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Recent Cases

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RECENT CASES

CONTRACTS — CEILING PRICE LEGISLATION — EFFECT UPON PERFORMANCE

Prior to the delivery date of a contract for the sale of goods, ceiling price legislation made the contract illegal and unenforceable at the original contract price. The seller offered to perform at the new lower price, but the buyer, contending that the supervening government act had terminated the contract, refused. The seller instituted arbitration proceedings pursuant to a provision in the contract. The trial court sustained the buyer's motion to stay the proceedings. *Held,* reversed. The price regulation did not void the contract but rather set a price above which it could not be performed. *Application of Josephs,* 280 App. Div. 326, 113 N.Y.S.2d 540 (1st Dep't 1952).[1]

According to early common law, a contract was enforced according to its literal terms; neither impossibility nor any change in circumstances, however extreme, would excuse performance.[2] However, because the application of this strict rule caused inequitable results, the courts created certain exceptions.[3] Among the exceptions suspending[4]

1. It is to be noted that this case is not one for breach of contract, but involves only the issue of allowing the parties to proceed to arbitration. As to the controlling law in a breach of contract suit in a case of this type, see Notes, 151 A.L.R. 1450 (1944), 147 A.L.R. 1286 (1943).

2. Paradine v. Jane, Aleyn 26, 82 Eng. Rep. 897 (K.B. 1647); Brason v. Dean, 3 Mod. 39, 87 Eng. Rep. 24 (K.B. 1684). Although *Paradine v. Jane* is the most often cited case as authority for the strict rule, it has been criticized as not being a case of impossibility. For this excellent discussion, see Page, *The Development of the Doctrine of Impossibility of Performance,* 18 MICH. L. REV. 589 (1920).

3. Impossibility due to the destruction of the subject-matter where the contract calls for a specific as distinguished from general subject-matter: Womack v. McQuarry, 28 Ind. 103, 92 Am. Dec. 306 (1867); Matthews Const. Co. v. Brady, 104 N.J.L. 438, 140 Atl. 433 (1928); Gouled v. Holwitz, 95 N.J.L. 277, 113 Atl. 323 (Sup. Ct. 1921); Greenberg v. Sun Shipbuilding Co., 277 Pa. 312, 121 Atl. 63 (1923); Taylor v. Caldwell, 3 Best & Sm. 826, 122 Eng. Rep. 309 (Q.B. 1863). Impossibility due to the death of one of the parties: Victory v. Union County Trust Co., 4 N.J. Misc. 908, 134 Atl. 883 (Sup. Ct. 1926); Sargent v. McLeod, 209 N.Y. 360, 103 N.E. 164, 52 L.R.A. (N.S.) 380 (1913); Parker v. Macomber, 17 R.I. 674, 24 Atl. 464, 16 L.R.A. 858 (1892). Impossibility due to the death of one of the parties to a joint contract: Griggs v. Swift, 82 Ga. 392, 9 S.E. 1062, 14 Am. St. Rep. 176 (1889). *Contra:* Hughes v. Gross, 166 Mass. 61, 43 N.E. 1031 (1896); Martin v. Hunt, 83 Mass. 418 (1861). Impossibility caused by a subsequent change of domestic law: Louisville & Nashville R.R. v. Mottley, 219 U.S. 467, 31 Sup. Ct. 265, 55 L. Ed. 297 (1911), *reversing* 133 Ky. 652, 118 S.W. 982 (1909); Buffalo East Side R.R. v. Buffalo Street R.R., 111 N.Y. 132, 19 N.E. 63, 2 L.R.A. 384 (1888); Heart v. East Tennessee Brewing Co., 121 Tenn. 69, 113 S.W. 364, 130 Am. St. Rep. 753 (1908). It is generally held that impossibility due to a change in foreign law is no excuse for breach of contract. Gray & Co. v. Cavalliotis, 276 Fed. 565 (E.D.N.Y. 1921), *aff'd mem.,* 293 Fed. 1018 (2d Cir. 1923); Beebe v. Johnson, 19 Wend. 500, 32 Am. Dec. 518 (N.Y. 1838).

4. Patch v. Solar Corp., 149 F.2d 558 (7th Cir.), *cert. denied,* 326 U.S. 741 (1945). *But cf.* Edward Maurer Co. v. Tubeless Tire Co., 272 Fed. 990 (N.D. Ohio 1921), *aff'd,* 285 Fed. 713 (6th Cir. 1922).

or discharging[5] the contract was supervening illegality due to a change in domestic law brought about by subsequent legislation[6] or judicial[7] or administrative order.[8] Price regulation, as such legislation, thus excused[9] performance.

The *Kramer* case,[10] in which the facts were substantially the same as those in the instant case except that the buyer rather than the seller sought arbitration, has been regarded as controlling the effect of supervening price regulation on a contract. There the court, sustaining the seller's motion to stay the arbitration proceedings, reasoned that the supervening price regulation had terminated the contract and that nothing remained to arbitrate. The holding in the *Kramer* case can be criticized in that it weakens the stability of contracts in this era of changing price regulations; furthermore, it destroys the whole purpose of an arbitration clause which is designed to avoid litigation over controversies arising under the contract.[11]

The court in the instant case distinguished the *Kramer* case on the theory that that holding did not mean that the contract was terminated but merely that it could not be enforced at the above-ceiling contract price. The court also emphasized the fact that the buyer should not be allowed to avoid the contract since he "is being accorded even more favorable treatment than he bargained for."[12] This distinction[13] is fallacious since the buyer will not be benefited if the seller has the option of performance in a buyers' market or of refusal to perform in a sellers' market.

The cases are inconsistent in that the seller is allowed to arbitrate while the buyer is denied that privilege. If this case overrules the *Kramer* case, parties can now enter into a contract knowing that a change in price regulation will not void the contract but will allow them to abide by their contract and proceed with arbitration. The effect the courts will give to the instant decision, in relation to the *Kramer* case, only future cases will reveal.

5. Sanders v. Lowenstein & Sons, 264 App. Div. 367, 35 N.Y.S.2d 591 (1st Dep't), *aff'd mem.*, 289 N.Y. 702, 45 N.E.2d 457 (1942).

6. Jarrett v. Pittsburgh Plate Glass Co., 131 F.2d 674 (5th Cir. 1942); Standard Chemicals & Metals Corp. v. Waugh Chemical Corp., 194 App. Div. 254, 185 N.Y. Supp. 207 (1st Dep't 1920).

7. *See* Moller v. Herring, 255 Fed. 670 (5th Cir. 1919); Operators' Oil Co. v. Barbre, 65 F.2d 857, 862 (10th Cir. 1933).

8. Mawhinney v. Millbrook Woolen Mills, Inc., 231 N.Y. 290, 132 N.E. 93 (1921).

9. Standard Chemicals & Metals Corp. v. Waugh Chemical Corp., 194 App. Div. 254, 185 N.Y. Supp. 207 (1st Dep't 1920); see note 5 *supra*.

10. *In re* Kramer & Uchitelle, Inc., 288 N.Y. 467, 43 N.E.2d 493, 141 A.L.R. 1497 (1942).

11. *See In re* Kramer & Uchitelle, Inc., 43 N.E.2d 493, 497 (1942) (dissenting opinion).

12. Instant case, 113 N.Y.S.2d at 541.

13. See Philadelphia Coke Co. v. Bowles, 139 F.2d 349, 357 (Emerg. Ct. App. Phila. 1943), which considered this distinction.

EVIDENCE — DECLARATIONS AGAINST INTEREST — THIRD-PARTY CONFESSIONS

Defendant was convicted of murder in a trial where his own confession, which was in some respects inconsistent with established facts concerning the murder, was admitted against him though he repudiated it as coerced. Evidence of a confession by a third party was excluded. *Held,* reversed and a new trial ordered. Repudiation of the confession which was inconsistent with established facts constituted sufficient circumstances to justify admission of the third-party confession. *People v. Lettrich,* 413 Ill. 172, 108 N.E.2d 488 (1952).

An extra-judicial statement of one not a party to a criminal prosecution that he, rather than the accused, committed the crime is pure hearsay.[1] The single exception by which such a statement could theoretically be admitted as evidence, if not part of the so-called *res gestae,*[2] is as a declaration against interest. Such a statement would be against the penal interest of the declarant since the matter asserted could subject him to criminal prosecution. However, the courts, with a few exceptions,[3] have refused to class a declaration against penal interest as an exception to the hearsay rule.[4] Thus by the great weight of authority a confession of a third person, now unavailable as a witness, is not admissible in aid of the accused.[5] The few cases which have ad-

1. See Donnelly v. United States, 228 U.S. 243, 276, 33 Sup. Ct. 449, 57 L. Ed. 820 (1913); Brown v. State, 99 Miss. 719, 55 So. 961 (1911). See also 5 WIGMORE, EVIDENCE § 1476 (3d ed. 1940); 20 AM. JUR., *Evidence* § 495 (1939).

2. If the statement is part of the so-called *res gestae* it is, of course, admissible. See Perdue v. State, 126 Ga. 112, 54 S.E. 820 (1906); *see* State v. Commonwealth, 25 Ky. L. Rep. 2209, 80 S.W. 221, 222 (1904); State v. Toten, 72 Vt. 73, 47 Atl. 105, 106 (1899); Greenfield v. People, 85 N.Y. 75, 87, 39 Am. St. Rep. 636 (1881). See also 20 AM. JUR., *Evidence* § 495 (1939).

3. Some courts have admitted declarations against penal interest as an exception to the hearsay rule. Sutter v. Easterly, 354 Mo. 282, 189 S.W.2d 284, 162 A.L.R. 437 (1945); Brennan v. State, 151 Md. 265, 134 Atl. 148, 48 A.L.R. 342 (1926); Hines v. Commonwealth, 136 Va. 728, 117 S.E. 843, 35 A.L.R. 431 (1923); *see* Ballew v. State, 139 Tex. Crim. R. 636, 141 S.W.2d 654, 655 (1940); Morris v. State, 131 Tex. Crim. R. 277, 98 S.W.2d 200, 201 (1936); Proctor v. State, 114 Tex. Crim. R. 383, 25 S.W.2d 350, 352 (1930). But see, MODEL CODE OF EVIDENCE, Rule 509 (1) (1942).

4. Prior to the Sussex Peerage Case, 11 Cl. & Fin. 85, 8 Eng. Rep. 1034 (H.L. 1844), the English courts had accepted such declarations as an exception to the hearsay rule. Standen v. Standen, 1 Peake (N.P.) 45, 170 Eng. Rep. 73 (1791). See cases cited note 5 *infra,* which refuse to class penal interests in the declaration against interest exception. For a thorough treatment of this subject, see also Note, 162 A.L.R. 446 (1946).

5. Donnelly v. United States, 228 U.S. 243, 33 Sup. Ct. 449, 57 L. Ed. 820 (1913); West v. State, 76 Ala. 98 (1884); Snow v. State, 54 Ala. 138 (1875); Snow v. State, 58 Ala. 372 (1877); Bryant v. State, 197 Ga. 641, 30 S.E.2d 259 (1944); Commonwealth v. Wakelin, 230 Mass. 567, 120 N.E. 209 (1918); State v. Hack, 118 Mo. 92, 23 S.W. 1089 (1893); State v. Evans, 55 Mo. 460 (1874); State v. Duncan, 28 N.C. 236 (1846); Cox v. State, 160 Tenn. 221, 22 S.W.2d 225 (1929); Peck v. State, 86 Tenn. 259, 6 S.W. 389 (1888); Rhea v. State, 18 Tenn. 257 (1837); State v. Totten, 72 Vt. 73, 47 Atl. 105 (1899).

In several cases where third-party confessions were excluded the court spoke of the majority rule, yet the declarant was available as a witness and such statements would not be admissible under either rule. See Brown v. State, 99

mitted these statements reject the rule that a declaration against interest does not include penal interests.[6]

The majority view has been criticized by Wigmore as "barbarous" and "shocking to the sense of justice"[7] because the view cannot be justified on the ground of public policy and because such evidence is as reliable as other admissible hearsay. The dissenting opinion of Justice Holmes in *Donnelly v. United States*[8] pointed out the unreasonableness of the rule and advocated its rejection. Holmes' reasoning was later applied in *Hines v. Commonwealth*[9] which, though recognizing the overwhelming weight of authority to the contrary, admitted the declaration where the conviction rested solely on circumstantial evidence.[10] The present view of the minority rule, which admits third-party confessions, seems to limit its application to cases where the conviction is based solely on circumstantial evidence or where there are special circumstances in the case meriting an exception to the general rule.

In the instant case the court recognized the sound reasoning of the rule excluding such evidence[11] but refused to apply it because of the special circumstances involved. However, the determination of "special circumstances" depends upon the facts of each case.[12]

The recognized danger of allowing third-party confessions to be admitted as evidence of defendant's innocence seems to be no more ominous than the injustice resulting from the refusal to allow the defendant to use every reasonable means to exonerate himself. There is

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Miss. 719, 55 So. 961 (1911); State v. May, 15 N.C. 328 (1833). For a complete listing of the pros and cons of this rule, see Notes, 35 A.L.R. 441 (1925), 48 A.L.R. 348 (1927), 162 A.L.R. 446 (1946), 167 A.L.R. 394 (1947), 131 Am. St. Rep. 778 (1910). See 5 WIGMORE, EVIDENCE § 1476 (3d ed. 1940).

6. Brennan v. State, 151 Md. 265, 134 Atl. 148, 48 A.L.R. 342 (1926) (special circumstances rule applied); Newberry v. Commonwealth, 191 Va. 445, 61 S.E.2d 318 (1950); Hines v. Commonwealth, 136 Va. 728, 117 S.E. 843, 35 A.L.R. 431 (1923); *cf.* Zimmerman v. Commonwealth, 167 Va. 578, 189 S.E. 144 (1937). The rule is settled in Texas that confessions or statements of a third person now unavailable as a witness that he and not the defendant committed the crime is admissible whenever the state is relying solely on circumstantial evidence. *See* Ballew v. State, 139 Tex. Crim. R. 636, 141 S.W.2d 654, 655 (1940); Morris v. State, 131 Tex. Crim. R. 277, 98 S.W.2d 200, 201 (1936); Stinson v. State, 124 Tex. Crim. R. 52, 60 S.W.2d 773, 774 (1933); Proctor v. State, 114 Tex. Crim. R. 383, 25 S.W.2d 350, 352 (1930); Wise v. State, 101 Tex. Crim. R. 58, 273 S.W. 850 (1925); see Morgan, *Declarations Against Interest in Texas*, 10 TEXAS L. REV. 399 (1932). In Thomas v. State, 186 Md. 446, 47 A.2d 43, 167 A.L.R. 390 (1946), the court admitted the extra-judicial confession of a person who was present at the trial as a witness on the ground that the evidence derived its sole value from the declarant who could be cross-examined.

