Certain presumptions are followed in inferring present intent.[17] Where there is ample proof of cohabitation and repute, a rebuttable presumption of marriage arises.[18] Once the parties have started out with a meretricious relationship, another rebuttable presumption arises, a presumption that the meretricious relationship continues until rebutted by proof of a present agreement of marriage entered into at some subsequent time.[19] These two presumptions run headlong into each other when the party seeking to establish the marriage presents evidence of cohabitation and general repute in the community in which they reside, and the party denying the relationship then presents evidence that at the time of the cohabitation the relationship was meretricious. With the introduction of evidence that at the time of the cohabitation the relationship was meretricious, the presumption of a present agreement is overcome. The party seeking to establish the marriage then has the burden to show a definite present agreement of marriage.

The Nebraska court, in the instant case, indulged in presumptions to arrive at its conclusion. Because common law marriages are not recognized in Nebraska, the parties' relations in Nebraska were presumed meretricious and continued so when they moved to Iowa.[20] The wife, therefore, had the burden of proving an agreement to be married at the time of the move. The evidence did not show a definite agreement and the court found no evidence of change in the parties' conduct from which it could infer the present intent of the parties, necessary under Iowa law, to be husband and wife. This in effect prevented the court from inferring the consent necessary to establish an implied agreement of marriage.

If the woman had sued for the divorce in Iowa, the result in this case might have been different. The evidence showed that the parties lived in Iowa for about one year and conducted themselves in the same manner in Iowa as they had in Nebraska. The evidence also showed that in Nebraska the parties cohabitated for a continuous period of 17 years, holding themselves out as husband and wife, and manifesting this in all the business instruments which they signed in the same last name. The evidence further showed that the public and the parties' own immediate families considered them to be husband and wife. This is strong circumstantial evidence that the parties considered themselves married, and might be enough to overcome the presumption of a meretricious relationship and to form a basis for inferring present intent of marriage in Iowa.

On the basis of the evidence of cohabitation, holding out as husband and wife, and repute in Iowa, the Iowa court would have had grounds to use the

---

[17] Porter v. United States, 7 Ind. T. 616, 104 S.W. 855 (1907); *In re* Will's Estate, 194 N.Y. 548, 87 N.E. 1129 (1909); Dirion v. Brewer 20 Ohio App. 298, 151 N.E. 818 (1925); also see Note, *Presumptions In Common Law Marriage*, 14 IOWA L. REV. (1928), for good discussion.

[18] Carr v. Walker, 205 Ga. 1, 52 S.E.2d 426 (1949); Thomey v. Thomey, 67 Idaho 393, 181 P.2d 777 (1947); Gammelgaard v. Gammelgaard, 247 Iowa 979, 77 N.W.2d 479 (1956); Coureas v. Allstate Ins. Co., 198 Va. 77, 92 S.E.2d 378 (1956).

[19] *In re* Medford's Estate, 197 Iowa 76, 196 N.W. 728 (1924); Dirion v. Brewer, 20 Ohio App. 298, 151 N.E. 818 (1925).

[20] This is a rebuttal presumption which is a matter of procedure and therefore determined by the internal law of the forum. GOODRICH, CONFLICT OF LAWS 84 (3d ed. 1949).

policy it announced in *Gammelgaard v. Gammelgaard*.[21] The Iowa court said in that case, that in those doubtful cases of present intent, where there is ample proof of cohabitation, holding out as husband and wife, and repute, it would prefer that construction of the evidence which finds a legitimate marriage rather than a long period of lewd and criminal cohabitation.

Actually the Nebraska court in refusing to find a common law marriage in Iowa was probably influenced more by its policy on common law marriage than by what the Iowa law is on the subject.[22]. In early days of America, sparseness of settlement, difficulty of travel, inaccessibility of ministers or officers given the right to perform the marriage ceremony were reasons for permitting common law marriage. However, today the abhorance of common law marriages is the rule rather than the exception.

