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state legislation in order to be in a position to challenge these large holding companies. In the meantime the large holding companies have a virtual interstate monopoly among the states with only a possibility of competition from other holding companies. It should be noted that the Board of Governors, which administers the Act, objected strongly to this provision of the Act that equates holding companies with branch banking.⁸⁷ It would have been more advantageous to have allowed the Board to have the final decision as to whether a holding company could acquire a bank in a different state because the Board is in a better position to see all the essential facts and the basic needs more clearly than the individual state. Also one bank may have a monopoly within a state and the Board is now powerless to allow competition without the state first acting.

There is also further need for legislation to restrict the ability of banks to merge with one another and to acquire unlimited branches. Banks have been able to merge with amazing ease over the past few years⁸⁸ and this matter has become one of great concern.⁸⁹ A bill which would have covered this subject failed to pass the Senate⁹⁰ last summer so the matter still demands immediate action.



GIFTS OF SECURITIES TO MINORS—ARTICLE 8-A, PERSONAL PROPERTY LAW

Introduction

Very recently, legislation was enacted in New York,¹ and several other jurisdictions,² concerning gifts of securities to minors. Although at common law a minor could hold securities, or any other personal property, in his own name,³ he could disaffirm any conveyance of that property.⁴ Third persons dealing with this property assumed

⁸⁷ *Hearings, supra* note 84, at 47, 142.

⁸⁸ See *Hearings Before the Antitrust Subcommittee of the House Committee On The Judiciary*, 84th Cong., 1st Sess., ser. 3, pt. 1, at 451, 466 (1955).

⁸⁹ See *Hearings, supra* note 88, at 465-66, pt. 3, at 2159.

⁹⁰ H.R. 5948, 84th Cong., 1st Sess. (1955). This bill was passed by the House but was not acted upon by the Senate.

¹ N.Y. PERS. PROP. LAW §§ 265-70.

² California, Colorado, Connecticut, Georgia, Michigan, New Jersey, North Carolina, Ohio, Rhode Island, South Carolina, Virginia, Wisconsin. See N.Y. STOCK EXCHANGE, *Stock Gifts to Minors, A Guide to Recent Legislative Action* 1 (1956). In addition, a similar statute was recently passed for the District of Columbia, Pub. L. No. 976, 84th Cong., 2d Sess. (Aug. 3, 1956).

³ See *Legis. Note*, 54 MICH. L. REV. 883 (1956).

⁴ See *Casey v. Kastel*, 237 N.Y. 305, 142 N.E. 671 (1924); WILLISTON, CONTRACTS 269 (rev. ed. 1938).

the risk of the disaffirmance.⁵ Moreover, the person dealing with the securities on behalf of the minor could be held liable in case the transaction resulted in a loss.⁶ These problems will be treated here, with a view of determining whether or not the recently enacted legislation will solve them. It will be assumed that the gifts treated are comparatively small, for example, one or two shares of stock.

Background

One method of effecting gifts of securities to minors which has been used to some extent in the past is the setting up of a trust.⁷ The donor, however, will not wish to go to any great expense or trouble in order to effectuate a small gift. Usually, an attorney will be needed in order to draw up the trust agreement. This, of course, involves some expense.⁸ In addition, a trustee must be appointed. If a corporate trustee is used, the expense could very well prohibit the making of the gift. In many cases the administrative burdens would be too heavy,⁹ if a non-professional trustee is appointed. Then too, there are tax problems involved, such as whether or not gifts to the trust will be entitled to the 3,000-dollar annual gift tax exclusion.¹⁰ The trouble and expense of all this seems to be excessive, however, in a case where a father wishes to give his son a few shares of stock for Christmas. The main advantage in setting up a trust lies in the fact that it is considered a separate legal entity,¹¹ and the disability of the minor does not affect the sale of the stock.¹²

Another device which has been used in the past is that of legal guardianship. There are so many disadvantages involved that a guardianship is hardly feasible. First of all, there is the annual expense of a surety bond.¹³ Then there are annual accountings,¹⁴ sharp restrictions on the type of investments made with the minor's property,¹⁵ and the fact that all expenditures will be closely observed by

⁵ See *Casey v. Kastel*, *supra* note 4; *cf.* *Matter of Goodchild*, 160 Misc. 738, 290 N.Y. Supp. 683 (Surr. Ct. 1936).

