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Recent Cases

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RECENT CASES

CONSTITUTIONAL LAW—DUE PROCESS OF LAW—CONSTITUTIONALITY OF THE FEDERAL YOUTH CORRECTIONS ACT IN ITS APPLICATION TO YOUTHFUL CRIMINAL OFFENDERS

Defendant, a minor, was found guilty of the theft of a radio-clock from a government reservation and was committed to the custody of the Attorney General of the United States for from four to six years under the Federal Youth Corrections Act (FYCA).[1] The maximum penalty that could have been imposed on an adult for the same offense under normal criminal procedures was a sentence of one year. Defendant filed a motion in a federal district court to correct the sentence, alleging that the imposition of this greater sentence resulted in a violation of his rights under the due process clause of the fourteenth amendment. From an adverse judgment, defendant appealed. *Held,* affirmed. Congress can make reasonable distinctions as to treatment of criminal offenders of different age groups, and the application of the FYCA to effect a sentence of greater duration than could be imposed under normal criminal procedures does not amount to a violation of due process. *Cunningham v. United States,* 256 F.2d 467 (5th Cir. 1958).[2]

The primary purpose of the FYCA is to promote the rehabilitation of those who are under the age of twenty-two at the time of criminal sentencing.[3] The theory of the act is that retributive punishment of such offenders should be eliminated in favor of a system of training and treatment designed to correct antisocial tendencies.[4] Further, it affords a discretionary guide to federal judges in the sentencing of such offenders. The rationale of Congress in enacting the FYCA is more clearly discerned when it is noted that in many respects its provisions are similar to the existing federal release procedures relative to probation and parole.[5] Prior to the enactment of the FYCA in

1. 18 U.S.C. §§ 5005-26 (1952).
2. Judge Rives, in dissenting, agreed that the FYCA was constitutional on its face, but reasoned that its application in this particular case was such that there was a violation of procedural due process in that defendent was not informed, at the time he waived counsel and pleaded guilty, that he could be sentenced for more than one year. 256 F2d at 473-74.
3. H.R. REP. No. 2979, 81st Cong., 2d Sess. 1 (1950).
4. *Ibid.*
5. In 1925 Congress passed the National Probation Act, and Chief Justice Taft stated that its objective was "the giving to young and new violators of law a chance to reform and to escape the contaminating influence of association

1950, several states had adopted similar legislation,[6] California being the first state to so legislate with the passage of the Youth Authority Law[7] in 1941. In 1943 the California Supreme Court, in *In re Herrera*,[8] ruled on the constitutionality of this statute. The court decided that there was no violation of the fourteenth amendment[9] even though a person committed to the Authority might remain in its custody for a longer period of time than one convicted of the same offense through normal criminal process.[10] In 1947, Minnesota enacted the Youth Conservation Act[11] which is very similar to the FYCA. One of the first cases to arise under this act was *State v. Meyer*.[12] There an eighteen-year-old defendent pleaded guilty to burglary and was sentenced under the statute.[13] The defense raised the objection that the act violated federal due process in that it deprived the defendent of his rights to credit for good conduct available to older offenders under normal penal sentences. The Supreme Court of Minnesota, in upholding the constitutionality of the statute, stated: "There is always some discrimination when classification is based on age, but so long as the classification has some reasonable basis it cannot be held unconstitutional on that account."[14] Thus far, the instant case is the only ruling on the constitutionality of the aforementioned discrimatory provisions in the FYCA.

The court in the instant case pointed out that the FYCA was designed for the corrective treatment and rehabilitation of offenders, not

with hardened or veteran criminals. . . ." United States v. Murray, 275 U.S. 347, 357 (1928). Like commitment under the FYCA, probation is granted at the discretion of the judge, but this must be done before the defendant has begun serving his term. Theoretically probation may be granted to any person except where the punishment imposed is life imprisonment or death. The probation period cannot exceed five years, but, as under the FYCA, it may run longer than the maximum period for which the defendent could have been imprisoned. The federal parole system was credited in 1910, and under its provisions any eligible prisoner can apply for parole after serving one-third of his sentence. A "parole board" in the Department of Justice, rather than a judge, is the final approving authority. In contrast to the FYCA and probation procedures a person cannot be paroled for a longer period of time than that for which he was sentenced. However, as with offenders under the FYCA, a parolee is carefully supervised. Each person released is required to file a written report at least once a month, and is under the continuing supervision of a probation officer. 1 U.S. ATT'Y GEN. SURVEY OF RELEASE PROCEDURES (1939).

6. CAL. WELFARE & INST'NS CODE ANN. §§ 1700-83 (Deering 1952); MASS. ANN. LAWS ch. 120 §§ 1-26 (1957); MINN. STAT. ANN. §§ 242.01-.54 (Supp. 1958); WIS. STAT. ANN. §§ 54.01-.38 (1957).

7. CAL. WELFARE & INST'NS CODE ANN. §§ 1700-83 (Deering 1952).

8. 23 Cal. 2d 206, 143 P.2d 345 (1943).

9. U.S. CONST. amend. XIV, § 1. "Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

10. 23 Cal. 2d 206, 143 P.2d 345 (1943).

11. MINN. STAT. ANN. §§ 242.01-.54 (Supp. 1958).

12. 228 Minn. 286, 37 N.W.2d 3 (1949).

13. MINN. STAT. ANN. §§ 242.01-.54 (Supp. 1958).

14. 37 N.W.2d at 14.

for their punishment.[15] Through the act, the defendent was here furnished with the opportunity to escape from the psychological shocks associated with serving an ordinary penal sentence. Under these circumstances the court could find no constitutional reason why Congress could not make general distinctions between treatment of different age groups. It was noted that similar provisions in state statutes had been upheld as not violating due process.[16] The court also added that the FYCA did not violate the equal protection clause of the fourteenth amendment inasmuch as it operated in the same manner on all persons belonging to the same general class.[17]

The result reached in the instant case in understandable when it is considered that the primary purpose of the FYCA is rehabilitation. The interests of society as well as the defendent may be better served by sentencing him to the custody of the Attorney General for six years rather than placing him with hardened criminals for one year. Also, treatment accorded under provisions of the FYCA is flexible and can be adjusted to needs of the particular defendent. If it is deemed desirable by the Attorney General, the youth may never be confined at all. In passing the FYCA, it was noted by Congress that existing methods of treating criminally inclined youths were not adequately solving the problem of rehabilitation.[18] The act is an experiment designed to meet this need.

CONSTITUTIONAL LAW—LEGISLATIVE POWER—INFRINGEMENT OF CONSTITUTIONAL GUARANTIES BY DEMANDS OF LEGISLATIVE INVESTIGATING COMMITTEES FOR THE PRODUCTION OF MEMBERSHIP LISTS.

The Florida Legislative Investigation Committee was created to investigate organizations within the state which might cause violence or disturbance.[1] The Committee served the petitioner with a subpoena

15. Cunningham v. United States, 256 F.2d, 467, 471 (5th Cir. 1958).
16. *Id.* at 472.
17. *Id.* at 473.
18. H.R. REP. No. 2979, 81st Cong., 2d Sess. 1 (1950).

1. FLA. LAWS 1957, ch. 57-125. The pertinent provisions of the act are as follows:

"Section 2. It shall be the duty of the committee to make as complete an investigation as time permits of all organizations whose principles or activities include a course of conduct on the part of any person or group which constitute violence, or a violation of the laws of the state, or would be inimical to the well-being and orderly pursuit of their personal and business activities by the majority of the citizens of this state.

"Section 3. (1) The committee is authorized . . . to require by subpoena or otherwise the attendance of such witnesses and the production of such

duces tecum requiring him to produce all books, records, and membership lists of the National Association for the Advancement of Colored People and the Florida Council for Human Relations. The petitioner moved in the circuit court to quash the subpoena, contending that it violated his rights under the first and fourteenth amendments of the United States Constitution.[2] On appeal to the Supreme Court of Florida from an order denying the motion to quash, *held,* affirmed. A court will not determine in advance whether an order by a legislative investigating committee to produce books, records, and membership lists is a violation of constitutional guaranties. *In re Graham,* 104 So. 2d 16 (Fla. 1958).

Incidental to their lawmaking function, legislative bodies have an inherent power of investigation,[3] and with the rightful exercise of that power goes the authority to issue subpoenas for the attendance of witnesses[4] and the production of documentary evidence.[5] However, the power to investigate is not without its limitations.[6] It has long been held that the legislature's power to investigate is subject to judicial review,[7] and many courts will allow a petitioner to test the validity of a subpoena duces tecum issued by a legislative investigating committee by entertaining motions to quash.[8] The legislative inquiry is also limited to that which is relevant and pertinent to the subject authorized to be investigated,[9] but the courts are generally reluctant to in-

papers, books, and documents . . . as it may deem necessary in the performance of its duties."

2. Although not expressly stated by the court, the inference is that the petitioner alleged an infrigement of due process guaranties under the fourteenth amendment, and violation of the first amendment right to freedom of association.

3. See McGrain v. Daugherty, 273 U.S. 135 (1927); *In re* Opinion of the Justices, 248 Ala. 590, 29 So. 2d 10 (1947); Massett Bldg. Co. v. Bennett, 4 N.J. 53, 71 A.2d 327 (1950); State *ex rel.* Robinson v. Fluent, 30 Wash. 2d 194, 191 P.2d 241 (1948); 49 AM. JUR. *States,* § 40 (1943).

4. *Ex parte* Battelle, 207 Cal. 227, 277 Pac. 725 (1929); *Ex parte* Caldwell, 61 W. Va. 49, 55 S.E. 910 (1906). See also McGrain v. Daugherty, 273 U.S. 135 (1927).

5. *Ex parte* Battelle, 207 Cal. 227, 277 Pac. 725 (1929); Opinion of the Justices, 96 N.H. 530, 73 A.2d 433 (1950); International Ry. v. Mahoney, 271 App. Div. 283, 64 N.Y.S.2d 854 (1946); *In re* Joint Legislative Comm. to Investigate Educ. Sys. of New York, 285 N.Y. 1, 32 N.E.2d 769 (1941).

6. See United States v. Owlett, 15 F. Supp. 736 (M.D. Penn. 1936); Morss v. Forbes, 24 N.J. 341, 132 A.2d 1 (1957); Annenberg v. Roberts, 333 Pa. 203, 2 A.2d 612 (1938); *Ex parte* Hague, 105 N.J. Eq. 134, 147 Atl. 220 (1929). For a discussion of such limitations see Landis, *Constitutional Limitations on the Congressional Power of Investigation,* 40 HARV. L. REV. 153 (1926).

7. Kilbourn v. Thompson, 103 U.S. 168 (1880).

8. See, *e.g.,* Falcone v. Joint Legislative Comm., 8 Misc. 2d 693, 168 N.Y.S.2d 543 (1957); *In re* Edge Ho Holding Corp., 256 N.Y. 374, 176 N.E. 537 (1931); Annenberg v. Roberts, 333 Pa. 203, 2 A.2d 612 (1938); NAACP v. Committee of Offenses, 199 Va. 665, 101 S.E.2d 631 (1958).

