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NOTES AND COMMENTS

Administrative Law—Taxation—Review of Discretionary Decisions.

The Commissioner of Internal Revenue reassessed a corporate taxpayer after having determined an overpayment and paid a refund.¹ Such determination was not reviewable by the courts.² The taxpayer contended that the Commissioner was precluded from redetermining tax liability here because the refund had already been paid and the discretionary power had been exhausted.³ The court, relying on *McIlhenny v. Commissioner*,⁴ held such redetermination proper, implying that ordinarily, in the absence of a closing agreement or the running of the statute of limitations, the tax administrators may reopen and redetermine as often as they choose.⁵

At first blush it seems highly irregular that an official, whose discretionary decision is conclusive against the taxpayer, may redetermine; but it appears sounder upon the realization that here was a refund

¹ This overpayment and consequent refund came as a result of a special assessment after the general assessment had been made and the tax paid. Under the Revenue Acts of 1917 and 1918 the commissioner was empowered to grant a special assessment of income and profits tax after the regular assessment upon petition by a taxpayer who could show great hardship as a result of the regular tax. The standard was the amount of tax paid by other similar concerns under the regular provisions of the taxing acts. These relief provisions were designed to administer the hastily raised tax more equitably in unusual cases. 40 STAT. 300 (1917); 40 STAT. 1057, 1088, 1093 (1918). In a recent Congressional enactment, basis for the arising of a similar situation was laid in the Second Revenue Act of 1940 whereby the commissioner was empowered to make discretionary special assessments to avoid hardships. Pub. L. No. 801, 76th Cong., 3rd Sess. (Oct. 8, 1940) §§721, 722.

² *Williamsport Co. v. United States*, 277 U. S. 551, 48 Sup. Ct. 587, 72 L. ed. 985 (1927); cf. *Blair v. Osterlein Machine Co.*, 275 U. S. 220, 48 Sup. Ct. 87, 72 L. ed. 249 (1927). Ordinarily general and special tax assessments may be reviewed in a court of law. In effect this interpretation prevented a taxpayer from attacking the commissioner's decision under this particular special determination power.

³ *Butte, Anaconda & Pacific Ry. v. United States*, 290 U. S. 127, 54 Sup. Ct. 108, 78 L. ed. 222 (1933), (1934) 43 YALE L. J. 503.

⁴ 39 F. (2d) 356 (C. C. A. 3rd, 1930). The commissioner was allowed to reopen an income tax case, in which he had allowed a deduction and in which the tax had been paid, in the absence of evidence of fraud or other new evidence. A closing agreement being available, and no binding agreement having been entered into, the commissioner still had power to reconsider. 42 STAT. 227 (1921). This case leads in giving general effect to the closing agreement provisions of the Revenue Act of 1921 in connection with all federal tax cases settled after its passage even though the tax itself was based on a prior tax law. *Burnet v. Porter*, 283 U. S. 230, 51 Sup. Ct. 416, 75 L. ed. 996 (1931) (Supreme Court expressed approval of *McIlhenny v. Commissioner*, *supra*).

⁵ *New Jersey Worsted Mills v. Gnichtel*, 31 F. Supp. 908 (D. N. J. 1940) (By following *McIlhenny v. Commissioner*; 39 F. (2d) 356 (C. C. A. 3rd, 1930), cited *supra* note 4, the court not only admits the general application of the closing agreement provisions of the Revenue Act of 1921, but also sanctions its application in this exceptional case where no court review is available to the taxpayer.).

based on an exception to the general tax, *i.e.*, a gratuity.⁶ The taxpayer's hardship arises not so much from the commissioner's power to reopen as from his own inability to obtain a court review of the determination;⁷ however, here the taxpayer petitioned for a special assessment and may thus be said to have assented to this hardship.⁸ Reassessments being allowed generally, should this unusual situation constitute an exception to that rule?

