As to transfers of corporate shares within the taxing jurisdiction, the validity of excise taxes of this nature is well established. *Thomas v. United States*, 192 U.S. 363, 24 Sup. Ct. 305, 48 L.Ed. 481 (1904); *Opinion of the Justices*, 196 Mass. 603, 85 N.E. 545 (1908); *People ex rel. Hatch v. Reardon*, 184 N.Y. 431, 77 N.E. 970 (1906), affd. 204 U.S. 152, 27 Sup. Ct. 188, 51 L.Ed. 415 (1907). Also, the state in which the stock transfer books are kept may tax transfers made upon such books. Christy, The Transfer of Stock (1929), 555. It has been said that the state of the company's incorporation may place an excise tax upon the transfer of the shares of that company. See *First Nat. Bank of Boston v. State of Maine*, 284 U.S. 312, 330, 52 Sup. Ct. 174, 76 L. Ed. 313 (1932). The language of the present case indicates that for the tax to be valid as to sales outside the taxing jurisdiction, that jurisdiction should be the state where the transfer books are kept as well as the state of incorporation. See 5 F. Supp. 721. Normally transfer books will be kept in the state of incorporation, however, and that result is required by statutes which have been enacted in a number of states, including Florida; hence the problem raised is largely academic. 3 Florida Comp. Gen. Laws (1927), § 6584; Mass. Gen. Laws (1932), c. 155, § 22; N.Y. Cahill's Cons. Laws (1930), c. 60, § 10; 72 Pa. Purdon's Stat. (1931), § 2082; Ind. Burn's Stat. (1933), § 2–3611 (by implication). It is to be noted that a tax upon transfers on the corporate books would not reach many unrecorded transfers which the statute in the principal case did attempt to affect.

Though the court in the present case decided that the memorandum passing between the customer and broker in Florida could not be subjected to an excise tax, a recent Supreme Court case indicates that a different decision possibly could have been reached on this point. Cf. *Graniteville Mfg. Co. v. Query*, 283 U.S. 376, 51 Sup. Ct. 515, 75 L.Ed. 1126 (1931), in which notes drawn in South Carolina and sent outside the state were subject to a stamp tax imposed by South Carolina, though, by the agreement under which they were sent out, they were to be of no effect until received and accepted. The loans which were to be effected by the notes were clearly consummated outside the state; similarly, in the principal case the sales which the memoranda effected took place outside the taxing jurisdiction.

BRIMSON GROW

Taxation—Income Tax—Deductions—[Federal].—Bankruptcy proceedings against a partnership of Donnelley and another were dismissed in 1905 when Donnelley's brother in law, Thorne, paid creditors of the partnership a percentage of the full amount due from the firm, and secured an assignment of their claims. In 1927 Donnelley made a payment to these former creditors to be applied as principal and interest on the old debts, and deducted that sum from his gross income for 1927 in computing his income tax. *Held*, the payments to the former creditors may not be deducted in determining taxable income. *Donnelley v. Commissioner of Internal Revenue*, 68 F.(2d) 722 (C.C.A. 7th 1934).

The liability to pay the income tax attaches when the income is received. *Rosenwald v. Com.*, 12 B.T.A. 350 (1928), affd. 33 F.(2d) 423 (C.C.A. 7th 1929). Subsequent disbursements or losses are, therefore, deductible only if authorized by statute. *Spring Canyon Coal Co. v. Com.*, 43 F.(2d) 78 (C.C.A. 10th 1930), cert. den. 284 U.S. 654, 52 Sup. Ct. 33, 76 L. Ed. 555 (1931); *Jankowsky v. Com.*, 56 F.(2d) 1006 (C.C.A. 10th 1932); *Mitchel v. Bowers*, 15 F.(2d) 287 (C.C.A. 2d 1926).

Deductions allowed by the federal income statutes relevant to the principal case are: (1) necessary and ordinary expenses, not of a permanent nature, incurred or paid in carrying on a trade or business, Rev. Act (1926), § 214 (a) (1), 44 Stat. 26, 26 U.S.C.A. § 935 (1928), Art. 121, Reg. 74; (2) losses sustained during the tax period, unless compensated for by insurance or otherwise, if incurred in a trade or business, or in any transaction entered into for profit; Rev. Act (1926), § 214 (a) (4, 5, 6), 44 Stat. 26, 27, 26 U.S.C.A. § 955 (a) (4, 5, 6)(1928); (3) all interest paid or accrued on indebtedness within the taxable year; Rev. Act (1926), § 214 (a) (2), 44 Stat. 26, 26 U.S.C.A. § 955 (a) (2) (1928).

As there is no showing in the case that the taxpayer made these payments as a part of his business, such payments seem not to fall within the first classification. "Necessary" means appropriate or helpful; "ordinary" means habitual or normal by the standards of business custom. *Welch v. Helvering*, 290 U.S. 111, 54 Sup. Ct. 8 (1933). The Commissioner of Internal Revenue construes "necessary and ordinary" strictly in the conjunctive; Klein, Federal Income Tax (1929) 395, 396; Montgomery, Federal Tax Handbook (1932) 294. The federal courts have been inclined to construe it more liberally. *Udolpho Wolfe Co. v. Com.*, 15 B.T.A. 485 (1929); *La. Jockey Club, Inc. v. Com.*, 13 B.T.A. 752 (1928). In *Harris v. Lucas*, 48 F. (2d) 187 (C.C.A. 5th 1931), payments made to reimburse former creditors for losses on a compromise settlement were held deductible. There, however, the payments were made for the express purpose of restoring the credit of the business.

