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will be available to most small tract owners. To qualify for the special allowable, one must prove that surrounding landowners have refused to pool on reasonable terms—a rather unlikely occurrence except under very special circumstances. The larger tract owners, in most instances, undoubtedly will be more than willing to pool on a reasonable basis with the small tract owners to prevent the drainage that can result if the latter is given a special allowable large enough to permit a profit. As the dissent points out, this case and resulting field rules represent a policy approaching a non-statutory compulsory pooling requirement.[58] No one will be forced to pool, but of course in most situations economic pressures will leave small tract owners no real alternative. Prior to this case, a portion of the minerals belonging to large tract owners were confiscated to prevent total confiscation, sometimes due to a refusal to pool, of minerals underlying a small tract. Under the new policy, if a pooling agreement is reached, nothing will be confiscated, but each owner will receive his fair share of the minerals in the common reservoir. The extreme inequities presented by the Commission's original order were perhaps necessary to point up the need for a new policy. The Texas Legislature has long declined to enact a compulsory pooling statute. If legislation now is forthcoming, it is hoped that the purpose would be only to clarify, or at most modify, and not to change the result of this case, which represents a trend toward more orderly and equitable development of the oil and gas fields of the states. The holding here is important and desirable not only as affecting correlative rights between landowners, but as promoting conservation and the general economy of the state's petroleum industry.

Thomas A. Howeth

Embezzled Funds: Taxable Income in the Year of Misappropriation

Petitioner was a union official who, during the years 1951 through 1954, embezzled over 738,000 dollars from his union and from an insurance company with which the union was doing business. He failed to report these amounts in his gross income in those years and was convicted for willfully attempting to evade the federal income tax due for each of the years 1951 through 1954

[58] See quotation note 49 *supra*.

in violation of the provisions of the Internal Revenue Code which make such conduct felonious.[1] The court of appeals affirmed the conviction.[2] The United States Supreme Court granted certiorari because of the apparent similarity between these facts and those in *Commissioner v. Wilcox.*[3] In the latter case the Court had decided that embezzled funds did not constitute a taxable gain. *Held: Wilcox* is overruled; embezzled funds constitute a gain to the embezzler which must be reported as gross income for federal income tax purposes in the year of the misappropriation. *James v. United States,* 366 U.S. 213 (1961).[4]

The sixteenth amendment to the Constitution of the United States makes no attempt to define income. It gives Congress the broad "power to lay and collect taxes on income, from whatever source derived."[5] Congress first undertook to exercise this power through the Income Tax Act of October 3, 1913, when it defined income in Section II B of that act: "[T]he net income of a taxable person shall include gains, profits, and income derived from . . . the transaction of any *lawful* business carried on for gain or profit, or gains or profits and income from any source whatever."[6] The word "lawful" was dropped when the statute was amended in 1916.[7] Although Congress added other amendments to the various income defining provisions,[8] it made only one change in wording of any major significance when it adopted the Internal Revenue Code of

[1] Int. Rev. Code of 1939, § 145(b) and Int. Rev. Code of 1954, § 7201. Both sections are applicable because of the years involved; however, there are no substantial differences between the two.

[2] 273 F.2d 5 (7th Cir. 1959).

[3] 327 U.S. 404 (1946). In his capacity as bookkeeper, the taxpayer had embezzled several thousand dollars from his employer. The company never condoned the taking, but held him liable to return the misappropriated funds. He was unable to do so, having lost most of the money in various gambling houses in Reno. The taxpayer was convicted of embezzlement and sentenced to serve two to fourteen years in prison.