Congress, by providing for a definite method for obtaining finality, *viz.* a closing agreement, may properly be said to have negated other modes.⁹ Proof that Congress intended no exceptions is found in the fact that substantially these same provisions have been thrice enacted.¹⁰ Thus the question resolves into one of desirability.

The Commissioner may reassess for fraud or mistake of fact or law,¹¹ and under present statute he may reconsider ordinary tax assessments within the statute of limitations period.¹² Previously refunds could be recovered any time within that period in the absence of closing agreements, but statute has narrowed this to two years after payment.¹³ There is express authorization of successive deficiency assessments,¹⁴

⁶ See note 1, *supra* (This was a refund based on an exception to the general tax law). See *Lynch v. United States*, 292 U. S. 571, 577, 54 Sup. Ct. 840, 842, 78 L. ed. 1434, 1439 (1934) (taxpayer receives no vested interest in refunds); *Frisbie v. United States*, 157 U. S. 160, 166, 15 Sup. Ct. 586, 588, 39 L. ed. 657, 659 (1895).

⁷ This hardship, pointed out to be unusual in note 2, *supra*, the taxpayer suffered in the original special assessment. The question, then, is whether or not commissioners should be allowed to reconsider their discretionary decisions. Assuming this to be answered "yes", one still sees no change, resulting from the reconsideration, in the rights of the taxpayer to seek a review of the commissioner's decision. If he had it in the first place, he has it after the reconsideration; if he didn't have it at first, he has been deprived of nothing by lacking it after the reconsideration.

⁸ See *United States v. Henry Prentiss & Co.*, 288 U. S. 73, 87, 53 Sup. Ct. 283, 286, 77 L. ed. 626, 632 (1933); *Michigan Iron & Land Co. v. United States*, 10 F. Supp. 563 (Ct. Cl., 1935); *Central Iron & Steel Co. v. United States*, 6 F. Supp. 115 (Ct. Cl., 1934), *cert. denied*, 293 U. S. 563, 55 Sup. Ct. 75, 79 L. ed. 663 (1934).

⁹ *Botony Worsted Mills v. United States*, 278 U. S. 282, 49 Sup. Ct. 129, 73 L. ed. 379 (1928). But see *Loewy & Son v. Commissioner*, 31 F. (2d) 652, 654 (C. C. A. 6th, 1929).

¹⁰ 42 STAT. 313 (1921); 43 STAT. 340 (1924); 44 STAT. 113 (1926). *Oak Worsted Mills v. United States*, 38 F. (2d) 699, 702 (Ct. Cl., 1930). For comprehensive history of these statutes see 26 U. S. C. §3772.

¹¹ *Woodworth v. Kales*, 26 F. (2d) 178 (C. C. A. 6th, 1928); *Boyne City Lumber Co. v. Doyle*, 47 F. (2d) 772 (W. D. Mich. 1930); see *Penrose v. Skinner*, 298 Fed. 335, 337 (D. Colo. 1923).

¹² 52 STAT. 573 (1938), 26 U. S. C. §3760(a) (Supp. 1939). *United States v. Green*, 28 F. Supp. 549 (E. D. Pa. 1939).

¹³ *United States v. Wurts*, 303 U. S. 414, 58 Sup. Ct. 637, 82 L. ed. 932 (1937). When the two-year period in which suit may be allowed after rejection of a claim for a refund has expired, the commissioner has no authority to reopen the rejected claim for the refund. *First National Bank v. United States*, 102 F. (2d) 907 (C. C. A. 7th, 1939), *cert. denied*, 307 U. S. 641, 59 Sup. Ct. 1038, 83 L. ed. 103 (1939).

