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Recent Cases

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RECENT CASES

AGENCY — LIABILITY OF MASTER FOR SERVANT'S ACTS — STATE PERMIT TO OPERATE

Defendant entered into a lease agreement for the use of the driver's truck and services, the vehicle to be under the complete control of the lessee and the lessee's responsibility to last only so long as the vehicle was being operated on the specified routes. Defendant held a ten day permit from the State of Kansas to operate lessor's vehicle while on its business. Lessor-driver, after delivering freight for defendant, deviated from his route on a personal mission but was back on his route as specified when he negligently killed plaintiff's minor child. Plaintiff sued defendant and its insurer; the trial court found the lessor-driver alone liable on the ground that his employment had ceased with the expiration of the lease agreement. *Held,* reversed. The lease agreement was interpreted as not having expired, thus maintaining the master-servant relationship. Although the driver had deviated from his employment with the defendant, the driver was back within the scope of his original employment; and the expiration of the state permit did not affect the lessee's liability. *Marriott v. National Mutual Casualty Co.*, 195 F.2d 462 (10th Cir. 1952).

Generally the master is liable for the negligent acts of his servant;[1] in order to fix liability on the master the servant's acts must be within the scope of his employment.[2] Most cases hold that a driver is beyond the scope of his employment when he deviates from a specified route, but may again be within the scope thereof when he returns to the original route.[3] With certain exceptions, however, the master is under no liability for the negligence of an independent contractor.[4] In de-

1. *Cf.* Consolidated Motors v. Ketcham, 49 Ariz. 295, 66 P.2d 246 (1937). "If a servant by his negligence does any damage to a stranger, the master shall answer for his neglect." 1 BL. COMM. *431. "A master is subject to liability for injuries caused by the tortious conduct of his servants within the scope of their employment." PROSSER, TORTS 473 (1941). See RESTATEMENT, AGENCY § 219 (1934).

2. Larkins v. Utah Copper Co., 169 Ore. 499, 127 P.2d 354 (1942). See 7-8 HUDDY, CYCLOPEDIA OF AUTOMOBILE LAW § 138 (9th ed. 1931): "A master or employer may be liable for the negligence of his servant or employee in the course of his employment, though the employee is using his own car."

3. See, *e.g.*, Hodges v. Johnson, 52 F. Supp. 488 (W.D. Va. 1943); Barmore v. Vicksburg St. P. Ry., 85 Miss. 426, 38 So. 210 (1905); Riley v. Standard Oil Co., 231 N.Y. 301, 132 N.E. 97, 22 A.L.R. 1382 (1921); cf. Edwards v. Earnest, 206 Ala. 1, 89 So. 729 (1921); Sanders Ex'rs v. Armour & Co., 220 Ky. 719, 295 S.W. 1014 (1927). For a good discussion of this particular problem see Smith, *Frolic and Detour*, 23 COL. L. REV. 444 & 716 (1923).

4. *Cf.* Atlanta & F.R.R. v. Kimberly, 87 Ga. 161, 13 S.E. 277 (1891); Pickett v. Waldorf System, Inc., 241 Mass. 569, 136 N.E. 64, 23 A.L.R. 1014 (1922). For the rule on liability of employer of independent contractor and exceptions thereto, see PROSSER, TORTS 483 (1941).

termining which relationship exists the courts look to control as the paramount test.[5]

In the instant case the primary question considered by the court was the relationship between the driver and the defendant.[6] And in the interpretation of the lease the right of control held over the driver was clearly the decisive factor in finding the existence of the master-servant relationship.[7] The court, following the general rule, held that the driver was within the scope of his employment.[8] It further found that the expiration of the permit before the accident did not relieve the master of his liability to third persons.[9]

Where the master has a state permit to operate the lessor-driver's truck upon public highways, there appears to be an exception to the rule of nonliability for the acts of independent contractors. Some courts hold that possession of such state authority by the master places liability upon him[10] despite the independent contractor relationship.[11] This rule seems to be based upon the theory that there is public policy for maintaining such liability by virtue of the public nature of the operation of a transportation company.[12] At least one court has held freight trucks intrinsically dangerous when operated on public highways.[13]

It has been held that where no terms of control are stipulated by the lessee in a lease agreement the relationship would be that of employer and independent contractor.[14] Since there was enough question as to the presence of a master-servant relationship in this case for the lower court to deny its existence, it would appear that the court might

5. *Accord,* Lee Moore Contracting Co. v. Blanton, 49 Ariz. 130, 65 P.2d 35 (1937); *cf.* Singer Manufacturing Co. v. Rahn, 132 U.S. 518, 10 Sup. Ct. 175, 33 L. Ed. 440 (1889); Balinovic v. Evening Star Newspaper Co., 113 F.2d 505 (D.C. Cir. 1940); Dobson's Case, 124 Me. 305, 128 Atl. 401 (1925). "A servant is a person employed to perform service for another in his affairs and who, with respect to his physical conduct in the performance of the service, is subject to the others' control or right to control." RESTATEMENT, AGENCY § 220(1) (1933).

6. 195 F.2d at 465.

7. 195 F.2d at 465. While the driver was reporting the accident to the defendant, employees of the defendant were loading the truck for another trip. This indicated further control over the driver.

8. 195 F.2d at 466.

9. The court, by indicating that the liability of the defendant stemmed from the agreement, held that the expiration before the accident of the master's authority from the state to operate on the highways would not relieve the master of its liability to third persons.

10. Venuto v. Robinson, 118 F.2d 679 (3d Cir. 1941); Balinovic v. Evening Star Newspaper Co., 113 F.2d. 505 (D.C. Cir. 1940); Hodges v. Johnson, 52 F. Supp. 488 (W.D. Va. 1943).

11. Bates Motor Transport Lines, Inc. v. Mayer, 213 Ind. 664, 14 N.E.2d 91 (1938); Duncan v. Evans, 60 Ohio App. 265, 20 N.E.2d 729 (1937); Stickel v. Erie Motor Freight, Inc., 54 Ohio App. 74, 6 N.E.2d 15 (1936).

12. RESTATEMENT, TORTS § 428, comment *a* (1934).

13. *Cf.* Joel v. Morrison, 6 C. & P. 501 (N.P. 1834). See Smith, *Frolic and Detour,* 23 COL. L. REV. 444 & 716 (1923).

14. Houdek v. Gloyd, 152 Kan. 789, 107 P.2d 751 (1940).

well have reached the same result on firmer grounds had it based its ruling upon the theory that the state permit made the master liable for the acts of the lessee driver as an independent contractor. The public policy consideration appears a better basis for liability than an extension of the master-servant relationship.

AGENCY — POSSESSION AS INDICIA OF OWNERSHIP

Plaintiff was the owner of a diamond ring which he entrusted to *T* to sell for him. Principal and agent orally agreed that *T*'s period of agency was to last for seven days. *T*, representing himself to be the owner of the ring, sold it to defendants for value after the termination of his authority to sell. Plaintiff sued defendants for conversion. *Held*, defendants are liable. At the time of sale *T* was not plaintiff's agent to sell the ring and plaintiff did not enable *T* to mislead the defendants by giving him possession of the ring. *T* was, in fact, a converter by his sale and could not pass good title to defendants. *Jerome v. Bentley and Co.*, [1952] 2 Q.B. 114.

Cases concerning the conflicting rights of an owner and a bona fide purchaser from owner's fraudulent agent arise in two ways. The purchaser may deal with the agent as such. In doing so he may rely on the "apparent authority" of the agent, *i.e.*, that which the principal holds his agent out as having, to third parties.[1] Secondly, the bona fide purchaser may deal with the agent as an owner. In this situation the buyer does not rely on the agent's "apparent authority" to represent anyone.[2] The only relevant question is whether he can sell as owner.[3]

An agent, who is dealt with as an owner, cannot divest the true owner of title, unless the latter has estopped himself.[4] Estoppel may arise if the principal gives this person ostensible ownership of the property thus enabling him to commit fraud by appearing as owner.[5] The true owner then cannot recover against a bona fide purchaser.[6] The court in the instant case said that the plaintiff had not enabled his agent to appear as owner by giving him possession of the ring.[7]

1. MECHEM, OUTLINES OF AGENCY § 247 (3d ed. 1923); Ferson, *Bases for Master's Liability and for Principal's Liability to Third Persons*, 4 VAND. L. REV. 260 (1951).
2. See 2 AM. JUR., *Agency* § 103 (1936), and cases cited therein. See Note, 95 A.L.R. 1319 (1935), for collection of cases on this question.
3. See note 4 *infra*.
4. HUFFCUTT, AGENCY § 168 (2d ed. 1901); MECHEM, OUTLINES OF AGENCY § 262 (3d ed. 1923); 2 WILLISTON, SALES § 312 (Rev. ed. 1948).
5. Cowdrey v. Vandenburgh, 101 U.S. 572, 25 L. Ed. 923 (1879); Rosser v. Darden, 82 Ga. 219, 7 S.E. 919 (1888); Baily v. Hoover, 233 Ky. 681, 26 S.W.2d 522 (1930); Berkshire Glass Co. v. Wolcott, 84 Mass. 227 (1861); Cairns v. Pepper, 133 Pa. St. 114, 19 Atl. 336 (1890); see HUFFCUTT, AGENCY § 170 (2d ed. 1901).
6. See note 4 *supra*.
7. [1952] 2 Q.B. at 118.

American courts hold that mere possession by an agent is not sufficient indicia of ownership to bar recovery by an owner when the person who appears to be the owner wrongfully transfers the property.[8] Agents representing themselves to be owners of property usually appear to prospective buyers as factors, dealers or as private individuals selling their own property.

Factors are by definition agents to sell,[9] but usually they sell property in their own names.[10] Factor's acts have been passed to protect purchasers,[11] and in these jurisdictions possession by the factor bars the principal's recovery against a bona fide purchaser.[12] Where such statutes do not exist, the general rule allows the principal's recovery.[13]

Mere possession by a dealer is held to be insufficient indicia of ownership to pass title to a third person even though he is a bona fide purchaser.[14] There is some uncertainty, however, as to the sufficiency of possession alone when the dealer is one accustomed to sell such property in his own name.[15]

When the agent appears to the third party as an individual selling his own property, as in the instant case, the rights of the parties

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8. Calhoun v. Thompson, 56 Ala. 166 (1876); Romeo v. Martucci, 72 Conn. 504, 45 Atl. 1 (1900); Gilman Linseed Oil Co. v. Norton, 89 Iowa 434, 56 N.W. 663 (1893); Levi v. Booth, 58 Md. 305 (1882); Unger & Co. v. Abbott, 92 Miss. 563, 46 So. 68 (1908); Knox v. Eden Musee American Co., 148 N.Y. 441, 42 N.E. 988 (1896); Smith v. Clews, 114 N.Y. 190, 21 N.E. 160 (1889). see 2 AM. JUR. *Agency* § 114 (1936); Note, 57 A.L.R. 393 (1928).

9. See, *e.g.*, Holleman v. Taylor, 200 N.C. 618, 158 S.E. 88 (1931); People's Bank of Pratt, Kan. v. Frick Co., 13 Okla. 179, 73 Pac. 949 (1903).

10. See, *e.g.*, Gadsden County Tobacco Co. v. Corry, 103 Fla. 217, 137 So. 255 (1931); Commercial Investment Trust v. Stewart, 235 Mich. 502, 209 N.W. 660 (1926); see 2 MECHEM, AGENCY § 2505 (2d ed. 1914).

11. 2 MECHEM, AGENCY § 2511 (2d ed. 1914); see statutes cited in 2 WILLISTON, SALES § 320 (Rev. ed. 1948).

12. 2 WILLISTON, SALES § 322 (Rev. ed. 1948). For discussion of mere possession by factor as notice to purchasers, see 10 FORD. L. REV. 287 (1941).

13. 2 MECHEM, AGENCY § 2574 (2d ed. 1914); see generally as to factors, Note, 14 A.L.R. 423 (1921).

14. See Gilman Linseed Oil Co. v. Norton, 89 Iowa 434, 56 N.W. 663 (1893); Levi v. Booth, 58 Md. 305 (1882); Royle v. Worcester Buick Co., 243 Mass. 143, 137 N.E. 531 (1922); Kelly v. Pelt, 220 S.W. 199 (Tex. Civ. App. 1920); McBrayer v. Smith, 145 S.W. 1053 (Tex. Civ. App. 1912). Also see Note, 57 A.L.R. 393 (1928).

15. Some authority holds that entrusting such a dealer with possession bars recovery of the true owner. See, *e.g.*, Carter v. Rowley, 59 Cal. App. 486, 211 Pac. 267 (1922). See Romeo v. Martucci, 72 Conn. 504, 45 Atl. 99 (1900) (dissenting opinion of case cited, note 8 *supra*); William Frantz & Co. v. Fink, 125 La. 1013, 52 So. 131 (1910); Fanning v. C.I.T. Corp., 187 Miss. 45, 192 So. 41 (1939); Jones v. Commercial Investment Trust, 64 Utah 151, 228 Pac. 896 (1924); Boice v. Finance & Guaranty Corp., 127 Va. 563, 102 S.E. 591 (1920). Other authority holds that a sale to a bona fide purchaser by an agent or bailee who has been given possession for some other purpose does not bar recovery by the true owner. Gilman Linseed Oil Co. v. Norton, 89 Iowa 434, 56 N.W. 663 (1893); Levi v. Booth, 58 Md. 305 (1882); Royle v. Worcester Buick Co., 243 Mass. 143, 137 N.E. 531 (1922); Utica Trust Deposit Company v. Decker, 244 N.Y. 340, 155 N.E. 665 (1927); Biggs v. Evans [1894] 1 Q.B. 88; 2 WILLISTON, SALES § 314 (Rev. ed. 1948); 22 ILL. L. REV. 652 (1928); 5 TUL. L. REV. 670 (1931).

seem to be clearly embraced by the general rule.[16] For most personal property there is no means of title recordation, and the buyer of such property from individual owners does so at his peril or at the price of considerable investigation. In a business world striving for greater commerciability the rule that mere possession is insufficient indicia of ownership seems to be a doctrine which needs re-evaluation.

