Recent Decisions

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CONFLICT OF LAWS — UNIFORM ENFORCEMENT OF FOREIGN JUDGMENTS ACT — FULL FAITH AND CREDIT REQUIRES REGISTRATION OF FOREIGN ALIMONY AND CHILD SUPPORT DECREES AS TO FUTURE INSTALLMENTS. — Plaintiff received a divorce decree in Missouri providing for monthly payments of child support and alimony. Her husband moved to Illinois and she filed a petition to register the decree in Illinois under the UNIFORM ENFORCEMENT OF FOREIGN JUDGMENTS ACT, ILL. ANN. STAT. c. 77, §§ 88-105 (Supp. 1957). The decree was registered only as to the installments that had accrued. Plaintiff appealed the refusal to register the decree as to future payments. Held, reversed. The Missouri decree is entitled to full faith and credit as to future payments as well as to those which have already accrued. Light v. Light, 147 N.E.2d 34 (III. 1957).

The decision in the instant case has two effects, one practical and the other theoretical. The practical effect is that the plaintiff need not re-register the Missouri decree each time an installment accrues. Illinois has in effect adopted the decree as its own and whatever remedies are available to enforce a domestic decree should be available to enforce a registered foreign decree. The theoretical effect is the extension of the full faith and credit clause of the Federal Constitution, U.S. CONST. art. IV, § 1, to non-final foreign judgments.

By allowing a foreign alimony and child support decree (which is not a final decree since it is subject to modification) to be registered under an act which, in several of its sections, refers to the registered judgments as final judgments, ILL. ANN. STAT. c. 77, §§ 94, 99, 100 (Supp. 1957), the court has shown an awareness of the fact that alimony and support decrees cannot be viewed as other non-final judgments and intermediate decrees. They are not mere private contractual debts but rather are closely connected with a vital public interest in the support of dependents. McKeel v. McKeel, 185 Va. 108, 37 S.E.2d 746 (1946). Thus it is a matter of grave public concern to insure that alimony payments are made. To force the plaintiff to bring an action at law each time a payment accrues is to put upon the plaintiff undue hardship and enable a spouse with liquid assets to put his property out of the reach of execution. Sackler v. Sackler, 47 So. 2d 292 (Fla. 1950). A foreign alimony decree should not be enforced merely as a debt of record but should be enforced in the same manner and to the same extent as if the decree had originally been rendered in the executing state. To deny the decree the inherent power of equitable enforcement is to render it only partially potent. Fanchier v. Gammill, 148 Miss. 723, 114 So. 813 (1927).

The Illinois courts, at least on the appellate level, have shown some disagreement concerning their power to use equitable remedies to enforce foreign alimony decrees. Compare Roberts v. Roberts, 11 Ill. App. 2d 86, 136 N.S.2d 590 (1956); Rule v. Rule, 313 Ill. App. 108, 39 N.E.2d 379 (1942) with Tailby v. Tailby, 342 Ill. App. 664, 97 N.E.2d 611 (1951). The instant case, without passing directly on the subject of equitable remedies, would seem to rule affirmatively on the matter by allowing a foreign decree for future installments to be registered. Many other state courts have granted equitable remedies for accrued alimony payments. See, e.g., Glanton v. Renner, 285 Ky. 808, 149 S.W.2d 748 (1941); German v. German, 122 Conn. 155, 188 Atl. 429 (1936). But only a
small minority have granted the same remedies to future installments. See, e.g., Biewend v. Biewend, 17 Cal. 2d 117, 109 P.2d 701 (1941); Cousineau v. Cousineau, 155 Ore. 184, 63 P.2d 897 (1936). The courts granting equitable relief for future installments base their decisions on either comity or public policy and do not claim that such decrees come within the purview of the full faith and credit clause of the Federal Constitution. The instant case although recognizing public policy as a basis for its decision relies also upon the Federal Constitution.

A decree for alimony is a valid judgment and is entitled to full faith and credit. Barber v. Barber, 62 U.S. (21 How.) 582, 591 (1858). But the right to the payments does not become vested until the payments have accrued and the full faith and credit clause protects only those accrued installments which cannot be modified retrospectively. Sistare v. Sistare, 218 U.S. 1 (1910). Thus it would seem that the Supreme Court would not consider an alimony decree which can be modified prospectively as necessarily within the purview of the full faith and credit clause as to future installments. See Worthley v. Worthley, 44 Cal. 2d 465, 283 P.2d 19, 22 (1955). However, the specific issue has not been decided by the Supreme Court and in recent decisions the requirement of finality has been seriously questioned. Barber v. Barber, 323 U.S. 77, 86 (1944) (concurring opinion); Griffin v. Griffin, 327 U.S. 220, 236 (1946) (dissenting in part).

The full faith and credit clause of the Constitution, U.S. CONST. art. IV, § 1, does not mention finality as an express prerequisite to enforcement of a judgment in a foreign state, nor does the implementing statute. 28 U.S.C. § 1738 (1952). But the theory that a foreign judgment must be final to come within the full faith and credit clause is firmly established. See, RESTATEMENT, CONFLICT OF LAWS § 435 (1934). The rationale behind the doctrine is easily seen. If a judgment is open to modification there is present the danger that the decree will be modified in the original forum and execution rendered in the second forum on the unmodified decree. But there seems to be no valid reason why the modification cannot be given the same full faith and credit as was given the original decree. When the modification is entered in the one state it can also be entered in the other. Cousineau v. Cousineau, supra.

The practical problems involved in granting full faith and credit to prospective alimony decrees of sister states are not insurmountable. There is, however, a difference of opinion as to the authority by which full faith and credit should be extended. The majority of state courts that adopt the more modern view of extending full faith and credit hold that they are not required to do so by the Constitution but do so under principles of comity or public policy. The instant case and some writers, notably Justice Jackson, hold that the full faith and credit clause of the Constitution requires the recognition of non-final alimony decrees. See, Jackson, Full Faith and Credit — The Lawyers Clause of the Constitution, 45 COLUM. L. REV. 1 (1945).

