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Recognition of Gain on the Sale of Realty-The Closed Transaction Test

RECOGNITION OF GAIN ON THE SALE OF REALTY—THE CLOSED TRANSACTION TEST

When a taxpayer sells real property and receives the full consideration in the same taxable year, there is, of course, no doubt as to when his gain or loss will be recognized for federal income tax purposes. This is true whether the taxpayer uses the cash or accrual method of reporting his income.[1] However, where the receipt of the consideration by the seller is extended over more than one taxable year by periodic deferred payments, and the sale does not qualify for, or the taxpayer does not elect,[2] the special treatment under the installment method,[3] the cases appear conflicting and confused as to when the gain should be reported. The confusion arises mainly in the case of an individual, cash-basis taxpayer who sells his home or other real property under a simple land contract. He may be forced to recognize his total gain for income tax purposes before it has been actually realized.

There is no express statutory authority for the use of a deferred-

1. Harold W. Johnston, 14 T.C. 560 (1950). In general, when a taxpayer is on the cash basis, his taxable income is the aggregate of income items actually or constructively received during the taxable year in cash or its equivalent. Treas. Reg. §§ 1.446-1(c)(1)(i), 1.451-1(a). Under the accrual method, income must be reported when all the events have occurred which fix the right to receive income and the amount can be ascertained with reasonable accuracy. INT. REV. CODE OF 1954, § 446(c)(2); Treas. Reg. §§ 1.446-1(c)(ii), 1.451-1(a).

2. The installment method is optional. Joseph Frost, 37 B.T.A. 190 (1938), *acq.*, 1938-2 CUM. BULL. 13; G.C.M. 3350, VII-1 CUM. BULL. 62 (1928).

3. Under the installment method, if the payments received in the year of sale do not exceed 30 per cent of the selling price, the taxpayer may report only that proportion of his gain on the installment payments actually received during the taxable year which the total gross profit to be realized bears to the total contract price, thereby spreading his gain over the life of the contract. INT. REV. CODE OF 1954, § 453.

payment method of reporting income.[4] The rules have developed by judicial interpretation of the Commissioner's regulations concerning section 1001(b) of the 1954 Code and similar provisions in the prior law.[5] Under section 1001 when a taxpayer sells property and payment is extended over more than one taxable year, the payments in cash and property having a fair market value received by the seller are applied against and reduce the basis of the property sold, and if in excess of the basis of the property sold, the amount of the excess is taxable.[6] Gain or loss is recognized when the obligations having no fair market value are disposed of or satisfied. The amount of the gain or loss is the difference between the reduced basis and the amount realized.[7]

It has been held on the basis of the Commissioner's regulations that even an accrual basis taxpayer may compute income by the deferred-payment method and need not report his entire gain in the year of sale.[8] This view, which has been severely criticized by cases[9] and scholars,[10] is due to the Commissioner's failure to make a distinction between the cash and accrual methods of reporting income in his regulations concerning deferred-payment sales not on the installment basis.[11] The deferred-payment method is merely a descriptive term for reporting income on the cash basis. It is neither consistent nor logical to permit an accrual basis taxpayer to adopt the cash basis in the case of sales of real property. The holding in *C. W. Titus*[12] destroys the distinction between the *cash* and *accrual* basis of reporting income from the sale of real property. *Harold*

4. See Comment, *Tax Aspects of Installment Sales,* 23 TENN. L. REV. 302, 311 (1954).

5. MONTGOMERY'S FEDERAL TAXES § 10.3 (37th ed. 1958).

6. Pacific Nat'l Co. v. Welch, 304 U.S. 191, 193 (1938); Burnet v. Logan, 283 U.S. 404 (1931); Victor B. Gilbert, 6 T.C. 10 (1946); G.C.M. 1387, VI-1 CUM. BULL. 48 (1927). The problem of whether the purchaser's obligations received in lieu of cash have a fair market value has been a fertile source of litigation. If the obligations of the purchaser have no fair market value, they do not constitute income to the seller. Burnet v. Logan, *supra;* Bedell v. Commissioner, 30 F.2d 622 (2d Cir. 1929); Harold W. Johnston, 14 T.C. 560 (1950); Bella Hommell, 7 T.C. 992 (1946); J. W. Perry, 4 T.C.M. 14 (1945); Alice G. K. Kleberg, 43 B.T.A. 277 (1941); Cambria Development Co., 34 B.T.A. 1155 (1946); Dudley T. Humphrey, 32 B.T.A. 280 (1935); Ravlin Corp., 19 B.T.A. 1112 (1930); Woodmar Realty Co., 17 B.T.A. 88 (1929); Charles C. Ruprecht, 16 B.T.A. 919 (1929); Leroy G. Evans, 5 B.T.A. 806 (1926).