There are many policy arguments against common law marriages. Establishing common law marriages often involve expensive litigation. Children born from this relationship are illegitimate and innocent victims if the marriage is not established. Rights of inheritance are put in doubt. Sanctity of marriage is cheapened. Common law marriages furnish a means of defeating effectiveness of reforms sought to be brought about through the legislature, such as laws requiring premarital physical examinations.[23]

Pioneer conditions which fostered common law marriages in the U.S. have disappeared, except perhaps in Alaska which does not recognize such marriages.[24] The clerk's office is available to all and none are beyond the sound of church bells. If reason be the life of the law, it would appear wise to abolish common law marriages everywhere in the U.S. by individual action in the states in which it still enjoys a tenuous hold, for its continuance seems to promise more abuse than use.

LOUIS A. LAVARATO (June 1962)

INCOME TAX—Was payment in 1958 by farmer's cooperative to member for rice delivered to cooperative in 1957 constructively received by the member in 1957?

The plaintiff, a cash basis taxpayer, delivered rice to an agricultural cooperative association, of which he was a member, in October and November, 1957. In 1958, the plaintiff received an advance of $17,959.50 on the rice, and he received the net balance of the ultimate sale price later in that year. The

---

[21] 247 Iowa 979, 77 N.W.2d 479 (1956).

[22] Sorensen v. Sorensen, 68 Neb. 483, 485, 100 N.W. 930, 932 (1904) ("This ancient doctrine is alien to the ideas and customs of our people. It tends to weaken the public estimate of the sancity of the marriage relation . . . . It places honest, God-ordained matrimony and mere meretricious cohabitation too nearly on a level with each other.").

[23] See Kirkpatrick, *Common-Law Marriages: Their Common Law Basis and Present Need*, 6 ST. LOUIS U. L. J. 30, 46 (1960).

[24] Alaska Acts, Ch. 52 (1941); Alaska Acts, Ch. 71 (1939).

Commissioner of Internal Revenue contended that the transfer of rice constituted a sale, and that the advance of $17,959.50 actually received by plaintiff in 1958 had been constructively received in 1957. A tax deficiency was assessed. Plaintiff paid the assessment, and his claim for refund having been denied this suit followed. *Held,* claim for refund allowed. The evidence sustained the finding of the jury that the advance was not constructively received in 1957.[1] *Oliver v. United States,* 193 F. Supp. 930 (E.D. Ark. 1961).

A cash basis taxpayer reports income as it is received, in money or property equivalent, and deducts expenses as they are paid.[2] But, "a taxpayer may not deliberately turn his back on income and thus select the year for which he will report it."[3] The Treasury Department conceived and has included in the Regulations[4] the doctrine of constructive receipt of income. The doctrine, which is applicable only to the cash basis taxpayer,[5] treats income which is unreservedly subject to demand or which could have been received, as though it were actually received. The apparent purpose of the doctrine is to prevent taxpayers from choosing the year in which to report income by controlling the reduction of income to possession.[6] The Board of Tax Appeals[7] once indicated that the doctrine was to be applied sparingly and only in unique circumstances.[8] Now it is used more commonly, and is construed as a "rule of law" which may be invoked by either the Commissioner or the taxpayer.[9]

The clearest application of the constructive receipt doctrine exists when the taxpayer fails to request that payment, to which he is entitled, be made immediately,[10] or does not cash the check received by him.[11] However, a request by the drawer that the check be "held" for a period of time will

---

1 The jury also found that the transaction was one of agency, rather than a sale as was presupposed in the first finding.

2 STANLEY & KILCULLEN, THE FEDERAL INCOME TAX 188-89 (3d ed. 1955). This text also points out that the ability to control deductions is an advantage of the cash basis method. A full deduction may be taken in the year of payment, even though expenses relate to future years.

3 Hamilton Nat'l Bank of Chattanooga v. Commissioner, 29 B.T.A. 63, 67 (1933).

4 Treas. Reg. § 1.451-2 (1957) provides: "(a) *General Rule.* Income although not actually reduced to a taxpayer's possession is constructively received by him in the taxable year during which it is credited to his account or set apart for him so that he may draw upon it at any time. However, income is not constructively received if the taxpayer's control of its receipt is subject to substantial limitations or restrictions. . . ."

The doctrine is not mentioned in the Code, which only provides: "(a) *General Rule.*—The amount of any item of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under the method of accounting used in computing taxable income, such amount is to be properly accounted for as of a different period." INT. REV CODE OF 1954, § 451.

