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Comments

DEPRECIATION AND INCOME ASPECTS OF COPYRIGHT UNDER THE INTERNAL REVENUE CODE OF 1954

In actuality, only a minute portion of all taxation legislation passed in the United States has been directed solely at copyrights or at income derived from their exploitation. Yet, owners of copyrights or various rights thereunder have found themselves, and their Internal Revenue agents, in a quandry as to how the ordinary tax laws apply to such property and its income. Some problems, such as that of depreciation, have been solved simply by a careful application of the revenue law itself. Others, including chiefly the problem of the category of the receipts derived from a copyright, have been resolved in part by corrective legislation and in part by court deci-

sions. In addition, the birth of a copyright and its income after extended periods of gestation has often introduced inequities due to the progressive tax rates.

The Internal Revenue Code of 1954 has been only recently passed for the purpose of gathering, clarifying, and amending the vast outgrowth of taxation law conceived by Congress and the courts. In the field of copyright, as in all other areas of revenue-production, the Code has in part inserted entirely novel provisions, altered many sections, and substantially reenacted still others. The purpose of this article is to cull from the revenue law those provisions applicable to copyright and to air them in their present day light.

DEPRECIATION

Section 167(a) of the 1954 act provides, "There shall be allowed as a depreciation deduction a reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence) (1) of property used in the trade or business, or (2) of property held for the production of income."

There seems to be no question that a copyright, falling generally within the definition of an "intangible", is subject to the depreciation allowance of the above section. An Income Tax Unit Ruling as early as 1922 stated that the deduction could be taken under the revenue acts of 1918 and 1921.¹ The regulations under the 1954 Code have not as yet been issued, but a "Proposed Regulation," Section 1.167(a)-1,² states at subsection (a) (3):

"Intangibles, the useful life of which is definitely limited, may be the subject of a depreciation allowance. Examples are . . . copyrights. Intangibles, the useful life of which is not limited, will not usually be depreciable. If an intangible asset is known from experience or other factors to be of use in the business or in the production of income for only a limited period, the length of which can be estimated with reasonable accuracy, such an intangible asset may be the subject of a depreciation allowance. No allowance will be permitted merely because, in the unsupported opinion of the taxpayer, the intangible asset has a limited useful life. . . ."

Regulations 118, § 39.23(1)-3, under the 1939 Code, provided substantially the same, so one may be reasonably certain the proposed regulation will be adopted without significant changes.

The expense of publishing a copyrighted text in book form, where the author pays all the publication costs and sells the books himself, is not subject to a depreciation deduction. Such capital is a part of the cost of certain books, which are for sale in the ordinary course of business and therefore should be returned when those books are sold. A part of the expense incurred should be apportioned to each book in the edition, and the price received from the sale of each book, less the expense so apportioned to it, should be returned by the author as profit.³

1. I.T. 1287, I-1 CUM. BULL. 28 (1922).

2. 2 CCH 1955 FED. TAX REP. § 1712.

3. I.T. 1287, I-1 CUM. BULL. 28 (1922).

As indicated by the proposed regulation, the taxpayer must be in a position to show that the copyright is "property" to which the allowance can apply. In *Taylor v. Commissioner*,⁴ the taxpayer attempted to take the deduction for depreciation on his copyrighted plan to increase classified advertizing for newspapers. The taxpayer refused to divulge the details of the plan, as apparently the only value therein was in its remaining secret. The deduction was denied.

The Code allows the use of several methods of calculating the depreciation deduction, including the straight line, declining balance, and sum of the years-digits systems, as well as "any other consistent method" subject to certain limitations.⁵ However, none but the straight line system may be used in depreciating copyrights, as Section 167(c) states the others mentioned ". . . shall apply only in the case of property (other than intangible property) described in subsection (a). . . ." Under the straight line method, the cost or other basis of the property, less its estimated salvage value (there would be no salvage value in a copyright after its expiration), is deducted in equal annual amounts over the period of the estimated useful life of the property. For example, a \$55,000 asset, with a 5-year useful life and a salvage value of \$5000, would be depreciated at the rate of \$10,000 per year.

The period over which the deduction may be taken causes no appreciable problem. The proposed regulation requires, as before, that "The allowance should be computed by an apportionment of the cost or other basis of the . . . copyright over its remaining useful life."⁶ Therefore, if the useful life of the copyright can be determined, that period must be used. If such is impossible to calculate, as it might well be, its useful life still may "be estimated with reasonable accuracy" as required in subsection (a) (3) of the regulation. Since the life of a copyright in the United States is 28 years from the date of first publication,⁷ this period may be used.⁸ Copyrights, however, may be renewed for a further period of 28 years,⁹ and apparently the principles applicable to leases with an option to renew apply. Treasury Decision 4957¹⁰ states in this connection:

" . . . (T)he matter of spreading such depreciation . . . over the term of the original lease, together with the renewal period or periods, depends upon the facts in the particular case. As a general rule, unless the lease has been renewed or the facts show with reasonable certainty that the lease will be renewed, the cost or other basis of the lease . . . shall be spread only over the number of years the lease has to run, without taking into account any right of renewal."

The proposed regulation provides, "If in any year before its expiration a . . . copyright becomes valueless, the unrecovered cost or other basis may be deducted in that year."

4. 51 F.2d 915 (3rd Cir. 1932).

5. Section 167(b).

6. Section 1.167(a)-1(b) (1).

7. 61 STAT. 652, 17 U.S.C.A. § 24 (1947).

8. 2 CCH 1955 FED. TAX REP. 1717.01.

9. 61 STAT. 652, 17 U.S.C.A. § 24 (1947).

10. 1939-2 CUM. BULL. 87.

Calculating the basis upon which a copyright is to receive a depreciation deduction involves no special law, but merely an application of the Code as directed to other forms of assets. Section 167(f) of the Code states that the basis is that provided in Section 1011 for the purpose of determining gain on sale or other disposition of property. The latter provision requires the basis to be figured according to Section 1012, which states that such basis shall be the cost of the property, unless otherwise provided, adjusted under Section 1016. The proposed regulation announces, "... (T)he capital sum to be recovered is the cost or other basis. . . ."

"If the . . . copyright was acquired from the Government, its cost consists of the various Government fees, cost of drawings, experimental models, attorney's fees, or similar expenditures," so provide the proposed regulations, following past rulings. The cost of a copyright to the author consists of his actual capital outlay in securing it, including the cost of producing the work covered by the copyright, but it does not include any amount representing the value of the author's time and labor.¹¹ The cost of producing and copyrighting the text of a book is the cost of a capital asset or property, and because of the monopoly secured under the copyright, the owner has an increased value for any edition of his book published during the copyright period. The cost of this capital asset may be returned to the owner through his depreciation allowance.¹²

Regulations 118, § 39.23(1)-7, under the 1939 Code, added to the cost factors stated above "development or experimental expenses, etc., actually paid." However, as suggested by the proposed regulations, these expenses are presently to be omitted in determining one's basis for depreciation and treated as a separate deduction under the newly-enacted Section 174 relating to research and experimental expenditures. Under this section, a deduction is allowed for research or experimental expenditures paid or incurred in connection with one's trade or business if not charged to capital account.¹³ If the allowance is not taken in this manner, and if the expenses are chargeable to capital account (except if an allowance is available under the regular depreciation or depletion deduction provisions), the expenditures can be treated as deferred expenses and allowed as a deduction ratably over a period of not less than 60 months as selected by the taxpayer.¹⁴ However, under the latter alternative, an adjustment to basis must be made to the extent of a deduction so taken, under certain circumstances.¹⁵ Prior to the enactment of Section 174, the Commissioner's policy was to allow deduction of research and development expenditures where the practice of the taxpayer under his established method of accounting was to charge such items to expense.¹⁶

As to an estate, trust, or legatee holding a copyright previously owned by a

11. O.D. 996, CUM. BULL. 155 (Dec. 1921).

12. I.T. 1287, I-1 CUM. BULL. 28 (1922).

13. Section 174(a) (1).

14. Section 174(b) (1).

15. Section 1016(a) (14).

16. 2 P-H 1954 FED. TAX SERV. § 11,095.

decendent, the value of the property is determined as of the date of decedent's death.¹⁷ The basis for determining gain on a sale of property in such a case is stated in Section 1014, and, as Section 167(f) provides, this basis is to be used in calculating the depreciation deduction. Such a provision allows a deduction for depreciation even though the property cost the taxpayer nothing.

