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Recent Cases

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RECENT CASES

CONFLICT OF LAWS—GOVERNMENTAL ACTIVITIES—RECOGNITION IN FORUM OF SISTER STATE'S ORIGINAL REVENUE CLAIM

The State of Oklahoma brought an original action in an Arkansas court to collect income taxes on rentals received by defendant on mining machinery temporarily located in Oklahoma. Although Oklahoma qualified to maintain the suit under an Arkansas reciprocity statute,[1] defendant demurred on the ground that the statute should not be applied to a suit based on a tax liability which accrued before the effective date of the statute. The demurrer was sustained. On appeal, *held,* reversed. An action by a sister state to collect taxes owing that state is maintainable in the courts of Arkansas even in the absence of statute. *Oklahoma ex rel. Oklahoma Tax Commission v. Neely,* 282 S.W.2d 150 (Ark. 1955).

The legal maxim that "one country will not take notice of the revenue laws of another" came to this country from England,[2] where it originated during England's period of world commercial leadership.[3] The doctrine was first given effect here in regard to foreign revenue laws, as distinguished from those of a sister state of the union.[4] However, it soon was extended to sister states in an early New Hampshire dictum.[5] One of the first direct adoptions of this rule was made by a New York court in an original action by the State of Maryland to collect a personal property tax. The court sustained the defendant's demurrer, on the ground that sister states are to be treated as foreign countries and one country will not enforce the revenue laws of another.[6] This rationale was further developed in a leading case, *Colorado v. Harbeck,*[7] in which a claim by Colorado based on an inheritance tax was refused enforcement in the courts of New York. On the other hand, in an earlier North Carolina case New Jersey

1. ARK. STAT. ANN. §§ 84-3201 to -3203 (Supp. 1953).
2. Leflar, *Extrastate Enforcement of Penal and Governmental Claims,* 46 HARV. L. REV. 193, 215 (1932). Note, *Extra-Territorial Collection of State Inheritance Taxes,* 29 COLUM. L. REV. 782 (1929).
3. Holman v. Johnson, 1 Cowp. 341, 343, 98 Eng. Rep. 1120, 1121 (K.B. 1775) (dictum).
4. Ludlow v. Van Rensselaer, 1 Johns. R. 94 (N.Y. 1806).
5. Henry v. Sargeant, 13 N.H. 321, 332 (1843) (dictum).
6. Maryland v. Turner, 75 Misc. 9, 132 N.Y. Supp. 173 (Sup. Ct. 1911).
7. 232 N.Y. 71, 133 N.E. 357 (1921); *but cf.* New York v. Coe Mfg. Co., 112 N.J.L. 536, 172 Atl. 198, 200 (1934) (dictum), *cert. denied,* 293 U.S. 576 (1935) (New Jersey gave "full faith and credit" to a tax judgment of a New York court; however, defendant was personally served within the jurisdiction of the New York court).

was allowed to pursue a license fee claim against the receiver of an insolvent corporation chartered in New Jersey but doing business in North Carolina and having all its assets there.[8] The court held that under the doctrine of comity New Jersey had standing to sue, but could not assert the claim as a preferred one under the New Jersey statute.[9]

In 1948 Congress amended the federal "full faith and credit" statute by adding the words "public acts."[10] However, there are few decisions determining directly whether full faith and credit must be given to revenue acts of sister states.[11] Although the Supreme Court has indicated that the full faith and credit requirement does extend, at least in some situations, to the statutes as well as the judgments of sister states,[12] in *Milwaukee County v. White*[13] the Court said, "whether one state must enforce the revenue laws of another remains an open question in this court."[14]

A present trend of allowing sister states to maintain tax collection suits seems to have had its beginning in a 1946 Missouri decision.[15] The Missouri court, after reviewing the history of the prohibitive doctrine, concluded that it "has no place in a union of states such as the United States."[16] Following this decision the *Restatement* by a caveat[17] modified its previous position supporting the doctrine.[18] The Missouri holding was followed in a suit brought by Ohio in a Kentucky court.[19]

The court in the instant case noted that growing state activity demands more state revenue, which in turn produces a greater likelihood of state tax evasion. Because of these factors the court was quite willing to enforce the revenue laws of a sister state without resorting to a pertinent local statute. Although the doctrine against entertainment of such suits is still followed in the majority of jurisdictions, in view of the increasing financial needs of the states and the high mobility of our population, it seems that the majority will soon become a minority.[20] This result can be accomplished by judicial

8. J. A. Holshouser Co. v. Gold Hill Copper Co., 138 N.C. 248, 50 S.E. 650 (1905).
9. *Cf. id.*, 50 S.E. at 653-54.
10. 28 U.S.C.A. § 1738 (1950).
11. See Moore v. Mitchell, 30 F.2d 600 (2d Cir. 1929), *aff'd*, 281 U.S. 18 (1930) (on grounds that Indiana officer had no capacity to sue in another state), 5 IND. L. J. 625.
12. See Hughes v. Fetter, 341 U.S. 609 (1951).
13. 296 U.S. 268 (1935) (action on a judgment for default on taxes).
14. *Id.* at 275.
15. State *ex rel.* Oklahoma Tax Comm'n v. Rodgers, 238 Mo. App. 1115, 193 S.W.2d 919, 165 A.L.R. 785 (1946).
16. *Id.*, 193 S.W.2d at 927.
17. RESTATEMENT, CONFLICT OF LAWS § 610 (Supp. 1948).
18. RESTATEMENT, CONFLICT OF LAWS § 610 (1934).
19. Ohio *ex rel.* Duffy v. Arnett, 314 Ky. 403, 234 S.W.2d 722 (1950).
20. See Goldstein, *Interstate Enforcement of the Tax Laws of Sister States*, 30 TAXES 247 (1952); Comments, 45 ILL. L. REV. 99 (1950), 47 MICH. L. REV. 796 (1949).

decision,[21] by enactment of reciprocity statutes,[22] or by an interpretation of the 1948 Congressional amendment as requiring that full faith and credit be given all legislative acts of sister states.[23]

CONSTITUTIONAL LAW—STATE TAXATION OF INTERSTATE COMMERCE—SALES TAX ON SHIPBOARD SALES TO PASSENGERS

Plaintiff, a shipper engaged in the transportation of passengers on the Great Lakes between Michigan, other states, and Canada, resisted a Michigan sales tax upon sales of food, liquor, postal cards, and novelties aboard plaintiff's ships. The tax, imposed upon sellers for the privilege of making retail sales in Michigan and measured by the gross proceeds of such sales, was apportioned to the percentage of time plaintiff's ships were in Michigan waters. Plaintiff did not question the fairness of the apportionment but asserted that all sales on all trips were made in interstate or foreign commerce and that the tax thereon, regardless of apportionment, was prohibited by the commerce clause of the federal constitution. *Held:* The tax is valid as applied to plaintiff because it is imposed upon retail sales consummated in Michigan, a local activity sufficiently distinct from plaintiff's interstate transportation to be made subject to state taxation. *Detroit & Cleveland Nav. Co. v. Michigan Dep't of Revenue,* 342 Mich. 234, 69 N.W.2d 832 (1955).

The Supreme Court, in determining whether a state tax creates an unconstitutional burden on interstate commerce, must weigh two conflicting policies: preservation of the Constitution's mandate that trade between the states be permitted to flow freely within the national boundaries, and maintenance of the autonomy of the states through financial independence.[1] In reaching its decisions the Court has laid down many different tests and formulae;[2] but as perplexing as the decisions may be, there are certain well-recognized objections to state taxation of interstate commerce.[3]

21. See note 14 *supra.*
22. Instant case, 282 S.W.2d at 150-51.
23. See note 10 *supra.*

1. Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157 (1954).
2. In this field it is difficult and probably impractical to lay down definite rules because of the complexities involved in the many situations which arise. See Freeman v. Hewit, 329 U.S. 249, 252 (1946) where the Court said, "Suffice it to say that especially in this field opinions must be read in the setting of the particular cases and as the product of preoccupation with their special facts."
3. See HARTMAN, STATE TAXATION OF INTERSTATE COMMERCE 49 (1953); Hartman, *Sales Taxation in Interstate Commerce,* 9 VAND L. REV. 138 (1956). See also, Barrett, *State Taxation of Interstate Commerce,* 4 VAND. L. REV.