Any foreign judgment that is entitled to full faith and credit may be registered under the Uniform Enforcement of Foreign Judgments Act. ILL. ANN. STAT. c.77, § 88 (Supp. 1957); but the act does not specify that the judgment be constitutionally entitled to full faith and credit in order to be registered. Thus the court in the instant case was not
compelled to rely on constitutional grounds. Action by the Supreme Court on the question of extending the full faith and credit clause to non-final future alimony decrees seems doubtful since a ruling that would afford the desired result would have to overthrow the deeply entrenched theory that only final judgments have the protection of the Federal Constitution. The state courts can by-pass this obstacle through the use of the principles of comity and public policy and Illinois may be the only one willing to hurdle it for the sake of constitutional theory.

L. D. Wichmann

CONSTITUTIONAL LAW — STATE ACTION — COURT ORDER SUBSTITUTING PRIVATE TRUSTEES FOR PUBLIC TRUSTEES DOES NOT CONSTITUTE STATE ACTION. — By his will probated in 1831, Stephen Girard left a fund in trust for the establishment and maintenance of an institution for "poor white male orphans," naming the City of Philadelphia as trustee. The Pennsylvania Legislature subsequently replaced the city with a Board of Directors of City Trusts. In 1954, two Negroes, meeting all the requirements except that of color, applied for admission to Girard College. The Board rejected their applications solely because they were not "white" as required by the will. The boys, joined by the city and the Commonwealth of Pennsylvania, petitioned the Orphans' Court of Philadelphia County to order their admittance. The petition was dismissed. Girard Estate, 4 Pa. D. & C.2d 671 (Orph. Ct. Philadelphia 1955), aff'd sub nom., In Re Girard's Estate, 386 Pa. 548, 127 A.2d 287 (1956). The United States Supreme Court reversed, Pennsylvania v. Board of Trusts, 353 U.S. 230 (1957), declaring that the board operating Girard College was an agency of the state and, therefore, its refusal to admit the Negro boys was discriminatory state action under Brown v. Board of Educ., 347 U.S. 483 (1954). The cause was remanded for further proceedings not inconsistent with the opinion. Subsequently, the Orphans' Court replaced the Board of Directors with private trustees to eliminate the state action objection. Upon appeal to the Supreme Court of Pennsylvania, held, affirmed. (1) The "College" remained a private charity capable of being administered by private trustees, and (2) the action of the Orphans' Court in substituting private trustees was not discriminatory state action forbidden by the fourteenth amendment. U.S. Const. amend. XIV. In Re Girard College Trusteeship, 138 A.2d 844 (Pa. 1958).

In thus attempting to solve one constitutional problem by replacing the public trustees with private trustees, the court found itself confronted with an equally serious constitutional problem: Did the judicial action of the Orphans' Court in replacing the public trustees with private trustees, solely because they could not comply with the racial restriction, constitute discriminatory state action? The majority, stressing the right of the individual to dispose of his property according to his personal wishes, reasoned that Negroes, not having been named as beneficiaries, had no right to share in the estate, and thus had not been deprived of a constitutionally guaranteed right. While such reasoning appears convincing,
the prior decision of the United States Supreme Court in *Pennsylvania v. Board of Trusts*, supra, casts grave doubts upon its validity for if Negroes were not being deprived of constitutional rights under the trust in the first instance, it seems incongruous to say that it was discrimination for the public trustees to refuse to admit them.

An adequate solution to the problem demands analysis of the doctrine of state action. Historically, the doctrine was formulated in the *Civil Rights Cases*, 109 U.S. 3 (1883) which held that it was not private invasion of individual rights, but discriminatory state action that was forbidden by the fourteenth amendment. In recent years this concept has been constantly expanded to incorporate a variety of factual situations. In *Smith v. Allwright*, 321 U.S. 649 (1944), state action (abridging the right to vote in violation of the fifteenth amendment) was found in the refusal of a political party to permit Negroes to vote in a primary election. The Court reasoned that the statutory provisions enabling selection of candidates in this manner made the party an agency of the state when conducting such elections. State acquiescence was the basis for the Court's finding of state action in *Terry v. Adams*, 345 U.S. 461 (1953), where a pre-primary poll was conducted by an exclusively white political association, when such a poll produced the equivalent of a prohibited election. Likewise, in *Marsh v. Alabama*, 326 U.S. 501 (1946), the state having permitted the existence of a company-owned town, state action was found in the operation of the town. *But see Dorsey v. Stuyvesant Town Corp.*, 299 N.Y. 512, 87 N.E.2d 541 (1949), cert. denied, 339 U.S. 981 (1950) (no state action in operation of privately owned low cost housing project although financially aided by the state). See also Note, 33 *Notre Dame Law.* 463 (1958).

The concept of state action has received a similar extension in its application to judicial action. In *Shelley v. Kraemer*, 334 U.S. 1 (1948), the Supreme Court held that racially restrictive covenants cannot be judicially enforced because such judicial action would constitute discriminatory state action forbidden by the fourteenth amendment. While conceding that so long as the purposes of such agreements are effectuated by voluntary adherence to their terms they are valid, the court pointed out that when these purposes are secured only by judicial enforcement, the state has made available to private individuals the full coercive power of government to assist them in their discrimination; and that such activity constitutes state action. For such active intervention by the court the discriminatory purposes of the agreements could not be effectuated. Nor can money damages be awarded for the breach of such a covenant since it would not then be a matter of voluntary choice but the state’s choice that the covenant be observed or damages suffered. The result of such a sanction by the state would be to encourage the use of restrictive covenants and such judicial encouragement involves state action. *Barrows v. Jackson*, 346 U.S. 249 (1953).

