NOTES AND COMMENTS

CONTRACTS

THIRD PARTY BENEFICIARY CONTRACTS

The City of Fort Wayne and appellee contracted for the construction of a sewer beneath the surface of a paved street upon which appellant's lot abutted. Damages were sought for the injury to appellant's frame building, caused by tunneling. The complaint averred that the city and appellee knew the nature of the soil and that appellant's property would be deprived of lateral support. The contract stipulated that the contractor (appellee) would pay all damages arising from the work whether initiated by negligence or not. Appellant contended that the contract is in the nature of insurance against incidental or consequential damages for which otherwise appellant would have no remedy. Appellee demurred. When the demurrer was sustained, the appellant refused to plead over. Held, Reversed. Where the sewer contractor agreed to pay all claims for damages for injury to property, owner of the building could recover as a third party beneficiary if owner could prove causal connection. *Freigy v. Gargaro Co.*, — Ind. —, 60 N.E. (2d) 288 (1945).

This case supports the modern doctrine that a third party beneficiary, not a party to the contract, can sue upon the contract.[1] The doctrine holds that where one person agrees with another on a sufficient consideration, to do a thing for the benefit of a third person, the latter may enforce the contract.[2] Ability of the third party beneficiary to sue, even though not privy to the contract, has been supported in most of the American states, including Indiana, although it is not the majority rule in England today.[3]

The theory upon which the court proceeded was that the right of the third party beneficiary rests on the liability of the promisor, and this liability must affirmatively appear from the language of the contract when properly construed.[4] The liability so appearing cannot be extended or enlarged merely on the ground that the situation and cir-

1. Carson Pirie Scott & Company v. W. J. Parrett et al., 346 Ill. 252, 178 N.E. 498, 81 A.L.R. 1262, 1271 (1931); Hendrick v. Lindsay, 93 U.S. 143 (1876); Bird v. Lanius, 7 Ind. 615 (1856); Harper v. Ragan, 2 Blackf. 39 (Ind. 1837); Corbin, "Contracts for the Benefit of Third Persons in the Federal Courts," (1930) 39 Yale L. J. 601.
2. Day v. Patterson, 18 Ind. 114 (1862); Ferris v. Am. Brewing Company, 155 Ind. 539, 58 N.E. 701, 52 L.R.A. 305 (1900); Miller v. Farr, 178 Ind. 36, 98 N.E. 805 (1912).
3. McCoy v. McCoy, 32 Ind. App. 38, 69 N.E. 193 (1903); Edwards v. Van Cleave, 47 Ind. App. 347, 94 N.E. 596 (1903); Reed v. Adams Steel & Wire Works, 57 Ind. App. 259, 106 N.E. 885 (1914); Nash Engineering Co. v. Marcy Realty Corp., Inc. et al., 222 Ind. 396, 54 N.E. (2d) 263 (1944); Knight-Jillison v. Castle, 172 Ind. 97, 87 N.E. 976 (1909); La Mourea v. Rhude, 209 Minn. 53, 295 N.W. 304 (1940); Tweddle v. Atkinson, 1 Best & S. 393, 121 Eng. Reprint, 762 (1861); 9 Am. Jur., Building and Construction Contracts, §94 ff.
4. Carson Pirie Scott & Company v. W. J. Parrett et al., 346 Ill. 252, 178 N.E. 498, 81 A.L.R. 1260, 1271 (1931); Anson, "Contracts" (1930), §295. A number of theories have been offered as rationales

cumstances of the parties justify or demand further or other liability.[5] If a contract be entered into for a direct benefit of a third person, not a party thereto, such third person may sue for breach thereof.[6] The test is whether the benefit to the third person is direct to him or is but an incidental benefit to him arising from the contract.[7] If direct, he may sue on the contract; if incidental, he has no right of recovery.[8]

In an indemnity contract, the damages necessary for recovery need not be restricted to damages awarded by a court for liability or damages incurred by the violations of a legal right in property.[9] Here, apparently, there was no negligence or other breach of duty by the city or appellee as against the appellant. It is not essential to the right of creditor or donee beneficiary of a contract to recover thereon that he be identified when the contract containing the promise is made.[10]

The instant case, allowing the parties to a contract the capacity to bestow a right on a third person, is in accordance with the weight of authority.[11]

CONTRACTS

MEANING OF "PROFITS"

Appellant suited for retirement benefits under the respondent corporation's pension plan which provided that, "No pension or gratuity

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of the third party beneficiary doctrine. (1) The agency theory makes the promisee the agent of the beneficiary, but this is fictional since the beneficiary does not make the promisee his agent. Gardner v. Denison, 217 Mass. 492, 105 N.E. 359, 51 L.R.A. (N.S.) 1108 (1914); Williston, Contracts (1920), §352; Anson, Contracts (1930), §277, 283. (2) Another theory finds a trust in a third party beneficiary contract; but this is weak, since there is no holding of legal title by a trustee. Seaver v. Ransom et al., 224 N.Y. 233, 120 N.E. 639 (1918); O'Hara et al. v. Dudley et al., 95 N.Y. 403 (1884); Anson, Contracts (1930), §277, 283a, 285. (3) Another theory allows the third party to recover on the basis of quasi-contract, but this theory breaks down because there is no unjust enrichment. Anson, Contracts (1930), 295. (4) The equitable asset theory holds that the promisee is the debtor of the beneficiary and hence makes a contract for his benefit, and this becomes an equitable asset of the beneficiary; however, this could apply only in the case of a third party creditor beneficiary and not in the case of a donee beneficiary. National Bank v. Grand Lodge, 98 U.S. 123 (1878); Hall v. Marston, 17 Mass. 575 (1822); Anson Contracts, §286. (5) One theory speaks of the third party's recovery as an equitable remedy, but this does not explain antecedent rights and duties. Smith et al. v. Thompson et al., 250 Mich. 302, 230 N.W. 156, 73 A.L.R. 1389, 1395 (1930). The theory of the instant case is immune from all of the above-mentioned objections.

5. Hageman v. Holmes, 179 Ill. 275, 53 N.E. 739 (1899).
6. Kinnan v. Hurst Co., 317 Ill. 251, 148 N.E. 12 (1925).
7. Vial v. Norwich Union Fire Ins. Society, 257 Ill. 355, 100 N.E. 929, 44 L.R.A. (N.S.) 317 (1913).
8. Searles v. City of Flora, 225 Ill. 167, 80 N.E. 98 (1906).
9. 27 Am. Jur., Indemnity, sec 20.
10. La Mourea v. Rhude, 209 Minn. 53, 259 N.W. 304, 306 (1940).
11. Carson Pirie Scott & Company v. W. J. Parrett et al., 346 Ill. 252 178 N.E. 498, 81 A.L.R. 1262, 1271 (1931).

shall be paid except out of the profits of the company and no pension or gratuity or claim thereto shall be a charge upon or against or payable out of any of the capital assets of the company." The defense was: first, that there were no profits, as depreciation on operating facilities was properly chargeable as an expense before profits were realized; second, that an item on the respondent's books, "Reserve for Pensions and Benefits" was only an estimate of contingent liability and not a segregation of assets constituting a trust fund. Held, the court found the meaning of the word "profits" in the contract to be plain and unambiguous, interpreting it to be net income less items of expense; including an allowance for depreciation of assets as an expense. There was no evidence to sustain the appellant's contention that the "Reserve for Pensions and Benefits" was a segregation of assets representing a trust fund. *Gearns v. Commercial Cable Co.*, 293 N.Y. 105, 56 N.E. (2d) 67 (1944), affirming 266 App. Div. 315, 42 N.Y.S. (2d) 81 (1943); motion for reargument denied, 293 N.Y. 755, 56 N.E. (2d) 749 (1944).

