[TRIANTAFYLLIDES, P., STAVRINIDES, L. LOIZOU, A. LOIZOU, MALACHTOS, JJ.]

THE REPUBLIC OF CYPRUS, THROUGH

1. THE MINISTER OF FINANCE,

2. THE COMMISSIONER OF INCOME TAX,

Appellants,

and

DEMETRIOS DEMETRIADES,

Respondent.

(Revisional Jurisdiction Appeal No. 141).

Income Tax Law, 1961 (Law 58 of 1961) section 21—Whether unconstitutional as being contrary to Articles 24.1 and 28.1 of the Constitution.

Income Tax—Wife's income—Section 21 of Income Tax Law, 1961 (Law 58 of 1961)—Taxing, thereunder, husband on the combined total of his and his wife's income derived from sources other than from her own labour—Whether it contravenes Articles 24.1 and 28 of the Constitution.

Equality—Principle of equality—Fiscal equality—Articles 24.1 and 28 of the Constitution—Section 21 of the Income Tax Law, 1961 (Law 58 of 1961)—Whether unconstitutional as being contrary to the aforesaid Articles.

*Judicial precedent—Doctrine of—Overrulling of precedent—Whether with prospective or retrospective effect—Judgments of former Supreme Constitutional Court—Not binding on present Supreme Court sitting either on Appeal or as a Full Bench—But binding on Judges of the Supreme Court sitting alone under s. 11 (2) of the Administration of Justice (Miscellaneous Provisions) Law, 1964—*Mikrommatis *v.* The Republic, *2 R.S.C.C. 125 to the effect that aggregation of the income of a wife, from sources other than from her own labour, with that of her husband, for income tax purposes, was not unconstitutional—Whether correctly decided.*

Income Tax—Assessments—Objection thereto—Determination of, by applying legislation which was not in force at the material time—Namely section 22 of the Income Tax Laws 1961-1969,

instead of section 21 of the Income Tax Law, 1961, which was the legislation properly applicable thereto—Validity of assessments.

Administrative Law—Administrative Act—Objection to income tax assessments—Determination of—Failure to apply the correct Law to relevant facts—Validity of assessment.

Equality—Discrimination—Discrimination on the ground of sex—Articles 6 and 28 of the Constitution.

Right to marry—Article 22 of the Constitution.

The respondent in this appeal was assessed by the Commissioner of Income Tax to pay tax on the combined total of his income received by way of salary, and the income of his wife, derived from the letting of shops and flats, for the years of assessment 1962 to 1968.

Upon a recourse by the respondent against the above assessment the trial Judge annulled the *sub judice* assessments after holding:

(a) That the income of the wife of the respondent from rents of flats and shops is not earned income as provided by section 22(1)* of the Income Tax Laws 1961 to 1969 but income from property and, therefore, should not be taxed separately.

(b) That section 22 of the Income Tax Laws 1961-1969 and all other similar earlier tax provisions are unconstitutional as being contrary to Articles 24 and 28 of the Constitution.

In deciding as above the trial Judge stated that Judges of the Supreme Court, sitting alone, are not bound by decisions of the former Supreme Constitutional Court and that, therefore, he was not bound by the second leg of the decision of the latter Court in *Mikrommatis* v. *Republic*, 2 R.S.C.C. 125, and he could depart from it.

Paragraph (b) above was the subject of an appeal by the Republic (through the Minister of Finance and the Commissioner of Income Tax) and paragraph (a) was the subject of a cross-appeal by the respondent—taxpayer.

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* Quoted at p. 227 *post*.

Held, (A. Loizou J., dissenting) that the *sub judice* assessments must be annulled.

(A) *Per Triantafyllides, P., Stavrinides, J., concurring:*

(1) That in determining the objections of the respondent for the years of assessment 1961-1968 the appellant Commissioner has applied the new section 22 of the relevant legislation, and not sections 21 of Gr. C. Ch. Laws 18/62 and 9/63 and the old section 21 of Law 58/61, which were in force, at the material time, in relation to the years of assessment concerned; that by doing so the Commissioner has failed, in taking administrative action in relation to the matter before him, to apply the correct law to the relevant facts, and he has instead based himself on a provision, the said section 22, which was enacted in 1969 and which was, therefore, inapplicable in respect of the years of assessment 1961-1968; that, as a result, instead of deciding whether or not the affected income of the wife of the respondent was income derived by her in the exercise of the right safeguarded under Article 25 of the Constitution, he examined the nature of such income from a much narrower angle, on the basis of whether or not it was "earned income" as defined in the income tax legislation; and that, consequently, the *sub judice* assessments have to be, and are hereby, annulled as being legally defective.

(2) That the issue of the validity of the new section 22 of Law 58/61, which was not applicable to the assessments in question and which is not part of the legislation enacted on the basis of the decision in the *Mikrommatis* case will be left entirely open.

(B) *Per Malachtos, J., L. Loizou, J., concurring:*

(1) That section 21 of the Income Tax Law, 1961 (now section 22 of the Income Tax Law, 1961-1969) is unconstitutional as being contrary to Articles 24.1 and 28.1 of the Constitution; that the argument that a husband and wife are considered as one financial unit and that the object of the Law is to make the husband a channel through which the collection of tax in respect of the income of his wife is effected cannot stand *(Hoeper* v. *Tax Commission of Wisconsin, 76 Law. Ed. U.S. 248 and Case No. 9 of 1957 of the Federal Constitutional* Court of the Federal Republic of Germany adopted *and followed).*

(2) That the said section 21 contravenes Article 24.1 of the Constitution, which provides that every person is bound to contribute according to his means towards the public burdens, by imposing on a married man the liability to contribute, in addition to his own means, for the means of somebody else.

(3) That the said section contravenes Article 28 of the Constitution which provides for equality before the law and against discrimination; that the addition of the income of the wife from other sources than from her own labour, to the income of her husband, results to unequal treatment between married men depending on whether their wives derive income from their own labour or from their own property; that, furthermore, a married man whose wife derives income from her own property, since the reduction of the scales for bachelors, as a result of *Panayides* v. *Republic* (1965) 3 C.L.R. 107, enjoys his income to a lesser extent than an unmarried man; and that likewise it results to unequal treatment between married and unmarried women.

(4) That in view of the judgment in the appeal that section 21 of the Income Tax Law 58/61 is unconstitutional, an examination as to whether income from rents of flats and shops of the wife of the respondent, is earned income, as provided by section 21 (2) of the law, or not is rendered superfluous. In fact, counsel for the respondent clearly stated that if the appeal were decided in his favour he would not insist on the cross-appeal.

On the question whether the trial Judge was entitled to depart from the decision in the Mikrommatis case (supra) *or whether he was bound to follow it:*

(A) *Per Triantafyllides, P., Stavrinides, J., concurring:*

(1) That a Judge of this Supreme Court acting under section 11 (2) of the Administration of Justice (Miscellaneous Provisions) Law, 1964 (Law 33/64) is, certainly, not to be regarded, in any way at all, as an "inferior court" in relation to a Full Bench of the Supreme Court; that he is bound, however, because of the doctrine of precedent, by the decisions of a Full Bench of this Court—(and of the Supreme Constitutional Court and of the High Court of Justice as its predecessors)—simply for the sake of ensuring, as much as possible, certainty regarding the law in force, since his decisions are not of a final nature, in the sense that they are subject to

an appeal, whereas those of a Full Bench of this Court, as well as those of the Supreme Constitutional Court and of the High Court of Justice, are, indeed, of a final nature.

(2) That a Full Bench of this Court can reverse its own case-law, as well as that of the Supreme Constitutional Court and of the High Court of Justice, on the same basis on which the House of Lords in England can do likewise.

(3) That it was not open, in the present case, to the learned trial Judge, not to follow, and to instead reverse, the decision in the *Mikrommatis* case; that he was, of course, perfectly entitled to put on record in his judgment his opinion that the *Mikrommatis* case had been wrongly decided, but having done so he was bound to follow it, leaving the matter of its possible reversal to be dealt with, if need be, by a Full Bench of this Court on appeal.

(B) *Per Malachtos, J., L. Loizou, J., concurring:*

(1) That, no doubt, this court in its appellate jurisdiction is not bound to follow the decisions of the former Supreme Constitutional Court, or even its own decisions, and can always depart from them, when, of course, there are good reasons for doing so (see in this respect *Constantinides* v. *The Republic* (1969) 3 C.L.R. 523).

(2) That the Cyprus Courts regard judicial precedent as a source of law and the decisions of the Supreme Court are binding on all courts; that the present case was tried in the first instance by a Judge of this Court whose decision is not final and conclusive but is subject to appeal; that the decision in *Mikrommatis* case was issued by the former Supreme Constitutional Court, which was constituted of three judges and which, according to Article 146.1 of the Constitution had exclusive jurisdiction to adjudicate finally on a recourse made to it on a complaint that a decision, an act or omission of any organ, authority or person, exercising any executive or administrative authority, was contrary to any of the provisions of the Constitution or of any law or was made in excess or abuse of powers vested in such organ or authority or person; that the trial judge in the present case was certainly entitled to express his disagreement with the decision of the Supreme Constitutional Court but was bound to follow it; and that the decision of the former Supreme Constitutional Court should be regard-

ed equivalent to the decision of the Supreme Court sitting either on appeal or as a Full Bench in its Revisional Jurisdiction and so it creates a judicial precedent.

(C) *Per A. Loizou, J.*

(1) That the doctrine of judicial precedent is part and parcel of our judicial system as being the necessary basis for providing a degree of certainty as to the law, in order to show a consistency in judicial pronouncements and at that an equality of treatment before the law, and the means for the development of legal rules in a disciplined and regular manner; that the doctrine of precedent, however, particularly so in matters relating to constitutional and administrative issues should be more liberal than the manner in which it was applied under the Common Law system from which we inherited same until 1966 when the House of Lords introduced a more liberal approach to the binding effect of their own precedents on themselves.

(2) That subordinate courts, and with it is meant District Courts and Assize Courts, are bound by the existing judicial precedent of superior courts, and as far as such subordinate courts are concerned, the Supreme Court whether sitting as a Full Bench or in Benches of three, should be deemed as a superior court.

(3) That the Supreme Court is entitled, being the highest Court of the land entrusted with both original and appellate jurisdiction, concerned with the interpretation of the Constitution and having exclusive jurisdiction on Administrative Law matters, to depart from precedent if it is of opinion that they are wrong or that changed political, economic and social developments call for a review of its previous approach, particularly so in matters of Constitutional and Administrative Law; and that it should, however, be reluctant and cautious to depart from precedent and should always be guided by the fact that such a departure should not interfere retrospectively with contractual relations and fiscal arrangements. (With regard to precedent in Criminal Law matters, see the case of The *Republic* v. *Nicolaos Sampson* (1977) 2 C.L.R. 1 at p. 80).

(4) That the approach of the learned trial judge was that since the then Supreme Constitutional Court was exercising original jurisdiction similar to that exercised by a single judge of the present Supreme Court trying a case on administrative

law under the provisions of Law 33/64, the doctrine of judicial precedent did not apply as in its various manifestations operates so as to bind Courts in the lower line of the ladder of hierarchy of Courts; that, consequently, it assimilated the status of the then Supreme Constitutional Court *vis-a-vis* the exercise of the same jurisdiction under the aforesaid section 11 by one of the judges of this Court to that of a High Court Judge in England who are not bound by judgments of their colleagues in the High Court but are merely of a persuasive authority; that there cannot be such comparison as the Supreme Constitutional Court had exclusive jurisdiction and, though exercising its jurisdiction in the first instance, had the final word on the subject, whereas when a Judge of the Supreme Court today exercises the same jurisdiction in the first instance, his judgment is subject to appeal to the Full Bench of the Court; that irrespective, therefore, of the equal status of a judge of this Court with his colleagues, yet the fact that the judgment of such a judge is subject to appeal to the Full Bench of the Supreme Court, leads to the conclusion that such a judgment must be treated for the purposes of the doctrine of judicial precedent as being governed by the same principle that applied to the cases of Courts of first instance being bound by the decisions of Appellate Tribunals.

On the question whether the Mikrommatis case was correctly decided:

(A) *Per Triantafyllides, P., Stavrinides, J., concurring.*

(1) That having carefully considered the *ratio decidendi* of the decision in the *Mikrommatis* case, *supra,* in the light of the correct application of the principle of equality—with particular reference to such application to matters of taxation and of social and economic policies—and having, also, examined the said *ratio decidendi* from the angle of its compatibility with the enjoyment of the right to marry, and that, having further, taken judicial notice of the relevant social conditions existing at the material time, this Court (Triantafyllides, P., Stavrinides, J., concurring) has come to the conclusion that the decision in the *Mikrommatis* case was a correct one at the time when it was reached, on December 11, 1961, and that it was not inconsistent with Articles 24 and 28, or with Article 22, of the Constitution; and that, consequently, the relevant legislation, which was based on the said decision, was not unconstitutional at the time when it was enacted.

(2) That, for the time being, the issue of whether or not,

because of intervening factual and legal developments, the decision given in the *Mikrommatis* case, and embodied in legislation based on it, has to be treated as being no longer valid will be left entirely open; that this course was adopted not only because there is not, in the present case, material before the Court, concerning factual and legal developments after the decision in the *Mikrommatis* case, as should lead the Court to the definitive conclusion that it is imperative to overrule it, but, also, because, even assuming that it were to be overruled, these are no adequate factors before the Court in order to be enabled to pronounce whether it is to be overruled only prospectively or retrospectively too, and, if so, as from what time in the past.

(B) *Per Malachtos, J., L. Loizou, J., concurring:*

That the *Mikrommatis* case should be reversed; that the Supreme Constitutional Court wrongly decided that the addition of the income from property of a married woman, resulting from the application of section 19 of Cap. 323, to that of her husband, was a reasonable distinction based on the intrinsic nature of the community of life existing between spouses, and did not amount to a discrimination on the ground of sex; and that section 19 of Cap. 323, ought to be declared as unconstitutional for the reasons explained above.

(C) *Per A. Loizou, J.:*

That the *Mikrommatis* case was correctly decided and the reasons given in that case are still holding good.

Appeal dismissed.

Cases referred to:

Mikrommatis and The Republic, 2 R.S.C.C. 125, at pp. 131, 132;

Hoeper v. *Tax Commission of Wisconsin,* 76 Law. Ed. 248;

Attorney-General of the Republic v. *Ibrahim,* 1964 C.L.R. 195 at p. 233;

Board of Registration of Architects and Civil Engineers v. *Kyriakides* (1966) 3 C.L.R. 640 at p. 654;

Matsis v. *The Republic* (1969) 3 C.L.R. 245 at p. 258;

Fekkas v. *Electricity Authority of Cyprus* (1968) 1 C.L.R. 173 at pp.183-184;

Panayides v. *The Republic* (1965) 3 C.L.R. 107 at pp. 116, 117, 118, 119;

Constantinides v. *The Republic* (1969) 3 C.L.R. 523 at pp. 533, 545;

5 *Republic* v. *Georghiades* (1972) 3 C.L.R. 594 at p. 690;

Hadji Moussa v. *Apostolides and Others* (1899) 5 C.L.R. 6 at p. 11;

Ismail and Another v. *The Attorney-General* (1929) 16 C.L.R. 9 at pp. 12, 14;

10 *Alma Shipping Co. S.A.* v. *V.M. Salgaoncar E. Irmaos Ltd.* [1954] 2 Q.B. 94;

London Street Tramways Co. Ltd. v. *London County Council* [1898] A.C. 375;

Geelong Harbor Trust Commissioners v. *Gibbs Bright & Co.*

15 [1974] 2 W.L.R. 507 at pp. 512-514;

Knuller (Publishing, Printing and Promotions) Ltd. and Others v. *Director of Public Prosecutions* [1972] 3 W.L.R. 143;

Young v. *Bristol Aeroplane Company Limited* [1944] 1 K.B. 718 at pp. 729, 730;

20 *Tiverton Estate Ltd.* v. *Wearwell Ltd.* [1974] 2 W.L.R. 176;

Morsis v. *The Republic* (1965) 3 C.L.R. 1;

Blackstone v. *Miller*, 47 Law. Ed. 439;

Farmers Loan & Trust Co. v. *State of Minnesota*, 74 Law. Ed. 371;

25 *Smith* v. *Allwright*, 88 Law. Ed. 987 at p. 998;

Republic v. *Sampson* (1977) 2 C.L.R. 1 at p. 80;

Anastassiou v. *The Republic* (reported in this Part at p. 91 *ante* at p. 106);

Currie v. *Commissioners of Inland Revenue*, 12 T.C. 245 at

30 p. 246;

Inland Revenue Commissioners v. *Maxse*, 12 T.C. 41 at p. 61;

Erichsen v. *Last* [1881-82] 8 Q.B. D. 414;

East v. *Watson*, 43 T.C. 472;

Smith v. *Anderson* [1880] 15 Ch. D. 247 at pp. 258-259;

Municipal Corporation of Nicosia v. *Rologis Co. Ltd.* (1963) 2 C.L.R. 90 at pp. 110-111;

Vita-Ora Co. Ltd. v. *The Republic* (1973) 3 C.L.R. 273 at p. 280;

Leitch v. *Emmott* [1929] 2 K.B. 236 at p. 247; 5

Elmhirst v. *Commissioners of Inland Revenue* [1937] 2 Q.B. 551;

Pikis v. *The Republic* (1965) 3 C.L.R. 131 at p. 149;

Doe d. Wetherell v. *Bird* [1834] 2 Ad. & El. 161 at p. 166;

Rolls v. *Miller* [1884] 27 Ch. D. 71 at p. 88; 10

Noddy Subsidiary Rights Co. Ltd. v. *Inland Revenue Commissioners* [1966] 3 All E.R. 459 at p. 470;

Miliangos v. *George Frank (Textiles) Ltd.* [1975] 1 All E.R. 1076 at pp. 1084-1085; [1975] 3 All E.R. 801 at pp. 801, 820; 15

Farrell and Another v. *Alexander* [1976] 1 All E.R. 129 at p. 137; [1976] 2 All E.R. 721 at p. 741;

Zimmerman v. *Grossman* [1971] 1 All E.R. 363;

Boys v. *Chaplin* [1968] 1 All E.R. 283 at p. 296;

Jones v. *Secretary of State for Social Services, Hudson* v. *Secretary of State for Social Services* [1972] 1 All E.R. 145 at pp. 149, 174, 196; 20

In re Harper and Others v. *National Coal Board* [1974] 2 W.L.R. 775 at pp. 777, 780, 781;

Smith v. *Central Asbestos Co. Ltd.* [1973] A.C. 518; 25

R. v. *Gould* [1968] 2 Q.B. 65 at pp. 68-69;

R. v. *Newsome, R.* v. *Browne* [1970] 3 All E.R. 455 at pp. 457-458;

United States v. *South Buffalo Railway Company,* 92 Law. Ed. 1077 at p. 1081; 30

Green v. *United States,* 2 L. Ed. 2d 199 at pp. 220;

States Board of Insurance v. *Todd Shipyards Corporation,* 8 L. Ed. 2 d. 620 at p. 625;

United States v. *Barnett,* 12 L. Ed. 2d 23 at p. 36;

United States v. *State of Maine*, 43 L. Ed. 2 d. 363 at pp. 371, 372;

Republic v. *Mozoras* (1966) 3 C.L.R. 356;

Morsis and The Republic, 4 R.S.C.C. 133 at p. 137;

5 *Loizides and The Republic*, 1 R.S.C.C. 107;

Constantinides v. *The Republic* (1967) 3 C.L.R. 483;

Zambakides and Others v. *The Republic* (1970) 3 C.L.R. 191 at pp. 193, 194;

Lehnhausen v. *Lake Shore Auto Part Co. and Barrett* v. *Shapiro*, 35 L. Ed. 2d 351 at pp. 354-355, 357-358; 10

Dandridge v. *Williams*, 25 L. Ed. 2d. 491 at pp. 501-502, 503;

Jefferson v. *Hackney*, 32 L. Ed. 2d. 285 at p. 296;

United States Department of Agriculture v. *Moreno*, 37 L. Ed. 2d 782 at pp. 787, 790; 15

Kahn v. *Shevin*, 40 L. Ed. 2d 189 at p. 193;

Weinberger v. *Salfi*, 45 L. Ed. 2d 522;

Gedulding v. *Aiello*, 41 L. Ed. 2d 256;

Bolling v. *Sharpe*, 98 Law. Ed., 884 at p. 886;

20 *Schneider* v. *Rusk*, 12 L. Ed. 2d 218 at p. 222;

Weinberger v. *Wiesenfeld*, 43 L. Ed. 2d 514 at p. 519;

Frontiero v. *Richardson*, 36 L. Ed. 2d 583;

Jimenez v. *Weinberger*, 41 L. Ed. 2d 363;

Xinari and The Republic, 3 R.S.C.C. 98 at pp. 100-101;

25 *Hji Kyriacos and Sons Ltd.*, 5 R.S.C.C. 22 at p. 27;

Kannas v. *The Police* (1968) 2 C.L.R. 29;

Gelpcke v. *The City of Dubuque*, 17 Law. Ed. 520 at pp. 525-526;

Great Northern Railway Company v. *Sunburst Oil & Refining Company*, 77 Law. Ed. 360 at pp. 366-367; 30

Linkletter v. *Walker*, 14 L. Ed. 2d 601 at pp. 604-606, 607-608;

Desist v. *United States*, 22 L. Ed. 2d 248 at pp. 254-256;

Katz v. *United States*, 19 L. Ed. 2d 576;

Cipriano v. *City of Houma*, 23 L. Ed. 2d 647 at pp. 651-652;

City of Phoenix v. *Kolodziejski*, 26 L. Ed. 2d 523 at pp. 530-531; 5

Hill v. *Stone*, 44 L. Ed. 2d 172 at p. 181;

Jones v. *Secretary of State of Social Services* [1972] A.C. 944 at pp. 1026-1027;

Pavlides v. *The Republic* (1967) 3 C.L.R. 217 at pp. 229-230;

Defrenne v. *Societe Anonyme Belge de Navigation Aerienne* 10 *(Sabenna)* (Case 43/75) (1976) 2 C.M.L. R. 98 at p. 128.

Appeal and cross-appeal.

Appeal and cross-appeal against the judgment of a Judge of the Supreme Court (Hadjianastassiou, J.) given on the 27th April, 1974 (Revisional Jurisdiction Case No. 15 160/70) whereby the income tax assessments relating to the income of the respondent in respect of the years of assessment 1962 to 1968 were annulled on the ground that the relevant legislative provisions concerning taxation of income, on which the assessments had been based, 20 were unconstitutional.

A. Evangelou with *A. M. Angelides*, Counsel of the Republic, for the appellants.

A. Triantafyllides, for the respondent.

Cur. adv. vult. 25

The following judgments were read:-

MALACHTOS, J.: This is an appeal by the Attorney-General of the Republic against the second part of a first instance decision* of a Judge of this court in Recourse No. 160/70 whereby it was decided that section 22 of the 30 Income Tax Laws 1961-1969 and all other similar earlier tax provisions are unconstitutional as being contrary to Articles 24 and 28 of our Constitution.

* Reported in (1974) 3 C.L.R. 246.

In the first part of his said decision, which is subject to cross-appeal, the trial Judge held that the income from rents of flats and shops of the wife of the respondent in this appeal, is not earned income as provided by section 22(1) of the Income Tax Laws 1961 to 1969 but income from other property and, therefore, should not be taxed separately.

The respondent in this appeal was assessed by the Commissioner of Income Tax to pay tax on the combined total of his income received by way of a salary and the income of his wife from rents for the years of assessment 1962 to 1968, inclusive. To these assessments the respondent filed an objection with the Commissioner of Income Tax which he based on the following two grounds.

(i) that the income of his wife should be considered as having been derived through exercise of her right guaranteed under Article 25 of the Constitution *i.e.* through trade or business; and

(ii) if the above ground is not considered as correct, then the relevant enactment providing for the separation of the wife's income derived from profession, trade or business, as distinct from income from other sources, is unconstitutional, contrary to Articles 24 and 28 of the Constitution. In this respect the case of *Argyris Mikrommatis and The Republic*, 2 R.S.C.C. 125, should be reconsidered so that the wife's income from whatever source should be separately taxed.

The Commissioner rejected the objection of the respondent and relied on section 22(2) of the Income Tax Laws 1961 to 1969 and sections 13(3) and 20(5) of the Taxes (Quantifying and Recovery) Law, 53/1963 as amended.

Since the assessments in question referred to a number of years of assessment different laws applied and so I consider it convenient at this stage to refer to them.

1. For the year of assessment 1962 section 21(1) (2) of the Greek Communal Law for Imposition of Personal Contributions on Members of the Greek Community, Law 18/62, applies. This section reads as follows:

"21. (1) The income of a married woman living with her husband shall, for the purposes of this Law, be deemed to be the income of the husband and shall be charged in the name of the husband:

Provided that the wife may be required to pay that part of the total tax charged upon the husband which bears the same proportion to that total tax as the income of the wife bears to the total income of the husband and wife notwithstanding that assessment has not been made upon her.

(2) For the purposes of sub-section (1) of this section, the expression 'income of a married woman' shall include any income other than income derived by a married woman from the exercise of the right safeguarded under Article 25 of the Constitution.

(3) Nothing in this section contained shall prevent a woman living with her husband from being assessed in her own name in respect of income received in her own right but chargeable on her husband where the husband is absent from the Republic".

2. For the years of assessment 1963, 1964 and 1965 section 21(1) (2) of the Greek Communal Law for Imposition of Personal Contributions on Members of the Greek Community, Law 9/63, applies. This section is identical to section 21(1) (2) of the Greek Communal Law 18/62.

3. For the years of assessment 1966, 1967 and 1968, section 21(1) (2) of the Income Tax (Foreign Persons) Law, 58/61, as amended by Laws 4/63 and 21/66 applies. This section is also identical to section 21(1) (2) of the Greek Communal Law 18/62.

This section 21(1) (2) in 1969 was amended by section 15 of Law 60/69 and it is now section 22(1) (2) of the Income Tax Laws 1961 to 1969 but it does not apply in the present case since the years of assessment, as regards the respondent, are up to 1968. In view of the fact that the Commisioner in rejecting the objection of the respondent relied on the new section 22 of the Law, reference was made to it both by counsel in their respective addresses and the trial court in its judgment but it was made

abundantly clear in the course of the proceedings that the material section of the law involved in the recourse was section 21 of Law 58/61, as amended by Laws 4/63 and 21/66. Section 22 of the Law as amended reads as fol-
5 lows:

"22(1) The earned income of a married woman living with her husband shall, for the purposes of this Law, be assessed separately on her.

(2) Any income other than earned income de-
10 rived by a married woman living with her husband shall, for the purposes of this Law, be deemed to be the income of the husband and shall be charged in the name of the husband:

Provided that the wife may be required to pay
15 that part of the total tax charged upon the husband which bears the same proportion to that total tax as the income of the wife charged in the name of the husband bears to the total income of the husband and wife charged on the husband notwithstanding
20 that assessment has not been made upon her.

(3) Nothing in this section contained shall prevent a woman living with her husband from being assessed in her own name in respect of income received in her own right but chargeable on her hus-
25 band where the husband is absent from the Republic".

Section 21 of Law 58/61 was enacted as a result of the decision in *Mikrommatis* case, *supra,* whereby the then Supreme Constitutional Court drew the distinction be-
30 tween the wife's income from labour and the wife's income from property and held that the addition of the former income to that of the husband is unconstitutional whereas the addition of the latter income to that of the husband is not unconstitutional.

35 Before the above decision in *Mikrommatis* case all the income of the wife, from any source, whatsoever, was added to that of the husband for income tax purposes under section 19 of the Income Tax Law, Cap. 323. This section reads as follows:

40 "19(1) The income of a married woman living with

her husband shall, for the purposes of this Law, be deemed to be the income of the husband and shall be charged in the name of the husband:

Provided that the wife may be required to pay that part of the total tax charged upon the husband which bears the same proportion to that total tax as the income of the wife bears to the total income of the husband and wife notwithstanding that assessment has not been made upon her.

(2) If either a husband or a wife makes written application to that intent to the Commissioner before the 31st January in the year of assessment, returns of income shall be required to be rendered by the husband and wife separately in the year of assessment and in subsequent years until the application is revoked and the amount of the tax chargeable on the husband pursuant to subsection (1) shall be apportioned between the spouses in such manner as to the Commissioner appears reasonable and the amounts so apportioned shall be assessed and charged on each spouse separately.

(3) Nothing in this section contained shall prevent a woman living with her husband from being assessed in her own name in respect of income received in her own right where the husband is absent from the Colony".

In the *Mikrommatis* case the applicant who was a farmer residing at Astromeritis on the 2nd March, 1961, after some correspondence with, and meetings at, the Income Tax Office, was informed that the income tax payable by him in respect of the years 1954-1960, both inclusive, amounted to £74.- odd. It was the allegation of the applicant that the assessment of his income and the resulting tax were made arbitrarily as, during those years, he did not earn any taxable income. The applicant subsequently alleged, by leave of the court, that section 19 of the Income Tax Law, Cap. 323, was unconstitutional as contravening Articles 6, 24 and 28 of the Constitution. The reasons for judgment of the court appear at pages 130 to 132 of the report and the relevant part reads as follows:

"In the opinion of the Court the term 'equal be-

fore the law' in paragraph 1 of Article 28 does not convey the notion of exact arithmetical equality but it safeguards only against arbitrary differentiations and does not exclude reasonable distinctions which have to be made in view of the intrinsic nature of things. Likewise, the term 'discrimination' in paragraph 2 of Article 28 does not exclude reasonable distinctions as aforesaid.

The above view regarding the application of the principle of equality applies also to the interpretation of paragraph 1 of Article 24.

It follows, therefore, bearing in mind the intrinsic nature of the status of marriage and the relationship it creates between spouses, that reasonable distinctions in taxation legislation between married and unmarried persons do not in principle offend against paragraph 1 or 2 of Article 28 and against paragraph 1 of Article 24.

The Court has examined section 19 of CAP 323 in the whole context of CAP 323 (including provisions such as allowances in respect of children and increased taxation on the income of unmarried persons) as well as against the background of the status of marriage as existing in Cyprus at present and it has come to the conclusion that, although the application of section 19 of CAP 323 may result in the making of a reasonable distinction between married and unmarried persons, it does not discriminate against married persons, as such, and it is not, therefore, unconstitutional on such ground.

Coming now to the question whether the application of section 19 of CAP 323 involves any discrimination on the ground of sex.

There is no doubt that a married woman whose income is added to that of her husband and is thereby taxed to a greater extent than if it were to be taxed separately, enjoys the income from her property or from her own labour to a lesser degree than any married man taxed separately in respect of similar income.

In the opinion of the Court the reason for such a

differentiation between a married woman and any married man regarding income from property, as results from the application of section 19 of CAP 323, is to be found in the community of life existing between spouses. The said community of life justifies treating the spouses, when living together, as one financial unit in this connection. Such differentiation, therefore, is nothing more than the making by taxation legislation of a reasonable distinction based on the intrinsic nature of the marriage and does not amount to a discrimination on the ground of sex.

In the case, however, of a married woman not being able, through the application of section 19 of CAP 323, to enjoy, to the same extent as any married man, the income from her own labour, the position is quite different. In such a case a married woman is placed in a disadvantageous position *vis-a-vis* any married man in the same profession, occupation, trade or business. Such a differentiation is not a reasonable distinction based on the intrinsic nature of the marriage nor is it otherwise justified. It, therefore, amounts to a discrimination on the ground of sex contrary to Article 28.

