An Agricultural Law Research Article

Cropper and Tenant Distinguished in Missouri

by

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Originally published in MISSOURI LAW REVIEW
24 MO. L. REV. 330 (1959)

MISSOURI LAW REVIEW

Published in January, April, June, and November by the
School of Law, University of Missouri, Columbia, Missouri.

Volume 24 JUNE 1959 Number 3

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Subscription Price $2.50 per volume $1.00 per current number

"My keenest interest is excited, not by what are called great questions and great cases, but by little decisions which the common run of selectors would pass by because they did not deal with the Constitution or a telephone company, yet which have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law."—OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 269 (1920).

Comments

CROPPER AND TENANT DISTINGUISHED IN MISSOURI

When an individual cultivates farm land not his own it often becomes necessary to ascertain the relationship which he occupies toward the owner. It may be that the cultivator will have possession of the land under either a written or oral agree-

ment. In this instance the cultivator is denominated a tenant, the owner a landlord, and the cultivator is said to hold upon lease.[1] On the other hand it may be that the cultivator does not hold an estate in the land but merely tends it for a consideration, which is many times a portion of the yield taken.[2] In such case the cultivator is defined as a cropper and takes no possessory interest in the land, but merely the rights of ingress and egress.[3] In both cases, the cultivation may be on shares of the crops.

Whether, in any given situation, the relation between owner and cultivator is that of landlord and tenant or owner and cropper will depend upon certain factors involved in the transaction.[4] It is the object of this Comment to indicate significant criteria for determining whether a particular cultivation agreement attains the dignity of a lease or merely constitutes a contract for personal service. The distinction is more than academically important. The tort liability of a possessor of land,[5] an employer's liability under the workmen's compensation law,[6] right to sue for ejectment[7] or trespass,[8] and other problems may turn on the distinction.

As indicated above, a lease is a transaction wherein the owner of an estate in land grants to another the right to possession, the former party retaining a reversion therein.[9] It is possible in Missouri for this relationship to arise from either an oral agreement or one reduced to writing.[10] The interest granted may be an estate for life, years, from period to period or at will, though in practice few leases are for life.[11] The lease for ninety-nine years is becoming quite popular in the case of city property because it involves certain benefits to both the lessor and lessee,[12] but, of course, it is seldom found in the case of agricultural lands.

1. Marder v. Radford, 229 Mo. App. 789, 84 S.W.2d 947 (K.C. Ct. App. 1935); Williams v. Treece, 184 Mo. App. 135, 168 S.W. 209 (St. L. Ct. App. 1914); Whiteside v. Oasis Club, 162 Mo. App. 502, 142 S.W. 752 (St. L. Ct. App. 1912); State *ex rel.* Armour Packing Co. v. Dickmann, 146 Mo. App. 396, 124 S.W. 29 (St. L. Ct. App. 1910); 1 AMERICAN LAW OF PROPERTY § 3.2 (1952).

2. Pearson v. Lafferty, 197 Mo. App. 123, 193 S.W. 40 (St. L. Ct. App. 1917); Haggard v. Walker, 132 Mo. App. 463, 111 S.W. 904 (K.C. Ct. App. 1908); 52 C.J.S. *Landlord and Tenant* § 797(c) (1947).

3. 1 AMERICAN LAW OF PROPERTY § 3.6 (1952).

4. *Id.* § 3.3.

5. Lambert v. Jones, 339 Mo. 677, 98 S.W.2d 752 (1936); Walsh v. Southwestern Bell Tel. Co., 331 Mo. 118, 52 S.W.2d 839 (1932); Shouse v. Dubinsky, 38 S.W.2d 530 (K.C. Ct. App. 1931); PROSSER, TORTS § 75 (2d ed. 1955).

6. Under the Missouri Workmen's Compensation Law §§ 287.010-.800, RSMo 1949, farm laborers are not covered, § 287.090(1)(2), RSMo 1949, unless their employer elects to accept the act, § 287.090(2). Of course the employer may incur common law liability toward his injured workers. Therefore many farm employers find it desirable to accept the act, since by so doing they become insulated against any and all common law claims arising from injuries to their employees. § 287.120(1), RSMo 1949.

7. 18 AM. JUR. *Ejectment* § 40 (1938); 28 C.J.S. *Ejectment* § 24 (1941).

8. 52 AM. JUR. *Trespass* § 25 (1944); 87 C.J.S. *Trespass* § 22 (1954).

9. 1 AMERICAN LAW OF PROPERTY § 3.2 (1952).