If the meaning of the contract is clear, the effect will not be controlled by an erroneous construction given to it by the parties.[1] Profits are defined by the courts in a general manner to be the excess of receipts over expenditures.[2] Where statutes provide for taxes on the profits of municipal utilities, the term "profits" has usually been construed to include an allowance for depreciation as an expense.[3] In contracts between master and servant providing for salary and sharing of profits, the courts have interpreted profits to include depreciation as an expense so that payments will not be made out of the capital assets of the company.[4] Dividends, of course, can only be paid out of the profits of a corporation, and the stockholders are liable to creditors in the event dividend payments are made without first allowing for depreciation to

1. Gardner v. Caylor, 24 Ind. App. 521, 56 N.E. 134 (1900).
2. Providence Rubber Company v. Goodyear, 9 Wall. 788, 804 (U.S. 1869); see Bates v. Porter, 74 Cal. 224, 15 Pac. 732 (1887); Curry v. Charles Warner Company, 2 Marv. 98 (Del.), 42 Atl. 425 (1895).
3. City of Norfolk v. Board of Supervisors of Nansemond County, 168 Va. 606, 192 S.E. 588 (1937); People ex Rel Binghamton Light, Heat, and Power Company v. Stevens, 204 N.Y. 22, 23, 25, 96 N.E. 114, 118, 119 (1911); People ex Rel Jaimaica Water Supply Company v. Board of Tax Commissioners, 196 N.Y. 39, 57, 58, 89 N.E. 581, 586, 587 (1909). But cf. Mr. Justice Spratley, dissenting in City of Norfolk v. Board of Supervisors of Nansemond County, supra at 636, 192 S.E. at 601, ". . . in determining profits. . . If, in addition to current repairs and maintenance, an allowance is made for the replacement of original parts, and the plant kept in its original condition of usefulness, it is apparent no additional sum should be allowed for general depreciation."
4. Swaney v. Derragon, 281 Mich. 142, 143, 274 N.W. 741 (1937), "Profits are defined as the net gain made from an investment or from the prosecution of some business after payment of all expense incurred, and the term is not to be confused with earnings or receipts which deal only with income and not with operating costs, fixed charges, overhead, depreciation, or expenses." Indiana Veneer and Lumber Company v. Hageman, 57 Ind. App. 668, 105 N.E. 253 (1915); Arthur Jordan Company v. Caylor, 36 Ind. App. 640, 76 N.E. 419 (1905); E. B. Hartwell v. E. A. Becker, 181 Mo. App. 408, 168 S.W. 837 (1914); Cf. W. E. Jones v. W. F. Davidson, 2 Sneed 448 (Tenn. 1854).

replace capital assets.[5] In businesses, such as temporary exhibitions, where the initial investment is not intended to be replaced, obviously, depreciation is not allowable as an expense to ascertain the profits.[6]

The courts have followed a logically consistent pattern in defining the word "profits" to include the expense of depreciation, since profits are produced by capital and if no allowance was made for the replacement of capital then profits could no longer be accumulated. In the instant case, the contract itself is an obligation and therefore an expense, but the word "profit" is used to make the pension expense one of *contingent* liability; a type of unsecured claim.

CRIMINAL LAW

THE PROBLEM OF SIMILAR OFFENSES

L., a sales department manager, feloniously took goods from his own and other departments and removed them, during and after store hours, from the establishment where he was employed. He had no authority to remove goods from the premises without procuring a requisition. L. delivered the goods to G., who knew that they had not been legally obtained. G. subsequently sold them, sharing proceeds with L. Charged with grand larceny, L. pleaded guilty. G. was later tried and convicted for receiving stolen goods. Motion for new trial on grounds that verdict was contrary to law and not sustained by sufficient evidence overruled. Ruling assigned as error. *Conviction*, reversed: Statute[1] defines distinct offenses of feloniously receiving stolen goods and feloniously receiving embezzled goods. Where affidavit charged receipt of stolen goods and evidence showed receipt of embezzled goods, the variance requires reversal. *Gentry v. State*, —— Ind.——, 61 N.E. (2d) 641 (1945).

This case presents the anomalous situation of a defendant charged with and convicted of receiving stolen goods from a person who plead

5. Bank of Morgan v. Reid, 27 Ga. App. 123, 107 S.E. 555 (1921); Fricke v. Angemeier, 53 Ind. App. 140, 101 N.E. 329 (1913); Burk v. Ottawa Gas and Elec., Company, 87 Kan. 6, 123 Pac. 857 (1912). But see Guaranty Trust Co. of N.Y. v. Grand Rapids G. H. and M. Ry Co., 7 F. Supp. 511, 520 (W.D. Mich. 1931).

6. Eyster v. Centennial Board of Finance, 94 U.S. 500 (1876).

1. Ind. Stat. Anno. (Burns' 1933) § 10-3097: "Receiving Stolen Goods. Whoever buys, receives, conceals, or aids in the concealing of, anything of value, which has been stolen, taken by robbers, embezzled, or obtained by false pretenses, knowing the same to have been stolen, taken by robbers, embezzled, or obtained by false pretenses, shall, . . . "

The problem presented in the principal case would not arise in any of the states cited in the Burns' list of comparative legislation. Under a similar statute, the Ohio court has held averment of the character of the offense by which the property was originally wrongfully obtained unnecessary. Whiting v. State, 48. O.S. 220 (1891). The other legislation is not strictly parallel: Idaho has a separate statute defining receipt of embezzled goods; Illinois and Oregon classify embezzlement as larceny and goods obtained by embezzlement are "stolen"; California and New York have theft legislation and the property would be "stolen" regardless of the species of theft involved.

guilty[2] of larceny escaping initial liability[3] because the court determined that the original taker had not "stolen" the goods but had "embezzled" them. Since there was no evidence from which the jury could find larceny,[4] "stolen goods" had not been received; a material

2. "Nobody had talked to him about the difference between larceny and embezlement." Brief for Appellant, p. 70, Gentry v. State, —— Ind. ——, 61 N.E. (2d) 641 (1945). With the problem presented in the text, compare the effect of an improvident plea of guilty made through mistake of law concerning the offense committed: Overruling a timely motion to permit withdrawal of the plea stating that the defendant was not guilty of the crime charged would be an abuse of discretion. Capps v. State, 200 Ind. 4, 161 N.E. 8 (1928). Motion for new trial will not be entertained. Meyers v. State, 156 Ind. 388, 59 N.E. 1052 (1901). Appeal may be made, however, to test sufficiency of charge to which the plea was addressed. Pattee v. State, 109 Ind. 545, 10 N.E. 421 (1886). In Indiana, no appeal would lie on behalf of the state. The error of law does not prevent an effective plea of double jeopardy to the correct charge for the same transaction. State v. Morrison, 165 Ind. 461, 75 N.E. 968 (1905). A writ of coram nobis might be available. Trattner v. State. 185 Ind. 188, 113 N.E. 243 (1916); Orfield, "Write of Error Coram Nobis" (1932) 8 Ind. L. J. 247. Granting a writ of coram nobis would constitute a waiver of the plea of double jeopardy. Kleihege v. State, 202 Ind. 546, 177 N.E. 59 (1931). It remains unlikely that any attempt would be made to contest a lighter sentence, e.g. larceny rather than embezzlement.