¹⁴ 48 STAT. 740, 26 U. S. C. §271 (1934). An erroneous refund is recoverable

bordering upon a denial of *res judicata* principles; however, in the absence of a definite statutory determination of the matter, unanimity has not existed among all the courts, for there was some earlier insistence upon finality.¹⁵ Foremost among cases so insisting was *Woodworth v. Kales*¹⁶ which prevented the commissioner from reevaluating stock already assessed for income tax determination, which assessment was approved and re-approved by himself and his predecessors in office. Although possessing elements of estoppel, this case stood on the principle that no redetermination may be made of a discretionary decision in the absence of fraud or gross error. This position has been distinguished and discredited until it is now of little more than historic value.¹⁷ Dissents have infrequently taken a stand for conclusiveness,¹⁸ but since 1930, courts have consistently allowed the Commissioner to redetermine at any time within the statute of limitations, thereby achieving uniformity.¹⁹ Final sanction would occur if the Supreme Court

by a subsequent deficiency assessment. *Burnet v. Porter*, 283 U. S. 230, 51 Sup. Ct. 416, 75 L. ed. 996 (1931).

¹⁵ *Bonwit Teller & Co. v. United States*, 283 U. S. 258, 51 Sup. Ct. 395, 75 L. ed. 1018 (1931) (used up his jurisdiction by signing certificate of overassessment and receiving waiver from taxpayer); *United States v. Detroit Steel Products Co.*, 20 F. (2d) 675 (E. D. Mich. 1927) (in authorizing refund, commissioner acted quasi-judicially, and in the absence of fraud or gross error his decision is binding on the government); *Buick Motor Co. v. City of Milwaukee*, 43 F. (2d) 385 (E. D. Wis. 1930), *aff'd*, 48 F. (2d) 801 (C. C. A. 7th, 1931), *cert. denied*, 284 U. S. 655, 52 Sup. Ct. 33, 76 L. ed. 555 (1931) (authorized judgment of tax official on competent evidence not generally subject to reconsideration . . . must be error or new facts); *Boyne City Lumber Co. v. Doyle*, 47 F. (2d) 772 (W. D. Mich. 1930) (slight error in base evaluation of property for income tax computation after sale was insufficient to allow reconsideration); see *Kaufman v. United States*, 11 Ct. Cl. 659, 670, *aff'd*, 96 U. S. 567, 24 L. ed. 792 (1878); *Penrose v. Skinner*, 298 Fed. 335, 337 (D. Colo. 1923); *Daube v. United States*, 289 U. S. 367, 372, 53 Sup. Ct. 597, 599, 77 L. ed. 1261, 1264 (1933).

¹⁶ 26 F. (2d) 178 (C. C. A. 6th, 1928), (1929) 27 Mich. L. Rev. 677 (flagrant abuse of power motivated by political animosity is the possible explanation for this case). But *cf.* *James Couzens*, 11 B. T. A. 1040 (1928).

¹⁷ *Holmquist v. Blair*, 35 F. (2d) 10 (C. C. A. 8th, 1929); *Austin v. Commissioner*, 35 F. (2d) 910 (C. C. A. 6th, 1929) (presumption that commissioner is acting under the right to change, *i.e.* fraud or error); *Oak Worsted Mills v. United States*, 38 F. (2d) 699 (Ct. Cl., 1930); *McIlhenny v. Commissioner*, 39 F. (2d) 356 (C. C. A. 3rd, 1930); *Page v. Lafayette Worsted Co.*, 66 F. (2d) 339 (C. C. A. 1st, 1933), *cert. denied*, 290 U. S. 692, 54 Sup. Ct. 127, 78 L. ed. 596 (1933) (distinguished).

¹⁸ See *Austin v. Commissioner*, 35 F. (2d) 910, 913 (C. C. A. 6th, 1929); *Page v. Lafayette Worsted Co.*, 66 F. (2d) 339, 342 (C. C. A. 1st, 1933), *cert. denied*, 290 U. S. 692, 54 Sup. Ct. 127, 78 L. ed. 596 (1933). For comparison see excerpt from the commissioner's general order of January 20, 1923 in *McIlhenny v. Commissioner*, 39 F. (2d) at 358 (C. C. A. 3rd, 1930).