⁶ See *Casey v. Kastel*, *supra* note 4.

⁷ See Note, 69 HARV. L. REV. 1476, 1477 (1956).

⁸ *Ibid.*

⁹ See Rogers, *Some Practical Considerations in Gifts to Minors*, 20 FORDHAM L. REV. 233, 257 (1951).

¹⁰ See, *e.g.*, *Commissioner v. Disston*, 325 U.S. 442 (1945); *Fondren v. Commissioner*, 324 U.S. 18 (1945); *Kieckhefer v. Commissioner*, 189 F.2d 118 (7th Cir. 1951); *accord*, *Commissioner v. Kempner*, 126 F.2d 853 (5th Cir. 1942).

¹¹ See *In re Ihmsen's Estate*, 253 App. Div. 472, 3 N.Y.S.2d 125 (3d Dep't 1938).

¹² See Browning, *Gifts to Minors*, 27 CONN. B.J. 407, 414-15 (1953).

¹³ N.Y. SURR. CT. ACT § 180.

¹⁴ *Id.* §§ 190, 192.

¹⁵ N.Y. DOM. REL. LAW § 85; N.Y. PERS. PROP. LAW § 21.

the court.¹⁶ Since the guardian is a fiduciary¹⁷ he must also directly conform to the standards set down by the law.¹⁸

A third method for effectuating a gift of securities is the registration of the stock in the name of a nominee. This nominee is not a legal guardian and possesses no legal authority.¹⁹ Then, the problem arises as to whether or not an actual gift can be proved. The donative intent must be clearly established.²⁰ If it is proved, and title is in the minor, he may, upon reaching majority, disaffirm any transactions entered into by the nominee with respect to the securities.²¹ Further, the nominee may be liable for any loss incurred by reason of any of his transactions,²² even though he acted in good faith. If these were the only objections to the use of a nominee, many parents would be willing to make themselves nominees, or appoint some close relative, safe in the assurance that they would not be subjected to suit by the child. However, any transfer agent or broker who deals with the securities knowing they belong to a minor, is liable to that minor for any loss incurred.²³ A corporation whose stock is being transferred is liable to the same extent,²⁴ where knowledge exists.

If the securities are registered in the minor's name in the first instance, without the use of a nominee, it will be practically impossible to sell them.²⁵ Transfer agents and brokers are loathe to handle these securities.

The New York Statute

Against this background the New York Gift of Securities to Minors Act was passed. The legislation was originally sponsored by the New York Stock Exchange,²⁶ and the Association of Stock Exchange Firms. The Act was sponsored in order to simplify the procedure in giving gifts to minors; to provide an orderly and standard method of giving and still afford a measure of protection to the child and to third parties; and to satisfy the annual gift tax exclusion.²⁷

¹⁶ N.Y. Surr. Ct. Act § 190.

¹⁷ *Id.* § 182. See also note 15 *supra*.

¹⁸ N.Y. Dom. Rel. Law § 85; N.Y. Pers. Prop. Law § 21; N.Y. Surr. Ct. Act §§ 172-194-b.

¹⁹ See Rogers, *Some Practical Considerations in Gifts to Minors*, 20 *FORDHAM L. REV.* 233, 250-51 (1951).

²⁰ *Id.* at 252.

²¹ See note 4 *supra*.

²² See, e.g., *Adamson v. Adamson*, 266 Fed. 949 (E.D. Pa. 1920).

²³ See *Steele v. Leopold*, 135 App. Div. 247, 120 N.Y. Supp. 569 (1st Dep't 1909), *modified on other grounds*, 201 N.Y. 518, 94 N.E. 1099 (1911).

²⁴ See CHRISTY AND McLEAN, *THE TRANSFER OF STOCK* § 199 (2d ed. 1940).

²⁵ See Address by G. Keith Funston, National Association of Securities Administrators, Sept. 29, 1954.

²⁶ See Address by G. Keith Funston, Banking Law Section of the New York State Bar Association, Jan. 26, 1956.