5 Harbor Plywood Corp. v. Commissioner, 14 T.C. 158 (1950), *aff'd,* 187 F.2d 734 (9th Cir. 1951).

6 Ross v. Commissioner, 169 F.2d 483, 7 A.L.R. 2d 719 (1st Cir. 1948).

7 Presently the Tax Court.

8 Hal E. Roach, 20 B.T.A. 919 (1930).

9 Ross v. Commissioner, 169 F.2d 483, 7 A.L.R. 2d 719 (1st Cir. 1948). *See* McEuen v. Commissioner, 196 F.2d 127 (5th Cir. 1952); and L. Hand, dissenting, in Weil v. Commissioner, 173 F.2d 805 (2d Cir. 1949).

10 Kunze v. Commissioner, 19 T.C. 29 (1952), *aff'd,* 203 F.2d 957 (2d Cir. 1953).

11 Hedrick v. Commissioner, 154 F.2d 90 (2d Cir. 1946), *cert. denied,* 329 U.S. 719 (1946); Hooker Electrochemical Co., 8 T.C. 1120 (1947).

prevent application of the doctrine.[12] If payment is delayed at the insistence of the payee, it is considered income in the year payment could have been received.[13] A taxpayer may not, by merely delaying the making of a book entry, postpone the receipt of income.[14]

If a cash basis seller of merchandise or other property requests that payment be made in a year subsequent to the year of the sale, he will be considered to be in constructive receipt of the proceeds in the year of the sale, and the income will be taxable in that year.[15] Any delay in payment due only to the seller's own volition puts the seller in constructive receipt of income.[16] Income which is unqualifiedly available and subject to the demand or control of the taxpayer is taxable in the year it became available regardless of the time of actual receipt.[17]

Income is not constructively received, however, if the taxpayer's control of its receipt is subject to substantial limitations or restrictions.[18] A bona fide arm's length contract calling for payment of the proceeds of the sale in a taxable year following the year of delivery will satisfy the restrictive requirement so that the income is taxable in the year of receipt.[19] The agreement may be oral,[20] but it must be an enforceable contract rather than an informal agreement.[21] It also appears that the contract must have been made at the time of or before delivery and before the right to payment had accrued.[22] The taxpayer must show that the contract was an arm's length transaction and that receipt of the proceeds was beyond his demand or control.[23]

When all or a part of the purchase price or other income is held in escrow or other trust arrangements for payment in later years the tax consequence is questionable. Cases have held that where the beneficiary has no present right to payment, or lacks control over disposition of the funds, there is no constructive receipt.[24] Other cases have held that the

---

[12] L. M. Fischer, 14 T.C. 792 (1950).

[13] Frank v. Commissioner, 22 T.C. 945 (1954), *aff'd per curiam*, 226 F.2d 600 (6th Cir. 1955).

[14] Acer Realty Co. v. Commissioner, 132 F.2d 512 (8th Cir. 1942), *affirming* 45 B.T.A. 33 (1941).

[15] Hineman v. Brodrick, 99 F. Supp. 582 (D. Kan. 1951); Malmberg v. Lamb, 44 Am. Fed. Tax R. 1328 (D. N.D. 1953).

[16] Hineman v. Brodrick, 99 F. Supp. 582 (D. Kan. 1951); James E. Lewis, 30 B.T.A. 318 (1934); John Rossi, P-H 1950 T.C. Memo. Dec. ¶ 50,217.

[17] Penn v. Glenn, 250 F.2d 507 (6th Cir. 1958), *aff'd*, 265 F.2d 911 (6th Cir. 1959); Ralph Romine, 25 T.C. 859 (1956); Malmberg v. Lamb, 44 Am. Fed. Tax R. 1328 (D. N.D. 1958); John Rossi, P-H 1950 T.C. Memo. Dec. ¶ 50,217.

[18] Treas. Reg. § 1.451-2 (a) (1957); Margaret L. Carpenter, 34 T.C. 408 (1960).

[19] Rev. Rul. 58-162, 1958-1 CUM. BULL. 234; J. D. Amend, 13 T.C. 178 (1949); McIntyre v. United States, 1 Am. Fed. Tax R.2d 1100 (D. N.D. 1958); Wilfred Weathers, P-H 1953 T.C. Memo. Dec. ¶ 53,095.