¹⁹ *Burnet v. Porter*, 283 U. S. 230, 51 Sup. Ct. 416, 75 L. ed. 996 (1931), *aff'g.* *McIlhenny v. Commissioner*, 39 F. (2d) 356 (C. C. A. 3rd, 1930); *Stanford University Book Store v. Helvering*, 83 F. (2d) 710 (App. D. C. 1936). The changed determination may involve a revaluation on the same facts. *Levy v. Commissioner*, 48 F. (2d) 725 (C. C. A. 9th, 1931). However, the courts have refrained from an out and out declaration allowing the commissioner, in the absence of specific statutory allowance, to reverse his discretionary decision as to the granting of statutory special assessments when faced with the same facts.

adopted the holding in *The Sweets Co. of America v. Commissioner*,²⁰ that ". . . whether he believed his predecessor's ruling erroneous in law or fact is immaterial . . . Within the statutory period of limitations and in the absence of a binding settlement, the commissioner had authority to re-examine and redetermine the petitioner's tax liability."

In current federal taxation statutes the legislative intent is clear insofar as the statutes providing for closing agreements and deficiency assessments are the only restrictions on the commissioner's power of review.²¹ In the interest of arriving at a proper and uniform tax this vested discretion appears justified.

State tax administration has pursued an opposite course yielding to the argument that taxpayers experienced annoyance and uncertainty from numerous reassessments, especially when merely representative of a changed view of the same facts.²² Statutes often provide for back assessments of omitted property,²³ but a reassessment because of official omission or undervaluation of property included in the taxpayer's returns has usually been denied since such property has already been subjected to tax, however inadequate.²⁴ Even a statutory provision for reassessment upon incorrect levies has been interpreted to give that power only when new facts come to light.²⁵ Actual collusion with gov-

Austin v. Commissioner, 35 F. (2d) 910, (C. C. A. 6th, 1929); *Page v. Lafayette Worsted Co.*, 66 F. (2d) 339, *cert. denied*, 290 U. S. 692, 54 Sup. Ct. 127, 78 L. ed. 596 (1933). *Omaha Baum Iron Store v. United States*, 8 F. Supp. 703 Ct. Cl., 1934; *United States v. Green*, 28 F. Supp. 549 (E. D. Pa. 1939) (though the law relied on at the time of the determination was the only law in existence, a subsequent change of the law by the Supreme Court allows the commissioner to recover the refund previously granted, if he acts within the statute of limitations period). *Contra: Tumulty v. District of Columbia*, 102 F. (2d) 254 (App. D. C. 1939) (personal property tax).

²⁰ 40 F. (2d) 436, at 438 (C. C. A. 2d, 1930).

²¹ 52 STAT. 573 (1938), 26 U. S. C. §3760(a) (Supp. 1939) (provides for a binding closing agreement as to future tax liability). 48 STAT. 740, 26 U. S. C. §271 (1934) (provides for successive deficiency assessments). 52 STAT. 578, 26 U. S. C. §3761 (1938) (provides for compromise agreements, the statutory method being the only final one).

²² *Champlin v. Oklahoma Tax Commission*, 163 Okla. 185, 20 P. (2d) 904 (1933). An additional consideration is the apparent injustice of permitting the government to reopen questions of tax liability while the taxpayer is concluded by his payment on the original assessment. *Coulter v. Louisville Bridge Co.*, 114 Ky. 42, 70 S. W. 29 (1902).

²³ IOWA CODE (1939) §7105.1; MISS. CODE ANN. (1930) §3197; N. C. CODE (Michie, 1939) §7971(163) (5).

²⁴ *Hunt v. District of Columbia*, 108 F. (2d) 10 (App. D. C. 1939); *Langhout v. First National Bank*, 191 Iowa 957, 183 N. W. 506 (1921); *Commonwealth v. Robinson, Norton & Co.*, 146 Ky. 218, 142 S. W. 406 (1912); *Wolfenden v. Commissioners*, 152 N. C. 83, 67 S. E. 319 (1910); *Chowan County v. Commissioner of Banks*, 202 N. C. 672, 163 S. E. 808 (1932); *County of Buncombe v. Beverly Hills, Inc.*, 203 N. C. 170, 165 S. E. 335 (1932); *Town of Rockingham v. Hood ex rel. Bank of Pee Dee*, 204 N. C. 618, 169 S. E. 191 (1933). But *cf. Adams v. Clarke*, 80 Miss. 134, 31 So. 216 (1902).