CONSTITUTIONAL LAW — ALIENS — DETENTION WHERE DEPORTATION IS IMPOSSIBLE

In 1948, relator, a native of Great Britain, sought to enter the United States for the second time[1] under an American quota visa. He was excluded by the immigration authorities and denied a hearing. Efforts were made to deport him to France, the country from whence he sought entry, and, failing that, to twelve other nations. None of these efforts was successful, and the petitioner remained in detention on Ellis Island. The District Court granted his petition for habeas corpus but imposed certain conditions upon his release.[2] Both parties appealed. *Held* (2-1), affirmed as to the writ and remanded as to the conditions imposed. Detention based upon deportation proceedings is an unconstitutional deprivation of liberty when it becomes patent that deportation cannot be effectuated. *United States* ex rel. *Mezei v. Shaughnessy*, 195 F.2d 964 (2d Cir. 1952).

Admission of aliens to this country is not a matter of right but is discretionary.[3] It is subject to the will of Congress, and its administration is under the control of the executive branch.[4] A determination of exclusion may be made without the benefit of a hearing and without a disclosure of the reasons therefor.[5] However, through habeas corpus proceedings the courts may determine the fairness of the action.[6]

16. Baehr v. Clark, 83 Iowa 313, 49 N.W. 840 (1891) (almost identical to instant case); Davidson v. T. L. Farrow Merchantile Co., 13 Ala. App. 614, 68 So. 602 (1915); Unger & Co. v. Abbott, 92 Miss. 563, 46 So. 68 (1908); Stanton v. Hawley, 193 App. Div. 559, 184 N.Y. Supp. 415 (Sup. Ct. 1920); Dunagan v. Griffin, 151 S.W.2d 250 (Tex. Civ. App. 1941). See also 1 MECHEM, AGENCY § 848 (2d ed. 1914).

1. Relator first entered this country in 1923, and remained without becoming citizen until 1948 at which time he returned to Europe to visit his dying mother. Under immigration laws each entry is an original entry for the purposes of determining admission or exclusion. See Alpert, *The Alien and the Public Charge Clauses*, 49 YALE L.J. 18, 19 (1939).

2. The relator was not allowed to leave the juridiction of the district court, and a $5,000 performance bond was imposed.

3. KANSAS, UNITED STATES IMMIGRATION, DEPORTATION AND CITIZENSHIP 1 (3d ed. 1948); ROTTSHAEFER, CONSTITUTIONAL LAW §§ 182-83 (1939).

4. See note 3 *supra*.

5. 8 CODE FED. REGS. § 175.57 (b) (1949); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 70 Sup. Ct. 309, 94 L. Ed. 317 (1950).

6. 62 STAT. 964 (1948), 28 U.S.C.A. § 2241 (1950); United States *ex rel.* Chu Leung v. Shaughnessy, 88 F. Supp. 91 (S.D.N.Y. 1950); *Ex parte* Bouiss, 67 F. Supp. 65 (W.D. Wash. 1946). See ROTTSHAEFER, CONSTITUTIONAL LAW 375 (1939); VAN VLECK, THE ADMINISTRATIVE CONTROL OF ALIENS 149 (1932).

Though an order of deportation is not considered punishment,[7] the protections of the Constitution are ordinarily applicable.[8] But the courts have drawn a distinction between exclusion before entry and deportation subsequent to admission.[9] In the former case the alien may not claim constitutional protections since he is not within the borders of this country; in the latter situation he may do so.[10]

In the instant case the alien, though having left his ship, has entered no further than Ellis Island. Since deportation has apparently become impossible, his detention serves no purpose other than punishment.[11] If the alien is entitled to the benefit of the Fifth Amendment, the detention is an unconstitutional deprivation of liberty.[12] The few decisions in point indicate that he is so entitled.[13]

The distinction between absolute exclusion and debarkation at Ellis Island is negligible. Actually it is little more than a matter of convenience for the administration of immigration. Certainly there is a greater distinction between such an entry and the freedom to travel at large throughout the country. Consequently there seems to be no compelling reason for granting the alien constitutional protection merely by virtue of his debarkation.[14] The risk attendant upon attempted entry ought to fall upon the alien himself rather than upon the country where admission is sought.[15]

If the court refuses release the only problem is what to do with the alien. However, several problems arise when the court holds that detention must cease when deportation becomes impossible. For ex-

7. Fong Yue Ting v. United States, 149 U.S. 698, 13 Sup. Ct. 1016, 37 L. Ed. 905 (1893); KANSAS, UNITED STATES IMMIGRATION, DEPORTATION AND CITIZENSHIP 175 (3d ed. 1948). *See* Wong Wing v. United States, 163 U.S. 228, 235, 16 Sup. Ct. 977, 41 L. Ed. 140 (1895).

8. *See, e.g.*, Bridges v. Wixon, 326 U.S. 135, 154, 65 Sup. Ct. 1443, 89 L. Ed. 2103 (1945); Wong Wing v. United States, 163 U.S. 228, 238, 16 Sup. Ct. 977, 41 L. Ed. 140 (1895); Yick Wo v. Hopkins, 118 U.S. 356, 369, 6 Sup. Ct. 1064, 30 L. Ed. 220 (1886).

9. See, *e.g.*, Kaplan v. Tod, 267 U.S. 228, 230, 45 Sup. Ct. 257, 69 L. Ed. 585 (1925); United States v. Ju Toy, 198 U.S. 253, 263, 25 Sup. Ct. 644, 49 L. Ed. 1040 (1905); ROTTSHAEFER, CONSTITUTIONAL LAW §§ 182, 183 (1939); VAN VLECK, THE ADMINISTRATIVE CONTROL OF ALIENS 149 (1932).

10. See note 9 *supra*.

11. 195 F.2d at 967.

12. ROTTSHAEFER, CONSTITUTIONAL LAW 761 (1939); VAN VLECK, THE ADMINISTRATIVE CONTROL OF ALIENS 183 (1932).

13. Staniszewski v. Watkins, 80 F. Supp. 132 (S.D.N.Y. 1948); United States *ex rel.* Janavaris v. Nicolls, 47 F. Supp. 201 (D. Mass. 1942); Moraitis v. Dalany, 46 F. Supp. 425 (D. Md. 1942); *Ex parte* Matthews, 277 Fed. 857 (W.D. Wash. 1921). *See* Caranica v. Nagle, 28 F.2d 955, 957 (9th Cir. 1928); United States *ex rel.* Ross v. Wallis, 279 Fed. 401, 403 (2d Cir. 1922); United States *ex rel.* Chu Leung v. Shaughnessy, 88 F. Supp. 91, 92 (S.D.N.Y. 1950); *In re* Krajcirovic, 87 F. Supp. 379, 382 (D. Mass. 1949); United States *ex rel.* Miskic v. Uhl, 47 F. Supp. 165, 167 (S.D.N.Y. 1942). *But cf.* United States *ex rel.* Schlimm v. Howe, 222 Fed. 96 (S.D.N.Y. 1915).

14. Kaplan v. Tod, 267 U.S. 228, 45 Sup. Ct. 257, 69 L. Ed. 585 (1925); United States v. Ju Toy, 198 U.S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040 (1905).

15. The fact that the burden of proof rests upon the alien would appear to bear out this fact. See VAN VLECK, THE ADMINISTRATIVE CONTROL OF ALIENS 101 (1932).

ample, the length of time during which the deportation must be effectuated is unsettled.[16] Generally four months are allowed. The possibility of the utilization of repeated proceedings to preserve the validity of continued detention must be considered.[17] Furthermore, there is a question as to the finality of a release[18] as well as to the requirement of regular appearances and of an appearance bond.[19]

In the light of the present world situation perhaps the greatest problem stems from the threat of possible infiltration of this country by undesirables. If our power to exclude these aliens is to be limited by the readiness of foreign nations, who may have interests opposed to ours, to accept their return, a serious danger exists.

COURTS — CONTEMPT — DELAY IN SUMMARY PUNISHMENT

After nine months of trial, eleven Communist Party leaders were convicted of violating the Smith Act.[1] On receiving the verdict, the trial judge at once filed a certificate under Rule 42(a)[2] finding the defense counsel, petitioners here, guilty of criminal contempt and sentenced them to prison. The Court of Appeals reversed as to some specifications but affirmed the conviction and sentences. Certiorari denied, but upon reconsideration, granted. *Held,* (5-3), affirmed. Rule 42 allows the trial judge to punish contempt immediately and sum-

16. Caranica v. Nagle, 28 F.2d 955 (9th Cir. 1928) (two months); United States *ex rel.* Ross v. Wallis, 279 Fed. 401 (2d Cir. 1922) (four months); *In re* Krajcirovic, 87 F. Supp. 379 (D. Mass. 1949) (two months); United States *ex rel.* Janavaris v. Nicolls, 47 F. Supp. 201 (D. Mass. 1942) (one to four months); Moraitis v. Delany, 46 F. Supp. 425 (D. Md. 1942) (two to four months); United States *ex rel.* Schlimm v. Howe, 222 Fed. 96 (S.D.N.Y. 1915) (indefinite).

17. See, *e.g.,* United States *ex rel.* Chumura v. Smith, 29 F.2d 287 (W.D.N.Y. 1927).

18. *Compare In re* Hanoff, 39 F. Supp. 169 (N.D. Cal. 1941), where the alien was seized ten years after his release, *with* Petition of Brooks, 5 F.2d 238 (D. Mass. 1925), where the release was final, and *with* Moraitis v. Delany, 46 F. Supp. 425 (D. Md. 1942).

19. See note 18 *supra.*

1. 62 STAT. 808 (1948), 18 U.S.C.A. § 2385 (1951).

2. FED. R. CRIM. P. 42. "(a) *Summary Disposition.* A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record. (b) *Disposition Upon Notice and Hearing.* A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment."

marily, if delay will prejudice the trial. But, if he believes the exigencies of the trial require that he defer judgment until its completion, he may do so without extinguishing his power. *Sacher v. United States,* 343 U.S. 1, 72 Sup. Ct. 451, 96 L. Ed. 437 (1952).

The power of the courts to punish summarily for direct contempts is ancient.[3] It is inherent, "a necessary incident of judicial power, independent of statutory enactment. . . ."[4] Even the federal courts, having only that jurisdiction expressly given by Congress, have this implied power, because it is said to be necessary to the exercise of all others;[5] and legislatures are limited in their power to regulate it.[6] Trial without notice or hearing, being in direct conflict with our concept of due process, can be justified only by necessity.[7] This "necessity" is the need to preserve the dignity and authority of the court by immediate penal vindication;[8] it should be considered only when alternative means appear inadequate.[9]

Here the trial judge was forced to decide whether to punish the petitioners at once by summary action, adjudge them guilty of contempt and delay sentence until the conclusion of the trial, or delay any action until the end of the trial. Had he punished them at once, it is possible that there would have been no further contemptuous conduct; or, had he adjudged them guilty of contempt and postponed sentencing until the end of the trial, the same result might have been achieved. This, however is mere speculation, and, as the majority pointed out in the instant case, to find a lawyer guilty of contempt during the trial would likely prejudice his client.[10] The issue is not the guilt of the petitioners or the punishment they received but is a question of procedural regularity as to what tribunal should sit in judgment, who should mete out the appropriate punishment and

3. 4 BL. COMM. *286.
4. Watson v. Williams, 36 Miss. 331, 344 (1858).
5. *See* United States v. Hudson and Goodwin, 7 Cranch 32, 3 L. Ed. 259 (U.S. 1812).
6. ROTTSCHAEFER, CONSTITUTIONAL LAW 57 (1939).
7. *See* "Summary punishment of contempt is concededly an exception to the requirements of Due Process. Necessity dictates the departure. Necessity must bound its limits." Instant case, 343 U.S. at 36 (dissenting opinion). "Summary punishment for contempt is not a right of the judge, the exercise of which he may postpone. It is an extraordinary exception to due process of law, justified only by the urgent needs of the moment. When the need for this drastic action passes, the power so to act also passes. . . ." United States v. Sacher, 182 F.2d 416, 465 (2d Cir. 1950) (dissenting opinion).
8. *In re* Oliver, 333 U.S. 257, 275, 68 Sup. Ct. 499, 92 L. Ed. 682 (1948); Cooke v. United States, 267 U.S. 517, 536, 45 Sup. Ct. 390, 69 L. Ed. 767 (1925); United States v. Bollenbach, 125 F.2d 458 (2d Cir. 1942). *See* Toledo Newspaper Co. v. United States, 247 U.S. 402, 422, 38 Sup. Ct. 560, 62 L. Ed. 1186 (1918) (dissenting opinion by Holmes).
9. " 'Necessity' to punish for contempt by summary procedure is a relative term and is to be interpreted in the light of the reasonable use of the alternative means at hand and a reasonable anticipation of their effect to insure orderly judicial administration." Harper and Haber, *Lawyer Troubles in Political Trials,* 60 YALE L.J. 1, 31 (1951).
10. 343 U.S. at 10.

how the authority of the court should be exercised without detracting from the authority of the law itself.[11]

It was argued that because the trial judge, after the contempts had been committed, waited until the completion of the trial summary action was no longer necessary.[12] Rule 42 is silent on the subject of delaying summary punishment; therefore, it would seem that the Court's prior decisions on the subject would be controlling under the doctrine of stare decisis.[13] In Ex parte *Terry* it was held the court could either punish immediately and summarily, or wait until the defendant "was arrested on process, brought back into its presence, and permitted to make defense."[14] This decision indicates that delay would deprive the court of its power to proceed summarily. Yet in 1913, the Ninth Circuit cited the *Terry* case as a precedent for the proposition that a court could delay and still punish summarily;[15] two recent cases in the same circuit followed suit.[16] In almost all the other federal cases on summary punishment for direct contempts the need for immediate punishment has been the underlying theme.[17]

It was also argued that, since the contemptous conduct of petitioners was directed at the judge personally, another judge should have been asked to try the case.[18] Mr. Justice Frankfurter said in dissent that the record indicates the conduct of the lawyers had its effect on the judge.[19] He further said, "Departure from established judicial practice, which makes it unfitting for a judge who is personally involved to sit in his own case, was therefore unwarranted. Neither self-respect nor the good name of the law required it."[20] It is difficult to see how giving petitioners a reasonable opportunity to appear and offer a defense in open court before another judge would have resulted in any demoralization of the court's dignity and authority.

