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INDIANA LEGISLATION—1941*

The work of the Eighty-second General Assembly can not be judged, alone, by the 238 acts and 10 joint and concurrent resolutions which it passed. By far the greater amount of its activity was directed toward the sifting process by which legislative proposals were rejected. Thus although the following analysis of important new statutes is a valuable lawyer's tool, it does not give proper emphasis to the negative exercise of legislative power which rejected 10 bills for every one adopted.

Some comment also should be directed to the total amount of new legislation. It is popular to criticize the flood of legislation, yet the 238 new acts do not extend regulation substantially. If it were constitutionally possible to enact the 238 separate statutes as 30 or 40 acts relating to the 30 or 40 general subjects of legislation, the hue and cry against the extent of legislative action would probably subside. It is the significance of the law, not its bulk which should measure its effect.

The total legislative product of this session does not differ greatly from the pattern of previous legislatures. A large number of the acts relate to state administration. The number of regulatory acts remain large. Acts relating to local government hold a prominent place in the legislative product. The usual number of acts relating to the terms of circuit courts again appear. Some, obviously special legislation, and a few legalizing acts complete the picture.

The joint and concurrent resolutions indicate some change in the legislature's evaluation of its own functions. Two concurrent resolutions and a joint resolution create commissions for the interim study of important legislation. One concurrent and one joint resolution instruct administrative tribunals and law enforcing agents as to the type of regulation and enforcement that the legislation intends. In direct language the Assembly points out that "There are adequate provisions in the laws of our state to prevent the corruption of the

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* This article was prepared jointly by the senior members of the Student Editorial Board.
1 Ind. Acts 1941, c. 241, 244, 245.
2 Id. c. 242, 246.
morals of our children and youth by outlawing obscene, lewd, indecent and lascivious literature; . . . that those persons charged with the enforcement of our laws should take action to diligently prosecute the offenders of the statutes designed to curb the above mentioned evils. This conception of the legislature directing enforcement of its own laws and assuming a responsibility for not only the enactment of the law but the existence of the enactment in fact as law is a unique and encouraging development in the legislative pattern.

Three joint resolutions propose constitutional amendments: for home rule charters for cities, and for extending the term of office of the prosecuting attorney and for all county officials.

The form of legislative enactment and the quality of draftsmanship appears to improve with each succeeding session. Some untoward tendencies, however, appear. Of the 238 acts passed by the 82nd General Assembly, 50 per cent were amendatory, 45 per cent original, and 5 per cent repealing. The percentage of original legislation is astonishingly high. In most states it is unusual for the amount of original legislation to exceed 25 or 30 per cent of the total. It is, of course, perfectly obvious that 45 per cent of the enactment of the 1941 session was not new legislation. By far the largest part of it was amendatory of prior enactment. It is called original only because it is written in the form of original legislation. What may seem to be purely a technical quibble as to the form of the legislation has, however, important consequences for the lawyer. It is always difficult to absorb with accuracy original legislation into a code of law. Its effect on past legislation must always be by implication which will inevitably lead to litigation shrouded in ambiguity and uncertainty.

The unusually high percentage of original legislation in Indiana is probably attributable to an unfortunate interpre-

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3 Id. c. 242.
4 Id. c. 243.
5 Id. c. 247.
6 Id. c. 248.
7 When an original act is passed regulating subject matter already covered by existing legislation, no one can predict prior to judicial decision whether the new act repeals by implication or is only supplementary. Such uncertainty is entirely unnecessary and invites all possible censure.
tation of the constitutional provision relating to amendments.\(^8\) No other state follows the Indiana interpretation, and it is hoped that when the question again arises the legislature may be freed from a limitation which makes the easy amendment of statutes impossible and which makes the constitutionality of any amendment uncertain. In 1930 the Harvard Law Review commenting upon the form of amendments in Indiana observed, that a “Perusal of the Indiana amendatory acts . . . reveals astonishingly long and redundant titles and meaningless lengthy previews. Responsibility for these curiosities of the draftsman’s art does not lie with the unprofessional legislator but must be put to the artful construction given by courts to the common constitutional provision forbidding amendment by reference to the title of acts and requiring the amended act to be set forth in full.”\(^9\) The comment concluded “Insistence upon unimportant technicalities such as these not only serves to provide pitfalls for the draftsman. It tends to make a mystery of his profession instead of elevating it to the position of a science. For civilized peoples, it makes the statute book a wilderness of waste words.”\(^10\)

The Indiana Constitution in common with the constitutional provisions of most states, requires that “No act shall be revised or amended by mere reference to its titles; but the act revised, or section amended, shall be set forth and published at full length.”\(^11\) Nothing in this constitutional provision requires that the amendatory act include the title of the original act and certainly there is no indication that the title be reproduced \textit{in ipsissimis verbis}. By an interpretation followed only in Indiana this requirement has been read into the constitution which together with another uniquely Indiana doctrine that an amendment wipes out the existing original legislation and only the amendment can be amended.\(^12\) The result is that titles to amendatory acts in Indiana are

\(^8\) Ind. Cont. Art. IV, §21.
\(^9\) Legis. (1930) 43 HARV. L. REV. 482.
\(^10\) Id. at 485.
\(^12\) Thus an amendment must be to the last amendatory act and an attempt to amend the original act is void. Draper v. Fayley, 33 Ind. 485 (1875); Blakemore v. Dolan, 50 Ind. 194 (1875); Feibleman v. State, 98 Ind. 516 (1884); Boring v. State, 141 Ind. 640, 41 N. E. 270 (1894); Mitsker v. Whitsell, 181 Ind. 126, 103 N. E. 1078 (1913). \textit{Cf.} State \textit{ex rel.} v. Bowman, 199 Ind. 436, 156 N. E. 394 (1927).
frequently longer than the act itself.\(^{13}\) An over solicitous desire to preserve the constitutional provision\(^{14}\) has in fact destroyed its usefulness and removed its protection.\(^{15}\)

The development of an orderly and consistent body of legislation in Indiana would be greatly stimulated if legislatures were free from the hazards inherent in drafting amendatory statutes. The adoption of the constitutional rule followed by the great majority of states permitting the identification of the act to be amended by reference to chapter number or code and by a disclosure of the subject matter involved would promote this result. Adequate safeguard remains in the requirement that the act or section amended be set forth at full length.\(^ {16}\) Without the adoption of this interpretation legislative draftsmen will be helpless to stem the tide of original legislation or to promote the orderly development of a consistent code of laws.

The full disclosure of the character of the amendment is now achieved through the printing of amendatory bills with italicized changes. It would not greatly increase the bulk of the session laws if the printed statutes adopted the same procedure. This simple visual device would greatly assist the hurried lawyer in determining the changes made in existing law.\(^ {17}\)

\(^ {13}\) The older session laws contained more grotesque examples but the policy in the last few sessions has been to enact original acts to avoid the dangerous and cumbersome amendatory form. See, Ind. Acts 1929, c. 68; Ind. Acts 1917, c. 74, 140, 156; Ind. Acts 1913, c. 229; Ind. Acts 1909, c. 124. But even the 1941 Indiana Legislature found it necessary to use some lengthy amendatory titles. See Ind. Acts 1941, c. 37, 57, 222, 223.

\(^ {14}\) The abuse of the "blind amendment" is always cured by setting forth in full the section as amended. Originally the court required that the section amended be set forth at length both in its original and amended form. But in Greencastle Southern Turnpike Company v. State, 28 Ind. 382 (1867), the court reversed its previous decisions and held that setting forth at length in its amended form was sufficient. The court in that case recognized the impracticability of the previous requirement. It is hoped that a reexamination of the present interpretation will result in a more liberal rule.

\(^ {15}\) The requirement imposed by the court has little practical value in informing of the act. Indeed, the present titles do more to prevent disclosure of the content of amendments than to enhance it.

\(^ {16}\) There is no affirmative requirement in the constitution that the title of the act be set forth at full length. The general rule of construction is that the title is no part of the act and if the same rule is applied to the constitutional requirement, then there is no need for compounding title upon title until the amendment is lost in an ununderstandable recitation of section numbers.

\(^ {17}\) The practice is already followed in the printing of bills for the legislator's use and many states have adopted the practice in the publication of the acts. See, Legis. (1930) 43 HARV. L. REV. 1143.
Prior to 1933 there was no organized plan of administration in Indiana. Administrative agencies had been created from time to time, with the result that some duplication, and much overlapping of activities existed among the various boards. Each was independent of the other and no single person had the power to reconcile their jurisdictional conflicts. The Executive-Administrative Act of 1933 completely reorganized the administrative branch of the state government. It established eight divisions within the executive department. The Governor was given the power to assign the various state administrative bodies among these eight departments, and all elective executive offices, except constitutional ones, were abolished. The Governor was given the power to terminate, at his discretion, the appointment of every officer and employee covered by the act. All vacancies, with the exception of immediate aids to the elective officials, were to be filled by appointees of the governor and the appointments were to continue at his discretion. A maximum tenure of four years was placed upon these appointments, but all officers were eligible for reappointment at the expiration of their terms. Boards were created to administer each department and the governor was a member of each board. The act concentrated responsibility in the governor, eliminated duplicating activities, and simplified the state administrative

1 REPORT, IND. COMM. ON GOVERNMENTAL ECONOMY, p. 44 (1935).
2 Ind. Acts 1933, c. 4, IND. STAT. ANN. (Burns, 1933) §60-101 et seq.
3 These were the Executive, State, Audit and Control, Treasury, Law Education, Public Works, and Commerce and Industries department. IND. STAT. ANN. (Burns, 1933) §60-102. Later a State Department of Public Welfare was created. Ind. Act Spec. Sess. 1936, c. 3, IND. STAT. ANN. (Burns, Supp. 1940) §52-1101.
4 IND. STAT. ANN. (Burns, 1933) §60-109.
5 Id. at §60-103. These were the Governor, Secretary, Auditor, Treasurer of State, and State Superintendent of Public Instruction. Upon the expiration of the term of the then incumbent attorney general, that office was abolished by §60-104.
6 But in no event was an existing officer to serve later than June 30, 1933. Id. at §60-105.
7 Id. at §60-106.
8 Id. at §§60-109 to 117.
organization. Under the act the governor truly was the chief executive of the state.\(^9\)

The 1941 General Assembly repealed the State Executive-Administrative Act of 1933,\(^10\) and created a new administrative organization\(^11\) providing for the termination of employment of all officers within the scope of the act, the appointment of officers to replace those whose tenures were ended, and for the reorganization of administrative agencies into four departments. Each department was headed by a board of three persons, composed either of two elective administrative officers and the Governor, or one elective administrative officer, the Governor and the Lieutenant Governor. Existing administrative agencies were placed in one of the administrative departments and the board heading the department was empowered to appoint and remove personnel within the department.

The office of attorney general and department of law was abolished, as were the tenure of the attorney general, deputies, and employees of the department of law.\(^12\) A new office of attorney general to be filled by popular election was created, the first election to be November, 1942.\(^13\)

The State Board of the Department of Education was abolished and a new Board of Education of nine members created.\(^14\) The State Superintendent of Public Instruction was to have full voting rights and be, ex officio, president of the board. Four appointments to the board were to be by the Governor, and four by the Lieutenant Governor, unless the Governor and Lieutenant Governor were of the same political party, in which case all were to be appointed by the Governor.

\(^9\) "The Governor [is] the real head of the administration in the same way that the President is head of the national administration, and just as the general manager of a large business undertaking is at its head." REPORT, IND. COMM. ON GOVERNMENTAL ECONOMY, p. 45 (1935).

\(^10\) Ind. Acts 1933, c. 4, p. 7, IND. STAT. ANN. (Burns, 1933) §§ 60-101, 60-133.

\(^11\) Ind. Acts 1941, c. 13, p. 31, IND. STAT. ANN. (Burns, Supp. 1941) §§60-135, 60-157; also repealed by Ind. Acts 1941, c. 4, p. 8; noted IND. STAT. ANN. (Burns, Supp. 1941) §60-135.

\(^12\) Ind. Acts 1941, c. 108.


\(^14\) Ind. Acts 1941, c. 182; IND. STAT. ANN. (Burns, Supp. 1941) §28-401.
II

[Because of a difference of opinion among the members of the Editorial Board Parts II and III represent conflicting views on the case of Tucker v. State.]

The acts considered above were vetoed by the Governor and thereafter passed over his veto by the General Assembly. Upon adjournment of the legislature, the Governor, in behalf of the state, sought to enjoin the operation of these acts, on the grounds that the legislature unconstitutionally delegated executive power to ministerial officials. The lower court granted the injunction and on appeal the Supreme Court held the acts to be unconstitutional.15

The majority of the court stated that under the Indiana Constitution all executive power is vested in the Governor only, that the appointive function is an exercise of executive power, and concluded, therefore, that only the Governor can appoint.

The court deduced its major premise from the express separation of powers provision of the Indiana Constitution, emphasizing that the administrative department was specifically included in the executive.16 According to the court, the powers of government are granted to specific agencies within the departments and not to the departments.17 Thus the executive power is vested in the Governor and not in the executive department.18 The court concluded that any executive power not expressly delegated elsewhere by the Constitution, or not incidental to some principal power elsewhere granted, resides solely in the Governor.19

The minor premise, that the appointive power is inher-

16 "The powers of the Government are divided into three separate departments; the Legislative, the Executive, including the Administrative, and the Judicial; and no person charged with official duties under one of these departments shall exercise any of the functions of another, except as in this Constitution expressly provided." Ind. Const. (1852) Art. III, §1.
17 The legislative authority is vested in the General Assembly, Ind. Const. Art. IV, §1; the executive power is vested in a Governor, id. at Art. V, §1; the judicial power is vested in the courts, id. at Art. III, §1.
18 Id. at Art. V, §1.
19 The court, from its study of the constitutional debates and other historical writings of the time, concluded that the convention clearly intended this. See Fansler, C. J., in Tucker v. State, 35 N. E. (2d) 270, 279-281 (Ind. 1941); accord, Meyers v. United States, 272 U. S. 52, 123 (1926).
ently executive, is established by the present case. Only the following exceptions to the Governor's exclusive appointive powers are allowed: (1) each independent department has some appointive power as an incident of its principal power; (2) each elective official may appoint deputies or employees whose duties are incidental to the discharge of the administrative function of his office. Once these two premises have been established, the conclusion that only the Governor can appoint is inescapable.

One of the problems in the instant case involved the sharing of the executive appointive power with purely administrative officers. The court's conclusion that this sharing is not permitted under the Indiana Constitution is supported by the constitutional command that the Governor faithfully execute the laws. Since the Governor can not perform this function alone, it is essential to the proper discharge of this duty that he have the power to select the executive and administrative personnel of the state. However, this appointive power cannot be delegated, even in part, to administrative officers. Although the administrative department is

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20 However, prior Indiana cases have definitely stated that the general appointive power is intrinsically executive. See State ex rel. Yancey v. Hyde, 121 Ind. 20, 25-30, 22 N. E. 644, 646 (1889); Evansville v. State ex rel. Blend, 118 Ind. 426, 443, 21 N. E. 267, 272 (1889); State ex rel. Jameson v. Denny, Mayor, 118 Ind. 392, 396, 21 N. E. 252, 254, 255, 257 (1889).

21 State ex rel. Hovey v. Noble, 118 Ind. 350, 21 N. E. 244 (1888) (act creating Supreme Court Commissioners to be appointed by the Legislature for the purpose of assisting the court in performing its judicial function was held an unlawful interference with the independence of the judiciary).


23 Cf. Gray, Governor v. State ex rel. Coghlan, 72 Ind. 567, 578 (1880) holding that such officers may be joined with the Governor in the exercise of ministerial functions, but by dictum stating that they may not be joined with him in the exercise of executive functions. Also see French v. State ex rel. Harley, 141 Ind. 618, 635, 41 N. E. 2, 7 (1895).


included in the executive, it is the Governor, not the administrative department, who is charged with the duty of executing the laws. Furthermore, the administrative officials provided for in the Constitution are not granted any executive function. Finally, it is clear that the selection of individuals to head the various agencies of the state is not a ministerial, but an executive function, requiring the use of great discretion.

The second problem presented by the 1941 reorganizing acts was the delegation of executive appointing power to the Lieutenant Governor. This delegation is invalid on the same reasoning which nullified the delegation to administrative officials. Since the Governor is given all executive power except that elsewhere delegated, and since the duties assigned to the Lieutenant Governor by the Constitution do not expressly include the power to sit on boards with the Governor and exercise the executive appointive power, such delegations are void.

By express Constitutional provision, offices that were appointive by the General Assembly at the time the Constitution was adopted may still be filled by legislative appointment; thus several cases that seem in conflict with the majority opinion are, in fact, distinguishable.

III

In Tucker v. State a majority of the Indiana Supreme Court held that all state appointive power, not incidental to

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26 Ind. Const. Art. VI, §1. This provision is interpreted to mean that the Secretary, Auditor, and Treasurer of State are granted only those powers sufficient to carry out the functions of their office, and none of the general executive power. Fansler, C. J., in Tucker v. State, 35 N. E. (2d) 270, 291, 292 (Ind. 1941).


28 The Lieutenant Governor is given the duties of the governor in case of incapacity of the latter. The Lieutenant Governor presides over the Senate and may cast a vote in case of a tie. Id. at §§10, 21.

29 All officers whose appointments are not otherwise provided for in the constitution shall be chosen in such manner as now is, or hereafter may be prescribed by law. Ind. Const. Art. XV, §1.

