With this number the University of Chicago Law Review concludes its tenth volume, celebrates its tenth anniversary. To the student editors this is, excusably we hope, a moment of pride and of satisfaction. At the same time, the decreased student enrollment makes difficult the effective continuance of student control. To assure the continued existence of the Review, therefore, the faculty will assume editorship with the next volume for the duration.

NOTES AND RECENT CASES

OWNERSHIP AND INCOME TAXATION

THE CLIFFORD DOCTRINE

The effect of the Clifford doctrine on family trusts and short-term trusts has been scrutinized and evaluated. Much has been made of the various tests proposed in the leading case, and its devolution through the circuit courts of appeals has been discussed. There is reason to believe, however, that consideration has been unduly restricted to family trusts and that a cloudy interpretation has resulted from this overemphasis on the domestic character of the facts present.

1 See James, Family Trusts and Federal Taxes, 9 Univ. Chi. L. Rev. 427 (1942); Pavenstedt, The Broadened Scope of Section 22(a): The Evolution of the Clifford Doctrine, 51 Yale L.J. 213 (1941); Case, The Circuit Courts of Appeals Examine the Clifford Doctrine, 7 Md. L. Rev. 201 (1943). Case cites other treatments of the Clifford doctrine at 201 note 2.
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in the leading case. There is reason to believe, furthermore, that the full implication of the Clifford doctrine can be more clearly understood if the Clifford case is considered in conjunction with some more or less contemporaneous cases involving related problems. The main purpose of this note is to review the components of the "doctrine" with a view to ascertaining whether it is properly relevant only to the family trust which engendered it.

Since 1939 the United States Supreme Court has had occasion to ascertain the income tax liability of a donor in three closely allied types of cases. In one type the problem centered on the family trust; in another, the problem was presented by the establishment of a trust in favor of the settlor's estranged wife; in the third, a gift of income caused the litigation. Each class has contributed to the ascertainment of a settlor's liability for the income of a trust. The cases will be discussed in the order given.

In Helvering v. Clifford, 2 the settlor named himself trustee of a five-year trust in favor of his wife with reversion to himself. In addition, he reserved to himself all the rights with respect to management which he had had before the trust was established, including the right to vote the stock and to include extraordinary income as principal rather than distributable income. Mr. Justice Douglas, in holding the income taxable to the settlor, remarked that the intimate relationship of the settlor and the beneficiary, plus the short term of the trust, were important to his decision. But these remarks must not be taken to mean that a short-term trust or a family trust are per se the causal factors compelling the imposition of income tax liability on the settlor of such trusts. 3 They are merely evidential, relevant to the ascertainment of operative facts.

This seems a reasonable inference from the use made by Mr. Justice Douglas


3 Short-term trusts in favor of one's relatives, without more, should not incur liability to the settlor under the Clifford rule. Compare Jones v. Norris, 122 F. 2d 6 (C.C.A. 10, 1941). Unfortunately, no case precisely in point has yet arisen. See Case, op. cit. supra note 1 at 210, note 34a. But it is evident that the term of the trust is not the decisive factor when it is considered that in the following twelve cases, all involving long-term trusts, six were decided for the taxpayer, five for the government, and one was remanded: Com'r v. Bateman, 127 F. 2d 266 (C.C.A. 1, 1942); Suhr v. Com'r, 126 F. 2d 283 (C.C.A. 6, 1942); Com'r v. Armour, 125 F. 2d 467 (C.C.A. 7, 1942); Com'r v. Betts, 123 F. 2d 534 (C.C.A. 7, 1942); Jones v. Norris, 122 F. 2d 6 (C.C.A. 10, 1942); Com'r v. Branch, 114 F. 2d 985 (C.C.A. 1, 1940). Not all the following cases (decided for the government) were controlled by the Clifford doctrine. In the first case, for example, the income of the trust was taxed to the settlor under sections 166-67 of the I.R.C. 49 Stat. 1707 (1936), 26 U.S.C.A. §§ 166-67 (1940), which provide for taxation to the settlor in cases involving revocable trusts or trusts the income of which may be used for the benefit of the settlor when agreed to by a party not having a substantial adverse interest. Nevertheless, the cases sufficiently illustrate that factors other than the term of the trust are most important. Downie v. Com'r, 133 F. 899 (C.C.A. 6, 1943); Hogle v. Com'r, 132 F. 2d 66 (C.C.A. 10, 1944); Williamson v. Com'r, 132 F. 2d 489 (C.C.A. 7, 1942); Brown v. Com'r, 131 F. 2d 640 (C.C.A. 3, 1942); Com'r v. Buck, 120 F. 2d 775 (C.C.A. 2, 1941). Bush v. Com'r, 133 F. 2d 1005 (C.C.A. 2, 1943), was remanded; see infra note 13.
of section 22(a)⁴ and from the tenor of his language. The issue, according to the Associate Justice, "is whether the grantor after the trust has been established may still be treated, under this statutory scheme, as the owner of the corpus."⁵ The other facts, namely, the family solidarity, the term, and the control are important because they "lead irresistibly to the conclusion that respondent continued to be the owner for purposes of § 22(a)."⁶

