his future rights in her property. Upon the death of the wife the husband was allowed to set aside the agreement, though he had never contributed to the support of his wife, on the grounds that the parties could not bargain away the wife's right to support. In *Kyff v. Kyff*,[12] a New York case, a woman who had spent $30,000 paid her by her husband in lieu of future duty of support had the agreement declared void. The situation present in both of these cases and all other cases raising this problem did not exist when the common law rule was formulated. At that time a married woman could not own property apart from her husband and had no opportunities for gainful employment. In effect, she was utterly dependent upon him for her support and if he did not support her there was a strong probability that she would have to be supported by the state. With the appearance of employment opportunities for women and laws giving a married woman equal right to her property the dependence of the married woman disappeared and along with it the danger that she would have to be supported by the community if not provided for by her husband.

Recognizing the position of the married woman under present day conditions, the majority of other jurisdictions have changed the common law either by statute[13] or by judicial decision.[14] Numerous decisions uphold the validity of lump sum payments as a complete discharge of further obligation upon the part of the husband to support his wife.[15] Also an agreement in *Fischer v. Fischer*,[16] where the parties agreed to release each other from all obligations and rights owed the other, was not thought to be contrary to public policy. Their only requisite for a separation agreement is that it be fair in light of attending circumstances. It is submitted that this is a desirable view and is more compatible with the mores of our modern society.

WILLIAM R. DRISCOLL.

INCOME TAX—*Deductions Under Section 23(a)(2) of the Internal Revenue Code by a Fiduciary Charged With Mismanagement.* (Federal)

Respondent, administrator of an estate, was charged with mismanagement in a suit brought by the heirs. Pursuant to the demand of the heirs, a final accounting was filed by the respondent which was approved

[12] 286 N.Y. 71, 35 N.E. 2d 655 (1941).
[13] Calif.
[14] *See* 120 A.L.R. 1335.
[15] Daniels v. Benedict, 38 C.C.A. 592, 97 Fed. 367 (1889); Baily v. Dillon, 186 Mass. 244, 71 N.E. 538 (1904); Carrol v. Springer, 14 Tenn. App. 195 (1931); Lee v. Lee, 55 Mont. 426, 178 P. 173 (1919); In re Hoy's Estate, 308 Pa. 131, 162 A. 155 (1932).
[16] 53 N.D. 631, 207 N.W. 434 (1926).

by the State Probate Court of Minnesota. The heirs commenced an independent action along the same lines in the State District Court wherein the respondent's demurrer was sustained. While appeals by the heirs were pending in both actions, the parties reached a settlement under the terms of which the respondent paid $10,000, and released his claim for compensation for his services as administrator. He also incurred attorney fees of $1500 during the course of the litigation. Respondent claims these items as deductions in his income tax return. The Commissioner of Internal Revenue denied the deductions and assessed a deficiency. The Tax Court expunged the deficiency and allowed the deductions. On petition to the Circuit Court of Appeals for review of the decision of the Tax Court of the United States, *held*: Decision reversed. The items are not deductible. *Commissioner of Internal Revenue v. Josephs*, 168 F. 2d 233 (C.C.A. 8th 1948).[1]

This case presents the question whether amounts paid by a taxpayer in settlement of a claim against him for breach of his fiduciary duties as administrator of an estate and attorney fees attending his defense are deductible under section 23 (a) (2) [2] of the Internal Revenue Code. This section was added to the code in 1942 and it allows deductions by an individual for "all the ordinary and necessary expenses paid or incurred . . . for the production or collection of income, or for the management, conservation or maintenance of property held for the production of income." [3]

In allowing the deduction the Tax Court based its decision squarely upon its interpretation of *Trust of Bingham v. Commissioner*.[4] In this case the Supreme court pointed out that "the effect of section 23 (a) (2) was to provide for a class of non-business deductions coextensive with the business deductions allowed by section 23 (a) (1),[5] except for the fact that, since they were not incurred in connection with a business, the section made it necessary that they be incurred for the production of income or in the management or conservation of property held for the production of income." [6] The court also stated that section 23 (a) (2) is "comparable and in pari materia" with section 23 (a) (1).

Prior to the *Bingham* case the Tax Court had held, under facts similar to those in the principal case, that the expenses were not deductible

[1] Petition for writ of certiorari to the Court of Appeals for the Eighth Circuit dismissed on October 18, 1948, without comment or opinion. 69 S.Ct. 66.

[2] 26 U.S.C.A., § 23 (a) (2), Internal Revenue Code (1948 Supp.).

[3] *Supra* note 1.

[4] 325 U.S. 365, 65 S.Ct. 1232 (1945).

[5] 26 U.S.C.A., § 23 (a) (1), Internal Revenue Code (1948 Supp.): "In computing net income there shall be allowed as deductions: . . . In general. All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business. . . ."

