NOTES AND COMMENTS

BANKRUPTCY

RES JUDICATA OF JUDGMENT CREDITORS' CLAIM

Claimant seeks to establish a claim based upon a judgment obtained against a bankrupt in the U.S. District Court for Southern California for the value of raw gems fraudulently procured and converted by the bankrupt. After default judgment and before bankruptcy, the bankrupt contested the value of the gems at a hearing ordered by the district court, which found the value to be as alleged. No appeal was taken or review had. After the voluntary petition in bankruptcy, the trustee was authorized to attempt to have the judgment set aside. This he did, claiming that fraud had been practiced on the district court by claimant in regard to the value of the gems. The motion to set aside was dismissed for lack of proof. In bankruptcy, the referee disallowed the claim for fraud. The district court allowed the claim, holding that the issue of fraud in procuring judgment in the California court was res judicata. On appeal from reversal by U.S. Circuit Court of Appeals for the 10th Circuit *held*: Claim allowed; the issue of fraud was res judicata, which doctrine is fully applicable in a federal court sitting in bankruptcy. *Heiser v. Woodruff*, 66 S. Ct. 853 (1946).

Only those creditors' claims can be proved and discharged in bankruptcy which are provided for in the Bankruptcy Act,[1] and since it is settled that the merger of a claim into a judgment does not affect its nature so far as provability in bankruptcy is concerned,[2] it is necessary in each instance of a judgment claim for the court to examine into the nature of the obligation underlying the judgment. If the original obligation is of the type provable in bankruptcy, the judgment creditor's claim may be allowed. Although of a provable character, the judgment may be attacked as invalid due to want of jurisdiction by the court rendering it over (a) the parties in the action, or (b) the subject matter involved;[3] and as a claim in bankruptcy, a judgment may also be collaterally attacked as having been obtained by fraud or collusion.[4]

Pepper v. Litton,[5] although holding that the issue of fraud had

1. 52 Stat. 840 §§ 17, 63 (1938), 11 U.S.C.A. §§ 35, 103 (Supp. 1945), Wetmore v. Markoe, 196 U.S. 68 (1904); Lesser v. Gray, 236 U.S. 70, 74 (1915).
2. Pepper v. Litton, 308 U.S. 295 (1939); Boynton v. Ball, 121 U.S. 457 (1887).
3. Thompson v. Whitman, 18 Wall. 457 (U.S. 1873); Consolidated Iron & Steel Co. v. Maumee Iron & Steel Co., 284 Fed. 550 (C.C.A. 8th, 1922).
4. In Re Thompson, 276 Fed. 313 (W.D. Pa. 1921); In Re Stucky Trucking & Rigging Co., 243 Fed 287 (N.J. 1917); In re Continental Engine Co., 234 Fed. 58 (C.C.A. 7th, 1916); Chandler v. Thompson, 120 Fed. 940 (C.C.A. 7th, 1902).
5. 308 U.S. 295 (1939).

not been litigated,[6] had been interpreted as extending the equity jurisdiction of bankruptcy courts to matters within the scope of the doctrine of res judicata.[7] This was due to the statement that, assuming the claimant's judgment represented a valid underlying obligation, the bankruptcy court might subordinate the claim to those of other creditors because of the fiduciary relationship in which the claimant stood as owner of the bankrupt one-man corporation.[8] The principal case precludes the reconsideration of the issue of fraud or collusion[9] where it has been previously litigated between the same parties on the merits.[10]

CONFLICT OF LAWS

THE ACCUMULATION OF CONTACT POINTS THEORY

Defendants, An Indiana partnership, indebted to the plaintiff, doing business in Illinois, agreed to make a cash payment and settle the balance of an open account with a note payable in periodic installments.

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6. Pepper v. Litton, 308 U.S. 295, 302 (1939). The opinion also stated that the trustee could collaterally attack a judgment on grounds of fraud or collusion only in the absence of a valid plea of res judicata. Id. at 306.
7. In re Noble, 42 F. Supp. 684 (Colo. 1941), reversed in Beneficial Loan Co. v. Noble, 129 F. (2d) 425 (C.C.A. 10th, 1942). See Mr. Justice Rutledge, concurring in the principal case at 860; 3 Collier, Bankruptcy (14th Ed.) p. 1800. Contra: In re Redwine, 53 F. Supp. 249 (N.D. Ala. 1944).
8. The court reasoned that since the Bankruptcy Act, 52 Stat. 840 § 57 k. (1938), 11 U.S.C.A. § 93 k. (1943) provided that "Claims which have been allowed may be reconsidered for cause and reallowed or rejected in whole or in part, according to the equities of the case . . . " that such disallowance or suberdination in the light of equitable considerations may be made originally.
9. Following an understandable tendency of courts of equity jurisdiction charged with the duty of marshalling the assets of a debter and distributing them equitably among his bona fide creditors; cf. In re Mallory, 16 Med. Cas. 549, No. 8,991 (Nev. 1871).
10. "But we are aware of no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of res judicata, which is founded upon the generally recognized public policy that there must be some end to litigation and that when one appears in court to present his case, is fully heard, and the contested issue is decided against him, he may not later renew the litigation in another court." Principal case at p. 856. Compare the language of the District Court of Massachusetts in Ex parte O'Nield, 18 Fed. Cas. 714, 715, No. 10,527 (Mass. 1867) in refusing to reduce a judgment claim based on damages challenged as excessive, "Where the court rendering judgment has jurisdiction, and there bas been no fraud and no preference, no one can examine into the consideration of a judgment, and show by evidence, outside of the record, that the judgment ought not to have been rendered, or not for so large a sum."
    The similar English view is asserted In re Howell, 84 L.J. 1399, 1400 (K.B. 1915). "The working rule is that the Registrar can go behind a judgment, where it is a judgment by default or compromise. He ought not to go behind it, when the judgment has been given in open court against a person who is represented."

The plaintiff forwarded, from Illinois, a note for signature containing a cognovit which gave no indication of the place of signing. The defendants signed the note in Indiana and mailed it to the plaintiff in Illinois. The plaintiff then credited the account of the defendants as satisfied. Plaintiff obtained judgement upon the note in Illinois pursuant to the cognovit provision, the final instalment of the principal being overdue, and sought to enforce the Illinois judgement in Indiana. Held: Judgement denying recovery reversed. The instrument is to be governed by Illinois law, under which the judgment was valid; accordingly it must be given full faith and credit in Indiana. *W. H. Barber Co. v. Hughes*, 63 N.E. (2d) 418 (Ind. 1945).

The public policy of Indiana concerning the execution or enforcement of a cognovit or warrant of attorney is expressed by statute rendering such cognovit void,[1] prohibiting local enforcement of a foreign judgement obtained pursuant to a cognovit provision,[2] and providing a penalty for the violation thereof.[3] The principal case raises the issue of the force and effect of the statute under the full faith and credit clause of the U.S. Constitution,[4] which requires the enforcement by a sister state of a valid judgment,[5] even though contrary to local public policy.[6] Such prior judgement, however, is subject to collateral attack by showing a lack of jurisdiction over the subject matter[7] or of the person[8] in the foreign forum.

The principal case involves the validity of the personal jurisdiction of the Illinois court over the defendants, and, if valid, must rest upon the cognovit serving as a waiver of service of process.[9] The court classified the problem as one of contract,[10] although reference was made

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1. Ind. Stat. Ann. (Burns, 1933) § 2-2904; Farrabaugh and Arnold, "Commentaries on the Cognovit Note Act" (1929) 5 Ind. L. J. 93.
2. Ind. Stat. Ann. (Burns, 1933) § 2-2905.
3. Id. § 2-2906.
4. U.S. Const. Art. IV, § 1, "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state."
5. Christmas v. Russell, 5 Wall. 290 (U.S. 1866); Roche v. McDonald, 275 U.S. 449 (1928).
6. Magnolia Petroleum Co. v. Hunt, 320 U.S. 430 (1943), 150 A.L.R. 413 (1944); Fauntleroy v. Lum, 210 U.S. 230 (1908); Rodenbeck v. Crews State Bank & Trust Co., 97 Ind. App. 21, 163 N.E. 616 (1933); 3 Freeman, "Judgments" (5th ed. 1925) 2887.
7. Thompson v. Whitman, 18 Wall. 457 (U.S. 1873); Restatement, "Judgements" (1942) § 10.
8. Pennoyer v. Neff, 95 U.S. 714 (1877).
9. See Note (1906) 3 L.R.A. (N.S.) 449; Restatement, "Conflict of Laws" (1934) § 81, comment b; Note (1931) 44 Harv. L. Rev. 1275.
10. The diversity of decision found in such cognovit provision cases is due largely to incomplete analysis of the problem involved. The first and major problem is that of "classification", i.e., into what broad catagory of substantive law the factual elements fall, e.g., contract, agency, corporations etc. The court is then faced with the secondary problem of "qualification", i.e., the "choice of law" appropriate to the facts, e.g., in a factual situation classified as contract, shall the law of the place of contracting, law of place of performance apply. The diversity of decision results from non-uniformity in the

to the principles of agency[11] and procedure.[12] The court then considered (1) the law of the place of execution,[13] (2) the law of the place of performance,[14] (3) the law of the place as governed by the intent of the parties[15] and (4) the method used in modern case books on conflict of laws[16] designated as "accumulation of contact points".[17] The court,

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approach to the problem. It has been suggested by some writers that the problem be solved at the first level of analysis, e.g., in the principal case by classifying as a problem in agency and applying the law of the place of the creation of the agency, where the act of consent occurred. Gavit, "Indiana Cognovit Note Statute" (1929) 5 Ind. L. J. 208; Notes (1924) 19 Ill. L. Rev. 584, (1924) 38 Harv. L. Rev. 110, (1924) 23 Mich. L. Rev. 908; see Milliken v. Pratt, 125 Mass. 374, 28 Am. Rep. 241 (1878). The majority of courts, however, have "classified" the problem as one of contract. A diversity then arises in the "qualification" of the problem. One solution is the application of the law of the place of contracting to determine the validity of the contract. Monarch Refrigerating Co. v. Faulk, 228 Ala. 554, 155 So. 74 (1934); Garrigue v. Kellar, 164 Ind. 676, 74 N.E. 523 (1905), 69 L.R.A. 870 (1906); Acme Food Co. v. Kirsch, 166 Mich. 433, 131 N.W. 1123 (1911), 38 L.R.A. (N.S.) 814 (1912). Other courts have "qualified" the problem as one relating to performance and governed by the law of the place of performance. Egley v. T.B. Bennett & Co., 196 Ind. 50, 145 N.E. 830 (1925), 40 A.L.R. 436 (1926); cf. Irose v. Balla, 181 Ind. 491, 104 N.E. 851 (1914). Still other courts have used the place of performance as the place intended by the parties. Vennum v. Mertens, 119 Mo. App. 461, 95 S.W. 292 (1906). A few states have considered the cognovit in terms of "procedure" of the forum where judgment has been rendered. Carroll v. Gore, 106 Fla. 582, 143 So. 633 (1932), 89 A.L.R. 1495 (1934); Wedding v. First Nat. Bank, 280 Ky. 610, 133 S.W. (2d) 931 (1939); Gotham Credit Corp. v. Powell and Sokalski, 22 N.J. Misc. 301, 38 A. (2d) 700 (1944); Hastings v. Bushong, 252 S.W. 246 (Tex. Civ. App. 1923). New York has apparently added consideration of the domicil of the obligor. Baldwin Bldg. & Loan Ass'n v. Klein, 136 N.Y. Misc. 752, 240 N.Y. Supp. 804 (Sup. Ct. 1930), aff'd, 230 App. Div. 827, 244 N.Y. Supp. 899 (1939). See also 2 Beale, "Treatise on Conflict of Laws" (1935) 1077 et seq. The Restatement offers assistance only in the choice of law governing the factual elements after the preliminary problem of "classification" has been solved by the law of the forum. Restatement, "Conflict of Laws" (1934) § 7.

