Montana Law Review

Volume 17
Issue 2 *Spring 1956*

Article 6

January 1956

Constitutional Questions Raised by Montana's New Income Tax Law

Tom Hendricks

of decency." We have pointed out the difficulties attendant to defining "the primary requirements of decency," and of phrasing statutes to specifically apply only to pictures which are inimical to the public welfare or public morals. As a practical matter, such a state of perfection may never be reached, but until it is, it seems likely that the Supreme Court will continue to prohibit the prior censorship of moving pictures.

EUGENE C. TIDBALL

CONSTITUTIONAL QUESTIONS RAISED BY MONTANA'S NEW INCOME TAX LAW

The 1955 amendments to the income tax laws of the State of Montana pose interesting problems of constitutionality.

Section 84-4905[1] now reads in part: "Adjusted gross income shall be the taxpayer's gross income as defined in section 62 of the Internal Revenue Code of 1954 or as that section shall be labeled or amended. . . ." In a similar manner the deductions from gross income for determining adjusted gross income under the federal code are incorporated into the Montana law by reference to the appropriate section number of the federal code.[2]

Although there are some state not permitting the practice,[3] the majority of American jurisdictions, including Montana,[4] regard incorporation by reference as an acceptable procedure when the purpose is to pass a law similar to one that is already in existence in another jurisdiction. This is not considered to be a delegation of legislative power.[5] But when an attempt is made to incorporate into a statute a foreign law as it now appears on the statute books of the foreign jurisdiction, together with changes thereafter to be made, the lawmakers are walking on uneasy ground.

Two questions are raised by the Montana amendment which this paper will consider, namely:

1. Does that part of Section 84-4905, *supra,* which reads "as that Section shall be labeled or amended," render the statute void as an unconstitutional attempt to delegate legislative power to the federal government, by including future amendments by the United States Congress in the laws of the State of Montana?

[1]This section supersedes §§ 84-4906 and 84-4907, REVISED CODES OF MONTANA (1947). The amended law also includes interest on all state, county, and municipal bonds, which are not taxed by the federal government. Interest on United States obligations and dividends on national banks situated in Montana are excluded from the state tax.

[2]REV. CODES OF MONT. § 84-4906 states: In computing net income, there shall be allowed as deductions:

(a) The items referred to in §§ 161 and 211 of the Internal Revenue Code of 1954, or as §§ 161 and 211 shall be labeled or amended, except that state income tax paid shall not be deductible and also subject to exceptions provided in § 84-4909, relating to items not deductible.

(b) Federal income tax paid within the taxable year. (Note: § 84-4909, *supra,* excludes personal expenses, building and property improvements, and premiums on life insurance policies, where taxpayer is a beneficiary.)

[3]For example, New York: N. Y. Const. Art. III § 17 states: "No act shall be passed which shall provide that any existing law, or any part thereof, shall be made or deemed a part of said act, or shall enact that any existing law or part thereof, shall be applicable, except by inserting it in such act."

[4]State v. District Court, 83 Mont. 400, 272 Pac. 525 (1928).

[5]Featherstone v. Norman, 170 Ga. 370, 153 S.E. 58, 70 A.L.R. 449 (1930).

2. If the aforementioned portion of the laws is invalid, will the remainder of the law stand?

In the majority of state constitutions, the legislative branch of the state government is not specifically forbidden to delegate its power, but the doctrine that the essential legislative powers cannot be delegated, is generally upheld by the courts.[6] Montana has an express prohibition in the constitution against the delegation or usurpation of the powers of one department by another.[7] In only slightly varying degrees, all of the state courts follow the doctrine of separation of powers, breathing life into the trite but ever potent maxim, *delegata potestus non potest delegari.*[8]

But our government must be practical and workable. To require rigid adherence to the exact word of the constitutional mandate would certainly overburden the Legislature to the point of stagnation. It is in the light of practicability that delegation by the Legislature to administrative bodies and commissions has been traditionally accepted by the courts. The statement of Mr. Justice Agnew in *Locke's Appeal*[9] has been reiterated with resounding force in innumerable decisions throughout the states: "Congress may not delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend." It is sufficient if the lawmakers set the standard and define the boundaries within which the administrative body must act.[10] Such a delegation is not a delegation of essential legislative power,[11] but merely an authorization to the administrative body to "fill in the details"[12] in the legislation, a task which would be entirely impracticable for the legislature to attempt.