7. INT. REV. CODE OF 1954, § 1001.

8. C. W. Titus, 33 B.T.A. 928 (1936), *nonacq.,* XV-1 CUM. BULL. 46 (1936).

9. George L. Castner Co., 30 T.C. 1061 (1958); Harold W. Johnston, 14 T.C. 560 (1950).

10. Desmond, *Sales of Property Under the Deferred Payment Method,* 32 TAXES 40 (1954); Comment, 23 TENN. L. REV. 302 (1954).

11. *E.g.,* G.C.M. 3350, VII-1 CUM. BULL. 62 (1928) and G.C.M. 1387, VI-1 CUM. BULL. 48 (1927), which indicate the Commissioner will treat deferred-payment sales of land in the same manner, regardless of the method of accounting used by the taxpayer.

12. 33 B.T.A. 928 (1936).

W. Johnston[13] indicates a more realistic approach and leaves the *Titus*[14] case on doubtful ground. The essence of the accrual basis is to report income as earned. When the accrual basis taxpayer has acquired a legal right to income, he must report his gain on the sale of property. Accrual accounting requires the seller to report his income in the year the sale is closed and the obligation to pay becomes fixed.[15] Thus, the rules which allow the reporting of income by the deferred-payment method should not apply to an accrual basis taxpayer, who must report his entire gain in the year of sale.[16]

When a taxpayer is on the cash basis, no income from the sale of land is reported until payments received in cash or property (other than cash) exceed his basis.[17] In general, taxable income is the aggregate amount of payments actually or constructively received during the taxable year in cash or its equivalent.[18] Payments are constructively received when they become available to the taxpayer without restrictions, even though they are not actually collected until a subsequent period.[19] An acute problem has developed concerning under what circumstances the taxpayer will be held to have received property which is the "equivalent of cash."

The purchaser's obligation to make deferred payments may be represented by promissory notes, a bond, a mortgage or a mere contractual promise to pay. Where the seller receives notes or a mortgage there seems to be no problem. If these are negotiable instruments having a value at or near their face amount, they are treated as the equivalent of cash.[20] Where the obligation of the purchaser is represented solely by a bare contract right, however, with no other evidences of indebtedness much confused litigation has resulted. The Commissioner has long taken the position that only in rare and unusual cases do obligations of the purchaser have no fair market value.[21] The courts, however, have not been uniform in their holdings and have failed to lay down proper and certain guides for the determination of fair market value. In most cases

13. 14 T.C. 560 (1950).
14. C. W. Titus, 33 B.T.A. 928 (1936).
15. Treas. Reg. §§ 1.446-1(c)(ii), 1.451-1(a) (1957).
16. George L. Castner Co., 30 T.C. 1061 (1958); Harold W. Johnston, 14 T.C. 560 (1950).
17. INT. REV. CODE OF 1954, § 1001(a), (b); G.C.M. 1387, VI-1 CUM. BULL. 48 (1927); John B. Atkins, 9 B.T.A. 140, 150 (1927).
18. Treas. Reg. §§ 1.446-1(c)(ii), 1.451-1(a) (1957).
19. Ross v. Commissioner, 169 F.2d 483, 490-91 (1st Cir. 1948); MONTGOMERY'S FEDERAL TAXES § 8.18 (37th ed. 1958).
20. W. D. Cline, 15 B.T.A. 934 (1929), *acq.*, VIII-2 CUM. BULL. 10 (1929).
21. Treas. Reg. § 1.1001-1(a) (1957); Rev. Rul. 58-402, 1958-2 CUM. BULL. 15; G.C.M. VII-1 CUM. BULL. 62 (1928); G.C.M. 1387, VI-1 CUM. BULL. 48 (1927).

the courts have refused to decide, as a matter of law, that a bare contract can have a fair market value,[22] and it has never been held, as a matter of law, that a bare contract has an ascertainable fair market value.[23] It has been held as a matter of law, however, that an obligation, evidenced by a mere promise to pay incorporated in a contract with no notes, mortgage or other evidence of indebtedness, has no fair market value and cannot be recognized as the equivalent of cash.[24] In deciding the question as one of fact, however, the courts have developed a conflict in determining the fair market value of a bare contractual promise to make payments in the future.[25]