In this judgment the Court has used the expression 'income from her own labour' as meaning income derived from the exercise of the right safeguarded by Article 25 of the Constitution and 'income from property' as meaning income from all other sources".

The trial judge in the case in hand after hearing arguments of counsel issued a long and elaborate judgment declaring section 22 of the Income Tax Laws 1961-1969 and all other similar earlier provisions unconstitutional as being contrary to Articles 24 and 28 of the Constitution. In so doing he based his decision mainly on the American case of *Albert A. Hoeper* v. *Tax Commission of Wisconsin,* 76 Law. Ed. U.S. 248. At page 54 of the record the trial judge had this to say:

"In the case of *Hoeper* v. *Tax Commission*, U.S. Supreme Court Reports, 76 Law. Ed. U.S. 248, a case which is on all fours with the present case, the facts are these:- The appellant married in the year

1927. Subsequent to his marriage he was in receipt of income taxable to him under the income tax statute of the state, and particularly s. 71.05 (2) (d) and s. 71.09 4(c). Under the first section, in effect, the income of the wife shall be added to that of the husband and the taxes levied shall be payable by the husband, but if not paid by him may be enforced against any person whose income is included within the tax computation; and under the second section, although married persons living together as husband and wife were given the right to make separate returns or join in a single joint return, again in either case the tax should be computed on the combined average taxable income of both. The wife of the appellant during the same period received taxable income, composed of a salary, interest and dividends and a share of the profits of a partnership with which her husband had no connection. The assessor of incomes assessed against the appellant a tax computed on the combined total of his and his wife's income as shown by separate returns, treating the aggregate as the husband's income. The amount was ascertained and assessed and exceeded the sum of the taxes which would have been due had their taxable incomes been separately assessed. Appellant paid the tax and instituted proceedings to recover so much of the tax which was in excess of the tax computed on his own separate income. He ascertained that the statute as applied to him violated the 14th Amendment. The Supreme Court of Wisconsin overruled this contention and confirmed the judgment for the appellees.

The question before the Supreme Court of the United States was whether the state law, as interpreted and applied, deprives the tax payer of due process and of the equal protection of the law. The appellant says that what the State has done is to assess and collect from him a tax, based in part upon the income received by his wife and that such exaction is arbitrary and discriminatory, and consequently, violative of the constitutional guarantees. On the contrary, the Attorney-General submitted on behalf of the appellees that practical considerations upon which legislature may well have relied are sufficient to sustain the law in question; and that under Wis-

consin laws the husband still has substantial pecuniary advantages from the property and income of the wife which are not possessed by other persons; and the fact that evasion of just income taxation (higher rates for higher incomes) would be easier if the incomes of husband and wife were not combined and tax assessed on this basis is a further consideration supporting the law".

It should be noted here that this appeal was allowed by majority.

The grounds of the present appeal are the following:

"1. The Honourable Court wrongly decided that section 22(2) of the Income Tax Law No. 58/61 as amended by Laws Nos. 4/63, 21/66 and 60/69, and the earlier corresponding provisions by virtue of which the income from property of a married woman living with her husband shall be deemed to be the income of the husband and shall be charged in the name of him, are unconstitutional as offending against the provisions of Articles 24 and 28 of the Constitution. Consequently the Honourable Court erred in Law in declaring the assessments for the years of assessment 1962-1968 (both inclusive) *null* and *void* and of no effect whatsoever. (The earlier corresponding provisions are section 21(2) of the Income Tax Law No. 58/61 as amended by Laws Nos. 4/63 and 21/66 before its amendment by Law No. 60/69, section 21(2) of the Greek Communal Law No. 18/62 and section 21(2) of the Greek Communal Laws Nos. 9/63, 7/64 and 2/65).

2. The Honourable Court, in considering the question of constitutionality of section 22(2) and the earlier corresponding provisions of the aforesaid Laws, though guided by certain well established principles governing the exercise of judicial control of legislative enactments, failed to take into account that —

(a) the power of the Legislature to classify for the purposes of taxation is of wide range and flexibility;

(b) in taxation there is a broader power of classification than in some other exercises of legislation;

(c) absolute equality in taxation cannot be obtained and it is not required under the principle of equality; and

(d) in applying a Constitutional provision such as Article 28, a Court can only interfere with the validity of legislation if the legislative enactment concerned is clearly unreasonable and arbitrary.

3. The addition of the wife's income from property to the income of the husband for tax purposes is neither discriminatory between sexes nor between married men whose wives derive income from their labour on the one hand and those who derive income from their property on the other hand inasmuch as —

(a) 'equal before the Law' does not convey the notion of exact arithmetical equality but it safeguards only against arbitrary differentiations and does not exclude reasonable distinctions which have to be made in view of the intrinsic nature of things;

(b) it is reasonable differentiation based on the intrinsic nature of the community of life existing between spouses. The said community of life in Cyprus justifies treating the spouses when living together as one financial unit in this connection;

(c) the totalling of the income of both spouses for income tax purposes as aforesaid does not deserve condemnation as long as it is compensated by appropriate means of correcting injustices such as 'children allowances', 'wife's relief' and 'wife's income allowance' which take into account the real fiscal capacity of both spouses;

(d) in the case of spouses living together there are reasons for convenience and fiscal expediency in treating the aforesaid income as joint and the arrangement is justified by the

consideration that in the normal case it is in effect really joint, the spouses being one person with common interests and responsibilities. The fact that in exceptional cases a husband may possibly derive no benefit from his wife's income from property does not invalidate the relevant tax provision; 5

(e) it is common feature of many systems of income taxation that the household be regarded as one unit for tax purposes because the family unit is both the basic element of social life and economic reality; 10

(f) 'According to his means' in paragraph 1 of Article 24 of the Constitution does not mean 'according to his income' but according to his fiscal capacity, which is greater in the case of husbands whose wives derive income from property. 15

4. The fact that evasion of just income taxation would be easier if the wife's income from property was not combined to the income of the husband for income tax purposes, is in it self sufficient to support the validity of the aforesaid income tax provisions. 20

5. The Honourable Court erred in law in following the American case of *Hoeper* v. *Tax Commission of Wisconsin*, 284 U.S. 206 (1931) inasmuch as in that case the relevant income tax provision of the State of Wisconsin was found to be contrary to the 'due process clause' as guaranteed by the 14th Amendment which does not correspond to anything in either Article 24 or Article 28 of our Constitution". 25 30

Counsel for the appellant submitted before us that in considering the question of the constitutionality of a statute we have to be guided by certain well established principles governing the exercise of judicial control of legislative enactments. He argued that — 35

1. No act of legislation will be declared *void* except in a very clear case or unless the act is unconstitutional beyond all reasonable doubt. He referred us to the case of 40

Attorney-General of the Republic v. *Moustafa Ibrahim*, 1964 C.L.R. page 195 at page 233; *The Board for Registration of Architects and Civil Engineers* v. *Kyriakides* (1966) 3 C.L.R. page 640 at page 654 and also *Matsis* v. *The Republic* (1969) 3 C.L.R. 245 at page 258.

2. The courts are concerned only with the constitutionality of legislation and not with its motives, policy or wisdom or with its concurrence with natural justice, fundamental principles of government or spirit of the Constitution. (*Kyriakides* case, *supra*, at page 654).

3. In applying a constitutional provision such as Article 28 a court can only interfere with the validity of legislation if the legislative enactment concerned is clearly unreasonable or arbitrary. He referred us to the case of *Fekkas* v. *Electricity Authority of Cyprus* (1968) 1 C.L.R. page 173 at pages 183-184.

4. When the constitutionality of a taxation law is attacked on the ground that it infringes the doctrine of equality the legislative discretion is permitted by the judiciary a great latitude in view of the complexity of fiscal adjustment; in other words, the power of the state to classify for purposes of taxation is of wide range and flexibility.

5. In taxation there is a broader power of classification than in some other exercises of legislation; and

6. Absolute equality in taxation cannot be obtained and it is not required under the principle of equality. The principles referred to under 4, 5 and 6 have been enunciated in the *Matsis* case.

Counsel for the appellant also submitted that the trial judge did not give due weight to at least the last three principles. The object of section 21(1) (2) of the Income Tax Law No. 58/61, as amended by Laws 4/63 and 21/66, which is now section 22(1) (2), after the 1969 amendment, is to make the husband a channel through which the collection of tax in respect of his wife's income is effected. The addition of the wife's income from property to the income of the husband for tax purposes is neither discriminatory between sexes nor between married men whose wives derive income from their labour and those who derive income from their property and this is clear from the *Mikrommatis* case. The philosophy behind the reasoning

in *Mikrommatis* case that "equal before the law" in paragraph 1 of Article 28 does not convey the notion of exact arithmetical equality but it safeguards only against arbitrary differentiations and does not exclude reasonable distinctions which have to be made in view of the intrinsic nature of things, is that this reasonable differentiation is based on the intrinsic nature of the community of life existing between spouses. The said community of life justifies treating the spouses when living together as one financial unit. The expression "according to his means" in paragraph 1 of Article 24 does not mean according to his income but according to his fiscal capacity. The aggregation of the income of both spouses for taxing purposes is but a technical device which does not deserve condemnation since it is compensated by proper means of correcting injustice such as children's allowances, wife's relief and wife's income allowances which take into account the real fiscal capacity of both spouses. In our income tax legislation provision is being made for the above allowances and reliefs.

Counsel for the appellant also pointed out that practical considerations, such as the fact that evasion of just income taxation would be easier if the wife's income from property was not combined to that of the husband, is sufficient to support the validity of the relevant income tax provisions. In other words, the object of the provision is to frustrate tax evasion which may be achieved by transferring property from one spouse to the other thus minimising the tax liability.

Lastly, counsel for appellant argued that the trial judge erred in law in following the American case of *Hoeper* and submitted that in that case it was decided by majority that an attempt by the Statute to measure tax on a person's income by reference to the income of another, is contrary to due process as guaranteed by the 14th Amendment. The due process clause in the 14th Amendment does not correspond to anything in Article 24 or Article 28 of our Constitution. The trial judge seems to have overlooked this important point.

Another reason for which the trial judge ought not to follow the *Hoeper's* case is that in Cyprus we have the distinction which is made in *Mikrommatis* case.

On the other hand, counsel for the respondent by able and extensive arguments supported the decision of the trial Judge that declares unconstitutional section 21 of the Income Tax Law 1961 (now section 22 of the Income Tax Laws 1961 to 1969). He submitted that as the law stands today the decision of the Supreme Constitutional Court in *Mikrommatis* case has to be reconsidered or extended because it creates more discrimination today than at the time it was decided when under the then existing legislation an unmarried person was paying more tax than a married one. This distinction ceased to exist after the decision of this court in the case of *Panayides* v. *The Republic* (1965) 3 C.L.R. 107 where it was decided that it is not reasonable to make in Cyprus a distinction between married and unmarried persons in so far as the liability to pay personal tax, of the nature for which provision is made in Article 87 of the Constitution, is concerned, nor does such a distinction has to be made in view of the intrinsic nature of things. The court was of opinion that as such distinction not being a reasonable one to make and not being one which has to be made in view of the intrinsic nature of the status of a bachelor, contravenes Article 28 and paragraph 1 of Article 24 of the Constitution and, therefore, the relevant legislative provision in question, namely, section 20 of Schedule A to Law 16/61 and paragraphs 1 and 2 of the table of rates of taxation attached thereto, are unconstitutional.

Counsel for the respondent also submitted that another category is between married women as such. A married woman who derives income from property is placed in a worse position than a married woman who has income from labour. She has to pay more tax.

Counsel for the respondent further submitted that on the same grounds on which the Supreme Court of the United States in *Hoeper's* case declared the law to be unconstitutional, this court must also declare section 21 of the law to be unconstitutional. He also referred us to Case No. 9 of 1957 of the Federal Constitutional Court of the Federal Republic of Germany and made available to us the full report translated in English.

In that case a provision similar to our section 21 of Law 58/61, *i.e.* section 26 of the Income Tax Act of the

Federal Republic of Germany, as reenacted on 17th January, 1952, in connection with section 43 of the Income Tax Implementation Order was declared by the Federal Constitutional Court as unconstitutional. This section is as follows:

1. Married couples will be assessed jointly in so far as both are liable to tax without restriction and do not permanently live apart from one another. These conditions must have existed for at least four months within the period of assessment.
2. On a joint assessment the income of the husband and that of the wife are to be added together.

Section 43 of the Income Tax Implementation Order is as follows:

> "Income from paid employment of the wife in a trade unconnected with the husband is excluded on joint assessment".

The facts of this case are shortly as follows: Mr. and Mrs. S. were assessed jointly for the year 1951 under section 26 of the Income Tax Act by virtue of a notice of assessment from the Fiscal Court. The husband, as a retired civil servant, was receiving a pension and the wife had income from her retail business. Mr. and Mrs. S. appealed against the assessment order; they objected primarily to their joint assessment as they thereby had to pay more tax owing to the progressive graduated tariff than on a separate assessment. The Fiscal Court rejected the objection as unfounded in so far as it related to joint assessment. Mr. and Mrs. S. then lodged a further appeal which after various procedural stages reached the Federal Constitutional Court for its decision. The grounds of appeal were that section 26 of the Income Tax Law 1951 was contrary to Article 3 of the Basic Law (Constitution) as by the differential treatment of married persons under section 43 of the Income Tax Implementation Order the income of a wife from paid employment is excluded on a joint assessment whilst the income of the husband, on the other hand, is not, and also as against Article 6 of the Basic Law. These two Articles read as follows:

> Article 3(1) All persons shall be equal before the Law.

(2) Men and women shall have equal rights.

(3) No one may be prejudiced or favoured because of his sex, his parentage, his race, his language, his homeland and origin, his faith or his religious or political opinions.

Article 6(1) Marriage and family enjoy the special protection of the Law.

Similar arguments to those advanced by Counsel for the appellant in support of his case, were advanced by the Federal Taxation Minister of the Federal Republic of Germany. The Federal Constitutional Court in its decision stated that:-

The subject matter of the constitutional examination is not the question whether from an abstract angle the joint assessment of any two or more persons generally, or of spouses, in particular is compatible with the Basic Law, but rather it is a question of whether the joint assessment of a husband and wife is unconstitutional within the scope of the Income Tax Act of 1951 which is based on the progressive taxation of the individual tax payer. From a constitutional point of view, it might be unjustifiable to base taxation instead of on the income of a single person on the sum of the income of several persons living within the household community either generally by selecting the principle of household taxation or by introducing a proportionate tariff whilst at the same time maintaining the principle of individual taxation. In such instance the decisive factor is that on account of being jointly assessed, a husband and wife in view of the progressive taxation scale designed with the productive capacity of the individual in mind, are in the final result in a worse position than other persons, the joint and several liability associated with joint assessment being an additional factor. In this system of modern income tax law based on the principle of individual taxation the two cases of joint assessment constitute an alien element. Up to the end of the First World War joint assessment was financially of little relevance both for the tax payer and also for the State as the progressive scale was minimal and the tax rates remained low. Only after the thought had

become established that, with direct taxes the equitable nature of the tax system required a more precipitous progressive graduation of the tax scale and since such graduation has led to a considerable gap between the highest and the lowest tax rate, has a severe additional burden on married couples occurred by virtue of joint assessment. This is, however, not offset by the creation of several tax classes and tax free sections of income for the wife and for the children incorporated into the scale. These allowances take account only of the increase in the minimum standard of living, an increase which is connected with the duty incumbent on the individual tax payer to maintain the members of his family and, therefore, changed nothing with regard to principle of progressive individual taxation. At the same time, the additional tax burden associated with joint assessment has become a source of increased revenue for the State whilst in earlier times, it merely served to simplify administration procedures. Such an additional burden on a husband and wife tight to the state of matrimony, as is also produced by section 26 of the Income Tax Act of 1951, is incompatible with Article 6(1) of the Basic Law. This Article places marriage and the family as the germ cell of each human community whose significance cannot be compared with any other human association, under the special protection of State regulations. The legal effect of Article 6(1) of the Basic Law is, however, not exhausted in such functions, like many constitutional rules of law, in particular those that define the relationship of the citizens to the State or govern communal rights. This Article purports several functions which are associated with one another and overlap each other. The task of the Constitutional Court is to develop the various functions of the Constitutional Rule of Law, in particular of a basic right. In so doing preference is to be given to the interpretation which most vigorously develops the legal effective power of the rule of law in question. An interpretation of Article 6(1) of the Basic Law under this principle shows that it does not only contain an acknowledgement and has an effect as a guarantee of institutions, but, rather, in addition, simultaneously represents a Basic Rule of Law, *i.e.*, a binding dictum for the entire sphere of Private and Public Law affecting marriage and the family. As the basis of family life and of the preservation and increase of the na-

tion, marriage is under the special protection of the Constitution. It is based on the equality of rights of both sexes. The special protection of the law of the State for marriage and the family as enacted in Article 6(1) of the Basic Law
5 accordingly comprises two elements:

(i) Positively the duty of the State not only to protect marriage and the family from encroachment by external forces but also to promote these two institutions by suitable measures; and

10 (ii) Negatively, the prohibition on the State itself against prejudicing or otherwise adversely affecting marriage.

In any event, it categorically negatively prohibits any encroachment on marriage and the family through intru-
15 sive interventions by the State itself. Joint assessment cannot be justified by stating that it is not coupled to the marriage but rather to the savings achieved by joint budgeting and to a thereby increased taxation on married couples is merely an undesirable secondary consequence. The op-
20 portunity of making savings in the cost of living is not, however, taken into account in the entire remaining income tax law as a factor of productive capacity; this point of view is thus unknown to the system. Above all, however, it is not true that the increased taxation of married
25 couples is merely an undesired secondary consequence, for joint assessment is not only basically bound from a legal aspect to the marriage but rather the effect of increased taxation thereby occurring is precisely the main purpose of such provision. If the increased productive capacity
30 owing to joint budgeting within the household were the true criterion, the marital household community would not be taxed as a unique phenomenon, the more so as it is in no way the typical case of the household community made up of several persons with a free market income.
35 Renunciation of joint assessment of spouses would, therefore, likewise not mean an injustice in comparison with unmarried people as in the case of the latter there would in general be no opportunity of joint budgeting by two or more persons. It is unintelligible how the placing of mar-
40 ried couples in a worse taxation position is intended to be able to be justified by the more elevated moral assessment of their status on which the method of taxation is

based. The financial needs of the State are, however, never a suitable reason for justifying unconstitutional tax. Joint assessment is said to serve the object of bringing back the wife into the home, the educational effect as it were, by the increased taxation burden associated there- 5 with restraining the wife from any occupational activity. In fact, there can be no misgivings from a constitutional law point of view of pursuing with a tax purpose other than the production of revenue. In the case of joint assessment of married spouses, however, the instructional effect 10 is quoted firstly to justify a profession which even for another reason is unconstitutional. Secondly, the instructional purpose itself relates to an area which is already circumscribed constitutional law decisions, in which therefore, the mere legislator is no longer fully free to lay down 15 dicta. This results both from Article 6(1) of the Basic Law itself, as well as from Article 3(2) and (3) of the Basic Law. From this concept follows generally the acknowledgement of a sphere of private life which is protected from State intervention. The amount of private 20 freedom of decision making by married spouses also includes the decisive factor of whether a wife dedicates herself exclusively to the home, whether she assists her husband in his profession or whether she should acquire her own free market income. The unsuitability of the so call- 25 ed instructional effect to justify joint assessment also follows from the principle of the equality of rights of the sexes under Article 3(2) and (3) of the Basic Law. The Basic Law assumes that equality of rights is compatible with protection of marriage and the family, with the re- 30 sult that the legislation may itself not assume any contradiction of the two principles. The equality of rights of women, however, includes the fact that she has the opportunity of achieving a free market income with the same legal chances as every male citizen. The view that the 35 gainful activity of a wife is to be regarded *ab initio* as disruptive of marriage contradicts not only the principle but also the text of Article 3(2) of the Basic Law. The directional purpose of the law of restraining the wife from undertaking a free market activity is inappropriate for justi- 40 fying joint assessment. From all the above it follows that section 26 of the Income Tax Act 1951 constitutes a prejudicial exceptional provision against married people and thereby infringes the dictum of Article 6(1) of the Basic

Law to the detriment of marriage. The Federal Constitutional Court went further and stated that it requires no examination whether section 26 of the Income Tax Act 1951 is unconstitutional also under other constitutional law aspects, in particular on account of an infringement against Article 3 of the Basic Law, but stated that in this connection a number of questions would be raised by the material link of this section with section 43 of the Income Tax Implementation Order 1951 which constitutes, according to the desire of the legislator an essential integral part of the overall regulations relating to the taxation of married couples. This creates, according to the nature of the income, an inequality within the group of married persons, for only if the wife is a wage earner, she is assessed separately but with all other types of income of the wife jointly. (Question of the infringement of Article 3(1) of the Basic Law). In the Regulation there is, moreover an unequal treatment according to sex. Only when the wife is a wage earner she is separately assessed but if the husband is a wage earner, assessment will be made jointly (Question of the infringement of Article 3(2) and (3) of the Basic Law). In addition, doubts could exist as to whether section 43 of the Income Tax Implementation Order of 1951 remains within the framework of the authority. All these aspects may, however, remain undiscussed as section 26 of the Income Tax Act as such is *null* and *void* on account of the infringement of Article 6(1) of the Basic Law and section 43 of the Income Tax Implementation Order of 1951 has, therefore, lost its substance. In view of this result administrative considerations, which have been cited to justify joint assessment, such as the simpler identifiability of the marital community in comparison with other household communities and the possibility of preventing tax manipulations among married persons cannot be authoritative. This, however, does not state that such administrative aspects are of no significance if tax law is to be examined against the standard of Article 3(1) of the Basic Law, *i.e.* as to its compatibility with the basis of the general fairness of taxation.

Counsel for the respondent finally submitted that the reasoning behind this Decision of the Federal Constitutional Court, particularly the dicta as regards Article 3 of the Basic Law, which is similar to Article 28 of our

Constitution, offered sufficient guidance in upholding the decision of the trial judge.

It is well settled that the Cyprus Courts in applying administrative law follow, by way of guidance, the Case Law of the continental countries. English and American administrative law are not of much use, because they are not based on the concept of the recourse for annulment which is provided for by virtue of Article 146 of our Constitution, and which has been taken from the continental administrative law system in Europe; but American Constitutional Law Jurisprudence is most useful, and is followed by way of guidance by our Supreme Court.

In the *Hoeper's* case, *supra,* it was decided that a husband cannot, consistently with the due process and equal protection clause of the Fourteenth Amendment, be taxed by a State on the combined total of his and his wife's incomes as shown by separate returns, where her income is her separate property and, by reason of the tax being graduated, its amount exceeded the sum of the taxes which would have been due had their separate incomes been separately assessed. In other words, an attempt by the State to measure tax on the income of a person by reference to the income of another, is contrary to the due process clause as guaranteed by the Fourteenth Amendment.

However, the argument of counsel for the appellant that the due process clause in the Fourteenth Amendment does not correspond in anything in Articles 24 and 28 of our Constitution, cannot stand.

In Basu's Commentary of the Constitution of India, 5th edition, volume 1, it is stated at page 564 that the Fourteenth Amendment to the American Constitution says that

> "No person shall be . . . deprived of his life, liberty or property, without due process of law. In the result, the State cannot make any law imposing restrictions upon any of the fundamental rights, without conforming to the requirements of 'due process'. 'Due process' is a dynamic concept and the Supreme Court has refused to give it any static definition. Broadly speaking, it negatives anything which is ar-

bitrary or shocking to the universal sense of justice having regard to the circumstances of each case".

One of the grounds on which the *Hoeper's* case was argued and decided, was unequal treatment and discrimi-
5 nation.

It is also true that in the German case, *supra*, it was decided that section 26 of the Income Tax Act of the Federal Republic of Germany was unconstitutional as being contrary to Article 6(1) of the Basic Law which provides
10 that "marriage and family enjoy the special protection of the State" and that this Article has no resemblance to Article 22(1) of our Constitution, which safeguards the right of any person reaching nubile age, to marry and found a family, according to the law relating to marriage.

15 In interpreting, however, Article 6(1) of the Basic Law, the Federal Constitutional Court stated clearly that this Article contains the notion of equality of both sexes. Although the court did not examine section 26 of the Income Tax Act under any other constitutional law aspect, it pro-
20 ceeded and made certain observations which appear at the end of its judgment which lead to the conclusion as to what would have been the result had this section been examined under Article 3 of the Basic Law, which is similar to Article 28 of our Constitution.

25 It is worth mentioning here that Article 23 of the International Covenant on Civil and Political Rights which covenant was ratified without any reservation by the Republic of Cyprus by Law 14/69 and which came into force on 23.3.1976, contains the very same provision to
30 that of Articles 6(1) of the Basic Law of the Federal Republic of Germany. This Article reads as follows:

"23.1 The family is the natural fundamental group unit of society and is entitled to protection by society and the State.

35 2. The right of men and women of marriageable age to marry and to found a family shall be recognized.

3. No marriage shall be entered into without the free and full consent of the intending spouses.

4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children".

After careful consideration of all the above I find myself in full agreement with the view reached by the trial Judge that section 21 of the Income Tax Law 1961 (now section 22 of the Income Tax Law, 1961-1969), is unconstitutional as being contrary to Articles 24.1 and 28.1 of our Constitution.

It contravenes Article 24.1 of our Constitution, which provides that every person is bound to contribute according to his means towards the public burdens by imposing on a married man the liability to contribute, in addition to his own means, for the means of somebody else.

The argument that a husband and wife are considered as one financial unit and that the object of the law is to make the husband a channel through which the collection of tax in respect of the income of his wife is effected, cannot stand.

These arguments, as well as all the other arguments of counsel for the appellant, are fully and lucidly answered both in the *Hoeper's* and the German Case (*supra*) the reasoning of which I fully adopt.

The situation would certainly be different in the past when the wife's property, owned at the date of marriage, or in any manner acquired thereafter, was the property of her husband. Her earnings and income were his, and he might dispose of them at will. This anachronistic system has been abolished in all civilised and modern communities. Women are declared to have the same rights as men, including property rights of married women and these rights in Cyprus are guaranteed by the Constitution.

It may well be worth mentioning here the following passage from the judgment of Mr. Justice Roberts in the *Hoeper's* case, which appears at page. 251 of the report:

"Since, then, in law and in fact, the wife's income is

in the fullest degree her separate property and in no sense that of her husband, the question presented is whether the state has power by an income-tax law to measure his tax, not by his own income but, in part, by that of another. To the problem thus stated, what was said in *Knowlton* v. *Moore,* 178 U.S. 41, 77, 44 L. ed. 969, 984, 20 S.Ct. 747, is apposite:

'It may be doubted by some, aside from express constitutional restrictions, whether the taxation by Congress of the property of one person, accompanied with an arbitrary provision that the rate of tax shall be fixed with reference to the sum of the property of another, thus bringing about the profound inequality which we have noticed, would not transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems'.

We have no doubt that, because of the fundamental conceptions which underlie our system, any attempt by a state to measure the tax on one person's property or income by reference to the property or income of another is contrary to due process of law as guaranteed by the 14th Amendment. That which is not in fact the taxpayer's income cannot be made such by calling it income".

This section 21 of the Income Tax Law 58/61 also contravenes Article 28 of our Constitution, which provides for equality before the law and against discrimination. The addition of the income of the wife from other sources than from her own labour, to the income of her husband, results to unequal treatment between married men depending on whether their wives derive income from their own labour or from their own property. Furthermore, a married man whose wife derives income from her own property, since the reduction of the scales for bachelors, as a result of *Panayides* case, *supra* in 1965, enjoys his income to a lesser extent than an unmarried man. Likewise it results to unequal treatment between married and unmarried women.

It follows from the above, that I am in disagreement with the decision in *Mikrommatis* case, which, in my opi-

nion, should be reversed. The Supreme Constitutional Court wrongly decided that the addition of the income from property of a married woman, resulting from the application of section 19 of Cap. 323, to that of her husband, was a reasonable distinction based on the intrinsic nature of the community of life existing between spouses, and did not amount to a discrimination on the ground of sex. Section 19 of Cap. 323, ought to be declared as unconstitutional for the reasons I have explained above.

In view of my judgment in the appeal that section 21 of the Income Tax Law 58/61 is unconstitutional, an examination as to whether income from rents of flats and shops of the wife of the respondent, is earned income, as provided by section 21 (2) of the law, or not is rendered superfluous. In fact, counsel for the respondent clearly stated that if the appeal were decided in his favour he would not insist on the cross-appeal.

A question which was raised during the hearing before us, although not included in the grounds of appeal, was whether the trial judge was entitled to depart from the *Mikrommatis* case or whether he was bound to follow it.

No doubt, this court in its appellate jurisdiction is not bound to follow the decisions of the former Supreme Constitutional Court, or even its own decisions, and can always depart from them, when, of course, there are good reasons for doing so (see in this respect *Constantinides* v. *The Republic* (1969) 3 C.L.R. 523).

The Cyprus courts regard judicial precedent as a source of law and the decisions of the Supreme Court are binding on all courts. This binding effect of judicial precedent has been inherited from the English Judicial System. The present case was tried in the first instance by a Judge of this Court whose decision is not final and conclusive but is subject to appeal. The decision in *Mikrommatis* case was issued by our former Supreme Constitutional Court, which was constituted of three judges and which, according to Article 146.1 of the Constitution had exclusive jurisdiction to adjudicate finally on a recourse made to it on a complaint that a decision, an act or omission of any organ, authority or person, exercising any executive or administrative authority, was contrary to any of the pro-

visions of the Constitution or of any law or was made in excess or abuse of powers vested in such organ or authority or person. The trial judge in the present case was certainly entitled to express his disagreement with the decision of the Supreme Constitutional Court but was bound to follow it. The decision of the former Supreme Constitutional Court should be regarded equivalent to the decision of our Supreme Court sitting either on appeal or as a Full Bench in its Revisional Jurisdiction and so it creates a judicial precedent.

For the reasons stated above, the appeal should be dismissed.

On the question of costs, like the trial judge, I am of the view that there should be made no order.

L. LOIZOU, J.: I have had the opportunity of considering the judgment of Malachtos, J. in which he has set out the facts and referred to the authorities relied on. I agree with his judgment and the conclusion that the appeal and cross-appeal should be dismissed and there is nothing that I wish to add.

A. LOIZOU, J.: By this appeal and cross-appeal from the judgment of a Judge of this Court who heard in the first instance the recourse under the provisions of section 11 of the Administration of Justice (Miscellaneous Provisions) Law, 1964, Law No. 33/64, very important, constitutional and legal issues connected with income tax legislation, are raised.

The appeal has been filed on behalf of the Republic against that part of the judgment of the learned trial Judge by which it was decided that section 22(2) of the Income Tax Laws, 1961-1969 and all other similar earlier tax provisions by virtue of which the income of a wife from property is added to the income of the husband for tax purposes, are unconstitutional, as offending against Arts. 24 and 28 of the Constitution.

The cross-appeal, on behalf of the tax payer, is against the part of the judgment by which it was decided that the income of the wife of the tax payer (applicant before the trial Judge and respondent in the present appeal) had not been derived in the exercise of her right to carry on an oc-

cupation, trade or business in the sense of Article 25 of the Constitution and within the meaning of section 22(2) of the Income Tax Laws, 1961-1969. It is claimed that it was wrong to decided that his wife's income is not included in the notion of "income from labour" as enunciated in the case of *Mikrommatis and The Republic,* 2 R.S.C.C. p. 125, to which extensive reference will be made in the course of this judgment.