11. Classified as an agency situation the cognovit would serve to act as an appointment of an agent to do the act of confessing judgment. See n. 10 supra.
12. Classified as a procedural matter the cognovit merely indicates the method of obtaining judgment in Illinois and is governed by the law of the place of suit. See n. 10 supra; Ailes, "Substance and Procedure in the Conflict of Laws" (1941) 39 Mich. L. Rev. 392; compare Cook, "Logical and Legal Bases of Conflict of Laws" (1942) c. 6.
13. The contract was executed in Illinois since the last act in the formation of the contract was the giving of value, the cancellation of the open account owed by the defendants. Principal case at p. 423. Compare Restatement, "Conflict of Laws" (1934) §§ 313, 314.
14. The place of performance indicated by the note was Illinois.
15. Intent to be governed by Illinois law was found by jury. Principal case at p. 419.
16. Harper and Tainter, "Cases on Conflict of Laws" (1937) 173; Cheatham, Dowling, Goodrich, Griswold, "Cases on Conflict of Laws" (2d ed. 1941) 510.
17. Harper and Tainter, loc. cit. supra n. 16.

in the principal case and in a subsequent case,[18] established the so called contact point rule as the 'choice of law' governing such instruments in Indiana.[19]

Contrasting the contact point and the intent theory[20] as a basis of determining the validity of contracts has been the subject of much controversial writing.[21] The following basic objections to the intent theory have been made: (1) where the intent has been specifically expressed the parties are permitted to choose the applicable law in order to avoid the consequences of the law normally applied,[22] (2) where the intent has not been specifically expressed, the difficulty of ascertaining the parties intent results in speculation by the court causing unpredictability and diversity of judicial opinion.[23] Consideration of the cases where the parties specifically provide for the application of the law of a particular state is without the scope of this note, as is the consideration of the rule of presumed intent frequently applied in usury cases.[24]

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18. In Spahr v. P. & H. Supply Co., 63 N.E. (2d) 425 (Ind. 1945) delivered the same day as the principal case, the court rejected the application of the law of the place of performance and applied the accumulation of contact points theory, referring to the principal case as controlling.
19. Two prior conflicting Indiana decisions which may only be reconciled through the application of the accumulation of contact points theory are referred to but not overruled in the principal case. The first, applying the rule of the place of execution, was merely distinguished in the principal case. The court indicated that in this case there was a mis-application of the rule in finding the situs of the place of execution. Garrigue v. Kellar, 164 Ind. 676, 74 N.E. 523 (1905), 69 L.R.A. 870 (1906); compare Ohio v. Eubank, 295 Mich. 230, 294 N.W. 166 (1940); Palmer Nat. Bank v. Van Doren, 260 Mich. 310, 244 N.W. 485 (1932). The second prior Indiana case applied the rule of the place of performance. Egley v. T.B. Bennett & Co., 196 Ind. 50, 145 N.E. 830 (1925), 40 A.L.R. 436 (1926).
20. One definition of the intent theory has been expressed, "If the intent of the parties is expressed, or an actual intent found, either that the Minnesota law (i.e. law of forum), or the Montana law govern, such intent must be given effect. If the intent is not expressed, or an actual intent found, the court must find the presumed intent and such presumed intent then fixes the law." Green v. Northwestern Trust Co., 128 Minn. 30, 35, 150 N.W. 229, 231 (1914).
21. Beale, "What Law Goverus Validity of a Contract" (1909) 23 Harv. L. Rev. 1, 79, 194, 260; Lorenzen, "Validity and Effect of Contracts" (1921) 30 Yale L. J. 655; Goodrich, "Handbook of Conflict of Laws" (2d ed. 1938) 278, 279; Cook, "Logical and Legal Bases of Conflict of Laws" (1942) c. 15; compare Westlake, "Private International Law" (5th ed. 1912) 302; Cheshire, "Private International Law" (1935) 182, 183.
22. See 2 Beale, loc. cit. supra n. 10; cf. Gilbert v. Burnstine, 255 N.Y. 348, 174 N.E. 706 (1931).
23. See 2 Beale, op. cit. supra n. 10, at 1083.
24. 6 Williston and Thompson, "Williston on Contracts" (Rev. ed. 1938) 5097. "The usury cases have developed their own special rule whereby in the absence of circumstances indicating a contrary intent, the parties are presumed to have chosen the law which will uphold the legality of the bargain." See Note (1940) 125 A.L.R. 482.

The traditional objections to the determination of the parties intent is satisfactorily answered by the application of the accumulation of contact points method. The principal case defines the procedure as, "The court will consider all acts of the parties touching the transaction in relation to the several states involved and will apply as the law governing the transaction the law of that state with which the facts are in most intimate contact."[25] Many courts have employed similar analysis in determining the applicable choice of law, i.e., the law of the place of performance, law of place of execution etc. But it is believed that this method has not been heretofore formulated by any court into a rule for conflict of laws application.[26]

The accumulation of contact points method permits the application of the law appropriate to the factual elements of the case rather than the application of 'mechanical jurisprudence' such as the place of contract or place of performance,[27] furthermore it parallels more closely the results which the business man would normally anticipate when contracting. Utilization of this method will also result in greater uniformity of future decisions with resulting certainty in predictability of judicial action. It is believed, therefore, that the accumulation of contact points method of determining the validity or illegality of a contractual situation is therefore preferable to that advanced by the Restatement of the Conflict of Laws and utilized by many courts.[28]

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25. Principal case at p. 423.

26. Indicating the "modus operandi", see Seeman v. Philadelphia Warehouse Co., 274 U.S. 403 (1927); Union Trust Co. v. Grosman, 245 U.S. 412 (1918); Coghlan v. South C. R.R., 142 U.S. 101 (1891); Hall v. Cordell, 142 U.S. 116 (1891); Prichard v. Norton, 106 U.S. 124 (1882); Hubbard v. Exchange Bank, 72 Fed. 234 (C.C.A. 2d, 1896), cert. denied, 163 U.S. 690 (1896); Coxe v. Coxe, 21 Del. Ch. 30, 180 Atl. 612 (1935); Greenlee v. Hardin, 157 Miss. 229, 127 So. 777 (1930), 71 A.L.R. 741 (1931); Cameron v. Ellis Constr. Co., 252 N.Y. 394, 169 N.E. 622 (1930); Wilson v. Lewiston Mill Co., 150 N.Y. 314, 44 N.E. 959, 55 Am. St. 680 (1896); In re Missouri Steamship, 42 Ch. Div. 321 (1888). In the principal case the contact points indicating an Illinois contract were: (a) business transacted in Illinois, (b) debt arose in Illinois, (c) place of conference concerning settlement of debt in Illinois, (d) note on Illinois form, (e) note prepared in Illinois, and (f) lower court found parties intended to be governed by Illinois law. The Indiana contacts were found to be: (a) residence of debtors, and (b) note signed and mailed in Indiana.

27. "Every attempt to reduce the law in a given field to a rule which can be applied automatically to really new situations by process of deductive logic is of necessity doomed to failure. In the words of Mr. Justice Holmes, 'But certainty generally is illusion, and repose is not the destiny of man.' " Cook, "The Present Status of the 'Lack of Mutuality Rule' " (1927) 36 Yale L. J. 897, 912.

28. The basic objections to the application of pat rules of law such as the law of the place of performance, etc. may be summarized as follows: (1) In using the place of contracting to determine the validity of an agreement it is necessary to assume a valid contract in order to determine the locus of the last act in order to determine the applicable law. Question begging technique. (2) The courts are not consistant in ascertaiming the final act. Compare Garrigue v. Kellar, 164 Ind. 676, 74 N.E. 523 (1905), 69 L.R.A. 870 (1906) with Ohio v. Eubank, 295 Mich. 230, 294 N.W. 166 (1940);

CRIMINAL PROCEDURE

RIGHT TO FAIR TRIAL

In a recent case, *Blue v. State*,[1] the defendant shoved or pushed the complaining witness, Burgess, in the chest to prevent him crossing a picket barricade. No serious bodily harm was sustained by Burgess; but he was frustrated in his effort to enter the plant where he was employed.

In a prosecution for assault and battery the trial court found the defendant guilty and fixed a penalty of $1000.00 fine and six months imprisonment—the maximum penalty allowed under the statute.[2] During the trial, the prosecutor made frequent references to the fact that the accused was a striker, a "saboteur", and that the defendant and his witnesses were hoodlums and worse than German spies. The prosecutor in a final appeal to the jurors to give the defendant "the full extent of the law", reminded them to think of his son and their sons and daughters who were overseas. The cross examination of the defendant's witnesses was pursued in like manner and consisted mainly of questions and statements calculated to reveal their "soft jobs", "good salaries" and draft status.[3]

Blue's counsel made no objection to either the cross examination or the argument of the prosecuting attorney, nor was any motion made to dismiss the jury. On appeal by new counsel Blue set out as grounds for reversal the prejudicial argument and misconduct of the prosecuting attorney in the trial court. The Indiana Supreme Court affirmed the decision with Richman, J., dissenting. The latter in a very pointed dissent conceded the guilt of the defendant but deplored the conduct of the trial court in its failure to discharge its duty by securing of its own initiative a fair and impartial trial.[4] The majority

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see 2 Beale, op. cit. supra n. 10 at 1091, "There can be only one place in which a contract is made, and that place can never be subject to great or serious doubt." (3) Why give one act, e.g., acceptance, more weight than another, e.g., offer, in determining questions of contract? (4) The dividing line between questions of obligation and performance is not a clear one nor always logical. Restatement, "Conflict of Laws" (1934) § 358, comment b. For further discussion, see Cook, op. cit. supra n. 12, c. 8, 14, 15.

1. 67 N.E. (2d) 377 (Ind. 1946).
2. Ind. Stat. Ann. (Burns, 1933) § 10-403.
3. Blue's case was tried during the Battle of the Bulge when the United States and Allied war effort hung in the balance and at a time when the fires of public sentiment against strikes and strikers were being fanned by various newspapers and radio commentators. The atmosphere in which the trial was conducted was reminiscent of World War I draft board bribery cases tried during war time, e.g., August v. U.S., 257 Fed. 388 (C.C.A. 8th, 1918).
4. When prejudicial appeals are being made to the jury and defense counsel remains silent, the duties of the trial court are drawn into issue. The question becomes whether the judge of his own initiative should take such action as may be necessary to assure a fair and impartial trial. While an early Indiana case, The St. Louis and South-Eastern Ry. v. Myrtle, 51 Ind. 566 (1875), has denied this duty of the trial court in such situations, other courts have recog-

did not concede that these arguments of the prosecutor were inflammatory or improper but rather justified these statements as necessary for the jury whose duty it was to fix the penalty.[5] The court further

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nized that such a *sua sponte* duty exists. Aetna Life Insurance Co. v. Kelley, 70 F. (2d) 589 (C.C.A. 8th, 1934); Collins v. State, 100 Miss. 435, 56 So. 527 (1911); Brown v. Swineford, 44 Wis. 282, 28 Am. Rep. 582 (1878). The concept has been thus stated by Judge Learned Hand: "A judge, at least in a Federal Court, is more than a moderator. He is affirmatively charged with securing a fair trial, and must intervene *sua sponte* to that end when necessary. It is not enough that the other side does not protest; often protest will only serve to emphasize the evil". Brown v. Walter, 62 F. (2d) 798, 799 (C.A.A. 2nd, 1933). But see Union P. R.R. v. Field, 137 Fed. 14 (C.A.A. 8th, 1905).

5. Whether or not the jury should have been allowed to hear the alleged prejudicial remarks depends upon whether they were in fact prejudicial. Prejudicial appeals to the jury by inspired or over zealous prosecutors may take any form. The most common grounds for reversal are appeals to racial or class hatred: People v. Simon, 80 Cal. App. 675, 252 Pac. 758 (1927) (that the defendants were Jews and that the populace had grown suspicious of all fires in which Jews were in any way connected). The cases involving appeals to racial prejudices are particularly abundant where negro defendants are concerned. Simmons v. State, 14 Ala. App. 103, 71 So. 979 (1916) (that the jury should deal with the negro defendant in light of the fact that he was a negro); Hampton v. State, 88 Miss. 257, 40 So. 545 (1906) (that mulattoes were negros who were hated by the white race and should be despised by every negro). Religious prejudice: Freeman v. Dempsey, 41 Ill. App. 554 (1891) (counsel called the appellee "a Jewish Christ killer and murderer of our Savior"). References to the relative wealth of the defendant and the poverty of his victim: Goff v. Commonwealth, 241 Ky. 428, 44 S.W. (2d) 306 (1931) (ability of the defendant to pay "fat fees" to combat and stall the legal process); Sorrell v. State, 74 Tex. Crim. Rep. 100, 167 S.W. 356 (1914) (reference to the wealth and influence of the accused and the poor circumstances of the complaining witness). References to the conduct, habits or associations of the accused: People v. Tufts, 167 Cal. 266, 139 Pac. 78 (1914) (in prosecution for obtaining money under false pretenses, the prosecutor persistently asked the accused questions intimating that he was a sexual pervert); People v. McGraw, 66 App. Div. 372, 72 N.Y. Supp. 679 (4th Dept. 1901) (in a prosecution for burglary, the prosecutor alluded to the neighborhood where the defendant lived as one inhabited by criminals, and that the defendant associated with exconvicts). The enumeration of these by no means completes the list.

