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NOTES AND COMMENTS

Abuse of Process.

In the recent case of *Ledford v. Smith*¹ the North Carolina Supreme Court was called upon to consider the somewhat unusual but well recognized action for abuse of legal process. The defendant had instituted a criminal proceeding against the plaintiff in which the plaintiff was arrested, released under bond, and finally adjudged not guilty. There was some evidence that the defendant's purpose was to collect a disputed civil debt which the defendant claimed was owed him by the plaintiff.

¹212 N. C. 447, 193 S. E. 722 (1937).

There was no evidence that the alleged debt was collected, nor that, after the proceeding was begun, the defendant, by any unauthorized act pursuant to criminal process or by any collateral act in connection therewith, attempted to coerce payment. A majority of the court held that a verdict for the plaintiff was supported by the evidence. Three justices dissented on the ground that there was no evidence of any act of the defendant, after the commencement of the prosecution, which amounted to an abuse of process.²

The tort of abuse of process is sometimes confused with malicious prosecution. In both, an injury is caused by the wrongful employment of legal process, but the two are definitely distinguishable. In malicious prosecution the gist of the injury is commencing an action or causing process to issue as an incident thereto, without justification. Malice, want of probable cause, and a termination of the proceeding adverse to the party who commenced it must be shown.³ On the other hand, an action for abuse of process lies not because the defendant has set process in motion but because he has misapplied or perverted it for a wrongful end after it has been issued.⁴

In the principal case both the majority and the minority agreed, and it is generally held in other jurisdictions, that the essential elements of abuse of process are: (1) an ulterior motive, and (2) a willful act in the use of process not proper in the regular prosecution of the proceeding.⁵ If the defendant's purpose in procuring or using a warrant or writ of attachment, for instance, is to accomplish a collateral object—something not within the scope of the process and which it is not designed to effect—the requirement of an ulterior purpose is satisfied. Such a purpose might be to injure the plaintiff, to extort money from him, to gain possession of property, or to collect a debt. As for the second element, there is an improper use if, after the process is issued, the defendant by some wrongful act successfully employs it to accom-

² There is also some disagreement between the majority and the minority as to the sufficiency of the evidence bearing upon the existence of an ulterior motive. However, the objection by the dissent that there was no evidence of an improper act seems most fundamental. If there *was* such an act an ulterior motive might be inferred; but, without it, an action for abuse of process should fail, no matter how conclusive the evidence of an ulterior motive. See notes 6 and 8, *infra*.

³ *Duckwall v. Davis*, 194 Ind. 670, 142 N. E. 113 (1924); *Anderson v. Dyer*, 188 App. Div. 707, 176 N. Y. Supp. 758 (2d Dep't 1926); *Pittsburg, J., E. & E. R. v. Wakefield Hardware Co.*, 143 N. C. 54, 55 S. E. 422 (1906); *Stancil v. Underwood*, 188 N. C. 475, 124 S. E. 845 (1924).

⁴ *Wood v. Graves*, 144 Mass. 365, 11 N. E. 567 (1887); *Assets Collection Co. v. Myers*, 167 App. Div. 133, 152 N. Y. Supp. 930 (1st Dep't 1915); *Abernethey v. Burns*, 210 N. C. 636, 188 S. E. 97 (1936); *Garland v. Wilson*, 289 Pa. 272, 137 Atl. 266 (1927).

⁵ *Bonney v. King*, 201 Ill. 47, 66 N. E. 377 (1903); *Bourisk v. Derry Lumber Co.*, 130 Me. 376, 156 Atl. 382 (1931); *Hauser v. Bartow*, 273 N. Y. 370, 7 N. E. (2d) 268 (1937); *Pittsburg, J., E. & E. R. v. Wakefield Hardware Co.*, 143 N. C. 54, 55 S. E. 422 (1906).

plish his purpose or if, by means of it, he makes an attempt to achieve that end. However, some definite act or threat either not authorized by the process or designed to procure an objective not a legitimate use of the process is necessary⁶—something more than the seizure of specified property or the arrest of the plaintiff as in the case of an attachment or warrant. Regular and legitimate use of process, though with a bad intention, by the great weight of authority is not an abuse of process.⁷ In this respect the principal case seems out of line. The rules of law enunciated by the court are perfectly orthodox, but, since the evidence does not show that defendant did anything more than cause a probably unjustified criminal prosecution to be instituted, the second essential element laid down by the court seems to be missing. It is true that an ulterior motive may be inferred from an improper use of process, but acts constituting an improper use should not be inferred from an ulterior motive.⁸

In an action for abuse of process is it necessary, as in malicious prosecution, to prove malice, want of probable cause, and a termination of the former proceeding? The term "malicious abuse of process" is frequently used,⁹ and some courts seem to require a showing of malice as a distinct element¹⁰—malice, however, only in the sense that the abuse complained of must be intentional.¹¹ Other courts, while requiring that the improper act in the use of process be willful, say that malice is not necessary.¹² If there is a distinction, it seems to be, for the most part,

⁶ Demurrers sustained where allegations of an act constituting improper use of process omitted: *Keithley v. Stevens*, 238 Ill. 199, 87 N. E. 375 (1909); *Bartlett v. Christhilf*, 69 Md. 219, 14 Atl. 518 (1888); *MacLean v. Naumkeag Trust Co.*, 268 Mass. 437, 167 N. E. 748 (1929); *Carpenter, Baggott & Co. v. Hanes*, 167 N. C. 551, 83 S. E. 577 (1914).

⁷ *Roberts v. Danforth*, 92 Vt. 88, 102 Atl. 335 (1917) (*P* held not to have cause of action based on civil arrest, because "all that was done after the issue of process was done pursuant to it"). See *Bonney v. King*, 201 Ill. 47, 51, 66 N. E. 377, 378 (1903); *Wright v. Harris*, 160 N. C. 543, 547, 76 S. E. 489, 491 (1912).

⁸ *Jeffery v. Robbins*, 73 Ill. App. 353 (1897); *Saliem v. Glovsky*, 132 Me. 402, 172 Atl. 4 (1934); *Bartlett v. Christhilf*, 69 Md. 219, 14 Atl. 518 (1888); see *Carpenter, Baggott & Co. v. Hanes*, 167 N. C. 551, 556, 83 S. E. 577, 580 (1914).

⁹ *Coplea v. Bybee*, 290 Ill. App. 117, 125, 8 N. E. (2d) 55, 60 (1937); *Ludwick v. Penny*, 158 N. C. 104, 111, 73 S. E. 228, 231 (1911); *Mayer v. Walter*, 64 Pa. 283, 285 (1870).

¹⁰ *Lambert v. Breton*, 127 Me. 510, 144 Atl. 864 (1929); *Shaw v. Fulton*, 266 Mass. 189, 165 N. E. 26 (1929); *Glidewell v. Murray-Lacy & Co.*, 124 Va. 563, 98 S. E. 665 (1919).

¹¹ *Bourisk v. Derry Lumber Co.*, 130 Me. 376, 156 Atl. 382 (1931); *Glidewell v. Murray-Lacy & Co.*, 124 Va. 563, 98 S. E. 665 (1919); see *Page v. Cushing*, 38 Me. 523, 526 (1854).

¹² *Coplea v. Bybee*, 290 Ill. App. 117, 8 N. E. (2d) 55 (1937); *Petry v. Childs & Co.*, 43 Misc. 108, 88 N. Y. Supp. 286 (Sup. Ct. 1904); *Pittsburg, J. E. & E. R. R. v. Wakefield Hardware Co.*, 143 N. C. 54, 55 S. E. 422 (1906); *Klander v. West*, 205 N. C. 524, 171 S. E. 782 (1933); *Kool v. Lee*, 43 Utah 394, 134 Pac. 906 (1913).

only verbal. It should be noted that the improper use contemplated in the second essential element of abuse of process is a *willful* act. Express malice in the sense of malevolence or ill will need not be shown except where the plaintiff seeks to recover punitive damages.¹³ In the leading English case of *Grainger v. Hill*¹⁴ it was decided that neither a want of probable cause nor a termination of the former proceeding need be alleged in an action for abuse of process. In some of the early American cases either or both were required,¹⁵ probably as a result of confusion of the action with that for malicious prosecution. *Grainger v. Hill*, however, has been widely followed, and it is now well settled that neither allegation is necessary.¹⁶ Since the ground for recovery in an action for abuse of process is not that the defendant caused process to issue without justification but rather that he misapplied the process of the court after it was issued, it should be immaterial whether the proceeding was commenced with or without probable cause.

Proceedings which have most commonly given rise to suits for abuse of process may be arranged roughly in three classes. In the first class are involved proceedings in which the property of the plaintiff is seized, most frequently by a writ of attachment¹⁷ or under execution,¹⁸ and

¹³ *McGann v. Allen*, 105 Conn. 177, 134 Atl. 810 (1926) (verdict held excessive, in absence of proof of malice, where more than compensatory damages allowed); *Sokolowske v. Wilson*, 211 Iowa 1112, 235 N. W. 80 (1931); *Salim v. Glovsky*, 132 Me. 402, 172 Atl. 4 (1934) (punitive damages approved where actual malice shown); see *Pittsburg, J., E. & E. R. R. v. Wakefield Hardware Co.*, 138 N. C. 175, 178, 50 S. E. 571, 573 (1905). *Contra*: *Malone v. Belcher*, 216 Mass. 209, 103 N. E. 637 (1913) (exemplary damages not recoverable for abuse of process).

¹⁴ 4 Bing. (N. C.) 211 (Eng. 1836).

¹⁵ In the early North Carolina cases there was much confusion as to whether want of probable cause was necessary. *Tucker v. Davis*, 77 N. C. 330 (1877) (want of probable cause held necessary); *Lockhart v. Bear*, 117 N. C. 298, 23 S. E. 484 (1895) (not necessary); *Pittsburg, J., E. & E. R. R. v. Wakefield Hardware Co.*, 138 N. C. 175, 50 S. E. 571 (1905) (necessary); *Jackson v. Am. Tel. & Tel. Co.*, 139 N. C. 347, 51 S. E. 1015 (1905) (not necessary); *Pittsburg, J., E. & E. R. R. v. Wakefield Hardware Co.*, 143 N. C. 54, 55 S. E. 422 (1906) (expressly overrules earlier *Pittsburg R. R.* case and definitely establishes that want of probable cause is not necessary element).

¹⁶ *Brantley v. Rhodes-Haverty Furniture Co.*, 131 Ga. 276, 62 S. E. 222 (1908) (termination of former proceeding not necessary); *McMullen v. Michigan Home Furnishing Co.*, 132 Misc. 838, 230 N. Y. Supp. 508 (N. Y. City Cts. 1928), *aff'd*, 133 Misc. 320, 232 N. Y. Supp. 124 (Sup. Ct. 1928) (neither want of probable cause nor termination of proceeding necessary); *Sneeden v. Harris*, 109 N. C. 349, 13 S. E. 920 (1891) (termination not necessary); *Kool v. Lee*, 43 Utah 394, 134 Pac. 906 (1913) (neither necessary); see *Ledford v. Smith*, 212 N. C. 447, 452, 193 S. E. 722, 725, (1937) (principal case—neither necessary).

¹⁷ *Lambert v. Breton*, 127 Me. 510, 144 Atl. 864 (1929) (abuse of process where landlord used writ of attachment to evict a tenant); *Salim v. Glovsky*, 132 Me. 402, 172 Atl. 4 (1934) (*D* attached store and stock of goods, with value greatly in excess of amount for which writ issued, with avowed purpose to attach store, put in keeper, take what money he could gather, and get out. *Held*, an abuse of process.); *Malone v. Belcher*, 216 Mass. 209, 103 N. E. 637 (1913) (*D* attached property to prevent sale to third person); *Pittsburg, J., E. & E. R. R. v. Wakefield Hardware Co.*, 138 N. C. 175, 50 S. E. 571 (1905) (Complaint, alleging that *D*, knowing that no debt was owed him by *P*, attached *P*'s freight

less frequently, by sequestration,¹⁹ garnishment,²⁰ or claim and delivery proceedings.²¹ The second class includes proceedings in which the person of the plaintiff is seized in a civil action, either by a civil arrest²² or by execution against the person.²³ The third class involves situations in which criminal process is used for private purposes. Except in Georgia, where it has been held that no action will lie for abuse of criminal process,²⁴ a misapplication of process gives rise to an action whether it occurs in a civil or criminal proceeding. Some states are rather disinclined to permit a recovery in spite of the fact that criminal process has been used to induce payment of a civil debt if it is a lawful debt,²⁵ but the plaintiff should have no difficulty in maintaining his action when such process has been used as a tool of extortion or intimidation.²⁶

cars for purpose of coercing *P* to pay rather than lose use of property, stated cause of action.).

¹⁸ *Coplea v. Bybee*, 290 Ill. App. 117, 8 N. E. (2d) 55 (1937) (Where *D* levied on certain personal property, refused to return it to *P* after being ordered to do so by the court, and sold it, there was an abuse of process.); *Antcliff v. June*, 81 Mich. 477, 45 N. W. 1019 (1890) (*D* obtained judgment fraudulently, procured writ of execution, and by means of threats to levy upon *P*'s property, induced *P* to pay a sum of money.).

¹⁹ *Casey v. Hanrick*, 69 Tex. 44, 6 S. W. 405 (1887) (where sheriff took possession of house under writ of sequestration, threw household goods into yard, and forced occupant's daughter out into the rain, acts constituted an abuse of process, and person causing writ to issue would be liable if he directed or ratified the acts).

²⁰ *Williams v. Adelman*, 41 Ga. App. 424, 153 S. E. 224 (1930) (*P* had no cause of action for abuse of process where he failed to allege that garnishment proceedings were employed for unlawful purpose.).

²¹ *Ludwick v. Penny*, 158 N. C. 104, 73 S. E. 228 (1911) (*P* had no cause of action for abuse of process, because he failed to show improper use of claim and delivery proceedings.).

²² *Brantley v. Rhodes-Haverty Furniture Co.*, 131 Ga. 276, 62 S. E. 222 (1908) (Where as an alternative to going to jail, *P* who had been arrested in a bail trover proceeding, was compelled to surrender a diamond brooch and sign a contract, *P* had cause of action for abuse of process.); *Sneeden v. Harris*, 109 N. C. 349, 13 S. E. 920 (1891) (*D* had *P* imprisoned under writ of arrest and bail in order that *D* might more easily take possession of land claimed by both. *P* had cause of action for abuse of process.); *Lockhart v. Bear*, 117 N. C. 298, 23 S. E. 484 (1895) (*D* attempted to coerce *P* into paying debt out of funds coming within personal property exemption, by means of civil arrest. *P* had cause of action.).

²³ *Ash v. Cohn*, 119 N. J. Law 54, 194 Atl. 174 (1937) (*D* secured judgment against *P* and, by conspiracy with officer, had execution returned unsatisfied, in spite of fact that *P* had sufficient property to satisfy judgment. *D* obtained order for execution against the person of *P* and used it to coerce an immediate payment. *P* had cause of action for abuse of process.).

²⁴ *Grist v. White*, 14 Ga. App. 275, 80 S. E. 519 (1914).

²⁵ *Glidewell v. Murray-Lacy & Co.*, 124 Va. 563, 98 S. E. 665 (1919) (VA. CODE ANN. (Michie, 1936) §4849 authorizes dismissal of prosecution for misdemeanor for which there is also civil remedy, when the injured party acknowledges that he has received satisfaction. Held, that there was no cause of action for abuse of process when such a misdemeanor was committed and the injured party swore out a warrant for the ulterior purpose of obtaining satisfaction, made settlement with the party for whom the warrant was issued, and caused the criminal prosecution to be dropped.).

²⁶ *Hotel Supply Co. v. Reid*, 16 Ala. App. 563, 80 So. 137 (1918) (use of criminal process to coerce payment of worthless check would be an abuse); *McClenny v. Inverarity*, 80 Kan. 569, 103 Pac. 82 (1909) (*D* had *P* arrested on

These three classes are by no means inclusive. There are other miscellaneous proceedings which cannot well be fitted into any distinct class.²⁷ In general it may be said that when legal process, whatever its nature, is employed to the injury of the plaintiff and for a collateral purpose not ostensibly within its scope, the plaintiff will have a cause of action for abuse of process.

M. B. GILLAM, JR.

Attorney General—Common Law Powers Over Criminal Prosecutions and Civil Litigation of the State.