3. Motion for new trial constitutes a waiver of the plea of double jeopardy. State v. Balseley, 159 Ind. 395, 65 N.E. 185 (1902). Statute of limitations is tolled during pendency of the motion.

4. "In our opinion only one reasonable inference can be drawn from the facts in this case . . . that the merchandise . . . was embezzled." Principal case at 641. The statement of facts given in the text includes facts not contained in the opinion. Compare principal case at 641. L. testified that he "worked inside the store," that he took a drill and tires "from the service station" which was "out of my department." Certified transcript of evidence quoted in Brief for Appellant, pp. 64, 68, 61, 66, Gentry v. State, —— Ind. ——, 61 N.E. (2d) 641 (1945). The store manager testified that "under the rules of the company or under any of my rules," L. or any other employee "was not privileged to take any merchandise belonging to our company out of the store unless it was properly recorded." Id. at 93. L. admitted he had not obtained requisitions. Id. at 68, 96.

The embezzlement statute specifies a misappropriation by an employee of the employer's property to which he has access, control or possession "while in such employment." Ind. Stat. Anno. (Burns' 1933) 10-1704. The statute incorporates the crime of larceny by servant, making the nebulous distinction betwen custody and possession relatively unimportant. State v. Wingo, 89 Ind. 204 (1863). The determinative question is whether "the property at the time of the conversion is rightfully in the control or possession of the wrongdoer, by virtue of his employment." Wynegar v. State, 157 Ind. 577, 580, 62 N.E. 38 (1901); Note (1921) 11 A.L.R. 801. The property must be obtained within the scope of employment. Colip v. State, 153 Ind. 584, 55 N.E. 739 (1899); Bowen v. State, 189 Ind. 644, 128 N.E. 926 (1920). The conversion must occur during the employment. Wynegar v. State, supra at 580.

In the instant case, it is submitted that no special trust

element of the crime charged had not been established.[5] The defendant had been convicted for a crime of which he was innocent. The fact that he was guilty of another and similar offense which might have been charged is legally irrelevant; the conviction was contrary to law.[6]

The court preferred, however, to justify the reversal on the ground of variance.[7] In Indiana, a variance "which does not tend to prejudice the substantial rights of the defendant upon the merits" is to be deemed immaterial.[8] Whether a variance affects substantial rights is to be determined by reference to the principles underlying the general rule of criminal procedure that allegations and proof must correspond; namely (1) that the accused shall be definitely informed as to "the nature and cause of the accusation against him," so that he may be enabled to present his defense and not be taken by surprise by the evidence offered in trial;[9] and (2) that he may be protected

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existed regarding property taken from departments other than L.'s own; property taken after closing hours is not taken "during employment." Similar fact situations have supported convictions for larceny rather than embezzlement. Marcus v. State, 26 Ind. 101 (1866); Com. v. Davis, 104 Mass. 548 (1870); Com. v. Barry, 116 Mass. 1 (1874); Zysman v. State, 52 Tex. Cr. Rep. 432, 60 S.W. 669 (1901); Note (1940) 125 A.L.R. 373: 87 Am. St. Rep. 19 (1902); 88 Am. St. Rep. 559 (1903). The rationale most consistent with the embezzlement statute is that the physical possession was not obtained within the scope of employment; many of the cases cited in the annotations depend on the trespass to the constructive possession of the master by a servant having merely custody. The recent decision of Warren v. State, —— Ind. ——, 62 N.E. (2d) 624, is in the same category. "The facts in Gentry v. State, supra, clearly distinguish it from the case at bar." Id. at 625. It is submitted that the facts reported in the opinion do distinguish the cases but that the facts certified from the trial court afford no clear ground for distinction.

5. Davis v. State, 196 Ind. 213, 147 N.E. 766 (1925).
6. Deal v. State, 140 Ind. 354, 39 N.E. 930 (1895); Luther v. State, 177 Ind. 619, 98 N.E. 640 (1912).
7. Principal case at 642.
8. Ind. Stat. Anno. (Burns' 1933) § 9-1127 cl. 10. Thirty-one states have comparable legislation. This type of legislation reflects a relaxation of the rigor of old common law rules of criminal pleading which made any variance fatal. The earlier rules "were merely artifices of mercy developed not to protect innocence, but te shield guilt from the unjustifiable savagery of the common law." Kavanagh, "Improvement of Administration of Criminal Justice by Exercise of Judicial Power" (1925) 11 A.B.A.J. 217, 220. For discussions of the practices culminating in such legislation see Perkins, "Absurdities of Criminal Procedure" (1926) 11 Iowa L. Rev. 297; Pound, "The Causes of Popular Dissatisfaction with the Administration of Justice" (1906) 29 A.B.A.Rep. 395.
9. U.S. Const. Amend. VI; Ind. Const. Art I, § 13. "The words 'nature and cause of the accusation' have a well-defined meaning, . . . that meaning is that the gist of an offense shall be charged in direct and unmistakable terms." Hinshaw v. State, 188 Ind. 447, 124 N.E. 458 (1919); "For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth . . ." United States v. Cruikshank,

against another prosecution for the same offense.[10] Accordingly, a variance is not prejudicial where allegations and proof substantially correspond, or where the variance is not of a character which "could have misled the accused on trial," or where the allegation is surplusage.[11] A variance is prejudicial whenever the indictment or information charges a specific offense and the proof establishes commission of a different crime not included in that charged.[12]

When tested by the basic principles stated above, the latter rule seems in at least two situations to result in an insistence upon technicality at the cost of substantial merit: (1) where a single transaction may constitute one of several (as opposed to one or more) related offenses depending upon elements external to the immediate fact situation;[13] and (2) where subdivisions are found to exist within crimes having the same gist.[14] The instant case illustrates both sit-

92 U.S. 542, 558 (1875); Berger v. United States, 295 U.S. 78, 82 (1935); cf. Ind. Stat. Anno. (Burns' 1933) § 9-1104.

10. Berger v. United States, 295 U.S. 78, 82 (1935); Edwards v. State, 220 Ind. 490, 494, 44 N.E. (2d) 304, 306 (1942). See generally, Millar, "The Function of Criminal Pleading" (1922) 12 J. Cr. L. & Crim. 500.

11. E.g. in the offense of receiving stolen goods. Substantial correspondence: Miller v. State, 165 Ind. 566, 76 N.E. 245 (1905) (description of property received). Not misleading: Marco v. State, 188 Ind. 540, 547, 125 N.E. 34, 40 (1919) (conviction for receiving stolen goods affirmed as against contention that variance existed because property had been taken by robbers; the conceded variance was "not erroroneous as being misleading, uncertain or ambiguous.") (distinguishable from principal case on ground that robbery includes larceny). Surplusage: Blum v. State, 196 Ind. 675, 148 N.E. 193 (1925)) (value of property received). See generally Berger v. United States, 295 U. S. 78, 83 (1935).

12. For Justice Marshall's reasons see The Hoppet v. United States, 7 Cranch 389, 394 (U.S. 1813); Note (1931) 73 A.L.R. 1484.