In Indiana the following statements by prosecuting attorneys have been considered sufficiently prejudicial to demand a reversal or new trial where proper preliminary steps were taken by the accused to preserve his right to relief: "Luke Bessette has a bad looking face. . . If his face does not show him to be a bad man then I am not a good judge of human countenance." Bessette v. State, 101 Ind. 85 (1884); that the prosecutor knew the saloon keeper defendant and that "he was guilty of this and sure of other crimes." Brow v. State, 103 Ind. 133, 2 N.E. 296 (1885); that the wife of the defendant who was being tried for fornication was broken hearted over the defendant's conduct and that it was all the talk of the defendant's home town, Jackson v. State, 116 Ind. 464, 19 N.E. 330 (1888); that murders had been too frequent because of lax enforcement of the laws and that

held that the alleged misconduct was not available on appeal since the defense counsel had made no objection in the trial court.[6]

Inasmuch as the general rules of procedure require that an objection be made in the trial court to prejudicial argument or conduct and since none was made here the decision would at first appear to be clearly supported by the weight of authority. However, the general rule requiring objection is not without exception[7] and other jurisdictions have long recognized that prejudicial error may be raised for the first time on appeal where the argument or conduct was grossly prejudicial and no curative action on the part of the court could have assured an impartial trial.[8] The Indiana Supreme Court in a recent ease, *Wilson v. State*,[9] recognized the exception and readily applied it.

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the jury should make an example of the defendant, Ferguson v. State, 49 Ind. 33(1874).

6. "As a general rule an appellate court will not reverse a judgment in a civil action or a conviction in a criminal prosecution because of an improper appeal by counsel to the prejudices of the jury where the improper appeal was not brought to the attention of the trial court by objection during the course of the trial." Notes (1932) 78 A.L.R. 1438, 1527, (1907) 7 A. & E. Ann. Cas. 229.

7. "The rule is subject to the exception stated. . . that if the improper remarks are of such character that neither rebuke nor detraction can entirely destroy their sinister influence a new trial should be promptly awarded regardless of the want of an objection or exception." Note (1907) 7 A. & E. Ann. Cas. 229, 231.

8. In a prosecution for violation of the liquor laws, M'Nutt v. U.S., 267 Fed. 670, 672 (C.C.A. 8th, 1920), the court after stating the general rule said: "Such is undoubtedly the general rule but there is an exception to it as firmly established as the rule itself. It is that in criminal cases where the life or liberty of the citizen is at stake the courts of the United States in exercise of a sound discretion, may notice and relieve from radieal errors in the trial which appear to have been prejudicial to the rights of the defendant although the objection they present were not properly reserved by objection, exception, request, or assignment of error." In Gawn v. State, 7 Ohio Cir. Dec. 19, 24 (1896) the court after asserting that the remarks of the prosecuting attorney were planned to excite passion and prejudice and lead to a decision influenced by the prejudice so created said, "Many of these remarks were not objected to when made nor was the court asked to take any action in relation to them. This we believe is not always essential. When improper remarks are made to the jury and it is apparent that an objection thereto would afford no redress but only aggravate their injurious effect, the absence of objection at the time, under such circumstances ought not preclude their consideration upon a motion for new trial." Aetna Life Insurance Co. v. Kelley, 70 F. (2d) 589 (C.C.A. 8th, 1934); Skuy v. U.S., 261 Fed. 321 (C.C.A. 8th, 1920); People v. Simon, 80 Cal. App. 675, 252 Pac. 758 (1927); Starr v. Chicago, B & Q. R.R. 103 Neb. 645, 173 N.W. 682 (1919); Houston & T.C.R.R. v. Rehm, 36 Tex. Civ. App. 553, 82 S.W. 526 (1904); accord, Kansas City Southern R.R. v. Murphy, 74 Ark. 256, 85 S.W. 428 (1905); Akin v. State, 86 Fla. 564, 98 So. 609 (1923).

9. 222 Ind. 63, 51 N.E. (2d) 848 (1943). The case was a prosecution for receiving stolen goods valued at less than $25.00. The defense counsel failed to subpoena important witnesses for the defense and in general inadequately defended the accused. The trial judge assumed the role of an assistant prosecutor, commented upon the

In the *Wilson* case the court held that procedural rules should not prevent a consideration of prejudicial errors where fundamental civil rights were affected. The court there allowed the prejudicial conduct of the judge to be assigned as error in the motion for appeal even though no objection had been made to this misconduct in the trial court.

Although the combination of prejudicial forces is different in the *Wilson* and *Blue* cases, certainly the result—an unfair trial—seems the same.[10] The remarks of the prosecuting attorney in the *Blue* case appear no less inflammatory or prejudicial than those that have prompted other courts to apply the exception.[11] The gulf between the majority and the dissent and the reason for the majority's refusal to apply the exception[12] recognized in the *Wilson* case seems clearly explicable on the basis that the majority does not believe the prosecutor's conduct or argument was prejudicial. While a refusal to invoke the exception is consistent with a finding of no prejudice, the premise of the majority that the appeals were not inflammatory seems untenable in view of remarks and arguments that the courts have previously condemned as prejudicial error.[13]

While the court found that the judge in the *Wilson* case was guilty of active misfeasance and prejudicial conduct, the judge in the *Blue* case remained silent when it is alleged his office demanded that he speak and affirmatively control the argument and conduct of the trial.[14] Though not every case can be anticipated and an inflexible rule prescribed as to when the trial judge shall interfere on his own motion, yet in a case of this kind where it is apparent that a high degree of animosity is being created, charging the trial court with a *sua sponte* duty is a desirable safeguard of civil rights. In view of the recent tendency of American courts to extend the judicial protec-

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evidence, and conveyed to the jury the idea that he thought the defendant was guilty. The defense counsel made no objection to this prejudicial conduct of the trial judge. The Indiana Supreme Court speaking through Richman, J., unanimously reversed the decision of the trial court stating that while ordinarily procedural rules must be observed to give appellate practice the necessary order and stability, yet, when it appeared from the record that a defendant's constitutional rights of an impartial trial had been denied, the court was free to take cognizance of the errors complained of even though objection had not been made in the trial court.

10. In the Wilson case the unfair trial resulted from tbe prejudicial conduct of the judge and the lack of objection to this conduct by incompetent defense counsel. In the Blue case the seemingly unfair trial is a result of prejudicial argument and conduct of the prosecuting attorney coupled with lack of objection by competent (Brief for appellant p. 85) defense counsel and a passive endorsement of the prejudicial argument by a silent judge.
11. Aetna Life Insurance Co. v. Kelley, People v. Simon, Gawn v. State, Houston T. C. R.R. v. Rehm, cited supra n. 8.
12. In the Blue case the majority concede the existence of the exception, p. 381.
13. See n. 5 supra.
14. Brief for Appellant, p. 88.

tion of the civil rights of religious minorities,[15] picketers,[16] and speakers,[17] and to reflect the mores of fair-play and justice of an American society in cases of capital crimes,[18] the *Blue* case stands as an incongruous result—a holding that reflects the unchecked bias and blind patriotic passion against one who exercised an unpopular right to strike in a time of grave national emergency.

FEDERAL JURISDICTION

LIMITATIONS ON FEDERAL EQUITY JURISDICTION

Appellants sought to enjoin enforcement of the 1944 "anti-closed shop" amendment[1] to the Florida Constitution, alleging that it violated the First Amendment, Fourteenth Amendment, and the contract clause[2] of the United States Constitution and that it conflicted with the National Labor Relations Act[3] and the Norris-LaGuardia Act.[4] The district court granted a temporary restraining order and caused a three-judge court to be convened. This court, deciding the case on the merits, vacated the restraining order and dismissed the complaint.[5] On appeal to the Supreme Court, reversed and remanded with directions to retain the bill pending determination of proceedings in the state courts which would supply the lacking construction and interpretation of the amendment. *American Federation of Labor v. Watson*, 66 Sup. Ct. 761 (1946).

After holding that the district court had jurisdiction to hear and decide the case on the merits, that it was a proper case for a three-judge district court, that the complaint stated a goed cause of action in equity on the grounds of threatened irreparable injury, the Court concluded, Justice Douglas writing for the majority,[6] that it was improper for the lower court to have ruled on the merits at this stage of the litigation. The Court's action followed very closely its

15. E.g., the overruling of the Gobitis decision in West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943); Taylor v. Mississippi, 319 U.S. 583 (1943).
16. E.g., Thornhill v. Alabama, 310 U.S. 88 (1940); Carlson v. California, 310 U.S. 106 (1940).
17. E.g., Thomas v. Collins, 323 U.S. 516 (1945).
18. E.g., Hawk v. Olson, 326 U.S. 271 (1945); Ashcraft v. Tennessee, 322 U.S. 143 (1944); Chambers v. Florida, 309 U.S. 227 (1940); Powell v. Alabama, 287 U.S. 45 (1932).
1. Fla. Const., Declaration of Rights § 12; Fla. Laws, 1943, p. 1134, ratified at the general election Nov. 7, 1944.
2. U. S. Const. Art. I, § 10.
3. 49 Stat. 449 (1935), 29 U.S.C.A. §§ 151 et seq. (1942).
4. 47 Stat. 70 (1932), 29 U.S.C.A. §§ 101 et seq. (1942).
5. American Federation of Labor v. Watson, 60 F. Supp. 1010 (S.D. Fla. 1945).
6. Stone, C. J., dissented on the grounds that the bill should have been dismissed for want of equity. Murphy, J., dissented on the grounds that the Court should hear the appeal on the merits. Jackson, J., took no part in the consideration of the case.

decision in *Specter Motor Co., Inc. v. McLaughlin.*[7] But the unpredictable question of when a federal court sitting in equity should exercise its discretion to refuse to decide a case although it has jurisdiction still remains in considerable doubt.

It is a fundamental maxim that bills in equity are addressed to the sound discretion of the court.[8] A court of equity in the exercise of this discretion may refuse to hear a case although it has jurisdiction. In recent years this phase of equitable discretion has been prominent in attempting a solution to the problem of interference by federal courts in matters involving the application, interpretation, and enforcement of state laws, especially uncertain or unsettled state laws.

The issue is made more difficult by the holdings that both the refusal to decide a case and the interference by federal courts in the application, interpretation, and enforcement of state laws can be warranted only by "extraordinary circumstances". The usual "extraordinary circumstances" which justify federal interference have been irreparable injury and a violation of a constitutionally protected right.[9] The usual "extraordinary circumstances" which warrant refusal to decide have involved a desire to uphold "the rightful independence of state governments" or to further a recognized public policy.[10]

There are several presently recognized situations affording examples of these extraordinary circumstances wherein the Supreme Court has held that federal courts should not use their power to interfere:

1. with state criminal prosecutions except where moved by urgent considerations;[11]
2. with collection of state taxes or with the fiscal affairs of a state;[12]
3. with the state administrative function of prescribing local utility rates;[13]
4. with liquidation of state banks by a state officer where there is no contention that shareholders and creditors will not be protected;[14]
5. in shaping the domestic policy of a state governing its administrative agencies.[15]
6. In addition, a federal court may stay proceedings before it, to enable parties first to litigate in state courts questions of

7. 323 U.S. 101 (1944).
8. Meredith v. City of Winter Haven, 320 U.S. 228, 235 (1943); Beal v. Missouri Pac. R.R., 312 U.S. 45, 50 (1941).
9. Watson v. Buck, 313 U.S. 387 (1941); Spielman Motor Co. v. Dodge, 295 U.S. 89 (1935).
10. Meredith v. City of Winter Haven, 320 U.S. 228, 235 (1943).
11. Beal v. Missouri Pac. R., 312 U.S. 45 (1941).
12. Matthews v. Rodgers, 284 U.S. 521 (1932). But cf. Hillsborough Township v. Cromwell, 66 Sup. Ct. 445 (1946).
13. Central Kentucky Natural Gas Co. v. Railroad Comm. of Ky., 290 U.S. 264 (1933).
14. Pennsylvania v. Williams, 294 U.S. 176 (1935).
15. Burford v. Sun Oil Co., 319 U.S. 315 (1943); Railroad Comm. v. Rowan & N. Oil Co., 311 U.S. 570 (1941).

state law which are preliminary to and may rended unnecessary a decision of constitutional questions.[16]

The basic principle underlying the above named situations appears to be very similar to the underlying doctrine of *Erie R.R. v. Tompkins*[17] —that the interpretation and application of purely local laws should be left to the state courts and federal courts should exercise their powers by interference only when exceptional circumstances arise.[18]

In 1943, the Court added some confusion to the problem by its decision in *Burford v. Sun Oil Co.*[19] In this case, the only reason given for refusing to enjoin enforcement of an order of the Texas Railroad Commission was that a comprehensive system for review of the orders of that body had been provided by statute in the state courts. Considering the intricacy of the orders of the commission and the economic importance of the oil industry in Texas, it was deemed more wise for the federal court not to interfere in the system of regulation. The decision seems to rest as much on a basis of convenience in a situation involving substantial economic import in the particular state as on the simple basis of non-interference in shaping the domestic policy of a state.