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11. *Id.* at 25.
12. *Id.* at 7.
13. The majority in the instant case, however, said that the prior decisions are of little value as precedents because their facts are so distinguishable. 343 U.S. at 8.
14. "It was within the discretion of that court, whose dignity he had insulted, and whose authority he had openly defied, to determine whether it should, upon its own view of what occurred, proceed at once to punish him, or postpone action until he was arrested upon process, brought back into its presence, and permitted to make defense." 128 U.S. 289, 313, 9 Sup. Ct. 77, 32 L. Ed. 405 (1888).
15. *In re* Maury, 205 Fed. 626 (9th Cir. 1913).
16. MacInnis v. United States, 191 F.2d 157 (9th Cir. 1951); Hallinan v. United States, 191 F.2d 880 (9th Cir. 1950).
17. "[T]he need for immediate penal vindication of the dignity of the court created it." Cooke v. United States, 267 U.S. 517, 536, 45 Sup. Ct. 390, 69 L. Ed. 767 (1925). "[T]here should be no delay, upon the part of the court, in exerting its power to punish." *Ex parte* Terry, 128 U.S. 289, 311, 9 Sup. Ct. 77, 32 L. Ed. 405, (1888). "[H]e must be able to repress disorders quickly and, if necessary, ruthlessly. . . ." United States v. Bollenbach, 125 F.2d 458, 460 (2d Cir. 1942).
18. 343 U.S. at 7.
19. *Id.* at 34.
20. *Id.* at 36.

The constitutional safeguards of due process and of trial by jury should be offered an accused wherever that is possible. In the instant case it was possible. Perhaps, because of the extraordinary facts of this case, the rule of law laid down will be rigidly restricted to similar fact situations.

CRIMINAL LAW — HABITUAL CRIMINAL STATUTES — MEANING OF PREVIOUS CONVICTION REQUIREMENT

Petitioner was tried in 1943 for a felony under an indictment which set forth the existence of two prior convictions and sentences imposed upon him in 1933. He was convicted and given a life sentence under the habitual criminal statute.[1] In a habeas corpus proceeding against the warden of the West Virginia penitentiary, he sought to obtain a release from custody on the ground that the 1933 convictions were imposed on successive days and hence did not satisfy the statutory provision, "have been twice before convicted," since he had not served the first sentence when the second was imposed. The trial court granted the petition. *Held,* reversed. Each conviction under the statute must be for an offense committed subsequent to the prior conviction. However, the petitioner is remanded to the custody of the warden in order that he may serve the remaining valid portion of the 1943 sentence. *Dye v. Skeen,* 62 S.E.2d 681 (W. Va. 1950).

At least forty-three states have enacted some form of an habitual criminal statute.[2] There appear to be two main purposes underlying them, namely to serve as a warning to first offenders and to afford a

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1. W. Va. Acts. 1939, c. 26, §§ 18, 19.

2. ALA. CODE ANN. tit. 15, § 331 (1940); ARIZ. CODE ANN. § 43-6111 (1939); CAL. PEN. CODE § 644 (1949); COLO. STAT. ANN. c. 48, §§ 555(1)-555(3) (Supp. 1951); CONN. REV. GEN. STAT. § 8820 (Supp. 1949); D. C. CODE §§ 22-104 (1940); FLA. STAT. §§ 775, 775.09, 775.10 (1949); GA. CODE § 27-2511 (1933); IDAHO CODE ANN. § 19-2414 (1932); ILL. REV. STAT. c. 38, § 602 (1949); IND. STAT. ANN. § 2343 (Baldwin 1934); IOWA CODE § 747.1 (1950); KAN. GEN. STAT. ANN. § 21-107*a* (1949); KY. REV. STAT. § 431.190 (1948); LA. CODE CRIM. LAW & PROC. ANN. § 709.1 (Dart 1943); ME. REV. STAT. c. 136, § 3 (1944); MASS. GEN. LAWS c. 279, § 25 (1932); MICH. COMP. LAWS §§ 76910-76913 (1948); MINN. STAT. ANN. §§ 610.28, 610.29 (West 1945); MO. REV. STAT. ANN. § 556.290 (1949); MONT. REV. CODES ANN. § 94-4713 (1947); NEB. REV. STAT. § 29-2221 (1943); NEV. COMP. LAWS ANN. § 9976 (1929); N.H. REV. LAWS c. 460, § 1 (1942); N.J. STAT. ANN. § 2:103-10 (Supp. 1937); N.M. STAT. ANN. §§ 42-1601, 42-1603 (1941); N.Y. PEN. LAW § 1942; N.Y. CON. LAWS ANN. art. 90, § 1020 (Baldwin 1938); N.D. REV. CODE §§ 12-0618, 12-0619 (1943); OHIO CODE ANN. §§ 4130, 13457-2 (Baldwin 1940); OKLA. STAT. tit. 21, §§ 51, 52 (1951); ORE. COMP. LAWS ANN. § 26-2803 (1940), as amended; PUB. LAWS ORE. c. 585 (1947); PA. STAT. ANN. tit. 18, § 5108 (1945); R.I. GEN. LAWS c. 625 § 64 (1938); S.D. CODE § 13.0611 (1939); TENN. CODE ANN. §§ 118631, 118632 (Williams Supp. 1947); TEX. STAT. PEN. CODE ANN. art. 63, 64 (1936); UTAH CODE ANN. § 103-1-18 (1943); VA. CODE ANN. §§ 19-268, 20-46, 53-296 (1950); VT. PUB. LAWS § 8751 (1933); WASH. REV. STAT. ANN. § 2286 (1932); W. VA. CODE ANN. § 6130 (1949); WIS. STAT. § 359.02 (1949), also WIS. ANN. §§ 359.02, 359.17 (1950); WYO. COMP. STAT. ANN. §§ 9-109, 9-110 (1945).

convict an opportunity to reform.[3] The typical enactment provides for the imposition of an additional sentence for the second conviction.[4] Others provide for the additional sentence on the third, fourth or fifth offenses, and a few provide for intermediate convictions on a graduated scale plan, until a maximum is reached at which time a life term or death sentence is imposed.[5]

The instant case involves a question that has caused concern in interpreting such statutes, namely, the meaning of the words "previously convicted."[6] The overwhelming majority of the courts, in construing these words, hold that for purposes of satisfying the statute a person has not been "previously convicted" unless he has not only been charged and convicted for a previous crime, but also has served the sentence imposed. In so construing these words they declare that the legislative intention is to give the previously convicted a chance to reform under threat of a more severe penalty if he again offends society.[7] Under this view, the criminal who is successful in evading the police for years and has perpetrated crimes *ad infinitum,* is not when apprehended for the first time a habitual criminal under the

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3. See, *e.g.,* Joyner v. State, 158 Fla. 806, 30 So.2d 304 (1947); Cobb v. Commonwealth, 276 Ky. 176, 101 S.W.2d 418 (1936); State v. Hamilton, 340 Mo. 768, 102 S.W.2d 642 (1937); People v. Spellman, 136 Misc. 25, 242 N.Y. Supp. 68 (Sup. Ct. 1930); Commonwealth v. Calio, 155 Pa. Super. 355, 38 A.2d 351 (1944); Gammill v. State, 135 Tex. Crim. R. 52, 117 S.W.2d 790 (1938); State v. Jones, 138 Wash. 110, 244 Pac. 395 (1926). See also 51 HARV. L. REV. 345 (1937).

4. *E.g.,* ARIZ. CODE ANN. § 43-6111 (1939); IND. STAT. ANN. § 2343 (Baldwin 1934); KY. REV. STAT. § 431.190 (1948); ME. REV. STAT. c. 136, § 3 (1944); MICH. COMP. LAWS § 769.10 (1948); N.M. STAT. ANN. § 42-1601 (1941); OKLA. STAT. tit. 21, §§ 51, 52 (1951); R.I. GEN. LAWS c. 625, § 64 (1938); WIS. STAT. § 359.12 (1949).

5. For a general view of this type see IND. STAT. ANN. § 2343 (Baldwin 1934) (third conviction); TENN. CODE ANN. §§ 11863.1, 11863.2 (Williams Supp. 1947) (fourth conviction); NEV. COMP. LAWS ANN. § 9976 (1929) (fifth conviction). The preceeding are mandatory provisions. Other examples where the maximum sentence is discretionary are ME. REV. STAT. c. 136, § 3 (1944) (second conviction); ILL. REV. STAT. c. 38, § 602 (1949) (third conviction); S.D. CODE § 13.0611 (1939) (fourth conviction). Not all the statutes, however, provide for a life or death sentence, ALA. CODE ANN. tit. 15, § 331 (1940); CONN. REV. GEN. STAT. § 8820 (Supp. 1949); D.C. CODE § 22-104 (1940); GA. CODE ANN. § 27-2511 (1933); IOWA CODE § 747.1 (1950); MASS. GEN. LAWS c. 279, § 25 (1932); NEB. REV. STAT. § 29-2221 (1943); N.H. REV. LAWS c. 460, § 1 (1942); R.I. GEN. LAWS c. 625, § 64 (1938); WIS. STAT. § 359.12 (1949). See also Note, *Court Treatment of General Recidivist Statutes,* 48 COL. L. REV. 238 (1948) (an excellent discussion and classification of the various statutes).

6. *E.g.,* People v. Braswell, 103 Cal. App. 399, 284 Pac. 709 (1930); People v. Dawson, 210 Cal. 366, 292 Pac. 267 (1930); Cobb v. Commonwealth, 267 Ky. 176, 101 S.W.2d 418 (1936); People v. Lowenstein, 309 Mich. 94, 14 N.W.2d 794 (1944); People v. Spellman, 136 Misc. 25, 242 N.Y. Supp. 68 (Sup. Ct. 1930); Commonwealth v. Sutton, 125 Pa. Super. 406, 189 Atl. 556 (1937); Waxler v. State, 67 Wyo. 396, 224 P.2d 514 (1950).

7. See People v. Dawson, 210 Cal. 366, 292 Pac. 267 (1930); Cobb v. Commonwealth, 267 Ky. 176, 101 S.W.2d 418 (1936); Taylor v. State, 114 Neb. 257, 207 N.W. 207 (1926); Arbuckle v. State, 132 Tex. Crim. R. 371, 105 S.W.2d 219 (1937). See also Note, *Court Treatment of General Recidivist Statutes,* 48 COL. L. REV. 238, 244 (1948).

statute.[8] Whereas, it is possible for one who commits a minimum of two crimes to become so labeled and suffer the added penalty which can range up to a life sentence if he has been convicted and sentenced on the first charge.[9] These are admittedly extreme examples, yet they are real possibilities.

The minority view is to interpret these words to mean the conviction for a crime committed, disregarding whether or not the sentence imposed has been served.[10] Under this interpretation, the courts believe that by looking at a man's crimes regardless of when committed, his habits can be revealed, and, if criminal, he can at once be removed from society.[11] The majority view seems to favor the reform of the criminal, while the other view gives more weight to the immediate protection of society. The question as to which view is more beneficial to society has been thoroughly discussed by various authors in the field, who seemingly can only agree that revision of the existing statutes is sorely needed.[12]

The West Virginia court in this instance has interpretated its statute in accordance with the overwhelming majority view. To do otherwise, would have necessitated the reversal of earlier West Virginia precedent.[13]

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8. An interesting example is the case of Willie Sutton in Commonwealth v. Sutton, 125 Pa. Super. 407, 189 Atl. 556 (1937). Also, "In Ohio, under the decision in State v. Sudekatus [72 Ohio App. 165, 51 N.E.2d 22 (6th Dist. 1943)] an habitual offender committing repeated grand larcenies immediately on his release after serving minimum sentences under the larceny law [OHIO CODE ANN. § 12447 (1940)] and the habitual criminal law [*id.* §§ 13744-1 to-3] would require nine years to build up a record to entitle him to life imprisonment. For a professional burglar, it would take forty years, and the statute may not reach him with full effect till 1969. *Id.* § 12437." 48 COL. L. REV. 238, 244 n.51 (1948).