²⁵ *State ex rel. Schuster Realty Co. v. Lyons*, 184 Wis. 175, 197 N. W. 585 (1924).

ernment agents is necessary to warrant reopening assessments for fraud,²⁶ and courts seem even less inclined to allow reassessments where the error is of law.²⁷ Despite the concession that as a practical matter taxing officials rely on taxpayers' returns in the exigency of voluminous work, and that a flexible system is desirable,²⁸ assessments are still extensively held conclusive.²⁹ There might be good reason for the presence of greater finality in property and franchise taxes, assessed by the officials,³⁰ but state income taxes are so like the federal, the taxpayers assessing themselves, that there seems no good reason for this difference. In many cases it appears as the application by courts of the broad principles enunciated in property cases to this newer tax.³¹ Gradually by legislation and judicial interpretation states are introducing into taxation administrative leeway.³²

²⁶ Compare *State ex rel. Tax Commission v. Sinclair Prairie Oil Co.*, 171 Okla. 498, 41 P. (2d) 876 (1935) with *Adams v. Clarke*, 80 Miss. 134, 31 So. 216 (1902). Deliberate failures to list property items or to report accurate valuations have not been deemed sufficiently reprehensible to overcome the presumption that the tax assessor had performed his duty. *Commonwealth v. Robinson, Norton & Co.*, 146 Ky. 218, 142 S. W. 406 (1912); *Sudderth v. Brittain*, 76 N. C. 458 (1876).

²⁷ *Anniston City Land Co. v. State*, 185 Ala. 482, 64 So. 110 (1913). But cf. *Buick Motor Co. v. Milwaukee*, 43 F. (2d) 385 (E. D. Wis. 1930), *aff'd*, 48 F. (2d) 801 (C. C. A. 7th, 1931), *cert. denied*, 284 U. S. 655, 52 Sup. Ct. 33, 76 L. ed. 555 (1931), in which the court introduces some of the federal tax system's flexibility into the state system.

²⁸ See dissent in *Miller v. Copeland's Estate*, 139 Miss. 788, 812, 104 So. 176, 177 (1925), which argues that permitting unlisted property to go untaxed is both unfair to the other taxpayers and conducive to fraud.

²⁹ *Coulter v. Louisville Bridge Co.*, 114 Ky. 42, 70 S. W. 29 (1902) (franchise tax); *Commonwealth v. Kentucky Heating Co.*, 176 Ky. 35, 195 S. W. 459, *modified*, 180 Ky. 607, 203 S. W. 538 (1918) (corporation tax); *State ex rel. Ford Motor Co. v. Gehner*, 325 Mo. 24, 27 S. W. (2d) 1 (1930) (income tax); *State ex rel. Tax Commission v. Sinclair Prairie Oil Co.*, 171 Okla. 498, 41 P. (2d) 876 (1935) (property tax).

³⁰ *Tennessee Coal, Iron & R.R. v. Board of Education*, 80 F. (2d) 307 (C. C. A. 5th, 1935).

³¹ *State ex rel. Ford Motor Co. v. Gehner*, 325 Mo. 24, 27 S. W. (2d) 1 (1930); *State ex rel. Schuster Realty Co. v. Lyons*, 184 Wis. 175, 197 N. W. 585, *aff'd*, 184 Wis. 492, 199 N. W. 48 (1924); *Arizona Tax Commission v. Tucson Gas, Electric Light & Power Co.*, 103 P. (2d) 467, *modified*, 103 P. (2d) 955 (Ariz. 1940).

