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Current Legislation and Decisions

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CURRENT LEGISLATION AND DECISIONS

Procedure — Foreign Corporations — Service of Process on Sub-Subsidiary

Plaintiff, an El Salvador corporation, brought suit against Rolls Royce of England, Ltd., the manufacturer of the engines on plaintiff's aircraft, to recover for damages to the plane as a result of a crash in Nicaragua. Service of process on Rolls Royce of England was made by serving summons on an officer of its sub-subsidiary corporation, Rolls Royce, Inc., which was chartered in Delaware. Its stock was wholly owned by Rolls Royce of Canada, Ltd., whose stock was wholly owned by Rolls Royce of England. Rolls Royce of Canada, the actual parent corporation of Rolls Royce, Inc., was not a party to the present suit. Only Rolls Royce, Inc. was licensed to do business in New York, and apparently neither Rolls Royce of Canada nor Rolls Royce of England had any contacts or conducted any business within the state which would subject them to suit except through Rolls Royce, Inc. The New York trial court found that service of summons on an officer of Rolls Royce, Inc. was not sufficient to render Rolls Royce of England amenable to suit.[1] The Appellate Division reversed the trial court's decision by a two-to-one vote,[2] and Rolls Royce of England appealed to the New York Court of Appeals. *Held:* Service of process on an officer of Rolls Royce, Inc. was sufficient to subject Rolls Royce of England, Ltd. to the jurisdiction of the New York court. *Taca Int'l Airlines, S.A. v. Rolls Royce of Eng., Ltd.*, 15 N.Y.2d 97, 256 N.Y.S.2d 129, 204 N.E.2d 329 (1965).

Where the corporation is licensed to do business within the state there is no problem with service of process and jurisdiction. Most states require the appointment of an agent as one of the prerequisites to licensing.[3] When dealing with unauthorized foreign corporations,[4] service may be made under an applicable "long-arm" statute[5] or by service on its agent

[1] Taca Int'l Airlines, S.A. v. Rolls Royce of Eng., Ltd., No. 19962, Sup. Ct. of N.Y., 1st Jud. Dist., 1961.

[2] Taca Int'l Airlines, S.A. v. Rolls Royce of Eng., Ltd., 21 App. Div. 2d 73, 248 N.Y.S.2d 273, *resettled*, 252 N.Y.S.2d 395 (1964). The dissenting judge stated that the trial court's findings justified its holding that Rolls Royce, Inc. maintained complete separateness and independence from Rolls Royce of England, Ltd. 248 N.Y.S.2d at 276.

[3] See, *e.g.*, Cal. Corp. Code § 6403(e).

[4] An unauthorized foreign corporation is one which has not complied with the forum state's licensing statute, and is not authorized to do business within the state.

[5] Usually the secretary of state is deemed the appointed agent of the corporation under these statutes. See, *e.g.*, Tex. Rev. Civ. Stat. Ann. art. 2031(b), § 3 (1964).

doing business within the state.[6] The trouble here is whether the unauthorized corporation has a business agent (one not expressly authorized to receive service of process) within the state at all, and whether the necessary minimal contacts exist with the forum state to satisfy a concept of fair play and substantial justice which is the due process requirement set out in *International Shoe Co. v. Washington*[7] and subsequent cases. Only if this requirement of due process is met is the corporation amenable to suit. Whatever method of service of process is used, it must be the best possible means available which will give notice to the corporation of the pending suit.[8] A special problem arises when the possible contact with the state is a subsidiary of the foreign parent corporation. Earlier Supreme Court cases,[9] not overruled by *International Shoe*, prevent application of its rule of minimal contacts as a criteria for service of process, to gain jurisdiction over the foreign parent corporation, because the acts of the subsidiary are presumed not to be those of the parent.[10] The test for determining the question of jurisdiction over a parent corporation by serving summons on a subsidiary doing business within a state differs from the tests for tort liability of the parent corporation, liability for taxes, or for submission to the regulatory statutes of a state. The basis for this differentiation is that a determination of jurisdiction does not affect the substantive rights of the parties, but merely requires suit in another jurisdiction, a matter which turns on considerations of "traditional notions of fair play and substantial justice," and "an estimate of the inconveniences. . . ."[11]

The leading case in the area of parent-subsidiary relationships, so far as jurisdictional issues are concerned, is *Cannon Mfg. Co. v. Cudahy Packing Co.*[12] There the Supreme Court stated the rule that complete ownership and domination of the subsidiary corporation were not sufficient con-

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[6] In the present case, the New York Court of Appeals found that Rolls Royce, Inc., a licensed corporation, was an agent of its parent. See N.Y. Civ. Prac. § 302(a)(1): "A court may exercise personal jurisdiction over any non-domiciliary . . . if, in person or through an agent, he: (1) transacts any business within the state. . . . "

[7] 326 U.S. 310, 316 (1945).

[8] Mullane v. Central Hanover Bank & Trust, 339 U.S. 306, 314-15 (1950):

> "The fundamental requisite of due process of law is the opportunity to be heard." . . . This right to be heard has little reality of worth unless one is informed that the matter is pending. . . . An elementary and fundamental requirement of due process . . . is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. . . . But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.

[9] *E.g.*, Consolidated Textile Corp. v. Gregory, 289 U.S. 85 (1933); Cannon Mfg. Co. v. Cudahy Packing Co., 267 U.S. 333 (1925); Philadelphia & R. Ry. v. McKibbin, 243 U.S. 264 (1917); Peterson v. Chicago, R.I. & Pac. Ry., 205 U.S. 364 (1907).

[10] See cases cited note 9 *supra*. The presumption is rebuttable. See notes 13-15 *infra*.

[11] International Shoe Co. v. Washington, *supra* note 7, at 316-17. See Cannon Mfg. Co., *supra* note 9, at 337; American Chain Co. v. Stewart-Warner Speedometer Corp., 56 F.2d 614 (S.D.N.Y. 1929); LaVarre v. International Paper Co., 37 F.2d 141 (E.D.S.C. 1929). See also Ballantine, Corporations § 140 (Rev. ed. 1946). If a corporation has sufficient contact with a state to be covered by the state's regulatory statutes and presumably its tax statute, it probably will be subject to service of process in that state. See C. T. System Publication, *Three Kinds of Doing Business* 1-2 (Doing Business Series 1965).

[12] 267 U.S. 333 (1925).

tacts with a state to subject the parent to the jurisdiction of a state court so long as the separate corporate structure of the subsidiary was observed in all respects.[13] Under this doctrine many courts have held that corporate operations through a subsidiary did not necessarily constitute doing business within a state, so as to render the parent amenable to suit by serving summons on its subsidiary.[14] Only when a court determines that the acts of the subsidiary are in reality those of the parent does the doctrine of *International Shoe* come into effect.[15] Before a court will hold that jurisdiction may be asserted over the parent by serving summons on the subsidiary, it must be shown that the two corporations are not in fact distinct entities, with each transacting business on its own behalf.[16]

Where the courts have followed *Cannon* and refused to look beyond the form of corporate separation, the parent has escaped the jurisdiction of the court.[17] Thus, a foreign corporation is not regarded as doing business within a state merely because its products are sold through a subsidiary as long as it is done by the subsidiary as an independent enterprise.[18] Eight years after *Cannon,* the Supreme Court, in *Consolidated Textile Corp. v. Gregory,*[19] held that a foreign parent was not amenable to suit, even though its wholly owned subsidiary was the instrumentality used to market its products in the state, if corporate separation was maintained and the subsidiary did not act as an agent.[20] It has also been held that a foreign parent was not doing business merely because it supplied the means for carrying on the business of the subsidiary.[21] Some courts have

[13] *Id.* at 337: "The corporate separation, though perhaps merely formal, was real. It was not pure fiction." The separation mentioned in *Cannon* was that the two corporations, one the parent/manufacturer and the other, the subsidiary/distributor and seller, meticulously maintained separate books, and that both were financially independent of the other, at least in form.

[14] See, *e.g.,* Consolidated Textile Corp. v. Gregory, *supra* note 9; Gravely Motor Plow & Cultivator Co. v. H. V. Carter Co., 193 F.2d 158 (9th Cir. 1951); Goldlawr, Inc. v. Shubert, 169 F. Supp. 677 (E.D. Pa. 1958), *aff'd,* 276 F.2d 614 (3d Cir. 1960); State St. Trust Co. v. British Overseas Airways Corp., 144 F. Supp. 241 (S.D.N.Y. 1956); Anderson v. British Overseas Airways Corp., 144 F. Supp. 543 (S.D.N.Y. 1956); Shedd v. Willys Motors, 143 F. Supp. 391 (S.D.N.Y. 1956); Berkman v. Ann Lewis Shops, 142 F. Supp. 417 (S.D.N.Y. 1956), *aff'd,* 246 F.2d 44 (2d Cir. 1957); LaVarre v. International Paper Co., *supra* note 11; Zimmers v. Dodge Bros., 21 F.2d 152 (N.D. Ill. 1927); Vaughn Motors, Inc. v. Societe Anonyme Des Automobiles Peugeot, 30 Misc.2d 1047, 220 N.Y.S.2d 292 (Sup. Ct. 1961); Rosario v. Public Serv. Coordinated Transp., 270 App. Div. 169, 59 N.Y.S.2d 50 (1945).