[4] Mr. Chief Justice Warren delivered the judgment of the court in an opinion in which Justices Stewart and Brennan concurred. They felt that although the Petitioner should have paid taxes on the embezzled funds, the element of willfulness, which is required for income tax evasion convictions, could not be proven in this case "so long as the statute contained the gloss placed upon it by *Wilcox* at the time the alleged crime was committed." 366 U.S. at 221. Justices Harlan, Frankfurter, and Clark agreed that *Wilcox* should be overruled, but did not concur with the court's reversal of the conviction as a matter of law. Justices Black, Douglas, and Whittaker believed that *Wilcox* was still correct and that the Petitioner should not be convicted because, in their opinion, he owed no tax on the misappropriated funds. Hence, the highly divided court (there were five separate opinions) found little common ground for deciding the fate of the Petitioner. More important for the present discussion, however, is the fact that six justices did agree that *Wilcox* was incorrect and should be overruled.

[5] Montgomery, Federal Taxes 1·1 (37th ed. 1958).

[6] Revenue Act of 1913, ch. 16, § II B, 38 Stat. 167. (Emphasis added.)

[7] Revenue Act of 1916, ch. 463, § 2(a), 39 Stat. 757.

[8] By the time of the adoption of the 1939 Code, "net income" had become "gross income" and there was a special section devoted to the definition of that term. Int. Rev. Code of 1939, § 22(a).

1954. That version states simply that "[G]ross income means all income from whatever source derived. . . ."[9] The broadening trend in the concept of gross income, as manifested by the statutory definitions, has been borne out in the courts.[10] This same trend is found in the realm of illegal transactions. The Supreme Court in *United States v. Sullivan*[11] paid particular attention to the omission of the "lawful" requirement from the gross income definition in the 1916 Act. The Court, by declaring bootlegging profits taxable, finally resolved any doubts entertained by the lower courts concerning the taxability of income because it was illegally obtained.[12] In a series of cases decided over the past thirty-five years, in opinions rendered at every level from the Tax Court to the Supreme Court, the principle has become firmly established that income obtained from illegal businesses[13] and acquired through most illegal transactions[14] is taxable.

[9] Int. Rev. Code of 1954, § 61(a). This section is based upon the language found in the sixteenth amendment and seems to indicate the legislative intent to exercise the taxation power to its fullest extent. For a general legislative history of this section see U.S. Code Cong. & Ad. News 4802 (1954).

[10] Speaking of the word "income" in Towne v. Eisner, 245 U.S. 418 (1918), Mr. Justice Holmes said, "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." *Id.* at 425. For a graphic illustration of this changing concept *compare* Eisner v. Macomber, 252 U.S. 189 (1920), *with* Commissioner v. Glenshaw Glass Co., 348 U.S. 426 (1955).

The statutory definition of "gross income" was under consideration in Helvering v. Clifford, 309 U.S. 331 (1940), when the court stated, "The broad sweep of this language indicates the purpose of Congress to use the full measure of its taxing power . . . . Hence our construction of the statute should be consonant with that purpose." *Id.* at 334.

[11] 274 U.S. 259 (1927). After taking note of the deletion, Mr. Justice Holmes, speaking for a unanimous court, stated, "We see no reason . . . why the fact that a business is unlawful should exempt it from paying the taxes that if lawful it would have to pay. *Id.* at 263.

[12] *E.g.*, the concurring opinion of Manton, J., in Steinberg v. United States, 14 F.2d 564, 569 (2d Cir. 1926): "It is incredible to believe that it was intended that a bootlegger be dignified as a taxpayer for his illegal profit, so that the government may accept his money for governmental purposes, as it accepts the money of the honest merchant taxpayer."

[13] *E.g.*, United States v. Chapman, 168 F.2d 997 (7th Cir.), *cert. denied*, 335 U.S. 853 (1948) (black market operations); Barker v. Magruder, 95 F.2d 122 (D.C. Cir. 1938) (usurious loans); Paterson v. Anderson, 20 F. Supp. 799 (S.D.N.Y. 1937) (unlawful insurance policies); George L. Rickard, 15 B.T.A. 316 (1929) (illegal prize fight pictures); Mary Luginbuhl, 8 CCH Tax Ct. Mem. 968 (1949) (abortion racket).