It is well settled that a state may not tax a corporation for the privilege of engaging in interstate commerce, because Congress has the exclusive power to regulate commerce among the states.[4] Also, a tax will not be allowed which reaches beyond the borders of the taxing state[5] or discriminates against interstate commerce.[6] Yet the states may tax a business which crosses state lines if there is a local incident or activity which may be deemed sufficiently separated from interstate commerce to give the state power to tax.[7] Thus, a state may impose a tax on the privilege of selling, and use interstate gross receipts as a means of computing the tax, if the sale is a sufficiently local activity.[8] Gross receipts may be used to establish the value of the local event for tax purposes, and the fact that the gross receipts include receipts from both interstate and intrastate sales will not affect the validity of the apportionment.[9]

Although at times the Supreme Court has seemed to disregard the states' needs for revenue in freeing interstate commerce from taxes,[10] at other times activities indispensible to the actual interstate commerce itself have been deemed taxable local activities[11] with the idea expressed that interstate commerce must pay its way.[12] At the other

496 (1951); Lockhart, *Gross Receipts Taxes on Interstate Transportation and Communication,* 57 HARV. L. REV. 40 (1943); Powell, *More Ado About Gross Receipts Taxes,* 60 HARV. L. REV. 501, 710 (1947).

4. Spector Motor Serv. Inc. v. O'Connor, 340 U.S. 602 (1951); Alpha Portland Cement Co. v. Massachusetts, 268 U.S. 203 (1925); Crutcher v. Kentucky, 141 U.S. 47 (1891).

5. Norton Co. v. Department of Revenue, 340 U.S. 534 (1951).

6. Nippert v. Richmond, 327 U.S. 416 (1946).

7. "[F]rom the viewpoint of the Commerce Clause, where the corporations carry on a local activity sufficiently separate from the interstate commerce, state taxes may be validly laid, even though the exaction from the business of the taxpayer is precisely the same as though the tax had been levied upon the interstate business itself." Memphis Natural Gas Co. v. Stone, 335 U.S. 80, 87 (1948).

8. Chicago v. Willett Co., 344 U.S. 574 (1953); Norton Co. v. Department of Revenue, 340 U.S. 534 (1951).

9. See International Harvester v. Evatt, 329 U.S. 416, 422 (1947) where the Court said, "Furthermore, this Court has long realized the practical impossibility of a state's achieving a perfect apportionment of expansive, complex business activities such as those of appellant, and has declared that 'rough approximation rather than precision' is sufficient."

10. Freeman v. Hewit, 329 U.S. 249 (1946).

11. Memphis Natural Gas Co. v. Stone, 335 U.S. 80 (1948); Coverdale v. Arkansas Louisiana Pipe Line Co., 303 U.S. 604 (1938); Utah Power & Light Co. v. Pfost, 286 U.S. 165 (1932). *But see* Joseph v. Carter & Weeks Stevedoring Co., 330 U.S. 422 (1947).

12. In 1938 Mr. Justice Stone, recognizing the need for state revenue, reinterpreted previous cases and, maintaining that interstate commerce must be made to pay its way, he set forth the "cumulative burdens doctrine." Western Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938). *But see* Freeman v. Hewit, 329 U.S. 249 (1946); Braniff Airways v. Nebraska State Bd., 347 U.S. 590, 607 (1954) (Mr. Justice Frankfurter, *dissenting,* said, "The appealing phrase that 'interstate business must pay its way' can be invoked only when we know what the 'way' is for which interstate business must pay"). See also, Comment, *Taxation: New Developments in State Taxation of Gross Receipts from Interstate Commerce,* 27 CALIF. L. REV. 336 (1939); Note, *The Multiple Burden Theory in Interstate Commerce Taxation,* 40 COLUM. L. REV.

extreme the Court has declared that a state may not be allowed "one single-tax-worth of direct interference with the free flow of commerce. An exaction by a State from interstate commerce falls not because of a proven increase in the cost of the product. What makes the tax invalid is the fact that there is interference by a State with the freedom of interstate commerce."[13]

The court in the instant case found that a sale consummated locally, though incidentally involved in interstate commerce, is a taxable local event. In reaching this conclusion the court relied heavily upon *McGoldrick v. Berwind-White Coal Mining Co.*,[14] a Supreme Court decision in which delivery of goods at the end of an interstate journey under a contract of sale was deemed a taxable local event.[15] The court admitted that the situation in the instant case is not analogous to that in the *Berwind-White* case, for there the sale was between parties in different states and was itself the interstate commerce. In the instant case the transportation of passengers was the interstate commerce and the sale of goods merely an incident of that transportation.[16] No case involving similar facts has come before the Supreme Court.[17] Although the interstate transportation of passengers clearly may not be directly taxed,[18] other activities just as essential to interstate transportation as the sale of food and goods to passengers have been made the subject of state privilege taxes: *e.g.*, taxes on the fuel and power used to propel a commodity of commerce[19] and taxes upon other instrumentalities used in commerce.[20] The situation in the instant case does not seem essentially different from the travel of people across state lines by land or air transportation, yet no case has been found which even suggests that such travelers are not subject to a tax on food and drink consumed while traveling.

653 (1940); Note, *State Taxation of Interstate Commerce: The Western Live Stock Case*, 52 HARV. L. REV. 502 (1939).

13. Freeman v. Hewit, 329 U.S. 249, 256 (1946).

14. 309 U.S. 33 (1940).

15. "Recent cases in which a taxable sale does not clearly take place within the taxing state, elements of the transaction occurring in different states, have presented peculiar difficulties. . . . "Miller Bros. v. Maryland, 347 U.S. 340, 345 (1954). *Compare* Norton Co. v. Department of Revenue, 340 U.S. 534 (1951), *with* International Harvester Co. v. Department of Treasury, 322 U.S. 340 (1944); see also McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33 (1940); McGoldrick v. Felt & Tarrant Mfg. Co., 309 U.S. 70 (1940).

16. Instant case, 69 N.W.2d at 836.

17. See Union Stock Yards v. State Tax Comm'n, 93 Utah 174, 71 P.2d 542 (1937) (sales tax upon feed for livestock being transported in interstate commerce upheld).

18. Passenger Cases, 48 U.S. (7 How.) 283 (1848).

19. See note 11 *supra*.

20. "We have frequently reiterated that the Commerce Clause does not immunize interstate instrumentalities from all state taxation, but that such commerce may be required to pay a nondiscriminatory share of the tax burden." Braniff Airways v. Nebraska State Bd., 347 U.S. 590, 597, 598 (1954). See also Canton R.R. v. Rogan, 340 U.S. 511 (1951); Ott v. Mississippi Valley Barge Line Co., 336 U.S. 169 (1949); Central Greyhound Lines, Inc. v. Mealey, 334 U.S. 653 (1948). *But see* Southern Pacific Co. v. Gallagher, 306 U.S. 167, 177 (1938) (use tax).