[15] Curtis Publishing Co. v. Cassel, 302 F.2d 132 (10th Cir. 1962); Harris v. Deere & Co., 223 F.2d 161 (4th Cir. 1955); Steinway v. Majestic Amusement Co., 179 F.2d 681 (10th Cir. 1949), *cert. denied,* 339 U.S. 947 (1950); Lawlor v. National Screen Corp., 10 F.R.D. 123 (E.D. Pa. 1950). *But see* Velandra v. Regie Nationale Des Usines Renault, 336 F.2d 292 (6th Cir. 1964), suggesting that ownership of a subsidiary corporation is one contact, not sufficient in itself, with the state to be taken along with others as a means of determining minimal contacts under the doctrine of International Shoe Co. v. Washington. See note 7 *supra* and accompanying text.

[16] Anderson v. British Overseas Airways Corp., *supra* note 14.

[17] See, *e.g.,* Consolidated Textile Corp. v. Gregory, *supra* note 9; Harris v. Deere & Co., *supra* note 15; Favell-Utley Realty Co. v. Harbor Plywood Corp., 94 F. Supp. 96 (N.D. Cal. 1950). See cases cited notes 13-15 *supra.*

[18] Consolidated Textile Corp. v. Gregory, *supra* note 9; Cannon Mfg. Co., *supra* note 12; Bank of America v. Whitney Cent. Nat'l Bank, 261 U.S. 171 (1923); Vaughn Motors, Inc. v. Societe Anonyme Des Automobiles Peugeot, *supra* note 14.

[19] 289 U.S. 85 (1933).

[20] *Id.* at 88.

[21] Philadelphia & R. Ry. v. McKibben, *supra* note 9; Peterson v. Chicago, R.I. & Pac. Ry., *supra* note 9; Berkman v. Ann Lewis Shops, 246 F.2d 44 (2d Cir. 1957).

felt bound by the *Cannon* case, even though the result seemed inequitable. In *Harris v. Deere & Co.*,[22] the court stated:

> The fiction of different corporate entities ought not to permit the manufacturer, in such case, to avoid suit in the states where its product is being sold and where the wholly owned and controlled subsidiary is representing it just as truly as if it were an agent in the legal sense. . . .[23]

However, it was held that *Cannon* was controlling and the parent was not amenable to suit. Other courts and several writers have also expressed dislike for the rule of the *Cannon* case.[24]

Various courts have held that service of process on a subsidiary was sufficient to subject a foreign parent corporation to their jurisdiction when the subsidiary was found to be an agent of the parent,[25] or that the parent and subsidiary had not maintained their separate corporate entities[26]—that the subsidiary had no separate existence and was no more than a department, instrumentality, business conduit, or bookkeeping entry for the parent,[27] or was undercapitalized.[28] Other courts, using criteria expressly rejected by the Court in *Cannon*,[29] have held the parent subject to suit on the basis of an "undue degree of control."[30] In all these cases the courts have looked beyond form and have gone to the substance of the corporate structure,[31] although some cases have purported to look only at form.[32] The question presented in all of these cases was whether the business done in the state by the subsidiary was for its own account or that of the parent.[33] It is only where the corporations have commingled their affairs

[22] 223 F.2d 161 (4th Cir. 1955).

[23] *Id.* at 163.

[24] See, *e.g.*, Velandra v. Regie Nationale Des Usines Renault, *supra* note 15; Steinway v. Majestic Amusement Co., *supra* note 15; Waldron v. British Petroleum Co., 149 F. Supp. 830 (S.D.N.Y. 1957); Pergament v. Frazer, 93 F. Supp. 9 (E.D. Mich. 1949), *amended and aff'd*, 224 F.2d 80 (6th Cir. 1955); Foster, *Personal Jurisdiction Based on Local Causes of Action*, 1956 Wis. L. Rev. 522, 563; Comment, 104 U. of Pa. L. Rev. 381 (1955). See note 51 *infra*.

[25] See, *e.g.*, *In re* Siemens & Halske A.G., 155 F. Supp. 897 (S.D.N.Y. 1957); Bator v. Boosey & Hawkes, 80 F. Supp. 294 (S.D.N.Y. 1948). See Ballantine, *Separate Entity of Parent and Subsidiary Corporations*, 14 Calif. L. Rev. 12, 18 (1925) where he states:

> What is meant by such terms as "adjunct," "agency," "instrumentality," "creature" or "mouthpiece"? . . . The word "agency" is often used as a synonym of "adjunct," whatever that may mean, and as descriptive of a relation variously defined in the cases as "alter ego," "alias," "device," "dummy," "branch," "tool," "corporate double," "business conduit," "instrumentality," etc., but all in the sense of "means" through which a corporation's own business is actively prosecuted.

[26] See, *e.g.*, United States v. Buffalo Weaving & Belting Co., 155 F. Supp. 454 (S.D.N.Y. 1956); Gray v. Eastman Kodak Co., 53 F.2d 864 (E.D. Pa. 1930); State *ex rel* Grinnell Co. v. MacPherson, 62 N.M. 308, 309 P.2d 981, *cert. denied*, 355 U.S. 825 (1957).

[27] See, *e.g.*, Massey-Harris-Ferguson, Ltd. v. Boyd, 242 F.2d 800 (6th Cir. 1957), *cert. denied*, 355 U.S. 806 (1957) (instrumentality or adjunct); Mas v. Orange-Crush Co., 99 F.2d 675 (4th Cir. 1938) (bookkeeping entry).

[28] See Rabinowitz v. Kaiser-Fraser Corp., 198 Misc. 707, 96 N.Y.S.2d 642 (Sup. Ct. 1950), *aff'd*, 278 App. Div. 584, 102 N.Y.S.2d 815, *aff'd*, 302 N.Y. 892, 100 N.E.2d 177 (1951). See also note 40 *infra*.

[29] See note 13 *supra*.

[30] See, *e.g.*, Massey-Ferguson, Ltd., v. Intermountain Ford Tractor Sales Co., 325 F.2d 713, 714 (10th Cir. 1963): "[T]he appellant Canadian corporation was enabled to and did direct 'the detailed activities of . . . [its subsidiary].'"

[31] See, *e.g.*, Massey-Harris-Ferguson, Ltd. v. Boyd, *supra* note 27; Focht v. Southwestern Skyways, Inc., 220 F. Supp. 441 (D. Colo. 1963), *aff'd*, 336 F.2d 603 (10th Cir. 1964).

[32] See, *e.g.*, Curtis Publishing Co. v. Cassel, *supra* note 15.

[33] See Bach v. Friden Calculating Mach. Co., 167 F.2d 679 (6th Cir. 1948); Commonwealth *ex rel* Hawkins v. Southern Ry., 193 Ky. 474, 237 S.W. 11 (1921), stating that the question is one of who is doing the business rather than one of what constitutes doing business.

and the subsidiary is in fact no more than an agent or business conduit of the parent, or where the parent so controls the subsidiary that it may be used as an agent or instrumentality[34] that the courts will disregard corporate form and prevent it from acting as a bar to direct suit against the parent.[35] This is done, for example, where the subsidiary has obviously surrendered its freedom of corporate action in regard to matters usually and lawfully within its control.[36]

In *Taca* the Appellate Division held that Rolls Royce, Inc. was a mere department of Rolls Royce of England, acting as its exclusive sales agent in the United States.[37] The court, in its opinion, did nothing more than list the various facts on which it based its finding that Rolls Royce, Inc. was an agent. The evidence only established the facts that Rolls Royce of England owned the sub-subsidiary through its ownership of Rolls Royce of Canada, had some directors in common with the sub-subsidiary, held frequent conferences with the executives of the subsidiary and sub-subsidiary, gave Rolls Royce, Inc.'s employees the necessary technical training, furnished all sales literature, and that the net income of Inc. went to Rolls Royce of Canada and, as affected by its operations, appeared in the consolidated earnings statement and profit and loss statement of Rolls Royce of England. It is submitted that no more than the exercise of power which is consistent with corporate ownership was shown. Thus, in form at least, Rolls Royce of England was not "doing business" in New York, but was deriving economic benefit from the state through corporate ownership of its sub-subsidiary, Rolls Royce, Inc. Under the doctrine of *Cannon* and other cases,[38] this is not sufficient to establish that the two corportions were not separate entities. Further, the *Rabinowitz* case,[39] a New York decision cited as controlling by the court, differs in two major respects. First, it dealt with subsidiaries rather than a sub-subsidiary, the control and direction of the subsidiary being more direct, at least in form. Secondly, the subsidiaries were undercapitalized.[40] In *Rabinowitz* the parent manufactured automobiles and sold them to one of its subsidiaries, the sales corporation, for which it was paid by the subsidiary. The plaintiff contended, and the court found, that the parent and its four subsidiaries were carrying on business as an integrated set-up and that the sales corporation was an agent or department of the parent; that the sales corporation was

[34] See, *e.g.*, Gray v. Eastman Kodak Co., *supra* note 26; State *ex rel* Grinnell Co. v. MacPherson, *supra* note 26 (parent and subsidiaries held themselves out as one in advertising).

[35] See, *e.g.*, Waldron v. British Petroleum Co., *supra* note 24; Pergament v. Frazer, *supra* note 24. *But see* Harris v. Deere & Co., *supra* note 22, expressing dislike but refusing to pierce the corporate veil. See text accompanying notes 22-24 *supra*. See generally, Comment, 51 Calif. L. Rev. 574 (1963).