[14] *E.g.*, Rutkin v. United States, 343 U.S. 130 (1952) (extortion); Johnson v. United States, 318 U.S. 189 (1943) (protection racket); Humphreys v. Commissioner, 125 F.2d 340 (7th Cir.), *cert. denied*, 317 U.S. 637 (1942) (ransom payment); Christian H. Droge, 35 B.T.A. 829 (1937) (lottery). For further compilation of these activities and cases see Note, 30 Ind. L.J. 487 (1955); Comment, 38 Marq. L. Rev. 262, 263 (1955); Comment, 13 U. Miami L. Rev. 359 (1959); Note, 62 Yale L.J. 662 (1953). For a good general discussion of the problem see Annot., 166 A.L.R. 891 (1947); Geller & Rogers, *How the Federal Income Tax Applies to Illegal and Unlawful Gains*, 27 Taxes 214 (1949).

It is interesting to note, however, that the cases do not purport to establish any universal test to determine tax liability. An early case, James P. McKenna, 1 B.T.A. 326 (1925), held that "a wrongdoer will not be heard to urge his own wrongdoing . . . in bar of rights of third parties, and this is equally true when such third party is the Federal Government seeking to assert a tax . . . ." Later, in Griffith v. Smith, 101 F.2d 348

The notable exceptions to the general rule of taxability were the gains acquired by embezzlement[15] and possibly theft.[16] Prior to the *Wilcox* case, the circuit courts could not agree on the taxability of embezzled funds.[17] That inconsistency was the reason given by the Supreme Court for granting certiorari in *Wilcox*.[18] In an opinion which subsequently has received substantial judicial attention as well as extensive treatment by legal writers, the Court specifically stated that the money received by an embezzler through his crime was not taxable.[19] Further, the Court established a basis for taxability which was unknown prior to this decision.[20] It was held that:

> a taxable gain is conditioned upon (1) the presence of a claim of right to the alleged gain and (2) the absence of a definite, unconditional obligation to repay or return that which would otherwise constitute a gain. Without some bona fide legal or equitable claim, even though it be contingent or contested in nature, the taxpayer cannot be said to have received any gain or profit within the reach of Section 22(a).[21]

(7th Cir. 1938), the circuit court of appeals spoke in terms of "legal title" and held that corporate officers who had received excessive bonuses, voidable at the instance of the stockholders, must pay taxes on the money received because the "legal title" had passed from the corporation to the officers. The "claim of right" doctrine of Commissioner v. Wilcox, 327 U.S. 404 (1946), and the "control and benefit" theory of Rutkin v. United States, *supra*, will be discussed in detail in the text *infra*.

[15] Commissioner v. Wilcox, *supra* note 14.

[16] Steinberg v. United States, 14 F.2d 564, 566 (2d Cir. 1926) (dictum). See also Note, 30 Ind. L.J. 487, 488 (1955): "Proceeds from larceny have never been considered subject to taxation as income for a simple, practical reason. If the thief was apprehended, the property was returned to the victim. If the criminal escaped, the Government did not know on whom to levy the tax."

[17] For taxability: Kurrle v. Helvering, 126 F.2d 723 (8th Cir. 1942). The court followed the general trend of cases up to that time which had taxed funds held by the taxpayer, even though they were returned at a later time. For non-taxability: McKnight v. Commissioner, 127 F.2d 572 (5th Cir. 1942). Here the court compared the embezzler to a borrower and the employer to a lender. Although the borrower/embezzler has the use and control of the money it still rightfully belongs to the lender/employer. The fact that the United States might get a preferential claim to the money, to the direct loss and detriment of the rightful owner also seemed important to the court. *Id.* at 574.

[18] 327 U.S. at 406.

[19] *Id.* at 409.

[20] While the "claim of right" doctrine, as such, was not new, its use in *Wilcox was* new. It was applied there to determine whether a gain was taxable. The doctrine was first mentioned in North Am. Oil Consol. v. Burnet, 286 U.S. 417, 424 (1932):

> If a taxpayer receives earnings under a claim of right and without restriction as to its disposition, he has received income which he is required to return, even though it may still be claimed that he is not entitled to retain the money, and even though he may still be adjudged liable to restore its equivalent.