That the Clifford doctrine is even more than a question of control⁷ is demonstrated by Mr. Justice Douglas' answer to the argument that the settlor retained only the type of dominion exercised by any trustee: "Since the income remains in the family and since the husband retains control over the investment, he has rather complete assurance that the trust will not effect any substantial change in his economic position."⁸ This statement is also potentially misleading. Considered alone, it would inspire the conclusion that maintenance of the family assets, rather than the economic position of the settlor, is the essential fact in the complex.

Such a conclusion is unsound, however, both on the theory of the income tax laws and from the implications of the cases. As Judge Magruder has said, "it might be rational for Congress under the concept of family solidarity to tax all family income as a unit."⁹ But very definitely Congress has not done this. . . ."¹⁰ As a matter of fact, it is fairly clear that Mr. Justice Douglas was maintaining the distinction between benefit to the settlor and benefit to the family, for in the same paragraph he returned to his analysis of the effect of the trust on the overall position of the settlor: "When the benefits flowing to him indirectly through the wife are added to the legal rights he retained, the aggregate may be said to be a fair equivalent of what he previously had."

The second line of cases indicates more clearly that, not family solidarity, but the effect of the trust on the settlor's individual economic position is the essential consideration. The standard pattern in these cases is a trust in favor of an estranged wife with more or less control retained by the husband. It has been generally held that the income from such a trust will not be included in the settlor's gross income if it appears that, under the law of the state in which the divorce is granted, the trust acts as a complete discharge of the settlor's legal obligation of support.¹¹ In Helvering v. Fuller¹² the standard facts were roughly

⁴ 52 Stat. 457 (1938), 26 U.S.C.A. § 22(a) (1940) is the general definition of gross income and has not been substantially changed throughout the years.
⁵ Helvering v. Clifford, 309 U.S. 331, 334 (1940).
⁶ Ibid., at 335.
⁹ See James, Irascible Comments on the Revenue Laws, 9 Univ. Chi. L. Rev. 58, 63 (1941).
¹⁰ Com'r v. Bateman, 127 F. 2d 266, 271 (C.C.A. 1, 1942).
¹² 310 U.S. 69 (1940).
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present, and the Court held the income from the trust not taxable to the settlor because under Nevada law the trust acted as a complete expiation of the settlor’s obligation of support. Despite the absence of an intimate family group such as existed in Helvering v. Clifford, however, Mr. Justice Douglas said that the rule of the Clifford case might have been applicable had the Commissioner alleged and proved the amount of control requisite to indicate that the settlor had suffered no economic harm in virtue of the trust.

The dictum in the Fuller case expressly subtracts one qualifying element arguably present in the Clifford doctrine: family solidarity is not a prerequisite to taxation of the income of a trust to its settlor. The important issue is whether, after the trust is established, an economic benefit remains in its settlor. Clearly, the concept of economic benefit is basic to the present problem. The third group of cases illuminates the contours of the concept.

These cases involve a gift of income; the problem is whether the income so given is to be taxed as income of the donor. In Lucas v. Earl, Mr. Justice Holmes held that a contractual transfer of one-half of a husband’s income to his wife would not negate the husband’s income tax liability for the amount so transferred. The interesting aspect of the Earl case is that the taxability was not articulated on the concept of economic benefit to the donor. Indeed, according to Mr. Justice Holmes, a “very forcible argument” against taxing the donor resided in the fact that the economic benefit was in the donee. The holding against the donor was based, therefore, on the theory that the revenue code purported to tax income to the one who earned it. Since counsel’s argument, admittedly “very forcible,” was nevertheless rejected, it seems reasonable to infer either that the benefit accruing from such an assignment was not considered as of primary importance, or that it was not relevant.

