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tional question be decided when raised. Because of the uncertainty of the application of the immunity doctrine, to decide the issue of jurisdiction first would avoid prolonging the litigation in a substantial number of cases.

The doctrine of sovereign immunity with all of its subtleties is one which frequently confronts the federal courts. It has been suggested that a test avoiding all fictions should be adopted, that only those suits should be dismissed which would unduly interfere with government operations.⁵⁸ This measure of jurisdiction would certainly be more in keeping with the fundamental nature of a form of government which derives its authority and power from consent of the governed; however, such a test is not without shortcomings. If adopted it would place upon the courts the heavy burden of predicting the effect of each action upon the operations of the governmental machinery involved, and the necessity of weighing that effect against the interests of the plaintiff and all persons similarly situated.

There is little, if any, likelihood of Congressional action on this subject; therefore, future cases will in all probability continue the same pattern of case by case adjudication and application of the doctrine of sovereign immunity to the peculiar facts of the litigation before the court.

R. G. HALL, JR.

Insurance—Recovery under Windstorm Clauses

As a result of the recent hurricane which struck North Carolina, many problems will arise as to what damages are recoverable under windstorm clauses of insurance policies. This note is an attempt to set forth some of the rules of law applicable to windstorm clauses.

The extended coverage endorsement generally in use in North Carolina covers direct loss by windstorm. Expressly excepted are all losses caused directly or indirectly by water, whether driven by wind or not, unless the water entered the building through an opening made by wind. Damage to seawalls, docks, piers, boathouses, cabanas, and bulkheads is also excepted.¹

(1940); *Royal Sundries Corp. v. United States*, 111 F. Supp. 136 (E. D. N. Y. 1953).

⁵⁸ Advocated in Block, *Suits Against Government Officers and the Sovereign Immunity Doctrine*, 59 HARV. L. REV. 1060 (1946).

¹ An example of the usual extended coverage endorsement approved by the North Carolina Fire Insurance Rating Bureau is: "EXTENDED COVERAGE: In consideration of the premium for this coverage shown on the first page of this policy, and subject to provisions and stipulations (hereinafter referred to as 'provisions') herein and in the policy to which this endorsement is attached, including riders and endorsements thereon, the coverage of this policy is extended to include direct loss by Windstorm, Hail. . . ."

The term windstorm means a wind of unusual violence. It is a storm characterized by high winds with little or no precipitation. It must be more than an ordinary gust of wind, no matter how prolonged. It need not have the twirling features of a cyclone or tornado, but it must assume the aspect of a storm—that is, an outburst of tumultuous force.²

Accepting this as a definition of a windstorm, the courts have experienced difficulty in finding a standard by which the facts can be measured to determine whether a windstorm did in fact occur.³ A few courts have adopted as a standard the velocity of the wind.⁴ One court approved an instruction to the effect that the wind had reached windstorm proportions if the wind was blowing with sufficient force to blow down a tree.⁵

"PROVISIONS APPLICABLE ONLY TO WINDSTORM AND HAIL:
This Company shall not be liable for loss caused directly or indirectly by (a) frost or cold weather or (b) ice (other than hail), snowstorm, waves, tidal wave, high water or overflow, whether driven by wind or not.

"This Company shall not be liable for loss to the interior of the building or the property covered therein caused, (a) by water, rain, snow, sand or dust, whether driven by wind or not, unless the building covered or containing the property covered shall first sustain an actual damage to roof or walls by the direct force of wind or hail and then shall be liable for loss to the interior of the building or the property covered therein as may be caused by water, rain, snow, sand or dust entering the building through openings in the roof or walls made by direct action of wind or hail or (b) by water from sprinkler equipment or other piping, unless such equipment or piping be damaged as a direct result of wind or hail.

"Unless liability therefor is assumed in the form attached to this policy by separate and specific item(s), or by endorsement hereon, this Company shall not be liable for damage to the following property; (a) Cloth awnings and their frames; (b) fences; (c) seawall, property line and similar walls; (d) greenhouses, hothouses, slathouses, trellises, pergolas, cabanas and outdoor equipment pertaining to the service of the premises; (e) wharfs, docks, piers, boat-houses, bulkheads or other structures located over or partially over water and the property therein or thereon."