30 Hovey, Governor v. State ex rel. Carson, 119 Ind. 395, 21 N. E. 21 (1889); see State ex rel. Worrell v. Peele, 121 Ind. 495, 505, 22 N. E. 654, 658 (1889); State ex rel. Geake v. Fox, Comptroller, 158 Ind. 126, 139, 63 N. E. 19, 24 (1902) (Art. XV, §1 of Indiana Constitution discussed and explained).

the exercise of some other power expressly granted, is in the Governor.\textsuperscript{32}

Nowhere does the constitution grant an express general power of appointment to the governor. The court sought to imply it from the grant of executive power,\textsuperscript{33} from the Governor's responsibility to take care that the laws are faithfully executed,\textsuperscript{34} and from the presumed intention of the Indiana constitutional convention of 1851.\textsuperscript{35}

Having implied the grant of power, the court interpreted the separation of powers\textsuperscript{36} to require that the grant be exclusive, and by this chain of reasoning reached the holding of the case. To buttress its holding, the majority said that the decision was supported by "the weight of authority" at the time the Indiana constitution was adopted,\textsuperscript{37} and at the present time.\textsuperscript{38}

Few recorded cases prior to 1851 involve appointive power, but their holdings and language seem contra to the instant case.\textsuperscript{39} And if the indulgence be granted that constitutions meant in 1851 what the respective state courts subsequently interpreted them to mean, at least five more states denied that the governor had exclusive appointive power.\textsuperscript{40} Apparently no case under state constitutions in effect in 1851 implied the appointive power in the governor of a state.

The grant of executive power does not carry with it the power to appoint;\textsuperscript{41} nor does the duty to take care that

\begin{footnotes}
\begin{itemize}
\item \textsuperscript{32} Id. at 284.
\item \textsuperscript{33} Ind. Const. Art. V, §1.
\item \textsuperscript{34} Id. at 316. The majority also relies on the governor's authority to sign commissions as implying the power to appoint, under Ind. Const. Art. XV, §6. See Mr. Judge Richman's discussion of the fallacy of this argument and cases cited in Tucker v. State, 35 N. E. (2d) 270, 308. (Ind. 1941) (dissenting opinion).
\item \textsuperscript{35} Tucker v. State, 35 N. E. (2d) 270, 278 et seq. (Ind. 1941).
\item \textsuperscript{36} Ind. Const. Art. III.
\item \textsuperscript{37} Tucker v. State, 35 N. E. (2d) 270, 281 (Ind. 1941).
\item \textsuperscript{38} Id. at 284.
\item \textsuperscript{39} People v. Fitch, 1 Cal. 536 (1851); Commonwealth v. Hanley, 9 Pa. 513 (1848).
\item \textsuperscript{40} Mayor v. City Council of Baltimore, 15 Md. 376 (1859); Davis v. State, 7 Md. 161 (1854); see In re Opinion of the Justices, 302 Mass. 605, 621, 19 N. E. (2d) 807, 818 (1939); People v. Hurlbut, 24 Mich. 44, 63 (1871); cf. State v. Seymour, 35 N. J. L. 47, 54 (1871); People v. Woodruff, 32 N. Y. 355, 364 (1865).
\item \textsuperscript{41} "The chief executive power of the state shall be vested in a governor.

\ldots Now, if it could be shown that the power to appoint all officers which are not expressly made elective by the people is a part of 'the chief executive power of the state,' the appellant's contention
the laws be faithfully executed include this power.42 Appointments by the governor have been held ineffective without statutory authority,43 or without complying with a statutory44 or constitutional requirement.45 Many decisions hold that the legislature may appoint state officers,46 or designate who shall appoint.47 In the few states whose courts have held that the legislature can not itself appoint, the majority rule expressly denies that the power is in the governor.48 The rule is almost universal that appointive power is not vested in the governor, in the absence of constitutional or statutory grant of power.49

would be sustained; but no authority whatever has been cited to sustain this view, nor is it believed that any exists . . . " Biggs v. McBride, 17 Ore. 640, 21 Pac. 878, 891 (1889). To the same effect, State v. Boucher, 3 N. D. 389, 395, 56 N. W. 142, 144 (1889); Richardson v. Young, 122 Tenn. 471, 125 S. W. 664, 669 (1910); cf. Dunbar v. Cronin, 18 Ariz. 583, 164 Pac. 447, 450 (1917); People v. Morgan, 90 Ill. 558, 562 (1878).

42 "It is true that certain powers are peculiar to each department . . . and the Governor sees that they (the laws) are faithfully executed . . . It does not follow, as a necessary conclusion, that, in order to perform this duty, he must have agents of his own nomination. Our form of government, in its various changes has never recognized this power as an executive prerogative." Mayor v. City Council of Baltimore, 15 Md. 376, 456 (1859).

43 Cox v. State, 72 Ark. 97, 78 S. W. 756 (1904); Davis v. State, 7 Md. 151 (1854); cf. People v. Fitch, 1 Cal. 519, 558 (1851); Cunningham v. Sprinkle, 124 N. C. 642, 33 S. E. 138, 139 (1899).

44 People v. Osborne, 7 Colo. 605, 4 Pac. 1074 (1884); see State v. Wright, 251 Mo. 325, 335, 158 S. W. 823, 827 (1913).

45 State v. Bowden, 92 S. C. 393, 75 S. E. 866 (1912).

46 Cox v. State, 72 Ark. 97, 78 S. W. 756 (1904); People v. Fitch, 1 Cal. 519 (1851); Cunningham v. Sprinkle, 124 N. C. 642, 33 S. E. 138 (1899); Richardson v. Young, 122 Tenn. 471, 125 S. W. 664 (1910).


48 Craig v. O'Rear, 199 Ky. 553, 251 S. W. 823 (1923); see In re Opinion of the Justices, 302 Mass. 605, 621, 19 N. E. (2d) 807, 818 (1939).

49 Fox v. McDonald, 101 Ala. 51, 3 So. 416 (1893); Dunbar v. Cronin, 18 Ariz. 563, 164 Pac. 447 (1917); Cox v. State, 72 Ark. 97, 78 S. W. 756 (1904); People v. Fitch, 1 Cal. 519 (1851); People v. Osborne, 7 Colo. 605, 4 Pac. 1074 (1884); State v. Bird, 129 Fla. 780, 163 So. 248 (1935); Americus v. Perry, 114 Ga. 881, 40 S. E. 1004 (1902); People v. Morgan, 90 Ill. 558 (1878); Craig v. O'Rear, 199 Ky. 553, 251 S. W. 823 (1923); State v. Herron, 24 La. Ann. 432 (1872); Davis v. State, 7 Md. 151 (1854); People v. Hurlbut, 24 Mich. 44 (1871); Daley v. St. Paul, 7 Minn. 390 (1862); State v. Seymour, 35 N. J. L. 47 (1871); State v. Rosenstock, 11 Nev. 128 (1876); Cunningham v. Sprinkle, 124 N. C. 642, 33 S. E. 138 (1899); State v. Boucher, 3 N. D. 389, 56 N. W. 142 (1893); Biggs v. McBride, 17 Ore. 640, 21 Pac. 878 (1889); Commonwealth v. Hanley, 9 Pa. 513 (1848); State v. Bowden, 92 S. C. 393, 75 S. E. 19411
The majority further relied on *Meyers v. United States*; but cases involving interpretation of the federal constitution seem inapplicable. Authorities long have recognized a difference in the powers of federal and state governmental departments.

Although Judge Richman cited numerous instances where appointive power had been placed in others than the governor, the majority refused to give weight to this contemporaneous construction of the constitution. Practical or contemporaneous construction is generally recognized as a proper method of interpretation which creates a strong presumption, entitled to great weight.

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50 272 U. S. 52 (1926).

51 The federal government is one of delegated powers; the Indiana Constitution provides that all power is inherent in the people. Ind. Const. Art. I, §1.

Elsewhere the distinction between federal and state governments has been recognized as to power of appointment. *See* Bridges v. Shallcross, 6 W. Va. 562, 573 (1873). Under state government this power repeatedly has been held to be a power of sovereignty reserved to the people, Fox v. McDonald, 101 Ala. 51, 13 So. 416 (1893); Cox v. State, 72 Ark. 97, 78 S. W. 750 (1904); Mayor v. City Council of Baltimore, 15 Md. 376 (1859); People v. Henderson 4 Wyo. 535, 35 Pac. 517 (1894); or a power of their representatives, the legislature, *see* Dunbar v. Cronin, 18 Ariz. 583, 164 Pac. 447, 450 (1917); or the power is held to be a political function to be placed where the people will, Richardson v. Young, 122 Tenn. 471, 125 S. W. 664 (1910); *see* State v. Frazier, 47 N. D. 314, 322, 182 N. W. 545, 547 (1921).

52 *See* Tucker v. State, 85 N. E. (2d) 270, 310, 311 (Ind. 1941) (dissenting opinion).

53 "Where there has been contemporaneous practical construction of particular provisions of the constitution, ... which has been acquiesced in for a considerable period, ... it is not to be denied that a strong presumption exists, that the construction rightly interprets the intention." Bridges v. Shallcross, 6 W. Va. 562, 575, 576 (1873).

54 "The power exercised by the legislature in the appointment of some of these officers ... is, in itself, a contemporaneous construction of the constitution which, if the question were doubtful, might be sufficient to turn the scale in its favor. Under any view, such
Prior Indiana decisions hold that appointment to office is an executive or administrative function, but deny that the governor has the exclusive power. The appointive power could be given to one or more administrative officers. Appointment by a board similar to the ones in controversy has been upheld. Even nominations by non-governmental agencies have been held valid. Thus, if doubt existed prior to the instant decision concerning the meaning of Article V, contemporaneous construction and judicial decision support the dissent. Only by a priori determination could the majority have decided that the contemporaneous legislative construction was in open violation of Article V.

In developing its construction of the constitution, the majority asserted that the intention of the Indiana constitutional convention was to vest the appointive power in the Governor; first, because "the Constitution-makers knew that the appointive power was in the President under the Federal

construction is entitled to great weight, and could not be lightly regarded." Briggs v. McBride, 17 Ore. 640, 21 Pac. 878, 881 (1889); cf. Mayor v. City Council of Baltimore, 15 Md. 376, 458 (1859).

See State v. Hyde, 129 Ind. 296, 308, 28 N. E. 186, 189 (1891) (governor's appointee had no right to the office of state supervisor of oil inspection; the appointee of the state geologist, as provided by statute, was the legal holder of the office).

"While the appointment to office is, generally, the exercise of an executive or administrative function, we do not think it must, of necessity, be made by the chief executive..." Ibid.

"... the general assembly has created... (named offices) ... and many other offices, and has made the incumbents of such offices appointive... it need not provide that such appointments shall be made by the governor. Such appointments, if the law so provides, could doubtless be made by the governor of the state, or by any one or more of the administrative state officers.

"We are not aware that a different doctrine has ever been advanced or advocated by any one." State v. Gorby, 122 Ind. 17, 25, 23 N. E. 678, 681 (1890).

French v. State, 141 Ind. 618, 41 N. E. 2 (1895).


The argument of the majority as to open violation seemingly ignores the function of contemporaneous construction in constitutional interpretation. In Ogden v. Saunders, 12 Wheat. 213, 290 (U. S. 1827), the court said, "Every candid mind will admit that this is a very different thing from contending that the frequent repetition of wrong will create a right. It proceeds upon the assumption that the contemporaries of the constitution have claims to our deference on the question of right, because they had the best opportunities of informing themselves of the understanding of the framers of the constitution, and of the sense put upon it by the people when it was adopted by them..."
Constitution," and second that "the Constitution-makers knew that the appointive power was . . . in the governor under the old Constitution of Indiana, and that it was there curtailed and limited by a provision for approval by the Senate. In the new Constitution they omitted the limitation upon the power, and inserted no other limitations. . . ." The court did not mention that not only the limitation, but the entire section granting power of appointment was omitted in the 1851 constitution.

The Journal of the constitutional convention reveals that some of the delegates wanted a change in the appointment of officers by the governor. There is evidence, therefore, that the omission of the section granting the governor power to appoint was not accidental. Likewise a comparison of the constitutions of 1816 and of 1851 supports this conclusion. Under the constitution of 1816 three classes of offices were recognized: appointment to the first class was expressly directed by the Constitution; appointment to the second class was by the governor, by and with the consent of the senate; and appointment to the third class was to be "in such manner as may be directed by law." That a distinction was intended between appointment by the governor and the filling of offices "in such manner as may be directed by law" seems obvious, as these provisions were all in the same section of the Constitution. This section seems inconsistent with the majority's interpretation of substantially the same phrase in the 1851 constitution.

61 Tucker v. State, 35 N. E. (2d) 270, 283 (Ind. 1941). The Federal constitution Art. II, §2, contains these words: "but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments." (Italics supplied). Under this express grant of appointive power in the Federal constitution it seems clear the executive had no such power as is implied to the governor by the decision in Tucker v. State.


63 A resolution proposing the reform that all officers be elected by the people was introduced October 9, 1850, and another to the same effect October 12, 1850. The committee to which the resolutions were referred reported a section embracing the proposed change, and asked its adoption by the convention. The report was concurred in, and passed to second reading. Ind. Const. Convention Journal, pp. 26, 49, and 172.

64 Ind. Const. (1816) Art. IV, 8.

65 Ibid.

The Indiana separation of powers provision, which differs from the usual tri-partite division of powers by inclusion of administrative officers within the executive department, is relied on by the majority. In other states, the rule has been followed consistently that appointment can be placed elsewhere than in the governor and the division of powers remain unimpaired.

The majority adopts a rigid conception of separation of powers. Briefly, the argument is that appointment is an executive function, and, therefore, only the executive can exercise it. But even the majority makes an exception where appointment is a necessary incident to the exercise of some other power. Thus even under the majority’s view it is not the nature of the function which prevents others from exercising it, but the majority’s assumption that the governor has the exclusive appointive power because he has the executive power. The separation of powers doctrine as reflected in the modern cases does not support such a conclusion.

If the majority’s rigid concept of separation of powers is applied in future cases, the validity of many administrative agencies exercising more than one function will be in doubt and governmental agencies long recognized as constitutional may expect new attacks on the legality of their existence.

**IV**

Doubt has been raised by the decision in *Tucker v. State* concerning the existence and organization of administrative departments and agencies in Indiana. Two possibilities are: reversion to the immediately preceding organization; reversion to the organization prior to 1933.

Express repeal of the State Executive-Administrative Act of 1933 negatives the first possibility, unless the re-
pealing act itself is invalid.\textsuperscript{73} The second possibility apparently obtains because the original acts creating the various state administrative agencies were not repealed by either the State Executive-Administrative Act of 1933,\textsuperscript{74} or the State Administrative Act of 1941.\textsuperscript{75} Thus, the state administrative agencies apparently now derive their authority from the acts originally creating them, excepting such ones as have been specifically repealed.

In a recent opinion, the Attorney General stated that Chapter 4 of the Acts of 1941 terminated the executive orders under the State Executive-Administrative Act of 1933, but did not repeal the original acts creating the boards and prescribing their power and duties. Under this opinion the original boards are still in existence, and under the decision in \textit{Tucker v. State} the members must be appointed by the governor.\textsuperscript{76}

Sections relating to the number of members of the Industrial Board and the salaries and expenses of members and employees\textsuperscript{77} were repealed by Chapter 40, Acts of 1941. The Attorney General’s opinion is that Chapter 34 of the Acts of 1937,\textsuperscript{78} creating the Division of Labor, adopted the above repealed sections by the rule of \textit{in pari materia}, and that since the latter act has not been repealed, the board exists as originally created.\textsuperscript{79}

Serious doubt may arise as to the validity of several 1941 acts not litigated in \textit{Tucker v. State}. It would seem

\textsuperscript{73} Application of the \textit{in pari materia} rule of construction might be made if the intent of the General Assembly were found to be that the repeals in Chapter 4, Acts of 1941, were not to take effect unless the administrative organization in Chapter 13 were held valid. However, the fact that a separate act was passed to repeal the prior administrative organization would seem to be some indication that the General Assembly intended to repeal the State Executive-Administrative Act of 1933, regardless of the constitutionality of Chapter 13.

\textsuperscript{74} Ind. Acts 1933, c. 4, \textit{IND. STAT. ANN.} (Burns, 1933) §§60-101, \textit{et seq.}

\textsuperscript{75} Ind. Acts 1941, c. 13, \textit{IND. STAT. ANN.} (Burns, Supp. 1941) §§60-134, \textit{et seq.}

\textsuperscript{76} \textit{OPS. ATT’Y GEN., IND.}, July 15, 1941. This opinion reviewed the status of the State Athletic Commission, Soldiers and Sailors Monument Board of Control, Battle Flags Commission, Store Licenses, Superintendent of Buildings and Property, Grand Army of the Republic, Year Book, and Statistical Commission.

\textsuperscript{77} Ind. Acts 1929, c. 172, §§50-51, \textit{IND. STAT. ANN.} (Burns, 1933) §§40-1501 to 1502.

\textsuperscript{78} \textit{IND. STAT. ANN.} (Burns, Supp. 1941) §§40-2101 \textit{et seq.}

\textsuperscript{79} \textit{OPS. ATT’Y GEN., IND.}, July 12, 1941.
that at least the provisions in these acts, providing for appointment by others than the Governor, are now invalid. Furthermore, two acts of the General Assembly provided for appointment of officers by the Governor from lists submitted by non-governmental agencies.

Chapter 40 of the Acts of 1941 repealed the sections containing power of appointment to numerous boards and agencies. Other 1941 acts placed the appointive power in persons other than the Governor. If general repeal by Chapter 40 of the older method of appointment is valid, and the acts of 1941 placing this power elsewhere than in the Governor are invalid under the decision in Tucker v. State, the appointive power seemingly is left unplaced. However, Tucker v. State holds that all appointive power is in the Governor, and the Attorney General has taken the position that the Governor can appoint to take care of the situation created by this lack of statutory provision for appointment.