Though the Earl case was perhaps the most important precedent for the holding in Helvering v. Horst, Mr. Justice Stone’s opinion in the latter case presents a significant contrast to the theory utilized in Lucas v. Earl. In Helvering v. Horst an owner of bonds detached negotiable interest coupons and delivered them to his son, who cashed them at maturity (all within the same year). The income so transferred was held taxable to the donor. In so holding, however, Mr. Justice Stone abandoned the salient from which Mr. Justice Holmes

...This dictum has probably been transmuted to a bona fide holding by virtue of an application made in Helvering v. Stuart, 317 U.S. 154 (1942). There it was held that the income of a trust in favor of adult children, otherwise not taxable to the settlor, might be held taxable to him if a rehearing should establish that he had retained such powers that “it must be said the taxpayer is the owner of its income.” In Bush v. Com’r, 133 F. 2d 1005 (C.C.A. 2, 1943), Judge Frank said that Helvering v. Stuart compelled him to remand a case which, prior to the Stuart holding, he would have adjudged for the taxpayer. The trust involved in the Bush case was in favor of an estranged wife for her life with no reversion in the settlor but reserving certain management rights.

...Lucas v. Earl, 281 U.S. 111 (1930); Helvering v. Horst, 311 U.S. 112 (1940); Helvering v. Eubank, 311 U.S. 122 (1940); Harrison v. Schaffner, 312 U.S. 579 (1941). A full discussion of these cases, treated from the point of view of their effect on family trusts, may be found in James, op. cit. supra note 1, at 439-41.

...281 U.S. 111 (1930).

...311 U.S. 112 (1940).
had operated: the donor in the *Horst* case was subjected to income tax liability because the Court felt that he had received a full measure of economic benefit from the interest coupons, even though the beneficial interest appeared to be in another.

If the *Clifford* case stands for the proposition that income of a trust will be taxed to its settlor when he retains substantial ownership, then cognizance of the attitude toward ownership displayed in the *Horst* case is indispensable to any useful understanding of the *Clifford* doctrine.17 According to Mr. Justice Stone, "the power to dispose of income is the equivalent of ownership of it. The exercise of that power to procure the payment of income to another is the enjoyment, and hence the realization, of the income by him who exercises it."18 In applying this proposition to the specific facts before him, the present Chief Justice said: "When by the gift of the coupons [the donor] has separated his right to interest payments from his investment . . . . he has enjoyed the economic benefits of the income. . . ."19

These statements, like signs pointing to the moon, are clearly so general as to be useless to draftsmen of tax-avoidance trusts. But they are neither vague nor misleading; they are a clear proclamation that a gift must involve the corpus and an absolute abandonment thereof in order for the donor to avoid income taxation thereon.20

As amplified by the theory of economic benefit expressed in the *Horst* case, the *Clifford* doctrine might appear drastic even to one not preoccupied with the

17 For examples of how the rules of the Clifford and Horst cases merge, see Com'r v. Buck, 120 F. 2d 775 (C.C.A. 2, 1941) and Brown v. Com'r, 131 F. 2d 640 (C.C.A. 3, 1942). To the taxpayer's argument that the income of a trust was not taxable to him because he had deprived himself of certain of his prior rights, the court in the Buck case answered that the donor's retained power to dispose of the income was the equivalent of ownership of it (citing the Horst case). See further, Pavenstedt, op. cit. supra note 1, at 214.

18 311 U.S. 112, 118 (1940). Compare the following statement made in Harrison v. Schaffner, 312 U.S. 579, 582 (1941): "... one vested with the right to receive income [does] not escape the tax by any kind of anticipatory arrangement, however skilfully devised, by which he procures payment of it to another, since, by the exercise of his power to command the income, he enjoys the benefit of the income on which the tax is laid."