²Jordan v. Iowa Mutual Tornado Ins. Co., 151 Iowa 73, 130 N. W. 177 (1911); Sabatier Bros. v. Scottish Union & Nat. Ins. Co., 152 So. 85 (La. App. 1934); Metropolitan Ice Cream Co. v. Union Mut. Fire Ins. Co., 358 Mo. 727, 210 S. W. 2d 700 (1949); Schaeffer v. Northern Assur. Co., 177 S. W. 2d 688 (Mo. App. 1944); Lunn v. Indiana Lumbermens Mut. Ins. Co., 184 Tenn. 584, 201 S. W. 2d 978 (1947).

³Pearson v. Aroostook County Patrons Mut. Fire Ins. Co., 101 A. 2d 183, 186 (Me. 1953). "To say that a windstorm must be 'an outburst of tumultuous force' or 'a wind of unusual violence,' hardly more than states the difficulty. The vital questions are, accepting this definition of a windstorm, how much force or violence of wind does it take to make a windstorm, and how may it be measured."

⁴Bogalusa Gin & Warehouse Co. v. Western Assurance Co., 199 La. 715, 718-719, 6 So. 2d 740, 741 (1942) (The court said that the testimony of witnesses from the United States Weather Bureau is to the effect that the average wind velocity necessary to constitute a windstorm is twenty-seven miles per hour. The preponderance of evidence here is that the velocity was not less than thirty-five miles per hour. "Such being the case, the velocity of the wind reached the degree of a windstorm."); Clark v. Fidelity & Guaranty Fire Corp., 39 N. Y. S. 2d 377 (City Ct. 1943) (a twenty-eight mile per hour wind held not to constitute a windstorm).

⁵Atlas Assur. Co., Ltd., v. Lies, 70 Ga. App. 162, 27 S. E. 2d 791 (1943).

The modern trend is for the courts to hold that to constitute a windstorm, the wind must be of sufficient force and violence to damage the insured property.⁶ The courts of Kentucky and Maine have adopted this view with the qualification that the insured property must be in a reasonable state of repair.⁷ A result of this interpretation is that a plaintiff, who proves damages resulting from wind, has established the right to recover without further evidence that the wind was a storm or outburst of tumultuous force.

The question of whether a windstorm did in fact occur is a question of fact for the jury.⁸

The insured, in order to recover, must bring himself within the terms of the policy by proving that the loss was occasioned by wind-

Contra: Fidelity-Phenix Fire Ins. Co. of N. Y. v. Board of Education of Town of Rosedale, 201 Okla. 250, 204 P. 2d 982 (1949).

⁶ Albert Lea Ice & Fuel Co. v. United States Fire Ins. Co., 58 N. W. 2d 614 (Minn. App. 1953); Fidelity-Phenix Fire Ins. Co. v. Board of Education, 201 Okla. 250, 204 P. 2d 982 (1945); Adams Apple Products Corp. v. National Union Fire Ins. Co., 170 Pa. Super. 269, 85 A. 2d 702 (1952); Gerhard v. Travelers Fire Ins. Co., 246 Wis. 625, 18 N. W. 2d 336 (1945).

⁷ Druggist Mut. Ins. Co. v. Baker, 254 S. W. 2d 691 (Ky. App. 1953); Old Colony Ins. Co. v. Reynolds, 256 S. W. 2d 362 (Ky. App. 1953); Pearson v. Aroostook County Patrons Mut. Fire Ins. Co., 101 A. 2d 183 (Me. 1954).