Today North Carolina contemplates a Department of Justice, and an amendment to the constitution of the state incorporating this proposal will be submitted to the people within the year.¹ Other jurisdictions are considering similar moves. The object of such a department is to give the office of the Attorney General a strong, co-ordinating, and perhaps controlling power in the administration of the criminal law. Naturally, adoption of the amendment is conjectural, and is certainly not immediate. Yet crime refuses to wait while the electorate is being aroused from its inertia. Consequently, the pertinent question is raised² as to whether the Attorney General has common law powers, independent of constitutional amendments or statutes, that might, if tested, give him that control over the prosecution of crimes which is believed by many to be necessary in a fight against modern criminal activity.³ Recent decisions from two courts give pronounced encouragement to an affirmative answer. In *People v. Tru-Sport Publishing Company*,⁴ a

charge of fraudulently disposing of mortgaged property. *P* was released after payment of \$250 to *D*, only \$145 being due on the mortgage. *P* had cause of action for abuse of process.); *Marlatte v. Weickgenant*, 147 Mich. 266, 110 N. W. 1061 (1907) (*P* had cause of action where *D* had *P* arrested for larceny but caused proceedings to be dropped when *P* paid for goods, which had been bought on credit, and moved to another town.); *Jackson v. Am. Tel. & Tel. Co.*, 139 N. C. 347, 51 S. E. 1015 (1905) (Where *D* had *P* imprisoned for assault and battery for purpose of getting *P* out of way so that *D* could erect telephone poles on *P*'s land, *P* had cause of action.).

²⁷ For example, in *Dishaw v. Wadleigh*, 15 App. Div. 205, 44 N. Y. Supp. 207 (3d Dep't 1897), it was held an abuse of process to use a subpoena for the purpose of making *P* pay a debt rather than appear in court.

¹In November 1938. For a discussion of the powers and duties of North Carolina's Attorney General and solicitors, and comments on the proposed Department of Justice see Coates, *The State's Legal Business* (1938) 16 N. C. L. Rev. 119.

²On Dec. 12, 1937 in the Capitol, Raleigh, the governor's commission studying the Department of Justice presented this question. A test case to ascertain the scope of common law powers in the Attorney General of North Carolina is contemplated.

³"Criminal acts and organizations no longer have a localized aspect and such operations, more than ever before, transcend restricted fields in their mutiny against the law." *People v. Tru-Sport Pub. Co.*, 160 Misc. 628, 639, 291 N. Y. Supp. 449, 461 (Sup. Ct. 1936).

⁴160 Misc. 628, 291 N. Y. Supp. 449 (Sup. Ct. 1936).

New York supreme court upheld the common law power of the Attorney General to appear before the grand jury while seeking a criminal indictment, even though statutes had conferred this power on the district attorney. Pennsylvania, in *Commonwealth ex rel. Miner v. Margiotti, Attorney General*,⁵ sustained his common law power to prosecute in trial courts without the consent of the district attorney.

Common law power in the Attorney General as criminal prosecutor is not all that appears desirable to many of those who favor concentration of powers in the hands of the Attorney General. In an attempt to secure co-ordinated legal service to the growing number of departments and agencies in the several states the question arises as to the Attorney Generals' common law power to direct the course of civil litigation of their state agencies, and center the state's legal business in his office. Therefore, the scope of this note will be: (1) to ascertain the criminal and civil powers possessed by the Attorney General in England; (2) to see if the states have recognized common law power in their Attorneys General; (3) and if so, whether recognition has been of powers in civil matters, or criminal matters, or both; and (4) to determine the limits to which criminal and civil common law powers extend in the face of statutory delegation of powers to other officials or departments.

In England the office of Attorney General developed gradually. At first, the Crown was represented by many attorneys, each with limited authority as to matters over which he had control and courts in which he could appear.⁶ Bit by bit, the Attorney General supplanted these lesser attorneys until by the beginning of the sixteenth century he had become the chief law officer of the Crown. He not only had the power to appear in both high and low courts, but he also acted throughout the realm.⁷ Because of his wide range of duties he was empowered to appoint deputies to represent him in distant courts.⁸ The Attorney General acted on all the king's business, was consulted by the government on legal questions, and conducted important state trials, not only in court but also in preliminary stages.⁹ Blackstone gives us illustrations of his civil powers by noting that he filed informations to recover money or chattels belonging to the Crown; that he proceeded *in rem* to recover goods to which the Crown had a right; that he issued *quo warranto* for

⁵ 325 Pa. 17, 188 Atl. 524 (1936) (decision was partly based on statute).

⁶ 6 HOLDSWORTH, *HISTORY OF ENGLISH LAW* (1924) 458; Bellot, *The Origin of the Attorney-General* (1909) 25 L. Q. REV. 400; Holdsworth, *The Early History of the Attorney and Solicitor General* (1919) 13 ILL. L. REV. 602; STEPHEN, *Criminal Procedure from the Thirteenth to the Eighteenth Century* in 2 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY (1908) 443.

⁷ PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* (1929) 158; Holdsworth, *supra* note 6, 13 ILL. L. REV. at 607.

⁸ See note 7, *supra*.

⁹ Bellot, *loc. cit. supra* note 6; Holdsworth, *supra* note 6, 13 ILL. L. REV. 602.

the usurpation, abuse, or neglect of office, franchise, or liberty;¹⁰ and that he acted to have charities properly established.¹¹ The same writer notes the Attorney General prosecuting for breaches of custom and excise laws,¹² and filing informations in those types of misdemeanors peculiarly tending to disturb or endanger the government, or to molest or affront the king in the regular discharge of his royal functions.¹³ Where the case involved a minor misdemeanor the prosecution was customarily by private lawyers,¹⁴ but we have no reason to believe that the Attorney General could not have acted even here had he so desired. The conclusion seems reasonable that he had the power and duty of appearing in any matter, civil or criminal, whenever the sovereign was interested. There seems to be little, if any, authority which denies that he had such broad powers, and various sources confirm them.¹⁵

Crown charters providing for colonial laws agreeable as nearly as might be to those of England,¹⁶ logically served to transport the Attorney General with his common law powers to our Atlantic seaboard. Statutes incorporating the common law into the laws of the state¹⁷ constituted the next step in implanting him as the chief law officer in the several states. This adoption of the common law lends support to the contention that the Attorneys General in the several states have common law powers. Twenty-nine states have considered this problem, or have heard cases in which the matter fairly cried for discussion. Twelve jurisdictions¹⁸ have directly and unequivocally held that their Attorneys

¹⁰ 3 BL. COMM. *261.

¹¹ *Id.* at *427.

¹² 4 *Id.* at *308.

¹³ *Id.* at *261.

¹⁴ 3 *Id.* at *27.

¹⁵ *People v. Kramer*, 33 Misc. 209, 213, 68 N. Y. Supp. 383, 386 (Ct. Gen. Sess., N. Y. Co. 1900) and 2 THORNTON, ATTORNEYS AT LAW (1914) 1131 purport to quote 3 BL. COMM. *27 as follows: "He [Attorney General] represents the sovereign . . . and his power to prosecute all criminal offenses is unquestioned at common law." The writer is unable to find this remark in Blackstone, however. On the question of the extent of these powers compare *People v. Miner*, 2 Lans. 396 (N. Y. 1868) with *People v. Tweed*, 13 Abb. Pr. (N.S.) 25 (N. Y. Sup. Ct. 1872).

¹⁶ *Charter of Carolina* (1663) §6, 5 THORPE, AMERICAN CHARTERS, CONSTITUTIONS AND ORGANIC LAWS (1909) 2743, 2746 is typical of these.

¹⁷ For instance, FLA. COMP. GEN. LAWS ANN. (1927) §87; N. C. CODE ANN. (Michie, 1935) §970; PA. STAT. (Purdon, 1936) tit. 46, §152; VA. CODE ANN. (Michie, 1936) §2.

¹⁸ (1) *California*: *People v. Stratton*, 25 Cal. 242 (1864); *Pierce v. Super. Ct. in and for Los Angeles Co.*, 1 Cal. (2d) 759, 37 P. (2d) 460 (1934). (2) *Florida*: *State ex rel. Landis, Att'y Gen., v. S. H. Kress & Co.*, 115 Fla. 189, 155 So. 823 (1934). (3) *Illinois*: *Hunt, Att'y Gen., v. The Chicago and D. Ry.*, 20 Ill. App. 282 (1886), *aff'd*, 121 Ill. 638, 13 N. E. 176 (1887); *Fergus v. Russel*, 270 Ill. 304, 110 N. E. 130 (1915); *Saxby v. Sonnemann*, 318 Ill. 600, 149 N. E. 526 (1925). (4) *Kentucky*: *Respass v. Commonwealth ex rel. Att'y Gen.*, 131 Ky. 807, 115 S. W. 1131 (1909). (5) *Maine*: *Withee, Co. Att'y, v. Lane & Libby Fisheries Co.*, 120 Me. 121, 113 Atl. 22 (1921). (6) *Massachusetts*: *Parker v. May*, 59 Mass. 336 (1850). (7) *Minnesota*: *State ex rel. Young, Att'y Gen., v. Village of Kent*, 96 Minn. 255, 104 N. W. 948 (1905); *State ex rel. Young v. Robinson*, 101 Minn. 277, 112 N. W. 269 (1907). (8) *Missouri*: *State ex rel. Barrett, Att'y Gen., v. Boeckeler Lumber Co.*, 302 Mo. 187, 257 S. W.

General have the powers with which that officer was vested at common law¹⁹—such opinion being a necessary element in determining the case. Eight others²⁰ have expressly recognized these powers, but the expressions were dicta, or were plainly reinforced by statute. On the other hand, four states²¹ maintain in clear cut holdings that their Attorney General has no common law capacity to act. In addition, five others,²² either by dicta, or by implication, in failing to consider these powers, indicate that they may not recognize them.²³

Such diversity of result is hardly explained by a survey of the constitutional provisions for the office of Attorney General in these states. In general, the jurisdictions fall into three categories: (1) those with no constitutional provisions;²⁴ (2) those which merely provide for the

453 (1924). (9) *Montana*: State *ex rel.* Ford v. Young, 54 Mont. 401, 170 Pac. 947 (1918). (10) *New York*: People v. Tweed, 13 Abb. Pr. (n.s.) 25, (Sup. Ct. 1872); People v. Brennan, 69 Misc. 548, 127 N. Y. Supp. 958 (King's Co. Ct. 1910); People v. Tru-Sport Pub. Co., 160 Misc. 628, 291 N. Y. Supp. 449 (Sup. Ct. 1936). But *cf.* Ward Baking Co. v. Western Union Tel. Co., 205 App. Div. 723, 200 N. Y. Supp. 865 (3d Dep't 1923). (11) *Oregon*: Gibson v. Kay, 68 Ore. 589, 137 Pac. 864 (1914). (12) *Pennsylvania*: Commonwealth *ex rel.* Minerd v. Margiotti, Att'y Gen., 325 Pa. 17, 188 Atl. 524 (1936).

¹⁹ Except for certain statutory restrictions and implications which will appear later in this note.

²⁰ (1) *Kansas*: State v. Finch, 128 Kan. 665, 668, 280 Pac. 910, 912 (1929). (2) *Michigan*: Mundy v. McDonald, 216 Mich. 444, 450, 185 N. W. 877, 880 (1921). (3) *Mississippi*: State v. Key, 93 Miss. 115, 118, 46 So. 75, 76 (1908); Capitol Stages v. State *ex rel.* Hewitt, Dist. Att'y, 157 Miss. 576, 590, 128 So. 759, 763 (1930). *Contra*: Board of Sup'rs v. Guaranty Loan, Trust & Banking Co., 117 Miss. 132, 77 So. 955 (1918). (4) *Nevada*: State *ex rel.* Fowler v. Moore, 46 Nev. 65, 79, 207 Pac. 75, 76 (1922). (5) *New Hampshire*: Fletcher v. Merrimack County, 71 N. H. 96, 100, 51 Atl. 271, 273 (1901). (6) *New Jersey*: Bd. of Pub. Util. Comm'rs of N. J. v. Lehigh V. R. R., 106 N. J. Law 411, 413, 149 Atl. 263, 264 (1930). (7) *North Dakota*: State *ex rel.* Miller v. Dist. Ct. of Burleigh Co. 19 N. D. 819, 124 N. W. 417 (1910) *semble*. (8) *West Virginia*: State v. Ehrlick, 65 W. Va. 700, 702, 64 S. E. 935, 936 (1909).

²¹ (1) *Indiana*: Julian v. State, 122 Ind. 68, 23 N. E. 690 (1890). (2) *New Mexico*: State v. Davidson, 33 N. M. 664, 275 Pac. 373 (1929). (3) *Washington*: State *ex rel.* Winston v. Seattle Gas & Elec. Co., 28 Wash. 488, 68 Pac. 946 (1902). (4) *Wisconsin*: State v. Milwaukee E. Ry. & Light Co., 136 Wis. 179, 116 N. W. 900 (1908); State *ex rel.* Haven, Att'y Gen., v. Sayle, 168 Wis. 159, 169 N. W. 310 (1918); see State v. Snyder, 172 Wis. 415, 417, 179 N. W. 579, 580 (1920).

²² (1) *Arkansas*: R. R. Tax Cases, 136 Fed. 233 (C. C. E. D. Ark. 1905) *semble*. (2) *Colorado*: The Atchison, T. & S. F. R. R. v. People *ex rel.* Att'y Gen., 5 Colo. 60 (1879) *semble*. (3) *Georgia*: Walker, Att'y Gen., v. Georgia Ry. & Power Co., 146 Ga. 655, 92 S. E. 57 (1917) *semble*. (4) *Iowa*: Cosson, Att'y Gen., v. Bradshaw, Dist. Judge, 160 Iowa 296, 141 N. W. 1062 (1913) *semble*. (5) *Louisiana*: Saint v. Allen, 172 La. 350, 134 So. 246 (1931) *semble*.

²³ The numerical weight of the cases is interesting. The compilation of decisions is taken from the cases cited *supra* notes 18, 19, 20, 21, 22 and *infra* notes 32, 33, 34, 70.

	acknowledging common law powers	denying them
Direct holdings:	18	6
Dicta:	17	2
Implications:	11	6

²⁴ Indiana, Maine, and Oregon.

office;²⁵ (3) those which provide for the office and say that its duties shall be such as are prescribed by law.²⁶ States which acknowledge common law powers in the Attorney General, and those which deny them are found in each of these classes.²⁷

As has been pointed out, the Attorney General in England acted freely in actions concerning the Crown with no distinctions being drawn between civil and criminal powers. So, too, in the United States. No jurisdictions acknowledging common law powers in that office expressly limit the same to either criminal or civil actions. In Michigan,²⁸ Minnesota,²⁹ and New York³⁰ there are cases in both fields based on his common law powers. Mississippi, in dicta,³¹ has admitted his capacity in both situations. Cases arising in California,³² Florida,³³ Illinois,³⁴ Ken-

²⁵ IOWA CONST. (1857) art. V, §12; KANSAS CONST. (1859) art. I, §1; MASSACHUSETTS CONST. (1780) amend. XVII; MISSISSIPPI CONST. (1890) §1/3; NEW HAMPSHIRE CONST. (1902) art. 45; NEW JERSEY CONST. (1844) art. VII, §2 (4); NEW MEXICO CONST. (1911) art. V, §1; NEW YORK CONST. (1894) art. V, §1; PENNSYLVANIA CONST. (1874, as amended (1909) art. IV, §8.

²⁶ ARKANSAS CONST. (1874) art. VI, §§1, 22; COLORADO CONST. (1876) art. IV, §1; FLORIDA CONST. (1885) art. IV, §§20, 22; GEORGIA CONST. (1877) art. VI, §10; ILLINOIS CONST. (1870) art. V, §1 KENTUCKY CONST. (1890) §91; MICHIGAN CONST. (1850) art. VIII, §1; MINNESOTA CONST. (1857) art. V, §§1, 5; MISSOURI CONST. (1875) art. V, §1; MONTANA CONST. (1889) art. VII, §1; NEVADA CONST. (1864) art. V, §§19, 22; NORTH DAKOTA CONST. (1889) §§82, 83; WASHINGTON CONST. (1889) art. III, §§1, 21; WISCONSIN CONST. (1848) art. VI, §§1, 3.

²⁷ (a) Of those states whose constitutions merely provide for the office, Kan., Mass., N. J., N. H., Pa., and W. Va. recognize common law powers. Iowa and N. M. do not. Miss. and N. Y. have decisions both ways.

(b) Of those states whose constitutions make provision for the office and that its duties shall be such as are prescribed by law, Fla., Ill., Ky., Mich., Minn., Mo., Mont., Nev., and N. D. seem to acknowledge common law powers. Ark., Colo., Ga., Wash., and Wis. do not.

(c) Of those states whose constitutions are silent on this office, Me. and Ore. recognize common law powers. Indiana does not.

²⁸ The Att'y Gen. *ex rel.* Cook v. Detroit, 26 Mich. 262 (1872) *semble* (civil); see Mundy v. McDonald, 216 Mich. 444, 450, 185 N. W. 877, 880 (1921) (civil); People v. Rich, 237 Mich. 481, 212 N. W. 105 (1927) *semble* (criminal).

²⁹ State *ex rel.* Young, Att'y Gen., v. Village of Kent, 96 Minn. 255, 104 N. W. 948 (1905) (civil); State *ex rel.* Young v. Robinson, 101 Minn. 277, 112 N. W. 269 (1907) (criminal).