The question is even less clear when the state law is merely uncertain or in confusion as it is in the instant case where a new piece of state legislation has received no construction by the state courts. In 1940, the Supreme Court in *Thompson v. Magnolia Petroleum Co.*[20] reversed a federal bankruptcy court because it *had* decided an unsettled question of state property law.[21] However, in 1943, in *Meredith v. City of Winter Haven*,[22] the Supreme Court reversed a circuit court of appeals because it *had not* decided a question of applicability and effect of a state statute for the reason that the state decisions were so in conflict that it was doubtful just what the state law was. In the *Meredith* case, the Court indulged in the presumption that the last decision of the state supreme court represents the state law unless it can be said with some certainty that the state court would not follow it.[23] Nevertheless, it appears that the Court swung back to the classical view that it is the duty of the federal courts to decide a case when it has jurisdiction unless there is some recognized public policy or defined principle guiding the exercise of jurisdiction conferred which would in exceptional cases warrant it non-exercise.[24]

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16. Chicago v. Fieldcrest Dairies, Inc., 316 U.S. 168 (1942); Railroad Comm. of Texas v. Pullman Co., 312 U.S. 496 (1941); Gilchrist v. Interborough Rapid Transit Co., 279 U.S. 159 (1929); Feimer v. Boykin, 271 U.S. 240 (1926).
17. 304 U.S. 64 (1938).
18. Di Giovani v. Camden Fire Ins. Ass'n, 296 U.S. 64 (1935); cases cited n. 16 supra.
19. 319 U.S. 315 (1943); Note (1944) 53 Yale L. J. 788, 791.
20. 309 U.S. 478 (1940).
21. Ibid. The Court directed that the trustee in bankruptcy proceed in state courts to determine the unsettled state law. Note (1940) U. of Chi. L. Rev. 727.
22. 320 U.S. 228 (1943).
23. Id. at 234.
24. Ibid.

It has been declared that inasmuch as the Constitution gives federal courts jurisdiction in diversity cases, and that this has been supplemented by legislation, it is the duty of the federal courts to decide every diversity case coming before them, with the exception of very unusual cases; that if a change of policy in accepting and deciding diversity cases is to be made, Congress should make the change.[25] Although this argument has great weight, neither can it be denied that throughout our history, the Court has played an important part in shaping the legal, social, and political policy of our country. It does not seem that the Court should fail to effectuate a desirable policy solely on the grounds that it would be better for the legislature to make the change.

The limitations heretofore placed by Congress on the jurisdiction of federal courts have not been too broad nor in most cases proved very effective. The question did not draw too much attention until 1908 when in *Ex parte Young*,[26] it was decided that a federal court could enjoin a state official in the enforcement or threatened enforcement of an alleged unconstitutional state statute notwithstanding the Eleventh Amendment. In 1910, Congress enacted section 266 of the Judicial Code[27] which provided that interlocutory injunctions of this type could only be issued by a three-judge court with a right of direct appeal to the Supreme Court. In subsequent years this section was broadened slightly.[28]

In more recent years Congress has passed the Johnson Act[29] which withdrew jurisdiction to enjoin most state utility orders on grounds of unconstitutionality but which has been largely ineffective.[30] In 1937 a similar statute was passed regarding state taxes.[31] In addition, there are the well-known limitations on injunctions in the labor field.[32]

It is impossible to say at this time whether the conflicting views shown in the *Magnolia* and *Meredith* cases rendered within four years of each other evidence a genuine change of attitude of the Court, or

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25. See dissent by Frankfurter, J., in Burford v. Sun Oil Co., 319 U.S. 336, 348 (1943). But cf. Di Giovani v. Camden Fire Ins. Ass'n, 296 U.S. 64, 73 (1935) "Its discretion may be properly influenced by considerations of public policy."; Matthews v. Rodgers, 284 U.S. 521, 525 (1932) "The scrupulous regard for the rightful independence of stato governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operation require that such relief should be denied in every case where the asserted federal rigght may be preserved without it." See also Note (1941) 54 Harv. L. Rev. 1379, 1390.
26. 209 U.S. 123 (1908).
27. 36 Stat. 557 (1910), 28 U.S.C.A. § 380 (1928).
28. 37 Stat. 1013 (1913), 28 U.S.C.A. § 380 (1928).
29. 48 Stat. 775 (1934), 28 U.S.C.A. § 41 (1) (Supp. 1945).
30. E.g., Mountain States Power Co. v. Public Service Comm., 299 U.S. 167 (1936); Corporation Comm. of Okla. v. Cary, 296 U.S. 452 (1935).
31. 50 Stat. 738 (1937), 28 U.S.C.A. § 41 (1) (Supp. 1945).
32. 47 Stat. 738 (1937), 29 U.S.C.A. §§ 101 et seq. (1942).

whether we are still in the formative state in a matter of serious policy wherein no definite trend has begun to appear. We can say that the manner in which the Court will treat the next case presenting the same problem is quite unpredictable. Like many questions of law wherein an active social or political policy is the final arbiter, the presence or absence of a few facts on either side may be the deciding factor with little or no real attention given to preceding cases.

It is not contended that federal judges are less qualified than state judges to decide questions of interpretation and application of state law. However, it cannot be denied that most of these cases, especially those where a constitutional question is involved, can travel te the Supreme Court through the state courts as well as through the federal courts and in doing so will pick up the applicable interpretation of state law which cannot be doubted to be the state law at least for that case. This alone appears to be sufficient reason for litigants to resort to state courts when an uncertain or unsettled question of state law is inherent in the case, even though federal courts are equally open to them so far as jurisdiction is concerned.

Although at present it is presumptuous to say that it is the policy of the Court that state matters would be better litigated in state courts, the instant case presents an almost too clear example of when a federal court should refuse to rule on the merits of a case because the matter would not only be better litigated in the state courts, but because it is essential to have it litigated there. The *Meredith* case would seem to indicate that the Court had withdrawn from its post-*Erie* attitude of emphasizing federal noninterference with state laws.

The most effective way at present of avoiding this unnecessary litigation and burden to both federal and state courts seems to be with the clients and their lawyers, who, having a choice of either federal or state courts, should choose the state courts when their litigation involves a doubtful or uncertain application of state law.

JURISDICTION

FUTURE EARNINGS AS BASIS FOR EQUITY JURISDICTION

To compel the support and maintenance of minor children of parties to a divorce, an equity court ordered sequestration of future salary of the nonresident husband, who had been served by publication. The salary was payable by his resident employer, a party to the action. Later the court ordered that either the husband pay the award decreed within a specified time or that the amount accumulated by the employer be paid to the plaintiff. Held: affirmed. The decree for maintenance was in rem since (a) a man's labor or right to labor is the highest form of property,[1] (b) the husband's property in his work was in existence at the time of the sequestration order by analogy to

1. Massie v. Cessna, 239 Ill. 352, 358, 70 N.E. 564, 565 (1904) (freedom to contract for assignment of wages); Frorer v. People, 141 Ill. 171, 181, 31 N.E. 395, 396 (1892) (freedom to contract for manner of payment of wages).

a trust fund case,[2] and (c) the alternative feature of such a decree preserves its character as a decree in rem.[3] *Mowrey v. Mowrey*, 65 N.E. (2d) 234 (Ill. App. 1946).

A purely personal decree for alimony or maintenance against a non-resident, who does not appear after constructive notice, is void.[4] But where the nature and situs of the property will support a proceeding in rem or quasi in rem,[5] the court, if authorized hy statute, will render such decree against property within the jurisdiction specifically proceeded against.[6] Attachment or seizure of the property at the heginning of or during pendency of the suit is not essential to jurisdiction.[7]

Here the only question is whether the nature of the property[8]

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2. Tuttle v. Gunderson, 254 Ill. App. 552 (1929), cert, dis'm., 341 Ill. 36, 173 N.E. 175 (1930).
3. Cox v. Cox, 192 Ill. App. 286, 295 (1915); Crawford v. Nimmons, 180 Ill. 143, 146, 54 N.E. 209, 210 (1899); Kirby v. Runals, 140 Ill. 289, 297, 29 N.E. 697, 699 (1892).
4. Smith v. Smith, 74 Vt. 20, 51 Atl. 1060, 1061 (1901); Hicks v. Hicks, 193 Ga. 446, 447, 18 S.E. (2d) 754, 755 (1942); Proctor v. Proctor, 215 Ill. 275, 277, 74 N.E. 145, 146 (1905).
5. "The proceeding in rem can be correctly and adequately understood only if it be realized that it is essentially an anonymous proceeding, being aimed to reach the interest of the true owner (or owners) of the property whoever he may be. The proceeding quasi in rem is, on the other hand, aimed to reach only the interest of a named party." Hohfeld, "Fundamental Legal Conceptions" (1923) 110, n. 103.
6. Wilson v. Smart, 324 Ill. 276, 281, 155 N.E. 288, 291 (1927) (real estate); Clark v. Clark, 202 Ind. 104, 111, 172 N.E. 124, 126 (1930) (trust fund); Geary v. Geary, 272 N.Y. 390, 398, 6 N.E. (2d) 67, 70 (1936) (retirement or pension fund); Reed v. Reed, 121 Ohio St. 188, 167 N.E. 684, 687 (1929) (real estate).
7. Illustrations of other methods are: service of process upon trustees of defendant's funds, Clark v. Clark, 202 Ind. 104, 111, 172 N.E. 124, 126 (1930); general prayer for relief, Twing v. O'Meara, 59 Iowa 326, 331, 13 N.W. 321, 323 (1882); descriptioin of property in petition and prayer for vindication through same, Reed v. Reed, 121 Ohio St. 188, 167 N.E. 684, 687 (1929); preliminary injunction, Benner v. Benner, 63 Ohio St. 220, 58 N.E. 569, 571 (1900). On the general subject matter see Notes (1924) 29 A.L.R. 1381, (1928) 64 A.L.R. 1392, (1937) 108 A.L.R. 1302.
8. The word "property" has no definite or stable connotation. Sometimes it is employed to indicate the physical object to which various legal rights, privileges, etc. relate; then again with greater discrimination it is used to denote the legal interest (or aggregate of legal relations) appertaining to such physical object. Hohfeld, "Fundamental Legal Conceptions" (1923) 28. The court in the principal case founded its jurisdiction on a man's property in his labor, but relied on cases involving the protection of the right to labor and exemplifying loose usage by designating labor as the highest form of property. See n. 1 supra; cf. Gleason v. Thaw, 185 Fed. 345, 347 (C.C.A. 3d, 1911). The word "property" is a very general term and its meaning should be restricted by the more specific words with which it is associated and by the purpose for which it is usod.

is such as to support a "decree in rem".[9] In a creditor's suit the defendant's salary can be reached only to the amount accrued at commencement of the action.[10] Such earnings are not subject to a suit in aid of execution or to process of a court of equity because defendant has neither legal nor equitable title thereto.[11] Thus, under facts similar to the instant case, it was held that, since future earnings cannot be reached by a suit in equity, it would be an anomoly to allow sequestration of earnings accruing subsequent to appointment of a receiver.[12] The court distinguished sequestration of future income from a trust or pension fund on the ground that such income would be subject to a judgment creditor's suit.[13] Also in such cases the right to the income was vested in the defendant when sequestration was sought. But in the salary case an agreement, though prescribing rate of payment in writing, does not of itself give a right to receive the salary. Such salary, if given, is only payment for services to be rendered.[14]

Neither reason nor precedent support the instant case. The state's interest in the marriage contract[15] and its responsibility upon divorce

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9. In terms of the Hohfeldion analysis, a right in rem, or multital right, correctly understood is simply one of a large number of fundamentall similar rigghts residing in one person; and any one of such rights has as its correlative one and only one, of a large number of general, or common duties—that is, fundamentally similar duties residing respectively in many different persons. A right in personam is one having few if any "companion rights", whereas a right in rem always has many such "companions". All rights in rem are against persons. The intrinsic nature of substantive primary rights, whether they be rights in rem or rights in personam, is not dependent on character of proceedings by which they may be vindicated. A primary right in personam, e.g., A's right that B pay $1000 may frequently be vindicated only by an attachment proceeding, one quasi in rem. Hohfeld, "Fundamental Legal Conceptions" (1923) 76, 77, 95, 110, 114; cf. Cook, "Powers of Courts of Equity" (1915) 15 Col. L. Rev. 37, 106.