It has also been held that to enforce a clause in a deed providing for reversion to the grantor should the land ever be sold or leased to anyone of Mexican descent constitutes discriminatory state action. *Clifton v. Puente*, 218 S.W.2d 272 (Tex. Civ. App. 1948). *But see Charlotte Park and Recreation Comm’n v. Barringer*, 242 N.C. 311, 88 S.E.2d 114 (1955), cert. denied sub nom., *Leeper v. Charlotte Park and Recreation*
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350 U.S. 983 (1956), holding that a clause in a deed of land to a city for recreational purposes, providing for reversion to the grantor if the land were used for non-whites, is valid since the reversion would operate automatically, requiring no active judicial enforcement. And an Iowa court recognized a racially restrictive clause in a contract as a defense in an action for damages resulting from a refusal to permit the interment of a non-Caucasian in a private cemetery. Rice v. Sioux City Memorial Park Cemetery, Inc., 245 Iowa 147, 60 N.W.2d 1110 (1953), aff'd by an equally divided court, 348 U.S. 880 (1954), judgment vacated and cert. dismissed as improvidently granted, 349 U.S. 70 (1955).

As can be seen, there is still considerable doubt as to the limits of the rule formulated in Shelley v. Kraemer. In the instant case the action of the court was not as direct as that in the Shelley case, but judicial recognition was accorded a racially restrictive clause and judicial action was taken insuring the effectiveness of the clause. Cf. Barrows v. Jackson, supra.

While under no specific order from the U.S. Supreme Court to admit the Negro applicants, the Pennsylvania Supreme Court appears to have violated the intent of the Court's rescript of remanding "for further proceedings not inconsistent with this opinion." (Emphasis added.) In attempting to solve the constitutional dilemma with which it was faced it has assumed one of the crucial questions to be decided by declaring that Negroes have no constitutionally protected right to share in the charity's benefit. The court failed to answer fully the argument of Musmanno, J. (dissenting opinion), that Girard College was a public institution by reason of the circumstances surrounding its origin, history, and management, and therefore the substitution of private trustees was inconsistent with Girard's intent. It might have applied the doctrine of cy pres to remove the racial restriction and fulfill as nearly as possible Girard's charitable intention. See RESTATEMENT, TRUSTS § 399 (1953); see also In Re Dominion Students' Hall Trust, 1947 1 Ch. 183 (racial restriction removed because "primary purpose" had become "impossible" of attainment) and Moore v. City and County of Denver, 133 Colo. 190, 292 P.2d 986 (1956) (dictum) (cy pres would apply to a restriction similar to the instant case if present circumstances prevented carrying out the terms of the will). The court, in rejecting or avoiding these questions, brought to the fore the issue of state action. It is submitted that the United States Supreme Court, should it grant certiorari, will not find the Pennsylvania Supreme Court's answer to that issue to be satisfactory. Instead, it will probably find that there has been discriminatory state action in the very act of substituting private trustees. Such a ruling would have far-reaching effects not only upon constitutional law, but also upon contract, property, and trust law.

Lawrence James Bradley

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DISCOVERY — INTERROGATORIES — DEPONENT REQUIRED TO ANSWER INTERROGATORIES RESPECTING EXISTENCE AND AMOUNT OF LIABILITY INSURANCE. — In a personal injury action pending in the circuit court, deponent was ordered by the trial judge to answer discovery interrogatories as to the existence and amount of his liability insurance. He then

This specific issue has been raised in numerous litigations in the recent past and has resulted in conflicting decisions in both the federal courts and those states which have adopted the federal discovery rules, Fed. R. Civ. P. 26-34, in whole or in part. Both federal and state courts are in agreement that these rules should be applied liberally in order to effectuate an expeditious administration of justice. See Hickman v. Taylor, 329 U.S. 495 (1947).

In the federal system plaintiff has been permitted to examine defendant's insurance policy on the basis that it was relevant to the subject matter of the litigation and consequently within the purview of Fed. R. Civ. P. 26(b) and 34. Insurance was also held discoverable because it was material to plaintiff's preparation for trial and might inform him of rights not otherwise known. Brackett v. Woodall Food Products, Inc., 12 F.R.D. 4 (E.D. Tenn. 1951). Accord, Orgel v. McCurdy, 8 F.R.D. 585 (S.D.N.Y. 1948). In McNelley v. Perry, 18 F.R.D. 360 (E.D. Tenn. 1955), the court disagreed with the rationale of the Brackett case, and held that insurance information ordinarily was not relevant since it could not be used at trial nor lead to information which could be so used. However, the court admitted that such information may be relevant depending on the specific circumstances, and distinguished the Brackett case where defendant was possibly insolvent and proration of insurance could become an issue among the various claimants. See also Layton v. Cregan & Mallory Co., 263 Mich. 30, 248 N.W. 539 (1933) (insurance policy discoverable to show defendant's ownership of automobile).

The court in McClure v. Boeger, 105 F. Supp. 612 (E.D. Pa. 1952) gave the materiality of the insurance policy lesser importance than that given in the Brackett case, and stated that its discovery had nothing to do with the presentation of the case and did not lead to the kind of information which is the objective of discovery procedure. Although the court could see advantages in the plaintiff discovering "rights" not otherwise available, it reasoned that every possible argument in favor of requiring disclosure could also be made for furnishing plaintiff with information as to the defendant's other financial resources. Cf. Balazs v. Anderson, 77 F. Supp. 612 (N.D. Ohio 1948).