9. See Jones v. Securities & Exch. Com'n, 298 U.S. 1 (1936); McGrain v. Daugherty, 273 U.S. 135 (1927); United States v. Owlett, 15 F. Supp. 736 (M.D. Penn. 1936); Nelson v. Wyman, 99 N.H. 33, 105 A.2d 756 (1954). Pertinency is a question of law properly decided by the court. Sinclair v. United States, 279 U.S. 263 (1929); United States v. Di Carlo, 102 F. Supp. 597 (N.D. Ohio 1952).

terfere if there is doubt as to pertinency or if there is still a possibility of constitutional disposition by the legislature.[10] In an effort to further define limitations on legislative investigations and to protect a witness from running an undue risk of being held in contempt, the Supreme Court of the United States has required the investigating committee to make indisputably clear to the witness under interrogation the pertinency of the questions asked and the authority to inquire.[11] When an investigation invades areas involving free speech and other substantive freedoms it becomes subject to closer scrutiny, and it is only when the state's need for self-protection outweighs the individual's right to privacy and personal liberties that the power to inquire into these areas exists.[12] There had been doubt whether membership lists of organizations are entitled to constitutional protection from compulsory disclosure by the state[13] until the Supreme Court of the United States in *NAACP v. Alabama*[14] held that the right to withhold such lists would be protected until the state showed a sufficient need to interfere.[15]

A rehearing was denied in the instant case two weeks after the decision in *Alabama,* but there was no indication that the court deemed it necessary to distinguish that case.[16] In turning the decision on the procedural point that the time to raise the question of whether an unlawful demand has been made by the committee is "when the inquiry gets under way,"[17] the court avoided the necessity of considering the substantive questions posed either by the *Alabama* decision, or by two earlier cases[18] relied upon by the petitioner to show that the demands in the subpoena violated certain rights. The court indicated that it did not believe these cases supported the proposition but pointed out that even if they did the question was raised prematurely.[19] The same result has been reached by other courts prior to the *Alabama* case, but

10. See United States v. Bryan, 72 F. Supp. 58 (D.D.C. 1947); Barsky v. United States, 167 F.2d 241 (D.C. Cir. 1948), *cert. denied,* 334 U.S. 843 (1948).

11. Watkins v. United States, 354 U.S. 178 (1957).

12. Sweezy v. New Hampshire, 354 U.S. 234, 266-67 (1957) (concurring opinion). For other cases where undue governmental prying was condemned see Quinn v. United States, 349 U.S. 155 (1955); Sinclair v. United States, 279 U.S. 263 (1929); Kilbourn v. Thompson, 103 U.S. 168 (1880).

13. Cf. United States v. Harriss, 347 U.S. 612 (1954); United States v. Rumely, 345 U.S. 41 (1953). *But see* Bryant v. Zimmerman, 278 U.S. 63 (1928).

14. 357 U.S. 449 (1958).

15. Although the subpoena in the *Alabama* case was issued by a court rather than a legislative committee, the Court indicated the protection would extend to any type of state inquiry. *Id.* at 463.

16. The instant case was orginally decided approximately two weeks before the *Alabama* decision.

17. 104 So. 2d at 18.

18. Sweezy v. New Hampshire, 354 U.S. 234 (1957); NAACP v. Patty, 159 F. Supp. 503 (E.D. Va. 1958).

19. 104 So. 2d at 18.

in those decisions the constitutional questions were considered even though they were raised in the same procedural manner.[20]

In many areas of the South, exposure of the membership lists of the NAACP would make the organization difficult if not impossible to operate.[21] Where the inhibiting effect of the exposure is specifically asserted by those resisting it, the courts should dispose of the merits of the claim in one way or another.[22] It is true that courts should not interfere with legislative bodies exercising their proper discretion, but this should not prevent a court from questioning whether the legislature has invaded the constitutional rights of a group of individuals. In the instant case the court allows the legislature, by threat of contempt proceedings, to demand the membership lists of an organization merely on the allegation that its unpopular, but legitimate views may cause violent reaction. Thus, the court by precluding the assertion of constitutional claims effectively supports an investigation which may amount to harassment of the NAACP. For this reason the decision appears unjust. It is probable, in view of the *Alabama* decision, that the question would be resolved in favor of the petitioner in a later contempt proceeding.

COURTS—PROCESS—IMMUNITY OF NONRESIDENT DEFENDANTS IN FEDERAL CRIMINAL ACTIONS FROM SERVICE OF STATE CIVIL PROCESS

Defendant, a resident of North Carolina, was convicted in the federal district court in New York City of manipulating accounts of the plaintiff corporation, of which defendant was a stockholder and former president, in order to defraud the federal government of taxes. As he left the federal court he was served with process in a state civil action seeking damages for alleged acts which were substantially the same as those leading to his conviction in the criminal prosecution. Defendant appeared specially and moved to set aside the service on the ground that he was immune therefrom since he had voluntarily come to New York to defend the criminal charge.[1] The special term granted

20. *In re* Joint Legislative Comm. to Investigate Educ. Sys. of New York, 285 N.Y. 1, 32 N.E.2d 769 (1941) (as to pertinency of the lists); NAACP v. Committee of Offenses, 199 Va. 665, 101 S.E.2d 631 (1958) (as to infringement of constitutional rights).

21. See NAACP v. Alabama, 357 U.S. 449 (1958); NAACP v. Patty, 159 F. Supp. 503 (E.D. Va. 1958).

22. Robison, *Protection of Association from Compulsory Disclosure of Membership Lists*, 58 COLUM. L. REV. 615, 648 (1958).

1. No warrant or summons was ever served on defendant, who was in North Carolina when indicted. Four days after indictment defendant surrendered to the district court in New York City, pleaded not guilty, posted bail, was re-

the motion. The appellate division reversed on the ground that under a New York statute[2] immunity ceases upon conviction. On appeal, *held,* reversed. A statutory denial of immunity from civil process to nonresident defendants, upon their extradition and criminal conviction, does not exclude immunity under common law principles to those who voluntarily appear to defend criminal proceedings. *Thermoid Co. v. Fabel,* 4 N.Y.2d 494, 151 N.E.2d 883 (1958).

Nonresident litigants and witnesses are generally granted immunity from service of civil process while in a jurisdiction for purposes of attending to matters concerning litigation.[3] This immunity was originally declared to be conferred as a privilege of the court in order to secure the administration of justice free from outside interference or influence.[4] In regard to the extension of such immunity to nonresident defendants in criminal prosecutions, the courts are sharply divided.[5] By the weight of authority, a defendant voluntarily appearing to answer a criminal charge, or in compliance with a bail bond, is exempt,[6] since such appearance saves the state the expense and uncer-

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leased and returned to North Carolina. Defendant returned to New York for trial, withdrew his former plea and entered a plea of guilty to one count and *nolo contendere* to the others. Bail was continued and defendant went back to North Carolina returning again to New York where he was sentenced to pay a $25,000 fine and was given a suspended jail sentence.

2. "A person brought into this state on or after waiver of extradition based on a criminal charge shall not be subject to service of personal process in civil actions arising out of the same facts as the criminal proceedings to answer which he is being or has been returned until he has been convicted in the criminal proceedings, or if acquitted, until he has had reasonable opportunity to return to the state from which he was extradited." N.Y. CODE CRIM. PROC. § 855. This statute is almost identical with § 25 of the UNIFORM CRIMINAL EXTRADITION ACT. 9 U.L.A. 258 (1957). The appellate division thought that defendant's situation was so similar to waiver of extradition that it should have the same treatment. "New York State policy with respect to any person without the state, *who voluntarily surrenders and waives extradition* on a state criminal charge, is now evident by the adoption in 1936 of Section 855 of the Code of Criminal Procedure. . . . We must hold that whatever immunity the defendant acquired was terminated upon the imposition of sentence." Thermoid Co. v. Fabel, 4 App. Div. 2d 475, 167 N.Y.S.2d 274, 276-77 (1957). (Emphasis added.)

3. Stewart v. Ramay, 242 U.S. 128 (1916); Nichols v. Horton, 14 Fed. 327 (N.D. Iowa 1882); Moseley v. Ricks, 223 Iowa 1038, 274 N.W. 23 (1937); Diamond v. Earle, 217 Mass. 499, 105 N.E. 363 (1914); Cooper v. Wyman, 122 N.C. 784, 29 S.E. 947 (1898). The rule is all but unanimous as to witnesses, but there are some decisions which distinguish between nonresident plaintiffs and nonresident defendants. Rizo v. Burruel, 23 Ariz. 137, 202 Pac. 234 (1921); Livengood v. Ball, 63 Okla. 93, 162 Pac. 768 (1916).

4. "Experience, however, has shown that in order that causes may be fully heard, and the orderly administration of justice may be assured, it is necessary that parties, witnesses, and jurors shall be protected against service of process in civil actions while they are in good faith in attendance upon the trial of causes." Nichols v. Horton, 14 Fed. 327, 330 (N.D. Iowa 1882).

5. Annot., 14 A.L.R. 771 (1921); Annot., 20 A.L.R.2d 163 (1950).

6. Benesch v. Foss, 31 F.2d 118 (D.C. Mass. 1929); Cummins' Adm'r v. Scherer, 231 Ky. 518, 21 S.W.2d 836 (1929); Jacobson v. Hosmer, 76 Mich. 234, 42 N.W. 1110 (1889); Michaelson v. Goldfarb, 94 N.J.L. 352, 110 Atl. 710 (1920); Whited v. Phillips, 98 W.Va. 204, 126 S.E. 916 (1925); see 30 COLUM. L. REV. 265 (1930) (exemption of nonresidents under bail). *Contra,* Ryan v. Ebecke,

tainty of extradition. On the other hand, one brought into a state by extradition proceedings is generally not immune.[7] An exception, dictated by consideration for the defendant, is generally made where there is reason to fear abuse of process, as in cases where process is served by the individual who procured the defendant's extradition.[8]

The court in the instant case employed the majority common law rule in granting the defendant immunity.[9] However, since the appellate division had based its decision on a New York statute[10] the court of appeals felt it only proper to set forth the reasons why such statue was inapplicable. The statute by its terms deals with extradition only, and thus it literally does not include a defendant who was not extradited, did not waive extradition, or was not brought into the state, but returned voluntarily and surrendered. Further, an analysis of the purposes of the statute showed that it was designed only to protect innocent nonresidents from service of civil process when brought into the jurisdiction by extradition.[11] The court also expressed concern over the fact that this case involved service of process on a defendant involved in a federal criminal prosecution and reasoned that comity suggested careful avoidance of an interference with a privilege of the federal courts.[12]

The decision as to whether or not a nonresident defendant in a criminal action will be immune from service of civil process depends largely on the extent to which the court will draw an analogy to the rules applicable to nonresident litigants and witnesses in civil actions. The New York court apparently entertains the belief that immunity does, in fact, induce nonresidents to appear voluntarily. If such inducement

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102 Conn. 12, 128 Atl. 14 (1925); Netograph Mfg. Co. v. Scrugham, 197 N.Y. 377, 90 N.E. 962 (1910).

7. Reid v. Ham, 54 Minn. 305, 56 N.W. 35 (1893); Martin v. Woodhall, 56 N.Y. Super. Ct. 439, 4 N.Y.S. 539 (1889) (defendant was extradited, and upon arrival was served; plaintiff procured her arrest, but not in bad faith). *Contra,* Bramwell v. Owen, 276 Fed. 36 (D.C. Ore. 1921).