But that case dealt with *when* income became taxable, not *whether* it was taxable. Some earlier cases had held that the recipient of illegally derived funds had a claim of right, hence taxable income. *E.g.*, Kurrle v. Helvering, 126 F.2d 723 (8th Cir. 1942). Yet in other cases the wrongdoer was held to have no claim of right to the money and the courts still found that the funds constituted taxable income. *E.g.*, Humphreys v. Commissioner, 125 F.2d 340 (7th Cir.), *cert. denied*, 317 U.S. 637 (1942).

[21] 327 U.S. at 408. The Court did note the broad statutory language of § 22(a) of the 1939 Internal Revenue Code, but at the same time stated that mere dominion over money or property is not decisive in all cases. "In fact, no single, conclusive criterion has yet been found to determine in all situations what is sufficient gain to support the imposition of an

Some years later the Court confronted a very similar problem in *Rutkin v. United States*,[22] a case involving the taxability of extorted funds. The taxpayer unsuccessfully contended that *Wilcox* was authority for the proposition that such funds should be exempt from taxation. The voidable title obtained by the extortionist and the fact that this title would probably never be assailed by the victim seemed to the majority to be reason enough to distinguish this from the embezzlement situation.[23] Mr. Justice Black wrote a vigorous dissent in which he objected to the rationale of the majority on the ground that it was in effect rejecting the basis for the *Wilcox* case.[24] The Court *had*, in fact, vitiated the *Wilcox* holding by establishing a new test of taxability.[25] Under the *Rutkin* test a gain "constitutes taxable income when its recipient has such control over it that, as a practical matter, he derives readily realizable economic value from it."[26] There is no requirement for a "claim of right," or for the "absence of an unconditional duty to repay" in order for there to be a taxable gain. Unfortunately, *Wilcox* was not overruled and was declared to be controlling in cases with a similar set of facts.[27] This situation led to several unsuccessful attempts to plead embezzlement as a defense in tax evasion cases,[28] and to a number of interesting opinions in which the differentiation in fact situations was tenuous,

income tax. No more can be said in general than that all relevant facts and circumstances must be considered." *Id.* at 407. As in the McKnight case, 127 F.2d 723 (8th Cir. 1942), the Court stated that the debtor-creditor relationship between the taxpayer and his employer was definite and unconditional as of the time of the misappropriation. "All right, title and interest in the money rested with the employer." 327 U.S. at 409. In *Wilcox* the embezzler had no claim of right to the money upon which a tax claim could be based. At the end of the majority opinion, the Court added another significant reason for its holding. "Sanctioning a tax under the circumstances before us would serve only to give the United States an unjustified preference as to part of the money which rightfully and completely belongs to the taxpayer's employer." *Id.* at 410.

[22] 343 U.S. 130 (1952). The taxpayer had obtained $250,000 from his victim through threats upon the life of the victim and his family. He failed to report this income and was convicted for income tax evasion. In an opinion delivered by Mr. Justice Burton, the lone dissenter in *Wilcox*, the majority upheld the conviction. The reasoning of the Court was substantially the same as that used by Mr. Justice Burton in his earlier dissent.

[23] *Id.* at 136-37.

[24] *Id.* at 140.

[25] See United States v. Bruswitz, 219 F.2d 59, 61 (2d Cir. 1955):

> It is difficult to perceive what, if anything, is left of the Wilcox holding after Rutkin v. United States. . . . Certainly the whole approach of the later case, stressing actual possession and control, is diametrically opposed to the "claim of right" criterion of the earlier case.

[26] 343 U.S. at 137 (1952).

[27] *Id.* at 138.