7. 5 WIGMORE, EVIDENCE § 1477 (3d ed. 1940).

8. 228 U.S. 243, 277, 33 Sup. Ct. 449, 57 L. Ed. 820 (1913).

9. 136 Va. 728, 117 S.E. 843, 35 A.L.R. 431 (1923).

10. See Hines v. Commonwealth, 136 Va. 728, 117 S.E. 843, 848, 35 A.L.R. 431, 439 (1923). In view of the great weight of authority against its position, the court limited the effect of this decision to the case before it.

11. 108 N.E.2d at 491, 492.

12. See *e.g.*, Brennan v. State, 151 Md. 265, 134 Atl. 148, 48 A.L.R. 342 (1926) (bastardy proceeding where admission of fatherhood was in suicide letter written the same day child was born).

apparently some trend toward admitting such confessions; but, as long as courts persist in their refusal to accept a declaration against penal interest as an exception to the hearsay rule, progress in this direction will doubtless be slow.

FAMILY LAW — LOSS OF CONSORTIUM OF THE PARENT — RIGHT OF CHILD TO RECOVER AGAINST A NEGLIGENT DEFENDANT

Plaintiff, a child whose mother was injured by defendant's negligence, sued to recover damages resulting from deprivation of the comfort, aid, kindness and assistance of her mother. Defendant moved to dismiss the complaint. *Held*, for defendant. The right of recovery for loss of a parent's affection caused by defendant's negligence is not extended to a child. *Hill v. Sibley Memorial Hospital*, 108 F. Supp. 739 (D.D.C. 1952).

The law relating to consortium has developed in four definite progressive stages. (1) Originally, only the husband could sue for loss of consortium.[1] His cause of action grew out of services which, under the marriage contract, were due him from his wife. For interference with those services a cause of action would lie analagous to that which a master had for interference with the services of a servant.[2] During this stage of the development of the law, the wife or child, inferior parties to the relationship to whom no services were owed, had no cause of action for loss of consortium.[3] (2) After the emancipation statutes most courts allowed the wife to recover, where the loss of consortium was occasioned by the wilful or malicious acts of the defendant in an action for alienation of affections. However, recovery was refused in negligence cases[4] upon the distinction that in the former situation there

1. Morgan v. Martin, 92 Me. 190, 42 Atl. 354 (1898); Doe v. Roe, 82 Me. 503, 20 Atl. 83 (1890); Duffies v. Duffies, 76 Wis. 374, 45 N.W. 522 (1890) (cases of alienation of affections involving loss of consortium). See 3 VERNIER, AMERICAN FAMILY LAWS § 158 (1935); Holbrook, *The Change in the Meaning of Consortium*, 22 MICH. L. REV. 1 (1923). For the first case on consortium see Winsmore v. Greenbank, Willes 577, 125 Eng. Rep. 1330 (C.P. 1745).

2. See 3 VERNIER, AMERICAN FAMILY LAWS § 158 (1935); Lippman, *The Breakdown of Consortium*, 30 COL. L. REV. 651, 653 (1930). For a contention that this is not the correct historical theory see Guevin v. Manchester St. Ry., 78 N.H. 289, 99 Atl. 298, 300 (1916).

3. *See* Stout v. Kansas City Terminal Ry., 172 Mo. App. 113, 157 S.W. 1019, 1020 (1913); *cf.* Goldman v. Cohen, 30 Misc. 336, 63 N.Y. Supp. 459 (Sup. Ct. 1900). See 3 BL. COMM. *143; 3 VERNIER, AMERICAN FAMILY LAWS § 158 (1935). That the crux of the action is based upon services, see Boden v. Del-Mar Garage, Inc., 205 Ind. 59, 185 N.E. 860 (1933).

4. "The enlarged right of the wife under the Married Women's Acts is therefore pretty clear; she can generally sue for any intentional injury to the consortium, but cannot sue for a loss of consortium due to negligence." Holbrook, *The Change in the Meaning of Consortium*, 22 MICH. L. REV. 1, 6 (1923). See Clow v. Chapman, 125 Mo. 101, 28 S.W. 328 (1894); Goldman v. Cohen, 30 Misc. 336, 63 N.Y. Supp. 459 (Sup. Ct. 1900). See Lippman, *The Breakdown of Consortium*, 30 COL. L. REV. 651, 654 (1930).

was a direct wrong to the wife which gave rise to a right which had always been present but unassertable before the emancipation statutes.[5] (3) Though the general rule seems to be that a child cannot recover for loss of consortium, either because he had no legally enforceable right to the services of the parent[6] or because consortium was thought of as growing out of a marriage contract,[7] recently a few courts have allowed a child to recover for alienation of the affections of a parent if a third party intentionally deprives the child of those elements of consortium which are his by virtue of the family relationship, upon the theory that a child has a right in the family relationship which is enforceable at law.[8] (4) *Hitaffer v. Argonne Co.*[9] allowed a wife a cause of action for loss of consortium of the husband occasioned by the negligence of the defendant.

The *Hitaffer* case criticized, as one of the basic fallacies in the reasoning of the consortium cases, the idea that service is considered the predominant element of consortium.[10] It was there stated that "Consortium, although it embraces within its ambit of meaning the wife's material services, also includes love, affection, companionship, . . . etc., all welded into a conceptualistic unity,"[11] and that the loss of any of these should be compensable. Another fallacy in the consortium cases is the idea that the child, though morally entitled to these elements of consortium from the parent, cannot legally enforce these rights[12] and, hence, should not recover from a third party for loss of them.[13] *Miller*

5. Haynes v. Nowlin, 129 Ind. 581, 29 N.E. 389 (1891); Bennett v. Bennett, 116 N.Y. 584, 23 N.E. 17 (1889); see Cravens v. Louisville & N.R.R., 195 Ky. 257, 242 S.W. 628, 632 (1922).

6. Huke v. Huke, 44 Mo. App. 308 (1891); Henson v. Thomas, 231 N.C. 173, 56 S.E.2d 432 (1949). See PROSSER, TORTS 936 (1941); Pound, *Individual Interests in the Domestic Relations,* 14 MICH. L. REV. 177, 185 (1916).

7. See Coulter v. Coulter, 73 Colo. 144, 214 Pac. 400 (1923); Hamilton v. McNeil, 150 Iowa 470, 129 N.W. 480 (1911); Morrow v. Yannantuono, 152 Misc. 134, 273 N.Y. Supp. 912 (Sup. Ct. 1934); *cf.* McMillan v. Taylor, 160 F.2d 221 (D.C. Cir. 1946); Rudley v. Tobias, 84 Cal.App.2d 454, 190 P.2d 984 (1948).

8. Daily v. Parker, 152 F.2d 174 (7th Cir. 1945); Russick v. Hicks, 85 F. Supp. 281 (W.D. Mich. 1949); Johnson v. Luhman, 330 Ill. App. 598, 71 N.E.2d 810 (1947); *see* Heck v. Schupp, 394 Ill. 296, 68 N.E.2d 464, 466 (1946).

9. 87 App. D.C. 57, 183 F.2d 811 (D.C. Cir.), *cert. denied,* 340 U.S. 852 (1950), 4 VAND. L. REV. 358 (1951). This case was followed in Passalacqua v. Draper, 199 Misc. 827, 104 N.Y.S.2d 973 (Sup. Ct.), *rev'd,* 279 App. Div. 660, 107 N.Y.S.2d 812 (2d Dep't 1951). Hipp v. DuPont DeNemours & Co., 182 N.C. 9, 108 S.E. 318 (1921), allowed recovery of this nature, but apparently was overruled by Hinnant v. Tide Water Power Co., 189 N.C. 120, 126 S.E. 307 (1925).

10. *Accord,* Guevin v. Manchester Ry., 78 N.H. 289, 99 Atl. 298 (1916); PROSSER, TORTS 948 (1941); Note, 162 A.L.R. 824, 826 (1946). That damages in a loss of consortium case are punitive rather than compensatory, see Goldman v. Cohen, 30 Misc. 336, 63 N.Y. Supp. 459 (Sup. Ct. 1900), and Lippman, *The Breakdown of Consortium,* 30 COL. L. REV. 651 (1930).

11. Hitaffer v. Argonne Co., 87 App. D.C. 57, 183 F.2d 811, 814 (D.C. Cir.), *cert. denied,* 340 U.S. 852 (1950), 4 VAND. L. REV. 358 (1951).

12. See MADDEN, PERSONS AND DOMESTIC RELATIONS § 112 (1931). That a child's right to support cannot be enforced by the child, see Rawlings v. Rawlings, 121 Miss. 140, 83 So. 146 (1919); Baker v. Baker, 169 Tenn. 589, 89 S.W.2d 763 (1935). *See* Alling v. Alling, 52 N.J. Eq. 92, 27 Atl. 655, 659 (1893).

13. 2 COOLEY, TORTS § 174 (4th ed. 1932).

v. Monsen[14] pointed out that the family relationship can be divided into two groups, the relationship of the members of the family one to another, which is largely self-governed by moral law, and the relationship of a member of the family with a third party who is outside the family unit.

The rights of the child to certain elements of consortium have been recognized;[15] and the right of the wife to recover has been allowed although the loss of consortium was through the negligence of the defendant.[16] It seems that the next step should be a combination of these lines of reasoning to allow the child to recover where the child has been deprived of elements of consortium by the negligence of a third party.[17]

In the development of this area of the law, the instant case presents a step which has not yet been taken.[18] Although the court indicates a belief that such should be the law, it apparently feels that precedent is too well established to allow a lower court to expand the law of consortium and suggests that a higher court take the step.[19]

FEDERAL PROCEDURE — STATUTORY CONSTRUCTION — MEANING OF "MENTALLY INCOMPETENT"

After indictment for a federal offense, petitioner, pursuant to a federal statute, was adjudged mentally incompetent and was committed to the custody of the Attorney General to be confined until he became competent to stand trial or until the charges against him were disposed of according to law. Petitioner, claiming to be permanently insane, brought this habeas corpus proceeding in which he challenged the power of the United States to confine him for an indefinite time in advance of trial on the criminal charge, merely because he was insane.

14. 228 Minn. 400, 37 N.W.2d 543, 544 (1949).

15. "As against the world at large a child has an interest in the relation because of the support he may expect by virtue thereof while infancy or, after majority, circumstances precluding self-support render it improper or impossible for him to be left to himself. Also he has an interest in the society and affections of the parent, at least while he remains in the household. But the law has done little to secure these interests." Pound, *Individual Interests in the Domestic Relations*, 14 MICH. L. REV. 177, 185 (1916). See 4 VERNIER, AMERICAN FAMILY LAWS § 266 (1936); Note 74 A.L.R. 11, 29 (1931). Also see cases cited note 9 *supra*.

16. Hitaffer v. Argonne Co., 87 App. D.C. 57, 183 F.2d 811 (D.C. Cir.), *cert. denied*, 340 U.S. 852 (1950), 4 VAND. L. REV. 358 (1951).

17. "Ultimately it may be expected that public opinion as to the equality of the sexes will force recognition of the wife's action. Perhaps at that time some thought will be given to the relational interest of the child, which thus far has been denied all remedy for any loss suffered through injury to its parent." PROSSER, TORTS 948 (1941).

18. Expressly refused in Eschenbach v. Benjamin, 195 Minn. 378, 263 N.W. 154 (1935); cf. Welch v. Davis, 410 Ill. 130, 101 N.E.2d 547 (1951) (administrator of the mother recovered for the benefit of the daughter from the estate of the father for the wrongful death of the mother).

19. Instant case, 108 F. Supp. at 741.

His petition was denied. *Held,* judgment vacated and cause remanded for determination of temporary or permanent insanity. The statute, construed to avoid constitutional questions, only permits commitment of one temporarily mentally incompetent. *Wells, by Gillig, v. Attorney General of the United States,* 201 F.2d 556 (10th Cir. 1953).

Mental incompetency is relevant in criminal law administration: (1) at the time of the act, where the question is whether the accused is sane enough to be held legally responsible for the act under the "right-wrong"[1] test or, in some states, under the irresistible impulse test;[2] (2) at the time of the criminal proceedings, where the test is whether the accused has the capacity to understand the nature and object of the proceeding against him, to communicate with his attorney in a rational manner and to aid effectively in the preparation of his defense;[3] (3) at the time of punishment, where the test is whether the convicted has the capacity to understand the nature, purpose and effect of the punishment to be executed upon him.[4] The federal courts by statute[5] recognize the doctrine codified[6] by most states that when a person is found insane after arrest and before trial, he may not be tried, convicted or punished.[7] The prosecution must be suspended, and the

1. See generally 14 AM. JUR., *Criminal Law* §§ 32, 40 (1938); GLUECK, MENTAL DISORDER AND THE CRIMINAL LAW 214-31 (1927); WEIHOFEN, INSANITY AS A DEFENSE IN CRIMINAL LAW 17-44 (1933).

2. See 14 AM. JUR., *Criminal Law* § 35 (1938); GLUECK, MENTAL DISORDER AND THE CRIMINAL LAW 232-45 (1927); WEIHOFEN, INSANITY AS A DEFENSE IN CRIMINAL LAW 44-64 (1933).