8. Thomas v. Blackwell, 172 Okla. 487, 46 P.2d 509 (1935). Some courts also grant the exception where the defendant is acquitted. Moletor v. Sinned, 76 Wis. 308, 44 N.W. 1099 (1890); *cf.* Church v. Church, 270 Fed. 361 (D.C. Cir. 1921) (immune for a reasonable time whether coming voluntarily or not). Section 25 of the UNIFORM CRIMINAL EXTRADITION ACT adopted both of these exceptions, and since the act has been enacted in thirty-four states the majority rule would now apparently be that immunity will be granted on extradition where the civil action arises out of the same facts as the criminal proceedings.

9. "It should be sufficient ground for reversal that this case comes within the spirit and terms of the common-law immunity rule which has existed 'from the earliest times' and which expresses a 'privilege of the court' as well as of the defendant (Netograph Mfg. Co. v. Scrugham, 197 N.Y. 377, 380, 90 N.E. 962, 963, *supra*)." 4 N.Y.2d 494, 151 N.E.2d 883, 885 (1958).

10. N.Y. CODE CRIM. PROC. § 855, *supra* note 2.

11. The court pointed out that although the New York decisions had never allowed an abuse of the extradition process, still the governors of asylum states would more readily sign extradition papers when confronted with a statute specifically granting immunity. 4 N.Y.2d 494, 151 N.E.2d 883, 886 (1958).

12. 4 N.Y.2d 494, 151 N.E.2d 883, 885 (1958).

does exist the decision in the instant case seems desirable.[13] Sound public policy favors the encouragement of voluntary returns so as to save the state the expense and trouble of extradition. Again, for some offenses, extradition is not available,[14] and in such a situation a nonresident defendant would not likely return without immunity from civil process. The fact that a defendant is convicted and sentenced in criminal proceedings should not affect his immunity where his original return was voluntary.[15] Further, comity strongly suggests immunity in order to allow the federal court, as well as state courts, to benefit from the defendant's voluntary return.[16]

DAMAGES—INSTALLMENT VERDICT IN TORT ACTION

In a negligence action for personal injuries sustained in defendant's store, the jury returned a verdict for plaintiff for $36,000, to be paid in monthly installments of $150 for a period of twenty years. After discharge of the jury the trial court struck as surplusage the qualification as to method of payment. On appeal to the Supreme Court of Oklahoma, *held,* reversed, with instructions to render judgment in accordance with the jury's verdict. After discharge of the jury a trial court is without authority to strike that part of a verdict making tort damages payable in installments, and such a verdict will not be invalidated on appeal, absent timely objections. *M & P Stores, Inc. v. Taylor*, 326 P.2d 804 (Okla. 1955).

Since a judgment represents a final determination,[1] damages are ordinarily stated in terms of a single sum of money without further

13. But if most nonresidents are not in danger of being sued, or do not fear such suits, or do not rely on the rapidly changing rules of immunity, it would seem more conducive to justice to let those having rights against the nonresident enforce them in court.

14. Scott, *Criminal Jurisdiction of a State Over a Defendant Based Upon Presence Secured by Force or Fraud,* 37 MINN. L. REV. 91 (1953) (pointing out that sometimes offenses are not extraditable because the accused did not "flee from justice").

15. See Bunce v. Humphrey, 214 N.Y. 21, 108 N.E. 95 (1915). "It is this willingness to appear and aid the advancement of justice which should be rewarded and encouraged by exemption from service of process. . . ." 108 N.E. at 96.

16. But see State v. Taran, 91 N.W.2d 444 (Minn. 1958) where a nonresident defendant in a federal criminal prosecution, while in St. Paul for the sole purpose of defending the criminal action, was served with civil process by the state in an action to recover delinquent taxes. In denying immunity the court said that comity was not a rule of law, but one of practice, convenience and expediency and that the civil process would in no way conflict with or impede the administration of justice in the federal court as to require application of the principles of comity.

1. 30A AM. JUR. *Judgments* § 2 (1958). "We hold that a 'judgment' is . . . the final determination of the rights of the parties in an action." Wells v. Shriver, 81 Okla. 108, 197 Pac. 460, 480 (1921).

provision for the adjustment of rights between the parties. There are, however, situations where a single monetary figure has not proved satisfactory. Very early, the equity courts adopted the installment form rather than a single sum in certain types of alimony awards.[2] Periodic payment has also been authorized in workmen's compensation statutes[3] and in statutes which allow an impoverished judgment debtor to pay from his income or by installments.[4] Two cases have allowed installment judgments where the controversies involved school boards and the satisfaction of the judgments might have to come from taxes yet to be collected.[5] In all of these examples except workmen's compensation the prime motivation for allowing the payment of a judgment in installments seems to have been the plight of the insolvent or financially embarrassed defendant.

The instant case is unusual in that an installment verdict is allowed to stand in an ordinary tort action. There is no indication of what led the jury to deliver the verdict in this form. The record showed that the jury knew defendant had insurance[6] and consequently the jury could have believed that he was financially able to meet a lump sum obligation. Therefore, some aspect of the plaintiff's situation must have inspired the jury to render such a verdict. In any event, it is unlikely, at least in Oklahoma, that another installment verdict will be rendered or accepted. The court indicates that it does not approve of such a method of payment[7] and another installment judgment would probably not be upheld over timely objections.

There are obvious advantages in installment verdicts. For example, a large judgment might force a defendant into bankruptcy if it had to be paid immediately, whereas he could make small periodic payments on the judgment in addition to meeting his other obligations.[8] On the other hand, a court might feel a particular plaintiff incapable of manag-

2. 17 AM. JUR. *Divorce and Separation* § 560 (1957). "I am willing . . . to direct a monthly allowance of $30 to the plaintiff . . . and that this allowance continue until further order of the court." Mix v. Mix, 1 Johns. 108 (N.Y. Ch. 1814).

3. 58 AM. JUR. *Workmen's Compensation* § 3 (1948). See, *e.g.*, TENN. CODE ANN. § 50-1007 (1956) and ALA. CODE ANN. tit. 26, § 279 (1940).

4. See Annot., 111 A.L.R. 392 (1937). An example of this kind of statute is N.J. REV. STAT. § 2 A: 17-64 (1952). It allows the court to direct the defendant to pay a judgment by installments and either party may make application at any time to modify the terms of the order.

5. Board of Educ. v. Board of Educ., 293 S.W.2d 568 (Ky. 1956) and Trustees of Eddyville Graded Common Schools v. Board of Educ., 141 Ky. 126, 132 S.W. 182 (1910). In both cases the defendants had collected school taxes which belonged to the plaintiffs as a result of mistakes. The 1956 case was clearly equitable in nature but the 1910 case may have been a legal action.

6. 326 P.2d at 808.

7. *Ibid.*

8. See also footnote 4 *supra*. While the prime motivation for the installment provisions may have been the impoverished debtor's position, the creditor's interest was also considered and the creditor also used these laws as in Reeves v. Crownshield, 274 N.Y. 74, 8 N.E.2d 283 (1937).

ing a large sum of money. There are also many problems in a judgment of this type. The collection of many small debts and the satisfaction of the attorney's fees and court costs from these collections might prove too much of a burden on the parties and the courts. Some form of acceleration provision making the entire judgment due and payable might be necessary in the event of failure to meet a payment. In such a case, it might be necessary for the court to retain jurisdiction to carry out these provisions efficiently. Where law and equity are joined in a jurisdiction, this should not be an insurmountable difficulty. More difficult problems will arise where the status of the parties changes during the period in which the judgment is to be paid. Death, bankruptcy, and/or sudden acquisition of wealth by the defendant could affect the situation to such an extent that redetermination of the method of payment would be desirable. Where consideration of the interests of the plaintiff is the reason for allowing payments by installments, the parties might be precluded from changing the terms by settlement or agreement.[9] Economic fluctuations might rob the plaintiff of his just compensation.[10] Then, too, the plaintiff would be losing the use of the balance until paid. This fact would probably be reflected in the amount of the verdict awarded. It is obvious that the right to receive a lump sum immediately is of more value than the right to the same sum received over a long period of time. Despite the many problems involved, there is reason to believe such a judgment would be desirable and workable and should be used when the circumstances so warrant. The plaintiff cannot complain, for the alternative result of lump sum payment might be bankruptcy of the defendant and complete escape from liability. Although it may be possible for a court to find justification for installment judgments in existing statutes,[11] there will probably be very few, if any, installment judgments without legislative action, especially in tort and contract actions.

9. Analogous situations arise in both divorce proceedings and in workmen's compensation cases. See Annot., 84 A.L.R. 299 (1933) for a discussion of compromises and settlements affecting the payment of alimony. In a typical case, Higgins v. Higgins, 119 N.Y.S.2d 103, 107 (Sup. Ct. 1952), the court said "the provision for the assignment of future alimony is void as against public policy and is thus unenforcible. . . ." Some workmen's compensation statutes do not leave this matter to judicial determination and contain explicit provisions. See, *e.g.*, TENN. CODE ANN. § 50-1006 (1956), "[B]ut all settlements, before the same are binding on either party . . . shall be approved by the judge. . . ."

10. See Daniel, *The Purchasing Power of the Dollar and Tort Verdicts*, 4 MERCER L. REV. 249 (1953).

11. The installment judgment is not too different from a conditional judgment, the condition being the passage of time. 49 C.J.S. *Judgments* § 73 (1947). And, as pointed out in Kendrick & Roberts, Inc. v. Warren Bros. Co., 110 Md. 47, 72 Atl. 461, 465 (1909), a code provision that "The Court shall give judgment in all actions according as the very right of the cause and matter in law shall appear to them, without regarding any matters of mere form. . . ." was sufficient authority for giving a qualified judgment which included a perpetual stay of execution.

DOMESTIC RELATIONS—SEPARATION—SUIT BY MENTALLY INCOMPETENT WIFE

In a suit for separation on the grounds of nonsupport, the plaintiff wife alleged that although she had left defendant this did not constitute an abandonment so as to terminate defendant's duty of support inasmuch as she was mentally ill, and did not comprehend the nature of her acts. Defendant moved for dismissal on the grounds of plaintiff's lack of mental capacity to sue. The motion was denied. On appeal, *held,* affirmed. A wife who is of unsound mind but not judicially declared insane may sue for separation even though mental incompetency is alleged in her complaint. *Sengstack v. Sengstack,* 4 N.Y.2d 502, 176 N.Y.S.2d 337 (1958).