State courts with discovery rules similar to those in the federal system have also arrived at conflicting results. It has been held that if insurance is relevant in a suit against the insurer after judgment against the actual tort-feasor has been returned unsatisfied, it should also be relevant while the action is pending, since the insurer is in reality one of the real parties in interest. Maddox v. Grauman, 265 S.W.2d 939 (Ky. 1954). Such disclosure would not violate the sanctity of a private contract since a liability policy is a contract which inures to the benefit of anyone negli-
gently injured by the insured as completely as if such injured person had
been named in the policy. Accord, Superior Ins. Co. v. Superior Court,
37 Cal. 2d 749, 235 P.2d 833 (1951); Demaree v. Superior Court, 10
Judicial Dist. Court, 69 Nev. 196, 245 P.2d 999 (1952). The opinion
in the instant case adopted this reasoning in view of Section 388 of the
Insurance Code, ILL. ANN. STAT. c. 73, § 1000 (Smith-Hurd 1956)
(insurance policy must include provision giving an injured person the
right of suit against the insurer), and construed it to be declarative of
state policy that the contract confers rights on anyone negligently injured
by the insured. These rights cannot be defeated by the concerted action
of the insured and the insurer. See Scott v. Freeport Motor Cas. Co., 392
Ill. 332, 64 N.E.2d 542 (1945). This public policy is also employed in
the instant case to refute the reasoning of McClure v. Boeger, supra,
that every argument in favor of allowing discovery of insurance could
also be used in favor of discovering other assets of the defendant. The
Illinois court distinguished insurance from other assets in that, unlike
other assets, insurance exists for the single purpose of satisfying the
liability that it covers. This reflects the better view since insurance is
not properly an asset—the insured is not free to employ it at his discre-

Pre-trial discovery of information concerning insurance should be
construed as relevant because, in reality, the insurance company ordi-
narily investigates and controls the litigation involving its insured and
is, practically speaking, one of the real parties in interest. Maddox v.
Grauman, supra. The instant court also relied upon the practical role of
insurance companies in negligence suits. Consequently, where the insurer
is virtually a substituted party, insurance should be discoverable because
it affords counsel a more realistic appraisal of his adversary in the com-
ing litigation, and “litigation is a practical business.” 145 N.E.2d at 593.
The instant case seems even more liberal than the Maddox case when
the applicable discovery rules are compared. The Kentucky court in
Maddox was operating under a rule similar to Fed. R. Civ. P. 26(b)
which defines the scope of examination in discovery depositions. Illinois
Rule 19-4 draws largely from the Federal Rule also, but omits the latter
part which states that it is not necessary that the testimony sought in the
discovery proceedings be admissible at the trial as long as the informa-
tion sought appears reasonably calculated to lead to the discovery of
admissible evidence. The drafting committee, in explaining this omission,
stated that, in their opinion, the laudable theory inherent in this part of
the Federal Rule did not square with actual practice. They felt that it
could be used indiscriminately to harass and oppress an adversary and
that the possible abuses outweighed the theoretical advantages which
the broadened inquiry supposedly afforded. Joint Committee Comments,
ILL. ANN. STAT. c. 110, § 101.19-4 (Smith-Hurd 1956). Yet, under the
apparently narrower rule, the Illinois Supreme Court decided that the
existence and amount of defendant's liability insurance was “relat[ed]
to the merits of the matter in litigation” as provided in Rule 19-4.
Another expressed reason for the holding in the instant case was that
discovery of insurance coverage would afford a sounder basis for the
settlement of disputes and thereby help alleviate the present-day problem
of the congested docket. The Maddox case does not mention settlement but says that the phrase "relevant to the subject matter" is the governing feature of the rule and this relevancy should be more loosely construed at pre-trial examination than at trial. This general relevancy should include the entire scope of the action from its origin to the collection of any judgment. However, Jeppesen v. Swanson, 243 Minn. 547, 68 N.W. 2d 649 (1955), held that the amount of insurance was not discoverable for the sole purpose of enabling a party to determine whether or not he will settle. Insurance would be relevant only in a subsequent suit against the insurer. Accord, Bean v. Best, 80 N.W. 2d 565 (S.D. 1957); Brooks v. Owens, 97 So. 2d 693 (Fla. 1957).

In Superior Ins. Co. v. Superior Court, 37 Cal. 2d 749, 235 P.2d 605 (1937), the contention that knowledge of insurance limits would give the plaintiff an "undue and oppressive" advantage in negotiating for settlement was refuted. The court pointed out that the relationship between the amount of insurance and the seriousness of the plaintiff's injuries would determine which side had the advantage. A plaintiff with serious injuries might settle for less than he could recover in a judgment if he knew of low policy limits. It is difficult to see what unjust advantages will accrue to the plaintiff if he be given this insurance information. Insurance companies who control the litigation of those insured employ able counsel, skilled in negotiation. It is doubtful whether they would be seriously handicapped by their adversary's knowledge of the existence and amount of liability insurance. Obviously, a settlement will not be made by the insurance company unless there is good reason to believe that an adverse judgment would be rendered at trial. There is nothing to indicate that fair and equitable settlements could not be achieved when both sides possess all the pertinent insurance information. One side ought not be blinded in negotiating a settlement, since this is a practical business and not a game of hide and seek. See Brooks v. Owens, supra at 701 (dissenting opinion). However, the bare fact that settlements tend to alleviate congested dockets ought not be made the sole reason for allowing the discovery of insurance.

The instant case has adopted the more cogent reasoning in allowing discovery, since the rules were adopted as procedural tools to educate the parties in advance of the trial as to the real value of their claims and defenses, and thereby effectuate the prompt and just disposition of litigations.

John F. Beggan

Federal Income Tax — Capital Gains — Profits From Sales of Cars Used Either in Automobile Dealer's Business or as Leased Cars Are Capital Gains.—Plaintiff, an automobile dealer and wholesaler, segregated a small number of new cars in 1950 and 1951 from inventory, using some as company cars, while leasing others to a finance company for rental by the mile. The cars used in the business were fully insured by the plaintiff, regular license plates were procured for each in plaintiff's name, each was entirely paid for in cash by plaintiff, and
carried on the books of account as a fixed asset. These cars were used by the various officials of the company for everyday business purposes, loaned to customers while their cars were being repaired, and used in civic functions for purposes of promotion and good will. As to the leased cars the operating costs and maintenance expense, including collision and public liability insurance, were paid by the finance company. Plaintiff claimed the profits from the sale of a number of these cars held over six months as capital gains under Int. Rev. Code of 1939, § 117 (j), added by 56 STAT. 846 (1942) (now INT. REV. CODE OF 1954, § 1231); this was subsequently disallowed by the Commissioner. The tax on the amount in question was paid and plaintiff filed a claim for refund. Held, as the automobiles were not held primarily for sale to customers in the ordinary course of business the dealer was entitled to long-term capital gains treatment on profits realized from their disposition. Massey Motors, Inc. v. United States, 156 F. Supp. 516 (S.D. Fla. 1957).