[28] *E.g.*, Davis v. United States, 226 F.2d 331 (6th Cir. 1955), *cert. denied*, 350 U.S. 965 (1956); Kann v. Commissioner, 210 F.2d 247 (3d Cir. 1953), *cert. denied*, 347 U.S. 967 (1954). Both cases involved closely held corporations where the officers claimed to have embezzled the funds taken by them from the corporation. The courts refused to be deceived by what appeared to be nothing more than a tax dodge. *But cf.* J. J. Dix, Inc. v. Commissioner, 223 F.2d 436 (2d Cir.), *cert. denied*, 350 U.S. 894 (1955).

if not questionable.[29] The stage was set for the Supreme Court to consider the question once again.

In overruling *Wilcox* the Court in the instant case stated, "[E]xamination of the reasoning used in *Rutkin* leads us inescapably to the conclusion that *Wilcox* was thoroughly devitalized."[30] In his opinion Mr. Chief Justice Warren compared the facts and holdings of the two cases and pointed out the practical inconsistencies between the two tests for determining tax liability. Furthermore he said that:

> it is inconsequential that an embezzler may lack title to the sums he appropriates while an extortionist may gain a voidable title. Questions of federal taxation are not determined by such "attenuated subtleties." . . . Likewise unimportant is the fact that the sufferer of an extortion is less likely to seek restitution than one whose funds are embezzled.[31]

In the absence of these two points, *Wilcox* and *Rutkin* are indistinguishable. The Court chose to adopt the *Rutkin* rationale, thereby making control of the property, and the benefits derived from that control, decisive. The origin of the criteria in that case can be traced

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[29] *E.g.*, Briggs v. United States, 214 F.2d 699 (4th Cir.), *cert. denied*, 348 U.S. 864 (1954); Marienfeld v. United States, 214 F.2d 632 (8th Cir.), *cert. denied*, 348 U.S. 865 (1954). In the *Briggs* case, the taxpayer was authorized by his company to take bids on land which the company wished to sell. With the help of his co-defendant, Briggs, the taxpayer pocketed the difference between the price paid to him and that which he reported to his employer. Both defendants then invested the money in a real estate venture, realizing a substantial gain. Upon learning of the income tax evasion prosecution, the company sought and obtained restitution from the defendants. The court distinguished this case from *Wilcox* on the ground that Wilcox had lost all the money which he took from his employer, while in the *Briggs* case the taxpayers were still solvent and had repaid the funds taken by them. The court felt that there was even less similarity between the *Wilcox* case and the situation of Briggs, who, not being an agent of the company, obtained his share through fraud, not embezzlement. 214 F.2d at 702.

In the *Marienfeld* case, *supra*, the Defendant processed meat products for Stokely-Van Camp Co. and was authorized to sell these for Stokely. However, he converted a substantial amount of the products to his own use. The court pointed out that the only distinction apparent to them between *Marienfeld* and *Wilcox* was the fact that in the latter case, the bookkeeper was under an immediate and unconditional obligation to repay the funds taken by him, whereas Marienfeld was to hold the proceeds from the sales for Stokely and account for them at a later time.

It appears that in both cases the defendants would have been guilty of embezzlement under the applicable local laws; however, the courts refused to consider this point controlling. In the *Marienfeld* case the court stated specifically that state laws were not decisive in determining tax liability, even though it noted that the Supreme Court in *Wilcox* had relied upon Nevada law to show the taxpayer's duty to repay the funds taken by him.

The instant case, too, can be distinguished from *Wilcox* on its facts. The Petitioner would have been liable for a taxable gain even under the latter decision, although not in the year of the misappropriation. *Wilcox* did not hold that the funds obtained by embezzlement were never taxable, just that they were not taxable so long as they still belonged to the victim. Condonation by or a release from the rightful owner would create income which would be taxable. The union had settled its claims against James for $13,568.50. According to the *Wilcox* decision, the amount unpaid by the taxpayer was income to him at that time.

[30] 366 U.S. at 215.