10. Davis v. Gerson, 219 S.W.2d 748 (K.C. Ct. App. 1949); Vanderhoff v. Lawrence, 201 S.W.2d 509 (K.C. Ct. App. 1947), *aff'd*, 206 S.W.2d 569 (Mo. 1947); Coleman v. Fletcher, 238 Mo. App. 813, 188 S.W.2d 959 (Spr. Ct. App. 1945).

11. 1 AMERICAN LAW OF PROPERTY § 3.2 (1952).

12. See 4 GILL, REAL PROPERTY LAW IN MISSOURI 1627-28 (1954).

Although generally leases may be created for any desired length of time, this is true in Missouri only if the formal statutory requisites of execution are observed. As indicated by the statute and cases decided thereunder, unless a lease is created in writing and signed by both the lessor and lessee, the result is only a tenancy at will.[13] One may well wonder whether a cultivator who enters under an informal lease and tends a crop, expecting to retain a percentage of the yield, is properly protected if he can be evicted at the will of the owner prior to harvest. To protect the tenant in this situation the Missouri courts early established by repeated decision that the tenancy at will of farming land created by statute becomes by common law a tenancy from year to year.[14] And by statute such tenancy can be terminated only upon written notice by either party given not less than sixty days next before the end of the year.[15] However, by judicial decision, this rule is limited to cases where no expiration date is agreed upon by the parties. If they agree upon a terminal date the lease will expire at that point without the necessity of notice to quit.[16] Thus, in Missouri, a written lease of farming land can be created for any desired duration. An oral lease of agricultural land becomes, by Missouri common law, a tenancy from year to year; and, where no terminal date is agreed upon, it can be terminated by at least sixty days written notice prior to the end of the agricultural year. Where an expiration date is agreed upon, the lessee's interest automatically expires on that date.

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13. § 432.050, RSMo 1949. The Missouri courts have made a strict literal interpretation of this statute, holding that upon failure of either party to sign, the result is a tenancy at will only. Sinclair Ref. Co. v. Wyatt, 347 Mo. 862, 149 S.W.2d 353 (1941); Reid v. Gees, 277 Mo. 556, 210 S.W. 878 (1919); Midland Realty Co. v. Manzella, 308 S.W.2d 326 (K.C. Ct. App. 1957); Blake v. Shower, 207 S.W.2d 775 (St. L. Ct. App. 1948). In Midland Realty Co. v. Manzella, *supra*, the Kansas City Court of Appeals held that though the signatures of both lessor and lessee are required, the lease itself need not be a single document; it may consist of a number of writings sufficiently connected so as to warrant their being read together. In that case a lease was held to be composed of: (1) a letter from the lessor, signed by him, to his duly authorized agent, ordering the latter to renew an existing lease with the lessee, (2) the agent's written offer of renewal to the lessee and (3) the "renewal lease" signed by the lessee only. The court in this case, at 331, emphasized that the intent of the legislature, in regard to the *lease itself*, was to require both the lessor and the lessee, or their agents lawfully authorized by writing, to sign the lease, even though a *contract to make a lease* could be specifically enforced if merely one party signed, provided that he was the party "to be charged." § 432.010, RSMo 1949.

14. Kerr v. Clark, 19 Mo. 132 (1853); Ridgely v. Stillwell, 28 Mo. 400 (1859); Scully v. Murray, 34 Mo. 420 (1864); Vanderhoff v. Lawrence, 201 S.W.2d 509 (K.C. Ct. App. 1947), *aff'd*, 206 S.W.2d 569 (Mo. 1947); Coleman v. Fletcher, 238 Mo. App. 813, 188 S.W.2d 959 (Spr. Ct. App. 1945); Fisher v. Lape, 176 S.W.2d 871 (Spr. Ct. App. 1944); Hauer v. Harkreader, 221 S.W. 813 (St. L. Ct. App. 1920); Winter v. Spradling, 163 Mo. App. 77, 145 S.W. 834 (Spr. Ct. App. 1912); Womach v. Jenkins, 128 Mo. App. 408, 107 S.W. 423 (K.C. Ct. App. 1908); Kroeger v. Bohrer, 116 Mo. App. 208, 91 S.W. 159 (St. L. Ct. App. 1905); Hosli v. Yokel, 58 Mo. App. 169 (St. L. Ct. App. 1894).

15. § 441.050, RSMo 1949.

16. Vanderhoff v. Lawrence, *supra* note 14, extensively considered in 13 Mo. L. REV. 324-27 (1948); Ray v. Blackman, 120 Mo. App. 497, 97 S.W. 212 (St. L. Ct. App. 1906); Butts v. Fox, 96 Mo. App. 437, 70 S.W. 515 (K.C. Ct. App. 1902).