Section 1053 provides:

"In the case of property acquired before March 1, 1913, if the basis otherwise determined under this part, adjusted (for the period before March 1, 1913) as provided in section 1016, is less than the fair market value of the property as of March 1, 1913, then the basis for determining gain shall be such fair market value."

This provision may well apply today in the case of a copyright which has been renewed, as the second 28-year period, in reference to the above section, could last until 1969. The allowance will often result in a saving to the taxpayer due to an increased depreciation deduction. However, as provided in the proposed regulation, "Depreciation of a copyright can be taken on the basis of the fair market value as of March 1, 1913, only when affirmative and satisfactory evidence of such value is offered."¹⁸

CAPITAL EXPENDITURES

The 1954 Code provides¹⁹ that certain deductions are not to be allowed, including those stated in Section 263:

"(a) No deduction shall be allowed for—(1) Any amount paid out for . . . permanent improvements or betterments made to increase the value of any property. . . ."

The section holds that expenditures which increase the value of property are not permitted to be claimed as expense deductions. These capital items are treated as permanent investments to be added to the cost basis of the property and charged off by the depreciation or obsolescence deductions.

The 1939 regulations applicable to the comparable section in the old Code stated, "Amounts expended for securing a copyright and plates, which remain the property of the person making the payments, are investments of capital."²⁰

Therefore, the cost of obtaining a copyright can be returned only through the depreciation deduction and not as a business expense.

17. Section 1014(a): "... (T)he basis of property in the hands of a person acquiring the property from a decedent or to whom the property passed from a decedent shall, if not sold, exchanged, or otherwise disposed of before the decedent's death by such person, be the fair market value of the property at the date of the decedent's death. . . ." See also Section 2032.

18. See also O.D. 966, 5 CUM. BULL. 155, and T.B.R. 59, 1 CUM. BULL. 138.

19. Section 261.

20. Internal Revenue Reg. 118, § 39.24(a)-2.

INCOME AND CAPITAL GAINS TAXES

Royalties received under a copyright are taxable by the ordinary income provisions of the Internal Revenue Code. Section 61(a) (6) expressly so provides.

A great deal of litigation has arisen over the problem of whether certain payments received by the holder of a copyright can be classified as a capital gain and therefore be subject to reduced taxation. As will be discussed later, the mass of conflict evolving from such claims has been conclusively settled by the addition of Section 1221(3) into the 1954 Code. However, as the problem may still arise in certain connections, also to be analyzed later, a summary of the law on the subject remains relevant.²¹

The cases involved have arisen chiefly in two connections; the ordinary application of the capital gains tax to the particular income, and whether the income was a capital gain so as to exempt it in certain cases from taxation to a non-resident alien author not doing business in the United States.²²

In *Goldsmith v. Commissioner*,²³ the court held that a perpetual assignment of the exclusive world-wide motion picture rights in a copyrighted play was not a sale of the copyright such as to make the income therefrom taxable as a capital gain. The court held the income was subject to the ordinary income rates. The cases involving the non-resident alien aspect of the problem have been more numerous. In *Sabatini v. Commissioner*,²⁴ the taxpayer had granted exclusive world right to produce motion pictures for a limited time based upon certain of his works and had received a lump-sum payment. The court held no sale was made, but merely a limited license. The receipts were determined to be a royalty paid in advance, the lump-sum payment rather than the more common royalty arrangement not affecting the substance of the transaction. Other cases have followed this decision.²⁵ In *Rohmer v. Commissioner*,²⁶ non-resident aliens sold an American company the exclusive and perpetual American and Canadian serial rights in their manuscript for a lump-sum payment. In following the earlier cases mentioned, the court held that since the rights given were only in a limited territory, the transfer was of less than the whole and, therefore, a license. The lump-sum payment did not change the nature of the dealing. The court distinguished several cases in which virtually all

21. Gitlin, *Taxation of Copyright*, 27 TAXES 503 (1949); Swartz, *Authors and the Federal Income Tax*, 26 TAXES 51 (1948); Casey, *Sale of Patents, Copyrights and Royalty Interests*, 7 INST. ON FED. TAX. 383 (1949); Fincke, *An Analysis of the Income Aspects of Patents, Copyrights, and Their Analogues*, 5 TAX L. REV. 361 (1950); Whitley, *Copyrights and the Income Tax Problem*, FOURTH COPYRIGHT LAW SYMPOSIUM 159 (1952).

22. Section 861(a) (4) [1939 CODE § 119(a) (4)]; Section 871(a) (1) [1939 CODE § 211(a) (1) (A)]; Section 1441(c) [1939 CODE § 143(b)].

23. 143 F.2d 466 (2nd Cir. 1944).

24. 98 F.2d 753 (2nd Cir. 1938).

25. Estate of Marton, 47 B.T.A. 184 (1942); Ehrlich v. Higgins, 52 F. Supp. 805 (S.D. N.Y. 1943).

26. 153 F.2d 61 (2nd Cir. 1946).

of the rights in patents were transferred so as to make their transfer a sale.²⁷ Finally, in *Commissioner v. Wodehouse*,²⁸ the Supreme Court held taxable the receipts from an arrangement whereby the purchaser bought several stories from a non-resident alien and agreed to copyright them. After publication, all rights, except American serial rights, were to be reassigned to the author. The court found, notwithstanding the ruling by the circuit court that business practice gave effect to transfers of separate rights as sales, that legislative history and past decisions disclosed a policy to make the receipt of copyright rentals and royalties subject to taxation. Again, lump-sum payments were not regarded as capable of altering the grant of a license to a sale.

The result of these cases seems to be that the transfer of a particular or limited right in copyrighted material, rather than the entire "bundle of rights", is not a sale, but only a license, with the receipts thereunder being taxable as ordinary income, regardless of whether the payments are made in installments or in a lump sum.²⁹

However, in 1952, the rule of "one bundle" in the copyright field took a healthy side-step when the case of *Herwig v. United States*³⁰ came before the U. S. Court of Claims. The controversy involved a claim by Kathleen Winsor for a partial refund of taxes arising out of a transaction regarding her famous novel, *Forever Amber*. The author had sold the exclusive motion picture rights in the book to a film company, whereupon the purchase price of \$165,000 was taxed as royalties for the grant of a license, following previous decisions. The judges considered the statements of the circuit court in the *Wodehouse* case to the effect that the business practice was to buy and sell the various rights under a copyright as separate and distinct "goods," as well as Judge Learned Hand's repudiation of the "one package rule" in his dissent to the ruling in the *Goldsmith* case, and similar problems in the field of patent and trademark law. Their decision was, "We believe that it is not only logical but also practical and just to consider the exclusive and perpetual grant of any one of the 'bundle of rights' which go to make up a copyright as a 'sale' of personal property rather than a mere 'license'." The court went on to find that Miss Winsor had not made the sale in the ordinary course of business, gave her the benefits of the capital gains tax, and granted a \$26,000 tax refund. No mention was made of a reversal of prior cases.