CORPORATIONS

Amendment of Indiana General Corporation Act. The word "reorganization," as used in the Indiana General Cor-


82 See boards and agencies enumerated in footnote 11.

83 See Acts enumerated supra note 80.

84 See OPS. ATT'Y GEN., IND., July 12, 1941.
poration Act of 1929,\(^1\) referred to the incorporation of existing corporations under the provisions of the act. However, "reorganization" in a technical sense applies to a judicial sale of corporate property and franchises and the formation by the purchaser of a new corporation.\(^2\) Consequently, the meaning of the 1929 act was greatly clarified in 1941 by substituting the terms "accept," "accepted," "acceptance" and "articles of acceptance" for "reorganize," etc.

The choice of these new words was necessary because compliance of an existing corporation with the provisions of the 1929 act was in fact accomplished by an amendment to the articles of incorporation\(^4\) and not by a reorganization. Compliance is merely an amended continuance of the corporation and not the creation of a new corporation.\(^5\)

A corporation, which came into existence prior to March 16, 1929, and whose corporate existence has terminated, may file articles of acceptance within five years from the date of termination.\(^6\) The corporation then shall be treated as though its existence was continuous and its acts as valid. By express provision of the amendment this does not apply to corporations who have forfeited their charters.\(^7\)

A corporation ceases to exist upon the expiration of its charter, unless there is some statutory provision to the contrary.\(^8\) The 1941 amendment does not extend the corporate

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\(^1\) **IND. STAT. ANN.** (Burns, 1933) §§25-101 to 254.

\(^2\) People v. Halstead Bank, 295 Ill. App. 198, 14 N. E. 872 (1938); People v. Cook, 110 N. Y. 443, 18 N. E. 113 (1888); 8 THOMPSON, CORPORATIONS (3rd ed. 1927) §5962; BALLENTINE, LAW DICTIONARY (1930) 1118.

\(^3\) **IND. STAT. ANN.** (Burns, Supp. 1941) §§25-101, 230, 245, 246 to 249.

\(^4\) SCHORTEMEIER AND MCNUTT, IND. GEN. CORP. ACT ANN. (1929) n. 187a, 188. In a recent opinion, not based upon 1941 legislation, the attorney general held that all corporations which elect to accept the provisions of the General Corporation Act, must include the words "corporation" or "incorporated" or their abbreviations, in the corporate name. **OPS. ATT'Y GEN., IND.,** Aug. 19, 1941. This reverses an earlier opinion that corporations existing prior to the 1929 act which accepted, did not have to comply with that provision. *Id.* (1929) 89.

\(^5\) Rossi v. Caire, 186 Cal. 554, 199 Pac. 1042 (1921); 8 THOMPSON, CORPORATIONS (3rd ed. 1927) §5962.

\(^6\) **IND. STAT. ANN.** (Burns, Supp. 1941) §25-245.

\(^7\) Ibid.

\(^8\) Arlington Hotel Co. v. Rector, 124 Ark. 90, 186 S. W. 622 (1916); Venable Bros. v. Southern Granite Co., 135 Ga. 508, 69 S. E. 522 (1910); Clark v. American Cannel Coal Co., 165 Ind. 213, 73 N. E. 1083 (1905); note (1927) 47 A. L. R. 1394; 8 FLETCHER CYCLOPEDIA CORPORATIONS (perm. ed. 1931) §3842.
life but revives it. Authorities differ as to whether a corporation which acts following the expiration of its charter is freed from collateral attack by virtue of being a de facto corporation or corporation by estoppel; or whether it is subject to collateral attack since it ceases to exist as a corporation.

Indiana courts have held that a de facto corporation does not exist where there can be no de jure corporation. Where the corporation charter expires there is no law with which a corporation may colorably comply. Thus, the corporation is not de facto but ceases to exist and is subject to collateral attack. The effect, then, of filing articles of acceptance is to make the acts of the corporation valid and after such filing the corporation will not be subject to collateral attack.

If the corporation acts within the five year period and does not accept, are the acts valid? May the corporation be collaterally attacked? Under a Georgia revival statute it was held that the corporation was de facto during the period allowed for accepting although the corporation in fact had not accepted. A later case held that after the passage of the revival statute a debtor was stopped from denying the existence of the corporation although formerly the state had

9 IND. STAT. ANN. (Burns, 1933) §25-243 (corporation existence extended for two years for purpose of winding up business).
10 (1939) 28 CAL. L. REV. 195; 8 FLETCHER, CYCLOPEDIA CORPORATIONS (perm. ed. 1931) §4092.
14 Clark v. American Cannel Coal Co., 165 Ind. 213, 73 N. E. 1083 (1905) (collateral attack allowed in suit by corporation, when corporation operating under an unconstitutional extension statute after expiration of special charter).
15 Clark v. American Cannel Coal Co., 165 Ind. 213, 73 N. E. 1083 (1905).
16 GA. CODE (1933) §22-601.
allowed collateral attacks on corporations whose charter had expired. It is difficult to rationalize the holding of the court that the revival statute had the effect of making the corporation de facto. Probably the best rationalization is that the corporation by continuing to exist is presumed to have intended to comply with the revival statute. Thus, the question is answered through an inferred consequence of revival legislation. Apparently this question is still undetermined in Indiana.

Section four of the amendment permits a resident agent of a foreign corporation to terminate his agency by filing a statement with the secretary of state. The secretary of state then notifies the corporation. However, the corporation is not free from service of process after the agent's resignation, since the General Corporation Act provides that on failure of a foreign corporation to appoint an agent the process may be served on the secretary of state.

Not For Profit Corporation. An act of 1909 for the incorporation of private, not-for-profit corporation owning and conducting charity hospitals, omitted the procedure for amending the articles of incorporation and for dissolution. These omissions were corrected by the 1941 acts, which provide methods similar to those in the General Not-For-Profit Corporation Act.

INDIANA SECURITIES ACT

Indiana Acts 1941, c. 30 amended the 1937 Securities Act by eliminating the term "public offering" as one of the

20 One of the essentials for a de facto corporation is that there must be a valid law under which a corporation has colorably complied with incorporating. By merely continuing to exist a corporation can hardly be said to have complied with the provision in the amendment for acceptance.
23 IND. STAT. ANN. (Burns, 1933) §§25-318.
24 Id. at §§25-3601.
26 IND. STAT. ANN. (Burns, Supp. 1941) §§25-507 to 542.
1 IND. STAT. ANN. (Burns, 1941) §§25-330.
2 Ind. Acts. 1937, c. 120.
criteria in determining whether a particular stock issue or transaction falls within the act. Certain types of securities and transactions, such as negotiable instruments, sales of securities under court order and sales by mortgages, were exempted under the earlier act if they did not involve a "public offering." Under the new act those types are exempted with no mention of "public offering." Without this limitation the exemptions are probably broadened to some degree, but the act still seems to include those situations which Blue Sky Laws are intended to cover. The reason for the change was the uncertainty which resulted from the use of so vague a term as "public offering." The 1937 Act, like the Federal Securities Act which also uses the term, made no attempt to define it. With the passage of time, through judicial construction and administrative regulations, the bounds of public and private offering probably would be fairly determined, but in the meantime, a dealer in securities had to assume the risk of determining whether or not an offering was public, with very indefinite standards to guide him.

Several changes have been made in the administration of the act. The securities commissioners and their deputies are declared to be police officers of the state with power to make arrests for violations of the act, and to serve process, notice, or orders in the enforcement of the act. The commission is given the power to determine whether a proposed security issue or transaction is exempt. It may, however, decline to

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3 Blue Sky Laws are intended to protect purchasers and security holders who must rely almost exclusively upon the representations made to them by issuers or their selling agents. People v. F. H. Smith Co., 230 App. Div. 268, 243 N. Y. Supp. 446 (1930); Good-year v. Meux, 143 Tenn. 287, 228 S. W. 57 (1921).


5 The general counsel to the Securities and Exchange Commission offered as principal factors to be considered: (1) the number of offerees and their relationships to one another and to the issuer; (2) the number of units of the security offered by the issuer; (3) the monetary size of the offering; and (4) the manner in which the offering is made. S. E. C. Release No. 285, Mar. 1935. For other criteria that have been proposed in order to determine whether or not a particular securities transaction involves a public hearing, see S. E. C. v. Sunbeam Gold Mines, 95 F. (2d) 699 (C. A. 9th, 1938); note (1933) 87 A. L. R. 42; C. C. A Securities Act Serv. 2202, 2203; Op. ATT'Y GEN., IND. (1930) 44.

6 IND. STAT. ANN. (Burns, Supp. 1941) §25-830.
exercise this power at its discretion. The decision of the commission is binding unless an appeal is taken.

The commission now may determine the fairness of and approve securities to be issued under any reorganization plan not approved by a federal court of competent jurisdiction, or securities to be issued in exchange for other securities. Under the former act, only a court could approve of the terms of issuance. The commission also is impowered to approve or disapprove any plan of reorganization.

The commission may, at its discretion, accept certified copies of the registration statement of a security which has been filed with the federal Securities and Exchange Commission in lieu of all the information required for registration.8

CRIMINAL LAW

Chapter 148 of the Acts of 19411 deals with several different crimes and matters of criminal procedure.2 It is believed that the act does not violate constitutional limitations on subject matter and title.3 There is but one general subject of legislation here—viz. public offenses. The different types of crimes, the penalties and the procedures seem to be "matters properly connected therewith."4 The title5 certainly is sufficiently broad,6 and the subject matters ex-

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7 Id. at §25-835.
8 Id. at §25-836.
1 Generally, there is no question that the previously existing statutes have been repealed by implication by the 1941 provisions. Hence only in the cases where such repeal is thought questionable will the problem be discussed.
2 The procedural matters, being relatively unimportant, are not discussed. They are found in Ind. Acts 1941, c. 148, §§10, 11, IND. STAT. ANN. (Burns, Supp. 1941) §§89-815, 1203.
4 "If there is any reasonable basis for grouping together in one act various matters of the same nature, and the public can not be deceived reasonably thereby, the act is valid." Stith Petroleum Co. v. Dept of Audit and Control, 211 Ind. 400, 409, 5 N.E. (2d) 1177, 521 (1937). See Albert v. Milk Control Board, 210 Ind. 283, 288, 200 N. E. 698, 690 (1936); Board of Com'rs v. Scanlon, 178 Ind. 142, 146-147, 98 N. E. 801, 802 (1912).
5 The title is, "An act concerning public offenses and criminal procedure, prescribing penalties, and repealing laws or parts of laws in conflict. . . ."
6 "Art. 4, §19 of the Constitution aims only at titles narrower than the enactment. The unnecessary breadth of the title is ordinarily no objection to it." Crabb's v. State, 193 Ind. 248, 254, 139 N.E. 180, 182 (1923); Manson, The Drafting of Statute Titles (1934) 10 IND. L. J. 155.
pressed in the act apparently are stated with sufficient cer-
tainty in the title.\textsuperscript{7}

\textit{Murder}. No substantive change was made in the exist-
ing section\textsuperscript{8} on murder in the first degree. It was merely reworded.\textsuperscript{9}

\textit{Manslaughter}. Two changes were made in the crime of manslaughter.\textsuperscript{10} The distinction between voluntary and in-
voluntary manslaughter was abolished. Involuntarily kill-
ing a person in the commission of some unlawful act now

carries the same penalty as voluntarily killing without malice
—imprisonment for not less than two nor more than twenty-
one years.\textsuperscript{11}

The previous act provided, “Whoever voluntarily kills
any human being without malice expressed or implied is

 guilty. . . . ” The new section adds the words “in a sud-

den heat” after the word “implied.” This addition seemingly

will make no change, however, in the essential elements of
the crime. This phrase was part of the definition until a
1927 amendment\textsuperscript{12} eliminated it. The Supreme Court of
Indiana held that the elements were the same under this
amendment as before.\textsuperscript{13}

\textit{Rape}. The section making an attempt to rape\textsuperscript{14} a spe-
cific crime was expressly repealed.\textsuperscript{15} The new act, however,
does not expressly effect c. 210 of the Acts of 1927. Whether it
amounts to an implied repeal is as yet undecided. Implied
repeals are not favored and where two acts relate to the

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\textsuperscript{7}Criminal statutes with almost identical titles have been upheld as
valid. Christison v. State, 177 Ind. 363, 98 N.E. 113 (“An act
concerning public offenses”); Peachee v. State, 63 Ind. 399 (1878)
(“An act defining certain felonies and prescribing penalties there-
for”).

\textsuperscript{8}Ind. Acts 1941, c. 148, §1, IND. STAT. ANN. (Burns, Supp. 1941)
§10-3401. Since every section but one repeals, to some extent at
least, previous sections, the new sections are inserted in Burns
Supplement under the same section number as the previous act in
the parent volume or an earlier supplement.

\textsuperscript{9}The section as to murder in the second degree was not affected by
the 1941 act.

\textsuperscript{10}Ind. Acts 1941, c. 148, §2, IND. STAT. ANN. (Burns, Supp. 1941)
§10-3405.

\textsuperscript{11}Formerly the penalty for involuntary manslaughter was imprison-
ment for one to ten years.

\textsuperscript{12}Ind. Acts. 1927, c. 203, §1. See IND. STAT. ANN. (Burns, Supp.
1941) §10-4202.

\textsuperscript{13}Romeo v. State, 203 Ind. 116, 173 N. E. 324 (1931).

\textsuperscript{14}IND. STAT. ANN. (Burns, 1933) §10-4202.

\textsuperscript{15}Ind. Acts 1941, c. 148, §13.
same subject matter both are given effect if possible. There must be a positive repugnancy for the later act to repeal the former. Further, a criminal statute is impliedly repealed only when the new statute covers the whole subject of the old, adds new offenses, and prescribes different penalties.

The section concerning rape, in the 1927 act, contains two paragraphs: the first deals with rape in the first degree; the second, with rape in the second degree. The new act changes the definition; covers the entire subject matter; and reduces the penalties included in the first paragraph. It seems impossible for the two to stand together. The new section, however, makes no reference to rape in the second degree. This omission may either repeal the second paragraph, or repeal may extend only to actual repugnancy. A mere omission to include a separable part of a previous act in the new statute would not seem to make the two so inconsistent as to imply a repeal. The conflict

16 Straus Bros. v. Fisher, 200 Ind. 307, 163, N. E. 225 (1928); Greathouse v. Board, 198 Ind. 95, 151 N. E. 411 (1926); Renner v. State, 182 Ind. 394, 106 N. E. 703 (1914); State v. Noblesville, 157 Ind. 31, 60 N. E. 704 (1901); Pitzer v. Ind. State Board, 94 Ind. App. 631, 177 N. E. 876 (1931).


18 Renner v. State, 182 Ind. 394, 106 N. E. 703 (1914); State v. Ensley, 177 Ind. 483, 97 N. E. 113 (1911); State v. Wells, 112 Ind. 237, 13 N. E. 722 (1887).

19 IND. STAT. ANN. (Burns, 1933) §10-4201.

20 The words "unlawfully" and "male or" have been eliminated from the sentence, "Whoever, unlawfully has carnal knowledge... of a male or female child under the age of sixteen years." The omission of "unlawfully" would seem to make no change in the effect of the section. The acts made punishable are of themselves unlawful.

21 With the exception of the few changes mentioned, the words used are almost identical.

22 Formerly the penalty was imprisonment for not less than five nor more than twenty-one years. It is now for two to twenty-one.

23 Apparently this is the interpretation accorded the new act by the compilers of Burns Statutes. See compilers note to §10-4201, IND. STAT. ANN. (Burns, Supp. 1941).

24 See SUTHERLAND, STATUTORY CONSTRUCTION (1891) §138. Also see Schaeffer v. State, 202 Ind. 318, 173 N. E. 229 (1930); Pitzer v. Ind. State Board, 94 Ind. App. 631, 177 N. E. 876 (1930).

25 In Schaeffer v. State, 202 Ind. 318, 173 N. E. 229 (1930) the court held that the rape statute of 1927, Ind. Acts 1927, c. 201, §2 dealing with rape in the first and second degrees did not repeal by implication through omission of the section on attempt to rape. It quoted with approval the following language from Payne v. Conner, 3 Bibb. 180, 181 (Ky. 1813): "... we think the provision of the act repealing all acts or parts of acts coming within
between the two sections is not direct.26

**Assault.** Only the penalty was changed in the section pertaining to assault. Previously, the fine could not exceed $50. The maximum is now $500, to which may be added imprisonment in the county jail or in the Indiana State Farm not to exceed six months.27

**Grand Larceny.** If the new section is literally interpreted, a felonious intent28 is no longer an element of the statutory grand larceny.29 A mere “borrowing” without the consent of the owner, or a taking under a mistaken claim of right falls within this section. While such an interpretation is possible,30 it seems improbable.

A wrongful intent has long been recognized as an important, if not almost essential, element of a criminal act.31 Likewise, a felonious intent is classically an element of larceny. Courts are reluctant to construe a statute so as to make a person guilty of a crime without a criminal intent32 unless the legislature has expressly so provided or the evil to be cured requires such interpretation.33 The Indiana Supreme Court has held felonious intent necessary, though not

its purview, should be understood as repealing all acts in relation to all cases which are provided for by the repealing act; and that the provisions of no act are thereby repealed in relation to cases not provided for by it.”

26 “... there is no irreconcilable conflict between statutes unless substantial harmony is impossible, after application of every recognized rule of statutory construction.” Pitzer v. Ind. State Board, 94 Ind. App. 631, 638, 177 N. E. 876, 879 (1930).


28 As to what constitutes a felonious intent see: Currier v. State, 157 Ind. 114, 60 N. E. 1023 (1901); Barnhart v. State, 154 Ind. 177, 56 N. E. 212 (1899); Robinson v. State, 113 Ind. 510, 16 N. E. 184 (1887); EWDBANK, INDIANA CRIMINAL LAW (1929) §971.