While a consideration of the problem of oral leases of city type property is beyond the scope of this Comment, it may be well to mention here that, by statute, oral leases of city type property in Missouri are treated as tenancies from month to month, terminable upon one month's written notice by either party.[17]

As has been previously pointed out, it may be that the agreement between owner and cultivator does not give rise to any possessory estate in the latter. His interest may be only a contractual right to some form of compensation for his services, that often being a percentage of the crop. In such instance the cultivator may be what is termed a "cropper." This individual has been defined as one who, having no interest in the land, is hired by the owner to cultivate it, receiving for his compensation a portion of the crops raised.[18]

No problem of distinguishing tenant from cropper ever arises if landowner and cultivator state in express terms what their relationship is intended to be. But this is frequently neglected and when such an arrangement comes under judicial scrutiny the courts are obliged to look to the subject matter, attendant facts and circumstances and the intention of the parties to determine the legal significance of their agreement.[19] The judicial task is increased by the fact that owner and cultivator generally agree to divide the yield in either situation.[20] Under such circumstances what factors do the courts consider? To what incidents do they attach significance?

In *Johnson v. Hoffman*,[21] the earliest Missouri case on the problem, the parties entered into a written agreement providing that Hoffman "leases, rents and lets unto" Johnson "for the term of three years, his farm" in St. Charles County. Johnson, signing by mark, agreed (1) to make necessary repairs and maintain the farm in good order, (2) to provide needed teams for cultivation, (3) to find all necessary seed during the first year, and half during the remaining two years, (4) to pay half the expense of dredging all grains sown on the farm and (5) to give up possession at the end of the term. Hoffman and Johnson were each to take half of "whatever may or will be raised on said farm for said three years." In a suit by Johnson for ejectment of Hoffman and possession of the farm the Supreme Court of Missouri unanimously held that, under this agreement, Johnson was to have possession of the farm for the specified period as tenant with Hoffman being his landlord. The decision was based upon the words "leases, rents and lets unto" and the promise of Johnson that he would give up possession at the end of the term. The court

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17. § 441.060, RSMo 1949.

18. Maltbie v. Olds, 88 Conn. 633, 92 Atl. 403 (1914); Paulson v. Rogis, 247 Iowa 893, 77 N.W.2d 33 (1956); Wood v. Garrison, 139 Ky. 603, 62 S.W. 728 (1901); Hampton v. Struve, 160 Neb. 305, 70 N.W.2d 74 (1955); Empire Gas & Fuel Co. v. Denning, 128 Okla. 145, 261 Pac. 929 (1927); Wanamaker v. Buchanan, 33 Pa. Super. 138 (1907).

19. Gabel-Lockhart Co. v. Gabel, 360 Mo. 518, 229 S.W.2d 539 (1950); Paisley v. Lucas, 346 Mo. 827, 143 S.W.2d 262 (1940); Mecartney v. Guardian Trust Co., 274 Mo. 224, 202 S.W. 1131 (1918); Thompson v. Lindsay, 242 Mo. 53, 145 S.W. 472 (1912); Donovan v. Boeck, 217 Mo. 70, 116 S.W. 543 (1909).

20. 52 C.J.S. *Landlord and Tenant* § 793 (1947).

21. 53 Mo. 504, 506-07 (1873).

observed that Johnson could not surrender possession unless he had it, therefore the parties contemplated tenancy by Johnson. A decree in his favor was affirmed.

In *Moser v. Lower*[22] the parties agreed that Lower should plant and raise a crop on Moser's field, Lower to take one-third of the yield and Moser two-thirds. Lower's third was to be cribbed by Moser. After the harvest a dispute arose as to whether Lower was entitled to one-third of the stalks as pasturage. Moser argued that the stalks were part of the land and that Lower never gained any interest therein. The Kansas City Court of Appeals decided that Lower was not Moser's tenant, that Lower was a mere cropper without interest in or possession of the premises except for right of ingress and egress. Therefore he had no rights to the pasturage unless the stalks were considered so valuable that they could be said to be part of the crop, even though they were never taken off. The court felt that the parties had intended the stalks to be so treated and decreed that Lower should have his pasturage.

In both the *Johnson* and *Moser* cases it will be observed that in regard to the raising of the crop the duties of both cultivators were essentially the same. But in the latter case there was no mention of possession, no provision for the surrender of the land and no duties of repair or maintenance placed upon the cultivator. It may also be significant that the landowner was to crib the cultivator's share. This suggests a restricted sphere of activity by the cultivator, implying little, if any, in the way of possessory rights.