⁸ Pearl Assur. Co. v. Stacey Bros. Gas. Const. Co., 114 F. 2d 702 (6th Cir. 1940); Jordan v. Iowa Mutual Tornado Ins. Co., 151 Iowa 73, 130 N. W. 177 (1911) (The court found that a windstorm had occurred when witnesses testified that the wind lasted all day, that it was the hardest they had experienced, that well built windmills in the locality were blown down and that visibility was poor.); Druggist Mut. Ins. Co. v. Baker, 254 S. W. 2d 691 (Ky. App. 1953) (The evidence establishing a windstorm was the testimony that the witness was awakened during the night by the sound of the wind and the falling of a wall and testimony of other witnesses that the wind was blowing hard. There was no damage to other houses in the vicinity. Although there was evidence that some of the witnesses observed neighbors patching roofs, there was no indication that the patching was made necessary by the damage occurring on the night in question. Under the standard that a windstorm is a wind of sufficient violence to be capable of damaging the property, assuming the property in reasonable repair, the evidence was held sufficient to take the question of whether the damage was done by windstorm to the jury.); Sabatier Bros. v. Scottish Union & Nat. Ins. Co., 152 So. 85 (La App. 1934) (The insured building was destroyed, but there was no other damage in the vicinity. The court said that the evidence indicated that the wind was merely blowing in gusts and did not rise to the heights of tumultuous violence.); Metropolitan Ice Cream Co. v. Union Mut. Fire Ins. Co., 358 Mo. 727, 210 S. W. 2d 700 (1949) (The court found the jury justified in finding that a windstorm had occurred from testimony that a witness was awakened twice by the noise of the wind and the rattling of windows. The wind seemed violent when riding in the car and papers were seen blowing in the street. The wind was heard whistling between the buildings. The records of the United States Weather Bureau showed a maximum wind velocity of twenty-three miles per hour and that the velocity was seventeen miles per hour at the time of the damage. A tower on top of a building collapsed, and evidence showed that the tower was improperly constructed. The court said that if the insurer wished to limit his liability to winds of certain velocity, he should so state in the policy.); George A. Hoagland & Co. v. Insurance Co. of N. A., 131 Neb. 105, 267 N. W. 239 (1936) (On conflicting evidence of whether the storm was accompanied by winds of fifteen or thirty miles per hour, the question was for the jury as to whether the wind amounted to a windstorm.)

storm.⁹ This burden is sustained upon establishing by a fair preponderance of evidence that the windstorm was the efficient cause of the damage incurred.¹⁰ This can be established by direct and circumstantial evidence and opinions of expert and skilled witnesses.¹¹

When the insured offers evidence tending to show that the damage was occasioned by one of the causes insured against, the burden shifts to the insurer to show that the loss was caused by an excluded cause.¹² The burden is on the insurer to bring the loss within the exception.¹³

Direct loss by windstorm means that the windstorm must be the proximate or efficient cause of the loss.¹⁴ The term "efficient," as applied to windstorm coverage, is not expressly defined but it is often used in the cases, and where used it means that the wind must be the direct cause—the predominating cause without which the loss would not have occurred. The wind of itself must have been capable of producing the loss without combining with some other cause.¹⁵ The court in *Niagara Fire Ins. Co. v. Muhle* construed the policy to mean that "if the damages sued for were caused by wind, and the damage sued for would have resulted from the wind alone without the presence of water, recovery was proper."¹⁶

These suggested meanings are not quite comprehensive and are not applicable in certain situations. They leave out the case where an object is projected against the insured building by the wind.¹⁷ Recovery is denied, however, when the damage is occasioned by water

⁹ *Phenix Ins. Co. v. Charlestown Bridge Co.*, 65 Fed. 628 (4th Cir. 1895); *Sabatier Bros. v. Scottish Union & Nat. Ins. Co.*, 152 So. 85 (La. App. 1934); *Styborski v. Hartford Fire Ins. Co.*, 169 Pa. Super. 452, 82 A. 2d 543 (1952); *Marks v. Lumbermens Ins. Co.*, 160 Pa. Super. 66, 49 A. 2d 855 (1946).

¹⁰ *Perito v. Northern Ins. Co. of N. Y.*, 189 Misc. 204, 69 N. Y. S. 2d 611 (Sup. Ct. 1948); *La Bris v. Western Nat. Ins. Co.*, 59 S. E. 2d 263 (W. Va. 1950).

¹¹ *Loyola University v. Sun Underwriters Ins. Co. of N. Y.*, 93 F. Supp. 186 (E. D. La. 1951), *aff'd*, 196 F. 2d 169 (5th Cir. 1952).

¹² *Kinney v. Farmers Mut. F. & Ins. Soc.*, 159 Iowa 490, 141 N. W. 706 (1913).

¹³ *Jordan v. Iowa Mut. Tornado Ins.*, 151 Iowa 73, 130 N. W. 177 (1911) (One of the main reasons for the trial court's finding loss by windstorm was the failure of the insurer to show that the exception applied.); *Polansky v. Millers Mut. Fire Ins. Ass'n of Ill.*, 238 N. C. 427, 78 S. E. 2d 213 (1954) (automobile policy); *Collins v. U. S. Casualty Co.*, 172 N. C. 543, 90 S. E. 585 (1916) (health policy). *Contra*: *Coyle v. Palatine Ins. Co.*, 222 S. W. 973 (Tex. Comm. App. 1920).