29 Formerly the definition was, “Whoever feloniously steals, takes, and carries, leads, or drives away the personal goods of another . . . ” IND. STAT. ANN. (Burns, 1933) §10-3001. The two italicized words were omitted from the new act. Ind. Acts 1941, c. 148, §9, IND. STAT. ANN. (Burns, Supp. 1941) §10-3001.

30 “The courts cannot venture upon the dangerous path of judicial legislation to supply omissions, or remedy defects in matters committed to a coordinate branch of the government.” Railroad Comm. v. Grand Trunk W. R. R., 179 Ind. 255, 263, 100 N. E. 852, 855 (1912); CRAWFORD, STATUTORY INTERPRETATION (1940) §200.

31 Fritz v. State, 178 Ind. 463, 99 N. E. 727 (1912); CLARK AND MARSHALL, CRIMES (1927) §38.

32 Mhoon v. Greenfield, 52 Miss. 434 (1876); Bradley v. People, 8 Colo. 599, 9 Pac. 783 (1886); Commonwealth v. Barney, 115 Ky. 475, 74 S. W. 181 (1903).

33 E. g. vehicle taking, IND. STAT. ANN. (Burns, 1933) §10-3010; Rokvic v. State, 194 Ind. 450, 143 N. E. 357 (1923).
mentioned, in the embezzlement statute,\textsuperscript{34} and in a statute
prohibiting the sale of diseased meat.\textsuperscript{35} Other courts have
implied the felonious intent in a larceny statute,\textsuperscript{36} a usury
statute,\textsuperscript{37} and an embezzlement statute.\textsuperscript{38} In the light of
such decisions, a felonious intent probably remains in Indiana
a necessary element of the crime of grand larceny.\textsuperscript{39}

Under this interpretation, an indictment in the words
of the statute apparently will not be sufficient.\textsuperscript{40}

The statute could be declared unconstitutional for un-
certainty.\textsuperscript{41} If an act cannot be given an intelligible meaning,
it will be held invalid; and this especially is true of criminal
statutes.\textsuperscript{42} But the failure to expressly require a felonious
intent need not invalidate the act if the legislature "intended"
its inclusion.\textsuperscript{43} Further, the Indiana court has held that the

\textsuperscript{34} State v. Ensley, 177 Ind. 483, 97 N. E. 113 (1912); Stropes v. State,
120 Ind. 562, 22 N. E. 772 (1889).

\textsuperscript{35} Schmidt v. State, 78 Ind. 41 (1881).

\textsuperscript{36} "... we harmonize this section with the general principles of
jurisprudence. We do no violence to the language of the act; we
only limit the force of a rule of construction respecting omitted
words by the application of another rule as (in a legal sense) the
higher law of the case." Bradley v. People, 8 Colo. 599, 9 Pac.
783, 786 (1886).

\textsuperscript{37} People v. Shakum, 251 N. Y. 107, 167 N. E. 187 (1929).

\textsuperscript{38} Commonwealth v. Barney, 115 Ky. 475, 74 S. W. 181 (1903); State
v. Blue, 17 Utah 175, 53 Pac. 978 (1898). "Willful wrongdoing"
was implied in the following cases: Mhoon v. Greenfield, 52 Miss.
434 (1876) (statute levied treble damages for conversion); Wal-
lace v. Furch, 24 Mich. 255 (1872) (same); State v. Waxman, 93
N. J. L. 27, 107 Atl. 150 (1919) (sale of liquor without permit).
Also see SUTHERLAND, STATUTORY CONSTRUCTION (1899) §§354, 355;
CRAWFORD, STATUTORY CONSTRUCTION (1940) §275. For an ex-
cellent note on intent in bigamy prosecution see (1928) 57 A. L. R.
792.

\textsuperscript{39} Some jurisdictions have given some effect to the statutory change
by holding that it shifted the burden of proof to the defendant.
Bradley v. People, 8 Colo. 599, 9 Pac. 783 (1886); State v. Blue,
17 Utah 175, 53 Pac. 978 (1898).

\textsuperscript{40} The Indiana cases cited notes 34 and 35 supra, hold the indictments
insufficient even though in the words of the statute.

\textsuperscript{41} "Every act ... shall be plainly worded, avoiding, as far as prac-
ticable, the use of technical terms." Ind. Const. Article IV, §20.

\textsuperscript{42} Hunt v. State, 195 Ind. 585, 146 N. E. 329 (1924); Glendale Coal
Co. v. Douglas, 193 Ind. 73, 137 N. E. 615 (1923); Smith v. State,
186 Ind. 262, 115 N. E. 943 (1917); Gustavel v. State, 158 Ind.
618, 54 N. E. 123 (1899); Cook v. State, 26 Ind. App. 278, 59
N. E. 489 (1900). See also CRAWFORD, STATUTORY CONSTRUCTION
(1940) §198; Aigler, Legislation in Vague or General Terms (1923)
21 MICH. L. REV. 581.

\textsuperscript{43} See p. 153 supra.
legislature may define a crime by name without stating its essential elements.\(^4\)

**Vehicle Taking.** Section 8 of chapter 148 “adopted” parts of each of the three existing sections pertaining to vehicle taking and the unlawful use of vehicles.\(^45\)

Section 10-3010 of Burns statutes defined the crime of “vehicle taking,”\(^46\) and imposed a penalty of one to ten years in the state prison. Section 10-3011 made it unlawful to “use, drive, run or operate” a vehicle without the consent of the owner.\(^47\) Section 10-3012 provided that the violation of section 10-3011 was a misdemeanor.\(^48\)

The 1941 act defines “vehicle taking” substantially as defined in section 10-3011 and hence in a more limited sense than in section 10-3010. Under the new section, the defendant upon conviction is subject to the same penalty as that in section 10-3010, but in the discretion of the court or jury the sentence may include not more than one year in the county jail, the Indiana State Farm, or the Indiana Women’s Prison. To this may be added a fine not to exceed $500.00. The latter provisions are similar to the punishment provided in section 10-3012.

The new act incorporated parts of each of the existing sections, but it is improbable that section 10-3010 is impliedly repealed.\(^49\) The definitions in the two acts include different subjects, and the new act far from covers the whole subject

\(^4\) Hood v. State, 56 Ind. 263 (1877); Wall v. State, 23 Ind. 150 (1864) (overruled four previous cases).

\(^45\) This new section was inserted under §10-3011 of IND. STAT. ANN. (Burns, Supp. 1941).

\(^46\) “Whoever without the consent of the owner takes, hauls, carries, or drives away, any vehicle, automobile, car, truck, airplane or airship . . . , or any accessory or appurtenance contained in or forming a part, thereof, of the value of $50.00 or more or whoever receives, buys, conceals, or aids in the concealment of such . . . knowing the same to have been stolen. . . .”

\(^47\) “It shall be unlawful for any person . . . to assume control of any vehicle of any character whatsoever which vehicle is the property of another, and to use, drive, run or operate such vehicle, without first procuring the consent of the owner thereof . . . and it shall also be unlawful for any person or persons . . . to accompany any person . . . while unlawfully using, driving, running or operating any vehicle . . . with knowledge . . . it is without the consent of the owner thereof.”

\(^48\) The penalty was a fine of $25.00 to $500.00 and imprisonment in the county jail for ten days to six months.

\(^49\) For discussion of implied repeal in Indiana see p. 151 *supra.*
matter of the old. The two acts are not so inconsistent that they cannot stand together.

On the other hand by using the definition in section 10-3011, the new section does cover the subject matter of sections 10-3011 and 10-3012. Furthermore, the offense has been changed from a misdemeanor to a felony. These two sections, therefore, would seem to be repealed by the 1941 act.

Robbery. The words "forcibly and feloniously" have been omitted from the statutory definition of robbery. As pointed out above the failure to mention a felonious intent will probably make no change in the essential elements of the crime since the court may imply such requirement.

Omitting the word "forcibly" would not seem to make any material change. The taking still must be "by violence or by putting in fear." This is but another way of stating the element of force.

The provision, "Whoever perpetrates an assault or an assault and battery upon any human being with intent to commit robbery shall on conviction suffer the same penalty as prescribed for robbery" was eliminated. Such assault will not go unpunished. The criminal may be prosecuted

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50 If it be said that there is a repeal, the following acts are no longer punishable as vehicle taking: an unlawful taking without also a using, driving, running or operating the vehicle; the taking of accessories of the value of $50.00 or more; and the receiving, buying or concealing of such vehicle.

51 See SUTHERLAND, STATUTORY CONSTRUCTION (1891) §142.

52 "... if the same offense, identified by name or otherwise is altered in degrees or incident, if a felony is changed to a misdemeanor, or vice versa, the statute making such changes has the effect to repeal the former statute." Id. at §143. Also see cases cited notes 16 to 18 supra.

53 This is the conclusion reached by the compilers of Burns Annotated Statutes. The 1941 section was given the section number 10-3011 and the compilers note stated that act was believed to have superseded sections 10-3011 and 10-3012.

54 Ind. Acts 1941, c. 148, §6, IND. STAT. ANN. (Burns, Supp. 1941) §10-4101.

55 See p. 153 supra. Since the interpretation accorded to the section on grand larceny and robbery undoubtedly will be the same, conviction may still be had for grand larceny under a robbery indictment. Payne v. State, 194 Ind. 365, 142 N. E. 651 (1924); Duffy v. State, 154 Ind. 250, 56 N. E. 209 (1900); Rains v. State, 137 Ind. 88, 36 N. E. 532 (1893). It would not include petit larceny, however, if it were held that no felonious intent is required in robbery.

56 Koby v. State, 209 Ind. 91, 198 N. E. 88 (1935); Shinn v. State, 64 Ind. 13 (1878); CLARK AND MARSHALL, CRIMES (1927) §374.
for (1) assault and battery,57 (2) assault and battery with intent to commit a felony,58 or (3) conspiracy to commit a felony.59 This means a considerable reduction in the punishment, however. The penalty for robbery is imprisonment for ten to twenty-five years while the severest penalty under the other sections is two to fourteen years and a fine of from $25 to $5000.

Burglary. Substantial changes were made in the crime of burglary, including a change in its essential elements.60

(a) First degree burglary. Prior to the 1929 amendment61 both a breaking and an entry were necessary elements to the crime.62 The 1941 act re-establishes the element of "breaking." Previous decisions have marked out what constitutes a breaking.63

The act originally read, "Whoever enters any dwelling house . . . with the intent to take, steal or carry away any property of any kind or to commit any felony therein. . . ." The italicized words have been omitted. A taking however is covered by "or intent to commit any felony therein. . . ."

The term of imprisonment remains as it was in the 1935 act—ten to twenty years, but the provision for a fine was repealed.

(b) Second degree burglary. A breaking and entering now is required in place of a breaking or entering. The act continues to limit burglary in the second degree to the nighttime.64

The provision prohibiting the possession of keys, picklocks and similar objects with a felonious intent to break or

57 IND. STAT. ANN. (Burns, 1933) §10-403; EWBANK, INDIANA CRIMINAL LAW (1929) §908.
58 IND. STAT. ANN. (Burns, 1933) §10-401; EWBANK, INDIANA CRIMINAL LAW (1929) §§901-904, 906.
59 IND. STAT. ANN. (Burns, 1933) §10-1101; EWBANK, INDIANA CRIMINAL LAW (1929) §1651.
60 IND. STAT. ANN. (Burns, Supp. 1941) §10-701. This section was amended in 1935. Any reference to the "previous act," therefore, refers to the section printed in the 1935 Supplement to Burns.
61 IND. STAT. ANN. (Burns, 1933) §10-701.
62 IND. STAT. ANN. (Burns, 1928) §2446.
64 "There was no daytime burglary at common law. It is a creature of statute." Dedrick v. State, 210 Ind. 259, 282, 2 N. E. (2d) 409, 420 (1936).
enter or the making of these articles with the felonious intent to enter was repealed.

The provision, "that such person has in his possession a dangerous or deadly weapon, or commits an act of violence against the person, upon any one found in such place, the penalty shall be the same as for burglary in the first degree" was eliminated. Prosecution for such acts must now be brought under other statutes.65

A new act grants the court power to suspend the prison sentence and place the defendant on probation. The fine for the violation of this section was repealed.

(c) Third degree burglary. Several minor changes were made. Only three are important. The entering of any structure enumerated in burglary in the first or second degree with the intent to commit a misdemeanor is burglary in the third degree. The amount of the fine may be in any sum not exceeding $500. Formerly it was from $25 to $300. The court may suspend sentence and place the defendant on probation.66

Entering to Commit a Felony. After the clause providing, "Whoever enters any dwelling-house," the words "or other place of human habitation" are added.67 The new section retained the enumeration of buildings and structures of the prior act with the exception that "kitchen" and "smoke-house" were eliminated and "business house" was added.

As in burglary in the second degree, the provision that the crime may be committed either in the nighttime or daytime has been omitted. However, this omission would not seem to have the same effect as its elimination in burglary.68 Entering to commit a felony, of course, is not a common law crime. The definition must therefore come from the statute. If no limitation appears in the statute itself, it would seem the requirement that it can be committed only at night could not be implied.

A last change in the section was in the type of act made punishable. Previously it was provided, "Whoever enters . . . and attempts to commit a felony therein . . . ." The new section provides in place of this, "Whoever enters . . .

65 See p. 157 supra.
66 Other minor changes are not important enough to merit discussion.
68 See p. 157 supra.
with the intent to commit a felony therein . . . .” Consequently the criminal need not actually attempt the commission of the felony before he can be guilty of this crime—\(^{60}\) the mere intent is sufficient.

**Disorderly Conduct.** This is a new crime in Indiana.\(^{10}\) Decisions of other jurisdictions\(^{71}\) will indicate to some extent the effect of the act.

Disorderly conduct has been defined as conduct “of such a nature as to affect the peace and quiet of persons who may witness the same and who may be disturbed or provoked to resentment thereby.”\(^{72}\) Also “there must be such a degree of publicity attached [to the conduct] as that some one person, other than the actor is disturbed thereby.”\(^{73}\) Although a violation may occur in either a public or private place, it is nevertheless necessary that some person be disturbed.\(^{74}\) Disorderly conduct is punishable however even though it originates in a “private place.”\(^{75}\)

Specific cases of disorderly conduct include: calling a woman from her work and threatening to beat her if she refuses to have a date;\(^{76}\) calling a council member a “bootlegger” at a public session;\(^{77}\) calling a policeman a “bastard;”\(^{78}\) and strikers “picketing” the home of a non-union

\(^{60}\) See McAleer v. State, 200 Ind. 366, 163 N.E. 593 (1928); Abshire v. State, 199 Ind. 478, 158 N. E. 228.

\(^{70}\) “Whoever shall act in a loud, boisterous or disorderly manner in any place either publicly or privately, or whoever shall act to the prejudice of the good order of any community, shall be guilty of disorderly conduct, and upon conviction shall be fined in any sum not exceeding one hundred dollars, to which may be added imprisonment in the county jail for not to exceed sixty days.” Ind. Acts, 1941 c. 148, §12, IND. STAT. ANN. (Burns, Supp. 1941) §10-1509.

\(^{71}\) Many of the decisions cited herein arise under municipal ordinances.

\(^{72}\) State v. Zanker, 179 Minn. 355, 357, 229, N. W. 311, 312 (1930).

\(^{73}\) Garvin v. Waynesboro, 15 Ga. App. 633, 84 S. E. 90, 93 (1915).

\(^{74}\) Williams v. Valdosta, 47 Ga. App. 810, 171 S. E. 553 (1933). This is true even though some other state law is violated. Kahn v. City of Macon, 95 Ga. 419, 22 S. E. 641 (1895) (gaming); Shreveport v. Price, 142 La. 946, 77 So. 883 (beyond power of city to make fornication and adultery, unaccompanied by scandal or disorder, a crime). Contra: State v. Byrnes, 100 S. C. 230, 84 S. E. 822 (1915).

\(^{75}\) Some acts required the conduct to be in a public place. Ruthenbeck v. Dist. Court, 7 N. J. Misc. 969, 147 Atl. 625 (1929).


\(^{77}\) In re Kirk, 101 N. J. L. 450, 130 Atl. 569 (1925). But calling him a “souphead” is not.

\(^{78}\) Cleveland Heights v. Christie, 128 Ohio St. 297, 190 N. E. 770, cert. denied, 293 U. S. 574 (1934). But calling a policeman a “mutton head” is not. Ruthenbeck v. Dist. Court of Bergen County, 7 N. J. Misc. 969, 147 Atl. 625 (1929).
member causing a crowd to gather. 70

The following acts have been held not to constitute a violation: unobtrusive shadowing by detective and ringing complainants doorbell at ten o'clock at night; 80 wandering abroad on the street and not giving a good account of oneself; 81 and the mere preparation to commit a crime. 82

This section may be attacked on the ground that it is indefinite and uncertain. While the Indiana Court has invalidated statutes on this ground, 83 it is submitted that this section will be upheld. The legislature may create a crime by name without defining it. 84 Statutes which have been declared unconstitutional for indefiniteness did not create a crime by name. They merely made particular acts illegal, and the acts were too indefinitely described. Here the legislature created the crime of disorderly conduct. Whether any particular act falls within the section is for the courts to decide.

DECEDEENTS' ESTATES

Wages and Bank Accounts of Decedents. Chapter 184, Acts of 1941, allows employers and banks to pay claims of decedent employees and depositors to persons designated by law to receive such payments, without requiring letters testamentary or letters of administration. 1 The primary purpose of the act is to avoid opening estates the value of which does not justify the costs of administration.

Section one authorizes the employer to pay the decedent's accrued earnings or wages, not exceeding $150, to the surviving spouse, children 18 or over, father or mother, or


80 People v. Clark, 164 N. Y. S. 137 (1917).


82 The crime charged was gambling. Sheppard v. City of Jackson, 11 Ga. App. 811, 76 S. E. 367 (1912).

83 Glendale Coal Co. v. Douglas, 193 Ind. 73, 137 N. E. 615 (1923) (act required "a sufficient number of practical experienced miners"); Cook v. State, 26 Ind. App. 278, 59 N. E. 489 (1901) (act prohibited driving "narrow tired wagon with a load over 2000 pounds over a road in a condition to be cut up").

