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Embezzled Funds as Income

TAXATION

EMBEZZLED FUNDS AS INCOME

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

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

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

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12. Mr. Justice Frankfurter did not understand why the judgment wasn't free from any inherent infirmity in that it was "too large an assumption on which to base judicial action that those workers who are paid by the day have a different outlook psychologically than those who earn weekly wages . . ." Principal case at p. 990.

1. T.C. Memo. Dec., 3 C.C.H. 1944 Fed. Tax Serv. T.C. Dec. 14,107 (M)
2. 148 F. (2d) 933 (C.C.A. 9th, 1945).
3. Dissenting opinion Burton, J., principal case at p. 550.
4. The Treasury Department's interpretation of the decision is as follows: "The mere act of embezzlement does not of itself result in taxable income to the embezzler for federal income tax purposes. If the owner condones the taking of the property and forgives the indebtedness, taxable income may result to the embezzler, depending on the facts in the particular case." 4 C.C.H. 1946 Fed. Tax Serv. ¶ 6230, G.C.M. 24945, 1946-13-12335.
5. G.C.M. 16572, XV-1 Cum. Bul. 82 (1936).
6. See Spruance, 43 B.T.A. 221 (1941), rev'd sub nom., McKnight v. Comm'r, 127 F. (2d) 572 (C.A.A. 5th, 1942); Kurrle v. Comm'r, P.H. 1941 Fed. Tax Serv. B.T.A. Memo. Dec. 41,085, aff'd, 126 F. (2d) 723 (C.C.A. 8th, 1942).
7. (1946) 44 Mich. L. Rev. 885; (1946) 34 Calif. L. Rev. 449,

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

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

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

the dissenting position stated above relating to Congressional intent.

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

19. Principal case at p. 549.

20. Boston Consolidated Gas Co. v. Comm'r, 128 F. (2d) 447 (C.C.A. 1st, 1942); Humphreys v. Comm'r, 125 F. (2d) 340 (C.C.A. 7th, 1942), cert. denied, 317 U.S. 637 (1942); National City Bank v. Helvering, 98 F. (2d) 93 (C.C.A. 2d, 1938); Barker v. Magruder, 95 F. (2d) 122 (App. D.C. 1938); Charleston & Western Carolina Ry. v. Burnet, 50 F. (2d) 342 (App. D.C. 1931); Chicago, R.I. & P. R.R. v. Comm'r, 47 F. (2d) 990 (C.C.A. 7th, 1931), cert. denied, 284 U.S. 618 (1931); Agne v. U.S., 42 F. Supp. 66 (Ct. Cl. 1941).

21. 286 U.S. 417 (1932).

22. Knight Newspapers Inc. v. Comm'r, 143 F. (2d) 1007 (C.C.A. 6th, 1944) (no claim of right, dividend declaration was mistake); Clinton Hotel Realty Co. v. Comm'r, 128 F. (2d) 968 (C.C.A. 5th, 1942) (acknowledged liability to repay, therefore no claim of right). But cf. Renwick v. U.S., 87 F. (2d) 123 (C.C.A. 7th, 1936); Griffin v. Comm'r, 101 F. (2d) 348 (C.C.A. 7th, 1939) (received under apparent claim of right believing himself entitled thereto); National City Bank v. Helvering, 98 F. (2d) 93 (C.C.A. 2d, 1938) (finding of Board accepted as to taking under claim as his own); Greenwald v. U.S., 57 F. Supp. 569 (Ct. Cl. 1944) (received compensation in 1934, 1935, 1936 but in 1938 discovered he must repay, so the court says he asserted "no claim of right" to the funds); Charles G. Duffy, 2 T.C. 568 (1943) (received as his own, presumably under a claim of right); H. Lewis Brown, 1 T.C. 760 (1943) (North American case distinguished for here the taxpayer had only a "qualified claim" to the whole).

23. See n. 22 supra.

24. Helvering v. Clifford, 309 U.S. 331 (1940) (settlor of short term trust denied any claim of right whatsoever); Burnet v. Wells, 289 U.S. 670 (1933) (settlor of trust to pay insurance had no claim to funds); Helvering v. Horst, 311 U.S. 112 (1940) (assignor of interest coupons taxable); Johnson v. U.S., 318 U.S. 189 (1943) (politician receiving protection payments); Humphreys v. Comm'r, cert. denied, 317 U.S. 637 (1942) (ransom payments taxable to kidnapper); Chadick v. U.S., cert. denied, 296 U.S. 609 (1935) (graft payments).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

40. 291 U.S. 43 (1933).

41. North American Oil Consolidated v. Burnet was distinguished on the very narrow grounds that it had no application to §219, under which taxability arose in the Frueler case.

42. Knight Newspapers Inc. v. Comm'r, 143 F. (2d) 1007 (C.C.A. 6th, 1944); Clinton Hotel Realty Co. v. Comm'r, 128 F. (2d) 968 (C.C.A. 5th, 1942); Comm'r v. Turney, 82 F. (2d) 661 (C.C.A. 5th, 1936); Greenwald v. U.S., 57 F. Supp. 569 (Ct. Cl. 1944); H. Lewis Brown, 1 T.C. 760 (1943); Walter I. Bones, 4 T.C. 415 (1944) (receipt of check subject to dispute held no receipt at all to come within North American rule); E.P. Madigan, 43 B.T.A. 549 (1941).

43. 82 F. (2d) 661 (C.C.A. 5th, 1936).

44. See Mertens, "Law of Federal Income Taxation" (1942) §§ 17.10 et. seq.

45. This test is expressed in Barker v. Magruder, 95 F. (2d) 122, 124 (App. D.C. 1938), and Jacobs v. Hoey, 136 F. (2d) 954 (C.C.A. 2d, 1943). This latter opinion was written by A. Hand, J., and the case was decided by practically the same court which handed down National City Bank v. Helvering, discussed infra.

46. 98 F. (2d) 93 (C.C.A. 2d, 1938).

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

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

TAXATION

VALUATION OF FUTURE INTERESTS FOR FEDERAL TAX PURPOSES

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

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

WILLS

CONFIDENTIAL RELATION—PRESUMPTION OF UNDUE INFLUENCE

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

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