In view of the *Herwig* case, the government has issued Revenue Ruling 54-409³¹ modifying a prior release³² which had followed the earlier decisions. The ruling holds, "... (A) copyright proprietor's grant of the exclusive right to exploit a copy-

27. *General Aniline and Film Corp. v. Commissioner*, 139 F.2d 759 (2nd Cir. 1944); *Commissioner v. Celanese Corp. of America*, 140 F.2d 339 (App. D.C. 1944).

28. 337 U.S. 369 (1949).

29. The distinction has recently been reaffirmed in a late case, applying to a transaction occurring in 1942. *Cory and Cory v. Commissioner*, 23 T.C.—, Jan. 31, 1955.

30. 105 F. Supp. 384 (U.S. Ct. of Claims 1952).

31. INT. REV. BULL. 1954-39, 10.

32. I.T. 2735, XII-2 CUM. BULL. 131 (1933).

righted work in a particular medium effects a transfer of property, and . . . a grant of less confers only a license on the grantee."

From the ruling and the *Herwig* case, it seems that a sale of anything less than the exclusive right to exploit a work in a particular medium still invokes the old "bundle" rules. The government has not given in completely, however. The ruling further states:

"That a copyright proprietor's grant effects a transfer of property does not necessarily mean that the consideration received from the grant is in the nature of proceeds from a sale. . . . Therefore, it is held that, when the proprietor of a copyright grants the exclusive right to exploit the copyrighted work throughout the life of the copyright in a medium of publication or expression for a consideration which is not measured by a percentage of receipts from the sale, or publication of the copyrighted work, is not measured by the number of copies sold, performances given or exhibitions made of the copyrighted work, and it not payable periodically over a period generally coterminous with the grantee's use of the copyrighted work, the consideration is to be treated as the proceeds of a sale of property and not as rentals or royalties.

"Whether a copyright is a capital asset within the meaning of section 117 of the Internal Revenue Code of 1939 and when the provisions of section 107(b) of the Code with respect to copyrights would apply are separate and distinct questions."

The result of these comparatively recent developments seems to be that the old concept of the indivisibility of a copyright has vanished in part, to allow a "sale" of the exclusive rights in particular mediums, provided the consideration for the purchase is not paid as royalties, etc., so as to give the transaction the appearance of a license grant.

The question which presents itself at the present date is whether or not income received from a transfer of a copyright, even in a manner approved by the courts in the above cited cases, may be taxed as a capital gain.

Section 1201 of the 1954 Code sets out the alternative tax on a capital gain. The tax is determined with reference to short and long term capital gains or losses as defined in Section 1222. That section in turn requires a reference to Section 1221 to ascertain what is to be included in a "capital asset," the genesis of the entire capital gains scheme.

Section 1221 provides:

"For purposes of this subtitle, the term "capital asset" means property held by the taxpayer (whether or not connected with his trade or business), but does not include— . . .

(3) a copyright, a literary, musical or artistic composition, or similar property held by—

(A) a taxpayer whose personal efforts created such property, or

(B) a taxpayer in whose hands the basis of such property is determined, for the purpose of determining gain from a sale or ex-

change, in whole or in part by reference to the basis of such property in the hands of the person whose personal efforts created such property."

The section makes it perfectly clear that a taxpayer-author, regardless of whether he transfers his copyright in a manner to be interpreted by the courts to be a "sale," cannot receive the benefits of the capital gains tax. This exclusion was added in 1950 to prevent amateurs from obtaining an unintended tax benefit. Professional writers, etc., were never able to treat the proceeds from the sales of their works as capital gain, since the transfers were made to customers in the regular course of business much like a merchant in across-the-counter sales, and such gains were not within the definition of "capital assets," per Section 1221(1) and (2) and its predecessors. However, the amateur was making only a casual sale of his wares and could not be deemed to be transferring in the "regular course of business."³³ The situation was brought to the forefront in 1948, when President Eisenhower, then in the public eye only as a military leader, obtained a purported \$500,000 tax saving by selling his *Crusade in Europe* to the publishers for a lump-sum payment, including all his rights in the work. The Bureau of Internal Revenue ruled the transaction was the sale of a capital asset and taxable according to capital gains rates.³⁴

The author himself clearly is excluded from the capital gains benefits under Section 1221(3) (A). Other persons also omitted are those named in subsection (3) (B). The reference apparently is to Section 1015, which says the basis of property acquired by gift or by a transfer in trust ". . . shall be the same as it would be in the hands of the donor. . . ." or ". . . the grantor. . . ." A question might well be raised as to why the framers of the Code did not refer specifically to the section. Other sections in the revenue act referring to the methods for calculating the basis of property set out systems for such determination which would reach a result contrary to that mentioned in the subsection above. Apparently, therefore, a taxpayer is prevented from having his copyright income taxed as a capital gain only when he himself created the copyrighted property, or where he received the copyright as a gift or as a beneficiary under a trust. A purchaser, devisee, heir, etc., appears to retain the advantage of the lower tax rates, provided still, of course, he meets the requirements of the *Sabatini*, *Wodehouse*, *Herwig*, etc., cases, and the government rulings in relation thereto, and makes the transfer a sale rather than a license. The 1939 regulations on the previous section give no aid in resolving the question.³⁵

Section 1231 of the new Code, referring to special rules for determining capital gains in respect to property used in the trade or business of the taxpayer, makes the same exclusions as Section 1221(3). Presumably, however, a purchaser, devisee, or heir would still be able to claim the reduced rates.

33. I.T. 2169, IV-1 CUM. BULL. 13 (1925).

34. See also Paul Reece Rider, 16 T.C. 1456, affirmed 200 F.2d 524 (8th Cir. 1952); Richard W. TeLinde, 18 T.C. 91 (1952).

35. Internal Revenue Reg. 118, § 39.117(a)-1(c).

Of course, if trafficking in copyrights is the business of the taxpayer, he would be unable to claim the benefits of the regular Section 1201 capital gains tax, as Section 1221(1) and (2) expressly excludes a copyright or any other property so used from the definition of a "capital asset."

LONG TERM INCOME

A taxpayer receiving income under a copyright was, at one time, subject to an inequity with regard to his income tax, due to the fact that although the compensation he received was often attributable in whole or in part to work done over a period of years, the income was taxed wholly in the year received, making the taxpayer taxable in higher brackets than would have been so had he been assessed during each year in which he did his work. However, this inequity has been eliminated by Section 1302 of the 1954 Code and its predecessors. The section, as applicable to copyrights, is cited in the footnotes below.³⁶

The 1954 provisions were taken from Section 107(b) of the 1939 Code. The former section granted long-term benefits to compensation for services rendered over an extended period. Originally this section applied only to "personal services" so rendered, and authors, etc., were unable to qualify. This led to the inclusion of Section 107(b) by an amendment in 1942.

Long-term benefits are available only to a taxpayer who receives compensation in the tax year from an artistic work created by the taxpayer himself, the labor on such work having covered a period of 24 months or more. The compensation so received in the tax year must, however, be at least 80 percent of the total amounts received for the artistic work in the tax year itself and in all previous years, plus sums which are expected to be received in the 12 months following the end of the tax year.