The delegation of a purely administrative function of a nature such that it might be delegated to a domestic administrative body, may not be delegated to a foreign administrative body, since such delegation would be an impairment of state sovereignty; but it has been held that it may be delegated to a federal administrative body since the federal government may not properly be called a foreign sovereign. The states may not, however, delegate the essential legislative functions even to the federal governmnt.[13]

Inasmuch as Montana has apparently not decided a case precisely in point, let us examine a few of the leading cases of other states which have considered the question of the adoption by a state of prospective laws of another jurisdiction.

In a leading Maine case,[14] the precise question presented for decision was whether a certain state act was valid insofar as it purported to incorporate

[6]Opinion of the Justices, 160 Mass. 586, 36 N.E. 488 (1899).

[7]Art. IV, § 1 provides: "The powers of the government of this state are divided into three distinct departments: The legislative, executive, and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted.

[8]See Duff and Whiteside, *Delegata Potestas Non Potest Delegari, A Maxim of American Constitutional Law*, 14 CORNELL L. Q. 168 (1928).

[9]72 Pa. 491, 13 Am. Rep. 716 (1873).

[10]United States v. Grimaud, 220 U.S. 506, 31 Sup. Ct. 480, 55 L.Ed. 563 (1911).

[11]People ex rel Goldfogle, 242 N.Y. 277, 151 N.E. 452 (1926).

[12]In re Lasswell, 1 Cal. App. 2d 183, 36 P.2d 678 (1934).

[13]With regard to general question of delegability of legislative power, see 1 COOLEY, CONSTITUTIONAL LIMITATIONS 224 (8th ed. 1927).

[14]State v. Intoxicating Liquors, 121 Me. 438, 117 Atl. 588 (1922).

by reference into the state law a definition of intoxicating liquors contained in the federal law, and declaring such liquors to be intoxicating. The court had no hesitation in striking the law down as void. Under a constitution which vests the legislative power in a state legislature, subject only to the initiative and referendum measures of the people, "such legislation constitutes an unlawful delegation of legislative power and an abdication by the representatives of the people of their power, privilege, and duty to enact laws."

A proposed Massachusetts statute which was to be enacted for the purpose of carrying into effect, as far as the state was concerned, the Eighteenth Amendment to the Federal constitution and which incorporated laws made and to be made thereunder for the purpose of establishing offenses to be punished, was held an unconstitutional delegation of legislative authority.[15]

In *Holgate Bros. Company v. Bashore*,[16] the Pennsylvania court held that legislative power was improperly delegated by a provision of a state statute adopting current and prospective federal standards as a basis of the state law. The statute prescribed maximum periods of labor, and vested power to vary the statutory schedule of hours in the State Department of Labor and Industry. With respect to any industry whose schedule of hours was established by federal regulation, the schedule to be fixed by the Department of Labor and Industry should conform to the schedule established by federal authority. The court said:

> Whatever the Federal schedule now or hereafter adopted may be, the Pennsylvania schedule "shall conform." There is no escape from the conclusion that this language is mandatory. The result would be, if the provision was effective, that whenever a Federal regulatory body established a scheduled of hours for any industry, our Department of Labor and Industry is bound to adopt such schedule of hours for that industry. This would of course introduce an inequality in the requirement for hours of labor in Pennsylvania. There is no pretense that the Federal schedule will be limited by any standard. In this attempted transfer of legislative power there is not even the semblance of limitation or control. A more sweeping abdication of power and duty would be difficult to imagine.

A Florida statute was declared unconstitutional as an improper delegation of legislative power in *Hutchins v. Mayo*.[17] The statute provided that citrus fruit be graded "according to standards as now fixed by the United States Department of Agriculture or as such standards be hereafter modified or changed." The Supreme Court of Florida said: "We cannot accept the view that the estate commission may make binding rules to be promulgated by the federal bureau in the future. That is a delegation of a delegated power which we cannot sanction."

