court, not only to appoint an attorney for a person unable to employ counsel but to appoint adequate counsel.[1]

If the court intended to say that the Sixth Amendment to the United States Constitution applied to this Indiana case, as it might be inferred that it did, this would be an erroneous statement, since the Sixth Amendment, as well as other provisions in the original federal bill of rights, applies only to the federal government and not to the state government.[2]

However, the due process clause of the Fourteenth Amendment does apply to the states and the United States Supreme Court has extended the due process clause so as to include most of the provisions of the original federal bill of rights[3] and it has extended it to include the right to counsel,[4] but in so doing it has taken the position that the due process clause does not compel a state to furnish counsel.[5] For this reason the court was wrong in saying that the action of the trial judge in appointing counsel violated the due process clause of the United States Constitution.

But the due process clause of the Fourteenth Amendment also guarantees an impartial trihunal[6] and it might be that in this case, as the court said, the judge acted so that his tribunal was not impartial, even though due process does not guarantee a jury trial (or at least that he did not give appellant an orderly course of procedure); and to this extent the court might correctly say that the trial was in violation of the Constitution of the United States.

LEGISLATION

THE PERRY-DECATUR BOUNDARY DISPUTE

In 1933 the Board of Commissioners of Marion County entered an order changing the boundary between Perry and Decatur Townships. The effect of this action was to locate valuable property of the Indianapolis Power & Light Co. within the limits of Perry Township which had formerly been in Decatur Township. In 1943 an

1. State ex rel. White v. Hilgemann, Judge, 218 Ind. 572, 34 N.E.(2d) 129 (1941); Knox County Council v. State ex rel. McCormick, 217 Ind. 493, 29 N.E.(2d) 405 (1940); Sanchez v. State, 199 Ind. 235, 247, 157 N.E. 1, 5 (1927). In a federal case the United States Supreme Court has held that the guaranty of counsel in the Sixth Amendment of the United States Constitution has the same meaning. Glasser v. United States, 315 U.S. 60 (1942). See also People v. Blevins, 251 Ill. 381, 96 N.E. 214 (1911).
2. Betts v. Brady, Warden, 316 U.S. 455 (1942); Barren v. Mayer, etc. of Baltimore, 7 Pet. 243 (1833); Willis, "Constitutional Law" (1935) 502, 562.
3. Near v. Minnesota etc., 283 U.S. 697 (1931); Willis, "Constitutional Law" (1935) 655.
4. Powell et al. v. Alabama, 287 U.S. 45 (1932).
5. Betts v. Brady, Warden, 316 U.S. 455 (1942).
6. Tumey v. Ohio, 273 U.S. 510 (1927).
7. Quercia v. United States, 289 U.S. 466 (1933).

emergency bill became law[1] which provided for a uniform method of altering township boundaries. The act concluded with a proviso which restored boundaries previously changed by a different procedure where such townships included within their limits a part of a city having a population of 300,000 or more. The proviso obviously affected the Perry-Decatur boundary and none other, and the effect was to restore the line existing prior to 1933. Perry Township and others brought suit for a declaratory judgment in which the constitutionality of the act was attacked, and from a decision upholding it, they appealed to the Supreme Court. Held, reversed. The proviso is inherently local and special in nature and is, therefore, void. Perry Civil Township of Marion County et al. v. Indianapolis Power & Light Co. et al., ——Ind.——, 51 N.E. (2d) 371 (1943).

The reasoning by which the court invalidated this enactment may be summarized thusly: (1) Historically, legislation affecting counties has usually been special;[2] (2) Similarly, legislation affecting townships has usually been general, though " . . . the general assembly might, in the first instance, have directly defined the boundaries of every township in the state . . . [3]; (3) Townships and counties may be treated alike from the standpoint of legislation affecting them;[4] (4) The matter of changing township boundaries may properly be the subject of general laws;[5] (5) As a general law the proviso is void because, though general in form, it is special in fact since the classification rests on no rational basis and is an arbitrary limitation on the operation of the act.[6]

It is elementary that a statute even under a constitutional prohibition is not *a priori* invalid because it is local or special, and here the appellees vigorously contended that even though special the act was constitutional. The court seems not to have adequately answered that contention.