13. E.g. the external element distinguishing embezzlement from larceny is the employment relation; that fact of employment is within the peculiar knowledge of the employee. Assuming that he has been charged with feloniously taking the goods of X whom he cannot but know to be his employer, it is difficult to see how he could be misled on trial by introduction of evidence of his employment, i.e. why allegation of act and intent is not sufficient information as to the nature and the cause of the accusation against him. Where the offenses are mutually exclusive, a conviction for one is a bar to prosecution for the other on the same transaction. See Orfield, "Federal Criminal Appeals" (1936) 45 Yale L. J. 1223; Miller "Appeals by the State in Criminal Cases" (1927)) 36 Yale L. J. 486. In such situations, both requirements are met. When, however, one or more distinct crimes are committed by the same transaction, the requirement for a valid plea of double jeopardy does not generally exist as against a subsequent charge of the different offense. See Horack, "The Multiple Consequences of a Single Criminal Act" (1937) 21 Minn. L. Rev. 805. The second requirement is not met.

14. E.g. the Indiana decisions (1) that a conviction under a general statute cannot be sustained when the evidence establishes violation of a more specific statute. Robertson v. State, 207 Ind. 374, 192 N.E. 887 (1934) criticized in Note (1935) 10 Ind. L. J. 467; Note (1921) 12 A.L.R. 603. (2) that, if the statute defines two sep-

uations. The absence of prejudice in fact[15] does not, however, warrant sustaining a conviction for one offense because the accused is guilty of another. The principle that all material elements of the crime charged must be established to justify conviction must not be relaxed.

While, on the one hand, the present decision represents a worthwhile effort to preserve important principles, on the other hand, it raises serious problems that result from confused substantive law. The solution lies in legislative simplification of the definitions of crimes.[16]

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arate or distinct offenses, a conviction founded upon violation of one section cannot be sustained upon proof of violotion of the other. Rogers v. State, 220 Ind. 374, 44 N.E. (2d) 343 (1942), 143 A.L.R. 1074, 1076 (1943). Cf Todd v. State, 31 Ind. 514 (1869). Contra: United States v. Nixon, 235 U.S. 231 (1914); Maresca v. United States, 277 Fed. 727 (C.C.A. 2d 1921). Notes (1932) 76 A.L.R. 1534.

15. Consider: the defendant was definitely informed as to what acts of his were the ground for the accusation. He could not have been misled on trial. Marco v. State, 188 Ind. 540, 125 N.E. 34 (1919). The prosecutor need not have alleged either the name of the person who wrongfully obtained the property or the manner in which it was obtained. Semon v. State, 158 Ind. 55, 62 N.E. 625 (1902); Werthheimer & Goldberg v. State, 201 Ind. 572, 169 N.E. 40 (1929), 68 A.L.R. 179, 187 (1930). On subsequent trial, the defendent would be sentenced under the statute entitled "Receiving Stolen Goods" and subjected to the identical punishment imposed. The gist of the offense—feloniously receiving property wrongfully obtained by another—remained identical whether the property had been stolen or embezzled.

16. § 5 of the Criminal Appeal Act of 1907 (7 Edw. VII, c. 23) allows the Court of Criminal Appeal to substitute for the jury's verdict a verdict of another offense, if it appears that the jury found facts warranting such a verdict. Lawson and Keedy, "Criminal Procedure in England" (1910) 1 J. Cr. L. & Crim. 595, 748. Several States have comparable legislation, but the courts have consistently interpreted the provision conservatively. Note 1938) 22 Minn. L. Rev. 211. There is authority that such a change in the "nature of the offense charged" would be unconstitutional. Notes (1920) 7 A.L.R. 1516. This is indicative that an effective solution must be by revision of the initial definitions. E.g. the instant result would not have occurred under a statute which specified merely that the property received must have been unlawfully obtained by another. The area of greatest substantive confusion remains the various allied property offenses. Notes: "Larceny, Embezzlement and Obtaining Property by False Pretenses" (1920) 20 Col. L. Rev. 318; Note (1942) 11 Fordham L. Rev. 323; Beale, "The Borderland of Larceny" (1892) 6 Harv. L. Rev. 244. A statutory amalgation of the crimes of larceny, embezzlement, false pretenses, etc. under the cognomen of theft seems the most satisfactory method to relieve courts from questions arising from the contentions that the evidence shows commission of an offense similar to, but distinct from, that charged. E.g. Cal Penal Code (Deering's 1931) 484 ff. A statement of the facts constituting the offense becomes sufficient charge of the cause against the defendant. In Indiana, permissive joinder of different charges arising from the same transaction is deemed adequate to reconcile effective administration with protection to innocence. Cooprider v. State, 218 Ind. 122, 31 N.E. 53, 132 A.L.R. 553, 557 (1941). Multiple charging of property offenses submitted to the jury without necessity of election by the state and presumptions of a verdict to the valid count indicate practical elimination of the technical distinctions and the desirability, on other grounds, for the simplification suggested.

DIVORCE

THE DOCTRINE OF RECRIMINATION

Libel for divorce by wife alleging statutory grounds of cruel and abusive treatment. The libelee answered that the libelant "has spent a great deal of time in the company of a certain young man . . . and has been on terms of intimacy with said man." This was not an allegation of adultery. The trial judge held, although the wife proved grounds for divorce, she was not entitled to a decree nisi as she was not an innocent party. Reversed. The doctrine of recrimination does not apply unless the libelant's act constitutes a stautory cause for divorce. *Reddington v. Reddington,* —— Mass. ——, 59 N.E. (2d) 775 (1945).

The statutory grounds for divorce are similar in Indiana and Massachusetts.[1] Indiana, however, expressly recognizes by statute the doctrine of recrimination when the party seeking the divorce is guilty of adultery;[2] while Massachusetts does not recognize the doctrine by statute for any cause.[3] Massachusetts, however, recognizes the doctrine by judicial decision.[4] In the United States thirty-two jurisdictions recognizes the doctrine of recrimination by statute.[5] There are eight types of recrimimatory defense statutes, and the number of jurisdictions using each type is as follows: complaint of adultery—defense of adultery (15); complaint of any cause for divorce—defense of any cause for divorce (6); complaint of any cause for divorce—defense of same crime or misconduct (3); complaint of any cause for divorce—defense of any cause of equal wrong (2); complaint of any cause for divorce—defense of adultery (3); complaint of adultery—defense of any cause for divorce (1); complaint of any cause for divorce—defense of adultery or like cause for divorce (1); complaint of desertion, cruelty, adultery, intoxication—defense of like conduct (1).[6]

By judicial decision Indiana extends the doctrine of recrimination to: complaint of cruel and inhuman treatment—defense of cruel and inhuman treatment;[7] complaint of adultery—defense of abandonment;[8] complaint of any cause which is a ground for divorce—defense of any cause which is a ground for divorce.[9] The Supreme Court of Indiana has said "Where each of the married parties has committed a matri-

1. Compare Ind. Stat. Ann. (Burns, 1933) §3-1201; Ind. Stat. Ann. (Burns, 1943 Replacement) §3-1201, with Mass. Gen. Laws (Ter. Ed. 1931) c. 208, §1, 2.
2. Ind. Stat. Ann. (Burns, 1933), §3-1202.
3. Mass. Gen. Laws (Ter. Ed. 1931) c. 208, §1, 2; See Reddington v. Reddington, —— Mass. ——, 59 N.E. (2d) 775, 777 (1945).
4. Pratt v. Pratt, 157 Mass. 503, 32 N.E. 747 (1892); Morrison v. Morrison, 142 Mass. 361, 8 N.E. 59 (1886); Robbins v. Robbins, 140 Mass. 528, 5 N.E. 837 (1886).
5. 2 Vernier, American Family Law (1932) 87.
6. Id.
7. Alexander v. Alexander, 140 Ind. 555, 38 N.E. 855 (1894).
8. Eikenbury v. Eikenbury, 33 Ind. App. 69, 70 N.E. 837 (1904).
9. See McMurrey v. McMurrey, 210 Ind. 595, 596, 4 N.E. (2d) 837 (1936) Alexander v. Alexander, 140 Ind. 555, 559, 38 N.E. 855, 856 (1894), cited supra note 7.