Another Florida statute, in defining the word "employer" for purposes of industrial compensation laws, excluded any employer, employment, or service which is not included within Title IX of the Federal Social Security Act, or amendments thereto. The court[18] felt that it was within

[15]In re Opinion of Justices, 239 Mass. 606, 133 N.E. 453 (1921).
[16]331 Pa. 255, 200 Atl. 672, 117 A.L.R. 639 (1938).
[17]143 Fla. 707, 197 So. 495, 133 A.L.R. 394 (1940).
[18]Florida Ind. Comm. v. Penninsular Life Insurance Co., 152 Fla. 55, 10 So. 2d 793 (1942).

the Legislature's province to approve or disapprove administrative interpretations of a state or federal act that was in effect at the time the Legislature acted, but it is not competent for the Legislature to approve administrative interpretations of an act of another state or of the federal government to be promulgated in the future. The court considered the question "academic."

In *City of Cleveland v. Piskura*,[19] a municipal ordinance of Cleveland, Ohio, provided that it was an offense against the city to violate the Emergency Price Control Act of the federal government. This ordinance was held to be an unlawful attempt by the city to delegate power to a federal agency. But New York upheld a similar state statute on the theory that it does not delegate power to the federal government inasmuch as the Office of Price Administration already had power to act in price regulation violation. The mere adding of the city's enforcement to the federal law does not empower the federal agency to change existing state law.[20]

Many courts have upheld state statutes which adopt federal standards and regulations, but most of these can be distinguished from the cases previously referred to on the ground that they authorize the mere filling in of details.

In California, one Lasswell was accused of cleaning a woman's dress for fifty cents and a man's hat for the same amount in violation of a state code of fair competition regulating the cleaning and dyeing industry. It was contended that the act which Lasswell had violated was an unconstitutional delegation by the State of California to the federal government. It was charged that the California National Industrial Recovery Act, called the "Little NRA," adopted the federal National Recovery Act. But the California statute was upheld, the court saying, "there must be an overlying law which constitutes the primary standard. The function of the delegated power must be to 'determine some fact or state of things upon which the enforcement of the primary standard law depends.' " The court found nothing improper in the "filling in of details" by the federal government although stressing that the "correlative rights of state and nation are of great importance."[21]

The California Alien Land Law was likewise upheld against the same charge as in the *Lasswell* case. The court held that the law does not unconstitutionally delegate authority merely because of the fact that the state Legislature has set up rules of eligibility to citizenship under the laws of the United States as a primary standard.[22]

An Arizona statute provided that no veteran entitled to the benefits under Servicemen's Readjustment Act shall be under legal disability by reason of minority to make any contract involving such benefits.[23] The statute was held not to be an unconstitutional delegation of essential legislative power to the United States Veteran's Administrator, since only matters of detail are left to the administrator.

Statutes have recently been upheld which authorize administrators or commissioners to adopt rules later to be promulgated by a foreign state

[19]145 Ohio St. 144, 60 N.E.2d 919 (1945).
[20]Mosher v. Haddock, 181 Misc. 486, 46 N.Y.S.2d 343 (1944).
[21]In re Lasswell, 1 Cal. App. 2d 183, 36 P.2d 678 (1934).
[22]People v. Oyama, 29 Cal. 2d 164, 173 P.2d 794 (1946).
[23]Valley National Bank of Phoenix v. Glover, 62 Ariz. 538, 159 P.2d 292 (1945).

or even a non-political organization.[24] The adoption by the Texas legislature of standards theretofore prescribed by the National Board of Underwriters for safe handling of liquefied petroleum gases according to a document on file, was held not to be rendered invalid by further provision in the statute authorizing the Railroad Commission to aodpt and promulgate such regulations as might be thereafter adopted and published by the National Board of Fire Underwriters or National Fire Protection Association, neither of which was a governmental agency.[25] An Ohio statute empowered building and loan associations to convert into federal savings and loan associations and imposed conditions and limitations on the exercise of that power, such as the requirement of compliance with federal laws and regulations of federal agencies. It was held that the statute did not delegate legislative power.[26] These cases may be distinguished from other cases considered for the reason that the statutes did not imperatively command or prohibit the performance of acts but only authorized or permitted them.