If the income meets all the requirements stated above, one proceeds as follows:

- (1) The tax attributable to the artistic work income in the present tax year is cal-

36. Section 1302: "(a) Limitation on Tax.—If

(1) an individual includes in gross income amounts in respect of a particular . . . artistic work created by the individual; and

(2) the work on the . . . artistic work covered a period of 24 months or more (from the beginning to the completion thereof); and

(3) the amounts in respect of the . . . artistic work includible in gross income for the taxable year are not less than 80 percent of the gross income in respect of such . . . artistic work in the taxable year plus the gross income therefrom in previous taxable years and the 12 months immediately succeeding the close of the taxable year, then the tax attributable to the part of such gross income of the taxable year which is not taxable as a gain from the sale or exchange of a capital asset held for more than 6 months shall not be greater than the aggregate of the taxes attributable to such part had it been received ratably over . . . in the case of an artistic work, that part of the period preceding the close of the taxable year but not more than 36 months.

(b) Definitions. For the purposes of this section . . .

(2) Artistic Work.—The term "artistic work" means a literary or artistic composition or copyright covering a literary, musical, or artistic composition."

culated by determining the difference between the tax where the particular receipts are added to the taxpayer's gross income and where those amounts are excluded. (2) The artistic work income is then spread ratably over a period not exceeding the 36 months prior to the close of the tax year, and the amount of tax attributable to such income for each of the tax years represented by the 36 months period is calculated (again, by subtracting the difference between the tax with and without the ratable portion of the artistic income attributed to such year). (3) The tax arrived at under step (2) for each of the years represented by the 36 month period is totaled. If the amount of tax arrived at under step (1) is greater than that calculated under step (3), the tax in the present year will be reduced to the extent of such excess. Should the step (1) total be less than that in step (3), which would be an unusual case, the lesser sum will be assessed.

This section is a limitation on the tax for the year in which the type of income is received, however. Income and taxes for prior years are not readjusted (except as stated in the following paragraph), although revisions are made for the purpose of calculating the present year's tax.

It is important to note that in determining whether the 80 percent rule is met, one must also include the artistic work income which is received in the 12 month period following the end of the present tax year. This, of course, necessitates an estimation. In the event receipts from the artistic work in the following 12 months actually reach an amount large enough to make such income received in the tax year less than 80 percent of the total received, the taxpayer would be required to file an amended return and pay tax without the benefit of the long-term income section.

Several cases arose under the old code with regard to what should be included in calculating income under the 80 percent provision. In one decision,³⁷ it was held that even though the author's contract provides for royalties to be given in advance, or the publisher voluntarily gives the author the same, the amounts are still considered in meeting the percentage test, as all amounts actually received are to be so included. The fact that the advances were to be charged against later royalties was immaterial. But even though the taxpayer may have been entitled to advances or was offered them, if such actually were not taken, they may not be included to enable the author to fall within the section. In another case,³⁸ the court held that where the payment to the taxpayer was dated December 30, 1943, the author had constructively received payment in 1943, even though the payment actually was deposited in 1944, so as to permit him to take advantage of the benefits by complying with the 80 percent provisions.

The section expressly excludes capital gains income from its terms. This merely conforms with Section 1221, which denies capital gains benefits to the taxpayer-author who receives income under a copyright.

37. J.G. Cozzens, 19 T.C. 663 (1953).

38. *McEuen v. Commissioner*, 196 F.2d 127 (5th Cir. 1952).

The period over which the artistic work must extend has caused some difficulty. The new Code states the labor must cover at least 24 months, shortening the period from 36 months as previously provided. Although the duration of the work was more than the 36 month period over which the receipts therefrom are to be extended, the income can be spread only to the extent of 36 months.³⁹

The fact that all the work was done prior to the year in which the compensation is received does not affect the applicability of the section. Such was the holding in *Robertson v. United States*,⁴⁰ where the work was completed 8 years before payment was made prior case holding contra was overruled.⁴¹

Problems have arisen as to when an author begins work upon his composition, so as to ascertain whether the 24 month test has been met. In *E. H. Blum*,⁴² the tax court held the work period under the 1939 Code began with the written notation of an idea by the author, where followed by persistent, although not systematic, research. The period started before the final idea was decided upon and the actual work was commenced. In *I. D. Richardson*,⁴³ the period commenced when the author began field notes for a war memo book, even though the notes were later lost and the work done all over again.

SOURCE OF INCOME

In several connections, under the revenue code, it becomes important to determine whether income has been derived from sources within or without the United States. This is true in the case of non-resident aliens,⁴⁴ foreign corporations,⁴⁵ and U. S. citizens or domestic corporations receiving income from U. S. possessions in certain situations.⁴⁶

Section 861 and 862 define respectively what is to be treated as income from within and without the United States. Among the former are:

"(a) . . . (4) Rentals or Royalties.—Rentals or royalties from property located in the United States or from any interest in such property, including rentals or royalties for the use of or for the privilege or using in the United States . . . copyrights. . . ."

The latter section provides, logically enough, that income from without the U. S. includes:

"(4) rentals or royalties from property located without the United States or from any interest in such property, including rentals or royalties for the use of or for the privilege of using without the United States . . . copyrights. . . ."

39. The 1939 Code and Internal Revenue Reg. 118, § 39.107-2, Example 1, thereto followed.

40. 343 U.S. 711 (1952).

41. *Williams v. United States*, 84 F. Supp. 362 (U.S. Ct. of Claims 1949).

42. 11 T.C.M. 612, Decision 19.042 (1942).

43. 14 T.C. 547 (1950).

44. Section 871.

45. Section 881.

46. Section 931.

Although the 1954 regulations on this subject have not as yet been issued, those involving the 1939 Code added nothing to the interpretation.⁴⁷

A few cases have arisen involving the interpretation of these sections as applicable to copyrights. Payments received by a nonresident alien author for the publication rights of his works in the U. S. were held to be "payments for the use or privilege of using property in the U. S.," although the contract was executed abroad.⁴⁸ Also, income has been held to have been derived from sources within the country although the receipts were derived from the assignment to a U. S. corporation of the world-wide motion picture rights in the works.⁴⁹

STEPHEN E. STROM

EQUITABLE ADOPTION IN MISSOURI

In Missouri the doctrine of equitable adoption has become well established. Contracts to adopt, even though oral and not completed by formal and legal adoption, as prescribed by the applicable statutes during the adopting parent's life, will be enforced by a decree of equitable adoption. This decree will not put the adopted child in quite the same status as one legally adopted, but at least it will allow him to inherit from the estate of the adoptive parent.¹

However, although the courts of Missouri have been willing to grant such a decree in a proper case, they have jealously guarded the doctrine, and made it impossible to get such a decree without unmistakable proof. Reasons for requiring such a high degree of certainty in order to prove an adoption the parent did not himself make by formal compliance with statutory procedure, and perhaps made only by an oral agreement, are more than obvious. The supreme court in *Benjamin v. Cronan* said:

47. Internal Revenue Reg. 118, § 39.119(a)-4 and (c)-1(d).

48. *Sabatini v. Commissioner*, 98 F.2d 753 (2nd Cir. 1938).

49. *Molnar v. Commissioner*, 156 F.2d 924 (2nd Cir. 1946).