19 Helvering v. Horst, 311 U.S. 112, 120 (1940). Helvering v. Eubank, 311 U.S. 122 (1940), goes beyond the Horst case in holding an assignment of renewal commissions on insurance already sold taxable to the assignor. The Buck case, note 17 supra at 778, makes the point that in Helvering v. Eubank the assignor had relinquished all rights over what might be termed analogous to the corpus of a trust, whereas in the Horst case he had not. Since there is no mention in the Eubank case of any intimate relationship between the assignor and assignee, moreover, it may be to the Horst case what Helvering v. Fuller is to the Clifford case. See text supra at note 13.

20 The bonds in the Horst case may properly be considered analogous to the corpus of a trust.

21 Under Helvering v. Eubank, note 19 supra, any gift of income may be taxed to the donor, but since Blair v. Com'r, 300 U.S. 5 (1937), is still ostensibly good law, a life assignment by a trust beneficiary of part of his trust income will not be taxed to the donor if the gift is absolutely without strings. See Harrison v. Schaffner, 312 U.S. 579, 582-83 (1941), for a discussion of this point.
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problems of tax avoidance. Every trust, indeed every gift, involves at least psychic income to the donor; and it is not at all clear that the donor in the *Horst* case enjoyed a more substantial satisfaction. But the problems are harrowing more in contemplation than in application. Guided by the underlying notion that the income of a trust is to be assessed to the donor only when from all the facts it appears that tax avoidance rather than an abnegation of ownership is intended, the circuit courts of appeals have hewn a rough but practical conception of what constitutes the type of continuing ownership interdict under the blended doctrine of the *Clifford* and *Horst* cases.

Thus, in *Com'r v. Chamberlain*, the court held that the income of a short-term trust in favor of a university was not taxable to the settlor, though he named himself a co-trustee. The nonfamilial character of the trust was considered highly important by the court, but only because it was relevant to the ascertainment of whether the benefits to the settlor of a family trust were present in the trust before the court. While recognizing that the view of the *Horst* case is an integral part of the *Clifford* doctrine, the court said: "We cannot believe the *Horst* case means that every settlor of a trust is taxable upon whatever part of its income is applied to purposes the furthering of which gives him satisfaction."

Again, when a mother established a trust in favor of an adult daughter who had established her own home, the court found little difficulty in distinguishing the *Horst* and *Clifford* cases. There was recognition that in a sense the family relationship of the *Clifford* case was present, but in holding for the taxpayer the court noted that "the trust here effectuated a substantial change in the settlor's economic position."

These cases indicate that the doctrine is no more unwieldy than other rules of law. And if this is so, objections based upon its generality are in the unfortunate position of having proved too much. To the objection that Mr. Justice Stone's criterion is unfair, it may be answered that he probably did not intend to abolish the institution of the bona fide gift, even among members of a family. Limitations on gifts of *income* do not present insuperable difficulties to one who actually intends to impoverish himself. In addition, the combined effect of the *Clifford* and *Horst* cases works well within the scheme of the internal revenue code. There can be little doubt that Congress was thinking of a bona fide settlement when it provided that a trust should be taxed as a separate entity.

Economic benefit, ordinarily translated as control, is the touchstone of income taxation according to the *Horst* and *Clifford* cases. It has been revealed elsewhere that the mechanical approaches—the term of the trust, the identity of the parties, and so on—are important only insofar as they throw light on the

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2121 F. 2d 765 (C.C.A. 2, 1941).

22 Ibid., at 766.

23 Com'r v. Armour, 125 F. 2d 467, 469 (C.C.A. 7, 1942).

24 See Pavenstedt, op. cit. supra note 1, at 217.
position of the settlor with respect to the trust.\textsuperscript{26} As has been proposed in this note, moreover, the reasoning of the \textit{Clifford} case was not limited to family trusts. It remains now to demonstrate that the blended doctrine of the \textit{Clifford} and \textit{Horst} cases has found sound application far from the family scenes which stimulated it.