monial offense, which is a cause for divorce, so that when one asks for this remedy, the other is equally entitled to the same, whether the offenses are the same or not, the court can grant the prayer of neither."[10]

The rule announced by the Indiana[11] and Massachusetts[12] courts seems a harsh one, but it is the rule followed by a majority of American jurisdictions.[13] It is based upon the principle that divorce is a remedy only for an innocent party,[14] and public policy is against granting divorces, except where an innocent person is injured, because of the social interests of the state in maintaining the marriage relationship.[15] Some jurisdictions have impliedly adopted the doctrine of comparative rectitude as an exception to the doctrine of recrimination, and will grant a decree to the party least in fault, where it appears that the parties cannot live together and both are guilty of an offense constituting ground for divorce.[16] In the District of Columbia the divorce laws have been liberalized so that recrimination is no longer an absolute bar to divorce.[17] The state of Washington has granted a decree of divorce to both parties in a suit wherein each party proved cruelty.[18] Kansas, Minnesota, and Oklahoma provide by statute that the court shall use its discretion as to whether a divorce will be granted where recrimination is shown.[19] A Nevada statute provides that the court shall not deny a divorce on the ground of recrimination, but may in its discretion grant a divorce to the party least in fault.[20] The courts of England, since 1857, have not been bound to deny divorces to petitioners guilty of adultery.[21] Switzerland, the Scandinavian countries, Esthonia, and Germany all recognize divorce without fault

10. See Alexander v. Alexander, 140 Ind. 555, 559, 38 N.E. 855, 856 (1894), cited supra notes 7 and 9.

11. See McMurrey v. McMurrey, 210 Ind. 595, 596, 4 N.E. (2d) 837 (1936), cited supra note 9; Alexander v. Alexander, 140 Ind. 555, 38 N.E. 855 (1894), cited supra notes 7, 9, and 10.

12. Cumming v. Cumming, 135 Mass. 386 (1883).

13. 2 Vernier, American Family Laws (1932) 83.

14. See Mr. Justice Howard, in Alexander v. Alexander, 140 Ind. 555, 559, 38 N.E. 855, 856 (1894), quoting Stewart, Marriage and Divorce, §314, "Divorce is a remedy provided for an innocent party; a divorce granted to both parties is an anomaly; if both parties have a right to a divorce, neither has"; Gullett v. Gullett, 25 Ind. 517 (1865); Eikenbury v. Eikenbury, 33 Ind. App. 69, 74, 70 N.E. 837, 839 (1904).

15. See Eikenbury v. Eikenbury, 33 Ind. App. 69, 72, 70 N.E. 837, 838 (1904), cited supra note 14.

16. Notes (1912) 63 A.L.R. 1132; Notes (1907) 6 Ann. Cas. 171.

17. D.C. Code (1940) tit. 16, §403; Vanderhuff v. Vanderhuff, 144 F. (2d) 509 (1944); Parks v. Parks, 116 F. (2d) 556 (1940).

18. Flagg v. Flagg, 192 Wash. 679, 74 P. (2d) 189 (1937).

19. 2 Vernier, American Family Laws (1932) 84.

20. Vernier, American Family Laws (Supp. 1938) 48.

21. 20 & 21 Vict. c. 85, s. 3 (1857); 15 & 16 Geo. V, c. 49, s. 178 (1925); 1 Edw. VIII & 1 Geo. VI, c. 57, s. 4 (1937).

of either party, or divorce by an action brought by a spouse, admittedly guilty of marital offenses.[22]

The doctrine of recrimination is hard to defend from a social view point. It prevents the dissolution of the marital status of parties whose conduct is admittedly unfavorable to a successful marriage.[23] Where one party violates his marital duties the remedy of divorce is granted.[24]

FEDERAL JURISDICTION

SUITS AGAINST THE STATE

Petitioner, non-resident Foreign manufacturing corporation, seeks a refund of gross income taxes from the board of the department of treasury[1] of the State of Indiana.[2] The taxes were claimed to have been derived from sales occurring in Indiana;[3] petitioner alleged violation of the Commerce Clause and the Fourteenth Amendment of the United States Constitution.[4] United States District Court denied recovery. Circuit Court of Appeals affirmed.[5] Certiorari granted.[6] Held, complaint dismissed. The consent of the State of Indiana to suit for a tax refund in the state court does not extend to suit in a federal court.[7] No decision on the merits. *Ford Motor Co. v. Department of Treasury of State of Indiana,* et al., 65 Sup Ct. 347 (1945).

Petitioner's right to maintain this action in federal court depends on (1) whether the action is against the individual or the stato, and (2) if against the state, whether the state has consented to suit in

22. Silving, "Divorce Without Fault" (1944) 29 Iowa L. Rev. 527.
23. See Vanderhuff v. Vanderhuff, 144 F. (2d) 509 (1944), cited supra note 17.
24. Ind. Stat. Ann. (Burns, 1933) §3-1201; Ind. Stat. Ann. (Burns, 1943 Replacement) §3-1201.
1. The action is brought against the department of treasury of the State of Indiana, and M. Clifford Townsend, Joseph M. Robertson, and Frank G. Thompson, the Governor, Treasurer, and Auditor, respectively, of the State of Indiana, who together constituted the board of the department of treasury, as provided by Ind. Stat. Ann. (Burns, 1943 Replacement) §64-2614. See Ind. Stat. Ann. (Burns, 1943 Replacement) § 60-101.
2. Petitioner followed the statutory procedure for obtaining a refund as set forth in Ind. Stat. Ann. (Burns, 1943 Replacement) §64-2614(a).
3. Indiana claimed the taxes under Ind. Stat. Ann. (Burns, 1943 Replacement) § 64-2602.
4. U.S. Const. Art. I, § 8; U.S. Const. Amend. XIV, § 1.
5. Ford Motor Co. v. Department of Treasury of State of Indiana et al., 141 F. (2d) 24 (C.C.A. 7th, 1944).
6. Id at 322 U.S. 721 (1944).
7. The suit was barred by U.S. Const. Amend. XI, "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." See Hyneman, "Judicial Interpretation of the Eleventh Amendment" (1927) 2 Ind. L. J. 371, especially pps. 380-382.

federal court. If against an individual, a remedy is allowed against the wrongdoer personally.[8] Where the action is against a state officer in his official capacity, constituting an action against the state,[9] the express constitutional limitation of the Eleventh Amendment operates as a bar,[10] unless waived.[11] Petitioner's suit constitutes an action against the state.[12]

A provision of a state tax refund statute, similar to the statute in Indiana, was held a waiver of state immunity from suit in a state court only.[13] The Indiana Attorney General appeared in the Federal District Court and Circuit Court of Appeals and defended on the merits, objecting for the first time in the Supreme Court. Respondents concede that if it is within the power of administrative and executive

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8. The Eleventh Amendment allows no protection in this situation. Atchison, T., and S. F. Ry. v. O'Connor, 223 U.S. 280, 287 (1912); Mathews v. Rodgers, 284 U.S. 521, 528 (1932).