To be deductible under the second classification the payments in controversy must be construed as a loss incurred in trade or business. Voluntary payments were held not deductible in *Welch v. Helvering*, 290 U.S. 111, 54 Sup. Ct. 8 (1933) (taxpayer paid obligations of former business associate to strengthen his own credit); *Mastin v. Com.*, 28 F.(2d) 748 (C.C.A. 8th 1928) (stockholder paid for advertising real estate of the corporation); *Bavinger v. Com.*, 22 B.T.A. 1239 (1931) (stockholder paid obligations of the corporation to prevent a petition in bankruptcy); *Park, Ex'r v. Com.*, 22 B.T.A. 1263 (1931) (bank president made good embezzlements of cashier); *Blackwell Oil Co. v. Com.*, 60 F. (2d) 257 (C.C.A. 10th 1932) (corporation paid minority stockholder to compromise his suit against director). In circumstances similar to *Welch v. Helvering*, the Board of Tax Appeals has been more liberal than the other federal courts. In *Herschel v. Jones*, 1 B.T.A. 1226 (1925), a taxpayer was allowed to deduct payment of a promissory note given by him to reimburse another for loss occasioned by the failure of a firm of which the taxpayer was a salaried member. The Board gave as its reason the fact that the payment was not made as a gift and was based on "moral" consideration.

The payments in the principal case do not fall within the third classification because there was no indebtedness at the time the payments were made. *Saunders v. Whitcomb*, 177 Mass. 457, 59 N.E. 192 (1900). Restatement of the Law of Contracts (1932), § 423; 1 Williston, Contracts (1921), § 159. The settlement with the creditors was not a discharge in bankruptcy but an assignment by them of their existing claims. A subsequent promise to pay a debt discharged in bankruptcy will be enforced by the courts. *Zavelo v. Reeves*, 227 U.S. 625, 33 Sup. Ct. 365, 57 L. Ed. 676 (1913) (judicial composition); Restatement of the Law of Contracts, § 87; 1 Williston, Contracts (1921), § 158; *contra*, *Taylor v. Skiles*, 113 Tenn. 288, 81 S.W. 1258 (1904). Payment in performance of such a promise should be deductible from gross income, at least where the new promise was given in the course of a business. See *Harris v. Lucas*, 48 F. (2d) 187 (C.C.A. 5th 1931); 1 Williston, Contracts (1921), § 196.

Although the payment of a debt to be deductible must be an expense or loss connected with a business, the payment of interest need not be on a business debt to be deductible. Rev. Act (1926), § 214 (a) (2), 44 Stat. 26, 26 U.S.C.A. § 955 (a) (2) (1928). As a result, at least the payment of interest in the present case would be deductible if an indebtedness exists, whether in connection with carrying on a business or not.

On the other hand, a new promise made after a *voluntary* composition agreement does not create an enforceable obligation, *Grant v. Porter*, 63 N.H. 229 (1884); *Depuy v. Swart*, 3 Wend. (N.Y.) 136, 20 Am. Dec. 673 (1829); *Taylor v. Hotchkiss*, 81 App. Div. 470, 80 N.Y.S. 1042 (1903); 1 Williston, Contracts (1921), § 159.

The federal appellate courts are stricter than the Board of Tax Appeals in applying the requirement that the loss must have occurred in a transaction entered into for profit before it is deductible. *Goldsborough v. Burnet*, 46 F.(2d) 432 (C.C.A. 4th 1931). The instant case is the latest example of this tendency, which seems the better legal view since the Revenue Act of 1926 requires explicitly that losses to be deductible must at least have occurred in a transaction entered into for profit. Furthermore it is generally accepted today that the doctrine of moral consideration should have no place in our law. *Schnell v. Nell*, 17 Ind. 29 (1861); *Eastwood v. Kenyon*, 11 A. & E. 438 (1840); *Rann v. Hughes*, 7 T.R. 350 (a) (1778); but cf. Ga. Civil Code (1926), § 2741, restricted, however, in *Davis v. Morgan*, 117 Ga. 504, 43 S.E. 732 (1903).

KARL HUBER

Taxation—Presumption of Capacity to Have Issue as Affecting Exemption from Succession Tax—[Federal].—Testator devised property in trust to pay the income to his daughter for life, and on her death to transfer the principal to her lawful issue; if she should have no such issue, then to distribute the property among certain charitable institutions, bequests to which were exempt under the Revenue Act of 1918, § 403(a) (3), 40 Stat. 1098. When testator died, his daughter was fifty years of age, childless, and had undergone an operation which made it impossible for her to have issue; however, in computing the estate tax the total value of the principal amount bequeathed was included, since the remainder to the charities was contingent upon the daughter's death without issue. In a suit to recover the additional tax paid, *held*, the court need not conclusively presume that the daughter was capable of having issue, and the tax should be refunded. *United States v. Provident Trust Co.*, 54 Sup. Ct. 389 (1934).

The court expressly limited its holding to the field of taxation, and emphasized the fact that the sole question before it was the value of the interest of the charities which was exempt from taxation. The decision may have been influenced by the fact that the life tenant had died before the present suit was brought. See opinion of court below, *Provident Trust Co. v. United States*, 2 F. Supp. 472 (1933). An earlier federal decision, on similar facts, had declined to consider evidence as to incapacity to have issue. *Farrington v. Commissioner of Internal Revenue*, 30 F.(2d) 915 (C.C.A. 1st 1929), cert. den. 279 U.S. 873, 49 Sup. Ct. 513, 73 L.Ed. 1008 (1929).

The presumption that the capacity to have issue continues throughout a person's life appears most frequently today in cases involving four classes of problems: (1) the application of the rule against perpetuities; (2) the time at which a trust may be ter-