[20] J. D. Amend, 13 T.C. 178 (1949); Wilfred Weathers, P-H 1953 T.C. Memo. Dec. ¶ 53,095.

[21] Penn v. Glenn, 250 F.2d 507 (6th Cir. 1958), *aff'd*, 265 F.2d 911 (6th Cir. 1959).

[22] Wilfred Weathers, P-H 1953 T.C. Memo. Dec. ¶ 53,095.

[23] Kasper v. Banek, 214 F.2d 125 (8th Cir. 1954); McIntyre v. United States, 1 Am. Fed. Tax R.2d 1100 (D. N.D. 1958). In J. D. Amend, 13 T.C. 178 (1949), the court pointed out that the taxpayer had made a regular practice of contracting for payment in a subsequent year. This may be a determinative factor for non-application of the doctrine.

[24] Drysdale v. Commissioner, 277 F.2d 413 (6th Cir. 1960), *reversing* 32 T.C. 378 (1960); Harold W. Johnston, 14 T.C. 560 (1950); Merton E. Farr, 11 T.C. 552 (1948), *aff'd sub nom.* Sloane v. Commissioner, 188 F.2d 254 (6th Cir. 1951); Commissioner v. Tyler, 72 F.2d 950 (3d Cir. 1934), *affirming* 28 B.T.A. 367 (1933).

income is entirely taxable in the year of the transaction regardless of the payment arrangement.[25] Two reasons for the distinction may be given: application of other tax principles when the doctrine of constructive receipt was inapplicable,[26] or the restrictions, being self-imposed, resulted only in "sham" transactions purely for the purpose of tax avoidance.[27] Although not truly a constructive receipt problem, it should also be noted that receipt of income by an agent is generally considered as receipt by the principal.[28]

Interest credited to the savings account of a taxpayer is constructively received by him when so credited, even though the taxpayer does not desire to withdraw such sums.[29] This is also true of interest coupons which have matured and are payable, though not cashed,[30] and the taxpayer's physical inability to reduce the income to actual possession is irrelevant.[31] Dividends on corporate stock are constructively received when unqualifiedly made subject to the demand of the shareholder.[32] However, such interest or dividend payments are not constructively received if there are no funds available for payment or if receipt is subject to substantial limitations or restrictions.[33]

The application of the constructive receipt doctrine in compensation plans and deferred compensation agreements is complex and extensive. The basic premise is that such compensation is income, although not actually reduced to possession, in the year it is credited to his account or set apart for him so that he may draw upon it at anytime.[34] However, if receipt is beyond the control of the taxpayer,[35] or there is no right to demand pay-

---

[25] Williams v. United States, 219 F.2d 523 (5th Cir. 1955); Kuehner v. Commissioner, 214 F.2d 437 (1st Cir. 1954), *affirming* 20 T.C. 875 (1953); Williams v. United States, 185 F. Supp. 615 (D. Mont. 1960); Sproull v. Commissioner, 16 T.C. 244 (1951), *aff'd*, 194 F.2d 541 (6th Cir. 1952).

[26] Kuehner v. Commissioner, 214 F.2d 437 (1st Cir. 1954), *affirming* 20 T.C. 875 (1953); Corliss v. Bowers, 30 F.2d 135 (S.D. N.Y. 1929), *aff'd*, 34 F.2d 656 (2d Cir. (1929), *aff'd*, 281 U.S. 376 (1930); Sproull v. Commissioner, 16 T.C. 244 (1951), *aff'd*, 194 F.2d 541 (6th Cir. 1952).

[27] Williams v. United States, 219 F.2d 523 (5th Cir. 1955), Williams v. United States, 185 F. Supp. 615 (D. Mont. 1960).

[28] United States v. Pfister, 205 F.2d 538 (8th Cir. 1958), *reversing* 102 F. Supp. 640 (D. S.D. 1952); Helvering v. Schaupp, 71 F.2d 736 (8th Cir. 1934); F. H. Wilson, 12 B.T.A. 403 (1928).

[29] Treas. Reg. § 1.451-2 (b) (1957).