9. Such is possible under "second conviction" statutes. *E.g.*, ME. REV. STAT. c. 136, § 3 (1944); OKLA. STAT. tit. 21, §§ 51, 52 (1951).

10. People v. Braswell, 103 Cal. App. 399, 284 Pac. 709 (1930); State v. Fry, 131 Kan. 777, 291 Pac. 782 (1930); Bumbaugh v. State, 36 Ohio. App. 375, 173 N.E. 267 (1930); People v. Lowenstein, 309 Mich. 94, 14 N.W.2d 794 (1944) (possible under this holding); Waxler v. State, 68 Wyo. 396, 224 P.2d 514 (1950). *But see* People v. Dawson, 210 Cal. 366, 292 Pac. 267, 270 (1930), which confuses the California decisions. The California Supreme Court, by employing the opposite theory of that used in People v. Braswell, 103 Cal. App. 399, 284 Pac. 709 (1930), decided eight months earlier, leaves the California courts in a position to choose between theories.

11. See cases cited note 9 *supra*.

12. For those interested in approaching the problem from a scientific, yet practical standpoint, see ELLIOTT, CONFLICTING PENAL THEORIES IN STATUTORY CRIMNAL LAW c. II, X, XIII (1931); GLUECK AND GLUECK, AFTER CONDUCT OF DISCHARGED OFFENDERS c. VI, VIII (1945); Monachesi, *American Studies in the Prediction of Recidivism*, 41 JOUR. CRIM. L. 268 (1950). Other excellent works appear in Brown, *The Treatment of the Recidivist in the U.S.*, 23 CAN. B. REV. 630 (1945); McCurig, *Modern Tendencies in Habitual Criminal Legislation*, 15 CORNELL L. Q. 62 (1929); Note, 57 YALE. L.J. 1085 (1948). For those less interested in a scientific approach see, GAROFALO, CRIMINOLOGY (Millar transl. 1914). See especially the outline of principles suggested as a basis for an international penal code, §§ 15, 16. *Id.* at 409.

13. See Stover v. Riffe, 128 W. Va. 70, 35 S.E.2d 689 (1945).

DOMESTIC RELATIONS — LIABILITY OF HUSBAND FOR NECESSARIES OF WIFE RIGHTFULLY LIVING APART

A wife, who was compelled to leave her husband because of his cruelty, borrowed money from the plaintiff to purchase necessaries. Plaintiff sued the husband for payment of the money lent on the theory that the wife was the husband's agent by necessity. The lower court denied the plaintiff recovery because the wife had assets of her own which she could have used to pay for her necessaries. *Held,* plaintiff's appeal dismissed. The wife, having means to support herself, was not the husband's agent by necessity. *Biberfeld v. Berens* [1952] 2 All E. R. 237 (C.A.).

At common law a husband had the duty to support his wife and family.[1] This duty still exists; it is said to be imposed by law and to arise out of the marriage itself.[2] It is based on considerations of public policy and cannot be evaded by contract.[3] If the husband fails to support his wife she may pledge his credit for her necessaries.[4] Some jurisdictions take the view that the husband's liability for his wife's necessaries is but another application of his primary duty to her arising out of the marriage.[5] Other authorities predicate the husband's liability on the theory of implied agency.[6] This type of agency is commonly referred to as "agency of necessity," which simply means that there is an implied agency existing when the wife is forced to purchase articles for her needs on her husband's credit.[7] Accurately speaking this type of "agency" is not referable to the law of agency[8] as it can be imposed upon the husband against his will.[9] Regardless of the reasons given by the courts for establishing liability in these

1. *See* Traux v. Ellett, 234 Iowa 1217, 15 N.W.2d 361, 362 (1944); Broaddus v. Broaddus, 221 S.W. 804, 806 (Mo. App. 1920); Rich v. Rich, 12 N.J. Misc. 310, 171 Atl. 515, 517-18 (Juv. & Dom. Rel. Ct. 1934); *In re* Garrison, 171 Misc. 983, 14 N.Y.S.2d 803, 804 (Co. Ct. 1939); *In re* McGinnis' Estate, 109 Pa. Super. 248, 167 Atl. 616, 617 (1933).

2. *See* Kelley v. Kelley, 244 Ala. 465, 14 So.2d 371 (1943); Remondino v. Remondino, 41 Cal. App.2d 208, 106 P.2d 437, 441 (1940); Wallace v. Wallace, 61 Ga. App. 789, 7 S.E.2d 604, 606 (1940); Kearney v. Kearney, 178 Miss. 766, 174 So. 59, 60 (1937); Levy v. Levy, 17 N.J. Misc. 324, 9 A.2d 779, 781 (Ch. 1939); Jacobs v. Jacobs, 163 Misc. 98, 297 N.Y. Supp. 642, 644 (Dom. Rel. Ct. 1937).

3. *See In re* Ryan's Estate, 134 Wis. 431, 114 N.W. 820, 15 L.R.A. (N.S.) 491 (1908); *In re* Simonson's Estate, 164 Wis. 590, 160 N.W. 1040, 1042 (1917).

4. *See* Stokes v. Dollard, 94 Colo. 206, 29 P.2d 706, 707 (1934); Pfenninger v. Brevard, 129 S.W.2d 924, 925 (Mo. App. 1939); Reynolds v. Rice, 224 Mo. App. 972, 27 S.W.2d 1059, 1060 (1930); Asche v. Wakeley, 112 N.J. Eq. 60, 163 Atl. 278 (Ch. 1932); Gruenberg v. Douglas, 118 N.J.L. 398, 193 Atl. 176, 177 (Sup. Ct. 1937).

5. *See* Kelley v. Kelley, 244 Ala. 465, 14 So.2d 371 (1943); Wallace v. Wallace, 61 Ga. App. 789, 7 S.E.2d 604, 605 (1940).

6. *See* Bergh v. Warner, 47 Minn. 250, 50 N.W. 77, 78 (1891); see 1 MECHEM, AGENCY § 161 (2d ed. 1914).

7. See MADDEN, PERSONS AND DOMESTIC RELATIONS 190 (1931).

8. *See* Bergh v. Warner, 47 Minn. 250, 50 N.W. 77, 78, (1891); see Brown, *The Duty of the Husband to Support the Wife,* 18 VA. L. REV. 823, 827 (1932).

9. See note 8 *supra.*

cases, the real basis for holding the husband liable seems to be his duty to support his wife according to his means.[10]

The husband's liability in such cases is not without qualification. He will not be liable for necessaries of his wife if he makes adequate provision for her.[11] In the absence of the wife's actual necessity, the husband can only be made liable through an express agency.[12] If the wife leaves the husband without justifiable cause she forfeits the right to obtain her necessaries at his expense.[13] The term "necessaries" in its legal sense is not restricted to food and clothing but includes any article that is suitable to maintain the wife according to her station in life and her husband's means.[14] The husband is liable for the wife's funeral expenses[15] and Married Women's Acts do not relieve the husband of this liability.[16] It is generally said that if the necessaries were given to the wife on her own credit and not on the credit of her husband, he will not be liable for them.[17]

In the instant case the court applied the rule previously laid down

10. Bergh v. Warner, 47 Minn. 250, 50 N.W. 77 (1891).

11. Benjamin v. Benjamin, 15 Conn. 347 (1843); Steinfield v. Girrard, 103 Me. 151, 68 Atl. 630 (1907); Weingreen v. Beckton, 102 N.Y. Supp. 520 (Sup. Ct. 1907); Wanamaker v. Weaver, 176 N.Y. 75, 68 N.E. 135 (1903). *Contra:* Hill v. Comm'r, 88 F.2d 941 (8th Cir. 1937); *see* Corbett v. Wade, 124 S.W.2d 889, 891 (Tex. Civ. App. 1939).

12. *See* McFerren v. Goldsmith-Stern Co., 137 Md. 573, 113 Atl. 107, 109, 18 A.L.R. 1125 (1921); Bergh v. Warner, 47 Minn. 250, 50 N.W. 77, 78 (1891).

13. Johnson v. Coleman, 13 Ala. App. 520, 69 So. 318 (1915); Steinfield v. Girrard, 103 Me. 151, 68 Atl. 630 (1907); Gimbel Bros. v. Adams, 178 Wis. 590, 190 N.W. 357 (1922); *see* Pfenninger v. Brevard, 129 S.W.2d 924, 925 (Mo. App. 1939); Mihalcoe v. Holub, 130 Va. 425, 107 S.E. 704, 706 (1921); *cf.* Kessler v. Kessler, 2 Cal. App. 509, 83 Pac. 257 (1905) (statute relieving husband of the duty to support his wife where she leaves him without justifiable cause); Brown v. Durepo, 121 Me. 226, 116 Atl. 451, 27 A.L.R. 551 (1922).

14. Cooper v. Haseltine, 50 Ind. App. 400, 98 N.E. 437 (1912) (jewelry was held to be a necessary); Jordan Marsh Co. v. Cohen, 242 Mass. 245, 136 N.E. 350, 24 A.L.R. 1480 (1922) (furniture); Schneider v. Rosebaum, 52 Misc. 143, 101 N.Y. Supp. 529 (Sup. Ct. 1906) (services of a nurse); Clark v. Tenneson, 146 Wis. 65, 130 N.W. 895, 33 L.R.A. (N.S.) 426 (1911) (false teeth).

15. Ketterer v. Nelson, 146 Ky. 7, 141 S.W. 409, 37 L.R.A.(N.S.) 754 (1911); Anderson v. Carter, 175 Md. 540, 2 A.2d 677 (1938); Stone v. Tyack, 164 Mich. 550, 129 N.W. 694, (1911); *In re* Waesch's Estate, 166 Pa. 204, 30 Atl. 1124 (1895); Simpson v. Drake, 150 Tenn. 84, 262 S.W. 41 (1924); *see* Reynolds v. Rice, 224 Mo. App. 972, 27 S.W.2d 1059, 1060 (1930). *But cf. In re* Kefover's Estate, 112 Colo. 53, 145 P.2d 879 (1944); *In re* Johnson's Estate, 198 S.C. 526, 18 S.E.2d 450 (1942); Edwards v. Cuthbert, 184 Va. 502, 36 S.E.2d 1 (1945).

16. Ponder v. D.W. Morris & Bros., 152 Ala. 531, 44 So. 651 (1907); Dubow v. Gottinello, 111 Conn. 306, 149 Atl. 768 (1930); Reynolds v. Rice, 224 Mo. App. 972, 27 S.W.2d 1059 (1930); Bowen v. Daugherty, 168 N.C. 242, 84 S.E. 265 (1915).

17. Gafford v. Dunham, 111 Ala. 551, 20 So. 346 (1896); Noel v. O'Neill, 128 Md. 202, 97 Atl. 513 (1916); Byrnes v. Rayner, 84 Hun 199, 32 N.Y. Supp. 542 (Sup. Ct. 1895); Tille v. Finley, 126 Ohio St. 578, 186 N.E. 448 (1933); *see* Brown v. Durepo, 121 Me. 226, 116 Atl. 451, 452, 27 A.L.R. 551 (1922); Fulcomer v. Pennsylvania R.R., 141 Pa. Super. 264, 14 A.2d 593, 597 (1940). *Contra:* Edminston v. Smith, 13 Idaho 645, 92 Pac. 842 (1907). The burden of proving the husband's liability is on the creditor who bears the risk of recovering from him. He must prove that the articles he furnished were necessaries, that the husband failed to provide for his wife and that the wife is justified in living apart from her husband. *See* Bergh v. Warner, 47 Minn. 250, 50 N.W. 77, 78 (1891). On burden of proof in general see 26 AM. JUR., *Husband and Wife* § 372 (1940); MADDEN, PERSONS AND DOMESTIC RELATIONS 190 (1931).

in England that if the wife is able to support herself, either through her ability to earn or her separate estate or income, the husband will not be liable for necessaries.[18] American courts, with a few exceptions, have taken a contrary position. It is well settled in this country that the husband will be liable for his wife's necessaries when he forces her to live apart from him and fails to provide for her support, regardless of her separate estate or ability to earn.[19] A few American courts have adopted the English view and have absolved the husband from liability where it can be proved that the wife has a separate means of support.[20]

The English rule is based on the idea that an "agency of necessity" presupposes an actual necessity.[21] It is argued by the advocates of this view that it would be highly inequitable for the husband to be charged with the articles furnished the wife when she might have a separate estate or income of a far greater amount than his.[22] Nevertheless, the American courts refuse to accept this reasoning and persist in stating that the duty of the husband to furnish the wife with means of obtaining her necessaries is not to be affected by the wife's separate estate or income.

INCOME TAXATION — EXCLUDIBILITY FROM GROSS INCOME OF PAYMENT OVER CEILING PRICE

The taxpayer, a Maryland corporation, was engaged in buying and selling automobiles for which were paid prices in excess of the ceilings officially determined under the Emergency Price Control Act of 1942.[1] It computed its gross income by subtracting from gross receipts the actual prices paid for the cars. A deficiency assessment was determined by the Commissioner who limited the exclusion to the authorized ceiling prices. The taxpayer paid the tax and brought this action in the District Court to recover the alleged deficiency. *Held,*

18. Liddlow v. Wilmot, 2 Stark. 86, 171 Eng. Rep. 581 (N.P. 1817); *cf. In re* Wood's Estate, 1 De G. J. & S. 465, 46 Eng. Rep. 185 (Ch. 1863); Johnston v. Sumner, 3 H. & N. 261, 157 Eng. Rep. 469 (Ex. 1858).