84 Hood v. State, 56 Ind. 263 (1877) citing Wall v. State, 23 Ind. 150 (1864) (4 previous cases requiring crimes to be defined were expressly overruled).

1 IND. STAT. ANN. (Burns, Supp. 1941) §§6-1514, 1515.
sister or brother of the deceased, in that order of preference. Payment must be made not less than thirty days after death, and it operates as full discharge of the claim. The employer may require an affidavit as to the parties in interest and a receipt from the party whom he pays.

Section two permits any bank to pay decedent’s deposit, not exceeding $100, to the clerk of the court of the county of deceased’s residence, upon application by any of the parties enumerated in section one. Payment to the clerk discharges the bank’s obligation. Upon petition of any party in interest, the court may order the clerk to pay out, as the court deems proper, any part of the fund received from the bank.

If the wages or earnings due exceed $150, or if the bank deposit exceed $100, the employer or bank is not authorized to pay any part thereof. A bank may pay deposits to the clerk upon application made any time after the death, but an employer may not pay wages or earnings until thirty days after the death.

An employer probably is bound to use reasonable care that he pay wages or earnings only to the persons entitled under the act. Requiring an affidavit as to the parties in interest would ordinarily seem to be reasonable care, however. A bank, on the other hand, need require no proof of the applicant’s identity or right, because the money is placed with the county clerk, and can be distributed only by judicial order. Nothing in this act directs how or to whom such payments are to be made, but it must be implied that the court’s discretion is limited by the laws pertaining to distribution and creditors’ rights, with which this statute is in pari materia.

If a person, who is entitled under section one to receive the decedent’s wages or earnings, obtains payment from the employer, he must be regarded as a trustee for the benefit of deceased’s creditors and other persons entitled to share in the deceased’s estate. If a person who is not entitled to receive the payment obtains the money, any creditor or heir may hold him liable as an executor de son tort for intermeddling.2

Since the terms of this act are not mandatory, an employer or bank need not comply with the demands of an applicant unless it wishes.

2 IND. STAT. ANN. (Burns, 1933) §6-2201.
Privileged Communications: Newspapers. Chapter 44 provides that a bona fide owner, editorial or reportorial employee of a newspaper or a recognized press association can not be compelled to disclose in any legal proceeding the source of any information obtained in the course of employment. The privilege did not exist at common law, but there has been a recent tendency to classify this information as privileged.

To come within the act the newspaper must be either a weekly, triweekly, semiweekly or daily newspaper; must conform to postal regulations; must have been published for five consecutive years in the same city or town; and must have a paid circulation of at least two percent of the population of the county in which it is published.

The last two provisions cast doubt on the constitutionality of the statute.

These restrictions were evidently taken from similar provisions in statutes relating to the publication of legal no-

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2 This includes legal proceedings before any court or legal body, presiding officer of any tribunal or its agents, or committee of the Indiana General Assembly.

3 The leading case in the United States that there is no privilege probably is People ex rel. Mooney v. Sheriff, 269 N. Y. 291, 199 N. E. 415, 84 U. of Pa. L. Rev. 795, 22 Cornell L. Q. 115 (1936). Also see Ex parte Lawrence, 116 Cal. 298, 48 Pac. 124 (1897); Plunkett v. Hamilton, 136 Ga. 72, 70 S. E. 781 (1911); In re Julius Grunow, 84 N. J. L. 235, 85 Atl. 1011 (1913).

4 At least nine other states have passed similar statutes, most of them within the last few years. Alabama (1935), Arizona (1937), Arkansas (1937), California (1935), Kentucky (1936), Maryland (1937), New Jersey (1937), Ohio (1941), Pennsylvania (1937). Similar statutes have failed to pass in several states as well as in Congress. Also the Committee on Improvements in the Law of Evidence Section of Judicial Administration of the American Bar Association has gone on record against such acts. See Jones, Law of Journalism (1940) 376; 45 Yale L. J. 387 (1935).

5 Construing a similar provision under §49-704, IND. STAT. ANN. (Burns, 1933), a notice statute, it was held that the changing of ownership and missing a few numbers does not disqualify a newspaper under this provision. Board of Comm'rs v. Greensburg Times, 215 Ind. 471, 19 N. E. (2d) 459 (1939). Nor does suspension of publication for a period less than a year extinguish the rights acquired under the statute. Lee v. Burns, 94 Ind. App. 676, 182 N. E. 277 (1932).

6 The provision that it must be a weekly, semiweekly etc. might also tend to be unreasonable and arbitrary. It does not seem that the legitimacy of a newspaper should be determined by its frequency of issue. The fact that this provision might be all inclusive is the only factor that would sustain its validity.

tices. But whether a newspaper is one of "general circulation" or whether it has been published a sufficient length of time to give a legal notice seem questionable as tests to determine if the paper is a bona fide publication. Some newspapers published in small towns—especially if one or more large cities are in the same county—will not be able to meet the circulation requirement, yet they should be privileged if others are.

While some publications should not be permitted to use this statute as a shield for illegitimate activities, the requirements, as enacted seem unfair and arbitrary. The better course would be to let the courts decide whether a particular newspaper is a bona fide publication. Legitimate small town papers and newspapers recently started would not then be unjustly excluded.

However, there is argument to sustain the statute. Reasonable classification is permissible. And if any state of facts reasonably can sustain the validity of the statute, that state of facts must be presumed. The fact that some inequality may result will not be sufficient to invalidate the act; there must be a manifest unreasonableness.

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8 That it must have been published for five consecutive years, IND. STAT. ANN. (Burns, 1933) §49-704; that it must have a paid circulation of not less than 2% of the population of the county in which published, IND. STAT. ANN. (Burns, Supp. 1941) §49-711. The other restrictions also appear in the notice statutes. That it must be a weekly, triweekly, semimweekly or daily, IND. STAT. ANN. (Burns, 1933) §49-704, IND. STAT. ANN. (Burns, Supp. 1941) §49-710; that it must conform to postal regulations, id.

9 The problem in notice statutes without the 2% requirement is whether the newspaper is one of "general circulation". See note (1929) 68 A. L. R. 542. The 2% provision is a legislative definition of the term.

10 Even in the notice statute, newspapers published in towns in the same county with a first, second or third class city are excepted from the act. IND. STAT. ANN. (Burns, Supp. 1941) §49-711. Further, an opinion of the Attorney General held township notices exempt from the 2% requirement. O'S. ATT'Y GEN., IND., (1939) 249. It would seem similar exceptions are more necessary in a statute purporting to cover all bona fide newspapers than in statutes dealing only with adequacy of notice.


13 Baldwin v. State, 194 Ind. 303, 141 N. E. 343 (1923).
classification in this act should not be considered that unreasonable.  

If the act is held valid, a question may arise as to what is a newspaper. A usual definition is "a medium for the dissemination of news of passing events printed and distributed at short but regular intervals." Such a general definition is of little practical value, however. A satisfactory answer in any particular case can be given only by a comparison of the publication in question with the previous decisions.

Undoubtedly the Associated Press, United Press, and the International News Service were intended to be within the act. Their purpose is clearly the gathering and dissemination of news. But what of a syndicate—i.e. an organization which distributes feature matter prepared in advance and copyrighted? While such material has some news value, it is probable that syndicates and their employees will not be given the protection of the statute.

It should be noted that the act provides that the person "shall not be compelled to disclose . . . ." In the other cases involving privileged communications in Indiana, the

14 See Groves v. Board of Comm'rs, 209 Ind. 371, 376, 199 N. E. 140 (1936); Baldwin v. State, 194 Ind. 303, 307, 141 N. E. 343, 345 (1923). But cf. Heckler v. Conter, 206 Ind. 376, 381, 187, N. E. 878, 880 (1934). The Indiana Court has not been consistent as to when the court will review a legislative classification and substitute its judgment as to the reason for and the reasonableness of the classification. See Horack and Welsh, Special Legislation (1936) 12 IND. L. J. 109, 183.

15 In re Sterling Cleaners and Dyers, Inc., 81 F. (2d) 596, 597 (C. C. A. 7th, 1936). Other elements generally required are: (1) that it be in sheet form, Hanscomb v. Meyer, 60 Neb. 68, 82 N. W. 114 (1900); White v. Multnomah County, 74 Ore. 96, 144 Pac. 1193 (1914); and (2) it contain the current news, Lynn v. Allen, 145 Ind. App. 584, 44 N. E. 646 (1896); Times Printing Co. v. Star Publishing Co., 51 Wash. 667, 99 Pac. 1040 (1909). Hence magazines, even though containing "news of the week," are excluded.


18 WATSON, HISTORY OF NEWSPAPER SYNDICATES (1936) c. 9.

19 The privilege being in derogation of the common law will be strictly construed. Myers v. State, 192 Ind. 592, 137 N. E. 547 (1922); Wm. Laurie Co. v. McCulloch, 174 Ind. 477, 90 N. E. 1014 (1910).

20 IND. STAT. ANN. (Burns, 1933) §2-1714. They are attorney and client, physician and patient, clergyman and confessor, and husband and wife.
recipient of the information is deemed an incompetent witness. They cannot testify unless the informant waives the privilege.\textsuperscript{21} Under this statute the privilege of disclosure is entirely in the discretion of the employee. The informant has no choice.

Furthermore, the act applies only to disclosing "the source of any information procured." Apparently the reporter may be compelled to divulge the actual information even though he has promised not to publish it or desires not to divulge it.

**FIDUCIARIES**

*Distribution of Assets of Insolvent Estates.* The Uniform Act Governing Secured Creditors' Dividends in Liquidation Proceedings\textsuperscript{1} was adopted by the Eighty-Second General Assembly\textsuperscript{2} The act covers: (1) voluntary and involuntary assignments for benefit of creditors; (2) administration of insolvent decedent estates; (3) liquidation of insolvent banks; (4) equity receiverships of insolvents; and (5) other proceedings for distribution of an insolvent's assets.

The act provides that the secured creditor shall disclose the character of his security.\textsuperscript{3} In case a secured creditor with intent to evade the act fails to disclose the existence of his security, he is excluded from participating in the distribution of assets unless he surrenders the security to the liquidator.\textsuperscript{4}

The value of the security shall be established by collection if the assets constituting security are for the payments of money, or by creditors sale if the security represents other than an obligation to pay money.\textsuperscript{5} When these methods are impractical, the court may order a determination of value by compromise, by liquidation proceedings or by liquidator's sale of assets.\textsuperscript{6}

\textsuperscript{21} *E. g.* the patients waiver permits physician to testify, Brackney v. Fogle, 156 Ind. 535, 538, 60 N. E. 303, 304 (1900); the clients waiver permits attorney to testify, Myers v. State, 192 Ind. 592, 599, 137 N. E. 547, 550 (1922).

\textsuperscript{1} NAT. CONF. COMM’RS UNIFORM STATE LAWS, HANDBOOK (1939) 216.

\textsuperscript{2} Ind. Acts 1941 c. 50, IND STAT. ANN. (Burns, Supp. 1941) §31-201 et seq.

\textsuperscript{3} IND. STAT. ANN. (Burns, Supp. 1941) §31-202.

\textsuperscript{4} Id. at §31-203.

\textsuperscript{5} Id. at §31-205.

\textsuperscript{6} Id. at §31-206.
The act adopts the bankruptcy rule governing claims of secured creditors.\(^7\) Four conflicting rules have been followed in the several states.\(^8\) The uniform act adopted by Indiana, although not the majority rule, was selected as the rule most likely to gain uniform adoption. The rule permits a creditor holding collateral and desiring to participate in the distribution of an insolvent's assets to: (1) exhaust the security and claim the deficiency; (2) credit the value of the security against his claim and prove the balance; and (3) surrender the security and prove the full claim.

Since the Indiana court has expressly adopted the bankruptcy rule,\(^9\) and the legislature has incorporated it in the assignment for benefit of creditors\(^10\) and insolvent decedent estates\(^11\) acts, the passage of the uniform act does not alter the Indiana law.

**FINANCIAL INSTITUTIONS**

Although numerous changes were made in banking legislation by the 1941 General Assembly, the only provisions of great importance related to the corporate existence of banks, sound capital, and real estate loans of building and loan associations.

**Corporate Existence of Banks.** The repeal of Article XI, section 10 of the Indiana Constitution\(^1\) paved the way for the validation of many bank charters whose legality may have been in doubt.\(^2\) Chapter 166 of the Acts of 1941 vali-

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\(^7\) *Id.* at §31-204.

\(^8\) The four rules are: (1) *Bankruptcy rule*—the face of the claim less the value of the collateral (eight states); *Maryland rule*—the balance owing at the time of declaring each dividend, crediting only the amounts realized from collateral (ten states); *Equity rule*—the balance owing at the time of transfer in insolvency without deduction for collateral (the federal courts and eighteen states). *NAT'L. CONF. COMM'RS UNIFORM STATE LAWS, HANDBOOK (1939)* 214.


\(^10\) *IND. STAT. ANN. (Burns, 1933)* §17-115.

\(^11\) *Id.* at §6-1812.

\(^1\) Proposed in Ind. Acts 1937, c. 311, Ind. Acts. 1939, c. 174; repealed at general election Nov. 5, 1940; *IND. STAT. ANN. (Burns, Supp. 1941)* Ind. Const. Art. XI, §10. This section restricted bank charters to twenty years.

\(^2\) *IND. STAT. ANN. (Burns, 1933)* §18-2008 (upon expiration of charter, bank by written instrument delivers over business to department of financial institutions which upon examination grants petition for bank to reopen). The general rule is that a corporation ceases
date "any and all reorganizations by financial institutions under any law of this state under and pursuant to the provisions of The Indiana Financial Institutions Act." Existing corporations may amend their articles of incorporation to permit their continuance for a period fixed in the articles or perpetually.

Par Value Shares. In order to simplify the enforcement of the constitutional provisions for stockholders' double liability, the Financial Institutions Act of 1933 required all stock to have a par value of one hundred dollars. Chapter 54 of the Acts 1941 permits the division of capital stock into shares of a par value of not less than ten nor more than one hundred dollars. Shares of building and loan and savings and loan companies still must be issued with one hundred dollars par value.

Sound Capital. The sound capital of a financial institution, according to chapter 223, shall contain reserves for dividends payable in common stock, in addition to paid-in and unimpaired capital, unimpaired surplus, and unimpaired proceeds of notes and debentures issued under the authority of and approved by the department of financial institutions.

Liquidation. In the liquidation of a financial institution, no interest shall be paid to the creditors of any class until the creditors of every class (including debenture holders) have received payment of the principal amount of their claims in full. Likewise the court is prohibited from or-

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3 IND. STAT. ANN. (Burns, Supp. 1941) §18-1009.
4 Id. at §§18-601, 612.
5 Id. at Ind. Const. Art. XI, §6, proposed in Ind. Acts 1937, c. 309, Ind. Acts 1939, c. 173; repealed at general election Nov. 5, 1940.
6 IND. STAT. ANN. (Burns, 1933) §18-413.
7 IND. STAT. ANN. (Burns, Supp. 1941) §18-413.
8 Ibid.
9 Ibid.
10 Id. at §18-103.
11 Id. at §18-318. It has been held that payment of interest on claims does not impair obligation of contract of a stockholder or deprive him of property without due process of law, where interest was paid out of surplus after liquidation and the claims were paid in full. Greva v. Rainey, 2 Cal. (2d) 338, 41 P. (2d) 328 (1935); Leach v. Sanborn State Bk., 210 Iowa 613, 231 N. W. 497 (1930). The statute declares the general rule, that no interest will be paid to creditors of an insolvent bank after date or appointment of
Voluntary Liquidation Notices Validated. Financial institutions must publish notice of voluntary dissolution. Chapter 157 authorizes notices to correct proceedings where notice was omitted and bars claims of interested persons failing to object within sixty days.

Saturday Half Holiday. Chapter 53 permits any bank, trust company, or safe deposit institution to close at noon on Saturday and such closing constitutes a legal half holiday for the institution. The effect of the act, however, seems to make Saturday a full legal holiday for the presentment of checks for payment and notice of dishonor.

Savings Banks. Under the act of 1869, trustees of savings banks were required to keep reserve deposits in banks of adjoining states or in national banks. Chapter 104 Acts 1941, authorizes deposits in any bank organized under the laws of the United States or of any state. The act also changes the approval of reserve depository banks from the state auditor to the department of financial institutions.

Building and Loan Associations. Chapter 60 permits more liberal loan policies by building and loan associations. In share reducing amortized loans, where the primary ob-

receiver. Henrichs v. Higley, 199 Iowa 765, 202 N. W. 746 (1925). But if a surplus is left after claims are paid, interest will be allowed. Leach v. Sanborn State Bank, 210 Iowa 613, 231 N. W. 497 (1930).

This statute is remedial in nature. The general rule is that creative or remedial statutes which change remedies or matters of procedure are constitutional, provided vested rights are not destroyed or obligations of contracts impaired. County of San Bernardino v. State Indust. Accid. Comm., 217 Cal. 618, 20 P. (2d) 673 (1933). There is no vested right in a mode of procedure and each legislature may establish a different one provided that in each one are preserved the essential elements of protection. Backus v. Fort St. Union Depot Co., 169 U. S. 557 (1897).

Checks received on Saturday may be presented for payment on next following business day; checks presented and dishonored may be protested and notice given or deposited in post office on next following business day. Cf. IND. STAT. ANN. (Burns, 1933) §§19-616 which provided that demand instruments falling due on Saturday may be presented before 12 o'clock noon on Saturday at option of holder. The 1941 amendment would seem to repeal this optional provision.