¹⁴ *Trexler Lumber Co. v. Allemannia Fire Ins. Co. of Pittsburgh*, 289 Pa. 13, 136 Atl. 856 (1927).

¹⁵ *Phenix Ins. Co. v. Charlestown Bridge Co.*, 65 Fed. 628 (4th Cir. 1895).

¹⁶ 208 F. 2d 191, 194 (8th Cir. 1954).

¹⁷ *Phenix Ins. Co. v. Charlestown Bridge Co.*, 65 Fed. 628 (4th Cir. 1895) (vessels were blown against the insured bridge); *Queens Ins. Co. v. Hudnut Co.*, 8 Ind. App. 22, 35 N. E. 397 (1893) (boat blown by wind against insured building); *Gerhard v. Travelers F. Ins. Co.*, 246 Wis. 625, 18 N. W. 2d 336 (1945) (ice blown from a nearby lake against cottage).

driven by wind,¹⁸ or hail driven by wind under a policy excepting loss by hail.¹⁹

It is not necessary in all cases to prove injury by direct impact of the wind or by the wind projecting some object against the insured property.²⁰ Recovery was permitted when a horse, terrified by the blowing in of a barn door, broke his halter and forced his foot through a timber in the barn so that he could not extricate himself and died from injuries and exhaustion.²¹ Recovery was permitted also for the displacement of insured property and damage resulting from its being deposited in water.²²

Whether the windstorm is the efficient cause of the loss is a question of fact for the jury.²³

¹⁸ Newark Trust Co. v. Agricultural Ins. Co., 237 Fed. 788 (3d Cir. 1916) (The court would not accept the insured's argument that because the wind drove the water against the house the wind was the proximate cause of the loss.)

¹⁹ Hartford F. Ins. Co. v. Nelson, 64 Kan. 115, 67 Pac. 440 (1902).

²⁰ Jordan v. Iowa Mutual Tornado Ins. Co., 153 Iowa 73, 130 N. W. 177 (1911).

²¹ Fidelity-Phenix Fire Ins. Co. of N. Y. v. Anderson, 81 Ind. App. 124, 130 N. E. 419 (1921).

²² Pennsylvania Fire Ins. Co. v. Sikes, 197 Okla. 137, 168 P. 2d 1016 (1946).

²³ Home Ins. Co. v. Sherrill, 174 F. 2d 945 (5th Cir. 1949) (Eyewitnesses testified that they saw the roof of the insured building blown off and the walls collapse before the water rose to the window sills or the waves began to beat against the building. The evidence was held sufficient for the jury to find loss by windstorm.); Pearl Assurance Co. v. Stacey Bros. Gas. Const. Co., 114 F. 2d 702 (6th Cir. 1940); North British & Merchantile Ins. Co. v. Sciandra, 54 So. 2d 764 (Ala. 1952); Ebert v. Pacific Nat. Fire Ins. Co., 40 So. 2d 40 (La. App. 1949) (The court overruled the finding of the trial court that the loss resulted from water rather than wind.); National Fire Ins. Co. v. Albers, 167 Md. 599, 175 Atl. 597 (1934) (A windstorm of fifty miles per hour caused the island on which the insured house was located to be inundated. The house was on higher ground and more subjected to the wind. There was evidence that lower houses were not as damaged and that trees had been blown down.); Anderson v. Connecticut Fire Ins. Co., 231 Minn. 469, 43 N. W. 2d 807 (1950); Brown v. Penn. Fire Ins. Co., 263 S. W. 2d 893 (Mo. App. 1954); Schaeffer v. Northern Assur. Co., 177 S. W. 2d 688 (Mo. App. 1944) (Where a windstorm lasted three days in which the velocity of the wind reached forty miles per hour the first day, thirty-one miles per hour the second, and fourteen miles per hour the third, and cracking noises were heard throughout the period, the evidence warranted the finding that the sliding of the roof was directly caused by windstorm.); Protzmann v. Eagle Fire Co. of N. Y., 272 App. Div. 319, 71 N. Y. S. 2d 43 (1st Dep't 1948) (Photographs of the insured property before and after the windstorm indicated that a bulkhead which protected the house had been washed away, and conveyed the impression that the front of the insured's house was undermined by the ocean. The verdict of the jury that the loss was caused by wind was held contrary to the weight of the evidence.); Miller v. Farmers Mutual L. Ins. Asso., 198 N. C. 572, 152 S. E. 684 (1930); Pennsylvania Fire Ins. Co. v. Sikes, 197 Okla. 137, 168 P. 2d 1016 (1946) (evidence held sufficient for jury to find that the house was blown from its foundation into a flooded street rather than carried by water); Murphy v. Insurance Co. of N. A., 355 Pa. 442, 50 A. 2d 217 (1947); Trexler Lumber Co. v. Allemannia Fire Ins. Co., 289 Pa. 13, 136 Atl. 856 (1927); Styborski v. Hartford Fire Ins. Co., 169 Pa. Super. 452, 82 A. 2d 543 (Super. Ct. 1952); Marks v. Lumbermen's Ins. Co., 160 Pa. Super. 66, 49 A. 2d 855 (Super. Ct. 1946) (The peak wind velocity for a five minute period was 82 miles per hour. There were no eyewitnesses to the damage done to insured's house, but witnesses