In determining the validity of state taxes where interstate commerce is concerned, the Supreme Court has seldom considered the economic result of the taxes involved.[21] The Court has usually been concerned with the primary duty of protecting interstate commerce. Because the need for state revenue has often been overlooked, interstate commerce has not always been forced to pay its way and exclusively local business has been placed at a competitive disadvantage.[22] Such a result would have occurred in the instant case had the tax not been allowed, as applied to plaintiff's business, since other local business paid the tax. It would seem that the test of validity should not be whether the activity taxed is a "local" activity, for this term by itself has little meaning. In one of its latest decisions the Supreme Court expressed a better test, stating that the validity of a tax "depends upon other considerations of constitutional policy having reference to substantial effect, actual or potential, of the particular tax in suppressing or burdening unduly the commerce."[23] Unfortunately, however, the Court did not adopt this criterion but decided that "it is now well settled that a tax imposed on a local activity related to interstate commerce is valid if, and only if, the local activity is not such an integral part of the interstate process, the flow of commerce, that it cannot realistically be separated from it."[24]

COURTS—CERTIORARI FROM UNITED STATES SUPREME COURT—LOSS OF IMPORTANCE GROUND FOR DISMISSAL

Defendant, a private cemetery, entered into a contract with plaintiff for the sale of a burial lot. The contract provided that burial privileges could accrue only to members of the Caucasian race. Upon defendant's refusal to allow interment of the body of plaintiff's husband, a non-Caucasian, plaintiff brought suit to recover damages for breach of contract. Judgment was given for defendant, and the Supreme Court

21. See note 12 *supra.*

22. International Harvester Co. v. Department of Treasury, 322 U.S. 340, 349 (1944).

23. Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 164 (1954). See also McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 45n .2 (1940). "Despite mechanical or artificial distinctions sometimes taken between the taxes deemed permissible and those condemned, the decisions appear to be predicated on a practical judgment as to the likelihood of the tax being used to place interstate commerce at a competitive disadvantage." *But see* Freeman v. Hewit, 329 U.S. 249, 252 (1946) where Mr. Justice Frankfurter said, "A state is also precluded from taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between the states. It is immaterial that local commerce is subjected to a similar encumbrance. It may commend itself to a State to encourage a pastoral instead of an industrial society."

24. Michigan-Wisconsin Pipe Line Co. v. Calvert, *supra* note 23, at 116.

of Iowa affirmed.[1] The Supreme Court of the United States granted certiorari to consider plaintiff's claim that recognition of the contract provision was unconstitutional state action, and affirmed by a divided court.[2] On petition for rehearing on the same ground, it was revealed that, subsequent to the time that plaintiff brought her suit, the Iowa legislature enacted a statute[3] prohibiting denial of burial on the basis of race. *Held* (5-3), petition granted and the writ of certiorari dismissed as improvidently granted. Only in cases involving questions of public importance should the Court grant a writ of certiorari; where a statute has been enacted remedying the situation which a petitioner claims is unconstitutional, the case is of interest to petitioner alone. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955).

Certiorari is distinguished from appeal in that the latter exists as a matter of right in order that the rights and duties of the particular litigants be protected and enforced.[4] Certiorari is denied, or, if already granted, is revoked when the case appears moot.[5] Concession by defendant to all plaintiff's demands,[6] acquirement by one party of all interest of the other party in the suit,[7] and collusion by the parties in order to formulate a suit[8] are examples of factors which render a case moot.[9] Similarly, certiorari is denied if the issue presented is not of such recurring nature as to be important to large numbers of people and, therefore, is not a matter of public interest.[10] The discretion to be exercised by the Supreme Court of the United States is stated in Supreme Court Rule 19: "certiorari . . . will be granted only where there are special and important reasons therefor."[11]

The Court in the instant case regarded its prior granting of certiorari as improvident because subsequent litigation involving the same issues would be controlled by the recently enacted Iowa statute. Decision for plaintiff on the constitutional grounds urged by her

1. Rice v. Sioux City Memorial Park Cemetery, Inc., 245 Iowa 147, 60 N.W.2d 110 (1953).
2. 348 U.S. 880 (1954). Plaintiff's claim was based on the decision in Shelley v. Kraemer, 334 U.S. 1 (1948), that enforcement by a court of provisions in a private contract constituted state action within the meaning of the fourteenth amendment.
3. IOWA CODE ANN. §§ 566A.1-.11 (1953).
4. SUP. CT. RULE 19.
5. St. Pierre v. United States, 319 U.S. 41 (1943); *cf.* United States v. Alaska S.S. Co., 253 U.S. 113 (1920); United States v. Hamburg American Line, 239 U.S. 466 (1916); California v. San Pablo & Tulare R.R., 149 U.S. 308 (1893); Cleveland v. Chamberlain, 66 U.S. (1 Black) 419 (1861); Lord v. Veazie, 49 U.S. (8 How.) 250 (1850).
6. California v. San Pablo & Tulare R.R., 149 U.S. 308 (1893).
7. Cleveland v. Chamberlain, 66 U.S. (1 Black) 419 (1861).
8. Lord v. Veazie, 49 U.S. (8 How.) 250 (1850).
9. See also, Diamond, *Federal Jurisdiction to Decide Moot Cases*, 94 U. PA. L. REV. 125 (1946).
10. Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387 (1923); Magnum Import Co. v. Coty, 262 U.S. 159 (1923) (dictum); Gibbs, *Certiorari: Its Diagnosis and Cure*, 6 HASTINGS L. J. 131, 148 (1955).
11. SUP. CT. RULE 19.

would require the Court "to pass judgment on Iowa for unconstitutional [state] action . . . when it has already rectified any possible error"[12] and a decision against plaintiff might "unnecessarily discourage . . . remedial action" by other state legislatures.[13] The dissenting justices pointed out that the statute "leaves everyone in Iowa free to vindicate this kind of right except the petitioner."[14] Citing no authority, the three justices stated, "This raises a new question of denial of equal protection of the laws."[15]

It is true that the situation of the plaintiff in the instant case is different from that of a plaintiff whose case is moot. However, refusal to consider plaintiff's claim by revocation of certiorari for lack of public importance seems no more an injustice than refusal to grant the petition of any plaintiff for the same reason. In either situation the plaintiff has had his day in the lower courts on the constitutional question which he raises. And, laying aside speculation that similar cases may arise in other states, after enactment of legislation which will prevent the questioned result from recurring in the courts of the state from which a case arose, the issue of the constitutionality of that result is of no public importance, however important it may be to the particular litigants.

DOMESTIC RELATIONS—ADOPTION—REVOCATION OF CONSENT BY NATURAL PARENTS

Appellees, husband and wife, filed a petition for the adoption of a minor illegitimate child. The written consent of the natural mother, who had sole custody of the child, accompanied the petition. Before the hearing, the mother executed a written revocation of the consent to appellees and consented to the adoption of the child by appellants. The trial court rejected the purported revocation and granted the petition for adoption filed by appellees. On appeal, *held,* reversed. Consent to adoption given by the natural parents may be withdrawn at any time prior to the final adoption proceedings. *In re Thompson's Adoption,* 283 P.2d 493 (Kan. 1955).

Adoption is a statutory proceeding unknown at common law.[1] The adoption statutes in practically all states declare that the natural parents must consent to the adoption of their child,[2] except in cases

12. 349 U.S. at 77.
13. *Ibid.*
14. *Id.* at 80.
15. *Ibid.*

1. Quarles, *The Law of Adoption—A Legal Anomaly,* 32 MARQ. L. REV. 237, 241 (1949).
2. VERNIER, AMERICAN FAMILY LAWS 340 (1936).

of abandonment,[3] in order to validate the adoption proceedings. Few statutes, however, contain provisions concerning the revocation of the parent's consent. Three divergent views have been expressed by American courts as to the effect of an attempted revocation in the absence of a controlling statute.[4] The majority of courts adhere to an early established rule that the right to revoke a consent is an absolute right exercisable at any time before the final proceedings.[5] A minority have held that a consent, freely given, is irrevocable in the absence of a showing of good cause.[6] But the growing trend is to hold that revocation is a matter within the discretion of the court.[7]

In deciding which rule to follow, a court is faced with the problem of construing its statutes in order to give preference to one class of person over another. Those courts that follow the majority rule apply the presumption that the legislature did not intend to abrogate the common-law rights of the natural parents,[8] and reason that since the natural parents' right to the child is paramount, their consent to the adoption may be freely revoked.[9] On the other hand, those courts that favor the strict rule against revocation consider that the best interests of society are thereby served.[10] They point out that allowing the withdrawal of consent at the whim or caprice of a parent disrupts the administrative procedure of adoption and often infringes upon the rights of those who seek to adopt the children. The courts which take the intermediate position stress that the adoption statutes were designed to promote the welfare of the child, and that requiring ap-

3. Emmons v. Dinelli, 125 N.E.2d 446 (Ind. App. 1955); Stanfield v. Willoughby, 269 S.W.2d 270 (Ky. 1954); *In re* Peter's Adoption, 110 A.2d 825 (Pa. Super. 1955); Deveraux' Adoption v. Brown, 2 Utah 2d 30, 268 P.2d 995 (1954).