²⁷ See Memorandum in Relation to an Act Amending the Personal Property Law, Nov. 10, 1955, p. 2 (New York Stock Exchange). See also N.Y. Stock

The New York statute provides for registration of the securities in the donor's name, or in the name of any adult member of the minor's family, or in his guardian's name, as custodian for the child. The statute further requires delivery to the named custodian, but states that mere registration constitutes delivery. If the security is in bearer form, all of the above is applicable, except that delivery may not be made to the donor as custodian. The gift is declared irrevocable if there is compliance with these conditions.²⁸

The custodian under the Act is given broad powers of management.²⁹ For example:

The custodian may sell, exchange, convert, or otherwise dispose of any and all of the securities . . . for such prices and upon such terms as he may deem advisable . . . he shall invest the minor's property in such securities as would be acquired by prudent men of discretion and intelligence. . . .³⁰

The custodian may also apply any income from the securities to the support of the minor. There are here none of the restrictions imposed upon a trustee³¹ or a guardian.³² Absent intentional wrong, the custodian may, in his discretion, treat the securities as he pleases, subject only to the "prudent man" test.³³ The statute also provides that "no issuer of securities, transfer agent, registrar or bank . . ." ³⁴ acting on the instructions of a person purporting to be a custodian is bound to inquire as to whether the alleged custodian has actual authority to act as such. In addition it states, that in the sale of securities, the person selling them as transfer agent is protected and need not inquire into the facts of the sale. The transfer agent is to be held liable only if he acts with *actual knowledge* of malfeasance on the part of the custodian.³⁵ This provision clears the way for the unlimited trading of securities actually owned by minors.

The statute further provides that a custodian other than a guardian of the minor is to receive no compensation,³⁶ and that he may

EXCHANGE, *Stock Gifts to Minors, A Guide to Recent Legislative Action* (1956). Under the Internal Revenue Code of 1954, there is an annual gift tax exclusion of \$3,000 for a single person, and \$6,000 dollars for married persons. But in order to come under this section, certain requirements must be satisfied. These requirements the statute under consideration seeks to satisfy. INT. REV. CODE OF 1954, § 2503(b), (c).

²⁸ N.Y. PERS. PROP. LAW § 265.

²⁹ *Id.* § 266.

³⁰ *Id.* § 266(2) (b).

³¹ See *Delafield v. Barret*, 270 N.Y. 43, 200 N.E. 67 (1936); 4 BOGERT, TRUSTS §§ 961-63, 967.

³² N.Y. Surr. Ct. Act §§ 190-94-b; N.Y. Rules Civ. Prac. § 290.

³³ This test, however, is very difficult to apply. See, e.g., *Kavanaugh v. Commonwealth Trust Co.*, 223 N.Y. 103, 119 N.E. 237 (1918); *Casey v. Woodruff*, 49 N.Y.S.2d 625 (Sup. Ct. 1944); *McNally v. Colwell*, 91 Mich. 527, 52 N.W. 70 (1892).

³⁴ N.Y. PERS. PROP. LAW § 266(2) (e).

³⁵ *Ibid.*

³⁶ *Id.* § 266(3).

resign at any time provided he petitions the court for that purpose.³⁷ The minor is entitled to an accounting after he reaches the age of twenty-one, or if before that time a successor custodian is appointed.³⁸ The proceeds of the gift remaining at the time the child reaches age twenty-one are turned over to him and, in the event of his death before reaching majority, to his estate.

The Model Act,³⁹ as put forth by the New York Stock Exchange and the Association of Stock Exchange Firms, served as the basis for the drafting of the New York statute. The legislature has, however, made several changes which are interesting to note. Both the New York statute and the Model Act contain provisions relieving transfer agents from liability to the minor. The transfer agent need not inquire as to whether the custodian has actual authority to act as such. The New York Act, however, further provides that the transfer agent will be liable if he has *actual knowledge* of the lack of authority of the custodian.⁴⁰ There is no such provision in the Model Act. The inclusion of this provision in the New York statute would seem to be a practical necessity. Without it, the statute, on its face, would *completely* relieve the transfer agent of liability, actual knowledge notwithstanding. Undoubtedly, this was not the intent of the framers of the Model Act.⁴¹ Though it would seem that most courts would construe a like provision in accordance with the New York provision, under the terms of the Model Act a problem of statutory construction arises.