Courts which, in early decisions, spoke in prohibitory terms with reference to delegations of legislative power, now agree that some delegations are permissible so long as they are accompanied by sufficient basic standards. The "exigencies of modern government" dictate the use of general rather than minutely detailed standards.[27] Delegations "must be judged in the light of what is practical."[28] In a 1955 New Jersey case, *State v. Hotel Bar Foods,*[29] the court was called upon to determine the constitutionality of the Packaging Food Law of that state. It was pointed out that New Jersey courts had in the past approved statutory authorization to adopt the rules and regulations which "shall be kept in conformity as nearly as may be with the laws, rules, and regulations of the United States government concerning aeronautics." Similarly, it approved the statutory direction to "cooperate to the fullest extent consistent with the provisions of the Social Security Board of the federal government." Statutes had also been upheld, the court pointed out, which directed the State Department of Health to follow the rules "from time to time promulgated by the Secretary of Agriculture of the United States under the federal act." The Packaging Food Law under attack forbade any person to have in possession for sale "any article of food in package form unless marked thereon with the weight, measure or numerical count, provided that reasonable variations in small packages shall be permitted and that the state superintendent shall fix "such tolerances and exceptions as to small packages as shall be fixed by the Secretary of the Treasury, the Secretary of Agriculture and the Secretary of Commerce of the United States."

[24]For cases in which states have upheld laws adopting federal standards which are designed to augment the enforcement of federal laws and regulations, see Transit Commision v. Long Island R. Co., 272 N.Y. 27, 3 N.E.2d 622 (1936) ; Smith v. Alphin, 150 N.C. 425, 64 N.E. 210 (1902) ; Cleveland Macaroni v. State Board of Health of California, D.C., 256 F. 376 (1919) and Note, 33 MICH. L. REV. 597 (1934-35).

[25]Dudding v. Automatic Gas Co., 145 Tex. 1, 193 S.W.2d 517 (1946).

[26]Opdyke v. Security Savings & Loan Co., 157 Ohio St. 121, 105 N.E.2d 9 (1952).

[27]State Board of Milk Control v. Neward Milk Co., 118 N.J.Eq. 504, 179 Atl. 116 (1935) ; New Jersey Bell Telephone Co. v. Communications Workers, 5 N.J. 354, 75 A.2d 721 (1950) ; Ward v. Scott, 11 N.J. 117, 93 A.2d 385 (1952).

[28]Alaska Steamship Co. v. Mullaney, 180 F.2d 805 (9th Cir. 1950).

[29]18 N.J. 115, 112 A.2d 726 (1955).

In approving of this entire line of cases, the court said:

> Realistically viewed, the distinction seems insubstantial and hardly sufficient to determine basic issues of constitutionality. The ultimate and controlling policy decision—as to whether there shall be uniformity of Federal-State regulation in this field—rests always with the Legislature and it does not in any vicious sense abdicate its judgment or authority.

The 1955 amendment to the Montana income tax laws is not entirely novel in the United States. New Hampshire, in 1955, considered passing a similar law and the state supreme court was asked for an advisory opinion as to the constitutionality.[30] The court declared that it was beyond the legislative authority to enact such a law, but it was on constitutional grounds which are not applicable in Montana.[31] In 1954, Kentucky passed a law[32] incorporating into the state law the applicable sections of the federal code, but prospective amendments were not included. Georgia had a law[33] similar to the 1954 Kentucky statute as early as 1929. The Corporate Franchise Tax Law of Pennsylvania provided that the tax will be a fixed percentage of the amount reported to the federal government as taxable income. In 1952, the constitutionality of the law was challenged.[34] At the outset the court distinguished this tax, an excise tax on the privilege of doing business within the state, from a graduated income tax, saying: "If the legislature had the constitutional right to levy a graduated income tax and should provide that it should be the same as fixed by the Federal government, then we would have a situation such as the appellant contends . . ." is a delegation of legislative power. The court thought that *Holgate Co. v. Bashore, supra,* supported their position rather than that of the appellants, adding that the *Holgate* case "would be an analogue, if an income tax statute had been passed, similar to such as the Federal Legislature might enact, which, as before pointed out, is not the case." Although dicta, the statements clearly reveal the reluctance of the Pennsylvania court to approve an income tax based upon the federal method of computation, including future changes.