10. McGrew v. McGrew, 38 F. (2d) 541, 544 (App. D.C. 1930), cert. denied, 50 Sup. Ct. 349 (1930); State ex rel. Busby v. Cowan, 232 Mo. App. 391, 394, 107 S.W. (2d) 805, 807 (1937); Browning v. Bettis and Garrow, 8 Paige 568 (N.Y. 1841); Valentine v. Williams, 159 N.Y. Supp. 815 (1916); Note (1937) 106 A.L.R. 588.

11. See n. 10 supra.

12. Tompers v. Tompers, 159 N.Y. Supp. 817 (1916), appeal denied, 159 N.Y. Supp. 1146.

13. Zwingmann v. Zwingmann, 150 App. Div. 358, 134 N.Y. Supp. 1077 (2d Dep't 1912) (pension fund); Moore v. Moore, 143 App. Div. 428, 128 N.Y. Supp. 259 (1st Dep't 1911) (trust case).

14. Tompers v. Tompers, 159 N.Y. Supp. 817 (1916), appeal denied, 159 N.Y. Supp. 1146; cf. Bruton v. Tearle, 7 Cal. (2d) 48, 53, 59 P. (2d) 953, 955 (1936), where the court emphasizing that means of enforcing an alimony judgment are different and more effective than those applicable to an ordinary money judgment, appointed a receiver of the future earnings of the husband. See criticism Note (1937) 106 A.L.R. 588. The case is distinguishable from the present decision where future earnings are the basis for the court's jurisdiction.

15. People v. Case, 241 Ill. 279, 284, 89 N.E. 638, 640 (1909); Jarrard v. Jarrard, 116 Wash. 70, 198 Pac. 741, 742 (1921).

to provide for the support and custody of children is well recognized;[16] yet "public policy" alone is not a sufficient justification for the decision Since divorce law is statutory,[17] legislative authority for the procedure followed would be preferable.

STATUTORY CONSTRUCTION

CHANGE IN INTERPRETATION AFTER REENACTMENT

In an aplication for naturalization, a native of Canada, a Seventh Day Adventist, refused to promise to bear arms in defense of this country on the basis that the promise would be contrary to his religious belief. He was willing to do military service as a non-combatant and was willing to take the oath of allegiance as required of aliens by the Nationality Act of 1940,[1] which does not specifically require that petitioners for citizenship must promise to bear arms. Held: The District Court's order admitting the applicant to citizenship was affirmed.[2] *Girouard* v. *United States*, 66 S. Ct. 826 (1946).[3]

The question presented is one of statutory construction. Does the statute require an applicant for citizenship to stato under oath that he is willing to take up arms in defense of his country? A divided court, interpreting the Naturalization Act of 1906,[4] held in the *Schwimmer*,[5] *Macintosh*,[6] and *Bland*[7] cases that it was an implied requirement.[8] The decisions met with prolific adverse criticism.[9] For

16. Kelley v. Kelley, 317 Ill. 104, 110, 147 N.E. 659, 661 (1925); Hickey v. Thayer, 85 Kan. 556, 118 Pac. 56, 57 (1911), 41 L.R.A. (N.S.) 564 (1913).
17. Barrington v. Barrington, 206 Ala. 192, 89 So. 512, 513 (1921); Sweigart v. State, 213 Ind. 157, 167, 12 N.E. (2d) 134, 138 (1938). E.g., Ill. Rev. Stat. (1945) c. 40, § 1-21.
1. 54 Stat. 1137, 1157, 8 U.S.C.A. § 735 (b) (1940).
2. The decision of the District Court of Massachusetts, admitting him to citizenship was reversed by the Circuit Court of Appeals, U.S. v. Girouard, 149 F. (2d) 760 (C.A.A. 1st, 1945). The Circuit Court took its action on the authority of U.S. v. Schwimmer, 279 U.S. 644 (1929); U.S. v. Macintosh, 283 U.S. 605 (1931); U.S. v. Bland, 283 U.S. 636 (1931).
   As a matter of statutory construction, the Court held that Congress did not intend to require a promise to bear arms as a prerequisite to citizenship, and that judicial interpretation rendered prior to legislative re-enactment of the Naturalization Act did not preclude judicial review of previous Supreme Court decisions.
3. Stone, C. J., Frankfurter and Reed, J. J., dissenting.
4. 34 Stat. 596 (1906).
5. U.S. v. Schwimmer, 279 U.S. 644 (1929).
6. U.S. v. Macintosh, 283 U.S. 605 (1931).
7. U.S. v. Bland, 283 U.S. 636 (1931).
8. The Court in the principal case has adopted the dissenting opinion of Hughes, C.J., in U.S. v. Macintosh, 283 U.S. 605, 635 (1931), ". . . while recognizing the power of Congress, the mere holding of religious or conscientious scruples against all wars should not disqualify a citizen from holding office in this country, or an applicant otherwise qualified from being admitted to citizenship. . ."
9. Fields, "Conflicts in Naturalization Decisions" (1936) 10 Temp.

the next ten years numerous bills were introduced in Congress to nullify the effect of the decisions.[10] Arguments for and against these bills were made in committee hearings[11] and on the floor of Congress.[12] However, all the bills died in committee.[13] In the meantime the decisions were followed.[14] In 1940, after studied deliberation, the Nationality Act was revised[15] and the words of the oath were left substantially the same as in the 1906 act;[16] but non-combatants in the armed forces were permitted to become citizens by an amendment to the Second War Powers Act of 1942.[17]

Both majority and minority agree that the primary rule of construction is to ascertain and declare the intent of the legislature.[18] Legislative history affords accurate and compelling guides to legislative intent.[19] The majority could not find affirmative recognition of the rule of *Schwimmer*, *Macintosh* and *Bland* decisions in the

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L. Q. 272; Carpenter, "The Promise to Bear Arms as a Prerequisite to Naturalized Citizenship" (1931) 10 Ore. L. Rev. 375; Notes (1930) 3 So. Calif. L. Rev. 224; (1929) 101 Literary Digest 9; (1929) 128 Nation 689; (1929) 59 New Republic 92; (1929) 152 Outlook 250.

10. HR 3547, 71st Cong. 1st Sess., 71 Cong. Rec. 2184; HR 297, 72nd Cong. 1st Sess., 75 Cong. Rec. 95; S 3275, 72nd Cong. 1st Sess. 75 Cong. Rec. 2600; HR 1528, 73rd Cong. 1st Sess., 77th Cong. Rec. 90; HR 5170, 74th Cong, 1st Sess., 79th Cong. Rec. 1356; HR 8259, 75th Cong. 1st Sess., 81 Cong. Rec. 9193; S 165, 76th Cong. 1st Sess. 84 Cong Rec. 67.
11. See committee hearings on the bills listed in n. 10.
12. 72nd Cong. Rec. 6966-7; 75th Cong. Rec. 15354-7.
13. See n. 10 supra.
14. Shelley v. U.S., 120 F. (2d) 734 (App. D.C. 1941); In re Warkentin, 93 F. (2d) 42 (C.C.A. 7th, 1937); Beale v. U.S., 71 F. (2d) 737 (C.C.A. 8th, 1934); In re Losey, 39 F. Supp. 37 (D.C. Wash. 1941); In re Aldecoa, 22 F. Supp. 659 (D.C. Idaho 1938); Clarke's Case, 301 Pa. 321, 152 A. 92 (1930). Contra: re John P. Klessen, (C. P. Allen Co., Ohio 1933); In re Bubeck, (C. P. Bergen Co., N.J., 1933).
15. See n. 1 supra. The revision of the naturalization laws was considered by a Congressional Committee and a committee of Cabinet members, one of whom was the Attorney General. Both committees were aware of the Schwimmer, Macintosh, and Bland decisions.
16. Extensive changes were made in the requirements and procedure for naturalization.
17. 56 Stat. 176, 182 (1944), 8 U.S.C.A. § 1001 (1945).
18. The majority and minority purport to ascertain legislative intent. See principal case at pp. 830, 831-33. Radin, "Statutory Interpretation" (1930) 43 Harv. L. Rev. 863, 870 states that there is no such thing as legislative intent. He modified his view in Radin, "A Short Way with Statutes" (1942) 56 Harv. L. Rev. 388, 410, to say that debates, committee reports and the like are neither irrelevant nor incompetent, but that they are in no sense conrolliing. See, Miller, "The Value of Legislaive History of Federal Statutes" (1925) 73 U. of Pa. L. Rev. 158.
19. See Landis, "A Note on Statutory Interpretation" (1930) 43 Harv. L. Rev. 886.

legislative history of the act.[20] Declaring that there was an absence of clear and explicit direction from Congress, the majority determined what they believed was the basic legislative intent. Relying upon the American tradition of freedom of religious belief,[21] the majority stated that they did not believe Congress intended to exact a pledge to bear arms as a prerequisite to citizenship. They construed the failure of any of the proposed bills to be reported out of committee as congressional silence.[22] Thus, the Court refused to accept what has generally been recognized as an important extrinsic aid in statutory construction.[23] The majority would review previous interpretations of statutes in much the same manner as constitutional construction is reviewed.[24] The justification for such treatment, however, is not similar; unlike constitutional construction erroneous statutory construction can be corrected by legislative action.[25] The majority opinion encourages judicial law-making. Upon occasions it is admitted that this is necessary,[26] but as a general proposition judicial law-making should have a definite and stable limit. For when the subjective determination of policy rests with the courts rather than the legislators, the legislative process is ignored.[27]

The minority determined legislative intention by a consideration of all extrinsic evidence.[28] They carefully analyzed the complete legis-

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20. See principal case at p. 830.
21. See U.S. v.Schwimmer, 279 U.S. 644 (1929) (dissenting opinion); U.S. v. Macintosh, 283 U.S. 605 (1931) (dissenting opinion.)
22. In the interpretation of a statute it has been regarded as improper to resort to a bill on the subject proposed in committee, but never voted upon by the legislature. District of Columbia v. Washington Market Co., 108 U.S. 243 (1879).
    Rules against reading anything into a statute by implication are particularly applicable to provisions expressly rejected by the legislature. Carey v. Donohue, 240 U.S. 430 (1916); Pennsylvania R.R. v. International Coal Min. Co., 230 U.S. 184 (1913). This contention is that the court can have no means of knowing the reasons that influenced the legislature in such rejection. Similarly, the court can have no knowledge of the reasons that influence passage.
23. See 2 Sutherland, "Statutory Construction" (3d. ed. 1943) §§5505, 5006, 5007, 5008, 5015.
24. See Willis, "The Part of the United States Constitution Made By The Supreme Court" (1937) 23 Iowa L. Rev. 165; Lobinger, "Precedent in Past and Present Legal Systems" (1946) 44 Mich. L. Rev. 955, 978, n. 128; (1946) 4 Nat. Bar. J. 137; (1946) 32 A.B.A.J. 345. See Lyon, "Old Statutes and New Constitution" (1944) 44 Col. L. Rev. 599, 631.
25. "Courts are not responsible for the law." Thomas v. Industrial Commission, 243 Wis. 231, 10 N.W. (2d) 206 (1943.)
26. See Horack, "In the Name of Legislative Intention" (1932) 38 W. Va. L. Q. 119.
27. To ignore legislative processes and legislative history in the processes of interpretation, is to turn one's back on whatever history may reveal as to the direction of the political and economic forces of our time." Landis, "A Note on Statutory Interpretation" (1930) 43 Harv. L. Rev. 886, 892.
28. See Horack, "Cases and Materials on Legislation" (1940) 491.