With regard to the removal of a custodian, the Model Act makes no provision therefor. The New York statute expressly provides that "the donor, a parent of the minor or a guardian of the minor may at any time present to the supreme court or the surrogate's court . . . a petition alleging that removal of the custodian will be in the best interests of the minor. . . ." ⁴² This provision will simplify and expedite the procedure in any case of malfeasance by a custodian. In the event of the death of a custodian the Model Act provides, *inter alia*,⁴³ that the guardian of the minor, if such there be, will succeed as custodian. The New York statute makes it necessary to petition the court for appointment of a successor custodian.⁴⁴ This, though giving added

³⁷ *Id.* § 267(2).

³⁸ *Id.* § 268.

³⁹ N.Y. Stock Exchange, An Act Concerning Gifts of Securities to Minors, Dec. 15, 1955.

⁴⁰ N.Y. PERS. PROP. LAW § 266(2)(e).

⁴¹ "If a broker has *actual knowledge* that the donor has not complied with the statute or that the custodian is exceeding his powers as set forth in the statute, the broker, of course, may not be protected." N.Y. STOCK EXCHANGE, *Stock Gifts to Minors, A Guide to Recent Legislative Action* 3 (1956) (emphasis added).

⁴² N.Y. PERS. PROP. LAW § 267(3).

⁴³ N.Y. Stock Exchange, An Act Concerning Gifts of Securities to Minors, Dec. 15, 1955, § 7(a).

⁴⁴ N.Y. PERS. PROP. LAW § 267(4).

protection to the minor, would appear to be an unwarranted formality, considering that the purpose of the statute is the simplification of the procedure for the giving of securities to minors.⁴⁵

In order for a custodian to resign, the Model Act merely requires that he execute ". . . an instrument of resignation designating a successor custodian who is an adult member of the minor's family. . . ." ⁴⁶ New York, again not wishing to adopt this simplified procedure, requires that the custodian who wishes to resign, petition the court for permission and for the appointment of a successor custodian. Here too it would appear that the child is being afforded a greater degree of protection at the cost of the primary purpose of the statute. In the final analysis, the child is receiving a gift which in most cases will be given by a close relative. It seems unnecessary to impose the formal restrictions of a court petition upon the custodian in this instance.

In dealing with the problem of supervision, the Model Act simply states that the minor or his parent, guardian or legal representative may petition the court for an accounting. In no event, however, may they so petition the court if one year has elapsed since the minor reached his majority, or since his death before reaching age twenty-one.⁴⁷ This is in effect, a one-year statute of limitations covering accounting under the Act. The New York statute states that when any petition is made due to the death, resignation or removal of a custodian as discussed above, the court may require an accounting. There is no provision in the New York statute restricting the time within which an accounting may be had.

It can be seen that the New York statute has enlarged on the Model Act in many respects. Some of the additions will facilitate judicial construction of the statute. For the most part, however, the legislature has complicated the procedure involved, thereby defeating to a certain extent one of the original aims of the proponents of the statute.⁴⁸

Tax Aspects

As far as gifts under the statute are affected by the gift tax and income tax, no very serious problem is presented. Compliance with the statute vests indefeasible legal title in the donee-minor. By its terms, the securities or the income therefrom may be expended for the benefit of the minor. To the extent that they are not expended for the benefit of the minor, the securities, or the income therefrom will pass to the donee upon his reaching the age of twenty-one. In the event of his death before attaining majority they pass to his estate.

⁴⁵ See Memorandum in Relation to an Act Amending the Personal Property Law, Nov. 10, 1955, p. 2 (N.Y. Stock Exchange).

⁴⁶ N.Y. Stock Exchange, *supra* note 43, § 6.

⁴⁷ N.Y. Stock Exchange, *supra* note 43, § 10.

⁴⁸ One of the original aims was to simplify the giving of gifts to minors. See note 45 *supra*.