[31] *Id.* at 216.

back to an opinion by Mr. Justice Holmes in *Corliss v. Bowers,*[32] in which he concluded that "taxation is not so much concerned with the refinements of title as it is with actual command over the property taxed—*the actual benefit for which the tax is paid.*"[33] Mr. Justice Cardozo intensified the force of this statement in an opinion written by him three years later in *Burnet v. Wells:*[34]

> [The government] may tax not only ownership, but *any right or privilege that is a constituent of ownership. . . .* Liability may rest upon the enjoyment by the taxpayer of privileges and benefits so substantial and important as to make it reasonable and just to deal with him as if he were the owner, and to tax him on that basis.[35]

The two previous cases were concerned with *whom* to tax when dealing with trusts; nonetheless, the same policy reasons underlying these decisions are applicable when determining *what constitutes a taxable gain.* Administrative convenience and the practical necessities required in order to have an efficient taxing system now seem to command equal importance when deciding either question.[36] At any rate, the "control and benefit" test is firmly established as the one which the courts will use in these cases.[37] The downfall of the somewhat anomolous *Wilcox* holding was predictable from the time it first appeared because it constituted an exception to an almost universal rule for the taxation of illegally earned income.[38] When considered in the light of modern judicial pronouncements construing the definition of gross income, the limits of the constitutional taxing power,[39] and the meaning of "claim of right"[40] the present decision seems correct.

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[32] 281 U.S. 376 (1930).

[33] *Id.* at 378. (Emphasis added.)

[34] 289 U.S. 670 (1933).

[35] *Id.* at 678. (Emphasis added; citations omitted.)

[36] See Rutkin v. United States, 343 U.S. 130, 137 (1952); Corliss v. Bowers, 289 U.S. 670, 678 (1933). As pointed out before, *Wilcox* did not hold that embezzled funds would never be taxable. See note 29 *supra.* One of the main criticisms of that case was that it merely delayed the collection of the taxes which could later become due. Such a delay makes administration of the tax difficult and collection less certain. See generally Note, 30 Ind. L.J. 487 (1955); Note, 62 Yale L.J. 662 (1953).

[37] See, *e.g.,* Benes v. United States, 276 F.2d 99 (6th Cir. 1960); United States v. Bruswitz, 219 F.2d 59 (2d Cir. 1955).

[38] See, *e.g.,* Note, 44 Mich. L. Rev. 885 (1946).

[39] Commissioner v. Glenshaw Glass Co., 348 U.S. 426 (1955). The Court stated that it would give a liberal construction to the broad phraseology in the statutory definition of gross income "in recognition of the intention of Congress to tax all gains except those specifically exempted." *Id.* at 430.

See also Commissioner v. Jacobson, 336 U.S. 28, 48-49 (1949):

> The contrast between the provisions [defining income and listing exemptions] is striking. The income taxed is described in sweeping terms and should be broadly construed in accordance with an obvious purpose to tax income comprehensively. The exemptions, on the other hand, are specifically stated and should be construed with restraint in the light of the same policy.

[40] See, *e.g.,* Healy v. Commissioner, 345 U.S. 278 (1953).

The "claim of right" doctrine, in its original context, was a result of the annual accounting system of income taxation. The courts used it to determine *when* income became taxable. The doctrine was also adopted by the courts, though to a lesser extent than the "control and benefit" theory, to determine *what constituted a taxable gain.*[41] However, the Supreme Court in *Healy v. Commissioner*[42] combined the two concepts and stated that when the taxpayer had the funds in his possession subject to his control and disposition, he held the funds under a "claim of right." The case was concerned with when the income should be reported for tax purposes. Thus the Court correctly applied the "claim of right" doctrine to the facts to decide when the income was earned. At the same time, it used the "control and benefit" test to determine whether the income was in fact taxable and to establish a claim of right even though the money received by the taxpayer had to be returned at a later date.