The facts of the case are briefly as follows: The respondent in this appeal is a judicial officer of the Republic. His wife's income for the years of assessment 1962-1963, 1964, 1965, 1966, 1967 and 1968 consisted of rents which, as stated by him in his objection addressed to the Commissioner of Income Tax on the 6th March, 1970 (*exhibit* 2), were "derived from immovable property built and/or developed by his wife who, in that respect, undertook an enterprise of her own". The said property consisted of six shops at Kimon Coast, Kyrenia. The money for their construction was secured from surrendering property to her father, who, in return, advanced to her the sum of £1,005 and the sum of £1,263 was lent to her by the respondent. It also consisted of two flats at Themistoclis Street, Kyrenia, built from her dividends from her shares in the Katsellis Hotel Ltd., her rents and money borrowed from the Bank of Cyprus. None of the above properties formed part of the dowry given to her.

It was also claimed that the income of his wife should be considered "as having been derived through the exercise of her right guaranteed under Article 25 of the Constitution, *i.e.* through trade or business or, if the above submission was not correct, then the relevant enactment providing for the separation of the wife's income derived from a profession, trade or business as distinct from income from other sources is unconstitutional, contrary to Articles 24 and 28 of the Constitution. In that respect, the case of *Mikrommatis and The Republic,* 2 R.S.C.C. p. 125, should be reconsidered so that the wife's income from whatever source should be separately taxed".

The objection was determined by the Commissioner of Income Tax who, by letter dated the 4th April, 1970 (*exhibit* 3), informed the respondent that he had determined his outstanding objections for the years of assessment 1961

to 1968 as per attached Notices of Tax Payable. His decision was based on "the contents of section 22(2) of the Income Tax Laws, 1961 to 1969 and sections 13(3) and 20(5) of the Taxes (Quantifying and Recovery) Law 53/ 5 1963 as amended".

The relevant law in respect of the year of assessment 1962, is section 21(1) and (2) of the Greek Communal Chamber Law, No. 18/62, the years of assessment 1963, 1964 and 1965, section 21(1) and (2) of the Greek Com- 10 munal Chamber Law, No. 9/63, and the years of assessment 1966, 1967 and 1968, section 21(1) and (2) of Law 58/61, as amended by Laws 4/63 and 21/66.

Section 21 which is found recurring identically phrased in the aforementioned Laws, was enacted as a result of 15 the decision in *Mikrommatis* case (*supra*), in which the constitutionality of section 19 of the then in force Income Tax Law, Cap. 323, was raised and in which case the Court decided that that section was unconstitutional, in so far as it applied to the income of a wife from her own 20 labour and that it should be applied modified accordingly.

Before quoting verbatim sub-sections (1) and (2) of section 21, it should be stated that this section, after 1969, was amended by section 15 of Law 60/69, and has been re-numbered, as section 22(1) and (2), but this section 25 does not apply to the present case, because the years of assessment do not go beyond 1968. Though there is reference to this section 22(1) and (2) in the recourse and the judgment of the learned trial Judge, yet it is common ground that the material section is section 21.

30 Both counsel argued the case before us in relation to the said section 21 and it is the unconstitutionality of this section as it was before 1969 that is in issue in these proceedings and which we have to determine in this appeal and no complaint has been made regarding the reference 35 to the wrong section.

As stated in *The Republic* v. *Georghiades* (1972) 3 C.L.R. 594, at p. 690, "This Court when hearing an appeal from a judgment of one of its members, approaches the matter as a complete re-examination of the case with 40 due regard to the issues raised by the parties on appeal,

or to the extent that they have been left undetermined by the trial Judge, or in the case of a successful appeal, in addition in the above, to the extent of the cross-appeal".

In view, therefore, of this approach, this Court has to decide the constitutionality of section 21 which governs the assessments complained of, for the years 1962-1968. To the extent that it is relevant, it reads:-

"21.-(1) The income of a married woman living with her husband shall, for the purposes of this Law, be deemed to be the income of the husband and shall be charged in the name of the husband:

Provided that the wife may be required to pay that part of the total tax charged upon the husband which bears the same proportion to that total tax as the income of the wife bears to the total income of the husband and wife notwithstanding that assessment has not been made upon her.

(2) For the purposes of sub-section (1) of this section, the expression 'income of a married woman' shall include any income other than income derived by a married woman from the exercise of the right safeguarded under Article 25 of the Constitution.

(3) ...."

Before proceeding any further with the issues raised in this recourse, it is useful to quote from the judgment of the learned trial Judge who referred therein also to the *Mikrommatis* case (*supra*) as follows:-

"The Court, after dealing with Article 28 which deals with equality before the law, safeguarded under that Article, and after stating that the term 'equal before the law' does not convey the notion of exact arithmetical equality but that it safeguards only against arbitrary differentiations and does not exclude reasonable distinctions which have to be made in view of the intrinsic nature of things, said at pp. 131-133:-

'It follows, therefore, bearing in mind the intrinsic nature of the status of marriage and the relationship it creates between spouses, that reasonable distinc-

tions in taxation legislation between married and unmarried persons do not in principle offend against paragraph 1 or 2 of Article 28 and against paragraph 1 of Article 24.

5 The Court has examined section 19 of Cap. 323 in the whole context of Cap. 323 (including provisions such as allowances in respect of children and increased taxation on the income of unmarried persons) as well as against the background of the status 10 of marriage as existing in Cyprus at present and it has come to the conclusion that, although the application of section 19 of Cap. 323 may result in the making of a reasonable distinction between married and unmarried persons, it does not discriminate 15 against married persons, as such, and it is not, therefore, unconstitutional on such ground.

Coming now to the question whether the application of section 19 of Cap. 323 involves any discrimination on the ground of sex.

20 There is no doubt that a married woman whose income is added to that of her husband and is thereby taxed to a greater extent than if it were to be taxed separately, enjoys the income from her property or from her own labour to a lesser degree than any 25 married man taxed separately in respect of similar income.

In the opinion of the Court the reason for such a differentiation between a married woman and any married man regarding income from property, as re-30 sults from the application of section 19 of Cap. 323, is to be found in the community of life existing between spouses. The said community of life justifies treating the spouses, when living together as one financial unit in this connection. Such differentiation, 35 therefore, is nothing more than the making by taxation legislation of a reasonable distinction based on the intrinsic nature of the marriage and does not amount to a discrimination on the ground of sex.

In the case, however, of a married woman not 40 being able, through the application of section 19 of Cap. 323, to enjoy to the same extent as any married

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man, the income from her own labour, the position is quite different. In such a case a married woman is placed in a disadvantageous position *vis-a-vis* any married man in the same profession, occupation, trade or business. Such a differentiation is not a reasonable distinction based on the intrinsic nature of the marriage nor is it otherwise justified. It, therefore, amounts to a discrimination on the ground of sex contrary to Article 28'.

Finally, the Court went on:

'In this judgment the Court has used the expresssion 'income from her own labour' as meaning income derived from the exercise of the right safeguarded by Article 25 of the Constitution and 'income from property' as meaning income from all other sources'."

The learned trial Judge after referring extensively to the arguments advanced, and in particular to the United States Supreme Court case of *Albert A. Hoeper* v. *Tax Commission of Wisconsin,* 76 Law. Ed. U.S. p. 248 and the principles governing the question of declaring Laws as unconstitutional came to the conclusion that "the *Hoeper's* case was on all fours with the facts of the present case" and in the light of the observations made therein, adopted and followed it being in agreement with the reasoning behind it; and he had no doubt "that any attempt by the Commissioner to measure the tax on one person's property, income or means by a reference to the income of another is contrary to paragraph 1 of Article 24 of our Constitution which establishes the principle of fiscal equality whereby every person is bound to contribute according to his means towards the public burdens".

And further down he concluded by saying that— "the addition of the unearned income of the wife to that of the applicant brings about the inequality safeguarded by Article 28 and results in a discriminatory treatment between married men who enjoy their income to a lesser extent depending on the wife's income over which, as I said earlier, they have no legal right. Similarly, a discrimination results between married men whose wives derive income from their labour on the one hand and those whose wives derive income from their property on the other

hand". And found that "sub-section 2 of s. 22 and all other similar income tax enactments between 1961 and 1969 applied to the applicant, do not justify such differentiation based on the intrinsic nature of marriage, because a married man is placed in a disadvantageous position *vis-a-vis* any other man with the same profession, occupation, trade or business whose wife earns an income through her labour, once such differentiation is not a reasonable distinction based on the intrinsic nature of the marriage, nor is it otherwise justified, because the exaction of tax is arbitrary".

The aforesaid conclusions of the learned trial judge posed the question, as put by him, whether, in the circumstances of this case *Mikrommatis* case (*supra*) should be reconsidered, as counsel on behalf of the tax payer claimed, becaue it was wrongly decided, in so far as it dealt with this second leg of the judgment, *i.e.* "income from property".

The binding effect, therefore, of judicial precedent in our judicial system becomes an issue. On this point the learned trial Judge said:

> "I think I ought to add that in Cyprus judicial precedent may properly be regarded as a source of Law, and the binding effect we attach to precedent is inherited from the English judicial system and the Courts are bound to follow the *ratio decidendi* of decided cases. In European systems, however, a Law report is generally only persuasive and not authoritative. In Cyprus, the decisions of the Supreme Court are binding on inferior courts and as at present advised, the Supreme Court of Cyprus sitting on appeal can change its mind and not follow precedent already laid down by it in a previous case if it is of opinion that the previous precedent was wrong (*Papageorghiou* v. *Komodromou* (1963) 2 C.L.R. 221, particularly Vassiliades, J. (as he then was) in his dissenting judgment refused to follow a previous judicial precedent relating to adverse possession of immovable property).
>
> In *Constantinides* v. *The Republic* (1967) 3 C.L.R. 483, Triantafyllides, J. (as he then was) felt

free to depart from precedent when dealing with the case of *Loizides and The Republic* 1 R.S.C.C. 107, quite rightly in my view, because the process of judicial review of administrative acts under Article 146 is closely related with the continental countries, whose reports, as I have said earlier, have persuasive force only. Triantafyllides, J. had this to say at p. 976:

'But I have, in this Case, considered the validity of the relevant reasoning in the *Loizides* case independenty of my past participation in its determination. My sole purpose was to decide correctly the present Case, irrespective of past views, but, of course, with due regard to the principle that precedent should not be disturbed unless there are good reasons for doing so. I have, in the end, reached the conclusion that the *Loizides* case was correctly decided'."

He then deals with the *Mikrommatis* case,

"With this in mind and for the reasons I have already given, I turn now to *Mikrommatis* case, and would make one preliminary observation about it, that it is difficult to discern with certainty the facts in issue, in order to extract the *ratio decidendi, i.e.* that part of the judgment the reasoning of which is essential for the determination of the facts in issue. As I have said earlier, it is not clear whether the facts of that case made it necessary for the Court to decide whether the unearned income of a wife derived from a source other than her labour should be added to that of a husband for income tax purposes. If this was not necessary in my view, then the views expressed by the Court on that matter were obiter and no question of a binding precedent can arise. 'It is of course perfectly familiar doctrine that *obiter dicta,* though they may have great weight as such, are not conclusive authority. *Obiter dicta* in this context means what the words literally signify—namely, statements by the way. If a Judge thinks it desirable to give his opinion on some point which is not necessary for the decision of the case, that of course has not the binding weight of the decision of the case,

and the reasons for the decision'. (*Flower* v. *Ebbw. Vale Steel Iron & Coal Co. Ltd.*, [1934] K.B. 132 per Talbot J. at p. 154).

5 On the other hand, if the reasons given by the Court in *Mikrommatis* case—covering what has been described by me as the 'second leg' of the decision—are part of the principles involved and not merely illustrations, then with respect, after careful consideration, I find myself unable to agree with counsel for 10 the respondent that that decision is the law of the land, though it might well be to the interest of fiscus that it should be so.

It seems to me, therefore, that for the reasons I have given earlier, that I find myself unable to follow 15 that doctrine and I feel free to depart from it because I am not bound by the said decision of the Court in *Mikrommatis* case once it appears to me the right thing to do".

The doctrine of judicial precedent is as old as the re-20 organization of our judicial system done shortly after the British assumed the administration of the Island in 1878. The establishment of an hierarchy of courts and the setting up of a system of law reporting have always been considered as two indispensable prerequisites to the operation 25 of this doctrine. The first volume of the Cyprus Law Reports published under the supervision of the Judges of the Supreme Court covers the year 1883 to the year 1890. In the case of *Hadji Moussa* v. *Apostolides & Others* (1899) 5 C.L.R. p. 6 at p. 11, reference is made to a part 30 of a judgment cited to them as being *obiter dictum* which was defined as an incidental expression of opinion given by the Court in the course of its judgment but not necessary for the decision of the case and therefore not binding.

In the case of *Ismail and Another* v. *The Attorney-Ge-*35 *neral* (1929) 16 C.L.R. p. 9 at p. 12, Belcher, C. J. said:

"Undoubtedly the rule of English Law as to the binding nature of the decisions of appellate tribunals which in the absence of any clear rule of Ottoman Law on the subject we may properly follow, is that 40 such a Court should in general follow the previous

decisions of the same Court. But in exceptional cases they are not bound to do so (*Vernon* v. *Watson*, [1891] 1 Q.B. 400).

And at page 14 he says:

The decision is a comparatively recent one: it stands by itself, without any line of cases bending in its direction and without there being any subsequent case in which it was followed: the decision is not supported by reasons other than the adoption of the *ratio decidendi* of a District Court judgment which when examined shows that it was based on a misquotation of the text in an Order in Council. I feel the greatest reluctance in overruling any prior decision of this Court because one of its chief functions is to build up a fabric of interpretation on whose permanence the public can rely; but the fabric must be sound as well as permanent".

It will be helpful to refer also to the sequence in the *Constantinides* case (*supra*). On appeal, the Full Bench of the Supreme Court reversed the decision of Triantafyllides J. (as he then was) and its judgment is reported as *Constantinides* v. *The Republic* (1969) 3 C.L.R. 523. There was some divergence of opinion with the details of which I need not be concerned here, except that it was a case concerning a scheme for educational grants for public servants existing prior to the coming into operation of the Constitution and which, in the *Loizides* case the Supreme Constitutional Court found as a vested right but made what it thought as being a necessary adaptation so that such educational grants should be payable for studies to Greece and Turkey with which Cyprus was, as it was said therein linked by the Zurich agreement than to the United Kingdom. Vassiliades, P. at p. 533, says the following regarding this adaptation:-

"But such adaptation was not 'necessary' in my opinion, for the determination of the *Loizides* case where the scheme did not fall to be applied.

Apart from the fact that such an *obiter dictum* cannot be considered as a decision constituting a precedent, looking at it in the light of developments since that time (May 1961) I take the view that it

went too far; and it must now be adjusted. It gave, I think, too much emphasis to the division of the people of this Island into Greek and Turks with 'close affinity to the Greek and Turkish Nations respectively'."

Hadjianastassiou J. at p. 553 after referring to the principles governing the use of precedent as being an indispensable foundation upon which to decide what is the law and its application to individual cases providing some degree of certainty, went on to decide that the *Loizides* case was wrongly decided.

In England from which we inherited the doctrine of precedent, the Courts are bound by decisions of Supreme Courts in the same hierarchy, and the Court of Appeal and the Divisional Court are each bound by their own decisions. Single Judges of the High Court are not strictly bound by their brothers' decisions, but they will, as an ordinary practice, follow them. (See *Alma Shipping Co. S.A.* v. *V.M. Salgaoncar E. Irmaos Ltd.* [1954] 2 Q.B. 94).

The ruling of the House of Lords in the *London Street Tramways Co. Ltd.* v. *London County Council* [1898] A.C. 375 that it was bound by its own decisions has now been replaced by the recognition that that Court while treating its former decisions as clearly binding, may depart from the previous decision when it appears right to do so. That is to be found in the Practice Direction of [1966] 3 All E.R. p. 75 where it is emphasized that precedent is an indispensable foundation as providing some degree of certainty and as being the basis for orderly development of legal rules. In departing however from precedent, they stress that they will bear in mind "the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the especial need for certainty as to the Criminal Law".

In the case of *Geelong Harbor Trust Commissioners* v. *Gibbs Bright & Co.* [1974] 2 W.L.R. p. 507 at p. 514, Lord Diplock said:-

"If the legal process is to retain the confidence of the

nation, the extent to which the High Court exercises its undoubted power not to adhere to a previous decision of its own must be consonant with the consensus of opinion of the public, of the elected legislature and of the judiciary as to the proper balance between the respective rules of the legislature and of the judiciary as lawmakers. Even among those nations whose legal system derives from the common law of England, this consensus may vary from country to country and from time to time. It may be influenced by the federal or unitary nature of the constitution and whether it is written or unwritten, by the legislative procedure in Parliament, by the ease with which parliamentary time can be found to effect amendments in the law which concern only a small minority of citizens, by the extent to which Parliament has been in the habit of intervening to reverse judicial decisions by legislation; but most of all by the underlying political philosophy of the particular nation as to the appropriate limits of the lawmaking function of a non-elected judiciary".

Whatever the position is, yet both the House of Lords and the Privy Council have been reluctant to depart from their previous decisions. (See *Knuller (Publishing Printing and Promotions) Ltd. and Others* v. *Director of Public Prosecutions*, [1972] 3 W.L.R. p. 143).

The position regarding the Court of Appeal is to be found in *Young* v. *Bristol Aeroplane Company Limited* [1944] 1 K.B. 718 where Lord Greene, M.R. at pp. 729, 730, after reviewing numerous authorities, said:

"On a careful examination of the whole matter we have come to the clear conclusion that this court is bound to follow previous decisions of its own as well as those of courts of co-ordinate jurisdiction. The only exceptions to this rule (two of them apparent only) are those already mentioned which for convenience we here summarize: (1) The Court is entitled and bound to decide which of two conflicting decisions of its own it will follow. (2) The court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot, in its opinion, stand with a decision of the House of Lords.

(3) The court is not bound to follow a decision of its own if it is satisfied that the decision was given per *incuriam*.

I should perhaps add, speaking for myself individually, with regard to the observations in *Unsworth's* case [1940] 1 K.B. 658, mentioned in this judgment, that I have carefully considered my own observations there mentioned in *Perkins*' case [1940] 1 K.B. 56, and I have come to the conclusion that the criticism of them in *Unsworth's* case is justified, and that what I said was wrong. What I said there formed no part of the *ratio decidendi*, as will appear from a reading of the judgment, and does not affect its validity for that reason".

The noble attempts of Lord Denning to persuade his brethren to accept his view that they should not be absolutely bound by previous decisions of their own if it was clearly shown to be erroneous and so they should be able to put it right, have been without success. (See *Tiverton Estates Ltd.* v. *Wearwell Ltd.* [1974] 2 W.L.R. p. 176).

Since independence, a new situation has been created by the adoption of a written Constitution and the introduction, through its Article 146, of the process of judicial review of administrative acts as existing in continental countries such as Greece, France or Germany and the establishment of a separate sector of the judicature to review the exercise of administrative powers on the model of similar courts in continental countries. The adoption of the principles of administrative law evolved in the said countries which could be considered as part of the science of administrative law, can and are, generally speaking, adopted and applied by our courts as the law governing similar situations in Cyprus. (See *Stelios Morsis* v. *The Republic* (1965) 3 C.L.R. p. 1). Though this judgment does not purport to be a study of comparative law on the question of precedent, I am inevitably compelled, in view of the very significance of this question in the system of any country, to have a cursory glance to the approach in continental countries and in the United States of America from which we have drawn extensively, on account of their long experience in implementing and construing a written constitution. In France for long the decisions of

the Courts (La Jurisprudence) have been acknowledged to play a major role in the development of the law. It has been stated that although precedents even of superior courts are not recognised as automatically binding, subsequently either on themselves or on inferior tribunals, this has tended to diminish and it is now generally agreed that a decision of the Cour de Cassation, is for all intents and purposes regarded as authoritative for the future. Yet, deviation is not in itself a ground for quashing a decision of a lower court and there have been famous occasions when lower courts encouraged by writers of doctrine have resisted innovations of the Cour de Cassation. (See Introduction to Jurisprudence, 3rd ed. by Lord Lloyd, p. 712).

In the United States the principle of judicial precedent is sometimes applied and sometimes ignored in the field of Constitutional Law. The Supreme Court at times overruled decisions of long standing. (*Blackstone* v. *Miller,* 47 L. Ed. 439, was expressly overruled in *Farmer's Loan & Trust Co.* v. *State of Minnesota,* 74 L. Ed. 371).

The question has always been posed whether the decisions reflect a judicial purpose and policy of adapting constitutional language by a process of construction to fit current political, economic and social developments.

The role of *stare decisis* on the questions of constitutional interpretation is a matter closely related to the questions raised above. In the case of *Smith* v. *Allwright,* 88 L. Ed. 987 at p. 998, Mr. Justice Reed said:

> "In reaching this conclusion we are not unmindful of the desirability of continuity of decision in constitutional questions. However, when convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions. This has long been accepted practice, and this practice has continued to this day. This is particularly true when the decision believed erroneous is the application of a constitutional principle rather than an interpretation of the Constitution to extract the principle itself".

In Greece, the prevailing view is that judicial precedent is not included among the sources of law. They do not create law but they apply the existing laws and in matters relating to administrative law it is recognised that the de- 5 cisions of administrative courts, and in particular of the Council of State, offer valuable assistance in the exploration of administrative law and the clarification of many *of its principles but they do not constitute a source of ad-* ministrative law. (See Stasinopoullos, the Law of Admini- 10 strative Acts, 1951, p. 20).

The aggregate effect of the position regarding judicial precedent in the countries referred to above, with such different legal systems viewed in the light of the Practice Direction of the House of Lords of 1966 and the pro- 15 nouncements of this Court, lead me to the following conclusions:

(a) The doctrine of judicial precedent is part and parcel of our judicial system as being the necessary basis for providing a degree of certainty as to the law, in order to 20 show a consistency in judicial pronouncements and at that an equality of treatment before the law, and the means for the development of legal rules in a disciplined and regular manner. The doctrine of precedent, however, particularly so in matters relating to constitutional and admini- 25 strative issues should be more liberal than the manner in which it was applied under the Common Law system from which we inherited same until 1966 when the House of Lords introduced a more liberal approach to the binding effect of their own precedents on themselves.

30 (b) Subordinate courts, and with this I mean District Courts and Assize Courts, are bound by the existing judicial precedent of superior courts, and as far as such subordinate courts are concerned, the Supreme Court whether sitting as a Full Bench or in Benches of three, 35 should be deemed as a superior court.

(c) The Supreme Court is entitled, being the highest Court of the land entrusted with both original and appellate jurisdiction, concerned with the interpretation of the Constitution and having exclusive jurisdiction on Admi- 40 *nistrative Law matters, to depart from precedent if it is* of opinion that they are wrong or that changed political,

economic and social developments call for a review of its previous approach, particularly so in matters of Constitutional and Administrative Law. It should, however, be reluctant and cautious to depart from precedent and should always be guided by the fact that such a departure should not interfere retrospectively with contractual relations and fiscal arrangements. With regard to precedent in Criminal Law matters, see the case of The *Republic* v. *Nicolaos Sampson* (1977) 2 C.L.R. 1 at p. 80.

Finally the Court should also bear in mind that it has a written constitution, that legislation has been entrusted to another authority of the State and there should be "limits of the law-making function of non-elected judiciary", as pointed out by Lord Diplock in *Geelong Harbour Trust Commissioners* v. *Gibbs* (*supra*).

A problem, however, is bound to arise in the cases where under section 11 of the Administration of Justice (Miscellaneous Provisions) Law 1964 (Law 33/64), a judge of this Court is seized in the first instance with jurisdiction over recourses for the annulment of an administrative act or omission under Article 146 of the Constitution.

The approach of the learned trial judge on this issue was that since the then Supreme Constitutional Court was exercising original jurisdiction similar to that exercised by a single judge of the present Supreme Court trying a case on administrative law under the provisions of Law 33/64, the doctrine of judicial precedent did not apply as in its various manifestations operates so as to bind Courts in the lower line of the ladder of hierarchy of Courts; consequently it assimilated the status of the then Supreme Constitutional Court *vis-a-vis* the exercise of the same jurisdiction under the aforesaid section 11 by one of the judges of this Court to that of a High Court Judge in England who are not bound by judgments of their colleagues in High Court but are merely of a persuasive authority. With respect, I feel that there cannot be such comparison as the Supreme Constitutional Court had exclusive jurisdiction and, though exercising its jurisdiction in the first instance, had the final word on the subject, whereas when a Judge of the Supreme Court today exercises the same jurisdiction in the first instance, his judgment is sub-

ject to appeal to the Full Bench of the Court. Irrespective therefore of the equal status of a judge of this Court with his colleagues, yet the fact that the judgment of such a judge is subject to appeal to the Full Bench of the Supreme Court, leads me to the conclusion that such a judgment must be treated for the purposes of the doctrine of judicial precedent as being governed by the same principle that applied to the cases of Courts of first instance being bound by the decisions of Appellate Tribunals.

Before, however, dealing with the approach of the learned trial Judge on the issues raised in the appeal proper, I would like to stress once more that the issue before us was the constitutionality of section 21(1) (2) on the basis of which the aggregation of the income of husband and wife was made, and this section 21 (1) (2) is that of the Personal Contributions (Imposition for the Year 1962) Communal Law 1962 (Greek Communal Law 18/62), which covers the year of assessment 1962; section 21(1) (2) of the Personal Contributions (Imposition for the year 1963) Communal Law 1963 (Greek Communal Law 9/63) which covers the years of assessment 1963, 1964 and 1965; and section 21(1) (2) of the Income Tax (Foreign Persons) Law 1961 (Law 58/61) as amended by Laws 4/63 and 21/66 for the years of assessment 1966, 1967 and 1968.

This is the section which immediately upon the pronouncement of the judgment of *Mikrommatis* the administration enacted in compliance thereto.

These sections were the proper ones upon which the assessments were decided and in examining the legality of the assessment in this administrative recourse, they are the ones that have to be considered from the constitutional point of view raised therein. It is immaterial that they were not the ones referred to by the respondent, although they were the only ones upon which his decision could be reached.

As stated by Triantafyllides, P. in his judgment in *Nicos Anastassiou* v. *The Republic* (reported in this Part at p. 91 *ante*, at p. 106). "It should, perhaps, be pointed out, at this stage, that the fact that in his *sub judice* decision the respondent Commissioner of Income Tax referred

expressly to section 5(1) (b) of Law 58/61 does not preclude this Court from upholding his decision, on the basis of the same facts, but on the strength of an alternative legal reason applicable to such facts ..... (see, *inter alia, Spyrou and Others* (*No.* 1) v. *The Republic* (1973) 3 C.L.R. 478, 484)".

In dealing with the *Mikrommatis* case, the learned trial Judge observed that it was difficult for him to discern with certainty the facts in issue therein in order to extract the *ratio decidendi,* that is to say, that part of the judgment the reasoning of which was essential for the determination of the facts in issue, and according to him it was not clear whether its facts made it necessary for the Court to decide whether the unearned income of a wife derived from a source other than her labour, should be added to that of her husband for income tax purposes; consequently, if that was not necessary then the views expressed by the Supreme Constitutional Court on that matter were *obiter* and no question of binding precedent could arise.

The *Mikrommatis* case was a recourse under Article 146 of the Constitution against income tax assessments. The applicant in that recourse was a farmer residing at Astromeritis who, after some correspondence with, and meetings at, the Income Tax Office, was informed of the decision of the Commissioner of Income Tax regarding the tax payable by him in respect of the years 1954-1960, against which decision he filed that recourse; originally it was based on the ground that the assessment of his income was made arbitrarily as he did not earn any taxable income. Subsequently and by leave of the Court, the applicant filed a notice of his intention to raise at the resumed hearing of that case, a supplementary legal point, namely, that section 19 of the Income Tax Law, Cap. 323, was unconstitutional. The Supreme Constitutional Court held that that legal point was material for the determination of the case and went on to hear same and gave its judgment thereon.

This, alone, in my view, is sufficient for me to say that the differentiation made betweeen earned and unearned income of a wife was part of the *ratio decidendi* of the case.

It has to be accepted that in the assessments, subject-

matter of that recourse, the income of the wife—a married woman living with her husband—was, under section 19 of the Law, Cap. 323, and in the absence of any written application that returns of income should be required to be rendered by the husband and the wife separately, deemed to be the income of the husband for the purposes of the said Law and charged in the name of the husband. Had the Supreme Constitutional Court not been persuaded, and in the absence of a dispute as to the factual aspect of the case, it has to be taken that the said income tax returns included the income of the wife, it would not have considered it material to determine the constitutionality of section 19. Needless to say that the constitutionality of statutory provisions was never considered by the Supreme Constitutional Court or this Court as its successor in abstracto, but only, if it was material to be done for the determination of a matter in issue before it.

However, the learned trial Judge went on to say that if the reasons given by the Court in *Mikrommatis* case were part of the principles involved and not merely illustrations, he found himself unable after careful consideration, to agree with the view that that decision was the law of the land "though it might well be to the interest of fiscus that it should be so", and that the case in hand should be considered and decided "in the light of our whole experience and not merely in that of what was said in *Mikrommatis* case 13 years ago".

In arriving at the conclusion that the provisions of the Income Tax Law that correspond to section 19 were unconstitutional, thus departing from the principles enunciated in *Mikrommatis* case, the learned trial Judge referred to the case of *Albert A. Hoeper* v. *Tax Commission of Wisconsin,* 76 Law. Ed. U.S. p. 248, which he found to be on all fours with the present case. That was a case where it was held that a husband could not consistently with the due process and equal protection clauses of the 14th Amendment, be taxed by a State on the combined total of his and his wife's income as shown by separate returns, where her income is her separate property and, by reason of the tax being graduate, its amount exceeded the sum of the taxes which would have been due had the sum of the taxes which would have been due had their separate incomes been separately assessed. That was de-

cided in 1931 on a four to three majority. The basis of the decision was that in law and in fact the wife's income was in the fullest degree her separate property and in no sense that of her husband, and the question presented was whether the State had power by an Income Tax Law, to measure his tax, not by his own income but, in part, by that of another. 5

In the opinion delivered by Mr. Justice Roberts, emphasis is laid on the abolition of the spouse's ownership and control of the wife's property and the fact that women 10 were declared to have the same rights as the men in the exercise of suffrage, freedom of contract, choice of residence, for voting purposes, jury service, holding office, holding and conveying property, care and custody of children, and in all other respects. He was emphatic on 15 the fact that the husband never has any title to the income of the wife or controls any part of it. That income remains hers until the tax is paid and what is left continues to be hers after that payment, the State merely levying a tax upon it. What *Wisconsin* has done is to tax as a joint in- 20 come that which under its law is owned separately and thus to secure a higher tax than would be the sum of the taxes on the separate incomes. And it was emphasized that in law and in fact the wife's income was in the fullest degree her separate property and in no sense that of her 25 husband.