9. The nature of a suit as one against the state is to be determined by the essential nature and effect of the proceeding. Worcester County Trust Co. v. Riley, Controller of California, 302 U.S. 292, 296 (1937); Ex Parte in the Matter of the State of New York et al., Petitioner, 256 U.S. 490, 500 (1921); In Re Ayers, 123 U.S. 443, 488 (1887). These actions are ordinarily authorized by statute.

10. The state is the real substantial party in interest and may invoke its sovereign immunity even though individual officials are nominal defendants. Great Northern Insurance Co. v. Read, 322 U.S. 47, 53 (1944); Smith v. Reeves, 178 U.S. 436, 440 (1900).

11. The immunity may be waived. Gunter v. Atlantic Coast Line, 200 U.S. 273, 284 (1906) (ancillary proceeding where defendant South Carolina attempted to attack validity of the Pegnes judgment (Humphrey v. Pegues, 16 Wall. 244 (U.S. 1872) which had been defended on the merits, after twenty years had elapsed, with a South Carolina statute conferring on the attorney general power to "stand in judgment for the state."); Clark v. Barnard, 108 U.S. 436, 447 (1883) (a voluntary proceeding in intervention); Missouri v. Fiske, 200 U.S. 18, 24 (1905) (intervention proceeding). These cases indicate that something more is required for a waiver than is found in the instant case.

12. Petitioner brings the action under strict compliance with Ind. Stat. Ann. (Burns, 1943 Replacement) § 64-2614(a). Any judgment which might be obtained in such an action is satisfied by payment "out of any funds in the state treasury." This statute clearly provides for action against the state through its collective representatives, instead of one against the collecting officials themselves.

13. "When we are dealing with the sovereign exemption from judicial interference in the vital field of financial administration a clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation must be found." Great Northern Insurance Co. v. Read, 322 U.S. 47 (1944) at p. 54, cited supra note 10. Ind. Stat. Ann. (Burns, 1943 Replacement) §64-2614(a) provides for refund in "circuit or superior court of the county in which the taxpayer resides or is located." Reference to a particular state court in a similar California statute warranted an inference that the state legislature consented to suit in state court only. Smith v. Reeves, 178 U.S. 436, 441 (1899). See Ind. Stat. Ann. (Burns, 1933) § 4-1501 for a like provision in case of a contract liability.

officers to waive, they have done so.[14] The Indiana Attorney General exercises only the power delegated him by statute,[15] and does not possess powers of an attorney general at common law;[16] therefore there is no waiver of the state's immunity.

A collateral issue raised by the instant case is the difference in controlling rules regarding application of the Eleventh Amendment when the action is for injunctive relief in equity rather than an action at law as presented in the principal case. Ever since Ex Parte Young[17] it is well settled that federal courts may enjoin proceedings in state courts to enforce statutes repugnant to the Federal Constitution,[18] and suits against state officers to enjoin enforcement of statutes contravening the Federal Constitution are held not suits against the state for the purposes of this particular rule.[19] As a

14. The Indiana Const. Art. IV, § 24 prohibits state consent to suit in any one particular case without a general consent to suit in all similar causes of action. "Since the state legislature may waive state immunity only by general law, it is not to be presumed in the absence of clear language to the contrary, that they conferred on administrative or executive officers discretionary power to grant or withhold consent in individual cases." Principal case at 352.

15. For powers delegated to Indiana Attorney General, see Ind. Stat. Ann. (Burns, 1933) § 4-1501 and § 49-1902. Provision for the attorney general in the instant case is made in Ind. Stat. Ann. (Burns, 1943 Replacement) § 64-2614(c).

16. State ex rel. Bingham v. Home Brewing Co., 182 Ind. 75, 93, 105 N.E. 909, 915 (1914); Julian v. State, 122 Ind. 68, 73, 23 N.E. 690, 692 (1890). An appearance by an attorney general will not bind the state unless he is given authority by state laws to waive the immunity. O'Connor v. Slaker, 22 F. (2d) 147, 152 (1927).

17. 209 U.S. 123 (1907), 13 L.R.A. (N.S.) 932 (1908). See Note (1908) 21 Harv. L. Rev. 527.

18. The federal circuit court in Ex Parte Young had enjoined the Minnesota Attorney-General from proceeding under railroad rate statutes pending decision of their constitutionality. He disobeyed the injunction and his habeus corpus petition was dismissed. The court found (1) the statutes were unconstitutional and (2) the court had jurisdiction to issue the injunction. Accord, Wells Fargo and Co. v. Taylor, 254 U.S. 175 (1920); Truax v. Reich, 239 U.S. 33 (1915); Smythe v. Ames, 169 U.S. 466 (1898); Reagan v. Farmers Loan and Trust Co., 154 U.S. 362 (1894). Dobie, "Federal Procedure" (1928) at p. 679 propounds this view. Cf. North Carolina v. Southern Ry., 145 N.C. 495, 59 S.E. 570 (1907), 13 L.R.A. (N.S.) 966 (1908); In Re Ayers, 123 U.S. 433 (1887); La. ex rel. v. Jumel, 107 U.S. 711 (1882).

19. Looney v. Crane Co., 245 U.S. 178 (1917); Caldwell v. Sioux Falls Stockyards Co., 242 U.S. 559 (1917); Prout v. Starr, 188 U.S. 537 (1903); Tanner v. Little, 240 U.S. 369 (1916). The opposite view was clearly expressed by Mr. Justice Harland dissenting in the Young case, Ex Parte Young, 209 U.S. 123 (1907), cited supra note 18, at p. 173, "And the manifest—indeed the avowed and admitted —object of seeking such relief was to tie the hands of the state, so that it could not in any manner or by any mode of proceeding in its own courts test the validity of the statutes and orders in question. It would therefore seem clear that within the true meaning of the Eleventh Amendment the suit brought in the federal court was one, in legal effect, against the state." Consider-

matter of comity, federal courts ought not to issue an injunction until the party has exhausted the right of appeal in the state,[20] but the doctrine is inapplicable if, pending an appeal, the party would suffer losses for which there is not adequate compensation at law.[21] To further limit excessive use of the power, Congress provided that such injunction could only be issued by three-judge courts.[22]

It is suggested that injunctive relief was not asked for in the principal case because (1) the claim of unconstitutionality was a secondary one,[23] and (2) the Indiana statute had no penalizing features

able confusion seems to have arisen as to whether the Eleventh Amendment operates as a bar in this particular situation, and many authorities agree it to be an uncomfortably close question. Trickett, "Suits Against States by Individuals In Federal Courts" (1907) 41 Am. L. Rev. 364 at 383 says, "A survey of the cases, and of the reasonings of the courts too painfully discloses the absence of a clear and definite criterion for deciding when a suit is to be deemed a suit against a state." " . . . and suits by these officers are enjoined at the instance of individuals, surely this is perilously close to the evil which the Eleventh Amendment sought to avert." Dobie, "Federal Procedure" (1928) 537.

20. Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 228 (1908) (where a state commission was fixing the alleged unconstitutional rates); Gilchrist v. Interborough Rapid Transit Co., 279 U.S. 159 (1920) (a public utility attempting to enjoin a commission from changing its rate schedule); Pullman Co. v. Railroad Comm. of Texas, 33 F. Supp, 675 (W.D. Tex. 1940) (injunction sought against an order of Ry. Commission of Texas). Cf Public Utilities Comm. of Ohio v. United Fuel Gas Co., 317 U.S. 456 (1943), Note (1943) 56 Harv. L. Rev. 825. With reference to a tax statute, federal courts ordinarily will not enjoin state officers from collecting taxes where the taxpayer has an adequate remedy at state law. Mathews v. Rodgers, 284 U.S. 521, 526 (1932).