On the other hand, in the face of cases such as those discussed above, the income tax law of Alaska was upheld by the ninth circuit court in *Alaska Steamship Co. v. Mullaney.*[35] The territory income tax was set at 10% of the amount paid the federal government in the previous year. The court, speaking through Judge Pope, recognized the right to incorporate by reference provisions of the federal law "now in effect" as beyond question. In regard to the effect of amendments to the federal law, the court said:

> We do not overlook the fact that if the words "or hereafter amended" were dropped from the Act, what remains would, in the long run, be unworkable under the legislative scheme here devised, for if the Federal income tax requirements were changed sub-

[30]In re Opinion of Justices, 99 N.H. 527, 113 A.2d 548 (1955).
[31]The constitution of New Hampshire forbids a graduated income tax; Montana has no such limitation.
[32]KEN. REV. STAT. § 141.010.9 (.....).
[33]See Featherstone v. Norman, 170 Ga. 370, 153 S.E. 58 (1930).
[34]Commonwealth v. Warner Bros. Theatres, 345 Pa. 270, 27 A.2d 63 (1942).
[35]180 F.2d 805 (9th Cir. 1950).

> stantially by future amendments, it would be impossible administratively, to calculate the Alaska income tax merely by dividing the tax shown on the federal return by 10. That is a hypothetical question that conceivably may never arise.
>
> We think it far from clear that any invalid delegation is attempted. There are of course many cases which have held attempts by a legislative body to incorporate provisions into its enactment by reference to other acts or amendments by other legislatures, to be invalid. But where it can be said that the attempt to make the local law conform to future changes elsewhere is not a mere labor-saving device for the legislators, but is undertaken in order to attain a uniformity which is in itself an important object of the proposed legislative scheme, there are a number of precedents for approval of this sort of thing. Reciprocal and retaliatory legislation falls into this category.

Much credit is due Judge Pope's persuasive argument. Indeed, this is the kind of legislation that has long been desired by accountants and tax consultants who discover the necessity of "keeping two sets of books" for state and federal income tax purposes to record minor differences in computing the tax for two separate governments taxing substantially the same income.[86] The simplicity of filing a return under the amended law in Montana is evidence of merit of the law. Although this type of law may be desirable by reason of its operational simplicity, the question of constitutionality is more difficult to answer. It should be noted that in the *Alaska Steamship* case, the court did not consider the effect of the line of cases discussed in this paper. The matter was apparently set at rest in an earlier case[87] involving the same taxpayer, so that those cases were not urged upon the court for consideration. In the former case, the appellant (taxpayer) was prepared with an imposing volume of authority to sustain his argument that the statute was a delegation of legislative power. The court there was convinced that the weight of numerical authority supported the position of the appellant and would, if deemed controlling, preclude the territory from availing itself of the advantage to be gained from adopting the federal method of computation of the tax. But counsel for the appellant "scratched up a snake"[88] by citing *In re Lasswell, supra,* in support of his position. This seemed enough to satisfy the court that the statute, even with its prospective amendments, was valid. The *Lasswell* case, the court said, was the better rule. But this was only dicta in the decision since, at that time, there had been no changes in the federal code after the enactment of the territory income tax law. The appellant was not in a position to complain until such time as the federal law was amended.

In the second *Alaksa Steamship* case, the court referred to "a number

[86] See Kassell, *No Uniformity in State Income Taxes—Why?* 87 J. Accountancy 293 (1949).

[87] Alaska Steamship Co. v. Mullaney, 84 F. Supp. 561 (9th Cir. 1949). The petitioner relied on: *In re* Lasswell, 1 Cal. App. 2d 183, 36 P.2d 678 (1934); Florida Commission v. State, 155 Fla. 772, 21 So. 2d 599 (1945); Featherstone v. Norman, 170 Ga. 370, 153 S.E. 58 (1930); *In re* Opinion of Justices, 239 Mass. 606, 133 N.E. 453 (1921); State v. Weber, 125 Me. 319, 133 Atl. 738 (1926); Santee Mills v. Query, 122 S.C. 158, 115 S.E. 202 (1922).

[88] This an expression of A. Lincoln when, in a trial, he cited a case upholding his opponent's view.

of precedents for approval of this sort of thing'' and included reciprocal and retaliatory legislation as among those. It is difficult to see how there is any real similarity.[39] The power to tax is neither reciprocal nor retaliatory, but a separate incident of each sovereignty to finance its operation and continue its existence. The Territory of Alaska, of course, has no separate sovereign entity, but the court did not regard this factor as controlling the question of whether or not the territorial legislature might be delegating its power to the federal government. To the extent that this factor should be found to be controlling, the cases construing a territorial statute would seem to be, to the same extent, less authoritative in a decision concerning the constitutionality of a state statute. But, in any event, it will be interesting to note how the ninth circuit handles the question when a case arises after changes in the federal code which have not, as existing law, been incorporated by reference into the law of the territory.