The courts, in an effort to rationalize their opinions on the basis of a definite test, have adopted the "closed transaction"[26] as the taxable event to determine the year of inclusion of gain in taxable income.[27] If a completed *contract of sale* is made by a responsible purchaser and is a type ordinarily dealt in, it may have a fair market value which will be treated as the equivalent of cash, despite the absence of notes or mortgages.[28] On the other hand, it has been held, as a matter of fact, that a bare executory *contract to sell* containing a provision for payment of a sum of money in the future has no fair market value.[29] The absence of notes or other readily salable obligations is strong evidence of lack of marketability.[30] The mere signing of an executory contract

22. Bella Hommell, 7 T.C. 992 (1946); J. W. Perry, 4 T.C.M. 14 (1945).

23. But *cf.* Frank S. Cowden, 32 T.C. 853 (1959), noted in, 59 COLUM. L. REV. 1237 (1959).

24. Bedell v. Commissioner, 30 F.2d 622 (2d Cir. 1929); Harold W. Johnston, 14 T.C. 560 (1950).

25. Bella Hommell, 7 T.C. 992 (1946); Trust No. 5522, 27 B.T.A. 1250 (1933), *rev'd on other grounds,* 83 F.2d 801 (9th Cir. 1936); Rapid Transit Land Sales Co., 20 B.T.A. 608 (1930), *acq.,* X-1 CUM. BULL. 54 (1931).

26. There is a completed contract of sale and the transaction is generally considered closed when title has passed or when possession is surrendered by the seller so that dominion and control pass, resulting in transfer of the benefits and burdens of ownership to the purchaser, even though title has not passed. Union Pac. R.R., 32 B.T.A. 383, *aff'd* 86 F.2d 637 (2d Cir. 1936); MONTGOMERY'S FEDERAL TAXES § 10.2 (37th ed. 1958). In the absence of the transfer of either title or possession, there is a mere executory contract to sell. *Cf.* C.L. Starr, 9 B.T.A. 886 (1927).

27. 2 MERTENS, LAW OF FEDERAL INCOME TAXATION § 12.03 (1955).

28. Trust No. 5522, 27 B.T.A. 1250 (1933), *rev'd on other grounds,* 83 F.2d 801 (9th Cir. 1936); Rapid Transit Land Sales Co., 20 B.T.A. 608 (1930), *acq.,* X-1 CUM. BULL. 54 (1931); Gertrude H. Sweet, 8 B.T.A. 404 (1927), *acq.,* VII-1 CUM. BULL. 30 (1928); W. B. Geary, 6 B.T.A. 1109 (1927).

29. Cambria Development Co., 34 B.T.A. 1155 (1936); Ravlin Corp., 19 B.T.A. 1112 (1930); Woodmar Realty Co., 17 B.T.A. 88 (1929); C. L. Starr, 9 B.T.A. 886 (1927).

30. Laughlin v. Commissioner, 113 F.2d 611 (7th Cir. 1940); Bedell v. Commissioner, 30 F.2d 622 (2d Cir. 1929); J. D. Amend, 13 T.C. 178 (1949), *acq.,* 1950-1 CUM. BULL. 1; Alice G. K. Kleberg, 43 B.T.A. 277 (1941), *nonacq.,* 1950-2 CUM. BULL. 5; C. W. Titus, 33 B.T.A. 928 (1936), *nonacq.,* XV-1 CUM. BULL. 46 (1936).

to sell property in the future does not result in current taxable income to the seller, whether he is on the cash basis[31] or the accrual basis.[32] If the sale is not a closed transaction, no gain is realized until the amounts actually received exceed the basis of the property sold.[33] In *Bedell* v. *Commissioner*,[34] it was held that a contract for the sale of realty was not property with a present market value on the ground that there was not a closed transaction. The contract was conditional because title was not to pass until final payment. *J. W. Perry*[35] followed the *Bedell* case and held a contract for deferred payments had no fair market value because the contract was merely executory, despite substantial testimony as to its value and a finding that the contract actually might have been sold.