Frequently the loss to the insured property is occasioned by a combination of causes. A cause not insured against may join with the wind in different degrees to produce the loss. These degrees may be classified as follows:

(1) Contributing: The general rule laid down by the courts is that if the cause designated in the policy is the efficient cause of the loss, recovery may be had though other causes contributed.²⁴ The word "contributed" is used in the sense that it is a minor, secondary cause of the loss.²⁵ Recovery for loss by a contributing cause is not permitted when the loss attributable to it can be ascertained. In this situation, recovery is limited to the damage caused by the efficient cause. However, if the amount of the damage resulting from the contributing cause cannot be determined, the party bearing the loss for the predominant cause is liable for the entire loss.²⁶ It would seem that the general rule stated above would obtain even though the contributing cause was expressly excepted, and it has been so held.²⁷

The language used by some courts, however, seems to indicate otherwise. In the only North Carolina case dealing with loss by wind-storm, the court, after laying down the general rule, said: "Of course the principal enunciated in these cases has no application if liability for the contributing cause is expressly excluded by the terms of the policy."²⁸

testified that it had been moved off its foundation and that other damage was done to the house. Destruction was prevalent throughout the area.)

²⁴ *Miller v. Farmers Mutual L. Ins. Asso.*, 198 N. C. 572, 152 S. E. 684 (1930) (contributory damage by snow accumulated on roof).

²⁵ The word "contributed" is not always given this meaning by the courts. In *Palatine v. Petrovick*, 235 S. W. 929 (Tex. Civ. App. 1917) the court said that water was at least a contributing cause and that was enough to bring it within the exception in the policy. A further examination of the case reveals that the court regarded water as a concurring rather than as a contributory cause.

²⁶ *Phenix Ins. Co. v. Charlestown Bridge Co.*, 65 Fed. 628 (4th Cir. 1895).

²⁷ *Phenix Ins. Co. v. Charlestown Bridge Co.*, 65 Fed. 628 (4th Cir. 1895) (contributory damage by water); *Jordan v. Iowa Mutual Tornado Ins. Co.*, 151 Iowa 73, 130 N. W. 177 (1911) (contributory damage by snowstorm to the loss of the cattle); *Anderson v. Connecticut Fire Ins. Co.*, 231 Minn. 469, 43 N. W. 2d 807 (1950) (contributory damage by snow accumulated on roof); *Trexler Lumber Co. v. Allemannia F. Ins. Co.*, 289 Pa. 13, 136 Atl. 856 (1927) (contributory damage by snow accumulated on the roof); *Providence Wash. Ins. Co. v. Cooper*, 223 S. W. 2d 329 (Tex. Civ. App. 1949) (The court found that the finding of the jury, that no loss was caused by snow accumulated on the roof, was without support in the evidence, but the court said that the insured could recover if the windstorm was the efficient cause though other causes contributed.). It will be noted that most of the cases stating the rule [that if the cause designated in the policy is the efficient cause, recovery may be had though there are contributing causes] involve contributory damage by snow. Where water is involved as a factor in producing the loss, the courts usually just discuss whether the evidence was sufficient for the jury to find that the wind was the proximate cause.

²⁸ *Miller v. Farmers Mutual L. Ins. Asso.*, 198 N. C. 574, 152 S. E. 684, 685 (1930).