[36] See, *e.g.*, Chicago, M. & St. P. Ry. v. Minneapolis Civic & Commerce Ass'n, 247 U.S. 490 (1918), in which joint parent corporations controlled the rates charged by their subsidiary, which were in excess of their own line haul rates. A contract between the three of them deprived the subsidiary's board of directors of normal legal control over its stock, finances, and business relations with third parties.

[37] 256 N.Y.S.2d at 130, 204 N.E.2d at 330.

[38] See cases cited note 9 *supra*.

[39] Rabinowitz v. Kaiser-Frazer Corp., *supra* note 28.

[40] *Id.* at 645. "[T]he value of the assets of the Sales Corporation [one of the subsidiaries] did not even equal the amount of the loan."

dependent financially on the parent and could not stand on its own feet; that the subsidiary had not been paying interest on advances totaling seven million dollars made by the parent; that less than fifteen per cent of the consolidated earnings and assets was attributed to all the subsidiaries combined; that the subsidiary sales corporation never paid dividends; that banks required the parent to guarantee repayment of loans made to the subsidiary; that the two corporations had directors in common; and that the parent paid the entire salary of the sales subsidiary's executive officers who were also officers of the parent, and in a few cases one of the subsidiaries had paid the entire salary of officers common to both. The court found that this, in itself, showed disregard of corporate form by the corporations themselves.[41] In *Taca* there was a finding by the Appellate Division that Rolls Royce, Inc. was independent in form,[42] and no finding, as in *Rabinowitz,* that it was undercapitalized or financially dependent on its parent; no finding that Rolls Royce of England ever made its sub-subsidiary loans without interest or had to guarantee repayment of any bank loans made to Rolls Royce, Inc.; and no finding that the salaries of their common directors were paid totally by only one of the two corporations. To hold that Rolls Royce, Inc. was an agent of Rolls Royce of England for the purpose of service of process, the Court of Appeals should have shown that the control exercised by Rolls Royce of England over its sub-subsidiary was through contracts, financial domination, or other means distinguishable from mere indicia of ownership.[43]

The only other reported case involving service of process on a sub-subsidiary corporation, *United Steelworkers of America v. Copperweld Steel Co.,*[44] held that the parent corporation was not doing business within the state so as to render it amenable to suit by serving summons on its sub-subsidiary. The court directed its attention to the question of whether the parent so controlled and dominated the sub-subsidiary as to deprive it of a separate existence.[45] *Taca,* therefore, is the first reported case where service on a sub-subsidiary was held sufficient to bind the parent corporation. Further, the court relied to some extent upon transactions between Rolls Royce of Canada and Rolls Royce, Inc. as grounds for sustaining service.[46] Ignoring the separate corporate form, the court considered the realities of the corporate structure and found an integrated set-up from

[41] *Id.* at 643-45.

[42] 256 N.Y.S.2d at 130, 204 N.E.2d at 330: "Inc., though nominally independent, actually functioned as a department of its British parent, Ltd. . . . [T]he claimed independence of Inc. was illusory and . . . despite form and appearance Inc. was a mere sales agent of Ltd."

[43] An excellent example of this procedure is Goodman v. Pan Am. World Airways, 1 Misc. 959, 148 N.Y.S.2d 353 (Sup. Ct.), *aff'd mem.,* 2 App. Div. 2d 707, 153 N.Y.S.2d 600, *motion for leave to appeal denied,* 2 App. Div. 2d 781, 154 N.Y.S.2d 839 (1956). See also Curtis Publishing Co. v. Cassel, *supra* note 15.

[44] 230 F. Supp. 383 (W.D. Pa. 1964).

[45] *Id.* at 387-89. The court found that the corporations maintained their formal separation, and while they had common directors the question was whether the sub-subsidiary was the alter-ego of the parent. "[D]efendant Fulton the parent has not exercised such complete domination of the financies, policies and business practices of . . . [its sub-subsidiary] so as to deprive it of a separate existence." It should be pointed out that the wholly owned subsidiary owned only 48.45% of the sub-subsidiary's common stock and 51% of its non-cumulative preferred stock.

[46] 256 N.Y.S.2d at 131-32, 204 N.E.2d at 330-31.

which Rolls Royce of England was doing business within the state.[47] In so doing, the court went further than any previous court in "piercing the corporate veil." The opinion that corporate separation should not act as a bar to holding a foreign parent corporation to suit appears to be a step closer to recognition. Possibly, the minimal contacts theory[48] will soon apply in the area of parent-subsidiary relationships as in other areas of doing business by a foreign corporation. The court expressly declined to decide whether Rolls Royce of England could have been held to suit on the basis of the minimal contacts theory.[49] However, ownership of a sub-subsidiary, through which a parent is deriving economic benefit from the state, should be sufficient to establish the necessary minimal contacts, even though the contact is through an "independent" corporation doing business within the jurisdiction.[50] Under either the minimal contacts theory or the rule followed in this case, the result would be the same. As a matter of choice, the minimal contacts theory seems to be better.[51] It has the advantage of avoiding conflict with the *Cannon* doctrine[52] and obviates the necessity of paying "lip-service" to *Cannon* but ignoring its rule of formal separation, while at the same time preserving the theory of corporate entities.[53] As it stands today each case will be determined on its own facts,[54] and whether the corporation will be held amenable to suit will depend

[47] *Id.* at 131, 204 N.E.2d at 330-31.

[48] As embodied in International Shoe Co. v. Washington, *supra* note 7.

[49] 256 N.Y.S.2d at 132, 204 N.E.2d at 331: "Decision of this appeal does not require us to decide whether . . . Ltd. treated as a corporation separate from Inc. has substantial enough contacts with our State . . . to subject Ltd. to a judgment in personam."

[50] At least Rolls Royce, Inc. was independent in form if not in substance. See note 42 *supra*.

[51] This sentiment has been expressed many times by courts and writers. See Velandra v. Regie Nationale Des Usines Renault, *supra* note 15; Harris v. Deere & Co., *supra* note 22; Steinway v. Majestic Amusement Co., *supra* note 15; Waldron v. British Petroleum Co., *supra* note 24; Pergament v. Frazer, *supra* note 24; Foster, *Personal Jurisdiction Based on Local Causes of Action*, 1956 Wis. L. Rev. 522, 563; Comment, 51 Calif. L. Rev. 574 (1963). As stated in Waldron v. British Petroleum Co. at 834-35:

> Does the fact that this large business entity, for tax reasons . . . decides to fragmentize its operations into . . . subsidiaries, make the resulting operations of the subsidiaries any the less a part of transaction of business by . . . [the parent]? . . . [T]here is no reason to carry the fiction to the extreme of saying that a corporation which has a wholly owned subsidiary performing services in the local jurisdiction . . . is in fact not transacting business in that jurisdiction. . . .

And in Pergament v. Frazer at 12:

> [T]he courts do not and should not encourage the creation of corporate empires which have subsidiaries trading on the strength of the main organization's name . . . only to have those who deal with . . . the subsidiaries, learn that when question of suit arises it is necessary for the offended party to travel across the continent . . . in order to find a jurisdiction where his suit may be tried.

[52] *Compare* Massey-Ferguson, Ltd. v. Intermountain Ford Tractor Sales Co., *supra* note 30, *with* Harris v. Deere & Co., *supra* note 51.

[53] Applying the minimal contacts theory to a parent-subsidiary situation would eliminate the need to "pierce the corporate veil" as the parent has the necessary contact through its subsidiary. See Velandra v. Regie Nationale Des Usines Renault, *supra* note 15, where the court advanced much the same view as is advocated here. In the absence of a parent-subsidiary relationship, the criterion to hold a foreign corporation to suit is the same. See Hanson v. Denckla, 357 U.S. 235, 253 (1958): "[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." A parent corporation meets these requirements when its subsidiary operates within the state.

[54] National Bond Fin. Co. v. General Motors Corp., 341 F.2d 1022 (8th Cir. 1965); United Steelworkers of America v. Copperweld Steel Co., *supra* note 44; Focht v. Southwestern Skyways, Inc., *supra* note 31.

on whether the plaintiff has satisfied the court that the two corporations are not in fact separate.[55]

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[55] Anderson v. British Overseas Airways Corp., *supra* note 14; Dam v. General Elec. Co., 111 F. Supp. 342 (E.D. Wash. 1953). See also text accompanying notes 15 & 16 *supra*.

Judgments — Collection of Interest Under the Federal Tort Claims Act — Are Individual Awards Final Judgments?

Following an airplane collision over Maryland involving a government aircraft, the survivors of the pilot and the survivors of the co-pilot brought two separate actions against the United States under the Federal Tort Claims Act.[1] The two suits were joined for trial and each group of survivors received a judgment in excess of 100,000 dollars,[2] although with one exception no individual survivor obtained an award in excess of 100,000 dollars.[3] No copies of the transcript of the judgments were filed with the General Accounting Office as required to obtain interest on a judgment under 31 U.S.C. § 724(a).[4] Instead, nine months later, plaintiffs, survivors of the pilot, brought suit for interest on the judgment pursuant to 28 U.S.C. § 2411(b), which applies to judgments in excess of 100,000 dollars and does not require the filing of a judgment transcript.[5] *Held:* Each individual award within the judgment is a separate final judgment for the purposes of interest and, therefore, is governed by 31

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[1] Federal Tort Claims Act, ch. 753, 60 Stat. 842 (1946) (codified in scattered sections of 28 U.S.C.).