³⁰ People v. Vanderbilt, 26 N. Y. 287 (1863) *semble*; People v. Tobacco Mfg. Co., 42 How. Pr. 162 (Sup. Ct. 1871) *semble*; see People v. Long Island R. R., 113 Misc. 700, 705, 185 N. Y. Supp. 594, 597 (Sup. Ct. 1920) (all civil cases). People v. Brennan, 69 Misc. 548, 127 N. Y. Supp. 958 (King's Co. Ct. 1910); People v. Tru-Sport Pub. Co., 160 Misc. 628, 291 N. Y. Supp. 449 (Sup. Ct. 1936); see People v. Kramer, 33 Misc. 209, 213, 68 N. Y. Supp. 383, 386 (Ct. Gen. Sess. N. Y. Co. 1900); People v. Glaser, 60 Misc. 410, 414, 112 N. Y. Supp. 323, 325 (Sup. Ct. 1908) (all criminal cases).

³¹ State v. Key, 93 Miss. 115, 118, 46 So. 75, 76 (1908) (criminal); Capitol Stages v. State *ex rel.* Hewitt, Dist. Att'y, 157 Miss. 576, 590, 128 So. 759, 763 (1930) (civil).

³² People v. Stratton, 25 Cal. 242 (1864); Pierce v. Super. Ct. in and for Los Angeles Co., 1 Cal. (2d) 759, 37 P. (2d) 460 (1934); People v. Gold Run Ditch & Mining Co., 66 Cal. 138, 4 Pac. 1152 (1884) *semble*; People *ex rel.* Roberts v. Beaudry, 91 Cal. 213, 27 Pac. 610 (1891) *semble*; People v. Oakland Water-Front Co., 118 Cal. 234, 50 Pac. 305 (1897) *semble*.

³³ State *ex rel.* Landis, Att'y Gen., v. S. H. Kress & Co., 115 Fla. 189, 155 So.

tucky,³⁵ Maine,³⁶ Montana,³⁷ Massachusetts,³⁸ and Oregon³⁹ have been purely civil. Those from Kansas,⁴⁰ Missouri,⁴¹ New Hampshire,⁴² North Dakota,⁴³ and Pennsylvania⁴⁴ are criminal only. But there is no reason to believe that these courts which have heard only cases of one type or the other will not include both civil and criminal aspects in the common law scope of their Attorney Generals' powers when the question arises. The question of common law powers has arisen in a diversity of ways. It is noteworthy that of the two situations where there are a substantial number of decisions, one is criminal, the other civil. Thus, eight cases have involved the Attorney General's power to appear before a grand jury in a criminal case.⁴⁵ Nine cases⁴⁶ have arisen where private counsel tried to represent a state agency and there was either an objection to his doing so, or to his collecting fees therefor, on the ground that this was a duty of the Attorney General.

823 (1934); *State ex rel. Crim v. Juvenal*, 118 Fla. 407, 159 So. 663 (1935) *semble*.

³⁴ *Hunt, Att'y Gen., v. The Chicago and D. Ry.*, 20 Ill. App. 282 (1886), *aff'd*, 121 Ill. 638, 13 N. E. 176 (1887); *Fergus v. Russel*, 270 Ill. 304, 110 N. E. 130 (1915); *Saxby v. Sonnemann*, 318 Ill. 600, 149 N. E. 526 (1925); *People ex rel. Lowe v. Marquette Nat. Fire Ins. Co.*, 351 Ill. 516, 184 N. E. 800 (1933) *semble*.

³⁵ *Respass v. Commonwealth ex rel. Att'y Gen.*, 131 Ky. 807, 115 S. W. 1131 (1909).

³⁶ See *Withee, Co. Att'y, v. Lane & Libby Fisheries Co.*, 120 Me. 121, 123, 113 Atl. 22, 23 (1921).

³⁷ *State ex rel. Ford v. Young*, 54 Mont. 401, 170 Pac. 947 (1918); see *State ex rel. Pew v. Porter, State Auditor*, 57 Mont. 535, 537, 189 Pac. 618, 619 (1920).

³⁸ *Parker v. May*, 59 Mass. 336 (1850); *Commonwealth v. Kozlowsky*, 238 Mass. 379, 131 N. E. 207 (1921) *semble*.

³⁹ See *In re State v. Millis*, 61 Ore. 245, 249, 119 Pac. 763, 765 (1912); *Gibson v. Kay*, 68 Ore. 589, 594, 137 Pac. 864, 866 (1914).

⁴⁰ See *State v. Finch*, 128 Kan. 665, 668, 280 Pac. 910, 912 (1929).

⁴¹ *State ex rel. Barrett, Att'y Gen., v. Boeckeler Lumber Co.*, 302 Mo. 187, 257 S. W. 453 (1924).

⁴² See *Fletcher v. Merrimack County*, 71 N. H. 96, 100, 51 Atl. 271, 273 (1901).

⁴³ *State ex rel. Miller v. Dist. Ct. of Burleigh Co.*, 19 N. D. 819, 124 N. W. 417 (1910) *semble*.

⁴⁴ *Commonwealth ex rel. Miner v. Margiotti, Att'y Gen.*, 325 Pa. 17, 188 Atl. 524 (1936).

⁴⁵ *Cosson, Att'y Gen., v. Bradshaw, Dist. Judge*, 160 Iowa 296, 141 N. W. 1062 (1913); *Commonwealth v. Kozlowsky*, 238 Mass. 379, 131 N. E. 207 (1921); *People v. Rich*, 237 Mich. 481, 212 N. W. 105 (1927); *State ex rel. Miller v. Dist. Ct. of Burleigh Co.*, 19 N. D. 819, 124 N. W. 417 (1910); *People v. Kramer*, 33 Misc. 209, 68 N. Y. Supp. 383 (Ct. Gen. Sess. N. Y. Co. 1900); *People v. Glaser*, 60 Misc. 410, 112 N. Y. Supp. 323 (Sup. Ct. 1908); *People v. Brennan*, 69 Misc. 548, 127 N. Y. Supp. 958 (King's Co. Ct. 1910); *People v. Tru-Sport Pub. Co.*, 160 Misc. 628, 291 N. Y. Supp. 449 (Sup. Ct. 1936).

⁴⁶ *Fergus v. Russel*, 270 Ill. 304, 110 N. E. 130 (1915); *Julian v. State*, 122 Ind. 68, 23 N. E. 690 (1890); *Saint v. Allen*, 172 La. 350, 134 So. 246 (1931); *State ex rel. Pew v. Porter, State Auditor*, 57 Mont. 535, 189 Pac. 618 (1920); *Bd. of Pub. Util. Comm'rs of N. J. v. Lehigh V. R. R.*, 106 N. J. Law 411, 149 Atl. 263 (1930); *State v. Davidson*, 33 N. M. 664, 275 Pac. 373 (1929); *People v. Santa Clara Lumber Co.*, 55 Misc. 507, 106 N. Y. Supp. 624 (Sup. Ct. 1907); *Gibson v. Kay*, 68 Ore. 589, 137 Pac. 864 (1914); *State v. Gattavara*, 182 Wash. 325, 47 P. (2d) 18 (1935).

From the point of view of the Attorney General's prosecution of criminal cases in trial courts it is important to determine the effect of statutes creating prosecuting attorneys for various districts throughout the state. Even where the general capacity of the Attorney General to use common law powers is recognized, four states⁴⁷ have reasoned that when the legislature delegates duties to a prosecuting attorney which were the Attorney General's common law function, the powers vest exclusively in the local prosecutor. The prosecuting attorney is said to be carved out of the office of Attorney General. In sustaining this position they argue that concurring powers would produce interference, conflict, and friction, and delay business to the detriment of the state.⁴⁸ Yet Minnesota,⁴⁹ New York,⁵⁰ and Pennsylvania⁵¹ hold the powers to be concurrent in this situation. These states reason that the powers remain latent in the Attorney General, and that concurrence, far from being a detriment, facilitates prompt and thorough action. Pennsylvania goes so far as to allow the Attorney General to replace a prosecuting attorney without his consent.⁵² The New York and Minnesota cases on their facts involved co-operation between the Attorney General and the local prosecutor and thus do not meet the situation where the prosecutor objects to the Attorney General's action. If the limitation placed on the Attorney General's common law powers by the first group of states is followed it is manifest that his power of prosecution in lower courts is non-existent. Even under the more liberal interpretation of the second group, the lone Pennsylvania decision gives the Attorney General such control over prosecution as is contemplated by the establishment of a Department of Justice. Of course, many may feel that the present system of prosecution in complete charge of the local solicitor, of whom this state has twenty, is to be preferred, even if the common law would allow co-ordination through the Attorney General.

Passing from criminal to civil activity, we seek to find out what control the Attorney General may maintain over civil litigation in which

⁴⁷ *Kansas*: See *State v. Finch*, 128 Kan. 665, 669, 280 Pac. 910, 912 (1929). *New Jersey*: See Bd. of Pub. Util. Comm'rs of N. J. v. *Lehigh V. R. R.*, 106 N. J. Law 411, 413, 149 Atl. 263, 264, (1930). *Oregon*: See *In re State v. Millis*, 61 Ore. 244, 249, 119 Pac. 763, 765 (1912). *West Virginia*: *State v. Ehrlick*, 65 W. Va. 700, 64 S. E. 935 (1909).

⁴⁸ *State v. Ehrlick*, 65 W. Va. 700, 703, 64 S. E. 935, 936 (1909) expresses this argument forcefully.

⁴⁹ *State ex rel. Young, Att'y Gen., v. Village of Kent*, 96 Minn. 255, 104 N. W. 948 (1905); *State ex rel. Young v. Robinson*, 101 Minn. 277, 112 N. W. 269 (1907).

⁵⁰ *People v. Brennan*, 69 Misc. 548, 127 N. Y. Supp. 958 (King's Co. Ct. 1910); *People v. Tru-Sport Pub. Co.*, 160 Misc. 628, 291 N. Y. Supp. 449 (Sup. Ct. 1936).

⁵¹ *Commonwealth ex rel. Miner v. Margiotti, Att'y Gen.*, 325 Pa. 17, 188 Atl. 524 (1936).

⁵² *Ibid.* This case is the only one found by the writer which goes this far in giving the Attorney General power over prosecution in lower courts.

the state is concerned. In England this control was extensive if not complete. It might well follow that in states acknowledging common law powers in their Attorneys General this control is relatively extensive. The difficulty is that statutes may give his powers to various state departments. The cases arising out of such statutes are few. One state, Illinois, emphatically denies to its legislature the power to create these departmental attorneys on the ground that the common law powers of the Attorney General may not be taken from him by legislative enactment.⁵³

This is the only jurisdiction which has not allowed the legislature by express action, at least, to lessen the common law powers of the Attorney General. The other cases merely decide that where such statutes exist, the Attorney General may no longer exclusively act for the various state departments. But whether he would be held to be completely cut out, or to have concurrent powers, or to be able in certain instances to replace the departmental attorney is left in doubt. If we follow an analogy to the Attorney General-prosecuting attorney relationship developed in the preceding paragraph any of these results is possible, depending on the jurisdiction. What result is desirable? The control by the individual department of its legal affairs may breed greater familiarity with the problems that come up. Co-ordination through the Attorney General might lead to economy, uniformity, and simplicity in operation.

Such a general survey as the above fails to point out the tortuous path which this seemingly simple problem has weaved in many states. It is marked by reversals of position, extreme conclusions, and confusion. The Kentucky Court, in 1829, by holding⁵⁵ that the Attorney General could represent a defendant in a criminal trial plainly implied that his common law powers were not complete, as in England the Attorney General could not appear against the Crown.⁵⁶ Yet in 1909 this court fully acknowledged these powers.⁵⁷ In Washington, where the Attorney General is purportedly given only constitutional and statutory powers,⁵⁸ the court said in 1935 by way of dictum that "in the absence of legislative instructions he may exercise all such powers as public interest may

⁵³ *Fergus v. Russel*, 270 Ill. 304, 110 N. E. 130 (1915); see *People ex rel. Gullett v. McCullough*, 254 Ill. 9, 20, 98 N. E. 156, 159 (1912).

⁵⁴ *Bd. of Pub. Util. Comm'rs of N. J. v. Lehigh V. R. R.*, 106 N. J. Law 411, 149 Atl. 263 (1930); *People v. Santa Clara Lumber Co.*, 55 Misc. 507, 106 N. Y. Supp. 624 (Sup. Ct. 1907); *Gibson v. Kay*, 68 Ore. 589, 137 Pac. 864 (1914).

⁵⁵ *Sharp's Adm'x v. Kirkendall*, 25 Ky. 150 (1829).

⁵⁶ 3 BL. COMM. *27. By consent of the king the Attorney General could appear for any party.

⁵⁷ *Respass v. Commonwealth ex rel. Att'y Gen.*, 131 Ky. 807, 115 S. W. 1131 (1909).

⁵⁸ *State ex rel. Winston v. Seattle Gas & Electric Co.*, 28 Wash. 488, 68 Pac. 946 (1902).

require".⁵⁹ While the Illinois court has held that the legislature may not lessen the Attorney General's common law powers,⁶⁰ Missouri's highest tribunal has ventured far in the opposite direction, stating that the legislature may not add to his powers at common law.⁶¹ California's court has a somewhat similar doctrine. There, apparently, the legislature may not require the Attorney General to perform any duties which were not customarily performed by this officer at the time their constitution was adopted.⁶² Louisiana's Attorney General has been told that while the constitution allows him to appear in all actions in which the state is interested, that "interest" must be narrowly construed and does not include all state departments.⁶³ The Mississippi court first acknowledged common law powers by dictum.⁶⁴ Then it held them to be nonexistent.⁶⁵ Amidst such confusion the legislature passed a statute conferring full common law duties and attributes on the Attorney General,⁶⁶ but subsequently the court has intimated that this was unnecessary.⁶⁷ The New Mexico supreme court reasons that although common law powers would normally fall to the Attorney General, they do not do so in that state because his powers were defined by statute at the time the office was created.⁶⁸

New York, because of the number of cases⁶⁹ decided there, and their apparent confusion, merits especial attention. Numerous holdings and dicta in lower courts⁷⁰ are to the effect that the Attorney General has

⁵⁹ State v. Gattavara, 182 Wash. 325, 329, 47 P. (2d) 18, 19 (1935). This broad statement does not seem to be based on a statute.

⁶⁰ See note 53, *supra*.

⁶¹ See State *ex rel.* Barrett, Att'y Gen., v. Boeckeler Lumber Co., 302 Mo. 187, 206, 257 S. W. 453, 456 (1924).

⁶² Love v. Baehr, 47 Cal. 364 (1874). In this connection it is interesting to note that California's Department of Justice was created by constitutional amendment rather than by statute as has been done usually. Was a constitutional amendment necessary under the doctrine of this case in order to give the Attorney General wider powers?

⁶³ Saint v. Allen, 172 La. 350, 134 So. 246 (1931).

⁶⁴ State v. Key, 93 Miss. 115, 118, 46 So. 75, 76 (1908).

⁶⁵ Board of Sup'rs v. Guaranty Loan, Trust & Banking Co., 117 Miss. 132, 77 So. 955 (1918).

⁶⁶ Miss. Laws 1918, c. 238, §1.

⁶⁷ Capitol Stages v. State *ex rel.* Hewitt, Dist. Att'y, 157 Miss. 576, 590, 128 So. 759, 763 (1930).

⁶⁸ State v. Davidson, 33 N. M. 664, 275 Pac. 373 (1929).

⁶⁹ There are more cases from New York considering the common law powers of the Attorney General than from any other jurisdiction.