There are four reasons why the North Carolina Supreme Court should not follow this deviation from the general proposition. The statement is dictum because the contributing cause (snow) was not expressly excepted in the policy. The cases cited for the dictum do not support the distinction between an expressly excepted contributing cause and a contributing cause which is not expressly excepted.²⁹ The cases cited by the North Carolina Supreme Court for the proposition that if the cause designated in the policy is the efficient cause, recovery may be had though other causes contributed, are cases in which recovery was permitted though an *expressly* excepted cause contributed to the loss.³⁰ Lastly, though the language of some courts seems to support the distinction,³¹ no case has been found which on its facts stands for the proposition that the general rule does not operate when the contributing cause is expressly excepted.

(2) Concurrent: When the wind *concurrs* with a cause not insured against to produce the loss, and neither independently of the other could have caused the damage, recovery is denied. The policy does not permit recovery for loss by a combination of wind and some other cause.³² There is no part of the loss which can be attributed to the wind alone. Hence recovery is denied.

²⁹ *Holmes v. Phenix Ins. Co.*, 98 Fed. 240, 241 (8th Cir. 1899) (The court approved an instruction to the jury that "all damage done to this building which was the result of the injury done by hail is not recoverable in this action for the reason that the policies exempt the company from damage or loss from hail." But, it was found that the chief damage was caused by hail, the excepted cause. Here the efficient cause was the excepted cause. The court did not have the precise question before it of whether recovery could be had if wind were the efficient and hail were only a contributing cause.); *National Union Fire Ins. Co. v. Crutchfield*, 160 Ky. 802, 803, 170 S. W. 187, 187 (1914) (The insured building was surrounded by water. High wind produced waves which were driven by the wind against the building. Several witnesses testified that the damage would not have occurred but for the water. The court said that "the two concurring causes brought about the damage which neither by itself alone would have produced." The whole tenor of the opinion is to the effect that neither the wind nor water independently would have caused the loss. This is not a case in which the water is only a contributing cause.)

³⁰ *Phenix v. Charlestown Ins. Co.*, 65 Fed. 628 (4th Cir. 1895) (contributory damage by high water); *Jordan v. Iowa Mut. Tornado Ins. Co.*, 151 Iowa 73, 130 N. W. 177 (1911) (a snowstorm contributed to the loss of cattle).

³¹ *Palatine Ins. Co. v. Petrovick*, 235 S. W. 929, 932 (Tex. Civ. App. 1917) (The court said that water was at least a contributing cause and that was enough to bring it within the exception in the policy and prevent recovery. Later in the opinion, when deciding on the motion for rehearing, the court said: "If therefore under the facts appearing, the loss sustained by appellee was to any extent due to water, the insurance company was not liable.")

After reviewing the testimony of witnesses the court found that from the evidence no other conclusion could be drawn than that the water did directly or indirectly concur with the wind in destroying the house. The loss resulted from the combined effects of wind and water. This was the actual holding and indicates clearly that water was more than a contributing cause.)

³² *National F. Ins. Co. v. Crutchfield*, 160 Ky. 802, 170 S. W. 187 (1914); *Coyle v. Palatine Ins. Co.*, 222 S. W. 973 (Tex. Comm. App. 1920); *Palatine v. Petrovick Ins. Co.*, 235 S. W. 929 (Tex. Civ. App. 1917).

It would seem that when part of the loss is attributable to wind alone, recovery may be had for that part, though the wind was not the efficient cause of the entire loss. It is incumbent upon the insured to prove the loss by the wind alone. This may logically be inferred from the statement of the court in *Loyola University v. Sun Underwriters Ins. Co. of N. Y.*³³ "If the cause of the damage or destruction be not the direct result of the wind alone, but the damage or destruction be caused by a combination of wind and water, and the damage by either cannot be separated, then, there can be no recovery under the policy, because the insured bears the burden of proving the cause of the loss, and if it fails to make that proof, it cannot recover."