At early common law, insane persons were incapable of maintaining a suit in their own behalf since they lacked the necessary ability to reason and comprehend.[1] Although there is still some recent authority to this effect,[2] the majority of cases now hold that such a person can sue or be sued providing he has not been adjudicated insane or placed under guardianship.[3] If so adjudicated, suit may be brought through a guardian or committee appointed to represent him.[4] Irrespective of an insane party's power to sue generally, it is the prevailing common law rule that such a person cannot sue for divorce.[5] This has been rationalized on the basis that divorce requires the active and affirmative volition of the innocent spouse and that an incompetent lacks the requisite capacity to exercise proper discretion in the matter.[6] Furthermore, since the right to sue for divorce is strictly personal to the aggrieved spouse, such an action cannot be maintained by anyone in the insane party's behalf.[7] However, divorce actions have been allowed when

1. 28 AM. JUR. *Insane and Other Incompetent Persons* § 103 (1940); Annot., 64 L.R.A. 513 (1904).
2. Parrish v. Rigell, 183 Ga. 218, 188 S.E. 15 (1936).
3. Zeigler v. Bark, 121 Wis. 533, 99 N.W. 224, 227 (1904); Menz v. Beebe, 95 Wis. 383, 70 N.W. 468 (1897); 28 AM. JUR. *Insane and Other Incompetent Persons* § 103 (1940); Annot., 130 Am. St. Rep. 841 (1910).
4. Whitney v. Whitney, 229 Iowa 14, 293 N.W. 832, 835 (1940); Linderholm v. Walker, 102 Kan. 684, 171 Pac. 603, 604 (1918); Schulz v. Oldenburg, 202 Minn. 237, 277 N.W. 918, 922 (1938).
5. Jackson v. Bowman, 226 Ark. 1312, 294 S.W.2d 344, 347 (1956); Bradford v. Abend, 89 Ill. 78, 31 Am. Rep. 67 (1878); Quear v. Madison Cir. Ct., 229 Ind. 503, 99 N.E.2d 254 (1951); Dillon v. Dillon, 274 S.W. 217, 226 (Tex. 1925).
6. *In re* Application of Babushkin, 176 Misc. 911, 29 N.Y.S.2d 162, 163 (1941).
7. Mohler v. Shank, 93 Iowa 273, 61 N.W. 981, 983 (1895); Johnson v. Johnson, 294 Ky. 77, 170 S.W.2d 889 (1943); Higginbotham v. Higginbotham, 146 S.W.2d 856, 857 (Md. 1940); Dillon v. Dillon, 274 S.W. 217 (Tex. 1925); 2 BISHOP, MARRIAGE AND DIVORCE § 306a (6th ed. 1881); KEEZER, MARRIAGE AND DIVORCE § 749, at 799 (3d ed. 1946); Annots., 70 A.L.R. 964 (1931); A.L.R. 1284 (1944); 19 A.L.R.2d 182 (1951); *But cf.,* Turner v. Bell, 198 Tenn. 232, 279 S.W.2d 71 (1955) (where wife, who cross-complained for divorce from bed and board, had been adjudged insane and this was known by the trial court, it was presumed in an action by the wife's guardian to set the divorce decree aside that the divorce court had reached the conclusion that wife had the

plaintiff has not been adjudged insane and appears to know the nature of the action taken,[8] sanity being presumed.[9] There is authority for treating an action for separation differently from an action for divorce.[10] Even one legally adjudicated insane has been allowed to sue for separation.[11] The reasons often given for such a distinction are that since the marriage relationship is not dissolved by separation, the hesitancy to allow a divorce[12] disappears. Further, the necessity for protection and maintenance of a spouse has been thought to be the same irrespective of sanity and mental competency.[13]

The instant case points up two problems which arise in separation suits brought by one mentally incompetent. Is the plaintiff legally insane? If so, is a separation action distinguishable from a divorce action so that an insane party can sue for separation? The court, in allowing plaintiff's action, based its holding on a broad general statutory provision[14] to the effect that, unless judicially declared incompetent,[15]

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necessary capacity to testify and take oath and that he found she had the requisite personal volition to seek a divorce or separation).

8. In the case of Stephens v. Stephens, 143 Neb. 711, 10 N.W.2d 620, 622 (1943), the court laid down the following rule: "If a plaintiff in an action for divorce reasonably understands the nature and purpose of such action, the effect of his acts with reference thereto, and has the will to decide for himself whether such action should be brought, he has sufficient mental capacity to maintain such an action in his own name."

9. Stevens v. Stevens, 266 Mich. 446, 254 N.W. 162 (1934); Smentek v. Smentek, 46 N.Y.S.2d 115 (Sup. Ct. 1944).

10. Wray v. Wray, 33 Ala. 187 (1858); Mims v. Mims, 33 Ala. 98 (1858); Kaplan v. Kaplan, 256 N.Y. 366, 176 N.E. 426, 427-28 (1931); Flynt v. Flynt, 237 N.C. 754, 75 S.E.2d 901, 903 (1953); Birdzell v. Birdzell, 35 Kan. 638, 11 Pac. 907 (1886) (dictum indicating the court would allow a separation action by an insane spouse although relief denied because petition filed in the form of an action for divorce and alimony); 2 BISHOP, MARRIAGE AND DIVORCE § 307 (6th ed. 1881).

11. Kaplan v. Kaplan, 256 N.Y. 366, 176 N.E. 426 (1931).

12. The generally suggested reasons for this hesitancy to allow a divorce are: "Marriage is a personal *status* and relation . . . and can never be created . . . except with the free and voluntary consent of the parties assuming the same, and it can never be dissolved or destroyed, while both parties are living, . . . except for a grievous and essential wrong committed against such relation by the other party, and with the free and voluntary consent, and . . . with the active and affirmative volition, of the wronged and innocent party. . . . There are no wrongs that may be committed by a husband or wife sufficient in and of themselves to work a dissolution of the marital ties. The injured party may be willing to condone the wrong, or, for reasons satisfactory to himself or herself, may desire to continue the marriage relation, notwithstanding the wrong.

"Many persons believe that marriage is a sacrament, and that to procure a divorce upon any of the ordinary grounds for which divorces are usually granted, is a violation of all true religion and morality. . . . Besides, insanity is often temporary; and what if such insane person should become restored to sanity immediately after the divorce, and should disapprove the divorce and all proceedings connected therewith?" Birdzell v. Birdzell, 33 Kan. 433, 6 Pac. 561, 561-62 (1885).

13. Kaplan v. Kaplan, 256 N.Y. 366, 176 N.E. 426 (1931); 2 BISHOP, MARRIAGE AND DIVORCE § 307 (6th ed. 1881).

14. N.Y. CIV. PRAC. ACT § 236.

15. The procedure for a lunacy proceeding is largely determined by local statute. It is set in motion generally by a petition by a relative, although it

a person may sue as an ordinary member of the community. Although plaintiff was of unsound mind and this had been alleged in her complaint, since she had not been adjudged insane the court felt there was no reason she could not sue generally. Thus, in answering the first question in the negative, the court dispensed with the necessity of answering the second. However, in the decision of the lower court, it was pointed out that even if plaintiff had been so adjudged, she could still maintain an action for separation through a committee or guardian ad litem.[16]

It would seem proper that a suit for separation should be maintainable by the insane spouse. The action for separation is independent of the divorce statutes. It is a remedy which equity has derived for the inadequacy of the doctrine of "agency by necessity" in forcing the husband to care for his family. It does not involve dissolving the marriage at all, but the enforcement of a property right in which the court will order the husband to contribute to his wife's support by periodic payments.[17] Since an insane party may enforce other property rights, it would seem that there is no reason why she should not be allowed to bring suit for separate maintenance, either in her individual capacity or through a guardian where there has been an adjudication of incompetency.

INTERSTATE COMMERCE—HOBBS ACT—"ROBBERY" PROVISION CONSTRUED AS REQUIRING PROOF OF COMMON LAW ELEMENTS OF OFFENSE.

The Hobbs Act[1] provides, *inter alia,* for criminal punishment for those who obstruct commerce by extortion or robbery.[2] The definition of robbery given therein omits the common law requirements of an asportation and an intent to steal.[3] Appellants, who had obstructed the

may be started by a friend or officer of the state. The alleged lunatic has the right to appear and defend himself and, in some jurisdictions, he is entitled to a jury trial upon the issue of his sanity. Proceedings in insanity are invoked, ordinarily, either for the purpose of securing a commitment to an institution or for obtaining appointment of a guardian of the person. 28 AM. JUR. *Insane and Other Incompetent Persons* §§ 11-12 (1940).

16. Sengstack v. Sengstack, 7 Misc. 2d 1012, 166 N.Y.S.2d 576 (1957).

17. Lang v. Lang, 70 W. Va. 205, 73 S.E. 716 (1912).

1. 18 U.S.C. § 1951 (1952).

2. The Hobbs Act also prescribes punishment for those who obstruct commerce by an attempt or conspiracy to commit extortion or robbery and for those who employ violence or threats of violence in furtherance of a plan to violate the act. The defendants were not charged with employing violence in furtherance of a plan to violate the act, although such a charge may have been justified. See notes 3 and 13 *infra.*

3. "(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery

movement of a truck in interstate commerce, were convicted of robbery under the act in a federal district court[4] on evidence which failed to show a taking and carrying away of goods and an intent to keep them wrongfully.[5] On appeal, *held,* reversed. In order to establish commission of robbery under the Hobbs Act, all the elements of common law robbery must be proved. *United States v. Nedley,* 255 F.2d 350 (3d Cir. 1958).

The Hobbs Act was passed as a replacement[6] for the Federal Anti-Racketeering Act of 1934,[7] which prohibited the obtaining of money by threats or force in connection with any act affecting commerce. However, the latter act excepted the payment of wages by a bona fide employer to a bona fide employee, and this proved to be an escape clause under the decision in *United States v. Local 807, Teamsters' Union.*[8] The Supreme Court of the United States there held that the Anti-Racketeering Act did not apply to defendants who required truckers in interstate commerce to pay wages to local men if their services were offered in good faith. That threats and violence were used to obtain payment or that the services were declined were felt not to alter this result. The Hobbs Act omitted this escape clause and, as it appears from the House debate,[9] the chief purpose in passing the Act was to get around the sometimes maligned[10] holding in *United States v. Local 807.* The definitions of robbery and extortion given were taken substantially from the New York Penal Code.[11] Since the

or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

"(b) As used in this section—

"(1) The term 'robbery' means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining." 18 U.S.C. § 1951 (1952).

4. 153 F. Supp. 887 (W.D. Pa. 1957).

5. Defendants striking truckers stopped a tractor-trailer, assaulted the driver and his helper, and "interfered with" the contents of the truck. The evidence did not show that the defendants moved the truck or took anything from it. 255 F.2d at 352-53.

6. 91 CONG. REC. 11841-42, 11848, 11900 (1945).

7. Act of June 18, 1934, ch. 569, 48 Stat. 979.

8. 315 U.S. 521 (1942). For discussions of the *Local 807* case see 54 HARV. L. REV. 1400 (1941); 20 N.C.L. REV. 104 (1941); 16 TEMP. L.Q. 329 (1942); 90 U. PA. L. REV. 972 (1942).

9. 91 CONG. REC. 11839-48, 11899-922 (1945). Several representatives recounted situations in which trucks were stopped, usually at the entrances to large cities, by union drivers and helpers. The local men would then demand payment for taking the truck to its destination in the city and, in some cases, for unloading it. The demands were sometimes accompanied by threats or force, and the services were not always rendered even though paid for.

10. See dissent of Chief Justice Stone, 315 U. S. at 539; 16 TEMP. L.Q. 329 (1942); 90 U. PA. L. REV. 972 (1942). See generally the House debate on the Hobbs Bill, 91 CONG. REC. 11839-48, 11899-922 (1945).

11. 91 CONG. REC. 11842-43, 11900 (1945). N.Y. PEN. CODE §§ 2120, 2121.

passage of the Hobbs Act the courts have on several occasions construed its extortion provisions[12] but the instant case is the first in which a court's interpretation of the definition of robbery has been the dispositive factor.[13]

The Government's contention[14] was that robbery as defined in the Hobbs Act was different from robbery at common law[15] and that proof of only those elements of robbery enumerated in the act would sustain a conviction. In disagreeing with this contention and reversing the judgment, the court relied heavily on legislative history, pointing out that in the House debate on the bill its sponsor stated that the definitions of robbery and extortion used were taken from the New York Code and had been construed by the courts "a thousand times."[16] Since New York courts had held prior to the passage of the Hobbs Act that these provisions did not dispense with the common law requirements in proving robbery,[17] the court found that Congress did not intend to dispense with these requirements. The court's opinion is further braced by quotations from two Supreme Court cases, *Morissette v. United States*[18] and *United States v. Turley*,[19] to the effect that where Congress uses common law terms in criminal statutes, these terms will be given their established common law meanings, unless the courts are otherwise instructed or the terms are otherwise defined.