⁷⁰ People v. Tweed, 13 Abb. Pr. (N.S.) 25 (N. Y. Sup. Ct. 1872); People v. Brennan, 69 Misc. 548, 127 N. Y. Supp. 958 (King's Co. Ct. 1910); People v. Tru-Sport Pub. Co., 160 Misc. 628, 281 N. Y. Supp. 449 (Sup. Ct. 1936); see People v. Miner, 2 Lans. 396, 398 (N. Y. 1868); People v. Kramer, 33 Misc. 209, 213, 68 N. Y. Supp. 383, 386 (Ct. Gen. Sess. N. Y. Co. 1900); People v. Santa Clara Lumber Co., 55 Misc. 507, 515, 106 N. Y. Supp. 624, 630 (Sup. Ct. 1907); People v. Glaser, 60 Misc. 410, 414, 112 N. Y. Supp. 323, 325 (Sup. Ct. 1908); People v. Long Island R. R., 113 Misc. 700, 705, 185 N. Y. Supp. 594, 597 (Sup. Ct. 1920); People v. Finch, Pruyn & Co., 207 App. Div. 76, 78, 202 N. Y. Supp. 582, 584 (3d Dep't 1923); People v. Tobacco Mfg. Co., 42 How. Pr. 162 (Sup. Ct. 1871) *semble*.

full common law powers except where positively restricted by statute. Yet the Appellate Division of the Supreme Court has vigorously denied⁷¹ that this officer could investigate and prosecute a crime, even under a statute which was apparently followed with care.⁷² The court was shocked that the legislature would attempt to delegate to the Attorney General any such duty, and completely ignored the fact that this activity was routine at common law. Nor does it mention any of the lower court opinions referred to above. Sixty years earlier the highest court of the state had allowed the Attorney General to bring an action to enjoin a public nuisance.⁷³ The court relied on neither constitution nor statute, and the implication might perhaps follow that it was allowed under a common law power.⁷⁴

The general survey of the nation as a whole, and a more particularized view of the individual states, reveal the wide diversity of attitudes and confusion in the states as to how far to allow common law powers to extend. The liberal view demonstrated by the most recent case, *Commonwealth ex rel. Miner v. Margiotti, Attorney General*,⁷⁵ would seem to permit the co-ordinated prosecution of crimes and direction of state civil litigation by the Attorney General by virtue of his common law powers. New York, in the *Tru-Sport* case,⁷⁶ recognizes the desirability of this when it says: "The cycle of problem that confronts the administration of our criminal law has turned to the point where the need of a renewal of the use of the Attorney General's common law power may be said to be oftentimes apparent."

The North Carolina courts have not as yet determined the question. The fact that our court has not heretofore recognized common law powers in the Attorney General is in no way conclusive. Pennsylvania, only a year ago, considering the matter for the first time, acknowledged wide common law powers in that officer. Passage of the constitutional amendment would go far to clarify many of the problems. Its failure would throw the issue squarely into the hands of the legislature and the

⁷¹ *Ward Baking Co. v. Western Union Tel. Co.*, 205 App. Div. 723, 200 N. Y. Supp. 865 (3d Dep't 1923).

⁷² N. Y. Laws 1917, c. 595, §62 provides ". . . Attorney General may . . . inquire into matters concerning the public peace, public safety and public justice. . . ."

⁷³ *People v. Vanderbilt*, 26 N. Y. 287 (1863).

⁷⁴ In the following cases the Attorney General was allowed to act to abate a public nuisance by virtue of his common law powers: *People v. Gold Run Ditch & Mining Co.*, 66 Cal. 138, 4 Pac. 1152 (1884) *semble*; *People ex rel. Roberts v. Beaudry*, 91 Cal. 213, 27 Pac. 610 (1891) *semble*; *Hunt, Att'y Gen., v. Chicago and D. Ry.*, 20 Ill. App. 282 (1886), *aff'd*, 121 Ill. 638, 13 N. E. 176 (1887); *Respass v. Commonwealth ex rel. Att'y Gen.*, 131 Ky. 807, 115 S. W. 1131 (1909); *Withee, Co. Att'y, v. Lane & Libby Fisheries Co.*, 120 Me. 121, 113 Atl. 22 (1921); *State ex rel. Ford v. Young*, 54 Mont. 401, 170 Pac. 947 (1918); *State v. Ehrlick*, 65 W. Va. 700, 64 S. E. 935 (1909).

⁷⁵ 325 Pa. 17, 188 Atl. 524 (1936).

⁷⁶ 160 Misc. 628, 639, 291 N. Y. Supp. 449, 461 (Sup. Ct. 1936).

courts. State departments and agencies continue to increase⁷⁷ and the problem as to the source of their legal aid becomes more acute. Is each department to have private counsel, or shall we have co-ordination in the hands of the Attorney General? Likewise, in combating the criminal of today, is the local prosecutor to be in complete control, or is he to be subject to partial guidance from the Attorney General?

ROBERT C. HOWISON, JR.

Injunctions Against Federal Taxes—Collection of Federal Admission Taxes from State Universities

The Revenue Act of 1926¹ imposed a tax of ten per cent on the purchaser of an admission to an athletic contest, the tax to be collected by the promoter of the contest. The University System of Georgia collected such taxes on the sale of tickets to football games engaged in by the University of Georgia and the Georgia Institute of Technology. On the back of each ticket was printed the statement that, if the school, because it is a state instrumentality, should be found not liable for the tax, it would be retained as a part of the admission fee. Funds thus collected were deposited in a separate bank account on which the defendant collector of internal revenue levied under warrants of distraint. The plaintiff Board of Regents of the University System sought an injunction to restrain the collections. *Held*, there is no special statute authorizing the collection of admissions taxes against the plaintiff under warrants of distraint. It is unnecessary to construe the general distraint statute, because the plaintiff, having no adequate remedy at law, is entitled to an injunction against the collection of an unconstitutional tax on a state governmental function.²

Though taxes may be collected from a taxpayer in summary fashion by means of distraint of the taxpayer's property,³ it is generally recognized that such action may not be taken against the property of a third party who is not the taxpayer,⁴ except where there is specific statutory authority.⁵ In the principal case, because the purchaser of a ticket, and

⁷⁷In 1868 there were fourteen state departments, agencies and institutions. By 1937 there were one hundred fifteen.

¹44 STAT. 91, 92 (1926), as amended by 47 STAT. 271 (1932), 26 U. S. C. A. §§940, 941 (1935).

²Page v. Regents of The Univ. System of Ga., 93 F. (2d) 887 (C. C. A. 9th, 1937).

³REV. STAT. §3187 (1866), as amended by 43 STAT. 343 (1924), 26 U. S. C. A. §1580 (1935).

⁴Long v. Rasmussen, 281 Fed. 236 (D. Mont. 1922); Owensboro Ditcher & Grader Co. v. Lucas, 18 F. (2d) 798 (W. D. Kan. 1927); Livingston v. Becker, 40 F. (2d) 673 (E. D. Mo. 1929); Hubbard Inv. Co. v. Brast, 59 F. (2d) 709 (C. C. A. 4th, 1932); Lion Coal Co. v. Anderson, 62 F. (2d) 325 (C. C. A. 10th, 1932); Cannon v. Nichols, 80 F. (2d) 934 (C. C. A. 10th, 1935).

⁵Phillips v. Comm'r of Int. Rev., 283 U. S. 589, 51 Sup. Ct. 608, 75 L. ed. 1289 (1930); Seaman v. Guaranty Trust Co. of N. Y., 1 F. (2d) 39 (S. D. N.

not the university, actually pays the tax, it is argued that the general distraint statute⁶ does not authorize distraint of the university's property. There appears, however, to be specific authorization for distraint of the property of one in the plaintiff's position, *i.e.*, one who does not pay the tax but on whom is imposed the duty of collecting it, in another statute. This act⁷ provides that internal revenue funds so collected by another "shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including penalties) as are applicable to the taxes from which such fund arose." By the terms of the statute, distraint, undoubtedly a valid process against the taxpayer's property, becomes applicable to the stakeholder's property.

However, irrespective of the validity of the use of distraint by the collector of internal revenue, the circuit court of appeals feels that the plaintiff is entitled to an injunction against the collection of the tax, because its remedy at law is inadequate. This conclusion is based on the premise that, if the plaintiff pays the tax, it could not maintain an action at law to recover the funds, that it is not the taxpayer and lacks the requisite interest.⁸ Such a premise seems somewhat vulnerable. Clubs, seeking to recover initiation and dues taxes imposed on their members, have been held to have sufficient interest to maintain suit.⁹ The duties of collection and liability over to the government, which are imposed on the collecting party, were deemed sufficient to make the club a real party in interest. Those cases are possibly distinguishable in that the club was under a duty to account for funds recovered to identifiable members. But, in the principal case, by contractual agreement the ticket purchasers have relinquished their interest in the funds to the university. Thus the university is in even a stronger position than the clubs to maintain a suit to recover the funds after payment to the government. A remedy at law existing, grounds for equitable relief might well fail.

Another obstacle to the availability of injunction is the long standing but much contested policy against judicial interference with collec-

Y. 1924); *Felland v. Wilkinson*, 33 F. (2d) 961 (W. D. Wis. 1928); *United States v. American Exchange Irving Trust Co.*, 43 F. (2d) 829 (S. D. N. Y., 1930); *Alexander v. Mid-Continent Petroleum Corp.*, 51 F. (2d) 735 (C. C. A. 10th, 1931).

⁶ 46 STAT. 768 (1934), 26 U. S. C. A. §1551 (1935).

⁷ Prior to bringing suit for injunction, the plaintiff made payment under protest of taxes on sale of football tickets, and filed a claim for refund with the Commissioner of Internal Revenue. The claim was denied on the ground that plaintiff was not the taxpayer and suffered no loss.

⁸ *Alliance Country Club v. United States*, 62 Ct. Cl. 579 (1926); *Masonic Country Club of Western Mich. v. Holden*, 18 F. (2d) 553 (C. C. A. 6th, 1927); *Congressional Country Club v. United States*, 44 F. (2d) 266 (Ct. Cl. 1930); *Bunker Hill Country Club v. United States*, 9 F. Supp. 52 (Ct. Cl. 1934); *Builders' Club of Chicago v. United States*, 14 F. Supp. 1020 (Ct. Cl. 1936); see *White v. Hopkins*, 51 F. (2d) 159, 163 (C. C. A. 5th, 1931). *Contra*: *Shannonpin Country Club v. Heiner*, 2 F. (2d) 393 (W. D. Pa. 1924).

tion of the revenues.¹⁰ There was early recognition¹¹ of the wisdom of REV. STAT. §3224,¹² a seemingly succinct, unambiguous statement of a flat legislative prohibition against any such suits. Impelled by the equities of certain cases, however, the Supreme Court has recognized three exceptions to the statute, injunctions being granted where: (1) the exaction, denominated a tax, is not a tax, but a penalty;¹³ (2) an exceptional hardship is worked upon the taxpayer¹⁴ (such as forcing him to go out of business); (3) the tax has previously been declared a nullity by the Court.¹⁵ In this process of judicial emasculation of the statute, language has been so loosely employed by the Court¹⁶ as to result in utter confusion in the application of the case law by the lower federal courts. Section 3224 has been conflictingly defined as: (1) requiring only that the case come under one of the ordinary heads of equity jurisprudence;¹⁷ (2) declaring that more than the ordinary equities are neces-

¹⁰ Miller, *Restraining the Collection of Federal Taxes and Penalties by Injunction* (1923) 71 U. OF PA. L. REV. 318; Gorovitz, *Federal Tax Injunctions and the Standard Nut Cases* (1932) 10 TAX MAG. 446; Note (1935) 49 HARV. L. REV. 109.

¹¹ Pullan v. Kinsinger, 20 Fed. Cas. No. 11, 463 (C. C. S. D. Ohio, 1870).

¹² "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." REV. STAT. §3224 (1867), 26 U. S. C. A. §1543 (1935).

¹³ Lipke v. Lederer, 259 U. S. 557, 42 Sup. Ct. 549, 66 L. ed. 1061 (1922); Regal Drug Corp. v. Wardell, 260 U. S. 386, 43 Sup. Ct. 152, 67 L. ed. 318 (1922).

¹⁴ Hill v. Wallace, 259 U. S. 44, 42 Sup. Ct. 453, 66 L. ed. 822 (1921); Miller v. Standard Nut Margarine Co. of Fla., 284 U. S. 498, 52 Sup. Ct. 260, 76 L. ed. 422 (1932).

¹⁵ Rickert Rice Mills, Inc. v. Fontenot, 297 U. S. 110, 56 Sup. Ct. 374, 80 L. ed. 512 (1936).

¹⁶ While the basis of the decision in Hill v. Wallace, 259 U. S. 44, 42 Sup. Ct. 453, 66 L. ed. 822 (1921), seemed to be the exceptional circumstances involved, the Court later attempted to classify the case with Lipke v. Lederer, 259 U. S. 557, 42 Sup. Ct. 549, 66 L. ed. 1061 (1922), as one of a penalty. Graham v. Dupont, 262 U. S. 234, 258, 43 Sup. Ct. 567, 570, 67 L. ed. 965, 968 (1923). Still later, in the Standard Nut Margarine case, "exceptional circumstances" was again made the basis of the ruling, but Section 3224 was declared to be merely declaratory of the old equity rule that a suit will not lie to restrain the collection of a tax upon the sole ground of its illegality. Miller v. Standard Nut Margarine Co. of Fla., 284 U. S. 498, 52 Sup. Ct. 260, 76 L. ed. 422 (1932).

This interpretation of Section 3224 would rob it of any vitality whatsoever, since equity has long denied its "jurisdiction" where the remedy at law was adequate.

The Court only added to the confusion by its decision in Rickert Rice Mills, Inc. v. Fontenot, 297 U. S. 110, 56 Sup. Ct. 374, 80 L. ed. 513 (1936), cited *supra* note 14. Though the decision there is explainable on the ground that the A. A. A. processing tax had been declared a nullity a week previously in United States v. Butler, 297 U. S. 1, 56 Sup. Ct. 312, 80 L. ed. 477 (1936), still the granting of an injunction pending appeal (after its denial by the circuit court) in the Rice Milling cases has had no explanation. Rickert Rice Mills, Inc. v. Fontenot, 296 U. S. 569, 56 Sup. Ct. 249, 80 L. ed. 401 (1935); see also Bailey v. George, 259 U. S. 16, 42 Sup. Ct. 419, 66 L. ed. 816 (1922) (where injunction was denied against the Child Labor Tax, which was declared unconstitutional the same day). Note (1936) 21 ST. LOUIS L. REV. 140.

¹⁷ Gold Medal Foods, Inc. v. Landy, 11 F. Supp. 65 (D. Minn. 1935); Lake Erie Provision Co. v. Moore, 11 F. Supp. 522 (N. D. Ohio 1935); Neild Mfg.

sary in order to remove the statutory bar.¹⁸ What exactions constitute penalties seem fairly well defined.¹⁹ But, even after the various interpretations of the meaning of the statute, what circumstances are "exceptional and extraordinary", so as to take the case out of the statute, is a matter upon which there has been a wide divergence of opinion. Most prominent example of such divergence is the variety of rulings by the lower courts in litigation arising under the A.A.A. Before the A.A.A. was invalidated, the passage of a bill by the House of Representatives,²⁰ denying recovery of previously-accruing taxes, was held by some courts to constitute such a threat to the legal remedy that equitable relief was imperative.²¹ Other courts felt that pending legislation should not be

Corp. v. Hassett, 11 F. Supp. 642 (D. Mass. 1935); Inland Milling Co. v. Huston, 11 F. Supp. 813 (S. D. Iowa 1935); Washburn Crosby Co. v. Nee, 11 F. Supp. 822 (W. D. Mo. 1935); G. B. R. Smith Milling Co. v. Thomas, 11 F. Supp. 833 (N. D. Tex. 1935); Danahy Packing Co. v. McGowan, 11 F. Supp. 920 (W. D. N. Y. 1935); John A. Gebelein, Inc. v. Milbourne, 12 F. Supp. 105 (D. Md. 1935); Baltic Mills Co. v. Bitgood, 12 F. Supp. 132 (D. Conn. 1935); Kingan & Co., Inc. v. Smith, 12 F. Supp. 328 (S. D. Ind. 1935); Kingan & Co., Inc. v. Smith, 12 F. Supp. 329 (S. D. Ind. 1935); Gold Medal Foods, Inc. v. Landy, 12 F. Supp. 406 (D. Minn. 1935); Grosvenor-Dale Co. v. Bitgood, 12 F. Supp. 416 (D. Conn. 1935); Danahy Packing Co. v. McGowan, 12 F. Supp. 457 (W. D. N. Y. 1935); A. P. W. Paper Co., Inc. v. Riley, 12 F. Supp. 1238 (N. D. N. Y. 1935); *In Re Processing Tax Cases*, 13 F. Supp. 218 (W. D. Tex. 1935); Kingan & Co., Inc. v. Smith, 16 F. Supp. 549 (S. D. Ind. 1936).

¹⁸ Fisher Flouring Mills Co. v. Vierhus, 78 F. (2d) 889 (C. C. A. 9th, 1935); Larabee Flour Mills Co. v. Nee, 11 F. Supp. 132 (W. D. Mo. 1935); Cohen v. Durning, 11 F. Supp. 824 (S. D. N. Y. 1935); Merkel, Inc. v. Rasquin, 12 F. Supp. 215 (E. D. N. Y. 1935); Woner v. Lewis, 13 F. Supp. 45 (N. D. Cal. 1935); C. F. Simonin's Sons, Inc. v. Rothensies, 13 F. Supp. 807 (E. D. Pa. 1936); R. J. Reynolds Tobacco Co. v. Robertson, 14 F. Supp. 463 (M. D. N. C. 1935); Pinkney Packing Co. v. Thomas, 17 F. Supp. 420 (N. D. Tex. 1936); Red Star Yeast & Products Co. v. La Budde, 83 F. (2d) 394 (C. C. A. 7th, 1936); Huston v. Iowa Soap Co., 85 F. (2d) 649 (C. C. A. 8th, 1936); O'Malley v. Haskins Bros. & Co., 85 F. (2d) 657 (C. C. A. 8th, 1936); Gardner v. Helvering, 88 F. (2d) 746 (App. D. C. 1936); Concentrate Mfg. Corp. v. Higgins, 90 F. (2d) 439 (C. C. A. 2d, 1937).