In every case where the taxpayer claims capital gains treatment under section 117 (j) the court must determine, as a question of fact, whether the property in question was a depreciable asset of the business or was held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business. W. R. Stephens Co. v. Commissioner, 199 F.2d 665 (8th Cir. 1952); Latimer-Looney Chevrolet, Inc., 19 T. C. 120 (1952). But see, Philber Equipment Corp. v. Commissioner, 237 F.2d 129 (3d Cir. 1956). There is no set formula or rule of thumb for decision; each case must rest on its own facts, interpreted in the light of the individual nature of the business. Cohn v. Commissioner, 226 F.2d 22 (9th Cir. 1955); Friend v. Commissioner, 198 F.2d 285 (10th Cir. 1952). Certain factors are helpful, however; namely: (a) the purpose for which the property was originally acquired, W. R. Stephens Co. v. Commissioner, supra; (b) the purpose for which the property is held, Rollingwood Corp. v. Commissioner, 190 F.2d 263 (9th Cir. 1951); (c) the frequency and continuity of sales, Curtis Co., 23 T.C. 740 (1955); (d) whether the property is properly includible in the inventory of the taxpayer, Mary Alice Browning, P-H 1950 T.C. Mem. Dec. ¶ 50,285.

Congress, when it enacted section 117, intended to deal with the inequities of taxing at the graduated rate (designed for a single year's income) the profit realized upon the sale of some asset or investment which appreciates in value over a much longer period of time. Watson v. Commissioner, 197 F.2d 56 (9th Cir. 1952), aff'd, 345 U.S. 544 (1953); Rollingwood Corp. v. Commissioner, supra. See H.R. REP. No. 2333, 77th Cong., 2d Sess. 53, 54 (1942) cited in 1942-2 Cum. Bull. 372, 415.

The Supreme Court warned against a liberal interpretation of section 117 in Corn Products Refining Co. v. Commissioner, 350 U.S. 46 (1955). Emphasizing the intention of Congress that the profit and loss resulting from the normal everyday business operations should not receive the same preferential treatment as transactions which are not the normal source of business income, the court stated:

Since this section [117] is an exception from the normal tax requirements of the Internal Revenue Code, the definition of a capital asset must be narrowly applied and its exclusions interpreted broadly. This is necessary to effectuate the basic congressional purpose. Corn Products Refining Co. v. Commissioner, supra at 52.

No unanimity can be found in cases where automobile dealers use cars
for the operation of their businesses. Where the vehicles were assigned to salesmen and company officials for personal use and to some extent for business and demonstration purposes the tax court held that the gain realized on their sale was ordinary income, *Johnson-McReynolds Chevrolet Corp.*, 27 T.C. 300 (1956). On the other hand, if the taxpayer can sufficiently prove a necessary and actual use of the automobiles in his business, this is evidence that the cars were held for a purpose other than for sale to customers. *W. R. Stephens Co. v. Kelm*, 140 F. Supp. 12 (D. Minn. 1956); *Fields v. Granquist*, 134 F. Supp. 624 (D. Ore. 1955); *Lattimer-Looney Chevrolet Inc.*, supra. But where the court found the automobiles were used primarily for demonstration purposes, it held the gain realized on their sale was ordinary income. *W. R. Stephens Co. v. Commissioner*, supra. More recently an automobile dealer was denied capital gains treatment on the profit realized on the sale of cars used in his business when the tax court decided these cars were "demonstrators." *Duval Motor Co.*, P-H 1957 T.C. Mem. Dec. ¶ 28.8. For the factors to be considered regarding the distinction between "company cars" and "demonstrators," see Rev. Rul. 54-222, 1954-1 *CUM. BULL. 19.*

To hold that automobiles which are actually used to perform a necessary function in the business are capital assets appears to be a more reasonable interpretation of section 117 (j). An automobile dealer, as any other merchant, must have means of transportation readily accessible. Were he selling any other item there would be no problem when he disposed of an automobile used in the business; the sale would be treated as a capital transaction. Capital gains treatment should not be denied merely because goods which must be used in the operation of the business are the same as those sold in the normal course of that business. This has been followed in cases where property other than automobiles have been entitled to section 117 treatment, although they were the kind sold by the taxpayer in the normal course of his trade or business. *United States v. Bennett*, 186 F.2d 407 (5th Cir. 1951) (livestock); *Differential Steel Car Co.*, 16 T.C. 413 (1951) (haulage equipment); *Nelson A. Farry*, 13 T.C. 8 (1949) (rental property); *Carl Marks & Co.*, 12 T.C. 1196 (1949) (securities). These cases reiterate the rule that it is not the nature of the property itself which is determinative, but rather, the purpose for which the property is held.