3. "The precise question . . . is to determine whether at this time the prisoner is in such possession of his mental faculties as enables him to rightly comprehend his condition with reference to the proceedings against him, and to rationally aid in the conduct of his defense." United States v. Chisolm, 149 Fed. 284, 287 (C.C.S.D. Ala. 1906). *See* Jordan v. State, 124 Tenn. 81, 135 S.W. 327, 329, 34 L.R.A. (N.S.) 1115 (1910). See also Notes, 3 A.L.R. 94 (1919); 142 A.L.R. 961 (1943); 14 AM. JUR., *Criminal Law* §§ 44, 45 (1938); Note, 11 N.Y.U.L.Q. REV. 438 (1934); GLUECK, MENTAL DISORDER AND THE CRIMINAL LAW 47-95 (1927); WEIHOFEN, INSANITY AS A DEFENSE IN CRIMINAL LAW 341-77 (1933). A breakdown of the heading "insanity at the time of the criminal proceedings" would include: Insanity before indictment, insanity after indictment and before trial, and insanity during trial.

4. *See* Solesbee v. Balkcom, 339 U.S. 9, 14, 70 Sup. Ct. 457, 94 L. Ed. 604 (1950) (dissenting opinion); see Note, 49 A.L.R. 804 (1927); 14 AM. JUR., *Criminal Law* § 49 (1938); Dession, *The Mentally Ill Offender in Federal Criminal Law and Administration,* 53 YALE L.J. 684, 696 (1944); WEIHOFEN, INSANITY AS A DEFENSE IN CRIMINAL LAW 385-95 (1933). Generally, if the punishment to be executed is less than death, a defendant may not after sentence interpose for the first time, a plea of present insanity as a bar to th punishment. Kelley v. State, 157 Ark. 48, 247 S.W. 381 (1923). The reason behind this rule is that provision is usually made for the hospitalization in proper institutions of convicts found to be insane while serving sentence. 39 STAT. 309 (1916), 24 U.S.C.A. § 212 (1927); MASS. ANN. LAWS c. 123, § 103 (1950); TENN. CODE ANN. § 4476 (Williams 1934).

5. 63 STAT. 686 (1949), 18 U.S.C.A. § 4244 (1951).

6. MASS. ANN. LAWS c. 123, § 100 (1950); N.Y. CRIM. CODE §§ 658, 662-b; TENN. CODE ANN. §§ 4519, 4476 (Williams 1932); GLUECK, MENTAL DISORDER AND THE CRIMINAL LAW 504-643 (1927); KOREN, SUMMARIES OF STATE LAWS RELATING TO THE INSANE (Hamilton and Haber ed., 1918).

7. *See* Youtsey v. United States, 97 Fed. 937, 940-42 (6th Cir. 1899). "Also, if a man in his sound memory commits a capital offence, and before arraign-

accused confined until his sanity is restored.[8]

In the instant case the issue was whether one who claimed to be permanently insane could constitutionally be subjected to section 4246 of Title 18 providing that: "Whenever the trial court shall determine in accordance with sections 4244 . . . of this title that an accused is or was mentally incompetent, the court may commit the accused to the custody of the Attorney General or his authorized representative, until the accused shall be mentally competent to stand trial or until the pending charges against him are disposed of according to law."[9] The majority opinion construes the statute as applicable only when the accused is temporarily insane, reasoning that if the statute authorized detention of the permanently insane, a question of constitutionality would be forced on the court. The dissenting opinion reasons that the Federal Government may constitutionally make provision for the care of incompetent persons irrespective of the duration of the mental incapacity where those persons are properly brought within its control by the exercise of its criminal jurisdiction.

Does one permanently insane come within the meaning of the term "mentally incompetent" used in the statute? By a frequently stated rule of statutory construction, when the words are plain and unambiguous their literal and ordinary meaning is to be adopted.[10] Thus, it

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ment for it he becomes mad, he ought not to be arraigned for it because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried; for how can he make his defense? If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if after judgment he becomes of nonsane memory, execution shall be stayed: for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment of execution." 4 BL. COMM. *24, 396. *But cf.* State *ex. rel.* Novak v. Utecht, 203 Minn. 448, 281 N.W. 775 (1938) (though court directed by statute not to try person while insane, it does not go to the court's jurisdiction and failure to comply with statute will not subject conviction to attack by habeas corpus or other proceedings.

8. *See* Forthoffer v. Swope, 103 F.2d 707, 709 (9th Cir. 1939). When sanity is restored the offender is to be returned for trial. *See* Miller v. Spring Grove State Hospital, 80 A.2d 898, 900 (Md.), *cert. denied,* 342 U.S. 841 (1951). One who becomes insane after indictment will be committed to jail until sanity is restored in absence of statute authorizing committment to hospital. *See* Hawie v. Hawie, 128 Miss. 473, 91 So. 131, 133 (1922).

9. 63 STAT. 686 (1949), 18 U.S.C.A. § 4246 (1951); 2 U.S. CODE CONGRESSIONAL SERVICE 1928-29 (1949). Legislative history: 11 STAT. 158 (1857) and 18 STAT. 251 (1874), preceded 39 STAT. 309 (1916), 24 U.S.C.A. § 211 (1927). The 1874 statute seemed to authorize the committment to Saint Elizabeth's Hospital all persons charged with offenses against the United States and found insane. However, an opinion of the attorney general held that the foregoing statutes applied only to insane defendants in the District of Columbia; thus the statute did not apply to cases tried in any district court of the United States except the District Court of the District of Columbia. 17 OPS. ATT'Y GEN. 211 (1881). A later statute permitted committment of any person in actual custody of federal officers who had either been charged with a federal offense or convicted in a court of the United States. 39 STAT. 309 (1916), 24 U.S.C.A. § 212 (1927). See Holtzoff, *Looking at the Law,* 7 FED. PROBATION No. 2, 41 (1943); Pollak, *Insanity as a Bar to Prosecution in the Federal Courts,* 7 FED. B.J. 55, 69 (1945).

10. *See* Terral v. Terral, 212 Ark. 221, 205 S.W.2d 198, 201, 1 A.L.R.2d 1092

seems reasonable that where Congress used the broad term "mentally incompetent," the plain and ordinary meaning does not import a "temporary-permanent" limitation. Furthermore, this construction is consistent with both the language and the over-all purpose[11] of the statute. Had Congress intended the statute to apply only to the temporarily insane, would it not have made provisions for the disposition of one permanently incompetent?[12]

Under this literal construction[13] of the statute the significant constitutional questions raised and the policy reasons involved in favor of such a construction should be considered. The general care and custody

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(1947); Citizens' Tel. Co. v. City of Newport, 188 Ky. 629, 224 S.W. 187, 190, 14 A.L.R. 1369 (1920); Dundalk Liquor Co. v. Tawes, 79 A.2d 525, 529 (Md. 1951); Hendricks v. Hendricks, 55 N.M. 51, 226 P.2d 464, 473 (1950). "Courts should be slow to impart any other than their commonly understood meaning to terms employed in the enactment of a statute. . . . It is a general rule of statutory construction that words of a statute will be interpreted in their ordinary acceptation and significance and the meaning commonly attributed to them." 50 AM. JUR., *Statutes* § 238 (1944). See also Jones, *The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal Statutes,* 25 WASH. U.L.Q. 2 (1939).

11. *See* United States v. American Trucking Ass'ns, Inc., 310 U.S. 534, 543, 60 Sup. Ct. 1059, 84 L. Ed. 1345 (1940); Albright v. United States, 76 F. Supp. 532, 537 (D. Minn. 1948); California Drive-In Restaurant Ass'n v. Clark, 22 Cal.2d 287, 140 P.2d 657, 660 (1943); Canfield Co. v. United Const. Workers, 134 Conn. 358, 57 A.2d 624, 625 (1948); see 59 AM. JUR., *Statutes* § 303 (1944); Note, 43 HARV. L. REV. 886, 892 (1930).

12. In the Southern District of New York the inadequateness of the federal statutes on the detention of the presently insane resulted in this practice under the former statutes. "There, when a defendant in a criminal case is found to be presently insane, pending charges against him are withdrawn by the Government and he is released from custody. The matter is informally brought to the attention of State authorities who are relied upon to take the necessary steps to have the defendant confined as an insane person. If the defendant's sanity is subsequently restored he is not returned to the custody of the United States District Court so that his prosecution may continue. Charges against him are no longer pending in that court. Should the United States Attorney be advised or learn that the defendant's sanity is so restored, he may, in some cases, start prosecution anew, provided the statute of limitations has not run." Pollak, *Insanity as a Bar to Prosecution in the Federal Courts,* 7 FED. B.J. 55, 70 (1945). In cases where residence cannot be ascertained it is difficult to arrange for state committment of federal prisoners found presently insane since most states require actual residence as a condition for entry to the state hospital. Dession, *The Mentally Ill Offender in Federal Criminal Law and Administration,* 53 YALE L.J. 684, 694 (1944).

13. The many statutes providing for the care of insane lawfully within the exclusive jurisdiction of the Federal Government are applied without regard to the duration of mental incompetency. Saint Elizabeth's Hospital in the District of Columbia was established for the "humane care and enlightened curative treatment of the insane of the Army and Navy of the United States and of the District of Columbia." 39 STAT. 309 (1916), 24 U.S.C.A. § 161 (1927). Provision is made for the admission to this hospital of insane persons over which the Federal Government exercises jurisdiction. 38 STAT. 801 (1915), 24 U.S.C.A. § 191 (1927) (personnel of the Army, Navy, Marine Corps, Coast Guard and civilians who become insane while employed in the Quartermaster Corps of the Army); 62 STAT. 1018 (1948), 42 U.S.C.A. § 222 (1952) (insane patients of the Public Health Service); 39 STAT. 309 (1916), 24 U.S.C.A. § 195 (1927) (insane inmates of the National Home for Disabled Volunteer Soldiers); 39 STAT. 309 (1916), 24 U.S.C.A. § 211a (1927) (insane convicts); 55 STAT. 756 (1941), 24 U.S.C.A. § 191a (1952) (Foreign Service personnel adjudged insane in foreign country).

of the insane is a function of the state in its role as *parens patriae*.[14] However, an existing power of the Federal Government is not limited by this power of the state; hence, Congress may validly legislate concerning custody and detention of the mentally incompetent for the purposes of criminal administration. Virtually all federal criminal law machinery finds its constitutional basis in implied powers; thus "the federal government is employing committment as an instrument for the protection of federal interests or as a necessary adjunct to the exercise of federal powers."[15] There is little case law on the constitutionality of the statute. *Dixon v. Steele*,[16] relied on by the majority, holds that insofar as section 4246 gives the court a right to commit an accused person for an indefinite time, it is beyond the constitutional power of Congress because it allows one charged with a federal offense to be "imprisoned for the rest of his life without any trial as to the issue of whether or not he committed an offense, but only as to the question of whether or not he was sane or insane at the time of the hearing."[17] If the accused was insane at the time of the offense, then he is legally guilty of no offense; yet this issue cannot be determined since he is detained for insanity. However, the jurisdiction of the Federal Government over one accused and found presently insane should be, and seemingly is, predicated on the *charge* of a federal offense and his *arrest* therefor rather than on the issue of guilt for the crime.[18] The accused thus properly within the control of the Federal Government should then be subject to detention until, if ever, he is able to stand trial.

A construction of the statute without the temporary-permanent limitation likewise seems justified on the policy considerations underlying the statute. For under the circumstances there is no more reason why a state rather than the Federal Government should detain an accused found presently insane. If sane at the time of the act he has committted

14. *See* Yeomans v. Williams, 117 Ga. 800, 45 S.E. 73 (1903); Sporza v. German Savings Bank, 192 N.Y. 8, 84 N.E. 406, 408, 412 (1908).

15. Dession, *The Mentally Ill Offender in Federal Criminal Law and Administration*, 53 YALE L.J. 684, 692 (1944). "The right of a sovereign to proceed against an insane person charged with the commission of a felony is incidental to the power to define crimes and prescribe procedure under a criminal code. [citations omitted]. So far as that power is resident in the Federal Government it can be traced to Art. I, Sec. 8, Cl. 18 of the Constitution of the United States, relating to 'incidental powers.'" Higgins v. McGrath, 98 F. Supp. 670, 674 (W.D. Mo. 1951).

16. 104 F. Supp. 904 (W.D. Mo. 1951).

17. *Id.* at 908.

18. "Suffice it to say that an insane person who is charged with a federal offense and has been arrested therefor, is for purposes of trial and judgment thereon within the lawful custody and control of the Federal Government. If requisites of due process are thereafter satisfied, the Federal Government has the right and power to determine the issue of the mental capacity of such an accused, not only to stand trial, but also the question of his competency to commit the offense. . . ." Higgins v. McGrath, 98 F. Supp. 670, 674 (W.D. Mo. 1951).

a federal crime and the Federal Government thus has an interest in controlling his detention. Furthermore, is there not an implied duty on any sovereign government to restrain the liberty of individuals properly within its control if necessary to protect the community and promote the health and welfare of those restrained?[19] Finally, when one confined under the statute can show sufficient mental competency to stand trial, the use of habeas corpus is an adequate safeguard of his rights.[20]

INCOME TAXATION — SURRENDER OF LEASE — CAPITAL GAIN TO LESSEE

Petitioner, lessee, surrendered his year to year leasehold three months prior to termination in consideration of a payment of $7,500 by the lessor's assignee. The transaction was not reported on petitioner's income tax return. The Commissioner determined that the $7,500 was taxable to the lessee as ordinary income, but the Tax Court held that it constituted a capital gain.[1] On petition for review to the Court of Appeals, *held,* affirmed. The compensated surrender of a lease by a tenant is a sale of property resulting in capital gain rather than ordinary income. *Commissioner of Internal Revenue v. Golonsky,* 200 F.2d 72 (3d Cir. 1952).

"Capital assets," within section 117(a),[2] means all property, tangible and intangible,[3] held by the taxpayer; there are several arbitrary exclusions, among which are stock in trade, property held primarily for sale to customers in the ordinary course of business and inventorial property.[4] Real estate and depreciable personal property used in a trade or business and held for more than six months may be treated as

19. *See* Maxwell v. Maxwell, 187 Iowa 7, 177 N.W. 541, 543 (1920); Dession, *The Mentally Ill Offender in Federal Criminal Law and Administration,* 53 YALE L.J. 684, 693 (1944). Such restraint of the mentally incompetent is not regarded as punishment. *See In re* Bryant, 214 La. 573, 38 So.2d 245, 249 (1949); *In re* Moulton, 77 N.H. 370, 77 A.2d 26, 28 (1950).