Where there is a closed transaction and the only act remaining to be done is payment by the purchaser, the earlier cases have concluded, even where the taxpayer was on a cash basis, that deferred payments represented only by a contract obligation have a fair market value and gain must be reported in the year of sale.[36] In *Old Colony Trust Co.*,[37] the court found a fair market value despite uncontroverted evidence by the taxpayer that even though the purchaser had a good credit standing no banker would discount the contract because of its non-negotiable character. *Harold W. Johnston*[38] refused to follow these cases in spite of the fact that they could not be distinguished, saying they were incorrectly decided and concluded that such a contract has no fair market value as a matter of law. To consider the contract as an "amount realized"[39] and that it has a fair market value to the seller equal to the balance of the purchase price is contrary to the cash method of reporting income. This type of transaction demonstrates the difference between the cash and accrual methods.[40] A simple contract to make payments in the future creates accounts payable by the purchaser and accounts receivable by the seller, which each would accrue if they were reporting income by the accrual method of accounting. But such an agreement has no tax significance to either the purchaser or the seller if he is on the cash basis,

31. C. L. Starr, 9 B.T.A. 886 (1927).
32. Lucas v. North Texas Lumber Co., 281 U.S. 11 (1930); J. T. Wurtsbaugh, 8 T.C. 183 (1947).
33. Burnet v. Logan, 283 U.S. 404 (1931); United States v. Christine Oil & Gas Co., 269 Fed. 458, 459-60 (W.D. La. 1920).
34. 30 F.2d 622 (2d Cir. 1929).
35. 4 T.C.M. 14 (1945).
36. Harry C. Moir, 14 B.T.A. 23 (1928), *nonacq.*, VIII-1 CUM. BULL. 57 (1929); Old Colony Trust Co., 12 B.T.A. 1334 (1928).
37. 12 B.T.A. 1334 (1928).
38. 14 T.C. 560 (1950).
39. INT. REV. CODE OF 1954, § 1001(b).
40. Harold W. Johnston, 14 T.C. 560, 565 (1950).

regardless of when the sale becomes final and completed.[41] Under the Code[42] a taxpayer is free to report income in any manner which is consistent with his method of accounting. A method of accounting is the procedure employed to determine the income of a particular period.[43] Its function is to determine to which accounting period income and expenses are to be assigned.[44] The taxpayer's method of accounting has been the criterion for the computation of income for more than forty years.[45] A taxpayer who keeps no books must report on the cash basis,[46] and under the cash basis a taxpayer is required to report income only when he receives cash or its equivalent and can take deductions only when expenses are paid.[47] It makes no difference to a cash basis taxpayer when the transaction is closed. The sale has no tax significance to either the seller or the purchaser, if he is on the cash basis, regardless of when the sale becomes final and completed. The transaction creates accounts receivable by the seller and accounts payable by the purchaser which each would accrue if he were reporting income on the accrual method. But the agreement to pay the balance of the purchase price in deferred payments extending over several years has no tax significance to either the seller or the purchaser if he is using the cash method.[48] If a cash basis taxpayer is required to report as income the promise of future payment due him under a legally binding obligation, he is being forced to report income in a manner inconsistent with his method of accounting, which is prohibited by the Code.[49] Thus we see that the "closed transaction" test of when to report income has become a judicial concept adopted in violation of the statutory mandate as applied to cash basis taxpayers. The question of when a taxpayer is to report income should in the first instance depend on his method of accounting.

The courts have recognized that the taxpayer's method of accounting is the primary test for determining when to report income.[50] In *Helvering*

41. *Ibid.*
42. INT. REV. CODE OF 1954, § 451.
43. 1 NEWLOVE & GARNER, ADVANCED ACCOUNTING 403 (1951).
44. Stern Bros., 13 B.T.A. 1192, 1193 (1928); Clarence Shock, 1 B.T.A. 518, 530 (1925); LASSER, TAX ACCOUNTING METHODS 2 (1951).
45. INT. REV. CODE OF 1954, § 446 and similar provision in prior laws. See, Hahn, *Methods of Accounting: Their Role In The Federal Income Tax Law,* 1960 WASH. U.L.Q. 1, 17 n. 100 (1960).
46. INT. REV. CODE OF 1954, § 446(a).
47. INT. REV. CODE OF 1954, § 451; Treas. Reg. § 1.446-1(c)(i) (1957).
48. Harold W. Johnston, 14 T.C. 560, 565 (1950); Rev. Rul. 60-31, 1960-5 INT. REV. BULL. 17, 20.
49. INT. REV. CODE OF 1954, § 446.
50. Helvering v. Nibley-Mimnaugh Lumber Co., 70 F.2d 843 (D.C. Cir. 1934); Hahn, *op. cit. supra,* note 45.