It becomes more difficult to reconcile the holding of the court that the leased cars were section 117 assets with the congressional intent discussed in *Corn Products Refining Co. v. Commissioner*, supra. The court in the instant case relies solely on *Philber Equipment Corp. v. Commissioner*, supra, where the taxpayer was in the business of furnishing vehicles to fleet operators on a lease basis. After re-possession from the lessees the vehicles were sold through an agent and the profits realized were claimed as capital gains. Reversing the decision of the tax court denying capital gains treatment, the court of appeals upheld the contention of the taxpayer and stated, at 131-32, "The final sale of the property can only be decisive if the taxpayer's business was operated with the final gains from the sale of the vehicles as a determining business purpose." In the tax court the fact was established that in one year the only profit was from sales, the leasing operations resulting in a loss. *Philber Equipment Corp.*, 25 T.C. 88, 93 (1955).
Where a person leases property which is normally held for sale in the ordinary course of his trade or business the courts have been reluctant to treat the subsequent sale as a capital gains transaction. *S.E.C. Corp. v. United States*, 140 F. Supp. 717 (S.D.N.Y. 1956), *aff'd per curiam*, 241 F.2d 416 (2d Cir.), *cert. denied*, 354 U.S. 909 (1957) (electric coolers); *King v. Commissioner*, 189 F.2d 122 (5th Cir. 1951) (houses); *Albert T. Erickson*, 23 T.C. 458 (1954) (breeding bulls). *Contra: S. P. McCall*, P-H 1954 T.C. Mem. Dec. ¶ 54,138 (1954) (construction machinery); *Mary Alice Browning*, supra. A revenue ruling on the exact point at issue in the instant case ordered that a taxpayer who buys automobiles at wholesale prices, and leases them for a period substantially shorter than their normal useful life may not treat the profit on their disposition as capital gain. Rev. Rul. 54-229, 1954-1 Cum. Bull. 124.

It is natural that any taxpayer should desire to classify profits on the sale of assets as capital gains due to the preferential treatment that results. But this classification should not be extended to the point (which is referred to in *S.E.C. Corp. v. United States*, supra at 719) where the statute would become a source of windfalls rather than a relief from hardship. The question now confronting the courts is whether this point has been reached when a taxpayer is allowed to treat the profit realized on the sale of identical merchandise as that carried in his inventory as long term capital gains, merely because he has leased it to another for the required holding period. The situation where the primary operation of the business is leasing certain assets, *S. P. McCall*, supra; *Mary Alice Browning*, supra, is distinguishable. The physical depreciation resulting from constant use demands that the assets be replaced. The subsequent sale then becomes incidental to the primary business of renting. The converse is present in the instant case where the primary function is the sale of the assets, any leasing operation being incidental to the ordinary course of the business. The subsequent sale of the leased property in this situation should be regarded as one in the ordinary course of business and not entitled to capital gains treatment.

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**Habeas Corpus — Extradition — Demanding Governor's Reliance Upon Inappropriate Law in Requisition for Extradition Renders Asylum State's Detention of Prisoner Unlawful Even Though Warrant Was Issued Pursuant to Proper Statute.** — The Governor of Nebraska requested that the Governor of Colorado issue a warrant for the arrest of the petitioner so that he could be extradited to Nebraska and criminally tried for nonsupport of his wife and children. Petitioner lived in Colorado and had never lived in Nebraska. His wife lived in Nebraska. Although the requisition stated that the petitioner was a fugitive, it is clear that he was not; but it did state that petitioner had committed a crime in Nebraska (that of failing to support his family). It was recited that the Nebraska demand was pursuant to the Constitution and laws of the United States. He was arrested under a warrant issued by the Governor of Colorado pursuant to the correct statute,
COLO. REV. STAT. ANN. § 60-1-6 (1953), which allows discretionary extradition where a person in Colorado is charged with committing an act in Colorado or another state intentionally resulting in a crime in the state of demand. Petitioner appealed for a writ of habeas corpus contending that he was not a fugitive and since the requisition relied upon federal law, the warrant issued in pursuance of Colorado law was invalid. The writ was denied and he appealed. Held, reversed. Petitioner was not a fugitive and a governor may act only in strict accordance with a demand since extradition statutes must be strictly construed. Matthews v. People, 314 P.2d 906 (Colo. 1957).

The inter-state extradition of fugitives from justice is provided for by the U.S. Const. art. IV, § 2, cl. 2, as implemented by 18 U.S.C. §§ 3182, 3194 (1952). One can be extradited under federal law only if present in the demanding state at the time the crime was committed. Hyatt v. People ex rel. Corkran, 188 U.S. 691 (1903). The states, however, may regulate matters which are neither expressly nor by necessary implication covered by federal law. Innes v. Tobin, 240 U.S. 127 (1916). Accordingly, the Uniform Criminal Extradition Act has been adopted in forty-one states. 9 Uniform Laws Ann. 258. In the present case the Governor of Colorado invoked COLO. REV. STAT. ANN. § 60-1-6 (1953), which is comparable to section six of the Uniform Act. Under this provision a person committing an act in one state intentionally resulting in a crime in the asylum state's governor's discretion.

The facts of Ex parte Kaufman, 73 S. Dak. 166, 39 N.W.2d 905 (1949), are almost identical with those of the present case. Habeas corpus was granted because the requisition was inconsistent with the factual showing upon which it was predicated. The court admitted that the objection was highly technical but chose to apply the Uniform Act very strictly. The reason given — that the power conferred by section six is discretionary while it is mandatory that a requisition in pursuance of federal law be honored — is questionable.

The reasoning of the dissent in Ex parte Kaufman, supra, was adopted in Hagel v. Hendrix, 302 S.W.2d 323 (Mo. Ct. App. 1957). It was held that "the only question within the field of judicial inquiry is whether jurisdictional facts authorizing extradition properly appear from the requisition and accompanying documents." Hagel v. Hendrix, supra at 329. This requirement had been fulfilled as it had in Ex parte Kaufman, supra, and in the instant case. Although the demand was made pursuant to federal law, the accompanying facts clearly indicated that extradition would be authorized under section six, and the warrant of the asylum state's governor correctly invoked section six in issuing the warrant. While the Uniform Criminal Extradition Act § 7, requires the warrant to recite the facts necessary for the validity of its issuance, a reasonable construction of this provision does not require the warrant to recite the same law as a basis for its issuance as the demanding governor recites as his authority. As long as the demand contains the correct material facts, and both governors are aware of these facts, and the warrant recites the correct facts and authority for its issuance it should suffice. At this stage the demanding governor's recital of authority is no longer material. See, Ex parte Oxford, 157 Tex. Crim. 512, 249 S.W.2d 917 (1952). When
there is any law under which extradition could be obtained, the recitation of authority in the requisition and warrant should be material only in so far as it indicates whether the asylum state’s governor understood the facts and the extent of his discretion. If the requisition for a non-fugitive is under section six but the warrant invokes federal law it is probable that the asylum state’s governor misunderstood the facts and did not realize that he had a discretionary prerogative to refuse extradition. In this event extradition is illegal. Stobie v. Barger, 129 Colo. 211, 268 P.2d 409 (1954); People ex rel. Swanson v. Fitzsimmons, 2 App. Div. 2d 235, 153 N.Y.S.2d 772 (4th Dep’t 1956). Since no practical method exists for compelling a governor to surrender a fugitive and he has at best only a moral duty to do so, Kentucky v. Dennison, 65 U.S. (24 How.) 66 (1860), his lack of discretion may be of little practical importance; however, it must be assumed that a governor will obey the law. In the instant case, as in Ex Parte Kaufman, supra, the warrant recited the correct authority for its issuance, indicating that the governor of the asylum state understood the facts and the extent of his discretion.