¹⁹ The 15% sales tax imposed by the Bituminous Coal Act upon those coal dealers who did not comply with its provisions, as compared with a 1½% tax on those complying, was uniformly held by the lower federal courts to constitute a penalty, and, as such, to be enjoinable. *R. C. Tway Coal Co. v. Glenn*, 12 F. Supp. 570 (W. D. Ky. 1935); *Hume-Sinclair Coal Mining Co. v. Nee*, 12 F. Supp. 801 (W. D. Mo. 1935); *Pittsburgh Coal Co. v. Bell*, 13 F. Supp. 37 (W. D. Pa. 1935); *Westmoreland Coal Co. v. Rothensies*, 13 F. Supp. 321 (E. D. Pa. 1935); *Pocahontas Fuel Co. v. Early*, 13 F. Supp. 605 (W. D. Va. 1935); *cf. Sewell Ridge Coal Corp. v. Early*, 13 F. Supp. 610 (W. D. Va. 1936).

The Supreme Court allowed an injunction against the collection of the tax without mentioning the prohibitory statute. *R. C. Tway Coal Co. v. Glenn*, 298 U. S. 238, 56 Sup. Ct. 855, 80 L. ed. 1160 (1936).

Other recent cases involving penalties are *Cleveland v. Davis*, 9 F. Supp. 337 (S. D. Ala. 1934); *Green v. Page*, 9 F. Supp. 844 (S. D. Ga. 1935); *Driscoll v. Jones*, 19 F. Supp. 792 (N. D. Okla. 1937).

²⁰ H. R. REP. NO. 8492, 74th Cong., 1st Sess. (1935) 9991.

²¹ *Gold Medal Foods, Inc. v. Landy*, 11 F. Supp. 65 (D. Minn. 1935); *Neild Mfg. Corp. v. Hassett*, 11 F. Supp. 642 (D. Mass. 1935); *Inland Milling Co. v. Huston*, 11 F. Supp. 813 (S. D. Iowa, 1935); *Washburn Crosby Co. v. Nee*, 11 F. Supp. 822 (W. D. Mo. 1935); *Kingan & Co., Inc. v. Smith*, 12 F. Supp. 328 (S. D. Ind. 1935).

considered as having any effect on the equities of the case.²² A subsequent amendment to the A.A.A.²³ required, as a condition precedent to recovery of taxes paid under the act, that the processor prove that he had absorbed and had not passed on the tax. Again the judges differed as to the effect of the amendment on the adequacy of the remedy at law, and hence as to the availability of injunctions against the tax. Some declared that the legal remedy, hedged about with such limitations, was inadequate;²⁴ others felt that the legal remedy, on the basis of previous authority,²⁵ was adequate.²⁶ A provision of the Revenue Act of 1936,²⁷ aimed at recalcitrant processors who had obtained injunctions and paid the amounts of the taxes into court, levied a "wind-fall" tax of 80% on the sums returned to those processors by the court, if the processor had not absorbed the amount of the tax. A majority of the courts felt that this statute created no such "exceptional circumstances" as would permit of interference by injunction with collection of the 80% levy.²⁸ Furthermore, in amending the A.A.A., congress specifically prohibited injunctions against the processing taxes imposed by the act,²⁹ using substantially the same language with which it had previously prohibited, in Section 3224, injunctions against any tax. One court denied injunctive relief as to taxes accruing after the amendment, yet declared that Section 3224 presented no such bar as to taxes accruing prior to that date.³⁰

²² *Lake Erie Provision Co. v. Moore*, 11 F. Supp. 522 (N. D. Ohio 1935); *Cohen v. Durning*, 11 F. Supp. 824 (S. D. N. Y. 1935); *Merkel, Inc. v. Rasquin*, 12 F. Supp. 215 (E. D. N. Y. 1935); *Fisher Flouring Mills Co. v. Vierhus*, 78 F. (2d) 889 (C. C. A. 9th, 1935).

²³ 49 STAT. 1747 (1936), 7 U. S. C. A. §644 (Supp. 1937).

²⁴ *G. B. R. Smith Milling Co. v. Thomas*, 11 F. Supp. 833 (N. D. Tex. 1935); *Baltic Mills Co. v. Bitgood*, 12 F. Supp. 132 (D. Conn. 1935); *Kingan & Co., Inc. v. Smith*, 12 F. Supp. 329 (S. D. Ind. 1935); *Gold Medal Foods, Inc. v. Landy*, 12 F. Supp. 406 (D. Minn. 1935); *Grosvenor-Dale Co. v. Bitgood*, 12 F. Supp. 416 (D. Conn. 1935); *Danahy Packing Co. v. McGowan*, 12 F. Supp. 457 (W. D. N. Y. 1935); *A. P. W. Paper Co., Inc. v. Riley*, 12 F. Supp. 738 (N. D. N. Y. 1935); *In re Processing Tax Cases*, 13 F. Supp. 218 (W. D. Tex. 1935).

²⁵ In *United States v. Jefferson Elec. Mfg. Co.*, 291 U. S. 386, 54 Sup. Ct. 443, 78 L. ed. 859 (1933), the Supreme Court held valid legislation requiring that a plaintiff, seeking a refund of sales taxes erroneously paid, must first prove that the taxes had been absorbed and not passed on.

²⁶ *Meridian Grain & Elevator Co. v. Fly*, 12 F. Supp. 64 (S. D. Miss. 1935); *Rieder v. Rogan*, 12 F. Supp. 307 (S. D. Cal. 1935); *Jones v. Viley*, 12 F. Supp. 476 (D. Idaho 1935); *Louisville Provision Co. v. Glenn*, 12 F. Supp. 545 (W. D. Ky. 1935); *Frye & Co. v. Vierhus*, 12 F. Supp. 597 (W. D. Wash. 1935).

²⁷ 49 STAT. 1734 (1936), 26 U. S. C. A. §345a, b (Supp. 1937).

²⁸ *Pinkney Packing Co. v. Thomas*, 17 F. Supp. 420 (N. D. Tex. 1936); *Sheridan Flouring Mills, Inc. v. Cassidy*, 87 F. (2d) 20 (C. C. A. 10th, 1936); *Steinhagen Rice Milling Co. v. Scofield*, 87 F. (2d) 804 (C. C. A. 5th, 1937); *White Packing Co. v. Robertson*, 89 F. (2d) 775 (C. C. A. 4th, 1937). *Contra*: *Kingan & Co., Inc. v. Smith*, 16 F. Supp. 549 (S. D. Ind. 1936), (1936) 5 GEO. WASH. L. REV. 278.

²⁹ 49 STAT. 770 (1935), 7 U. S. C. A. §623a (Supp. 1937).

³⁰ *Grosvenor-Dale Co. v. Bitgood*, 12 F. Supp. 416 (D. Conn. 1935); *cf. Larabee Flour Mills Co. v. Nee*, 12 F. Supp. 395 (W. D. Mo. 1935). Several courts

However, in spite of the apparent confusion engendered by the language of the Supreme Court's opinions, the fact still remains that the Court has denied injunctive relief save where the facts of the case fell into one of the three categories of exceptions enumerated above. In the principal case, as the tax is not a penalty or a previously declared nullity, and it does not appear that the plaintiff will undergo exceptional hardship if required to pay, the facts here do not come within one of those accepted avenues of escape from the legislative mandate of "pay first and litigate later." Assuming, as does the circuit court, the inadequacy of the plaintiff's legal remedy, the sustaining of an injunction in this case by the Supreme Court, if it affirms the circuit court, will bring about a definite extension of the factual situations hitherto recognized as not within the prohibition of Section 3224.

Turning to the constitutional issue involved in a federal tax on admissions to a state university's athletic contests, we again find well-settled principles of law that are difficult of application to specific facts. *McCulloch v. Maryland*³¹ made early pronouncement of the principle that a state government may not tax the instrumentalities of the federal government. A similar exemption of state instrumentalities from federal taxation is a necessary corollary under our dual system of government.³² The fact that the tax herein involved is imposed on the ticket purchaser, rather than on the university, does not necessarily rob it of its character as a tax on a state instrumentality. On several occasions the Supreme Court has held that purchase and sale are merely two elements of one transaction.³³ Where the tax is imposed on an individual seller but is measured by the sale, it is a burden on the whole transaction, and therefore, invalid as a burden on the purchaser where the purchaser is a government.³⁴ The converse of the situation certainly seems to be true, *i.e.*, where an admissions tax is imposed on the individual purchaser but is measured by the sale, it would be a burden on the whole transaction, and therefore, invalid as a burden on the seller government.

However, the immunity of each of our dual governments from taxation by the other is limited to those situations where the tax imposed is a "burden"³⁵ on activities in which the government is exercising a gov-

considered that the amendment was to be construed in the same manner as Section 3224, and that, since the latter was no bar to an injunction, neither was the former. *Danahy Packing Co. v. McGowan*, 12 F. Supp. 457 (W. D. N. Y. 1935); *A. P. W. Paper Co., Inc. v. Riley*, 12 F. Supp. 738 (N. D. N. Y. 1935); *In re Processing Tax Cases*, 13 F. Supp. 218 (W. D. Tex. 1935).

³¹ 4 Wheat. 415 (U. S. 1819).

³² *Collector v. Day*, 11 Wall. 113, 20 L. ed. 122 (U. S. 1871).

³³ *Panhandle Oil Co. v. Miss.*, 277 U. S. 218, 46 Sup. Ct. 451, 72 L. ed. 857 (1928); *Indian Motorcycle Co. v. United States*, 283 U. S. 570, 51 Sup. Ct. 601, 75 L. ed. 1277 (1931).

³⁴ See note 33, *supra*.

³⁵ It must be borne in mind that the term "burden" is used in a highly technical sense. Thus, the amount of the particular tax is not important, but the essential

ernmental function, as distinguished from a proprietary function.³⁶ Public education is firmly established as a state function governmental in nature, and therefore, immune from federal taxation.³⁷ Then the pertinent issue becomes whether the conduct of an intercollegiate football game is an educational activity. While physical education is, perhaps, commonly accepted as essential to a well-rounded curriculum, that modern intercollegiate football, considered from the viewpoint of the physical development of the squad as distinguished from a public spectacle, is an integral part of a program of physical education for an entire student body is subject to question.³⁸

Even if it is agreed that intercollegiate football is conducted today mainly as a commercialized show or proprietary activity, the tax might be considered invalid for the reason that the profits therefrom go specifically to support intramural sports and other admittedly educational activities.³⁹ However, what constitutes a "burden" is a question of degree, depending upon the extent to which the particular activity is removed from functions ordinarily considered as essentially governmental in character, in this case, orthodox educational operations. A survey of the dissenting opinions in recent intergovernmental taxation cases,⁴⁰ coupled with the changing personnel of the Court, suggest that in the future a less technical and more practical application will be made of the "burden" test.⁴¹ These considerations lead one to doubt that the principle case will be affirmed.

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consideration is its effect on the exercise of a governmental function. *Snyder v. Bettman*, 190 U. S. 249, 23 Sup. Ct. 803, 47 L. ed. 1035 (1903); *Metcalf & Eddy v. Mitchell*, 269 U. S. 514, 46 Sup. Ct. 514, 70 L. ed. 384 (1925).

³⁶ *South Carolina v. United States*, 199 U. S. 437, 26 Sup. Ct. 110, 50 L. ed. 261 (1905).

³⁷ *Burnet v. Coronado Oil & Gas Co.*, 285 U. S. 393, 52 Sup. Ct. 443, 76 L. ed. 815 (1932).

³⁸ Note (1937) 23 VA. L. REV. 570.

³⁹ In *Burnet v. A. J. Jergin's Trust*, 288 U. S. 508, 53 Sup. Ct. 439, 77 L. ed. 925 (1933), the Court held that a lessee's income derived from a lease of oil lands owned by a city was not exempt from federal taxation. In *Burnet v. Coronado Oil & Gas Co.*, 285 U. S. 393, 52 Sup. Ct. 443, 76 L. ed. 815 (1932), a lessee's income derived from a lease of oil lands owned by the state (and which were devoted exclusively to public school purposes) was declared exempt from federal taxation. The only basis of distinction seems to be the fact that in the *Coronado* case funds derived from the land were held in express trust for the public schools. On a somewhat imperfect analogy, it may well be argued that, where a state engages in an activity that ordinarily is in the nature of a private business, but the funds derived from that activity are devoted exclusively and specifically to the support of a governmental function, the activity is exempt from federal taxation. *Spalding v. United States*, 17 F. Supp. 957 (S. D. Cal. 1937); *Nielson, Federal Taxation of Private Business of State Educational Institutions* (1933) 19 IOWA L. REV. 71.

⁴⁰ *Gillespie v. Oklahoma*, 257 U. S. 501, 42 Sup. Ct. 590, 66 L. ed. 338 (1921) (Mr. Justice Brandeis dissenting); *Panhandle Oil Co. v. Miss.*, 227 U. S. 218, 46 Sup. Ct. 451, 72 L. ed. 857 (1928) (Justices Brandeis, Stone, and MacReynolds dissenting); *Indian Motorcycle Co. v. United States*, 283 U. S. 570, 51 Sup. Ct. 601, 75 L. ed. 1277 (1931) (Justices Stone and Brandeis dissenting); *Burnet v. Coronado Oil & Gas Co.*, 285 U. S. 393, 52 Sup. Ct. 443, 76 L. ed. 815 (1932) (Justices Stone, Roberts, Brandeis, and Cardozo dissenting).

⁴¹ Note (1931) 38 W. VA. L. Q. 59.

Insurance—Reinstatement of Policy as Affecting Incontestable Clause.

In insured's application for reinstatement of a lapsed policy, he made false representations as to his health. The policy was reinstated, but after insured's death the defendant, claiming the fraud inducing the reinstatement relieved the company of liability, refused to pay the amount of the policy. In an action by the beneficiary, *held*, judgment for defendant. A truthful representation of health was a condition precedent to reinstatement.¹

The principal case raises a problem, the interest of which corresponds proportionately to the confusion of the courts in reaching a solution: Where a policy containing an incontestable clause has lapsed for nonpayment of premiums, or for other cause, and has been reinstated, shall the incontestable period be computed from the date of reinstatement or of original issue?

Logically it would seem necessary to determine whether reinstatement creates a *new* contract which runs afresh from the date of reinstatement, or whether it merely revives and continues in force the *original* contract. If the former is true, then logically the contestable period should commence anew at the date of reinstatement; if the latter is true, then the policy should be incontestable after reinstatement, provided of course, that the contestable period, as measured from the date of original issue, has expired before lapse and reinstatement. One line of cases considers reinstatement merely as a transaction which continues in force the original agreement,² while other authorities hold that a new contract is created.³ But the problem cannot be disposed of so easily, since many of the same courts which concede that reinstatement simply effects a continuation of the old contract also hold that the policy is contestable for fraud in procuring the reinstatement.⁴ One case goes so far as to hold that it is unnecessary to inquire whether reinstatement creates a new contract or revives the old.⁵ Also, the term "new contract" is of itself subject to different connotations, some courts holding

¹ *Petty v. Pac. Mut. Life Ins. Co. of Cal.*, 212 N. C. 157, 193 S. E. 228 (1937).

² *Reliance Life Ins. Co. of Pittsburg v. Lowry*, 229 Ala. 258, 156 So. 570 (1934); *Winder Nat. Bank v. Aetna Life Ins. Co.*, 36 Ga. App. 703, 137 S. E. 848 (1927); *Commonwealth Life Ins. Co. v. Haskins*, 259 Ky. 780, 83 S. W. (2d) 457 (1935); *New York Life Ins. Co. v. Bulchberg*, 249 Mich. 317, 228 N. W. 770 (1930); *Mo. State Life Ins. Co. v. Jensen*, 139 Okla. 130, 281 Pac. 561 (1929); *Rothchild v. N. Y. Life Ins. Co.*, 106 Pa. Super. 554, 162 Atl. 463 (1932).

³ *Wastun v. Lincoln Nat. Life Ins. Co. of Ft. Wayne, Ind.*, 12 F. (2d) 422 (C. C. A. 8th, 1926); *MacDonald v. Met. Life Ins. Co.*, 304 Pa. 213, 155 Atl. 491 (1931); *Wash. Nat. Ins. Co. v. Coleman*, 18 Tenn. App. 438, 79 S. W. (2d) 46 (1935).

⁴ *Mut. Life Ins. Co. v. Dreeben*, 29 F. (2d) 963 (C. C. A. 5th, 1929); *N. Y. Life Ins. Co. v. Tedder*, 113 Fla. 649, 153 So. 145 (1934); *Petty v. Pac. Mut. Life Ins. Co. of Cal.*, 212 N. C. 157, 193 S. E. 228 (1937).