In a dissenting opinion Justice Holmes expressed the view that that case could not be disposed of as an attempt to take one person's property to pay another person's debts. And at page 253, he says: 30

> "The emphasis in other sections on separation of interests cannot make us deaf to the assumption in the sections quoted of community when two spouses live together and when usually each would get the benefit of the income of each without inquiry into the 35 source. So far as the Constitution of the United States is concerned the legislation has power to determine that the consequences of marriage shall be, and as it may provide that the husband shall or shall not have certain rights in his wife's property and shall 40 or shall not be liable for his wife's debts it may enact that he shall be liable for taxes on an income that in

every probability will make his life easier and help to pay his bills. Taxation may consider not only command over but actual enjoyment of the property taxed".

5 He then went on to say that the statute was justified also by its tendency to prevent tax evasion and concluded with the following words:

"No doubt, if, as was held in *Schlesinger* v. *Wisconsin,* 270 U.S. 230 70 Law. Ed. 557, 43 A.L.R. 1224,
10 46 S. Ct. 260, with regard to the measure then before the Court there was no reasonable relation between the law and the evil, the Statute could not be upheld. But the fact that it might reach innocent people does not condemn it. It has been decided too
15 often to be open to question that administrative necessity may justify the inclusion of innocent objects or transactions within a prohibited class".

The addition of the income of the wife living with her husband, to that of the latter, has been an accepted me-
20 thod of taxation in many countries. The justification for treating the spouses as one financial unit, is that the husband as the head of the family manages the family income and for that purpose their incomes must be submitted and taxed as one unit. By living together and constituting a
25 financial unit, they enjoy same together and the expenditure for many basic and other needs, such as food, housing, heating, light, telephones, etc. is covered by substantially smaller sums in comparison with those which would have been spent if the two spouses constituted separate
30 entities. In the result, there is bigger purchasing power in the income of such a husband than the individual incomes of spouses separately spent. In other words, the taxable capacity or the means of a husband, is increased from this real income. As, however, the burdens are also increased,
35 there are to be found in the relevant Income Tax Laws, provisions allowing deductions for these increased burdens. This aggregation of the income of both spouses for taxation purposes is a technical device which cannot outright be condemned, especially when it is compensated by
40 children's allowances, wife's income allowances, etc.

As pointed out in *Svolos and Vlahos, The Constitution*

of Greece, Vol. 1, p. 223—a passage commenting on provisions of the Greeek Constitution, "it is imperative that in each case the appropriate authority should proceed with the ascertainment of the 'taxable capacity' (*Capacité fiscale*) of each tax-payer and on the basis of such ascertainment alone, any difference in the charging of the taxpayers, by assessing their different financial position, does not constitute a contravention but a realization of the principle of equality". This is a passage cited with approval by the learned trial Judge, who, rightly, if I may say, with respect, pointed out that Article 24.1 of our Constitution, establishes the principle of fiscal equality, whereby every person is bound to contribute, according to his means, towards the public burdens. Under paragraph (2) thereof, "no such contribution by way of tax, duty or rate of any kind whatsoever shall be imposed save by or under the authority of a law".

In my view, there is nothing to prevent such a law imposing a tax, from defining the means of a person as including the income of the wife living with him from other sources than that derived from the wife's own labour. As pointed out "means" contains the notion of taxable capacity and the technical device of the aggregation of the income of spouses living together is not inconsistent with it. If the drafters of the Constitution wanted to permit taxation only on the basis of one's own income and preclude any aggregation, the word "income" would have been preferred as against the word "means" ('dynamis' in the Greek text) which has a wider connotation. A further justification for such device of taxation is also its tendency to prevent tax evasion by defeating the objectives of progressive taxation.

I should revert, however, to the *Mikrommatis* case where the Supreme Constitutional Court in arriving at its decision, bore in mind "the intrinsic nature of the status of marriage and the relationship it creates between spouses"; it also examined section 19 (the corresponding provision to section 21) "as against the background of the status of marriage as existing in Cyprus at the time". It further found that the aggregation of the income of the spouses might result in the making of a reasonable differentiation between married and unmarried persons but that it did not discriminate against married persons as

such and explained that the reason for such a differentiation between a married woman and a married man regarding income from property was to be found "in the community of life existing between spouses which justified 5 treating the spouses when living together as one financial unit in that connection".

It has been said that decisions reflect a judicial purpose and policy of adapting constitutional language by a process of construction to fit correct political economic and 10 social developments. It is obvious from the reasoning of the Supreme Constitutional Court in the *Mikrommatis* case that it did take into consideration the social and economic circumstances of the country at the time and it was natural to interpret and apply the Constitution guided by 15 these fundamental factors. After all a Constitution sets down the basic rules which regulate the behaviour of the State towards the citizens, of the citizens towards the State, as well as of the citizens among themselves not in abstracto, but bearing in mind the social and economic 20 conditions and circumstances of their every-day life at a particular time in their own country, and there has been no suggestion that these characteristics of the social and economic life of this country have changed so radically as to call for a new judicial approach to the interpretation 25 and the application of this constitutional notion of equality to the question regarding this matter of fiscal policy.

It is because the principles enunciated in the *Mikrommatis* case take cognizance of such fundamental factors that between this unanimous decision of the Supreme 30 Constitutional Court and a majority decision of the Court of another country with different social and economic background, particularly so when that other country is a developed country with unlimited resources as against our country with developing economy and limited resources 35 and with limited resources of revenue for the State, I unhesitatingly prefer the first. I have also reached this conclusion not only as a matter of adhering to a precedent which in fact has been adopted by the elected legislature and embodied in the definition of earned income, as it ap- 40 pears in section 2 of the Law, but also because the interpretation of Article 28 of the Constitution to the effect that the term "equal before the law" in paragraph 1 thereof, does not convey the notion of exact arithmetical equa-

lity, but it safeguards only against arbitrary differentiations and does not exclude reasonable differentiations which have to be made, in view of the intrinsic nature of things, and because the term "discrimination" in paragraph 2 thereof, does not exclude reasonable differentiations as aforesaid, is a principle that has been followed in every case where questions of discrimination were raised ever since 1961 when the *Mikrommatis* case was decided. 5

I have no difficulty in saying that in the circumstances and for the reasons given in the *Mikrommatis* case and which are still holding good, the differentiation made between married and unmarried persons and at that between married persons with wives having income arising out of sources other than from the wife's labour, is a reasonable differentiation in respect of a wide class and impersonal in character. Therefore, the decision in question cannot be said that it is erroneous. 10 15

Furthermore, it has not been claimed, and in fact there have not been such changes in the social and economic circumstances, particularly the intrinsic nature of marriage and the community of life between spouses, as recognized in the *Mikrommatis* case, that would justify a departure from the principles in that case as part of our power to re-examine the basis of such constitutional decision. 20 25

Before leaving this point, I would like to point out that in the *Hoeper's* case the wife's income was composed of a salary, interest and dividends and a share of the profits of a partnership with which her husband had no connection. Though, therefore, it was income mixed in character in the sense of partly being derived from her own labour and partly from other sources, the distinction made between these different characters of income was never argued and examined as it was done in the *Mikrommatis* case. 30 35

I turn now to a decision of the German Federal Constitutional Court of the 12th December, 1957. The learned trial Judge had a brief reference to it made in the Year Book of Human Rights for 1957 under the heading, "Equal Treatment in General" which was a case of joint assessment of married couples which, up to then, have 40

been legal and customary and which had been declared by that Court to be unconstitutional. We had the advantage of having the full judgment in English translation, and the first observation that has to be made in respect
5 of this case, is that it dealt with the aggregation of income of a husband, a retired civil servant receiving a pension and his wife's income from her retail business.

Therefore, it carries the case for the respondent no further, inasmuch as what it was decided there was that earn-
10 ed income of the wife could not be jointly assessed with that of her husband. The German Federal Court considered the constitutionality of the relevant provisions of the Income Tax Act of 1951 regarding the joining of the income of husband and wife, as against Article 6, paragraph
15 1, of the German Federal Constitution which says: "Marriage and family enjoy the special protection of the State". In this provision, two elements are to be found:

(a) The positive duty for the State not only to protect marriage and the family from encroach-
20 ments by external forces, but also to promote these two institutions by suitable measures; and

(b) Negatively the prohibition on the State itself against prejudicing or otherwise adversely affecting a marriage.

25 That it was a question of earned income, it is apparent from the reasoning also of the decision, where they speak of the free market income and the percentage of the earning wives living with their husband in one household numbering only 0.74 million in such year, those assisting in
30 the businesses of their husbands not being taken into account. "Not even one in seven cases of the coincidence of more than one person having an independent free-market economy in one household was therefore based on the free-market activity of the wife".

35 It is further evident from the argument advanced that joint assessment was justified by the alleged necessity of bringing back the wife into the house. This argument, of course, was dismissed. The German Federal Court examined also the constitutionality of the said taxing provi-
40 sion from the view point of the principle of equality of the rights of the sexes.

Article 3, of the German Federal Republic, reads as follows:-

"3 (1) All persons shall be equal before the law.

(2) Men and women shall have equal rights.

(3) No one may be prejudiced or favoured because of his sex, his parentage, his race, his language, his homeland and origin, his faith or his religious or political opinions". 5

It was found that equality of rights was compatible with the protection of marriage and the family and that the 10 equality of rights of women included the fact that she had the opportunity of achieving a free-market income with the same legal changes as every male citizen. "The view that the gainful activity of a wife is to be regarded *ab initio* as disruptive of marriage, contradicts not only 15 the principle but also the text of Article 3(2) of the Basic Law. The directional purpose of the law of restraining the wife from undertaking a free-market activity is inappropriate for justifying joint assessment". It was found, however, that no examination was required whether section 20 26 of the Income Tax Act of 1951 was unconstitutional also under other constitutional law aspects. In particular, on account of an infringement against Article 3 of the Basic Law, although it commented upon it in the following terms: 25

"This creates, according to the nature of the income, an inequality within the group of married persons, for only if the wife is a wage-earner is she assessed separately, but with all other types of income of the wife jointly (question of the infringement of Art. 3, 30 para. 1 of the Basic Law). In the regulation there is moreover an unequal treatment according to sex: only when the wife is a wage-earner assessment will be made jointly (question of the infringement of Art. 3, paras. 2 and 3 of the Basic Law). In addition, 35 misgivings could be asserted against the constitutionality of the authoritative provision of para. 51 of the Income Tax Act 1951 and also doubts could exist as to whether para. 43 of the Income Tax Implementation Order of 1951 remains within the 40 framework of the authority. All these aspects may,

however, remain undiscussed as para. 26 of the Income Tax Act 1951 as such is *null* and *void* on account of infringement against Art. 6, para. 1, of the Basic Law, and para. 43 of the Income Tax Implementation Order of 1951 has, therefore, lost its substance".

The approach of the Federal Court in a case where the issue was regarding the joining of the wife from her retail business and the whole approach being when the wife was a wage-earner, does not carry our case any further, because all arguments advanced in that case should relate to the income of a wife from her labour, which, in fact, in the *Mikrommatis* case was placed on a different footing than income from other sources. Needless to say that in our case we have not been concerned with the constitutionality of our Income Tax Law, *vis-a-vis* the protection of the family, a constitutional provision which is not to be found in our Constitution. We have only been concerned with the constitutionality of the law as a matter of discrimination contrary to Article 28 or as offending Article 24 with regard to the right to impose tax on the basis of one's own means.

In the result, I am of the opinion that the term "equal before the law", in paragraph 1 of Article 28 of the Constitution, carries with it not only the protection of the rights of a citizen, but read together with Article 24 of the Constitution to the effect that every person is bound to contribute according to his means towards public burdens, it conveys the notion that there should be also an equality in the contribution towards the public burdens, an equality, depending on the means of each person, an equality which can be achieved if the wealthier contribute progressively more than the less wealthy and the family is treated as a unit for the purpose of ascertaining the means of the head of such a wealthy family.

For the aforesaid reasons this appeal should succeed.

I turn now to the cross-appeal. It was the case for the respondent that the income of his wife should be considered as having been derived through the exercise of her right guaranteed under Article 25 of the Constitution, namely, through trade or business and as such, ought not

to have been assessed or added to his income, but assessed separately on her. The factual aspect on which this contention was based, is to be found in the objections which have already been set out in this judgment and which are to the effect that the wife's income consisted of rents derived from immovable property built and/or developed by her thus undertaking an enterprise of her own.

The learned trial Judge, with whose approach on this issue I agree, referred to a number of decisions, among which, *Currie* v. *Commissioners of Inland Revenue* 12 T.C. 245 at p. 246; *Inland Revenue Commissioners* v. *Maxse,* 12 T.C. 41 at p. 61; *Erichsen* v. *Last* [1881-82] 8 Q.B.D. 414; *East* v. *Watson,* 43 T.C. 472; and also the decision of the Greek Council of State No. 2974/71, in which it was decided that the letting of buildings does not constitute an exercise of carrying on a business for the purposes of income tax.

He also referred to the case of *Smith* v. *Anderson* [1880] 15 Ch. D. 247, where at p. 258, Jessel M.R., after citing definitions from several dictionaries, said at pp. 258-259:-

> "Anything which occupies the time and attention and labour of a man, for the purpose of profit, is business".

Further on he remarks:

> "There are many things which in common colloquial English would not be called a business, when carried on by a single person, which would be so called when carried on by a number of persons. For instance, a man who is the owner of a house divided into several floors and used for commercial purposes *e.g.* offices, would not be said to carry on business because he let the offices as such. But suppose a company was formed for the purpose of buying a building, or leasing a house, to be divided into offices and to be let out—should not we say, if that was the object of the company, that the company was carrying on business for the purpose of letting offices? The same observation may be made as regards a single individual buying or selling land, with this addition, that he may

make it a business, and then it is a question of continuity. When you come to an association of company formed for a purpose, you would say at once that it is a business, because there you have that from which you would infer continuity. So in the ordinary case of investments, a man who has money to invest, the object being to obtain his income, invest his money, and he may occasionally sell the investments and buy others, but he is not carrying on a business".

This passage was cited with approval in the case of *The Municipal Corporation of Nicosia* v. *Rologis Co. Ltd.* (1963) 2 C.L.R., p. 90, at pp. 110-111.

The learned trial Judge arrived at the following conclusion:

"Having heard full argument on behalf of the applicant and the respondent, and applying these principles to the facts of the present case, one with respect, can hardly find any difficulty in reaching the conclusion that the wife of the applicant is not carrying on a business by letting six shops and two flats in Kyrenia, because in doing so, it does not take or occupy her time, attention and her labour for the purpose of profit.

In the light of the above statement, I find that the Commissioner did not misdirect himself as to the law, because, I repeat, her income does not fall within s. 22(1) of the Income Tax Laws 1961-1969 and all other relevant sections of the previous laws, once such income is derived from income from property, and is, therefore, an income other than earned income (see s. 22(2)) and not income from her own labour as laid down in *Mikrommatis supra*.

For these reasons, and because the production of the income does not need personal effort but is derived through the exercise of the right to possess property under Article 23, I find myself in agreement with counsel for the respondent and, therefore, I would affirm the decision of the Commissioner, and dismiss this contention of counsel for the applicant on this point".

No doubt, it is a question of fact to be decided in each case. In my view, the acquisition of immovable property and the receipt of rents, in the present case, does not amount to carrying on of a business or trade, even though a great deal of time and trouble is spent on the management of the property. It amounts to nothing else but to the holding of an investment and the receipt of income therefrom is not in the nature of profit of trade or business, but in the nature of rents which are separately classified under section 5(1) of the Law, than income from business.

The definition of the word "business" to be found in section 12(7) para. (d) of the Income Tax Law 58/61 invoked by learned counsel for the respondent in support of the proposition that "business" includes the letting of premises, does not take his case any further, as the purpose of that definition was solely confined to the purpose of the said section as clearly stated in sub-section (7) of section 12. Besides, if otherwise intended, it would have been included in section 2, the definition section of the Law.

In the result, having regard to the facts of this case the income derived by the tax-payer's wife is income derived through the exercise of the right of possession of property, under Article 23 of the Constitution and not income derived through the exercise of her rights safeguarded by Article 25. It is, definitely, not income from labour, to use a phrase from the judgment of Triantafyllides, P. in the *Vita-Ora Co. Ltd.* v. *Republic of Cyprus* (1973) 3 C.L.R. 273, at p. 280 dealing with the question of reduced taxation of a company's profits, where such profits are not "interest, dividends and rents", that is, "they are not profits derived from sources not involving productive effort".

For all the above reasons, the present cross-appeal fails.

In the result, the appeal succeeds and the judgment of the learned trial Judge is set aside. The cross-appeal fails, but in the circumstances I make no order as to costs.

TRIANTAFYLLIDES, P.: The appellants have appealed from an in the first instance judgment of a Judge of this Court which was given in a recourse that was made under Article 146 of the Constitution by the respondent;

by such judgment there were annulled the income tax assessments relating to the income of the respondent in respect of the years of assessment 1962 to 1968 (years of income 1961 to 1967) on the ground that the relevant
5 legislative provisions concerning taxation of income, on which the assessments had been based, were unconstitutional.

The main reason for which the said provisions were found to be contrary to the Constitution—and, in parti-
10 cular, contrary to Articles 24 and 28 of the Constitution which safeguard the right to equality—was that they enabled the appellant Commissioner of Income Tax (who comes under the appellant Minister of Finance) to aggregate the income of the respondent with income of his wife
15 for the purpose of taxing it.

INTRODUCTORY

It has been common ground that the legislative provisions in question were those which were enacted on the basis of the decision, on December 11, 1961, in *Mikrom-*
20 *matis* v. *The Republic,* 2 R.S.C.C. 125, 132, that it was unconstitutional, as amounting to a discrimination on the ground of sex contrary to Article 28 of the Constitution, to aggregate the income of a wife from her own labour with that of her husband for purposes of income tax; the
25 wife's "income from her own labour" was defined in the decision in the *Mikrommatis* case as meaning "income derived from the exercise of the right safeguarded by Article 25 of the Constitution".

Article 25 protects the "right to practise any profession
30 or to carry on any occupation, trade or business".

The aggregation of the income of a wife from any other source with that of her husband, for income tax purposes, was not held to be unconstitutional in the *Mikrommatis* case.

35 In arguing the matter before the trial Judge counsel for the respondent submitted that the *Mikrommatis* case had been wrongly decided, and that it was, therefore, unconstitutional, in the light, *inter alia,* of Articles 24 and 28 of the Constitution, to aggregate the income of husband

and wife, from any source, for purposes of income tax; in the alternative, he submitted that even if the decision in the *Mikrommatis* case was a correct one, and, therefore, the legislation which had been based on it was not unconstitutional, that part of the income of the wife of the respondent which, in this particular instance, had been aggregated with his own, and had been taxed together with it, was, in actual fact, income derived from the exercise, by the respondent's wife, of her right under Article 25 of the Constitution and, therefore, it should not, in any case, have been added to his own income for taxation purposes.

The learned trial Judge reached the conclusion that the *Mikrommatis* case was wrongly decided and that, consequently, the aggregation of the income of spouses from any source, for purposes of income tax, was unconstitutional; at the same time he rejected the alternative contention of the respondent that the income of his wife, which had been taxed together with his own, was income from the exercise of her right under Article 25 of the Constitution.

The appellants have appealed against that part of the judgment of the trial Judge which found the relevant legislation to be unconstitutional and the respondent has cross-appealed against that part of the judgment which treated the affected income of his wife as not being income derived from the exercise of her right under Article 25.

As what is, in substance, in issue in the present proceedings is the validity of the *sub judice* assessments it follows that the appeal of the appellants and the cross-appeal of the respondent are, in effect, two sides of one and the same coin.

THE LEGISLATION

In proceeding to deal with the several matters that have to be considered in the present case, it seems to me that it is particularly useful to bear in mind the purpose for which, according to the relevant legislative provisions—which are similar both here and in England—the family is treated as an appropriate tax unit, with the result that

there is aggregation of the income of the spouses for income tax purposes.

As it appears from a Report of the Royal Commission, in England, on the Taxation of Profits and Income (1953, 5 Cmd. 9105, paras. 117, 119, 120) which is referred to in the Annual Survey of Commonwealth Law, 1974, p. 173, the historical justification for the rule in question may have been that the husband was entitled to the wife's income or that the rule facilitated collection; but, modern 10 attempts to justify the rule are based on taxable capacity (see, also, Κούλη "Εἰσαγωγὴ εἰς τὴν Δημοσίαν Οἰκονομικὴν" 4th ed., vol. B, pp. 44-45).

In this connection Lawrence L.J. explained as follows the effect of the then in force, in England, legislation in 15 *Leitch* v. *Emmott,* [1929] 2 K.B. 236 (at p. 247):-

"The proviso does not alter the character of the income charged to tax or the measure of the tax, but merely provides, with the object of facilitating the collection of the tax, that the assessment and charge 20 shall be made in the name of the husband and that for that purpose the wife's income shall be treated as the income of the husband. This provision does not, in my judgment, operate to convert the income of the wife into income of the husband further than 25 is necessary for the purpose of collecting the tax;"

The view expressed, as above, in the *Leitch* case was confirmed in *Elmhirst* v. *Commissioners of Inland Revenue,* [1937] 2 Q.B. 551.

Recent statutory provisions in England to which refe- 30 rence may be made, are section 23 of the Finance Act 1971 (see Halsbury's Statutes of England, 3rd ed., vol. 41, pp. 1435-1436) and paragraph 1 of Schedule 4 to the same Act (see Halsbury's, *supra,* p. 1494).

Section 23 above reads as follows:-

35 "23. Taxation of wife's earnings

(1) Where a man and his wife living with him jointly so elect for the year 1972-73 or any subsequent year of assessment the wife's earnings and their

other income shall be chargeable to income tax as provided in Schedule 4 to this Act.

(2) An election under this section must be made in such form and manner as the Board may prescribe and must be made not earlier than six months before the beginning of the year of assessment for which it is made nor later than six months after the end of that year or such later time as the Board may in any particular case allow.

(3) An election under this section for any year of assessment shall, unless revoked, have effect also for any subsequent year of assessment.

(4) An election in force for any year may be revoked by notice in writing in such form and manner as the Board may prescribe and any such notice must be given jointly by the husband and the wife not later than six months after the end of that year or such later time as the Board may in any particular case allow.

(5) Any election or revocation of an election under this section that could have been made jointly with a person who has died may, within the time permitted by this section, be made jointly with his personal representatives".

Paragraph 1 of Schedule 4 reads as follows:-

"1. Reference in this Schedule to the wife's earnings are references to any earned income of hers other than —

(a) income arising in respect of any pension, superannuation or other allowance, deferred pay or compensation for loss of office given in respect of the husband's past services in any office or employment; or

(b) any payment on account of an allowance under the Family Allowances Acts 1965 to 1969 or the Family Allowances Acts (Northern Ireland) 1966 to 1969 or any payment or benefit under the National Insurance Acts 1965 to 1970 or the National Insurance Acts

(Northern Ireland) 1966 to 1969 which is payable to the wife otherwise than by virtue of her own insurance".

I shall refer, now, to the relevant legislative provisions
5 in Cyprus:

At the time of the decision in the *Mikrommatis* case, *supra,* there was in force section 19 of the Income Tax Law, Cap. 323, which (modified under Article 188 of the Constitution) read as follows:

10 "Wife's income 19.(1) The income of a married woman living with her husband shall, for the purposes of this Law, be deemed to be the income of the husband and shall be charged in the name of the husband:

15 Provided that the wife may be required to pay that part of the total tax charged upon the husband which bears the same proportion to that total tax as the income of the wife bears to the total income of the hus-
20 band and wife notwithstanding that assessment has not been made upon her.

(2) If either a husband or a wife makes written application to that intent to the Commissioner before the 31st January in
25 the year of assessment, returns of income shall be required to be rendered by the husband and wife separately in the year of assessment and in subsequent years until the application is revoked and the amount of
30 the tax chargeable on the husband pursuant to sub-section (1) shall be apportioned between the spouses in such manner as to the Commissioner appears reasonable and the amounts so apportioned shall be assessed
35 and charged on each spouse separately.

(3) Nothing in this section contained shall prevent a woman living with her husband from being assessed in her own name in respect of income received in her own

right where the husband is absent from the Republic".

In relation to the constitutionality of this section the, at the time, Supreme Constitutional Court, which determined the *Mikrommatis* case, said (at pp. 131-133):-

"In the opinion of the Court the term 'equal before the law' in paragraph 1 of Article 28 does not convey the notion of exact arithmetical equality but it safeguards only against arbitrary differentiations and does not exclude reasonable distinctions which have to be made in view of the intrinsic nature of things.

Likewise, the term 'discrimination' in paragraph 2 of Article 28 does not exclude reasonable distinctions as aforesaid.

The above view regarding the application of the principle of equality applies also to the interpretation of paragraph 1 of Article 24.

It follows, therefore, bearing in mind the intrinsic nature of the status of marriage and the relationship it creates between spouses, that reasonable distinctions in taxation legislation between married and unmarried persons do not in principle offend against paragraph 1 or 2 of Article 28 and against paragraph 1 of Article 24.

The Court has examined section 19 of CAP 323 in the whole context of CAP 323 (including provisions such as allowances in respect of children and increased taxation on the income of unmarried persons) as well as against the background of the status of marriage as existing in Cyprus at present and it has come to the conclusion that, although the application of section 19 of CAP 323 may result in the making of a reasonable distinction between married and unmarried persons, it does not discriminate against married persons, as such, and it is not, therefore, unconstitutional on such ground.

Coming now to the question whether the application of section 19 of CAP 323 involves any discrimination on the ground of sex.

There is no doubt that a married woman whose income is added to that of her husband and is thereby taxed to a greater extent than if it were to be taxed separately, enjoys the income from her property or from her own labour to a lesser degree than any married man taxed separately in respect of similar income.

In the opinion of the Court the reason for such a differentiation between a married woman and any married man regarding income from property, as results from the application of section 19 of CAP 323, is to be found in the community of life existing between spouses. The said community of life justifies treating the spouses, when living together, as one financial unit in this connection. Such differentiation, therefore, is nothing more than the making by taxation legislation of a reasonable distinction based on the intrinsic nature of the marriage and does not amount to a discrimination on the ground of sex.

In the case, however, of a married woman not being able, through the application of section 19 of CAP 323, to enjoy, to the same extent as any married man, the income from her own labour, the position is quite different. In such a case a married woman is placed in a disadvantageous position *vis-a-vis* any married man in the same profession, occupation, trade or business. Such a differentiation is not a reasonable distinction based on the intrinsic nature of the marriage nor is it otherwise justified. It, therefore, amounts to a discrimination on the ground of sex contrary to Article 28.

In this Judgment the Court has used the expression 'income from her own labour' as meaning income derived from the exercise of the right safeguarded by Article 25 of the Constitution and 'income from property' as meaning income from all other sources".

It is pertinent, to refer, next, separately, to each one of the legislative provisions under which the *sub judice* assessments were made:-

In relation to the year of assessment 1962 the provision

concerned is section 21 of the Imposition of Personal Contributions on Members of the Greek Community for the Year 1962 Communal Law, 1962 (Gr. C. Ch. Law 18/62), which reads as follows:-

"21.-(1) Τὸ εἰσόδημα ἐγγάμου γυναικὸς συμβιούσης μετὰ τοῦ συζύγου αὐτῆς θὰ λογίζηται, διὰ τοὺς σκοποὺς τοῦ παρόντος Νόμου, ὡς εἰσόδημα τοῦ συζύγου καὶ θὰ φορολογῆται ἐπ' ὀνόματι τοῦ συζύγου: 5

Νοεῖται ὅτι τοιαύτη ἔγγαμος γυνή, παρὰ τὸ γεγονὸς ὅτι δὲν ἐπεβλήθη φορολογία ἐπ' αὐτῆς, δυνατὸν νὰ κληθῇ ὅπως καταβάλῃ μέρος τοῦ ἐπὶ τοῦ συζύγου ἐπιβληθέντος ὁλικοῦ φόρου, τὸ ὁποῖον μέρος θὰ ἔχῃ τὸν αὐτὸν λόγον ἔναντι τοῦ ὁλικοῦ φόρου ὡς καὶ τὸ εἰσόδημα αὐτῆς ἔναντι τοῦ ἀθροίσματος τῶν εἰσοδημάτων τῶν δύο συζύγων. 10 15

(2) Διὰ τοὺς σκοποὺς τοῦ ἐδαφίου (1) τοῦ παρόντος ἄρθρου ἡ ἔκφρασις 'εἰσόδημα ἐγγάμου γυναικός' σημαίνει εἰσόδημα προερχόμενον ἄλλως ἢ ἐκ τῆς ἐνασκήσεως τοῦ δικαιώματος τοῦ κατωχυρωμένου ὑπὸ τοῦ ἄρθρου 25 τοῦ Συντάγματος. 20

(3) Οὐδὲν τῶν ἐν τῷ παρόντι ἄρθρῳ διαλαμβανομένων θὰ παρακωλύῃ τὴν ἰδίῳ ὀνόματι ἐπιβολὴν φορολογίας ἐπὶ γυναικὸς συμβιούσης μετὰ τοῦ συζύγου της, ἀναφορικῶς πρὸς εἰσόδημα ληφθὲν ἰδίῳ δικαίῳ ἀλλὰ φορολογητέον ἐπ' ὀνόματι τοῦ συζύγου αὐτῆς, ὁσάκις ὁ σύζυγος αὐτῆς ἀπουσιάζῃ ἐκ Κύπρου". 25

("21.-(1) The income of a married woman living with her husband shall, for the purposes of this Law, be deemed to be the income of the husband and shall be charged in the name of the husband: 30

Provided that the wife may be required to pay that part of the total tax charged upon the husband which bears the same proportion to that total tax as the income of the wife bears to the total income of the husband and wife notwithstanding that assessment has been made upon her. 35

(2) For the purposes of sub-section (1) of this section, the expression 'income of a married woman' shall include any income other than income derived

by a married woman from the exercise of the right safeguarded under Article 25 of the Constitution.

(3) Nothing in this section contained shall prevent a woman living with her husband from being assessed in her own name in respect of income received in her own right but chargeable on her husband where the husband is absent from Cyprus").

In relation to the years of assessment 1963, 1964 and 1965, the corresponding legislative provision is section 21 of the Imposition of Personal Contributions on Members of the Greek Community for the Year 1963 Communal Law, 1963 (Gr. C. Ch. Law 9/63), which is the same as section 21 of Gr. C. Ch. Law 18/62, above.

In respect of the years of assessment 1966, 1967 and 1968, the relevant provision is section 21 of the Income Tax Law, 1961 (Law 58/61), which reads as follows:-

"21.-(1) Τὸ εἰσόδημα ἐγγάμου γυναικὸς συμβιούσης μετὰ τοῦ συζύγου αὐτῆς θὰ λογίζηται, διὰ τοὺς σκοποὺς τοῦ παρόντος Νόμου, ὡς εἰσόδημα τοῦ συζύγου καὶ θὰ φορολογῆται ἐπ' ὀνόματι τοῦ συζύγου:

Νοεῖται ὅτι τοιαύτη ἔγγαμος γυνή, παρὰ τὸ γεγονὸς ὅτι δὲν ἐπεβλήθη φορολογία ἐπ' αὐτῆς, δυνατὸν νὰ κληθῇ ὅπως καταβάλῃ μέρος τοῦ ἐπὶ τοῦ συζύγου ἐπιβληθέντος ὁλικοῦ φόρου, τὸ ὁποῖον μέρος θὰ ἔχῃ τὸν αὐτὸν λόγον ἔναντι τοῦ ὁλικοῦ φόρου ὡς καὶ τὸ εἰσόδημα αὐτῆς ἔναντι τοῦ ἀθροίσματος τῶν εἰσοδημάτων τῶν δύο συζύγων.