The words of the statute actually paraphrase the words used in Section 2503(c) of the Internal Revenue Code.⁴⁹ This section lists the requirements which must be met in order to qualify for the 3,000-dollar gift tax exclusion under Section 2503(b).⁵⁰ Consequently, the Internal Revenue Service has stated that the transfer of shares of stock, under these conditions, constitutes a completed gift of a present interest for purposes of the Code.⁵¹ Therefore a gift under the statute qualifies for the 3,000-dollar gift tax exclusion.⁵²

With regard to income tax, there has, up to the present time, been only one ruling by the Internal Revenue Service.⁵³ In effect, it was stated that where any part of the income from the securities is used for the support of the minor, that amount will be considered as income to the person charged with support of the child.⁵⁴ This is so regardless of any relationship of the donor or the custodian to the donee-minor. Thus, for example, if the donor was an uncle and the custodian a brother of the minor, neither would be taxed on the income. In that case, any income expended for the child's support, is taxable income as to the minor's father, or whoever else may be charged with the support of the child.⁵⁵ In the ordinary case, all the income from the securities will be re-invested. In this situation, it would seem that it should be taxed as income to the child.⁵⁶ In addition, if the child is actually supported by his parents, they may claim a 600-dollar deduction for the child as an exemption.⁵⁷ This is so no matter how high the income from the securities may be, as long as the child is either under nineteen or is a student.⁵⁸

A problem which is not yet resolved, and will not be resolved until an actual case arises, is that of estate tax.⁵⁹ There is, however, a fairly well established body of law concerning similar arrange-

⁴⁹ "No part of a gift to an individual who has not attained the age of 21 years . . . shall be considered a gift of a future interest . . . if the property and income therefrom—

- (1) may be expended by, or for the benefit of, the donee before his attaining the age of 21 years, and
- (2) will to the extent not so expended—
 - (A) pass to the donee on his attaining the age of 21 years, and
 - (B) in the event the donee dies before attaining the age of 21 years, be payable to the estate of the donee or as he may appoint under a general power of appointment as defined in section 2514(c)." INT. REV. CODE OF 1954, § 2503(c).

⁵⁰ *Id.* § 2503(b).

⁵¹ See Letter from Office of Commissioner of Internal Revenue, Jan. 6, 1956.

⁵² *Supra* note 51.

⁵³ See Letter from Office of Commissioner of Internal Revenue, Mar. 27, 1956.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ INT. REV. CODE OF 1954, § 61. See also note 53 *supra*.

⁵⁷ *Id.* §§ 151(e), 152(a).

⁵⁸ *Id.* § 151(e) (1) (B).

⁵⁹ It is the policy of the Internal Revenue Service not to rule on the prospective application of the Federal estate tax law. See note 51 *supra*.

ments.⁶⁰ With regard to the minor, this much can be said; if he dies before reaching age twenty-one, the securities, and income therefrom pass to the child's estate.⁶¹ Therefore, they will be taxed just as any other asset of the estate.⁶² In the case of the donor; where he is also custodian and dies before the minor attains majority, it has been suggested that the property may very well be included in his gross estate by virtue of Section 2038 of the Code.⁶³ That section applies to cases where the donor retains the right to alter or terminate.⁶⁴ If a donor designates someone else as custodian, it is not likely that his estate will be taxed.⁶⁵ But, if the donor-custodian is under an obligation to support the minor, he may be taxed under Section 2036(a)(1) which relates to retaining possession and enjoyment.⁶⁶ This would be on the theory that the father-donor could possibly make support payments out of the income of the securities. As to the custodian, if he is neither donor nor under legal obligation to support, he probably would not be subjected to any estate tax.⁶⁷

As to the conflict of laws problem, there seem to be no serious stumbling blocks.⁶⁸ The general rule, and the safest rule to follow, would seem to be to group as many elements of the gift as possible into the state whose statute is being invoked.⁶⁹ In most cases, however, all persons involved will be New York residents.

When the infant donee is a New York resident, there will be no problem.⁷⁰ If the donor is a New York resident, it would seem that he may properly use New York law in order to effectuate his gift.⁷¹ If the custodian, on the other hand, is a New York resident, the same

⁶⁰ See Widmark, *Security Gifts to Minors*, 95 TRUSTS & ESTATES 698 (1956).

⁶¹ N.Y. PERS. PROP. LAW § 266(2). See also Widmark, *supra* note 60, at 700.

⁶² INT. REV. CODE OF 1954, § 2037(1).

⁶³ See *Lober v. United States*, 346 U.S. 335 (1953). See also Widmark, *supra* note 60, at 700.

⁶⁴ Section 2038 states that a person's gross estate shall include all property ". . . of which the decedent has at any time made a transfer . . . where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power . . . by the decedent alone. . ." INT. REV. CODE OF 1954, § 2038(a)(1).