4. Annots., 138 A.L.R. 1038 (1942), 156 A.L.R. 1011 (1945).

5. Martin v. Ford, 277 S.W.2d 842 (Ark. 1955); Wheeler v. Howard, 211 Ga. 596, 87 S.E.2d 377 (1955); Keheley v. Koonce, 85 Ga. App. 893, 70 S.E.2d 522 (1952); *In re* Byrd, 226 La. 194, 75 So. 2d 331 (1954); Haney v. Knight, 78 A.2d 643 (Md. App. 1951); Adoption of Schult, 14 N.J. Super. 587, 82 A.2d 491 (1951); *In re* Kozak, 124 N.E.2d 168 (Ohio App. 1955); Boyed v. Wilson, 258 S.W.2d 223 (Tex. Civ. App. 1953); Williams v. Liles, 245 S.W.2d 551 (Tex. Civ. App. 1952).

6. *Ex parte* Barents, 99 Cal. App. 748, 222 P.2d 488 (1950); Mabbitt v. Miller, 68 N.W.2d 740 (Iowa 1955); *In re* Adoption of Cannon, 243 Iowa 828, 53 N.W.2d 877 (1952); Driggers v. Jolley, 219 S.C. 31, 64 S.E.2d 19 (1951); *In re* Adoption of Morrison, 260 Wis. 50, 49 N.W.2d 759 (1951).

7. *A.* v. *B.*, 217 Ark. 844, 233 S.W.2d 629 (1950); *In re* Adoption of Pitcher, 103 Cal. App. 2d 859, 230 P.2d 449 (1951); Bailey v. Mars, 138 Conn. 593, 87 A.2d 388 (1952); Weisbart v. Berezin, 347 Ill. App. 13, 105 N.E.2d 814 (1952); Petition of Dickholtz, 341 Ill. App. 400, 94 N.E.2d 89 (1950); Welsh v. Young, 240 S.W.2d 584 (Ky. 1951); Ellis v. McCoy, 124 N.E.2d 266 (Mass. 1954); Adoption of McKinzie, 275 S.W.2d 365 (Mo. App. 1955).

8. MADDEN, DOMESTIC RELATIONS 355 (1931).

9. *In re* White's Adoption, 300 Mich. 378, 1 N.W.2d 579 (1942); *In re* Anderson, 189 Minn. 85, 248 N.W. 657 (1933); State *ex rel.* Platzer v. Beardsley, 149 Minn. 435, 183 N.W. 956 (1921); French v. Catholic Community League, 69 Ohio App. 442, 44 N.E.2d 113 (1942); Fitts v. Carpenter, 124 S.W.2d 420 (Tex. Civ. App. 1939); *In re* Nelms, 153 Wash. 242, 279 Pac. 748 (1929).

10. Adoption of a Minor, 144 F.2d 644 (D.C. Cir. 1944); Westendorf v. Westendorf, 187 Iowa 659, 174 N.W. 359 (1919); Lee v. Thomas, 297 Ky. 858, 181 S.W.2d 457 (1944); Wyness v. Crowley, 292 Mass. 461, 198 N.E. 758 (1935).

proval of the revocation by the court insures the maximum protection of the child's interests.[11] These courts have generally been inclined to allow revocation when the interests of others have not intervened and no one has suffered detriment by relying upon the consent; always, however, the best interest of the child is the primary consideration.

The court in the instant case interpreted the statutes of Kansas in favor of the natural parents' rights and adopted the majority rule, but in so doing may have placed the welfare of the child in a subordinate position. The more flexible discretionary rule seems better suited to effectuate the purposes of the adoption laws. Perhaps the solution is legislative enactment of specific provisions governing revocation, as has been done in a few states.[12] Otherwise, the administrative agency responsible for adoptions may be seriously hampered, to the detriment of the children and society at large.

EVIDENCE—ADMISSIBILITY—EXCLUSION OF EVIDENCE OBTAINED BY UNREASONABLE SEARCH AND SEIZURE

Most of the incriminating evidence introduced at defendant's trial for conspiring to engage in horse-race bookmaking was obtained by microphone installations at places occupied by defendant, and by numerous forcible entries and seizures without search warrants. The evidence was admitted over defendant's objection, and the jury found him guilty. On appeal from an order denying a new trial, *held,* reversed. Evidence obtained in violation of a constitutional guaranty[1] against unreasonable search and seizure is inadmissible. *People v. Cahan,* 282 P.2d 905 (Cal. 1955).

At common law it is well settled that evidence otherwise admissible will not be excluded because illegally acquired.[2] A majority of the

11. *A.* v. *B.,* 217 Ark. 844, 233 S.W.2d 629 (1950); Adoption of Pitcher, 103 Cal. App. 2d 859, 230 P.2d 449 (1951); Bailey v. Mars, 138 Conn. 593, 87 A.2d 388 (1952); Weisbart v. Berezin, 347 Ill. App. 13, 105 N.E.2d 814 (1952); Petition of Dickholtz, 341 Ill. App. 400, 94 N.E.2d 89 (1950); Welsh v. Young, 240 S.W.2d 584 (Ky. 1951); Ellis v. McCoy, 124 N.E.2d 266 (Mass. 1954); Adoption of McKinzie, 275 S.W.2d 365 (Mo. App. 1955).

12. TENN. CODE ANN. § 36-117 (1955); State *ex rel. A* v. Licensed Child-Placing Agency, 194 Tenn. 400, 250 S.W.2d 776 (1952).

1. U.S. CONST. amends. IV, XIV; CAL. CONST. art. I, § 19.

2. "[T]hough papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility if they are pertinent to the issue. The court will not take notice how they were obtained, whether lawfully or unlawfully, nor will it form an issue to determine that question." 1 GREENLEAF, EVIDENCE § 254a (16th ed. 1899). "An evidential fact, otherwise admissible, is not excluded: (1) Because it had been obtained by means of some violation of the Law, (2) nor because its existence is attended with some violation of the Law." WIGMORE, POCKET CODE OF EVIDENCE, Rule 197 (1910).

states follow the rule that evidence is not rendered inadmissible by reason of the fact that it may have been obtained in violation of a constitutional guaranty against unreasonable searches and seizures.[3] It has been held by state courts that admission of such evidence does not contravene constitutional guaranties against self-incrimination[4] nor the privileges and immunities clause of the fourteenth amendment;[5] recently the Supreme Court of the United States ruled that the due process clause of the fourteenth amendment does not prohibit admission in the state courts.[6] However, the federal courts seem definitely committed to the view that evidence obtained by illegal search and seizure is not admissible,[7] and a number of states have adopted the federal rule.[8] Evidence obtained by private persons or officers unsanctioned by judicial process is not inadmissible under this rule.[9] Evidence obtained by illegal searches and seizures of state officers without the co-operation of federal authorities is admissible in the federal courts;[10] in those states which have adopted the federal rule, evidence illegally obtained by federal officials is admissible.[11]

The exclusionary rule is designed to deter unlawful police conduct and to enforce constitutional guaranties against unreasonable search and seizure. However, the rule has two major limitations.[12] Because protection may be claimed only by the person aggrieved by an

3. Banks v. State, 207 Ala. 179, 93 So. 293, 24 A.L.R. 1359 (1921), *cert. denied,* 260 U.S. 736 (1922); State v. Griswold, 67 Conn. 290, 34 Atl. 1046, 33 L.R.A. 227 (1896); Johnson v. State, 152 Ga. 271, 109 S.E. 662, 19 A.L.R. 641 (1921); State v. Dillon 34 N.M. 366, 281 Pac. 474, 88 A.L.R. 340 (1929); People v. Adams, 176 N.Y. 351, 68 N.E. 636, 63 L.R.A. 406, 98 Am. St. Rep. 675 (1903), *aff'd,* 192 U.S. 585 (1904); State v. Atkinson, 40 S.C. 363, 18 S.E. 1021, 42 Am. St. Rep. 877 (1894); State v. Aime, 62 Utah 476, 220 Pac. 704, 32 A.L.R. 375 (1923).