[30] *Ibid.*

[31] Loose v. United States, 74 F.2d 147 (8th Cir. 1934), *affirming* 4 F. Supp. 375 (W.D. Mo. 1933) (Matured interest coupons were taxable as income even though holder was physically unable to receive income). *But see:* Commissioner v. Fox, 218 F.2d 347 (3d Cir. 1954), *affirming* 20 T.C. 1094 (1953) (taxpayer could have collected dividends on December 31, 1949, at offices of various savings and loan companies, twenty-seven in number and all located outside of taxpayer's state of residence; court held doctrine of constructive receipt was not applicable).

[32] Treas. Reg. § 1.451-2 (b) (1957).

[33] Treas. Reg. § 1.451-2 (b) (1957).

[34] Treas Reg. § 1.451-2 (b) (1957; Cooke v. Commissioner, 203 F.2d 258 (10 Cir. 1953), *cert. denied*, 346 U.S. 815 (1953); C. H. Becker, 14 T.C. 361 (1950). The following cases indicate that the authorization of the amount of salary will not constitute constructive receipt: Eckland v. Commissioner, 182 F.2d 547 (10th Cir. 1950), *reversing* 12 T.C. 384 (1949); Hyland v. Commissioner, 175 F.2d 422 (2d Cir. 1949).

[35] Sanchez v. Commissioner, 6 T.C. 1141 (1946), *aff'd*, 162 F.2d 58 (2d Cir. 1947), *cert. denied*, 332 U.S. 815 (1947).

ment,[36] or if the amount due is in dispute,[37] the doctrine is not applicable. As in a sales transaction, compensation may be deferred to subsequent years by the making of a bona fide arm's length contract, provided the rights to payment are restricted to the terms of the contract.[38]

A farmer seeking to minimize taxes, as the rice grower in the principal case was, should remember, when contemplating the method of product disposition, that income may not be postponed by a request for future payment[39] or by the making of an unenforceable postponement agreement.[40] To prevent application of the constructive receipt doctrine he should store the product at the cooperative and sell in a subsequent year, or so contract as to preclude any right to the proceeds in the year of the sale.[41]

RONALD FRYKBERG (June 1963)

INTOXICATING LIQUOR—Is seller liable under Dram Shop Act when purchaser furnishes liquor to a third person who becomes intoxicated and causes injury?

Deceased's wife and her infant daughter brought suit under the North Dakota Civil Damage Act[1] against defendant liquor dealer for the death of their husband and father. Defendant illegally sold liquor to a minor, who subsequently shared the liquor with deceased, also a minor. Deceased became intoxicated and was involved in a fatal auto accident. There was no evidence that the sale was made to the minor by the defendant in the presence of deceased, whereby defendant would have known or had reasonable grounds to believe that deceased would consume a part of the liquor sold. Plaintiff's petition was dismissed by the trial court and plaintiff appealed. *Held,* affirmed. Liability under the Civil Damage Act for the unlawful sale of alcoholic beverages rests on the seller for damages caused by intoxication of the immediate buyer only, unless the seller knew or reasonably should have known that others would consume a part of such liquor. *Fladeland v. Mayer,* 102 N.W.2d 121 (N.D. 1960).

Many states have enacted statutes, commonly called Dram Shop Acts, to provide for civil liability of sellers or givers of intoxicating liquors. The North Dakota Civil Damage Act[2] states: "Every wife, child, parent, guardian, employer, or other person who shall be injured in person, property, or means of support, by any intoxicated person, or in consequence of intoxication, habitual or otherwise, of any person, shall have a right of action, in his or her own

---

[36] James Gould Cozzens, 19 T.C. 663 (1953).
[37] Walter I. Bones, 4 T.C. 415 (1944).
[38] Oates v. Commissioner, 18 T.C. 570 (1952), *aff'd,* 207 F.2d 711 (7th Cir. 1953),
[39] Hineman v. Brodrick, 99 F. Supp. 582 (D. Kan. 1951).
[40] Glenn v. Penn, 250 F.2d 507 (6th Cir. 1958), *aff'd,* 265 F.2d 911 (6th Cir. 1959).
[41] J. D. Amend, 13 T.C. 178 (1949).

[1] N.D. Gen. Code Ann § 5-01-21 (1960).
[2] *Ibid.*