(2) Διὰ τοὺς σκοποὺς τοῦ ἐδαφίου (1) τοῦ παρόντος ἄρθρου ἡ ἔκφρασις 'εἰσόδημα ἐγγάμου γυναικός' σημαίνει εἰσόδημα προερχόμενον ἄλλως ἢ ἐκ τῆς ἐνασκήσεως τοῦ δικαιώματος τοῦ κατωχυρωμένου ὑπὸ τοῦ ἄρθρου 25 τοῦ Συντάγματος.

(3) Οὐδὲν τῶν ἐν τῷ παρόντι ἄρθρῳ διαλαμβανομένων θὰ παρακωλύῃ τὴν ἰδίῳ ὀνόματι ἐπιβολὴν φορολογίας ἐπὶ γυναικὸς συμβιούσης μετὰ τοῦ συζύγου της, ἀναφορικῶς πρὸς εἰσόδημα ληφθὲν ἰδίῳ δικαίῳ ἀλλὰ φορολογητέου ἐπ' ὀνόματι τοῦ συζύγου αὐτῆς, ὁσάκις ὁ σύζυγος αὐτῆς ἀπουσιάζῃ ἐκ τῆς Δημοκρατίας".

("21.-(1) The income of a married woman living with

her husband shall, for the purposes of this Law, be deemed to be the income of the husband and shall be charged in the name of the husband:

Provided that the wife may be required to pay that part of the total tax charged upon the husband which bears the same proportion to that total tax as the income of the wife bears to the total income of the husband and wife notwithstanding that assessment has not been made upon her.

(2) For the purposes of sub-section (1) of this section, the expression 'income of a married woman' shall include any income other than income derived by a married woman from the exercise of the right safeguarded under Article 25 of the Constitution.

(3) Nothing in this section contained shall prevent a woman living with her husband from being assessed in her own name in respect of income received in her own right but chargeable on her husband where the husband is absent from the Republic").

Law 58/61 was amended in 1963 and in 1966 but not in a way affecting the provisions of its section 21, above.

It was, again, amended, in 1969; as this amendment is subsequent to the year of assessment 1968 it is not really material for the purposes of the present case; it is necessary, however, to point out, in this respect, that by section 15 of the Income Tax (Amendment) Law, 1969 (Law 60/69), section 21 of Law 58/61 was repealed and replaced by a new section (numbered section 22) to which counsel referred in argument before the trial Judge; and, subsequently, this new section 22 was, also, quoted in the judgment of the trial Judge and its wording was referred to, for certain purposes, in his judgment; the said section 22 reads as follows:-

"22.-(1) Τὸ κερδαινόμενον εἰσόδημα ἐγγάμου γυναικὸς συμβιούσης μετὰ τοῦ συζύγου της φορολογεῖται, διὰ τοὺς σκοποὺς τοῦ παρόντος Νόμου, κεχωρισμένως ἐπ' ὀνόματι αὐτῆς.

(2) Πᾶν εἰσόδημα ἄλλο ἢ τὸ ὑπὸ ἐγγάμου γυναικὸς συμβιούσης μετὰ τοῦ συζύγου της κερδαινόμενον εἰσό-

δημα λογίζεται, διὰ τοὺς σκοποὺς τοῦ παρόντος Νόμου, ὡς εἰσόδημα τοῦ συζύγου καὶ φορολογεῖται ἐπ' ὀνόματι τοῦ συζύγου:

Νοεῖται ὅτι, παρὰ τὸ γεγονὸς ὅτι δὲν ἐπεβλήθη φορο-
5 λογία ἐπ' αὐτῆς, δυνατὸν νὰ ἀπαιτηθῇ παρὰ τῆς συζύγου ὅπως αὕτη καταβάλῃ τοσοῦτο μέρος τοῦ ἐπὶ τοῦ συζύγου ἐπιβληθέντος συνολικοῦ φόρου ὅσον ἔχει τὸν αὐτὸν λόγον πρὸς τὸν συνολικὸν τοῦτον φόρον ὡς τὸ φορολογηθὲν ἐπ' ὀνόματι τοῦ συζύγου εἰσόδημα τῆς συ-
10 ζύγου πρὸς τὸ ἐπὶ τοῦ συζύγου φορολογηθὲν συνολικὸν εἰσόδημα τοῦ συζύγου καὶ τῆς συζύγου.

(3) Οὐδὲν τῶν ἐν τῷ παρόντι ἐδαφίῳ διαλαμβανομένων κωλύει τὴν ἐπὶ τῷ ἰδίῳ αὐτῆς ὀνόματι φορολογίαν γυναικὸς συμβιούσης μετὰ τοῦ συζύγου της ἀναφο-
15 ρικῶς πρὸς εἰσόδημα ληφθὲν ὑπ' αὐτῆς ἰδίῳ δικαίῳ ἀλλὰ φορολογητέον ἐπ' ὀνόματι τοῦ συζύγου της, ὁσάκις ὁ σύζυγος ἀπουσιάζῃ ἐκ τῆς Δημοκρατίας".

("22.-(1) The earned income of a married woman living with her husband shall, for the purposes of
20 this Law, be assessed separately on her.

(2) Any income other than earned income derived by a married woman living with her husband shall, for the purposes of this Law, be deemed to be the income of the husband and shall be charged in
25 the name of the husband:

Provided that the wife may be required to pay that part of the total tax charged upon the husband which bears the same proportion to that total tax as the income of the wife charged in the name of the husband
30 bears to the total income of the husband and wife charged on the husband notwithstanding that assessment has not been made upon her.

(3) Nothing in this section contained shall prevent a woman living with her husband from being
35 assessed in her own name in respect of income received in her own right but chargeable on her husband where the husband is absent from the Republic").

"Earned income" is defined in section 2 of Gr. C. Ch.
40 Law 18/62 as follows:-

" 'κερδαινόμενον εἰσόδημα' σημαίνει πᾶν εἰσόδημα κτώμενον ἐξ ἐμπορικῶν ἢ βιομηχανικῶν ἐν γένει ἐπιχειρήσεων, ἐκ τῆς ἀσκήσεως ἐπιτηδεύματος ἢ βιοτεχνίας τινός, ἐξ ἐλευθερίου ἢ ἄλλου τινὸς ἐπαγγέλματος, ἐκ μισθωτῶν ὑπηρεσιῶν, συντάξεων ἢ ἄλλων ἐτησίων προσόδων καταβαλλομένων λόγῳ ἢ ἀναφορικῶς πρὸς παρῳχημένας μισθωτὰς ὑπηρεσίας·" 5

(" 'earned income' means all income derived from trading or industrial in general enterprise, from the carrying on of any business or handicraft, from any profession or other occupation, from salaried services, pensions or other yearly emoluments granted because of, or in respect of, rendered salaried services"). 10

The definition of "earned income" in section 2 of Gr. C. Ch. Law 9/63 is the same as that in section 2 of Gr. C. Ch. Law 18/62, above, except that there are not to be found after the term "βιομηχανικῶν" ("industrial") the words "ἐν γένει" ("in general"). 15

The definition of "earned income" in section 2 of Law 58/61 reads as follows:- 20

" 'κερδαινόμενον εἰσόδημα' σημαίνει πᾶν εἰσόδημα κτώμενον ἐξ οἱασδήποτε ἐμπορικῆς ἢ βιομηχανικῆς ἐπιχειρήσεως, ἐκ τῆς ἀσκήσεως ἐπιτηδεύματος ἢ βιοτεχνίας τινός, ἐξ ἐλευθερίου ἢ ἄλλου τινὸς ἐπαγγέλματος, ἐκ μισθωτῶν ὑπηρεσιῶν, συντάξεων ἢ ἄλλων ἐτησίων προσόδων καταβαλλομένων λόγῳ ἢ ἀναφορικῶς πρὸς παρῳχημένας μισθωτὰς ὑπηρεσίας·" 25

(" 'earned income' means all income derived from any trading or industrial enterprise, from the carrying on of any business or handicraft, from any profession or other occupation, from salaried services, pensions or other yearly emoluments granted because of, or in respect of, rendered salaried services"). 30

Law 60/69 did not amend, in any way, the definition of "earned income" in Law 58/61. 35

It may be observed that the rendering in English of the definition of "earned income", in the context of section 2

of Law 58/61, is not an exact word by word translation of the Greek original text of such definition, because it reads, simply, as follows:-

> " 'earned income' means income derived from any trade, business, profession, vocation, employment, pension or annuity if such pension or annuity is granted on account or in respect of employment;".

For the purposes, however, of the present case the discrepancy between the Greek original text of the definition, as above, of "earned income' and the English version thereof is not of any real significance.

A perusal of all the foregoing definitions of "earned income" in Gr. C. Ch. Laws 18/62 and 9/63 and in Law 58/61 leads, without much difficulty, to the conclusion that, however wide such definition may be deemed to be, it cannot be as wide as the expression "income derived ... from the exercise of the right safeguarded under Article 25 of the Constitution" which was to be found in sections 21 of Gr. C. Ch. Laws 18/62 and 9/63 and of Law 58/61, before the above expression was replaced by the words "earned income" in the new section 22 of Law 58/61.

THE CROSS-APPEAL

I shall deal, next, with the facts on which the contentions of counsel for respondent, which have given rise to the cross-appeal, have been based:

It is necessary to quote, in full, first, some relevant correspondence.

On June 16, 1967, the respondent addressed to the Commissioner of Income Tax a letter, the material part of which reads as follows:-

> "..
>
> My wife's income consists of rents derived from immovable property built and/or developed by my wife who, in that respect, undertook an enterprise on her own.

Particulars:-

A. Six shops at Kimon Coast, Kyrenia:

They were built

(i) Through my wife's surrendering other property in favour of her father who in return advanced to her the sum of £1005, and

(ii) by my advancing to her the sum of £1263 which sum was later returned to me.

B. Two flats at Themistocles street, Kyrenia:

They were built

(i) through the proceeds of dividends received from the Catsellis Hotel Ltd.

(ii) From rents received by my wife,

(iii) With money borrowed from the Bank of Cyprus, Ltd.

None of the above, that is to say A and B formed part of my wife's dowry. Her only dowry was her house at Kyrenia.

On the basis of the above I submit as follows:-

(a) The income of my wife should be considered as having been derived through the exercise of her right guaranteed under Article 25 of the Constitution, *i.e.* through trade or business,

....".

The aforesaid letter was written in respect of the years of assessment 1961-1965.

In respect of the years of assessment 1966-1968 the respondent wrote to the Commissioner of Income Tax a letter dated March 6, 1970, the material part of which is exactly the same as the above-quoted part of the letter of June 16, 1967.

On April 4, 1970, the Commissioner of Income Tax wrote a letter to the respondent, the material part of which reads as follows:-

"I refer to the interviews you had with officials of this Department and to your claim that your wife's rents and other income are not assessable on you but on her, and to inform you that I have decided to de-
5 termine your outstanding objections for the years of assessment 1961-1968, as per attached Notices of Tax Payable. My decision is based on the contents of Section 22(2) of the Income Tax Laws 1961 to 1969, and Sections 13(3) and 20(5) of the Taxes
10 (Quantifying and Recovery) Law 53/1963 as amended".

It is most significant to note that the appellant Commissioner, in determining the objections of the respondent for the years of assessment 1961-1968, has applied the
15 new section 22 of the relevant legislation, and not sections 21 of Gr. C. Ch. Laws 18/62 and 9/63 and the old section 21 of Law 58/61, which were in force, at the material time, in relation to the years of assessment concerned.

By doing so the Commissioner has failed, in taking ad-
20 ministrative action in relation to the matter before him, to apply the correct law to the relevant facts, and he has instead based himself on a provision, the said section 22, which was enacted in 1969 and which was, therefore, inapplicable in respect of the years of assessment 1961-
25 1968; as a result, instead of deciding whether or not the affected income of the wife of the respondent was income derived by her in the exercise of the right safeguarded under Article 25 of the Constitution, he examined the nature of such income from a much narrower angle, on the
30 basis of whether or not it was "earned income", as defined in the income tax legislation. Consequently, the *sub judice* assessments have to be, and are hereby, annulled as being legally defective.

I should add that this is not an instance in which it
35 could properly be examined whether, nonetheless, the said assessments can be sustained by this Court on the basis of the application to the relevant facts of the legislation rightly applicable, namely sections 21 of Gr. C. Ch. Laws 18/62 and 9/63 and of Law 58/61; such a course would
40 involve the evaluation of the facts from an altogether different point of view, in order to ascertain if the affected income of the wife of the respondent was derived in the

exercise of her right under Article 25 of the Constitution, and, in this respect, this Court cannot, while sitting on appeal in this case, substitute itself in the place of the appellant Commissioner of Income Tax and act as the appropriate administrative organ instead of him (see, *inter alia, Pikis* v. *The Republic,* (1965) 3 C.L.R. 131, 149).

So, it is up to the Commissioner to re-examine the matter and decide if the affected income of the wife of the respondent has been derived in circumstances amounting to the exercise on her part of her right under Article 25 of the Constitution, that is in the course of a business enterprise, as contended by the respondent; and, in doing so, the Commissioner has to bear in mind that, as it is stated in Jowitt's Dictionary of English Law (1959), p. 294, "business" is a wider term than "trade".

In Halsbury's Laws of England, 3rd ed., vol. 38, p. 10, para. 2, it is, also, stated that "business" is a wider term than, and not synonymous with, "trade", and that it means practically anything which is an occupation as distinguished from a pleasure.

The above proposition seems to be based on, *inter alia,* the case of *Doe d. Wetherell* v. *Bird,* [1834] 2 Ad. & El. 161, where Lord Denman C.J. observed (at p. 166) "every trade is a business, but every business is not a trade".

In *Smith* v. *Anderson,* [1880] 15 Ch. D. 247, Jessel M.R. said (at p. 258):-

> "That is to say, anything which occupies the time and attention and labour of a man for the purpose of profit is business. It is a word of extensive use and indefinite signification".

In *Rolls* v. *Miller,* [1884] 27 Ch. D. 71, Lindley L.J. said (at p. 88):-

> "When we look into the dictionaries as to the meaning of the word 'business', I do not think they throw much light upon it. The word means almost anything which is an occupation, as distinguished from a pleasure—anything which is an occupation or duty which

requires attention is a business—I do not think we can get much aid from the dictionary".

In *Noddy Subsidiary Rights Co., Ltd.* v. *Inland Revenue Commissioners,* [1966] 3 All E.R. 459, Pennycuick J. stated (at p. 470):-

> "It seems to me that, where a person owns an item of property and grants licences under it, these activities may or may not, according to the particular circumstances, amount to a trade".

Moreover, it is useful to bear in mind that for at least the purposes of section 12 of Law 58/61 it is provided, by means of subsection 7(d) of that section, that "business" shall include the letting of buildings.

It is with all the above, among others, considerations in mind that the appellant Commissioner of Income Tax has to re-determine the objections of the respondent regarding the income tax payable by him for the years of assessment in question, and to decide, in particular, whether or not the manner in which the affected income of the wife of the respondent has been derived amounts, in the light of the special circumstances set out in the aforequoted letter of the respondent, dated June 16, 1967, to a business enterprise.

Of course, if, as it has been found by the learned trial Judge in the present case, it is unconstitutional to aggregate, for income tax purposes, the income of a wife from whatever a source with that of her husband, and, consequently, the *Mikrommatis* case, *supra,* and the legislation which was enacted on the basis of the decision in that case and is applicable in respect of the years of assessment concerned, are inconsistent with the Constitution because they allow (as already explained earlier on in this judgment) partial aggregation of the income of spouses, then a re-examination by the Commissioner of the objections in question of the respondent will be a merely futile exercise, because he will have to apply unconstitutional legislation with the result that any eventual new decision of his will be, in any case, unconstitutional.

So, the question has to be answered as to whether or not the *Mikrommatis* case was decided in a manner in-

consistent with the Constitution, as on the answer to this question depends the constitutionality of the relevant legislation (sections 21 of Gr. C. Ch. Laws 18/62 and 9/63 and of Law 58/61), which was enacted as a result of such case.

JUDICIAL PRECEDENT

As it has been already mentioned the trial Judge has overruled, in effect, the decision in the *Mikrommatis* case as having been decided in a manner contrary to the Constitution, and, in particular, Articles 24 and 28 thereof. Could he, as a Judge of this Court sitting alone, under section 11(2) of the Administration of Justice (Miscellaneous Provisions) Law, 1964 (Law 33/64), have overruled a final decision of the non-functioning now Supreme Constitutional Court, such as that in the *Mikrommatis* case? If he could not do so, can we, as a Full Bench of this Supreme Court, sitting on appeal under the proviso to section 11(2) of Law 33/64, overrule such a decision if we deem it necessary? I shall proceed to deal now with these two questions, and this involves inevitably an examination of the applicability of the "doctrine of judicial precedent" ("*stare decisis*") in our legal system.

In this respect the trial Judge said, *inter alia*, the following in his judgment:-

> "I think I ought to add that in Cyprus judicial precedent may properly be regarded as a source of law, and the binding effect we attach to precedent is inherited from the English judicial system and the Courts are bound to follow the *ratio decidendi* of decided cases. In European systems, however, a law report is generally only persuasive and not authoritative. In Cyprus, the decisions of the Supreme Court are binding on inferior courts and as at present advised, the Supreme Court of Cyprus sitting on appeal can change its mind and not follow precedent already laid down by it in a previous case if it is of opinion that the previous precedent was wrong. (*Papageorghiou* v. *Komodromou* (1963) 2 C.L.R. 221, particularly Vassiliades, J, (as he then was) in his dissenting judgment refused to follow a previous judicial precedent relating to adverse possession of immovable property).

In *Constantinides* v. *The Republic,* (1967) 3 C.L.R. 483, Triantafyllides, J. (as he then was) felt free to depart from precedent when dealing with the case of *Loizides and the Republic,* 1 R.S.C.C. 107, quite rightly in my view, because the process of judicial review of administrative acts under Article 146 is closely related with the continental countries, whose reports, as I have said earlier, have persuasive force only.

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....

.... before the merger of the Constitutional Court and the High Court, the Constitutional Court was trying and determining cases of administrative law, under Article 146 of the Constitution, at first instance, and in that way its jurisdiction is similar to that exercised by a single Judge of the present Supreme Court trying a case of administrative law under the provisions of Law 33/64. The doctrine of precedent in its various manifestations, operates so as to bind Courts in the lower line of the ladder of hierarchy of Courts. (See the judgment of Lord Hailsham, L.C. in *Cassell & Co. Ltd.* v. *Broome,* 801 at p. 809-810). Thus, it appears that it is for this reason that judgments of one High Court Judge in England are not binding on another Judge of the High Court, but are merely of persuasive authority. As I have tried to show earlier in this judgment, speaking about precedent, these reasons apply with equal force to judgments of the then Supreme Constitutional Court of Cyprus, which have only persuasive authority on another Judge of this Court".

As correctly pointed by the trial Judge the doctrine of judicial precedent was introduced into the law of Cyprus from the law of England; it is, therefore, useful to examine how such doctrine is applied in England:

In Cross on Precedent in English Law, 2nd ed., p. 6, it is stated thus:-

"Every court is bound to follow any case decided by a court above it in the hierarchy, and appellate courts (other than the House of Lords) are bound by their previous decisions".

Of course, as it is pointed out in Cross, *supra* (at p. 35), what is binding under the doctrine of precedent is the *ratio decidendi* of a judgment, and not, also, an *obiter dictum* therein.

Also, in Salmond on Jurisprudence, 12th ed., p. 158, there appears the following relevant passage:- 5

> "The general rule is that a court is bound by the decisions of all courts higher than itself. A High Court judge cannot question a decision of the Court of Appeal, nor can the Court of Appeal refuse to follow judgments of the House of Lords. A corollary of the rule is that courts are bound only by decisions of higher courts and not by those of lower or equal rank. A High Court judge is not bound by a previous High Court decision, though he will normally follow it on the principle of judicial comity, in order to avoid conflicts of authority and to secure certainty and uniformity in the administration of justice. If he refuses to follow it, he cannot overrule it; both decisions stand and the resulting antinomy must wait for a higher court to settle".

The exact nature of the doctrine of judicial precedent can best be seen when one examines its aspect on the basis of which even appellate courts in England (other than the House of Lords) are bound by their previous decisions: 25

This rule was laid down, as follows, by the Court of Appeal, in *Young* v. *Bristol Aeroplane Company, Limited*, [1944] K.B. 718 (at pp. 729-730):-

> "On a careful examination of the whole matter we have come to the clear conclusion that this court is bound to follow previous decisions of its own as well as those of courts of co-ordinate jurisdiction. The only exceptions to this rule (two of them apparent only) are those already mentioned which for convenience we here summarize: (1) The court is entitled and bound to decide which of two conflicting decisions of its own it will follow. (2) The court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot, in its opinion, stand with a decision of the House of Lords.

> (3) The court is not bound to follow a decision of its own if it is satisfied that the decision was given per *incuriam*".

Also, in this respect, Lord Denning M.R. said the following in *Miliangos* v. *George Frank (Textiles) Ltd.*, [1975] 1 All E.R. 1076 (at pp. 1084-1085):-

> "The law on this subject has been authoritatively stated in *Young* v. *Bristol Aeroplane Co.*[1] *and Morelle Ltd.* v. *Wakeling.*[2] This court is bound to follow its own decisions—including majority decisions—except in closely defined circumstances. One of these is where a previous decision of this court, although not expressly overruled, cannot stand with a subsequent decision of the House of Lords.[3] Note the word 'subsequent'. It is an essential word.
>
> ....
>
> Another exception is where a previous decision has been given per *incuriam*. 'Such cases', said Lord Green M.R.[4] in *Young* v. *Bristol Aeroplane Co*[5], 'would obviously be of the rarest occurrence and must be dealt with in accordance with their special facts'. So it has been held that a decision is not given per *incuriam* because the argument was not 'fully or carefully formulated' (see *Morelle* v. *Wakeling*[6]), or was 'only weakly or inexpertly put forward' (*Joscelyne* v. *Nissen*[7]); nor that the reasoning was faulty (*Barrington* v. *Lee*[8] by Stephenson L.J.). To these I would add that a case is not decided per *incuriam* because counsel have not cited all the relevant authorities or referred to this or that rule of court or statutory provision. The court does its own researches itself and consults authorities; and these may never receive mention in the judgments. Likewise a case is

1 [1944] 2 All E.R. 293.

2 [1955] 1 All E.R. 708.

3 See *Young* v. *Bristol Aeroplane Co* [1944] 2 All E.R. at 298.

4 [1944] 2 All E.R. at 300.

5 [1944] 2 All E.R. 293.

6 [1955] 1 All E.R. at 714.

7 [1970] 1 All E.R. 1213 at 1223.

8 [1971] 3 All E.R. 1231 at 1245.

not decided per *incuriam* because it is argued on one side only and the other side does not appear. The duty of counsel in those circumstances, as we all know, is to put the case on both sides to the best of his ability; and the court itself always examines it with the utmost care, to protect the interests of the one who is not represented. That was done in the *Schorsch Meier* case[1] itself.

The cases in which we have interfered are limited. One outstanding case recently was *Tiverton Estates Ltd* v. *Wearwell Ltd*[2] where this court in effect overrules *Law* v. *Jones*[3] on the ground that a material line of authority was not before the court and that the point called for immediate remedy. I have myself often said that this court is not absolutely bound by its own decisions and may depart from them just as the House of Lords from theirs; but my colleagues have not gone so far. So that I am in duty bound to defer to their view".

In the later case of *Farrell and Another* v. *Alexander*, [1976] 1 All E.R. 129, Lord Denning M.R. appeared to hold the view that the Court of Appeal in England should not absolutely be bound by its previous decisions, any more than the House of Lords, and he stated the following (at p. 137):-

"In my opinion, therefore, *Remmington* v. *Larchin*[4] is no authority on the 1968 Act; and *Zimmerman* v. *Grossman*[5] was wrongly decided. So much so that I do not think it is binding on us. I have often said that I do not think this court should be absolutely bound by its previous decisions, any more than the House of Lords. I know it is said that when this court is satisfied that a previous decision of its own was wrong, it should not overrule it but should apply it in this court and leave it to the House of Lords to overrule it. Just think what this means in this case.

1 [1974] 3 W.L.R. 823.
2 [1974] 1 All E.R. 209.
3 [1973] 2 All E.R. 437.
4 [1921] 3 K.B. 404.
5 [1971] 1 All E.R. 363.

These ladies do not qualify for legal aid. They must go to the expense themselves of an appeal to the House of Lords to get the decision revoked. The expense may deter them and thus an injustice will be perpetrated. In any case I do not think it right to compel them to do this when the result is a foregone conclusion. I would let them save their money and reverse it here and now".

But the other two members of the Court, Lawton L.J. and Scarman L.J., refused to agree with him and considered themselves bound by the previous decision of the Court of Appeal in *Zimmerman* v. *Grossman,* [1971] 1 All E.R. 363, which Lord Denning M.R., sitting in the Court of Appeal, wanted not to follow on the ground that it had been wrongly decided.

In this connection Scarman L.J. stated (at p. 147):-

"Nevertheless, I have immense sympathy with the approach of Lord Denning M.R. I decline to accept his lead only because I think it damaging to the law in the long term—though it would undoubtedly do justice in the present case. To some it will appear that justice is being denied by a timid, conservative adherence to judicial precedent. They would be wrong. Consistency is necessary to certainty—one of the great objectives of law. The Court of Appeal—at the very centre of our legal system—is responsible for its stability, its consistency, and its predictability: see my comments in *Tiverton Estates Ltd* v. *Wearwell.*[1] The task of law reform, which calls for wide-ranging techniques of consultation and discussion that cannot be compressed into the forensic medium, is for others. The courts are not to be blamed in a case such as this. If there be blame, it rests elsewhere. Parliament has had since 1922 the opportunity to change the law, but has not taken it, and cannot be thought to have taken the opportunity in the Rent Act 1968, since to do in that Act would involve a neglect by Parliament itself of its own enactment (the Consolidation of Enactments (Procedure) Act 1949). Parliament must use very plain words indeed to justi-

1 [1974] 1 All E.R. 209 at 228.

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fy such a view of its intensions being accepted by the courts. I happen to think that a wrong turning was taken by the Court of Appeal in 1921. But only the legislature, or the House of Lords in its judicial capacity, can put the courts on what I believe to be the right road". 5

When the *Farrell* case, *supra,* was taken to the House of Lords (see *Farrell* v. *Alexander*, [1976] 2 All E.R. 721) Lord Simon of Glaisdalé said the following as regards the doctrine of precedent (at p. 741):- 10

"The relevant law on this point has been laid down beyond all question by two of the most eminent judges who have ever held the great office of Master of the Rolls—Lord Greene (in *Young* v. *Bristol Aeroplane Co Ltd*[1]) and Lord Denning (in *Miliangos* v. *George Frank (Textiles) Ltd*[2])". 15

Also, the *Miliangos* case, *supra,* was taken to the House of Lords (see *Miliangos* v. *George Frank (Textiles) Ltd.,* [1975] 3 All E.R. 801) and it was held (see the headnote, at p. 802) that — 20

"The *maxim cessante ratione cèssat ipsa lex* does not justify the abrogation of a rule of law embodied in a binding precedent on the ground that changed circumstances have nullified the reason for the rule; its purpose is merely to distinguish an instant from a previous legal decision or to justify an exception to a principal legal rule". 25

In this connection the following were stated by Lord Simon of Glaisdale (at p. 820):-

"To sum up on this part of the case: (1) the maxim in the form '*cessante ratione cessat ipsa lex*' reflects one of the considerations which your Lordships will weigh in deciding whether to overrule, by virtue of the 1966 declaration,[3] a previous decision of your Lordships' House; (2) in relation to courts bound by 35

1 [1944] 2 All E.R. at 297 *et seq.*

2 [1975] 1 All E.R. 1076 at 1081, 1084, 1085.

3 [1966] 3 All E.R. 77.

the rule of precedent the maxim '*cessante ratione cessat ipsa lex*', in its literal and widest sense, is misleading and erroneous; (3) specifically, courts which are bound by the rule of precedent are not free to disregard an otherwise binding precedent on the ground that the reason which led to the formulation of the rule embodied in such precedent seems to the court to have lost cogency; (4) the maxim in reality reflects the process of legal reasoning whereby a previous authority is judicially distinguished or an exception is made to a principal legal rule; (5) an otherwise binding precedent or rule may, on proper analysis, be held to have been impliedly overruled by a subsequent decision of a higher court or impliedly abrogated by an Act of Parliament; but this doctrine is not accurately reflected by citation of the maxim '*cessante ratione cessat ipsa lex*'."

Lord Simon dissented as regards the actual outcome of the *Miliangos* case before the House of Lords, but the above statement of the law regarding the application of the maxim "*cessante ratione cessat ipsa lex*" was agreed to by three other, out of the five, Lords of Appeal who dealt with that case.

The "1966 declaration", which was referred to by Lord Simon in the above-quoted passage, is a Practice Statement made by Lord Gardiner L.C. "on behalf of himself and the Lords of Appeal in Ordinary" on July 26, 1966 (see [1966] 3 All E.R. 77, [1966] 1 W.L.R. 1234):-

"Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.

Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose, therefore, to modify their present practice and, while treating former decisions of this House as normally binding,

to depart from a previous decision when it appears right to do so.

In this connection they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law.

This *announcement* is *not intended* to *affect* the use of precedent elsewhere than in this House".

In *Boys* v. *Chaplin*, [1968] 1 All E.R. 283, Diplock L.J. observed (at p. 296) that "The House of Lords in an extra-judicial pronouncement has expressed its intention of loosening its self-imposed fetters of stare decisis".

In *Geelong Harbor Trust Commissioners* v. *Gibbs Bright & Co.*, [1974] 2 W.L.R. 507 the Privy Council dealt with the matter of precedent, and Lord Diplock said (at pp. 512-514):-

> "The High Court of Australia has always possessed the power, which the House of Lords itself only assumed as recently as 1966, to refuse to follow its own previous decisions if it thinks fit. This power however has been used but sparingly. The decision whether or not to exercise it is, in their Lordships' view, one of legal policy into which wider considerations enter than mere questions of substantive law. The fact that the court considers its previous decision to have been plainly wrong is a prerequisite to discarding it, but it is by no means a decisive reason for doing so.
>
> The law laid down by a judicial decision, even though erroneous, may work in practice to the satisfaction of those who are affected by it, particularly where it concerns the allocation of the burden of unavoidable risks between parties engaged in trade or commerce and their insurers. If it has given general satisfaction and caused no difficulties in practice, this is an important factor to be weighed against the more theoretical interests of legal science in determining whether the law so laid down ought now to be changed by judicial decision.

By intervening to change the common law Parliament has relegated the courts within this field to the lesser role of interpreting the written law that Parliament has enacted; but the power to state authoritatively what the words that Parliament has used mean for the purpose of applying them to particular circumstances necessarily involves a power in the courts to make law even though this be, in the phrase of Justice O.W. Holmes, but interstitially. When for the first time a court of final instance interprets a written law as bearing one of two or more possible meanings, as the High Court did in the *Townsville* case, the effect of the exercise of its interpretative role is to make law. The issue involved in the application of the doctrine of stare decisis to judicial decisions on statutory construction is: at what point as a matter of legal policy should the interpretative role of the court be treated as spent? Ought it to be regarded as exhausted once the court of final instance has expounded the meaning of the statute, as was the practice of the House of Lords in England until it was changed in 1966? Or should it be regarded as continuing so as to entitle the court to correct a previous erroneous interpretation if experience shows that this has caused confusion or difficulty in its practical application?