[6] *Supra* note 3 at 374, 65 S.Ct. at 1237.

under section 23 (a) (2).[7] But in *Heide v. Commissioner of Internal Revenue*,[8] as in this case they reached exactly the opposite conclusion and allowed the deductions. In both of these latter cases they were reversed by the Circuit Court of Appeals. Whether these reversals are justifiable is the present consideration.

As previously noted, section 23 (a) (2) was a part of the Revenue Act of 1942 and provided a new class of deductions, namely, non trade or non business expenses. Prior to this time non trade or non business income, such as income from investments, was fully taxable. Yet no deduction was allowed for expense incurred incidental to the realization of such income. After the case of *Higgins v. Commissioner of Internal Revenue* [9] in which the Supreme Court disallowed such deductions because they were not incurred in a "trade or business" as required by section 23 (a) (1), the stage was set for the amendment. Manifestly, the general aim of the provision was to correct the existing inequity by allowing deductions for such expenses.[10]

In *Davis v. Commissioner of Internal Revenue* [11] the Tax Court recognized the purpose of the amendment as already set out above and they construed it as giving "a deduction for ordinary and necessary expenses to one not engaged in carrying on a business, limited, however, to the extent set forth in this subsection and under circumstances where such expenditures would be allowable to one engaged in carrying on a trade or business." [12] They cited, as a basis for their interpretation, a quotation from the congressional reports [13] to the effect that any deduction under this section is subject to all the limitations and restrictions that apply in the case of a business deduction under section 23 (a) (1) except for the requirement of being incurred in connection with a trade or business. This interpretation is referred to with approval by the Circuit Court of Appeals in *Davis v. Commissioner of Internal Revenue*.[14] Accepting

[7] 2 T.C. 676 (1943).

[8] 8 T.C. 314 (1947).

[9] 312 U.S. 212, 61 S.Ct. 475 (1941).

[10] See Mertens, LAW OF FEDERAL INCOME TAX, Vol. 4, § 25.118; 1 C.C.H. 1948 Fed. Tax Serv. Par. 168C; H. Rep. No. 2333, 77th Cong., 2d Sess.; S. Rep. No. 1631, 77th Cong., 2d Sess.

[11] 4 T.C. 329 (1944).

[12] *Ibid.* at 334.

[13] "A deduction under this section is subject, except for the requirement of being incurred in connection with a trade or business, to all the restrictions and limitations that apply in the case of the deduction under section 23 (a) (1) of an expense paid or incurred in carrying on a trade or business . . .". Senate Finance Comm. Rep. 1631, 77th Cong., 2d sess., 1942—2 Cum. Bull., pp. 504, 571, and Ways and Means Comm. Rep. 2333, 77th Cong., 1st sess., 1942—2 Cum. Bull., pp. 372, 430.

[14] "In our opinion, to be deductible under section 23 (a) (2), the expenses must be such as would, if incurred in carrying on a business, be proper deductions under section 23 (a) (1) and must have been paid or incurred 'for the production or collection of income, or for the management, conservation or maintenance of property held for the production of income' ". 151 F.2d 441, 443 (C.C.A. 8th 1945).

this as a valid interpretation of the provision it follows that in order for an expense to be deductible under section 23 (a) (2) it must meet the same requirements as under section 23 (a) (1) except that it shall be incurred for the production of income or in the management of property held for the production of income rather than in connection with a trade or business. Consequently, if such expenses as those considered in the principal case are deductible under section 23 (a) (1) by a taxpayer engaged in the business of administering estates they should likewise be deductible by an individual administrator *if* the expenses are incurred for the production of income or in the management of property held for the production of income.

Such expenses were held deductible under section 23 (a) (1) by the court in *Hochschild v. Commissioner of Internal Revenue.*[15] In this case a taxpayer incurred attorney fees in defense of a stockholder's derivative suit against him for breach of his fiduciary duties as a director and officer of the American Metal Company. The court found that he was engaged in a trade or business and that such expenses were deductible as ordinary and necessary business expenses within the meaning of section 23 (a) (1).

In the *Josephs* case the court said "It is impossible to believe that the expenses of respondent in this case were such as ordinarily and necessarily result from the activities of a fiduciary." [16] But in the *Hochschild* case such expenses were held to be ordinary and necessary for a business trustee, the court there saying: ". . . it was necessary for him to defend the lawsuit to protect himself from being compelled to account generally for the alleged breach of the duties to the American Metal Co." [17] Seemingly the substantial relationship between these two sections of the code would warrant a conclusion that "ordinary and necessary" should be construed the same under either. If such expenses are ordinary and necessary for the business trustee are they not just as much so for the individual trustee?

It has been shown herein that Congress intended that the same requirements be met under both sections except that under section 23 (a) (2) the expenses must be incurred for the production of income rather than in connection with a trade or business. Surely Congress did not contemplate different interpretations of these requirements which they made common to both sections. And yet one must resort to varied interpretations in order to find that these expenses are ordinary and necessary for a business trustee but not so for an individual trustee. Such treatment of the enactment can result only in frustration of the benevolent intent of Congress.