4. Shields v. State, 104 Ala. 35, 16 So. 85, 53 Am. St. Rep. 17 (1894); State v. Dillon, 34 N.M. 366, 281 Pac. 474, 88 A.L.R. 340 (1929).

5. Banks v. State, 207 Ala. 179, 93 So. 293, 24 A.L.R. 1359 (1921), *cert. denied,* 260 U.S. 736 (1922).

6. Wolf v. Colorado, 338 U.S. 25 (1949).

7. Byars v. United States, 273 U.S. 28 (1927); Agnello v. United States, 269 U.S. 20 (1925); Gouled v. United States, 255 U.S. 298 (1921); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920); Weeks v. United States, 232 U.S. 383 (1914).

8. State v. Arregui, 44 Idaho 43, 254 Pac. 788, 52 A.L.R. 463 (1927); People v. Castree, 311 Ill. 392, 143 N.E. 112, 32 A.L.R. 357 (1924); Youman v. Commonwealth, 189 Ky. 152, 224 S.W. 860, 13 A.L.R. 1303 (1920); People v. Weaver, 241 Mich. 616, 217 N.W. 797, 58 A.L.R. 733 (1928); Orick v. State, 140 Miss. 184, 105 So. 465, 41 A.L.R. 1129 (1925); State v. Owens, 302 Mo. 348, 259 S.W. 100, 32 A.L.R. 383 (1924); Hughes v. State, 145 Tenn. 544, 238 S.W. 588, 20 A.L.R. 639 (1922); State v. Kinnear, 162 Wash. 214, 298 Pac. 449, 74 A.L.R. 1400 (1931); State v. Wills, 91 W. Va. 659, 114 S.E. 261, 24 A.L.R. 1398 (1922); Allen v. State, 183 Wis. 323, 197 N.W. 808, 39 A.L.R. 782 (1924).

9. State v. Barela, 23 N.M. 395, 168 Pac. 545, 1918B L.R.A. 844 (1917).

10. Weeks v. United States, 232 U.S. 383 (1914).

11. State v. Gardner, 77 Mont. 8, 249 Pac. 574, 52 A.L.R. 454 (1926). *But see,* Rea v. United States, 76 Sup. Ct. 292 (1956) (federal agent enjoined from testifying in state case with respect to narcotics obtained in illegal search).

12. Comment, *Judicial Control of Illegal Search and Seizure,* 58 YALE L. J. 144, 154 (1948).

illegal search,[13] police and prosecutors familiar with the rule know that they may rummage anywhere for evidence against a suspect except among his belongings or in his home.[14] Further, because the protection extends only to actions by the particular government or its agents,[15] the courts are said to have no power to protect the people against illegal searches of other agencies, or to censure or nullify those acts.[16] Some authorities have felt that the rule of exclusion, academically designed for improvement of police methods, has in practical application conduced to serious police misbehavior, and has fostered, rather than diminished, lawless police practices.[17] In Michigan, where at least one fourth of those persons found carrying concealed weapons were allowed to go free, the rule proved so unsatisfactory that the state constitution was amended to end it.[18]

The court in the instant case considered the effects of its prior adherence to the common-law rule of admissibility, and overruled a long line of decisions to adopt the exclusionary rule.[19] Professor Wigmore,

13. Kelly v. United States, 61 F.2d 843, 845 (8th Cir. 1932).

14. Fraenkel, *Concerning Searches and Seizures*, 34 HARV. L. REV. 361, 375 (1921) condemned the limitation on this ground: "This last ruling [referring to Haywood v. United States, 268 Fed. 795 (7th Cir. 1920)], it is submitted, is at variance with both the letter and spirit of the Constitution, as it ignores the security given to the papers and effects as well as to the houses of the people, and because it permits the government to benefit by illegal search so long as it is careful not to take property from the possession of its owners."

15. Barron v. Baltimore, 32 U.S. (7 Pet.) 153 (1833).

16. "The record shows that what [the policemen] did by way of arrest and search and seizure was done before the finding of the indictment in the Federal court, under what supposed right or authority does not appear. What remedies the defendant may have had against them we need not inquire, as the Fourth Amendment is not directed to individual misconduct of such officials. Its limitation reaches the Federal Government and its agencies." Weeks v. United States, 232 U.S. 383, 398 (1914).

17. Waite, Comment, 42 MICH. L. REV. 679, 685 (1944), states that if the rule of exclusion did not actually beget the "tip-over raid," it nourished that vicious practice to its evil florescence. Waite, who during the last years of prohibition participated in various police raids and witnessed the smashing of property so as to drive the illegal operators out of business, concludes that the net consequences of the rule was a police alternative of "harrassing" some operators out of business, or of letting more of them operate.

18. "Michigan courts quickly applied the rule to evidence of carrying concealed weapons. Here it well nigh blocked the machinery of social protection. . . . Without going into detail here, suffice it to say that during one year 1,347 robberies with arms were reported, 237 persons were prosecuted for the felony of carrying concealed weapons and only 134 were convicted. . . . All told, it is safe to say that at least one-fourth of all the guilty gun-toters discovered and arrested during the year escaped any penalty, not because they were innocent, but solely because of the judge-made rule that evidence of their guilt could not be used. So intolerable was the evil that the people of Michigan amended their constitution to end it." Waite, *supra* note 17, at 687, 688.

19. "The law in California is well settled that any illegality in the procurement of evidence is immaterial to its admissibility unless the presence of certain conduct brings it within the "brutal and shocking" rule of the *Rochin* case (referring to Rochin v. California, 243 U.S. 25 (1949), where the United States Supreme Court held that evidence obtained by causing the defendant to regurgitate capsules was a shock to the conscience and a violation

in stating the reason for this prior position,[20] satirized what he believed to be the manifest folly of the federal rule.[21] Apparently, however, the common-law rule resulted in flagrant violations of constitutional principles,[22] leading the court to believe that neither administrative, criminal, nor civil remedies are effective in suppressing lawless searches and seizures. This conclusion has been reached by other authorities, who point out that civil suits for damages have seldom been undertaken even by innocent search victims,[23] that an effective statutory remedy has rarely been provided,[24] and that governments have uniformly failed to prosecute the wrongdoers.[25] The California court, having adhered to the common-law rule for many years, found it necessary to adopt the rule of exclusion in order to protect both the rights guaranteed by constitutional provisions and the interest of society in the suppression of crime.

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of the due process clause.). However, this rule has been so narrowly restricted by the California courts that it made no substantial change in the previously accepted law. In view of the consistency of California decisions from 1896 to 1954 any major alteration in this law should be made by the legislature and not the courts." Comment, 5 HASTINGS L.J. 227, 235 (1954).

20. "A judge does not hold court in a street-car to do summary justice upon a fellow-passenger who fraudulently evades payment of his fare; and, upon the same principle, he does not attempt, in the course of a specific litigation, to investigate and punish all offences which incidentally cross the path of that litigation." 8 WIGMORE, EVIDENCE § 2183 (3d ed. 1940).

21. "Titus, you have been found guilty of conducting a lottery; Flavius, you have confessedly violated the constitution. Titus ought to suffer imprisonment for crime, and Flavius for contempt. But no! We shall let you both go free. We shall not punish Flavius directly, but shall do so by reversing Titus' conviction. This is our way of teaching people like Flavius to behave, and incidentally of securing respect for the Constitution. Our way of upholding the Constitution is not to strike at the man who breaks it but to let off somebody who broke something else." 8 WIGMORE, EVIDENCE § 2184 (3d ed. 1940).

22. "Thus, without fear of criminal punishment or other discipline, law enforcement officers, sworn to support the Constitution of the United States and the Constitution of California, frankly admit their deliberate, flagrant acts in violation of both Constitutions and the laws enacted thereunder. It is clearly apparent from their testimony that they casually regard such acts as nothing more than the performance of their ordinary duties for which the City employs and pays them." People v. Cahan, 282 P.2d 905 (Cal. 1955).