Under a system of law which admits exceptions to the strict rule of stare decisis there is no simple answer to these questions. It depends upon striking a balance between many factors whose relative importance may vary considerably from case to case. If it can be inferred from the terms in which subsequent legislation has been passed that Parliament itself has approved a particular judicial interpretation of words in an earlier statute this would be decisive in both Australia and England in favour of adhering to it. Newton J in the Supreme Court of Victoria felt able to draw that inference in the instant case, but the majority in the High Court did not rely on this; and in their Lordships' view there is no ground for doing so. So it was for the High Court to form its own conclusion as to where in the particular field of law dealt

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with by section 110 of the Geelong Act the balance of advantage lay between adhering to an interpretation of the section which had regulated the rights and liabilities of those affected by it for 50 years, and adopting a new interpretation which, though it might well be more consistent with the established rules of statutory construction, might create retrospectively rights of action against owners, masters and agents of vessels which had used Australian harbours. As their Lordships have previously observed, the High Court sitting in Australia is better qualified than their Lordships are to do this.

Apart from those factors which are special to the particular field of law in the instant case, there is however a wider consideration which would make their Lordships reluctant to interfere with the decision of the High Court on a matter of this kind. If the legal process is to retain the confidence of the nation, the extent to which the High Court exercises its undoubted power not to adhere to a previous decision of its own must be consonant with the consensus of opinion of the public, of the elected legislature and of the judiciary as to the proper balance between the respective roles of the legislature and of the judiciary as lawmakers. Even among those nations whose legal system derives from the common law of England, this consensus may vary from country to country and from time to time. It may be influenced by the federal or unitary nature of the constitution and whether it is written or unwritten, by the legislative procedure in Parliament, by the ease with which parliamentary time can be found to effect amendments in the law which concern only a small minority of citizens, by the extent to which Parliament has been in the habit of intervening to reverse judicial decisions by legislation; but most of *all by the underlying political philosophy of the particular* nation as to the appropriate limits of the lawmaking function of a non-elected judiciary".

The approach that the power of a supreme judicial organ to depart from one of its previous decisions should be sparingly exercised, so that the advantage of finality is not to be thrown away too readily, especially in matters of

statutory construction, is found, too, in the judgments delivered in the House of Lords in *Jones* v. *Secretary of State for Social Services, Hudson* v. *Secretary of State for Social Services,* [1972] 1 All E.R. 145.

Lord Reid stated the following (at p. 149), after referring to the Practice Statement made as aforesaid in 1966:-

> "My understanding of the position when this resolution was adopted was and is that there were a comparatively small number of reported decisions of this House which were generally thought to be impending the proper development of the law or to have led to results which were unjust or contrary to public policy and that such decisions should be reconsidered as opportunities arose. But this practice was not to be used to weaken existing certainty in the law. The old view was that any departure from rigid adherence to precedent would weaken that certainty. I did not and do not accept that view. It is notorious that where an existing decision is disapproved but cannot be overruled courts tend to distinguish it on inadequate grounds. I do not think that they act wrongly in so doing; they are adopting the less bad of the only alternatives open to them. But this is bound to lead to uncertainty for no one can say in advance whether in a particular case the court will or will not feel bound to follow the old unsatisfactory decision. On balance it seems to me that overruling such a decision will promote and not impair the certainty of the law.
>
> But that certainty will be impaired unless this practice is used sparingly. I would not seek to categorise cases in which it should or cases in which it should not be used. As time passes experience will supply some guide. But I would venture the opinion that the typical case for reconsidering an old decision is where some broad issue is involved, and that it should only be in rare cases that we should reconsider questions of construction of statutes or other documents. In very many cases it cannot be said positively that one construction is right and the other wrong. Construction so often depends on weighing one consideration against another. Much may de-

pend on one's approach. If more attention is paid to meticulous examination of the language used in the statute the result may be different from that reached by paying more attention to the apparent object of the statute so as to adopt that meaning of the words under consideration which best accord with it.

Holding these views, I am firmly of opinion *Dowling's* case [1967] 1 All E.R. 210, ought not to be reconsidered. No broad issue of justice or public policy is involved nor is any question of legal principle. The issue is simply the proper construction of complicated provisions in a statute. There must be a large number of decisions of this House of this character. Possibly some of your Lordships may think the decision in *Dowling's* case more wrong than most of them. But a decision to reconsider *Dowling's* case would I think encourage those who would like to see others of such decisions reversed, to think that litigation for that purpose might be worthwhile and would have a rather far-reaching tendency to impair existing certainty. Moreover, if the decision in *Dowling's* case is causing administrative difficulties in the respondent's department—as to which I have no knowledge—then the respondent is in a position to seek amendment of the Act".

Lord Pearson said (at p. 174):-

"My Lords, in my opinion the decision of this House in *Minister of Social Security* v. *Amalgamated Engineering Union (Re Dowling)* [1967] 1 All E.R. 210, ought to be followed in the present cases for several reasons.

First, there is the principle of stare decisis. A decision of this House has had the distinctive advantage of being final both in the sense that it put an end to the litigation between the parties and in the sense that it established the principle embodied in the *ratio decidendi*. Consequently it provided a firm foundation on which commercial, financial and fiscal arrangements could be based. Also it marked a definite step in the development of the law, irreversible except by Act of Parliament. This distinctive advan-

tage of finality should not be thrown away by too ready use of the recently declared liberty to depart from previous decisions.

Secondly, in *Dowling's* case the courts were confronted with a difficult question of construction arising under a complicated statute. The decision of such questions depends largely on an impression as to the meaning of words in their context, and often different minds have different impressions so that a divergence of opinion results. That is what happened in *Dowling's* case. There were two conflicting views and each of them was tenable. That which ultimately became the minority view was taken by the three members of the Divisional Court, by one member of the Court of Appeal [1966] 1 All E.R. 705, and by one of my noble and learned friends in this House. The view which became the majority view was taken by two members of the Court of Appeal and by four of my noble and learned friends in this House. On a count of judicial voices one might say the slender majority of six to five is not sufficient to prove conclusively the correctness of the view which prevailed, but the voices in favour afford unimpeachable evidence that it is a tenable view, in the absence of any demonstration that it was arrived at per *incuriam* or is for some other reason clearly unmaintainable. No such demonstration has been given. That seems to me a sufficient reason for not overruling the decision in *Dowling's* case. If a tenable view taken by a majority in the first appeal could be overruled by a majority preferring another tenable view in a second appeal, then the original tenable view could be restored by a majority preferring it in a third appeal. Finality of decision would be utterly lost".

Lord Simon stated (at p. 196):-

"I have already indicated that, if the matter were *res integra,* I would presume to put a different construction on the Act than that which commended itself to the majority of the House in *Dowling's* case [1967] 1 All E.R. 210. Nevertheless, I am clearly of opinion that it would be wrong now to seek to depart from that decision, for the following reasons:

(1) The declaration of 26th July 1966 (see Note [1966] 3 All E.R. 77, itself implies that the power to depart from a previous decision of your Lordships' House is one to be most sparingly exercised.

(2) A variation of view on a matter of statutory construction—so much a matter of impression—would, I should have thought, rarely provide a suitable occasion, by itself, that is to say, for it would be different if it were convincingly shown that a previous construction, clearly demonstrated to be wrong, was causing administrative difficulties or individual injustice.

(3) Your Lordships will, I apprehend, be reluctant to encourage frequent litigants before your Lordships' House—like the Secretary of State for Social Services in this type of case or the Commissioners of Inland Revenue in revenue cases—to endeavour to re-open arguments once concluded against them—particularly since appellate committees do not sit in banc, so that similar arguments might be put forward in successive cases in the hope of finding a favourably constituted committee. (It was claimed on behalf of the respondent that it was of importance, in this connection, that *Inland Revenue Comrs* v. *Brooks,* [1915] A.C. 478 was not drawn to the attention of the House of *Dowling's* case; but, in my view, *Inland Revenue Comrs* v. *Brooks,* although useful, is only of marginal significance, since it turned on the construction of words of a particular statute of a very different character from those your Lordships are now considering. I would also apply in this context what Lord Shaw said in a different one in *Hoystead* v. *Taxation Comr* [1926] A.C. 155 at 165:

'Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result. . . . . If this were permitted litigation would have no end, except when legal ingenuity is exhausted')".

On the other hand, *In re Harper and Others* v. *National*

Coal Board, [1974] 2 W.L.R. 775, 777, the Court of Appeal was faced with the situation that there is no discernible *ratio decidendi* common to the majority view in the House of Lords in the case of *Smith* v. *Central Asbestos* 5 *Co. Ltd.*, [1973] A.C. 518, which would normally have been a binding precedent on it, and the situation was approached as follows by Lord Denning, who said (at pp. 780, 781):-

"How then do we stand on the law? We have listened 10 to a most helpful discussion by Mr. McCullough on the doctrine of precedent. One thing is clear. We can only accept a line of reasoning which supports the actual decision of the House of Lords. By no possibility can we accept any reasoning which would 15 show the decision itself to be wrong. The second proposition is that if we can discover the reasoning on which the majority based their decision, then we should accept that as binding upon us. The third proposition is that, if we can discover the reasoning 20 on which the minority base their decision, we should reject it. It must be wrong because it led them to the wrong result. The fourth proposition is that, if we cannot discover the reasoning on which the majority based their decision, we are not bound by it. We 25 are free to adopt any reasoning which appears to us to be correct, so long as it supports the actual decision of the House.

In support of those propositions, I would refer to the speech of Lord Dunedin in *Great Western Rail-* 30 *way Co.* v. *Owners of S.S.* Mostyn [1928] A.C. 57, 73-74, and of Lord MacDermott in *Walsh* v. *Curry* (1955) N.I. 112, 124-125, and of Viscount Simonds in *Midland Silicones Ltd.* v. *Scruttons Ltd.* [1962] A.C. 446, 468-469.

35 Applying the propositions to *Smith* v. *Central Asbestos Co. Ltd.* (*Dodd's* case) [1973] A.C. 518, the position stands thus: (1) the actual decision of the House in favour of Dodd must be accepted as correct. We cannot accept any line of reasoning which 40 would show it to be wrong. We cannot therefore accept the reasoning of a minority of two—Lord Simon of Glaisdale and Lord Salmon—on the law. It must

be wrong because it led them to the wrong result.

(2) We ought to accept the reasoning of the three in the majority if we can discover it. But it is not discoverable. The three were divided. Lord Reid and Lord Morris of Borth-y-Gest took one view of the law. Lord Pearson took another. We cannot say that Lord Reid and Lord Morris of Borth-y-Gest were correct: because we know that their reasoning on the law was in conflict with the reasoning of the other three. We cannot say that Lord Pearson was correct: because we know that the reasoning which he accepted on the law led the other two (Lord Simon of Glaisdale and Lord Salmon) to a wrong conclusion. So we cannot say that any of the three in the majority was correct. (3) The result is that there is no discernible ratio among the majority of the House of Lords. In these circumstances I think we are at liberty to adopt the reasoning which appears to us to be correct.

In my opinion we should adopt the reasoning which was accepted in this court in the long line of cases before the decision of the House of Lords. None of these was overruled. They may therefore be said to be binding on us. But in any case we should follow their reasoning especially as it was accepted by two of their Lordships who were in the majority and was expressed convincingly by Lord Morris of Borth-y-Gest in the passage I have quoted".

In order to complete the review of the application in England of the doctrine of precedent it is perhaps useful to mention that in relation to criminal cases there appears to exist some laxity in this connection.

Thus, in *R* v. *Gould,* [1968] 2 Q.B. 65, Diplock L.J. said (at pp. 68-69):-

"In its criminal jurisdiction, which it has inherited from the Court of Criminal Appeal, the Court of Appeal does not apply the doctrine of *stare decisis* with the same rigidity as in its civil jurisdiction. If upon due consideration we were to be of opinion that the law had been either misapplied or misunderstood in an earlier decision of this court or its prede-

cessor, the Court of Criminal Appeal, we should be entitled to depart from the view as to the law expressed in the earlier decision notwithstanding that the case could not be brought within any of the exceptions laid down in *Young* v. *Bristol Aeroplane Co. Ltd* [1944] K.B. 718, as justifying the Court of Appeal in refusing to follow one of its own decisions in a civil case (*Rex* v. *Taylor*) [1950] 2 K.B. 368. A *fortiori,* we are bound to give effect to the law as we think it is if the previous decision to the contrary effect is one of which the *ratio decidendi* conflicts with that of other decisions of this court or its predecessors of co-ordinate jurisdiction".

In *R* v. *Newsome, R* v. *Browne,* [1970] 3 All E.R. 455, the above *dictum* of Diplock L.J. was referred to with approval by Widgery L.J. who, also, said (at pp. 457-458) that: "We do, however, recognise, as has been recognised for years, that the principle of *stare decisis* does not apply in its full vigour to decisions of the Court of Criminal Appeal, as it used to be, and the criminal division of this court, as it now is".

An aspect of the principle of precedent which could not have been dealt with fully in England, because there is no written Constitution there, is that which relates to the extent to which the highest court in a country should consider itself bound by its previous decisions in relation to matters of constitutional adjudication.

In this respect it is useful to refer to some relevant pronouncements by the United States Supreme Court:

In *Smith* v. *Allwright,* 88 L. Ed. 987, Mr. Justice Reed stated (at p. 998):-

"In reaching this conclusion we are not unmindful of the desirability of continuity of decision in constitutional questions. However, when convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to re-examine the basis of its constitutional decisions. This has long

been accepted practice, and this practice has continued to this day. This is particularly true when the decision believed erroneous is the application of a constitutional principle rather than an interpretation of the Constitution to extract the principle itself". 5

In *United States* v. *South Buffalo Railway Company,* 92 L. Ed. 1077, Mr. Justice Jackson said (at p. 1081):-

"........... when the questions are of statutory construction, not of constitutional import, Congress can rectify our mistake, if such it was, or change its 10 policy at any time, and in these circumstances reversal is not readily to be made".

In *Green* v. *United States,* 2 L. Ed. 2d 199, Mr. Justice Frankfurter stated (at p. 220):-

"We should not be so unmindful, even when consti- 15 tutional questions are involved, of the principle of *stare decisis,* by whose circumspect observance the wisdom of this Court as an institution transcending the moment can alone be brought to bear on the difficult problems that confront us". 20

In *State Board of Insurance* v. *Todd Shipyards Corporation,* 8 L. Ed. 2d 620, Mr. Justice Douglas said the following (at p. 625):-

"We have, of course, freedom to change our decisions on the constitutionality of laws. *Smith* v. *All-* 25 *wright,* 88 L. Ed. 987, 998. But the policy announced by Congress in the McCarran-Ferguson Act was one on which the industry had reason to rely since 1897, when the Allgeyer decision was announced; and we are advised by an amicus brief how severe 30 the impact would be on small insurance companies should the old rule be changed. When, therefore, Congress has posited a regime of state regulation on the continuing validity of specific prior decisions (see *Federal Trade Com.* v. *Travelers Health Asso.,* 4 35 L. Ed. 2d 724, 729), we should be loath to change them".

In *United States* v. *Ross R. Barnett,* 12 L. Ed. 2d 23, Mr. Justice Clark stated (at p. 36):-

"It is true that adherence to prior decisions in consti- 40

tutional adjudication is not a blind or inflexible rule. This Court has shown a readiness to correct its errors even though of long standing. Still, where so many cases in both federal and state jurisdictions by such a constellation of eminent jurists over a century and a half's span teach us a principle which is without contradiction in our case law, we cannot overrule it".

In *United States* v. *State of Maine,* 43 L. Ed. 2d 363, Mr. Justice White said the following (at pp. 371, 372):-

"But the doctrine of *stare decisis* is still a powerful force in our jurisprudence; and although on occasion the Court has declared—and acted accordingly—that constitutional decisions are open to re-examination, we are convinced that the doctrine has peculiar force and relevance in the present context. It is apparent that in the almost 30 years since California, a great deal of public and private business has been transacted in accordance with those decisions and in accordance with major legislation enacted by Congress, a principal purpose of which was to resolve the 'interminable litigation' arising over the controversy of the ownership of the lands underlying the marginal sea. See HR Rep No. 215, 83d Cong, 1st Sess, 2 (1953). Both the Submerged Lands Act and the Outer Continental Shelf Lands Act which soon followed proceeded from the premises established by prior Court decisions and provided for the orderly development of offshore resources. Since 1953, when this legislation was enacted, 33 lease sales have been held, in which 1,940 leases, embracing over eight million acres, have been issued. The Outer Continental Shelf, since 1953, has yielded over three billion barrels of oil, 19 trillion mcf of natural gas, 13 million long tons of sulfur, and over four million long tons of salt. In 1973 alone, 1,081,000 barrels of oil and 8.9 billion cubic feet of natural gas were extracted daily from the Outer Continental Shelf. Exploitation of our resources offshore implicates a broad range of federal legislation, ranging from the Longshoremen's and Harbor Workers' Compensation Act, incorporated into the Outer Continental Shelf Lands Act, to the more recent Coastal Zone Management Act. We are quite sure that it would

be inappropriate to disturb our prior cases, major legislation, and many years of commercial activity by calling into question, at this date, the constitutional premise of prior decisions".

Regarding the application of the doctrine of precedent in Cyprus it is useful to refer, first, to *The Republic* v. *Mozoras,* (1966) 3 C.L.R. 356, in which the view was adopted, expressly or by clear implication, that a Full Bench of the Supreme Court can depart from a decision of the former Supreme Constitutional Court (in that case the decision concerned was that in *Morsis and The Republic,* 4 R.S.C.C. 133, at p. 137).

Munir J. stated the following (at p. 386):-

"I, therefore, see no reason for departing from the opinion expressed by the Supreme Constitutional Court on this point in *Morsis and The Republic* (*supra,* at p. 137)".

Josephides J. said (at pp. 399, 416):-

"In deciding this question it is, I think, also necessary to decide whether we are prepared to accept the decision in the *Morsis* case or overrule it. In fact, counsel for the Commission submitted that that case should be overruled.

....

It, therefore, follows that I would, with respect, overrule the decision in the *Morsis* case".

In *Constantinides* v. *The Republic,* (1969) 3 C.L.R. 523, a Full Bench of this Court reversed, in effect, the judgment of the Supreme Constitutional Court in *Loizides and others* v. *The Republic,* 1 R.S.C.C. 107, by refusing to accept the adaptations made, under Article 188 of the Constitution, to a scheme for educational grants to children of public officers.

Josephides J. said (at p. 545):-

"It, therefore, follows that, with respect, as a matter of construction, I would not be prepared to make

the adaptations made by the Court in the *Loizides* case".

Hadjianastassiou J. stated the following (at pp. 553, 554):-

5 "I regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases, because it provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, 10 as well as a basis for orderly development of legal rules. Nevertheless, I also recognize that too rigid adherence to precedent may lead to injustice in this particular case, and also unduly restrict the proper development of the law. I propose, therefore, to de- 15 part from the previous decision of the Supreme Constitutional Court, because it appears to me the right thing to do. Indeed, I am further of the view that the Supreme Court of Cyprus should not shrink from overruling a decision, or series of decisions, which 20 establish a doctrine plainly outside the Constitutional Law, the law of the land, or for any other good reason which appears to the Court right to do so.

After considering more fully the reasoning behind the judgment in the *Loizides*' case, I have no doubt 25 that it has been wrongly decided and, therefore, I find myself in agreement with counsel for the appellant that the adaptations effected are wrong and are contrary to the provisions of Article 192 of the Constitution".

30 The *Constantinides* case, *supra,* was an appeal from an in the first instance judgment of mine which had been based on the earlier decision in the *Loizides* case, *supra.*

It is correct, as it has been pointed by the trial Judge in the case now before us, that, when I was dealing my- 35 self, sitting alone, with the *Constantinides* case (see *Constantinides* v. *The Republic,* (1967) 3 C.L.R. 483), I had said the following regarding the *Loizides* case (at p. 492):-

"But I have, in this Case, considered the validity of the relevant reasoning in the *Loizides* case indepen- 40 dently of my past participation in its determination.

My sole purpose was to decide correctly the present Case, irrespective of past views, but, of course, with due regard to the principle that precedent should not be disturbed unless there are good reasons for doing so. I have, in the end, reached the conclusion that the *Loizides* case was correctly decided".

It could be said that it is to be inferred from the above passage that, when trying the *Constantinides* case at first instance, I *might* not have been prepared to follow the *Loizides* case had I reached the conclusion that it had been wrongly decided.

It is, however, perhaps, pertinent to point out that what I said then is attributable to the fact that, as I was a Judge of the Supreme Constitutional Court when it decided the *Loizides* case, it was proper on my part to stress that I was approaching all the issues, which had been raised in *Constantinides* case, with an open mind.

Anyhow, the fact remains that in the end I did not refuse to follow the *Loizides* case and, therefore, whatever I said then was stated by way of an observation, without my having had to decide finally as to whether or not I was bound, by virtue of the principle of judicial precedent, to follow the *Loizides* case.

In any case, after the *Constantinides* case was decided by a Full Bench on appeal, as aforesaid, and the *Loizides* case was, thus, reversed in a manner inconsistent with the views which I had expressed while sitting alone at first instance in the *Constantinides* case, I had the opportunity to consider to what extent I was bound, as a Judge of this Court sitting at first instance, by a decision of a Full Bench of the Court, and I said the following in *Zambakides and Others* v. *The Republic,* (1970) 3 C.L.R. 191 (at pp. 193, 194):-

> "It is correct that in the case of *Loizides and The Republic* (1 R.S.C.C. 107) the then Supreme Constitutional Court—with myself as one of its members—decided that the scheme for education grants, as set out in the said circulars, had to be adapted, under Article 192.7(b) of the Constitution, in such a manner as, in effect, to substitute in the place of the edu-

cation grants in respect of studies in the United Kingdom, other British Commonwealth countries and the Republic of Ireland (as provided for by the aforementioned circulars) education grants in respect of studies in Greece and Turkey (for Cypriot Greeks and Cypriot Turks respectively).

In the latter case of *Constantinides and The Republic*—in which when dealt with by me in the first instance ((1967) 3 C.L.R. 483) the adaptations to the scheme as made in the *Loizides* case were adhered to—the Supreme Court decided on appeal ((1969) 3 C.L.R. 523) that such adaptations ought not to have been made and that, therefore, the scheme for education grants still continued to be applicable to studies in the United Kingdom, other countries of the British Commonwealth and the Republic of Ireland.

Though I, myself, still hold the views which I expressed in the *Loizides* case and in my first instance decision in the *Constantinides* case, I do consider myself bound to apply the law as laid down on appeal in the latter case".

In the light of all the foregoing I have reached the conclusion that it was not open, in the present case, to the learned trial Judge, not to follow, and to instead reverse, the decision in the *Mikrommatis* case, *supra*. He was, of course, perfectly entitled to put on record in his judgment his opinion that the *Mikrommatis* case had been wrongly decided, but having done so he was bound to follow it, leaving the matter of its possible reversal to be dealt with, if need be, by a Full Bench of this Court on appeal.

I am fully aware that in dealing with the present case the trial Judge was acting under section 11(2) of the Administration of Justice (Miscellaneous Provisions) Law, 1964 (Law 33/64), which reads as follows:-

"Any original jurisdiction vested in the Court under any law in force and any revisional jurisdiction, including jurisdiction on the adjudication of a recourse made against an act or omission of any organ, authority or person exercising executive or administrative authority as being contrary to the law in force or in

excess or abuse of power, may be exercised, subject to any Rules of Court, by such Judge or Judges as the Court shall determine:

Provided that, subject to any Rules of Court, there shall be an appeal to the Court from his or their decision".

A Judge of this Supreme Court acting under section 11(2), above, is, certainly, not to be regarded, in any way at all, as an "inferior court" in relation to a Full Bench of the Supreme Court; he is bound, however, because of the doctrine of precedent, by the decisions of a Full Bench of this Court—(and of the Supreme Constitutional Court and of the High Court of Justice as its predecessors)—simply for the sake of ensuring, as much as possible, certainty regarding the law in force, since his decisions are not of a final nature, in the sense that they are subject to an appeal, whereas those of a Full Bench of this Court, as well as those of the Supreme Constitutional Court and of the High Court of Justice, are, indeed, of a final nature.

I am, further, of the view that a Full Bench of this Court can reverse its own case-law, as well as that of the Supreme Constitutional Court and of the High Court of Justice, on the same basis on which the House of Lords in England can do likewise.

There remains to decide next whether or not in the present instance it should be found by this Full Bench of the Supreme Court that the *Mikrommatis* case, *supra,* was wrongly decided, in that, as has been found by the trial Judge and as has been submitted by counsel for the respondent, it was decided in a manner inconsistent with the principle of equality, as safeguarded by means of Articles 24 and 28 of the Constitution.

EQUALITY

Regarding the application of the principle of equality to a matter of taxation reference was made in argument, in the present case, to the decision of this Court in *Matsis* v. *The Republic,* (1969) 3 C.L.R. 245, where that principle was examined in the light of relevant decisions of the United States Supreme Court; so, it is useful to refer,

in this respect, to some more recent decisions of that Court:

In *Lehnhausen* v. *Lake Shore Auto Parts Co.*, and *Barrett* v. *Shapiro,* 35 L. Ed. 2d 351, which were decided together, there has been made a comprehensive review of the case-law concerning the application of the doctrine of equal protection in relation to matters of taxation; and I think that it is helpful to quote, at some length, from the judgment of the Court which was delivered by Mr. Justice Douglas; the following were stated (at pp. 354-355):-

> "The Equal Protection Clause does not mean that a State may not draw lines that treat one class of individuals or entities differently from the others. The test is whether the difference in treatment is an invidious discrimination. *Harper* v. *Virginia Board of Elections*, 383 US 663, 666, 16 L. Ed. 2d 169, 86 S Ct 1079. Where taxation is concerned and no specific federal right, apart from equal protection, is imperiled, the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation.
>
> As stated in *Allied Stores of Ohio* v. *Bowers,* 358 US 522, 526-527, 3 L. Ed. 2d 480, 79 S Ct 437:
>
> 'The States have a very wide discretion in the laying of their taxes. When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the National Government or violating the guaranties of the Federal Constitution, the States have the attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interests. Of course, the States, in the exercise of their taxing power, are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment. But that clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation. The State may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products. It is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value'.

In that case we used the phrase '*palpably arbitrary*' or '*invidious*' as defining the limits placed by the Equal Protection Clause on state power. *Id.*, at 530, 3 L. Ed. 2d 480. State taxes which have the collateral effect of restricting or even destroying an occupation or a business have been sustained, so long as the regulatory power asserted is properly within the limits of the federal-state regime created by the Constitution. *Magnano Co.* v. *Hamilton,* 292 US 40, 44-47, 78 L. Ed. 1109, 54 S Ct 599. When it comes to taxes on corporations and taxes on individuals, great leeway is permissible so far as equal protection is concerned. They may be classified differently with respect to their right to receive or earn income".

It was further stated (at pp. 357-358):-

"In *Madden* v. *Kentucky,* 309 US 83, 84 L. Ed. 590, 60 S Ct 406, 125 ALR 1383, a State laid an *ad valorem* tax of 50 c per $100 on deposits in banks outside the State and only 10 c per $1,000 in deposits within the State. The classification was sustained against the charge of invidious discrimination, the Court noting that 'in taxation, even more than in other fields, legislatures possess the greatest freedom in classification'. *Id.,* at 88, 84 L. Ed. 590, 125 ALR 1383. There is a presumption of constitutionality which can be overcome 'only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes'. *Ibid.* And the Court added, 'The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it'. *Ibid.* That idea has been elaborated. Thus, in *Carmichael* v. *Southern Coal Co.* 301 US 495, 81 L. Ed. 1245, 57 S Ct 868, 109 ALR 1327, the Court, in sustaining an unemployment tax on employers, said:

'A state legislature, in the enactment of laws, has the widest possible latitude within the limits of the Constitution. In the nature of the case it cannot record a complete catalogue of the considerations which move its members to enact laws. In the absence of such a record courts cannot assume that its

action is capricious, or that, with its informed acquaintance with local conditions to which the legislation is to be applied, it was not aware of facts which afford reasonable basis for its action. Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function'. *Id.*, at 510, 81 L. Ed. 1245, 109 ALR 1327".

The test of "invidious discrimination" which was linked to the principle of equal protection in the *Lehnhausen* case, *supra,* had already been adopted in the earlier cases of *Dandridge* v. *Williams,* 25 L. Ed. 2d 491, 503, and *Jefferson* v. *Hackney,* 32 L. Ed. 2d 285, 296. In the later case of *United States Department of Agriculture* v. *Moreno,* 37 L. Ed. 2d 782, Mr. Justice Brennan said (at p. 787):-

"Under traditional equal protection analysis, a legislative classification must be sustained if the classification itself is rationally related to a legitimate governmental interest. See *Jefferson* v. *Hackney,* 406 US 535, 546, 32 L. Ed. 2d 285, 92 S Ct 1724 (1972); *Richardson* v. *Belcher,* 404 US 78, 81, 30 L. Ed. 2d 231, 92 S Ct 254 (1971); *Dandridge* v. *Williams,* 397 US 471, 485, 25 L. Ed. 2d 491, 90 S Ct 1153 (1970); *McGowan* v. *Maryland,* 366 US 420, 426, 6 L. Ed. 2d 393, 81 S Ct 1101 (1961)".

And he added (at p. 790):-

"Traditional equal protection analysis does not require that every classification be drawn with precise 'mathematical nicety'. *Dandridge* v. *Williams,* 397 US, at 485, 25 L. Ed. 2d 491. But the classification here in issue is not only 'imprecise', it is wholly without any rational basis".

Also, in *Kahn* v. *Shevin,* 40 L. Ed. 2d 189, Mr. Justice Douglas in upholding the constitutionality of legislation granting certain taxation exemptions to widows, but not widowers, stated the following (at p. 193):-

"While the widower can usually continue in the occupation which preceded his spouse's death, in many

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cases the widow will find herself suddenly forced into a job market with which she is unfamiliar, and in which, because of her former economic dependency, she will have fewer skills to offer.

There can be no doubt, therefore, that Florida's differing treatment of widows and widowers 'rests upon some ground of difference having a fair and substantial relation to the object of the legislation'. *Reed* v. *Reed,* 404 US 71, 76, 30 L. Ed. 2d 225, 92 S Ct 251, quoting *Royster Guano Co.* v. *Virginia,* 253 US 412, 415, 64 L. Ed. 989, 40 S Ct 560.

This is not a case like *Frontiero* v. *Richardson,* 411 US 677, 36 L. Ed. 2d 583, 93 S Ct 1764, where the Government denied its female employees both substantive and procedural benefits granted males 'solely ..... for administrative convenience'. *Id.,* at 690, 36 L. Ed. 2d 583 (emphasis in original). We deal here with a state tax law reasonably designed to further the state policy of cushoning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden. We have long held that 'where taxation is concerned and no specific federal right, apart from equal protection, is imperiled, the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation'. *Lehnhausen* v. *Lake Shore Auto Parts Co.* 410 US 356, 359, 35 L. Ed. 2d 351, 93 S Ct 1001. A state tax law is not arbitrary although it 'discriminates in favor of a certain class ..... if the discrimination is founded upon a reasonable distinction, or difference in state policy', not in conflict with the Federal Constitution. *Allied Stores* v. *Bowers,* 358 US 522, 528, 3 L. Ed. 2d 480, 79 S Ct 437. This principle has weathered nearly a century of Supreme Court adjudication, and it applies here as well. The statute before us is well within those limits".