[15] 161 F.2d 817 (C.C.A. 2d 1947).

[16] 168 F.2d 233, 236 (C.C.A. 8th 1948).

[17] *Supra* note 14 at 819. (This case involved only the deductibility of attorney fees since no settlement was made. However, it seems unlikely that any justifiable distinction could be drawn between the two items.)

That these expenses are deductible by a business trustee or administrator is settled.[18] That they should be deductible by an individual in a non business capacity *if* they were incurred for the production of income is suggested. We must consider this latter question. Certainly the respondent had anticipated a remuneration for his services and the facts as found by the Tax Court indicate that he was under no duty or obligation to serve as administrator of the estate and that he accepted the appointment upon condition that he would receive compensation.

In passing on this problem in the *Josephs* case the court relied upon *Commissioner of Internal Revenue v. Heide* [19] which had disallowed a deduction by a non business trustee for an amount paid in settlement of a claim against him for mismanagement. The *Heide* case opinion demanded that, to be allowable as incurred for production or collection of income, the expenses "should result from conditions which stand in the path of his producing income at all (and) they should not be such as he interposes himself, as little so, when his attention has flagged as when he has been deliberately unfaithful to his trust." [20] This language clearly illustrates the court's concern over the possibility of one profiting by his own wrong. That one should receive the benefit of an income tax deduction for an avoidable expense paid as restitution for his misconduct is paradoxical. Admittedly, such an intent could not reasonably be imputed to Congress. But, in an effort to forestall such a happening, the court in both the *Heide* and *Josephs* cases has construed very strictly the requirement that the expense be incurred for the production of income. By these cases it is not sufficient that the expense is incurred in connection with or as a direct result of the income producing activity. Seemingly they require that the expenditure be made positively and directly in the proper pursuit of anticipated income. The result is that a fiduciary who apparently acts in good faith, as did the respondent to the principal case,[21] is the victim of a rigid construction designed by the court to combat an evil to which he is not a party.

In the final analysis the broad question becomes: Is it reasonable and just to distinguish between a business fiduciary and a casual fiduciary in the circumstances of the principal case, allowing the deduction to the former but denying it to the latter? A consideration of the circumstances prompting the amendment, the Congressional intent in enacting it, the

[18] Hochschild v. Commissioner of Internal Revenue, *supra* note 14; Kornhauser v. United States, 276 U.S. 145, 48 S.Ct. 219 (1928); Annotation: Federal Income Tax—Deductibility of Legal Expenses, 88 L.Ed. 171; Abbott v. Commissioner, 38 B.T.A. 1290 (1938). (There was an acquiescence by the Commissioner in this case which is indicative of his agreement with the theory of the decision.)

[19] 165 F.2d 699 (C.C.A. 2d 1948).

[20] *Ibid.* at 701.

[21] Respondent had favorable decisions in the trial court in both of the actions against him.

judicial treatment of the two sections as an integrated unit and the Supreme Court's pronouncement that section 23(a)(2) is "comparable and in pari materia" with section 23(a)(1) and hence to be construed with reference thereto, would seem to compel a negative answer.

ROBERT H. MILLER.

LABOR LAW—*Specific Performance of Collective Bargaining Agreements.* (Federal)

Mountain States Division No. 17, Communication Workers of America, entered into three collective bargaining contracts with the Mountain States Telephone and Telegraph Company, one in January and two in May of 1947. The Union represented the Company's employees in Colorado, New Mexico, Arizona, Idaho, Utah, and El Paso, Texas. The agreements contained the usual collective bargaining provisions: bargaining and grievance procedures, arbitration, pensions, disability and death benefits, termination allowances, and provisions for payroll deduction of dues. The agreements were subject to termination by either party on sixty days' advance notice to the other. On May 15, 1948, the Company notified the Union that the contracts were terminated at midnight as of that day. Previous to this notification, there had been correspondence between the Company and the Union, initiated by the Union, for amendment and modification of the contracts. The Union then brought suit in the Federal District Court of Colorado, under Section 301(a) of the Labor Management Relations Act,[1] against the Company for an injunction directing the Company to continue the contracts in full force until they were terminated by their own provisions or by law. To support its demand for injunctive relief, the Union alleged irreparable damage and the lack of an adequate, speedy remedy at law. The Company countered that the Union had no cause of action, that the court lacked jurisdiction in the matter, and that the Union had an adequate remedy at law. *Held,* injunction granted. *Mountain States Division No. 17, Communication Workers of America v. Mountain States Telephone and Telegraph Company,* 81 F. Supp. 397, 15 Labor Cases 74,275, ¶64,724 (U.S.D.C., D. Colo., 1948).

[1] Public Law 101, 80th Congress, Chapter 120, 1st Session, H.R. 3020. § 301. "(a) Suits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." 29 U.S.C.A. 185 (1947).