v. *Nibley-Mimnaugh Lumber Co.*,[51] the court held that delivery of possession of the property and the unconditional obligation of the purchaser constituted a closed transaction and were sufficient to require *accrual* of the entire purchase price by the seller in the year the contract was executed. The court said, however, if the seller were on the *cash* basis of reporting income, a different situation would exist and a different principle would be applicable. The fact that there was a contract of sale resulting in a closed transaction did not bear on the determination of when there was reportable income. Since the cash received in the year the contract was executed did not exceed the taxpayer's basis of the property sold, there was no gain until the subsequent year when the full purchase price was received in negotiable notes, which had a fair market value and were the equivalent of cash. On the basis of this analysis, the court properly remanded the case to determine the taxpayer's method of accounting.

Thus, if a taxpayer is on the *accrual* basis he must report all income as it is earned, regardless of when payment is to be made.[52] When a contract has been executed and the rights and obligations of the parties have become fixed, the transaction is closed and any gain must be accrued at that time.[53] However, when a taxpayer is on the *cash* basis the emphasis must by necessity switch from the status of the contract to the date of payment. Under the *cash* basis the date of payment is the taxable event, not the fixation of the obligation to make and the corresponding right to receive payment. Only when the taxpayer has received payment in cash (or other property), including property which is the equivalent of cash should the taxpayer be required to report his gain. Only marketable tangible property and negotiable intangible property should be regarded as the equivalent of cash.[54] A bare contractual promise to pay, whether a "contract to sell" or a "contract of sale," not being negotiable, should not be regarded as the equivalent of cash. It seems absurd to say that such a contract is the equivalent of cash, or to even regard such a contract as property.[55] A contract for deferred payments without any negotiable

51. 70 F.2d 843 (D.C. Cir. 1934).

52. Treas. Reg. §§ 1.446-1(c)(ii), 1.451-1(a) (1957); MONTGOMERY'S FEDERAL TAXES § 8.10 (37th ed. 1958).

53. Lucas v. North Texas Lumber Co., 281 U.S. 11 (1930); Frost Lumber Industries, Inc. v. Commissioner, 128 F.2d 693 (5th Cir. 1942); Commissioner v. Union Pac. R.R., 86 F.2d 637 (2d Cir. 1936); Commissioner v. North Jersey Title Ins. Co., 79 F.2d 492 (3d Cir. 1935); J. T. Wurtsbaugh, 8 T.C. 183 (1947); Ohio Brass Co., 17 B.T.A. 1199 (1929).

54. Bedell v. Commissioner, 30 F.2d 622 (2d Cir. 1929); Nina J. Ennis, 17 T.C. 465 (1951); Harold W. Johnston, 14 T.C. 560 (1950); Edward J. Hudson, 11 T.C. 1042 (1948).

55. Bedell v. Commissioner, *supra*, note 54.

evidence of indebtedness is analogous to a mere account receivable which has never been regarded as the equivalent of cash.[56]

In *Nina J. Ennis*,[57] the court held that a bare contract obligation was not property which is the equivalent of cash, and there was no taxable income to the cash basis taxpayer in the year of sale. The *Ennis* case does not mention fair market value but states that an obligation to make periodic deferred payments cannot be the "equivalent of cash" unless it is freely negotiable, so that it readily passes from hand to hand in commerce.[58] This decision is in accord with the cash basis of reporting income.

If contract obligations to make deferred payments are considered to be the equivalent of cash, or at least until the taxpayer proves to the contrary,[59] the distinction between the cash and accrual methods of reporting income will become so narrowed that it will finally disappear. The attempt of the Commissioner to require a land contract to be treated the same as a mortgage[60] results in an undue hardship to the cash basis taxpayer. The taxpayer is required to pay taxes on a gain, before he has fully recovered his basis, where he has received no consideration out of which these taxes can be paid. The contract should not be recognized as income since it does not represent property which is available for the payment of the tax which would be imposed on the transaction.[61] Salary received in the current year for services rendered in a prior year is income in the current year to a recipient on the cash basis.[62] Dividends declared is one year and received by a cash basis taxpayer in a subsequent year are income in the year of receipt.[63] Advance rental payments are also income in the year of receipt, regardless of when earned.[64] A professional

56. Dudley T. Humphrey, 32 B.T.A. 280 (1935); Charles C. Ruprecht, 16 B.T.A. 919 (1929); Rev. Rul. 60-31, 1960-5 INT. REV. BULL. 17, 20; MERTENS, LAW OF FEDERAL INCOME TAXATION § 11.06 (1955).