⁶⁵ See *Commissioner v. Douglass' Estate*, 143 F.2d 961 (3d Cir. 1944).

⁶⁶ The fact that the one under an obligation to support could apply the income to the child's support would seem to be considered the retaining of possession and enjoyment under Section 2036(a)(1) of the Internal Revenue Code. Cf. *Helvering v. Mercantile Commerce Bank and Trust Co.*, 111 F.2d 224 (8th Cir. 1940), which placed this construction on a similar provision of the 1926 Code.

⁶⁷ See Widmark, *Security Gifts to Minors*, 95 TRUSTS & ESTATES 700 (1956).

⁶⁸ See Note, 69 HARV. L. REV. 1476, 1486 (1956).

⁶⁹ See *Wilmington Trust Co. v. Wilmington Trust Co.*, 26 Del. Ch. 397, 24 A.2d 309 (Sup. Ct. 1942). For an interesting discussion of the situs of intangibles, see Note, 30 ST. JOHN'S L. REV. 224 (1956).

⁷⁰ "If the infant donee is a resident of New York the statute clearly validates the exercise by the custodian of the powers it confers." See Memorandum in Relation to an Act Amending the Personal Property Law, Nov. 10, 1955, p. 7.

⁷¹ See *Application of New York Trust Co.*, 195 Misc. 598, 87 N.Y.S.2d 787 (Sup. Ct. 1949); *City Bank Farmers Trust Co. v. Meyn*, 263 App. Div. 671, 673, 34 N.Y.S.2d 373, 375 (2d Dep't 1942) (dictum).

law would seem to apply.⁷² To examine any other situations would involve mere speculation. Suffice it to say that the safest thing to do is to group as many elements of the gift as possible in New York.⁷³

Conclusion

The New York statute very effectively remedies the problems concerning the freedom of action of the individual holding securities for the minor. A custodian, as previously pointed out, has, under the statute almost complete freedom of action in dealing with the securities, unlike a guardian,⁷⁴ or trustee.⁷⁵ This in itself is a great advance in this area. Then too, the provisions freeing the custodian and transfer agent, when acting in good faith, from the threat of disaffirmance or suit by the minor, have made it practical to give small gifts of securities to children.

Though clearing up many problems, the statute raises some new ones. For example, it may be contended that the protection afforded the minor is not extensive enough. The custodian has almost unlimited control of the securities. This control is tempered only by the "prudent man" test, at best very unsubstantial and difficult to apply.⁷⁶ But since the statute will be utilized for the most part by parents, the protection afforded the minor seems adequate.⁷⁷ There is, however, a more serious objection to the New York statute. In several instances, as mentioned above, it is necessary to petition the court before any action is taken. Although giving added protection to the child it seems to be an unduly formal restriction, not to mention the fact that a not unsubstantial expense is involved. One of the purposes of the statute was to provide an inexpensive, facile method of giving securities. In seeking to protect the child, the legislature has not entirely achieved this purpose.

However, on the whole, this is excellent remedial legislation. Its defects are substantially outweighed by its advantages. When viewed in the light of the problem sought to be solved, it seems that the objectives of the statute have been achieved, and the device used seems to be the best possible one.⁷⁸

⁷² See *Hutchison v. Ross*, 262 N.Y. 381, 187 N.E. 65 (1933).

⁷³ See note 69 *supra*.

⁷⁴ See note 15 *supra*. See also N.Y. Surr. Ct. Act § 182.

⁷⁵ See *Adamson v. Adamson*, 266 Fed. 949 (E.D. Pa. 1920).

⁷⁶ See note 33 *supra*.

⁷⁷ The New York Stock Exchange conducted a survey among shareowning parents with incomes above \$7,500. The result indicated that 40% of these parents wished to invest in securities for their children. See Address by G. Keith Funston, National Association of Securities Administrators, Sept. 29, 1954, p. 6.

⁷⁸ One of the best possible reasons for the passage of this legislation was put forward by G. Keith Funston. "Our children will reach maturity at a time when the capital needs of our economy will be so staggering that, if they are not met willingly from the savings of people educated to the significance of stock ownership, they will be met by government investment and government ownership." Address by G. Keith Funston, Banking Law Section of the New York State Bar Association, Jan. 26, 1956.