1. *Kay v. Niehaus*, 249 S.W. 625 (Mo. 1923); *Dillman v. Davison*, 239 S.W. 505 (Mo. 1922); *Holloway v. Jones*, 246 S.W. 587 (Mo. 1922); *Karr v. Smiley*, 239 S.W. 501 (Mo. 1922); *McCary v. McCary*, 239 S.W. 848 (Mo. 1922); *Craddock v. Jackson*, 223 S.W. 924 (Mo. 1920); *Fisher v. Davidson*, 271 Mo. 195, 195 S.W. 1024 (Mo. 1917); *Lindsley v. Patterson*, 177 S.W. 826 (Mo. 1915); *Horton v. Troll*, 183 Mo. App. 677, 167 S.W. 1081 (1914); *Martin v. Martin*, 250 Mo. 539, 157 S.W. 575 (1913); *Thomas v. Malone*, 142 Mo. App. 193, 126 S.W. 522 (1910); *Steele v. Steele*, 161 Mo. 566, 61 S.W. 815 (1901); *Healey v. Simpson*, 113 Mo. 340, 20 S.W. 881 (1892).

"We might again call attention to the wisdom of the rule as to the character and quantum of proof required to support oral adoption, or to support adoption by estoppel, as it is sometimes termed. If this rule is relaxed, then couples, childless or not, will be reluctant to take into their homes orphan children, and for the welfare of such children, as well as for other reasons, the rule should be kept and observed. No one, after he or she has passed on, should be adjudged to have adopted a child unless the evidence is clear, cogent, and convincing so as to leave no reasonable doubt."²

Thus, in *Lynn v. Hockaday*³ the supreme court refused to allow the failure to execute the deed of adoption, then the only statutory requirement, to avoid an equity decree of adoption in the face of the facts and circumstances involved: The adopted child's grandmother gave the orphan to the decedent to be raised as his own, making that a specific condition to her giving up custody. The child was given the decedent's name, raised as his own, and called "daughter" by him. The child did not know until her eighteenth birthday that she was not decedent's daughter, and was generally accepted by society as his daughter, living with decedent until her marriage.

There must be something more than the mere agreement to adopt a child, to give rise to the relationship of parent and child such as results from legal adoption.⁴ Thus, in *Menees v. Cowgill*, the supreme court said that:

"We cannot agree to the contention that there can be an adoption by contract and performance without either a compliance with the statutory formalities required by law relating to the adoption of children or a decree of a court of equity based upon equitable principles and decreeing an equitable adoption."⁵

Therefore, for purposes of equitable adoption the contract itself must be one which the court is willing to enforce, upon equitable principles, in order for the status to exist, and in order for the contract to be enforced, assuming there is proof that such a contract existed, it must be shown that equity and justice can be served in no other way.

Most frequently, the agreement to adopt is in connection with an agreement to bequeath or devise property to the adopted child, or to make him an heir of the adoptive parent.⁶

In *Signaigo v. Signaigo*,⁷ where there was an alleged contract to adopt, and also

2. 338 Mo. 1177, 93 S.W.2d 975, 981 (1936).

3. 162 Mo. 111, 61 S.W. 885 (1901).

4. MADDEN, PERSONS AND DOMESTIC RELATIONS, p. 366 (1931); TIFFANY, DOMESTIC RELATIONS p. 318 (3d ed. 1921).

5. 359 Mo. 697, 223 S.W.2d 412, 416 (1949).

6. Healey v. Simpson, 113 Mo. 340, 20 S.W. 881 (1892) and Signaigo v. Signaigo, 205 S.W. 23 (Mo. 1892) are cases involving an agreement to adopt and to bequeath or devise property. Dillman v. Davison, 239 S.W. 505 (Mo. 1922); Martin v. Martin, 250 Mo. 539, 157 S.W. 575 (1913); and Sutton v. Hayden, 62 Mo. 101 (1876) are cases involving an agreement to adopt and to make the child an heir of adoptive parent.

7. *Supra* note 6.

to devise to the adopted child the property possessed by the adoptive parents at their death, the court, in enforcing the contract, said that the parol agreement had been completely performed in that the deceased received and enjoyed all the benefit that was the consideration for his agreement. In that case the court said the land involved would be charged with a trust in favor of the one who paid the consideration, and that such trust would be executed by decreeing legal title in accordance with the Statute of Uses.

In determining what is a proper case in which to render a decree of equitable adoption, the courts have used various word tests. The Missouri Supreme Court in *Drake v. Drake* said:

"The law, for the same reasons that it sometimes enforces oral contracts affecting real estate, will not allow the mere failure of one party to do his duty to work an irreparable wrong to one who had fully performed his part. This court, for that reason, has not only held an oral contract for adoption valid, but has also required fulfillment of a collateral agreement of the adopting parent to leave the adopted child his estate at his death."⁸

In *Hogane v. Otterbach*,⁹ the court required that a) there be a contract to adopt the child, b) acts and conduct of the parties that have put the child in such a position that it is now inequitable to refuse adoption, and c) equity and good faith can protect the interests of the child in no other way. Many other courts have used language roughly similar and equivalent to the above. Usually included is the phrase that the court should order equitable adoption "only where justice, equity, and good faith require it."

FORM OF DECREE

As stated above in the *Signaigo* case, the court ordered the land which the adoptive parent promised to devise to be charged with a constructive trust, consequently executed by the Statute of Uses, so that ultimately legal title could be vested in the adopted child. This was a satisfactory answer in the cases involving an adoption agreement combined with the promise to devise. Frequently the promise made by the adoptive parents is one to make the child an heir to the property of the adoptive parents. A stipulation of this kind is generally construed to impose upon the adoptive parent an obligation to make the child an heir, which equity will enforce.¹⁰ In *Martin v. Martin*,¹¹ a suit for partition of real estate, plaintiff claimed a one-half statutory share of the decedent's estate. He was an illegitimate son and his mother married the decedent. It was alleged that John Martin, Jr., the decedent, and husband of plaintiff's mother, had promised and agreed if plaintiff's mother would marry him, he would adopt her child, the plaintiff, and would make him his heir. It

8. 328 Mo. 966, 43 S.W.2d 556, 558 (1931).

9. 269 S.W.2d 9 (Mo. 1954).

10. *Rich v. Baer*, 361 Mo. 1048, 238 S.W.2d 408 (1951); *Kay v. Niehaus*, *supra* note 1; *Holloway v. Jones*, *supra* note 1; *Kerr v. Smiley*, *supra* note 1; *McCary v. McCary*, *supra* note 1.

11. *Supra* note 6.

was also alleged that plaintiff's name would be changed from John Gillett to Frank John Martin. Decedent introduced plaintiff as his son, and plaintiff thought he truly was decedent's son until manhood. The two called each other father and son, and plaintiff lived and worked on decedent's farm until he was forty years old. It was further alleged that decedent had said no provision was necessary for plaintiff as he was his son. The defendant, plaintiff's mother, who received the other half of the estate as her statutory share, offered no evidence, and the court held that the land should be partitioned, plaintiff recovering his statutory share on the basis that plaintiff had proven equitable title by parol evidence, clear and convincing enough to leave no reasonable doubt in the chancellor's mind.