20. *In re* Buchanan, 129 Cal. 330, 61 Pac. 1120, 50 L.R.A. 378 (1900); Northfoss v. Welch, 116 Minn. 62, 133 N.W. 82 (1911); *see* Overholser v. Boddie, 184 F.2d 240, 243 (D.C. Cir. 1950). See also 25 AM. JUR., *Habeas Corpus* § 85 (1940); GLUECK, MENTAL DISORDER AND THE CRIMINAL LAW 399-412 (1927); Pollak, *Insanity as a Bar to Prosecution in the Federal Courts,* 7 FED. B.J. 55, 68 (1945). As to the remedy of one convicted of crime while insane, see Notes, 10 A.L.R. 213 (1921); 121 A.L.R. 267 (1939).

1. 16 T.C. 1450 (1951).

2. INT. REV. CODE § 117(a).

3. See Jones v. Corbyn, 186 F.2d 450 (10th Cir. 1950) (exclusive general insurance agency held a capital asset); Ranier Brewing Co. v. Comm'r, 7 T.C. 162 (1946), *aff'd,* 165 F.2d 217 (9th Cir. 1948) (trade name held a capital asset). See also Citizens State Bank v. Vidal, 114 F.2d 380 (10th Cir. 1940).

4. See also INT. REV. CODE § 22(a).

capital assets under section 117(j),[5] to the extent that their transfer results in a net gain.[6] Not all property rights constitute capital assets within these definitions; if the right is essentially an income item, the proceeds from its transfer will not be considered as capital gain.[7] In the sale of a contract right, for example, capital asset treatment would depend upon the nature of the income resulting from the fulfillment of the contract. If the contract requires the rendition of personal services, the proceeds of its sale ar ordinary income.[8]

Hort v. Commissioner[9] held that the sum paid to the landlord by the tenant for release from a long term lease was taxable as ordinary income, and not as capital gain.[10] The relinquishment of the right to future rental payments in return for a present, substituted payment and possession of the leased premises was "essentially a substitute for rental payments which § 22(a) expressly characterizes as gross income."[11] The statement illustrates an inquiry beyond the form into the substance of the transaction. The Court assumed that "the lease was 'property,' whatever that signifies abstractly,"[12] but determined that the payment, as a substitute for ordinary income, was itself ordinary income.[13]

The *Hort* case is in agreement with the Commissioner's apparent po-

5. INT. REV. CODE § 117(j). See 3 MERTENS, FEDERAL INCOME TAXATION §§ 22.01 *et seq.* (1942). See also 512 West Fifty-Sixth St. Corp. v. Comm'r, 151 F.2d 942 (2d Cir. 1945) (lease as depreciable property).

6. To be entitled to capital gains treatment, the asset must fall within the definitions of either § 117(a) or § 117(j) and, in addition, there must be a "sale or exchange." See, *e.g.*, 3 MERTENS, FEDERAL INCOME TAXATION § 22.12 (1942). A "sale" of a capital asset, resulting in capital gain or loss, is a transfer of property for a valuable consideration. Jones v. Corbyn, 186 F.2d 450 (10th Cir. 1950) (cancellation of exclusive general insurance agency held a sale); Hawaiian Gas Products, Ltd. v. Comm'r, 126 F.2d 4 (9th Cir. 1942) (condemnation proceedings held a sale). Many transactions involving intangibles have been construed as resulting in capital gain or loss. See Citizens State Bank v. Vidal, 114 F.2d 380 (10th Cir. 1940). "[A] lease [is] an asset . . . within definition of capital assets . . . in section 117." Sutliff v. Comm'r, 46 B.T.A. 446, 453 (1942).

7. Starr Bros., Inc. v. Comm'r, 18 T.C. 149 (1952). See Rhodes v. Comm'r, 43 B.T.A. 780 (1941), *aff'd sub nom.* Rhodes' Estate v. Comm'r, 131 F.2d 50 (6th Cir. 1942) (sale of right to receive dividends which have been declared held ordinary income to vendor); Levy, *The Line Between a Sale of Property and the Anticipation of Ordinary Income,* N.Y.U. SEVENTH ANNUAL INSTITUTE ON FEDERAL TAXATION 399 (1949).

8. See, *e.g.*, Parker v. Comm'r, 5 T.C. 1355 (1945); Williams v. Comm'r, 5 T.C. 639 (1945).

9. 313 U.S. 28, 61 Sup. Ct. 757, 85 L. Ed. 1168 (1941).

10. *Cf.* Oxford Paper Co. v. United States, 86 F. Supp. 366 (S.D.N.Y. 1949). *But cf.* Meredith v. Comm'r, 12 T.C. 344 (1949).

11. 313 U.S. 28, 31, 61 Sup. Ct. 757, 85 L. Ed. 1168 (1941); followed as to income received from repossession of leased premises in Estate of Bryant v. Comm'r, 44 B.T.A. 1306 (1941).

12. Hort v. Comm'r, 313 U.S. 28, 31, 61 Sup. Ct. 757, 85 L. Ed. 1168 (1941). See Jensen, *Sale of Rights, Interest, and Other Intangibles,* N.Y.U. EIGHTH ANNUAL INSTITUTE ON FEDERAL TAXATION 833 (1950).

13. But see Levy, *supra* note 7, at 399: "[I]t is basic that every capital gain represents a conversion of prospective income to the extent that earning power is a factor in the sales price."

sition that an interest or right, which if continued to be held by the taxpayer would produce ordinary income, should not be accorded capital gains treatment if sold.[14] The support given this position has been meager.[15] Its frustration has been most obvious in those cases which hold that the consideration received for transfer of a life estate in a trust to the remainderman is capital gain.[16]

The transaction in the *Hort* case is to be distinguished from the one in the instant case. In the former, the lessor, in receiving the lump sum payment, anticipated rent; in the instant case, the lessee, who received the payment, did not anticipate rent, but parted with valuable property rights and privileges which he alone possessed. This distinction, drawn in the instant case, seems determinative.

If, in a transaction like the instant one, a sublease remains in effect, the transfer is nevertheless a sale.[17] Similarly, if a lease is transferred to a third party at a profit, the result is a capital gain.[18] The description of the transaction in the instant case as a "cancellation" of a lease (or as a release of the obligor-lessor from the contract by the obligee-lessee) should not be permitted to obscure the true facts.[19] More was involved than a termination of mere contractual rights and obliga-

14. "[The courts] have refused to regard as 'capital' transactions . . . divers sorts of transfers of 'property,' especially those by which transferors have procured advance payments of future income." McAllister v. Comm'r, 157 F.2d 235, 239 (2d Cir. 1946) (dissenting opinion). *But cf.* Sinoak v. Comm'r, 43 B.T.A. 907 (1941) (proceeds from sale of exclusive sales agency held a capital gain although clearly an essentially income item). See also Holtzman, *Tax Classics*, 30 TAXES 65 (1952); Jensen, *supra* note 12, at 833.

15. "To apply . . . the rule of the *Hort* decision would be the equivalent of holding that when the owner of an interest in a rental property disposes of such interest the consideration received therefor in excess of the cost basis is essentially the equivalent of anticipated rentals therefrom." Sutliff v. Comm'r, 46 B.T.A. 446, 452 (1942). See Levy, *supra* note 7, at 402, indicating that the *Hort* case has had but slight influence as precedent.

16. McAllister v. Comm'r, 157 F.2d 235 (2d Cir. 1946); Bell's Estate v. Comm'r, 137 F.2d 454 (8th Cir. 1943). See Reingold v. Comm'r, P-H 1941 BTA MEM. DEC. ¶ 41,319 (1941) (release by beneficiary's vendee of interest in future interest payments on matured life insurance policy to beneficiary's conservators given capital gains treatment); Rainier Brewing Co. v. Comm'r, 7 T.C. 162 (1946), *aff'd*, 165 F.2d 217 (9th Cir. 1948) (granting of exclusive right to trade name a sale of a capital asset).

17. Sutliff v. Comm'r, 46 B.T.A. 446 (1942).

18. *Ibid.* An amount paid by a lessor to a lessee for the cancellation of an unexpired lease is not an ordinary and necessary expense deductible in full during the taxable year. Having been paid in order to obtain possession of the premises for the unexpired term of the lease it is a capital expenditure to be deducted over the period of the lease remaining before cancellation. The amount paid represents the cost to the lessor of acquiring the right to the possession, use and enjoyment of his property for the remaining portion of the lease. Wells Fargo Bank & Union Trust Co. v. Comm'r, 163 F.2d 521 (9th Cir. 1947); Borland v. Comm'r, 27 B.T.A. 538 (1933); Bretzfelder v. Comm'r, 21 B.T.A. 789 (1930).

19. See Sutliff v. Comm'r, 46 B.T.A. 446 (1942). See also Ray v. Comm'r, 18 T.C. 438 (1952) (lessee's release to lessor of a restrictive covenant in lease for a consideration held a sale of a capital asset).

tions.[20] Petitioner had a property right in the premises for the unexpired term. Transfer of this right to possession and use of the property was properly denominated by the court as a sale of a capital asset, within section 117, entitled to capital gains treatment. The Commissioner is obviously concerned that transfer of essentially income items under the guise of capital assets may result in an artificial diminution of ordinary income; this concern seems unwarranted in the instant case.

INCOME TAXATION — TAXABLE STOCK DIVIDEND — TREASURY STOCK HELD FOR INVESTMENT

Petitioners were two of the three principal stockholders of a corporation. The shares of stock owned by the third stockholder were purchased by the corporation over a period of eleven years, paid for in annual installments out of corporate earnings, and shown on the balance sheet of the corporation as an asset called "treasury stock." The board of directors declared a dividend and distributed the stock *pro rata* between the petitioners who treated the distribution as a nontaxable stock dividend. The Commissioner assessed a deficiency based upon the fair value of the stock as gross income. After paying, petitioners sought a refund. *Held,* for respondent Commissioner. Distribution of "treasury stock" acquired by purchase out of undivided profits and held not for retirement, but for investment purposes, constitutes a taxable dividend. *Joseph P. Schmitt,* P-H 1953 TC ¶ 19, 114 (1953).

Although the federal income tax law has always included gain from "dividends" within its definition of gross income,[1] early decisions excepted stock dividends on the theory that no income or gain is realized by their mere receipt.[2] In 1916, express provision was made for taxing stock dividends;[3] *Eisner v. Macomber,*[4] however, held that a dividend of common stock to the holders of the outstanding common stock gave the recipients no income[5] and could not constitutionally be

20. *But cf.* United Cigar-Whelan Stores Corp. v. District of Columbia, 85 App. D.C. 301, 176 F.2d 952 (1949) (District of Columbia income tax), which held that cancellation of a lease is not a transfer but a termination and therefore not a sale.

1. " 'Gross income' includes gains, profits, and income derived from . . . interest, rent, dividends . . . or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever." INT. REV. CODE § 22(a).

2. *E.g.,* Towne v. Eisner, 245 U.S. 418, 38 Sup. Ct. 158, 62 L. Ed. 372 (1918).

3. 39 STAT. 757 (1916).

4. 252 U.S. 189, 40 Sup. Ct. 189, 64 L. Ed. 521, 9 A.L.R. 1570 (1920).

5. "A 'stock dividend' shows that the company's accumulated profits have been capitalized, instead of distributed to the stockholders or retained as surplus available for distribution in money or in kind should opportunity offer. Far from being a realization of profits of the stockholder, it tends rather to postpone such realization, in that the fund represented by the new stock has

taxed.[6] Attempts to interpret the decision in *Eisner v. Macomber* have been responsible for much uncertainty in the taxation of corporate distributions.[7] In the year following the decision the tax law was amended to prohibit the taxation of all stock dividends.[8] The view that such dividends were not taxable was soon weakened,[9] however, and in 1936, the law was changed to recognize that there can be some stock dividends which give a recipient income taxable under the Constitution.[10] The test of taxability that has developed under this provision is that a stock dividend is not taxable unless after its receipt the stockholder's proportionate interest is essentially different from his former interest.[11] Under this "proportional interest" test, it has been fairly well established that a dividend payable in common stock to holders of common is not income when there is no other stock outstanding.[12] It has also been said that the fact that the dividend is paid

been transferred from surplus to capital, and no longer is available for actual distribution." 252 U.S. 189 at 211.

6. "[N]either under the Sixteenth Amendment nor otherwise has Congress power to tax without apportionment a true stock dividend made lawfully and in good faith, or the accumulated profits behind it, as income of the stockholder." *Id.* at 219.

7. *E.g.*, Mertens found language in the opinion indicating the use of five different tests as to realization of income: (1) whether there was any separation of assets from the corporation, (2) whether there was any change in the stockholder's proportionate interest, (3) whether there was any change in the value of the stockholder's holdings, (4) whether there was any effect on the aggregate holdings of the other stockholders and (5) whether the new stock represented anything different from what the stockholder had before. 1 MERTENS, LAW OF FEDERAL INCOME TAXATION 605-6 (1942).

8. "A stock dividend shall not be subject to tax. . . ." Revenue Act of 1921 § 201(d), 42 STAT. 227, 228 (1921).

9. Koshland v. Helvering, 298 U.S. 441, 56 Sup. Ct. 767, 80 L. Ed. 1268 (1936) (involving a question of basis after receipt of a stock dividend on old shares). See the following decisions involving reorganization distributions: Cullinan v. Walker, 262 U.S. 134, 43 Sup. Ct. 495, 67 L. Ed. 906 (1923); Rockefeller v. United States, 257 U.S. 176, 42 Sup. Ct. 68, 66 L. Ed. 186 (1921); United States v. Phellis, 257 U.S. 156, 42 Sup. Ct. 63, 66 L. Ed. 180 (1921). *Compare* Marr v. United States, 268 U.S. 536, 45 Sup. Ct. 575, 69 L. Ed. 1079 (1925), *with* Weiss v. Stam, 265 U.S. 242, 44 Sup. Ct. 490, 68 L. Ed. 1001 (1924). All of these decisions involved distributions under the Revenue Act of 1921, *supra* note 8, which were not taxable as stock dividends.