19. McFerren v. Goldsmith-Stern Co., 137 Md. 573, 113 Atl. 107, 18 A.L.R. 1125 (1921); Ott v. Hentall, 70 N.H. 231, 47 Atl. 80, 51 L.R.A. 226 (1900); Moore v. Copeley, 165 Pa. 294, 30 Atl. 829 (1895); Mihalcoe v. Holub, 130 Va. 425, 107 S.E. 704 (1921); *cf.* H. G. Goelitz Co. v. Industrial Board of Illinois, 278 Ill. 164, 115 N.E. 855 (1917); American Mill Co. v. Industrial Board of Illinois, 279 Ill. 560, 117 N.E. 147 (1917); *see* Reynolds v. Rice, 224 Mo. App. 972, 27 S.W.2d 1059, 1060 (1930); Boldwin v. Fowler, 217 S.W. 637, 638 (Mo. App. 1920).

20. Litson v. Brown, 26 Ind. 489 (1866); Hunt v. Hayes, 64 Vt. 89, 23 Atl. 920, 15 L.R.A. 661 (1892); *cf.* Eiler v. Crull, 99 Ind. 375 (1884); Prescott v. Webster, 175 Mass. 316, 56 N.E. 577 (1900). See 22 CORNELL L.Q. 266 (1937), for a discussion of how New York's various domestic relation laws have affected the husband's liability for his wife's necessaries.

21. See Liddlow v. Wilmot, 2 Stark. 86, 171 Eng. Rep. 581, 582 (N.P. 1817).

22. See Johnston v. Sumner, 3 H. & N. 261, 157 Eng. Rep. 469, 472 (Ex. 1858).

1. 56 STAT. 23 (1942).

the entire cost of the automobiles was properly subtracted from gross receipts in determining gross income. *Anderson Oldsmobile, Inc. v. Hofferbert,* 102 F. Supp. 902 (D. Md. 1952).

Originally, the Bureau of Internal Revenue ruled[2] that payments in excess of ceiling prices set by the O.P.A. were not allowable in computing the gross income, since public policy decreed that no tax advantage should be derived from such illegal expenditures. The Tax Court rejected this in *Sullenger v. Comm'r,*[3] and held that the taxpayer was entitled to have such excess treated as part of the cost of goods sold in computing income from the sale thereof. The courts have followed the *Sullenger* case insofar as it holds that there is no constitutional authority for taxing gross receipts.[4] The Sixteenth Amendment[5] gave Congress power to tax only income and not capital.[6] Unless the taxpayer is allowed to recover his capital cost from gross receipts, he is being taxed on the basis of receipts rather than income.[7]

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2. See discussion and criticism of the Bureau's ruling I.T. 3724, 1945 CUM. BULL. 57, in Krekstein, *Deductibility of Over-Ceiling Payments* in SIXTH ANNUAL INSTITUTE ON FEDERAL TAXATION 703, 705-10 (1948), to the effect that the six cases cited in that ruling in support of the conclusion are concerned with deductions under INT. REV. CODE § 23, and are authority only that the payments made in contravention of public policy may not be deducted from gross income in determining net income.

3. 11 TC 1076 (1948), *aff'd without opinion,* 4 P-H 1950 FED. TAX SERV. ¶ 71,055 (5th Cir. 1950); followed in Herman Baum, P-H 1951 TC MEM. DEC. ¶ 51,082; Ethel L. Couch, P-H 1951 TC MEM. DEC. ¶ 51,054; Carl H. Conner, P-H 1951 TC MEM. DEC. ¶ 51,320; Bruce E. Gentry, P-H 1951 TC MEM. DEC. ¶ 51,034; Winnifred Guminski, P-H 1951 TC MEM. DEC. ¶ 51,051; Clara Eugenia Piper, P-H 1951 TC MEM. DEC. ¶ 51,055; Sol Smith, P-H 1951 TC MEM. DEC. ¶ 51,315; Benjamin Weisman, P-H 1951 TC MEM. DEC. ¶ 51,139, *aff'd sub nom.* Comm'r v. Weisman, 197 F.2d 221 (1st Cir. 1952). The last mentioned case is the most recent affirmation of the principle in the instant case.

4. *Compare* Anderson Oldsmobile, Inc. v. Hofferbert, 122 F. Supp. 902, 907 (D. Md. 1952) (refusal to exclude the illegal portion of cost of goods sold would violate "due process" of the 5th Amendment), and Herber v. Jones, 103 F. Supp. 210 (W.D. Okla. 1951) (refusal to exclude this illegal portion of cost of goods sold would violate the 16th Amendment as being tax on gross receipts rather than on gross income), *with* United States v. Sullivan, 274 U.S. 259, 47 Sup. Ct. 607, 71 L. Ed. 1037 (1927) (held, not a violation of 5th Amendment to tax income, gains and profits of illegal business), and Comm'r v. Weisman, 197 F.2d 221, 225 (1st Cir. 1952) (concurring opinion) ("It seems to me clear that Congress would have constitutional power to impose such a sanction [*i.e.*, tax on illegal gross receipts] . . . whether or not Congress would have power to impose a general tax on gross receipts. . . .") Although the principal case and the *Weisman* case disagree on the constitutional issue involved, they do agree that Congress has imposed no sanction to taxing gross receipts of those who paid more than the ceiling prices. Instant case at 906-7; Comm'r v. Weisman, *supra* at 222-26. See U.S. Treas. Reg. 111, § 29.22(a)-5 (1943) (gross income from business means "the total sales less the cost of goods sold").

5. "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration." U.S. CONST. AMEND. XVI.

6. Eisner v. Macomber, 252 U.S. 189, 40 Sup. Ct. 189, 64 L. Ed. 521 (1920); Doyle v. Mitchell Brothers Co., 247 U.S. 179, 38 Sup. Ct. 467, 62 L. Ed. 1054 (1918) (cost of goods is capital and as such must be restored to the seller before a sale can produce taxable income); 1 MERTENS, FEDERAL INCOME TAXATION § 5.06. (1942).

7. Herber v. Jones, 103 F. Supp. 210, 214 (W.D. Okla. 1951).

A distinction is drawn between subtracting illegal sums from gross receipts in determining gross income under Section 22(a) and deducting such sums from gross income under Section 23.[8] In the latter situation the courts have noted the sharply defined policies of the Emergency Price Control Act of 1942[9] and considered whether its policies would be frustrated by allowing these deductions.[10] Where the violation was innocent and unintentional, allowing a deduction does not frustrate the policies of the price control law.[11] But where the violation results in a criminal prosecution and a fine is assessed, to allow a deduction under Section 23 of that fine would mitigate its penal nature and hence frustrate the policy of the statute imposing it.[12] The courts have also held that losses arising out of unlawful business operations in contravention of regulatory statutes are not deductible as "ordinary and necessary" expenses.[13]

Why have the courts consistently disallowed illegal sums as business deductions on the basis of public policy, and just as consistently allowed them as exclusions in determining gross income? The basis for including these illegal expenditures in the cost of goods sold is that

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8. See Davis v. United States, 87 F.2d 323, 324 (2d Cir.), *cert. denied*, 301 U.S. 704 (1937); Sullenger v. Comm'r, 11 T.C. 1076, 1077 (1948); Lawrence Sternkopf, P-H 1950 TC MEM. DEC. ¶ 50,062; Harold E. McCullough, P-H 1949 TC MEM. DEC. ¶ 49,175. Krekstein, *Deductibility of Overceiling Payments* in SIXTH ANNUAL INSTITUTE ON FEDERAL TAXATION 703, 706 (1948).

9. The Emergency Price Control Act, 56 STAT. 23 (1942), was amended by the Stabilization Act of 1942, 56 STAT. 765, 767, to the effect that, "The President shall also prescribe the extent to which any . . . payment made in contravention of such regulations shall be disregarded by . . . government agencies in determining the costs or expenses of any employer for the purposes of any other law or regulation." See also, Exec. Order No. 9250, discussed in instant case at 907. The latest legislation is the Defense Production Act of 1950, 64 STAT. 80, as amended, 65 STAT. 136, 50 U.S.C.A. App. § 2105 (1951) (authority given to the President to authorize, by Executive Order, government agencies to disregard payments of overceiling prices; but no such Executive Order has been executed). None of the above alter the original act as to the issues involved in the present case.

10. Lilly v. Comm'r, 343 U.S. 90, 72 Sup. Ct. 497, 96 L. Ed. 385 (1952); Comm'r v. Heininger, 320 U.S. 467, 64 Sup. Ct. 249, 88 L. Ed. 171 (1943) (narrowing the generally accepted meaning of § 23(a) in order that tax deduction consequences might not frustrate sharply defined national or state policies). See also Comment, 59 YALE L.J. 561 (1950).

11. Jerry Rossman Corp. v. Comm'r, 175 F.2d 711 (2d Cir. 1949), 3 VAND. L. REV. 323 (1950); Pacific Mills v. Comm'r, 17 T.C. 705 (1951). See also note 9 *supra*.

12. Compare cases cited note 10 *supra*, with I.T. 3627, 1943 CUM. BULL. 111, and I.T. 3630, 1943 CUM. BULL. 113 which denied deduction of fines paid the government for violation of O.P.A. regulation as frustration of the policy of the statute. See Comm'r v. Portland Cement Co., 148 F.2d 276 (5th Cir.), *cert. denied*, 326 U.S. 728 (1945); United States v. Jaffray, 97 F.2d 488, 494 (8th Cir. 1938), *aff'd sub nom.* United States v. Bertelsen & Peterson Engineering Co., 306 U.S. 276, 59 Sup. Ct. 541, 83 L. Ed. 647 (1939); Gelfand, *Payments to O.P.A.*, 27 TAXES 961 (1949); 20 GEO. WASH. L. REV. 796 (1952).

13. Wagner v. Comm'r, 30 B.T.A. 1099 (1934) (neither "ordinary and necessary" business expenses nor business losses deductible if incurred in the commission of act forbidden by statute).

to refuse to do so would amount to taxing capital.[14] On the other hand, it is clear that Congress possesses a broad power to limit or deny deductions from gross income in determining net income.[15] The courts have interpreted Section 23 so that it will not violate the basic policies of other statutes involved.[16]

In the instant case the court approved the approach of the Tax Court in the *Sullenger* case. This result seems sound, and the holding probably will be followed wherever an illegal sum is involved in determining gross income from the gross receipts.

INCOME TAXATION — TAXABLE INCOME — CLAIM OF RIGHT

From 1929 to 1933, defendant was associated with others in a bootlegging operation, known as the "High Seas Venture." Contributing no capital, he shared in the profits because of his associates' fear that they might otherwise have "trouble and interference." In 1933, when Prohibition came to an end, defendant's associates organized an honest liquor business. In order to exclude defendant, they paid him $60,000 in exchange for the assignment of his interests, if any, in the new enterprise. Thereafter, however, he continued to demand his share of the profits, and over a period of years he was paid more than $750,000 as a result of threats that he would kill members of the family of the chief stockholder. Having failed to include some $250,000 of

14. Eisner v. Macomber, 252 U.S. 189, 40 Sup. Ct. 189, 64 L. Ed. 521 (1920); Doyle v. Mitchell Bros. Co., 247 U.S. 179, 38 Sup. Ct. 468, 62 L. Ed. 1954 (1918); Davis v. United States, 87 F.2d 323 (2d Cir.), *cert. denied*, 301 U.S. 704 (1937).

15. Helvering v. Independent Life Insurance Co., 292 U.S. 371, 54 Sup. Ct. 758, 78 L. Ed. 1311 (1934); New Colonial Ice Co. v. Helvering, 292 U.S. 435, 440, 54 Sup. Ct. 788, 78 L. Ed. 1348 (1934) ("Whether and to what extent deductions shall be allowed depends upon legislative grace; and only as there is clear provision therefor can any particular deduction be allowed."); Van Vleck v. Comm'r, 80 F.2d 217 (2d Cir. 1935); Gillette v. Comm'r, 76 F.2d 6 (2d Cir. 1935); see Davis v. United States, 87 F.2d 323, 325 (2d Cir.), *cert. denied*, 301 U.S. 704 (1937) (deduction may be allowed or not in sound discretion of Congress as a matter of grace); BURTON, CASES ON FEDERAL TAXATION 148 (3d ed. 1950); 1 MERTENS, FEDERAL INCOME TAXATION 150-51 (1942) (deductions are only a matter of legislative grace and not a matter of right); Note, *Taxability of Gross Income Under the Sixteenth Amendment*, 36 COL. L. REV. 274 (1936).