A presumption that Congress knew of these New York decisions when it employed that state's statutory definition of robbery is in accord with the normal approach utilized when a legislature adopts the statute of another jurisdiction.[20] The decision is also in line with

12. United States v. Green, 350 U.S. 415 (1956); United States v. Floyd, 228 F.2d 913 (7th Cir.), *cert. denied*, 351 U.S. 938, *rehearing denied*, 351 U.S. 990 (1956); Callanan v United States, 223 F.2d 171 (8th Cir.), *cert. denied*, 350 U.S. 862, *rehearing denied*, 350 U.S. 926 (1955).

13. The Government in the district court agreed that for the defendants to be convicted under the indictments the evidence had to sustain a finding that there had been a robbery or an attempted robbery as defined by the Hobbs Act, or a conspiracy to commit robbery. 255 F.2d at 353. The district judge referred to the indictments as "loosely drawn." 153 F. Supp. at 892. The trial court found the defendants guilty of robbery, but in the appellate court the Government in its brief phrased the question as "whether or not the conduct of the defendants amounted to an attempt to commit robbery." 255 F.2d at 354.

14. 255 F.2d at 354, 356.

15. According to the court, common law robbery is the felonious and forcible taking from the person of another of goods or money by violence or putting him in fear. 255 F.2d at 356. The prosecution must prove "forcible taking and carrying away with the specific intent to steal personal property taken from the person of another by violence or putting in fear, and with the intention to permanently keep the property so taken." 255 F.2d at 357.

16. 255 F.2d at 355; 91 CONG. REC. 11900 (1945).

17. People v. Koerber, 244 N.Y. 147, 155 N.E. 79 (1926). See also People v. Levan, 295 N.Y. 26, 64 N.E.2d 341 (1945); Irving Trust Co. v. Leff, 253 N.Y. 359, 171 N.E. 569 (1930.

18. 342 U.S. 246 (1952).

19. 352 U.S. 407 (1957).

20. *E.g.*, Joines v. Patterson, 274 U.S. 544 (1927); Interstate Commerce

the rule prescribing strict construction of a criminal statute.[21] Inquiry into legislative debate to determine the intent of the legislature is not unusual, although the value of such an inquiry in determining true intent may at times be questionable.[22] On the whole, the case rests well on these considerations. But an interesting implication arises from the application of common law meaning to the term "robbery." Congress undoubtedly has the power to define the terms it uses and to substitute its definitions for the common law meanings.[23] The cases relied on by the court in support of the application of common law meanings to terms used in a criminal statute seem to except situations in which the statute defines the term[24] or the court is "otherwise instructed"[25] as to its meaning. The court does not allude to these exceptions even though the term "robbery" was particularly defined in the Hobbs Act. Therefore it seems a fair inference from this case that if Congress intends to make the meaning of a common law criminal term less restrictive it must not only define the term but must further recite in the statute the intent to substitute the definition set forth for the common law meaning.

Comm'n v. Delaware, L. & W. R. R., 220 U.S. 235 (1910); Melby v. Anderson, 64 S.D. 249, 266 N.W. 135 (1936). See Note, 43 HARV. L. REV. 623 (1930).

21. But the rule should not override common sense. United States v. Brown, 333 U.S. 18, *rehearing denied,* 333 U.S. 850 (1948). See generally 82 C.J.S. *Statutes* § 389 (1953).

22. Legislative intent can be a malleable thing in the hands of a court, and delving into congressional debate may possibly result in a discovery of legislative manipulation rather than intent. For instance, the court did not refer to the following exchange, which also took place [91 CONG. REC. 11900 (1945)] on the floor of the House during debate on the bill:

Rep. EBERHARTER. "I am concerned whether or not this bill would change the definition of robbery and extortion and conspiracy all over the United States."

Rep. HANCOCK. "Only so far as interstate commerce is concerned, that is all."

The indication from the *Congressional Record* is that this exchange took place in general debate, however, and the statements of the author of the bill may be more authoritative as to congressional intent. Cf. Wollcott v. Shubert, 217 N.Y. 212, 111 N.E. 829 (1916) and cases there cited.

23. McComb v. Homeworkers' Handicraft Cooperative, 176 F.2d 633 (4th Cir. 1949). Cf. Fox v. Standard Oil Co., 294 U.S. 87 (1935); Industrial Comm'n v. Northwestern Mut. Life Ins. Co., 103 Colo. 550, 88 P.2d 560 (1939).

24. The quotation from the *Turley* case was: "We recognize that where a federal criminal statute uses a common law term of established meaning without otherwise defining it, the general practice is to give that term its common law meaning." 352 U.S. at 411. The court in the instant case does not discuss the fact that the term "robbery" was otherwise defined in the Hobbs Act. Another unanswered question is that of the purpose of Congress in including a statutory definition of robbery in the act if it was intended that robbery under the act should be the same as common law robbery. On the use and effect of definition clauses see 2 SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION §§ 4814-4816 (3d ed., Horack, 1943).

25. Part of the opinion in the *Morissette* case, quoted with approval in the instant case, reads as follows: "And when Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning it will convey to the judicial mind unless otherwise instructed." 342 U.S. at 263. The court in the instant case italicized for emphasis down to the last three words.

TAXATION—INCOME—DETERMINATION OF "USEFUL LIFE" OF A BUSINESS ASSET FOR PURPOSES OF DEPRECIATION.

The corporate taxpayer was engaged in the business of automobile rentals. The automobiles were generally disposed of after an average business usage of twenty-six months. During 1954-56 they were depreciated for purposes of federal income taxation according to the straight line method based upon a useful life period of four years (*i.e.*, twenty-five per cent annual depreciation). Taxes were paid accordingly. Subsequently the taxpayer sought a refund, maintaining that since assets involved had a useful economic life of four years, he could have written them off under the declining balance method authorized by section 167(c) of the Internal Revenue Code of 1954 for those assets having a useful life of at least three years. Under this method, the assets could have been depreciated at an appreciably higher rate than by the straight line method. The Commissioner, relying on newly promulgated regulations, contended that under section 167(c) useful life is that period of time a taxpayer actually uses the asset in his business, and therefore the automobiles, being disposed of in twenty-six months, did not have a useful life of at least three years. *Held,* refund denied.[1] For purposes of determining whether a depreciable asset has a useful life of at least three years, in order to qualify for the declining balance method of depreciation under section 167(c) of the Internal Revenue Code of 1954, the period of time such asset is actually used in the business, not its entire physically useful life, is controlling. *Hertz Corp. v. United States,* 165 F. Supp. 261 (D. Del. 1958).

One of the most disputed areas in present day tax law concerns the deduction of a reasonable allowance[2] for depreciation.[3] Before the adoption of new depreciation regulations in 1956[4] there had never

1. Since the court refused to apply the new depreciation regulations retroactively, the taxpayer *was* allowed a refund for 1954-55, but *not* for 1956, which was after the issuance of the new regulations.

2. "The amount of the allowance for depreciation is the sum which should be set aside for the taxable year, in order that, at the end of the useful life of the plant in the business, the aggregate of the sums set aside will (with the salvage value) suffice to provide an amount equal to the original cost." United States v. Ludey, 274 U. S. 295, 300 (1927).

3. INT. REV. CODE OF 1954, § 167(b) provides three specific methods of computing depreciation; straight line, declining balance, and sum of the year's-digits. It also allows any other method the application of which will produce results not inconsistent with one of the three listed methods. See Lassers, *Depreciation Under the* 1954 *Code,* 32 TAXES 695 (1954) for an analysis of these methods.

4. Treas. Reg. § 1.167 (1956). Previously tentative regulations had been issued as Treas. Reg. § 1.167 and published in 19 FED. REG. 5490 (1954), but were later withdrawn. This early regulation seemed to indicate that the Treasury Department intended to administer § 167(b) of the 1954 Code in the same manner as the corresponding provision under the 1939 Code, inasmuch as the provisions relating to useful life and salvage value were similar to those under Treas. Reg. 118, § 39.23 (1)-1 (1953).

been an official definition of the elements involved in depreciation, (particularly "useful life" and "salvage value"[5]), and taxpayers had developed their own meanings for these terms from accounting principles.[6] The useful life of an asset was commonly understood to be that period of time over which the asset was functionally usable for the task in which it was employed,[7] and most taxpayers treated salvage value[8] as synonymous with "residual" or "scrap" value.[9] There was no statutory modification in the Internal Revenue Code of 1954 which indicated congressional dissatisfaction with this concept of useful life and salvage value,[10] but with the issuance of the new regulations these two elements of a depreciation computation have taken on new meaning and a new importance. Since the enactment of the 1954 code those taxpayers accustomed to selling assets used in their business prior to the expiration of the asset's physically useful life have been quick to utilize section 167 (b) (2) of the Code in conjunction with section 1231.[11] The latter section permits capital gains treatment for the difference between the selling price and the depreciated basis of certain assets used in a trade or business. This was done even though the asset had not been retained for three years and the depreciated basis was drastically decreased by the declining balance method.[12] Treasury Department reaction to this practice has not been favorable.[13]

5. There have been a few scattered cases in which the courts have made a determination of either useful life or salvage value; the traditional accounting definitions were usually accepted. See, *e.g.*, Goldberg v. Commissioner, 239 F.2d 316 (5th Cir. 1956); Yellow Cab Co. v. Driscoll, 24 F. Supp. 993 (W.D. Pa 1938); Dorothy Caruso, 23 T.C. 836 (1955); Wier Long Leaf Lumber Co. v Commissioner, 9 T.C. 990 (1947).

6. See Note, 7 DRAKE L. REV. 32 (1957) for a discussion of the historical implications of useful life and salvage value.

7. The new regulation describes useful life as "not necessarily the useful life inherent in the asset but . . . the period over which the asset may reasonably be expected to be useful to the taxpayer in his . . . business. . . ." Treas. Reg. § 1.167 (a)-1 (b) (1956). It is interesting to not the definition is phrased as though it were necessary to dispel a previous understanding to the contrary.

8. Salvage value is "the amount (determined at the time of acquisition) which it is estimated will be realizable upon sale . . . when it is no longer useful in the taxpayer's . . . business. . . ." Treas. Reg. § 1.167 (a) -1 (c) (1956).

9. There are even indications that it had become a practice for revenue agents to disregard salvage value in auditing tax returns. See, *e.g.*, Koelling v. United States, 57-1 U. S. Tax Cas. ¶ 9453 (D. Neb. 1957).

10. *Compare* INT. REV. CODE OF 1954, § 167, *with* INT. REV. CODE OF 1939, ch. 1, § 23 (1).