⁵ *Great Western Life Ins. Co. v. Snavelly*, 206 Fed. 20 (C. C. A. 9th, 1913).

that the new contract incorporates the terms of the original contract, including the incontestable clause,⁶ while other courts treat reinstatement as creating a new contract which does not include the incontestable clause of the original policy.⁷ Hence the problem cannot be solved on the sole basis of "new contract, or old contract."

The vast majority of jurisdictions hold that the insurer may avoid liability if the reinstatement is obtained through fraud.⁸ Although a similar result is reached by these jurisdictions, the legal bases for the conclusion vary, depending upon the particular significance which is attached to the incontestable clause as affected by reinstatement. The cases fall within at least five categories:

(1) The clause contained in the original policy may be regarded as *not applying* to the circumstances surrounding the reinstatement, *i.e.*, the insurer may contest the policy on the ground of fraud in obtaining the reinstatement at *any time* after reinstatement, unless barred by a statute of limitations.⁹

(2) A new contract being created, the clause does apply to the reinstatement as of the date of reinstatement, thus allowing a period of contest after reinstatement equal in length to the period prescribed in the clause of the original policy.¹⁰

⁶ Pac. Mut. Life Ins. Co. v. Galbraith, 115 Tenn. 471, 91 S. W. 204 (1905).

⁷ Mass. Benefit Ass'n v. Robinson, 104 Ga. 256, 30 S. E. 918 (1898).

⁸ Alper v. N. Y. Life Ins. Co., 41 F. (2d) 956 (N. D. Ill. 1930); Perkins v. Prudential Ins. Co. of America, 69 F. (2d) 218 (C. C. A. 7th, 1934); Wallach v. Aetna Life Ins. Co., 78 F. (2d) 647 (C. C. A. 2d, 1935); N. Y. Life Ins. Co. v. Crumpton, 230 Ala. 147, 160 So. 332 (1935); N. Y. Life Ins. Co. v. Tedder, 113 Fla. 649, 153 So. 145 (1934); Phillips v. N. Y. Life Ins. Co., 173 Ga. 135, 159 S. E. 696 (1934); Met. Life Ins. Co. v. Hutson, 253 Ky. 635, 69 S. W. (2d) 742 (1934); Umans v. N. Y. Life Ins. Co., 259 Mass. 573, 156 N. E. 721 (1927); Woods v. Nat. Aid Life Ass'n, 87 S. W. (2d) 698 (Mo. 1935); Chuz v. Columbian Nat. Life Ins. Co., 10 N. J. Misc. 1145, 162 Atl. 395 (1933); Acacia Mut. Life Ass'n v. Kaul, 114 N. J. Eq. 491, 169 Atl. 36 (1933); Goldman v. N. Y. Life Ins. Co., 115 N. J. Eq. 535, 171 Atl. 541 (1934); Teeter v. United Life Ins. Ass'n, 159 N. Y. 411, 54 N. E. 72 (1899); McCormack v. Security Mut. Life Ins. Co., 220 N. Y. 447, 116 N. E. 74 (1917); Columbian Nat. Life Ins. Co. v. Industrial Trust Co., 53 R. I. 334, 166 Atl. 809 (1933); Ward v. N. Y. Life Ins. Co., 129 S. C. 121, 123 S. E. 820 (1924); Pac. Mut. Life Ins. Co. v. Galbraith, 115 Tenn. 471, 91 S. W. 204 (1905); State Mut. Life Ins. Co. v. Rosenberry, 213 S. W. 242 (Tex. Com. App. 1919); see N. Y. Life Ins. Co. v. Feicht, 29 F. (2d) 318, 320 (N. D. Ill. 1928).

Whether the false representations are made innocently or with intent to deceive may make a difference in the results of the cases, some courts holding that the representation must be wilfully false. Shaw v. Imperial Mut. Life and Benefit Ass'n, 4 Cal. App. (2d) 534, 41 P. (2d) 574 (1935); Houston v. N. Y. Life Ins. Co., 159 Wash. 162, 292 Pac. 445 (1930). On the other hand, an innocent misrepresentation may entitle insurer to avoid liability. Woods v. Nat. Aid Life Ass'n, 87 S. W. (2d) 698 (Mo. 1935).

⁹ Ash v. Fidelity Mut. Life Ass'n, 26 Tex. Civ. App. 501, 63 S. W. 944 (1901); State Mut. Ins. Co. v. Rosenberry, 213 S. W. 242 (Tex. Com. App. 1919).

¹⁰ Alper v. N. Y. Life Ins. Co., 41 F. (2d) 956 (N. D. Ill. 1930); Perkins v. Prudential Ins. Co. of America, 69 F. (2d) 218 (C. C. A. 7th, 1934); Wallach v. Aetna Life Ins. Co., 78 F. (2d) 647 (C. C. A. 2d, 1935); N. Y. Life Ins. Co. v. Crumpton, 230 Ala. 147, 160 So. 332 (1935); Phillips v. N. Y. Life Ins. Co.,

(3) The contract for reinstatement merely effects a *waiver* of the forfeiture, which restores the original policy and makes it as effective as if no forfeiture had occurred, but at the same time reserves the right of the company to avoid the effect of the reinstatement by showing that it was induced by fraud.¹¹

(4) Reinstatement does *not* create a new agreement but rather renews the original contract in full, including the incontestable period, which starts running anew with the reinstatement.¹²

(5) Where the reinstatement is obtained through fraud there is in effect no reinstatement at all, *i.e.*, reinstatement is a complete nullity.¹³

The minority view, denying the insurer the right to contest the policy for fraud, is supported by two lines of reasoning. The court in *Massachusetts Benefit Ass'n v. Robinson*¹⁴ held that reinstatement created a new contract, yet it was merely the cancellation of a forfeiture previously incurred and the old policy must be looked to for the terms of the new agreement. Thus where the old policy stated that it should be incontestable three years from "date of issue," the "date of issue" was that borne by the old policy. The other view is that the old contract is revived by the reinstatement, therefore the clause runs only from the original date of issue; hence the insurer may attack the reinstatement for fraud only if the reinstatement takes place within the original contestable period.¹⁵

The principal case, in holding that truthful representations are a condition precedent to valid reinstatement, apparently follows the rule that fraudulent misrepresentations preclude the reinstatement from being effective at all. In assuming this position the North Carolina Court reaches a result which is in direct conflict with that reached in *Wam-*

173 Ga. 135, 159 S. E. 696 (1934); *Acacia Mut. Life Ass'n v. Kaul*, 114 N. J. Eq. 491, 169 Atl. 36 (1933); *Goldman v. N. Y. Life Ins. Co.*, 115 N. J. Eq. 535, 171 Atl. 541 (1934); *Teeter v. United Life Ins. Ass'n*, 159 N. Y. 411, 54 N. E. 72 (1899); *McCormack v. Security Mut. Life Ins. Co.*, 220 N. Y. 447, 116 N. E. 74 (1917); *Columbian Nat. Life Ins. Co. v. Industrial Trust Co.*, 53 R. I. 334, 166 Atl. 809 (1933); *Ward v. N. Y. Life Ins. Co.*, 129 S. C. 121, 123 S. E. 820 (1924); *Pac. Mut. Life Ins. Co. v. Galbraith*, 115 Tenn. 471, 91 S. W. 204 (1905); see *N. Y. Life Ins. Co. v. Feicht*, 29 F. (2d) 318, 320 (N. D. Ill. 1928).

Under the view represented by these cases it is obvious that the insurer may not contest for fraud if the new contestable period has run. *Ill. Bankers Life Ass'n v. Hamilton*, 188 Ark. 887, 67 S. W. (2d) 741 (1934).

¹¹ *N. Y. Life Ins. Co. v. Tedder*, 113 Fla. 649, 153 So. 145 (1934); *Inter-Southern Life Ins. Co. v. Omer*, 238 Ky. 790, 38 S. W. (2d) 931 (1931).

¹² *Mut. Life Ins. Co. v. Dreeben*, 29 F. (2d) 963 (C. C. A. 5th, 1929). In adopting this view the court proceeds on a different theory from that generally used by the federal courts. See federal cases cited note 10, *supra*.

¹³ *Umans v. N. Y. Life Ins. Co.*, 259 Mass. 573, 156 N. E. 721 (1927); *Petty v. Pac. Mut. Life Ins. Co. of Cal.*, 212 N. C. 157, 193 S. E. 228 (1937).

¹⁴ 104 Ga. 256, 30 S. E. 918 (1898).

¹⁵ *N. Y. Life Ins. Co. v. Campbell*, 192 Ark. 54, 83 S. W. (2d) 542 (1935).

*boldt v. Reserve Loan Life Ins. Co.*¹⁶ In that case the court denied the insurer the right to raise the issue of fraud in obtaining "riders"¹⁷ to the policy, the original contestable period having expired.¹⁸ Consequently it seems that the North Carolina Court has gone from one extreme to the other.

Reinstatement is also important in regard to those policies which limit the liability of the insurer if the insured commits suicide within a certain time from the date of issue. Though this problem is closely akin to the one of incontestability, far less confusion exists in the law, and the cases uniformly hold that the "suicide period" runs only from the date of original issue and never from the date of reinstatement. Thus if the suicide period has run before lapse, and if the policy is reinstated, suicide at any time after reinstatement will not bar the right of recovery under the policy.¹⁹ This holds true even though the reinstatement is held to create a new contract.²⁰ The law on this point substantiates the conclusion that those courts treating reinstatement as a new contract do not mean that one comes into being in the broad sense of the term, but rather a new contract is born for *some purposes* yet not for others. As further evidence of this we find a court following the "new contract rule" holding that reinstatement does not create a new agreement for the purpose of limiting the amount of recovery when natural death occurred within one year from the date of reinstatement, but more than one year from the date of original issue, the policy limiting recovery if death took place within one year.²¹ Likewise, statutes applicable to the issuance of the original policy have been held inapplicable to reinstatement, *e.g.*, where persons over a certain age are denied the right to insurance²² and/or benefit certificates.²³

The chaotic state of the law in regard to the effect of reinstatement on the defenses of the insurer is subject to criticism in view of the fact that a simple rationale should be used as a basis for deciding the cases:

¹⁶ 191 N. C. 32, 131 S. E. 395 (1926).

¹⁷ The riders in this case provided for double indemnity, total disability, and premium waiver.

¹⁸ Although the facts of this case are not identical with those of the principal case, the difference in facts should make no difference in result, since the fraud in obtaining a rider is of the same type as that in obtaining reinstatement, and in both cases the misrepresentations induce transactions which benefit insured, both transactions taking place after the original issuance of the policies.

¹⁹ *Life and Cas. Ins. Co. of Tenn. v. McCray*, 291 U. S. 566, 54 Sup. Ct. 482, 78 L. ed. 987 (1934); *Life and Cas. Ins. Co. of Tenn. v. Barefield*, 291 U. S. 575, 54 Sup. Ct. 486, 78 L. ed. 999 (1934); *Tatum v. Guardian Life Ins. Co.*, 75 F. (2d) 476 (C. C. A. 2d, 1935); *Mut. Life Ins. Co. v. Lovejoy*, 201 Ala. 337, 78 So. 229 (1919); *Security Life Ins. Co. v. Leeper*, 171 Ark. 77, 284 S. W. 12 (1926).

²⁰ *Tatum v. Guardian Life Ins. Co.*, 75 F. (2d) 476 (C. C. A. 2d, 1935).

²¹ *Business Men's Assurance Co. v. Scott*, 17 F. (2d) 4 (C. C. A. 8th, 1927).

²² *Reed v. Mo. Mut. Ass'n*, 5 S. W. (2d) 675 (Mo. 1928).

²³ *James v. Colonial Mut. Life Ass'n*, 7 Cal. App. (2d) 748, 47 P. (2d) 362 (1935).

A distinction should be made, in computing the contestable period, between those defenses arising out of the provisions of the policy itself and those arising out of transactions connected with the reinstatement. In the former case the contestable period should run not from the date of reinstatement, but from the date of original issue. The result of the "suicide cases" is consistent with this theory since the defense is one growing out of the terms of the original policy. But where the insurer's defense is based on some transaction such as fraud connected with and resulting in the reinstatement, the running of the incontestable clause, as to this defense, should be computed from the date of reinstatement.

JOHN TAYLOR SCHILLER.

Libel—Broadcast of Murder Trial.

The trial judge, with consent of counsel, permitted a broadcasting company to install a microphone in the courtroom and radiocast a murder trial. The defense attorney referred to plaintiff, a witness for the state, as a dope fiend and stated that she was lower than a rattlesnake and her testimony unreliable. Plaintiff, alleging that the judge, attorney for the defense, and broadcasting company had conspired to injure her reputation, sued them for defamation. The court allowed a motion for nonsuit as to the judge and the jury found in favor of the other defendants. On appeal the decision was affirmed, the court saying that statements made by the judge are absolutely privileged, and those made by an attorney are privileged if relevant to the case.¹

The rule of the principal case, as to the judge's privilege, obtains both in England and the United States,² even though the statements are made by the judge maliciously, without reasonable cause, and are entirely irrelevant to the subject matter of the inquiry.³ The reason advanced by the courts for this rule is that if judges could be called to account for remarks made by them during a trial the judiciary would be

¹ *Irwin v. Ashurst et al.*, 74 P. (2d) 1127 (Ore. 1938).

² *Bradley v. Fisher*, 13 Wall. 335, 20 L. ed. 646 (U. S. 1871); *Mundy v. McDonald*, 216 Mich. 444, 185 N. W. 877 (1921); *Karelas v. Baldwin*, 237 App. Div. 265, 261 N. Y. Supp. 518 (2d Dep't 1932); *Douglas v. Collins*, 152 Misc. 839, 273 N. Y. Supp. 663 (Sup. Ct. 1934); *Haughton v. Humphries*, 85 Wash. 50, 147 Pac. 641 (1915); *Scott v. Stansfield*, L. R. 3 Ex. 220 (1868); see *Spaulding v. Vilas*, 161 U. S. 483, 494, 16 Sup. Ct. 631, 636, 40 L. ed. 780, 784 (1895); *Yates v. Lansing*, 5 Johns. 281, 291 (N. Y. 1810); *Wells v. Carter*, 164 Tenn. 400, 402, 50 S. W. (2d) 228 (1932); *GATLEY, LIBEL AND SLANDER* (2d ed. 1929) 190; *NEWELL, SLANDER AND LIBEL* (4th ed. 1924) §360.

³ *Mundy v. McDonald*, 216 Mich. 444, 185 N. W. 877 (1921); *Douglas v. Collins*, 152 Misc. 839, 273 N. Y. Supp. 663 (Sup. Ct. 1934); *Scott v. Stansfield*, L. R. 3 Ex. 220 (1868); see *Spaulding v. Vilas*, 161 U. S. 483, 494, 16 Sup. Ct. 631, 636, 40 L. ed. 780, 784 (1895); *Wells v. Carter*, 164 Tenn. 400, 402, 50 S. W. (2d) 228 (1932); *Anderson v. Gorrie and Others*, [1895] 1 Q. B. 668, 671; *GATLEY, loc. cit. supra* note 2; *NEWELL, loc. cit. supra* note 2.

unduly hampered and restrained in the trial of cases⁴ and much difficulty would be encountered in securing capable men for the bench.⁵

In England counsel share the same privilege granted the judge,⁶ because it is believed that if attorneys were subject to civil or criminal actions for words spoken during a trial it would impair and restrict the discharge of the duties which they owe to their clients.⁷ However the majority of the courts in this country, in an effort to keep the above rule from being used as a cloak for private malice, hold that the privilege attaches only when the language is relevant or pertinent to the case.⁸

Reports of what transpires during the course of a trial can be published with impunity provided they are fair and accurate.⁹ Such publi-

⁴ *Yates v. Lansing*, 5 Johns. 281 (N. Y. 1810); *Karelas v. Baldwin*, 237 App. Div. 265, 261 N. Y. Supp. 518 (2d Dep't 1932); see *Scott v. Stansfield*, L. R. 3 Ex. 220, 224 (1868); *Anderson v. Gorrie and Others*, [1895] 1 Q. B. 668, 670. Lord Tenterden stated in *Garnett v. Ferrand*, 6 B. & C. 611, 625 (K. B. 1827), "This freedom from action and question at the suit of an individual is given by the law to the Judges, not so much for their own sake as for the sake of the public, and for the advancement of justice, that being free from actions they may be free in thought and independent in judgment, as all who are to administer justice ought to be."

⁵ *Veeder, Absolute Immunity in Defamation* (1909) 9 COL. L. REV. 463, 474 "Under such a rule, as Lord Stair said [in *Miller v. Hope*, 2 Sh. Sc. App. 125 (H. L. 1825)] 'No man but a beggar or a fool would be a judge.'"