[2] The pilot of the National Guard plane was held to be a civilian "caretaker" and an employee of the United States within the meaning of the Federal Tort Claims Act. United States v. Maryland *ex rel.* Meyer, 322 F.2d 1009 (D.C. Cir.), *cert. denied*, 375 U.S. 954 (1963). However, in a similar case, Maryland *ex rel.* Levin v. United States, 381 U.S. 41 (1965), the Supreme Court ruled that a civilian caretaker was a state, rather than a federal employee. See Note, 31 J. Air L. & Com. 42 (1965).

[3] Mary Jane Meyer $85,000
Paul Jeffery Meyer $25,000
Susan Lynn Meyer $30,000
Pamela Ann Meyer $30,000
Vance Lewman Brady $175,000
Virginia Brady $35,000
Kendall Jesse Brady, Jr. $38,000
Austin F. Canfeld, administrator $2,000

[4] 75 Stat. 1526 (1961), 31 U.S.C. § 724(a) (1964):

> There are appropriated, out of any money in the Treasury . . . such sums as may on and after July 27, 1956 be necessary for the payment, not otherwise provided for, as certified by the Comptroller General, of judgments (not in excess of $100,000 in any one case) rendered by the district Courts and the Court of Claims against the United States which have become final. . . . *Provided,* That, whenever a judgment of a district court to which the provisions of section 2411 (b) of Title 28 apply, is payable from this appropriation, interest shall be paid thereon only when such judgment becomes final after review on appeal or petition by the United States, and then only from the date of filing of the transcript thereof in the General Accounting Office. . . . *Provided further,* That whenever a judgment rendered by the Court of Claims is payable from this appropriation, interest payable thereon in accordance with section 2516 (b) of Title 28 shall be computed from the date of the filing of the transcript thereof in the General Accounting Office.

[5] 28 U.S.C. § 2411 (b) (1964):

> Except as otherwise provided in subsection (a) of this section, on all final judgments rendered against the United States in actions instituted under section 1346 of this title, interest shall be computed at the rate of 4 per centum per annum from the date of the judgment up to, but not exceeding, thirty days after the date of approval of an appropriation Act providing for payment of the judgment.

U.S.C. § 724(a) rather than 28 U.S.C. § 2411(b). *United States v. Maryland ex rel. Meyer*, 349 F.2d 693 (D.C. Cir. 1965).

The basis for an award of interest on a judgment, in the majority of state jurisdictions, is statutory rather than common law.[6] The sovereign must give its consent to be sued[7] and the correlative proposition that the sovereign must also consent to any award of interest follows. The Supreme Court stated the well established maxim in *Smyth v. United States*[8] that unless there is a statute to the contrary, interest may not be awarded against the Government. The adoption of the Federal Tort Claims Act as a broad waiver of governmental immunity signaled the need for a further waiver of immunity in the payment of interest. Subsequently, in 1948, Congress provided for the payment of interest on final judgments against the United States.[9] However, from the Government's standpoint, 28 U.S.C. § 2411(b) presented an expensive and time consuming procedure with salient deficiencies. Three of the primary difficulties associated with the statute were:[10]

1. The congressional process for passing appropriations to pay judgments against the Government was sometimes dilatory and resulted in an increased cost of interest to the United States and an inconvenience to the successful litigant.

2. While the handling of requests for appropriations was routine, it did absorb a certain amount of time.

3. There existed a wide variance between the payment of interest between the Court of Claims and the district courts.[11]

For these reasons, Congress acted to simplify the collection of interest on judgments against the Government by enacting 31 U.S.C. § 724(a) as a modification of 28 U.S.C. § 2411(b). The important change made is the requirement that a transcript of the judgment be filed before interest will begin to run. However, because Congress did not wish to lose all control over these appropriations, only those judgments which are "not in excess of $100,000 in any one case" are payable from the separate permanent appropriation.[12] Those judgments in excess of 100,000 dollars require no filing of a judgment transcript, and are to be paid by special congressional appropriations, the interest being computed under the provisions of 28 U.S.C. § 2411(b).

The committee hearings which preceded the adoption of 31 U.S.C. §

[6] Note, *Interest on Verdicts and Judgments in State and Federal Courts*, 38 Notre Dame Law. 58 (1962).

[7] Kawananakoa v. Polyblank, 205 U.S. 349 (1907).

[8] 302 U.S. 329 (1937).

[9] 28 U.S.C. § 2411(b) (1964), *supra* note 5.

[10] *Hearings on H. 400 Before the Subcommittee of the House Committee on Appropriations*, 84th Cong., 2d Sess., pt. 2, at 883-89 (1956).

[11] Interest was paid on judgments rendered by the Court of Claims only when the United States appealed and a transcript of the judgment was filed with the Treasury Department. Interest was paid on district court judgments from the date of the judgment regardless of whether the Government appealed.

[12] See note 10 *supra*. In referring to a previous proposal similar to 31 U.S.C. § 724(a) which had been defeated, Mr. Rappaport, Assistant Director of the Bureau of Budget, in testimony before the House Subcommittee on Appropriations said "it seems to indicate that the Congress is unwilling to relinquish completely its control over appropriations for the payment of judgments."

724(a) revealed that during the years 1954-1955, the largest number of appropriation requests were derived from the Federal Tort Claims Act.[13] Except where the Federal Tort Claims Act specifically provides for a deviation from state law, the liability of the Government is to be determined by the substantive law of the state where the tort occurs.[14] In wrongful death actions under the act, the courts have applied the respective state statutes in determining the nature of the right created,[15] the basis for recovery,[16] the liability of the Government,[17] and the persons for whose benefit the suit is brought.[18] Further, the question of who must bring the action also depends upon the substantive law of the state.[19] This means that state law governs both the form of the action and the identity of the parties who are allowed to sue.[20] The Supreme Court has stated that, "it seems sufficient to note that Congress has been specific in those instances where it intended the federal courts to depart completely from state law."[21] Since there is no federal statute defining a federal court judgment in an action under the act, the logical conclusion would seem to be that the federal courts would follow the respective state practice.

The majority of the states follow the general rule that there can be only one final judgment in a case and it must dispose of the entire case as to all the issues.[22] A case is a judicial entirety which, when conducted to a determination, results in a judgment.[23] However, there may be numerous separate and distinct causes of action contained in one case and, as one court has pointed out, there is a recognizable difference between a case and several causes of action incorporated in a case.[24] The joining of different causes of action into one case is usually an advantagous procedure both for the courts and a defendant who is subject to multiple claims. It is important to note that piecemeal litigation of one cause of action which could lead to several judgments and several executions is disfavored in the federal courts.[25] Perhaps for this reason one court held that a single

[13] Hearings before the House Subcommittee on Appropriations, *supra* note 10, at 885.

[14] Richards v. United States, 369 U.S. 1 (1962). 28 U.S.C. § 1346(b) (1951):

> Subject to the provisions of chapter 171 of this title, the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

[15] Betts v. Southern Ry., 71 F.2d 787 (4th Cir. 1934).

[16] Maryland *ex rel.* Burkhardt v. United States, 165 F.2d 869 (4th Cir. 1947).

[17] Alaniz v. United States, 257 F.2d 108 (10th Cir. 1958).

[18] United States v. Massachusetts Bonding & Ins. Co., 227 F.2d 385 (1st Cir. 1955).

[19] Campbell v. Pacific Fruit Express Co., 148 F. Supp. 209 (S.D. Idaho 1957).

[20] Kaufman v. Service Trucking Co., 139 F. Supp. 1 (D. Md. 1956).

[21] Richards v. United States, *supra* note 14, at 16.

[22] Radio Station WOW v. Johnson, 326 U.S. 120 (1945); De Vally v. Kendall De Vally Operalogue Co., 220 Cal. 742, 32 P.2d 638 (1943). See also 49 C.J.S. *Judgments* § 65 (1947).

[23] North v. Hawkinson, 324 S.W.2d 733 (Mo. 1959).

[24] Blaise v. Bovin, 173 Misc. 963, 18 N.Y.S.2d 716 (N.Y. City Ct. 1939).