16. Although the results as to deductibility of a fine have varied with the facts in the cases, the rationale of the courts has been to allow a deduction from gross income only when it does not violate the basic policy of the statute. *E.g.*, Jerry Rossman Corp. v. Comm'r, 175 F.2d 711, (2d Cir. 1949); Comm'r v. Longhorn Portland Cement Co., 148 F.2d 276 (5th Cir.), *cert. denied*, 326 U.S. 728 (1945); Chicago R.I. & P. Ry. v. Comm'r, 47 F.2d 990 (7th Cir.), *cert. denied*, 284 U.S. 618 (1931); Burroughs Building Material Co. v. Comm'r, 47 F.2d 178 (2d Cir. 1931). Among the many cases of Tax Court denying deductibility of penal fine, see Pacific Mills v. Comm'r, 17 T.C. 705 (1951); Universal Atlas Cement Co. v. Comm'r, 9 T.C. 971 (1947), *aff'd per curiam*, 171 F.2d 294 (2d Cir. 1948); Garibaldi & Cuneo v. Comm'r, 9 T.C. 446 (1947). In I.T. 3627, 1943 CUM. BULL. 111 and I.T. 3630, 1943 CUM. BULL. 113, in which the Treasury Department recognized the policies of the statutes as controlling and would not allow a fine paid to the government as a "ordinary and necessary" business expense deductible from gross income.

this money in his gross income for 1943, defendant was indicted and convicted of tax evasion. The Court of Appeals affirmed, and the Supreme Court granted certiorari. *Held* (5-4), affirmed. Money obtained by extortion is distinguishable from stolen money and is gross income. *Rutkin v. United States,* 343 U.S. 130, 72 Sup. Ct. 571, 96 L. Ed. 485 (1951).

The Federal Government bases taxation of income on an annual accounting period[1] which is invoked in order to facilitate administration of the income tax law.[2] Although this system simplifies administration, it can cause hardship to a taxpayer whose transactions do not conform to definite tax periods or who acquires possession of funds which may have to be returned in subsequent tax periods. Recipients of such unsettled income contended that items which ordinarily would be gross income[3] were not taxable, either because of their contingency or because of their subsequent restitution. The courts, however, have consistently held that any such item of income received under a claim of right is taxable in the year received, even though that right is defective and a court of equity might order the money returned in a later year.[4] In a variety of cases involving money the taxpayer received and treated as his own[5] a claim of right was found, even where the money was the proceeds of an illegal activity.[6]

The term "claim of right" denotes whether or not a taxable gain has been acquired. The presence or absence of a claim of right de-

1. INT. REV. CODE § 41.

2. Burnet v. Sanford & Brooks Co., 282 U.S. 359, 51 Sup. Ct. 150, 75 L. Ed. 383 (1931).

3. INT. REV. CODE § 22(a) broadly defines "gross income" in part as "gains, profits and income . . . derived from any source whatever." Judicial definition has likewise been broad. *See, e.g.,* Eisner v. Macomber, 252 U.S. 189, 207, 40 Sup. Ct. 189, 64 L. Ed. 521 (1920) ("gain derived from capital, from labor, or from both combined").

4. *See* North American Oil Consolidated v. Burnet, 286 U.S. 417, 424, 52 Sup. Ct. 613, 76 L. Ed. 1197 (1932). Prior to the *North American* case, the general rule had been that money which met the broad test of "gross income" was taxable in the year received by the taxpayer. Burnet v. Sanford & Brooks Co., 282 U.S. 359, 51 Sup. Ct. 150, 78 L. Ed. 382 (1931); Lucas v. American Code Co., 280 U.S. 445, 50 Sup. Ct. 202, 74 L. Ed. 538 (1930). However, the Board of Tax Appeals had favored refunds of taxes upon restitution on the theory that the gains had never been gross income in the first place. Lilly v. Comm'r, 14 B.T.A. 703 (1928).

5. Brown v. Helvering, 291 U.S. 193, 54 Sup. Ct. 376, 78 L. Ed. 725 (1934); St. Regis Paper Co. v. Higgins, 157 F.2d 884 (2d Cir. 1946); Jacobs v. Hoey, 136 F.2d 954 (2d Cir. 1943); Penn v. Robertson, 115 F.2d 167 (4th Cir. 1940); First National Bank v. Comm'r, 107 F.2d 141 (6th Cir. 1939); Saunders v. Comm'r, 101 F.2d 407 (10th Cir. 1939); Griffin v. Smith, 101 F.2d 348 (7th Cir. 1938); National City Bank v. Helvering, 98 F.2d 93 (2d Cir. 1938); McDuffie v. United States, 19 F. Supp. 239 (Ct. Cl. 1937).

6. See, *e.g.,* Johnson v. United States, 318 U.S. 189, 63 Sup. Ct. 549, 87 L. Ed. 704 (1943); United States v. Sullivan, 274 U.S. 259, 47 Sup. Ct. 607, 71 L. Ed. 1037, 51 A.L.R. 1020 (1927); Humphreys v. Comm'r, 125 F.2d 340 (7th Cir. 1942); Chadick v. United States, 77 F.2d 961 (5th Cir. 1935); United States v. Commerford, 64 F.2d 28 (2d Cir. 1933); United States v. Wampler, 5 F. Supp. 796 (D. Md. 1934); Droge v. Comm'r, 35 B.T.A. 829 (1937); Rickard v. Comm'r, 15 B.T.A. 316 (1929); James P. McKenna, 1 B.T.A. 326 (1925); Petit v. Comm'r, 10 T.C. 1253 (1948).

pends upon whether the transaction is void at law or voidable in equity.[7] Borrowed money is not income;[8] likewise, embezzled or stolen money is not income,[9] for the thief gets no title.[10] On the other hand, money obtained by false pretenses is held under a claim of right,[11] as is money taken from, or paid over by, an owner with full knowledge of a fraud or wrong.[12]

In the instant case, the court distinguished defendant's extortion from embezzlement[13] and compared it to fraud,[14] thus preserving the distinction between void and voidable transactions. The decision, therefore, is but a reaffirmation[15] of the claim of right doctrine and the application of traditional principles of property law in determining

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7. Akers v. Scofield, 167 F.2d 718 (5th Cir.), *cert. denied,* 335 U.S. 823 (1948). In Penn. v. Robertson, 115 F.2d 167 (4th Cir. 1940), dividends were held taxable although the stock allotment plan under which they had been paid was declared "void ab initio." Parker, J., said: "In my view, the stock transaction was not absolutely void but voidable. . . . If, however, I were of the opinion that the stock transaction was absolutely void, ab initio, and not merely voidable, I would think that no taxable income resulted from the entry of the credit for dividends on the note of Penn. If the stock transfer was void, the credit of the dividends was likewise void. No taxable income could possibly result from void entries of credit on a void note." *Id.* at 177 (concurring opinion).

8. Wells v. United States, 64 F. Supp. 476 (Ct. Cl. 1946). Borrowed money, however, may later become income if the debtor-creditor relationship is extinguished. Comm'r v. Jacobson, 336 U.S. 28, 69 Sup. Ct. 358, 93 L. Ed. 477 (1949) (release given in exchange for less than the full debt); Securities Co. v. United States, 85 F. Supp. 532 (S.D.N.Y. 1948) (suit barred by statute of limitations).

9. Comm'r v. Wilcox, 327 U.S. 404, 66 Sup. Ct. 546, 90 L. Ed. 752, 166 A.L.R. 884 (1946); Estate of Joseph Nitto v. Comm'r, 13 T.C. 858 (1949).

10. Comm'r v. Wilcox, 327 U.S. 404, 66 Sup. Ct. 546, 90 L. Ed. 752, 166 A.L.R. 884 (1946).

11. *See* Akers v. Scofield, 167 F.2d 718, 720 (5th Cir.), *cert. denied,* 335 U.S. 823 (1948).

12. Distinguishing embezzlement from swindling, the Tax Court said, referring to the *Wilcox* case: "In that case, unlike here, the funds were misappropriated without the knowledge or participation of the owner and, also, the funds came to the party who was sought to be taxed, not by the 'conscious act' of the owner in response to a claim for an agreed service by the party to whom they were paid." Estate of Joseph Nitto v. Comm'r, 13 T.C. 858, 866 (1949).

13. "The issue here is whether money extorted from a victim with his consent induced solely by harassing demands and threats of violence is included in the definition of gross income under § 22(a)." 343 U.S. at 138.

14. "[I]t would be an extraordinary result to hold here that petitioner is to be tax free because his fraud was so transparent that it did not mislead his victim and his victim paid him the money because of fear instead of fraud." *Id.* at 138.

15. Only a few months earlier the Supreme Court had said: "Income taxes must be paid on income received (or accrued) during an annual accounting period. . . . The 'claim of right' interpretation of the tax laws has long been used to give finality to that period, and is now deeply rooted in the federal tax system. . . . We see no reason why the Court should depart from this well-settled interpretation merely because it results in an advantage or disadvantage to a taxpayer." United States v. Lewis, 340 U.S. 590, 592, 71 Sup. Ct. 572, 85 L. Ed. 56 (1951). This decision definitely resolved the conflict as to the validity of the "mistake" theory as advanced by the Court of Claims in cases where money was received through error and later returned by the taxpayer. See, *e.g.,* Gargaro v. United States, 73 F. Supp. 973 (Ct. Cl. 1947). *But see* Haberkorn v. United States, 173 F.2d 587, 589 (6th Cir. 1949).

taxable gains.[16] The distinction between the two wrongdoers, the thief and the swindler, is the very heart of the claim of right doctrine. The swindler's gain actually is his, because, unlike the thief, he has legal title unless and until equity orders restitution.

PROCEDURE — GRAND JURY — MOTION TO EXPUNGE DEFAMATORY REMARKS IN REPORT

As a result of remarks which plaintiff has made to the effect that there was a club of "non-virgins" in a Memphis school, school authorities requested the grand jury to make an investigation. No indictment was returned, but a report was issued which recommended that plaintiff be dismissed as a teacher in the school. Plaintiff sought by motion to have this report expunged from the records. The motion was denied. *Held* (4-1), affirmed. Though no indictment was returned, it was within the discretion of the trial court whether or not the report or portions thereof should be expunged. *Hayslip v. State,* 249 S.W.2d 882 (Tenn. 1952).

It has generally been held that a grand jury, while possessing broad investigative powers, has no right to cast aspersions on those whom it investigates when it does not return an indictment.[1] The basis for such a rule seems to be that while a person can defend himself and be heard on an indictment, he has no chance to answer a report.[2] The cases in this regard are numerous, and include those where the person investigated is the one censured, where a person helping in the investigation is the one censured[3] and even where the person criticized was not even named.[4] In all such cases the offensive material was expunged. A case holding to the contrary has been repudiated in its own jurisdiction, and has never been followed.[5]

Although apparently the older cases would not except even the movent from this rule, a distinction has been drawn in two recent cases where the person instigating the investigation was reproved. In an Arkansas case[6] petitioner requested the grand jury to investigate

16. See Note, 58 YALE L.J. 955 (1949), to the effect that the claim of right doctrine has too many "exceptions" and ought to be discarded and the revenue law amended. See also 2 MERTENS, FEDERAL INCOME TAXATION § 12.103 (1942).

1. *In re* Report of Grand Jury of Baltimore, 152 Md. 616, 137 Atl. 370 (1927); see *In re* Woodbury, 155 N.Y. Supp. 851, 853 (Sup. Ct. 1915).

2. See *In re* Presentment to Superior Court, Hudson County, 14 N.J. Super. 542, 82 A.2d 496, 497 (1951); *In re* Heffernan, 125 N.Y. Supp. 737, 738 (Co. Ct. 1909); Dession and Cohen, *The Inquisitorial Functions of Grand Juries,* 41 YALE L.J. 687, 705 (1932); Note, 17 B.U.L. REV. 438 (1937).

3. Bennett v. Kalamazoo Circuit Judge, 183 Mich. 200, 150 N.W. 141 (1914); *In re* Osborne, 68 Misc. 597, 125 N.Y. Supp. 313, Sup. Ct. 1910).

4. *In re* Grand Jury Report, 204 Wis. 409, 235 N.W. 789 (1931).

5. *In re* Jones, 101 App. Div. 55, 92 N.Y. Supp. 275 (2d Dep't 1905). Repudiated in *In re* Funston, 133 Misc. 620, 233 N.Y. Supp. 81 (Sup. Ct. 1929).

6. *Ex parte* Cook, 199 Ark. 1187, 137 S.W.2d 248 (1940).

him. They returned no indictment, but criticized his administrative practices. The acceptance of the report was held within the discretion of the trial court, and his petition to expunge was denied.[7] In another case[8] the petitioner wrote to members of the bar requesting a grand jury investigation of public officials. They found petitioner's charges baseless, and requested that the minutes of the hearing be transmitted to a justice for appropriate action against him. His motion to expunge was denied; the court barely considered the plea that he had been maligned by the report.

It seems apparent in the instant case that plaintiff was less a moving factor than plaintiffs in the two cases cited. Thus, the distinction of these two cases is extended to one bearing an even more remote factual connection with the instigation of the action. The dissent[9] by Chief Justice Neil, however, opposes the theory that the trial court can accept or reject a report of this kind. His opinion follows the majority of the cases, and he draws no distinction between the acceptability of reports regarding movents and those who are not movents.

It is difficult to ascertain whether or not this case represents a present trend in the law. However, a change in the old rule seems to be of doubtful desirability, since it allows a group to punish a person without a hearing and thus accomplishes indirectly what is unconstitutional if done directly.

PROCEDURE — STATUTE OF LIMITATIONS — RETROACTIVE OPERATION

Plaintiff seeks to recover damages under a contract between the Commodity Credit Corporation and defendant for storage of wool. The wool was allegedly returned in a damaged condition in 1945. This action was brought in 1952. Prior to 1948, there was no federal statute of limitations applicable to suits by or against the Commodity Credit Corporation. Included in the Commodity Credit Corporation Charter Act of 1948[1] was a four year statute of limitations which was extended to six years by the Amending Act of 1949.[2] Defendant pleads this

7 "We think petitioner's act in requesting an investigation was responsible for the result. True, he did not anticipate critical comment; yet, in view of publicity given the charges, the grand jury evidently thought comment on its finding should be made. It was within the discretion of the circuit court to receive or reject the report." *Id.* at 249.