⁶ *Munster v. Lamb*, 11 Q. B. D. 588 (1883); *GATLEY, op. cit. supra* note 2 at 196, 197; *NEWELL, op. cit. supra* note 2 §362.

⁷ See *Maulsby v. Reifsnider*, 69 Md. 143, 151, 14 Atl. 505, 506 (1883); *Munster v. Lamb*, 11 Q. B. D. 588, 595 (1883); *GATLEY, op. cit. supra* note 2, at 197; *Veeder, supra* note 5 at 463. An additional reason is that the English judges exercise a more rigid control over what is said during a trial than does the bench of this country. Hence, counsel are generally restrained from making irrelevant defamatory statements by the judge rather than by fear of private prosecution.

⁸ *Maulsby v. Reifsnider*, 69 Md. 143, 14 Atl. 505 (1883); *Hoar v. Wood*, 44 Mass. 193 (1841); *McLaughlin v. Cowley*, 127 Mass. 316 (1879); *Gallagher v. Surpless*, 163 N. Y. Supp. 551 (Sup. Ct. 1917); *Andrews v. Gardiner*, 224 N. Y. 440, 121 N. E. 341 (1919); *Shelfer v. Gooding*, 47 N. C. 175 (1855); see *Anonymous*, an attorney, v. *Trenkman et al.*, 48 F. (2d) 571, 573 (C. C. A. 2d, 1931); *Adams v. Ala. Lime and Stone Co. et al.*, 225 Ala. 174, 142 So. 424, 425 (1932). The American courts give this rule a very liberal interpretation as is shown by Justice Cardozo's statement in *Andrews v. Gardiner, supra*, at 445, 121 N. E. at 343, "There is no room in such matters for any strict or narrow test. Much must be left to the discretion of the advocate. The privilege embraces anything that may possibly be pertinent."

⁹ *Shiell v. The Metropolis Co.*, 102 Fla. 794, 136 So. 537 (1931); *Atlanta News Pub. Co. v. Medlock*, 123 Ga. 714, 51 S. E. 756 (1905); *Flues v. New Nonpareil Co.*, 155 Iowa 290, 135 N. W. 1083 (1912); *McBee v. Fulton*, 47 Md. 403 (1877); *Conner v. Standard Pub. Co.*, 183 Mass. 474, 67 N. E. 596 (1903); *Brown v. Globe Printing Co.*, 213 Mo. 611, 112 S. W. 462 (1908); *Jones v. The Pulitzer Pub. Co.*, 240 Mo. 200, 144 S. W. 441 (1912); *Salisbury v. The Union and Advertiser Co.*, 45 Hun 120 (N. Y. 1887); *Johns v. Press Pub. Co.*, 61 N. Y. Super. Ct. 207, 19 N. Y. Supp. 3 (1892); *Metcalfe v. The Times Pub. Co.*, 20 R. I. 674, 40 Atl. 864 (1902); *Brown v. Providence Tel. Pub. Co.*, 25 R. I. 117, 54 Atl. 1061 (1903); *American Pub. Co. v. Gamble*, 115 Tenn. 663, 90 S. W. 1005 (1906); *Kimber v. The Press Ass'n, Ltd.*, [1893] 1 Q. B. 65; see *Lundin v. Post Pub. Co.*, 217 Mass. 213, 215, 104 N. E. 480, 481 (1914); *Wason v. Walker*, L. R. 4 Q. B. 73, 86 (1868); *GATLEY, op. cit. supra* note 2, at 328.

cations do not have to be verbatim but must not be partial or garbled.¹⁰ One test sometimes applied in determining whether or not the report meets the above requirements is, "Does the report place the reader [or hearer] in substantially the same position, so far as the defamatory matter is concerned, that he would occupy if he had personally heard the proceedings?"¹¹ Various reasons have been given for the existence of this privilege,¹² all of which merely express in different ways the policy of the common law which sought to protect the right of citizens to be informed of what goes on in court proceedings.¹³

A broadcasting station, which is likely to be under contract to send out definite programs at particular times, would probably not be able to radiocast all the proceedings in a murder trial. In the event that they were unable to do so the question would arise as to whether the portions broadcast constituted a fair and accurate report of the proceedings. There is some question as to whether the mere furnishing of the broadcasting facilities which make it possible for the listeners to hear the actual words spoken in the courtroom, should be considered as the making of a report of the trial. However, the same restrictions which apply to reports of judicial proceedings,¹⁴ might well be extended to the radiocasting of trials.

The American Bar Association, after expressing the opinion that excessive publicity often interferes with the proper administration of justice, appointed a committee to investigate ways and means of preventing abuse of the privilege of fair report.¹⁵ It seems undesirable, as a matter of public policy, to permit the broadcasting of trials, because only the most sordid and exciting criminal cases would have enough so called "human interest" to warrant their being sent over the air. Small children would be able to hear the most degrading details of the blackest crimes. Also in important cases in which the whole nation is interested, attorneys, and judges, whether consciously or unconsciously, would be influenced in their conduct by the knowledge that millions of people were listening to and passing judgment on their every word.

J. NATHANIEL HAMRICK.

¹⁰ *McBee v. Fulton*, 47 Md. 403 (1877).

¹¹ *HALE AND BENSON, LAW OF THE PRESS* (2d ed. 1933) 160.

¹² See *Cowley v. Pulsifer*, 137 Mass. 392, 394 (1884); *Johns v. Press Pub. Co.*, 61 N. Y. Super. Ct. 207, 19 N. Y. Supp. 3, 4 (1892); *Lee v. The Brooklyn Union Pub. Co.*, 209 N. Y. 245, 248, 103 N. E. 155, 156 (1913); *Kimber v. The Press Ass'n Ltd.*, 1 Q. B. 65, 69 (1893).

¹³ *Gatley, op. cit. supra* note 2, at 329.

¹⁴ See note 9, *supra*.

¹⁵ For discussions of the problem see (1937) 22 A. B. A. J. 79, 147, 219, 295.

Real Party in Interest—Actions to Recover Property

Ejectment (though not known by this name) was originally, at early common law, an action brought by a lessee of real property to recover damages for the injury caused by a stranger in ousting him from possession before the expiration of his term.¹ Later the courts began to require specific restitution of the possession, and it then became necessary for the lessee to prove, by showing a better title in his lessor, that he had more right to the possession than the ejector.² Gradually ejectment developed into an action to try title, with the result that the plaintiff was allowed to recover "only upon the strength of his own title, and not on the weakness of that of the defendant".³ This title, of course, had to be *legal*, for equitable interests were not recognized in the common law courts.⁴ The common law maxim has been brought over into modern law, and today the great weight of authority in the United States requires that a plaintiff not in prior peaceful possession have legal title in order to maintain an action for the recovery of the possession of real property.⁵

Under the codes of civil procedure, the old common law forms of action have been abolished, and all suits must be brought by "the real party in interest". Who is the real party in interest? Under one theory, he is the person entitled to the fruits of the action;⁶ under another, he is the person in whom the legal title is vested.⁷ Apparently, however, the decisions support a third theory—that the real party in interest is the person who by the substantive law has the right of action, *i.e.*, the person who had, before the codes, a right of action either in law or in equity.⁸ Applying this last test, we should not expect the courts to refuse the holder of an equitable title (which carried with it the right of possession) the recovery of the possession of the property. But we find the courts relying upon the theory that the equitable titleholder had no right of action *in ejectment* before the codes; that an action for the recovery of the possession of the land is the equivalent of the late common law action of ejectment; hence an equitable titleholder is not the real party in interest.⁹ In many cases, however, the equitable titleholder did have a right of action, by the substantive law, although he could not enforce it by the legal action of ejectment.¹⁰ He could go into equity

¹ 3 BL. COMM. 200.

² NEWELL, EJECTMENT (1892) 9; WARVELLE, EJECTMENT (1905) §7.

³ Note (1929) 28 MICH. L. REV. 184.

⁴ CLARK, CODE PLEADING (1928) 114.

⁵ Dillard, *et al. v. Jeffries*, 118 Va. 81, 86 S. E. 844 (1915), (1916) 1 VA. L. REG. (N.S.) 680; Hutchins, *Equitable Ejectment* (1926) 26 COL. L. REV. 436; (1928) 16 KY. L. J. 353.

⁶ CLARK, CODE PLEADING 97.

⁷ *Ibid.*

⁸ *Id.* §22.

⁹ Hutchins, *supra* note 5, at 438.

¹⁰ CLARK, CODE PLEADING 114, 115; Hutchins, *supra* note 5.

and compel the conveyance of the legal title to him and then sue in ejectment, or he might be put into possession by a court of equity as an incident to the relief of specific performance.¹¹ Thus the purpose of the codes is being defeated solely by the force of the label "ejectment" put upon an action for the recovery of the possession of real property, whereas, on the same set of facts, the label "specific performance", for example, would lead to a recovery.¹²

The law in North Carolina on this subject is confusing. The opinions frequently state that a plaintiff in an action for the recovery of the possession of land must recover on the strength of his own title.¹³ Four ways in which title may be shown are set forth: (1) a connected chain of title, or a grant direct from the state to the plaintiff; (2) adverse possession for the statutory period; (3) title by estoppel (by showing that the defendant claims under the plaintiff); and, (4), by connecting the defendant with a common source of title, and showing in the plaintiff a better title from that source.¹⁴ The omission of an "equitable title" from the list might imply that a plaintiff having a mere equitable title cannot recover. In addition, the statement has been made that a *legal* title is necessary.¹⁵ Apparently, however, with the exception of the mortgage assignment cases hereinafter mentioned, these statements are not made in cases specifically denying an equitable titleholder the right to maintain the action, but appear in cases where the plaintiff either has a valid legal title, or else has no interest in, or right to the possession of, the land whatsoever. And where the plaintiff actually relies upon an equitable title, he has usually been allowed to recover.

The court has often specifically stated that an equitable title *will*

¹¹ See note 10, *supra*.

¹² See note 10, *supra*. Where the plaintiff went into possession of land under a contract to purchase, and thereafter the vendor contracted to sell the same land to the defendant who, under the terms of this latter agreement, ousted the plaintiff, a N. Y. court held, in an action against the vendor and the defendant seeking recovery of possession and "other relief", that a plaintiff in ejectment cannot recover upon an equitable title. *McDonald v. Skinner*, 124 Misc. 545, 209 N. Y. Supp. 219 (Sup. Ct. 1925). But, in the same year, another court of that state allowed recovery where the defendant contracted to sell land to the plaintiff and thereafter leased it to the other defendant, on the ground that it was an action for "specific performance". *Klapp v. Dealy*, 213 App. Div. 523, 211 N. Y. Supp. 22 (3d Dep't, 1925).

¹³ *Rumbough v. Sackett*, 141 N. C. 495, 497, 54 S. E. 421, 422 (1906); *Savage Bros. Timber Co. v. Cozad*, 192 N. C. 40, 41, 133 S. E. 173, 174 (1926); *Carstarphen v. Carstarphen*, 193 N. C. 541, 547, 137 S. E. 658, 662 (1927); *Virginia-Carolina Power Co. v. Taylor*, 194 N. C. 231, 233, 139 S. E. 381, 383 (1927); *Hayes v. Cotton*, 201 N. C. 369, 371, 160 S. E. 453, 454 (1931); *Shelly v. Grainger*, 204 N. C. 488, 490, 168 S. E. 736, 738 (1933).

¹⁴ *Mobley v. Griffin*, 104 N. C. 112, 115, 10 S. E. 142 (1889); *Prevatt v. Harrelson*, 132 N. C. 250, 251, 43 S. E. 800 (1903); *Campbell v. Everhart*, 139 N. C. 503, 512, 52 S. E. 201, 204 (1905); *Moore v. Miller*, 179 N. C. 396, 397, 102 S. E. 627, 628 (1920).

¹⁵ *Davidson v. Gifford*, 100 N. C. 18, 20, 6 S. E. 718, 719 (1888); *Taylor v. Meadows*, 169 N. C. 124, 126, 85 S. E. 1, 2 (1915).

support "ejectment", and has permitted the following to maintain the action: *cestui que trust*,¹⁶ grantee whose deed was lost before registration,¹⁷ remainderman taking under a will made in the exercise of a power of appointment created by a deed void at law by reason of the fact that the grantee of a life estate therein was the wife of the grantor,¹⁸ grantor who executed a deed to the defendant under a mutual mistake,¹⁹ grantee under a deed not under seal,²⁰ heirs of a remainderman, where a deed made before the vesting of the remainder conveyed, by mistake, a fee simple estate in the land,²¹ grantee in a deed executed by a trustee after an invalid foreclosure sale,²² grantee, where there was a mistake in her name in the deed,²³ mortgagor.²⁴ The proposition is further supported by numerous dicta.²⁵

On the other hand, however, where the assignee of a mortgage, or his vendee, attempts to recover possession of the mortgaged property, the court ignores these precedents and denies recovery, apparently reverting to the legal title requirement.²⁶ And this he does not meet unless the assignment complies with the requisites of a deed and conveys the mortgagee's interest in the *land* as well as his interest in the debt and the mortgage securing it.²⁷ There is no apparent reason, and the

¹⁶ *Murray, Ferris & Co. v. Blackledge*, 71 N. C. 492 (1874); *Condry v. Cheshire*, 88 N. C. 375 (1883); *Graves v. Trueblood*, 96 N. C. 495, 1 S. E. 918 (1887); *Troy & North Carolina Gold Mining Co. v. Snow Lumber Co.*, 170 N. C. 273, 87 S. E. 40 (1915).

¹⁷ *McMillan v. Edwards*, 75 N. C. 81 (1876); *Jennings v. Reeves*, 101 N. C. 447, 7 S. E. 897 (1888).

¹⁸ *Taylor v. Eatman*, 92 N. C. 602 (1885).

¹⁹ *Ely v. Early*, 94 N. C. 1 (1886).

²⁰ *Geer v. Geer*, 109 N. C. 679, 14 S. E. 297 (1891); *Westfeldt v. Adams*, 159 N. C. 409, 74 S. E. 1041 (1902).

²¹ *Griffin v. Thomas*, 123 N. C. 310, 38 S. E. 903 (1901).

²² *Hinton v. Moore*, 139 N. C. 44, 51 S. E. 787 (1905).

²³ *Evans v. Brendle*, 173 N. C. 149, 91 S. E. 723 (1917).

²⁴ *Arrington v. Arrington*, 114 N. C. 116, 19 S. E. 723 (1917). It has been held that a purchaser of an equity of redemption at a sale under execution acquires, by reason of the fact that such sales are permitted by statute, a "legal interest" to the extent that he may recover possession of the property from the mortgagor. *Davis v. Evans*, 27 N. C. 525 (1845); *Black v. Justice*, 86 N. C. 504 (1882); *Parrott v. Hardesty*, 169 N. C. 667, 86 S. E. 582 (1915). But does he not acquire only the mortgagor's equitable title?

²⁵ See *Ryan v. McGehee*, 83 N. C. 500, 502 (1880); *Respass v. Jones*, 102 N. C. 5, 11, 8 S. E. 770, 772 (1889); *Leatherwood v. Fulbright*, 109 N. C. 683, 684, 14 S. E. 299 (1891); *Watkins v. Kaolin Mfg. Co.*, 131 N. C. 536, 537, 42 S. E. 983 (1902); *Skinner v. Terry*, 134 N. C. 305, 309, 46 S. E. 517, 518 (1904); *Walker v. Miller*, 139 N. C. 448, 456, 52 S. E. 125, 127 (1905); *Perry v. Hackney*, 142 N. C. 368, 371, 55 S. E. 289, 290 (1906); *Brown v. Hutchinson*, 155 N. C. 205, 207, 71 S. E. 302 (1911); *Vaught v. Williams*, 177 N. C. 77, 84, 97 S. E. 737, 740 (1918). *Carson v. Jenkins*, 206 N. C. 475, 476, 174 S. E. 271 (1934) *semble*.

²⁶ *Williams v. Teachey*, 85 N. C. 402 (1881); *Dameron v. Eskridge*, 104 N. C. 621, 10 S. E. 700 (1889). *Contra*: *Wright v. Fort*, 126 N. C. 615, 36 S. E. 113 (1900).

²⁷ *Jenkins v. Wilkinson*, 113 N. C. 532, 12 S. E. 630 (1893); *Hussey v. Hill*, 120 N. C. 312, 26 S. E. 919 (1897); *Morton v. Blades Lumber Co.*, 154 N. C. 336, 70 S. E. 623 (1911); *Weil & Bros. v. Davis*, 168 N. C. 298, 84 S. E. 395 (1915); *First Nat. Bank v. Sauls*, 183 N. C. 165, 110 S. E. 865 (1922); *Citizen's*

court gives none, for distinguishing mortgage assignees from other equitable titleholders. Chattel mortgage assignees, who are permitted to recover possession of the mortgaged property,²⁸ do not occupy a strictly analogous position, for there the courts hold that legal title passes regardless of the form of the assignment, since the formalities of a deed are not necessary to pass title to chattels. But the real property mortgage assignee has usually, like the chattel mortgage assignee, given a valuable consideration for the assignment; and, in both cases, the intention of the parties was that all the rights of the mortgagee pass to the assignee. Should not, then, the holder of an equitable title have the same right to recover possession?