[25] Commonwealth Ins. Co. v. O. Henry Tent & Awning Co., 273 F.2d 163 (7th Cir. 1959). For example: *A* has a fire insurance policy with *B* Company. *A's* house is destroyed by fire and he claims his loss is $30,000. *B* offers to pay only $14,000. *A* is awarded $14,000 on a partial summary

ruling containing separate and distinct sums does not create separate and distinct judgments as to each sum.[26] However, separate final judgments may be proper in a multiple party or joinder of actions case. Freeman, in his text on judgments, stated:

> If several plaintiffs properly join, but their causes of action are separate and distinct and their damages may be different, the judgment should not be for an aggregate sum but should segregate and award to each the damages or relief to which he is properly entitled.[27]

However, he drew a distinction concerning judgments in a wrongful death action because the amount recovered is considered to be a single fund for the reimbursement of the damage suffered by the plaintiffs individually. Since there is only one fund, there would be only one cause of action. The few jurisdictions which have considered the question are in agreement that the test used to determine if separate judgments are proper is whether a separate action could have been maintained by each of the plaintiffs.[28] Thus, where the action is severed,[29] where there is a permissive joinder of two separate causes of action,[30] or where there is a consolidation of two actions,[31] it is recognized that separate judgments are proper and may even be necessary.[32] The case of *United States v. Harue Hayashi*[33] illustrated the application of a separate judgment situation. The wife and children had permissively joined in a suit for a wrongful death, as permitted by Hawaiian law. The children were individually awarded sums less than 100,000 dollars, but which totaled over 100,000 dollars. The Fiscal Assistant Secretary of the Treasury Department requested an opinion from the Comptroller General on the payment of the judgment. In his reply, the Comptroller General recognized that each of the children could have brought a separate action, and that any award less than 100,000 dollars was to be paid from the appropriation set up by 31 U.S.C. § 724(a).[34] Reliance was placed on the primary purpose of the appropriation to promptly pay the judgments and thereby reduce the interest cost. The Comptroller General did not consider whether a distinction should be made between a permissive and compulsory joinder.

The action in the instant case was instituted under the Maryland

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judgment, and an accompanying execution. *B* appeals, and while the appeal is pending, *A* receives another judgment and execution for $16,000. It is obvious that there need have been only one judgment and one execution.

[26] Chicago Trust Co. v. Daniel Boone Coal Corp., 58 F.2d 305, 312 (E.D. Ky. 1931).

[27] Freeman, Judgments 175 (5th ed. 1925).

[28] Berry v. St. Louis & S.F.Ry., 118 Fed. 911 (C.C.D. Kan. 1902). Irwin v. Wood, 7 Colo. 477, 4 Pac. 783 (1884). Emmco Ins. Co. v. Aetna Cas. & Sur. Co., 86 So. 2d 249 (La. Ct. App. 1956). Caton v. Flig., 343 Ill. App. 99, 98 N.E.2d 162 (1951).

[29] Kriser v. Rodgers, 195 App. Div. 394, 186 N.Y. Supp. 316 (1921).

[30] Lewis v. Bricker, 235 Mich. 656, 209 N.W. 832 (1926).

[31] Frankel v. Burke's Excavating, Inc., 223 F. Supp. 945 (E.D. Pa. 1963).

[32] Irwin v. Wood, *supra* note 28. For example: *A*, while driving his car, strikes *B*, and also *C*'s parked car. If there were only one judgment in favor of *B* and *C* jointly, a reversal by the appellate court of one cause of action would result in the whole judgment being reversed.

[33] 282 F.2d 599 (9th Cir. 1960).

[34] 40 Decs. Comp. Gen. 307, 308 (1960): "The primary purpose in establishing the appropriation was to provide for the prompt payment of judgments and to thereby eliminate or greatly reduce the costs of interest thereon."

Wrongful Death Statute which allows only one action to be brought.[35] At the time the suit was commenced, the statute provided that "every such [wrongful death] action shall be brought by and in the name of the state of Maryland for the use of the person or persons entitled to damages."[36] All parties seeking compensation must join together and failure to do so bars any subsequent action.[37] The statute creates only one cause of action and one case which should culminate in one judgment. The procedure followed requires the jury to assess the total liability of the defendant and then to apportion the amount recovered between the claiming parties.[38] However, unless the defendant can show that a failure to apportion the damages has been to his detriment, it is not reversible error for the jury to fail to do so.[39] In the present case the district court ruled that 31 U.S.C. § 724(a) was not applicable to this action.[40] Following the previously discussed rules on judgments the court said that "the question resolves itself into this: was the judgment involved in this case for less or more than $100,000."[41] The court reasoned that under the Federal Tort Claims Act, the nature of the action was governed by Maryland law, and since Maryland permits only one action to be brought, there was only one judgment containing individual awards. In reversing the trial court, the court of appeals stated that "judgment 'in any one case' does not necessarily mean in one law suit without regard to the character of the judgment as it bears on the problem of interest."[42] The court reasoned that 31 U.S.C. § 724(a) was to be applied in conformity with its own purpose, and that Maryland's joinder requirement had no bearing on the Government's liability for interest. Previous cases in which 31 U.S.C. § 724(a) was considered had little or no bearing on the specific outcome of the case, because they involved judgments below the 100,000 dollar limit.[43] For the purposes of 31 U.S.C. § 724(a), each individual award was ruled a final judgment "in any one case." Although the majority found that there were "no policy considerations which outweigh those which operate in favor of the view we take,"[44] the dissent accepted the

[35] Md. Ann. Code art. 67, § 4 (Supp. 1964).

> The amount so recovered [in a wrongful death action] shall be divided amongst the above mentioned parties, in such shares as the jury by their verdict shall find and direct; provided, that no more than one action shall be for and in respect of the same subject matter of complaint. . . .

[36] A 1962 amendment eliminated this provision requiring a wrongful death action to be brought in the state's name. Md. Acts 1962, S. Bill 70, ch. 36, § 1.

[37] State *ex rel.* Bashe v. Boyce, 72 Md. 140, 19 Atl. 366 (App. Div. 1890).

[38] Maryland *ex rel.* Gaegler v. Thomas, 173 F. Supp. 568 (D. Md. 1959). Many of the state statutes provide that damages recovered in a wrongful death action are to be distributed by the probate court according to the intestacy provisions, and not the court or jury that assesses the total liability. See generally 16 Am. Jur. *Death* § 251 (1938).

[39] Central Vt. Ry. v. White, 238 U.S. 507 (1915). Passapae v. Oehring, 141 Md. 60, 118 Atl. 130 (1922). Both courts felt that the only matter which concerns the defendant is his total liability, not the share each claimant receives.

[40] Maryland *ex rel.* Meyer v. United States, 229 F. Supp. 280 (D.D.C. 1964).

[41] *Id.* at 281.

[42] 349 F.2d at 695.

[43] Glidden Co. v. Zdanok, 370 U.S. 530 (1962); United States v. Jacobs, 308 F.2d 906 (5th Cir. 1962).

[44] 349 F.2d at 696.

reasoning of the district court relying primarily on 28 U.S.C. 1346(b) and the fact that Maryland allowed only one action.[45]

The effect of the majority decision is to interpret "judgment in any one case" to mean in any individual award.

The congressional purpose behind 31 U.S.C. § 724(a) was to reduce the cost of interest to the Government. The legislative history does not indicate a desire to standardize the payment of interest among the states, but the decision has that effect. The result of the case is to create a special definition of "judgment" for the purpose of interest payments. To consider each individual money award within a judgment to be a separate and final judgment presents ramifications. The ruling may cause problems in those jurisdictions which allow the probate court to apportion the judgment.[46] Until the probate court acts the claimants will not know the extent of their award and will be unable to file a transcript of the judgment. Delays will mean loss of interest. There may be cases in which it will be beneficial for the parties to collect their judgment without the necessity of a congressional appropriation,[47] since the interest rate paid by the Government is only four per cent as opposed to a higher commercial rate. All things considered, the effect of the majority decision in interpreting "judgment in any one case" to mean in any one individual award serves as an exception to a generally accepted and proper rule of law.

James Knox Murphey III

[45] *Id.* at 698.
[46] See note 38 *supra.*
[47] Brief for Appellant, p. 29, United States v. Maryland *ex rel.* Meyer, 349 F.2d 693 (D.C. Cir. 1965).

Constitutional Law — Airport Zoning — Height Restrictions

In 1949, the City of Gary, Indiana, enacted an airport zoning ordinance[1] prescribing certain height restrictions[2] around the municipal airport. Subsequently, the Indiana Toll Road Commission constructed a bridge approximately twelve feet in excess of the maximum height prescribed by the ordinance.[3] The airport operators brought suit against the Commission for injunctive relief and damages and although the injunction was denied, damages were awarded by the trial court.[4] The Indiana Supreme Court reversed, holding that the airspace above the land is a constitutionally protected area and that the ordinance was unconstitutional as it "purported to authorize an unconstitutional appropriation of property rights without payment of compensation."[5] The decision was based on the Indiana Constitution[6] and the Fourteenth Amendment to the Constitution of the United States, but the two constitutional provisions were not considered separately. The Supreme Court of the United States granted certiorari.[7] *Held:* The writ of certiorari was dismissed as improvidently granted because the state ground was "an independent and adequate ground of decision," thereby depriving the United States Supreme Court of jurisdiction to review the decision.[8] *Jankovich v. Indiana Toll Road Comm'n*, 379 U.S. 487 (1965).

Height zoning restrictions have been recognized as a proper exercise of the police power since the landmark case of *Welch v. Swasey*.[9] Although *Welch* was not an airport case, the Supreme Court held that in order for the ordinance to be valid, it must have a reasonable relation to the pre-

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[1] Gary, Ind., Ordinance 2897, 20 Sept. 1949. This ordinance is set forth in full in the petitioners' brief. Brief for Petitioners, pp. 4-6, Jankovich v. Indiana Toll Rd. Comm'n, 379 U.S. 487 (1965).

[2] *Id.* at 5. "(c) Inner Area Approach Zone as indicated (extending 6,000 feet from the end of the proposed runway) not to exceed height greater than permitted of 40 to 1 slope." This is commonly referred to as a 40 to 1 glide angle. The effect of this ratio is that no structure may exist over one foot in height at a distance of forty feet from the end of the proposed runway, two feet in height at eighty feet away, etc.