Assuming the proviso is not general, it is not necessarily void.[7] The Indiana Constitution expressly forbids special legislation on seventeen enumerated subjects, the tenth of which relates to "county and township business."[8] However, the term "business," as here employed, " . . . when applied to a public corporation, signifies the conduct of the usual affairs of the corporation, and the conduct of such affairs

1. Acts 1943, c. 23, § 1, Ind. Stat. Ann. (Burns, 1933 Supp.) § 65-130. Approved by the Governor February 13, 1943.
2. See instant case at 373.
3. See instant case at 373.
4. See instant case at 373.
5. See instant case at 374. Note that the Court did not assert that special laws on the subject would be improper.
6. See instant case at 374.
7. Ind. Const. Art. IV, § 23.
8. Ind. Const. Art. IV, §22. "The General Assembly shall not pass local or special laws, in any of the following enumerated cases, that is to say: . . . [10.] Regulating county and township business . . . ."

as commonly engage the attention of township and county officers."[9] This definition of subsection 10, which has remained unchanged since 1883,[10] appears not to include the matter of altering township boundaries, and while the court stated that such might properly be the subject of general laws, they carefully avoided any assertion that the proviso violated the express prohibition of the subsection.

The framers of the constitution, in an abundance of caution, followed the seventeen prohibitions with a section forbidding special legislation " . . . in all other cases where a general law can be made applicable . . . . "[11] If the statute here in jeopardy is special but does not do violence to Section 22 (10), the inquiry then is: Would a general law be applicable?[12] A review of the cases indicates that it is exceedingly doubtful whether this question is a judicial one.[13]

Two years after the adoption of our present constitution, it was decided in the case of Thomas et al. v. Clay County[14] that the courts are competent to inquire whether or not a general law could be made applicable. There was little, if any, discussion of this problem until 1868 when the much cited case of Gentile v. State[15] inaugurated the doctrine that the question rests exclusively in the legislative judgment and discretion, and that its determination is not open to judicial review.[16] This doctrine was consistently followed with hardly a dissent

9. Mount, Trustee v. The State, ex rel. Richey, 90 Ind. 29, 31 (1883). This definition was approved in Mode et al. v. Beasley et al., 143 Ind. 306, 316, 42 N. E. 727, 730 (1895) and again in Bolivar Township, Bd. of Fin. of Benton County v. Hawkins et al., 207 Ind. 171, 196, 191 N. E. 158, 168 (1934).

10. See note 9 supra.

11. Ind. Const. Art. IV, § 23. "In all cases enumerated in the preceding Section, and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the State."

12. "The next question is, this not being 'county business', Does §23 of Art. 4 apply. . .?" Crist et al. v. Molony et al., 187 Ind. 614, 616, 119 N.E. 1001, 1003 (1918). See also Horack, "Special Legislation: Another Twilight Zone" (1936) 12 Ind. L. J. 109 where it is said at 124: "The form of enactment is not conclusive; thus an act general in form but special in fact will be treated, judicially, as a special act. Again, it should be warned that this does not mean that the act is unconstitutional. If not relating to one of the seventeen prohibited subjects, its validity cannot be questioned unless a general law would have been inapplicable."

13. See notes 14, 15, and 16 infra; cf. Note (1942) 18 Ind. L.J. 140.

14. 5 Ind. 4 (1854).

15. 29 Ind. 409 (1868).

16. " . . . the question whether a general law . . . can be made applicable and of uniform operation throughout the State, rests exclusively in the legislative judgment and discretion, which cannot be reviewed by the courts; and . . . when the Legislature has determined the question by enacting such a law, that is final and conclusive on that subject." Mode et al. v. Beasley et al., 143 Ind. 306, 315, 42 N.E. 727, 729 (1895) citing with approval Gentile v. State, 29 Ind. 409 (1868).

for sixty-six years[17] and was cited with approval by a federal court as late as 1931.[18] In 1934 the case of Heckler v. Conter et al.[19] boldly purported to overthrow the long-standing rule of the Gentile case and to re-establish the position taken in Thomas et al. v. Clay County. So far as discovered, however, the Heckler case has not been followed on this point,[20] and furthermore has since been rejected in Groves v. Lake County.[21] The Groves opinion failed even to mention the Heckler case and apparently went directly back to the Gentile case doctrine, thus leaving the question in a state of uncertainty. Whatever may be said of the decision in the Groves case, it undoubtedly modifies and weakens the bold assertions of the Heckler opinion,[22] yet the court in the instant case by-passed and entirely avoided discussion of this issue.