Loss to the interior of the insured building by water may be recovered upon proof that the water entered the building through an opening made by the wind.³⁴ The mere lapse of time between the damage to the building and the entering of the water through the opening made by the wind is not sufficient to take the loss outside the coverage of the policy where efforts were made to have the building repaired. Reasonable means must be taken by the insured to prevent damage to the interior after the opening is made.³⁵

Liability for damage to the interior might depend upon the wording of the policy. In *Unobsky v. Continental Ins. Co.*,³⁶ the policy on which the action was brought stated that the insurer would be liable for rain, snow, sand or dust entering the building through an opening made by the wind. It will be noted that the section of the extended coverage endorsement dealing with loss to the interior did not include *water* as does the extended coverage endorsement quoted in footnote two herein. The court said that the policy only contemplated damage by rain which directly entered the building through an opening made by

³³ 93 F. Supp. 186, 190 (E. D. La. 1951), *aff'd*, 196 F. 2d 169 (5th Cir. 1952); See also *Coyle v. Palatine Ins. Co.*, 222 S. W. 973 (Tex. Comm. App. 1920).

³⁴ *Loyola University v. Sun Underwriters Ins. Co.*, 93 F. Supp. 186 (E. D. La. 1951), *aff'd*, 196 F. 2d 169 (5th Cir. 1953); *National U. F. Ins. Co. v. Harrower*, 170 Ark. 694, 280 S. W. 256 (1926); *Parish v. County F. Ins. Co.*, 134 Neb. 563, 279 N. W. 170 (1938) (The evidence did not sustain the finding of the jury that the windstorm caused the damage through which rain water from the flooded street entered the building.); *Pennsylvania F. Ins. Co. v. Sikes*, 197 Okla. 137, 168 P. 2d 1016 (1942) (rain entered building through windows and doors blown out by wind); *New York Underwriters Ins. Co. v. Sproles*, 73 S. W. 2d 857 (Tex. Civ. App. 1934).

³⁵ *Peerless Hosiery Co. v. Northern Ins. Co.*, 108 F. Supp. 52 (D. Conn. 1953), *aff'd*, 199 F. 2d 957 (2d Cir. 1953) (A storm on November 25 damaged the roof. Roof repairmen were unavailable. On December 7 rain entered the building through the opening made by the wind and damaged more goods. The mere lapse of time did not preclude recovery. Recovery was denied, however, because the insured failed to exercise reasonable care to protect the goods after the initial damage to the roof. The policy placed a duty on the insured to protect the property from further damage.); *Auch v. New Hampshire Fire Ins. Co.*, 65 Dauph. 335 (Pa. Co. Rep. 1954).

³⁶ 147 Me. 249, 86 A. 2d 160 (1952).

the wind. It did not cover damage caused by running surface water from a rainstorm and melting snow which entered the building through an opening made by the wind.

JOHN L. RENDLEMAN.

Legal Ethics—Enforceability of Canon Prohibiting Attorney's Testimony on Behalf of Client

With regard to the propriety of an attorney's testifying for his client, the Canons of Professional Ethics of the American Bar Association have this to say:

"When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in court in behalf of his client."¹

The problem then arises as to whether such a provision is enforceable. Where an attorney, in a civil action, desires to testify for his client, and the need of his testimony should have been apparent within ample time for him to withdraw from the case, may the court enforce this canon by refusing to permit the attorney to testify unless he withdraws?

In the recent case of *Millican v. Hunter*,² the Supreme Court of Florida seems to answer this question in the affirmative. In that case an action was brought to recover a commission for the sale of a radio station. A question involved was whether there was sufficient evidence to show that the property had been listed for sale. Plaintiff's attorney sought to testify on this point in regard to statements made by one defendant to another in his presence. Defendant objected to the admission of this testimony without the attorney's withdrawal, on the ground that it violated the Code of Ethics.³ The trial court determined that the testimony did not relate to formal matters and was not essential to the ends of justice, and therefore sustained defendant's objection. The Florida Supreme Court affirmed.

It should be noted that a technical appraisal of the language of Canon 19 seems to disclose two meanings of the word "withdrawal." The phrase, "he should leave the trial of the case to other counsel,"

¹ Canon 19. Practically every state has the same or a similar provision incorporated in its state bar association canons of ethics, or in its supreme court or trial court rules. Vol. 4 N. C. GEN. STAT., Rules, Regulations, etc., of the North Carolina State Bar, Art. X, § 19 (1943), is identical.

² 73 So. 2d 58 (Fla. 1954).

³ 31 FLA. STAT. ANN., Supreme Court Rule B, §(1), subd. 19 (1950). This provision is identical to Canon 19, *supra* note 1.