In *Haggard v. Walker*[23] the landowner was to furnish the land and seed, the cultivator was to break the land, sow the seed, cultivate, harvest and thresh. Each was to take an equal share of the yield. It was held that the cultivator was not a tenant but a mere cropper. Again there was no mention of possession, surrender or maintenance.

The St. Louis Court of Appeals held the cultivator to be a cropper in *Pearson v. Lafferty*,[24] where an oral agreement provided that owner and cultivator should share the yield equally. The cultivator did not live on the land, had no right thereto for any fixed period and had no privilege to exclude the owner.

Jackson v. Knippel[25] involved a written agreement wherein the owner "demised and leased" certain land to the cultivator for a year, the cultivator promising to pay half the yield as rent, to make necessary repairs and to deliver up the premises at the end of the term. The landowner was to furnish seed and fertilizer. The St. Louis Court of Appeals felt that a landlord-tenant relationship was created.

The problem arose again recently in *Hogue v. Wurdack*,[26] a case involving

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22. 48 Mo. App. 85 (K.C. Ct. App. 1892).
23. 132 Mo. App. 463, 111 S.W. 904 (K.C. Ct. App. 1908).
24. 197 Mo. App. 123, 193 S.W. 40 (St. L. Ct. App. 1917).
25. 246 S.W. 1007 (St. L. Ct. App. 1923).
26. 298 S.W.2d 492 (Spr. Ct. App. 1957).

liability under the Missouri workmen's compensation law.[27] Hogue, tending Wurdack's farm under a written agreement, was seriously injured when, as he was mounting a trailer wheel, the rim blew off and struck him across the face. Wurdack, seeking to escape employer liability, argued that Hogue was a tenant, therefore not entitled to an award under the act.[28] Under the agreement Wurdack furnished the land, animals, equipment, buildings and fencing material. Hogue was to provide all labor, harvest the crop, tend the stock and make repairs. Hogue was provided with a house on the premises and was to take 40 per cent of the yield as "compensation for the above services." The Springfield Court of Appeals observed that the agreement referred to Wurdack and Hogue as "owner" and "tenant" respectively. Nevertheless the court held Hogue to be only a cropper, treating with significance the fact that Hogue's share was denominated "compensation" while Wurdack's share was nowhere referred to as rent. The court was unable to find that Hogue possessed an estate in the premises and observed that Wurdack remained in actual control of the farming operations.

With the preceding cases in mind certain factors consistently involved become noticeable and begin to crystallize into discernible legal standards. Thus it appears that in deciding whether a cultivator is a tenant or cropper the Missouri courts have looked to see:

1. Whether or not the operative words creating the relationship indicate a landlord-tenant relationship. (Key words may be "leases," "demises," "lets," "rents," etc.)

2. How much the cultivator is required to do. (The wider the scope of his control and privileges and the greater his discretion, the more likely he is to be held a tenant.)

3. Whether the cultivator agrees to surrender possession at the end of the term. (Such promise strongly indicates tenancy on the part of the cultivator.)

4. The terms in which the parties' shares of the yield are couched. (If the owner is to take a share as "rent," this indicates a lease; if the cultivator is to receive a portion as "compensation" this suggests a personal service contract.)

Courts in other states have looked to these and other factors in ruling on the problem. Some of the factors which have been held indicative of a landlord-tenant arrangement include a provision in the agreement prohibiting subletting,[29] a provision that the cultivator should not commit waste,[30] and a reservation by the owner of a right of re-entry if the cultivator violates certain covenants.[31] Courts

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27. §§ 287.010-.800, RSMo 1949.
28. § 287.040(2), RSMo 1949, seemingly exempts the landlord-tenant relationship from the effect of the Missouri workmen's compensation law unless it is created for the "fraudulent purpose of avoiding liability."
29. Dolin v. Wachter, 87 Mont. 466, 288 Pac. 616 (1930).
30. Underhill v. Allis-Chalmers Mfg. Co., 15 F.2d 181 (8th Cir. 1926).
31. Davis v. Burton, 126 Mont. 137, 246 P.2d 236 (1952).

have found cropper agreements where the owner was to retain possession of the land and direct the planting of crops,[32] where the cultivator did not live on the land and had no exclusive control thereof,[33] and where the owner retained a right to possession of all crops until the cultivator performed all covenants required of him.[34]