23. Comment, *supra* note 12, at 151.

24. Municipalities, like states, are generally not liable in tort, so that "where there is liability (as in the case of policemen), the fact of financial irresponsibility is operative and, presumably, conclusive; while, when financial responsibility exists (as in the case of a city), there is no liability." Hall, *The Law of Arrest in Relation to Contemporary Social Problems*, 3 U. CHI. L. REV. 345, 348 (1936).

25. Lack of prosecutions may derive from doubt as to whether illegal search constitutes a punishable crime. See State v. Leathers, 31 Ark. 44 (1876); State v. Wagstaff, 115 S.C. 198, 105 S.E. 283 (1920). Federal officers have apparently never been prosecuted. CORNELIUS, SEARCH AND SEIZURE (2d. ed. 1930) at p. 45, declares: "[T]he writer has yet to learn of a single instance where either a state or a federal officer has been prosecuted criminally for an illegal search and seizure, although extended inquiry has been made and illegal searches are common."

FEDERAL PROCEDURE—ILLEGAL SEARCH—INJUNCTION AGAINST AGENT'S TESTIFYING IN STATE COURT

Petitioner was indicted for acquiring narcotics in violation of a federal statute.[1] The evidence having been obtained under an improper search warrant,[2] the federal district court granted petitioner's motion to suppress, and dismissed the indictment. Thereupon, a federal narcotics agent caused petitioner to be arrested by New Mexico officials for possession of narcotics in violation of New Mexico law. Petitioner moved for an injunction in the federal district court restraining the federal agent from testifying in the state case because the agent's testimony would be based on evidence obtained under an improper search warrant. The Supreme Court granted certiorari to review a judgment of the court of appeals affirming the district court's denial of the motion. *Held,* reversed. A federal agent may be enjoined from testifying in a state court on the basis of evidence obtained by him under an improper search warrant. *Rea v. United States,* 76 Sup. Ct. 292 (1956).

The fourth amendment, as judicially construed, bars in a federal prosecution the use of evidence obtained in violation of the amendment's guaranty against unreasonable search and seizure.[3] A majority of the states, however, follow the rule that evidence otherwise admissible will not be excluded by reason of the fact that it may have been obtained in violation of a state constitutional guaranty,[4] and in *Wolf v. Colorado*[5] the Supreme Court of the United States ruled that the due process clause of the fourteenth amendment does not prohibit admission in state courts of evidence obtained by an unreasonable search and seizure. In those states which have adopted an exclusionary

1. Int. Rev. Code of 1939, § 2593 (a) (now INT. REV. CODE OF 1954, § 4744).
2. Rule 41(c) of the Federal Rules of Criminal Procedure provides in relevant part as follows: "A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof."
3. Byars v. United States, 273 U.S. 28 (1927); Gouled v. United States, 255 U.S. 298 (1921); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920); Weeks v. United States, 232 U.S. 383 (1914).
4. Banks v. State, 207 Ala. 179, 93 So. 293, 24 A.L.R. 1359 (1921), *cert. denied,* 260 U.S. 736 (1922); State v. Griswold, 67 Conn. 290, 34 Atl. 1046 (1896); Johnson v. State, 152 Ga. 271, 109 S.E. 662, 19 A.L.R. 641 (1921); State v. Dillon, 34 N.M. 366, 281 Pac. 474, 88 A.L.R. 340 (1929); People v. Adams, 176 N.Y. 351, 68 N.E. 636, 63 L.R.A. 406 (1903), *aff'd,* 192 U.S. 585 (1904); State v. Atkinson, 40 S.C. 363, 18 S.E. 1021 (1894); State v. Aime, 62 Utah 476, 220 Pac. 704 (1923).
5. 338 U.S. 25 (1949).

rule, evidence obtained by federal officials in violation of the fourth amendment without the cooperation of state officials is not rendered inadmissible.[6] Moreover, in the absence of collusion between state and federal officials, evidence obtained by state officers in an unreasonable search and seizure is admissible in the federal courts.[7]

In *Stefanelli v. Minard*[8] it was held that the federal courts should refuse to intervene in state criminal proceedings to prevent the use of evidence claimed to have been secured by the unreasonable search and seizure of state officers. In the instant case the dissenting justices, pointing out that under the *Wolf* rule the federal courts would not have intervened had the petitioner been convicted in the state court by use of evidence obtained under an invalid search warrant, and that under the instant decision federal interference may be justified when the state has not yet obtained the evidence, felt that the decision of the majority modifies the language used in the *Stefanelli* case. Such a rule would make the matter simply a race between a state prosecution and a federal injunction proceeding.

It is not clear upon what grounds the majority of the Court based its decision. Since Congress has made property seized under a federal revenue law contraband and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof,[9] it would seem clear that in the instant case the federal agent would not have been permitted to make the evidence subject to state authority by introducing it as evidence in a state court. On that theory, it would appear that the court in the exercise of its supervisory power over federal agents refused to permit the same result by testimony based solely on his description of that property, and thereby sought to enforce the statute against a person owing obedience to it. But the dissenting justices apparently assumed that the property, having been obtained under an invalid search warrant, was not in the custody of the federal court and, therefore, could have been subjected to state authority. Such an assumption seems untenable in view of the broad language employed by Congress in the statute.

It appears, however, that the present decision was founded upon a violation of the federal statute governing searches and seizures;[10] the result is that a federal agent may not testify in a state court when his testimony is based on evidence obtained by him under an improperly issued federal search warrant. The crux of the problem is

6. State v. Gardner, 77 Mont. 8, 249 Pac. 574, 52 A.L.R. 454 (1926).

7. Weeks v. United States, 232 U.S. 383 (1914).

8. 342 U.S. 117 (1951).

9. "All property taken or detained under any revenue law of the United States shall not be repleviable, but shall be deemed to be in the custody of the law and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof." 28 U.S.C.A. § 2463 (1950).

10. See note 2 *supra*.

whether the Court would have reached the same result if the property had been seized without a search warrant but in violation of the constitutional guaranty against unreasonable search and seizure. If the decision is not based solely on the violation of a federal statute or the abuse of federal process, then the instant case represents a modification of the *Wolf* rule insofar as it excludes from state prosecutions evidence obtained by federal officials in violation of the fourth amendment.

INCOME TAXATION—CLAIM OF RIGHT INCOME—TIME OF DEDUCTION WHEN RESTORATION REQUIRED

Plaintiff, an accrual basis taxpayer, was engaged in the business of selling burial lots to the public. During the years 1930 through 1941, plaintiff used all receipts for general corporate purposes and reported its entire sales as income, notwithstanding both a contractual and statutory duty to set apart and maintain a perpetual care fund equal to twenty-five per cent of its gross sales.[1] In 1942 a lot owner instituted suit to compel compliance with the fund requirement, and, by agreement, plaintiff deposited four secured notes with a trustee to make up the deficit. The notes were payable one, two, three and four years from date, and as they were paid plaintiff deducted the amounts from gross income in the year of each payment. The Commissioner disallowed the deductions, asserting that the amounts which plaintiff was bound to set apart should have been excluded from gross income in the year of receipt.[2] Plaintiff paid the assessed deficiencies and penalties, and sought recovery. *Held:* Plaintiff was required by the claim of right doctrine to report as income the prior years' receipts misappropriated to its own use, and, having done so, is entitled to a deduction in the later years for payments actually made to make up the deficit in the fund. *Memphis Memorial Park v. McCann,* 133 F. Supp. 293 (M.D. Tenn. 1955).

The claim of right doctrine had its inception in *North American Oil Consolidated v. Burnet,*[3] and is essentially a part of the concept that taxpayers must report their incomes on the basis of annual accounting periods.[4] The doctrine may be expressed in two parts: (1) receipts

1. TENN. CODE ANN. §§ 46-110 to 117 (1955) (formerly TENN. CODE ANN. §§ 3919-36 (Williams 1934)).
2. The Commissioner argued that the proceeds from sales during the prior years were, to the extent of 25% of gross sales, impressed with a trust. Instant case at 297. "Admittedly, receipts by a trustee expressly for the benefit of another are not income to the trustee in his individual capacity . . . ." Healy v. Commissioner, 345 U.S. 278, 282 (1953).
3. 286 U.S. 417 (1932).
4. "It is the essence of any system of taxation that it should produce revenue

taken under a claim of right and without restriction as to their use, or receipts with respect to which the taxpayer in fact recognizes no restriction, must be reported in the year of receipt; (2) the year of receipt is then closed and if the amount is later returned, adjustment must be made in the year of return.