In the case of *Dillman v. Davison*,¹² there was involved an agreement between Charles Davison, father of the plaintiff and William R. Moore, alleged adoptive parent, that stated:

"This indenture made entered into and concluded on this twelfth day of June, A.D., 1817, witnesseth that Charles Davison, father of Clarrance Davison hath this day and doth by these presents place the said Clarrance Davison as an apprentice to William R. Moore . . . (Clarrance then being only one year and nine months old) . . . and the said William R. Moore further covenants and agrees that when the said Clarrance Davison shall have arrived at the age of twenty-one years he shall inherit in his, the said William R. Moore's estate share and share alike with his own children and hereby makes him his legal heir. . . ."¹³

This indenture was filed with the probate judge. There was evidence of normal familial behavior between the parties, such as calling each other "Ma" and "Pa", and an absence of natural children in the family of William R. Moore. The evidence was sufficient to allow the court to grant a decree protecting Clarrance's rights as heir of said William R. Moore. Of course, in applying this doctrine of equitable adoption to protect the rights of the adopted child, the courts base their jurisdiction on the well implanted doctrine that equity will treat as done that which should be done, and thus will look at the equities on either side of the question and determine what is necessary to protect the equitable rights of the adopted child if they are found to exist.¹⁴

The present Missouri statutes relating to adoption provide:

"When a child is adopted in accordance with the provisions of this chapter, all legal relationships and all rights and duties between such child and his natural parents (other than a natural parent who joins in the petition for adoption as provided in section 453.010) shall cease and determine. Said child shall thereafter be deemed and held to be for every purpose the child of his parent or parents by adoption, as fully as though born to him or them in lawful wedlock."¹⁵

12. *Supra* note 6.

13. *Ibid.*, 505.

14. *Craddock v. Jackson*, *supra* note 1, *Martin v. Martin*, *supra* note 6.

15. Mo. Rev. Stat. § 453.090 (1949).

If adoption by equity decree should have the same effect upon the child's relationships with all relatives of his adoptive parents as adoption by statutory method, the child's status would be exactly the same whether the adoption was legal or equitable. Some cases would, at first glance, lead one to think this is so:

"It also is a matter of law, or consequence, rather than of the decree that an equitable adoption creates the same relationship which would be created by a strict compliance with the adoption statutes of Missouri."¹⁶

However, although lawful adoption will allow an adopted child to inherit from, and bear other natural family relationships to, collateral relatives as though a natural child in Missouri, it is quite clear that a child decreed adopted by a court of equity may not enjoy so broad a relationship with collaterals.

"While it is in effect admitted that the appellant would have been entitled to a decree of equitable adoption against Guy M. Cowgill [the adoptive father] during his lifetime, or against his heirs at law or his personal representative after his death, entitling her to inherit from him as an adopted daughter, she is not entitled to such a decree as against the collateral kin of his sister, who were not parties to the adoption contract and who are not bound thereby. No equities exist in her favor as against them authorizing a decree of equitable adoption by him as against them. . . . If Guy M. Cowgill had legally adopted appellant in compliance with statutory requirements, the adoption would have been binding on all persons, including the respondents, but in an equitable proceeding based upon contract, only the parties thereto, or those in privity with them are bound. Equity acts only against specific individuals and, in such case, one person may be bound and not another."¹⁷

STATUTES OF ADOPTION AND FRAUDS DO NOT PRECLUDE EQUITABLE ADOPTION

Because the decree of equitable adoption creates, in many instances, rights in the adopted child that ordinarily are required to be in writing in order to be protected, it was questioned whether the equity court could make a decree, based on the proof of an oral contract, that would be effective in the face of the Statute of Frauds. In *Signaigo v. Signaigo*¹⁸ it was pointed out that, while at law the court was without power to enforce rights taken under an oral contract for the disposition of land, the equity court would not permit the Statute of Frauds to become in reality an instrument of fraud and deception, and to prevent this equity has enforced oral contracts in disregard of its terms. The court was quick to point out that equity's jurisdiction in the case was not on the contract itself, but upon the consideration received by way of performance of the oral contract.

In *Lindsley v. Patterson*,¹⁹ it was held that even though the contract by a married woman to adopt a child was invalid under the Statute of Frauds at the time of its execution, still, performance by the child and her foster mother amounted to a sufficient execution thereof to remove it from the operation of the statute.

16. *Menees v. Cowgill*, *supra* note 5, *loc. cit.* 414.

17. *Ibid.*, 418. See also *Sharkey v. McDermott*, 91 Mo. 647, 4 S.W. 107 (1887) on equity decree's binding effect on adoptive parent's heirs.

18. *Supra* note 6.

19. *Supra* note 1.

In *Holloway v. Jones*,²⁰ the court said that the Statute of Frauds did not preclude enforcement of a contract where there was evidence to the effect that the child was, during her infancy, given by the natural father and mother to the adoptive parents with the full understanding that she was to become their child, and that the adoptive parents took the child with such understanding, and would have adopted her in legal form except for the advice of their lawyer that adoption was not necessary to achieve the purpose. The child occupied the place of the only child in the family, in fact and in sentiment, until many years after her majority. Her natural parents had abandoned any control whatsoever. The court said that she became in fact and in equity the adopted daughter of her adoptive parents, without regard to the statute of frauds.

The dissent in *Drake v. Drake*²¹ exemplified the feeling that the passage of the complicated method for legal adoption with all its attendant court procedure removed from the courts of equity the power to enforce contracts or quasi-contracts for adoption. However, it becomes rather clear that the Missouri Supreme Court still countenances an equity jurisdiction in the absence of any statutory compliance, at least to the extent of protecting property rights in the adopted child:

"The present and prior statutory enactments, however, did not oust a court of equity of jurisdiction to decree an adoption in a proper case, where the facts warrant it, although the statutory methods of adoption were not complied with. . . . Where such contract is actually made and is based upon a good consideration and where it is fully performed by the person to be adopted but is not performed by the promisor during his lifetime, a court of equity will declare specific performance against the adoptor's estate to the extent at least of making the adoptee an heir."²²

McCary v. McCary put the stamp of approval upon this general determination when it was said therein:

"It is firmly settled in this state that no formal act of adoption in such cases is necessary, but that this status may be created by the acts and undertakings of the parties fully performed."²³

TEST FOR SUFFICIENCY OF EVIDENCE

In order to enforce an oral contract, as usual, there must be a great deal of proof to overcome the Statute of Frauds, in keeping with the policy of the law to protect persons from making rash oral contracts by requiring certain contracts, deemed important enough to warrant it, to be in writing. Therefore, the courts have usually said, in cases involving a request for a decree of equitable adoption, that the evidence must be examined with special strictness and must be so clear, cogent and convincing as to leave no reasonable doubt in the chancellor's mind.²⁴

20. *Supra* note 1. See also *Carlin v. Bacon*, 322 Mo. 435, 16 S.W.2d 46 (1929).

21. *Supra* note 7.

22. *Menees v. Cowgill*, *supra* note 5, *loc. cit.* 416.

23. *Supra* note 1, *loc. cit.* 850.

24. *Hogane v. Otterbach*, *supra* note 9; *Westlake v. Westlake*, 201 S.W.2d 964 (Mo. 1947); *Ahern v. Matthews*, 337 Mo. 362, 85 S.W.2d 377 (1935); *Lamb v. Feehan*, 276 S.W. 71 (1925); *Kay v. Niehaus*, *supra* note 1; *Martin v. Martin*, *supra* note 1; *Grantham v. Gossett*, 182 Mo. 651, 81 S.W. 895 (1904).

Drake v. Drake put it a little differently, saying:

"If the statements and conduct of the adopting parents are such as furnish clear and satisfactory proof that an agreement of adoption must have existed, then the agreement may be found as an inference from that evidence."²⁵

The supreme court, in *Wales v. Holden*,²⁶ went even farther in its requirement of evidence to establish an oral contract to adopt a child. There the rule was stated to be that the proof to sustain a case of this kind, in the face of the Statute of Frauds, must be *overwhelming* in its probative force, leaving no room for reasonable doubt.