Whether the cultivator is a tenant or cropper may, in the absence of contractual provisions, determine his right in the growing crops before division thereof.[35] In many jurisdictions a tenant on shares is, apart from the effect of statute, the owner of the crops until division whereas under a cropper agreement title to the products remains in the landowner.[36] However, a number of other jurisdictions regard the owner and cultivator as tenants in common or joint tenants of the crop, no matter what their relationship is in regard to the land.[37]

In Missouri a landlord-tenant relationship was held to give rise to a tenancy in common of the crop,[38] while under an owner-cropper agreement title to and possession of the entire crop was held to remain in the owner until a division thereof.[39] Thus in Missouri where the cultivation agreement creates only an owner-cropper relationship it appears that the cultivator cannot maintain a suit against the title-holder for conversion of the cultivator's share of the yield before division since he has no title to or right to possession of the crop prior to that time.[40] And where the arrangement is one of landlord and tenant and the former, by contract, seeks to retain a lien upon the latter's portion of the crop, it has been held that such provision operates as a chattel mortgage and must be recorded.[41] This would appear to be sound under the Missouri rule that a tenant is a tenant in common of the crops, if it can be said that growing crops are chattels. And the Missouri courts appear to so regard them.[42]

In conclusion it should be reasserted that the crucial difference between tenant and cropper is whether or not the cultivator has possession of the premises involved. The extrinsic factors surrounding the transaction are of value only insofar as they illumine the intention of the parties in regard to the matter of possession.

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32. Taylor v. Donahoe, 125 Wis. 513, 103 N.W. 1099 (1905).
33. Sayles v. Wilson, 31 Wyo. 55, 222 Pac. 1020 (1924).
34. Gibbons v. Huntsinger, 105 Mont. 562, 74 P.2d 443 (1937).
35. 52 C.J.S. *Landlord and Tenant* §§ 809-11 (1947).
36. *Id.* at § 809 nn.49-51.
37. *Id.* at § 810 nn.63-69.
38. Kamerick v. Castleman, 23 Mo. App. 481 (K.C. Ct. App. 1886).
39. Morrill v. Alexander, 215 S.W. 764 (K.C. Ct. App. 1919).
40. *Ibid.*
41. Hardin v. Bank of Centralia, 177 Mo. App. 44, 163 S.W. 306 (K.C. Ct. App. 1914); Saunders v. Ohlhausen, 127 Mo. App. 546, 106 S.W. 541 (K.C. Ct. App. 1908). § 443.460, RSMo 1949, provides that mortgages and deeds of trust of personal property must be recorded in order to be valid against anyone other than the parties thereto, except where possession of the chattels involved is delivered to and retained by the mortgagee or *cestui que trust.*
42. Garth v. Caldwell, 72 Mo. 622 (1880); Hill v. Brothers, 217 S.W. 581 (Spr. Ct. App. 1920); Swafford v. Spratt, 93 Mo. App. 631, 67 S.W. 701 (K.C. Ct. App. 1902); Glass v. Blazer, 91 Mo. App. 564 (K.C. Ct. App. 1901).

FILING APPLICATION FOR FEDERAL TAX REFUND AFTER SIGNING FORM 870-AD, PROMISING NOT TO FILE

In accordance with the 1954 Internal Revenue Code provisions relating to closing agreements[1] and compromises[2] it is possible for the government to end all controversies over a disputed tax payment or deficiency. The finality of such agreements cannot be disregarded under any circumstances except those expressly provided.[3] However, the procedure followed in consummating the agreements is rather burdensome and for this reason, few of the controverted claims are closed in this manner.[4] Therefore, either a less burdensome procedure is followed or the disputed amounts are subjected to litigation.

Also contained within the 1954 Code are provisions restricting the manner in which deficiencies may be assessed.[5] It is possible however to waive these restrictions[6] and may be advisable to do so to stop the running of interest.[7] The form of this waiver has varied in the past but the essential provisions have remained unchanged.[8] One of the present forms on which the waiver may be effected is Form 870, which is not regarded as binding in the absence of special provisions but merely assents to the assessment of the deficiency. There is, however, another form that may be signed, after the taxpayer has obtained certain compromises on his liability, and that is Form 870-AD. This form contains a provision that the taxpayer shall not subsequently file application for refund or file suit, and is the child of confusion as to its binding effect. Neither of the above forms purports on its face to be a substitute for the statutory finality agreements and have express provision relating that very fact.[9]

These two agreements unlike the formal closing agreement or compromise, are concluded with relative simplicity and are therefore used to a considerable extent. This simplicity, however, along with the desire of the taxpayer to stop the six percent interest from accruing, the burdensome procedure of entering the formal closing agreement, and the eagerness of the government to avoid litigation form the nucleus of a troublesome area.