[3] The property in question was within the "Inner Area Approach Zone."

[4] It is interesting to note that damages were awarded to the airport operators for a prospective loss of business since the bridge had increased the glide angle on the north-south runway rendering it unusable to aircraft in excess of 15,000 pounds.

[5] Indiana Toll Rd. Comm'n v. Jankovich, 244 Ind. 574, 193 N.E.2d 237, 242 (1963).

[6] Ind. Const. art. 1, § 21.

[7] Jankovich v. Indiana Toll Rd. Comm'n, 377 U.S. 942.

[8] In a dissenting opinion, Mr. Justice Stewart, joined by Mr. Justice Black, said that since the question of airport zoning was such an important one with respect to the federal constitution, the case should be remanded to the Indiana Supreme Court for a determination of whether the basis of their decision was federal or state. The rationale was that if allowed to stand, this case should be precedent for state courts becoming "the final arbiter of important issues under the federal constitution" just by deciding the question on apparently commingled state and federal grounds. 379 U.S. at 496.

[9] 214 U.S. 91 (1909); see also Annot., 8 A.L.R.2d 963 (1949) for a good discussion of the validity of height zoning.

vention of undesirable conditions, and that these undesirable conditions must be a proper subject of public health, safety, morals, or general welfare. Since the turn of the century, most states have passed legislation enabling cities and counties to prevent airport hazards and obstructions through local zoning ordinances.[10] Most of this state legislation was implemented or induced by the Federal Airport Act[11] and the Federal Aviation Act of 1958.[12] From these two acts, the Federal Aviation Agency derives its authority to propose and annually revise a National Airport Plan[13] designed to provide for a nationwide system of airports. To execute this plan, Congress adopted a federal grant-in-aid program. In order to receive federal funds, airport sponsors must assure the Administrator of the FAA that future airport hazards will be prevented.[14] A recent amendment to the Federal Airport Act recommends the use of zoning ordinances where possible.[15] Many such ordinances, including the one in the instant case, are patterned after the Model Airport Zoning Ordinance[16] authored by the FAA.

Only a minority of cases have upheld the validity of height zoning with respect to airports.[17] In *Harrell's Candy Kitchen, Inc. v. Sarasota-Manatee Airport Authority*,[18] a business establishment's ornamental roof extended above the height limitation prescribed by the local ordinance. The excess height was not shown to be essential to the operation of the business. The Florida Supreme Court held that prohibiting the existence of the roof above the minimum was a valid exercise of the police power and not a "taking" of private property without just compensation. In *Waring v. Peterson*,[19] the ordinance so limited the height of structures on plaintiff's

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[10] For a partial list of these statutes and a discussion of a few, see Rhyne, Airports and the Courts 171-76 (1944). See also 17 NIMLO Munic. L. Rev. 178 (1954), for analysis and recent trends in provisions in airport zoning legislation.

[11] 60 Stat. 170 (1946), as amended, 49 U.S.C. §§ 1101-20 (1964).

[12] 72 Stat. 730 (1958), 49 U.S.C. §§ 1301-1542 (1964).

[13] National Airport Plan, Requirements for Fiscal Years 1963-1967, 1963 Supplement, FAA (March 1963).

[14] Form FAA-1624, Part III 7, Sponsor Assurances:

> Insofar as it is within its power and reasonably possible, the Sponsor will, either by the acquisition and retention of easements or other interests in or rights for the use of land or airspace or by the adoption and enforcement of zoning regulations, prevent the construction, erection, alteration, or growth of any structure, tree or other object in the approach areas of the runways of the Airport, which would constitute an obstruction to air navigation according to the criteria or standards prescribed in Section A of FAA Technical Standard Order No. N18, dated April 26, 1950, as amended.

[15] Federal Airport Act, 49 U.S.C.A. § 1110 (1964), requires assurance to the Administrator that:

> . . .
>
> (4) appropriate action, including the adoption of zoning laws, has been or will be taken, to the extent reasonable, to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes compatible with normal airport operations including landing and take-off of aircraft.

[16] Model Airport Zoning Ordinance, July 1960, is set out in full in petitioner's brief. Brief for Petitioners, pp. 27a-47a, Jankovich v. Indiana Toll Rd. Comm'n, 379 U.S. 487 (1965).

[17] See, *e.g.*, Baggett v. City of Montgomery, 160 So. 2d 6 (Ala. 1963); Sneed v. County of Riverside, 218 Cal. App. 2d 310, 32 Cal. Rptr. 318 (Dist. Ct. App. 1963); Waring v. Peterson, 137 So. 2d 268 (Fla. 1962); Harrell's Candy Kitchen, Inc. v. Sarasota-Manatee Airport Authority, 111 So. 2d 439 (Fla. 1959); Burnham v. Beverly Airways, Inc., 311 Mass. 628, 42 N.E.2d 575 (1942). For cases contra, see note 22 *infra*.

[18] 111 So. 2d 439 (Fla. 1959).

[19] 137 So. 2d 268 (Fla. 1962).

land that it was suited only for agricultural purposes, which was the only use to which plaintiff was putting the property at the time of the suit. The Florida court said that as long as there was a beneficial use left to the plaintiff, it did not have to be the most beneficial use to which the land could be put. In a well-reasoned opinion, the Alabama Supreme Court in *Baggett v. City of Montgomery*[20] upheld a blanket height restriction of thirty-five feet within a two-mile radius of an airport as a reasonable exercise of the police power. As grounds for upholding the zoning ordinances, the courts have relied upon either: (1) public safety, which includes prevention of obstructions and hazards around the airport; or (2) general welfare which includes protection of the airport investment by preventing construction which could render all or a part of the airport useless;[21] or (3) a combination of the two. However, the majority of the courts have held that the ordinances have authorized an unconstitutional "taking" of private property rights without just compensation.[22] When the courts have failed to uphold the validity of height zoning ordinances, the local governmental units have been forced to acquire the fee to, or an avigation easement[23] over, such land as is necessary to ensure the protection of the airport's glide paths.[24]

Since the basic limitation on all types of zoning is reasonableness of the ordinance with respect to a balancing of the individual property interests against the public interests of safety and general welfare, the main difference between the two lines of cases lies in the interpretation of reasonableness. The courts in upholding the height zoning ordinances have stated that the ordinances must provide for variance from the restriction upon application to the local board, and for quasi-judicial hearings in case the application is refused.[25] On the other hand, in striking down the ordinances as unconstitutional, the courts have stated that although airport zoning is desirable, it may not be used to deprive the individual of his constitutional rights.[26] It is interesting to note, however, that in *Harrell's Candy Kitchen, Waring,* and *Baggett,* the courts said that although the

[20] 160 So. 2d 6 (Ala. 1963).

[21] The courts base their reasoning on the premise that the public has a valid interest in adequate air transportation.

[22] At least nine jurisdictions have so held. See, *e.g.,* Dutton v. Mendocino County, 1949 U.S. Av. 1 (Cal. Super. Ct. 1948); Mutual Chem. Co. v. Baltimore, 1939 U.S. Av. 11 (Md. Cir. Ct. 1939); Yara Eng'r Co. v. City of Newark, 132 N.J.L. 370, 40 A.2d 559 (Sup. Ct. 1945).

[23] In Johnson v. Airport Authority of the City of Omaha, 173 Neb. 801, 115 N.W.2d 426 (1962), the court gave the following definition of avigation easement: "Generally, an avigation easement is an easement of right to the navigation of airspace over designated land and to the use of land as an incident to air navigation."

[24] See, *e.g.,* Swetland v. Curtiss Airports Corp., 55 F.2d 201 (6th Cir. 1932); Dutton v. Mendocino County, *supra* note 22; Yara Eng'r Co. v. City of Newark, *supra* note 22; Gardner v. Allegheny County, 393 Pa. 120, 142 A.2d 187 (1958). See also Note, 13 Hastings L.J. 397 (1962).

[25] See, *e.g.,* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), holding that for a zoning ordinance to be reasonable, it must bear a rational relation to public health, safety, morals, or general welfare of the community. See also Welch v. Swasey, *supra* note 9; Model State Airport Zoning Act § 6 (1944) prepared by the Civil Aeronautics Administration, United States Department of Commerce, and NIMLO, Brief for Respondent, p. 1a, Jankovich v. Indiana Toll Rd. Comm'n, 379 U.S. 487 (1965).