That essentially the same features are present emerges when it is considered that close friends may be even more obliging trustees than members of the family. Again, the "realization of benefit" to the settlor (discussed in the \textit{Horst} case) when the beneficiary is a son, is practically the same when he is a devoted friend.\textsuperscript{27} The doctrine should be similarly applied in similar situations. Thus, the observation\textsuperscript{28} that most trusts involve "a continuing exercise by the settlor of a power to direct the application of the income,"\textsuperscript{29} applies as well to gifts of income or trusts in favor of a stranger as to those in favor of one's relatives. The mere fact that a trust is in favor of a stranger or even a charity, therefore, should not detract from a rigorous analysis aimed at ascertaining whether a substantial economic benefit remains in the settlor despite the transfer in trust. So, when in a related type of case one makes a gift to his wife of a one-half interest in his business, the issue is not decided merely by the presence of a family relationship; the decision rests, rather, on the inquiry whether the donor has suffered an economic harm from the transfer. The court must decide whether "for all practical purposes [the donor has] surrendered nothing."\textsuperscript{30}

Further afield, the Clifford doctrine has found application in ascertaining the party (as between vendor and purchaser) liable for the income from oil lands and in imposing income tax liability on a corporation for dividends distributed to its stockholders by another. In \textit{Anderson v. Helvering},\textsuperscript{31} income tax liability was assessed against the purchaser of oil lands for the proceeds from the production and sale of oil, though pursuant to an agreement he paid over those proceeds to the vendor. Citing the \textit{Clifford} case, Mr. Justice Murphy said that taxability depended on the extent of the various interests.\textsuperscript{32} Again, in \textit{U.S. v. Joliet & Chicago Ry. Co.},\textsuperscript{33} a corporation was held taxable on dividends paid to its shareholders by its lessee, the lease providing for such payment. "The con-

\textsuperscript{26}Ibid., at 221 et seq. See Case, op. cit. supra note 1; Merrills, Status of Short Term Trusts and Trusts Where the Control Remains in the Grantor, 28 Wash. U.L.Q. 99 (1943); cf. note 3 supra.

\textsuperscript{27}See Brown v. Com'r, 131 F. 2d 640 (C.C.A. 3, 1942).

\textsuperscript{28}See James, op. cit. supra note 1, at 435, 440.

\textsuperscript{29}Burnet v. Wells, 289 U.S. 670, 682 (1933).


\textsuperscript{31}Ibid., at 407: "It is settled that the same basic issue determines both to whom income . . . . is taxable and to whom a deduction is allowable. That issue is, who has a capital investment . . . . and what is the extent of his interest."

\textsuperscript{32}315 U.S. 44 (1942).
clusion that the dividend payments made to respondent's stockholders were income realized by it," Mr. Justice Douglas pointed out, "marks no innovation in income tax law.... 'Income is not any the less taxable income of the taxpayer because by his command it is paid directly to another in performance of the taxpayer's obligation to that other.' "

These cases are distinguishable from each other and from the types discussed above; yet, a common element exists in all. It is fairly easy to see that a corporation should pay income tax on income distributed to its stockholders, or that one should be taxed on income used by him to discharge a continuing obligation of support. Little violence is done, moreover, when the Court compels a man to pay income tax on the income from land in which he has the capital investment and of which he may direct the exploitation. The common element in these cases is the *dominion* over a thing which constitutes the major premise of the most sophisticated notions of ownership. With this in mind, taxation of the income of a trust to one who has retained the right to vote the stock composing the corpus, for example, does not seem a tour de force. And the opinion in the *Horst* case, besides its straightforward warning, refines the elemental conceptions of ownership relevant to income taxation.

**PICKETING FOR CLOSED SHOP—CONSTITUTIONALLY ENJOINABLE?**

The defendant union, aiding a strike for a closed shop, was enjoined from picketing. On appeal, the Massachusetts Supreme Court affirmed the decree, asserting that it did not violate the First Amendment. *Fashioncraft v. Halpern.*

It has now been almost two years since the United States Supreme Court held picketing to be guaranteed under the right of free speech. During that time, critics have been skeptical of the doctrine; state courts and lower federal courts have shown a decided distaste for it; and the Supreme Court itself has twice restricted its applicability. First, in *Milk Wagon Drivers' Union v. Meadowmoor*

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34 Ibid., at 49.
35 See Helvering v. Stuart, 317 U.S. 154 (1942) (settlor held taxable for all the income of a trust which *might* be used for the maintenance and support of his minor children).
1 48 N.E. 2d (Mass. 1943).
4 The attitude of these courts is discussed in Objective Tests for Determining the Legality of Labor Activities, 41 Mich. L. Rev. 1143 (1943); Ratner and Come, The Norris-La Guardia Act in the Constitution, 11 Geo. Wash. L. Rev. 428 (1943); Teller, op. cit. supra note 3, at 453.