source of property from which a profit could be made.

The British decisions furnish a test of liability to taxation which could very well be applied to the case of college professors, and for their benefit. If the houses they occupy must be occupied by them in the performance of their official duties, they cannot be rented, and there is no species of property furnished to them capable of producing income.

We have found no collection of State court rulings on this subject; and there is no reason to believe that such decisions, if existing, would extend or modify the Federal attitude on this subject, except so far as the State income tax laws may be differently framed. We are informed, in this latter connection, that the Maryland taxing authorities require ministers to include the rental values of their manses in "gross income", for the reason that the Maryland income tax law does not afford to ministers the exemption as to leasing which the Federal law furnishes.

Upon principle, we suggest that the right of ministers of the Gospel to be relieved from the burden of this taxation, apart from specific statutory exemption, perhaps is different from the case of Army officers as passed upon in the *Clifford Jones* case, or even of college professors required to live on the campus. But the same tests of liability vel non should apply to them.

III.

RENTAL VALUE OF REAL ESTATE OCCUPIED BY THE OWNER

This possible source of taxation raises a question of abstract justice, about which the Supreme Court of the United States and the court of last resort of Wisconsin have expressed different points of view.

A man owns a single piece of residence property. In the one case, he elects to rent it, and he is taxed upon his net rental, as income. In the other case, he decides to occupy it himself. Theoretically, at least, while he pays himself no rent, he owns a capital asset which is capable of producing a profit in money. Exact economic parity would require that he be taxed upon the rental value of his house, to the same extent as the man who does not occupy his own house, but whose rental value is expressed in exact cash figures.

The United States Supreme Court, in 1934, decided tersely and emphatically that the rental value of a building occupied by the owner is not income within the meaning of the Sixteenth Amendment to the Federal Constitution.³⁴

The 1921 Revenue Act³⁵ made a special provision for the income of life insurance companies. In the description of gross income, "rents" were included. In the section providing for "deductions", allowance was made for taxes, repairs, and obsolescence. Section 245³⁶ of the Act provided that these deductions were "not allowable unless there is included in the return of gross income the rental value of the space so occupied."

The insurance company in the above cited case claimed allowance for taxes, etc., under the Act in question. The company owned a building, a part of which it occupied and a part of which it rented. The Commissioner directed that the rental value of the occupied portion of the property be included as income. The company resisted this ruling on the ground that the rental value was not income within the meaning of the Sixteenth Amendment to the Federal Constitution, and that this amounted to a direct tax. The Supreme Court agreed with this contention, and said:³⁷

"The rental value of the building used by the owner does not constitute income within the meaning of the Sixteenth Amendment."

³⁴ *Helvering v. Independent Life Insurance Co.*, 292 U. S. 371, 78 L. Ed. 1311, 54 S. Ct. 758 (1934).

³⁵ 42 Stat. L. 261, Sec. 245.

³⁶ *Ibid.*

³⁷ 292 U. S. 371, 379, 78 L. Ed. 1311, 1314, 54 S. Ct. 758, 759-60 (1934).

The Court held, however, that the company was not required to include in the gross any amount to cover the rental value of the space used by it, and that the statute did not require the inclusion of rental value as income; it only provided conditions under which the deductions should be made. It was held no objection to making as a condition allowing certain deductions that the rental values of the building out of which the deductions grew should be included. While the general principle was sustained that rental value is not income, yet the particular statute was not invalid.

Since this case, the phraseology of the provision of the law taxing the income of life insurance companies has been changed and now reads³⁸ that the deductions, allowances for taxes, etc., are limited to an amount which bears the same ratio as the rental value of the space not so occupied bears to the rental value of the entire property.

The case of *Rockford Life Insurance Company v. Commissioner of Internal Revenue*³⁹ makes a similar ruling based upon the decision in the *Independent Life Insurance Company* case.

These cases are, however, an explicit decision that such rental value of real estate is not income taxable as such within the meaning of the Sixteenth Amendment to the Federal Constitution. The Supreme Court, in reaching its conclusion, cites the line of decisions of which *Eisner v. Macomber*⁴⁰ is the first and parent case.

Wisconsin looked at the matter differently, and decided that the rental value of a residence occupied by the owner was taxable as income.⁴¹

The Wisconsin tax law of 1911 included as a basis of taxation "all rent of real estate, including estimated rental of residence property occupied by the owner." The Wisconsin Supreme Court considered the effect of the quoted statutory provision, and concluded that such a provision was necessary under the Fourteenth Amendment to the

³⁸ Now 26 U. S. C. A. 203(B).

³⁹ 292 U. S. 382, 78 L. Ed. 1315, 54 S. Ct. 761 (1934).

⁴⁰ *Supra*, n. 1.

⁴¹ *Supra*, n. 9.