11. INT. REV. CODE OF 1954, § 1231.

12. To illustrate, assume the A company bought an automobile in 1954 at a cost of $2000. The basis used for depreciation was cost without any reduction for salvage value. Although the useful physical life was determined to be four years, the practice of the A company was to operate its autos for only two years before replacing them. By using the declining balance method, at the end of two years the asset would be depreciated by $1500 and the adjusted basis would then be $500. If the automobile was sold for $800, the $300 difference between the selling price and the adjusted basis was taxable as capital gain under § 1231 at 25% rather than as ordinary income in the taxpayer's regular bracket.

13. See, *e.g.*, Robley H. Evans, 16 CCH Tax Ct. Mem. 639 (1957). In addi-

The argument of the taxpayer in the instant case was that when an interpretation has become seasoned from long continued acceptance, and when its underlying statute is reenacted[14] by Congress without change, the interpretation in vogue is conclusive of congressional intent.[15] Hence, not only could the new regulation not be applied retroactively, but it would have no validity whatever.[16] The court accepted the conclusion as to the non-retroactive nature of the regulation[17] and allowed a refund for the years of 1954 and 1955, but rejected the argument that reenactment of the statute in light of long continued acceptance of the old interpretation is necessarily conclusive as to the intent of Congress. Thus the validity of the regulation hinges on the question of statutory interpretation with the resulting attempt to determine legislative intent. The fact of reenactment, committee reports pursuant to such renactment,[18] judicial interpretation, Treasury Department interpretation,[19] and the inclusion of the new declining balance method in the 1954 Code are all relevant in this inquiry. The new definitions of useful life and salvage value approved in the instant case may, however, frustrate the broadly expressed purpose of Congress in allowing the declining balance method.[20] They are certainly con-

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tion to the promulgation of the new regulations, the Commissioner has argued in some cases that the taxpayer holds the assets not only for use in his business but also primarily for sale to customers in the ordinary course of his trade or business. This approach received a setback in the case of Philber Equipment Corp. v. Commissioner, 237 F.2d 129 (3d Cir. 1956). See also Massey Motors, Inc. v. United States, 156 F. Supp. 516 (S.D. Fla. 1956).

14. See Brown, *Regulations, Reenactment, and the Revenue Acts,* 54 HARV. L. REV. 377 (1941) for a discussion of the effect of reenactment.

15. *Cf.* Helvering v. R. J. Reynolds Tobacco Co., 306 U. S. 110 (1939); Commissioner v. Clark, 202 F.2d 94 (7th Cir. 1953); Shearer v. Anderson, 16 F.2d 995; (2d Cir. 1927; St. Louis Co. v. United States, 134 F. Supp. 411 (D. Del. 1955). See Surrey, *The Scope and Effect of Treasury Regulations Under the Income, Estate, and Gift Taxes,* 88 U. PA. L. REV. 556 (1940).

16. See St. Louis Co. v. United States, 134 F. Supp. 411 (D. Del. 1955).

17. Since the statute of limitations had not yet run on several taxable years under the 1939 Code when the new regulations were published, the Treasury Department has challenged some depreciation deductions under the old law, insisting that the new definitions have in fact been the law all the time. See, *e.g.,* Philbert Equipment Co. v. Commissioner, 237 F.2d 129 (3d Cir. 1956); Pilot Freight Carriers, Inc., 15 CCH Tax Ct. Mem. 1027 (1956).

18. S. REP. No. 1622, 83d Cong., 2d Sess. (1954); H. R. REP. No. 1337, 83d Cong., 2d Sess. (1954).

19. INT. REV. BULL. F. (1920, revised 1942), republished as INT. REV. SER. PUB. 173 (1955), which is published as a guide to what the Department considered a reasonable normal period of useful life for various assets, has always had language indicating approval of the old definitions.

20. It should be noted that the new definitions will restrict the amount of depreciation that can be taken under the other methods of computation permitted by § 167(b) of the Internal Revenue Code of 1954, for in all instances now where the asset will probably be disposed of prior to the expiration of its physically useful life, a sizable salvage value (resale value) will have to be deducted in advance. This is hard to rationalize in light of Congress' avowed intent to accelerate tax-free recovery of costs in the interest of economic growth, increased production, and a higher standard of living. See H.R. REP. No. 1337, 83d Cong., 2d Sess. (1945). *Cf.* Taynton, *Effect of Salvage Value on Depreciation,* 36 TAXES 97 (1958).

trary to well established accounting principles,[21] and will result in a reappraisal of some depreciation practices.[22] The new definitions will have the greatest impact on taxpayers who dispose of assets while still in good operating condition.

The Treasury Department has adopted the general policy of accepting the judgment of the taxpayer on depreciation matters unless the facts in the case furnish a clear and convincing basis for adjustment.[23] The fact that the same method of depreciation was unchallenged in previous years does not preclude adjustment now if the facts so warrant.[24] By rejecting the Commissioner's argument that the new interpretation of useful life and salvage value has been the law all along, the court necessarily implies that Congress changed the interpretations in 1954. Weighing the results of overturning definitions long accepted by the courts, the Commissioner, accountants, and taxpayers alike — in the absence of specific statutory authorization—against the closing of a tax loophole of something less than alarming proportions, the decision seems at best ill supported and calls for judicial or legislative clarification.[25]

TAXATION—INCOME—FULL PAYMENT OF TAX DEFICIENCY AS A CONDITION PRECEDENT TO SUIT FOR REFUND

A tax deficiency of almost $29,000 was assessed against the petitioner by the Commissioner of Internal Revenue on the taxpayer's 1950 federal income tax return. Rather than challenging the assessment in the Tax Court before payment, the petitioner paid over $5,000 and then

21. In determining useful life and salvage value the court should disregard its present knowledge and base its findings only upon those facts and circumstances that were available for the taxpayer to consider at the time he was supposed to have made an estimate. See, *e.g.*, Leonard Refineries, Inc., 11 T.C. 1000 (1948).

22. Under the new definitions the selling price of the used asset should result in a negligible amount of gain or loss. Such a theory has been criticized from an accounting viewpoint in that it ignores the fact that fixed assets wear out regardless of fluctuation of market values, and the resulting cost expiration is an operating expense. See FINNEY & MILLER, PRINCIPLES OF ACCOUNTING (Intermediate) 440-41 (4th ed. 1951).

23. Rev. Rul. 90, 1953-1 CUM. BULL. 43; REV. Rul. 91, 1953-1 CUM. BULL. 44. It is interesting to note that Rev. Rul. 54-229, 1954-1 CUM. BULL. 124, sanctions the very practice forbidden by the instant case.

24. Rev. Proc. 57-18, 1957-1 CUM. BULL. 748.

25. If Congress intended to eliminate gains from the sale of depreciable property used in the business by authorizing the restrictive regulations approved in the instant case, it seems inconsistent that it was found necessary and desirable to enact § 1231 of the Internal Revenue Code of 1954, which permits such capital gain treatment. Robley H. Evans, 16 CCH Tax Ct. Mem. 639 (1957), a case almost identical to the instant one (and reaching the same result), has been appealed to the ninth circuit.

commenced an action in the federal district court for a refund.[1] With some reluctance[2] the district court took jurisdiction and denied the refund. The court of appeals reversed and remanded the case to be dismissed for want of jurisdiction in that the full amount of the deficiency had not been paid.[3] On certiorari to the Supreme Court of the United States, *held,* affirmed. A taxpayer must pay the full amount of a tax deficiency assessed against him before he can bring an action in the federal district court for refund. *Flora v. United States,* 375 U. S. 63 (1958).

Both textwriters and practitioners have long assumed that there are alternative procedures in tax deficiency cases of either bringing an action in the Tax Court to challenge the assessment prior to payment or of making the payment and then bringing an action for a refund in the federal district court.[4] "Pay first and litigate later" has become an oft quoted rule of thumb in conjunction with the latter procedure.[5] The precise meaning of this phrase, however, has been shadowed with uncertainty as to whether or not the requirement of prior payment will be satisfied by partial payment. There is no ambiguity on the face of the jurisdictional statute in its authorization of suit for the recovery of "any . . . tax," "any penalty," or "any sum."[6] It would seem that a literal interpretation of these broad and all-inclusive terms would not require full payment. Prior to the instant decision the court of appeals of three separate circuits considered this matter and each rejected the requirement of full payment.[7] On the other hand, in addition to the court of appeals decision in the instant case,[8] support of the full payment doctrine is to be found in one recent

1. Prior to bringing this action the taxpayer had submitted a claim to the Commissioner of Internal Revenue which had been refused.

2. The district court felt that the case should be dismissed for want of jurisdiction. However, in view of the fact that the court of appeals had not ruled on this issue the district court considered the case on the merits. Flora v. United States, 142 F. Supp. 602 (D. Wyo. 1956).

3. The pertinent jurisdictional statute reads as follows:

"(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

"(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws. . . ." 28 U.S.C. § 1346(a)(1), (1952), as amended, 28 U.S.C. § 1346(a)(1) (Supp. III, 1956).

4. STANLEY & KILCULLEN, THE FEDERAL INCOME TAX 358 (3d ed. 1955).

5. The Court denominates the phrase as the "*Cheatham* principle." 357 U.S. at 75. See Allen v. Regents of Univ. Sys. of Ga., 304 U.S. 439, 456 (1938) (concurring opinion).

6. See statute quoted note 2 *supra.* The Court itself recognizes the "clear authorization" of the statute when it suggests the need to look further to the legislative history. 357 U.S. at 65.

7. Bushmiaer v. United States, 230 F.2d 146 (8th Cir. 1956); Sirian Lamp Co. v. Manning, 123 F.2d 776 (3d Cir. 1941); Coates v. United States, 111 F.2d 609 (2d Cir. 1940).

8. Flora v. United States, 246 F.2d 929 (10th Cir. 1957).

federal district court case,[9] certain dicta in an 1876 decision of the Supreme Court,[10] and three court of appeals cases which are not directly on point.[11]

In the instant case the Supreme Court rules for the first time on the precise meaning of the principle "pay first and litigate later." By deciding that full payment is a condition precedent to maintaining an action for refund, the Court resolves the conflict which had arisen between the circuits.[12] It affirms the decision of the Tenth Circuit but holds contra to the conclusion reached by the three circuits which had considered this matter prior to the instant case.[13] To reach its present decision, the Court traces the language of the present jurisdictional statute back to the Revenue Act of 1866.[14] Strong emphasis is placed on the case of *Cheatham v. United States*[15] which is interpreted as setting forth the requirement of full payment.[16] Then, by looking at the legislative history of subsequent amendments to this early act, the Court assumes that no change was intended since the full payment requirement was not specifically mentioned in legislative debate. Knowledge of and acquiescence in this requirement as set forth in the *Cheatham* dicta[17] is attributed to Congress, the Treasury Department, and the taxpayer. Further support is gained from the Court's assumption that no case prior to 1940[18] had been brought without first paying the full amount of the government's claim.