³² N. C. CODE (Michie, 1939) §7971(163)(6) (property tax provision allowing for reassessment where facts newly come to the attention of the assessor which would permit a board of equalization, if they were confronted with this same new evidence, to raise the assessment). *Head v. McKenney*, 61 Ga. App. 552, 6 S. E. (2d) 405 (1939) (where state income tax law provided that the tax should be one-third of that paid to the federal government, an additional assessment by the federal government against the taxpayer permitted an additional assessment by the state). Cf. N. C. CODE (Michie, 1939) §7880(152) (taxpayer must report any change in his federal income tax to the state officials; for failure to report he cannot claim the running of the statute of limitations). The implication of this statute points toward the allowance of reassessments by state officials, but could they change their decision, as in the instant case, where there has been a general assessment, a discretionary special assessment whereupon the state makes its first change, and then a change of the special assessment by the federal officials? Clearly state officials should have the power to reconsider

Close analogies are found in other fields, including determinations by the interstate commerce commission,³³ land patent board,³⁴ workmen's compensation commission,³⁵ and immigration department³⁶ which are characterized as quasi-judicial and thus afford ground for holding that the body making the decision has no power to change it.³⁷ It is reasoned that since all administrative power arises from statute, these decisions may be held final as against the official in the absence of statutory provisions to the contrary³⁸ as over against the rationale that such absence of statute leaves the field wide open for reconsiderations.³⁹ Another theory is that the officer's authority is exhausted by its initial exercise,⁴⁰ this conflicting with the idea that such freedom of re-determination achieves greater justice.⁴¹ Actually whether finality is to be accorded to administrative determinations or whether they may be reopened by their determiners appears governed by particular circumstances and not by any comprehensive judicial rule.⁴² Where legislative policy remains unexpressed, it appears desirable to decide the power of administrative agencies to reverse their former actions according to the nature of the proceedings involved and the nature of the substantive law administered. A policy of judicial *laissez faire* seems preferable, since administrative agencies are best qualified to develop their own

in cases where the provisions of the state law involved depend upon the disposition of the same matter by the federal officials, but may the state officials change their decisions where the state law provisions are independent and the state official's decision is also independent of outside considerations?

³³ *Butte, Anaconda & Pac. Ry. v. United States*, 290 U. S. 127, 54 Sup. Ct. 108, 78 L. ed. 222 (1933); Note (1940) 49 YALE L. J. 1250.

³⁴ *Noble v. Union River Logging R. R.*, 147 U. S. 165, 13 Sup. Ct. 271, 37 L. ed. 123 (1893); *Ballinger v. United States ex rel. Frost*, 216 U. S. 240, 30 Sup. Ct. 338, 54 L. ed. 464 (1910); *Lane v. Watts*, 234 U. S. 525, 34 Sup. Ct. 965, 58 L. ed. 1440 (1914); *Kern River Co. v. United States*, 257 U. S. 147, 42 Sup. Ct. 60, 66 L. ed. 175 (1921); *Great Northern Ry. v. Steinke*, 261 U. S. 119, 43 Sup. Ct. 316, 67 L. ed. 564 (1923); *West v. Standard Oil Co.*, 278 U. S. 200, 49 Sup. Ct. 138, 73 L. ed. 265 (1929).

³⁵ Notes (1940) 49 YALE L. J. 1250, (1929) 27 MICH. L. REV. 677; (1927) 4 WIS. L. REV. 175.

³⁶ Sharp, *Conclusive Administrative Decisions* (1930) 5 IND. L. J. 563.

³⁷ *Lilienthal v. Wyandotte*, 286 Mich. 604, 282 N. W. 837 (1938); *Shugg v. Anaconda Copper Mining Co.*, 100 Mont. 159, 46 P. (2d) 435 (1935).

³⁸ *Connor's Case*, 126 Me. 37, 115 Atl. 520 (1921); *Hyland v. Waldo*, 158 App. Div. 654, 143 N. Y. Supp. 901 (1st Dep't 1913).