The first requirement is essential to any definition of gross income and usually causes no hardship, although it has prevented accrual basis taxpayers from deferring income having a future performance liability,[5] a result contrary to accepted accounting principles.[6] In the *North American Oil* case, the court held that income must be reported in the year of receipt despite pending litigation attacking the taxpayer's right to receive it.[7] Most commonly the doctrine has been used to require the reporting of contingent receipts[8] and those which the taxpayer was later obligated to return.[9] In the case of illegal receipts, inclusion in gross income is required if title to the funds passed.[10] In a decision holding that dividends paid contrary to an indenture agreement must be reported as income by the recipient, it was noted that no law had been violated and the payment was at most the violation of a private contract.[11] However, the cases involving illegal receipts indicate that no distinction is made because a statute was violated;[12]

ascertainable, and payable to the government, at regular intervals." Burnet v. Sanford & Brooks Co., 282 U.S. 359, 365 (1931).

5. See, *e.g.*, Curtis R. Andrews, 23 T.C. No. 127 (March 15, 1955) (prepaid tuition); Wallace A. Moritz, 21 T.C. 622 (1954) (deposits on unfinished photographs). Corrective legislation giving the taxpayer an election to defer the prepaid income was subsequently repealed because of problems in the transition period. INT. REV. CODE OF 1954, § 452, 68A STAT. 152 (later repealed by 69 STAT. 134 (1955)).

6. Subject to equal criticism is a corollary of the claim of right doctrine that contingent liabilities may not be deducted through the use of reserve accounts. Brown v. Helvering, 291 U.S. 193 (1934). Similar corrective legislation was enacted, but likewise repealed. INT. REV. CODE OF 1954, § 462, 68A STAT. 158 (later repealed by 69 STAT. 134 (1955)).

7. See also Safety Tube Corp. v. Commissioner, 168 F.2d 787 (6th Cir. 1948) (royalties received during pendency of patent suit); National City Bank v. Helvering, 98 F.2d 93 (2d Cir. 1938) (receipts under investigation by Senate committee).

8. Gilken Corp. v. Commissioner, 176 F.2d 141 (6th Cir. 1949).

9. A relatively frequent application is made to require the inclusion of improper dividend or bonus payments subsequently recovered by the corporation. See, *e.g.*, United States v. Lesoine, 203 F.2d 123 (9th Cir. 1953); Griffin v. Smith, 101 F.2d 348 (7th Cir. 1938), *cert. denied*, 308 U.S. 561 (1939). *Contra*, Knight Newspapers, Inc. v. Commissioner, 143 F.2d 1007 (6th Cir. 1944) (harsh result prevented by finding exception based on theory of constructive trust).

10. Rutkin v. United States, 343 U.S. 130 (1952) (proceeds of extortion held taxable income); Akers v. Scofield, 167 F.2d 718 (5th Cir.) (swindler required to pay taxes), *cert. denied*, 335 U.S. 823 (1948), 1 VAND. L. REV. 299 (comment on opinion of district court); Commissioner v. Wilcox, 327 U.S. 404 (1946) (embezzled funds held not received under claim of right).

11. St. Regis Paper Co. v. Higgins, 157 F.2d 884 (2d Cir. 1946), *cert denied*, 330 U.S. 843 (1947); *cf.* Bates Motor Transp. Lines, Inc. v. Commissioner, 200 F.2d 20 (7th Cir. 1952).

12. See note 10 *supra*.

therefore, the fact that the receipts in the instant case were used in violation of both contractual and statutory provisions appears unimportant.[13] With the exception of the requirement that legal title must pass, it would seem that the test for claim of right income is not based on legal right, but on the degree of control exercised over the funds by the recipient.[14]

The second part of the doctrine has produced the most inequitable results by refusing adjustment to the year of receipt if, in a subsequent period, the taxpayer is required to restore claim of right income.[15] Although a deduction of the year of restitution is allowed,[16] obvious inequity arises when the taxpayer's bracket has changed because of a difference in income level or a change in the tax rate.[17] In this regard, the claim of right cases fit into a larger group under the heading of transactional problems[18] and are governed by the principle that each year is a separate unit for tax accounting purposes.[19] This part of the doctrine aptly illustrates the inherent conflict in our income tax laws produced by the annual accounting concept. When consistently applied, the concept may distort the taxpayer's income picture; but any departure to a transactional approach would cause difficulties in the administration of the taxing statutes.

Remedial legislation has been enacted which allows the taxpayer the option of taking a deduction in the year of restitution, or computing his tax for that year without the deduction, then taking a credit for the amount his earlier taxes were increased by inclusion of the claim of right income.[20] This provision affords relief in most cases,

13. *But cf.* Midvale Co. v. United States, 129 Ct. Cl. 483, 124 F. Supp. 678 (1954).

14. See Moore v. Thomas, 131 F.2d 611 (5th Cir. 1942).

15. Healy v. Commissioner, 345 U.S. 278 (1953); United States v. Lewis, 340 U.S. 590 (1951). The rule can be traced to a dictum in North American Oil Consol. v. Burnet, 286 U.S. 417, 424 (1932).

16. Presumably the deduction would be taken as an ordinary and necessary expense of the trade or business, INT. REV. CODE OF 1954, § 162(a); or an expense in the production of income, INT. REV. CODE OF 1954, § 212.

17. Other factors which might cause the deduction to be "worth more or less" in the subsequent year are changes in the substantive law, such as split-income benefits provided in the Revenue Act of 1948; or a change in taxable status, such as the taxpayer's marital status.

18. See, *e.g.*, Burnet v. Sanford & Brooks Co., 282 U.S. 359 (1931) (taxpayer required to report all his receipts from government contract work in the year of receipt, even though his expenses under the contract were incurred in previous years).

19. One form of legislative relief, designed to correct situations similar to that in Burnet v. Sanford & Brooks Co., *supra* note 18, is the provision for net operating loss carrybacks and carryovers. INT. REV. CODE OF 1954, § 172. The arbitrary Tax Benefit Rule represents a judicial attempt to give relief when transactions produce repercussions in later years. See Dobson v. Commissioner, 320 U.S. 489 (1943).

20. INT. REV. CODE OF 1954, § 1341. On the theory that administrative difficulties would outweigh any loss to the taxpayer, the option is limited to deductions exceeding $3,000. *Id.* § 1341(a). See H.R. REP. No. 1337, 83d Cong., 2d Sess. 86-87 (1954) and S. REP. No. 1622, 83d Cong., 2d Sess. 118 (1954).

but it has certain express limitations[21] and the Government must still maintain an inconsistent position.[22] With respect to a fair distribution of the tax burden a further limitation is noted when, as in the instant case, the taxpayer receives a greater benefit from a deduction in the later year than would have been derived from exclusion in the year of receipt. It appears that under both the 1939 Code and the remedial provisions of the 1954 Code, the taxpayer would be entitled to a windfall deduction in the year of adjustment if the claim of right income was reported in a year in which there was a net loss for tax purposes.[23] Although it may cause some administrative problems[24] a solution fair to both the taxpayer and the treasury lies in a rule requiring inclusion in the year of receipt and adjustment of that year if later events show that the amount actually was not income to the taxpayer.[25]

MALICIOUS PROSECUTION—PRIVILEGE—FILING OF COMPLAINT WITH BAR ETHICS AND GRIEVANCE COMMITTEE

Defendant complained to the County Bar Ethics and Grievance Committee that plaintiff, an attorney, was guilty of improper conduct. After hearings before the committee and the Supreme Court of New Jersey, the complaint was dismissed on the ground that plaintiff's misconduct was committed not while he was acting as attorney, but while acting as a real estate broker, so that under the present law[1] the complaint should have been filed with the New Jersey Real Estate

21. The principal limitation is the express exclusion of transactions incident to the sale of property held primarily for sale to customers. INT. REV. CODE OF 1954, § 1341(b). This exclusion would have prevented the taxpayer in the instant case from obtaining the benefit of the provision if the situation were such that exercise of the option would have been to his advantage.