Checks may be presented for payment on next following business day; checks presented and dishonored may be protested and notice given or deposited in post office on next following business day. Cf. IND. STAT. ANN. (Burns, 1933) §§18-2622.

Ibid.
ligation requires the borrower to subscribe to shares of the association and pledge them as security, the weekly payments may run for twenty years instead of fifteen. A similar extension was made in direct reduction loans.

Limitations on the amount of the loan have been relaxed both as to the relation to the fair cash value of the real estate and as to the proportion of a loan to any one borrower to the total assets of the association.

**Guarantee Loan and Savings Associations.** Chapter 36 Acts 1941 repealed the double liability of guarantee stockholders as of December 31, 1941 except for associations in liquidation on or before that date.

**INSURANCE**

The 1941 acts made important changes in the reinsurance and investment statutes and liberalized the qualifications for directors in physicians' and dentists' liability insurance.

**Reinsurance.** As defined by chapter 115, Acts 1941, reinsurance is "a legal transaction other than merger or consolidation by which an insurance company for a consideration on stated terms and conditions assumes all or a portion of the insurance, annuity and endowment risks or obligations of another company." Reinsurance of 15% or less of the total risks is exempted from the coverage of the act and left

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18 Id. at §18-2123.
19 IND. STAT. ANN. (Burns, Supp. 1941) §18-2125. Permits loans for 75% (by former act 60%) of fair cash value on home or combination home or business property; 60% (by former act 50%) of the fair cash value of improved real estate used for business purposes; 50% (by former act 40%) of fair cash value of real estate securing any straight loan payable without amortization unless the excess is secured by bonds.
20 IND. STAT. ANN. (Burns, Supp. 1941) §18-2126. Association with assets of $250,000 or less may loan $5,000; with assets of $500,000 may loan $7,500; and with assets over $500,000 may loan $10,000 or 1% of assets whichever is greater.
21 Id. at §18-2804.
1 IND. STAT. ANN. (Burns, Supp. 1941) §§39-3901, 3909, 3910, 3911, 3913, 3914.
2 Id. at §39-4202.
3 Id. at §39-3711 (in companies writing only physicians' and dentists' liability insurance, the director, if not a policyholder, may substitute five years experience in management or underwriting of insurance of that character.)
4 Id. §39-3907.
exclusively to free contract, except where the ceding company is in rehabilitation or liquidation proceedings or where the accepting company is a nonlicensed foreign company.5

The amount and manner of reinsurance is made certain by the new amendments.8 The reinsurance procedure is likewise simplified.7 Under the original act, articles of reinsurance could be issued only after action by the board of directors, ratified by two-thirds of the shareholders, reapproval by the board, and finally approved by the department of insurance.8 Although the new act eliminates shareholder approval,9 the rights of shareholders are adequately protected by the insurance commissioner.10 The flexibility of the new procedure will be of great assistance to companies making reinsurance contracts.11

**Investments.** Liberalization of investment restrictions on life insurance companies reflects general optimism con-

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5 *Ibid.* The act recognizes that reinsurance is of two types: (1) where one company insures a large risk and shifts it by insuring that individual risk with another company (2) where reinsurance is a device substituted for merger and consolidation. This latter type usually is employed where an insurance company is in financial difficulties. See 1 COUCH, INSURANCE (1929) §44; 1 COOLEY, BRIEFS ON INSURANCE (2d ed. 1927) 774; note (1940) YALE L J. 117. The act, then, seeks to regulate this latter type of insurance.

6 IND. STAT. ANN. (Burns, Supp. 1941) §39-3901; cf. IND. STAT. ANN. (Burns, 1933) §§39-3907 to 3901. The act now states a company may reinsure, "all or a portion in excess of 15% of its risks" where formerly it expressed it, "all or a substantial number of its risks".

7 IND. STAT. ANN. (Burns, Supp. 1941) §39-3907.

8 IND. STAT. ANN. (Burns, 1933) §§39-3907 to 3911.

9 IND. STAT. ANN. (Burns, Supp. 1941) §39-3909.

10 *Id.* at 39-3907. The commissioner's approval is made an express condition precedent to validity of the agreement. One of the conditions for approval is that the agreement deal fairly and equitably with the contract and policyholders of the companies. Further, this section provides for notice to the policyholder. If the policyholder rejects the agreement within the prescribed period, he may demand the reserve of his policy if the company is a going concern. If not a going concern, he may submit a claim against the assets of the insurer. Iowa Life Ins. Co. v. Eastern Mut. Life Ins. Co., 64 N. J. L. 340, 45 Atl. 762 (1900) (court upheld as constitutional the delegation of power to insurance commissioner to approve reinsurance agreements).

11 "The large number of policyholders, the need for speed in effecting the transfer, the ignorance of the insured about the financial intricacies of insurance—all militate against making policyholder participation a useful adjunct of insurance reorganization. Reliance must be placed in the only effective protective device—the independent insurance commissioner's supervisory power, subject to judicial review, over the fairness of the reinsurance agreement." PATTERTON, THE INSURANCE COMMISSIONER IN THE UNITED STATES (1st ed. 1927) 212. Note (1940) YALE L J. 117, 118.
cerning the future stability of land values. The 1941 amendments permit loans on real estate "worth not less than fifty per cent more than the amount loaned thereon." The prior law required the security to be worth 66 2/3 per cent of the loan. Where improvements constitute a part of the security, the improvements must be insured for the benefit of the mortgagee in an amount not less than the difference between two-thirds of the value of the land and the amount of the loan.

INTOXICATING LIQUORS

The liquor control laws of Indiana were changed in two respects by Chapter 237 of the Acts of 1941: (1) a general administrative reorganization, and (2) further regulation of the sale of intoxicants.

For the purpose of reorganizing the Alcoholic Beverages Commission, the governor was ordered to declare vacant the offices of the present members of the commission and to appoint four new members. If the governor and lieutenant-governor were not members of the same political party, two members of the commission were to be appointed with the consent of the lieutenant-governor. The excise administrator, formerly appointed by the governor, was to be elected by the commission from among its members. The validity of these changes is doubtful since the decision in Tucker v. State, although this act was not litigated in the case.

The enforcement of the Fair Trade Act is facilitated by giving the Alcoholic Beverages Commission the power to prohibit or regulate alcoholic beverage sales which are in violation of that act. Permittees are not allowed to discriminate between purchasers by granting any price, discount, allowance or service charge which is not available to all purchasers at the same time.

By Section six of the 1941 Act, women, other than a

12 IND. STAT. ANN. (Burns, Supp. 1941) §39-4202.
13 IND. STAT. ANN. (Burns, 1933) §39-4202.
14 IND. STAT. ANN. (Burns, Supp. 1941) §39-4202.
1 IND. STAT. ANN. (Burns, Supp. 1941) §12-401.
2 Tucker v. State, 35 N. E. (2d) 270 (Ind. 1941), noted p. 135 supra.
3 Ind. Acts 1937, c. 17, IND. STAT. ANN. (Burns, Supp. 1941) §66-301.
4 IND. STAT. ANN. (Burns, Supp. 1941) §12-402.
5 Id. at §12-530.
permittee or the wife of a permittee, are forbidden to go behind the bar for the purpose of tending bar. The Commission has interpreted this section to mean, that in determining the liability of either the woman or the permittee the intent of the woman is controlling, and that a woman may go behind the bar for any purpose other than tending bar.  

Section seven adds an enforcement tax to the present tax on alcoholic beverages. The tax does not apply to alcoholic beverages withdrawn for sale for delivery outside the state and sold for delivery outside the state.

Section four makes it unlawful for grocery stores and drug stores, as permit holders for the sale of beer, to dispense iced or cooled beer ready for immediate consumption. The section has been declared unconstitutional in a lower court on the ground that it unreasonably discriminated against the druggist or grocer holding beer permits in favor of the tavern license holder. No injunction is in effect, however, and the commission is enforcing the act.

MINES AND MINERALS

Strip Mines. Indiana Acts 1941, chapter 68 requires commercial strip mine operators to obtain a permit for stripping and to reforest land previously stripped.

This act appears to be a valid exercise of the police power. The injurious effect of strip mining upon the land stripped and upon adjacent land and streams can hardly be argued, and the value of trees and shrubs in preventing

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7 IND. STAT. ANN. (Burns, Supp. 1941) §12-428.
8 Id. at §12-510.
9 Clark v. Barnhart, Marion Superior Court (1941). Suit was filed to enjoin enforcement and Judge Spencer granted a temporary restraining order. He later ruled that the provision was unconstitutional, but dissolved the restraining order.
1 IND. STAT. ANN. (Burns, Supp. 1941) §46-1501. All commercial operators (producers of more than 250 tons per year) are required to obtain a permit. As a condition to engaging in strip mining the permittee is required to reforest with seeds or seedlings all land stripped the preceding year or an equal number of acres of other land mined previously, and 1% of the number of acres stripped prior to the effect of this act. A map must be turned in showing land stripped in the past. A bond to insure performance is required, and in case of failure of performance the director of Department of Conservation may use the funds to have the work done.
erosion and excessive run-off of water is unquestioned. A state has an interest in the preservation of its natural resources which it may protect by regulating the methods of their exploitation and the manner and extent of their use. And the use of one resource may be regulated to protect another. Under the present enactment the method of mining is regulated to protect soil and water. Nor is it a deprivation of property without due process to impose upon private persons the duty of making certain forced expenditures.

The question of equal protection is raised by the limitation of the application of the act to operators mining over 250 tons per year. But the scope of regulatory legislation may be made co-extensive with practical needs and convenience. A classification that considers the degree in which an evil is present is reasonable. The legislature might properly find it impractical to include small scale operations within the act, and that the injurious effect of a small pit upon surrounding territory was negligible.

PLEADING

Relief From Default Judgments Taken in Suits to Quiet Title. Chapter 72, of the Acts of 1941 amends the Default

2 The barren strip banks thrown up during operations erode rapidly under rain water and sheet wash. Surrounding streams are discolored and choked with sediment. Replanting will alleviate much of this. The problem of chemical pollution caused by exposing pyrite to air and water will not be solved by replanting alone, but replanting will keep the soil from washing away, thus rendering the pyrite much less soluble. Esarey, A Report Upon the Pollution Problem of the Patoka River, (unpublished manuscript, Dept. of Geology and Geography, Indiana University).

3 Ohio Oil Co. v. Indiana, 177 U.S. 190 (1900); Walls v. Midland Carbon Co., 254 U.S. 300 (1920); note (1923) 24 A.L.R. 307. While the taking of private property under the police power for purely aesthetic reasons is a violation of due process, if the regulation bears a reasonable relation to safety, health, or morals, aesthetic considerations are a powerful auxiliary. Euclid v. Ambler, 272 U.S. 365 (1926); General Outdoor Adv. Co. v. Indianapolis, 202 Ind. 85, 172 N.E. 309 (1930); Perlmuter v. Green, 259 N.Y. 327, 182 N.E. 5 (1932).

4 Miller v. Schoene, 276 U.S. 272 (1928); Ohio Oil Co. v. Indiana, 177 U.S. 190 (1900); cf. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).


1 IND. STAT. ANN. (Burns, Supp. 1941) §2-1068.
Judgment Act passed in 1881. The latter provided that relief may be obtained from a judgment taken against a party through his own mistake, inadvertence, surprise, or excusable neglect, if complaint is filed and notice issued within two years from the date of the judgment. This amendment adds the exception that where relief is sought from a judgment taken on default in a suit to quiet title to real estate, the complaint must be filed within one year after judgment or be forever barred. The amendment applies to any default judgment which was of record at the time it was passed, and applies to all persons whether service of process was by summons or by publication.

This amendment is especially important because suits to quiet title are frequent, and a high percentage of them result in default judgments. The amendment must be considered in relation to two other statutes. It may repeal by implication the last sentence of a 1915 statute, which provides that judgments taken on default to quiet title against claims of heirs and devisees who have been missing for seven years (and therefore are presumed to be dead), shall not become absolute until three years from the date rendered.

It is well settled that repeals by implication are not favored. Only when there is an irreconcilable conflict between two acts upon the same subject does the latter act impliedly repeal the former. This rule is especially strong where the prior act is special—that is, where it applies to a particular subdivision of objects, persons, or circumstances, as contrasted with a general act, applying to all the objects, persons, or circumstances of a class. The act of 1915 is clearly a special act since it refers to only one of the many sets of circumstances out of which suits to quiet title rise.

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2 IND. STAT. ANN. (Burns, 1933) §2-1068.
3 Id. at §2-1403.
4 Id. at §3-1402.
5 See State ex rel. Davenport v. International Harvester Co., 25 N.E. (2d) 242, 244 (Ind. 1940) 1 LEWIS' SUTHERLAND, STATUTORY CONSTRUCTION (1904) §247.
6 Medias v. City of Indianapolis, 23 N.E. (2d) 590 (Ind. 1939); State ex rel. Black v. Board of Comm'rs, 205 Ind. 582, 187 N.E. 392 (1933); Sallwasser v. City of LaForte, 205 Ind. 248, 186 N.E. 297 (1933).
7 Straus Bros. v. Fisher, 200 Ind. 397, 316, 163 N.E. 225, 230 (1928); Walter v. State, 105 Ind. 589, 5 N.E. 735 (1886). "The general law can have full effect beyond the scope of the special law, and, by allowing the latter to operate according to its special
and so it supercedes the general statute of 1881 as to the particular circumstances to which it applies.\textsuperscript{8}

The hardship imposed by allowing a missing person's heirs to obtain his real estate after seven years' continuous absence, undoubtedly influenced the legislature to grant a longer period of time during which the missing person might return and recover his property. This intention does not appear to be negatived by the amendment of 1941 and the two acts may stand side by side.

This conclusion is further supported by the rule of \textit{in pari materia}. Statutes relating to the same subject, regardless of the date of their passage, are to be construed together, if possible, as constituting one act.\textsuperscript{9} If the legislature made no express repeal none is deemed to be intended, unless the two statutes \textit{in pari materia} are so inconsistent that only one—the more recent—can stand.\textsuperscript{10} Here there is no irreconcilable conflict. It appears that no repeal was intended by the 1941 Act.

This amendment, however, does seem to modify an 1881 statute\textsuperscript{11} which provides that in all cases, except divorce, when a judgment was rendered without other notice than publication, the defendant in that action may have the matter opened and be allowed to defend anytime within five years. But a petition for relief from a judgment taken in a suit to quiet title, whether service was by summons or by publication, must by the terms of the 1941 Act be filed within one year. This provision seems to be inconsistent with the 1881 statute as far as that statute affects judgments taken in suits to quiet title. Therefore, although it does not impliedly repeal the entire act, it must operate as a repeal in so far as the 1881 act allowed five years in which to gain relief from

\begin{footnotesize}
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  \item[9] See Sherfey v. City of Brazil, 213 Ind. 493, 497, 498, 13 N.E. (2d) 568, 570 (1937); Hall v. Craig, 125 Ind. 521, 25 N.E. 538 (1890); 2 Lewis' Sutherland, Statutory Construction (1904) §443.
  \item[10] DeHaven v. Municipal City of South Bend, 212 Ind. 194, 7 N.E. (2d) 184 (1937), app'd dismissed, 302 U.S. 644 (1937); see 2 Lewis' Sutherland, Statutory Construction (1904) §447.
\end{itemize}
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judgments taken in suits to quiet title. The 1881 Act now should have no more effect on these judgments than it has on decrees of divorce.\textsuperscript{12}

The constitutionality of the amendment may be seriously questioned. It is an act which declares a rule of procedure, and purports to change the statute which was adopted by the Supreme Court as a rule of the court on June 21, 1937, and again in the 1940 Revision, Rule 1-1. Whether the legislature can alter a statute on judicial procedure after it has been adopted as a rule of the Court is a moot question, but there is authority to support the view that such legislation should be held unconstitutional.\textsuperscript{13}

\textbf{PROCEDURE}

\textit{Removal of Clouds Upon Titles.} Indiana Acts 1941, c. 141, provides that any defects, imperfections, or adverse claims which burden, cloud, or impair the title to real property, and which have arisen or appear in the abstract of title or matters of record thirty-five or more years prior to the time such property may, after the passage of this act, be sold, transferred, exchanged or mortgaged, shall cease to exist or (and)\textsuperscript{1} be barred as against the present owner of such property. Three exceptions are made: (1) savings in favor of persons under legal disabilities, (2) litigation pending at the passage of this act, or (3) vested property rights. Furthermore, the act specifies it has no effect on the laws pertaining to adverse possession.\textsuperscript{2}

The purpose of the act does not seem to be to strike down long established and favored property interests. Rather, it is to waive long-standing formal defects in the records.

\textsuperscript{12} But see 1 GAVIT, INDIANA PLEADING AND PRACTICE (1941) §12, subsection 6: "The obvious purpose of the act [1941 amendment] is to repeal by implication the last sentence of section 3-1403, Burns' Stat. Supp. which fixed a three-year period if service was by publication in a proceeding under that act, and section 2-2603 [2-2601?] which fixed a five-year limitation as to other judgments quieting title."

\textsuperscript{13} See 1 GAVIT, INDIANA PLEADING AND PRACTICE (1941) §§1-12, for a complete discussion of the 1940 Revision and the constitutional questions involved.

\textsuperscript{1} There seems to be no significance attached to the word "or." It probably should read "and," that being in harmony with the rest of the statute. \textit{See} Armstrong v. State, 72 Ind. App. 303, 318, 120 N.E. 717 (1918); State v. Myers, 146 Ind. 36, 38, 44 N.E. 801, 802 (1896).

\textsuperscript{2} IND. STAT. ANN. (Burns, Supp. 1941) §2-626.
such as typographical errors and variations in names, and to bar belated adverse claims which do not fall within the broad exceptions to the act.