The true basis for the conflict of decisions on the issue raised by the instant case lies in the degree of liberality with which the extradition laws are to be applied by the courts. This ultimately depends upon a value judgment reached by weighing the rights of an individual against the right of society to protect itself against criminal behavior. Extradition laws were designed to foster the efficient administration of justice; they were not enacted to shield criminals from the rightful consequences of their wrongdoing. Appleyard v. Massachusetts, 203 U.S. 222 (1906). Properly construed they prevent state boundaries from becoming barriers to the apprehension of criminals. Biddinger v. Commissioner of Police of New York, 245 U.S. 128 (1917). In view of their purpose it is evident that extradition laws should not be construed narrowly and technically as penal laws, but liberally so as to effect this purpose. Biddinger v. Commissioner of Police of New York, supra. The rights of citizens must be protected but extradition laws should not be so construed as to enable criminals to secure permanent asylum. Appleyard v. Massachusetts, supra. An extradition proceeding does not determine guilt or innocence. The accused is merely turned over to the proper authorities for a trial in the demanding state; there is no reason to believe that his constitutional rights will not be adequately protected in that state.

There is ample precedent for viewing extradition proceedings liberally. An indictment, defective as a pleading, has been held sufficient for extradition purposes because a narrow construction would lead to a miscarriage of justice. Pierce v. Creecy, 210 U.S. 387 (1908). The recital of the wrong date for the commission of a crime in a warrant for extradition does not void the proceedings unless prejudicial to the rights of the accused because the same strict accuracy is not required in state as in usual criminal proceedings. United States ex rel. Jackson v. Meyering, 54 F.2d 621 (7th Cir. 1931), cert. denied, 286 U.S. 542 (1932).

However, extradition laws have been interpreted very strictly in some cases. See United States ex rel. McCLine v. Meyering, 75 F.2d 716 (7th Cir. 1934); Commonwealth ex rel. Spivak v. Heinz, 141 Pa. Super. 158, 14 A.2d 875 (1940). But see Commonwealth ex rel. Taylor v. Superintendent Philadelphia County Prison, 382 Pa. 181, 114 A.2d 343 (1955).
Most of the cases which exhibit the strict approach involve prejudicial treatment of a substantial right of the accused. It is submitted that the proper test is not whether extradition laws should be strictly or liberally construed, but rather would a liberal construction, which manifestly effectuates the purpose of these acts, prejudice a substantial right of the accused. See Stobie v. Barger, supra.

In the present case it is difficult to see what right of the petitioner would have been prejudiced by requiring him to stand trial in Nebraska. The warrant made the purpose of his arrest clear. The Governor of Colorado undoubtedly had authority to cause the arrest of a resident who failed to support his family living in another state; further, there is no reason to believe he would not receive a fair trial in Nebraska. As a result of the instant case, a great deal of time and money has been lost and the petitioner is still liable to extradition. The failure to vindicate the policy behind the criminal sanction diminishes the likelihood that his family will receive financial support until the final extradition proceedings are complete.

The instant decision can be justified only if the Uniform Criminal Extradition Act §§ 3, 7, be construed to require the recitation of the appropriate authority for extradition in the requisition. This requirement is not expressed in the act, and only a strained interpretation of the requirement that the warrant recite the facts upon which it is based could justify this conclusion. No substantial right of a prisoner is protected by this requirement and the purpose of the extradition laws is frustrated. Courts should heed Mr. Justice Holmes' admonition that they are "apt to err by sticking too closely to the words of a law where those words import a policy that goes beyond them." Olmstead v. United States, 277 U.S. 438, 469 (1928) (dissenting opinion). Legislation is more than composition; it is an instrument of government. It should be interpreted in the light of the ends which it is designed to achieve. Frankfurter, Some Reflections on the Reading of Statutes 19 (1947). Adherence to this advice in the present context impels acceptance of the principle enunciated in Hagel v. Hendrix, supra at 329, i.e., "the only question within the field of judicial inquiry is whether jurisdictional facts authorizing extradition properly appear from the requisition and accompanying documents."

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payable from the defendant as a third party tortfeasor under the subrogation provision of the statute. DEL. CODE ANN. tit. 19 § 2363 (1953), as amended, tit. 19 § 2363 (Supp. 1956). Defendant's answer, denying negligence on its part, was amended by adding the affirmative defense of the employer's contributory negligence to bar the subrogated action. Plaintiffs moved to strike the affirmative defense for legal insufficiency, held, granted. A third-party tortfeasor cannot raise as an affirmative defense the employer's contributory negligence in a subrogation action by the employer and his insurer to recover statutory compensation payments made to the injured employee. Marciniak v. Pennsylvania R.R., 152 F. Supp. 89 (D. Del. 1957).