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1. INT. REV. CODE of 1954, § 7121 providing for closing agreements is carried forward without substantial change from Revenue Act of 1928, ch. 852, § 606, 45 Stat. 874, as amended by Revenue Act of 1938, ch. 289, §§ 801, 802, 52 Stat. 573.

2. INT. REV. CODE of 1954, § 7122, relating to compromises is carried forward without substantial change from R.S. 3229, Revenue Act of 1934, ch. 277, § 112(b), 48 Stat. 759, Revenue Act of 1938, ch. 289, § 815, 52 Stat. 578.

3. INT. REV. CODE of 1954, § 7122, provides that the agreement shall not be reopened except upon a showing of fraud or malfeasance, or misrepresentation of a material fact.

4. Griswold, *Finality of Administrative Settlements in Tax Cases,* 57 HARV. L. REV. 912 (1944).

5. INT. REV. CODE of 1954, § 6213(a). Under this provision no assessment may be made for ninety days after a deficiency notice is mailed.

6. INT. REV. CODE of 1954, § 6213(d).

7. INT. REV. CODE of 1954, § 6601(d).

8. Prior to the present 870-AD the technical staff used Form 870-TS. Both of these forms contain a promise by the taxpayer not to reopen the case nor file a claim for refund.

9. The forms specifically state that they are not final closing agreements under INT. REV. CODE of 1954, § 7121.

The problem that is posed, simply stated is: "After signing Form 870-AD may a taxpayer subsequently file or prosecute an application for refund?" Before analyzing the courts' decisions in respect to this question, a further item should be mentioned that adds to the controversy. The item is the statute of limitations with respect to tax claims and deficiency assessments.

Under the 1954 Code, as originally enacted, the taxpayer had three years after the due date of the return to file for a refund, or two years after the payment date, whichever period was longer.[10] The government has three years after the date of filing the return in which to assess a deficiency.[11] The situation that can arise here, and often does arise, is that the taxpayer may pay pursuant to signing Form 870-AD, and if the statutory period has tolled against the government can file for refund after the government is barred from assessing a deficiency. As a result of this a further complicating factor is added to the conflict.

As may readily be observed there are four possible approaches which the court could conceivably follow to decide a case of this sort. The court could hold the agreement binding per se; or base the decision on estoppel; or allow equitable recoupment or set-off; or fail to accord the agreement any degree of finality. The inconsistency of the courts' decisions may be partially attributable either to the fact that all four of these alternatives have not been considerd by the court or to the failure to insist upon the necessary elements of the alternative selected.

Solutions have been suggested to this dilemma,[12] but have resulted in little action.[13] Some effort extended by the treasury department has been regarded as solving the problem,[14] but the fact remains that the area is just as vulnerable to assailability, due to the above mentioned factors as before.

What is generally regarded as the predecessor of modern cases dealing with this subject is *Botany Worsted Mills v. United States.*[15] In reference to the agreement being binding per se, the court completely dispelled any such view stating: "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode."[16] The case has subsequently been regarded as standing for the proposi-

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10. INT. REV. CODE of 1954, ch. 736, § 6511(a), 68A Stat. 730 (mended by 72 Stat. 1606 (1958) which now makes the three year period run from the time the return was filed).

11. INT. REV. CODE of 1954, ch. 736, § 6505(a), 68A Stat. 730 (amended by 72 Stat. 1606 (1958) which changed only the provisions relating to stamp taxes).

12. Griswold, *Finality of Administrative Settlements in Tax Cases,* 57 HARV. L. REV. 912 (1944).

13. The changing of the wording in INT. REV. CODE of 1954, § 7121 to "Secretary or his delegate" from the words "Secretary, the Under Secretary, or an Assistant Secretary," appearing in the 1939 Code, has had little effect upon the facility with which the claims may be handled.

14. Note, *Informal Tax Settlements—The Old Law and the New Procedure,* 23 U. CINC. L. REV. 214 (1954). As long as the agreement states it is not a formal closing agreement it cannot be accorded statutory finality.

15. 278 U.S. 282 (1929).

16. *Id.* at 289.

tion that unless a formal closing agreement or compromise is signed the agreement is not binding. This does of course accord with sound reason, for if the government is not bound by the agreement, than neither should the taxpayer be bound. The agreement appears to be bilateral in character. The government promises not to assess a further deficiency and the taxpayer promises not to file for refund. Since the promise by the government cannot be binding, due to the lack of authority to bind the government, it is difficult to see how a legally enforceable contract could ensue.