Because the act does not affect vested property rights, it seems to be constitutional, although retrospective. However, of all the exceptions to the act, the term “vested property rights” may cause the most speculation. In the strict sense, a vested property right is a complete and consummated right, of which the person to whom it belongs cannot be divested without his consent; a right that is absolute and unconditional, its immediate exercise being unobstructed, and not depending on a contingency. Following this definition, non-vested interests such as contingent remainders, inchoate rights in lieu of dower and curtesy, and other interests in property which will become vested only upon the happening of a contingency seem to fall within the act. However, if the term “vested property rights” can be interpreted more broadly, some of these interests may be excluded from the operation of the act. A federal court has said justice, equity, and fair dealing may be considered in construing an interest as a vested right. In a more recent case, the determination whether a right was vested was made not by a distinct and separate consideration of the individual case, but upon broad general grounds which embrace the welfare of the whole community. In defining “vested property rights” for the purpose of this act, considerations of justice, equity, and community welfare should enter in. The legislature did not intend that the term be given a narrow technical meaning, but used it in a general sense to include all substantial property interests. It was neither the purpose nor the policy of the legislature to cut off contingent interests such as those mentioned above. Certainly contingent remainders have been

3 Jackson Hill Coal and Coke Co. v. Board of Comm’rs, 181 Ind. 335, 104 N.E. 497 (1913); Johnson v. Board of Comm’rs, 107 Ind. 15, 8 N.E. 1 (1886); People ex rel. Eitel v. Linkheimer, 371 Ill. 367, 21 N.E. (2d) 318 (1939), app’d dismissed, 308 U.S. 505, rehear- ing denied, 308 U.S. 636 (1939).
5 State v. Hackman, 272 Mo. 609, 199 S.W. 990 (1917).
6 May v. Fletcher, 40 Ind. 575 (1872); Weidler v. Floran, 105 Ind. App. 564, 13 N.E. (2d) 330 (1938).
regarded as desirable for too long, and rights of widows have been guarded too zealously by both legislatures and courts to conclude that this general act, with its broad exceptions, was intended to destroy them.

As a matter of statutory interpretation, imperfect and inchoate rights are subject to future, even retroactive, legislation, but the intention to destroy them must be clearly expressed. "After a statutory system or policy has been long established and is well defined, it will not be lightly presumed to be departed from or abandoned. General words are not to be so construed as to alter the previous policy of the law unless no sense or meaning can be put upon them consistently with the intention of preserving the existing policy untouched."

A final consideration which would seem conclusively to take contingent interests and estates outside the scope of this act is the fact that it refers only to defects, imperfections, or adverse claims. "Defects and imperfections" refers to formal errors or omissions in the abstract, not to contingent interests in the real estate. "Adverse claims" refers to rival, antagonistic rights or claims to the title and contingent property interests are not within this class. They are not subject to being challenged and settled in a suit to quiet title. No right against the record owner can be asserted under them until they are technically vested. Therefore, they cannot be barred by the provisions of this act.

PROPERTY

Uniform Simultaneous Death Act. There is no common law presumption of survivorship when two or more persons perish in a common disaster. The property of persons dying simultaneously is distributed by applying the recognized rules of property law, descent, evidence and procedure as logically as possible to the facts of each particular case. In order to correct the inequitable and affirm the fair results of this


10 2 LEWIS' SUTHERLAND, STATUTORY CONSTRUCTION (1904) §673.

11 Id. at §581. See also CRAWFORD, STATUTORY CONSTRUCTION (1940) §212.

method of distribution, the Indiana General Assembly in 1941 adopted the Uniform Simultaneous Death Act, as approved in 1940 by the National Conference of Commissioners on Uniform State Laws.

Section one provides that where title and devolution of property "depends upon priority of death and there is no sufficient evidence that the persons have died otherwise than simultaneously, the property of each shall be disposed of as if he had survived, except as provided otherwise in this act." To illustrate, statutory rights in lieu of dower and curtesy depend entirely on survivorship. If husband and wife die simultaneously, under this act the property of the husband would be distributed as if he had survived, his heirs taking only his separate estate. The distribution of the wife's property would be accomplished in the same manner.

To take another case, if a man, his wife, and their children die in a common disaster, his property passes to his heirs as if he had survived the others. A third illustration which falls within this class is where T devises property to A, but if A die before T, gift over to B. If T and A drown together, there being no sufficient evidence of survivorship, T's property descends as if he survived A, and B takes by the gift over. The statute in effect adopts the result of these common law cases.

Section two provides that where two or more beneficiaries, who are designated to take successively by reason of survivorship, die simultaneously, the property is divided into as many equal portions as there are successive beneficiaries, and these portions are distributed respectively to those who would have taken if each beneficiary had survived. This section changes the common law result in the case where T

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2 Ind. Acts 1941, c. 49, IND. STAT. ANN. (Burns, Supp. 1941) §§2356, 2363.

3 The act was adopted in 1941 by the legislatures of Arkansas, Illinois, Indiana, Maine, Maryland, Michigan, New Hampshire, Pennsylvania, South Dakota, Tennessee, Vermont, Wisconsin, Wyoming, and Hawaii.

4 This result was reached also at common law. Russell v. Hallet, 23 Kan. 276 (1880).

5 This same rule of distribution was applied, under the common law, in Women's Christian Home v. French, 187 U.S. 401 (1903). For other common law decisions which reached the same result as will prevail after the enactment of this section, see Johnson v. Meredith, 90 Me. 111, 13 Atl. 182 (1886); Carpenter v. Severin, 201 Iowa 969, 204 N.W. 448 (1925); In re Kimmey's Estate, 326 Pa. 33, 191 Atl. 47 (1937).
devises land to A for life, with remainder to B if living, but if B does not survive A, then a residuary bequest to charities. Formerly, if A and B perished in a common disaster and it could not be proved which died first, T's heirs took the reversion, contrary to T's intention. By this statute, an equitable rule allots one-half of the gift to B and one-half to the charities.⁶

Section three provides that where joint tenants or tenants by the entireties die simultaneously the property is distributed one-half as if one had survived and one-half as if the other had survived. Where there are more than two joint tenants, all having died simultaneously, the property is distributed in the proportion that one bears to the whole number of them. At common law, where a husband and wife perished together in a burning building, the property which they owned as tenants by the entireties was held to descend as if they had been tenants in common; i.e., one-half to the heirs of each.⁷ The same decision would be reached under this section, which in general simply states the common law rule.

Section four provides that where the insured and beneficiary of a life or accident insurance policy die simultaneously, the proceeds of the policy shall be distributed as if the insured had survived the beneficiary. This is the weight of authority at common law, and was the rule in Indiana before this act. The beneficiary does not have a vested interest in the policy, but rather must bear the burden of proving that he survived the insured in order to receive the benefits.⁸ If the beneficiary is unable to do this, the proceeds must revert to the estate of the insured. This is the result even though the insured had not reserved the power to change the beneficiary.⁹ Where a second beneficiary is provided in the

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⁶ This in substance is the illustration given by Dean Wigmore; see NAT. CONF. COMM'RS UNIFORM STATE LAWS, HANDBOOK (1939) 194. No cases to illustrate this section were found.

⁷ McGee v. Henry, 144 Tenn. 548, 234 S.W. 509 (1921) (realty); Vaughn v. Borland, 234 Ala. 414, 175 So. 367 (1937) (personal property held jointly by husband wife).


policy or in the laws of mutual benefit association, and he 
survives the insured and first beneficiary, victims of common 
disaster, if the representative of the first beneficiary cannot 
prove that his decedent survived the insured, the benefits go 
to the second named beneficiary.\textsuperscript{10} This section clearly 
adopts the rule of the best common law cases.

By section five, the act does not apply to the distribution 
of the property of persons who died before it took effect. 
Thus rights which have become vested by deaths prior to 
that date are not affected.

Section six gives the parties to wills, living trusts, deeds, 
and contracts of insurance the privilege to provide for the 
distribution of their property, in case of simultaneous deaths, 
in a manner different from that provided by this act. This 
provision is included only as a matter of policy to allow 
freedom of contract, especially to parties to insurance con-
tracts. It is not necessary to save the constitutionality of 
the act, for the legislature has the power to determine the 
laws of descent and distribution,\textsuperscript{11} and to cut off non-vested 
interests.\textsuperscript{12}

\textit{Accumulations of Personal Property.} This amendment 
allows the accumulation of personal property under a con-
veyance or will for the benefit of minors until such minors 
become thirty years of age.\textsuperscript{3} Formerly the accumulation 
terminated at the expiration of the minority.\textsuperscript{2} The reason 
for the amendment probably is that persons who have just 
attained their majority are not ordinarily capable of handling 
investment funds.\textsuperscript{3} By safeguarding the principal and accum-
ulations until the beneficiary reaches thirty years of age, 
the settlor or testator's purpose may be successfully accompl-
ished.

\textsuperscript{10} Modern Woodmen of America v. Parido, 335 Ill. 239, 167 N.E. 52 
(1929).
\textsuperscript{11} See Waugh v. Riley, 68 Ind. 482, 497 (1879).
\textsuperscript{12} Jackson Hill Coal & Coke Co. v. Board of Comm'rs, 181 Ind. 335, 
104 N.E. 497 (1914).
\textsuperscript{1} Ind. Acts 1941, c. 218, \textit{IND. STAT. ANN.} (Burns, Supp. 1941) §51-102.
\textsuperscript{2} \textit{IND. STAT. ANN.} (Burns, 1933) §51-102.
\textsuperscript{3} See Leach, \textit{The Rule Against Perpetuities and the Indiana Perpe-
tuities Statute} (1940) 15 \textit{IND. L. J.} 261, 273.
PROVISIONAL REMEDIES AND SPECIAL PROCEEDINGS

Children Born out of Wedlock. The 1941 act\(^1\) concerning children born out of wedlock was passed for the purpose of providing proper legal procedures to enable such children to obtain the same care, maintenance, education, protection, support and opportunities as legitimate children are accorded.\(^2\)

Obligations to Support.\(^3\) The same obligations which parents owe their legitimate children are by this act imposed upon the parents of children born out of wedlock. Hence both parents owe the child necessary maintenance, medical care, education and support, and must pay funeral expenses in case of its death. The mother may recover from the father a reasonable share of these expenses. The father is also liable for the expenses of the pregnancy and birth, including such items as prenatal care, delivery, hospitalization, post-natal care, and the mother’s funeral expense should she die as a result of the pregnancy. Formerly the father was liable only for the maintenance and education of the child.\(^4\)

Third persons entitled to remuneration for care, services and support furnished the mother or child are now given a cause of action against the father after his paternity is established. The father’s obligations may be enforced against his estate after his death, but never in an amount exceeding what the child’s distributive share would have been had it been legitimate. The provisions of this section do not impair the rights of surviving wife nor amend the laws of descent.

Procedures.\(^5\) The father and mother may file a voluntary joint petition for a hearing to establish the paternity of their child. The court then holds an informal private hearing to establish the pertinent facts, and may have the facilities of the state and county welfare departments at its disposal to aid in the investigation. The judgment of the court establishes the paternity and fixes the financial responsi-

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\(^1\) Ind. Acts 1941, c. 112, IND. STAT. ANN. (Burns, Supp. 1941) §§3-623.  
\(^2\) Ind. Acts 1941, c. 112, §1, IND. STAT. ANN. (Burns, Supp. 1941) §§3-623.  
\(^3\) IND. STAT. ANN. (Burns, Supp. 1941) §§3-624 to 629.  
\(^4\) IND. STAT. ANN. (Burns, 1933) §§3-614 (repealed); Brown v. State ex rel. Pavey, 94 Ind. App. 669, 182 N.E. 263 (1932) (father held liable only for court costs when child was stillborn); Price v. State ex rel. Gordon, 67 Ind. App. 1, 118 N.E. 263 (1932) (expenses of a surgical operation necessary during childbirth, damages for seduction, and “lying in” expenses could not be included in the judgment).
bilities of the father, and this has the same force and effect as any other civil judgment.

If an action to compel support is necessary, it is now brought in a court having juvenile jurisdiction in any county where the mother, child, or father resides or is found. Formerly, the action was brought only in the county where defendant resided, and after a hearing before a justice of the peace he was bound over for trial to the Circuit Court. It seems that the mother may now bring the action in her own name, rather than by the former ex rel action in the name of the state. The prosecuting attorney of the county in which the action is brought is to represent the mother if she desires, without charge. 7

If the defendant fails to appear at the hearing, having been served with summons or warrant, the court may enter an order as if he were present. This order, or judgment, may be satisfied by forfeiting defendant's bond. If he appears and contests the suit, both he and the mother are competent witnesses, although the defendant cannot be compelled to testify. 9

The judgment of the court establishes the paternity, and provides for the support of the child in the light of its needs and the father's ability to pay, and for the expenses of the mother in connection with the birth of the child. The judgment is a continuing one subject to modification upon change of circumstances. All the records are kept in a separate book, and are confidential with the exception that the financial obligation of the judgment is made a public record like other judgments. Execution may be obtained upon it without relief from valuation, appraisement, or exemption laws. The

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5 IND. STAT. ANN. (Burns, Supp. 1941) §§3-630 to 645.
6 Hawley v. State ex rel. Fisk, 69 Ind. 98 (1879).
7 IND. STAT. ANN. (Burns, Supp. 1941) §3-631.
8 The hearing cannot be held until the child is born, unless the father consents to an earlier hearing; but the death of the child before the hearing does not bar the action, though it may affect the amount of the judgment. If defendant dies before the hearing, his personal representative may be made defendant.
9 This provision is not required by the constitutional provisions against self incrimination, however, for proceedings under this act are civil actions. Moore v. State ex rel. Collins, 81 Ind. App. 673, 144 N.E. 433 (1924); Reynolds v. State ex rel. Cooper, 115 Ind. 421, 17 N.E. 909 (1888); State ex rel. McArthur v. Evans, 19 Ind. 92 (1862).
judgment does not now constitute a lien upon the father's real estate.\(^\text{10}\)

Defendant may file a motion for new hearing within ten days after finding or verdict, and may appeal as in other civil cases. He may be required to give bond or be held until the matter is finally adjudicated.

The court may, in its discretion, require the father to give bond that he will comply with the judgment. If he fails to give such bond the court may commit him to jail for not more than one year, or may commit him to a probation officer. The latter course will allow an impecunious father, unable to post bond, an opportunity to work to satisfy the judgment and support his child. If defendant is financially able to comply with the judgment but refuses to do so, a jail sentence may be the more effective means of coercion. The judgment remains unsatisfied even though he serves his year in jail.\(^\text{11}\)

**Miscellaneous Provisions.\(^\text{12}\)** The parents may enter into an agreement for the support of the child which, if fair and

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\(^\text{10}\) *IND. STAT. ANN.* (Burns, 1933) §3-608 provided that filing the transcript should operate as a lien upon defendant's real estate. This section was repealed and no similar provision enacted.

\(^\text{11}\) Imprisonment for failure to comply with the judgment does not violate the constitutional provisions against imprisonment for debt. *McIlvain v. State*, 87 Ind. 602 (1882). The reason is that the obligation imposed by judgment in a bastardy proceeding is not a "contracted" debt, as contemplated by the Indiana Constitution, Art. I, §22. It is, rather, a legal and moral duty owed to the child and society, so imprisonment as a coercive measure or as punishment is constitutional. *Lower v. Wallick*, 25 Ind. 68 (1866); *State v. Hollinger*, 69 N.D. 363, 287 N.W. 225 (1939). The rationale that the court may imprison the father for contempt seems valid only where the failure to comply with the court order is without lawful excuse. If defendant is financially unable to pay the judgment, his inability is not contempt of court, and throwing him in jail only makes him less able to pay. *State v. McKay*, 54 N.D. 801, 211 N.W. 435 (1926) (decided under §26 of the Uniform Illegitimacy Act, upon which §8-646 of the Indiana Act seems to be based); *Lopez v. Maes*, 38 N.M. 524, 37 P. (2d) 240 (1934). But the Indiana court disregarded this argument, and held that regardless of defendant's lack of ability to comply with the order, he may be jailed for contempt. *Lower v. Wallick*, 25 Ind. 68 (1865); *Ex parte Teague*, 41 Ind. 276 (1872). *But see Reynolds v. Lamont*, 45 Ind. 310 (1873), which holds that the non-compliance is not to be treated as contempt if defendant is unable to pay, but that imprisonment is simply authorized by the statute as a remedy to the state. One Indiana case presents the idea that the father is a wrongdoer, a tortfeasor, whose acts the legislature may punish and who does not deserve the constitutional privileges afforded to honest debtors. *Turner v. Wilson*, 49 Ind. 581 (1875).

\(^\text{12}\) *IND. STAT. ANN.* (Burns, Supp. 1941) §§3-646 to 655.
adequate, is a bar to further action so long as the father complies with it. The court is to give full consideration to the recommendations of state, county and other welfare agencies in determining whether the provisions are adequate for the needs of the child.

Actions must be brought under this act within two years after the birth of the child, but if the paternity was at any time acknowledged or established by another competent court, or if the father has furnished support for the child, action may be brought within two years from such time. If the mother is under a legal disability when the cause of action accrues, or if the father is a non-resident or can not be found, the two year period does not begin to run until such condition ends. However, not more than two years’ accrued support may be recovered in any case.

Vital statistics gleaned from the judgment establishing paternity and filed in the offices of state, county and city health authorities are as confidential as the court records themselves, and are not to be disclosed except by court order in cases where such information is necessary to determine personal or property rights. It is sufficient to refer to the mother as the “parent having sole custody of the child,” and to the child as being “in the sole custody of the mother” for all purposes except in birth records and where question of legitimacy are at issue.

Except for the provisions concerning records, this act does not apply to cases where the child was born before the act took effect.\(^1\) It does not impair any rights previously conferred by the acts it repeals,\(^1\) nor does it affect pending litigation.