10. "A distribution made by a corporation to its shareholders in its stock or in rights to acquire its stock shall not be treated as a dividend to the extent that it does not constitute income to the stockholder within the meaning of the Sixteenth Amendment to the Constitution." INT. REV. CODE § 115 (f) (1). At this same time § 201(d) of the 1921 Act, *supra* note 8, was omitted.

11. Helvering v. Sprouse, 318 U.S. 604, 63 Sup. Ct. 791, 87 L. Ed. 1029, 144 A.L.R. 1335 (1943); Strassburger v. Comm'r, 318 U.S. 604, 63 Sup. Ct. 791, 87 L. Ed. 1029 (1943); Helvering v. Griffiths, 318 U.S. 371, 63 Sup. Ct. 636, 87 L. Ed. 843 (1943). *See* Koshland v. Helvering, 298 U.S. 441, 446-47, 56 Sup. Ct. 767, 80 L. Ed. 1268 (1936). See also Lowndes, *The Taxation of Stock Dividends and Stock Rights*, 96 U. OF PA. L. REV. 147, 150-52 (1947); Rottschaefer, *Present Taxable Status of Stock Dividends in Federal Law*, 28 MINN. L. REV. 106 (1943).

12. Helvering v. Griffiths, 318 U.S. 371, 63 Sup. Ct. 636, 87 L. Ed. 843 (1943). *Cf.* Helvering v. Sprouse, 318 U.S. 604, 63 Sup. Ct. 791, 87 L. Ed. 1029 (1943) (dividend in nonvoting common on all outstanding voting, as well as nonvoting, common); Strassburger v. Comm'r, 318 U.S. 604, 63 Sup. Ct. 791, 87 L. Ed. 1029 (1943) (dividend in new cumulative nonvoting preferred paid to sole owner of only outstanding stock).

in treasury stock does not affect the taxability of a distribution.[13]

The decision in the instant case is not an abandonment of the present limited application[14] of *Eisner v. Macomber;* the Tax Court has merely held that the distribution was not a real stock dividend in the *Eisner* sense.[15] The "dividend"[16] was found to be but a distribution of property held for investment purposes.[17] This result is analagous to that reached where a taxable gain is recognized on the sale by a corporation of its own stock where the corporation deals in its own stock as it would in the stock of another corporation.[18] The decision is, therefore, an instance where taxation has been made to depend upon an analysis of the substantive nature of the facts of the transaction, rather than the application of any "common on common" formula based solely upon the ultimate form of the distribution.[19]

JUDGMENT — SUIT TO VACATE — INSUFFICIENT ALLEGATIONS OF CRUELTY VOID DIVORCE DECREE

The plaintiff sued to set aside a divorce decree obtained by her husband, on the grounds that the court lacked jurisdiction of both the person and the subject matter. The lower court dismissed upon a finding that the wife had made a personal appearance in the former suit and refused to hear evidence on the issue of jurisdiction of the subject matter. *Held,* reversed and remanded. Since the husband had not al-

13. U.S. Treas. Reg. 111, § 29.115-7 (1953), 1 P-H 1953 FED. TAX SERV. ¶ 9353 (1953). See Bruckheimer v. Comm'r, 46 B.T.A. 234 (1942); Kay v. Comm'r, 28 B.T.A. 331 (1933), *dismissed,* 70 F.2d 1017 (4th Cir. 1934).

14. See Helvering v. Griffiths, 318 U.S. 371, 398-404, 63 Sup. Ct. 636, 87 L. Ed. 843 (1943), clearly indicating that the constitutional holding in *Eisner v. Macomber* was no longer law and that it was possible for a stock dividend of even common on common to be taxed by statute.

"*Eisner v. Macomber* dies a slow death. It now has a new reprieve granted under circumstances which compel my dissent." Douglas, J., dissenting. 318 U.S. at 404.

15. "The language of the resolution viewed in the light of the facts revealed by the record indicate that the distribution was the specific 1,486 shares of stock acquired out of 'undivided profits' and not a stock dividend such as would be nontaxable under the rationale of *Eisner v. Macomber.* . . ." P-H 1953 TC ¶ 19,114 at p. 19,575 (1953).

"The distribution . . . effected no conversion of surplus into capital stock. The balance sheet . . . shows that the . . . shares . . . reacquired by purchase out of earnings were carried as assets under the designation of 'Treasury Stock.' Such stock was not acquired for retirement but for investment purposes." P-H 1953 TC ¶ 19,114 at p. 19,576 (1953).

16. Taxation here is based on the general definition of "dividend" in INT. REV. CODE § 115(a): "The term . . . means any distribution made by a corporation to its shareholders, whether in money or in other *property.* . . ." (italics added).

17. P-H 1953 TC ¶ 19,114 at p. 19,576 (1953).

18. Helvering v. R. J. Reynolds Tobacco Co., 306 U.S. 110, 59 Sup. Ct. 423, 83 L. Ed. 536 (1939). See Rankin, *Income Tax Aspects of a Corporation's Dealings in Its Own Shares,* 89 U. OF PA. L. REV. 934 (1941); Rankin, *Taxability of Transaction by a Corporation in Its Own Stock,* 47 YALE L.J. 111 (1937).

19. *E.g.,* Chamberlin v. Comm'r, 18 T.C. 164, 174-75, 177 (1952).

leged acts sufficient to constitute statutory cruelty, the court was without jurisdiction of the subject matter and the divorce decree was void on its face. *Bennett v. Bennett,* 70 S.E.2d 894 (W. Va. 1952).

Jurisdiction, often a very loosely used term,[1] is generally categorized into two elements, (1) jurisdiction of the person and (2) jurisdiction of the subject matter.[2] The latter can be divided into two phases: (a) jurisdiction over the general class of cases; (b) within that general class, jurisdiction over the particular case based upon the existence of certain jurisdictional facts.[3]

Since the power of the court lies dormant until properly invoked by the pleadings of one of the parties,[4] the court in any proceeding first must look to the pleadings to see whether a case belonging to that general class over which it has jurisdiction has been pleaded. The sufficiency of the pleadings is not a jurisdictional question; therefore, to give the court jurisdiction of the subject matter it is only necessary that the pleader show he intended a cause of action within that general class.[5] If the case pleaded is not within that general class over which the court has jurisdiction, the court has no power to act and any action it takes is void.[6]

If the pleadings fall within the general class, the court at once has jurisdiction to decide for itself the existence of other jurisdictional requirements.[7] Such a decision is binding unless and until reversed on

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1. "It has been well said that there is perhaps, no word or legal terminology so frequently used as the word 'jurisdiction', so capable of use in a general and vague sense, and which is used so often by men learned in the law without a due regard to precision in its application." Friend v. Northern Trust Co., 314 Ill. App. 596, 42 N.E.2d 330, 334 (1942). See 14 AM. JUR. *Courts* §§ 159-60 (1938). In discussing the various definitions of the word jurisdiction, Van Fleet says, "Jurisdiction is simply *power.*" VAN FLEET, THE LAW OF COLLATERAL ATTACK ON JUDICIAL PROCEEDINGS 70 (1892).

2. 14 AM. JUR. *Courts* § 160 (1938).

3. See Olson v. Hoffman, 4 F.2d 263, 264 (N.D. Ill. 1924); Lovett v. Lovett, 93 Fla. 611, 112 So. 768, 775 (1927); Hunt v. Hunt, 72 N.Y. 217, 229-30 (1878). See also 1 BLACK, JUDGMENTS 171 (1891); 2 NELSON, DIVORCE AND ANNULMENT 619 (2d ed. 1945).

4. "The jurisdiction and power of a court remain at rest until called into action by some suitor . . . by pleading. . . ." Lovett v. Lovett, 93 Fla. 611, 112 So. 768, 775 (1927). See Atwood v. Cox, 88 Utah 437, 55 P.2d 377, 381 (1936); Waldron v. Harvey, 54 W. Va. 608, 46 S.E. 603, 605 (1904).

5. See Foltz v. St. Louis & S.F. Ry., 60 Fed. 316, 318, (8th Cir. 1894); Greenwood v. Greenwood, 112 Cal. App. 691, 297 Pac. 589, 591 (1931); Friend v. Northern Trust Co., 314 Ill. App. 596, 42 N.E.2d 330, 334-35 (1942); Main Cleaners & Dyers, Inc. v. Columbia Super Cleaners, Inc., 332 Pa. 71, 2 A.2d 750, 751 (1938); Atwood v. Cox, 88 Utah 437, 55 P.2d 377, 381 (1936); Jarrell v. Laurel Coal & Land Co., 75 W. Va. 752, 84 S.E. 933, 935 (1915). See also 14 AM. JUR., *Courts* 365 (1938); 21 C.J.S., *Courts* § 33 (1940); 1 FREEMAN, JUDGMENTS § 365 (5th ed. 1925).

6. See, *e.g.,* Risley v. Phenix Bank of City of N.Y., 83 N.Y. 318, 337 (1881).

7. "If the court has jurisdiction of the class of cases to which the particular case belongs, it has jurisdiction to decide whether, so far as the particular case is concerned, the jurisdiction of the court attaches." Olson v. Hoffman, 4 F.2d 263, 264 (N.D. Ill. 1924). See also 1 FREEMAN, JUDGMENTS 718-19 (5th ed. 1925).

appeal or some other such review.[8] Where this matter is litigated, the determination thereon is as conclusive as any other finding of fact.[9] If the court's decision is wrong, the error is in the exercise rather than in the assumption of its jurisdiction.[10] If, however, the record shows that a jurisdictional fact did not exist, the judgment is void on its face and not entitled to enforcement.[11] Where all jurisdictional facts are pleaded or are recited by the court the majority rule is that the judgment is valid and no extrinsic evidence will be allowed to impeach the record in a subsequent proceeding.[12] Where some jurisdictional facts are omitted, a distinction is drawn between a court of general jurisdiction and one of limited jurisdiction.[13] In a court of general jurisdiction there is a presumption that the court has jurisdiction, and unless the record itself shows a lack of jurisdiction no extrinsic evidence will be allowed to overcome the presumption.[14] But if the court is one of limited jurisdiction, then there is no presumption and extrin-

8. "If the circumstances which give rise to the jurisdiction do not exist in a particular case the authority to act does not arise. But the question as to whether or not they do in fact exist is a matter primarily for the court whose powers are invoked, and it has jurisdiction to examine and determine whether the particular application is within or beyond its authority. Its decision in this respect is itself the exercise of a power conferred by the pleading or other act invoking its jurisdiction, and if such decision is incorrect, whether because of lack of evidence or for any other reason, it is none the less binding upon the parties unless and until set aside on appeal or by some other proceeding for that purpose." 1 FREEMAN, JUDGMENTS 719 (5th ed. 1925). See also Gordon, *The Relation of Facts to Jurisdiction,* 45 L.Q. REV. 459 (1929). But see Gavit, *Jurisdiction of the Subject Matter and Res Judicata,* 80 U. OF PA. L. REV. 386, 387 (1932).

9. Postal v. Postal, 192 Ind. 376, 134 N.E. 882 (1922); Bell v. Brown, 116 W. Va. 484, 182 S.E. 579 (1935). *Cf.* Kindrick v. Capps, 196 Ark. 1169, 121 S.W.2d 515, 517 (1938); Kuzak v. Anderson, 267 Ill. 609, 108 N.E. 662, 663 (1915) (finding of personal jurisdiction). See 1 FREEMAN, JUDGMENTS § 379 (5th ed. 1925).

10. Parker Bros. v. Fagan, 68 F.2d 616 (5th Cir. 1934); Friend v. Northern Trust Co., 314 Ill. App. 596, 42 N.E.2d 330 (1942); Bowser v. Tobin, 215 Ind. 99, 18 N.E.2d 773 (1939); Honaker v. Honaker, 218 Ky. 212, 291 S.W. 42 (1927); Ulrich v. Lincoln Realty Co., 175 Or. 296, 153 P.2d 255 (1944); Broduer v. Broduer, 53 R.I. 450, 167 Atl. 104 (1933); Jarrell v. Laurel Coal & Land Co., 75 W. Va. 752, 84 S.E. 933 (1915). See 2 NELSON, DIVORCE AND ANNULMENT 628 (2d ed. 1945); Gordon, *The Relation of Facts to Jurisdiction,* 45 L.Q. REV. 459, 487 (1929).

11. *E.g.,* Montgomery v. Suttles, 191 Ga. 781, 13 S.E.2d 781 (1941); Martin v. Schillo, 389 Ill. 607, 60 N.E.2d 392 (1945).

12. Crouch v. H. L. Miller & Co., 169 Cal. 341, 146 Pac. 880 (1915) (recital of jurisdiction of the person); McMurray v. Sivertsen, 28 Cal. App.2d 541, 83 P.2d 48 (1938); Postal v. Postal, 192 Ind. 376, 134 N.E. 882 (1922); Hopper v. Hopper, 172 Md. 152, 190 Atl. 841 (1937). See 1 FREEMAN, JUDGMENTS § 379 (5th ed. 1925). But see Broyhill v. Dawson, 168 Va. 321, 191 S.E. 779 (1937).

13. Some jurisdictions distinguish between courts of limited and general jurisdiction; others, between inferior and superior courts; and still others, between courts of record and courts not of record. Freeman intimates the latter distinction is the best. 1 FREEMAN, JUDGMENTS § 374 (5th ed. 1925).

14. *See, e.g.,* Fisher v. Cowan, 205 Ark. 722, 170 S.W.2d 603, 606 (1943); Dean v. Brown, 261 Ky. 593, 88 S.W.2d 298, 300 (1935); Mangani v. Hydro, Inc., 119 N.J.L. 71, 194 Atl. 264, 265 (1937); *In re* Crouch's Estate, 191 Okla. 74, 126 P.2d 994, 996 (1942); Cooper v. Little, 29 Tenn. App. 685, 694, 201 S.W.2d 210, 214 (W.S. 1946).

sic evidence will be allowed to show the nonexistence of any jurisdictional fact not appearing in the record.[15]

As the court in the instant case decided, the statutory grounds for divorce are often jurisdictional facts. Although the husband alleged cruel and inhuman treatment, which alone might be a conclusion of law and therefore no allegation at all, he went further and alleged the specific acts which he concluded amounted to cruel and inhuman treatment.[16] Whether these acts did amount to cruel and inhuman treatment was for that court to decide.[17] If its decision was wrong the error was only in the exercise and not in the assumption of jurisdiction.[18] To allow a judgment to be set aside for error in the exercise of jurisdiction would put an end to the finality of judgments as we know it today. This decision should have been reviewable only on appeal and not in the proceeding here employed.