22. Under section 1341 (the option provision) adjustment is made in the year of restitution and the taxpayer receives no interest on the prior tax payments, presumably because the receipts were properly reported as income in the prior year; however, the taxpayer may at his election credit against this year's tax the amount his earlier taxes were increased by inclusion of the claim of right income, presumably because the receipts were improperly reported as income in the prior year. See the dissenting opinion of Mr. Justice Douglas in United States v. Lewis, 340 U.S. 590, 592 (1951).

23. Since the 1954 Code leaves the option with the taxpayer, he will elect according to his own best advantage, which may or may not be fair to the treasury. See Maurice P. O'Meara, 8 T.C. 622 (1947) (application of the Tax Benefit Rule in favor of the Commissioner denied).

24. The present statute of limitations on the reopening of an earlier year's return is three years. INT. REV. CODE OF 1954, § 6511(a). An amendment would be necessary to allow adjustment of the earlier year in all cases.

25. See Surrey and Warren, *The Income Tax Project of the American Law Institute*, 66 HARV. L. REV. 761, 798 (1953).

1. Subsequently this court has assumed jurisdiction in matters involving unethical conduct of attorneys in non-legal matters. *In re* Carlsen, 17 N.J. 338, 111 A.2d 393 (1955); *In re* Genser, 15 N.J. 600, 105 A.2d 829 (1954).

Commission. Plaintiff then sought damages for malicious prosecution, basing his action upon defendant's participation in the prior proceedings. A motion to dismiss the complaint in this suit was granted. On appeal, *held* (5-2), affirmed. The filing of a complaint with a bar ethics and grievance committee is privileged. *Toft v. Ketchum,* 18 N.J. 280, 113 A.2d 671 (1955).

The public policy that criminals should be brought to justice demands that both public officials and private citizens be encouraged to advance the detection and punishment of crime. Therefore, those who initiate criminal prosecutions must not fear revenge or legal retaliation if they mistakenly accuse and prosecute an innocent person in a conscientious attempt to see justice done. This does not mean, however, that baseless and malicious criminal charges may be made with impunity. To prevent such abuses of the criminal law the civil action of malicious prosecution was developed.[2] The cause of action was said to arise when one person wrongfully caused another to be prosecuted for a crime. Always aware that the exposure and prosecution of crime must not be impeded, the courts have restricted the action so that it cannot be a threat to one instituting a criminal proceeding in good faith. The plaintiff must carry a very heavy burden of proof, showing: (a) a criminal proceeding instituted or continued by the defendant against the plaintiff; (b) termination of the proceeding in favor of the accused; (c) absence of probable cause;[3] and (d) "malice," or a primary purpose in instituting the proceeding other than that of bringing an offender to justice.[4] These strict requirements seem to have achieved their purpose of discouraging malicious and ill-founded prosecutions without hampering criminal law enforcement. Although the action originally arose only from criminal proceedings, many jurisdictions now allow the same or a similar action to be based on civil,[5] and sometimes on administrative proceedings.[6]

In the instant case the court indicated that, but for defendant's privilege, the action would have been appropriate.[7] But the court

2. PROSSER, TORTS (2d ed. 1955).

3. Probable cause is defined generally as a state of facts which would lead an ordinary prudent man to believe that the party is guilty of the offense. McAfee v. Los Angeles Gas & Electric Corp., 215 Cal. 219, 9 P.2d 212, 214 (1932); McGann v. Allen, 105 Conn. 177, 134 Atl. 810, 813 (1926); Hyman v. New York Cent. R.R., 240 N.Y. 137, 147 N.E. 613, 615 (1925).

4. PROSSER, TORTS 646 (2d ed. 1955).

5. Peerson v. Ashcraft Cotton Mills, 201 Ala. 348, 78 So. 204 (1917); Ackerman v. Kaufman, 41 Ariz. 110, 15 P.2d 966 (1932); Shaeffer v. O.K. Tool Co., 110 Conn. 528, 148 Atl. 330, 332 (1930) (dictum); Ahring v. White, 156 Kan. 60, 131 P.2d 699 (1942); Rosenblum v. Ginis, 297, Mass. 493, 9 N.E.2d 525 (1937); Kolka v. Jones, 6 N.D. 461, 71 N.W. 558 (1897); Nashville Union Stockyards, Inc. v. Grissim, 13 Tenn. App. 115 (M.S. 1930).

6. Melvin v. Pence, 130 F.2d 423 (D.C. Cir. 1942) (proceeding to revoke license of private detective); National Surety Co. v. Page, 58 F.2d 145 (4th Cir. 1932) (insurance agent); see Stein v. Schimtz, 21 N.J. Misc. 218, 32 A.2d 844 (Sup. Ct. 1943), *aff'd*, 137 N.J.L. 725, 61 A.2d 260 (1948).

7. "[U]nder certain circumstances a malicious prosecution may be predicated

held that "the filing of a complaint with an ethics and grievance committee is privileged and . . . an attorney cannot predicate a malicious prosecution action or similar suit on it."[8] This conclusion was based on a fear that the filing of legitimate grievances would be discouraged by the threat of tort liability. In finding a privilege the court said, in effect, that the filing of a complaint of unprofessional conduct against an attorney, however malicious and ill founded, and however ruinous it may be to the attorney, nevertheless does not afford him a cause of action or other legal redress. The only deterrent noted by the court was the possibility that the complainant would be found in contempt of court.[9]

The necessity of maintaining efficiency and facility in the operation of governmental machinery has given rise to the declaration of certain immunities and privileges more or less analogous to that found in the instant case, *e.g.*, the privilege afforded judicial and legislative officials acting in their official capacities, and the immunities sometimes given prosecuting attorneys, sheriffs, police officers, and certain other public officials.[10] These are simply exceptions to the ordinary rules of tort liability. In the case of public officials, however, the policy in favor of fearless administration of the law seems more compelling and less subject to abuse. The instant case cites no authority giving an absolute privilege to a private citizen, and apparently there is none. On the contrary, a prior New Jersey decision held that there is no such privilege,[11] and in an earlier Kentucky case the court did not consider the question, but dismissed the complaint because there had been probable cause in the original disbarment proceeding.[12] Although the plaintiff in the instant case clearly failed to prove lack of probable cause, the court refused to base its decision on that ground. The privilege announced by the court, as the dissenting opinion points out, denies to the attorney relief which would ordinarily be available to any other member of the community.[13] The rationale seems to imply that the public policy in favor of exposing unprofessional conduct among attorneys is more urgent than that of bringing criminals to justice.

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upon the institution of other than a judicial action, at least where such proceedings are adjudicatory in nature and may adversely affect legally protected interests." Instant case, 113 A.2d at 673.

8. Instant case, 113 A.2d at 675.

9. *Ibid.*

10. See, *e.g.*, Laughlin v. Garnett, 138 F.2d 931 (D.C. Cir. 1943), *cert. denied*, 322 U.S. 738 (1944) (U.S. attorneys and police officer); Cooper v. O'Connor, 99 F.2d 135 (D.C. Cir.), *cert. denied*, 305 U.S. 643 (1938) (U.S. attorneys); Coverstone v. Davies, 38 Cal. 2d 315, 239 P.2d 876, *cert. denied*, 344 U.S. 840 (1952) (sheriff).

11. Stein v. Schmitz, 21 N.J. Misc. 218, 32 A.2d 844 (Sup. Ct. 1943), 42 MICH. L. REV. 535, *aff'd*, 137 N.J.L. 725, 61 A.2d 260 (1948) (without considering the question of privilege).

12. Lancaster v. McKay, 103 Ky. 616, 45 S.W. 887 (1898).

13. Instant case, 113 A.2d at 678.