The question was one of first impression in Delaware and could be determined only after resolving an apparent conflict between the subrogation provision of the Delaware Workmen's Compensation Act and general tort law relating to negligence, i.e., contributory negligence is a complete defense to negligence actions. The instant case adheres to the stricter view that subrogation provisions in Workmen's Compensation statutes are to be read literally, in accordance with the plain wording of the statute. Consequently, the employer is said to stand precisely in the same position as would the injured employee had he brought suit, and any defense asserted is considered only in relation to its merit as against the employee. Since the employer's contributory negligence is no defense to the employee's right to recover, by parity of reasoning it does not affect the employer who is merely substituted for the employee through subrogation. Otis Elevator Co. v. Miller & Paine, 240 Fed. 376 (8th Cir. 1917); General Box Co. v. Missouri Util. Co., 331 Mo. 845, 55 S.W.2d 442 (1932); Fidelity & Cas. Co. v. Cedar Valley Elec. Co., 187 Iowa 689, 174 N.W. 709 (1919).

The contrary view is based upon a more liberal construction of subrogation provisions. To allow a negligent employer to recover payments made to an injured employee is deemed inequitable and such an employer may not insulate himself against the "clean hands" doctrine of equity by taking refuge in subrogation and thus escape the consequences of his negligence. American Cas. Co. v. South Carolina Gas Co., 124 F. Supp. 30 (W.D.S.C. 1954); Essick v. City of Lexington, 233 N.C. 600, 65 S.E.2d 220 (1951); Brown v. Southern Ry., 204 N.C. 668, 169 S.E. 419 (1933). In Hekman Biscuit Co. v. Commercial Credit Co., 291 Mich. 156, 289 N.W. 113 (1939), the court even went so far as to impute the negligence of a fellow employee to the employer and thus bar his recovery in a subrogated action. Contra, Western Cas. & Surety Co. v. Shafton, 231 Wis. 1, 283 N.W. 806 (1939).

The conflict presented must be defined in terms of the result obtained under each of the divergent views. To disallow the defense of the employer's contributory negligence is in fact to permit the employer to escape all the consequences for his wrong. On the other hand, to allow the defense is to release the third-party tortfeasor completely from damage liability (or at least grant a substantial reduction of liability) assuming the defense is allowed only to the extent of compensation payments made, see Defendant's Motion for Reargument or Clarification, 152 F. Supp. 89, 91 (D.Del. 1957), since under many statutes (including the Delaware statute) the election by the employee of the compensation remedy will

Courts enforcing strict subrogation reason that the employer, having assumed absolute liability under the Workmen's Compensation Act, should be granted immunity from tort liability, for the absolute liability stands in lieu of any other responsibility to the injured employee. Since the employer is not liable in tort due to the granted immunity, this liability cannot be indirectly re-established by allowing contributory negligence as a defense in a subrogated action against a third-party tortfeasor. Thus the employer's right of subrogation has been held to bar not only the assertion of this affirmative defense, but also attempts to join the employer as a defendant for purposes of indemnity or contribution. Peak Drilling Co. v. Halliburton Oil Well Cementing Co., 215 F.2d 368 (10th Cir. 1954) (indemnity); Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282 (1952) (contribution). This view, although procedurally distinguishable, lends support to the more widely accepted rule. It would follow, then, that there is a logical inconsistency in the North Carolina approach, Essick v. City of Lexington, supra, which bars the joinder of a contributorily negligent employer as a third-party defendant (because his assumption of compensation liability abrogates his tort responsibility to the employee as a joint tortfeasor) but allows the tort defense to affect pro tanto the recovery of compensation payments. Compare Lovette v. Lloyd, 236 N.C. 663, 73 S.E.2d 886 (1953), with Brown v. Southern Ry., supra.

The Minnesota courts have adopted a variation of the liberal view based upon a unique division in the state's subrogation provision. Where the employer and the third-party are engaged in a common enterprise, the employee must elect a remedy. An election of compensation extinguishes his legal right to share in the proceeds of any subsequent action which is brought by the employer to recover the payments due to the employee. Minn. Stat. Ann. § 176.06 (1) (1947). However, when the common enterprise provision does not apply, election is not required and the employee may collect compensation and retain an interest in any action against the third-party. Minn. Stat. Ann. § 176.06 (2) (1947). In the former situation, the defense of contributory negligence is allowed against the employer because the action is solely for his own benefit whereas, in the latter, the defense is rejected since the employee himself would benefit from the judgment and it would be inequitable to allow the employer's contributory negligence to bar the action. Compare Thornton Bros. Co. v. Reese, 188 Minn. 5, 246 N.W. 527 (1933), with Nyquist v. Batcher, 235 Minn. 491, 51 N.W.2d 566 (1952). Thus the defense is denied where the employee retains a real interest in the proceedings, regardless of the fact that the major share of the judgment may still go to the negligent employer as reimbursement.

The more practical approach to the problem may well be found in an acknowledgment of the separate nature of the tort proceeding and the statutory provision for the disbursement of the damages recovered in the action, e.g., Del. Code Ann. tit. 19 § 2363 (b) (1953), as amended, tit. 19 § 2363 (e) (Supp. 1956). The disbursement provision implies that the action against the third-party is prosecuted on behalf of any person entitled to share in the recovery, regardless of whether he is a party to
the action. *Lovette v. Lloyd, supra.* Thus it should make no difference, after compensation has been paid, that the subrogated employer is bringing the suit rather than the employee himself. Neither this provision, nor the fundamental notion of subrogation contemplates any interference with the essential nature of this action as one sounding in tort. The Workmen's Compensation Act controls only the relations between employer and employee, and in providing for disbursement of a damage judgment recovered for a wrong inflicted on the employee, the bounds of that act are not exceeded. As between the employee and the third-party, tort law is exclusively controlling and such a third-party tortfeasor should not be allowed to plead an employer's contributory negligence where such negligence does not impose tort liability upon the employer. Since the employer has no tort liability to his injured employee originally, then none should effectively attach by allowing as a defense his contributory negligence.

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