It would seem that Montana is free to decide this question either against or in favor of upholding the tax statute, depending upon which line of authority the courts should deem desirable. Is there in any real sense an abdication of the essential legislative powers of the legislature? It may be forcibly argued that there is not.

To begin with, there is a basic standard, the federal law, which it itself confined within the limits of the definition of the term ''income.''[40] *Pollock v. Farmers' Loan & Trust Co.*[41] condemned the Tax Act of 1894 as repugnant to the constitutional inhibition against direct taxes which were not apportioned among the several states according to population. To the extent that income subject to the tax included income from property, the tax was held to be a tax on property, and was therefore a direct tax according to traditional constitutional dogma. The Sixteenth Amendment to the federal Constitution, which was passed to countermand the effect of the *Pollock* case, specifically authorized taxation on incomes without the requirement of apportionment among the states, but made no changes in other direct taxes. There remains, therefore, a stringent limitation on the power of Congress to expand the coverage of an income tax. Can it not be argued that Montana, in adopting the definition of ''gross income'' and ''deductions'' are merely delegating to the federal government the power to ''fill in the details?'' A contrary determination might indeed be to ''exault the form before the substance'' and allow insubstantial technicalities to impinge unnecessarily upon the flexibility so necessary in a modern government.

Realistically considered, the real dangers of this type of legislation are practically non-existent. If the federal government should amend or interpret the Internal Revenue Code in a manner unsatisfactory to the Montana legislature, then the legislature may at any time amend the state law to remove the undesired changes.

[39]Reciprocal legislation of a state (particularly with reference to inheritance taxation) and retaliatory legislation (common with reference to regulation of insurance) may depend, for their effectiveness, upon the future legislative action of other jurisdictions, but are generally recognizd as valid. See People v. Fire Ass'n of Philadelphia, 92 N.Y. 311, 44 Am. Rep. 380 (1883).

For an interesting comment on reciprocal and retaliatory legislation, see Starr, *Recriprocal and Retaliatory Legislation in the United States*, 21 MINN. L. REV. 371 (1937). See also 57 YALE L. J. 201 (1947).

[40]Eisner v. Macomber, 252 U.S. 189, 40 S.Ct. 189, 64 L.Ed. 521 (1920).

[41]157 U.S. 429, 15 S.Ct. 673, 39 L.Ed. 759 (1895)

What will be the effect on the balance of the law, if the Supreme Court of Montana should strike down the portion of the law which incorporates the future amendments of the federal code? There is adequate authority to support the conclusion that the remainder will be valid standing alone.

In considering the validity of a statute, we have the benefit of a presumption of constitutionality.[42] Every reasonable doubt will be resolved in favor of validity.[43] Where a statute is attacked as unconstitutional, the question to be answered is not whether it is possible to condemn it, but whether it is possible to uphold it.[44] Where the language of a statute is susceptible of two constructions, the court will adopt the one which avoids injustice, hardship, constitutional doubts or other objectional results.[45] The same presumption obtains against delegations of power by the legislature.[46] Montana courts have placed themselves squarely on record in support of these general theorums of law. "A court cannot assume that the Legislature intended to do an unlawful act or pass an unconstitutional bill."[47]

In Montana, the presumption of validity applies to the remainder of a statute after the objectional part has been stricken out, if the remainder is complete in itself and capable of being executed in accordance with the apparent legislative intent, and the approval of the invalid portion was not an inducement to the enactment of those remaining.[48] In late cases, the Montana court has spoken in mandatory language, that the statute "must" be upheld if it is possible to eliminate the invalid portion without destroying the whole statute.[49]

Some cases in other jurisdictions have declared that the presumption of inseverability will be indulged in unless there is a "savings clause" clearly setting forth the intention of the legislature that if "any portion of the statute should be subsequently declared unconstitutional, the remainder shall stand." In the much-cited case of *Williams v. Standard Oil Co. of Louisiana,*[50] the court said that in the absence of a legislative declaration that invalid portions shall not affect the remainder, the presumption is that the legislature intended the act to be effective as an entity. From that case we have this pronouncement:

> The effect of the statutory declaration is to create, in place of the presumption just stated, the opposite one of separability. That is to say, we begin in the light of the declaration, with the presumption that the legislature intended the act to be divisible; and this presumption must be overcome by considerations which make evident the inseparability of its provisions, or the clear probability that, the invalid part being eliminated, the legislature would not have been satisfied with what remains.