LABOR LAW — FILING REQUIREMENTS — NONCOMPLIANCE AT TIME CHARGES FILED

At the time charges alleging unfair labor practices were filed, the complainant union had failed to submit the non-Communist affidavits required by section 9 (h) [1] of the Taft-Hartley Act. These requirements were met, however, prior to the issuance of the complaint by the Board. On petition for enforcement of the Board's order pursuant to the complaint the court of appeals set it aside and ruled that since compliance had no retroactive effect, the Board was not empowered to entertain the charge or issue a complaint or order based thereon. *Held*, reversed. Section 9 (h) establishes a condition precedent only to the issuing of a complaint; where a noncomplying union files charges and submits the affidavits prior to issuance of the complaint, an order based thereon is valid. *NLRB v. Dant*, 73 Sup. Ct. 375 (U.S. 1953).

15. Junkin v. Anderson, 12 Wash.2d 58, 123 P.2d 759 (1942). *Cf.* Krivitsky v. Nye, 155 Fla. 45, 19 So.2d 563, 568 (1944); Mangani v. Hydro, Inc., 119 N.J.L. 71, 194 Atl. 264, 265 (1937). *But see* Ross v. Pitcairn, 179 S.W.2d 35 (Mo. 1944).
16. McLaughlin v. McLaughlin, 126 W. Va. 498, 29 S.E.2d 1 (1944).
17. See note 7 *supra.*
18. See note 10 *supra.*

1. 61 STAT. 136 (1947), as amended, 65 STAT. 601 (1951), 29 U.S.C.A. § 159 (h) (Supp. 1952): "No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization . . . and no complaint shall be issued pursuant to a charge [unfair labor practice] made by a labor organization . . . unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he . . . is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. . . ." The affidavit form (Form NLRB 1081) is found in 1 CCH LAB. LAW REP. (4th ed.) ¶ 1224 (1948).

Under the Taft-Hartley Act the labor union has found itself faced with certain obligations. Among these are the so-called filing requirements — sections 9(f),[2] (g)[3] and (h)[4] — which preclude the Board from investigating petitions for representation or issuing unfair labor practice complaints unless the labor organization files and maintains with the government certain data including organizational statements, financial reports, and non-Communist affidavits of its officers.[5] Numerous problems have arisen concerning these requirements. Aside from the practical aspects of administration[6] and effectiveness,[7] the Board and courts have had to decide whether the provisions are constitutional,[8] whether compliance is litigable[9] and must be alleged and proved,[10] whether federations as well as local and international unions

2. 61 STAT. 136 (1947), as amended, 65 STAT. 601 (1951), 29 U.S.C.A. § 159(f) (Supp. 1952) (requires filing of constitution, by-laws, procedures and financial statements with Secretary of Labor).

3. 61 STAT. 136 (1947), as amended, 65 STAT. 601 (1951), 29 U.S.C.A. § 159(g) (Supp. 1952) (maintaining annual reports with Secretary of Labor).

4. See note 1 *supra*.

5. The magnitude of the administrative work created by these requirements is shown from an NLRB report: at the close of the fiscal year 1951, 225 national and international unions were qualified; 15,678 local unions had complied; 139,483 officers of unions had filed the necessary affidavits; 9,999 local unions with 92,455 officers had permitted their compliance to lapse. 16 NLRB ANN. REP. 11-12 (1952).

6. A San Francisco lawyer objects that the huge task of collating the required material delays the Board's processes so that hearings may not take place until six to nine months after the charge is filed. "As a result, during the interval the enforcement of the act is frustrated and we go through a period of nihilism in labor relations." Tobriner, *The Taft-Hartley Act After Three Years*, 1 LABOR L.J. 1165, 1215 (1950). See also WOLLETT, LABOR RELATIONS AND FEDERAL LAW 145 (1949).

7. All writers agree that Communist influence in the labor unions has decreased in the past few years; a disagreement arises as to whether Taft-Hartley effected this decrease. See WOLLETT, LABOR RELATIONS AND FEDERAL LAW 36 (1949) ("considerable doubt"); Brown, *Needed — A New Start on National Labor Relations Law*, 4 LABOR L.J. 71, 76 (1953) ("relatively ineffective"); Kearns, *Non-Communist Affidavits under the Taft-Hartley Act*, 37 GEO. L.J. 297, 304 (1949) ("one of the important factors"); Shair, *How Effective is the Non-Communist Affidavit?* 1 LABOR L.J. 935, 943 (1950) ("a catalyst"); Comment, 18 U. OF CHI. L. REV. 783, 790 (1951) ("not clear . . . that the provision has had a decisive effect"). An excellent discussion of the filing requirements as a whole (wherein the conclusion is reached that the gains do not meet the administrative and practical difficulties) is found in MILLIS AND BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY 541-60 (1950).

8. American Communications Ass'n v. Douds, 339 U.S. 382, 70 Sup. Ct. 674, 94 L. Ed. 925 (1950) (§ 9(h) constitutional); Nat. Maritime Union v. Herzog, 334 U.S. 854, 68 Sup. Ct. 1529, 92 L. Ed. 1776 (1948) (§§ 9(f) and (g) constitutional), *affirming to that extent*, 78 F. Supp. 146 (1948).

9. See, *e.g.*, *In re* The Coleman Co., 101 NLRB No. 51, 31 LAB. REL. REP. (Labor-Management) 1020 (1952) (an administrative determination); *In re* Sunbeam Corp., 94 NLRB 844, 28 LAB. REL. REP. (Labor-Management) 1115 (1951); *cf.* NLRB v. Highland Park Mfg. Co., 341 U.S. 322, 325, 71 Sup. Ct. 758, 95 L. Ed. 969 (1951). See also 16 NLRB ANN. REP. 47 (1952) ("the compliance status of a labor organization is a matter exclusively for administrative determination by the Board. . . .").

10. NLRB v. Michalik, 201 F.2d 48 (6th Cir. 1952) (need not be alleged or proved); Law v. NLRB, 192 F.2d 236 (10th Cir. 1951) (not a prerequisite of jurisdiction).

must comply,[11] whether the Board will investigate the truth or falsity of the non-Communist affidavit[12] and whether the individual member of the noncomplying union may file charges.[13]

Although the requirements perhaps more stringently affect union status in representation proceedings,[14] the problem of the instant case arises out of the filing by a noncomplying union of a charge alleging unfair labor practices. The question is presented whether the union must have complied at the time charges were filed or only prior to the issuance of the complaint.

Only one circuit[15] has agreed with the Board's position that compliance must precede only the complaint.[16] The argument made was that all the union's statutory rights remain and only a bar to remedy is erected, which bar may be removed by compliance; "[t]he purpose of Congress was not to make the Board's processes unavailable to employees, but to put a certain reasonable price upon their availability."[17] Four other circuits,[18] however, reasoned that the Board could not entertain the charge since some advantage may accrue to the union merely by reason of the fact that charges are entertained by the Board,[19] and the elimination of Communism demands that the non-

11. NLRB v. Highland Park Mfg. Co., 341 U.S. 322, 71 Sup. Ct. 758, 95 L. Ed. 969 (1951) (the national federations, AFL and CIO, must comply before the affiliated local can utilize Board processes). Prior to the *Highland Park* case it was felt that compliance by national federations was not required. The Court in the instant case may have been influenced by the fact that noncompliance was based on this honest belief and was not *mala fide*. A different result might have been reached had the complaint and order been based on a refusal-to-bargain charge by a noncomplying Communist-dominated union.

12. United Electrical, Radio & Machine Workers of America v. Herzog, 110 F. Supp. 220 (D.D.C. 1953) (Board not empowered to investigate truth of affidavits); see also 16 NLRB ANN. REP. 48 (1952) (Board will not attempt to investigate truth or falsity of non-Communist affidavits).

13. NLRB v. Clausen, 188 F.2d 439 (3d Cir. 1951), *cert. denied*, 342 U.S. 868 (1951) (filing requirements do not apply to individuals); NLRB v. Augusta Chemical Co., 187 F.2d 63 (5th Cir. 1951) (acceptance of assistance from noncomplying union does not disqualify individual). But no individual can front for a noncomplying union. NLRB v. Happ Bros. 196 F.2d 195 (5th Cir. 1952) (Board order invalid where individual fronts for union); NLRB v. Alside, Inc., 192 F.2d 678 (6th Cir. 1951); *In re* Wood Parts, Inc., 101 NLRB No. 93, 31 LAB. REL. REP. (Labor-Management) 1090 (1952).

14. Brief statements of some of the problems faced in the field of representation as a result of noncompliance are found in Shair, *supra* note 7, at 938-39, and in Comment, 18 U. OF CHI. L. REV. 783, 784-85 (1951).

15. *See* West Texas Utilities Co. v. NLRB, 184 F.2d 233, 239 (D.C. Cir. 1950).

16. *In re* New Jersey Carpet Mills, Inc., 92 NLRB 604 (1950).

17. *In re* New Jersey Carpet Mills, Inc., 92 NLRB 604, 612 (1950).

18. NLRB v. Tennessee Egg Co., 199 F.2d 95 (6th Cir. 1952), *rev'd*, 201 F.2d 370 (1953); NLRB v. Nina Dye Works Co., 198 F.2d 362 (3d Cir. 1952), *rev'd*, 73 Sup. Ct. 390, 97 L. Ed. 328 (1953); NLRB v. American Thread Co., 198 F.2d 137 (5th Cir. 1952), *rev'd*, 73 Sup. Ct. 390, 97 L. Ed. 328 (U.S. 1953); NLRB v. Dant, 195 F.2d 299 (9th Cir. 1952), *rev'd*, 73 Sup. Ct. 375 97 L. Ed. 311 (U.S. 1953).

19. Mr. John T. Casey, counsel for Dant, argued that 87.3% of all unfair labor practice cases are disposed of at the charge and investigation stage, prior to the issuance of a complaint by use of settlement agreements which incldue the remedial provisions of a Board order. 31 LAB. REL. REP. (Labor-Management) 122 (1952).

complying union should find no favor whatsoever from the Act. In resolving the conflict in favor of the Board's rule that compliance is a condition precedent to the complaint only, the Supreme Court declared that the purposes of the Act — to eliminate Communism and to regulate union activity — will be effected since no benefit can flow except on the issuance of a complaint; further that since at any one moment compliance is a matter of happenstance, to rule otherwise would deny relief to the union which acts in good faith in periods of unintentional lapse. When the union has complied with the filing requirements, the Act's purposes are effectuated. Arguments as to which rule forces the speedier compliance are largely speculative. Had the Court adopted the opposite rule, its holding could not be found erroneous.[20]

MUNICIPAL CORPORATIONS — LIABILITY FOR NEGLIGENCE — OPERATION OF SWIMMING POOL FOR PROFIT

Plaintiff's nine-year-old daughter drowned in a swimming pool operated for profit by the defendant city. The plaintiff alleged that the city was negligent in that the lifeguard, knowing of deceased's inability to swim, failed to remove the child from her peril though he had the last clear chance to do so; that the lifeguards were inexperienced, untrained and inadequate in number; and that the pool was a dangerous nuisance attractive to children. Defendant's demurrer was sustained primarily on the ground[1] that operation of the pool was a governmental, not a proprietary function and therefore the city was immune from tort liability. *Held,* affirmed. *Vaughan v. City of Alcoa,* 251 S.W.2d 304 (Tenn. 1952).

During the first part of the Nineteenth Century, the courts of the United States generally imposed tort liability upon municipal corporations on the same theory as that applied to private corporations.[2]

20. Senator Taft has introduced five bills to amend the Taft-Hartley Act. See 31 LAB. REL. REP. (Labor-Management) 209 (1953) for complete text. Only one — Sen. No. 655 — deals with the filing requirements. Under that bill, § 9(h) is changed to preclude the Board from entertaining a charge (thereby would the rule of the instant case fall) unless the non-Communist affidavits are filed; further the burden of filing such affidavits is placed on employers. Section 9(f) is amended to eliminate the analysis of the by-laws from the requirements by striking § 9(f) (6). For CIO analysis of Taft's proposals generally, see 31 LAB. REL. REP. (Labor-Management) 257 (1953). The changes to filing requirements are considered minor except for extension of the affidavit to employers, which many writers consider absurd. See Petro, *The Taft Proposals to Amend Taft-Hartley,* 4 LABOR L.J. 227, 300 (1953).

1. Other grounds upon which the court sustained the demurrer were (1) the allegations were not sufficient to charge a nuisance in the operation of the pool, (2) the operation of a swimming pool was not an attractive nuisance. Even where a governmental function is involved, the Court conceded that the municipality would be liable if it "maintained a nuisance in the performance of one of its governmental functions." 251 S.W.2d at 305 (Tenn. 1952).

2. Hooe v. Alexandria, 12 Fed. Cas. No. 6666 (D.C. 1802); Steel v. Company

The dictum in *Bailey v. City of New York*,[3] which set out a distinction between a municipal corporation's liability for its negligent private functions and its immunity from liability for its negligent public functions, was the first step toward the present-day dichotomy of muncipal functions which has led to the confusion so prevalent in this field of law.[4] Since developing and applying the "governmental-proprietary" distinction in determining municipal immunity or liability, the courts have been confronted with the exceedingly difficult problem of establishing a test[5] which would be a just compromise between the interests of negligent municipalities and injured persons. The fear that judgments against cities for their negligence would stifle municipal development has prompted the courts to hold many municipal functions to be governmental rather than proprietary in character.[6] One jurisdiction has held that all municipal functions are proprietary or private,[7] whereas another has urged that municipal functions be con-

of Western Inland Lock Navigation, 2 Johns. 283 (N.Y. 1807); Barnett, *The Foundations of the Distinction between Public and Private Functions in Respect to the Common-Law Tort Liability of Municipal Corporations*, 16 ORE. L. REV. 250 (1937).