The reasons for the strictness of the proof requirement have already been alluded to in the introduction by the quotation from *Benjamin v. Cronan*. The case of *Baker v. Payne*²⁷ further elucidated on why it required such quantum of proof:

"But on account of the momentous consequences which result from allowing oral evidence to create an heir to a man's property, the courts in this state have uniformly set a guard over uncertain memory and protection against wilful falsehood, by requiring the proof to be cogent and overwhelming, without substantial ground for reasonable doubt. . . . In the exercise of this care, it is far easier to discover and guard against perjury than it is to ascertain when and where memory is at fault. It is true that it is often impossible, after lapse of years, to separate actual fact from new conceptions of what is honestly thought to be the fact. Fortunately, the evidence in this case is of such character and comes from such sources as to relieve us of anxiety as to the good faith of the witnesses. They are people of good standing and reputation for intelligence and veracity. We have no fears of being beguiled by perjury or misled by the self-interest of those who have been called to testify."

The claimant has the burden of proving the adoption contract, of course.²⁸ In meeting this burden, however, the supreme court said that declarations of intention as to the disposal of property in behalf of one living as the child of declarant are to be received with great care, and where not supported by other evidence, are generally entitled to little weight.²⁹ Incomplete or defective adoptions have been held to support a decree of equitable adoption. In *Thomas v. Maloney*³⁰ where the adoptive parent did not mention in his will a child who had been received into his family under an irregular adoption proceeding, the child was decreed a right of inheritance in the estate under a pretermitted heir statute. In *Kerr v. Smiley* a deed of adoption failed to be recorded as required by law and was thus insufficient to establish adoption at law. However, in the light of the other facts of the case in connection with the attempt it was held a good and valid contract of adoption in

25. *Supra* note 8, *loc. cit.* 560.

26. 209 Mo. 552, 108 S.W. 89 (1908); see in accord, *Baker v. Payne*, 198 S.W. 75 (Mo. App. 1917).

27. 198 S.W. 75 (Mo. App. 1917).

28. *Capps v. Adamson*, 362 Mo. 539, 242 S.W.2d 556 (1951); *Westlake v. Westlake*, *supra* note 24; *Taylor v. Hamrick*, 134 S.W.2d 52 (Mo. 1939).

29. *Kinney v. Murray*, 170 Mo. 674, 71 S.W. 197 (1902).

30. 142 Mo. App. 193, 126 S.W. 522 (1910).

equity, and also evidentiary of a prior parol promise to adopt with the right of inheritance.³¹ Nearly the same situation was involved in *Healey v. Simpson*,³² where the instrument of writing in question could not operate as an adoption as it did not come up to the existing legal requirements, but it was allowed to operate as a contract for adoption and as such enforced in equity. When the alleged adoptive parent, in *Fugate v. Allen*,³³ executed the contract of adoption after a divorce from the mother of the child, the latter having been awarded custody of the child, the court refused to enforce the contract as lack of control of the child was deemed a failure of consideration if not a lack of it in the contract's inception. Since the contract was unenforceable it did not preclude the testator from disinheriting the child in his will, and leaving his entire property to his natural children. In the case of *Shelp v. Merchantile Trust Co.*,³⁴ the evidence that decedent's niece entered his home with her mother, but remained under custody and control of her mother, negated any attempt to establish the status of adopted child. In certain cases, evidence that could be construed as showing a parent-child relationship has been found not inconsistent with some other obligation, and therefore not sufficient to establish grounds for an equitable adoption. Thus where a change of custody was allowed by statute, and the county court had so ordered it, certain familial acts and conduct were considered only as carrying out the order of the court transferring custody.³⁵ In *Westlake v. Westlake*,³⁶ where the alleged parent entered a contract with an orphan's home providing that they must care for, nurture, love and educate the child in a proper Christian manner, as though he were their own child, and to give him a small sum of money upon his reaching the age of eighteen years, the court said all the attention and conduct shown the child was only in reasonable accordance with the terms of this agreement, and not enough to warrant the finding of any oral contract to adopt. The evidence to establish the contract need not be direct:

"If the statements and conduct of the adopting parents are such as to furnish clear and satisfactory proof that an agreement of adoption must have existed, then the agreement may be found as in inference from that evidence."³⁷

Kay v. Niehaus said that the contract of adoption may be established by the acts, conduct and statements of the parties, direct proof not being essential.³⁸

EVIDENCE HELD INSUFFICIENT TO ESTABLISH RIGHT TO EQUITABLE ADOPTION

In *Hogane v. Otterbach*,³⁹ decedent told the child's maternal grandfather that he would raise the plaintiff as his own. There was no formal adoption. Plaintiff left

31. *Supra* note 1.

32. *Supra* note 1.

33. 119 Mo. App. 183, 95 S.W. 980 (1906).

34. 322 Mo. 682, 15 S.W.2d 818 (1929).

35. *Rich v. Baer*, *supra* note 10.

36. *Supra* note 24.

37. *Drake v. Drake*, *supra* note 8, *loc. cit.* 560.

38. *Supra* note 1.

39. *Supra* note 9.

her grandfather's and moved in with decedent on the marriage of her mother to him, and lived with them for the next thirteen years, although she never took decedent's name. She was treated by the decedent as his own child, he calling her his "girl", and she calling him "Dad" or "pop". Later, when plaintiff purchased a farm, the decedent helped her by financing one half of the purchase price. A newspaper obituary included the plaintiff as a surviving daughter of the decedent. On these facts, the court found no proof of an oral contract or any inference thereof.

Adoption was also refused in *Rich v. Baer*.⁴⁰ In that case the defendant asserted an equitable adoption as a defense to a suit to set aside a warranty deed. An order of the Henry County Court, in 1909, took defendant out of the custody of his natural parents, and gave it over to Millie and Oliver Wyatt. Thereafter, until her marriage defendant lived with them as their child, giving them her love and receiving theirs. There was much evidence that the defendant called decedents "Dad" and "Mother", and they in return called her "our girl", or "our daughter". Defendant's name was on the school rolls as "Wyatt", and as such she was publicly known. Testimony was given that the Wyatts often stated that they intended to adopt defendant. The Wyatts supported her and clothed her. They sent her to college, and she joined their church, and when she was married Oliver gave her away. All of these were done under the name Wyatt. After her first marriage, Oliver let defendant and her husband live in one of his houses rent free. After her second unsuccessful marriage she returned to live with the Wyatts, and joined the Eastern Star, using her relation to Oliver as one of the requirements. When she married a third time, Oliver gave her a deed to one of his homes. In disallowing equitable adoption, the court said, as discussed *supra*, that the most favorable view of the defendant's evidence shows nothing inconsistent with mere compliance with the order of the county court.

*Westlake v. Westlake*⁴¹ involves the intervention of one Roger McGinnis in the partition of the estate of J. E. Westlake. J. E. Westlake and his wife Minnie could have no children of their own, so they went to an orphan's home where they found Roger. They made a contract with the home which allowed them to have him so long as they would love, cherish, nurture and properly care for him in a Christian way, as if he were their own child. They were to give him \$50.00 upon his reaching the age of eighteen. Many witnesses testified that Roger was treated as "our boy" by Minnie and J.E., and many thought that he was their natural child. When Roger was married, and later when J.E. died, newspaper accounts called him a son. J.E., who was a local teacher, introduced Roger as "this is my boy, and I want you to be good to him." He was included on the school rolls as Roger Westlake. When Roger had children, J.E. referred to them as "my grandchildren", and when one of them died as an infant J.E. officiated at the burial in Roger's place, and the infant was buried in the Westlake family plot. There was testimony that Roger spoke of J.E. and Minnie as "Dad", and "my father", or "my mother" when speaking of them in the third person, but when he spoke to them directly he addressed them as "Uncle

40. *Supra* note 10.