³⁹ *Pearson v. Williams*, 202 U. S. 281, 26 Sup. Ct. 608, 50 L. ed. 1029 (1906); *Gage v. Gunthar*, 136 Cal. 338, 68 Pac. 710 (1902).

⁴⁰ *State ex rel. Gillespie v. Thursby*, 104 Fla. 103, 139 So. 372, rehearing denied, 104 Fla. 103, 140 So. 775 (1932); *Kern River Co. v. United States*, 257 U. S. 147, 42 Sup. Ct. 60, 66 L. ed. 175 (1921); see dissent in *Austin v. Commissioner*, 35 F. (2d) 910, 913 (C. C. A. 6th, 1929).

⁴¹ *Holmquist v. Blair*, 35 F. (2d) 10 (C. C. A. 8th, 1929); *United States v. Green*, 28 F. Supp. 549 (E. D. Pa. 1939); *Omaha Baum Iron Store v. United States*, 8 F. Supp. 703 (Ct. Cl. 1934).

⁴² Compare *In re Smiling*, 193 N. C. 448, 137 S. E. 319 (1927), with *Board v. Little*, 195 N. C. 793, 143 S. E. 827 (1928).

res judicata practices out of intimate acquaintance with their individual problems.⁴³

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Civil Procedure—Use of Motion to Strike.

If appealed cases afford an accurate criterion, the statutory motion to strike from pleadings is becoming much more prevalent in the North Carolina courts. In the last completed volume of the North Carolina Reports, there are five cases raising the point as compared to only twenty-five in the previous sixteen volumes. The part of the statute with which this note is concerned provides in effect that irrelevant or redundant matter may be stricken out on the motion of the aggrieved party, if made before answer or demurrer, or before extension of time is granted in which to plead.¹

In a recent suit against a railroad and its employee for negligent injuries from the use of firearms in the hands of the employee, the trial court, on defendant's motion, struck from the amended complaint allegations that the individual defendant was possessed of a nervous and irritable disposition, and of a violent and ungovernable temper. On appeal the Supreme Court reversed the trial court only as to the nervous disposition, saying "Irritability and violent and ungovernable temper could hardly be a contributing factor to negligence, while nervousness may readily be a concomitant part thereof, and the retaining of a person equipped with firearms with which to guard the railway station of which he was in charge, when such person was known to possess a nervous disposition, might constitute negligence on the part of the railway company."² In passing it may be said that such a distinction is rather difficult to comprehend. The reverse appears nearer the truth.

The principal case lays down a general rule that seems quite popular with the court: "On a motion to strike out, the test of relevancy of a pleading is the right of the pleader to present the facts to which the allegation relates in the evidence upon the trial."³ The difficulty of this rule is in its application. There is no apparent reconcilable or pre-

⁴³ Note, *Res Judicata in Administrative Law* (1940) 49 YALE L. J. 1250. Also see Culp, *Administrative Remedies In the Assessment and Enforcement of State Taxes* (1938) 17 N. C. L. REV. 118, in which a hands-off policy is suggested to the courts insofar as upsetting expert administrative determinations as to tax liability, thereby relying more heavily on the bodies' expertness.

¹ N. C. CODE ANN. (Michie, 1939) §537.

² *Whitlow v. Southern Ry.*, 217 N. C. 558, 8 S. E. (2d) 809 (1940).

³ *Pemberton v. Greensboro*, 203 N. C. 514, 166 S. E. 396 (1932); *Patterson v. Southern Ry.*, 214 N. C. 38, 198 S. E. 364 (1938); *Virginia Trust Co. v. Dunlop*, 214 N. C. 196, 198 S. E. 645 (1938); *Duke v. Crippled Childrens' Hospital*, 214 N. C. 570, 199 S. E. 918 (1938); *Wadesboro v. Cox*, 215 N. C. 708, 2 S. E. (2d) 876 (1939); *Sayles, Adm'x v. Loftis*, 217 N. C. 674, 9 S. E. (2d) 393 (1940).