3. "If [powers to a city] granted for public purposes exclusively, they belong to the corporate body in its public, political or municipal character. But if the grant [of power by the legislature] was for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation *quoad hoc*, is to be regarded as a private company. It stands on the same footing as would any individual or body of persons upon whom the like special franchises had been conferred." 3 Hill 531, 539, 38 Am. Dec. 669, 672 (N.Y. 1842).

4. "The present state of things is one of confusion, fears, and assumptions, and often injustice." Repko, *American Legal Commentary on the Doctrines of Municipal Tort Liability*, 9 LAW & CONTEMP. PROB. 214, 233 (1942). "This 'bifurcation' of municipal corporations has of course brought nothing but confusion and injustice from the beginning. Largely from humanitarian motives, especially the later decisions in applying the distinction have tended, illogically, to reduce the scope of immunity and thus to make confusion worse confounded; and an absurd and distressing mass of 'spotted and striped' law is the result, not only considering the country as a whole but almost every particular jurisdiction in it." Barnett, *The Foundations of the Distinction between Public and Private Functions in Respect to the Common-Law Tort Liability of Municipal Corporations*, 16 ORE. L. REV. 250, 269 (1937).

5. In Burton v. Salt Lake City, 69 Utah 186, 253 Pac. 443 (1926), the court held that the test of whether a city is acting in governmental or proprietary capacity is whether the act is for the common good of the public without the element of profit. "The liability or nonliability of a municipality for its torts does not depend upon the nature of the tort, the relation existing between the city and the person injured, or whether the city was engaged in the management of tangible property, but depends upon the capacity in which the city was acting at the time." City of Kokomo v. Loy, 185 Ind. 18, 112 N.E. 994, 996 (1916). "The underlying test is whether the act is for the common good of all without the element of special corporate benefit or pecuniary profit. If it is, there is no liability, if it is not, there may be liability." Bolster v. City of Lawrence, 225 Mass. 387, 114 N.E. 722, 724 (1917).

6. "There was a fear that an unrestrained demand to satisfy tort judgments from public treasuries would stunt their [cities] growth. It was therefore thought wiser to let the loss lie where it had fallen in certain instances than to risk an obstruction in the development of this important unit of government and civilization." Repko, *American Legal Commentary on the Doctrines of Municipal Tort Liability*, 9 LAW & CONTEMP. PROB. 214, 217 (1942).

7. In a tort action against a city which operated under the city manager

sidered public or governmental unless there is a statute to the contrary.[8]

In applying the theory that since operation of a pool is a public service, the city, performing a governmental function, is not liable for its negligence, the court in the instant case follows the reasoning of many courts. Upon close analysis it would appear that all municipal functions in some measure perform a public service; consequently it could be argued, with a devastating result upon the injured public, that a municipality could never be held liable for any of its negligent acts. The court is perhaps correct in stating that it is following the majority view;[9] however, there is an abundance of authority among courts and writers[10] which would support a holding of liability.

The Supreme Court of Tennessee, in holding that a governmental corporation could not be subject to garnishment, has previously indicated that the profit test would be employed to determine whether a governmental or proprietary function was being performed.[11] Yet the same court failed to employ the profit test in the instant case where the defendant city was clearly operating the pool as a "commercial and economic adventurer." This court has granted the municipal corporation immunity from liability for negligence when its sometimes com-

plan, the court said: "Therefore no municipal function is governmental, a city is not a political subdivision of the state, not a government but purely a business, commercial, proprietary management of local public interests." Kaufman v. City of Tallahassee, 84 Fla. 634, 94 So. 697, 699 (1922).

8. *See* Irvine v. Town of Greenwood, 89 S.C. 511, 517, 72 S.E. 228, 230 (1911).

9. *Accord*, Crone v. City of El Cajon, 133 Cal. App. 624, 24 P.2d 846 (1933); Mola v. Metropolitan Park District, 181 Wash. 177, 42 P.2d 435 (1935). "The older, and probably still the majority, rule is that of non-liability, holding that the maintenance of parks is a governmental function looking to improvement of public health." 34 MICH. L. REV. 1250, 1251 (1936). For a general collection of cases on swimming pools and bathing beaches, see Notes, 51 A.L.R. 370 (1927), 57 A.L.R. 402 (1928); on parks and playgrounds, see Notes, 29 A.L.R. 863 (1924), 42 A.L.R. 263 (1926).

10. Pickett v. City of Jacksonville, 155 Fla. 439, 20 So.2d 484 (1945); Glirbas v. City of Sioux Falls, 64 S.D. 45, 264 N.W. 196 (1935); City of Belton v. Ellis, 254 S.W. 1023 (Tex. Civ. App. 1923); Burton v. Salt Lake City, 69 Utah 186, 253 Pac. 443 (1926); Hoggard v. City of Richmond, 172 Va. 145, 200 S.E. 610 (1939); *accord*, Costello v. City of Aurora, 295 Ill. App. 510, 15 N.E.2d 38 (1938); *see* Williams v. City of Longmont, 109 Colo. 567, 129 P.2d 110, 111 (1942); Baumgardner v. City of Boston, 304 Mass. 100, 23 N.E.2d 121, 125 (1939). "[I]n view of the tendency of late decisions and the development of the law on this subject, the rule will ultimately prevail that in maintaining parks, playgrounds, bathing pools and beaches, and like recreations, the city is performing a local function for its people and it should be held liable on the same basis as a private person or corporation." 18 MCQUILLIN, MUNICIPAL CORPORATIONS 457 (3d ed. 1950). 24 GEO. L.J. 1027 (1936); 34 MICH. L. REV. 1250 (1936); 24 VA. L. REV. 430 (1938); 44 W. VA. L.Q. 159 (1938).

11. "A distinction has been taken in cases against governmental agencies wherein the state divested itself of its character of sovereign and descended to the common level of a commercial and economic adventurer. . . . [W]here the sovereign divested itself of the attributes of government and descended to the level of trafficker in private affairs under the guise of a public corporation, it was held that the government could not abandon its assumed character and seek immunity under the cloak of government." Home Owners' Loan Corp. v. Hardie & Caudle, 171 Tenn. 43, 100 S.W.2d 238, 239 (1936).

petitor, the private corporation, would be held for the same act. In its denial for rehearing the court indicated that stare decisis was the controlling factor in its decision.[12] Consequently it may have missed an opportunity to define what is a governmental and what is a proprietary function, and to adopt a view that would be in line with the recent trend to impose liability upon municipalities for their negligent operation of swimming pools and parks.[13] To hold that a function is governmental because it performs public service appears to state little more than a conclusion and does not give any reliable reasons upon which that conclusion is based. Thus it would appear to be advisable for the legislature to provide a reliable standard for determining municipal tort liability.

PROCESS — CONSTRUCTIVE SERVICE — TORT ACTION ARISING WITHOUT STATE

A New York statute provided for substituted service of process on nonresident owners of aircraft for the purposes of litigation growing out of accidents to aircraft "which landed at or departed from any airfield in this state."[1] Defendant was served with process pursuant to this statute, and contested its application as a violation of due process, since the cause of action arose out of a plane crash in California. The plane had departed from a New York airport and had made five stops en route. *Held,* the defendant had sufficient minimum contacts with the State of New York to subject it to the jurisdiction of the courts of the state in a tort action, and the court could exercise this jurisdiction although the cause of action arose without the state. *Peters v. Robin Airlines, Inc.*, 21 U.S.L. WEEK 2293 (N.Y. Sup. Ct. Dec. 17, 1952).

In *Hess v. Pawloski*,[2] the Supreme Court held constitutional a statute[3] requiring nonresidents who used the highways of the state to ap-

12. Vaughan v. City of Alcoa, 251 S.W.2d 304, 309 (Tenn. 1952).
13. See note 10 *supra.*

1. "The operation by a nonresident of an aircraft from any airfield in this state, or such operation of an aircraft owned by a nonresident if so operated with his consent, express or implied, shall be deemed equivalent to an appointment by such nonresident of the secretary of state to be his true and lawful attorney upon whom may be served the summons in any action against him, growing out of any accident or collision in which such nonresident be involved while operating an aircraft which has landed at, or departed from any airfield in this state. . . ." N.Y. GEN. BUSINESS LAW § 250 (Cum. Supp. 1952).

2. 274 U.S. 352, 47 Sup. Ct. 632, 71 L. Ed. 1091 (1927). This case followed Kane v. New Jersey, 242 U.S. 160, 37 Sup. Ct. 30, 61 L. Ed. 222 (1916), which held constitutional a New Jersey statute requiring nonresident motorists to expressly consent to the service of process on a designated public official.

3. For a collection of similar statutes, see Knoop v. Anderson, 71 F. Supp. 832 (N.D. Iowa 1947); Legis., 20 IOWA L. REV. 654 (1935). See also cases collected in Note, 99 A.L.R. 130 (1935). For an analysis of the *Hess v. Pawloski* doctrine ten years later, see Tapley, *Jurisdiction and the Non-Resident Motorist,* 13 ST. JOHN'S L. REV. 278 (1939).

point a designated state official as agent for the service of process.[4] The theory of the *Pawloski* holding was that placing such requirements on nonresidents was a valid exercise of the state police power to protect the general welfare and safety of its residents in view of the dangerous character of the operation of motor vehicles.[5] In *Doherty & Co. v. Goodman*,[6] the Court applied the same reasoning to the sale of securities within a state by a nonresident. Such activity was "fraught with danger and economic harm to the general public."[7] In the *Doherty* case the fact that the activity engaged in was state regulated was stressed, and subsequent cases have emphasized the same factor.[8]

The statute in the instant case appears to be substantially the same as the nonresident motorist statutes interpreted in *Hess v. Pawloski;* however, such statutes usually limit the jurisdiction of the courts to causes of action arising out of accidents occurring within the state.[9]

The Supreme Court of the United States originally required that a foreign corporation be "doing business"[10] within a state before it could be subjected to the jurisdiction of the courts of that state.[11] This gave

4. Due process requires that the statute provide for notice reasonably calculated to reach the defendant. Wuchter v. Pizzutti, 276 U.S. 13, 48 Sup. Ct. 259, 72 L. Ed. 446 (1928); Horvath v. Brettschneider, 131 Misc. 618, 227 N.Y. Supp. 109 (City Ct. 1928). *But cf.* Sorenson v. Stowers, 251 Wis. 398, 29 N.W.2d 512 (1947).

5. See note 2 *supra.* See also cases collected in Note, 99 A.L.R. 130 (1935); RESTATEMENT, JUDGMENTS § 23 (1942).

6. 294 U.S. 623, 55 Sup. Ct. 553, 79 L. Ed. 1097 (1935). See Kaiser v. Butchart, 197 Minn. 28, 265 N.W. 826 (1936); 83 U. OF PA. L. REV. 683 (1935).

7. GOODRICH, CONFLICT OF LAWS 203 (3d ed. 1949). See also Note, 99 A.L.R. 130 (1935).

8. See Sugg v. Hendrix, 142 F.2d 740 (5th Cir. 1944); Condon v. Snipes, 205 Miss. 306, 38 So.2d 752 (1949). Other cases have held the service valid regardless of whether the activity is state regulated. See, *e.g.*, Interchemical Corp. v. Mirabelli, 269 App. Div. 224, 54 N.Y.S.2d 522 (1st Dep't 1945); Wein v. Crockett, 113 Utah 301, 195 P.2d 222 (1948); 3 MIAMI L.Q. 623 (1949).

9. See note 3 *supra.*

10. For discussion of what constituted doing business, see People's Tobacco Co. v. American Tobacco Co., 246 U.S. 79, 38 Sup. Ct. 233, 62 L. Ed. 587 (1918); Isaacs, *An Analysis of Doing Business*, 25 COL. L. REV. 1018 (1925); Note, 36 HARV. L. REV. 327 (1923). There is some indication that doing business for the purpose of jurisdiction may be different from doing business for the purpose of securing a license to do business within a state.

11. After it was established that the foreign corporation was doing business within the state it was held liable on one of three theories:

(1) By doing business the corporation "consented" to jurisdiction. Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co., 243 U.S. 93, 37 Sup. Ct. 344, 61 L. Ed. 610 (1917); Lafayette Ins. Co. v. French, 18 How. 404, 15 L. Ed. 451 (U.S. 1856); 1 BEALE, CONFLICT OF LAWS 385 (1935). For a review of the statutes requiring the consent of the corporation to service of process before it is allowed to do business, see Culp, *Constitutional Problems Arising from Service of Process on Foreign Corporations*, 19 MINN. L. REV. 375 (1935).

(2) If the foreign corporation does business within the state, it is "present" there for the service of process. Louisville & N.R.R. v. Chatters, 279 U.S. 320, 47 Sup. Ct. 329, 73 L. Ed. 711 (1929); International Harvester Co. v. Kentucky, 234 U.S. 579, 34 Sup. Ct. 944, 58 L. Ed. 1479 (1914); GOODRICH, CONFLICT OF LAWS 209 (3d ed. 1949); Haffer, *Personal Jurisdiction over Foreign Corporations as Defendants in the United States Supreme Court*, 17 B.U.L. REV. 639 (1937).

(3) By doing business within the state the foreign corporation "submits"

the state sufficient power over the defendant to satisfy the requirements of due process.[12] However, in *International Shoe Co. v. Washington*,[13] the "doing business" test seems to have been cast aside and a more liberal requirement established. In that case, the Court said that the demands of due process "may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there."[14] The activities of the defendant within the state in that case were the soliciting of orders and the exhibiting of samples by its agents.[15] In subsequent cases, the soliciting by mail of insurance contracts[16] and the management of a foreign corporation by a president residing within the state[17] have been sufficient contacts to support jurisdiction over the nonresident corporation.

The Supreme Court held at an early date that a foreign corporation, amenable to process because of a state statute, could not be sued on a cause of action arising without the state.[18] The cases so holding have never been overruled, but later decisions, in reaching a contrary result, have distinguished them on the basis that service there was on a pub-

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to the jurisdiction of the state courts. This theory has not received express judicial sanction, but it has been mentioned in some of the cases. *E.g.*, St. Louis S.W. Ry. v. Alexander, 227 U.S. 218, 33 Sup. Ct. 245, 57 L. Ed. 486 (1913); People's Tobacco Co. v. American Tobacco Co., 246 U.S. 79, 38 Sup. Ct. 233, 62 L. Ed. 587 (1918). See 1 BEALE, CONFLICT OF LAWS 388 (1935).