[26] See cases cited note 24 *supra.* See also Waring v. Peterson, *supra* note 19. Although upholding the validity of the zoning ordinance, the court by way of dicta said that the ordinance might later interfere with a specific use (*i.e.,* height of a proposed building) and amount to a "taking."

ordinances were constitutional, a situation that would amount to a "taking" could arise and thus require the payment of compensation. For example, the court in *Harrell's Candy Kitchen* implied that if the ornamental roof had been a necessity rather than an ornament, the restriction could have amounted to a "taking." In determining when a "taking" occurs, a distinction has been made that where a private property right is totally destroyed, zoning principles are usually applicable, but where the right is taken from the individual and conferred on the public, eminent domain principles are applicable.[27]

In *Jankovich,* the Indiana Supreme Court, although declaring the ordinance unconstitutional on both federal and state grounds, seemed to rely heavily on the decisions of the United States Supreme Court in *United States v. Causby*[28] and *Griggs v. Allegheny County.*[29] In effect, both of these cases were inverse condemnation actions concerning repeated low flights over the plaintiffs' lands.[30] The Court held that the low flights constituted a "taking" of an avigation easement. In the instant case the Indiana court reasoned that the ordinance in question had the same effect on the plaintiff's property as the low flights in *Causby* and *Griggs.* It constituted a "taking" of an easement over the property of the plaintiff.[31] The United States Supreme Court dismissed the writ of certiorari because the decision of the Indiana Supreme Court was supported by an independent and adequate state ground. However, Mr. Justice White said by way of dicta: (1) that the Indiana Supreme Court decision was compatible with the new amendment to the National Airport Plan in that although zoning is one means of ensuring prevention of airport hazards, there are also provisos in the Plan which allow for acquisition of avigation easements[32] and for acquisition of the fee to land where necessary to accomplish the purpose of prevention of obstructions; and (2) that the Indiana decision did "not portend the wholesale invalidation of all airport zoning laws,"[33] because the court could not negate the obvious legislative intent of Congress in the recent amendment to the National Airport Act.[34] Although the writ of certiorari was dismissed, the effect of this opinion actually is likely to be an affirmance of the unconstitutionality of the ordinance as applied to the Indiana Constitution.

The optimistic view taken by the majority in the dicta mentioned above appears to be the law today. While a few state courts are broadening the

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[27] Ackerman v. Port of Seattle, 55 Wash.2d 400, 348 P.2d 664 (1960).

[28] 328 U.S. 256 (1946).

[29] 369 U.S. 84 (1962).

[30] For a concise discussion of the inverse condemnation procedure, see Note, 30 J. Air L. & Com. 287, 288 (1964).

[31] See note 5 *supra.*

[32] Form FAA-1624, *supra* note 14, provides for the acquisition or retention of whatever interests in land that are necessary for the purpose of protection of both the general public and the investment. The funds expended for such acquisition are among the "allowable project costs" for which the sponsor may be reimbursed under the Federal Airport Act.

[33] 379 U.S. at 493.

[34] The apparent intent of Congress in the recent amendment was to authorize the use of local zoning ordinances where appropriate to insure the airport protection from obstructions. See note 15 *supra.*

scope of zoning ordinances, most courts have been reluctant to step beyond the limitations of strict public necessity in zoning where the property owner is left with some reasonable use of his land. It appears, however, that even these limitations allow the taking of private property rights without just compensation. For example, suppose a height restriction of fifty feet is imposed upon a tract of land. Has not the owner less property rights in his land than he had prior to the imposition of the restriction? The United States Supreme Court has answered this by saying that one owns only the airspace above his land which he may reasonably use.[35] However, even some of that airspace may be taken without compensation under a reasonable zoning ordinance so long as some reasonable use of the land is left to the owner. Is taking a portion of a property owner's airspace, *i.e.*, a property right, different from taking only one acre out of a tract of many acres for a public highway? If a restriction is imposed on the use of property, and if the restriction results in measurable monetary damage to the property owner, should he not be compensated for his loss even though he is left with a reasonable use of his property? Certainly the property is worth less on the market after the imposition of the restriction. It is argued that the restriction is for a valid public purpose, hence public necessity overrides any consideration of individual rights. The obvious answer is that since the taking is for a public purpose, the public should bear the burden of the loss. It is further argued that the public cannot afford to acquire the necessary land interests by paying for them. For example, in the airport situations, the acquisition of the fee to, or easements over, sufficient land to meet federal standards for receipt of federal aid would be economically unfeasible in most cases, if not fatally overburdensome. The mere advancement of these arguments recognizes that there is a loss, but the letter and the spirit of the United States Constitution forbid the taking of private property rights by any governmental body without payment of just compensation. There is no objection to either the validity or the desirability of zoning, but it is submitted that if through zoning restrictions a property owner incurs an economic loss which can be proved in court, the burden of the loss should be shouldered by the public, rather than by the individual.

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[35] United States v. Causby, *supra* note 28.

Labor Law — Railway Labor Act — Major and Minor Disputes

Because of the loss of a government contract Aaxico Air Lines furloughed its pilots, all of whom were members of the complaining Air Line Pilots Association. Aaxico notified the union that it considered their previous collective bargaining agreement to be terminated. The union replied that the agreement was merely dormant and that it still expected to deal with the company upon resumption of services. Later, Aaxico was awarded a government contract, but did not reinstate the ALPA pilots. The union filed suit for a declaratory judgment and injunctive relief asserting that Aaxico had failed to comply with the notice and bargaining requirements of the Railway Labor Act[1] in changing the working conditions of the pilots. The trial court issued an injunction restoring the wages and conditions which prevailed before the changes were made, and ordered the parties to establish a system board of adjustment to decide any disputes regarding compliance with the court order. *Held, reversed:* the controversy was a "minor" dispute and, therefore, beyond the competence of the trial court since the question of termination of the collective bargaining agreement could only be decided by interpreting the agreement itself, which, under the Railway Labor Act, is a function of the boards of adjustment. *Aaxico Airlines, Inc. v. Air Line Pilots Ass'n,* 331 F.2d 433 (5th Cir.), *cert. denied,* 379 U.S. 851 (1964).

The Railway Labor Act, enacted in 1926, was amended in 1936 to include common air carriers engaged in interstate commerce. The purpose of the act was to provide means for the prompt settlement of disputes between a carrier, or a group of carriers, and their employees.[2] Through its plenary power over interstate commerce, Congress sought to avoid interruptions of service resulting from strikes that might develop from such disputes. Section 203 of title II of the act[3] created the National Mediation Board which handles disputes concerning changes in rates of

[1] 44 Stat. 587 (1926), as amended, 45 U.S.C. §§ 151-63, 181-88 (1964).
[2] Atchison, T. & S.F. R.R. v. Brotherhood of Locomotive Firemen, 26 F.2d 413 (7th Cir. 1928).
[3] Railway Labor Act, § 203, 49 Stat. 1189 (1936), 45 U.S.C. § 183 (1964):

> § 183 *Disputes within jurisdiction of Mediation Board*
>
> The parties or either party to a dispute between an employee or a group of employees and a carrier or carriers by air may invoke the services of the National Mediation Board and the jurisdiction of said Mediation Board is extended to any of the following cases:
>
> (a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference. . . .
>
> (b) Any other dispute not referable to an adjustment board, as hereinafter provided, and not adjusted in conference between the parties, or where conferences are refused.
>
> The National Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.
>
> The services of the Mediation Board may be invoked in a case under sections 181-188 of this title in the same manner and to the same extent as are the disputes covered by section 155 of this title.

pay, rules, or working conditions not covered in a bargaining agreement. In this type of dispute, labeled "major" by the case law, the federal courts have concurrent jurisdiction with the Mediation Board.[4] The notice provisions of section 6 of title I[5] must be adhered to before the authority of the Mediation Board may be invoked. It is important to note that the language of section 203 is merely permissive—the parties "may invoke" the jurisdiction of the Mediation Board. In most cases under section 203 one of the parties will bring suit in a federal district court for relief, usually in the form of an injunction to maintain the status quo or a declaratory judgment. If the court fails to rule on the merits, the parties will then carry the controversy to the bargaining table or the Mediation Board. Section 204 of title II[6] requires that grievances over the interpretation of bargaining agreements be decided by regional boards of adjustment. The act is not permissive with respect to this type of controversy—it "shall be handled" by the adjustment board. Disputes within the purview of this section have been labeled "minor." The regional boards' awards are final and binding on the parties except with respect to a money judgment, and are enforceable in the federal district courts.[7] The United States Supreme Court has held[8] that the boards of adjustment have exclusive primary jurisdiction to resolve disputes arising out of interpretation or application of collective bargaining agreements as a "con-

[4] Moore v. Illinois Cent. R.R., 312 U.S. 630 (1941).

[5] Railway Labor Act, § 6, 44 Stat. 577 (1926), 45 U.S.C. § 156 (1964) provides in pertinent part:

> § 156 *Procedures in changing rates of pay, rules, and working conditions*
>
> Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, . . . rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title.

Section 205, tit. II, 49 Stat. 1189 (1936), 45 U.S.C. § 185 (1964) gives the National Mediation Board the power at its discretion to create the National Air Transport Adjustment Board. However, as of this writing such a National Board has not been established.

[6] Railway Labor Act, § 204, 49 Stat. 1189 (1936), 45 U.S.C. § 184 (1964) provides in pertinent part:

> § 184 *System, group, or regional boards of adjustment*
>
> The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on April 10, 1936 before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.
>
> It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of sections 181-188 of this title, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 153 of this title.

[7] Railway Labor Act § 3, tit. I, 49 Stat. 1189 (1936), 45 U.S.C. § 153 (m), (p) (1964).

[8] Slocum v. Delaware L. & W. R.R., 339 U.S. 239, 244 (1950).

gressionally designated agency peculiarly competent in this field."[9] The importance of the classification of the dispute as either "major" or "minor" is that it determines the forum and type of relief available to the parties.