In the *Botany* case the issue of whether the taxpayer was estopped from asserting the non-finality of the agreement, due to the statute of limitations preventing the government from assessing a further deficiency, was not before the court. The court did not therefore authoritatively comment on the subject, but did state that it was not necessary to decide if estoppel could make such a non-binding agreement, binding under some circumstances. As the dissenting opinion in *Cain v. United States*[17] pointed out it is possible that the government was barred by the statute from assessing a deficiency, but since the matter was not considered the way was opened for the issue of estoppel.

The authority for the taxpayer not being estopped is *Joyce v. Gentsch*,[18] and the authority for estoppel is *Guggenhiem v. United States*.[19] These two cases form the adversary views in the present opinions. In the *Joyce* case, in addition to the normal clauses relating to the promise not to file for refund, there was a provision providing that the government would not be barred from assessing a further deficiency. This clause was stricken in the *Guggenheim* case and has been used as a basis for distinguishing the two cases.

The *Joyce* case did recognize the possibility of recoupment but the *Guggenhiem* case recognized neither set-off nor recoupment. The Guggenhiem result appears to be illogical because two of the elements of estoppel are detriment and reliance. As to the detriment, if the government points to an actual loss in tax money, then it may recover by way of recoupment or set-off—therefore there is no detriment and thus no estoppel. As to reliance, it is difficult to see how the government may be justified in relying on the waiver when it is known, as a matter of law, that it is not binding.[20] However, the courts have allowed the defense of estoppel without even requiring that a detriment be shown other than the running of the statute. The courts allowing estoppel generally do not talk of recoupment or set-off.

In support of the argument that estoppel is inapplicable because there is no detriment is the recent case of *Arthur V. Davis*.[21] Recognizing that the agreement was the product of mutual concessions, the court also considered that it was difficult to see how the government would have conceded an amount it actually considered

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17. See the dissenting opinion in Cain v. United States, 255 F.2d 193, 199 (8th Cir. 1958).
18. 141 F.2d 891 (6th Cir. 1944).
19. 111 Ct. Cl. 165, 77 F. Supp. 186 (1948), *cert. denied*, 335 U.S. 908 (1949).
20. Botany Worsted Mills v. United States, 278 U.S. 282 (1929).
21. 29 T.C. 878 (1958).

collectible. The court, after discussing this point, recognized that the agreement was not binding under the authority of the *Botany* case (therefore no reliance), and stated that even if a collectible item were conceded it could not be the detrimental element of estoppel, due to the availablility of set-off. The distinguishing factor, of the express reservation to assess a further deficiency, used by some courts was stated to be no distinction at all as the government would have had that right, until the statute of limitations tolled against them, notwithstanding the clause. This appears to be a valid contention. The taxpayer knows that the party with whom he is contracting is not binding the government and that the government will be permitted to assess a deficiency if they later discover money is actually due. Therefore it is difficult to see how a clause expressly reserving this right to the government to assess a further deficiency would be necessary, or that the lack of it should create an estoppel situation.

Perhaps the strongest case exemplifying the availability of set-off precluding the defense of estoppel is *Cuba R.R. v. United States.*[22] The form in this case was exactly like that in the *Guggenhiem* case. The facts do not present the issue of the statute of limitations but language in the decision leaves no doubt that it would matter little whether it had run or not. In holding that the government would not be precluded from asserting any claims it may have waived by accepting the form, due to set-off, the court held the form in that respect was a nullity. Asserting no valid grounds for estoppel appeared, judgment was for the taxpayer with an order allowing the government to plead a set-off of any claim it might have.

The court in the *Cuba* case, made the only justifiable decision that could be made. Realizing, however, that the decision was contrary to prior decisions in other courts on the matter, the court attempted to absolve the judiciary of the illogical inconsistency. This was done by placing the fault on the treasury department for failure to comply with statutory provision, or with Congress for setting forth the requirements that are stated in the Code. Suffice it to say at this point that if there were consistency in the courts' decisions there would be no reason to place the fault, as the issue would be settled.