8. Application of Knight, 176 Misc. 635, 28 N.Y.S.2d 353 (Gen. Sess. 1941).

9. "While it may be true generally that the matter of expunging a grand jury's report is within the sound discretion of the trial court, nevertheless it is not discretionary where the report is defamatory of witnesses and no indictment is found. No court is ever so high and mighty that the law clothes it with discretion to say when a grand jury may defame a witness in its official report." 249 S.W.2d at 886.

1. 62 STAT. 1070, 15 U.S.C.A. § 714b (1948), as amended, 63 STAT. 154 (1949), 64 STAT. 261 (1950), 15 U.S.C.A. § 714b (Supp. 1951).

2. *Ibid.*

statute in bar of the action. *Held,* defendant's motion to dismiss allowed. The statute operates retroactively from the date of passage, and the action is barred. *United States v. Lindsay,* 105 F. Supp. 467 (D. Mass. 1952).

The courts have consistently held that a statute which, on its effective date, cuts off completely a pre-existing cause of action violates the constitutional prohibition against the impairment of contracts.[3] To avoid this they have construed the statutes in at least three different ways. One way is to construe the statute as applying only to causes arising after its passage and to leave all prior claims with no bar whatever.[4] This purely prospective construction seems unreasonable because it defeats the purpose of these statutes, in that the defendant may never feel secure in his reasonable expectation that the slate has been wiped clean.[5] Another construction is to apply the statute only to those existing actions upon which a portion of the statutory time has already run, but which still have a reasonable period left before the action is barred; reasonableness of this time is determined by the court.[6] If prior actions remain unaffected by this interpretation, because there is no such reasonable period left, this construction would seem little better than the first.[7] An Iowa statute has been held constitutional which provided a transitional period of six months for all prior actions to be brought, and all claims arising after passage to be subject to the permanent two year statute.[8] The third method is that adopted by the United States Supreme Court in the leading case of *Sohn v. Waterson,*[9] where it was said, "Upon principle, it would seem to be clear, that [the statute of limitations] must commence [to run] when the cause of action is first subjected to the operation of the statute, unless the legislature has otherwise provided."[10] The Court there, in distinguishing *Murray v. Gibson,*[11] made it clear that it did not hold the other constructions to be manifestly

3. See, *e.g.,* Chapman v. County of Douglas, 107 U.S. 348, 2 Sup. Ct. 62, 27 L. Ed. 378 (1882).

4. Murray v. Gibson, 15 How. 421, 14 L. Ed. 755 (U.S. 1853); *cf.* United States Fidelity and Guaranty Co. v. United States, 209 U.S. 306, 28 Sup. Ct. 537, 52 L. Ed. 804 (1908).

5. *Developments in the Law — Statutes of Limitations,* 63 HARV. L. REV. 1177, 1185 (1950).

6. Lamb v. Powder River Live Stock Co., 132 Fed. 434, 67 L.R.A. 558 (8th Cir. 1904) (three months held unreasonable); Steele v. Gann, 197 Ark. 480, 123 S.W.2d 520, 120 A.L.R. 754 (1939); Merchants Nat. Bank of Bismarck v. Braithwaite, 7 N.D. 358, 75 N.W. 244 (1898) (three and one-half months held reasonable).

7. Sohn v. Waterson, 17 Wall. 596, 21 L. Ed. 737 (U.S. 1873).

8. Reid v. Solar Corp., 69 F. Supp. 626 (N.D. Iowa 1946).

9. Sohn v. Waterson, 17 Wall. 596, 21 L. Ed. 737 (U.S. 1873); Lewis v. Lewis, 7 How. 776, 12 L. Ed. 909 (U.S. 1848); Ross and King v. Duval, 13 Pet. 45, 10 L. Ed. 51 (U.S. 1839); Carscadden v. Territory of Alaska, 105 F.2d 377 (9th Cir. 1939) (ten year statute amended to seven years, held that plaintiff had seven years from date of amendment).

10. Sohn v. Waterson, 17 Wall. 596, 600, 21 L. Ed. 737 (U.S. 1873), quoting from Taney, C.J., in Lewis v. Lewis, *supra.*

11. 15 How. 421, 14 L. Ed. 755 (U.S. 1853).

erroneous. The Court has not since hesitated to apply them when ruling on cases arising in states which have adopted them.

A prospective construction does seem to be within the majority rule on this question,[12] and it has been often stated that there is a presumption[13] against retrospective operation unless the legislature makes manifestly clear a contrary intent.[14] The statute in question is worded similarly to most statutes of limitation and such wording has generally been held not to express the clear legislative intent necessary to give them a retroactive effect.[15]

The court in the instant case based its decision solely upon its interpretation of the legislative intent which it believes is expressed by the use of the word "accrued." The court refused to follow a recent construction of the same statute by another United States District Court upon similar facts,[16] and also cites two other federal cases which are unreported[17] in which this same statute was given a prospective construction.

Since the mere use of the word "accrued" has not generally been held sufficient to express the "clear legislative intent" necessary to make a statute retroactive,[18] and since it involves only a federal question unaffected by any state decisions, it would seem that *Sohn v. Waterson* is controlling, and that the court erred in construing this statute to be retroactive.

STATUTES — HOLDING OF UNCONSTITUTIONALITY OVERRULED — NECESSITY FOR RE-ENACTMENT

In 1923, the United States Supreme Court declared the District of Columbia Minimum Wage Law unconstitutional.[1] However, in 1937 when a similar statute was before the Court, the 1923 decision was expressly overruled.[2] Pursuant to an opinion handed down by the At-

12. 34 AM. JUR., *Limitation of Actions* § 43 (1941), and cases there cited n.4.
13. *Id.* § 43 n.6.
14. *Id.* § 43 n.5.
15. Sohn v. Waterson, 17 Wall. 596, 21 L. Ed. 737 (U.S. 1873). In this case the Court construed a Kansas statute worded as follows: "That all actions . . . shall be commenced within two years next after the cause or right of such action shall have *accrued*, and not after." (Italics added). See also Russell v. United States, 278 U.S. 181, 49 Sup. Ct. 121, 73 L. Ed. 255 (1929). United States v. St. Louis, S.F. & T. Ry., 270 U.S. 1, 2, 46 Sup. Ct. 182, 70 L. Ed. 435 (1926), construed the Transportation Act of 1920 as follows: "All actions at law by carriers . . . shall be begun within three years from the time the cause of action *accrues* and not after." (Italics added).
16. United States v. Bowden, 105 F. Supp. 264 (N.D. Ga. 1950).
17. United States v. Rabinoff, Civil No. 12290-Y, United States District Court, S.D. Cal.; United States v. Ham, Civil No. 708-N, United States District Court, M.D. Ala.
18. See cases cited note 15 *supra*.

1. Adkins v. Children's Hospital, 261 U.S. 525, 43 Sup. Ct. 394, 67 L. Ed. 785 (1923).
2. West Coast Hotel Co. v. Parrish, 300 U.S. 379, 57 Sup. Ct. 578, 81 L. Ed. 703 (1937).

torney General,[3] there was no legislative move to re-enact the District of Columbia statute. Plaintiff brought this action under that statute,[4] and the only defense raised was the nonexistence of such a statute in the District of Columbia. The trial court awarded judgment to the plaintiff. *Held,* affirmed. If a decision declaring a statute unconstitutional is subsequently overruled, no re-enactment is necessary to give effect to the statute. *Jawish v. Morlet,* 86 A.2d 96 (D.C. Munic. Ct. App. 1952).

A basic problem in the administration of statutory law raised by this case is the effect to be given to a statute that has been declared unconstitutional. When a court declares a statute unconstitutional, it is neither repealed nor expunged from the books.[5] The statute remains in existence but is without legal force.[6] The "void *ab initio*" doctrine, on the other hand, states that the statute is not law and is as inoperative as though it had never been passed.[7] This theory has been accepted by a few writers[8] and courts,[9] but it has been severely criticized and limited in its application.[10] The majority and better view appears to be that the statute is in existence but dormant.[11] Thus, when the decision of unconstitutionality is overruled,[12] the statute is revived without the need for re-enactment.[13]

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3. Upon request of the President, the Attorney General had delivered an opinion expressing the belief that re-enactment was not necessary to revitalize the law. 39 OPS. ATT'Y GEN. 22 (1937).

4. D.C. CODE §§ 36-401 *et seq.* (1951).

5. See Allison v. Corker, 67 N.J.L. 596, 52 Atl. 362, 363, 60 L.R.A. 564 (1902), to the effect that the ruling on the constitutionality affects only the parties before the bar and is merely precedent for later decisions. See Crawford, *The Legislative Status of An Unconstitutional Statute,* 49 MICH. L. REV. 645 (1951). That the ruling is determinative against the parties, not against the statute, see Shepherd v. Wheeling, 30 W. Va. 479, 4 S.E. 635 (1887).

6. "[A]n unconstitutional statute is nevertheless a statute; that is, a legislative act. Such a statute is commonly spoken of as void. I should prefer to call it unenforceable, because in conflict with a paramount law." Allison v. Corker, 67 N.J.L. 596, 52 Atl. 362, 363, 60 L.R.A. 564 (1902). See Miller v. Dunn, 72 Cal. 462, 14 Pac. 27 (1887); Note, 33 CORNELL L.Q. 281 (1947). But see 11 AM. JUR., *Const. Law* § 148 (1937).

7. Norton v. Shelby County, 118 U.S. 425, 6 Sup. Ct. 1121, 30 L. Ed. 178 (1886); Marbury v. Madison, 1 Cranch 137, 2 L. Ed. 60 (U.S. 1803).

8. 1 COOLEY, CONSTITUTIONAL LIMITATIONS 382-84 (8th ed., Carrington, 1927).

9. Chicago, I. & L. Ry. v. Hackett, 228 U.S. 559, 33 Sup. Ct. 581, 57 L. Ed. 966 (1913).

10. "[S]uch broad statements as to the effect of a determination of unconstitutionality must be taken with qualifications." Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371, 374, 60 Sup. Ct. 317, 84 L. Ed. 329 (1940). "Reasoning along these lines is not only futile as an aid to the solution of the procedural problem, but serves to obscure its real nature as one of law administration." Note, 29 COL. L. REV. 1140, 1143 (1929). *Cf.* Anniston Mfg. Co. v. Davis, 87 F.2d 773 (5th Cir.), *aff'd,* 301 U.S. 337 (1937).

11. See note 6 *supra.*

12. Pierce v. Pierce, 46 Ind. 86 (1874); McCollum v. McConaughy, 141 Iowa 172, 119 N.W. 539 (1909); Shepherd v. Wheeling, 30 W. Va. 479, 4 S.E. 635 (1887); *cf.* Christopher v. Mungen, 61 Fla. 513, 55 So. 273 (1911). See also Crawford, *The Legislative Status of An Unconstitutional Statute,* 49 MICH. L. REV. 645 (1951).

13. It is interesting to note here that although a statute may be revitalized by overruling the decision of unconstitutionality, it cannot be brought back

If the "void *ab initio*" doctrine is followed there is no further problem, since re-enactment would be necessary to revitalize the statute and its operation would be revived at the time of re-enactment. However, the view that the statute was merely dormant may raise the question of the effect of the statute during the interim between the decision of unconstitutionality and the subsequent overruling of that decision.[14] Does the revitalized statute become effective at the time of the overruling decision or does the decision operate retroactively to fill the gap[15] of the period between the two decisions?[16] Blackstone said that judicial decisions are mere evidences of the law, and an overruled decision rather than being bad law was no law at all.[17] Thus an overruling decision does not change the law but corrects an erroneous interpretation thereof.[18] The courts in following this theory generally hold that the overruling decision operates retroactively.[19] However, recognizing a "conflict between legal logic and the desire for ethical bases of justice,"[20] the courts make an exception when rights have become vested or action was taken during this period under the "erroneous" interpretation of law.[21]

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into effect by an amendment to the constitution. Banaz v. Smith, 133 Cal. 102, 65 Pac. 309 (1901); Whetstone v. Slonaker, 110 Neb. 343, 193 N.W. 749 (1923). But if the statute is amended to remove the unconstitutional provisions it becomes valid. Allison v. Corker, 67 N.J.L. 596, 52 Atl. 362, 60 L.R.A. 564 (1902); 11 AM. JUR., *Const. Law* § 151 (1937). If the impediment causing the unconstitutionality is removed the statute becomes effective. *In re* Rahrer, 140 U.S. 545, 11 Sup. Ct. 865, 35 L. Ed. 572 (1891).

14. See Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371, 60 Sup. Ct. 317, 84 L. Ed. 329 (1940); Sunray Oil Co. v. Comm'r, 147 F.2d 962 (10th Cir.), *cert. denied,* 325 U.S. 861 (1945); Ruppert v. Ruppert, 134 F.2d 497 (D.C. Cir. 1942); Warring v. Colpoys, 122 F.2d 642 (D.C. Cir.), *cert. denied,* 314 U.S. 678 (1941); State v. O'Neil, 147 Iowa 513, 126 N.W. 454, 33 L.R.A. (N.S.) 788 (1910); Whetstone v. Slonaker, 110 Neb. 343, 193 N.W. 749 (1923); Oklahoma County v. Queen City Lodge, 195 Okla. 131, 156 P.2d 340 (1945).