It should be further noted that "The problem in last analysis is one of legislative policy, with a wide margin of discretion conceded to the lawmakers. Only in cases of plain abuse will there be revision by the courts."[23] It would thus appear that the courts should tread lightly with respect to the policy underlying legislative action for this is the legislature's domain, and the courts are usually not

17. Jennings County et al. v. Fetter, 193 Ind. 288, 139 N.E. 451 (1923); Crist et al. v. Molony et al., 187 Ind. 614, 119 N.E. 1001 (1918); Mode et al. v. Beasley et al., 143 Ind. 306, 42 N.E. 727 (1895); Young v. Tipton County et al., 137 Ind. 323, 36 N.E. 1118 (1894); Bell et al. v. Maish et al., 137 Ind. 226, 36 N.E. 358 (1894); State ex rel. City of Terre Haute v. Kolsem et al., 130 Ind. 434, 29 N.E. 595 (1891); Hovey, Governor, et al. v. Foster, 118 Ind. 502, 21 N.E. 39 (1889); City of Evansville v. State, 118 Ind. 426, 21 N.E. 267 (1889); Wiley v. Bluffton, 111 Ind. 152, 12 N.E. 165 (1887); Johnson v. Wells County et al., 107 Ind. 15, 8 N.E. 1 (1886); Warren v. City of Evansville, 106 Ind. 104, 5 N.E. 876 (1886); Kelly, Treasurer, v. The State, 92 Ind. 236 (1883); Mount, Trustee, v. State ex rel. Richey, 90 Ind. 29 (1883). See also Crawford, "Statutory Construction" (1940) § 83; Sutherland, "Statutory Construction" (1st ed. 1891) § 116.

18. See Handy v. Johnson et al., 51 F. (2d) 809, 811 (E.D.Tex. 1931).

19. 206 Ind. 376, 187 N.E. 878 (1933).

20. Cf. Crowe v. St. Joseph County et al., 210 Ind. 404, 3 N.E. (2d) 76 (1936).

21. 209 Ind. 371, 199 N.E. 137 (1936); accord, State v. Clements, 215 Ind. 666, 22 N.E. (2d) 819 (1939).

22. Horack, "Special Legislation: Another Twilight Zone" (1936) 12 Ind. L. J. 109, 120.

23. Mr. Justice Cardozo in Williams v. Mayor & City Council of Baltimore, 289 U. S. 36, 46 (1933). See Sutherland, "Statutory Construction" (Horack's ed. 1943) § 2106. See also Horack, "Special Legislation: Another Twilight Zone" (1936) 12 Ind. L. J. 109 where it is said at 119: "The question —— whether a particular community . . . needs special legislative attention —— requires only a policy judgment; and when a court endeavors to review such a judgment they enter into the field of legislation. This, of course, is not necessarily bad, although it may lead to 'mistaken judgment and conscientious weakness'."

so well informed as to the reasons which impelled the enactment.[24] A statute otherwise valid should not be stricken down though the policy upon which it rests in a vicious one.[25] Even though it be doubtfully assumed that a desirable result was obtained in the instant case, it is submitted that the short-cut by which the court reached its objective affords little satisfaction to the proponents of the act and those injuriously affected by its fall.

PROCEDURE

CONCLUSIVENESS OF SHERIFF'S RETURN

In a recent case the Indiana Appellate Court held:
(1) that an alleged non-resident defendant in an action in personam (to recover an unpaid loan) properly raised the question of jurisdiction over his person, where the sheriff had returned that the defendant had been served by leaving a copy at his last and usual place of residence, by an answer in abatement rather than by a motion to quash;
(2) that the taking of a deposition to be used on the trial of the issues raised by the answer in abatement did not constitute a general appearance in the action; and
(3) that because the fact as to the residence of the defandant was not presumptively within the knowledge of the sheriff, the defendant was not bound by the usual conclusive presumption as to the correctness of a sheriff's return. Donnelley v. Thorne, —— Ind. App. ——, 51 N.E. (2d) 873 (1943).

The first two propositions decided are unquestionably correct and find uniform support in the previous Indiana cases. The motion to quash is properly used only where the issue sought to be raised is one which can be decided on the record itself and which, therefore, does not require the proof of extrinsic facts for its decision. The issue raised was as to the residence of the defendant in the state and clearly the proper procedure for raising the question is by answer in abatement and not by a motion to quash. Aetna Ins. Co. v. Black, 80 Ind. 513 (1881). In view of that fact that the taking of a desposition on the merits of a case is not a general appearance, Coplinger v. The David Gibson, 14 Ind. 480 (1860), it follows that the taking of a deposition on an answer in abatement is not a general appearance. The fact that the evidence adduced on the taking of the deposition may be related in part to the merits of the case would not alter the result.

The third point decided goes beyond any previous Indiana case on this subject so far as the language of the opinion is concerned although obviously the result reached is quite proper, and indeed necessary.

The Supreme Court cases on this subject have held that in the

24. Vandalia R.R. v. Stillwell, 181 Ind. 267, 104 N.E. 289 (1914); Pittsburgh, C.C. & St. L. Ry. v. State, 180 Ind. 245, 102 N.E. 25 (1913); State v. Barrett, 172 Ind. 169, 87 N.E. 7 (1909).
25. Mount, Trustee, v. State ex rel. Richey, 90 Ind. 29 (1883).