41. *Supra* note 24.

Ed" and "Aunt Minnie". When Roger was married, the wedding dinner was at J.E.'s home. Later, J.E. wanted Roger's name changed to Westlake, and after it was done, said: "It's all right now. Roger's name is Westlake. It cost \$25.00 but it is worth that." As stated *supra*, the court, on these facts decided that all these factors were not inconsistent with the contract of custody entered into with the orphan's home. The court found the fact that Roger wasn't mentioned in either will as significant. They also felt, that since Roger had gained as much from the association with the Westlakes as they had from him, it was not inequitable to refuse to decree equitable adoption.

*Capps v. Adamson*⁴² is another case in which the court felt the burden of producing clear, cogent, and convincing proof was not met. There, Edna Willetts and her mother lived together in a boarding house until Edna was eight to nine years old. Then her mother married Adam Adamson, who had been a boarder in her mother's boarding house. Thereafter, Edna moved to live with Adam and her mother. Edna's husband did not know until two years after his marriage to her that she was not the natural child of Adam. After her mother's death, Adam ate with Edna and her husband, shared expenses with them, gave Edna some property, and fixed up her and her husband's house. A boarder in Edna's mother's house testified that prior to the marriage there had been an agreement to adopt Edna, and to make her an heir of Adam. Adam usually called Edna "daughter", "adopted daughter", or "step daughter", and had had her name changed to his. He also made her the beneficiary of his life insurance. In the face of these facts the court still refused to find any grounds for equitable action.

In *Shelp v. Merchantile Trust Co.*⁴³ the fact that a niece entered the home of the decedent as a child of his own wasn't enough for equity to invoke its jurisdiction in the face of evidence that the niece remained under her mother's custody and was not held out as decedent's daughter, especially in her wedding announcement.

The doctrine was not applied to one who was an adult at the time the contract was entered into.⁴⁴ The court said that to apply the doctrine of equitable adoption

"... to an adult, who is capable of caring for himself and contracting for himself, would greatly extend the doctrine and would surely open the door to many fraudulent claims. We hold that it should not be thus extended. We further hold that the petition herein, based upon a mere oral contract to adopt a person who was an adult when it was made, fails to state a cause of action in equity for equitable adoption and cannot support the decree entered adjudging that such adult person became the adopted child and sole heir of a party to such oral contract and that he was the owner by inheritance thereunder of all the property owned by such party at his death."⁴⁵

The fact that a child had done some acts alleged in performance of an alleged contract to adopt, where evidence was to the effect that the alleged adoptive parent

42. *Supra* note 28.

43. *Supra* note 34.

44. *Thompson v. Mosely*, 344 Mo. 240, 125 S.W.2d 860 (1939).

45. *Ibid.*, 862.

had made some casual remarks from time to time to some of her acquaintances to the effect that she was going to leave some property to the child, was held not to establish the agreement by clear, cogent and convincing evidence.⁴⁶

EVIDENCE HELD SUFFICIENT TO ESTABLISH RIGHT TO EQUITABLE ADOPTION

In the case of *Lynn v. Hockaday*⁴⁷ an orphan's grandmother gave the child to the decedent on the condition that he raise it as his own, refusing to give it up under any other circumstances. The child was given the decedent's name, and he called her his daughter. Decedent did not let her know that she was not his daughter until she was eighteen years old. She passed in society as his daughter, and lived with decedent until her marriage. The court there felt that the condition upon which the decedent took the child was such that it would establish a contract to adopt, and that her performance was such as would invoke equity's protection.

In *Martin v. Martin*⁴⁸ the plaintiff was the illegitimate son of the woman married by John Martin, Jr. He agreed with the mother, plaintiff alleges, that if she would marry him, he would adopt her child, and make him an heir. In consequence, plaintiff's name was changed from John Gillett to Frank John Martin, and he was introduced by John as his son. In truth, plaintiff himself thought he was so until manhood. The two called each other father and son, and John said there was no need for a provision for plaintiff since he was his son. Plaintiff lived and worked on the decedent's farm until he was over forty years old. The defendant offered no rebutting evidence, and the court found for the plaintiff. The court thought it inconceivable that any man would marry the mother without attempting to legitimize her son.

In *Drake v. Drake*⁴⁹ the intervenor came in claiming adoption or requesting specific performance of a contract to adopt in the alternative. An oral contract was made between the decedent and the intervenor's mother shortly after their marriage, intervenor alleges. Decedent had no children of his blood, and although the intervenor had sisters, none of them received the care and affection bestowed upon the intervenor. They called each other "papa", "pap" and "son", and the intervenor became known by decedent's last name in schools and clubs, to the assent of the decedent. Decedent's widow testified that there had always been an understanding between her and the decedent that the intervenor would be adopted. The respondents claim that the statute prescribes the only form of adoption allowable either in law or equity. The court found that the contract could be inferred from the evidence adduced, feeling that one of the facts of great significance was the distinction the decedent made between the children of his wife. Therefore they allowed specific performance of the contract, in the face of the dissent which agreed with respondent's contention that the statute of adoption precluded any other methods available.

46. *Teats v. Flanders*, 118 Mo. 660, 24 S.W. 126 (1893).

47. *Supra* note 3.

48. *Supra* note 6.

49. *Supra* note 7.

The pertinent fact allowing equitable adoption in *Dillman v. Davison*⁵⁰ was a contract whose terms made decedent promise to make the adopted child share in his estate with the natural children of the decedent. As a matter of fact, decedent never had any natural children.

Schouler felt the following was enough to found a decree of equitable adoption:

"An oral contract of adoption may be enforced in equity although the statute on the subject is not complied with where the contract is partially executed by taking the child and treating her as a natural child and where the child performs the usual duties of a child . . . where one treats another as his child on the parent's [natural] making this a condition of taking the child this shows an executed agreement to adopt the child which is binding in the absence of a deed of adoption."⁵¹

CONCLUSION

It is clear that Missouri will not allow the rights of a child to be lost merely because the statutory form of adoption is not carried out by the adoptive parents. The courts will enforce a written contract of adoption although not completed by legal adoption by the adoptive parents during their lives. Further, it will enforce an oral contract not performed by such parents, even in the face of the Statute of Frauds. In fact, it would seem that the courts may go further and even infer a contract from the acts and conduct of the parties when such are felt necessarily to pertain to the existence of some contract, although actual proof of that contract is not made. However, it is also clear that this beneficent doctrine will be severely limited to those cases in which equity and justice would in no other way be served, upon proof that the adopted child is actually and equitably entitled to such relief. The relief granted, although not identical with a legal adoption, will afford adequate protection to the rights of the adopted child in most cases, since property rights in the estate of the adoptive parent are generally the subject of this protection. Of course, as discussed above, equity has no power to enforce such a contract against those who are not parties thereto, or in privity with such parties.

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50. *Supra* note 1.

51. 1 SCHOULER, MARRIAGE, DIVORCE, SEPARATIONS AND DOMESTIC RELATIONS, § 722, p. 765 (6th Ed. 1921). See also *McCary v. McCary*, *Lindsley v. Patterson*, *Thomas v. Malone*, *supra* note 1; *Craddock v. Jackson*, 223 S.W. 924 (Mo. 1920); and *Baker v. Payne*, *supra* note 27.