57. 17 T.C. 465 (1951).

58. Compare Frank S. Cowden, 32 T.C. 853 (1959), in which it is difficult to determine whether the court decided that the taxpayer had realizable income on the basis of "constructive receipt" or "cash equivalent." See also Alice G. K. Kleberg, 43 B.T.A. 277 (1941).

59. See Frank S. Cowden, *supra*, note 58.

60. See, *e.g.*, dissenting opinion in Nina J. Ennis, 17 T.C. 465 (1951).

61. Garber v. Commissioner, 50 F.2d 588 (10th Cir. 1931); Commissioner v. Moore, 48 F.2d 526 (10th Cir. 1931). See Desmond, *Sales of Property Under the Deferred-Payment Method*, 32 TAXES 40, 45 (1954).

62. Jackson v. Smietanka, 272 Fed. 970 (7th Cir. 1921); C. Florian Zittel, 12 B.T.A. 675 (1928); Iver J. Boyum, 7 B.T.A. 1084 (1927); E. F. Cremin, 5 B.T.A. 1164, 1169 (1927); J. M. Edmunds, 1 B.T.A. 998 (1925).

63. Kales v. Woodworth, 32 F.2d 37 (6th Cir. 1929); Dodge v. United States, 64 Ct. Cl. 178 (1927).

64. Andrew J. Pembroke, 23 B.T.A. 1176 (1931); A. P. Schiro, Inc., 20 B.T.A. 1026 (1930); O'Day Investment Co., 13 B.T.A. 1230 (1928). See also S. P. Freeling, 7 B.T.A. 1238 (1927).

person on a cash basis, who renders services which are represented by contracts of various kinds, could possibly sell those accounts, but it is generally considered that he has no taxable income until it is actually realized, either by collection on the contract or sale of it.[65] There is no logical or legal basis for requiring a cash basis taxpayer to apply a rule in computing his gain on the sale of real property different from the method he uses in all his other transactions.[66]

THE DECLINE OF SOVEREIGN IMMUNITY IN INDIANA

Sovereign immunity from tort liability is a subject that has received more than its share of space and attention by legal writers. Indeed, more than 200 separate articles and notes dealing with this archaic principle have appeared in the various law reviews and legal periodicals over the past sixty years.[1] In 1935, an article concerned specifically with the tort liability of a municipal corporation in Indiana appeared in the Indiana Law Journal,[2] and again, in 1948, the same publication carried a note which extensively summarized the law of governmental immunity in general in Indiana.[3] It would therefore be duplicitious to undertake again at this time a general discussion of the cases and law which are treated at length in the above two works. However, a recent Supreme Court of Indiana case, *Flowers v. Board of Comm'rs,* [4] in expressly overruling prior Indiana authority necessitates a renewed analysis of immunity in this state and the effect the *Flowers* decision may have on that doctrine.

Indiana, along with the majority of other jurisdictions has long sustained the state's immunity from tort liability. There are numerous decisions upholding the immunity of the state and its institutions.[6]

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65. See text accompanying note 56, *supra.*

66. Harold W. Johnston, 14 T.C. 560 (1950).

1. Illustrative are Davis, *Tort Liability Of Governmental Units,* 40 MINN. L. REV. 752 (1956); Leflar and Kantrowitz, *Tort Liability Of The States,* 29 N.Y.U.L. REV. 1363 (1954); and see Annot., 120 A.L.R. 1376 (1939).

2. Chattin, *Tort Liability Of Municipal Corporations In Indiana,* 10 IND. L.J. 329 (1935).

3. See Note, *Governmental Tort Liability In Indiana,* 23 IND. L.J. 468 (1948).

4. 168 N.E.2d 224 (Ind. 1960).

5. For an exhaustive summary of the law in each state see Leflar and Kantrowitz, *Tort Liability Of The States,* 29 N.Y.U.L. REV. 1363 (1954).

6. See *e.g.,* Ford Motor Co. v. Dep't of Treasury, 323 U.S. 459 (1945); Bracht v. Conservation Comm'rs, 118 Ind. App. 77, 76 N.E.2d 848 (1948); State v. Mutual Life Ins. Co., 175 Ind. 59, 93 N.E. 213 (1910).