21. Pacific Tel. and Tel. Co. Co. v. Kuykendall, 265 U.S. 196 (1924); Oklahoma Natural Gas Co. v. Russell, 261 U.S. 290 (1923). In the words of Mr. Justice Holmes in Massachusetts State Grange v. Benton, 272 U.S. 525 (1926) at p. 527, " . . . no injunction ought to issue against officers of a state clothed with authority to enforce the law in question, unless in a case reasonably free from doubt and when necessary to prevent great and irreparable injury." See Lockwood, Maw, and Rosenberry, "The Use of the Federal Injunction" (1930) 43 Harv. L. Rev. 426 at 433-436 for a discussion of necessary elements before a tax statute leaves open the way to federal injunction.

22. 36 Stat. 557 (1910), 28 U.S.C.A. §380 (1928). Congress also enunciated the common law at 50 Stat. 738 (1937), 28 U.S.C.A. § 41 (1928), which sanctioned federal court practice by forbidding district courts to enjoin state action when there was an adequate remedy at law available. Great Lakes Dredge and Dock Co. v. Huffman, 319 U.S. 293 (1943), discussed in Note (1943) 43 Col. L. Rev. 837, 871, gives a most recent interpretation of the federal statutes, in this case allowing the injunction to restrain collection of illegal taxes from maritime employees.

23. In the Circuit Court of Appeals, 141 F. (2d) 24 (1944), petitioner's main contention was that the income taxed did not derive from sources in the State of Indiana; the claim of unconstitutionality was not accorded much importance by either the litigants or the court.

giving the petitioner an inadequate legal remedy.[24] By this decision, the operation of Indiana's immunity is not precluded by the mere joining of nominal defendants and Indiana courts must pass initially on Indiana's liability for tax refunds.[25]

INSURANCE

DEATH BY ACCIDENTAL MEANS

Beneficiaries sued on the double indemnity clause of a policy insuring their mother. The clause covered a death occurring "as a result directly and independently of all other causes, of bodily injuries, effected solely through external, violent, and accidental means." Decedent fell while entering a bathroom, suffered a broken hip, hydrostatic pneumonia developed, and death resulted. Prior to her fall, the insured had been bedfast because of chronic nephritis, hypertension, and coronary sclerosis. Decedent's physician testified that death could have been independent of her physical illness and except for a broken hip and resulting pneumonia, she might have lived for several years. Judgments of the trial and appellate courts[1] for plaintiffs reversed and remanded because beneficiaries failed to prove that death occurred as a result of bodily injuries effected solely through accidental means. *Prudential Insurance Co. of America v. Van Wey et al.*, —— Ind. ——, 59 N.E. (2d) 421 (1945).

Indiana is in accord with the majority rule that burden of proof is on the plaintiff to show not only that injury or death was caused by accidental means, but also that it was not caused by pre-existing disease or bodily infirmity.[2]

The introduction of the phrase "accidental means" in the double

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24. Indiana legislators appear to have realized the possibility of intervention by the federal court and therefore established no basis for the exercise of equitable jurisdiction by the federal court when they enacted Ind. Stat. Ann. (Burns, 1943 Replacement) 64-2614. As suggested by Warren, "Federal and State Court Interference" 43 Harv. L. Rev. 345, 377, it lies with each state itself to eliminate this source of friction with the federal authority. Justice Frankfurter, "The Federal Court" (1929) 58 New Republic 273, 275, is in accord. Statutory construction of the statute in question finds that Indiana has followed this well-guided approach to the problem.

25. Of course, final recourse to federal courts is not foreclosed. " . . . the construction given the Indiana statute leaves open the road to review in this court on constitutional grounds after the issues have been passed upon by state courts." Principal case at 353.

1. Prudential Ins. Co. of America v. Van Wey et al., —— Ind. App. ——, 56 N.E. (2) 509 (1944). Lower courts found pneumonia resulting from the fall was the proximate cause of death. Dissent in principal case concurs in that proximate cause of death determines liability. The cause was transferred from the Appellate Court under Ind. Stat. Ann. (Burns, 1933) §4-215.

2. Orey v. Mutual Life Insurance Company of New York, 215 Ind. 305, 307, 19 N.E. (2d) 547, 548 (1939); Police & Fireman's Ins. Asso. v. Blunk, 107 Ind. App. 279, 285, 20 N.E. (2d) 660, 663 (1939); Note (1943) 144 A.L.R. 1416.

indemnity clause of a life insurance policy has been employed to limit the liability of the insurance companies.[3] In construing the term "accidental means," it must be realized that an insurance policy is in fact a contract between insurer and insured.[4] As such, the expressed intent of the parties must be regarded,[5] subject to the well-recognized rule of construction that an insurance policy is to be interpreted most strictly against the insurer.[6] A distinction has been drawn between "accidental death" and "death by accidental means." The majority of the courts maintain that where the act resulting in death or injury is such that nothing foreseen and unintended occurs in the doing of such act and the sole unforeseen element is the effect or consequence of the act, that is, the death or injury—such death or injury is "accidental";[7] where something unforeseen and unintended occurs in the very performance of the act itself, then the resulting death or injury is caused by accidental means.[8] A cursory examination of the cases shows that there is much confusion in the application of this doctrine even by the courts which purport to adhere strictly to the distinction.[9]

Another serious problem arises when an accident befalls an insured who has a pre-existing condition of disease or bodily weakness, when neither the condition nor the accident alone would have caused the death. A slight majority hold no recovery.[10] Some states allow

3. Vance, Insurance (2d ed. 1930) 871.
4. Burnett v. Mutual Life Ins. Co., 66 Ind. App 280, 284, 290, 114 N.E. 232, 234 (1917).
5. F. S. Royster Guano Co. v. Globe & Rutgers Fire Ins. Co., 252 N.Y. 75, 84, 168 N.E. 834, 837 (1929).
6. Comm'l Union Assur. Co., Ltd. v. Joss, 36 F. (2d) 9, 10 (C.C.A. 5th 1929); Fidelity Health & Acc. Co. v. Holbrook, 96 Ind. App. 457, 462, 169 N.E. 57, 59 (1929).
7. Landress v. Phoenix Mutual Life Insurance Co. et al, 291 U.S. 491, 496 (1934) (death by sunstroke while playing golf) (strong dissent by Justice Cardoza who advocated "average man" conception of "accidental means"); Husbands v. Indiana Travelers' Acc. Assn., 194 Ind. 586, 589, 593, 133 N.E. 130, 131, 132 (1921) (rupture of blood vessel caused by shaking furnace in usual manner); Schmid, Guardian v. Indiana Travelers Accid. Assoc., 42 Ind. App. 483, 495, 85 N.E. 1032, 1036, 1038 (1908) (death from heart paralysis, caused by carrying bag up a long flight of stairs).
8. U.S. Mutual Acc. Assn. v. Barry, 131 U.S. 100, 121, 9 Sup. Ct. 755, 762 (1889) (stricture of duodenum due to involuntary turn of body in jumping, causing insured to land on heels instead of toes); Orey v. Mutual Life Insurance Co. of New York, 215 Ind. 305, 308, 310, 19 N.E. (2d) 547, 548 (1939) (death from scrotal strangulated hernia developed while cranking car).
9. See cases cited supra notes 7 and 8. Note (1930) 78 U. of Pa. L. Rev. 762 (advocates true solution lies in placing emphasis upon whether there is an unknown and unforeseen element which is sufficiently connected with the voluntary act of insured to constitute a part of it and therefore render the act the accidental means of the injury or death).
10. Ryan v. Continental Casualty Co., 47 F. (2d) 472, 473 (C.C.A. 5th 1931); National Masonic Accident Ass'n v. Shryock, 73 F. 774, 776 (C.C.A. 8th 1896); Stanton v. Travelers' Ins. Co., 83 Conn. 708, 78 Atl. 317, 318 (1910).