There are, then, at least three questions which might arise in these illegal income cases, or, for that matter, in any case where the claim to the property is contested:

(1) *In what period is the income to be reported?* It should be reported in the period during which the taxpayer acquires it under a claim of right. The requisite claim of right is established when the taxpayer treats the income as his own.[43]

(2) *Under what circumstances does a gain constitute taxable income?* It becomes taxable when its recipient has such control over it that, as a practical matter, he derives readily realizable economic value from it.[44]

(3) *Who should be the taxpayer under these circumstances?* One who is in a position to derive the economic value from the gain should pay the tax.[45]

The correct application of these criteria will lead to a relatively simple and uniform method for determining tax liability, which in turn will promote convenient administration of the tax under the annual accounting system.

In the *Wilcox* decision and the *Rutkin* and *James* dissents, one of the primary reasons advanced for nontaxability of embezzled funds was the fact that the government's tax lien might impair the rightful owner's chances of recovering the money taken from him.[46] This

[41] See note 20 *supra.*
[42] 345 U.S. 278 (1953).
[43] Healy v. Commissioner, 345 U.S. 278 (1953).
[44] See the instant case.
[45] Burnet v. Wells, 289 U.S. 670 (1933).
[46] This problem was really not before the Court in the instant case because the victim union had already released its claim against the taxpayer for a fraction of the amount

argument has been considered only one time in any Supreme Court opinion. Mr. Justice Burton in the *Wilcox* dissent stated that, at most, such an argument should be reason for Congress to change the law, not for the Court to refuse to enforce it.[47] The argument has not been a deciding factor in any other field of illegal activity, and it should not be when embezzled funds are involved. The evasion prosecution brought by the government will normally follow a civil suit or criminal prosecution arising out of the misappropriation. By that time the rightful owner will ordinarily have begun proceedings to recoup his losses. The government's tax lien attaches to the property of the taxpayer which is not subject to a prior lien.[48] Hence, the owner will be prejudiced by the government's claim only when he is unable to identify his property in the hands of the embezzler and when he has neglected to obtain a prior lien on the property which the embezzler might own.[49]

The embezzler's repayment of the money taken raises the problem of his right to take a deduction in that year. It had not been altogether clear whether Section 1341 of the Internal Revenue Code of 1954 would be applicable in this type of case.[50] In a statement made as dictum the Court in the instant case seems to recognize that there may be a reduction of the taxpayer's income "if, when, and to the extent that the victim recovers back the misappropriated funds. . . ."[51] While this would be consistent with the cases which establish the "control and benefit" doctrine as a basis for taxability, it seems contrary to the plain language of the statute. The presence of Section 1341 in the portion of the Internal Revenue Code entitled "Claim of Right" indicates that the statute was designed to alleviate the tax burden imposed upon those persons who must pay tax in the year during which property is acquired under a claim of right and who later restore a substantial amount of that property. As mentioned above, the Supreme Court has equated this claim of right with control of and benefit from the property so acquired.[52] But

taken. Thus the equities which faced the Court in *Wilcox* were not present; however, it is unlikely, under the rationale adopted in the present decision, that the holding would have been different had there been no release.

[47] 327 U.S. 404, 414.

[48] Int. Rev. Code of 1954, §§ 6321, 6323.

[49] For an excellent discussion of the problem see Note, 30 Ind. L.J. 487, 493-95 (1955). See also Mertens, Federal Income Taxation §§ 54.10-.12, 54.38-.47 (1958).

[50] This section provides for a recomputation of the tax upon income which was held under an "unrestricted right" and which was later given up to someone with a better right. There had been some doubts expressed concerning the "unrestricted right" of an embezzler to the property taken by him. See Note, 30 Ind. L.J. 487, 495-97 (1955). For a discussion of the application of this statute see Montgomery, Federal Taxes 1·4 (37th ed. 1958); Spilky & Halprin, *Embezzlers Have Tax Problems Too*, 36 Taxes 798, 801-02 (1958).

[51] 366 U.S. at 220.

[52] See note 42 *supra* and accompanying text.