The effect of the savings clause thus seems to be to change the presumption from inseverability to severability. The legislature of Montana

[42]Arps v. State Highway Commission, 90 Mont. 152, 300 Pac. 549 (1931).
[43]In re Mosmain Drainage Dist., 90 Mont. 1, 300 Pac. 280 (1931).
[44]Arps v. State Highway Commission, 90 Mont. 152, 300 Pac. 549 (1931).
[45]Hill v. Board of Education, 207 Misc. 736, 140 N.Y.S.2d 358 (1955).
[46]Town of Mamaroneck v. New York Interurban Water Co., 212 N.Y.Supp. 639 (Spec. Term 1925).
[47]Couch v. Chase, 91 Mont. 234, 6 P.2d 867 (1932).
[48]Hamilton v. County Commissioners, 54 Mont. 301, 169 Pac. 729 (1917).
[49]Gullickson v. Mitchell, 113 Mont. 359, 126 P.2d 1106 (1942).
[50]278 U.S. 235, 73 L.Ed. 287, 49 Sup.Ct. 115, 60 A.L.R. 596 (1929).

thoughtfully added such a clause to the 1955 amendment to the income tax statutes.[51] While it seems clear, from what has already been said, that the valid portions of the statute will stand alone without a savings clause, the addition of such a clause should eliminate all doubt. It is the final manifestation of the legislative intent on the question of severability.[52]

It may be said that the intended effect of the amendment has been substantially accomplished, even if the phrase incorporating the prospective federal changes is declared to be invalid. But, as pointed out by Judge Pope in the *Alaska Steamship* case, *supra,* in order for the law to be fully effective, that phrase must be included.[53] Since the Montana legislature convenes only once every two years, the interim revisions in the federal code cannot currently be included in the Montana law, unless it remains as it was written.

TOM HENDRICKS

NEED FOR A REPLACEMENT STATUTE TO CORRECT EXISTING INEQUITIES

Suppose Mr. A. B. White, a business man, and Mr. C. D. Black, a rancher, had both died the same day, each leaving an estate valued at $60,000. If you were the widow of Mr. Black, would you expect to receive the same amount of inheritance as Mrs. White? You probably would, especially if you had the same number of children and your husband owed no more debts than Mr. White. You can also imagine Mrs. Black's surprise when the court awarded her a life interest in $16,667 and $5,000 outright as her share, while Mrs. White received $30,000.

How could the same court arrive at such divergent amounts? The answer to this question requires an analysis of the assets of the two estates. Mr. White, the business man, lived in a rented house which he furnished himself. The furniture, appliances, and personal effects were valued at $5,000. He owned an automobile with a market value of $3,000, and his bank blance read $2,000 when he died. The shares of stock which he held, had a value of $50,000. This gave Mr. White an estate of $60,000. Mr. Black's estate reached the same total. The land and buildings on his ranch were worth $50,000. He had a pickup and a tractor, each worth about $1,500. The livestock was quoted at $4,000. Mr. Black had $2,000 in personal effects and $1,000 in the bank.

[51]Section 84-4941 reads: If any section, subsection, sentence, clause or phrase of this act is for any reason held to be unconstitutional or invalid, such decision shall not affect the validity of the remaining portions of this act.

[52]Hill v. Wallace, 259 U.S. 44, 66 L. Ed. 822, 42 Sup. Ct. 456 (1922).

[53]It should be noted that there are certain distinct differences between the Alaska and Montana laws. The Alaska law requires the payment of a certain percentage of the tax paid to the federal government, whereas the Montana law merely includes the definitions of income and deductions. The tax rate is set by the Montana statutes; only the income subject to the tax is subject to variation by prospective federal enactments. The Alaska tax could not be effectively administered without inclusion of current federal changes, since it would otherwise be necessary to recompute the federal tax to eliminate the effect of federal changes which had not become a part of the Alaska law, before applying the fixed percentage. On the other hand, the exclusion of current federal changes from the Montana law would not have so harsh an effect, since it is already necessary to make a recomputation to allow for additions and exclusions from income referred to in note 2 *supra.*