full recovery on the theory that if the accident accelerates death, which otherwise might have been delayed for a considerable time, then it must be held to be the sole and exclusive cause of the death despite the concurrence of the disease in causing the fatality.[11] A sizable number of states, Indiana included, permit recovery so long as the accident was the proximate cause of the death and the disease was no more than the remote cause.[12] However, a rule has been developed which seems to effect a compromise betwen the too strict majority doctrine and the proximate cause theory which is difficult to apply, with the result that the intent of the parties is frequently ignored. Courts following this ameliorating rule allow recovery where the pre-existing condition was simply a normal incident of advancing age or when the insured has pre-existing tendency to disease, but deny recovery if disease was abnormal or malignant in its nature.[13] Thus, cognizance is taken of the intent of the contracting parties and yet deserving beneficiaries are not denied recovery. Although Indiana is generally a disciple of the proximate cause doctrine,[14] it followed the theory of distinguishing between minor frailties or the normal infirmities of age and significant diseases in two well-reasoned appellate court cases.[15]

Rationally the principal case on the theory that the nature and extent of the pre-existing diseases were of the character to prevent recovery by a reasonable construction of the terms of the policy, the decision can be sustained.

LABOR LAW

ORGANIZER'S RIGHT TO SPEAK

Appellant, a labor union president, in violation of a restraining order issued by a Texas District Court pursuant to a Texas statute[1] requiring labor union organizers to file a written request for an organizer's card before soliciting members for the union, addressed an audience of oil workers. The meeting was part of a campaign to organize the employees of an oil plant under the Oil Workers Indus-

11. Benefit Assn. of Ry. Employees v. Armbruster, 217 Ala. 282, 116 So. 164, 166 (1928); Standard Acc. Ins. Co. v. Hoehn, 215 Ala. 109, 110 So. 7, 9 (1926); Note (1927) 25 Mich. L. Rev. 803.
12. Continental Casualty Co. v. Lloyd, 165 Ind. 52, 59, 60, 73 N.E. 824, 826 (1905); Inter-Ocean Cas. Co. v. Wilkins, 96 Ind. App. 231, 249, 250, 182 N.E. 252, 258 (1932); Kokomo Life and Accident Co. v. Walford, 90 Ind. App. 395, 400, 167 N.E. 156, 157, 158 (1929); Note (1930) 5 Ind. Law J. 298.
13. Leland v. Order of United Commercial Travelers of America, 233 Mass 558, 564, 124 N.E. 517, 520 (1919); Silverstein v. Metropolitan Life Ins. Co., 254 N.Y. 81, 84, 85, 171 N.E. 914, 915 (1930).
14. See note 12 supra.
15. Policeman & Fireman's Ins. Assoc. v. Blunk, 107 Ind. App. 279, 287, 288, 20 N.E. (2d) 660 (1939); Railway Mail Assn. v. Schrader, 107 Ind. App. 235, 242, 19 N.E. (2d) 887, 889, 890 (1939).
1. Tex. Stat. (Vernon Supp. 1943) Art. 5154, Sec. 5.

trial Union. Appellant invited all present to join and orally solicited one employee. Held, guilty of contempt of court. Petition for a writ of habeus corpus, denied.[2] Held, reversed. The statute as applied imposed a previous restraint upon appellant's rights of free speech and assembly. *Thomas v. Collins*, —— U.S. ——, 65 Sup. Ct. 315 (1944). The court applied the "clear and present danger" test,[3] denying validity to the application of the "reasonable basis" test,[4] relied upon by appellee.

A state may not, in imposing a licensing requirement upon the soliciting of funds, vest discretion of issuance in the issuing authorities.[5] But the Supreme Court has indicated that a statute merely requiring previous identification of solicitors would be upheld upon the showing of a social interest sufficient to justify the invocation of the state's police power.[6] Labor unions, like any other groups, are subject to regulation by the states acting within the scope of their police power.[7] Nor does the fact that the Federal Government has legislated[8] on the subject under the commerce clause of the Constitution exclude the exercise of the power.[9] Regulation of matters of local concern and within the states' police power which unavoidably involves some regulation of interstate commerce, but which, because of local character, can not be effectively dealth with by Congress, has been left to the states.[10] Though Congress, under the commerce clause, may pre-empt

2. Ex Parte Thomas, 141 Tex. 591, 174 S. W. (2d) 961 (1943).
3. Bridges v. California, 314 U.S. 252 (1941); Schenck v. United States, 249 U.S. 47; see Mr. Justice Holmes dissenting in Gitlow v. New York, 268 U.S. 652, 672 (1923) and in Abrams v. United States, 250 U.S. 616, 624 (1919).
4. California v. Thompson, 313 U.S. 109 (1941); Clark v. Paul Gray, Inc., 306 U.S. 583 (1939); Hendrick v. Maryland, 253 U.S. 610 (1914). Appellee urged a standard analogous to that applied under the commerce clause to sustain state statutes regulating transportation.
5. Largent v. Texas, 318 U.S. 418 (1943); Schneider v. State, 308 U.S. 147 (1939).
6. People of State of New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 72 (1928); see Cantwell v. Connecticut, 310 U.S. 296 (1940) at p. 305. "Without doubt a State may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent." The Court in the principal case found that the invitations to membership were inseperably interwoven into the speech and that therefore the First Amendment would apply. The dissenting opinion, however, found no difficulty in calling the transaction "solicitation," thus rendering the application of the statute constitutional.
7. See Allen Bradley Local no. 1111, United Electrical, Radio & Machine Workers of America v. Wisconsin Employment Relations Board, 315 U.S. 740 (1942).
8. National Labor Relations Act, 29 USCA, §§ 151 et seq. (1935)
9. Wisconsin Labor Relations Board v. Fred Rueping Leather Co., 228 Wis. 473, 279 N.W. 673 (1938).
10. Cooley v. Board of Port Wardens, 12 How. 299 (1851); Willson v Black Bird Marsh Creek Co., 2 Pet. 245 (1829).

the field, the intention to exclude the states from exercising their police power must be clearly manifested.[11]

The decision in the instant ease rests on the theory that lawful public meetings which do not immediately threaten social interests entitled to state protection are not such as to require previous identification of the speakers. The Court, in invoking the "clear and present danger" test, confined its decision to the question of free speech and assembly. It carefully avoided passing on the more troublesome problem of state control of solicitation, which necessarily enters either directly or indirectly, into all meetings of labor groups. If it is beyond the orbit of state control, the situation presents an anomoly in light of the "street soliciting" cases[12] unless the National Labor Relations Act may be said to preclude state action. If solicitation by union organizers may be subject to state control, the decision of the Thomas case by no means makes certain at what point speaking favorably to unionism ends and solicitation begins.

11. See Kelley v. Washington, 302 U.S. 1, 10 (1937); Mintz v. Baldwin, 289 U.S. 346 (1933).

12. Cox v. New Hampshire, 312 U.S. 569 (1942); City of Manchester v. Leiby, 117 F. (2d) 661 (1941); See Cantwell v. Connecticut, 310 U.S. 296 (1940), cited supra note 6.