In the *Dandridge* case, *supra,* it was pointed out by Mr. Justice Stewart that some latitude should be allowed to the legislature in the area of economics and social welfare when applying the principle of equal protection; he said (at pp. 501-502):-

"In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis', it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality'. *Lindsley* v. *Natural Carbonic Gas Co.,* 220 US 61, 78, 55 L. Ed. 369, 377, 31 S Ct 337. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific'. *Metropolis Theatre Co.* v. *City of Chicago,* 228 US 61, 69-70, 57 L. Ed. 730, 734, 33 S Ct 441. ' A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it'. *McGowan* v. *Maryland,* 366 US 420, 426, 6 L. Ed. 2d 393, 399, 81 S Ct 1101".

In the *Jefferson* case, *supra,* Mr. Justice Rehnquist said (at p. 296):-

"This Court emphasized only recently, in *Dandridge* v. *Williams;* 397 US 471, 485, 25 L. Ed. 2d 491, 501, 90 S Ct 1153 (1970), that in 'the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect'. A legislature may address a problem 'one step at a time', or even 'select one phase of one field and apply a remedy there, neglecting the others'. *Williamson* v. *Lee Optical Co.* 348 US 483, 489, 99 L. Ed. 563, 573, 75 S Ct 461 (1955). So long as its judgments are rational, and not invidious, the legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional straitjacket. The very complexity of the problems suggests that there will be more than one constitutionally permissible method of solving them".

The same view was adopted by Mr. Justice Rehnquist in the subsequent case of *Weinberger* v. *Salfi,* 45 L. Ed. 2d 522 (and see, also, *Geduldig* v. *Aiello,* 41 L. Ed. 2d 256).

In the *Matsis* case, *supra,* it was held (at p. 270) that

there is nothing in our Constitution safeguarding *expressly* the right to "due process" in the manner in which such right is safeguarded under the U.S.A. Constitution. But it is to be noted that in *Bolling* v. *Sharpe*, 98 L. Ed. 884, it was held that the notion of equal protection is related to the notion of due process; Chief Justice Warren said (at p. 886):-

> "The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law', and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process".

In the *Lehnhausen* case, *supra* (at p. 356) it was stressed that "the Fifth Amendment in its use of due process carries a mandate of equal protection".

In *Schneider* v. *Rusk*, 12 L. Ed. 2d 218, Mr. Justice Douglas said (at p. 222):-

> "Moreover, while the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process'. *Bolling* v. *Sharpe*, 347 US 497, 499, 98 L. Ed. 884, 886, 74 S Ct 693".

In the *Moreno* case, *supra*, Mr. Justice Brennan said (at p. 787):-

> "In essence, appellees contend, and the District Court held, that the 'unrelated person' provision of §3(e) creates an irrational classification in violation of the equal protection component of the Due Process Clause of the Fifth Amendment. We agree".

It may be observed, at this stage, that the equal protection component of the due process clause in the Fifth Amendment to the U.S.A. Constitution corresponds to the

principle of equality safeguarded by Articles 24 and 28 of our Constitution; therefore, the notion of due process to the extent to which it relates to the principle of equality forms part of our own Constitutional structure; and the *Matsis* case, *supra,* cannot be treated as being inconsistent with the above view, especially as this particular aspect of due process, which is connected with the concept of equality, was not considered in that case.

In the report of *Weinberger* v. *Wiesenfeld,* 43 L. Ed. 2d 514, it is pointed out (in a footnote to the judgment of Mr. Justice Brennan, at p. 519) that the approach of the U.S.A. Supreme Court to equal protection claims under the Fifth Amendment has been the same as that to equal protection claims under the Fourteenth Amendment, and reference is made, in this respect, to, *inter alia,* the cases of *Frontiero* v. *Richardson,* 36 L. Ed. 2d 583, *Jimenez* v. *Weinberger,* 41 L. Ed. 2d 363.

A due process clause is included not only in the Fifth Amendment but, also, in the Fourteenth Amendment to the U.S.A. Constitution where the equal protection clause is to be found. A case in which the due process and equal protection clauses in the Fourteenth Amendment were applied together is that of *Hoeper* v. *Tax Commission of Wisconsin,* 76 L. Ed. 248, which has been relied on by the learned trial Judge in the present instance. In the *Hoeper* case it was held, by majority, that "A husband cannot, consistently with the due process and equal protection clauses of the 14th Amendment, be taxed by a state on the combined total of his and his wife's incomes as shown by separate returns, where her income is her separate property and, by reason of the tax being graduated, its amount exceeded the sum of the taxes which would have been due had their separate incomes been separately assessed". The opinion of the majority of the Court is to be found in the judgment of Mr. Justice Reynolds, and Mr. Justice Holmes delivered a dissenting opinion; a perusal of both opinions leads me to the conclusion that the *Hoeper* case was decided partly on the basis of the legal and social situation which existed at the time —in 1931—in the U.S.A. and it cannot, therefore, be regarded as being of decisive significance in relation to the outcome of the appeal with which we are now dealing. Moreover, as the *Hoeper* case is case-law of a foreign

country, which is not directly applicable with binding force in Cyprus, it can only be of a persuasive nature; and, personally, I am, indeed, inclined to attribute equal weight both to the majority opinion of Mr. Justice Reynolds and to the dissenting opinion of Mr. Justice Holmes. 5

It is I think helpful to examine, next, the application of the principle of equality elsewhere than in the U.S.A.

In Article 3 of the Constitution of 1952, in Greece, it was provided that all Greek citizens contribute without exception, according to their means, towards the public 10 burdens ("Οἱ Ἕλληνες πολῖται συνεισφέρουσιν ἀδιακρίτως εἰς τὰ δημόσια βάρη ἀναλόγως τῶν δυνάμεών των"). This provision is very similar to Article 24.1 of our Constitution which states that every person is bound to contribute according to his means towards the public burdens 15 ("ἕκαστος ὑποχρεοῦται νὰ συνεισφέρῃ εἰς τὰ δημόσια βάρη ἀναλόγως τῶν δυνάμεων αὐτοῦ"). In Σβώλου—Βλάχου "Τὸ Σύνταγμα τῆς Ἑλλάδος" (1954), vol. A, p. 222, the above provision in Article 3 of the Constitution of 1952, in Greece, is commented upon and it is explained that the 20 principle of equality contained therein permits not only taxation proportionate to the means of each citizen, but, also, progressively greater taxation according to such means; and, while on this point, it is pertinent to draw attention to the fact, too, that in Κούλη "Εἰσαγωγὴ εἰς τὴν 25 Δημοσίαν Οἰκονομικήν", 4th Ed. (1967), vol. 2, p. 45, it is pointed out that the aggregation of the income of the spouses for purposes of taxation is a means adopted by the State in order to defeat efforts of taxpayers to avoid the consequences of progressively increasing taxation. 30

In India the approach to the application of the principle of equality in taxation matters is shown by the following passage from Constitutional Law of India by Seervai, 2nd Ed., vol. 1, pp. 222-223:-

> "However, it was held in *East India Tobacco Co.* v. 35 *A.P.* that the wide latitude given by our Constitution to the legislature in classification for taxation was correctly described in the following words:
>
> 'A State does not have to tax everything in order to tax something. It is allowed to pick and choose 40 districts, objects, persons, methods and even rates

for taxation if it does so reasonably ..... The (U.S.) Supreme Court has been practical and has permitted a very wide latitude in classification for taxation'.

The *Tobacco* Case was cited with approval in *Khyerbari Tea Co. Ltd.* v. *Assam,* and these decisions have been followed in other cases. The same principles were affirmed in *Rai Ramkrishna* v. *Bihar,* where the court also considered the circumstances under which tax laws would be struck down as violating Arts. 14 and 19:

'... the power of taxing the people and their property is an essential attribute of the Government and Government may legitimately exercise the said power by reference to the objects to which it is applicable to the utmost extent to which Government thinks it expedient to do so. The objects to be taxed so long as they happen to be within the legislative competence of the Legislature can be taxed ... according to the exigencies of its needs, because there can be no doubt that the State is entitled to raise revenue by taxation. The quantum of tax levied ..... the conditions subject to which it is levied, the manner in which it is sought to be recovered, are all matters within the competence of the Legislature, and in dealing with the contention ... that the taxing statute contravenes Art. 19, Courts would naturally be circumspect and cautious. Where for instance it appears that the taxing statute is plainly discriminatory, or provides no procedural machinery for assessment and levy of the tax, or that it is confiscatory, Courts would be justified in striking down the impugned statute as unconstitutional. In such cases, the character of the material provisions of the impugned statute is such that the Court would feel justified in taking the view that, in substance, the taxing statute is a cloak adopted by the Legislature for achieving its confiscatory purposes. This is illustrated by .... *Kunnathat Thathunni Moopil Nair* v. *Kerala* where a taxing statute was struck down because it suffered from several fatal infirmities. On the other hand,..... (in) *Jagannath Baksh Singh* v. *U.P.* ...... a challenge to the taxing statute on the ground that its provisions were unreasonable was rejected and it was observed

that unless the infirmities in the impugned statute were of such a serious nature as to justify its description as a colourable exercise of legislative power, the Court would uphold a taxing statute'.

Decided cases show that a classification may be made not only for the imposition or recovery of a tax, but also to prevent an evasion of tax".

In Basu's Commentary on the Constitution of India, 5th Ed., vol. 1, the following are stated (at pp. 463-465):-

"Taxation law is no exception to the doctrine of equal protection.

Hence, a taxation will be struck down as violative of Art. 14 if there is no reasonable basis behind the classification made by it, for example, where differentiation is made between tax evaders belonging to the same class merely because the evasion was detected by different methods, or, if the same class of property, similarly situated, is subjected to unequal taxation. If there is no reasonable basis for the classification, the law will be struck down and it is not necessary, further, to establish that the tax 'has been imposed with a deliberate intention of differentiating between individual and individual'.

But —

(a) If the taxation, generally speaking, imposes a similar burden on every one with reference to that particular kind and extent of property, on the same *basis* of taxation, the law shall not be open to attack on the ground that the result of the taxation is to impose unequal burdens on different persons.

(b) As in the case of other laws, there is no violation of Art. 14 if there is a reasonable basis for the classification.

....

(c) In the matter of taxation laws, however, the Court permits a greater latitude to the discretion of the Legislature. In the words of the Supreme Court -

'. . . in the application of the principles, the courts, in view of the inherent complexity of fiscal adjust-

ment of diverse elements, permit a larger discretion to the Legislature in the matter of classification, so long it adheres to the fundamental principles underlying the said doctrine. The power of the Legislature to classify is of 'wide range and flexibility' so that it can adjust its system of taxation in all proper and reasonable ways'.

In tax matters, 'the State is allowed to pick and choose districts, objects, persons, methods and even rates for taxation if it does so reasonably'.

....

(d) For the same reason, where there is more than one method of assessing a tax and the Legislature selects one out of them, the Court will not be justified to strike down the law on the ground that the Legislature should have adopted another method which, in the opinion of the Court, is more reasonable, unless it is convinced that the method adopted is capricious, fanciful, arbitrary or clearly unjust.

(e) Similarly, the classification between small and large manufacturers or between imported and country tobacco for the purpose of taxation; or the classification of goldsmiths, for the purpose of exemption from sales tax, into those who make the ornaments by their personal labour or by paid artisans and those who sell ornaments produced by artisans on a commission basis; has been held to be reasonable.

(f) On the same need for flexibility in the matter of taxation, a provision empowering the Executive to exempt particular goods from a duty has been upheld as valid. Even the delegation of the power to determine the *rate* of a tax has been upheld as valid where the policy is laid down in the statute and the subordinate authority (*e.g.*, a Municipal Board) is required to follow a quasi-judicial procedure in determining the rate.

(g) As to what articles should be taxed is a question of policy and there cannot be any complaint of discrimination merely because the Legislature has decided to tax certain articles and not others. Thus, -

In a law imposing a sales tax, -

The State may not consider it administratively worth while to tax sales by small traders who have no organisational facilities for collecting the tax from their buyers and turn it over to the Government.

(h) The freedom of the Legislature is conceded not only in the choice of the articles to be taxed but also as regards the manner and rate of taxation". 5

It is, furthermore, useful to examine how the corresponding to the principle of equality principle of non-discrimination has been understood in the course of the application of the relevant provision of the European Convention on Human Rights, of 1950; the said provision is Article 14, which reads as follows:- 10

"Article 14

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status". 15 20

In Fawcett on the Application of the European Convention on Human Rights (1969, at p. 239) it is pointed out that as it is to be derived from various definitions of discrimination "non-discrimination and equality of treatment are equivalent" and "discrimination and non-discrimination are relational terms, so that whether we speak of disadvantage, equality, or advantage, we are speaking of treatment of one person or group as measured by the treatment, or the standard of treatment, of another person or group". 25 30

Then, in the same book reference is made to the decision of the European Commission of Human Rights in application No. 511/59 (see the Yearbook of the European Convention on Human Rights, No. 3, 1960, p. 394) and the following passage is to be found (at pp. 242-243) of the same textbook:- 35

"*Taxation*. In 1957 Law No. 44 was enacted in Iceland, which provided for taxation on capital assets of both individuals and corporations. The appli-

cants, who had been assessed for tax under this law, alleged before the Commission that it was an expropriation of property contrary to Article 1 of the Protocol, but that its incidence was discriminatory in that the law contained certain exemptions, in particular for co-operative societies, and preferential treatment for particular forms of enterprise.

The Commission held that:

... with regard to the complaint that Law No. 44 of 1957 violates Article 14 of the Convention in that it accords different treatment to co-operative societies and joint stock companies, it is to be observed that it is a common incident of taxation laws that they apply in different ways or in different degrees to different persons or entities in the community; whereas, accordingly, the mere fact that Law No. 44 may not act upon co-operative societies and joint stock companies in exactly the same way, does not afford any sufficient basis for calling in question its character as a legitimate means of taxation for the purposes of Article 1 of the Protocol.

In other words, the tax differential between co-operative societies and companies was a necessary component of the whole taxation scheme and was not aimed against the companies as such".

In Castberg on the European Convention on Human Rights (1974) it is pointed out (at p. 161) that "That the tax legislation of the State ... must necessarily differentiate between the tax payers according to their capital or income is so obvious that it seems superfluous even to mention it".

The following are stated, further on, in the same textbook (at pp. 161-163):-

"However, the question is where to draw the line between permissible differentiation in legislation and other government activities, on the one hand, and discrimination in violation of Art. 14 of the Convention, on the other. Is it possible to formulate certain basic guidelines for determining the concept of discrimination according to this provision of the Convention?...

The Court"—the European Court of Human Rights—"first pointed out that differential treatment in the exercise of rights violated the principle of equality of treatment if the distinction did not have 'any objective and reasonable justification'. This had to be determined in relation to the aims and effects of the measures concerned, having regard to the principles normally prevailing in a democratic society. Art. 14 would also be violated if it were clearly established that there was no reasonable relationship of proportionality between the means employed and the aim sought to be achieved".

In Jacobs on the European Convention on Human Rights (1975) it is stated (at pp. 188, 190-191):-

"The enunciation of the principle of equality, and the prohibition of discrimination, were considered so fundamental as to be placed at the beginning of the Universal Declaration of Human Rights (Article 1 and 2) and of the United Nations Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights (Article 2 and 3). These principles also have a prominent place in many national constitutions, for example in the Basic Law of the Federal Republic of Germany (Article 3), in the 'equal protection' clauses of the United States Constitution and in the Constitutions of many Commonwealth countries. Several international instruments prohibiting particular forms of discrimination, or discrimination in particular fields, have been drawn up, in the United Nations, in the International Labour Organization, in UNESCO, and elsewhere.

....

A second, and more difficult, major problem of interpretation raised by Article 14 was also dealt with by the Court in the Belgian Linguistic Case. What forms of differential treatment constitute 'discrimination'?

To argue that Article 14 prohibits all inequalities of treatment based on the grounds stated would lead to manifestly unreasonable results, since the inequality might actually be designed to benefit the less pri-

vileged class. For example, the provision of additional education facilities for the children of poorer families would not necessarily constitute discrimination. On the other hand, if only certain forms of inequality are prohibited, by what objective criteria can they be identified?

'In spite of the very general wording of the French version ('sans distinction aucune'), Article 14 does not forbid every difference in treatment in the exercise of the rights and freedoms recognised. This version must be read in the light of the more restrictive text of the English version ('without discrimination'). In addition, and in particular, one would reach absurd results were one to give Article 14 an interpretation as wide as that which the French version seems to imply. One would, in effect, be led to judge as contrary to the Convention every one of the many legal or administrative provisions which do not secure to everyone complete equality of treatment in the enjoyment of the rights and freedoms recognised. The competent national authorities are frequently confronted with situations and problems which, on account of differences inherent therein, call for different legal solutions; moreover, certain legal inequalities tend only to correct factual inequalities.......*' "

It is pertinent to refer, in particular, to a decision of the European Commission of Human Rights which relates to differentiation between married couples and single persons; it is the decision in application No. 4130/69 (see Yearbook of the European Convention on Human Rights, No. 14,1971, p. 224) in which the Commission, stated (at pp. 246-248):-

"With regard to the contributions made to the old-age and the widows' and orphans' pension funds, the Commission has already noted that, in principle, such contributions are assessed on the basis of annual income up to a certain limit in excess of which no contributions are required. No distinction is made in this respect between married and unmarried or

* The Yearbook of the European Convention on Human Rights No. 11, 1968, pp. 832, 864.

divorced women having an income, except in the case of a married couple where both spouses have an income of their own. In that case a joint assessment is possible with the consequence that the contributions payable by both spouses together amount to less than if they were assessed separately.

The Commission finds, however, that this difference, insofar as it can be said to amount to an inequality of treatment between married and unmarried or divorced women, is justified as being based on the legislator's appreciation of the general family pattern while making allowances for the generally different situation of a married couple in comparison with that of a single person. Such a difference, which is to be found in many spheres of the law, is legitimate and any inequality in the present case is not out of proportion to the purpose of the national insurance schemes concerned. Consequently, there cannot be, in this respect, any discrimination within the meaning of Art. 14 of the Convention".

Later on, in the same decision, and with regard to the complaint that there was unequal and discriminatory treatment as regards the distribution of the benefits accruing under legislation concerned, the Commission stated (at pp. 248-250):-

"In examining this final question, the Commission finds that there is no appearance of any such violation and refers to the reasons already given for finding that there was equally no discrimination in respect of the contributions made by the applicants. It is true, as has already been noted, that the General Old-Age Pensions Act differentiates between the pension benefits accruing to single persons and those accruing to married couples. This difference in treatment, however, is based on the reasoning of the Dutch legislator appreciating the difference of the situation of single persons from that of a married couple living together. This distinction is made in a legitimate interest taking into account the general family pattern of the society and is not out of proportion to the general purpose of the legislation concerned, namely to provide for an adequate standard

of living for old people and survivors. Consequently, in this regard as well, there cannot be any discrimination within the meaning of Art. 14 of the Convention".

5 *THE RIGHT TO MARRY*

Before pronouncing whether or not the *Mikrommatis* case, *supra*, has been wrongly decided, it has to be examined if it is inconsistent with Article 22(1) of the Constitution, which reads as follows:-

10 "1. Any person reaching nubile age is free to marry and to found a family according to the law relating to marriage, applicable to such person under the provisions of this Constitution".

The above constitutional provision corresponds to, *in-*
15 *ter alia,* Article 12 of the European Convention on Human Rights, of 1950, which reads as follows:-

"Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right".

20 In Fawcett on the Application of the European Convention on Human Rights (at p. 226) it is stated that it is doubtful whether Article 12 of the Convention, as drafted, would give much protection against public measures of taxation seeking to achieve family limitation, and, also,
25 in Jacobs on the European Convention on Human Rights (at p. 164) it is stated that fiscal disincentives to marriage are probably not contrary to Article 12 of the Convention.

In *Panayides* v. *The Republic,* (1965) 3 C.L.R. 107,
30 our Supreme Court has decided that a taxation measure, such as a surcharge on the income tax payable by unmarried persons, could be treated as related to the provision regarding the right to marry in Article 22.1 of the Constitution; Munir J. said, in this respect, the following (at
35 p. 118) in delivering the judgment of the Court:-

"Although, in view of the conclusion reached in connection with Articles 28 and 24 of the Constitution it has not become necessary to examine the provi-

sions of paragraph 1 of Article 22 of the Constitution, it might be observed that had the Court found that the making of a distinction for the purposes of personal taxation between married and unmarried persons had not contravened Articles 28 and 24 of the Constitution, then it would have been for consideration whether the encouragement of marriage by the imposition of a personal tax on those who do not marry does not, in fact, amount to an interference with the freedom of marriage which is safeguarded by paragraph 1 of Article 22, inasmuch as it might be said that those who do not marry were being penalised by taxation legislation on account of their failure to marry".

In the same case, there was expressed by me, on the same point, the following view, in a separate judgment (at p. 119):-

"In my opinion, the right to marry, which has been expressly safeguarded as a Fundamental Right and Liberty, necessarily implies the converse, *i.e.* the right *not* to marry. Nobody can be *free to do* something unless he is also *free not to do* it.

The distinction between married and unmarried persons under consideration in this Case, having already been found not to be reasonable, in the light of the intrinsic nature of things and as being divorced from the question of means, remains a provision which appears calculated to promote the institution of marriage. In view of Article 22.1 of the Constitution such a social policy can no longer be pursued by means of legislation. Nobody can be burdened with increased taxation by way of an inducement or compulsion to change his unmarried status into a married one. Otherwise, he is not 'free to marry'.

I would add, however, that nothing in this Judgment is intended to lay down that taxation legislation properly treating the difference of status between married and unmarried persons as a difference leading to the making of reasonable distinction on the basis of means, would also be treated as unconstitutional, as being contrary to Article 22. The matter

would have to be determined when it arises, if at all and in the meantime should be left entirely open".

VALIDITY OF THE "MIKROMMATIS" DECISION

Having carefully considered the *ratio decidendi* of the decision in the *Mikrommatis* case, *supra,* in the light of the correct application of the principle of equality—with particular reference to such application to matters of taxation and of social and economic policies—and having, also, examined the said *ratio decidendi* from the angle of its compatibility with the enjoyment of the right to marry, and, having, further, taken judicial notice of the relevant social conditions existing at the material time, I have come to the conclusion that the decision in the *Mikrommatis* case was a correct one at the time when it was reached, on December 11, 1961, and that it was not inconsistent with Articles 24 and 28, or with Article 22, of the Constitution; consequently the relevant legislation, which was based on the said decision, was not unconstitutional at the time when it was enacted.

Of course, this Court, sitting as a Full Bench, can pronounce the decision in the *Mikrommatis* case as being no longer valid, in view of developments since 1961, with the consequence that the aforementioned legislation would cease to be validly applicable.

In this respect it is useful to examine, first, the evolution of our case-law since the decision in the *Mikrommatis* case:

In *Xinari* v. *The Republic,* 3 R.S.C.C. 98, which was decided on April 19, 1962, it was held that it was unconstitutional to deprive either member of a married couple of the cost-of-living allowance payable to him, or her, as part of his or her emoluments, as the case might be; the following passage is to be found (at pp. 100-101):-

> "Article 28 safeguards, *inter alia,* the principle of equality before the law and the administration and in the opinion of the Court the notion of equal pay for equal work in relation to public officers is an integral part of such principle.
>
> There can be no doubt that though the cost-of-

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living allowance is not part of the basic salary of public officers it is part of their remuneration. It is very significant in this respect that the Pensions Law, CAP 311 was amended in 1958 so as to incorporate in the pensionable emoluments of a public officer such part of the cost-of-living allowance 'amounting to twelve and a half per centum of the sum total of salary and overseas allowance'.

It appears, therefore, that depriving either of two public officers, married to each other, of a cost-of-living allowance, under General Order 16, results in a disparity in relation to the remuneration of public officers doing the same work, *i.e.* where there are two public officers doing the same work and one being unmarried receives a cost-of-living allowance and the other one being married is deprived of such allowance by virtue of General Order 16, and it remains to be examined whether such a course is constitutional.

As already stated the cost-of-living allowance is, at present, co-related to the cost-of-living index which is prepared on the basis of items normally used by an average family of four. In the opinion of the Court General Order 16 does not, however, result in achieving a reasonable differentiation based on the fact of co-habitation and the consequent sharing of some expenses by two public officers married to each other. This is proved to be so by the mere fact that even if two such public officers live separately, either because they are posted at different places or for any other reason whatsoever, they still do not, under General Order 16, both receive a cost-of-living allowance.

....

It is when one turns to pensions that the inconsistency of General Order 16 with the principle of equality becomes most glaring. Depriving either of two public officers, married to each other, of a cost-of-living allowance, under General Order 16, results in the pension of one of them, being less than what it might otherwise have been by virtue of the above-

mentioned amendment* of CAP 311 in 1958. Actually the Chief Establishment Officer in his evidence was not prepared to go to the extent of stating that he would still consider proper the making, after the said amendment of CAP. 311, of a provision such as General Order 16.

In view of the foregoing the Court has come to the conclusion that General Order 16 is contrary to, and inconsistent with, the principle of equality safeguarded under Article 28 because it contravenes the notion of equal pay for equal work in relation to public officers and it does not result in achieving, as it could have been destined to achieve, a reasonable differentiation based on the fact of co-habitation and the consequent sharing of some expenses by two public officers married to each other".

It appears from the above passage that the principle of equal pay for equal work, which did not receive particular attention in the *Mikrommatis* case, was brought forcibly into the foreground, as regards married and unmarried persons in the *Xinari* case.

In the later case of *Panayides* v. *The Republic* (1965) 3 C.L.R. 107, it was held that legislation rendering a bachelor liable to pay personal tax, which was 20% in excess of what would otherwise have been paid by him had he not been a bachelor, was unconstitutional as being contrary to Articles 24 and 28 of the Constitution, in other words as contravening the principle of equality. Munir J., in delivering the judgment of the Court, referred with approval to the construction of the expression "equal before the law" in Article 28.1 of the Constitution which was given in the *Mikrommatis* case, *supra* (at p. 131) and proceeded to state the following (at pp. 116, 117):-

"Coming now to the specific question whether the making of such a distinction between married and unmarried persons in this respect was *reasonable,* the first point to consider is whether, having regard to the circumstances and conditions prevailing in Cyprus, and particularly having regard to the customs

* s. 2(1) (viii) of the Pensions Law, Cap. 311

and traditions of the particular Community of the Communal Chamber which has imposed such personal taxation, it is reasonable to assume that a bachelor is in fact in a more advantageous position financially, all other relevant things being equal, than a married person of the same social and economic class as such bachelor. It is true that when a bachelor gets married he assumes added financial responsibilities towards his wife and children and, to that extent, it may be said that a married man's financial obligations are thus greater than a bachelor's. This distinction may more readily appear reasonable in certain countries where an unmarried man is not expected to have any financial or other obligations towards his family, such as in the case of those countries where as soon as a young man comes of age he probably leaves home and probably severs all financial and other ties with his parents' family. It is well known, however, that in Cyprus, and particularly amongst the Greek Community, an unmarried man is expected by custom and tradition to undertake financial obligations not only towards his parents (which is also a legal obligation) but also towards the members of his family and in particular towards his unmarried sisters, and there are often instances where a young man may find that he is not in a financial position to marry, and is not expected to do so, until his sisters have been settled in marriage.

Furthermore, the unreasonableness of the distinction might be illustrated by considering the extreme case of a bachelor and a person whose wife dies, for example, the day after their marriage. Could it be said that it would be reasonable to make a distinction, for the purposes of the personal taxation in question, between a bachelor and such a widower? The answer must of course in the Court's view be in the negative.

It should also be observed that the provisions in the Law in question allowing deductions to be made in respect of the wife and children of a married man already appear to make adequate allowance for the added financial burden of a person who is responsible for maintaining a family and bringing up his

children. Having thus made this allowance for a married man, it seems unreasonable to discriminate further between married and unmarried persons by imposing an increased rate of taxation on unmarried persons.

In these circumstances the Court is of the opinion that it is not reasonable to make in Cyprus a distinction between married and unmarried persons in so far as the liability to pay personal tax, of the nature for which provision is made in Article 87 of the Constitution, is concerned, nor does such a distinction have to be made, in the Court's opinion, in view of the intrinsic nature of things.

The Court is, therefore, of the opinion that as such distinction, not being a reasonable one to make and not being one which has to be made in view of the intrinsic nature of the status of a bachelor, contravenes Article 28 and paragraph 1 of Article 24 of the Constitution, and, therefore, the relevant legislative provision in question, namely, section 20 of Schedule 'A' to Law 16/61 and paragraphs 1 and 2 of the Table of Rates of Taxation attached thereto, are unconstitutional".

It is useful to point out, at this stage, that the personal tax to which the *Panayides* case related was essentially a tax in the nature of income tax (see the case of *Hjikyriacos and Sons Ltd.*, 5. R.S.C.C. 22, 27).

It should be recalled that when the *Mikrommatis* case, *supra*, was determined in 1961 the surcharge imposed on a bachelor for purposes of income tax was apparently one of the considerations which led the Supreme Constitutional Court to reach the conclusion which it did in that case; this is derived from the following passage in its judgment (at p. 132):-

"The Court has examined section 19 of CAP 323 in the whole context of CAP 323 (including provisions such as allowances in respect of children and increased taxation on the income of unmarried persons) as well as against the background of the status of marriage as existing in Cyprus at present and it

has come to the conclusion that, although the application of section 19 of CAP 323 may result in the making of a reasonable distinction between married and unmarried persons, it does not discriminate against married persons, as such, and it is not, therefore, unconstitutional on such ground". 5

So, it might not be quite certain that the outcome of the *Mikrommatis* case would have been the same had it been preceded, and not followed, by the *Panayides* case, *supra*.

It is pertinent to examine next the evolution of the relevant legislation since the decision in the *Mikrommatis* case: 10

When that case was determined the relevant legislative provision was section 19 of the Income Tax Law, Cap. 323, subsection (2) of which read as follows:- 15

> "(2) If either a husband or a wife makes written application to that intent to the Commissioner before the 31st January in the year of assessment, returns of income shall be required to be rendered by the husband and wife separately in the year of assessment and in subsequent years until the application is revoked and the amount of the tax chargeable on the husband pursuant to subsection (1) shall be apportioned between the spouses in such manner as to the Commissioner appears reasonable and the amounts so apportioned shall be assessed and charged on each spouse separately". 20 25

Thus it was open to either spouse to elect that the income tax payable in respect of the aggregation of their income should be apportioned between them, and be paid separately by them, in such a manner as the Commissioner of Income Tax would consider reasonable. 30

Subsequently, however, a provision of this nature was omitted from the legislative enactments (Gr. C. Ch. Laws 18/62 and 9/63 and Law 58/61) under which the *sub judice* assessments of income tax were raised. 35

On May 24, 1962, after the *Mikrommatis* case had been determined, there was promulgated the European Convention on Human Rights (Ratification) Law, 1962

(Law 39/62), and, as a result of it, and because of the provisions of Article 169.3 of the Constitution, such Convention has now superior force to any municipal law in Cyprus, including, of course, the income tax legislation
5 (see, *inter alia, Kannas* v. *The Police,* (1968) 2 C.L.R. 29). Article 8(1) of the Convention provides that "everyone has the right to respect for his private and family life.....", in the same way as Article 15.1 of our Constitution provides that "every person has the right to re-
10 spect for his private and family life".