lative history and saw that the former interpretation had been presented to Congress in a precise form.[29] The minority would place the burden of proof upon those who are attempting to show that Congress did not intend to adopt existing interpretations. Statutory interpretation should be on the basis of the assumed acquiescence of the members of the legislature to the prevailing interpretations.[30] Granting that the Court in the first instance misinterpreted the Act of 1906, there has been abundant opportunity for Congress to give further expression to their will.[31] Its failure to do so amounts to ratification.[32] Congress having adopted the statute by reenactment, neither the department charged with its execution nor the courts should be at liberty to disregard it.[33] This properly places the responsibility of settling controversial issues of interpretation on the legislature and relegates the judicial function to that of making a determinable statuto somewhat more determinate.[34]

SUPREME COURT

SELECTION FEDERAL JURY PANEL

Petitioner was injured when he jumped from moving train operated by respondent. Suit in a California court alleging negligence, was removed to federal court in San Francisco where petitioner moved to strike jury panel as it represented "mostly business executives or those having the employer's point of view. . ." Evidence showed the jury commissioners excluded day laborers from the jury list since this group probably would have been excused by the trial judge anyway on grounds of financial hardship. Motion denied. Court of appeals

29. See n. 10 supra.

30. U.S. v. Anderson, 269 U.S. 422 (1926). See U.S. v. SouthEastern Underwriters Ass'n, 322 U.S. 533 (1944) (Dissenting opinion by Stone, C.J.).

31. See n. 10 supra.

32. Manley v. Mayor, 68 Kan. 377, 75 Pac. 550 (1904); U.S. v. Elgin J. & E. Ry., 298 U.S. 492 (1935). Contra: Rosse v. St. Paul & D. Ry., 68 Minn. 216, 71 N.W. 20 (1897). See Sutherland, "Statutory Construction" (3d ed. 1943) § 5109.

33. See Sutherland, "Statutory Construction" (3d ed. 1943) § 5109. For a discussion of this problem in the field of tax and administrative law, see Alford, "Treasury Regulations with the Wilshire Oil Case" (1940) 40 Col. L. Rev. 252; Brown, "Regulations, Reenactment, and the Revenue Acts" (1941) 54 Harv. L. Rev. 377; Feller, "Addendum to the Regulations Problem" (1941) 54 Harv. L. Rev. 1311; Griswold, "A Summary of the Regulations Problem" (1941) 54 Harv. L. R. 398; Paul, "Use and Abuse of Tax Regulations in Statutory Construction" (1940) 49 Yale L. J. 660; Surrey, "The Scope and Effect of Treasury Regulations under the Income, Estate and Gift Taxes" (1940) 88 U. of Pa. L. Rev. 556; "If there has been a series of uniform decisions on the same point they ought to have the force of law, because in this case they become conclusive evidence of the law. . . " Lieber, "Hermeneutics" (3d ed. 1880).

34. Radin, "Statutory Interpretation" (1930) 43 Harv. L. Rev. 863.

affirmed.[1] Certiorari granted. Held, reversed. The court, through Mr. Justice Murphy stated, inter alia, that "such exclusion cannot be justified by state or federal law." *Thiel v. Southern Pacific Co.*, 66 S. Ct. 984 (1946).[2]

Jurors in federal courts are qualified according to the law of the state in which the court is sitting.[3] The state may provide quailfications and exemptions so long as it doesn't discriminate against persons because of their race, color, or previous condition of servitude.[4] The California code makes provision for specific exemptions in the interests of the community,[5] but there are no provisions for exemption of day laborers as such. Yet, it further provides that the jury lists shall be made of such only as are not exempt and who are otherwise qualified.[6] Still, the California code provides that prospective jurors may be *excused by the court* for other than trivial reasons, when material injury or destruction to that person's property is threatened.[7] Thus the court was faced with an exemption of a particular class not specifically provided for by the California code. The proposition is now apparent that this is a violation of federal law by reference to the state law.

But the court went further than the above proposition by stating that this was also violative of the American tradition of trial by jury. The courts conception of this jury, by analogy to the cases arising under the Fourteenth Amendment, is that it be a body truly representative of the community and be drawn from a cross-section thereof.[8] Yet, an arbitrary exclusion of members of a particular race is a denial of equal protection of the laws.[9] Even though the cases in the past have confined themselves to the issue of racial discrimination,[10] it is apparent tbat the court is extending the principle of those cases to cover the circumstance here.

Smce the United States Supreme Court exercises supervisory powers over the lower federal courts, it may reverse a judgement when something less than a constitutional issue is involved.[11] The court condemned the practice of the jury commissioners as not only viola-

1. Thiel v. Southern Pacific Co., 149 F. (2d) 783 (C.C.A. 9th, 1945).
2. Mr. Justice Frankfurter, with whom Mr. Justice Reed concurred, dissented.
3. 28 U.S.C.A. (1942) § 411.
4. Id. § 411 (8).
5. Calif. Code of Civ. Proc. (1941) §§ 198-200.
6. Id. § 205.
7. Id. § 201.
8. Smith v. Texas, 311 U.S. 128 (1940); accord, Dixon v. State, 67 N.E. (2d) 138 (Ind. 1946).
9. Smith v. Texas, 311 U.S. 128 (1940); Hill v. Texas, 316 U.S. 400 (1942); Pierre v. Louisiana, 306 U.S. 354 (1938); Hale v. Kentucky, 303 U.S. 613 (1938); Norris v. Alabama, 294 U.S. 587 (1935); Carter v. Texas, 177 U.S. 442 (1900); Gibson v. Mississippi, 162 U.S. 565 (1896); Neal v. Delaware, 103 U.S. 370 (1881).
10. See n. 9 supra.
11. McNabb v. United States, 318 U.S. 332 (1943).

tive of law but also of the American standards of justice and equality. Submitted, that the judgment in this case was not prejudicial to the petitioner since the trial court orally found that five members of the jury did tend toward the laboring class.[12] The court appears to be closing the door to a practice, which if not controlled, could serve substantial injustice in future litigation.

TAXATION

EMBEZZLED FUNDS AS INCOME

Taxpayer, employed as a bookkeeper, embezzled over $12,000 during 1941. He was convicted in 1942, sentenced for the crime, and paroled in 1943. The Commissioner determined that the taxpayer was required to report the embezzled funds as income received in 1941 and asserted a tax deficiency. The Tax Court sustained the Commissioner[1] and the circuit court of appeals reversed.[2] Held: affirmed. The embezzled money did not constitute income to the taxpayer in 1941 under Sec. 22 (a) of the Internal Revenue Code. *Commissioner v. Wilcox*, 66 Sup. Ct. 546 (1946).[3]

This decision holds that embezzled funds *per se* are not as a matter of law taxable income,[4] reversing the previous administrative interpretation of Sec. 22 (a)[5] approved by the Tax Court.[6] The decision has been criticized as a departure from the previous approach that illegal gains are taxable as a matter of public policy, that the "test" proposed is irreconcilable with other decided cases, and that the decision ignores the practical gains to the embezzler.[7]

Mr. Justice Burton took sharp issue with the majority opinion, summing up his position as follows: "Because of the legislative history of Sec. 22 (a), the breadth of the langnage used by Congress in that section, the attempt of Congress to use the full measure of its

12. Mr. Justice Frankfurter did not understand why the judgment wasn't free from any inherent infirmity in that it was "too large an assumption on which to base judicial action that those workers who are paid by the day have a different outlook psychologically than those who earn weekly wages . . ." Principal case at p. 990.
1. T.C. Memo. Dec., 3 C.C.H. 1944 Fed. Tax Serv. T.C. Dec. 14,107 (M)
2. 148 F. (2d) 933 (C.C.A. 9th, 1945).
3. Dissenting opinion Burton, J., principal case at p. 550.
4. The Treasury Department's interpretation of the decision is as follows: "The mere act of embezzlement does not of itself result in taxable income to the embezzler for federal income tax purposes. If the owner condones the taking of the property and forgives the indebtedness, taxable income may result to the embezzler, depending on the facts in the particular case." 4 C.C.H. 1946 Fed. Tax Serv. ¶ 6230, G.C.M. 24945, 1946-13-12335.
5. G.C.M. 16572, XV-1 Cum. Bul. 82 (1936).
6. See Spruance, 43 B.T.A. 221 (1941), rev'd sub nom., McKnight v. Comm'r, 127 F. (2d) 572 (C.A.A. 5th, 1942); Kurrle v. Comm'r, P.H. 1941 Fed. Tax Serv. B.T.A. Memo. Dec. 41,085, aff'd, 126 F. (2d) 723 (C.C.A. 8th, 1942).
7. (1946) 44 Mich. L. Rev. 885; (1946) 34 Calif. L. Rev. 449,

taxing power in that section, the long established administrative practice of holding embezzled funds to be taxable income of the embezzler, and finally because of the arbitrary distinctions in favor of the embezzler which arise from an opposite interpretation of the Code, I believe that embezzled funds are taxable gains as defined by Congress."[8] The problem of statutory construction as to previous administrative interpretation posed by Justice Burton's dissent, indeed an important issue, illustrates an approach to the question which the Court might have followed in reaching the opposite result.[9] The "legislative history" to which the dissent refers is the amendment of Sec. 22 (a) to include gains or profits from illegal transactions. The taxability of such receipts is well settled[10] and the majority opinion does not question this proposition.[11]

Mr. Justice Burton's argument in another passage that the embezzled funds should be taxable because of the embezzler's complete possession, his exercise of dominion over the moneys, and his realiation of economic value from them,[12] based upon the language of *Burnet v. Wells*[13] and *National City Bank v. Helvering*[14] is equally applicable to gross receipts of the taxpayer from loans, the sale of capital assets, or sales of goods. But the gross receipts concept has been consistently rejected by the Court and by Congress from *Doyle v. Mitchell Bros. Co.*[15] to date.[16]. This rejection applies to illegal[17] as well as legal sources of income and seems to negate the "approach that illegal gains are taxable as a matter of public policy" referred to above as a basis for criticizing the result of the principal case. The rejection of the concept of gross receipts by Congress[18] also seems to weaken

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8. Principal case at p. 552.
9. Had the position of the Treasury been incorporated in a regulation rather than in a G.C.M., the argument based on the administrative interpretation would have been much stronger.
10. U.S. v. Sullivan, 274 U.S. 259 (1927).
11. Principal case at p. 549.
12. Principal case at p. 551.
13. 289 U.S. 670 (1932).
14. 98 F. (2d) 93 (C.A.A. 2d, 1938).
15. 247 U.S. 179 (1918), decided under the Corporation Excise Tax Act of 1909.
16. Magill, "Taxable Income" (1945) c. 9; id. p. 373: ". . .it would be unwise to assume that 'income' in the amendment [XVI] means gross receipts. With the possible exception of the mining depletion cases, which seem to stand upon a peculiar footing of their own, some provision for the recoupment of the cost of goods sold, or of the investment must be made."
17. Kjar, B.T.A. Memo. Dec., C.C.H. 1941 Fed. Tax. Serv. ¶ 7714-E (cost of goods sold deductible from illicit liquor income); James P. McKenna, 1 B.T.A. 326 (1925) (income of bookmaker determined as gross receipts less amounts paid out to bettors, amounts returned by reason of scratches and called-off bets, and amounts handled as "lay-off" bets); Frey, 1 B.T.A. 338 (1925) (income from betting on horses, playing poker and roulette set-off against gambling losses. This provision is now incorporated in §23(h) Int. Rev. Code).
18. See § 22 (b) Int. Rev. Code.

the dissenting position stated above relating to Congressional intent.