In *Elgin, J. & E.R.R. v. Burley*,[10] the leading case in this area, the Supreme Court held that an order by a railway adjustment board in settlement of a dispute arising out of grievances or out of the interpretation of a collective labor agreement was more than an advisory opinion and precluded judicial review. The importance of the case lies in Mr. Justice Rutledge's discussion of the differences between the two classes of controversy under the act. The court concluded that a "major" dispute involves controversies over the "formation of collective agreements or efforts to secure them."[11] A "pure" major dispute exists when there is no such agreement, and, therefore, the issue is not whether an existing agreement controls the controversy. Disputes over changes in the terms of an existing contract are major if the parties look to the acquisition of rights for the future, and not to the assertion of rights claimed to have vested in the past. A "minor" dispute, the court reasoned, presupposes the existence of a collective agreement and a controversy as to either the meaning or proper application of a specific section. This type of issue involves a situation in which no effort is made to bring about a formal change in terms, but the claim is to "rights accrued" in the agreement.[12]

The *Burley* distinction seems simple in theory, but as a practical matter the differences are difficult to define when applied to a fact situation. The issue before a court making such an application is whether the controversy in question requires an interpretation as to "rights accrued" or "new rights created." Generally when the courts have been forced to refer to the bargaining agreement in order to reach their decisions, they have classified a controversy "minor."[13] However, the District of Colum-

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[9] *But see* Milstead v. Atlantic Coast Line R.R., 273 Ala. 557, 142 So.2d 705 (1962), *cert. denied*, 371 U.S. 892 (1963), which held that in an interpretation of a collective bargaining agreement, the Railway Labor Act was not intended to confer exclusive primary jurisdiction when the dispute was between the employee and their bargaining representatives. See also Note, 15 Ala. L. Rev. 626 (1963).

[10] 325 U.S. 711 (1945).

[11] *Id.* at 723.

[12] *Ibid.*

[13] See, *e.g.*, International Ass'n of Machinists v. Eastern Airlines, Inc., 320 F.2d 451 (5th Cir. 1963) in which the court held that the union's claims that management had unilaterally cancelled earned vacations and extended the work week in order to eliminate the union as a sole bargaining agent involved a minor dispute; Flight Engineers' Ass'n v. American Airlines, Inc., 303 F.2d 5 (5th Cir. 1962) where the court held that questions presented as to interpretation of supplemental agreements to labor contracts and right of the union to compel bargaining thereunder were minor disputes; International Ass'n of Machinists v. Northwest Airlines, Inc., 304 F.2d 206 (8th Cir. 1962) in which the court held that the airline's claim that maintenance employees were obliged to cross fellow employees' picket lines involves a minor dispute; Missouri-Kan.-Tex. R.R. v. Brotherhood of Locomotive Engineers, 266 F.2d 335 (5th Cir. 1959) where the court found that a dispute involving changing terminals in a class of service and abolishing a number of positions was minor.

bia[14] and Second Circuits[15] classified disputes "major" despite the necessity of "interpreting" the existing agreements. In *Manning v. American Airlines, Inc.*[16] the carrier discontinued the check-off of dues with the union. The Second Circuit, in an opinion by Judge Friendly, interpreted the union check-off agreements to be within the phrase "working conditions" under Section 203 of the Railway Labor Act.[17] Although the term "major" dispute was not mentioned, the court rejected American's claim of exclusive jurisdiction in the board of adjustment. In *Southern R.R. v. Brotherhood of Locomotive Firemen,*[18] the District of Columbia Circuit likewise found the dispute to be "major" since the carrier's action involved a change in the long-standing interpretation which the parties had given the agreement. The court reasoned that to allow a unilateral change in the construction of the contract would in substance and effect change the agreement itself.[19] Thus, it is explicit in *Southern* and implicit in *Manning* that the courts may consider the construction of the agreement in order to classify a dispute "major" or "minor."

In *Aaxico*[20] the Fifth Circuit, recognizing the *Burley* distinction, considered the controlling issue to be whether the agreement between Aaxico and ALPA was still in effect. If there was no agreement applicable to the issue in controversy, obviously a "major" dispute existed, and the court would have had concurrent jurisdiction. The union's argument and the district court's position was that the trial court had authority to construe the agreement to discover if the contract was still operative. However, the court of appeals concluded that it was beyond the competence of the trial court to interpret the bargaining contract. The court followed its earlier decision in *St. Louis, S.F. & Tex. Ry. v. Railway Yardmasters.*[21] In *Yardmasters* the carrier gave notice of the abolishment of all the yardmaster positions at the Ft. Worth yards and of the transfer of the duties of that classification to other employees. Reversing the district court, the Fifth Circuit classified the dispute "minor" because the lower court had construed the language of the existing agreement.[22] In the present case,

[14] Southern R.R. v. Brotherhood of Locomotive Firemen, 337 F.2d 127 (D.C. Cir. 1964). The D.C. Circuit held that the district court properly enjoined any effort by the carrier to effect changes in working conditions under its contract of operating all locomotives with firemen present in the cab, and properly forbade change in long-standing interpretations which had been given by the parties to the existing contract. The carrier had decided to do away with the fireman position on the diesels.

[15] Manning v. American Airlines, Inc., 329 F.2d 32 (2d Cir.), *cert. denied,* 379 U.S. 817 (1964).

[16] *Ibid.*

[17] *Id.* at 34-35.

[18] 337 F.2d 127 (D.C. Cir. 1964).

[19] *Id.* at 132.

[20] 331 F.2d 433 (5th Cir.), *cert. denied,* 379 U.S. 851 (1964).

[21] 328 F.2d 749 (5th Cir.), *cert. denied,* 377 U.S. 980 (1964). The district court in *Yardmasters,* 218 F. Supp. 193, 206 (N.D. Tex. 1963), holding the dispute to be major stated:

> It is an action that will change working conditions as they are contemplated by the agreement. If the plan continues, it will terminate that agreement by destroying the subject matter thereof. It is only reasonable that the union will use every legal means to keep from losing the contract by planned erosion. That kind of issue does not meet the test of a minor dispute. . . .

The court of appeals reversed, holding the dispute to be minor.

[22] 328 F.2d at 753.

Judge Tuttle reasoned that the uniform holdings of the case law required the use of the grievance procedures of the boards of adjustment to resolve the contract interpretation.[23] *Aaxico* stands strong in favor of the exhaustion of the administrative remedies of the disputing parties. It is clear that the court is demanding that these disputes be decided by the terms of the Railway Labor Act where the expertise of the boards of adjustment can be utilized. The court also held that the trial court did not have jurisdiction to decide whether the pay requirements under the contract were violated by the company's changes.

Although in *Aaxico* and *Yardmasters* the causes were remanded to the boards of adjustment, this does not mean that the Fifth Circuit is adverse to holding a controversy "major." In fact, in a recent case the court did just that and in doing so put the earlier cases into their proper perspective. In *Florida East Coast Ry. v. Brotherhood of Railroad Trainmen*,[24] the court rejected the carrier's contention that this was a "minor" dispute and that the only complaint of the union was that the agreement was not being complied with. In classifying the dispute as "major," the court distinguished *Aaxico*:[25]

> This is not a case like . . . *Aaxico* involving a dispute as to whether the agreement authorizes action taken by the Carrier. Neither is it a case involving a dispute over the meaning of the terms relating to the rates of pay, hours, and working conditions. Rather, this is a case in which a Carrier has unilaterally instituted wholesale changes in these terms, changes which, in the negotiations presently going on with respect to the September 25 notice, it seeks to establish permanently.

The distinctions between the types of controversy become more understandable in the light of the three recent Fifth Circuit cases. In *Yardmasters* there was a provision in the agreement for the abolishment of the yardmaster positions and since the grievance was over the interpretation of this section the dispute was properly a "minor" one. Likewise, the decision in *Aaxico* was justified since the real issue there was whether the agreement required the carrier to rehire the union pilots. The union's position that the court had jurisdiction to construe the contract to determine its existence or non-existence was untenable in view of its other contention that the agreement was a continuous one which was violated by the carrier. The carrier's denial of coverage and refusal to rehire the pilots might appear to be a material change in the working conditions and, therefore, within the ambit of section 6. However, the court stressed that to be a "major" dispute the claim must be to new rights created for the future as in *Florida East Coast* rather than to rights already accrued.

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[23] 331 F.2d at 437.

[24] 336 F.2d 172 (5th Cir. 1964). The Fifth Circuit upheld the trial court's preliminary injunction preventing the carrier from operating under conditions different from those contained in the agreement. Notice by the carrier to cancel the union ship provision of the agreement and to change the pay, rules, and working conditions under the contract brought on a strike between the parties. The court concluded that the controversies were "major" and that it was within the jurisdiction of the trial judge to pass on which changes were necessary for the carrier to continue to operate.

[25] *Id.* at 178-79.

The Fifth Circuit's interpretation of the *Burley* distinction between "major" and "minor" disputes in *Aaxico* and the other Fifth Circuit cases is helpful in clarifying this area of the law. Although the District of Columbia and Second Circuits are in seeming conflict in *Manning* and *Southern*, the Fifth Circuit cases are more explicit and direct in their analysis of the problem. At the same time, the court can be criticized for its failure to support its decision with policy reasons or justifications by virtue of the purposes of the Railway Labor Act. Unfortunately, the denial of certiorari in *Aaxico* and *Manning* offers no guidelines from the Supreme Court. Since the boards of adjustment are powerless to issue injunctions, the most serious consequence of the decision is the preclusion of the court from using its injunctive powers to maintain the status quo until the dispute can be resolved.

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