12. Consolidated Textile Corp. v. Gregory, 289 U.S. 85, 53 Sup. Ct. 529, 77 L. Ed. 1047 (1933); *see* Riverside & Dan River Cotton Mills v. Menefee, 237 U.S. 189, 193, 35 Sup. Ct. 579, 59 L. Ed. 910 (1915).

13. 326 U.S. 310, 66 Sup. Ct. 154, 90 L. Ed. 95, 161 A.L.R. 1057 (1945), 21 N.Y.U.L.Q. REV. 442 (1946).

14. 326 U.S. at 317.

15. The Court said: "It is evident that these operations establish sufficient contacts or ties with the state of the forum to make it reasonable and just, according to our traditional conception of fair play and substantial justice, to permit the state to enforce the obligations which appellant has incurred there." 326 U.S. at 320.

16. Travelers Health Ass'n v. Virginia, 339 U.S. 643, 70 Sup. Ct. 927, 94 L. Ed. 1154 (1950) (Virginia attempted to subject a Nebraska corporation to its "Blue Sky Laws" — lack of jurisdiction in the Virginia courts asserted); *cf.* Boyd v. Warren Paint & Color Co., 254 Ala. 687, 49 So.2d 559 (1950). See cases collected in Note, 94 L. Ed. 1167 (1949). See also 99 of U. OF PA. L. REV. 245 (1950).

17. Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 72 Sup. Ct. 413, 96 L. Ed. 485 (1952). In this case defendant was a Philippine corporation driven from its homeland by the Japanese occupation. The president resided in Ohio and conducted directors meetings, transferred stock, carried on correspondence and conducted corporate banking from his office there. See Note, 96 L. Ed. 495 (1952). *Cf.* Employers' Liability Assur. Corp. v. Lejeune, 189 F.2d 521 (5th Cir. 1951), *cert. denied*, 342 U.S. 869 (1951), 12 LA. L. REV. 486 (1952) (issuance of an insurance contract to a resident of Louisiana by a New York corporation not sufficient to subject the defendant to jurisdiction in Louisiana). See generally Comment, *Expanding Jurisdiction over Foreign Corporations*, 37 CORNELL L.Q. 458 (1952); Note, *Recent Constitutional Developments on Personal Jurisdiction of Courts*, 4 VAND. L. REV. 661 (1951).

18. Old Wayne Mutual Life Ass'n v. McDonough, 204 U.S. 8, 27 Sup. Ct. 236, 51 L. Ed. 345 (1907); Simon v. Southern Ry., 236 U.S. 115, 36 Sup. Ct. 255, 59 L. Ed. 492 (1915).

lic official and not on the expressly appointed corporate agent.[19] However, the Court recently held in *Perkins v. Benguet Consol. Mining Co.*[20] that a foreign corporation which was subject to the jurisdiction of the courts of Ohio, under the *International Shoe* doctrine, could be sued on a cause of action that arose outside of Ohio. The Court intimated that the question was not whether there was jurisdiction, but whether the exercise of jurisdiction was reasonable in view of the fact that the cause of action arose outside of the state. The Court cast some doubt on its previous decisions limiting jurisdiction to in-state causes of action, intimating that, under the *International Shoe* doctrine, they were of doubtful efficacy. The state courts have consistently allowed the action in this type of case.[21] The court in the instant case finds the exercise of jurisdiction reasonable, relying strongly on the decision of a lower federal court which held the venue proper in a New York federal court where the cause of action arose in California.[22]

Although the statute in the instant case is similar to that in *Hess v. Pawloski,* the holding seemingly is based on the *International Shoe* doctrine presumably on the theory that the landing and taking off of aircraft from an airport within the state is sufficient contact with the jurisdiction to make the airline amenable to constructive process.[23] The result reached seems to extend the *Hess v. Pawloski* type of statute to actions arising outside of the forum state by interpreting the statute in light of the *International Shoe* doctrine. If the statute in the instant case is based upon the state police power, the Supreme Court of the United States could easily reject the reasoning of the New York court as an attempt to give extraterritorial effect to the police power of that state.

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19. See Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co., 243 U.S. 93, 37 Sup. Ct. 344, 61 L. Ed. 610 (1917); Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 72 Sup. Ct. 413, 96 L. Ed. 485 (1952); Tauza v. Susquehanna Coal Co., 220 N.Y. 259, 115 N.E. 915 (1917).

20. 342 U.S. 437, 72 Sup. Ct. 413, 96 L. Ed. 485 (1952).

21. See Enger v. Midland Nat. Life Ins. Co., 176 Minn. 143, 222 N.W. 901 (1929); Woelfle v. Connecticut Mut. Life Ins. Co., 234 Mo. App. 135, 112 S.W.2d 865 (1938); Karius v. All States Freight, Inc., 176 Misc. 155, 26 N.Y.S.2d 738 (Sup. Ct. 1941); Aetna Casualty & Surety Co. v. Gentry, 191 Okla. 659, 132 P.2d 326 (1942); Thompson v. Meridian Life Ins. Co., 38 S.D. 570, 162 N.W. 373 (1917); Patton v. Continental Casualty Co., 119 Tenn. 364, 104 S.W. 305 (1907). For decisions *contra,* see cases collected Note, 145 A.L.R. 630 (1943).

22. Kibler v. Transcontinental & Western Air, Inc., 63 F. Supp. 724 (E.D.N.Y. 1945).

23. Instant case, 21 U.S.L. WEEK 2293. Due to the brevity of the *Law Week* report it is possible that other contacts were present in the case which are not mentioned, but which might lend greater weight to the court's decision.

TORTS — RES IPSA LOQUITUR — APPLICATION TO DISAPPEARING AIRPLANE

Plaintiffs, as personal representatives, sought damages for the death of their decedents who were passengers on defendant's airplane, a commercial carrier, which disappeared without a trace while on a flight. There were no icing or storm conditions prevailing along the route at the time of the disappearance. The federal court, applying the doctrine of *res ipsa loquitur,* allowed recovery. *Held,* affirmed. The doctrine of *res ipsa loquitur* applies in an action for wrongful death following the disappearance of a commercial airliner. *Bachman v. Des Marais,* 100 F. Supp. 1, *aff'd mem.,* 198 F.2d 550 (1952).

The common law doctrine of *res ipsa loquitur* is generally said to have three necessary elements. First, there must be an accident which is of such a nature that it would not ordinarily occur in the absence of someone's negligence; second, it must have been caused by an agency or instrumentality within the exclusive control of the defendant; and third, the accident must not have been due to the voluntary action of the injured party.[1] Most cases state that the policy underlying the doctrine is that evidence of the true cause of the accident is more readily accessible to the defendant than to the plaintiff.[2]

There is a sharp conflict as to the application of *res ipsa loquitur* in actions involving airplane crashes. Some courts, taking the view that there are too many possible causes of crashes other than negligence, refuse to apply the doctrine.[3] Others utilize the doctrine[4] on the basis

1. *See* Ybarra v. Spangard, 25 Cal.2d 486, 154 P.2d 687, 689, 162 A.L.R. 1258, 1261 (1944); PROSSER, TORTS 295 (1941); 9 WIGMORE, EVIDENCE § 2509 (3d ed. 1940).

2. *See* Ybarra v. Spangard, 25 Cal.2d 486, 154 P.2d 687, 689, 162 A.L.R. 1258, 1261 (1944); Connor v. Atchison, T. & S.F. Ry., 189 Cal. 1, 207 Pac. 378, 379, 22 A.L.R. 1462, 1465 (1922); Yellow Cab Co. v. Hodgson, 91 Colo. 365, 14 P.2d 1081, 1084, 83 A.L.R. 1156, 1161 (1932). See 9 WIGMORE, EVIDENCE § 2509 (3d ed. 1940), 38 AM. JUR., *Negligence* § 299 (1941). But Prosser doubts that this is the true basis of the rule. See PROSSER, TORTS 301 (1941).

3. Cohn v. United Airlines, Inc., 1948 U.S. Av. Rep. 623 (U.S.D.C., D. Md. 1948); Herndon v. Gregory, 190 Ark. 702, 81 S.W.2d 849 (1935); Wilson v. Colonial Air Transport, Inc., 278 Mass. 420, 180 N.E. 212, 83 A.L.R. 329 (1932); Rochester Gas & Electric Corp. v. Dunlop, 148 Misc. 849, 266 N.Y. Supp. 469 (Co. Ct. 1933). See Boulineaux v. Knoxville, 20 Tenn. App. 404, 410, 99 S.W.2d 557, 560 (E.S. 1935), where the court, in holding the doctrine of *res ipsa loquitur* inapplicable to an airplane crash, said: "This is not a case for the application of the doctrine of *res ipsa loquitur,* for it is a common and not an unusual occurrence for airplanes to stall and fall while in operation, and without the intervention of any act upon the part of the operator." The trial judge in the Wilson case stated that the doctrine of *res ipsa loquitur* as applied to unexplained airplane crashes "discards as too improbable for consideration the chance that the ignition may have unexpectedly failed through the breaking under vibration of the copper strands concealed by insulation, that the generator or magneto may have failed internally, or the porcelain insulation on a spark plug may have broken from the heat, that a particle of sediment or drop of water may have reached the carburetor needle at a critical moment, that the gasoline feed line may have broken under the vibration or become clogged, these and many other things which are consistent with care must be rejected

that it is particularly suitable in actions against common carriers because of the high degree of care required of them.[5] When the doctrine is applied, the element most frequently emphasized by the courts is control over the instrumentality.[6] Thus where a private plane has dual controls and it cannot be determined whether the pilot or passenger had control at the time of the crash, the doctrine is inapplicable.[7]

In the instant case, the court reasoned that the airplane was unlikely to disappear in the absence of negligence of the defendant. Without discussing the other elements, it further found exclusive control of the airplane in the defendant notwithstanding CAB limitations on air carriers. The attempt of the defendant to avoid application of the doctrine on the ground that the knowledge of both the plaintiff and defendant of the facts was equal was rejected by the court which reasoned that "equal ignorance" — where neither party knows the causal factors of the accident — will not preclude the use of *res ipsa loquitur*.[8]

The court relied on three crash cases involving airlines as authority for applying the doctrine.[9] This is apparently the first case involving disappearing aircraft. All of the elements of *res ipsa loquitur* are present, and if one can accept the reasoning that the defendant is better able to explain the accident than the plaintiff, the holding is within the policy upon which the doctrine is said to be based. Further it reaffirms the position of other courts requiring a high degree of care

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if the *res ipsa* rule is to operate." Wilson v. Colonial Air Transport, Inc., 1931 U.S. Av. Rep. 109, 110 (Mun. Ct. of Boston 1931), *aff'd*, 278 Mass. 420, 180 N.E. 212, 83 A.L.R. 329 (1932).

4. *See* Bratt v. Western Air Lines, Inc., 169 F.2d 214, 215 (10th Cir.), *cert. denied*, 335 U.S. 886 (1948) (common carrier); Smith v. Pacific Alaska Airways, Inc., 89 F.2d 253, 254 (9th Cir.), *cert. denied*, 302 U.S. 700 (1937) (common carrier); Smith v. Pennsylvania Central Airlines Corp., 76 F. Supp. 940, 942-45, 6 A.L.R.2d 521 (D.C. 1948) (common carrier); Smith v. O'Donnell, 5 P.2d 690, 693 (Cal. App. 1931), *aff'd and op. adopted*, 215 Cal. 714, 12 P.2d 933 (1932) (common carrier) (*res ipsa loquitur* applied but defendant successfully rebutted the presumption); Seaman v. Curtiss Flying Service, Inc., 231 App. Div. 867, 247 N.Y. Supp. 251, 253 (2d Dep't 1930) (private carrier); Stoll v. Curtiss Flying Service, 1930 U.S. Av. Rep. 148, 152, 153 (N.Y. Sup. Ct. 1930) (private carrier). See Note, 4 VAND. L. REV. 857 (1951).

5. *See* Smith v. Pennsylvania Central Airlines Corp., 76 F. Supp. 940, 945, 6 A.L.R.2d 521 (D.C. 1948); Smith v. O'Donnell, 5 P.2d 690, 692 (Cal. App. 1931), *aff'd and op. adopted*, 215 Cal. 714, 12 P.2d 933 (1932). Prosser expresses some disapproval of such a view; see PROSSER, TORTS 299 (1941).

6. *See* Wilson v. Colonial Air Pransport, Inc., 278 Mass. 420, 180 N.E. 212, 214, 83 A.L.R. 329 (1932); State v. Henson Flying Service, 191 Md. 240, 60 A.2d 675, 678, 4 A.L.R.2d 1300 (1948).

7. Parker v. James E. Granger, Inc., 4 Cal.2d 668, 52 P.2d 226 (1935), *appeal dismissed*, 298 U.S. 644 (1936); Budgett v. Soo Sky Ways, Inc., 64 S.D. 243, 266 N.W. 253 (1936); Towle v. Phillips, 180 Tenn. 121, 172 S.W.2d 806 (1943).

8. 100 F. Supp. 1, 2 (1951).

9. Pacific Alaska Airways v. Mahan, 89 F.2d 255 (9th Cir.), *cert. denied*, 302 U.S. 700 (1937); Smith v. Pacific Alaska Airways, 89 F.2d 253 (9th Cir.), *cert. denied*, 302 U.S. 700 (1937); Seaman v. Curtiss Flying Service, 231 App. Div. 867, 247 N.Y. Supp. 251 (2d Dep't 1930).

from commercial air-carriers[10] and placing the burden on the carrier to exonerate itself or pay.[11] In view of the cases applying the doctrine to crashes, the use of *res ipsa loquitur* here does not seem unwarranted.

10. See Smith v. O'Donnell, 5 P.2d 690, 692 (Cal. App. 1931), *aff'd and op. adopted,* 215 Cal. 714, 12 P.2d 933 (1932); Kamienski v. Bluebird Air Service, Inc., 321 Ill. App. 340, 53 N.E.2d 131, 134 (1944), *aff'd,* 389 Ill. 462, 59 N.E.2d 853 (1945).

11. See PROSSER, TORTS 299 (1941).