Federal Constitution to provide for equality of income taxation between the owners of residence property not occupied by them, but rented; and that not rented, but occupied by the owner. The opinion of the Court contained the following:⁴²

“In this connection, though not perhaps in its logical order may be considered the exception to that provision of the Act which directs that the estimated rental of residence property occupied by the owner shall be considered as income. It is said that this is not income, and that calling it income does not make it income. It may be conceded that things which are not in fact income cannot be made such by mere legislative fiat, yet it must also be conceded, we think, that income in its general sense need not necessarily be money. Clearly, it must be money or that which is convertible into money. The Century Dictionary defines it as that which comes in to a person or payment for labor or services rendered in some office, or as gain from lands, business, the investment of capital, etc. This clause was doubtless inserted in an effort to equalize the situation of two men each possessed of a house of equal rental value, one of whom rents his house to a tenant, while the other occupies his house himself. Under the clause in question, the two men with like property are placed upon an equal footing, and in no other way apparently can that be done. Under the English income tax laws, it has been held that where a man has a residence or right of residence which he can turn into money if he chooses, and he occupies the residence himself, the annual value of the rental forms part of his income. *Corke v. Fry*, 32 Scottish Law Report, 341. We discover no objection to that provision in question.”

This Wisconsin case is cited in later decisions⁴³ of that Court to support the parent proposition that income is not only money, but also that which is convertible into money. A Federal case⁴⁴ has cited it for the same purpose.

⁴² *Supra*, n. 9, 148 Wisc. 456, 512-513, 134 N. W. 673, 691.

⁴³ *Lawrence v. Wisconsin Tax Commission*, 213 Wisc. 273, 251 N. W. 242 (1933); and *Zweifel v. Wisconsin Tax Commission*, 214 Wisc. 223, 252 N. W. 586 (1934).

⁴⁴ *Richardson v. Conway*, 49 F. (2d) 554, 555 (C. C. A. 7th, 1931).

Conversely, it was argued in a case⁴⁵ brought to determine the constitutionality of the Maryland Income Tax Law of 1939, that uniformity under the State constitutional provision required that occupiers of residence property should pay an income tax upon the rental value of such property. The Maryland Court of Appeals upheld the act in question, but did not discuss this objection in its opinion.

Uniformity from the point of view of constitutional requirements may not be the same thing as when viewed from considerations of economic parity. When A owns a house and lives in it, he has capital invested in a residence which, therefore, he occupies free of rent. If B, who owns the same amount of capital, decides not to invest it in a house, but puts it in interest paying securities, he can use the interest therefrom for payment of his rent. Manifestly, if these two men are to be in the same tax-paying category, both should pay taxes on the income, received or receivable from the invested capital, one on the income actually received from his securities, the other on the rent he in effect pays himself by the occupancy of his own house. The latter is the "money or money's worth" idea.

To say that constitutional requirements of equality of taxation cannot reach the exactness of economic considerations, evades the question. And such a thought is, moreover, inaccurate, because all income tax laws try to produce economic equality viewed from the standpoint of the taxpayer's economic situation, when they provide different exemptions for single and married persons, and additional exemptions for other dependents than a wife.

In connection with this latter idea, the Supreme Court of Pennsylvania has decided that an income tax law which provides different exemptions for married and single persons lacks the uniformity required of such laws by the Pennsylvania constitution and so is unconstitutional.⁴⁶

⁴⁵ *Oursler v. Tawes*, *supra*, n. 13.

⁴⁶ *Kelley v. Kalodner*, 320 Pa. St. 180, 181 A. 598 (1935).

In *Eisner v. Macomber*,⁴⁷ and in the other Federal decisions dealing with income, the Supreme Court concluded that the Sixteenth Amendment to the Federal Constitution had in mind the kind of income contemplated by the Corporation Excise Tax of 1909, and held, in effect, that the meaning of income as so defined was to that extent specialized.

In the later case of *Merchant's Loan and Trust Co. v. Smietanka*,⁴⁸ this idea was elaborated and the Supreme Court specifically excluded as a basis for its decision the State decisions in connection with whether or not stock dividends, gains from the sale of capital assets, etc., were income as between life tenant and remainderman. It also rejected the British decisions, which are "interpretations of statutes so wholly different in their wording" as to be without value.

It seems a fair comment to make in connection with the conflict between the ideas of the Supreme Court, as in the *Independent Life Insurance Company* case,⁴⁹ and those of the Wisconsin court in its income tax cases, that State courts have a right to consider income from their stand upon the broad ground in accordance with the generally accepted ideas of what is income in the other cases. They are not limited in their contemplation of this subject in the way that the Supreme Court felt itself bound in defining income in the *Smietanka* case, specifically as restricted by the rationale of the definition of income in cases arising under the Corporation Excise Tax Acts of 1909.

Of course, one can conceive that income, as viewed from the point of view solely of a stockholder of a corporation, might be thought of differently than in more general connections. For instance, the stockholders of a corporation contribute a specified amount, which constitutes capital. If a part of this specified amount invested in a piece of real estate is sold at a profit, the surplus over the amount actually representing capital could be regarded

⁴⁷ *Supra*, n. 1.

⁴⁸ *Supra*, n. 2.

⁴⁹ *Supra*, n. 34.

as income payable to the stockholders. Such a conception, however, should not control the general meaning of income, looked at from all standpoints.

The difference between the views of the Supreme Court of the United States in the *Independent Life Insurance Company* case, and those of the Wisconsin Supreme Court in *Bolens v. Frear*⁵⁰ are based upon the different constitutional limitations of the Federal fundamental law and a State constitution, which latter limits the taxation of income only to requirements of uniformity, or, as someone has defined the Equal Protection Clause, to the Englishman's idea of *fair play in sports*.

⁵⁰ *Supra*, n. 9.