This act gives the court much greater freedom and discretion in its methods of receiving evidence and information, and in rendering and enforcing judgments. By broadening the father’s obligations and by requiring that hearings be private and records confidential, the act increases the chances that the child will have the same opportunities he would have had if born in wedlock.\(^1\)

\(^1\)This act took effect July 1, 1941.
\(^1\)This act specifically repealed IND. STAT. ANN. (Burns, 1933) §§3-601 to 622, and the 1935 amendments to §§3-605 and §§3-615.
\(^1\)The organization, ideas and much of the terminology of this act are based on the Uniform Illegitimacy Act, approved in 1922 by the National Conference of Commissioners on Uniform State Laws
STATE AFFAIRS AND GOVERNMENT

State Personnel Act. The 1941 General Assembly enacted a number of laws directly affecting state employees. The State Personnel Act, a civil service law, is perhaps the most notable. In scope, the new merit law includes the personnel of the state penal, correctional, benevolent, and health institutions (except the chief administrative officer of each); the Indiana Library and Historical Department; the state and county Departments of Public Welfare; and the Indiana Unemployment Compensation Division, including the Indiana Employment Service.

Prior to 1941, the personnel of the Departments of Public Welfare and the Unemployment Compensation Division operated under departmental merit systems. The Personnel Act provides that employees in any department or division who were appointed under a merit system satisfactorily complying with the provisions of the act, may, upon approval by the state personnel board and the state personnel director, retain their positions without examination. All other incumbent employees are required to qualify in open competitive examinations.

Under recent amendments to the Federal Social Security Act, all administrative agencies receiving funds under that act must operate a merit system complying with the standards fixed by the Social Security Board. Accordingly, the State Personnel Act provides that federal regulations in regard to personnel shall prevail in those departments where federal aid is granted.

The State Personnel Act also establishes a merit system and since adopted by Iowa, Nevada, New York, New Mexico, North Dakota, South Dakota and Wyoming. Decisions from these states may furnish valuable precedent in the interpretation and construction of the Indiana Act.

1 Ind. Acts 1941, c. 139, IND. STAT. ANN. (Burns, Supp. 1941) §60-1301.  
2 For a complete discussion of the constitutionality of civil service laws, see Field, Civil Service Laws (1939) 7-17.  
for the selection and retention of the personnel in the state institutions and agencies affected. A four-member, bi-partisan personnel board is to establish general policies, adopt classification and compensation plans, and act as a quasi-judicial body in hearing dismissal appeals.

A personnel director, appointed without term by the board, is charged with the duty of preparing classification and compensation plans, recruiting, establishing eligible lists, certifying persons qualified for appointment, operating a service rating system as a supplement to the administration of promotional policies, and developing in-service training programs.

The state service is divided into the classified service and the unclassified service. The latter, however, consists primarily of the inmate help in the state institutions.

Original appointments to positions in the classified service are to be made from eligible lists prepared by the personnel director on the basis of competitive examinations. Provision is made for a veteran's preference of five points for all honorably discharged veterans and ten points for all disabled veterans. The wives and widows of veterans also receive this preference. The preference, however, is given only to those veterans who pass the examination.

Appointees to positions in the classified service must undergo a working test for a period of not less than six months before receiving a permanent career status. During this period, the appointing authority may remove an appointee but must report his action and reasons to the personnel director. The appointing authority, however, may not remove more than three appointees successively from the same position without the approval of the director.

An appointing authority may dismiss for cause any employee in his division. The dismissed employee is given the right to appeal to the state personnel board for an investigation, in which both the appealing employee and the appointing authority have the right to be heard publicly and to present evidence. If the board finds that the employee was dismissed for any political, social, religious, or racial reason, he is reinstated to his position without loss of pay. In all

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6 Certain extraordinary appointments, constituting exceptions to this rule of appointment after competitive examination, are carefully protected against possible abuses.
other cases, the findings and recommendations of the board are submitted to the appointing authority who makes the final decision disposing of the appeal.

Competent employees are further protected against dismissal by service ratings and are given an opportunity to advance by in-service training programs and promotional tests.

Other provisions of the act prohibit political activity on the part of employees and define and prescribe penalties for violations of the act.

Another civil service law, chapter 177, Acts 1941, provides for a merit system of appointment and promotion of registered professional engineers and other engineering employees actually engaged in engineering service in any state agency.

Chapter 16, Acts 1941, prohibits state officials and members of state boards, commissions, and institutions from employing their father, mother, brother, sister, uncle, aunt, husband, wife, son, daughter, son-in-law, daughter-in-law, niece, or nephew in offices and institutions over which they have control. An identical law, except that it did not include state institutions, was repealed by Chapter 213, Acts 1937.

TAXATION

Motor Vehicles. The 1941 session has left the status of motor vehicle licensing and registration a matter of conjecture. Indiana Acts 1941, Chapter 103, approved March 5, 1941, amended Section one of the Motor Vehicles Weight Tax Act of 1937. Under the emergency section of Chapter 103, this amendment, consisting of definitions, took effect immediately. Thus on March 5, Section one of the 1937 act was no longer in existence, having been replaced by Chapter 103.

On March 10, 1941, Chapter 181 was passed over the
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Indianas veto. This short chapter of six lines attempted to repeal the same Motor Vehicles Weight Tax of 1937 which had just been amended on March 5. The effective date of Chapter 181 is in doubt, however. The title of this act claims it declares an emergency. The body not only fails to include an emergency clause, but Section two provides the act is to become effective on the first day of January, 1942. Normally, where the title of an act comprehends more than the act, the surplusage of title is disregarded and the entire act is valid. On this basis, the mention of an emergency clause in the title would be ignored and the act allowed to take effect on January 1, 1942. Since Chapter 181 does not purport to repeal Chapter 103 and the latter took effect immediately under an emergency clause and the former will not be effective until January 1, Section one of the Motor Vehicles Weight Tax, as amended by Chapter 103, still will exist, even after January 1. Since Section one contains only definitions, however, the whole act is effectively repealed.

The confusion is made more impenetrable by Chapter 220. This act also purports to repeal the Motor Vehicle Weight Tax of 1937, which repeal was to be effective January 1, 1942. However, Chapter 220 appears to be unconstitutional. The body of the act provides for an increase in the registration fees for various classes of trucks, trailers and semi-trailers of from two dollars to fifty dollars each. This is by amendment to Chapter 271, Section 3, of the Acts of 1937. However, the title of this 1941 amendment fails to provide for the amendment of any statute and this part of Chapter 220 is undoubtedly unconstitutional, as not having been mentioned in the title. Section five of the act provides that if any part of the statute is declared unconstitutional, the entire act is to be invalid and all pre-existing laws

3 Wayne Township v. Brown, 205 Ind. 437, 186 N.E. 481 (1933); Manson, Drafting of Statute Titles (1934) 10 IND. L. J. 155, at 163.
4 Metsker v. Whitsell, 181 Ind. 126, 103 N.E. 1078 (1914), 181 Ind. 704, 103 N.E. 1085 (1914); Lawson v. DeBolt, 78 Ind. 563 (1881).
5 This chapter is not printed in the June, 1941, Supplement of Burns Indiana Statutes Annotated because it is considered unconstitutional. The changes which this act would have made in motor vehicle taxes are summarized in the note following §47-110.
6 IND. STAT. ANN. (Burns, 1933) §47-110.
which would have been affected by this act are to remain in effect.

Before the 1941 acts, there were two special taxes assessed on commercial vehicles: a license fee graduated according to the tire size of the vehicle;\(^8\) and an annual registration fee according to the size of the vehicle.\(^9\) The first of these taxes was repealed entirely by Chapter 181. Chapter 220 attempted to increase the rate imposed under the second. The apparent unconstitutionality of this act should result in the continuation of the former rates.\(^10\)

_Gross Income Tax._ Only a few changes in the Indiana Gross Income Tax were effected by the 1941 General Assembly.\(^1\) It is now clear that domestic casualty and fire insurance carriers must compute and report as part of their gross income _each tax year_ the gross earnings from the sale during that year of assets in the business conducted by such carrier.\(^2\) However, these carriers need consider as gross income only so much of their gross earnings “as does not become or is not used to maintain a reserve or other policy liability” required by the laws of Indiana or rulings of duly authorized supervisory officials.\(^3\) This taxable portion of gross income, according to the new amendment, is determined by dividing the year’s average of all reserves by the year’s average of all admitted assets and multiplying the percentage figure thus obtained times the gross income. This provision will apply also to domestic mutual insurance companies, since they are included in Section 1(o)\(^4\) and by inference may be considered included in the related Section 1(p).

As the result of much demand for relief\(^5\) to retail mer-

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\(^8\) _IND. STAT. ANN._ (Burns, 1933) §47-1120.

\(^9\) _IND. STAT. ANN._ (Burns, 1933) §47-110.

\(^10\) This is the view taken by the Treasury Department of the State and a public appeal was made in October, 1941, to trucking companies, asking them not to contest the validity of the increased tax in order that the state would not be deprived of these needed revenues.

\(^1\) _Ind. Acts 1941, c. 140._

\(^2\) _IND. STAT. ANN._ (Burns, Supp. 1941) §64-2601(p).

\(^3\) Also excluded from “gross income” of these domestic casualty or fire insurance carriers is premium income derived from business conducted outside the state of Indiana on which such carrier pays a premium tax of one percent or more in the foreign state. _IND. STAT. ANN._ (Burns, Supp. 1941) §64-2601(p).

\(^4\) _OPS. ATT’Y GEN., IND._ (1933) 473.

\(^5\) One of the proposed changes was _H.B. 8_, changing the exemption of retail merchants from $3,000 to $20,000. _H.B. 14_ proposed
chants from the flat levy of one per cent of their gross income over $3,000, the 1941 General Assembly reduced this tax to one-half of one per cent. However, this special rate is limited to that portion of the retail merchant's income received from "selling at retail" as defined in Section 1(k) of the act. Thus a retail merchant with $15,000 gross income from selling at retail and $5,000 from other sources pays one-half of one per cent on $12,000 and one per cent on the $5,000. It is well to note here that under the new amendments, all sales of property not covered in the definition of "wholesale sales" or selling "at retail" are "retail sales" and taxable at one per cent.

Before the 1941 amendments, laundries and dry cleaning companies had been held to be selling services and therefore taxable at one per cent under Section 3(g). The new amendments abolish this by imposing a special rate of one-half of one per cent for gross income received from the business of dry cleaning and laundering. However, income from these businesses is not income derived by a retail merchant from selling at retail and so falls within Section 5(e) with reference to deductions. Thus laundries and dry cleaning establishments are taxed at the same rate as retail merchants, but have deductions of only $1,000 as compared to $3,000 for the retail merchants.

Some doubt may arise as to the constitutionality of classifying laundries and dry cleaners in a separate group for the purposes of taxation, giving them a lower rate than that placed on the income of other service enterprises. This classification may be discriminatory taxation. The Supreme Court of the United States, however, has been liberal in sustaining classifications under the power of taxation.

replacement of the gross income tax with a graduated tax based on retail sales, also allowing deduction of losses. H.B. 157 proposed replacement of the gross income tax with a net income tax.

6 IND. STAT. ANN. (Burns, Supp. 1941) §64-2603(c).
7 Under §64-2605(a), id., a retail merchant is allowed a $3,000 deduction from that part of his income derived from selling at retail and no deduction from the remainder of his income.
8 Id. at §64-2603(a).
9 Id. at §64-2601(k).
10 Id. at §64-2603(g).
11 Charles Laundry and Dry Cleaning Co. v. Dept. of Treasury, 103 Ind. App. 359, 5 N.E. (2d) 683 (1936).
12 WILLIS, CONSTITUTIONAL LAW (1936) 587.
protection of the laws does not prevent discretion in the classification for taxation of properties, businesses, trades, callings, or occupations. Discrimination in favor of a certain class is not arbitrary, if the discrimination is founded upon a reasonable distinction. This may be done so long as all in like circumstances are treated alike.

The same question may arise as to the inclusion among items taxable at one-fourth of one per cent of income from the business of industrial processing, enameling, plating or servicing of goods which are to be sold by the person for whom the work is done. This provision likewise seems constitutional.

A final change in the tax rates is the specific inclusion of outdoor poster and painted display advertising within the meaning of “display advertising” and so taxable at the rate of one-fourth of one per cent. Previously, the Gross Income Tax Division had considered display advertising as including only the gross receipts derived from advertising in a newspaper, magazine, or periodical.

Of considerable interest to taxpayers in general is the deletion of the requirement of verifying gross income tax returns by oath. Under the new act signing by the taxpayer or duly authorized agent is sufficient.

STATE BOARDS AND COMMISSIONS

Barbers. Chapter 77 delegates to the State Board of Barber Examiners the authority to fix reasonable prices and set reasonable opening and closing hours for barber shops in any county or locality in which the board has found, after investigation, that conditions warrant such regulation. The standards promulgated by the act are: (1) unfair economic practices which tend to make insecure the economic status of the barbers, (2) unreasonably long or irregular hours of operation which (a) tend to make difficult adequate and timely sanitary inspections, (b) tend to impair the health or efficiency of barbers, or (c) tend to endanger

13 State Board of Tax Comm’rs of Ind. v. Jackson, 283 U.S. 530 (1931); COOLEY, TAXATION (4th ed. 1924) §343.
14 Miles v. Dept. of Treasury, 209 Ind. 172, 199 N.E. 372 (1935).
15 IND. STAT. ANN. (Burns, Supp. 1941) §64-2603(a) (4).
17 IND. STAT. ANN. (Burns, Supp. 1941) §64-2610(a).
the health or safety of the patrons. Penalty for violation of the act or orders promulgated under it is revocation of the license.\(^1\)

This is the second attempt at such regulation, the 1939 statute\(^2\) having been declared unconstitutional as an unlawful delegation of power to barber organizations.\(^3\) The present act seems to have cured that defect by putting the initiative for price setting in the board rather than with the barbers, and by providing a reasonable standard for rates.\(^4\)

There are two possible grounds for invalidity from the standpoint of discrimination: first, that the act discriminates between barbers and beauty operators, and second, that other kinds of business are favored.\(^5\) It would seem, however, that the regulation of barbering and beauty culture present substantially different problems.\(^6\) The question of discrimination in favor of other types of business involves the same considerations as the question of due process; that is; whether there is a reasonable relation between the public health and welfare and the barber regulation.\(^7\)

Regulation of barbering to protect the public from communicable diseases, unhealthful practices and unsanitary conditions is concededly within the police power.\(^8\) The reason usually given is that the personal nature of barbering makes it necessary to insure sanitary methods. Thus, licensing and examination of barbers has been upheld in practically every state where the question has been presented.\(^9\) However, although the fixing of opening and closing hours for various businesses has been upheld by the courts,\(^10\) the majority of

\(^1\) IND. STAT. ANN. (Burns, Supp. 1941) §63-342.
\(^3\) Hollingsworth v. Board of Examiners, 28 N.E. (2d) 64 (Ind. 1940).
\(^4\) A fair inference from the language in Hollingsworth v. Board of Examiners, 28 N.E. (2d) 64 (Ind. 1940).
\(^7\) ROTTSCHAEFER, CONSTITUTIONAL LAW (1939) 457.
\(^8\) People v. Logan, 284 Ill. 83, 119 N.E. 913 (1918); note (1935) 98 A. L. R. 1088.
states have declared invalid such regulation of barbering.\textsuperscript{11} There is, however, a growing tendency to uphold such laws on grounds that (1) they are necessary to facilitate inspection, (2) barber shops often become gathering places for anti-social characters, and late hours augment the evil, (3) long hours lower resistance and make barbers more susceptible to disease, and the regulation of hours of business is the only effective way of regulating hours of labor in barber shops.\textsuperscript{12}

Price regulation has followed the same course. Earlier cases, relying on \textit{Adkins v. Children's Hospital},\textsuperscript{13} consistently rejected such regulation,\textsuperscript{14} but since \textit{Nebbia v. New York}\textsuperscript{15} and \textit{West Coast Hotel v. Parrish}\textsuperscript{16} the recent majority have upheld price-fixing laws for barbers on the basis that where price-cutting and unfair competition exist sanitary safeguards are sacrificed.\textsuperscript{17} The question in its final analysis, however, is to what extent the court will accept the legislative determination that prices and hours of barbers bear a sufficient relation to the public health and welfare to permit regulation.

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\textsuperscript{11} McDermott v. Seattle, 4 F. Supp. 855 (W.D.Wash. 1933) (goodwill lost is deprivation of property without due process); Ganby v. Claeyzs, 2 Cal. (2d) 266, 40 P.(2d) 817 (1955); Denver v. Schmidt, 98 Colo. 32, 52 P.(2d) 388 (1935) (inspection opportunities not sufficient reason to regulate hours); Chairis v. Atlanta, 164 Ga. 755, 139 S.E. 559 (1927) (unequal protection of laws); Opinion of Justices, 14 N.E.(2d) 953 (1938); Patton v. Bellingham, 179 Wash. 566, 38 P.(2d) 864 (1934), 93 A.L.R. 1076, 1085 (1935).


\textsuperscript{13} Adkins v. Children's Hospital, 261 U.S. 525 (1923).


\textsuperscript{15} Nebbia v. New York, 291 U.S. 502 (1934).

\textsuperscript{16} West Coast Hotel v. Parrish, 306 U.S. 379 (1937).

\textsuperscript{17} Board of Examiners v. Parker, 190 La. 214, 182 So. 485 (1938); \textit{State v. McMAsters}, 204 Minn. 438, 283 N.W. 767 (1939); \textit{Arnold v. Board of Examiners}, 45 N.M. 57, 109 P.(2d) 779 (1941); \textit{Herrin v. Arnold}, 183 Okla. 392, 82 P.(2d) 977 (1938).