The majority opinion by Justice Murphy chose to ignore the administrative construction issue and attempted to analyze the problem in terms of the concept of taxable income, emphasizing the necessity of a gain or profit. "For present purposes however, it is enough to note that a taxable gain is conditioned upon (1) the presence of a claim of right to the funds and (2) the absence of a definite, unconditional obligation to repay or return that which would otherwise constitute a gain."[19] This reasoning is certainly open to serious criticism. In many cases the taxpayer has been under a definite, unconditional *legal* obligation to repay or return that which is taxable to him.[20] The "claim of right" test, which was established by *North American Oil Consolidated v. Burnet*,[21] has been followed, distinguished, and explained in numerous decisions since 1932, but with little success or clarity.[22] The lower federal courts seem to be in hopeless confusion as to when a taxpayer receives funds under a "claim of right",[23] and the majority position in the principal case that a taxable gain requires "some bona fide legal or equitable claim" is clearly incompatabile with prior decisions by the Court.[24] Certainly the embezzler takes the money under

19. Principal case at p. 549.
20. Boston Consolidated Gas Co. v. Comm'r, 128 F. (2d) 447 (C.C.A. 1st, 1942); Humphreys v. Comm'r, 125 F. (2d) 340 (C.C.A. 7th, 1942), cert. denied, 317 U.S. 637 (1942); National City Bank v. Helvering, 98 F. (2d) 93 (C.C.A. 2d, 1938); Barker v. Magruder, 95 F. (2d) 122 (App. D.C. 1938); Charleston & Western Carolina Ry. v. Burnet, 50 F. (2d) 342 (App. D.C. 1931); Chicago, R.I. & P. R.R. v. Comm'r, 47 F. (2d) 990 (C.C.A. 7th, 1931), cert. denied, 284 U.S. 618 (1931); Agne v. U.S., 42 F. Supp. 66 (Ct. Cl. 1941).
21. 286 U.S. 417 (1932).
22. Knight Newspapers Inc. v. Comm'r, 143 F. (2d) 1007 (C.C.A. 6th, 1944) (no claim of right, dividend declaration was mistake); Clinton Hotel Realty Co. v. Comm'r, 128 F. (2d) 968 (C.C.A. 5th, 1942) (acknowledged liability to repay, therefore no claim of right). But cf. Renwick v. U.S., 87 F. (2d) 123 (C.C.A. 7th, 1936); Griffin v. Comm'r, 101 F. (2d) 348 (C.C.A. 7th, 1939) (received under apparent claim of right believing himself entitled thereto); National City Bank v. Helvering, 98 F. (2d) 93 (C.C.A. 2d, 1938) (finding of Board accepted as to taking under claim as his own); Greenwald v. U.S., 57 F. Supp. 569 (Ct. Cl. 1944) (received compensation in 1934, 1935, 1936 but in 1938 discovered he must repay, so the court says he asserted "no claim of right" to the funds); Charles G. Duffy, 2 T.C. 568 (1943) (received as his own, presumably under a claim of right); H. Lewis Brown, 1 T.C. 760 (1943) (North American case distinguished for here the taxpayer had only a "qualified claim" to the whole).
23. See n. 22 supra.
24. Helvering v. Clifford, 309 U.S. 331 (1940) (settlor of short term trust denied any claim of right whatsoever); Burnet v. Wells, 289 U.S. 670 (1933) (settlor of trust to pay insurance had no claim to funds); Helvering v. Horst, 311 U.S. 112 (1940) (assignor of interest coupons taxable); Johnson v. U.S., 318 U.S. 189 (1943) (politician receiving protection payments); Humphreys v. Comm'r, cert. denied, 317 U.S. 637 (1942) (ransom payments taxable to kidnapper); Chadick v. U.S., cert. denied, 296 U.S. 609 (1935) (graft payments).

as valid a "legal or equitable claim of right" as does the kidnapper to whom a ransom payment is taxed,[25] or the politician to whome "protection" payments are taxable.[26]

Nevertheless, it is submitted that the result in the principal case is sound. The decision does not hold that embezzled funds cannot be taxable income, but on the contrary expressly states that if embezzlement were forgiven or condoned, the embezzled funds might be taxable.[27] The opinion also states that "no single conclusive criterion has yet been found to determine in all situations what is a sufficient gain to support the imposition of an income tax"; and that "no more can be said in general than that all relevant facts and circumstances must be considered."[28] This factual approach to preblems of what constitutes taxable income is to be commended. Abstract language of decisions attempting to limit and define the single word "income" is fruitful only in miring the courts in illogical, unsound ground from which extrication is often difficult, if not impossible. The factual approach to issues of taxable income has been emphasized by the present Court in its adherence to such a standard on several different tax problems.[29]

The majority opinion concludes: "Sanctioning a tax *under the circumstances before us* would serve only to give the United States an unjustified preference as to part of the money which rightfully and completely belongs to the taxpayer's employer."[30] It is probably

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25. Humphreys v. Comm'r, 125 F. (2d) 340 (C.C.A. 7th, 1942), cert. denied, 317 U.S., 637 (1942).
26. Johnson v. U.S., 318 U.S. 189 (1943).
27. Principal case at p. 550. Helvering v. American Dental Co., 318 U.S. 322 (1943) raises the possibility of the forgiveness being a gift and so not taxable.
28. Principal case at p. 549.
29. In Helvering v. Clifford, 309 U.S. 331 (1940), technical considerations, niceties of the law of trusts, and mere formalisms were penetrated, to tax to the settlor the income of a short term trust set up for the benefit of his wife. In Helvering v. Horst, 311 U.S. 112 (1940), the gift by a father to his son of bond coupons shortly before maturity was beld insufficient to avoid tax liability of the father for the value of the coupons. In Helvering v. American Dental Co., 318 U.S. 322 (1943), the Court realized the essential incongruity of holding that a taxpayer in difficult financial circumstances realized income when his creditors forgave part of his past debts in order to keep him in business as a profitable customer. This facility for deciding cases and cutting through formalisms of language extends at least from U.S. v. Kirby Lumber Co., 284 U.S. 1 (1931), and is not confined to the Supreme Court, Knight Newspapers Inc. v. Comm'r. 143 F. (2d) 1007 (C.C.A. 6th, 1944); Greenwald v. U.S., 57 F. Supp. 569 (Ct. Cl. 1944); Paul A. Draper, 6 T.C. 209 (1946); Walter I. Bones, 4 T.C. 415 (1944).
30. Principal case at p. 550. This result was clearly pointed up in McCue v. Comm'r, T.C. Memo. Dec., 5 C.C.H. 1946 Fed. Tax Serv. ¶ 7343 (M). An individual had misappropriated over $300,000 from the estate of her brother. Had the amount been taxable, the United States would hold a lien for probably well over $200,000 which would have to be satisfied before the estate could recoup any part of its loss. Such a result is certainly not desirable.

true, if the embezzler still had the moneys or if they were traceable, that a trust could be impressed upon the funds to which the tax lien would be inferior.[31] But in the situation before the Court, as in the usual embezzlement case, the funds were gone. To give the United States a tax lien would be to deprive the defrauded party of his partial recoupment from other property of the embezzler or to defer his eventual recoupment from property subsequently acquired[32] until such time as the tax lien had been satisfied. To answer this argument with "ask Congress to modify the lien", is to assert that the legislature and not the judiciary is the only guardian of justice. Considerations of justice or "tax morals" in reaching a decision is not a novel innovation. The Court has from time to time recognized the need for changes in rules of taxation and in the income concept. It has met particularly harsh conditions either by modifying the rules or by rationalizing a new solution without the aid of legislation.[33]

It seems apparent that the majority in the principal case realized the essential incongruity of holding that any taxable gain arises from the bare receipt of money or property wholly belonging to another which must be repaid, and which in fact the taxpayer has little probability of retaining.[34] This seems to be an entirely defensible position not only as a matter of logic but as a matter of precedent.

The taxability of receipts subject to be repaid or returned stems at least from the decision of *North American Oil Consolidated v. Burnet*.[35] In that case there had been a receipt of funds and a judicial determination that the recipient was entitled to retain them. With such objective probability of retention, the most practical manner from the annual accounting standpoint was to tax the company in the year of receipt.[36] The decisions which apply the rule of taxability show this same objective probability of retention.[37] This probability

31. But see U.S. v. Waddill, Holland & Flinn, Inc., 323 U.S. 353, 355 (1945).
32. See Glass City Bank of Jeanette, Pa. v. U.S., 66 Sup. Ct. 108 (1945).
33. Bull v. U.S., 295 U.S. 247 (1934); Bowers v. Kerbaugh-Empire Co., 271 U.S. 170 (1926); Helvering v. Clifford, 309 U.S 331 (1940); Helvering v. American Dental Co., 318 U.S. 322 (1943); Knight Newspapers Inc. v. Comm'r, 143 F. (2d) 1007 (C.C.A. 6th, 1944); Greenwald v. U.S., 57 F. Supp. 569 (Ct. Cl. 1944). See Rutledge, J., dissenting in Douglas v. Comm'r, 322 U.S. 275 (1944).
34. In the principal case, the employer is demanding repayment and the taxpayer has little possibility of escaping the repayment of the funds which he embezzled. See respondent's brief, principal case p. 5., referring to pp. 12-13 of the record.
35. 286 U.S. 417 (1932).
36. Income tax is based upon 12 month period, § 41 Int. Rev. Code; and a line is drawn between each year, Helvering v. National Contracting Co., 69 F. (2d) 252, 254 (C.C.A. 8th, 1934).
37. In Chicago, R.I. & P. R.R. v. Comm'r, 47 F. (2d) 990 (C.C.A. 7th, 1931), cert. denied, 284 U.S. 618 (1931), the persons to whom the excess fares belonged were unknown and the probabilities clearly were that the money would be retained by the company. In Barker v. Magruder, 95 F. (2d) 122, 124 (App. D.C. 1938) the court states the probability of the lendor collecting the usurious interest. In Jacobs v. Hoey, 136 F. (2d) 954, 957 (C.C.A. 2d, 1938) the proba-

of retention will normally be determined at the close of the taxable year in which the funds are received,[38] but there are cases in which the courts have considered subsequent events as evidence in the determination of this factual preblem.[39]

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bilities of the administrator retaining his commissions is pointed out. In Commonwealth Investment Co., 44 B.T.A. 445 (1941) the company receiving the income was a "dummy" of the payor; in Board v. Comm'r, 51 F. (2d) 73 (C.C.A. 6th, 1931) a director received payments from his company by virtue of a contract with it; and in Patterson v. Anderson, 20 F. Supp. 799 (S.D. N.Y. 1937), the receipt by the taxpayer was likewise under a contract with the company in which he was a director. In these cases the probability of the taxpayer being required to repay or refund was obviously slight, and the Comm'r's position was that until canceled, the contracts were legal and binding and therefore the recipient should be taxed, Commonwealth Investment Co., 44 B.T.A. 445, 452 (1941). In Griffin v. Comm'r, 101 F. (2d) 348 (C.C.A. 7th, 1939); Saunders v. Comm'r, 101 F. (2d) 407 (C.C.A. 10th, 1939); and Agne v. U.S. 42 F. Supp. 66 (Ct. Cl. 1941), the payments were by corporations to directors and the probability of retention at the end of the taxable year of receipt was excellent. In Boston Consolidated Gas Co. v. Comm'r, 128 F. (2d) 473 (C.C.A. 1st, 1942), the unclaimed deposits and overpayments for gas by former customers would undoubtedly be retained by the company. In Charleston & Western Carolina Ry. v. Burnet, 50 F. (2d) 342 (App. D.C. 1931) unclaimed wages, and in Lehman, B.T.A. Memo. Dec., 3 C.C.H. 1943 Fed. Tax Serv. ¶7013A, unclaimed dividends, were likewise unlikely to be repaid, at least in full. In Caldwell v. Comm'r, 135 F. (2d) 488 (C.C.A. 5th, 1943) the funds taxed were illegal "kickbacks" from building contractors who could not have recovered them and though the opinion pointed out the possibility of the state claiming the funds, it was considered only a possibility. In Humphreys v. Comm'r, 125 F. (2d) 340 (C.C.A. 7th, 1942), cert. denied, 317 U.S. 637 (1942), the victim of the ransom payments was apparently afraid, or at least reluctant, to criminally prosecute, see Murray Humphreys, 42 B.T.A. 857, 879 (1940), let alone demand the return of his money. In the protection payment cases, Johnson v. U.S., 318 U.S. 189 (1943); Richard Law, 2 T.C. 623 (1942); and Harrison J. Freebourn, T.C. Memo. Dec., 3 C.C.H. 1944 Fed. Tax Serv. ¶7587 (M); if the recovery is not barred for illegality or because the payment was voluntary, at least the courts realize that recovery will not be requested. The same statement applies to the gambling cases, L. Weiner, 10 B.T.A. 905 (1928); James P. McKenna, 1 B.T.A. 326 (1925); Frey, 1 B.T.A. 338 (1925); although some states permit the loser to recover his funds, Ark. Dig. Stat. (Pope, 1937) §6112 et. seq.; Conn. Gen. Stat. (1930) §4739; Laws of N.Y. (Thompson, 1939) c. 88, §995; Ore. Comp. Laws Ann. (1939) §64-102.