In the judgment in the *Mikrommatis* case there is no indication that the constitutionality of the relevant legislative provision was examined in relation to the right safeguarded by means of Article 15.1 of the Constitution.

15 It may, also, be stated, at this stage, that, because of the ratification of the European Convention on Human Rights, there became applicable in Cyprus Article 14 of the Convention, which excludes discrimination and corresponds, in this respect, to Article 28 of the Constitution.

20 By means of the International Covenants (Economic, Social and Cultural Rights, and Civil and Political Rights) (Ratification) Law, 1969 (Law 14/69), which was promulgated on February 28, 1969, Cyprus has ratified the two United Nations International Covenants on Human
25 Rights, which were adopted by the United Nations General Assembly on December 16, 1966.

Article 10(1) of the International Covenant on Economic, Social and Cultural Rights provides that —

"The States Parties to the present Covenant reco-
30 gnize that:

1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible
35 for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses".

Article 23(1) (2) of the International Covenant on Civil and Political Rights provides as follows:-

"1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

2. The right of men and women of marriageable age to marry and to found a family shall be recognized".

Since the concept of the "protection of the family" is expressly referred to in the above-quoted provisions of Covenants ratified by Cyprus, it is pertinent to mention that in 1957, before even the decision in the *Mikrommatis* case, which was determined prior to the adoption, and ratification by Cyprus, of the said Covenants, the Federal Constitutional Court of the Federal Republic of Germany held (by means of Decision No. 9, of January 17, 1957, in case BvL 4/54) that income tax legislation providing that spouses should be assessed jointly if they were not living permanently apart from each other, with the exception that income from paid employment of the wife in a trade unconnected with her husband was to be excluded from the joint assessment, was unconstitutional, not only as being contrary to the principle of equality, but because it violated, also, Article 6 of the Basic Law (that is, the German Constitution), which provided that the marriage and the family enjoy the special protection of the State.

The above decision of the German Constitutional Court could not have influenced the decision in the *Mikrommatis* case at the time when that case was determined, because Cyprus had not then undertaken any commitment to protect the family as it has done when it ratified the two aforementioned Covenants; but, now such a commitment may be found to be of some significance in relation to the matters under consideration in the present proceedings.

The question, therefore, arises, in the light of factual and legal developments since the decision in the *Mikrommatis* case, whether it should be upheld as being still valid, or whether it should be treated as having in the meantime, been deprived of its validity, with the result that it has to be overruled; and in the latter instance the relevant legislative provisions, which were enacted in accordance with it, would no longer be applicable, in that they would

be inconsistent with the Constitution or with international agreements which, under Article 169.3 of the Constitution, are of superior force to such provisions.

Inextricably connected with the above question is the 5 issue of since when are the decision in the *Mikrommatis* case, and the derived therefrom legislative provisions, to be found to be devoid of validity, assuming that they are no longer validly applicable; prospectively only, or retrospectively, and if so as from what date in the past?

10 I find it, therefore, necessary to refer, at this stage, to the concept of "prospective overruling", as it has been expounded in conjunction with the principle of judicial precedent:

PROSPECTIVE OVERRULING

15 The general rule is that when judicial precedent is overruled this is done with both retrospective and prospective effect, but, in relation, *inter alia,* to judicial decisions concerning constitutionality resort has been had to the course which has come to be described as "prospective over-20 ruling", so as not to affect legal situations which have been created through widespread and long standing reliance on the overruled judicial precedent.

The above course has been adopted, in particular, on certain occasions by the U.S.A. Supreme Court and so it 25 is useful to refer to some of its relevant case-law:

In *Gelpcke* v. *The City of Dubuque,* 17 L. Ed. 520, Mr. Justice Swayne said (at pp. 525-526):-

"The late case in Iowa, and two other cases of a kindred character in another State, also overruling 30 earlier adjudications, stand out, as far as we are advised, in unenviable solitude and notoriety. However we may regard the late case in Iowa as affecting the future, it can have no effect upon the past. 'The sound and true rule is, that if the contract, when 35 made, was valid by the laws of the State as then expounded by all departments of the government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation, or decision of its courts altering

the construction of the law'. *Ohio Life & Trust Co.* v. *Debolt*, 16 How., 432.

The same principle applies where there is a change of judicial decision as to the constitutional power of the Legislature to enact the law. To this rule, thus enlarged, we adhere. It is the law of this court. It rests upon the plainest principles of justice. To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal. The rule embraces this case".

In *Great Northern Railway Company* v. *Sunburst Oil & Refining Company*, 77 L. Ed. 360, Mr. Justice Cardozo in delivering the opinion of the Court said (at pp. 366-367):-

"This is not a case where a court in overruling an earlier decision has given to the new ruling a retroactive hearing, and thereby has made invalid what was valid in the doing. Even that may often be done, though litigants not infrequently have argued to the contrary. *Tidal Oil Co.* v. *Flanagan*, 263 U.S. 444, 450, 68 L. ed., 382, 385, 44 S. Ct. 197; *Fleming* v. *Fleming*, 264 U.S. 29, 68 L. ed. 547, 44 S. Ct. 246; *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill*, 281 U.S. 673, 680, 74 L. ed. 1107, 1113, 50 S. Ct. 451; cf. *Montana Nat. Bank* v. *Yellowstone County*, 276 U.S. 499, 503, 72 L. ed. 673, 675, 48 S. Ct. 331. This is a case where a court has refused to make its ruling retroactive, and the novel stand is taken that the constitution of the United States is infringed by the refusal.

We think the Federal constitution has no voice upon the subject. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions. Indeed there are cases intimating, too broadly (cf. *Tidal Oil Co.* v. *Flanagan*, 263 U.S. 444, 68 L. ed. 382, 44 S. Ct. 197, *supra*), that it *must* give them that effect; but never has doubt been expressed that it *may* so

treat them if it pleases, whenever injustice or hardship will thereby be averted. *Gelpcke* v. *Dubuque*, 1 Wall. 175, 17 L. ed. 520; *Douglas* v. *Pike County*, 101 U.S. 677, 687, 25 L. ed. 968, 971; *Loeb* v. *Columbia Twp*. 179 U.S. 472, 492, 45 L. ed. 280, 290, 21 S. Ct. 174; *Harris* v. *Jex*, 55 N.Y. 421, 14 Am. Rep. 285; *Menges* v. *Dentler*, 33 Pa. 495, 499, 75 Am. Dec. 616; *Com*. v. *Fidelity & C. Trust Co*. 185 Ky. 300, 215 S.W. 42; *Mason* v. *A.E. Nelson Cotton Co*. 148 N.C. 492, 510, 18 L.R.A. (N.S.) 1221, 128 Am. St. Rep. 635, 62 S.E. 625; *Hoven* v. *McCarthy Bros. Co*. 163 Minn. 339, 204 N.W. 29; *Farrior* v. *New England Mortg. Secur. Co*. 92 Ala. 176, 12 L.R.A. 856, 9 So. 532; *Falconer* v. *Simmons*, 51 W. Va. 172, 41 S.E. 193. On the other hand, it may hold to the ancient dogma that the law declared by its courts had a Platonic or ideal existence before the act of declaration, in which event the discredited declaration will be viewed as if it had never been, and the reconsidered declaration as law from the beginning. *Tidal Oil Co*. v. *Flanagan*, 263 U.S. 444, 68 L. ed. 382, 44 S. Ct. 197, *supra; Fleming* v. *Fleming*, 264 U.S. 29, 68 L. ed. 547, 44 S. Ct. 246, *supra; Central Land Co*. v. *Laidley*, 159 U.S. 103, 112, 40 L. ed. 91, 94, 16 S. Ct. 80; see, however, *Montana Nat. Bank* v. *Yellowstone County*, 276 U.S. 499, 72 L. ed. 673, 48 S. Ct. 331, *supra*. The alternative is the same whether the subject of the new decision is common law (*Tidal Oil Co*. v. *Flanagan*, 263 U.S. 444, 68 L. ed. 382, 44 S. Ct. 197, *supra*) or statute. *Gelpcke* v. *Dubuque*, 1 Wall. 175, 17 L. ed. 520, *supra; Fleming* v. *Fleming*, 264 U.S. 29, 68 L. ed. 547, 44 S. Ct. 246, *supra*. The choice for any state may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature. We review not the wisdom of their philosophies, but the legality of their acts. The State of Montana has told us by the voice of her highest court that with these alternative methods open to her, her preference is for the first. In making this choice, she is declaring common law for those within her borders. The common law as administered by her judges ascribes to the decisions of her highest court a power to bind and loose that is unextinguish-

ed, for intermediate transactions, by a decision overruling them. As applied to such transactions we may say of the earlier decision that it has not been overruled at all. It has been translated into a judgment of affirmance and recognized as law anew. Accompanying the recognition is a prophecy, which may or may not be realized in conduct, that transactions arising in the future will be governed by a different rule. If this is the common law doctrine of adherence to precedent as understood and enforced by the courts of Montana, we are not at liberty, for anything contained in the constitution of the United States, to thrust upon those courts a different conception either of the binding force of precedent or of the meaning of the judicial process".

In *Linkletter* v. *Walker*, 14 L. Ed. 2d 601, Mr. Justice Clark said (at pp. 604-606, 607-608):-

"At common law there was no authority for the proposition that judicial decisions made law only for the future. Blackstone stated the rule that the duty of the court was not to 'pronounce a new law, but to maintain and expound the old one'. 1 Blackstone, Commentaries 69 (15th ed. 1809). This Court followed that rule in *Norton* v. *Shelby County*, 118 U.S. 425, 30 L. ed. 178, 6 S. Ct. 1121 (1886), holding that unconstitutional action 'confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed'. At 442, 30 L. ed. at 186. The judge rather than being the creator of the law was but its discoverer. Gray, Nature and Sources of the Law 222 (1st ed. 1909). In the case of the overruled decision, *Wolf* v. *Colorado, supra*, here, it was thought to be only a failure at true discovery and was consequently never the law; while the overruling one, Mapp. was not 'new law but an application of what is, and theretofore had been, the true law'. Shulman, Retroactive Legislation, 13 Encyclopaedia of the Social Sciences 355, 356 (1934).

On the other hand, Austin maintained that judges do in fact do something more than discover law; they

make it interstitially by filling in with judicial interpretation the vague, indefinite, or generic statutory or common-law terms that alone are but the empty crevices of the law. Implicit in such an approach is 5 the admission when a case is overruled that the earlier decision was wrongly decided. However, rather than being erased by the later overruling decision it is considered as an existing juridical fact until overruled, and intermediate cases finally de- 10 cided under it are not to be disturbed.

The Blackstonian view ruled English jurisprudence and cast its shadow over our own as evidenced by *Norton* v. *Shelby County, supra.* However, some legal philosophers continued to insist that such a 20 rule was out of tune with actuality largely because judicial repeal of time did 'work hardship to those who (had) trusted to its existence'. Cardozo, Address to the N.Y. Bar Assn., 55 Rep. NY State Bar Assn. 263, 296-297 (1932). The Austinian view gained 15 some acceptance over a hundred years ago when it was decided that although legislative divorces were illegal and *void,* those previously granted were immunized by a prospective application of the rule of the case. *Bingham* v. *Miller,* 17 Ohio 445 (1848). And 25 as early as 1863 this Court drew on the same concept in *Gelpcke* v. *Dubuque,* 1 Wall. 175, 17 L. ed. 520 (1863). The Supreme Court of Iowa had repeatedly held that the Iowa Legislature had the power to authorize municipalities to issue bonds to 30 aid in the construction of railroads. After the City of Dubuque had issued such bonds, the Iowa Supreme Court reversed itself and held that the legislature lacked such power. In *Gelpcke,* which arose after the overruling decision, this Court held that the 35 bonds issued under the apparent authority granted by the legislature were collectible. 'However we may regard the late (overruling) case in Iowa as affecting the future, it can have no effect upon the past'. At 206, 17 L. ed. at 525. The theory was, as Mr. Justice 40 Holmes stated in *Kuhn* v. *Fairmont Coal Co.* 215 U.S. 349, 371, 54 L. ed. 228, 239, 30 S. Ct. 140 (1910), 'that a change of judicial decision after a contract has been made on the faith of an earlier

one the other way is a change of the law'. And in 1932 Mr. Justice Cardozo in *Great Northern R. Co.* v. *Sunburst Oil & Refining Co.* 287 U.S. 358, 77 L. ed. 360, 53 S. Ct. 145, 85 ALR 254, applied the Austinian approach in denying a federal constitutional due process attack on the prospective application of a decision of the Montana Supreme Court. He said that a State 'may make a choice for itself between the principle of forward operation and that of relation backward'. At 364, 77 L. ed. at 366. Mr. Justice Cardozo based the rule on the avoidance of 'injustice or hardship' citing a long list of state and federal cases supporting the principle that the courts had the power to say that decisions though later overruled 'are law none the less for intermediate transactions'. At 364, 77 L. ed. at 366. Eight years later Chief Justice Hughes in *Chicot County Drainage Dist.* v. *Baxter State Bank,* 308 U.S. 371, 84 L. ed. 329, 60 S. Ct. 317 (1940), in discussing the problem made it clear that the broad statements of Norton, *supra,* 'must be taken with qualifications'. He reasoned that the actual existence of the law prior to the determination of unconstitutionality 'is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration'. He laid down the rule that the 'effect of the subsequent ruling as to invalidity may have to be considered in various aspects'. At 374, 84 L. ed. at 333.

....

Thus, the accepted rule today is that in appropriate cases the Court may in the interest of justice make the rule prospective. And 'there is much to be said in favor of such a rule for cases arising in the future'. *Mosser* v. *Darrow,* 341 U.S. 267, at 276, 95 L. ed. 927, at 934, 71 S. Ct. 680 (dissenting opinion of Black, J.).

While the cases discussed above deal with the invalidity of statutes or the effect of a decision overturning long-established common-law rules, there seems to be no impediment—constitutional or philosophical—to the use of the same rule in the constitutional area where the exigencies of the situation

require such an application. It is true that heretofore, without discussion, we have applied new constitutional rules to cases finalized before the promulgation of the rule. Petitioner contends that our method of resolving those prior cases demonstrates that an absolute rule of retroaction prevails in the area of constitutional adjudication. However, we believe that the Constitution neither prohibits nor requires retrospective effect. As Justice Cardozo said, 'We think the federal constitution has no voice upon the subject'.

Once the premise is accepted that we are neither required to apply, nor prohibited from applying, a decision retrospectively, we must then weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further on retard its operation. We believe that this approach is particularly correct with reference to the Fourth Amendment's prohibitions as to unreasonable searches and seizures. Rather than 'disparaging' the Amendment we but apply the wisdom of Justice Holmes that 'the life of the law has not been logic: it has been experience'. Holmes, The Common Law 5 (Howe ed. 1963)."

In *Desist* v. *United States,* 22 L. Ed. 2d 248 Mr. Justice Stewart said (at pp. 254-256) in relation to the application of an earlier decision of the Court in *Katz* v. *United States,* 19 L. Ed. 2d 576:-

"Ever since *Linkletter* v. *Walker*, 381 U.S. 618, 629, 14 L. Ed. 2d 601, 608, 85 S. Ct. 1731, established that 'the Constitution neither prohibits nor requires retrospective effect' for decisions expounding new constitutional rules affecting criminal trials, the Court has viewed the retroactivity or nonretroactivity of such decisions as a function of three considerations. As we most recently summarized them in *Stovall* v. *Denno,* 338 U.S. 293, 297, 18 L. Ed. 2d 1199, 1203, 87 S. Ct. 1967, 'The criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the

old standards and (c) the effect on the administration of justice of a retroactive application of the new standards'.

Foremost among these factors is the purpose to be served by the new constitutional rule. This criterion strongly supports prospectivity for a decision amplifying the evidentiary exclusionary rule. Thus, it was principally the Court's assessment of the purpose of *Mapp* v. *Ohio,* 367 U.S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684; 84 ALR 2d 933 which led it in *Linkletter* to deny those finally convicted the benefit of *Mapp's* extension of the exclusionary rule to the States: 'all of the cases .... requiring the exclusion of illegal evidence have been based on the necessity for an effective deterrent to illegal police action .... We cannot say that this purpose would be advanced by making the rule retrospective. The misconduct of the police .... has already occurred and will not be corrected by releasing the prisoners involved'. 381 U.S., at 636-637, 14 L. Ed. 2d at 613.

We further observed that, in contrast with decisions which had been accorded retroactive effect, 'there is no likelihood of unreliability or coercion present in a search-and-seizure case'; the exclusionary rule is but a 'procedural weapon that has no bearing on guilt', and 'the fairness of the trial is not under attack'. 381 U.S., at 638, 14 L. Ed. 2d at 613-614. Following this reasoning of *Linkletter,* we recently held in *Fuller* v. *Alaska,* 393 U.S. 80, 21 L. Ed. 2d 212, 89 S. Ct. 61, that the exclusionary rule of *Lee* v. *Florida,* 392 U.S. 378, 20 L. Ed. 2d 1166, 88 S. Ct. 2096, should be accorded only prospective application. Analogizing *Lee* to *Mapp,* we concluded that evidence seized in violation of § 605 of the Federal Communications Act was 'no less relevant and reliable than that seized in violation of the Fourth Amendment', and that both decisions were merely 'designed to enforce the federal law'. 393 U.S., at 81, 21 L. Ed. 2d at 214.

The second and third factors—reliance of law enforcement officials, and the burden on the admini-

stration of justice that would flow from a retroactive application—also militate in favor of applying *Katz* prospectively".

In *Cipriano* v. *City of Houma*, 23 L. Ed. 2d 647, it was stated in the opinion of the Court (at pp. 651-652):-

"The challenged statute contains a classification which excludes otherwise qualified voters who are as substantially affected and directly interested in the matter voted upon as are those who are permitted to vote. When, as in this case, the State's sole justification for the statute is that the classification provides a 'rational basis' for limiting the franchise to those voters with a 'special interest', the statute clearly does not meet the 'exacting standard of precision we require of statutes which selectively distribute the franchise'. *Kramer* v. *Union Free School District* No. 15, *supra,* at 632, 23 L. Ed. 2d at 592. We therefore reverse the judgment of the District Court.

Significant hardships would be imposed on cities, bondholders, and others connected with municipal utilities if our decision today were given full retroactive effect. Where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity. *Great Northern R. Co.* v. *Sunburst Oil & Refining Co.,* 287 U.S. 358, 364, 77 L. Ed. 360, 366, 53 S. Ct. 145, 85 ALR 254 (1932). See *Chicot County Drainage Dist.* v. *Baxter State Bank,* 308 U.S. 371, 84 L. Ed. 329, 60 S. Ct. 317 (1940). Cf. *Linkletter* v. *Walker,* 381 U.S. 618, 14 L. Ed. 2d 601 85 S. Ct. 1731 (1965). Therefore, we will apply our decision in this case prospectively. That is, we will apply it only where, under state law, the time for challenging the election result has not expired, or in cases brought within the time specified by state law for challenging the election and which are not yet final. Thus, the decision will not apply where the authorization to issue the securities is legally complete on the date of this decision. Of course, our decision will not affect the validity of securities which

have been sold or issued prior to this decision and pursuant to such final authorization"

In *City of Phoenix* v. *Kolodziejski,* 26 L. Ed. 2d 523, Mr. Justice White stated (at pp. 530-531):-

"We must therefore affirm the District Court's declaratory judgment that the challenged provisions of the Arizona Constitution and statutes, as applied to exclude nonproperty owners from elections for the approval of the issuance of general obligation bonds, violate the Equal Protection Clause of the United States Constitution.

In view of the fact that over the years many general obligation bonds have been issued on the good-faith assumption that restriction of the franchise in bond elections was not prohibited by the Federal Constitution, it would be unjustifiably disruptive to give our decision in this case full retroactive effect. We therefore adopt a rule similar to that employed with respect to the applicability of the *Cipriano* decision: our decision in this case will apply only to authorizations for general obligation bonds that are not final as of June 23, 1970, the date of this decision. In the case of States authorizing challenges to bond elections within a definite period, all elections held prior to the date of this decision will not be affected by this decision unless a challenge on the grounds sustained by this decision has been or is brought within the period specified by state law. In the case of States, including apparently Arizona, that do not have a well-defined period for bringing challenges to bond elections, all elections held prior to the date of this decision that have not yet been challenged on the grounds sustained in this decision prior to the date of this decision will not be open to challenge on the basis of our ruling in this case. In addition, in States with no definite challenge period, the validity of general obligation bonds that have been issued before this decision and prior to the commencement of an action challenging the issuance on the grounds sustained by this decision will not be affected by the decision in this case. Since appellee in this case brought her constitutional challenge to

the Phoenix election prior to the date of our decision in this case and no bonds have been issued pursuant to that election, our decision applies to the election involved in this case".

5 In both the *Cipriano* and *Phoenix* cases, *supra*, which were affirmed in *Hill* v. *Stone*, 44 L. Ed. 2d 172, 181, there was involved the application of the equal protection rule and, for reasons which the U.S.A. Supreme Court found to be compelling, its decisions on the issue of con-
10 stitutionality were given only prospective effect.

The question of prospective overruling was examined in England in *Jones* v. *Secretary of State for Social Services*, [1972] A.C. 944; Lord Simon of Glaisdale said, in what he described as 'afterthoughts', the following (at pp.
15 1026-1027):-

"I am left with the feeling that, theoretically, in some ways the most satisfactory outcome of these appeals would have been to have allowed them on the basis that they were governed by the decision in *Dowling's*
20 case, but to have overruled that decision prospectively. Such a power—to overrule prospectively a previous decision, but so as not necessarily to affect the parties before the court—is exercisable by the Supreme Court of the United States, which has held it
25 to be based on the common law: see *Linkletter* v. *Walker* (1965) 381 U.S. 618.

In this country it was long considered that judges were not makers of law but merely its discoverers and expounders. The theory was that every case was
30 governed by a relevant rule of law, existing somewhere and discoverable somehow, provided sufficient learning and intellectual rigour were brought to bear. But once such a rule had been discovered, frequently the pretence was tacitly dropped that the rule
35 was pre-existing: for example, cases like *Shelley's Case* (1581) 1 Co. Rep. 93b, *Merryweather* v. *Nixan* (1799) 8 Term Rep. 186 or *Priestly* v. *Fowler* (1837) 3 M. & W. 1 were (rightly) regarded as new departure in the law. Nevertheless, the theory, however
40 unreal, had its value—in limiting the sphere of lawmaking by the judiciary (inevitably at some disad-

vantage in assessing the potential repercussions of any decision, and increasingly so in a complex modern industrial society), and thus also in emphasising that central feature of our constitution, the sovereignty of Parliament. But the true, even if limited, nature of judicial lawmaking has been more widely acknowledged of recent years; and the declaration of July 20, 1966, may be partly regarded as of a piece with that process. It might be argued that a further step to invest your Lordships with the ampler and more flexible powers of the Supreme Court of the United States would be no more than a logical extension of present realities and of powers already claimed without evoking objection from other organs of the constitution. But my own view is that, though such extension should be seriously considered, it would preferably be the subject-matter of parliamentary enactment. In the first place, informed professional opinion is probably to the effect that your Lordships have no power to overrule decisions with prospective effect only; such opinion is itself a source of law; and your Lordships, sitting judicially, are bound by any rule of law arising extra-judicially. Secondly, to proceed by Act of Parliament would obviate any suspicion of endeavouring to upset one-sidedly the constitutional balance between executive, legislature and judiciary. Thirdly, concomitant problems could receive consideration—for example, whether other courts supreme within their own jurisdictions should have similar powers as regards the rule of precedent; whether machinery could and should be devised to apprise the courts of the potential repercussions of any particular decision; and whether any court (including an Appellate Committee on your Lordship's House) should sit in banc when invited to review a previous decision".

In my opinion, the above approach of Lord Simon is quite applicable in England, where there is no written Constitution and where normally there would be no need to resort to prospective overruling, because an ordinary Act of the Parliament would serve the same purpose equally well, or even better. But, in the case of Cyprus, as in the case of United States, where there are written

Constitutions which cannot be easily amended, prospective overruling might be, in my view, for the reasons set out in the cited above U.S.A. case-law, the proper course to be adopted when the circumstances so require.

5 It is the first time, as far as I am in a position to know, that the possibility of adopting the principle of prospective overruling is being canvassed in a judgment in Cyprus; there is, however, a case which indicates that our Supreme Court has, to a certain limited extent, adopted, indirectly, 10 an approach similar to prospective overruling, in constitutional matters; this is *Pavlides* v. *The Republic,* (1967) 3 C.L.R. 217, where a bachelor, who had paid income tax on a taxation scale applicable to unmarried persons and which was higher than that payable by married persons, 15 was claiming a refund, of the difference paid by way of higher income tax, after the Supreme Court had decided in *Panayides* v. *The Republic, supra,* that the distinction as regards tax payable by married and unmarried persons was unconstitutional.

20 Hadjianastassiou J. in delivering the judgment of the Supreme Court, on appeal, in the *Pavlides* case, *supra,* said (at pp. 229-230):-

"With regard to the first ground of appeal counsel for the appellant, in his able argument, has submitted 25 that since the appellant had paid the tax assessed upon him prior to the decision of the Supreme Court in the *Panayides* case *(supra)* he ought not to find himself in a worse position than bachelors who had paid their tax after the said decision, because this 30 would be contrary to the principle of equality safeguarded by Article 28 of the Constitution.

He further submitted that as Article 148 of the Constitution provides that 'subject to the provisions of paragraph 3 of Article 144, any decision of the 35 Supreme Constitutional Court on any matter within its jurisdiction or competence shall be binding on all courts, organs, authorities and persons in the Republic' a decision of the Supreme Court, exercising the competence of the Supreme Constitutional Court 40 under Article 146, such as in the *Panayides* case, was binding not only inter partes, as in the case of a re-

ference under Article 144, but constituted a decision establishing the unconstitutionality of the provisions relating to the special taxation scale for unmarried persons, thus rendering it unlawful for the respondent to refuse to refund the relevant difference in tax resulting on the basis of the first and second assessments; Respondent's refusal led to unlawful enrichment of the State at the expense of the citizen, submitted counsel for the appellant.

The learned trial Judge in dismissing the contention of counsel for the appellant based on the principle of equality, has referred to a German case reported at p. 92 in the 'Yearbook on Human Rights for 1957' under the heading 'Equal Treatment in General', and had this to say at p. 23 of his judgment (pp. 545-546 of the report):

'In that case the joint assessment of married couples, which up to then had been legal and customary, had been declared by the Court on the 21st February, 1957 to be unconstitutional. The Federal Constitutional Court ruled on the 12th December, 1957 (BV ref. GE7/194) 'that no person could demand the adjustment of a tax assessment which had become final before the 21st February, 1957, on the ground of the principle of equality'. It was held by the Federal Constitutional Court 'that this involved violation of the Basic Law, since the certainty of the law and justice were equally essential features of the rule of law' and that 'the legislator was at liberty to decide to which of these two principles he wished to give preference; inequality thereby created did not offend against the principle of equality'.'

We are in full agreement with the above view".

It is rather interesting to note that quite recently, on April 8, 1976, the Court of Justice of the European Communities appeared to echo, in *Defrenne* v. *Societe Anonyme Belge de Navigation Aerienne (Sabena) (Case 43/75)*, (1976) 2 C.M.L.R. 98, the underlying theme of prospective overruling, when it delivered its judgment regarding the application of Article 119 of the Treaty of Rome, which provides for "equal pay for equal work";

the following were stated by the Court in this connection (at p. 128):-

"*The effect in time of this judgment*

(69) The Governments of Ireland and the United Kingdom have drawn the Court's attention to the possible economic consequences of attributing direct effect to the provisions of Article 119, on the ground that such a decision might, in many branches of economic life, result in the introduction of claims dating back to the time at which such effect came into existence. (70) In view of the large number of people concerned such claims, which undertakings could not have foreseen, might seriously affect the financial situation of such undertakings and even drive some of them to bankruptcy.

(71) Although the practical consequences of any judicial decision must be carefully taken into account, it would be impossible to go so far as to diminish the objectivity of the law and compromise its future application on the ground of the possible repercussions which might result, as regards the past, from such a judicial decision. (72) However, in the light of the conduct of several of the member-States and the views adopted by the Commission and repeatedly brought to the notice of the circles concerned, it is appropriate to take exceptionally into account the fact that, over a prolonged period, the parties concerned have been led to continue with practices which were contrary to Article 119, although not yet prohibited under their national law. (73) The fact that, in spite of the warnings given, the Commission did not initiate proceedings under Article 169 against the member-States concerned on grounds of failure to fulfil an obligation was likely to consolidate the incorrect impression as to the effects of Article 119. (74) In these circumstances, it is appropriate to hold that, as the general level at which pay would have been fixed cannot be known, important considerations of legal certainty affecting all the interests involved, both public and private, make it imposible in principle to reopen the question as regards the past. (75) Therefore, the direct effect

of Article 119 cannot be relied on in order to support claims concerning pay periods prior to the date of this judgment, except as regards those workers who have already brought legal proceedings or made an equivalent claim". 5

Unfortunately, no arguments have been advanced, or invited, during the hearing of this appeal, as regards the possible application of the principle of prospective overruling in the present instance, because it was not, and could not be, envisaged, on the basis of the notices of the 10 appeal and of the cross-appeal, that such an issue might arise.

CONCLUSIONS

In the light of all that I have set out at considerable length in this judgment I have reached the following con- 15 clusions:

(a) The *sub judice* assessments have to be, and are hereby, annulled as, in determining the relevant objections of the respondent, the appellant Commissioner of Income Tax applied legislation which was not in force at the ma- 20 terial time, instead of the legislation properly applicable thereto.

(b) The *Mikrommatis* case, *supra,* was rightly decided at the time when it was determined.

(c) It was not open to the trial Judge not to follow 25 the decision in the *Mikrommatis* case, but it is open to a Full Bench of this Court to overrule it.

(d) I leave entirely open, for the time being, the issue of whether or not, because of intervening factual and legal developments, the decision given in the *Mikrommatis* case, 30 and embodied in legislation based on it, has to be treated as being no longer valid; I have had to adopt this course, not only because there is not, in the present case, such material before the Court, concerning factual and legal developments after the decision in the *Mikrommatis* case, 35 as should lead me to the definitive conclusion that it is imperative to overrule it, but, also, because, even assuming that it were to be overruled, I do not have adequate

factors before me in order to be enabled to pronounce whether it is to be overruled only prospectively, or retrospectively too, and, if so, as from what time in the past.

(e) I, also, leave, likewise, entirely open the issue of the validity of the new section 22 of Law 58/61, which was not applicable to the assessments in question and which is not part of the legislation enacted on the basis of the decision in the *Mikrommatis* case.

In the result, the *sub judice* assessments have, in my opinion, to be declared *null* and *void* and of no effect whatsoever for the reason stated in conclusion (a), above.

STAVRINIDES, J.: I agree with the judgment of His Honour the President and have nothing to add.

TRIANTAFYLLIDES, P.: In the result the annulment of the *sub judice* income tax assessments by the trial Judge is upheld, by majority, for the various reasons set out in the judgments just delivered.

There shall be no order as to the costs of the appeal or of the cross-appeal.

Appeal dismissed.
No order as to costs.