15. "The rejected precedent may be regarded as never having had any validity, in which case the overruling decision would have to be applied retroactively to fill the gap in the law thus created. Or the court may consider that the precedent now overruled was nevertheless the law until the time of its abandonment, and that the new ruling is to apply only prospectively." Note, *Retroactive Effect of an Overruling Decision,* 42 YALE L.J. 779 (1933).

16. See FIELD, THE EFFECT OF AN UNCONSTITUTIONAL STATUTE 181-97 (1st ed. 1935). Notes, 29 COL. L. REV. 1140 (1929), 37 GEO. L.J. 574 (1949), 60 HARV. L. REV. 437 (1933).

17. 1 BL. COMM. *60-70.

18. *Ibid;* Legg's Estate v. Comm'r, 114 F.2d 760 (4th Cir. 1940); *accord,* Pierce v. Pierce, 14 Ind. 86 (1874). But Blackstone's theory has been sharply criticized: "Blackstone's attempt to . . . make decisions evidence of [law] is unfortunate." GRAY, THE NATURE AND SOURCES OF THE LAW 221-22 (Rev. ed. 1921). See Carpenter, *Court Decisions and the Common Law,* 17 COL. L. REV. 593 (1917), which states that the Blackstonian theory does not accord with the growth of common law and points out that it works unjust results and hampers the development of the law.

19. See Ruppert v. Ruppert, 134 F.2d 497 (D.C. Cir. 1942); 14 AM. JUR., *Courts* § 130 (1938). But see FIELD, THE EFFECT OF AN UNCONSTITUTIONAL STATUTE 181-97 (1935), where it is suggested that retroactive operation should be the exception rather than the rule.

20. FIELD, *op. cit. supra* note 19, at 182.

21. See Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371, 60 Sup. Ct. 317, 84 L. Ed. 329 (1940); Ruppert v. Ruppert, 134 F.2d 497 (D.C.

The Supreme Court has stated that to give retroactive effect to a statute is not a violation of the due process clause of the Fourteenth Amendment.[22] On the other hand, the court has held that it is not unconstitutional to give a statute only prospective operation.[23] This seems to leave the problem to the discretion of the court.[24] In the instant case the court was not faced directly with this question since the rights of the plaintiff arose after the overruling decision. The opinion indicates, however, that the court favored retroactive operation.[25]

WILLS — CONTEST — INTEREST OF LEGATEE'S REPRESENTATIVE

Testator bequeathed his entire estate to his wife for life, with remainder to other devisees and legatees, not related to testator. He had obtained a judicial declaration of his wife's incompetence and had placed her in a sanitarium, where she died five months after testator. Her niece, administratrix of her will, thereafter filed a petition to revoke probate of the husband's will, alleging as grounds nonexecution, lack of testamentary capacity and undue influence of certain devisees of the remainder of the estate. Administratrix appealed from a ruling that she was not a proper party in interest. *Held,* reversed. The widow was an "interested person" entitled to contest the will of her deceased spouse; the widow's right of contest survived her death and could be prosecuted by her personal representative. In re *Field's Estate,* 238 P.2d 578 (Cal. 1951).

The right to make a will had no common law origin but was created by statute in 1540.[1] The right to contest a will depends upon the statutes of the particular jurisdiction.[2] Statutes concerning will contests vary only slightly among the states, and the language that "any person interested" may contest a will is common to all.[3] But as applied

Cir. 1942); Warring v. Colpoys, 122 F.2d 642 (D.C. Cir.), *cert. denied,* 314 U.S. 678 (1941); Miller v. Dunn, 72 Cal. 462, 14 Pac. 27 (1887); Christopher v. Mungen, 61 Fla. 513, 55 So. 273 (1911); State v. O'Neil, 147 Iowa 513, 126 N.W. 454, 33 L.R.A. (N.S.) 788 (1910); Oklahoma County v. Queen City Lodge, 495 Okla. 131, 156 P.2d 340 (1945); 14 AM. JUR., *Courts* § 130 (1938); Note, *The Effect of Declaring a Statute Unconstitutional,* 29 COL. L. REV. 1140 n.32 (1929).

22. *See* Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 680, 50 Sup. Ct. 451, 74 L. Ed. 1107 (1930).

23. Great Northern Ry. v. Sunburst Oil and Refining Co., 287 U.S. 358, 53 Sup. Ct. 145, 77 L. Ed. 360, 85 A.L.R. 254 (1932).

24. Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371, 60 Sup. Ct. 317, 84 L. Ed. 329 (1940). See Note, *Prospective Operation of Decisions Holding Statutes Unconstitutional or Overruling Prior Decisions,* 60 HARV. L. REV. 437 (1941).

25. *See* 86 A.2d at 97.

1. Wills Act, 1540, 32 HEN. 8, c. 1; 2 BL. COMM. *12.

2. A few states have no relevant statutory provisions. *See, e.g., In re* Duffy's Estate, 228 Iowa 426, 292 N.W. 165, 168, 128 A.L.R. 943 (1940); Lee v. Keech, 151 Md. 34, 133 Atl. 835, 836 (1926); Winters v. American Trust Co., 158 Tenn. 479, 491, 14 S.W.2d 740, 743 (1928).

3. See, *e.g.,* CAL. PROB. CODE §§ 370, 380 (1944); ILL. ANN. STAT. c. 3, § 242 (1941); MODEL PROBATE CODE § 72 (1946).

to certain contestants there is a definite split of authority in the interpretation of this phrase. All contestants fall into one of three categories according to the manner in which they are affected by the will. Those who are directly affected, such as the widow, heirs, legatees and devisees under a prior will, are considered "persons interested" in all courts.[4] Those indirectly affected, such as general creditors of an heir and those whose interest is a mere expectancy, are not considered "persons interested" in most courts.[5] Those not definitely in the first two categories comprise a third group. This category, including heirs of the heirs, judgment creditors, administrators, executors and other personal representatives of widows, heirs, devisees and legatees, has produced the conflict.[6]

All states require that the interest be a "pecuniary" interest and disallow suits based solely on sentiment.[7] Some courts require that the interest must have existed at the time of the probate of the will.[8] The principal issue presented in all such cases is whether the right to contest a will is a personal right or a property right. The majority of the courts follow the view that it is a property right,[9] which is assignable,[10] inheritable[11] and survives death,[12] thus including the third group as "persons interested" within the meaning of the statutes. On the other hand the minority take the view that the right is personal,[13] non-assignable,[14] noninheritable[15] and abates with the death.[16] It is to be

4. ATKINSON, WILLS §§ 188 *et seq.* (1937); 2 PAGE, WILLS §§ 610, 612 (3d ed. 1941). Estoppel to contest presents another problem. See *Id.* § 621.

5. ATKINSON, WILLS § 190 (1937); 2 PAGE, WILLS § 618 (3d ed. 1941). *Contra*: Brooks v. Paine's Ex'rs, 123 Ky. 271, 90 S.W. 600 (1906), recognizing the refusal of an heir to contest a will as a fraud upon his general creditors.

6. For treatment of the problem involving judgment creditor of a disinherited heir, see 5 VAND. L. REV. 857 (1952).

7. *In re* Duffy's Estate, 228 Iowa 426, 292 N.W. 165, 167, 128 A.L.R. 943 (1940); Hamill v. Hamill, 162 Md. 159, 159 Atl. 247, 250, 82 A.L.R. 878 (1932); Chilcote v. Hoffman, 97 Ohio St. 98, 119 N.E. 364, L.R.A. 1918D 575 (1918); Dickson v. Dickson, 5 S.W.2d 744, 747 (Tex. Comm. App. 1928); ATKINSON, WILLS § 188 (1937); 2 PAGE, WILLS § 610 (3d ed. 1941).

8. Allen v. Pugh, 206 Ala. 10, 89 So. 470 (1921); Storrs v. St. Luke's Hospital, 180 Ill. 368, 54 N.E. 185 (1899); McDonald v. White, 130 Ill. 493, 22 N.E. 599 (1889).

9. *In re* Baker's Estate, 170 Cal. 578, 150 Pac. 989 (1915); *In re* Riggs' Estate, 120 Ore. 38, 241 Pac. 70 (1925), 250 Pac. 753 (1926). In Sheeran v. Sheeran, 96 Minn. 484, 105 N.W. 677 (1905), the court allowed the personal administratrix of a disinherited heir to appeal from probate of testator's will because of her duty to preserve the estate.

10. *In re* Clark's Estate, 94 Cal. App. 453, 271 Pac. 542 (1928); Dickson v. Dickson, 5 S.W.2d 744 (Tex. Comm. App. 1928); Komorowski v. Jackowski, 164 Wis. 254, 159 N.W. 912 (1916).

11. *In re* Morrow's Will, 41 N.M. 723, 73 P.2d 1360 (1937); *In re* Siebs' Estate, 70 Wash. 374, 126 Pac. 912 (1912).

12. Crawfordsville Trust Co. v. Ramsey, 178 Ind. 258, 98 N.E. 177 (1912). Chilcote v. Hoffman, 97 Ohio St. 98, 119 N.E. 364 (1918).

13. Gain v. Burger, 219 Ala. 19, 121 So. 17 (1929); Allen v. Pugh, 206 Ala. 10, 89 So. 470 (1921); Campbell v. St. Louis Union Trust Co., 346 Mo. 200, 139 S.W.2d 935, 129 A.L.R. 316 (1940).

14. Havill v. Havill, 332 Ill. 11, 163 N.E. 428 (1928); Storrs v. St. Luke's Hospital, 180 Ill. 368, 54 N.E. 185 (1899); *In re* Vanden Bosch's Estate, 207 Mich. 89, 173 N.W. 332 (1919). *But cf.* Cassem v. Prindle, 258 Ill. 11, 101 N.E. 241 (1913).

noted that the reasoning in practically all the cases is circuitous and begs the issue. The courts use one legal conclusion in reaching another. For example, some say the right is personal because it is nonassignable;[17] others that it is nonassignable because it is personal.[18] The confusion is further complicated by the fact that many cases involve minors and incompetents.[19]

The basic question, one of policy, appears to be how far the courts should extend the limit of those entitled to contest a will. Perhaps the only test should be that of pecuniary interest. Admittedly the major effect of this test would be to destroy the distinction between judgment creditors and general creditors. Furthermore, the tests other than that of pecuniary interest, when applied by the courts, have resulted in dubious distinctions which cannot be supported by legal logic or theory.[20] The instant case follows the majority view, fully realizing the split of authority. Because the widow had a pecuniary interest in setting aside the will of her deceased husband, it seems a sensible result to allow her personal representative to assert her interest against the will.

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15. Campbell v. St. Louis Union Trust Co., 346 Mo. 200, 139 S.W.2d 935, 129 A.L.R. 316 (1940); Storrs v. St. Luke's Hospital, 180 Ill. 368, 54 N.E. 185 (1899). *Compare,* Ligon v. Hawkes, 110 Tenn. 514, 75 S.W. 1072 (1903), holding that an heir of the testratrix's heir, but a stranger to her blood, could not contest the testatrix's will since he could not at any time, in his own right, have inherited from the testatrix, *with* Winters v. American Trust Co., 158 Tenn. 479, 14 S.W.2d 740 (1928), holding that the widow of one contestant of a will could continue the suit although the other contestant wished to abandon it, because under the statutes, the will, having been certified by the county court to the circuit court for contest and probate, was of "no legal effect" and because the suit could not be dropped since it was not an adversary proceeding and the court must rule on the *res* (will).

16. Hall v. Proctor, 242 Ala. 636, 7 So.2d 764 (1942); *Ex parte* Liddon, 225 Ala. 683, 145 So. 144 (1932); Seldon v. Illinois Trust & Savings Bank, 239 Ill. 67, 87 N.E. 860 (1909) 184 Fed. 872 (7th Cir. 1911); Braeuel v. Reuther, 270 Mo. 603, 193 S.W. 283 (1917); King v. King, 35 R.I. 375, 87 Atl. 180 (1913).

17. Seldon v. Illinois Trust & Savings Bank, 239 Ill. 67, 87 N.E. 860 (1909), 184 Fed. 872 (7th Cir. 1911); Storrs v. St. Luke's Hospital, 180 Ill. 368, 54 N.E. 185 (1899).

18. *Ex parte* Liddon, 225 Ala. 683, 145 So. 144 (1932).

19. See, *e.g.,* Campbell v. St. Louis Union Trust Co., 346 Mo. 200, 139 S.W.2d 935, 129 A.L.R. 316 (1940); *In re* Siebs' Estate, 70 Wash. 374, 126 Pac. 912 (1912). It is impossible to determine how much weight the courts place on this point of the cases generally; however, it is usually held to toll the statute of limitations on the action.

20. "A sound method [of determining who should be allowed to contest a will] would be first to exclude all parties who have no pecuniary interest. If the party seeking to contest has some pecuniary interest . . . the court should then balance the substantialness of the interest — the degree of certainty of his receiving any portion of the testator's property if the will is invalid — against the extent to which the field of possible will contestants will be expanded by allowing him to contest. Only in this way can protection to persons who have some interest in the disposition of the testator's property be given and the interest in keeping will contests at a minimum be maintained." Note, 27 IOWA L. REV. 443, 450 (1942).