By the substantive rules of law, the real property mortgage assignee is entitled to possession (he could, before the codes, bring a bill in equity to compel conveyance of the legal title to him, and then sue in ejectment for the possession)²⁹ and therefore is the real party in interest. Since he is the real party in interest, and since the holders of other types of equitable titles have been allowed to maintain the action, for the sake of clarity the real property mortgage assignee should be allowed, either by judicial decision or by statute, to maintain an action for the recovery of the possession of the property.

JAMES D. CARR.

Taxation—Exemption of Property Owned by the State and Municipal Corporations

Is property owned by the State of North Carolina or its political subdivisions subject to *ad valorem* taxation? A glance at article V, section five of the state constitution which provides that "Property belonging to the State, or to municipal corporations, shall be exempt from taxation" would seem to furnish a simple answer. But an examination of a recent case shows no such simple solution. In *Weaverville v. Hobbs, Commissioner Veterans Loan Fund*¹ it was held that property owned by the State Veterans Loan Fund (an agency of the state) was

Savings Bank & Trust Co. v. White, 189 N. C. 281, 126 S. E. 745. But, although the mortgagee does have legal title, he has that title for security purposes only; hence do not the debt and the mortgage constitute his only interest in the land?

The problem is further complicated in those cases where the debt is assigned, but the mortgage securing it is not. The court holds, however, that an assignment of the debt carries the mortgage security with it. *Hyman v. Devereux*, 63 N. C. 624 (1869).

²⁸ *Watson v. Dobbin*, 89 N. C. 107 (1883) (the court states, at page 109, that even if the legal title did not pass, the plaintiff should be allowed to recover on his equitable title); *Hodges v. Wilkinson*, 111 N. C. 56, 15 S. E. 941 (1892); *Satterthwaite v. Ellis*, 129 N. C. 67, 39 S. E. 726 (1901); *Johnson v. Bray*, 174 N. C. 176, 93 S. E. 728 (1917).

²⁹ 2 JONES, MORTGAGES (8th ed. 1928) 439.

¹ 212 N. C. 684, 194 S. E. 860 (1938).

exempt from taxation by the town of Weaverville, but the decision was reached by a bare four to three majority, with four separate opinions written. Here the property, a dwelling, was rented by the state agency to private parties. When publicly owned property is used for a private purpose a majority of jurisdictions refuse to allow the exemption; but courts almost without exception hold such property exempt when used for public or governmental purposes, by reason of constitutional or statutory provisions.²

The North Carolina court first had occasion to examine the problem in the early case of *Atlantic and N.C.R.R. v. The Commissioners of Carteret County*.³ Here it was held that the entire property of the railroad was taxable by the county even though the State of North Carolina owned two-thirds of its stock. The court stated, "We do not think that the exemption in the Constitution embraces the interest of the State in business enterprises, but applies to property of the State held for State purposes."⁴ Although this case involved property belonging to a corporate entity in which the state had a pecuniary interest, it has been followed as an authority in cases where the property is owned directly by a governmental agency. It is also cited as construing the constitutional provision to embrace only that property used for a public purpose.

Not until half a century later was the court again confronted with the problem. In the case of *Town of Andrews v. Clay County*⁵ the town owned property situated in the adjoining county. The property was used for a power plant, the electricity generated therefrom being used by the town in lighting its streets and also distributed locally for domestic and commercial purposes. The county attempted to tax the property under a state statute providing that real property owned and held by counties, cities, townships, or school districts, is not exempt from taxation unless such property is used wholly and exclusively for public purposes.⁶ Justice Connor, writing the opinion, held the property to be exempt under article V, section five, because "New or additional provisions cannot be imposed by the General Assembly as prerequisites for its exemption from taxation."⁷ He further stated, "The quality of

²Notes (1919) 3 A. L. R. 1439, (1932) 81 A. L. R. 1518, (1935) 99 A. L. R. 1143.

³*Id.* at 476.

⁴75 N. C. 474 (1876).

⁵200 N. C. 280, 156 S. E. 855 (1930).

⁶N. C. CODE ANN. (Michie, 1935) §7971 (17) now N. C. CODE ANN. (Michie, 1937 Supp.) §7971 (129), "The following real property, and no other, shall be exempted from taxation: (1) Real property, if directly or indirectly owned by the United States or this State, however held, and real property lawfully owned and held by counties, cities, townships, or school districts, used wholly and exclusively for public or school purposes." It will be noted that the wording of the above act is broader in its exemption of state property than in its exemption of "local" property.

⁷200 N. C. 280, 282, 156 S. E. 855, 856 (1931).

exemption attaches to such property, as soon as it is lawfully acquired and remains with such property so long as it is owned by the corporation without regard to the purpose for which it was acquired or was held"⁸ No mention is made in the opinion of the *Carteret* case.

During the same year in *Latta v. Jenkins*,⁹ by way of dictum, Justice Connor supplemented his language in the *Andrews* case by declaring, "The mandatory constitutional provision that property belonging to or owned by the State or municipal corporations shall be exempt from taxation is in language so clear and free from ambiguity that ordinarily there is no room for its construction as to its application to specific property."¹⁰

Five years later in *Board of Financial Control v. Henderson County*¹¹ a unanimous court seems in effect to have overruled the *Andrews* case. Here the board, an agency of Asheville and Buncombe County, owned property in Henderson County which was rented to private parties. In holding the property taxable the court, in unmistakable language, laid down the proposition that property of a municipal corporation held for "purely business purposes" is not exempt from taxation. The early *Carteret* case was relied upon as authority, and the *Andrews* case was distinguished on the ground that there the property was used for a "public use or purpose."¹² This ground for the *Andrews* case is "hindsight" reasoning by the court. The opinion in the *Andrews* case itself places the decision on no such basis.

The following year in *Town of Benson v. Johnston County*¹³ it was held that the county could tax property owned by the town (Benson being situated in Johnston County) which it had acquired by tax foreclosure and was renting to private parties. Following the *Henderson* case of the preceding year the court relied upon the *Carteret* case as limiting the constitutional exemption. Likewise, a similar unsatisfactory distinction was made of the *Andrews* case.

From the foregoing cases the following rules would seem to be a reasonable codification of the law before the *Weaverville* case came up for decision: (1) article V, section five embraces only that property used for a public purpose. (2) This constitutional provision applies equally to state and "local" property. (This may be assumed because the court has cited the *Carteret* case as authority in cases where "local" property was involved.)

As has been pointed out, the property in the *Weaverville* case was owned by the state and rented to private parties. Therefore it seems

⁸ *Id.* at 283, 156 S. E. at 857.

⁹ 200 N. C. 255, 156 S. E. 857 (1931). ¹⁰ *Id.* at 258, 156 S. E. at 859.

¹¹ 208 N. C. 569, 181 S. E. 636 (1935).

¹² *Id.* at 574, 181 S. E. at 639.

¹³ 209 N. C. 751, 185 S. E. 6 (1936).

to be *now* established (as clearly as anything can be established by a divided court) that property belonging to the state is exempt from taxation regardless of the purpose for which it is held. Whether in the future the court will treat "local" property in the same manner is a matter of conjecture.

Justice Devin (who dissented in the *Benson* case), writing the majority opinion in the *Weaverville* case, quotes the constitutional provision and adds the statement that the property "belongs to the State, and therefore comes directly within the letter and purpose of the constitutional prohibition against taxation of 'property belonging to the State'."¹⁴ He distinguishes the *Carteret* case because, "The decision in that case was addressed to a question materially different from the one presented here."¹⁵ This distinction is probably based upon the fact that the property in that case was not owned by the state although it did own a pecuniary interest therein. It is evident from the above language that the court is exempting the property according to the literal terms of the constitution with the sole requirement of state ownership. Going further, a lengthy quotation from the *Andrews* case, which embraces the "disputed" language of Justice Connor, is inserted. From this quotation apparently a majority of the court *now* consider that case as holding "local" property exempt because of ownership and without regard to the purpose for which it is used. But to confuse an otherwise clear opinion the court, without explanation, "distinguishes" the *Henderson* and *Benson* cases from the instant one. If the cases are to be taken as distinguishable on the ground that they involve "local" property, and this seems the only possible ground for distinction, the prior reasoning of the court as pointed out above would seem to be meaningless.¹⁶

¹⁴ 212 N. C. 684, 687, 194 S. E. 860, 862 (1938).

¹⁵ *Id.* at 688, 194 S. E. at 862.

¹⁶ Justice Connor, writing a concurring opinion in the *Weaverville* case, bases his decision upon the clear language of the constitution as interpreted by the court in the *Andrews* case. His position as regards "local" property would be entirely clear were it not for the fact that he failed to dissent in the *Henderson* and *Benson* cases.

Chief Justice Stacy, dissenting, quotes with approval the early *Carteret* case which is distinguished by the majority. He also takes the position that the *Andrews* case, quoted with approval and followed by the majority, is dictum and that it was not followed in the *Henderson* and *Benson* cases.

Justice Clarkson dissents on the ground that several statutes show the legislative intent to hold such property taxable unless used for a public purpose. He also quotes the *Carteret* case with approval and further maintains that the disputed dictum in the *Andrews* case had been disapproved. Although there is some justification for saying that the language of the Machinery Act gives a broader exemption for state property than for "local" property, yet the rest of the justices, of both majority and minority base their opinions primarily on constitutional arguments rather than any difference in the Machinery Act.

It is interesting to note that the decision in the principal case would have been to the contrary except for the position taken by the recently appointed justices.

The following language of Justice Devin shows another possible reason for the decision in the principal case: "Whether the real property, the subject of this controversy, is used directly by the State, or the rents derived therefrom are held and applied by the State as additions to the state's veteran loan fund, is immaterial since its use is exclusively for governmental purposes. The rents from such property, while owned by the state, would be in the same category with interest collected on outstanding loans."¹⁷ While this excerpt taken along with the rest of the opinion is far from clear, it is probable that the court is basing the exemption on the fact that the rents derived from the property were used for a public purpose. No such theory was recognized in the *Henderson* and *Benson* cases because the income derived from the property in both these cases was devoted to a public use. Whatever may be the status of "privately" held property, the income from which is used for a public use, it is clear that investments of a sinking fund in *securities* are tax exempt if the derived income is devoted to such use. This distinction between tangible and intangible property was explained by the court in a case involving credits, the income from which was used for charitable and educational purposes.¹⁸ The reason given by the court was that the only fashion in which credits can possibly be used for a charitable purpose is by employing the income for such a purpose. While there may be some basis for this distinction the fact remains that the profits derived from both types of property are expended for public benefit.

Proper analysis of these opinions is consistently made difficult by the court's tendency to state that other cases are distinguishable without assigning any reason for the distinction.

While it may be argued with some validity that the policy followed by the legislature and (at times) by the court, of limiting the exemption, is a sound one, the real question seems to be one of simple constitutional construction. The clear and unambiguous language of article V, section five would seem to lead to but one reasonable interpretation—that the basis of exemption is solely one of ownership without regard to use or purpose.

Whether in the future the court follows the *Henderson* and *Benson* cases where "local" property is involved or whether the property will be exempt solely on the basis of ownership two questions are likely to arise which may give some difficulty: (1) What constitutes a municipal corporation? (2) Will the exemption be limited to those municipal

¹⁷ *Weaverville v. Hobbs*, Comm'r Veterans Loan Fund, 212 N. C. 684, 687, 194 S. E. 860, 862 (1938).

¹⁸ *United Brethren v. Comm'rs*, 115 N. C. 489, 20 S. E. 626 (1894).

corporations specified in the Machinery Act?¹⁹ (*i.e.* counties, cities, townships, and school districts). In the determination of the first question it is likely that the court will examine the statute under which the purported municipal corporation is created to see if the statute attempts to make it a municipal corporation. If it is found that the legislative intent was to create a municipal corporation it is probable that the court will respect this intent.²⁰ It would seem that the answer to the second question would depend upon whether the court will follow the *Andrews* or the *Henderson* and *Benson* cases. The constitution in exempting the property of municipal corporations does not limit the exemption to any enumerated ones as does the Machinery Act. But in the *Henderson* and *Benson* cases the court has construed this constitutional provision to include only that property used for a public purpose and it is just as probable that it would be construed to embrace only those municipal corporations enumerated in the Machinery Act.²¹

The cases permitting taxation always give as the reason the familiar argument that governmental units, if allowed to compete with private enterprise, should bear their proportionate share of taxation.²² However, the rule employed to give effect to this reason is the public purpose test. Cases are likely to arise where the reason for permitting

¹⁹ N. C. CODE ANN. (Michie, 1937 Supp.) §7971 (129).

²⁰ In a letter to Vernon W. Flynt, dated May 4, 1934, the Attorney General ruled that property of drainage districts is exempt; and he affirmed this ruling in response to an inquiry submitted at the March, 1936, Tax Supervisors' meeting.

In answer to another inquiry submitted at the 1936 Tax Supervisors' meeting, the Attorney General has stated that exemption of the property of other special districts, must, in each case, depend upon whether the statute under which the district was created attempts to make it a municipal corporation. (If the statute does so, administrative officials should follow the statute and treat the property as exempt where used for a public purpose.)

²¹ If the *Henderson* and *Benson* cases are to be followed in the future the problem becomes more complicated because an additional question must be decided in each case, *i.e.*, whether the particular property is used for a public purpose. There is no hard-fast rule to guide the court in this determination. The *Andrews*, *Henderson*, and *Benson* cases recognize the fact that property used for water-works, power plants, *etc.* is used for a public purpose when these service enterprises are operated by the town *for the benefit of its own residents*. However, the situation would probably be different if they were operated for the sole purpose of furnishing service to non-residents. (In a letter to O. M. Hooker, reported in the May-June, 1937, issue of POPULAR GOVERNMENT, the Attorney General ruled that the electric transmission lines owned by a town to transmit current to non-resident customers are taxable by the county.) In some cases where the service is exclusively to non-residents but the service is of material benefit to the health and sanitation of the town, as for example water and sewer lines, it would seem fair to regard the use as one for a public purpose.

The distinction between a public and non-public use of property has resulted in a difficulty in its application. It would seem in the majority of cases to be more productive of litigation than of justice and should be abolished entirely.

²² One possible argument for the taxation of property not held for a public purpose is that to exempt it would cause a shifting of the tax burden from the people of one unit to those of another. The answer to this is that the amount of property of this type is comparatively small and hence the exemption would not cause any appreciable increase in the tax rate of the exempting unit.

taxation will be absent, but the rule allowing exemption will not be applicable. Suppose town *T*, situated in county *C*, has acquired vacant land through tax foreclosure. Now obviously if this vacant land is not rented by the town it will be in no way competitive with private enterprise. Yet following the rule advanced in the *Benson* and *Henderson* cases it is equally apparent that it is not used for a public purpose and hence would probably be taxable.²³ Now suppose county *C* operates a liquor store within the corporate limits of town *T*. The business is certainly not competitive with any private enterprise, other than that of illegal bootlegging. But unless the court would hold a liquor store to be a public use of property (which is highly improbable) it would likely be taxable.²⁴

The confusion precipitated by the principal case places many county and city officials in a state of uncertainty. The court should clarify the existing situation at the first opportunity.

HARRY LEE RIDDLE, JR.

²³ In a letter to Vernon W. Flynt, reported in the January, 1936, issue of *POPULAR GOVERNMENT*, the Attorney General ruled that a vacant lot situated in Forsyth County but owned by a city in another county, not used for a public purpose but producing no income, was subject to taxation.

In a letter to R. B. Woodard, reported in the January, 1937, issue of *POPULAR GOVERNMENT*, the Attorney General ruled that a furniture factory, bid in by a county, would be subject to city taxation, even though not rented, and therefore producing no income at all.

In a letter to Roy J. Moore, reported in the March, 1938, issue of *POPULAR GOVERNMENT*, the Attorney General ruled (in answer to the question as to whether property which a city has foreclosed on and began to collect rentals would be taxable) that since the *Weaverville* case he is uncertain as to what answer would be given were the question again presented to the court. He further stated that it is possible that a distinction might be made between property owned by the state and property owned by cities or counties.

²⁴ In letters to J. E. Malone and A. E. Ekers, reported in September, 1937, issue of *POPULAR GOVERNMENT*, the Attorney General ruled that stocks of liquors and fixtures in ABC stores are taxable.

1938 ANNUAL MEETING, N. C. BAR ASSOCIATION

The North Carolina Bar Association will hold its 40th annual meeting at the Carolina Hotel, Pinehurst, beginning Thursday evening, May 5, and ending Saturday noon, May 7.