In all of these cases, the person receiving the money or property had at least the probability, if not the certainty of never repaying or returning that which is being taxed to him.

38. Penn v. Robertson, 115 F. (2d) 167 (1940); Comm'r v. Alamitos Land Co., 112 F. (2d) 648 (1940), cert. denied, 311 U.S. 679 (1940).

39. Knight Newspapers Inc. v. Comm'r, 143 F. (2d) 1007 (C.C.A. 6th, 1944); Greenwald v. U.S., 57 F. Supp. 569 (Ct. Cl. 1944); H. Lewis Brown, 1 T.C. 760 (1943). See Cardozo, J., in Sinclair Refining Co. v. Jenkins Petroleum Process Co., 289 U.S. 689 (1933) saying that experience should be used when available, such experience being a "book of wisdom that courts may not neglect" and that "no rule of law sets a clasp upon its pages, and forbids us to look within".

The same Court which laid down the rule of taxability though the taxpayer might be required to return or repay the funds, decided the case of *Frueler v. Helvering*[40] approximately one year after the *North American* decision. In the *Frueler* case, a trustee had made payments to the beneficiaries in excess of the amounts to which they were entitled. The Court held that the overpayments were not taxable to the beneficiaries.[41] The principle of that case, that receipts are not taxable when there is a clear obligation definite and unconditional to repay or return them, has been applied to other decisions although often under tenuous distinctions as to "claim of right".[42] *Comm'r v. Turney*[43] expressly enunciates the principle that tax officials are not required to treat as income, money received by a taxpayer when under well-settled law his receipt of it has the effect of obligating him unconditionally to pay that money to another. The non-taxability of funds received by one as an agent for another illustrates this same principle.[44]

This rationalization of an objective probability of retention test results in a factual problem which can be determined on the administrative level. Has the taxpayer received money or property in the taxable year which he probably will not be required to repay or return?[45]

National City Bank v. Helvering[46] and similar cases are seemingly inconsistent with this test. In that case, a director had used his position to obtain secret profits and turned them over to his company when a Congressional investigation was threatened. The opinion by L. Hand, J., held that the director was taxable on the funds for the year of receipt although these funds were recoverable by the corporation. The basis of the decision was the receipt of funds "under a claim of right" and the practical inconvenience to the collection of revenue if the Treasury was forced to determine the validity of the taxpayer's receipt as against the equitable claims of the corporation. The real question in the case was not the existence of a gain or profit, but whether the individual director should be taxed therefor. The majority

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40. 291 U.S. 43 (1933).
41. North American Oil Consolidated v. Burnet was distinguished on the very narrow grounds that it had no application to §219, under which taxability arose in the Frueler case.
42. Knight Newspapers Inc. v. Comm'r, 143 F. (2d) 1007 (C.C.A. 6th, 1944); Clinton Hotel Realty Co. v. Comm'r, 128 F. (2d) 968 (C.C.A. 5th, 1942); Comm'r v. Turney, 82 F. (2d) 661 (C.C.A. 5th, 1936); Greenwald v. U.S., 57 F. Supp. 569 (Ct. Cl. 1944); H. Lewis Brown, 1 T.C. 760 (1943); Walter I. Bones, 4 T.C. 415 (1944) (receipt of check subject to dispute held no receipt at all to come within North American rule); E.P. Madigan, 43 B.T.A. 549 (1941).
43. 82 F. (2d) 661 (C.C.A. 5th, 1936).
44. See Mertens, "Law of Federal Income Taxation" (1942) §§ 17.10 et. seq.
45. This test is expressed in Barker v. Magruder, 95 F. (2d) 122, 124 (App. D.C. 1938), and Jacobs v. Hoey, 136 F. (2d) 954 (C.C.A. 2d, 1943). This latter opinion was written by A. Hand, J., and the case was decided by practically the same court which handed down National City Bank v. Helvering, discussed infra.
46. 98 F. (2d) 93 (C.C.A. 2d, 1938).

in the principal case recognizes the distinction between the bare receipt of money or property wholly belonging to another, and the use of those funds by the recipient resulting in a gain or profit.[47] The distinction is both logical and practical and is not necessarily inconsistent with the objective probability of retention test. Although the law is well settled that a person in a fiduciary position is accountable for secret profits, the factual variations in which the rule will be applied does not necessarily make it probable that the fiduciary will be required to pay over all moneys received.[48]

The factual test proposed herein leaves the problem with the Commissioner and the Tax Court[49] where on case by case precedent the rule can be given body and the limits of probability of retention defined.

TAXATION

VALUATION OF FUTURE INTERESTS FOR FEDERAL TAX PURPOSES

In *Estate of Pompeo M. Maresi*,[1] the Tax Court of the United States gave what is believed to be first judicial recognition to a table on the probability of remarriage.[2] The Commissioner refused petitioner's claim of an estate tax deduction for the present value of an alimony claim, holding that the interest which ceased with the wife's possible remarriage was too uncertain to be calculated. The Tax Court, while recognizing the fallibility of the table offered by petitioner, held that the deduction should be allowed.[3]

As recently as 1943 the Supreme Court stated that the taxpayer is required to present evidence that the contingent interest has a "present value" in order to overcome the Commissioner's determination that its value is unascertainable.[4] Apparently the recognition of the remarriage table will meet that requirement.

WILLS

CONFIDENTIAL RELATION—PRESUMPTION OF UNDUE INFLUENCE

Action was brought to contest a will in which the residuary legatees

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47. Principal case at p. 549, and footnote 7 of the opinion citing National City Bank v. Helvering.
48. 3 C.J.S. §165 (agents); 19 C.J.S. §§786 et. seq. (individual profits from corporate business); 54 Am. Jur. §§311 et. seq. (trustees).
49. See Dobson v. Comm'r, 320 U.S. 489 (1943); Paul, "Dobson v. Comm'r: The Strange Ways of Law and Fact," (1944) 57 Har. L. Rev. 753.
1. 6 T.C. 583 (1946), aff'd, 156 F (2d) 929 (C.C.A. 2d, 1946).
2. See 19 Proceedings of the Casualty Actuarial Society (May 26, 1933) pp. 291, 298.
3. Principal case at p. 586: "The figures presently relied upon may leave much to be desired in the way of soundness and accuracy. . ."
4. Robinette v. Helvering, 318 U.S. 184, 188 (1943) cf. Humes v. U.S,. 286 U.S. 487 (1928).

were the infant sons of the attorney who drafted the instrument. The lower court set aside the probate of the will. This decision was reversed on the grounds of an erroneous instruction. In anticipation of questions which would arise upon a new trial, the court said: (1) that where a confidential relation exists hetween the testator and a beneficiary, and the beneficiary has been actively concerned with the preparation or execution of the will, the burden of disproving undue influence is cast upon the beneficiary;[1] (2) that this rule should also include the situation where the one actively engaged in the preparation or execution of the will is a member of the immediate family of the benficiary; and (3) that this rule should apply to testamentary gifts as well as gifts inter vivos. *Sweeney v. Vierbuchen,* 66 N.E. (2d) 764 (Ind. 1946).

According to the general rule, in order to raise this presumption, two circumstances must be present: (1) a confidential relation between the testator and the beneficiary; (2) participation in the preparation or execution of the will by the beneficiary.[2] Not all jurisdictions recognize that this state of facts will raise a presumption in the case of testamentary gifts.[3] The mere existence of a confidential relation between the testator and the beneficiary is not sufficient to establish the presumption.[4] In the absence of participation by the beneficiary in the preparation or execution of the will, the existence of other facts is not sufficient to establish a presumption of undue influence.[5] Under tbe general rule, the evidence in the principal case would have been sufficient to establish a presumption of undue influence if the attorney had been a beneficiary.

The rule has been extended in other jurisdictions to include those

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1. Contra: Munson v. Quinn, 110 Ind. App. 277, 280, 37 N.E. (2d) 693, 694 (1941) (the so called presumption is in reality an inference).
2. Willet v. Hall, 220 Ind. 310, 41 N.E. (2d) 619 (1942); Vance v. Grow, 206 Ind. 614, 190 N.E. 747 (1934); Note (1945) 154 A.L.R. 584; see In re Llewellyn's Estate, 296 Pa. 74, 145 Atl. 810, 812 (1929);In re Bucher's Estate, 48 Cal. App. (2d) 465, 120 P. (2d) 44 (1941) (beneficiary secured attorney for testatrix); In re Smalley's Estate, 124 N.J.Eq. 461, 2 A. (2d) 321 (1938), aff'd, 126 N.J.Eq. 217, 8 A. (2d) 296 (1939) (beneficiary discussed will with testatrix, and had his attorney prepare the will); In re Poller's Estate, 204 Wis. 127, 235 N.W. 542 (1931) (payment of witness to will by beneficiary).
3. In re Geist's Estate, 325 Pa. 401, 191 Atl. 29 (1937) (in addition to these facts there must be evidence of mental weakness of the testator); Ebert v. Ebert, 120 W.Va. 722, 200 S.E. 831 (1939) (undue influence sufficient to invalidate a will is never presumed but must be established by proof).
4. Goodbar v. Lidikey, 136 Ind. 1, 35 N.E. 691 (1893); Notes (1930) 66 A.L.R. 229, (1945) 154 A.L.R. 584.
5. Beaver v. Emery, 84 Ind. App. 581, 149 N.E. 730 (1925) (acts of kindness by the beneficiary towards the testator); Bundy v. McKnight, 48 Ind. 502 (1874) (beneficiary had an opportunity to exert undue influence); Breadheft v. Cleveland, 184 Ind. 130, 108 N.E. 5 (1915), aff'd, 110 N.E. 662 (failure to leave the estate to next of kin); In re Kelley's Estate, 150 Ore. 598, 46 P. (2d) 84 (1935) (illicit relations existed between testator and beneficiary).

situations where a confidential relation existed between the testator and a person who was actively engaged in the preparation and execution of the will, which person is not himself a beneficiary but is a member of the immediate family of a beneficiary.[6] This extension is sound. If this extension were not possible, the person with whom the testator enjoyed a confidential relation might still aid in the preparation and execution of the will, indirectly obtain the benefits of the will, but obtain them none the less, and still avoid the effect of a presumption of undue influence which would otherwise be applied.

In those jurisdictions which have refused to apply to testamentary gifts the presumption which has been applied to gifts inter vivos, the reason given is that when unduly influenced a donor of a gift inter vivos has been deprived of a beneficial enjoyment of his property, but a testator has not been similarly deprived of this benefit since he is deceased and could not have otherwise enjoyed the benefit of the property given away.[7] This reasoning is not sound. It is equally important that the determination to give and to whom the gift is to be made should be free from undue influence in the case of testamentary gifts as in the case of gifts inter vivos. Once the essential facts necessary to raise a presumption of undue influence are present, the presumption should be applied with equal force to testamentary gifts as it is applied to gifts inter vivos.[8]

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6. Little v. Sugg, 243 Ala. 196, 8 So. (2d) 866 (1942) (mother and son); Dudley v. Gates, 124 Mich. 440, 83 N.W. 97 (1900), aff'd, 86 N.W. 959 (1901) (husband and wife); In re Daly's Estate, 59 S.D. 403, 240 N.W. 342 (1932) (attorney and son).

7. See Folsom v. Buttolph, 82 Ind. App. 283, 308, 143 N.E. 258, 266 (1924); Graham v. Courtwright, 180 Iowa 394, 161 N.W. 774, 777 (1917).

8. Cf. cases on gifts inter vivos, Olds v. Hitzemann, 220 Ind. 300, 42 N.E. (2d) 35 (1942); Castle v. Kroeger, 111 Ind. App. 43, 39 N.E. (2d) 459 (1942).