Inconsistency is fully exemplified by contrasting the *Cuba* case and *Daugette v. Patterson.*[23] The form signed here was exactly the same as the form used in the *Cuba* and *Guggenhiem* cases. Here, as in the *Guggenhiem* case and contrary to the *Cuba* case, the court estopped the taxpayer from filing for a refund. Citing the *Guggenhiem* case as authority, the court held that the tolling of the statute of limitations prevented the government from being in the same position as it was before and it would be inequitable to allow the taxpayer to recover. Just as in the *Guggenhiem* case, set-off or recoupment was not mentioned. If the court is going to apply estoppel, there would appear to be some basis for ignoring set-off and recoupment. For example, if in a case such as the *Daugette* case, the taxpayer capriciously filed for a refund, with no

22. 124 F. Supp. 182 (S.D.N.Y. 1954).
23. 250 F.2d 753 (5th Cir. 1957).

retroactive statute or subsequent judicial interpretation of a statute that was contrary to the interpretation at the time the agreement was consummated, then, in a sense of fairness, he could be estopped—if indeed, estoppel should be applied at all. But, if in a case where a retroactive statute were applicable, such as the *Guggenhiem* case, the court were to search for a solution other than estoppel, a pattern of consistency might be ascertained. However, as is evidenced by these two cases, whether or not the taxpayer has ample reason for filing appears to be immaterial. The courts simply do not explore the possibilities and there is no factual or theoretical way to distinguish the cases.

In *Cain v. United States* the court states that the mere running of the statute would preclude the taxpayer from filing for a refund. However, the court then proceeds to note the inability of the government to deal with the situation other than by the use of estoppel. The facts do present a case that would casually appear to warrant estoppel, but in reality estoppel could not apply due to a lack of justifiable reliance. The case concerned a partnership profit distribution—the taxpayer of course claiming a smaller distributive share and the government alleging a larger share. After the statute had run the taxpayer filed for refund alleging a smaller share of the profit. Of course to assess one partner a smaller share meant the other partners would have to be assessed a larger share, and since the statute had tolled the government could not reopen the case against them. Therefore recoupment or set-off could not make the government whole.

The dissenting opinion in this case noted that justifiable reliance was not made out and that upon a proper interpretation of the facts the detriment alleged could be prevented from becoming real by use of recoupment.

Now, as to placing responsibility or fault for this incongruous and often anomalous situation, it must devolve upon the courts. Congress has provided a manner in which disputed tax claims may be settled. Congress has also provided the taxpayer with an opportunity to submit to an immediate assessment of a deficiency. The Treasury Department follows both statutes and cannot be condemned for setting up a defense of estoppel, even though it may fully realize the defense is without merit. The courts however in interpreting the cases, and the acts pursuant to the law, cannot in sound reasoning be justified in their decisions.

Conclusion

Injustice is often worked in the promulgation of a rule that is not tenable. The *Botany* case recognized fully the meaning of the statutes and is binding precedent to the effect that the agreement is not binding per se. The *Joyce* case next set a precedent, although not binding, for estoppel being inapplicable. However, the *Guggenhiem* case appears oppressive and stimulated the promulgation of an untenable rule. Examining the principal elements of estoppel (reliance, detriment and misrepresentation), the knowledge of the parties with reference to the non-finality of the agreement, and the defenses of recoupment or set-off which are not barred as long

as the action being brought is timely,[24] the court was without merit in deciding as it did.

With reference to remedial action, it would appear there is no need for such action if a consistent pattern is followed by the courts. While it is true claims will still be litigated, a supreme load is being taken off the Treasury Department by allowing these agreements, as apparently only a small portion of the agreements are litigated. In effect, there would be much more litigation without the agreements, as the discretionary matter would eventually devolve upon the courts to be resolved. Here at least the parties have an opportunity to resolve the issue by mutual concessions. Realizing fully the finality of a closing agreement, both government and taxpayer are hesitant to sign due to its decisive effect, and a taxpayer would want to resort to every available alternative before signing such an agreement. As noted in the *Botany* case, such a decisive measure could not be entrusted to subordinate officials and with the present tax volume, a delegation of binding authority to many could easily have unsavory results. The taxpayer does not want to meet a vindictive government by contumaciously ignoring the agreement, and therefore few cases reach the courts where anything but a justifiable claim is presented. After being thus presented, the government, if possessed with a valid claim, may set it off against the application for refund. Much litigation is avoided by the agreement, but the courts appear oppressive and without justification in estopping the taxpayer.

In proper cases, where one of the following exist: misapplication of the law at the time the agreement was consummated, a retroactive statute applicable to matters considered in entering into the agreement, or facts subsequently appearing that render the agreement inequitable; then it would appear that the taxpayer is justified in filing a claim for refund. This would be true notwithstanding the fact that the statute of limitations had run against the government. If the claim must be litigated and the taxpayer properly presents the argument that the necessary elements of estoppel do not exist and that there is available to the government set-off or recoupment, then it would appear the taxpayer cannot be estopped to assert his claim.

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