There appear compelling reasons why a rehearing should be granted in this case. The assumption that Congress knew of this requirement of full payment and understood its implications from an 1876 decision, not in point, seems unwarranted. Furthermore, it is questionable whether the actual practice of the Treasury Department and the tax-

9. Rogers v. United States, 155 F. Supp. 409 (E.D.N.Y. 1957).
10. Cheatham v. United States, 92 U.S. 85 (1876) (full payment had been made prior to bringing the action).
11. Bendheim v. Commissioner, 214 F.2d 26 (2d Cir. 1954) (decided on the right to appeal to the Tax Court; McConkey v. Commissioner, 199 F.2d 892 (4th Cir. 1952) (decided on the right to appeal to the Tax Court); Suhr v. United States, 18 F.2d 81 (3d Cir. 1927). The Suhr case was decided on the basis that refund action could not be brought after petition had been filed in the Board of Tax Appeals. In a later case, this same court reversed a district court decision which had denied jurisdiction on the authority of the *Suhr* case. Sirian Lamp Co. v. Manning, 123 F.2d 776 (3d Cir.), *reversing* 36 F. Supp. 539 (D.N.J. 1941).
12. The Supreme Court granted certiorari to resolve this conflict. 357 at 64.
13. See note 7 *supra*.
14. Stat. 152 (1866).
15. 92 U.S. 85 (1876).
16. The most direct statement to be found in the *Cheatham* case in support of the full payment doctrine reads as follows, "The objecting party . . . can pay the amount claimed, and commence his suit at any time within that period." 92 U.S. at 89. It might be argued that the Court did not in fact give full consideration to a situation where action was brought after only partial payment.
17. Cheatham v. United States, 92 U.S. 85 (1876).
18. The date of Coates v. United States, 111 F.2d 609 (2d Cir. 1940).

payer during the period prior to 1940 was in fact in accord with the acceptance of the full payment doctrine which the Court found to exist.[19] There appear to be no sound policy arguments in favor of full payment. In the decision itself the Court recognizes that hardships may result from this rule, particularly in those cases where the taxpayer cannot make full payment due to financial considerations and where suit has been barred in the Tax Court by the statute of limitations.[20] This unhappy situation the Court meets with the argument that if Congress had intended any change from the existing policy of full payment it would have so provided through appropriate legislation.[21] In view of the serious questions which have been raised as to the existence of a contrary policy it would appear that the above argument would compel the Court to thoroughly reconsider the basis for its decision. Tax litigation during the past few years has multiplied tremendously in scope and importance. Here is a relatively new and progressive field of the law which shows every sign of continued growth. It would seem unfortunate that this area should be clouded by restrictions based upon archaic dicta which the Court reads into an otherwise clear and unambiguous statute.

TAXATION—INCOME—REDEMPTION OF CORPORATE STOCK AS EQUIVALENT TO TAXABLE DISTRIBUTION OF DIVIDENDS TO REMAINING SHAREHOLDER

The petitioning taxpayer acquired a fifty per cent interest in the Holsey Corporation, operator of an Oldsmobile dealership, by exercising an option granted to him by the Greenville Company, which was controlled by taxpayer's father. Petitioner subsequently received a second option from Greenville which permitted him or a corporation in which he owned at least fifty per cent of the common stock to purchase the remaining shares for $80,000. The taxpayer assigned this option to the corporation which redeemed the stock, paying Green-

19. These arguments are cogently set forth in a petition for rehearing which has been filed with the Court. As yet there has been no determination of whether a rehearing will be granted. However, the Solicitor General has been requested to file a response to the petition for rehearing. 27 U.S.L. WEEK 3134 (Oct. 27, 1958) (No. 492, 1957 Term). After searching the statements of fact in pre-1940 tax cases, petitioner has uncovered numerous cases where recovery was permitted after only partial payment including two cases which were heard before the Supreme Court itself. In none of these cases did the government challenge jurisdiction nor did the court consider this matter on its own motion. For this reason these cases are not reported as involving the full payment issue. See cases cited in Petition for Rehearing, p. 5 n.5.

20. 357 U.S. at 75.

21. 357 U.S. at 75-76.

ville therefor.[1] Taxpayer was thus left the sole owner of the corporation. The Commissioner of Internal Revenue urged that the purpose of the redemption of Greenville's stock was to allow the taxpayer to gain control of the corporation without cash outlay and sought to tax the payment as a constructive dividend to the taxpayer. The Tax Court[2] found that the redemption of stock was instituted in accordance with a plan to use corporate earnings for the personal benefit of the taxpayer and was therefore taxable to him as a distribution "essentially equivalent to a dividend" under section 115(g)(1) of the Internal Revenue Code of 1939.[3] On petition for review, *held,* reversed. Where a corporation distributes earnings to one shareholder by redeeming his stock, the distribution cannot be treated under section 115(g)(1) as a taxable dividend to a remaining shareholder who thereby gains control of the corporation but who neither receives any part of the amount distributed nor is under any obligation which is discharged by such distribution. *Holsey v. Commissioner,* 258 F.2d 865 (3d Cir. 1958).[4]

Section 115 (c) of the 1939 Code provides that any distribution in redemption of stock[5] is a distribution in liquidation and thus entitled to capital gain treatment.[6] Section 115(g), an exception to this rule, was

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1. The option was assigned to the corporation and exercised in 1951. From the time the second option was granted in 1946 through 1951, the earned surplus and yearly cash dividends of the corporation were as follows:

YEAR	SURPLUS	DIVIDENDS	YEAR	SURPLUS	DIVIDENDS
1946	$80,687	$2,000	1949	$239,583	$4,000
1947	$163,537	$2,000	1950	$306,979	$4,000
1948	$183,851	$4,000	1951	$351,738	$6,000

2. Joseph R. Holsey, 28 T.C. 962 (1957).

3. Section 115 (g)(1) provides as follows:

"If a corporation cancels or redeems its stock (whether or not such stock was issued as a stock dividend) at such time and in such a manner as to make the distribution and cancellation or redemption in whole or in part essentially equivalent to the distribution of a taxable dividend, the amount so distributed in redemption or cancellation of the stock, to the extent that it represents a distribution of earnings or profits accumulated after February 28, 1913, shall be treated as a taxable dividend." INT. REV. CODE OF 1939, § 115(g)(1), 53 Stat. 48.

4. The Commissioner acquiesced in the result of this case, Internal Revenue Service Technical Information Release No. 109, Oct. 30, 1958; and the Justice Department did not appeal.

5. The distinction between "redemption" and "repurchase" which exists in the field of corporation law is not applied in income taxation. The Internal Revenue Code treats stock as redeemed when a corporation acquires its stock from a shareholder in exchange for property. INT. REV. CODE OF 1954, § 317 (b).

A corporation may repurchase its stock in most jurisdictions. Only two states follow the English rule which prohibits redemptions altogether. A few states allow corporations to purchase shares out of capital when no prejudice to other shareholders or creditors results, but most jurisdictions permit corporations to purchase only out of surplus. *E.g.,* TENN. CODE ANN. § 48-117 (1956). For discussion of the problems of corporation law relevant to stock redemptions, see generally, BALLANTINE, CORPORATIONS §§ 256-58 (1946); O'NEAL, CLOSE CORPORATIONS §§ 7.11-13 (1958); Nemmers, *The Power of a Corporation to Purchase Its Own Stock,* 1942 WIS. L. REV. 161; Note, 59 YALE L.J. 1177 (1950).

6. INT. REV. CODE OF 1939, § 115(c), 53 Stat. 48.

meant[7] to prevent the use of the stock redemption process to get earnings out of the corporation and into the hands of the shareholders at capital gain rates when the stockholders retain essentially the same interests in the corporation that they had before the redemption.[8] Moreover, it has been suggested that section 115(g) was intended to prevent only the shareholder whose stock is being redeemed from avoiding taxation at dividend rates.[9] Though the statutory language, "distribution . . . essentially equivalent to the distribution of a taxable dividend," is obviously broad enough to cover the taxation of a redemption payment to a retiring stockholder as a constructive dividend to the remaining shareholders, there is no indication that the draftsmen of the section contemplated such a result.[10]

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7. See Nolan, *The Uncertain Tax Treatment of Stock Redemptions: A Legislative Proposal*, 65 HARV. L. REV. 255, 256 (1951); H. R. REP. No. 1, 69th Cong., 1st Sess. 5 (1925); H. R. REP. No. 356, 69th Cong., 1st Sess. 30 (1925); S. REP. No. 52, 69th Cong., 1st Sess. 15 (1925).

8. The simplest examples of a redemption equivalent to a dividend under § 115(g) are: (1) a distribution of earnings by the corporation through the repurchase of stock from shareholders on a pro rata basis; (2) a redemption of part of the stock of the sole owner of the corporation. Neither of these distributions affects the proportionate interest of the shareholders in the corporation.

However, the cases interpreting this section developed a rule of law that if there is a genuine contraction of business (a partial liquidation)—even though the distribution is made on pro rata basis—or if there is a distribution which terminates the stockholder's interest, the funds received are entitled to capital gain treatment. Whether or not a redemption is equivalent to a dividend in cases not falling within this rule is a question of fact. Relevant factors include: existence of a business purpose; corporation or shareholder initiation of the redemption; past dividend record; extent of change in control of the corporation. See 1 MERTENS, FEDERAL INCOME TAXATION § 9.1 (1956); Note, 67 YALE L.J. 112, 113 n.7, (1957).

The Internal Revenue Code of 1954, § 302 extends capital gain treatment to proceeds received in redemption of stock if the redemption: (1) is not essentially equivalent to a dividend; (2) is substantially disproportionate; (3) terminates a shareholder's interest. If one of these criteria is not satisfied, the distribution is taxed as a dividend to the extent that it is derived from earnings. See also INT. REV. CODE of 1954, § 346 (stock redemptions in partial liquidation taxed as capital gain); *id.* §§ 302(c), 318 (application of rules of constructive ownership); *id.* § 317 (b) ("redemption" occurs whether stock cancelled, retired or held as treasury stock).

The 1954 Code was probably meant to codify rather than change existing law in regard to stock redemptions. See S. REP. No. 1662, 83d Cong., 2d Sess. 233-34 (1954); Bittker, *Stock Redemptions and Partial Liquidations Under the Internal Revenue Code of* 1954, 9 STAN. L. REV. 13 (1956). The Commissioner's acquiescence in the instant case seemingly recognizes that "essentially equivalent to a dividend" has the same meaning in both the 1939 and the 1954 codes at least in regard to the taxation of redemptions as constructive dividends to surviving shareholders. See note 18 *infra*.

9. See note 7 *supra*.

10. See note 7 *supra*. See also Treas. Reg. 118 § 39.115(g)-1 (1954): "a cancellation or redemption by a corporation of all of the stock of a particular shareholder, so that the shareholder ceases to be interested in the affairs of the corporation, does not effect a distribution of a taxable dividend."

During the drafting of § 302 of the 1954 Code, the Senate Finance Committee was confronted with the question of taxing the remaining shareholder and was asked to clearly indicate such an intent in the legislative history of the section if it contemplated such a result. There is nothing in subsequent

There are a number of variations of close corporation stock redemption arrangements,[11] and, whether so intended or not, each enables a shareholder to gain control of a corporation while avoiding taxation which would otherwise be incidental to such an acquisition. The alternative to the stock redemption method of acquiring control is direct purchase of the stock by the remaining shareholder.[12] In order to finance the purchase, the buyer must usually take down enough of the corporation's earnings in the form of dividends to permit him to retain an amount after taxation equivalent to the purchase price of the outgoing shareholder's stock. The result of this type transaction is that the remaining shareholder sustains dividend income and the value of the corporation is reduced by the amount of the dividend payments. But if there is a redemption, the value of the corporation is reduced only by the amount of the repurchase price of the stock, and the surviving shareholder is not required to pay tax until he sells his stock, at which time he has the advantage of capital gain rather than dividend rates.[13]

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legislative history indicating such an intent. *Hearings Before Committee on Finance of the United States Senate,* 83d Cong., 2d Sess., pt. 1, at 517 (1954).

11. Agreements often require the corporation to purchase deceased or retiring shareholders stock in order to insure harmonious continuation of the business. Where the remaining shareholders are unable or unwilling to purchase the stock, such agreements prevent the necessity of choosing between three equally undesirable consequences: a sale of unmarketable close corporation stock at reduced prices; unwilling participation in business; separation of ownership and management. Corporations often fund redemption agreements by taking out life insurance policies on its shareholders.

Redemptions may also be utilized to provide stock for sale to key employees or to allow the sale of a corporation to a third party who does not have sufficient capital to finance the transaction.

See generally, O'NEAL, CLOSE CORPORATIONS §§ 7.10, 7.27-28, 9.03-05 (1958); Sneed, *A Defense of the Tax Court's Result in Prunier and Casale,* 43 CORNELL L.Q. 339 (1958); Note, *Income Tax Problems in the Use of Stock Redemptions to Purchase A Corporation Out of Future Earnings,* 67 HARV. L. REV. 1387 (1954); Note, *Stock Redemptions in Close Corporations: A Plan For Taxation,* 67 YALE L.J. 112 (1957).

12. Dissolution of the corporation provides another means for a third party to acquire the business assets after they have been distributed at capital gain rates. See O'NEAL, CLOSE CORPORATIONS §§ 1.07, 8.17 (1958). However, many disadvantages attend such a liquidation. See Note, 67 YALE L.J. 112, 120 n.38 (1957).

13. The instant case illustrates the tax advantages of the redemption method over the direct purchase method:

(1) Under a typical direct purchase plan, the remaining shareholder in the instant case might have exercised his option to purchase the stock from the outgoing shareholder for $80,000, payable in eight annual installments of $10,000. If his normal yearly tax rate were 38%, he would have to take down roughly $20,000 per year in dividends in order to retain $10,000 (his marginal tax rate would increase from 38% to approximately 50% because of increased earnings) with which to pay the yearly installments—paying $80,000 in dividend tax over the course of the eight years.

Assuming, *arguendo,* an addition to the corporation's earned surplus of $130,000 for the eight-year period, the corporation would have an earned surplus after eight years of $320,000 ($350,000 in the first year of the period plus $130,- less $160,000 paid to remaining shareholder in dividends). See note 1 *supra.* If the remaining shareholder then sells the corporation at book value, he will pay

The Commissioner has ordinarily been unsuccessful in taxing remaining shareholders except in one type of redemption situation. This exception is illustrated in the leading case of *Wall v. United States*[14] where it was held that a surviving stockholder sustains constructive dividend income under section 115(g)(1) when he obligates himself to purchase stock of a retiring shareholder and the corporation subsequently discharges his obligation by redeeming the stock. The court reasoned that this arrangement is equivalent to the payment of the taxpayer's obligation by a third party.[15] The Commissioner's early efforts to tax surviving stockholders in other situations were unsuccessful;[16] and when the Tax Court did adopt the Commissioner's position in 1953, the courts of appeal usually reversed its decisions.[17] The Internal Revenue Service, by its acquiescence in the instant case, has retreated from its former position and will probably no longer treat a distribution in redemption as a dividend to remaining shareholders merely because the shareholders' percentage interests in the corporation are increased.[18]

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a capital gains tax of $60,000 (25% of the remainder of $320,000 less adjusted basis of $80,000 paid for stock). Total tax on the transaction is $140,000 ($60,000 in capital gains plus $80,000 dividend tax.)

(2) By the redemption method, the remaining shareholder received a corporation in 1951 whose earned surplus was $270,000 ($350,000 less $80,000 distributed to retiring shareholder). If the taxpayer keeps the corporation for the same eight years, assuming the same hypothetical $130,000 addition to surplus, and then sells his stock at book value, he would pay a capital gains tax of $100,000 (25% of the sum of $270,000 plus $130,000). Total tax is $100,000 as compared to $140,000 under direct purchase method.

14. 164 F.2d 462 (4th Cir. 1947), 46 MICH. L. REV. 1002 (1948). Similar cases are Woodworth v. Commissioner, 218 F.2d 719 (6th Cir. 1955); Frank P. Holloway, 10 CCH Tax Ct. Mem. 1257 (1951), *aff'd* 203 F.2d 566 (6th Cir. 1953). But see Tucker v. Commissioner, 226 F.2d 177 (8th Cir. 1955), *reversing* 23 T.C. 115 (1954).

15. 164 F.2d at 464.

16. Fox v. Harrison, 145 F.2d 521 (7th Cir. 1944); Ray Edenfield, 19 T.C. 13 (1952), *acq.*, 1953-1 CUM. BULL. 4, 53 COLUM. L. REV. 881 (1953); Fred F. Fisher, 6 CCH Tax Ct. Mem. 520 (1947); Lloyd H. Diehl, 1 T.C. 139; (1942); S. K. Ames, Inc., 46 B.T.A. 1020 (1942), *acq.*, 1942-1 CUM. BULL. 1; A. M. Lawrence, 13 B.T.A. 463 (1928).

17. See Henry E. Prunier, 28 T.C. 19 (1957), *rev'd*, 248 F.2d 818 (1st Cir. 1957) (insurance premiums to fund corporate entity plan); Sneed, note 11 *supra;* Joseph P. Schmitt, 20 T.C. 352 (1953), *rev'd*, 208 F.2d 819 (3d Cir. 1954) (corporate redemption leaving minority stockholders in control), 67 HARV. L. REV. 1266 (1954). See also Sanders v. Fox, 149 F. Supp. 942 (D. Utah 1957), *rev'd*, 253 F.2d 855 (10th Cir. 1958); Oreste Casale, 26 T.C. 1020 (1956) *rev'd*, 247 F.2d 440 (2d Cir. 1957), 11 VAND. L. REV. 237 (1957). But see Louis H. Zipp, 28 T.C. 314 (1957), *aff'd*, 259 F.2d 119 (6th Cir. 1958).

18. Internal Revenue Service, Technical Information Release, No. 109, Oct. 30, 1958. The IRS further stated in its release that it is not retreating from its position in Wall v. United States, note 14 *supra*, and Zipp v. Commissioner, note 17 *supra;* and made it clear that if the stock is in reality purchased by a remaining shareholder and paid for by the corporation, then regardless of the form of the transaction, the payment will be considered a dividend to the shareholder who made the purchase.

Caveat: The Commissioner's retreat in stock redemption cases has often times been shortlived. For example he has subsequently argued a position contrary to his acquiescences in *Edenfield* and *Ames*, note 16 *supra*.

In the principal case, the court held that the motive or purpose of a redemption is irrelevant in determining whether the distribution has the effect of a dividend.[19] Thus, no significance was attached either to the Tax Court's finding that the redemption was a planned use of corporate earnings for the personal benefit of the taxpayer or to the taxpayer's argument that the redemption subserved a valid business interest of the corporation.[20] Instead, the court said that the effect of the redemption is not equivalent to the payment of a dividend because the taxpayer "realized" no income from the transaction.[21] The Court concluded that the very fact that the taxpayer substantially increased his proportionate interest in the corporation militates against dividend equivalence since the distribution of a true dividend leaves the proportionate interests of the shareholders of a corporation relatively unchanged.[22]

The court's rejection of motive or purpose as a test in determining dividend equivalence and its insistence that the formalities of the stock redemption process excuse the remaining shareholder from a tax that he would otherwise have to pay are subject to criticism. The court's argument seems to begin with the truism that both an ordinary dividend made directly to a taxpayer and a redemption distribution made in order to enable a taxpayer to gain control of a corporation represent the outlay of corporate funds for the personal benefit of the taxpayers. But the court then reasons that the motive test is irrelevant because the benefit to the taxpayer in the normal dividend situation is "realized" whereas no such "realization" is present in the redemption situation. However, the taxpayer's benefit in the instant case seems no less "realized" than are other benefits arising out of payments to a third party which are treated as a "constructive" dividend to the taxpayer.[23] If it is recognized that the taxpayer does "realize" a

19. 258 F.2d at 869.

20. The taxpayer argued that its Oldsmobile franchise was in jeopardy because General Motors had expressed disapproval of the fact that Greenville owned one half of the corporation's stock. The Tax Court, refusing to follow Tucker v. Commissioner, 226 F.2d 177 (8th Cir. 1955) (protection of franchise held valid corporate purpose), held that it required no corporate act to remedy the situation.

21. 258 F.2d at 868.

22. *Id.* at 868-69.

23. See authorities cited in note 14 *supra;* Louis Greenspon, 23 T.C. 138 (1954), *aff'd* 229 F.2d 947 (8th Cir. 1956); Clark v. Commissioner, 84 F.2d 725 (3d Cir. 1936); Sneed, note 11 *supra,* at 347-53. See also Helvering v. Horst, 311 U.S. 112, 116 (1940), where the Court said in regard to the rule that income is not taxable until realized:

"The rule, founded on administrative convenience, is only one of postponement of tax to the final event of enjoyment of the income, usually the receipt of it by the taxpayer, and not one of exemption from taxation where the enjoyment is consummated by some event other than the taxpayer's personal receipt of money or property."

For some discussions of this problem, suggesting relaxation of the strict realization rule, see Bittker, *Charitable Gifts of Income and The Internal Rev-*

benefit from a stock redemption, the question then becomes whether all such benefits should be taxed. While all redemptions may result in the same benefits to the remaining shareholders, it is doubtful that all should receive the same treatment. Many redemptions, entered into for valid business reasons quite unrelated to any personal or investment benefits which accrue to the shareholders, are, in a sense, thrust upon the remaining shareholders.[24] Thus, in establishing whether a distribution in redemption is essentially equivalent to a dividend, it seems helpful to determine whether the redemption is made for valid corporate reasons or purely for the benefit of the remaining shareholders. Moreover, to allow a few close corporation shareholders to avoid taxation by a process that is not available to most corporate shareholders[25] seems to contradict an underlying principle of income taxation that equals should be taxed equally. But in view of the similarity between sections 302(b)(1)[26] of the 1954 Code and 115(g)(1) of the 1939 Code, the Commissioner's acquiescence in the instant case indicates that stock redemptions will continue to provide a means for remaining shareholders to increase their proportionate corporate interests without sustaining dividend taxation.[27]

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enue Code: Another View, 65 HARV. L. REV. 1375 (1952); Griswold, *Charitable Gifts of Income and The Internal Revenue Code,* 65 HARV. L. REV. 84 (1951); Surrey, *The Supreme Court and The Federal Income Tax: Some Implications of the Recent Decisions,* 35 ILL. L. REV. 779 (1941).

24. See note 11 *supra.*

25. The shareholders of public corporations are usually unable to use the redemption process. And not every shareholder of a close corporation can take advantage of the arrangement. For example, where a father and son own equal interests in a close corporation and the father dies, a redemption by the corporation of the shares held in the father's estate would be taxed as ordinary income to the estate if the son is one of its beneficiaries. The attribution rules of § 318 combined with § 302 cause such a result.

26. "Subsection (a) [redemptions shall be treated as a sale or exchange of stock] shall apply if the redemption is not essentially equivalent to a dividend." INT. REV. CODE OF 1954, § 302(b)(1).

27. A short commentary agreeing with the court's decision and reasoning in the instant case appears in 72 HARV. L. REV. 776 (1959).